

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III**

AMERICAN BAPTIST)
THEOLOGICAL SEMINARY d/b/a)
AMERICAN BAPTIST COLLEGE,)
)
Plaintiff,)
)
vs.)
)
NATIONAL BAPTIST)
CONVENTION, USA, INC.,)
)
Defendant.)

No. 17-1140-BC

**FINAL ORDER, AND MEMORANDUM OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW FROM 10/7 TO 10/11/19 TRIAL**

This lawsuit is a dispute between the American Baptist Theological Seminary d/b/a American Baptist College, and its founder and affiliated entity, the National Baptist Convention, USA, Inc. (“NBC”). The lawsuit concerns the procedure for appointing the College’s Board of Trustees.

The College is a 95-year nonprofit corporation, with a liberal arts emphasis. Its mission is to educate a predominately African American student population for Christian leadership, service, and social justice. The College is renowned for educating numerous civil rights and national leaders, and Christian ministers.

Defendant NBC is the largest predominantly African-American Christian denomination in the United States. It is a Washington, D.C. nonprofit corporation with its principal place of business in Davidson County, Tennessee.

The College filed this lawsuit pursuant to Tennessee Code Annotated section 29-14-102 seeking a declaratory judgment that it is entitled to self-appoint its Board of Trustees based upon a course of alleged waiver, abandonment and/or acquiescence (these claims are collectively referred to herein as “waiver”) by NBC. The Plaintiff’s waiver claim is asserted in its *Complaint* as the First Cause of Action (referred to herein as “Count 1”) seeking a declaratory judgment and injunctive relief. Alternatively, the Plaintiff seeks judgment on an alleged 2017 agreement of the parties of an appointment process where the College would select its Board Trustees with approval by NBC. That claim is stated in the Fourth Cause of Action (referred to herein as “Count 4”) asserting promissory estoppel.¹

In answer to the Plaintiff’s Complaint, NBC denies it waived any right and denies that the parties reached an agreement in 2017. Moreover, Defendant NBC also seeks a declaratory judgment pursuant to Tennessee Code Annotated section 29-14-102 in a Counterclaim it has filed, but seeks a declaration at variance with that sought by the College. In Count One of its Counterclaim NBC seeks a judgment declaring that the paragraph 9 Trustee appointment power stated in the College’s 1995 Charter vests sole power in NBC to select and appoint Trustees, and that this governs and voids any bylaws, enactments, or actions taken by the College to self-appoint Trustees. The only other part

¹ The Plaintiff’s claims stated in its Second, Fifth and Sixth Causes of Action were dismissed in an April 11, 2019 order of summary judgment. A breach of contract claim asserted by the Plaintiff in its Third Cause of Action was dismissed pursuant to Tennessee Civil Procedure Rule 41.02 at the conclusion of the Plaintiff’s proof at trial for lack of evidence on the essential element of damages.

of the Counterclaim, Count Two, seeks an injunction to enforce the matters sought to be declared in Count One.

The Trustee appointment procedure in issue in this case is significant because it is the Trustees who govern and make decisions about the College. Those decisions include the 50 acres along the Cumberland River in the Trinity Lane corridor in east Nashville where the College is located. The land has become increasingly valuable in the development Nashville is undergoing. Under the College's Charter, if the College is dissolved, its assets, including the land, revert to NBC if it maintains its nonprofit status.

From October 7, 2019 to October 11, 2019 a bench trial was conducted. Eleven witnesses testified, and 81 exhibits were admitted as evidence. At the conclusion of the trial, the Court took the matter under advisement.

After studying the evidence and applying the law, the Court finds that Plaintiff's Count 1 claim for a declaratory judgment that it has gained the right to self-appoint with no involvement by NBC on Board appointments is not consistent with the evidence, but nor is NBC's Count 1 Counterclaim for a declaratory judgment that it, and it alone, selects the College's Board of Trustees.

Instead the proof at trial established conclusively, through evidence of the nature of the parties' lengthy relationship and course of dealing over many years, that the meaning of the provision "shall be appointed by" NBC, in paragraph 9 of the College's 1995 Charter is that the Plaintiff selects Trustees with the right reserved to the Defendant to approve or disapprove those. Since at least 1995 this is the way the parties have implemented and

performed the paragraph 9 Charter provision for appointment of the College's Trustees by NBC until this dispute arose. This two-step process, the Court concludes, is the meaning and construction of "shall be appointed by" NBC provided for in paragraph 9 of the 1995 Charter.

It is therefore ORDERED, pursuant to the power vested in this Court under Tennessee Code Annotated section 29-14-102 to declare the rights and obligations of the parties under the College's governing Charter, that the following declaratory judgment is entered.

1. On the Plaintiff's Count 1 Declaratory Judgment Claim and on the Defendant's Count One paragraph 46(A) and (B) Declaratory Judgment Counterclaim, the Court declares that the meaning of paragraph 9 of the College's 1995 Charter is a two-step process where the Plaintiff selects and nominates Trustees, and the Defendant has the right to approve or disapprove those. This process, the Court declares, is the meaning of "shall be appointed by the National Baptist Convention, U.S.A., Inc." in paragraph 9 of the College's 1995 Charter, and this is the appointment process, the Court declares that has been and shall be in effect for the College pursuant to paragraph 9 of the Charter.

The Court further declares that in the College's role in the two-step Charter appointment process of selecting Trustees, the College has the sole discretion in determining how to construct and implement a selection process.

2. Consistent with the foregoing declaratory judgment, the Court declares and strikes down as void any provision in the 2013 *Revised Constitution and Bylaws* (the "2013 Bylaws") of the College that the Trustees are "elected" by the Board of Trustees of the College and any provision in the 2013 Bylaws that the College's Board has the right to amend the Charter. These provisions in the 2013 Bylaws conflict with the 1995 Charter and the Court's declaration of the construction of that Charter.

The remainder of the 2013 Bylaws do not conflict with the 1995 Charter and are not objected to by NBC, and those Bylaw provisions are in effect, including but not limited to provisions for: term limits and staggered

terms; that the Board shall consist of at least seventeen (17) but not more than twenty-five (25) voting members; and that a minimum of 20% of the Board members shall be members of church congregations and formally affiliated with the Defendant.

3. As to the remainder of the Counterclaim Count One, paragraphs 46(C) and (D), they are not supported by the evidence, and it is ORDERED that these claims are dismissed.

4. Lastly, in declaring the rights and obligations of the parties pursuant to Tennessee Code Annotated section 29-14-102 to the present selection and composition status of the Board of Trustees, the Court dissolves the temporary injunction entered February 6, 2018, and declares that the Board of Trustees of the College, as of the entry of this Order, consists of the Trustees of the Board as composed prior to September 2017 and as provided in the February 6, 2018 temporary injunction. One such Trustee, Dr. Albert Berry, is deceased as of October 2017 and a successor Trustee was appointed. This successor is declared to be a Trustee of the present Board.

The Court declares that, as of the date of entry of this Order, the staggered terms of the Trustees referred to in Article III of the 2013 Bylaws, are based upon the date the particular Trustee was selected for the Board by the College, using as a reference the “term expires” stated on Trial Exhibit 134. The Court declares the staggered terms as follows.

- For Trustees with a “term expires” of 2017 on Trial Exhibit 134, their term is declared to expire 2020.
- For Trustees with a “term expires” of 2018 on Trial Exhibit 134, their term is declared to expire 2021.
- For Trustees with a “term expires” of 2019 on Trial Exhibit 134, their term is declared to expire 2022.
- For Trustees with a “term expires” of 2020 on Trial Exhibit 134, their term is declared to expire 2023.

Further, because the parties’ dispute arose in part because of the absence of an explicit, formalized mechanism for the two-step appointment process they were using, the Court declares that henceforth the College shall notify NBC of vacancies on the College Board of Trustees and selections to fill those vacancies as follows.

- A. For vacancies arising due to the expiration of a Trustee's regular term, the College: (1) shall notify NBC, in writing by registered or certified mail, postage prepaid, or sent by a reputable overnight courier charges prepaid, to National Baptist Convention USA, Inc., c/o President, 1700 Baptist World Center Drive, Nashville, Tennessee 37207, on or before June 1, of the year in which the Trustee's term expires; and (2) shall notify NBC, by the same method, prior to NBC's Annual Convention held each Labor Day, of the Trustees the College has selected for the vacancies.

- B. For vacancies arising outside of the expiration of a Trustee's regular term, such as due to death, resignation, or expulsion, the College: (1) shall notify NBC, in writing, in the manner and to the address as provided in (A) above, within thirty days of the vacancy; and (2) within the following thirty days shall notify NBC of the Trustee the College has selected for the vacancy.

The Court declares that NBC shall approve or disapprove of Trustees selected by the College as follows.

- C. For vacancies arising under (A) above, NBC shall approve or disapprove of Trustee selections by the College at NBC's Annual Convention held on each Labor Day and shall promptly provide notice, in writing, by registered or certified mail, postage prepaid, or sent by a reputable overnight courier charges prepaid to American Baptist College, c/o President, 1800 Baptist World Center Drive, Nashville, Tennessee 37207, to the College of NBC's decision to approve or disapprove.

- D. For vacancies arising under (B) above, NBC shall approve or disapprove of Trustee selections by the College within sixty days of receiving the College's selection, and shall promptly provide notice in the manner and to the address as provided in (C) above of NBC's decision to approve or disapprove.

The Court additionally declares that if NBC in good faith disapproves of any Trustee selected by the College, NBC shall provide notice as provided in (C) above within ten days of NBC's disapproval. Upon receipt of NBC's disapproval, the College shall provide NBC notice in the manner and to the address as provided in (A) above of an alternative Trustee selection within thirty days, and NBC shall notify the College of approval or disapproval of the alternative within thirty days, with approval not being unreasonably withheld and being provided in the manner and to the address stated in (C) above. This process shall continue until NBC gives notice of approval.

With respect to the other claims in the pleadings, the Court rules as follows.

As to the Plaintiff's Count 4 Promissory Estoppel Claim, it is ORDERED that it is dismissed as a cause of action that does not apply to the facts of this case and whose essential elements have not been established by the evidence. Dismissal of this claim renders moot Plaintiff's election of remedies claim, and no ruling is issued on the election of remedies.

It is also ORDERED that the Defendant's affirmative defense of laches is dismissed as not having been developed by the Defendant and not having been established by the evidence.

In addition it is ORDERED that Defendant's Count Two Injunction Counterclaim is dismissed. This relief has not been shown to be needed.

As to the Plaintiff's objections to the admissibility of Trial Exhibit 187, those objections go to the weight of the evidence not the admissibility. It is therefore ORDERED that Plaintiff's objections are overruled, and Trial Exhibit 187 remains admitted into evidence.

Court costs are taxed equally between the parties.

The findings of fact and conclusions of law on which this Final Order is based are as follows.

Findings of Facts and Conclusions of Law

1. Findings on Background and Events of the Dispute

American Baptist Theological Seminary d/b/a American Baptist College was founded in 1924 as a joint educational partnership between the Southern Baptist Convention (“SBC”) and the Defendant, National Baptist Convention USA, Inc.

The College’s original 1924 charter, Trial Exhibit 1, provided that the College’s Board of Trustees would be “chosen” by Defendant NBC and the SBC.

During the Civil Rights Movement there were discussions about the SBC terminating its affiliation with the College. Consistent with that, the SBC conveyed title to two parcels of real estate to the College’s Board of Trustees in 1977 and 1982 vesting ownership in the College of the 50 or so acres where the College is presently located.

In 1995 the affiliation between SBC and the College amicably ended. The College’s Charter was amended (the “1995 Charter”), Trial Exhibit 2, to remove the provision that the College’s Board of Trustees would be “chosen” by SBC and NBC, as stated in the 1924 charter. The 1995 Charter provided that the College’s Board of Trustees “shall be appointed by” NBC. Paragraph 9 of the 1995 Charter provides as follows.

9. The corporation shall be governed by a Board of Trustees, who shall be the directors, and who shall be appointed by the National Baptist Convention, U.S.A., Inc.

In 1999, Dr. Forrest Harris was appointed President of the College, and he remains in that position to date. In 2013, he and another Board member, Richard Jackson, introduced and had passed the 2013 Bylaws which provided that the Board had the sole right to elect/self-appoint Trustees to the College's Board (Article III(B)(1)), and that the Board had the power to amend (Article I). As quoted above, paragraph 9 of the Charter provides for appointment of Trustees by NBC. As to amendments, paragraph 13 of the Charter provides that it can be amended with the approval of NBC in writing.

The 2013 Bylaws also, for the first time in the College's history, set four-year staggered term limits on Board members and required that no Board member serve more than three (3) consecutive terms.

After the enactment of the 2013 Bylaws, the College self-appointed at least four Board members.

Witnesses for the College testified that in June 2015, the College was motivated by a notice from the Association of Biblical Higher Education ("ABHE"), the College's accrediting agency, that the College should reconcile perceived inconsistencies between the 1995 Charter and the 2013 Bylaws—*i.e.*, the fact that the 1995 Charter states that NBC appoints members to the Board of Trustees, but the 2013 Bylaws provide that it is the College Board who elects its Board. The College's witnesses testified that they took actions to comply with the directive of the ABHE for the College to reconcile the language in the 1995 Charter and 2013 Bylaws relating to the appointment of Board members. By

letter of June 2015, Trial Exhibit 47, the College notified NBC of the issue. Thereafter, discussions took place between the parties on the appointment process but to no avail.

In June 2016, the Defendant announced its plan to appoint ten (10) new members at once to the College's Board of Trustees—effectively removing nearly half of the current members—but never formally notified the College of those persons' identities.

Motivated by receipt in February 2017 of a letter from the ABHE disapproving the College's progress on reconciling the perceived conflict of the 1995 Charter and the 2013 Bylaws, the College participated in efforts with NBC to address the ABHE's concerns. *See*, Trial Exhibit 70, March 2017 letter from Reverend Don Darius Butler to NBC's President Dr. Young. In June 2017, representatives from the College and the Defendant convened a joint "Task Force" to reconcile the perceived conflict and draft a resolution for the Defendant to introduce at NBC's June 2017 meeting in St. Louis, Missouri. Reverend Don Darius Butler (chair of the College's Board of Trustees) and Dr. Calvin McKinney (NBC's General Secretary) were to confer about the precise language of the Resolution. Prior to the Defendant's June 2017 meeting in St. Louis, the parties were discussing an appointment process documented in Trial Exhibit 79.

Subsequently, at the Defendant's June 2017 meeting in St. Louis, representatives from the College and the Defendant and NBC's President, Dr. Young, met in Dr. Young's hotel suite, to attempt to finalize the terms of an agreement. The Court accredits the testimony of Reverend Butler that the group settled on a Resolution (the "June 2017 Resolution"), Trial Exhibit 80, that differed from the agreement the parties had previously been discussing, Trial Exhibit 79. The process provided for in Trial Exhibit 80 was to

delegate to the College's Board the authority to nominate persons to serve as new members of the reconstituted Board of Trustees of the College Board, subject to the approval of NBC. The Court further finds that Dr. Young, President of NBC, and Dr. McKinney, General Secretary of NBC, promised, as agents of NBC and on behalf of NBC, to present the terms stated in Trial Exhibit 80 for a vote by NBC. The Court accredits Reverend Butler's testimony that promptly after the meeting he emailed the text of the June 2017 Resolution, Trial Exhibit 80, to Dr. McKinney to provide to Dr. Young to present at the NBC meeting the next day for a vote as promised.

The Court finds, however, that Dr. McKinney did not provide that June 2017 Resolution, Trial Exhibit 80, to Dr. Young. Dr. McKinney claims that he did not have access at the Convention to his email in his home in New Jersey and did not know that Reverend Butler had provided him the June 2017 Resolution, Trial Exhibit 80, to pass on to Dr. Young.

What occurred, then, is the final agreement the Task Force had worked out to constitute the June 2017 Resolution, Trial Exhibit 80, was never presented to the NBC meeting as Dr. Young, on behalf of NBC, had promised, and no vote was ever taken as promised. NBC President Dr. Jerry Young, working off of an earlier draft of the Joint 2017 Resolution, Trial Exhibit 79, testified at trial that he determined at the 2017 NBC St. Louis meeting that he needed to obtain legal advice and review by NBC's attorneys before presenting the Resolution to the NBC Board.

At the conclusion of the June 2017 St. Louis meeting, when the Task Force had left and returned home, Dr. McKinney testified he read in his home in New Jersey Reverend

Butler's email of the 2017 Joint Resolution, Trial Exhibit 80, and emailed it to Dr. Young. It is Dr. Young's testimony that he never received the email.

These events, testified to by Dr. Young and Dr. McKinney, appear not credible except the proof did show that Dr. Young was not adept with electronic communication. On that basis, the Court accredits Dr. Young that he never knew of the content of the 2017 Joint Resolution, Trial Exhibit 80. The Court does not, however, believe Dr. McKinney, General Secretary of NBC, and faults him for not delivering Trial Exhibit 80 to Dr. Young at NBC's Convention and for not following up his transmission of the email to Dr. Young after the NBC Convention. From this, the Court finds that NBC breached its promise to present the agreement documented in Trial Exhibit 80 for a vote by the NBC Executive Committee and/or Convention. The result was the parties still had not provided a solution for the College's ABHE accrediting agency concerning consistency of the Charter and Bylaws.

Following the failure of NBC to put to its organization a vote on Trial Exhibit 80 as it had promised the College, in September of 2017 NBC passed its own Resolution (the "September 2017 Resolution") to appoint and seat a "Reconstituted Board of Trustees." The Defendant's September 2017 Resolution placed ten (10) new individuals on the College's Board of Trustees.

The Defendant's September 2017 Resolution also dismissed eight current Board members without cause or justification, including the following:

- a. Dr. Albert Berry (deceased 10/16/2017), the immediate past chair who was the principal spokesperson and advocate for the Board's position and concerns during his tenure;

- b. Dr. Iva Carruthers, the chair of the committee responsible for providing guidance for the College's academic affairs;
- c. Rev. Darrell Drumwright, Senior Pastor at one of Nashville's largest churches and co-chair of the committee that plans and implements the College's principal lecture series;
- d. Linda Rose, an immigration attorney who serves as an invaluable resource to the College's international students and chairs the committee that reviews potential new Board members; and
- e. Sherri Neal, an executive at Hospital Corporation of America (HCA) who has been instrumental in helping the College develop relationships with Nashville's corporate and philanthropic community and assisting students in securing corporate internships.

The Court finds that these actions by NBC in September of 2017 violated ABHE accreditation standards implemented shortly thereafter, Trial Exhibit 98A.

The Defendant's September 2017 Board appointments were followed by the Plaintiff filing this lawsuit on October 20, 2017.

On February 6, 2018, a temporary injunction was issued by this Court to maintain the composition of the Board prior to NBC's September 4, 2017 Board selection.

On October 7, 2019, the trial of this case was conducted and the following persons testified.

Dr. Forrest E. Harris, Sr. – President of American Baptist College,

Linda Rose – Attorney at Rose Immigration Law Firm in Nashville, Tennessee and current College Board of Trustee Member,

Frank C. Davis – Financial Advisor and member of Mt. Eagle Baptist Church, and former College Board of Trustee Member,

Dr. Julius R. Scruggs – Pastor of First Missionary Baptist Church in Huntsville, Alabama and former President of the National Baptist Convention, USA, Inc.,

Richard E. Jackson – Executive Vice President/General Counsel for American Baptist College,

Dr. Don Darius Butler – Pastor of Tabernacle Community Baptist Church in Milwaukee, Wisconsin and current Chairman of American Baptist College Board of Trustees,

Dr. William J. Shaw – Pastor of White Rock Baptist Church in Philadelphia, Pennsylvania and former President of the National Baptist Convention, USA, Inc.,

Dr. Jerry Young – Pastor of New Hope Baptist Church in Jackson, Mississippi and current President of the National Baptist Convention, USA, Inc.,

Dr. Calvin McKinney – Pastor of Calvary Baptist Church of North Jersey in Garfield, New Jersey and current General Secretary of the National Baptist Convention, USA, Inc.,

Bishop Lawrence Kirby – Pastor of St. Paul Baptist Church in Racine, Wisconsin, Vice Chairman of American Baptist College Board of Trustees, and former National Baptist Convention, USA, Inc. Board of Director, and

Samuel Wesley Hale, Jr. – Graduate of American Baptist College and former American Baptist College Board of Trustee Member due to his role as the President of the American Baptist College Alumni Association.

2. Declaratory Judgment Findings and Conclusions—Count 1 of the Complaint and Counterclaim

The Court’s authority for issuing the above declaratory orders is Tennessee Code Annotated section 29-14-102. It provides as follows.

§ 29-14-102. Powers and duties

- (a) Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.
- (b) No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.
- (c) The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

The following sections of the statute also apply and are another source of the Court’s authority for issuing the above orders.

§ 29-14-103. Construction of law; instruments

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

* * *

§ 29-14-104. Construction of contracts

A contract may be construed either before or after there has been a breach thereof.

* * *

§ 29-14-106. Enumerated powers; construction

The enumeration in §§ 29-14-103 -- 29-14-105 does not limit or restrict the exercise of the general powers conferred in § 29-14-102, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Further, the law provides that “‘Declaratory judgments’ are so named because they proclaim the rights of the litigants without ordering execution or performance. [Footnote omitted] 26 C.J.S. *Declaratory Judgments* § 1 (2001). Their purpose is to settle important questions of law before the controversy has reached a more critical stage. 26 C.J.S. *Declaratory Judgments* § 3 (2001). The chief function is one of construction. *Hinchman v. City Water Co.*, 179 Tenn. 545, 167 S.W.2d 986, 992 (1943) (quoting *Newsum v. Interstate Realty Co.*, 152 Tenn. 302, 278 S.W. 56, 56–57 (1925)). . . . Declaratory judgment statutes are remedial in nature and should be construed broadly in order to accomplish their purpose. Tenn. Code Ann. § 29-14-113 (2000); *Shelby County Bd. of Comm’rs v. Shelby County Quarterly Court*, 216 Tenn. 470, 392 S.W.2d 935, 941 (1965).” *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008).

In addition to the foregoing law vesting broad authority in trial courts to declare the rights and obligations of the parties, Counsel have cited the following authorities to the Court with respect to the governance and construction of corporate charters. NBC has cited law that the charter governs a corporation and controls over the bylaws in support of NBC’s position that the appointment power vested in NBC in paragraph 9 of the 1995 Charter voids the self-appointment, Board “election” provisions of the 2013 Bylaws.

“Tennessee courts have long held that a nonprofit corporation’s bylaws are ‘wholly inoperative and void, [if] not authorized by the charter.’ *Bailey v. Ass’n of Master Plumbers of City of Memphis*, 52 S.W. 853, 858 (Tenn. 1899). Other authorities note that ‘the language of the [charter] control[s] over bylaws,’ rendering a bylaw ‘void to the extent that it is inconsistent with the [charter].’ 18 Am. Jur. 2d *Corporations* § 255.” *Defendant’s Trial Brief*, April 24, 2019, at 7-8.

The College, however, has cited Tennessee law that recognizes that charter powers may be abandoned after a period of inaction or acquiescence. *See, e.g., Knox Cty. Tuberculosis Sanitarium, Inc. v. Moss*, 5 Tenn. App. 589 (1927) (noting that “the charter itself is not conclusive” and “the parties may go behind the charter” in holding that a for-profit institution “abandoned” its charter and became a non-profit); *see also State v. Bd. of Tr. of Vanderbilt Univ*, 164 SW. 1151, 1169 (Tenn. 1914) (“Not until after the so-called Vanderbilt Commission had reported that they had no right to membership in the board, but that they held the right of visitation, were they heard to claim such a right, or did they attempt to exercise it; and this was nearly 40 years after the charter was granted to the university, and after they had in the outset declined all official relations to the corporation. If there ever had been any merit in the claim, we think they had long since abandoned it, and were then estopped to assert it”); *Mobile & O.R. Co. v. Donovan*, 58 S.W. 309 (Tenn. 1900) (“[A] deed, long acquiesced in by both parties under a construction by the courts that excluded its charter rights . . . must be observed by the parties, notwithstanding the conflicting provisions of the company’s charter.”). *See* 7A Fletcher Cyc. Corp. § 3735 (“And a party may be precluded or estopped from attacking or procuring relief from an

amendment of the corporate charter where that party has acquiesced in the amendment or has been guilty of inexcusable delay or laches in the matter.”).

Additionally, college charters are treated as contracts. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (holding that a college charter is a contract between private parties).

In this case, NBC is referred to in three provisions of the 1995 College Charter, paragraphs: 9—appointment of Trustees; 12—upon dissolution of the College, its property reverts to NBC if it maintains its nonprofit status; and 13—amendments to the Charter require the approval in writing of NBC. The Court concludes that NBC’s legal status is an intended third-party beneficiary of the College’s Charter, which is a contract with the State of Tennessee, and therefore subject to the doctrines of contract law. *See, e.g., Nat’l Bd. of Examiners for Osteopathic Physicians & Surgeons, Inc. v. Am. Osteopathic Ass’n*, 645 N.E.2d 608 (Ind. Ct. App. 1994). It is well-settled that contract rights may be waived and abandoned. *See, e.g., Cantrell v. Chism*, 37 Tenn. 116, 118-19 (1857) (noting that a party may not maintain an action for an abandoned contract).

The standard for proving waiver is high—the College must provide evidence of a “decisive” action or absolute inaction by NBC demonstrating a “voluntary relinquishment” of its appointment authority under the 1995 Charter. *See, e.g., Jenkins Subway, Inc.*, 990 S.W.2d 713, 723 (Tenn. Ct. App. 1998).

Applying the foregoing law to the evidence presented at trial, the Court finds that the greater weight and preponderance of the evidence established that over the years from

the 1980's to 2013 the meaning of NBC's appointment power, provided for in paragraph 9 of the 1995 Charter, was that when a vacancy occurred on the Board, the College (by the President or a committee), would select Board Trustees who were admitted to the Board.

The evidence further established that with respect to NBC exercising selection or nominating power, there was no material proof that NBC did. As detailed below, the Court finds that NBC never selected College Trustees.

As to the right to approve or disapprove Trustees selected by the College and NBC exercising its approval right, there was some evidence of this, and enough evidence so as not to constitute a waiver by NBC of its right of approval or disapproval. While there was no evidence of official documents or letters from NBC to the College or the Trustees stating that NBC had approved their selection and only a few references, as detailed below, of reports made by the College at NBC meetings and testimony from NBC Board members that the College would present a list of its selection of Board members during the College's Report and that constituted approval, very weighty proof is the College's own Board minutes. These acknowledge that NBC must approve or disapprove of Trustee selections by the College. The College's own Board minutes acknowledge the two-step process of the College selecting the Trustees for NBC to approve.

The foregoing is based upon the following detailed findings.

a. Relationship of the Parties

The proof clearly established that the parties are closely affiliated. Many of the College's graduates over decades have been and are members of NBC. The Boards of each party share dual members and have for years. NBC promotes the College in its

meetings, committees and literature. The College has been provided a one-hour slot at the NBC's meetings and conventions to provide reports. NBC has provided some financial assistance through the years although, because of its own financial challenges, that assistance has not been steady or sustaining and amounts to only 5% of the College's annual budget over 20 years. Other evidence of the long-standing affiliation of the entities is that NBC assisted in the College obtaining Historical Black College recognition which has many academic and financial benefits for the College, including a grant of \$2 million per year. In addition NBC was a cofounder of the College, but because of ABHE accreditation standards of academic autonomy, there has to be independence of the organizations.

These foregoing facts of the close affiliation of the parties are consistent with and support the Court's finding that the paragraph 9 College Charter appointment provision includes roles and input by both parties by a two-step process with selection by the College and approval by NBC.

b. College's Board Minutes

Weighty evidence of the two-step appointment process is provided in Trial Exhibits 17 (repeated as Trial Exhibit 159); 12 (repeated as Trial Exhibit 143); and 147 (Bates NBC 000759). These Trial Exhibits consist of the College's May 2, 2002; October 6, 2005; and March 23, 2006 Board Minutes, and they refer to and acknowledge the two-step appointment process.

c. Two-Step Process is Beneficial with Accreditation

That this two-step process is the way the parties have implemented paragraph 9 of the 1995 Charter is further bolstered by the fact that the process has the important benefit of preserving the independent and autonomous nature of the College's Board of Trustees necessary for academic freedom requirements for higher education.² Eighty percent of the College's students obtain financial aid. Only with an accredited college can such aid be obtained.

d. Bishop Lawrence Kirby

There also is the testimony of Bishop Kirby, the Senior Pastor of a Church in Racine, Wisconsin who has served on the College's Board as Vice-President from 1983 to the present and as a member of NBC's Board. He testified to the two-step process for appointment to the College's Board.

The Court accredits Bishop Kirby's testimony that the way the paragraph 9 appointment process was implemented over the years was when a College Board position became vacant for any reason, the College was to formally notify NBC of the vacancy and recommend a candidate to fill the vacancy. NBC then considered and either approved or disapproved the recommendation. If approved, NBC formally appointed the candidate to the College Board. Bishop Kirby testified that the College would report their Board

² Standard 4 of the ABHE, Trial Exhibit 98, states in paragraph 9 of its Essential Elements "Relative to this standard, an accredited institution is characterized by 9. A governing board that is sufficiently autonomous to protect the integrity of the institution.

selections during the College Report as part of NBC's Conventions. *See* Trial Exhibits 141 and 188.

He further testified that College Board Trustees did not have terms limits until the 2013 Bylaws were enacted, so NBC became aware of College Board vacancies only when the College notified NBC that appointment action was needed. During certain years, no NBC action was required because no College Board seats became vacant. It was not unusual for several years to elapse without a College Board vacancy opening.

Bishop Kirby also testified that he did not recall NBC ever rejecting a candidate recommended by the College.

Further evidence was provided by Bishop Kirby that he helped to draft and compose the 1995 Charter, and he included paragraph 9 to assure the relationship and affiliation between NBC and the College was maintained.

e. Samuel Hale

There also was the testimony of Samuel Hale who served from 2010 to 2015 as a College Trustee by virtue of being President of the College's Alumni Association. The testimony was consistent from the witnesses that the Alumni President was automatically a Trustee—it was a reserved seat. Mr. Hale's testimony provided corroboration of the two-step Board appointment process with the detail that in 1984 when he was a student at the College, the students petitioned the College to have an Alumni representative Trustee seat and that was approved not only by the College but also by NBC.

f. Dr. William Shaw

Additionally, there is the testimony of Dr. Shaw, who served as President of NBC for 10 years: 1999 to 2009. On direct examination he testified neither NBC nor the NBC President made appointments to the College Board during his tenure, but on cross examination, in response to Exhibit 141, which contained an NBC convention report from January 2001, Dr. Shaw admitted the process was not clear.

g. Board Discussion on Passage of 2013 Bylaws Evidences Two-Step Process

The Court makes the credibility determination and accredits the testimony of Mr. Hale and Bishop Kirby that when Dr. Harris and Mr. Jackson introduced the 2013 Bylaws, Board members Kirby and Hale expressed concern that the self-appointment process under the 2013 Bylaws conflicted with the 1995 Charter. They raised the question of what the College's relationship with NBC would be going forward. The Court finds that in response, Mr. Jackson stated that the Board should pass the Bylaws, the Board would subsequently work out the conflict issues with NBC, and that NBC would continue approving and appointing Board members until the conflict was resolved. This is further evidence that while NBC had acceded selection of the Trustees to the College, NBC had maintained the right of approval of the Trustees.

h. Insufficient Evidence by Plaintiff of Self Appointment but Sufficient Evidence as to Selection of Trustees

The Plaintiff presented Trial Exhibits 8, 9, 17, 20, 21, 33, 34, 35, 39-41, 58, and the testimony of the present President of the College, who has served since 1999, Dr. Harris, that he never sought approval from NBC of the Board members selected by the College

from 1999 forward. Similarly Dr. Scruggs, College Board member from the mid-1980's and NBC Vice President from 2009 to 2014, testified NBC made no appointments to the College Board from 1999-2013.

On cross examination, however, these witnesses were shown College Board Minutes, Trial Exhibits 12, 17 and 147, listed above, stating NBC had to approve the College's selection of Trustees. Moreover, that NBC had approval power was admitted by Dr. Scruggs in his deposition, and on cross examination he said there was tacit approval. Dr. Scruggs agreed NBC had never voted to waive or forego appointments to the College Board. Also Dr. Harris had no knowledge of the appointment process prior to his tenure as the College's President beginning in 1999.

The Plaintiff also presented the testimony of College Trustees Linda Rose, selected in 2012, and Frank Davis, selected in the 1980's, who testified they received no communication on their appointment from NBC. Yet, both conceded that they did not attend the NBC Convention where the College President made his report and where approval occurred.

There also is the College's claim that NBC waived all its rights under paragraph 9 of the Charter and approved of the College self-appointing its Trustees when Dr. Shaw was President of NBC from 1999 to 2009. The College's claim is that Dr. Shaw, while President of NBC, stated that the College had the right to self-appoint because NBC was not contributing financially to the College. Although Dr. Shaw's statement, as the President of NBC, is weighty evidence, the Court concludes the statement is not the kind of

decisive or absolute act or conduct required to establish waiver as provided in the case law recited above.

In addition there is the College's claim that NBC waived all its rights under paragraph 9 of the Charter with passage of the 2013 Bylaws by the College Board. The College's argument is that NBC's then president and two NBC Board members were also Trustees of the College Board at the time of the passage of the 2013 Bylaws, and that these "dual members" voted in favor of the 2013 Bylaws, including the provision for the College Board to self-appoint its Trustees. These events, the College asserts, constitute a waiver by NBC of any right it had under paragraph 9 of the 1995 College Charter to select or in any way appoint Trustees.

The success of this argument depends upon the Court finding as a matter of law that the knowledge of the dual members of the approval and passage of the 2013 Bylaws is imputed to NBC. This finding, the Court concludes, cannot be made.

The Court's research located the following legal authorities concerning imputation of knowledge based upon dual board status which the Court has applied to decide this issue.

As a general principle, where there are two corporations, dealing with one another through a common officer, the question of whether one corporation is to be charged with notice of what is known to the agent by virtue of his relation to the other corporation depends on the circumstances of each case.

The knowledge of a director is imputed to the corporation only if the person with knowledge is acting within the scope of his employment at the time and at least in part with the intent to benefit the corporation. The knowledge of an

individual director who has no further authority than the position implies and is not at the time acting in behalf of the corporation cannot be imputed to the corporation [footnote omitted], for notice to an individual director is not notice to the corporation if the director had no duty to relay such notice to the corporation. Thus, there is no authority to support the attribution of knowledge to outside directors who are not alleged to be directly involved in the day-to-day operations of the company. Moreover, where interlocking directors acquired their knowledge of a takeover in their capacities as directors of the acquiring corporation and the bank financing the acquisition, and not as directors of the acquired corporation, their knowledge could not be imputed to the acquired corporation. On the other hand, if a director is acting for a corporation in a particular transaction, the director's knowledge, as in the case of other corporate officers and agents, will be imputed to the corporation. Corporations have also been charged with notice of facts known to one or more directors and not communicated to the board where the director having such knowledge acts as a member of the board upon the very matter affected thereby.

18B AM. JUR. 2D *Corporations* § 1417 (West 2019) (footnotes omitted).

* * *

Generally, the fact that two or more corporations have officers or agents in common will not of itself impute the knowledge gained by such officers while acting for one corporation to another corporation in which they also hold office. Nevertheless, there are circumstances under which the knowledge gained by an officer or agent of one corporation will be carried over and imputed to another corporation. A common officer's knowledge of the affairs of one corporation will be imputed to the other when such knowledge is present in the officer's mind and memory at the time the officer engages in a transaction on behalf of such other corporation or when such knowledge comes to the officer while acting as an agent for such other corporation in his or her official capacity or while acting as an agent of such corporation and within the scope of his or her authority. The fact that the common officer is the principal stockholder or the managing officer of the corporation to which his or her knowledge is sought to be imputed is a circumstance of importance in this connection.

18B AM. JUR. 2D *Corporations* § 1425 (West 2019) (footnotes omitted).

* * *

Where there are dealings between two corporations, or between a corporation and an individual, through the intervention of a common officer or agent, the question whether the corporation is to be charged with notice of what is known to the agent by virtue of his or her relation to the other corporation, or to the other party, depends on the circumstances of each case. If under the circumstances it is the duty of the officer or agent to communicate such knowledge, the corporation to which he or she owes such a duty will be chargeable with his or her knowledge.

§ 4596. Powers and duties of corporate officers or agents, 9A FLETCHER CYC. CORP. § 4596 (West 2019) (footnotes omitted).

Applying these legal principles to the evidence, the Court finds that there is no proof that either NBC or the College had instructed, directed or charged these dual members with the duty to act on behalf of NBC or provide notice to NBC of matters determined by the College Board which affected NBC. There is no proof of such a duty, and, therefore, knowledge and approval of the 2013 Bylaws cannot be imputed to NBC as the premise for waiver.

Additionally, as found above, the Court accredits the testimony of Samuel Hale that passage of the 2013 Bylaws was not an absolute. It was accompanied by the promise and agreement by Richard Jackson to work with NBC to reconcile any conflicts. The somewhat conditional passage of the 2013 Bylaws undercuts the Plaintiff's assertion of waiver.

Based upon all of the above findings, in particular those contained in items 2(a)-(h) above, the Court finds the College did not prove it had obtained the right to self-appoint Trustees. The College did prove it has the right to select Trustees with the right to approve/disapprove vested in NBC.

i. NBC's Evidence of Selecting Trustees is Insufficient

All of the foregoing findings establish that from 1995 through 2013 NBC never selected a Trustee. That is, it never inquired formally about vacancies. It never implemented a process for it to select or nominate Trustees. NBC never contacted the College to state a selection of Trustees until September of 2017. There were, then, from 1995 to 2017, 22 years of the NBC not asserting the right it now claims to select the College's Trustees. In particular, the Court finds NBC did not select Wilma Johnson. The evidence establishes only that she was approved by NBC. The evidence established NBC did not select Frank Davis or Charles Taylor. There is no credible proof that NBC selected Trustees.

In its defense to the College's claims of waiver and in support of NBC's claim that paragraph 9 of the 1995 Charter gives it the right to not only approve but select Trustees, NBC cites to Trial Exhibit 187. As ordered above, this Trial Exhibit has been admitted into evidence, and it does show that vacancies on the College Board were infrequent. From this NBC argues that it did not have even enough opportunities of appointment power to waive it. The Court's evaluation of Trial Exhibit 187 is that it is not weighty and does not change the greater weight and preponderance of the evidence as found above that NBC never inquired formally about vacancies. NBC never implemented a process for it to select or nominate Trustees. NBC never contacted the College to state a selection of Trustees until September of 2017 when the parties were engaged in the dispute. The Court finds that NBC's failure to select Trustees was with full knowledge that the College was exercising the power of selection of Trustees. Part of NBC's proof was testimony

that the College announced its Board selections at NBC's annual meetings. The Court therefore finds that even if vacancies occurred infrequently, NBC knew the College was performing the selection aspect of the appointment process and NBC acceded to that while reserving its approval/disapproval right.

The above detailed findings of fact are the basis for the Declaratory Judgment issued by the Court, on Counts 1 of the Complaint and Counterclaim, that the rights and obligations of the parties under paragraph 9 of the College 1995 Charter are that the College selects the Trustees and NBC approves or disapproves the selections.

3. Promissory Estoppel—Count 4 of the Complaint

“In Tennessee, the doctrine of promissory estoppel is not liberally applied. *Barnes & Robinson Co., Inc.*, 195 S.W.3d at 645. Because promissory estoppel is an equitable doctrine, its limits are ‘defined by equity and reason.’ *Chavez v. Broadway Elec. Serv. Corp.*, 245 S.W.3d 398, 404 (Tenn. Ct. App. 2007) (citations omitted). In order to succeed on a claim for promissory estoppel, plaintiffs must establish the following elements: ‘(1) that a promise was made; (2) that the promise was unambiguous and not unenforceably vague; and (3) that they reasonably relied upon the promise to their detriment.’ *Id.* (citations omitted).”

Kinard v. Nationstar Mortgage LLC, 572 S.W.3d 197, 210 (Tenn. Ct. App. 2018).

While the Court has found above that a promise was made by NBC that Dr. Young would present the June 2017 Resolution, Trial Exhibit 80, to NBC for a vote, and that was not done, there are no damages and no detrimental reliance the Court can ascertain from the breach. The evidence established these essential elements are not present. The College asserts that the detriment and damage is that it was unable to appoint Trustees for a

subsequent vacancy that arose. Yet, the College had sufficient Trustees to constitute a quorum and conduct business. The Court therefore concludes that the promissory estoppel cause of action is not established by the evidence and is dismissed.

This ruling makes it unnecessary for the Court to rule on the Defendant's Statute of Frauds defense to the promissory estoppel claim, and the Court will not do so especially since "a lack of clarity exists under Tennessee case law as to whether promissory estoppel" is an exception to the Statute of Frauds, and the Tennessee Supreme Court has declined certification of the issue. *Jones v. BAC Home Loans Servicing, LP*, No. W2016-00717-COA-R3-CV, 2017 WL 2972218 *10 (Tenn. Ct. App. 2017).

4. Laches Findings and Conclusions—Defendant's Affirmative Defense

In its Answer, NBC raised the doctrine of laches as an affirmative defense. This doctrine "provides that 'equity will not intervene on behalf of one who has delayed unreasonably in pursuing his rights.'" *Dennis Joslin Co., LLC v. Johnson*, 138 S.W.3d 197, 200 (Tenn. Ct. App. 2003) (quoting *Hannewald v. Fairfield Communities, Inc.*, 651 S.W.2d 222, 228 (Tenn. Ct. App. 1983)). Laches requires "an unreasonable delay that prejudices the party seeking to employ laches as a defense." *Id.* "[C]ourts frequently cite the death of witnesses or the loss of evidence as the sort of prejudice that, coupled with an unreasonable delay, amount to laches." *Brown v. Ogle*, 46 S.W.3d 721, 726 (Tenn. Ct. App. 2000). Proof of this doctrine, the Court concludes, was not developed by NBC, and the evidence does not contain facts to apply the doctrine. The affirmative defense of laches is dismissed.

Based upon the foregoing findings of fact and conclusions of law, the Court has made its declarations in this case stated above and has dismissed the other causes of action of the parties.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, fax, or efileing as applicable to:

James F. Sanders
William J. Harbison II
E. Todd Presnell
Casey L. Miller
Melvin V. Priester, Jr.
Charlene Priester

Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson
Deputy Clerk
Chancery Court

November 15, 2019