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; *et al.* **Additional Counterclaim Defendant:** RT. REV. ROBERT J. O'NEILL.	• COURT USE ONLY • Case No. 2007CV1971 Div.: COM5
Attorneys for Defendant and Counterclaimants: L. Martin Nussbaum, Atty. Reg. #15370 ROTHGERBER JOHNSON & LYONS LLP 90 South Cascade Avenue, Suite 1100 Colorado Springs, CO 80903 Phone No.: (719) 386-3000 Fax No.: (719) 386-3070 E-mail: mnussbaum@rothgerber.com	

CORRECTED TRIAL BRIEF FOR THE COLORADO EPISCOPAL CHURCH ENTITIES (Commercial Docket)

[NB: This Corrected Trial Brief corrects the typographical errors which were found after the original Trial Brief was filed on January 15, 2009.]

I.
INTRODUCTION; STATEMENT OF FACTS; DESCRIPTION OF DISPUTED PROPERTY; AND IDENTITY OF ECCLESIASTICAL OFFICE HOLDERS

A. Introduction and Statement of Facts. Can a faction leave the Episcopal Church, and take its property? Can a group of Episcopal Church parish leaders leave the Episcopal Church yet retain their authority to the parish corporation? The answer to these questions is no.

While this case involves the 135 year history of an Episcopal Church parish and, therefore, substantial evidence, the Court will see that the controlling law is settled, and the relevant facts are not in dispute. The congregation, originally called, Grace Church, was organized as an Episcopal Church mission in 1873 and was established as a parish by 1874 with its own parish corporation, Grace Episcopal Church of Colorado Springs, incorporated that same year. It was incorporated under the territorial laws by recording a certificate of incorporation in the El Paso County property records.

In 1923, another Episcopal Church parish, St. Stephen's, merged into the first parish and the combined parish was called Grace and St. Stephen's Episcopal Church (and a variety of other similar names). It formed a new parish corporation under the name Grace Church and St. Stephen's. It, too, was incorporated under a now archaic law by recording an affidavit of incorporation in the property records. The parish and this 1923 corporation continue in good

standing with the Diocese and the Colorado Secretary of State to this day. The 1923 parish corporation holds legal title to the disputed property.

In 1987, the parish engaged the Rev. Donald Armstrong as its rector. For many years before the events of secession, Father Armstrong was a critic of the Episcopal Church. He taught that faithful Episcopalians are called to stay within this church and work for its reform. This changed on December 27, 2006, when the Rt. Rev. Robert O'Neill, Bishop of Colorado, placed Father Armstrong under canonical inhibition as the beginning of a church disciplinary process that led to an ecclesiastical investigation, an ecclesiastical trial and conviction, and to Father Armstrong's deposition from priesthood.

Immediately after being placed under inhibition, Father Armstrong and his closest allies developed a plan to leave the Episcopal Church, to take its property including the name and corporate identity of the parish, and to align their new congregation with the Convocation of Anglicans in North America. On March 15, 2007, Father Armstrong and those allied with him on the vestry secretly finalized their plan. They publicly enacted it on March 26. This split the congregation with half following Father Armstrong and locking out the other half who remained loyal to the Episcopal Church. Around 500 parishioners remained loyal to their 135 year old Episcopal parish. They now worship in exile at the First Christian Church and long to be restored to their church home.

B. The Disputed Property. The disputed property is not just the real estate (the church, school, choir house, office or McWilliams house, and rectory). It includes the financial assets and bank and brokerage accounts, vestments, books, furnishings, and other real property.

It also includes the parish's name and corporate identity,[1] its intellectual property, its domain name (www.graceandststephens.org), and its federal employer identification number. Finally, it includes the beneficial interest of a number of special charitable trusts created by declaration and testamentary gifts.

C. Identity of Ecclesiastical Office Holders. After the events of secession, Episcopal Church loyalist and vestry member, Robert McJimsey, reconstituted the vestry to fill those positions abandoned by the former members. This vestry and its successors is called the "McJimsey Vestry." Jon Wroblewski led the vestry members who left the Episcopal Church. He became the senior warden of the vestry for the new CANA parish, called the "Wroblewski Vestry." Bishop O'Neill recognizes the McJimsey Vestry and not the Wroblewski Vestry.

II.
ANALYTICAL GRID

The Colorado Episcopal Church Entities recommends this five question "decision tree" as a framework for the Court's analysis:

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[1] **Common Law Trade Name.** The common law right against unfair competition from deceptively similar trade names entitles the Grace and St. Stephen's Episcopal Church and its 1923 parish corporation, Grace Church and St. Stephen's, to an injunction against plaintiff's use of "Grace Church and St. Stephen's" and similar iterations that are deceptively similar, trade names. *See generally* Gregg Homes, Inc. v. Gregg & Co. Builders, Inc., 978 P.2d 146, 147 (Colo. App. 1998) (describing common law elements). The Episcopal parish and its corporations have used its trade name in Colorado Springs for more than 135 years--easily establishing protected status for its trade name. *See* United States Bank of Grand Junction v. Mesa United Bank of Grand Junction National Association, 595 P.2d 259, 261 (Colo. App. 1979) (discussing bank use of name for 50 years). Plaintiff's appropriation of an identical trade name is unfair because "the public is likely to be deceived by its use." Gregg Homes, Inc., 978 P.2d at 147. Accordingly, plaintiff must be enjoined from further unfair use of the Episcopal parish's protected name.

First Question:	**Under *Mote*, Is the Beneficial Interest in the Property in the Episcopal Church and the Diocese?**
Second Question:	**Does the 1929 Instrument of Donation Restrict the Property to the Benefit of the Diocese and the Church?**
Third Question:	**Under *Jones v. Wolf*, Does the Dennis Canon Ensure That the Beneficial Interest Is in the Episcopal Church and the Diocese?**
Fourth Question:	**Has Bishop O'Neill, as an Official Within a Hierarchical Church, Determined the Identity of the Leaders of the Parish Corporation?**
Fifth Question:	**Who Are the Beneficiaries of the Special Trusts?**

III.
LEGAL ANALYSIS

First Question
UNDER *MOTE*, IS THE BENEFICIAL INTEREST IN THE PROPERTY IN THE EPISCOPAL CHURCH AND THE DIOCESE?

A. *Mote* Establishes That Episcopal Parishes and Their Corporations Hold Legal Title to Property in Trust for the Diocese and the Episcopal Church. This Court's decision is controlled by The Bishop and Diocese of Colorado v. Mote, 716 P.2d 85 (Colo. 1986), a Colorado Supreme Court decision directly on point. Mote holds that, when a faction of an Episcopal parish leaves the Episcopal Church and attaches to another Anglican group, the property stays with the Episcopal entities because it is held in trust for the general church. Id. at 110. Mote stands squarely among numerous other published decisions reaching the same conclusion, including decisions from the highest courts in New York, Pennsylvania, Connecticut, New Jersey, and Nevada, along with the recent decision by the California Supreme Court.[2]

[2] *See* Episcopal Church Cases, - - - Cal. Rptr. 3d - - -, 2009 WL 18700, *1 (Cal. Jan. 5, 2009) ("Applying the neutral principles of law approach, we conclude that the general church, not

Scope of Relevant Evidence Under Neutral Principles Analysis. Mote adopted the neutral principles methodology articulated in Jones v. Wolf, 443 U.S. 595 (1979) for resolving secessionist church property disputes. Mote, 716 P.2d at 96. Under this methodology, the court does not "narrowly restrict[] the scope of permissible inquiry,"[3] and it does not limit itself to "a search for explicit trust language." Id. at 100. "[T]he intent to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties," id., **and from "the examination of church documents, *i.e.,* the constitution and canons of the local and general church."** Id. at 101 (citing Jones v. Wolf, 443 U.S. at 600-01) (emphasis added). Indeed, the primary difference between the Colorado Supreme Court decision in Mote

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the local church, owns the property in question."); Episcopal Diocese of Rochester v. Harnish, - - - N.E. 2d - - -, 2008 WL 4657796, *6-*7 (N.Y. 2008) ("We conclude that the Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church."); In re Church of St. James the Less, 888 A.2d 795, 809–10 (Pa. 2005) (same); Rector, Wardens v. Episcopal Church, 620 A.2d 1280, 1293 (Conn. 1993) (same); *and* Episcopal Church Cases, 2009 WL 18700 at *16 (collecting cases awarding disputed property to the general church). The highest court of two additional states have found for the general Episcopal Church under a deference approach. Protestant Episcopal Church v. Graves, 417 A.2d 19 (N.J. 1980); Tea v. Protestant Episcopal Church in Diocese of Nevada, 610 P.2d 182 (Nev. 1980).

Plaintiff previously trumpeted Protestant Episcopal Church in the Diocese of Los Angeles v. Barker, 115 Cal.App.3d 599 (1981) a case rejected first by Mote, 716 P.2d at 109, n.17, and more recently distinguished and rejected by the California Supreme Court. Episcopal Church Cases, 2009 WL 18700 at *15. Now it trumpets an unpublished Virginia trial court decision based upon a particular Virginia statute with no analogue in Colorado.

[3]**Inadmissibility of Evidence Related to Departure from Doctrine or to Canonical Legislative History.** While the evidence relevant in neutral principles analysis is broad, it is not without limit. Civil courts may not consider evidence regarding which faction follows traditional doctrine, Jones v. Wolf, 443 U.S. 595, 602 (1979), Mote, 716 P.2d at 93; and they may not consider evidence as to whether a denomination properly enacted a particular canon. Episcopal Church Cases, 2009WL18700 at *16 (Cal. Jan. 5, 2009) (rejecting former members' argument that the Episcopal Church improperly enacted the Dennis Canon by reasoning that proper legislative procedure is "one of those questions regarding 'religious doctrine or polity' . . . on which we must defer to the greater church's resolution").

and the Court of Appeals decision it reversed is that the Colorado Supreme Court devoted four pages to the discussion of numerous national and Colorado property canons. Id. at 105-08. The Episcopal Church Side will show that the very canons identified in Mote as giving rise to a trust relationship are identical to those canons present in 2007[4] (when the former members seceded), and in 1973 (when the former members hypothesize that the real property migrated from the 1923 parish corporation to the alleged 1973 entity). Trial Summary Ex. 3. The Episcopal Church Side will show that the evidence relevant under neutral principles analysis is substantially more compelling here than it was in *Mote* because this case includes evidence of the 1929 Instrument of Donation, the 1979 adoption of the Dennis Canon, over twenty instances of parish leaders acceding canon law and affirming that it provides the operative law for the parish, its corporation, and its leaders, along with other evidence. *See* Trial Summary Ex. A.

B. It Is Irrelevant Whether the Parish Formed a 1973 Corporation. Plaintiff initially alleged that it was the 1873 [sic] parish corporation. Complaint at ¶ 1. It was not until July 31, 2007, that plaintiff announced its revisionist parish history, denied the existence of canonical parishes,[5] and contended that the parish corporation had "declared its independence" from the Episcopal Church as part of its 1973 centennial celebration by forming a new parish corporation with "articles" omitting reference to the Episcopal Church and accession to canon

[4]There is one additional canon enacted after Mote commenced, the Dennis Canon enacted in 1979, and discussed on page 20, *infra*. *See* Mote, 716 P.2d at 105, n.15. The adoption of the Dennis Canon is one of the new facts in the instant case that further strengthens the position of the Episcopal Church Side.

[5]Curiously, plaintiff does not deny the existence of The Episcopal Church, an entity defined exclusively through its constitution and canons that the civil law treats like an association.

law.[6] The two living Episcopal priests named as "incorporators" deny any intention to form a new corporation or to plan an exit from the Episcopal Church. There was no centennial celebration in 1973, and there is no contemporary evidence supporting plaintiff's "1973 declaration of independence" narrative. Furthermore, if the parish acquired "independence" in 1973, there would be no need to declare it anew in 2007.

Parishioners and Their Entities Are Subject to Canon Law Regardless Whether There Is a Parish Corporation and Regardless Whether That Corporation Accedes to Canon Law. Plaintiff[7] believes its theory helps prove that the parish corporation was released from canonical strictures because its so-called articles contain no accession clause. This argument not only lacks evidentiary and legal bases, it is also irrelevant because: (1) the parish and its corporation were, at all times, an entity of the Episcopal Church and, therefore, subject to its rules**;** (2) it s a matter of First Amendment doctrine that “[a]ll who united themselves to [a church body] do so with an implied consent to this government, and are bound to submit to it," Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 11-154 (1952), and this doctrine does not depend upon an accession provision in an ecclesiastical entity's organizing document; and (3) the parish, its corporation, and their leaders repeatedly acceded to canon law or affirmed that they were bound by canon law from 1873 through March 26, 2007, the very day the former members formally seceded, *see* Trial Summary Ex. 2.

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[6]These "articles" also omit reference to a parish, parishioners, members, a rector, a vestry, and wardens. They also omit provisions for § 501(c)(3) status in the 1973 Internal Revenue Code.

[7]Unless indicated otherwise, references to "plaintiff" include all those persons and entities on plaintiff's side.

C. The 1973 "Articles of Incorporation" Do Not Alter *Mote*'s Result. The 1973 parish corporation argument does not commend a different result than in Mote for other reasons.

1. The 1923 Parish Corporation Is Not Dissolved. (a) *The legal effect of the 1973 filing was to reinstate the 1923 corporation that had become defunct but not dissolved.* The two living incorporators of the 1973 entity will testify that they had no intention of forming a new parish corporation, that they never organized such an entity, and that no property was conveyed to it. This raises an obvious question: what was the purpose of the 1973 filing? While no one has a clear memory regarding this filing, the only plausible explanation is that someone, other than parish legal counsel, filed the wrong form intending to reinstate the corporation that had become defunct. The footnote added to the form states: "**Grace Church & St. Stephen's has been incorporated at least since 1929."** This statement, using the same name for the entity formed before 1929 and for the purported new corporation that the form was supposed to create, makes clear that there was no intent to form a new parish corporation but rather that there was an intention to put the Secretary of State on notice of the 1923 corporation. Therefore, as it turns out, the form entitled "Articles of Incorporation" was the wrong form. This form did, however, contain the right information to effect reinstatement as explained in Appendix I.

(b) If the 1923 corporation dissolved in 1977, it was retroactively reinstated in 2007. Colo. Rev. Stat. § 7-90-1005 (2007). Plaintiff contends that the 1973 filing did not effect the reinstatement of the parish corporation, and that the corporation dissolved, without notice, by force of law on January 1, 1977. Colo. Rev. Stat. § 7-20-105(8). The parish and its leaders, however, continued to operate the parish and its corporation for thirty years after 1977, just as they had for the 104 years before 1977. Even if plaintiff is correct about this, Colorado law

permits the reinstatement of such a dissolved entity, by filing articles of reinstatement. Id. at § 7-90-1003. On October 18, 2007, the vestry filed articles of reinstatement complying with this statute. Colorado law also provides that "upon reinstatement, the existence of the entity shall be deemed for all purposes to have continued without interruption; the entity resumes carrying on its business or conducting its activities as if dissolution had never occurred." Id. § 7-90-1005.

2. Those Purportedly Forming and Organizing the 1973 "Corporation" Had No Authority to Do So. In its Order re: Motions Argued at May 2 Hearing (entered May 13, 2008) at p. 2, ¶ 3, this Court noted that the parties had not addressed whether the parish corporation "by 'acceding' to the general church in 1923 agreed that it would not form a new corporation or allow the old one to lapse, without consent of the Bishop." The Court is correct to raise this issue. The relevant canons state:

> Any person accepting any office in this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised. National Canon I.17.2.
>
> The articles of incorporation of each parish shall accede to the Constitution and Canons for the Government of the Episcopal Church and to these canons and the constitution of this diocese and shall be approved by the Ecclesiastical Authority and by the chancellor or a vice-chancellor. Colorado Canon 14.1.
>
> No parish shall amend its articles of incorporation without the prior written consent of the Ecclesiastical Authority and of the chancellor or a vice-chancellor of this diocese. Id. at 14.2.

The three priests in the parish in 1973--Father Hewitt, Anderson, and Fields--executed the 1973 "articles" as purported "incorporators." According to the plaintiff's revisionist history, the vestry of the parish and of the 1923 parish corporation who held office in 1973 thereafter assumed office as the "board of directors" for the alleged new parish corporation. These purported acts by

Episcopal priests and an Episcopal parish vestry of "forming" and "organizing" an alleged new parish corporation without diocesan approval and with articles that had no accession clause were beyond the power of these office holders. Thus, just as the Mote court gave no effect to the pre-secession amendment of articles without diocesan approval in that case, 716 P.2d at 89, this court should give no effect to the purported creation of a 1973 "corporation" that plaintiff contends is its lifeboat to CANA here.

3. The Alleged 1973 Parish Corporation Never Organized or Acquired Ability to Act. Plaintiff's revisionist history is a *post hoc* fiction with massive factual and legal gaps. Those identified as "incorporators" had no intention to form a new corporation. There are no vestry minutes reflecting any discussion about forming a new corporation. There was no organizing meeting, and no bylaws were adopted.[8] While directors were named in the "articles," there is no evidence that they were informed of a new corporation and accepted their appointment. No directors, vestry members, officers, wardens, treasurer, or clerk were elected. Indeed, the 1973 "articles" contains no mention of wardens, officers, a rector, or, for that matter, members or parishioners.

The alleged creation of a new 1973 nonprofit corporation violated nine provisions of the 1973 Nonprofit Corporation Code, including the requirements for: (1) adoption of bylaws, Colo. Rev. Stat. § 7-23-102 (1973); (2) holding an organizational meeting "for the purpose of adopting bylaws [and] electing officers," id. at § 7-21-105(1); (3) providing, in the articles or bylaws, for

[8]Despite repeated requests for production of the bylaws, plaintiff repeatedly failed to identify any bylaws even though it knew that the parish had used a set of 1974 bylaws for years. It was only immediately before the May 2008 summary judgment argument that plaintiff finally took the position that the 1974 bylaws were the bylaws for the 1973 corporation. This position is not defensible. The 1974 bylaws state in their chapter I that they are bylaws for the 1923 parish corporation.

members, their manner of election, their qualifications, and their rights, id. at §§ 7-23-101(1) and 7-20-102(9); (4) abstaining from conducting annual membership meetings except at times as provided in the bylaws, id. at § 7-23-104(2); (5) abstaining from electing or appointing successor directors except as provided in the articles . . . or the bylaws, id. at § 7-24-101(3); (6) abstaining from having traditional corporate officers--president, vice president, secretary, and treasurer--except as prescribed in the articles or bylaws, id. at § 7-24-107(1); (7) abstaining from having special corporate officers--rector, wardens, and clerk--except as provided in the articles or bylaws, id. at § 7-24-107(3); (8) refraining from taking a "corporate name . . . the same as or deceptively similar to the name of any corporation," id. at § 7-22-103 (1973); and (9) failing to keep minutes of member, director, and committee meetings, id. at § 7-24-109.

Accordingly, even if the 1973 filing resulted in a *de jure* corporation, that corporation has no ability to act. There is a distinction between a corporation's *de jure* existence and its legal ability to act.

> 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.

8 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 4066 (2007) (emphasis added). The Colorado Court of Appeals similarly holds:

> 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.’

Aspen Water & Light Co. v. City of Aspen, 37 P. 728, 730-31 (Colo. App. 1894) (even though articles of incorporation were properly filed, "[t]he entity never was born, and hence the grant never took place [because] the company never had any legal president and never had any legal secretary").

4. Even If Fathers Hewitt and Thompson Organized the 1973 "Corporation" and That Entity Had Legal Ability to Act, It Owns No Property. *a. If the 1923 parish corporation dissolved and was never reinstated as plaintiff contends, then its property automatically reverted to the Diocese under canon law.* Plaintiff contends that the Episcopal parish was subsumed into the 1923 parish corporation and, when that corporation dissolved, the property leaped to the 1973 "corporation." If plaintiff's assumptions were correct, the property would not transfer to the 1973 "corporation," it would revert to the Diocese under Colorado Canon 18.2 that states:

> From the time of dissolution of a Parish, the title to all of its property, both real and personal, shall vest automatically and forthwith in the Diocesan Corporation known as The Bishop and Diocese of Colorado.

The Colorado Supreme Court discussed this provision, stating:

> [C]anons 18 and 21 . . . are obviously relevant . . . . Canon 18 provides for the dissolution of parishes. . . . Section 2 provides that upon dissolution "the title to all of its property, both real and personal, shall vest automatically and forthwith with the Diocesan Corporation known as The Bishop and Diocese of Colorado." . . . This canon . . . does establish that the property is not intended by the general church to leave the diocese and that the general church has the authority to implement that intention. The canon is sufficient, in concert with the other provisions, to demonstrate the irrevocable nature of the dedication of property by the local church corporation for the purpose of advancing the work of PECUSA.

Mote, 716 P.2d at 106-07.

b. *Alternatively, if the 1923 parish corporation dissolved, its property remained in that corporation.* The Colorado statute that plaintiff invokes regarding the alleged January 1, 1977 dissolution of the parish states: "**after dissolution, title to any corporate property not distributed or disposed of in the dissolution shall remain in the corporation**." Colo. Rev. Stat. § 7-26-120(2) (emphasis added). Plaintiff previously argued that the board of directors for the alleged 1973 entity "assumed" the 1923 corporation's property. This statute bars such an "assumption" of property.

c. *The 1923 parish corporation never transferred its property.* The Colorado Statute of Frauds establishes that real property does not transfer "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); Colo. Rev. Stat. § 59-1-6 (1963).

If the 1923 corporation dissolved, the property either reverted to the Diocese under Colorado Canon 18 or it remained with the 1923 corporation and did not transfer to the 1973 "corporation."

5. <u>If Legal Title Somehow Passed from the 1923 Corporation to the 1973 "Corporation," It Passed Subject to the Pre-Existing Beneficial Interests Owned by the Diocese and National Church</u>. The alleged gratuitous transfer of property from the 1923 parish corporation to the alleged 1973 "corporation" does not destroy the beneficial interest in favor of the Diocese and the Episcopal Church that was already impressed upon the property. <u>Denver Foundation v. Wells Fargo Bank</u>, 163 P.3d 1116, 1125-26 (Colo. 2007) (absent a merger of the trustee's and the beneficiary's interest, a trustee's transfer of a charitable trust interest does not extinguish the beneficial interest in the property).

Plaintiff now contends that the "transfer" from the 1923 corporation to the 1973 "corporation" was part of a plan that would allow a future generation of vestry persons to take the property away from the Episcopal Church. If there were such a plan, it would not only violate the trustee's canonical duties referenced on page ten, *supra,* it would trigger application of Restatement (Second) of Trusts § 289 (1959):

> If the trustee in breach of trust transfers trust property and no value is given for the transfer, the transferee does not hold the property free of the trust, although he had no notice of the trust.

Here, according to plaintiff's theory, the transferee would be the 1973 parish corporation staffed by the very same people who had staffed the 1923 parish corporation and each of whom would be on notice of the canon law establishing that the property was held in trust for the Diocese and the national church. Accordingly, the beneficial interest in the property persists regardless of the alleged transfer.

6. If There Were an Organized 1973 Corporation That Acquired Legal Title, This Corporation Was Subject to the National and Colorado Canons. *(a) The 1974 bylaws expressly accede to canon law.* Plaintiff now contends that the 1974 bylaws serve the 1973 "corporation." If so, chapter I of those bylaws expressly accedes to the constitution and canons of the Episcopal Church and of the Colorado Diocese. Plaintiff also contends that the 1973 "corporation" is governed by the Colorado Nonprofit Corporation Act. That Act states that "[t]he bylaws of a nonprofit corporation may contain any provision for managing and regulating the affairs of the nonprofit corporation that is not inconsistent with law or with the articles of incorporation." Colo. Rev. Stat. § 7-122-106(2) (2008) (emphasis added). "A nonprofit corporation may alter the default structure set forth in the [Act] through its articles of incorporation or bylaws, and it may

provide different or additional rights and obligations to its members." Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859, 867 (Colo. 2004). The bylaws' additional provisions may be incorporated by reference. "The phrase 'incorporation by reference' is almost universally understood . . . to mean the inclusion, within a body of a document, of text which, although physically separate from the document, becomes as much a part of the document as if it had been typed in directly. To 'incorporate,' after all, literally means to put into a body." Republic Bank v. Marine Nat'l Bank, 45 Cal. App. 4th 919, 922 (Cal. App. 1996).

Once adopted, a nonprofit corporation, its directors, and other personnel are all bound by and obligated to act in accordance with the corporation's bylaws. Model Land & Irrigation Co. v. Madsen, 285 P. 1000, 1001 (Colo. 1930); *see* Eagle Ridge Condominium Assn. v. Metropolitan Builders, Inc., 98 P.3d 915, 917 (Colo. App. 2004) ("condominium association may exercise its powers only within the constraints of its condominium declaration and bylaws"); Lion Square Phase II and III Condominium Assn., Inc. v. Hask, 700 P.2d 932, 934 (Colo. App. 1985); *see also*, 8 Fletcher Cyc. Corp. §§ 4166, 4197 (corporation, its directors, and officers are bound by and must comply with the bylaws).

(b) The purported secession day amendment of the bylaws had no effect for four reasons. First, the Colorado Supreme Court gives no effect to amendments of organizing documents as part of a secession effort. Mote, 716 P.2d at 89 (affirming the District Court's finding that the pre-secession purported amendment of the articles was void). Second, those seeking to enact the amendment, being themselves subject to canon law, had no authority to adopt an amendment to facilitate abandoning the Episcopal Church and taking its property. Third, those seeking to enact the amendment did not comply with the notice requirement for amendments defined by the

bylaws. Finally, the language of the purported amendment suggests that the vestry could choose to be subject to other canon law, in addition to that of the Episcopal Church. CANA, however, never adopted any canon law during the relevant periods of time.

(c) The First Amendment mandates that all who affiliate with a church impliedly accede to its law. Plaintiff contends that the 1973 "corporation" was a parish corporation of the Episcopal Church for thirty-four years. If so, as an entity of the Episcopal Church, it would, as a matter of First Amendment Doctrine, be subject to canon law even if both its articles and bylaws contained no accession clause, because "[a]ll who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871). *See* Presbytery of Cimarron v. Westminster Presbyterian Church of Enid, 515 P.2d 211, 217 (Okla. 1973) (applying the constitutional implied consent doctrine to church entity). Similarly, the New Mexico Supreme Court held:

> Upon the foundation of Watson v. Jones, . . . the authorities are virtually unanimous that where property is acquired by a local church group regularly affiliated with a parent church of the ecclesiastical type under an agreement it shall be governed in its temporal affairs by the direction of the parent church, and that its property shall thenceforth be held under the constitution and discipline of the parent church, the local congregation, or a faction thereof, may, by right, withdraw from such affiliation, but unless such withdrawal is accomplished with the consent of the parent church and in cooperation with its ecclesiastical machinery, they may not take with them the property of the church.

Latin Amer. Council of Christian Churches v. Leal, 260 P.2d 697, 702 (N.M. 1953).

(d) The parish, its corporation, and its leaders repeatedly acceded to canon law and affirmed they were subject to it. See Trial Summary Exhibit 2.

Second Question
DOES THE 1929 INSTRUMENT OF DONATION

RESTRICT THE PROPERTY TO THE BENEFIT OF THE DIOCESE AND THE EPISCOPAL CHURCH?

In November 1929, the parish corporation, Grace Church and St. Stephen's, delivered a document entitled Instrument of Donation to the Episcopal Bishop of Colorado. The rector, wardens, vestry persons, and secretary of the corporation signed the document. It said:

> . . . We, the Rector, Wardens and Vestry **being the corporation holding title to the realty** of the Parish of **Grace Church and St. Stephen's** Colorado Springs, in the Diocese of Colorado, and being . . . in the possession of a House of Prayer, now free from all worldly debt, **do hereby appropriate and devote the same to the Worship and Service of Almighty God,** the Father, the Son, and the Holy Ghost, according to the customs of the Holy Catholic Church, and the provisions of the Church in the United States of America, in its Ministry, Doctrines, Liturgy, Rites, and Usages, as set forth in the Book of Common Prayer, and for a Congregation in communion with said Church, and in union with the Convention thereof in the Diocese of Colorado.
>
> And we do hereby request the Right Reverend Irving P. Johnson, Bishop of Colorado, to take said building under his spiritual Jurisdiction and authority, and that of his successors in office . . . and thereby separate it from all unhallowed, worldly, and common uses, and **solemnly dedicate it to the holy purposes above mentioned.**
>
> And **we do . . . hereby relinquish all claim to any right of disposing of the said building, without due consent given by the Ecclesiastical Authority of the Diocese, according to the Canons** of the said Diocese, or allowing the use of it in any way inconsistent with the terms and true meaning of this Instrument of Donation . . . . (Emphasis added).

The leaders of the parish and parish corporation formally presented this Instrument of Donation to the bishop, and, according to the formularies of that time, he accepted it and assented to its terms.

If there were no other evidence in this case, this Instrument alone is sufficient proof of a charitable trust. "It has always been the policy of the law to uphold charitable bequests and give effect to them whenever possible . . . ." Haggin v. Int'l Trust Co., 169 P. 135, 140 (Colo. 1917).

Courts engage in a broad inquiry when looking for an intention to create a trust relationship. The intention to create a trust "can be inferred from the nature of property transactions, the circumstances . . . the particular documents or language employed, and the conduct of the parties." Mote, 716 P.2d at 100. Furthermore, "no *particular* language must be used to create a trust or to manifest the necessary intention to create a trust." Id. at 100–01 (emphasis in original). For this reason, the "use of the word 'trust' is not necessary to establish a legally sufficient trust. Marshall v. Grauberger, 796 P.2d 34, 36 (Colo. App. 1990).

> A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.

Restatement (Second) of Trusts, § 348 (1959). The purposes that are "charitable" have been identified in Anglo-American jurisprudence since the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). Id. at § 368 cmt a; Haggin, 169 P. at 138. They include: "the advancement of religion." Restatement (Second) of Trusts, § 368(c); *see also* Haggin, 169 P. at 141. The purpose of "advancing religion" is clear in the text quoted above.

A charitable trust can be created through a variety of circumstances including:

> (a) a declaration by the owner of property that he holds it upon a charitable trust; or
>
> (b) a transfer inter vivos by the owner of property to another person to hold it upon a charitable trust; or . . .
>
> (d) an appointment by one person having a power of appointment to another person to hold the property appointed upon a charitable trust; or
>
> (e) a promise by one person to another person whose rights thereunder are to be held upon a charitable trust.

Restatement (Second) of Trusts at § 349. Accordingly, there are firm[9] legal and factual bases for the Court to find that the 1929 Instrument of Donation created a charitable trust, the terms of which are consistent with the Book of Common Prayer and the "Canons of said Diocese" that, of course, incorporate by reference the National Canons of the Episcopal Church. *See* Rector, Wardens v. Episcopal Church, 620 A.2d 1280, 1298 n.17, 1293 (Conn. 1993) (favorably discussing written agreement from Episcopal ceremony of consecration—with identical language to the Instrument of Donation in this case—as having "more than just religious significance . . ."

[9]Plaintiff contends that because the 1929 Instrument of Donation begins with the phrase, "In the Name of God. Amen," it is mere ritual and should be given no legal effect. The opposite is true. Religious language is consistent with the charitable purpose of advancing religion. It also is evidence of a seriousness of purpose in the context of this case. The Instrument of Donation is consistent with Canon 50. In addition, from the constitutional period through the 1920s and beyond, taking action or giving testimony "in the name of God" has been the preferred way to solemnize the civil importance of the action. Such religious language is not mere ritual but a way of solemnizing the importance of a document just as is the taking of *religious* oaths in the federal constitution and under Colorado law. This statutory protocol conforms with the paradigm in Colorado Constitution, Art. 12 § 8 ("oath or affirmation"), which itself conforms to the paradigm in the U.S. Constitution, Art. 6 ("oath or affirmation"), Art. 1 § 3 (same); Art. 2 § 1 (same). In 1925, four years before the parish adopted the Instrument of Donation, Colorado enacted Colo. Rev. Stat. § 24-12-101 and 102 which made the giving of oaths "in the name of the ever living God" the preferred method of solemnizing testimony.

and supporting the finding of "the existence of a legally enforceable trust in favor of the general church in the property claimed by the defendants").

Third Question
UNDER *JONES v. WOLF*, DOES THE DENNIS CANON ENSURE THAT THE BENEFICIAL INTEREST IS IN THE EPISCOPAL CHURCH AND THE DIOCESE?

In 1979, the United States Supreme Court gave denominations guidance on how to avoid protracted property litigation when former members secede and seek to take the local church property with them. It ruled that, when a church split occurs, "the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. . . . [T]he constitution of the general church can be made to recite an express trust in favor of the denominational church . . . [T]he civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form." Jones v. Wolf, 443 U.S. 595, 606 (1979). The Episcopal Church promptly thereafter enacted the Dennis Canon that recited an express trust in favor of the Diocese and the denomination. Every court to consider this issue has ruled that the Dennis Canon establishes a trust or codifies a pre-existing trust for the local diocese and the Episcopal Church.[10] This Court should do likewise.

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[10]*See* Episcopal Church Cases, No. S155094, - - - Cal.Rptr.3d - - -, 2009 WL 18700 at *13 (Cal. 2009) (discussing Episcopal Church's enactment of Dennis Canon in response to the admonition in Jones v. Wolf, 443 U.S. 595, 606 (1979), as "strongly support[ing] the conclusion that, once defendants left the general church, the property reverted to the general church."); Episcopal Diocese of Rochester v. Harnish, 2008 N.Y. Slip Op. 07991, 11 N.Y.3d 340, 350, 351 (N.Y. 2008) (discussing that the Dennis Canon was "an attempt by the Episcopal Church to do exactly what this language suggested"; and that it alone "clearly establish[es] an express trust in favor of the Rochester Diocese and the National Church"); In re Church of St. James the Less, 833 A.2d 319, 324-25 (Pa. Commw. Ct. 2003) (Dennis Canon establishes trust in favor of denomination, even as to property held before its adoption), *aff'd in part, rev'd in part*, 888 A.2d 795 (Pa. 2005) (same); Daniel v. Wray, 580 S.E.2d 711, 718 (N.C. App. 2003) (same); Episcopal Diocese of Massachusetts. v. Devine, 797 N.E.2d 916, 923-24 (Mass. App. 2003) (same).

Fourth Question
HAS BISHOP O'NEILL, AS AN OFFICIAL WITHIN A HIERARCHICAL CHURCH, DETERMINED THE IDENTITY OF THE PARISH CORPORATION'S LEADERS?

Rule 8(a) requires parties to plead particular claims for relief. Colo. R. Civ. P. 8(a). This pleading requirement permits the Court to evaluate the sufficiency of each claim based upon its particular law. While there are a number of claims in this case that relate to property and should be decided by the neutral principles methodology as articulated in Mote, this case includes claims not pleaded in Mote.[11] Indeed, each side has pleaded particular claims[12] that require the Court to determine the identity of ecclesiastical office holders.

The First Amendment requires the Court to adjudicate such claims by determining whether the Episcopal Church is hierarchical and then deferring to the hierarchy's recognition of those persons who hold ecclesiastical office. 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 hierarchy "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

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[11]*See* Mote, 716 P.2d at 87 (case is "a dispute over the control of the real and personal property").

[12]The plaintiff's fourth claim in its amended complaint seeks "declaratory relief" regarding whether its "duly-elected Vestry and duly-selected Rector . . . have been duly elected by the membership of Grace Church & St. Stephen's." First Amended Complaint at ¶¶ 25-27. In their ninth counterclaim, the Colorado Episcopal Church Entities similarly seek declaratory relief that the McJimsey vestry (and not the Wroblewski vestry or Father Armstrong) is the lawful vestry for the parish and its corporation. *See* Second Amended Answer, Counterclaims ¶¶ 51-52, 60-67, 128-134, prayers 2-9. The Episcopal Church makes similar allegations, and requests that the Court "declare that the leadership and members" of the parish corporation "are those individuals recognized by the Episcopal Church and the Diocese of Colorado." Episcopal Church's Answer and Counterclaims, ¶¶ 4-5, 32-36, prayer c.

church authorities to determine what the essential qualifications of a chaplain are 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 of the office holders regardless whether their office was within a canonical entity or church-related corporation. Id.

Even plaintiff's own "expert," Mary McReynolds, admits these propositions. She states:

> Both Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952), and Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), involved the question whether a hierarchical church is entitled to deference on issues involving its choice of ecclesiastical leaders. . . .
>
> Milivojevich arose when authorities in the Serbian Eastern Orthodox Church "defrocked" the Bishop of their American-Canadian Diocese because he no longer possessed the "fitness to serve as a Bishop." 426 U.S. 698, 702. The Bishop refused to recognize his removal and filed suit seeking "to have himself

> declared the true Diocesan Bishop." Id. at 707. The Illinois courts held that the Bishop's removal was "arbitrary," but the Supreme Court reversed. While the Court examined church polity in order to identify where authority over discipline of ecclesiastical leadership lay, it condemned the lower court's finding that defrocking the Bishop was arbitrary. The Court held that questions involving "the conformity of the members of the church to the standard of morals required of them" are "strictly and purely ecclesiastical in its character," and, thus, beyond a civil court's jurisdiction. Id. at 714.
>
> Kedroff and Milivojevich thus involve deference to hierarchical decisions concerning the question of whom is the rightful ecclesiastical leader of church units, as opposed to decision 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.

See Mary McReynolds Affidavit (September 4, 2007) ¶¶ 83-85.

Contrary to plaintiff's assertions, it should be beyond cavil that the Episcopal Church is hierarchical. The District Court in Mote determined that "PECUSA was a hierarchical church," 716 P.2d at 90, and the Colorado Supreme Court likewise recognized that the Diocese of Colorado "is one of the subordinate geographical units of the national church . . ." Id. at 88. After lengthy consideration of the issue in Moses v. Diocese of Colorado, 863 P.2d 310, 325 (Colo. 1993), the Colorado Supreme Court found that "the structure of the Episcopal Church is basically hierarchical." Every other published opinion on this subject finds likewise.[13]

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[13]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. Commw. Ct. 2003), aff'd in pertinent part, 888 A.2d 795 (2005) ("The Episcopal Church system is in all respects hierarchical. The Church

Fifth Question
WHO ARE THE BENEFICIARIES OF THE SPECIAL TRUSTS?

The disputed property in this case includes the beneficial interests in eight special trusts. Six of those trusts were created before 1973, the date that plaintiff contends it was incorporated. There are two remaining trusts, the Bowton Trust formed in 1974 and the Smith Trust formed in 1975. The Bowton Trust identifies its beneficiary as "Grace Church and St. Stephen's" and requires that distributions go to "those unmarried people desiring to pursue theological studies 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."

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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 (Wis. 1972) ("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. Buhrman, 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."); St. James Church, Elmhurst v. Episcopal Diocese of Long Island, (Case no. 22564/05) 23-24 (N.Y.S.Ct., Queens County March 12, 2008).

"In the interpretation of a trust, the intent of the settlor or testator must be given effect." Matter of Trusts Created by Ferguson, 929 P.2d 33, 35 (Colo. App. 1996). 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").

IV.
LEGAL STATUS OF THE CANA PARISH

The filing of the 1973 "articles" either resulted in the reinstatement of a defunct 1923 parish corporation or the creation of *de jure* corporation with no personnel, no ability to conduct business, and no property. What then is the legal status of the congregation that has possession of the property? This congregation is a CANA parish with Father Armstrong as its rector and the Wroblewski vestry as its governing body. It is not the 1973 parish "corporation." It is, instead, an unincorporated nonprofit association born on March 26, 2007.

In July 1994, Colorado became the third state to adopt the Uniform Unincorporated Nonprofit Association Act ("UUNAA"). Colo. Rev. Stat. § 7-30-101 *et seq*. The Colorado UUNAA defines a "nonprofit association" as **"an unincorporated organization, consisting of two or more members joined by mutual consent for a common, lawful, nonprofit purpose."** Id. § 7-30-101(2) (emphasis added).

The Colorado UUNAA does not require a self-conscious intent to form a nonprofit association.[14] It does not require the expressed designation of the group as an "association." *See* id. § 7-30-101 *et seq*. It does not require an organizing document, Phelan, *infra*, or the filing of papers with any state agency. *See* id. § 7-30-101 *et seq*. All that is required to create a nonprofit association is for two or more persons to join in a common, lawful, nonprofit purpose. Id. § 7-30-101(2); *see* 1 William W. Bassett, W. Cole Durham, Jr., Robert T. Smith, Religious Organizations and the Law § 3.42 (2007) ("association may be formed without a written constitution and entirely upon the basis of an informal agreement among its members.").

> Like a general partnership, a[n unincorporated nonprofit association ("UNA")] is not required to file articles or any other legal instrument with the jurisdiction in order to be formed and existing under the Act. A UNA is formed as soon as two [or] more persons have mutually consented as a matter of fact to form the UNA and pursue a nonprofit purpose through the UNA. The Act does not require that the mutual consent be manifested in writing.

Nicholas Karambelas, Limited Liability Companies: Law, Practice and Forms § 12.2 (Supp. 2007).

While most Colorado nonprofit groups incorporate, Colorado UUNAA makes those that do not unincorporated nonprofit associations. Id.; U.L.A. UUNAA prefatory note (2003) ("There is no principled basis for excluding any nonprofit association."). "The organization of an unincorporated association does not usually, as in the case of corporations, depend upon compliance with any statutory provisions . . . ." 6 Am.Jur.2d *Associations and Clubs* § 5 (2007). "An association can be created much easier than a corporation. One is established when members

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[14] *See* id. § 7-30-101 *et seq*. Several states adopting UUNAA "provide that [the association members] be 'joined together for a *stated* common purpose.'" U.L.A. UUNAA § 1 cmt 8 (2003). Colorado UUNAA does not require the "common purpose" to be stated. Colo. Rev. Stat. §7-30-101(2).

agree to perform a common purpose. Articles of association are not necessary . . . ." Marilyn E. Phelan, Nonprofit Enterprises: Corporations, Trusts, and Associations § 1:09 (Oct. 2007); *see* Colo. Rev. Stat. § 7-30-101 *et seq*. State involvement is not necessary for the organization of a nonprofit association. *See* 6 Am.Jur.2d, *Associations and Clubs* § 4 (2007); *see* Colo. Rev. Stat. § 7-30-101 *et seq*.

When the Uniform Laws Association promulgated UUNAA, it intended the recognition of nonprofit associations to be expansive.

> This Act applies to all unincorporated nonprofit associations. Nonprofit organizations are classified as public benefit, mutual benefit, **or religious.** . . . There is no principled basis for excluding any nonprofit association. Therefore, the act covers unincorporated philanthropic, educational, scientific, and literary clubs, unions, trade associations, political organizations, cooperatives, **churches,** . . . and all other unincorporated nonprofit associations.

U.L.A. UUNAA prefatory note (2003) (emphasis added). It is, therefore, basic to the law affecting churches that, if unincorporated, the civil law treats churches as nonprofit associations. "In general, any church that is not a corporation is an unincorporated association." Richard R. Hammar, Pastor, Church and Law 261 (2000); Phelan, *supra*, § 16.10 ("Many churches operate as unincorporated associations."); 1 William W. Bassett *et al.*, Religious Organizations and the Law § 3.34 (2007) ("Churches that are not separately incorporated or part of larger corporations are unincorporated associations."). *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871) (describing local churches as "voluntary religious associations" while noting "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned"); Presbyterian Church in the United States v. Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 442 (1969) (describing a denomination as an

"association"). The true plaintiff in this case is not a corporation but an association. It has been served with process, but has not filed an answer. It is in default.

Respectfully submitted,

ROTHGERBER JOHNSON & LYONS LLP

/s L. Martin Nussbaum
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APPENDIX I

THE FILING OF THE 1973 "ARTICLES" REINSTATED THE 1923 PARISH CORPORATION THAT WAS NOT DISSOLVED BUT MAY HAVE BECOME DEFUNCT.

The 1967 Colorado General Assembly overhauled its existing nonprofit law by adopting the Nonprofit Act. It sought to have the Nonprofit Act apply to all domestic nonprofit corporations, even special purpose corporations (like the 1923 Parish Corporation) that were organized under other statutes. To effect that result, the Nonprofit Act required such corporations to elect to be governed by the Nonprofit Act within two years or become defunct. *See* Colo. Rev. Stat. § 7-20-105(1), (3) and (4) (1973).

It appears that the 1923 Parish Corporation did not do this and thereby may have become defunct on January 1, 1972. Because the Parish Corporation, while possibly defunct in 1973, had not been dissolved, it could easily be reinstated by filing certain information with the Secretary of State. So long as it had not dissolved by virtue of being defunct for five years, "[a]ny defunct corporation may be reinstated by: (a) filing all due and appropriate annual reports, (b) designating a registered office and agent, and (c) paying all filing fees and the penalty prescribed in section § 7-28-105." Id. § 7-20-105(7)(1973).

The 1973 "articles" substantially complied[15] with these requirements. First, the filing of the 1973 "articles" accomplished the fundamental purpose of an annual report by putting the Secretary of State on notice that "Grace Church & St. Stephen's" [sic] was in existence and active as a corporate entity. In addition, the 1973 "articles" had all the information that was required to be included in an annual report. An annual report was required to state:

(i) The corporation's name;
(ii) The address of the registered office and the name of its registered agent;
(iii) The character of the corporation's affairs; and

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[15]Colorado recognizes the doctrine of substantial compliance with respect to the statutory requirements for creating a new corporation, granting limited liability to a partnership, and providing notice that real property is subject to foreclosure. People ex Rel. Bernard v. Cheeseman, 7 Colo. 376, 3 P. 716 (1884) (articles of incorporation which listed an excessive duration for corporate existence substantially complied with the general law and created a corporation); Black v. La Plat Medical Center Associates, Ltd., 830 P.2d 1103, 1111 (Colo. App. 1992) (limited partnership is formed when there is good faith and substantial compliance with the requirement to file a certificate of limited partnership with the Secretary of State); FCC Construction, Inc. v Casino Creek Holdings, Ltd., 916 P.2d 1196 (Colo. App. 1996) (notice of mechanic's lien that substantially complied with statutory requirement gave effective notice). Applying the substantial compliance doctrine to the filing of an annual report of a corporation that lawfully conducted its affairs for forty-nine years is a much smaller legal step that itself is supported by precedent. Ethanair Corp. v. Thompson, 561 N.W. 2d 225 (Neb. 1997) (substantial compliance with statutory requirements for revival sufficient to permit a suspended to corporation to pursue claims).

(iv) The respective names and addresses of the directors and officers.

See Colo. Rev. Stat. § 7-28-101(1) (1973). The 1973 Articles included each of these items.

Second, the "articles" designated a registered office and agent. Lastly, the filing could not have occurred without the payment of the required fee.

However, the annual report, required by the State, was to be made on forms prescribed and furnished by the Secretary of State, and the “articles” form used in 1973 was the wrong form. Id. § 7-28-101(2) (1973). The $10 fee for filing the 1973 “articles” fell short of the required fees and penalties. Id. § 7-20-105(7)(1973). Although the Parish Corporation paid something less than required, imposing penalty fees is arguably not the fundamental purpose of the corporate statute, and the difference may have been as little as five dollars. *See* id. §§ 7-20-105(7), 7-28-103, 7-28-105 (1973). Accordingly, to the extent there were shortcomings in complying with the statute, those shortcomings were immaterial. This is particularly so given that the Parish Corporation formed in 1923 did not wind up its affairs or transfer its assets. It continued to operate and minister to the faithful. Accordingly, the Court should find that the filing of the 1973 “articles” substantially complied with the requirements of § 7-20-105(7), thereby effecting the reinstatement of the 1923 Parish Corporation.

CERTIFICATE OF SERVICE

On January 19, 2009, I served, via LexisNexis File & Serve, a copy of the foregoing on:

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On January 20, 2009, I mailed a copy of the foregoing to:

Chad Friese, Junior Warden
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s/Karen Lutterschmidt

Karen Lutterschmidt