SUPERIOR COURT OF CALIFORN • COUNTY OF FRESNO **Civil Department - Non-Limited** 1100 Van Ness Avenue Fresno, CA 93724-0002 (559)488-3352	FOR URT USE ONLY
TITLE OF CASE: **Diocese of San Joaquin vs David M Schofield**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: **08CECG01425 AMC**

Name and address of person served:

David M. Overstreet
Overstreet & Associates
1530 E. Shaw Ave., Ste 102
Fresno, CA 93710

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a true copy of the **Court's Ruling/Law and Motion Minute Order** was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at, California, on:

Date: **July 22, 2009**

Clerk, by _____, Deputy
M. Rodriguez

Russell G. Van Rozeboom, 246 W. Shaw Avenue, Wild, Carter & Tipton, Fresno CA 93704
David M. Overstreet, Overstreet & Associates, 1530 E. Shaw Ave., Ste 102, Fresno CA 93710
Eric C. Sohlgren, 4 Park Plaza, Suite 1100, Irvine CA 92614
Michael O. Glass, 900 Fifth Ave, Suite 100, San Rafael CA 94901
Eric J. Glassman, Mennemeier, Glassman & Stroud, 980 9th Street, Sacramento CA 95814

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Michael O Glass
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San Rafael, CA 94901

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Name and address of person served:

Eric J Glassman
Mennemeier, Glassman & Stroud
980 9th Street Suite 1700
Sacramento, CA 95814

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SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Diocese of San Joaquin vs David M Schofield**	
LAW AND MOTION MINUTE ORDER	Case Number: **08CECG01425 AMC**

Date: July 21, 2009
Department: **97A**
Court Clerk: Michele M. Rodriguez

Court's Ruling on: **Motion for Summary Adjudication**
Judge/Temporary Judge: **Adolfo M. Corona**
Reporter/Tape: From Chambers

Appearing Parties:
Plaintiff: No Appearance
Counsel:

Defendant: No Appearance
Counsel:

☐ Off Calendar

☐ Continued to ☐ Set for _____ at _____ Dept. _____ for _____

☐ Submitted on points and authorities with/without argument. ☐ Matter is argued and submitted.

☐ Upon filing of points and authorities.

☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.

☐ Taken under advisement.

☐ Demurrer ☐ overruled ☐ sustained with _____ days to ☐ answer ☐ amend

☐ Tentative ruling on Motion to Compel becomes the order of the court. No further order is necessary.

☐ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☐ Service by the clerk will constitute notice of the order.

☐ Time for amendment of the complaint runs from the date the clerk serves the minute order.

☐ Judgment debtor _____ sworn and examined.

☐ Judgment debtor _____ failed to appear.
Bench warrant issued in the amount of $ _____

Judgment:

☐ Money damages ☐ Default ☐ Other _____ entered in the amount of:
Principal $ _____ Interest $ _____ Costs $ _____ Attorney fees $ _____ Total $ _____

☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to $ _____ per _____

Further, court orders:

☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.

☐ $ _____ to be released to judgment creditor and balance returned to judgment debtor.

☐ Levying Officer, County of _____, notified. ☐ Writ to issue

☐ Notice to be filed within 15 days. ☐ Restitution of Premises

☐ **Other: Matter having been previously taken under advisement on May 5, 2009, the court now rules. See attached order.**

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

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

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

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

Rationale

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

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

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

Mootness

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

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

First Cause of Action for Declaratory Relief

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

> 101. Defendants take the position that defendant Schofield was authorized to revise the articles of "The Protestant Episcopal Bishop of San Joaquin, a corporation sole" in 2006 and 2008, and that defendant Schofield may continue as the incumbent of "The Protestant Episcopal Bishop of San Joaquin, a corporation sole" and as President of the Episcopal Foundation and the Investment Trust after leaving the Episcopal Church and being deposed.
>
> 102. Plaintiffs contend to the contrary, that the purported

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lamb is the Incumbent of the Corporation Sole

Corporations Code section 10002 provides: "A corporation sole may be formed under this part by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering

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

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

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

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

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

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

Lamb is the President of the Episcopal Foundation and Investment Trust

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

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

Therefore, Lamb holds both these offices.

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

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

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

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

The Diocese is Properly a Party Plaintiff

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

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

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

The Corporation Sole is a Party Plaintiff

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

Plaintiffs Have Standing to Sue

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

Trust Beneficiaries Need Not Be Named or Noticed

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

section 17200 has been filed.

Procedural Issues

Defendants claim that the motion must be denied because plaintiffs have failed to comply with Rule of Court 3.150, which Rule requires that the specific cause of action must be stated specifically in the notice of motion and be repeated, verbatim in the separate statement of undisputed material facts. Specifically, plaintiff's notice of motion and separate statement seek summary adjudication on "Count I" not the "First Cause of Action." This distinction is immaterial. As Weil and Brown note, that although few lawyers and judges use the term "count," the term may be used interchangeably with the phrase "cause of action." (Weil & Brown, *Civil Procedure Before Trial* (The Rutter Group 2008) "Pleadings" § 6:105-6:106.)

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

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

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

Evidentiary Rulings

Supplemental Declarations in Reply

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

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

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

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

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

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

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

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

Plaintiffs' Objections to Defendants' Evidence

1. Sustained.
2. Sustained.
3. Sustained.
4. Sustained.
5. Sustained.

Defendants' Objections to Plaintiffs' Evidence

1. Overruled.
2. Overruled.
3. Overruled.
4. Overruled.
5. Overruled.
6. Overruled.
7. Overruled.
8. Overruled.
9. Overruled.
10. Sustained as to "February 28, 2008"; overruled as to remainder.
11. Overruled.
12. Overruled.
13. Overruled.
14. Overruled.

15. Overruled.

16. Overruled.

17. Overruled.

18. Overruled.

19. Overruled.

20. Overruled.

21. Overruled.

22. Overruled.

23. Overruled.

24. Overruled.

25. Overruled.

26. Overruled.

27. Overruled.

28. Overruled.

29. Sustained.

30. Overruled.

31. Overruled.

DATED this 21st day of July 2009.

Adolfo M. Corona
Judge of the Superior Court