

THE STATE OF NEW HAMPSHIRE

GRAFTON, S.S.

SUPERIOR COURT

Docket No.: 07-E-0289

Association of Alumni of Dartmouth College

v.

Trustees of Dartmouth College

**ASSOCIATION OF ALUMNI OF DARTMOUTH COLLEGE'S
OPPOSITION TO MOTION TO DISMISS**

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INTRODUCTION

In 1891, after difficult negotiations, the Trustees of Dartmouth College (“the College”) and the Association of Alumni of Dartmouth College entered into an agreement that Dartmouth’s board of trustees would be composed of equal numbers of “alumni trustees” (chosen by the Association) and “charter trustees” (chosen by the trustees themselves).¹ In exchange for the right to appoint one-half of Dartmouth’s board, the Association agreed to assume responsibility for recruiting qualified trustee candidates, to drop a threatened lawsuit, and to mail an appeal to its members seeking contributions to the College. For 116 years, the parties have performed according to the 1891 agreement. The alumni have chosen half of Dartmouth’s trustees, and the trustees have chosen the other half. But on September 8, 2007, the incumbent trustees announced a plan to breach the 116-year-old agreement by unilaterally packing Dartmouth’s eighteen-member board with eight additional charter trustees to be chosen solely by the board. Alumni trustees would be reduced to one-third of the board, and a self-perpetuating majority of charter trustees would be created. The College has stated that this may be only the first step; in the future, it may reduce again the percentage of alumni trustees.

The Association filed a petition with this Court that seeks a declaration of the parties’ rights and duties under the 1891 agreement. In response, the College filed a motion to dismiss. The College’s motion does not seriously dispute that the College and the Association reached an agreement in 1891 under which the Association would select five of Dartmouth’s ten trustees, as well as those trustees’ successors going forward. *See* College’s Mem. Supp. Mot. to Dismiss

¹ In addition to the equal numbers of “charter” and “alumni” trustees, New Hampshire’s governor and the College’s president are deemed members of Dartmouth’s board *ex officio*. For brevity and clarity, the Association may refer to the appointed (i.e., non-*ex officio*) trustees simply as “the trustees” or “the board.”

(“Mem.”) at 1, 3. Nor could it.² Rather, the College argues that the 1891 agreement cannot be legally binding, or that the agreement should be interpreted to promise only five (rather than one-half) of the trusteeships to the Association. *See id.* The College’s arguments for dismissal should be rejected for several reasons.

First, the College previously told a New Hampshire court that it was legally obligated to seat the Association’s choices for alumni trustees to one-half of the board seats, and the College told two federal courts that the Association is a “necessary party” to any lawsuit over trustee selection because the “Association has a long-standing interest and role, acting on behalf of all alumni, in the process of selecting College Trustees.” The College has procured the dismissal of earlier lawsuits by touting the Association’s right to choose Dartmouth trustees. The doctrine of *judicial estoppel* bars the College from now contending that the Association has no such rights.

Second, the College’s arguments disregard the requirement that a motion to dismiss be denied if “the allegations pleaded in the plaintiff’s writ are reasonably susceptible of a construction that would permit [relief].” *Bel Air Assocs. v. N.H. Dep’t of Health & Human Servs.*, 154 N.H. 228, 231 (2006). Although the College’s motion pays lip service to this standard, the motion ignores the facts pleaded in the petition, instead substituting the College’s preferred version of events. The motion baldly asks the Court to disbelieve facts in the petition on the ground that they lack (in the College’s view) “sufficient” evidentiary basis. The motion

² Even documents the College attaches to its motion—the minutes of the Association’s June 24, 1891 meeting minutes—refer to the parties’ “agreement” and “clear understanding.” Mem. Ex. D, 1891 Mtg. Min. at 3 (noting that the Association’s negotiators “recommend[ed] the adoption of . . . this . . . agreement”). Other contemporaneous documents also describe the parties’ “agreement.” *See, e.g.*, Ex. 17, June 1891 *N.Y. Times* (referencing the “plan . . . agreed to by the Trustees [and] accepted by the association”); Ex. 18, 1892 Mtg. Min. at 1 (referencing “the agreement entered into between the Committee of said Association and the Committee of the Trustees”); *id.* at 3 (referencing the “understanding . . . between these bodies”); Ex. 19, 1891 *Boston Globe* (referencing “the plan agreed upon”); Ex. 20, Aug. 1891 *N.Y. Times* (same).

asks the Court to draw inferences that disfavor the Association. And it asks the Court to consider an incomplete set of documents that the College submits with its motion, even though such weighing of evidence is improper at this early stage. The College mounts a premature and improper factual challenge to the petition, in apparent recognition that the petition itself is legally adequate. *See Pike Indus., Inc. v. Hiltz Constr., Inc.*, 143 N.H. 1, 4 (1998) (New Hampshire has a “liberal standard for pleadings,” and the “writ need not do more than state the general character of the action”). Moreover, the College attacks phantom allegations that the Association has never pleaded, such as the unpleaded claim that an 1891 board resolution *alone* is the agreement. Needless to say, the petition’s legal adequacy must be judged based on the facts actually pleaded.

Third, even if the Court *were* to accept the College’s improper invitation to disregard the petition and weigh evidence at the motion-to-dismiss stage, the College’s motion still should be rejected. Although this case is at the earliest stage, and discovery has not begun, the facts pleaded in the petition are amply supported by the documentary evidence located to date.³ Indeed, one Superior Court in New Hampshire already has reviewed the voluminous historical record and decided the key issue in this case; *i.e.*, that the 1891 agreement constitutes a legally binding contract between the Association and the College. *See Tell v. Trs. of Dartmouth Coll.*, Docket No. 95-E-58 (Merrimack Cty. Sup. Ct. 1995).

Fourth, the College is wrong that unincorporated associations lack legal capacity to enter contracts. No New Hampshire court has so held, and the New Hampshire Supreme Court

³ The Association objects to the weighing of evidence at the motion-to-dismiss stage. However, if the Court decides to consider the incomplete set of documents that the College attached to its motion, then the Court in fairness also should consider the exhibits filed herewith, which confirm that the Association has stated claims upon which relief can be granted. At a minimum, the documents are “reasonably susceptible of a construction that would permit recovery” when “all reasonable inferences [are] drawn . . . in the plaintiff’s favor,” as required at this stage. *Bel Air*, 154 N.H. at 231.

repeatedly has enforced contracts entered by unincorporated associations. The College's argument, if accepted, would disrupt settled economic relationships throughout the state because (for example) unincorporated trade associations could no longer lease office space. In any event, the Court does not even need to reach the College's legal capacity argument: under settled law, a party that enters a contract is estopped to deny the other party's capacity to enter that contract.

Fifth, the College is wrong that the 1891 agreement must be void because the trustees "lacked the power to delegate to a third party the fiduciary responsibility to select trustees." If the College were right, then the trustees have breached their fiduciary duties continuously for 116 years: it is undisputed that the alumni have chosen one-half of Dartmouth's trustees since 1891. Indeed, even under the College's new plan, alumni still would choose one-third of the non-*ex officio* trustees. The Association seeks only the preservation of the right that alumni have exercised for 116 years. The trustees deemed it in Dartmouth's best interests to enter the 1891 agreement, and this Court should not conclude, a century later, that those trustees breached their fiduciary duties.

FACTS

A. The Association's Efforts To Obtain Alumni Suffrage.

The Association was formed in 1854 to represent the interests of Dartmouth graduates (including their interests in the College's governance), and the Association's members are the 68,800 Dartmouth alumni. *See* Petition ("Pet.") ¶ 1. In the Nineteenth Century, the Association was deeply concerned about the College's poor governance. *See id.* ¶ 8. College administrators and life-appointed trustees were reckless in managing the College's shaky finances, and they insisted on adherence to an antiquated curriculum that emphasized classical and religious study to the exclusion of such practical fields as engineering and natural sciences. *See id.* Starting in

the 1860s, the Association pressed for alumni election of trustees as a means to ensure the College's good governance and the wise use of alumni contributions. *See id.*

The Association in 1869 appointed a ten-member committee to raise \$200,000 of alumni contributions to be paid to the College in exchange for “‘a suitable understanding with the Board’ in reference to the representation of the alumni upon it.” *Id.* ¶ 9. The College resisted this and other overtures during twenty years of intermittent negotiations. *See id.* ¶ 10. In 1885, the Association appointed a new committee “to confer with the trustees to secure for the graduates a fixed voice in the election of trustees. With the present plan of self-perpetuation in that [trustee] body the mass of the alumni was intensely dissatisfied.” *Id.* A Boston newspaper reported in 1888 that alumni gathered in Boston to discuss the College's poor governance and

[the] remedy suggested by all was that the alumni should be granted . . . a definite voice in its management. . . . The tone of these remarks throughout was kindly to the college, but hostile to the administration of its affairs that makes the board of trustees a self-perpetuating and irresponsible body.

Id.

Eventually, the College's mounting financial difficulties and the Association's persistence overcame the resistance to reform. *See id.* ¶ 12. In January of 1890, the College circulated an appeal describing the College's dire financial needs and inviting alumni to Hanover for a report on the situation. *See id.* Boston alumni, perceiving an opportunity for a *quid pro quo*, passed a motion calling for direct election of trustees by alumni. *See id.* Other alumni renewed the call for alumni election of trustees, and the Association, at its 1890 meeting, resolved that “the alumni deem it most important for the prosperity of the College that the Trustees cordially adopt the principle of alumni representation and that they provide as soon as may be for the practical embodiment of the principle.” *Id.*

On June 26, 1890, the Association appointed representatives to negotiate an agreement whereby the alumni would choose Dartmouth trustees. *Id.* ¶ 14. The representatives of the Association and the College spent many months negotiating, seeking helpful legislation from the New Hampshire legislature, employing counsel to negotiate, threatening legal action and the termination of all alumni funding of the College, and promising to raise money for the College if an agreement could be reached. *See id.* The College made a proposal under which four of the ten appointed trustees would be chosen by alumni, a proposal the Association rejected, insisting that no fewer than *one-half* of the appointed trustees be chosen by alumni. *See id.* Finally, in June of 1891, during Commencement week, the alumni and trustees finally reached what has been known as “the 1891 agreement.” *Id.*

B. The 1891 Agreement.

Under the agreement, the alumni thereafter would appoint one-half of the non-*ex officio* trustees (“alumni trustees”), and the trustees would appoint the other half (“charter trustees”). *See id.* ¶ 16. There would be parity—equal numbers—of alumni and charter trustees thereafter. *See id.* The Association was to amend its constitution to provide for the selection of trustees, and it was to have a recurring obligation to select trustees to fill vacancies in alumni seats. *See id.* ¶ 17. The Association agreed that the alumni would assume responsibility for finding potential trustee candidates, evaluating their credentials, and conducting elections. *See id.* Threatened lawsuits would be tabled. *See id.* The Association would withdraw its previous public ultimatum that “no material aid would be furnished the college” absent alumni suffrage. *Id.* The Association also would send an appeal to its members for funds for the College. *See id.*

The agreement between the College and Association is reflected in signed writings of each party. *See id.* ¶ 15. The College, by its board of trustees, adopted resolutions on June 23,

1891 that it said embodied the agreement. *See id.*⁴ The next day, the Association approved the agreement at its annual meeting and also incorporated a partial description of the agreement into its meeting minutes. *See Pet.* ¶ 15. The minutes were provided to the College, which did not object to anything therein. *See id.* Other writings also reflect the 1891 agreement. *See id.*

After the Association voted to accept the 1891 agreement, the Association’s negotiators “congratulate[d] the alumni upon the attainment of the object so long sought, and the beginning of what they believe to be a new era of prosperity for the College.” *Id.* ¶ 5. One graduate beamed: “From this time on, the trustees will include men who represent the graduates and have a duty to them to perform.” *Id.* ¶ 19.

C. 116 Years of Performance.

In reliance on the 1891 agreement, the Association on June 24, 1891 amended its constitution to provide for election of one-half of Dartmouth’s non-ex officio trustees. *See id.* ¶ 21. Three charter trustees resigned, and the Association named their replacements. *See id.*

In 1892, the Association circulated an appeal to its members for donations to the College, as pledged. *See id.* ¶ 22. But in June of that year the College sought to be relieved of its obligation to seat alumni trustees to one-half of the non-*ex officio* board seats. *See id.* The Association rejected the College’s request, and the College performed according to the agreement, seating two more alumni trustees. *See id.*

⁴ Significantly, an earlier, 1876 board resolution (attached to the College’s motion to dismiss) that had provided for some alumni participation in trustee selection had expressly stated that “[t]his [1876] arrangement may be terminated by vote either of the Association or the Board, if at any future time it shall be deemed desirable by either.” *See Mem.* at 7, n. 5; *Mem. Ex. B*, 1876 Bd. Res. *But the 1891 resolution dropped this language providing that the trustees unilaterally could terminate the arrangement.* Moreover, during the negotiations of the 1891 agreement, the parties *rejected* an alternative proposal by which the trustees would have had the option to unilaterally terminate the agreement at the end of fifteen years. *See Ex. 6*, Richardson’s *History* at 655-56.

For the next 116 years, the Association and the College performed according to the 1891 agreement: the Association and its members identified, recruited, and selected (often through contested elections) alumni to fill one-half of the seats on Dartmouth's board. *See id.* ¶ 23. And the College has seated every one of them on its board, maintaining an equal number of charter and alumni trustees. *See id.* ¶ 24. Although the board's size has been increased on two occasions, the College and the Association have taken care to preserve the equal number of charter and alumni seats required by the 1891 agreement. *See id.* ¶ 23. In 1961, the College added four seats: two for charter trustees and two for alumni trustees. *See id.* And in 2003, the College added six seats: three for charter trustees and three for alumni trustees. *See id.*

D. The *Tell* Cases.

Previous litigation concerning the composition of Dartmouth's board is relevant to the College's motion. In 1989 and 1990, a joint committee of alumni and trustees studied the process for selecting alumni trustees. *See Ex. 1, Tell Order at 4.* The joint committee recommended certain procedural changes, including that (i) the College be permitted to re-seat for second terms alumni trustees without further action by the alumni and (ii) at least three candidates stand for election for each alumni trustee seat. *See id.* at 5. The College approved the recommendations in 1990, and the Association approved them in September 1990. *See id.* at 6.

In 1995, some individual graduates challenged the 1990 procedures in a Merrimack County Superior Court lawsuit against the College (*Tell v. Trs. of Dartmouth Coll.*, No. 95-E-58 (Merrimack Cty. Sup. Ct. 1995)). *See id.* The *Tell* petitioners alleged that the College should not have seated alumni trustees chosen by the Association because the 1990 procedures violated the 1891 agreement. *See id.* at 11–12. In response, the College argued that it was *legally obligated* to seat the Association's trustee choices to one-half of the board seats:

[The] Board of Trustees consists of the President of the College, the Governor of the State of New Hampshire, and fourteen elected members who typically serve two five-year terms. Seven of the elected members of the Board are nominated by the alumni of the College. The nominees' names are then transmitted to the Board and *the Board then must act to elect, or seat, the alumni's nominees.*

Ex. 2, July 1995 *Tell* Brief at 3 (emphasis added). The College submitted a vast quantity of archival material to the court. *See* Ex. 3, 1st Cir. Br. at 4 n.3. The court reviewed the historical record, and made these findings in its final order:

The Court sets forth the undisputed background facts of this case essentially as stated in the parties' pleadings. . . .

One half, or seven, of the [non-ex officio] members of the Board are nominated by the alumni of the College and are called "Alumni Trustees". The nominees' names are transmitted to the Board *which must act to elect, or seat, the alumni's nominees.* The other seven Board member are elected by the Board without alumni involvement and are called "Charter Trustees". . . .

A history of the procedure by which alumni . . . gained the right to choose Trustees is relevant to petitioners' claims. The Association of Alumni was formed in or about 1854 to represent the common interests of the graduates of Dartmouth College, including their interest in the governance of the College. Since its founding in 1769, the College has been run by the Board of Trustees which, *until 1891*, was entitled to select, by majority vote, the successor of any Trustee whose office became vacant. Apparently, in the late 1800s, the College was financially strapped and the Board sought funds from the alumni. *As a condition of financial support, the alumni demanded representation on the Board.* Alumni representatives were authorized by . . . the Association . . . to effect *an agreement with the Board* on the matter. . . .

On June 23, 1891, the Board agreed to take no action to fill the next five vacancies (elected trustees numbered 10 at that time) on the Board of Trustees, or succeeding vacancies of those five seats, without first giving at least three months' notice to the Secretary of the Association. During these three months, the Board would accept a nomination by the alumni of a suitable successor. The Board also agreed that the term of office of Trustees so nominated, who came to be called "Alumni Trustees," would be limited to five years, at which time the trustee would resign his seat, and that the terms of office of Alumni Trustees would be arranged so that an election for Alumni Trustee would be held each year. Moreover, *it was agreed that the person nominated by the alumni would be elected by the Board to fill the vacancy.*

On June 23, 1891, the Association adopted a constitution containing terms consistent with *this agreement with the Board* and intended to implement the voting rights newly won from the Board. . . .

[P]etitioners' breach of contract argument as to the Trustees fails because the Court cannot find on the facts alleged that the Board breached its [1891] agreement with the Association [in 1990]. The Board adopted [procedural changes] in April 1990. . . . The Association similarly amended its constitution in September 1990. . . . *The contested changes in procedure did not occur because of unilateral action* by the Board but by agreement of all . . . involved in selection and election of Alumni Trustees. *The contract was thus modified by the parties and not breached by the Board.*

Ex. 1, Tell Order at 1–4, 11–12 (emphasis added). The court thus found that the 1891 agreement existed; that a pledge of “financial support” was part of its consideration; that the College “*until 1891*, was entitled to select . . . the successor of any Trustee”; that “it was agreed that the person nominated by the alumni would be elected by the Board”; that the College “must act to . . . seat . . . the alumni’s nominees”; and that in 1990 the “contract was thus modified by the parties and not breached.” *Id.* at 1–4, 11–12 (emphasis added).⁵

The next year, individual graduates filed a federal lawsuit challenging certain trustee appointments, and the College obtained dismissal by arguing that “the Alumni Association”—which was not named as a defendant—“[wa]s a necessary party” because the “Association has a long-standing interest and role, acting on behalf of all alumni, in the process of selecting College Trustees.” Ex. 3, 1st Cir. Br. at 9. The College argued that the Association had “rights” in the process of trustee selection that it could not defend unless it was joined as a party. *Id.* at 19

⁵ The College’s argument that the *Tell* court “accepted as true plaintiffs’ factual allegations and viewed those allegations in the light most favorable to plaintiffs” (Mem. at 26) is belied by the College’s subsequent representations to two federal courts that the *Tell* court “digested a number of affidavits, reviewed a voluminous documentary record, and heard oral argument of the parties.” Ex. 3, 1st Cir. Br. at 4 n.3. The College’s statement also is belied by the fact that the *Tell* court, after reviewing the historical record, wrote that the facts were “undisputed” and “essentially as stated in [*the College’s*] pleadings.” Ex. 1, Tell Order at 1.

(“[T]he Association cannot join this action to defend its rights” without destroying diversity and thus federal jurisdiction.). The College argued that there was substantial doubt—and that the College should be “rightly concerned”—that it could not “properly” or “legally” appoint to alumni trustee seats any person who was not properly selected by the Association. *Id.* at 22. The district court dismissed the case because the plaintiffs had failed to join a necessary party—the Association—and the First Circuit affirmed.

E. The College’s September 8, 2007 Anticipatory Breach.

Notwithstanding the 1891 agreement, the College on September 8, 2007 announced that it had decided, unilaterally, to stop seating alumni trustees to one-half of the board. *See* Pet. ¶ 37. The College announced that it would pack the eighteen-member board with eight more charter trustees to be chosen by the incumbent trustees, bringing the total number of charter trustees to sixteen. *See id.* The change would expand charter trustees to a two-thirds majority and reduce alumni trustees to a one-third minority. *See id.* The College announced this plan even as it admitted that “[a]lumni sentiment . . . was overwhelmingly in favor of maintaining the traditional ‘parity’ between Charter and Alumni Trustees.” *Id.* ¶ 6.

LEGAL STANDARD

In ruling on a motion to dismiss, courts must “assume [that] all facts pleaded . . . are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff’s favor.” *Bel Air*, 154 N.H. at 231. The motion must be denied if “the allegations pleaded in the plaintiff’s writ are reasonably susceptible of a construction that would permit [relief].” *Id.* New Hampshire has a “liberal standard for pleadings,” and the “writ need not do more than state *the general character of the action* and put both court and counsel on notice of the nature of the controversy.” *Pike*, 143 N.H. at 4 (emphasis added).

Moreover, the existence and terms of a contract are fact-specific questions that must be

determined by the fact-finder after discovery. See *Durgin v. Pillsbury Lake Water Dist.*, 153 N.H. 818, 821 (2006) (“The question of whether a ‘meeting of the minds’ occurred is a factual question to be determined by the trier of fact, as is the issue of the existence of a contract.”) (citation and quotation marks omitted); *Chisholm v. Ultima Nashua Indus. Corp.*, 150 N.H. 141, 145 (2003) (“[W]hen there is a disputed question of fact as to the existence and terms of a contract it is to be determined by the trier of fact.”) (quotation marks omitted).⁶

⁶ In ruling on a motion to dismiss, courts may not look beyond the writ and its attachments *unless the plaintiff acquiesces in that procedure*. See *Chasan v. Vill. Dist. of Eastman*, 128 N.H. 807, 812 (1986). In particular, courts may not weigh evidence that the defendant submits with its motion, even if the evidence could be integral to the plaintiff’s claims. See *Seidel v. Pub. Serv. Co. of N.H.*, 616 F. Supp. 1342, 1353 (D. N.H. 1985) (to “consider the various documents contained in the defendants’ ‘appendices’ (none of which documents are appended to the complaint), the Court would be in violation of . . . Rule 12(b)(6)”). “[T]he fact that a plaintiff might quote from a . . . document in its pleading without appending such document to the pleading[,] does not permit the defendants to introduce such document where a dismissal is sought.” *Id.*; see also *Swoboda v. Dubach*, 992 F.2d 286, 290 (10th Cir. 1993) (error to review document outside complaint because “[t]he court’s function . . . is not to weigh potential evidence . . . but to assess whether *the plaintiff’s complaint alone* is legally sufficient to state a claim”) (quotation marks omitted); *Johnson v. Long Beach Mortg. Loan Trust 2001-4*, 451 F. Supp. 2d 16, 46–47 (D.D.C. 2006) (a contract “attached to . . . [a] Motion to Dismiss is . . . a ‘matter outside the pleading’ and cannot be considered” at this stage) (brackets omitted); *Harvey M. Jasper Ret. Trust v. Ivax Corp.*, 920 F. Supp. 1260, 1263 (S.D. Fla. 1995) (“that a plaintiff might quote from a corporate document in its pleading without appending such document to the pleading does not permit the defendants to introduce such document where a dismissal is sought”) (quotation marks omitted).

The College cites *Chasan* for the proposition that the Court may “consider documents referred to or relied upon in the Petition.” Mem. at 12. But *Chasan*—the only New Hampshire case cited by the College—did not hold that courts at the motion-to-dismiss stage are free to weigh documentary evidence submitted by the defendant, merely because a petition refers to that evidence. See 128 N.H. at 812. Rather, *Chasan* held that “plaintiffs, having themselves submitted documents along with their briefs in opposition to the motion [to dismiss], cannot [later] object to . . . ‘summary judgment treatment’” of the motion to dismiss. *Id.* at 813. Here, the Association expressly does *not* consent to “summary judgment treatment” of the College’s motion to dismiss at this stage of the proceedings, when discovery has not even begun. See *Seidel*, 616 F. Supp. at 1353 (“[S]uch a conversion of the pleadings would necessarily entitle the plaintiffs to discovery.”).

ARGUMENT

I. Judicial Estoppel Bars the College from Denying the Association's Rights.

The College argues that collateral estoppel does not apply here.⁷ *See* Mem. at Part II. Even assuming the College is right, the separate doctrine of judicial estoppel does apply. The College obtained dismissals of other lawsuits by touting the Association's right to select trustees, and judicial estoppel bars the College from changing its position.

A. Judicial estoppel bars a party from changing its position.

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, it may not thereafter, simply because its interests have changed, assume a contrary position." *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 848 (2005) (brackets and quotation marks omitted). "The purpose of this doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* (quotation marks omitted).

While the circumstances under which judicial estoppel may be invoked vary with each situation, the court considers the following three factors: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id.; *see also Cohoon v. IDM Software, Inc.*, 153 N.H. 1, 4 (2005).

Judicial estoppel applies even if the estopped party could not have obtained appellate review, and even if the court's findings were not essential to a final judgment. *See Kelleher*, 152 N.H. at 848; *Cohoon*, 153 N.H. at 5. Judicial estoppel applies to a party's legal arguments. *See*

⁷ The College presumably raised collateral estoppel anticipating that the Association might invoke that doctrine to oppose the College's arguments for dismissal. For purposes of opposing the College's motion, however, the Association makes no collateral estoppel argument.

Kelleher, 152 N.H. at 848–49.⁸ It applies to positions taken in earlier cases in other courts. *See id.* And it applies even if the party invoking it was not a party to the earlier litigation. *See id.* at 832; *Cohoon*, 153 N.H. at 5. A plaintiff invoking judicial estoppel need not have relied on the defendant’s prior litigation position. *See Cohoon*, 153 N.H. at 5.

In *Kelleher*, a window manufacturer argued in Eighth Circuit litigation against a chemical company that its windows were warranted to last at least one year. *See* 152 N.H. at 849. In later New Hampshire litigation against homeowners, the manufacturer argued that the warranty was exactly one year. *See id.* The New Hampshire Supreme Court held that the manufacturer was estopped from making that argument. *See id.* Because the manufacturer “benefited from refuting the applicability of the alleged one-year warranty” in federal court, “it would be manifestly unjust to allow [it] to assume a contrary position in this case.” *Id.*

Likewise, in *Cohoon*, a corporation argued in a malpractice case against its attorneys that its shareholders had certain valuable rights vis-à-vis the corporation. *See* 153 N.H. at 5. The malpractice case settled before judgment, and shareholders later sued the corporation. *See id.* The Supreme Court held that the corporation was judicially estopped to deny the shareholder-plaintiffs’ rights. *See id.* The shareholder-plaintiffs’ “would be hurt . . . by now allowing [the corporation] to maintain the inconsistent position that the [shareholders] have no . . . rights after [the corporation] used those rights to obtain a settlement from the defendant-attorneys in the malpractice suit.” *Id.* at 7. The court affirmed judgment for the plaintiffs. *See id.*

⁸ *See also In re Cassidy*, 892 F.2d 637, at 641–42 (7th Cir. 1990) (A “change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact.”).

B. The College’s new position is inconsistent with its prior positions.

The College’s position in this case is clearly inconsistent with its prior positions. The College contends that the Association has *no rights*, contractual or otherwise, to choose Dartmouth trustees. It contends that “the trustees [have] the sole authority and responsibility for selecting their successors.” College’s Mot. at ¶ 1. But the College sang a different tune—and prevailed—when seeking dismissal of the *Tell* plaintiffs’ state and federal suits.

In the Merrimack County case, the College argued that it was legally obligated to seat the Association’s choices for alumni trustee to one-half of the board seats: “Seven of the [fourteen] elected members of the Board are nominated by the alumni of the College. The nominees’ names are then transmitted to the Board and *the Board then must act to elect, or seat, the alumni’s nominees.*” Ex. 2, July 1995 *Tell* Brief at 3 (emphasis added). According to the College, the court “digested a number of affidavits, reviewed a voluminous documentary record, and heard oral argument of the parties,” Ex. 3, 1st Cir. Br. at 4 n.3, and it agreed that the College “must” seat the Association’s nominees, dismissing the case. *See* Ex. 1, *Tell* Order at 1–4.

The next year, in federal court, the College denied that the 1891 agreement was binding, but nonetheless argued that the Association had acquired unspecified “rights” in the selection of Dartmouth trustees. The College argued that “the Alumni Association [wa]s a necessary party” to the lawsuit because the “Association has a long-standing interest and role, acting on behalf of all alumni, in the process of selecting College Trustees.” Ex. 3, 1st Cir. Br. at 9. The College argued that the Association had “rights” in the process of trustee selection that it could not defend unless it was joined as a party. *Id.* at 19 (“[T]he Association cannot join this action to defend its rights” without destroying diversity and thus federal jurisdiction.). The College argued that there is substantial doubt—and that the College should be “rightly concerned”—that it cannot “properly” or “legally” appoint to alumni trustee seats any trustee who was not properly

selected by the Association. *Id.* at 22.⁹ The College prevailed by invoking the Association’s rights:

On motion by the Board of Trustees, the district court dismissed the case. . . . It held that the Alumni Association was a necessary party under Rule 19(a); that it could not be joined without undermining diversity (the original basis for federal jurisdiction); and that without the Alumni Association, the action could not proceed ‘in equity and good conscience.’

Tell v. Trs. of Dartmouth Coll., 145 F.3d 417, 418, 420 (1st Cir. 1998) (affirming).

The College—having procured the dismissal of two earlier lawsuits by touting the Association’s rights in the process of choosing Dartmouth trustees—cannot now pretend that the Association has no such rights. As in *Cphoon*, the College would derive an unfair advantage were it permitted “to maintain the inconsistent position that the [Association has] no . . . rights after [it] used those rights to obtain” its desired outcome in earlier lawsuits. 153 N.H. at 7. The College is estopped from denying the existence of the rights the Association has exercised for 116 years in the process of trustee selection.

II. The Petition States a Claim for Breach of the 1891 Agreement (Count I).

A. The petition pleads that the College is required to seat alumni trustees to one-half of the board seats.

The College’s first argument for dismissal concerns the proper interpretation of the 1891 agreement. *See* Mem. Part I.A. Specifically, the College argues that the 1891 agreement gives the Association the right to select no more than *five* trustees, rather than *one-half* of the trustees. The College’s argument is wrong.

⁹ The College argued that if the “court were to declare the 1990 amendments [to the Association’s constitution] invalid, thus drawing into question whether members of the College Board of Trustees have been improperly or illegally seated since 1990, the College is rightly concerned over the effect on Board decisions from 1990 to the present.” Ex. 3, 1st Cir. Br. at 22.

1. New Hampshire courts interpret agreements to give effect to the parties' intentions.

“[Courts] give an agreement the meaning intended by the parties when they wrote it.” *Gen. Linen Servs., Inc. v. Franconia Inv. Assocs., L.P.*, 150 N.H. 595, 597 (2004). To interpret an agreement, the fact-finder must “consider[] the circumstances and context in which the agreement was negotiated.” *Id.* An agreement’s “subject matter, the situation of the parties at the time, and the object intended to be effected will be considered in arriving at the sense of the words they used.” *Peter Salvucci & Sons, Inc. v. State*, 110 N.H. 136, 144–45 (1970) (quotation marks omitted), *aff’d*, 111 N.H. 259 (1971).

2. The petition pleads that the Association has the right to select one-half of the trustees, rather than five.

Focusing on the word “five” in documents the College attaches to its motion, the College argues that the Association has the legal right to select at most five trustees. *See* Mem. at 14. But those documents may not be considered on a motion to dismiss, which merely tests the legal sufficiency of the facts pleaded in the petition.¹⁰ *See Seidel*, 616 F. Supp. at 1353; *Bel Air*, 154 N.H. at 231. And, in any event, “[e]ven language which is otherwise explicit may be read with a modification needed to make it consistent with [the parties’] purpose.” Restatement (Second) of Contracts § 202(1), cmt. c (1981); *see also Peter Salvucci*, 110 N.H. at 144–45.

Here, the petition plainly pleads that “the College and the Association reached an agreement in 1891 giving alumni the right to elect *one-half* of Dartmouth’s trustees.” Pet. ¶ 5 (emphasis added). It pleads that the Association and the College spent many months negotiating,

¹⁰ The College notes that the Association attached documents to its separately filed Motion for Preliminary Injunction, a motion that the Association withdrew without prejudice when the College agreed to postpone the implementation of the disputed governance changes. That the Association submitted evidence to support its Motion for Preliminary Injunction (which the Association filed to prevent irreparable, imminent harm) hardly means that the Association consented to the weighing of evidence at the motion-to-dismiss stage. It did not.

and the College “made a proposal under which four of the ten appointed trustees would be chosen by alumni, a proposal the Association rejected, *insisting that no fewer than one-half* of the appointed trustees be chosen by alumni.” *Id.* ¶ 14. The College relented, and the parties agreed that “the alumni thereafter would appoint *one-half* the non-*ex officio* trustees.” *Id.* ¶ 16.

The petition pleads that, under the agreement “[t]here would be parity—equal numbers—of alumni and charter trustees thereafter.” *Id.* Although the agreement would be implemented by the Association’s choosing trustees to fill the next five vacancies, the “parties well understood that the Association would have the right to choose one-half of the non-*ex officio* trustees thereafter.” *Id.* ¶ 18. At the time, it was believed by the parties (and the College insisted) that the number of trustees could never be expanded beyond ten (plus the two *ex officio* trustees) consistent with the United States Supreme Court’s decision in *Dartmouth College v. Woodward*. *Id.* The agreement that the alumni would choose persons for each of the five trusteeships next becoming vacant and his successors “thus was an agreement (and understood to be such) that the alumni would elect one-half of the non-*ex officio* trustees thereafter.” *Id.* Indeed, it would have been redundant to elaborate that five trustees also equaled one-half of the board. *See id.*

The petition further pleads that the parties’ practice over 116 years—always adding equal numbers of alumni and charter trustees—confirms that they understood that the Association was to choose *one-half* of the trustees. *See id.* ¶ 22. “[H]ow the parties acted . . . is [properly] considered . . . in interpreting the disputed language in [a] contract.” *Spectrum Enters., Inc. v. Helm Corp.*, 114 N.H. 773, 776 (1974); Restatement (Second) of Contracts § 202 cmt. g (1981) (“The parties to an agreement know best what they meant, and their action under it is often *the strongest evidence* of their meaning.”) (emphasis added). The parties’ pleaded purpose was to

pledge one-half of the board seats to alumni, and the “purpose of the parties . . . is given great weight” in interpreting a contract. Restatement (Second) of Contracts § 202(1) (1981).

The College argues that it is “just as likely, if not more, that alumni sought five seats” for some purpose other than choosing one-half of the Board. Mem. at 15. Even if the College’s factual speculation could be considered on a motion to dismiss, “just as likely” is not the standard. The facts pleaded in the petition are “reasonably susceptible of a construction” under which the Association has the right to choose one-half of the trustees. The motion to dismiss should be denied. *See Bel Air*, 154 N.H. at 231.

3. Even if the Court entertains the College’s improper factual challenge to the petition, the College’s motion still should be denied.

In arguing that the Association has the legal right to select no more than five trustees, the College asks the Court to go beyond the petition’s four corners and examine documents attached to its motion to dismiss. As an initial matter, the documents submitted by the College are not the only ones relevant to the parties’ 1891 agreement, and the Association is entitled to develop additional evidence through discovery. *See, e.g.*, Pet. ¶ 15 (“Other writings, including writings to be sought through discovery in this matter, also reflect the agreement.”). At this early stage, the Association “need not do more than state the general character of the action” for its petition to survive dismissal. *Pike*, 143 N.H. at 4. The facts pleaded in the petition state claims, so the motion to dismiss should be denied. *See Bel Air*, 154 N.H. at 231.

However, if the Court *were* to weigh evidence at the motion-to-dismiss stage, it nonetheless should reject the College’s factual challenge because the facts pleaded in the petition are amply supported by the documentary evidence located to date. For example, the negotiations between the College and the Association, the Association’s demands, and its emphasis on the percentage of trusteeships are detailed in John King Lord’s 1913 *History of Dartmouth College*,

Leon Burr Richardson’s 1932 *History of Dartmouth College*, numerous contemporaneous news accounts, or other records. *See, e.g.*, Ex. 5, Lord’s *History* at 378–81, 456–71; Ex. 6, Richardson’s *History* at 578–83, 650–61, 688–89, 696–99; Ex. 7, 1888 *Boston Advertiser*; Ex. 8, *Reform Demanded*. The 1891 parties’ belief that the number of appointed trustees could never legally be expanded beyond ten is documented both in the College’s official histories and in the historical records discovered to date. *See, e.g.*, Ex. 9, 1891 Barrett Opn. (“[Trustee] Barrett, late of the Supreme Court of Vermont, says: ‘The . . . Charter . . . says ‘the whole number of said Trustees hereafter *forever* to consist of twelve and no more.’”); Ex. 5, Lord’s *History* at 463 (“Judges Ross and Barrett and other prominent lawyers [opined] that a change [in number of trustees] could not legally be made.”). Richardson’s *History* confirms that it was the *percentage* of alumni trustees that mattered to the parties in 1891, not the number. *See* Ex. 6, Richardson’s *History* at 659 (The trustees’ “offer . . . really provided a much larger degree of alumni representation (five-twelfths . . . of the total) . . . , [so] it quickly gained the favor of the Alumni Association and was adopted.”). The College’s own website confirms that the 1891 agreement promises alumni one-half of the non-*ex officio* board seats, not a mere five seats:

In 1891 the arguing finally came to an end and a resolution was reached that is still in effect today. The plan settled upon allowed for alumni to appoint *seven* of the sixteen trustees. This proved to be a big victory for alumni and with a newfound voice in trustee selection that was farseeing in its day.

Ex. 10, Alumni Council (emphasis added); *see also* Ex. 11, Tobias’s *Old Dartmouth* at 132 (“[I]n 1891, the alumni obtained the recognition of their right to representation as alumni on the Board of Trustees. Excluding the President and the Governor of New Hampshire, the alumni had gained *one-half of the seats on the Board.*”) (emphasis added).

Although this matter is at the earliest stage, the evidence already located confirms that the parties’ principal purpose was to pledge one-half of the board seats to alumni. *See Gen. Linen*,

150 N.H. at 597 (agreement is given “the meaning intended by the parties when they wrote it”). The facts are “reasonably susceptible of a construction” under which the Association has the right to choose one-half of the trustees. Thus, the motion should be denied.

4. The College’s motion makes three plainly erroneous assertions.

Finally, in support of its argument that the Association has the right to choose no more than five trustees, the College makes three assertions that can be readily rejected:

First, the College repeatedly asserts that “this Court should not interpret a *Board resolution* as a contract.” Mem. at 16 (emphasis added). But the College attacks a phantom allegation that the Association has never pleaded. The Association has never contended that the resolution itself is a contract. To the contrary, the Association contends that the parties’ oral agreement, the trustees’ 1891 board resolution, the Association’s reciprocal resolution the next day adopting the parties’ “agreement,” and the parties’ return performances together are evidence of a legally enforceable contractual relationship. Contractual rights can arise from oral communications, multiple writings, or even from conduct alone. *See Sawin v. Carr*, 114 N.H. 462 (1974); *Huot v. Janelle*, 95 N.H. 10, 12 (1948); *Morgenroth & Assocs., Inc. v. Town of Tilton*, 121 N.H. 511, 514 (1981). What matters is mutual assent to terms, whether manifested orally, in one or more writings, or by conduct, and “the court can[] ascertain[] from all the evidence whether the parties made a binding contract and what it was in spite of some ambiguity.” *Grayson v. LaBranche*, 107 N.H. 504, 505 (1967). “A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of [contract] formation cannot be determined.” Restatement (Second) of Contracts §

22(2) (1981).¹¹ Indeed, the New Hampshire Supreme Court has enforced an 1891 agreement, formed in similar fashion, on behalf of an unincorporated association. *See Curtis v. City of Portsmouth*, 67 N.H. 506 (N.H. 1894). In *Curtis*, representatives of an unincorporated association and the City of Portsmouth negotiated over the assignment of a lease. *See* 67 N.H. at 508. On July 24, 1891, the city council enacted an ordinance authorizing the city to assume the lease. *See id.* Five days later, the association voted to approve assignment of the lease. *See id.* The Supreme Court held that “[t]he ordinance, and the subsequent assignment, taken together” established that a contract enforceable by the association had been formed, even though the parties did not sign any unitary document. *Id.* The 1891 agreement between the College and the Association arose in like fashion. The College’s misleading argument that the “Court should not interpret a *Board resolution* as a contract” is simply unrelated to the Association’s actual claims and provides no basis for dismissal. Mem. at 16 (emphasis added).

Second, building on its earlier assertion, the College argues that “[t]he only ‘rights’ the Association received were those conferred by the resolution . . . which the Board was always free to change.” Mem. at 15; *see also id.* at 14 (“resolutions . . . are always subject to modification”). But, leaving aside the other problems with the College’s argument, the fact that an organization’s board may adopt new resolutions does not mean that the organization is not bound by contracts that the organization previously entered. The trustees could enact a resolution directing that the College’s treasurer not pay the College’s next electric bill, but that resolution would not prevent Granite State Electric from maintaining contract claims against the College for non-payment.

¹¹ “Offer and acceptance become still less important after there have been repeated occasions for performance by one party where the other knows the nature of the performance and has an opportunity for objection to it.” Restatement (Second) of Contracts § 22(2) cmt. b (1981).

Third, the College asserts that documents it submitted do not prove that the College intended to be legally bound. *See* Mem. at 14 (the Association’s minutes “do not state that the . . . Association [has] *the legal right* to select . . . Trustees”) (emphasis added); *id.* at 15 (“[T]he Board’s 1891 resolution does not state . . . that it memorializes a permanently binding contract.”). As an initial matter, the Association disputes the College’s interpretation of these documents (an interpretation that, in any event, may not be considered at the motion-to-dismiss stage). For example, importantly, the trustees’ earlier 1876 board resolution, touted by the College, expressly stated that “[t]his [1876] arrangement may be terminated by vote either of the Association or the Board, if at any future time it shall be deemed desirable by either.” *See* Mem. at 7, n. 5; Mem. Ex. B, 1876 Bd. Res. The 1891 resolution, on the other hand, dropped this unilateral termination language, and the trustees’ decision not to include it in the 1891 resolution plainly evinces the parties’ intent that their new arrangement be terminable only by the mutual consent of both parties (which is why the College sought the Association’s consent to the 1990 changes). Moreover, during the negotiations of the 1891 agreement, the parties *rejected* an alternative proposal by which the trustees would have had the option to unilaterally terminate the agreement at the end of fifteen years. *See* Ex. 6, Richardson’s *History* at 655-56. In any event, even if the College’s interpretation of documents could be considered at this stage of the proceedings, the College also is wrong on the law: “Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract” Restatement (Second) of Contracts § 21 (1981). The facts pleaded in the petition are “reasonably susceptible of a construction” under which the Association has the right to choose one-half of the trustees. *See Bel Air*, 154 N.H. at 231. The College’s motion to dismiss therefore should be denied.

B. The petition pleads consideration.

The petition pleads that the Association agreed to assume responsibility for finding potential trustee candidates, evaluating their credentials, and conducting elections. It also agreed to send an appeal to its members for contributions for the College, to withdraw a public ultimatum opposing alumni contributions, and to forebear from filing a lawsuit. *See, e.g.*, Pet. ¶¶ 17, 22, 24, 33, 42. Despite these facts, the College asserts that the “Association did not provide legal consideration” as part of the 1891 agreement. Mem. at 16. A century of settled law contradicts the College’s argument.

1. The petition pleads agreed-upon performances and forbearance.

Any promise or performance, however small, is legally sufficient consideration if there was bargaining between the parties. *See Chisholm*, 150 N.H. at 145; *Burgess v. Queen*, 124 N.H. 155, 160 (1983). The law “does not measure the adequacy of . . . consideration.” *Frye v. Hubbell*, 74 N.H. 358, 375 (1907). “Only in the absence of bargaining will the court weigh the relative values of the benefits and detriments.” *Burgess*, 124 N.H. at 160.

The petition pleads that the parties “spent many months negotiating, seeking helpful legislation from the New Hampshire legislature, employing counsel to negotiate, threatening legal action and the termination of all alumni funding of the College, and promising to raise money for the College if an agreement could be reached.” Pet. ¶ 14. The petition describes the parties’ positions, and specific proposals that were rejected as part of the bargaining. *See id.* Indeed, the College conceded in the prior federal litigation that “the historical materials show that the resolution of the 1891 controversy was arrived at through a process of negotiation,” a concession that the district court confirmed after examining the historical materials. *Id.* ¶ 27; *see* Ex. 12, *Tell v. Trs. of Dartmouth Coll.*, Civil No. 96-357-B, at 8 (D. N.H. June 15, 1997) (the “1891 Trustee selection procedures were arrived at through a process of negotiation between the

Trustees and a committee appointed by the Association”). The petition pleads that the negotiations resulted in the Association’s agreement to four performances:

First,

the Association . . . was to have a recurring obligation to select trustees to fill vacancies in alumni seats. The Association agreed that it and its members would assume responsibility for finding potential trustee candidates, evaluating their credentials, and conducting elections. . . . The Association was to designate members to stand for election and to serve the College as alumni trustees.

Pet. ¶ 17.¹² *Second*, the Association agreed to send an appeal to its members for contributions for the College. *Id.*; *see also id.* ¶ 28. *Third*, the Association “agreed to withdraw a public ultimatum that ‘no material aid would be furnished the college’ absent alumni election of trustees.” *Id.* ¶ 17. *Fourth*, the Association agreed to table the litigation that its leaders had threatened to bring against the trustees in the days before the 1891 agreement was reached. *See id.*¹³ The petition pleads that the Association agreed to undertake certain tasks and to forebear from bringing suit. The petition pleads consideration, so the College’s motion should be denied. *See Bel Air*, 154 N.H. at 231.

2. The improper factual challenge over consideration should be rejected.

Implicitly recognizing that the petition states a claim, the College again mounts an improper factual challenge to the petition, arguing that the weight of the evidence does not support a finding of adequate consideration. As explained above, this sort of inquiry is improper

¹² The College’s motion makes the bare statement that these performances “hardly . . . qualify[y] as legal consideration” (Mem. at 17), but it offers neither reasoning nor legal authority to explain why it believes these performances “hardly qualify[y].” They plainly do. *See Burgess*, 124 N.H. at 160 (courts will not judge the adequacy of consideration).

¹³ The College cannot seriously contend that forbearance from bringing suit is not good and valuable consideration. *See, e.g., Burgess*, 124 N.H. at 160 (surrendering even an unfounded legal claim is good consideration “so long as [the claim] [i]s not wholly frivolous and unreasonable”).

at the motion-to-dismiss stage. Even if the Court were to weigh documentary evidence at this premature stage, however, it still should reject the College's motion because the evidence collected to date supports the consideration described in the petition.

First, concerning the Association's assuming responsibility for choosing one-half of the trustees (*see* Pet. ¶ 17): The College's motion asserts that the Association's minutes of June 24, 1891 do not "even mention the Association's side of the supposed bargain." Mem. at 17. Not true. The Association's minutes expressly refer to the "agreement" and state that "the Alumni should understand . . . that they were to have . . . an annually recurring obligation to discharge for [the College] which they could not throw off or leave to the Board of Trustees." Mem. Ex. D, 1891 Mtg. Min. at 2. The minutes recite detailed procedures (e.g., holding annual elections) that the Association was to adopt to fulfill its new obligations. *See id.* at 3–5. The minutes further state that the agreement was made with "the clear understanding" that the Association would assume the College's former role of vetting and recruiting trustees:

These resolves were adopted on the part of the Board with the clear understanding and assurance that three vacancies in the Board will be provided at once, and two more before the next commencement in 1892. *All to be filled as above provided* and that the persons so nominated by the Alumni will be elected to the Board to such Trusteeships, and that . . . *there shall be an annual election of a Trustee* at each commencement.

Id. at 3 (emphasis added).

Second, concerning the Association's agreement to send an appeal to its members for contributions for the College (*see* Pet. ¶ 17, 28): The College argues that the evidence of this consideration is "snippets" from contemporaneous news accounts and from Leon Burr Richardson's 1932 *History of Dartmouth College* "with no direct connection to the Board's 1891 resolution." Mem. at 18. But the College is mistaken that the evidence is "snippets," or that the agreement had "no direct connection to the Board's 1891 resolution" (especially when the facts

are viewed in the light most favorable to the Association). *Id.* at 18. To the contrary, Richardson’s *History* (for example) explains that the “Association [made] a pledge of support . . . during the struggle to obtain alumni representation upon the board,” and the Association “redeemed [that] pledge” in May of 1892 by mailing an appeal to all of its members, thus raising \$17,000 for the College for new athletic facilities. Ex. 6, Richardson’s *History* at 689. “The leaders of the alumni . . . [had] professed themselves to be willing to bring financial aid to the institution, but only if they had active voice in its management.” *Id.* at 654; *see also* Ex. 5, Lord’s *History* at 482 (in the fall of 1891, the Association began raising money “to support the demand for representation on the Board of Trust”). Dartmouth’s President Samuel Bartlett acknowledged the Association’s proposal to raise money in exchange for board seats, writing in Dartmouth’s student newspaper (during the negotiations that led to the 1891 agreement) that “[m]ore money is our first, second and third want. And it may undoubtedly be hoped that a closer relation to the Alumni will secure . . . a large increase of Alumni contributions to the College.” *See* Ex. 13, *The Dartmouth* at 2.

Third, concerning the Association’s agreement to withdraw its public ultimatum that no material aid should be furnished the College absent alumni election of trustees (*see* Pet. ¶ 17): The evidence is substantial. The Association’s leaders had taken a public stance that alumni should withhold donations until they were granted suffrage. An 1885 alumni circular stated:

What is needed is more money and the remodeling of the board of trustees, to allow the alumni a voice. . . . As for the money, there is plenty to be had, and the trustees know it, among the alumni. *But it will not be forthcoming until certain objections are removed.*

Ex. 14, 1885 Circular (emphasis added). The Association leaders told an 1888 alumni gathering that “alumni should be granted . . . a definite voice in [the College’s] management, and that, until it is done, the effect of their active assistance could not be expected.” Ex. 7, 1888 *Boston*

Advertiser. During the 1891 negotiations that culminated in the agreement, Association leaders “reinforced [their] demand [for board seats] by the practical alternative that *unless it should be granted no material aid would be furnished the college.*” Ex. 15, 1892 *Boston Advertiser* (emphasis added). As one historian has explained, “the alumni equated their demands—in this case, . . . direct election of alumni . . . —with the contribution of funds.” Ex. 11, Tobias’s *Old Dartmouth* at 96. Indeed, Dartmouth trustee Hiram Hitchcock expressly recognized the Association leaders’ ultimatum before a gathering of New York alumni in January 1891, telling alumni: “We want your financial aid, and you are right in applying to your Alma mater the principle, ‘No taxation without representation.’” Ex. 16, Jan. 1891 *N.Y. Times*. Discovery has not yet begun, but the evidence collected to date strongly supports the Association’s claims.

Fourth, the Association’s agreement to table litigation that its leaders had threatened against the trustees just before the 1891 agreement is described in the 1913 and 1932 *Histories of Dartmouth*. See, e.g., Ex. 6, Richardson’s *History* at 658; Ex. 5, Lord’s *History* at 467.

In sum, even if a factual challenge to the petition were proper at this stage, the College’s arguments nonetheless should be rejected and its motion denied because the consideration pleaded in the petition is amply supported by evidence.

C. The Association’s obligations are not too indefinite.

The College next argues that “the terms of the supposed contract are not reasonably certain, particularly as they relate to the Association’s ‘obligations.’” Mem. at 19. This is not so. And, even assuming *arguendo* that the 1891 contract was not “reasonably certain,” the parties’ performance removed any uncertainty as to the Association’s obligations.

1. New Hampshire’s “reasonable certainty” requirement is not strict.

“[T]he difficulty regarding uncertainty has probably been overemphasized, and . . . [uncertainty] should not be allowed to hamper equitable relief further than necessity requires.”

Kann v. Wausau Abrasives Co., 85 N.H. 41, 48 (1931) (quotation marks omitted). “Reasonable certainty is all that is demanded, and that requirement is fulfilled if the meaning of the contract, taken as a whole, is intelligible to the court.” *Id.* “[T]he terms of a contract need only be *reasonably* certain to be enforceable.” *Howtek, Inc. v. Relisys*, 958 F. Supp. 46, 48 (D. N.H. 1997) (emphasis added). “[P]ristine preciseness” is not required. *Id.*; *see also Phillips v. Verax Corp.*, 138 N.H. 240, 245 (1994) (“not all terms need be scrupulously exact for a contract to exist”). The “terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.” *Id.*

In *Howtek*, a manufacturer provided color scanners to a marketer for resale. *See* 958 F. Supp. at 47. The parties agreed that if the marketer someday decided to sell other, unspecified products, then the marketer would “negotiate in good faith for the manufacture [by the manufacturer] of such other products.” *Id.* In a later lawsuit, the manufacturer argued that an agreement merely to negotiate at an unspecified date over the manufacture of unspecified products that a marketer may or may not decide to sell was not “reasonably certain” to be enforceable under New Hampshire law. *See id.* at 48. The court acknowledged that “[a] meaningful standard for measuring compliance with the duty to negotiate in good faith will not always be . . . possible to draw,” but it nonetheless held that the agreement was “of a sufficiently definite nature as to be enforceable under New Hampshire law.” *Id.* at 48–49.

Likewise, in *Sawin v. Carr*, 114 N.H. 462 (1974), the court enforced an oral agreement for the sale of real estate even though the sale date, down payment, payment schedule, and agreed-upon improvements could not be determined. *See* 114 N.H. at 465. The court held that, “[w]hile the court cannot make a contract for the parties, this does not prevent it from

ascertaining from all the evidence whether the parties made a binding agreement and what it was in spite of some ambiguity.” *Id.*

2. The Association’s obligations are not too indefinite to be enforced.

The Association’s obligations under the 1891 agreement are not too indefinite for a court to “determine the existence of a breach.” Mem. at 19. *First*, a court easily could determine if the Association’s members stopped finding potential trustee candidates, evaluating their credentials, and conducting elections in breach of its agreement. *See* Pet. ¶ 17. *Second*, a court easily could determine if the Association breached its agreement by not mailing an appeal to its members for contributions, or if the Association had affirmatively discouraged its members from contributing to the College. *See id.*; *id.* ¶ 22.¹⁴ *Third*, a court easily could determine if the Association filed the litigation against the trustees that it had agreed to table. *See id.* Although the College argues that the petition does not plead this litigation with particularity, the College admits that the threatened litigation was the particular litigation matter that the Association’s negotiating committee threatened in 1891 (on the eve of the 1891 agreement), and for which the committee had hired Senator Edmonds of Vermont as counsel. *See* Mem. at 18 (admitting that the threatened litigation is the matter described in Richardson’s *History of Dartmouth College*); *see also* Ex. 6, Richardson’s *History* at 658 (“[T]he alumni committee was unbending in its support of its own plan, and its members were entirely willing to resort to legal action to defend it. They

¹⁴ In an attempt to paint the consideration as uncertain, the College hypothesizes questions that are unrelated to the facts actually pleaded in the petition. *See, e.g.*, Mem. at 19 (“How much money did the Association agree to raise for the College?”). But the Association has never contended that it pledged to raise a sum certain; rather, it merely pledged to mail an appeal to its members, a promise it fulfilled. Even if the Association *had* pledged to raise an unknown amount of money, however, that promise still would not be so indefinite as to defeat the contract. *See, e.g., Howtek*, 958 F. Supp. at 48 (holding, under New Hampshire law, that “the implied covenant of good faith may supply standards, based on the parties’ expectations, against which the exercise of discretionary authority under a contractual provision may be measured”).

had even secured counsel (Senator Edmonds) for that purpose if litigation should become necessary.”); Ex. 5, Lord’s *History* at 467 (the alumni committee “in anticipation of a suit had informally consulted Senator Edmonds of Vermont, with the expectation that he would appear for them if litigation should follow.”).

In sum, viewing the pleaded facts in the light most favorable to the Association, a court could determine the existence of a breach of the Association’s obligations under the 1891 agreement.¹⁵ The College’s motion to dismiss should be denied.

3. The course of performance removed any uncertainty.

The College’s “uncertainty” argument for dismissal suffers from yet another fatal flaw: it simply pretends that the parties’ 116-year course of performance does not exist. “If . . . the side of the agreement which was originally too vague for enforcement becomes definite by entire or partial performance, the other side of the agreement (or a divisible part thereof, corresponding to the performance received), though originally unenforceable, becomes binding.” *Perreault v. Hall*, 94 N.H. 191, 194 (1946). “Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.” Restatement (Second) of Contracts § 34(2) (1981); *see also Spectrum*, 114 N.H. at 776; Restatement (Second) of Contracts § 202(4) (1981) (“Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.”).

Even assuming *arguendo* that the Association’s obligations were too indefinite as of 1891, the parties’ subsequent performances removed any doubt about what is required. After

¹⁵ A court also easily could remedy violations through such remedies as specific performance or a declaratory judgment. *See* Restatement (Second) of Contracts § 345 (1981).

entering the 1891 agreement, the Association promptly “voted that its constitution be amended to provide for election of one-half of Dartmouth’s non-*ex officio* trustees.” Pet. ¶ 21. The Association then filled vacancies in one-half of the board seats (as it has continued to do for 116 years). *See id.*; *id.* ¶ 24.¹⁶ The College not only acquiesced in the Association’s conduct, the College seated *every one* of the Association’s trustee nominees to its board for 116 years (always maintaining equal numbers of alumni and charter trustees). *See id.* ¶ 42. Viewed in the light most favorable to the Association, the Association’s performance, in which the College acquiesced, removed any doubt as to what is required of the parties: the Association is obliged to find potential trustee candidates, evaluate their credentials, conduct elections when necessary, and nominate trustees to one-half of the board seats. And the College is obliged to seat the Association’s nominees to one-half of the board seats. *See Perreault*, 94 N.H. at 194 (“[A] divisible part [of the agreement] corresponding to the performance received . . . though originally unenforceable, becomes binding” through performance.) (quotation marks omitted). The petition states a claim, so the College’s motion should be denied. *See Bel Air*, 154 N.H. at 231.

III. The College’s “Lack of Capacity” Argument Should Be Rejected.

The College seeks to escape its agreement with the Association by arguing that the Association lacked the legal capacity to enter the agreement. The College’s argument fails for two independent reasons. Unincorporated associations can enter contracts in New Hampshire. But the court does not even need to decide that issue because a party (like the College) that enters an agreement with an unincorporated association is estopped to deny the association’s legal capacity to enter the agreement.

¹⁶ The Association not only dropped its public ultimatum that “no material aid” be furnished the College, it also promptly circulated the promised appeal to its members seeking financial aid for the College. *See id.* ¶ 22.

A. Unincorporated associations can enter contracts.

No New Hampshire court has held that unincorporated associations lack legal capacity to enter contracts, and the New Hampshire Supreme Court has decided several cases involving contracts entered into by unincorporated associations. *See Barclay Square Condo. Owners' Ass'n v. Grenier*, 153 N.H. 514, 517 (2006) (a “condominium’s legal documents are a contract that governs the legal rights between the association and property owners”); *Border Brook Terrace Condo. Ass'n v. Gladstone*, 137 N.H. 11, 13–14 (1993) (warranty between association and developer); *Textile Workers Union v. Textron, Inc.*, 99 N.H. 385, 385–86 (1955) (contract between employer and unincorporated association);¹⁷ *Curtis*, 67 N.H. at 508 (contract between city and unincorporated association).

Moreover, New Hampshire statutory and common law treat unincorporated associations as legal persons for various purposes. *See, e.g., Kay v. Bruno*, 605 F. Supp. 767, 771 (D. N.H. 1985) (holding that the New Hampshire Democratic Party, “an unincorporated association . . . may be sued”); *Nordic Inn Condo. Owners' Ass'n v. Ventullo*, 151 N.H. 571, 575–76 (2004) (granting unincorporated association’s preliminary injunction motion in trademark infringement case); *Kappa Sigma Fraternity v. Kappa Sigma Gamma Fraternity*, 654 F.Supp. 1095, 1097 (D. N.H. 1987) (finding liable for trademark infringement “an unincorporated association holding title to and charged with maintaining the KSG fraternity house”); *N.H. Motor Transp. Assoc. v. Town of Plaistow*, 881 F. Supp. 695, 696 (D. N.H. 1994) (deciding case brought by “an unincorporated trade association”); RSA § 358-A:1 (2007) (“‘Person’ shall include . . . unincorporated associations, and any other legal entity” under consumer protection statute.); *id.* §

¹⁷ *Textron* involved the New Hampshire law of contracts and unincorporated associations; the New Hampshire Supreme Court made no reference to the National Labor Relations Act or other federal statute. *See* 99 N.H. at 385–86 (claims in “[a]ssumpsit” (contract)).

399-B:1 (2007) (“Person’ means any . . . association . . . or unincorporated organization” under fair credit statute.). The College’s argument also is contrary to New Hampshire law that unincorporated associations may sue or be sued. *E.g., Peerless Ins. Co. v. Aetna Cas. & Sur. Co.*, 735 F. Supp. 452, 455 (D. N.H. 1990); RSA § 510:13 (2007). Were the College correct, unincorporated associations could sue or be sued, but they could not enter settlement agreements, hire expert witnesses, stipulate to facts, or even hire counsel. That is not the law.

Unincorporated associations *must* hire counsel; they *cannot* appear *pro se* in New Hampshire courts. *See New Eng. Capital Corp. v. Finaly Co.*, 137 N.H. 226, 228 (1993).

The College’s argument, if accepted, would disrupt settled economic relationships throughout New Hampshire because (for example) unincorporated condominium associations could no longer hire janitors or gardeners. Unincorporated trade associations could no longer lease office space. Unincorporated political parties or interest groups could no longer contract to buy political advertisements.

The College’s argument is based on a dictum from *Shortlidge v. Gutoski*, 125 N.H. 510 (1984). But one 1984 dictum is slim support for the proposition that the Association lacked capacity to contract “with the Board *in 1891*,” as the College contends. Mem. at 21 (emphasis added). The New Hampshire Supreme Court’s 1894 *Curtis* decision is far more relevant to the legal capacity of unincorporated associations in 1891. In *Curtis*, an unincorporated association (Storer Post) contracted with the City of Portsmouth to assign a lease to the city. 67 N.H. at 508. When the city refused to perform under the 1891 contract, the Supreme Court held that the contract was “valid” and that “compensation to [the unincorporated association] for a breach . . . will furnish them an adequate remedy.” *Id.* at 509.

Just as importantly, the issue in *Shortlidge* was not the capacity of unincorporated associations to enter contracts. Rather, *Shortlidge* addressed the separate question of whether an association *member* could be “personally liable” for having “authorized, assented to, or ratified” *the Association’s contracts*, a question the court answered in the affirmative. 125 N.H. at 514. The sentence in *Shortlidge* about an association’s capacity to enter contracts is a dictum. Indeed, it is not even a clear dictum, as *Shortlidge* elsewhere suggests that unincorporated associations do have capacity to enter contracts. *Shortlidge* notes that a member may incur “liability for *the debts of the association*” depending on “the exact terms of *the . . . contract . . . with the . . . Association.*” *Id.* at 514–15 (emphasis added). *Shortlidge* even concluded that a plaintiff who sues an unincorporated association for breach of a contract with the association must satisfy any judgment “out of [the association’s] property alone.” *Id.* at 516. The College’s suggestion that *Shortlidge*’s dictum swept away decades of settled New Hampshire law is clearly erroneous. Indeed, in the twenty-seven years after *Shortlidge*, *not one* court has cited it for the proposition that unincorporated associations lack capacity to enter contracts. Meanwhile, unincorporated associations have continued to do business in New Hampshire. *See, e.g., Barclay Square*, 153 N.H. at 517; *Nordic Inn*, 151 N.H. at 575–76; *Kay*, 605 F. Supp. at 771; *Kappa Sigma Fraternity*, 654 F.Supp. at 1097; *N.H. Motor Transp. Assoc.*, 881 F. Supp. at 696; *Peerless*, 735 F. Supp. at 455. If the Court chooses to decide this issue, it should reject the College’s argument.

B. The College is estopped to deny the Association’s capacity to contract.

The Court need not decide whether unincorporated associations can enter contracts in New Hampshire because the College is bound by the 1891 agreement as a matter of estoppel. “[O]ne who enters a contract with an unincorporated association as a legal entity may be estopped to deny the validity of the contract on the ground that the association did not have a legal existence.” *Wilson & Co. v. United Packinghouse Workers*, 181 F. Supp. 809, 816 (N.D.

Iowa 1960). “A person who enters into a contract with an unincorporated association is, of course, legally liable for the fulfillment of his undertakings under the contract.” *Cox v. GEICO*, 126 F.2d 254, 256 (6th Cir. 1942).¹⁸ This rule is merely a specific application of the general principle, recognized in New Hampshire, that “a person entering into a contract with a corporation in their corporate name is estopped to deny that it is duly constituted.” *Low v. Conn. & P.R.R.R.*, 45 N.H. 378, 1864 WL 1541, at *9 (1864); *see also Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N.H. 295, 1874 WL 4646, at *12 (1874). The College “enter[ed] into a contract” with the Association, so it “is estopped to deny” the Association’s legal capacity to enter into that contract.

IV. The College’s “Lack of Authority” Argument Should Be Rejected.

A. The trustees had authority to enter the 1891 agreement.

The College argues that the 1891 agreement must be void because the trustees “lacked the power to delegate to a third party the fiduciary responsibility to select trustees.” Mem. at 21. This proposition cannot be right. If it were, then the trustees have breached their fiduciary duties continuously for 116 years: it is undisputed that the alumni have chosen one-half of Dartmouth’s trustees since 1891. Indeed, under the College’s reasoning, even its present plan—which delegates to the alumni the power to appoint one-third of the trustees—constitutes a breach of the trustees’ fiduciary duties. Such reasoning cannot be credited.

The cases cited by the College do not support its argument. *Burke v. Concord Railroad*, 61 N.H. 160 (1881), involved interpretation of the Concord Railroad Corporation’s charter. The railroad argued that its charter authorized it to enter into a joint partnership with another railroad,

¹⁸ *See also Painting Sys. Inc. v. Popkins*, 376 So. 2d 584, 586 (La. Ct. App. 1979); *Associated Students of Univ. of Ariz. v. Ariz. Bd. of Regents*, 584 P.2d 564, 567 (Ariz. Ct. App. 1978); *Krall v. Light*, 210 S.W.2d 739, 745 (Mo. Ct. App. 1948); *Petty v. Brunswick & W. Ry. Co.*, 35 S.E. 82, 85–86 (Ga. 1900).

but the court disagreed. *See* 61 N.H. at 243. The court reasoned that “[a]uthority to enter into such a partnership is not granted to the Concord Railroad Corporation by its charter . . . unless such authority *is necessary* to carry into effect the purposes of the charter,” and the joint partnership was not “necessary” to carry into effect the charter’s purposes. *Id.* (emphasis added). Here, by contrast, the College admits that Dartmouth’s charter gave the 1891 trustees broad authority to “make and establish such Ordinances[,] Orders & Laws *as may tend* to the good and wholesome government of the said College.” Mem. at 5 (emphasis added). The trustees in 1891 decided it would “tend to the good and wholesome government” of Dartmouth to enter the 1891 agreement, and this Court should not conclude, a century later, that those trustees breached their fiduciary duties or exceeded their authority under the charter.¹⁹

Chapin v. Benwood Foundation, Inc., 402 A.2d 1205 (Del. Ch. 1979), also does not support the College’s argument. *Chapin* applied Delaware law to conclude that an agreement *among trustees* “[t]o commit themselves . . . perhaps years in advance to fill a particular board vacancy with a certain named person, regardless of the circumstances that may exist at the time that the vacancy occurs, is not the type of agreement that this Court should enforce.” *Id.* at 1211. Here, by contrast, the 1891 trustees did not commit themselves “to fill . . . particular board vacanc[ies] with . . . certain named person[s],” *id.*, but instead agreed that the College would seat “suitable person[s]” to be nominated by the Association. Moreover, the 1891 trustees did not enter an agreement *with each other*, but with the College’s alumni association, which provided critically needed consideration to the College in return. Like *Burke*, *Chapin* provides no support

¹⁹ The College’s argument that the 1891 trustees lacked authority to agree to seat trustees chosen by the alumni was considered *and rejected* by the 1891 trustees. *See* Ex. 5, Lord’s *History* at 456 (before the 1891 agreement, some opined that “under the charter the Trustees cannot divest themselves of the duty and responsibility of filling vacancies”).

for the College's surprising (and erroneous) suggestion that Dartmouth's trustees breach their fiduciary duties by agreeing to seat suitably qualified trustees chosen by the alumni.

B. The trustees had apparent authority to enter the 1891 agreement.

The College's "lack of authority" argument for dismissal is wrong for another reason: even if the trustees lacked *actual* authority to enter the 1891 agreement, the College remains bound under the doctrine of apparent authority.

Persons with "apparent authority" may bind a principal to a contract even if they lacked actual authority. *Boynton v. Figueroa*, 154 N.H. 592, 604 (2006). "Apparent authority" exists if the principal causes "a third party to reasonably believe that the agent is authorized to act." *Id.* (quotation marks omitted). Whether an agent has apparent authority to act on behalf of a principal is a question of fact. *See Dent v. Exeter Hosp., Inc.*, 931 A.2d 1203, 1209 (N.H. 2007).

The College cannot seriously contend that its board of trustees lacked, at a minimum, apparent authority to bind the College. The College appointed a committee of trustees (rather than administrators or professors) to negotiate with the Association leaders. *See, e.g.*, Pet. ¶ 14. During negotiations, College officers (including President Samuel Bartlett) not only did not deny the trustees' authority, they urged that an agreement with the trustee committee be reached. *See id.* ¶ 10. Moreover, the College, by vote of its board of trustees, adopted resolutions it said embodied the agreement that the trustee committee had reached with the Association representatives. *See id.* ¶ 15. The Association approved "the agreement" at its June 24, 1891 meeting, incorporated a partial description of the agreement into its meeting minutes, and provided those minutes to the College. *See id.* The College did not object to anything therein. *See id.* The facts pleaded in the petition are "reasonably susceptible of a construction" under which the College caused the Association to believe reasonably that the trustees were authorized

to enter the 1891 agreement. *Bel Air*, 154 N.H. at 231. Thus, even assuming that the trustees somehow lacked actual authority to enter the 1891 agreement, the motion still should be denied.

V. The Petition States an Implied-in-Fact Contract Claim (Count II) Separate from the 1891 Agreement.

The petition's Count II asserts that the "[t]he College and the Association . . . in the ensuing 116 years took actions that created an implied-in-fact contract." Pet. ¶ 47. The College's only argument for dismissal of this implied-in-fact contract claim is that it "fails for the same reasons that [the] breach of contract claim fails." Mem. at 28. But the Association's implied-in-fact contract claim could proceed even if the Association's claim under the 1891 agreement (Count I) were dismissed.

"An implied in fact contract is a true contract that is not expressed in words; the terms of the parties' agreement must be inferred from their conduct." *Morgenroth & Assocs., Inc. v. Town of Tilton*, 121 N.H. 511, 514 (1981). Under this doctrine, contracts are formed by the parties' conduct even absent an express written or verbal agreement. Thus, in *Morgenroth*, the plaintiff alleged that the towns of Tilton and Northfield entered an implied-in-fact contract with the plaintiff to perform engineering work on a sewer system by voting to appropriate money for the work with the understanding that the plaintiff would perform it. *See id.* at 517. Although no written or oral agreement existed, the Supreme Court held that the plaintiff had stated a claim for breach of contract because the towns' conduct created an implied-in-fact contract. *See id.*; *see also Panto v. Moore Business Forms, Inc.*, 130 N.H. 730, 736 (1988) (an at-will employee's continuing work after his employer announced post-layoff benefits "may be taken to demonstrate both acceptance of [an] offer and consideration for the promise to pay benefits," resulting in "enforceable contract terms").

Even if the 1891 agreement were deemed unenforceable, the Association nonetheless could proceed with its claim for breach of the implied-in-fact contract that arose from the parties' return performances after 1891. The petition pleads that "the Association and its members since 1891 have nominated trustees to fill one-half of the non-*ex officio* seats on Dartmouth's board of trustees," and "[t]he College since 1891 without exception has seated every nominee of the alumni to its board." Pet. ¶ 48. Construing all reasonable inferences in the Association's favor, the petition's description of the parties' return performances states an implied-in-fact contract claim. See *Morgenroth*, 121 N.H. at 514 ("An implied in fact contract is a true contract that . . . must be inferred from their conduct."). The motion to dismiss should be denied as to Count II.

VI. The Petition States a Promissory Estoppel Claim (Count III).

As explained above, the College's promises that the Association could choose one half of the trustees were hardly gratuitous—the College received ample consideration in return. But even if they were gratuitous, the College's promise still would be legally enforceable under the doctrine of promissory estoppel.

New Hampshire courts "have applied promissory estoppel in order to enforce promises when consideration is lacking, such as in cases involving gratuitous promises, charitable subscriptions and certain intra-family promises." *Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270, 290 (1992). Promissory estoppel "serves to impute contractual stature based upon an underlying promise, and to provide a remedy to the party who detrimentally relies on the promise." *Id.* It is properly applied "in the absence of an express agreement." *Id.* Application of promissory estoppel "is a question of fact to be resolved by the trier of fact." *Id.* at 289.

The College argues that "the Association has not alleged a clear and definite promise by the College to permit alumni forever to select one-half of the elected Trustees." Mem. at 29. As an initial matter, the assertion that a promise must be "clear and definite" finds no support

whatsoever in New Hampshire law. To the contrary, the New Hampshire Supreme Court expressly has held that promissory estoppel may apply even “in the case of an indefinite or unclear promise.” *Jackson v. Morse*, 152 N.H. 48, 53 (2005).

Even if “clear and definite” were the ultimate standard to be applied at trial, however, at this stage the “writ need not do more than state the general character of the action.” *Pike*, 143 N.H. at 4. The petition goes far beyond merely informing the College of “the general character” of the Association’s promissory estoppel claim. It pleads (for example) that:

- In 1891, the College promised that “the alumni thereafter would appoint one-half the non-*ex officio* trustees (‘alumni trustees’), and the trustees would appoint the other half (‘charter trustees’).” Pet. ¶ 16.
- The College promised in 1891 that “[t]here would be parity—equal numbers—of alumni and charter trustees thereafter.” *Id.*
- The College promised in 1891 that “trustees chosen by the alumni for limited terms thereafter would wield one-half of the voting power of the ultimate governing body of Dartmouth College.” *Id.*
- “In 1990, the College [admitted to the Association] that it was legally bound to seat as trustees those persons chosen by the alumni.” *Id.* ¶ 29.
- “The College’s official press release announcing the 2003 [board] expansion . . . promised that the number of charter and alumni trustees would expand to ten each. The College announced a schedule for adding the trustees.” *Id.* ¶ 23.
- “The College in 1891 and in the ensuing 116 years made statements promising to seat persons nominated by the alumni to one-half of the non-*ex officio* seats on Dartmouth’s board of trustees.” *Id.* ¶ 53.

The College is simply wrong that the petition has not alleged any promise by the College, and discovery may reveal still more promises. Nor is the College correct that “the Association has not alleged reasonable reliance by it or its members.” Mem. at 30. Once again, the College simply ignores the facts pleaded in the petition. For example, it pleads that, “[i]n express reliance on the 1891 agreement, the Association on June 24, 1891 voted that its constitution be amended to provide for election of one-half of Dartmouth’s non-*ex officio* trustees.” *Id.* ¶ 21. It pleads that:

“[T]he Association and its members have taken countless actions in reliance on the College’s . . . promises . . . , including: . . . conducting countless meetings, expending substantial time and resources preparing for and participating in trustee elections, recruiting potential trustee candidates, evaluating their credentials, conducting and voting in trustee elections, nominating alumni trustees, paying money to the College, raising money for the College, standing for election as candidates for alumni trustee, [and] serving the College as alumni trustees.” *Id.* ¶ 31.²⁰

This case presents a classic promissory estoppel situation.

The College makes two more erroneous assertions:

First, the College asserts that “[a]ctions previously taken . . . cannot serve to bind the College . . . into the future.” Mem. at 30. But the College offers no reasoning or legal authority to support this assertion, which is exactly the opposite of New Hampshire law. The New Hampshire Supreme Court recently held that specific (future) performance is a proper remedy in promissory estoppel cases, and that “reliance damages” (for past actions) is *not* the usual remedy. *Jackson*, 152 N.H. at 53. “[P]romissory estoppel serves to impute contractual stature based upon an underlying promise,” so “full-scale enforcement by normal remedies is often appropriate, [and] . . . the appropriate remedy may be specific performance.” *Id.* (quotation marks omitted).

Second, the College asserts that “the Association cannot possibly establish that injustice can be avoided only by continuing to enforce the Board’s 1891 ‘promise.’” Mem. at 30. But the College ignores that it reiterated its promise to maintain parity as recently as 2003. *See* Pet. ¶ 38. It also ignores that its promises have induced the Association and its members to undertake substantial detriments from which it has benefited, and that it would be manifestly unjust to permit the College to disregard its promises at the expense of the settled expectations of its

²⁰ The College speculates that “there [is no] basis for the Association’s suggestion that alumni in the past have made contributions to the College . . . in reliance upon the Board’s 1891 resolution.” Mem. at 30. But the College ignores that its motion must assume that “all facts pleaded . . . are true.” *Bel Air*, 154 N.H. at 231. In any event, the College’s speculation is wrong, as the trial of this matter will demonstrate.

benefactors. Most importantly, the College ignores that it would be improper to dismiss a well-pleaded claim based on speculation about what the evidence might show after discovery. *See Great Lakes*, 135 N.H. at 289 (Promissory estoppel “is a question of fact to be resolved by the trier of fact.”). The College’s motion to dismiss Count III should be denied.

CONCLUSION

For the foregoing reasons, the Association of Alumni of Dartmouth College respectfully requests that the College’s motion to dismiss be denied.

Respectfully submitted, this 16th day of November 2007.

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THE STATE OF NEW HAMPSHIRE

GRAFTON, S.S.

SUPERIOR COURT

Association of Alumni of Dartmouth College

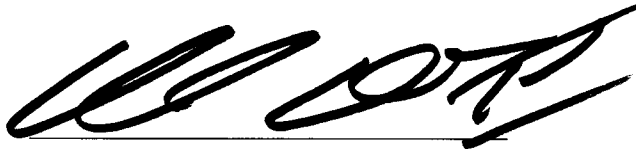
v.

Trustees of Dartmouth College

Docket No.: 07-E-0289

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing and any attachments were served by United States and electronic mail to Richard C. Pepperman, II, Sullivan & Cromwell LLP, 125 Broad Street, New York, New York 10004-2498, peppermanr@sullcrom.com, and Bruce W. Felmly, McLane, Graf, Raulerson & Middleton, P.A., City Hall Plaza, 900 Elm Street, Manchester, New Hampshire, 03101, bruce.felmly@mclane.com this November 16, 2007.

A handwritten signature in black ink, appearing to be "WOT", written over a horizontal line.