

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

Docket No. 08-E-0294

**B.V. BROOKS, KENNETH F. CLARK, JR., MARISA DEANGELIS KANE, JOHN H. PLUNKETT, DOUGLAS R. RAICHLE, ROBERT G. REED III, AND JOHN STEEL III,**

**Petitioners**

**v.**

**TRUSTEES OF DARTMOUTH COLLEGE,**

**Respondent**

**MEMORANDUM OF RESPONDENT TRUSTEES OF DARTMOUTH COLLEGE IN  
RESPONSE TO *AMICUS CURIAE* STATEMENT OF PROFESSOR TODD J. ZYWICKI**

**(Oral Argument Requested)**

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September 30, 2009

The College seeks summary judgment on two grounds: the instant lawsuit is barred by *res judicata*, and plaintiffs lack standing as third-party beneficiaries to sue to enforce the Association of Alumni's alleged contract. Prof. Zywicki's statement<sup>1</sup> barely addresses these dispositive issues, discussing *res judicata* in one footnote and third-party beneficiary standing in five paragraphs of a 20-page brief. (Zywicki Statement at 13-15, 20 & n.40.) The statement does not even mention the word "privity," even though the only disputed element of *res judicata* is whether plaintiffs were in privity with the Association in the Prior Lawsuit. Instead, Prof. Zywicki's statement focuses on (i) the election and performance of Alumni Trustees selected by petition (*id.* at 3-4, 7-9); (ii) the Board's decision not to re-elect Prof. Zywicki to a second term as a Trustee (*id.* at 5-7); (iii) changes in the last two decades to procedures for electing Trustees (*id.* at 4-5, 8-9); (iv) the views of Prof. Zywicki and various commentators on those changes (*id.* at 9-10); and (v) the views of Prof. Zywicki and various commentators on trusteeship in general (*id.* at 11-12, 15-20). Each of these issues is irrelevant to whether *res judicata* bars this lawsuit and whether plaintiffs have standing to sue as third-party beneficiaries.

Besides being utterly irrelevant to the two issues before the Court, Prof. Zywicki's discussion of governance-related events and practices at Dartmouth is one-sided—and, in some instances, inaccurate. Dartmouth submits this brief response so that its silence is not construed as acquiescence in Prof. Zywicki's distorted version of events.

1. Prof. Zywicki speculates that he was not reelected to a second term as a Trustee (an act he characterizes as "expulsion") because he "criticized the board-packing plan and opined on the declining state of higher education and growing threat of mal-administration" in a 2007 speech at a public conference outside Dartmouth. (*Id.* at 6-7.) That speech was controversial not

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<sup>1</sup> The Court has not yet ruled on Prof. Zywicki's motion for leave to file an *amicus* statement. The submission of this memorandum is therefore contingent on the Court's ruling on that motion.

because of Prof. Zywicki's comments about the state of higher education, but because his public statements about Dartmouth, its alumni, and its Board reflected poorly on the College, in violation of his fiduciary duties as a Trustee. Among other things, Prof. Zywicki called the late James Freedman, a president of Dartmouth College for more than 10 years, a "truly evil man." (Ex. A at 1.)<sup>2</sup> He also belittled the gifts of alumni donors, a critical source of support for the College, claiming that "\$10 million or a million dollars is chump change at Dartmouth" and that donors "basically use this to buy indulgences for being rich" and "to deal with their conscience." (*Id.* at 3.) Prof. Zywicki further advocated investing in "alternative institutions," either in addition to or *instead of* donating to "[e]lite institutions" like Dartmouth. (*Id.* at 3.) Statements by a Trustee that discourage alumni from donating money to the College are potentially highly damaging to Dartmouth. If that were not bad enough, Prof. Zywicki, who emphasizes his credentials as a scholar (Zywicki Statement at 1-2), launched ad hominem attacks at college administrators and trustees, asserting that those who control the university "don't believe in God and they don't believe in country" and "are vicious people" and that people become trustees "because you get good seats at the football game and you get wined and dined and everybody pretends like you're a genius and all that sort of thing" but "really don't care what goes on inside the classroom, by and large." (Ex. A at 2-3, 5.)

Prof. Zywicki fails to mention any of these comments in his *amicus* statement. Although he now defends his speech, Prof. Zywicki at the time apologized to the Freedman family and stated that he would like to retract other parts of his lecture. (Ex. B.) As a result of this speech, Dartmouth's Board of Trustees voted to reprimand Prof. Zywicki, concluding that he "had exercised poor judgment and had violated his responsibilities as a Trustee of Dartmouth College,

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<sup>2</sup> Dartmouth will refer to documents by exhibit letters, as listed in the Affidavit of Richard C. Pepperman, II, filed herewith.

which include acting in the best overall interests of Dartmouth and representing Dartmouth positively in words and deeds.” (*Id.*)

At the end of Prof. Zywicki’s term as a Trustee, the Board considered whether to reelect him (as well as other Trustees whose first term was expiring) on the basis of “whether appointing the individual to Dartmouth’s governing board is in the best interests of the College.” (Ex. C at 1.) The Board did not reelect Prof. Zywicki. (*Id.*) Although the Board’s deliberations are confidential, Board Chair Charles E. Haldeman noted in a statement concerning the decision that “trustees have fundamental responsibilities and obligations—including fiduciary duties” and that Prof. Zywicki’s 2007 speech was inconsistent with his duties as a Board member. (*Id.*)

2. At the same time it declined to reelect Prof. Zywicki, Dartmouth’s Board of Trustees reelected two other Alumni Trustees who had been selected by petition, T.J. Rodgers and Peter Robinson, despite what Prof. Zywicki characterizes as their “willingness to criticize the administration.” (Zywicki Statement at 7.) The fact that the Board reelected Messrs. Rodgers and Robinson as Trustees puts the lie to Prof. Zywicki’s suggestion that the Board is intolerant of dissent and seeks only like-minded Trustees who are unlikely to disagree or debate the issues. Many Trustees—and not only those nominated through the alumni petition process—have disagreed from time to time with decisions of the majority.

In fact, under the Board’s *Statement of Governance and Trustee Responsibilities*, each Trustee “pledges” to “[p]articipate in rational, informed deliberations by considering reliable information, thinking critically, asking good questions and respecting diverse points of view, in order to reach decisions on the merits that are in the best interests of the institution” and to “[u]se your own judgment in voting versus following the lead of others.” (Ex. D at 1.) Although Board deliberations are confidential, Board Chair Charles E. Haldeman, Jr. states in the accompanying affidavit that Board members “exercise independent judgment regarding Dartmouth’s

governance as well as its financial, administrative and academic affairs”; “scrutinize proposals from the President and other senior officials of the College and have not hesitated to critique and challenge such proposals”; and “determine[] College policy and shape[] in significant ways Dartmouth’s decisions concerning facilities, finances, academic planning, student life, human resources and many other areas of College activity.” (Affidavit of Charles Edgar Haldeman, Jr. (“Haldeman Aff.”), sworn to Sept. 22, 2009, ¶ 3.)

3. On September 8, 2007, the Board of Trustees adopted a resolution increasing by eight the number of Charter Trustees, while keeping the number of Alumni Trustees constant. Prof. Zywicki asserts that the Board made this change to please “a few large donors” and to “silence alumni.” (Zywicki Statement at 9, 15.) This assertion is baseless. As Prof. Zywicki well knows, the resolution was preceded by a thorough study by the Board’s Governance Committee that resulted in a lengthy report explaining in detail why the changes would benefit Dartmouth as a whole. The report concluded that the College should add eight Charter Trustee seats because “[s]ixteen is the minimum number of Charter Trustee positions that we believe are necessary to provide the Board with the needed skills, capabilities, and diversity to match the breadth of Dartmouth’s programs and meet the challenges of higher education in the 21<sup>st</sup> century.” (Ex. E at 2.) As the report explained, adding Alumni Trustee seats would not serve the same purpose “because while it is possible that the Alumni Trustee nomination process *might* produce a nominee who matches the College’s greatest needs, there is no assurance that it will do so.” (*Id.*) Moreover, adding Alumni Trustee seats, and consequently increasing the number of contested elections for such seats, would be “potentially divisive, political, and distracting” and would impose “a cost” on Dartmouth. (*Id.*) This conclusion was based on the Board’s experience with recent elections, which “unnecessarily pitted some of our most committed,

involved, and capable alumni against one another in a way that risks deterring them from being involved in the future.” (*Id.*)

4. Additional facts flatly contradict Prof. Zywicki’s assertion that the Board believes that “seats should be awarded to financial largesse rather than to skill and a commitment to governance.” (Zywicki Statement at 8.) In the governance study discussed above, the Board’s Governance Committee identified “Charter Trustee Criteria” for nomination of Trustees to the Board. (Ex. E, Appendix B.) The list includes “[a] commitment to giving financially to the College according to one’s means—whether modest or substantial, and to participate fully in the College’s fundraising efforts.” (*Id.* at 1.) But, the Criteria make clear, “wealth alone would never justify trusteeship” and does not substitute for the many other criteria for choosing Trustees, including expertise in particular fields in which current Trustees are not expert; non-profit governance experience; gender, racial, geographic, and age diversity, and personal traits such as an ability to listen to other points of view. (*Id.* at 1-3.) As Mr. Haldeman points out, “[m]any Board members who are not in a position to make significant gifts have been appointed as Trustees because of their backgrounds, skills, or involvement with the College.” (Haldeman Aff. ¶ 7.)

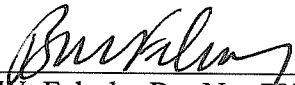
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For the reasons set forth in Dartmouth's opening and reply briefs, no genuine issues of material fact exist, and Dartmouth is entitled to summary judgment as a matter of law. Prof. Zywicki's *amicus* statement does not change this conclusion and should be ignored by the Court.

Dated: September 30, 2009

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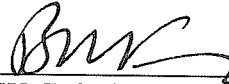
Respectfully submitted,

  
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*Attorneys for Respondent Trustees of  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing and any attachments were served by hand and electronic mail on Eugene M. Van Loan III, Wadleigh, Starr & Peters, PLLC, 95 Market Street, Manchester, NH 03101, on September 30, 2009.



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Bruce W. Felmly, Bar No. 787