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** **MEMORANDUM IN SUPPORT OF DEFENDANT LAWRENCE'S SUPPLEMENTAL MOTION TO DISMISS OR IN THE ALTERNATIVE TO STAY PROCEEDINGS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Introduction

Defendant Lawrence submits his Memorandum as directed by the Court at the Status Conference held on June 11, 2015. This Memorandum is supplementary to the Defendant Lawrence's Motion and Memorandum in Support of His Motion to Dismiss filed on March 28, 2013 ("Lawrence Memo") and Defendant Lawrence's Reply to vonRosenberg's Response to the Motion to Dismiss ("Lawrence Reply") filed on April 25, 2013.[1]

II. Brief Procedural History

Pursuant to Defendant Lawrence's previous Motion, this Court dismissed this action by order of August 23, 2013 and denied Plaintiff vonRosenberg's Rule 59(e) Motion for Reconsideration on January 15, 2014. The essence of this Court's orders was that vonRosenberg's injunctive relief and attorney's fees claims were necessarily dependent on his declaratory judgment claim making all the claims subject to review under the *Brillhart/Wilton* abstention doctrine. Or. at 20-22 (Aug. 23, 2013); Or. at 6-7 (Jan. 15, 2014).[2]

vonRosenberg appealed these orders. The Fourth Circuit vacated the dismissal order and remanded. *vonRosenberg v. Lawrence*, 781 F.3d 735 (4th Cir. 2015). After asserting that the Fourth Circuit "had never expressly held which abstention standard applies to a federal complaint, like the one at hand, which asserts claims for both declaratory and injunctive relief," *Id.* at 734, the Court of Appeals held that "*Colorado River*, not *Brillhart/Wilton*, must guide a court's decision to abstain from adjudicating mixed complaints alleging claims for both

[1] The initial motion to dismiss or in the alternative to abstain from exercising jurisdiction and/or to stay was based on Rules 12(b)(1) and 12(b)(2), Federal Rules of Civil Procedure, the Anti-Injunction Act (28 U.S.C. § 2283) and three abstention doctrines: federal declaratory judgment, *Younger* and *Colorado River*.

Where relevant this memorandum may incorporate directly rather than by reference portions of the Lawrence Memo and the Lawrence Reply for ease of reference and readability.

[2] The Court did not reach the other grounds for dismissal raised by Lawrence's Motion: the Anti-Injunction Act, and *Younger* and *Colorado River* abstention.

declaratory and non-declaratory relief…even when the claims for coercive relief are merely 'ancillary' to [a party's] request for declaratory relief." (citations omitted). The Court expressed no view on whether consideration of the six *Colorado River* factors (citing *Chase Braxton*, 411 F.3d at 463-64) warranted abstention. *Id.* at 734, 735.

III. Parallel State Court Action[3]

The early procedural history of the state court action has previously been described. Def. Lawrence's Memo. In Support of Mot. to Dismiss, Doc. No. 13 at 1-8 (Mar. 28, 2013) ("Lawrence Memo") (Exhibit 1). Since that memorandum, the state court action has been tried and a judgment has been entered. The judgment grants relief diametrically opposed to that sought by vonRosenberg in this action. Exhibit 2 ("Final Order"). [4]

On March 24, 2015, The Episcopal Church ("TEC") and The Episcopal Church in South Carolina ("TECSC") appealed Judge Goodstein's order. On April 15, 2015, the South Carolina Supreme Court transferred the case from the Court of Appeals and set the case for oral argument on September 23, 2015. Exhibit 3 (Order of South Carolina Supreme Court).

A. The South Carolina Circuit Court's "Final Order"

The parallel state court action was tried between July 8 and July 25, 2014. Fifty-nine witnesses testified including Bishops vonRosenberg and Lawrence. Over 1,200 exhibits were introduced and the official transcript of record is 2,523 pages. Exhibit 2 at 5 (Final Order).

On February 3, 2015, the circuit court filed its forty-six page order, in which it made extensive findings of fact and conclusions of law. The state circuit court found in its final order

[3] *The Protestant Episcopal Church in the Diocese of South Carolina 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, Case No. 2013-CP-18-00013, filed January 4, 2013.

[4] The judgment finds that corporate control of the Diocese does not reside with TECSC and consequently Bishop Lawrence is its Bishop, not Bishop vonRosenberg. It also permanently enjoins Bishop vonRosenberg and others from using the marks at issue in this action.

that Bishop Lawrence was the Chief Operating Officer of the Diocese, Final Or. at p.8 ¶ 16, and that TECSC's provisional bishop is Bishop vonRosenberg and he was elected on January 26, 2013. *Id*. at 23 ¶83; *compare with* Compl., Doc. No. 1, ¶25 (vonRosenberg is bishop and COO) and ¶2 (vonRosenberg was elected provisional bishop of Diocese on Jan. 26, 2013). Additional findings pertinent to the present motion follow:

- The Defendants (TEC & TECSC) are "aligned in interest." *Id.* at 2.
- "TECSC's Provisional Bishop is Charles vonRosenberg who was elected to that position by TECSC delegates meeting in Convention on January 26, 2013." *Id.* at 23.
- "Charles vonRosenberg is an agent of TECSC and a Bishop" and member in TEC. *Id.* at 4.
- Bishop "Mark Lawrence is the Chief Operating and Executive Officer of the Diocese [The Protestant Episcopal Church in the Diocese of South Carolina] and is also its Ecclesiastical Authority, and Bishop." *Id*. at 8.
- When resolving church dispute cases, South Carolina does not defer to church authorities; rather it uses neutral principles of law to resolve such disputes. *Id.* at 23-24.
- "Whatever rights [TEC and TECSC] might possess derive from their claim that corporate control is vested in TECSC not the Diocese. Therefore, the sole issue with respect to the Diocese is corporate control. If the Diocese legally withdrew from TEC, then those currently in union with it and its leadership control it." *Id.* at 26.
- "The Diocese withdrew its association with TEC in October 2012." *Id.* at 14.
- "There is no basis to claim that the Diocese did not validly exercise its legal and constitutionally-protected right to disassociate from TEC in October 2012." *Id.* at 32.

- "[TEC and TECSC] admit that the Diocese is the owner and registrant of its marks …." *Id.* at 39.

- The Diocese's marks are the same as those at issue in this action. Compare Cmpl. ¶ 29 with Final Order ¶ 30 at 12.

- TEC & TECSC "used, without the Diocese's permission, and with knowledge of that use, the names, marks and emblems of the Diocese,"…, including taking action "as if TECSC was the Diocese." *Id.* at 15.

- "The Diocese presented extensive testimony on the unauthorized use of the Diocese's marks, which was not contradicted by any witness for the Defendants [TEC and TECSC]." *Id.* at 39.

- At a November 15, 2013 meeting, "called without authority in the name of the Diocese[,] Tom Tisdale, Jr. (counsel for TEC and the future TECSC)," stated, with Bishop vonRosenberg present, that "he was functioning as legal counsel for the President Bishop" and "he stated their intent to use the names and seals of the Diocese." *Id.* at 40.

- "Bishop vonRosenberg testified that both he and the [TECSC] Steering Committee regularly used the name and seal of the Diocese in the fall of 2012 and that their use was intentional." *Id.* at 39.

- "Under both statutes, the Plaintiffs have established their entitlement to permanent injunctive relief." *Id.* at 43.[5]

[5] It is also clear, as to the Diocese, that the Defendants "willfully intended to trade on the registrant's reputation" and that they chose, intentionally, to use the names and seal of the Diocese as strategic support for TECSC's purposes. This strategy was not simply one of TECSC's but was one that TEC benefited from and promoted. "Legal counsel for the presiding bishop" announced it. TEC allowed the TEC shield to be used jointly with the Diocese's seal and TEC's presiding bishop called a special convention using both the name and the seal of the Diocese. Even after the entry of the January 2013 orders, TECSC continued to use the name of the Diocese on its

The Circuit Court concluded by entering a permanent injunction:

> It is Therefore Ordered,
>
> …
>
> 3. The Defendant TEC, also known as The Protestant Episcopal Church in the United States of America and Defendant The Episcopal Church in South Carolina and their officers, agents, servants, employees, members, attorneys and any person in concert with or under their direction or control are permanently enjoined from using, assuming, or adopting in any way, directly or indirectly, the names, styles, emblems or marks of the Plaintiffs as hereinafter set out, or any names, styles, emblems or marks that may be reasonably perceived to be those names, styles emblems or marks.

Id. at 44.

B. Bishop vonRosenberg's Testimony.

In addition, Bishop vonRosenberg testified at the trial of the state court action (Exhibit 4) and by deposition (Exhibit 5) that:

- He was elected the Provisional Bishop of TECSC on January 26, 2013 at a Convention of TECSC and was thereafter installed as TECSC's Bishop by TEC's Presiding Bishop. Exhibit 4 at 2148, 2150, 2151. He holds that position today. *Id.* at 2152.
- He is employed by TECSC. *Id.* at 2191.
- Prior to his election as Bishop of TECSC in January 2013, he had been retired and unemployed. *Id.* at 2181.
- He has not previously been associated with the Diocese of South Carolina or the Trustees. *Id.* at 2181 – 2182.
- He never attended an annual Convention of the Diocese. *Id.* at 2182.

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checking account, acted to make modifications to the Diocese's Constitution and Canons also using the Diocese's name, and forwarded web searches for the Diocese to TECSC's website. *Id.* at 43-44.

- His use of the title "in his capacity as Provisional Bishop of the Protestant Episcopal Church in the Diocese of South Carolina" in his complaint in this action was based on the advice of counsel. Exhibit 5 at 69-72. ("The advice of counsel was to use that title.")

- He never had permission from the Diocese of South Carolina to use the marks registered in its name. *Id.* at 95:14-19.

IV. Factual Summary

Bishop vonRosenberg is the Provisional Bishop of TECSC made so by his election at TECSC's Convention in January 2013 and installation by TEC's Presiding Bishop. His complaint in this action alleges that he is the Provisional Bishop of the Diocese; in effect, that TECSC is the Diocese. Compl. at ¶ 2. ("An office to which he was elected and installed at a special meeting of the Convention of the Diocese on January 26, 2013.") TECSC does not have current control of the Diocese. Those that do elected Bishop Mark Lawrence the Diocese's Bishop. The issue of which group has the legal right under South Carolina law to control the Diocese has been fully litigated in the state court and a judgment has been entered. Bishop vonRosenberg's employer and principal (TECSC) is a party to that litigation as is Bishop Lawrence's employer and principal (the Diocese). In addition to the issue of corporate control, the use and misuse of the Diocese's marks was at issue in the state court. These marks are the same marks at issue here. *Id*. at ¶ 29. The state court has issued a permanent injunction against the use of those marks by Bishop vonRosenberg and others associated with him. The state court also made findings that the use of these marks in 2012 and 2013 by TECSC, TEC, Bishop vonRosenberg and others aligned with them, was unauthorized and was intentionally infringing.

In this action, Bishop vonRosenberg alleges a legal standard for resolution of controversies involving religious organizations that is not followed in South Carolina and was

not followed in the parallel action. Compl. at ¶ 11-19; Exhibit 2 at 23-24 (Final Order). He alleges facts in the following paragraphs that have now been determined adverse to his legal interest by the state court: ¶ 10, 11, 14, 15, 17, 18, 20, 22, 23, 24, 27, 28, 31, 32, 33, 34, 35, 37, 38, 39, 40. His complaint seeks a declaration that Bishop Lawrence's use of the same marks violates the Lanham Act and asks this court to issue a permanent injunction which would directly contradict the permanent injunction entered against TEC, TECSC, and against him as TECSC's agent and employee and as a member of TEC.

It is against this undisputed factual background that Defendant Lawrence requests the dismissal of vonRosenberg's action or in the alternative, for a stay.

V. vonRosenberg's Action Should Be Dismissed Under Res Judicata Principles[6]

Central to vonRosenberg's two causes of action is this essential premise: he is the Bishop of The Protestant Episcopal Church in the Diocese of South Carolina. This premise is based on allegations associated with the Diocese's departure from TEC, Bishop Lawrence's alleged removal as its Bishop, and a special meeting in January 2013 to install vonRosenberg as the Bishop of the Diocese. In other words, his allegations assume that corporate control resides with those who elected him Bishop in January 2013 (TECSC). If he is not the Bishop of the Diocese, then he has no Lanham Act claims to assert in federal court for they do not accrue to him individually because he has pled that he does not own the marks. *Id*. at ¶ 29. They accrue to him solely by virtue of the office he allegedly holds with the owner of the marks – the Diocese. Now, however, the issue of which group has the legal right under South Carolina law to control

[6] Res judicata in this instance refers to issue preclusion, "the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Marrese v. American Academy of Orthopedic Surgeons,* 470 U.S. 373, 376 n. 1 (1985).

the Diocese has been finally decided in the parallel state action: vonRosenberg is not the Diocese's Bishop because control does not belong with TECSC.

"[A] federal court must give to the state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which that judgment was rendered." 28 U.S.C. § 1738; *Marrese v. American Academy of Orthopedic Surgeons,* 470 U.S. 373, 380 105 S.Ct. 1327 (1985) ("This statute [28 U.S.C. § 1738] directs a federal court to refer to the preclusion law of the state in which the judgment was rendered."); *Migra v. Warren City School Dist. Bd. Of Educ.,* 465 U.S. 75, 81, 104 S.Ct. 892 (1984); *accord, Briggs v. Newberry County School Dist.,* 838 F.Supp. 232, 234 (D.S.C. 1991), *aff'd*, 989 F2d 491 (1993). In considering a preclusion issue, the federal court may judicially notice facts from the state court proceeding. *Id.*

Under the law of South Carolina, a judgment on the merits in a prior action bars the parties and their privies from litigating in a subsequent action issues actually litigated or that could have been litigated. *Id.* at 235; *Jaynes v. County of Fairfield*, 303 S.C. 434, 401 S.E.2d 183 (Ct. App. 1991). There are three elements to be shown for an issue to be precluded: (1) an identity of parties or their privies; (2) an identity of the subject matter; and (3) a final adjudication of the issue in the first suit. *Yelson Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). vonRosenberg conceded that this Court would have to give full faith and credit to a state court judgment on this issue if the two Bishops are "somehow parties" in the state court action.[7]

[7] vonRosenberg conceded during the argument on the Motion to Dismiss that if the two Bishops "somehow are parties to the state court action, then ordinary principles of preclusion would apply. And if the state court judgment is rendered first, then that would, under Section 1738, Full Faith and Credit Act, preclude further litigation of the issue, under just ordinary principles of collateral estoppel and res judicata."
Mot. Hr., Transcr. 21 (Aug. 8, 2013) (Exhibit 6). Under South Carolina law, they do not have to be parties if their legal interests were the same as those litigated in the prior proceeding.

It is clear from the state court order that the issue of who has the legal right to control the Diocese was actually litigated. Exhibit 2 at 25-34 (section captioned, "Corporate Control and Rightful Leadership"). vonRosenberg's claim assumes that he is the Bishop of the Diocese, but the state court has found that he is not the rightful leader of the Diocese as the result of the state court's decision on corporate control. Final Or. at 25, n. 5. Moreover, not only is vonRosenberg a party to the state court action by operation of law, s*upra* at 12-13, he is also a privy of TEC and TECSC. vonRosenberg is the agent of TECSC and thus in privity with TECSC through the principal-agency relationship. *U.S. Steel Corp. Plan for Employee Ins. Benefits v. Musiko*, 885 F.2d 1170, 1179 (3rd Cir. 1989).

More fundamentally, in South Carolina for purposes of res judicata, privity is found in each party's relationship to the subject matter not in their relationship with each other. *Yelson,* 397 S.C. at 22, 723 S.E.2d at 596 ("For the purpose of res judicata, however, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation."); *accord*, *Briggs*, 838 F.Supp. at 235; *Holiday Amusement Company of Charleston, Inc. v. South Carolina*, 2006 WL 1285105 at 4 (D.S.C. 2006). Bishop vonRosenberg is "so identified in interest with [TEC and TECSC] that he represents the same legal rights. One in privity is one whose legal interests were litigated in the former proceeding." *Richburg v. Baughman,* 290 S.C. 431, 434, 351 S.E.2d 164 (1986). vonRosenberg's legal interest in the issue of corporate control and his status as Bishop of the Diocese was litigated in the state court action by TEC and TECSC who had the same relationship to this issue as he has in the present action. Without that status, he has no Lanham Act claims to assert.

Finally, the pendency of TEC and TECSC's appeal of the state court judgment does not affect the judgment's "finality" for purposes of preclusion. *Toney v. LaSalle Bank Nat. Ass'n,* 896 F.Supp.2d 455, 475 (D.S.C. 2012); *Sea Cabin on the Ocean IV Homeowner's Ass'n. v. City of North Myrtle Beach*, 828 F.Supp. 1241, 1248 (D.S.C. 1991); *Dawson v. State Law Enforcement Div.,* 1992 WL 208967 at 3-4 (D.S.C. 1992); *accord,* Restatement (Second) of Judgments § 13, Reporter's Note g .

VonRosenberg is precluded from asserting that he is Bishop of the Diocese because the issue of the rightful leadership of the Diocese has been finally determined by the state court order in its decision on corporate control. Therefore, he has no Lanham Act claims because he has no office with the owner of those claims – the Diocese.

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

28 U.S.C. §2283.

In vonRosenberg's previous response to the Anti-Injunction Act's applicability, he argued that the Act did not apply because: (1) there was no "proceeding in state court," because the state action had been removed, Pl. Resp. to Def. Mot. To Dismiss or in the Alt. to Abstain or Stay Proceedings, Doc. No. 24 (Apr. 15, 2013) ("vonRosenberg Response"), (2) that even if there were a pending state proceeding, the present action did not have the effect of staying the state proceedings, *Id.* at 14-15, and finally (3) that Bishop vonRosenberg is a "stranger" to the state court proceeding. *Id*. at 16.

The 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); *accord, In re American Honda Motor Co., Inc. v. Bernard's Inc.,* 315 F.3d 417 (4th Cir. 2003).

A. There Is A Pending State Court Proceeding

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, 56 S.Ct. 278 (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.").[8] "State court proceedings" include state court injunctions as long as they are in effect. *County of Imperial v. Munoz,* 449 U.S. 54, 59, 101 S.Ct. 289 (1980) (citing *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286-87 (1970)); *accord*, *Garcia v. Bauza-Salas*, 862 F.2d 905, 908 (1st Cir. 1988).

The state injunction is in effect; there is a pending state court proceeding.

B. The Injunction Sought Would "Stay" The State Proceeding

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[8] The broadest possible definition has been given to his phrase by the United States Supreme Court:

> That term is comprehensive. 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. It applies to appellate as well as original proceedings; and is independent of the doctrine of *res judicata*. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective.

Hill v. Martin, 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed. 293 (1935).

vonRosenberg previously stated that "none of [his] requested relief would have the effect of halting the state court proceeding." vonRosenberg Response at 15-16. However, "the prohibition of § 2283 cannot be evaded by *prohibiting utilization of the results of a completed state proceeding." Atl. Coast Line R. Co., Brotherhood of Locomotive Engr.,* 398 U.S. 281, 287, 90 S.Ct. 1739 (1970). (emphasis added) If the effect of the federal court injunction renders the state court proceeding ineffective, it constitutes a "stay" within the meaning of 28 U.S.C. § 2283. *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 881 (7th Cir. 1989) (The federal injunction would "nullify the results of the prior state proceeding."); *U.S. Steel Plan for Employee Ins. Benefits*, 885 F.2d at 1175 (The applicability of ERISA to the state claims as described, while not terminating the case, would effectively prevent the trial judge from doing what the Superior Court instructed him to do, thus "obstructing and interfering with the state court's process."); *Garcia*, 862 F.2d at 908 (federal court injunction "in direct conflict with earlier injunction" would "nullify the effect of the state court judgment" and "block the utilization of the results of a completed state court proceeding.")

There is no more effective "stay" that could be obtained than to have a federal court injunction countermand not only the state court injunction but also the very basis upon which it was entered.[9]

C. vonRosenberg Is No "Stranger" To The State Court Action

The Act applies unless the federal court parties are "strangers to the state court

[9] 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; *accord Denny's, Inc. v. Cake*, 364 F.3d 521, 528 n. 8 (4th Cir. 2004). 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)). 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. Compl., Doc. No. 1 at ¶ 1 and Prayer for Relief ¶ 1. The complaint then seeks to enjoin the conduct "declared" unauthorized.

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).

Plaintiff vonRosenberg is no "stranger" to the state court proceedings. As stated in the previous motion, he was personally served with the First Amended Complaint, the Second Amended Complaint, and the TRO. Now, he has been served with the Permanent Injunction. Exhibit 7. He alleges to have an express and unique relationship with the Diocese as its Chief Operating Officer and the "sole representative of the Diocese" recognized by TEC.[10] The Diocese is a party in the state court action. TECSC is also a party. The circuit court found vonRosenberg to be TECSC's agent. TEC is also a party in the state court action and vonRosenberg is a member of TEC. Moreover, as a member of one or both of these unincorporated associations, he is also a party to any proceeding in which they are parties.[11]

TEC and TECSC, the two state court Defendants, are unincorporated associations. Members of an unincorporated association are parties to the action involving the unincorporated association. *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

[10] Compl. at ¶ 25, 47 & 48. The Diocese, a party in the state court action, expressly alleges the opposite.

[11] Bishop vonRosenberg's previous assertion that he is not a "member" of TECSC or TEC not only flies in the face of the state court finding, but also of common sense:

> Mr. Dreher has put in a special plea in advance of his answer, in which he contends that he is not a member of the congregation, and therefore not implicated in the trial of their rights. But this plea cannot be sustained. **It would be exceedingly strange, if the Pastor of a congregation was no member of it.** Besides, Mr. Dreher was a perfect stranger, but, as a confederate with the other defendants, stood as an impediment in the way of the plaintiffs, (supposing them to be the congregation,) he would be as liable to a decree as they.

Harmon v. Dreher, 17 S.C. Eq. 87, 119 (S.C. App. Eq. 1843) (emphasis added).

TECSC are legal entities "separate from the persons who compose [them]." *Graham*, 296 S.C. at 255, 371 S.E.2d at 804; *Medlin v. Ebenezer Methodist Church,* 132 S.C. 498, 129 S.E. 830 (1925). Judgment in a state court action is entered against members of an unincorporated association *individually*. *Crocker*, 305 S.C. at 409, 409 S.E.2d at 370; *Elliott,* 181 S.C. 84, 186 S.E. 651.[12]

As a result, the Anti-Injunction Act applies and this Court must dismiss this action, as it does not come within one of the Act's exceptions. *See* Lawrence Memo at 20-22.[13]

VII. The Court Should Abstain From Exercising Jurisdiction.

A. The Younger Abstention Doctrine[14] Applies.

Younger abstention, applicable in civil actions, *Pennzoil Co. v. Texaco. Inc.,* 481 U.S. 1, 11-13, 107 S. Ct. 1519, 1526-27 (1987), is appropriate in three instances: (1) when there is an ongoing state criminal proceeding, (2) when there is a state civil proceeding "akin" to a criminal proceeding; and (3) when there is a civil proceeding that touches on a state court's ability to perform its judicial function. *Sprint Communication, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013).[15] The first and second instances are not applicable.

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[12] 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

[13] "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.

[14] *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971).

[15] "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 Corp. v Maryland Comm.n on Human Relations*, 38 F.3d 1392, 1396 (4th Cir. 1994) (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)).

However, granting the requested relief would "implicate a state's interest in enforcing the orders and judgments of its courts." *Sprint*, 134 S.Ct. at 588. Examples of appropriate *Younger* abstention are when there is a challenge to the state's ability to "vindicate the regular operation of its judicial system" through its contempt process, *Juidice v. Vail*, 430 U.S. 327, 335 n. 12, 97 S.Ct. 1211 (1977) ("It [contempt] … stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory."), or when there is a challenge that would prevent the enforcement of a state court judgment, *Pennzoil v. Texaco, Inc.* 481 U.S. 1, 14 and n. 12. (1987) ("…we rely on the state's interest in protecting the authority of the judicial system, so that its orders and judgments are not rendered nugatory.") (citations omitted).

This action is a direct challenge to an injunction of a South Carolina court. Granting vonRosenberg the requested relief would directly conflict with the two central issues of the state court injunction – control of the Diocese and use of its marks. It would strike directly at the state court's ability to perform its judicial function by nullifying its order; obviously affecting the enforcement of its order. The requested relief would not simply "implicate" the state's interest in enforcing its orders and judgments," it would destroy the judgment's effectiveness by contradicting its decision on corporate control and its injunction on the use of the marks.

Moreover, there is no question that there was an adequate opportunity to present any federal claims in the state proceeding.[16] Lanham Act claims were, in fact, made: "Bishop vonRosenberg's claim seeks the same relief as TEC's counterclaim in the state action." Or., Doc. No. 30, at 19 (Aug. 23, 2013).

[16] "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*, 472 F.2d at 774.

Finally, there has been no "substantial progress" in this case, as the parties have not moved beyond the pleading stage. The state court action, however, has been concluded at the trial court level.

B. The Colorado River Abstention Doctrine Applies

Under the new standard for mixed cases in the Fourth Circuit, when a Plaintiff seeks both declaratory and non-declaratory relief, a federal court is to consider the six factors of *Colorado River* abstention. *vonRosenberg*, 781 F.3d at 735. Although the application of *Colorado River* abstention is limited to "exceptional circumstances," 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.'" *Colorado River v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

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, 103 S.Ct. 927 (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.[17] "This factor, as 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

This Court has previously determined that this case and the state action are parallel, Or.,

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

Doc. No. 30, at 14-17, and the Court of Appeals did not take issue with that finding.

In one form or another, the parties in this lawsuit consist of the same individual faction members involved in the state suit. While the federal lawsuit may appear to be a straightforward trademark-infringement and false advertising action under the Lanham Act, its essential premise requires the federal court to declare who controls the owner of the marks, the Diocese. This is the same lawsuit that is pending in state court. Both lawsuits seek a determination of who controls the corporation and therefore is entitled to control the corporation's property. The proceedings involve "substantially the same parties" litigating "substantially the same 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. Hector Carlos Pages Morales,* 368 F.3d 1320, 1329-30 (11th Cir. 2004).[18] "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.*, 250 F.3d at 518 (quoting *Day v. Union Mines Inc.,* 862 F.2d 652, 656 (7th Cir. 1988)).

D. Colorado River Factors

The Fourth Circuit has listed six factors to consider when determining whether "exceptional circumstances" exist warranting such abstention:

[18] *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.").

> (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); a*ccord, Chase Braxton Health Services, Inc. v. State of Maryland,* 414, F.3d 457, 463-64 (2005).

"No one factor is necessarily determinative," *Colorado River*, 424 U.S. at 818, and the decision to dismiss "does not rest on a mechanical checklist." *Moses H. Cone Mem. Hosp.,* 460 U.S. at 16. Rather, the factors are to be applied in "a pragmatic, flexible manner with a view to the realities of the case at hand." *Id.* at 13. With the exception of the "inconvenience" factor[19], all of the *Colorado River* factors weigh heavily in favor of dismissing the case.

1. *In Rem* Jurisdiction

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 at issue is intellectual property located in South Carolina held by a South Carolina non-profit corporation. This factor weighs in favor of the application of *Colorado River* abstention, because in the parallel state court litigation, the court was asked to declare the marks invalid, an *in rem* action. The final order of the trial court determined the registered marks were not invalid and were the property of the Diocese of South Carolina, a South Carolina corporation and that it had properly left The Episcopal Church ("TEC") Therefore, Mark Lawrence is its Bishop. Final Or. p. 44 (1st Judicial Circuit, S.C. Feb. 3, 2015) (permanently enjoining The Episcopal Church and The Episcopal Church in South Carolina and their officers, agents, and employees from using them in

[19] 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.

any way). These are the same Diocese of South Carolina marks vonRosenberg claims Lawrence is illegally using. Compl. at ¶ 25.

2. Avoidance of 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 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 permanent 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. The state court's temporary injunction in place when this action began has been replaced by a permanent injunction against TEC and The Episcopal Church in South Carolina ("TECSC") and their officers, agents, and employees.

3. Order of Acquisition of Jurisdiction and Progress Achieved In Each Motion

The state court action was filed on January 4, 2013. A final order resolving the state case was issued by the trial court on February 3, 2015. That order was appealed on March 23, 2015 by both Defendants, TEC and TECSC. The South Carolina Supreme Court has accepted jurisdiction of the case and oral arguments have been set for September 23, 2015. Here, an answer has not yet been filed. The state court first acquired jurisdiction and its case has proceeded to judgment. This factor favors abstention.

4. Rules of Decision

South Carolina law, not federal law, provides the rule of decision on the rights of the parties, the internal affairs of a corporation, state trademark issues and the resolution of church

disputes over property ownership and control. *See* Lawrence Reply at 2-6; *see also Jones v. Wolf*, 443 U.S. 595, 601, 99 S.Ct. 3020 (1979) ("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 issues are determined can the Court reach the Lanham Act questions. This factor favors abstention.

5. The Adequacy Of The State Proceeding To Protect The Parties' Rights.

TEC and TECSC litigated issues that vonRosenberg raises here during the three-week trial. TEC pled Lanham Act claims. The ultimate issue in the state case was the control of the state corporation and the ownership of property. Bishop vonRosenberg's claims rise or fall on that issue. Persons aligned with his interest litigated the state case and he testified during trial and a deposition. TEC and TECSC ultimately lost those arguments in state case and have appealed the decision. Bishop vonRosenberg's rights were adequately protected during the state court proceeding; in fact, he participated in that litigation to ensure their protection.

The circumstances of this action **are** exceptional. It was begun to avoid the state court. Its essential premise has now been determined by the state court. The relief sought here cannot be obtained unless this court overrules a state court order involving thirty-eight parties – thirty-six South Carolina non-profit corporations, one South Carolina unincorporated association and one New York unincorporated association. It is hard to imagine a case where "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" requires abstention if this case does not. [20]

[20] 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.*, 11 F. App'x at 189 (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

VIII. Alternatively, This Court Should Stay This Action Pending The South Carolina Supreme Court's Opinion

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. Jan. 6, 2011) ("Fort Worth"); Exhibit 8 (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.

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court." *Id.*; *see Kelser v. Anne Arundel County Dep't of Soc. Servs.,* 679 F.2d 1092, 1094 (4th Cir.1982).

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."

On September 20, 2013, the District Court administratively closed the case The court closed the case after the Texas Supreme Court reversed and remanded judgment in favor of The Episcopal Church and it's local diocese the state court case to apply neutral principles. The District Court closed the federal trademark case allowing for it to be "reopened, without prejudice, upon the motion of either party, upon the resolution of the related state-court proceeding." *Episcopal Diocese of Fort Worth*, 4:10-CV-700-Y, No. 52 (N.D. Tex. Sept. 20, 2013); Exhibit 9 (Order Administratively Closing Case).

IX. Conclusion

vonRosenberg's complaint seeks relief that only Mark Lawrence could now assert based on the final judgment of a South Carolina court. The issue of corporate control has been decided adverse to vonRosenberg's allegations. It was decided based on South Carolina's constitutionally selected method for resolving disputes between religious organizations which looks to neutral principles of state law to resolve such disputes. That would also be the only allowable method for their resolution in this court. The state court decision on corporate control now precludes its relitigation here. If it did not, the Anti-Injunction Act, the *Younger* abstention doctrine, and the *Colorado River* abstention doctrine would require dismissal.

This is one of those rare cases, begun in an effort to avoid the state court, that strikes at the heart of federal and state relationships. vonRosenberg's claim here derives exclusively from his relationship to "some" Diocese. He did not want the state court to decide that issue so he brought it to this court. He now asks this court to do what it most assuredly should not do, and that is to overrule a state court judgment affecting not just one, but thirty-eight parties. To decide in this action, as vonRosenberg requests, that Lawrence is not properly employed by the Diocese because the state court got it wrong on the issue of corporate control would not only be a collateral attack on a state court judgment, but it would also put the state action in disarray while wrecking havoc with the federal-state relationship.

It is respectfully submitted that this action be dismissed on one or all of the many grounds available to the court or that it be stayed pending the opinion of the South Carolina Supreme Court in the parallel state court action.

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