

Case No. 11-4066

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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

*Plaintiff/Appellee.*

v.

BRUCE R. WISAN, Special Fiduciary of the United Effort Plan  
Trust; MARK SHURTLEFF, Attorney General for the State of Utah;  
TERRY GODDARD, Attorney General for the State of Arizona; and  
DENISE POSSE LINDBERG, Judge of the Third Judicial District  
Court of Salt Lake County, State of Utah,

*Defendants/Appellants.*

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APPELLEE'S MOTION TO RECONSIDER AND/OR CLARIFY STAY  
ORDER DATED APRIL 15, 2011

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Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Appellee respectfully moves this Court to reconsider and/or clarify its Stay Order issued April 15, 2011, and in support thereof states as follows:

Earlier today, Judge Linberg filed an Emergency Motion to Stay Order to Show Cause—the latest in a flurry of filings by Judge Lindberg (and the other parties to this action) insisting that this Court address, on an emergency basis, an al-

leged “crisis.” In response to that Motion—to which Appellee was preparing an opposition—this Court issued its Stay Order.

Appellee wishes to apprise the Court that the effect of its Stay Order may not be to impose a complete stay or freeze on the situation pending the expedited briefing the Court has ordered by Friday, April 22. Instead, the effect will be to expose the members of Appellee religious association to the same irreparable harm that caused the district court to issue the injunction, and to re-empower the same state actors the district court found to be engaged in a serious, substantial, ongoing violation of the Constitution, without any of the protections in place that Appellee and the Utah Attorney General agreed would ensure a proper balance in this complicated situation.

The chronology leading up to the Order to Show Cause is important:

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|-------------------|---|
| December 21, 2011 | U.S. District Court enters its Order Regarding Plaintiff’s Renewed Motion for Temporary Restraining Order and Preliminary Injunction, which restrained all parties “from taking action that would materially change the status quo or which would irreparable harm the Plaintiff or the Defendants.” This order was to remain in place pending the court’s resolution of the motion for preliminary injunction. |
| February 24, 2011 | U.S. District Court enters its Memorandum Decision and Order holding the state’s “reformation” of the UEP Trust to have been a clear violation of the Establishment Clause of the U.S. Constitution. This followed several rounds of briefing as well as several hearings in that Court. The Order leaves in place the District Court’s December 21 Order pending the   |

filing of a further order describing the final form of the preliminary injunction.

- March 1, 2011 Judge Lindberg issues a Minute Entry acknowledging the ruling and, though not conceding its correctness, recognizing that the parties should not be subject to “inconsistent orders” and therefore imposing a “voluntary stay by the Court pending further appellate action with respect to the district court’s decision.” See Minute Entry, Exhibit A hereto.
- March 15, 2011 U.S. District Court holds a hearing inviting the parties to work toward an agreed order or otherwise submit a proposed form of Preliminary Injunction to the Court for review.
- March 23-25, 2011 Defendants file notices of appeal of the February 24, 2011 Memorandum Decision and Order.
- April 5, 2011 The Plaintiffs and the Utah Attorney General jointly submit a proposed Preliminary Injunction Order to the Court for consideration. Other parties file pleadings voicing concerns but do not submit proposed orders.
- April 7, 2011 Judge Benson signs the Preliminary Injunction Order proposed by the Plaintiffs and the Utah Attorney General.
- April 11, 2011 Without seeking a stay from any court, Judge Lindberg issues sua sponte her Ruling and Order Directing the Special Fiduciary to Retain UEP Trust Assets Pending Further Order of This Court, Court reasserting her own “control” over the UEP Trust. See Exhibit B hereto.
- April 12, 2011 Bypassing the U.S. District Court, Judge Lindberg moves directly in this Court for a stay of the Preliminary Injunction Order.
- April 14, 2011 The U.S. District Court enters the Order to Show Cause, treating the April 12, 2011 Lindberg order as

an apparent violation of the Preliminary Injunction Order, and setting the issue for hearing April 18, 2011.

April 15, 2011 Judge Lindberg seeks an emergency stay from this Court of the Order to Show Cause.

April 15, 2011 This Court issues its Stay Order.

Had Judge Lindberg maintained the “voluntary stay” she entered on March 1, 2011, after the district court issued its Memorandum Opinion and Ruling, Appellee might take some comfort that it would not be exposed to the serious, substantial and ongoing constitutional violation that Judge Benson found to exist by virtue of Judge Lindberg’s and the Special Fiduciary’s control over the Trust. But—in open defiance of a lawfully entered order of the U.S. District Court in a case in which she chose to participate as a litigant rather than as a nominal party—she unilaterally lifted that stay, reasserted her own control over the Trust, and directed the Special Fiduciary to take such decisions as he might deem appropriate in the exercise of his business judgment to “preserve” the Trust—which is precisely the situation the district court found to so profoundly violate the constitution.

Thus the effect of this Court’s staying the preliminary injunction is to leave Judge Lindberg’s self-help order in place, and to once again expose Appellee to irreparable harm. Judge Lindberg’s order stands in open defiance of a lawfully entered order of the U.S. District Court. Regardless of what may happen to the Preliminary Injunction Order on appeal, Judge Lindberg’s defiance cannot be counte-

nanced or excused. Where she has refused to rescind the offending order, her chances of success on appeal of any finding of contempt would be virtually non-existent.

Tenth Circuit Rule 8.1 requires a careful balancing of harms and the public interest. In the present case, the public interest strongly favors permitting the lower courts to enforce their lawfully entered orders, or at the very least requires that a situation that has been judicially determined to constitute irreparable harm of the highest order of magnitude not persist. Moreover, to undermine the District Court's process while at the same time excusing a sitting state court judge's open defiance of lawful orders is immensely harmful to the public's perceptions of the court system and thus to the public interest.

By contrast, the potential harm to Judge Lindberg, in the form of sanctions for contempt, is within her power to mitigate: She can simply stand down from her defiance and follow the lawful processes other litigants are expected to follow. She previously recognized the lack of any harm in staying further proceedings in her court by issuing her March 1 "voluntary stay." Since she has unilaterally lifted the stay of proceedings in her court that she previously imposed voluntarily, and since this Court's stay of the injunction removes the stay that the district court imposed, the unconstitutional regime is once again in place.

As Judge Lindberg notes, under the Federal Courts Improvement Act a state court can properly be enjoined from violating a declaratory decree. *See* 42 U.S.C. § 1983 (stating that “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.”) (emphasis added). Here the federal district court has declared that the Utah Third District Court’s continued assertion of “oversight and control” over the Trust would amount to a serious, substantial, ongoing constitutional violation. The Order to Show Cause Judge Lindberg seeks to block on an “emergency” basis is nothing more than an effort by the federal district court to prevent continued action contrary to that declaration through the type of injunction that the FCIA expressly permits. Since this Court has prohibited Judge Benson from enforcing the injunction and has stayed the injunction against further proceedings in the state court, Appellee respectfully asks that this Court reinstate that injunction to that extent, such that Appellee will not suffer even one more day of irreparable harm.

#### CONCLUSION

For the foregoing reasons, this Court should reconsider its Stay Order, or at a minimum clarify that all proceedings involving the Trust be stayed, including all proceedings in the state courts, pending further consideration by this Court on the briefing schedule set forth in the Stay Order.

DATED: April 15, 2011.

By s/ Rodney R. Parker  
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*Attorneys for Plaintiff/Appellee*

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2011, I electronically filed the foregoing APPELLEE'S MOTION TO RECONSIDER AND/OR CLARIFY STAY ORDER DATED APRIL 15, 2011 with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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s/ Rodney R. Parker

**CERTIFICATE OF DIGITAL SUBMISSION**

In compliance with the Tenth Circuit's General Order of August 10, 2007, I hereby certify:

(1) All required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(2) The digital submissions have been scanned for viruses with the most recent version of Kaspersky Anti-Virus, version 6.0.4.1424 updated April 15, 2011 and, according to the program, are free of viruses.

By s/ Rodney R. Parker  
Rodney R. Parker

FILED  
U.S. DISTRICT COURT

2010 DEC 22 A 8:32

DISTRICT OF UTAH

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DEPUTY CLERK

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Attorneys for Defendant Bruce R. Wisan, as the Court-Appointed  
Special Fiduciary of the United Effort Plan Trust

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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

Plaintiffs,

v

BRUCE R. WISAN, Special Fiduciary of the  
United Effort Plan trust; MARK  
SHURTLEFF, Attorney General for the State  
of Utah, TERRY GODDARD, Attorney  
General for the State of Arizona; and  
DENISE POSSE LINDBERG, Judge of the  
Third Judicial District court of Salt Lake  
County, State of Utah,

Defendants.

**ORDER REGARDING PLAINTIFF'S  
RENEWED MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Case No.2:08-cv-772-DB

Judge Dee Benson

On October 6, 2010, the Plaintiff filed a Renewed Motion for Temporary Restraining Order and Preliminary Injunction ("Motion"). Defendant Bruce R. Wisan, Court-Appointed Special Fiduciary of the United Effort Plan Trust ("Special Fiduciary"); Defendant Mark L. Shurtleff, Attorney General for the State of Utah ("Utah Attorney General"); and Defendant Terry Goddard, Attorney General for the State of Arizona ("Arizona Attorney General") all filed written opposition to the Motion. The Utah Attorney General and the Arizona Attorney General also filed motions to dismiss the first amended complaint on the grounds that this Court lacks subject matter jurisdiction.

Two hearings on the Motion were held on December 3, 2010, and December 14, 2010. At the hearing on December 14, 2010, the following counsel appeared: Rodney R. Parker, Kenneth A. Okazaki, and Stephen C. Clark for the Plaintiff; Jeffrey L. Shields and Zachary T. Shields for the Special Fiduciary; David N. Sonnenreich for the Utah Attorney General; and William A. Richards for the Arizona Attorney General (via telephone). Other counsel also attended the December 14, 2010, hearing and some were identified during the course of the hearing.

After reviewing the file and hearing the arguments of counsel, the Court entered its findings of fact and conclusions of law on the record. The Court directed Jeffrey L. Shields, counsel for the Special Fiduciary, to prepare this Order.

Pending the Court's review of issues regarding this Court's subject matter jurisdiction and other substantive issues raised in opposition to the Motion, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. The Motion is granted in part as follows:
  - a. The parties are temporarily restrained from taking action that would materially change the status quo or which would irreparably harm the Plaintiff or the Defendants;
  - b. Specifically, United Effort Plan Trust property, including the Berry Knoll Farm property, shall not be sold or encumbered;
  - c. Specifically, subdivision plats earlier approved by Judge Shumate for United Effort Plan Trust property located in Hildale City, Utah shall not be recorded any sooner than ten (10) business days after the Court rules on the Motion; and
  - d. This Order is effective as of noon, December 13, 2010.
2. The Plaintiff is not required to post any bond.
3. This Order shall expire when the court rules on the Motion.
4. If any party feels that this Order needs to be adjusted, such party may make a motion to do so.

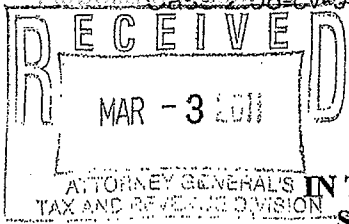
DATED: December 21, 2010

UNITED STATES DISTRICT COURT,  
DISTRICT OF UTAH



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The Honorable Dee Benson  
United States District Court Judge



**IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH  
SALT LAKE DEPARTMENT**

**IN THE MATTER OF THE UNITED  
EFFORT PLAN TRUST**

**MINUTE ENTRY**

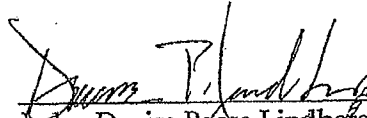
Case No. 053900848

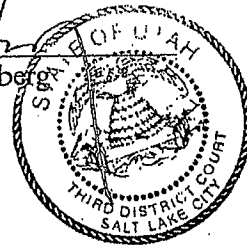
Judge Denise P. Lindberg

Date: March 1, 2011

The Court is aware that on Thursday, February 24, 2011, the United States District Court for the District of Utah (Central Division) issued a Memorandum Opinion and Order in the case of *The Fundamentalist Church of Jesus Christ of Latter Day Saints v. Wisan*, Case No. 2:08-cv-772.<sup>1</sup> In that case, the district court granted the plaintiff's request for a preliminary injunction, effective immediately, but stated that a separate order will enter "identifying the precise extent of the preliminary injunction." This Court has reviewed the district court's opinion and does not concede the legal correctness of that court's opinion. That said, this Court recognizes that by taking action on matters currently pending before it, the Court would place the parties in this case, *i.e.*, the Attorneys General of Arizona and Utah, the Special Fiduciary, and the Corporation of the President (COP), in the untenable position of being subject to inconsistent orders in the two cases. Thus, the Court will, for now, defer (a) entering its final Order on procedures to address and resolve competing claims to Trust property, (b) ruling on the pending motions, and (c) scheduling the promised evidentiary Order to Show Cause (OSC) hearing against Warren Jeffs, et al. This is a voluntary stay by the Court pending further appellate action with respect to the district court's decision.

DATED this 1<sup>st</sup> day of March, 2011.

  
Judge Denise Posse Lindberg  
District Court Judge



<sup>1</sup> The Court is also a named party to that litigation and has participated in the proceedings through counsel.