

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 SUPPORT OF  
REQUEST FOR  
PRELIMINARY INJUNCTION**

**STATEMENT OF THE CASE**

On June 27, 2023, Plaintiff Fifth Avenue United Methodist Church of Wilmington (“Fifth Avenue”), filed a Verified Complaint against Defendants, seeking injunctive and declaratory relief regarding Fifth Avenue’s rights to its church property located in Wilmington, North Carolina. On July 6, 2023, this Court entered a Consent Temporary Restraining Order, prohibiting Defendants from encumbering, impairing or altering Fifth Avenue’s property. On July 13, 2023, Defendants served upon Fifth Avenue their Motion to Dismiss as well as their Motion to Stay Discovery. Defendants’ Motion was accompanied by several Affidavits. Fifth Avenue

served a Notice of Hearing, calendaring Fifth Avenue’s Motion for Preliminary Injunctive Relief for September 7, 2023. Fifth Avenue’s Motion is now before the Court for hearing.

**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). The Conference’s “closure” of Fifth Avenue was announced a mere two weeks before Easter Sunday, April 9, 2023.<sup>1</sup>
- 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).

---

<sup>1</sup> The North Carolina Judicial Branch website published a list of Official Court Holidays and Good Friday was observed Friday April 7, 2023, which would place Easter Sunday April 9, 2023. <https://www.nccourts.gov/holiday-schedule>.

- 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. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED.**

#### A. Requirements for a Preliminary Injunction.

A preliminary injunction may be issued during litigation:

- When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

- When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,
- When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff.

G.S. § 1-485.

Whether to issue an injunction is “a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). It is well established that, “to justify the issuance of a preliminary injunction it must be made to appear (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation.” *Setzer v. Annas*, 286 N.C. 534, 537, 212 S.E.2d 154, 156 (1975).

To prove irreparable injury, “it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit, or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.” *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949); *see also A.E.P. Industries, Inc. v. McClure*, 308 N.C. at 407, 302 S.E.2d at 763.

In addition, when deciding whether to issue an injunction, a court must weigh the equities and advantages and disadvantages to the parties. *Pruitt v. Williams* 288 N.C. 368, 372, 218 S.E.2d 348, 350 (1975); *State ex rel. Edmisten*, 299 N.C. at 357, 261 S.E.2d at 913.



B. Fifth Avenue's Verified Complaint Demonstrates That Fifth Avenue will Likely Prevail on its Claims.

In support of its Motion for Preliminary Injunction, Fifth Avenue relies upon the Verified Complaint attested to by Sarah Godwin, the Chairman of the Board of Trustees of Fifth Avenue. Fifth Avenue also relies on portions of the Defendants' Affidavits submitted in connection with their Rule 12(b)(1) motion that refute their own defenses. As explained herein, this evidence shows that Fifth Avenue will succeed upon its claims.<sup>2</sup>

1. Breach of Contract Claim

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

a. Existence of a Contract

The Book of Discipline (“BOD”) is a contract entered into by units of the United Methodist Church (“UMC”) including Fifth Avenue and Defendants, to which all parties have agreed to be bound. (Verified Compl. ¶ 105). Defendants have acknowledged they are bound by its terms and hold responsibilities under the BOD. (Affidavit of Connie Shelton, attached to Defendants' Motion to Dismiss, ¶¶ 9, 51; Affidavit of Tara Lain, attached to Defendants' Motion to Dismiss, ¶ 33). As detailed in Fifth Avenue's Brief in Opposition to Defendants Motion to Dismiss, at least two other courts that have issued preliminary injunctions based on a conference's failure to comply with the provisions of ¶2553: *Carrollton First United Methodist Church, Inc., et. al., v. The Trustees of the North Georgia Conference of the United Methodist*

---

<sup>2</sup> An affidavit or verified complaint in support of a motion for preliminary injunction does not have to meet the same standards required for summary judgment affidavits pursuant to G.S. § 1A-1, Rule 56(e). *Schultz v. Ingram*, 38 N.C. App. 422, 427, 248 S.E.2d 345, 349 (1978).

*Church, Inc., et. al.*, Civil Action No. 23102495-65, Cobb County Superior Court, (May 19, 2023) (attached as Exhibit 1 to Fifth Avenue's Brief in Opposition to Defendants' Motion to Dismiss) and *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) (attached as Exhibit 4 to Fifth Avenue's Brief in Opposition to Defendants' Motion to Dismiss).

Both courts have treated the UMC defendants' obligation under ¶¶2553 and 248 as contractual in nature. The *Carrollton* court explained:

The Court finds that the status quo is that state of affairs dictated by, ¶¶2553 and 248 of the "Discipline" and is clear on its face. Therefore, in order to restore the status quo, it is necessary for the parties to adhere to the unequivocal meaning of ¶2553 and ¶ 248. The relevant portion of ¶248 states that a church conference "may be called at the discretion of the district superintendent or following a written request to the district superintendent by ...the church council." This language is in the disjunctive such that the conference *may* be called by the district superintendent in his discretion, or *must* be called by the district superintendent when requested by the church. Any other construction would violate the established canons of construction by which Georgia courts construe contracts, including that a document must be construed to give effect, if possible, to all of its language. ...¶2553 and ¶248 are clear in its creation of a right for a congregation to vote. ¶2553 and ¶248 therefore, creates an interest in both contract and property rights for Plaintiff churches, and the Defendants have not shown any authority which allows the Defendants to abrogate those rights[.]

(*Carrollton* Order, p. 5 (emphasis original)(emphasis added)).

The *First United* Court, in turn, went as far as to treat ¶2553 as an adhesion contract, stating that:

[The local church] was offered a disaffiliation process that is an adhesion contract. The General Conference of the UMC made the

rules for a “take it or leave it” disaffiliation process. Defendants improperly violated its own process without justification.

(*First United Order*, ¶ 23) (emphasis added). Here, as in the *Carrollton* and *First United* cases, Fifth Avenue contends that Defendants have breached the terms of BOD, by obstructing the disaffiliation process. The *Carrollton* and *First United* courts confirm that the obligations under ¶2553 and ¶248 are contractual. Therefore, Fifth Avenue will likely succeed in proving the existence of a contract between the parties.

b. Breach of the Terms of the Contract

“In every contract there is an 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.” *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985). Defendants have breached their covenant: they deprived Fifth Avenue of the right to receive the benefits of ¶2553 by refusing to hold a church conference to vote on disaffiliation and unilaterally seizing the church property.

The terms of ¶2553 and ¶248 are straightforward. ¶2553 of the BOD provides that:

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).

(Verified Compl. ¶ 46 and Exhibit C to Shelton Aff.). ¶2553 also sets out a specific procedure whereby a local church may disaffiliate from the UMC and retain its property free of any claim of trust in favor of the UMC. The disaffiliation process commences with a local church, acting through its governing body, requesting the district superintendent to call a church conference of the membership of the local church for the purpose of voting on whether the local church wishes to disaffiliate from the UMC. (Verified Compl. ¶ 50 and Exhibit C to Shelton Aff.). This church

conference is presided over by the district superintendent or an elder designated by the district superintendent. (*Id.*) With respect to this local church conference, ¶2553 states it “shall be conducted in accordance with ¶248” of the BOD and “shall be held within one hundred twenty (120) days after the district superintendent calls for the church conference” (Verified Compl. ¶ 51 and Exhibit C to Shelton Aff.). (emphasis added).

¶248 makes it clear that there are two ways in which a church conference can be called by the district superintendent. One is at his/her own discretion. The other is when he/she is requested to do so by the pastor, the church governing body, or 10 percent of the professing membership of the local church. (Verified Compl. ¶ 52 and Exhibit C to Shelton Aff.). In the latter cases, the district superintendent’s duty is purely ministerial and is not subject to his/her discretion. (*Id.*) Therefore, under ¶248 and ¶2553, if a local church has requested a church conference vote, the district superintendent has no discretion to refuse to call one. (Verified Compl. ¶ 53 and Exhibit C to Shelton Aff.). The church conference must be called for a vote. (*Id.*) The *Carrollton* court and the *First United* Court confirmed this interpretation of the BOD. (*Carrollton* Order, p. 5, *First United* Order ¶ 19).

Defendants in this matter breached the terms of ¶2553 (and ¶ 248) by failing to schedule a church conference for Fifth Avenue’s disaffiliation vote. Fifth Avenue anticipates that Defendants will argue that it was entitled to sign the Resolution to close the church and keep its property pursuant to ¶2549 prior to complying with its obligations under ¶2553. However, this argument fails. At its core, Defendants’ actions were unequivocally aimed at depriving Fifth Avenue of its rights to pursue disaffiliation and keep the church property under the BOD once Defendants learned about the value of the property. This is a clear breach of the covenant of good faith in fair dealing. *Bicycle Transit Auth., Inc.*, 314 N.C. at 228, 333 S.E.2d at 305 (that “neither

party will do anything which injures the right of the other to receive the benefits of the agreement”). Further, the idea that UMC conferences and others acting on the conferences’ behalf can refuse to provide local churches the opportunity to engage in the disaffiliation process under the guise of compliance with the BOD has been squarely rejected within the past year. *See Carrollton and First United Orders.*

The Resolution signed by the Defendants pursuant to ¶2549 cited cursory reasons for closure of Fifth Avenue: “low” membership/weekly attendance, lack of participation in ministry opportunities, and Fifth Avenue’s intention to disaffiliate. As discussed below, in connection with Fifth Avenue’s claim for fraud, the citation to low membership and failure to participate in ministry opportunities were used as a mere pretext for seizing Fifth Avenue’s property. The other reason—Fifth Avenue’s express intention to disaffiliate—is critical to the analysis here.

¶2553 was enacted just recently in 2019, after ¶2549 relied on by Defendants. Defendants admit that ¶2553 was enacted in response to a very specific set of circumstances facing the entirety of the UMC in recent years. (Shelton Aff., ¶¶ 48-49). Therefore, the local churches’ rights to disaffiliation articulated under ¶2553 were not contemplated at the time ¶2549 was enacted. ¶2553—which addresses the specific circumstances of a church’s desire to disaffiliate due to LBGTQ issues—controls the process once disaffiliation is on the table and ¶2549 cannot be used to override it. (*Id.*) As the North Carolina Supreme Court has explained, “[o]ur canons of contract construction hold that “when general terms and specific statements are included in the same contract and there is a conflict, the general terms should give way to the specifics.” *Wood–Hopkins Contracting Co. v. North Carolina State Ports Auth.*, 284 N.C. 732, 738, 202 S.E.2d 473, 476 (1974) (emphasis added); *see also State v. Philip Morris USA Inc.*, 359

N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (a “fundamental” rule of contract interpretation is that a written contract is construed against the party who drafted it.”(emphasis added).

Because Fifth Avenue has established both the existence of the contract, and that Defendants breached its terms, Fifth Avenue will likely prevail on its claim for breach of contract.

## 2. Promissory Estoppel

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.

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.

Fifth Avenue has established a valid claim for promissory estoppel, and that Defendants have breached its promise, and Fifth Avenue will likely prevail on its claim for promissory estoppel.

### 3. Fraud and Constructive Fraud

To establish a claim for fraud, Fifth Avenue must show “(1) [a f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.’ ”*Hudgins v. Wagoner*, 204 N.C. App. 480, 486, 694 S.E.2d 436, 442 (2010). Fraudulent intent is rarely proven by direct evidence, therefore, the factfinder may infer intent from the totality of the properly admitted evidence. *Id.*, at 491, 694 S.E.2d at 445.

In turn, the elements of a constructive fraud claim are proof of circumstances “(1) which created the relation of trust and confidence [the ‘fiduciary’ relationship], 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.” *Bogovich v. Embassy Club of Sedgfield, Inc.*, 211 N.C. App. 1, 8, 712 S.E.2d 257, 262 (2011). “[W]hen [a] party figuratively holds all the cards—all the ... power [...] North Carolina courts found that the special circumstance of a fiduciary relationship has arisen.” *Fox v. Fox*, 283 N.C. App. 336, 345, 873 S.E.2d 653, 661 (2022).

The evidence before the Court regarding the sequence and nature of Defendants’ actions establishes a likelihood that Fifth Avenue will succeed on both its claim for fraud and for constructive fraud. As demonstrated by the Verified Complaint and Defendants own submissions, Defendants engaged in a concealed and concerted effort to deprive Fifth Avenue of its right to vote on disaffiliation and take Fifth Avenue’s valuable property. Prior to November 2022, Defendants, by virtue of their purported declared adherence to the BOD, represented to Fifth Avenue that Fifth Avenue would be entitled to the benefits of exercising its right to the disaffiliation process under ¶2553 (Verified Compl. ¶ 113). In November 2022, while Fifth Avenue was openly considering disaffiliation, Defendant Lain expressed to Fifth Avenue the



Conference's desire for Fifth Avenue to stay in the denomination. (Verified Compl. ¶ 64). However, after Fifth Avenue submitted its disaffiliation paperwork and disclosed the significant value of Fifth Avenue's property in a prime location, Defendant Lain and her fellow Defendants quickly began working on a way to cut off Fifth Avenue's right to the disaffiliation vote and to seize Fifth Avenue's property. (Verified Compl. ¶¶ 68-69). Despite accepting Fifth Avenue's disaffiliation paperwork and Fifth Avenue's two requests to schedule a church conference for the vote on disaffiliation pursuant to the non-discretionary procedure set forth in ¶2553, Defendants ignored Fifth Avenue's requests and instead quietly and clandestinely worked on a way to circumvent the obligations ¶2553 and to cut off Fifth Avenue's rights to its own property. (Verified Compl. ¶¶ 68-84). Nowhere in Defendants' Affidavits do they assert that Fifth Avenue was apprised of Defendants' efforts to close the church and assert title to the property. Nor do they offer any details on the timeline demonstrating a bona fide effort to meet and confer with each other on the Resolution.

Unbeknownst to Fifth Avenue, while the church patiently waited for word on the scheduling of the disaffiliation vote, 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). Specifically, Defendants attempted to justify their actions based on a "recent" decline in membership and missional activity of the Church which has 205 members and average weekly attendance of approximately 20 members. (Id. ¶¶ 84-85). However, the Conference's *own published data* regarding Fifth Avenue's average worship attendance shows that weekly attendance has fluctuated from 33 to "approximately 20" *since 2017*, for over five years prior to Defendants' drastic actions (*Id.*). In fact, the only recent change in Plaintiff's relationship with

the UMC or the Conference was its formal requests for a Church Conference vote on disaffiliation. (*Id.* ¶ 86).

The purportedly low membership and attendance and other assertions regarding the ministry opportunities were used as a mere pretext to enter of the Resolution. This is supported by the fact that Fifth Avenue boasted a higher weekly attendance than over 200 churches in the North Carolina conference in 2020. (*Id.* ¶91). Moreover, Defendants have not offered any real evidence that they attempted to address or help Fifth Avenue with its purportedly declining membership. This is bolstered by Defendant Shelton and Defendant Lain’s own admission that Defendants elected not to follow the procedure set forth in ¶2549 to guide Fifth Avenue through an assessment of its potential before closure was pursued. (Shelton Aff., ¶52 and Exhibit C, ¶2549.2(1); Lain Aff., ¶ 34).

Further, to the extent that Defendant Lain asserts that Defendants closed the church based on Fifth Avenue’s failure to engage in ministry opportunities, her own Affidavit exposes that this assertion is without any foundation, and this purported justification was also a mere pretext for taking Fifth Avenue’s property. She cites three examples of Fifth Avenue’s “failure” to engage in ministry opportunities: (1) participation in a backpack drive that fizzled *during the pandemic*, (2) participation in a plan for collaboration with Cityspace that was foiled by circumstances relating to an adjacent property *that were outside of Fifth Avenue’s control*, and (3) serving as a meeting place for LBGTQIA+ persons and allies. (Lain Aff., ¶¶ 22-24). As to this last item, Defendant Lain acknowledged that ¶2553 provided Fifth Avenue a right to disaffiliate for reasons of conscious regarding the changes to the BOD regarding the practice of homosexuality. (*Id.*, ¶36).

The *First United* court rejected similar sham explanations. In *First United*, the UMC defendants engaged in a scheme to stall the local church's disaffiliation vote under ¶2553 by forcing the local church to engage in a "viability study" that was not even sanctioned under the BOD. The grounds cited by the UMC defendants for their actions were that (1) the local church had unpaid apportionments and (2) the local church had subpar ministry outreach. (*First United*, ¶¶ 17-18). The *First United* court found that neither was credible. (*Id.*). First, the court noted that other churches had lower percentages of paid apportionments than the plaintiff and were nevertheless permitted to disaffiliate. (*First United*, ¶¶ 17). Second, when the court examined the actual contents of the viability study, none of it had to do with ministry outreach. (*First United*, ¶ 18). In other words, when examined closely, the baseless nature of the reasons provided by Defendant was obvious. Here, the evidence already before the Court similarly demonstrates that Defendants' proffered reasons for the Resolution are unfounded.

To this point, Defendants have not offered any evidence of the actual deliberations that took place during the timeline of the closure Resolution which would demonstrate that they acted in good faith. Fifth Avenue has asked for discovery of this information, which up to this point, has been withheld and is the subject of Fifth Avenue's Motion to Compel compliance with a subpoena by a third-party witness. Defendants have not provided any meeting minutes, notes or communications addressing the timeline of their decision-making process to close Fifth Avenue relative to its request to disaffiliate. The absence of these records from Defendants' submissions is telling.

In its most egregious act, Defendants recorded the Affidavit of Ownership in the chain of title to Fifth Avenue's property on March 24, 2023, without Fifth Avenue's knowledge. (Verified Compl. ¶ 77). Fifth Avenue finally found out about Defendants actions against its title two days

later at the “informational meeting” called by Defendant Lain. (Verified Compl. ¶ 79).

Defendants changed the locks on the sanctuary and fellowship hall, barring Fifth Avenue from its own building. (Verified Compl. ¶ 81). Defendants carried out all of their machinations in a race to close Fifth Avenue a week before Holy Week and a mere two weeks before Easter Sunday, April 9, 2023. Defendants’ invocation of and reliance upon their religious missions as ground for the closure is highly suspect in light of the timing of their actions. Why the rush to close Fifth Avenue at Easter? The Defendants have provided no answer to this most basic question other than it was our right to do so.

The evidence already before the Court shows that Defendants embarked on a scheme to deprive Fifth Avenue of its disaffiliation rights and seize its property. The Defendants acted through concealed and concerted means that were reasonably calculated to deceive Fifth Avenue. And Fifth Avenue, obviously waiting for its vote on disaffiliation to be scheduled, was, in fact, deceived. Defendants’ fraudulent intent is easily inferred from the clandestine nature of the Defendants acts and the timing of the “informational meeting.” Finally, the harm to Fifth Avenue is obvious: Defendants deprived Fifth Avenue the benefits guaranteed by ¶ 2553, have placed a cloud on Fifth Avenue’s title, and restricted access to its own property.

These facts also demonstrate that Defendants were in a position of power, authority and influence over Fifth Avenue and that Fifth Avenue placed special trust and confidence in all Defendants that the disaffiliation vote would be scheduled. (Verified Compl. ¶¶ 142-43). 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. (Verified Compl. ¶¶ 62-92, 144). Again, the harm to Fifth Avenue is obvious, and is a proximate and direct result of Defendants' conduct.

Therefore, Fifth Avenue will likely succeed on its claims for fraud and constructive fraud.

#### 4. 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.

G.S. § 36C-4-410 provides:

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416. A settlor may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411...

G.S. § 36C-4-412 provides:

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

G.S. § 36C-4-415 provides:

The court may reform the terms of a trust, if the terms of the trust are ambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence what the settlor's intent was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement

Defendants rely on the purported Trust to exercise dominion over Fifth Avenue's property. As an initial matter, the Affidavit of David Martin submitted with Defendants' Motion to Dismiss does not impact the viability of Fifth Avenue's claims to modify the purported Trust. Assuming for the sake of this argument that the property is subject to the Trust as claimed by Defendants, Fifth Avenue is seeking modification or termination based on the fact that the Trust—as interpreted and applied by Defendants—does not conform with the intent of the settlors.

Fifth Avenue's strongest claim is under G.S. § 36C-4-412, at least at this pre-discovery stage of the proceedings. Under this statute, Fifth Avenue only has to show that modification of the trust is warranted because of circumstances—not anticipated by the settlor—that render the Trust contrary to its established purpose. G.S. § 36C-4-412. Under this provision, Fifth Avenue only has to show the settlor's "probable intention." *Id.* Without a doubt, the settlors' probable intention did not include that the Trust clause be used as a vehicle to deprive the local church of its rights set forth in the BOD or to commit a fraudulent taking. The more probable intention of the settlors was that the UMC and its authorities grant Fifth Avenue the benefits due under the BOD, which now include ¶ 2553. In fact, Mr. Martin's Affidavit tends to support this point. (Martin Aff., ¶ 13) He states "the property was deeded 'for the use and benefit of the said Fifth Avenue Methodist Episcopal Church South as a parsonage, or for any other use or purpose the said trustees, their successors and assigns, may deem proper, subject to the discipline, usage, and ministerial appointments of said Church as from time to time authorized and declared by the

General Conference[.]” In 2019, by enacting ¶2553, the General Conference declared that local churches have the right to participate in a disaffiliation process.

By committing an unauthorized, fraudulent taking and wrongfully denying Fifth Avenue the benefits afforded to it under the BOD, and more specifically ¶2553, Defendants have created circumstances not anticipated by the settlors of the Trust. Therefore, at the very least, modification is warranted under G.S. § 36C-4-412 to make the trust revocable. Therefore, Fifth Avenue has shown a likelihood of success on at least one ground for judicial modification of the Trust.

#### 5. Declaratory Judgment and Quiet Title

Fifth Avenue’s claims for Declaratory Judgment and Quiet Title share the same grounds as the claim for judicial modification of the Trust: that even if the purported Trust is applicable to the property, the settlors did not intend to relinquish all rights to the property without recourse and without receiving the benefits of the terms of the BOD, including ¶2553. Fifth Avenue’s claims for Breach of Contract, Fraud, and Constructive Fraud also support these claims. Accordingly, Fifth Avenue incorporates the preceding arguments by reference, which demonstrates that Fifth Avenue’s claims for Declaratory Judgment and Quiet Title are likely to succeed.

Based on the foregoing, Fifth Avenue has demonstrated a likelihood of success on the merits of its claims.

#### C. Fifth Avenue’s Verified Complaint Sufficiently Forecasts Irreparable Harm to Fifth Avenue to Support an Injunction.

Loss of “real property nearly always threatens irreparable damage,” *Jones v. Buxton*, 121 N.C. 285, 28 S.E. 545, 545 (1897), and in these particular circumstances, the loss of the property cannot be redressed by an award of damages. This is not just any piece of real estate; this is a

church property with a rich history, that is personal to Fifth Avenue. The property goes to the core of Fifth Avenue's identity; after all, the Fifth Avenue church is named after the street on which the church property is located. Defendants have recognized its special history, dating all the way back to 1847. (Lain Aff., ¶ 9). If Fifth Avenue loses its property in this fashion—upon collusion of Defendants—it will be forced out of the only home it has ever had, with no facilities to continue to worship as its members see fit. After literally hundreds of years working tirelessly to maintain and preserve its unique historic home, Fifth Avenue would be left with nothing. (Verified Compl. ¶ 26).

Moreover, if Fifth Avenue's rights are not immediately restored, it will lose its ability to pursue disaffiliation under ¶2553 and keep its property. 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. (Verified Compl. ¶ 96). This special annual conference is the final opportunity for local UMC churches desiring to disaffiliate pursuant to ¶2553 to disaffiliate from the UMC. (*Id.*) If Fifth Avenue is not up for a vote on disaffiliation at the special Annual Conference in October, then they will be unable to disaffiliate through ¶2553. (*Id.*)

Both the *Carrollton* and the *First United* courts found that the plaintiff local churches would be irreparably injured if they were prevented from pursuing disaffiliation under ¶2553 given the impending sunset of that very specific provision. Given the nature of Fifth Avenue's potential permanent loss of its home and the impending deadlines, it will suffer irreparable harm unless injunctive relief issues.

#### D. Balancing of Equities Favors Fifth Avenue

In considering Fifth Avenue' Request for Preliminary Injunction and the Verified Complaint the balancing of equities favors Fifth Avenue. As explained, Fifth Avenue will lose



its property, which has served as its home since before the Civil War, and an important piece of identity if injunctive relief is not issued. It will also lose the benefit of its rights under the BOD. Defendants, in turn, will not be harmed by the requested injunctive relief. As the *Carrollton* court explained, “Defendants will suffer no injury at all by being required to comply with the terms of the Discipline to which they have already agreed to be bound.” (*Carrollton* Order, p. 6). Defendants simply cannot justifiably claim they will be harmed by being forced to return Fifth Avenue to its position before the closure and facilitating its rights to pursue disaffiliation under ¶2553. Fifth Avenue is at risk of losing everything. Defendants will lose nothing. Therefore, the balance of equities favors injunctive relief.

E. Scope of Injunction

Fifth Avenue seeks the following injunctive relief:

- Fifth Avenue and its members shall have immediate access to and use of Plaintiff’s property including that the doors to the Church sanctuary be open to its congregants each Sunday at 10:30 a.m. for up to two hours for worship;
- Defendants shall not take any action to encumber, impair, change or otherwise alter Plaintiff’s property in any way;
- Defendants and all persons acting in concert with them must call a church conference and preside therein or appoint someone for that purpose;
- Defendants must call and conduct the church conference in sufficient time for Defendant Trustees and Plaintiff to execute the requisite disaffiliation agreement and Defendant Conference to conduct the requisite vote on Plaintiff’s disaffiliation application for the October 7, 2023, special Annual Conference;

- Defendants shall not interfere with or discourage Plaintiff’s disaffiliation application or its church conference and vote, or Plaintiff’s further efforts to disaffiliate pursuant to ¶2553;
- Defendants shall not impair or interfere with Plaintiff’s requested disaffiliation at the special Annual Conference in October; and
- Defendants shall take no further acts to impair or infringe Plaintiff’s right to seek disaffiliation under ¶2553.

The foregoing directives are tailored to prevent the harm that Fifth Avenue may suffer in the coming months as ¶ 2553 sunsets, and to restore its rights to disaffiliate under that provision expire. The relief requested is directly in line with the relief granted by both the *Carrollton* and *First Avenue* courts, which issues injunctions compelling the UMC defendants to honor their obligations to the local churches under ¶ 2553. Fifth Avenue is entitled to the same relief here.

## II. NO BOND IS NECESSARY.

No security is necessary for Plaintiff’s requested injunction. “The purpose of [Rule 65(c)] security is to protect the enjoined party from damages incurred as a result of the wrongful issuance of the injunction.” 2 G. Wilson, *North Carolina Civil Procedure* (3d ed. 2007) § 65-6, p. 65-17.

The trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant no material damage, where there has been no proof of likelihood of harm, and where the applicant for equitable relief has considerable assets and is ... able to respond in damages if defendant does suffer damages by reason of a wrongful injunction citations omitted.

*Keith v. Day*, 60 N.C. App. 559, 562, 299 S.E.2d 296, 298 (1983)(citations omitted). A party seeking more than a minimal bond must come forward with evidence of losses it may suffer as a result of its inability to undertake the activity prohibited by the injunction. *Merck & Co., Inc. v.*

*Lyon*, 941 F. Supp. 1443, 1464 (M.D.N.C. 1996).

Plaintiff seeks a preliminary injunction to regain access to its property, and an opportunity to disaffiliate through a church conference vote, a Defendant Conference vote, a disaffiliation agreement and no interference or discouragement from Defendants in the disaffiliation process. This requested relief costs Defendants nothing and certainly does not pose any harm to Defendants. Further, Plaintiff's real estate is more than sufficient to cover any damages Defendants could theoretically suffer from the injunction. Therefore, no bond should be required.

### **CONCLUSION**

For the reasons stated above, Fifth Avenue's request for Preliminary Injunction should be granted and Defendants should be enjoined as described herein.

This the 5th day of September, 2023.

COATS + BENNETT, PLLC

By: 

Gavin B. Parsons

N.C. State Bar No. 28013

Attorney for Plaintiff

1400 Crescent Green, Suite 300

Cary, North Carolina 27518

Telephone: (919) 719-4868

Facsimile: (919) 854-2084

[gparsons@coatsandbennett.com](mailto:gparsons@coatsandbennett.com)

## CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiff hereby certifies that the foregoing BRIEF IN SUPPORT OF PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION was served upon the attorneys of record for the Defendants by electronic mail pursuant to a prior stipulation by counsel and addressed as follows:

Eric Stevens  
Colin McGrath  
POYNER & SPRUILL LLP  
301 Fayetteville Street, Suite 1900  
Raleigh, North Carolina 27602  
[estevens@poynerspruill.com](mailto:estevens@poynerspruill.com)  
[cmcgrath@poynerspruill.com](mailto:cmcgrath@poynerspruill.com)

This the 5th day of September, 2023.



Gavin B. Parsons