

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

FUNDAMENTALIST CHURCH OF
JESUS CHRIST OF LATTER-DAY
SAINTS, an Association of Individuals,

Plaintiff-Appellee,

v.

DENISE POSSE LINDBERG, Judge of the
Third Judicial District Court of Salt Lake
County, State of Utah,

Defendant-Appellant,

BRUCE R. WISAN, Special Fiduciary of the
United Effort Plan Trust; MARK L.
SHURTLEFF, Attorney General for the
State of Utah; THOMAS C. HORNE,
Attorney General for the State of Arizona,

Defendants,

RICHARD JESSOP REAM; THOMAS
SAMUEL STEED; DON RONALD
FISCHER; DEAN JOSEPH BARLOW;
WALTER SCOTT FISCHER; RICHARD
GILBERT; BRENT JEFFS,

Intervenors,

JONATHAN HARKER; HYRUM
HARKER; HARKER DAIRY FORM,

Movants.

No. 11-4066
(D.C. No. 2:08-CV-00772-DB)
(D. Utah)

**ARIZONA ATTORNEY
GENERAL'S MEMORANDUM IN
SUPPORT OF STAY OF
PRELIMINARY INJUNCTION
ORDER**

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Thomas C. Horne, the Arizona Attorney General, is the Appellant in a related matter, Appeal No. 11-4049. Pursuant to this Court's order of April 15, 2011 (Document 01018623246), the Attorney General (hereinafter "AZAG") submits his memorandum in support of the Motion to Stay Preliminary Injunction Order filed by Appellant Judge Denise Posse Lindberg on April 13, 2011 (Document 01018621127).

In its order of April 15, this Court granted a temporary stay of the District Court's preliminary injunction. That stay should be extended and maintained until the interlocutory appeals filed by the various Appellants have been resolved.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. CASE BACKGROUND.

As factual and procedural background for the present memorandum, the AZAG adopts by reference the thirty-six paragraph “Background” section of the Emergency Motion to Stay Preliminary Injunction Order filed by Appellant Lindberg on April 13, 2011 (Document 01018621127). In addition, a detailed history of the case and the relevant litigation that has occurred in the Utah state courts is set forth in the Utah Supreme Court’s opinion in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 238 P.3d 1054 (Utah 2010) (“*FLDS Association v. Lindberg*”).

II. ARGUMENT.

A. Introduction.

In making its determination whether or not to grant a stay of the District Court’s preliminary injunction order, this Court’s analysis is guided by consideration of four factors: “(1) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) any risk of harm to the public interest.” *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (citing 10th Cir. R. 8.1).

“In general, a preliminary injunction is an extraordinary remedy; it is the exception rather than the rule.” *General Motors v. Urban Gorilla*, 500 F.3d 1222, 1226 (10th Cir. 2007) (internal quotations omitted). “Moreover, when a preliminary injunction would alter the status quo, such as the injunction at issue in this case, the movant bears a heightened burden and ‘must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms.’” *Id.* (quoting *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc, per curiam), *aff’d*, 546 U.S. 418 (2006)).

The District Court failed to either recognize or acknowledge that the Anti-Injunction Act, § 1983, and principles of judicial immunity all preclude the District

Court from enjoining the administration of the United Effort Plan Trust (“UEP Trust” or “Trust”) by the Third Judicial District Court of Utah. The District Court has also erred by entering a preliminary injunction that upends the status quo and that is likely to result in irreparable harm to both parties and non-parties. The factors to be weighed in regard to a potential stay weigh heavily in favor of the Appellants; therefore, the AZAG requests that this Court extend its previously-entered stay of the District Court’s preliminary injunction pending the resolution of the interlocutory appeals filed by Appellants.

The District Court has subject matter jurisdiction of this case because the Plaintiff Association’s complaint alleges matters within the scope of 28 U.S.C. §§ 1331 and 1343(3). This Court has jurisdiction of the pending appeals and all related motions pursuant to 28 U.S.C. § 1292.

B. The District Court Is Legally Barred From Entering or Maintaining the Preliminary Injunction Against the State Court And its Fiduciary.

1. The Anti-Injunction Act Prohibits the District Court From Enjoining the State Court.

Judge Benson’s preliminary injunction is barred by the Anti-Injunction Act. 28 U.S.C. § 2283. Under the Act, “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” *Id.* Through the creation of the Act, Congress adopted a policy “under which state proceedings should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the United States Supreme] Court.” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (internal quotations omitted). “[A] federal court does not have inherent power to ignore the limitations § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an

area pre-empted by federal law, even when the interference is unmistakably clear.” *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281 (1970).

The Anti-Injunction Act is “an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions.” *Id.* at 286. The three exceptions to the Anti-Injunction Act, - “expressly authorized by Act of Congress”, “necessary in aid of jurisdiction”, and “to protect or effectuate its judgments” - are to be narrowly construed. *Id.* at 287 (exceptions to the Anti-Injunction Act are “not [to] be enlarged by loose statutory construction.”). “Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.” *Id.* at 297.

The Supreme Court has found that “§ 1983 is an Act of Congress that falls within the ‘expressly authorized’ exception” of the Anti-Injunction Act. *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). Although the Plaintiff Association asserts claims under 42 U.S.C. § 1983, the District Court erred by not dismissing those claims due to the Plaintiff’s lack of capacity under that statute. The plaintiff in this case is not the FLDS Church itself, but rather an unincorporated “association of individuals” who claim to be members of the church congregation.¹ In *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006), the Tenth Circuit, as a matter of first impression, squarely addressed in depth the question of whether an unincorporated association constitutes a “person” with the capacity to maintain § 1983 claims. *Id.* at 1211-16. The Tenth Circuit concluded that an unincorporated association did not constitute a “person” under § 1983, and that claims

¹ On page 2 of Document 117 of the District Court record, Plaintiff states that, “In the present case, the FLDS Association is exercising its right as an ‘unincorporated association’ under Fed. R. Civ. P. 17(b) to sue ‘in its common name to enforce a substantive right existing under the United States Constitution or laws.’ The plaintiff Association is a congregation of members, so its membership is necessarily not a fixed group of individuals.”

made by such an association under the statute must be dismissed. *Id.* at 1216. The AZAG raised the issue of the Plaintiff Association's capacity in its motion to dismiss submitted to the District Court (Document 30, p. 10), but the Court failed to address the point in its Memorandum Opinion (Document 118.)

The Plaintiff Association has no capacity to sue under § 1983, and there is no other "expressly authorized" legislative authority to support the preliminary injunction in this matter. In addition, the District Court's injunction fails to meet either of the other recognized exceptions to the Anti-Injunction Act.²

2. Judicial Immunity Bars the District Court From Granting Injunctive Relief That Runs Against Either the State Court or the Special Fiduciary.

Even if the Plaintiff Association had the capacity to pursue § 1983 claims, the District Court's preliminary injunction is still barred by § 1983 itself and by principles of judicial immunity.

In *Pulliam v. Allen*, 466 U.S. 522 (1984), the United States Supreme Court ruled that, despite the doctrine of judicial immunity, a federal court had authority pursuant to § 1983 to grant prospective injunctive relief against a state court to prevent action the federal court deemed to be in violation of the Constitution. However, in 1996 the Congress significantly limited the scope of *Pulliam* when it passed the Federal Courts

² The "necessary in aid of jurisdiction" exception is understood to allow a federal court to enjoin a state proceeding regarding property in custody of the federal court; however, "if the state court has first obtained custody of the res the federal court cannot enjoin the state proceeding." 17A Charles Alan Wright, et al., *Federal Practice & Procedure* § 4225 (3d ed. 2010). Here, the state court first obtained custody of the res and, therefore, this exception is inapplicable. The "to protect or effectuate its judgments" exception, alternatively known as the relitigation exception, is also inapplicable to the circumstances here because the state proceeding enjoined is not relitigating matters already determined by the federal court. The circumstances here are actually the inverse of the circumstances that support the relitigation exception. See *Weyerhaeuser Co. v. Wyatt*, 505 F.3d 1104, 1110 (10th Cir. 2007).

Improvement Act (“FICA”). FICA amended § 1983 to add the following language: “in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” The Tenth Circuit has recognized that, since the FICA amendment, “the doctrine of judicial immunity now extends to suits against judges where a plaintiff seeks not only monetary relief, but injunctive relief as well.” *Lawrence v. Kuenhold*, No. 06-1397, 271 Fed. Appx. 763, n. 6, 2008 WL 822458 (10th Cir. Mar. 27, 2008) (unpublished).

In the present case, there is no previous declaratory decree in place that Judge Lindberg, the state court judge, can be accused of having violated. Under the plain language of § 1983, therefore, the District Court had no power to grant injunctive relief of any kind, preliminary or permanent, that would run against Judge Lindberg.

In addition to judges themselves, judicial immunity extends to persons who work for or assist judges in carrying out judicial functions or executing judicial decrees. “Absolute judicial immunity applies not only to judges, but has extended, in the form of quasi-judicial immunity, to any person acting as an arm of the absolutely immune judicial officer.” *Coleman v. Governor of Michigan*, No. 09-1139, 2011 WL 894430, at *5 (6th Cir. Mar. 16, 2011) (unpublished). *See also Moss v. Kopp*, 559 F.3d 1155, 1163 (10th Cir. 2009); *Valdez v. City & County of Denver*, 878 F.2d 1285, 1287-88 (10th Cir. 1989). The protection of “quasi-judicial”, or derivative, immunity extends to receivers appointed by a court, which is the position of the Special Fiduciary in the present case. *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir. 1978). In *T & W Investment Co.*, the Tenth Circuit explained:

At the least, a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge’s absolute immunity. To deny him this immunity would seriously encroach on the judicial immunity already recognized by the Supreme Court. It would make the receiver a lightning rod for harassing litigation aimed at judicial orders. In addition to the unfairness of sparing the judge who gives an order while punishing the

receiver who obeys it, a fear of bringing down litigation on the receiver might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between receiver and judge seem inevitable. Other federal courts have reached a similar conclusion.

588 F.2d at 802 (internal citations omitted).

As discussed above, the 1996 FICA amendment to § 1983 prohibits federal courts from granting injunctive relief against a state court unless a previous declaratory decree has been violated. The immunity from injunctive relief conferred by the FICA amendment extends derivatively to persons working for the state court or acting in some capacity as an arm of the court. *Roth v. King*, 449 F.3d 1272, 1287 (D.C. Cir. 2006) ("There is no reason to believe that the Federal Courts Improvement Act of 1996 is restricted to 'judges,' and thus we find that . . . [non-judge] appellants are immune from injunctive relief."); *see also Coleman v. Governor of Michigan*, No. 09-1139, 2011 WL 894430, at *5 (6th Cir. Mar. 16, 2011); *Gilbert v. Ferry*, 298 F. Supp. 2d 606, 612 (E.D. Mich. 2003), *holding aff'd* 401 F.3d 411, 414 n. 1; *Wise v. United States*, No. 6:09-01376-HFF-WMC, 2009 WL 3052608, at *4 (D.S.C. Sept. 23, 2009) (unpublished); *Cannon v. South Carolina Dep't of Corrections*, No. 8:07-3984-CMC-BHH, 2008 WL 269519, at *4 (D.S.C. Jan. 29, 2008) (unpublished).

Because the Special Fiduciary was appointed by the state court and acts as an arm of that court, the Fiduciary shares the state court's immunity to injunctive relief. The District Court is prohibited by law from granting injunctive relief that runs against either Judge Lindberg or the Special Fiduciary; to the extent the preliminary injunction includes such relief, it is illegal and should be vacated.

C. A Stay is Strongly Favored By the Four Factors to be Considered Under 10th Cir. R. 8.1.

1. The Likelihood of Success on Appeal.

a. Claim Preclusion and Issue Preclusion.

The Appellants are likely to succeed on appeal because the Plaintiff Association's claims are barred by the doctrines of claim preclusion (*res judicata*) and issue preclusion (collateral estoppel). On these points, the AZAG adopts and incorporates the arguments set forth in the memorandum submitted in this matter by the Utah Attorney General. *See* Document 01018626334, pp. 8 – 19.³

b. Laches.

Setting aside the questions of claim preclusion and issue preclusion, the AZAG asserts that the Utah Supreme Court's conclusion that the FLDS Association's claims are barred by laches was correct on the merits. *See FLDS Association v. Lindberg*, 238 P.3d 1054, 1062-64.

³ The Utah Supreme Court dismissed the Plaintiff Association's constitutional claims under the doctrine of laches. *FLDS Association v. Lindberg*, 238 P.3d 1054, 1062-1064. The District Court decided that it was not bound by the Utah Supreme Court's ruling because "currently, there is no clear precedent from the Utah Supreme Court or any other Utah state court regarding whether laches always constitutes a 'judgment on the merits' for *res judicata* purposes." Document 118, p.35. Judge Benson therefore proceeded to examine and decide the binding effect of the *Lindberg* ruling under Utah law. Document 118, pp. 35 – 43. The proper course of action for the District Court would have been to certify the question to the Utah Supreme Court. *See United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.*, 573 F.3d 997, 998 (10th Cir., 2009) (finding that where "the disposition of [the] appeal turns on an important and unsettled question of [state] law" that "certification of [the] question will further the interests of comity and federalism by giving the [state] Supreme Court the opportunity to answer the question in the first instance." If this Court finds any reason to question the binding nature of the *Lindberg* ruling under Utah law, the AZAG requests that it certify the question to the Utah Supreme Court.

“To provide laches, a party asserting the defense must show (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice.” *Southside Fair Housing Comm. v. City of New York*, 928 F.2d 1336, 1354 (1991) (citing *Costello v. United States*, 365 U.S. 265 (1961)). “Laches can bar constitutional claims.” *Id.* (citing *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1181-82 (9th Cir. 1988) [laches barred equal protection claim]; *see also Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, 1476 (10th Cir. 1990) (due process, equal protection and unconstitutional taking claims barred by laches). In the present case, although the District Court found that there were possible explanations for why the Plaintiff Association failed to assert its claims in a timely manner (*see* Document 118, pp. 31-32), none of those explanations is adequate to legally excuse the failure to act. The Utah Supreme Court was correct in ruling that the Association’s claims are barred. The District Court should have reached the same conclusion.

c. The Plaintiff Association Is Not a “Person” Within the Meaning of 42 U.S.C. § 1983.

As was previously discussed, the Plaintiff Association is not a “person” within the meaning of 42 U.S.C. § 1983, and therefore is not entitled to injunctive relief pursuant to that statute. *Lippoldt v. Cole*, at 1211-16. The Plaintiff Association’s only remaining cause of action is pursuant to the declaratory judgment statutes, 28 U.S.C. §§ 2201-2202; however, in contrast to § 1983, injunctive relief against a state court is not expressly authorized by those statutes. Because the “expressly authorized” exception is not met, the District Court’s injunction violates the Anti-Injunction Act, 28 U.S.C. § 2283. *See* Section II.B.1, *supra*. This factor alone makes it likely the Appellants will succeed on appeal.

d. The Doctrine of *In Custodia Legis* Prohibits the District Court from Interfering With Trust Administration Decisions and the Barton Doctrine Prohibits Such Interference Without Leave Granted By the State Court.

Property under court administration and assigned to management by a court-appointed fiduciary is considered *in custodia legis*, meaning it is considered to be in the physical possession of the court. *See, e.g., 75 C.J.S. Receivers* § 99 (2011); *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schmader*, 294 U.S. 189, 196-97 (1935) (court first invoking control over property *in rem* or *quasi in rem* is in constructive possession of the property and authorized to proceed as against other later acting courts with concurrent jurisdiction). Once property is placed under the control of a state court for trust administration purposes, it is removed from the jurisdiction of all other courts, including federal courts. *See, e.g., United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477-78 (1936); *Continental Bank & Trust Co. v. Apodaca*, 239 F.2d 295, 297-98 (10th Cir. 1956). Moreover, exclusive jurisdiction to construe a trust is vested in the first court acquiring jurisdiction over the issue. *See In re Franz' Estate*, 145 S.W.2d 400, 403 (Mo. 1940). There is no question that supervision of the UEP Trust by Utah's Third Judicial District Court began in 2005, years before the present federal action was filed. Thus, the state court is entitled to maintain jurisdiction and control over the Trust.

“It is well settled that leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee, for acts done in the trustee's official capacity and within the trustee's authority as an officer of the court.” *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240-41 (6th Cir. 1993); *see also Barton v. Barbour*, 104 U.S. 126 (1881). This rule, known as the “*Barton doctrine*,” applies to claims brought against any court-appointed trustee or receiver under § 1983, or any other

state and federal statutory theories that are related to the administration of the trust. *See Lawrence v. Goldberg*, 573 F.3d 1265, 1268-71 (11th Cir. 2009). This doctrine arises from the fact that the court appointing the receiver or trustee has exclusive jurisdiction over the property of the entity to be administered. *See* 16 Fletcher Cyc. Corp. § 7855. The crucial question is whether the claims could impact administration of the trust, and claims are barred “if the outcome could alter the [trust’s] rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the . . . estate.” *Lawrence v. Goldberg* at 1270-71.

Under these doctrines, it is questionable whether the District Court should have allowed the Plaintiff Association’s case to proceed at all. Putting that issue aside, however, it is obvious that the preliminary injunction issued by the District Court improperly interferes with the lawful prerogatives of the state court.

e. Federal Abstention Doctrines.

The District Judge also ignored various federal abstention doctrines whose principles counsel that the District Court should have either declined or terminated its involvement in this case. These doctrines include *England* abstention, *Younger* abstention, and *Colorado River* abstention.

Of these doctrines, none could be more on point than the doctrine laid out in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964):

[W]e see no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of litigation; it would also be a potential source of friction between the state and federal judiciaries. . . . We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then-whether or not he seeks direct review of the state decision in this Court - he has elected to forgo his right to return to the District Court.

375 U.S. at 419.

In addition, the District Court should not have allowed this matter to proceed under “*Younger* abstention,” whereby a federal court *must* abstain from deciding claims filed to enjoin state enforcement proceedings absent a showing of bad faith, harassment, or other unusual circumstances calling for equitable relief. *Younger v. Harris*, 401 U.S. 37 (1971).

Abstention by the District Court was also called for in light of the considerations identified in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976) and its progeny. *See, e.g., Sierra Club v. City of San Antonio*, 112 F.3d 789, 797 (5th Cir. 1997). First, the Plaintiff Association’s claims all incorporate issues of state law, including: 1) whether Utah and Arizona law would recognize any enforceable legal interest in undocumented religious “stewardships” granted by religious leaders over properties owned by a charitable trust, particularly where those same leaders had intentionally taken measures after their loss in *Jeffs v. Stubbs*, 907 P.2d 1234 (Utah 1998) to implement a trust amendment (the 1998 reformation) that attempted to ensure that no other competing interests could be claimed; and 2) the scope of the state court’s trust administration powers under the Utah trust statutes and common law, including its cy pres powers. Moreover, the state interests in deciding charitable trust administration issues are compelling. This is doubly so where the Plaintiff Association waited to launch any challenges to the Trust administration until years after it had begun, and long after the state court’s reformation of the Trust was complete. The State of Utah also has a compelling interest in ensuring that those who respect the courts’ authority and obtain lease or occupancy rights through the state judicial process are not subjected to untimely claims seeking to upend their reliance and remove them. For all these reasons, “wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition” called for abstention by the District Court in this case. *Colorado River*, 424 U.S. at 817.

2. Irreparable Injury Absent a Stay.

The Utah Supreme Court recognized the reliance of numerous individuals upon the 2005 reformation of the Trust, explaining that “[t]he FLDS Association has shown a lack of diligence in challenging the modification of the Trust, and this lack of diligence has operated to the detriment of others.” *FLDS Association v. Lindberg*, 238 P.3d 1054, 1064. Also, before issuing his preliminary injunction, Judge Benson explicitly recognized the “mess” that would be created by altering the *status quo*, stating: “I assume that is going to be something of a mess to unravel, but it is going to have to happen if there is a court of final jurisdiction that finds that the actions of the state here were against . . . the U.S. Constitution.” Document 72, p. 52, lns. 14-20. However, disregarding that the District Court is not “a court of final jurisdiction,” Judge Benson has now issued a preliminary injunction that aims to begin that “unraveling” immediately, before there is a final determination on the merits.

a. The Preliminary Injunction Fails to Protect People and Entities Engaged In Business With the Trust.

The Special Fiduciary has engaged and continues to engage in commercial relationships with people and entities that are not affiliated with the FLDS Church. For example, the Fiduciary contracts with two brothers, Jonathan and Hyrum Harker, to operate the Harker Dairy Farm in Beryl, Utah, which is owned by the Trust. (The Harkers’ grandfather founded the farm in the 1950’s.) *See* Documents 157 and 158, Motion to Intervene by Harker Movants. The Harker brothers have invested substantial time and money in the dairy operation, with the goal of eventually purchasing it from the Trust. As another example, the Fiduciary has commercial leases with Shane and David Stubbs to operate a farming and livestock operation on a portion of the Berry Knoll property (another parcel owned by the Trust).

The preliminary injunction transfers control of the Trust from the state court’s Special Fiduciary to the Corporation of the President of the FLDS Church (“COP”), a

corporation sole which is not a party to the present case. The injunction order provides that the COP will abide by commercial leases and agreements made by the Fiduciary, but states that it “may enforce or terminate those leases according to their terms.” As to the Harker and Berry Knoll Farms specifically, the injunction order states that the operations and income of those farms will be “returned” to the COP.⁴

The terms of the preliminary injunction allow the COP to terminate or severely restrict the commercial operations of persons engaged in business with the Trust even while this litigation is still pending. Such provisions obviously do not preserve the status quo, and fail to protect the rights and interests of innocent third parties. They are completely inappropriate as a matter of interim relief.

b. The Preliminary Injunction Order Does Not Provide For Adequate Accounting of the Receipt and Expenditure of Trust Monies.

The preliminary injunction provides that the COP will be responsible for accounting for the expenditure of the Trust’s funds only to the extent necessary to show that property taxes have been paid. As a matter of interim relief, this proposal is obviously unreasonable and inadequate. Whoever is in control of the Trust while the preliminary injunction is in effect should be expected to be able to account to a court for the use and expenditure of the Trust’s monies.

c. The Injunction Violates the Due Process Rights of Trust Participants.

The population of people living or working on properties owned by the UEP Trust does not consist exclusively of adherents of the FLDS Church. The populations of those communities include people who have never been members of the Church and people who have either been expelled from or voluntarily left the Church. The District Court’s

⁴ To the AZAG’s knowledge, these two farming operations were never previously assets of the COP, and it is therefore strange that the order proposed by the Plaintiff Association and adopted by the District Court provides that they be “returned” to the COP.

injunction order turns over control of all property in which these non-FLDS members have legally established interests (*see, e.g., Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998)) to a church corporation that has been openly hostile to them in the past. Neither the Plaintiff Association nor the District Court made any attempt to join such persons in the litigation, or to give them notice and an opportunity to voice their objections to taking the property out of the supervision of the state court and giving it to the exclusive control of someone who is in jail awaiting trial on felony charges and who would likely take actions consistent with the previously exhibited hostility against them. The preliminary injunction therefore violates the fundamental due process rights to notice and a hearing of those with established rights.

The same goes for the numerous individuals who have entered into judicially-authorized leases and occupancy agreements with the Special Fiduciary over the past six years. These persons have property occupancy and use rights recognized by state, and hence, federal law. Those rights will be upset by the order that their “landlord”—the person they must rely on to honor the legal obligations created by their lease documents—is being switched to an individual who may be a religious adversary, who sits in jail in Texas, and who has proven himself repeatedly willing to ignore court orders and law enforcement authority. Yet, neither the Plaintiff Association nor the District Court attempted to make the many such persons parties to the case or give them any other notice or opportunity to object to this drastic change in their property rights. The preliminary injunction was entered in violation of due process rights and therefore must be stayed.

d. The Preliminary Injunction Unnecessarily Exposes the Trust and Others to Substantial Harm By Not Requiring the Posting of Any Bond.

The Trust itself (and, by extension, its beneficiaries) has a financial stake in how the Trust is to be operated and administered. Those who have business or legal relationships with the Trust, or who have leases or occupancy agreements with the Trust, also have significant financial interests at risk. It is not a given that the District Court's interim findings in favor of the Plaintiff Association will be incorporated into its final findings and conclusions, or, even if they are, that those findings will be sustained on appeal.

In the meantime, the Trust and the people and entities that have relationships with it deserve some reasonable protection from possible mismanagement and potential retaliation by the COP. The AZAG recommended to the District Court that, if the Court intended to transfer control of the Trust from the state court to the COP, the Plaintiff Association should be required to post a bond of at least ten million dollars. A bond of at least this amount is justified to protect against potential damages arising from such things as: 1) interference with or impairment of the commercial interests of the people and/or entities presently engaged in the farming operations at Harker Farm and Berry Knoll Farm (*see* Documents 157 and 158, Motion to Intervene by Harker Movants); 2) the Trust's loss of its ability to obtain income through the sale of certain trust assets, such as Berry Knoll; 3) the Trust's loss of its ability to use the income from asset sales to pay off current liabilities of the Trust; 4) potential financial losses to the Trust caused by changes of position in pending lawsuits; 5) the potential diversion of Trust monies to pay the criminal defense costs of Warren Jeffs and other FLDS-affiliated persons charged with crimes; and 6) the potential diversion of trust monies to pay the legal fees and related expenses of persons or entities who are or have been engaged in litigation against the Trust. Despite these serious concerns, Judge Benson's preliminary injunction order

required no bond, and thus provides no protection whatsoever for the Trust, its beneficiaries, or persons who have business or other relationships with the Trust.

3. The Absence of Harm to Opposing Parties if the Stay or Injunction is Granted.

The administration of the Trust by the state court and its Special Fiduciary has been in place since the summer of 2005. The Plaintiff Association waited more than three years, until October 2008, to file this lawsuit. After that, the Association allowed the federal litigation to remain mostly inactive for two additional years, not filing their motion for preliminary injunction until October 2010. The state court's control of the Trust is the *status quo*. There is no apparent reason why the maintenance of that *status quo* while the appeals from the preliminary injunction are pending would cause any new or additional harm to the Plaintiff Association.

4. The Public Interest.

a. Transferring Control of the Trust to the COP is Unwise and Impractical Because There is an Ongoing Dispute Over that Position.

The Preliminary Injunction Order provides that control over the property and assets of the Trust are to be transferred to the COP (that is, the President of the Church). The District Judge issued this order even though he had been made aware that there was a contest under way within the Church over the position of President. *See* Document 149, "Arizona Attorney General's Submittal Regarding Terms of a Modified Preliminary Injunction", Section III (previously filed in this Court as Document 01018623143).⁵

⁵ In mid-February 2011, a filing with the Department of Commerce of the State of Utah stated that Warren Steed Jeffs was replacing Wendell Nielsen as COP. Jeffs is the person who has been generally recognized as the current "Prophet" of the Church. Document 118, p. 7. On March 28, 2011 a rival for the presidency of the Church, William Edson Jessop, filed papers with the Department of Commerce stating that he had been "called" to be President of the Church, and therefore was President. A subsequent filing by

In light of this ongoing dispute over the leadership of the Church, it is obviously unwise and impractical to transfer control of the UEP Trust to one of the two competing Church “Presidents”, or, for that matter, to any person claiming to be an officer of the Church. Any such person would inevitably belong to one faction or the other, and the District Court, in compelling such a transfer, would be “picking a winner” in the leadership struggle. This would be just the sort of “entanglement with religion” that the District Court strongly condemned in its Memorandum Decision. *See, e.g., Schofield v. Superior Court*, 190 Cal. App. 4th 154, 162, (App. Dist. 5 2010) (where a “dispute does not involve ownership of property - if it concerns issues such as church doctrine, membership, credentials of clergy, discipline of clergy and members, or church governance and organization - the matter is to be left to internal decision-making processes of the church itself”); *see also Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

It is also important to recall that the plaintiff in this case is an “association of individuals” (asserted to be members of the Church and beneficiaries of the UEP Trust), not the Church itself. The District Court concluded that the Plaintiff Association consists of approximately 5,000 people. Document 118, p. 2. Even if the presidency of the Church was not currently contested, how can the District Court know that the 5,000 members of the Plaintiff Association actually support transferring control of the Trust to the President of the Church?⁶ On top of that, with a fight over the presidency actively under way, it is logical to assume that some members of the Plaintiff Association support one faction in the dispute, while other members support the opposing faction. The

supporters of Jeffs disputes Jessop’s claim, and asserts that Jeffs remains the recognized President of the Church. *See generally* Document 149, Exhibit B.

⁶ Before the state court’s appointment of the Special Fiduciary, the Trust had in the past always been operated by a board of trustees, of which the President was only one member. Document 118, pp. 4-6.

District Court's order should not reward one faction or the other by transferring control of the Trust to a person (or persons) who is, or who claims to be, an officer of the Church hierarchy.

Not only does the District Court's preliminary injunction order upend a judicially supervised and orderly regime of trust administration that has been in place for years, it also provides for the immediate transfer of the Trust to a corporate entity over which there is an ongoing struggle for control. The public interest is not served by such an order.

b. Warren Jeffs Is Not a Suitable Candidate to Be Put In Control of the Trust.

One of the persons vying for control of the FLDS Presidency is the "Prophet" of the Church, Warren Jeffs. As is not disputed by any party in this case, Jeffs is a once-convicted sex offender who is presently in custody awaiting trial for multiple alleged felony crimes involving the sexual exploitation of children. In at least one instance documented by the Arizona Court of Appeals, Jeffs used his position and influence as a UEP trustee to retaliate against a family that refused to consent to Jeffs' demand that their fifteen-year-old daughter marry a thirty-nine year-old man. *See United Effort Plan Trust v. Holm*, 101 P.3d 641, 643 (Ariz.App. 2004). Moreover, Jeffs is one of the UEP trustees whose default and abandonment of the Trust caused the Third Judicial District Court to assume supervision of the Trust in the first place. Document 118, pp. 7-8. In addition to his past abusive disregard of his fiduciary responsibilities, Jeffs is presently incarcerated in Texas, which obviously hinders his ability to effectively administer the Trust. It is certainly contrary to the public interest, especially as a matter of interim relief, to hand over control of the Trust to such a person. Such action would also be in violation of Utah Code § 75-7-1002, which provides that a trustee who contributed to a breach of trust is not permitted to benefit from that breach of trust.

III. CONCLUSION.

The primary purpose of a preliminary injunction is to preserve the *status quo* while litigation continues. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). For six years, the *status quo* in regard to the UEP Trust is that it has been administered by the Special Fiduciary under the supervision of Utah's Third Judicial District Court. The United States District Court was wrong to displace the state court and its fiduciary as a matter of interim relief. Moreover, the District Court's order is unlawful under the Anti-Injunction Act, § 1983, and principles of judicial immunity. Finally, the factors to be weighed per 10th Circuit Rule 8.1 in considering a stay pending appeal are heavily in favor of the Appellants. For all of these reasons, this Court should extend its temporary stay of the District Court's preliminary injunction order pending resolution of the interlocutory appeals filed by the Appellants.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ARIZONA ATTORNEY GENERALS' MEMORANDUM IN SUPPORT OF STAY OF PRELIMINARY INJUNCTION PENDING APPEAL was furnished through (ECF) electronic service to the following on this 22nd day of April, 2011:

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