IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

THE EXECUTIVE BOARD OF THE MISSOURI BAPTIST CONVENTION, *et al.*, Plaintiffs, v. ROBIN CARNAHAN, *et al.*, Defendants.	)))))))))))	 Case No. 02CV325096 Division II

JUDGMENT

Now on this 4th day of March, 2008, the Court again takes up this matter for the purpose of entering a final judgment with respect to the defendant Windemere Baptist Conference Center.

INTRODUCTION

This lawsuit stems from a dispute between the Missouri Baptist Convention, (hereinafter referred to as "MBC" or "Plaintiffs") on one side and the Windermere Baptist Conference Center, Inc. (hereinafter referred to as "Windermere" or "Defendant") on the other side.

In August of 2000, pursuant to a business reorganization plan adopted at its annual meeting a year earlier, the MBC incorporated Windemere as a separate nonprofit entity and transferred substantial assets into Windemere for the purpose of establishing a conference and recreation center that would maintain a Christian and family-value atmosphere for personal study, renewal, and commitment. In accord with the original articles of incorporation, the first designated board of trustees was selected by the MBC, and the articles further provided that succeeding boards would also be determined at the annual MBC meetings. Less than one year later, in a seemingly ungrateful spirit, the Windermere board of trustees amended its articles of

incorporation without permission or consent from MBC and eliminated MBC's right to designate board members. This lawsuit followed.

The law governing the business affairs of Missouri nonprofit corporations is based on the Revised Model Nonprofit Corporation Act and codified in Chapter 355 of the Missouri Revised Statutes. If an outside or "parent" entity with the power to elect or designate the trustees of another nonprofit entity desires to protect that right so that it cannot be taken away without its consent, Chapter 355 provides two alternative methods it may choose from to protect its right.

The first method is to provide in the articles of the subject board over which one wishes to maintain control that the subject corporation shall have members. In fact section 355.096, RSMo 2000 requires every newly-formed corporation to specifically state in its first articles whether or not it shall have members. If the articles of incorporation state that a corporation shall have members, the articles may never be amended to change how the board is selected without the consent and vote of its members, section 355.596, RSMo. Inexplicably however, in its drafting of Windemere's initial articles of incorporation, MBC provided that Windemere would **not** have members. This choice granted the Windemere Bopard of Trustees the power to amend its articles without seeking the consent of the MBC.

The second method one may choose to protect one's right to select or appoint board members is to provide in the initial articles of incorporation that the article granting the right to appoint or designate members may not be amended without the consent of those having the right to select or appoint. Section 355.606 specifically states, "The articles may require an amendment to the articles or bylaws to be approved in writing by a specified person or persons other than the board." Thus, in its drafting of Windemere's initial articles of incorporation, MBC could have included a provision that Windemere's articles could not be amended without the

consent of the MBC; however, MBC again failed to include any such provision in Windemere's articles..

In the absence of the above two limitations which MBC chose not to include in Windemere's articles at the time of incorporation, the Windemere board of trustees had broad authority to amend its articles. MBC has advanced numerous legal theories why the unambiguous language and choices made by its 2000 executive board and messengers should not preclude its success on the merits of this lawsuit. However our justice system strives for a system of laws and predictability where legal documents and unambiguous choices have consequence. MBC was not without the ability to protect any rights it wanted protected; Chapter 355 of the Revised Statutes of Missouri provided such options. For whatever reasons, MBC's 2000 executive board and messengers did not avail themselves of those protections in 2000. This Court cannot rewrite history. The Court's Judgment follows in greater detail.

SUMMARY JUDGMENT AND STANDARD OF REVIEW

Before the Court are four (4) fully-briefed motions for summary judgment related to Plaintiffs' claims in the Fifth Amended Petition against Defendant Windermere Baptist Conference Center ("Windermere"). The Motions are:

(1) Plaintiffs' Motion for Partial Summary Judgment on Defendant Windermere Baptist Conference Center's Affirmative Defenses Arising Under Mo. Rev. Stat. 355.141, filed November 15, 2006, and all pleadings and evidence in support and opposition ("Motion (1)");

(2) Defendant Windermere Baptist Conference Center's Motion for Summary Judgment, filed December 18, 2006, and all pleadings and evidence in support and opposition ("Motion (2)");

(3) The portion relating to Windermere of the Motion of Defendants The Baptist Home, Windermere Baptist Conference Center and Word & Way for Summary Judgment on Counts I, XI, XII, XIII and XV of Plaintiffs' Fifth Amended Petition, filed August 22, 2007, and all pleadings and evidence in support and opposition ("Motion (3)"); and

(4) Motion of Plaintiffs for Summary Judgment Against Separate Defendant Windermere Baptist Conference Center, filed October 10, 2007, and all pleadings and evidence in support and opposition ("Motion (4)").

Counsel for the Parties presented oral arguments on Motions (1) and (2) on July 18, 2007. On August 7, 2007, the Court entered its Judgment of that date, disposing of some of the issues presented in Motions (1) and (2). On August 17, 2007, the parties presented oral argument on the narrow issue of whether the MBC and/or the messengers who attended past MBC Annual Meetings were statutory members of Windermere by virtue of language in Windermere's August 25, 2000 Articles of Incorporation ("the Original Articles") regarding election of Windermere's trustees, which was an issue raised in Motions (1) and (2). On January 2, 2008, the parties without objection and presented oral argument on all the issues raised in Motions (1) through (4). This Judgment follows.

This Court finds that these four Motions set forth uncontroverted facts sufficient to enter summary judgment on enough legal issues to dispose of every claim between Plaintiffs and Windermere. As such, this Court makes the following findings of fact and conclusions of law. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the following conclusions of law are actually findings of fact, they are adopted as such.

Rule 74.04(b) of the Missouri Rules of Civil Procedure provides that a defending party against whom a claim is asserted or declaratory judgment is sought may move for a summary judgment as to all or any part of the pending issues. The propriety of summary judgment is purely an issue of law. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.* 854 S.W.2d 371, 376 (Mo. banc 1993). "Movants who are defending parties in a lawsuit may establish a right to judgment as a matter of law by showing (1) facts that negate *any one* of the

claimant's elements facts, [or] (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of *any one* of the claimant's elements[.]" *Nodaway Valley Bank v. E.L. Crawford Const.*, 126 S.W.3d 820, 824 (Mo.App. W.D. 2004). Summary judgment proceeds from an analytical predicate that, where the facts are not in dispute, a prevailing party can be determined as a matter of law. *ITT Commercial*, 854 S.W.2d at 376. "Summary judgment is particularly appropriate when construction of a contract is at issue and the contract is unambiguous on its face." *Lupo v. Shelter Mutual Ins. Co.*, 70 S.W.3d 16, 18-19 (Mo.App. E.D. 2002).

FINDINGS OF FACT

Pursuant to Missouri Supreme Court Rule 74.04(d), the Court finds the there is no genuine dispute regarding the following material facts:

1. Windermere is a nonprofit, public benefit corporation existing under The Missouri Nonprofit Corporation Act, Chapter 355, RSMo. See Motion (2), Windermere Fact # 1.

2. At the 1999 Annual Meeting of the MBC, Terry Lamberth, an MBC messenger, moved that the New Directions Strategic Planning Report and Recommendation ("New Directions Plan") be approved and that implementation begin on January 1, 2000. See Motion (3), Plaintiffs Fact # 81.

3. The motion to approve and begin implementation of the New Directions Plan carried. See Motion (3), Plaintiffs Fact # 83.

4. The New Directions Plan provided for the creation of a new entity to take over the assets and operations of the Windermere Baptist Conference Center. See Motion (3), Plaintiffs Fact # 84.

5. The property that was transferred to Windermere following creation of the separate corporation was transferred pursuant to the New Directions Plan. See Motion (3), Plaintiffs Fact # 86.

6. The Executive Director of the MBC, James Hill, a-then employee of the Executive Board of the Missouri Baptist Convention ("Executive Board"); worked with Mark Comley, an attorney then employed by the Executive Board, to prepare and file the Original Articles. See Motion (4), Windermere Fact # 8.

7. On August 25, 2000, James Hill caused the Original Articles to be filed with the Secretary of State, which issued a Certificate of Incorporation on that same date. See Motion (3), Windermere Fact # 13.

8. The Original Articles stated that "[t]he corporation shall have no members." See Motion (2), Windermere Fact # 2; Original Articles, Article VI.

9. Windermere's Original Articles did not state that the Missouri Baptist Convention ("MBC") is a member of Windermere. See Motion (2), Windermere Fact # 3; Original Articles.

10. Article VII of the Original Articles stated:

. . . .

> The purpose for which this Corporation is formed is to establish and maintain in perpetuity conference and recreational facilities and equipment to under gird an extensive Christian training program that is relevant to contemporary society and Christian family values and a setting in which worship, prayer, Bible study and mission study may become intensely personal, meaningful, and helpful in Christian renewal and commitment.

. . . .

See Motion (3), Exhibit 2(a), Original Articles.

11. The MBC is an unincorporated association comprised of "messengers" from affiliated churches who meet on an annual basis for approximately three (3) days. See Motion (2), Windermere Fact # 5.

12. Churches affiliated with the MBC send representatives called "messengers," to each of the annual meetings of the MBC. At the Annual Meetings, the nominating committee of the MBC proposes a slate of persons recommended for Board of Trustee positions of the various agencies, based on the number of vacancies to be filled. The messengers are permitted to nominate from the floor additional persons for those positions. After nominations are completed, the messengers vote in an election to select the trustees. See Motion (2), Plaintiffs Fact # 11.

13. The Daily Bulletin is distributed each day of an MBC Annual Meeting and contains information about the day's activities and informs the messengers what will be voted on that day. See Motion (3), Windermere Fact # 18.

14. The Daily Bulletin for October 31, 2000 contained an accurate copy of the Original Articles, and stated that the State of Missouri had approved the filing of the articles on August 25, 2000. See Motion (3), Windermere Fact # 19.

15. Prior to any vote being taken by the MBC messengers to ratify and approve the Original Articles, copies of same were available to the messengers in attendance, via the October 31, 2000 Daily Bulletin. See Motion (3), Windermere Fact # 20.

16. The messengers had the opportunity to read the Original Articles contained in the Daily Bulletin before voting to ratify same. See Motion (3), Windermere Facts # 20-21.

17. Prior to any vote being taken by the MBC messengers to ratify and approve the Original Articles and to transfer property to Windermere, the 2000 MBC messengers had an opportunity to express their opinions in support or in opposition to the same. See Motion (3), Windermere Fact # 23.

18. On October 31, 2000, the messengers at the 2000 MBC Annual Meeting ratified and approved the Original Articles. See Motion (3), Windermere Fact # 15.

19. The Original Articles did not contain an express requirement that amendments thereto must be approved by the MBC. See Motion (3), Windermere Fact # 34.

20. The express language of the Original Articles did not place any restrictions or limitations on the authority of Windermere's Board of Trustees to amend or change any provision of the Original Articles. See Motion (3), Windermere Fact # 35.

21. Raymond Giles served on the initial board of trustees for Windermere. See Motion (4), Windermere Fact # 28.

22. Mr. Giles also served on the board of directors for the Executive Board. See Motion (4), Windermere Fact # 29.

23. Prior to this lawsuit, Mr. Giles knew of no document, and knew of no conversation involving the board of trustees of Windermere or any authorized agent of Windermere, describing or even referring to a "covenant agreement" or other contractual relationship between the MBC and Windermere. See Motion (4), Windermere Fact # 32.

24. Mr. Giles has no knowledge of any vote, resolution, written document, or discussion by Windermere's board of trustees suggesting that certain documents known as "the MBC Governing Documents" could or should be read together with the August 25, 2000 Articles of Incorporation, and that the combination of those documents would constitute a "covenant

agreement" or other contractual relationship between the MBC and Windermere. See Motion (4), Windermere Fact # 33.

25. On or about July 30, 2001, Windermere's Board of Trustees adopted Amended Articles of Incorporation ("the Amended Articles"), which were filed with the Secretary of State on August 15, 2001. See Motion (3), Windermere Fact # 35.

26. The Amended Articles did not grant the MBC the privileges of nominating and electing Windermere's trustees, or disposing of Windermere's assets upon Windermere's dissolution. See Motion (3), Windermere Fact # 38.

27. The MBC claims to have a contractual relationship with Windermere that is composed of the Original Articles and the MBC's "Governing Documents," which allegedly consist of the MBC Constitution, the MBC Bylaws, the MBC Business and Financial Plan, the Executive Board's Articles of Incorporation and the Executive Board's Bylaws. See Motion (3), Windermere Fact # 55.

28. David Tolliver and David Clippard are the two individuals that are affiliated with the MBC that Plaintiffs identified as persons having knowledge of the formation and content of the alleged "contract relationship" between the MBC and each Defendant Institution. See Motion (3), Windermere Fact # 56.

29. David Tolliver served as President of the MBC from November 2003 to about October 27, 2004. See Motion (3), Windermere Fact # 57.

30. David Tolliver presently serves as Executive Director of the MBC. See Motion (3), Windermere Fact # 58.

31. David Tolliver was the person designated as the corporate representative for both the MBC (an unincorporated association) and the Executive Board of the MBC (a nonprofit

corporation), for an August 15, 2007 deposition the Defendant Institutions[1] took pursuant Missouri Supreme Court Rule 57.03(b)(4). See Motion (3), Windermere Fact # 59.

32. David Clippard served as the Executive Director of the MBC from 2002 through at least February 2007. See Motion (3), Windermere Fact # 61.

33. David Clippard's duties as Executive Director included being the Chief Executive Officer and Treasurer for the Executive Board of the MBC, and being responsible for the day-to-day operations of the MBC. See Motion (3), Windermere Fact # 62.

34. The terms of the alleged Covenant Agreement between the MBC and Windermere can be found only among several separate documents created by different parties at different times. See Motion (3), Windermere Fact # 64.

35. Plaintiffs contend that the totality of all contractual rights and obligations of the MBC and Windermere are contained within the MBC Governing Documents and the Original Articles, and that there are no oral promises or anything other than the written terms of the MBC Governing Documents and Original Articles that is part of the alleged contract. See Motion (3), Windermere Fact # 65.

36. Neither the MBC Governing Documents nor the Original Articles set forth any terms with reference to the transfer of property from the Executive Board to the corporate entity of Windermere; nor did the terms of these documents set forth any conditions with regard to the transfer of property. See Motion (3), Windermere Fact # 66.

37. The MBC can unilaterally change the terms of the contract that Plaintiffs allege exists between the MBC and the Defendant Institutions by amending the MBC Governing Documents. See Motion (3), Windermere Fact # 70.

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[1] "Defendant Institutions" is defined in Motion (3) as referring to Windermere Baptist Conference Center, The Baptist Home, and Word & Way. For purposes of this Judgment, Defendant Institutions refers to Windermere, and in some fact statements, "Windermere" has been substituted for "Defendant Institutions."

38. Defendant Institutions like Windermere are not permitted to vote on any amendment to the MBC's Governing Documents. See Motion (3), Windermere Fact # 71.

39. The MBC Governing Documents have been amended through the years without the approval of the Defendant Institutions. See Motion (3), Windermere Fact # 72.

40. The MBC Governing Documents were not referred to as a contract by the MBC prior to the filing of this lawsuit. See Motion (3), Windermere Fact # 73.

41. The MBC Governing Documents are not referred to as a contract in the Annual Book of Statistics prepared by the MBC each year following its annual meetings. See Motion (3), Windermere Fact # 74.

42. Plaintiffs cannot point to any provisions in the contract it alleges exists between the MBC and Windermere wherein Windermere agreed to be bound by any changes that the MBC might make to the MBC Governing Documents after the alleged agreement was initially entered into. See Motion (3), Windermere Fact # 75.

43. Plaintiffs cannot point to any document that expresses the intent of Windermere that the Original Articles and the five (5) MBC Governing Documents were to be treated as one (1) contract. See Motion (3), Windermere Fact # 76.

44. The MBC administers a "Cooperative Giving Program," through which it distributes funds to Baptist institutions, including previously to the Defendant Institutions. See Motion (3), Windermere Fact # 77.

45. The funds distributed through the Cooperative Giving Program consist of contributions received by the MBC from individual Baptist churches. See Motion (3), Windermere Fact # 77.

46. The MBC and/or its messengers determine the allocation of Cooperative Program Funds to the Baptist agencies and institutions at the MBC annual conventions. See Motion (3), Windermere Fact # 78.

47. The amount of moneys to be distributed to the Defendant Institutions from the Cooperative Giving Program could be changed unilaterally by the MBC. See Motion (3), Windermere Fact # 79-80.

48. The MBC was not obligated to give any money whatsoever to the Defendant Institutions. See Motion (3), Windermere Fact # 80.

49. The MBC owed no legal obligations to the Defendant Institutions under the Convention Governing Documents. See Motion (3), Windermere Fact # 82.

50. The MBC was entitled to withdraw its support of the Defendant Institutions at any time. See Motion (3), Windermere Fact # 83.

51. The Convention Governing Documents that MBC alleges make up a part of the contract contain no statement as to how long the contract shall last. See Motion (3), Windermere Fact # 85.

52. The MBC contends that the alleged contracts with the Defendant Institutions last until the MBC decides to end them. See Motion (3), Windermere Fact # 86.

53. The MBC can point to no provisions in the Original Articles which expressly states that the MBC had any approval rights over the Original Articles. See Motion (3), Windermere Fact # 88.

54. The MBC has no knowledge of any document signed by Windermere in which Windermere stated it will submit any requested changes to the Original Articles to the MBC for approval. See Motion (3), Windermere Fact # 89.

CONCLUSIONS OF LAW

A. Statutory Member

1. The Original Articles are a complete written document.
2. The Original Articles clearly and unambiguously state that the corporation shall have no members.
3. Parol evidence cannot be used to contradict, add to, or distort the clear and unambiguous language in the Original Articles.
4. Any ambiguity found in the Original Articles must be construed against Plaintiffs, whose employees and attorney drafted the Original Articles.
5. Windermere was never a corporation with members.
6. Neither the MBC nor the messengers who attended MBC Annual Meetings were ever statutory members of Windermere.

The Original Articles unambiguously state that "[t]he corporation shall have no members." See Original Articles, Article VI. Corporate articles are construed according to the general rules of contracts. *Ironite Prod. Co., Inc. v. Samuels*, 985 S.W.2d 858, 861 (Mo. App. E.D. 1998). Extrinsic evidence is not admissible to vary, add to, or contradict the terms of an unambiguous and complete written document. *Executive Bd. of Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437, 447 (Mo. App. W.D. 2005). A trial court cannot use parol evidence to create ambiguity "in order to distort the clear language of the document." *City of Harrisonville v. Pub. Water Supply Dist. No. 9 of Cass County*, 49 S.W.3d 225, 231 (Mo. App. W.D. 2001).

The Act was patterned after the Revised Model Nonprofit Corporation Act ("RMNCA").[2] Under the RMNCA, incorporators were required to answer three fundamental questions when filing articles of incorporation:

. . . .

> 1. Will the corporation be a public benefit, mutual benefit or religious corporation[3];
>
> 2. Will the corporation have members;
>
> 3. What provisions will be made for distribution of corporate assets upon dissolution.

. . . .

Introduction commentary at xxxi, RMNCA (1988).

At the time the Original Articles were drafted for filing, the defendant in this lawsuit, Windermere, did not yet exist. Windermere's incorporator was James Hill, the Executive Director of the MBC. Mr. Hill was required to state in the Original Articles whether Windermere would have members, and with the assistance of legal counsel provided by the Executive Board, it was stated in the Original Articles that that "[t]he corporation shall have no members." Thereafter, the messengers at the 2000 MBC Annual Meeting had the opportunity to review the Original Articles Mr. Hill had filed. The messengers at the 2000 MBC Annual Meeting voted to ratify and approve the Original Articles, which included the unambiguous statement that "[t]he corporation shall have no members." Had there been any expectation or intent to create Windermere as a corporation with members and to identify the MBC as a member of Windermere, such ratification and approval would not have occurred.

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[2] Kara a. Gilmore, *House Bill 1095: The New Nonprofit Corporation Law for Missouri*, 63 UMKC L. Rev. 633 (1995).

[3] The Missouri Nonprofit Corporation Act adopted only two categories of nonprofit corporations: public benefit corporations and mutual benefit corporations. R.S.Mo. § 355.096.2(2).

The comment sections of the RMNCA also discuss the rationales behind requiring a nonprofit corporation's articles of incorporation to state whether or not the corporation will have members.

. . . .

> Those incorporating under the Revised Act must state in the corporation's articles whether or not it will have statutory members. This requires incorporators to consider alternative forms of organization and to make a choice in light of the rights statutory members would have and the appropriateness of having such members.

. . . .

Introduction commentary at xxxii-xxxiii, RMNCA (1988).

. . . .

> Many nonprofit corporations do not have members. They operate with a self-perpetuating board of directors, delegates, or some other system. Those corporations that will not have members must so indicate in their articles. Those corporations that will have members must indicate that there will be members.

. . . .

Official Comment to § 2.02.2(e), RMNCA (1988).

"The general rule of statutory construction requires a court to determine the intent of the legislature based on the plain language used and to give effect to this intent whenever possible." *Care and Treatment of Schottel v. State of Missouri,* 159 S.W.3d 836, 841 (Mo. 2005). "To ascertain legislative intent, the courts should examine the words used in the statute, *the context* in which the words are used and the problem the legislature sought to remedy by the statute's enactment." *Id*. at 841-42 (emphasis in original). "The provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other." *Bachtel v. Miller County Nursing Home Dist.,* 110 S.W.3d 799,

801 (Mo. 2003). Statutory construction is strictly a matter of law. *City of St. Joseph v. Village of Country Club*, 163 S.W.3d 905, 907 (Mo. 2005).

The Missouri Legislature endorsed the concepts contained in the RMNCA's comments when it modeled the Act after the RMNCA. The Act, like the RMNCA, provides that a nonprofit corporation may have, but is not required to have, members. Section 355.181.2, RSMo. Consistent with the RMNCA's comments, the Act also requires a corporation formed after 1995 to declare in its articles of incorporation whether it is a corporation with members. Section 355.096.2(5), RSMo. If, as Plaintiffs contend, Windermere was to be a corporation with members, the Original Articles must have declared that it was to be a corporation with members, pursuant to § 355.096.2(5). Instead, the Original Articles contain the unambiguous declaration that it is a corporation with no members. The requirement of this declaration avoids any confusion regarding whether a given corporation has members. If the Act's definition of a member determines whether a corporation has members, regardless of what a corporation's articles state, the requirements of § 355.096.2(5) would be rendered meaningless.

Plaintiffs' position relies exclusively on the statutory definition of "member" set forth in § 355.066(21), RSMo. After examining the Act as a whole and the intent behind the Act, this Court concludes that § 355.066(21)'s definition of a member was not meant to be applied to corporations that have declared that they are corporations with no members. The Introduction to § 355.066 states that the terms set forth in that section are to have the meaning provided in that section for purposes of Chapter 355 "unless the context otherwise requires or unless otherwise indicated." It was not the Missouri Legislature's intent that the definition of a member found in § 355.066(21) be applied within the context of a corporation, like Windermere, that has declared that it has no members.

Plaintiffs' position would create patent ambiguity on the face of the Original Articles. On the one hand, Plaintiffs acknowledge that the Original Articles contain the unambiguous declaration in Article VI that the corporation has no members. But on the other hand, Plaintiffs argue that the language in Article XII, granting the MBC the privilege of electing trustees, means that Windermere is actually a member corporation and that the MBC is a member of Windermere. Such incongruity cannot be reconciled, resulting in patent ambiguity. Such ambiguity must be resolved against Plaintiffs, the drafters of the Original Articles.

This conclusion is also supported by a sound policy basis. When a Missouri nonprofit corporation's board considers amendments to the corporation's articles of incorporation, the trustees and the corporation's attorneys will examine the then-current articles of incorporation. These trustees and attorneys must be able to rely on the plain language of the articles of incorporation. Courts and other third parties must be similarly guided by the plain language of a corporation's articles of incorporation.

In Windermere's case, Article VI of the Original Articles informed the trustees and attorneys that the corporation had no members, meaning that under § 355.551.2, RSMo, the trustees could freely amend the Original Articles, subject only to any approval required pursuant to § 355.606, RSMo. When the trustees and attorneys then found that Original Articles contained no approval provision consistent with § 355.606, RSMo, the trustees and attorneys logically concluded that the trustees could adopt the Amended Articles without obtaining any third party's approval.

This policy basis would be thwarted by Plaintiffs' interpretation of how statutory members are created. If Plaintiffs are correct, a nonprofit corporation with no members who

previously granted a third party the privilege of electing the nonprofit corporation's trustees would need to file a declaratory judgment to determine whether the corporation had members.

Plaintiffs' argument is that if a nonprofit corporation with no members gave a third party the privilege of electing the nonprofit corporation's trustees, the unintentional but unavoidable result would be to (1) transform the corporation into a corporation with members; and (2) grant the third party all the other rights associated with membership. This position is facially inconsistent with § 355.326.2, RSMo, which states:

. . . .

> If the corporation does not have members, all the directors, except the initial directors, shall be elected, appointed or designated as provided in the articles or bylaws. If no method of designation or appointment is set forth in the articles or bylaws, the directors, other than the initial directors, shall be elected by the board.

. . . .

Under § 355.326, RSMo, a person may participate in the election of directors without that person being (or becoming) a member of the corporation and without that person being (or becoming) entitled to the accompanying statutory rights of a member. In construing statutes, a court must presume that the legislature does not enact meaningless provisions and that it does not intend an unreasonable or absurd result, but rather intends a logical result. *David Ranken, Jr. Technical Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. banc 1991). A non-member corporation does not automatically become a member corporation just because a third party is given the privilege of electing, appointing, or designating a director. See § 355.326.2, RSMo. To hold otherwise would render both §§ 355.096.2(5) and 355.326.2 meaningless.

Even if the definition of a member found in Section 355.066(21) were applicable here, neither the MBC nor the MBC messengers would qualify as members of Windermere under the corporation's Original Articles. Section 355.066(21) states:

. . . .

> "Member", without regard to what a person is called in the articles or bylaws, any person or persons who on more than one occasion, pursuant to a provision of a corporation's articles or bylaws, have the right to vote for the election of a director or directors; but a person is not a member by virtue of any of the following:
>
> (a) Any rights such person has as a delegate;
>
> (b) Any rights such person has to designate a director or directors; or
>
> (c) Any rights such person has as a director;

. . . .

The Act's definition of a member excludes persons who have a right to vote for directors as delegates. Section 355.066(21)(a), RSMo. The Act defines "delegates" as "those persons elected or appointed to vote in a representative assembly for the election of a director or directors or on other matters." Section 355.066(7), RSMo. The MBC messengers fit this definition, as they are elected or appointed by their respective churches to, *inter alia*, vote for the election of directors in a representative assembly at the MBC Annual Meeting, never at any meeting or assembly of Windemere. Under the Act's definition of a member, any voting rights a person has as a delegate are insufficient to confer member status on that person.

Section 355.141, RSMo

7. Plaintiffs' claims based upon an alleged contractual relationship between the MBC and Windermere are not barred by § 355.141, RSMo.

8. Under § 355.141, RSMo, Plaintiffs' lack standing to pursue claims not based upon an alleged contractual relationship between the MBC and Windermere.

Section 355.141, RSMo is entitled "challenges to corporation's power to act" and states in pertinent part:

. . . .

> 1. Except as provided in subsection 2 of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> 2. A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the attorney general, a director, or by a member or members in a derivative proceeding.

. . . .

Corporations like Windermere are creatures of statute and may only do that which is expressly permitted by Missouri law. See e.g., *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 808 (Mo. 1988); *U.S. Central Underwriting v. Hutchings*, 952 S.W.2d 723, 725 (Mo. Ct. App. 1997). Thus, every unlawful or illegal action by a corporation is *ultra vires*, because Missouri law does not authorize a corporation to take any illegal or unlawful action. *McWilliams v. Central States Life Insurance Company*, 137 S.W.2d 641, 645-646 (Mo. App. 1940) (ultra vires acts are those "contrary to public policy or some statute expressly prohibiting them."); *State ex rel. State Highway Commission v. Quincy Railroad Co.*, 539 S.W.2d 760, 764 (Mo. Ct. App. 1976) (holding that an act that violated the Missouri Constitution, i.e., an unlawful act, was *ultra vires*).

A corporation may amend its articles of incorporation only in accordance with the specific provisions set forth in the statutes governing amendments to a corporation's articles. See §§ 355.551, 355.556, 355.561, 355.566, 355.571, and 355.581, RSMo. Assuming, *arguendo*, that Windermere's July 30, 2001 act of adopting amendments to the Original Articles ("the Amended Articles") was "unlawful, ineffective and void *ab initio*," then Windermere exceeded its statutory power to act, i.e., Windermere acted *ultra vires*.

Count XI of the Fifth Amended Petition seeks a declaratory judgment and other relief based on Plaintiffs' claims that Windermere's adoption of the Amended Articles: (a) violated § 355.561, RSMo; (b) violated § 355.586, RSMo; (c) violated common law; or (d) violated the MBC's alleged contractual rights. See Fifth Amended Petition, ¶¶ 199-200 and 203. Consistent with this Court's August 7, 2007 Judgment, this Court concludes that Plaintiffs' claims based upon an alleged contractual relationship between the MBC and Windermere are not barred by § 355.141, RSMo. See ¶¶ 203.1 and 203.3 of Count XI, and Count XIII. However, Plaintiffs' remaining "non-contract" claims in Count XI of the Fifth Amended Petition are barred as constituting challenges based on the ground that the corporation lacked power to act.

Regardless of how Plaintiffs characterize or plead their "non-contract" claims, including the third-party beneficiary claim, such claims constitute a challenge to Windermere's power to act in adopting the Amended Articles, on the basis that such action was *ultra vires*. Plaintiffs lack standing to bring such claims, as Plaintiffs do not allege they are the Missouri Attorney General or a director of Windermere, and as discussed above, neither the MBC nor the MBC messengers were members of Windermere. Where a statute directs performance to an enumerated class, it implies that those not enumerated are not included. *Johnson Controls, Inc. v. Citizens Mem'l Hosp. Dist.*, 952 S.W.2d 791, 793 (Mo. App. S.D. 1997).

C. Section 355.586, RSMo

9. The limitations or restrictions on a Missouri non-profit corporation's power to amend its articles of incorporation is set forth in §§ 355.551, 355.556, and 355.561, RSMo.

10. Section 355.586, RSMo does not limit or restrict a corporation's power to amend its articles of incorporation.

11. Section 355.586, RSMo only protects non-members that have existing causes of action against a corporation and/or contractual rights existing independent of a corporation's articles of incorporation from being adversely affected by the corporation's unilateral amendment of its articles of incorporation.

12. Windermere's adoption of the Amended Articles was lawful and complied with § 355.556.2, RSMo and Missouri law.

Plaintiffs claim that § 355.586, RSMo renders Windermere's adoption of the Amended Articles unlawful, ineffective, and void *ab initio* because it constitutes an attempt by Windermere to extinguish the existing rights of persons other than a member. See Fifth Amended Petition, ¶ 200. Notwithstanding the Court's conclusion that under § 355.141, RSMo, Plaintiffs lack standing to pursue this claim, the Court finds that Plaintiffs' claims under § 355.586, RSMo fail on their merits as well. Section 355.586, RSMo states:

. . . .

> An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, any requirement or limitation imposed upon the corporation or any property held by it by virtue of any trust upon which such property is held by the corporation or the existing rights of persons other than members of

> the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

. . . .

Plaintiffs' interpretation of § 355.586, RSMo would effectively constitute a limitation or restriction on Windermere's power to adopt amendments to the Original Articles. Windermere's statutory power to amend the Original Articles is set forth in §§ 355.551, 355.556, and 355.561, RSMo. As a corporation with no members, Windermere's power to amend the Original Articles was, *inter alia*, governed by § 355.556.2, RSMo, which states in pertinent part that:

. . . .

> 2. If a corporation has no members, its incorporators, until directors have been chosen, and thereafter its board of directors may adopt one or more amendments to the corporation's articles subject to any approval required pursuant to section 355.606. . . . The amendment must be approved by a majority of the directors in office at the time the amendment is adopted.

. . . .

Pursuant to this statute, the only limitation on Windermere's power to adopt the Amended Articles was "any approval required pursuant to section 355.606." The Original Articles contained no approval provision under § 355.606, RSMo. As such, Windermere's adoption of the Amended Articles was lawful and complied with § 355.556.2, RSMo and Missouri law.

The Missouri Legislature enumerated only two (2) limitations (member approval and third party approval under § 355.606) on a corporation's power to amend its articles of incorporation. Were this Court to adopt Plaintiffs' interpretation of § 355.586, RSMo, the effect would be graft on to § 355.556.2, RSMo that a corporation's right to amend its articles of incorporation is "further subject to preserving any rights previously granted in the articles of

incorporation to third parties." No such language appears in § 355.556, RSMo, and it would exceed this Court's authority to interpret §§ 355.556 and 355.586, RSMo in this manner.

While there are no Missouri cases interpreting § 355.586, RSMo, this Court finds that a Georgia case styled *Morales v. Sevananda, Inc.*, 293 S.E.2d 387 (Ga. App. 1982) is persuasive on this point. As in this case, *Morales* involved a nonprofit corporation. Under the corporation's original articles, seven (7) directors were elected to serve on the board for life. *Id.* at 388. A majority of the board voted to amend the corporation's articles to state that the corporation's trustees were to be elected according to the corporation's bylaws. *Id.* The board's majority then adopted bylaws eliminating the lifetime directorships and stating that the corporation's directors were to be elected by the membership to serve staggered three (3) year terms. *Id.* An election was held under the new bylaws, and nine (9) new directors were elected to the board. *Id.*

Three (3) of the corporation's former directors filed suit to have the amended articles and bylaws declared void and to have themselves reinstated as directors. *Id.* In essence, the directors claimed that the articles of incorporation provided them with a contractual right to be directors for life, unless removed by two-thirds vote of the entire board. *Id.* To support their argument, they relied on § 22-906(b) of the Georgia Nonprofit Code. *Id*. Section 22-906(b), like § 355.586 of the Missouri Act, provides that no amendment to a corporation's articles shall affect the existing rights of persons other than members:

. . . .

> No amendment [to the articles of incorporation] shall affect any existing cause of action in favor of or against such corporation, or any pending suit to which such corporation shall be a party, *or the existing rights of persons other than [members]* . . . . (Emphasis supplied.)

Id. at 388-89.

. . . .

On appeal, the court stated that "[t]he essence of a vested right is fixity; rights are vested only when they are fixed, unalterable or irrevocable." *Id.* at 389 (citation omitted). The court then noted that § 22-2801 of the Georgia Code – similar to § 355.551 of the Missouri Act – allows a nonprofit corporation to amend its articles, "from time to time, in any and as many respects as may be desired, so long as the amendment contains only such provisions as might be lawfully contained in original articles of incorporation at the time of making such amendment." *Id.* at 389. The court found that the former lifetime directors did not have a vested right in any provision in the corporation's original articles of incorporation, "in the sense that a continuance thereof could be demanded," but added that any rights accruing under the articles were protected up to the time of amendment. *Id.* In so holding, the court stated that the "statutory right to amend its articles of incorporation would be meaningless if a corporation . . . were unalterably bound by the provisions of its original articles of incorporation." *Id.* The court added that when the corporation adopted its articles, "it did not surrender its right to amend the same at any time." *Id.*

Like the defendant corporation in *Morales*, Windermere was not "unalterably bound" by the Original Articles. The "rights and privileges" given to the MBC and/or its messengers under Windermere's Original Articles were not "fixed, unalterable, irrevocable" rights, but were rights or privileges subject to amendment by Windermere. As such, the privileges afforded to the MBC and/or its messengers were not "existing rights" in the sense that they could be enforced. The Original Articles providing such privileges were subject to amendment at any time, and thus, were not "rights" at all. Section 355.586, RSMo is intended to protect "existing rights," such as contract rights, which cannot be unilaterally amended away.

This Court holds that § 355.586, RSMo does not operate to limit or restrict a corporation's power to amend its articles of incorporation. Instead, this statute was intended to protect non-members that have existing causes of action against a corporation and/or contractual rights existing independent of a corporation's articles of incorporation from being adversely affected by a corporation's amendment of its articles of incorporation. In this case, § 355.586, RSMo is only applicable to ensure that Windermere's adoption of the Amended Articles did not affect any rights Plaintiffs may have had pursuant to contracts Plaintiffs claim existed between the MBC and Windermere.

D. Contract based on the Original Articles

13. The Original Articles did not constitute a contract between the MBC and Windermere, as neither the MBC nor the messengers to the MBC were members of Windermere.

14. As non-members of Windermere, neither the MBC nor the messengers to the MBC could be parties to a contract with Windermere that consisted only of the Original Articles.

Plaintiffs claim that the Original Articles constituted a contract between the MBC and Windermere and that Windermere's adoption of the Amended Articles constituted a breach of that contract. See Fifth Amended Petition, ¶ 203.1. Plaintiffs' claims are without merit.

A corporation's articles of incorporation constitutes a contract between the corporation and the State of Missouri. See e.g., *Moorshead v. United Rys. Co.*, 96 S.W. 261, 279 (Mo. Ct. App. 1906). Under certain circumstances, Missouri courts have found that a corporation's articles of incorporation can constitute a contract between the corporation and its members. See e.g., *McDaniel v. Frisco Emp. Hospital Ass'n*, 510 S.W.2d 752, 756 (Mo. Ct. App. 1974).

However, a corporation's articles of incorporation cannot create a contractual relationship between a corporation and persons who are not members of the corporation. *Blue Cross and Blue Shield of Missouri v. Nixon*, 81 S.W.3d 546 (Mo. App. W.D. 2002); 18A Am.Jur.2d Corporations § 271 (the constitution and bylaws of a voluntary association, whether it is incorporated or not, confers no legal rights on nonmembers thereof).

As discussed *supra*, Windermere was a corporation with no members, and thus, the MBC and/or the MBC's messengers were never members of Windermere. Consequently, Plaintiffs cannot rely on *McDaniel* and other law supporting the proposition that a corporation's articles of incorporation can constitute a contract between the corporation and its member(s). As non-members of Windermere, neither the MBC nor its messengers could be parties to a contract with Windermere that consisted only of the Original Articles.

E. Third Party Beneficiary Claim

15. Plaintiffs' third-party beneficiary claim is necessarily based upon the Original Articles, which constituted a contract between Windermere and the State of Missouri.

16. The four (4) corners of the Original Articles contain no ambiguity or uncertainty about whether its parties intended to primarily benefit the MBC.

17. Absent an express declaration of the parties' intent for the Original Articles to primarily benefit the MBC, the strong presumption is that the MBC was not a third-party beneficiary.

18. Absent any ambiguity or uncertainty in the four (4) corners of the Original Articles, the Court may not consider the circumstances surrounding the execution of the Original Articles.

19. The MBC was an incidental beneficiary of the Original Articles and had no enforceable rights.

20. Windermere's adoption of the Amended Articles did not constitute a breach of the Original Articles, and thus, no third-party beneficiary cause of action existed.

Plaintiffs claim that the Original Articles constituted a contract that was intended by its parties to confer rights and privileges upon the MBC as a third-party beneficiary, and that Windermere breached the Original Articles when it adopted the Amended Articles. See Fifth Amended Petition, ¶ 203.2. Notwithstanding the Court's conclusion that under § 355.141, RSMo, Plaintiffs lack standing to pursue this claim, the Court finds that Plaintiffs' third-party beneficiary claims fail on their merits as well.

As discussed *supra*, Plaintiffs' third-party beneficiary claims are necessarily based upon an alleged contractual relationship between Windermere and someone other than the MBC. See *JTL Consulting, L.L.C. v. Shanahan*, 190 S.W.3d 389, 399 (Mo. Ct. App. 2006) ("A third-party beneficiary is one who is not a party to the contract, but who may be able to enforce the terms of the contract."). Windermere is a corporation with no members, and thus, the only parties to the Original Articles are Windermere and the State of Missouri. *Moorshead v. United Rys. Co.*, 96 S.W. 261, 279 (Mo. Ct. App. 1906).

"Only those third parties for whose primary benefit the contracting parties intended to make the contract may maintain an action." *Wood v. Centermark Properties, Inc.*, 984 S.W.2d

517, 526 (Mo. App. 1998); *McKenzie v. Columbian Nat. Title Ins. Co.*, 931 S.W.2d 843, 845 (Mo. App. W.D. 1996). "The general rule is that recovery by a third party is not permitted if the party is only incidentally, indirectly or collaterally benefited by the contract." *Trout v. General Security Services Corporation*, 8 S.W.3d 126, 132 (Mo. Ct. App. 1999). "The contracting parties must have intended to benefit the third party before the third party may maintain a cause of action for breach of contract against the parties." *Id.* "[W]here the contract lacks an express declaration of that intent [to benefit a third party or an identifiable class of which that party is a member], there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves." *Nitro Distributing, Inc. v. Dunn,* 194 S.W.3d 339, 345 (Mo. 2006). "The question of intent is paramount in any analysis of an alleged third party beneficiary situation." *Wood*, 984 S.W.2d at 526. "The court may not speculate from the language in the contract that the contracting parties wanted to make the plaintiff a third party beneficiary." *Laclede Investment Corp. v. Kaiser*, 596 S.W.2d 36, 42 (Mo. Ct. App. 1980).

Plaintiffs allege that the "clear intent of the provisions in Windermere's Charter, which conferred voting power and property rights upon the MBC, was to allow the MBC to protect the assets and operations that it turned over to Windermere." See Motion (4), p. 13. However, the purpose clause in the Original Articles expressly declares that the purpose for which Windermere was formed was to establish and maintain in perpetuity conference and recreational facilities and equipment to under gird an extensive Christian training program. There is no evidence before the Court suggesting that Windermere has deviated from that purpose. Further, nothing in the purpose clause indicates that the parties to the Original Articles (Windermere and the State of Missouri) intended the MBC to be the primary beneficiary of the Original Articles.

This Court is persuaded by the Introduction to the RMNCA, noting that "[t]he assets of a public benefit corporation are held for public or charitable purposes and not to benefit members, directors, officers or controlling persons. See Introduction commentary at xxiv-xxv, RMNCA (1988). Plaintiffs' claims are inconsistent with that concept.

The Court is further persuaded by the Missouri Supreme Court's decision in *Farm & Home Savings & Loan Association of Missouri v. Armstrong*, 85 S.W.2d 461 (Mo. 1935). In that case, the plaintiff sought to hold the individual delegates to the Missouri Baptist General Association (the MBC's legal name at the time) liable on a note executed by Hardin College, based on a provision contained in the college's charter stating that the college's trustees would be elected by the Missouri Baptist General Association, or its successors, at annual sessions. *Id.* at 463. In discussing the relationship between Hardin College and the General Association, the Court held that "the interest, powers, and privileges conferred by the amended charter upon the General Association were incidental, not substantial[.]" *Id.* at 467.

Plaintiffs argue that this Court may look to the circumstances surrounding the execution of Windermere's Original Articles to glean that there was an intention to benefit the MBC. See Motion (4), Plaintiffs' Memorandum in Support, p. 13. Plaintiffs reason that the MBC would not have transferred control of assets and operations to Windermere if the MBC could not retain some degree of control over the assets and operations through rights under the Original Articles. See Motion (4), Plaintiffs' Memorandum in Support, p. 13.

However, Missouri law clearly states that the circumstances surrounding the contract's execution may only be examined if the court first finds uncertainty or ambiguity in the Original Articles. *McKenzie v. Columbian National Title Insurance Co.*, 931 S.W.2d 843, 845 (Mo. Ct. App. 1996) ("The intention of the parties is to be gleaned from the four corners of the contract,

and if uncertain or ambiguous, from the circumstances surrounding its execution."). "If the contract is unambiguous, it will be enforced according to its terms. If ambiguous, it will be construed against the drafter, as is the case with other contracts under Missouri law." *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. 2005).

The MBC's Executive Director, James Hill, and the Executive Board's attorney, Mark Comley, prepared and filed the Original Articles, which were later ratified by the messengers to the 2000 MBC Annual Meeting. To the extent the Original Articles are unambiguous, this Court cannot consider anything outside the four corners of the document. If the Original Articles are ambiguous on their face, such ambiguity must be construed against Plaintiffs.

This Court finds no ambiguity or uncertainty in the four (4) corners of the Original Articles, as they contain no express declaration that Windermere's and the State of Missouri's intent was to primarily benefit the MBC. This Court interprets the absence of an express declaration of intent to benefit the MBC as a reflection of the MBC's intent, as the drafter of the Original Articles, to not reserve such third party beneficiary rights. Absent such an express declaration of intent, the strong presumption is that the MBC was not a third-party beneficiary, and this Court is not permitted to speculate on whether the parties intended to make the MBC a third-party beneficiary of the Original Articles. Further, absent any ambiguity or uncertainty, the Court may not consider the circumstances surrounding the execution of the Original Articles.

Based on the foregoing, this Court concludes that the MBC was, at most, an incidental beneficiary of the Original Articles. As an incidental third party beneficiary, the MBC had no enforceable third party beneficiary rights. *Trout v. General Security Services Corporation*, 8 S.W.3d 126, 132 (Mo. Ct. App. 1999).

This conclusion that the MBC has no enforceable third-party beneficiary rights is further supported by the Court's finding *supra* that Windermere's adoption of the Amended Articles was lawful and complied with Missouri law. "[A] third party beneficiary is one who is not privy to a contract or its consideration but who may nonetheless maintain a cause of action for breach of contract." *General Motors Acceptance Corp. v. Windsor Group, Inc.*, 2 S.W.3d 836, 839 (Mo. App. E.D. 1999). Even assuming, *arguendo*, that Plaintiffs had enforceable third-party beneficiary rights, Plaintiffs have failed to demonstrate a breach of the Original Articles, the contract between Windermere and the State of Missouri, that would give rise to a third-party beneficiary claim. Said contract was subject to amendment at any time. Windermere lawfully amended the Original Articles on July 30, 2001. Absent any breach, Plaintiffs could not have a third-party beneficiary claim based on the Original Articles.

F. Covenant Agreement

21. Under the "covenant agreement" as alleged by Plaintiffs, the MBC was capable of unilaterally amending the alleged "covenant agreement" by unilateral amendment to the MBC Governing Documents.

22. Under the "covenant agreement" as alleged by Plaintiffs, the MBC owed no legal obligations to Windermere.

23. Under the "covenant agreement" as alleged by Plaintiffs, the MBC retained the right to terminate the "covenant agreement" at any time.

24. The "covenant agreement," as alleged by Plaintiffs, lacked mutuality of obligation.

25. The "covenant agreement," as alleged by Plaintiffs, lacked sufficient definiteness to enable the Court to give the alleged contract an exact meaning.

26. There was no meeting of the minds between the MBC and Windermere necessary to form the alleged "covenant agreement."

27. The relationship between the MBC and Windermere prior to Windermere's adoption of the Amended Articles was not an enforceable contractual relationship.

Plaintiffs claim that a "covenant agreement" existed between the MBC and Windermere. See Fifth Amended Petition, ¶ 203.3. Plaintiffs claim that the terms of such "covenant agreement" were set forth in a combination of six (6) separate documents: the Original Articles, and five (5) documents identified as the MBC Governing Documents, to wit, the MBC's Constitution, the MBC's Bylaws, the MBC's Business and Financial Plan, the Executive Board's Articles of Incorporation and the Executive Board's Bylaws. Plaintiffs claim that Windermere breached the "covenant agreement" when it adopted the Amended Articles without the MBC's approval. See Fifth Amended Petition, ¶ 203.3.2.

The MBC Governing Documents were not referred to as a contract by the MBC prior to the filing of this lawsuit, nor were they referred to as a contract in the Annual Book of Statistics prepared by the MBC each year following its annual meetings. Plaintiffs cannot identify any document that expresses the intent of Windermere that the Original Articles and the five (5) MBC Governing Documents were to be treated as one (1) contract.

Under the alleged "covenant agreement," the MBC could unilaterally change the terms of the contract by amending the MBC Governing Documents without Windermere's approval.

Plaintiffs cannot identify any provisions in the "covenant agreement" wherein Windermere agreed to be bound by any changes that the MBC might make to the MBC Governing Documents after the agreement allegedly began.

The MBC administers a "Cooperative Giving Program," through which it distributes funds received from individual Baptist churches to Baptist institutions, including previously to Windermere. The MBC and/or its messengers determine the allocation of Cooperative Program Funds to the Baptist agencies and institutions at the MBC annual conventions. The MBC was not obligated to give any money whatsoever to the Defendant Institutions. Further, the MBC owed no legal obligations to the Defendant Institutions under the Convention Governing Documents. The MBC was entitled to withdraw its support of the Defendant Institutions at any time.

A valid contract under Missouri law requires that both parties supply consideration. *American Laminates, Inc. v. J.S. Latta Co.*, 980 S.W.2d 12, 23 (Mo. App. 1998). When one party retains "the right to cancel a contract or avoid one's promise," the alleged consideration from that party is nothing more than an unenforceable, illusory promise. *Id.* (citing *Fenberg v. Goggin*, 800 S.W.2d 132, 136 (Mo. App. 1990)).

"Mutuality of contract means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound." *Middleton v. Holecroft*, 270 S.W.2d 90, 92-93 (Mo. App. 1954). "[A] promise is not good consideration unless there is mutuality of obligation, so that each party has the right to hold the other to a positive agreement." *Sumners v. Service Vending Co., Inc.*, 102 S.W.3d 37, 41 (Mo. App. S.D. 2003). "A contract must be valid on its face before the

burden shifts to the defendant to prove failure or lack of consideration." *Middleton*, 270 S.W.2d at 94.

In the summary judgment pleadings, the MBC alleged that it promised to provide funding, assets, and non-monetary support, accept Windermere as an agency of the MBC, handle the process of nominating trustees for Windermere's board, allow Windermere's assets to be transferred to the MBC or its affiliates in the event of dissolution, and have two (2) of its officers serve as permanent members of the Windermere board. See Motion (3), Plaintiffs' Memorandum in Opposition, p. 13. However, Plaintiffs' summary judgment pleadings do not conform to their allegations in the Fifth Amended Petition, and Windermere has objected to the pleadings conforming to the evidence Plaintiffs' have proffered. Thus, this Court must be guided by the Fifth Amended Petition.

In the Fifth Amended Petition, Plaintiffs claim that Windermere's adoption of the Amended Articles deprived them of alleged rights which they regarded as consideration for the "covenant agreement," to wit, the right to nominate and elect Windermere's trustees, the right to direct disposition of Windermere's assets in the event of Windermere's dissolution, and the right to designate the Executive Director and President of the Convention and Executive Board as trustees for Windermere. See Fifth Amended Petition, ¶ 196. Plaintiffs identified this as consideration flowing to the MBC, not consideration flowing to Windermere, as alleged in the summary judgment pleadings.

In the Fifth Amended Petition, Plaintiffs identified the following as consideration flowing from the MBC to Windermere: (a) the transfer of real estate and physical property; (b) financial support; (c) encouragement of third parties to support Windermere; and (d) promotion and assistance to Windermere to provide services to Missouri Baptists. See Fifth Amended Petition,

¶¶ 201 and 204. However, as to item (a), the transfer of real estate and physical property was not identified or referenced in any of the six (6) documents that are alleged to constitute the "covenant agreement." Instead, this transfer was part of an internal reorganization decision by the MBC.

The messengers to the 1999 MBC Annual Meeting adopted the New Direction Plan, which provided for the creation of a new entity to take over the assets and operations of the Windermere Baptist Conference Center. Notably, Plaintiffs allege as an uncontroverted fact, and Windermere admits, that "the property that was transferred to Windermere following creation of the separate corporation was transferred pursuant to the New Directions Plan."

This transfer of real estate and physical property is akin to a sale, in which the MBC sold the real estate and assets to Windermere in exchange for Windermere's assumption of the liabilities related to said real estate and assets and the assumption of the conference center's operating costs going forward. This Court concludes that the transfer of real estate and assets was only consideration for that sale, and not the alleged "covenant agreement," which alleged writing makes no references to said transfer of real estate and assets.

This Court further concludes that the real estate and assets were property of, and titled in the name of, the Executive Board, not the MBC. See Fifth Amended Petition, ¶ 193. The Executive Board is before this Court only as a representative of the real plaintiff party in interest, the MBC. The Missouri Court of Appeals in this lawsuit previously sustained this Court's ruling dismissing the Executive Board in its independent corporate capacity, finding that "[s]tanding is limited to the Convention itself." *Executive Board of the Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437, 452 (Mo. Ct. App. 2005). As such, Plaintiffs' prayer requesting an award of the real estate and assets to Plaintiffs is not possible.

As to the alleged items of consideration identified above as (b), (c), and (d), the MBC was under no obligation to provide such support. The MBC was free to withdraw its support of Windermere at any time, which it did following Windermere's adoption of the Amended Articles. Nothing in the six (6) documents that allegedly make up the "covenant agreement" establish any mutuality of obligation related to the alleged consideration. Instead, the documents describe what an entity must do in order to be regarded by the MBC as "an agency of the MBC" and therefore eligible to receive contributions from the Cooperative Program. For example, the Bylaws of the Executive Board state in Article XIV that:

. . . .

> B. Any educational or benevolent institutions, cooperating in covenant relationship with the Convention, which shall desire to receive contributions by the Executive Board from the Cooperative Program Allocations Budget as approved by the Missouri Baptist Convention shall only be eligible to do so under the conditions set forth in Paragraph C of this article.

. . . .

Paragraph C of that Article XIV then lists certain conditions for such "eligibility," including that the governing board be elected or approved by the MBC and that it make reports to the Executive Board.

This Court further concludes that there is no evidence of the parties' intent to enter into such an alleged "covenant agreement." This Court notes portions of the Affidavit of Raymond Giles, who served on both the Windermere board and the Executive Board at the time that Plaintiffs allege that the "covenant agreement" came into existence. Despite serving on both boards, Mr. Giles has no knowledge of any votes, resolutions, discussions, or documents regarding the existence or terms of any contractual relationship between the MBC and Windermere. This Court concludes there is insufficient evidence of a "meeting of the minds"

between the MBC and Windermere that would be required to form the alleged "covenant agreement." *Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996).

Plaintiffs rely on the actions of the parties to support their claim of a contractual relationship between the MBC and Windermere. Subsequent actions or conduct do not determine the terms of an agreement. *Don King Equip. Co. v. Double D Tractor Parts, Inc.*, 115 S.W.3d 363, 369 (Mo. App. 2003); *Board of Education of the City of St. Louis v. State of Missouri*, 229 S.W.3d 157, 167, n. 13 (Mo. Ct. App. 2007) (agreement at issue was ambiguous; court rejected plaintiffs' argument that subsequent actions determined terms of agreement). The actions and conduct upon which Plaintiffs rely do not evidence a binding contractual relationship between the MBC and Windermere. See e.g., *Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996) ("Whether a contract is made and, if so, what the terms of the contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties.").

This Court further concludes that the "covenant agreement," as described by Plaintiffs, was fatally indefinite. While a contract may consist of separate documents created at separate times, the contract must clearly reference the documents and describe them in such terms that their identity may be ascertained beyond doubt. *Intertel v. Sedgwick Claims Management*, 204 S.W.3d 183, 196 (Mo. App. 2006) ("So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties, and including a separate document which is unsigned.").

The Original Articles did not incorporate by reference any of the MBC Governing Documents and did not describe the MBC Governing Documents in such terms that their identity may be ascertained beyond doubt. Similarly, the MBC Governing Documents made no reference to the Original Articles. None of the six (6) documents contained sufficient language for this Court to find that there was any intent for the six (6) documents to be read together as a single contract. As such, this Court finds that were just six (6) separate documents, not a contract.

Plaintiffs argue, without factual support, that the MBC only released control over the assets, operations and/or funds because it knew it would retain some degree of control; that it would make no sense for the MBC to enter into the arrangement unless the right of continued control was perpetual; and that the MBC believed it would retain some degree of control. As noted above, "[w]hether a contract is made and, if so, what the terms of the contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties." *Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 925 S.W.2d 932, 937 (Mo. App. S.D. 1996).

The Court cannot create a contract for the parties. *Skaggs v. Dial*, 861 S.W.2d 188, 192 (Mo. Ct. App. 1993) ("The court cannot create a contract for the parties nor can the court decree specific performance if the agreement sought to be enforced is indefinite."). Given that the MBC and Executive Board drafted the MBC Governing Documents, that the MBC's Executive Director and the Executive Board's attorney prepared and filed the Original Articles, and that the messengers at the 2000 MBC Annual Meeting ratified the Original Articles as written, there was ample opportunity to clearly identify the fact of and terms of the alleged "covenant agreement," had that been the intent of the parties. "The essential terms of the contract must be certain or

capable of certain interpretation. That is, [the] terms of agreement must be sufficiently definite to enable the court to give it an exact meaning." *Building Erection v. Plastic Sales & Mfg.*, 163 S.W.3d 472, 477 (Mo. App. W.D. 2005).

Plaintiffs have not produced, and this Court has not identified, a "normal contract" purporting to set forth with certainty the essential terms of the alleged "covenant agreement." The alleged terms of the "covenant agreement" are not sufficiently definite to enable this Court to give it an exact meaning. This Court concludes that the relationship between the MBC and Windermere was not contractual.

G. Injunction

28. Plaintiffs' claim for an injunction in Count XII of the Fifth Amended Petition is designed to maintain the status quo during this litigation.

29. As this Court finds against Plaintiffs and in favor of Windermere on Plaintiffs' claims against Windermere in the Fifth Amended Petition, Plaintiffs' have no right to the injunctive relief sought in Count XII.

H. Rescission and Restitution

30. The MBC was never a party to the Original Articles, and thus, Plaintiffs have no standing to seek rescission of the Original Articles.

31. The alleged "covenant agreement" was never an enforceable agreement between the MBC and Windermere, and thus, rescission of that alleged contract is not possible.

In Count XIII of the Fifth Amended Petition, Plaintiffs claim a right to rescission and restitution as an alternative to their claims for declaratory judgment relief set forth in Count XI. See Fifth Amended Petition, ¶¶ 225. In support of their claim for rescission, Plaintiffs allege

there was a failure of consideration and a constructive fraud. See Fifth Amended Petition ¶ 228. This Court concludes that the absence of a contractual relationship between the MBC and Windermere precludes any right to rescission.

The remedies of rescission and restitution rest upon the existence of a contract. *Medicine Shoppe Intern., Inc. v. J-Pral Corp.*, 662 S.W.2d 263, 270 (Mo. App. E.D. 1983) ("Before there can be 'rescission' there must be a contract completely formed and in force or at least provisionally binding on the parties."); *Muncy v. City of O'Fallon*, 145 S.W.3d 870, 874 (Mo. App. E.D. 2004) (rescission contemplates a voidable but existing contract); *Patel v. Pate*, 128 S.W.3d 873, 878 (Mo. App. W.D, 2004) (defining rescission and restitution, and noting that "[r]estitution...is an available remedy where a party alleges and proves a material breach of contract justifying rescission"). As discussed above, this Court find that Windermere did not breach any contract when it adopted its Amended Articles.

In Count XIII, Plaintiffs claim that the Original Articles and the alleged "covenant agreement" should be rescinded for failure of consideration and constructive fraud. See Fifth Amended Petition, ¶ 228. This Court disregards Plaintiffs' argument in the summary judgment pleadings for rescission on the ground of a material breach, as same was not pleaded in the Fifth Amended Petition. See Motion (4), Plaintiffs' Memorandum in Support, pp. 22-23. Similarly, this Court disregards Plaintiffs' arguments in the summary judgment pleadings for restitution based on the doctrine of unjust enrichment, which claim was not pleaded in the Fifth Amended Petition. See Motion (4), Plaintiffs' Memorandum in Support, pp. 23-25.

In their summary judgment pleadings, Plaintiffs claim that representations by James Hill, who was the incorporator for Windermere, constituted the constructive fraud justifying rescission. See Motion (3), Plaintiffs' Memorandum in Opposition, pp. 56-59. However, some

of the alleged representations occurred in or around the 1999 MBC Annual Meeting, before Mr. Hill could have been incorporator for Windermere. See Motion (3), Plaintiffs' Memorandum in Opposition, pp. 57. The other representations were allegedly made during the 2000 MBC Annual Meeting, before Windermere's board had even been selected.

Plaintiffs acknowledge that "[t]he MBC trusted James Hill due to his capacity as its agent at the time of the misrepresentation." See Motion (3), Plaintiffs' Memorandum in Opposition, p. 58. As discussed above, James Hill was the Executive Director of the MBC. Under Missouri law, "in a dual agency one principal cannot charge the other principal, who is not at fault, with the misconduct of the common agent because the agent owes no more duty to one than another." *Weems v. Montgomery*, 126 S.W.3d 479, 486 (Mo. App. 2004); see also, *Thomason v. Miller*, 555 S.W.2d 685, 688 (Mo. App. 1977). This Court finds that Windermere was not responsible for any representations of Mr. Hill. Accordingly, under Missouri law, Windermere cannot be liable for any alleged misconduct of Mr. Hill.

As discussed *supra*, this Court has concluded that the Original Articles were a contract only between Windermere and the State of Missouri. The MBC was never a party to the Original Articles. As such, the MBC cannot seek a right to rescission of the Original Articles.

This Court has also concluded that the alleged "covenant agreement" was not an enforceable contract between the MBC and Windermere. Absent the existence of any contractual relationship between the MBC and Windermere, rescission and restitution are not possible.

CONCLUSION

Based upon the foregoing findings and conclusions, and the motions, memoranda and oral arguments of the parties, the Court enters Judgment as follows:

IT IS HEREBY ORDERED that Defendant Windermere Baptist Conference Center's Motion for Summary Judgment, filed December 18, 2006, is SUSTAINED;

IT IS FURTHER ORDERED that the portion relating to Windermere of the Motion of Defendants The Baptist Home, Windermere Baptist Conference Center and Word & Way for Summary Judgment on Counts I, XI, XII, XIII and XV of Plaintiffs' Fifth Amended Petition, filed August 22, 2007, is SUSTAINED;

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment on Defendant Windermere Baptist Conference Center's Affirmative Defenses Arising Under Mo. Rev. Stat. 355.141, filed November 15, 2006, is OVERRULED;

IT IS FURTHER ORDERED that the Motion of Plaintiffs for Summary Judgment Against Separate Defendant Windermere Baptist Conference Center, filed October 10, 2007, is OVERRULED;

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike the Affirmative Defenses of Defendant Windermere Baptist Conference Center, or in the Alternative, for More Definite Statement, is DENIED;

IT IS FURTHER ORDERED that the costs of this litigation are taxed against Plaintiffs.

There being not just reason for delay, this judgment is designated as final for purposes of appeal pursuant to Supreme Court Rule 74.01(b).

SO ORDERED THIS 4th DAY OF MARCH, 2008.

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Richard G. Callahan
Circuit Court Judge, Division II