

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

STEVE GASKINS,)
)
MICHAEL MANFREDI,)
)
ROLAND SMITH,)
)
KEVIN ELWELL,)
)
and)
)
ADAM JEANTET.)
)
Plaintiffs,)
)
v.) Case No. CL-2021-0010198
)
MCLEAN BIBLE CHURCH, INC.,)
)
Serve:)
McLean Bible Church Inc.)
8925 Leesburg Pike)
Vienna, VA 22182)
)
Defendant.)

SECOND AMENDED COMPLAINT - BREACH OF CONTRACT & INJUNCTIVE RELIEF

COME NOW your Plaintiffs, Steve Gaskins, Michael Manfredi, Roland Smith, Kevin Elwell and Adam Jeantet, by counsel, and propound this Complaint for breach of contract and request for injunctive relief, and pray this honorable Court to remedy Defendant's breach of contract with Plaintiffs, and to enjoin Defendant from taking numerous actions in violation of Plaintiff's rights to a democratic process as protected by Virginia law. In support thereof, Plaintiffs state as follows:

I. INTRODUCTION

1. This is a breach of contract action seeking to remedy Defendant's illegal actions to deny Plaintiffs their rights to cast a free and fair vote, to have those votes lawfully counted, and to enjoy their right to a secret ballot.

PARTIES

2. Plaintiff Steve Gaskins is a natural person, a citizen of the United States and the Commonwealth of Virginia, and a member of McLean Bible Church ("MBC" or "the Church").

3. Plaintiff Michael Manfredi is a natural person, a citizen of the United States and the Commonwealth of Virginia, and a member of McLean Bible Church.

4. Plaintiff Roland Smith is a natural person, a citizen of the United States and the Commonwealth of Virginia, and a member of McLean Bible Church.

5. Plaintiff Kevin Elwell is a natural person, a citizen of the United States and the Commonwealth of Virginia, and a member of McLean Bible Church.

6. Plaintiff Adam Jeantet is a natural person, a citizen of the United States and the Commonwealth of Virginia, and a member of McLean Bible Church.

7. On information and belief, Defendant McLean Bible Church is a Virginia unincorporated association, a house of religious worship located in Fairfax County and the Commonwealth of Virginia.

II. JURISDICTION AND VENUE

8. This Court has jurisdiction over the contract dispute at the heart of this action pursuant to § 17.1-513 of the Code of Virginia. This Court has jurisdiction to grant the requested injunction pursuant to § 8.01-620 of the Code of Virginia.

9. Venue is proper in this Court pursuant to § 8.01-262 (1), (3) and (4) of the Code of Virginia, as the defendant Church is located in Fairfax County, several Plaintiffs are residents of

Fairfax County, and the actions complained of as breaches of contract and the actions taken by Defendant that Plaintiffs seek to enjoin occurred in Fairfax County.

III. BACKGROUND

A. The MBC Constitution's Insular Framework Gives Vast Power to the Board of Elders

10. Defendant McLean Bible Church ("MBC" or "the Church") styles itself as an independent evangelical Christian house of worship, located in Vienna in Fairfax County, Virginia.
11. MBC is governed pursuant to a church Constitution ("the Constitution"). A copy of the Constitution is attached as Plaintiffs' Exhibit 1.
12. The "ruling body" of the Church is designated as a "Board of Elders." Constitution, Art. VI, § 1.
13. The Current Board of Elders is composed of David Platt, Lawrence Cooper, Patrick Lee and Wayne Fujito. In addition, in July, three additional Elders – Chuck Hollingsworth, Ken Tucker and Jim Burris, were purportedly elected as Elders. For purposes of this Complaint, these seven individuals are referred to collectively as "the Elders" or "the Board."
14. Platt is an Elder by virtue of this Lead Pastor position alone and is elected in a manner distinct from other Elders.
15. No one may serve as an Elder without receiving an affirmative three-quarters vote at the appropriate Congregational Meeting. The Lead Pastor is selected (confirmed) at a special Congregational Meeting pursuant to Art. IX, § 1, B, while regular Elders are elected at the June Congregational Meeting pursuant to Art. VI, §§ 3, 4.

16. The Constitution operates as a contract between the Church and its members, under which the members have certain rights. ¹
17. The Constitution guarantees a right to vote on church business to all “active members who have passed their sixteenth (16th) birthday.” Constitution, Art. V, § 2.
18. A person may become a member of MBC by a unanimous vote of the Elders, subject to confirmation by a three-quarters vote of “active members present at any congregational meeting.” Art. V, § 3.
19. According to Art. V, § 4, a member who misses eight consecutive weeks or more of worship services “without reasonable excuse” “shall be declared inactive by the Board of Elders.” The same section provides that “[i]nactive members shall have no vote in congregational meetings....”
20. The Constitution provides no guidance as to how a determination shall be made that a member is absent for eight consecutive weeks, or has no “reasonable excuse.”
21. Moreover, the Church does not call a roll or keep records of members’ attendance at worship services.
22. Moreover, the Church has significant numbers of members who participate in the Church’s service through the Church’s online livestream, in particular since the onset of the coronavirus pandemic in March, 2020.

¹ See, e.g. *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856 (1958) (“The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts.”) *Gibson v. BSA*, 359 F. Supp. 2d 462, 468 (E.D. Va. 2005) (“Under Virginia law, corporations or associations may not act contrary to or beyond the scope of their own rules, policies or procedures”); *Reid v. Gholson*, 229 Va. 179, 189-90 (1985) (“[Church members] may appeal only to the simple and fundamental principles of democratic government which are universally accepted in our society. These principles include the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes. Such rights are fundamental to our notions of due process. They are neutral principles of law, applicable not only to religious bodies, but to public and private lay organizations and to civil governments as well”).

23. In fact, at the outset of the coronavirus pandemic in March, 2020, the Church suspended all in-person worship services and held only online worship services for some time.² For quite some time, according to Platt, he had to preach to “multitudes” of people only through a livestream.³

24. Accordingly, the Church and the Board have no practical means to determine that a member has missed eight consecutive weeks.

25. In addition, the Church itself on March 14, 2020, suspended all in-person worship services “until further notice,” holding all services online only. A copy of the email from MBC suspending all in-person worship services is attached as Exhibit 2.

26. MBC continued for more than eight weeks with no in-person services at all.

27. By itself suspending all in-person services due to COVID, Defendant has made clear its position that absence from a worship service due to COVID concerns is in fact a “reasonable excuse.” Defendant cannot now argue the opposite; that somehow missing services due to COVID concerns is an action subject to church discipline as a “religious” matter.

28. The Constitution gives all active members the right to participate in the selection of the Elders who make up the “ruling body” of the Church.

29. In Article VI, the Constitution lays out a highly specific, and highly insular, protocol for how the Church may choose its Elders.

²Moran, Dan, “DC-Area Megachurch McLean Bible Church Moves Online and Calls for Serving Others Amidst the Coronavirus Pandemic,” Juicy Ecumenism blog, March 21, 2020, *available at* <https://juicyecumenism.com/2020/03/21/dc-area-megachurch-mclean-bible-church-moves-online-calls-serving-others-amidst-coronavirus-pandemic/>

³ Platt, David, Washington Post, “These days I preach to an empty room. But I see my church clearer than ever,” March 20, 2020, *available at* https://www.washingtonpost.com/opinions/these-days-i-preach-to-an-empty-room-but-i-see-my-church-clearer-than-ever/2020/03/27/213ef632-7057-11ea-aa80-c2470c6b2034_story.html

30. The Board of Elders must consist of a minimum of six Elders, “plus the pastor-teacher.” Elders “shall be chosen by the congregation at the June Congregational Meeting to serve for a term of three (3) years. One-third (1/3) of the Board of Elders shall be chosen each year.” Art. VI, § 1.

31. The Constitution requires that candidates for Elder may be nominated by any member of the congregation. Art. VI, § 3. The Board of Elders then appoints a nominating committee to determine the qualifications of the nominees. *Id.*

32. “The Board of Elders will then evaluate the men approved by the nominating committee as to their conformance with the qualifications.... The Board of Elders shall then submit to the congregation a list of men qualified to serve as elders.” Art. VI, § 3.

33. Art. VI, § 4 requires an affirmative vote of “seventy-five percent (75%) or more” for election as an Elder. “If as a result of the election, the Board of Elders fails to consist of a minimum of six (6) elected elders ... the elders shall submit *additional* nominations to the congregation for approval within ninety (90) days after the June Congregational Meeting” (emphasis added).

34. The Elders are given immense power under the Constitution. They have authority for [a]ppointing and removing all associate pastors and staff as may be deemed appropriate by the elders.” Art. VI, § 5G. They “provid[e] for the discipline of erring members.” Art. VI, § 5H. Such discipline includes being “publicly dismissed from the Church fellowship.” Art. V, 6. The Elders are tasked with “[a]pproving ... those who serve in Church leadership positions.” Art. VI, § 5E. The Elders are, in sum, “the final authority on ... practices, policies, and discipline” at MBC. Art. VI, § 1.

35. The congregation has no power to directly remove an Elder mid-term. Regular accountability to the congregation is limited to election, or re-election if re-nominated. Elders

may be removed only by the Board of Elders itself, with removal requiring “a three-fourths (3/4) vote of the Board.” Art. VI, § 9.

36. There are two – and only two – checks on the power of the Elders. The first is the ability of active members of the congregation to freely vote to approve or disapprove a prospective Elder’s election to begin with. Art. VI, § 4. The second occurs “[i]f the annual election process fails to produce a minimum of six (6) elected elders ... within 90 days after the elder election in June,” or “[i]f the Board of Elders is unable to fill a vacancy to bring the number of elected elders to the required minimum of six (6)...” Art. VI, § 11.

37. In this second circumstance, the entire Board of Elders must face a “vote of confidence” from the congregation. “A 75% affirmative vote of the votes cast by members of the congregation present and voting is required for the board to pass this vote.” Art. VI, § 11B. If the Board fails to receive 75 percent, then the congregation – not the Board of Elders – must choose a nominating committee to “nominate a new slate of Elders and submit them directly to the congregation for approval.” Art. VI, § 11B. “This shall take place within ninety (90) days and the congregation shall appoint a temporary six (6) man governing board for this interim. *Id.*

38. In other words, the “vote of confidence” is effectively the final veto power of the congregation. If the candidates selected by the Elders cannot win 75 percent support from the congregation, the entire Board must then win 75 percent approval, or the congregation selects a nominating committee to present a wholly new slate of Elder candidates, and selects a whole new “governing board” – in effect, a temporary Board of Elders in the interim.

B. The Elders Attempt to Deny the Democratic Rights of the Congregation Under the MBC Constitution at the June Congregational Meeting

39. In advance of the 2021 June Congregational Meeting, members of MBC put forward a number of nominees for consideration for election as Elder.

40. On information and belief, a large number of men were determined by the Board of Elders to meet the qualifications of an Elder.

41. However, in defiance of the requirement of Article VI, § 3 to “submit to the congregation a list of men qualified to serve as elders,” the Board submitted only three handpicked candidates who the Board desired to be selected by the Church – Hollingsworth, Tucker and Burris. None of the other qualified nominees were submitted.

42. On Wednesday, June 30, the Church held its June Congregational Meeting for 2021.

43. Historically, candidates for Elder have typically received nearly unanimous confirmation by the congregation.

44. However, due to perceived opposition to the three candidates put forward by the Board, MBC lead pastor David Platt and the Board – consisting at that time of Platt, Cooper, Lee and Fujito – took many heavy-handed steps in advance of the June Congregational Meeting (“the Meeting”) to attempt to secure a 75 percent vote for the candidates.

45. The Board began seeking to disqualify members from voting, attempting to purge members by designating them “inactive” on an arbitrary basis, with no record that the members had missed eight consecutive Sundays, and without investigation into whether the members had “reasonable excuse,” such as missing services for fear of the coronavirus, or even from the Church’s own cancellation of in-person services due to the coronavirus.

46. Accordingly, the Board’s actions in selecting certain members to be purged, and others to be left on the active roll, with no measurable standard for making the determination the Constitution requires, were completely arbitrary and capricious, done with the sole intent of predetermining the outcome of the election.

47. At the outset of the Meeting, it was announced from the pulpit that there would be no public discussion of the candidates for Elder or the voting processes, and that any attempt at public discussion would lead to forcible removal from the building.

48. No discussion was allowed before a hasty vote.

49. The Board of Elders challenged the voting credentials of numerous members in good standing, and arbitrarily placed a large number of such members in “inactive” nonvoting status (including Plaintiff Elwell), and required a large number of members to cast “provisional” ballots.

50. The Board informed Plaintiff Elwell that he was in “inactive” status and had been purged from the roll of active members, and thus would not be allowed to cast a vote at all.

51. Plaintiff Elwell promptly filed with the Board an Affidavit contesting his “inactive” status, and demanding to be reinstated to “active” status and allowed to vote. A copy of Elwell’s Affidavit is attached to the Complaint as Exhibit 3.

52. The Meeting check-in staff informed Plaintiff Jeantet that he was in “inactive” status and had been purged from the roll of active members, and thus would not be allowed to cast a vote at all.

53. Plaintiff Jeantet promptly contested his inactive status and prepared an Affidavit documenting his challenge and demand to be reinstated to “active” status and allowed to vote. A copy of Jeantet’s Affidavit is attached to the Complaint as Exhibit 4.

54. Never in MBC’s 60-year history had members been required to cast “provisional” ballots.

55. On information and belief, some or all of the “provisional” ballots were not counted.

56. Nevertheless, despite the Board’s heavy-handed tactics, the candidates for Elder failed to receive the required 75 percent of the congregational vote.

57. In response, faced with the Constitutional requirement of Article VI, § 4, that “the elders shall submit additional nominations to the congregation for approval within ninety (90) days after the June Congregational Meeting,” the Board never adjourned or recessed the meeting. The chairman merely dismissed the congregation and abandoned the meeting.

58. The Board’s unprecedented failure to adjourn had the effect of circumventing the Constitutional requirement to submit a new slate of Elder nominees “within ninety (90) days of the June Congregational Meeting.”

59. While Roberts’ Rules of Order does allow for meetings to be recessed rather than adjourned, this meeting was neither recessed nor adjourned. Roberts’ Rules are supplementary to the constitution or bylaws of an organization, and govern only where the constitution or bylaws are silent.⁴

60. Under Virginia law, it is the Constitution, not Roberts’ Rules, that constitutes a contract between MBC and its members, including Plaintiffs.⁵

61. The Board’s failure to either recess or adjourn the meeting was an *ultra vires* act utterly without authority and contrary to the direct text of the Constitution, which clearly contemplates that if vacant Elder positions are not filled within 90 days of a meeting in June – not some indeterminate time after some indeterminate number of “recesses” – the Board must face a congregational “vote of confidence.”

⁴ See, e.g., the website of Roberts’ Rules of Order, “Frequently Asked Questions” page. (“These rules are, in effect, default rules; that is to say, they govern only if there are no contrary provisions in any federal, state, or other law applicable to the society, or in the society’s bylaws, or in any special rules of order that the society has adopted”); available at <https://robertsrules.com/frequently-asked-questions/>.

⁵ See, e.g. *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856 (1958) (“The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts.”).

62. Church leadership, including the Board of Elders, was now aware that unless the Board could offer candidates who could secure 75 percent of the vote, the entire Board would have to face a “vote of confidence,” requiring a 75 percent affirmative vote to avoid a whole new Board being nominated by the congregation.

63. However, the Board refused to follow the dictates of Article VI, § 4 to “submit *additional* nominations to the congregation for approval” (emphasis added). Instead, MBC lead pastor David Platt and the Elders redoubled their heavy-handed tactics.

64. The Board simply and illegally resubmitted only the three candidates who had failed to receive 75 percent approval at the Meeting.

C. The Elders Deny the Democratic Rights of the Congregation Under the MBC Constitution at a new Election in July by Eliminating Secret Ballots

65. In violation of Article VI, § 4, the Board announced that a new vote, for the same candidates, would take place on Sunday, July 18.

66. However, to ensure their elected positions, the Board – utterly without precedent in MBC’s 60-year history – announced that it was arbitrarily eliminating the secret ballot for the meeting required by Article VI § 4 on July 18 (“the Art. VI, § 4 meeting”), at which the aforesaid Section requires the Board to “submit additional nominations to the congregation for approval.”

67. The Board announced in a letter to the congregation that for the Art. VI, § 4 meeting, “Ballots will not be anonymous, but will instead include a unique identifier with the active member’s name on the ballot itself.” A copy of the Board’s letter is attached as Exhibit 5.

68. The congregation includes some 100-plus members who are also paid staff of MBC. On information and belief, some of these staff persons voted against the proposed slate of Elders at the June 30 Meeting.

69. The elimination of the secret ballot would likely subject these staff persons to “discipline” up to and including termination and being “publicly dismissed from the Church fellowship” at the hands of the powerful Board of Elders, who now know, to a person, how each member and staff person voted.

70. The actions of the Board have undermined the independence of the vote, and intimidated and coerced voters with the possible loss of their livelihoods for voting the “wrong” way.

71. Other congregation members also likely face severe repercussions at the hands of the Board if they dare to vote in a way unapproved by the Board, up to and including being “publicly dismissed from the Church fellowship,” as there is no provision for congregational override of arbitrary dismissals of members by the Board on the basis of their voting choice.

72. The Board already required presentation of identification by members before receiving a ballot, for purposes of ballot integrity. But the idea that the elimination of the secret ballot has anything to do with “ballot integrity” is specious on its face. The only possible reason for the Board to know the way members vote is to mete out punishment for “wrong” votes.

73. On information and belief, between the June and July votes, the Elders continued placing into “inactive” status members they believed were among the dissenters, with no evidence that they had missed the required eight consecutive services.

74. On July 18, 2021, the Elders in fact conducted the illegally recessed election.

75. As threatened, they required each member wishing to vote to submit ballots marked with the voter’s name, so as to be able to identify the vote of each member.

76. As at the June meeting, the Elders again refused to allow any discussion before conducting the non-secret ballot.

77. As at the June meeting, the Elders again required Plaintiffs Jeantet and Elwell to submit “provisional” ballots. Both Plaintiffs’ “provisional” ballots were marked with the voter’s name.

78. There is no provision in the MBC Constitution for “provisional ballots.” According to the Constitution, an individual can be in only one of three groups – either an active member with voting rights, an “inactive” member without voting rights (and then only if eight consecutive services are proven to have been missed) or a disciplined former member removed from the rolls with no rights in the church at all.

79. In none of these cases is a “provisional” ballot necessary, and there is no provision for such in the Constitution. “Provisional ballots” are invalid by the plain text of the Constitution. The creation of “provisional ballots” was a purely arbitrary action in contradiction to the plain text, and thus *ultra vires*.

80. The purpose for the unprecedented creation of “provisional” ballots in conjunction with the equally unprecedented elimination of secret ballots, was simply so the Elders could make an *ex post facto* decision to throw out a ballot – after, of course, seeing which member’s name was written on the non-secret ballot, and whether the member had voted “correctly” or not.

81. The poisonous combination of non-secret ballots and provisional ballots was designed to facilitate a “post-vote manipulation of the count,” and to facilitate punishment of dissenting members for voting the “wrong” way.

82. This time, the Elders announced that the three candidates for Elder all narrowly exceeded the required three-quarters affirmative vote, and they were declared elected. The actual number of members voting and the vote totals for and against the three purported Elders were never announced.

83. In the months since the July vote, the Elders have “disciplined” numerous members who voted against the purported Elders at the July meeting.

84. Michael Lynch, the longtime volunteer leader of an MBC Sunday School class entitled “Discovering the Word,” was removed from leadership by one of the Elders. He had voted against the proposed Elders and the Elders were aware of this due to the non-secret ballots.

85. Theresa Miller, a longtime volunteer leader of a children’s Sunday School class entitled “Kids Quest”, was removed from leadership. She was told she was “too old” for this work. Miller had voted against the proposed Elders and the Elders were aware of this due to the non-secret ballots.

86. Numerous other members who had voted against the purported Elders received a generic email from an “MBC Elders” email address indicating that they were under “Matthew 18” discipline and would not receive any additional communications from the church until the “Matthew 18” process was concluded. The email contained no notice as to the substance of any specific charges or evidence to support any charges. A copy of the “MBC Elders” email is attached as Exhibit 6.

87. On information and belief, the Elders have continued to place dissenting members of MBC into “inactive” status since the July vote, with no evidence that the members have missed the required eight consecutive meetings, and solely on the basis of having voted the “wrong” way on July 18.

D. The Elders Attempt to Insulate Themselves from a “Vote of Confidence” by Asserting Authority to Arbitrarily “Discipline” Members for Voting Against the Elders’ Wishes

88. The MBC Constitution promises that “[a]ctive membership ... shall be open to all persons twelve (12) years of age or older who confess Christ as Savior, who desire Him to be

Lord of their lives, and who are in agreement with the doctrinal position of McLean Bible Church as stated in Article II herein.” Constitution, Art. V, § 1.

89. It further promises that all “active members who have passed their sixteenth (16th) birthday” have voting privileges in the church.” *Id.* at Art. V, § 2.

90. The Constitution does allow for placement of members into “inactive” status without voting rights. But the sole reason for such placement is if members can be shown to have “absented themselves from the worship services ... for a period of eight (8) consecutive weeks without reasonable excuse.” *Id.* at Art. V, § 4.

91. Yet in briefs submitted to this Court, Defendant has repeatedly claimed that the Elders have blanket authority to deny voting rights to members, falsely claiming that factual questions of whether a member has missed “eight (8) consecutive weeks without reasonable excuse,” as outlined in Article V, Section 4, are somehow a “religious” determination the Elders can make arbitrarily and without evidence as a matter of “Scriptural interpretation.”

92. In their Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction, Plaintiffs claim that “the Elders possess a general authority under the MBC Constitution as the ‘sole authoritative interpreter of the Scripture and the final authority on its application to practices, policies, and discipline,’ including as to the status of members and to the interpretation of the MBC Constitution itself as an exercise and expression of church doctrine, policy and practice.” [Def. Br. on SMJ at p. 13].

93. Defendant claims under this authority that whether a member has “active” status and is entitled to a vote is entirely within “the discretion of the elders.”

94. Further, Defendant claims that factual questions of whether a member has missed eight consecutive services are actually matters “related to church discipline,” over which the Elders

have discretion under the Constitution. [Def. Br. on SMJ at p. 13]. Defendant denied the jurisdiction of this Court to “force the Board of Elders to disclose the name of all persons placed on inactive status [for which the only constitutional basis is missing eight consecutive services] ... and provide the evidence to support the action.” *Id.* at pp. 13-14.

95. “Any church discipline or dismissal of members is thus an inherently religious action and cannot be subject to judicial review without violating the First Amendment,” Defendant alleged. *Id.* at p. 14.

96. By its text, nothing in the Constitution suggests that the “discretion of the elders” can override the express promises of voting rights made in the text.

97. Any reasonable person sixteen or older considering membership in McLean Bible Church would read the Constitution as promising him/her the right to vote unless he/she could be shown to have missed eight consecutive services, or taken an action subjecting the member to discipline.

98. No reasonable person would read the Constitution as granting the Elders “discretion” to arbitrarily place a member in inactive status with no evidence of missing the required eight consecutive meetings.

99. Defendant’s claim that “the discretion of the Elders” overrides the express promises of voting rights renders those promised rights a nullity, and works a fraud upon current and prospective members of MBC.

COUNT ONE – BREACH OF CONTRACT

A. Defendant Breached the Clear Textual Promises of Voting Rights in MBC’s Constitution

100. Plaintiffs reallege and incorporate by reference Paragraphs 1 to 97 *supra*, as if fully restated herein.

101. The MBC Constitution is a contract between MBC and its members, including Plaintiffs.⁶

102. The Constitution protects Plaintiffs' rights as active members to vote in the election of Elders.

103. Yet on information and belief Defendant, through the actions of the Board, has knowingly and intentionally sought to strip numerous MBC members, including Plaintiffs Elwell and Jeantet, of their voting rights under the Constitution, by arbitrarily declaring them "inactive" without evidence as to missed services or "reasonable excuse."

104. The Board has further sought to strip numerous MBC members of their voting rights under the Constitution, by requiring them, in contravention of 60 years of MBC election protocol, to vote "provisional" ballots when the Constitution makes no allowance for "provisional ballots," and on information and belief, some "provisional" ballots were not counted after the Meeting.

105. The combined effect of all Defendant's actions is to intentionally dilute the voting strength of Plaintiffs and their fellow dissenting voices, by arbitrarily and unconstitutionally denying voting rights to members in the dissenting faction, thus injuring all Plaintiffs.

106. The Board has further sought to effectively deny the voting rights of members, including Plaintiffs and in particular MBC staff, by eliminating the secret ballot for Elder Elections, a contravention of 60 years of MBC election protocol, in a brazen effort to intimidate members and staff persons into voting the "right" way at the Art. VI, § 4 meeting.

⁶ See, e.g. *Gottlieb v. Economy Stores, Inc.*, 199 Va. 848, 856 (1958) ("The constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts." *Gibson v. BSA*, 359 F. Supp. 2d 462, 468 (E.D. Va. 2005) ("Under Virginia law, corporations or associations may not act contrary to or beyond the scope of their own rules, policies or procedures").

107. Accordingly, the Board has caused MBC to breach its contract with its members, including Plaintiffs, who are entitled to have that contract enforced according to its terms.

108. Nothing in Plaintiffs' request requires this Court to wade into "the religious thicket." Plaintiffs ask only that MBC and the Board be held to the terms of MBC's Constitution, as required of any voluntary association, religious or not, by Virginia law.

B. Plaintiffs Should Also Prevail Under Doctrines of Modification, Estoppel & Waiver

109. Even if Defendant is correct that the Constitution does not in its text require secret ballot, the parties course of performance over the 60-plus-year history of MBC establishes modification of the contract to guarantee members a secret ballot in Elder elections.

110. Every election for Elder held in the history of MBC, up to and including the June 2021 congregational meeting, was held by secret ballot.

111. In Virginia,

contracting parties, through a course of dealing, may evince a mutual intent to modify the terms of their contract. The circumstances surrounding the conduct of the parties must be sufficient to support a finding of mutual intention that the modification be effective and such intention must be shown by clear, unequivocal, and convincing evidence, direct or implied [*Reid v. Boyle*, 259 Va. 356, 370 (2000).]

112. It is clear that Defendant had established over a 60-year course of dealing that members could be assured of the secrecy of their votes in elections for Elder.

113. Even if the parties did not expressly modify the contract, Defendant should be estopped from denying the right to secret ballots in Elder elections, after Plaintiffs changed their position in reliance on Defendant's unbroken practice of granting secret ballots for Elder elections.

114. Virginia recognizes the doctrine of estoppel. "Estoppel, as a doctrine in equity, is the consequence worked by operation of law which enjoins one whose action or inaction has induced

reliance by another from benefiting from a change in his position at the expense of the other.”
Employers Commercial Union Ins. Co. v. Great American Ins. Co., 214 Va. 410, 412 (1973).

115. All Plaintiffs realized after their first MBC congregational meeting that Defendant treated Elder elections differently from other congregational meetings, by respecting the right to a secret ballot in Elder votes. All Plaintiffs continued in membership at MBC, and continued supporting MBC with their time and financial contributions, in reliance upon the ability to cast their vote in church leadership elections without coercion via the secret ballot.

116. “Yet another form of estoppel is that descriptively labelled ‘estoppel by inconsistent positions’. One who has, with knowledge of the options open to him, elected to assume one position is thereafter estopped to assume an inconsistent position to the prejudice of another who has been led to rely upon his first position.” *Id.* at 413.

117. “In estoppel, intent to relinquish is not an element.....” *Id.* By conducting, unbroken for 60 years, all Elder elections by secret ballot, including the June 2021 congregational meeting, Defendant has induced detrimental reliance by not just Plaintiffs, but thousands of MBC members over six decades.

118. Defendant’s course of performance for 60 years has acknowledged the right of members to express their choice of leaders in secrecy, without coercion, and they cannot suddenly, when a single election goes the “wrong” way, change a 60-year course of performance relied upon by Plaintiffs and all MBC members as a right to vote their conscience without fear.

119. Even if estoppel did not apply in this case, Defendant has voluntarily waived any right it might have to require members to submit to non-secret ballots in Elder elections.

120. “Waiver, a doctrine at law, is voluntary action or inaction with intent to surrender a right *in esse* with knowledge of the facts and circumstances which gave birth to the right.” *Id.* at 412.

Defendants voluntarily waived the authority to terminate the right to secret ballot in Elder elections, by never attempting to terminate the right of a secret ballot for 60 years, until an election went the “wrong” way in June 2021.

121. The parties’ 60-year course of dealing shows knowing waiver of any claimed right by Defendants to strip the right of secret ballot in Elder elections.

COUNT TWO – FRAUD

122. To prove fraud, a plaintiff must show “by clear and convincing evidence the following elements: (1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.” *Richmond Metro. Auth. v. McDevitt St. Bovis*, 256 Va. 553, 557-58 (1998).

123. Each Plaintiff joined MBC with the understanding that it was a congregational church in which the congregation chooses its leaders, and that all “active members who have passed their sixteenth (16th) birthday” have voting privileges in the church.” *Id.* at Art. V, § 2.

124. The language of Article V, § 2 is a clear and unambiguous promise of voting rights to members in good standing who regularly attend services.

125. Defendant intentionally markets itself as a congregational church where the congregation votes to choose the Board of Elders.

126. Plaintiffs reasonably relied on the clear language of Article V, § 2 in agreeing to join and become contributors of their time and financial resources to MBC.

127. The ability to have a voice in selecting church leadership was material to each Plaintiff’s decision to join MBC.

128. If, as Defendant maintains, the “promise” of voting rights in Article V § 2 is purely illusory, and subject to the “discretion of the elders” to arbitrarily place members in nonvoting

status with no evidence of the required eight consecutive missed services, although no suggestion to that effect is made in the text, then Defendant fraudulently misled Plaintiffs- and indeed all its members – to induce them to join MBC at the outset, and is liable for fraud in the inducement.

129. A plaintiff who proves fraud in the inducement can recover his attorney’s fees. *Prospect Development Company, Inc. v. Bershader*, 258 Va. 75, 92 (1999).

PLAINTIFFS’ GROUNDS FOR INJUNCTIVE RELIEF

130. Plaintiffs reallege and incorporate by reference Paragraphs 1 to 127 *supra*, as if fully restated herein.

131. In recent years Virginia courts have followed the Fourth Circuit, adopting the United States Supreme Court’s standard for a preliminary injunction in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). *See, e.g., McEachin v. Bolling*, 84 Va. Cir. 76, 2011 WL 10909615, at 1 (Va. Cir. Ct. 2011) (denying temporary injunction). Under *Winter*, Plaintiffs must satisfy all four of the following requirements by a “clear showing” for the Court to grant Plaintiffs’ motion:

- (1) [it] is likely to succeed on the merits;
- (2) [it] is likely to suffer irreparable harm in the absence of preliminary relief;
- (3) the balance of equities tips in [its] favor; and
- (4) any injunction is in the public interest.

Kalos v. Greenwich Ins. Co., 404 Fed. App’x 792, 793 (4th Cir. 2010) (quoting *Winter*, 555 U.S. at 17).

132. Plaintiffs meet all four of the *Winter* factors. Most notably, Plaintiffs are likely to suffer irreparable harm in the absence of an injunction. The July 18, 2021 vote proved that if the Board is allowed to employ its unprecedented and heavy-handed tactics, including continuing to purge active members and denying the secret ballot, the Board is far more likely to achieve its desired

result. The Board thus elected will be protected from accountability by the insular nature of the MBC Constitution.

133. Likewise, courts will properly be less willing to step in and invalidate a questionable election *ex post facto*, despite its being run under such undemocratic processes.

134. There is no measurable prejudice to Defendant in being forced to allow “the right to reasonable notice, the right to attend and advocate one's views, and the right to an honest count of the votes” which are recognized under Virginia law in *Reid v. Gholson*, 327 SE 2d 107, 113 (Va. 1985). If the Elder candidates can win an honest election, they deserve to do so. But win or lose, there is no prejudice in being required to ensure a truly free and fair election.

135. A “vote” that risks costing a person his or her livelihood depending on how it is cast is not in any sense a free and fair vote. Such tactics are unacceptable in any free society, let alone a professing house of worship.

136. Accordingly, Plaintiffs pray this honorable Court to declare the July 18, 2021 election to be invalid as violative of the MBC Constitution, and to order a new election open to any member included on the Church’s active roll as of March 1, 2020, when the coronavirus pandemic created a “reasonable excuse” for members to miss services, and indeed caused the Church to cancel all in-person services for many weeks, as well as any member duly added to the Church’s membership rolls from March 1, 2020 until July 18, 2021 when the purported Elders were elected, unless any such member has requested to be removed from active voting status.

REQUEST FOR RELIEF

Accordingly, Plaintiffs respectfully request this Court to award the following relief:

1. Enter a temporary and permanent injunction ordering the Board to conduct all elections by secret ballot at any future votes on Elders under the current MBC Constitution;

2. Enter an Order that the July 18, 2021 election be declared invalid as violative of the MBC Constitution, and order a new election for the three Elder positions purportedly elected at that meeting (a “new election”);
3. Enter a temporary and permanent injunction ordering Defendant, and its Board of Elders, should the purported Elders not receive a three-quarters affirmative vote at the new election, to permit the congregation of MBC to conduct a “vote of confidence” on the entire Board, pursuant to Article 11, Section 6.B of the MBC Constitution, and order that the “vote of confidence” be conducted via secret ballot;
4. Enter a temporary and permanent injunction ordering Defendant, and its Board of Elders, to permit voting at the new election and any subsequent “vote of confidence” by any member included on the Church’s active roll as of March 1, 2020, when the coronavirus pandemic created a “reasonable excuse” for members to miss services, as well as any member duly added to the Church’s membership rolls from March 1, 2020 until July 18, 2021 when the purported Elders were elected, unless any such member has requested to be removed from active voting status;
5. Enter a temporary and permanent injunction forbidding Defendant, and its Board of Elders, from permitting voting at the new election and any subsequent “vote of confidence” by any members added to MBC membership rolls subsequent to the July 18, 2021 meeting, in order to preserve the status quo as of the date of the tainted election Plaintiffs ask this Court to declare invalid as violative of the MBC Constitution. Plaintiffs request that all members added to MBC after July 18, 2021 be permitted to vote in Elder elections only after the contested election of July 18, 2021, and any “vote of confidence” that may be required as a result, is properly

conducted by the membership duly entitled to vote at that time, in order to preserve the status quo;

6. Enter a temporary and permanent injunction ordering Defendant, and its Board of Elders, to provide counts and tabulations of all elections, beginning with June 2021, to the congregation.

7. Enter an Order appointing a special commissioner to oversee the voting process and vote counts at the new election for Elders and any “vote of confidence” that may be required as a result, in order to ensure that all proper votes – and only proper votes – are accurately and honestly counted;

8. Enter an Order directing the Board to disclose to the congregation the names of all persons placed on inactive status, or removed from the membership rolls entirely, from January 1, 2021 to the present, together with the reasons for the action taken and the evidence to support the action;

9. Enter an Order awarding Plaintiffs their reasonable attorney’s fees in this action due to the fraud perpetrated by Defendant in falsely inducing Plaintiffs to join MBC by promising that the right of members sixteen and older – including Plaintiffs – to vote in Elder elections would be protected;

10. Such other and further relief as shall seem to this honorable Court to be just and prudent.

Respectfully Submitted,

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By Counsel

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