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

The Protestant Episcopal Church in the Diocese of South Carolina et al.,	)	
Plaintiffs,	)	
v.	)	Case No.: 2:13-cv-00893-CWH
The Episcopal Church et al.,	)	
Defendants.	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO REMAND

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Defendant, The Episcopal Church in South Carolina ("TECSC"), respectfully submits this response to Plaintiffs' motion to remand.

INTRODUCTION

"[F]or nearly 100 years," the Supreme Court has recognized "that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). This is such a case.

At the heart of this case is whether certain former Episcopalians have unilaterally withdrawn Plaintiffs, The Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese") and several parishes within the Diocese, from The Protestant Episcopal Church in the United States of America ("The Episcopal Church" or the "Church"), and the related question whether those now purporting to act on behalf of the Diocese and those parishes—most prominently, the Right Reverend Mark J. Lawrence—are the true leaders of those entities. In the words of Bishop Lawrence, the central issue in this case is "whether . . . the Diocese could and did sever its ties with The Episcopal Church so that corporate control was vested in its current leadership," Case No. 13-cv-00587, Resp. to Mot. for Prelim. Inj., Doc. 20, at 6. If the Diocese and the parishes were not validly withdrawn from the Church, then Bishop Lawrence and the rest of the "current leadership," are not the true leaders of those entities.

Each of Plaintiffs' three causes of action seeks, through a declaratory measure or injunctive relief, judicial confirmation and enforcement of their view that they "could and did sever [their] ties with The Episcopal Church" and that Bishop Lawrence and his followers are the true leaders of the Diocese and the Plaintiff parishes. Those causes of action each necessarily raise the question whether the First Amendment requires the Court to defer to the determinations

of authorities within The Episcopal Church that neither the Diocese nor the Plaintiff parishes could or did validly withdraw from the Church, and that Bishop Lawrence has been removed as Bishop of the Diocese and replaced by the Right Reverend Charles G. vonRosenberg.

Each of Plaintiffs' claims turns on that First Amendment question, and Plaintiffs and Defendants fundamentally disagree about the proper way to provide an answer. Plaintiffs argue that the First Amendment does not require deference to Church authorities on the question whether the Diocese and subordinate parishes could be withdrawn. *See* Mem. in Supp. of Mot. for a TRO, Doc. No. 1-4, at 10-12. Defendants, on the other hand, maintain that because the question whether a diocese or a parish may withdraw is a question of church polity and administration, the First Amendment compels civil courts to defer to the authorities within the Church. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976). That undeniably raises a question of federal constitutional law, and whoever is correct, Plaintiffs cannot prevail on their claims in this case without it being answered. Plaintiffs' claims therefore necessarily raise an issue of federal constitutional law. And because this question of federal constitutional law manifestly is substantial and is capable of being addressed in federal court without disrupting any congressionally approved balance between federal and state courts, Plaintiffs' action could have been filed originally in this Court. Removal accordingly is proper.

Plaintiffs' contentions that TECSC waived its right to remove lack merit. According to the Fourth Circuit, a finding of waiver is appropriate only in extreme situations where the defendant has manifested a clear and unequivocal intent to remain in state court. No action TECSC took in the brief time after it was added as a defendant in this action comes close to meeting that standard. Accordingly, TECSC respectfully requests that the Court deny Plaintiffs' motion to remand.

STATEMENT OF FACTS

This case arises out of the purported withdrawal of Plaintiffs from The Episcopal Church. In 2008, Bishop Mark J. Lawrence was ordained, in accordance with The Episcopal Church's Constitution, Canons, and Book of Common Prayer, as Bishop of the Diocese. In November 2012, at an event that was led by Bishop Lawrence and that claimed to be a special meeting of the Convention of the Diocese, a majority of voting delegates present voted to "disaffiliate" the Plaintiff Diocese from the Church. This action violated The Episcopal Church's Constitution and Canons, and directly contravened a resolution passed by the Executive Council of the Church's General Convention that all dioceses must maintain an unqualified accession to the Church's Constitution and Canons and that any diocesan actions to remove or limit their accessions were null and void. *See* Ex. A. In accordance with that resolution, the Church has determined that the Diocese remains a subordinate unit of the Church. And when several parishes within the Diocese, named as Plaintiffs here, also purported to leave the Church, those actions likewise violated the Church's Constitution and Canons. Those Plaintiff parishes accordingly remain subordinate units of the Church and the continuing Diocese.

As a result of these and other events, in December 2012, the Presiding Bishop of The Episcopal Church accepted Bishop Lawrence's actions as a renunciation of the Church and his ministry. In accordance with Church Canon III.12.7, the Presiding Bishop therefore declared that Bishop Lawrence is "removed from the Ordained Ministry of this Church and released from the obligations of all Ministerial offices, and is deprived of the right to exercise the gifts and spiritual authority as a Minister of God's Word and Sacraments conferred on him in Ordinations." On January 26, 2013, the Diocesan Convention convened pursuant to Church

Canons, and Bishop vonRosenberg was elected and installed as Provisional Bishop of the Diocese.

The Plaintiffs responded to Bishop Lawrence's removal by initiating this lawsuit. On January 4, 2013, entities claiming to be the Diocese, the trustees of the Diocese, and sixteen parishes filed this action against The Episcopal Church in state court in Dorchester County. They sought a declaratory judgment that "they are the sole owners of their respective real and personal property" and that The Episcopal Church has "improperly used and may not continue to use any of the names, styles, seals and emblems of any of the Plaintiffs or any imitations or substantially similar names, styles, seals and emblems." Doc. No. 1-2, at 2. Plaintiffs also sought an injunction prohibiting The Episcopal Church and others allegedly under its control from such uses. *Id.*

On January 22, 2013, Plaintiffs filed a First Amended Complaint, adding seventeen additional parishes as Plaintiffs in the lawsuit. Doc. No. 1-5. One day later, the state court issued an *ex parte* TRO, which enjoined everyone in the world, except Bishop Lawrence and those under his control or acting in concert with him, from using the Diocese's names and marks. Doc. No. 1-6, at 6-7. Out of respect for the state-court TRO, The Episcopal Church began referring to the Diocese as The Episcopal Church in South Carolina.

On January 31, 2013, the state court issued a temporary injunction, which again provided the same unbounded temporary injunctive relief granted by the TRO. Doc. No. 1-9. The Episcopal Church consented to this injunction pending the filing of its opposition papers.

With the consent of The Episcopal Church, Plaintiffs filed a Second Amended Complaint on March 5, 2013. The complaint added additional parishes as Plaintiffs and for the first time named TECSC as a Defendant. Doc. No. 1-11. The Second Amended Complaint alleges three

causes of action: First, Plaintiffs request a declaratory judgment that neither The Episcopal Church nor any person "claiming under an alleged interest" of The Episcopal Church has any interest in any real and personal property held in the name of Plaintiffs. *Id.* ¶ 494. Second, they allege that Defendants committed service mark infringement. *Id.* ¶¶ 495-99. Third, they allege that Defendants have engaged in the improper use of Plaintiffs' names, styles, and emblems. *Id.* ¶ 502. The complaint requests wide-ranging declaratory and equitable relief, including declarations that "the Diocese of South Carolina has withdrawn" from The Episcopal Church; that "the Defendants may not assume or hold out that any entities under their direction or control are the Diocese of South Carolina"; that "Defendants and anyone acting under their direction or control does not have legal capacity to act in the name of the Diocese of South Carolina"; and an injunction prohibiting Defendants and their officers from identifying themselves as "the officers or other leaders of Plaintiffs." *Id.* at 88-90.

On March 28, 2013, Defendants filed answers to the Complaint and asserted multiple counterclaims. Doc. Nos. 1-23; 1-24. TECSC removed the action to this Court on April 3, 2013. Doc. No. 1.

ARGUMENT

Removal of this action was proper because Plaintiffs' claims turn on a substantial issue of federal law and thus arise under federal law within the meaning of 28 U.S.C. § 1331. Plaintiffs' argument that TECSC waived its right to removal should be rejected as inconsistent with fact and law.

I. Plaintiffs' Claims Turn On A Substantial Issue Of Federal Law.

Jurisdiction over this case is proper because Plaintiffs' claims arise under federal law. Although "federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of

action created by federal law," the Supreme Court has "recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). "The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Id.* The doctrine applies where the federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013). The federal issue raised by Plaintiffs' claims satisfies each of these requirements.

A. Plaintiffs' Claims Necessarily Raise A Question Under The First Amendment.

Bishop Lawrence has described as the central issue in this case "whether . . . the Diocese could and did sever its ties with The Episcopal Church so that corporate control was vested in its current leadership," Case No. 13-cv-00587, Resp. to Mot. for Prelim. Inj., Doc. 20, at 6. Plaintiffs accordingly ask the Court to declare that "the Diocese of South Carolina has withdrawn from the Church." Second Amended Compl. 88, ¶ d; *see also id.* at 88-90, ¶¶ c, f, g, j, k, l. And each of Plaintiffs' causes of action is premised on Plaintiffs' assertion that they validly have been withdrawn from The Episcopal Church. This premise, however, cannot be established without addressing a substantial question of First Amendment law that is vigorously disputed by the parties: Whether the civil courts must defer to the determination of Church authorities that the Diocese and Plaintiff parishes could not be and were not withdrawn from the Church.

It is well-established that, in the context of hierarchical churches such as The Episcopal Church, the First Amendment requires that civil courts accept as controlling the decisions of church authorities regarding church polity and the government and direction of subordinate bodies. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976); *see also Dixon v. Edwards*, 290 F.3d 699, 715-16 (4th Cir. 2002) (reaffirming that "The Episcopal Church is hierarchical" and that "[u]nder the constraints of the First Amendment, when a subordinate in a church hierarchy disputes a decision of the highest ecclesiastical tribunal, the civil courts may not constitutionally intervene"). Plaintiffs cannot possibly show they validly have been withdrawn from the Church unless they first demonstrate that the First Amendment permits a civil court to disregard the Church's conclusion that Plaintiffs could not be and were not withdrawn. And as shown below, each of Plaintiffs' causes of action depends on their assertion that they were validly withdrawn.

For example, to succeed on its claim of service mark infringement against TECSC, the Diocese must show that (1) it possesses registered marks; (2) Defendants used the marks without consent; (3) Defendants used the marks in commerce; (4) Defendants' use was in connection with their services; and (5) the use is likely to cause confusion or mistake or to deceive. *See* S.C. Code § 39-15-1160; *BMW of N.A., LLC v. FPI MB Entm't, LLC*, No. 10-82, 2010 WL 4365838, at *1-2 (D.S.C. Sept. 13, 2010), *report and recommendation adopted by* 2010 WL 4340929 (D.S.C. Oct. 28, 2010). To show that Defendants used the Diocese's marks without consent and in a manner that is likely to deceive, the Diocese unavoidably must demonstrate that the Diocese validly was withdrawn from the Church and that Bishop vonRosenberg and other leaders of TECSC therefore are not the true leaders of the Diocese. If, as the Church has determined, the Diocese was not withdrawn and Bishop vonRosenberg is the true Bishop of the Diocese, then

any use of the marks by TECSC or the Church would be both consented to and not deceptive. The Diocese cannot possibly prevail on its claim unless it was validly withdrawn from the Church, and that conclusion cannot be reached without confronting the First Amendment question whether civil courts must defer to the Church's determination on the matter. Thus, there is no legal theory under this cause of action that would not require the court to address whether the First Amendment requires the court to accept the Church's determination as controlling.

The same is true of the Diocese's claim that Defendants have improperly used the names, styles, and emblems of the Diocese. This claim requires the Diocese to show that (1) Defendants used another entity's names, styles, and emblems or have used colorable imitations thereof; and (2) the Diocese preexisted Defendants. S.C. Code § 16-17-310. If the Diocese remains a member of The Episcopal Church, then it necessarily follows that this claim would fail because TECSC (as the continuing Diocese) cannot be liable for using its own names, styles, and emblems, and has authorized the Church to use them as well.

The Diocese's declaratory judgment claim also depends completely on a determination that the Diocese has withdrawn from the Church. If the Diocese was not validly withdrawn from the Church, then the leaders of TECSC are the true leaders of the Diocese and, in that capacity, obviously have an interest in the Diocese's real and personal property. And similarly, if the Diocese remains a sub-unit of The Episcopal Church, then the Church has an interest in the real and personal property of the Diocese because Church doctrine requires that each member use its property for the mission of the Church, *see* Answer and Counterclaims of The Episcopal Church, Doc. No. 1-23, at 45-46, and TECSC (as the continuing Diocese) acknowledges the Church's interest in Diocesan property.

And for these same reasons, the parishes' claims are dependent upon whether they have withdrawn from the Church and the Diocese. If they have not withdrawn, they will be unable to show that Defendants have infringed on their service marks or have improperly used their names, styles, and emblems because the Diocese and the Church are authorized to use the marks, names, styles, and emblems of their subordinate units. The parishes will also be unable to show that the Church (and TECSC as an entity "claiming under any alleged interest of the [Church]," Second Amended Compl. ¶ 494(b)) has no interest in parish property because Church law expressly grants such an interest.[1]

Because Plaintiffs' causes of action all are premised on their assertion that Plaintiffs validly were withdrawn from the Church, and because establishing that premise unavoidably requires the Court to resolve whether the First Amendment requires it to defer to the Church's determination on the issue, each of Plaintiffs causes of action "requires resolution of a federal issue." *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (en banc). The First Amendment issue therefore is "necessarily raised." *Gunn*, 133 S. Ct. at 1065.

B. The First Amendment Question Is Disputed.

There is no denying that the First Amendment issue is central to this case and that it is sharply disputed. Plaintiffs assuredly will continue to press the argument set forth in their state-

[1] Plaintiffs will likely dispute that the Defendants have any interest in parish property even if the parishes remain members of the Church. This issue, however, would raise an additional federal question: whether the First Amendment requires civil courts to give legal effect to a provision of church law—here, Canon I.7.4—that provides that a parish's real and personal property is held in trust for the Church and the diocese in which it is located. Defendants would argue, "yes." *See Jones v. Wolf*, 443 U.S. 595, 603 (1979) ("Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy.") Plaintiffs would argue, "no." *See All Saints Parish Waccamaw v. The Protestant Episcopal Church in the Diocese of S.C.*, 685 S.E. 2d 163, 174 (S.C. 2009).

court TRO motion that the determination of Church authorities can be set aside and the case resolved without offending the First Amendment by applying state corporations law. Mem. in Supp. of Mot. for a TRO, Doc. No. 1-4, at 10-12. Significantly, Bishop Lawrence, who Plaintiffs claim is the Chief Operating Officer of the Diocese, Second Amended Compl. ¶ 3, and who is represented by many of the same attorneys who represent Plaintiffs, has vigorously asserted this argument in the federal trademark and false advertising case currently before this Court, Case No. 13-cv-00587-CWH. Indeed, Bishop Lawrence argues not only that the Court may set aside the determinations of the Church, but he goes so far as to argue that the First Amendment forbids application of the deference approach. Doc. 20, at 15-23, 31. The claims in this case thus plainly "'involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law.'" *Grable*, 545 U.S. at 313 (alterations in original) (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912)).

C. The First Amendment Question Is Substantial.

The First Amendment issue is also manifestly substantial. The Supreme Court recently explained that the substantiality inquiry "looks . . . to the importance of the issue to the federal system as a whole." *Gunn*, 133 S. Ct. at 1066. Because constitutional questions define the boundaries of our federal system of government, the Supreme Court has instructed that federal constitutional issues, as compared to statutory questions, typically reach the requisite level of substantiality. *See Grable*, 545 U.S. at 320 n.7. Indeed, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the case which both *Grable* and *Gunn* identified as the "classic example" of circumstances justifying removal, *Gunn*, 133 S. Ct. at 1066; *Grable*, 545 U.S. at 312, the plaintiff's right to relief depended upon the resolution of an issue of federal constitutional law. *See Smith*, 255 U.S. at 199.

And as in *Smith* itself, the constitutional question here is important to more than merely "the particular parties in the immediate suit." *Gunn*, 133 S. Ct. at 1066. It involves the authority of civil courts—state and federal—under the First Amendment and the freedom of religious associations to organize and govern themselves according to the dictates of their faith. "Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." *Serbian E. Orthodox Diocese*, 426 U.S. at 714-15; *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872) ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."). The Plaintiffs in this action seek to employ the power of the judiciary to abnegate the determinations of Church authorities on matters of Church governance and doctrine and thereby affect a radical reordering of the Church's polity. Whether the First Amendment permits that is a matter of immeasurable importance mot merely to millions of Episcopalians across the country but to the free exercise of religion ***in general***.

Indeed, the First Amendment issue here already is or soon will be at play in other similar litigation. *See, e.g.*, "Churches in Court," The Pew Forum on Religion & Public Life (Mar. 31, 2011), http://www.pewforum.org/Church-State-Law/Churches-in-Court(7).aspx (noting the decades-long litigation involving The Episcopal Church and similar legal disputes involving Presbyterian and Methodist denominations); Brenda Goodman, "A Church Is Divided, And Headed for Court," N.Y. Times, Dec. 5, 2007, at A20 (Ex. B) (reporting that religious rifts involving The Episcopal Church and Presbyterian Church have "flooded courts nationwide"). The state court's resolution of this issue thus could be "'controlling in numerous other cases'" in

South Carolina, while at the same time undermining "uniformity" in the interpretation of the First Amendment. *Gunn*, 133 S. Ct. at 1067. Yet, providing for uniform interpretation of the U.S. Constitution is not merely one of "the advantages thought to be inherent in a federal forum," *Grable*, 545 U.S. at 313, but indeed was a key reason for having federal courts at all, *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (noting that one justification for federal courts is the "necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution"); *cf. Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996) ("Where the resolution of a federal issue in a state-law cause of action could, because of different approaches and inconsistency, undermine the stability and efficiency of a federal statutory regime, the need for uniformity becomes a substantial federal interest, justifying the exercise of jurisdiction by federal courts."). In short, it is an issue of "federal law that sensibly belongs in a federal court." *Grable*, 545 U.S. at 315.

Plaintiffs suggest that this case is more like *Empire Healthchoice* than *Grable*, Pls.' Mem., Doc. No. 9-1, at 14, but the suggestion does not stand up to scrutiny. Plaintiffs suggest that this case presents a "nonstatutory issue" of federal law, *id.* (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006)), but that hardly could aid their argument given that the issue here is *constitutional*. *See Grable*, 545 U.S. at 320 n.7. They likewise suggest that the issue here, as in *Empire Healthchoice*, is "fact-bound and situation-specific," Pls.' Mem., Doc. No. 9-1, at 14 (quoting 547 U.S. at 701), but that is simply incorrect. Under *Serbian Eastern Orthodox*, application of the First Amendment requirement of deference to church authorities on questions of church governance depends only on whether the church is hierarchical. 426 U.S. at 724. And here, both the Supreme Court and the Fourth Circuit have held that The Episcopal Church is hierarchical. *See Watson*, 80 U.S. (13 Wall.) at 729; *Dixon*,

290 F.3d at 716. Finally, Plaintiffs distinguish *Grable* as involving "the action of a[] federal department." Pls.' Mem., Doc. No. 9-1, at 14 (quoting *Empire Healthchoice*, 547 U.S. at 700). But the involvement of a "federal department" is not a requirement for removal under *Grable*. *See*, *e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 413 (6th Cir. 2012). And moreover, the issue here does involve the propriety of actions of the judiciary under the First Amendment. That the issue transcends the federal government, and instead implicates both the federal and state judiciary makes it more important to our "federal system as a whole" rather than less. *Gunn*, 133 S. Ct. at 1066.

Finally, Plaintiffs' reliance on *Dixon v. Coburg Diary, Inc.*, a pre-*Grable* case, is misplaced. *See* Pls.' Mem., Doc. No. 9-1, at 14. There, in an alternative holding, the court concluded that the First Amendment issue raised by the complaint was not substantial because Congress had not provided for a federal cause of action for First Amendment violations in private workplaces. *Id.* at 818. *Grable*, however, expressly rejected any such bright-line rule. 545 U.S. at 317. In *Grable*, "federal law provide[d] for no quiet title action that could be brought against [the defendant]," but the Court held that to deny removal on that ground would "convert[] a federal cause of action from a sufficient condition for federal-question jurisdiction into a necessary one." *Id.* *Grable* thus appears to abrogate the reasoning underlying the alternative holding of *Coburg Dairy* on which Plaintiffs rely.

In any event, even as a mere "sufficient condition," the federal-cause-of-action rule of *Coburg Dairy* would apply only in cases where a violation of federal law is one of the elements of the plaintiff's state-law cause of action. This is clear from *Coburg Dairy*'s citation to *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), which the Court of Appeals observed as involving "a complaint alleging a violation of a federal statute as an element of a

state cause of action." 369 F.3d at 818 (quoting *Merrell Dow*, 478 U.S. at 817). When the state-law cause of action does not incorporate the violation of federal law as an element, but rather, as here, necessarily incorporates a legal theory that requires resolution of issues of federal law, the cause-of-action analysis has no relevance to the substantiality inquiry. *See*, *e.g.*, *Gunn*, 133 S. Ct. at 1065 (not employing cause-of-action analysis in substantiality inquiry to state-law malpractice claim that depended on federal questions of patent law). What matters is "the importance of the issue to the federal system as a whole," *id.* at 1066, and that is amply demonstrated here.

D. Federal Resolution Of Questions Under The First Amendment Does Not Disrupt Any Congressionally Approved Division Between State And Federal Authorities.

Lastly, there is no reason to think resolution of this case in federal court would disrupt the federal-state balance approved by Congress. A federal court's exercise of jurisdiction in this case will not result in a substantial number of state trademark cases being removed to federal court. *See In re Capital One Derivative Shareholder Litig.*, No. 12cv1100, 2012 WL 6725613, at *7 (E.D. Va. Dec. 21, 2012) (finding federal jurisdiction based, in part, on the fact that the case would not result in a wave of new federal litigation). This case implicates a First Amendment issue that simply does not arise in the vast majority of cases presenting similar claims. *Cf. Rose v. SLM Fin. Corp.*, No. 3:05CV445, 2007 WL 674319, at *5 (W.D.N.C. Feb. 28, 2007) (finding jurisdiction because the case presented "rare" circumstances and would therefore not open the gates to federal jurisdiction in cases involving generally similar claims). Thus, just as in *Grable*, "because it will be the rare state [trademark] case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over [the First Amendment] will portend only a microscopic effect on the federal-state division of labor." 545 U.S. at 315. In any event, the cause of action created by section 43(a) of the Lanham Act, 15

U.S.C. § 1125(a), is a strong indication that Congress has authorized federal jurisdiction over claims such as those present here.

* * *

In sum, Plaintiffs' claims turn on a substantial and disputed First Amendment issue. Plaintiffs offer no legitimate reason this issue does not provide a basis for federal jurisdiction.[2]

II. TECSC Did Not Waive Its Right To Remove.

Plaintiffs' argument that TECSC has waived its right to remove this action is baseless.

Plaintiffs premise much of their waiver argument on actions taken in the state court by The Episcopal Church, principally the Church's consent to a temporary injunction pending the filing of opposition papers and to the filing of a second amended complaint. These actions by The Episcopal Church when it was the sole defendant in the action cannot under any circumstance bar TECSC, after being named as a defendant, from exercising its own right to remove the action. Indeed, Plaintiffs' suggestion that the actions of The Episcopal Church should be imputed to TECSC is deeply undermined by their very decision to name TECSC as a

[2] In the event that this Court concludes that it possesses original jurisdiction over some, but not all, of the claims in this case, it should exercise supplemental jurisdiction over any remaining claims. *See* 28 U.S.C. §§ 1367, 1441(c). Supplemental jurisdiction is proper if the state law claim "stem[s] from the same common nucleus of operative facts as a federal law claim." *Rosmer v. Pfizer Inc.*, 263 F.3d 110, 116 (4th Cir. 2001). Here, each claim stems from, and is based on, the purported withdrawal by the Diocese and certain parishes from The Episcopal Church. *See, e.g.*, Second Amended Compl. ¶¶ 25, 39, 53, 62, 75 (alleging that Plaintiffs withdrew from The Episcopal Church). As a result, all claims "form part of the same case or controversy," § 1367(a), and this Court's jurisdiction over the entire case is proper. *See, e.g.*, *Booker v. S.C. Dep't of Corr.*, No. 12-cv-01957, 2012 WL 5430950, at *5 (D.S.C. Sept. 12, 2012) (finding supplemental jurisdiction where federal and state claims relied on same alleged conduct); *Padgett v. Orangeburg Cnty. Sheriff's Dep't*, No. 10-cv-1713, 2012 WL 1032688, at *2 (D.S.C. Mar. 27, 2012) ("The same facts that make up [plaintiff's] Fourteenth Amendment claims against [one defendant] undergird [plaintiff's] state law claims against both [defendants].").

separate defendant in the Second Amended Complaint. If TECSC legitimately could be bound by The Episcopal Church's actions and any relief entered against the national Church, then Plaintiffs would not have had a reason to add a TECSC as a separate defendant.

More importantly, even if The Episcopal Church's actions in litigation could be imputed to TECSC—and they cannot—Plaintiffs cite no relevant legal authority to support the proposition that consenting to a temporary injunction pending the filing of opposition papers, or consenting to the filing of an amended complaint, or both, waives a defendant's right to remove a case to federal court. The one case Plaintiffs cite that actually pertained to removal makes clear that only a "substantial *defensive* action in the state court" can qualify as a waiver. *Aqualon Co. v. MAC Equip., Inc.*, 149 F.3d 262, 264 (4th Cir. 1998) (emphasis added). Neither consenting to a temporary injunction nor consenting to the filing of an amended complaint can legitimately be characterized as "substantial defensive action." *Cf. E2M Health Servs. v. Curative Health Servs.*, No. 302CV1562K, 2003 WL 23017509, at *5 (N.D. Tex. Dec. 19, 2003) (finding no waiver of personal jurisdiction where party accepted service of an amended complaint).

To the contrary, the Fourth Circuit has established that a defendant waives its right to remove only if its actions "demonstrat[e] a 'clear and unequivocal' intent to remain in state court." *Aqualon Co.*, 149 F.3d at 264 (quoting *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir. 1991)). Waiver of the right to remove is found only in "extreme situations." *Grubb*, 935 F.2d at 59. It is "not lost by participating in state court proceedings short of seeking an adjudication on the merits." *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003); *see also Sayre Enters., Inc. v. Allstate Ins. Co.*, 448 F. Supp. 2d 733, 735 (W.D. Va. 2006). The Church's consent to the injunction and Second Amended Complaint cannot possibly be

characterized either as "extreme" or as demonstrating the Church's "clear and unequivocal intent to remain in state court," and certainly did not "seek[] an adjudication on the merits."

Plaintiffs also identify no action taken by TECSC after it was named a Defendant in this action that could possibly have waived its right to removal. Far from "extreme," the circumstances that preceded TECSC's removal of this case were entirely typical of the early phases of civil litigation.

Plaintiffs first argue that TECSC's filing of its answer with affirmative defenses qualified as waiver. This argument lacks merit. It simply is not the law that answering a state-court complaint waives one's right to a federal forum. *See, e.g.*, *Sayre Enters., Inc.*, 448 F. Supp. 2d at 736 ("The defendant does not waive the right to remove by filing a pleading in state court that raises a conclusive defense; waiver requires some further action by the defendant that results in a decision on the merits of the case."); *Hawes v. Cart Prods., Inc.*, 386 F. Supp. 2d 681, 687 (D.S.C. 2005) (no waiver where defendant had filed responsive and defensive pleadings). Indeed, the Federal Rules of Civil Procedure recognize that this may sometimes be the order of events. Rule 81(c)(2) provides the time periods within which a defendant in a removed action "***who did not answer before removal*** must answer or present other defenses or objections." Fed. R. Civ. P. 81(c)(2) (emphasis added). The Rule thus implicitly recognizes that in some cases a defendant may have answered and presented defenses prior to removal. Plaintiffs' answer-as-waiver argument, moreover, would effectively curtail the thirty-day period of removal for defendants sued in states that require answers to be filed within less than thirty days of service of the complaint. This is the precise result Congress sought to avoid when it twice amended the removal statute in the 1940's to achieve uniform operation in all states. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351-52 (1999). But Plaintiffs' understanding of

waiver would portend a return to a prior version of the statute that permitted removal only prior to the expiration of a defendant's time to respond to the complaint.

Nor is it the law that a defendant waives its right to removal by asserting counterclaims with its answer. In support of their argument, Plaintiffs cite a decision in which the court found waiver based, in part, on the defendant's filing of a *permissive* counterclaim. *See Va. Beach Resort & Conference Ctr. Hotel Ass'n Condo. v. Certain Interested Underwriters*, 812 F. Supp. 2d 762, 765-66 (E.D. Va. 2011). Plaintiffs do not contend, however, that any of TECSC's counterclaims are permissive. To the contrary, they are quite clearly compulsory since each "arises out of the transaction or occurrence that is the subject matter of the [Plaintiffs'] claim[s]." S.C. R. Civ. P. 13(a). And "the filing of a compulsory counterclaim is not sufficient to waive removal." *Landry v. Cross County Bank*, 431 F. Supp. 2d 682, 687 (S.D. Tex. 2003).

Finally, it is well established that engaging in limited discovery does not constitute waiver. *See, e.g.*, *Joyner v. A.C. & R. Insulation Co.*, No. 12-2294, 2013 WL 877125, at *9 n.9 (Mar. 7, 2013 D. Md.) ("Seeking additional discovery and conducting depositions scheduled under emergency circumstances are not the types of substantial defensive action that constitutes such a waiver."); *Nixon v. Wheatley*, 368 F. Supp. 2d 635, 641 (E.D. Tex. 2005) (finding no waiver where defendants' state-court activity included "filing an original answer and sending interrogatories, a request for production, and a request for disclosure to Plaintiffs").

TECSC's state-court actions—either individually or in the aggregate—do not demonstrate the "clear and unequivocal" intent to remain in state court, and they accordingly do not provide the basis for a finding of waiver of the right to remove.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to remand should be denied.[3]

Dated: April 29, 2013

Respectfully Submitted,

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[3] In the last sentence of their memorandum, Plaintiffs request that this Court award fees and costs under 28 U.S.C. § 1447(c). If the Court were to grant Plaintiffs' remand motion, awarding fees and costs would not be justified. Contrary to Plaintiffs' offhand request, awarding of fees under § 1447(c) does not automatically follow remand and is proper "only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Plaintiffs offer "no evidence that [TECSC was] acting in bad faith or attempting to harass or delay when [it] removed this matter." *Legette v. Nucor Corp.*, No. 12-cv-1020, 2012 WL 3029650, at *5 (D.S.C. July 25, 2012). To the contrary, as shown above, TECSC's arguments in support of removal are amply supported by precedent. *See id.*

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all ECF users registered with the Court for this case.

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