

THE EPISCOPAL CHURCH, et al.,	)	IN THE DISTRICT COURT OF
	)	
VS.	)	TARRANT COUNTY, TEXAS
	)	
FRANKLIN SALAZAR, et al. <sup>1</sup>	)	141 <sup>ST</sup> DISTRICT COURT

**RESPONSE TO MOTIONS TO QUASH RULE 12 MOTIONS**

TO THE HONORABLE JUDGE OF SAID COURT:

The individual Local Episcopal Parties and the Local Episcopal Congregations (hereafter, the Local Episcopal Parties) file this Response to Motions to Quash Rule 12 Motions filed by attorneys J. Shelby Sharpe, Scott Brister, Kendall Gray,<sup>2</sup> and R. David Weaver (hereafter, the breakaway-faction attorneys),<sup>3</sup> and would respectfully show the Court as follows:

**I. Introduction**

Nothing about this Rule 12 dispute (or the Local Episcopal Congregations’ motion for continuance) should delay the summary judgment proceedings as they concern the claims and defenses between the individual Local Episcopal Diocesan officials and the individual Defendants (Salazar, Iker, *et al.*) or the claims and defenses between The Episcopal Church and the individual Defendants. Nothing should delay the determination of the “identity” issue<sup>4</sup>

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<sup>1</sup> The style is being shortened at the request of the Clerk’s office. It does not imply that any parties are omitted or dropped from the case.

<sup>2</sup> Mr. Gray, in a previous e-mail, and the breakaway-faction attorneys argue that Kendall Gray has not filed an appearance in this Court and participated only in connection with the mandamus proceeding. Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 7. Gray has been listed as counsel in the signature blocks of some of the pleadings filed in this Court on behalf of the breakaway faction. *See, e.g.*, Defendants’ Motion to Correct Style of Suit, at 7; Defendants’ Reply to Response to Motion to Correct Style of Suit, at 8. Additionally, counsel for both sides have included Gray in the list of attorneys on whom copies of pleadings are served. At no point has Gray raised any objection to his inclusion on such lists. In any event, any ruling as to the authority of Andrews Kurth should bind Gray.

<sup>3</sup> This response answers arguments raised in the two nearly identical motions to quash: one filed by Sharpe, Brister, and Gray and a separate one filed by Weaver.

<sup>4</sup> The “identity” issue includes determining which individuals are the leadership of the Episcopal Diocese of Fort Worth and its subordinate institutions.

between the individual leaders of the competing factions or between The Episcopal Church and the leaders of the breakaway faction.

The breakaway-faction attorneys have never had the authority to represent the Episcopal Diocese of Fort Worth, the Corporation of the Episcopal Diocese of Fort Worth, or any parishes or individuals associated with the Episcopal Diocese of Fort Worth. However, the Local Episcopal Parties, believing that summary judgment is the best way to resolve the “identity” issue at the heart of this case, sought to avoid causing any further delay of resolution of this issue on summary judgment. Although the Episcopal Parties want a ruling on the merits of the identity issue through summary judgment as soon as possible, they felt compelled to file Rule 12 motions before the summary judgment hearing after the breakaway-faction attorneys filed Defendants’ Motion for Partial Summary Judgment on December 23, 2010. Defendants’ summary judgment motion distorts and misapplies the Fort Worth Court of Appeals’ Rule 12 opinion in this case by arguing that the court of appeals had effectively determined that the breakaway faction alone represents the Corporation and Diocese.<sup>5</sup>

Shortly thereafter, in order to preserve their rights and prevent the breakaway-faction attorneys’ misuse of the Rule 12 opinion and mandate, the Episcopal Parties filed Rule 12 motions challenging the authority of Sharpe, Brister, Gray, and Weaver to represent the Corporation, Diocese, and the Defendant Congregations. These Rule 12 motions were filed on December 29, 2010 (as to Sharpe, Brister, and Gray) and December 31, 2010 (as to Weaver), just six and eight days, respectively, after the breakaway-faction attorneys filed Defendants’ Motion

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<sup>5</sup> See, e.g., Defendants’ Motion for Partial Summary Judgment, at 7 (“The Second Court of Appeals has barred counsel for the Plaintiffs’ from filing actions on behalf of the Corporation, and that is the law of this case. So as a matter of law, the owner of the property is the Defendant Corporation, not the Plaintiffs.”). In their motions to quash, the breakaway-faction attorneys sometimes back away from this contention. See Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 7; Motion to Quash Rule 12 Motion Against R. David Weaver and Original Answer Subject to Motion to Quash, at 7.

for Partial Summary Judgment. While Sharpe, Brister, and Gray were not personally served with citation, copies of the Rule 12 motions were served by facsimile and email on the breakaway-faction attorneys the same day that these motions were filed.<sup>6</sup> In conferring with counsel for the Local Episcopal Parties, Sharpe and Weaver did not object to setting the Rule 12 motions along with the parties' cross-motions for summary judgment on January 14, 2011.<sup>7</sup>

But thereafter, contrary to counsels' conduct in connection with their own Rule 12 motions, the breakaway-faction attorneys refused or did not respond to requests to waive service of citation, requiring the Local Episcopal Parties to hire private process servers at a considerable expense.<sup>8</sup> The difficulties of the private process servers to serve Sharpe, Brister, and Gray are detailed in attached affidavits.<sup>9</sup> The process server who attempted to serve Gray at his home, for example, saw a man between forty and fifty years of age through the window but was told by Gray's wife that he was out of town and that the man was Gray's brother.<sup>10</sup>

In sum, the breakaway-faction attorneys' motions to quash fail to raise any valid procedural or substantive defect in the Episcopal Parties' Rule 12 motions. The Rule 12 motions were timely filed and notice was served by facsimile and e-mail more than ten days before the hearing. The motions impose no added burden on the breakaway-faction attorneys, as they involve much of the same affidavit proof that has been filed in connection with the cross-motions for summary judgment. Because the motions will in no way delay or alter the January 14 summary judgment hearing on the identity issue, *see* note 4, *supra*, or preparation for the same,

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<sup>6</sup> Ex. F, Wells Aff. at ¶ 6.

<sup>7</sup> Ex. E, Nelson Aff. at ¶ 3; Ex. F, Wells Aff. at ¶ 3.

<sup>8</sup> Ex. F, Wells Aff. at ¶¶ 3-5. Although Sharpe and Gray did not expressly refuse to waive service, they have not yet accepted service. Weaver refused to waive service of citation but was served by a process server.

<sup>9</sup> *See* Ex. A, Pendergrass Aff. at ¶¶ 4-7; Ex. B, Habecker Aff. at ¶¶ 4-5; Ex. C, Davis Aff.; Ex. D, Simpson Aff.

<sup>10</sup> Ex. D, Simpson Aff.

the Court should deny the breakaway-faction attorneys' motions to quash.

**II. A Motion to Quash is Not a Proper Method by Which to Challenge the Substance of the Rule 12 Motions.**

The breakaway-faction attorneys' motions are procedurally deficient because they use an improper procedural vehicle to challenge the Episcopal Parties' Rule 12 motions. The purpose of a motion to quash is to challenge defective jurisdictional allegations, defective service of process, and defects in the citation.<sup>11</sup> While the attorneys challenge service, "[t]he remedy for defective service is additional time to answer the suit," not dismissal or denial of the motion.<sup>12</sup>

**III. The Episcopal Parties' Rule 12 Motions Will Not Delay the Summary Judgment Hearing.**

The Episcopal Parties' Rule 12 motions will not unnecessarily delay or continue the January 14 summary judgment hearing. The Rules of Civil Procedure provide that "the trial shall not be unnecessarily continued or delayed for the hearing" on a Rule 12 motion.<sup>13</sup> As an initial matter, nothing about the Rule 12 motions or motions to quash stops the Court from hearing on January 14, 2011 the cross-motions for summary judgment between the individual Local Episcopal Diocesan officials and the individual Defendants or between The Episcopal Church and the individual Defendants. The Court can and should decide the issues between these parties first in the interest of judicial economy.

Moreover, the breakaway-faction attorneys contend that, because Weaver represents a number of clients, "the evidence [he] is required to produce at the hearing on the Rule 12 motion will require not less than three (3) hours to present, unquestionably delaying the hearing on the

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<sup>11</sup> See *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985).

<sup>12</sup> *Onda Enters., Inc. v. Pierce*, 750 S.W.2d 812, 813 (Tex. App.—Tyler 1988, orig. proceeding.).

<sup>13</sup> Tex. R. Civ. P. 12.

motions for summary judgment.”<sup>14</sup> However, this argument is irrelevant to the extent that a summary judgment hearing is not a trial for Rule 12 purposes, as demonstrated in Section IV, *infra*. In any event, the Court can expediently resolve the Rule 12 motions at the hearing on January 14 that will not delay or continue the summary judgment hearing scheduled for the same day. Courts can decide Rule 12 motions on the basis of affidavits.<sup>15</sup> The Rule 12 hearing should not significantly delay the summary judgment hearing. Finally, any delay that is necessitated should not be “significant” as the cross-motions are fully briefed.

#### **IV. The Episcopal Parties Timely Filed Their Rule 12 Motions.**

The Court should deny the breakaway-faction attorneys’ motions to quash because the Episcopal Parties’ Rule 12 motions were timely filed. The breakaway-faction attorneys, citing *Tenneco, Inc. v. Enterprise Products Co.*, argue that the Episcopal Parties waived their right to file a Rule 12 motion by failing to act for a long period of time.<sup>16</sup> This argument ignores the plain language of Rule 12, which provides that a Rule 12 motion “may be heard and determined *at any time* before the parties have announced ready for trial.”<sup>17</sup> *Tenneco* deals with waiver of rights provided in a contract and is not even applicable to motions brought pursuant to the Rules of Civil Procedure.<sup>18</sup> Significantly, no Texas court has held that a party’s right to file a Rule 12

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<sup>14</sup> Motion to Quash Rule 12 Motion Against R. David Weaver and Original Answer Subject to Motion to Quash, at 5; *see also* Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 5.

<sup>15</sup> *See, e.g., Patton Children’s Trust v. Hamlin*, No. 07-07-0488-CV, 2008 WL 3863475, at \*4 (Tex. App.—Amarillo Aug. 20, 2008, no pet.) (“Typically, in response to a Rule 12 motion, an attorney satisfies his or her burden to establish their authority to prosecute or defend a suit through an affidavit from the client indicating the attorney was retained to provide representation in the case, and/or through testimony of the attorney.”); *Perkins v. Chase Manhattan Mortgage Corp.*, No. 03-04-00741-CV, 2006 WL 1649006, at \*4 (Tex. App.—Austin June 16, 2006, no pet.) (holding that a client’s affidavit was sufficient proof to support a response to a Rule 12 motion); *Boudreau v. Fed. Trust Bank*, 115 S.W.3d 740, 742 (Tex. App.—Dallas 2003, pet. denied) (concluding that an affidavit from the purported client and testimony from the attorney were sufficient proof under Rule 12).

<sup>16</sup> Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 4; Motion to Quash Rule 12 Motion Against R. David Weaver and Original Answer Subject to Motion to Quash, at 4.

<sup>17</sup> TEX. R. CIV. P. 12 (emphasis added).

<sup>18</sup> *See Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996).

motion is waivable outside the context specifically enumerated in the rule (and even then “waiver” has been narrowly construed and subject to exceptions depending on the particular case’s circumstances, *see infra* at 8-9). As such, under the plain language of the rule, the Episcopal Parties’ motion is timely, as no party has announced ready for trial.

The breakaway-faction attorneys’ motions assert that

respondents’ agreement to file their motion for partial summary judgment in time to be heard on the hearing date of January 14, 2011, followed by respondents’ timely filing of their motion constitutes an announcement of “ready for trial” because a hearing on a motion for summary judgment is considered to be a trial within the meaning of Texas Rules of Civil Procedure.<sup>19</sup>

This statement is unsupported by citation to any rules or case law and, in fact, contravenes established law for two reasons. First, a summary judgment proceeding is *not* a trial within the meaning of Rule 12, particularly under this case’s unusual circumstances and issues. The Texas Supreme Court has held, “The disposition of a cause by summary judgment may effectively adjudicate the merits of a dispute, but the summary judgment proceeding is not a conventional trial but rather an exception to the usual and traditional form of procedure.”<sup>20</sup> Following the Supreme Court’s holding in *Richards*, lower courts have repeatedly distinguished summary judgment from trial for the purposes of several Rules of Civil Procedure. The Fort Worth Court of Appeals held that appeal from a summary judgment ruling that does not dispose of all the parties or issues is interlocutory because “[t]he presumption of finality of judgments applicable to judgments entered after a conventional trial does not apply to summary judgments.”<sup>21</sup> Similarly, another court concluded that “a summary judgment hearing is not a trial for the

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<sup>19</sup> Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 5; Motion to Quash Rule 12 Motion Against R. David Weaver and Original Answer Subject to Motion to Quash, at 5.

<sup>20</sup> *Richards v. Allen*, 402 S.W.2d 158, 160 (Tex. 1966).

<sup>21</sup> *Amerivest Inc. v. Bluebonnet Sav. Bank*, 897 S.W.2d 513, 515 (Tex. App.—Fort Worth 1995, writ denied).

purposes of Rule 166b [which has been repealed and replaced, with modifications, by Rule 192],” which required parties to supplement discovery no less than thirty days prior to trial.<sup>22</sup> Thus, established precedents from the Supreme Court, the Fort Worth Court of Appeals, and other courts of appeals suggest that a summary judgment hearing is *not* a trial for purposes of Rule 12.

Second, no court has ever held that agreeing to file and timely filing a motion constitutes an announcement of ready for trial. As such, even if a summary judgment hearing is a trial for Rule 12 purposes, the mere filing of a motion is not an announcement of ready for trial. In the overwhelming majority of cases, an announcement of “ready for trial” consists of an express oral statement in open court.<sup>23</sup> Consistent with these cases, the filing of a motion alone is insufficient to constitute an announcement of ready for trial. In another context, the Fort Worth Court of Appeals noted that “while the filing of an answer amounted in law to an appearance on the part of the defendants, it did not amount, we think, to an announcement of ready for trial.”<sup>24</sup> Another court of appeals examined a question similar to the one at issue here: whether a party could file

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<sup>22</sup> *Hollek v. Ugarte*, No. B14-93-001133-CV, 1994 WL 699060, at \*2 (Tex. App.—Houston [14th Dist.] Dec. 15, 1994, no writ). The Episcopal Parties recognize that Texas courts have concluded that a summary judgment hearing constitutes a trial for purposes of Rule 63, which requires leave of court to amend pleadings within seven days of trial. See *Mensa-Wilmot v. Smith Int’l, Inc.*, 312 S.W.3d 771, 778 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Guereque v. Thompson*, 953 S.W.2d 458, 464 (Tex. App.—El Paso 1997, writ denied). This appears to be the only rule for which courts have held that a summary judgment proceeding is considered a trial. Because Rule 63 aims to prevent surprise at trial by limiting the parties’ ability to amend the pleadings, it makes sense to extend the rule to summary judgment proceedings in order to prevent surprise at summary judgment hearings as well. Conversely, the purpose of Rule 12—“to discourage and cause dismissal of suits brought without authority,” *Sloan v. Rivers*, 693 S.W.2d 782, 784 (Tex. App.—Fort Worth 1985, no writ)—is not frustrated by allowing a party to file a Rule 12 motion after the parties have filed cross-motions for summary judgment, particularly when the parties have hotly contested the identity issue throughout this case, including in the cross-motions for summary judgment, and there is no surprise. Defendants would have filed exactly the same motion for partial summary judgment with the same arguments and evidence whether or not a Rule 12 motion was anticipated or pending.

<sup>23</sup> See, e.g., *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 116 (Tex. 2004); *Zwick v. Zwick*, No. 2-08-182-CV, 2009 WL 1564928, at \*2 (Tex. App.—Fort Worth June 4, 2009, no pet.).

<sup>24</sup> *Finkelstein v. Roberts*, 220 S.W. 401, 404 (Tex. Civ. App.—Fort Worth 1920).

an amended pleading just four days prior to a summary judgment proceeding.<sup>25</sup> The court concluded that Rule 185, “which authorizes the filing of a sworn denial as late as the day of trial, but before announcement of ‘ready’ by the party,” was applicable to the proceeding, and under that rule, the amended pleading was permissible, as no announcement of ready for trial had yet occurred.<sup>26</sup> Here, neither party has made a formal announcement of ready for trial; the Episcopal Parties’ Rule 12 motions are, therefore, timely.

Even if the breakaway faction’s filing of a motion for partial summary judgment constituted an announcement of ready for trial, the Court should nevertheless deny the breakaway-faction attorneys’ motions to quash. Although the rules ordinarily prohibit the parties from filing a Rule 12 motion after announcement of ready for trial, courts have identified circumstances that justify deviation from this general rule. The Fort Worth Court of Appeals, for example, allowed parties to raise a Rule 12 motion for the first time on appeal when the case was an original proceeding.<sup>27</sup> Another court has held that “a Rule 12 motion may be properly brought when a new and different attorney attempts to appear as attorney of record purporting to advance a motion for new trial after the trial has concluded.”<sup>28</sup> The court reasoned that its reading conformed with the rule’s timing requirement: “concerning when the motion can be heard, . . . Rule 12 uses the permissive ‘*may*,’ as opposed to the mandatory ‘*shall*’ language.”<sup>29</sup>

Here, exceptional circumstances likewise permit the Episcopal Parties to file Rule 12 motions even if the parties have already announced ready for trial. Specifically, the breakaway

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<sup>25</sup> *Magnolia Fruit & Produce Co. v. Unicopy Corp. of Tex.*, 649 S.W.2d 794, 796 (Tex. App.—Tyler 1983, writ dismiss’d).

<sup>26</sup> *Id.* at 796-97.

<sup>27</sup> *Sloan*, 693 S.W.2d at 784.

<sup>28</sup> *Air Park-Dallas Zoning Comm. v. Crow-Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 906 (Tex. App.—Dallas 2003, no pet.).

<sup>29</sup> *Id.* (emphasis added) (citing TEX. GOV’T CODE ANN. § 311.016(1) (Vernon 1998)).



faction's misuse of the holding and mandate from the court of appeals<sup>30</sup> could prejudice the rights of the Episcopal Parties, particularly when the Episcopal Parties have disputed the identity issue throughout these proceedings.<sup>31</sup> **Furthermore, the parties that filed the Rule 12 motions here include the Local Episcopal Congregations, which did not intervene in the case until November 12, 2010 and, therefore, could not be held to have waited too long to file a Rule 12 motion.**<sup>32</sup>

**V. The Episcopal Parties Had Timely Actual Notice of the Rule 12 Motions and Hearing.**

Sharpe, Brister, and Gray attempt to defeat the Rule 12 motion by pointing out that they were not cited with personal service ten days prior to the hearing date of January 14, 2011.<sup>33</sup> The Local Episcopal Parties acknowledge this, despite the efforts of their process servers. Rule 12 goes on to provide that notice of a Rule 12 motion "shall be served upon the challenged attorney at least ten days before the hearing on the motion."<sup>34</sup> Here, there is no dispute that the breakaway-faction attorneys had timely actual notice of the Rule 12 motions and the hearing and were served with the motions and the notice of hearing under Texas Rule of Civil Procedure 21a more than ten days before the hearing. The Episcopal Parties served copies of the Rule 12

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<sup>30</sup> See, e.g., Defendants' Motion for Partial Summary Judgment, at 7 ("The Second Court of Appeals has barred counsel for the Plaintiffs' from filing actions on behalf of the Corporation, and that is the law of this case. So as a matter of law, the owner of the property is the Defendant Corporation, not the Plaintiffs.').

<sup>31</sup> Additionally, and in the alternative, should the Court limit its consideration of the cross-motions to the claims and defenses of the competing individuals and The Episcopal Church, there will have been no summary judgment hearing and no arguable trial as to the Defendant Corporation, the Defendant Diocese, and the Defendant Congregations.

<sup>32</sup> In addition, on October 6, 2010, the breakaway faction filed a Motion to Disclose Potential Conflicts, which they did not set for hearing until December 9, 2010. Because that motion invoked (albeit improperly) a rule of civil procedure that governs recusal of the presiding judge, there was a risk that action on any motions would be suspended. See Defendants' Motion for Disclosure of Potential Conflicts; see also Tex. R. Civ. P. 18a, 18b.

<sup>33</sup> Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 5. Weaver was served with citation and does not raise any objection related to service.

<sup>34</sup> TEX. R. CIV. P. 12.

motions on Sharpe, Brister, and Gray by facsimile and email on December 29, 2010, sixteen days before the hearing.<sup>35</sup> Under these circumstances, service by facsimile should be deemed sufficient to satisfy the procedural requirements of the rule.

Moreover, after the breakaway-faction attorneys refused to waive personal service,<sup>36</sup> the Local Episcopal Parties' diligent efforts to personally serve the breakaway-faction attorneys sufficiently satisfied any service requirements that exist under Rule 12. While the Local Episcopal Parties' attorneys appeared without objection when the breakaway faction filed a Rule 12 motion,<sup>37</sup> the breakaway-faction attorneys refused to do the same here. Process servers made numerous attempts to serve Sharpe, Brister, and Gray at their homes and offices, but each has been unavailable.<sup>38</sup> Just one day after Rule 12's ten-day deadline for service had passed, Sharpe, Brister, and Gray filed their motion to quash in which they asserted that the Episcopal Parties failed to comply with the service requirement.<sup>39</sup>

Even if service of citation was required, when there was timely actual notice, failure to personally serve the breakaway-faction attorneys is a defect that would not render the Rule 12 motion invalid. The Fort Worth Court of Appeals has held:

The purpose of the rules relating to service and notice is to make reasonably certain that all parties to a suit are notified as to the date and time the court has set their matter down for hearing and determination. This is in order that the parties, individually or by counsel may appear, and present their side of the case and to take such action as is deemed appropriate to protect their interest.

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<sup>35</sup> Ex. F, Wells Aff. at ¶ 6.

<sup>36</sup> *Id.* at ¶¶ 3-4. Brister and Weaver specifically refused to waive service of citation. *Id.*

<sup>37</sup> Ex. E, Nelson Aff. at ¶ 4; Ex. F, Wells Aff. at ¶ 7. Notably, the breakaway-faction attorneys neither asked the Episcopal Parties' attorneys to waive service nor personally served the attorneys. *Id.* Nevertheless, the Episcopal Parties' attorneys did not object to the breakaway faction's Rule 12 motion on those grounds. *Id.*

<sup>38</sup> Ex. A, Pendergrass Aff. at ¶¶ 4-7; Ex. B, Habecker Aff. at ¶¶ 4-5; Ex. C, Davis Aff.; Ex. D, Simpson Aff. The Episcopal Parties are mindful and respectful of Sharpe's personal circumstances which kept him out of his office and out of town during some of this period.

<sup>39</sup> Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 5.

Thus, service and notice in a technical sense is incidental where the main purpose of obtaining the appearance of all parties and their participation is accomplished.<sup>40</sup>

The very fact that Sharpe, Brister, and Gray knew about the motions and filed a motion to quash the Episcopal Parties' Rule 12 motion demonstrates that they have had sufficient notice to respond to the motions, as did Weaver. Additionally, in their motion to quash or in subsequent correspondence, they acknowledge their understanding that the hearing on the Rule 12 motions will take place on January 14, 2011, demonstrating that they have notice of the hearing date, and they have set their motions to quash at the same time.<sup>41</sup> Indeed, Sharpe and Weaver did not object to setting the Rule 12 motions for hearing on January 14, 2011.<sup>42</sup> Thus, in spite of the breakaway-faction attorneys' avoidance of personal service, they received sufficient notice to satisfy the requirements of Rule 12.

**VI. The Court of Appeals' Holding Applies with Equal Force to the Breakaway-Faction Attorneys Until the Identity Issue is Resolved.**

The Court should grant the Episcopal Parties' Rule 12 motions based on the Fort Worth Court of Appeals' prior Rule 12 opinion in this case.<sup>43</sup> The breakaway-faction attorneys, subject to their motions to quash, responded to the Rule 12 motions by arguing that the reasoning of the mandamus opinion applies only to the Local Episcopal Parties.<sup>44</sup> Although that court was only asked to rule on the breakaway faction's Rule 12 motion, the opinion applies with equal force to both sides. As noted in the Episcopal Parties' Rule 12 motions, the court concluded that

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<sup>40</sup> *Hill v. W.E. Brittain, Inc.*, 405 S.W.2d 803, 807 (Tex. Civ. App.—Fort Worth 1966, no writ).

<sup>41</sup> See Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 5 (“Neither respondent Sharpe nor respondent Brister was served ‘ten days’ prior to *the hearing date of January 14, 2011.*”) (emphasis added).

<sup>42</sup> Ex. E, Nelson Aff. at ¶ 3; Ex. F, Wells Aff. at ¶ 3.

<sup>43</sup> This is the first of the several grounds supporting the Rule 12 motions.

<sup>44</sup> Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 6-7; Motion to Quash Rule 12 Motion Against R. David Weaver and Original Answer Subject to Motion to Quash, at 5-7.

the trier of fact will be unnecessarily confused by presentations from two opposing factions who claim to be the Corporation and the Fort Worth Diocese. . . . [C]onfusion in the litigation will be perpetuated, including the appearance that the issue is already resolved in favor of one party before the questions of identity and title to the property held by the Corporation and the Fort Worth Diocese are determined in the course of the litigation.<sup>45</sup>

The breakaway-faction attorneys inexplicably emphasize the court’s subsequent reference to the posture of the case and the fact that no Rule 12 motion against the breakaway-faction attorneys was before the Court. However, this in no way lessens the application of the court’s reasoning and holding to the breakaway-faction attorneys. By expressly declining to reach the merits of the case and noting that “[t]he question of ‘identity’ remains to be determined in the course of the litigation,”<sup>46</sup> the court made clear that neither party may act on behalf of the Corporation or Diocese until the merits of the case are resolved. In fact, given the undisputed facts and law of the case, the court has no discretion but to grant the Rule 12 motions filed by the Episcopal Parties against attorneys Sharpe, Brister, Gray, and Weaver.

**VII. Kathleen Wells May Execute an Affidavit Verifying a Rule 12 Motion.**

Sharpe, Brister, and Gray further misuse the mandamus opinion to argue that Kathleen Wells cannot execute an affidavit as Chancellor for the Diocese.<sup>47</sup> Although the court of appeals concluded that Kathleen Wells could not represent the Corporation or Diocese as an *attorney of record* until the identity issue was resolved, it expressly declined to “determine on the merits which Bishop and which Trustees are the authorized persons within the Corporation and the Fort

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<sup>45</sup> *In re Salazar*, 315 S.W.3d 279, 287 (Tex. App.—Fort Worth 2010, orig. proceeding). Despite the Court of Appeals’ concerns, here, the Episcopal Parties know that this Court is familiar with the issues and not confused about the need still to decide the identity issue.

<sup>46</sup> *Id.* at 286.

<sup>47</sup> Motion to Quash Rule 12 Motion and Answer Subject to the Motion to Quash, at 4.

Worth Diocese.”<sup>48</sup> Because the Court expressed no opinion as to whether Kathleen Wells is the rightful Chancellor of the Diocese, nothing prevents her from executing an affidavit as such for purposes of the Rule 12 motions. Moreover, Wells is an individual party to this action with every right to verify the Rule 12 motion against these attorneys. The Rule 12 opinion addressed only her capacity as counsel of record for the Diocese and the Diocesan Corporation; it expressly did not decide and does not affect her capacity as official of the Diocese or her status as party sued individually by the breakaway faction. Finally, in the federal case, one of the same attorneys served a subpoena on Chancellor Kathleen Wells. This objection should be overruled.

### **VIII. Prayer**

BASED ON THE ABOVE, the Local Episcopal Parties respectfully request that the Court:

- a. deny the breakaway-faction attorneys’ motions to quash;
- b. grant the Episcopal Parties’ Rule 12 motions and find that Sharpe, Brister, Gray, and Weaver have no authority to prosecute or defend this case on behalf of the Episcopal Diocese of Fort Worth, the Corporation of the Episcopal Diocese of Fort Worth, or affiliated congregations; and
- c. grant such other and further relief as the Court may deem just.

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<sup>48</sup> *Salazar*, 315 S.W.3d at 286.

Respectfully submitted,

*Frank Hill with permission*  
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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing Response to Respondents' Motions to Quash Rule 12 Motions has been sent this 11th day of January, 2011, by Federal Express or hand-delivery and by email, to:

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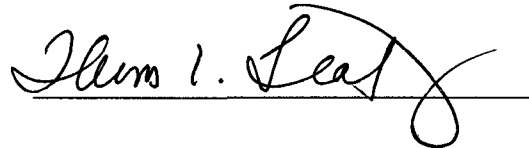
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Kendall M. Gray, Esq.  
Andrews Kurth, L.L.P.  
600 Travis, Suite 4200  
Houston, TX 77002

David Booth Beers, Esq.  
Adam Chud, Esq.  
Goodwin Procter, LLP  
901 New York Avenue, N.W.  
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dbeers@goodwinprocter.com

Mary E. Kostel, Esq.  
Special Counsel for Property Litigation  
c/o Goodwin Procter LLP  
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mkostel@goodwinprocter.com

Sandra Liser, Esq.  
Naman Howell Smith & Lee, LLP  
306 West 7th Street, Suite 405  
Fort Worth, Texas 76102-4911  
sliser@namanhowell.com

  
\_\_\_\_\_

US 712339v1

# **EXHIBIT A**



THE EPISCOPAL CHURCH, et al.,	)	IN THE DISTRICT COURT OF
	)	
VS.	)	TARRANT COUNTY, TEXAS
	)	
FRANKLIN SALAZAR, et al.	)	141 <sup>ST</sup> DISTRICT COURT

**AFFIDAVIT OF TOD E. PENDERGRASS**

STATE OF TEXAS           §  
  §  
COUNTY OF TRAVIS       §

BEFORE ME THE UNDERSIGNED AUTHORITY, on this day personally appeared Tod E. Pendergrass, who, being by me personally sworn, upon his oath stated:

1.       “My name is Tod E. Pendergrass. I am over twenty-one (21) years of age, of sound mind, and fully competent to make this Affidavit. The facts stated in this Affidavit are within my personal knowledge and are true and correct.

2.       I am a certified process server, authorized by order of the Supreme Court of Texas, Number SCH1660, to serve process pursuant to Rules 103 and 536a of the Texas Rules of Civil Procedure.

3.       On December 30, 2010, Vinson & Elkins L.L.P. asked Direct Results Legal Process Server to serve a Citation and Rule 12 Motion on Scott Brister in the above-styled matter.

4.       On December 31, 2010, at 11:29 a.m., I attempted to serve Mr. Brister at his usual place of business, the law firm of Andrews Kurth at 111 Congress Avenue, Suite 1700, Austin, Texas 78701, where I found the office closed.

5.       I forwarded the process to another process server at our company, Rick Habecker.


6. On January 4, 2011, at 10:09 a.m., I called the Houston offices of Andrews Kurth at (713) 220-4200 and was told Mr. Brister was not there.

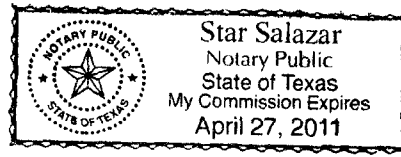
7. On January 4, 2011, at 10:10 a.m., I called the Dallas offices of Andrews Kurth at (214) 659-4400 and was told Mr. Brister was not there.”

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Tod E. Pendergrass

Subscribed and sworn to me on this 7<sup>th</sup> day of January, 2011.

  
\_\_\_\_\_  
Notary Public of the State of Texas  
My commission expires: 4-27-2011



# **EXHIBIT B**

THE EPISCOPAL CHURCH, et al.,	)	IN THE DISTRICT COURT OF
	)	
VS.	)	TARRANT COUNTY, TEXAS
	)	
FRANKLIN SALAZAR, et al.	)	141 <sup>ST</sup> DISTRICT COURT

**AFFIDAVIT OF RICK HABECKER**

STATE OF TEXAS           §  
  §  
COUNTY OF TRAVIS       §

BEFORE ME THE UNDERSIGNED AUTHORITY, on this day personally appeared Rick Habecker, who, being by me personally sworn, upon his oath stated:

1.       “My name is Rick Habecker. I am over twenty-one (21) years of age, of sound mind, and fully competent to make this Affidavit. The facts stated in this Affidavit are within my personal knowledge and are true and correct.

2.       I am a certified process server, authorized by order of the Supreme Court of Texas, Number SCH1860, to serve process pursuant to Rules 103 and 536a of the Texas Rules of Civil Procedure.

3.       On December 30, 2010, Vinson & Elkins L.L.P. asked Direct Results Legal Service to serve a Citation and Rule 12 Motion on Scott Brister in the above-styled matter.

4.       I made the following attempts to serve Mr. Brister by delivery in person at 380 River Chase Boulevard, Georgetown, Texas 78628 (the ‘original service address’), the Defendant’s usual place of abode, and/or a place where the Defendant can probably be found:

a.       On December 31, 2010 at 3:50 p.m., I arrived at the original service address. When I rang the door bell, no one answered. I affixed a business card to the door and then departed the premises.

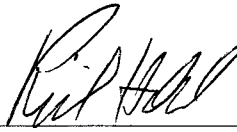
b. On January 1, 2011 at 8:44 a.m., I received a telephone call but failed to answer it before it stopped ringing. My telephone's memory recorded the call coming from 512-869-7959. I did not recognize the number, so I dialed it. An adult female answered, and I gave my full name and stated that I was returning a call to the person there that I had just missed. The lady said she made no call to me, but asked me to hold while she asked her husband if he had made the call. I could hear a man in the background denying that he made the call. I politely stated to the lady that I must have dialed a wrong number and hung up. I then researched the number and found that it was held in the name of Scott Brister, which prompted my next visit to the original service address.

c. On January 1, 2011 at 9:40 a.m., I re-visited the original service address. I found that my business card was gone. I rang the doorbell repeatedly, but no one came to the door. I left another business card at the door and departed.

d. On January 3, 2011 at 7:25 p.m., I made one final attempt to serve the process upon Mr. Brister at the original service address, but no one came to the door after ringing the door bell several times. I then departed the premises.

5. I also attempted to serve the process upon Mr. Brister by delivery in person at his office at 111 Congress Avenue, Suite 1700, Austin, Texas 78701 (the 'alternate service address'), the Defendant's usual place of business, or a place where the Defendant can probably be found, on January 3<sup>rd</sup>, 2011, at 9:20 a.m. When I arrived at the alternative service address the receptionist informed me that Mr. Brister was in Colorado for the entire week. She said he would return to the office on Monday, January 10th. I left a business card with the receptionist and then departed the premises."

FURTHER AFFIANT SAYETH NOT.

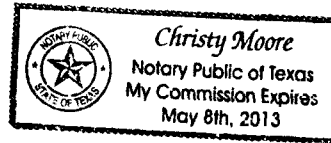


\_\_\_\_\_  
Rick Habecker

Subscribed and sworn to me on this 7<sup>th</sup> day of January, 2011.



\_\_\_\_\_  
Notary Public of the State of Texas



My commission expires: \_\_\_\_\_

# **EXHIBIT C**

CAUSE NO. 141-237105-09

THE EPISCOPAL DIOCESE OF  
FT WORTH, ET AL

§  
§

IN THE DISTRICT COURT

vs.

§  
§

FRANKLIN SALAZAR, ET AL  
ET AL

TARRANT COUNTY, TEXAS

**AFFIDAVIT OF DUE DILIGENCE**

**BEFORE ME**, the undersigned authority, this day personally appeared John P Davis, to me well known and who after being by me duly sworn, did depose, and say; "I am over the age of 18 years, I am of sound mind, capable of making this affidavit. I am authorized by a court order to serve process in this matter. I am not a party to this suit nor interested in its outcome. I am personally acquainted with the facts stated in this affidavit; all statements are true and correct.

That on the 31st day of December 2010 at 10:00 a.m. I received a citation in the above listed cause to be delivered to J Shelby Sharpe at 6100 Western Place # 1000 Ft Worth, Texas .

DATE:

TIME:

NARRATIVE:

12/31/2010

2:45 pm

I arrived at 6100 Western Place Ft Worth, Texas only to find the office dark and locked. Everyone was gone for the holiday weekend. I was given his home phone # (817) 731-8511 but there was no answer.

01/03/2011

10:45 am

I attempted delivery again to Mr.Sharpe at his office at 6100 Western Place in Ft Worth. The receptionist said he was out of the office and didn't know when he would return. I left a card asking him to call. I was told by other sources that he was out of town until Wednesday.

01/05/2011

9:30 am

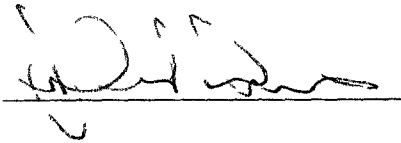
Again I attempted delivery of citation to Shelby Sharpe. And again they said he was not in the office. The receptionist said he would call me later. Wednesday afternoon she called saying Mr Sharpe said he would be in Thursday morning and to come by then.



01/05/2011

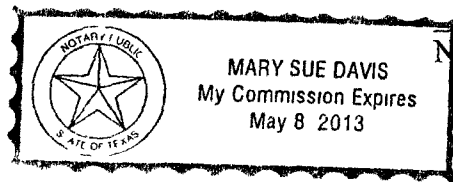
9:45 am

I attempted delivery of citation to Shelby Sharpe but again they said he was not going to be in Thursday because he had to leave town.



John P Davis  
SCH # 403

**SUBSCRIBED AND SWORN TO BEFORE ME**, by John P Davis, on this 7th day of January 2011, to which certify my hand and official seal.



  
NOTARY PUBLIC, State of Texas

# **EXHIBIT D**

**CAUSE NO. 141-237105-09**

THE EPISCOPAL DIOCESE OF FORT §  
WORTH, ET AL., §  
**PLAINTIFF** § IN THE 141ST JUDICIAL DISTRICT  
§  
VS. § TARRANT COUNTY, TX  
§  
FRANKLIN SALAZAR, ET AL , §  
**DEFENDANT** §

**AFFIDAVIT OF DUE DILIGENCE**

My name is A J SIMPSON. I am over the age of eighteen (18), I am not a party to this case, and have no interest in its outcome. I am a private process server authorized by and through the Supreme Court of Texas, am in all ways competent to make this affidavit, and this affidavit is based on personal knowledge. The facts stated herein are true and correct. My business address is 1201 Louisiana St., Suite 210, Houston, Texas, 77002.

**On December 31, 2010 at 10:28 AM**

- I received a PRECEPT,RULE 12 MOT CHALLENGING AUTHORITY OF ATTYS;  
NOTICE OF HEARING ON RULE 12 MOT for service on KENDALL M. GRAY, ESQ..  
28411 SHINING CREEK LANE, SPRING, TX 77386.

**On December 31, 2010 at 06:22 PM**, at 28411 SHINING CREEK LANE, SPRING, TX 77386 Wife says he is out of town until later next week, there is a male 40-50 years old within the residence and when I question her about him she says it's Mr. Kendall M. Gray's brother.

**On January 03, 2011 at 02:00 PM**, at 600 TRAVIS 4200, HOUSTON, TX 77002 I called via the Telephone to inquire if Mr. Kendall M. Gray was in the office today and only got his voice mail, I then called his Secretary and also got her voice mail.

**On January 03, 2011 at 07:15 PM**, at 28411 SHINING CREEK LANE, SPRING, TX 77386 No answer at the door, and no movement witnessed within the residence.

**On January 04, 2011 at 03:00 PM**, at 600 TRAVIS 4200, HOUSTON, TX 77002 I was told by the receptionist and I quote "yes sir, I factually know that Mr. kendall Gray is not in today", at 600 Travis, Suite 4200, Houston Texas, 77002.

**On January 04, 2011 at 08:15 PM**, at 28411 SHINING CREEK LANE, SPRING, TX 77386 I went back by the residence to see if possibly Mr. Kendall M. Gray's schedule had changed to where he might be back from being out of town, there was no answer at the door. I did see lights on within the house and two dogs met me at the front door. It almost appeared as if they were out of the house at the time I was there so I sat in my car down the street to watch for 30 minutes or so to see if I could possibly approach them upon their arrival back home, however nothing changed during the time is was there at 28411 Shining Creek Lane, Spring Texas, 77386. At about 8:40 P.M. it had started to rain pretty hard and after not seeing anyone or any movement I pulled away from the house to leave and as I got about two houses down I stopped to see a female come out of the residence at 28411 Shining Creek Lane, to retrieve the trash or garbage container which had been sitting out at the street at the end of the driveway, she moved it to the side of the garage and went back into the residence through the front door.

**CAUSE NO. 141-237105-09**

THE EPISCOPAL DIOCESE OF FORT  
WORTH, ET AL.,  
**PLAINTIFF**

§§

IN THE 141ST JUDICIAL DISTRICT

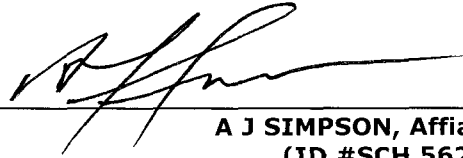
VS.

TARRANT COUNTY, TX

FRANKLIN SALAZAR, ET AL ,  
**DEFENDANT**

**On January 05, 2011 at 11:55 AM**, No answer at the door and no movement witnessed within the residence. No cars and no dogs.

**On January 05, 2011 at 01:32 PM**, at 600 TRAVIS 4200, HOUSTON, TX 77002 After finishing my daily paperwork in downtown Houston I decided to call Mr. Kendall M. Gray's Secretary, who is Ms. Theresa Hicks (to the best of my knowledge) at the Law Firm of Andrews Kurth. I called the main number of 713.220.4200 at 1:25 P.M. and asked for Theresa Hicks who then came on the line to say that Mr. Kendall M. Gray was currently in his office there at the firm at 600 Travis, Suite 4200, Houston Texas, 77002. I told her I was a Process Server and I had Documents from the Courts for Mr. Kendall M. Gray and I was headed over to deliver the documents and would be there in a couple of minutes. I arrived at 600 Travis, Suite 4200, Houston Texas, 77002, at 1:32 P.M. and asked for Mr. Kendall M. Gray, the receptionist asked me to have a seat in the waiting area while she contacted him. After about two minutes she then approached me and stated "Mr. Gray is not in the office today", at which point I told her that I had just spoken to his Secretary Ms. Theresa Hicks, who stated that Mr. Gray was currently in his office here at the firm, and she knew I was coming over with documents, of which Mr. Kendall M. Gray would need to personally accept. The Receptionist who would only identify herself as "Debbie" then asked me again to have a seat and she would now contact Ms. Theresa Hicks to see if maybe she could help as she was the individual who led me to believe that if I came over immediately Mr. Kendall M. Gray would accept the documents from me. The Receptionist then came back over to me to state that Mr. Kendall M. Gray has gone to lunch. I said "thank you" and left the firm.



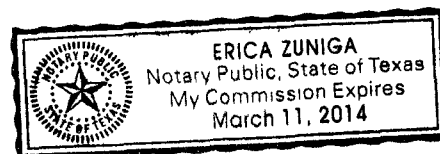
**A J SIMPSON, Affiant  
(ID #SCH 5622)**

**Before me personally appeared the above-named affiant, who, being first duly sworn, stated upon oath that the above-stated facts are true and correct and within his or her personal knowledge, and subscribed the same on this 5<sup>th</sup> day of**

January, 2011.



Notary Public in and for the State of Texas



# **EXHIBIT E**

THE EPISCOPAL CHURCH, et al.,	)	IN THE DISTRICT COURT OF
	)	
VS.	)	TARRANT COUNTY, TEXAS
	)	
FRANKLIN SALAZAR, et al.	)	141 <sup>ST</sup> DISTRICT COURT

**AFFIDAVIT OF JONATHAN D.F. NELSON**

THE STATE OF TEXAS           \*\*  
  \*\*  
COUNTY OF TARRANT         \*\*

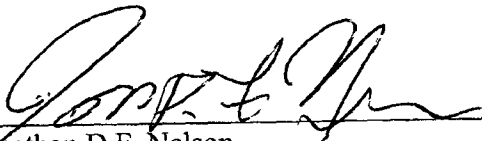
BEFORE ME, the undersigned notary public, on this day personally appeared JONATHAN D.F. NELSON, who being by me duly sworn, upon oath deposed and said:

1.       “I am over the age of 18 years and competent to make this affidavit and have personal knowledge of the facts stated herein.


2.       I am counsel of record for The Rt. Rev. C. Wallis Ohl and the individuals named as plaintiffs, third-party defendants, and/or counter-plaintiffs in this case.

3.       Before filing a Rule 12 motion, I conducted a telephone conference with J. Shelby Sharpe on December 29, 2009. I told Mr. Sharpe that I would file the Rule 12 motion and ask the Court to set it for hearing on January 14, 2011 along with the motions for summary judgment. He did not object to setting the Rule 12 motion for hearing on January 14, 2011.

4.       When Mr. Sharpe filed a Rule 12 motion on August 19, 2009 challenging my authority to represent the Episcopal Diocese of Fort Worth and the Corporation of the Episcopal Diocese of Fort Worth, he did not ask me to waive service and he did not serve me with citation. Nevertheless, I appeared at the hearings on the Rule 12 motion on September 9, 2009 and September 16, 2009.

  
Jonathan D.F. Nelson

Subscribed and sworn to me on this 11 day of January, 2011.

  
Notary Public of the State of Texas

My commission expires: \_\_\_\_\_



# **EXHIBIT F**



THE EPISCOPAL CHURCH, et al.,	)	IN THE DISTRICT COURT OF
	)	
VS.	)	TARRANT COUNTY, TEXAS
	)	
FRANKLIN SALAZAR, et al.	)	141 <sup>ST</sup> DISTRICT COURT

**AFFIDAVIT OF KATHLEEN WELLS**

THE STATE OF TEXAS       \*\*  
   \*\*  
 COUNTY OF TARRANT       \*\*

BEFORE ME, the undersigned notary public, on this day personally appeared KATHLEEN WELLS, who being by me duly sworn, upon oath deposed and said:

1. "I am over the age of 18 years and competent to make this affidavit and have personal knowledge of the facts stated herein. I am the Chancellor of the Episcopal Diocese of Fort Worth and have served as Chancellor since February 7, 2009. I am a party to this lawsuit.

2. I am counsel of record for The Rt. Rev. C. Wallis Ohl and the individuals named as plaintiffs, third-party defendants, and/or counter-plaintiffs, the parties affiliated with The Episcopal Church, in this case.

3. Before filing a Rule 12 motion against attorney R. David Weaver, I conducted a telephone conference with Mr. Weaver on December 31, 2009. I asked Mr. Weaver if he would waive service of citation for the Rule 12 motion, and he declined to do so. I told him that I would file the Rule 12 motion and ask the Court to set it for hearing on January 14, 2011 along with the motions for summary judgment. He did not object to setting the Rule 12 motion for hearing on January 14, 2011.

4. On December 29, 2010, I contacted J. Shelby Sharpe, Scott Brister, and Kendall Gray by email to request that they each waive service of citation for the Rule 12 motion.<sup>1</sup> Mr. Brister refused to waive service of citation.<sup>2</sup> Mr. Sharpe and Mr. Gray did not respond to my request.

5. In light of their refusal to waive service, Jonathan D.F. Nelson and I hired private process servers to serve the citations and the Rule 12 motions on Mr. Sharpe, Mr. Brister, and Mr. Gray, and Mr. Weaver.

6. On December 29, 2010, I also served copies of the Rule 12 motion as to Mr. Sharpe, Mr. Brister, and Mr. Gray on each of them and on all other counsel of record by facsimile and email. On December 31, 2010, I served a copy of the Rule 12 motion as to Mr. Weaver on him and on all other counsel of record by facsimile and email.

7. When Mr. Sharpe filed a Rule 12 motion on August 19, 2009 challenging my authority to represent the Episcopal Diocese of Fort Worth and the Corporation of the Episcopal Diocese of Fort Worth, he did not ask me to waive service and he did not serve me with citation. Nevertheless, I appeared at the hearings on the Rule 12 motion on September 9, 2009 and September 16, 2009.

8. In addition, following the court's initial ruling denying Mr. Sharpe's Rule 12 motion in this case, the Plaintiffs filed their first motion for summary judgment on September 3, 2009 and set the motion for hearing. Mr. Sharpe filed a motion for continuance, alleging that he needed depositions in order to prepare a response to the Plaintiffs' motion for summary judgment. Based on that representation, Mr. Nelson and I agreed to continue the hearing to an agreed date in January 2010, which date Mr. Sharpe represented to the Court Coordinator that he

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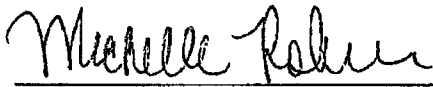
<sup>1</sup> See Email from Kathleen Wells to J. Shelby Sharpe, Scott Brister, and Kendall Gray, attached hereto as Exhibit A.

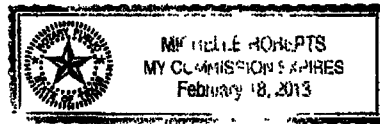
<sup>2</sup> See Email from Scott Brister to Kathleen Wells, attached hereto as Exhibit B.

agreed. Thereafter the Plaintiffs and Mr. Sharpe scheduled by agreement the depositions of a number of witnesses requested by Mr. Sharpe, in Fort Worth as well as in Washington D.C. and New York City. However, shortly before the depositions were to commence, Mr. Sharpe and Mr. Brister filed their petition for writ of mandamus and sought a stay of all proceedings in this case. No depositions have been rescheduled or requested by Mr. Sharpe or Mr. Brister.

  
Kathleen Wells

Subscribed and sworn to me on this 11<sup>th</sup> day of January, 2011.

  
Notary Public of the State of Texas  
My commission expires: 2-18-13



**Kathleen Wells**

---

**From:** Kathleen Wells  
**Sent:** Wednesday, December 29, 2010 6:15 PM  
**To:** 'utlawman@aol.com'; 'scottbrister@andrewskurth.com'; 'kendallgray@andrewskurth.com'  
**Cc:** 'Leatherbury, Tom'; 'Sims, Bill'; Jonathan D. F. Nelson  
**Subject:** waiver of service of citation  
**Attachments:** Waiver Citation Brister.DOC; Waiver Citation Gray.DOC; Waiver Citation Sharpe.DOC  
Shelby, Scott, and Kendall,

Regarding our Rule 12 motion filed today and set for hearing on January 14, would you please let me know if you will agree to execute a waiver of the service of citation that is required by the rule? I have attached draft waivers for your review. We would appreciate it if you would agree to execute a voluntary waiver and return the original to me for filing early next week.

Would you please let me know tomorrow whether you object to work with us on these waivers?

Thanks again. Best wishes for the new year.

Kathleen Wells, Chancellor  
Episcopal Diocese of Fort Worth  
3550 Southwest Loop 820  
Fort Worth, Texas 76133  
817.921.4533 Diocesan Office  
817.332.2580 Law Firm  
817.806.5209 Direct  
[chancellor@episcopaldiocesefortworth.org](mailto:chancellor@episcopaldiocesefortworth.org)  
[www.episcopaldiocesefortworth.org](http://www.episcopaldiocesefortworth.org)



1/10/2011

**Kathleen Wells**

---

**From:** Brister, Scott [ScottBrister@andrewskurth.com]  
**Sent:** Thursday, December 30, 2010 12:42 PM  
**To:** Kathleen Wells  
**Subject:** RE: waiver of service of citation  
**Follow Up Flag:** Follow up  
**Flag Status:** Red

I do not agree to waive service of citation. Beyond its lack of merit, we will object to this motion as untimely. Even if the timing was not intended to interrupt the preparation of the our responses to the Plaintiffs' huge motions, that is its effect. Thus, it violates the Court's scheduling order. If the motion is not withdrawn, the Diocese and the Diocesan Corporation reserve the right to seek all appropriate remedies, including sanctions and attorneys fees.

**Scott Brister**  
Partner

**Andrews Kurth LLP**  
111 Congress Avenue, Suite 1700  
Austin, Texas 78701  
512.320.9220 Phone  
[sbrister@andrewskurth.com](mailto:sbrister@andrewskurth.com)  
[vCard](#) | [Bio](#) | [andrewskurth.com](http://andrewskurth.com)

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**From:** Kathleen Wells [mailto:kwells@toase.com]  
**Sent:** Thursday, December 30, 2010 12:21 PM  
**To:** Kathleen Wells; utlawman@aol.com; Brister, Scott; Gray, Kendall M.  
**Cc:** Leatherbury, Tom; Sims, Bill; Jonathan D. F. Nelson  
**Subject:** RE: waiver of service of citation

I have called your offices this morning and left messages for you. Would you mind contacting me as soon as possible today to advise me whether you will agree to waive service of citation for the motion? Thanks again.

Kathleen Wells, Chancellor  
Episcopal Diocese of Fort Worth  
3550 Southwest Loop 820  
Fort Worth, Texas 76133  
817.921.4533 Diocesan Office  
817.332.2580 Law Firm  
817.806.5209 Direct  
[chancellor@episcopaldiocesefortworth.org](mailto:chancellor@episcopaldiocesefortworth.org)  
[www.episcopaldiocesefortworth.org](http://www.episcopaldiocesefortworth.org)

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**From:** Kathleen Wells

1/11/2011



**Sent:** Wednesday, December 29, 2010 6:15 PM  
**To:** 'utlawman@aol.com'; 'scottbrister@andrewskurth.com'; 'kendallgray@andrewskurth.com'  
**Cc:** 'Leatherbury, Tom'; 'Sims, Bill'; Jonathan D. F. Nelson  
**Subject:** waiver of service of citation

Shelby, Scott, and Kendall,

Regarding our Rule 12 motion filed today and set for hearing on January 14, would you please let me know if you will agree to execute a waiver of the service of citation that is required by the rule? I have attached draft waivers for your review. We would appreciate it if you would agree to execute a voluntary waiver and return the original to me for filing early next week.

Would you please let me know tomorrow whether you object to work with us on these waivers?

Thanks again. Best wishes for the new year.

Kathleen Wells, Chancellor  
Episcopal Diocese of Fort Worth  
3550 Southwest Loop 820  
Fort Worth, Texas 76133  
817.921.4533 Diocesan Office  
817.332.2580 Law Firm  
817.806.5209 Direct  
[chancellor@episcopaldiocesefortworth.org](mailto:chancellor@episcopaldiocesefortworth.org)  
[www.episcopaldiocesefortworth.org](http://www.episcopaldiocesefortworth.org)

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1/11/2011