**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

Docket No. 2010-0179

B.V. BROOKS, KENNETH F. CLARK, JR., MARISA KANE,
JOHN H. PLUNKETT, DOUGLAS R. RAICHLE**,** ROBERT G. REED III, AND JOHN STEEL III

Appellants

v.

TRUSTEES OF DARTMOUTH COLLEGE

Appellee

**RULE 7 MANDATORY APPEAL FROM**
**GRAFTON COUNTY SUPERIOR COURT'S GRANT OF**
**DEFENDANT/APPELLEE'S MOTION FOR SUMMARY JUDGMENT**

# BRIEF OF PLAINTIFFS/ APPELLANTS

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1. Where the undisputed facts establish that the parties to the 1891 Agreement intended and expected alumni such as the Plaintiffs to be individually benefited by and have rights under the contract, was the Superior Court in error in ruling that the Plaintiffs do not have standing as third-party beneficiaries to sue in their own names to enforce this contract? [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p. 19-26]

2. The Superior Court assumed that the Plaintiffs do have standing as members of the Association to bring suit in their own names to enforce the 1891 Agreement. Do the undisputed facts indeed confirm that the Superior Court's assumption was correct and, therefore, is such a ruling compelled in this case? [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p. 17-19]

3. Even if the 1891 Agreement is not deemed to be a contract between the Association and the College, do the Plaintiffs, as persons who the undisputed facts establish that the College should reasonably have expected to rely upon its promises regarding parity and who have in fact taken actions in reliance upon the College's said promises, have standing under the doctrine of promissory estoppel to sue in their own names to enforce the College's promises? [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p. 26-27]

4. Even if the filing of a "with prejudice" voluntary dismissal of the Prior Lawsuit might, in ordinary circumstances, have provided a basis for the College's assertion of the defense of *res judicata*, should the College be denied the opportunity to avail itself of such a defense in this case where the undisputed facts establish (a) that the Association's Executive Committee had not been authorized by the alumni to take any action which would extinguish the Association's or the alumni's legal rights to parity, (b) that the Association and the alumni received absolutely nothing in return for the Executive Committee's dismissal of the Prior Lawsuit "with prejudice," and (c) that the College itself colluded with the Association's Executive Committee and orchestrated the preparation and filing of the "with prejudice" dismissal in such a manner that the alumni would not find out about it until it was too late? [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p. 34-39]

5. Was the Superior Court (and is this Court) barred by the so-called Bricker doctrine from inquiring into the irregularities surrounding the preparation and filing of the "with prejudice" dismissal of the Prior Lawsuit [see Question # 4, above] where the actions of the Association's Executive Committee in withdrawing the Prior Lawsuit with prejudice did not involve some mere policy dispute over the Association's internal affairs, but instead arguably effected a relinquishment of important legal rights of the Association and its members vis-à-vis an outside third party, i.e., the College, and where the party attempting to claim the benefit of the Bricker doctrine is not the Association, but is instead the College? [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p.39, n. 48]

6. Where the undisputed facts establish (a) that the Plaintiffs had no personal involvement in the Prior Lawsuit, (b) that, as of the time of the filing of the Plaintiffs' lawsuit,

the Plaintiffs' third-party beneficiary rights could not be extinguished because their rights had vested, (c) that there had been no trial on the merits and no judicial findings of fact in the Prior Lawsuit, and (d) in any case, that neither the Plaintiffs personally nor the alumni in general had taken any action or authorized the Executive Committee of the Association to take any action to extinguish the Association's or the alumni's legal rights to parity, was the Superior Court in error in ruling in this case that the Plaintiffs' third-party beneficiary claims are barred by *res judicata*. [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p. 29-30]

7. Where the undisputed facts establish (a) that the Plaintiffs had no personal involvement in the Prior Lawsuit, (b) that, as of the time of the filing of the Plaintiffs' lawsuit, the Plaintiffs' rights to bring claims in promissory estoppel could not be extinguished because their rights had vested, and (c) in any case, that neither the Plaintiffs personally nor the alumni in general had taken any action or authorized the Executive Committee of the Association to take any action to extinguish the Association's or the alumni's legal rights to parity, was the Superior Court in error in ruling in this case that the Plaintiffs' promissory estoppel claims are barred by *res judicata*. [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p.30, n. 38]

8. Where the undisputed facts establish (a) that the Plaintiffs had no personal involvement in the Prior Lawsuit and (b) that neither the Plaintiffs personally nor the alumni in general had taken any action or authorized the Executive Committee of the Association to take any action to extinguish the Association's or the alumni's legal rights to parity, if both the Association and the Plaintiffs, as individual members thereof, have standing to sue to enforce the 1891 Agreement, do such undisputed facts compel a ruling in this case that the Plaintiffs' claims as members of the Association are *not* barred by *res judicata*. [Issue raised in Plaintiffs' Objection to College's Motion for Summary Judgment, App. A, p. 28-29]

## IV. STATEMENT OF THE CASE AND THE UNDISPUTED FACTS

This case (the "Current Lawsuit") is brought by seven individual alumni[1] of Dartmouth College nominally against the College. The Plaintiffs bring claims in their capacities as members of Dartmouth's Association of Alumni (the "Association"), claims as third-party beneficiaries of a contract between the Association and the College, and claims as promisees of promises made by the College upon which the Plaintiffs relied. In each case, the substantive right that the Plaintiffs seek to vindicate is their right to have the College seat on its governing

[1] Technically, the word "alumni" is the plural of the Latin masculine noun "alumnus." The feminine counterparts would be "alumnae" and "alumna." Since Dartmouth is now a co-educational institution, its graduates consist of both alumni and alumnae. However, both because it is conventional to do so and for the sake of simplicity, we use the term "alumni" to refer to both.

board an equal number of trustees selected by the alumni to that number of trustees selected for the position by the College itself. This right is customarily referred to at Dartmouth as the alumni's right to "parity."

## A. The Prior Lawsuit

The Association had previously sought to vindicate the alumni's right to parity by bringing suit against the College in 2007. Association of Alumni of Dartmouth College v. Trustees of Dartmouth College, Grafton Superior Court #07-E-289 (the "Prior Lawsuit"). The College attempted to obtain an early disposition of the case by filing a motion to dismiss. On February 1, 2008, the Court (Vaughan, Presiding Justice), denied the College's motion (App. A, pp. 49-63)[2]. In its order, the Court summarized the nineteenth century origin of the alumni's right to parity, the history of its implementation over the next 100+ years and the College's recent effort to abrogate it as follows (App. A, pp. 50-51):

> Dartmouth College was founded in 1769. Under the Dartmouth College Charter, the College is governed by a Board of Trustees ("Board"). Between 1769 and 1891, the Trustees of Dartmouth College designated their own successors, who exercised authority and responsibility over the College governance without participation from College alumni. Starting in the 1860s, the Association and its members began pressing the College for alumni participation on the Board. (Petition ¶8). The dialogue between the Association and the College continued throughout the 1860s, 1870s and 1880s, (Pet. ¶¶9,10, and 11). In June of 1891, the College and the Association reached an agreement that became known as the "1891 Agreement (hereinafter referred to as the "Agreement").
>
> There is no written memorialization signed by both parties setting forth the details of the Agreement. However, the Agreement between the College and the Association is independently reflected within a signed document of each organization. The College, by its Board of Trustees, adopted resolutions on June 23, 1891, that it said embodied the Agreement. (*Id.*) The Association approved the Agreement at its annual meeting on June 24, 1891 and incorporated a partial description of the Agreement into its meeting minutes. (Pet. ¶15).
>
> After the Association voted to accept the Agreement, it amended its constitution to provide for the election of one-half of the College's non-*ex officio* trustees. (Pet. ¶19).

[2] The references herein to "App. A" are to the Plaintiffs' Objection to the College's Motion for Summary Judgment and the evidence submitted by the Plaintiffs in support thereof, filed herewith as Appendix A to this Brief.

> It circulated an appeal to its members for donations to the College (Pet. ¶22), lifted a public ultimatum opposing alumni contributions which had been in place while the Association sought representation on the Board, and forbore from filing a lawsuit against the Board. (Pet. ¶¶24, 33, 42).
>
> Following the Agreement, the Board would be composed of two "*ex officio* trustees," namely, the President of the College and the Governor of the State of New Hampshire, and, pursuant to the agreement, the Alumni would seat one half of the non-*ex-officio* trustees seats on the Board ("alumni trustees") and Dartmouth College would hold the other half of the seats on the Board ("charter trustees"). Thereafter, the board of trustees would include an equal number of alumni trustees and charter trustees (Petition ¶16).
>
> The parity between alumni trustees and charter trustees has continued up to the present. The Board has been twice expanded, once in 1961 and again in 2003. (Pet. ¶23). The College and the Association maintained the parity between alumni trustees' and charter trustees' representation on both occasions. *Id.*
>
> On September 8, 2007, the Board of Trustees adopted a resolution that increased the total number of trustees to twenty-six. The resolution maintained the number of alumni trustees at eight, while expanding the charter trustees' seats to sixteen.

In light of these facts and the allegations in the Association's complaint, the Court concluded that the Association had sufficiently pled legally cognizable causes of action against the College for breach of an express contract, breach of an implied-in-fact contract and promissory estoppel. The Court, therefore, denied the College's motion to dismiss.

Undaunted, the College embarked upon a course of action designed to accomplish outside of court what it had failed to accomplish in court, namely to do an end run around the lawsuit and thus avoid having to deal with the merits of the alumni's claim of a right to parity. The vehicle for this was the annual election of new members of the Executive Committee of the Association. Throughout the Spring of 2008, two slates of candidates, one known as the "Unity Slate" and the other known as the "Parity Slate," waged a vigorous contest for the Executive Committee positions. The Unity Slate ran on a platform favoring preservation of the alumni's

right to parity through negotiation, rather than litigation.[3] Accordingly, while the Parity Slate supported pressing on with the litigation, the Unity Slate pledged that, if elected, they would dismiss the Prior Lawsuit.[4]

The ballots cast in the election were tallied up and the results announced at the general meeting of the Association of Alumni held on June 10, 2008. (App. A, pp. 70-72). The Unity Slate won. On that very same evening, the new Executive Committee met by telephone and adopted the following resolutions (App. B, p. 128)[5]:

> RESOLVED, that effective immediately any and all authority previously delegated to Frank Gado to act in any manner for the Association of Alumni of Dartmouth College ("Association of Alumni") as Liaison for Legal Affairs ("Liaison") or in any other capacity in connection with (a) the lawsuit filed by the association of Alumni in New Hampshire Superior Court (Docket No. 07-E-0289) against the Trustees of Dartmouth College ("the Lawsuit"); or (b) the law firm of Williams & Connolly and/or Hatem & Donovan, including but not limited to all authority delegated by the resolutions of the Executive Committee of August 23, 2007 and October 2, 2007, is hereby revoked and rescinded.
>
> RESOLVED, that effective immediately the Executive Committee hereby designates the President of the Association of Alumni of Dartmouth College ("Association of Alumni"), John Mathias '69, as its Liaison for Legal Affairs, and delegates him full power and authority (1) to oversee and direct the work of Williams & Connolly and Hatem & Donovan; (2) to take any and all actions necessary to obtain the prompt dismissal of the lawsuit filed by the Association of Alumni in New Hampshire Superior Court (Docket No. 07-E-0289) against the Trustees of Dartmouth College ("the Lawsuit "); and (3) at his discretion, to engage new or additional counsel to represent the Association of Alumni in the Lawsuit.

[3] The campaign materials of the Unity Slate (also known as the "Dartmouth Undying" slate) were clearly intended to convey the message that its members supported parity. (App. A, p. 115) For example, the following statement was posted on their website: "Our slate is fully committed to working constructively with the Trustees to address the issue of alumni governance and 'parity' in true dialogue, and not in the New Hampshire state courts or legislature. The Trustees, all of whom are fellow Dartmouth alumni except the President and the Governor of New Hampshire, welcome such dialogue. Dartmouth needs it, now more than ever." (App. A, p. 120) Indeed, had the Unity Slate even hinted that they would give up the alumni's rights to parity, the slate would surely have been defeated because this would have flaunted clear alumni sentiment in parity's favor. This sentiment had been documented several months earlier in a poll of the alumni where they had voted almost ten to one in favor of retaining parity. (The poll had been conducted by the former Executive Committee of the Association before it had filed the Prior Lawsuit. App. A, pp. 116-119)

[4] The Unity Slate's campaign was essentially orchestrated and financed by the College. (App. A, pp. 64-69).

[5] The references herein to "App. B" are to the College's Motion for Summary Judgment and the evidence submitted by the College in support thereof, filed herewith as Appendix B to this Brief.

Note that neither resolution contains any express direction or even the hint of a suggestion that the Prior Lawsuit might be dismissed *with prejudice*.[6]

In any case, that is exactly what happened. Moreover, as reflected in internal documents of the College obtained in discovery by the Plaintiffs in the Current Lawsuit, the College played the leading role in this event. To begin with, the initial draft of the two above-quoted resolutions which were passed by the Association's newly-elected Executive Committee on June 10, 2008 was prepared by General Counsel for the College, Attorney Robert Donin. (App. A, p. 75, bullet #1)[7] Attorney Donin was also the one who recommended that the Association hire Attorney Russell Hilliard as its new counsel and, at the request of Mr. Mathias, the Executive Committee's newly-designated Liaison for Legal Affairs, he was the one who made the initial contact with Attorney Hilliard. (App. A, p. 76, bullet #4; App. A, pp. 78-81) And finally – although not disclosed to Attorney Hilliard at the time[8] - it was Attorney Donin who saw to it that the College helpfully paid all of Attorney Hilliard's legal fees. (App. A, p. 86)

According to his bill for professional services, Attorney Hilliard was hired on June 12, 2008. (App. A, p. 78) On that day, he had a telephone conference with Mr. Mathias and Attorney Donin, at which time he presumably received his marching orders. (Ibid) Four days later, Attorney Hilliard filed his appearance for the Association in the Grafton County Superior Court and on the very next day, June 17, he emailed counsel for the College, Attorneys Donin,

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[6] Equally telling is the fact that the minutes of the meeting, which were posted on the Association's website for the alumni to read, reflect no discussion of such a possibility. (App. B, p. 128) Indeed, according to the minutes, the meeting lasted only 8 minutes. (Ibid.)

[7] According to the College, this draft was prepared by Attorney Donin at the request of David Spalding, the Secretary-Treasurer of the Association's Executive Committee. (App. A, p. 75, bullet #1) Mr. Spalding, however, worked both sides of the Association/College street. He was indeed a member of the Association's Executive Committee, having been elected as a member of the Unity Slate. On the other hand, Mr. Spalding was also Dartmouth's Director of Alumni Affairs and an employee of the College.

[8] In response to an Interrogatory from the Plaintiffs in the Current Lawsuit concerning who paid his legal fees, Attorney Hilliard answered, "I have learned in preparing these answers that my bills were paid by Dartmouth College." (App. A, p. 84, answer to Interrogatory No. 13)

Richard Pepperman (New York counsel for the College) and Bruce Felmly (outside local counsel for the College), as follows: "Can we speak some time today about discontinuance of this matter?" (App. A, p. 87) After then speaking by telephone with Attorney Pepperman (App. A, p. 78; App. A, p. 76, bullet #6), Attorney Hilliard prepared and circulated a draft of a proposed docket marking (App. A, p. 87). The document was designed to be filed by the Association and stated simply: "The plaintiff in the above matter hereby takes a voluntary non-suit with prejudice." (App. A, p. 90) In his email which accompanied his draft docket marking, Attorney Hilliard inquired of the addressees, Attorney Pepperman and Attorney Bruce Felmly: "Is it really this simple?" (App. A, p. 87) Attorney Felmly promptly responded as follows: "It is commonly done as simply as you have done it." (App. A, p. 91) Apparently satisfied, Attorney Hilliard replied: "[A]re we ready to file this?" (App. A, p. 91) At this point, however, Attorney Pepperman – obviously having some second thoughts about the matter – put the brakes on; his email back to Attorney Hilliard reads as follows: "If possible, I'd like to discuss an issue with Bruce Felmly when he frees up tomorrow." (App. A, p. 91)

Two days later, on June 19, Attorneys Pepperman and Felmly left a message for Attorney Hilliard to the effect that they wished to hold off the filing of the docket marking because "[we] may want to re-work the language slightly." (App. A, p. 92) Later that day, Attorney Felmly sent a revealing email to Attorneys Pepperman and Hilliard (with a copy to Attorney Donin). The email describes Attorney Felmly's legal research on the *res judicata* effects of the various ways that had traditionally been used in New Hampshire to withdraw a civil action without a trial on the merits. (App. A, p. 93) The obvious focus of Attorney Felmly's research was on how the parties should craft the dismissal so as to have the best chance to bulletproof the lawsuit from potential subsequent efforts to revive it. In summary, Attorney Felmly suggested that rather than

the Association unilaterally filing a docket marking and rather than the Association taking a "non-suit," the parties should jointly file a stipulation providing that the docket be marked "voluntary dismissal with prejudice." (App. A, p. 93)

At this juncture, the lawyers agreed to schedule a teleconference among themselves and Mr. Mathias for the following day. The teleconference among the lawyers and Mr. Mathias was conducted in the late morning of June 20, 2008. (App. A, p. 78; App. A, p. 76, bullet #10) In the course of that call, they agreed upon a form of stipulation which was to be signed by counsel for both the Association and the College and which would provide that the docket be marked "Voluntarily dismissed with prejudice." Attorney Felmly then undertook to draft and circulate the stipulation for signature. (App. A, p. 95) Finally, on June 23, after counsel for both sides had signed it, Attorney Felmly mailed the stipulation to the Clerk of the Grafton County Superior Court. (App. A, p. 99)

At this point, the College's PR machine shifted into high gear. On the same day that Attorney Felmly mailed the stipulation to the court, Diana Lawrence, the Director of Communications in the Office of Alumni Relations, sent an email to Mr. Mathias alerting him to the fact that when the Court received the stipulation, there probably would be media inquiries and that he, Mr. Mathias, would be "the most logical and ideal spokesperson" to respond. (App. A, p. 101) In the meantime, however, she reported that, "The game plan does seem to still be not to issue anything until the judge acts … ." (App. A, p. 101)

This "game plan" email from Ms. Lawrence provoked a telling exchange of communications between Mr. Mathias and herself (with blind copies to David Spalding) as to how the parties should deal with the public relations backlash that the filing of the stipulation was likely to create. Most significant is Ms. Lawrence's observation that, "With respect to

reporters' inquiries, I think the most controversial question might be why the AoA, which is only elected for a year, would file to withdraw a suit with prejudice and prohibit future executive committees from acting differently." (App. A, p. 102) For his part, Mr. Mathias, counseled patience and, if possible, silence. In particular, he recommended that everyone stick to the game plan and keep a low profile "until the judge acts on the stipulation of dismissal." (App. A, p. 105)

The stipulation was stamped in at the Grafton County Superior Court at 1:33 p.m., Tuesday, June 24, 2008. (App. B, p. 131) After waiting one day, Attorney Hilliard – presumably at the urging of Mr. Mathias – telephoned the Court on June 26 in an effort to get a judicial sign-off on the stipulation. (App. A, p. 78) He did not have long to wait because on the very next day, June 27, at 10:25 a.m., Judge Vaughan directed the entry of the following telephonic order: "Stipulation approved; docket shall be marked in accordance therewith." (App. A, p. 132) Attorney Hilliard apparently learned of Judge Vaughan's approval of the stipulation later that same day and his secretary promptly reported it to Attorneys Pepperman and Felmly and to Mr. Mathias. (App. A, p. 107) [9]

Even though the Court had approved the stipulation, both the Association's new Executive Committee and the College carefully avoided publicizing its specific terms. As David Spalding put it in an earlier email to Mr. Mathias, "We are now working on a very minimal release. It will only be used after we hear where this stands with the judge or if it leaks from the other parties to the action." (App. A, p. 106)[10] True to his word, the press release which Mr. Spalding's PR team issued on the afternoon of June 27 was indeed minimal (App. A, p. 108):

[9] The frenetic efforts of the lawyers for both sides to get Judge Vaughan to sign off on the docket marking – although neither legally required nor customary in New Hampshire ( see generally, 5 Wiebusch, NEW HAMPSHIRE PRACTICE, Civil Practice and Procedure §34.09) – were undoubtedly motivated by an appreciation of the notion that, as a practical matter, judicial approval of the stipulation would clothe it with a special aura of finality.

[10] Mr. Spaulding's mention of possible leaks by "the other parties to the action" was a reference to four Alumni Trustees who had filed a pro se amicus brief in the Superior Court in favor of the Association's claims and who therefore were copied on Attorney Felmly's filing of the stipulation. Diana Lawrence obviously shared Mr. Spaulding's

> The New Hampshire Superior Court, on June 27, issued an order approving the joint stipulation filed by attorneys for Dartmouth College and the College's Association of Alumni voluntarily dismissing the lawsuit brought by the Association in October 2007.
>
> The Dismissal follows the recent election of the Association's new executive committee, all of whom were committed to ending the lawsuit. The eleven executive committee members were elected by a 60 percent majority, with a record 24,900 (38 percent) of Dartmouth's more than 60,000 alumni voting in the election.
>
> The lawsuit was filed in October, 2007 after a 6-3 vote by the Association's previous executive committee. The lawsuit was opposed by the previous president of the Association, Bill Hutchinson '76, as well as the executive committee of the Alumni Council.

The Association did an even better job than the College of attempting to keep the lid on any publicity about the terms of the dismissal. In a post on the Association's internet "blogspot" on the afternoon of June 27, Mr. Mathias entered the following uninformative report: "This morning the Court approved our voluntary dismissal of the lawsuit brought by the Association of Alumni against the College." (App. A, p. 109)

The participants in these dismissal machinations had good reason to want to keep the terms of the stipulation secret for they knew that others did not appreciate the significance of what was being done. For example, the campus newspaper, The Dartmouth, published several editorials in the June 23-27, 2008 timeframe while the stipulation was working its way through the Grafton County Superior Court. Although the authors of these editorials obviously understood that the Prior Lawsuit was being dismissed, they also assumed that if the efforts of the Unity Slate to achieve a restoration of parity through negotiation were to fail, a new lawsuit could be instituted.[11]

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concerns because she sent an email to Mr. Mathias right after the stipulation had been filed suggesting that because the four trustees might begin "blogging, emailing, and spinning," he should issue a pre-emptive press release. Mr. Mathias, a senior litigation partner at the Chicago law firm of Jenner & Block, declined to act, reminding her, "that's why I say we should wait until the judge issues the dismissal order." (App. A, p. 105)

[11] For example, in a June 24, 2008 editorial, the writer advocated the following course of action: "If these talks again prove fruitless, the new committee – yes, the same one that withdrew this lawsuit – must be prepared to file a new one to get what the alumni want. They are, after all, the elected representatives of the alumni." (App. A, p. 121)

On the other hand, those who were actually orchestrating the "with prejudice" dismissal clearly grasped its potential adverse effects upon the alumni's legal rights to parity. For example, Diana Pearson, another Dartmouth employee whose notes were obtained in discovery by the Plaintiffs in the Current Lawsuit, recorded a conversation she had on June 30, 2008 with David Spalding about discussions he had earlier had with John Mathias. (App. A, pp. 124-130) Ms. Pearson's notes report that Mr. Spalding, either speaking for himself or for Mr. Mathias or both, acknowledged that although the election was "Fought over lawsuit not parity," dismissing the Prior Lawsuit in the manner that the parties did was intended to render "1891 dead forever," thereby "Ending parity – done deal." (App. A, p. 125) See also, App. A, p. 131 (email of David Spalding of June 22, 2008 taking issue with a proposed public statement on the dismissal that would have commented that the dispute about parity was still "far from over"). Mr. Mathias is also recorded in Ms Pearson's notes as saying that what they had done caused him to be "concerned pol." (App. A, p. 126) (The abbreviation "pol." presumably stands for "politically.") Mr. Spaulding urged caution so as not to stir up the alumni; as he put it, "move slowly – board to reflect, consult + then take action." (Ibid.).[12]

As things turned out, the concerns of the Association's new Executive Committee and of the College that if someone learned of the terms of the stipulation, he/she might try to challenge it were well founded. Despite all their efforts to keep secret the fact that the Prior Lawsuit was being dismissed "with prejudice," a former member of the Association's Executive Committee, Frank Gado, found out about it – and he did try to challenge it. On the very same day that Judge Vaughan issued his telephonic order signing off on the stipulation – but, as luck would have it,

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[12] Even the President of the College and an *ex officio* member of its Board of Trustees, James Wright, was concerned that the dismissal of the lawsuit might not stick; for when he was informed by David Spalding on June 27 that "the judge has accepted the withdrawal of the lawsuit with prejudice," he responded via email as follows: "David – good news. good job. now we have to understand how comprehensive the 'with prejudice' concept is!" (App. A, p. 123) [Note: President Wright's email name was "2X99q."]

*after* the order had already been issued – Mr. Gado had a letter delivered to the Clerk of Court requesting that the Court delay accepting any dismissal of the case. (App. B, p. 134) Mr. Gado requested that he and the other members of the "old" Executive Committee who had supported filing the Prior Lawsuit be given an opportunity to consult with counsel to determine what new course of action might be available to them. (App. B, p. 134) However, because Judge Vaughan had already issued his order, Mr. Gado's representative was informed that he was "too late." (App. B, p. 137, ¶16)

On the other hand, despite his inability to do anything about it, Mr. Gado's persistence at least overcame the College's disinformation campaign and resulted in the alumni being made aware of the exact wording of the stipulation. [13]

**B. <u>The Current Lawsuit</u>**

During the pendency of the Prior Lawsuit, the College's Board of Trustees had instituted a so-called "freeze" upon the filling of vacant Board seats. However, at its first meeting after the dismissal of the litigation, in September, 2008, the Board voted to lift the freeze and to elect five new Charter Trustees. This partially executed the Board's decision in the Fall of 2007 to expand its membership by adding eight new Charter Trustees – but no corresponding new Alumni Trustees, thus formally breaching parity. When the Board refused at its November, 2008 meeting to re-consider its decision and to match the appointment of the new Charter Trustees with an equal number of new Alumni Trustees, it became apparent that the Unity Slate's strategy of attempting to preserve parity through negotiation - if not a total farce - was at least a failure.

[13] Mr. Gado subsequently attempted to intervene in the Prior Lawsuit and moved to have the "with prejudice" wording stricken from the stipulation. (App. B, pp. 140-147) Judge Vaughan, however, denied Mr. Gado's Motion to Intervene (presumably because he was too late) and, accordingly, Mr. Gado's Motion to Disallow Docket Marking in its Present Form was marked "moot." (App. B, p. 148)

Accordingly, seven individual alumni stepped forward and filed the Current Lawsuit. (App. C, pp. 17-38)[14]

## C. The Plaintiffs

None of the Plaintiffs in the Current Lawsuit had any personal involvement in the Prior Lawsuit. (App. B, Dartmouth Ex. BB through HH, pp. 310-337, Interrogatory #5. See also, App. B, Dartmouth Ex. BB through HH, pp. 310-337, Interrogatory #7)

Each of the Plaintiffs is a graduate of Dartmouth and, by reason thereof, a member of the Association. Paragraph 31 of the Petition further describes the Plaintiffs as follows:

> The Plaintiffs and all other alumni 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. (App. C, p. 28)

By way of example, the affidavit of Plaintiff John Steel, III, a former Alumni Trustee, catalogs some of the specific actions taken by him in reliance upon the 1891 Agreement and the College's other promises of parity:

> I personally have engaged in many of the foregoing activities in reliance upon the College's agreements and promises that alumni would have the right to elect one-half of the elected Board of Trustees, including but not limited to: making contributions over the course of the last 50+ years to the College and to Dartmouth – affiliated organizations, running and getting elected and serving as an Alumni Trustee on the Board, sending all five of my children to Dartmouth, putting Dartmouth in my estate plan, raising funds from others for Dartmouth and serving as an officer of my local Dartmouth Club. (App. A, p. 43)

## D. The Summary Judgment Motion

On July 17, 2009, after both sides had conducted extensive discovery, the College filed a Motion for Summary Judgment seeking to dismiss the Current Lawsuit on the grounds (a) that

[14] The references herein to "App. C" are to the Appendix C to this Brief which contains pleadings and orders other than the College's Motion for Summary Judgment and the Plaintiffs' responses thereto, which are in Appendices B and A, respectively.

the Plaintiffs allegedly have no standing to sue to enforce the 1891 Agreement and (b) that all of the Plaintiffs' claims are allegedly barred by the doctrine of *res judicata* on account of the filing of the stipulation of dismissal "with prejudice" in the Prior Lawsuit. (App. C, pp. 1-32) The Plaintiffs filed a timely objection and memorandum of law in support thereof. (App. A, pp. 1-41) The Plaintiffs were joined in their opposition to the College's motion by Amicus Todd Zywicki, a former Alumni Trustee.

The Superior Court heard oral argument on the College's motion for summary judgment on December 4, 2009. On January 8, 2010, Judge Vaughan issued an order granting the College's motion. (App. C, pp. 1-13) The Plaintiffs filed a timely Motion for Reconsideration, to which the College objected. (App. C, pp. 52-61 and 62-71) On February 5, 2010, Judge Vaughan denied the Motion for Reconsideration. (App. C, pp. 14-46) This appeal was timely filed by the Plaintiffs on March 18, 2010.

## V. SUMMARY OF ARGUMENT

1. The Plaintiffs have personal standing to sue to enforce the 1891 Agreement.
2. The stipulation filed by the Association and the College dismissing the Prior Lawsuit "with prejudice" provides no *res judicata* bar to the Current Lawsuit.

## VI. ARGUMENT

### A. Preliminary Matters.

There are no disputes of material fact. Since the rulings by the Superior Court were rulings of law, this Court is not bound to give any deference to the conclusions reached by the Superior Court and all matters at issue should be decided *de novo*.[15] *E.g.*, Hill-Grant Living Trust v. Kearsage Lighting Precinct, 159 N. H. 529, 532 (2009).

[15] Independently, the applicability of the doctrine of *res judicata* is always a question of law to be decided *de novo* by this Court. *E.g.*, Kalil v. Town of Dummer Zoning Board of Adjustment, ___ N. H. ___(February 11, 2010); South Willow Properties, LLC v. Burlington Coat Factory of New Hampshire, LLC, ___ N. H. ___ (December 16, 2009).

**B**. **Since The Undisputed Facts Establish That The Parties To The 1891 Agreement Intended And Expected Alumni Such As The Plaintiffs To Be Individually Benefited By And Have Rights Under The Contract, The Superior Court Was In Error In Ruling That The Plaintiffs Do Not Have Standing As Third-Party Beneficiaries To Sue In Their Own Names To Enforce This Contract.**

New Hampshire generally follows the RESTATEMENT OF CONTRACTS on issues of contract law. Section 302 of the RESTATEMENT states the rule as to when non-parties to a contract may be recognized as third – party beneficiaries (which it calls "intended beneficiaries"), who, under the common law, are entitled to sue to enforce the contract in their own names. In relevant part, Section 302 states as follows: "Unless otherwise agreed between a promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and … the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." RESTATEMENT (SECOND) OF CONTRACTS §302(1)(b).

According to the RESTATEMENT, therefore, the critical determinant of whether a contract has any third-party beneficiaries is the "intention of the parties." Citing to the RESTATEMENT, this Court has articulated the test as follows: "A third-party beneficiary relationship exists if … the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract …. A benefit to a third party is a 'motivating cause' of entering into a contract only where the promisee intends 'to give the beneficiary the benefit of the promised performance.'" Grossman v. Murray, 144 N.H. 345, 347-8 (1999).

The entire evidence of record with respect to the intentions of the parties to the 1891 Agreement is contained in the two documents which together form the Agreement: the June 23, 1891 Resolution of the College's Board of Trustees and the June 25, 1891 Report of the

Association to the alumni. (See generally, App. A, pp. 159-166 & App. B, pp. 93-94) Both make specific references to the benefits which the parties expected the Agreement to confer upon the alumni and, in turn, the obligations which it imposed upon them. In a nutshell, the benefit which the 1891 Agreement conferred upon the alumni was the opportunity to participate in a process to choose one-half of the members of the Board of Trustees and, as the Superior Court correctly observed, to thus enjoy "a greater role in management of Dartmouth College." (App. C, p. 11) In particular, this is how the Association's Report to the alumni described what the committee which negotiated the Agreement with the Board of Trustees intended:

> The Committee's opinion was that the most certain, if not the only, effectual way to create and preserve the live, constant, active interest of the Alumni in the College, and their cooperation in its affairs, was to confer upon them a *real, substantial, personal responsibility* thereon; that a mere advisory Board with no rights, or the mere privilege of occasionally making a nomination of a possible Trustee, would be too uncertain, contingent, and remote a right, to excite and keep up that clear, constant, active interest of the Alumni, which is needed, and which it was the duty of your Committee to secure, if possible. (App. A, p. 161) (emphasis in original)

Note that the Report refers to the alumni having been granted something "personal." In other words, the essential intent of the framers of the 1891 Agreement was not merely to confer a participatory privilege in the College's governance upon the Association of Alumni, as an entity, but to confer this privilege upon the individual members of the body of alumni.[16] Although the privilege was to be exercised through a collective process administered by the Association, the benefit of the College's agreement to accept alumni parity on its Board of Trustees was clearly intended to devolve upon the alumni themselves.[17]

[16] Note, also, that if one examines the other side of the contractual equation, the situation is parallel. For it is also the alumni, not the Association, from whence the consideration for the College's promise of parity flows. Suffice it to say that such things as making financial contributions to the College, serving on College committees, serving on the Board of Trustees and voting in elections for Alumni Trustees (see Petition ¶31-32, App. C, pp. 28-29) are all the acts of *individual* alumni, not the Association.

[17] While less expressive of the parties' intent to confer benefits upon the alumni as individuals, the June 23, 1891 Resolution of the Board of Trustees, which is the document constituting the College's component of the 1891 Agreement, states that the College is granting the right to nominate Alumni Trustees to "the graduates of the College." (App. B, p. 93)

Indeed, the College itself has taken certain actions which essentially acknowledge that whatever privileges exist with respect to alumni representation on the Board of Trustees, the alumni themselves possess those privileges. For example, at the same meeting in September, 2007, that the Board voted to breach parity, it also voted to take over administrative control of the process for the election of Alumni Trustees. (App. C, Petition¶37, pp. 30-31) Only if the Alumni Council (which nominates candidates for Alumni Trustee seats) and the Association (which conducts the elections for those seats in the event of a contest) were to change their constitutions to "reform" the electoral process in a manner to the liking of the Board would the Board agree to return administrative control of the elections to these two organizations. In other words, the College considered the Association (and the Council) superfluous to the alumni's exercise of their rights to participate in the governance of the College. See Public Service Co. of N.H. v. Hudson Light and Power Dept., 938 F.2d 338, 345 (1st Cir., 1991) (third-party beneficiary standing is especially appropriate where the contract promisee is only a "token intermediary" for the real parties in interest).

Accordingly, the undisputed evidence of record sufficiently satisfies the intent-to-benefit prong of the RESTATEMENT's third-party beneficiary test. Nevertheless, the College will probably argue on appeal – as it did below – that there must also be evidence that the parties specifically intended to give putative third-party beneficiaries a right to sue on the contract. To begin with, the evidence of record establishes that the parties to the 1891 Agreement did indeed intend to confer *rights* and not just *benefits* upon the alumni. In this regard, the June 25, 1891 report to the alumni specifically states that the 1891 Agreement – unlike prior plans which the alumni and the College had considered – was intended to grant the alumni "rights" which would "excite … [their] … clear, constant active interests …, which is needed, and which it was the

duty of your Committee to secure, if possible." (App., p. 161) Although the report does not, in so many words, express the parties' intent to grant the alumni standing to sue on the contract, it is arguable that the ability to enforce the alumni's rights to parity is implicit in the granting of such rights because, as Chief Justice John Marshall so famously put it, "a right without a remedy is no right at all." Marbury v. Madison, 5 U.S. 137, 163 (1803).

More important, there is no mention in the RESTATEMENT or in the New Hampshire case law of any such requirement that the parties express a specific intent to confer upon a third-party beneficiary the right to sue on the contract. As stated in RESTATEMENT (SECOND) OF CONTRACTS §304: "A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." See also, id. at *comment d*. This makes perfect sense in light of the fact that the RESTATEMENT rule is really a default rule; in other words, it is designed to provide a rule of construction where the parties to the contract have *not* included language therein which expresses their intent about enforcement by non-parties. And, since the parties to a contract only rarely express their intent on such a matter, having a default rule in this area is perfectly appropriate.

In other words, once the intent-to-benefit test has been satisfied – as it is in this case - it is the law, not the specific intent of the parties, which supplies the third-party beneficiary with the power to enforce the contract. As prescribed in the RESTATEMENT, whether the law will recognize such a right – expressed therein as "a right to performance" – depends upon whether it is "appropriate to effectuate the intention of the parties." RESTATEMENT (SECOND) OF CONTRACTS §302(1)(b).

The Plaintiffs respectfully submit that it is entirely "appropriate" to recognize individual alumni rights of performance with respect to the 1891 Agreement. Besides the fact that the

parties to the contract expressed their intent to confer personal rights upon the alumni, enforcement of the contract by *individual* alumni – such as these Plaintiffs – necessarily inures to the benefit of *all* alumni. To put things the other way, no other alumnus can be prejudiced by the relief sought by these Plaintiffs. In other words, if the Plaintiffs are successful in enforcing the 1891 Agreement, they will have no greater ability to actually choose the persons who will serve as Alumni Trustees than other alumni will.

The other reason that recognizing the right of individual alumni to sue on the 1891 Agreement is appropriate to effectuate the intention of the parties arises out of the public policy implications of enforcing the contract at issue. The way in which public policy militates in favor of permitting this suit to go forward will be addressed in detail in the brief to be filed by the amicus in this case, former Alumni Trustee Todd Zywicki. If anything beyond what the Plaintiffs offer herein is needed to tip the scales of justice on this issue, Professor Zywicki's brief will clearly establish why Dartmouth's 100+ year history of alumni representation on its governing body is something worth preserving.

### C. The Superior Court Assumed, Without Deciding, That the Plaintiffs Do Have Standing as Members of the Association to Bring Suit in Their Own Names to Enforce the 1891 Agreement. The Undisputed Facts Indeed Confirm That the Superior Court's Assumption Was Correct And, Therefore, Such a Ruling Is Compelled in this Case.

The Association is an unincorporated entity and the Plaintiffs claim to have standing as members thereof to personally sue on the contract. The law of New Hampshire is admittedly fuzzy on this point. The primary case on the rights and obligations of members of unincorporated associations is Shortlidge v. Gutoski, 125 N.H. 510 (1984). In that case, the Court held that individual members of an unincorporated association could be sued personally on contracts entered into by the association to which such members had assented and ratified. Id. at 515. The

Plaintiffs take the position that the reverse is also true, i.e., that individual members of an unincorporated association can sue to enforce contracts of the association to which they have assented and ratified. [18] See Bowker v. Nashua Textile Co., Inc., 103 N.H. 242, 246 (1961) (only shareholders who have themselves suffered injury may bring a stockholders' derivative suit).

**D. Even If the 1891 Agreement Is Deemed Not to Be a Contract Between the Association and the College, the Plaintiffs, as Persons Who the Undisputed Facts Establish That the College Should Reasonably Have Expected to Rely upon its Promises Regarding Parity and Who Have in Fact Taken Actions in Reliance upon the College's Said Promises, Have Standing under the Doctrine of Promissory Estoppel to Sue in Their Own Names to Enforce the College's Promises.**

New Hampshire recognizes promissory estoppel as a cause of action that serves to "impute contractual stature based upon an underlying promise, and to provide a remedy to the party who detrimentally relies on the promise." Great Lakes Aircraft Co., Inc. v. City of Claremont, 135 N.H. 270, 290 (N.H. 1992). The RESTATEMENT (SECOND) OF CONTRACTS, §90 defines this cause of action as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Some elements of a promissory estoppel claim are very similar to the elements of a third-party beneficiary claim: (a) a promise-reasonably-expected-to-induce-another's-action-or-forbearance vs intention-to-benefit-another and (b) injustice-being-avoided-only-by-enforcement-of-the-promise vs recognition-of-a-right-of-performance-being-appropriate-to-effectuate-the-intention-of-the-parties. As argued above, the undisputed facts establish the Plaintiffs' standing to sue as third-party beneficiaries and it is respectfully suggested that the same evidence adequately establishes their standing to sue under promissory estoppel.

[18] The Plaintiffs allege such assent and ratification in paragraph 31 of their Petition and such allegation is substantiated by the affidavit of Plaintiff John Steel. (App. A, p. 43)

The only additional element of a promissory estoppel claim is that the promise of the promisor must have actually induced the action or forbearance which the promisor expected.[19] The Plaintiffs have alleged that they all relied upon the College's promise of parity and that they took actions in reliance thereon. (App. C, Petition, ¶¶30-31 & 77-81, pp. 28 and 36-37)[20] As noted above, the Plaintiffs have supplemented their allegations, by way of example, with a statement of specific facts applicable to Plaintiff John Steel. (App. A, pp. 42-43) Since the Plaintiffs' facts are undisputed, their standing to sue under the doctrine of promissory estoppel is established.

**E. Even If the Filing of a "With Prejudice" Voluntary Dismissal of the Prior Lawsuit Might, under Ordinary Circumstances, Have Provided a Basis for the College's Assertion of the Defense of *Res Judicata*, the College Should Be Denied the Opportunity to Avail Itself of Such a Defense in this Case Where the Undisputed Facts Establish (A) That the Association's Executive Committee Had Not Been Authorized by the Alumni to Take Any Action Which Would Extinguish the Association's or the Alumni's Legal Rights to Parity, (B) That the Association and the Alumni Received Absolutely Nothing in Return for the Executive Committee's Dismissal of the Prior Lawsuit "With Prejudice," and (C) That the College Itself Colluded with the Association's Executive Committee and Orchestrated the Preparation and Filing of the "With Prejudice" Dismissal in Such a Manner That the Alumni Would Not Find out about it until it Was Too Late.**

The College claims that even if the Plaintiffs have standing to sue, the Current Lawsuit should be dismissed under the doctrine of *res judicata* on account of the filing of the stipulation in the Prior Lawsuit dismissing the Association's claims "with prejudice." The Plaintiffs claim that the stipulation is not worthy of *res judicata* recognition.

Although voluntary dismissals generally do qualify for such recognition, exception is made for cases of "fraud, collusion or error." Merchants Mutual Casualty Co. v. Kiley, 92 N.H.

[19] On the other hand, when it comes to the merits of a promissory estoppel claim, the claimant does not have to prove that there was a contract.

[20] Note that the Plaintiffs claim to be both direct promisees of and foreseeable third parties who relied upon the College's promise to seat an equal number of Alumni Trustees to the number of Charter Trustees.

323, 327 (1943). For example, in Beliveau v. Amoskeag Manufacturing Co., 68 N.H. 225 (1894), a plaintiff attempted to strike a stipulation which had been entered on the record by his attorney after the plaintiff had discharged him as his counsel. The docket had been marked "judgment for the plaintiff by agreement and judgment satisfied." Without knowledge of the opposing attorney's lack of authority, the defendant's counsel had agreed to the settlement and the defendant had paid over the agreed-upon sum of money. The plaintiff's counsel, however, promptly absconded with the money. Noting that settlement agreements are conclusive as between the parties "in the absence of fraud or mistake," the Court denied the plaintiff's motion to set the stipulation aside because the evidence established that the defendant's attorney "acted in good faith, without knowledge or … reason to suppose that [opposing counsel] was not the plaintiff's attorney." Id. at 226. Accord, Hubley v. Goodwin, 91 N.H. 200, 203 (1940) (stipulation for dismissal executed by counsel without client authority is enforceable where no "fraud or collusion" and agreement was entered into "in good faith"); Moore v. Lebanon, 96 N.H. at 22 (stating that stipulations for dismissal "made in good faith" will be enforced). Burtman v. Butman, 94 N.H. 412 (1947) (settlement by attorneys in probate matters will be enforced if "reasonable"). See also, Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2nd Cir., 1982) (under Federal Rule of Civil Procedure 60(b), non-parties permitted to modify a stipulation for dismissal on equitable grounds); Guarantee Trust & Safe-Deposit Co. v. Duluth & W.R. Co., 70 F. 803 (D.C. Minn., 1895) (permitting intervention by shareholders of a corporate party who allege that the corporation and the other party to the suit are about to enter a collusive consent decree adverse to the shareholders' interests); Warner Company v. Sutton, 637 A.2d 960 (N.J. Super., 1994) (also allowing intervention to prevent entry of collusive consent decree). See generally, RESTATEMENT (SECOND) OF JUDGMENTS, §42, *comment b* ("[A]

judgment is not binding on the represented person where it is the product of collusion between the representative and the opposing party ….").

In applying the foregoing principles to the case at bar, one should first note that the Association's dismissal of the Prior Lawsuit "with prejudice" was completely gratuitous. Indeed, there is simply no good reason why the Association did not take a dismissal "without prejudice."[21] Suffice it to say that the Association gave up something of value; it had just received a favorable order from the Court denying the College's motion to dismiss – which constituted at least some indication that the Association had a valid claim and might win if the case went to trial. Yet it received absolutely *nothing* in return for giving up its legal rights to pursue its claims.[22] Accordingly, to the extent that the stipulation is a type of contract and subject to contract rules of interpretation,[23] it should be deemed unenforceable because there was no consideration for the Association's relinquishment of the alumni's rights.

The second reason that the Association's stipulation of dismissal with prejudice should be deemed ineffective to bar the Current Lawsuit is that it was a product of collusion and bad faith. In this regard, since it is the College which wishes to avail itself of the preclusive effect that such a stipulation might normally have, one must focus primarily upon its actions. As the undisputed facts make clear, the College not only colluded with the Association in dismissing the Prior Lawsuit with prejudice; it virtually commandeered the entire process. For it was the College that

[21] A dismissal without prejudice would have terminated the Prior Lawsuit, but would not have prevented the Association (or anyone else having standing) from reinstituting it if negotiations with the College for a restoration of parity ultimately failed. E.g., Town of Plaistow v. Riddle, 143 N.H. 307, 309 (1996); RESTATEMENT (SECOND) OF JUDGMENTS, §20.

[22] Indeed, the College has yet to answer what Ms. Lawrence dubbed the most controversial question: "why [the Executive Committee of] the AoA, which is only elected for a year, would file to withdraw a suit with prejudice and prevent future executive committees from acting differently?" (App. A, p. 102)

[23] Israel v. Carpenter, 120 F.3d 361, 366 (2d Cir., 1997).

selected the Association's new counsel; it was the College that managed the process; and it was the College that even dictated the terms of the stipulation.[24]

Equally apparent is the College's lack of good faith. As the notes of Diana Pearson's June 30, 2008 conversation with David Spalding reveal, Mr. Spalding knew full well that a cancellation of the Agreement would require a two-thirds vote of the alumni. Obviously referring to the recent Executive Committee election, he is reported to have said, "[T]o change A o A rules/constitution – as 1891 agreement calls for 2/3 majority of all alumni. This one got 60%." (App. A, p. 127). The point is that the College understood that if the dismissal with prejudice were effective to extinguish the alumni's right to parity,[25] the act of the Association's new Executive Committee in agreeing to such a thing was beyond the scope of its authority.[26] That, of course, is precisely why the college orchestrated a public relations campaign designed to keep the terms of the stipulation secret.

The final reason that the Association's stipulation of dismissal with prejudice should be deemed ineffective to bar the Current Lawsuit is that its execution was without proper authority. As those who were involved in the crafting and filing of the stipulation well understood, in the event that it were enforced, the stipulation would be tantamount to a cancellation of the 1891

[24] This is a case of the nominally subservient body – the College's administration – actually manipulating and controlling the process by which the rights of alumni were terminated by a procedural maneuver without any determination on the merits. This demonstrates, in a dramatic way, the accuracy of the observation made in the *amicus* brief, that there has been a modern trend whereby power in academic institutions has been allowed to devolve onto the administration because of a relinquishment by boards of trustees of their fiduciary duties of independent governance.

[25] And, as Ms. Pearson's notes reflect, this is precisely what Mr. Spalding and Mr. Mathias were hoping to accomplish: "1891 dead forever." (App. A, p. 125).

[26] At one point in their discussions about what form the dismissal of the Prior Lawsuit should take, Attorney Hilliard sent an email to counsel for the College and Mr. Mathias in which he suggested that "in order to have all options on the table", they might want to consider a so-called "neither party" docket marking together with the execution of a release "on behalf of the Association, its successors and its past, current, and future directors, officers, and members." (App. A, p. 94) The record does not contain any written response to this suggestion from the College or from Mr. Mathias, but one can safely assume that they rejected it because they knew that the execution by the Association's Executive Committee of a release which would actually *say* that the alumni were forever giving up their legal rights under the 1891 Agreement and would actually *say* that the Executive Committee purported to be authorized to take such action in the alumni's behalf would be tantamount to waving a red flag.

Agreement. It is the position of the Plaintiffs that no cancellation by the Association of the 1891 Agreement could be effected without a vote of its members.[27]

Although the Association's constitution does not expressly mention the 1891 Agreement, it clearly presupposes its existence. (App. B, pp. 95-98) Therefore, it is the Plaintiffs' further contention that a cancellation of the 1891 Agreement would amount to an amendment of the Association's constitution. And, like a cancellation of the 1891 Agreement, changes in the Association's constitution may only be effected by a vote of the Association's members.[28]

Despite prior admissions to the contrary by Mr. Mathias and Mr. Spalding, the College will presumably argue that the Executive Committee did not need a vote of the Association's members to dismiss the Prior Lawsuit with prejudice. It is important to understand the following implication of such a proposition: if the Executive Committee had the unilateral power to give up the alumni's right to *equal* representation on the College's Board of Trustees, it also had the unilateral power to give up the alumni's right to *any* representation on the Board. Since the Association's primary (and some would contend, its only) reason for being is to conduct elections for the Alumni Trustee seats guaranteed by the 1891 Agreement, if the Executive Committee could, on its own, completely give up the alumni's right to representation on the Board, it could essentially put the Association out of business. For the College to even suggest such an untenable proposition ought to be sufficient for this Court to reject it.

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[27] Note that the 1891 Agreement was originally adopted by the Association through a vote of its *members*. (App. A, p. 166) Likewise, over the years, when changes have been made to the procedures to be used by the Association for the election of Alumni Trustees, these changes have always been adopted by its *members*.

[28] Suffice it to say that no vote of the alumni has ever been taken to cancel the 1891 Agreement. Moreover, as noted previously, even the only poll that was ever taken on the pure concept of parity, the poll taken by the former Executive Committee before it filed the Prior Lawsuit, resulted in an overwhelming vote *in favor* of parity. See footnote 3, *ante*. The College, of course, will point to the alumni's election of the Unity Slate in the face of the latter's campaign pledge to dismiss the Prior Lawsuit. However, as Mr. Mathias and Mr. Spalding have attested to, that vote was "fought over lawsuit not parity." See p. 11, *ante*.

According to the New Hampshire Supreme Court, "[R]es judicata bars relitigation of issues between parties *absent some extenuating circumstance*. " Indian Head Nat. Bank of Derry v. Simonsen, 115 N. H. 282, 284 (1975) (emphasis supplied). Applying the teachings of such cases as Beliveau, Hubley and Moore, this Court should (1) find that there are indeed extenuating circumstances in this case, (2) strip the stipulation of its presumption of regularity and (3) grant the stipulation absolutely no *res judicata* effect upon the Current Lawsuit. Accordingly, the Court should rule that the Plaintiffs are not barred by the dismissal of the Prior Lawsuit from bringing the Current Lawsuit, either as members of the Association, as third-party beneficiaries or as parties who have standing to bring claims in promissory estoppel.

**F. The Judiciary Should Not Be Barred by the So-called Bricker Doctrine from Inquiring into the Irregularities Surrounding the Preparation and Filing of the "With Prejudice" Dismissal of the Prior Lawsuit Where the Actions of the Association's Executive Committee in Withdrawing the Prior Lawsuit with Prejudice Did Not Involve Some Mere Policy Dispute over the Association's Internal Affairs, but Instead Arguably Effected a Relinquishment of Important Legal Rights of the Association and its Members Vis-à-Vis an Outside Third Party, i.e., the College, and Where the Party Attempting to Claim the Benefit of the Bricker Doctrine Is Not the Association, but Is Instead the College.**

The College will undoubtedly respond to the Plaintiffs' contention that this Court should not give *res judicata* effect to the stipulation because of its aforementioned flaws by arguing that the Court is barred from looking behind the stipulation by the so-called Bricker doctrine. This is the proposition that courts will generally not interfere in the internal affairs of unincorporated associations. Bricker v. New Hampshire Medical Society, 110 N.H. 469 (1970).

To begin with, the College has no standing to raise this issue. The Association is not a party to the Current Lawsuit and the College has no authority to assert the Association's legal rights. Compare, Brzica v. Trustees of Dartmouth College, 147 N.H. 443 (2002) (where the Association *was* a party).

More important, the Bricker doctrine is not a bar to judicial scrutiny of the stipulation because it does not apply in cases involving "injustice or illegal action." Bricker supra at 470; Brzica, supra at 456. The fact that the stipulation was *ultra vires*, was without consideration and was a product of collusion with the College certainly qualifies as sufficient "injustice" to eliminate the immunity from judicial scrutiny which the Bricker doctrine might otherwise have afforded the stipulation.

Finally, the Plaintiffs respectfully suggest that the Bricker court's reference to a voluntary association's qualified immunity from judicial oversight for its "internal affairs" was never meant to extend to actions taken by an association which materially and adversely affect the *legal rights* of the association's members vis-à-vis outside parties. This is illustrated by the Bricker case itself. The complaint by the plaintiff in that case concerned the action of the governing body of the New Hampshire Medical Society, of which the plaintiff was a member, in using the services of a particular law firm which sometimes experienced conflicts of interest between its representation of the Society and its representation of other clients. In refusing to get involved in such a dispute, the Supreme Court expressly noted that "the plaintiff does not claim that the society or its attorney has inflicted or threatened to inflict any specific existing or reasonably anticipated damage to himself as a physician or as a member of the New Hampshire Medical Society." Bricker v. New Hampshire Medical Society, 110 N.H. 469, 470 (1970). In other words, the dispute between the parties was more in the nature of a general policy dispute than a dispute over anyone's legal rights. This is quite unlike the case at bar. The fact that the Association's Executive Committee entered into a stipulation with the College which purports to completely and forever bar the Association and its members from enforcing their contract with the College (the implementation of which is the primary business of the Association) is hardly

something which pertains to only the Association's "internal"[29] affairs. Compare, Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 456 (2002) (challenge to a modification of the Association's process for selecting Alumni Trustees is not judicially cognizable because it is merely a dispute over a voluntary association's "internal governance procedures").

It is especially inappropriate to decline inquiry into the circumstances surrounding the actions of the Association's Executive Committee in the context of the College's reliance upon those actions to impose the bar of *res judicata*, a doctrine which in New Hampshire specifically implicates equitable considerations. As recently as last summer, in a case in which the interests of the parties to the action at bar were admittedly represented by a party to an earlier action and where all of the formal conditions for the application of *res judicata* were satisfied, this Court nevertheless declined to apply *res judicata* "because of the potential adverse impact … on the … interests of persons not themselves parties in the initial action." In re: Zachary, ___ N.H. ___, ___ (July 31, 2009) (also holding that the burden of proof with respect to the application of *res judicata* is upon the party asserting it). See also, State of NH v. Charpentier, 126 N.H. 56, 61 (1985); RESTATEMENT (SECOND) OF JUDGMENTS §28(5). Suffice it to say that invocation of the Bricker doctrine to preclude a judicial investigation into the propriety of the stipulation in question has more than a mere "potential adverse effect" upon important interests of the Plaintiffs and the other alumni; it completely *extinguishes* them. It is respectfully suggested that the Bricker doctrine was never meant to require the judiciary to sit on the sidelines under circumstances such as these.

And, finally, whatever may be the merits of the College's assertion of the Bricker doctrine with respect to the Plaintiffs' claims as members of the Association, the issue is entirely

[29] Note that the Association itself has not moved to intervene as a party in this case. The probable reason for this is that the Plaintiffs are not asking for any relief which would require the Association to do anything or not to do anything. In that sense, therefore, the Plaintiffs are not interfering in *any* of the Association's affairs, internal or otherwise.

irrelevant to the Plaintiffs' independent claims as third-party beneficiaries and as parties entitled to recover under principles of promissory estoppel. Since these claims are ones which cannot be involuntarily taken from them by the Association's Executive Committee or even by a vote of the alumni, the validity of the stipulation or the question of whether the Bricker doctrine insulates the stipulation from judicial scrutiny simply has nothing to do with the Plaintiffs' rights to pursue these particular claims.

**G. Where the Undisputed Facts Establish (A) That the Plaintiffs Had No Personal Involvement in the Prior Lawsuit, (B) That, as of the Time of the Filing of the Plaintiffs' Lawsuit, the Plaintiffs' Third-Party Beneficiary Rights Could Not Be Extinguished Because Their Rights Had Vested, and (C) in Any Case, That Neither the Plaintiffs Personally Nor the Alumni in General Had Taken Any Action or Authorized the Executive Committee of the Association to Take Any Action to Extinguish the Association's or the Alumni's Legal Rights to Parity, Such Undisputed Facts Compel a Ruling in this Case That the Plaintiffs' Third-Party Beneficiary Claims Are *Not* Barred by *Res Judicata*.**

The doctrine of *res judicata* bars the re-litigation of the same cause of action by the same parties or those in privity with them where the earlier litigation was terminated by a judgment on the merits. Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 454 (2002). The problem for the College, of course, is that the parties in the Current Lawsuit are not the same as the parties in the Prior Lawsuit. Accordingly, to apply the doctrine of *res judicata*, the College must establish that the Plaintiffs were in "privity" with the Association in the Prior Lawsuit.

Under general rules of privity, a non-party to an earlier suit may be barred from bringing a second suit where he/she was personally involved in the earlier suit in such a fashion as to have been in control of the litigation. In this case, the undisputed facts establish that the Plaintiffs had no involvement whatsoever in the Prior Lawsuit. Accordingly, the general rule has no bearing upon the Plaintiffs' rights to proceed with the Current Lawsuit. [30]

[30] Nevertheless, in its Motion for Summary Judgment below, the College argued that the Plaintiffs should be deemed to be in functional privity with the Association in the Prior Lawsuit and thus barred from proceeding with the Current Lawsuit by the asserted *res judicata* effect of the stipulation. The College's claim was based upon the fact that an entity known as The Hanover

However, when it comes to third-party beneficiaries of a contract, the RESTATEMENT prescribes a special rule as to when such parties are deemed to be in privity with a contract promisee for purposes of *res judicata*. In this regard, the RESTATEMENT (SECOND) OF JUDGMENTS, §56(1) provides as follows:

> When a contract between two persons creates an obligation in favor of another person as an intended beneficiary … a judgment for or against the promisee in an action between him and the promisor does not preclude an action by the beneficiary on the obligation to him unless at the time of the judgment was rendered the promisee had the power to discharge the obligation.

Applying this rule to the case at bar, unless at the time that the Prior Lawsuit was dismissed, the Association - the promisee under the 1891 Agreement - had the power to cut off the rights of individual alumni - the third-party beneficiaries under the Agreement - the dismissal of the Prior Lawsuit has no *res judicata* effect upon the rights of the Plaintiffs to proceed with the Current Lawsuit. To determine whether the Association had such a power, one must refer back to the rules governing contracts and the rights of third-party beneficiaries. RESTATEMENT (SECOND) OF JUDGMENTS, §56(1), *comment a.*

RESTATEMENT (SECOND) OF CONTRACTS §311(3) provides that a contract promisee has no power to cut off the rights of a third-party beneficiary after "the beneficiary …

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Institute (the "Institute") financed both the Prior Lawsuit and the Current Lawsuit. The Institute is a New Hampshire not-for-profit corporation founded in 2002 whose mission, in part, is "to support, encourage and facilitate the full, fair and informed participation by the alumni of Dartmouth College in the governance of Dartmouth College and the nomination and election of alumni trustees of Dartmouth College;…"(App. A, p. 132) None of the Plaintiffs are members, directors or officers of The Hanover Institute. (App. B, Dartmouth Ex. BB through HH, pp. 310-337, Interrogatories #2 & 4) Moreover, the undisputed facts establish that except for the payment of legal fees, the Institute played no role in the Prior Lawsuit. Accordingly, even if the actions of the Institute could somehow be imputed to the Plaintiffs, since the determinant of functional privity is whether the non-party who is alleged to be in privity with a party in the first suit was in *control* of that suit, it is clear that the doctrine does not apply in this case. Daigle v. Portsmouth, 129 N.H. 561, 571 (1987) (citing and summarizing RESTATEMENT (SECOND) OF JUDGMENTS, §39 as follows: "A person who controls, or who substantially participates in controlling, the presentation on behalf of a party is bound by the determination of the issue decided, as though he were himself a party.")

In addition, even if the Plaintiffs could be deemed to be in functional privity with the Association in the Prior Lawsuit, the doctrine at issue would be collateral estoppel, not *res judicata*. RESTATEMENT (SECOND) OF JUDGMENTS §39; Tsiatsios v. Tsiatsios, 144 N.H. 438, 441-443 (1999); Aranson v. Schroeder, 140 N.H. 359, 368-9 (1995); Daigle v. Portsmouth, supra; see RESTATEMENT (SECOND) OF JUDGMENTS, §59(3). The problem for the College is that *nothing* was resolved in the Prior Lawsuit. As stated in *comment e* to RESTATEMENT (SECOND) OF JUDGMENTS §27, "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, [collateral estoppel] does not apply with respect to any issue in a subsequent action." Accord, Waters v. Hedberg, 126 N.H. 546, 549 (1985).

materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee." As noted before, all of the Plaintiffs claim that they have taken actions in reliance upon the 1891 Agreement and these allegations are documented by way of example with respect to Plaintiff John Steel. There are no facts of record to the contrary. Accordingly, regardless of the possible efficacy of the stipulation to bar future claims by the Association itself, since the Plaintiffs' third-party beneficiary rights were vested in the manner prescribed by the RESTATEMENT, their third-party beneficiary claims survive the Association's dismissal of the Prior Lawsuit with prejudice.

Moreover, even if the Plaintiffs' third-party beneficiary rights had not vested by the time the stipulation was filed, the other reason that the Association's Executive Committee did not – in the words of the RESTATEMENT §56(1) - have the "power to discharge the obligation" of the College was because, as argued above, the alumni had never voted to authorize the stipulation or to otherwise relinquish the Association's or their rights to parity. Accordingly, for this reason as well, the Plaintiffs' third-party beneficiary claims survive the Association's dismissal of the Prior Lawsuit with prejudice.

**H. Where the Undisputed Facts Establish (A) That the Plaintiffs Had No Personal Involvement in the Prior Lawsuit, (B) That, as of the Time of the Filing of the Plaintiffs' Lawsuit, the Plaintiffs' Rights to Bring Claims in Promissory Estoppel Could Not Be Extinguished Because Their Rights Had Vested, and (C) in Any Case, That Neither the Plaintiffs Personally Nor the Alumni in General Had Taken Any Action or Authorized the Executive Committee of the Association to Take Any Action to Extinguish the Association's or the Alumni's Legal Rights to Parity, Such Undisputed Facts Compel a Ruling in this Case That the Plaintiffs' Claims Based upon Promissory Estoppel Are *Not* Barred by *Res Judicata*.**

Plaintiffs suggest that the effect of *res judicata* upon their independent claims under the theory of promissory estoppel should properly be governed by the same principles as apply to their third-party beneficiary claims. First, the undisputed facts establish that the Plaintiffs had no

personal involvement in the Prior Lawsuit. Second, because of their actions taken in reliance upon the College's promise of parity, the Plaintiffs' rights to bring claims in promissory estoppel should be deemed to be vested and therefore immune from divestiture by the College's and the Association's execution and filing of the stipulation. And, finally, regardless of whether their rights had become vested, neither the Plaintiffs individually nor the alumni collectively had ever given the Executive Committee of the Association the authority to dismiss the Prior Lawsuit with prejudice or to otherwise relinquish the Association's or their rights to parity and, therefore, the dismissal should be ineffective as a *res judicata* bar to their promissory estoppel claims.

## I. Where the Undisputed Facts Establish (A) That the Plaintiffs Had No Personal Involvement in the Prior Lawsuit, (B) That Both the Association and the Plaintiffs, as Individual Members Thereof, Have Standing to Sue to Enforce the 1891 Agreement, and (C) in Any Case, That Neither the Plaintiffs Personally Nor the Alumni in General Had Taken Any Action or Authorized the Executive Committee of the Association to Take Any Action to Extinguish the Association's or the Alumni's Legal Rights to Parity, Such Undisputed Facts Compel a Ruling in this Case That the Plaintiffs' Claims as Members of the Association Are *Not* Barred by *Res Judicata*.

As noted above, the Plaintiffs take the position that the filing of the dismissal of the Prior Lawsuit with prejudice was *ultra vires* as to the Association itself because it was not authorized by a vote of the Association's members. Accordingly, if the Plaintiffs do have standing as individual members of the Association to enforce the 1891 Agreement, their claims are not be barred by *res judicata*.

On the other hand, even if the stipulation were deemed effective to bar subsequent claims by the Association, there is an unresolved question under New Hampshire law as to whether the Plaintiffs' individual claims are likewise barred. In the RESTATEMENT, the *res judicata* effect upon the members of an unincorporated association of prior litigation by the association turns upon whether, under applicable law, an unincorporated association is treated as a "jural

entity distinct from its members." RESTATEMENT (SECOND) OF JUDGMENTS, §61. The test for what is a jural entity is whether it is permitted under local law to bring suit in its own name. If it is, the RESTATEMENT provides that a suit by the entity bars a second suit by its members. Id. at §61(2). On the other hand, if an unincorporated association does not have the right to sue in its own name, the RESTATEMENT would not bar the association's members from bringing their own suit. RESTATEMENT (SECOND) OF JUDGMENTS, §35, *comment d*.

The Plaintiffs take the position that, under New Hampshire law, *both* an unincorporated association *and* its members may sue to enforce the association's contracts.[31] See Kessler v. Gleich, 156 N.H. 488, 492-4 (2007) (limited partner may bring either a derivative action in behalf of the partnership or a direct, personal action). Accordingly, this case does not fit neatly into the either/or mold contemplated by the RESTATEMENT.

So, what is this Court to do? The Plaintiffs respectfully suggest that the appropriate rule for New Hampshire to apply to this situation is something analogous to the rule applicable to contract promisees and contract third-party beneficiaries.[32] Accordingly, because the Plaintiffs were not involved in the Prior Lawsuit and because neither the Plaintiffs personally nor the other members of the Association authorized the dismissal of the Prior Lawsuit with prejudice or otherwise authorized the Association's Executive Committee to give away the Association's or their rights to parity, the dismissal of the Prior Lawsuit should not be a bar to their claims in the Current Lawsuit as members of the Association.

[31] Ironically, in the Prior Lawsuit, the College took the position that the Association had no standing to sue in its own name and only its members could to sue to enforce the 1891 Agreement. Now that the shoe is on the other foot, the College, of course, takes the opposite position.

[32] It is especially appropriate to apply such a rule in this case where the association's members who have elected to become plaintiffs have personally taken actions in reliance upon the association's contract. Although it may be a bridge too far to suggest that the independent rights of these association members might now be "vested" so as to be immune from divesture by the association, that bridge does not have to be crossed in this case because the Executive Committee of the Association of Alumni was never given any authority to do such a thing and, therefore, what it did do (i.e., file the stipulation) was ineffective to divest the members of their independent rights to enforce the 1891 Agreement.

## VII. CONCLUSION

For the reasons stated above, the Plaintiffs respectfully pray that the Court rule as follows:

1. That the Plaintiffs have standing to bring the Current Lawsuit as members of the Association;

2. That the Plaintiffs' claims as members of the Association are not barred by *res judicata*;

3. That the Plaintiffs have standing to bring the Current Lawsuit as third-party beneficiaries of the 1891 Agreement;

4. That the Plaintiffs' claims as third-party beneficiaries are not barred by *res judicata*;

5. That the Plaintiffs have standing to sue on the grounds of promissory estoppel;

6. That the Plaintiffs' claims based on promissory estoppel are not barred by *res judicata*;

And, therefore, this Court should reverse the Superior Court's granting of the College's Motion for Summary Judgment and remand this case for a trial on the merits.

## REQUEST FOR ORAL ARGUMENT

The Plaintiffs respectfully request that their counsel be permitted to argue orally.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2010, copies of the foregoing were served by hand on Attorney Bruce W. Felmly, Esquire, McLANE, GRAF, RAULERSON & MIDDLETON, 900 Elm Street, Manchester, NH 03101, and by first-class mail upon Richard C. Pepperman, II, Esquire, SULLIVAN & CROMWELL, 125 Broad Street, New York, NY 10004, both counsel for the Defendant/ Appellee, and by first-class mail upon Harvey Silverglate, Esquire, ZALKIND, RODRIGUEZ, LUNT & DUNCAN, 65A Atlantic Avenue, Boston, MA 02110 and Andru H. Volinsky, Esquire, BERNSTEIN, SHUR, SAWYER & NELSON, 670 N. Commercial Street, Suite 108, Manchester, NH 03105, both counsel for *amicus*.

_____
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