

STATE OF NORTH CAROLINA

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 NCCS
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.
Schmerhorn, individually and as Trustees
of the Montreat Presbyterian Church, an
unincorporated religious congregation
organized and existing under NCCS
Chapter 61,

Defendants.

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

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION TO STRIKE

Defendants have moved to strike certain paragraphs and portions of plaintiffs' complaint in this action pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure on the grounds that such paragraphs and portions of the complaint contain irrelevant, immaterial, impertinent or scandalous matter. In opposition to defendants' motion, plaintiffs submit this Memorandum of Law and the exhibits attached hereto.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose underpinning Rule 12(f) of the North Carolina Rules of Civil Procedure is to avoid expenditures of time and resources before trial by removing feigned issues, introduced in the complaint, from consideration. *Estrada v. Jaques*, 70 N.C. App. 627 (1984). In considering a motion to strike pleadings under Rule 12(f), generally well-pleaded facts are accepted as true... and matters outside the pleadings will not be considered. *Daily v. Mann Media, Inc.*, 95 N.C. App. 746 (1989).

Defendants' motion to strike should be denied since the words that defendants object to are either commonly understood terms or have been used consistently with the usage as in the *Book of Order* of The Presbyterian Church (U.S.A.) or PCUSA. Defendants' motion to strike the Fifth Cause of Action of the complaint should also be denied as the plaintiffs have the right to present evidence in good faith as to the relevant facts surrounding these claims at trial. It is well established under North Carolina law that a matter should not be stricken from a pleading unless it has no possible bearing on the litigation. If there is any question as to whether an issue may arise, the motion to strike should be denied. *Shellhorn v. Ragan*, 38 N.C. App. 310 (1978).

II. DEFENDANTS' MOTION TO STRIKE THE WORD "SCHISMATIC"

In paragraph 3(a) of defendants' motion to strike, defendants request an order striking all paragraphs and portions of paragraphs or references in the complaint to the Montreat Presbyterian Church d/b/a Montreat Presbyterian Church, E.P.C. as "schismatic," "the schismatic congregation," "schismatic Montreat Church," or any reference to schismatic as it relates to defendants, asserting that said allegations are irrelevant, impertinent or scandalous.

Defendants' motion should be denied since the terms "schism" or "schismatic" are commonly understood terms to describe a division or split within a group or organization, particularly with a religious group. *Blacks Law Dictionary*, 8th edition, defines a schism as follows: (1) a breach or rupture, a division especially among members of a group, as of a union; (2) a separation of beliefs and doctrines by persons of the same organized religion, religious denomination or sect. The *Merriam-Webster Dictionary* (online) defines a "schism" as follows: (1) a division, separation, discord, disharmony; (2) (a) a formal division in or separation from a church or religious body, (b) the offense of promoting schism. See attached **Exhibits A and B**.

The *Book of Order* of PCUSA also uses the term "schism" when explaining the course of action that is required to be followed as to the property of a church in schism. See the *Book of Order*, paragraph G-8.0600 attached as **Exhibit C**. Specifically, this section of the *Book of Order* states that: "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.)." (emphasis added)

Plaintiffs' use of the terms "schism" or "schismatic" are used to identify defendant Montreat Presbyterian Church d/b/a Montreat Presbyterian Church, E.P.C. as the group that split or divided itself from the remaining congregation of plaintiff Montreat Presbyterian Church (PCUSA) due to a difference of religious beliefs. The use of the words "schism" and "schismatic" are not used in a derogatory, impertinent or scandalous manner, but rather are merely descriptive as such terms are commonly used and understood to mean the group that undertook the split or separation.

III. DEFENDANTS' MOTION TO STRIKE THE WORDS "TRUE CHURCH"

In paragraph 3(c) of defendants' motion to strike, defendants ask the Court to strike all references to the plaintiff Montreat Presbyterian Church as being the "true church," asserting that said use of such words is irrelevant, immaterial or impertinent to the property issues involved in this action.

As explained above, the *Book of Order* of PCUSA uses the term "true church" when describing the course of action that is required to be followed as to the property of a church in schism. See the *Book of Order* paragraph G-8.0600 attached as Exhibit C. Plaintiffs' use of the term "true church" is consistent with its use in the *Book of Order* to identify the faction in a schism that is affiliated with the Presbyterian Church (U.S.A.). The use of the words "true church" is not irrelevant, immaterial or impertinent to the property issues involved in this matter, but rather is descriptive of the group affiliated with the Presbyterian Church (U.S.A.) consistent with the *Book of Order*. Therefore, defendants' motion to strike these words should be denied.

IV. DEFENDANTS' MOTION TO STRIKE THE FIFTH CAUSE OF ACTION

In paragraph 3(b) of defendants' motion to strike, defendants ask the Court to strike the Fifth Cause of Action: Actual or Constructive Fraud and Constructive Trust/Unjust Enrichment consisting of paragraphs 65 through 71 of the complaint, asserting that such cause of action contains irrelevant, immaterial, impertinent or scandalous matters.

The purpose underpinning Rule 12(f) is to avoid expenditures of time and resources before trial by removing feigned issues, introduced in the complaint, from consideration. *Estrada v. Jaques*, 70 N.C. App. 627 (1984). In considering a motion to strike pleadings under Rule 12(f), generally well-pleaded facts are accepted as true... and matters outside the pleadings will not be considered. *Daily v. Mann Media, Inc.*, 95 N.C. App. 746 (1989).

Defendants' motion should be denied as plaintiffs have in good faith pleaded facts sufficient to support a claim for actual or constructive fraud and constructive trust as to the property in question. The claims of actual or constructive fraud and constructive trust have a clear bearing on the litigation in this case as they contain assertions as to deliberate, intentional actions taken by Steven T. Aceto, a member of Defendant Montreat Presbyterian Church d/b/a Montreat Presbyterian Church, E.P.C., who knew or should have known that the 1961 edition of the *Book of Order* that he attached to Exhibit E to the complaint had been repealed and modified in 1982. These facts are significant as this was the document that Mr. Aceto caused to be recorded in the office of the Registry of Deeds in Buncombe County, North Carolina. Further, Mr. Aceto knew or should have known that the version of the document that was sent to the plaintiff Presbytery (Exhibit D to the Complaint) differed substantially from Exhibit E and that Exhibit E was never sent to plaintiff Presbytery. These facts are sufficient to support a claim that Mr. Aceto intentionally or with reckless abandon or gross disregard for the truth caused an untrue document to be filed with the Buncombe County Register of Deeds and has never attempted to correct the filing.

Plaintiffs have the right to present evidence in good faith as to the relevant facts surrounding these claims at trial. *Daniel v. Gardner*, 240 N.C. 249 (1954). Furthermore, it is well established under North Carolina law that a matter should not be stricken from a pleading unless it has no possible bearing on the litigation. If there is any question as to whether an issue may arise, the motion to strike should be denied. *Shellhorn v. Ragan*, 38 N.C. App. 310 (1978).

Plaintiffs assert that the claims of actual or constructive fraud and constructive trust have a material bearing on this action. Plaintiffs plan to introduce evidence to further support such claims, including, but not limited to, evidence that will show that Mr. Aceto had actual

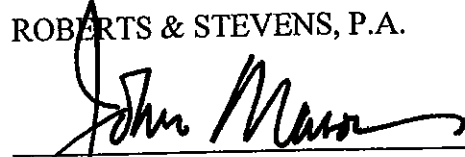
knowledge before the congregational meeting of Montreat Presbyterian Church in the Fall of 2006 at which the schism was approved that the document filed on the public record (Exhibit E to the Complaint) was false because a repealed version of the *Book of Order* was attached to the filing, when Mr. Aceto knew that in the years immediately prior to establishment of the PCUSA, the constitution of the Presbyterian Church in the United States (PCUS) had been changed to add a trust clause. Based on this evidence the issue of whether there were actual or constructive fraudulent acts taken by Mr. Aceto and/or others will arise at trial. Therefore, defendants' motion to strike the Fifth Cause of Action should be denied and the Fifth Cause of Action should remain in the complaint.

CONCLUSION

Based upon the foregoing facts and principles of law, plaintiffs respectfully ask that the defendants' motion to strike pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure be denied.

This the 14th day of January, 2009.

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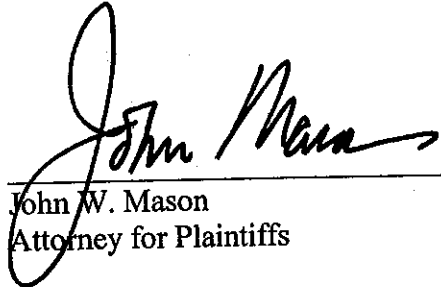
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike was served on all parties to this action by delivering a copy thereof to the offices of counsel for defendants at the following address:

Robert B. Long, Jr., Esq.
William A. Parker, Esq.
Long, Parker, Warren & Anderson, P.A.
14 South Pack Square, Suite 600
Asheville, NC 28802

This 14th day of January, 2009.



John W. Mason
Attorney for Plaintiffs

a market-maker. • This action violates association of Securities Dealers guidelines. *vb.*

scandal. 1. Disgraceful, shameful, or degrading acts or conduct. 2. Defamatory reports or rumors; esp., slander. See SCANDALOUS MATTER.

"Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause, to which may be added that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous. The matter alleged, however, must be not only offensive, but also irrelevant to the cause, for however offensive it be, if it be pertinent and material to the cause the party has a right to plead it. It may often be necessary to charge false representations, fraud and immorality, and the pleading will not be open to the objection of scandal, if the facts justify the charge." Eugene A. Jones, *Manual of Equity Pleading and Practice* 50-51 (1916).

scandalous matter. *Civil procedure.* A matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense. • A federal court — upon a party's motion or on its own — can order a scandalous matter struck from a pleading. Fed. R. Civ. P. 12(f). Cf. IMPERTINENT MATTER. [Cases: Federal Civil Procedure ⇨1127; Pleading ⇨364(4). C.J.S. *Pleading* § 683.]

scandalous subject matter. *Trademarks.* A word, phrase, symbol, or graphic depiction that the U.S. Patent and Trademark Office may refuse to register because it is shockingly offensive to social mores. • Although the Lanham Act uses the phrase "immoral, deceptive, or scandalous subject matter," courts have not distinguished "scandalous" from "immoral." [Cases: Trade Regulation ⇨161. C.J.S. *Trade-Marks, Trade-Names, and Unfair Competition* § 159.]

scandalum magnatum (skan-də-ləm mag-nay-təm). [Law Latin] *Hist.* Actionable slander of powerful people; specif., defamatory comments regarding persons of high rank, such as peers, judges, or state officials.

"Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are held to be still more heinous; and, though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury; which is redressed by an action on the case founded on many ancient statutes; as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained." 3 William Blackstone, *Commentaries on the Laws of England* 123-24 (1768).

scarlet-letter punishment. See *shame sanction* under SANCTION.

scarlet-letter sentence. See *shame sanction* under SANCTION.

scatter-point analysis. A method for studying the effect that minority-population changes have on voting patterns, involving a plotting of the percentage of votes that candidates receive to determine whether voting percentages increase or decrease as the percentages of voters of a particular race increase or decrease.

scènes à faire (sen ah fair). [French "scenes for action"] *Copyright.* Standard or general themes that are common to a wide variety of works and are there-

copyrightable. • Examples of *scènes à faire* are plot elements and character types. [Cases: Copyrights and Intellectual Property ⇨12(2).]

schedule, n. A written list or inventory; esp., a statement that is attached to a document and that gives a detailed showing of the matters referred to in the document <Schedule B to the title policy lists the encumbrances on the property>. — **schedule, vb.** — **scheduled, adj.**

scheduled injury. See INJURY.

scheduled property. See PROPERTY.

scheme. 1. A systemic plan; a connected or orderly arrangement, esp. of related concepts <legislative scheme>. 2. An artful plot or plan, usu. to deceive others <a scheme to defraud creditors>.

schism (siz-əm or skiz-əm). 1. A breach or rupture; a division, esp. among members of a group, as of a union. 2. A separation of beliefs and doctrines by persons of the same organized religion, religious denomination, or sect. [Cases: Religious Societies ⇨23, 35. C.J.S. *Religious Societies* §§ 70, 98-100.]

"It has been held that the civil courts are not concerned with mere schisms stemming from disputations over matters of religious doctrine, not only because such questions are essentially ecclesiastical rather than judicial, but also because of the separation between the church and the state However, it has also been held that the situation is different in the case of self-governing congressional churches, for here the courts do not hesitate to assume jurisdiction when a schism affects property rights, for in this form . . . each local congregation is independent and autonomous and there is no recourse within the denomination." 66 Am. Jur. 2d *Religious Societies* § 51, at 804 (1973).

school, n. 1. An institution of learning and education, esp. for children. [Cases: Schools ⇨11. C.J.S. *Schools and School Districts* §§ 4, 74, 76, 396-398.]

"Although the word 'school' in its broad sense includes all schools or institutions, whether of high or low degree, the word 'school' frequently has been defined in constitutions and statutes as referring only to the public common schools generally established throughout the United States When used in a statute or other contract, 'school' usually does not include universities, business colleges, or other institutions of higher education unless the intent to include such institutions is clearly indicated." 68 Am. Jur. 2d *Schools* § 1, at 355 (1993).

common school. See *public school*.

district school. A public school contained in and maintained by a school district. See SCHOOL DISTRICT.

private school. A school maintained by private individuals, religious organizations, or corporations, funded, at least in part, by fees or tuition, and open only to pupils selected and admitted based on religious affiliations or other particular qualifications. [Cases: Schools ⇨1. C.J.S. *Schools and School Districts* §§ 2, 807.]

public school. An elementary, middle, or high school established under state law, regulated by the local state authorities in the various political subdivisions, funded and maintained by public taxation, and open and free to all children of the particular district where the school is located. — Also termed *common school*. [Cases: Schools ⇨11.]



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Schism

One entry found. On Off

Main Entry: **schism**

Pronunciation: \ˈsi-zəm, ˈski- also ˈshi-; among clergy usually ˈsi-
Function: *noun*

Etymology: Middle English *scisme*, from Anglo-French *scisme*, *cisme*, from Late Latin *schismat-*, *schisma*, from Greek, cleft, division, from *schizein* to split — more at **SHED**

Date: 14th century

- 1 : **DIVISION**, **SEPARATION**; also : **DISCORD**, **DISHARMONY** <a *schism* between political parties>
- 2 **a** : formal division in or separation from a church or religious body **b** : the offense of promoting schism

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G-8.0500-.0701

G-8.0500
G-8.0501
Selling or
Encumbering
Church Property

5. Selling, Encumbering, or Leasing Church Property

A particular church shall not sell, mortgage, or otherwise encumber any of its real property and it shall not acquire real property subject to an encumbrance or condition without the written permission of the presbytery transmitted through the session of the particular church.

G-9.0000

G-9.0100

G-9.0101
Definitio

G-8.0502
Leasing Church
Property

A particular church shall not lease its real property used for purposes of worship, or lease for more than five years any of its other real property, without the written permission of the presbytery transmitted through the session of the particular church.

G-8.0600
G-8.0601
Property of
Church in Schism

6. Property of Church in Schism

The relationship to the Presbyterian Church (U.S.A.) of a particular church can be severed only by constitutional action on the part of the presbytery. (G-11.0103i) If there is a schism within the membership of a particular church and the presbytery is unable to effect a reconciliation or a division into separate churches within 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 within the Presbyterian Church (U.S.A.). This determination does not depend upon which faction received the majority vote within the particular church at the time of the schism.

G-9.010:
Distinct
Governn
the State

Ecclesia
Jurisdict

G-8.0700
G-8.0701
Exceptions

7. Exceptions

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.

G-9.010
Unity o
Govern

G-9.010
Particiq
Repres