

THE STATE OF NEW HAMPSHIRE

GRAFTON, S.S.

SUPERIOR COURT

Docket No.: _____

Association of Alumni of Dartmouth College

v.

Trustees of Dartmouth College

PETITION FOR INJUNCTIVE & DECLARATORY RELIEF

NOW COMES the Petitioner, Association of Alumni of Dartmouth College, by and through its undersigned attorneys, and hereby requests an injunction and declaratory relief. In support thereof, the Association states as follows:

PARTIES

1. The Petitioner, the Association of Alumni of Dartmouth College (“the Association” or “the alumni”), is an unincorporated association with a mailing address of P.O. Box 525, Hanover, New Hampshire, 03755. 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.

2. The Respondent, Trustees of Dartmouth College (“the College”), is a New Hampshire non-profit corporation with a principle business address of 63 South Main Street, Fleet Bank Building, 3rd Floor, Hanover, New Hampshire, 03755.

JURISDICTION

3. The Superior Court is a trial court of general jurisdiction as guaranteed under Part II, Article 72-A of the New Hampshire Constitution. New Hampshire R.S.A. 491:7 further

defines the role of the court to hear matters of civil origin. Jurisdiction of this matter is properly vested in the Superior Court.

4. Grafton County is a proper venue as the Association has members who reside here, and the College is located within Grafton County.

INTRODUCTION

5. Dartmouth College is unique in American higher education for the responsibility that its alumni have taken for its continuing academic excellence and vitality. Dartmouth's loyal alumni not only give generously of their time and money, they also share direct responsibility for the College's governance through the election of one-half of its trustees. This arrangement dates from the Nineteenth Century, when the College was badly misgoverned. Alumni proposed that a "closer relationship between the College and its great and powerful body of graduates" would reform the College and ensure its good governance. The Association sought to "secure to the Alumni an active participation in the management of the college" in the expectation that "a warmer interest and closer relation between the Board of Government and the Alumni would strengthen the college, and promote its welfare and usefulness." After twenty years of difficult negotiations, the College and the Association reached an agreement in 1891 giving alumni the right to elect one-half of Dartmouth's trustees (excluding New Hampshire's governor and the College's president, who serve as trustees *ex officio*).¹ The Association "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." For the next 116 years, alumni chose one-half of Dartmouth's trustees, and Dartmouth prospered, becoming America's finest undergraduate college.

¹ For brevity and clarity, the Association may refer to the appointed (i.e., non-*ex officio*) trustees simply as "the trustees" or "the board."

6. On September 8, 2007, the College's current trustees announced that they will expand Dartmouth's eighteen-member board by adding eight new "charter trustees" to be chosen solely by the board of trustees. The trustees' plan would reduce from one-half to one-third the percentage of trustees chosen by Dartmouth alumni. The trustees also announced that they may consider reducing the percentage of "alumni trustees" even further in the future. The trustees take these actions even as they concede that "[a]lumni sentiment . . . was overwhelmingly in favor of maintaining the traditional 'parity' between Charter and alumni Trustees."

7. The 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. Alumni selection of trustees encourages Dartmouth alumni to take a lively interest in the College's affairs and to devote their attention to its needs; ensures that the College benefits from the advice and experience of its great body of successful graduates; and ensures that those who love Dartmouth the most—its sons and daughters—share responsibility for its future. The Association believes it has a duty to act in the best interests of Dartmouth College and its alumni, and it believes that it can best serve those interests by seeking a judicial opinion as to the propriety of the board's planned governance changes, and by ensuring to the greatest extent possible that the responsibility of alumni for the College's governance is not diminished.

FACTS

The Association's Negotiations For Alumni Suffrage

8. In the Nineteenth Century, alumni were deeply concerned about the College's poor governance. 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. Starting in the 1860s, the Association and its members pressed for alumni election of trustees as a means to ensure the College's good governance and the wise use of alumni contributions. For example, Reverend Samuel Bartlett, Class of 1836, proposed that the College could be reformed and strengthened through a "closer relationship between the College and its great and powerful body of graduates."

9. The Association in 1869 appointed a ten-member committee (which included Reverend Bartlett, Amos Tuck, Senator James W. Patterson, and Judge James Barrett) to raise \$200,000 in alumni contributions to be paid to the College in exchange for "a suitable understanding with the Board" concerning the appointment of trustees chosen by alumni.

10. The College resisted this and other overtures by the Association during twenty years of on-and-off negotiations. 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." In 1888, alumni gathered in Boston to discuss poor governance of the College 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." Dartmouth's student newspaper, *The Dartmouth*, printed an article by the College's president stating that "[m]ore money is [the College's] first, second and third want. And it may undoubtedly be hoped that a closer relation to the Alumni, [through alumni election of trustees], will secure . . . a large increase of Alumni contributions to the College."

11. The College offered to appoint “alumni advisors” in exchange for the \$200,000 the Association had raised. This offer was not acceptable to the Association, which demanded nothing less than the right to elect trustees.

The 1891 Agreement

12. Eventually, the College’s mounting financial difficulties and the Association’s persistence overcame the resistance to reform. 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. Boston alumni, perceiving an opportunity for a *quid pro quo*, passed a motion calling for direct election of trustees by alumni. 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.” In response, the College acknowledged the Association’s legitimate interest “in the management of the College,” but still refused alumni the franchise.

13. According to John King Lord’s *History of Dartmouth College*, “[t]he alumni . . . wished that [representation] be granted before they did anything further, while the Board . . . wished assurance of help as an advance proof of the interest of the alumni.” The alumni “would listen to nothing that did not require the acceptance [by the College] of their first choice” of trustee.

14. On June 26, 1890, the Association appointed another 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.” 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. Trustees 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. In June of 1891, during Commencement week, the College and Association finally reached what has been known as the “1891 agreement.”

15. The agreement between the College and Association is reflected in signed writings of each party. The College, by its board of trustees, adopted resolutions it said embodied the agreement. The Association approved the agreement at its June 24, 1891 meeting and also incorporated a partial description of the agreement into its meeting minutes. Those minutes were provided to the College, and the College did not object to anything therein. Other writings, including writings to be sought through discovery in this matter, also reflect the agreement and its binding nature.

16. 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. Excluding the two *ex officio* trustees, 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.

17. Under the agreement, the Association was to amend its Constitution to provide for the selection of trustees (whom the College would seat), and it 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. Accusations that the trustees had acted in bad faith in prior dealings with alumni were to cease. Imminent legal actions were to be tabled. The Association and its leaders agreed to withdraw a public ultimatum that “no material aid would be furnished the college” absent alumni election of trustees. The Association and its leaders agreed to use their best efforts to raise funds from alumni for the College. Alumni were to take a livelier interest in, and a direct responsibility for, the College’s management, curriculum, and finances. The Association was to designate members to stand for election and to serve the College as alumni trustees.

18. The agreement would be implemented by the Association’s choosing trustees to fill the next five vacancies on the board, with the continuing right to choose those trustees’ successors. The parties well understood that the Association would have the right to choose one-half of the non-*ex officio* trustees thereafter. At the time, it was believed by the parties (and the College insisted) that the number of trustees could not legally be expanded beyond ten (plus the two *ex officio* trustees) consistent with the United States Supreme Court’s decision in *Dartmouth College v. Woodward*. The parties’ agreement that the alumni would choose, and the College would appoint, persons to each of the five trusteeships next becoming vacant and his successors in such trusteeship thus was an agreement (and understood to be such) that the alumni would elect one-half of the non-*ex officio* trustees thereafter. Indeed, it would have been redundant to elaborate that five trustees also equaled one-half of the board. The parties understood that the College would seat all trustees nominated by the alumni.

19. An Association member wrote in 1892: “From this time on, the trustees will include men who represent the graduates and have a duty to them to perform. That duty will include the commission to keep Dartmouth in administration and scholarship abreast of the

times, and with that spirit inside the college management, the graduates will respond as they have never done before.”

20. The College in 1932 published a history that states: “As we look back upon the controversy, we can hardly believe that the prognostications of evil which were set forth with such earnestness by the opponents of alumni representation could ever have been seriously held.”

116 Years Of Performance Under The 1891 Agreement

21. In 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. Three charter trustees resigned, and the Association named their replacements.

22. In 1892, the Association used its best efforts to raise funds from alumni for the College as pledged during the negotiation to obtain alumni representation. But in June of that year the College sought to be relieved, at least temporarily, of its obligation to seat alumni trustees to one-half of the non-*ex officio* board seats. The Association rejected the College’s request, and the College performed according to the agreement, seating two more alumni trustees. Since that time, one-half of Dartmouth’s non-*ex officio* trustees have been trustees chosen by the alumni.

23. For 116 years, the College has made statements and promises, and has taken actions, consistent with its being bound by its promises that the alumni have the right to name one-half of the non-*ex officio* trustees. For example, the College in 1961 and 2003 increased the size of the board, and each time it added equal numbers of charter and alumni trustees—preserving the parity promised in the 1891 agreement, which has been affirmed and ratified from time to time since 1891. The College’s official press release announcing the 2003 expansion stated: “These added seats will consist of three ‘charter’ trustees appointed by the Board and

three ‘alumni’ trustees nominated by the alumni body and elected by the Board.” The College’s 2003 expansion promised that the number of charter and alumni trustees would expand to ten each. The College announced a schedule for adding the trustees.

24. For 116 years, the alumni have chosen alumni trustees, and the College has seated every one of them on its board, maintaining an equal number of charter and alumni trustees.

25. From time to time over the decades, the board of trustees, committees of the board of trustees, the Association, and others have considered whether the size, composition, or manner of choosing trustees should be changed. During these deliberations, the parties have repeatedly re-affirmed the right of alumni to elect one-half of the non-ex officio trustees through their statements and conduct.

26. The College and its personnel have admitted that the 1891 agreement is “an agreement,” and the College and its personnel over the decades have witnessed the Association and its members referring to it as “an agreement” without disputing that characterization. As recently as this year, the chairmen of the board of trustees (and others) called the 1891 agreement an “agreement.”

27. The College also has argued in prior legal proceedings with other parties that the board “*must . . . seat[] the alumni’s nominees*” to one-half of its board seats, and that 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 argued that the Association has “legitimate interests in the Trustee selection process,” and that the Association is an “indispensable party” to any lawsuit concerning the selection of Dartmouth trustees because, unless it is a party to the lawsuit, the Association “cannot . . . defend its rights.” The College has argued that there is substantial doubt—and that the College should be “rightly concerned”—that it cannot legally

appoint to alumni trustee seats any person who was not properly elected by the Association. The College has stated that the function of the Association is “to determine the alumni’s nominees for the [then-] seven alumni-nominated seats on the Board.” The College has distinguished between “charter trustees” and “alumni trustees” and correctly observed that “when the number of trustees of the College has increased after 1891, trustee positions for which the alumni nominate candidates also has increased.” The College has argued that “the historical materials show that the resolution of the 1891 controversy was arrived at through a process of negotiation,” and that “the 1891 agreement was an exchange of participation in the governance of the College for continued financial support for the alumni.”

28. The Merrimack County Superior Court, in prior litigation between the College and other parties, expressly 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 [in 1891] 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—when the College and the Association negotiated changes to the alumni trustee selection process—the “contract was thus modified by the parties [the Association and the College].”

29. In 1990, the College requested that the Association amend its constitution to authorize the College to reseat alumni trustees for one additional five-year term without the Association’s further approval. After discussions, the Association agreed. The College’s request constituted a further admission that it was legally bound to seat as trustees those persons chosen by the alumni: If the College unilaterally could appoint a person to fill one of the seats pledged

to alumni (i.e., one-half of the non-*ex officio* seats), then the College would not have needed the Association's approval or the amendment of its constitution.

30. In 2005, the College and its Alumni Governance Task Force expended substantial time and money in an effort to persuade the Association to amend its constitution to change the procedures by which alumni trustees are chosen. Again, the College's efforts confirmed that the College was legally bound to seat as trustees those persons chosen by the alumni.

31. Over 116 years, the Association and its members have taken countless actions in reliance on the College's agreements and promises that the alumni would have and preserve the right to elect one-half of the non-*ex officio* trustees, including: amending the Association's constitution to provide for election of half the non-*ex officio* trustees, 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, serving the College as alumni trustees, and taking a livelier interest in, and responsibility for, the College's management, curriculum, and finances.

32. Alumni, the Association's members, were foreseeable and intended beneficiaries of the College's agreements and repeated promises (over the decades) that present and future alumni would have and preserve the right to elect one-half of the non-*ex officio* trustees. The Association and its members have a special interest in Dartmouth's governance, distinct from that of the general population, by dint of the 1891 agreement, their reliance on the College's promises and actions, their having attended the College as students, their continuing relationship

to the College, their historical role in the selection of its trustees, their financial and other contributions, and their ties of affection and loyalty.

33. The Association's members have made legendary contributions to Dartmouth College. For example, alumni spend more than 230,000 hours per year volunteering for Dartmouth; interview more than 7,000 applicants for admission; support one-third of the College's operating budget through contributions; mentor Dartmouth students on career decisions; and provide more than 180 student scholarships. More than half of alumni contribute to the College's annual fund, and alumni contributed \$39.1 million to Dartmouth in its fiscal 2007.

34. For 116 years, the College willfully accepted the benefits of the 1891 agreement and did not repudiate it.

The College Repudiates Its Obligations

35. At a May 19, 2007 meeting, the chairman of the board of trustees (a charter trustee) admitted that a Governance Committee of the board of trustees was secretly meeting to develop recommendations for the full board of trustees concerning altering the size and composition of the board of trustees. When questioned by alumni, the chairman conceded that the board might act to eliminate the right of alumni to choose one half of the non-*ex officio* trustees. The chairman told *The Dartmouth*: "In terms of honoring that [agreement], any Board of the College would be aware of it and the history since then, but it is of even more importance that the Board look at current circumstances."

36. In response to the Chairman's statement, ten of the eleven members of the Association's Executive Committee approved a letter to the College stating that "any action which violates, restricts, abridges or dilutes [the 1891] agreement, as currently enjoyed, would be

injurious to Dartmouth College, its students and alumni.” The Executive Committee also resolved “that the Association will take all appropriate measures necessary and advisable to protect and insure retention of its constitutional right to nominate and elect Alumni Trustees.”

37. On September 8, 2007, the incumbent trustees enacted resolutions and purported to amend the College’s charter in violation of the 116-year-old right of alumni to select one-half of Dartmouth’s non-*ex officio* trustees. The incumbent trustees announced that they will expand the board by eight charter trustees of their own choosing, bringing the total number of charter trustees to sixteen. Unlike all prior occasions where Dartmouth expanded its board, the incumbent trustees are not to seat an equal number of new alumni trustees to maintain the historic parity between alumni and charter trustees. Rather, the number of alumni trustees is to remain eight, even as the charter trustees increase to sixteen. Having violated the Association’s right to select one-half of the non-*ex officio* trustees, the incumbent trustees then purport to go even farther and take control over the administration of alumni trustee elections, which the Association has administered for 116 years. They are to “allow” only “one or two” candidates to stand for election as the official candidate for alumni trustee, although the Association’s constitution provides for three such candidates for each seat. The College also purports to change the system of voting from the “approval voting” system duly chosen by the Association. Under the incumbent trustees’ resolutions, the College “shall administer” the elections unless and until the Association amends its constitution to submit to the College’s violation of the governance rights of Dartmouth alumni.

38. In addition to breaching the Association’s longstanding contractual rights, the incumbent trustees’ refusal to seat more than eight alumni trustees is a breach of the College’s

express promise, announced in a 2003 press release, to increase the number of alumni trustees to ten.

39. The incumbent trustees' decision to reduce the percentage of alumni trustees from one-half to one-third of Dartmouth's board would have an improper entrenchment effect in that it would permit the incumbents to reappoint themselves and create a permanent two-thirds majority of unelected charter trustees (excluding the two *ex officio* trustees).

CLAIMS

Count I **Breach of Contract**

40. The Association incorporates all prior paragraphs by reference.

41. The College and the Association reached an agreement in 1891. One material term is that the College seat persons nominated by the Association to one-half of the non-*ex officio* seats on Dartmouth's board of trustees.

42. The parties for 116 years have performed according to the agreement. The Association raised money for the College, and the Association has nominated alumni trustees to fill one-half of the non-*ex officio* seats on Dartmouth's board. The College since 1891 has seated every alumni nominee to its board without exception.

43. The parties have affirmed and ratified their agreement from time to time.

44. The College's September 8, 2007 actions constitute a material anticipatory breach of the College's obligations under the parties' agreement.

45. The Association and its members (including in their capacity as third-party beneficiaries) will be irreparably harmed as a direct and proximate result of such breach.

Count II
Breach of Implied-In-Fact Contract

46. The Association incorporates all prior paragraphs by reference.

47. The College and the Association in 1891 and in the ensuing 116 years took actions that created an implied-in-fact contract. One material term is that the College seat persons nominated by the Association to one-half of the non-*ex officio* seats on Dartmouth's board of trustees.

48. For example, 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. The College, without exception since 1891, has seated every nominee of the alumni to its board.

49. The parties have affirmed and ratified their implied-in-fact contract from time to time.

50. The College's September 8, 2007 actions constitute a material anticipatory breach of the College's obligations under the parties' implied-in-fact contract.

51. The Association and its members (including in their capacity as third-party beneficiaries) will be irreparably harmed as a direct and proximate result of such breach.

Count III
Promissory Estoppel

52. The Association incorporates all prior paragraphs by reference.

53. 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. It was foreseeable that the Association and its members would rely on those promises.

54. The Association and its members have taken countless actions in reasonable reliance on the College's promises, including periodically amending the Association's constitution to adopt procedures for selecting alumni trustees, holding trustee elections, and raising money for the College.

55. Injustice can be avoided only by enforcement of the College's promises to seat persons nominated by the alumni to one-half of the non-*ex officio* seats on Dartmouth's board.

PRAYER FOR RELIEF

AND THEREUPON the Association of Alumni of Dartmouth College respectfully prays for:

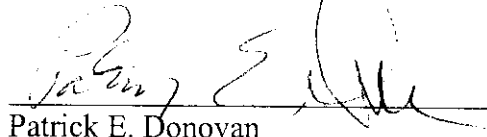
- (a) a declaration of the Association's right to choose one-half of Dartmouth's non-*ex officio* trustees through the Association's chosen selection process;
- (b) an injunction (i) barring the College from adding charter trustees to its board, unless it seats an equal number of alumni trustees chosen by the Association, and (ii) requiring the College to continue seating alumni trustees chosen by the Association;
- (c) an order that the College specifically perform its contractual obligations and promises by seating equal numbers of charter and alumni trustees chosen by the Association; and
- (d) such other and further relief as the Court deems just.

The Association requests a jury trial on all issues that may be tried to a jury.

Respectfully submitted, this 3rd day of October 2007.

**ASSOCIATION OF ALUMNI OF
DARTMOUTH COLLEGE,**

BY ITS ATTORNEYS,



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