UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MEN OF DESTINY MINISTRIES, INC.
Plaintiff,

vs. CASE NO: 6:06-cv-624-Orl-31DAB

OSCEOLA COUNTY, FLORIDA,
Defendant.
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OSCEOLA COUNTY'S TRIAL BRIEF

Defendant Osceola County, Florida ("Osceola"), pursuant to Paragraph 8 of this Court's July 5, 2006 Trial Order, hereby submits its Trial Brief and states as follows:

Argument

I. Osceola is entitled to judgment on all counts of MDM's Complaint because MDM has come to the Court with unclean hands.

1. Judgment should be entered in Osceola's favor because, during the Conditional Use Permit ("CUP") process, MDM mislead Osceola about several material facts concerning its program, including the fact that it admits sex offenders and other serious criminal. MDM is therefore prohibited from seeking equitable relief under the doctrine of unclean hands.[1]

2. Under well-established law, "one who comes into equity must come with clean hands else all relief will be denied him regardless of the merit of his claim." *See Roberts v. Roberts*, 84 So. 2d 717, 720 (Fla. 1956); *see also Shatel Corp. v. Mao Ta Lumber & Yacht Corp.*, 697 F.2d 1352, 1355 (11th Cir. 1983). To warrant denial of equitable relief due to unclean hands, a plaintiff's misconduct must concern the defendant and be "directly related to the matter in the litigation" and must have resulted in injury to the defendant. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dunn*, 191 F. Supp. 2d 1346, 1355 (M.D. Fla. 2002) (citation omitted). False or misleading

[1] Each count of MDM's Complaint demands equitable relief requiring Osceola to grant MDM's CUP or otherwise permit MDM to continue to operate at the Property without County interference.

representations made in connection with the property a plaintiff seeks to protect constitute misconduct that bars relief under the doctrine of unclean hands. *Shatel*, 697 F.2d at 1355 (citation omitted).

3. MDM lied about several facts that were material to Osceola's consideration of its CUP application -- facts which, had MDM been truthful and disclosed them at the time, would have resulted in its application being rejected on grounds that would clearly pass constitutional and statutory muster. During the CUP process, MDM repeatedly represented that it does not accept sex offenders or persons convicted of serious crimes. *See* Complaint, Ex. G; Complaint, Ex. I, pp. 12, 13; Transcript of 1/23/06 Planning and Land Use Hearing, attached hereto as Ex. 1, pp. 5, 8. MDM also repeatedly represented that all of its clients are there voluntarily and none are there under any court imposed condition or requirement. *See* Complaint, Ex. I, pp. 12, 13; Transcript of 11/16/05 Code Enforcement Hearing, attached hereto as Ex. 2, pp. 13, 20; Ex. 1 hereto, p. 5.

4. Osceola will present evidence that at least one MDM client was convicted of felony sexual battery on a minor, and was released by the court to the custody of MDM's George Shafter while awaiting trial with the condition that he attend and complete MDM's program. Osceola will also show that other MDM clients have been convicted of violent crimes, several have been remanded to MDM's care as a condition of pre-trial release or probation, and many have extensive criminal records -- not just for "victimless" crimes such as drug possession, but for serious crimes against property such as theft and burglary.[2]

5. All of MDM's misrepresentations are directly related to the matter in litigation. These facts were critical to Osceola's informed consideration of MDM's CUP application and

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[2] Osceola reasonably believes based on admissions made by MDM staff that a significant number of other MDM clients have extensive and serious criminal records. Indeed, MDM representatives conceded in deposition that, contrary to the representations made to the County during the CUP process, vast numbers of MDM's past and present participants have criminal records. Osceola, however, cannot quantify that number as a result of MDM's refusal to provide discovery with respect to the identities and criminal histories of its clients. On July 17, 2006, Magistrate Judge Baker heard Osceola's Motion to Compel on this issue, but the motion has not yet been ruled upon.

MDM's misrepresentations deprived Osceola of these material facts during the CUP process. The Property sits in a single-family neighborhood within a mile of an elementary school and a public park. One can hardly imagine a location less compatible with a facility that houses a significant number of convicted and accused criminals.

6. While MDM asserts that the denial of its CUP was improperly motivated by an unjustified preconception that its clients pose an unacceptable risk to the surrounding neighborhood, the revelation of MDM's misrepresentations confirms that any such alleged preconception was, in fact, **completely justified and absolutely true**. MDM is in fact using the subject Property to house convicted sex offenders and other serious criminals, several of whom were, once again contrary to MDM's false representations, compelled by court order to participate in the MDM program.

7. MDM's misrepresentations are matters of grave and legitimate concern to Osceola and are directly related to the matters at issue both during the CUP application process and in this litigation. To the extent that Osceola evaluated MDM's CUP application without knowledge of the facts misrepresented by MDM, Osceola was injured by such misconduct. Therefore, pursuant to the doctrine of unclean hands, judgment should be entered against MDM on all counts of the Complaint. *See Merrill Lynch*, 191 F. Supp. 2d at 1355; *Shatel*, 697 F.2d at 1355.

II. Osceola is entitled to judgment on Counts I, VI, VII, VIII, and IX because MDM's program is not a religious practice and because Osceola's denial of MDM's CUP does not substantially burden or restrain an exercise of religion.

8. Osceola is entitled to judgment on Counts I, VI, VII, VIII, and IX (the "Religion Claims") because MDM's use of the Property does not constitute "religious exercise" as defined by the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, *et seq.* ("RLUIPA"), the First Amendment to the United States Constitution, or the Florida Religious Freedom Restoration Act, Fla. Stat. §761.01, *et seq.* ("RFRA"). In addition, even if MDM's program did qualify as "religious exercise," Osceola has not imposed any "substantial burden" upon MDM for

purposes of the RLUIPA or the RFRA, nor has Osceola restrained any religious exercise significantly enough to merit relief under the First Amendment.

a. MDM's program is not a protected "exercise of religion."

9. In the Religion Claims, MDM alleges violations of the rights of "exercise of religion" as protected under RLUIPA, and the rights of freedom of speech, peaceable assembly and exercise of religion under the First Amendment and the RFRA. Before this Court may even consider whether Osceola illegally burdened MDM's religious rights, it must first determine whether MDM's activities constitute "religious exercise" entitled to protection under such laws. There is no evidence upon which this Court could properly make such a factual finding.

10. The Free Exercise Clause prohibits governments from "prohibiting the free exercise" of religion and Section (a)(1) of RLUIPA provides that "no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly... .". *See also* RFRA, Fla. Stat. § 631.03 (prohibiting governments from "substantially burden[ing] a person's exercise of religion"). "Religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and specifically includes the "use ... of real property for the purpose of religious exercise." 42 U.S.C. §§ 2000cc-5(7)(A) and (B); *see also* RFRA, Fla. Stat. § 761.02(3) (defining "exercise of religion" as "an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief").

11. RLUIPA's legislative history makes clear that **not every land use or building operated by a religious institution constitutes "religious exercise":**

> The definition of 'religious exercise' under this Act includes the 'use, building, or conversion' of real property for religious exercise. However, not every activity carried out by a religious entity or individual constitutes religious exercise. In many cases, real property is used by religious institutions for purposes that are comparable

> to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution … this alone does not automatically bring these activities or facilities within the bill's definition of 'religious exercise.'

Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. S7776 (July 27, 2000).

12. MDM asks that Osceola be compelled to permit it to operate a "residential drug and alcohol rehabilitation program" on the Property. Even assuming that MDM is genuinely inspired by its religious beliefs, the specific **activities** carried out at the Property -- drug and alcohol rehabilitation -- are indisputably secular in nature and are "comparable to those carried out by other [secular] institutions." 146 Cong. Rec. S7776. *See also First Assembly of God of Naples, Florida, Inc. v. Collier County,* 20 F.3d 419 (11th Cir. 1994) (in a pre-RLUIPA case decided under the Free Exercise Clause, the Eleventh Circuit held that the county's generally applicable zoning ordinance, which incidentally impacted a church-run homeless shelter, was facially neutral and was motivated by "wholly secular concerns").

13. MDM is not using the Property as a "house of worship." It admits that it no longer conducts religious activities on the Property and, in any event, reading the Complaint *in pari materia*, it is clear that MDM's "primary thrust" is not religious worship *per se*, but instead is "assisting those addicted to drugs and alcohol by reaching out to them and by helping them overcome their addictions through a relationship with Jesus Christ and by following Biblical principles." Complaint, ¶¶15, 82. Thus, by MDM's own admission, its "primary thrust" is assisting addicts, not the practice of religion for its own sake. In short, the activity taking place at the Property is a secular endeavor that merely happens to be motivated by religious convictions.

14. When churches operate schools or day care centers, the schools or day care centers are not, in and of themselves, "houses of worship," nor are the activities being conducted the "exercise of religion." On this issue, the instant case is substantively indistinguishable on its facts from *Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775 (10th Cir. 2005), in which

the Tenth Circuit found that the city's refusal to grant a zoning variance to allow a church-run day care center to operate in a low-density residential neighborhood **did not** violate RLUIPA's "substantial burden" provision. The Court found that the jury properly concluded that the proposed operation of the day care center was not an "exercise of religion." 427 F.3d at 793-97. Given the inherently secular nature of rehabilitation programs, MDM's program does not constitute "religious exercise" under RLUIPA.

b. Osceola has not prohibited or substantially burdened a religious exercise.

15. Even if MDM's program qualified as a "religious exercise," neither the fact that MDM had to submit a CUP application nor the County's denial of that CUP imposed a "substantial burden" on MDM's right to religious exercise, and Osceola clearly did not prohibit MDM from practicing its religion. RLUIPA does not define the term "substantial burden," but under binding 11th Circuit precedent the mere fact that Osceola's zoning code requires MDM to seek a CUP does not constitute a "substantial burden." *Konikov v. Orange County*, 410 F. 3d 1317, 1323-24 (11th Cir. 2005).

16. In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), the court defined "substantial burden" as being "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly" or pressure that "tends to force adherents to forego religious precepts" or that "mandates religious conduct," and that it must be something "more than an inconvenience on religious exercise." 366 F. 3d at 1226-27. While the land use regulation at issue was deemed improper because it was not content neutral and specifically excluded synagogues from a district in which similar secular uses were permitted, the court found that neither the fact that suitable alternative space might be difficult to find nor the fact that the plaintiff was required to apply for a CUP constituted "substantial burdens."

17. In *First Assembly of God*, 20 F. 3d 419, the Eleventh Circuit concluded in the context of Free Exercise claims that a county's refusal to grant a special use permit to a church-run homeless shelter was not a "substantial burden" on the exercise of religion. 20 F.3d at 424. The court identified the "burden" on the plaintiff as the duty "to either conform the shelter to the zoning laws, or to move the shelter to an appropriately zoned area," and found that "burden" to be insubstantial. 20 F. 3d at 422.

18. The principle that a religious group's inability to operate at its preferred site is **not a "substantial burden"** is the binding view of the Eleventh Circuit and is widely accepted by other federal courts. *See Town of Surfside*, 366 F.3d at 1227-28; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004); *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 406 F.Supp.2d 507 (D.N.J. 2005).

19. Osceola's denial of MDM's CUP did not prohibit MDM from practicing its religion, nor did it impose a "substantial burden" upon MDM, because there are other available sites within the County to which MDM could relocate its program. *See* Affidavit of Theodore Garrod, attached hereto as Ex. 3 (without exhibits).[3] Osceola's refusal to grant a CUP for the subject Property simply does not prohibit MDM's "exercise of religion," nor does it constitute a "substantial burden" on MDM's "exercise of religion," in light of the fact that alternative sites are available to MDM within the County.

20. In a decision that bears a striking factual similarity to this case, it was held that no "substantial burden" was placed on the complaining plaintiff's rights regardless of whether an "as applied" or an "on its face" analysis was employed. In *Christian Gospel Church v. City and County*

[3] The original of Mr. Garrod's affidavit, with exhibits, was previously filed as Exhibit D to Osceola's memorandum of law in opposition to MDM's motion for TRO/temporary injunction and Mr. Garrod has been deposed and will testify at trial)

of San Francisco, 896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999, 111 S. Ct. 559, 112 L. Ed. 2d 565 (1990),[4] the plaintiff church applied for a CUP to operate in a neighborhood that was zoned for single-families only. The defendant denied the CUP because it concluded, without reference to the religious aspects of the use, that the intended use of the property would adversely affect the neighborhood. The court held that the church's rights were not violated (on an "as applied" or "on its face" basis) because the zoning code at issue required that **all** assembly-type activities in that particular zoning district, whether of a religious or secular nature, seek and obtain CUP's. The court noted that the only burdens placed upon the plaintiff were burdens of "convenience and expense" requiring it to find "another home or another forum for worship," and concluded that those burdens were minimal and not "substantial." *Id.* at 1224-25. On the other hand, the court found that the local government's interests in maintaining the integrity of its zoning scheme and protecting the welfare and character of its residential neighborhoods were strong. *Id.* at 1224-25. Finally, the court noted that while the local government had over the prior four years granted several CUP's of the sort sought by the plaintiff, it rarely granted CUP's in residential neighborhoods. *Id.* at 1225.

21. The rationale in the *Christian Gospel Church* case applies equally to this case in which the Osceola County Land Development Code ("Code") requires that a CUP be sought and obtained for any non-single family residential use in an E-2A district without regard to the religious or secular nature of the use.

22. Accordingly, judgment should be entered in Osceola's favor on the Religion Claims because MDM's program is not a "religious exercise" entitled to statutory or constitutional protection, and because Osceola's denial of MDM's CUP did not prohibit or substantially burden any religious exercise.

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[4] In *Open Homes Fellowship, Inc. v. Orange County*, 325 F. Supp. 2d 1349 (M.D. Fla. 2004, J. Presnell), Note 44 at Page 1365, this Court cited the *Christian Gospel Church* case as factually distinguishable.

III. Osceola is entitled to judgment on Counts II, III, and IV because MDM's clients are not protected by the ADA, the Rehabilitation Act, or the FHA, and because Osceola did not discriminate against persons protected under such laws in denying MDM's CUP application.

23. Osceola is entitled to judgment on Counts II, III, and IV (the "Disability Claims") because MDM has not proven that its clients are "disabled" or otherwise entitled to relief under the Americans with Disabilities Act, 42 U.S.C. §2000cc *et* seq. ("ADA"), the Rehabilitation Act, 29 U.S.C. §701 *et seq*., or the Fair Housing Act, 42 U.S.C. §3601 *et* seq. ("FHA"). Furthermore, even if MDM's clients were "disabled" for purposes of these laws, Osceola did not unlawfully discriminate against them in denying MDM's CUP.

a. MDM cannot prove that its clients are "disabled" persons entitled to relief under the ADA, the Rehabilitation Act, or the FHA.

24. In the Disability Claims, MDM seeks relief under federal laws that prohibit discrimination against the "disabled." Before this Court may even consider whether Osceola discriminated against MDM or its clients, it must first determine whether or not MDM and its clients are entitled to protection under the ADA, the Rehabilitation Act, and the FHA (i.e., whether MDM meets the statutory meaning of a "supervised rehabilitation program" and whether its clients meet the statutory meaning of "individuals with a disability"). To demonstrate a disability protected under these statutes, MDM must prove that its clients either *have*, have a *record of having*, or *are regarded as having* (1) a "physical or mental impairment" that (2) "substantially" (3) "limits one or more major life activities" (*See* 42 U.S.C. § 12102(2); 29 U.S.C. § 705(20); 42 U.S.C. § 3602(h)) and that MDM is a "supervised rehabilitation program" (*See* 42 U.S.C. §12210(b)(2)).

(i). Alcohol or drug addiction is not a disability* per se *-- MDM must prove that its clients' alleged addictions substantially limit a major life activity.

25. MDM attempts to establish the statutory "disability" of its clients by alleging that it "operates a residential home for drug and alcohol addicts," and that recovering drug and alcohol addicts, in general, "are disabled." *See* Complaint, at ¶¶ 176-77, 191-92, 209-10. However,

addiction "is not a disability *per se*," and "even a plaintiff who suffers from a condition such as alcoholism or drug addiction -- or is perceived as suffering from such a condition -- must demonstrate that the condition substantially limits, or is perceived . . . as substantially limiting, his ability to perform a major life function." *See Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847, 859-61 (5th Cir. 1999).

26. Accordingly, MDM may not obtain relief by merely alleging that it operates a rehabilitation program or that its clients are addicts. MDM must prove that its clients are entitled to the protection of the federal statutes upon which MDM bases its Disability Claims.[5] MDM must prove that its clients' addictions affect a "major life activity," that such effect is "substantial," and that its clients are not "currently engaged in illegal drug use." *See* 42 U.S.C. § 12102(2); 29 U.S.C. § 705(20); 42 U.S.C. § 3602(h); *see also RECAP*, 294 F.3d at 46; *Zenor*, 176 F.3d at 859-61.

(ii). MDM and its clients are not entitled to protection if MDM's program is not a "supervised rehabilitation program."

27. Not all addicts are entitled to the legal protection sought by MDM. The ADA and the Rehabilitation Act expressly state that "an individual who is currently engaging in the illegal use of drugs" is not a disabled person entitled to protection from discrimination. *See* 42 U.S.C. § 12210(a); *see also* 29 U.S.C. § 705(20)(C)(i). The Acts also contain "safe harbor" provisions which provide that an addict will not be excluded from their protection if he or she has "successfully completed" or is "participating in" a "supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs." *See* 42 U.S.C. § 12210(b)(1) and (2); *see also* 29 U.S.C. § 705(20)(C)(ii) (emphasis added). These provisions make clear that an addict who claims to be in a "program" is not entitled to protection unless he/she is no longer using and the program in which he/she participates is a "**supervised rehabilitation program**."

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[5] As referenced previously in this trial brief, MDM has refused to produce any documentation or information that would shed light on the issue of whether or not its clients meet the statutory prerequisites for protection under the ADA, Rehabilitation Act and FHA and, indeed, has refused even to provide the names of its clients.

28. Congress did not define the term "supervised rehabilitation program" in the ADA or the Rehabilitation Act, nor is a meaning suggested in the House Conference Report on the ADA. When Congress does not expressly define a statutory term or phrase, a court should "normally construe it in accord with its ordinary or natural meaning." *See Smith v. United States*, 508 U.S. 223, 228 (1993). The testimony of MDM's own staff and clients establishes that MDM exercises, at best, a minimal level of "supervision" over its participants (particularly overnight). Further, Osceola will present expert evidence at trial that, in accordance with the customarily accepted definitions of "treatment" and "supervised rehabilitation program" among addiction treatment professionals, what happens at MDM is not "treatment" and MDM is not a "supervised rehabilitation program."

(iii). Even if MDM were operating a "supervised rehabilitation program," MDM and its clients are not entitled to relief if those clients have not been drug-free for a significant period of time.

29. The Circuit Courts of Appeal have uniformly held that the terms "currently engaging" and "no longer engaging" in the illegal use of drugs are to be construed broadly, such that addicts who are terminated from employment *while receiving or immediately after completing in-patient addiction treatment* are often **not** entitled to protection under the ADA and the Rehabilitation Act, even if they are not using on the date that their employment is terminated. *See Shafer v. Preston Memorial Hospital Corp.*, 107 F.3d 274 (4th Cir. 1997); *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847 (5th Cir. 1999); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001).

30. "[T]he mere fact that [one seeking protection under the ADA or Rehabilitation Act] has entered a rehabilitation program does not automatically bring that [person] within the safe harbor's protection." *See Zenor*, 176 F.3d at 857. Instead, "the safe harbor provision applies only to individuals who have been drug-free for a significant period of time." *Id.*

31. Addicts -- even those receiving treatment in supervised rehabilitation programs -- do not fall outside the ADA and Rehabilitation Act definition of "current" users simply because they are not using on the exact date upon which they were allegedly discriminated against. As the Fourth Circuit explained:

> the ordinary and natural meaning of the phrase 'currently using drugs' does not require that a drug user have a heroin syringe in his arm or a marijuana bong to his mouth at the exact moment contemplated. Instead, in this context, the plain meaning of 'currently' is broader. Here, 'currently' means a periodic ongoing activity in which a person engages (even if doing something else at the precise moment) that has not yet permanently ended. . . . Accordingly, under the plain meaning of the statutes, an employee illegally using drugs in a periodic fashion during the weeks and months prior to discharge is 'currently engaging in the illegal use of drugs.'

Shafer, 107 F.3d at 278. Furthermore, "the legislative history reveals that Congress intended to exclude from statutory protection an employee who uses drugs during the weeks and months prior to her discharge, even if the employee is participating in a drug rehabilitation program and is drug-free on the day she is fired." *Id.* at 279 (citing legislative history in which the House stated that the safe harbor provision of the ADA is not intended to apply "to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that person's drug use is current").

(iv). MDM's program is <u>not</u> a "supervised rehabilitation program," and MDM cannot demonstrate that its clients are not "current" users of drugs and alcohol.

32. MDM and its clients are not entitled to relief under the ADA, the Rehabilitation Act, or the FHA because MDM does not run a "supervised rehabilitation program." *See* 42 U.S.C. § 12210(b); 29 U.S.C. § 705(20)(C)(ii). Thus, MDM is not entitled to relief on the Disability Claims, both because MDM's program is not a "supervised rehabilitation program" and because MDM cannot demonstrate that its clients are not "currently" using alcohol or drugs.

33. While MDM now claims for strategic purposes of this case that it operates a drug and alcohol rehabilitation center, MDM consistently identified itself during the CUP process as a "discipleship program," and expressly denied that it was a drug/alcohol rehabilitation program.

When MDM was specifically asked by Osceola's Planning Department exactly what it was, MDM responded that "**Men of Destiny is not a drug or alcohol rehabilitation facility.**" *See* MDM Response to Staff Report of Osceola County Planning Department, Osceola's Amended Answer, Ex. A at p. 31 (emphasis added).

34. Furthermore, even though MDM presumably provides addicts with "services" of some sort, the expert testimony at trial will prove that MDM does not provide "treatment" to its clients, nor is it a "supervised rehabilitation program." As a result, neither MDM nor its clients are entitled to protection under the ADA or the Rehabilitation Act.

35. MDM admits that many of its clients have not been drug/alcohol free long enough to justify a reasonable belief that their drug/alcohol use has ended. As a result, they are deemed "current" users who are not entitled to protection under the ADA and the Rehabilitation Act in accordance with the authorities cited above. Pastor Shafter admits that men frequently enter MDM directly from jail and that "two out of five" enter directly from detoxification centers -- virtually immediately after their last use of drugs/alcohol. As held in *Shafer*, *Zenor*, and *Brown*, such persons are "current" users who are not afforded protection under the ADA or the Rehabilitation Act. MDM, of course, is a legal entity and not a natural person and cannot itself be "disabled." MDM only has derivative standing to pursue its Disability Claims to the extent that its clients have such standing, and relief can only be granted in favor of MDM to the extent that its individual clients are entitled to such relief. Because MDM's clients are "current" users not entitled to federal statutory protection, and because MDM is not a "supervised rehabilitation program," MDM is not entitled to relief on the Disability Claims.[6]

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[6] As previously stated, MDM has repeatedly refused to permit discovery aimed at determining whether MDM or its clients are entitled to the relief sought in the Disability Claims. MDM has refused to identify its clients or to allow Osceola to discover whether its clients have a documented history of addiction and, if so, for how long those participants have been drug free. MDM has thus deprived Osceola (and this Court) of access to facts which show its lack of entitlement to the relief it seeks and should not be permitted to proceed with its Disability Claims. *See, e.g.,*

b. Osceola did not discriminate against persons protected under the ADA, the Rehabilitation Act or the FHA in denying MDM's CUP.

36. Even if MDM can somehow establish that its clients are "disabled" persons entitled to protection under the ADA, the Rehabilitation Act and/or the FHA, Osceola is still entitled to judgment because it did not discriminate against those person in denying MDM a CUP. The evidence will clearly show that Osceola had legitimate, nondiscriminatory reasons for denying the CUP.

37. In considering MDM's Disability Claims under the ADA and the FHA, this Court must engage in a three-step analysis. *See RECAP*, 246 F.3d at 49. First, the Court must determine whether MDM has shown that animus toward persons protected under those statutes "was a significant factor in the position taken by the [local government]."[7] *Id.* Second, should the Court determine that MDM has made its prima facie case, it must then determine whether Osceola has demonstrated "a legitimate, non-discriminatory reason for [its] decision." *Id.* Third, should the Court determine that Osceola has satisfied this burden, it must then determine whether MDM has proven that Osceola "intentionally discriminated [against MDM] on a prohibited ground," i.e., whether the non-discriminatory reasons proffered by Osceola are false and pretextual. *Id.*

38. MDM's Disability Claims must fail because MDM cannot carry its burden of proof. As reflected by MDM's CUP application, MDM asserted throughout the CUP process that it was a "discipleship" program, and emphasized that it was **not** a drug/alcohol rehabilitation program.

Fed. R. Civ. P. 37(b)(2) (authorizing court upon party's failure to comply with order compelling discovery to take certain facts adverse to the disobedient party as having been established, to refuse to allow the disobedient party to assert certain claims, etc.); *Rabello v. Bell Helicopter Textron, Inc.*, 200 F.R.D. 484 (S.D. Fla. 2001) (precluding defendant from offering documents at trial as result of defendant's failure to timely produce same).

[7] The Rehabilitation Act requires MDM to carry the even heavier prima facie burden of proving that Osceola "denied the permit '***solely***' because of the disability." *RECAP*, 246 F.3d at 49 (emphasis added). Osceola is therefore entitled to judgment under the Rehabilitation Act claim if the evidence establishes that its reason(s) for denial of MDM's CUP application included *any* reason other than animus toward disabled persons. *See id.*

Because MDM did not (and does not) operate a rehabilitation program, Osceola's denial of the CUP could not possibly have been motivated by animus toward disabled persons.

39. Furthermore, even if there were evidence from which this Court might conclude that animus toward "disabled" persons played a "significant factor" in Osceola's denial of the CUP, Osceola is still entitled to judgment in its favor because legitimate and nondiscriminatory reasons exist for the denial. MDM's use of the Property is indisputably incompatible with Osceola's zoning scheme for E-2A districts. Further, Osceola has ***never*** granted a CUP to allow a use such as MDM's in an E-2A district, regardless of whether or not the proposed application was for use by handicapped persons, and regardless of whether or not the applicant had a religious affiliation. Further, prior to denying MDM's CUP, Osceola offered to help MDM relocate to an appropriate location within the County. Finally, Osceola has not treated MDM less favorably than other "non-disabled" or "secular" applicants who have sought CUP's for similar nonconforming uses in an E-2A district. If anything, Osceola has treated MDM more favorably through its offers to assist MDM in finding a suitable alternate location despite having no legal obligation to do so. Osceola, therefore, clearly has not discriminated against MDM.

40. In addition, Osceola had legitimate, nondiscriminatory reasons for denying MDM's CUP application including:

- protecting the health, safety, and welfare of the citizens of the surrounding neighborhood from threats presented by MDM's proposed incompatible use;[8]
- preserving the surrounding single-family residences from the declining property values that would inevitably result from MDM's incompatible use; and
- MDM's demonstrated and chronic disregard of the County's rules and regulations (initiating nonconforming use prior to seeking CUP approval, septic tank violations and engaging in construction activities without seeking or obtaining necessary permits).

[8] These threats are now known to be well-founded in light of the extensive criminal histories of many (if not most) MDM clients. Indeed, George Shafter acknowledged at his deposition that the MDM property is "supervised" by a "senior brother" at night to ensure that the residents don't steal from one another or from MDM itself.

See Ex. 4 hereto, pp. 9-11. None of these reasons even suggest any animus, bias or discrimination against any protected class (disabled persons) or activity (e.g. religious exercise).

41. There is simply no credible evidence to support MDM's allegation that Osceola's denial of its CUP was motivated, in whole or in part, by animus against any protected class or activity, or that Osceola's stated reasons for the denial are pretextual. To the contrary, the Osceola Commissioners that voted to deny MDM's CUP application agreed that MDM's program might benefit the community in general, but was simply incompatible with the neighborhood surrounding the MDM Property. *See* Ex. 4 hereto, pp. 9-11. Accordingly, Osceola is entitled to judgment in its favor on MDM's Disability Claims.

IV. Osceola is entitled to judgment on Count V because the Osceola County Land Development Code does not discriminate, either on its face or as applied, on the basis of handicap, religion, or viewpoint.

42. In Count V, MDM combines the arguments in its Religion and Disability Claims, and asserts an entitlement to relief under the Equal Protection Clause for the misconduct alleged in those other claims. *See* Complaint, at ¶¶ 223-37. MDM asserts that the Code is discriminatory both *on its face* and *as applied*. However, Osceola is entitled to judgment in its favor on Count V because the Code is facially neutral and does not, either on its face or as applied, discriminate against "disabled persons" or "religious assemblies," or on the basis of content, viewpoint, identity or expression.

a. The Code is content neutral and therefore facially constitutional.

43. MDM alleges that the Code is unconstitutional on its face. Under well-established federal law, however, the Code is vested with a presumption of constitutionality and will be sustained if the classifications it draws are content neutral and rationally related to a legitimate government interest. *See City of Clerburne v. Clerburne Living Center, Inc.*, 473 U.S. 432, 440

(1985). The only portions of the Code MDM calls into question are those governing E-2A districts, including those requiring MDM to obtain a CUP for its proposed use.

44. Like the zoning provisions at issue in *City of Clerburne*, the provisions of the Code applied by Osceola in denying MDM's CUP application are facially neutral and therefore non-discriminatory. *See* Code, §§ 14.9(A)-(E). Under the Code, **any** proposed use of property zoned E-2A, other than single-family residential, is subject to the CUP process. Further, the Code makes no distinction among uses based on disability, religion, or viewpoint; the only "distinctions" are predicated on the content neutral criteria of density (single-family) and use (residential).

45. Osceola's decision to set aside certain areas for single-family residences furthers legitimate, nondiscriminatory government interests. In addition to "character of the neighborhood" issues, the establishment of single-family residential districts insures that low density rural areas are not overwhelmed by a need for services better provided in more urban areas, preserves property values, and protects the public health, safety and welfare. Other courts have recognized the legitimacy of land use regulations that establish single-family zoning districts. *See, e.g.*, *Albert v. Zoning Hearing Board of North Abington* Township, 854 A.2d 401 (Pa. 2004) (halfway house for recovering addicts deemed impermissible in low-density residential district in light of the transience of its residents, which rendered the use incompatible with the legitimate goal of creating stable and permanent residential neighborhoods). Since the challenged Code sections are facially neutral and rationally related to a legitimate governmental purpose, the Code is constitutional on its face.

b. The Code is not discriminatory, as applied, against any protected class (the disabled) or activity/status (religious exercise or viewpoint).

46. MDM's suggestion that the Code is discriminatory as applied against the disabled is without merit. MDM argues that the mere denial of a CUP to MDM constituted an act of discrimination against the disabled. MDM, however, cannot identify any "non-disabled" persons proposing similar uses who have been treated more favorably than MDM.

47. Osceola's stated and actual basis for denying MDM's application was that its stated use for the Property is incompatible with Osceola's zoning scheme for E-2A districts. Furthermore, Osceola has ***never*** permitted such a use or similar use in an E-2A district, regardless of whether or not the applicants were disabled. There is no evidence that Osceola treated MDM less favorably than "non-disabled" applicants proposing similar uses in an E-2A district. In short, MDM cannot prove that Osceola has discriminated on the basis of "handicap" and Osceola is therefore entitled to judgment in its favor on MDM's Equal Protection claim as it relates to MDM's allegedly "handicapped" residents. *See Moore v. City of Edgewood*, 790 F. Supp 1561, 1567-68 (M.D. Fla. 1992).

48. Osceola's denial of MDM's application clearly satisfies the "rational basis" test under the Equal Protection Clause. While addicts and alcoholics may under certain circumstances be entitled to the protections afforded to the "disabled" under the ADA, Rehabilitation Act and FHA, they are "neither a suspect nor a quasi-suspect class for purposes of equal protection analysis." *See Mitchell v. Commissioner of the Social Security Administration*, 182 F.3d 272, 274 (4th Cir. 1999). Accordingly, a government action purportedly discriminating against drug addicts or alcoholics "'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification'" and "the burden rests on the one challenging the legislation to disprove the existence of '**every conceivable basis which might support it.**'" *Id.* (emphasis added). Osceola's denial of MDM's CUP was rationally related to its legitimate interests in protecting the health, safety, and welfare of the residents living in the surrounding neighborhood. MDM is therefore not entitled to relief for any alleged discriminatory effect the Code has, either on its face or as applied, upon MDM or its clients.

49. MDM's suggestion that the Code has been applied in a manner which discriminates on the basis of religion is similarly without merit. MDM argues that the mere denial of a CUP to

MDM constituted an act of discrimination on the basis of religion. MDM, however, cannot identify any persons proposing similar nonconforming uses that have been treated by the County more favorably than MDM based on differences in religion (or in content, viewpoint, identity or expression).

50. Since MDM's program does not constitute "religious exercise," Osceola's denial of MDM's application does not constitute disparate treatment of a "religious assembly" in violation of the Equal Protection Clause. The specific **activities** carried out at the Property -- the rehabilitation and housing of addicts -- are indisputably secular in nature and comparable to those carried out by other secular institutions. *See First Assembly of God of Naples, Florida, Inc. v. Collier County,* 20 F.3d 419 (11th Cir. 1994). The fact that MDM's program is inspired by religious beliefs does not transform its program into a religious "assembly" or "exercise." Accordingly MDM's Equal Protection claim must be rejected.

51. MDM is not entitled to relief under the Equal Protection Clause because MDM has cannot prove that it was treated any differently than other similarly situated persons that do not share its religious content, viewpoint, identity, or expression. *See Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1560-61 (M.D. Fla. 1995). Count V of MDM's Complaint is substantively identical to the Equal Protection claim asserted in *Daytona Rescue Mission* by a church that was denied a special use permit to operate a homeless shelter. *See id.* at 1555-57. Like MDM, the church asserted that the denial of a permit violated its constitutional rights of equal protection and free religious exercise. *See id.* at 1557. The Middle District granted summary judgment in favor of the county on the church's Equal Protection claim, however, stating:

> '[T]o maintain an equal protection claim with any significance independent of the free exercise count which has already been raised, [the plaintiffs] must also allege and prove that they received different treatment from other similarly situated individuals or groups. . . . The record lacks evidence that [the plaintiffs] were treated differently from similarly situated persons. Further, the court find that the equal

> protection count is another attempt by [the plaintiffs] to recharacterize their free exercise claim.

Id. at 1561 (citation omitted); *see also Moore*, 790 F. Supp at 1567-68.

52. Osceola has ***never*** permitted a use similar to the one proposed by MDM in an E-2A district, regardless of whether or not the proposed users were members of a "discipleship" program or otherwise shared a common spiritual viewpoint. *See* Garrod Affidavit, Ex. 3 hereto. Thus, there is no evidence that Osceola has treated MDM any less favorably that it has treated other "secular" applicants and Osceola is entitled to judgment in its favor on MDM's Equal Protection claim. *See Daytona Rescue,* 885 F. Supp. at 1561; *Moore*, 790 F. Supp at 1567-68.

Conclusion

For the foregoing reasons, and in accordance with the foregoing authorities, Osceola respectfully requests that this Court enter a judgment in its favor on all counts and claims asserted in MDM's Complaint, and also award Osceola its reasonable costs and attorney's fees pursuant to 42 U.S.C. §1988.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a Notice of Electronic Filing to the following: **David M. Corry**, *Counsel for Plaintiff*, Liberty Counsel, 1055 Maitland Center Commons, Maitland, FL 32751.

Respectfully submitted,

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