



profit corporation, while defendant Heartland Multiple Listing Service (“HMLS”) is a Johnson County for-profit corporation.

HMLS is a multiple listing service (“MLS”), which is a computerized database that compiles properties offered for sale in the region. Real estate agents rely on the access to listings that HMLS provides to market their clients’ properties for sale to other brokers and agents and to identify properties to show interested clients. Plaintiff alleges that most, if not all, active real estate agents in the Kansas City area have access to the HMLS. KCRAR provides access to the HMLS through additional application fees and quarterly participation fees. KCRAR requires that all its members also be members of the National Association of Realtors (“NAR”) and one of the Kansas Association of Realtors (“KAR”) or the Missouri Association of Realtors (“MAR”). NAR holds the trademark to the term “REALTOR,” which it defines as a real estate professional who is a member of NAR and NAR’s associated state and local brands.

KCRAR enacted Bylaws, and HMLS enacted Rules and Regulations, that govern the operation of each organization. KCRAR’s Bylaws and HMLS’s Rules and Regulations both provide that non-REALTORS, and by proxy, non-KCRAR members, may participate in the HMLS. KCRAR’s Bylaws state the following:

Section 4. Participation.

...

- (a) A non-REALTOR applicant for MLS participation who is a principal partner, corporate officer, or branch office manager acting on behalf of a principal, shall supply evidence satisfactory to the Multiple Listing Service that he/she has no record of recent or pending bankruptcy; has no record of official sanctions involving professional conduct; agrees to complete a course of instruction (if any) covering the MLS rules and regulations and computer training related to MLS information entry and retrieval, and shall pass such reasonable and non-discriminatory written examination thereon as may be required by the MLS; and shall agree that if elected as a Participant, he/she will abide by such rules and regulations and pay the MLS fees and dues, including the nonmember differential (if any), as from time to time established. Under no circumstances is any individual or firm entitled to MLS or membership unless they hold a current, valid real estate broker’s license and offer or accept compensation to

and from other Participants, or are licensed or certified by an appropriate state regulatory agency to engage in the appraisal of real property. Use of information developed by or published by an Association Multiple Listing Service is strictly limited to the activities authorized under a Participant's licensure(s) or certification and unauthorized uses are prohibited. Further, none of the foregoing is intended to convey participation or membership or any right of access to information developed by or published by an Association Multiple Listing Service where access to such information is prohibited by law.

In addition, HMLS' Rules and Regulations state the following:

**Non-REALTOR Member Participation.** Participation in the Service is also available to the firm, partnership, or corporation of a nonmember principal who has a place of business within the jurisdiction of the Shareholder Association and meets the qualifications established in these Bylaws and MLS Rules and Regulations. The non-REALTOR member principal of any firm, partnership or corporation shall be termed the Participant in the MLS and shall have only those rights, benefits and privileges as specified by the MLS, and shall accept all obligations to the MLS for the Participant's firm, partnership, or corporation, and for compliance with the Bylaws and Rules and Regulations of the MLS by all persons affiliated with the Participant who utilize the MLS.

Scott DeNeve is the supervising broker for Platinum 2.0 and a licensed real estate agent and broker in Kansas and Missouri. Mr. DeNeve instructed KCRAR to cancel his membership. For the purposes of this motion, Mr. DeNeve is a former member of KCRAR, not a current member. In September of 2016, Platinum 2.0 submitted HMLS' "Non-REALTOR Participant Agreement" and a \$600.00 application fee, requesting that Platinum 2.0 be given access to HMLS as a non-REALTOR participant. Mr. DeNeve and Platinum 2.0 agreed that all subscribers within Platinum 2.0's office would complete the HMLS Mandatory Basic Computer Class, that Mr. DeNeve holds a valid real estate Kansas Broker's license and offers and/or accepts offers of cooperation and compensation made by other Participants through MLS, and that participation is subject to the HMLS Bylaws and Rules and Regulations. In addition, Mr. DeNeve has no record of recent or pending bankruptcy, has no record of official sanctions involving unprofessional conduct, and successfully completed the course of instruction covering MLS rules and regulations and computer training related to MLS information entry and retrieval.

On September 14, 2016, KCRAR notified Platinum 2.0 that its application was denied on the grounds that KCRAR still considered Mr. DeNeve to be a REALTOR, and a firm cannot be a non-REALTOR member if its principal is a REALTOR member. KCRAR returned Platinum 2.0's application fee. On September 23, 2016, Platinum 2.0 attempted to clarify that Mr. DeNeve no longer held a license with a REALTOR firm and again requested access to HMLS. On September 30, 2016, KCRAR requested a letter from Mr. DeNeve, disclosing his ownership interests of various entities. Plaintiff alleges that such disclosure is not required and irrelevant. That same day, Mr. DeNeve and Platinum 2.0 resubmitted its application. Plaintiff does not indicate whether Mr. DeNeve and Platinum 2.0 complied with KCRAR's disclosure request. On October 28, 2016, KCRAR and HMLS again denied Platinum 2.0 non-REALTOR participation in the HMLS.

On November 9, 2016, plaintiff filed a petition for a mandatory injunction, seeking non-REALTOR participation in HMLS. Defendants filed a motion to dismiss, alleging that their multiple denials of plaintiff's applications were because Mr. DeNeve owns and operates another real estate brokerage called Platinum Realty. As a principal of Platinum Realty, Mr. DeNeve has been a REALTOR member of KCRAR for more than thirteen years. According to defendants, Mr. DeNeve was unable to cancel his membership because he remains the owner of Platinum Realty, and Platinum Realty is a member firm of KCRAR. KCRAR's Bylaws require that all principals of a member firm themselves be a member of KCRAR. Because Mr. DeNeve is also principal of Platinum Realty 2.0, that firm is required to be a member firm of KCRAR and thus not eligible for non-REALTOR participation.

On February 23, 2017, plaintiff filed a motion for leave to file an amended petition, adding a declaratory judgment count, requesting the Court to determine whether plaintiff is a non-

REALTOR applicant for HMLS participation. Defendants opposed the motion on the grounds of futility.

## **II. STANDARD OF REVIEW**

The standard applicable to a motion to dismiss requires the Court to credit the well-pleaded facts of the non-moving party, without crediting conclusory allegations. *Gatlin v. Hartley, Nicholson, Hartley & Arnett, P.A.*, 29 Kan. App. 2d 318, 319, 26 P.3d 1284, 1286 (2001) (citing *Grindsted Prods., Inc. v. Kan. Corp. Comm'n*, 262 Kan. 294, 302-03, 937 P.2d 1, 7 (1997)). Disputed issues of fact cannot be resolved or determined on a motion to dismiss for failure to state a claim upon which relief can be granted. *Colombel v. Milan*, 24 Kan. App. 2d 728, 729, 952 P.2d 941 (1998) (citations omitted). In considering a motion to dismiss for failure to state a claim for relief, a court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom. *Id.*

Although a court is not required to accept conclusory allegations, the petition is to be liberally construed. *Mitchell v. Wilfong*, 4 Kan.App.2d 231, 232, 604 P.2d 79, 81 (1979). Dismissal is justified only when the allegations of the petition clearly demonstrate petitioner does not have a claim. *Bruggeman v. Schimke*, 239 Kan. 245, 247, 718 P.2d 635, 637-38 (1986). Only if a party can prove that "no set of facts" would entitle the petitioner to relief is dismissal justified. *Dye v. WMC, Inc.*, 38 Kan.App.2d 655, 661, 172 P.3d 49, 54 (2007).

## **III. CONCLUSIONS OF LAW**

### **1. Is a mandatory injunction proper?**

Plaintiff seeks a permanent mandatory injunction, ordering defendants to grant plaintiff non-REALTOR participation in the HMLS in accordance with KCRAR's Bylaws and HMLS' Rules and Regulations. Doc. 1 at 9. An injunction is an order to do or refrain from doing a certain

act. *State ex rel. Stephan v. Pepsi-Cola General Bottles, Inc.*, 232 Kan. 843, 844, 659 P.2d 213 (1983) (citing K.S.A. 60-901). Injunctions apply to future events rather than to past or completed acts. *Mid-America Pipeline Co. v. Wietharn*, 246 Kan. 238, 242, 787 P.2d 716 (1990). A mandatory injunction is an extraordinary remedy used to effectuate full and complete justice by commanding the performance of a positive act. *Friess v. Quest Cherokee, L.L.C.*, 42 Kan. App. 2d 60, 64, 209 P.3d 722 (2009) (quoting *Wietharn*, 246 Kan. at 242). On the other hand, a preventive or prohibitory injunction requires a party to refrain from doing an act. *Id.* Although the granting of a mandatory injunction is governed by the same rules for preventive injunctions, courts are more reluctant to grant a mandatory injunction. *Id.* Mandatory injunctions are disfavored because they require court supervision of future performance. *Legakis v. Loumpos*, 40 So.3d 901, 903 (Fla. Dis. Ct. App. 2010). They will not be granted unless extreme or very serious damage will occur from the withholding of relief and they will not be issued in doubtful cases. *Heidkamper v. Odom*, 880 So.2d 363, 366 (Miss. Ct. App. 2004) (quoting *Mississippi State Highway Comm'n v. Spencer*, 233 Miss. 155, 101 So.2d 499, 506 (1958)).

There are four elements that a movant must prove to obtain injunctive relief: (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. *Friess*, 42 Kan. App. 2d at 64 (quoting *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462, 726 P.2d 287 (1986)). While these four elements are more commonly use to evaluate preventive injunctions, their use in mandatory injunctions is proper. *Id.*

In addition to these four requirements, a clear legal right must have been violated. *See Prophet v. Builders, Inc.*, 204 Kan. 268, 273 462 P.2d 122 (1969) (“A party seeking a mandatory injunction must clearly be entitled to such relief before it will be rendered.”); *see also Shaw v. Tampa Elec. Co.*, 949 So.2d 1066, 1069 (Fla. Dist. Ct. App. 2007) (“A mandatory injunction is proper where a clear legal right has been violated. . .”); *Second on Second Café, Inc. v. Hing Sing Hrading, Inc.*, 65 A.D.3d 255, 264, 884 N.Y.S.2d 353 (N.Y. App. Div. 2009) (“[S]uch relief will be granted only where the right [thereto] is clearly established.”); *Legakis*, 40 So.3d 901 at 903 (“A mandatory injunction is proper where a clear legal right has been violated. . .”). Because an injunction is an equitable remedy, equitable principles apply to the decision of whether to grant a mandatory injunction. *Wietharn*, 246 Kan. at 242.

Here, an extraordinary remedy such as a mandatory injunction would be inappropriate. Plaintiff has not alleged any clear right that has been violated. Plaintiff does not have the right to be a non-REALTOR participant and receive HMLS access. Rather, the Bylaws and Rules and Regulations of KCRAR and HMLS demonstrate that acceptance of such applications is discretionary. KCRAR and HMLS have no obligation to offer participation to any non-REALTOR member. The language in the Bylaws and Rules and Regulations reflects this, using such language as “available” and “if elected as a Participant.” The only mandatory language regarding non-REALTOR members in the Bylaws explains what the non-REALTOR member applicants must do in order to be considered for non-REALTOR member access. Imposing mandates for an application is not the same as imposing mandates for acceptance.

Plaintiff attached KCRAR’s Bylaws and HMLS’ Rules and Regulations to its petition, and as such, the Court will make reference to provisions in those Bylaws and Rules and Regulations that were not specifically cited in plaintiff’s petition. The Bylaws state that any REALTOR

member shall be eligible to participate in Multiple Listing upon agreeing to conform to the rules and pay the costs. Doc. 1 at 35. The Rules and Regulations use similar language. (“Any REALTOR Member of the Shareholder or any Board/Association of REALTORS who is a principal, partner, or corporate officer, or branch manager acting on behalf of a principal, without further qualification, and each of whom shall be eligible to participate in the services to be provided by Heartland Multiple Listing Service, Inc. . .”). Doc. 1 at 66. There is no corresponding provision in either the KCRAR Bylaws or the HMLS Rules and Regulations that states that non-REALTOR members *shall* be eligible. The eligibility mandate for REALTOR members is not present for non-REALTOR members. The Bylaws also state the following:

The Association and/or MLS may consider the following when determining a nonmember applicant’s qualifications for MLS participation or membership:

1. all final findings of Code of Ethics violations and violations of other membership duties in any other board/association within the past three (3) years
2. pending ethics complaints (or hearings)
3. unsatisfied discipline pending
4. pending arbitration requests (or hearings)
5. unpaid arbitration awards or unpaid financial obligations to any other board/association or board/association MLS

Doc. 1 at 37.

The Bylaws outline various considerations for determining a non-REALTOR applicant’s qualifications. KCRAR and HMLS are presented with a great deal of discretion in coming to an ultimate conclusion. Without any language indicating that KCRAR and HMLS must provide access to non-members who meet those qualifications, KCRAR and HMLS appear to have that same discretion in granting or denying non-members access in general. There is no clear language in the Bylaws or Rules and Regulations that would meet a mandatory injunction’s high threshold of “clear right or entitlement to relief.” The Bylaws and Rules and Regulations allow for non-member participation, but do not mandate it.



Defendants also argue that plaintiff is already a member of KCRAR through his relationship with Platinum Realty. However, the Court must accept as true plaintiff's allegation that it is not a member of KCRAR. Even accepting this as true and rejecting defendants' arguments, plaintiff does not have a clear legal right to non-REALTOR participation and HMLS access.

In addition to not demonstrating a clear legal right, plaintiff has not shown irreparable harm. If plaintiff is unable to obtain non-REALTOR member benefits, it can reap those benefits by obtaining member status. Plaintiff has not alleged that it is unable or precluded from becoming a KCRAR member. Without such an allegation, no irreparable harm can be found when HMLS access is allowed through other channels. Accordingly, the injunction count is dismissed.

## **2. Does plaintiff have standing?**

In the face of the motion to dismiss, plaintiff requested leave to amend to seek a declaratory judgment. Defendants respond that such an amendment would be futile. The Court agrees. Even if the Court had not found that plaintiff does not meet the high standards required for a mandatory injunction, plaintiff has no standing to seek any type of relief, as it is not an intended third-party beneficiary.

Standing is a jurisdictional question whereby courts determine whether the plaintiff has alleged such a personal stake in the outcome of a controversy as to warrant invocation of jurisdiction and to justify exercise of the court's remedial powers on its behalf. *Bd. of Cnty. Comm'rs of Sumner Cnty. v. Bremby*, 286 Kan. 745, 750-51, 189 P.3d 494 (2008) (quoting *Moorhouse v. City of Wichita*, 259 Kan. 570, 574, 913 P.2d 172 (1996)). A party must have a sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy. *Id.*

Plaintiff alleges injury caused by KCRAR's and HMLS' violation of its Bylaws and Rules and Regulations, respectively. The bylaws of a corporation constitute a contract between the corporation and its members. *Stolow v. Greg Manning Auctions, Inc.*, 258 F. Supp. 2d 236, 249 (S.D.N.Y. 2003) (internal citations omitted); *see also Radio Station KFJH Co. v. Musicians Ass'n, Local No. 297, American Federation of Musicians*, 169 Kan. 596, 220 P.2d 199 (in the context of an association) ("The constitution, rules and by-laws of a voluntary, unincorporated association constitute a 'contract' between the association and its members and the rights and duties of the members as between themselves and in their relation to the association. . .").

A third-party, who is not a member of the association or corporation nor a party to the bylaws, lacks standing to bring suit against an organization for violation of its bylaws. *Stolow*, 258 F. Supp. 2d at 249. Were it otherwise, bylaws would subject organizations to unlimited liability resulting from duties owed to third-parties who have no relationship to the organization. *Id.* The *Stolow* court found that the Stolow, who did not allege that he was a member of the defendant associations, was owed no duty under their bylaws, and therefore lacked standing to sue for a violation of the same. *Id.*

The facts presented are that Mr. DeNeve instructed KCRAR to cancel his membership and that Platinum 2.0 is not a member of KCRAR. Plaintiff's response brief states the same. Because plaintiff is not a member of either of the defendants' organizations, it has no standing to challenge defendants' actions as being contrary to the bylaws, unless it is an intended third-party beneficiary of the Bylaws and Rules and Regulations.

Plaintiff argues that it is an intended beneficiary of KCRAR's Bylaws and HMLS' Rules and Regulations, and such a relationship gives it standing to seek relief. The burden of establishing standing to bring suit as a third party beneficiary to a contract rests with the party asserting it. *State*

*ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 793, 107 P.3d 1219 (2005). For a party to be a third party beneficiary to a contract, the contract must be made for the third party's benefit as its object, and [it] must be the party intended to be benefitted in order to be entitled to sue upon it. *Id.* (citing *Fasse v. Lower Heating and Air Conditioning, Inc.*, 241 Kan. 387, 389, 736 P.2d 930 (1987)). The third party beneficiary can enforce the contract if it is one who the contracting parties intended to receive a direct benefit from the contract. *Id.* Before this enforcement, the third party must show the existence of some provision in the contract that operates to its benefit. *Kincaid v. Dess*, 48 Kan. App. 2d 640, 647, 298 P.3d 358 (2013). A third-party beneficiary does not need to be personally named in the contract to have standing, as long as he or she is a member of a designated class or identifiable as a benefitted person. *Byers v. Snyder*, 44 Kan. App. 2d 380, 386, 237 P.3d 1258 (2010).

Third-party beneficiaries of a contract are divided into intended beneficiaries and incidental beneficiaries. Only intended beneficiaries have standing to sue for damages resulting from the breach of a contract. *Id.* Intended beneficiaries may maintain an action to enforce a contract even if they had no knowledge of the contract when it was made and paid no part of the consideration. *Id.* An incidental beneficiary benefits incidentally by the contract's performance but cannot maintain an action. *Hurley v. Lano Intern., Inc.*, 569 S.W.2d 602, 603 (Tex. Civ. App. 1978).

To determine whether a particular person is an intended beneficiary of a contract, the court applies the general rules for construction of contracts. *Kincaid v. Dess*, 48 Kan. App. 2d 640, 647, 298 P.3d 358 (2013). When interpreting written contracts, the contract should not be interpreted by isolating one particular sentence or provision, but by construing and considering the entire contract. *Id.* If the terms of the contract are clear, the parties' intent is determined from the contract

itself without applying rules of construction. *Id.* A contract is ambiguous when the words in the contract expressing the intent of the parties may be understood in two or more ways. *Id.*

Plaintiff is not an intended third-party beneficiary in this case. The allowance of non-REALTOR member participation is not mandatory. The Bylaws and Rules and Regulations use discretionary terms. Essentially, non-REALTOR member participation is a privilege, not a right. Plaintiff applied for non-REALTOR member participation multiple times and was denied. Defendants were under no obligation to offer the same. Plaintiff cannot find a provision of the contract that operates to its benefit. The provisions it highlights in its petition discuss the availability of non-REALTOR member participation. However, these provisions operate to the benefit of a non-REALTOR member only if that non-REALTOR member is allowed access to the HMLS. Otherwise, it merely sets forth the application process to be considered for access to the HMLS. There is no benefit until that application is accepted.

Non-REALTOR members would be intended third-party beneficiaries of the Bylaws and Rules and Regulations upon acceptance of their application and access to the HMLS. If defendants unjustifiably restricted a non-REALTOR participant's access after acceptance, then that non-member would have third-party standing as an intended beneficiary, even though it was not a member of KCRAR. Such are not the facts here. Plaintiff is not alleging restrictions after acceptance as a non-REALTOR participant. Plaintiff's application was denied by defendants using the discretion outlined in the Bylaws and Rules and Regulations. Allowing plaintiff to be an intended third-party beneficiary would open the floodgates of litigation, as any non-REALTOR member would have standing to sue, without regard to meeting applicant qualifications. KCRAR and HMLS would be subject to unlimited liability by anyone wishing to gain access to the HMLS.

Plaintiff does not have standing as a third-party beneficiary, as it received no benefit and was not entitled to receive the same.

Standing is a component of subject matter jurisdiction. *State v. Ernesti*, 291 Kan. 54, 60, 239 P.3d 40 (2010). Without standing, the Court may not exercise its remedial powers. As such, the proposed amendment to the pleadings would be futile. Plaintiff does not have standing to bring a declaratory judgment claim. Even if the plaintiff did have standing, whether plaintiff is a REALTOR member or a non-REALTOR member is irrelevant and moot. If plaintiff is a non-REALTOR member, the Court cannot order plaintiff's access to HMLS. If plaintiff is a member, it is not entitled to non-REALTOR member benefits. A declaratory judgment action would have no effect on the litigation.

#### **IV. CONCLUSION**

A mandatory injunction is improper because plaintiff has not shown that defendants violated a clear right. Such a remedy is an extraordinary one that is inappropriate in this matter. Even more significantly, plaintiff has no standing to request any relief because it is not a party to the Bylaws or Rules and Regulations, and it is not a third-party beneficiary of the same. Defendants' motion to dismiss is hereby **GRANTED** and plaintiff's motion for leave to file first amended petition is hereby **DENIED**.

**IT IS SO ORDERED.**

3/22/17

\_\_\_\_\_  
Date

/s/ David W. Hauber

\_\_\_\_\_  
DISTRICT COURT JUDGE, Div. 7

**NOTICE OF ELECTRONIC SERVICE**

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file a certificate of service for any additional service made.

/s/ DWH

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