

NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 2156

FIFTH AVENUE UNITED METHODIST CHURCH)
OF WILMINGTON)
)
Plaintiff,)
)
v.)
)
THE NORTH CAROLINA CONFERENCE,)
SOUTHEASTERN JURISDICTION, OF THE)
UNITED METHODIST CHURCH, INC.;)
THE BOARD OF TRUSTEES OF THE NORTH)
CAROLINA CONFERENCE, SOUTHEASTERN)
JURISDICTION, OF THE UNITED METHODIST)
CHURCH, INC.)
CONNIE SHELTON, TARA C. LAIN,)
DEBORAH BLACK, MIKE PRIDDY,)
REBECCA W. BLACKMORE, EARL HARDY,)
M. FRANCIS DANIEL, BECCA DETTERMAN,)
SUE W. HAUSER, HEATHER REAVES,)
ISMAEL RUIZ-MILLAN, DENA M. WHITE,)
JON STROTHER, KENNETH LOCKLEAR,)
DAVID BLACKMAN, MICHAEL D. FRESE)
)
Defendants.)

**PLAINTIFF’S BRIEF
IN OPPOSITION TO
DEFENDANTS’ MOTIONS
TO DISMISS**

FACTUAL BACKGROUND

Plaintiff Fifth Avenue United Methodist Church of Wilmington (“Fifth Avenue”), which was first organized for worship in 1847, is a historic church located in downtown Wilmington, North Carolina, just a short distance from the scenic Cape Fear River and the city’s waterfront district. (Compl. ¶¶ 22-23). Fifth Avenue owns the real property on which it is located, including a historic church sanctuary built around 1889, a fellowship hall built in 1921, and parking lots as well as undeveloped green space (the “Property”). (Compl. ¶¶ 24-25). The Property has an assessed tax value of over \$2 million, and the fair market value of the property is estimated to be even more. (Compl. ¶ 30). It is a highly desirable property in a prime location. (*Id.*)

Importantly, Fifth Avenue held the Property prior to affiliating with the United Methodist Church (“UMC”) in 1968. (Compl. ¶¶ 27-28). At the time of affiliation with the UMC, Fifth Avenue understood that it would have the freedom to leave without having the property unilaterally seized by the UMC. (Compl. ¶ 29). Under such understanding, Fifth Avenue’s congregation has worked tirelessly through the years to maintain and preserve the unique historic home and until the time of the events outlined in the Complaint, Fifth Avenue held weekly worship services with at least twenty members in regular attendance, and continually maintained good standing with the UMC. (Compl. ¶¶ 26, 31-32).

As explained in the Complaint, the UMC acts through units organized as hierarchical conferences, with the Global Conference at the top, the Annual Conferences (geographic divisions) underneath, followed by the local districts, run by a superintendent. (Compl. ¶ 35). Fifth Avenue is affiliated with the UMC through Defendants Conference and District. (Compl. ¶ 36). All of these parties are subject to the Book of Discipline (“BOD”), which is the constitution and governing document of the UMC. (Compl. ¶¶ 40-43). None of the parties to this action, including Defendant Conference, have the ability to amend, override, or negate the terms of the BOD. (Compl. ¶ 42). Only the General Conference holds the power to legislate and amend the BOD. (*Id.*).

Exercising such power in 2019, the General Conference enacted ¶2553 of the BOD, and created a process for local churches to disaffiliate from the UMC without forfeiting their property. (Compl. ¶ 44). ¶2553 specifically addressed the question of church property:

A disaffiliating local church shall have the right to retain its real and personal, tangible and intangible property. All transfers of property shall be made prior to disaffiliation. All costs for transfer of title or other legal work shall be borne by the disaffiliating local church. (¶2553 4.c) (emphasis added).

(Compl. ¶ 46).

In addition to conferring this right to local churches, ¶2553 also provides a procedure for the disaffiliation process. (Compl. ¶ 47). The process, as applicable in this case, is straightforward:

- 1) the local church requests the district superintendent call a church conference so that the members of the local church can vote on whether to disaffiliate,
- 2) the district superintendent sets a date for the membership of the local church to vote on disaffiliation (within 120 days), and
- 3) the membership of the local church votes on disaffiliation.

If two-thirds of the voting members of the local church vote in favor of disaffiliation, then the local church is directed to execute the disaffiliation agreement prepared by the UMC, which shall then be presented to the annual conference for simple majority vote for ratification by the annual conference members during a regular or specially called session of the annual conference.

(Compl. ¶¶ 50-54). Importantly, the district superintendent does not have the power to refuse the local church's request for a local church conference vote. (Compl. ¶ 35).

Beginning in 2022, Fifth Avenue's members began exploring the possibility of leaving the United Methodist Church through the disaffiliation process outlined in ¶2553 of the BOD. (Compl. ¶ 62). The following timeline highlights the critical sequence of events that followed:

- On or before November 2022, Defendant Conference became aware that Fifth Avenue was exploring disaffiliation under ¶2553. Defendant Tara Lain, the District Superintendent, came to Fifth Avenue to speak to the membership regarding the disaffiliation process and stressed the Conference's desire for local churches to remain in the UMC. (Compl. ¶ 64).

- On January 18, 2023, Fifth Avenue submitted a disaffiliation inquiry online via the Conference’s disaffiliation portal. (Compl. ¶ 66).
- On February 1, 2023—in accordance with the procedures set forth in ¶2553 of the BOD—Fifth Avenue’s internal governing body, the Church Council, met and voted 8-2 in favor of moving forward with the disaffiliation process. (Compl. ¶ 67).
- The Fifth Avenue congregation submitted all the necessary information to the Conference to proceed with the disaffiliation process and to conduct a Church Conference vote on disaffiliation, and pursuant to the procedure set forth in ¶2553. Importantly, this information included the inventory of assets and the value of the property owned by Fifth Avenue. (Compl. ¶¶ 68-69).
- Upon making the required submission, and pursuant to the procedure outlined in ¶2553, Fifth Avenue called upon Defendant Tara Lain, the District Superintendent, to hold a Charge Conference for Plaintiff to conduct a vote on disaffiliation. (Compl. ¶ 68);
- On February 27, 2023, the Conference confirmed to Fifth Avenue that it had in fact received all information and material necessary for Fifth Avenue to take the next step in the disaffiliation process and conduct a Church Conference vote. (Compl. ¶ 72).
- On March 19, 2023, Fifth Avenue’s congregation was alerted that Defendant Tara Lain, its District Superintendent, would hold an “informational meeting” regarding disaffiliation on March 26, 2023. (Compl. ¶¶ 73-74).
- On March 21, 2023, Fifth Avenue submitted a second request to Defendant Tara Lain, that she schedule a Church Conference vote on disaffiliation in accordance with ¶2553 of the BOD prior to March 31, 2023. (Compl. ¶ 76).

- As of late February, and March 2023, Fifth Avenue was under the impression that the disaffiliation process was proceeding as required under the BOD, and was waiting for the Defendant Lain to set the Church Conference vote as requested. (Compl. ¶ 75).
- On Friday afternoon, March 24, 2023, unbeknownst to Fifth Avenue, Defendants recorded an Affidavit of Declaration of Ownership (“Affidavit of Ownership”) in Book 6629, Page 1196, of the New Hanover County Registry, in the chain of title on all Plaintiff’s parcels of real property. The Affidavit of Ownership included a Resolution For Closure of Fifth Avenue United Methodist Church (“Resolution”) also dated March 24, 2023. (See Compl. Ex 1). (Compl. ¶ 77).
- The Defendants signed the Resolution and agreed to close Plaintiff’s church and take its property without recourse or notice to Fifth Avenue all for the benefit of the Defendants. (Compl. ¶ 78). The Resolution cited the following “exigent circumstances” for closure:
 - A “recent” decline in membership and missional activity of the Church which has 205 members and average weekly attendance of approximately 20 members; and
 - Plaintiff’s congregation initiated a procedure seeking for the Church to disaffiliate from the United Methodist Church; (Compl. ¶ 84).
- On Sunday, March 26, 2023, Defendant Bishop and Defendant Lain arrived at Plaintiff’s church for the “informational meeting” and announced that they had closed Plaintiff’s church effective Friday March 24, 2023, two days prior to the “informational meeting.” (Compl. ¶ 79).
- On Monday, March 27, 2023, Defendants changed the locks on Plaintiff’s church sanctuary and fellowship hall, excluding Plaintiff’s members from church property and conducting church activities. (Compl. ¶ 81).

- Despite Fifth Avenue’s protests, on June 15-17, 2023, Defendants advocated for the forced closure of Plaintiff’s church at Defendant’s Annual Conference and based upon the Defendants’ advocacy the delegates at the Annual Conference voted to affirm the forced closure of Plaintiff’s church on June 16, 2023. (Compl. ¶¶ 93-94).
- At the recent Annual Conference, the Conference approved the disaffiliation of 59 other local churches. Plaintiff would have been the 60th local church to disaffiliate this year, but instead Plaintiff was deprived of its right to have a vote on disaffiliation and absent Court intervention, the opportunity will be completely lost along with Plaintiff’s property when ¶2553 sunsets at the end of 2023. (Compl. ¶ 95).
- The Bishop has scheduled a special Annual Conference on October 7, 2023, to consider those remaining local churches who have voted to disaffiliate pursuant to ¶2553. This special annual conference is the final opportunity for local UMC churches desiring to disaffiliate pursuant to ¶2553 to disaffiliate from the UMC. If a local church is not up for a vote on disaffiliation at the special Annual Conference in October, then they will be unable to disaffiliate. (Compl. ¶ 96).

Defendants gave Fifth Avenue no warning that it would force Fifth Avenue to close, nor did Defendants ever attempt to address their alleged grounds for closure with Fifth Avenue or its membership before the forced closure. (Compl. ¶¶ 82-83). Fifth Avenue was compelled to file the Complaint to recover its church property and seek a temporary restraining order and preliminary injunction to avoid irreparable harm.

ARGUMENT

I. DEFENDANTS’ MOTION TO DISMISS PURSUANT TO RULE 12(b)(1) FAILS.

Defendants move to dismiss the Complaint pursuant to Rule 12(b)(1) on the grounds that it calls for an examination of whether Defendants' conduct was proper and justified under canonical law in violation of the Ecclesiastical Abstention Doctrine. (Defendants Motion, p. 1). For the reasons stated herein, all of Plaintiff's claims can be decided through applicable of neutral principles of law, without entanglement in religious doctrine, and therefore Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) must be denied.

A. Standard of Review

In ruling on a motion under Rule 12(b)(1), the Court must "view the allegations [the complaint] as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). Although this Court may consider materials outside of the pleadings in reviewing Defendants' motion pursuant to Rule 12(b)(1), it must view those materials in the light most favorable to Plaintiff. Id.

B. This action requires application of neutral principles of law; therefore, the Ecclesiastical Abstention Doctrine does not apply.

"While the civil courts have no jurisdiction over and no concern with purely ecclesiastical questions and controversies due to constitutional guarantees of freedom of religious profession and worship, the courts do have jurisdiction to determine property rights which are involved in, or arise from, a church controversy." *Looney v. Cmty. Bible Holiness Church*, 103 N.C. App. 469, 473, 405 S.E.2d 811, 813 (1991) (emphasis added). Importantly, "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Atkins v. Walker*, 284 N.C. 306, 316, 200 S.E.2d 641, 648 (1973).

Contrary to Defendants' assertions, this action can be evaluated by the Court by applying neutral, straightforward principles of law. At their core, Fifth Avenue's claims seek to preserve Fifth Avenue's right to its property, and seek to compel Defendants to honor their contractual, nondiscretionary obligations regarding the disaffiliation process under ¶2553 of the BOD. Importantly, even though Defendants have submitted Affidavits attempting to insert religious issues or interpretation of religious doctrine, none of Plaintiff's claims actually require an interpretation of religious doctrine.

i. Similar Cases Brought Pursuant to ¶2553 Have Been Permitted to Proceed in Sister Jurisdictions.

Enacted in 2019, ¶2553 is a relatively new addition to the Book of Discipline; however, in its short existence, it has already been the subject of at least two actions in which the local churches have alleged that the annual conferences have failed to abide by their own contractual obligations. In both cases, the courts dispensed with the annual conferences' arguments that the local churches' claims were barred by the First Amendment and Ecclesiastical Abstention Doctrine.

Just this past May, in *Carrollton First United Methodist Church, Inc., et. al., v. The Trustees of the North Georgia Conference of the United Methodist Church, Inc., et. al.*, Civil Action No. 23102495-65, Cobb County Superior Court, (May 19, 2023), a court in Georgia granted dozens of plaintiff churches' motion for preliminary injunction against the North Georgia Conference of the UMC for matters involving application of ¶2553. A copy of the Complaint, as well as the court's decision are attached hereto as Exhibit 1 and Exhibit 2 respectively. The *Carrollton* plaintiff churches filed a complaint against their local UMC conference, among other defendants, alleging that the defendants engaged in a scheme to "run out the clock" on the disaffiliation process for these churches, so that they would be unable to disaffiliate before the

hard deadline. (Ex. 1, pp. 64-66). Similar to Fifth Avenue, the plaintiffs in that action simply sought to compel the defendants to comply with their clearly defined obligations under ¶2553. Granting the plaintiff churches' motion for preliminary injunctive relief, the *Carrollton* court specifically found that the issues involving disaffiliation can be determined through application of neutral principles of law and without unnecessary entanglement. (Ex. 2, pp. 3-4).

Initially, this Court finds that it has subject matter jurisdiction over Plaintiffs' claims against Defendants and to rule on Plaintiffs' Motion. While the principle of separation of church and state embodied in the First Amendment to the United States Constitution and in the Georgia Constitution of 1983 (Art. I, Sec. I, Par. IV) prevents courts from deciding questions involving matters of church ecclesiology, discipline, or governance, it does not prevent courts from deciding civil disputes that do not require any intrusion or excessive entanglement into ecclesiastical matters. Here, it is undisputed that all persons and entities associated with the UMC are bound to act as dictated by the "Discipline." Plaintiffs' Motion argues that Defendants have failed to abide by the clear and express terms of the "Discipline." Because their Motion presents a question of property rights and of contract interpretation and application, and 2553 and 248 of the Book of Discipline creates a property interest for the Plaintiffs, it can be decided based upon neutral legal principles without any impermissible entanglement in uniquely ecclesiastical affairs.

(*Id.*) (citations omitted)(emphasis added). Ultimately, the *Carrollton* court compelled the defendants to honor the plaintiffs' right to a disaffiliation vote as well as a "gracious exit." (*Id.* at p. 7).

Similarly, in *The First United Methodist Church of Oklahoma City v. The Oklahoma Annual Conference of the United Methodist Church, Inc., et. al.*, Case No. CJ-2023-3075, Oklahoma County District Court (2023), the local church plaintiff sued the annual UMC conference and others for interference with the plaintiff's right to disaffiliate under ¶2553 and sought injunctive relief from the court. The *First United* court granted relief to the plaintiff church, compelling the Conference and other defendants to permit the disaffiliation process to

proceed. A true and accurate copy of the transcript of the district court’s ruling is attached hereto as Exhibit 3. True and accurate copies of the Injunction order and Verified Petition are also attached hereto as Exhibit 4 and Exhibit 5 respectively. The court explained from the outset that the ruling was based on application of neutral principles of law pertaining to the covenant or contract between the annual conference and the local church, and again confirmed this throughout the explanation of the ruling. (Ex. 3, pp. 3-4; Ex. 4, ¶1). The district court ultimately determined that the annual conference did not follow its own covenant set forth in ¶2553 and ordered the defendants to facilitate the disaffiliation process for the local church in a timely manner. (Ex. 3, p. 22-23; Ex. 4 ¶¶12-27).

These courts have held that issues regarding the annual conferences’ compliance with the disaffiliation process under ¶2553 is a non-religious matter that can be resolved by applying neutral principles of law. Fifth Avenue is asking for the same relief as these other local UMC churches: that Defendants honor their clearly articulated, non-religious, obligations under ¶2553 and allow Fifth Avenue to proceed with the disaffiliation process to completion before the deadline of December 31, 2023.

ii. North Carolina Case Law Demonstrates Church Property Issues Can be Resolved by Application of Neutral Legal Principles.

A review of North Carolina case law also reveals that property disputes involving “connectional” churches (those associated with denominations) have been resolved in civil court several times. Each of these cases are summarized below:

- In *A.M.E. Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 308 S.E.2d 73 (1983), *cert. denied*, 310 N.C. 308, 312 S.E.2d 649 (1984), (“*Union*”) the court was asked to address the issue of whether the parent body of a hierarchical church (denomination) had the right to control the property of the local affiliated

church. The Court of Appeals explained that although the parent body of a connectional church may have the right to control the property of local affiliated churches, our Supreme court has recognized that “a local church could have retained sufficient independence from the general church so that it reserved its right to withdraw... and, presumably take along with it whatever property it independently owned prior to and retained during its limited affiliation with the general church.” *Id.* at 414; 308 S.E.2d at 85 (emphasis added). The Court remanded the case to the trial court for a determination as to whether the local church was in a hierarchical relationship with the denomination with respect to *property matters* as opposed to ecclesiastical matters. In remanding the matter for resolution by the trial court, the Court of Appeals clearly viewed the property issue as separable from ecclesiastical issues, and capable of resolution by application of neutral principles of law.

- In *Looney v. Cmty. Bible Holiness Church*, 103 N.C. App. 469, 405 S.E.2d 811 (1991), a denominational church sued a local member church, to determine whether the defendant gave up its right to own and control local church property by affiliating with the denomination. The matter went to trial, and the jury determined that although the denomination was a connectional church, the local church was not in a connectional church relationship with the denomination *with respect to property matters*, and the trial court declared the local church to be sole owner of the disputed church property. *Id.* at 474, 405 S.E.2d at 813-14. The Court of Appeals affirmed, again demonstrating that property disputes between local churches and parent denominations can be determined in the civil courts without delving into ecclesiastical matters. *Id.*

- In *Fire Baptized Holiness Church v. McSwain*, 134 N.C. App. 676, 680, 518 S.E.2d 558, 560 (1999), a local church withdrew from a denomination. In an action brought by the denomination to determine ownership of the local church property, which was acquired during the denominational relationship, a jury found in favor of the local church. On appeal, the North Carolina Court of Appeals noted that there was evidence that the local church had not recorded deeds favoring the denomination as clearly required by the denomination's rules set forth in its Discipline, and that the denomination had made no effort to enforce its rules at that time. The Court determined that this evidence created a question for the jury as to whether the local church had relinquished control of the property to the denomination, and the judgment in favor of the local church was affirmed. *Id.* at 682-83, 518 S.E.2d 558, 561-62. The *Fire Baptized Holiness Church* opinion once again confirms that questions of property rights between the denomination and a local church can be resolved in civil courts.
- In the most recent case, *Aff: Methodist Episcopal Zion Church v. Parker*, 244 N.C. App. 152, 780 S.E.2d 760 (2015) (“*Parker*”), the Court of Appeals relied upon *Looney* and *Fire Baptized Holiness Church* in holding that the property dispute between a local church and a denomination was appropriately submitted to the jury. Although the denomination’s Book of Discipline required a member church to convey rights to all real property and other assets to the denomination, the member church did not comply with the Book of Discipline. The Court of Appeals held that the departure from the denomination’s rules created a question as to who controlled the property, which was appropriately submitted to the jury.

Here, as in the foregoing cases, Fifth Avenue has alleged a dispute against Defendants regarding Fifth Avenue's right to its property. And like the foregoing cases, resolution of this dispute has nothing to do with the interpretation of UMC's religious doctrine.

iii. Fifth Avenue's Claims are Secular in Nature and Do Not Require Interpretation of Religious Doctrine.

Examining the nature of the claims more specifically:

a. Breach of Contract

Similar to the plaintiff churches in *Carrollton* and *First United Methodist Church of Oklahoma City*, Fifth Avenue has alleged that the Book of Discipline is a contract, to which Fifth Avenue and the Defendants have agreed to be bound, and that all of the parties are bound by a duty of good faith and fair dealing in their performance and enforcement. Seeking specific performance of ¶2553, Fifth Avenue asserts that Defendants have breached this provision—which is clear and unequivocal as to both *the right to* and *the process for* disaffiliation—by preventing Plaintiff from having a Church Conference vote on disaffiliation after the vote had been requested. ¶2553 is unambiguous and its application to the facts before the Court will not require any inquiry into religious matters. “Where civil contract or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules. *Atkins v. Walker*, 284 N.C. 306, 320, 200 S.E.2d 641, 651 (1973) (citations omitted) (emphasis added). Fifth Avenue asserts that Defendants failed to observe their own organic forms and rules by failing to follow the clearcut procedure under ¶2553. Importantly, the Court should not be distracted by Defendants' attempts to insert religious doctrine or interpretation of canonical law through the Affidavits submitted with their Motion to Dismiss. As the *Carrollton* and *First United Methodist Church of Oklahoma City* court explained, review of compliance with ¶2553 is a matter of contract interpretation and

examination of the parties' conduct, plain and simple. (See Ex. 1, 2, 3, and 4). Therefore, this Court has subject matter jurisdiction over Fifth Avenue's claim for breach of contract.

b. Promissory Estoppel

As an alternative to the breach of contract claim, Fifth Avenue has brought a claim for promissory estoppel, alleging that Defendants made promises to Fifth Avenue by virtue of the process created for disaffiliation and promising Fifth Avenue any local church desiring disaffiliation would have the opportunity to do so. Whether Defendants made this promise, whether Fifth Avenue reasonably relied to its detriment on this promise, and whether a failure to enforce this promise would result in an injustice, are all issues that can be decided by application of straightforward, neutral principles, without wading into religious issues. At its core, this claim is about the right to retain property and whether Defendants honored their promises regarding Fifth Avenue's right to disaffiliate. *Atkins*, 284 N.C. at 320, 200 S.E.2d at 651. The local churches in the *Carrollton* action similarly asserted a claim for promissory estoppel for the failure to honor ¶2553, and the *Carrollton* court specifically found that it had subject matter jurisdiction over such claim. (See Ex. 2). Therefore, this Court has subject matter jurisdiction over Fifth Avenue's claim for promissory estoppel.

c. Declaratory Judgment, Quiet Title, and Judicial Modification of the Trust

Fifth Avenue's claims for declaratory judgment, quiet title, and judicial modification of the trust are centered around the cloud on the title of the church property, the intent of the settlor of the purported trust at the time the alleged trust was created, and whether the alleged trust is revocable (Compl. ¶¶ 99-103, 118-128, 147-172). More specifically, Fifth Avenue alleged that when the church joined UMC, it was their understanding that the local church could disaffiliate and keep its property. (Compl. ¶ 100). It was never Fifth Avenue's intent that it would lose its

church buildings and property to the UMC on a whim and without recourse. (*Id.*). Fifth Avenue has further alleged that it was not the intent of the donors who contributed real property and funds to Fifth Avenue that their donations would be wiped away and repurposed for Defendants' benefit on a whim and without recourse. (Compl. ¶ 166). These circumstances were not and could not have been anticipated by Fifth Avenue when it affiliated with the UMC and allegedly put its property in trust for what was supposed to be the benefit of its members. (Compl. ¶ 168).

At their core, these claims involving the purported trust on Fifth Avenue's property, and Fifth Avenue's right to quiet title, have nothing to do with Plaintiff's reasons for disaffiliation or religious interpretation of the Book of Discipline. Instead, these claims deal exclusively with questions concerning 1) the deeds related to the property, 2) the applicability or revocability of the purported trust, 3) the intent with regard to possible disaffiliation at the time the alleged trusts were created, and 4) whether—because of the material change in circumstances—the alleged trust should be modified or terminated. The present question surrounding Fifth Avenue or its members' intent as settlors of the alleged trust is no different than those in the *Looney*, *Fire Baptized Holiness Church* and *Parker* cases, all of which involved questions surrounding the intent of the grantors, and all of which were properly resolved through the civil court system. *Fire Baptized Holiness Church* 134 N.C. App. at 681, 518 S.E.2d at 561; *Looney*, 103 N.C. App. 474, 405 S.E.2d 813-14; *Parker*, 244 N.C. App. 152, 780 S.E.2d 760 (“In the instant case, as in [*Looney* and *Fire Baptized Holiness Church*], we hold that the testimony concerning the intent of [local church], coupled with the language designating [the] grantees, created a factual issue for the jury”). Therefore, Plaintiffs' claims for declaratory judgment, quiet title and judicial modification of the trust withstand Defendants' Rule 12(b)(1) motion on First Amendment grounds.

d. Fraud and Constructive Fraud

Fifth Avenue's claims for fraud and constructive fraud are based, in part, on Defendants' representations to Fifth Avenue and the public that the Defendants actually conferred and genuinely determined exigent circumstances warranted closing the church. (Compl. ¶¶ 130-136). Importantly, Fifth Avenue is not asking the Court to interpret ¶2549, the provision of the BOD relied upon by Defendants, or whether exigent circumstances actually existed. Instead, Fifth Avenue has alleged that Defendants' colluded and agreed upon the Resolution as a mere pretext to prevent Fifth Avenue from having a vote on disaffiliation and seize its valuable real property to repurpose it for Defendants' benefit. (Compl. ¶ 130). In other words, Fifth Avenue asserts that the Resolution is a sham and expects to confirm, through discovery, that Defendants never genuinely and collectively considered the circumstances outlined in the Affidavits submitted by Defendants. Fifth Avenue is confident that discovery will show that Defendants purposefully concealed a disingenuous and orchestrated act to seize the property before it was lost through Fifth Avenue's disaffiliation. (Compl. ¶¶ 78, 101). Whether Defendants colluded to deprive Fifth Avenue's property under the guise of legitimate action can be determined without delving into the validity of the reasons conveniently asserted after the fact. Moreover, if the Resolution was issued under fraudulent circumstances, filing it with the Affidavit of Ownership in the property's Chain of Title would also constitute a misrepresentation to the public.

In circumstances such as these, the Ecclesiastical Abstention Doctrine does not bar subject matter jurisdiction. In fact, exactly one month prior to the hearing of this matter, the United States Court of Appeals for the Ninth Circuit confirmed that circumstances of fraud fall outside protections of the First Amendment. *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, No. 21-56056, 2023 WL 5008207 (9th Cir. Aug. 7, 2023). In

Huntsman, the plaintiff alleged that he contributed money and assets to the church in reliance upon the church's assurances that money was not used to finance commercial projects. The plaintiff claimed that despite these assurances, the church used in fact used his financial contributions to finance a church-owned shopping mall development and to bail out a troubled for-profit life insurance company owned by the church. The church argued that the plaintiff's claims were barred by the First Amendment. The Court of Appeals determined that the court had subject matter jurisdiction, and explained:

The ecclesiastical abstention doctrine protects First Amendment rights by avoiding court entanglement “in essentially religious controversies” or the state intervening on behalf of a particular religious doctrine. *See Serbian E. Orthodox Diocese*, 426 U.S. at 709, 96 S.Ct. 2372. But these “considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud ... [is] alleged.” *Gen. Council on Fin. & Admin. of the United Methodist Church v. Superior Ct. of Cal., Cnty. of San Diego*, 439 U.S. 1355, 1373, 99 S.Ct. 35, 58 L.Ed.2d 63 (1978) (Rehnquist, J., in chambers). That is because “under the cloak of religion, persons may [not], with impunity, commit frauds upon the public.” *Id.* (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)).

While there is no in-circuit case directly on point, there is a closely analogous decision by a district court in the Tenth Circuit. In *Gaddy v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 551 F. Supp. 3d 1206, 1211, 1215 (D. Utah 2021), former members of the Church brought a civil RICO claim contending that the Church's statements about tithing were false. The district court held that the First Amendment did not bar plaintiffs' claims because the claims “d[id] not implicate religious principles of the Church or the truth of the Church's beliefs concerning the doctrine of tithing ... or [if] its members were acting in accord with what they perceived to be the commandments of their faith.” *Id.* at 1225–26. Like the fraud claims in *Gaddy*, the fraud claim here does not implicate religious beliefs about tithing itself.

The Free Exercise Clause is violated if “the truth or verity of respondents' religious doctrines or beliefs [is submitted] to the jury.” *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 88

L.Ed. 1148 (1944); *see also United States v. Rasheed*, 663 F.2d 843, 847 (9th Cir. 1981). In the case before us, we are not required to rely on or interpret the Church's religious teachings to determine if it misrepresented how it was using tithing funds. Nor are we required to examine Huntsman's religious beliefs about the appropriate use of church money.

Instead, as presented to us, the questions are secular. The questions are whether the Church's statements about how it would use tithing funds were true, and whether Huntsman reasonably relied on those statements when he made tithing contributions. A court or jury can answer these questions based on secular evidence and analysis. See *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 963 (9th Cir. 2004); *Puri*, 844 F.3d at 1167 (“The dispute, which ‘concern[s] the [d]efendants' actions, not their beliefs,’ turns entirely on ‘what the [defendants] did, ... and the texts guiding [their] actions can be subjected to secular legal analysis.’”) (alterations in original) (emphasis removed) (quoting *Elvig*, 375 F.3d at 963, 968). A court or jury can look at public statements and relevant financial records of the Church to determine what church officials said about how the City Creek Mall project would be financed and to determine what funds were actually used to finance the project. A court or jury can assess Huntsman's reliance by looking to the Church's and Huntsman's evidence and asking if Huntsman reasonably relied on the Church's statements in deciding whether to tithe.

Id. at *4-5 (emphasis added). The *Huntsman* court went on to determine that the district court erred in granting summary judgment on the plaintiff's fraud claim with regard to the funding of the commercial project and remanded the case for further proceedings. *Id.* at *12.

Here, as in *Huntsman* and *Gaddy* (discussed in *Huntsman*), a court or jury can look at the secular evidence regarding Defendants' representations and course of conduct prior to signing the Resolution to determine whether Defendants acted in good faith or if Defendants were misleading in their concealment. *Id.*; *see also Bendross v. Readon*, 89 So. 3d 258, 261 (Fla. App. 2012) (“[W]hen a ‘faction’ of the church arrogates authority to itself, disrupts the organization and sets at naught well-defined rules of church order, there is no course left for

those who desire their rights settled through orderly processes but resort to the courts.”) (*quoting Epperson v. Myers*, 58 So.2d 150, 152 (Fla. 1952) (“[W]hen there is a showing of fraud, collusion, or arbitrary conduct on the part of church authorities, the courts will interfere to protect the rights of those imposed on)). Although Fifth Avenue has plead adequate facts to withstand Defendants’ Rule 12(b)(6) Motion, Fifth Avenue is still in need of discovery to reveal the details of Defendants’ conduct leading up to the signing of the Resolution and the filing of the Affidavit of Ownership.

Along these lines, where there is a factual dispute that goes to the core of whether the Ecclesiastical Abstention Doctrine applies, the Court should permit discovery so that a proper determination on jurisdiction can be made. *See e.g. Kelley v. Decatur Baptist Church*, No. 5:17-CV-1239-HNJ, 2018 WL 2130433 (N.D. Ala. May 9, 2018). In *Kelley*, the plaintiff similarly alleged that the Defendants sought to hide an unlawful act under the guise of a religious act. In a pregnancy discrimination action, the plaintiff alleged that the church pastor fired her because she was pregnant, and the church contended that the pastor discharged her because she violated religious tenets by having extra-marital sex. *Id.* at *1-2. The court denied the church’s Rule 12(b)(1) motion on the grounds that it could not determine the question of subject matter jurisdiction without additional discovery. *Id.* at *2. The *Kelley* court explained:

If [the church] declares truthfully the reasons for Kelley’s discharge, then the ecclesiastical abstention doctrine applies to bar Kelley’s action; otherwise, its assertions constitute pretext buttressing Kelley's pregnancy discrimination claim. [T]he court violates no constitutional rights by merely investigating the circumstances of plaintiff's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.

Id. (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 628 (1986))(emphasis added); *see also Sacred Heart Sch. Bd. v. Lab. & Indus. Rev. Comm'n*, 157

Wis. 2d 638, 460 N.W.2d 430 (Ct. App. 1990) (investigation into whether religious-based reasons asserted by defendant for employee’s discharge were simply a pretext to cover unlawful activity did not violate the First Amendment).

Here, in accordance with the foregoing cases, Fifth Avenue urges the Court to permit investigation into whether there were truly “religious reasons” for the Resolution signed by Defendants, or if—as the course of conduct suggests—the reasons asserted are mere pretext to wrongfully deny Fifth Avenue the right engage in the disaffiliation process and to seize the valuable property before Fifth Avenue could vote to disaffiliate.

For all of the foregoing reasons, Fifth Avenue’s claims can be appropriately investigated and adjudicated without delving into canonical interpretation or ecclesiastical issues. Therefore, Defendants’ Motion to Dismiss pursuant to Rule 12(b)(1) must be denied.

II. FIFTH AVENUE HAS ALLEGED SUFFICIENT FACTS TO SURVIVE DEFENDANTS’ MOTION TO DISMISS PURSUANT TO RULE 12(b)(6).

Defendants’ Motion also seeks to dismiss Fifth Avenue’s claims pursuant to Rule 12(b)(6) for failure to state a claim; however, for the reasons explained herein, each of Defendants’ arguments for dismissal fails.

A. Standard of Review

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Complaint in the light most favorable to Plaintiff. *BDM Invs. v. Lenhil, Inc.*, 264 N.C. App. 282, 291, 826 S.E.2d 746, 756 (2019). Under North Carolina’s notice pleading requirements, “[a] complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of a plaintiff’s claim so as to enable them to answer and prepare for trial.” *Id.* (quoting

McAllister v. Ha, 347 N.C. 638, 641, 496 S.E.2d 577, 580 (1998) (citation omitted)). When reviewing a Rule 12(b)(6) motion, the issue is “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Quackenbush v. Groat*, 271 N.C. App. 249, 251, 844 S.E.2d 26, 28 (2020) (citation and quotation marks omitted) (emphasis added). The Courts have made clear that our “system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss.” *Wray v. City of Greensboro*, 370 N.C. 41, 46, 802 S.E.2d 894, 898 (2017) (citations omitted).

Importantly, though the Court may consider Defendants’ Affidavits in support of their Motion to Dismiss pursuant to Rule 12(b)(1), when reviewing their Motion to Dismiss pursuant to Rule 12(b)(6), the court is confined to reviewing the allegations in the Complaint. *See Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998). Therefore, to the extent the Affidavits and attachments provided by Defendants purport to submit evidence as to the merits of each of Plaintiff’s claims, such materials must be ignored for purposes of evaluating the sufficiency of the Complaint under rule 12(b)(6) for purported failure to state a claim.

A. Defendants’ Motion to Dismiss Appears to be a Motion for Summary Judgment Under the Guise of a Motion to Dismiss, and Fifth Avenue Has Not Had a Reasonable Opportunity to Discover and Present Evidence Pertinent to its Claims.

Fifth Avenue is perplexed by Defendants’ Rule 12(b)(6) motion that recites:

Plaintiff’s Complaint should be dismissed Pursuant to Rule 12(b)(6) where (1) the *Book of Discipline*, which Plaintiff alleges constitutes a contract between it and Defendants, forecloses Plaintiff’s claims for breach of contract, declaratory relief, constructive fraud, and to quiet title[.]

(Defendants’ Motion, p. 2). Fifth Avenue admittedly does not understand Defendants’ Motion.

The only plausible reading Fifth Avenue can make out is that the Motion—although made

pursuant to Rule 12(b)(6)— calls for examination of materials from the BOD that are not part of the Complaint. As the Court of Appeals has explained, “[w]hen considering a 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff’s recovery.” *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (emphasis added); *see also Smith v. Privette*, 128 N.C. App. at 493, 495 S.E.2d at 397.

When, as it appears here, matters outside of the Complaint are presented to the Court in connection with a Rule 12(b)(6) Motion, Rule 12(b) provides:

If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(emphasis added). Defendants have attached portions of the BOD to the Affidavits submitted in connection with their Rule 12(b)(1) Motion, but the Rule 12(b)(6) Motion does not reference the Affidavits or BOD passages attached to the Affidavits. For purposes of the Rule 12(b)(6) Motion, and testing the sufficiency of the Complaint itself, the Court must limit its review to the allegations in the Complaint and exclude outside materials from its consideration. *Kemp*, 166 N.C. App. at 461, 602 S.E.2d at 690. Further, if the Court were to consider additional portions of the BOD outside the Complaint and treat the motion as one for summary judgment under Rule 56, Fifth Avenue has not yet had an opportunity to engage in discovery to gather and present evidence in support of its claims—including the discovery that is the subject of Fifth Avenue’s Motion to Compel, which is also currently pending before this Court. Therefore, summary judgment at this time would be premature. *See id.* at 462, 602 S.E.2d at 690.

To be clear, Fifth Avenue is confident that its claims are not “foreclosed” by the BOD, and fully intends to prove that to this Court at the appropriate stage of this proceeding. All Fifth Avenue is asking at this stage is that the Court conduct the review of Defendants’ Rule 12(b)(6) motion according to the notice pleading standard, and to determine whether Fifth Avenue’s allegations made within the four corners of the Complaint, if “treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Quackenbush*, 271 N.C. App. at 251, 844 S.E.2d at 28.

The few provisions of the BOD set forth in First Avenue’s Complaint itself do not foreclose its claims. Even if the Court were to construe the provisions of the BOD recited in Paragraphs 153 and 154 of the Complaint to preliminarily establish a trust in favor of the UMC, Fifth Avenue has still alleged that the trust does not conform with the settlor’s intent regarding the ability to keep church property upon disaffiliation and that the inconsistency within the BOD makes the trust revocable. (Compl. ¶¶ 99-100, 124, 160-72). Further, Fifth Avenue has alleged an absence of the trust language from the deeds covering the property (Compl. ¶ 156). At this stage, these allegations must be taken as true. *Quackenbush*, 271 N.C. App. at 251, 844 S.E.2d at 28. Moreover, none of the BOD provisions cited in the Complaint excuse Defendants failure to abide by their obligations under ¶2553 to facilitate Fifth Avenue’s requested disaffiliation vote.

For the foregoing reasons, Defendants’ Motion to Dismiss pursuant to Rule 12(b)(6) on the grounds that the BOD “forecloses” Fifth Avenue’s claims should be denied.

B. Fifth Avenue’s Allegations of Fraud Meet the Requirements of Rule 9(b)

The North Carolina Court of Appeals has explained:

In order to survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint for fraud must allege with particularity all material facts and circumstances constituting the fraud. The requisite elements of fraud include: (1) False representation or concealment of a material

fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. Intent and knowledge may be averred generally. G.S. 1A-1, Rule 9(b). While the facts constituting the fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used. It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts.

Carver v. Roberts, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985) (citations omitted) (emphasis added). Importantly, “[f]raudulent intent need not be specifically alleged if there are facts alleged from which a fraudulent intent may be reasonably inferred.” *Id.* Fifth Avenue’s Complaint meets all of these requirements.

The sequence of Defendants’ actions reveals a concerted effort to quietly and fraudulently seize Fifth Avenue’s property before it could exercise its rights under ¶2553: By virtue of the creation of ¶2553 in 2019, Defendants represented to Fifth Avenue there was a pathway to disaffiliation and that Fifth Avenue could keep its property. (Compl. ¶ 113). In November 2022, while Fifth Avenue was still undecided about disaffiliation, Defendant Lain expressed to Fifth Avenue the Conference’s desire for Fifth Avenue to stay in the denomination. (Compl. ¶ 64). However, after Fifth Avenue submitted its disaffiliation paperwork and disclosed the value of its property—well over \$2 million—Defendant Lain and her fellow Defendants switched gears to find a way to seize the property before the official disaffiliation vote could take place. (Compl. ¶¶ 68-69). Despite accepting Fifth Avenue’s disaffiliation paperwork and Fifth Avenue’s two requests to schedule the vote on disaffiliation pursuant to the procedure set forth in ¶2553, Defendants quietly and clandestinely worked on a way to circumvent the obligations of ¶2553 and to cut off Fifth Avenue’s rights to its own property. (Compl. ¶¶ 68-84).

Fifth Avenue was kept in the dark as to Defendants' concerted efforts to force closure and seize the property, waiting for notification from Defendant Lain that the disaffiliation vote had been scheduled. (*Id.*) While Fifth Avenue was waiting for the next step in the disaffiliation process, Defendants secretly entered the Resolution to close Fifth Avenue, disingenuously citing low attendance to weekly services, when hundreds of other local UMC churches had lower attendance but were permitted to stay open. (*Id.* ¶¶ 90-91). Worse—without any prior notice to Fifth Avenue—Defendants recorded the Affidavit of Ownership in the chain of title to Fifth Avenue's property on March 24, 2023. (Compl. ¶ 77). Fifth Avenue found out about Defendants actions against its title two days later at the “informational meeting” called by Defendant Lain. (Compl. ¶ 79). The next day, Defendants changed the locks on the sanctuary and fellowship hall, barring Fifth Avenue from its own building. (Compl. ¶ 81).

There can be no doubt that the claim of fraud has been adequately plead: (1) Defendants concealed their actions to close the church and seize the property while Fifth Avenue was under the impression, based on the acceptance of the disaffiliation paperwork, that the disaffiliation vote was being scheduled; (2) Defendants' acts were reasonably calculated to deceive, as Fifth Avenue would have no reason to suspect that Defendants were secretly recording an Affidavit of Ownership in Fifth Avenue's chain of title while Fifth Avenue was waiting for the disaffiliation vote to be scheduled; (3) the intent to deceive is easily inferred from the clandestine nature of the Defendants acts and the timing of the “informational meeting”; (4) the concealment did, in fact, deceive Fifth Avenue, who was ignorantly waiting for the disaffiliation vote to be scheduled while Defendants colluded to deprive it title to its property; and (5) Fifth Avenue was undoubtedly harmed by Defendants unilateral seizure of its property and Defendants' assertion in the chain of title that Fifth Avenue does not own the property.

Therefore, Fifth Avenue has adequately plead its claim for fraud pursuant to Rule 9(b), and Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) must be denied.¹

C. Fifth Avenue's Claim for Promissory Estoppel is Proper

Although North Carolina courts have not officially recognized an affirmative claim for promissory estoppel, Fifth Avenue submits, in good faith, that these circumstances warrant extension of the law. Affirmative use of promissory estoppel has been increasingly recognized in jurisdictions throughout the United States. *See e.g. Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 906 N.E.2d 520 (Ill. 2009)(reversing lower court decisions limiting use of promissory estoppel to defensive use); *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wisc. 1965)(recognizing affirmative relief on theory of promissory estoppel); *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 811 (Wyo. 1992) (recognizing promissory estoppel can be used to enforce oral promise otherwise within statute of frauds); *McCormick v. Lake Washington Sch. Dist.*, 992 P.2d 511 (Wash. App. 1999) (explaining that promissory estoppel can be used as a sword in action for damages); *Arnold & Assocs., Inc. v. Misys Healthcare Sys., a div. of Misys, PLC*, 275 F. Supp. 2d 1013 (D. Ariz. 2003)(stating that promissory estoppel can be used as both a sword and shield); *Youngblood v. Auto-Owners Ins. Co.*, 158 P.3d 1088 (Utah 2007) (explaining promissory estoppel can be a cause of action); *Sun-Pac. Enterprises, Inc. v. Girardot*, 553 S.E.2d 638 (Ga. App. 2001) (recognizing action for promissory estoppel). *Russell v. Bd. of Cnty. Comm'rs, Carter Cnty.*, 952 P.2d 492 (Okla. 1997) (same). The foregoing list of jurisdictions is not exhaustive.

¹ To the extent that Defendants move for dismissal on the grounds that there is no claim for "collusion" under North Carolina law, Fifth Avenue simply clarifies that its claim for relief is for fraud, and that it is not asserting a separate claim for relief for collusion. Fifth Avenue included the word "collusion" not as a separate claim, but as a descriptor of Defendants' fraudulent acts done in concert.

The Restatement of Contracts § 90 provides that promissory estoppel applies to:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee ... and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Restatement (Second) of Contracts § 90 (1981). In adopting the restatement, courts have articulated the following elements to state a claim for promissory estoppel: “(1) a clear and unambiguous promise, (2) foreseeability by the promisor that the promisee would rely upon it, (3) reasonable reliance upon the promise to the promisee's detriment and (4) hardship or unfairness can be avoided only by the promise's enforcement.” *Russell*, 952 P.2d at 503.

Here, by requiring Fifth Avenue to be bound by the Book of Discipline and then extending a disaffiliation process to local churches by enacting ¶2553, Defendants made a promise to Fifth Avenue that it could pursue the disaffiliation process. It was foreseeable to Defendants that Fifth Avenue would rely upon ¶2553 and seek disaffiliation. In fact, Fifth Avenue reasonably relied upon ¶2553 to pursue disaffiliation. Now that Defendants have deprived Fifth Avenue the ability to follow through with the disaffiliation vote, injustice will result. Justice can only be served by enforcement of the promise set forth in ¶2553, and therefore, Fifth Avenue believes that these circumstances warrant recognition of this equitable claim for relief. The *Carrollton* and *First United* courts certainly did.

D. Fifth Avenue has Adequately Plead All of its Claims.

Defendants’ Motion generally states that, “Plaintiffs claims otherwise fail as a matter of law,” but do not specify on what grounds, other than those discussed above. Fifth Avenue has already addressed the claim for fraud and promissory estoppel and will briefly address the sufficiency of the remaining claims.

i. Breach of Contract

The North Carolina Court of Appeals has explained:

The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of the contract. This Court has held that where the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under Rule 12(b)(6).

Woolard v. Davenport, 166 N.C. App. 129, 134, 601 S.E.2d 319, 322 (2004) (citations omitted).

Moreover, under North Carolina law, every contract contains:

[A]n implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. In addition to its express terms, a contract contains all terms that are necessarily implied to effect the intention of the parties and which are not in conflict with the express terms.

Cordaro v. Harrington Bank, FSB, 260 N.C. App. 26, 38, 817 S.E.2d 247, 256 (2018)(citations omitted)

Here, Fifth Avenue has alleged that the BOD is a contract entered into by units of the UMC, including Fifth Avenue and Defendants, and by their actions and their oaths of ministry or membership, all parties have agreed to be bound by the provisions of the BOD. (Compl. ¶105). Fifth Avenue has further alleged Defendants breached the contract, specifically the provisions of ¶2553, and the implied duty of good faith and fair dealing by preventing Plaintiff from having a Church Conference vote on disaffiliation after the vote had been requested. (Compl. ¶107). Therefore, Fifth Avenue has adequately plead its claim for breach of contract.

ii. Declaratory Judgment

Under North Carolina law, “[a] motion to dismiss for failure to state a claim is seldom appropriate in actions for declaratory judgments.” *Morris v. Plyler Paper Stock Co.*, 89 N.C.

App. 555, 557, 366 S.E.2d 556, 558 (1988) (citation and internal quotation marks omitted) (emphasis added).

A declaratory judgment claim has been stated where:

(1) ... a real controversy exists between or among the parties to the action; (2) ... such controversy arises out of opposing contentions of the parties, made in good faith, as to the validity or construction of a deed, will or contract in writing, or as to the validity or construction of a statute, or municipal ordinance, contract, or franchise; and (3) ... the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, and may be determined by a judgment or decree in the action”

Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, 256 N.C. App. 625, 631, 808 S.E.2d 576, 581 (2017) (quoting *Consumers Power v. Power Co.*, 285 N.C. 434, 449, 206 S.E.2d 178, 188 (1974)). Here, First Avenue has alleged that (1) a real controversy exists between First Avenue and Defendants regarding their respective rights to the property (Compl. 119, ¶127), (2) this controversy arises out of the validity the alleged trust and the validity of claims to the property (Compl. ¶¶ 118-125), and (3) Fifth Avenue has a legal right to its property. (Compl. ¶¶ 24, 118-128). These are issues that can be determined by a judgment from this court. Therefore, Fifth Avenue has adequately plead its claim for declaratory judgment.

iii. Constructive Fraud

To state a claim for constructive fraud, the plaintiff must allege circumstances, “(1) which created the relation of trust and confidence [...] and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’ *Governors Club, Inc. v. Governors Club Ltd. P’ship*, 152 N.C. App. 240, 249–50, 567 S.E.2d 781, 787–88 (2002) (citations omitted). Importantly, “[a] claim of constructive fraud does not require the same rigorous adherence to elements as

actual fraud[,]” and accordingly does not need to meet the Rule 9(b) pleading requirement.”

Ironman Med. Properties, LLC v. Chodri, 268 N.C. App. 502, 513, 836 S.E.2d 682, 691 (2019) (emphasis added).

Here, Fifth Avenue alleged that Defendants were all in a position of power, authority and influence over Fifth Avenue and that Fifth Avenue placed special trust and confidence in all Defendants. (Compl. ¶¶ 142-43). Fifth Avenue further alleged that by secretly signing the Resolution to close Fifth Avenue and secretly recording the Affidavit of Ownership over Fifth Avenue’s property, all while Fifth Avenue was pursuing its right to disaffiliation in good faith, Defendants took advantage of their position of trust to take Fifth Avenue’s real and personal property for the benefit of the Conference and Board without recourse. (Compl. ¶¶ 62-92, 144) Fifth Avenue further alleged that it will be harmed as a direct and proximate result of Defendants’ devious acts if Defendants are permitted to take their real and personal property. (Compl. ¶ 145). Therefore, Fifth Avenue has adequately plead its claim for constructive fraud.

iv. Quiet Title

“To establish a *prima facie* case for removing a cloud upon title, two requirements must be met: (1) the plaintiff must own the land in controversy or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff’s title, estate or interest.” *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004). Fifth Avenue has alleged that it has an interest in the church property (Compl. ¶ 147-151) and that Defendants have claimed a competing interest in it through the alleged trust and the Affidavit of Ownership (Compl. ¶¶ 152-155). Therefore, there can be no question that Fifth Avenue adequately plead its claim for quiet title.

v. Judicial Modification of the Trust

Chapter 36C of the North Carolina General Statutes empowers this Court to modify or terminate a trust when—because of circumstances not anticipated by the settlor—modification or termination will further the purpose of the trust. It also empowers this Court to modify or terminate the trust to conform to the settlor’s intention when a term of the trust is ambiguous and was affected by a mistake of fact or law, whether in expression or inducement. *See* G.S. § 36C-4-410; G.S. § 36C-4-412; G.S. § 36C-4-415.²

Defendants rely on the purported trust to exercise dominion over Fifth Avenue’s property. However, Fifth Avenue has alleged that at the time Fifth Avenue affiliated with the UMC, it was not its intent that it would lose its church buildings and property to the UMC by unilateral action and without recourse. (Compl. ¶166). Nor was it the intent of the donors who contributed real property and funds to Plaintiff that their donations would be wiped away and repurposed for Defendants’ benefit without recourse. (*Id.*) The settlor of the purported trust could not have anticipated the current circumstances when Fifth Avenue first affiliated with the UMC, and therefore, equity requires either termination of the trust, or alternatively, modification of the trust so that it is clearly revocable. (Compl. ¶ 168). Taking Fifth Avenue’s allegations as true, *Quackenbush* 271 N.C. App. at 251, 844 S.E.2d at 28, Fifth Avenue has adequately plead a claim for Judicial Modification of the Trust, and Defendants’ Motion to Dismiss should be denied.

² To the extent that Defendants contend that Chapter 61 (Religious Societies) controls the parties’ rights as to the alleged trusts instead of Chapter 36C, this would not be fatal to Plaintiff’s claim. Even under G.S. § 61-3, governing grants of interest to religious organizations, the grantor’s intent is paramount. *See* G.S. § 61-3; *Fire Baptized Holiness Church*, 134 N.C. App. 676, 518 S.E.2d 558 (in reviewing property dispute between church and denomination under G.S. § 61-3, grantor’s intent created question of fact for the jury). Further, Plaintiff have certainly provided Defendants adequate notice of the basis for their claim for trust reformation, regardless which statute controls. Therefore, Defendants’ Motion to Dismiss Plaintiffs’ claim for judicial reformation of the trusts must be denied.

vi. Claim for Preliminary Injunction

Fifth Avenue's claim for preliminary injunction is discussed separately in Plaintiff's Brief in Support of Preliminary Injunction, submitted simultaneously herewith.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) should be denied.

This the 5th day of September, 2023,

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CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiff hereby certifies that the foregoing BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS was served upon the attorneys of record for the Defendants by electronic mail pursuant to a prior stipulation by counsel and addressed as follows:

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This the 5th day of September, 2023.



Gavin B. Parsons