

DISTRICT COURT, EL PASO COUNTY, COLORADO
Court Address: 270 S. Tejon (80903), P.O. Box 2980
Colorado Springs, CO 80901
Phone Number: (719) 448-7577

Plaintiff and Counterclaim Defendant:

GRACE CHURCH & ST. STEPHEN'S, a Colorado nonprofit corporation,
v.

Defendants and Counterclaimants:

THE BISHOP AND DIOCESE OF COLORADO, a Colorado nonprofit corporation; and THE EPISCOPAL CHURCH,

and

Third Party Counterclaimants:

THE DIOCESE OF COLORADO IN THE EPISCOPAL CHURCH; GRACE AND ST. STEPHEN'S EPISCOPAL CHURCH; and GRACE CHURCH AND ST. STEPHEN'S, a Colorado religious society and corporation,
v.

Counterclaim Defendants:

REV. DONALD ARMSTRONG III; CHARLES C. BROWN; DARELEEN SCHAFFER; JON WROBLEWSKI; MARGE GOSS; CRAIG WHITNEY; ROBERT C. BALINK; CHAD FRIESE; MICHAEL BARBER; KEITH STAMPHER; JASON HUNTLEY; EMILY KLINE; RIP HOLLISTER; JACK GLORIOD; EDWIN J. MONTGOMERY, JR.; KEVIN DIBBLE; SUSAN SPENCER; ALAN CRIPPEN II; ST. STEPHEN'S CLASSICAL ACADEMY, a Colorado nonprofit corporation; and GRACE CHURCH & ST. STEPHEN'S, a Colorado unincorporated nonprofit association.

Additional Counterclaim Defendant:

RT. REV. ROBERT J. O'NEILL.

L. Martin Nussbaum #15370

• COURT USE ONLY •

Case No. 2007CV1971

Div.: COM5

Rothgerber Johnson & Lyons LLP 90 S. Cascade Avenue #1100 Colorado Springs, CO 80903 o: 386-3000; f:386-3070; mnussbaum@rothgerber.com	
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(Commercial Docket) BISHOP O’NEILL’S AND EPISCOPAL CHURCH ENTITIES’ REPLY RELATED TO THEIR MOTIONS FOR PARTIAL SUMMARY JUDGMENT, THEIR MOTIONS TO DISMISS THE ABUSE OF PROCESS COUNTERCLAIMS, THE INDIVIDUAL COUNTERCLAIM DEFENDANTS’ MOTIONS TO DISMISS, AND FATHER ARMSTRONG’S MOTION TO QUASH

The Most Rev. Robert J. O’Neill and the Episcopal Church Entities submit this reply brief as indicated in the title above as follows:

INTRODUCTION

During the March 18 case management conference, the Court commented that “Mr. Wright’s brief” appeared to have created a factual controversy regarding the material facts. This is not so. That brief is an artful deception based on mischaracterizing the Episcopal Church Entities’ arguments, ignoring scores of inconvenient facts, invoking a corporation code that did not exist in 1973, disregarding First Amendment principles set forth in Levitt and Serbian, and hoping the Court will not notice.

Summary judgment--especially partial summary judgment--is a viable procedural device in Episcopal Church for secessionist congregation disputes as shown most recently in the March 12, 2008 New York summary judgment order attached to the Episcopal Church’s recent summary judgment reply brief and the April 2007 Florida summary judgment order previously provided to the Court as Exhibit R. The summary judgment rule serves an important purpose: “to pierce the

formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail.” Peterson v. Halsted, 829 P.2d 373, 375 (Colo. 1992). It is particularly important in this case for the Court to carefully consider the merits of granting partial summary judgment because most issues turn on questions of law.

A word about exhibits and terminology. Whenever possible, exhibits cited herein are those master exhibits previously provided to the Court. A few additional exhibits beginning with “CR” are attached. The motions and briefs now before the Court are listed in Appendix I along with abbreviations for them. Some terminology used herein is explained in Appendix II.

I.
**THE FIRST AMENDMENT REQUIRES THE COURT TO DETERMINE
THE IDENTITY OF ECCLESIASTICAL OFFICE HOLDERS
WITHIN A HIERARCHICAL CHURCH BY DEFERRING TO THE HIERARCHY.**

The Court need not immerse itself in the 1973 Colorado Nonprofit Corporation Act and other state law in order to determine whether the Wroblewski Vestry and its successors are the directors of the 1973 Parish “corporation.” This is because the First Amendment requires the Court to determine disputes about the identity of ecclesiastical officer holders, including directors of a parish corporation, exclusively by the deference approach. In Levitt v. Calvary Temple of Denver, 33 P.3d 1227, 1230 (Colo. App. 2001), for example, there was a dispute as to whether the plaintiff was a member of a church. The Colorado Court of Appeals held that “a civil court

simply has no authority to reverse” the decision by the church hierarchy¹ “no matter how arbitrary or unfair, to expel Levitt or any other member.” *Id.* See also Van Osdol v. Vogt, 908 P.2d 1122, 1127 (Colo. 1996) (“Because the appointment [to a chaplaincy] is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are

¹One of the clearest principles in the civil law affecting religious institutions is that the Episcopal Church is a hierarchical church. See Parish of the Advent v. Protestant Episcopal Diocese of Mass., 688 N.E.2d 923, 931 (Mass. 1997) (“the Protestant Episcopal Church is hierarchical”); Protestant Episcopal Church v. Graves, 417 A.2d 19, 24 (N.J. 1980) (“the Protestant Episcopal Church is a completely integrated hierarchical body”); Rector, Wardens & Vestrymen of Trinity-St. Michael’s Parish, Inc. v. Episcopal Church in the Diocese of Conn., 620 A.2d 1280, 1285 (Conn. 1993) (“the Protestant Episcopal Church of the United States of America is hierarchical”); Episcopal Diocese of Massachusetts v. DeVine, 797 N.E.2d 916, 921 (Mass. App. 2003) (“the Episcopal Church is hierarchical”); Daniel v. Wray, 580 S.E.2d 711, 717 (N.C. App. 2003) (the Episcopal Church “is hierarchical”); Bennison v. Sharp, 329 N.W.2d 466, 472 (Mich. App. 1982) (“the Protestant Episcopal Church [is] hierarchical with regard to property, as well as spiritual matters”); Tea v. Protestant Episcopal Church, 610 P.2d 182, 184 (Nev. 1980) (“from the regulations of the Episcopal church polity[, it is evident] that the church is hierarchical”); In re Church of St. James the Less, 2003 Phila. Ct. Com. Pl. LEXIS 91, aff’d, 833 A.2d 319 (Pa.Commwh.Ct. 2003), aff’d in pertinent part, 888 A.2d 795 (2005) (“The Episcopal Church system is in all respects hierarchical. The Church functions under a national Constitution that grants broad authority over the affairs of individual parishes to the General Convention and to the bishops of the dioceses. Each parish is consequently directly accountable to the General Convention and to its diocesan bishop”); Olsten v. Hallock, 201 N.W.2d 35, 39 (“The government of the [Episcopal Church] is presbyterial rather than congregational”); Hiles v. Episcopal Diocese of Massachusetts, 773 N.E.2d 929, 933 (Mass. 2002) (“The Episcopal Church is a hierarchical religious organization”); Dixon v. Edwards, 290 F.3d 699, 716 (4th Cir. 2002) (“The Episcopal Church is hierarchical.”); Diocese of Southwestern Virginia of Protestant Episcopal Church v. Buhman, 1977 WL 191134, *6 (Va.Cir.Ct.,1977) (Constitutional and canonical provisions such as the foregoing are what gives The Episcopal Church its hierarchical character, and this super congregational characteristic is the reason that the Diocese has a proprietary interest in the subject property.”); Trustees of the Diocese of Albany v. Trinity Episcopal Church, 250 A.D.2d 282, 284 n.2 (N.Y. App.3d 1999) (“The Protestant Episcopal Church is a hierarchical form of church government in which local parishes are subject to the constitution, canons, rules and decisions of their dioceses, which, in turn, are presided over by a bishop”); Bjorkman v. Protestant Episcopal Church, 759 S.W.2d 583, 586 (Ky.1988) (“the church organization is hierarchical.”); The Episcopal Church in the Diocese of Florida v. Lebhar, No. 16-2006-CA-002361 8 (Fla. Cir. Ct. April 27, 2007) (“[T]he Diocese and the Episcopal Church are hierarchical in structure and government under the Colorado Canons and the Episcopal Church Canons.”). See also Ex. V ¶ 4, Sub-exhibits V-1 through V-3, Ex. E ¶¶ 5-15, Ex. G ¶¶ 38-52.

and whether the candidate possesses them.’ . . . Secular courts must accept this decision as conclusive . . . because it is a purely ecclesiastical matter.”)

Levitt relied upon Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the leading case regarding how courts adjudicate disputes regarding the identity of church office holders. Serbian’s facts are remarkably similar to those here: a cleric and those aligned with him, seeking to avoid church discipline of the cleric, seceded; took church property with them; declared the cleric free of denominational control; claimed to control church corporations; and filed a pre-emptive civil lawsuit to have the cleric declared bishop and executive of the related civil corporations. The United States Supreme Court held that resolution of this dispute would impermissibly entangle the civil court in ecclesiastical affairs and held that the state court, that had sought to adjudicate the matter, had “unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church.” Id. at 701-02, 720. Serbian’s ruling applied to the identity office holders regardless whether their office was within a canonical entity or church-related corporation. Id.

Even plaintiff’s “expert” admits these propositions. She writes of Serbian and its predecessor, Kedroff: “In sum, Kedroff [v. St. Nicholas Cathedral of the Russian Orthodox Church in North America], 344 U.S. 94 (1952) is not principally about who owned church property (a question that in Colorado must be decided by neutral principles), but about the state’s inability to choose the ecclesiastical leader of the congregation that occupies such property (a question of ecclesiology).” Plaintiff’s Affidavit #2 ¶ 85. She concludes:

Kedroff and Milivojevich [aka Serbian] thus involve deference to hierarchical decisions concerning the question of whom is the rightful ecclesiastical leader of church units, as opposed to decisions about property ownership. Courts will defer to internal hierarchical decisions on inherently ecclesiastical issues (*e.g.*, determining who speaks for a church), as Milivojevich and Kedroff confirm.

When the ICDs contend that they are the vestry of the 1973 Parish “corporation” in order to claim “director immunity” and to avoid the Court finding that the Secessionist Congregation is unincorporated, they contend that they hold ecclesiastical office. Civil courts resolve such disputes exclusively by deferring to the church’s hierarchy’s recognition of who does or does not hold such office. The plaintiff and the ICDs do not contest that Bishop O’Neill and the Diocesan Standing Committee removed Father Armstrong and the secessionists from all previous offices. Ex. AD, ¶ 18; Ex. D, ¶¶ 21, 32, 40-41, Sub-exhibits D-1, D-2. The First Amendment requires the Court to defer to this determination.

Hoping the Court might overlook Levitt, Serbian, and the First Amendment rule of deference, the plaintiff and the ICDs never discuss this law in their Joint Response other than to assert that there is nothing in the 2008 corporation code or the 1973 “articles” that give Bishop O’Neill the power to remove officers or directors from this church “corporation.” ICD Response 14. The secessionists cite no authority suggesting that a Colorado statute might trump the First Amendment.

In fact, state statutes cannot trump First Amendment principle regarding religious organizations’ freedom to organize themselves and determine their members and officers as they will. In Kedroff, 344 U.S. 94, 107 (1952), the United States Supreme Court voided state legislation that effectively reallocated authority within the Russian Orthodox Church.

By fiat [the New York legislature] displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.

Id. at 119. Kedroff concluded that “an enactment by a legislature cannot validate action which the Constitution prohibits . . .” Id. at 107. *See also* Northside Bible Church v. Goodson, 387 F.2d 534 (5th Cir. 1967) (voiding the Act that had the effect of modifying church polity).

The Court, thus, should enter partial summary judgment deferring to Episcopal Church hierarchy and declaring that the Wroblewski Vestry and its successors do not serve as directors or in any other office of the 1973 Parish “corporation;” Father Armstrong does not serve as its Rector; Jon Wroblewski and Chad Friese do not serve as its Wardens; Dareleen Schaffer does not serve as its Treasurer; and Susan Spencer does not serve as its Clerk. *See* Sub-exhibits D-1, D-2.

II.
THE 1973 COLORADO NONPROFIT CORPORATION ACT REQUIRES THE COURT TO DECLARE THAT THE 1973 “CORPORATION” HAS NO RECTOR, MEMBERS, SUCCESSOR DIRECTORS, OFFICERS, WARDENS, OR CLERK.

The Joint Response never cites the 1973 Colorado Corporation Code (“1973 Code”) even though the key corporate law issues arise in 1973. Instead, the plaintiff and the ICDs rely exclusively on the 2008 Colorado Corporation Code (“2008 Code”). This is the wrong code. The plaintiff and the ICDs invoke it because the alleged incorporation and organization of the 1973 “corporation” violates at least eight provisions of the 1973 Code, provisions that require the Court to declare that the 1973 “corporation” has no rector, clerk, officers, wardens, or successor directors. This legal issue is ripe for partial summary judgment.

It remains uncontested that the one-page 1973 “articles” does not provide for a rector, clerk, officers, wardens, or successor directors. Sub-ex. Y-1. Even though the 1973 Code mandates that the initial board hold an organizational meeting for the election of officers and for the adoption of bylaws and that the corporation maintain minutes of all such events,² the plaintiff and the ICDs admit that the 1973 “corporation” has no bylaws; that it conducted no organizing meeting; and that it kept no minutes. *See* Ex. CT; ECE 2-13-08 Brief at 21, n.14. They contend “none of this matters.” Joint Response at 7. They then cite the 2008 Code to argue adoption of bylaws is permissive and that the 2008 Code empowers directors to appoint officers. *Id.* The 2008 Code provides the secessionists no solace.³ It is also irrelevant for “corporate” acts occurring in 1973.

A. No Members. The 1973 Code makes members optional. Colo. Rev. Stat. § 7-23-101(1)(1973). It also states that nonprofit corporations have no members unless they have “membership rights in a corporation **in accordance with provisions of its articles and bylaws.**” *Id.* § 7-20-102(9)(1973) (emphasis added). Because the 1973 “articles” do not provide for

²Colo. Rev. Stat. §§ 7-21-105(1) (1973) (mandatory organizational meeting for election of officer and adoption of bylaws), 7-23-102 (1973) (“initial bylaws . . . shall be adopted;); 7-24-109 (1973) (mandatory minutes).

³Even if the 2008 Code applied, the 1973 “corporation” would still have no rector, clerk, members, wardens, or successor directors. There would be no rector, clerk, or wardens because the 2008 Code does not permit nontraditional officers unless bylaws provide for them. Colo. Rev. Stat. §§ 7-128-301(1), 7-128-302 (2008). There would be no voting members because the articles do not provide for them, *id.* § 7-122-102(1)(e) (2008), and because there are no bylaws stating criteria for their admission, *id.* § 7-126-102(1). Without voting members, there would be no successor directors because the secessionists contend that the successor directors were elected by the non-existent members.

members and the 1973 “corporation” has no bylaws,⁴ the Court should enter partial summary judgment declaring that the 1973 “corporation” has no members. The Episcopal Parish has members. The 1923 Parish Corporation has members. The unincorporated association that is the Secessionist Congregation has members. But the 1973 “corporation” has no members.

B. No Successor Directors. The plaintiff and the ICDs have provided an affidavit from five current members of the 2007 Secessionist Congregation who were named as “directors” of the 1973 Parish “corporation.” Joint Response Ex. 3. This affidavit is certainly false. It has no documentary support. It is contrary to the affidavits of the “incorporators” Fathers Hewitt and Thompson, Exs. X and Y; the affidavits of Jerry Teske and Dr. E.R. Peterson who were named to the same 1973 “board,” Exs. CR and CS; and the 1987 letter of Senior Warden Harry McWilliams who stated that the Parish had no change in its corporate structure and no conveyance of assets between 1967 and 1986. Ex. CG.

Even if the Court finds that the affidavit attached to the Joint Response creates a factual controversy regarding whether some of the initial “directors” of the 1973 “corporation” assumed office, there remain three independent reasons why those initial directors have no successors.

First, successor directors can only “be elected or appointed in the manner and for the terms provided **in the articles of incorporation or the bylaws.**” Colo. Rev. Stat. § 7-24-101(3)

⁴The statement in the joint affidavit of half of the initial directors that they “determined all members of the congregation would be members” of the 1973 “corporation” is irrelevant because, under the 1973 Code, members do not exist unless provided for in the articles or bylaws. *See* Joint Response Ex. 3, ¶ 4.

(1973) (emphasis added). Because the “articles” are silent regarding the method for electing directors, there was no way to elect successor directors.

Second, the plaintiff and the ICDs now contend that successor directors were elected by “members” of the 1973 “corporation,” Joint Response at 14, but as previously explained, the 1973 Code establishes that this “corporation” has no members. *See Id.* § 7-20-102(9) (1973), Part II(A), *supra*.

Finally, the plaintiff and the ICDs contend that the successor directors were elected at annual meetings of members, Joint Response Ex. 3, ¶ 8, but the 1973 Code only permits members meetings to occur “**as may be provided in the bylaws,**” *Id.* § 7-23-104(1)(1973) (emphasis added), and the 1973 “corporation” has no bylaws.

The Court, therefore, should enter partial summary judgment declaring that even if there is a factual controversy as to whether the initial board members assumed office by accepting their “appointment,” their failure to adopt bylaws providing for members, the election of directors, and membership meetings and their failure to keep minutes of the same determined, as a matter of law, that the “corporation” could not elect directors to succeed the initial board.

C. No Officers. The 1973 Code states that the officers of a corporation “shall consist of a president, one or more vice-presidents, a secretary, a treasurer, each of whom shall be elected or appointed at such time, in such manner, and for such terms, not exceeding three years, **as may be prescribed in the articles of incorporation or the bylaws.**” *Id.* § 7-24-107(1) (1973) (emphasis added). The 1973 “articles” are silent regarding officers or their mode of election or appointment. The affidavit provided by the five initial “directors” creates no factual controversy

as to whether the articles or bylaws identified officers or their mode of election. Thus, the Court should enter partial summary judgment declaring that the 1973 “corporation” has no officers.

D. No Wardens, Rector, or Clerk. The Secessionist Congregation, pretending to be the 1973 “corporation,” holds itself out as having other officers not identified in the 1973 Code, specifically wardens, a rector, and a clerk. Answer to PECUSA ¶ 4. The 1973 Code permits a corporation to create additional officers but only by providing for them in the corporation’s articles or bylaws. It says, “[t]he officers of a corporation may be designated by such additional titles as may be provided in the articles of incorporation or the bylaws.” Colo. Rev. Stat. § 7-24-107(3) (1973). The Court, therefore, should enter partial summary judgment declaring that the 1973 “corporation” has no wardens, no clerk, and no rector.

**III.
THE 1973 COLORADO NONPROFIT CORPORATION ACT
REQUIRES THE COURT TO ENTER PARTIAL SUMMARY JUDGMENT
DECLARING THAT THE INDIVIDUAL COUNTERCLAIM DEFENDANTS
ARE NOT DIRECTORS OF THE ALLEGED 1973 PARISH CORPORATION.**

Because the 1973 “corporation” could not, as a matter of law, elect directors to succeed the initial board, it follows that the 1973 “corporation” had no directors after the initial year⁵ of its *de jure* existence. While the Wroblewski Vestry and its successors may serve as directors for the Secessionist Congregation in its status as an unincorporated association, they do not serve as directors of the 1973 “corporation.” Partial summary judgment should enter accordingly.

**IV.
THE COURT SHOULD ENTER PARTIAL SUMMARY JUDGMENT**

⁵The initial “board” had a one year term. Colo. Rev. Stat. § 7-24-101(3) (1973).

**DECLARING THAT THE TRUST PROPERTY IS HELD
FOR THE BENEFIT OF THE EPISCOPAL PARISH OR ITS MEMBERS
AND THAT LEGAL TITLE TO OTHER PROPERTY
REMAINS IN THE 1923 PARISH CORPORATION.**

The plaintiff and the ICDs made no attempt in their Joint Response to dispute the material facts of Property ownership and the terms of several trusts that the Episcopal Church Entities recited on pages 25 through 27 of their 2-13-08 Brief and on pages 28 and 29 of their 2-27-08 Brief. This leaves only legal issues for the Court.

In a nutshell, this evidence shows that, except for the Parish rectory, legal title to all the real property was conveyed to the 1923 Parish Corporation beginning in the 1920s. The 1969 conveyance of the rectory identified the transferee, as “Grace Church and St. Stephen’s *Parish.*” (The plaintiff does not claim to be the Episcopal Parish. Indeed, it denies the existence of parishes.) No real property was conveyed after June 23, 1973, the date plaintiff alleges it came into existence.

The plaintiff and the ICDs also do not dispute the evidence identifying the beneficiaries of several Parish trusts. Those trusts describe the beneficiaries as follows:

Date Exhibit of Trust	Name of Trust	Trust’s Description of Beneficiary or Parish	No.
1929	Alice B. Taylor Indenture	“The Grace Episcopal Church of Colorado Springs, Colorado”	AI
1931	Josephine L. Carpenter Trust	“Grace Church and Saint Stephen’s, Colorado Springs” with backup beneficiary being “Church Pension Fund of the Protestant Episcopal Church”	AH
undetermined	Anne H. Gates Trust	“Grace and St. Stephen’s Episcopal Church of Colorado Springs”	AH

1958	Carlton Trust	“Grace Episcopal Church”	AH
1967	Koch Trust	“Grace Church and St. Stephen’s Parish, Colorado Springs”	AJ
1970	Ralph O. Giddings, Jr. Testamentary Trust	“The Grace Episcopal Church of Colorado Springs, Colorado”	AH
1974	Bowton Trust	“Grace Church and St. Stephen’s” and also providing funds “for those unmarried people desiring to pursue theological studies with the intent of entering Episcopal ministry”	AH
1975	Smith Trust	“Grace Episcopal Church of Colorado Springs” ⁶	AH

Similarly, the Joint Response does not contest Father Hewitt’s testimony that no “real estate” was conveyed from the 1923 Parish Corporation to the 1973 “corporation.” Ex. X, ¶ 14. The secessionists admit there are no deeds or other instruments of transferring the Property to the 1973 “corporation.” Exs. BS, BT, BU, BV, BZ, CB, CC, and CT.

A. Legal Title to the Real and Personal Property. It may be the oldest, continuing law in Colorado that “[n]o estate or interest in lands . . . shall be created, granted, assigned, surrendered, or declared, **unless by act of operation of law, or by deed or conveyance in writing** subscribed by the party” conveying the interest. Colo. Rev. Stat. § 38-10-106 (2008) (emphasis added); Colo. Rev. Stat. § 59-1-6 (1963) (same). *See also* Colo. Rev. Stat. § 38-30-101 (permitting bodies politic and corporate to hold real property and convey it by deed); Colo. Rev. Stat. § 118-1-1 (1963)(same).

The Joint Response offers three arguments to explain how legal title to the Property migrated from the 1923 Parish Corporation to the 1973 “corporation.” First, they offer testimony

⁶The Smith Trust actually establishes a scholarship fund in which the members of “Grace Episcopal Church of Colorado Springs” are eligible to apply. Ex. AH.

from the five “directors” stating that the 1973 “corporation” “assumed ownership and responsibility for all the Church’s property . . .” when the 1923 Parish Corporation allegedly⁷ became defunct. Joint Response, Ex. 3, ¶ 4. Even though the testimony is controverted, *see* Exs. X, Y, CR, and CS, the secessionists repeatedly assert that the 1973 “corporation” simply took the 1923 Parish Corporation’s Property. *See* Joint Brief at 5 (“assumed the assets”), 6 (“acceded to the prior entity’s assets”), and 10 (“acceded to the assets”). Property does not transfer by assumption or accession.

Next, the plaintiff and the ICDs argue that the filing of the 1973 “articles” is “analogous to a merger,” where the surviving nonprofit corporation, by operation of law, automatically acquires all assets of the merged nonprofit corporation.” Joint Brief at 10. They do not assert that there was a merger, only something “analogous to a merger.” There is no merger unless both merging

⁷Plaintiff and the ICDs make no attempt to rebut the law showing that the filing of the 1973 “articles” was, while using the wrong form, a substantially complying attempt to reinstate the defunct 1923 Parish Corporation. *See* ECE 2-27-08 Brief at 13-16. Indeed, the use of the wrong form to reinstate that corporation complied far better with statutory requirements than the alleged incorporation and organization of a 1973 “corporation” that breached at least eight statutory requirements discussed in Part V(A), *infra*.

Except for their “reliance” argument, the secessionists do not disagree that the 2007 reinstatement of the 1923 Parish Corporation was effective, that it retroactively revived the 1923 Parish Corporation, and that it resulted in the issuance of a certificate of good standing. They also do not contest that all of this was accomplished through statutes that address this precise situation and provide for this result. *See* Colo.Rev. Stat. §§ 7-90-1005, 7-137-102(5)(2007); Ex. BW, ECE 2-27-08 Brief at 16-18. The secessionists invoke § 7-90-1005(2) to argue that parishioners made donations to the 1973 “corporation” in reliance on the fact of the 1977 dissolution of the 1923 Parish Corporation. This is another *post hoc* fiction. No one ever thought of the possibility that the 1923 Parish Corporation might have dissolved until plaintiff’s counsel developed this theory in the summer of 2007. Ex. CU, Joint McJimsey affidavit, ¶ 7. Furthermore, the secessionists have identified no adverse effect from any such reliance.

corporations adopt plans of merger; file them with the state; and acquire a certificate of merger. Colo. Rev. Stat. §§ 7-25-101 through 7-25-104 (1973).⁸ None of this occurred.

Third, plaintiff and the ICDs cite Solmonovich v. Denver Consol. Tramway Co., 89 P.57 (Colo. 1907). Response Brief at 10. It is an old corporate consolidation case decided, as the ICDs admit, id., under a statute not applicable in 1973. It is inapposite. Further, there was no corporation consolidation because there was no plan, articles, or certificate of consolidation as required in Colo. Rev. Stat. §§ 7-25-102, 7-25-103, 7-25-104 (1973).

Lastly, the secessionists cite Black Canyon Citizens Coalition, Inc. v. Bd. of County Comm'rs of Montrose County, 80 P.3d 932 (Colo. App. 2003) as supporting the proposition that when Fathers Hewitt, Thompson, and Fields filed the woefully deficient 1973 “articles,” their action automatically extinguished the 1923 Parish Corporation and caused the 1973 “corporation” to accede “to the prior entity’s assets.” Joint Brief at 6. This is wishful thinking. Black Canyon merely holds that a complaint filed by a corporation that does not exist at the time of filing should be dismissed. It does not ask or decide the question whether the corporation at issue “acceded” to the property of the association it purported to succeed.

B. Beneficial Interest in Trust Property. The Joint Response neither contests the facts related to the Parish trusts nor argues that plaintiff is the beneficiary of those trusts. “The interpretation of a written instrument, such as a trust, is a question of law.” Matter of Trusts Created by Ferguson, 929 P.2d 33, 35 (Colo. App. 1996). “In the interpretation of a trust, the

⁸Plaintiff and the ICDs cite the 2008 Code, Colo. Rev. Stat. § 7-131-104 (2008) regarding merger. Joint Brief at 10. It is the wrong statute. Even if not, its many requirements are not satisfied.

intent of the settlor or testator must be given effect.” *Id.* Furthermore, “the intent of the settlor” must be measured “at the time the clause was drafted . . .” University Nat’l Bank v. Rhoadarmer, 827 P.2d 561, 563 (Colo. App. 1991); Restatement (Third) of Trusts § 4 cmt. a (2003) (“The intention of the settlor that determines the terms of the trust is the intention at the time of the creation of the trust and not a subsequent intention”).

The settlors and testators of the trusts identified above could not have intended an entity beneficiary that did not exist when they executed their respective declarations of trust or wills. Therefore, as a matter of law, the beneficiaries of the Taylor, Carpenter, Carlton, Koch, and Giddings Trusts could not have been the 1973 “corporation.”

Furthermore, the Gates Trust names “Grace and St. Stephen’s **Episcopal** Church of Colorado Springs.” The Bowton Trust names the 1923 Parish Corporation and provides funds for persons “with the intent of entering **Episcopal** ministry.” The Smith Trust describes its charitable purpose and its beneficiaries as “to provide scholarships or financial assistance to a member or members of Grace **Episcopal** Church of Colorado Springs attending institutions of higher learning, with preference being given to any member or members attending a school of Divinity.”

If the secessionists have made anything clear, it is that they neither desire nor have any relationship with any **Episcopal** Church entity. *See, e.g.*, Ex. BQ, Plaintiff’s Summary Judgment Response, Ex. P-3. The United States Supreme Court has long held that it is “the obvious duty of the court . . . to see that property so dedicated [in trust agreements] is not diverted from the Trusts which is thus attached to its use. So long as there are persons qualified within the meaning

of the original dedication . . . , it must be that they can prevent the diversion of the property or fund to other or different uses.” Watson v. Jones, 80 U.S. (13 Wall.) 679, 723 (1871).

Accordingly, the Court should enter partial summary judgment declaring that the 1973 “corporation” has no interest in or claim upon any of these trusts and that the beneficiary of these trusts are either the Parish, the 1923 Parish Corporation, or, in the case of the Smith and Bowton Trusts, qualified persons affiliated with the Parish or the Episcopal Church.

The Court should also enter partial summary judgment declaring that the 1923 Parish Corporation holds *legal* title to the Property.

V.

**THE COURT MUST DENY FATHER ARMSTRONG’S MOTION TO QUASH
AND ENTER PARTIAL SUMMARY JUDGMENT
DECLARING THAT THE SECESSIONIST CONGREGATION
IS AN UNINCORPORATED NONPROFIT ASSOCIATION.**

Father Armstrong’s Motion to Quash Service of Process upon the Secessionist Congregation as an association was based on little more than his assertion that “[t]here is no legal entity that is an “unincorporated nonprofit association” known as Grace & St. Stephen’s, nor as a matter of law, can there be this fictional entity,” Quash Motion ¶ 1, and his similar affidavit.

The Joint Response takes a different tack. It abandons Father Armstrong’s contention that associations are fictional. It does not doubt that associations exist under the common law. It does not disagree that, when “two or more members join[] by mutual consent for a common, lawful, nonprofit purpose” and do not incorporate, their common enterprise is performe an association under the Colorado Uniform Unincorporated Associations Act. Colo. Rev. Stat. § 7-

30-101(2). And it does not contest that, most churches are, under civil law, unincorporated nonprofit associations as explained in ECE 2-27-08 Brief at 5-7.

Father Armstrong and the secessionists now oppose characterizing their congregation as an association by contending that it incorporated in 1973 and, as proof, invoke the certificate of incorporation issued by the Colorado Secretary of State. Response Brief at 5.

A. There Is a Difference Between Corporate “Existence” and Corporate Ability to Act. The secessionists’ argument about the existence of the 1973 “corporation” is a “straw man,” *see* Joint Response at 4, because the Episcopal Church Entities have previously allowed that the 1973 filing may have resulted in a *de jure* corporation, ECE 2-13-08 Brief at 20. The secessionists erect this straw man regarding the “existence” of the 1973 “corporation” hoping that it will distract the Court from inquiring whether the “corporation” could function, and, if so, whether it could do so through Father Armstrong and the Wroblewski Vestry.

Consider a scenario in which a person prepares articles of incorporation for “Wonderland, Inc.,” signs them for the incorporators as “M. Hare, W. Rabbit, and C. Cat;” files them; and the Secretary of State issues a certificate of incorporation. The 1973 Code appears to say that this results in a *de jure* corporation with existence. *See* Colo. Rev. Stat. § 7-21-103(1) (1973). But this mere existence is insufficient for the corporation to act and manage its affairs.

If the 1973 “articles” brought a new corporation into existence, those minimal form “articles” and the subsequent failures to adopt bylaws, keep minutes, and organize the corporation violated these 1973 Code requirements:

- ! § 7-22-103 (a corporation cannot take a “corporate name . . . the same as or deceptively similar to the name of any corporation”);
- ! § 7-23-102 (a corporation must adopt bylaws for “the regulation or management of the affairs of the corporation”);
- ! § 7-21-105(1) (a corporation must hold an organizational meeting “for the purpose of adopting bylaws [and] electing officers”);
- ! § 7-20-101(9) (a corporation with members must provide for them in its articles or bylaws);
- ! § 7-23-104(1) (a corporation with members must adopt rules regarding annual membership meetings);
- ! § 7-24-101(3) (a corporation must define the method for appointing or electing successor directors in its articles or bylaws);
- ! § 7-24-107(3) (a corporation with nontraditional titles for officers--like rector, warden, and clerk--must provide for such titles in its articles or bylaws); and
- ! § 7-24-109 (a corporation must keep minutes of member, director, and committee meetings).

These deficiencies matter. They ensured, as a matter of law, that the 1973 “corporation,” had no members, Part II(A), *supra*; no successor directors, Part II(B), *supra*; no officers, Part II(C), *supra*; and no rector, wardens, or clerk, Part II(D), *supra*. Without such personnel, the “corporation” could not act. Burgess v. Federated Credit Service, Inc., 365 P.2d 264, 265 (Colo. 1961) (“a corporation cannot of itself perform any act except through authorized agents or officers elected by its directors”); Home Builders Co. v. Reddin, 48 P.2d 800, 802 (Colo. 1935) (corporation acts only through its lawfully authorized agents). This is why the secessionists claim that the 1973 “corporation” filed annual corporate reports is false because, as a matter of law, it had no personnel to act on its behalf.

The post-incorporation organizing of a corporation is indispensable for it to be able to manage its affairs and conduct business.⁹ This is why corporation law distinguishes between existence and the ability to manage affairs and do business.

The time a corporation commences *to do business* does not necessarily mark the beginning of its corporate *existence*. So a corporation may acquire its corporate *existence* although it has not yet complied with conditions precedent to its right *to commence business or to exercise the powers conferred* (emphasis added).

8 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 4066 (2007).

The adoption of bylaws was critical for the 1973 “corporation” to organize itself.

The by-laws of a corporation are the rule of its life. A corporation may begin to live the moment its charter issues, but it may not be able to act for the purposes of its creation until those to whom the franchises are given, and who make up its corporate existence, have agreed how it shall act, what it shall do, and who shall immediately direct its conduct. The agreement of the members of a corporation as to what shall be its mode of life is found in its by-laws, and their first and most important duty is to adopt them.

Bagley v. Reno Oil Co., 50 A. 760, 761 (Pa. 1902).

Unlike the 2008 Code, the 1973 Code mandated prompt adoption of bylaws. *See* Colo. Rev. Stat. §§ 7-23-102, 7-21-105(1)(1973); Colo. Rev. Stat. § 7-122-106 (2008). The likely reason for the difference is that, unlike the 1973 Code, the 2008 Code includes numerous default provisions that provide a governance structure if the directors fail to adopt bylaws.

⁹The organizing of a corporation including “the election of officers [and] the adoption of by-laws” is needed to endow an entity with ability “to transact the legitimate business.” Omaha Nat’l Bank v. Jensen, 58 N.W.2d 582, 584 (Neb. 1953) *quoting* 18 C.J.S. Corporations § 63; *see also* 8 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 3738 (2007); 18A Am. Jur. 2d Corporations § 184 (2008). “Without such organization, the corporation . . . can do no corporate act, can receive no corporate property, and can incur no corporate liability” 8 Fletcher, *supra*, § 3737.

Aspen Water & Light Co. v. City of Aspen, 37 P. 728 (Colo. App. 1894) is relevant. The City of Aspen awarded a contract to Aspen Water after it had incorporated but before it had organized itself by issuing stock, electing officers, and transferring assets to it. The city revoked the contract. Upholding the city’s revocation, the Court of Appeals acknowledged that, upon issuance of the certificate of incorporation, “it may be true that *for some purposes* the corporation has an existence.” Id. at 730 (emphasis added). It then reasoned:

It only remains to determine the legal consequences which flow from the failure to complete the organization In some states the general incorporation act provides that upon the filing of the certificate the persons who sign it, and their successors, shall become a body corporate, and be invested with certain powers. But even in a case like that the authorities hold that it only becomes a *quasi* corporation, invested possibly with certain power for certain limited purposes. **In reality it becomes a corporation only in name.** It is universally agreed that a corporation cannot exist without stockholders or members. As said by the learned Commissioner Pattison . . . , “without organization and members, and without officers and stockholders, a corporation is but a naked body.”

Id. at 730-31 (emphasis added). The Court of Appeals then held that even though articles were properly filed, “[t]he entity never was born, and hence the grant never took place. . . . The company never had any legal president and never had any legal secretary, and consequently the so-called contract was never executed.” Id. 731.

For these reasons and also by application of First Amendment principle described in Part I, *supra*, the Court should declare that the Secessionist Congregation is not the 1973 “corporation,” and neither the Wroblewski Vestry, its successors, Father Armstrong, Ms. Schaeffer, Mr. Wroblewski, Mr. Friese, or Ms. Spencer serve as officers or directors of that “corporation.”

B. The Secessionist Congregation Is an Unincorporated Nonprofit Association.

Because the Secessionist Congregation is not the 1973 “corporation” and because that entity has neither a rector, officers, successors, directors, nor members, what remains is a church congregation with every attribute of an unincorporated nonprofit association. The Joint Response does not contest the judicial admissions and other evidence (set forth in ECE 2-27-08 Brief at 8-10) showing that Father Armstrong is the “rector” of a congregation, that the congregation describes itself as a “parish,” that this parish has members who worship together and practice their faith together; that the parish is led by the Wroblewski Vestry and its successors; and that this vestry and congregation followed Father Armstrong out of the Episcopal Church in March 2007. *See* ECE 2-27-08 Brief at 8-11. The Joint Response does not contest that parties are bound by their judicial admissions. *See, e.g., Holiday Acres Property Owners Ass’n, Inc. v. Wise*, 998 P.2d 1106, 1110 (Colo. App. 2000).

The Court, therefore, should deny Father Armstrong’s motion to quash service of process and enter partial summary judgment declaring that the Secessionist Congregation is an unincorporated nonprofit association that came into existence on March 26, 2007 when it left the Episcopal Parish, and began its life as a non-Episcopal Church parish of the Anglican Church of Nigeria.

VI.
**THE COURT MUST DENY THE INDIVIDUAL COUNTERCLAIM DEFENDANTS
MOTION TO DISMISS BASED ON THE DIRECTOR IMMUNITY DEFENSE.**

The ICDs have not contested that they must establish *each* of five requirements, set forth below in order to benefit from the immunity provided to directors of non-profit corporations.

Some ICDs satisfy the fourth requirement. Some do not. None satisfy requirements 1, 2, 3, or 5.

1. The defendant must serve as director, officer, or trustee for a nonprofit corporation;
2. The nonprofit corporation must be tax exempt under § 501(a) and listed as an exempt organization under § 501(c) of the Internal Revenue Code;
3. The defendant's alleged tortious actions must be within the scope of the defendant's official functions or duties as director;
4. The defendant must be uncompensated; and
5. The defendant's actions cannot be willful and wanton.

See Colo. Rev. Stat. §§ 13-21-116(2)(b)(I) and 13-21-116.7(2).

A. The Individual Counterclaim Defendants Are Not Directors or Officers of the 1973 “Corporation.” The First Amendment requires the Court to defer to the Episcopal Church hierarchy's determination that the ICDs hold no office in the 1973 Parish “corporation.” *See* Part I, *supra*. In addition, the 1973 Code requires the Court to find that because the 1973 “corporation” had imprecise articles and no bylaws and because it was never properly organized, the ICDs cannot be officers or directors of the 1973 “corporation.” *See* Parts II and III, *supra*.

Plaintiff and the ICDs have contested only one issue: whether those persons named as initial directors accepted their appointments. Even though this was done through a highly dubious

affidavit, this “controverted” fact has no affect on the constitutional analysis in Part I or the corporate analysis in Part II.

Meanwhile, the plaintiff and the ICDs have made no effort to controvert the Episcopal Church Entities’ proof that:

- ! The ICDs’ argument that they serve a 1973 “corporation” is a *post hoc* fiction created by their counsel, ECE 2-13-08 Brief at 7-10;
- ! Senior Warden Harry McWilliams acknowledged to a bank trustee in 1987 that the Episcopal Parish and its 1923 Parish Corporation had not been involved in any “significant asset transfers” or any change in corporate structure from 1967 through 1976, id. at 7-8;
- ! The secessionists attempted to amend the 1974 bylaws for the 1923 Parish Corporation on the day they left the Episcopal Church, id. at 9;
- ! Plaintiff contended in its original complaint that it was the Episcopal Parish corporation from the 1870s that merged into the 1923 Parish Corporation, id. at 9;
- ! Plaintiff reinvented itself as the 1973 “corporation” to avoid references to the Episcopal Church and its Canon Law in the operative affidavit of incorporation for the 1923 Parish Corporation, id. at 10-12;
- ! The Episcopal Parish, Grace and St. Stephen’s, has been an Episcopal mission or parish since 1873, id. at 12-13;
- ! The Episcopal Parish was served, first, by an 1874 Parish Corporation and, from 1923 forward by the 1923 Parish Corporation, a corporation with a founding affidavit of incorporation drenched with connection to the Episcopal Church and Diocese and accession to their canon law, id. at 13-14; and
- ! There is and always has been but one vestry, and it directs both the Parish and its corporation, id. at 15-17.

B. The 1973 “Corporation” Is Not a § 501(c) Entity. Plaintiff and the ICDs contend that the 1973 “corporation” is a § 501(c) entity because it has an employer’s identification number (“EIN”). This argument is irrelevant and false. It is irrelevant because

501(c) status and possession of an EIN are not the same. *Compare* 26 U.S.C. § 501(c) *with* 26 U.S.C. § 6109(c). This argument is false because the 1973 “corporation” has no EIN. Father Armstrong effectively acknowledged this when, on July 18, 2007, he wrote the IRS, misrepresented that he led “Grace Episcopal Church,” and requested the IRS to change the employer name attached to this number--“Grace Episcopal Church”--to the name of the 1973 “corporation” he and his allies were trying to appropriate. Ex. BR.1. Grace Episcopal Church continues to use this EIN as it always has.

The secessionists also assert, through inadmissible legal opinion testimony from Father Armstrong, that the 1973 “corporation” has § 501(c)(3) status. The Internal Revenue Service requires churches to have members. Internal Revenue Manual § 7.26.22.4(4). It also requires a recognized creed, a form of worship, an ecclesiastical government, and numerous other features absent from the one page document filed in 1973 and absent from the *de jure* “corporation” that never organized. *See* ECE 2-13-08 Brief at 24. The secessionists effectively admit this is so because they never discuss the fourteen IRS criteria for a church.

Finally, the secessionists correctly but irrelevantly contend that churches automatically have § 501(c) status. This is why the Secessionist Congregation has such status. The Secessionist Congregation, however, is not the 1973 “corporation,” and the 1973 “corporation” is not a church. It is, at most a *de jure* corporation with no rector, clerk, wardens, officers, directors, or members.

C. The Individual Counterclaim Defendants’ Tortious Actions Are Not Within the Scope of their Official Functions or Duties as Directors or Officers. The ICDs could not

have acted within the scope of their duties as directors or officers of the 1973 “corporation” because they hold no such offices. *See* Parts I-III, *supra*. Against the written advice of their former legal counsel, Sub-exhibit C-1, the ICDs have taken Property of others, specifically the Episcopal Church Entities and the Episcopal Church. *See* Part IV, *supra*. They have taken the Parish’s name in violation of Colo. Rev. Stat. § 7-22-103 and the common law of trademarks, United States Bank of Grand Junction v. Mesa United Bank of Grand Junction Nat’l Assn., 595 P.2d 259 (Colo. App. 1978), and they have taken the Parish’s website and are seeking to appropriate its Employer Identification Number. Ex. BR.1

As March 26, 2007 began, Father Armstrong was a priest of the Episcopal Church under canonical inhibition for suspected embezzlement and the Wroblewski Vestry were vestry members of the Episcopal Parish and its 1923 Parish Corporation--Episcopalians all. The secessionists do not contest the well-established constitutional law that, by being members of the Episcopal Church, they had, *at the very least*, impliedly assented to the canon law of that church. ECE 2-13-08 Brief at 27, n.18. In addition this constitutionally-required implied consent, the Episcopal Church Entities provided the Court *fifteen documented instances* in which one or more secessionists or the Parish and Parish Corporation that they served *expressly* acceded to Episcopal Church canon law. *See* ECE 2-13-08 Brief at Appendix II and related exhibits. The secessionists’ Joint Response does not contest these express accessions to canon law. Father Armstrong’s and the Wroblewski Vestry’s duties, on the morning of March 26, 2007, were to the Episcopal Church and its constituent parts, including the duty not to take Episcopal Church property.

D. Willful and Wanton. The Episcopal Church Entities have provided the Court with legal authority indicating that an insurer acts willfully and wantonly when it fails to heed an internal memo advising that a considered course of action “may turn out to be a bad idea” or “could be viewed as bad faith by a court,” Coors v. Security Life of Denver Ins. Co., 112 P.3d 59, 66 (Colo. 2005), and that a driver acts willfully and wantonly when he fails to heed a warning from his passenger to slow down.” Steeves v. Smiley, 354 P.2d 1011, 1014 (Colo. 1960). The Joint Response does not discuss these precedents.

Instead, it paraphrases Colo. Rev. Stat. § 7-128-401(1)(c)¹⁰ as requiring “directors to act in what they believe is in the best interests of the nonprofit corporation . . .” The statute actually states that directors and officers shall discharge their duties:

- (a) In good faith;
- (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (c) In a manner the director or officer reasonably believes to be in the best interests of the nonprofit corporation.

This provision also states that directors and officers are entitled to rely upon information acquired from corporate legal counsel and from “religious authorities or ministers, priests, . . . or other persons . . . in a religious organization with which the nonprofit corporation is affiliated . . .” Id. § 7-128-401(2)(b) and (c).

¹⁰The secessionists mistakenly cite this provision as Colo. Rev. Stat. § 7-128-104. Joint Response at 15-16.

The secessionists did not act in good faith, with the care of ordinarily prudent persons, or in a manner that they *reasonably* believed were in the best interest of the Episcopal Parish and 1923 Parish Corporation they served. They rejected the advice of their legal counsel, and they did not consult with religious authorities. On that day, they tried to change the rules that bound them by “amending” the 1974 bylaws. *See* Exs. W at ¶¶ 23-26, BQ. This attempted amendment is a dramatic admission that they knew their conduct was wrongful and contrary to the bylaws that bound them.

Even if their illegal amendment of the bylaws had effect, the “amended” bylaws still stated that the Parish Corporation, the secessionists served as vestry members, was incorporated in 1923 and that the Parish Corporation was “subject to the General Canons of the National [Episcopal] Church and the Canons of the Diocese of the State of Colorado. Sub-exhibit C-5, ch. I.

It remains undisputed that most of these same vestry members confirmed on July 18, 2006, that they were acting “according to the Canons and Constitution of ECUSA.” ECE 2-13-08 Brief at 36, § 11, Ex. BN ¶ 1. It remains undisputed that just two months earlier, these Vestry members and Wardens assured the parishioners of Grace Episcopal Church that they would exercise their responsibility “[p]ursuant to Canon law.” ECE 2-13-08 Brief at 37, § 15; Ex. C ¶ 12, Sub-ex. C-2, ¶ 2. Plaintiff and the ICDs also do not contest that The Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (Colo. 1986) makes their actions illegal unless the Colorado Supreme Court overturns this decision. ECE 2-13-08 Brief at 30-31; Sub-ex. S-1.

The secessionists do not contest that they sought the legal advice of Derry Adams, Esq. They do not contest that she advised them in a written memorandum that their authority was

derived from the Constitution and Canons of the Episcopal Church and its Colorado Diocese; that the Parish was bound by those authorities; that the “property of Grace Church is owned by its nonprofit corporation, . . . subject to the trust imposed upon it by the national church;” and that such real and personal property was “held by the Parish in trust for the national church (ECUSA) and for the Diocese” ECE 2-13-08 Brief at 30; Sub-ex. C-1 at 5-6.

Acting contrary to these facts, their bylaws, and church law; contrary advice of respected legal counsel; contrary to over 100 years of custom and practice; without consulting with religious authorities; contrary to the canonical inhibition that barred Father Armstrong from returning to ministry; and contrary to Colorado precedent directly on point cannot constitute the care of an “ordinarily prudent person.” It cannot be “reasonable,” and it cannot constitute “good faith.” If disregarding a passenger telling a driver to slow down constitutes bad faith, leaving a church and taking its property is as well.

E. Compensation and Mr. Brown and Ms. Schaffer. The ICDs moved to dismiss claims against two employees of the Secessionist Congregation, Mr. Brown and Ms. Schaffer, under the director immunity statutes. ICD Motion to Dismiss 2. The Episcopal Church Entities responded that Mr. Brown and Ms. Schaffer received compensation and did not serve as directors and, therefore, were ineligible for the protections of the director immunity statutes. ECE 2-13-08 Brief at 5-6. The Secessionist do not contest this argument. Joint Reply at 13. Instead, they argue that employees “just following orders” cannot be liable for their master’s torts. The argument is not properly before the Court because it was not part of the ICD Motion to Dismiss. It is also refuted in ECE 2-14-08 Brief at ¶ 6.

VII.
**THE COURT MUST DENY FATHER ARMSTRONG’S MOTION TO DISMISS
BASED ON THE “JUST FOLLOWING ORDERS” DEFENSE
AND STRIKE THAT DEFENSE.**

Father Armstrong wants it both ways. In his motion to dismiss, he argues that claims against him should be dismissed both because he was an employee just following orders and also because he was an uncompensated director of a nonprofit corporation. *See* Armstrong Motion to Dismiss at 2. He provided an affidavit in support of this motion that contained testimony directly at odds with his previous affidavit. ECE 2-14-08 Brief at 4. This warrants Rule 11 sanctions.

In his Motion to Dismiss, Father Armstrong argued that claims against him should be dismissed because he was “a non-voting member of the church Vestry and congregation;” “[h]e neither has any authority or control over the physical Church property;” he is an “employee who serves at the discretion of the Vestry and is duty bound to obey [their] directives;” and he “took no part in the decision making of the Vestry” regarding post-secession “disposition of Church property and therefore . . . has no basis for liability.” Armstrong Motion to Dismiss at 2.

After the Episcopal Church Entities pointed out Father Armstrong’s prior contrary testimony and numerous examples where he led the charge toward secession, ECE 2-14-08 Brief at ¶¶ 7-8, the secessionists shifted their argument and now deny that Father Armstrong raised a defense that he was “just following orders.” Joint Response at 22. The rest of Father Armstrong’s argument is a muddle, *see id.* at 22-23, but appears to now re-assert a claim for director immunity. *Id.* at 23. He is not entitled to such statutory protection because he receives compensation and for the reasons set forth in Parts I-III, *supra*.

VIII.
THE COURT MUST DISMISS THE ABUSE OF PROCESS CLAIM
AND DROP BISHOP O'NEILL AS A PARTY.

A. The Individual Counterclaim Defendants Have Added Bishop O'Neill as a Third Party Defendant in Violation of the Rules. The ICD concede that they cannot add Bishop O'Neill as a third party defendant without leave of the court under Rule 14, the third-party practice rule. Joint Response at 18.

They contend that they properly added Bishop O'Neill as a third party defendant under Rule 20(a). The problem is that, while Rule 20(a) defines the circumstances when joinder is permitted, this rule does not abrogate the additional requirement of Rule 21 that court approval is required before adding parties. Unlike the Episcopal Church Entities' addition of the ICDs that occurred upon court order, the ICDs unilaterally added Bishop O'Neill as a new party. Rule 21 serves the salutary purpose of permitting a court to supervise the coming and going of parties in a case and, if observed here, would have permitted the Court to note that Bishop O'Neill could not, as a matter of law, be liable for abuse of process, and, therefore, should not be burdened with litigation due to the ICDs' pique.

B. There Is No Abuse of Process Because the Episcopal Church Entities Employed Process for Its Intended Purpose. One of the elements that the ICDs must establish for their abuse of process claim is that there was an improper use of process. James v. Moore & Associates Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367, 373 (Colo. App. 1994) *quoting* Institute for Professional Development v. Regis College, 536 F. Supp. 632, 635 (D. Colo. 1982).

If the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint there is no abuse, even if the plaintiff had an ulterior motive in bringing the action *or if he knowingly brought suit upon an unfounded claim. Further, while ulterior motive may be inferred from the wrongful use of process, the wrongful use may not be inferred from the motive.*

Id., 536 F. Supp. at 635 (emphasis added); ECE Motion to Dismiss Abuse of Process Claim, 7.

The ICDs do not contest that the Episcopal Church Entities used process for the legitimate function of seeking redress for damages. *See* Joint Response at 19. The ICDs argue, instead, that wrongful motive is the primary element as to whether abuse of process is alleged. There are two problems with this argument. First, it is non-responsive to the fact that, as a matter of law, there can be no abuse of process in the filing of the Second Amended Complaint in Intervention because this is a legitimate use of process. Second, the ICDs' authorities do not support their argument. The ICDs, for example, cite American Guarantee & Liability Ins. Co. v. King, 97 P.3d 161 (Colo. App. 2003). King, however, states:

[A] claim for abuse of process requires proof of, among other things, an ulterior purpose for the use of a judicial proceeding **and willful action in the use of that process which is not proper** in the regular course of the proceedings.

Id. at 170 (emphasis added). Patent improper use of process is a necessary element for abuse of process as, for example, when a defendant files a lawsuit in a court that clearly had no jurisdiction over the plaintiff. Lauren Corp., 953 P.2d 200 (Colo. App. 1998). Because the element of illegitimate use of process is, as a matter of law, not present here, the Court must dismiss the abuse of process claim.

C. **The Abuse of Process Claim Violates Protect Our Mountain Environment, Inc. v. Dist. Ct., 677 P.2d 1361 (Colo. 1984), the First Amendment Right to Redress**

Grievances, and Similar Colorado Constitutional Protections. Because of the importance of the First Amendment right to redress grievances through filing suit and the potential for sharp tactics by those alleging abuse of process counterclaims, the Colorado Supreme Court has shifted the burden to the suing party alleging such claims and has required them “to make a sufficient showing to permit the court to reasonably conclude that the defendant’s petitioning activities were not immunized from liability under the First Amendment” P.O.M.E., 677 P.2d at 1368-69. P.O.M.E. requires the ICDs to establish each of the three factors discussed below.

1. The ICDs Have Not Shown That the Second Amended Complaint in Intervention “Lacks Any Cognizable Basis in Law.” As the Court certainly knows by now, there is an abundance of legal support for the Episcopal Church Entities’ claims, including the pillars of their case: The Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (Colo. 1986) and Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). In their Joint Response, the ICDs chose not to contest the adequacy of the Second Amended Complaint in Intervention’s legal support.

2. The ICDs Have Not Shown That The Second Amended Complaint in Intervention Is “Devoid of Reasonable Factual Support.” The Episcopal Church Entities attached to their motion a twenty page chart comparing the facts in Mote with undisputed evidence related to Grace Episcopal Church. *See* ECE Motion to Dismiss Abuse of Process Claim, 13, and its Ex. A. This chart provided scores of citations to exhibits in the record, and identified forty-one noncontrorverted facts that are not only closely analogous to those in Mote, but provide an even

more compelling justification for the Court to find against all the counterclaim defendants here.

The ICDs chose not to discuss this evidence. Joint Response at 20.

Instead, they argue that the Diocese effectively acquiesced to “notice” that the Parish has a canonically insufficient 1973 “corporation.” This is a patently false argument. *See* Exs. Z and AA and Parts I-III, *supra*. They also argue, contrary to undisputed evidence in Part IV, *supra*, that legal title for the disputed real Property cannot be in the 1923 Parish Corporation because it “had to be reinstated.” Joint Response at 20. Reinstatement means revival. It is not a failing, but a cure. As previously explained, Colorado law provides a method for a corporation formed under the Religious, Education, and Benevolent Societies Act at Colorado Compiled Laws ch. XIII §§ 2384-2399 (1921) to be reinstated if defunct, Colo. Rev. Stat. § 7-20-105(7)(1973), and retroactively reinstated and revived if dissolved, *id.* at §§ 7-90-1001 (2007), § 7-90-1005 (2007). *See generally* ECE 2-27-08 Brief at 13-18.

3. The ICDs Have Not Shown That The Episcopal Church Entities’ Primary Purpose Is Improper. There is nothing improper, when another takes your Property, to seek its return through judicial processes.

D. The ICDs Admit That They Have Not Alleged a Claim of Extortion. *See* Joint Response at 20.

IX.
**THE COURT SHOULD STRIKE INADMISSIBLE PORTIONS OF
THE INDIVIDUAL COUNTERCLAIM DEFENDANTS' AFFIDAVITS.**

The ICDs Joint Response is founded, in part, upon inadmissible evidence. The Court should strike from Exhibit 3 to the Joint Response (the affidavit of Drs. Jones and Edwards, Mrs. McCullough, and Messrs. Paulson and Vandezande) the following paragraphs:

Paragraphs 3, 5, and 6 because, contrary to C.R.E. 602, these paragraphs state the intentions of the “incorporators” (Fathers Hewitt, Thompson, and Fields) and of Frear Simons and the affiants have no personal knowledge and fail to establish any basis for personal knowledge of these statements.

Paragraphs 3, 8, and 9 because they state legal opinions as to whether the 1973 “corporation” was defunct, as to whether a meeting of members compliant with the 1973 Corporation Code occurred as explained in Part II, *supra*, and as to whether the 1973 “corporation” was in good standing, and these witness are not qualified to render such an opinion and such opinions are inadmissible. Quintana v. City of Westminster, 8 P.3d 527 (Colo. App. 2000).

Paragraph 4 for failure to keep and provide the required minutes related to this statement as required in Colo. Rev. Stat. § 7-24-109 (1973).

The Court should strike from Exhibit 2 to the Joint Response (affidavit of Father Armstrong) the following paragraphs:

Paragraph 7 because it is a hearsay statement regarding an alleged declaration by the IRS.

Paragraph 11 because it constitutes a legal opinion as to whether the 1973 “corporation” had any personnel to act on its behalf and whether that “corporation” had organized itself

CONCLUSION

While the secessionists may have meant their motions to further delay the Court’s consideration of the substantive issues in this case, they actually present the opportunity for the Court to begin to recognize which parties are proper, to narrow the issues in this case, and to

enter partial summary judgment on matters that the Court can now decide as a matter of law.

Based on the arguments presented in this brief and the briefs listed in Appendix I, the Episcopal Church Entities and Bishop O’Neill respectfully request that the Court:

1. Deny the Individual Defendants’ Motion to Dismiss;
2. Deny Father Armstrong’s Motion to Quash Service of Process;
3. Deny Rev. Donald Armstrong, III’s Motion to Dismiss Counterclaim and Third-Party Complaint;
4. Dismiss the Abuse of Process Counterclaims and to Drop Bishop O’Neill as a Party (*see* Part IX, *supra*);
5. Grant partial summary judgment, under the First Amendment Doctrine of Judicial Deference to Hierarchical Ecclesiastical Authority as required by Levitt v. Calvary Temple of Denver, 33 P.3d 1227, 1230 (Colo. App. 2001) and Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) declaring that the Wroblewski Vestry and its successors do not serve as directors or in any other office of the 1973 Parish “corporation;” Father Armstrong does not serve as its rector; Jon Wroblewski and Chad Friese do not serve as its Wardens; Dareleen Schaffer does not serve as its Treasurer; and Susan Spencer does not serve as its Clerk (*see* Part I, *supra*);
6. Grant partial summary judgment, consistent with Colo. Rev. Stat. §§ 7-23-101(1), 7-20-102(9) (1973), declaring that the 1973 “corporation” has no members (*see* Parts II(A) and V(A), *supra*);
7. Grant partial summary judgment, consistent with Colo. Rev. Stat. §§ 7-23-101(1), 7-20-102(9), 7-124-101(3), 7-123-104(1) (1973), declaring that no directors succeeded the directors named in the 1973 “articles” (*see* Parts II(B) and V(A), *supra*);
8. Grant partial summary judgment, consistent with Colo. Rev. Stat. § 7-124-107(1) (1973), declaring that the 1973 “corporation” has no officers (*see* Parts II(C) and V(A), *supra*);
9. Grant partial summary judgment, consistent with Colo. Rev. Stat. § 7-124-107(3) (1973) declaring that the 1973 “corporation” has no wardens, rector, or clerk (*see* Parts II(D) and V(A), *supra*);

10. Grant partial summary judgment declaring that the Secessionist congregation is not the 1973 “corporation,” (*see* Parts I II, and V(A), *supra*);
11. Grant partial summary judgment declaring that the 1973 “corporation” and the Secessionist Congregation are not beneficiaries of the Taylor, Carpenter, Gates, Carlton, Koch, Giddings, Bowton, and Smith Trusts; that the 1973 “corporation” and the Secessionist Congregation have no lawful claim upon the property held in those trusts; and that the beneficiaries of those trusts are either the Episcopal Parish, its 1923 Parish Corporation, or, in the case of the Smith Trust, qualified members of those Episcopal entities according to the terms of the Smith Trust, or, in the case of the Bowton Trust, qualified persons according to the terms of the Bowton Trust;
12. Grant partial summary judgment declaring that the 1923 Parish Corporation (and not the alleged 1973 “corporation”) holds legal title to the Property (*see* Part IV(A), *supra*);
13. Grant partial summary judgment, consistent with Colo. Rev. Stat. § 7-30-101 *et seq.*, declaring that the Secessionist Congregation is an unincorporated nonprofit association that formed on March 26, 2007 (*see* Parts I-III, V, *supra*); and
14. Strike inadmissible evidence as identified in Part IX, *supra*.

Respectfully submitted,

ROTHGERBER JOHNSON & LYONS LLP

/s/

L. Martin Nussbaum Atty. Reg. # 15370
Attorneys for the Episcopal Church Entities

CERTIFICATE OF SERVICE AND MAILING

On March 26, 2008, I served, via LexisNexis File & Serve, a copy of the foregoing to:

J. Gregory Walta
J. Gregory Walta, P.C.
105 E. Moreno Avenue, Suite 101
Colorado Springs, CO 80903

Bruce M. Wright
Flynn, Wright & Fredman LLC
111 South Tejon Street, Suite 202
Colorado Springs, CO 80903-2246

Dennis W. Hartley
Law Office of Dennis W. Hartley, P.C.
1749 S. Eighth Street, Suite 5
Colorado Springs, CO 80906

Brent E. Rychener
Holme Roberts & Owen LLP
90 South Cascade Avenue, Suite 1300
Colorado Springs, CO 80903

On March 26, 2008, I mailed a copy of the foregoing to:

Chad Friese, Junior Warden
Grace Church & St. Stephen's,
a Colorado unincorporated nonprofit association
c/o Argent Company
511 N. Tejon, Suite 100
Colorado Springs, CO 80903

Adam Chud
Goodwin Proctor
901 New York Avenue NW
Washington, D.C. 20001

/s/

Karen Lutterschmidt

APPENDIX I
MOTIONS AND BRIEFS BEFORE THE COURT

1-21-08	Wright for ICD's (other than Armstrong)	Individual Defendants' Motion to Dismiss, Counterclaim, and Third Party Complaint (arguing statutory director immunity)	ICD Motion to Dismiss
2-13-08	Nussbaum for ECE	Episcopal Church Entities' Response in Opposition to Individual Counterclaim Defendants' Motion to Dismiss & Episcopal Church Entities' Cross Motion for Partial Summary Judgment to Strike Individual Counterclaim Defendants' Director Immunity Defense	ECE 2-13-08 Brief
2-8-08	Hartley for Armstrong	Motion to Quash Service of Process	Quash Motion
2-27-08	Nussbaum for ECE	Episcopal Church Entities' Response in Opposition to Motion to Quash Service of Process & Episcopal Church Entities' Motion for Partial Summary Judgment Regarding Secessionist Congregation's Civil Status as an Unincorporated Association	ECE 2-27-08 Brief
1-22-08	Hartley for Armstrong	Rev. Donald Armstrong, III's Motion to Dismiss Counterclaim and Third-Party Complaint (arguing "just following orders" defense)	Armstrong Motion to Dismiss
2-14-08	Nussbaum for ECE	Episcopal Church Entities' Response in Opposition to Father Armstrong's Motion to Dismiss & Episcopal Church Entities' Cross Motion for Partial Summary Judgment to Strike Father Armstrong's Affirmative Defenses	ECE 2-14-08 Brief
2-13-08	Nussbaum for O'Neill and Diocesan Corporation	Bishop O'Neill's and the Diocese of Colorado in the Episcopal Church's Motion to Dismiss Abuse of Process Claim and to Drop Bishop O'Neill as a Party	ECE Motion to Dismiss Abuse of Process Claim
3-10-08	Walta for Plaintiff, Wright for ICDs, Hartley for Armstrong	Joint Response of Grace Church and Individual Defendants to Pending Motions	Joint Response

3-26-08	Nussbaum for O'Neill & Episcopal Church Entities	Episcopal Church Entities' Reply Related to Their Motions for Partial Summary Judgment, Their Motions to Dismiss the Abuse of Process Counterclaims, The Individual Counterclaim Defendants' Motions to Dismiss, and Father Armstrong's Motion to Quash	ECE Joint Reply
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APPENDIX II TERMINOLOGY

The Episcopal Church Entities use terminology in court filings as follows:

Plaintiff or Secessionist Congregation refer to the plaintiff and the third party defendant (*both as “corporation” and as association*). *The plaintiff contends that it is a 1973 Colorado nonprofit “corporation” called Grace Church & St. Stephen’s.*

Counterclaim Defendants refers to the plaintiff plus Rev. Donald Armstrong III; Charles C. Brown; Dareleen Schaffer; Jon Wroblewski; Marge Goss; Craig Whitney; Robert C. Balink; Chad Friese; Michael Barber; Keith Stampher; Jason Huntley; Emily Kline; Rip Hollister; Jack Gloriod; Edwin J. Montgomery, Jr.; Kevin Dibble; Susan Spencer; Alan Crippen II; St. Stephen’s Classical Academy, a Colorado nonprofit corporation; and Grace Church & St. Stephen’s, a Colorado unincorporated nonprofit association. *When we use the term, Counterclaim Defendants, we do not intend to include Bishop O’Neill, even though he is called a counterclaim defendant by Bruce Wright’s clients.*

Defendant or Diocesan Corporation refers to the defendant and counterclaimant. The Defendant’s legal name is The Bishop and Diocese of Colorado. The Defendant is a corporation under Colorado law. It is the corporate entity for the Diocese of Colorado in the Episcopal Church.

Diocese refers to the ecclesiastical entity properly known as the Diocese of Colorado in the Episcopal Church.

Diocese of Colorado refers jointly to the Diocese and the Diocesan Corporation.

Parish or Episcopal Parish refers to the ecclesiastical entity established by the Diocese. It is the Episcopal Church parish served by the Parish Corporation. The Parish, at various times, has held itself out as Colorado Springs Episcopal Church, Grace Church, Grace Church at Colorado Springs, Grace Episcopal Church, Grace Church and St. Stephen’s, and Grace and St. Stephen’s Episcopal Church. The Parish is an intervenor and third party plaintiff.

Parish Corporation or 1923 Parish Corporation refers to the corporation serving the Parish. The Parish incorporated it in 1923 by recording an affidavit of incorporation. Its proper name is Grace Church and St. Stephen’s. The McJimsey Vestry and its successors direct the Parish Corporation. The McJimsey Vestry intervened as a third party plaintiff in the name of the Parish Corporation. The Wroblewski Vestry that originally filed this lawsuit in the name of the Parish Corporation later took the position that it led a parish “corporation” formed by filing “articles of incorporation” with the Colorado Secretary of State in 1973.

Grace Episcopal Church refers jointly to the Parish and the Parish Corporation.

Episcopal Church Entities refers jointly to the Diocese, the Diocesan Corporation, the Parish, and the Parish Corporation.

Episcopal Church refers to a Christian denomination with the proper name. The Protestant Episcopal Church in the United States of America. After February 2, 2008, the Episcopal Church became a defendant and counterclaimant.

Property refers to the real property described in Counterclaim Appendix A. It also includes various bank and financial accounts and a variety of personal property held in the name of or for the Parish or Parish Corporation. It includes the Parish website www.graceandststephens.org and its employer identification number. It includes all property that was in the possession of the Parish on or before March 26, 2007, the day the secessionists wrongfully took possession of much of such property. It also includes the legal or equitable interests in or has rights with respect to numerous trusts, trust accounts, restricted funds, and foundations that name or relate to the Parish or Parish Corporation. When the Parish or Parish Corporation hold legal title to property, they hold it *in trust* for the Episcopal Diocese of Colorado and the Episcopal Church.

McJimsey Vestry refers to the Grace Episcopal Church vestry. As of April 11, 2007, this vestry included Robert McJimsey, Timothy Fuller, David Watts, Clelia deMoraes, Amy Duell, and Helen Hazelton. As of October 22, 2007, this vestry includes Father Michael O'Donnell as priest in charge, Clelia deMoraes as Senior Warden, Timothy Fuller, David Watts, Amy Duell, Helen Hazelton, Dr. John Huff, Ed Brown, Susan Stoner, and Dr. John Hill.

Wroblewski Vestry refers to the vestry of the congregation occupying the Parish property. It is affiliated with the Anglican Church of Nigeria and its American mission known as Convocation of Anglicans in North America ("CANAN"). As of the day of the secession vote, the Wroblewski Vestry included Father Donald Armstrong, Jon Wroblewski as Senior Warden, Chad Friese as Junior Warden, Robert Balink, Dr. Michael Barber, Jack Gloriod, Dr. Rip Hollister, Jason Huntley, Emily Kline, Dr. Keith Stampher, and Craig Whitney. Since then, it is believed, that Dr. Stampher has resigned from the Wroblewski Vestry and Ed Montgomery, Kevin Dibble, and Gib Weiskopf have joined the Wroblewski Vestry. This vestry does not claim to be the vestry for the Episcopal Parish or the 1923 Parish Corporation. It claims it is the vestry only for the 1973 parish "corporation."