

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: (1) ENTERING TEMPORARY
INJUNCTION TO MAINTAIN PRE-SEPTEMBER 2017 BOARD
COMPOSITION; (2) REQUIRING \$25,000 BOND; (3) REFERRING CASE TO
MEDIATION TO BE COMPLETED BY 3/23/18; AND (4) SETTING
4/11/18 RULE 16 CONFERENCE**

This lawsuit was filed by a nonprofit corporation who operates the well-known and historical American Baptist College. The lawsuit is filed against the religious affiliated nonprofit corporation who co-founded the College.

In issue is which party has the right to appoint Board members. The College's 1995 Charter gives the Defendant sole appointment power of the Board. Yet in 22 years the Defendant has not selected Board members and has not disputed the Plaintiff self-selecting its Board members.

The event which spurred filing of the lawsuit was that in September 2017 the Defendant broke with these years of precedent and appointed 19 individuals to Plaintiff's Board, including nine existing Board members and 10 new Board members. Additionally, the Defendant's September 2017 Resolution dismissed eight current Board members (one is now deceased) without cause. The impact of this dismissal in terms of numbers is dismissal of 32 to 42% of current Board members since the Board consists of at least 17 and no more than 25 voting members. This is a large percentage of change in Board composition.

It is this September 2017 Resolution which presently brings the case before the Court. The Plaintiff has filed a motion for a temporary injunction to enjoin the seating of the Board appointed in the Defendant's September 2017 Resolution.

After studying the record and the law, and considering argument of Counsel, a temporary injunction is entered, limited in duration to April 11, 2018, upon the Plaintiff posting a \$25,000 bond, to preserve the pre-September 2017 status quo of the Board composition and for mediation to be conducted by March 23, 2018. The reason for the issuance of the temporary injunction is the unprecedented replacement of a large number of Board members without cause and as a consequence of a governance struggle between the College and its Founding organization which threatens immediate and irreparable harm to the College's reputation, standing, prestige and ability to attract students and teachers. If the case is not resolved by mediation, on April 11, 2018, the issuance of the temporary

injunction shall be reevaluated to see if it should be dissolved in conjunction with a Rule 16 Conference being conducted.

It is therefore ORDERED that upon the Plaintiff posting a \$25,000 bond, the Defendant's September 2017 Resolution appointing 10 new individuals to the Plaintiff's Board of Trustees is enjoined, shall not take effect, and these appointees shall not be seated on the Plaintiff's Board until further order of the Court.

It is additionally ORDERED that the Defendant's September 2017 Resolution dismissing eight Board members is enjoined, shall not take effect, and those Board members, with the exception of one who is deceased, shall remain as Board members until further Order of the Court.

It is further ORDERED that neither the Plaintiff nor Defendant shall appoint or dismiss any Board members, and the status quo of the composition of the Board shall remain as it was prior to the Defendant's September 2017 Resolution until further order of the Court.

It is also ORDERED, pursuant to Tennessee Supreme Court Rule 31, that this case is referred to mediation to be completed by March 23, 2018. Within fifteen days of entry of this Order of Reference, as required by Tennessee Supreme Court Rule 31(a), section 4, the parties shall file a notice of the mediator selected, or their inability to select a mediator for the Court to implement the process for selection of a mediator provided for in Tennessee Supreme Court Rule 31, section 4(a).

It is further ORDERED that if the case is not resolved in mediation, thereafter on April 11, 2018, at 1:30 p.m., the Court shall conduct a Rule 16 Conference to set deadlines

and procedures to decide the case. In particular the Court will consider expedited discovery and an expedited motion procedure on the dispositive defense, preliminarily asserted by the Defendant, that the lawsuit should be dismissed for failure of the Plaintiff Corporation to obtain Board authorization for the lawsuit. The Court will also conduct oral argument on whether there is new information, or new or upcoming circumstances which justify modifying or dissolving the temporary injunction. A motion to modify or dissolve must be filed by April 4, 2018, with opposition to be filed by April 9, 2018.

The factual bases for the above orders is the unprecedented action of the Defendant in removing Board members. The facts in this case of unprecedented action by the Defendant in dismissing eight current Board members without cause and appointing Board members not reviewed or vetted by the College presents immediate and irreparable harm to the College's reputation, prestige and ability to attract students and teachers.

As to a substantial likelihood of success on the merits, it is difficult at this juncture to say which side will prevail because the Defendant has on its side citation to analogous Tennessee for profit corporation law that Charter provisions control over bylaws. Tennessee's law governing for-profit corporations specifically states that a corporation's bylaws may only contain provisions that are "not inconsistent with law of the charter." TENN. CODE ANN. § 48-12-106. Courts recognize that when "construing the charter of the [non-profit] corporation," court "must look at the provisions of the Tennessee General Corporation Act which governs corporations not for profit as well as corporations for profit." *Seymour Volunteer Fire Dep't v. Harvey*, 1987 WL 11126, at *3 (Tenn. Ct. App.

May 22, 2017); *see also* 18 AM. JUR 2D *Corporations* § 33 (“The fundamental rules and principles of law of for-profit-corporations are equally applicable to nonprofit corporations unless otherwise specifically provided otherwise in the enabling statutes.”).

The Plaintiff, though, has evidence that the 1995 Charter appointment provision no longer governs because it has continuously been eroded by a series of events and conduct, and the 1995 Charter conflicts with governance standards such as the following: through course of dealing and notice of passage in 2013 of bylaw changes the Defendant waived the 1995 Charter appointment of Board provision; section 501(c) of IRS regulations forbids the 1995 Charter’s dissolution distribution provisions which may extend to invalidate or undercut the 1995 Charter appointment of Board process; a June 2016 Resolution settled the dispute allowing the Plaintiff to appoint the Board; and appointment of the Board by the Plaintiff complies with accreditation standards. These are substantial claims that the 1995 Charter may require modification.

Under these circumstances, for this case to be decided, it will be necessary for there to be

- discovery and litigation on the details of the parties’ course of dealing and knowledge on alleged waiver by the Defendant of the 1995 Charter provision on appointment of Board members;
- a ruling as a matter of law, potentially mixed with fact, on whether in June 2017 the parties had a settlement agreement;
- whether as a matter of law § 501(c)(3) of the Internal Revenue Code requires modification only of the provision of distribution of assets upon dissolution of the 1995 Charter, or also extends to modification of the Board appointment process by the Defendant contained in the Charter; and

- whether Standard 4.9 of the Association of Biblical Higher Education (“ABHE”) requires that the Plaintiff appoint its Board, or, alternatively, allows for some process where the Defendant could keep in place the 1995 Charter appointment provision if the Defendant’s appointments were independent, autonomous appointees.

The motion, discovery and potential trial processes required to decide the above issues and thereby determine the outcome of whether the 1995 Charter Board appointment process asserted by the Defendant prevails, or the 2013 Bylaws/June 2016 Resolution appointment process asserted by the Plaintiff prevails will be time-consuming and expensive. During that time the uncertainty and poor appearance generated by such governance disputes threatens the College’s reputation, prestige, standing and ability to attract students and teachers, and presents immediate and irreparable harm. As to other considerations on temporary injunctive relief, it is in the public interest and an appropriate balancing of the equities to keep in place in the short term the pre-September 2017 Board composition to maintain the status quo and to mediate so as not to risk damage the institution.

Accordingly, to assure that the College, its public and academic reputation, good will, and standing are not damaged, the Court has issued the above temporary injunction through April 11, 2018. This measure will preserve the status quo in the short term. In addition the Court has ordered the parties to mediation because even though it is early in the case, mediation may be productive because the parties have been working toward a solution for years. Much information and proposals are already available to make

mediation meaningful. Also, given the issues that will have to be prepared for trial, the Court orders mediation to avoid expense.

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

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