NO. 14-1122

In The
United **S**tates **C**ourt of **A**ppeals
For The Fourth Circuit

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 - Appellant

v.

THE RIGHT REVEREND MARK J. LAWRENCE; JOHN DOES 1-10,
being fictitious defendants whose names presently are unknown to
Plaintiff and will be added by amendment when ascertained

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 14-1122 Caption: vonRosenberg v. Lawrence et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Right Reverend Charles G vonRosenberg, individually and in his capacity as Provisional Bishop of
(name of party/amicus)

the Protestant Episcopal Church in the Diocese of South Carolina

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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If yes, identify all such owners:

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If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Thomas S. Tisdale Date: 02/25/14

Counsel for: Charles G. vonRosenberg

CERTIFICATE OF SERVICE

****

I certify that on 02/25/14 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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TABLE OF CONTENTS

Table Of Authorities ii

Jurisdictional Statement 1

Statement Of Issues Presented For Review 1

Statement Of The Case 1

Summary Of Argument 15

Argument 20

I. Standard Of Review 20

II. This Action And The State Court Action Are Not Parallel 22

III. The Relevant Abstention Standard Is Provided By *Colorado River*, Not *Brillhart/Wilton* 28

IV. Abstention Is Not Warranted Under The *Colorado River* Standard 32

V. Abstention Is Not Warranted Under The *Brillhart/Wilton* Standard 36

VI. Bishop vonRosenberg Is Entitled To A Preliminary Injunction 39

Conclusion 49

Request For Oral Argument 49

Certificate Of Compliance 50

Certificate Of Service 51

Addendum 52

TABLE OF AUTHORITIES

CASES

Alcon Assocs., Inc. v. Odell Assocs., Inc.,
No. 04-22151-18, 2005 WL 3579057 (D.S.C. 2005) 26

Am. S. Ins. Co. v. Conniff,
No. 09-1965, 2010 WL 2710568 (D.S.C. July 7, 2010) 38

Amerisure Mut. Ins. Co. v. Superior Constr. Corp.,
No. 10-961, 2010 WL 3433046 (D.S.C. Aug. 30, 2010) 37

Andrews v. Daw,
201 F.3d 521 (4th Cir. 2000) 26

Brillhart v. Excess Ins. Co. of Am.,
316 U.S. 491 (1942) 13, 18, 19, 21, 28, 29, 30, 31, 36

Centennial Life Ins. Co. v. Poston,
88 F.3d 255 (4th Cir. 1996) 37

Chase Brexton Health Servs., Inc. v. Maryland,
411 F.3d 457 (4th Cir. 2005) 20, 22, 29, 30, 32

Colo. River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 13, 14, 15, 18-21, 28, 29, 31, 32, 35

Daniel v. Wray,
580 S.E.2d 711 (N.C. Ct. App. 2003) 40

Dixon v. Edwards,
290 F.3d 699 (4th Cir. 2002) 3, 24, 40, 41, 42, 43

Eisenberg v. Montgomery County Public Schools,
197 F.3d 123 (4th Cir. 1999) 21, 22

Episcopal Diocese of Mass. v. DeVine,
797 N.E.2d 916 (Mass. 2003) 40

Gannett Co. v. Clark Constr. Grp., Inc.,
286 F.3d 737 (4th Cir. 2002) 20, 21, 34

Great Am. Ins. Co. v. Gross,
468 F.3d 199 (4th Cir. 2006) 30

Golden State Bottling Co. v. NLRB,
414 U.S. 168 (1973) 27, 28

Holliday Amusement Co. of Charleston, Inc. v. South Carolina,
No. 01-210, 2006 WL 1285105 (D.S.C. 2006) 26

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
132 S. Ct. 694 (2012) 41

Hunter v. Earthgrains Co. Bakery,
281 F.3d 144 (4th Cir. 2005) 20

Jones v. SEC,
115 F.3d 1173 (4th Cir. 1997) 26

Jones v. Wolf,
443 U.S. 595 (1979) 48

Kedroff v. St. Nicholas Cathedral,
344 U.S. 94 (1952) 43, 44

Lake Shore Asset Mgmt. Ltd. v. CFTC,
511 F.3d 762 (7th Cir. 2007) 28

McLaughlin v. United Va. Bank,
955 F.2d 930 (4th Cir. 1992) 22

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 32, 33, 35

Nautilus Ins. Co. v. Winchester Homes, Inc.,
15 F.3d 376 (4th Cir. 1994) 36, 37, 38

NBC Universal, Inc. v. NBCUniversal.com,
378 F. Supp. 2d 715 (E.D. Va. 2005) 34

New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.,
946 F.2d 1072 (4th Cir. 1991) 22, 23

New England Ins. Co. v. Barnett,
561 F.3d 392 (5th Cir. 2009) 30

NML Capital, Ltd. v. Republic of Argentina,
___F.3d___, 2013 WL 4487563 (2d Cir. 2013) 28

Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm., Co.,
290 F.3d 578 (3d Cir. 2002) 46

Penn-Am. Ins. Co. v. Pope,
368 F.3d 409 (4th Cir. 2004) 38

Protestant Episcopal Church in the Diocese of N.J. v. Graves,
417 A.2d 19 (N.J. 1980) 40

Purcell v. Summers,
126 F.2d 390 (4th Cir. 1942) 35

Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc.,
699 S.E.2d 45 (Ga. Ct. App. 2010) 40

Riley v. Dozier Internet Law, PC,
371 F. App'x 399 (4th Cir. 2010) 30, 31

Schofield v. Superior Ct. of Fresno Cnty.,
118 Cal. Rptr. 3d 160 (Cal. Ct. App. 2010) 44

Scotts Co. v. United Indus. Corp.,
315 F.3d 264 (4th Cir. 2002) 22, 39, 46

Serbian E. Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 19, 22, 27, 33, 41, 42, 43, 44, 48

Travelers Home & Marine Ins. Co. v. Pope,
No. 10-1688, 2010 WL 4607024 (D.S.C. Nov. 3, 2010) 38

United Capitol Ins. Co. v. Kapiloff,
155 F.3d 488 (4th Cir. 1998) 36, 37, 38

United States v. Horne,
474 F.3d 1004 (7th Cir. 2007) 47

Village of Westfield, N.Y. v. Welch's,
170 F.3d 116 (2d Cir. 1999) 21

VRCompliance LLC v. HomeAway, Inc.,
715 F.3d 570 (4th Cir. 2013) 30

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1872) 40, 41, 43, 44

Westberry v. Gislaved Gummi AB,
178 F.3d 257 (4th Cir. 1999) 21

Wilton v. Seven Falls Co.,
515 U.S. 277 (1995) 13, 29, 31

WV Ass'n. of Club Owners and Fraternal Services, Inc. v. Musgrave,
553 F.3d 292 (4th Cir. 2009) 22

Wyndham v. Lewis,
354 S.E.2d 578 (S.C. Ct. App. 1987) 26

Zenith Radio Corp. v. Hazeltine Research, Inc.,
395 U.S. 100 (1969) 28

STATUTES

15 U.S.C. §1116 .....39, 53
15 U.S.C. §1121(a) 1, 52
15 U.S.C. §1125(a) 33
15 U.S.C. §1125(a)(1)(A) 52, 53

15 U.S.C. §1125(a)(1)(B) 39, 52, 53
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
28 U.S.C. § 1338 1

RULES

S.C.R.Civ.P. 65(d) 28

JURISDICTIONAL STATEMENT

This appeal is taken from an order issued by the Honorable Weston Houck of the District of South Carolina. The Complaint alleged violations of 15 U.S.C. §§ 1051 *et seq.* (the "Lanham Act"). Joint Appendix ("JA") 8-10, 22-26. The basis for the District Court's subject matter jurisdiction was 15 U.S.C. § 1121(a) and 28 U.S.C. §§ 1331, 1338. The basis for appellate jurisdiction is 28 U.S.C. § 1291. A final appealable order abstaining from and dismissing the case without prejudice was issued on August 23, 2013. JA 1958-1979. Appellant filed a timely motion for reconsideration on September 16, 2013, JA 1980-2061, which was denied by the District Court on January 14, 2014. JA 2132-2138. Appellant filed a timely notice of appeal on February 5, 2014. JA 2139.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in abstaining from jurisdiction over Appellant's claim for false advertising under the Lanham Act?

2. Did the District Court err in denying the Appellant's motion for a preliminary injunction pursuant to Appellant's claim for false advertising under the Lanham Act?

STATEMENT OF THE CASE

A. Introduction

The Appellant, Bishop vonRosenberg, is the Provisional Bishop of The

Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese"), a diocese of The Protestant Episcopal Church in the United States of America ("The Episcopal Church" or the "Church"). JA 204 at ¶ 2. Since his election and installation as Bishop on January 26, 2013, however, Bishop vonRosenberg has been confronted with the claims of the Appellee and former Bishop of the Diocese, The Right Reverend Mark J. Lawrence, that he remains the Bishop of the Diocese. JA 8-9 at ¶ 1.

The Appellant alleges that Bishop Lawrence's claims are false: In the fall of 2012, after denouncing and disaffiliating from the Church, Bishop Lawrence was removed from his position in The Episcopal Church by the highest authorities in the Church, and the First Amendment commands that their decision controls in a controversy concerning the polity of a hierarchical church. *Id.* Nevertheless, Bishop Lawrence continues to hold himself out as the Bishop of the Diocese in communications with people of faith and the general public. *Id.*

Bishop Lawrence's conduct confuses consumers of religious services, diverts to him and his followers financial and spiritual support that would otherwise be directed toward Bishop vonRosenberg, impedes the exercise of the duties that have been entrusted to Bishop vonRosenberg, and restricts Bishop vonRosenberg's ability to exercise the authority of his office and to control the religious reputation of the Diocese. *Id.*

B. The Episcopal Church And The Diocese of South Carolina

The Protestant Episcopal Church in the United States of America is a religious denomination and a constituent member of the Anglican Communion, a name generally used to describe the worldwide fellowship of those churches in communion with the See (or seat) of the Archbishop of Canterbury. JA 245 at ¶ 38. The Episcopal Church, like the other "Provinces" of the Anglican Communion, is self-governing, has its own constituent units, and exercises jurisdiction within its geographic territory. JA 245 at ¶ 39; 246 at ¶41. The Episcopal Church's constituent units are regional dioceses as well as parishes within those dioceses. JA 242 at ¶ 29; 244-245 at ¶ 35.

From its inception, The Episcopal Church has been a hierarchical church. JA 247 at ¶ 43; 214 at ¶ 5; *see also Dixon v. Edwards*, 290 F.3d 699, 716 (4th Cir. 2002) ("The Episcopal Church is hierarchical."). Its Constitution, Canons, and Book of Common Prayer provide its governing law and are binding on every unit and member of the Church. JA 241 at ¶ 25. Those documents have been adopted and are amended only by the highest authority within the Church, the Church's General Convention, which consists of two houses: the House of Bishops, comprising the Bishops of the Church, and the House of Deputies, comprising clergy and lay members elected by and from the dioceses of the Church. JA 241 at ¶ 24. The General Convention cannot be limited by the actions of other entities

within the Church. JA 242 at ¶ 26. The General Convention elects the Presiding Bishop, who is the Chief Pastor and Primate of the Church. JA 242 at ¶ 27. The Presiding Bishop is charged with, among other duties, initiating and developing the Church's policy and strategy and speaking about the Church's policies, strategies, and programs. *Id.*

Over one hundred geographically defined dioceses are at the next level within the Church's hierarchy. JA 242 at ¶ 29. A diocese may be formed only with the consent of the General Convention and only after, among other things, the proposed diocese has affirmatively given its unqualified accession to The Episcopal Church's Constitution and Canons. JA 242-243 at ¶¶ 29-30. The Episcopal Church's Constitution and Canons do not provide for or permit the unilateral release, withdrawal, or transfer of any diocese. JA 291-292 at ¶ 153.

Each diocese is governed by its own Diocesan Convention, which adopts and may occasionally amend the diocesan constitution and canons. JA 243-244 at ¶¶ 32-33. The diocesan constitution and canons cannot be inconsistent with The Episcopal Church's Constitution and Canons. JA 243-244 at ¶ 33. Parishes, the units at the next level within the Church's hierarchy, are subject to the rules of both The Episcopal Church and their respective Diocese. *Id.*

Each diocese elects its own bishop, who may be installed only after receiving the consent of a majority of the leadership of the other dioceses. JA 244

at ¶ 34. An individual ordained as bishop must promise to "guard the faith, unity, and discipline of the Church" and to "share with [his or her] fellow bishops in the government of the whole Church." JA 243 at ¶ 31. A bishop is also charged with "exercising [his or her] . . . ministry in accordance with applicable provisions of the Constitution and Canons of the church and of the Diocese." JA 228 at ¶ 9. In addition, bishops, like all Church clergy, must affirm that they will "conform to the Doctrine, Discipline, and Worship of the Episcopal Church." JA 242-243 at ¶ 30; 228 at ¶ 10.

The bishop serves as the "Ecclesiastical Authority" and highest officer of the diocese and manages the diocese's spiritual and temporal affairs. JA 244 at ¶ 34. He or she is advised by, and shares authority over certain matters with, the diocesan Standing Committee, a body of clergy and laity elected by the diocesan convention. *Id.* Pursuant to The Episcopal Church's Constitution, a bishop may not resign his or her office and remain a bishop in good standing in the Church without the consent of a majority of the House of Bishops. JA 270-271 at ¶¶ 101-102. A bishop may be removed on grounds specified in The Episcopal Church's Canons. JA 272 at ¶ 106. One such ground is a bishop's "abandonment" of The Episcopal Church. *Id.*

The Protestant Episcopal Church in the Diocese of South Carolina (the "Diocese") has been a diocese of The Episcopal Church, and thus a subordinate

unit of the Church, since at least 1790, when the Diocese acknowledged the authority of the Constitution and Canons of The Episcopal Church. JA 223-224 at ¶¶ 8-9.

C. Bishop Lawrence's Renunciation Of The Episcopal Church And His Ministry

Bishop Lawrence was the XIV Bishop of the Diocese. Like the Diocese's bishops before him, he was elected, ordained, and installed pursuant to the requirements of The Episcopal Church's Constitution, Canons, and Book of Common Prayer. JA 215 at ¶ 9.

Since as early as 2010, however, Bishop Lawrence has encouraged and participated in a variety of actions on behalf of the Diocese that violated The Episcopal Church's Constitution and Canons (and, as such, are null and void). JA 228 at ¶ 8.

As a result of these actions, a group of laity and clergy submitted a complaint to The Episcopal Church's Bishop for Pastoral Development, who then forwarded the complaint to The Episcopal Church's Disciplinary Board for Bishops (the "Board"). JA 227-228 at ¶ 7. As its name implies, the Board has jurisdiction over the discipline of Bishops. JA 227 at ¶ 4. The complaint alleged that Bishop Lawrence had "abandoned The Episcopal Church by an open renunciation of the Discipline of the Church." JA 227-228 at ¶ 7.

The Board, pursuant to its authority under The Episcopal Church's Canons

and after consideration of evidence submitted in support of the complaint, concluded that Bishop Lawrence had engaged in a series of acts that constituted abandonment. JA 227 at ¶ 5; 228 at ¶ 8; 216 at ¶ 12. In accordance with The Episcopal Church's Canons, the Board then transmitted a "Certificate of Abandonment of The Episcopal Church and Statement of the Acts or Declarations Which Show Such Abandonment" to the Presiding Bishop. JA 229 at ¶ 11; 216 at ¶ 12.

On October 15, 2012, The Episcopal Church's Presiding Bishop, as required by the Church's Canons and pending an investigation by the House of Bishops, placed a restriction on Bishop Lawrence's exercise of office. JA 216 at ¶ 13. This restriction, of which Bishop Lawrence was informed, precluded him from performing "any Episcopal, ministerial, or canonical acts." JA 216 at ¶¶ 13-14.

On October 20, 2012, an announcement appeared on the website of the purported Diocese, stating that the "leadership" of the Diocese "had in place resolutions which would become effective upon any action by TEC." JA 18 at ¶ 42. The statement continued, "As a result of TEC's attack against our Bishop, the Diocese of South Carolina is disassociated from TEC, that is, its accession to the TEC Constitution and its membership in TEC have been withdrawn." *Id.* And in an address on November 17, 2012, Bishop Lawrence stated, "We have withdrawn from [The Episcopal] Church." JA 74-78.

On December 5, 2012, The Episcopal Church's Presiding Bishop, acting pursuant to the Church's Canons and with the consent of her Council of Advice, accepted Bishop Lawrence's renunciation. JA 217 at ¶ 17. As a result, Bishop Lawrence was removed from the ordained ministry of the Church, released from the obligations of all ministerial offices, and no longer permitted to exercise the authority conferred on him as Bishop. JA 217-218 at ¶ 18.

D. Bishop vonRosenberg's Election And Installation As The Provisional Bishop Of The Diocese

In accordance with The Episcopal Church's Constitution and Canons, the Presiding Bishop then called a special meeting of the Diocesan Convention at which a new bishop would be elected. JA 218 at ¶ 19. On January 26, 2013, the Diocesan Convention convened, and Bishop vonRosenberg was elected and installed as Provisional Bishop of the Diocese, pursuant to Church Canon III.13.1. *Id.* The Secretary of the Church's House of Bishops has entered Bishop vonRosenberg's name on the roll of Bishops as Provisional Bishop of the Diocese. *Id.* The Episcopal Church recognizes only Bishop vonRosenberg as the Bishop of the Diocese. *Id.*

E. Bishop Lawrence's Continued False Advertising

Despite his renunciation and removal from office, Bishop Lawrence continues to hold himself out as the Bishop of the Diocese, and continues to make other false representations of fact regarding the Diocese's authorization and

support of his activities.

Examples of such conduct abound. Bishop Lawrence's biography on the website of the purported Diocese continues to identify him as the "XIV Bishop of the Episcopal Diocese of South Carolina." JA 80; 203. In a letter issued on the same day the Presiding Bishop accepted his renunciation, Bishop Lawrence stated that he "remain[s] the Bishop of the Diocese of South Carolina." JA 84-85. In an announcement on the website of the purported Diocese, Bishop Lawrence is quoted as saying, "We continue to be the Diocese of South Carolina—also known, legally as the Protestant Episcopal Church in the Diocese of South Carolina and as the Episcopal Diocese of South Carolina, of which I remain the Bishop." JA 87. In addition, Bishop Lawrence and his followers purported to convene the "222nd Annual Convention of the Diocese of South Carolina," held on March 8-9, 2013. JA 175-176; 191.

Bishop Lawrence's repeated misrepresentations about his association with the Diocese have created insurmountable impediments to Bishop vonRosenberg's ability to carry out his spiritual and temporal duties. JA 206-211 at ¶¶ 9-21. Bishop Lawrence's conduct confuses and misleads followers, potential followers, and charitable donors regarding the leadership of the Diocese, Bishop Lawrence's association with the Diocese, and the values and principles to which the Diocese adheres. *Id.* As a result, Bishop Lawrence has undermined Bishop

vonRosenberg's ability to garner support for the Diocese and to maintain and control the Diocese's credibility and reputation. *Id.*

F. Bishop Lawrence Leads A Conspiracy To Bring A Lawsuit Against The Episcopal Church And The Diocese In State Court In The Names Of The Diocese's Corporations And Numerous Parish Corporations

On January 4, 2013, in the names of the Diocese's non-profit corporation, its corporate trustees, and numerous South Carolina parish corporations, a complaint was filed against The Episcopal Church in the Court of Common Pleas for the First Judicial Circuit in Dorchester County, South Carolina. JA 348-409. That complaint had been prepared and filed at the direction of Bishop Lawrence and his followers that had personally denounced and disaffiliated from the Church. *Id.* On the face of the complaint, the state court plaintiff corporations sought a declaratory judgment that they own all the real and personal property of the Diocese and the respective parishes. *Id.* They also asserted state law trademark infringement of several South Carolina state trademark registrations that had been filed at Bishop Lawrence's direction in the name of the Diocese's non-profit corporation in 2010. *Id.* Lastly, they asserted violations of state law rights to their South Carolina corporate names. *Id.*

On January 23, 2013, upon the state court plaintiffs' *ex parte* motion (for which there was certainly no emergency that justified the lack of notice and opportunity for a hearing), JA 422, the trial court issued a TRO forbidding any

person or entity not included on a list of persons drawn up by Bishop Lawrence and his followers from using the South Carolina registered state trademarks and South Carolina corporate names. JA 459-465.

The state court plaintiffs served notice of that *ex parte* TRO on Bishop vonRosenberg and several others having legitimate hierarchical authority in the Diocese recognized by The Episcopal Church. JA 428-447.

On January 29, 2013, upon another *ex parte* motion by the plaintiffs, the case was designated as complex and assigned to the Honorable Diane S. Goodstein. JA 419-421.

On January 31, 2013, after being stunned with the *ex parte* TRO, The Episcopal Church consented to a temporary injunction maintaining the status quo, but reserving its right to later move to modify or dissolve the temporary injunction upon 14 days notice. JA 455-458. A motion to vacate the temporary injunction was later denied by the court.

On March 5, 2013, the state court plaintiffs added "The Episcopal Church in South Carolina" ("TECSC") as a party defendant. JA 717-819. TECSC is a temporary pseudo name that was adopted by the continuing Diocese that has existed since the eighteenth century, as recognized by The Episcopal Church, at its Diocesan Convention on January 26, 2013, solely as a precaution to be avoid being accused of contempt of the *ex parte* TRO and temporary injunction that had

already been entered in the case before it became a party.

G. The Procedural History Of This Action And The State Court Action

On March 5, 2013, (the same day that TECSC was added as a party defendant in the state court action), Bishop vonRosenberg filed the instant action against Bishop Lawrence in the District Court. JA 8-28. Two days later, on March 7, 2013, Bishop vonRosenberg moved for a preliminary injunction against Bishop Lawrence. JA 29-301. Instead of filing an answer to the complaint, on March 28, 2013, Bishop Lawrence filed a motion to dismiss or in the alternative to stay the proceedings in light of the state court action. JA 302-881.

Meanwhile, in the state court action, on March 28, 2013, The Episcopal Church and TECSC filed answers and counterclaims, each alleging that individuals who were not named as parties in the complaint, including Bishop Lawrence and others whose identities were still being investigated, had wrongfully caused the plaintiff corporations to file the state action and that those individuals had committed various unlawful and tortious acts, including trademark infringement. JA 474-558.

Shortly thereafter, on April 3, 2013, The Episcopal Church in South Carolina timely removed the state action (to the same federal District Court that was entertaining the instant action) on the ground that it involved a substantial federal question of First Amendment rights under the United States Constitution.

JA 1961-1962.

On May 5, 2013, The Episcopal Church and TECSC moved the District Court to join a list of individuals that had been referred to generally in their answers and counterclaims, including Bishop Lawrence, as necessary and indispensable parties to the action. JA 2127-2128.

Without considering or ruling on that motion for joinder, on June 10, 2013, the District Court remanded the case back to the state court, finding that the complaint in the state court action was pled in such a way as to rely only on state law, regardless of the constitutional defenses and Lanham Act claims it may have implicated. JA 1962.

Next, in the instant action, on August 23, 2013, the District Court granted Bishop Lawrence's motion to abstain and dismissed the case without prejudice, and at the same time denied Bishop vonRosenberg's motion for a preliminary injunction, without considering its merits. JA 1958-1979. The District Court found that Bishop vonRosenberg had individual standing to bring Lanham Act claims against Bishop Lawrence. JA 1963-1968. But the District Court nevertheless decided to abstain, finding the instant action to be parallel with the state court action, and applying a permissive abstention standard that applies to declaratory judgment actions, *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), instead of applying the

stringent abstention standard that applies to other federal claims, *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). JA 1968-1979.

Bishop vonRosenberg then filed a motion for reconsideration on September 16, 2013, arguing that the actions are not parallel and that the Court applied the wrong abstention standard and should reconsider its decision under the correct one. JA 1980-2061. As an important procedural point, Bishop vonRoesnberg's motion also explained: "To address the Court's application of the incorrect standard, Bishop vonRosenberg could easily file a complaint that omitted his inconsequential request for declaratory relief but that still stated valid claims for relief under the Lanham Act. *Colorado River* would then clearly provide the relevant standard. Before Bishop vonRosenberg resorts to filing a new action, however, to conserve the Court's and the parties' resources, Bishop vonRosenberg asks the Court to reconsider its Order." JA 1988.

Turning back to the state court action, on September 27, 2013, the state court denied the motion filed in the District Court back on May 5, 2013 by The Episcopal Church and TECSC to join the individuals, including Bishop Lawrence, that they believe to be responsible for wrongfully controlling and causing the plaintiff corporations to file the state action and engaging in various unlawful and tortious acts, including trademark infringement. JA 2126-2131. The state court held that those individuals, including Bishop Lawrence, were not necessary parties

because all relief between the parties could be obtained without their joinder, and furthermore that a South Carolina statute gave them immunity in connection with all of the corporate acts at issue in the pleadings. *Id.* Bishop vonRosenberg informed the District Court of this state court decision in its reply in support of its motion for reconsideration filed on October 15, 2014. JA 2122.

On January 14, 2014, the District Court entered an order denying Bishop vonRosenberg's motion for reconsideration, summarily reaffirming its analysis and refusing to reconsider its abstention analysis as to the Lanham Act claims under the *Colorado River* standard. JA 2132-2138.

Bishop vonRosenberg filed a notice of appeal in this Court on February 5, 2014. JA 2139.

The state court action is currently stayed because of an interlocutory appeal relating to privilege assertions made by the lawyer for the unified Diocese prior to the purported disaffiliation led by Bishop Lawrence in late 2012 – who is the same lawyer who filed and still represents the state court plaintiffs in the state court action, as well as Bishop Lawrence in this action.

SUMMARY OF ARGUMENT

The District Court correctly answered the most essential jurisdictional question in this case, finding that Bishop vonRosenberg, individually, has alleged personal injuries and has standing to bring claims under the Lanham Act against

Bishop Lawrence, individually – apart from the organizational entities to which they each allege to lead. In short, the District Court recognized Bishop vonRosenberg's individual right to communicate with consumers of religious services as the ecclesiastically elected "sole Bishop of the Diocese" endowed with the authority of that office in accordance with The Episcopal Church's hierarchical polity protected by the First Amendment, and to prevent Bishop Lawrence from interfering with that right by engaging in false advertising protected by the Lanham Act.

Paradoxically, however, the District Court abstained from proceeding with the case in favor of the state court action: (i) which is between the same organizational entities whose absence in the instant case the District Court itself determined not to affect Bishop vonRosenberg's standing; (ii) which the District Court itself had remanded following removal on the ground that the complaint was limited to state law and did not inherently implicate the Lanham Act or First Amendment rights; and (iii) in which the joinder of Bishop Lawrence had been denied by the state court on the ground that he is not a necessary party to afford complete relief *between* the organizational entities, and that a South Carolina statute gave him immunity in connection with all of the corporate acts at issue in the pleadings. Simply put, Bishop vonRosenberg has a claim against Bishop

Lawrence that is not before the state court and will not be resolved by the state court.

To focus this case and simplify the applicable abstention analysis, Bishop vonRosenberg has limited this appeal to his false advertising claim under the Lanham Act (to be clear, he is therefore not appealing the District Court's dismissal without prejudice of his claims for trademark infringement and a declaratory judgment).

The abstention analysis begins, and in this instance should end, with the threshold requirement of parallelism. This case is different in every respect from the state action: as already mentioned, it involves different parties, a different claim, and different relief. The issues are not before the state court and it is explicitly clear from the procedural history that they will not be resolved by the state court. Under Fourth Circuit law, the fact that Bishop vonRosenberg shares *some* common interests with the state court defendants and is one of their agents does not by itself create parallelism. Nor does the fact that the state court plaintiffs decided to serve Bishop vonRosenberg (without naming him as a party) with copies of the *ex parte* TRO and temporary injunction involving the South Carolina registered state trademarks and South Carolina corporate names. Those state court orders have no relevance to the question of who can legally represent themselves to religious consumers as an Episcopal Bishop of an Episcopal

Diocese. That question depends not on any South Carolina corporate or statutory right, but rather on the First Amendment's deference to the polity of hierarchical religious organizations. Accordingly, an injunction against Bishop Lawrence from continuing to make such false representations would not conflict with the state court's orders, as the District Court seems to have feared it might. Ultimately, the state court may determine that Bishop Lawrence is lawfully acting as the "Chief Operating Officer" of the Diocese's non-profit corporation (of course the state court defendants strongly contend otherwise in that litigation), but the state court has not and cannot (nor has it been asked to by the plaintiffs) declare that Bishop Lawrence can legally represent himself to be the rightful Episcopal Bishop of the local Episcopal Diocese. That is what Bishop vonRosenberg's false advertising Lanham Act claim is about.

If, *arguendo*, this Court nevertheless affirms the District Court's finding that the cases are parallel, it should reverse the District Court's decision to evaluate abstention under the more permissive standard for declaratory judgments provided by *Brillhart/Wilton*, instead of the high standard for other federal claims provided by *Colorado River*. By not appealing the District Court's decision with respect to the declaratory judgment action, it eliminates any debate over which standard to apply (as Bishop vonRosenberg suggested could be done in his motion for reconsideration). But regardless, as reflected by Bishop vonRosenberg's

willingness to drop the declaratory claim, and pursuant to Fourth Circuit law, the declaratory claim was never an essential cause of action in this case, and should not have been characterized as such by the District Court to justify the application of the lower standard for abstention across the board to all of his claims. Bishop vonRosenberg's main objective in this litigation is to enjoin Bishop Lawrence from falsely advertising that he is the Bishop of the Diocese – not merely to obtain a declaratory judgment on that same issue without any teeth.

Analyzing the factors provided by the correct standard under *Colorado River* (as the District Court declined to do in its initial order and again in its order denying reconsideration), it is plain that this case does not present the "extraordinary circumstances" required for abstention. Furthermore, even analyzing the factors provided by the incorrect standard, *Brillhart/Wilton*, the District Court still abused its discretion in abstaining.

Given the District Court's error in abstaining, it follows that the District Court also erred in denying Bishop vonRosenberg's motion for a preliminary injunction without considering its merits. Under *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) and its progeny, the law is clear as to who must be recognized as the rightful bishop of a diocese in a hierarchical religious organization, such as The Episcopal Church, as the District Court recognized in a footnote in its order. Bishop Lawrence's widely publicized representations are

indisputably and moreover intentionally contrary to that mandate. The Lanham Act provides for injunctive relief from such false advertising, as the District Court also acknowledged in its order. To stop the irreversible injury that has gone on far too long already, this Court should reverse the District Court's denial of the preliminary injunction motion and award the preliminary relief to which Bishop vonRosenberg is so clearly entitled on the merits.

ARGUMENT

I. Standard of Review

"We begin with the premise that '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.' As has been reiterated time and again, the federal courts have a 'virtually unflagging obligation ... to exercise the jurisdiction given them.'" *Gannett Co., Inc. v. Clark Const. Group, Inc.*, 286 F.3d 737, 741 (4th Cir. 2002) (citing *Colorado River*, 424 U.S. at 813).

In accordance with this exceptionally high standard, abstention is reviewed for abuse of discretion. *Gannett*, 286 F.3d at 741. "Of course, an error of law by a district court is by definition an abuse of discretion." *Id.* (citing *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 150 (4th Cir. 2002)). As a threshold for abstention, the parallelism requirement is "strictly construed." *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 464 (4th Cir. 2005). If parallelism is established, the legal question of which abstention standard is to be applied to

each or all of the claims – *Colorado River* or *Brillhart/Wilton* – should be reviewed *de novo*, while balancing the factors of either standard should be reviewed for abuse of discretion. *Gannett*, 286 F.3d at 741 ("'Further, even if a district court applies the correct legal principles to adequately supported facts,' a reviewing court is obliged to reverse if the 'court has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'") (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999).

Here, because the District Court declined to apply the *Colorado River* standard in its initial order or in its order denying reconsideration, this Court has authority to apply the *Colorado River* standard and balance its factors *de novo*. *See Gannett*, 286 F.3d at 742 (citing *Village of Westfield, N.Y. v. Welch's*, 170 F.3d 116, 121-22 (2d Cir. 1999) (recognizing that the appellate court has the authority to apply *Colorado River* test where the district court fails to do so in first instance)).

Likewise, because the District Court denied the Appellant's motion for a preliminary injunction based on its decision to abstain and without considering its merits, this Court should review the merits of the motion for preliminary injunction *de novo*. *Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 128 (4th Cir. 1999) ("We review the denial of the preliminary injunction *de novo* since the district court based its decision solely on a premise and interpretation of the

applicable rule of law and the facts are established."). To be clear, the standard of review applicable to this appeal is therefore different than the typical case where a ruling on the merits of a preliminary injunction motion is reviewed for abuse of discretion. *See Scotts Co. v. United Industries Corp.*, 315 F.3d 264 (4th Cir. 2002). In any respect, the essential question in determining whether preliminary injunctive relief is merited in this case is whether Bishop Lawrence's representations are false, which is a matter of First Amendment law, *Serbian E. Orthodox*, 426 U.S. 696, which this Court should consider *de novo*. *See WV Ass'n. of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) ("We review the district court's grant of a preliminary injunction for abuse of discretion. Accordingly, we review factual findings for clear error and legal conclusions *de novo*.").

II. This Action And The State Court Action Are Not Parallel.

The abstention analysis begins, and in this instance should end, with the threshold requirement of parallelism. *See Chase*, 411 F.3d at 464. This Court has "strictly construed" the parallelism requirement. *Id*. Parallel cases are those in which the parties are "almost identical," *id.*, and the claims are "totally duplicative." *McLaughlin v. United Va. Bank*, 955 F.2d 930, 935 (4th Cir. 1992); *see also New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991) ("Suits are parallel if *substantially the same*

parties litigate *substantially the same issues* in different forums." (emphases added)).

This case is different in every respect from the state action: it involves different parties, a different claim, and different relief – as is plain on the face of the pleadings. In substance too, the legal rights Bishop vonRosenberg has asserted in this action are distinct from those represented by The Episcopal Church and TECSC in the state court action. This is amply demonstrated by the District Court's own determination that Bishop vonRosenberg, individually, has alleged personal injuries and has standing to bring claims under the Lanham Act against Bishop Lawrence, individually – apart from the organizational entities to which they each allege to lead. In short, the District Court recognized Bishop vonRosenberg's individual right to communicate with consumers of religious services as the ecclesiastically elected "sole Bishop of the Diocese" endowed with the authority of that office in accordance with The Episcopal Church's hierarchical polity protected by the First Amendment, and to prevent Bishop Lawrence from interfering with that right by engaging in false advertising protected by the Lanham Act. More particularly, the District Court held that Bishop vonRosenberg was asserting "rights and interests held by virtue of [his] office." JA 1964. Those rights and interests, the Court recognized, are not "the legal rights of a third party", JA 1967, and are "attendant to the spiritual mission and temporal duties with which

he has been charged to fulfill as provisional bishop." JA 1964. They include, for example, the bishop's right to perform certain ecclesiastical acts, such as confirmations. *See, e.g.*, JA 22 at ¶ 54 ("Bishop Lawrence's conduct impedes the exercise of Bishop vonRosenberg's spiritual and temporal duties and restricts Bishop vonRosenberg's ability to exercise the authority of his office."); 206 at ¶ 11 (stating that confusion has arisen about whether Bishop Lawrence has the authority to perform confirmations).

Thus, contrary to the District Court's suggestion, *see* JA 1965 at n.8, the rights and interests possessed by Bishop vonRosenberg as Provisional Bishop are not asserted in the state court action – and could not be asserted in that action – for the simple reason that The Episcopal Church and TECSC are not the Provisional Bishop. This Court's conclusion in *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002), applies with equal force here: "While the Diocese itself has no right to [perform ecclesiastical acts], Bishop [vonRosenberg], by virtue of [his] office, is plainly vested with such a right." *Id.* at 712. And "[w]hile the Diocese may be injured [by Bishop Lawrence's actions], such an injury would be different from those that Bishop [vonRosenberg] alleges [he] has suffered. *Id.*; *see also id.* at 713 ("It is also significant that Bishop Dixon does not claim that the Church itself has been injured in its power or prestige by the Defendants. Rather, she asserts that [the Defendants] have interfered with the exercise of the authority she possesses *as*

Bishop of the Diocese." (emphasis in original)). In sum, although Bishop vonRosenberg, The Episcopal Church, and the Diocese may all have been injured by Bishop Lawrence's conduct and may all have claims under the Lanham Act, Bishop vonRosenberg is asserting – and is the only individual or entity even ***capable*** of asserting – claims based on injuries he has suffered as Provisional Bishop. As a result, the state-court defendants do not "represen[t] precisely the same legal right[s]" that Bishop vonRosenberg represents in this action.

Furthermore, it should not be overlooked that the District Court itself remanded the state action following its removal on the ground that the complaint was limited to state law and did not implicate the Lanham Act or First Amendment rights. Also, the state court denied a motion to join Bishop Lawrence as a party to the state action on the ground that he is not a necessary party to afford complete relief among the organizational entities, and that a South Carolina statute gave him immunity in connection with all of the corporate acts at issue in the pleadings. JA 2126-2131. If it is not possible for the state-court defendants to obtain relief from Bishop Lawrence in the state-court action, then it is inconceivable that Bishop vonRosenberg's separate federal claim against Bishop Lawrence will be adjudicated in that action. In sum, Bishop vonRosenberg has a claim against Bishop Lawrence that is not before the state court and will not be resolved by the state court.

The District Court's finding of parallelism cannot otherwise be justified on the fact that Bishop vonRosenberg shares *some* common interests with the state court defendants and is one of their agents. *See Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, No. 01-210, 2006 WL 1285105, at *4 (D.S.C. May 5, 2006) (Houck, J.) (quoting *Wyndham v. Lewis*, 354 S.E.2d 578, 579 (S.C. Ct. App. 1987)), *aff'd by* 493 F.3d 404 (4th Cir. 2007) ("'[a]n agent and his principal are not, merely as such, in privity with each other.'"); *Alcon Assocs., Inc. v. Odell Assocs., Inc.*, No. 04-22151-18, 2005 WL 3579057, at *3 (D.S.C. Dec. 29, 2005) ("The contractual privity/agency relationship alone is insufficient to establish res judicata privity."); *Jones v. SEC*, 115 F.3d 1173, 1181 (4th Cir. 1997) (holding that parties are in privity only if their "aligned" interests "represent the same legal right"); *Holliday Amusement*, 2006 WL 1285105, at *4 (quoting *Andrews v. Daw*, 201 F.3d 521, 525 (4th Cir. 2000)) (emphasis in *Daw*) ("[t]he privity requirement assumes that the person in privity is so identified in interest with a party to former litigation that he represents *precisely the same legal right* in respect to the subject matter involved.").

Nor can the District Court's finding of parallelism be justified by the fact that the state court plaintiffs decided to serve Bishop vonRosenberg (without naming him as a party) with copies of the *ex parte* TRO and temporary injunction involving the South Carolina registered state trademarks and South Carolina

corporate names. Those state court orders have no relevance to the question of who can legally represent themselves to religious consumers as an Episcopal Bishop of an Episcopal Diocese. That question depends not on any South Carolina corporate or statutory right, but rather on the First Amendment's deference to the polity of hierarchical religious organizations. *See Serbian E. Orthodox*, 426 U.S. 696. Accordingly, an injunction against Bishop Lawrence from continuing to make such false representations would not conflict with the state court's orders, as the District Court seems to have feared it might. Ultimately, the state court may determine that Bishop Lawrence is lawfully acting as the "Chief Operating Officer" of the Diocese's non-profit corporation (of course the state court defendants strongly contend otherwise in that litigation), but the state court has not and cannot (nor has it been asked to by the plaintiff corporations) declare that Bishop Lawrence can legally represent himself to be the rightful Episcopal Bishop of the local Episcopal Diocese. That is what Bishop vonRosenberg's false advertising claim is about.

In any respect, Bishop vonRosenberg did not become a *de facto* participant in the state action due to the fact that he received notice of those orders, which simply served the purpose of communicating that he could become liable if he assisted The Episcopal Church in violating the orders, but do not directly enjoin any action by Bishop vonRosenberg. *See Golden State Bottling Co. v. NLRB*, 414

U.S. 168, 180 (1973) ("There will be no adjudication of liability against a [non-party] without affording it a full opportunity at a hearing, after adequate notice, to present evidence . . . . " (internal quotation marks and brackets omitted)); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) (holding that it was error to enter an injunction against a nonparty); *Lake Shore Asset Mgmt. Ltd. v. CFTC*, 511 F.3d 762, 767 (7th Cir. 2007) ("The only defendant in the CFTC's suit is Lake Shore Asset Management, which must be the sole addressee of the injunction."); *See* S.C. R. Civ. P. 65(d); *NML Capital, Ltd. v. Republic of Argentina*, ___ F.3d ___, 2013 WL 4487563, at *5 (2d Cir. 2013) (explaining that the injunctions issued only against the party to the case, do not directly enjoin non-parties, and, by operation of Federal Rule of Civil Procedure 65(d), "automatically forbi[d] others—who are not directly enjoined but who act 'in active concert or participation' with an enjoined party—from assisting in a violation of the injunction'").

III. The Relevant Abstention Standard Is Provided By *Colorado River*, Not *Brillhart/Wilton*.

If, *arguendo*, this Court affirms the District Court's finding that the cases are parallel, it should reverse the District Court's decision to evaluate abstention under the more permissive standard for declaratory judgments provided by *Brillhart/Wilton*, instead of the high standard for other federal claims provided by *Colorado River*.

By not appealing the District Court's decision with respect to the declaratory judgment action, it eliminates any debate over which standard to apply (as Bishop vonRosenberg suggested could be done in his motion for reconsideration).

But regardless, as reflected by Bishop vonRosenberg's willingness to drop the declaratory claim, it was never an essential cause of action in this case,[1] and should not have been characterized as such by the District Court to justify the application of the lower standard for abstention across the board to all of his claims. While Fourth Circuit jurisprudence on this issue is fact specific and somewhat undecided, the overwhelming weight of authority indicates that in cases involving both declaratory and nondeclaratory claims, the *Colorado River* standard should be applied, at least as to the nondeclaratory claims, unless they are perfunctory, boilerplate, and wholly dependent on the declaratory claims. *See Chase Brexton*, 411 F.3d at 466 (rejecting argument to apply the standard provided by *Wilton* in a mixed case: "[W]hen a plaintiff seeks relief in addition to a declaratory judgment, such as damages or injunctive relief, both of which a court *must address*, then the entire benefit derived from exercising discretion not to grant declaratory relief is frustrated, and a stay would not save any judicial resources . . .

[1] Furthermore, the declaratory request for relief related only to trademark issues that are not at issue in this appeal. The declaratory request for relief states: "Declare that Bishop Lawrence's unauthorized use of the Diocese's marks violates the Lanham Act." JA 695.

. The claims in this case for which declaratory relief is requested and those for which injunctive relief is requested are so closely intertwined that judicial economy counsels against dismissing the claims for declaratory judgment relief while adjudicating the claims for injunctive relief."); *VRCompliance LLC v. HomeAway, Inc.*, 715 F.3d 570, 575 (4th Cir. 2013) (quoting *Great Am. Ins. Co. v. Gross*, 468 F.3d 199, 210 (4th Cir. 2006) ("'jurisprudence suggests that, in a 'mixed' complaint scenario, the *Brillhart/Wilton* standard does not apply, at least to the nondeclaratory claims…"); *Riley v. Dozier Internet Law, PC*, 371 F. App'x 399 (4th Cir. 2010).[2]

[2] In declining to apply *Colorado River* to the entire action, the District Court relied substantially on the Fourth Circuit's unpublished opinion in *Riley v. Dozier Internet Law, PC*, 371 F. App'x 399 (4th Cir. 2010). If anything, *Riley* supports only application of *Colorado River* in this case. *Riley* is consistent with *Chase Brexton* and the Fourth Circuit's strong "suggest[ion]" that it has adopted the *Colorado River* approach in all mixed cases in which the nondeclaratory claims are not frivolous. *See, e.g., New England Ins.*, 561 F.3d at 395-96. In *Riley*, the Fourth Circuit applied the limited exception applicable to frivolous claims for nondeclaratory relief, explaining that *Colorado River* does not control in mixed cases if the nondeclaratory claims are merely "perfunctory" or "boilerplate." 371 F. App'x at 404 n.2. The perfunctory nature of the nondeclaratory claims in *Riley* was obvious. After a law firm sued Riley in state court for trademark infringement based on Riley's use of that law firm's name on his website, Riley instituted a separate federal action in which he sought a declaratory judgment that his website neither infringed the law firm's trademark nor defamed the law firm's founder. *See id.* at 400. Riley also included a request for an injunction against any future claims of defamation or trademark infringement as well as requests for nominal and punitive damages, attorneys' fees, and costs. *See id.* at 400-01; *see also Riley v. Dozier*, No. 08-642, Doc. No. 15, at 2 (E.D. Va. Nov. 20, 2008). It was clear that Riley simply wanted a declaratory judgment that could be used to halt the

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Bishop vonRosenberg's main objective in this litigation is to enjoin Bishop Lawrence from interfering with his rights by falsely advertising that he is the Bishop of the Diocese. The false advertising Lanham Act claim allows him to achieve that objective, not the declaratory claim.[3] The false advertising Lanham Act claim therefore cannot fairly be construed as perfunctory, boilerplate, or dependent. And it was error for the District Court to do so in order to avoid the *Colorado River* standard.

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pending state proceeding, and that the so-called injunction request was simply a redundant demand for that same relief. In short, the declaratory demand was the only real request for relief in the case. *See* 371 F. App'x at 403 (characterizing Riley's cause of action as only "requesting a declaration that he was not liable to [the firm] in state court").

[3] Any action for injunctive relief or damages based on a violation of federal law in some sense includes a request, sometimes explicit and sometimes implied, for a declaration that such a violation occurred. If that fact alone were enough to require that abstention be evaluated under the permissive *Brillhart/Wilton* standard, then the *Brillhart/Wilton* exception quickly would swallow the *Colorado River* rule and along with it the Supreme Court's mandate that, absent extraordinary circumstances, federal courts exercise their "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River*, 424 U.S. at 818; *cf. Wilton*, 515 U.S. at 285 (noting that the Court has rejected the application of *Brillhart* "beyond the context of declaratory judgments"). Here, the fact that Bishop vonRosenberg's claims for injunctive and other nondeclaratory relief can survive without any claim for a declaratory judgment compels the conclusion that the *Colorado River* standard must be applied.

IV. Abstention Is Not Warranted Under The *Colorado River* Standard

This case does not present the "exceptional circumstances" and the "clearest of justifications" that are required for *Colorado River* abstention. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983) (internal quotation marks omitted). In *Colorado River*, the Court reaffirmed the general principle that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colo. River*, 424 U.S. at 817 (internal quotation marks omitted). Only very limited circumstances possibly could warrant abstention in a federal action in light of a parallel state proceeding, and the Court cautioned that "[o]nly the clearest of justifications will warrant dismissal." *Id.* at 819. As the Court has since explained, "[T]he decision whether to dismiss a federal action because of parallel state-court litigation" rests "on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16.

Colorado River's exceptional circumstances test is generally expressed as a series of factors. *See Chase Brexton*, 411 F.3d at 463-64 ("Although the prescribed analysis is not a 'hard-and-fast' one in which application of a 'checklist' dictates the outcome, six factors have been identified to guide the analysis: (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.").

Critically, "the presence of federal-law issues must always be a major consideration weighing against" a federal court's surrender of jurisdiction. *Moses H. Cone*, 460 U.S. at 26. Federal law issues are not only present in this case, they provide the exclusive rules of decision. Bishop vonRosenberg's claims arise solely under section 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). And the subsidiary questions relating to the falsity of Bishop Lawrence's representations concerning his status as Bishop of the Diocese and his affiliation with the Diocese are controlled by the First Amendment, as interpreted in controlling decisions of the Supreme Court and Fourth Circuit. *See Serbian E. Orthodox*, 426 U.S. 696. That these federal-law issues provide the rules of decision for Bishop vonRosenberg's claims, and the absence of significant issues of state law, weigh strongly against abstention.

The other factors likewise support this Court's exercise of its jurisdiction:

First, the subject matter does not involve property over which the state court has assumed in rem jurisdiction (and to be sure, again, this appeal does not involve the trademarks). The plaintiffs in the state action filed an *in personam* action against the defendants in that case, not an in rem action requesting the court to exercise jurisdiction over any property. *See Gannett*, 286 F.3d at 747; *NBC Universal, Inc. v. NBCUniversal.com*, 378 F. Supp. 2d 715, 717 (E.D. Va. 2005). Even if the action filed in state court were an in rem action, this factor would not favor abstention because the present action is an *in personam* action against Bishop Lawrence and does not ask the Court to exercise jurisdiction over any property. *See Gannett*, 286 F.3d at 747 & n.9.

Second, as Bishop Lawrence acknowledges, JA 343, there is no possibility that this forum is an inconvenient one.

Third, the prospect of piecemeal litigation does not support abstention. As explained, this action and the state action are separate litigations, with different parties, a different claim, and different relief. Thus, there should be no concern of conflicting results on the same issues. Even assuming the contrary, moreover, "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colo. River*, 424 U.S. at 816 (emphasis added); *see also Gannett Co.*, 286 F.3d at 744 ("[F]or abstention to be appropriate, retention of jurisdiction must create the possibility of inefficiencies

and inconsistent results beyond those inherent in parallel litigation, or the litigation must be particularly illsuited for resolution in duplicate forums."). In *Colorado River*, it was the relevant statute's clear policy of avoiding piecemeal adjudication of the claims at issue that underlay the Supreme Court's decision to approve federal court dismissal. *See Moses H. Cone*, 460 U.S. at 16. There is absolutely no indication that the requisite "more" exists in this case. Indeed, the Fourth Circuit has held, on virtually identical facts, that "it is no objection to [the] exercise of jurisdiction that it may result in the determination of questions which are involved in the state court litigation." *Purcell*, 126 F.2d at 395.

Fourth, the relevant order in which the courts obtained jurisdiction, as well as the progress achieved in each action, does not weigh in favor of abstention. Although the state action was filed first (notably, however, TECSC was not added as a party until the same day this action was filed), the Supreme Court has instructed that the progress made in each action is more important than the sequence of the filings. *Moses H. Cone*, 460 U.S. at 21. Here, both proceedings are in their nascent stages. In addition, Bishop vonRosenberg was not elected and installed as Bishop of the Diocese until January 26, 2013—approximately three weeks after the state action was filed. Bishop vonRosenberg thus had no opportunity to file his federal action prior to the filing of the state action.

Finally, as detailed above, the state action will not adequately protect Bishop vonRosenberg's right to communicate with consumers of religious services as the ecclesiastically elected "sole Bishop of the Diocese" endowed with the authority of that office in accordance with The Episcopal Church's hierarchical polity protected by the First Amendment, and to prevent Bishop Lawrence from interfering with that right by engaging in false advertising protected by the Lanham Act.

In sum, the applicable factors weigh against abstention, and this case does not present the "exceptional circumstances" necessary to justify a federal court's surrendering its jurisdiction.

V. Abstention Is Not Warranted Under The *Brillhart/Wilton* Standard

Under the *Brillhart/Wilton* standard, whether to grant declaratory relief is within the discretion of the district court. The Fourth Circuit has identified four factors that guide the exercise of this discretion: (1) [W]hether 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. *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 493-94 (4th Cir. 1998) (internal quotation marks omitted) (quoting *Nautilus Ins.*

Co. v. Winchester Homes, Inc., 15 F.3d 376, 377 (4th Cir. 1994), abrogated on other grounds by *Centennial Life Ins. Co. v. Poston*, 88 F.3d 25 (4th Cir. 1996)).

First, the State of South Carolina has no interest, much less a strong interest, in having the remaining issues presented in this case decided in its courts. This action presents only issues of federal law. To the extent there are state law issues that might have some tangential connection, the Fourth Circuit has established that this fact "alone provides no reason for declining to exercise federal jurisdiction." *Nautilus Ins. Co.*, 15 F.3d at 378. Rather, abstention may be proper only if "the questions of state law involved are difficult, complex, or unsettled." *Id.*; *see also Kapiloff*, 155 F.3d at 494; *Amerisure Mut. Ins. Co. v. Superior Constr. Corp.*, No. 10-961, 2010 WL 3433046, at *3 (Aug. 30, 2010 D.S.C.). Again, Bishop vonRosenberg is not appealing the District Court's dismissal with prejudice of his Lanham Act trademark claim, so any interest the State of South Carolina might have in resolving the dispute related to those marks is not at issue. Furthermore, Bishop vonRosenberg's false advertising Lanham Act claim depends on First Amendment issues independent from any state trademark rights, for which this Court's interest in adjudicating this action is in fact much greater than the interest of a South Carolina court.

Second, even assuming *arguendo* that the state court possibly could resolve the issues in this action (which it definitively will not, as explained above), there is

absolutely no reason to believe that the state court could resolve the issues in this action more efficiently than the federal court. *See Penn-Am. Ins. Co. v. Pope*, 368 F.3d 409, 414 (4th Cir. 2004); *Nautilus Ins. Co.*, 15 F.3d at 379; *Travelers Home & Marine Ins., Co. v. Pope*, No. 10-1688, 2010 WL 4607024, at *3 (Nov. 3, 2010 D.S.C.). This action solely involves narrow issues of federal law between Bishop vonRosenberg and Bishop Lawrence, while the state court action involves approximately forty organizational parties, dozens of unrelated state law claims, various real and personal property, and tens of thousands of pages of relevant documents. Notably, the state court itself refused to allow any further complication that might result by joining Bishop Lawrence as a party.

Third, there is no likelihood of entanglement. Again, the false advertising Lanham Act claim is independent from any issues in the state court action. *See Am. S. Ins. Co. v. Conniff*, No. 09-1965, 2010 WL 2710568, at *3 (July 7, 2010 D.S.C.). In any event, even where there is the potential for significant entanglement, the Fourth Circuit has held that abstention is not required. *See Kapiloff*, 155 F.3d at 494.

Fourth, there is no evidence of "procedural fencing" by Bishop vonRosenberg. He is not a party in the state action and did not raise the same claims presented in the state action. *See Conniff*, 2010 WL 2710568, at *3. Furthermore, to the extent that he can be associated with the action by way of

TECSC, that party was not named in the state-court action until March 5, 2013, the same day Bishop vonRosenberg filed the present action.

VI. Bishop vonRosenberg Is Entitled To A Preliminary Injunction

Given the District Court's error in abstaining, it follows that the District Court also erred in denying Bishop vonRosenberg's motion for a preliminary injunction without considering its merits.

A plaintiff is entitled to a preliminary injunction upon establishing that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of hardships tips in his favor; and (4) an injunction is in the public interest. *See Scotts Co.*, 315 F.3d at 271.

Bishop vonRosenberg is likely to succeed on his false-advertising claim under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); 15 U.S.C. § 1116 (providing for injunctive relief). *Scotts*, 315 F.3d at 272 (listing elements of the claim). By falsely asserting that he continues to be Bishop of the Diocese, and that his activities are authorized and sponsored by the Diocese, Bishop Lawrence plainly "misrepresents the nature, characteristics, [and] qualities" of his "services [and] commercial activities." *Id.*, § 1125(a)(1)(B); *Scotts*, 315 F.3d at 272; *See, e.g.*, JA 87 ("We continue to be the Diocese of South Carolina—also known, legally as the Protestant Episcopal Church in the Diocese of South Carolina and as the Episcopal Diocese of South Carolina, of which I remain the Bishop.").

Bishop Lawrence makes such representations despite the fact that he renounced The Episcopal Church and was subsequently removed as Bishop of the Diocese on December 5, 2012. JA 217 at ¶ 17. His contention that he remains the Bishop of the Diocese because the Diocese left The Episcopal Church must be rejected as contrary to well-established First Amendment principles.

As previously described, and as the District Court recognized in Footnote 5 of its order, The Episcopal Church is a hierarchical church. JA 1960. The Supreme Court recognized this fact as early as 1872. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872). And this fact has been reaffirmed by numerous courts, including the Fourth Circuit, through the present day. *See, e.g.*, *Dixon*, 290 F.3d at 716 ("The Episcopal Church is hierarchical."); *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Ga., Inc.*, 699 S.E.2d 45, 48 (Ga. Ct. App. 2010) (same); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 921 (Mass. 2003) (same); *Daniel v. Wray*, 580 S.E.2d 711, 714 (N.C. Ct. App. 2003) (same); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 21 (N.J. 1980) (same). The Episcopal Church's hierarchical nature is apparent from, among other things, its three-tiered structure, that dioceses are subordinate to the national Church, that parishes are in turn subordinate to dioceses, that the Diocese and all other dioceses are subject to the Constitution and Canons of The Episcopal Church, and that all clergy are required to take an oath to

"conform to the Doctrine, Discipline, and Worship of the Episcopal Church." JA 242-243 at ¶ 30. It cannot be plausibly disputed that The Episcopal Church is a hierarchical church. JA 214 at ¶ 5.

Given The Episcopal Church's status as a hierarchical church, the First Amendment demands that civil courts defer to the decisions of church authorities regarding the identity of church leaders and the government and direction of subordinate bodies. *Serbian E. Orthodox*, 426 U.S. at 724-25; *see also Dixon*, 290 F.3d at 714 ("It is axiomatic that the civil courts lack any authority to resolve disputes arising under religious law and polity, and they must defer to the highest ecclesiastical tribunal within a hierarchical church applying its religious law."); *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704 (2012) ("[I]t is impermissible for the government to contradict a church's determination of who can act as its ministers."); *Watson*, 80 U.S. (13 Wall.) at 727 ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . .").

In *Dixon*, the Fourth Circuit applied this principle to circumstances analogous to those present here. The Episcopal Bishop for the Diocese of Washington sought a declaratory judgment that the defendant was not the rector of

a parish within the bishop's diocese. 290 F.3d at 703. Although the parish's vestry had selected the defendant as pastor, the bishop declined to approve that selection. *Id.* The district court ruled for the bishop, and the Fourth Circuit affirmed. Because the bishop was the highest ecclesiastical body that exercised authority over the hiring, the First Amendment required that the civil courts defer to her decision. *Id.* at 717.

As in *Dixon*, the decision of the Church's ecclesiastical authorities controls. On December 5, 2012, the Presiding Bishop, with the advice and consent of her Council of Advice and pursuant to her authority under The Episcopal Church's Canons, accepted Bishop Lawrence's renunciation of The Episcopal Church and removed him from the ordained ministry of the Church. JA 217 at ¶ 17. As a result, Bishop Lawrence is no longer a representative of The Episcopal Church or the Diocese. JA 217-218. Thereafter, the Diocesan Convention, in consultation with the Presiding Bishop, selected Bishop vonRosenberg as Provisional Bishop of the Diocese. JA 218. The Episcopal Church accordingly recognizes Bishop vonRosenberg as the sole Bishop of the Diocese. *Id.* It is that decision that must control. The First Amendment does not permit the federal courts to supplant that decision with Bishop Lawrence's claim that he represents the Diocese. "Under 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." *Dixon*, 290 F.3d at 715. Bishop vonRosenberg thus must be regarded as the legitimate and sole Bishop of the Diocese. Accordingly, Bishop Lawrence's continuing representations that he is the Bishop of the Diocese and that his activities are associated with and sponsored by the Diocese are patently false.

Bishop Lawrence cannot escape this conclusion by arguing that the Diocese has withdrawn from The Episcopal Church and that the Church's determination as to who is Bishop of the Diocese therefore has no effect. The same basic facts were present in *Serbian Eastern Orthodox*. There, too, the dissident Bishop asserted that "he no longer recognized" the decisions of the central church, and the Diocese's governing council declared itself "autonomous" from the central church. 426 U.S. at 704, 705. Yet this did not change the result because the First Amendment's protection of the autonomy of hierarchical churches "applies with equal force to church disputes over church polity and church administration." *Serbian E. Orthodox*, 426 U.S. at 710. Thus, on the question of whether the Diocese was autonomous from the central church, the Court recognized that courts were required to defer to the interpretations of "the highest ecclesiastical tribunals in which the church law vests authority to make that interpretation." *Id.* at 721; *see also Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (hierarchical churches have "power to decide for themselves, free from state interference,

matters of church government as well as those of faith and doctrine"); *Watson*, 80 U.S. (13 Wall.) at 728-29 (observing that the right of hierarchical churches "to create tribunals . . . for the ecclesiastical government of all the individual members, congregations, and officers within the general association[] is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."). The Court accordingly held that "reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs" as to which civil courts must "accept ... as binding upon them" the decisions of the highest ecclesiastical tribunal. *Serbian E. Orthodox*, 426 U.S. at 721, 725; *see also Schofield*, 118 Cal. Rptr. 3d at 162 ("The continuity of the diocese as an entity within the Episcopal Church is likewise a matter of ecclesiastical law, finally resolved, for civil law purposes, by the Episcopal Church's recognition of Lamb as the bishop of that continuing entity."). So, too, here.

Bishop Lawrence's conduct causes immense and irreparable harm to Bishop vonRosenberg, the actual ecclesiastical head of the Diocese. JA 206-211. Bishop Lawrence's unrelenting misrepresentations deeply undermine Bishop vonRosenberg's ability to lead and to control the Diocese and to communicate on behalf of the Diocese. *Id.* His conduct misappropriates the Diocese's goodwill and reputation for the benefit of his activities, and, in turn, deprives Bishop

vonRosenberg of the benefit of and control over the Diocese's credibility and reputation. *Id.* This enables Bishop Lawrence to divert to himself followers and charitable contributions that otherwise would flow to the diocese now led by Bishop vonRosenberg. *Id.* These consequences irreparably impede Bishop vonRosenberg's ability to carry out his pastoral mission. *Id.*

For example, a donation solicitation letter on the website of the purported Diocese states that Bishop Lawrence is the "XIV Bishop of South Carolina." JA 166. In addition, Bishop Lawrence and his followers called for a Convention that they represented to be the actual official Convention of the Diocese and would include activities and programs of importance to the Diocese. JA 191 ("This year's convention workshops are designed to equip the Diocese's lay members and clergy for the work of ministry. Bishop Lawrence promised that such workshops would be key parts of future annual Diocesan Conventions."). Those representations are patently false, as are the many other similar statements made by Bishop Lawrence. *See, e.g.*, JA 84-85 ("[T]he Diocese of South Carolina has canonically and legally disassociated from the Episcopal Church. . . . I remain the Bishop of the Diocese of South Carolina.").

From this, it follows inexorably that Bishop Lawrence's false statements and representations actually deceive a substantial segment of their audience. Where, as here, "the advertisement is literally false, a violation may be established without

evidence of consumer deception." *Scotts Co.*, 315 F.3d at 273 (internal quotation marks omitted); *see also Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm., Co.*, 290 F.3d 578, 586 (3d Cir. 2002) ("If a plaintiff proves that the challenged commercial claims are 'literally false,' a court may grant relief without considering whether the buying public was actually misled."). Indeed, the tendency of Bishop Lawrence's false statements to deceive is obvious. An individual seeking to make a donation to the Protestant Episcopal Church in the Diocese of South Carolina could arrive at the website of the purported Diocese, make a donation, and, based on Bishop Lawrence's representations, believe that her donation would further the mission and values of the Diocese. Bishop Lawrence's misrepresentations are intended to make consumers of religious services and charitable donors believe that Bishop Lawrence's activities are authorized and sponsored by the Diocese, and they no doubt have that effect.

Bishop Lawrence's misrepresentations are also material, in that they are likely to influence the decisions of consumers of religious services and charitable donors. This fact is apparent from the website mentioned above, in which Bishop Lawrence solicits donations alongside representations that he continues to represent the Diocese. *See, e.g.*, JA 166 (donation solicitation letter and "donate now" link alongside the name "The Diocese of South Carolina" and the Diocesan Seal). Further, that the website has dedicated a page to "frequently asked

questions" "About the Assault on the Diocese of South Carolina," JA 170-173, demonstrates that issues pertaining to the status of the Diocese are of immense importance to a significant number of consumers of religious services and charitable donors. Bishop Lawrence's repeated false representations that he is the Bishop of the Diocese and that the Diocese authorizes and supports his activities make it far more likely that persons will support his activities, financially or otherwise.

Bishop Lawrence has also placed his misleading statements in commerce. As the preceding discussion documents, Bishop Lawrence has made countless false statements and representations on the Internet. *Horne,* 474 F.3d at 1006. Finally, as explained above, Bishop Lawrence's misrepresentations regarding his status as Bishop and the Diocese's authorization and sponsorship of his activities have damaged and will continue to damage Bishop vonRosenberg. Those representations are significant obstacles to Bishop vonRosenberg's achievement of his pastoral mission. JA 206-211 at ¶¶ 9-21. They are designed to attract to Bishop Lawrence's activities support that is intended for the Diocese led by Bishop vonRosenberg, and they, in turn, undermine Bishop vonRosenberg's ability to garner support for the activities actually supported by the Diocese. Bishop Lawrence's false statements have diverted and will continue to divert followers and charitable donors from the Diocese and to Bishop Lawrence, and they will

continue to severely limit Bishop vonRosenberg's ability to utilize and control the reputation and goodwill of the Diocese.

Finally, it does not matter that The Episcopal Church's determination that Bishop vonRosenberg is the Bishop of the Diocese potentially impacts the control of property owned by the Diocese. Again, the same was true in *Serbian Eastern Orthodox*: there the Court recognized the case "affects the control of church property" because "the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations." 426 U.S. at 709. Yet, even though the religious dispute over the Bishop's defrockment "determines control of the property," it still was properly regarded "not [as] a church property dispute" but "a religious dispute the resolution of which under our cases is for ecclesiastical and not for civil tribunals." *Id.* So-called "neutral principles of law" that states may use to resolve disputes over "ownership of church property," *Jones v. Wolf*, 443 U.S. 595, 603, 604 (1979), have no bearing on the fundamentally religious dispute at issue here.[4]

[4] Indeed, *Jones v. Wolf* itself recognizes that even in the context of a dispute over the ownership of church property, if "the interpretation of the instruments of ownership would require the civil courts to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." 443 U.S. at 604.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's order abstaining from exercising jurisdiction and dismissing without prejudice Bishop vonRosenberg's false advertising Lanham Act claim and denying Bishop vonRosenberg's motion for a preliminary injunction pursuant to his false advertising Lanham Act claim.

REQUEST FOR ORAL ARGUMENT

The Appellant requests oral argument because this appeal presents important and complex questions of law.

Dated: April 7, 2014

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-1122 **Caption:** vonRosenberg v. Lawrence et al

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1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

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(s) /s/ Thomas S. Tisdale

Attorney for Charles G. vonRosenberg

Dated: 04/07/14

CERTIFICATE OF SERVICE

I certify that on April 7, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Thomas S. Tisdale
Signature

04/07/14
Date

ADDENDUM SETTING FORTH RELEVANT STATUTES

15 U.S.C. §1121(a)

(a) The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

15 U.S.C. §1125(a)(1)(A) and (B)

(a) Civil action

(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. §1116

(a) Jurisdiction; service

The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title. Any such injunction may include a provision directing the defendant to file with the court and serve on the plaintiff within thirty days after the service on the defendant of such injunction, or such extended period as the court may direct, a report in writing under oath setting forth in detail the manner and form in which the defendant has complied with the injunction. Any such injunction granted upon hearing, after notice to the defendant, by any district court of the United States, may be served on the parties against whom such injunction is granted anywhere in the United States where they may be found, and shall be operative and may be enforced by proceedings to punish for contempt, or otherwise, by the court by which such injunction was granted, or by any other United States district court in whose jurisdiction the defendant may be found.