

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

Docket No. 07-E-0289

ASSOCIATION OF ALUMNI OF DARTMOUTH COLLEGE,

Petitioner

v.

RESPONDENT TRUSTEES OF DARTMOUTH COLLEGE,

Respondent

**RESPONDENT TRUSTEES OF DARTMOUTH COLLEGE'S MOTION
TO DISMISS PETITION FOR INJUNCTIVE & DECLARATORY RELIEF**

(Oral Argument Requested)

NOW COMES Respondent, Trustees of Dartmouth College (the "College"), by and through their attorneys, McLane, Graf, Raulerson and Middleton, Professional Association, and Sullivan & Cromwell LLP, and moves to dismiss the Petition for Injunctive & Declaratory Relief filed by Petitioner Association of Alumni of Dartmouth College (the "Association") for failure to state a claim upon which relief can be granted. In support thereof, the College states as follows:

1. The Association's claims challenge the method chosen by Dartmouth's Board of Trustees for selecting Trustees. Dartmouth's Charter confers on the Trustees the sole authority and responsibility for selecting their successors. From 1769 until the late 19th century, the Trustees exercised this responsibility without any participation by alumni. In 1891, after many years of debate, the Trustees concluded that the interests of Dartmouth would be best served at that time by permitting alumni to nominate a "suitable" person for each of five trusteeships, then one-half of the elected members of the Board. This arrangement was adopted in a Board

resolution dated June 23, 1891. Today eight of Dartmouth's 18 Trustees (one-half of Dartmouth's 16 elected Trustees) are "Alumni Trustees" nominated by alumni of the College.

2. On September 8, 2007, the Board of Trustees adopted a resolution that increased the total number of Trustees to 26, while keeping the number of Alumni Trustees at eight. That resolution was preceded by a thorough study by the Board's Governance Committee resulting in a lengthy report and recommendations. In view of the changed circumstances since the Board last examined Trustee selection, the Governance Committee recommended that the Board, in the exercise of its fiduciary responsibilities, expand the total size of the Board without increasing the number of Alumni Trustees. After considering the Governance Committee's report, the Board concluded that the interests of the College today and in the future would best be served by adopting the Committee's recommendations. In deciding not to maintain "parity" between Charter Trustees nominated by the Board and Alumni Trustees nominated by alumni, the Board adopted the governance structure that it believed will best ensure that the College's Trustees have the broad range of backgrounds, skills and financial resources needed in today's competitive world, while maintaining a direct role for alumni in the selection of eight Alumni Trustees.

3. The Association clearly disagrees with the Board's judgment about what governance structure is best for Dartmouth. The Association does *not* contend, however, that the Board breached its fiduciary duties of care and loyalty in adopting the September 2007 resolution. The Board's judgment concerning what is best for Dartmouth thus is entitled to substantial deference.

4. The Association nevertheless asks the Court to issue an injunction barring the Board from making a change to the College's governance structure that the Board believes is in the best interest of the College. As a basis for this extraordinary request, the Association alleges that the College breached a supposed "contract" with the Association from 1891. In particular,

the Association maintains that the Board in 1891 made a contractual commitment to permit alumni to nominate one-half of the elected members of the Board in perpetuity.

5. Contrary to the Association's contention, the Board's 1891 resolution was simply that—a Board resolution and not a legally binding contract. The Board thus remained free to modify or rescind it by adopting a superseding resolution in the exercise of its fiduciary duty. The fact that the Board chose to proceed by resolution—something it has inherent authority to rescind—suggests that the Board did not intend to be contractually bound and was not relinquishing its plenary responsibility for College governance.

6. The Association has not alleged the required elements of a legally binding contract. According to the Petition, the alleged contract is “embodied” in the Board's 1891 resolution and the minutes of the Association's June 24, 1891 meeting. But those documents do not describe or create a reciprocally binding contractual arrangement. Indeed, they are utterly silent concerning the Association's end of the purported bargain, failing to specify what consideration the Association or its members supposedly provided to support the alleged contract. Nor do these documents state that Dartmouth's alumni have a contractual right in perpetuity to nominate a specific percentage of Trustees. They instead simply state that the Association shall have the opportunity to nominate a “suitable” person for the next five trusteeships and their successors.

7. The Association's breach of contract claim thus fails as a matter of law for at least five reasons. *First*, the Association has not alleged facts establishing that the Board intended to be contractually bound to a system of “parity”—let alone contractually bound in perpetuity. *Second*, the Association has not alleged that alumni provided legal consideration. Even accepting as true the allegations of the Petition, amorphous promises “to raise funds” or “take a livelier interest in, and direct responsibility for,” the College do not constitute valid

consideration. *Third*, the terms of the alleged contract, particularly as they relate to the Association's required performance, are insufficiently definite to be enforceable. Absent reasonably certain terms, a court cannot determine whether there was mutual assent or whether the Association or its members have complied with their "contractual obligations." *Fourth*, the Board in 1891 lacked the authority to delegate to a third party in perpetuity its fiduciary responsibility to select Trustees. *Fifth*, the Association, as an unincorporated association, lacked the legal capacity to enter into a contract in 1891.

8. The Association also cannot take advantage of the doctrine of collateral estoppel. The issues decided by the Merrimack County Superior Court in *Tell v. Trustees of Dartmouth College*, Docket No. 95-E-58 (N. H. Super. Ct., Merrimack County 1995), were very different from those presented here. The court granted the College's motion to dismiss that lawsuit because plaintiffs had not overcome the strong presumption against judicial interference in the internal affairs of associations. In so ruling, the court did not hold that the Association has a contractual right to select one half of the College's elected Trustees, a question not presented in that case. Moreover, collateral estoppel cannot apply because the College was the prevailing party in that prior litigation and thus had no ability to obtain appellate review of the trial court's "findings."

9. The Association's alternative claims for breach of an implied-in-fact contract and promissory estoppel are likewise meritless. An implied-in-fact contract must satisfy the other elements of an enforceable contract, such as consideration, reasonably certain terms and legal capacity. Those elements are absent here. The Association also has not alleged a clear and definite "promise" by the Board in 1891 that gives rise to a perpetual obligation to permit alumni to nominate one-half of the Board's elected Trustees under the doctrine of promissory estoppel.

10. In support of this Motion, the College includes herewith a supporting Memorandum of Law with Exhibits, including an Affidavit of Richard C. Pepperman, II, Esq., all of which are incorporated herein by reference.

11. Due to the dispositive nature of this Motion, the College has not sought the assent of Petitioner pursuant to Superior Court Rule 57-A.

12. Respondent also requests oral argument on this Motion because it believes that argument will assist the Court by adding to the Court's understanding of the issues presented.

WHEREFORE, Respondent Trustees of Dartmouth College respectfully requests that this Honorable Court enter an Order:

A. Dismissing Petitioner's Petition for Injunctive & Declaratory Relief for failure to state a claim upon which relief can be granted; and

B. Granting such other and further relief as is just and equitable.

Dated: October 26, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing and any attachments were served by Federal Express and electronic mail to Robert M. Cary, Esq., Williams & Connolly, LLP, 725 Twelfth Street, N.W., Washington, D.C. 20005, rcary@wc.com, and Patrick E. Donovan, Esq., Hatem & Donovan, P.C., 215 Main Street, Suite 1, Salem, New Hampshire 03079, pdonovan@hdlawpc.com, this October 26, 2007.

Bruce W. Felmly