

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

The Right Reverend Charles G. vonRosenberg)	Case No. 2:13-cv-00587-RMG
et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
The Right Reverend Mark J. Lawrence et al.,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS BISHOP VONROSENBERG, BISHOP ADAMS, AND THE EPISCOPAL
CHURCH IN SOUTH CAROLINA’S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS’ SECOND MOTION FOR SUMMARY JUDGMENT (DKT. 603)**

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INTRODUCTION

Plaintiffs Bishop vonRosenberg, Bishop Adams, and The Episcopal Church in South Carolina (“TECSC”) (referred to herein as “TECSC and its Bishops”) submit this Opposition to Defendants’ Second Summary Judgment Motion (Dkt. 603). Defendants’ Motion should be denied: (1) on the grounds set forth and supported in The Episcopal Church’s and TECSC and its Bishops’ (collectively “Plaintiffs”) Summary Judgment Motions (Dkt. 595 and 584), which are hereby incorporated by reference; (2) on the grounds set forth and supported in Bishop vonRosenberg’s initial Motion for Preliminary Injunction (Dkt. 6),¹ which is hereby incorporated by reference; (3) on the grounds set forth and supported in Plaintiffs’ other opposition briefs being filed this day, which are hereby incorporated by reference;² and (4) on the grounds set forth and supported herein.

ARGUMENT

1. The Lawrence Diocese is not the historic Diocese, TECSC is.

Defendants’ Motion is predicated on the central assertion that the Lawrence Diocese is the historic Diocese founded in the eighteenth century (known by the names “The Protestant Episcopal Church in the Diocese of South Carolina,” “Episcopal Diocese of South Carolina,” “Diocese of South Carolina,” and the diocesan seal). (Dkt. 603 at p.2). It is not, and TECSC is,

¹ Bishop vonRosenberg’s Motion for Preliminary Injunction, which was supported by numerous exhibits and affidavits that still support Plaintiffs’ claims and are incorporated by reference, was not considered because of the initial stay of this litigation.

² Among other issues, Plaintiffs’ other opposition briefs being filed this day address and dispose of Defendants’ arguments that: the Lawrence Diocese has priority over the marks in question by virtue of having been the first user of the marks; the evidence does not support a finding of a likelihood of confusion and trademark infringement; the evidence does not support a finding of trademark dilution; Plaintiffs’ claims are barred by laches; The Episcopal Church’s marks are generic and should be cancelled; the evidence does not support Plaintiffs’ claims against the Defendant Parishes; and that Plaintiffs’ experts should be excluded.

according to the South Carolina Supreme Court and First Amendment jurisprudence. (Dkt. 584-1 at 3-7).³ Accordingly, the Lawrence Diocese did not use the diocesan names and marks over the last two centuries. It did not register the diocesan names and marks in 2010.⁴ It cannot refer to itself as the historic Diocese, or use its names and marks, and neither can its bishop or its

³ The Defendant named in this action as the “Corporation formed in 1973 that is currently calling itself the Protestant Episcopal Church in the Diocese of South Carolina” was formed by the historic Diocese in 1973 under a corporate charter that provided as follows: “The purpose of the said proposed Corporation is to continue the operation of an Episcopal Diocese under the Constitution and Canons of The Episcopal Church in the United States of America.” (Ex. 1, attached hereto). The machinations undertaken by Bishop Lawrence and his followers to amend and repurpose that corporation in an attempt to remove it from the control of the historic Diocese operating under the Constitution and Canons of The Episcopal Church were *ultra vires* and are null and void. See S.C. Code Ann. § 33-31-180 (“If religious doctrine governing the affairs of a religious corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine controls to the extent required by the Constitution of the United States or the Constitution of South Carolina, or both.”). Further, assuming *arguendo* that the Lawrence Diocese legally exercises corporate control over that corporation, it is certainly not operating as the historic Diocese; rather, it is something else entirely, which is essentially a repurposed corporate shell, confusingly and improperly named.

⁴ The diocesan state trademark registrations were registered in 2010 in one of the names of the historic Diocese, “The Protestant Episcopal Church in the Diocese of South Carolina.” (Dkt. 584-1 at 8, n.5). Those registrations are based on historic “first use” dates, with one going back as far as 1821. (*Id.*) The seceding group led by Bishop Lawrence purported to disassociate in 2012. See Defendants’ Answer and Counterclaims (Dkt. 196 at ¶¶95, 101) (admitting diocesan names and marks registered in 2010 in one of the names of the historic Diocese, prior to its purported disassociation from The Episcopal Church in 2012). The Lawrence Diocese nonetheless argues that it is the registrant of the state marks, quoting the definition of registrant from the South Carolina code. (Dkt. 603, p.13) (quoting S.C. Code Ann. § 39-15-1105 (“Registrant” means the person to whom the registration of a mark under this article is issued and the legal representatives, successors, or assigns of that person.”). That definition includes “successor,” which TECSC is, and the Lawrence Diocese “can make no claim to being,” according to the South Carolina Supreme Court and First Amendment jurisprudence. (Dkt. 584-1 at 3-7). Furthermore, assuming *arguendo* that the Lawrence Diocese holds the registrations, they would have to be canceled because the Lawrence Diocese is clearly not the owner of the names and marks, and because of the superiority of The Episcopal Church’s federal registrations, and because the registrations would have necessarily been obtained fraudulently by Bishop Lawrence and his followers and granted improperly to the Lawrence Diocese. S.C. Code Ann. §39-15-1145. (Dkt. 584 at 11-13).

parishes. TECSC owns those names and marks, the goodwill embodied therein,⁵ and the registrations thereof. Defendants' use of the same constitutes violations of the Lanham Act and state law that should be enjoined. (Dkt. 584, 595, and 6).

2. The state trial court's findings do not control.

Defendants' Motion is likewise predicated on another central assertion that the state trial court's errant findings remain in place; in particular, that the Lawrence Diocese owns and is entitled to the diocesan names and marks, and registrations thereof. (Dkt. 603 at 2-4). The Supreme Court reversed the trial court's decision (except as to the disposition of certain parishes), noted many errors in its findings, vacated its injunction, and deferred to this Court to resolve the trademark claims between the parties. *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*, 421 S.C. 211, 806 S.E.2d 82 (2017), *reh'r denied* (2017), *cert. denied* (2018). This Court has already confirmed this straightforward reading of the Supreme Court's decision in denying a previous motion to dismiss on the same grounds. (Dkt. 411 at 2, 7-8). Further, not only are the state trial court's findings on this issue no longer in place, again, the Supreme Court made its own findings – principally, that the Lawrence Diocese “can make no claim to being” the historic Diocese – that support this Court in reaching the opposite conclusion than was reached by the state trial court on the question of who owns and is entitled to the diocesan names and marks, and registrations thereof. (Dkt 584-1 at 3-7).

⁵ See *Marshak v. Green*, 746 F.2d 927, 929-30 (2nd Cir. 1984) (“A trade name or mark is merely a symbol of goodwill; it has no independent significance apart from the goodwill it symbolizes. ‘A trademark only gives the right to prohibit the use of it so far as to protect the owner’s goodwill.’ *Prestonettes, Inc. v. Coty* (1924) 264 U.S. 359, 44 S.Ct. 350, 68 L.Ed. 731; a trademark cannot be sold or assigned apart from to goodwill it symbolizes, Lanham Act, Sec. 10, 15 U.S.C.S. Sec. 1060. There are no rights in a trademark apart from the business with which the mark has been associated; they are inseparable...”).

3. TECSC and its Bishops can show the five elements of false advertising.

Defendants argue that TECSC and its Bishops cannot establish four of the five elements of a Lanham Act false advertising claim, which are as follows: “(1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another’s product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.” *PBM Prod.*, 639 F.3d at 120 (citation omitted); *Skil Corp. v. Rockwell Int’l Corp.*, 375 F.Supp. 777, 782-83 (N.D. Ill. 1974) (seminal case providing the *Skil* test adopted across the circuits); *Lacoste Alligator, SA v. Bluestein’s Men’s Wear, Inc.*, 569 F. Supp. 491, 499 (D.S.C. 1983) (citing *Skil*).

Defendants are wrong. There is an abundance of evidence supporting these elements.

We analyze each element in turn.

(1) The defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another’s product.

Defendants describe and represent themselves to be the historic Diocese founded in the eighteenth century (using its names and marks, “The Protestant Episcopal Church in the Diocese of South Carolina,” “Episcopal Diocese of South Carolina,” “Diocese of South Carolina,” and the diocesan seal), or to be parishes of the historic Diocese, or to be the Bishop (or 14th Bishop) of the historic Diocese, or to be “Episcopal” parishes. Defendants also describe and represent, conversely, that TECSC is not the historic Diocese, and that TECSC is instead a newly formed

entity with no history prior to 2013, and that TECSC's Bishops are not Bishops of the historic Diocese. Defendants further describe and represent that the historic Diocese's history is their history and that its property and institutions are their property and institutions. These descriptions and representations have been made in public speeches and have appeared and still appear on Defendants' websites and in their newsletters and other publications, which are all forms of commercial advertising in interstate commerce.

These facts are not in dispute. Defendants *admitted* these facts in their pleadings, in which they refer to themselves, the Lawrence Diocese, as the "Diocese of South Carolina." (*See e.g.*, Dkt. 196 at 3) ("...The Diocese of South Carolina is, and holds himself out to be, the 14th Bishop of the Protestant Episcopal Church in the Diocese of South Carolina, which was founded in 1785..."); (Dkt. 439 at ¶ 27) ("...The Diocese of South Carolina denies that Bishop Lawrence was removed as Bishop of the Diocese; instead, he remains Bishop of the Diocese which disassociated from the national Episcopal Church in 2012. Further, neither Bishop vonRosenberg nor Bishop Adams succeeded him as Bishop of the Diocese. In his role as Bishop, The Diocese of South Carolina has continued to utilize the Diocese's names and marks the Diocese owns and are registered with the State of South Carolina in identifying the Diocese, including THE EPISCOPAL DIOCESE OF SOUTH CAROLINA and THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA."); (*id.* at ¶ 29) ("...The Diocese of South Carolina admits that it continues to use the referenced marks to identify the Diocese of which he is bishop..."); (*id.* at ¶ 4) ("...such diocese [TECSC] is a new entity formed in January 2013..."); (*id.* at ¶ 25) ("The Diocese of South Carolina admits that the Diocese disassociated from the national Episcopal Church in 2012 and many parishes continue their

affiliation with the Diocese.”); (*id.* at ¶ 30) (“...The Diocese of South Carolina admits that some of the constituent churches within the Diocese use the word “Episcopal” in their names...”).

Defendants conceded the same during their depositions and in their discovery responses. (Dkt. 595 and 584); (Dkt. 595-71 through 80) (charts providing evidence with respect to every Defendant Parish).⁶

It is indeed Defendants’ primary contention in this entire litigation, as well as their public position, that they, and not TECSC, constitute the historic Diocese.⁷

Defendants’ websites, newsletters, and other publications are part of the voluminous document production in this case, which can be provided to the Court in full upon its request. The Lawrence Diocese’s website is one example, <https://www.dioceseofsc.org>, having a domain name that refers to one of the names of the historic Diocese, which describes and represents: that the Lawrence Diocese is the historic Diocese founded in the eighteenth century, <https://www.dioceseofsc.org/about/>; operating under the names and seal of the historic Diocese, <https://www.dioceseofsc.org/about/history-seal/>; led by Bishop Lawrence as its 14th Bishop, <https://www.dioceseofsc.org/bishop-mark-lawrence/>; comprised of the Defendant Parishes, <https://www.dioceseofsc.org/find-churches>; controlling the historic Diocese’s property and institutions, such as Camp St. Christopher, <https://www.dioceseofsc.org/about/institutions/st-christopher/>, and the Canterbury House, <https://www.dioceseofsc.org/about/institutions/canterbury-house/>. The Lawrence Diocese’s website further provides links to many of the websites of the Defendant Parishes,

⁶ See also Plaintiffs’ Opposition to the Parishes Motions for Summary Judgment being filed this day.

⁷ Defendants’ behavior begs the question: How can they say they continue to be the diocese of a church from which they departed?

<https://www.dioceseofsc.org/find-churches>; as well as links to many newsletters and other publications, *e.g.*, <https://www.dioceseofsc.org/news-events/jubilate-deo/>,⁸ which variously contain similar descriptions and representations, *e.g.*, https://www.dioceseofsc.org/wp-content/uploads/2018/01/2013_winter_jubilate_deo_web.pdf, and https://www.dioceseofsc.org/wp-content/uploads/2019/01/2019_winter_jubilate_deo_web-1.pdf. See Ex. 2, attached hereto (Declaration of Jason S. Smith attaching screenshots and downloads from the above website links from the Lawrence Diocese’s website on this day, January 11, 2019).

We would note that the Lawrence Diocese and some of the Defendant Parishes have recently made certain changes to their websites, including removing the word “Episcopal” in some places.⁹ We appreciate this effort as an acknowledgement of the need to do so and as a

⁸ The “Jubilate-Deo” is the name of the historic Diocese’s newspaper, which it has published since at least the 1970’s. The Lawrence Diocese has no right to publish anything under that name. The Lawrence Diocese’s website nevertheless provides links to publications they have made under the name Jubilate-Deo from 2013 to present in 2018, as well as editions of the Jubilate-Deo that were published by the historic Diocese dating back to 2006, *e.g.*, https://www.dioceseofsc.org/wp-content/uploads/2018/01/jun_jul06_jub_deo.pdf, in which the title of the publisher is prominently stated as “The Episcopal Diocese of South Carolina.”

⁹ Defendants assert that the Lawrence Diocese has “discontinued its use of its THE EPISCOPAL DIOCESE IN SOUTH CAROLINA mark.” (Dkt. 603 at p.23). This is not entirely true as a factual matter as discussed herein and in Plaintiffs’ other opposition briefs filed on this day, but regardless, the reason behind their incomplete effort to do so is manifest: because they are of course aware that it defies all applicable law and common sense for them to continue calling themselves a name that includes the identifying words “Episcopal Diocese” after purporting to disassociate from The Episcopal Church and subsequently becoming a diocese of the Anglican Church in North America (“ACNA”). It does nothing to justify their claim to the remainder of the historic diocese’s names and marks, however, for Defendants to yield some of them. The goodwill in all of the diocesan names and marks belongs to the one and only historic diocese. That goodwill, as a matter of fundamental trademark law, cannot be divided between the competing dioceses. See *Marshak*, 746 F.2d at 929-30. (Dkt. 584 at 13-16). The fact that the Lawrence Diocese is suggesting that this Court should essentially divide the diocesan names and

step in the right direction, but it is neither sufficient nor complete, and it does not moot the injunctive relief sought by Plaintiffs in this action, as discussed herein and in Plaintiffs' other opposition briefs filed on this day.

The above descriptions and representations, which have undisputedly been made and are still being made by Defendants, are both false and misleading.

First, they are literally false. "A literally false message may be either explicit or conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated." *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 120 (4th Cir. 2011) (citations omitted).

The Lawrence Diocese is not the historic Diocese, as a matter of empirical fact, confirmed by the South Carolina Supreme Court and dictated by First Amendment jurisprudence. (Dkt. No. 584-1 at 3-7). Likewise, Bishop Lawrence is not the Bishop of the historic Diocese, and the Lawrence Parishes are not parishes of the historic Diocese, or otherwise "Episcopal" parishes. The history of the historic Diocese is not the history of the Lawrence Diocese, and the property and institutions of the historic Diocese are not those of the Lawrence Diocese. Conversely, TECSC is in fact the historic Diocese, entitled to claim its history,

marks only further exposes the vacuity of Defendants' position. The Lawrence Diocese also asserts that it "has gone to considerable lengths to explain the absence of any relationship between the parties..." (Dkt. 603 p.25). The answer to the question of why such explanations are necessary is again manifest: because their use of the historic diocese's names and marks, unaccompanied by such an explanation, creates confusion and is misleading. Despite the "considerable lengths" to which the Lawrence Diocese says it has gone to "explain the absence of any relationship between the parties," their ubiquitous use of the diocesan names and marks is typically unaccompanied by such an explanation, which is impossible to provide in all circumstances. The obvious solution to this problem is for the Lawrence Diocese to start using totally different or sufficiently modified names and marks that inherently explain the absence of any relationship between the parties and are not attached to the history of the historic diocese. One seemingly appropriate name for them to consider would be the "South Carolina Diocese of ACNA," which would accurately identify them as a regional diocese of ACNA.

property, and institutions; and Bishop Adams (who succeeded Bishop vonRosenberg, who succeeded Bishop Lawrence) is the Bishop of the historic Diocese. The literal falsity of Defendants’ descriptions and representations is further elucidated in view of the context of this religious schism, in which Defendants purported to have disassociated the historic Diocese and some of its parishes from The Episcopal Church. *See Purcell v. Summers*, 145 F.2d 979 (4th Cir. 1944) (analogous claim in the context of a religious schism).

Second, assuming *arguendo* that any of these particular descriptions and representations may not be literally false either explicitly or by necessary implication, they are certainly misleading. “A claim of false advertising may be based on at least one of two theories: ‘that the challenged advertisement is literally false, *i.e.*, false on its face,’ or ‘that the advertisement, while not literally false, is nevertheless likely to mislead or confuse consumers.’” *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 112 (2nd Cir. 2010) (quoting *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007)).

Defendants’ contention that they are merely using the word “Episcopal” to connote that they are “subject to the governance of a bishop,” (Dkt. No. 603 at 38), is specious at best; and that contention is no defense to using the other names and marks of the historic Diocese that do not include the word “Episcopal,” or claiming the history, leadership, property, and institutions of the historic Diocese to be theirs. In the context of this religious schism, these descriptions and representations are highly misleading and have caused and are likely to continue to cause pervasive confusion if not enjoined. (Dkt. 595, 584, and 6). *See Purcell*, 145 F.2d at 983.

(2) The misrepresentation is material, in that it is likely to influence the purchasing decision.

The above descriptions and representations are material. A religious organization’s history, leaders, property, institutions, denominational affiliation, and constituent parishes are

“inherent qualit[ies] or characteristic[s]” that influence the decisions of consumers of religious services. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001). These important qualities and characteristics cannot be likened to the minutiae at issue in cases where courts have found the materiality element lacking. *Compare, e.g., National Basketball Assoc. v. Motorola*, 105 F.3d 841, 855 (2d Cir. 1997) (affirming the district court’s conclusion that “[t]he statements as to the particular origin of game updates constitute nothing more than minutiae about SportsTrax.”). Indeed, Defendants themselves have stressed the importance of these issues over and over again in this case and the state case. The Fourth Circuit likewise recognized the importance of these issues the context of a religious schism in *Purcell*:

That the use of the name of the Methodist Episcopal Church, South, by the seceding members as the name of the new and rival organization that they are creating will result in injury and damage to the united church into which the Methodist Episcopal Church, South, has been merged, is not only established by allegation and proof but it *seems so clear to our minds as hardly to admit of argument.*

145 F.2d at 983 (emphasis added). And again, Plaintiffs have presented voluminous evidence that these material descriptions and representations have in fact caused and are likely to cause pervasive confusion between the competing dioceses and the religious services they each offer. (Dkt. 595, 584, and 6).

(3) The misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience.

Because these descriptions and representations are literally false either explicitly or by necessary implication, this element is presumed as a matter of law. *PBM Prods.*, 639 F.3d at 120.

Assuming *arguendo* that any of these descriptions and representations may not be literally false either explicitly or by necessary implication, actual deception and tendency to

deceive are demonstrated by the anecdotal evidence of confusion and survey evidence already submitted to the Court. (Dkt. 595, 584, and 6). It is, moreover, Defendants unabashed intent and purpose to convince the public that they constitute the historic Diocese, which is false. *See Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 256 (2d Cir. 2014) (“[W]here a plaintiff adequately demonstrates that a defendant has intentionally set out to deceive the public, and the defendant’s deliberate conduct in this regard is of an egregious nature, a presumption arises that consumers are, in fact, being deceived.”). Further, again, *Purcell* recognizes that an audience is likely to be confused, misled, and deceived by such descriptions and representations in the context of a religious schism. 145 F.2d at 983.

(4) The defendant placed the false or misleading statement in interstate commerce.

Defendants have placed these descriptions and representations in interstate commerce. As explained above, they have appeared and still appear on Defendants’ websites, and in their newsletters and other publications, which are all forms of commercial advertising in interstate commerce. (Dkt. 595, 584, and 6). *See TrafficSchool.com, Inc. v. eDriver Inc.*, 653 F.3d 820, 835 n.3 (9th Cir. 2011) (noting that the “interstate commerce” factor in the false advertising analysis “is virtually automatic for websites”). Indeed, Defendants concede that this fourth element is satisfied. (Dkt. 603 at 36) (“Plaintiffs cannot make the first, second, third, and fifth showings under this Circuit’s test for liability . . .”).

(5) The plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.

TECSC and its Bishops have been injured and are likely to continue to be injured because Defendants are confusing the public and diverting goodwill belonging to the historic Diocese of The Episcopal Church from TECSC and its Bishops to themselves and using it to advertise and

promote their own religious services. In so doing, Defendants are also lessening that goodwill and impeding TECSC's and its Bishops' abilities to communicate with the public, exercise their spiritual and temporal duties and authorities and roles, and provide their own religious services. Again, Plaintiffs have already submitted voluminous evidence establishing these facts. (Dkt. 595, 584, and 6). And again, *Purcell* recognizes that such "injury and damage" in the context of a religious schism analogous to this one is "so clear to our minds as hardly to admit of argument." 145 F.2d at 983.

It bears mentioning once more that Plaintiffs are not seeking monetary damages in this action, though they certainly could make such a case. They seek only injunctive relief, which is sorely needed to put end to the confusion and irreparable harm being caused by Defendants on a daily basis. *See Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1335 n.8 (8th Cir. 1999) ("An injunction, as opposed to monetary damages, is no windfall to the commercial plaintiff. An injunction protects both consumers and the commercial plaintiff from continuing acts of false advertising.").

CONCLUSION

Wherefore, respectfully, Defendants' Motion should be denied.

(Signature page to follow)

Dated: January 11, 2019

Respectfully submitted

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