

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO: 08 CVS 4943

COUNTY OF BUNCOMBE

The Presbyterian Church (U.S.A), The  
Presbytery of Western North Carolina, Inc., and  
The Montreat Presbyterian Church (Presbyterian  
Church U.S.A.), an unincorporated religious  
congregation organized and existing under  
NCGS Chapter 61 by and through its Trustees  
R. James Henderson, Henry W. Neale and  
Arline J. Taylor, as Trustees of the Montreat  
Presbyterian Church (PCUSA)

Plaintiffs,

vs.

Montreat Presbyterian Church, a North Carolina  
corporation d/b/a Montreat Presbyterian Church,  
E.P.C. and E.A. Andrews, Jr., Jessie G. Baker  
and Natalie W. Schermerhorn, individually and  
as Trustees of the Montreat Presbyterian  
Church, an unincorporated religious  
congregation organized and existing under  
NCGS Chapter 61,

Defendants.

PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS

Defendants have moved to dismiss this case pursuant to Rules 12(b)(1) and 12(b)(6), North Carolina Rules of Civil Procedure, for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. In opposition to defendants' motion, plaintiffs submit this Memorandum of Law and the exhibits attached hereto.<sup>1</sup>

<sup>1</sup> Plaintiffs submit this memorandum without benefit of having seen any brief or memorandum from defendants, and thus plaintiffs must guess at the grounds on which defendants intend to urge dismissal. Plaintiffs respectfully request the right to supplement this memorandum as necessary to respond to arguments of the defendants that are not addressed herein.

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiffs' complaint in this action clearly states claims over which this Court has subject-matter jurisdiction. In numerous reported cases, the courts of this state have adjudicated church property issues where there was a genuine controversy over which of two competing factions was entitled to possession of the property, and in all of such cases the courts have properly exercised jurisdiction, rejecting attempts to remove such controversies from judicial resolution. In fact, defendants are unable to point to a single reported decision holding that a Superior Court may not adjudicate a dispute over entitlement to property claimed by two factions of a church, provided that the Court do so by employing principles approved by our appellate courts, both state and federal, and not by attempting to resolve matters of religious doctrine.

## **II. PLAINTIFFS' CLAIMS**

In their complaint, plaintiffs allege that the defendants have wrongfully seized and claim ownership of real and personal property rightly belonging to defendants. Specifically, the complaint alleges that in 2007, a faction of the long-existing Montreat Presbyterian Church petitioned to leave its denomination, the Presbyterian Church (U.S.A.) (hereinafter PCUSA) to affiliate with a different denomination (the Evangelical Presbyterian Church), and was permitted to do so – without taking with it the church property – by the plaintiff Presbytery by following established procedures of the PCUSA constitution. The faction incorporated themselves as a new church with the same name as that of plaintiff Montreat Presbyterian Church, and the defendant trustees then conveyed certain real property belonging to the plaintiff church to the newly incorporated defendant church. In summary, the complaint alleges that the conveyances were wrongful and unlawful, because the defendant trustees held the church property in trust for the plaintiff church under express provisions of the denomination's constitution, and because the defendant trustees lacked any authority to donate the property held by them in trust to another

corporation. Plaintiffs seek to set aside the wrongful conveyances of its property held in trust by defendants for the use and benefit of PCUSA and a declaratory judgment to correct defendants' insertion of a false and misleading document into the public record. Plaintiffs further seek an injunction against the wrongful use and possession of their properties by defendants and against defendants' unlawful use of the name Montreat Presbyterian Church, which has been used by plaintiffs and their predecessors since 1906. Finally, plaintiffs seek damages and other appropriate relief for the defendant trustees' breach of their fiduciary duty and for actual and constructive fraud and unjust enrichment by defendants and their agents.

### **III. THE HISTORICAL BACKGROUND**

#### **A. The History and Organization of the Presbyterian Church**

For over 100 years the Montreat Presbyterian Church has been a "particular church" (the denomination's term for a member church) in the denomination known as the Presbyterian Church (U.S.A.) and its predecessor denomination, the Presbyterian Church in the United States. Complaint, ¶ 15. An awareness of the history and organization of the Presbyterian Church (U.S.A.) (hereinafter PCUSA) and of the origin of its property trust doctrine is essential to an understanding of the issues in this case. Therefore plaintiffs will offer a brief overview of that history.

The Presbyterian Church in this country dates from its founding in 1706. It was originally known as the Presbyterian Church in the United States of America. In the Civil War era, the Presbyterian Church became two branches, the United Presbyterian Church in the United States of America (UPCUSA), which was known colloquially as the "Northern" branch, and the Presbyterian Church in the United States (PCUS), which was known as the "Southern" branch. In 1983, the two branches reunited into a single church, which is now called The Presbyterian Church (U.S.A.). The PCUSA is not a new church, but "one single ecclesiastical entity which is

the continuing church resulting from the reunion of the Presbyterian Church in the United States and the United Presbyterian Church in the United States of America.” Articles of Agreement, Appendix B to PCUSA *Book of Order*). (Exhibit X attached to the Complaint and to Affidavit of James Aydelotte filed with this Memorandum.)

All parts of the PCUSA, including its local churches, are governed by the PCUSA’s Constitution, which consists of two volumes known as the *Book of Confessions* and the *Book of Order*. See *Book of Order* at § G-1.0500. The denomination is governed by a system of hierarchical or connectional bodies: session, presbytery, synod, and General Assembly, each having authority over the body under it.

The *Book of Order* provides that an individual or particular church is represented by a governing body called a “session.” *Book of Order* at § G.10.0100 *et seq.* The session consists of the pastor or co-pastors, the associate pastors, and the elders in active services, and the session is “responsible for the mission and government of the particular church.” *Id.* at § G-10.0102. Pursuant to the *Book of Order*, each individual church and session is governed by a presbytery, which is a district governing body comprised of all active ministers in the district and representative elders from each individual church in the district. See *Book of Order* at § G-11.0000 *et seq.* There are 173 presbyteries within the PCUSA. Geographical groups of presbyteries are governed by a regional body called a synod. *Book of Order* at § G-12.0000 *et seq.* There are 16 synods within the PCUSA. The synods, in turn, are governed by the General Assembly, the highest governing body in the PCUSA. *Book of Order* at § G-13.0000 *et seq.*

A presbytery has significant authority over its member churches and their ministers located in the presbytery’s geographical boundaries. Pursuant to the *Book of Order*, only the presbytery has the power to organize new churches, §§ G-7.0101, G-11.0103h; to receive and unite churches, *id.*; to divide, dismiss, or dissolve churches, § G-11.0103i; to control the location

of new churches and churches that desire to move, to § G-11.0103j; to take special oversight of churches without pastors, § G-11.0103k; to ordain, receive, dismiss, install, remove, and discipline ministers, § G-11.0103n; to establish and dissolve the pastoral leadership, § G-11.0103o; to assume original jurisdiction where it determines a church session is unable or unwilling to manage wisely the affairs of the local church, § G-11.0103s; and to appoint an administrative commission with the full powers of the session, *id.*.

Presbyterian governance, as expressed in the *Book of Order*, specifically extends to the subject of how property is to be owned, managed, and used for the good of the greater church. The *Book of Order* expressly places power over the property of local churches in the hands of the presbytery. Pursuant to the property provisions in the *Book of Order*, set forth in Exhibit A to the complaint and Aydelotte Affidavit, only the presbytery has the power to hold, use, apply, transfer, or sell property of a local church that ceases to act as a PCUSA church under the constitution, § G-8.0301; only the presbytery has the power to hold, use, apply, sell, or dispose of local church property where the local church is dissolved by the presbytery or is extinct, § G-8.0401; only the presbytery has the power (unless the particular church has properly obtained an exemption) to permit the sale, mortgage, or other encumbrance of local church property, § G-8.0501; only the presbytery has the power to permit the lease of local church property for a period of more than five years, *id.*; only the presbytery has the power to recognize a schism in a local church and determine if one of the factions is the true church within the PCUSA and entitled to the property, § G-8.0601.<sup>2</sup>

The *Book of Order* specifically gives the presbytery the power to control property held by or for a local church which no longer is part of the PCUSA:

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<sup>2</sup> Despite these powers, a local church, regardless of its form of organization, may and generally does hold record title to its property without joining the Presbytery as co-owner.

[w]henever property of, or held for, a particular church of the Presbyterian Church (U.S.A.) ceases to be used by that church as a particular church of the Presbyterian Church (U.S.A.) in accordance with this Constitution, such property shall be held, used, applied, transferred, or sold as provided by the presbytery.

*Book of Order* at § G-8.0300.

In addition, if a church is in schism, as was the Montreat Presbyterian Church prior to its dismissal (without property) to the Evangelical Presbyterian Church by the plaintiff Presbytery, the *Book of Order* gives the presbytery the power to allocate church property to the faction it determines to represent the true church:

If there is a schism with the membership of a particular church and the presbytery is unable to effect a reconciliation or a division into separate churches with the Presbyterian Church (U.S.A.), the presbytery shall determine if one of the factions is entitled to the property because it is identified by the presbytery as the true church with the Presbyterian Church (U.S.A.)

*Book of Order* at § G-8.0600.

The *Book of Order* further sets out the constitutional process by which controversies within a lower governing body are decided by the authority of a higher governing body. Specifically, the *Book of Order* makes clear the hierarchical nature of the PCUSA by providing:

That the several different congregations of believers, taken collectively, constitute one Church of Christ, called emphatically the Church; that a larger part of the Church, or a representation of it, should govern a smaller, or determine matters of controversy which arise therein; that, in like manner, a representation of the whole should govern and determine every part, and to all the parts united: that is, that a majority shall govern; and consequently that appeals may be carried from lower to higher governing bodies till they be finally decided by the collected wisdom and united voice of the whole Church.

*Book of Order* at § G-1.0400.

Amendment of the *Book of Order*, as a part of the Constitution, requires action by the General Assembly and approval by a majority of the presbyteries. *Book of Order* at § G-18.0301. No action by the local churches is required.

The same form of government has existed since the church's founding in this country in 1706. It continued through the period of the Civil War split until and following the reunion of the united church in 1983.

**B. The History of Montreat's Participation in the Denomination.**

The Montreat Presbyterian Church was founded in 1906 as a particular church of the Presbyterian Church in the United States. It was organized under the care of the Presbytery of Asheville, the predecessor presbytery to plaintiff Presbytery of Western North Carolina, Inc. (PWNC). Since its founding, the Montreat church has remained a member church in the PCUS or its successor, the PCUSA, bound by the polity of those denominations, as reflected in the PCUS *Book of Church Order* and, currently, the PCUSA *Book of Order*.

As both a congregation within the PCUSA and a member church of the plaintiff PWNC, the Montreat church, when it was first organized and accepted by a Presbytery, agreed to submit to the form of government established by the Constitution of that denomination (a predecessor of the PCUSA). See *Book of Order* at § G-4.0104. In addition, the church agreed that it would always adhere to the doctrine and discipline of the PCUSA (or its predecessor parent body). *Id.*; see also *Book of Order* at § G-7.0201.

In numerous ways throughout its history, the Montreat church has demonstrated its intent to participate in the hierarchical governance of the PCUSA as any other member church of the denomination. For example, in addition to its name and the use of denominational symbols and logos on its property and in its hymnals, liturgical objects, documents, choir robes, and so forth:

- The Presbytery has approved and installed all of the church's pastors, pursuant to its power "to ordain, receive, dismiss, install, remove, and discipline ministers," *Book of Order* at § G-11.0103n.
- Each of the church's pastors, elders, and deacons is required to take, and has always taken, an oath of office that includes a pledge to be governed by church polity and to abide by its discipline, as set forth in the *Book of Order*. See *Book*

of Order at §§ G-14.0207e, (elders), G-14.0405b(5) (pastors) (“Will you be governed by our church's polity, and will you abide by its discipline?”).

- Pursuant to the *Book of Order*, the Montreat church’s pastors have participated in the pension plan provided by PCUSA. Book of Order at § G-14.0506b.(2) (“The call shall provide for payment to the board responsible for benefits of a sum equal to the requisite percent of the minister’s compensation ... for the minister’s participation in the Benefits Plan of the PCUSA, including both pension and medical coverage ...”).
- The church has fully participated in meetings of its Presbytery by sending voting delegates to such meetings, and has even hosted meetings of the Presbytery.
- The church has engaged in the other denominational activities enumerated in Paragraph 15 of the complaint.

### **C. The Property Trust Doctrine**

From its inception it has been the doctrine and polity of the Presbyterian Church (U.S.A.) and each of its predecessor denominations that all church property, however titled, is held in trust for the denomination in furtherance of its religious mission. See *Advisory Opinion Note #19*, “Implementing the Trust Clause for the Unity of the Church,” attached as Exhibit Z to the Affidavit of James Aydelotte: “The idea of holding property in trust has always been part of the Presbyterian theology and practice as has been recognized by U.S. Supreme Court (*Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872)).”

In *Watson*, which involved a Presbyterian church in Kentucky, the Court recognized that under Presbyterian doctrine there was an implied trust on church property in favor of the denomination. “Though neither the deed nor charter said this in terms, it was admitted that both contemplated the connection of the local church with the general Presbyterian one, and subjected both property and trustees alike to the operation of its fundamental laws.” The Court deferred to the denomination’s right to apply this element of its religious polity: “It is the essence of these religious unions, and their right to establish tribunals for the decision of questions arising among

themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.” 80 U.S. at 728-29.

The denomination also expressly recognized the existence of an implied trust in 1944, when the General Assembly of PCUS stated, citing *Watson*: “In the final analysis the right in and to all property within its ecclesiastical jurisdiction belongs to the Church as a whole – the entire denomination.” *Advisory Committee Response to Request 90-24*, attached as Exhibit V to the Affidavit of James Aydelotte. In 1950, the General Assembly reaffirmed that a particular church (a local church that is a member of the denomination) does not have “absolute ownership of its property without reference to the denomination.” *Id.*

In 1979, the United States Supreme Court, in adjudicating a church property dispute arising in the context of the Presbyterian denomination, encouraged hierarchical churches wishing to avoid property disputes to adopt express trust clauses in their constitutions, rather than to rely on implied trusts claimed by the denominations:

Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the [church property] dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

*Jones v. Wolf*, 443 U.S. 595, 606 (1979) (emphases supplied). This language from the highest Court in the land could hardly be more clear in giving hierarchical churches – such as PCUSA – two paths to protect their property: (1) the addition of trust or reversion language to the deeds and corporate charters of each individual congregation; or (2) the far easier approach of including an express trust in the parent church’s national governing documents.

Heeding the Supreme Court's instruction, hierarchical churches nationwide, including the PCUSA, amended or drafted and enacted their national church governing documents to include a *Jones v. Wolf*-style statement of express trust in favor of the general church. Subsequently, factions who pledged their loyalty to their hierarchical general churches acceded to those churches' constitutions – including the express trust provisions included in the general church governing documents. As the Supreme Court suggested, this approach imposed a significantly reduced burden as compared to what would have been required to amend each of the tens of thousands of deeds and corporate charters associated with the hierarchical churches. Hierarchical denominations, including PCUSA, have been relying on the protections of these trust provisions for nearly thirty years.

In 1982, in response to the decision in *Jones*, the PCUS (one of the predecessor denominations that later united to form the PCUSA, and the denomination to which the Montreat Presbyterian Church belonged) amended Chapter 6, entitled "Church Property," of its *Book of Church Order*, to include an explicit trust provision, § 6-3, making express the longstanding principle that all church property, including property held by a corporation, was held in trust for the PCUS:

All property held by or for a particular church, whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church in the United States.<sup>3</sup>

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<sup>3</sup> As stated previously, the adoption of the express trust provision in the *Book of Church Order* did not create any new trust obligation. Rather, the express trust provisions simply memorialized the existing trust that had been accepted and understood by members of the denomination. For centuries, it had been the policy of the Presbyterian Church, whether before or after the 1983 reunion, that church property used by a local congregation is held in trust of the use and benefit of the general church. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); see also §6-10 of the *Book of Church Order* of the former PCUS: "This Chapter is declaratory of principles to which the Presbyterian Church in the United States and its antecedent church bodies have adhered from the inception of the presbyterian form of church government."

The relevant provisions of the amended Chapter 6 are set forth in Exhibit B to the complaint in this action and the Aydelotte Affidavit.

For the amendment to become effective, the PCUS *Book of Church Order* required that the amendment be adopted by both the General Assembly and a majority of the presbyteries. On October 13, 1981, the Presbytery of Asheville (one of the predecessor Presbyteries of the Presbytery of Western North Carolina, and the presbytery then having jurisdiction over Montreat Presbyterian Church) met in Highlands, N.C., and debated adding the property trust clause to Chapter 6 of the *Book of Church Order* of the constitution of the Presbyterian Church in the U.S. The Montreat Presbyterian Church sent representatives to that meeting and fully participated in the debate. See Exhibit C-1 to Aydelotte Affidavit. Although a majority of the commissioners of that presbytery did not vote in favor of the amendment to Chapter 6, a majority of other Presbyteries in the denomination did approve that amendment, making it part of the constitution of the PCUS, the denomination to which the Montreat church then belonged. As members of a hierarchical denomination having a representative form of government, defendants became bound by the outcome of that vote.

The following year, the two major Presbyterian denominations (PCUS and UPCUSA) debated whether to reunite into a single denomination, to be known as the Presbyterian Church (U.S.A.). Again, the vote required the approval of the General Assembly and a majority of presbyteries. On February 8, 1983, the Presbytery of Asheville debated the Plan for Reunion (which included an identical property trust clause) between the PCUS and the UPCUSA. The Montreat church was again represented at the meeting. See Exhibit C-2 to Aydelotte Affidavit. The Presbytery voted in favor of reunion. A majority of the Presbyteries of both denominations likewise approved reunion, thus forming the PCUSA.

The reunion of the PCUS and the UPCUSA was finalized in June 1983. Under the terms of the Articles of Agreement in the Plan of Reunion, each congregation from the former PCUS had a one-time opportunity until 1991 to withdraw with its property from the new PCUSA. See *Book of Order*, Appendix B, pp. B-13 - B-14 (Exhibit X to the Complaint and Aydelotte Affidavit). A number of nearby churches in Western North Carolina elected to withdraw from the denomination with their property. The Montreat church chose not to do so, but elected to remain within the PCUSA.

The Constitution of the newly formed denomination, by which all member churches of plaintiff's presbytery became bound, included an express property trust clause almost identical to the trust clause of the former PCUS to which the Montreat church had belonged:

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).

*Book of Order* at § G-8.0201. That clause remains part of the doctrine and polity of PCUSA to this day.

#### **D. The Exemption Under G-8.0701**

The only distinction of any substance between the property provisions of the PCUSA *Book of Order* and those of the former PCUS *Book of Church Order* was that the latter did not include a provision similar to *Book of Order* § G-8.0501, which requires Presbytery approval for the sale or encumbrance of a local church's real property. To accommodate the desires of former PCUS churches, the PCUSA Constitution added the following provision to the *Book of Order*:

The provisions of this chapter shall apply to all particular churches of the Presbyterian Church (U.S.A.) except that any church which was not subject to a **similar provision** of the Constitution of the church of which it was a part, prior to the reunion of the Presbyterian Church in the United States and The United

Presbyterian Church in the United States of America to form the Presbyterian Church (U.S.A.), shall be excused from **that provision** of this chapter if the congregation shall, within a period of eight years following the establishment of the Presbyterian Church (U.S.A.), vote to be exempt from **such provision** in a regularly called meeting and shall thereafter notify the presbytery of which it is a constituent church of such vote. **The particular church voting to be so exempt shall hold title to its property and exercise its privileges of incorporation and property ownership under the provisions of the Constitution to which it was subject immediately prior to the establishment of the Presbyterian Church (U.S.A.).** This paragraph may not be amended.

*Book of Order* at § G-8.0701 (emphases added). (See Exhibit A to Complaint and Aydelotte Affidavit.)

Because Chapter 6 of the PCUS *Book of Church Order* did not contain an analogous provision to § G-8.0501, the effect of § G-8.0701 was to permit former PCUS member churches to exempt themselves from § G-8.0501 and to hold property under the provisions of Chapter 6 of the PCUS *Book of Church Order*. It was not possible, however, for a member church to vote to exempt itself from § G-8.0201 of the PCUSA *Book of Order* (the property trust clause), because Chapter 6 of the PCUS *Book of Church Order* contained a property trust clause nearly identical to § G-8.0201. Instead, the member church would continue to hold its property under Chapter 6 of the PCUS *Book of Church Order*, including the property trust clause, in the form in which Chapter 6 existed immediately prior to reunion, which would have been the chapter as amended in 1982. A number of churches within the Presbytery of Western North Carolina exercised their option to hold their property as provided in Chapter 6 of the PCUS *Book of Church Order* and transmitted resolutions to that effect to the Presbytery office.

The Montreat church likewise exercised the option to exempt itself from § G-8.0501 of the *Book of Order* on May 6, 1990, shortly before the expiration of the eight-year period for seeking such exemption. The resolution drafted and approved by its congregation not only exempted the Montreat church from having to seek Presbytery approval of sales or

encumbrances of its property, however; it also expressly affirmed that the Montreat church would hold its property “under the provisions of the Constitution to which it was subject immediately prior to the establishment of the Presbyterian Church (U.S.A.).” See Exhibit D to Complaint and Aydelotte Affidavit. As previously stated, the Constitution to which the Montreat church was subject immediately prior to reunion was that of the PCUS, including Chapter 6 of the PCUS *Book of Church Order*, which included § 6-3, the property trust clause.<sup>4</sup>

The congregational resolution was duly transmitted to the Presbytery by letter dated May 8, 1990, from Rev. Calvin Thielman (pastor of the Montreat church) and Larry Wilson, its Clerk of Session *pro tempore*, together with a copy of the minutes of the congregational meeting at which it was adopted. The minutes reflect that the resolution was offered by Steve Aceto, a local attorney and member of the congregation, who was knowledgeable in Presbyterian church property doctrine and who explained the need to request the exemption from presbytery oversight of property transactions. Exhibit D to Complaint and Aydelotte Affidavit.

However, Mr. Aceto apparently also drafted a different version of the resolution, attached as Exhibit E to the complaint and Aydelotte Affidavit, and caused it to be placed on record at the Buncombe County Courthouse on June 21, 1990. Plaintiff Presbytery was not provided with a copy of this resolution. This resolution was signed by Warren T. Littlejohn, the Clerk of Session, and refers to the same congregational meeting held May 6, 1990. This resolution, as did the one provided to the Presbytery, also affirmed that the Montreat church would hold its property under the provisions of Section 6-1 of the *Book of Church Order* “as the same existed prior to union” and “under the provisions of the Constitution to which it was subject immediately prior to the establishment of the Presbyterian Church (U.S.A.).” However, the resolution added

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<sup>4</sup> While §6-3 is an explicit trust clause nearly identical to §G-8.0201, it should be noted that Chapter 6 is replete with other references to the concept that a local Presbyterian church holds its property in trust for greater denomination. See § §6-1, 6-2, 6-

this statement: "True copies of the above cited provisions of the Book of Order are attached hereto as Exhibit A, for illustrative purposes." Attached to the resolution that was placed on record was a copy of a copy of a single section of Chapter 6 of the PCUS *Book of Church Order*, not as it existed immediately prior to reunion as recited in the resolution, but as it existed in 1961, twenty-one years before the *Book of Church Order* had been amended in 1982. The 1961 version did not, of course, contain the property trust clause that was added in 1982, prior to the reunion of the Northern and Southern denominations, a fact well known to anyone even remotely knowledgeable of Presbyterian church polity in 1990. Plaintiff Presbytery was provided no notice of this false and misleading attachment to the Montreat church's resolution; instead, it relied on what the church leaders had sent to the Presbytery in their letter of May 8, 1990.

#### IV. THE CONTROLLING LAW

##### A. Overview

Over the years, the courts have developed three methods of analysis to determine which of two competing parties is entitled to a church's property. These may be described in shorthand fashion as the "departure-from-doctrine" approach, the hierarchical deference approach, and the neutral principles of law approach. The first approach is now discredited as unconstitutional; a civil court may not resolve a church property dispute by inquiring which faction more closely adheres to true church doctrine, as such inquiry inevitably injects the court into ecclesiastical affairs. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). As Justice Lake has pointed out, "[p]ressed to its logical conclusion, such a judicial inquiry becomes a heresy trial." *Atkins v. Walker*, 284 N.C. 306, 318, 200 S.E.2d 641, 650 (1973).

However, under the teaching of *Jones v. Wolf*, 443 U.S. 595 (1979), either of the remaining methods is constitutionally acceptable. That is, a civil court may constitutionally determine that it must defer to a hierarchical church's determination of which faction owns the property, see *Jones*, 443 U.S. at 609 ("Therefore, if Georgia law provides that the identity of the Vineville church is to be determined according to the 'laws and regulations' of the PCUS, then the First Amendment requires that the Georgia courts give deference to the presbyterial commission's determination of that church's identity."). If that constitutionally permissible method of analysis is followed in this case, the Court will be required to defer to the plaintiff Presbytery's determination of the issue of ownership under the procedures set forth in the *Book of Order*, and the Presbytery, on behalf of the denomination, has already determined that the plaintiff "true" Montreat Presbyterian Church (PCUSA) is entitled to the property.

Alternatively, a state's courts may elect to follow a "neutral principles of law" analysis. Under that method, the court would determine whether the property dispute could be resolved by reference to evidence such as a trust provision in the constitution of the general church. If it could, then the court would apply these "neutral" principles to resolve the dispute. But, the Court cautioned, "If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." 443 U.S. at 604. In *Jones v. Wolf*, supra, the Supreme Court expressly found that state courts may constitutionally follow either the "hierarchical deference" approach or "neutral principles" – as long as the courts did not become involved in doctrinal matters. *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

The neutral principles approach approved by *Jones* requires this Court to consider the provisions of the *Book of Order*:

In applying neutral principles, the focus is on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, *and the provisions in the constitution of the general church concerning the ownership and control of church property.*

*Jones*, 443 U.S. at 503 (emphasis supplied).

Indeed, the Court in *Jones* went a step further and noted that, if a religious organization such as the PCUSA wished to ensure that it could retain property in the event of a dispute such as the present dispute, it could amend the constitution to recite an express trust in favor of the general church, and the civil courts would be obligated to give effect to those provisions:

At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

*Id.* (emphasis supplied).

North Carolina's appellate courts have followed the guidance of *Jones v. Wolf* and have provided similar protection to connectional or hierarchical churches, using a blend of the hierarchical deference and neutral principles approaches. In *Daniel v. Wray*, 158 N.C. App. 161, 580 S.E.2d 711 (2003), the Court of Appeals affirmed a trial court's grant of summary judgment to the Episcopal denomination, upholding a similar general trust provision in the denomination's governing documents against a local church's claim (an unincorporated religious association under NCGS Chapter 61) that it owned its property free of trust. Held the court:

"As a general rule the parent body of a connectional church has the right to control the property of local affiliated churches, and, as a corollary, this right will be enforced in civil courts." [Citation omitted]

...  
... St. Andrew's is a connectional church that agreed to be bound by the Constitutions and Canons of PECUSA and the Diocese. In doing so, defendants .  
.. "accepted" PECUSA Canon I.7.4 as establishing a deed of trust in which the St.

Andrew's property would be held upon their resignation and withdrawal. Therefore, this canon did create a valid trust even though it was not signed by defendants.

158 N.C. App. at 168, 172-73, 580 S.E. 2d at 717, 719. Together, *Jones* and *Daniels* control the outcome of this case. See also *Wyche v. Alexander*, 15 N.C. App. 130, 189 S.E.2d 608 (1972), where the Court of Appeals affirmed the trial court's grant of a directed verdict in favor of the plaintiff Presbytery, holding that the question of whether a trust was imposed on a local church's property in favor of the parent denomination was a question of law, not fact, that could be resolved by looking not only to the deeds and other secular instruments, but also to the parent denomination's constitution (the *Book of Order*), which it found to be a "neutral principle" that could constitutionally be applied to the resolution of the dispute.

The undisputed evidence shows that ever since its founding in 1906, the Montreat Presbyterian Church has remained a member church of the hierarchical Presbyterian denomination and has repeatedly agreed, explicitly as well as implicitly, to be bound by its governing documents, which include a property trust clause of the type sanctioned in *Jones v. Wolf* as enforceable in the civil courts and upheld in *Daniel v. Wray*.

**B. The PCUSA is a Connectional or Hierarchical Church Which Expressly Holds All Church Property in Trust for its Use and Benefit.**

**1. The Montreat Presbyterian Church is a connectional church.<sup>5</sup>**

North Carolina courts have recognized the constitutional boundaries established by *Jones* and its predecessors *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 441 (1969), and *Watson v. Jones*, 80 U.S. 679

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<sup>5</sup> This brief uses the term "connectional" synonymously with "hierarchical." "Connectional" is actually the term favored by the denomination.

(1871)<sup>6</sup>, and have concluded that civil court intervention into church property disputes “should be limited to questions that can be resolved on the basis of [neutral] principles of law such as (1) who constitutes the governing body of this particular church, and (2) who has that governing body determined to be entitled to use the properties.” *Harris v. Matthews*, 361 N.C. 265, 272, 643 S.E.2d 566, 570 (2007) (citing *Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973)). For this reason, a central question for the North Carolina courts in determining property rights involving or arising from a church dispute is whether the church is connectional or congregational. *Daniel v. Wray*, 158 N.C. App. 161, 580 S.E.2d 711 (2003). Connectional or hierarchical churches are governed by large bodies and individual congregations bear the same relation to the governing body as counties bear to the State. *Looney v. Community Bible Holiness Church*, 103 N.C. App. 469, 473, 405 S.E.2d 811, 813 (1991), quoting from *N.C. Christian Conference v. Allen*, 156 N.C. 524, 526, 72 S.E. 617, 618 (1911). Congregational churches, on the other hand, are independent republics, governed by the majority of their members and not subject to control or supervision by any higher authority. *Id.* It is “a general rule [that] the parent body of a connectional church has the right to control the property of local affiliated churches, and, as a corollary, this right will be enforced in civil courts.” *Looney v. Community Bible Holiness Church*, 103 N.C. App. 469, 473, 405 S.E.2d 811, 813 (1991).

It is well established that the Presbyterian denomination is, as a matter of law, connectional or hierarchical. See, e.g., *Jones*, 443 U.S. 595; *Hull*, 393 U.S. 440; *Watson*, 80 US 679. Courts in North Carolina have similarly recognized the Presbyterian Church as a connectional denomination. *Simmons v. Allison*, 118 N.C. 763, 770, 24 S.E. 716 (1896); *N.C. Christian Conference v. Allen*, 156 N.C. 524, 526, 72 S.E. 617, 618 (1911); *African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church*, 64 N.C. App. 391, 412, 308

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<sup>6</sup> *Jones*, *Hull* and *Watson* all concerned property disputes arising in the Presbyterian Church.

S.E.2d 73, 85 (1983); *Jacobs v. Mallard Creek Presbyterian Church, Inc.*, 214 F. Supp.2d 552, 557 (W.D.N.C. 2002) (noting the hierarchical paradigm on which the Presbyterian church is modeled and governed). Unlike the denominations at issue in cases such as *Looney* and *Fire Baptized Holiness Church v. McSwain*, 134 N.C. App. 676, 518 S.E.2d 558 (1999), in which it is apparently possible, as a matter of church polity, to be congregational as to property matters and connectional as to worship, the Presbyterian denomination recognizes no such distinction, and there is no precedent supporting it. *Daniel* distinguishes both of those decisions from the situation of a clearly hierarchical denomination with a trust doctrine historically established in its constitution, as was the case of the Episcopal denomination in that case.

The connectional nature of the Presbyterian Church is easily evidenced by its system of government. Namely, as discussed *supra*, the PCUSA is “one single ecclesiastical entity which is the continuing church resulting from the reunion of the Presbyterian Church in the United States and the United Presbyterian Church in the United States of America.” Articles of Agreement 1.1, set forth in *Book of Order*, Appendix B. All parts of the PCUSA, including its churches, are governed by the PCUSA’s Constitution, which consists of the *Book of Confessions* and the *Book of Order*. *Book of Order* at § G-1.0500. The PCUSA is governed by a system of successively higher governing bodies granted the powers described *supra*, pp. 6-8, including control over church property and its ultimate disposition for the benefit of the greater church community, and an extensive system of adjudicating disputes within the denomination.

**2. A local church’s connectional relationship with the PCUSA extends to matters involving property.**

In the Presbyterian church, the local congregation is in a hierarchical relationship with the parent body with respect to property matters. Pursuant to the property provisions in the *Book of Order*, only the presbytery has the power to hold, use, apply, transfer, or sell property of a local

church that ceases to act as a PCUSA church under the constitution, § G-8.0301; only the presbytery has the power to hold, use, apply, sell, or dispose of local church property where the local church is dissolved by the presbytery or is extinct, § G-8.0401; and only the presbytery has the power to recognize a schism in a local church and determine if one of the factions is the true church within the PCUSA and entitled to the property, § G-8.0601.

There is only one property provision in the *Book of Order* from which a local congregation may, under certain circumstances and procedures, be exempt. Pursuant to § G-8.0701, a local congregation may become exempt from § G-8.0501 (preventing the sale or encumbrance of church property without written permission of the presbytery) and § G-8.0502 (preventing a lease exceeding five years of real property without written permission of the presbytery) *if* that particular church was not subject to any similar provision of the Constitution of the church of which it was a part of prior to the formation of the PCUSA, *and* if that particular church voted for the exemption within a period of eight years following the establishment of the PCUSA.

The Montreat church qualified for the exemption under § G-8.0701 and correctly followed the procedures to be exempt from G-8.0500 *et seq.*. See Exhibit D to Complaint and Aydelotte Affidavit, Resolution of May 6, 1990.). By availing itself of the exemption, the church was simply permitted to continue engaging in property transactions as it had done in the past as a member church of the PCUS, which lacked any requirement of presbytery approval. In accordance with this denominational policy, the Montreat church has acquired, sold, leased, or encumbered its property over the years of its existence without written permission from the Presbytery, for none was required.

The church's adherence to the procedural requirements of G-8.0701 evidences its assent to the *Book of Order* and to the hierarchical governance of church matters, including property

ownership. See e.g., *Daniel v. Wray*, 158 N.C. App. at 170-71, 580 S.E.2d at 718 (enforcing trust clause in the national constitution where the connectional local church had pledged to follow the denomination's constitution and had a long history of participation in the connectional relationship).

In fact, it is not possible simultaneously to be a member of the PCUSA and yet to be "congregational" as to its property matters, if defendants so contend, for "property matters" are a fundamental part of Presbyterian doctrine, as explained previously. Not a single case involving a member church of the PCUS or the PCUSA, whether from the several that have reached the United States Supreme Court, or from the North Carolina appellate courts, has found that a Presbyterian church can be connectional as to matters of doctrine and worship, and congregational as to property matters. Such a dearth of supporting precedent for defendants is not surprising, because all member churches of the PCUSA agree to be bound by the *Book of Order*, which explicitly provides, as a matter of church doctrine, that all church property, including property held by a corporation, is held in trust for the denomination. All officers of a local church, both pastors and elders, take a solemn vow upon their installation that they will "be governed by our church's polity, and . . . abide by its discipline." *Book of Order* at § G-14.0207e (elders), § G-14.0405b (pastors). Defendants' pastor and elders may not pick and choose which parts of the church's polity they will obey; to do so would be to violate their solemn oaths.

C. **The Montreat Church Has Expressly Agreed To Be Bound by the Property Trust Clause.**

As set forth above, the Montreat church accepted the reunited denomination's offer to allow former PCUS churches to be governed in property matters by Chapter 6 of the PCUS *Book of Church Order* rather than Chapter 8 of the PCUSA *Book of Order* by exercising the option to

exempt itself from § G-8.0501 of the *Book of Order*. The church's action is memorialized in the congregational resolution adopted May 6, 1990, a copy of which is attached to plaintiffs' complaint and Aydelotte Affidavit as Exhibit D. In its formally adopted resolution, the Montreat church voted to exempt itself from the requirement that the Presbytery approve sales or encumbrances of its property and agreed that it would, instead, "hold title to all of its property and reserve and affirm all of its rights to freely and fully exercise its privileges of incorporation and property ownership under the provisions of the Constitution to which it was subject immediately prior to the establishment of the Presbyterian Church (U.S.A.)." As previously stated, immediately prior to the establishment of PCUSA by the reunion of the Northern and Southern denominations, Chapter 6 of the PCUS *Book of Church Order* included § 6-3, the property trust clause, which provided as follows:

All property held by or for a particular church, whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church in the United States.<sup>7</sup>

Thus the Montreat church expressly accepted a trust in favor of the denomination upon all property held by the church – as is the case with every single other member church of its denomination.

**D. This Court Has Jurisdiction to Resolve Plaintiffs' Claims.**

As demonstrated by the cases cited above, on numerous occasions the courts of this state have exercised subject-matter jurisdiction over disputes substantially similar to that presented in this case. No superior court has, as far as the reported decisions indicate, ever declined to

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<sup>7</sup> As previously pointed out, Chapter 6 also provides for a trust in favor of the denomination in a number of other sections as well. See § §6-1, 6-2, 6-4, 6-5, and 6-10 (Exhibit B to Complaint). The chapter also states that it is "declaratory of principles to which the Presbyterian Church in the United States and its antecedent church bodies have adhered from the inception of the presbyterian form of church government." It would be very difficult for any pastor, elder, or congregant reading Chapter 6 not to comprehend that it required church property to be held in trust for the denomination.

exercise jurisdiction over a real controversy as to which faction of a schismatic church is entitled to possession and ownership of the church's property. As our Supreme Court has recognized, "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property[.]" *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007), quoting from *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, supra, 393 U.S. at 449. When "relationships involving church property [have been structured] so as not to require the civil courts to resolve ecclesiastical questions," noted the Court in *Harris*, "[c]ivil court intervention into church property disputes is proper." *Id.* When the dispute does not involve one of property, but merely issues of church governance, and no neutral principles exist to enable a court to resolve such issues, then *Harris* holds that courts may not intervene in such ecclesiastical matters. See also *Tubiolo v. Abundant Life Church*, 167 N.C. App. 324, 605 S.E.2d 161 (2004) (holding court had jurisdiction even over an issue of whether plaintiff's church membership was properly terminated, provided the court's inquiry is confined to a determination of whether by-laws were properly amended).

The courts of the State have no jurisdiction over and no concern with purely ecclesiastical questions and controversies. . . . The courts do have jurisdiction as to civic, contract and property rights which are involved in or arise from a church controversy, including the right to determine the type organization of a particular church.

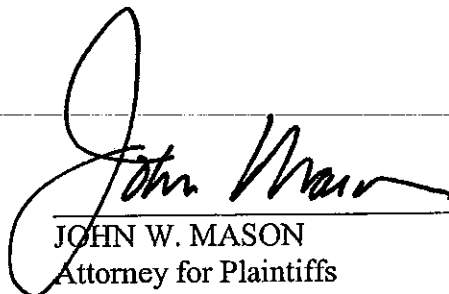
*Braswell v. Purser*, 282 N.C. 388, 393, 193 S.E.2d 90, 93 (1972) (emphasis added). In this case, resolution of the issues will not require the court to determine purely ecclesiastical questions, but rather to apply either the hierarchical deference or neutral principles approaches expressly sanctioned by our courts as modes of analysis that do not violate the Constitution. Under either of those approaches, it is clear that plaintiffs will be entitled to the relief they seek.

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, together with the accompanying Affidavit, were served on all parties to this action by delivering a copy thereof to the offices of counsel for defendants at the following address:

William A. Parker  
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This 14 day of January, 2009.



JOHN W. MASON  
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