

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
OBJECTIONS TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION**

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 hereby objects to the Motion for Preliminary Injunction filed by Petitioner Association of Alumni of Dartmouth College (the "Association"). The Association seeks a preliminary injunction barring the College from seating additional "Charter Trustees" selected by the Board of Trustees pending resolution of this action. In support of this request for the extraordinary remedy of a preliminary injunction, the Association argues that it has a contractual right to select one-half of the elected Trustees on Dartmouth's Board and that the addition of new Charter Trustees selected by the Board would be a breach of that contract. The Association's motion should be denied. In support thereof, the College states as follows:

1. "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *ATV Watch v. N.H. Dep't of Res. & Econ. Dev.*, ___ N.H. ___, 923 A.2d 1061, 1064 (2007) (internal quotation omitted). "An injunction should not issue

unless there is an immediate danger of irreparable harm to the party seeking injunctive relief” *Murphy v. McQuade Realty, Inc.*, 122 N.H. 314, 316 (1982). The party seeking a preliminary injunction also “must show that it would likely succeed on the merits” of its claims. *Kukene v. Genualdo*, 145 N.H. 1, 4 (2000). The Association cannot satisfy this heavy burden.

2. First, there is no immediate danger of irreparable harm to the Association.¹ The Association premises its request for a preliminary injunction on the ground that Dartmouth’s Board will name additional Charter Trustees “[b]eginning in November 2007.” (Ass’n Mot. for Prelim. Inj. at 1.) That is not the case. As Dartmouth’s General Counsel, Robert Donin, explains in the accompanying affidavit, the Board decided on October 11, 2007 that it will not elect any additional Charter Trustees prior to February 1, 2008. (Donin Aff. ¶ 2 (attached hereto as Ex. A).) This decision will not delay the seating of new Trustees because any newly elected Trustees will not assume their positions until the Board’s March 2008 meeting, in any event. By waiting until February 1, 2008 to elect new Trustees, the Board sought to ensure that this Court has adequate time to consider the issues raised by this matter and render a decision. The postponement of the election of new Trustees also will provide additional time for a thorough review of potential Trustee candidates. To assist the Court further in resolving this case, the College also is filing today a motion to dismiss the Petition in its entirety, which fully briefs all of the relevant issues. There is, in short, absolutely no need for the Court to enter a preliminary injunction at this time given that the status quo will remain unchanged over the next three months, thus affording the Court adequate time to resolve this matter.

¹ In arguing that it will suffer irreparable harm absent an immediate injunction, the Association analogizes Dartmouth’s alumni to shareholders of a corporation, citing cases involving shareholders’ voting rights. (See Ass’n Mot. for Prelim. Inj. at 16-17 & n. 6.) That analogy is inappropriate. Unlike shareholders of a corporation, graduates of Dartmouth do not own the College. In addition, Dartmouth’s Board of Trustees does not owe a fiduciary duty to alumni. See *Brzica v. Tr. of Dartmouth Coll.*, 147 N.H. 443, 447-48 (2002).

3. Second, the Association cannot demonstrate that it will likely prevail on the merits of its claims. Indeed, as the College explains in its motion to dismiss, the Association has failed to state a claim upon which relief can be granted. To avoid burdening the Court unnecessarily with additional briefing, the arguments set forth in that separate motion will not be repeated and thus are incorporated herein by reference. Briefly stated, the Association's claims for breach of contract, breach of implied-in-fact contract and promissory estoppel—all based on events occurring in the late 19th century—fail as a matter of law for multiple reasons. Those claims provide the Association with no legal basis to second-guess the Board's exercise of its fiduciary responsibilities on matters pertaining to the governance of the College.

4. The College's motion to dismiss should enable the Court to dispose of this action efficiently and expeditiously without the need for discovery or an evidentiary hearing. The relevant facts are more than 115 years old. No one is alive today with personal knowledge of the events in question, and the historical records are equally available to both parties through Dartmouth's archives.² (*See Ass'n Mot. for Prelim. Inj. at 3 n. 2.*) It should be in both parties' interest to resolve promptly the legal questions posed by the Association's Petition, and the College will work with the Association to propose a briefing schedule on the College's motion to dismiss that ensures that the issues are fully briefed in a timely matter.

5. In sum, the claimed urgency that was the basis for the Association's preliminary injunction motion does not exist. The Court need not issue a decision in November because the Board will not elect any additional Charter Trustees prior to February 1, 2008. The College will work with the Association to ensure that the dispositive issues raised by the College's motion to

² The Association submitted no affidavits in support of its motion for a preliminary injunction, relying instead on a collection of exhibits consisting mostly of historical records, excerpts from books about Dartmouth's history and court papers from prior lawsuits.

dismiss are fully briefed well in advance of that date so that the Court will have adequate time to review the papers, hear argument and render a decision.

6. For the foregoing reasons, the Association's motion for preliminary injunction should be denied.

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

- A. Denying Petitioner's Motion for Preliminary Injunction;
- B. Canceling the Preliminary Injunction Hearing scheduled for November 9, 2007; and
- C. Granting such other and further relief as is just and equitable.

Dated: October 26, 2007

Respectfully submitted,

Bruce W. Felmly
MCLANE, GRAF, RAULERSON & MIDDLETON
City Hall Plaza
900 Elm Street
P.O. Box 326
Manchester, New Hampshire 03105
(603) 625-6464

Richard C. Pepperman, II
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

*Attorneys for Respondent Trustees of
Dartmouth College*

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