

STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

Grafton, ss.

Docket No. 08-E-0294

B.V. Brooks, Kenneth F. Clark, Jr., Marisa Deangelis Kane,  
John H. Plunkett, Douglass R. Raichle, Robert G. Reed III, and John Steel III,  
petitioners

v.

Trustees of Dartmouth College,  
respondent

**MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF  
PLAINTIFFS' OBJECTION TO SUMMARY JUDGMENT**

NOW COMES, Todd J. Zywicki, through counsel, Bernstein, Shur, Sawyer & Nelson,  
P.A. and Zalkind, Rodriguez, Lunt & Duncan LLP, and respectfully moves for leave to submit a  
brief as *amicus curiae* in support of Plaintiffs' Objection to Summary Judgment.

Todd J. Zywicki states the following in support of this motion.

1. Todd J. Zywicki is a professor of law at George Mason University School of Law  
with an extensive teaching and scholarly record in the areas of law and economics, contracts, and  
business associations, and is frequently invited to speak at academic conferences on higher  
education governance. Professor Zywicki is an alumnus of Dartmouth College (the "College")  
and served from 2005 – 2009 as a trustee on the Dartmouth College Board of Trustees (the  
"Board"). Professor Zywicki's academic and professional credentials are further described in the  
contemporaneously filed *amicus* brief.

2. As a former "petition trustee"—nominated by petition and elected by the alumni  
of the College—who sat on the Board at the time of the Board's action destroying the historical  
parity between "alumni" and "charter" trustees on the Board, Professor Zywicki has personal

knowledge of the subject of this lawsuit and the background and circumstances leading to the Board's action. In addition, Professor Zywicki lost his position as a member of the Board as a direct result of the controversy arising from the subject of this lawsuit when the charter trustee controlled Board took the unprecedented action of denying Professor Zywicki a second term as trustee. Professor Zywicki has been closely involved and personally impacted by the essential issues before the Court regarding parity on the Board.

3. In rendering a decision in this matter, the Court must weigh the equities and consider what is just and fair under the particular context and circumstances of this case. *Singer Asset Finance Co., LLC v. Wyner*, 156 N.H. 468, 476, 937 A.2d 303, 311 (2007) ("The propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of the case.") (quotation omitted). Professor Zywicki's *amicus* brief will provide the Court with important factual information that will be helpful to the Court's understanding of the issues presented by this lawsuit. Furthermore, Professor Zywicki's *amicus* brief provides essential background on the law governing the exercise of fiduciary duty that will be helpful to the Court in resolving the ultimate technical questions that govern this case.

4. While there is not express authority permitting the filing of an *amicus* brief, this Court has the power to adopt special rules or make orders in a particular case as justice requires. RSA 490:10; *Garabedian v. Donald William, Inc.*, 106 N.H. 156, 157, 207 A.2d 425, 426 (1965) ("Courts of justice have power, as a necessary incident to their general jurisdiction, to make such orders in relation to the cases pending before them, as are necessary to the progress of the cases and the dispatch of business.") (quoting *Deming v. Foster*, 42 N.H. 165, 178 (1860)). *Amicus* briefs have been accepted and considered in other recent Superior Court proceedings, *see, e.g.*,

*Akins v. Secretary of State of New Hampshire*, 2005 WL 5582403, Doc. No. 04-E-360 (N.H.Super. Oct. 13, 2005) (Trial Order) (McGuire, J.); *Woodview Development Corp. v. Town of Pelham*, 2005 WL 5139536, Doc. No. 2004-607 (N.H.Super. April 26, 2005) (Trial Order) (Galway, J.), and Professor Zywicki was permitted, along with others, to file an amicus brief in the prior proceedings before this Court regarding Board parity at Dartmouth College. *Association of Alumni of Dartmouth College v. Trustees of Dartmouth College*, 2008 WL 693586, Doc. No. 07-E-289 (N.H.Super. Feb. 1, 2008) (Trial Order) (Vaughan, J.).

5. At issue on summary judgment is whether individual alumni are intended beneficiaries of the 1891 Agreement granting the alumni equal representation on the Board. Analysis of this issue requires the Court to examine the generally prevailing ideas of justice and convenience in light of the circumstances and existing mores pertaining to non-profit board governance. Essential to the Court's analysis is an understanding and consideration of the context of the current Board's attempt to violate the 1891 Agreement by packing the Board with loyal "charter" trustees and thereby destroying parity. Professor Zywicki's knowledge and perspective on the background and circumstances surrounding the Board's actions will facilitate the Court's analysis of the issues and its fundamental search for justice.

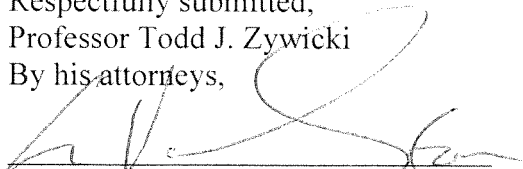
6. Professor Zywicki has neither sought, nor received, the consent of either Plaintiffs or Defendant to submit an *amicus* brief.

7. Given the importance of this case and Professor Zywicki's first-hand knowledge of the events and issues raised in the lawsuit, Professor Zywicki respectfully requests the opportunity to be heard in this matter.

WHEREFORE, for the foregoing reasons, Todd J. Zywicki respectfully requests that this Honorable Court grant leave to file the attached *amicus* brief in this matter.

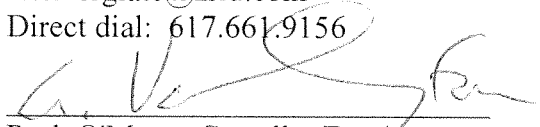
Dated: September 4, 2009

Respectfully submitted,  
Professor Todd J. Zywicki  
By his attorneys,

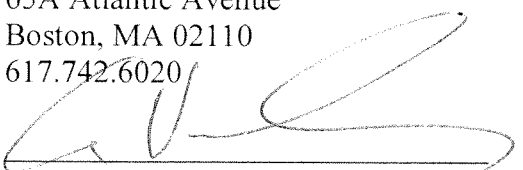
  
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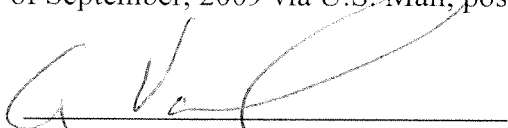
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### Certificate

I hereby certify that a true and exact copy of the foregoing has been forwarded to Eugene Van Loan, Wadleigh, Starr & Peters, LLP, 95 Market Street, Manchester, New Hampshire 03101, counsel for the petitioners, and Richard C. Pepperman, II, Sullivan & Cromwell LLP, 125 Broad Street, New York, New York 10004 and Bruce Felmley, McLane, Graf, Raulerson & Middleton, City Hall Plaza, 900 Elm Street, P.O. Box 326, Manchester, New Hampshire 03105, counsel for Dartmouth College, this 4<sup>th</sup> day of September, 2009 via U.S. Mail, postage prepaid.

  
Andru H. Volinsky, # 2634

\* Attorneys Silverglate and O'Meara-Costello are not members of the New Hampshire Bar. They contemporaneously seek admission, *pro hac vice*, by application filed pursuant to Rule 19, Super.Ct. Rules.