

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

Docket No. 08-E-0294

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

**Petitioners**

v.

**TRUSTEES OF DARTMOUTH COLLEGE,**

**Respondent**

**RESPONDENT'S ANSWER AND AFFIRMATIVE DEFENSES  
TO PETITION FOR DECLARATORY AND EQUITABLE RELIEF**

Respondent Trustees of Dartmouth College (the "College"), by its undersigned counsel, hereby answers the Petition for Injunctive and Equitable Relief (the "Petition") filed by Petitioners B.V. Brooks, Kenneth F. Clark, Jr., Marisa DeAngelis Kane, John H. Plunkett, Douglas R. Raichle, Robert G. Reed III, and John Steel III (collectively, "Petitioners"), subject to the affirmative defenses set forth below, as follows:

1. Denies the allegations of paragraph 1, except (a) is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 1 and therefore denies the same; (b) admits that (i) Petitioners are all alumni of Dartmouth College, (ii) the Association of Alumni of Dartmouth College (the "Association") is an unincorporated association with a mailing address of P.O. Box 525, Hanover, New Hampshire 03755, and (iii) the Association was formed in 1854; and (c) refers to the Association's Constitution for a description of the Association.

2. Denies the allegations of paragraph 2 as stated, and avers that the respondent Trustees of Dartmouth College is a New Hampshire non-profit corporation

established by Royal Charter with a principal business address of Parkhurst Hall, Hanover, New Hampshire 03755.

3. Avers that the allegations of paragraph 3 consist of a legal conclusion as to which no response is required or appropriate. To the extent that a response is required, the College is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 and therefore denies the same.

4. Avers that the allegations of paragraph 4 consist of a legal conclusion as to which no response is required or appropriate. To the extent that a response is required, the College admits that it is located in Grafton County.

5. Denies the allegations of paragraph 5, except (a) admits that the Board of Trustees of the College enacted a resolution in 1891 that permitted graduates of the College to nominate a "suitable person" for five trusteeships and refers to that resolution, as well as superseding Board resolutions in 1961 and 2003, for a complete and accurate statement of their contents, and (b) refers to the documents quoted or referenced in paragraph 5 for a complete and accurate statement of their contents.

6. Denies the allegations of paragraph 6, except is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Petitioners' beliefs and therefore denies the same.

7. Denies the allegations of paragraph 7, except (a) admits that certain Dartmouth alumni began seeking a role for alumni in the College's governance in the Nineteenth Century, and (b) refers to the document referenced or quoted therein for a complete and accurate statement of its contents.

8. Denies the allegations of paragraph 8 as stated, except (a) admits that the ten-member committee of alumni was appointed in 1869 "to take measures to increase the funds

of the College and to consider what steps ought to be taken to bring the alumni into a more intimate relation to its management," and (b) refers to the document referenced or quoted therein for a complete and accurate statement of its contents.

9. Denies the allegations of paragraph 9, and refers to the documents referenced or quoted therein for a complete and accurate statement of their contents.

10. Denies the allegations of paragraph 10.

11. Denies the allegations of paragraph 11, and refers to the documents referenced or quoted therein for a complete and accurate statement of their contents.

12. Denies the allegations of paragraph 12 as stated, and refers to the document referenced and quoted therein for a complete and accurate statement of its contents.

13. Denies the allegations of paragraph 13, except (a) admits that the Association appointed a committee in 1890, and (b) refers to the documents referenced or quoted therein for a complete and accurate statement of their contents.

14. Denies the allegations of paragraph 14, except (a) admits that the Board of Trustees adopted resolutions on June 23, 1891, and (b) refers to those resolutions and the minutes of the Association's June 24, 1891 meeting for a complete and accurate statement of their contents.

15. Denies the allegations of paragraph 15, and refers to the Board's June 23, 1891 resolution for a complete and accurate statement of its contents.

16. Denies the allegations of paragraph 16.

17. Denies the allegations of paragraph 17.

18. Denies the allegations of paragraph 18 as stated, and refers to the document referenced and quoted therein for a complete and accurate statement of its contents.

19. Denies the allegations of paragraph 19 as stated, and refers to the document referenced and quoted therein for a complete and accurate statement of its contents.

20. Denies the allegations of paragraph 20, except admits that three Trustees resigned in 1891.

21. Denies the allegations of paragraph 21, except admits that at most times from 1892 until September 5, 2008, the Board included an equal number of Charter Trustees and Alumni Trustees.

22. Denies the allegations of paragraph 22, except (a) admits that the Board of Trustees in 1961 and 2003 voted to expand the total number of Trustees and refers to the April 21, 1961 and November 15, 2003 resolutions for a complete and accurate statement of their contents, and (b) refers to the 2003 press release quoted therein for a complete and accurate statement of its contents.

23. Denies the allegations of paragraph 23 as stated, except admits that (i) the Board of Trustees has elected each nominee submitted by the alumni since 1891 and (ii) at most times from 1892 until September 5, 2008, the Board included an equal number of Charter Trustees and Alumni Trustees.

24. Denies the allegations of paragraph 24, except admits that the Board of Trustees has periodically examined and changed its size, composition and organization, as well as the process for selecting Trustees, to ensure that the College continues to have a strong and effective governing body.

25. Denies the allegations of paragraph 25.

26. Denies the allegations of paragraph 26, and refers to the documents referenced and quoted therein for a complete and accurate statement of their contents.

27. Denies the allegations of paragraph 27, and refers to the October 23, 1995 Order of the Merrimack County Superior Court for a complete and accurate statement of its contents.

28. Denies the allegations of paragraph 28.

29. Denies the allegations of paragraph 29.

30. Denies the allegations of paragraph 30.

31. Denies the allegations of paragraph 31.

32. Denies the allegations of paragraph 32, except (a) admits that Dartmouth's alumni have made, and continue to make, important contributions to the College; and (b) avers that (i) the resolution adopted by the Board on September 8, 2007 preserves eight trustee positions for alumni-nominated Trustees, (ii) with eight Alumni Trustee seats, Dartmouth will continue to have among the highest percentage of Alumni Trustees (31% versus an average of 17%) in its peer group, and (iii) the September 8, 2007 resolution reflected the Board's judgment concerning the Board structure best suited to provide the broad range of backgrounds, skills, expertise and capabilities needed to meet the needs of the College.

33. Denies the allegations of paragraph 33.

34. Denies the allegations of paragraph 34, except (a) admits that William H. Neukom, the Chairman of the Board of Trustees in May 2007, was a Charter Trustee, and (b) refers to *The Dartmouth* article referenced and quoted therein for a complete and accurate statement of its contents.

35. The College is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 35 and therefore denies the same. The College refers to the documents quoted or referenced therein for a complete and accurate statement of their contents.

36. Denies the allegations of paragraph 36, except (a) admits that the Board of Trustees adopted a resolution on September 8, 2007 that increased the total number of Trustees to twenty-six by adding eight new Charter Trustee seats and refers to that resolution for a complete and accurate statement of its contents, and (b) refers to the August 2007 report of the Governance Committee of the Board of Trustees for a description of the Board's decisions and the reasons therefor.

37. Denies the allegations of paragraph 37, except (a) admits that the Board of Trustees adopted a resolution on September 8, 2007 that increased the total number of Trustees to twenty-six by adding eight new Charter Trustee seats, and (b) refers to the resolutions adopted by the Board on September 8, 2007 for a complete and accurate statement of their contents.

38. Denies the allegations of paragraph 38 as stated, except (a) admits that the Association filed a lawsuit against the College on October 3, 2007 in the Grafton County Superior Court under Docket No. 07-E-0289, and (b) refers to the Association's Petition for Injunctive and Declaratory Relief for a complete and accurate statement of its contents.

39. Denies the allegations of paragraph 39 as stated, except (a) admits that (i) on October 26, 2007, the College filed a motion to dismiss the Association's Petition, (ii) on October 31, 2007, the Association filed a Notice of Withdrawal of its motion for a preliminary injunction, and (iii) on February 14, 2008, the Association and the College filed a Joint Notice Concerning Dartmouth's Trustee Elections; and (b) refers to those documents for a complete and accurate statement of their contents.

40. Denies the allegations of paragraph 40 as stated, including all subparts, except (a) admits that on February 1, 2008, this Court entered an Order denying the College's motion to dismiss, and (b) refers to that Order for a complete and accurate statement of its contents.

41. Admits the allegations of paragraph 41.
42. Denies the allegations of paragraph 42, and avers that the so-called "Unity Slate" stated that it would dismiss the Association's lawsuit against the College if elected.
43. Denies the allegations of paragraph 43 as stated, except (a) admits that the Board of Trustees voted on June 6, 2008 to freeze its membership until the resolution of the Association's then-pending lawsuit, and (b) refers to the College's press release dated June 6, 2008 for a description of the Board's action.
44. Admits the allegations of paragraph 44.
45. The College is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 45 and therefore denies the same, except admits that (i) on June 16, 2008, Russell F. Hilliard of Upton & Hatfield entered an appearance on behalf of the Association in the action docketed as 07-E-0289, and (ii) on June 17, 2008, Robert M. Cary, Charles Davant, IV, and Jonathan Kravis of Williams & Connolly, LLP, the counsel previously engaged by the Association, filed their withdrawal as counsel for the Association in the same action.
46. Denies the allegations of paragraph 46 as stated, except (a) admits that on June 20, 2008, the Association and the College filed in the action docketed as 07-E-0289 a stipulation that the disposition of the case would be voluntarily dismissed with prejudice, and (b) avers that on June 27, 2008, this Court (Vaughn, J.) issued an Order approving such stipulation and ordering that the case be voluntarily dismissed with prejudice.
47. Denies the allegations of paragraph 47, except is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Petitioners' or other alumni's intentions and state of mind and therefore denies the same.

48. Denies the allegations of paragraph 48, except is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Petitioners' or other alumni's personal knowledge and therefore denies the same.

49. Denies the allegations of paragraph 49, except (a) admits that on September 5, 2008, the Board of Trustees elected five Dartmouth alumni to fill five of the Charter Trustee seats created by the Board resolution of September 8, 2007, and (b) refers to the College's press release dated September 5, 2008 for a description of the Board's action.

50. Denies the allegations of paragraph 50.

51. Denies the allegations of paragraph 51, and refers to *The Dartmouth* article referenced and quoted therein for a complete and accurate statement of its contents.

52. Denies the allegations of paragraph 52, and refers to the advertisement appearing in the October 10, 2008 edition of *The Dartmouth*—titled “An Open Letter to the Entire Dartmouth Community” from Hanover Institute President John MacGovern—referenced and quoted therein for a complete and accurate statement of its contents.

53. Denies the allegations of paragraph 53, except (a) admits that the Board of Trustees met over the weekend of November 7-8, 2008, and (b) is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Petitioners' assumptions and therefore denies the same.

54. Denies the allegations of paragraph 54, except (a) admits that the Board of Trustees is presently engaged in the process of selecting a new president of the College, and (b) refers to *The Dartmouth* article referenced therein for a complete and accurate statement of its contents.



55. Denies the allegations of paragraph 55, except is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Petitioners' beliefs and therefore denies the same.

56. Denies the allegations of paragraph 56, except is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning Petitioners' beliefs and therefore denies the same.

57. In answer to the allegations of paragraph 57, the College incorporates and restates its answers to paragraphs 1 through 56 as if fully set forth herein.

58. Denies the allegations of paragraph 58.

59. Denies the allegations of paragraph 59, except admits that the Board of Trustees has elected each nominee submitted by the alumni since 1891.

60. Denies the allegations of paragraph 60.

61. Denies the allegations of paragraph 61.

62. Denies the allegations of paragraph 62.

63. Denies the allegations of paragraph 63.

64. Denies the allegations of paragraph 64.

65. In answer to the allegations of paragraph 65, the College incorporates and restates its answers to paragraphs 1 through 64 as if fully set forth herein.

66. Denies the allegations of paragraph 66.

67. Denies the allegations of paragraph 67.

68. Denies the allegations of paragraph 68.

69. Denies the allegations of paragraph 69.

70. Denies the allegations of paragraph 70.

71. Denies the allegations of paragraph 71.

72. In answer to the allegations of paragraph 72, the College incorporates and restates its answers to paragraphs 1 through 71 as if fully set forth herein.

73. Denies the allegations of paragraph 73, except admits that the Association is an unincorporated association.

74. Denies the allegations of paragraph 74.

75. Denies the allegations of paragraph 75.

76. Denies the allegations of paragraph 76.

77. In answer to the allegations of paragraph 77, the College incorporates and restates its answers to paragraphs 1 through 76 as if fully set forth herein.

78. Denies the allegations of paragraph 78.

79. Denies the allegations of paragraph 79.

80. Denies the allegations of paragraph 80.

81. Denies the allegations of paragraph 81.

82. Denies all allegations of the Petition not specifically admitted above.

### **AFFIRMATIVE DEFENSES**

The College states the following defenses and reserves its right to assert additional defenses when and if they become appropriate. In asserting these defenses, the College does not assume the burden of proof with respect to any issue where applicable law places the burden upon Petitioners.

#### **First Affirmative Defense**

83. The Petition fails to state a claim upon which relief can be granted.

#### **Second Affirmative Defense**

84. The resolutions adopted by the Board of Trustees on September 8, 2007, increasing the total number of Trustees to twenty-six by adding eight new Charter Trustee seats

and establishing precepts for the Alumni Trustee nomination process, and the Board of Trustees' September 5, 2008 election of five new Charter Trustees to fill the new Charter Trustee seats created by the September 8 resolutions, were lawful and appropriate exercises of the Board's fiduciary duty.

**Third Affirmative Defense**

85. Petitioners' claims should be dismissed for lack of standing.

**Fourth Affirmative Defense**

86. Petitioners' breach-of-contract claim is barred by the statute of frauds.

**Fifth Affirmative Defense**

87. Petitioners' claims should be dismissed, in whole or in part, for failure to join a necessary party.

**Sixth Affirmative Defense**

88. Petitioners' breach-of-contract and breach-of-implied-in-fact-contract claims are barred by a failure of consideration and lack of definite terms.

**Seventh Affirmative Defense**

89. Petitioners' claims are barred by the doctrine of *res judicata*.

**Eighth Affirmative Defense**

90. Petitioners' claims are barred by the doctrine of collateral estoppel.

**Ninth Affirmative Defense**

91. Petitioners are not third-party beneficiaries.

**Tenth Affirmative Defense**

92. Petitioners cannot sue to enforce an alleged contract between the Association and the College, particularly where the Association has decided not to sue following an election among all Dartmouth alumni devoted to this question.


**Eleventh Affirmative Defense**

93. Respondent incorporates by reference all of the legal issues, claims and defenses set forth in its October 26, 2007 Motion to Dismiss the Association's Petition in the action docketed as 07-E-0289.

WHEREFORE, the College demands judgment dismissing the Petition on the merits, in its entirety and with prejudice, and awarding such additional relief as the Court may deem just and proper. The College requests a jury trial as to all issues triable to a jury.

Dated: February 2, 2009

Respectfully submitted,

  
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*Attorneys for Respondent Trustees of  
Dartmouth College*

**CERTIFICATE OF SERVICE**

I hereby certify that, on this February 2, 2009, I caused a copy of the foregoing Respondent's Trustees of Dartmouth College Answer and Affirmative Defenses to Petition for Declaratory and Equitable Relief to be served by hand delivery on:

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