APPELLANT'S BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 31293

IGLESIA PENTECOSTAL
FUENTE DE VIDA, INC.

Plaintiff - Appellee

v.

MARIO TORRES

Defendant & Third-Party Plaintiff - Appellant

v.

NOHEMY HERRERA

Third-Party Defendant - Appellee

APPEAL FROM THE CIRCUIT COURT
OF THE
FIRST JUDICIAL CIRCUIT
DAVISON COUNTY, SOUTH DAKOTA

HONORABLE PATRICK T. SMITH
CIRCUIT COURT JUDGE

TUCKER J. VOLESKY
Attorney at Law
305 N. Kimball, PO Box 488
Mitchell, SD 57301
tucker.volesky@tuckervoleskylaw.com
Attorney for Defendant & Third-Party Plaintiff, Appellant

RYAN D. CWACH
Birmingham & Cwach Law Offices, Prof. LLC
202 W. 2nd St.
Yankton, SD 57078
ryan@birmcwachlaw.com
Attorney for Plaintiff and Third-Party Defendant, Appellees

Notice of Appeal Filed: November 13, 2025

TABLE OF CONTENTS

PAGE(S)

APPENDIX – TABLE OF CONTENTS……………………………………………………..ii

TABLE OF AUTHORITIES………………………………………………………………..iii

PRELIMINARY STATEMENT……………………………………………………………..1

JURISDICTIONAL STATEMENT………………………………………………………….1

STATEMENT OF THE ISSUES……………………………………………………………2

1. Whether the circuit court erred in granting the Church's Motion for Summary Judgment.

2. Whether the circuit court erred in awarding the Church prejudgment interest.

STATEMENT OF THE CASE AND FACTS………………………………………………..3

STANDARD OF REVIEW…………………………………………………………………..8

ARGUMENT AND AUTHORITY…………………………………………………………9

1. The circuit court erred in granting the Church's Motion for Summary Judgment....9

2. The circuit court erred in awarding the Church prejudgment interest…..………30

CONCLUSION……………………………………………………………………………...32

REQUEST FOR ORAL ARGUMENT……………………………….…………………32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPENDIX

APPENDIX – TABLE OF CONTENTS

PAGE(S)

ORDER, SR 1106-1111…………………………...App. 1-7

STATEMENT OF UNDISPUTED MATERIAL FACTS, SR 627-632………....App. 8-12

DEFENDANT MARIO TORRES' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND DEFENDANT'S STATEMENT OF ADDITIONAL MATERIAL FACTS, SR 776-808…...………………………..App. 13-34

COMPLAINT, SR 1-4……………………………………………………..App. 35-38

ANSWER TO COMPLAINT / COUNTERCLAIM, SR 20-25………………..App. 39-44

ANSWER TO COUNTERCLAIM, SR 112-116……….……………………...App. 45-49

JOINT MOTION FOR ADOPTING STIPULATION, SR 122-125…………...App. 50-53

ORDER (Adopting Stipulation), SR 126-127………………………………..App. 55-55

AFFIDAVIT OF MARIO TORRES, SR 170-174, SR 804-808……………….App. 56-60

AFFIDAVIT OF MARIA TORRES, SR 175-177……………………………...App. 61-63

AFFIDAVIT OF ALEX COOPER VASQUEZ, SR 178-183, 798-803……….App. 64-69

VERIFIED AMENDED THIRD PARTY COMPLAINT, SR 519-528……….App. 70-79

LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE, SR 1064-1067.App. 80-83

RULE 56(f) AFFIDAVIT, SR 1089-1091…………………..…………………App. 84-87

OBJECTIONS OF MARIO TORRES, SR 1128-1131………………………...App. 88-91

TABLE OF AUTHORITIES

CASES: **PAGE(S):**

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986)………………..…12

Bank of Hoven v. Rausch, 382 N.W.2d 39 (S.D. 1986)……..…………………………..19

Chem-Age Indus. v. Glover, 2002 S.D. 122, 652 N.W.2d 756…………………………26

Dakota Cheese, Inc. v. Ford, 1999 S.D. 147, 603 N.W.2d 73……………..…………2, 22

E. Side Lutheran Church of Sioux Falls v. Next, Inc., 2014 S.D. 59, 852 N.W.2d 434…28

Est of Thacker v. Timm, 2023 S.D. 2, 984 N.W.2d 679……….…………………….14

Gannon Int'l., Ltd. v. Blocker, 684 F.3d 785 (8th Cir. 2012)…………………………...21

Limpert v. Bail, 447 N.W.2d 48 (S.D. 1989)……...……………………………………..22

Matta v. Dakota Provisions, 2024 S.D. 75, 15 N.W.3d 448…………….…………………..8

Matter of Estate of Fiksdal, 388 N.W.2d 133 (SD 1986)…………………………………10

Meyers v. S. Dakota Dep't of Soc. Servs., 1998 S.D. 62, 581 N.W.2d 151……………..…15

Oxton v. Rudland, 2017 S.D. 35, 897 N.W.2d 356……………………………………...22

Robinson v. Freedom Faith Missionary Baptist Church, 2004-Ohio-2607 (Ct. App.)….24

Schuldies v. Millar, 1996 S.D. 120, 555 N.W.2d 90………...…………………………..15

Smith Angus Ranch, Inc. v. Hurst, 2021 S.D. 40, 962 N.W.2d 626……….2, 8, 25, 26, 27

Sporleder v. Van Liere, 1997 S.D. 110, 569 N.W.2d 8……...…………………………..22

Stockwell v. Stockwell, 2010 S.D. 79, 790 N.W.2d 52……….…………………………14

Wilcox v. Vermeulen, 2010 S.D. 29, 781 N.W.2d 464……….…………………………28

Wilson v. Great N. Ry., 83 S.D. 207, 157 N.W.2d 19 (1968)……………………..……2, 9

Wipf v. Hutterville Hutterian Brethren, Inc., 2012 S.D. 4, 808 N.W.2d 678……………25

STATUTES

SDCL 15-6-12………………………………………………………………………… 9

SDCL 15-6-52(a)……………………………………………………………………… 9

SDCL 15-6-56………………………………………………………………………..2, 9

SDCL 15-6-56(c)……………………………………………………………....8, 9, 10

SDCL 15-26A-3(1)………………………………………………………………2, 30

SDCL 19-19-401…………………………………………………………………11

SDCL 19-19-801(d)(2)………………………………………………………...11

SDCL 20-10-1……………………………………………………………………....22

SDCL 20-10-2……………………………………………………………………....22

SDCL 21-1-12……………………………………………………………………2, 31

SDCL 2-1-13.1…………………………………………………………………...2, 31

SDCL 43-36-1………………………………………………………………………...14

18 U.S.C. §1962(c) ………………………………………………………………….3

Fed. R. Evid. 801, Notes on Subdivision (a)……………………………………….11

OTHER AUTHORITIES

Restat 3d Property: Wills and Other Donative Transfers, § 6.1, *comment i. Donee's acceptance presumed*……………………………………………………………………15

Restat 3d Property: Wills and Other Donative Transfers, § 6.2, *comment g. Constructive or symbolic delivery*………………………………………………………15

Restat 3d Property: Wills and Other Donative Transfers, § 6.2, *comment n. Gifts by check*…………………………………………………………………………………10, 15

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC., Plaintiff and Appellee, v. MARIO TORRES, Defendant & Third-Party Plaintiff and Appellant, v. NOHEMY HERRERA, Third-Party Defendant and Appellee.	))))))))))))))))))	#31293 APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The Settled Record will be referred to as "SR" followed by the page number. Mario Torres, Defendant & Third-Party Plaintiff and Appellant, will be referred to as "Mario." Iglesia Pentecostal Fuente De Vida, Inc., Plaintiff and Appellee, will be referred to as "the Church." Nohemy Herrera, Third-Party Defendant and Appellee, will be referred to as "Nohemy."

JURISDICTIONAL STATEMENT

Mario appeals to the Supreme Court from the Order which was signed and filed on October 10, 2025. (SR 1106-1111). Notice of Entry of Order was filed and served on October 15, 2025. (SR 1120-1127). Notice of Appeal was served on all parties and filed on November 13, 2025. (SR 1134-1135). The Court has jurisdiction under SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

1. Whether the circuit court erred in granting the Church's Motion for Summary Judgment.

   The circuit court granted summary judgment in favor of the Church on all claims. SR 1106-1111.

   SDCL 15-6-56

   Smith Angus Ranch, Inc. v. Hurst, 2021 S.D. 40, 962 N.W.2d 626

   Dakota Cheese, Inc. v. Ford, 1999 S.D. 147, 603 N.W.2d 73

   Wilson v. Great N. Ry., 83 S.D. 207, 157 N.W.2d 19 (1968)

2. Whether the circuit court erred in awarding the Church prejudgment interest.

   The circuit court awarded the Church $81,994.86 in prejudgment interest. SR 1106-1111.

   SDCL 21-1-12

   SDCL 21-1-13.1

STATEMENT OF THE CASE AND FACTS

Procedural Background

This case was filed in the Circuit Court of the First Judicial Circuit, Davison County, and came before the Honorable Patrick T. Smith. (SR 1). In it, the Church sued Mario Torres in a dispute over $223,000 frozen in Mario's checking account, for claim and delivery, conversion, and breach of fiduciary duty. (SR 2-3). Mario answered asserting counterclaims for conversion and fraud against the Church (SR 20-24), and a third-party claim under the Racketeer Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §1962(c), against Nohemy Herrera, one of the Church leaders. (SR 31-35). Pursuant to a joint motion and stipulation, the circuit court dismissed the Church's count for claim and delivery and ordered that the $223,000 be placed in an interest-bearing account held in trust pending the outcome of the action. (SR 122-127). During discovery, various motions were subsequently filed by each of the parties. (SR 146-1093). The circuit court granted judgment on the pleadings in favor of Herrera on Mario's RICO claim in a memorandum decision on July 3, 2024 (SR 603-614) and summary judgment in favor of the Church on all claims by order dated October 10, 2025, including an express list of factual findings. (SR 1106-1111).

Factual Background

By check made out for $300,000 dated May 2, 2022, written by Alex Cooper Vasquez ("Cooper Vasquez"), by writing "Iglesia pentecostal Fuente de vida" on the payee line and "tithe" on the memo line, Cooper Vasquez donated to the Church by delivering the check to the Church. (SR 170-182, 74-80). At the same time he wrote the check to the Church, Cooper Vasquez wrote two other checks also for $300,000 each dated May 2, 2022, but left the payee lines blank and wrote "missions" on the memo lines, for delivery as personal gifts to two individual pastors whom Cooper Vasquez loved, respected, and had evangelized with, Mario Torres and Daniel Cabrera. (SR 178-182, 798-802, 985-986). Thus, following a religious campaign event attended by various churches and pastors, Cooper Vasquez delivered one $300,000 blank check which stated "missions" to Mario in a sealed envelope. (SR 178, 180); (SR 1044 pp. 50-52 ll. 18-5). All told, by the three checks dated May 2, 2022, Cooper Vasquez made one offering to the Church ("tithe"), and the two personal gifts to two individual pastors ("missions"). (SR 978-979, ll. 13-3; SR 999-1000 ll. 10-1); (SR 178-182).

Other than the checks themselves and how each is written, no other writing or documentation was made at the time as to the intent or purposes of the checks. (SR 992, ll. 6-9; SR 886, ll. 1-23). Nevertheless, before writing and delivering the three checks, Cooper Vasquez met and communicated with his attorney, Sean Conway of Omaha, Nebraska, as to what he intended to do with a portion of proceeds that Conway had recovered for him on a multimillion dollar personal injury/work comp claim, including his desire to make a donation to the Church as well as personal gifts to two individual pastors including Mario Torres. (SR 23-24 ¶¶ 23-24); (SR 986-988, ll. 23-4; SR 1064-1067). Cooper Vasquez expressly waived attorney-client privilege to allow Mr. Conway to testify to their discussions regarding Cooper Vasquez's desire and intent to make the three separate gifts to three intended recipients, which immediately followed Cooper Vasquez's multimillion dollar recovery on an injury claim with Conway as his attorney. (SR 1089-1091; SR 1064-1067). Additionally, to carry out the gifts, Cooper Vasquez made his intentions expressly known to Nohemy and Francisco Herrera, that one check was going to be for the Church and two other checks were going to be for two individual pastors including Mario. (SR 799); (SR 886-888 ll. 2-22); (SR 805-806).

Before receiving the injury claim proceeds, determining who to write checks to, and before carrying out his intended gifts giving rise to the instant dispute, Cooper Vasquez had been a congregant or worshipper at the Church located in Columbus, Nebraska, where he came to know Nohemy and Francisco Herrera, leaders or operators in the Church. (SR 961-963 ll. 10-1). Mario originally lived in Columbus and worshipped at the Church, but he moved to Mitchell, South Dakota with his family in 2017, began working as a painter and leading a congregation as pastor. (SR 22 ¶¶ 6-7; SR 879-880 ll. 23-14). While Mario started preaching to followers in Mitchell, no documentation or Church meeting minutes exist or were produced appointing Mario pastor, establishing a Mitchell Church location or bank account, nor any contracts, written agreements or understandings between Mario and the Church. (SR 1072, 1079-1080, 1083); (SR 224). Nevertheless, while Mario began pastoring and teaching the gospel to a Mitchell congregation through meetings and services, Nohemy testified that she, Francisco, and Mario opened a bank account in Mitchell using Mario's address. (SR 880-881, ll. 10-1); (SR 883-884, ll. 5-2). Mario indicated that the Herreras only assisted him in opening the account in Mitchell since they could communicate in English, that the monies in the account "are God's treasures," and he did not know that the Herreras could access the account until Nohemy withdrew money from it for the first time following the deposit of the check from Cooper Vasquez. (SR 1037 pp. 22-24 ll. 19-19).[1]

[1] The deposition transcript of Mario Torres (SR 1031-1063) is cited without waiving and subject to any objections on the record. SR 1037 notes objection in that the "owner" of the account or the $223,000 at issue, is a legal conclusion. Additionally, while the

By April 2022, Nohemy and Francisco Herrera were aware that Cooper Vasquez was anticipating a substantial sum of money for an injury claim and was inclined to donate to the Church from a portion of his injury claim proceeds. (SR 885-886 ll. 14-23); (SR 986-988 ll. 23-4). In addition to discussing his intentions with his attorney, Mr. Conway, Cooper Vasquez also specifically advised the Herreras that he was making a gift to the Church as well as personal gifts to two individual pastors, Mario Torres and Daniel Cabrera, including how he intended to carry it out by writing three separate checks: one to the Church, one to Mario, and one to Cabrera. (SR 179 ¶¶ 6-8; SR 971-972 ll. 22-25; SR 978-979 ll. 13-3); (SR 886-888 ll. 1-22). With knowledge of Cooper Vasquez's intended gifting and how he would do it around the time of a campaign event held in Columbus in late April or early May 2022, the Herreras called Mario and his wife, Maria, aside for a private meeting between the four of them during the event, telling Mario that he would be receiving a check "for the Church" and "we are going to go to Yankton…to deposit the check[,]" to tell "absolutely nobody" and keep it "between us," and that "we are going to buy you a car and give you $350 per week." (SR 171 ¶¶ 4-6; SR 175-176 ¶¶ 4-9); (SR 1040-1041 pp. 36-38 ll. 23-5).

In preparing to make the gifts upon receiving his injury claim proceeds, Cooper Vasquez testified that he wrote the checks dated May 2, 2022, at his home in anticipation of a weekend campaign or religious gathering where the pastors and various churches

---

undersigned's opinion is that this case can be decided on established, neutral legal principles without delving into religious doctrine or hierarchy, jurisdictional objections are also noted in Defendant Mario Torres' Response to Plaintiff's Statement of Undisputed Material Facts, to the the extent the theory of Plaintiff's case seeks to delve into matters of religious doctrine or church hierarchy as supporting grounds for its claims. (at SR 787-794).

would be present, to personally deliver the checks as intended. (SR 968-969, ll. 5-6). Cooper Vasquez testified that the checks for the two pastors were to be a surprise for each of them upon opening the sealed envelopes. (SR 967 ll. 11-20; SR 969 ll. 7-25); (SR 984-986 ll. 11-3). However, relying on the representations made to him by the Herreras anticipating the gift, when Mario opened the envelope, he advised Nohemy that the check was received as anticipated; Nohemy took the check from Mario, wrote on the payee line "Iglesia P. Fuente de vida" and then deposited the $300,000 check in the Mitchell account she could access. (SR 171 ¶¶ 7-12; SR 180).[2]

After learning through his own bank statements weeks later that all three checks had been made to list the Church as payee, Cooper Vasquez began to ask questions and make inquires to his bank, the Herreras and the individual pastors. (SR 969-972, ll.18-25); (SR 990-992 ll. 16-5); (SR 1003-1004 ll. 16-21); (SR 1007 ll. 8-19); (SR 172). When it came to light that the Herreras had talked to Mario in anticipation of him receiving Cooper Vasquez's gift and the Church was asserting control over the money intended for Mario (despite Herreras also making statements that Mario could take the money), the truth was uncovered and Mario transferred $223,000 of the remaining proceeds from the $300,000 check he had been given by Cooper Vasquez, to another

[2] In receiving the $300,000 "tithe" and then taking both $300,000 "missions" checks from Mario and Cabrera, despite her initial denials, Nohemy acknowledged disregarding corporate formalities, bylaws, policies, and/or other laws by engaging in extraordinary financial activities immediately after the deposits, including hundreds of thousands of dollars in distributions to family members, related associates, and for-profit business ventures owned by the Herreras in the month of May 2022 alone. (SR 850-860, 865-868, 875-877, 884, 898-901, 927-932, 940, 1070-1083). *See* SR 519-528, Verified Amended Third-Party Complaint.

account held solely in his name at First Dakota National Bank in Mitchell. (SR 1010-1012 ll. 16-7); (SR 806); (SR 1050 pp. 74-75 ll. 17-7); (SR 23).

Cooper Vasquez testified that in making inquiries regarding the disposition of each of the two checks he intended for Mario and Cabrera, he engaged in good-faith efforts to clear the matter up through direct communications with all parties involved; and in doing so, the Herreras told him that the two pastors had authority over the respective accounts that each of the $300,000 checks stating "missions" had been deposited, and, "if they wanted to take the money they could take it, that there was no problem." (SR 969-970 ll. 18-23). Nevertheless, when Mario took his remaining $223,000 of the initial $300,000 that had been deposited into the account, the instant lawsuit resulted. (SR 1-2). As for Cabrera, who had also been an intended recipient of $300,000 taken by the Church, he elected "to avoid any problem" by effectively disclaiming Cooper Vasquez's gift. (SR 969-971 ll.18-15).

STANDARD OF REVIEW

1.) **SDCL 15-6-56(c)**: Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Matta v. Dakota Provisions, 2024 S.D. 75, ¶ 13, 15 N.W.3d 448, 454 (citing cases).

2.) **De Novo Review**: The circuit court's entry of summary judgment is reviewed under a de novo standard. The Court's task is to determine whether there are genuine issues of material facts and whether the law was correctly applied. The Court does not defer to the trial court's findings or conclusions. Smith Angus Ranch, Inc. v. Hurst, 2021 S.D. 40, ¶ 13, 962 N.W.2d 626, 629.

3.) **Burden on the Movant**: The moving party bears the burden of clearly demonstrating the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. The evidence must be viewed in the light most favorable to the non-moving party, and all reasonable doubts must be resolved against the movant. Wilson v. Great N. Ry., 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968).

4.) **Extreme Remedy**: Summary judgment is considered an extreme remedy and should only be granted when the truth is clear, and no reasonable jury could find in favor of the non-moving party. The Court has emphasized that it is not a substitute for trial when genuine issues of material fact exist. Id.

ARGUMENT AND AUTHORITY

1. The Circuit Court Erred in Granting the Church Summary Judgment on All Claims.

a. Fact Finding

The circuit court granted summary judgment in favor of the Church and against Mario on all claims by way of its order dated and filed October 10, 2025. (SR 1106-1111). In doing so, the circuit court made factual findings in its summary judgment decision. The circuit court's factual findings indicate that genuine factual disputes existed, which should have precluded summary judgment, since findings of fact are unnecessary and generally inappropriate in summary judgment decisions because the procedure presupposes no genuine factual dispute. Wilson v. Great N. Ry., 83 S.D. 207, at 211, 157 N.W.2d 19, 21; see also SDCL 15-6-52(a) ("Findings of fact and conclusions of law are unnecessary on decisions of motions under § 15-6-12 or 15-6-56…"). The circuit court's duty on summary judgment was not to find facts as in a trial to the court, but to canvass the record to determine if there is a "genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). The circuit court's summary judgment decision reads like the resolution of fact and law questions after a trial to the court.

Furthermore, the summary judgment record shows the statement of facts submitted by the Church in support of its summary judgment motion pursuant to SDCL 15-6-56(c)(1). (SR 627-632). Mario responded by submitting a concise statement of material facts for which a genuine issue exists, controverting the material facts set forth in the statement submitted by the Church and showing that there is a genuine issue for trial as required under SDCL 15-6-56(c)(2)-(3) & (e). (SR 776-797); (see also SR 1089-1092). The Church did not directly reply to Mario's concise statement of material facts, and instead, it submitted a reply brief conceding a "dispute" to the extent it "centers on what a third-party Alex Cooper-Vasquez claims to have said to various people about the blank check he wrote." (SR 1093).[3] And in its concluding sentences, Plaintiff's reply

---

[3] Plaintiff's reply brief generally referenced various grounds for objection (e.g., relevance, reliability, hearsay, and/or materiality) without particularizing any specific reasoning or identifying which evidence is objectionable, the specific ground for objection and how it applies to specific evidence. Plaintiff's reply also misconstrued material issues through sweeping, generic characterizations of the evidentiary record.

Contrary to Plaintiff's assertion, the issues do not center on what Alex Cooper Vasquez has subsequently claimed about the blank check he wrote after the relevant events or during this lawsuit. Rather, the material factual issues center on what Cooper Vasquez did and communicated, how, when, where, why, and to whom, *at the time* he received his injury claim proceeds, decided what gifts to give and how to give them, wrote the three checks dated May 2, 2022, and delivered them to his intended recipients at and/or closely following a religious campaign event attended by various churches and pastors in late April or early May 2022. See, e.g., Restat. 3d Property: Wills and Other Donative Transfers, § 6.2, *comment n. Gifts by check* ("the gift may be perfected on the basis of donative intent alone"); Matter of Estate of Fiksdal, 388 N.W.2d 133, 138 (SD 1986) (establishing gift requires clear and convincing evidence). In this regard, both parties' claims are premised on a gift, in that Mario and the Church make similarly competing claims based on the same general theory that Cooper Vasquez intended to make a gift (to the Church or to Mario) when he delivered the $300,000 check at issue. Cooper Vasquez's affidavit and deposition testimony about his own purposes and intent as to what he did or communicated, when, how, where, why, with or to whom, is based on his own personal, firsthand knowledge and directly relevant to his donative intent at the time he gave the checks, directly contradicting the Church's claim that Cooper Vasquez intended the $300,000 check he delivered to Mario to be a gift to the Church. SDCL 19-19-401. In addition to his actions in writing each of the three checks and then delivering the checks, and the manner in how he carried out his intent, also particularly relevant is the record evidence of the meetings and communications Cooper Vasquez had with his attorney Sean Conway about the injury claim proceeds used to make the gifts, and the statements Cooper Vasquez made to the Herreras, Church leaders, after he had received the injury claim proceeds through Mr. Conway's representation in April 2020 and was intent on gifting through delivery of the three checks dated May 2, 2022. Moreover, the sworn testimony of Alex Cooper Vasquez, Mario Torres, and Maria Torres also set forth specific facts directly relevant and material as to the fraud alleged in Mario's pleadings.

Additionally, Cooper Vasquez's testimony about how he received the injury claim proceeds through Mr. Conway's representation, his meetings and communications with Mr. Conway and with the Herreras about what his intent was with a portion of the proceeds, and his statements and conduct in writing and then delivering the three separate checks in the manner that he did, as well as his actions and statements upon discovery that the money intended for Mario had gone to the Church, and what the Herreras or Church leaders did and said, are "verbal acts" or "acts of independent legal significance" and are not hearsay because they demonstrate the occurrence of a statement or conduct itself, which is legally operative or relevant. See Fed. R. Evid. 801, Notes of Advisory Committee on Rules, Subdivision (a). And any opposing party statements falling under SDCL 19-19-801(d)(2) also are not hearsay. While Cooper Vasquez's affidavit and deposition testimony highlight his actions, what he did and communicated, when, how, why, and with whom, as well as what he heard or saw others do or communicate, his testimony does not constitute inadmissible hearsay or out of court statements used to prove the truth of the matter asserted. Plaintiff did not directly reply to Mario's concise statement of material facts to specifically address any evidentiary issues, nor does Plaintiff's reply brief identify which part of Cooper Vasquez's testimony, if any, would constitute inadmissible hearsay.

Further, Cooper Vasquez's testimony is reliable because it is based on his own personal knowledge about what he heard, saw, did and communicated, how, when, where, why and with whom, in the approximate time he received his injury claim proceeds, made his decisions as to what gifts to make and how, and then wrote and delivered the three checks. Although Appellees may dispute Cooper Vasquez's testimony (or the reasonably anticipated testimony of his attorney Mr. Conway) as to what he did and communicated, when, how, why, or with whom relative to his donative intent with certain portions of his injury claim proceeds, Cooper Vasquez's factual assertions are competent, reliable, and are supported and corroborated by affidavits, brief seemingly conceded the existence of genuine factual disputes on the summary judgment record: "While there is disagreement among the parties, the evidence, even weighed in favor of Defendant Torres, shows that this money was intended to be to and through the Church." (SR 1099). Thus, it appears from the record that the parties agree a dispute exists, and Cooper Vasquez's competent and admissible testimony as to what he intended with his money when he received his injury claim proceeds in April 2022 and then wrote and delivered the three checks dated May 2, 2022, as evidenced by what he did and communicated, with whom, how, when, where, and why (versus what any opposing party factually asserts in dispute), presents genuine issues of material fact that can only be resolved by a fact finder at trial through live witness testimony, credibility determinations, weighing evidence, and finding facts.

b. Finding of Fact No. 2

The circuit court's finding of fact no. 2 states, in part: "The Church maintains a checking account at First Dakota National Bank, N.A. at the bank's Mitchell branch …. All monies in that account belonged to the Church or its parish. Mario was an authorized signor…" (SR 1107). This finding was genuinely disputed because, most importantly – while Nohemy and Francisco assisted Mario in opening the account at First Dakota

---

discovery answers, and deposition testimony. The facts set forth by Cooper Vasquez's testimony are also material because in the minds of reasonable jurors, they "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

In sum, Cooper Vasquez's testimony (and that of Mr. Conway's) is presentable in form and substance to be admissible at trial for the jury's consideration in resolving the genuine issues of material fact regarding Cooper Vasquez's donative intent at the time he delivered the three checks after receiving his injury claim proceeds. The same is true of Mario's testimony which together demonstrates fraud.

National Bank, N.A. in Mitchell – the $223,000 in proceeds remaining from the $300,000 that Cooper Vasquez intended for Mario, did not belong to the Church. (SR 170-179; SR 794-808).

First, the circuit court's finding of fact no. 2 lacks factual support from the record because the Church failed to produce any corporate documentation or meeting minutes authorizing the opening or maintenance of a Mitchell checking account, Mitchell branch, "parish," appointing Mario pastor, or any writings or contractual agreements outlining any relationship between Mario and the Church from the time the account was opened. (SR 1083; SR 224). Further, as to who 'maintained' the account, Mario's address is listed on the account to receive the bank statements – not the Church. (SR 883-884). And other than the bank statements themselves which were sent to Mario's address, no documentation exists or was produced by the Church showing how it purportedly managed, maintained, or made decisions with respect to the account from the time it was opened until the $300,000 check from Cooper Vasquez was deposited.

The Church's own inconsistent record assertions contradict the finding of a "parish." Nohemy Herrera's deposition testimony described Cooper Vasquez's $300,000 gift to Mario as a gift "for the Mitchell congregation or the Mitchell church branch" in that he wrote and delivered "individual checks to each pastor at each different church." (SR 888 ll. 7-19). Nohemy went on to describe that "each church has different accounts, so Columbus has its own account and Mitchell church has its own account" and Mario had authority over Mitchell. (SR 895-896 ll. 21-10). The following discussion below explains why the $223,000 that had been in the account before Mario transferred it on July 13, 2022, never "belonged to the Church" – contrary to finding of fact no. 2 and conclusion of law no. 19(b) which states "Defendant Mario Torres wrongfully converted $223,000.00 belonging to the Plaintiff Iglesia Pentecostal Fuente De Vida, Inc. by transferring the money in the Mitchell checking account to his personal account." (SR 1110).

c. *Conversion: Competing Claims of Ownership or Rightful Possession - Donative Intent*

Establishing a claim of conversion requires a party to demonstrate (1) ownership or rightful to possession of property, and (2) wrongful interference with that possession. Est of Thacker v. Timm, 2023 S.D. 2, ¶ 41, 984 N.W.2d 679, 691. In this case, both Plaintiff and Defendant claim ownership or rightful possession of the $223,000 at issue based on a theory that the money was a gift from Cooper Vasquez.

The Church's ownership claim asserts a gift was made when, "[o]n May 02, 2022, the Church received a charitable donation of $300,000" from Cooper Vasquez. (SR 1 ¶ 7). To the extent material, it is generally undisputed that the Church received a $300,000 donation or gift by way of the check from Cooper Vasquez who neatly wrote "tithe" on the memo line and "Iglesia pentecostal Fuente de vida" on the payee line, that was delivered to the Church. (SR 799 ¶ 4, SR 802). However, it is genuinely disputed that the Church ever received a $300,000 gift by way of the blank check that Cooper Vasquez wrote "missions" on the memo line and delivered to Mario in a sealed envelope. (SR 798-800).

A gift is a transfer of property, made voluntarily and without consideration. SDCL 43-36-1. The circuit court's order identifies required legal elements to establish a gift: (1) intent; (2) delivery; and (3) acceptance. (SR 1109, quoting Stockwell v. Stockwell, 2010 S.D. 79, ¶ 19, 790 N.W.2d 52, 60). Importantly, in addition to delivery[4] and acceptance,[5] establishing a valid gift requires demonstrating the donor's present intention: "The donor must intend to relinquish the right of dominion on the one hand, and to create it on the other, and this intention to make a gift must be a present intention; mere intention to give in the future will not suffice." Meyers v. S. Dakota Dep't of Soc. Servs., 1998 S.D. 62, ¶ 12, 581 N.W.2d 151, 155.[6] The Church did not present any admissible, concrete, or undisputed evidence demonstrating a present intention – that Cooper Vasquez intended to make a gift to the Church by virtue of the $300,000 represented by the check he delivered to Mario. To the contrary, the record evidence identified in Mario's summary judgment submissions demonstrates that the donor, Cooper Vasquez, intended the $300,000 check he delivered to Mario as a $300,000 personal gift for Mario, not the Church.

In fact, Cooper Vasquez specifically testified through his affidavit and deposition that he never intended for the $300,000 represented by the check he delivered to Mario, to be a gift for the Church. It was only in April 2022 that Cooper Vasquez received his injury claim proceeds and had money to give after he met with his attorney, Mr. Conway,

---

[4] See Schuldies v. Millar, 1996 S.D. 120, ¶ 21, 555 N.W.2d 90, 97 ("Delivery may be actual or constructive, depending on the circumstances surrounding how the gift was made" (citation omitted)); e.g., Restat 3d Property: Wills and Other Donative Transfers, § 6.2, *comment g. Constructive or symbolic delivery* ("delivery is constructive if the donor gives the donee the means of obtaining possession or control of the subject gift").

[5] E.g., Restat 3d Property: Wills and Other Donative Transfers, § 6.1, *comment i. Donee's acceptance presumed* ("done cannot be expected to accept or reject a gift until he learns of it and unless a gift is rejected when the donee is informed of it the presumption of acceptance is not defeated" (citing cases)).

[6] See also, e.g., Restat 3d Property: Wills and Other Donative Transfers, § 6.2, *comment n. Gifts by check* (may be perfected based on donative intent alone).

and they discussed Cooper Vasquez's intentions with certain portions of the proceeds, including that he intended to give to the Church as well as two individual pastors including Mario. (SR 986-988 ll. 23-4; SR 1064-1067, 1089-1092); (SR 23 ¶ 24). Additionally, the Herreras were aware that Cooper Vasquez was anticipating a substantial amount of money for an injury claim and inclined to use some of the money to make gifts including, among them, to the Church. (SR 799 ¶ 6); (SR 885-888). Accordingly, in addition to meeting Mr. Conway discussing his intent to make the three gifts, Cooper Vasquez also met with the Herreras in carrying out his intent to advise them that with his injury claim proceeds he was making three specific gifts, one gift to the Church and two more gifts for two individual pastors including Mario – that two checks were for pastors "Mario and Daniel personally." (SR 799 ¶ 6); (SR 978-979 ll. 19-3; SR 982 ll. 8-17; SR 885-888).

As such, Cooper Vasquez wrote three separate checks for $300,000 each dated May 2, 2022, writing on one check "tithe" on the memo line and "Iglesia pentecostal Fuente devida" on the payee line, and, on the other two checks, writing "missions" on the memo lines and leaving the payee lines blank. (SR 800-802). The material facts identified by Mario in the summary judgment record demonstrate why this was done, what Cooper Vasquez's intent was, and how he carried it out through receipt of injury claim proceeds, meetings and communications with attorney and with Church leaders, and writing and then delivering each of the three checks as he did. If he had intended to donate all $900,000 to the Church, "I would have written only one check. Instead, I wrote three separate checks." (See SR 798-799 ¶¶ 1-8).

Unaware that the Herreras had talked to the pastors and made representations to Mario in anticipation of Cooper Vasquez's intended gift to him, it was weeks after he had delivered the checks that Cooper Vasquez became alarmed with suspicion about whether his intended recipients actually received their $300,000, conferring with his bank after reviewing his own bank account statements indicating that all three checks had gone to the Church as the named payee. (SR 990-991 ll. 16-25). After conferring with his own bank about the check deposits transferring the funds from his account, Cooper Vasquez proceeded to make inquiries and asked questions of the Herreras about the funds, seeking an explanation as to all three checks being made payable to the Church. (SR 992 ll. 2-5). He also addressed the subject with Mario by asking whether he had purchased a home for his family with the $300,000 he had given him. (SR 806); (SR 1003-1004 ll. 16-13). In learning that the $300,000 intended for Mario was being claimed by the Herreras as Church property, Cooper Vasquez acted affirmatively to effectuate his intended gift to Mario through meetings and direct communications with the Herreras and with Mario. (SR 1010-1012 ll. 16-7). Despite Cooper Vasquez's belief that any dispute over the money by the Church had been successfully avoided when the Herreras advised him during a meeting that Mario had authority over the account, managed it, and could move the money from the account if he wanted to – after Mario transferred $223,000 of the remaining $300,000 from Cooper Vasquez to an account at First Dakota National Bank in Mitchell that only Mario had access to, the Church sued Mario. (Id.); (SR 1).

The circuit court's findings of fact do not address the record evidence and specific material facts demonstrating the actions and communications of Alex Cooper Vasquez in receiving the injury claim proceeds in April 2022 and then making certain gifts from the proceeds, for example, 1) his actions and communications with his attorney Mr. Conway, and with Church leaders, regarding the injury claim proceeds and what he intended to use them for, a gift to the Church, a gift to Mario Torres, and a gift to Daniel Cabrera, 2) his actions and communications in carrying out his stated intent by writing three separate checks, distinguishing the subjects, purposes or intent on the memo lines, and delivering them separately in the manner that he did, 3) his actions and communications upon becoming suspicious through review of his own bank statements weeks after delivering the checks, 4) his actions and communications making inquiries about the money and intended recipients, 5) his actions and communications in learning through his communications with Mario what the Herreras had said to Mario prior to receiving the check, or 6) his actions and communications in attempting to effectuate the intended gift and avoid a legal dispute.

Without addressing the material facts surrounding Cooper Vasquez's receipt of injury claim proceeds and him carrying out his stated intent in the manner that he did, the court concluded as a matter of law that Cooper Vasquez "did not make a completed gift" to Mario and, therefore, all Mario's claims fail and the Church prevails. Under the logic of the circuit court's order, however, all the Church's claims must fail too since the Church's claim of ownership of the money is also based on a theory that the money was a gift. (SR 1, Complaint ¶ 7). The Church failed to present undisputed facts demonstrating that it ever received a completed gift of the $300,000 through the check Cooper Vasquez delivered to Mario which stated "missions." Nor did the circuit court's factual findings support any undisputable conclusion that Cooper Vasquez intended, at the time he was carrying out his intended gifts, to voluntarily transfer or gift $300,000 to the Church through the check he delivered to Mario.

Ultimately, the circuit court's decision seems to adopt or effectively rest on the Church's belated, unsupported and otherwise genuinely disputed ratification theory. It was only in its reply brief that the Church directly argued for the first time that somehow through the $300,000 deposit combined with subsequent events (immaterial and impertinent matters about religious rituals or doctrine such as marriage), ownership or rightful possession of the money was ratified because the money was not transferred from the account until July 13, 2022, a little over two months after the check had been deposited. This notion of ratification is legally unsupported, and genuinely disputed by the testimony of Cooper Vasquez regarding the events that occurred around his receipt of the injury claim proceeds; meetings and communications with his attorney and Church leaders about his intent to make gifts with portions of the proceeds received; the writing and delivery of the three separate checks; the review of his own bank records weeks later alerting him to the deposits and alarming suspicion; and his subsequent inquires, meetings, and communications with his bank, the Herreras and Mario regarding the money, including efforts to effectuate his intent all leading to the $223,000 transfer on July 13.

The Church's ratification argument has no basis in fact or law because, as the Plaintiff's reply brief pointed out, "Ratification…requires full knowledge of material facts." (SR 1095, citing <u>Bank of Hoven v. Rausch</u>, 382 N.W.2d 39, 41 (S.D. 1986)). It was not until Cooper Vasquez learned through own his inquiries, after becoming suspicious through review of his bank statement weeks after he had given the checks, that the $300,000 did not go to Mario as he had intended. In so learning, Cooper Vasquez was engaging in direct communications with the Herreras and Mario regarding the money, attempting to effectuate his intent which led to the $223,000 transfer from the account on July 13. Mario's record submissions demonstrate that a reasonable juror can conclude that Mario was deceived by the Church into falsely believing that the $300,000 represented by the check he received from Cooper Vasquez was for the Church, when the Church knew it was not. Cooper Vasquez did not know that that the Herreras had talked to Mario prior to his receiving the check or that the Church was actively perpetuating a fraud upon Mario until he spoke with Mario weeks later. Thus, the material facts in the summary judgment record allow a juror to conclude that Mario acted reasonably under the circumstances, and that neither Cooper Vasquez nor Mario ever ratified the Church's claim to ownership of the money originating from the $300,000 check Cooper Vasquez delivered to Mario. Accordingly, given that Cooper Vasquez and Mario lacked full knowledge of the material facts and were, in fact, victims of the Church's fraudulent scheme regarding the money at issue, ratification cannot be established as a matter of law.

At most, the circuit court's findings set forth basic foundational facts that: 1) Mario received the check delivered to him by Cooper Vasquez, 2) Mario advised Nohemy of receiving the check, and 3) Nohemy took the check, wrote the Church as payee, and deposited it into a bank account that Mario, Nohemy, and Fransico each had access to. (SR 1107-1108). Critically though, mere fact that the $300,000 was deposited into the account that was accessible by Mario, Nohemy, and Francisco, is not prima facie or indisputable evidence that the Church, Nohemy, or Francisco had ownership or any legal right to those funds. See Gannon Int'l., Ltd. v. Blocker, 684 F.3d 785, 793 (8th Cir. 2012) (rejecting argument that "when money is transferred from one party into the bank account of another party, it is prima facie evidence that the receiving party has some legal right to those funds"). Neither the Church nor the circuit court cited any authority to support the proposition that mere transfer of funds from Cooper Vasquez's bank account to the bank account accessible by Mario, Nohemy, and Francisco, somehow constitutes undisputable evidence establishing the Church's ownership of the funds transferred from Cooper Vasquez's account. It does not.

Accordingly, the circuit court erred in granting summary judgment in favor of the Church since it failed to demonstrate the absence of any genuine issue of material fact regarding the element of ownership or rightful possession of the $223,000 at issue. Mario genuinely disputed the Church's claim that it ever had ownership or rightful possession of any of the $300,000 originating from Cooper Vasquez by way of the check delivered to Mario, particularly given the record evidence of fraud and deception by the Church demonstrated through affidavits and deposition testimony. Further, Cooper Vasquez's sworn record testimony established his intent to make the $300,000 gift to Mario through the blank check which stated "missions" – not the Church. Cooper Vasquez testified he never intended the $300,000 check delivered to Mario to be a gift to the Church. At minimum, the summary judgment record presents genuine issues of material fact as to Cooper Vasquez's intent with respect to the $300,000 gift made through the check he delivered to Mario.

d. Fraud / Deceit

The Court's past opinions highlight that fraud claims inherently involve factual determinations, making summary judgment generally unsuitable in such cases. See, e.g., Oxton v. Rudland, 2017 S.D. 35, ¶ 18, 897 N.W.2d 356, 361; Dakota Cheese, Inc. v. Ford, 1999 S.D. 147, ¶¶ 19-21, 603 N.W.2d 73, 77; Sporleder v. Van Liere, 1997 S.D. 110, ¶ 13, 569 N.W.2d 8, 11; Limpert v. Bail, 447 N.W.2d 48, 50 (S.D. 1989). Here, Mario's fraud claims present genuine issues of material fact and served as an additional basis that precluded summary judgment.

SDCL 20-10-1 states: "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

> A deceit within the meaning of § 20-10-1 is either:
>
> (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
>
> (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
>
> (4) A promise made without any intention of performing.

SDCL 20-10-2.

Mario's Counterclaim alleges that Nohemy spoke with both he and his wife privately during a special event on or about April 30, 2022, prior to Mario receiving the $300,000 check from Cooper Vasquez, telling him that he would be receiving a check from Cooper Vasquez, that the check was going to be for the Church, and that he was required not to tell anybody about it. (SR 22 ¶¶ 9-11). Consistent with Mario's deposition testimony, that meeting is specifically detailed in the affidavits of Mario and Maria Torres, including Nohemy's statements and actions to conceal Cooper Vasquez's true intent for the money through misrepresentations that the check was for the Church, telling Mario that the Church is going to buy him a car and begin paying a weekly stipend but he was required not to tell anybody about the check or the arrangement, lulling, misleading, and inducing Mario into silence and false belief in anticipation of the $300,000 check Cooper Vasquez intended for Mario. (SR 171, 175-176, 805).

Indeed, Nohemy and Francisco Herrera knew about Cooper Vasquez's intended gift to Mario, because he advised the Herreras about the gifts he was making in receiving his injury claim proceeds, three specific gifts, including one to Mario personally. (SR 799). Nohemy does not dispute the meeting with Cooper Vasquez about his intent to make three separate gifts and admitted in deposition testimony that Cooper Vasquez told her that "he was going to make individual checks to each pastor at each different church." (SR 888 ll. 17-19); (SR 799). Thus, Church leadership, with knowledge of Cooper Vasquez's intention to make the individual gift to Mario personally, deceived Mario in anticipation of his receipt of the $300,000 check into falsely believing that it was for the Church and that he could not talk about it to anybody. (SR 799; SR 805-807). As such, Mario advised Nohemy that he had received the check after opening the envelope that was delivered to him by Cooper Vasquez; Nohemy took the check from Mario, wrote "Iglesia P. Fuente de vida" on the payee line, deposited the check and claimed the funds as Church property. (SR 805-807).

When Cooper Vasquez became suspicious upon review of his bank statements weeks later, made inquiries about check deposits and transfer of funds, and began asking questions about the gift intended for Mario, Cooper Vasquez discovered that the Church was claiming ownership or control over the money intended for Mario, and Mario discovered that the $300,000 from Cooper Vasquez was intended as a gift to him personally – not the Church as Nohemy had represented to him. (SR 806). Just days after Cooper Vasquez had inquired about the gift with Mario, Nohemy was on the phone with Mario to reasserted that the Church owned the money represented by the check he had been given by Cooper Vasquez, attempting to perpetuate the fraudulent scheme. (Id.).

As a result of the Church's deceit, Mario suffered damages through the Church's fraudulent conversion of the $300,000 from Cooper Vasquez that was intended for Mario. (SR 23-24). Admissible record evidence supporting Mario's fraud claims was set forth in Mario's Statement of Additional Material Facts, including affidavit and deposition testimony based on personal knowledge. (SR 794-797). While the Church did not specifically reply to Mario's factual statement, claims that sound in fraud and deceit are inherently factual and require a jury to decide.

*e. **Breach of Fiduciary Duty***

First, it needs to be noted that the Church's reply brief took issue with Mario's opposition briefing regarding the fiduciary duty claim because, in the Church's words, Mario advanced "a non-biblical argument." (SR 1097). Of course, a civil court's subject matter jurisdiction to review church matters is necessarily limited by the First and Fourteenth Amendments. See, e.g., Robinson v. Freedom Faith Missionary Baptist Church, 2004-Ohio-2607, ¶ 29 (Ct. App.) (trial court lacked subject matter jurisdiction over an action alleging breach of fiduciary duty because inquiry into such matters "would necessarily involve whether the pastor of the Church engaged in wrongdoing, and therefore, whether he should be removed as pastor"); see also Wipf v. Hutterville Hutterian Brethren, Inc., 2012 S.D. 4, 808 N.W.2d 678. Here, the Church's breach of fiduciary duty claim seems aimed at determinations about what the Church purports regarding Mario's role as a pastor, duties within church hierarchy, and whether his conduct violated church standards. (See SR 1-3 ¶¶ 4-7 & 20). As noted above, however, the Church has failed to produce any corporate records or meeting minutes appointing Mario Torres as pastor, establishing a Mitchell 'parish,' opening a Mitchell bank account, nor any written contracts, agreements or understandings as to any relationship between the Church and Mario. This lack of documentation demonstrates that determinations about Mario's pastoral role and authority necessarily involves religious doctrine or church governance beyond the jurisdiction of a civil court, given certain allegations of the Church in its pleadings and briefing arguments. Notwithstanding any 'non-biblical argument' that may necessarily be advanced, this case may be properly decided on neutral principles of law only.

Subject thereto, much like fraud, claims for breach of fiduciary duty are also typically unsuitable for summary judgment due to their fact-intensive nature. E.g., Smith Angus Ranch, Inc. v. Hurst, 2021 S.D. 40, ¶¶ 24-26, 962 N.W.2d 626, 631. Here, the circuit court erred in granting summary judgment on the Church's breach of fiduciary duty claim because the Church failed to establish each element of the claim, and there existed disputed questions of fact, at best, for the Church.

To recover on a claim for breach of fiduciary duty, a plaintiff must prove: (1) that the defendant was acting as a fiduciary of the plaintiff; (2) that he breached a fiduciary duty to the plaintiff; (3) that the plaintiff incurred damages; and (4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages. Chem-Age Indus. v. Glover, 2002 S.D. 122, ¶ 38, 652 N.W.2d 756, 772. South Dakota law reflects the traditional view that fiduciary duties are not inherent to normal arm's-length business relationships, and arise only when one undertakes to act primarily for another's benefit. Smith Angus Ranch, Inc., 2021 S.D. 40, ¶ 14, 962 N.W.2d 626, 629. The existence and scope of a fiduciary duty are questions of law, but whether a breach occurred is a question of fact. Id.

Here, while Mario has and continues to lead the Mitchell congregation as pastor, the nature and scope of any fiduciary relationship with the Church are disputed. The Church's own failure to maintain proper corporate documentation raise questions about the formal nature of Mario's role and duties. Without clear documentation of Mario's appointment, duties, and authority within the Church, the existence or scope of any fiduciary duty that he owed to the Church cannot be determined as a matter of law.

Moreover, it is disputed that Mario owed any fiduciary duty to the Church with respect to the $223,000 at issue. The record evidence shows that Cooper Vasquez, the donor, intended the $300,000 check as personal gift to Mario, not as a donation to the Church. Cooper Vasquez left the check's payee line blank so Mario could deposit it into any account of his own, and the memo line stated "missions" meaning for Mario's personal expenses, not for the Church. Critically, Church leadership knew of Cooper Vasquez's intent to make the personal gift to Mario but misrepresented to Mario that the check was for the Church. Cooper Vasquez testified that after learning the Church had taken the money intended for Mario, he engaged in meetings and communications with the Herreras who advised that if Mario wanted to move the money from the account, he could do so. See Smith Angus Ranch, Inc., 2021 S.D. 40, ¶¶ 23-25. Thus, evidence shows that Mario was the intended donee, not the Church, and that Mario acted reasonably based on the donor's intent, Herreras' misrepresentations, and subsequent clarifications, authorization or approval. These facts create genuine disputes about whether Mario's conduct constituted a breach of any fiduciary duty.

Causation and damages were also genuinely disputed. The Church claims damages from losing Mitchell followers and having to close the Mitchell location (although Mario still leads Mitchell's congregation). However, any alleged damages resulted from Church leadership's own misconduct in misrepresenting the donor's intent, rather than from Mario's withdrawal of funds that were rightfully his. Furthermore, the Church's own policies and bylaws regarding the handling of large checks, dual signatures, conflicts of interest, and documentation were not strictly followed by the Church. The Church has failed to produce any official operating budgets, periodic reviews, conflict of interest proceedings, expenditure policies, or internal audits, all of which are required by its own bylaws or policies. The evidence suggests the Church's damages, if any, resulted from its own governance failures or fraudulent activities rather than Mario's conduct. Thus, the circuit court erred in granting summary judgment in favor of the Church on its breach of fiduciary duty claim to the extent it lacked jurisdiction over the premise of the claim asserted by the Church as a religious governance dispute, Mario did not owe any fiduciary duties to the Church with respect to the money at issue, and because genuine disputes of material fact existed regarding each element of the claim.

f. Estoppel

Mario explicitly pleaded estoppel as an affirmative defense in his Answer to Complaint. Equitable estoppel requires the following four elements: (1) that the Church made false representations to or concealed material facts from Mario; (2) Mario did not have knowledge of the real facts; (3) the misrepresentations or concealment was made with the intention that it should be acted upon; and (4) Mario relied upon those misrepresentations or concealment to his prejudice or injury. E. Side Lutheran Church of Sioux Falls v. Next, Inc., 2014 S.D. 59, ¶ 17, 852 N.W.2d 434, 441; see also Wilcox v. Vermeulen, 2010 S.D. 29, ¶ 19, 781 N.W.2d 464, 471.

Deposition and affidavit testimony show that Nohemy made representations to Mario regarding the nature and intended use of the $300,000 check or money at issue. With knowledge of Cooper Vasquez's true intent to make a personal gift to Mario, Herreras met privately with Mario and his wife to tell Mario that he would be receiving a donation for the Church, that the Herreras were going to buy him a car and begin paying him a weekly stipend with the money, and that the arrangement was to remain a secret. Cooper Vasquez testified that after he learned about the disposition of the check and money intended for Mario through inquires, meetings, and communications with his own bank, the Herreras, and Mario, that Nohemy and Francisco Herrera told him (and he relayed to Mario) that Mario could simply transfer the money from the Mitchell checking account since he had authority over the account, and that there was no problem with that. Thus, taking the events in totality, Mario relied on representations by the Church and acted accordingly – first by allowing the check to be deposited into the Mitchell checking account, and later by transferring $223,000 to his personal account. As a result of Mario's reasonable reliance on those representations, Mario has faced accusations of wrongdoing and litigation seeking recovery of the funds rightfully his.

Accordingly, the record contains evidence supporting an equitable estoppel theory as an affirmative defense for Mario based on representations made to him by Church leadership, Mario's reliance on those representations, and resulting detriment. At a minimum, factual disputes existed because there are conflicting accounts regarding what was said, by whom, and to whom, and whether Mario's reliance on any statements was reasonable under the circumstances.

g. Settlement Account

As noted, the Church sued Mario after it reported to First Dakota National Bank that the $223,000 transfer Mario made on July 13, 2022, was fraudulent, and the bank froze the $223,000 in Mario's bank account. With the funds frozen because of the Church's report, the parties entered a stipulation so that the $223,000 would be put in an interest bearing "Settlement Account" to be held in trust pending the outcome of the litigation. (SR 123-125). The court adopted the stipulation and entered an order restraining any of the parties or their attorneys from disposing of the cash in the Settlement Account, and providing that interest generated on the cash in dispute shall belong to the party determined to be rightfully entitled to the $223,000 cash. (SR 127). That order was entered on August 14, 2023, and thereafter the $223,000 cash was put in the Settlement Account generating income – until the court's summary judgment order on October 10, 2025, authorized Appellee's counsel "to unilaterally take all necessary action to transfer the money in the Settlement Account to Plaintiff and close such Settlement Account without prior notice or involvement" of Appellant's counsel, including language specifically overruling the August 14, 2023 stipulated order. (SR 1110-1112).

Plaintiff's Motion for Summary Judgment did not include any request for the court to consider, let alone overrule, the stipulated order entered on August 14, 2023. (SR 625). No motion was made or noticed for hearing to ask for any order regarding the Settlement Account. Mario was not provided any notice that the court was even being asked to consider disturbing the stipulated order entered August 14, 2023, nor was he given an opportunity to be heard on the propriety of such an action. (SR 761-764, 1114-1116). Mario did not agree to the summary judgment order under SDCL 15-6-58(b), as his objections pointed out following notice of entry of the order, indicating that entry of the order did not comply with statutory law. (SR 1128). The circuit court erred when it entered the order granting summary judgment on October 10, 2025, overruling the stipulated order entered August 14, 2023, without proper notice and an opportunity to be heard on the Settlement Account, especially when Mario had a right to appeal from the summary judgment decision within thirty days of entry and ask this Court to reverse and remand for a jury trial. SDCL 15-26A-3(1).

2. The Circuit Court Erred in Awarding the Church Prejudgment Interest.

The circuit court's summary judgment order awarded the Church prejudgment interest of $81,994.86. (SR 1111). As noted, the stipulated order dated and filed August 14, 2023, recites that on July 13, 2022, Mario wrote and deposited a check for $223,000 into his checking account at First Dakota National Bank. (SR 126). Thereafter, the Church alerted First Dakota National Bank, disputing the transfer as unauthorized and causing the bank to freeze the $223,000 in Mario's account. (SR 126). As a result of the Church's dispute, the $223,000 remained frozen in Mario's account, inaccessible, until the stipulated order was entered on August 14, 2023, providing that the $223,000 would thereafter be held in trust in a money market or interest-bearing account, the Settlement Account, and restraining and enjoining the parties from disposing of the cash and earned interest. (126-127).

Prejudgment interest is generally recoverable from the day the loss or damage occurred, except during periods when the debtor is prevented by law or by the act of the creditor from paying the debt. SDCL 21-1-13.1. While Mario disputes that he owes the Church anything, Mario was prevented by the act of the Church from paying the $223,000 because the Church caused First Dakota National Bank to freeze Mario's checking account including the $223,000. Following the entry of the stipulated order of August 14, 2023, Mario was prevented from paying the $223,000 because he was restrained and enjoined from using the $223,000 in the Settlement Account which was subject to judicial control pursuant to the order.

Further, under SDCL 21-1-12, accepting payment of the whole principal, as such ($223,000 cash in the Settlement Account), waives all claim to interest. The order granting summary judgment awards the Church the Settlement Account, the $223,000 cash therein plus all income generated thereon since approximately August or September 2023.

Finally, notwithstanding the foregoing, the calculation of $81,994.86 in prejudgment interest is inflated. Mario's objection sets for the proper calculation for prejudgment interest on $223,000 in damages occurring on July 13, 2022, accruing until

September 30, 2025. (SR 1130). Based on the Category B interest rate of 10% per year, total prejudgment interest on $223,000 in damages accruing from July 13, 2022, to September 30, 2025, is $71,655.03. (SR 1130).

CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court's summary judgment decision, reinstate the stipulated order for the Settlement Account, remand the case for a jury trial, and issue such other or further relief, orders, or instructions to the circuit court as the Court deems appropriate.

REQUEST FOR ORAL ARGUMENT

Appellant would welcome oral argument as the Court may deem necessary or appropriate in its discretion.

Dated this 23rd day of March 2026.

/s/ Tucker J. Volesky
TUCKER J. VOLESKY
Attorney for Appellant
305 N. Kimball, PO Box 488
Mitchell, SD 57301
tucker.volesky@tuckervoleskylaw.com

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC., Plaintiff and Appellee, v. MARIO TORRES, Defendant & Third-Party Plaintiff and Appellant, v. NOHEMY HERRERA, Third-Party Defendant and Appellee.	))))))))))))))))))	#31293 CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Microsoft Word was used in the preparation of the foregoing Appellant's Brief and that the word count done pursuant to that word-processing system calculated 9,234 words in the foregoing Appellant's Brief, pursuant to SDCL 15-26A-66.

Dated this 23rd day of March 2026.

/s/ Tucker J. Volesky
TUCKER J. VOLESKY
Attorney for Appellant

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC.,	)	#31293
Plaintiff and Appellee,	)	CERTIFICATE OF SERVICE
v.	)	
MARIO TORRES,	)	
Defendant & Third-Party Plaintiff and Appellant,	)	
v.	)	
NOHEMY HERRERA,	)	
Third-Party Defendant and Appellee.	)	

The undersigned hereby certifies that a true and correct copy of the Appellant's Brief in the above-entitled matter was served electronically through Odyssey file and serve system which sent notification of such filing to Ryan D. Cwach, Attorney for Plaintiff and Third-Party Defendant, Appellees, on this 23rd day of March 2026.

/s/ Tucker J. Volesky
TUCKER J. VOLESKY

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:ss.
COUNTY OF DAVISON) FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, PLAINTIFF, vs. MARIO TORRES, DEFENDANT AND THIRD PARTY PLAINTIFF, vs. NOHEMY HERRERA, THIRD-PARTY DEFENDANT.	17 CIV. 22-000202 **ORDER**

Now on this 30th day of September 2025, this matter came before the Court upon Plaintiff's motion for summary judgment on all claims. Ryan D. Cwach, attorney for the Plaintiff, appeared on behalf of the Plaintiff. Tucker J. Volesky, attorney for Defendant, appeared on behalf of the Defendant. Based upon the evidence submitted and arguments made, the Court grants the Plaintiff's motion for summary judgment on all claims. The Court makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1. Plaintiff (hereinafter "Church") is Iglesias Pentecostal Fuente De Vida, Inc., a 501(c)(3) and South Dakota foreign nonprofit corporation, with churches in Columbus, NE, Yankton, SD, and formerly in Mitchell, SD.
2. The Church owns and maintains a checking account at First Dakota National Bank, N.A. at the bank's Mitchell branch (hereinafter "Mitchell checking account"). All monies in that account belonged to the Church or its parish. Mario was an authorized signor on the Mitchell checking account from the opening of the account until August 2023.
3. Defendant Mario Torres (hereinafter "Mario") is a resident of Mitchell, SD and was the pastor for the Church at its Mitchell location during the events giving rise to this cause of action.
4. Venue is appropriate in this Court because the Defendant resides in Davison County, and substantially all events given rise to this complaint occurred in Davison County.
5. At a church campaign in Columbus, Nebraska in April 2022, Alex Cooper Vasquez handed an envelope with a blank check for $300,000.00 enclosed to Mario Torres.
6. Alex and Mario did not discuss the check or money at the event or any time prior to the event.
7. Mario delivered the check to the Church President Nohemy Herrera. In Mario's presence, Nohemy wrote the Church as the Payee of the Church. Several days later, On May 03, 2022, Church President Nohemy Herrera, Pastor Francisco Herrerra, and Pastor Mario Torres drove to Yankton, South Dakota to deposit the check in the Mitchell checking account at a Yankton branch of First Dakota National Bank, N.A.

8. Mr. Cooper-Vasquez's bank accepted the check. Mr. Cooper-Vasquez was aware that the money had been deposited into a Church checking account.
9. Mario had full access to the Mitchell checking account. After the money was transferred to the Mitchell checking account, Mario began receiving a weekly stipend, received one-time cash, and utilized a debit card to make purchases out of the Mitchell checking account.
10. On July 13, 2022, without prior authorization, Mario wrote a Mitchell checking account check payable to himself for $223,000.00 and deposited it into his personal bank account. Mario refused to return the money to the Church.
11. Pursuant to the stipulation of the parties and Court order dated August 14, 2023, these funds have been placed into a Settlement Account at First Dakota National Bank, NA, held in trust by Birmingham & Cwach Law Offices, PLLC and Tucker Volesky Law Offices with further order that the Parties, officers, agents, employees, and attorneys are restrained and enjoined from transferring the money.

CONCLUSIONS OF LAW

12. "Summary Judgment is appropriate under SDCL 15–6–56 when the entire record reveals that there is no genuine issue on any material fact and that the moving party is entitled to a judgment as a matter of law." *Fisher v. Kahler*, 2002 S.D. 30, ¶ 5, 641 N.W.2d 122, 124-125. (S.D. 2002).
13. "The Court must view the evidence most favorably to the non-moving party and resolve reasonable doubts about the facts in its favor." *Mark, Inc. v. Maguire Ins. Agency*, 518 N.W.2d 227, 229 (SD 1994) (*citing Koeniguer v. Eckrich,* 422 N.W.2d 600 (S.D. 1998)).

14. To prove conversion, each party must show (1) ownership or right to possession of property at the time of conversion, (2) the party's interest in the property was greater than the other party's interest, (3)conversion by the other party, and (4) deprivation of interest in the property. *Accord First American Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31.

15. A gift must be shown by clear and convincing evidence. *Matter of Estate of Fiksdal*, 388 N.W.2d 133, 138 (SD 1986). "A gift is a transfer of property, made voluntarily and without consideration." *Stockwell v. Stockwell*, 2010 S.D. 79 ¶ 19, 790 N.W.2d 52, 60 (2010) (*citing* SDCL § 43-36-1). "In South Dakota, a gift is complete when three elements are satisfied: (1) intent; (2) delivery; and (3) acceptance." *Id.* (internal citations omitted).

16. A blank check is not an assignment of the funds and is not sufficient delivery of a gift of money. *Steffen v. Davis*, 52 S.D. 283, 217 N.W. 221, 223 (1927). *See Also Meyer v. S. Dakota Dep't of Soc. Servs.*, 1998 S.D. 62, ¶ 13, 581 N.W.2d 151, 155 (stating "[A] present donative intent must be executed by a complete and unconditional delivery.")

17. "In order to recover on a claim for breach of fiduciary duty, a plaintiff must prove: 1) that the defendant was acting as a fiduciary of the plaintiff; 2) that he breached a fiduciary duty to the plaintiff; 3) that the plaintiff incurred damages; and 4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages." *Grand State Prop., Inc. v. Woods, Fuller, Shultz, & Smith, P.C.*, 1996 S.D. 139, ¶ 16, 556 N.W.2d 84, 88.

18. "The phrase 'fiduciary breach'... is no more descriptive than the phrase 'legal malpractice[;]' [and a] cause of action for fiduciary breach requires a breach of

confidence, a breach of loyalty, or both." *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 52, 698 N.W.2d 555, 576.

19. Based on the foregoing findings of fact and conclusions of law, the Court finds:
    a. Mr. Cooper-Vasquez did not make a completed gift from himself to Defendant Mario Torres.
    b. Defendant Mario Torres wrongfully converted $223,000.00 belonging to the Plaintiff Iglesias Pentecostal Fuente De Vida, Inc. by transferring the money in the Mitchell checking account to his personal account.
    c. Defendant Mario Torres breached his fiduciary duty to the Plaintiff by unilaterally withdrawing funds from the Mitchell checking account and depositing the funds in his personal account with no prior Church authority to do so.
    d. Plaintiff has been damaged in the amount of $223,000.00 with interest thereon from July 12, 2022 to date of entry.
20. Plaintiff's motion for summary judgment is granted in favor of Plaintiff on Plaintiff's claims for wrongful conversion and breach of fiduciary duty, and on Defendant's claims for wrongful conversion and for fraud.

THEREFORE, IT IS HEREBY ORDERED that the money in the Settlement Account is awarded and shall be transferred to the Plaintiff Iglesias Pentecostal Fuente De Vida, Inc.

IT IS FURTHER ORDERED that Ryan D. Cwach, Birmingham & Cwach Law Offices, PLLC is hereby authorized to unilaterally take all necessary actions to transfer the money in the Settlement Account to Plaintiff and close such Settlement Account without prior notice or involvement of Tucker Volesky Law Offices.

IT IS FURTHER ORDERED that to the extent that this Order conflicts with the Court's prior Order dated August 14, 2023, the Court's prior Order is overruled hereby.

IT IS FURTHER ORDERED THAT prejudgment interest of $81,994.86, costs and disbursements of $4,337.57, are assessed against Defendant Mario Torres and awarded to Plaintiff.

IT IS SO ORDERED.

10/10/2025 4:28:57 PM

BY THE COURT:

____

Attest:
Guthrie, Lauren
Clerk/Deputy

STATE OF SOUTH DAKOTA) :ss. COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
IGLESIAS PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, PLAINTIFF, vs. MARIO TORRES, DEFENDANT, vs. NOHEMY HERRERA, THIRD-PARTY DEFENDANT.	17 CIV22-202 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW, Plaintiff, by and through undersigned counsel of record, Ryan D. Cwach of Birmingham & Cwach Law Offices, PLLC, and respectfully submits this Statement of Undisputed Material Facts in Support of its Motion for Summary Judgment.

FACTS RELEVANT TO ALL CLAIMS

1. Plaintiff (hereinafter "Church") is Iglesias Pentecostal Fuente De Vida, Inc., a 501(c)(3) and South Dakota foreign nonprofit corporation, with churches in Columbus, NE, Yankton, SD, and formerly in Mitchell, SD. *Compare* Cmpl. ¶ 1 *with* Ans. ¶ 3.
2. The Church owns and maintains a checking account at First Dakota National Bank, N.A. at the bank's Mitchell branch (hereinafter "Mitchell checking account"). *Compare* Cmpl. ¶ 5 *with* Ans. ¶ 6. *See Also* Cwach Aff. Ex. 3 (Nohemy Depo. 70:22-71:8).
3. Defendant Mario Torres (hereinafter "Mario") was a pastor for the Church at its Mitchell location. Mario is a resident of Mitchell, SD. *Compare* Cmpl. ¶ 2 *with* Ans. ¶ 4.
4. Venue is appropriate in this court because the Defendant resides in Davison County, and substantially all events given rise to this complaint occurred in Davison County. *Compare* Cmpl. ¶ 3 *with* Ans. ¶ 5.
5. When Mario was deposed, Mario understood that he was under the same oath as if he were testifying in court; that he would be presumed to understand the questions if he answered

the question. Cwach Aff. Ex. 2 (Mario Depo. 5:4-10). He affirmed he was able to think clearly and nothing was preventing him from telling the truth. Cwach Aff. Ex. 2 (Mario Depo. 5:18-22).

6. When Alex Cooper-Vasquez (hereinafter "Alex") was deposed, Alex understood that he was under the same oath as if he were testifying in court; that he would be presumed to understand the question if he answered the question. Cwach Aff. Ex. 1 (Alex Depo. 7:1-3; 7:16-19). He affirmed he was able to think clearly and nothing was preventing him from telling the truth. Cwach Aff. Ex. 1 (Alex Depo. 7:20-25).
7. At a church campaign in Columbus, Nebraska in April 2022, Alex handed to Mario an envelope with a blank check for $300,000.00 enclosed. Cwach Aff. Ex. 2. (Mario Depo. 51:17-52:16). *See also* Cwach Aff. Ex. 1 (Alex Depo. 25:11-20).
8. There is no writing or documentation evidencing the intent or purpose of the blank check. Cwach Aff. Ex. 1 (Alex Depo. 49:6-10).
9. Nohemy and Alex had discussions about a donation to the Church prior to Alex making the donation. Nohemy understood the conversations with Alex to mean that Alex was making three separate donations to each church location. Cwach Aff. Ex. 3 (Nohemy Depo. 74:5-25; 77:7-14; 80:9-15; 81:11-17; 104:8-15; 109:15-25).
10. Alex did not provide any specific instructions to Nohemy prior to or after making the donation. Cwach Aff. Ex. 3 (Nohemy Depo. 95:11-25).
11. Alex and Mario did not discuss the check or money at the event or any time prior to the event. Cwach Aff. Ex. 2. (Mario Depo. 57:19-21). *See Also* Cwach Aff. Ex. 1 (Alex Depo. 42:5-19; 45:12-18).
12. In Mario's presence, Nohemy wrote the Church as the Payee onto the blank check. Cwach Aff. Ex. 3 (Nohemy Depo. 83:10-84:4; 116:24-117:5).
13. At the time of the donation, Alex did not know Mario's family, where he worked, his name or how to spell it. Cwach Aff. Ex. 1 (Cooper-Vasquez Depo. 17:9-25; 33:13-15; 34:19-25; 41:15-42:11; 45:12-18; 46:1-11).
14. The term "missions" can mean many things, for a person or for a church. Cwach Aff. Ex. 2 (Mario Depo. 60:8-13).
15. In 2022, Mario had three interactions with Alex. On April 29 or 30, 2022, Alex approached Mario at the Columbus church. They did not communicate. In mid-June 2022, Mario called

Alex. In August 2022, Mario called Alex again about the money. Cwach Aff. Ex. 2 (Mario Torres Ans. to Plaintiff's Int. No. 4).

16. Alex's bank accepted the check and made payment to the Church's Mitchell bank account. Cwach Aff. Ex. 5 (Bank Statement).
17. After the check was deposited, nothing happened. Cwach Aff. Ex. 2 (Nohemy Depo. 88:3-8). The donor Alex was aware that the check was deposited in the Mitchell bank account. He did not stop it. Instead, he got married through the Church, he gave an addition $10,000 to fix a door, and additional $25,000 for mission trips to El Salvador. Cwach Aff. Ex. 1 (Alex Depo. 62:4-21). He chose not to sue the Church or Nohemy . Cwach Aff. Ex. 1 (Alex Depo. 63:22-64:7). He decided to leave the Church without any enemies or unfriendliness and did not want to cause problems. Cwach Aff. Ex. 1 (Alex Depo. 63:14-21).
18. Alex filed a tax return in 2022. He did not report a $300,000 cash gift to Mario Torres to the IRS. Cwach Aff. Ex. 4.
19. Alex considers Noehmy Herrera to be a friend and spiritual parent. Cwach Aff. Ex. 1 (Alex. Depo. 20:2-12).
20. At a Church event in Columbus, Nebraska during the last weekend of April 2022, Alex gave Yankton Pastor Daniel Cabrerra an envelope containing a check for $300,000.00. Cabrera Aff. ¶ 3.
21. Yankton Pastor Daniel Cabrera and Alex had several conversations about Alex making a donation for the benefit of the Yankton parish between November 2021 and May 2022. Cabrera Aff. ¶¶ 4-7.
22. Alex described the blank check handled to Daniel Cabrerra to be "whatever God wants it to be for." Cwach Aff. Ex. 1 (Alex Depo. 26:12-17).
23. All monies in Mitchell checking account belonged to the Church or its parish. Cwach Aff. Ex. 2 (Mario Depo. 22:21-23:12).
24. Mario was an authorized signor on the Mitchell checking account from the opening of the account until August 2023. *Compare* Cmpl. ¶ 6 *with* Ans. ¶ 6. *See Also* Torres Ans. Req. Admn. ¶ 10.
25. Mario was a pastor for the Church on July 13, 2022. Cwach Aff. Ex. 5 (Torres Ans. Req. Admn. ¶ 7).

26. On July 13, 2022, Mario wrote and deposited a check to himself for $223,000 from the Mitchell checking account. The funds were deposited in Mario's personal bank account, which is also at the Mitchell branch of First Dakota National Bank, N.A. *Compare* Cmpl. ¶ 9 *with* Ans. ¶ 8.
27. Alex was not a pastor of the Church from April 30, 2022 to July 13, 2022. Aff. Ryan Cwach Ex. 5 (Torres Ans. Req. Admn. ¶ 8).
28. Alex was not a Director of the Church from April 30, 2022 to July 13, 2022. Aff. Ryan Cwach Ex. 5 (Torres Ans. Req. Admn. ¶ 9).
29. Mario did not consult with any member of the Board of Directors before depositing the $223,000 check into his personal checking account. Cwach Aff. Ex. 5 (Torres Ans. Req. Admn. ¶ 17).
30. Mario wrote the check to himself without the Church's prior approval and because Alex told him to do so. Cwach Aff. Ex. 2 (Mario Depo. 74:8-75:11). *See Also* (Cwach Aff. Ex. 3 (Nohemy Depo. 91:21-92:1).
31. Alex told Mario that Mario could remove the money from the church, but only after he believed Church President Nohemy Herrera and Francisco Herrera authorized the transfer. Cwach Aff. Ex. 1 (Alex Depo. Tr. 69:8-17).
32. Mario refused to return the $223,000 to the Church. *Compare* Cmpl. ¶ 11 *with* Ans. ¶ 9.
33. The lead pastor of the Church is Nohemy Herrera. Mario acted as a pastor under her direction. Cwach Aff. Ex. 2 (Mario Depo. 7:20-8:4; 8:20-22). *See Also* Cwach Aff. Ex. 1 (Alex Depo. 17:20-25).
34. Mario was originally from Columbus but moved to Mitchell specifically to start a parish for the Church. *Compare* Cwach Aff. Ex. 2 (Mario Depo. 9:12-24) *with* Cwach Aff. Ex. 3 (Nohemy Depo. 69:5-14).
35. Mario was a pastor of the Church. Mario's duties as pastor included the following:
    a. To take care of the souls of the people. Cwach Aff. Ex. 2 (Mario Depo. 6:14-16).
    b. Preach the word. Cwach Aff. Ex. 2 (Mario Depo. 6:23-25).
    c. Pray for people, visit people, to fast. Cwach Aff. Ex. 2 (Mario Depo. 9:1-6).
    d. Make sure building rent was timely paid. Cwach Aff. Ex. 2 (Mario Depo. 10:7-10).
    e. Hold church services multiple times a week. Cwach Aff. Ex. 2 (Mario Depo. 10:13-20).

f. To recruit new members to the Church. Cwach Aff. Ex. 2 (Mario Depo. 11:3-12).

g. To organize and participate in events known as anniversaries or campaigns. Cwach Aff. Ex. 2 (Mario Depo. 12:15-24; Mario Depo. 14:1-8).

h. To be active in the Hispanic community in Mitchell. Cwach Aff. Ex. 2 (Mario Depo. 15:1-5).

i. To collect offerings for the church, which helped it grow. Cwach Aff. Ex. 2 (Mario Depo. 15:19-16:2).

j. To perform all the administrative work related to the Mitchell parish. Cwach Aff. Ex. 2 (Mario Depo. 16:13-16).

36. Mario has started a new church as a secretary or treasurer with Alex Cooper Vasquez and Minor Sandoval in the same location as the Plaintiff's old church in Mitchell. Cwach Aff. Ex. 2. (Mario Depo. 46:18-47:9; 48:15-24).

37. The Mitchell parish congregants have been split with some following Mario to his new church while others commute to the Church's location in Yankton. Cwach Aff.. Ex. 3 (Nohemy Depo. 128:10-129:4).

CERTIFICATE OF SERVICE

I certify to this Court in writing, that on August 06, 2025, a true and correct copy of the foregoing was served electronically via the Odyssey system, or via email or U.S. mail if the recipient(s) below is (are) not registered with the Odyssey system, as indicated below:

Tucker J. Volesky
Attorney for Defendant
305 North Kimball, P.O. Box 488
Mitchell, South Dakota 57301

/s/ Ryan D. Cwach
Ryan D. Cwach - #4245
Birmingham & Cwach Law Offices, Prof. LLC
202 W 2nd St
Yankton, SD 57078
605-260-4747
ryan@birmcwachlaw.com

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF DAVISON	)	FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, Plaintiff, v. MARIO TORRES, Defendant and Third-Party Plaintiff, v. NOHEMY HERRERA, Third-Party Defendant.	)	17CIV22-000202 DEFENDANT MARIO TORRES' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND DEFENDANT'S STATEMENT OF ADDITIONAL MATERIAL FACTS

COMES NOW, the Defendant Mario Torres ("Mario"), through the undersigned counsel, who submits the following response to Plaintiff's Statement of Undisputed Material Facts as follows:

1. Plaintiff (hereinafter "Church") is Iglesia Pentecostal Fuente De Vida, Inc., a 501(c)(3) and South Dakota foreign nonprofit corporation, with churches in Columbus, NE, Yankton, SD, and formerly in Mitchell, SD. *Compare* Cmpl. ¶ 1 with Ans. ¶ 3.

RESPONSE: Objection to the extent this assertion is inconsistent with the deposition testimony provided by the entity's principal officer, Nohemy Herrera. (Volesky Aff. Ex. A, Nohemy Depo., pp. 15-16, ll. 7-6). Generally undisputed.

App. 13

2. The Church owns and maintains a checking account at First Dakota National Bank, N.A. at the bank Mitchell branch (hereinafter "Mitchell checking account"). *Compare* Cmpl. ¶ 5 *with* Ans. ¶ 6. *See Also* Cwach Aff. Ex. 3 (Nohemy Depo. 70:22-71:8).

RESPONSE: Objection to the extent this statement calls for a legal conclusion. Disputed to the extent this statement is incomplete or inconsistent with Nohemy Herrera's deposition testimony in that the said account was opened by Nohemy Herrera, Francisco Herrera, and Mario Torres, and that those three individuals had authority over the account. (Volesky Aff. Ex. A, Nohemy Depo., pp. 69-70 ll. 25-1, p. 72 ll. 5-6). Further, Herrera testified that the address on the said account was that of Mario Torres. (Id., pp. 72 ll. 18-25).

3. Defendant Mario Torres (hereinafter "Mario") was a pastor for the Church at its Mitchell location. Mario is a resident of Mitchell, South Dakota. *Compare* Cmpl. ¶ 2 *with* Ans. ¶ 4.

RESPONSE: Generally undisputed.

4. Venue is appropriate in this court because the Defendant resides in Davison County, and substantially all events giving rise to this complaint occurred in Davison County. *Compare* Cmpl. ¶ 3 *with* Ans. ¶ 5.

RESPONSE: Venue is undisputed.

5. When Mario was deposed, Mario understood that he was under the same oath as if he were testifying in court; that he would be presumed to understand the questions if he answered the question. Cwach Aff. Ex. 2 (Mario Depo. 5:4-10). He affirmed he was able to think clearly and nothing was preventing him from telling the truth. Cwach Aff. Ex. 2 (Mario Depo. 5:18-22).

RESPONSE: It is undisputed that Mario sat for a deposition, that he is competent to testify, and that he responded to questioning from Plaintiff's attorney as indicated in this statement through an interpreter.

6. When Alex Cooper-Vasquez (hereinafter "Alex") was deposed, Alex understood that he was under the same oath as if he were testifying in court; that he would be presumed to understand the question if he answered the question. Cwach Aff. Ex. 1 (Alex Depo. 7:1-3; 7:16-19). He affirmed he was able to think clearly and nothing was preventing him from telling the truth. Aff. Ex. 1 (Alex Depo. 7:20-25).

RESPONSE: It is undisputed that Alex sat for a deposition, that he is competent to testify, and that he responded to questioning from Plaintiff's attorney as indicated in this statement through an interpreter.

7. At a church campaign in Columbus, Nebraska in April 2022, Alex handed Mario an envelope with a blank check for $300,000 enclosed. Cwach Aff. Ex. 2 (Mario Depo. 51:17-52-16). *See also* Cwach Aff. Ex. 1 (Alex Depo. 25:11-20).

RESPONSE: Disputed to the extent the description in this statement is inconsistent with the referenced portions of the deposition transcripts. Approximately in late April of 2022, Alex handed Mario an envelope with a check for $300,000, "[w]hen the campaign was over…" (Cwach Aff. Ex. 1, Mario Depo. pp. 51-52 ll. 17-20); (*See also* Alex Cooper Vaquez Affidavit ¶ 2, Iglesia370).[1] Alex Cooper Vasquez further affirmed in the same portion of the cited deposition transcript that he gave checks to Mario Torres and Daniel Cabrera "with the purpose of giving it to them for themselves, not for the church." (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 25-26,

[1] The Affidavit of Alex Cooper Vasquez was originally filed herein on February 19, 2024, and it is being attached and annexed hereto.

ll. 21-6); (*See also* Alex Cooper Vasquez Aff. ¶¶ 2-3, Iglesia370 and Iglesia371); (Counterclaim ¶ 24; Volesky Aff. ¶ Ex. D, Waiver of Attorney-Client Privilege).

Further responding, during a meeting between Church President Nohemy Herrera, Vice President Francisco Herrera, Mario Torres, and Maria Torres at the time of the said campaign, Herreras advised Mario about a certain check that he would be receiving and misrepresented to him that it was for the Church. (Volesky Aff. Ex. C, Mario Depo. p. 37 ll. 1-25; pp. 56-57 ll. 24-15); (*See also* Mario Torres Affidavit;[2] Alex Cooper Vasquez Affidavit).

8. There is no writing or documentation evidencing the intent or purpose of the blank check. Cwach Aff. Ex. 1 (Alex Depo. 49:6-10).

RESPONSE: Disputed because the question at page 49 of Alex's Deposition recognizes that "the checks themselves" constitute writing or documentation evidencing the intent or purpose. Indeed, Alex Cooper Vasquez wrote three checks each for $300,000. On one of the checks Alex wrote "missions" on the memo line, left the payee line blank, and delivered it to Mario Torres, intending it be for Mario Torres personally. (Cooper Vasquez Aff. ¶ 2, Iglesia370). On another one of the checks Alex wrote "missions" on the memo line, left the payee line blank, and delivered it to Daniel Cabrera, intending it to be for Daniel Cabrera personally. (Cooper Vasquez Aff. ¶ 3, Iglesia371). On the final check Alex wrote "tithe" on the memo line and "Iglesia Pentecostal Fuente de vida" on the payee line, intending it to be a gift to the Church. (Cooper Vasquez Aff. ¶ 4, Iglesia109).

[2] The Affidavit of Mario Torres was originally filed herein on February 19, 2024, and it is being attached and annexed hereto.

Further responding, after writing and delivering the checks as described above, Alex Cooper Vasquez testified that he was in contact with his bank inquiring about the three $300,000 checks after seeing his account statement indicating they had all gone to the Church as Payee:

> **Q. So you looked at the bank statement and you saw that you had three checks going to one account?**
>
> **A. Yes. That they had the – the name of the church, Fuente de Vida. So I told them – I told them I only wrote one for the church. So if you look at the checks, you'll see that only one has my handwriting with the church's name…**
>
> **THE INTERPRETER: … "If you see the other two checks, you'll see that it was written in somebody else's handwriting, not mine, the female pastor's" …**

(Volesky Aff. Ex. B, Alex Cooper Depo. pp. 47-48, ll. 16-25); (*Compare* Alex Cooper Aff. ¶¶ 2-5, 8 & Attachments Iglesia370, Iglesia371, and Iglesia109).

9. Nohemy and Alex had discussions about a donation to the Church prior to Alex making the donation. Nohemy understood the conversations with Alex to mean that Alex was making three separate donations to each church location. Cwach Aff. Ex. 3 (Nohemy Depo. 74:5-25; 77:7-14; 80:9-15; 81:11-17; 104:8-15; 109:15-25).

RESPONSE: Objection to the extent this statement purports to vaguely recount general "discussions" or "conversations," lacks foundation, and constitutes inadmissible hearsay. This statement is disputed based on the

testimony of Alex Cooper Vasquez and because it does not accurately characterize his intent when he delivered the $300,000 check to Mario Torres. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 28-29, ll. 22-25; pp. 35-36, ll. 19-3; pp. 39-40, ll. 8-5); (Cooper Vasquez Aff. ¶ 2, Iglesia370). Alex did have a particular discussion with the Herreras prior to the writing of the three separate checks, wherein however, Alex specifically advised the Herreras that two of the checks were "for Mario and Daniel personally." (Cooper Vasquez Aff. ¶ 6).

10. Alex did not provide any specific instructions to Nohemy prior to or after making the donation. Cwach Aff. Ex. 3 (Nohemy Depo. 95:11-25).

RESPONSE: Disputed. Alex Cooper Vasquez testified at his deposition that he had a particular conversation with the Herreras prior to writing any checks and "told them how I was going to do it." (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 35-36 ll. 19-3); (*See also* Cooper Vasquez Aff. ¶ 6, "Nohemy and Francisco Herrera knew that the checks I delivered to Mario and Daniel were for Mario and Daniel personally. I had specifically told them this prior to writing the checks.")

11. Alex and Mario did not discuss the check or money at the event or any time prior to the event. Cwach Aff. Ex. 2 (Mario Depo. 57:19-21). *See also* Cwach Aff. Ex. 1 (Alex Depo. 42:5-19; 45:12-18).

RESPONSE: Undisputed.

12. In Mario's presence, Nohemy wrote the Church as the Payee onto the blank check. Cwach Aff. Ex. 3 (Nohemy Depo. 83:10-84:4; 116:24-117:5).

RESPONSE: Undisputed that Nohemy was in Mario's presence when she wrote the Church as the Payee onto the $300,000 check which stated "missions" on the memo line and had been delivered to Mario Torres by Alex Cooper Vasquez. (Mario Torres Aff. ¶ 10). Further responding, prior to receiving any check, Mario met with the Herreras who represented to him that he would be receiving a donation for the Church. (Volesky Aff. Ex. C, Mario Depo. pp. 36-37 ll. 23-25; p. 57 ll. 1-15) (*See also* Mario Torres Aff. ¶¶ 4-7). Accordingly, after receiving the $300,000 check from Alex Cooper Vasquez, Mario testified that "[s]ince Nohemy Herrera, she'd already deceived me, I just hold it. And then later on, she put on for the church." (Volesky Aff. Ex. C, Mario Depo. pp. 58-60 ll. 11-7). Without Herrera's misrepresentations, Mario "would have never consented to her taking the check, listing the Church as the payee, and depositing it into a Church account." (Mario Torres Aff. ¶¶ 20-21).

13. At the time of the donation, Alex did not know Mario's family, where he worked, his name or how to spell it. Cwach Aff. Ex. 1 (Cooper-Vasquez Depo. 17:9-25; 33:13-15; 34:19-25; 41:15-42:11; 45:12-18; 46:1-11).

RESPONSE: Objection to the extent this statement is not a material fact, is irrelevant, and does not fully or accurately describe the referenced portions of the deposition transcript which includes objections. This statement is disputed based on the transcript, in that it does not completely or accurately characterize Alex Cooper Vasquez's knowledge of Mario Torres.

Alex Cooper Vasquez's actual deposition testimony accurately identifies Mario's wife, Maria Torres and that they have children (Alex Depo., at p. 17), explains in detail why he left the payee line blank on the check he gave to Mario,

including that it was intended as a surprise gift for Mario (Id., at pp. 33-34, 41-42), that he knew Mario, "loved him," and "respected him," and described in detail his interactions and communications with Mario Torres, including visiting him in the hospital after Mario's wife was injured in a car accident (Id., at pp. 45-46).

14. The term "missions" can mean many things, for a person or for a church. Cwach Aff. Ex. 2 (Mario Depo. 60:8-13).

RESPONSE: This statement is disputed because the individual who wrote "missions" on the check, Alex Cooper Vasquez, testified specifically to what that term meant in this situation:

> **…**
>
> **Q. Okay. And then in the memo line you wrote the word "missions," as well?**
>
> **A. "Mission," yes.**
>
> **Q. Okay. What does "missions" mean?**
>
> **A. "Missions," for us that speak Spanish, is meaning that we're going to do that specific thing for that person. …**
>
> **Q. So I guess when you put "missions" on there, you wrote this check for the purpose of missions, correct?**
>
> **A. But to Pastor Torres. Not for the church.**
>
> **Q. So the memo line "missions" was for Pastor Torres to carry out missions?**
>
> **A. It was for his expenses, his electricity, his water, his personal life expenses. Nothing to do with the church.**

(Volesky Aff. Ex. B, Alex Cooper Depo. pp. 54-57 ll. 10-1); (*See also* Alex Cooper Vasquez Aff. ¶ 2, Iglesia370).

15. In 2022, Mario had three interactions with Alex. On April 29 or 30, 2022, Alex approached Mario at the Columbus church. They did not communicate. In mid-June 2022, Mario called Alex. In August 2022, Mario called Alex again about the money. Cwach Aff. Ex. 2 (Mario Torres Ans. to Plaintiff's Int. No. 4).

RESPONSE: Undisputed that Alex approached Mario when he delivered to him the $300,000 check in an envelope and that they communicated over the phone in subsequent months. (*See* Affidavit of Mario Torres ¶¶ 8-9, 17). However, the remainder of this statement is disputed because Mario's discovery answer, which meets the requirements of the South Dakota Rules of Civil Procedure, does not stand for the limited proposition insinuated by this statement. The discovery answer includes seven particularized and separately identifiable instances of interactions between Mario and Mr. Cooper Vasquez in 2022, including court appearances in this case. These would be in addition to other, less particularized interactions that Mario and Mr. Cooper Vasquez also had in 2022, including interactions in connection with evangelizing.

16. Alex's bank accepted the check and made payment to the Church's Mitchell bank account. Cwach Aff. Ex. 5 (Bank Statement).

RESPONSE: Generally undisputed. (*See* Mario Torres Aff. ¶¶ 8-13, 20-21; Volesky Aff. Ex. B, Alex Cooper Depo. pp. 47-48 ll. 16-25).

17. After the check was deposited, nothing happened. Cwach Aff. Ex. 2 (Nohemy Depo. 88:3-8). The donor Alex was aware that the check was deposited in the Mitchell bank

account. He did not stop it. Instead, he got married through the Church, he gave an addition $10,000 to fix a door, and additional $25,000 for mission trips to El Salvador. Cwach Aff. Ex. 1 (Alex Depo. 62:4-21). He chose not to sue the Church or Nohemy. Cwach Aff. Ex. 1 (Alex Depo. 63:22-64:7). He decided to leave the Church without any enemies or unfriendliness and did not want to cause problems. Cwach Aff. Ex. 1 (Alex Depo. 63:14-21).

RESPONSE: Objection to the extent this statement is not supported by the record, lacks appropriate citations as required by SDCL 15-6-56(c)(1), is vague, incomplete and otherwise immaterial.

Disputed. The cited portion of Nohemy Herrera's deposition transcript is contradicted by her own testimony and bank records showing multiple checks being written from the account the same day as the deposit. (Volesky Aff. Ex. A, Nohemy Depo. pp. 88-91 ll. 3-3). Further responding, the cited snippets of Alex Cooper's deposition do not fully and fairly characterize how Alex became aware that the Church obtained the funds or the steps he took to address it. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 47-49 ll. 16-5; pp. 60-61 ll. 16-13; pp. 67-69 ll. 16-20).

18. Alex filed a tax return in 2022. He did not report a $300,000 cash gift to Mario Torres to the IRS. Cwach Aff. Ex. 4.

RESPONSE: Objection in that this statement constitutes inadmissible hearsay and lacks foundation or context for the unsigned tax documentation prepared by Amayas Income Tax, dated February 14, 2024. This statement is also objected to for lacking materiality as to what Alex Cooper Vasquez's purpose and intent was at the time he delivered Mario Torres the $300,000 check in late April or early May

2022. This statement is disputed to the extent it purports to imply anything that is inconsistent with the Affidavit of Alex Cooper Vasquez filed for the record.

Further responding, Defendant Mario Torres is entitled to additional discovery on this alleged fact to explore this issue. (*See* Rule 56(f) Affidavit of Tucker Volesky). Alex Cooper Vasquez has signed a limited waiver of confidentiality and authorization for release of taxpayer information so that such discovery can be conducted. (Volesky Aff. Ex. E, Waiver for Taxpayer Information).

19. Alex considers Nohemy Herrera to be a friend and spiritual parent. Cwach Aff. Ex. 1 (Alex Depo. 20:2-12).

RESPONSE: Objection. See SDCL 19-19-610. This statement is also not material. Objection is also noted on the cited portion of the deposition transcript.

20. At a Church event in Columbus, Nebraska during the last weekend in April 2022, Alex gave Yankton Pastor Daniel Cabrerra an envelope containing a check for $300,000.00. Cabrera Aff. ¶ 3.

RESPONSE: Generally undisputed. (*See* Volesky Aff. Ex. B, Alex Cooper Depo. pp. 25-26 ll. 15-6); (*see also* Alex Cooper Vasquez Aff. ¶ 3, Iglesia371).

21. Yankton Pastor Daniel Cabrera and Alex had several conversations about Alex making a donation for the benefit of the Yankton parish between November 2021 and May 2022. Cabrera Aff. ¶¶ 4-7

RESPONSE: Objection in that this statement contains inadmissible hearsay and is conclusory, vague, and not completely accurate because the referenced Affidavit of Daniel Cabrera refers to only two conversations, one occurring "in the late fall of 2021" and another occurring "[a]pproximately three months later." This statement

is disputed based on the deposition testimony of Alex Cooper Vasquez. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 40-41 ll. 7-10).

22. Alex described the blank check handled to Daniel Cabrerra to be "whatever God wants it to be for." Cwach Aff. Ex. 1 (Alex Depo. 26:12-17).

RESPONSE: Objection to the extent that this statement is immaterial and does not fully and fairly characterize the intent of Alex Cooper Vasquez in giving the check. (e.g., Volesky Aff. Ex. B, Alex Cooper Depo. p. 33 ll. 2-6, "I gave a gift to Pastor Torres, not to the church and to Pastor Daniel also, to both of them. I repeat again, it was for them. They were going to do whatever they pleased with that money."); (*See also* Affidavit of Alex Cooper Vasquez ¶¶ 2-3).

23. All monies in Mitchell checking account belonged to the Church or its parish. Cwach Aff. Ex. 2 (Mario Depo. 22:21-23:12).

RESPONSE: Objection because this statement calls for a legal conclusion as noted at the cited portion of the deposition transcript. This statement is also objected to, to the extent it seemingly delves into matters over which the court may lack subject matter jurisdiction based on establishment clause and free exercise principles contained in the First Amendment to the United States Constitution. E.g., Wipf v. Hutterville Hutterian Brethren, Inc., 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. Further responding, Mario is the owner or rightful possessor of the $223,000 (part of the $300,000) that he transferred from the account on July 13, 2022, as shown by the Statement of Additional Material Facts set forth below.

24. Mario was an authorized signor on the Mitchell checking account from the opening of the account until August 2023. *Compare* Cmpl. ¶ 6 *with* Ans. ¶ 6. *See also* Torres Ans. Req. Admn. ¶ 10.

RESPONSE: It is generally undisputed that Mario was an authorized signor on the Mitchell checking account.

25. Mario was a pastor for the Church on July 13, 2022. Cwach Aff. Ex. 5 (Torres Ans. Req. Admn. ¶ 7).

RESPONSE: Objection because this statement contains a conclusion directed at the Church's hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction based on establishment clause and free exercise principles contained in the First Amendment to the United States Constitution. E.g., <u>Wipf v. Hutterville Hutterian Brethren, Inc.</u>, 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. This statement is generally undisputed.

26. On July 13, 2022, Mario wrote and deposited a check to himself for $223,000 from the Mitchell checking account. The funds were deposited in Mario's personal bank account, which is also at the Mitchell branch of First Dakota National Bank, N.A. *Compare* Cmpl. ¶ 9 *with* Ans. ¶ 8.

RESPONSE: Undisputed.

27. Alex was not a pastor of the Church from April 30, 2022 to July 13, 2022. Aff. Ryan Cwach Ex. 5 (Torres Ans. Req. Admn. ¶ 8).

RESPONSE: Objection because this statement contains a conclusion directed at the Church's hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction. E.g., <u>Wipf v. Hutterville Hutterian Brethren, Inc.</u>, 2012

S.D. 4, ¶ 11, 808 N.W.2d 678, 682. This statement is also objected to because it is neither relevant nor probative of any material issue. Further, this statement lacks foundation because it does not appear that the Church keeps corporate records or meeting minutes showing who has been appointed pastor. (Volesky Aff. Ex. G, Church's Ans. to Req. No. 5).

28. Alex was not a director of the Church from April 30, 2022 to July 13, 2022. Aff. Ryan Cwach Ex. 5 (Torres Ans. Req. Admn. ¶ 9).

RESPONSE: Objection because this statement contains a conclusion directed at the Church's hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction. E.g., <u>Wipf v. Hutterville Hutterian Brethren, Inc.</u>, 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. This statement is also objected to because it is neither relevant nor probative of any material issue. Further, this statement lacks foundation because it does not appear that the Church keeps corporate meeting minutes showing the appointment of its directors or officers. (Volesky Aff. Ex. G, Church's Ans. to Req. Nos. 1-2).

29. Mario did not consult with any member of the Board of Directors before depositing the $223,000 check into his personal checking account. Cwach Aff. Ex. 5 (Torres Ans. Req. Admn. ¶ 17).

RESPONSE: Disputed to the extent this statement construes an admission that is inconsistent with the deposition testimony of Alex Cooper Vasquez. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 26-29 ll. 18-25; pp. 68-69 ll. 1-20).

30. Mario wrote the check to himself without the Church's prior approval and because Alex told him to do so. Cwach Aff. Ex. 2 (Mario Depo. 74:8-75:11). See also (Cwach Aff. Ex. 3 (Nohemy Depo. 91:21-92:1).

RESPONSE: Disputed based on the deposition testimony of Alex Cooper Vasquez. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 26-29 ll. 18-25; pp. 68-69 ll. 1-20).

31. Alex told Mario that Mario could remove the money from the church, but only after he believed Church President Nohemy Herrera and Francisco Herrera authorized the transfer. Cwach Aff. Ex. 1 (Alex Depo. Tr. 69:8-17).

RESPONSE: This statement is disputed to the extent it does not fully and fairly characterize and describe Alex Cooper's efforts and interactions in this regard. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 26-29 ll. 18-25; 68-69 ll. 1-20); (*See also* Cwach Aff. Ex. 2, Mario Depo. 74:8-75:11). It is otherwise generally not disputed to the extent consistent with the cited record.

32. Mario refused to return the $223,000 to the Church. *Compare* Cmpl. ¶ 11 *with* Ans. ¶ 9.

RESPONSE: Generally undisputed based on the referenced pleadings. Further responding, the Order filed herein on August 14, 2023, is based on the parties' stipulation for their attorneys to put the funds into a trust account pending determination of this lawsuit.

33. The lead pastor of the Church is Nohemy Herrera. Mario acted as a pastor under her direction. Cwach Aff. Ex. 2 (Mario Depo. 7:20-8:4; 8:20-22). *See Also* Cwach Aff. Ex. 1 (Alex Depo. 17:20-25).

RESPONSE: Objection to the extent this statement contains conclusions directed at the Church's hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction. E.g., Wipf v. Hutterville Hutterian Brethren, Inc., 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. Generally undisputed.

34. Mario was originally from Columbus but moved to Mitchell specifically to start a parish for the Church. *Compare* Cwach Aff. Ex. 2 (Mario Depo. 9:12-24) *with* Cwach Aff. Ex. 3 (Nohemy Depo. 69:5-14).

RESPONSE: Objection to the extent this statement contains conclusions directed at the Church's hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction. E.g., Wipf v. Hutterville Hutterian Brethren, Inc., 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. It is undisputed that Mario moved to Mitchell with his family, worked as a painter, and lead a congregation as its pastor. (*Compare* Counterclaim ¶¶ 6-7).

35. Mario was a pastor of the Church. Mario's duties as pastor included. The following:

    a. To take care of the souls of the people. Cwach Aff. Ex. 2 (Mario Depo. 6:14-16).
    b. Preach the word. Cwach Aff. Ex. 2 (Mario Depo. 6:23-25).
    c. Pray for people, visit people, to fast. Cwach Aff. Ex. 2 (Mario Depo. 9:1-6).
    d. Make sure building rent was timely paid. Cwach Aff. Ex. 2 (Mario Depo. 10:7-10).
    e. Hold church services multiple times a week. Cwach Aff. Ex. 2 (Mario Depo. 10:13-20).

f. To recruit new members to the Church. Cwach Aff. Ex. 2 (Mario Depo. 11:3-12).

g. To organize and participate in events known as anniversaries or campaigns. Cwach Aff. Ex. 2 (Mario Depo. 12:15-24; Mario Depo. 14:1-8).

h. To be active in the Hispanic community in Mitchell. Cwach Aff. Ex. 2 (Mario Depo. 15:1-5).

i. To collect offerings for the church, which helped it grow. Cwach Aff. Ex. 2 (Mario Depo. 15:19-16:2).

j. To perform all the administrative work related to the Mitchell parish. Cwach Aff. Ex. 2 (Mario Depo. 16:13-16).

RESPONSE: Objection to the extent this statement contains conclusions directed at the Church's hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction. E.g., <u>Wipf v. Hutterville Hutterian Brethren, Inc.</u>, 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. This statement is also objected to because it is vague, conclusory, and immaterial to Alex Cooper Vasquez's intent and purpose in delivering the $300,000 check to Mario Torres.

Further responding, it does not appear that any documentation exists appointing Mario pastor or that shows any agreements between Mario and the Church in this regard. (Volesky Aff. Ex. F, Church's Ans. to Req. Nos. 3-5). It is undisputed that Mario leads a congregation in Mitchell as its pastor and performs certain functions as described in his deposition testimony.

36. Mario has started a new church as a secretary or treasurer with Alex Cooper Vasquez and Minor Sandoval in the same location as the Plaintiff's old church in Mitchell. Cwach Aff. Ex. 2 (Mario Depo. 46:18-47:9; 48:15-24).

RESPONSE: Objection to the extent this statement contains conclusions directed at church hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction based on establishment clause and free exercise principles contained in the First Amendment to the United States Constitution. E.g., <u>Wipf v. Hutterville Hutterian Brethren, Inc.</u>, 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. This statement is also objected to because it is immaterial and beyond the scope of this lawsuit. It is undisputed that Mario continues to lead congregants in Mitchell as pastor and an officer of the Ministerio Fresca Uncion as described in his deposition testimony.

37. The Mitchell parish congregants have been split with some following Mario to his new church while others commute to the Church's location in Yankton. Cwach Aff. Ex. 3 (Nohemy Depo. 128:10-129:4).

RESPONSE: Objection to the extent this statement contains conclusions directed at the Church's hierarchy, structure and/or doctrine over which the court may lack subject matter jurisdiction based on the establishment clause or free exercise principles contained in the First Amendment to the United States Constitution. E.g., <u>Wipf v. Hutterville Hutterian Brethren, Inc.</u>, 2012 S.D. 4, ¶ 11, 808 N.W.2d 678, 682. This statement is also objected to to the extent it is vague, lacks foundation, and immaterial to Alex Cooper Vasquez's intent and purpose in delivering the $300,000 check to Mario Torres. It is undisputed that Mario continues to lead congregants in

Mitchell as pastor and that Nohemy Herrera purported to describe her understanding of the congregation's makeup at her deposition.

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. Alex Cooper Vasquez ("Alex"), the donor, repeatedly testified and affirmed by affidavit that the $300,000 check he delivered to Mario Torres ("Mario") was intended as a personal gift to Mario, not as a donation to the Church. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 24-29 ll. 11-25; pp. 32-33 ll. 7-6; pp. 56-57 ll. 10-1; pp. 60-61 ll. 16-13; pp. 64-65 ll. 8-13); (Affidavit of Alex Cooper Vasquez).
2. Alex left the check's payee line blank so Mario could deposit the check into any account he may have set up; the memo line stated "missions" meaning for Mario's personal expenses, not Church purposes. (Alex Cooper Vasquez Aff. ¶ 2, Iglesia370); (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 56-57 ll. 7-1).
3. Alex wrote three $300,000 checks: one to Mario (intended for Mario personally), one to Daniel Cabrera (also personal), and one to the Church (explicitly made out to the Church and marked "tithe"). (Alex Cooper Vasquez Aff. ¶¶ 2-4, and attached check copies)
4. Alex's intent regarding the three $300,000 checks was communicated to both his attorney Sean Conway and Church officials Nohemy and Francisco Herrera, stated on the memo line of each check, and was further evidenced through his delivery of the checks to each intended recipient. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 44-45 ll. 1-4; Id. Ex. D, attorney-client waiver); (Id. Ex. B, Cooper Depo. pp. 25-26 ll. 11-6; pp. 28-29 ll. 22-25; pp. 35-36 ll. 19-3; pp. 39-40 ll. 8-5); (Alex Cooper Vasquez Aff. ¶¶ 2-4 and attached check copies).

Mitchell as pastor and that Nohemy Herrera purported to describe her understanding of the congregation's makeup at her deposition.

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. Alex Cooper Vasquez ("Alex"), the donor, repeatedly testified and affirmed by affidavit that the $300,000 check he delivered to Mario Torres ("Mario") was intended as a personal gift to Mario, not as a donation to the Church. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 24-29 ll. 11-25; pp. 32-33 ll. 7-6; pp. 56-57 ll. 10-1; pp. 60-61 ll. 16-13; pp. 64-65 ll. 8-13); (Affidavit of Alex Cooper Vasquez).
2. Alex left the check's payee line blank so Mario could deposit the check into any account he may have set up; the memo line stated "missions" meaning for Mario's personal expenses, not Church purposes. (Alex Cooper Vasquez Aff. ¶ 2, Iglesia370); (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 56-57 ll. 7-1).
3. Alex wrote three $300,000 checks: one to Mario (intended for Mario personally), one to Daniel Cabrera (also personal), and one to the Church (explicitly made out to the Church and marked "tithe"). (Alex Cooper Vasquez Aff. ¶¶ 2-4, and attached check copies)
4. Alex's intent regarding the three $300,000 checks was communicated to both his attorney Sean Conway and Church officials Nohemy and Francisco Herrera, stated on the memo line of each check, and was further evidenced through his delivery of the checks to each intended recipient. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 44-45 ll. 1-4; Id. Ex. D, attorney-client waiver); (Id. Ex. B, Cooper Depo. pp. 25-26 ll. 11-6; pp. 28-29 ll. 22-25; pp. 35-36 ll. 19-3; pp. 39-40 ll. 8-5); (Alex Cooper Vasquez Aff. ¶¶ 2-4 and attached check copies).

5. Before the checks were delivered, Nohemy Herrera and Francisco Herrera told Mario that he would be receiving a check and misrepresented to him that the check was for the Church, when in fact, according to the donor, it was for Mario personally. (Cooper Vasquez Aff. ¶¶ 6-7); (Mario Torres Aff. ¶¶ 5-6, 17-18); (Volesky Aff. Ex. C, Mario Torres Depo. pp. 36-37 ll. 23-25).
6. Mario only allowed Nohemy to write the Church as the payee and deposit the check because of Herreras' misrepresentations. (Mario Torres Aff. ¶¶ 7-12, 16).
7. Had Mario known the donor's true intent, he would not have consented to the Church's involvement with the check. (Id. ¶¶ 20-21)
8. Alex testified that after learning the check intended for Mario had been taken by the Church, he addressed the status of the money with Church leadership, Nohemy and Francisco Herrera, who told Alex that if Mario wanted to move the money to his personal account, he could do so, and Alex relayed this approval to Mario. (Volesky Aff. Ex. B, Alex Cooper Depo. pp. 26-28 ll. 18-15, pp. 68-69 ll. 1-12); (*See also* Volesky Aff. Ex. C, Mario Torres Depo. p. 74 ll. 2-16). Mario transferred the $223,000 (part of the $300,000) to himself from the Church account based on Alex's intent and instructions.
9. The Church did not have a contract or written agreement with Mario or the donor regarding the handling of the $300,000. (*See* Church's SUMF No. 8, *supra*)
10. The Church's own policies and bylaws regarding the handling of large checks, expenditures, dual signatures, conflicts of interest and documentation were not strictly followed by the Church. (Volesky Aff. Ex. A, Nohemy Herrera Depo. pp. 55-57 ll. 10-4; pp. 63-66 ll. 6-7; pp. 84-85 ll. 5-15; pp. 88-90 ll. 22-10).

11. The Church has failed to produce any official operating budgets, reviews, conflict of interest proceedings, expenditure policies, or internal audits as required by its own bylaws and policies. (Volesky Aff. Ex. F, Church's Resp. to Req. Nos. 1-5).
12. The Church has failed to produce any meeting minutes establishing the so-called Mitchell location. (Volesky Aff. Ex. G, Church's Resp. to Req. No. 3).
13. The Church has failed to produce any meeting minutes authorizing the opening of the so-called Mitchell bank account. (Volesky Aff. Ex. G, Church's Resp. to Req. No. 4).
14. The Church has failed to produce any corporate meeting minutes appointing Mario Torres as pastor at the Mitchell location. (Volesky Aff. Ex. G, Church's Resp. to Req. No. 5).
15. The Church has failed to produce any meeting minutes authorizing the pursuit of this litigation. (Volesky Aff. Ex. G, Church's Resp. to Req. Nos. 6-7).
16. Mario Torres was an authorized signor on the Mitchell checking account, and there is no evidence that Mario used the funds for purposes other than those intended by the donor after learning of the donor's intent. (*See* Church's SUMF No. 24, *supra*).
17. Alex Cooper Vasquez, the donor, has provided a limited waiver of attorney-client privilege, allowing his attorney, Sean Conway, to testify to the discussions he had with Alex regarding the purpose and intent of the checks which followed a 2022 settlement on Alex's injury claim, providing direct evidence that the $300,000 check to Mario Torres was intended as a personal gift. (Volesky Aff. Ex. D, attorney-client waiver); (Counterclaim ¶ 24); (*See also* Volesky Aff. Ex. B, Alex Cooper Depo. pp. 43-45 ll. 23-4).

Respectfully submitted this 16th day of September 2025.

App. 33

/s/ Tucker Volesky
Tucker Volesky
Attorney at Law
305 North Kimball, P. O. Box 488
Mitchell, SD 57301
605-996-5542
tucker.volesky@tuckervoleskylaw.com

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing "Defendant Mario Torres' Response to Plaintiff's Statement of Undisputed Material Facts and Statement of Additional Material Facts," was submitted through Odyssey for filing with Clerk of Court and served on the following:

Ryan D. Cwach #4245
Attorney for Third-Party Defendant and Plaintiff
Birmingham and Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078

via electronic service this 16th day of September 2025.

/s/ Tucker J. Volesky
Tucker J. Volesky

App. 34

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
:ss.	
COUNTY OF DAVISON)	FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, PLAINTIFF, vs. MARIO TORRES, DEFENDANT.	CIV. #22- **COMPLAINT**

COMES NOW, Iglesia Pentecostal Fuente De Vida, Inc., by and through its attorney of record, Ryan D. Cwach, Birmingham & Cwach Law Offices, PLLC, and for its Complaint against the Defendant Mario Torres, Plaintiff states:

1. Plaintiff (hereinafter "Church") is Iglesia Pentecostal Fuente De Vida, Inc., a 501(c)(3) and South Dakota foreign nonprofit corporation, with churches in Columbus, NE, Yankton, SD, and Mitchell, SD.
2. Defendant Mario Torres (hereinafter "Mario") was a pastor for the Church at its Mitchell location. Mario is a resident of Mitchell, SD.
3. Venue is appropriate in this court because the Defendant resides in Davison County, and substantially all events given rise to this complaint occurred in Davison County.
4. The purpose and mission of the Church is to encourage devotion to the lord and savior Jesus Christ.
5. The Church owns and maintains a checking account at First Dakota National Bank, N.A. at the bank's Mitchell branch (hereinafter "Mitchell checking account").
6. Mario was an authorized signor on the Mitchell checking account. The primary purpose of the Mitchell checking account is to cover expenses relating to the Church's mission in Mitchell.
7. On May 02, 2022, the Church received a charitable donation of $300,000 to be used to foster the mission of the Church in Mitchell.
8. On May 03, 2022, the Church deposited the $300,000 into the Mitchell checking account.

9. On July 13, 2022, Mario wrote and deposited a check to himself for $223,000 from the Mitchell checking account. The funds were deposited in Mario's personal bank account, which is also at the Mitchell branch of First Dakota National Bank, N.A.
10. First Dakota National Bank, N.A. was alerted of this transfer and has frozen the money in Mario's personal bank account, but the cash remains in his possession.
11. Mario refuses to return the $223,000 to the Church.

CAUSES OF ACTION

COUNT ONE

Claim and Delivery

12. The Church realleges and repleads paras. 1-11 as if fully set forth herein.
13. The Church claims the delivery and return of the $223,000 cash to the Church. Delivery should be immediate.
14. The Church attaches hereto the affidavit of Nohemy Herrera, marked as Exhibit 1 and incorporated by reference, stating:
    a. The Church is the owner of the $223,000 cash presently in Mario's personal account and is lawfully entitled to possession thereof.
    b. The cash was wrongfully detained by Mario.
    c. Upon information and belief, to best of affiant's knowledge, Mario was an authorized signor on the Church's Mitchell checking account, and without notice, knowledge, consent, or authorization, withdrew the cash from the Mitchell checking account to transfer it in his personal account.
    d. The cash has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the Church.
    e. The value of the cash is $223,000.
15. The Church will furnish a written undertaking of a surety approved by the Davison County Sheriff, or alternatively, requests the court to waive undertaking upon a showing the ownership of the property is not in question and belongs to the Church.

COUNT TWO

Conversion

16. The Church realleges and repleads paras. 1-15 as if fully set forth herein.

17. By transferring $223,000 from the Mitchell checking account to his personal account and refusing to return the money to the Church, Mario has converted the Church's funds to his own personal use.
18. Without notice, knowledge, consent or authorization, Mario exercised dominion and control over the Church's property. Such unauthorized dominion and control by Mario was unwarranted and seriously interfered with the Church's use of funds to further the mission of the Church in Mitchell and jeopardizes the tax exempt status of the Church.

COUNT THREE

Breach of Fiduciary Duty

19. The Church realleges and repleads paras. 1-18 as if fully set forth herein.
20. The Church had placed its faith, confidence, and trust in Mario. Mario was a pastor of the Church's Mitchell location and responsible for promoting the mission of the Church in Mitchell. In his role as pastor at an affiliate church, he acted as the Church's fiduciary.
21. Mario breached his fiduciary duty when he transferred Church funds of $223,000 from the Church's Mitchell checking account to his personal account.
22. Plaintiff has incurred damages as a result of Mario's breach of fiduciary duty.

WHEREFORE, Plaintiff prays for the following relief:

1. For an order to show cause at a specified time and place, after reasonable notice to the defendant, why the plaintiff should not have delivery of the property claimed;
2. The immediate delivery and return of the personal property to the Plaintiff;
3. For judgment against Defendant Mario Torres on its claims for claim and delivery, conversion, and breach of fiduciary duty.
4. For actual and special damages, including interest from date Defendant deposited the $223,000 into his personal checking account and for costs, disbursements, and attorneys' fees expended to recover the converted money, as well as punitive damages if appropriate; and,
5. For such other and further relief as the court deems appropriate.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES PRESENTED.

Dated this 17th day of October 2022.

/s/ *Ryan D. Cwach*

Ryan D. Cwach #4245
Attorney for Plaintiff
Birmingham & Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
605-260-4747
ryan@birmcwachlaw.com

App.38

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF DAVISON)		FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION,	)	17CIV22-000202
Plaintiff,	)	ANSWER TO COMPLAINT
v.	)	
MARIO TORRES,	)	
Defendant.	)	

COMES NOW, the above-named Defendant, by and through his undersigned counsel, and for his answer to Plaintiff's Complaint states as follows:

1. Defendant (hereinafter "Mario") sets forth affirmatively duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, and any other matter constituting an avoidance or affirmative defense.

2. Mario denies each and every matter, allegation, and thing in Plaintiff's Complaint unless specifically admitted.

3. Upon information and belief, Mario admits the averments in paragraph 1 of the Complaint.

4. With respect to paragraph 2, Mario admits to serving as pastor for Plaintiff (hereinafter "Church") and that he resides in Mitchell, SD.

5. With respect to paragraph 3, Mario admits that venue is proper.

6. With respect to paragraphs 5 and 6, Mario admits that the Church maintained a checking account at First Dakota National Bank, N.A. in Mitchell, SD, and that Mario was an authorized signor on the account.

7. With respect to paragraph 8, Mario admits, upon information and belief, that the check in the amount of $300,000 was deposited into the Mitchell checking account.

App. 39

8. With respect to paragraph 9, Mario admits to transferring the referenced funds to his personal account at the Mitchell branch of First Dakota National Bank, N.A. by writing and depositing a check for the same.

9. With respect to paragraphs 10 and 11, Mario admits that the money has been frozen in his account and denies that the Church is entitled to the funds.

10. With respect to paragraph 12, Mario restates paragraphs 1-9 above as if fully set forth herein.

11. With respect to paragraph 13, no response is necessary given the nature of the statement. To the extent a response is required, Mario denies.

12. With respect to paragraph 14, Mario admits that the affidavit accompanied the Complaint and contained the statements restated in a-e of paragraph 14.

13. With respect to paragraph 15, Mario is without knowledge or information sufficient to form a belief as to the truth of the averment that the Church will furnish written undertaking and therefore denies. Further, Mario resists any request that undertaking be waived.

14. With respect to paragraph 16, Mario restates paragraphs 1-13 above as if fully set forth herein.

15. Paragraphs 17-22 allege legal conclusions to which no response is required. To the extent a response is required, Mario denies.

16. Mario denies the Church's prayers for relief.

WHEREFORE, Defendant Mario demands trial by jury on all issues and respectfully prays that Plaintiff's claims be dismissed and held for naught, for costs, disbursements, and attorney fees, and for such other and further relief as the court deems appropriate.

COUNTERCLAIM

COMES NOW, the above-named Defendant, by and through his undersigned counsel, and for his counterclaim against the above-named Plaintiff states as follows:

1. The Defendant Mario Torres ("Mario") is a resident of Mitchell, SD.

2. The Plaintiff, Iglesia Pentecostal Fuente De Vida Inc. ("Church") is a 501(c)(3) and South Dakota foreign nonprofit corporation, with churches in Columbus, NE, Yankton, SD, and Mitchell, SD.

3. Nohemy Herrera ("Herrera") is the Church's President and beneficial owner. Francisco Herrera is the Church's Vice President, Director, and beneficial owner.

4. This Court has jurisdiction over the parties and the subject matter herein.

5. Venue is appropriate in this Court.

6. In 2017, Mario commenced serving as pastor at the Church's Mitchell location.

7. While serving as pastor, Mario worked as a painter for a local landlord to earn income to support his family.

8. On April 30, 2022, the Church held a special event at its Columbus, NE location.

9. That same day, Herrera spoke privately with Mario to advise that Alex Cooper ("Cooper"), a benefactor known to both parties, would be giving Mario a check and that it is going to be for the Church.

10. During the private meeting, Herrera also advised Mario not to tell any of the Church's other pastors or members about the check he would be receiving from Cooper.

11. At the special event on Saturday, April 30, 2022, Cooper handed Mario an envelope.

12. Mario would later open the envelope, which contained a check in the amount of $300,000; the payee line was blank, and the memo line stated "Missions."

13. On Monday, May 2, 2022, Mario's wife was badly injured in a vehicle accident and was taken to the ER.

14. Mario stayed with his wife in the ER.

15. During that time, Herrera obtained the $300,000 check, wrote in the Church on the payee line and deposited the check in the Church's checking account at First Dakota National Bank, N.A. at the bank's Yankton, SD branch on Tuesday, May 3, 2022, and began drawing on the funds.

16. That same day, upon depositing the funds, Herrera withdrew a total of $67,000.

17. Herrera continued withdrawing the funds from the account including a $5,000 cash withdrawal on June 23, 2022.

18. Mario was the intended beneficiary of the $300,000 from Cooper.

19. The Church, through its President, knew that Mario was the intended beneficiary of the $300,000 from Cooper.

20. On July 13, 2022, Mario was able to recover $223,000 via transfer from the Church's checking account to Mario's personal account at the Mitchell branch of the First Dakota National Bank, N.A., but the funds have been frozen by the bank and remain inaccessible to Mario.

21. The Church, through Herrera, is responsible for causing the bank to freeze the $223,000 cash in Mario's account.

22. The Church refuses to allow the release of the $223,000 and refuses to return the $77,000.

23. Cooper attended the hearings held in this matter on November 29, 2022, and December 13, 2022, before the Honorable Patrick Smith, Circuit Court Judge presiding, to attest that the $300,000 was intended for Mario personally.

24. Mario's undersigned counsel has been in contact with Cooper's counsel, Sean Conway of Dornan, Troia, Howard, Breitkreutz & Conway PC LLO of Omaha, NE who confirmed that his client, Cooper, intended the $300,000 to go to Mario personally.

COUNT I – CONVERSION

25. Mario realleges and repleads paragraphs 1-24 of the Counterclaim as if fully set forth herein.

26. By depositing the $300,000 into the Church's checking account and refusing to release or return the money to Mario, the Church converted Mario's funds to its own use.

27. Without notice, knowledge, consent or authorization, the Church exercised dominion and control over Mario's property. Such unauthorized dominion and control by the Church were unwarranted and seriously interfered with Mario's use of the funds.

COUNT II – FRAUD

28. Mario realleges and repleads paragraphs 1-27 of the Counterclaim as if fully set forth herein.

29. The Church made representations to Mario through its President, Herrera.

30. The representations were made as statements of fact but were untrue and known to be untrue by Herrera or else were recklessly made.

31. The representations were made with the intent to deceive and for the purpose of inducing Mario to act upon them.

32. Mario did in fact rely on the representations and was induced thereby to act to his injury or damage.

PRAYER FOR RELIEF

WHEREFORE, Defendant Mario respectfully requests this Court to enter judgment as follows:

1. For a judgment against Plaintiff, the Church, on Defendant's counterclaim for conversion.

2. For a judgment against Plaintiff, the Church, on Defendant's counterclaim for fraud.

3. For actual and special damages plus pre-judgment interest.

4. For punitive damages.

5. For such other and further relief as may be just and equitable, including but not limited to costs, disbursements and reasonable attorneys' fees incurred herein.

DEMAND IS HEREBY MADE FOR A JURY TRIAL ON ALL ISSUES PRESENTED.

Respectfully submitted this 10th day of January, 2023.

Tucker Volesky
Attorney at Law
305 North Kimball, P. O. Box 488
Mitchell, SD 57301
605-996-5542

Mario Torres – Defendant 1-10-2023
Date

Devy Alvizures – Interpreter 1/10/2023
Date

App. 43

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true and correct copy of the foregoing Answer to Complaint and Counterclaim on the following:

Ryan D. Cwach #4245
Attorney for Plaintiff
Birmingham and Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078

via electronic service and filed the same through Odyssey with the Davison County Clerk of Courts this 11th day of January, 2023.

Tucker J. Volesky

App. 44

STATE OF SOUTH DAKOTA) :ss. COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, PLAINTIFF, vs. MARIO TORRES, DEFENDANT AND THIRD PARTY PLAINTIFF, vs. NOHEMY HERRERA, THIRD-PARTY DEFENDANT.	17 CIV22-202 **ANSWER TO COUNTERCLAIM**

COMES NOW, Iglesia Pentecostal Fuente De Vida, Inc. (hereinafter "The Church"), by and through its attorney of record, Ryan D. Cwach, Birmingham & Cwach Law Offices, PLLC, and for its Answer to the Counterclaim of Defendant, Plaintiff states:

1. The Church admits Paragraph 1.
2. The Church admits Paragraph 2.
3. Admits the allegation that Nohemy Herrea is the Church's President and Francisco Herrera is the Church's Vice President. Defendant denies the allegation that Nohemy Herrea or Francisco Herrera are the Church's beneficial owners.
4. The Church admits Paragraph 4.
5. The Church admits Paragraph 5.
6. The Church admits Paragraph 6.
7. The Church admits knowledge that Mario was a painter, but does not have sufficient information to admit or deny the other allegations in Paragraph 7.
8. Upon information and belief, the Church held a Men's Revival event on April 29, 2022. The Church denies the allegation of an event on April 30, 2022.
9. The Church admits that Herrera told Mario that Alex Cooper's donations were for the Church, but denies each and every other allegation in Paragraph 9.

10. The Church denies each and every allegation in Paragraph 10.
11. The Church admits that Herrera advised Mario not to tell the Church Members about the check at the request of the donor, but otherwise denies each and every allegation in Paragraph 11.
12. The Church denies knowledge or information sufficient to form a belief as to when Mario opened the check. The Church admits that the check was in an envelope, the payee line was initially blank, the amount of the check was $300,000, and the memo line stated "missions, but otherwise, the Church denies each and every other allegation in Paragraph 12.
13. In Paragraph 13, the Church denies knowledge or information sufficient to know the exact date of the vehicle accident or the extent of Mario's wife's injuries, but the Church does admit the allegation that Mario's wife was admitted to the hospital after a vehicle accident in early May 2022.
14. The Church denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 14.
15. The Church admits that Herrera listed the Church as the Payee. This was done in a private meeting between Herrera and Mario at the time of the special event referenced in Paragraph 8. Otherwise, the Church denies each and every other allegation in Paragraph 15.
16. The Church denies each and every allegation in Paragraph 16.
17. The Church denies each and allegation in Paragraph 17, except that Herrera withdrew $5,000 on June 23, 2022.
18. The Church denies each and every allegation in Paragraph 18.
19. The Church denies each and every allegation in Paragraph 19.
20. The Church admits that Mario Torres unilaterally and without prior notice, consent, or authorization, attempted to write himself a check out of the Church's Mitchell Checking Account for $223,000 and further admits that First Dakota National Bank, N.A. froze the funds in Mr. Torres' bank account due to First Dakota National Bank, N.A.'s concerns of a fraudulent transfer, but except for the preceding admissions, the Church denies each and every allegation in Paragraph 20.
21. The Church denies each and every allegation in Paragraph 21.

22. The Church denies each and every allegation in Paragraph 22. At a prior hearing in this matter, Mario Torres authorized that funds to be held by the Church during the pendency of this lawsuit. Further, the $77,000 reference in Defendant's Paragraph 77 is actually represented by checks or draws written by Defendant.
23. The Church denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 23.
24. The Church denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 24.
25. Adopt by reference the answers to the allegations adopted by reference.
26. The Church denies each and every allegation in Paragraph 26.
27. The Church denies each and every allegation in Paragraph 27.
28. Adopt by reference the answers to the allegations adopted by reference.
29. The allegations in Paragraphs 29 through 32 are vague and the Church is unable to admit or deny as alleged. Specifically, the Paragraphs do not plead with specificity exactly what representations were made to Mario. The Church will supplement its answer upon the Defendant's clarification of the specific representations that induced Mario to be injured.
30. The Church alleges that the Counterclaim fails to state a claim against the Church for which relief can be granted.
31. The Church denies that Mario has sustained any damage, deny the nature and extent of damage (if any), and deny that the Church caused Mario to sustain damages.

AFFIRMATIVE DEFENSES

1. The Church asserts that Mario is barred from relief by the doctrine of equitable estoppel.
2. The Church asserts that the wrongful acts of deception of Alex Cooper in that Mr. Cooper represented all the money he donated to the Church was for the purpose of the Church's mission, and then subsequently, Mr. Cooper appears to have claimed that the money was specifically for Mario Torres.
3. The Church asserts that Mario Torres is barred by the doctrine of unclean hands, specifically that he used the Church's checking account for his own personal benefit.
4. The Church asserts that Mario Torres is barred in that he ratified that actions of the Church by continuing to use the Church's Mitchell checking account after the funds were

deposited into the Church's checking account and accepting wages from the Church's Mitchell checking account for a period of several months after the initial deposit.

5. The Church asserts that Mario Torres is barred in that he waived any right to the funds when he relinquished control of the check to the Church and continued to use and accept checks out of the Church's Mitchell checking account.
6. The Church reserves the right to assert any and all additional affirmative defenses that discovery or other evidence may reveal to be appropriate. The Church further reserves the right to amend its Answer or otherwise plead in response to Torres' counterclaim, and to file such other Motions as the Church may deem advisable in defense of the case or as warranted by information adduced through the discovery process.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES PRESENTED.

Dated this 17th day of February 2023.

/s/ *Ryan D. Cwach*

Ryan D. Cwach #4245
Attorney for Plaintiff
Birmingham & Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
605-260-4747
ryan@birmcwachlaw.com

CERTIFICATE OF SERVICE

I certify to this Court in writing, that on February 21, 2023, a true and correct copy of the foregoing was served electronically via the Odyssey system, via email, or via U.S. mail if the recipient(s) below is (are) not registered with the Odyssey system, as indicated below:

Tucker J. Volesky
Attorney for Defendant & Third Party Plaintiff
305 North Kimball, P.O. Box 488
Mitchell, South Dakota 57301

/s/ Ryan D. Cwach
Ryan D. Cwach - #4245
Birmingham & Cwach Law Offices, Prof. LLC
202 W 2nd St
Yankton, SD 57078
605-260-4747
ryan@birmcwachlaw.com

STATE OF SOUTH DAKOTA) :ss. COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
IGLESIAS PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, PLAINTIFF, vs. MARIO TORRES, DEFENDANT AND THIRD PARTY PLAINTIFF, vs. NOHEMY HERRERA, THIRD-PARTY DEFENDANT.	17 CIV22-202 **JOINT MOTION FOR ORDER ADOPTIONG STIPULATION**

COMES NOW, Iglesias Pentecostal Fuente De Vida, Inc. and Nohemy Herrera, by and through their counsel of record, Ryan D. Cwach, Birmingham & Cwach Law Offices, PLLC, and Mario Torres, by and through his counsel of record Tucker Volesky, Volesky Law Offices, and hereby jointly move that the Court adopt the fully executed stipulation as its Order.

Dated this 10th day of August 2023.

/s/ Ryan D. Cwach
Ryan Cwach
Birmingham & Cwach Law Office, Prof. L.L.C.
202 W. 2nd St.
Yankton, SD 57078
(605) 260-4747
ryan@birmcwachlaw.com

/s/ Tucker Volesky
Tucker Volesky
Attorney at Law
305 North Kimball, P. O. Box 488
Mitchell, SD 57301
605-996-5542

STATE OF SOUTH DAKOTA) :SS. COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
IGLESIAS PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, PLAINTIFF, VS. MARIO TORRES, DEFENDANT AND THIRD PARTY PLAINTIFF, VS. NOHEMY HERRERA, THIRD-PARTY DEFENDANT.	17 CIV22-202 **STIPULATION**

This Stipulation reflects the resolution reached between Iglesias Pentecostal Fuente De Vida, Inc., a Nebraska nonprofit corporation (hereinafter "Church"), Mario Torres (hereinafter "Torres") and Nohemy Herrera (hereinafter "Herrera") concerning the possession of the $223,000.00 cash in dispute during the pendency of this litigation.

1. On July 13, 2022, Mario wrote and deposited a Church check for $223,000.00 into his personal checking account at First Dakota National Bank (hereinafter "First Dakota").
2. Shortly thereafter, the Church alerted First Dakota, disputing that this was not an authorized transfer of funds. First Dakota froze the $223,000.00 in Mario's personal checking account. The $223,000.00 cash remains frozen in Mario's personal checking account.
3. On December 27, 2022, the Court entered an Order authorizing the return of the $223,000.00 cash to the Church in accordance with S.D. Codified Laws Ch. 21-15, such laws requiring the Church to post a bond for double the amount of value of the personal property.
4. After further investigation, the Church was informed by the surety bond company that the bond would cost approximately $5,000 per year of the litigation. The surety bond company further required an irrevocable letter of credit from a bank, which the Church's

bank informed the Church would also cost approximately $5,000 per year of the litigation.

5. The Parties desire to avoid the creation of an additional expenses related to this litigation.
6. The Parties stipulate that the $223,000.00 cash in Mario's personal checking account shall be removed and transferred to a joint savings or money market account at First Dakota National Bank (hereinafter "Settlement Account") jointly held as a trust account of Birmingham & Cwach Law Offices, PLLC, and Tucker Volesky Law Offices. The Parties hereby grant a limited power of attorney to their respective attorneys to withdraw and transfer the funds, open the Settlement Account, all such other powers necessary to complete the terms herein.
7. The Parties, their officers, agents, employees, and attorneys and all other persons in active concert or participation with any of them, whether acting directly or indirectly, are hereby preliminary restrained and enjoined from transferring, encumbering, pledging, loaning, disbursing, assigning, spending, withdrawing, granting a lien or security or other interest in, or otherwise disposing of the cash in the Settlement Account.
8. The parties stipulate that any interest generated on the cash in dispute shall belong to the party that is determined, either by court order or further stipulation, to be rightfully entitled to the $223,000.00 cash.
9. This Stipulation and Consent Judgment has the effect of mooting Church's claim for immediate claim and delivery of personal property and so the claim is hereby dismissed.

Dated this 28th day of July 2023.

FOR THE CHURCH AND PERSONALLY:

Nohemy Herrera

Nohemy Herrera

Plaintiff and Third Party Defendant Attorney's Consent:

/s/ Ryan D. Cwach

Ryan D. Cwach #4245
Attorney for Plaintiff

Birmingham & Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
605-260-4747
ryan@birmcwachlaw.com

Dated this 7th day of August 2023.

Mario Torres

Defendant Attorney's Consent:

/s/ Tucker Volesky
Tucker Volesky
Attorney at Law
305 North Kimball, P. O. Box 488
Mitchell, SD 57301
605-996-5542

STATE OF SOUTH DAKOTA) :ss. COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
IGLESIAS PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, PLAINTIFF, vs. MARIO TORRES, DEFENDANT AND THIRD PARTY PLAINTIFF, vs. NOHEMY HERRERA, THIRD-PARTY DEFENDANT.	17 CIV22-202 **ORDER**

Now, on this _____ day of _______ 2023, the above captioned matter came on for hearing on the parties' joint motion for approval of stipulation agreement. Thre were no appearances.

The Court notes the Stipulation is on file with the Court Clerk.

The Court hereby finds:

1. On July 13, 2022, Mario wrote and deposited a Church check for $223,000 into his personal checking account at First Dakota National Bank (hereinafter "First Dakota").
2. Shortly thereafter, the Church alerted First Dakota, disputing that this was not an authorized transfer of funds. First Dakota froze the $223,000 in Mario's personal checking account. The $223,000 cash remains frozen in Mario's personal checking account.
3. On December 27, 2022, the Court entered an Order authorize the return of the $223,000 cash to the Church in accordance with S.D. Codified Laws Ch. 21-15, such laws requiring the Church to post a bond for double the amount of value of the personal property.
4. After further investigation, the Church was informed that the bond would cost approximately $5,000 per year of the litigation. The surety bond company further

required an irrevocable letter of credit from the bank, which would also cost approximately $5,000 per year of the litigation.

5. The parties desire avoid the creation of an additional expenses related to this litigation.
6. The Parties stipulate that the $223,000.00 cash in Mario's personal checking account shall be removed and transferred to a joint savings or money market account at First Dakota National Bank (hereinafter "Settlement Account") jointly held as a trust account of Birmingham & Cwach Law Offices, PLLC, and Tucker Volesky Law Offices. The Parties hereby grant a limited power of attorney to their respective attorneys to withdraw and transfer the funds, open the Settlement Account, all such other powers necessary to complete the terms herein.
7. The Parties, their officers, agents, employees, and attorneys and all other persons in active concert or participation with any of them, whether acting directly or indirectly, are hereby preliminary restrained and enjoined from transferring, encumbering, pledging, loaning, disbursing, assigning, spending, withdrawing, granting a lien or security or other interest in, or otherwise disposing of the cash in the Settlement Account.
8. The parties stipulate that any interest generated on the cash in dispute shall belong to the party that is determined, either by court order or further stipulation, to be rightfully entitled to the $223,000 cash.
9. This Stipulation and Consent Judgment has the effect of mooting Church's claim for immediate claim and delivery of personal property and so the claim is hereby dismissed.

BE IT SO ORDERED.

Dated: **8/14/2023 4:15:58 PM**

BY THE COURT:

Attest:
Lorang, Trista
Clerk/Deputy

STATE OF SOUTH DAKOTA) : SS COUNTY OF DAVISON)		IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, Plaintiff, v. MARIO TORRES, Defendant and Third-Party Plaintiff, v. NOHEMY HERRERA, Third-Party Defendant.	)	17CIV22-000202 AFFIDAVIT OF MARIO TORRES IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAVISON)

Mario Torres, Defendant and Third-Party Plaintiff above named, being first duly sworn on oath, deposes and states that I am a resident of Mitchell, Davison County, State of South Dakota, over the age of eighteen (18) years and I make these statements based on my own personal knowledge and information, with the assistance of an interpreter who has been sworn and qualified to translate before the above Court:

1. I have personal knowledge concerning the affairs, operations, structure, and activities of the Plaintiff Iglesia Pentecostal Fuente De Vida, Inc., which I will refer to as "the Church."

2. Nohemy Herrera, as the Church's principal officer, managed, organized, and directed the Church's activities, including locations in Columbus, Nebraska, Yankton, South Dakota, and Mitchell, South Dakota.

3. In 2017, I began preaching at the Church's Mitchell location.

4. On or about May 2, 2022, the Church held an event at its Columbus, Nebraska location.

5. At the time of that event, Nohemy Herrera called me into her office to speak with me privately. My wife, Maria Torres, accompanied me into the office. Francisco Herrera, who is Nohemy Herrera's husband and a principal officer of the Church, was also present in the office.

6. In her office, Nohemy Herrera told me that I would be receiving a check for the Church and that "we would like to share it with you."

   a. Herrera stated that I would be getting a check, that "it is going to be for the Church," and that "we are going to go to Yankton [South Dakota] and we are going to deposit the check."

   b. Herrera stated that "we are going to buy you a car and give you $350 per week."

   c. Herrera specifically advised that the check I would be receiving was for the Church and that I should not say anything to anybody about the check, "absolutely nobody."

   d. Herrera stated that "we want this to stay between us."

7. I relied on these representations made to me by Nohemy Herrera.

8. During the said Church event, Mr. Cooper Vasquez gave me an envelope.

9. Inside the envelope there was a check in the amount of $300,000. The memo line of the check stated "Missions" and the payee line was blank.

10. At that time, I advised Herrera that I had received the check from Mr. Cooper Vasquez. Herrera then took the check and wrote "Iglesia P. Fuente de vida" on the payee line.

11. During the said event at Columbus, Nebraska, Herrera directed me to meet her at the First Dakota National Bank, N.A., in Yankton, South Dakota, on May 3, 2022, to deposit the check.

12. As directed, on May 3, 2022, I met Herrera in Yankton, South Dakota, where she had the check and deposited it in a checking account owned by the Church.

13. After depositing the check in the Church account, Herrera directed me to write some checks on the account.

14. I wrote out two checks, Herrera wrote out a third check, and I signed all three checks

as directed.

15. Bank records documenting financial transactions related to the $300,000 check from Mr. Cooper Vasquez have been produced through discovery in this lawsuit, attached to the Affidavit of Counsel as Exhibit A.

16. At that time, I was under belief the Church owned the funds based on the representation made to me by Herrera on May 2, 2022.

17. Approximately a month and a half after the $300,000 check that Mr. Cooper Vasquez had given to me was deposited in the Church account, we had a phone conversation. The phone call was general in nature; I had simply called to check on Mr. Cooper Vasquez and his family. During the phone call, Mr. Cooper Vasquez inquired of the $300,000 check that he had given me, including whether I had purchased a home for my family. I advised Mr. Cooper Vasquez at that time that the funds had been deposited in a Church checking accounting at the direction of Nohemy Herrera.

18. The $300,000 check that Mr. Cooper Vasquez had given to me was intended for me personally. Mr. Cooper Vasquez advised that he had specifically told this to Nohemy Herrera and Francisco Herrera prior to writing the check and delivering it to me.

19. Approximately a couple days after my phone call with Mr. Cooper Vasquez, Nohemy Herrera called me. At the time of the call, Herrera was in Columbus, Nebraska, upon information and belief, and I was in Mitchell, South Dakota. The purpose of Herrera's phone call was to assert that Church owned funds represented by the check that had been given to me by Mr. Cooper Vasquez. Over the said telephone call, Herrera attempted to perpetuate the fraud.

20. Had Herrera not misrepresented to me that the check was for the Church, I would have never consented to her taking the check, listing the Church as the payee, and depositing it into a Church account.

21. Nohemy Herrera deceived me into falsely believing that the $300,000 check given to me by Mr. Cooper Vasquez on May 2, 2022, was for the Church.

AFFIANT FURTHER SAYETH NOT.

Mario Torres
Mario Torres – Affiant

2-8-2024
Date

Devy Alvizures – Interpreter

2/8/2024
Date

App. 58

Subscribed and sworn to before me this 8th day of February 2024.

Mary Freeman

Notary Public, South Dakota
My Commission expires: 11-8-2027

App. 59

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true and correct copy of the foregoing Affidavit was filed with the Clerk of Courts and served on the following:

Ryan D. Cwach #4245
Attorney for Plaintiff and Third-Party Defendant
Birmingham and Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078

via electronic service this 19th day of February 2024.

/s/ Tucker J. Volesky
Tucker J. Volesky

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF DAVISON)		FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, Plaintiff, v. MARIO TORRES, Defendant and Third-Party Plaintiff, v. NOHEMY HERRERA, Third-Party Defendant.	17CIV22-000202 AFFIDAVIT OF MARIA TORRES

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAVISON)

Maria Torres, being first duly sworn on oath, deposes and states that I am a resident of Mitchell, Davison County, State of South Dakota, over the age of eighteen (18) years and I make these statements based on my own personal knowledge and information, with the assistance of an interpreter who has been sworn and qualified to translate before the above Court:

1. I have personal knowledge concerning the parties named above and the matters stated herein.

2. Mario Torres, above named, is my husband.

3. In 2017, Mario began preaching at the Church's Mitchell location.

4. On or about May 2, 2022, the Church held an event at its Columbus, Nebraska location.

5. At the time of that event, I accompanied Mario into the office of Nohemy Herrera

who is the principal officer and owner of the Church. Francisco Herrera, who is Nohemy Herrera's husband, was also present in the office.

6. In her office, Nohemy Herrera told Mario that he would be receiving a donation for the Church in the form of a check and that they would like to share it with Mario.

7. Herrera explained the check was going to be for the Church and that they were going to deposit it in Yankton, South Dakota.

8. Herrera stated that they wanted to buy Mario a car and begin giving Mario a weekly payment.

9. Herrera advised that the check Mario would be receiving was for the Church and that we should not say anything to anybody about the check, "absolutely nobody," that "we want this to stay between us."

AFFIANT FURTHER SAYETH NOT.

Maria Torres
Maria Torres – Affiant

2/8/2024
Date

Devy Alvizures – Interpreter

2/8/2024
Date

Subscribed and sworn to before me this 8th day of February 2024.

Mary Freeman
Notary Public, South Dakota
My Commission expires: 11-8-2027

App. 62

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true and correct copy of the foregoing Affidavit was filed with the Clerk of Courts and served on the following:

Ryan D. Cwach #4245
Attorney for Plaintiff and Third-Party Defendant
Birmingham and Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078

via electronic service this 19th day of February 2024.

/s/ Tucker J. Volesky
Tucker J. Volesky

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAVISON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION,

Plaintiff,

v.

MARIO TORRES,

Defendant and Third Party Plaintiff

v.

NOHEMY HERRERA,

Third Party Defendant

17CIV22-000202

AFFIDAVIT OF ALEX COOPER VASQUEZ

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAVISON)

Alex Cooper Vasquez, being first duly sworn on oath, deposes and states that I am a resident of Columbus, Platte County, State of Nebraska, over the age of eighteen (18) years and I make these statements based on my own personal knowledge and information, with the assistance of an interpreter who has been sworn and qualified to translate before the above Court:

1. That on May 2, 2022, I wrote out three separate checks each for $300,000.00.

2. Attached hereto, marked as Iglesia370, is a copy of the check I wrote for Mario Torres. I wrote the check out for $300,000, wrote "missions" on the memo line, and dated and signed the check. I intentionally left the payee line on the check blank, so that Mario could personally deposit the funds into any account he may have set up. I handed this check to Mario Torres in a sealed envelope. The check was for Mario Torres personally.

3. Attached hereto, marked as Iglesia371, is a copy of the check I wrote for Daniel Cabrera. I wrote the check out for $300,000, wrote "missions" on the memo line, and dated and signed the check. I intentionally left the payee line on the check blank, so that Daniel

could personally deposit the funds into any account he may have set up. I handed this check to Daniel Cabrera in a sealed envelope. The check was for Daniel Cabrera personally.

4. Attached hereto, marked as Iglesia109, is a copy of the check I wrote for Iglesia Pentecostal Fuente de Vida. I wrote the check out for $300,000, wrote "tithe" on the memo line, and dated and signed the check. I also wrote Iglesia Pentecostal Fuente de Vida on the payee line. This check was a gift to the Church, Plaintiff above named.

5. After I wrote and delivered each of the three checks as described above, I later learned that Nohemy and Francisco Herrera misrepresented to Mario and Daniel that the checks they had received were donations for the Church and that they caused the funds to be deposited into accounts maintained by the Church.

6. Nohemy and Fracisco Herrera knew that the checks I delivered to Mario and Daniel were for Mario and Daniel personally. I had specifically told them this prior to writing the checks.

7. Nohemy and Fracisco Herrera deceived Mario Torres into believing that the check I gave to him on May 2, 2022, a copy of which is attached hereto marked as Iglesia370, was for the Church.

8. Had it been my intent to donate $900,000 to the Church on May 2, 2023, I would have written only one check. Instead, I wrote three separate checks. The $300,000 check that I delivered to Mario Torres was for Mario Torres personally.

Further, affiant sayeth not.

______________________ 11/04/2023
Alex Cooper Vasquez – Affiant Date

______________________ 11/4/2023
Devy Alvizures – Interpreter Date

Subscribed and sworn to before me this 4th day of November 2023.

____
Notary Public, South Dakota
My Commission expires: 11-8-2027

NOTARY PUBLIC

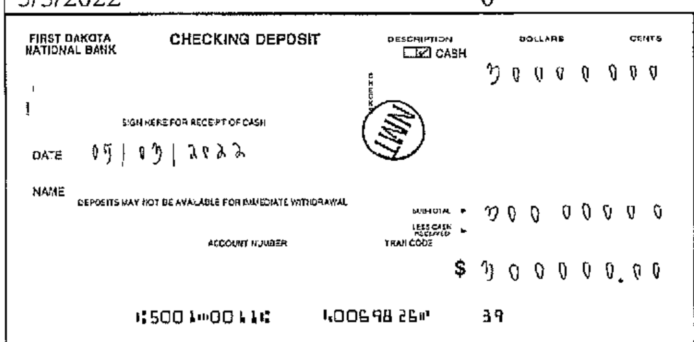
First Dakota National Bank
PO Box 156
Yankton SD 57078
605-665-7432

Iglesia Pentecostal Fuente De Vida Inc
dba Inglesia Pentecostal Fuente
Mitchell
1454 21st Ave
Columbus NE 68601-5119

Customer Number: IAA0598

Account Number: XXXXXXXXXXXXX826

Date	Check #	Amount
5/3/2022	0	$300,000.00


FIRST DAKOTA NATIONAL BANK CHECKING DEPOSIT

DESCRIPTION ☑ CASH — DOLLARS — CENTS: 300000 00

SIGN HERE FOR RECEIPT OF CASH

DATE 05 | 03 | 2022

NAME

DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

ACCOUNT NUMBER — TRAN CODE

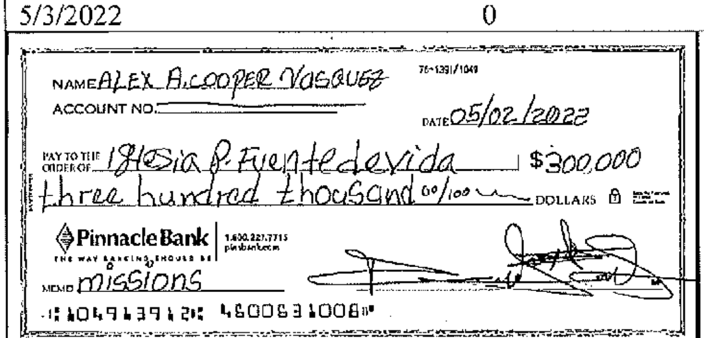
SUBTOTAL 300 000 00

LESS CASH RECEIVED

$ 300000.00

⑆500100114⑆ 100598 26⑈ 39

Date	Check #	Amount
5/3/2022	0	$300,000.00


NAME ALEX A. COOPER VASQUEZ 76-1391/1049

ACCOUNT NO.

DATE 05/02/2022

PAY TO THE ORDER OF Iglesia P. Fuente de vida $300,000

three hundred thousand 00/100 DOLLARS

PinnacleBank

MEMO missions

⑆104913912⑆ 46006 31008⑈

This temporary statement from First Dakota National Bank is not a formal statement of your account. These items will be reflected again on your regularly scheduled statement.

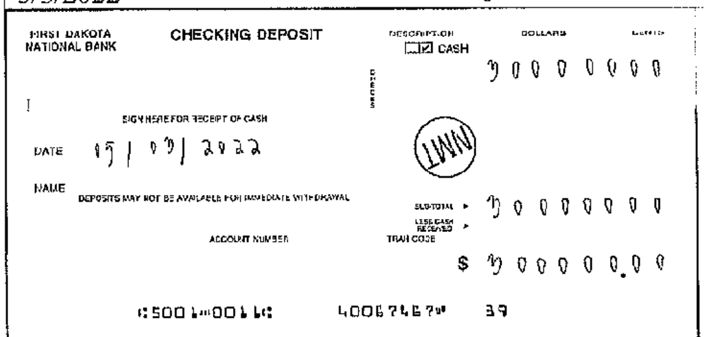
First Dakota National Bank
PO Box 156
Yankton SD 57078
605-665-7432

Iglesia Pentecostal Fuente De Vida Inc
1010 Burleigh St
Yankton SD 57078-3126

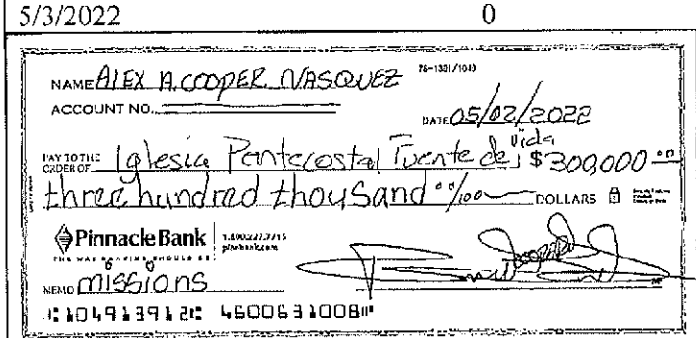
Customer Number: IAA0598

Account Number: XXXXXXXXXXXXX467

Date	Check #	Amount
5/3/2022	0	$300,000.00

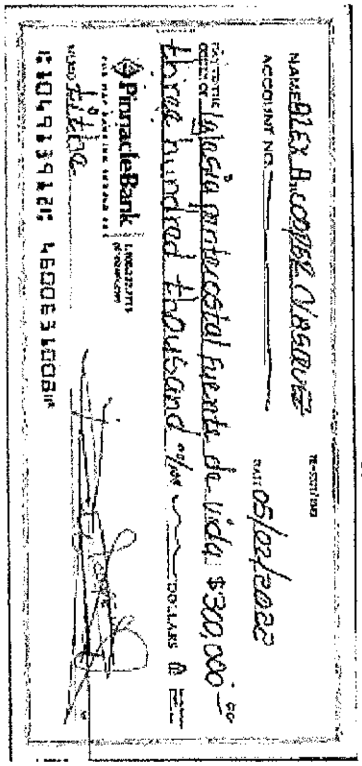


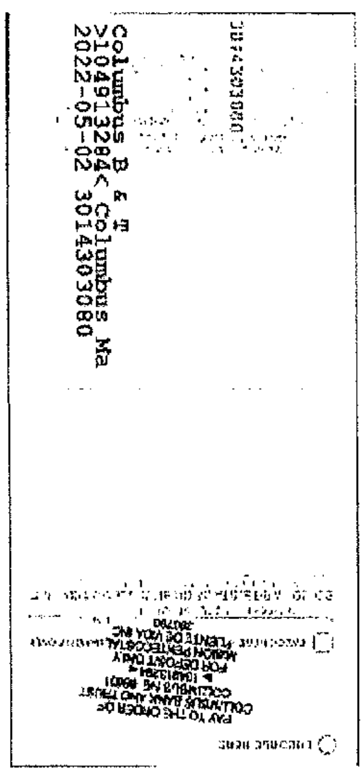
Date	Check #	Amount
5/3/2022	0	$300,000.00



This temporary statement from First Dakota National Bank is not a formal statement of your account.
These items will be reflected again on your regularly scheduled statement.

Iglesia371
April 20, 2023





Iglesia109

App. 68

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true and correct copy of the foregoing Affidavit was filed with the Clerk of Courts and served on the following:

Ryan D. Cwach #4245
Attorney for Plaintiff and Third-Party Defendant
Birmingham and Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078

via electronic service this 19th day of February 2024.

/s/ Tucker J. Volesky
Tucker J. Volesky

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAVISON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION,

Plaintiff,

v.

MARIO TORRES,

Defendant and Third-Party Plaintiff,

v.

NOHEMY HERRERA and FRANCISCO HERRERA,

Third-Party Defendants.

17CIV22-000202

VERIFIED AMENDED THIRD-PARTY COMPLAINT

COMES NOW, the above-named Third-Party Plaintiff, by and through his undersigned counsel, and for his cause of action against the Third-Party Defendants, demands a jury trial and states as follows:

1. The Third-Party Plaintiff Mario Torres ("Mario") is a resident of Mitchell, SD.
2. The Plaintiff Iglesia Pentecostal Fuente De Vida Inc. ("Church") is a 501(c)(3) and South Dakota foreign nonprofit corporation, with churches in Columbus, NE, Yankton, SD, and Mitchell, SD.
3. The Third-Party Defendant Nohemy Herrera ("Herrera" or "Nohemy") is a resident of Columbus, NE. Herrera is the Church's President and beneficial owner.

~~3.~~4. The Third-Party Defendant Francisco Herrera ("Francisco") is a resident of Columbus, NE. During the time relevant to the events alleged in this Verified Amended Third-Party Complaint, Francisco and Nohemy ("Herreras") were married. The Herreras, and each of them, conducted the operations of the Church as detailed below. Francisco is the Church's Vice-President and beneficial owner.

Exhibit A App. 70

~~4.~~5. This Court has jurisdiction over the parties and the subject matter herein. The Herreras committed acts within the State of South Dakota including, but not limited to, the transaction of business and use or possession of property within the state, from which Mario's cause of action arises.

~~5.~~6. Venue is appropriate in this Court.

~~6.~~7. In 2017, Mario commenced serving as pastor at the Church's Mitchell location.

~~7.~~8. While serving as pastor, Mario worked as a painter for a local landlord to earn income to support his family.

9. On or about April 30, 2022, the Church held a special event at its Columbus, NE location.

10. At that time, Alex Cooper Vasquez, who was a Church member, intended to make three separate monetary gifts, including to the Church and to two pastors personally, from proceeds he had recovered on a work injury claim.

11. Accordingly, Alex Cooper Vasquez wrote three checks for $300,000 each, dated May 2, 2022. On one check, Alex Cooper Vasquez wrote the name of the Church on the payee line and "Tithe" on the memo line. Cooper Vasquez subsequently delivered this check to Herrera. On the other two checks, Alex Cooper Vasquez left each payee line blank and wrote "Missions" on each memo line. Cooper Vasquez subsequently delivered these two checks to Daniel Cabrera and Mario Torres, respectively.

~~8.~~12. Before delivering the checks he had written as described above, Alex Cooper Vasquez informed the Herreras that he intended to make a gift to the Church and that he intended to make personal gifts to pastors Daniel Cabrera and Mario Torres, respectively, informing the Herreras how he intended to do it.

~~9.~~13. ~~That same day~~ Thereafter, before Cooper Vasquez delivered the checks as described above, Nohemy Herrera spoke privately with Mario to advise that Alex Cooper Vasquez ("Cooper"), a benefactor known to both parties, would be giving Mario a check and that it is going to be for the Church.

14. During the private meeting, Herrera also advised Mario not to tell any of the Church's other pastors or members about the check he would be receiving from Cooper, that he was not to discuss it with anybody and ~~to~~ keep it "between us," and that the Church was going to buy Mario a new car and would begin paying him a weekly pastoral stipend of $350.

15. Herrera instructed that after Mario received that check, they were going to go to Yankton, South Dakota to deposit it in a bank account owned by the Church.

~~10.~~16. Francisco was present during the said private meeting, as was Mario's wife, Maria Torres.

~~11.~~17. At the special event on Saturday, April 30, 2022, Cooper handed Mario an envelope.

~~12.~~18. Mario would later open the envelope, which contained a check in the amount of $300,000; the payee line was blank, and the memo line stated "Missions."

~~13.~~19. On Monday, May 2, 2022, Mario's wife was badly injured in a vehicle accident and was taken to the ER.

~~14.~~20. Mario stayed with his wife in the ER.

21. During that time, or approximately around the time of the Church event described above, Herrera obtained the $300,000 check that had been given to Mario by Cooper, wrote in the Church on the payee line and deposited the check in the Church's checking account at First Dakota National Bank, N.A. at the bank's Yankton, SD branch on Tuesday, May 3, 2022, and began drawing on the funds.

~~15.~~22. As directed by Herrera, Mario also traveled from Columbus, Nebraska to Yankton, South Dakota where the check was deposited in a Church checking account on May 3, 2022.

~~16.~~23. That same day, upon depositing the funds, Herrera directed Mario to write multiple checks from the account for ~~withdrew~~ a total of $67,000.

24. Herrera continued withdrawing the funds from the account, including a $5,000 cash withdrawal on June 23, 2022.

25. Herreras also paid Mario a pastoral stipend each week from the proceeds of Cooper's check, including by checks written on the Church account as follows:

Check dated May 6, 2022, and signed by Nohemy Herrera

Check dated May 13, 2022, and signed by Nohemy Herrera

Check dated May 27, 2022, and signed by Francisco Herrera

Check dated June 3, 2022, and signed by Francisco Herrera

Check dated June 10, 2022, and signed by Francisco Herrera

Check dated June 17, 2022, and signed by Nohemy Herrera

Check dated June 25, 2022, and signed by Nohemy Herrera

Check dated July 2, 2022, and signed by Nohemy Herrera

Check dated July 8, 2022, and signed by Nohemy Herrera

26. It was within this time frame that the above detailed scheme to defraud Mario of the $300,000 from Cooper was discovered and revealed, when Mario made a routine call to Cooper to congratulate him on his marriage and Cooper inquired how Mario was doing and if he had purchased a house for his family.

~~17.~~27. Herrera, from Nebraska, subsequently made a telephone call to Mario in South Dakota, attempting to perpetuate the fraud that the proceeds of the $300,000 check that Mario received from Cooper belonged to the Church.

~~18.~~28. Mario was the intended beneficiary of the $300,000 from Cooper.

~~19.~~29. Herreras knew that Mario was the intended beneficiary of the $300,000 from Cooper. Herreras' acts, detailed herein, were knowing, intentional, and undertaken with the specific intent to defraud Mario of the $300,000 from Cooper.

~~20.~~30. On July 13, 2022, Mario was able to recover $223,000 via transfer from the Church's checking account to Mario's personal account at the Mitchell branch of the First Dakota National Bank, N.A., but the funds were ~~have been~~ frozen by the bank and remain inaccessible to Mario.

~~21.~~31. Herrera, through the Church, is responsible for causing the bank to freeze the $223,000 cash in Mario's account.

~~22. Herrera refuses to allow the release of the $223,000.~~

COUNT I – VIOLATION OF 18 U.S.C. §1962(c) (RACKETEER INFLUENCED CORRUPT ~~OGR~~ORGANIZATIONS ACT (RICO))

~~23.~~32. Mario realleges and repleads paragraphs 1-31~~22~~ above as if fully set forth herein.

~~24.~~33. Nohemy and Francisco Herrera are each ~~is a~~ "persons" pursuant to 18 U.S.C. §1961(3).

34. The Church is a RICO enterprise pursuant to 18 U.S.C. §1961(4). It affects interstate commerce because it receives funds and conducts operations and has at all relevant times purchased, on a continuing basis, goods and services from vendors, located outside of South Dakota.

~~25.~~35. Nohemy and Francisco Herrrera are and have been officers, directors, and beneficial owners, and have controlled and operated, the Church, at all relevant times.

~~26.~~36. Herreras used the Church to carry out their ~~her~~ scheme to enrich themselves,~~herself,~~ at Mario's expense.

37. As a part of the scheme, Herrera misrepresented to Mario on April 30, 2022, that the check he would be receiving from Cooper was to go to the Church. Herrera instructed Mario not to tell anybody else about the check, that it needs to stay between them, and that the Church will buy Mario a car and begin giving him a weekly pastoral stipend of $350.00. As a result of Herrera's false and fraudulent representations to Mario, Herrera obtained the $300,000 check from Mario and travelled across state lines to deposit the check in a Church bank account.

~~27.~~38. As a part of the scheme, Mario was prohibited from mentioning the check he received from Cooper to anybody, and, each week, the Herreras wrote Mario a $350 "pastoral stipend" from the fraudulently begotten proceeds in the Church's account.

~~28.~~39. The scheme violated the provisions of SDCL Ch. 22-30A~~,~~ which states, ~~in s~~ at Section 15: "Conduct constituting theft pursuant to this chapter constitutes…any separate offenses…known as larceny, embezzlement, extortion, fraudulent conversion, false pretense, and receiving stolen property."

~~29.~~40. As a part of the scheme, Herrera obtained the check through false pretenses, extortion, and/or theft, wrote the Church on the payee line, deposited the check in the Church's checking account, and began drawing on the funds.

~~30.~~41. The false and fraudulent deposit as well as the false and fraudulent drawing of funds violated 18 U.S.C. §1344, which states, in pertinent part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> …
>
> (2) to obtain any of the moneys, funds, credits…under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

42. Herrera used false and fraudulent pretenses, representations, and promises in execution of the scheme which included obtainings ~~the~~ $300,000 under the custody or control of a financial institution, whereby Herrera, through false and fraudulent pretenses, representations, and promises, caused a transfer of funds from Cooper's bank account in the amount of $300,000 that was under the custody and control of Pinnacle Bank in Nebraska, a financial institution within the meaning of 18 U.S.C. § 1344, to the Church's bank account at First Dakota National Bank in South Dakota.

~~31.~~43. As a part of the scheme, Herrera caused First Dakota National Bank, N.A. to freeze $223,000 cash in Mario's personal checking account, attempting to continue the execution of the scheme.

~~32.~~44. The scheme interfered with commerce in violation of 18 U.S.C. §1951, which states, in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by…extortion or attempts or conspires so to do…in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> …
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced…under color of official right.

45. Herrera affected commerce and the movement of articles in commerce by extortion in furtherance of the scheme to defraud Mario, in that Herrera obtained the $300,000 check from Mario, with his consent, induced under color of her official right to the funds. In so doing, Herrera traveled from Columbus, Nebraska to Yankton, South Dakota, and deposited the check causing a transfer of funds from Pinnacle Bank in Nebraska to First Dakota National Bank in South Dakota. Herrera, in furtherance of the scheme to defraud Mario, thereafter conducted various, including repeated, banking and financial transactions with respect to the funds, affecting commerce and the movement of articles in commerce, with Mario's consent induced under the color of Herrera's official right to the funds.

~~33.~~46. As a part of the scheme, Herreras, and each of them, traveled from Nebraska to South Dakota to deposit the check and used facilities, in interstate commerce, to further the scheme.

~~34.~~47. This scheme violated 18 U.S.C. §1952, which states, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--
>
> (1) distribute the proceeds of any unlawful activity; or
>
> …
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform—
>
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years or both;

...

> (b) As used in this section (i) "unlawful activity" means...(2) extortion...in violation of the State in which committed or of the United States, or (3) any act which is indictable...under section 1956 or 1957 of this title[.]

48. As detailed above, Herrera committed theft and extortion, under state and federal law, in execution of the scheme to obtain~~ing~~ the $300,000 check from Mario and defraud him of the proceeds.~~,~~ The Herreras, and each of them, also traveled and used facilities in interstate commerce with the intent to distribute the unlawfully derived proceeds and to otherwise promote, manage, carry on, and facilitate the unlawful activity, as a part of the scheme to defraud Mario. And the Herreras thereafter distributed the proceeds, and promoted, managed, and facilitated the carrying on, of unlawful activity.

49. As detailed in Paragraphs 14 and 25 above, the scheme executed by the Herreras to defraud Mario of the $300,000, included payments to Mario of $350 per week from the unlawfully derived proceeds of the check from Cooper that was deposited into the Church checking account. These weekly pastoral stipends were purposely designed to lull Mario into silence through the laundering of the funds through the Church, including Mario's weekly "pastoral stipend" which was a recurring distribution each week, to prohibit Mario from asking any questions about the source of the funds or the $300,000 check given to him by Cooper.

50. The weekly pastoral stipends to Mario, which were to recur each week indefinitely projecting into the future, involved money laundering designed to conceal the nature, source, ownership, and control of the funds and to further the scheme to defraud Mario, and thus violated 18 U.S.C. § 1956 which prohibits conducting financial transactions involving proceeds derived from unlawful activities with the intent to carry on the activity or to conceal or disguise the nature, location, source, ownership, or control of the proceeds. Nohemy and Francisco Herrera conducted these financial transactions, as well as others detailed above, with the requisite knowledge and intent, and, with each such transaction violated 18 U.S.C. § 1956.

51. As part of the scheme to defraud Mario, as detailed above, the Herreras laundered funds through the Church, which included knowingly engaging in monetary transactions in criminally derived property from specified unlawful activity in violation of 18 U.S.C. § 1957, which specified unlawful activity included, without limitation, wire fraud under 18 U.S.C. § 1343 and bank fraud under § 1344, in addition to other such activity listed as offenses under 18 U.S.C. § 1961(1), including 18 U.S.C. §§ 2314 and 2315, that the Herreras violated as part of the scheme to defraud Mario.

~~35.~~52. SDCL Ch. 22-30A and 18 U.S.C. sections 1343, 1344, 1951, 1952, 1956, and 1957 are acts of racketeering pursuant to 18 U.S.C. §1961(1)(A)-(B).

~~36.~~53. Through the scheme concerning the $300,000 that was from Cooper and intended for Mario, as detailed above, the Herreras violated 18 U.S.C. §1962(c), which states, in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity…

~~37.~~54. The Herreras committed a pattern of violations of SDCL Ch. 22-30A and 18 U.S.C. §§ 1343, 1344, 1951, 1952, 1956, ~~and~~ 1957, 2314, and 2315. The scheme was executed through the ~~Church,~~ Church and included, in part, the weekly pastoral stipend to be paid to Mario indefinitely, utilizing frauds related to the ownership of the $300,000 from Cooper in order to be carried out.

~~38.~~55. This constitutes an open "pattern" of racketeering activity pursuant to 18 U.S.C. §§1961 (1) and (5), and §1962(c), which began approximately in late April of 2022 and projected indefinitely into the future. Mario was directly and proximately damaged by the frauds perpetrated by the Herreras in furtherance of the scheme concerning the $300,000.

~~39.~~56. As a direct and proximate result of, and by reason of, this pattern of racketeering, ~~Defendant~~ the Third-Party Plaintiff Mario has been injured in his business or property, within the meaning of 18 U.S.C. § 1964(c), in the amount of $300,000.

~~40.~~57. Wherefore, pursuant to 18 U.S.C. §1964(c), ~~Defendant~~ Mario demands judgment against the Herreras for three times his damages plus pre-judgment interest, taxable costs, and reasonable attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Defendant and Third-Party Plaintiff above named, Mario Torres, respectfully requests this Court to enter judgment as follows:

1. For an Order finding that the Third-Party Defendants, Nohemy and Francisco Herrera, are jointly and severally liable for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c).

2. For an Order awarding actual damages, treble damages and attorneys' fees as provided for by 18 U.S.C. § 1964(c) for Herreras's violations of 18 U.S.C. § 1962(c).

3. For such other and further relief as may be just and equitable, including but not limited to costs, disbursements and reasonable attorneys' fees incurred herein.

DEMAND IS HEREBY MADE FOR A JURY TRIAL ON ALL ISSUES PRESENTED.

App. 77

Respectfully submitted this _____ day of May~~January~~, 2024~~3~~.

/s/ Tucker Volesky 5/21/24

Tucker Volesky
Attorney at Law
305 North Kimball, P. O. Box 488
Mitchell, SD 57301
605-996-5542

VERIFICATION

I, Mario Torres, state, declare and verify as follows:

1. I am the Third-Party Plaintiff in the above captioned case. I have reviewed the foregoing Amended Third-Party Complaint, and I make these statements on my own personal knowledge, information, and belief, with the assistance of an interpreter who has been sworn and qualified to translate before the above captioned Court.

2. I have personal knowledge of myself, my activities, and my intentions, including those set out in the Amended Third-Party Complaint, and if called on to testify I would competently testify as to the matters stated therein.

3. I have personal knowledge of Alex Cooper Vasquez, Nohemy Herrera, and Francisco Herrera, their activities, and their intentions, including those set out in the Amended Third-Party Complaint, and if so called on to testify I would competently testify as to the matters stated therein.

4. I verify under penalty of perjury under the laws of the United States of America that to the best of my knowledge, information, and belief, the factual statements in the Amended Third-Party Complaint concerning myself, my activities, and my intentions are true and correct, as are the factual statements concerning Alex Cooper Vasquez, Nohemy Herrera, and Francisco Herrera, their activities, and their intentions. 28 U.S.C. § 1746.

Executed on May 20th, 2024.

Mario Torres

Mario Torres
Third-Party Plaintiff

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF DAVISON)

I, Devy Alvizures, being first duly sworn, depose and state that I am duly qualified in providing professional translation services and that I translated the foregoing document titled Verified Amended Third-Party Complaint and Verification to Mario Torres on the 20th date of May 2024, and I affirm that the translation provided was true, concise, and accurate to the best of my ability.

AFFIANT FURTHER SAYTH NOT.

Devy Alvizures

Subscribed and sworn to before me this 20 day of May 2024.

Notary Public, South Dakota
My Commission expires: 11-8-2027

MARY FREEMAN
NOTARY PUBLIC

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAVISON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION,	)	17CIV22-000202
Plaintiff,	)	LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE
v.	)	
MARIO TORRES,	)	
Defendant and Third-Party Plaintiff,	)	
v.	)	
NOHEMY HERRERA,	)	
Third-Party Defendant.	)	

LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE

BETWEEN:

ALEX COOPER VASQUEZ ("Client")
of Nebraska

AND

SEAN CONWAY, ESQ. ("Attorney")
Chandler Conway PC, LLO
1018 Dodge Street, Suite 5
Omaha, Nebraska 68102

RECITALS:

WHEREAS, Attorney represented Client in connection with a personal injury and/or work comp matter arising from a workplace accident that occurred in 2019, which resulted in a settlement paid to Client in 2022;

App. 80 EXHIBIT D

WHEREAS, a dispute has arisen in the matter of Iglesia Pentecostal Fuente De Vida, Inc. v. Mario Torres v. Nohemy Herrera, Case No. 17CIV22-000202, currently pending in the Circuit Court of Davison County, South Dakota (the "Litigation");

WHEREAS, the Litigation principally involves issues surrounding the intent and purpose of three checks, each in the amount of $300,000.00, written by Client on or about May 2, 2022, including one check that Client contends was intended as a personal gift for Mario Torres;

WHEREAS, Attorney possesses information regarding Client's intentions with respect to the disposition of settlement proceeds from Client's injury matter, including Client's stated intentions regarding gifts to Mario Torres, Daniel Cabrera, and a donation to Iglesia Pentecostal Fuente De Vida, Inc.;

WHEREAS, Attorney has been asked to provide testimony, by affidavit, deposition or at trial, regarding communications with Client concerning Client's intentions for the disposition of settlement proceeds, but Attorney has declined to provide on the record testimony based on the attorney-client privilege;

WHEREAS, Client desires to waive the attorney-client privilege to the limited extent necessary to allow Attorney to provide testimony regarding communications between Attorney and Client concerning Client's intentions for the disposition of settlement proceeds as they relate to the three $300,000.00 checks at issue in the Litigation;

NOW, THEREFORE,

1. LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE

1.1 **Grant of Limited Waiver**. Client hereby knowingly, voluntarily, and intentionally waives the attorney-client privilege, but only with respect to communications between Client and Attorney concerning Client's intentions for the disposition of settlement proceeds from Client's personal injury matter, specifically as those communications relate to Client's intentions regarding the three checks, each in the amount of $300,000.00, written by Client on or about May 2, 2022.

1.2 **Scope of Waiver**. This waiver applies to:

1. Communications between Client and Attorney regarding Client's intentions to make gifts to Mario Torres and Daniel Cabrera, and a donation to Iglesia Pentecostal Fuente De Vida, Inc.;

2. Communications regarding the amounts of such intended gifts and donation;

3. Communications regarding the timing of such intended gifts and donation;

4. Communications regarding the purpose of such intended gifts and

donation;

5. Client's intentions regarding the disposition of settlement proceeds from his injury claims, including the purpose and intent of three checks, each in the amount of $300,000, written on or about May 2, 2022.

6. Client's stated intentions to make a personal gift to Mario Torres, as well as other relevant communications regarding the checks or gift at issue.

2. AUTHORIZED DISCLOSURE

2.1 **Authorized Testimony**. Client authorizes Attorney to provide testimony, whether by affidavit, deposition, or at trial, regarding the communications within the scope of this limited waiver as defined in Section 1.

2.2 **Form of Testimony**. Attorney may, at Attorney's discretion, provide such testimony by executing an affidavit prepared by counsel for Mario Torres, by sitting for a deposition, or by testifying at trial, provided that such testimony remains within the scope of this limited waiver.

2.3 **Disclosure of Documents.** To the extent Attorney possesses any documents memorializing or reflecting communications within the scope of this limited waiver, Attorney is authorized to produce such documents in connection with Attorney's testimony.

3. PRESERVATION OF PRIVILEGE

3.1 **No Broader Waiver**. This limited waiver shall not be construed as a waiver of the attorney-client privilege with respect to any communications outside the scope of this waiver as defined in Section 1.

3.2 **No Waiver in Other Proceedings**. This limited waiver applies only to the Litigation and shall not constitute a waiver of the attorney-client privilege in any other proceeding or for any other purpose.

4. REPRESENTATIONS AND WARRANTIES

4.1 **Client's Representations**. Client represents and warrants that:

1. Client has carefully read and fully understands the terms and consequences of this limited waiver;

2. Client has had the opportunity to consult with independent legal counsel regarding this limited waiver;

3. Client is executing this limited waiver voluntarily and without coercion or duress; and

4. Client understands that once the attorney-client privilege is waived with respect to the communications within the scope of this waiver, those communications may be disclosed in the Litigation and may become part of the public record.

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF DAVISON)

I, Alex Cooper Vasquez, being of lawful age and competent to testify, hereby state under oath that I am the Client identified in the foregoing Limited Waiver of Attorney-Client Privilege, that I have carefully read and understand the terms and consequences of the same using the assistance of an interpreter who has been sworn and qualified to interpreter before the above referenced court, and that I hereby execute the same for the purposes and terms stated therein.

Further, affiant sayeth not.

Alex Cooper Vasquez – Client/Affiant

09/06/2025.
Date

Devy Alvizures – Interpreter

9/06/25
Date

Subscribed and sworn to before me this 6th day of September 2025.

Mary Freeman
Notary Public, South Dakota
My Commission expires: 11-8-2027

App. 83

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		
COUNTY OF DAVISON)		FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION, Plaintiff,	)	17CIV22-000202
v.	)	RULE 56(f) AFFIDAVIT OF TUCKER VOLESKY
MARIO TORRES, Defendant and Third-Party Plaintiff,	)	
v.	)	
NOHEMY HERRERA, Third-Party Defendant.	)	

STATE OF SOUTH DAKOTA)
: SS.
COUNTY OF DAVISON)

COMES NOW, Tucker Volesky, Affiant, after having been duly sworn upon oath, deposes and states as follows:

1. I am the attorney for Defendant Mario Torres in the above-entitled action and, as such, have knowledge of the matters asserted herein.

2. I am submitting this affidavit in response to Plaintiff's Motion for Summary Judgment. Pursuant to SDCL 15-6-56(f), this Court should refuse Plaintiff's Motion for Summary Judgment, or, in the alternative, should not rule on the pending summary judgment motion to allow additional time for discovery.

3. In this case, the central issue is the intent and purpose of Alex Cooper Vasquez when he delivered a $300,000 check to Mario Torres in late April or early May of 2022.

4. The gifted funds originated from a 2022 settlement of Mr. Cooper Vasquez's injury

claim.

5. Regarding his injury claim and settlement, Mr. Cooper Vasquez was represented by attorney Sean Conway of Nebraska.

6. Around the time that the settlement proceeds were paid, Mr. Cooper Vasquez discussed with attorney Conway his intention to make three specific gifts from the proceeds, i.e., (1) the $300,000 personal gift to Mario Torres, (2) the $300,000 personal gift to Daniel Cabrera, (3) the $300,000 donation to Iglesia Pentecostal Fuente De Vida. (*See* Volesky Aff. Ex. B, Alex Cooper Depo. pp. 43-45 ll. 23-4; id., Ex. D, waiver of attorney-client privilege); (*See also* Counterclaim ¶ 24).

7. Attorney Sean Conway has been an anticipated witness for Mario Torres's case in chief at trial in this matter. Your Affiant has been in contact with attorney Conway regarding this response to Plaintiff's Motion for Summary Judgment. Attorney Conway has declined to provide an affidavit due to attorney-client privilege but stated that he will provide deposition testimony with a formal waiver of attorney-client privilege executed by Alex Cooper Vasquez.

8. Attached as Exhibit D to the Affidavit of Tucker Volesky filed herewith is the Limited Waiver of Attorney-Client Privilege executed under oath by Alex Cooper Vasquez on September 6, 2025.

9. It is reasonably anticipated that attorney Conway will testify consistent with the Affidavit of Alex Cooper Vasquez as to his intent and purpose in delivering the $300,000 check to Mario Torres, in that it was intended as personal gift for Mario Torres and not a donation for the Church.

10. In addition to the rationale set forth in Defendant's briefing, Plaintiff's Motion for Summary Judgment should be denied by the Court because the testimony of attorney Sean Conway should be permitted before making a final judgment.

11. Plaintiff's Motion for Summary Judgment also purports to raise an issue asserting that Alex Cooper Vasquez did not file a 2022 gift tax return. It appears this issue is being raised for the first time in Plaintiff's summary judgment motion. While this argument is a red herring, and the returns constitute hearsay, lack foundation, relevance or probative value to the issue of Mr. Cooper Vasquez's intent at the time of delivering the $300,000 check to Mario Torres, to the extent the Court deems it admissible or relevant to the pending summary judgment motion, Mario Torres should be allowed an opportunity to obtain information pertinent to how certain gift and/or donations were accounted for in regard to Mr. Cooper Vasquez's tax reporting, including whether certain gift tax returns were filed or any deductions declared, the reasons therefore, and whether amendments may be filed.

12. Attached hereto as Exhibit E to the Affidavit of Tucker Volesky filed herewith is the Limited Waiver of Confidentiality and Authorization for Release of Taxpayer

Information executed under oath by Alex Cooper Vasquez on September 6, 2025.

13. It is reasonably anticipated that information concerning Alex Cooper Vasquez's tax reporting will reveal that none of the gifts/donations he made in 2022, including to the Church, were supplied to his tax professionals and that amendments may be filed as appropriated.

AFFIANT FURTHER SAYETH NOT.

Dated this 16th day of September 2025.

Tucker Volesky

Subscribed and sworn before me this 16th day September 2025.

MARY FREEMAN
NOTARY PUBLIC
SOUTH DAKOTA

Notary Public
Commission expires: 11-8-2027

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing "Rule 56(f) Affidavit of Tucker Volesky" was submitted through Odyssey for filing with Clerk of Court and served on the following:

Ryan D. Cwach #4245
Attorney for Third-Party Defendant and Plaintiff
Birmingham and Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078

via electronic service this 16th day of September 2025.

/s/ Tucker J. Volesky
Tucker J. Volesky

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF DAVISON) FIRST JUDICIAL CIRCUIT

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC. A NEBRASKA NONPROFIT CORPORATION,

Plaintiff,

v.

MARIO TORRES,

Defendant and Third-Party Plaintiff,

v.

NOHEMY HERRERA,

Third-Party Defendant.

17CIV22-000202

OBJECTIONS OF MARIO TORRES

COMES NOW, Defendant Mario Torres ("Mario"), through the undersigned counsel, who respectfully makes the following objections in connection with the "Order" signed and filed on October 10, 2025.

1. Mario objects to the Order for noncompliance with SDCL 15-6-52(a) and/or 15-6-58(b), which prevented Mario from submitting objections and proposals prior to the Court entering its Order.
2. Mario objects to the Court's findings of fact, conclusions of law, and Order granting summary judgment because Plaintiff failed to establish essential elements on each of its claims, genuine disputes of material fact exist, and summary judgment is inappropriate.

3. Mario objects to the Order awarding prejudgment interest of $81,994.86.

   a. Prejudgment interest is generally recoverable from the day the loss or damage occurred, except during periods when the debtor is prevented by law or by the act of the creditor from paying the debt. SDCL 21-1-13.1.

   b. This case involves $223,000 at issue. The Order dated and filed August 14, 2023, entered pursuant to the parties' stipulation, states:

      1. On July 13, 2022, Mario wrote and deposited a Church check for $223,000 into his personal checking account at First Dakota National Bank (hereinafter "First Dakota").

      2. Shortly thereafter, the Church alerted First Dakota, disputing that this was not an authorized transfer of funds. First Dakota froze the $223,000 in Mario's personal checking account. The $223,000 cash remains frozen in Mario's personal checking account.

   c. Pursuant to that Order dated and filed August 14, 2023, the $223,000 was transferred to a money market or interest-bearing account, the Settlement Account, and the parties were restrained and enjoined from disposing of the cash in the Settlement Account. The parties stipulated that the interest generated on the $223,000 cash would belong to the party determined to be entitled to the cash.

   d. Under SDCL 21-1-13.1, Mario (the debtor) was prevented by the act of the Plaintiff (creditor) from paying the debt ($223,000) because the Plaintiff caused First Dakota to freeze Mario's personal checking account including the $223,000.

   e. Under SDCL 21-1-13.1, Mario (the debtor) was prevented by the Order of August 14, 2023, from paying the debt ($223,000) because he was restrained and enjoined from using the $223,000 in the Settlement Account which was subject to judicial control.
   f. Under SDCL 21-1-12, accepting payment of the whole principal, as such ($223,000 in the Settlement Account), waives all claim to interest.
   g. The Order granting summary judgment awards Plaintiff the Settlement Account, the highest market value of the $223,000 to include earned interest.

4. Without waiving the foregoing objection to an award of prejudgment interest, Mario further objects to the calculation of $81,994.86 as inflated. The prejudgment interest on $223,000 damages occurring on July 13, 2022, to September 30, 2025, is calculated as follows:
   a. SDCL 21-1-13.1 specifies prejudgment interest, unless otherwise provided by contract, is awarded at the Category B interest rate of 10% per year.
   b. Annual interest: $223,000 x 10% – $22,300.
   c. July 13, 2022, to September 30, 2025, is a period of 3 years, 2 months, and 17 days.
   d. Interest for 3 full years: $22,300 x 3 – $66,900.
   e. Interest for 2 months (July 13 to September 13): $22,300 ÷ 12 x 2 – $3,716.67.
   f. Interest for 17 days (September 13 to September 30): $22,300 ÷ 365 x 17 = $1,038.36.
   g. Total prejudgment interest is $66,900 + $3,716.67 + $1,038.36 = $71,655.03.

Respectfully submitted this 15th day of October 2025.

/s/ Tucker Volesky_________
Tucker Volesky
Attorney at Law
305 North Kimball, P. O. Box 488
Mitchell, SD 57301
605-996-5542
tucker.volesky@tuckervoleskylaw.com

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing "Objections of Mario Torres" was submitted through Odyssey for filing with Clerk of Court and served on the following:

Ryan D. Cwach #4245
Attorney for Third-Party Defendant and Plaintiff
Birmingham and Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078

via electronic service this 15th day of October 2025.

/s/ Tucker J. Volesky________________
Tucker J. Volesky

NO. #31293

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC.

Plaintiff-Appellee,

v.

MARIO TORRES

Defendant & Third-Party Plaintiff – Appellant

v.

NOHEMY HERRERA

Third-Party Defendant - Appellee

Appeal from an order of Circuit Court, First Judicial Circuit, Davison County
(hereinafter "Circuit Court")
The Honorable Patrick T. Smith, Circuit Court Judge

BRIEF OF APPELLEE

Attorney for Defendant-Appellant	Attorney for Plaintiff-Appellee
Tucker J. Volesky 305 N. Kimball, PO Box 488 Mitchell, SD 57301 Tucker.volesky@tuckervoleskylaw.com	Ryan D. Cwach Birmingham & Cwach Law Offices, PLLC 202 W. 2nd St. Yankton, SD 57078 (605) 260-4747 ryan@birmcwachlaw.com

Notice of Appeal filed on November 13, 2025

TABLE OF CONTENTS

Description	Page
Table of Authorities	2
Statement of Jurisdiction	5
Statement of Legal Issues	5
Statement of the Case	7
Statement of Facts	8
Argument	11
Overview	11
Standard of Review	13
1. The $223,000 was in the Church's bank account. Mario had no Church authority to withdraw that amount, especially to himself	14
2. Alex Cooper-Vasquez did not make a completed gift to Mario Torres	16
3. The actions between April 2022 and July 12, 2022 are more dispositive than subsequent hearsay claims	20
4. Fraud is a bold assertion requiring specific evidence of fraud and intent. No such evidence exists here	22
5. Mario breached his fiduciary duty to the Church resulting in the Church losing its Mitchell parish and many of its congregants	26
6. The Circuit Court has inherent authority to modify, amend, revoke, or overrule prior Court orders	28
7. Prejudgment Interest	29
Conclusion	31

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–52,
106 S. Ct. 2505, 2511–12, 91 L. Ed. 2d 202 (1986) 12, 13

Atchley v. Rimmer, 148 Tenn. 303, 255 S.W. 366 (1923) 18

Bank of Hoven v. Rausch, 382 N.W.2d 39, 41 (S.D. 1986) 19

Behrens v. Wedmore, 2005 S.D. 79, ¶ 52, 698 N.W.2d 555, 576 26

Blodgett v. C.I.R., 394 F.3d 1030, 1040 (8th Cir. 2005) 18

Bonde v. Boland, 2001 S.D. 98, ¶ 24, 631 N.W.2d 924, 928 25

Bruske v. Hille, 1997 S.D. 108, ¶ 9, 567 N.W.2d 872, 875 21

Chem-Age Indus., Inc. v. Glover, 2002 S.D. 122, ¶ 16, 652 N.W.2d 756, 765 ...... 5, 22, 23

Connell v. Colwell, 214 Conn. 242, 252, 571 A.2d 116, 121 (1990) 21

Dakota Cheese, Inc. v. Ford, 1999 S.D. 147 ¶¶ 19-21, 603 N.W.2d 73, 77 21

Discover Bank v. Stanley, 757 N.W.2d 756, 762 (S.D. 2008) 12

Englund v. Berg, 69 S.D. 211, 212–13, 8 N.W.2d 861, 861–62 (1943) 13, 14

Estate of Elliot ex rel. Elliot v. A & B Welding Supply Co., Inc.,
1999 S.D. 57, ¶¶ 16-20, 594 N.W.2d 707, 710 22

Estate of Lynch v. Lynch, 991 N.W.2d 95, 2023 S.D. 23 28

Famous Brands Inc. v. David Sherman Corp., 814 F.2d 517, 522 (8th Cir. 1987) 21

First American Bank & Trust, N.A. v. Farmers State Bank of Canton,
2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31 .... 4, 13

Fisher v. Kahler, 2002 S.D. 30, ¶ 5, 641 N.W.2d 122, 124-125. (S.D. 2002) 12

Gannon Intern., Ltd. v. Blocker, 684 F.3d 785 (8th Cir. 2012 14

Garrett v. BankWest, Inc., 459 N.W.2d 833, 837–38 (S.D. 1990) 25

Grand State Prop., Inc. v. Woods, Fuller, Shultz, & Smith, P.C.,
1996 S.D. 139, ¶ 16, 556 N.W.2d 84, 88 25

Greenbaum v. U.S., 80 F.2d 113 (9th Cir. 1935) 18

Home Fed. Sav. & Loan Ass'n of Sioux Falls v. First Nat. Bank in Sioux Falls, 405 N.W.2d 655, 658 (S.D. 1987). 5, 21

In the Matter of Estate of Pina, 443 N.W.2d 627, 629 (SD 1989). 4, 17

Janssen v. Tusha, 68 S.D. 639, 642, 5 N.W.2d 684, 685 (1942). 5, 27

Liebig v. Kirchoff, 851 N.W.2d 743, 747 (S.D. 2014). 5, 21

Limpert v. Bail, 447 N.W.2d 48, 50 (S.D. 1989) 21

Mark, Inc. v. Maguire Ins. Agency, 518 N.W.2d 227, 229 (SD 1994) 12

Matter of Estate of Fiksdal, 388 N.W.2d 133, 138 (SD 1986). 16

Meyer v. S. Dakota Dep't of Soc. Servs., 1998 S.D. 62, ¶ 13, 581 N.W.2d 151, 155 .... 4, 17, 18

Oxton v. Rudland, 2017 S.D. 35, ¶ 18, 897 N.W.2d 356 21

Paulsen v. McKennan, 24 N.W.3d 523, 526, 2025 S.D. 37, ¶11 11

Purinton v. Purinton, 41 S.D. 125, 169 N.W 236 (1918). 5

Rensch v. Riddle's Diamonds of Rapid City, Inc., 393 N.W.2d 269, 274-75 (S.D. 1986). 6, 29

Reynolds v. Kenny, 87 N.H. 313, 179 A. 16 (1935) 18

SBS Fin. Servs., Inc. v. Plouf Family Tr., 2012 S.D. 67, ¶ 13, 821 N.W.2d 842, 845 (S.D. 1992). 5, 27

South Dakota Public Utilites Com'n v. Barzen Intern., Inc., 479 N.W.2d 910 .... 6, 29

Sporleder v. Van Liere, 1997 S.D. 110 ¶ 13, 569 N.W.2d 8, 11 21

State v. Dorhout, 513 N.W.2d 390, 394 (SD 1994) 18

Steffen v. Davis, 52 S.D. 283, 217 N.W. 221, 223 (1927). 4, 17

Stockwell v. Stockwell, 2010 S.D. 79 ¶ 19, 790 N.W.2d 52, 60 (2010) 4, 16

Taggart v. Ford Motor Credit Co., 462 N.W.2d 493, 398 (S.D. 1990) 21

Federal and State Statutes

26 U.S.C. § 2511 19

26 U.S.C. § 2522 19

26 U.S.C. § 2505 19

SDCL § 21-1-12 .... 7, 29

SDCL § 21-2-13.1 29

SDCL § 21-3-3 .... 5, 7, 30

SDCL § 21-3-3(1) 29

SDCL § 57A-3-103(f) 18

Other Authorities

38 Am. Jur 2d. Gifts § 77 19

38 Am. Jur. 2d Gifts § 86 19

38 Am. Jur. 2d Gifts § 55 17

38 Am. Jur. 2d Gifts § 65 (2nd Ed.) (1968) 18

STATEMENT OF JURISDICTION

Mario Torres (hereinafter "Mario") correctly cites jurisdictional authority for this appeal. Mario identifies the correct Order and procedural requirements for appeal. Iglesia Pentecostal Fuente De Vida, Inc. (hereinafter "the Church") did not file a notice of review.

STATEMENT OF LEGAL ISSUES

1. Whether Mario wrongfully converted $223,000 when he withdrew said amount from a Church checking account and deposited the same in his personal checking account.

   Circuit Court:

   The Circuit Court found that Mario did wrongfully convert the $223,000.00.

   Cases:

   First American Bank & Trust, N.A. v. Farmers State Bank of Canton, 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31.

   Statutes:

   SDCL § 21-3-3.

2. Whether a donor's stated intent and a blank check for $300,000.00 is clear and convincing evidence to constitute a completed gift to Mario.

   Circuit Court:

   The Circuit Court found that intent alone and a blank check are not sufficient to constitute a completed gift to Mario.

   Cases:

   Stockwell v. Stockwell, 2010 S.D. 79, ¶ 19, 790 N.W.2d 52, 60 (2010).

Steffen v. Davis, 52 S.D. 283, 217 N.W. 221, 223 (1927).

In the Matter of Estate of Pina, 443 N.W.2d 627, 629 (SD 1989).

Meyer v. S. Dakota Dep't of Soc. Servs., 1998 S.D. 62, ¶ 13, 581 N.W.2d 151, 155.

3. Whether conclusory statements of alleged fraud constitute clear evidence to show a dispute of fact to deny summary judgment on a fraud and deceit claim.

   Circuit Court:

   The Circuit Court found that Mario did not present clear evidence to justify a dispute of fact on his claim of fraud and deceit.

   Cases:

   Liebig v. Kirchoff, 851 N.W.2d 743, 747 (S.D. 2014).

   Home Fed. Sav. & Loan Ass'n of Sioux Falls v. First Nat. Bank in Sioux Falls, 405 N.W.2d 655, 658 (S.D. 1987).

   Chem-Age Indus., Inc. v. Glover, 2002 S.D. 122, ¶ 16, 652 N.W.2d 756, 765.

4. Whether the Circuit Court could order that the Church be awarded the $223,000.00 held in a trust account pursuant to a prior stipulated order when the Circuit Court found that the Church was entitled to such relief.

   Circuit Court:

   The Circuit Court ordered that the $223,000.00 held in a trust account pursuant to a prior stipulated order be returned to the Church

   Cases:

   Janssen v. Tusha, 68 S.D. 639, 642, 5 N.W.2d 684, 685 (1942).

   Purinton v. Purinton, 41 S.D. 125, 169 N.W 236 (1918).

SBS Fin. Servs., Inc. v. Plouf Family Tr., 2012 S.D. 67, ¶ 13, 821 N.W.2d 842, 845 (S.D. 1992).

5. Whether the Circuit Court could award prejudgment interest, and if so, in what amount.

   Circuit Court:

   The Circuit Court awarded prejudgment interest in the amount of $81,994.86.

   Cases:

   South Dakota Public Utilites Com'n v. Barzen Intern., Inc., 479 N.W.2d 910 (S.D. 1992).

   Rensch v. Riddle's Diamonds of Rapid City, Inc., 393 N.W.2d 269, 274-75 (S.D. 1986).

   Statutes:

   SDCL § 21-1-12.

   SDCL § 21-3-3.

STATEMENT OF THE CASE

This appeal arises from the Order of the Honorable Judge Patrick T. Smith of the First Judicial Circuit, Davison County, South Dakota.

The Church filed its complaint on October 17, 2022. The Davison County Sheriff served the Complaint on October 27, 2022. Mario did not timely answer, but appeared with counsel at a hearing for motion on default judgment. The Court granted Mario additional time to answer. Mario filed his answer and counterclaim on January 1, 2023. Mario filed a Third-Party Complaint alleging violations of federal RICO laws against Church President Nohemy Herrera on January 16, 2023. Nohemy answered on February

21, 2023. The Court granted Nohemy's Motion for Judgment on the Pleadings on the Third-Party Complaint on July 03, 2024. The Church filed a motion for Summary Judgment on all of the Church and Marios' respective claims The Court entered its order granting summary judgment on October 10, 2025.

Mario raises four issues in his docketing statement, but only argues the last two concerning summary judgment in favor of the Church.

STATEMENT OF FACTS

1. The Church is a 501(c)(3) and South Dakota foreign nonprofit corporation, with churches in Columbus, NE, Yankton, SD, and formerly in Mitchell, SD. *Compare* SR 1 ¶ 1 *with* SR 20 ¶ 3.
2. The Church owns and maintains a checking account at First Dakota National Bank, N.A. at the bank's Mitchell branch (hereinafter "Mitchell checking account"). *Compare* SR 1 ¶ 5 *with* SR 20 ¶ 6. *See Also* SR 700:22-701:8.
3. Mario was a pastor for the Church at its Mitchell location. Mario is a resident of Mitchell, SD. SR 1 ¶ 2 *with* SR 20 ¶ 4.
4. When Mario was deposed, Mario understood that he was under the same oath as if he were testifying in court; that he would be presumed to understand the questions if he answered the question. SR 675:4-10. He affirmed he was able to think clearly and nothing was preventing him from telling the truth. SR 675:18-22.
5. When Alex Cooper-Vasquez (hereinafter "Alex") was deposed, Alex understood that he was under the same oath as if he were testifying in court; that he would be presumed to understand the question if he answered the question. SR 654:1-3; 16-19. He affirmed he was able to think clearly and nothing was preventing him from telling the truth. SR 654:20-25.
6. At a Church campaign in Columbus, Nebraska in April 2022, Alex handed to Mario an envelope with a blank check for $300,000.00 enclosed. SR 692:17-693:16. *See also* SR 659:11-20.

7. There is no writing or documentation evidencing the intent or purpose of the blank check. SR 669:6-10.
8. Nohemy Hererra (hereinafter Nohemy), the Church President and Lead Pastor, and Alex had discussions about a donation to the Church prior to Alex making the donation. Nohemy understood the conversations with Alex to mean that Alex was making three separate donations to each church location. SR 702:5-25; 703:7-14; 704:9-15; 705:11-17; 712:8-15; 713:15-25.
9. Alex did not provide any specific instructions to Nohemy prior to or after making the donation. SR 711:11-25.
10. Alex and Mario did not discuss the check or money at the event or any time prior to the event. SR 694:19-21. *See also* SR 664:5-19; SR 666:12-18.
11. In Mario's presence, Nohemy wrote the Church as the Payee onto the blank check. SR 706:10-707:4; SR 714:24-715:5.
12. At the time of the donation, Alex did not know Mario's family, where he worked, his name or how to spell it. SR 656:9-25; 661:13-15; 662:19-25; 663:15-664:11; 666:12-18; 668:1-11.
13. The term "missions" can mean many things, for a person or for a church. SR 695:8-13.
14. In 2022, Mario had three interactions with Alex. On April 29 or 30, 2022, Alex approached Mario at the Columbus church. They did not communicate. In mid-June 2022, Mario called Alex. In August 2022, Mario called Alex again about the money. SR 746-747.
15. Alex's bank accepted the check and made payment to the Church's Mitchell bank account. SR 755-761.
16. After the check was deposited, nothing happened. SR 708:3-8. The donor Alex was aware that the check was deposited in the Mitchell bank account. He did not stop it. Instead, he got married through the Church, he gave an addition $10,000 to fix a door, and additional $25,000 for mission trips to El Salvador. SR 670:4-21. He chose not to sue the Church or Nohemy. SR 671:22-672:7. He decided to leave the Church without any enemies or unfriendliness and did not want to cause problems. SR 671:14-21.

17. Alex filed a tax return in 2022. He did not report a $300,000 cash gift to Mario. SR 718-734.
18. Alex considers Nohemy Herrera to be a friend and spiritual parent. SR 658:2-12.
19. At a Church event in Columbus, Nebraska during the last weekend of April 2022, Alex gave Yankton Pastor Daniel Cabrerra an envelope containing a check for $300,000.00. SR 762 ¶ 3.
20. Yankton Pastor Daniel Cabrera and Alex had several conversations about Alex making a donation for the benefit of the Yankton parish between November 2021 and May 2022. SR 762-763 ¶¶ 4-7.
21. Alex described the blank check handed to Daniel Cabrera to be "whatever God wants it to be for." SR 660:12-17.
22. All monies in Mitchell checking account belonged to the Church or its parish. SR 687:21-688:12.
23. Mario was an authorized signor on the Mitchell checking account from the opening of the account until August 2023. *Compare* SR 1 ¶ 6 *with* SR 20 ¶ 6. *See Also* SR 750 ¶ 10.
24. Mario was a pastor for the Church on July 13, 2022. SR 750 ¶ 7.
25. On July 13, 2022, Mario wrote and deposited a check to himself for $223,000 from the Mitchell checking account. The funds were deposited in Mario's personal bank account, which is also at the Mitchell branch of First Dakota National Bank, N.A. *Compare* SR 2 ¶ 9 *with* SR 21 ¶ 8.
26. Alex was not a pastor of the Church from April 30, 2022 to July 13, 2022. SR 750 ¶ 8.
27. Alex was not a Director of the Church from April 30, 2022 to July 13, 2022. SR 750 ¶ 9.
28. Mario did not consult with any member of the Board of Directors before depositing the $223,000 check into his personal checking account. SR 751 ¶ 17.
29. Mario wrote the check to himself without the Church's prior approval and because Alex told him to do so. SR 702:8-703:11. *See Also* SR 709:21-710:1.

30. Alex told Mario that Mario could remove the money from the church, but only after he believed Church President Nohemy Herrera and Francisco Herrera authorized the transfer. SR 673:8-17.
31. Mario refused to return the $223,000 to the Church. *Compare* SR 2 ¶ 11 *with* SR 21 ¶ 9.
32. The lead pastor of the Church is Nohemy Herrera. Mario acted as a pastor under her direction. SR 677:20-678:4; 678:20-22; 656:20-25.
33. Mario was originally from Columbus but moved to Mitchell specifically to start a parish for the Church. *Compare* SR 680:12-24 *with* SR 699:5-14.
34. Mario was a pastor of the Church. Mario's duties as pastor included the following:
    a. To take care of the souls of the people. SR 676:14-16.
    b. Preach the word. SR 676:23-25.
    c. Pray for people, visit people, to fast. SR 680:1-6.
    d. Make sure building rent was timely paid. SR 681:7-10.
    e. Hold church services multiple times a week. SR 681:13-20.
    f. To recruit new members to the Church. SR 682:3-12.
    g. To organize and participate in events known as anniversaries or campaigns. SR 683:15-24; 684:1-8.
    h. To be active in the Hispanic community in Mitchell. SR 685:1-5.
    i. To collect offerings for the Church, which helped it grow. SR 685:19-686:2.
    j. To perform all the administrative work related to the Mitchell parish. SR 686:13-16.
35. Mario has started a new church as a secretary or treasurer with Alex and Minor Sandoval in the same location as the Plaintiff's old Church in Mitchell. SR 689:18-690:9; 691:15-24.
36. The Mitchell parish congregants have been split with some following Mario to his new church while others commute to the Church's location in Yankton. SR 716:10-717:4.

ARGUMENT

OVERVIEW

The Church's claims for conversion and breach of fiduciary duty are relatively simple. On July 13, 2022, Mario, without authority, wrote a $223,000.00 check to himself personally from the Church's First Dakota National Bank checking account associated with the Mitchell parish. Mario's actions were without authority and were contrary to his obligations as a fiduciary of the Church. The breach of fiduciary duty claim does not require the Court to weigh in on Church matters; the Court need not look beyond Mario's own description of his role as pastor and his subsequent actions to take $223,000.00 from the Church. A pastor writing a Church check to himself personally without authority is a breach of fiduciary duty. It is a sin against his congregation and a crime in civil society.

Mario has a lot to prove for his claims of conversion and fraud to contradict the above undisputed facts. The essential factual assertion for his claims is that Alex actually intended that a blank check for $300,000 with "missions" in the memo line as gift for Mario. Mario, in his pleadings, wants the Court to take an illogical leap that a blank check for $300,000.00 is the equivalent of Mario being entitled to withdraw $223,000 from the Church's checking account without Church authorization.

Mario has to put a lot of words in Nohemy's mouth in order to show a true genuine dispute of fact. Words that Nohemy swears under oath she never said. The only evidence the Defendant offers on Nohemy's knowledge or wilfulness, a critical element of a fraud charge, is simply Alex's statements of what he claims to have said and what he claims she understood. There is no substantive evidence to contradict Nohemy's sworn statements and understanding about her words and knowledge.

After addressing the appropriate standard of review for a motion of summary judgment, the Church's brief will address the ownership of the account and funds therein, the alleged failed gift, Alex's intent and actions, both before and after the check was deposited. Next, the brief will address Mario's lack of evidence beyond speculation and conjecture to support his claim for fraud and deceit and the estoppel affirmative defense. The brief will then address the breach of fiduciary duty claim, which independently supports a claim of damages. Lastly, the brief will address the termination of the stipulated over and the prejudgment interest calculations.

STANDARD OF REVIEW

Summary judgment is reviewed de novo with no deference to the lower court's decision. *Paulsen v. McKennan*, 24 N.W.3d 523, 526, 2025 S.D. 37, ¶11. "Summary judgment is an extreme remedy, . . . not intended as a substitute for a trial." *Discover Bank v. Stanley*, 757 N.W.2d 756, 762 (S.D. 2008). "The Court must view the evidence most favorably to the non-moving party and resolve reasonable doubts about the facts in its favor." *Mark, Inc. v. Maguire Ins. Agency*, 518 N.W.2d 227, 229 (S.D. 1994) (*citing Koeniguer v. Eckrich,* 422 N.W.2d 600 (S.D. 1998)). "Summary Judgment is appropriate under SDCL 15–6–56 when the entire record reveals that there is no genuine issue on any material fact and that the moving party is entitled to a judgment as a matter of law." *Fisher v. Kahler*, 2002 S.D. 30, ¶ 5, 641 N.W.2d 122, 124-125. (S.D. 2002).

The US Supreme Court explained that a motion for summary judgment is akin to a motion for directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52, 106 S. Ct. 2505, 2511–12, 91 L. Ed. 2d 202 (1986). The question is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Id.* (Internal citation omitted). The standard for summary judgment and directed verdicts are identical, but the difference between the two is procedural, meaning summary judgment comes before trial. *Id.* "In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

A motion for summary judgment "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.*

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-moving party']s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].

Id.

1. The $223,000 was in Church's bank account. Mario had no Church authority to withdraw that amount, especially to himself.

To prove conversion, each party must show (1) ownership or right to possession of property at the time of conversion, (2) the party's interest in the property was greater than the other party's interest, (3) conversion by the other party, and (4) deprivation of interest in the property. *Accord First American Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31.

Here, the facts are undisputed that, *at the time of conversion*, the Church was the owner and possessor of the $223,000 cash because the cash was in the Church's First Dakota checking account. Mario disputes that the account is actually a Church account or alternatively, regardless, the money was actually Mario's money. This argument, however, is contradicted by Mario's answer. Since the beginning of this lawsuit, Mario admitted that the Church maintained an account at the First Dakota in Mitchell and that he was only an authorized signor. *Compare* SR 1 ¶¶ 5 & 6 *with* SR 20 ¶ 6.

Pleadings are judicial admissions, meaning they are not "a means of evidence, but a waiver of all controversy and therefore a limitation of the issues. Neither party may dispute beyond these limits." *Englund v. Berg*, 69 S.D. 211, 212–13, 8 N.W.2d 861, 861–62 (1943) (citing WIGMORE, EVIDENCE § 1064). Further,

> It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings, and that the facts which are admitted by the pleadings are to be taken as true for the purpose of the action. So, admissions in the pleadings may render proof of the admitted facts unnecessary, and if countervailing evidence, either through inadvertence or the tacit consent of the parties, is admitted it is entitled to no consideration.

Id. (citing 49 C.J. 124 and BANCROFT'S CODE PLEADING, § 429). As the Court noted in *Englund*, "A different ruling would utterly destroy the efficacy of pleadings and burden litigation with the necessity of preparing for a trial at large." *Id.*

This argument that the Church account was not necessarily a Church account is also undercut entirely by the acts of the parties involved and Mario's position in the case. Logic dictates that Mario does not have to take the money out of the Church's checking account if it is, in fact, his checking account. He wrote that check because the money was in the Church's account, and on July 13, 2022, he thought it should be in his personal account.

Mario relies on *Gannon Intern., Ltd. v. Blocker*, 684 F.3d 785 (8th Cir. 2012) to assert that money in an account may not belong to the account owner. *Gannon* concerned Vietnamese bank wire transfers between large southeast Asian beer makers and distributors. The citation relied upon was a refutation of Gannon's legal argument that

Gannon owned money deposited into its account from a third party Diageo and then immediately transferred to Doan Phuong Ly pursuant to an agreement. The transaction is more complex and confusing than the transactions raised herein.

There are certain contractual arrangements, such as escrow or trust accounts, that can demonstrate that funds in an account do not belong to the owner of the account. Mario does not plead facts or causes of action to give rise to these arrangements, nor do the facts support it. Critically, there was an underlying contractual agreement in *Gannon* that explained the multiple wire transfers therein that led the Eighth Circuit to affirm summary judgment. *Id.* at 789-790. Here, a gift is alleged so consideration is precluded. The money was deposited into the Church's account pursuant to the presentment of a check authorizing Alex's bank to pay $300,000.00 to the Church. Mario contends he is owed $223,000 because the Church converted $300,000.00 of his money due to a blank check drawn upon another person's account, which, as outlined below, is not equivalent.

As the local pastor, Mario was an authorized signor of the account but not an owner. The primary user of the account was Mario himself in pursuit of the Church's objectives. Mario then wrote a check to himself personally. Mario admits his only authority for writing the check was Alex's direction, but Alex had no authority to authorize the transfer. Mario successfully deposited the check into his personal checking account, also at First Dakota National Bank in Mitchell. The bank accepted the check; however, it froze the funds therein, suspecting fraud, after the Church reported it. Nonetheless, the Church had been deprived of $223,000 from the loss of funds.

The above paragraph demonstrates all the elements of conversion are proven and undisputed in favor of the Church.

2. Alex Cooper-Vasquez did not make a completed gift to Mario Torres.

At least half, if not two-thirds of, Mario's brief is dedicated to describing Alex's alleged intent regarding a blank check. However, Mario's brief overlooks the central legal premise of the circuit court's order: a blank check is not the same thing as cold, hard cash. As a result, Mario's conversion and fraud claims fail because a blank check for $300,000 is not the same thing as $223,000 cash, which is what Mario withdrew and what he pleads for in relief of his counterclaim.

Mario's claim for conversion and fraud further rests upon a claim that Alex made a gift to Mario several months prior to when Mario wrote the check to himself on July 12, 2022. Factually, this is irrelevant because, at the time of conversion, the Church owned or had the right to possession of the cash by its being in the Church account.

In addition to being factually irrelevant, it is legally not true. "A gift is a transfer of property, made voluntarily and without consideration." *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 19, 790 N.W.2d 52, 60 (2010) (*citing* SDCL § 43-36-1). "In South Dakota, a gift is complete when three elements are satisfied: (1) intent; (2) delivery; and (3) acceptance." *Id.* (internal citations omitted). A gift must be shown by clear and convincing evidence. *Matter of Estate of Fiksdal*, 388 N.W.2d 133, 138 (S.D. 1986). Importantly here, it is undisputed that the Payee was blank on Alex's check. There have been several justifications. For example, Alex did not know Mario's name or how to spell Mario's name. SR 661:13-23. Despite this, he did not want to ask Nohemy how to spell Mario name out of fear that she would get greedy. SR 662:19-25. That makes no sense. He claims he wanted it to be a surprise, so he did not ask Mario how to spell his name.

SR 662:13-18. For whatever reason, absurd or legitimate, the undisputed fact is the fatal flaw in Mario's legal theory of the case.

Mario's claim fails because a blank check is not the equivalent of cash or a completed gift. A check is not the US dollars that Mario seeks in his relief nor can it logically be concluded that the existence of a blank check for a specific amount gives someone the right to take money in a different amount than in the check. Mario cannot show conversion of the "property" because the property he claims is different than the evidence that he claims demonstrates proof or right to ownership.

"As a general rule, a donor's own check is not a valid subject of a gift. 38 Am. Jur. 2d Gifts § 55. At best, a check is a promise of a gift, and not completed until recognized by the bank. *Id.* A check is not the equivalent of money on deposit in the bank. *Id.*

> The general rule is that a donors check, prior to acceptance or payment by the bank, is not the subject of a valid gift either inter vivos or causa mortis. This is an accordance with the rules established by both the Uniform Negotiable Instruments Law and the Uniform Commercial Code that a check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on an instrument until he accepts it. The difficulty with respect to a gift of a donor's check, if the check does not operate as an assignment is that the mere delivery of a check to the donee or to some other person for him does not place the gift beyond the donor's power of revocation, prior to payment or acceptance.

38 Am. Jur. 2d Gifts § 65 (2nd Ed.) (1968). *See Also* SDCL § 57A-3-103(f) (A " 'Check' means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as 'money order.' "). South Dakota recognizes the general rule. *Steffen v. Davis*, 52 S.D. 283, 217 N.W. 221, 223 (1927)

(stating a check that is not an assignment of the fund is not sufficient for delivery of a gift of money). *See Also In the Matter of Estate of Pina*, 443 N.W.2d 627, 629 (SD 1989) (stating that there must be a clear and intelligent manifestation of intent and delivery to or for use of donee). *See Also Meyer v. S. Dakota Dep't of Soc. Servs.*, 1998 S.D. 62, ¶ 13, 581 N.W.2d 151, 155 (stating "[A] present donative intent must be executed by a complete and unconditional delivery.").

Moreover, Alex's alleged declarations of a gift, both before and after delivery of the blank check to Mario, are not sufficient to substitute delivery. "The donor must intend to relinquish the right of dominion on the one hand, and to create it on the other, and this intention to make a gift must be a present intention; a mere intention to give in the future will not suffice." *Id.* (internal citations omitted)). "Mere declarations of a gift, in absence of any other evidence of delivery, are not sufficient evidence of delivery." *Reynolds v. Kenny*, 87 N.H. 313, 179 A. 16 (1935). *See also Atchley v. Rimmer*, 148 Tenn. 303, 255 S.W. 366 (1923). "Declarations and admissions of an alleged donor in respect of a gift generally are not, in themselves, sufficient evidence to establish a gift has been made." 38 Am. Jur. 2d Gifts § 86. Equity cannot perfect an imperfect or void gift. 38 Am. Jur 2d. Gifts § 77. In other words, Alex cannot claim he made a completed gift because he allegedly told Nohemy Herrera or others, but notably never Mario, that he was making or made the gift.

Alex's dubious claim of a complete gift is also factually not true. He did not report the gift to the IRS. In response to a subpoena, Alex produced his 2022 tax return. No gift tax return was completed. All persons are presumed to know the law. *Accord State v. Dorhout*, 513 N.W.2d 390, 394 (S.D. 1994). While no gift tax is assessed against a gift of this size, a donor still has a legal obligation to report a gift over the annual exemption amount ($16,000 in 2022) for a reduction in the unified credit. *See* 26 U.S.C. §§ 2505 & 2511. In contrast, a donation to a church is an optional deduction against income and not required to be reported. 26 U.S.C. § 2522.

This further leads to the conclusion that Alex did not make a completed gift to Mario in 2022, since he would have had to claim it on his tax returns. "A tax return may constitute an admission by the taxpayer or by someone on taxpayer's behalf." *Blodgett v. C.I.R.*, 394 F.3d 1030, 1040 (8th Cir. 2005). *See Also Greenbaum v. U.S.*, 80 F.2d 113 (9th Cir. 1935) ("A return is a statement by the taxpayer or by some one on his behalf, hence hearsay and only receivable in evidence as an admission. An admission is evidence against him who made it, or, under the proper circumstances, against his principal, coconspirator, or coadventurer."). Even if you assume his words of intent are true, the other undisputed evidence shows that the gift was not completed, delivered, or properly reported to tax officials. Intent alone is not enough to constitute a completed gift.

The last element of a valid gift is acceptance. Here, Mario did not accept the money. The money was deposited in the Church account. Therefore, this element is not established. Since this is not a valid gift, Mario cannot prove conversion with requires proof of ownership or a right to possession of the property *at the time of the conversion.* A blank check is not a gift and gives no right of possession or ownership of the money in the Mitchell church account.

3. The actions between April 2022 and July 12, 2022 are more dispositive than subsequent hearsay claims.

Alex has presented evidence in this case in the form of deposition testimony and sworn statements; however, prior to the litigation, Alex had made the choice to ratify the deposit of funds into the Church account. "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Bank of Hoven v. Rausch*, 382 N.W.2d 39, 41 (S.D. 1986). Ratification may be express or implied from conduct, requiring full knowledge of material facts. *Id.* Alex claims that he told Nohemy Herrera that the donation was for Mario, and not the Church, before he handed the check to Mario. Alex further admits that he told Mario to take the money from the Church bank account on or around July 12, 2022. The in-between is important.

During those months, Alex and Mario never talked to each other. Alex, knowing this money was in the Church's Mitchell checking account, proceeded to get married in the Columbus parish, buy tables and chairs for the Columbus parish, fix the entry door of the Columbus parish at the cost of $10,000, and donate $25,000 to the Church for mission trips to El Salvador. SR 670:4-21. Despite apparently being angry at Church leadership, he decided to leave the Church, not sue the Church, and move on. SR 671:22-672:7. He did not want to cause problems. SR 671:14-21.

Alex has offered testimony and sworn statements that he, as the donor, investigated the situation and elected to do nothing. In fact, his testimony was that he only got involved in this matter when there was a concern that Mario could go to jail for stealing. SR 408:3-409:7 ("[I]n fact, I did not take the female pastor to court. [...] the problem really happened when they tried to put Pastor Torres in jail because of it.").

Alex ratified everything through his conduct for several months. If his claims were true, he should and could have immediately stopped it, or he could have brought a claim himself against the Church, but he instead chose to allow the money to remain in the Church checking account without taking legal action.

4. Fraud is a bold assertion requiring specific evidence of fraud and intent. No such evidence exists here.

Mario asserts that the Church perpetuated a fraud against him. Mario must identify evidence suggesting that (1) Nohemy made a statement of fact to Mario that the money was a donation to the Church; (2) that Nohemy knew this statement was untrue, or that she recklessly made it; (3) that Nohemy made the statement with the intent to deceive Mario; and (4) that Mario justifiably relied on the statement to his detriment. *Accord Liebig v. Kirchoff,* 851 N.W.2d 743, 747 (S.D. 2014). Mario's counterclaim fails to survive summary judgment under elements (2), (3), and (4). Mario offers no proof that Nohemy knew this statement was untrue or was recklessly made. Further, Mario's fraud counterclaim is against the Church, so Mario must present evidence that even if Nohemy acted fraudulently, she did so under the authority of the Church.

The law disfavors bare assertions of fraud to plead or avoid a summary judgment. "Conclusory statements are not sufficient to prove fraud to survive summary judgment." *Home Fed. Sav. & Loan Ass'n of Sioux Falls v. First Nat. Bank in Sioux Falls,* 405 N.W.2d 655, 658 (S.D. 1987). "Summary judgment is appropriate if no evidence of deceitful intent is produced." *Bruske v. Hille,* 1997 S.D. 108, ¶ 9, 567 N.W.2d 872, 875. *See also Taggart v. Ford Motor Credit Co.,* 462 N.W.2d 493, 398 (S.D. 1990) (holding that allegations of fraud and deceit without specific material facts will not prevent summary judgment). "Fraud is not to be presumed, but must be strictly proven. The evidence must be clear, precise and unequivocal." *Connell v. Colwell,* 214 Conn. 242, 252, 571 A.2d 116, 121 (1990). There must be "actual fraud; constructive fraud is inadequate." *Id.* "Some actual evidence of fraudulent intent must be offered." *Famous Brands Inc. v. David Sherman Corp.*, 814 F.2d 517, 522 (8^{th} Cir. 1987).

Mario cites to four cases, *Oxton v. Rudland*, 2017 S.D. 35, ¶ 18, 897 N.W.2d 356, *Dakota Cheese, Inc. v. Ford*, 1999 S.D. 147 ¶¶ 19-21, 603 N.W.2d 73, 77, *Sporleder v. Van Liere*, 1997 S.D. 110 ¶ 13, 569 N.W.2d 8, 11, *Limpert v. Bail*, 447 N.W.2d 48, 50 (S.D. 1989), for the assertion that summary judgment is not appropriate for fraud claims. In those particular cases, the non-moving party produced some form of evidence beyond accusations and affidavits.

The Court addressed this dichotomy in decision making in *Estate of Elliot ex rel. Elliot v. A & B Welding Supply Co., Inc.*, 1999 S.D. 57, ¶¶ 16-20, 594 N.W.2d 707, 710, holding that the "mere possibility is never sufficient to establish a fact." In that case, the Estate of Elliot relied on corporate meeting minutes and allegations of various meetings around the same time to establish a fraudulent statement was made that induced the decedent to enter into an agreement. The Court affirmed summary judgment, noting that this was not sufficient in of itself to substantiate the claims; it was "mere speculation and conjecture. *Id.* at ¶ 18.

Mario dedicates significant portions of his brief attempting to explain Alex's intent and that his testimony is in some way relevant or reliable. But those arguments never get pass the fundamental evidentiary problem that Mario has with his fraud case. The only evidence to support the fraud claim is Alex's assertions that he made statements and that Nohemy understood those statements and she ignored them and lied to Mario. Nohemy denies all assertions.

"Unsupported assertions do not raise a genuine issue of fact." *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 16, 652 N.W.2d 756, 765. Here, all the parties acknowledge that nothing other than the checks themselves is in writing. There are no text messages or voicemails. The check was blank and then the Church was written in as payee. Alex makes assertions that requires lots of leaps of logic to get to fraud. Mario can never prove the critical elements of fraud because the fraud claim essentially devolves into a he said versus she said situation. Mario comes to the Court with unverified and unverifiable claims of Alex, which is less than what the Defendant in *Estate of Elliot ex. rel Elliot* present and the Court affirmed summary judgment on fraud.

Conclusory statements and allegations are not unequivocal evidence to show fraudulent intent, and therefore the lower court should be affirmed. Mario's theory of the case is akin to *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, 652 N.W.2d 756 where the allegations of the alleged fraudster's knowledge was based on allegations in affidavits. The Plaintiff had no actual proof. The Plaintiff believed the Defendant, an attorney, knew his client had a history of disputes with investors, and therefore the Defendant "knew [his client] was cheating them[.]" *Id.* at ¶ 16. Like asserted herein, those accusations included information about the who, what, when, where, and why. The statements are still speculation and conjecture. The Court should affirm this consistent finding and holding in South Dakota precedent in this case.

The requirement that facts be seen in light most favorable to the non-moving party does not prohibit the Court from using logic. Alex's deposition testimony that he

(1) told Nohemy Herrera that the check was for Mario Torres, but (2) at the same time did not want to ask Nohemy how to spell Mario's name to write on the check because she would be greedy makes no sense. Why would he tell a person he believed to be greedy, that he was giving a blank check to an intended recipient while also not telling the intended recipient the blank check was for the intended recipient to deposit in the intended recipient's personal account? Alex commonly refers to this as "the problem" in his deposition, and to the extent he now has remorse, the problem is due to his failure to communicate his true intent to any person involved. Perhaps the best evidence of intent is his statement that the use of the money is up to God, and not him.

But, of course, correlation does not equal causation. Here, even if we view Alex's statements as evidence and most favorably to Mario, there is no evidence that (1) Nohemy knew her statements to Mario that the donation was for the Church was false, (2) Nohemy had the requisite *actual* fraudulent intent; and (3) Nohemy was attempting to deceive Mario. Mario can never prove that Nohemy heard these words or that she understood them. Mario's only evidence on this point is Alex's conclusory and hearsay allegations that (1) he said specific words to Nohemy, and (2) because he said those specific words, Nohemy understood them to mean the check is for Mario's personal account. It is fair for Nohemy to observe that if this was true, she and the Church do not need to be involved at all if he wants to give it to Mario.

Alex's statements are not sufficient to survive summary judgment on fraud. One of the sad ironies of this case is that the evidence shows that the Church did primarily use this money to benefit Mario as a pastor of the Mitchell church. Mario received a large lump sum from it to buy a new car. He began receiving weekly stipends. Mario had complete access to these funds. He was the sole possessor of a debit card for the account. He used that debit card freely to make purchases at gas stations, Walmart, and restaurants without objection from the Church board of directors. Mario also was able to unilaterally use it to cover the expenses of the Church in Mitchell, which, while not directly benefitting him personally, helped him fulfill his stated purpose in life to save souls through preaching. This high level of access directly contradicts any claim of fraudulent intent to deprive Defendant of the money. These transactions are documented in SR755 through SR760.

Lastly, Mario asserts that his estoppel defense should survive even if his fraud and deceit claim fails. Each element of an estoppel affirmative defense must be shown by clear and convincing evidence. *Bonde v. Boland*, 2001 S.D. 98, ¶ 24, 631 N.W.2d 924, 928. Mario's estoppel defense pleads the same facts and legal theories as the fraud and deceit claim. It fails for the same reasons that the fraud and deceit claim fails.

There is also the best evidence that (1) the check was blank and therefore not a gift, (2) Nohemy, with Mario, deposited the check in the Church's bank account, Alex's bank accepted the check, and Alex took no immediate action to correct the alleged mistake. In fact, as documented above, he intentionally did the opposite and chose to leave the Church and not sue anyone.

5. Mario breached his fiduciary duty to the Church resulting in the Church losing its Mitchell parish and many of its congregants.

"In order to recover on a claim for breach of fiduciary duty, a plaintiff must prove: 1) that the defendant was acting as a fiduciary of the plaintiff; 2) that he breached a fiduciary duty to the plaintiff; 3) that the plaintiff incurred damages; and 4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages." *Grand State Prop., Inc. v. Woods, Fuller, Shultz, & Smith, P.C.*, 1996 S.D. 139, ¶ 16, 556 N.W.2d 84, 88.

> "A fiduciary relationship imparts a position of *peculiar confidence placed by one individual in another.* A fiduciary is a person with a duty to *act primarily for the benefit of another.* A fiduciary is in a position to have and exercise, and does *have and exercise influence over another.* A fiduciary relationship implies a condition of *superiority of one of the parties over the other.* Generally, in a fiduciary relationship, the property, interest or authority of the other is *placed in the charge of the fiduciary.*"

Garrett v. BankWest, Inc., 459 N.W.2d 833, 837–38 (S.D. 1990) (emphasis original).

Here, the Church placed Mario in the highly important role as the sole Pastor for the Church within the Mitchell community. In argument, Mario asserts that the lack of corporate records shows a dispute of fact as to whether he was actually a pastor. Pleadings matter. Mario acknowledged in his counterclaim that in 2017, he "commenced serving as a pastor at the Church's Mithcell location." SR 21 ¶ 6.

Further, Mario acknowledges in his deposition that he was placed with the following confidences on behalf of the Church: take care of souls, preach, pray for people, pay rent, hold Church services, recruit new members, collect offerings, perform administrative work. He also was placed as the signor on the Church's Mitchell checking account. He was responsible for that account and the cash in it. He acknowledged the money in that account is for the Church.

"The phrase 'fiduciary breach'... is no more descriptive than the phrase 'legal malpractice[;]' [and a] cause of action for fiduciary breach requires a breach of confidence, a breach of loyalty, or both." *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 52, 698 N.W.2d 555, 576. The evidence is admitted that Mario took $223,000 out of the Church's checking account for his own personal account. He took money from his benefactor and gave it to himself. At the time, Mario had no duty of loyalty to Alex. He did, however, have a duty of loyalty to the Church. When the Church took the position that the money was to remain in the Church checking account, which Mario knew, Mario's duty of loyalty compelled him to not unilaterally withdraw the money. This element of the claim is undisputed and proven.

Because this involves a transfer of cash from one account to the another, the damages and cause of damage are straightforward. The Church lost $223,000 by Mario's actions. There is no other cause or explanation for the loss. But in addition to that loss, Mario had to be removed from the Church. He now has a new church parish with Alex in the same location as the Plaintiff Church's location in Mitchell. The Church has no local Mitchell parish, and is no longer able to complete its purpose at its Mitchell location. The Church has lost membership in Mitchell, and the congregants who have kept the faith with the Church now must commute to Yankton to practice their faith within the Church.

6. The Circuit Court has inherent authority to modify, amend, revoke, or overrule prior Court orders.

The $223,000.00 in dispute was held in a trust account pursuant to a prior stipulated order. Mario contends that in the event the circuit court entered a final order in favor of the Church's motion for summary judgment, the circuit court was prohibited from providing the relief requested of in the complaint, the return of the money. Mario's argument creates a strange outcome where the court could enter a final order but could not provide the party any relief thereunder. No authority is cited for this proposition.

"It is settled law that courts of general jurisdiction independent of statutory authority have inherent power under proper circumstances to set aside or vacate their own judgments. *Janssen v. Tusha*, 68 S.D. 639, 642, 5 N.W.2d 684, 685 (1942) (citing *Purinton v. Purinton*, 41 S.D. 125, 169 N.W 236; *Boshart v. National Ben. Ass'n, Inc., of Mitchell*, 65 S.D. 260, 273 N.W. 7). "A trial court has inherent power to reconsider and modify an order any time prior to entry of judgment." *SBS Fin. Servs., Inc. v. Plouf Family Tr.*, 2012 S.D. 67, ¶ 13, 821 N.W.2d 842, 845 (citing *Moore v. Michelin Tire Co., Inc.*, 1999 S.D. 152, ¶ 46, 603 N.W.2d 513, 525). Here, the lower court contemplated that it needed to nullify the prior order for purposes of its judgment being carried out. This was a necessary order to carry out the lower court's authority and not an abuse of discretion.

7. Prejudgment Interest

The Church is entitled to prejudgment interest. Claims for conversion are entitled to interest from the time pf the conversion based upon the value of the property converted. SDCL § 21-3-3(1). Prejudgment interest is also allowed upon damages resulting from a breach of fiduciary duty. SDCL § 21-2-13.1. *Accord Estate of Lynch v. Lynch*, 991 N.W.2d 95, 2023 S.D. 23 (*finding a breach of fiduciary duty and ordering the lower court to enter a judgment with prejudgment interest thereon)*. Prejudgment interest could be found upon both or either claim.

Mario's primary argument is that prejudgment interest cannot accrue because he was prevented from returning the money to the Church due to either the actions of the Church, First Dakota National Bank, N.A., or the Court. None of these entities prohibited Mario at any time from returning the money. The stipulated order resulted from the parties' desire to avoid costs and additional damages. SR126-127. The Court had previously granted the Church's request for immediate return of the funds upon payment of the statutory bond. The bond was difficult to procure and would have cost $10,000 annually during this litigation. In lieu of risking incurring an additional $10,000 per year in damages during the pendency of this litigation in the event that he lost, Mario agreed that the money should be held pursuant to the stipulated order. He did this to minimize his risk, but also because he did not believe the Church was entitled to the money. But this is not the equivalent of returning the money to the Church. The only person that prevented Mario from returning the money was Mario.

Mario makes a secondary argument citing SDCL § 21-1-12, which stands for the proposition that the acceptance of a payment of principal waives a claim to interest. This statute more appropriately holds that the acceptance of payment of debt principal, but not interest concurrently, results in a waiver of claim for interest. *Accord South Dakota Public Utilities Com'n v. Barzen Intern., Inc.*, 479 N.W.2d 910 (S.D. 1992) (*finding the acceptance of payment in the same amount as principal owed and not collecting interest on the debt waived the interest claiming*). This is a claim for conversion with no allegation of a debt owed.

Mario also asserts that the prejudgment interest calculation was incorrect. Mario calculates an amount, but provides no authority that this calculation is the correct or only calculation for prejudgment interest. SDCL § 21-3-3 does not specify a particular method (ie. Normal, U.S. Rule, Canadian, or Rule of 78) for the calculation of interest in a wrongful conversion case. The law authorizes "interest on the value of the property converted." *Rensch v. Riddle's Diamonds of Rapid City, Inc.*, 393 N.W.2d 269, 274-75

(S.D. 1986). The Court did not abuse its discretion in awarding and calculating interest under a conversion statute in the amount that it did as a form of damages under SDCL § 21-3-3(1). *Id.*

CONCLUSION

The Church and Mario allege the right to the same $223,000 cash. Mario has no conversion claim because a blank check is insufficient to demonstrate a gift. Moreover, the money was in the Church's account for several months prior to Mario's attempt to take the money for his personal use. Regardless of whatever incomplete gifts occurred in April 2022, by July 2022, the money was properly in the Church's account and it asserted ownership over it. The Court should not allow Mario and Alex to attribute words, knowledge or intent to Nohemy with no further evidence to claim fraud, especially when she denies it. Fraud is a serious allegation that requires more proof than naked accusations. The undisputed facts show no material issue on fraud. Finally, Mario breached his duty and caused damage to the Church. For the foregoing reasons, the Church respectfully requests that the circuit court's order be affirmed.

Dated this 7th day of May 2026.

Ryan D. Cwach #4245
Attorney for Plaintiff/Appellee
Birmingham & Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
605-260-4747
ryan@birmcwachlaw.com

CERTIFICATE OF COMPLIANCE

Ryan D. Cwach, the undersigned attorney, hereby certifies that the Appellee's Brief complies with the word and character limits of SDCL § 15-26A-66(b). Appellee's Brief consists of 7,680 words and 44,370 characters with spaces as determined by the word count feature of the word processing software Microsoft Word. The brief also complies with the type face requirements.

Ryan D. Cwach
Birmingham & Cwach Law Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
605-260-4747
ryan@birmcwachlaw.com
Attorney for Appellee

PROOF OF SERVICE

I certify that one original the foregoing Brief of Appellee was served by certified mail, postage prepaid to the office of the Clerk of the South Dakota Supreme Court Clerk at 500 E. Capitol Ave., Pierre, SD 57501.

I further certify that a true and correct copy of the foregoing Brief of Appellee was electronically filed with the South Dakota Supreme Court and also provided to the Appellant's attorney Tucker Volesky, via email to tuckervolestky@tuckervoleskylaw.com, and via mail to Tucker Volesky, 205 N. Kimball, PO Box 488, Mitchell, SD 57301.

Executed this 7th day of May 2026.

Ryan D. Cwach

STATE OF SOUTH DAKOTA)
:ss.
COUNTY OF YANKTON)

Subscribed and sworn to me this 7th day of May 2026 by Ryan D. Cwach, Attorney for Appellee.

Notary Public

My commission expires 10-6-26.

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 31293

IGLESIA PENTECOSTAL
FUENTE DE VIDA, INC.

Plaintiff - Appellee

v.

MARIO TORRES

Defendant & Third-Party Plaintiff - Appellant

v.

NOHEMY HERRERA

Third-Party Defendant - Appellee

APPEAL FROM THE CIRCUIT COURT
OF THE
FIRST JUDICIAL CIRCUIT
DAVISON COUNTY, SOUTH DAKOTA

HONORABLE PATRICK T. SMITH
CIRCUIT COURT JUDGE

TUCKER J. VOLESKY
Attorney at Law
305 N. Kimball, PO Box 488
Mitchell, SD 57301
tucker.volesky@tuckervoleskylaw.com
Attorney for Defendant & Third-Party Plaintiff, Appellant

RYAN D. CWACH
Birmingham & Cwach Law Offices, Prof. LLC
202 W. 2nd St.
Yankton, SD 57078
ryan@birmcwachlaw.com
Attorney for Plaintiff and Third-Party Defendant, Appellees

Notice of Appeal Filed: November 13, 2025

TABLE OF CONTENTS

PAGE(S)

APPENDIX – TABLE OF CONTENTS……………………………………………………ii

TABLE OF AUTHORITIES………………………………………………………….iii

PRELIMINARY STATEMENT……………………………………………………….1

INTRODUCTION……………………………………………………………………...1

JURISDICTION………………..……………………………………………………….2

STATEMENT OF THE CASE AND FACTS……………………………….………3

ARGUMENT………………..……………………………………………………………3

I. JUDICIAL ADMISSIONS DO NOT ESTABLISH CHURCH OWNERSHIP OF THE DISPUTED FUNDS……………………………....3

II. THE BLANK-CHECK THEORY DEFEATS THE CHURCH'S OWN OWNERSHIP CLAIM AND CANNOT SUPPORT SUMMARY JUDGMENT……………………………………………………………………4

III. THE TAX RETURN ARGUMENT IS INADMISSIBLE, LACKS FOUNDATION AND CANNOT RESOLVE DONATIVE INTENT AS A MATTER OF LAW…………………………………………………....12

IV. THE RATIFICATION THEORY FAILS BECAUSE NEITHER COOPER VASQUEZ NOR MARIO HAD FULL KNOWLEDGE OF MATERIAL FACTS……………………………………………………….14

V. THE CIRCUIT COURT ERRED IN OVERRULING THE STIPULATED SETTLEMENT ACCOUNT ORDER WITHOUT NOTICE……………………………………………………………………..18

CONCLUSION…………………………………………………………………………..19

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPENDIX

APPENDIX – TABLE OF CONTENTS

PAGE(S)

ORDER……………….…………………………...App. 1-7

STATEMENT OF UNDISPUTED MATERIAL FACTS………….………...App. 8-12

DEFENDANT MARIO TORRES' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND DEFENDANT'S STATEMENT OF ADDITIONAL MATERIAL FACTS……………..…..…………………………App. 13-34

COMPLAINT……….…………………………………………………………App. 35-38

ANSWER TO COMPLAINT / COUNTERCLAIM…………….…………………...App. 39-44

ANSWER TO COUNTERCLAIM……………….………..……………………...App. 45-49

JOINT MOTION FOR ADOPTING STIPULATION………….…………....App. 50-53

ORDER (Adopting Stipulation)……………………………………………….App. 54-55

AFFIDAVIT OF MARIO TORRES…………….…………….……………….App. 56-60

AFFIDAVIT OF MARIA TORRES…………….………………………………..App. 61-63

AFFIDAVIT OF ALEX COOPER VASQUEZ……………………….………App. 64-69

VERIFIED AMENDED THIRD PARTY COMPLAINT……………….…….App. 70-79

LIMITED WAIVER OF ATTORNEY-CLIENT PRIVILEGE………………..App. 80-83

RULE 56(f) AFFIDAVIT……………….…………………..…………………App. 84-87

OBJECTIONS OF MARIO TORRES……………..……………………....App. 88-91

TABLE OF AUTHORITIES

CASES: **PAGE(S):**

Bank of Hoven v. Rausch, 382 N.W.2d 39 (S.D. 1986)……………………………..14, 15

Blodgett v. Commissioner, 394 F.3d 1030 (8th Cir. 2005)……………………………...13

Englund v. Berg, 69 S.D. 211, 8 N.W.2d 861 (1943)……………………………………...3

Geerdes v. Likness, 2025 S.D. 6, 17 N.W.3d 882…………………………………….....3

Greenbaum v. United States, 80 F.2d 113 (9th Cir. 1935)………………………………13

Steffen v. Davis, 52 S.D. 28, 217 N.W. 221 (1927)………………………………………6

Stockwell v. Stockwell, 2010 S.D. 79, 790 N.W.2d 52…………………………………...8

STATUTES

SDCL 15-6-7(b)(1)……………………………………………………………………18

SDCL 15-6-56(f)………………………………………………………………………12

SDCL 15-6-58(b)……………………………………………………………………...18

SDCL 57A-3-103(f)……………………………………………………………………6

SDCL 57A-3-115………………………………………………………………………6

SDCL 57A-3-407………………………………………………………………………7

SDCL 57A-3-420………………………………………………………………………7

OTHER AUTHORITIES

Restat 3d Property: Wills and Other Donative Transfers, § 6.1…………………………..8

Restat 3d Property: Wills and Other Donative Transfers, § 6.1, *comment i. Donee's acceptance presumed*……………………………………………………………………8-9

Restat 3d Property: Wills and Other Donative Transfers, § 6.2, *comment g. Constructive or symbolic delivery*………………………………………………………...8

Restat 3d Property: Wills and Other Donative Transfers, § 6.2, *comment n. Gifts by check*……………………………………………………………………………………....8

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC.,	)	#31293
Plaintiff and Appellee,	)	
v.	)	APPELLANT'S REPLY BRIEF
MARIO TORRES,	)	
Defendant & Third-Party Plaintiff and Appellant,	)	
v.	)	
NOHEMY HERRERA,	)	
Third-Party Defendant and Appellee.	)	

PRELIMINARY STATEMENT

This Reply Brief uses standard abbreviations and party references as used in the Appellant's opening brief. Alex Cooper Vasquez will be referred to herein as "Cooper Vasquez" or "the donor."

INTRODUCTION

Without addressing Cooper Vasquez's April 2022 communications with his attorney, Sean Conway, receipt of his personal injury proceeds and meetings discussing his intent to make three specific gifts from the funds – the Church departs significantly from defending the circuit court's summary judgment order. Instead, the Church introduces or emphasizes several arguments that mischaracterize the record and applicable law, were not fully developed below or were not the basis of the trial court's decision. Perhaps most significantly, the Church's blank-check argument says too much: if a blank check cannot effect a transfer of ownership, then the Church cannot claim ownership merely because its agent, Nohemy, intercepted the blank check, altered it by filling in the Church's name on the payee line and then made the deposit.

More fundamentally, each of Appellee's theories either fails as a matter of law or underscores the genuine disputes of material fact that make summary judgment inappropriate. The record establishes that Cooper Vasquez intended to make three separate gifts: one to the Church and two to individual pastors including Mario. The record further establishes that Church leadership, with knowledge of Cooper Vasquez's intent, made representations to Mario in intercepting the gift intended for him, altering the blank-payee check and depositing it into the Church account. When Cooper Vasquez discovered the unauthorized alteration and deposit weeks later, he immediately took corrective action.

These facts present classic questions for jury determination: What was Cooper Vasquez's donative intent? Did the Church leadership fraudulently misrepresent the nature of the funds to Mario? Did Mario breach any fiduciary duty when the funds were intended as a personal gift to him? These questions cannot be resolved on summary judgment.

JURISDICTION

The parties agree that the Court has jurisdiction to decide this appeal.

STATEMENT OF THE CASE AND FACTS

Mario incorporates by reference the Statement of Case and Facts in his opening brief's statement at pages 2-8, as well as his responsive statement and additional material facts on summary judgment. App. 13-34; SR 794-815.

ARGUMENT

I. JUDICIAL ADMISSIONS DO NOT ESTABLISH CHURCH OWNERSHIP OF THE DISPUTED FUNDS

A. The Scope of Mario's Admission.

Appellee relies on Mario's acknowledgement in his Answer about the Church related account maintained at First Dakota National Bank in Mitchell and his status as an authorized signor as a judicial admission that all deposited funds were Church property. This argument overstates the scope of any admission that may be properly deduced from Mario's Answer.

Under South Dakota law, judicial admissions are statements made by a party in a judicial proceeding that are binding on that party. Englund v. Berg, 69 S.D. 211, 212-213, 8 N.W.2d 861, 862 (1943). However, judicial admissions must be construed in context, and do not extent beyond their plain meaning. Geerdes v. Likness, 2025 S.D. 6, ¶ 18, 17 N.W.3d 882, 887.

B. Account Title Versus Beneficial Ownership.

Acknowledging a Church-maintained account and that Mario was an authorized signor does not concede that every dollar deposited into that account was Church property or that the disputed proceeds were intended for the Church. The distinction between account title and maintenance, on one hand, and beneficial ownership of particular funds, on the other, is fundamental.

An authorized signor is a person authorized to sign checks on an account. This status does not necessarily mean the signor owns the funds in the account or that all funds deposited are the property of the account holder. Many situations exist where funds are deposited into an account but belong beneficially to someone other than the account holder – such as trust accounts, escrow accounts, agency accounts, or mistaken or unauthorized deposits.

C. Conversion Turns on Ownership of Specific Property.

Conversion requires proof of ownership or rightful possession of specific property at the time of conversion. The question is not who holds formal title to an account, but who has ownership or rightful possession of the funds at issue.

Mario's pleading that he was an authorized signor on an account maintained for the Church does not resolve the question of whether the proceeds from Cooper Vasquez's check deposited into the account belonged to the Church or to Mario. That question depends on Cooper Vasquez's donative intent, the circumstances surrounding the making, delivery, and deposit of the check, and whether the Church fraudulently misrepresented the nature of the funds to Mario.

II. THE BLANK-CHECK THEORY DEFEATS THE CHURCH'S OWN OWNERSHIP CLAIM AND CANNOT SUPPORT SUMMARY JUDGMENT

A. The Church's Position Rests on an Irreconcilable Contradiction.

The Church's central argument contains a fatal logical flaw that undermines its entitlement to summary judgment. The Church simultaneously advances two incompatible propositions: first, that it owns the $223,000 because the funds were deposited into its account; and second, that no completed gift could have been made to

Mario because the check bore a blank payee line and therefore could not effect a transfer of ownership.

This reasoning proves too much. If the Church's rule is correct – that a blank check cannot give rise to a completed gift because the instrument itself does not transfer ownership – then the Church cannot claim ownership merely because its agent, Nohemy, filled in the Church's name on the payee line and deposited the funds. Under the Church's own theory, the blank check could not have transferred ownership to the Church any more than it could have transferred ownership to Mario.

The Church's Complaint alleges that "[o]n May 2, 2022, the Church received a charitable donation of $300,000 to be used to foster the mission of the Church in Mitchell" and that "[o]n May 3, 2022, the Church deposited the $300,000 into the Mitchell checking account." App. 35-36; SR 1, ¶¶ 7-8. The Church's entire claim to the $223,000 that Mario transferred on July 13, 2022, rests on the theory that Cooper Vasquez had gifted the funds to the Church. Yet the Church now argues that the blank check cannot constitute a completed gift. The Church cannot have it both ways.

The circuit court's order awarded the money to the Church based on findings that Cooper Vasquez did not make a completed gift to Mario and that Mario wrongfully converted Church property. SR 1124-1135. But this reasoning is circular: it assumes the Church had ownership rights without establishing how the Church obtained those rights. If blank checks cannot effect gifts, the Church's ownership claim collapses.

B. The Blank-Check Theory Does Not Apply to Altered Instruments.

The Church's invocation of the blank-check theory misidentifies the dispositive question in this case. While it is true that a donor's blank check can raise delivery and assignment issues in the abstract, the critical inquiry here is not whether a check differs from cash, but rather what happens when a third-party interloper, the Church's agent Nohemy, alters an instrument without authorization and deposits it without the donor's knowledge or consent.

Appellee's brief (at p. 18) relies on snippets of language from secondary sources, SDCL 57A-3-103(f) defining a 'check,' as well as Steffen v. Davis, 52 S.D. 28, 217 N.W. 221, 223 (1927), to argue insufficient delivery for a valid gift from Cooper Vasquez to Mario. These arguments miss. Steffen more so supports Mario's position in this case than it helps the Church; the Court in Steffen looked to the circumstances surrounding the purported gift, focusing on donor intent "with the deposit in mind as the subject of the gift," and holding that there was a valid gift where "delivery of the fund was attempted by the execution and delivery of an order directed to the cashier of the bank holding the deposit." Id., 217 N.W. 221, 222-223.

The general rule that a check is not equivalent to cash and does not constitute a completed gift until accepted by the bank may apply in cases involving conditions precedent or where the donor retains certain rights regarding the gift, including the ability to stop payment and revoke the gift. Here, however, the bank honored the instrument and paid the funds. The check was converted to cash through the bank's acceptance and payment. At that point, the dispute shifts from the validity of the check itself to ownership and rightful possession of the proceeds after payment.

Moreover, under the UCC, when a donor delivers a check with a blank payee line to the intended individual, it gives that individual the means of obtaining the gifted funds, despite it being an incomplete instrument. SDCL 57A-3-115. Thus, when the Church's

President, Nohemy, took the check and inserted the Church's name as payee contrary to Cooper Vasquez's wishes, she committed an unauthorized completion under SDCL 57A-3-407 (Alteration), converting the instrument. SDCL 57A-3-420.

C. Account Title Does Not Determine Ownership When Deposit Is Challenged.

The Church's position reduces to a simple syllogism: money in the Mitchell church account equals Church ownership. This reasoning fails when the deposit itself is challenged as unauthorized or induced by fraud. This is because ownership of funds does not turn solely on the account into which they are deposited; it turns on the intent of the parties and the lawfulness of the deposit. If a jury finds that Nohemy misrepresented the nature of the check to Mario, altered it without authorization, induced the deposit into the Church account, and thereby obtained the funds through fraud, then the Church's mere possession of the funds in its account does not establish ownership. In such a scenario as here, the Church would be a wrongful possessor, and Mario would have a valid claim. The location of funds in an account is a mere fact, not a legal conclusion about ownership.

D. The Dispute Concerns Intent and Circumstances, Not Instrument Mechanics.

The Church's argument conflates two separate legal questions: whether a blank check, as an instrument, automatically transfers funds before payment, and whether the Church obtained ownership of the funds once honored and deposited. Even assuming a blank check does not constitute an assignment of funds in the abstract, this does not resolve the ownership dispute once the drawee bank has honored the check and the funds have moved. At that point, the relevant inquiry shifts from instrument mechanics to factual questions: whose money was it intended to be, and how did the Church come to possess it? The dispute therefore concerns the intent of the donor, the circumstances of delivery, the representations made to induce deposit, and whether the Church obtained the funds through misrepresentation. These are matters of fact, not law.

E. Donative Intent Plus Delivery Can Constitute a Completed Gift.

South Dakota law recognizes that a gift requires three elements: intent, delivery, and acceptance. Stockwell v. Stockwell, 2010 S.D. 79, ¶ 19, 790 N.W.2d 52, 60 (citations omitted). The Restatement of Property sets forth the following requirements applicable to all gifts:

> **(a) To make a gift of property, the donor must transfer an ownership interest to the donee without consideration and with donative intent.**
>
> **(b) Acceptance by the done is required for a gift to become complete. Acceptance is presumed, subject to the donee's right to refuse or disclaim.**

Restatement of the Law, Third, Property: Wills and Other Donative Transfers, § 6.1 (2003). The Restatement provides that a gift of funds by check may be perfected based on donative intent, particularly when combined with delivery, actual, constructive, or symbolic, and the presumption of acceptance. Id., § 6.2, *comment n. Gifts by check* (may be perfected based on donative intent alone); Schuldies v. Millar, 1996 S.D. 120, ¶ 21, 555 N.W.2d 90, 97 ("Delivery may be actual or constructive, depending on the circumstances surrounding how the gift was made" (citation omitted)); see also Restat 3d Property, *supra*, § 6.2, *comment g. Constructive or symbolic delivery* ("delivery is constructive if the donor gives the donee the means of obtaining possession or control of the subject gift"); Id., § 6.1, *comment i. Donee's acceptance presumed* ("donee cannot be expected to accept or reject a gift until he learns of it and unless a gift is rejected when the donee is informed of it the presumption of acceptance is not defeated" (citing cases)).

The record establishes Cooper Vasquez's clear donative intent to make a gift to Mario through delivery of the check, in multiple ways:

1. His meeting and communications with his attorney, Sean Conway, discussing his intent to make three separate gifts from his injury claim proceeds received in April 2022 through Conway's representation. SR 1004-1006, ll. 23-4; SR 1082-1085; SR 1107-1109; SR 23-24 ¶¶ 23-24.
2. His communications with Church leadership, Nohemy and Francisco Herrera, about making three separate gifts – one to the Church and two to individual pastors including Mario. SR 817, ¶¶ 6-8; SR 823-824; SR 904-906, ll. 1-22; SR 989-990, ll. 22-25; SR 996-997, ll. 13-3.
3. His deliberate act of writing three separate checks for $300,000 each, distinguishing them by memo line designations. SR 816-820.
4. His delivery of the blank-payee check to Mario in a sealed envelope as a surprise gift. SR 816-817; SR 823; SR 985-987.
5. His diligent corrective actions upon learning that the check intended for Mario had been made payable to the Church in reviewing his own bank statements weeks after the deposit. SR 987-991, ll. 18-8; SR 1008-1010, ll. 16-5; SR 1021-1022, ll. 16-21; SR 1025, ll. 8-19; SR 172.

F. Summary Judgment Requires Viewing the Evidence in Mario's Favor. Genuine Disputes Preclude Summary Judgment.

The record presents multiple genuine disputes of material fact that preclude summary judgment:

1. **Donative Intent**: Cooper Vasquez's sworn testimony establishes that he intended the check with the blank payee line and "missions" memo line as a personal gift to Mario, not a donation to the Church. The three-check structure – one explicitly payable to the Church with "tithe" on the memo line, and two with blank payee lines and "missions" on the memo lines – creates a material factual dispute about intent.
2. **Delivery and Circumstances**: The check was delivered to Mario in a sealed envelope, not placed in the Church offering, suggesting it was intended for personal receipt by Mario. Before Mario received the envelope, however, Church leadership knew of Cooper Vasquez's planned gifts and how he intended to carry them out, and called Mario and his wife for a private meeting with the Herreras, representing to Mario that he would receiving a check for the Church, instructing secrecy, promising a car and weekly stipend, and directing deposit into a Church account. These pre-delivery circumstances, communications, and misrepresentations are material facts that a jury must evaluate.
3. **Unauthorized Completion**: Nohemy wrote the Church name on the payee line and deposited the check. Whether Nohemy's actions were authorized by Cooper Vasquez is a material fact that affects whether the Church obtained the funds lawfully or through misrepresentation.
4. **Mario's Subsequent Transfer**: Mario transferred the $223,000 to his personal account after learning of Cooper Vasquez's donor intent and after communications from Cooper Vasquez about moving the funds. This sequence of

events is material to whether Mario acted wrongfully, had authorization, or was correcting an unauthorized deposit.

Even if the blank-check theory were to apply, genuine disputes of material fact exist regarding whether Nohemy's actions and communications in making pre-delivery representations to Mario, altering the check by writing the Church's name on the payee line and then depositing the check constitutes conversion or fraud. If Cooper Vasquez intended the check for Mario and Nohemy knew this, then Nohemy's surreptitious communications and actions as Church President in redirecting the check to the Church constitutes wrongful conversion or fraud, regardless of the technical status of the check before deposit.

The question of ownership and rightful possession of the proceeds after the bank accepted and paid the check is a fact question that cannot be resolved on summary judgment. The blank-check theory does not permit a wrongdoer to defeat a gift by intercepting and altering a blank-payee instrument. A jury could reasonably find that: (1) Cooper Vasquez intended the check as a personal gift to Mario; (2) the check was delivered to Mario as the intended recipient of the funds; (3) Nohemy misrepresented the nature of the check to Mario and induced the deposit into the Church account; (4) the Church obtained the funds through fraud; and (5) Mario has a right to possession of the funds. Summary judgment is therefore inappropriate.

III. THE TAX RETURN ARGUMENT IS INADMISSIBLE, LACKS FOUNDATION AND CANNOT RESOLVE DONATIVE INTENT AS A MATTER OF LAW

A. The Tax Return Evidence is Inadmissible and Mario was Denied Discovery on the Issue.

Mario's Response to the Church's statement of material facts regarding the tax return evidence, specifically noted objections because the purported evidence – unsigned tax documentation from Amayas Income Tax and dated February 14, 2024 – constitutes inadmissible hearsay, lacks foundation and context, and is immaterial to what Cooper Vasquez's purpose and intent was at the time he delivered Mario the $300,000 check in late April or early May 2022. App. 22-23; SR 803-804. Notwithstanding, Mario specifically noted in his Rule 56(f) affidavit that the tax return issue was being asserted for the first time in the summary judgment motion and requested additional discovery. App. 84-86; SR 1107-1109. Cooper Vasquez was consulted on the issue and provided a waiver for release of taxpayer information so that discovery could be conducted by obtaining information and explanations from his tax preparers. SR 1086-1087.

B. Tax Reporting and Donative Intent Are Analytically Distinct.

Tax reporting practices and donative intent are analytically distinct inquiries. Donative intent – the donor's state of mind at the moment of delivery – is a question of fact that must be established through evidence directly addressing that mental state. A tax return prepared several months, or as in this case years, after an alleged gift reflects tax-reporting decisions often influenced by tax preparers, accountants, and other advisors. These post-hoc reporting choices do not reliably demonstrate what the donor intended at the time of delivery.

The failure to report a gift on a tax return is, at most, circumstantial evidence. It does not directly prove the absence of donative intent. A donor may have intended to make a gift but failed to report it due to oversight, reliance on incorrect tax advice, misunderstanding of reporting requirements, or deliberate tax avoidance. Tax reporting and donative intent operate in different temporal and conceptual frameworks.

C. The Tax Return Lacks Context and Cannot Resolve Intent as a Matter of Law.

Even if the tax documentation were admissible,[1] it is at most circumstantial evidence requiring explanation and context. An unsigned tax return standing alone does not explain:

1. The involvement and role of the tax preparer in preparing the return.
2. What information was provided to the tax preparer regarding the personal injury claim proceeds, subsequent gifts, or the $300,000 transaction at issue.
3. Whether the tax documentation was ever completed, signed and filed (it appears incomplete, unsigned and unfiled). SR 718-734.
4. Whether amendments to the return are contemplated.
5. Whether any omission was deliberate, inadvertent, or based on tax advice.

---

[1] Appellee's brief (at p. 20) cites to two inapposite, but also instructive, cases – one arising in the United States Tax Court, Blodgett v. Commissioner, 394 F.3d 1030 (8th Cir. 2005) and a criminal case involving a stock fraud scheme where the corporation's financial condition, records and books of account were at issue, Greenbaum v. United States, 80 F.2d 113 (9th Cir. 1935). Neither of these cases support the admissibility, foundation, relevance or probative value of the tax return evidence proffered by the Church here and, in fact, counsel against admissibility. Blodgett, 394 F.3d 1030, at 1040 ("tax return is generally considered inadmissible hearsay"); Greenbaum, 80 F.2d 113, at 125-126 (duly filed IRS tax record qualified as 'public record' but holding that "even the original income tax return would not be receivable" as evidence of taxpayer admissions). As noted above, Mario specifically noted and preserved proper objections to the tax return evidence on the record. SR 803-804; App. 22-23.

D. Sworn Testimony Creates Genuine Disputes That Tax Reporting Cannot Eliminate.

The record includes Cooper Vasquez's sworn testimony regarding his intent and delivery of the alleged $300,000 gift by check to Mario. When sworn testimony establishes a factual dispute regarding intent and delivery, that dispute cannot be eliminated by a single piece of circumstantial evidence such as an unsigned tax return purportedly prepared almost two years later. At most, the tax return point creates another factual dispute to be resolved at trial; it cannot justify resolving donative intent as a matter of law against Mario.

IV. THE RATIFICATION THEORY[2] FAILS BECAUSE NEITHER COOPER VASQUEZ NOR MARIO HAD FULL KNOWLEDGE OF MATERIAL FACTS

A. Ratification Requires Full Knowledge of Material Facts.

Appellee argues that Cooper Vasquez's post-deposit conduct – including marriage through the Church, subsequent donations, and failure to sue promptly – constitutes ratification of the Church's receipt and use of the funds. This argument fails both legally and factually.

As a matter of law, ratification requires intent to ratify and full knowledge of material facts. See Bank of Hoven v. Rausch, 382 N.W.2d 39, 41-42 (S.D. 1986) (discussing authorities and case law). When a party's knowledge at the time of the alleged ratifying conduct is unclear or contested, summary judgment on the ratification

---

[2] As noted in Appellant's opening brief (at p. 19), the Church's newly introduced ratification theory based on conduct of Cooper Vasquez was not pleaded or developed below; it was only argued for the first time in the Church's reply brief on summary judgment. SR 1-3; SR 114-115; SR 765-776 & 1113-1114.

issue is inappropriate, as the determination requires resolution of factual disputes regarding what the party knew and intended.

B. Cooper Vasquez Lacked Full Knowledge at the Time of Deposit.

Cooper Vasquez's own testimony establishes that he did not possess full knowledge of the material facts – specifically, that the check had been altered by Nohemy and deposited into the Church account – at the time the alteration or deposit occurred; Cooper Vasquez discovered the payee issue only after reviewing his bank statements weeks later. SR 987-991, ll. 18-8; SR 1008-1010, ll. 16-5; SR 1021-1022, ll. 16-21; SR 1027-1031, ll. 1-1; (SR 817 & 824; App. 58 & 65). This temporal gap is dispositive: ratification requires knowledge of material facts, and Cooper Vasquez demonstrably lacked such knowledge when the deposit was made.

The Church cannot establish ratification based on Cooper Vasquez's post-discovery conduct because the ratifying act must be undertaken with knowledge of the facts that would make the original act unauthorized. Bank of Hoven, supra, 382 N.W.2d 39, 41. The Church fails to specify the alleged ratifying act with any particularity, context or timeframe, let alone facts showing full knowledge and intent. At no point did Cooper Vasquez ever receive any benefits that could be construed as ratification. In fact, Cooper Vasquez did not begin to learn of the material facts until weeks after the deposit when reviewing his bank statements, negating any ratification. At that point, he began making inquiries to his bank, the Herreras, and Mario to determine what had happened.

C. Cooper Vasquez's Post-Discovery Conduct Reflects Disaffirmance, Not Ratification.

Once Cooper Vasquez acquired knowledge of the deposit, his conduct demonstrates an intent to disaffirm rather than ratify. SR 987-990; SR 1008-1010; SR

1021-1022; SR 1028-1030; SR 1068, pp. 74-75, ll. 17-7; SR 824; SR 1-2 & 23. Specifically, Cooper Vasquez contacted his bank and the parties involved, seeking explanations, and attempting to correct the situation. These actions are inconsistent with ratification; they reflect an attempt to effectuate his original intent rather than to confirm the unauthorized deposit.

The Church characterizes Cooper Vasquez's later decisions to avoid conflict as ratification, but this characterization misapprehends the legal significance of such conduct. A party's decision to refrain from litigation or further confrontation after discovering an unauthorized act does not constitute ratification as a matter of law, particularly where the party has already taken corrective steps. Cooper Vasquez's support for Mario moving the remaining funds further demonstrates that he did not intend to ratify the Church's receipt of the deposit; rather, he sought to remedy the situation. Thus, this sequence of events – discovery of the unauthorized alteration and deposit followed by immediate corrective actions – is inconsistent with ratification. Cooper Vasquez's conduct upon learning of the material facts demonstrates that he did not ratify the Church's claim; he challenged it.

D. Mario Lacked Knowledge of Donor Intent Due to Misrepresentations.

Mario's verified pleadings, affidavit, and deposition testimony, corroborated by Maria Torres's affidavit as well as the Church's own record admissions of pre-delivery meetings with Cooper Vasquez and then with Mario and Maria in anticipation of the check, establishes that Mario lacked full knowledge of material facts at the time he relinquished the check to Nohemy. App. 56-79.[3] Specifically, Mario and Maria detail the pre-delivery misrepresentations and secrecy instructions that induced Mario to allow the Church to take and deposit the check. Mario asserts that he would not have permitted the Church to take or deposit the check absent these misrepresentations.

Where a party's decision to permit an act was induced by misrepresentation, that party cannot be said to have ratified the act with full knowledge. The factual context established by the verified pleadings, affidavits, and deposition testimony shows that Mario's continued receipt of stipends and access to the account is entirely consistent with the alleged inducement and lulling described in the record. If Mario was induced to permit the deposit through misrepresentations and secrecy instructions, his continued acceptance of the benefits flowing from that arrangement does not constitute a knowing and voluntary ratification of the underlying unauthorized act or the Church's claim. Rather, it reflects Mario's reliance on the misrepresentations that induced his initial acquiescence.

Whether Mario's continued receipt of stipends represents a deliberate choice to waive his rights or a continuation of the arrangement induced by misrepresentation is a factual question that must be resolved in Mario's favor at summary judgment. The verified pleadings, affidavits, and deposition testimony in the record, which describe pre-delivery misrepresentations and secrecy instructions, must be accepted as true for purposes of summary judgment.

---

[3] *See also* SR 22; SR 112-113; SR 171; SR 175-176; SR 538; SR 904-906, ll. 1-22; SR 913-914, ll. 21-14; SR 989-990, ll. 22-25; SR 996-997, ll. 13-3; SR 1058-1059, pp. 36-38, ll. 23-5.

V. THE CIRCUIT COURT ERRED IN OVERRULING THE STIPULATED SETTLEMENT ACCOUNT ORDER WITHOUT NOTICE

The circuit court's October 10, 2025, order overruled the August 14, 2023, stipulated order without providing Mario with notice that the court was being asked to consider disturbing the stipulated order, and without giving Mario an opportunity to be heard on the propriety of such action. The stipulated settlement account order was entered pursuant to a joint motion by both parties. It represents a contractual agreement between parties regarding how the disputed funds would be held pending resolution of the litigation. The circuit court modified the stipulated order without notice or opportunity to be heard, violating due process and prejudicing Mario's appellate rights by authorizing immediate fund transfer.

Moreover, Mario filed objections to the order pursuant to SDCL 15-6-58(b), asserting that entry of the order did not comply with statutory law. App. 88; SR 1146. See also SDCL 15-6-7(b)(1) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought"). Appellee makes not argument of statutory compliance.

The stipulated order was not merely a case management order subject to modification at the court's discretion; it was a substantive agreement affecting the parties' rights. If this Court reverses the summary judgment decision, the funds should be returned to the Settlement Account pending further proceedings.

CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court's summary judgment decision and issue such other or further relief, orders, or instructions as the Court deems appropriate.

Dated this 5th day of June 2026.

/s/ Tucker J. Volesky
TUCKER J. VOLESKY
Attorney for Appellant
305 N. Kimball, PO Box 488
Mitchell, SD 57301
tucker.volesky@tuckervoleskylaw.com

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC.,	)	#31293
Plaintiff and Appellee,	)	CERTIFICATE OF COMPLIANCE
v.	)	
MARIO TORRES,	)	
Defendant & Third-Party Plaintiff and Appellant,	)	
v.	)	
NOHEMY HERRERA,	)	
Third-Party Defendant and Appellee.	)	

The undersigned hereby certifies that Microsoft Word was used in the preparation of the foregoing Reply Brief of Appellant and that the word count done pursuant to that word-processing system calculated 4,664 words in therein, pursuant to SDCL 15-26A-66.

Dated this 5th day of June 2026.

/s/ Tucker J. Volesky
TUCKER J. VOLESKY
Attorney for Appellant

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IGLESIA PENTECOSTAL FUENTE DE VIDA, INC.,	)	#31293
Plaintiff and Appellee,	)	CERTIFICATE OF SERVICE
v.	)	
MARIO TORRES,	)	
Defendant & Third-Party Plaintiff and Appellant,	)	
v.	)	
NOHEMY HERRERA,	)	
Third-Party Defendant and Appellee.	)	

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief of Appellant in the above-entitled matter was served electronically through Odyssey file and serve system which sent notification of such filing to Ryan D. Cwach, Attorney for Plaintiff and Third-Party Defendant, Appellees, on this 5th day of June 2026.

/s/ Tucker J. Volesky
TUCKER J. VOLESKY