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October 18, 2011

By Hand-Delivery

Ms. Stephanie Selsor, Chief Clerk
141st District Court
200 East Weatherford Street – 3rd Floor
Fort Worth, Texas 76196

Re: *The Episcopal Diocese of Fort Worth, et al. v. Franklin Salazar, et al.*;
Cause No. 141-252083-11; In the 141st District Court of Tarrant County, Texas

Dear Ms. Selsor:

I have enclosed for filing an original and two (2) copies of Plaintiffs' Response to Defendants' Motion to Sign Supersedeas Order and for Temporary Injunction Relief. Please file and return a file-marked copy to my courier.

Thank you for your assistance.

Very truly yours,



Thomas S. Leatherbury

Enclosures
US 1100699v1

cc: J. Shelby Sharpe, Esq. (w/encl. via facsimile)
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THE EPISCOPAL CHURCH, et al.)	IN THE DISTRICT COURT OF
)	
VS.)	TARRANT COUNTY, TEXAS
)	
FRANKLIN SALAZAR, et al.)	141 ST DISTRICT COURT

PLAINTIFFS’ RESPONSE TO DEFENDANTS’ MOTION TO SIGN SUPERSEDEAS ORDER AND FOR TEMPORARY INJUNCTION RELIEF

TO THE HONORABLE COURT:

On October 13, 2011, Defendants filed a document titled “Motion to Sign Supersedeas Order and For Temporary Injunction Relief” (“Defendants’ New Motion”). Defendants set this motion for hearing on October 20, 2011, at the same time as Plaintiffs’ pending Amended Motion to Tender Supersedeas Orders. Plaintiffs respectfully respond as follows:

1. There is nothing new in Defendants’ New Motion. But since Defendants have styled their paper as a motion, rather than a response to Plaintiffs’ pending motion, Plaintiffs file this response to complete the record and incorporate their prior briefing herein.

2. There is a fundamental irony in Defendants’ ever-shifting positions. When this case involves core ecclesiastical questions, such as the sworn obedience and disciplining of clergy, Defendants urge the court to ignore the ecclesiastical nature and apply what they call “neutral principles” as in any other case.¹ Yet now that Defendants face the secular obligation to post a bond if they wish to supersede the judgment against them, they ask the Court to ignore Texas law because the services they offer, which generate over \$10,500,000 a year, are “unlike” the services provided by other companies.²

¹ Defendants’ use of “neutral principles” differs dramatically from the actual “neutral principles” cases across the country. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 600-602 (1979); *Episcopal Church in Diocese of Connecticut v. Gauss*, 2011 WL 4537297, *7 (Conn. October 11, 2011).

² Defendants’ New Motion at 3.

3. Of course, Defendants never quite explain how. They tell the Court that the dominant Texas supersedeas authority cited by Plaintiffs, such as *LMC*, *Ramco*, *EnviroPower*, and *G.M. Houser*, is “irrelevant.”³ However, Defendants themselves relied on *LMC*, *Ramco*, *EnviroPower*, and *G.M. Houser* in their Motion to Set Supersedeas Bond at \$0 (at notes 16; 17, 20, and 21; 12; and 13, respectively).

4. Defendants then try to distinguish this case from other Texas supersedeas cases such as *LMC* by claiming: “LMC retained its assets to generate income for its operations.”⁴ But Defendants cannot have it both ways: if they post the required supersedeas bond, they *will* retain those assets, including the name of The Episcopal Diocese of Fort Worth (which they will use to raise funds), throughout appeal. The requested minimum bond represents less than 3% of Defendants’ income during this period. Defendants have offered absolutely zero evidence that their historic revenue collected *during this litigation* will change. As *LMC* and *Ramco* make clear, the party bearing the burden – here, Defendants – cannot merely assert that their income might go down in the future. They must back up this claim with evidence.⁵ Here, all that Defendants have said, without evidence and by argument of counsel only, is that their future revenue *might* go down.⁶ But the record shows the opposite: over the past three years, Defendants have raised more than a million *additional* dollars for their litigation war chest in response to this case, *on top of and in addition* to their \$10,500,000 congregational revenue.⁷ Nor have Defendants offered any evidence of the *magnitude* of any claimed expected change in

³ Defendants’ New Motion at 3.

⁴ *Id.*

⁵ See, e.g., *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 487-88 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (affirming supersedeas finding against judgment debtor LMC where “the record contains no evidence that LMC would be unable to meet its future financial obligations [T]he trial court was free to reject [claims of substantial economic harm] in light of other evidence, including LMC’s past revenues and its ability to otherwise secure funding for its operations.”).

⁶ Defendants’ New Motion at 3-4.

⁷ See, e.g., Plaintiffs’ Response to Defendants’ Motion to Set Supersedeas at \$0 at 20.

revenue – or why any such change would be material when the requested bond is such a tiny percentage (<3%) of that revenue stream.

5. Defendants also claim that the Court cannot consider their past revenue because it is largely composed of contributions. But Plaintiffs have never shied away from this obvious fact. *As the supersedeas record shows, congregation size and contribution history are precisely the factors that are considered when churches seek supporting letters of credit*, which routinely secure supersedeas obligations. Defendants wish to tear down Plaintiffs’ expert, a man who served for eight years on the business and audit committee of the Baptist General Convention of Texas, and for 35 years as an accountant for churches in Texas. But at the end of the day, all the ad hominem attacks are beside the point, as ***Plaintiffs have no evidentiary burden***. Plaintiffs’ expert is absolutely correct that this is how letters of credit are underwritten for religious entities. *But no matter: Defendants – who bear the burden – presented no evidence to support their contrary claims*. As *LMC* and *Ramco* make clear, Defendants’ failure to establish such evidence at the May 19 supersedeas hearing is dispositive. Plaintiffs have had a final judgment since April 5, 2011 – the time has come for Defendants either to put up the statutorily required bond or to turn over the property that this Court has held they had no legal right to seize.

6. Contrary to the record, Defendants tell the Court that there is no evidence of their fraudulent dissipation, transfer, and encumbrance. Defendants suggest that their witness’s admissions cannot “reasonably be interpreted by an ordinary person using accepted rules of grammar” to show wrongdoing.⁸ One wonders what dangling participle or split infinitive might excuse such conduct as:

Q. [] And in response to receiving this letter from a lawyer questioning the ownership of the accounts, your -- the [Defendant] Diocese’s response

⁸ Defendants’ New Motion at 2.

was to transfer that money out of state?

A. Not immediately, no, sir, but after thought and discussion, that was what the [Defendant] Diocese decided to do.⁹

7. Defendants tell the Court that because “Defendants have been ordered to transfer all of their property” there is nothing left to support a bond.¹⁰ This is exactly wrong on the facts and the law. Defendants have not offered to turn over their annual, eight-figure post-separation revenue and certainly have not taken the position that this post-separation revenue and future revenue is Plaintiffs’ property. Nor do Defendants offer to turn over the real and personal property of the 12 new congregations that have joined the Defendant Diocese since this litigation began. Defendants cannot have it both ways: either this property is in the judgment or not.

8. Nor, as a matter of law, does the supersedeas analysis look only to Defendants’ “assets” and whether they are subject to the judgment, as Defendants wrongly imply. In fact, the opposite is true: to prove a likelihood of substantial economic harm, Defendants must consider *all of their available sources of revenue, loans, letters of credit, and other bond-supporting means, not just the “assets” of the entity*. “In other words, the court should be less concerned with what price the company might fetch in the marketplace if sold today and more concerned with the company’s available resources and its ability to use them to post security.”¹¹ Yet Defendants concede that they did not consult a single surety, historic contributor or donor, bank, parent organization (they have 2), or the twelve new congregations with real and personal property within their organization. Defendants did not offer a shred of proof that any of these

⁹ May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 93:6-12.

¹⁰ Defendants’ New Motion at 3.

¹¹ *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 917 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see also LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (adopting *Ramco* test); *EnviroPower, L.L.C. v. Bear, Stearns & Co., Inc.*, 265 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (en banc) (same); *Anderton v. Cawley*, 326 S.W.3d 725 (Tex. App.—Dallas 2010, no pet. h.) (same).

sources were unavailable. One leading case on which Defendants relied rejected a claim of “substantial economic harm” because the party only talked to *one* surety.¹² Defendants here talked to *none*. Defendants cannot meet their burden by ignoring reality or the case law. They had an obligation to provide actual evidence to support their claims at the supersedeas hearing. They did not do so. As the case law demonstrates, this is dispositive. And, while completely unnecessary, the record made by Plaintiffs shows the truth: Defendants have demonstrated a *repeated* ability to generate and raise massive sums when they actually endeavor to do so.

9. Nor is there any credibility whatsoever to Defendants’ claim that their 12 Individual Defendants’ assets are irrelevant. There is a final judgment against each of them. They cannot hide behind alleged “official capacities” when the judgment they seek to supersede holds that there is only one Episcopal Diocese of Fort Worth and that these Individual Defendants have no official capacities within it. Add to this obvious legal point the fact that at least one Individual Defendant has been a massive *source* of funding for Defendants *during this litigation for litigation costs*. He cannot use his wealth as a sword and a shield: if he financed a \$3.5 million line of credit during litigation, then he is a potential source that must be considered under supersedeas law. Defendants did not offer a shred of evidence claiming that his assistance is not available, for a minimum bond that is *just a quarter* of his previous financing.

10. Add to all of this that Defendants never presented any evidence that their historic pattern to date of funding 85% of their million-plus litigation effort through *additional* donations is somehow suddenly not applicable when it comes to a bond to keep the property during appeal.

11. Defendants’ proposed order is completely inadequate as a matter of law. It proposes a zero bond when Defendants have failed to prove any reduction from Plaintiffs’

¹² *LMC Complete Automotive*, 229 S.W.3d at 486-88 (affirming trial court’s denial of debtor’s argument that requiring it to post a supersedeas bond would be likely to cause it substantial economic harm, noting in part that the debtor had only applied for and been denied a bond with one bonding agency).

minimum requested bond. A bond that is less than 3% of revenue is not substantial economic harm. Defendants' proposed injunctions are woefully vague and inadequate in light of Defendants' documented, egregious conduct to date. For instance, where Defendants have moved money out-of-state and dissipated over half-a-million dollars *at the diocesan level alone* (while admitting their normal course of business is to break even), Defendants' proposed order is thoroughly toothless on the subjects of reporting about and monitoring bank accounts and preventing further sham transfers, encumbrances, and expenses.

12. Defendants' proposed reporting obligations are not at all sufficient or reassuring, based largely on internally-produced, unverifiable documents and without any objective financial account statements. This is hardly compelling when Defendants' internal documents and representations to date have been false, incomplete, and misleading (*e.g.*: "Q. Why didn't you tell the Court about the Louisiana bank account? A. Because at the time, it did not enter my mind. I forgot.");¹³ "Q. In your history as the director of business and finance for the Diocese, how many \$3.5 million liens has the Diocese taken out on church property? . . . A. Other than this, none"¹⁴ Q. Did you put it on the books? A. The -- no, sir, it is -- it's not on the books."¹⁵).

13. Indeed, Defendants' order goes so far as to grant themselves rights that this Court has already rejected, like using their fraudulent Jude Funding lien on Plaintiffs' property without limitation to pay their lawyers to sue Plaintiffs.¹⁶

14. In contrast, Plaintiffs' October 13, 2011 proposed order accomplishes the necessary protections by targeting Defendants' past wrongful conduct, without asking

¹³ Parrott Dep. at 88:3-6.

¹⁴ Parrott Dep. at 80:6-80:11.

¹⁵ Parrott Dep. at 83:13-15.

¹⁶ Defendants' New Motion at proposed order paragraph f; *cf.* March 31, 2011 Reporter's Record at 20.

Defendants to create new documents or to depart from their documented, *budgeted* normal course of business. **Defendants have no legal basis for a zero bond, and no basis for toothless, unenforceable injunctions where the minimum requested bond of \$950,000 secures only 1% of the property at risk.**

15. Plaintiffs incorporate and reurge the arguments, record citations, and authorities contained in the Local Episcopal Parties' Motion to Continue Hearing on Supersedeas and for Additional Protection (filed April 25, 2011 and granted in part on April 28, 2011), the Local Episcopal Parties' Response to Defendants' Motion to Set Supersedeas at \$0 (filed May 17, 2011), the Local Episcopal Parties' Motion to Tender Orders (filed June 24, 2011), Plaintiffs' Reply in Support of Their Motion to Tender Orders (filed July 19, 2011), Plaintiffs' Amended Motion to Tender Orders (filed October 13, 2011), Plaintiffs' proposed Order On Defendants' Motion To Set Supersedeas Bond And The Local Episcopal Parties' Motion For Additional Protection (attached to the Amended Motion to Tender Orders as Ex. B), and Plaintiffs' Notice of Supplemental Authority (filed October 14, 2011).¹⁷

16. This Court should deny Defendants' Motion to Sign Supersedeas Order and For Temporary Injunction Relief, reject their inadequate and unsupported proposed order, and sign and enter Plaintiffs' tendered order, setting a real bond of at least \$950,000 and imposing real post-judgment injunctions tailored to ensure no further misconduct by Defendants.

¹⁷ On May 19, 2011, the Court orally overruled Plaintiffs' oral objections to affidavit evidence at the supersedeas hearing and signed a written Order Denying Episcopal Parties' Motion to Strike Affidavits of Jane Parrott (filed on May 16, 2011). The parties have agreed to a written form of order documenting the Court's oral rulings that were not expressly covered by the May 19, 2011 written order: specifically, (1) Plaintiffs' oral objections to the use of affidavits in connection with post-judgment and supersedeas bond proceedings, (2) Plaintiffs' objections to Affidavit of Charles A. Hough, III (filed on January 31, 2011), and (3) Plaintiffs' oral objections to the Third Affidavit of Jane Parrott at the May 19, 2011 hearing. The parties will tender this form of order at the October 20, 2011 hearing.

Respectfully submitted,

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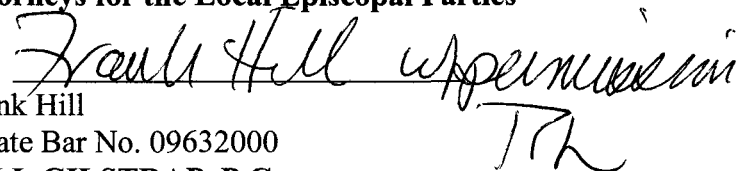
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Plaintiffs' Response to Defendants' Motion to Sign Supersedeas Order and For Temporary Injunction Relief has been sent this 18th day of October, 2011, by facsimile and/or email pdf, to:

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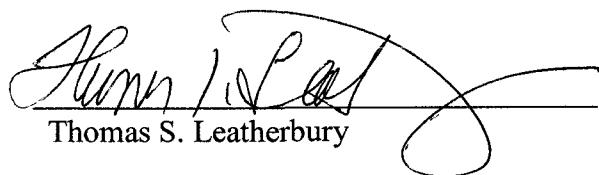
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