

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.)	No. 17-1140-BC
)	
NATIONAL BAPTIST)	
CONVENTION, USA, INC.,)	
)	
Defendant.)	

**MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT IN PART
AND DISMISSING SECOND, FIFTH AND SIXTH CAUSES OF ACTION,
AND DENYING SUMMARY JUDGMENT AS TO FIRST, THIRD
AND FOURTH CAUSES OF ACTION, AND AS TO COUNTERCLAIM;
AND ORDER OVERRULING OBJECTION TO REPLY BRIEF**

On April 5, 2019, oral argument was conducted on the Defendant’s motion for summary judgment.

After taking the matter under advisement and studying the law, the record and argument of Counsel, it is ORDERED that Defendant’s motion for summary judgment is granted in part, and the following claims of the October 20, 2017 *Complaint* are dismissed as a matter of law:

- Second Cause of Action (Impermissible Control of Nonprofit Corporation in Violation of Mission Statement and Applicable Non Profit Law), paragraphs 73-88;
- Fifth Cause of Action (Breach of Contract—Financial Contributions), paragraphs 103-108; and

— Sixth Cause of Action (Promissory Estoppel), paragraphs 110-114.

It is further ORDERED that not dismissed on summary judgment and set for trial beginning April 29, 2019, are the following claims of the October 20, 2019 *Complaint*:

— First Cause of Action (Declaratory Judgment and Injunctive Relief), paragraphs 61-71;

— Third Cause of Action (Breach of Settlement Agreement), paragraphs 89-95; and

— Fourth Cause of Action (Promissory Estoppel), paragraphs 96-101.

The foregoing shall be tried because genuine issues of material fact are in dispute with respect to these claims.

As to the Defendant's motion for summary judgment to grant it relief on its *Counterclaim*, it is ORDERED that the motion is denied. The reason for the denial is that the *Complaint* and *Counterclaim* have overlapping facts and issues of law. The result of this on summary judgment is that the Court is unable to parse out, pretrial, which portions of the *Counterclaim* dovetail with summary judgment dismissal of the Second, Fifth and Sixth Causes of Action and which portions of the *Counterclaim* pertain to the First, Third and Fourth Causes of Action which are to be tried. Thus, ruling on the *Counterclaim* at this juncture could result in inconsistent findings and rulings. Accordingly, judgment on the entire *Counterclaim* is held back until the conclusion of the trial of the case when the Court will have a complete record to accurately rule on the *Counterclaim*.

Finally, it is ORDERED that the April 4, 2019 *Objection to NBC's Reply Brief* is overruled. The record establishes that the Plaintiff did not take the deposition of Dr. Kroll

whose Supplemental Declaration is objected to. Not having availed itself of discovery on Dr. Kroll, the Plaintiff's claim of surprise and prejudice is unfounded. As to the other objection about new matters presented for the first time in the *Reply Brief*, there is no prejudice because the Court has not adopted the new matters as a basis to grant summary judgment.

The above rulings are based upon the following analysis of the record concerning undisputed facts, genuine issues of material fact, and application of the law.

Summary Judgment Standard

In deciding Defendant's motion for summary judgment the Court has applied the following standard issued by the Tennessee Supreme Court in *Rye v. Women's Care Center of Memphis*, 477 S.W.3d 235, 264-265 (Tenn. 2015).

[W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. . . . [A] moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set

forth specific facts” *at the summary judgment stage* “showing that there is a genuine issue for trial.” Tenn. R. Civ. P. 56.06. The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party [emphasis in original].

In addition, “Summary judgment should be granted when the nonmoving party’s evidence at the summary judgment stage is ‘insufficient to establish the existence of a genuine issue of material fact for trial.’ *Rye*, 477 S.W.3d at 264 (citing Tenn. R. Civ. P. 56.04). If the moving party does not meet its initial burden of production, the nonmoving party’s burden is not triggered and the motion for summary judgment should be denied. *Town of Crossville Hous. Auth.*, 465 S.W.3d 574, 578 (Tenn. Ct. App. 2014) (citations omitted).” *Jackson v. CitiMortgage, Inc.*, No. W201600701COAR3CV, 2017 WL 2365007, at *5 (Tenn. Ct. App. May 31, 2017). Furthermore, “[w]hen ascertaining whether a genuine dispute of material fact exists in a particular case, the courts must focus on (1) whether the evidence establishing the facts is admissible, (2) whether a factual dispute actually exists, and, if a factual dispute exists, (3) whether the factual dispute is material to the grounds of the summary judgment.” *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009).

Undisputed Background Facts

This lawsuit was filed to determine which party has the authority to appoint members to the Board of Trustees (the “Board”) of the American Baptist College.

The lawsuit has been filed by a historic college whose mission is to educate predominantly African American students for Christian leadership, service and social justice (the “College” or the “Plaintiff”), and who has educated numerous civil rights and national leaders, and ministers. The College is located on more than 50 acres on the east bank of the Cumberland River near the West Trinity Lane corridor in Nashville, Tennessee.

The lawsuit has been filed against National Baptist Convention USA, Inc. (“NBC” or the “Defendant”), the largest predominantly African-American Christian denomination in the United States with approximately 31,000 congregations and 7.5 million members. The NBC is a convention of member Baptist Churches from across the country.

NBC was one of the joint founders of the College along with the Southern Baptist Convention (“SBC”). The College’s original charter (the “1924 Charter”) states that the College is “controlled by [NBC] and the Southern Baptist Convention,” and the 1924 Charter provides that its Board of Trustees “shall be chosen by [NBC] and the Southern Baptist Convention.”

In 1995, the SBC withdrew affiliation with the College. This change was implemented that same year with approval of these parties to altering the College’s Charter (the “1995 Charter”) to remove SBC and give the Defendant the sole power to appoint the College’s Board of Trustees.

The Plaintiff contends, however, that from 1995-2013 the Defendant never appointed any Board members and the Plaintiff self-appointed. The Plaintiff further contends that the Defendant knew about and approved the practice of self-appointment.

The Defendant disputes knowledge and approval of the self-appointment practice. The Defendant asserts a competing inference from these circumstantial facts. The Defendant's inference is that the Plaintiff only selected and nominated Board members which, significantly, had to be and were approved by the Defendant.

In 2013 the College approved changes to its Bylaws which are still in effect. The change is that the 2013 Bylaws provide for self-appointment by the College of the members of the Board. In pertinent part the Bylaws provide that the Board "shall consist of at least seventeen (17) but not more than twenty-five (25) voting members . . . who shall be elected by the Board of Trustees on the recommendation of the Board Affairs Committee. A minimum of 20% of the Board members (five) shall be members of church congregations and formally affiliated with [NBC]."

In June 2015 and February 2017, the Association of Biblical Higher Education ("ABHE") who determines the College's accreditation,¹ notified the College that ABHE perceived an inconsistency in the 1995 Charter and the 2013 Bylaws with respect to appointment of members to the College's Board, and that the conflict in governing documents needed to be addressed and reconciled. Also during this time, in June 2016, the Defendant appointed 10 new members at once to the College's Board over the objection of the Plaintiff.

¹ In paragraphs 36 and 37 of the *Complaint* the Plaintiff explains the significance of ABHE's determinations, "Accreditation by an agency formally recognized by the US. Department of Education is vital to the College because it is not only a mark of institutional integrity but also a requirement for federal student aid eligibility, which represents more than half of the College's funding. . . . Loss of accreditation would have a devastating and irreparable impact on the College because it would result in current and prospective students being unable to qualify for federal student financial aid. Even the threat of loss of accreditation will negatively impact the College's recruitment, enrollment, and retention efforts. Currently more than 80% of students enrolled at the College receive federal financial aid."

In June 2017 the College and NBC convened a joint “Task Force” to reconcile the perceived conflict between the 1995 Charter and the 2013 Bylaws, and to draft a Resolution for NBC’s June 2017 meeting in St. Louis. The following Resolution was prepared by the Task Force.

RESOLUTION

Whereas, the accrediting body of American Baptist College (aka American Baptist Theological Seminary) has directed that the College resolve perceived conflicting language contained in the College’s Related Articles of Incorporation and its Bylaws pertaining to the authority to appoint member of the College’s Board of Trustees; and

Whereas, representatives of the Executive Committee of the Board of Directors of the National Baptist Convention, USA, Inc. and representatives of the College’s current Board of Trustees have reached an agreement to resolve any and all such issues going forward without the necessity of further revising the College’s 1995 Restated Articles of Incorporation by reconstituting [sic] the College’s Board of Trustees as indicated below and by delegating the authority for the nomination of future Trustee appointments to the reconstituted Board of Trustees, subject to the approval of the National Baptist Convention, USA, Inc., as follows:

It is therefore resolved, that the nineteen (19) persons listed on Exhibit A attached hereto are appointed to serve as the reconstituted Board of Trustees of American Baptist College effective immediately, and

It is also resolved, that the eight (8) persons listed on Exhibit B attached hereto are nominated to serve as members of the reconstituted Board of Trustees of American Baptist College, subject to the approval of the National Baptist Convention, USA, Inc., and,

It is further resolved, that effective September 1, 2019, the National Baptist Convention, USA, Inc. hereby delegates the authority to nominate persons to serve as new members of the reconstituted Board of Trustees of American Baptist College to said Board, subject to the approval of the National Baptist Convention, USA, Inc.

Approved by action of the Executive Committee of the Board of Directors of the National Baptist Convention, USA, Inc. on this the _____th day of June, 2017.

The Plaintiff asserts that the Defendant had agreed that the Resolution of the Task Force would be adopted/ratified at the NBC's June 2017 meeting. The Defendant disputes this characterization of the facts. The Plaintiff alleges that at the NBC's June 2017 meeting the Resolution was not presented and no vote was ever taken on the Resolution.

In September 2017 NBC passed its own, separate Resolution (the "September 2017 Resolution") in which it appointed a "Reconstituted Board of Trustees," which provided for appointment of 10 new individuals to the College's Board of Trustees and dismissal of some, then, serving Board members.

The *Complaint* has six causes of action. The relief sought in those causes of action is to enable the Plaintiff to appoint its Board members and to award it damages.

The Defendant has asserted affirmative defenses and a *Counterclaim* seeking dismissal of the *Complaint*, and seeking a declaratory judgment and injunction that would maintain the 1995 Charter provision of NBC appointment of the College's Board of Trustees and declare void and injoin actions or enactments to the contrary.

The case is set for a bench trial beginning April 29, 2019.

Claims Dismissed on Summary Judgment

Second Cause of Action

The Plaintiff's Second Cause of Action seeks reformation of the 1995 Charter to remove the Defendant's power to appoint members to the College Board of Trustees; to

remove the provision of the 1995 Charter that provides that upon dissolution of the College its assets are distributed to the Defendant; and to compel resignation of immediate Board members appointed by the Defendant in the September 2017 Resolution. The Plaintiff asserts three legal theories for the relief sought in its Second Cause of Action.

- The Defendant’s appointment of the Board threatens Plaintiff’s accreditation.
- The Defendant’s Board appointment power renders it the domineering/unrestrained member of the College which is violative of the 1995 Charter and tax-exempt 501(c)(3) status.
- The Defendant’s appointment power is a breach of fiduciary duty by the individuals appointed by the Defendant to the Board.

Beginning with the Plaintiff’s allegation in its Second Cause of Action that the Defendant’s Board appointment power threatens the College’s accreditation by the ABHE, the Court finds there are no facts of record to support this claim. The following facts are undisputed, and the Plaintiff has come forward with no facts to rebut these.

- ABHE has not issued any type of public sanction.
- The College has been accredited since 1971, was most recently accredited in 2013, and ABHE’s last communication stated that the College is in “substantial compliance” with accreditation standards.
- The College remains accredited today.

In addition, Dr. Ronald Kroll, the Director of ABHE’s Commission on Accreditation, confirmed the following.

- The College is currently a member of ABHE in good standing.
- ABHE first accredited the College in 1971, and the College has been a continuously accredited ABHE member since that time.

- ABHE does not object to sponsoring organizations like NBC making appointments to the Board.
- ABHE evaluates, under ABHE Standard 4, whether the Board is sufficiently independent from NBC, but such an evaluation assesses the Board's composition, not the organization making the appointment.
- ABHE evaluated the College's accreditation in 2014–2015 which resulted in no change to its accreditation status.
- The College remains in substantial compliance with ABHE requirements.

The foregoing undisputed facts establish that the Defendant's power to appoint the College's Board members does not threaten the College's accreditation status. This part of the Second Cause of Action is dismissed.

In the next part of the Second Cause of Action the Plaintiff contends that the 1995 Charter provision for the Defendant to appoint the College Board of Trustees (paragraph 9) threatens the Plaintiff's continuing tax-exempt, section 501(c)(3) nonprofit status of the Internal Revenue Code. These claims are all undisputed written charter provisions and regulations and, therefore, do not involve questions of fact and may be determined as a matter of law on summary judgment.

The Plaintiff's legal theory as to the Second Cause of Action begins with the assertion that the Defendant's Board appointment power in paragraph 9 of the Charter effectively establishes the Defendant as the dominant/unrestrained member of the College. The Plaintiff then alleges in its Second Cause of Action that the Defendant's domineering/unrestrained membership via its Board appointment power violates its

nonprofit status because of a reversionary clause in the 1995 Charter. Paragraph 12 of the 1995 Charter states that, upon dissolution, the assets of the College are to be distributed to the Defendant after all creditors are paid. Under 26 CFR § 501(c)(3)-(1)(b)(4), a nonprofit organization loses its status if its “articles provide that its assets would upon dissolution be distributed to its members.” The Board’s domineering/unrestrained member role via its appointment power, the Plaintiff argues, results in distribution to a member upon dissolution of the College in violation of section 501(c)(3)-(1)(b)(4).

Yet, as identified by the Defendant, there is additional text to the portion of section 501(c)(3)-(1)(b)(4) quoted in the *Complaint*. The additional text provides “An organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization’s assets will be considered dedicated to an exempt purpose, for example, if, upon dissolution, such assets would, by reason of a provision in the organization’s articles or by operation of law, be distributed for one or more exempt purposes.” The 1995 Charter states, “Upon dissolution . . . the assets of the [College] shall be distributed to [NBC] if [NBC] then qualifies as an exempt organization under 501(c)(3) If it does not qualify, then the assets shall be distributed to one or more organizations which do qualify” (1995 Charter ¶ 12). Thus, by its terms, the 1995 Charter requires the College’s assets to be distributed for a tax-exempt purpose. This complies with section 501(c)(3) and does not violate and is consistent with the requirements of section 501(c)(3) to maintain tax exempt status.

Further, while section 501(c)(3) does not allow distribution of assets to “members,” the Court determines that the College has no member according to paragraph 8 of the

Charter. The 1995 Charter clearly states in paragraph 8, “The corporation has no members.” This provision, the Court concludes, eliminates the existence of members, domineering/unrestrained or otherwise. Moreover, it is not rational that paragraph 9, providing for the NBC to appoint the Board, would have been included if that resulted in making NBC a domineering/unrestrained member in conflict with paragraph 8 of the Charter. Thus, the Defendant, in accordance with paragraph 8 of the Charter, is not a member of the College, and the domineering/unrestrained member argument fails in the face of this written Charter provision. Accordingly, the Plaintiff’s claim that the Defendant’s power to appoint members to the College’s Board violates the Charter and section 501(c)(3) is dismissed.

The other aspect of Plaintiff’s claim concerning section 501(c)(3) tax-exempt status pertains to the requirement of Tenn. Code Ann. § 48-58-301 that directors are to “discharge all duties as director . . . [i]n good faith . . . [and i]n a manner the director reasonably believes to be in the best interest of the corporation.” Tenn. Code Ann. section 48-58-301(a)(1), (3). At paragraph 87 of the Complaint, the Plaintiff alleges that “[a]ny Trustee appointed by NBC cannot act in good faith and cannot act in a manner the director reasonably believes to be in the best interests of the College when their appointment threatens the College’s continuing accreditation, § 501(c)(3) status and very existence.” These allegations are dismissed by the Court as not stating a legal cause of action against the Defendant. Tenn. Code Ann. § 48-58-301 sets forth the fiduciary duties directors and

officers owe to a corporation and its members; it does not provide a cause of action against the body that appoints those directors and officers, in this case the Defendant.

Further, there is no showing/facts that Defendant-appointed Board members have or would breach their fiduciary duties to the College. Nonprofit directors owe fiduciary duties to the corporation for which they serve. *Summers v. Cherokee Children & Family Servs., Inc.*, 112 S.W.3d 486, 503 (Tenn. Ct. App. 2002). In relation to their fiduciary duties, directors should avoid conflicts of interest. Under Tenn. Code Ann. § 48–58–701(2), a conflict of interest transaction is defined as “a transaction” to which the director “had knowledge and a material financial interest known to the director or officer or . . . knew that a related person was a party or had a material financial interest.” A director’s mere presence is not an apparent or automatic conflict of interest or equate to a breach of fiduciary duty. *See* Tenn. Code Ann. § 48–58–701(2).

For all of these reasons the Second Cause of Action of the *Complaint* is dismissed.

Fifth and Sixth Causes of Action

The Plaintiff’s claims in its Fifth and Sixth Causes of Action are that the Defendant is contractually, and by promise and reliance, obligated to provide ongoing financial support of the Plaintiff (paragraph 103 of the *Complaint*, and Sixth Cause of Action of the *Complaint*—promissory estoppel alternative claim), and that the Defendant has breached a contract and promise by failing to provide promised financial contributions. Also, contained in these causes of action are the allegations of the Plaintiff’s third-party beneficiary status, “[t]he College is an intended third-party beneficiary of the contract

between the Southern Baptist Convention and NBC and is entitled to enforce it against NBC.”

In the *Response To NBC’s Statement Of Undisputed Material Facts*, the Plaintiff cited to the following facts on which it claims there exists a contract and/or promise.

3. NBC has no contractual obligation to provide funding to the College. (Young Decl. ¶ 5; Scruggs Dep. 39:17-25).

RESPONSE: Disputed. The cited testimony of Dr. Scruggs states that he is unaware of any written contract *between NBC and the College*. [Ex. 19, Scruggs Dep. at 39:22-25]. The College has never alleged the existence of any such contract. Rather, the College alleges that *the Southern Baptist Convention and NBC* had a contract to provide the College with ongoing financial support. [Compl. at ¶¶ 12, 15-21, 102-108].

NBC has a contractual obligation to provide funding to the College. Documentary evidence establishes that NBC adopted an agreement with the following relevant terms:

- SBC and NBC would “share equally . . . in the financial and moral support, and operation of the [College].” [Ex. 23, 1949 SBC Annual at ABC_001489, ¶ 3].
- SBC “will match funds dollar for dollar with [NBC] up to the total amount of the annual budget figure.” [*Id.* at ¶ 13].
- “[T]he following agreement is entered into between [NBC] and [SBC]. . . Both conventions, utilizing their own ways and means, will give financial support to the [College].” [Ex. 24, 1964 SBC Annual at 63-64].
- SBC agreed to “[a] program of cooperation with [NBC] in the financial support of the [College]. National Baptists are slowly increasing their financial support of the [College] to make for a more efficient joint operation with the Southern Baptists.” [Ex. 25, 1965 SBC Annual at 237, ¶ 1].

Additionally, the terms of this agreement were acknowledged by NBC:

- A letter to the College from NBC's finance chairman states that NBC agrees to match funds from the SBC, and “should there be a deficit in the operation of the [College] . . . [NBC] should be called upon to pay its pro rata of the deficit.” [Ex. 26, NBC Letters at ABC_001492].
- Another letter to the College from NBC states NBC agrees to direct contributions, and “that [NBC's] Sunday School Publishing Board . . . assumes the responsibility of [NBC's] 50-50 pro rata only of the salaries of the President and faculty and administrative staff” [Ex. 26, NBC Letters at ABC_001494].
- A resolution passed by NBC on September 11, 1948 expressly acknowledged this agreement. [Ex. 37, 1948 NBC Resolution].

Moreover, NBC expressly acknowledged its contractual obligation to provide funding directly to the College after the passage of the 1995 Charter:

- The June 1995 edition of the *NBC Voice* publication contains an article titled “We’ve Got a Job to Do” that acknowledges NBC’s adoption of a “two hundred thousand dollar budget . . . for the [College].” [Ex. 36, 1995 NBC Voice at 3]. The article further recognizes NBC’s obligation to furnish the College with ongoing financial support. [*Id.*].
- NBC’s 1996 Annual acknowledges the “much needed financial support” it owes to the College. [Ex. 34, 1996 NBC Annual at 22]. It further acknowledges that after the SBC pulled support in 1995, the College “is the sole property *and responsibility* of [NBC].” [*Id.* at 23]. In fact, this Annual includes a budget with a specific line-item for NBC’s direct contributions to College – separate from contributions to the College from NBC affiliated entities and its member-churches. [*Id.* at 115, 120].
- NBC’s 1998 Annual also contains a budget with a \$600,000 line-item for NBC’s direct contributions to the College –*separate from* contributions to the College from NBC affiliated entities and its member-churches. [Ex. 35, 1998 NBC Annual at 160].

Response To NBC's Statement Of Undisputed Material Facts, pp. 2-3 ¶ 3 (Apr. 1, 2019).

Taking the above facts asserted by the Plaintiff in a light most favorable to the Plaintiff, the Court must nevertheless dismiss the Fifth and Sixth Causes of Action because these facts are devoid of the essential element of a definite and/or certain contract or promise.

An essential element of any breach of contract claim is the existence of an enforceable contract. *ARC LifeMed, Inc.*, 183 S.W.3d at 26. Under Tennessee law, to enforce a contract, it must be sufficiently definite as to its essential terms. If the contract is too indefinite, uncertain or vague as to the essential terms, the contract is unenforceable as a matter of law.

To be enforceable, a contract must result from a meeting of the minds, be based on sufficient consideration, and be sufficiently definite. *Peoples Bank of Elk Valley v. ConAgra Poultry Co.*, 832 S.W.2d 550, 553 (Tenn. Ct. App. 1991). “If the essential terms of an alleged agreement are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.” *Id.* at 553–554 (citing Restatement (2d) Contracts, § 33 (1981)). When a term is left open for future negotiation, there is nothing more than an unenforceable agreement to agree. *See Four Eights, L.L.C. v. Salem*, 194 S.W.3d 484, 486 (Tenn. Ct. App. 2005). “It is a fundamental rule of law that an alleged contract which is so vague, indefinite and uncertain as to place the meaning and intent of the parties in the realm of speculation is void and unenforceable.” *Id.* at 487 (quoting *United Am. Bank of Memphis v. Walker*, 1986 WL 11250 (Tenn. Ct. App. 1986) (quoting *King v. Dalton Motors, Inc.*, 260 Minn. 124, 109 N.W.2d 51 (1961))).

Cadence Bank, N.A. v. The Alpha Tr., 473 S.W.3d 756, 774 (Tenn. Ct. App. 2015).

Similarly, the doctrine of promissory estoppel requires “[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”

Alden, 637 S.W.2d at 864. Even if no express contract exists, to sustain a cause of action on the theory of promissory estoppel, the alleged promise must be unambiguous and not unenforceably vague.

The key element in finding promissory estoppel is, of course, the promise. It is the key because the court must know what induced the plaintiff's action or forbearance; only then would the court be able to prevent the injustice resulting from a failure to keep the promise.

The courts have not worked out a uniform standard to determine whether a defendant's words or actions justify the plaintiff's reliance. Some courts hold that the promise must be definite and unequivocal. *Reuben v. First National Bank*, 146 Ga.App. 864, 247 S.E.2d 504 (1978); *West Farms Estate Co. v. Consolidated Edison Co.*, 75 A.D.2d 622, 426 N.Y.S.2d 837 (1980); *Rossov Oil Co. v. Heiman*, 72 Wis.2d 696, 242 N.W.2d 176 (1976). Other courts hold that the promise may be inferred from the general statements of the promisee. *Prudential Ins. Co. of America v. Clark*, 456 F.2d 932 (5th Cir.1972); *Perlin v. Board of Education*, 86 Ill.App.3d 108, 41 Ill.Dec. 294, 407 N.E.2d 792 (1980). See, Feinman, *Promissory Estoppel and Judicial Method*, 97 Harv.L.Rev. 678. The latter view would seem to be more in line with the *Restatement 2d*'s definition of a promise as "a manifestation of intention ... so made as to justify a promisee in understanding that a commitment has been made." *Restatement of Contracts 2d*, § 2.

Regardless of how one arrives at a conclusion that a promise has been made, however, the resulting promise must be unambiguous and not unenforceably vague. See *Perlin v. Board of Education*, 86 Ill.App.3d 108, 41 Ill.Dec. 294, 407 N.E.2d 792 (1980) and *Reuben v. First National Bank*, 146 Ga.App. 864, 247 S.E.2d 504 (1978).

Amacher v. Brown-Forman Corp., 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991); see also *Smith v. Hi-Speed, Inc.*, 536 S.W.3d 458, 483–84 (Tenn. Ct. App. 2016) (affirming trial court's dismissal on summary judgment of Plaintiff's promissory estoppel claim because the alleged promise by the Defendants was too vague to be enforceable).

As with breach of contract and promissory estoppel, to maintain an action as an intended beneficiary a third party must show: "(1) a valid contract made upon sufficient

consideration between the principal parties and (2) the clear intent to have the contract operate for the benefit of a third party.” *Owner-Operator Indep. Drivers Ass’n, Inc. v. Concord EFS, Inc.*, 59 S.W.3d 63, 68–69 (Tenn. 2001).

None of these elements of definiteness and certainty is present in the record.

In the *Complaint* the Plaintiff cites no definite or certain contract or promise that would enable the Court to enforce an obligation of the Defendant. There are no certain and no definite terms alleged.

Additionally, in the *Complaint*, the Plaintiff alleges that, in 1924 when the College was founded, as part of their “joint partnership,” the Southern Baptist Convention (“SBC”) and NBC “agreed to each fund one half of the College’s total cost of operations.” (Compl. ¶¶ 11–12). Yet, no such agreement or language is included in the 1924 Charter—another indication of no certain and definite contract or promise.

The Plaintiff further cites, in its responses to Statements of Undisputed Material Facts quoted above, to two excerpts from SBC annual documents as reaffirming the “agreement” between SBC and NBC to financially contribute to the College. The first of these excerpts is from annual proceedings of SBC in 1949. The College cites the following language as evidence of a contract: “SBC, to share equally with [NBC] in the financial and moral support, and operation of the [College]”; and “SBC will match funds dollar for dollar with [NBC] up to the total amount of the annual budget figure.” The second of these excerpts is from SBC annual proceedings in 1964, which states, “Both conventions, utilizing their own ways and means, will give financial support to the [College].” These excerpts, however, from the 1949 and 1964 are not contracts—they are

minutes from SBC annual meetings. There is no evidence that NBC agreed to the language in these SBC documents.

In sum, then, there is no evidence of record of a definite and certain contract or promise on which to base relief on the Fifth and Sixth Causes of Action of the *Complaint*, and, therefore, these causes of action are dismissed.

First, Third, Fourth Causes of Action and the Counterclaim

Pursuant to Rule 56.05² of the Tennessee Rules of Civil Procedure, the Court provides the following representative, inexhaustive sampling of disputed material facts which preclude summary judgment.

First Cause Of Action – Declaratory Judgment and Injunctive Relief—Questions of Disputed Material Facts Related to the Plaintiff’s Waiver and/or Acquiescence Claim:

1. whether the actions which took place from 1995 to 2013 show that, even though the Board members appointed were all selected by the Plaintiff, that was followed by NBC’s approval to the College’s Board from 1995 to 2013, or, alternatively, whether the actions are indicative that the College has self-appointed individuals to the College’s Board from 1995 to 2013;

² Rule 56.05 of the Tennessee Rules of Civil Procedure provides states:

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

TENN. R. CIV. P. 56.05 (West 2019).

2. if the College has self-appointed individuals to the College's Board from 1995 to 2013, whether the Defendant had knowledge of this practice;
3. whether the knowledge obtained by dual/common members of both the College and the Defendant's Board can be imputed to the Defendant based on the specific facts and context of this case;
4. whether the Defendant had knowledge of the 2013 Bylaws;
5. whether the Defendant sufficiently objected to and/or opposed the 2013 Bylaws and/or the College's self-appointment process once they became known to the Defendant.

Third and Fourth Cause Of Action – Breach of Settlement Agreement/Promissory Estoppel—Questions of Disputed Material Fact:

1. Whether the Defendant delegated authority to its representatives on the joint “Task Force” in June 2017 to resolve and enter into a binding agreement on the appointment-authority dispute between the Defendant and the College, and, if so, whether the Defendant agreed to ratify whatever resolution the joint “task force” adopted through the appropriate legal procedure such as a charter amendment.

All of the above identified disputed facts are material in determining the Plaintiff's claims in Causes of Action One, Three and Four. For example, as to the Plaintiff's claim of waiver and/or acquiescence of the 1995 Charter provision giving the Defendant the power to appoint members to the College's Board of Trustees, there is no documentary evidence in the summary judgment record that conclusively establishes the process for who appointed the College's Board members from 1995 to 2013. In Tennessee, “it is also clear that whether there has been laches, waiver or acquiescence is a question of fact to be determined on the facts and circumstances of each case.” *Gordon v. Hirsch*, No. 41, 1990 WL 19702, at *4 (Tenn. Ct. App. Mar. 6, 1990) (citing *Hannewald v. Fairfield Communities, Inc.*, 651 S.W.2d 222, 228 (Tenn.App.1983)). Here, the facts and

circumstances informing whether there has been a waiver and/or acquiescence by the Defendant on the appointment-authority issue are disputed. *See, e.g., Response To NBC's Statement Of Undisputed Material Facts*, pp. 24-30 ¶¶ 24-30 (Apr. 1, 2019). The evidence submitted on summary judgment (depositions, affidavits, official meeting minutes and agendas, etc.) is circumstantial, involves competing inferences and credibility determinations. Given this type of evidence, the Court as a matter of law, can not decide this claim on summary judgment.

At the summary judgment stage of the proceedings, the trial court's function is 'not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' *Byrd v. Hall*, 847 S.W.2d 208, 212 (Tenn. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–255, 106 S.Ct. 2505, 2511–2513, 91 L.Ed.2d 202 (1986)). In order to create a genuine issue of fact for trial, the evidence must be 'such that a reasonable jury could return a verdict for the nonmoving party[.]' *Id.* It is the same standard used to evaluate a motion for a directed verdict. *Id.* If an issue 'may reasonably be resolved in favor of either party[,] it is an issue to be resolved by the trier of fact and not by summary judgment. *Id.* (quoting *Liberty Lobby*, 477 U.S. at 249–255, 106 S.Ct. 2505). It is well-settled that:

[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. (quoting *Liberty Lobby*, 477 U.S. at 249–255, 106 S.Ct. 2505).

Eden W. ex rel. Evans v. Tarr, 517 S.W.3d 691, 705 (Tenn. Ct. App. 2015).

Similarly, as to the Plaintiff's breach of contract and alternative promissory estoppel claim related to the "June 2017 Resolution," the Plaintiff has put forth disputed material facts sufficient to deny summary judgment on these claims. For example, at paragraphs

31-37 of the *Response To NBC's Statement Of Undisputed Material Facts*, the Plaintiff has identified specific evidence in the summary judgment record disputing the Defendant's position that it did not enter into a binding settlement agreement/resolution as to the appointment authority dispute between NBC and the College. The testimony and documents on this issue present competing inferences and credibility determinations that can not be decided on summary judgment.

According to the Plaintiff, the act of formally amending the Charter to coincide with the 2017 Resolution was also agreed to by the Defendant when it delegated authority to the Task Force. The Plaintiff does not dispute that for the Charter to be formally amended there had to be written approval by the Defendant. The factual dispute on summary judgment does not relate to the method of amending the Charter, but instead goes to whether NBC gave its representatives on the Task Force the legal binding authority to enter into a settlement agreement, *i.e.*, "the 2017 "Resolution." Encompassed within this mixed question of fact and law is whether NBC also agreed to ratify the 2017 Resolution through the formal procedure of amending the Charter with written approval by NBC. *See, e.g., Response To NBC's Statement Of Undisputed Material Facts*, p. 13 ¶ 31 (Apr. 1, 2019) ("NBC delegated authority to resolve the appointment-authority dispute to its representatives on the joint "task force" in June 2017. The Defendant's President Jerry Young told the College's representatives on the joint "task force" that the Defendant would ratify whatever resolution the joint "task force" adopted. [Ex. 21, Jackson Dep. At 99:23-100;1; Ex. 27, Butler Aff. at ¶ 9]. Thus, the College's representatives reasonably

believed that the Defendant's representatives had the authority to bind NBC. [Ex. 27, Butler Aff. at ¶¶ 5-11]).

As to the Defendant's assertion of the Statute of Frauds as a defense to the binding force of the Resolution, the Court is unable to analyze the applicability of this defense, at this juncture, because the necessary, detailed facts to inform that analysis are disputed.

As demonstrated by the foregoing examples and inexhaustive list above of disputed facts, essential facts necessary to determine the legal issues of Causes of Action One, Three and Four are unclear, disputed and/or involve competing inferences and credibility determinations. Summary judgment on these claims is, therefore, precluded.

Additionally, as explained at the outset, having granted only partial summary judgment on the *Complaint*, the Court determines not to address the *Counterclaim* on summary judgment but to make that determination at the conclusion of the trial. The reason is to avoid the potential for inconsistent rulings.

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

cc by U.S. Mail, fax, or efile as applicable to:
James F. Sanders
William J. Harbison II
E. Todd Presnell
Casey L. Miller