

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 The Protestant Episcopal Church In The)
 Diocese Of South Carolina; The Trustees of)
 The Protestant Episcopal Church in South)
 Carolina, a South Carolina Corporate Body;)
 et. al.,)
)
 PLAINTIFFS,)
)
 v.)
)
 The Episcopal Church (a/k/a, The)
 Protestant Episcopal Church in the)
 United States of America); The Episcopal)
 Church in South Carolina)
)
 DEFENDANT.)
)

IN THE COURT OF COMMON PLEAS
 FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2013-CP-18-00013

**PLAINTIFFS' RESPONSE TO
 DEFENDANT THE EPISCOPAL
 CHURCH IN SOUTH CAROLINA'S
 NOTICE AND MOTION TO JOIN
 ADDITIONAL PARTIES**

Life's but a walking shadow, a poor player
 That struts and frets his hour upon the stage
 And then is heard no more: it is a tale
 Told by an idiot, full of sound and fury,
 Signifying nothing.¹

I. Full of Sound and Fury.

Reminiscent of previous memoranda written by out of state counsel and filed in federal court, the Defendants once again have resorted to pounding the table.² Having failed to add 23 people as counterclaim defendants, they now seek to add 4 of them. *See* TEC's Mot. to Join (May 2, 2013) and Or. Denying Defendants' Motion to Join Additional Counterclaim Defs. (Oct.

¹ Shakespeare, *Macbeth* Act 5, Scene 5.

² Justice Oliver Wendall Holmes reportedly said

If you're weak on the facts and strong on the law, pound the law.
 If you're weak on the law and strong on the facts, pound the facts.
 If you're weak on both, pound the table.

Justice Holmes likely simplified a much earlier version. Elliott, Byrom K and William F., *The Work of the Advocate* 390 n. 17(Indianapolis:The Bobbs-Merrill Company 1911).

1, 2013). It is now asserted these 4 people control the Diocese rather than the 23 TEC previously said had such control. TECSC's legal argument is the same but it has been dressed it up with allegations "full of sound and fury."

Characterizing its motion as one "explicitly invited by the Court", TECSC seeks to allege in a proposed complaint 18 causes of action against 4 clerics that have been singled out from the 23 – 2 employed by the Diocese (Mark J. Lawrence and Jim Lewis,) and 2 volunteers who are former members and presidents of the Board of Directors (Standing Committee) (Paul Fuener and Jeffrey Miller). The allegations on any paper other than one filed in a court, would be libelous *per se*: Lawrence made an agreement with the Diocese's Search and Standing Committees (Board of Directors) to withdraw the Diocese from TEC in exchange for its votes to elect him Bishop, ¶7; Lawrence lied when he took his vows, ¶8; the other 3 knew he was lying, ¶11; they attempted to make themselves beneficiaries of the assets of the Trustees, ¶29; and many other allegations.³

The Defendants have made these serious allegations subject to Rule 11, SCRCP and the remedies provided by Section 15-36-10, S.C. Code (1976) supported only by an affidavit which was not submitted in accordance with Rule 6 (d), SCRCP.⁴ In an era when the public believes the legal profession contributes very little to society's well-being, the present motion only serves to support that belief.⁵ For legally, it signifies nothing.

³ TECSC has even strongly inferred, if not alleged, that the undersigned was part of this conduct.

⁴ The affidavit was mailed to the clerk and emailed to counsel on December 26, 2013. The cover letter stated that it was "in support of the Defendant The Episcopal Church in South Carolinas Motion to Join Additional Parties." *Letter of Thomas S. Tisdale*, December 26, 2013. The motion it supports was filed on November 25, 2013. Rule 6(d) states: "When a motion is to be supported by an affidavit, the affidavit shall be served with the motion...." It was not.

⁵ The military, teachers, doctors, scientists and engineers all rank higher than 60% in the public's view. Lawyers are last at 18%. *Trend in Perceived Contribution Survey*, March 21-April 8, 2013 and April 28-May 12, 2009, Pew Research Center, Washington, DC

II. Signifying Nothing

As in the previous motion filed by TEC seeking to join 23 individuals, this motion is made pursuant to Rules 13(h), 19 and 20, SCRCP. This Court's decision on this motion lies within its sound discretion and it will not be disturbed on appeal

unless a manifest abuse of discretion is found resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party.

Ex Parte Govt. Employee's Ins. Co. v. Goethe, 373 S.C. 132, 135, 644 S.E. 2d 699, 701 (2007) (Toal, C.J.) (citation omitted).

A. *The proposed claims are not counterclaims; they are individual actions.*

Rule 13(h) SCRCP allows parties to be joined "to a counterclaim or cross claim in accordance with Rule 19 or 20." Rule 13(h), SCRCP. However, as the plain text of the rule indicates, the counterclaim must already be one asserted against an existing party not one directed solely against the party sought to be joined. "Claims asserted against a party not already in the action are not counterclaims, but independent causes of action." *Condon v. Best View Cablevision, Inc.*, 292 S.C. 117, 123, 355 S.E.2d 7, 10 (Ct.App. 1987) (Bell, J.); *accord Fed. Deposit Ins. Corp. v. Bathgate*, 27 F.3d 850, 873 (3d Cir. 1994) (Non-party bank directors could be joined as additional parties to a counterclaim because the counterclaim was already before the court); *Johansen v. United States*, 392 F.Supp.2d 56, 59 (D. Mass. 2005) (counterclaim allowed against a non-party because the same counterclaim was already asserted against the plaintiff); *Sternaman v. Macloskie*, 37 F.R.D. 316, 317 (E.D.S.C. 1965) (cross claim solely against strangers to suit not allowed); *U.S. Agric. Processors Marketing Services, Inc. v. Quinonez Hermanos*, 73 F.R.D. 87, 89-90 (S.D. Fla. 1976) ("Rule 13(b) can only be used to bring in additional parties to an existing cross claim."); *Baltimore & Ohio R. Co. v. Cent. Ry. Servs., Inc.*,

636 F. Supp. 782, 786 (E.D. Pa. 1986) (Under Rule 13(h), parties may be joined to adjudicate a counterclaim "that already is before the court...This means that a counterclaim ...may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party."); *see also*, 6 Wright & Miller, Fed. Prac. & Proc. Civ. § 1434 (3d Ed.) ("It should be noted that courts generally have interpreted Rule 13(h) as authorizing the joinder of parties only for the purposes of adjudicating counterclaims or cross-claims that already have been interposed in the action or that are being asserted simultaneously with the motion to add the new parties.").

TECSC seeks to join 4 individuals to this action and assert 18 causes of action against them. Fifteen of these causes of action are not presently before the court and therefore cannot be made under Rules 13(h), 19 or 20. They "are not counterclaims, but independent causes of action." *Condon, supra*.

As to the 15 causes of action asserted solely against these 4 individuals, they could be brought if at all in this action only by a third party complaint since they are independent causes of action.⁶ TECSC has failed to move under Rule 14. However, such a complaint should not be allowed for the reasons stated in *Beach v. Hudson*, 298 S.C. 424, 426-27, 380 S.E. 2d 869, 871 (Ct.App. 1989). There the Court of Appeals affirmed the trial court's order striking a defendant's third party complaint because the additional claims and parties would complicate the litigation. The court stated:

In our view, the assertion against four additional parties of seven additional causes of action in the third-party complaint, involving as those cause of action do allegations, among other things, of fraud, negligence, recklessness, outrage and unfair trade practices, treble damages, and repeated demands for punitive damages, will

⁶ Wright & Miller notes that "the failure to recognize this limitation has resulted in confusion between the joinder of additional parties under Rule 13(h) and the impleader provisions of Rule 14." 6 *Wright & Miller, Fed. Prac. & Proc. Civ.* § 1434 (3d ed.)

unduly complicate the adjudicate of the relatively simple contract action brought by the plaintiffs.

Id. Likewise, the addition of 4 parties and 15 new causes of action through a third party action would unduly complicate this declaratory judgment action.

B. The Additional Parties are not Indispensable to the Present Action

An absent party is indispensable when complete relief cannot be afforded among those already parties, or when the *absent party's* ability to protect his interest will be impaired or impeded if not joined or when the *current parties* will be subject to substantial risk of incurring multiple or inconsistent obligations unless the absent party is joined. *Stewart v. State Crop Part. Commn.*, 307 S.C. 133, 140, 414 S.E. 2d 121, 125 (1992); Rule 19(a), SCRC. Necessary parties are only those “whose rights must be ascertained and settled before the rights of the parties to the action can be determined.” *Ex Parte Government Employees, supra*, 373 S.C. 132, 136-37. This court has already ruled as to these additional parties that they are not necessary. The Defendants “can get complete relief as prayed for in their counterclaims against the existing parties without adding these 23 individuals.” Or. Denying Mot. To Join at 3.⁷ Therefore as to those causes of action that *are* presently counterclaims against the existing parties, the court has already ruled that these 4 persons are not indispensable for the current parties to be afforded complete relief on the existing claims between them.

To avoid this result, TECSC argues that the acts of these 4 persons were *ultra vires* and therefore the corporate actions they allegedly controlled were not valid. The argument then asserts that TECSC’s rights will be “impaired or impeded”. The “impaired or impede” rights provision only applies to the third parties. Rule 20 (a)(2)(i). The only issue that TECSC might properly be concerned with is whether the absence of those third parties (the ones with the

⁷ “Complete relief refers to relief as between the persons already parties, not as between parties and the absent person whose joinder is sought.” *Id.* (citation omitted)

interest to be “impaired or impeded”) might result in a substantial risk to TECSC of an “obligation” to the third parties. However, there are no interests of these third parties that might create an “obligation” for TECSC. If the Diocese prevails, TECSC has no claims against these parties at all as TECSC has no interest in the Diocese. If TECSC prevails on the issue of control, then it “might” have a claim to pursue against these 4 persons although there likely will not be a “case or controversy” since TECSC will have put itself in the shoes of the Diocese.

In any event, Rule 19 clearly does not make these 4 persons “necessary” to the resolution of the present action.

C. The Additional Parties cannot be added under Rule 20

Initially, TECSC has no claims to assert against these 4 persons. The 15 causes of action that are not presently counterclaims in this action may not be asserted as counterclaims. *See 5 supra*. Nor are the 4 persons “necessary” to the resolution of the 3 causes of action which might be the same as existing counterclaims (conversion, fraudulent transfer, and civil conspiracy). So what remains? Nothing except strong evidence that these claims are frivolous.

Mark J. Lawrence is a present member of the Board of Directors (Standing Committee) but he has no vote. Jim Lewis was a former member for a brief period and is currently a Diocesan employee. Paul Fuener is a former President of the Board of Directors as is Jeff Miller. If TECSC’s allegations are to be believed, these 4 men completely controlled the corporate actions of the Diocese as well as its Committees since as early as 2006. They did so by lying, by buying votes, having secret meetings all while successfully controlling 30,000 parishioners and their parish leaders. Common sense strongly suggests that is impossible. The reality is that these allegations are outrageous. It is precisely for situations such as this that Rule 11 and Section 15-36-10, S.C. (1976) were meant. (“South Carolina Frivolous Civil Proceedings Sanctions Act”).

However, these are just the factual allegations. The accompanying legal allegations make this proposed pleading demonstrably frivolous. As noted in this Court's order, the joinder of additional parties may be denied when the amendment would be futile. Or. Denying Mot. To Join at 4. These proposed claims are futile because they fail to state a cause of action against these 4 individuals.

1. TECSC is not the Diocese of South Carolina

TECSC claims to be the Diocese of South Carolina in their instant motion in clear violation of the representation counsel made to this court on the record⁸ and the consent temporary injunction.⁹ TECSC claims its bishop, Charles vonRosenberg, is "the rightful managing authority of the Diocese's corporate entity according to its charter, and the rightful President of The Trustees." TECSC's Notice and Mot. to Join Additional Parties ¶5 (Nov. 25, 2103). TECSC claims they have either an ownership interest, are the rightful party who controls the corporation, or their bishop is the managing authority of the corporation (the theory shifts and changes to fit the arguments). What is crystal clear is the Diocese of South Carolina is a Plaintiff in this action against TECSC and TECSC has no control over that corporation: "They control the corporation." Transcr. Of Rec., p. 23:3-4 (Sept. 27, 2013).

A majority of the claims TECSC wishes to add are claims that can only be brought by the corporation against these individuals. TECSC wants this court to suspend reality and allow that

⁸ Transcr. of Rec., p. 20:11-12 (MR. TISDALE: We are an unincorporated association seeking to get our property back.), p. 22:5-8 (THE COURT: -- and that those two entities came to be the unincorporated association solely through the exercise of ecclesiastical law. MR. TISDALE: That is correct.), p. 23:3-4 ("MR. TISDALE: That's why we're an unincorporated association. They control the corporation."), 27:22-24 ("MR. TISDALE: Your Honor, I can represent to this Court that the only corporate entities involved in this dispute we claim are ours that they control.") (Sept. 27, 2013).

⁹ "The following persons employed by, or serving as the officers or directors of the Diocese of South Carolina or of the Trustees are not subject to this order:

- Diocese of South Carolina: Mark J. Lawrence, Chief Operating Officer...
- Trustees: Mark J. Lawrence, President."

Temp. Inj. (consent), (Jan. 31, 2013).

premise to become fact: that they are the current owner/controller/manager of the Diocese of South Carolina. At some future point, those allegations may be based on reality. At this moment TECSC has no such rights, is not recognized as the Diocese in the temporary injunction consented to by TEC and is not by the State of South Carolina.

2. *TECSC Lacks Standing to Attack Corporate Action*

The individual members of this unincorporated association, TECSC, are the real parties in interest. They are complaining about the corporation's action amending its charter, articles of incorporation, and bylaws or other actions the corporation took. These corporate acts are not at issue in the proposed causes of action nor in the original counterclaims since TECSC does not make direct allegations that the corporation acted illegally in either pleading. The new causes of action are directed solely at the actions of 3 former leaders and one current leader of the corporation for their actions which TECSC now claims were *ultra vires*. TECSC's Memo. In Support, p. 5 (Dec. 27, 2103).

a. *The proposed claims for ultra vires acts may only be brought by a member derivatively.*

TECSC's alleges these 4 individual directors and officers of the Diocese acted *ultra vires* but does not challenge the Diocese's actions. The Official Comment to S.C. Code § 33-31-304 states that as to nonprofit corporations "the object of section 3.04 is to do away with the *ultra vires* doctrine." The statute itself states that "the validity of a [nonprofit] corporation action may not be challenged on the ground that the corporation lacks or power to act" except "in a proceeding against the corporation to enjoin an act where a third party has not acquired right." S.C. Code § 33-31-304. Such a proceeding may only be brought "by the Attorney General, a director, or by a member or members in a derivative proceeding." § 33-31-304(b).

A member of a nonprofit has no right to bring a direct attack against a proposed action. The claim may only be brought derivatively. If an action has been accomplished and the member or others in charge have done something wrong, have acted "ultra vires," the members may bring a derivative action against the alleged wrongdoers.

South Carolina Reporters' Comments to § 33-31-304. The proposed cause of action is not derivatively made. §33-31-630.

If it were, TECSC does not have standing to bring a derivative action against the Diocese since its members are not the shareholders, nor members of the corporation. The Diocese does not have shareholders and delegates to the convention are not members of a non-profit corporation. §33-31-140(23). Further, even if the parishes meeting in convention were members, this action by TECSC "does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation." Rule 23(b)(1), SCRPC. After the board of directors acted on behalf of the corporation, the convention, by overwhelming majority vote, affirmed the decisions of the board of directors.

TECSC claims to have 100% of the voting rights to the corporation and therefore the right to elect its officers and directors. But, it has represented to the Court that it does not control the corporation. Transcr. Of Rec. 27:22-24 ("MR. TISDALE: That's why we're an unincorporated association. They control the corporation.").

3. Causes of Action Against Corporation, Not Individuals

A number of the causes of action can clearly only be made against the corporation. Against these 4 persons, the causes of action are futile. Those include fraudulent transfers under S.C. Code Ann. § 27-3-10, et seq. and § 27-23-10¹⁰, judicial removal of directors under S.C.

¹⁰ Section 27-23-10(A) of the South Carolina Code (often referred to as "The Statute of Elizabeth") provides that: "Every gift, grant, alienation, bargain, transfer, and conveyance of lands ... for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts,

Code Ann. § 33-31-810, judicial dissolution under S.C. Code Ann. §§ 33-31-1430 and 1431, ultra vires relief under S.C. Code Ann. § 33-31-304. Each of these causes of action are only valid against the corporation, have not been pled in any current counterclaim and are only alleged against individuals in this motion.

4. §33-31-180

This section creates no cause of action. As the comment states “Section 180 simply states the obvious.” All statutes must conform to the Constitution.

The Official Comments do note, however, that it “The Model Act avoids interfering with the free exercise of religion by negating or allowing religious corporations to negate provisions of the Model Act that might result in excessive entanglement in religious activities by the state.” S.C. Code Ann. § 33-31-180 (Official Comments). TEC has done nothing to amend its governing documents to limit the actions of a member Diocese to take corporate actions (in amending their governing documents), to seek approval for any corporate action (by seeking TEC’s approval for such changes), or withdrawing the Diocese from the unincorporated association. In fact, the governing documents are completely silent concerning the right to make and the right to review changes or whether a member Diocese is prohibited from withdrawing its association.

E. Piercing the Corporate Veil

TECSC alleges this cause of action against 4 individuals. They have no veil to pierce.

accounts, damages, penalties and forfeitures must be deemed and taken ... to be clearly and utterly void...” In other words, the purpose of The Statute of Elizabeth is to protect those who, as the result of a conveyance, have been rendered unable to recover on some sort of claim.

It is not necessary to join the four individuals to this action in order for TECSC to obtain relief pursuant to the Statute of Elizabeth. The remedy for violation of the Statute of Elizabeth is rescission of the conveyances, and the grantors and grantees of the challenged conveyances are already parties to the action. The Statute of Elizabeth provides TECSC with no separate cause of action against the four individuals who acted as officers or authorized agents of the quitclaim grantors, so it makes no sense to join them as parties.

F. Conversion

TECSC asks this Court to find that these 4 individuals converted the corporation's property for "their own personal use for a new religious organization conforming to their own personal religious beliefs." TECSC's Motion to Join, ¶152. The individuals did not transfer any property to themselves or to another entity. The Diocese owns all the real and personal property of the corporation

G. Service Mark Infringement

TECSC has attempted to have a federal court overrule this Court's injunction regarding the right to use the trademark and service marks of the corporation, which was dismissed, Or. Granting Def.'s Mot. to Dismiss, 2:13-vs-587-CWH (D.S.C. Aug. 23, 2013). They have moved to vacate that same injunction in this court after their federal gambit was shot down. Def. TECSCs Mot. To Vacate or Modify the Temp. Inj. (Oct. 1, 2013). TECSC has also sought to have this Court enter an injunction in their favor regarding the use of those marks. Def. TECSC's Mot. For Prelim. Inj. Against Pls. (Oct. 1, 2013). The Court denied both motions when it decided not to disturb the consent injunction entered almost 11 months ago. In fact, all four individuals are explicitly authorized to use the service marks by this Court's Temporary Injunction Order. *See* Temp. Inj. (consent) (Jan. 31, 2012). In their answer, TECSC alleges that the Diocese does not own these marks, but it does not allege trademark infringement against the Diocese. Def. TECSC Answer and Counterclaim (Mar. 27, 2013). Therefore, a claim of trademark infringement is not sustainable only against the individuals sought to be added in this motion.

H. Declaratory Judgment

The declaratory judgment TECSC seeks from this Court is a finding that the acts of these

4 individuals are null and void. Such a finding that will do nothing to invalidate or reverse the actions of the corporation who is not a party to this cause of action nor is this part of TECSC's counterclaims in the present action.

I. Ecclesiastically Based Individual Claims

The causes of action that *are* directed at the 4 individuals seek the resolution of issues this court cannot adjudicate and TECSC lacks standing to bring them.

TECSC alleges breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, promissory estoppel, fraud, and constructive fraud. All require this court to decide if ecclesiastical vows (in TEC's Canons) were broken. Furthermore, TEC's canons prohibit its members from asking civil courts to review and interpret TEC's Constitution and Canons. TEC Canon IV.19.2 ("No member of the Church, whether lay or ordained, may seek to have the Constitution and Canons of the Church interpreted by a secular court, or resort to a secular court to address a dispute arising under the Constitution and Canons"). Those causes of action fail to state a claim since they invite the Court to make a decision on whether vows were broken and since TEC's own rules do not allow it.

Even if this Court could make those determinations, TECSC was not a party to the contracts, was not the party to whom fiduciary duties were owed, or misrepresentations made, or who was defrauded. The proposed claims are made on behalf of TEC (not TECSC) or the Diocese (the Plaintiff in this action). TECSC lacks standing to assert these ecclesiastically based claims.

J. Civil Conspiracy

Finally, TECSC's civil conspiracy claim alleges special damages that are wildly speculative. They assert that the loss of parishioners when the Diocese left, has resulted in loss of

income since these parishioners no longer contribute to TECSC. There is not the slightest bit of proof associated with that except the obvious - the individuals who wished to remain in TEC have joined TECSC and those who wish to freely associate with the Diocese have remained with it. Were TECSC to prevail in its claim that it *is* the Diocese what evidence is there that the 28,000 parishioners who stayed with the Diocese would not then leave TECSC, as is their absolute right? ("A nonprofit organization cannot force a person to belong to it." Official Covenant, §33-31-670). They would lose the income either way.

III. Conclusion

Having failed in their federal court strategy, the Defendants are deliberately and transparently stalling the progress of this case. In the process they are causing tens of thousands of dollars to be spent dealing with their myriad tales full of sound and fury signifying nothing. With briefs written by out of state counsel, new half-baked theories are constantly churned out. They revisit court orders with new briefs cut and pasted from the losing briefs.

What if the question were posed, "would a reasonable attorney in the same circumstance believe that under the facts his claim or defense may be warranted under the existing law?" Are the Defendants claims and defenses warranted under *All Saints*? If "their" claim or defense is not warranted under the existing law" does " a good faith argument exist for the modification on reversal of existing law?" Do the Defendants have a good faith argument against the application of *All Saints* to these facts? They have deliberately avoided these questions and the *All Saints* case. Instead, these churches prefer to accuse 4 residents of South Carolina whose chosen profession is to minister to the needs of others of "unlawful acts", "schemes", "false statements", "falsely" making promises they never intended to keep, "executing a conspiracy", exerting "undue influence", and more.

The Plaintiffs respectfully submit that this frivolous motion be denied, that this case be set for trial, and that the Defendants be directed to address the relevance of *All Saints* in all future matters and that the costs of responding to this motion be awarded to the Plaintiffs.

December 30, 2013

Respectfully submitted,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

CERTIFICATE OF SERVICE

RE: *The Protestant Episcopal Church In The Diocese of South Carolina, et al. v. The
 Episcopal Church, et al.*
 Case No. 2013-CP-18-00013

PERSONALLY APPEARED before me Andrew S. Platte, who being duly sworn, deposes and says: that he is employed in the office of Speights & Runyan, attorney for the Plaintiffs in the above-referenced action; that he served and caused to be served the attached Plaintiffs Response to Defendant, The Episcopal Church in South Carolina's Notice and Motion to Join Parties, Via U.S. Mail by personally depositing a copy of the same in the U.S. Postal Service, via first class mail postage prepaid, this 30th day of December, 2013, addressed to all counsel as shown on attached service list.

Andrew S. Platte

Andrew S. Platte

SWORN TO before me this
^{30th} day of December, 2013

Janice Swafford (L.S.)

Notary Public for South Carolina
My Commission Expires: 12/15/21

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