

**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**

**MEMORANDUM OF LAW OF RESPONDENT TRUSTEES OF  
DARTMOUTH COLLEGE IN SUPPORT OF THEIR MOTION TO DISMISS**

**(Oral Argument Requested)**

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*

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**INTRODUCTION**

The claims in this case challenge the method chosen by the Board of Trustees of Dartmouth College for selecting Trustees. Dartmouth's Charter, which governs the College's legal affairs, confers on the Trustees the sole authority and responsibility for selecting their successors. From the founding of the College in 1769 until the last quarter of the 19th century, the Trustees exercised this responsibility without any participation by alumni. After many years of debate and expressions of alumni concern, however, the Trustees concluded in 1891 that the interests of Dartmouth would be best served at that time by permitting graduates of the College to nominate a "suitable" person for each of five trusteeships, then one-half of the elected members of the Board. This arrangement was adopted by the Board in a resolution dated June 23, 1891. Over the last 116 years, the Board twice increased the number of alumni-nominated Trustees, by resolutions in 1961 and 2003, as the total number of Trustees was increased. Today eight of Dartmouth's eighteen Trustees (one-half of Dartmouth's sixteen elected Trustees) are "Alumni Trustees" nominated by alumni of the College.

On September 8, 2007, the Board of Trustees adopted a resolution that increased the total number of Trustees to twenty-six, 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 Governance Committee's recommendations on this matter. In deciding not to maintain "parity" between Charter Trustees selected directly by the Board and Alumni Trustees nominated by alumni, the Board, in the exercise of its informed judgment, 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.

The leadership of the Association of Alumni, the petitioner here, clearly disagrees with the Board's judgment about what governance structure is best for Dartmouth.<sup>1</sup> In its Petition, the Association argues that "[t]he selection of one-half of the trustees by Dartmouth alumni remains vital to ensure Dartmouth College's progress, prominence, and usefulness as America's finest undergraduate College." (Pet. ¶ 7.) The Association does *not* contend, however, that the Board breached its fiduciary duties of care and loyalty in adopting the September 2007 resolution.

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<sup>1</sup> Six members of the eleven-member Executive Committee of the Association of Alumni voted in favor of bringing this action, with the President of the Association, Bill Hutchinson, dissenting. In contrast, the Executive Committee of the Dartmouth College Alumni Council, the principal voice of Dartmouth's alumni, opposes this lawsuit and has called for its immediate dismissal. The public statement of the Alumni Council's Executive Committee states that "the Council believes that the lawsuit is meritless, against the will of the majority of Dartmouth's alumni, and harmful to the interests of the College and the alumni."

Under such circumstances, the Board’s judgment concerning what is best for Dartmouth is entitled to substantial deference. “A court cannot second-guess the wisdom of facially valid decisions made by charitable fiduciaries, any more than it can question the business judgment of the directors of a for-profit corporation.” *Oberly v. Kirby*, 592 A.2d 445, 462 (Del. 1991).

The Association nevertheless asks the Court to issue an injunction barring Dartmouth’s Board from making a change to the College’s governance structure that the Board believes is in the best interest of the College. In support of this 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, an arrangement sometimes referred to as “parity.”

Contrary to the Association’s contention, the 1891 resolution was simply that—a resolution of the Board and not a legally binding contract. Consequently, the Board remained free to modify or rescind it by adopting a superseding resolution in the exercise of its fiduciary duty. Although the Association asserts that the 1891 resolution was the product of an “agreement” with the Association, that does not mean that a legally binding contract has been alleged. The word “agreement” has “a wider meaning than contract, bargain or promise” and “contains no implication that legal consequences are or are not produced.” RESTATEMENT (SECOND) OF CONTRACTS § 3 cmt. a (1981). Indeed, 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.

The Association also has not alleged several other 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. (Pet. ¶ 15.) Those

documents, however, 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, contrary to the Association's contention, 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.

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. That conclusion is not supported by any of the allegations and historical materials set forth in the Petition. *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 a direct responsibility for," the College (Pet. ¶ 17) 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. Thus, even if it existed, the alleged contractual arrangement would be unenforceable. *Fifth*, the Association, as an unincorporated association, lacked the legal capacity to enter into a contract in 1891. In short, the Association is attempting to fabricate a contract where none exists and substitute its own judgment for that of the Board on what is best for Dartmouth College.

The Association's other contentions and claims need not detain the Court long. The issues decided by the Merrimack County Superior Court in the 1995 case cited by the Association (Pet. ¶ 28) 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 doing, 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. Besides, the College was the prevailing party in that prior litigation, and thus collateral estoppel cannot apply because the College had no ability to obtain appellate review of the trial court's "findings."

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, and those elements are absent here. Nor has the Association alleged a clear and definite "promise" by the Board in 1891 that gives rise to a perpetual obligation to permit alumni to nominate a specific percentage of Trustees under the doctrine of promissory estoppel.

## **BACKGROUND**

### **A. Relevant History**

Dartmouth was established in 1769 through a Charter from King George III.<sup>2</sup> The Charter created a twelve-person Board of Trustees, which included the first President of the College, Eleazar Wheelock, and the Governor of the Royal Province of New Hampshire. (Charter § 13.) The Charter empowers the Board "to make and establish such Ordinances[,] Orders & Laws as may tend to the good and wholesome government of the said College & all the

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<sup>2</sup> A copy of the Charter of Dartmouth College is included as Exhibit A to the accompanying Affidavit of Richard C. Pepperman, II.

Students & the several Officers & Ministers thereof & to the publick benefit of the same.” (*Id.* § 28.) Upon a vacancy on the Board, the Charter provides that the remaining “Trustees & their Successors . . . shall . . . as soon as may be after the [vacancy occurs,] elect & appoint such Trustee or Trustees as shall supply the place [of the departing Trustee].” (*Id.* § 26.) From Dartmouth’s founding in 1769 until the late 1800s, Dartmouth’s Board of Trustees consisted of the College’s President, the Governor of New Hampshire *ex officio*, and ten Trustees selected and elected by the Board.<sup>3</sup>

In the 1860s, some alumni began expressing concern about the College’s governance and finances. (Pet. ¶ 8.) They believed that Dartmouth’s Trustees at the time (all of whom were elected for life terms) were too conservative and parochial in their theology and educational policies and that Dartmouth needed new ideas, fresh blood and additional resources. Starting in the 1860s, the Association of Alumni and its members sought, among other things, greater alumni participation in the selection of Trustees, not all of whom were Dartmouth graduates at the time. (*Id.*) For example, a committee of alumni was created in 1869 to take steps to increase the College’s funds and to involve alumni more closely in the College’s management. (*See id.* ¶ 9.) The committee offered to institute a campaign to raise \$200,000 if alumni’s objections to certain features of the College’s management were satisfied. (*Id.*) One of the committee’s suggestions was that a minority of the Trustees be elected upon nomination of alumni to hold office for a limited term. The Trustees rejected this suggestion, and the effort to raise \$200,000 was abandoned. (*Id.* ¶¶ 10, 11.)

In August 1875, the Board adopted a resolution that invited the Association of Alumni “to make nominations” for “the next three vacancies in the Board of Trustees” and, when any of

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<sup>3</sup> Although only the Governor of New Hampshire is technically an *ex officio* Trustee—whereas the President of the College by tradition has been elected to the Board—the Petition refers to both as *ex officio* Trustees. Because the distinction is not material to this case, the College adopts the same terminology for purposes of this motion.

those places became vacant, for their successors.<sup>4</sup> Under the Board’s proposed plan, the Association was to report to the Board for each vacancy “[t]he four names receiving the largest number of votes” among alumni on the understanding that “ordinarily,—and in all probability invariably,—some one of the persons nominated will be elected to the vacant place.” The Association of Alumni endorsed this plan at its meeting in June 1876.<sup>5</sup>

Notwithstanding the adoption of the 1876 plan, the Association and its members continued to press for a greater alumni role in the governance of the College over the next two decades. In June 1890, the Association appointed a committee “to confer and co-operate with a Committee of the Board of Trustees in devising some plan to secure to the Alumni an active participation in the management of the college.” (Pet. ¶ 14.) That committee proposed that the number of Trustees be increased by five and that the five new Trustees be elected by alumni for a definite term, while the status of the other twelve Trustees would remain unchanged. Because it would have involved the creation of five new Trustee seats, this plan required an amendment to Dartmouth’s Charter. The alumni committee thus obtained “helpful legislation from the New Hampshire legislature” in 1891 giving Dartmouth permission to add five members to its Board of Trustees.<sup>6</sup> (*Id.*) Ultimately, however, the Board did not adopt this plan (and the legislation expired by its own terms) in part because concerns were expressed about the legal consequences of amending the Charter. (*See id.* ¶ 18.)

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<sup>4</sup> A copy of the Board of Trustees’ resolution is included herewith as Exhibit B.

<sup>5</sup> The 1876 plan also provided that “[t]his 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.” In contrast, the 1891 resolution gives the Association no right to modify or terminate the arrangement.

<sup>6</sup> Until 2003, all amendments to the Charter required the approval of both the Board and the New Hampshire Legislature. In 2003, the Legislature authorized the College to amend its Charter without legislative approval, subject to the proviso that the Governor continue to be an *ex officio* Trustee. *See* 2003 N.H. Laws Ch. 161 (S.B. 1330).

In June 1891, the Board of Trustees finally was persuaded that alumni nomination of five of Dartmouth's then-twelve Trustees, as sought by the committee appointed by the Association, was in the best interests of the College. The Board therefore adopted the following resolution on June 23, 1891 (*see id.* ¶ 15), which, by its terms, superseded the 1876 plan:

I. Resolved, that the graduates of the College, the Thayer School, and the Chandler School, of at least five years['] standing, may nominate a suitable person for election to each of the five trusteeships[,] next becoming vacant on the board of trustees of the College (excepting those held by the Governor and President) and may so nominate for his successors in such trusteeship;

II. Resolved, that whenever any such vacancy shall occur in such trusteeship or the succession thereto, the trustees will take no action to fill the same until the expiration of three months after notice to the Secretary of the Alumni of the occurrence of such vacancy, unless a nomination therefor shall be sooner presented by the Alumni to said Trustees.

III. Resolved, that this plan of nomination shall be taken to supersede the plan heretofore adopted in 1876.<sup>7</sup>

At its meeting on June 24, 1891, the Association approved the plan adopted by the Board on the previous day.<sup>8</sup> (*Id.*) The Association also adopted a new Constitution that provided a procedure to nominate Trustees. (*See id.* ¶¶ 17, 21.) In making its report to alumni, the Association's committee stated: "Your Committee deem it just and proper to add that the Board of Trustees have given this subject their earnest and courteous consideration and by supplementing our efforts by wise suggestions have done much to bring about a harmonious result." (Ex. D at 2.)

Prior to the adoption of the September 2007 resolution at issue in this case, Dartmouth's Board twice amended the plan set out in its June 23, 1891 resolution by adopting a superseding

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<sup>7</sup> A copy of the Board of Trustees' June 23, 1891 resolution is included herewith as Exhibit C.

<sup>8</sup> A copy of the minutes of the Association's June 24, 1891 meeting is included herewith as Exhibit D.

resolution. (See Pet. ¶ 23.) When the Board voted in 1961 to expand the total number of Trustees from twelve to sixteen, the Board adopted the following resolution:

The authorized size of the Board of Trustees having now been increased from twelve to sixteen, the vote of the Trustees at the meeting of June 23, 1891 is superseded by the following: the number of trustees to be elected directly by the Board, in addition to the Governor, *ex officio*, and the President, during his term of office, is hereby increased from five to seven and the number of trustees elected upon nomination by the alumni as heretofore is increased from five to seven.<sup>9</sup>

Similarly, when the Board decided in November 2003 to expand the total number of Trustees from sixteen to no more than twenty-two, it adopted the following resolution:

The vote of the Trustees at the meeting of April 21, 1961 concerning “Composition of the Board” is superseded by the following: the number of trustees to be elected directly by the Board, in addition to the President and the Governor *ex officio*, is increased from seven to not more than ten, and the number of trustees to be elected upon nomination by the alumni is increased from seven to not more than ten.<sup>10</sup>

Since November 2003, two of these new Board seats have been filled, bringing the current size of Dartmouth’s Board of Trustees to eighteen: eight Trustees elected upon nomination of the Board, eight Trustees elected upon nomination of alumni, the Governor of New Hampshire and the President of the College. All sixteen of Dartmouth’s “elected” Trustees today are alumni of the College.

#### **B. The September 8, 2007 Resolution**

From time to time over the decades, the Board, committees of the Board and others have considered whether the size, composition or manner of selecting members of the Board of Trustees should be changed. (Pet. ¶ 25.) On May 19, 2007, the Chairman of the Board of

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<sup>9</sup> A copy of the Board of Trustees’ April 21, 1961 resolution is included herewith as Exhibit E.

<sup>10</sup> A copy of the Board of Trustees’ November 15, 2003 resolution is included herewith as Exhibit F.

Trustees announced that the Governance Committee, a standing committee of the Board, was commencing a review to determine the governance structure that would best serve Dartmouth's interests today and into the future. (*Id.* ¶ 35.) Over the next three months, the Governance Committee conducted a thorough review of Dartmouth's governance with input from current and former Trustees, alumni, faculty, students and parents, as well as leading experts in college and nonprofit governance. The Committee also evaluated the practices of more than thirty leading colleges and universities. After spending hundreds of hours examining governance-related issues, the Governance Committee issued a 42-page, single-spaced report in August 2007, accompanied by three appendices of supporting materials, that set out the Committee's findings and recommendations to the full Board.<sup>11</sup>

The Board considered the Governance Committee's report and recommendations at its meeting on September 8, 2007. (*See id.* ¶ 37.) At that meeting, the Board voted to increase the total size of the Board to twenty-six Trustees by adding eight new "Charter Trustees" (*i.e.*, Trustees both nominated and elected by the Board), while maintaining the number of "Alumni Trustees" (*i.e.*, Trustees nominated by alumni and elected by the Board) at eight. (*Id.*) The Board effected this change by adopting the following resolution:

That the vote of the Trustees at the meeting of November 15, 2003 concerning "Board Size and Composition" is superseded by the following:

The Charter of Dartmouth College is amended so that the number of Trustees shall be 26; provided, that the number of Trustees to be elected by the Board upon nomination by the Board shall be sixteen, and the number of Trustees to be elected by the Board upon nomination by the alumni shall be eight. The Governor *ex officio* and the President during his or her term of service shall continue to be Trustees.<sup>12</sup>

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<sup>11</sup> A copy of the Governance Committee's August 2007 report is included herewith as Exhibit G.

<sup>12</sup> A copy of the Board of Trustees' September 8, 2007 resolution is included herewith as Exhibit H.

Even with this increase in Charter Trustee seats, which will enable the Board to ensure that the College's Trustees have the broad range of backgrounds, skills and expertise needed today, Dartmouth will continue to have among leading colleges and universities one of the highest percentages of Board seats set aside specifically for alumni nomination. (Ex. G at 22 & Table 3.)

### **C. The Association's Petition**

The Association of Alumni is an unincorporated association. (Pet. ¶ 1.) Every person who has ever matriculated as a full-time student at Dartmouth is automatically a "member" for life of the Association.<sup>13</sup> The Association today has only two limited functions: (1) conducting an annual meeting at which the Association's officers and Executive Committee are elected and (2) conducting balloting contests to determine the alumni's nominees for the eight Alumni Trustee seats on the Board.<sup>14</sup>

The Association asserts three claims against Dartmouth College: (1) breach of contract, (2) breach of implied-in-fact contract, and (3) promissory estoppel. (Pet. ¶¶ 40-55.) It seeks a declaration of the Association's alleged contractual right to choose one-half of Dartmouth's elected Trustees and an injunction barring the College from adding Charter Trustees to its Board unless it seats an equal number of Alumni Trustees chosen by the Association.

## **ARGUMENT**

In ruling on a motion to dismiss, the court "must rigorously scrutinize the complaint to determine whether, *on its face*, it asserts a cause of action." *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44 (1987) (emphasis in original). "While it is true that in ruling on a motion to dismiss, all facts properly pleaded are to be deemed true, and all reasonable inferences therefrom are to be

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<sup>13</sup> See Constitution of the Association of Alumni of Dartmouth College, Article II (included herewith as Exhibit I).

<sup>14</sup> See *Tell v. Tr. of Dartmouth Coll.*, Docket No. 95-E-58, at 2 (N.H. Super. Ct., Merrimack County 1995) (included herewith as Exhibit J).

construed in the light most favorable to the plaintiff, the plaintiff must nevertheless ‘plead sufficient facts to form a basis for the cause of action asserted . . . [The court] need not accept statements in the complaint which are merely conclusions of law.’” *Chasan v. Vill. Dist. of Eastman*, 128 N.H. 807, 814 (1986) (quoting *Mt. Springs Water Co. v. Mt. Lakes Vill. Dist.*, 126 N.H. 199, 200-01 (1985)) (alteration in original). An allegation that certain documents “created a contract . . . represents nothing more than a legal conclusion, the validity of which the court [is] not required to accept.” *Id.*

In ruling on this motion, the Court is free to consider documents referred to or relied upon in the Petition.<sup>15</sup> In *Chasan*, for example, the trial court considered documents in addition to the pleadings in determining, on a motion to dismiss, whether a contract existed. *Id.* at 813-14. On appeal, the Supreme Court rejected plaintiffs’ argument that “the trial court erred when it referred to documents submitted with the pleadings in formulating conclusions of law contrary to those alleged in the complaint.” *Id.* at 813. The Supreme Court explained:

Ultimately, “the test for the validity of a form of procedure is . . . whether or not it is what justice and convenience require.” In this case, consideration of the VDE Council report, along with reference to the Covenants for Eastman, was required in order for the court to render adequate and informed conclusions of law with respect to the numerous and complex issues in this case. We hold, therefore, that the trial court did not err in considering documents beyond the pleadings.

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<sup>15</sup> Together with its Petition, the Association filed an Appendix of Exhibits in support of its Motion for Preliminary Injunction, which includes many of the documents discussed herein.

*Id.* at 813-14 (citation omitted); *see also King v. Shorty's New, LLC*, No. 06-C-208, 2006 WL 4640052 (N.H. Super. Ct. Oct. 2, 2006).<sup>16</sup>

### **I. The Association Has Not Alleged a Legally Binding Contract.**

The Association alleges that “[t]he College and the Association reached an agreement in 1891.” (Pet. ¶ 41.) The Association describes this “agreement” as follows:

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”). There would be parity—equal numbers—of alumni and charter trustees thereafter.

(*Id.* ¶ 16.) According to the Association, “[t]he College, by its board of trustees, adopted resolutions [in 1891] it said embodied the agreement.” (*Id.* ¶ 15.) “The Association approved the agreement at its June 24, 1891 meeting and also incorporated a partial description of the agreement into its meeting minutes.” (*Id.*)

An “agreement” is not the same thing as a “contract.” *Trauma Serv. Group, Ltd. v. United States*, 33 Fed. Cl. 426, 429 (Fed. Cl. 1995) (“Not every agreement is a contract.”). Instead, agreement has “a wider meaning than contract, bargain or promise.” RESTATEMENT (SECOND) OF CONTRACTS § 3 cmt. a. Unlike a contract, “[t]he word ‘agreement’ contains no implication that legal consequences are or are not produced.” *Id.*

The Association has not adequately alleged a contract with the College providing for permanent “parity” between Charter and Alumni Trustees. Nor has the Association alleged essential elements of a valid contract, such as consideration, definite terms and capacity to

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<sup>16</sup> *See Diva's Inc. v. City of Bangor*, 411 F.3d 30, 38 (1st Cir. 2005) (on motion to dismiss, court may consider extrinsic documents when their authenticity is undisputed and complaint is dependent upon them); *Carter v. N. Cent. Life Ins. Co.*, Civ. No. 05-cv-399-JD, 2006 WL 2381004, at \*1 (D.N.H. Aug. 17, 2006) (on motion to dismiss, “the court ‘may properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint, even though not attached to the complaint, without converting the motion into one for summary judgment’”); 61A AM. JUR. 2d *Pleadings* § 584 (on motion to dismiss, “court may examine and rely on documents which the plaintiff was aware of and relied on in framing the complaint, even though the plaintiff did not attach the documents to the complaint or incorporate them by reference”).

contract. Finally, any undertaking by Dartmouth's Board in 1891 to delegate in perpetuity to a third party its fiduciary responsibilities to elect Trustees would be unenforceable.

**A. The Association Has Not Adequately Alleged a Contractual Right to "Parity."**

The Association asserts that it has a contractual right to select "one-half of the non-*ex officio* seats on Dartmouth's board of trustees." (Pet. ¶ 41.) There is no support for this conclusory assertion in the documents on which the Association relies.

The Board's 1891 resolution provides that alumni "may nominate a suitable person for election to each of the five trusteeships next becoming vacant on the board of trustees of the College (excepting those held by the Governor and President) and may so nominate for his successors in such trusteeship." (Ex. C.) Contrary to the Association's contention (Pet. ¶ 16), the resolution does not mandate that "[t]here would be parity—equal numbers—of alumni and charter trustees thereafter." By its terms, the resolution does not bestow upon alumni the right—contractual or otherwise—to select a specific percentage of the College's elected Trustees. If, as the Association argues, the 1891 resolution required the Board to seat alumni nominees to one-half of the elected trusteeships in perpetuity, the 1961 and 2003 resolutions setting out the number of Alumni and Charter Trustees on Dartmouth's expanded Board would have been superfluous. Moreover, the fact that the Board consistently dealt with Trustee selection by means of resolutions—which are always subject to modification and revocation—indicates that the Board never intended to surrender its authority over governance issues by means of contract.

Likewise, the minutes of the Association's June 24, 1891 meeting do not state that the Association entered into a contract with the College that gives the Association the legal right to select a specific percentage of Trustees. (*See* Ex. D.) The Association's minutes, like the Board's resolution, simply refer to five Trustee seats. In fact, in describing the new Trustee selection plan, the Association's minutes quote the resolution adopted by the Board.

To be sure, as an arithmetic matter, five trusteeships were one-half of Dartmouth's elected Trustees in 1891. That fact alone, however, is an insufficient basis to conclude that the Board agreed in 1891 that alumni had the contractual right to nominate a specific percentage of Trustees in perpetuity. Throughout their discussions, the Board and the alumni committee focused on the specific number (four or five) of Trustees that would be nominated by alumni, not the percentage of seats. (*See* Pet. ¶ 14.) It is just as likely, if not more, that alumni sought five seats because that was the number of additional trusteeships that the proposed amendment to the Charter would have created or because five alumni seats, together with a five-year term of service, would provide for annual alumni elections. The Association readily admits that Dartmouth's alumni today continue to have the ability to nominate eight Trustees, three more than the five trusteeships specified in the 1891 resolution. (*Id.* ¶ 37.)

The Association notes that doubts were raised in 1891 about the legality of the proposed Charter amendment that would have increased the number of Trustees. (*See id.* ¶ 18.) On that basis, the Association speculates that the parties in 1891 "understood that the Association would have the right to choose one-half of the non-*ex officio* trustees thereafter." (*Id.*) Absent support in the language of the Board's resolution, however, such speculation cannot establish the contractual right claimed by the Association. The only "rights" the Association received were those conferred by the resolution (a kind of quasi-legislative enactment), which the Board was always free to change by adopting a superseding resolution.

It is no doubt for this reason that the Board's 1891 resolution does not state or imply that it memorializes a permanently binding contract that cannot be modified or superseded without the Association's consent regardless of circumstances arising in the future. Similarly, the Association's minutes do not state that the Board entered into a reciprocally binding contractual arrangement with the Association. The 1891 resolution, which itself superseded the previous

plan adopted in 1876, reflected the Board's efforts at that time to accommodate alumni desires and concerns after decades of discussion. As is the case with every Board resolution, the Board retained the inherent authority, in the exercise of its fiduciary duty, to modify the 1891 resolution to address changed circumstances in the future. Absent strong evidence to the contrary, this Court should not interpret a Board resolution as a contract that prevents the Board from making changes to the Trustee selection process that it believes are in the best interest of the College.

**B. The Association Has Not Adequately Alleged Essential Elements of a Valid Contract.**

To form a valid contract, “[o]ffer, acceptance, and consideration are essential.” *Tsiatsios v. Tsiatsios*, 140 N.H. 173, 178 (1995). There also must be a meeting of the minds on all essential terms. *Simonds v. City of Manchester*, 141 N.H. 742, 744 (1997). “Moreover, the terms of a contract must be definite in order to be enforceable.” *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 501 (2006). And the parties to the contract must have legal capacity to enter into a binding contract. RESTATEMENT (SECOND) OF CONTRACTS § 12.

**1. The Association Did Not Provide Legal Consideration.**

“Consideration is essential to all contracts . . . .” *Chasan*, 128 N.H. at 816. To support an enforceable contract, consideration must be valid, not illusory. Consideration is illusory where “two parties exchange promises, but one of the promises appears on its face to be so insubstantial as to impose no obligation at all on the promisor—who says, in effect, ‘I will if I want to.’” 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 2.13 (3d ed. 2004). “Words of promise which by their terms make a performance entirely optional with the ‘promisor’ do not constitute a promise.” RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a. In addition, to constitute legal consideration, a promise must be part of a bargained-for *quid pro quo*. *Id.* § 71(1) (“To constitute consideration, a performance or a return promise must be bargained for.”).

This is a textbook case of failure of consideration. Neither the Board's 1891 resolution nor the minutes of the Association's June 24, 1891 meeting even mention the Association's side of the supposed bargain. These documents, which the Association contends embody the purported agreement, are utterly silent on what promise the Association or its members supposedly made in exchange for the Board's agreement to permit alumni to nominate five Trustees. Had the Board's agreement been part of a bargained-for *quid pro quo*, the Board's 1891 resolution certainly would have set forth the Association's side of the deal. Absent some evidence of bargained-for consideration, there is no basis to conclude that the Board decided to permit alumni to nominate five Trustees in exchange for an enforceable promise from the Association or its members, rather than as an exercise of its fiduciary duty based on what it believed to be the best course of action for the College at the time.

The Association's efforts to hypothesize some consideration fall well short of the mark. First, the Association argues that it agreed to assume the responsibility for identifying and electing prospective candidates for the five Trustee seats. (Pet. ¶¶ 17, 42.) In other words, the Association contends that in exchange for the Board's agreement to permit alumni to nominate five Trustees, the Association agreed that alumni would nominate five Trustees, hardly an exchange of promises that qualifies as legal consideration. What is more, the Board's 1891 resolution does not *require* alumni to nominate anyone. It instead simply says that alumni "may" nominate a suitable person for five trusteeships and that "the trustees will take no action to fill [the vacancy] until . . . three months after notice to the [Association], unless a nomination therefor shall be sooner presented by the Alumni." (Ex. C.) Because the resolution makes the Association's nomination of Trustees entirely optional, the Association's purported promise is illusory and not valid consideration.

Second, the Association contends that it agreed to raise money for the College and notes that alumni have made generous financial contributions over the years. (Pet. ¶¶ 17, 33, 42.) Leaving aside that both the Board’s 1891 resolution and the Association’s own minutes make no mention of this supposed promise, it, too, does not constitute valid consideration. An indefinite “promise” to raise some undefined amount of money at some unspecified point or points in the future can be contrasted with the alumni’s offer decades earlier, which was rejected by the Board, to institute a campaign to raise \$200,000. (*Id.* ¶¶ 9-11.) More generally, the decision of alumni to contribute financially to Dartmouth is, and always has been, purely voluntary. The 1891 resolution would not provide a basis for the College to sue the Association or its members for breach of contract if alumni failed to contribute financially to the College.

Third, the Association asserts that “[a]ccusations that the trustees had acted in bad faith in prior dealings with alumni were to cease,” that “[i]mminent legal actions were to be tabled” and that “[t]he Association and its leaders agreed to withdraw a public ultimatum that ‘no material aid would be furnished the college.’” (*Id.* ¶ 17.) These items are simply snippets that the Association has lifted from a February 11, 1892 news article in the *Boston Daily Advertiser* and from Leon Burr Richardson’s *History of Dartmouth College* with no direct connection to the Board’s 1891 resolution.<sup>17</sup> Once again, the Association’s own minutes say nothing about ceasing accusations of bad faith, tabling imminent legal actions or withdrawing ultimatums not to contribute to the College as part of a *quid pro quo*.

## **2. The Terms of the Alleged Contract Are Too Indefinite.**

Under New Hampshire law, “contracts, both oral and written[,] must be definite in order to be enforceable.” *Sawin v. Carr*, 114 N.H. 462, 465 (1974). Where “the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there

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<sup>17</sup> See Exhibits 4 and 7 to the Association’s Motion for Preliminary Injunction.

is no contract.” RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a.<sup>18</sup> Of course, “the standard of definiteness is one of reasonable certainty and not ‘pristine preciseness.’” *Sawin*, 114 N.H. at 465. The terms of a contract, however, are not reasonably certain unless they “provide a basis for determining the existence of a breach and for giving an appropriate remedy.” RESTATEMENT (SECOND) OF CONTRACTS § 33(2).

Here, the terms of the supposed contract are not reasonably certain, particularly as they relate to the Association’s “obligations” under the alleged agreement. Nothing in the Board’s 1891 resolution or the minutes of the Association’s June 24, 1891 meeting provides any metric for a court to determine whether the Association or Dartmouth’s alumni have breached their obligations under the supposed contract or for giving the College an appropriate remedy if there were a breach. Indeed, with no specificity at all as to the Association’s obligations, there is no basis to find mutual assent on the material terms of the alleged contract. *See Towle v. Wood*, 60 N.H. 434, 436 (1881) (“The mutuality essential to make a promise a sufficient consideration for a promise is wanting . . .”).

Even assuming they were part of the supposed bargain, the very general promises suggested by the Association are too indefinite to be enforceable. How much money did the Association agree to raise for the College? When and how often? What steps did the Association agree to take to ensure that alumni would not accuse the Trustees of bad faith? What litigation did the Association agree to table? Litigation by the Association or individual alumni? How would alumni “take a livelier interest in, and a direct responsibility for, the College’s management, curriculum, and finances”? (Pet. ¶ 17.) Vague assurances of such future conduct

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<sup>18</sup> *See also Chasan*, 128 N.H. at 815 (“the promises and performances to be rendered by each party [must be] reasonably certain”) (internal quotation omitted); *Behrens*, 153 N.H. at 501 (“[T]he terms of a contract must be definite in order to be enforceable.”).

by the Association and alumni may suggest a political compromise designed to address alumni discontent, but certainly do not establish a reciprocally binding contractual arrangement.

### **3. The Association Lacked the Legal Capacity to Contract.**

As an unincorporated association (Pet. ¶ 1), the Association “is merely a group of individuals voluntarily joined together to further a common purpose” and, as such, is “without legal existence or significance apart from its constituent members.” *State v. Settle*, 129 N.H. 171, 178 (1987) (citation omitted). At common law, “unless there is a statute clothing a voluntary unincorporated association with the power to contract or the power to sue and be sued, such an association has no power to enter into, or to ratify, a contract.” 12 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 35:72 (4th ed. 1993).

In *Shortlidge v. Gutoski*, 125 N.H. 510, 512 (1984), the Supreme Court adopted this common law rule. In that case, an attorney sued a member of an unincorporated association for legal fees incurred pursuant to an alleged contract with the association. The defendant, an officer of the association, purported to contract “on behalf of” the association for plaintiff’s services. *Id.* The Court held, however, that the association lacked the legal capacity to enter into a contract:

Although the defendant may have believed that he was acting solely as an agent for a disclosed principal, the Winchester Taxpayers Association, when entering into the employment contract with the plaintiff, *the principal for which he acted was in actuality not a legal entity having the power to contract.*

*Id.* at 515 (emphasis added). The Court thus concluded that “[t]he defendant may, in effect, have entered into a contract personally binding himself and all other members of the taxpayer association who authorized, assented to, or ratified the contract.” *Id.*

No statute in New Hampshire empowers unincorporated associations to enter into contracts.<sup>19</sup> As a result, the Association was “not a legal entity having the power to contract” with the Board in 1891. *Shortlidge*, 125 N.H. at 515. This alone is sufficient reason to dismiss the Association’s breach of contract claim.<sup>20</sup>

**C. The Trustees in 1891 Lacked the Power to Delegate to a Third Party the Fiduciary Responsibility to Select Trustees.**

Any agreement that “tends to limit in a substantial way the freedom of director decisions on matters of management policy . . . violates the duty of each director to exercise his own best judgment on matters coming before the Board” and thus is invalid. *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. 1956). This rule is well-settled in New Hampshire and elsewhere.

In *Burke v. Concord Railroad*, 61 N.H. 160 (1881), the Court considered a contract between Concord Railroad and Boston & Lowell Railroad providing for joint management of the railroad lines running between Concord and Boston. A provision of that contract required the railroads to be operated and managed by a general manager chosen by the directors of the two companies. Concord Railroad’s charter, however, authorized its directors “to elect such agents and servants as are necessary for doing the work of the corporation.” *Id.* at 247. As the Court

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<sup>19</sup> By statute, unincorporated associations are viewed as “a corporation so far as may be necessary to take, hold, manage and use any gift or grant made to them.” RSA 292:14. Another statute permits “[s]ervice of writs or other process against unincorporated associations.” RSA 510:13. Neither of these statutes, however, gives an unincorporated association the legal capacity to contract in its own name. *See* 12 WILLISTON & LORD, *supra*, § 35:72 (“[A] statute which permits an unincorporated association merely to sue or be sued in its association name does not change the legal status of the association in such a manner as to render it liable on contracts entered into in the association name.”).

<sup>20</sup> The Association also may lack the capacity to bring this lawsuit. “The well-established rule is that in the absence of an enabling or permissive statute or rule of practice, an unincorporated association . . . cannot sue or be sued in the organization’s own name.” 6 AM. JUR. 2d *Associations and Clubs* § 51 (2007). The Supreme Court, however, has not yet decided this question. *See Textile Workers Union v. Textron, Inc.*, 99 N.H. 385, 386 (1955) (“The issue as to whether an unincorporated association may represent its members by a suit in its own name has never been decided in this state nor does it appear necessary to decide it here.”); *Exeter Hosp. Med. Staff v. Bd. of Tr. of Exeter Health Res., Inc.*, 148 N.H. 492, 495 (2002) (same).

observed, “this elective power is a fiduciary one, and the general rule is, that fiduciary power cannot be delegated by the trustee.” *Id.* The Court stated:

There is a wide difference between a Concord Railroad board of directors consulting the directors of another road as to the appointment of a Concord Railroad manager, and other matters, but retaining and exercising their undivided powers of appointment, removal, and management, and a Concord Railroad board making a contract of fiduciary partnership with the directors of another road, and sharing with them the powers and duties of the Concord company.

*Id.* Because the Concord Railroad board could not delegate its fiduciary responsibilities to a third party, the Court enjoined the performance of the contract.

In *Chapin v. Benwood Foundation, Inc.*, 402 A.2d 1205, 1206 (Del. Ch. 1979), the court considered whether the board of a Delaware nonprofit corporation can bind itself by a written agreement “to name designated persons to fill vacancies on the board of trustees as such vacancies occur.” In holding that such an agreement is unenforceable, the court stressed that directors “may not delegate to others those duties which lay at the heart of the management of the corporation.” *Id.* at 1210. The court explained: “To commit themselves in advance 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.

Dartmouth’s Board of Trustees likewise lacked the authority in 1891 to commit the College permanently to a particular plan for Trustee selection regardless of the circumstances that might exist in the future. The challenges and opportunities facing a leading American college demand governance that is attuned and responsive to present circumstances, not frozen for all eternity in a time capsule created in 1891. The fiduciary and practical responsibilities of the Board require flexibility, and any “contract” that delegates or shares those fiduciary duties with a third party is unenforceable as a matter of law.

## **II. Collateral Estoppel Does Not Apply to This Action.**

Relying on collateral estoppel, the Association asserts that it is entitled to judgment on its breach of contract claim because “[t]he Merrimack County Superior Court, in prior litigation between the College and other parties,” resolved the identical issue presented here. (Pet. ¶ 28.) That assertion is factually and legally incorrect. The issues in the prior litigation, *Tell v. Trustees of Dartmouth College* (Ex. J), were very different, and the court in that case did not hold that the Association has a contractual right to select one half of the College’s elected Trustees. Moreover, the College was the prevailing party in *Tell* and thus cannot be collaterally estopped in this case based on any ruling in that prior litigation.

Collateral estoppel precludes a party to a prior action from re-litigating in a subsequent case “any matter actually litigated in [the] prior action.” *Appeal of Manchester Transit Auth.*, 146 N.H. 454, 461 (2001). For estoppel to apply, “the issue subject to estoppel must be *identical* in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action, or have been in privity with someone who did.” *Simpson v. Calivas*, 139 N.H. 1, 7 (1994) (quotation omitted and emphasis added). “Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment.” *Id.* (citation omitted). To be “essential,” the first judgment must depend on the resolution of the issue: “If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded.” RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h (1982). Finally, “there is an exception to collateral estoppel when the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action. This includes the prevailing party, who was not aggrieved and

could not appeal the judgment.” *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1122 (9th Cir. 1997) (citation and alterations omitted); *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 28(1).

In *Tell*, seven Dartmouth alumni sued the College, its Trustees and the Secretary of the Alumni Association, challenging amendments to the Association constitution that permitted the Board to reseal Alumni Trustees for second terms without a second nomination by alumni. Plaintiffs complained that these amendments to the Association’s constitution were invalid because (1) they were not adopted at an annual meeting of the Association and (2) there was inadequate notice of the meeting at which the amendments were adopted. (Ex. J at 9-10.) Relying on *Bricker v. N.H. Medical Society*, 110 N.H. 469 (1970), the College moved to dismiss. (Ex. J at 8.) In *Bricker*, the Court held that “[j]udicial interference in the internal affairs of associations is strictly limited and will not be undertaken in the absence of a showing of injustice or illegal action and resulting damage to the complaining member.” 110 N.H. at 470.

The court granted the College’s motion to dismiss. First, it held that the “presumption against judicial interference in the internal affairs of an association” applied because the issue in *Tell* “involve[d] the internal affairs of the Alumni Council and the Association.” (Ex. J at 8-9.) Second, the court concluded that plaintiffs had not overcome this presumption against judicial interference by demonstrating “injustice or illegal action and resulting damage to them.” (*Id.* at 9.) On the first prerequisite, the court ruled that plaintiffs’ “conclusory allegations” regarding the Trustees’ motives and actions were “not sufficient to demonstrate ‘injustice or illegal action.’” (*Id.* at 10.) Turning to the second prerequisite—resulting damage to plaintiffs—the court rejected plaintiffs’ assertion that the Trustees had breached a contract. (*Id.* at 11-12) Accepting as true the allegations of the petition, the court assumed the existence of a contract but held that plaintiffs had not alleged a breach because the “contested changes in procedure” occurred “by agreement of all three groups involved in the selection and election of Alumni

Trustees,” the Board, the Alumni Council and the Alumni Association. (*Id.* at 12.) The court summarized its ruling as follows:

Based upon the above, the Court finds that this case involves the internal affairs of an association and that petitioners have not alleged sufficient facts, even looking at their allegations in the light most favorable to them, to overcome the presumption of judicial abstinence in such a situation. Simply put, the present case involves a disagreement by certain alumni to the procedures by which Alumni Trustees are selected. This is not a matter for judicial resolution but for resolution within the governing mechanisms of Dartmouth College and its related alumni organizations.

(*Id.*)

The *Tell* decision has no collateral estoppel effect on this action. As a threshold matter, collateral estoppel cannot bar the College from litigating here any issue decided in *Tell* because the College prevailed in that case and thus could not obtain appellate review of the decision. There is an exception to collateral estoppel when “[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.” RESTATEMENT (SECOND) OF JUDGMENTS § 28(1). Thus, “[i]f review is unavailable because the party who lost on the issue obtained a judgment in his favor, [collateral estoppel] is inapplicable by its own terms.” *Id.* § 28 cmt. a.<sup>21</sup> This rule applies with even greater force here. The College not only obtained a judgment in its favor in *Tell*—and thus, as a matter of law, could not appeal the decision—but also prevailed on every single issue raised in that litigation, making collateral estoppel entirely inapplicable.

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<sup>21</sup> See also *Johnson v. Watkins*, 101 F.3d 792, 795-796 (2d Cir. 1996) (“[F]acts determined in a pretrial suppression hearing cannot be given preclusive effect against a defendant subsequently acquitted of the charges. This rule is predicated on the defendant’s lack of an opportunity to obtain review of an issue decided against him.”); *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1472 (Fed. Cir. 1989) (“[W]here a party wins on its claim, but loses on an issue[,] [n]o issue preclusion attaches to the lost issue which could not by itself be appealed.”); *Jackson Jordan, Inc. v. Plasser Am. Corp.*, 747 F.2d 1567, 1577-1578 (Fed. Cir. 1984) (same); *Graco Children’s Prods. v. Regalo Int’l LLC*, 77 F. Supp. 2d 660, 664 (E.D. Pa. 1999) (“[B]ecause Graco won on its claim of patent infringement, but lost on a claim interpretation issue, no issue preclusion attaches to the lost issue of claim interpretation since it could not by itself be appealed.”).

More fundamentally, the issue here—whether the Board entered into a legally binding contract with the Association in 1891 that guarantees the Association a perpetual right to select one-half of Dartmouth’s elected Trustees—is not identical to any issue decided in *Tell*. Nor was that issue actually litigated or essential to the judgment in *Tell*. The only issues that were essential to the judgment in *Tell* were the court’s findings that the relief sought by plaintiffs involved the internal affairs of the Alumni Council and the Alumni Association and that plaintiffs had failed to allege facts sufficient to overcome the presumption against judicial interference. Those are not the issues in this case.

Although the court addressed a breach of contract argument in holding that plaintiffs had not alleged resulting damages to themselves, the court’s statements on that point were not essential to the judgment. To overcome the presumption against judicial interference, the *Tell* plaintiffs had to demonstrate *both* injustice or illegal action *and* resulting damage to themselves. By holding that plaintiffs had failed to satisfy both prerequisites, the court provided alternative bases for its ruling. (Ex. J at 9.) “If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.” RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i. In addition, the court did not hold that the Board entered into a binding contract with the Association in 1891. Rather, the court assumed, *arguendo*, the existence of a contract and held that plaintiffs had not alleged a breach.

Finally, the background “facts” described in the *Tell* opinion cannot have preclusive effect. At the beginning of its opinion, the court “set[] forth the undisputed background facts . . . essentially as stated in the parties’ pleadings.” (Ex. J at 1.) Because the court accepted as true plaintiffs’ factual allegations and viewed those allegations in the light most favorable to plaintiffs (*id.* at 12), those facts were not actually litigated by the parties or finally resolved on

the merits by the court. Furthermore, to the extent that defendants did not dispute some of plaintiffs' factual allegations in moving to dismiss the petition, collateral estoppel cannot apply to the court's findings. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e ("An issue is not actually litigated . . . if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial.").<sup>22</sup>

### **III. The Association's Claim for Breach of Implied-In-Fact Contract Fails for the Same Reasons That Its Breach of Contract Claim Fails.**

The Association argues that the College and it "took action that created an implied-in-fact contract." (Pet. ¶ 47.) "[S]ubjective expectations are insufficient to create an implied contract." *Durgin v. Pillsbury Lake Water Dist.*, 153 N.H. 818, 821 (2006) (internal quotation omitted). "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). "While an implied-in-fact contract may be inferred from the parties' conduct, the required elements for contract formation—a mutual intent to contract including an offer, an acceptance, and consideration—are the same for express and implied-in-fact contracts." *Maher v. United States*, 314 F.3d 600, 606 (Fed. Cir. 2002) (internal quotation omitted); see also WILLISTON & LORD, *supra*, § 1:5 ("An implied-in-fact contract requires proof of the same elements necessary to evidence an express contract: mutual assent or offer and acceptance, consideration, [and] legal capacity."); 17 C.J.S. *Contracts* § 6 (same). The only difference between an express contract and an implied contract "is in the character of the evidence necessary to establish the contract." 17A AM. JUR. 2d *Contracts* § 15.

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<sup>22</sup> The Association's suggestion that the College previously acknowledged the existence of a legally enforceable contract in "prior legal proceedings" involving the *Tell* plaintiffs (Pet. ¶ 27) is incorrect. In fact, in one of the College's briefs included with the Association's preliminary injunction motion, the College expressly argued that "the 1891 'agreement'" is not an enforceable contract. (Ex. 30 to Ass'n Mot. for Prelim. Inj. at 32-33.)

Courts routinely reject claims for breach of an implied-in-fact contract if any of the elements necessary to establish an express contract are missing. *See, e.g., Stanton v. Univ. of Maine Sys.*, 773 A.2d 1045, 1050-51 (Me. 2001) (affirming dismissal of breach of implied-in-fact contract claim where allegations fail to show sufficiently definite terms); *Lewis v. United States*, 70 F.3d 597, 601 (Fed. Cir. 1995) (rejecting claim of implied-in-fact contract because alleged offer did “not contain sufficiently definite terms to serve as the basis for a contract”); *Parke-Hayden, Inc. v. Loews Theatre Mgmt. Corp.*, No. 91 Civ. 0215 (RWS), 1993 WL 287815, at \*8 (S.D.N.Y. 1993) (“Implied-in-fact contracts are ‘true contracts’ which must be at least definite enough to be enforceable . . . .”), *aff’d*, 22 F.3d 1091 (2d Cir.), *cert. denied*, 513 U.S. 875 (1994).

As a result, the Association’s claim for breach of an implied-in-fact contract fails for the same reasons that its breach of contract claim fails: the Association has not alleged the elements of an enforceable contract (consideration, definite terms and legal capacity to contract). In addition, “a contract will not be implied if an express contract to the same effect would be contrary to law.” 17A AM. JUR. 2d *Contracts* § 13. Because the Board’s obligation under the Charter to elect new Trustees involves the exercise of the Board’s fiduciary duty, that power cannot be delegated in perpetuity to a third party such as the Association through an express or an implied contract.

#### **IV. The Association Cannot Permanently Bind the College to a Particular Plan for Trustee Selection Based on Promissory Estoppel.**

The Association asserts that the College “made statements promising to seat persons nominated by the alumni to one-half of the non-*ex officio* seats” on the Board and that “[i]t was foreseeable that the Association and its members would rely on those promises.” (Pet. ¶ 53.) The Association further contends that it and its members have taken actions in reliance on the College’s promise, “including periodically amending the Association’s constitution to adopt

procedures for selecting alumni trustees, holding trustee elections, and raising money for the College.” (*Id.* ¶ 54.)

There are four requirements for promissory estoppel: “First, there must have been a promise. Second, the promisor must have had reason to expect reliance on the promise. Third, the promise must have induced such reliance. Fourth, the circumstances must have been such that injustice can be avoided only by enforcement of the promise.” 1 FARNSWORTH, *supra*, § 2.19 (footnotes omitted). “The party invoking estoppel has the burden of proving that its application is warranted . . . .” *Great Lakes Aircraft Co. v. City of Claremont*, 135 N.H. 270, 289 (1992). In evaluating an estoppel claim, courts “are to exercise caution . . . and should apply the doctrine only where the facts are unquestionable and the wrong to be prevented undoubted.” *Novak v. Nationwide Mut. Ins. Co.*, 599 N.W.2d 546, 552 (Mich. Ct. App. 1999). The Association has not satisfied that high standard.

“A fundamental element of promissory estoppel . . . is the existence of a clear and definite promise which a promisor could reasonably have expected to induce reliance.” *D’Ulisse-Cupo v. Bd. of Dir. of Notre Dame High Sch.*, 520 A.2d 217, 221 (Conn. 1987); *accord Santoni v. FDIC*, 677 F.2d 174, 179 (1st Cir. 1982) (“promise must be definite and certain so that the promisor should reasonably foresee that it will induce reliance by the promisee or a third party”). Leaving aside conclusory assertions, 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.<sup>23</sup> The Board’s 1891 resolution, which is not such a promise, simply affords alumni the opportunity to nominate candidates for five Trustee seats. The Association also has not alleged facts that would

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<sup>23</sup> It is noteworthy that none of the historical materials cited by the Association in its Motion for Preliminary Injunction as “reflecting and affirming” this supposed promise contain any statement by the College promising alumni a perpetual right to select one-half of the elected Trustees. (*See Ass’n Mot. for Prelim. Inj.* at 23-24.)

establish that the Trustees in 1891 reasonably expected that the College would be permanently bound by the resolution because some alumni 116 years later would claim to rely on it.

Similarly, the Association has not alleged reasonable reliance by it or its members. (*See* Pet. ¶¶ 31, 54.) Actions previously taken to recruit, evaluate and nominate past Alumni Trustees cannot serve to bind the College to any particular plan for Trustee selection indefinitely into the future. There is no claim that the Board failed to elect a particular alumni nominee after the Association and its members invested time and effort selecting him or her. To the contrary, the Association acknowledges that the College “has seated every nominee of the alumni to its board.” (*Id.* ¶ 48.) The Association also has not adequately alleged that it raised money for, or that alumni donated money to, the College in reliance upon the Board’s supposed “promise” in 1891. In its Petition, the Association refers to only one effort on its part to raise funds for the College, which supposedly occurred in 1892. (*Id.* ¶ 22.) A single alleged effort to raise money 115 years ago cannot give rise to a permanent right to nominate a specific percentage of the College’s Trustees under the doctrine of promissory estoppel. Nor is there any basis for the Association’s suggestion that alumni in the past have made contributions to the College—and continue to do so today—in reliance upon the Board’s 1891 resolution.

Lastly, the Association cannot possibly establish that injustice can be avoided only by continuing to enforce the Board’s 1891 “promise” and thus binding the College to a method for selecting Trustees that its Board believes is no longer in Dartmouth’s best interests. The circumstances confronting Dartmouth today are very different from those that existed 116 years ago and that motivated the Board to adopt the 1891 resolution. The Board must retain the authority, in the exercise of its fiduciary responsibilities, to supersede its own resolution if it concludes that change is in the College’s best interests.

## CONCLUSION

For the foregoing reasons, the Petition should be dismissed in its entirety for failure to state a claim upon which relief can be granted.

Dated: October 26, 2007

Respectfully submitted,

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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.

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Bruce W. Felmly