

CAUSE NO. 2015-65325

KIEN VAN DANG,

Plaintiff,

vs.

**UNIFIED BUDDHIST CHURCH OF
VIETNAM – GIAO HOI PHAT GIAO
VIET NAM THONG NHAT d/b/a VAN
PHONG II VIEN HOA DAO,**

Defendant.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

113TH JUDICIAL DISTRICT

**DEFENDANT’S SUPPLEMENT AND REPLY IN SUPPORT OF
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Defendant Unified Buddhist Church of Vietnam – Giao Hoi Phat Giao Viet Nam Thong Nhat (“UBCV Inc.”, a registered Texas nonprofit corporation)¹ files this Supplement and Reply in support of its May 19, 2017 Traditional and No-Evidence Motion for Summary Judgment. Following document and deposition discovery, Plaintiff Kien Van Dang has presented no relevant, admissible evidence in support of his petition to inspect UBCV Inc.’s books and records. Summary Judgment for UBCV Inc. is ripe and proper because:

- For this Motion, the Court need only decide whether Plaintiff is a member of UBCV Inc. under the governing documents of the registered corporation;
- UBCV Inc.’s governing documents do not reflect Plaintiff as a member, nor do they support Plaintiff’s theory that his membership in an unincorporated association automatically made him a member of UBCV Inc.;
- Plaintiff’s attempt to conflate the Defendant-corporation with an unincorporated group of temple-goers fails as a matter of Texas law;

¹ Because Plaintiff’s briefing improperly used the label “UBCV Texas” both for the Defendant-corporation and for a related unincorporated association, Defendant will henceforth refer to itself as “UBCV Incorporated” to avoid any potential confusion with other entities.

- Statements or documents outside of UBCV Inc.’s governing documents do not replace or modify the corporation’s governing documents and raise no fact issue on membership in the Defendant-corporation; and
- Plaintiff has no evidence of his enrollment as a member of UBCV Inc.

All that remains on Defendant’s Motion is for the Court to apply straightforward Texas law on corporations, reject Plaintiff’s theory that flies in the face of the governing Texas statute, and grant summary judgment to avoid a wasteful trial.

A. This case revolves around a central question: whether Plaintiff Kien Van Dang is a member of Defendant UBCV Inc. (a Texas nonprofit corporation) under UBCV Inc.’s governing documents.

If Plaintiff is not a member of the Defendant-corporation UBCV Inc., then Plaintiff’s Petition to inspect UBCV Inc.’s records fails.² The Court need not resolve any factual question because the question of whether *Plaintiff* is a member of the corporation is an issue governed by Texas law on nonprofit corporations.

In Texas, a “member” of a nonprofit corporation is “a person who has membership rights in the nonprofit corporation under its governing documents.” Tex. Bus. Org. Code, § 1.002(53)(B). Those governing documents include “the certificate of formation” and “the other documents or agreements adopted by the entity...to govern [its] formation or [its] internal affairs[.]” *See id.*, § 1.002(36)(A). Any other definition of “member” or “governing documents” would be contrary to Texas statutory law.

Therefore, in order to be considered a member of UBCV Inc., Plaintiff must establish that Defendant’s *governing documents* grant him membership rights in the registered entity.

² To prevail on his request for inspection of books and records, Plaintiff must establish his membership of UBCV Inc. as of the time of his request (October 2015). *See Citizens Ass’n for Sound Energy v. Boltz*, 886 S.W.2d 283, 290 (Tex. App.—Amarillo 1994, writ denied).

B. Defendant’s governing documents do not support Plaintiff’s theory of membership.

Plaintiff’s stated theory of the case is that he, as a member of an unincorporated association allegedly formed in 1992, is somehow automatically a member of the Defendant-corporation (incorporated July 3, 2014). *See* Pl.’s Resp. at 4 (“All members of UBCV Texas before incorporation would remain members after incorporation”); *see also* Ex. G (Thich Giac Dang Dep.), 97:15–22 (Plaintiff’s counsel affirming: “That’s our theory.”).

Nothing in UBCV Inc.’s governing documents supports Plaintiff’s theory of the case. *Nowhere* do UBCV Inc.’s incorporation documents enroll all members of another entity into the new corporation. *See* Ex. D (Def.’s filings with Tex. Secretary of State).³ *Nowhere* do UBCV Inc.’s bylaws state that members of another entity are automatically members of the registered corporation. *See* Ex. E (Def.’s Sept. 2, 2015 bylaws).⁴ Plaintiff cites to UBCV Inc.’s governing documents for the proposition that the corporation “shall have” members (*see* Pl.’s Supp. Resp. at 1), but Plaintiff furnishes *no evidence* that the governing documents ratify his theory of membership, much less identify him as a member of UBCV Inc.

Had the corporation enrolled all members of another group as members of UBCV Inc., the governing documents would have said so. They don’t. Plaintiff’s membership theory fails.

C. Plaintiff cannot conflate the Defendant-corporation with an unincorporated association of fellow-believers.

As a matter of law, this Court must reject Plaintiff’s theory that the membership of an ill-defined unincorporated association of believers is the same as the membership of UBCV Inc.

First, Plaintiff’s theory runs counter to hornbook organizations law. “A corporation—whether for-profit or not-for-profit—is a distinct legal entity which comes into existence by

³ Previously filed with Defendant’s MSJ, reattached to this Reply for Court’s convenience.

⁴ Previously filed with Plaintiff’s Response as Ex. 5, reattached here as Ex. E.

charter from the state.” *Waddill v. Phi Gamma Delta Fraternity Lambda Tau Chapter Texas Tech. Univ.*, 114 S.W.3d 136, 141 (Tex. App.—Austin 2003, no pet.). Even if a defendant-entity arose from another related entity, membership in the defendant is determined only by the defendant’s specific governing documents. *See Perez v. Le Prive Enterprises, L.L.C.*, No. 14-15-291-CV, 2016 WL 3634298, at *3 (Tex. App.—Houston [14th Dist.] July 7, 2016, no pet.). In *Perez*, the Court of Appeals held that the membership of an LLC must be determined by that LLC’s governing documents, even if a closely-related partnership agreement memorialized that “said partnership is incorporated as [the] LLC” and listed all the partner-owners (including appellants). *Id.* at *4. Because the partnership document was not a company record of the LLC, it was “irrelevant to the issue of whether [appellants] are members of [the] LLC,” and appellants therefore “fail[ed] to conclusively establish that they are members [of the LLC].” *Id.* at *4. For the same reason, Plaintiff’s proffered documents concerning a similarly-named unincorporated entity are therefore irrelevant to the actual membership of the Defendant-corporation, UBCV Inc.

Second, Plaintiff improperly conflates a fellowship of temple-goers with a formal membership of a registered corporation. The two are different concepts. Members of a church’s congregation are not automatically members of the related nonprofit corporation unless the corporation’s governing documents say so. Other courts visiting this issue on similar facts agree. *See, e.g., Fortier v. Hughes*, 15 So. 3d 1185, 1188 (La. App. 4th Cir. 2009).

In *Fortier*, three members of a Catholic parish tried to argue that their membership in the church congregation translated to membership in the church’s nonprofit corporation, pointing to: (1) the corporation’s name— “The Congregation of Our Lady of Good Counsel Roman Catholic Church”; (2) the corporation’s articles of incorporation statement that “The Congregation...was established for the benefit of its members”; (3) the articles’ silence on whether membership was

limited to its board of directors or excluded members of the congregation; and (4) the articles' opening paragraph describing two laymen as "members of said Congregation." *Id.* at 1186–87. But as the governing documents did not say that *all* parishioners were corporate members, the court held that the congregation-members were *not* members of the corporation. *See id.* at 1188.

Similarly, in *Crissman v. Bd. of Trustees of Cathedral of Tomorrow of Akron, Inc.*, No. 14354, 1990 WL 31796 (Ohio Ct. App. Mar. 21, 1990), the court rejected the plaintiff's argument that his membership in a church congregation translated into membership in the related legal corporation. "[Plaintiff], as member of the congregation, is not a member/trustee of the corporation. Whenever a church incorporates, there are two entities—the church and the legal corporation. [Plaintiff]'s rights in the corporation depend exclusively upon regulations creating the corporation." *Id.* at *2 (citing 66 Am. Jur. 2d, Religious Societies, § 5).

The Court should not accept Plaintiff's incorrect idea that a group of fellow-believers or temple-goers are automatically members of a related legal entity. If that were so, then what would be the purpose of the very statute that Plaintiff is suing under, which defines who is and who is not a member of a nonprofit corporation? Unless there is specific language in the corporation's governing documents expressly extending corporate membership to members of the unincorporated association, Plaintiff's theory requires ignoring business organizations law in favor of religious membership. That would be contrary to Texas law, which requires that absent "specific, lawful provisions in a corporation's articles of incorporation or bylaws otherwise," the corporate affairs of a religiously-affiliated nonprofit corporation "are secular, not ecclesiastical, matters." *See Masterson v. Diocese of Nw. Texas*, 422 S.W. 3d 594, 609 (Tex. 2013) (finding that external religious organization did not control related Texas non-profit registered corporation). The Court should reject Plaintiff's theory as a matter of law.

D. Statements or impressions outside of UBCV Inc.'s governing documents do not replace or modify the corporation's governing documents.

Plaintiff has presented a variety of materials to try to cast himself within the definition of membership in UBCV Inc., but Plaintiff's materials are neither part of UBCV Inc.'s governing documents nor valid amendments to UBCV Inc.'s bylaws. *See* Ex. E (Bylaws), § 14.1 (requiring two-thirds Board approval to adopt, amend, or repeal bylaws). Plaintiff cannot generate fact issues on membership using materials outside of the corporation's governing documents—the only documents that matter here. *See* Tex. Bus. Org. Code, § 1.002(53)(B).

1. Plaintiff's proffered declarations are not governing documents of the corporation.

In his Response to UBCV Inc.'s Motion for Summary Judgment, Plaintiff attaches declarations from himself and from his ally Penelope Faulkner, alleging that all members of an unincorporated association automatically became members of the registered Defendant-corporation. But these self-serving declarations are neither part of UBCV Inc.'s governing documents nor valid amendments to the governing documents. Plaintiff's declarations are irrelevant to membership under Tex. Bus. Org. Code § 1.002(53)(B) and therefore raise no fact issue as to his membership in the corporation UBCV Inc.

2. Documents concerning a committee on temple maintenance are not governing documents of the corporation.

Plaintiff's Response also points to a document appointing Plaintiff to a committee to maintain the Phat Quang Temple. *See* Resp. at 4–5. But Plaintiff's participation in this temple committee is wholly irrelevant to corporate membership. This document is not a governing document of the corporation. It is silent on the question of whether Plaintiff is a member of the Defendant-corporation, and it is not even part of Plaintiff's stated theory of membership (*see* Ex. G, 97:15–22).

Plaintiff himself admits that whether one joins or leaves that temple committee has no bearing on one's membership in UBCV Inc.:

Q. And so it's fair to say that joining or leaving this committee did not impact his [the committee's vice group leader's] membership in UBCV Incorporated, according to you?

A. Correct. Correct.

Ex. F (Pl.'s Dep.) 48:25–49:3. Furthermore, Plaintiff admits that the Vietnamese title used throughout the document for committee volunteers, “Đạo hữu,” merely translates to “Buddhist brother/sister” or “Buddhist member.” *See id.*, 44:10–18. Finally, even had the committee document identified a “Buddhist member” of the *committee* (or members of the *temple*), nowhere does the document specify that they are therefore members of the registered *corporation*, UBCV Inc. In short, there is no legal connection between Plaintiff's participation in a volunteer temple committee and the formal membership of UBCV Inc. No corporate governing document supports such a link.

Participation or membership in a religious organization's work or fellowship is separate and distinct from formal membership in the registered corporation. As one treatise on religious legal organizations explains,

Members of a church or religious order are not automatically members of a corporation formed by the church or religious institute. For example, a high school may be independently incorporated as a public benefit nonprofit corporation without members. It will be governed by its board of directors. Members of the sponsoring church or religious order, however, may serve as teachers or staff of the high school. Thus, it is clear that members of the church are not members of the corporation as such.

W. Cole Durham & Robert Smith, *Religious Organizations and the Law*, § 10:42 (March 2017 update). Similarly, the Phat Quang Pagoda's volunteers might have been part of temple fellowship or part of a specific temple *committee*, but this did not make them legal members of

the registered *corporation* under Texas law. The temple committee document is irrelevant to corporate membership in UBCV Inc. and raises no fact issue to avoid summary judgment.

3. Any other purported proclamation about membership is irrelevant if it is outside the corporation's governing documents.

Plaintiff's declaration in response to UBCV Inc.'s Motion also alleged that Reverend Thich Giac Dang proclaimed that church-members were corporation members. Aside from being wrong, such proclamations are irrelevant and inadmissible here. Even assuming they were true (for purposes of summary judgment), no unilateral statements by a director of UBCV Inc. could have constituted part of the governing documents or have amended the bylaws of the corporation without the governing Board's formal approval. *See* Ex. E (Bylaws), § 14.1 (two-thirds board approval needed to adopt or amend bylaws). Because only UBCV Inc.'s *governing documents* can define its membership, Plaintiff's self-serving affidavit raises no fact issue.

E. Plaintiff never otherwise “enrolled in” the Defendant-corporation.

In what appears to be a final effort to concoct a fact issue, Plaintiff's Supplemental Response cites to the corporate bylaws provisions on membership. *See* Pl.'s Supp. Resp. at 1. But Plaintiff offers no admissible evidence to suggest that Plaintiff himself belongs to the corporation's board of directors (Bylaws, § 4.1) or otherwise “enroll[ed] in” the corporation's non-voting membership (Bylaws, § 3.1).

In Texas, “to enroll” has an “ordinary, common-sense” definition: “to insert, register, or enter in a list, catalog, or roll.” *Ex parte Morales*, 212 S.W.3d 483, 499 (Tex. App.—Austin 2006, pet. ref'd) (quoting Merriam-Webster Dictionary).⁵ Plaintiff has mustered no evidence of any registry, catalog, or list that ever included Plaintiff as a member of the *corporation*, much

⁵ *See also* Op. Tex. Att'y Gen. No. GA-0657 (2008) (same definition). This definition is “so well known” that the word is neither vague nor indefinite. *See Morales*, 212 S.W.3d at 499.

less any such registry created since the adoption of the corporation's bylaws. This is not surprising because, as Reverend Thich Giac Dang explained in his deposition, UBCV Inc.'s board of directors have not yet invited *any* non-voting members into the registered corporation. *See* Ex. G, Thich Giac Dang Dep. 29:11–16. Plaintiff cannot prove that he ever “enrolled in” the membership of the corporation. His claim to be a member of UBCV Inc. fails under the corporation's governing documents and the applicable Texas law.

F. Conclusion

Plaintiff's theory of this case—that all members of an unincorporated association became members of the UBCV Inc. upon its incorporation—is contrary to the governing Texas law on business organizations and finds no support in UBCV Inc.'s governing documents. For all the reasons set forth above and in Defendant's Motion, UBCV Inc. is entitled to summary judgment, and the Court should dismiss Plaintiff's petition.

Respectfully submitted,

SMYSER KAPLAN & VESELKA, L.L.P.

/s/ Jarod R. Stewart

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument and attachments were filed electronically under TEX. R. CIV. P. Rule 21 and served on all counsel of record via electronic mail on September 7, 2017.

/s/ Jarod R. Stewart

Jarod R. Stewart

Unofficial Copy Office of Chris Daniel District Clerk

**LIST OF EXHIBITS ATTACHED TO DEFENDANT’S SUPPLEMENT AND REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

- EXHIBIT D: Defendant UBCV Incorporated’s filings with the Texas Secretary of State (including July 3, 2014 Certificate of Formation)
- EXHIBIT E: Defendant UBCV Incorporated’s Sept. 2, 2015 Bylaws
- EXHIBIT F: Transcript of Aug. 7, 2017 Deposition of Plaintiff Kien Van Dang (excerpts)
- EXHIBIT G: Transcript of Aug. 9, 2017 Deposition of Dang Pham a/k/a Thich Giac Dang (excerpts)

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