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FRESNO SUPERIOR COURT

By _____ DEPT. 97A - DEPUTY

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
CENTRAL DIVISION

DIOCESE OF SAN JOAQUIN; THE RT.)	No. 08 CECG 01425
REV. JERRY A LAMB, in his)	Dept. 97A
capacity as the Episcopal)	
Bishop of San Joaquin; and THE)	
EPISCOPAL CHURCH,)	ORDER ON PLAINTIFFS' MOTION
)	FOR SUMMARY ADJUDICATION
Plaintiffs,)	
)	
v.)	
)	
DAVID MERCER SCHOFIELD, also)	
known as JOHN-DAVIS SCHOFIELD,)	
an individual; THE EPISCOPAL)	
FOUNDATION OF SAN JOAQUIN, INC.)	
an unknown entity; THE)	
DIOCESAN INVESTMENT TRUST OF)	
THE DIOCESE OF SAN JOAQUIN, a)	
California corporation; THE)	
ANGLICAN DIOCESE HOLDING)	
CORPORATION; MERRILL, LYNCH,)	
PIERCE, FENNER & SMITH, INC., a)	
Delaware corporation (d/b/a)	
Merrill Lynch); and DOES 1-300,)	
inclusive,)	
)	
Defendants.)	

On May 5, 2009, this court heard oral argument on Plaintiffs' Motion for Summary Adjudication. The Court having considered the moving, opposing and reply papers, as well as the arguments of counsel, now rules as follows:

1 The court grants the motion for summary adjudication of the
2 first cause of action.

3 Rationale

4 In ruling on a motion for summary judgment or summary
5 adjudication, the court must "consider all of the evidence' and
6 all of the 'inferences' reasonably drawn there from and must view
7 such evidence and such inferences 'in the light most favorable to
8 the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25
9 Cal.4th 826, 843.) In making this determination, courts usually
10 follow a three-prong analysis: identifying the issues as framed by
11 the pleadings; determining whether the moving party has
12 established facts negating the opposing party's claims and
13 justifying judgment in the movant's favor; and determining whether
14 the opposition demonstrates the existence of a triable issue of
15 material fact. (*Lease & Rental Management Corp. v. Arrowhead*
16 *Central Credit Union* (2005) 126 Cal.App.4th 1052, 1057-1058.)

17 The court's sole function on a motion for summary judgment is
18 issue finding, not issue-determination. The court must determine
19 from the evidence submitted whether there is a 'triable issue as
20 to any material fact.' (Code Civ. Proc. § 437c(c); *Zavala v.*
21 *Arce* (1997) 58 Cal.App.4th 915, 926.) "A plaintiff moving for
22 summary adjudication of a cause of action must establish each
23 element of the cause of action. If the moving party
24 satisfies its initial burden, the burden shifts to the opposing
25 party to set forth "specific facts showing that a triable issue of
26 material fact exists. The court must view the evidence and
27 reasonable inferences from the evidence in the light most
28 favorable to the opposing party, as on a motion for summary

1 judgment." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138
2 Cal. App. 4th 1135, 1154-55.)

3
4 Mootness

5 Subsequent to oral argument, defendants have suggested in a
6 letter brief directed to this court that this motion has been
7 mooted by the filing of the Fourth Amended Complaint, as this
8 motion was brought when the allegations of the Second Amended
9 Complaint were active. However, neither the intervening Third
10 Amended Complaint, which was filed before oral argument, nor the
11 current Fourth Amended Complaint, have changed the allegations of
12 the first cause of action as to which summary adjudication is
13 sought. The motion is not moot.

14 Defendants' authority, *Perry v. Atkinson* (1987) 195
15 Cal.App.3d 14 does not suggest otherwise. In that case, summary
16 adjudication was granted on a first amended complaint although
17 leave had been granted to file a second amended complaint amending
18 the very cause of action on which summary adjudication was
19 granted. (*Id.* at p. 18.) Accordingly, *Perry* is distinguishable.

20
21 First Cause of Action for Declaratory Relief

22 The first cause of action for declaratory relief alleges, in
23 relevant part:

24 101. Defendants take the position that defendant Schofield
25 was authorized to revise the articles of "The Protestant
26 Episcopal Bishop of San Joaquin, a corporation sole" in 2006
27 and 2008, and that defendant Schofield may continue as the
28 incumbent of "The Protestant Episcopal Bishop of San Joaquin,
a corporation sole" and as President of the Episcopal
Foundation and the Investment Trust after leaving the
Episcopal Church and being deposed.

102. Plaintiffs contend to the contrary, that the purported
Diocese of San Joaquin v. Schofield MSA Order

1 amendments to the articles of the corporation sole were ultra
2 vires, invalid and void, and that defendant Schofield may not
3 continue as the incumbent of "The Protestant Episcopal Bishop
4 of San Joaquin, a corporation sole," or as President of the
5 Episcopal Foundation or the Investment Trust, after leaving
6 the Episcopal Church and being deposed.

7 Secular courts, when resolving church property disputes, must not
8 entangle themselves in disputes over church doctrine or infringe
9 the free exercise of religion. (*In re Episcopal Church Cases*
10 (2009) 45 Cal.4th 467, 478-479.) In *In re Episcopal Church Cases*,
11 *supra*, 45 Cal.4th 467, the California Supreme Court held that we
12 must apply the "neutral principles of law" approach to resolving
13 church property disputes in a hierarchical church organization.

14 In doing so, "State courts must not decide questions of
15 religious doctrine; the court must defer to the position of the
16 highest ecclesiastical authority that has decided the point. But
17 to the extent the court can resolve a property dispute without
18 reference to church doctrine, it should apply neutral principles
19 of law. The court should consider sources such as the deeds to the
20 property in dispute, the local church's articles of incorporation,
21 the general church's constitution, canon, and rules, and relevant
22 statutes, including statutes specifically concerning religious
23 property, such as Corporations Code section 9142." (*In re*
24 *Episcopal Church Cases, supra*, 45 Cal.4th at p. 485.)

25 A hierarchical church is one in which individual churches are
26 organized as a body with other churches having similar faith and
27 doctrine, and with a common ruling convocation or ecclesiastical
28 head vested with ultimate ecclesiastical authority over the
29 individual congregations and members of the entire organized
30 church. (*New v. Kroeger* (2009) 167 Cal.App.4th 800, 815 (*New*.)

1 In a hierarchical church, an individual local congregation that
2 affiliates with the national church body becomes a member of a
3 much larger and more important religious organization, under its
4 government and control, and bound by its orders and judgments. In
5 contrast, a congregational church is defined as one strictly
6 independent of other ecclesiastical associations, and one that so
7 far as church government is concerned, owes no fealty or
8 obligation to any higher authority. (*Id.* at p. 816.)

9 Defendants argue that the issue of whether the relationship
10 between an Episcopal diocese and the Episcopal General Convention
11 is one of first impression. It is true that cases regarding the
12 Episcopal Church have involved the relationship between parishes
13 and their dioceses. However, it is beyond dispute that the
14 Episcopal Church is a hierarchical church. Both the California
15 Supreme Court in *In Re: Episcopal Church Cases* and the appellate
16 court in *New v. Kroeger* found it to be so. (*In Re: Episcopal*
17 *Church Cases, supra*, 45 Cal.4th at p. 494; *New v. Kroeger, supra*,
18 167 Cal.App.4th 816-817.) The fact that the Supreme Court and the
19 Fourth District were ultimately analyzing the actions of a parish,
20 rather than the actions of a diocese, do not invalidate the
21 findings regarding the nature of the Church as a whole. Moreover,
22 and more importantly, a review of the Constitution and Canons of
23 the Church indicates that it is indeed hierarchical.

24 The Episcopal Church's Constitution provides for the
25 establishment of a General Convention composed of two houses, the
26 House of Bishops and the House of Deputies, each with the right to
27 originate and propose legislation. (Mullin Decl. Exhibit 1,
28 Constitution of Episcopal Church Article I, Sec. 1.) Among the

1 duties of the General Convention is the enactment and amendment of
2 the Canons. (See Mullin Decl. Exhibit 1, Canons of Episcopal
3 Church Title 1, Canon 1, sec. (2)(n)(3), Title V, Canon 1, Sec.1.)
4 The General Convention approves and consents to the admission of
5 new dioceses and the election of new bishops. (Mullin Decl.
6 Exhibit 1, Constitution of Episcopal Church Article II, Sec. 2,
7 Article V, Sec. 1.) Currently, new dioceses must express
8 "unqualified accession to the Constitution and Canons" before they
9 can be in union with the general convention and admitted to the
10 Episcopal Church. (Mullin Decl. Exhibit 1, Constitution of
11 Episcopal Church Article V, Sec. 1.)

12 Defendant's attempt to dispute the hierarchical nature of the
13 Episcopal Church with the declaration of Rev. Wantland is
14 unavailing. His declaration as to the nature of the Church is an
15 inadmissible opinion and a legal conclusion. "[It] is thoroughly
16 established that experts may not give opinions on matters which
17 are essentially within the province of the court to decide."
18 (*Carter v. City of Los Angeles* (1945) 67 Cal.App.2d 524, 528.)

19 Nor is the hierarchical nature of the church something to be
20 determined on a "case by case basis" or based on a showing of the
21 powers and authority ceded to the general Church by the various
22 constituent Dioceses, as defendants have argued. The hierarchical
23 nature of the Church is apparent from its governing documents as a
24 matter of law.

25 "The interpretation of a written instrument, even though it
26 involves what might properly be called questions of fact
27 [citation], is essentially a judicial function to be exercised
28 according to the generally accepted canons of interpretation so

1 that the purposes of the instrument may be given effect. (See Civ.
2 Code, § 1635- 1661; Code Civ. Proc., § 1856- 1866.) . . . It is
3 therefore solely a judicial function to interpret a written
4 instrument unless the interpretation turns upon the credibility of
5 extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965)
6 62 Cal.2d 861, 865.)

7 Defendants would distinguish *New* on the grounds that in *New*,
8 the parish bylaws incorporate the General Church and Diocese
9 Constitution and Canons that must prevail when there is a
10 conflict with the parish bylaws. Defendants argue that there is
11 no such supremacy clause in the relationship between a diocese and
12 the General Convention and thus nothing to prevent disaffiliation
13 because the Diocese could always amend their constitution and
14 canons to disaffiliate from the General Church.

15 Defendants' right to amend their constitution and canons is
16 not unrestricted and unlimited. The constitution of the Diocese
17 has always permitted amendments. (Additional Material Fact No.
18 69, *Kamai Decl. Exhibits 4 and 7 Constitution of Diocese of San*
19 *Joaquin, Article XIII.*) However, from the inception of the
20 Diocese as a Missionary District, it acceded to the Constitution
21 of the Protestant Episcopal Church in the United States of America
22 and recognized the authority of the General Convention of the
23 same. (*Mullin Decl. Exhibit 7, Constitution of Missionary*
24 *District of San Joaquin, Article II.*) When the Missionary
25 District Petitioned to become a Diocese in 1961, the petition
26 clearly stated in conclusion, "As evidenced by the resolution of
27 the Special Convocation above referred to, the Church in the
28 Missionary District of San Joaquin has acceded to the Constitution

1 and Canons for the Government of the Protestant Episcopal Church
2 in the United States of America." (Mullin Decl. Exhibit 9,
3 Petition and Memorial of Missionary District of San Joaquin.) The
4 Constitution of the new Diocese of San Joaquin likewise acceded to
5 the Constitution of the Episcopal Church and recognized the
6 authority of the General Convention. (Mullin Decl. Exhibit 11,
7 Constitution of Diocese of San Joaquin, Article II.)

8 Although defendants make much over the fact that the Diocese
9 acceded only to the Constitution, and not the Canons of the
10 Episcopal Church, the court finds that the only reasonable
11 interpretation of the documents before it is that the Diocese
12 implicitly acceded to both the Constitution and Canons by virtue
13 to acceding to the Constitution. The function of the Constitution
14 is to form a legislative body, the General Convention. The
15 General Convention adopted and amends the Canons. Acceding to the
16 Constitution that creates the legislative body, and recognizing
17 the authority of the legislative body, while simultaneously
18 denying accession to the product of the legislative body is
19 nonsensical. Moreover, the Petition for the Erection of the
20 Diocese of San Joaquin mentions accession to both the Constitution
21 and Canons. This certainly reflects that it was always the
22 intention of the Diocese to accede to both documents. (See *In re*
23 *Episcopal Church Cases, supra*, 45 Cal.4th at pp. 488.) Finally,
24 the Constitution of the Episcopal Church in place in 1961 required
25 accession to both the Constitution and Canons. (Mullin Decl.
26 Exhibit 8, Constitution of Episcopal Church, Article VI.)

27 Accordingly, the 2008 amendments to the Diocese's
28 Constitution purporting to strike the accession clause and insert

1 new language relative to joining the Province of the Southern Cone
2 were ultra vires and void.

3 Defendants contend that there was no legal impediment to
4 their 2006 amendment qualifying the accession clause such that
5 they acceded to the Episcopal Church's Constitution only to the
6 extent that it was not inconsistent with the Constitution and
7 Canons of the Diocese, as amended from time to time and further
8 this 2006 amendment allowed for the 2008 amendment deleting the
9 accession clause entirely and withdrawing from the Episcopal
10 Church. Defendants are incorrect. The original accession clause
11 itself prevents such amendment. If the Constitution of the
12 Diocese incorporates and accedes to the Constitution and Canons of
13 the Episcopal Church, which require accession, then the
14 Constitution of the Diocese cannot be amended to remove such
15 language.

16 Defendants cite *Iglesia Evangelica Latina, Inc. v. Southern*
17 *Pacific Latin American Dist. of the Assemblies of God* (2009) 173
18 Cal.App.4th 420 (*Iglesia*) and *New, supra*, 167 Cal.App.4th 800 for
19 the proposition that this court can examine the special meeting at
20 which Lamb was elected Bishop. Specifically, defendants claim
21 that the calling of the special meeting was not in accordance with
22 the Constitutions and canons of either the Episcopal Church or the
23 Diocese of San Joaquin. In neither *Iglesia* nor in *New* did the
24 appellate court review the procedures used to select and recognize
25 a church primate. In both, the court reviewed the selection of
26 corporate directors of the church corporation. The distinction is
27 material.

28

1 Both the United States Supreme Court and California courts
2 have held that in the case of hierarchical religious entities the
3 civil courts must accept as binding and defer to decisions by
4 religious tribunals with respect to religious doctrine, practice,
5 faith, ecclesiastical rule, discipline, custom, law, membership,
6 polity, clergy credentials and discipline, as well as religious
7 entity governance and administration. (*Jones v. Wolf* (1979) 443
8 U.S. 595, 602, 603-604; *Concord Christian Center v. Open Bible*
9 *Standard Churches* (2005) 132 Cal.App.4th 1396, 1411; *Serbian*
10 *Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 708-709,
11 713; *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 449;
12 *Rosicrucian Fellow. v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121,
13 131-132.)

14 Accordingly since the Episcopal Church has seen fit to
15 recognize Lamb as the new Bishop of the Diocese of San Joaquin, we
16 must do so as well. (See UMF No. 66 -- Undisputed that Lamb has
17 been asked to consent to the ordination of new bishops, performed
18 baptisms and confirmations, attended the 2008 meeting of the house
19 of bishops as the Bishop of San Joaquin and attended the 2008
20 Lambeth Conference of Bishops as the Bishop of San Joaquin.)
21 Moreover, the Episcopal Church has deposed Schofield as Bishop.
22 (UMF No. 55.)

23
24 *Lamb is the Incumbent of the Corporation Sole*
25 Corporations Code section 10002 provides: "A corporation sole
26 may be formed under this part by the bishop, chief priest,
27 presiding elder, or other presiding officer of any religious
28 denomination, society, or church, for the purpose of administering

1 and managing the affairs, property, and temporalities thereof."
2 "Historically, a corporation sole consists of one person only and
3 his successors, in some particular station, who are incorporated
4 by law in order to give them legal capacities and advantages,
5 particularly that of perpetuity, which in their natural persons
6 they could not have." (*Estate of Zabriskie* (1979) 96 Cal.App.3d
7 571, 576-577.) Religious corporations are merely "permitted as a
8 convenience to assist in the conduct of the temporalities of the
9 church. Notwithstanding incorporation the ecclesiastical body is
10 still all-important. The corporation is a subordinate factor in
11 the life and purposes of the church proper." (*Wheelock v. First*
12 *Presb. Church* (1897) 119 Cal. 477, 483.)

13 "The Protestant Episcopal Bishop of San Joaquin, a
14 Corporation Sole" was created to hold title to property belonging
15 to the Missionary District and, later, Diocese of San Joaquin.
16 (UMF Nos. 23, 28, 34.) The Corporation's initial articles stated
17 that it was formed because "the rules and regulations of the
18 Protestant Church in the Missionary District of San Joaquin ...
19 require that the bishop of said Missionary District shall become a
20 corporation sole under the laws of the State of California by the
21 title of The Protestant Episcopal Bishop of San Joaquin for the
22 distraction of the temporalities thereof and the management of the
23 state and property thereof." (UMF No. 23.) When the Missionary
24 District became a Diocese Cannon XVII, sections 411 and 412
25 continued to require the Bishop to be a corporation sole "by the
26 title of 'The Protestant Episcopal Bishop of San Joaquin, a
27 Corporation Sole' " and to hold title to "[t]rust funds and real
28 estate acquired by gift or purchase for the use of the Diocese of

1 San Joaquin, or for any unincorporated parish therein, or for the
2 use of the Protestant Episcopal Church in any place within this
3 Diocese where there is no organized congregation." (UMF No. 34.)

4 The documents are clear. Only the "Bishop" of the Diocese of
5 San Joaquin has the right to the incumbency of the corporation
6 originally entitled "The Protestant Episcopal Bishop of San
7 Joaquin, a Corporation Sole" and given the number C0066488 by the
8 Secretary of State. Moreover, the Episcopal Church has recognized
9 Revered Lamb as the Bishop of the Diocese of San Joaquin.
10 Defendants assert that questions about Lamb's election as Bishop
11 constitute disputed material facts, but this court has no power to
12 rule on the validity of the Episcopal Church's election of its
13 Bishops and thus any dispute is immaterial for the purposes of
14 this motion.

15 Defendants contend that there was no proper notice of the
16 March 29, 2008 special convention at which Lamb was elected. It
17 is true that there is no competent evidence that 30 days notice of
18 the meeting was given. Hall's declaration only establishes that
19 he received the notice on March 2, 2008. (Decl. Hall ¶ 20;
20 Exhibit 9.) He did not mail the notice. It is undated.
21 Defendants also contend that the deposition of Schofield was
22 contrary to Church policy, procedure and law. However, we may not
23 look into the propriety of the election and deposition of church
24 officers according to church regulations and rules. (*Serbian*
25 *Orthodox, supra*, 426 U.S. at pp. 708-709; *Maxwell v. Brougher*
26 (1950) 99 Cal.App.2d 824, 826; see *Vukovich v. Radulovich* (1991)
27 235 Cal.App.3d 281, 292-293]; *Higgins v. Maher* (1989) 210
28 Cal.App.3d 1168, 1173.)

1 As the Episcopal Church has seen fit to recognize Lamb as the
2 true Bishop of the Diocese of San Joaquin, this court is without
3 the power to countermand that decision. Defendants cite *Singh v.*
4 *Singh* (2004) 114 Cal.App.4th 1264, 1283 for the proposition that a
5 court has jurisdiction to review whether a religious corporation
6 adhered to its own internal rules and bylaws. *Singh* is
7 distinguishable. In that case an orally elected board of
8 directors sued for judicial determination of the validity of their
9 election or to order a new election and determine the rights of
10 the members to vote, pursuant to Corporations Code section 9418,
11 subdivision (c). The appellate court determined that the trial
12 court, under neutral principals of law, could validly interpret
13 the bylaws of the corporation as it applied to the election of a
14 board of directors and their term of office. It did not decide
15 the matter of who was the ecclesiastical authority of the church.

16
17 *Lamb is the President of the Episcopal Foundation and Investment*
18 *Trust*

19 Diocesan Canon XXVII, section 28.02 states that the "Bishop
20 of the Diocese shall serve as President and Chairman of the Board"
21 of the Episcopal Foundation. (UMF No. 35.)

22 The Investment Trust's articles of incorporation provide that
23 the Bishop of the Diocese of San Joaquin "shall be ex officio
24 president of the Board of Trustees." (UMF No. 36.)

25 Therefore, Lamb holds both these offices.
26
27
28

1 *The Amendment of the Articles of Incorporation in 2006 and 2008*
2 *Are Void*

3 On March 21, 2006 Schofield filed amendments to the articles
4 of incorporation that removed references that, before a new bishop
5 could be ordained, consent from the majority of Diocesan Bishops
6 and Standing Committees of the Episcopal Church must be obtained
7 and the bishop must be consecrated by three Episcopal bishops.
8 (UMF No. 41.) However, this amendment was void because it
9 violated the accession clause and was thus not in conformity with
10 the "rules, regulations or laws" of the Episcopal Church. (See
11 Corp. Code, § 10003.) Moreover, when amending the articles of
12 incorporation of a corporation sole, the incumbent must "sign and
13 verify a statement setting forth the provisions of the amendment
14 and stating that it has been duly authorized by the religious
15 organization governed by the corporation." (Corp. Code, § 10010.)
16 Because the amendment was in direct contravention of the
17 Constitution and Canons of the Episcopal Church at the time it was
18 made, the accession clause prevented the Diocese from "duly
19 authorizing" it.

20 The 2008 amendment changing the name of the corporation to
21 "The Anglican Bishop of San Joaquin" is likewise void. The
22 Diocese of San Joaquin had not "duly authorized" the name change
23 when it occurred. The only purported authorization came about
24 after Schofield was deposed as a Bishop and the Anglican
25 defendants were no longer recognized by the Episcopal Church as
26 the Diocese of San Joaquin. Schofield resigned as Bishop on March
27 7, 2008. (UMF No. 54.) The Church purported to depose him on
28 March 12, 2008. (UMF Nos. 55-56.) The Diocese adopted at its

1 convention in October 2008, a resolution ratifying the amendment
2 changing the name of the corporation sole. (AMF No. 94.)

3
4 *The Diocese is Properly a Party Plaintiff*

5 Defendants contend that the Diocese of San Joaquin, by which they
6 mean the Anglican Diocese of San Joaquin, has not been joined as a
7 party and judgment may not be had unless it is joined because the
8 declaratory relief action seeks to invalidate its acts.

9
10 There are two problems with this line of reasoning. First, it
11 ignores the fact that the Episcopal Church has, rightly or
12 wrongly, procedurally correctly or not, recognized the
13 organization headed by Lamb as the true and surviving Diocese of
14 San Joaquin. (See UMF Nos. 55, 57-59, 66.) That Diocese is a
15 party plaintiff.

16 Second, this is not a breach of contract action as defendants
17 suggest in their memorandum of points and authorities. The
18 Diocese is not being sued for breaching a contract with the
19 Church. Although the rule regarding necessary parties is not
20 relaxed in actions brought to obtain declaratory relief, the
21 Diocese is not a necessary party. (See *Lloyd v. County of Los*
22 *Angeles* (1940) 41 Cal.App.2d 808, 812.) No judgment or order
23 against the Diocese directing them to pay or do anything is
24 sought. Rather, Schofield is being sued for declaratory relief
25 for his actions in amending the articles of incorporation of the
26 corporation sole and in refusing to give up the incumbency of
27 three corporations.

28

1 *The Corporation Sole is a Party Plaintiff*

2 Defendants claim that the corporation sole that is a party
3 plaintiff is not the true corporation sole known as No. C0066488,
4 the latter of which they claim to operate. Defendants are
5 incorrect for the reasons previously expressed above. The Diocese
6 of San Joaquin (plaintiffs) is not a new organization that "split
7 off" from defendants' older organization. It is the older
8 organization from which defendants' removed themselves.

9

10 *Plaintiffs Have Standing to Sue*

11 Defendants' arguments that plaintiffs are not validly
12 constituted as the Diocese and Bishop of the Diocese of San
13 Joaquin, or indeed of any subpart of the Episcopal Church, are
14 poorly taken. The defendants have voted to leave an organization
15 (the Episcopal Church) and that organization has a right to name
16 defendants' successors.

17

18 *Trust Beneficiaries Need Not Be Named or Noticed*

19 Defendants claim that because this action is to remove
20 Schofield from his position as incumbent of a corporation that
21 holds property in trust for unincorporated missions and parishes,
22 these beneficiaries are necessary parties and are required to be
23 given notice of this action by virtue of Probate Code section
24 17203. Probate Code section 17203 applies only to proceedings
25 under the probate code applicable to express trusts. The interest
26 at stake here is incumbency in a corporation sole. The fact that
27 the corporation sole holds property in trust does not mean that a
28 petition for the removal of a trustee pursuant to Probate Code

1 section 17200 has been filed.

2

3 Procedural Issues

4 Defendants claim that the motion must be denied because
5 plaintiffs have failed to comply with Rule of Court 3.150, which
6 Rule requires that the specific cause of action must be stated
7 specifically in the notice of motion and be repeated, verbatim in
8 the separate statement of undisputed material facts.

9 Specifically, plaintiff's notice of motion and separate statement
10 seek summary adjudication on "Count I" not the "First Cause of
11 Action." This distinction is immaterial. As Weil and Brown note,
12 that although few lawyers and judges use the term "count," the
13 term may be used interchangeably with the phrase "cause of
14 action." (Weil & Brown, *Civil Procedure Before Trial* (The Rutter
15 Group 2008) "Pleadings" § 6:105-6:106.)

16 Defendants also take issue with the separate statement's
17 failure to place the supporting facts in the first column
18 underneath the supported fact. [Rule of Court, Rule 3.1350,
19 subdivision (d)] and failure to place all supporting evidence
20 under one separate cover separately bound with a table of
21 contents. [Rule of Court, Rule 3.1350, subdivision (g).]
22 However, these minor technical violations did not impede the
23 court's to review the motion and are not grounds to deny the
24 motion.

25 Defendants contend that because the first cause of action is
26 broken into subparts seeking declaratory relief on several issues,
27 each issue had to be separately identified in the separate
28 statement of facts in support of summary judgment and the separate

1 statement organized so that it could be determined which fact
2 related to each issue. Code of Civil Procedure section 437c,
3 subdivision (f)(1), provides: "A party may move for summary
4 adjudication as to one or more causes of action within an action,
5 one or more affirmative defenses, one or more claims for damages
6 [as specified in Section 3294 of the Civil Code], or one or more
7 issues of duty . . . A motion for summary adjudication shall be
8 granted only if it completely disposes of a cause of action, an
9 affirmative defense, a claim for damages, or an issue of duty."
10 As such the cause of action for declaratory relief stands or fails
11 as a whole and the plaintiffs were not required to break the
12 separate statement into sub "issues" for adjudication, as this
13 would have been improper.

14
15 Evidentiary Rulings

16 *Supplemental Declarations in Reply*

17 At oral argument, the Court indicated its tentative ruling
18 was to sustain the objections to the supplemental declarations in
19 reply. The Court now rules on the objections to the supplemental
20 declarations in reply as follows:

21 The objection to the Declaration of Dr. Robert Bruce Mullin
22 is sustained and the Declaration is stricken.

23 The objection to the Declaration of the Rt. Rev. John
24 Buchanan is overruled, except as to Exhibit 1, which is stricken.

25 The objection as to the Declaration of the Rt. Rev Jerry A.
26 Lamb is overruled.

27 The objection as to the Declaration of the Rev. Mark Hall is
28 overruled.

1 A trial court may properly consider new evidence submitted
2 with a reply brief "so long as the party opposing the motion for
3 summary judgment has notice and an opportunity to respond to the
4 new material." (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349,
5 362, fn. 8.) In exercising its discretion to receive late-filed
6 evidence, the trial court must also consider the opposing party's
7 due process rights. (See *San Diego Watercrafts, Inc., v. Wells*
8 *Fargo Bank* (2002) 102 Cal.App.4th 308, 316 (San Diego
9 *Watercrafts*.) Here, the original declarations identified the
10 substantive evidence upon which plaintiffs sought summary
11 judgment. The supplemental declarations allowed herein simply
12 added foundational facts; they did not constitute new evidence.
13 They merely stated that the declarant was personally present when
14 various events described in the previous declaration occurred.
15 This was implicit in the first declarations. The facts from the
16 documents and declarations the plaintiffs were relying on in
17 support of the motion were referenced in its separate statement of
18 undisputed material facts and remained unchanged. While
19 defendants have objected to the supplemental declarations at the
20 hearing on the summary adjudication motion, they have identified
21 no prejudice from their admission.

22 This is not a situation like that in *San Diego Watercrafts*,
23 whereby the court's reliance on evidence submitted with the moving
24 party's reply, the party opposing the summary judgment motion was
25 not informed of the issues it was required to meet in order to
26 oppose the motion. (*San Diego Watercrafts, supra*, 102 Cal.App.4th
27 at p. 316.) As the facts were contained within the plaintiffs'
28 separate statement, defendant was aware of the issues they needed

1 to address. Having received due notice and an opportunity to be
2 heard, there was no violation of the right to due process. (See
3 *Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1098-
4 1099.)

5

6 *Plaintiffs' Objections to Defendants' Evidence*

- 7 1. Sustained.
8 2. Sustained.
9 3. Sustained.
10 4. Sustained.
11 5. Sustained.


12

13 *Defendants' Objections to Plaintiffs' Evidence*

- 14 1. Overruled.
15 2. Overruled.
16 3. Overruled.
17 4. Overruled.
18 5. Overruled.
19 6. Overruled.
20 7. Overruled.
21 8. Overruled.
22 9. Overruled.
23 10. Sustained as to "February 28, 2008"; overruled as to
24 remainder.
25 11. Overruled.
26 12. Overruled.
27 13. Overruled.
28 14. Overruled.

- 1 15. Overruled.
- 2 16. Overruled.
- 3 17. Overruled.
- 4 18. Overruled.
- 5 19. Overruled.
- 6 20. Overruled.
- 7 21. Overruled.
- 8 22. Overruled.
- 9 23. Overruled.
- 10 24. Overruled.
- 11 25. Overruled.
- 12 26. Overruled.
- 13 27. Overruled.
- 14 28. Overruled.
- 15 29. Sustained.
- 16 30. Overruled.
- 17 31. Overruled.
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DATED this 21st day of July 2009.



Adolfo M. Corona
Judge of the Superior Court