CAUSE NO. 141-237105-09

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

2011 MAR 29 AM 10: 30
DISTRICT CLERK

LOCAL EPISCOPAL PARTIES' RESPONSE TO DEFENDANTS' MOTION TO SEVER AND STAY REMAINING PROCEEDINGS

Now come the Local Episcopal Parties[1] and file this Response to Defendants' Motion to Sever and Stay Remaining Proceedings and in support thereof would respectfully show the Court as follows:

I. Introduction

Defendants' proposed severance of the Court's interlocutory order would amount to an improper abuse of discretion at this time for at least two reasons. First, it fails to satisfy the three-pronged test for granting a severance because (a) it would split the Local Episcopal Parties' cause of action for declaratory relief into two actions and (b) the severed declaratory claims would be so interwoven with the un-severed declaratory claims that the two actions would involve the same facts and issues. Second, Defendants' proposed severance fails to serve the "controlling reasons" for granting a severance because it would seriously prejudice the Episcopal Parties, fail to serve justice, and increase inconvenience to the parties and the Court.

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[1] The term "Local Episcopal Parties" includes the Rt. Rev. C. Wallis Ohl, Robert Hicks, Floyd McKneely, Shannon Shipp, David Skelton, Whit Smith, Margaret Mieuli, Anne T. Bass, Walt Cabe, the Rev. Christopher Jambor, the Rev. Frederick Barber, the Rev. David Madison, Robert M. Bass, the Rev. James Hazel, Cherie Shipp, the Rev. John Stanley, Dr. Trace Worrell, the Rt. Rev. Edwin F. Gulick, Jr., and Kathleen Wells. "Episcopal Parties" or "Plaintiffs" refers to the Local Episcopal Parties, the Local Episcopal Congregations, and The Episcopal Church.

In light of Defendants' pattern of conduct to date—spending Episcopal funds and encumbering Episcopal property with multi-million dollar debt while telling the Court that attempting to collect damages from them would be "wasting time"—Defendants' proposed severance threatens extreme prejudice to the Episcopal Parties. Before any severance is contemplated, the Court should finally adjudicate the Local Episcopal Parties' remaining claims for declaratory and injunctive relief,[2] in order to (1) apply the Court's correct legal rulings to the remaining parties, issues, and claims; (2) bind all similarly-situated and aligned parties; (3) ensure the compliance of all Defendants; (4) schedule the property at issue based on newly-produced discovery to ensure its protection during appeal; and (5) put the requested further injunctions and declarations in place to ensure a complete, easily enforceable Final Judgment that leaves no room for purported misunderstanding or further irreparable harm.

II. Procedural History

On February 8, 2011, the Court partially resolved the parties' competing claims for declaratory judgment. Namely, the Court (1) granted summary judgment on some of The Episcopal Church's requests for declaratory judgment, (2) granted summary judgment on some of the Local Episcopal Parties' requests for declaratory judgment and deferred ruling on the rest of the Local Episcopal Parties' requested declarations;[3] and (3) denied Defendants' cross-motion for summary judgment on their declaratory claims.

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[2] With the exception of declaratory claims that also involve additional defendants, such as Jude Funding, the Local Episcopal Parties are filing a supplemental motion for summary judgment that should lead to a proper severance.

[3] At the February 8, 2011 hearing regarding Defendants' Objections to Form of the Court's original orders, the Local Episcopal Parties explicitly preserved their ability to petition the Court to consider the additional requests for declaratory relief contained in their January 31, 2011 proposed further declaratory order. 1 RR 37

("Mr. Brister: I'm looking at the ones that you struck out, which are put back in on the Local Episcopal Party's motion.

The Court: He said I don't have to sign that. He didn't – he's dropping that.

Now Defendants have moved the Court to sever its interlocutory order of February 8, to make that order final and appealable, and to stay all other proceedings in this Court pending appeal. To support its motion to sever, Defendants attempt to argue that the only pending claims remaining in this Court are the Local Episcopal Parties' tort claims and the parties' competing claims for attorney fees.[4] But Defendants fail to mention that there are still several pending issues remaining in the parties' competing claims for declaratory judgment that must be resolved before the Court can enter a final judgment disposing of all parties and all issues on the declaratory claims.

Specifically, (1) the Court has not yet ruled on the Local Episcopal Parties' additional requests for declaratory relief which were included in the Local Episcopal Parties' amended motion for partial summary judgment and refiled with the Court on January 31, 2011; (2) the Local Episcopal Parties will be moving for summary judgment on their claims for declaratory judgment against the Defendant Congregations and are only now receiving the discovery responses to complete that record; (3) the Local Episcopal Congregations will be moving for summary judgment on their parish-specific claims for declaratory judgment against the

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Mr. Leatherbury: Without prejudice to –

The Court: Yeah. Right. We can hear that another day.");

1 RR 46-47 ("Mr. Leatherbury: As long as it's clear between the parties that anything that was not granted in this motion for summary judgment is still – you know, is without prejudice to seek further declarations and so forth at a later time, if that accomplishes the goal of getting an order in place that the Court is comfortable with, then that is – that's agreeable to us at this time. But we did ask for everything that's in the further declaratory order, and we're not giving any of it up. But if today is not the day to take all of those things up rather that's a thing for final judgment, that's fine.

Mr. Brister: That's fine with us.

The Court: Okay. Yeah. And . . . this order that Ms. Liser drafted doesn't say that all relief not granted is denied. So – okay.").

[4] Defendants' Motion to Sever at 4 ("This suit clearly involves more than one cause of action – the parties' cross-claims for declaratory judgment are separate from the Plaintiffs' pending tort claims."); *id.* at 1-2 ("Numerous issues remain pending. Plaintiffs have asserted tort claims for conversion, use of trade names, breach of fiduciary duty, trespass to try title, quiet title, damages, and attorney's fees. No discovery has been conducted on these matters, as both parties have focused on the legal issues in the cross-motions for summary judgment.").

Defendant Congregations;[5] and (4) the Local Episcopal Parties and Congregations have not yet received ancillary injunctive relief to enforce the Court's order and protect them from Defendants' continuing misappropriation of Diocesan property pending appeal.[6]

Defendants are only recently beginning to produce documents identifying the properties in dispute—especially in the form of endowment funds and other accounts—over which they have wrongly asserted control on behalf of the Diocese and its Congregations; the current amended order on summary judgment does not yet schedule the specific properties that are subject to it. Not only does this prevent the Court from rendering a final judgment, which should specifically identify the property that is subject to the judgment, but it also invites confusion about whether certain properties are covered by the Court's order even when that order is affirmed on appeal, risking irreparable harm in the interim.

III. Granting Defendants' proposed severance would be an improper abuse of discretion because it fails to satisfy the three-pronged test governing courts' discretion to sever claims.

Texas courts have created a three-pronged test for determining whether to sever claims:

> A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.[7]

"Although a reviewing court will not reverse the trial court's severance absent an abuse of discretion, if any one of these three criteria are not met, then the trial court has abused its

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[5] The Local Episcopal Parties and Local Episcopal Congregations have also not moved for summary judgment on their claims for declaratory and injunctive relief against The Rev. Thomas Hightower. Although the Local Episcopal Congregations adopted the Local Episcopal Parties Motion for Partial Summary Judgment, *see* 1/7/11 Notice of Adoption, the Local Episcopal Congregations have not yet moved for summary judgment on their own congregational specific declaratory claims against the Defendant Congregations.

[6] Texas Civil Practice & Remedies Code § 37.011.

[7] *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990).

discretion and reversal is warranted."[8] In addition, "courts have long recognized that it is an abuse of discretion to grant a severance that splits a single cause of action."[9]

Here, Defendants' proposed severance fails this test for two independent reasons: (1) it splits the Local Episcopal Parties' cause of action for declaratory relief against just the Defendants into two actions, and (2) the claims granting declaratory relief in the severed order would be so interwoven with the un-severed claims for declaratory relief that the two actions would involve the same facts and issues.

A. Severing now would split the Local Episcopal Parties' cause of action for declaratory relief.

First, Defendants' proposed severance would improperly split the Local Episcopal Parties' cause of action for declaratory relief against just the Defendants into two actions. Although Texas Rule of Civil Procedure 41 provides that "[a]ny claim against a party may be severed and proceeded with separately," "Rule 41 is also governed by this venerable rule: '[s]everance of a single cause of action into two parts is never proper and should not be granted for the purpose of enabling the litigants to obtain an early appellate ruling on the trial court's determination of one phase of the case.'"[10] But this is precisely what Defendants' motion to

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[8] *Owens v. Owens*, 228 S.W.3d 721, 726 (Tex. App.—Houston [14th Dist.] 2006, pet. dism'd) (citing *State Dept. of Highways & Pub. Transp. v. Cotner*, 845 S.W.2 818, 819 (Tex. 1993)).

[9] *Duncan v. Calhoun County Navigation Dist.*, 28 S.W.3d 707, 710 (Tex. App.—Corpus Christi 2000, pet. denied) (citing *In Re El Paso County Hosp. Dist.*, 979 S.W.2d 10, 12 (Tex. App.—El Paso 1998, no pet.); *Ryland Group, Inc. v. White*, 723 S.W.2d 160, 161 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Duke v. Merkin*, 599 S.W.2d 877, 880 (Tex. Civ. App.—El Paso 1980, no writ); *Nueces County Hospital District v. Texas Health Facilities Commission*, 576 S.W.2d 908 (Tex. Civ. App.—Austin 1979, no writ)).

[10] *Dalisa, Inc. v. Bradford*, 81 S.W.3d 876, 880 (Tex. App.—Austin 1993, no pet.) (quoting *Pierce v. Reynolds*, 160 Tex. 198, 329 S.W.2d 76, 79 n. 1 (1959)); *see also Pustejovsky v. Rapid American Corp.*, 35 S.W.3d 643, 647 (Tex. 2000) ("The reason for the rule lies in the necessity for preventing vexatious and oppressive litigation, and its purpose is accomplished by forbidding the division of a single cause of action so as to maintain several suits when a single suit will suffice."); *Kansas University Endowment Ass'n v. King*, 162 Tex. 599, 350 S.W.2d 11, 19 (Tex. 1961) ("A severance divides the lawsuit into two or more independent causes, each of which terminates in a separate, final and enforceable judgment. . . . Severance is proper only where the suit involves two or more separate

sever asks this Court to do—to split Plaintiffs' cause of action for declaratory judgment against just the Defendants so that Defendants can obtain an early appellate ruling on their own claims for declaratory judgment.

Although Defendants appear to argue that the rule against claim-splitting does not apply when a court severs a partial summary judgment for the purposes of expediting appeal, the rule against claim-splitting applies with equal force to severances of partial summary judgment orders. To support its argument and its proposed severance, Defendants cite an inapposite case, *Cherokee Water Co. v. Forderhause.*[11] But in *Cherokee*, the trial court fully resolved the plaintiff's cause of action for declaratory judgment, *including* the plaintiff's claim for ancillary specific performance, before it severed its order granting summary judgment on that cause of action from the defendants' counterclaim for reformation of the deed.[12] In short, a court cannot sever a partial summary judgment order when that severance would split a single cause of action: "Even though partial summary judgment is proper in many cases, severance of that portion of the lawsuit is not proper when it amounts to the splitting of a single cause of action."[13] Here, the Court's interlocutory order has only partially resolved the Local Episcopal Parties' cause of action for declaratory and ancillary injunctive relief; thus, severing the Court's order to allow

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and distinct causes of action. Each of the causes into which the action is severed must be such that the same might properly be tried and determined if it were the only claim in controversy.").

[11] Defendants' Motion to Sever at 2 (citing 641 S.W.2d 522, 525 (Tex. 1982)).

[12] *Cherokee*, 641 S.W.2d at 523 ("[Plaintiff], as holders of the preferential right to purchase, brought suit against [Defendants] for declaratory judgment and specific performance of the preferential right to purchase. The mineral owners brought a counterclaim for reformation of the deed. Both [Plaintiff] and [Defendants] moved for summary judgment. The trial court granted [Plaintiff's] motion for summary judgment. It severed the [Defendants'] claim for reformation of the deed. The trial court found that [Plaintiff] was the holder of a preferential right to purchase under the deed, that an oil and gas lease executed by the [Defendants] constituted an attempted sale of the oil, gas and other minerals under the terms of the preferential right to purchase, and ordered specific performance.").

[13] *Duncan*, 28 S.W.3d at 710; *see also Duke v. Merkin*, 599 S.W.2d 877, 880 (Tex. Civ. App.—El Paso 1980, no writ) ("We conclude that an order of severance which splits a single cause of action is an abuse of discretion.").

Defendants to appeal at this time would improperly split the Local Episcopal Parties' cause of action brought under the declaratory judgment statute.

Specifically, severing the Court's order disposing of part of the parties' competing claims for declaratory judgment would split the Local Episcopal Parties' cause of action seeking declaratory judgment into two actions for at least two reasons. First, severing at this time would separate the Local Episcopal Parties' claims for declaratory relief against the diocesan Defendants that have been granted by the Court from their further requests for declaratory relief against the diocesan Defendants that are still pending (as well as from their claims for declaratory judgment against the Defendant Congregations).[14] Second, severing at this time would split the Local Episcopal Parties' claims for declaratory relief from their ancillary claims for injunctive relief. As in *In re El Paso County Hospital District*, "[a]lthough plaintiffs' petition is couched in terms of both injunctive and declaratory relief, alternative requests for relief do not create multiple causes of action."[15] The Local Episcopal Parties are currently moving for summary judgment on their claims for ancillary injunctive relief to protect their property from Defendants' continuing misappropriation pending appeal. Accordingly, severing at this time would also split Plaintiffs' cause of action for declaratory relief by severing their claims for declaratory judgment from their ancillary claims for injunctive relief.[16]

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[14] Local Episcopal Parties' Further Declaratory Order, filed January 28, 2011 & Local Episcopal Parties' Supplemental Motion for Partial Summary Judgment, to be filed shortly.

[15] 979 S.W. 2d 10, 12 (Tex. App.—El Paso 1998, no pet.).

[16] *Id.* (finding that the trial court abused its discretion by severing the plaintiffs' claims for declaratory relief from its claims for injunctive relief because they were alternative claims for relief stemming from the same cause of action).

B. The proposed severance is also improper because the severed and un-severed declaratory claims would have interwoven facts.

Severing the claims disposed of in the Court's partial summary judgment order from the Local Episcopal Parties' pending claims for declaratory and ancillary injunctive relief would also be improper because the severed declaratory claims would be so interwoven with the declaratory claims in the un-severed action that they involve the same facts and issues.[17] The parties' competing claims for declaratory judgment are virtually identical, involving precisely the same facts and issues. In effect, both parties request "exactly contrapositive" declaratory relief;[18] they both have requested that the Court declare that they are the rightful leadership of the Episcopal Diocese of Fort Worth and its subordinate Corporation and that the other party is not the leadership of the Diocese and Corporation. However, the Court's partial summary judgment order only disposed of part of the parties' competing claims for declaratory judgment, leaving "exactly contrapositive" counter-claims for declaratory judgment pending. Accordingly, it would be improper to sever the court's order for the purposes of appeal until it has resolved the Episcopal Parties' pending claims for declaratory relief.

Specifically, while both the diocesan and congregational Defendants moved for summary judgment on their declaratory claims, which motion was denied, the Local Episcopal Parties and Local Episcopal Congregations only moved for summary judgment on some of their declaratory claims. For instance, in order to cleanly present the controlling issue of this case, the Local Episcopal Parties did not move for summary judgment against the Defendant Congregations

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[17] *Guar. Fed. Sav. Bank*, 793 S.W.2d at 658.

[18] *Dalisa, Inc.*, 81 S.W.3d at 881 ("Bradford requests negative declaratory relief exclusively: that Dalisa possesses no interest in the Bradford tract, that no contract exists between the parties by reason of negotiations and writings exchanged between them, and that Dalisa in consequence has no right to record a lis pendens notice against the tract. Dalisa's requested declaratory relief is **exactly contrapositive**: that Dalisa does possess a legal or equitable interest in the Bradford tract by reason of a contract resulting from negotiations between the parties and writings exchanged between them.") (emphasis added).

(even though the Defendant Congregations later moved for summary judgment against the Local Episcopal Parties). Similarly, the Local Episcopal Congregations did not move for summary judgment on their parish-specific claims against the Defendants Congregation even though the Defendant Congregations moved for summary judgment against the Local Episcopal Congregations. The pending counter-claims involve the same facts as the resolved claims for declaratory judgment, and in such cases courts have ruled that it is improper to sever.

For instance, in *Dalisa, Inc. v. Bradford,*[19] the court held that the trial court had improperly severed a plaintiff's requests for declaratory relief from the defendants' "contrapositive" counterclaims for declaratory relief because the severed and un-severed claims involved the same facts and issues. The plaintiff had requested that the court declare that the defendants possessed no interest in a tract of land, that no contract existed between the parties, and that the defendants had no right to record a lis pendens notice against the tract. In its answer, the defendants brought counterclaims seeking "exactly contrapositive" relief: that the defendant did possess a legal or equitable interest in the tract by reason of a contract between the parties and could record a lis pendens notice against the tract.[20] Given the obvious similarity between the parties' competing claims, the court found that "[i]t is difficult to conceive how these opposing actions do not involve the same facts and issues. We conclude from the face of the parties' pleadings that they do."[21] Accordingly, the court held that "the trial court abused its

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[19] *Id.*

[20] *Id.* ("Bradford requests negative declaratory relief . . . . Dalisa's requested declaratory relief is exactly contrapositive . . .").

[21] *Id.*

discretion when it severed Bradford's claim for declaratory relief from Dalisa's counterclaims because both are interwoven to an extent that they involve the same facts and issues."[22]

Here, the Local Episcopal Parties' pending claims for declaratory relief are similarly "contrapositive" to Defendants' claims. Both parties claim that they are the rightful leadership of the Episcopal Diocese of Fort Worth and its subordinate Corporation and that the other party is not the rightful leadership. Thus, the pending claims for declaratory relief are clearly interwoven with the resolved claims, and it would be improper to sever the court's order before it has resolved all of the competing claims for declaratory relief.

Further, it would be inappropriate to sever the claims disposed of in the Court's interlocutory order of February 8 from the Local Episcopal Congregations' pending claims for declaratory relief because the severance would exclude all of the Local Episcopal Congregations' parish-specific claims against the Defendant Congregations from being pursued on appeal even though those claims raise identical issues to the claims of the other parties. In such situations, courts should not sever one party's claims from another party's when the two claims involve identical facts and issues.[23]

C. Defendants' proposed severance is also improper because it fails to serve the "controlling reasons" for granting a severance because it will prejudice the Episcopal Parties, fail to do justice, and increase inconvenience.

Despite Defendants' thin arguments to the contrary, severing the Court's partial summary judgment order at this time would not avoid prejudice or increase convenience. Instead, severing the Court's order at this time would prejudice the Episcopal Parties by preventing them from

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[22] *Id.* at 882.

[23] *In re El Paso County Hospital District*, 979 S.W. 2d at 12 ("Moreover, the question of whether the County and Hospital District are complying with state truth-in-taxation laws involves identical facts and issues as to both. On this ground as well, then, we find that the trial court abused his discretion in severing the Hospital District from the County, and the request for injunctive relief from that for declaratory judgment.").

presenting a complete record on appeal, from obtaining a judgment on appeal that would specifically bind all parties as to all relevant property, and from taking action to protect Diocesan property pending appeal.

1. Defendants' arguments that a severance would avoid prejudice and increase convenience are unpersuasive.

The Supreme Court has held that "avoiding prejudice, doing justice, and increasing convenience are the controlling reasons to allow a severance."[24] Defendants attempt to argue that delaying an appeal of this Court's order will "work irreparable prejudice and injustice if the Court's summary judgment order proves to be in error" because any delay will cause uncertainty over who will control the churches in this case. They argue that this uncertainty *might* then lead (1) members to leave their church or withhold financial contributions, (2) students and teachers at the schools involved in this case to make other arrangements, and (3) vendors and creditors to be unwilling to extend credit to the organizations involved.[25] But Defendants have failed to produce any competent evidence that supports any of these claims of possible prejudice.[26]

Defendants also argue that failing to sever at this time could make an appeal "impossible" because "a large tort-damages verdict . . . could require a large supersedeas bond" that the Defendants could not post without control of and the ability to pledge the Diocese's real property.[27] But this argument is unpersuasive for three reasons. First, Defendants will still have to post a bond or other form of security in order to supersede the enforcement of the Court's current order finding that Defendants have no interest in the property at stake in this litigation

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[24] *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007).

[25] Defendants' Motion to Sever at 1.

[26] Defendants have only attempted to support their claims of prejudice through the representations of counsel and an inadmissible hearsay affidavit from an interested person who provides no evidentiary support for his conclusory opinions. *See* Affidavit of Charles Hough in Support of Objections to Form of Summary Judgment Orders.

[27] *Id.* at 3.

and ordering them to turn over that property to the Episcopal Parties.[28] Thus, because Defendants cannot pledge the Diocese's property in order to post bond, they will still have to find some other way to supersede the judgment, whether or not there is a tort-damages verdict. Further, Defendants' inability to post a supersedeas bond does not make an appeal impossible;[29] it would just prevent Defendants from possessing the property pending appeal.

The Local Episcopal Parties do not oppose severing the parties' competing claims for declaratory judgment from the Local Episcopal Partiers' pending tort claims and from the parties' competing claims for attorney fees. Defendants have created a false dichotomy by suggesting that the Court's options are either (1) to sever and stay immediately or (2) to resolve every pending claim, including the claims that must be resolved by a jury, and enter a final judgment as to all claims and all parties. But there is a third option: to finally resolve the parties' competing claims for declaratory judgment (except for those that involve additional defendants, such as Jude Funding), to ensure that the Episcopal Parties are protected from Defendants' continuing misappropriations pending appeal, and then to sever the parties' competing claims for declaratory judgment from the Local Episcopal Parties' tort claims and the parties' competing claims for attorneys' fees. But severing the Court's interlocutory order at this time—before the Court has fully and finally resolved the parties' claims for declaratory judgment—would prejudice the Episcopal Parties and decrease convenience for multiple reasons.

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[28] *See* Tex. R. App. P. 24.2(a)(2) ("When the judgment is for the recovery of an interest in real or personal property, the trial court will determine the type of security that the judgment debtor must post. The amount of that security must be at least: (A) the value of the property interest's rent or revenue, if the property interest is real; or (B) the value of the property interest on the date when the court rendered judgment, if the property interest is personal.").

[29] *Employees Finance Co. v. Lathram*, 369 S.W.2d 927, 930 (Tex. 1963) (holding that involuntary enforcement of a trial court's judgment does not moot an appeal of that judgment).

2. Severing the Court's order at this time would prejudice the Local Episcopal Parties, fail to serve justice, and decrease convenience.

First, severing now would prejudice the Local Episcopal Parties by preventing them from presenting a complete record on appeal. Specifically, the Local Episcopal Parties have not yet been able to introduce parish deed records into the record to further support their alternative neutral principles argument. Thus, if the Court severs its order at this time, the Local Episcopal Parties will be unable to fully present their argument that they are entitled to all Diocesan property even if the appellate courts reach the Defendants' proposed neutral principles standard.[30] Preventing the Local Episcopal Parties from including this deed evidence in the appellate record would be especially inappropriate since Defendants did not produce the relevant documents until the second week in March 2011, nearly three weeks after Defendants filed their motion to sever.

Severing the Court's order at this time would also decrease convenience by leaving open the possibility of unnecessary litigation on remand. At this time, none of the Episcopal Parties have moved for summary judgment on their specific declaratory claims against the Defendant Congregations. Thus, even though the Defendant Congregations moved for summary judgment on their declaratory claims against the Episcopal Parties, the Court must still formally apply its order requiring Defendants to turn over all Diocesan property to the congregational Defendants and to all relevant property. Although collateral estoppel would ensure that any dispute over covered parties or property would ultimately be resolved in Plaintiffs' favor, reaffirming the effect of the Court's ruling on the Defendant Congregations on remand would prove costly and

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[30] *Cf. Jones v. Ray*, 886 S.W.2d 817, 822 (holding that a trial court abused its discretion by severing the plaintiff's medical malpractice claims against some healthcare providers from its other claims alleging medical malpractice claims against other providers) ("Relator has a substantial right to present the complete set of intertwined facts and issues germane to his claims, to *one* factfinder, in *one* proceeding, rather than in two separate suits that are all but foreordained to generate, collectively, a decision destined to fail in the appellate process.")

time-consuming. The Court should avoid this by granting summary judgment in favor of the Local Episcopal Parties on their claims against the Defendant Congregations (and in favor of the Episcopal Parties on all of the Defendant Congregations' claims against them) before it severs its order for the purposes of appeal. Rather than allowing the Defendant Congregations to attempt to escape the effect of this Court's order if it is affirmed on appeal by severing its interlocutory order at this time,[31] the Court should first finally resolve as a matter of law the Episcopal Parties' claims for declaratory relief against all parties and Defendants' claims against the Episcopal Parties.

Similarly, severing the Court's order at this time would be premature because the order does not specifically list the real and personal property subject to the order. Defendants are only now beginning to produce the discovery contained in the Local Episcopal Parties' discovery requests regarding the various funds and accounts held by the Diocesan Corporation and the various parishes. Thus, it is necessary to specifically indicate what property the Court has ordered to be surrendered by the Diocese, the Diocesan Corporation, and the Episcopal Congregations. As an initial matter, ongoing discovery will shortly enable the Court to make its current order a readily enforceable final judgment by way of a writ of execution.[32] The property disposed of in a final judgment must be identified so clearly in the language of the judgment that the ministerial officers charged with executing that judgment can carry out the judgment without

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[31] Counsel for the Defendant Congregations has already indicated that he thinks it is not clear that his clients are bound by the Court's order. 1 RR 22-23 (Mr. Weaver: "Your Honor, I haven't had a whole lot to say in this lawsuit up to this point. In fact, the motions for summary judgment that the Court has ruled upon and were filed by the other side were not even directed to my clients, the 47 missions and parishes that I represent today. And so I don't know if I'm talking out of school, but what I can say is that the impact of whatever order that the Court may render may very well severely and negatively impact my clients, who are currently occupying some of the properties.").

[32] *See H.E. Butt Grocery Co. v. Bay, Inc.*, 808 S.W.2d 678, 680 (Tex. App.—Corpus Christi 1991, writ denied) ("A final judgment must also be certain, so that it can be enforced by writ of execution.") (citation omitted).

having to ascertain additional facts.[33] Thus, since the Court has not yet issued an Order specifically identifying the protected real and personal property, severance at this stage is improper.

IV. Even if the Court does grant Defendants' proposed severance, it should not make that judgment final and stay all other proceedings in the trial court because additional discovery about the property is needed.

If the Court does grant Defendants' proposed severance, it should refrain from making any severed judgment final until the Defendants fully produce the discovery requested in the Local Episcopal Parties' First Set of Interrogatories and First Requests for Production and the Court puts in place additional protections to guard that property from further irreparable harm. The parties and the Court need this discovery so that they can specifically identity the property disposed of in the judgment so that the ministerial officers charged with executing the Court's order do not need to ascertain any facts in order to execute.

Finally, if the Court severs its current order and makes it final, it should not stay all other proceedings in this Court at this time because the Local Episcopal Parties will need post-judgment discovery to identify the property and to allow them to request sufficient security when Defendants attempt to supersede this Court's judgment.[34] As argued in Plaintiffs' Response to Defendants' Objections to Form, injunctive relief and a substantial supersedeas bond are necessary to protect the Episcopal Parties from Defendants' continued use of Diocesan property pending appeal. The Local Episcopal Parties have already learned that Defendants have used the Diocese's real and personal property in a variety of ways that have irreparably injured the

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[33] *Id.* ("Ministerial officers must be able to carry the judgment into execution without ascertainment of additional facts.").

[34] For example, Defendants are in the process of producing financial account records, and the Local Episcopal Parties and the Defendants are in the process of scheduling property inspections at mutually convenient times. That document production and those inspections should proceed even if a severance is granted.

Episcopal Parties.[35] For example, while this litigation was pending, on October 13, 2010, Defendants secured a **$3,500,000 insider loan** purporting to use the Diocesan Center in Fort Worth and a portion of the Diocese's Camp Crucis property as collateral.[36] Without an injunction constraining Defendants' use of Diocesan property pending appeal, a truly meaningful and enforceable agreement confining Defendants' use of Diocesan property pending appeal, and/or substantial supersedeas security, the Local Episcopal Parties have no way to protect themselves from Defendants' continued misappropriation and waste pending appeal. The need for this protection pending appeal is further underscored by the fact that any additional injury stemming from Defendants' use of Diocesan property is likely to be irreparable since Defendants' counsel has already represented to the Court that all of the Defendants are "judgment proof."[37]

Similarly, if the Court grants Defendants' proposed severance, it should also not stay the remaining proceedings in its court until the Local Episcopal Parties (1) have obtained full discovery on Defendants' financial dealings with third parties since this dispute began and (2) have amended their pleadings to include causes of action against additional third-parties that have purchased Diocesan property from Defendants or that have been granted security interests in Diocesan property by Defendants. These claims could possibly become time-barred by the relevant statute of limitations during any court-imposed stay, and the Court should allow the Episcopal Parties to protect their rights to void and to recover their damages from these transactions if the Court's order is affirmed on appeal.

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[35] Plaintiffs' Response to Defendants' Objections to Form at 6-7.

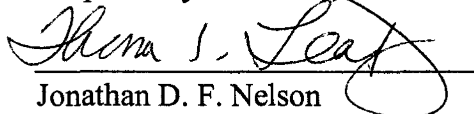
[36] *Id.* at 6 n.10.

[37] 1 RR 13 ("The fact of the matter is that the tort and attorneys' fees claims, if we lose, we are wasting time because our clients are all judgment proof. So they can get a million dollars of attorneys' fees, and who are they going to collect that from.").

V. Conclusion

For the foregoing reasons, the Court should deny Defendants' Motion to Sever and Stay Proceedings. The Local Episcopal Parties agree with Defendants that the parties' competing claims for declaratory judgment might be severed for the purposes of appeal before the parties begin litigating the Local Episcopal Parties' tort claims and the parties' competing claims for attorneys' fees. But Defendants' current Motion urges an impermissible abuse of discretion by proposing severance of an interlocutory order resolving only some claims from pending claims, issues, parties, and discovery that are deeply intertwined and essential to prevent further irreparable harm. Defendants' Motion should be denied.

Respectfully submitted,



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