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. Raichle Robert G. Reed III, and John Steel III

v.

Trustees of Dartmouth College

PLAINTIFFS' OBJECTION AND RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND THEIR STATEMENT OF FACTS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

NOW COME B.V. Brooks, Kenneth F. Clark, Jr., Marisa DeAngelis (formerly Kane), John H. Plunkett, Douglas R. Raichle, Robert G. Reed III, and John Steel III (collectively, the "Plaintiffs"), through counsel, and respectfully object and respond to the Motion for Summary Judgment filed by the Defendant, Trustees of Dartmouth College ("Dartmouth" or the "College"), dated July 17, 2009 (the "SJ Motion"). In support thereof, the Plaintiffs offer the following:

I. BACKGROUND

This case (the "Current Lawsuit") is brought by seven individual alumni[1] who seek to vindicate their contractual right as members of Dartmouth's Association of Alumni (the "Association"), their right as third-party beneficiaries of a contract between the Association and the College, and their right as promisees of promises made by the College upon which the Plaintiffs relied. The right that the Plaintiffs seek to vindicate is their right to have the College

[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.

seat on its governing 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".

The Association had previously sought to vindicate the alumni's right to parity by bringing suit against the College in 2007. See generally, 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 (Ex. A)[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:

> 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). It circulated an appeal to its members for donations to the College (Pet. ¶22), lifted a

[2] The references herein to "Ex. _____" are to the exhibits attached to the Affidavit of Eugene M. Van Loan, III, filed herewith.

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 promisory estoppel.

II. UNDISPUTED FACTS

A. The Dismissal of the Prior Lawsuit

In the wake of the Association's victory on Dartmouth's motion to dismiss, the College embarked upon a course of action designed to accomplish outside of court what it had failed to accomplish in court. For the first time in its history, Dartmouth insinuated itself into the election of the Executive Committee of the Association and, indeed, became a major player in what ultimately turned into a very public and a very vigorous election contest. That contest was waged between two slates of candidates, one known as the "Unity Slate"[3] and the other

[3] Also called "Dartmouth Undying".

known as the "Parity Slate". The Unity Slate ran on a platform favoring preservation of the alumni's right to parity through negotiation, rather than litigation. Accordingly, the candidates on the Unity Slate pledged that, if elected, they would dismiss the Prior Lawsuit.[4]

The 2008 general meeting of the Association of Alumni was held on June 10, 2008. At the end of that meeting, the ballots cast in the election were tallied up and the results announced. (Ex. C). The Unity Slate won. To say that its members thereafter acted *promptly* to fulfill what they considered to be their electoral mandate to dismiss the Prior Lawsuit[5] is an understatement; for on the very same evening that they were elected as the Association's new Executive Committee, they met by telephone and adopted the following resolutions (Dartmouth Ex. J):

> 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

[4] According to the deposition testimony of John MacGovern, the Unity Slate's campaign was essentially orchestrated and financed by the College. (Ex. B).

[5] In its Motion for Summary Judgment, the College claims that the alumni vote was "overwhelmingly to end the Prior Lawsuit". SJ Motion, ¶3. In fact, the Unity Slate's margin of victory was a respectable, but hardly "overwhelming", 60% of the votes cast. (Dartmouth Ex. I) [References to "Dartmouth Ex. _____" are to the exhibits to the affidavit of Attorney Pepperman which accompany the SJ Motion.] Moreover, suffice it to say that the alumni who voted in the election voted for people, not issues, and, therefore, that votes to elect the Unity Slate were not necessarily one-for-one votes to end the Prior Lawsuit. Accordingly, although it is probably not unfair to *generally* characterize the election as "a referendum on the Prior Lawsuit" (Dartmouth Memo p. 4), the College is gilding the lily when it suggests that the 60% vote for the Unity Slate translates into a 60% vote to end the Prior Lawsuit.

> 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.

Note that there is no direction or even the hint of a suggestion in either resolution that the Prior Lawsuit be dismissed *with prejudice*. Similarly, the minutes of the meeting reflect no such discussion. (Dartmouth Ex. J) [6]

In any case, Mr. Mathias wasted no time in exercising the authority granted to him by the resolutions of the new Executive Committee. However, as the documents which the Plaintiffs have obtained in discovery in the Current Lawsuit make clear, Mr. Mathias had plenty of help. Indeed, as reflected in those documents, it appears that the College played the leading role in the dismissal of the Prior Lawsuit. To begin with, the initial draft of the resolutions passed by the newly-elected Executive Committee of the Association on June 10, 2008 was prepared by General Counsel for the College, Attorney Robert Donin. (Ex. E, 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, he was the one who made the initial contact with Attorney Hilliard. (Ex. E, bullet #4; Ex. F) And finally – although not

[6] The official minutes of the June 10, 2008 meeting of the Executive Committee state that the teleconference began at 6:05 p.m. and ended at 6:13 p.m. (Dartmouth Ex. D) In other words, the call lasted exactly 8 minutes. Accordingly, the Plaintiffs respectfully suggest that the self-serving claim of Mr. Mathias in his affidavit submitted in support of the College's Motion for Summary Judgment that, "After discussing the issue fully, it was agreed that a dismissal with prejudice was the preferred manner of proceeding and accomplishing our desired objective" (Mathias Affidavit, ¶4) should be viewed with healthy skepticism. On the other hand, if such "full" discussions did take place, they must have occurred offline. In any case, whatever actually occurred, it is crystal clear that the participants in the decision to dismiss the Prior Lawsuit with prejudice went to great lengths to keep their intentions secret.

[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. (Ex. E, bullet #1) Mr. Spalding, however, worked both sides of the Association/ College street. He was indeed a member of the Executive Committee of the Association, having been elected as a member of the Unity Slate. (He had also been a member of the previous Executive Committee.) On the other hand, Mr. Spalding was also an employee of the College, serving in the position of Director of Alumni Affairs.

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. (Ex. H)

According to his bill for professional services, Attorney Hilliard was hired on June 12, 2008. (Ex. F) On that very same day, he had a telephone conference with Mr. Mathias and Attorney Donin. (Ibid) Four days later, Attorney Hilliard filed his appearance for the Association in the Grafton Superior Court and on the next day, June 17, he emailed counsel for the College as follows: "Can we speak some time today about discontinuance of this matter?" (Ex. I) After speaking by telephone with Attorney Richard Pepperman, New York counsel for the College in the Prior Lawsuit, (Ex. F; Ex. E, bullet #6) Attorney Hilliard prepared and circulated to opposing counsel a draft of a proposed docket marking (Ex. I). 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." (Ex. I) In his email which accompanied his draft docket marking, Attorney Hilliard inquired of the addressees, Attorney Pepperman and local counsel for the College in the Prior Lawsuit, Attorney Bruce Felmly: "Is it really this simple?" (Ex. I) Attorney Felmly promptly responded as follows: "It is commonly done as simply as you have done it." (Ex. J) Apparently satisfied, Attorney Hilliard replied: "[A]re we ready to file this?" (Ex. J) 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." (Ex. J)

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

[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." (Ex. G, answer to Interrogatory No. 13)

because "[we] may want to re-work the language slightly". (Ex. K) 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 been traditionally used in New Hampshire to voluntarily dismiss a civil action without a trial on the merits. (Ex. L) The obvious focus of Attorney Felmly's research was how to bulletproof the dismissal of the Prior 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". (Ex. L)

At this juncture, the lawyers agreed to schedule a conference telephone call among themselves and Mr. Mathias for the following day.[9] The teleconference among the lawyers and Mr. Mathias was conducted in the late morning of June 20, 2008. (Ex. F; Ex. E, 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". This, of course, is in substance what had been suggested earlier by Attorney Felmly. Accordingly, Attorney Felmly apparently volunteered to draft and circulate the stipulation for signature. (Ex. N) Finally, on June 23, after receiving back a signed copy thereof from Attorney Hilliard, Attorney Felmly signed and mailed the stipulation to the Clerk of the Grafton County Superior Court. (Ex. O)

[9] The next morning, June 20, prior to the call, Attorney Hilliard sent an email to the group in which he suggested that "in order to have all options on the table", they might want to consider a docket marking which says "judgment for the defendant; no costs" or perhaps 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." (Ex. M)

At this point, the College's PR machine team 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 would be "the most logical and ideal spokesperson" to respond. (Ex. P) In the meantime, however, she reported that, "The game plan does seem to still be not to issue anything until the judge acts … ." (Ex. P)

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." (Ex. P)

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". (Ex. P)[10] For example, in response to Ms. Lawrence's observation that the four Alumni Trustees who had filed an amicus brief in the Superior Court in support of the Association claims and who had therefore been copied on the filing of the

[10] Mr. Mathias, who describes himself as "a senior litigation partner in the law firm of Jenner & Block in Chicago" (Mathias Affidavit in support of SJ Motion, ¶4), was presumably taking into account the fact that judicial approval of the stipulation for dismissal would clothe it with a special aura of finality. Indeed, it is obvious that 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 – were motivated by an appreciation of this very same common sense assumption. See generally, 5 Wiebusch, NEW HAMPSHIRE PRACTICE, Civil Practice and Procedure §34.09.

stipulation might begin "blogging, emailing, and spinning", Mr. Mathias reminded her, "that's why I say we should wait until the judge issues the dismissal order." (Ex. P)

The stipulation was stamped in at the Grafton County Superior Court at 1:33 p.m., Tuesday, June 24, 2008. (Dartmouth Ex. L) 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. (Ex. F.) He did not have long to wait because on the very next day, June 27, at 10:25 a.m., Justice Vaughan directed the entry of the following telephonic order: "Stipulation approved; docket shall be marked in accordance therewith." (Dartmouth Ex. L) 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. (Ex. Q)

Even though the Court had approved the Stipulation, neither the Association's new Executive Committee nor the College had any interest in publicizing the specific terms of the dismissal. 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." (Ex. P) True to Mr. Spalding's word, the press release which his PR team issued on the afternoon of June 27 was indeed brief (and indeed misleading) (Ex. R):

> 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.[11]

The Association did an even better job than the College in attempting to keep the lid on any publicity about the terms of the dismissal. In a one-line post on the Association's internet "blogspot" on the afternoon of June 27, Mr. Mathias made the following (uninformative) entry: "This morning the Court approved our voluntary dismissal of the lawsuit brought by the Association of Alumni against the College." (Ex. S)

The participants in these dismissal machinations had good reason to want to minimize the public awareness of the terms of the dismissal. For one thing, they knew that the election had been fought over the Prior Lawsuit, not over parity.[12] Yet, to the extent that the actions of the new Executive Committee and the College were successful in engineering dismissal of the Prior Lawsuit which – in the words of Diana Lawrence – "would prohibit future executive

[11] Note the suggestion in Dartmouth's press release that, from the very beginning, the Prior Lawsuit had not really been supported by the Alumni. The College repeats this suggestion in its SJ Motion when it claims that, "The decision to file the Prior Lawsuit was highly controversial among Dartmouth Alumni." Dartmouth Memo, p. 4. In support of this contention, the College makes much out of the fact that of the eleven members of the Executive Committee of the Association, "only six voted in favor of [filing the suit]." (Dartmouth Memo, p. 4). The College fails to note, however, that two members of the committee were absent at the time that the vote was taken and that one of the dissenters, David Spalding, was a Dartmouth employee (who could hardly be expected to vote to sue his employer.) (Ex. T) Similarly, the College attempts to make hay out of the fact that another dissenting member of the Executive Committee was its president. Dartmouth Memo, p. 4. Since the Association's Executive Committee observed the rule of one-man-one-vote, it is difficult to understand how the fact that the Association's president voted against the resolution to sue imbues it with any lesser authority than it would have if he had voted for the resolution and someone else had voted against it.

[12] The campaign materials of the Dartmouth Undying slate were clearly intended to convey this message. (Ex. U) For example, the following statement was posted on its 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." (Ex. W) Indeed, had the Dartmouth Undying slate run on an anti-parity slate, it probably would not have been elected because the alumni had only recently been polled with respect to their desires about retaining parity and the responses ran almost ten to one in its favor. (This was the referendum conducted by the former Executive Committee of the Association before they voted to file the Prior Lawsuit. Ex. V)

committees from acting differently," this would indeed be tantamount to a snuffing out of the alumni's right to parity.[13]

Moreover, those who were orchestrating the dismissal with prejudice also knew that the alumni did not know or appreciate what they were up to. 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 demonstrated that they understood that the Prior Lawsuit was being dismissed, they also demonstrated that they assumed that if the efforts of the Dartmouth Undying slate to achieve a restoration of parity through negotiation were to fail, a new lawsuit could be instituted.[14]

The concerns of the College and the Association that the alumni might learn of the effort to extinguish their right to parity are reflected in several private communications obtained by the Plaintiffs through discovery in the Current Lawsuit. For example, the notes of Diana Pearson, a Dartmouth employee, of a conversation she had on June 30, 2008 with David Spalding attribute to John Mathias statements to the effect that Mr. Mathias believed that the stipulation would be effective to bar both the Association and individual alumni from bringing

[13] In other words, if the dismissal "with prejudice" were effective not merely to terminate the Prior Lawsuit, but also to bar the Association and all individual alumni from ever again seeking judicial enforcement of the 1891 Agreement, the College would be entitled to abrogate parity whenever and however it chose. This would effectively extinguish the alumni's legal right to parity 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).

[14] For example, as Phil Aubart of The Dartmouth staff wrote in a June 24, 2008 editorial, "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." (Ex. W) Even the President of the College and *ex officio* member of its Board of Trustees, James Wright – who definitely did know what was going on – was unclear about the effect of the stipulation on potential future lawsuits. 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!" (Ex. X)

a new lawsuit and, accordingly, that he was "concerned pol." (Ex. Y)[15] Accordingly, Mr. Spalding, counseled caution so as not to stir up the alumni.[16]

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 not unfounded. Despite all their efforts to keep secret the fact that the Prior Lawsuit was being dismissed "with prejudice ", Frank Gado found out about it – and he did try to challenge it.

On the very same day that Justice Vaughan issued his telephonic order – but, as luck would have it, *after* the order was issued – Mr. Gado had a letter delivered to the Clerk of Court requesting that the Court delay ruling on the stipulation. (Dartmouth Ex. M) As a member of the "old" Executive Committee of the Association, Mr. Gado requested that he and the other former members of the 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. (Dartmouth Ex. M) However, because Justice Vaughan had already issued his order, Mr. Gado's representative was informed that he was "too late". (Dartmouth Ex. N, ¶16) Mr. Gado subsequently attempted to intervene in the Prior Lawsuit and moved to have the "with prejudice" wording stricken from the stipulation. (Dartmouth Ex. O) However, the

[15] The abbreviation "pol." presumably stands for "politically". Ms. Pearson's notes also 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". (Ex. Y) See also, Ex. Z (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 is still "far from over").

[16] As he put it, "move slowly – board to reflect, consult + then take action". (Ex. _____)

Court (Vaughan, J.) denied Mr. Gado's Motion to Intervene and, accordingly, his Motion to Disallow Docket Marking in its Present Form was marked "moot". (Dartmouth Ex. P) [17]

Nevertheless, were it not for Mr. Gado's continued interest in the Prior Lawsuit - even after he had failed to be re-elected to the Association's Executive Committee and his authority to act in its behalf had been revoked - the fact that the stipulation had provided that the Association's suit be dismissed "with prejudice" might well have stayed off the alumni's radar screen for some time to come.

B. <u>The Relationship Of The Hanover Institute To the Prior Lawsuit</u>

When it appeared in the Summer of 2007 that Dartmouth's Board of Trustees was seriously considering breaching the alumni's right to parity, some members of the then Executive Committee of the Association began to consider legal action to enforce the alumni's rights. Robert Cary, a Dartmouth graduate and partner in the Washington, D.C. law firm of Williams & Connolly, was contacted and agreed to represent the Association.

An organization known as the Hanover Institute (the "Institute") agreed to fund the lawsuit. [18] The Institute is a New Hampshire not-for-profit corporation founded in 2002. Its Charter (Ex. AA) states the Institute's mission is as follows:

> To encourage and promote well delivered speeches, talks, seminars that encourage a fair, equal and open minded consideration of all social, industrial, economic issues, ideologies, and philosophies for the benefit of the students and alumni of Dartmouth College, Hanover, New Hampshire and members of the general public; 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; to arrange literary programs; and to

[17] Although the Court's order denying Mr. Gado's Motion to Intervene was not accompanied by any findings of fact or rulings of law, it was presumably based upon the fact that Mr. Gado was "too late".

[18] Note that although the Institute did agree to fund the Association's lawsuit, Attorney Cary "contributed" to the cause by deducting a substantial amount from each and every bill that he rendered to the Association; these amounts were presumably attributable to his personal services in support of the cause. See Dartmouth Ex. R (cover letters to Mr. Cary's bills reflecting the amounts by which he reduced the Williams & Connolly fees).

work for the educational advancement of the members. The Institute shall not be a degree granting institution.

The relationship among Williams & Connolly, the Association and the Institute was memorialized in an engagement letter dated August 29, 2007 signed by Attorney Cary for Williams and Connolly, Mr. Gado for the Association and John MacGovern for the Institute. (Dartmouth Ex. Q) That agreement provides that "although the fees and expenses may be paid by other entities and individuals including the Hanover Institute…. [t]he Association, and not the Institute, is W & C's client. W & C does not owe any duty to the Institute and the Institute has no right to control W & C's work." (Dartmouth Ex. Q at p. 1 & 3.)

As provided for in the engagement letter with Williams & Connolly and as played out in actual practice, the Institute played no role in the Prior Lawsuit except for the payment of the Association's legal fees.[19] On occasion, the Association's attorneys did send Mr. MacGovern informational copies of pleadings and legal memoranda pertinent to the Prior Lawsuit. (Dartmouth Ex. U through Y) However, as Mr. MacGovern testified in his deposition, he had no input into the preparation of any of these documents and he made no comments or suggestions for changes. (Ex. BB) Mr. MacGovern summarized the role of the Hanover Institute in the litigation as follows (Ex. CC):

Q. (by Mr. Van Loan, III) At one point, Mr. MacGovern, in response to questions that Attorney Pepperman was asking you you said something to the effect that there was a distinction between your role on behalf of the Hanover Institute and the role of the Plaintiffs in these lawsuits. Do you recall that testimony?

A. Yes.

Q. What did you mean by that?

[19] Although the Institute did pay the fees of Williams & Connolly, the only thing that the Institute even received as a "bill" was a summary reflecting the total amount due. By way of contrast, as the client, the Association received the detail pages reflecting the actual legal work performed by its attorneys. (Dartmouth Ex. R)

A. I, I meant that my role was to raise – the role of Hanover Institute was to raise money to support the lawsuit and the purpose for which it was filed; and the plaintiffs had a different role altogether, which was as plaintiffs, and those are very clear distinct roles.

Q. When you say that they had a role as plaintiffs, what do you mean by that?

A. That they, that the plaintiffs, the plaintiffs are you know, determine the direction of the case with their attorney, of course, but the attorney and they come to a decision as to how the case proceeds. That was never a role for Hanover Institute.

Q. Now, was that your understanding with respect to the first lawsuit, the one by the Association?

A. Absolutely, yes, it was. [20]

The proof of the pudding as to who was in control of the Prior Lawsuit is, of course, the decision of the new Executive Committee of the Association in June of 2008 to dismiss it. Suffice it to say that the Institute favored continuation of the litigation and disfavored its dismissal (with or without prejudice). (See, e.g., Dartmouth Ex. NN.) So, when it came to *the* most important decision concerning the Prior Lawsuit, the Hanover Institute was on the outside looking in.

C. The Relationship of the Plaintiffs to the Prior Lawsuit

Each of the Plaintiffs in the Current Lawsuit is a graduate of Dartmouth and, by reason thereof, a member of the Association. None of the Plaintiffs, however, had any personal involvement in the Prior Lawsuit.[21]

[20] Mr. MacGovern's testimony is corroborated by the minutes of the meetings of the Association's Executive Committee. The minutes of these meetings were regularly posted on the Association's website during the pendency of the Prior Lawsuit and, thus, were available for anyone to read. The minutes are replete with discussions among the members of the Executive Committee to the effect that *they*, not the Institute, were in control of the litigation. See, e.g., excerpts from minutes of the meetings of January 8, 2008, January 24, 2008 and May 1, 2008 (Ex. DD). See also, testimony of Frank Gado (Ex. EE).

[21] In their responses to Interrogatories propounded by the College as to "whether you were involved or participated in any way in the Prior Lawsuit", each of the Plaintiffs responded "No". (Dartmouth Ex. BB through HH, Interrogatory #5. See also, Dartmouth Ex. BB through HH, Interrogatory #7)

Additionally, none of the Plaintiffs are members, directors or officers of the Hanover Institute. (Dartmouth Ex. BB through HH, Interrogatories #2 & 4) It is true that the individual Plaintiffs have made periodic contributions to the Hanover Institute to support its charitable mission. (Dartmouth Ex. BB through HH, Interrogatory #3) However, when they were asked in discovery whether they had provided any "direct or indirect financial support for the Prior Lawsuit", each of them responded to the effect that they did not know whether any of their contributions to the Hanover Institute had been used for such purposes.[22]

D. The Filing of the Current Lawsuit

In September, 2008, the College's Board of Trustees lifted the so-called "freeze" which it had imposed upon the filling of vacant Board seats on account of the Prior Lawsuit and elected five new Charter Trustees – but no new Alumni Trustees. This partially executed the Board's decision in the Fall of 2007 to expand its membership by eight, all of whom were to be new Charter Trustees. When the Board refused at its November, 2008 meeting to re-consider its decision not to match the appointment of new Charter Trustees with an equal number of new Alumni Trustees, the Plaintiffs filed the Current Lawsuit.

E. The Relationship Of The Hanover Institute To The Current Lawsuit

The College suggests that it is significant that the Institute "recruited seven Plaintiffs to bring the Current Lawsuit". SJ Motion, ¶8. It is true that the initial involvement of six out of the seven Plaintiffs in the Current Lawsuit was in response to a general emailing by the Institute to its supporters which inquired as to the recipients' interest in and willingness to become plaintiffs in a new lawsuit to preserve the

[22] (Dartmouth Ex. BB through HH, Interrogatory #6.) Note also that if one examines the contributions of the individual Plaintiffs, one will note that not only did they begin before the Prior Lawsuit years, but also that they were no greater in the years in which the Prior Lawsuit was pending than they were in earlier years. (Dartmouth Ex. BB through HH, Interrogatory #3)

alumni's right to parity.[23] Nevertheless, after expressing a willingness to become involved in such a suit, the Plaintiffs' communications concerning the Current Lawsuit have been with their counsel, Wadleigh, Starr & Peters, P.L.L.C., not with the Institute. (Dartmouth Ex. BB through HH, Interrogatories #11-12.)

The Plaintiffs acknowledge that the Institute is paying their legal fees. On the other hand, the relationship between the Institute, the Plaintiffs and the Plaintiffs' attorneys in the Current Lawsuit is not any different from the relationship which existed between the Institute, the Association and the Association's attorneys in the Prior Lawsuit.[24] In other words, the Institute pays the bills, but the Plaintiffs control the lawsuit.

III. THE LAW

A. Dartmouth's Claim That The Plaintiffs Have No Standing to Sue

1. The Plaintiffs have standing as members of the Association

In support of its Motion to Dismiss in the Prior Lawsuit, the College had argued that because the Association was an unincorporated entity, the Association itself had no standing under New Hampshire Law to bring suit on a contract to which it was a party. Compare RSA 292: 12-14. In the Current Lawsuit, the College makes exactly the opposite argument, now claiming that the Association *did* have standing to bring the Prior Lawsuit, but that the Plaintiffs *do not* have standing to bring the Current Lawsuit.[25] In other words, putting the College's

[23] It is not true that Plaintiff Kenneth Clark was recruited by the Institute. Indeed, it was the other way around; for it was Mr. Clark who contacted Mr. MacGovern and volunteered to become a plaintiff if a new lawsuit were filed. (Dartmouth Ex. DD, Interrogatory #9-10.)]

[24] In that regard, Mr. MacGovern testified in his deposition that, "it's my understanding that the same situation applies to both cases." (Ex. CC)

[25] The College's argument on this point is based upon a construction of the Petition which assumes that the Plaintiffs are suing *only* in a representative capacity, i.e., as members of the Association. The Plaintiffs are indeed suing as members of the Association (see Petition, Count III) and since the Association is an unincorporated entity, the Plaintiffs claim to have standing do so. Their claim to have standing on this basis, however, is distinct from their claim to have standing as third-party beneficiaries of the Association's contract. The latter claim is dependent upon their status as alumni, not as members of the Association. Peculiarly, in its Motion for Summary Judgment, the College mixes and matches these concepts in ways that tend to obfuscate the distinctions between them. See, e.g., SJ Motion, ¶10.

contentions in both cases together, the College has essentially taken the position that even if it were a party to a valid contract, *no one* could sue it to enforce that contract.

In ruling upon the College's Motion to Dismiss in the Prior Lawsuit, the Court (Vaughan, J.) ruled that the Association did have standing to bring a suit in its own name. The Court, however, did not have occasion to determine whether individual members of the Association also had standing to bring such a suit. It is the position of the Plaintiffs that there is nothing inconsistent about *both* the Association *and* its members having standing to sue the College on the 1891 Agreement.[26]

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.[27] 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).

In any case, the Plaintiffs' standing as members of the Association to sue to enforce the Association's contract with the College is purely a question of law and one that is ripe for resolution by this Court. Accordingly, the Plaintiffs respectfully request that the Court rule that

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[26] At a minimum, if this Court were, upon reflection, to conclude that the College was right in the Prior Lawsuit in arguing that the Association did not have standing, that would militate in favor of a determination in the Current Lawsuit that members of the Association do have standing.

[27] The Plaintiffs allege such assent and ratification in paragraph 31 of their Petition.

they *do* have standing as members of the Association and, therefore, that the Court deny the College's Motion for Summary Judgment on this issue.

2. The Plaintiffs have standing as third-party beneficiaries

The College also seeks to dismiss the Plaintiffs' Petition on the ground that they allegedly lack standing to sue as third-party beneficiaries of the 1891 Agreement. The College has attempted to accomplish this result through the filing of a motion for summary judgment. Superior Court Rule 58-A provides that motions for summary judgment shall be filed in accordance with the provisions of RSA 491:8-a. RSA 491:8-a, in turn, provides that a party seeking summary judgment shall accompany its motion with evidence of "admissible *facts*" and that the motion will be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material *fact*". RSA 491:8-a, II & III (emphasis supplied). See also, Nash v. Keene Pub. Corp., 127 N.H. 214, 219 (1985) ("The moving party has the burden to *demonstrate* that there is no genuine issue as to any material fact ….") (emphasis supplied).

The College's Motion for Summary Judgment on this issue, however, is not supported by a recitation of any facts. On the contrary, the College merely alleges that, "There is absolutely no evidence that the College and the Association intended [individual alumni] … to bring a lawsuit to enforce the contract." SJ Motion ¶11. The Plaintiffs respectfully suggest that the College does not satisfy its burden of affirmatively stating the existence of undisputed facts which would entitle it to judgment as a matter of law by simply *asserting* that there is "no evidence" to support the Plaintiffs' allegations.

At best, that portion of the College's Motion for Summary Judgment dealing with the Plaintiffs' third-party beneficiary status is nothing more than a motion to dismiss on the

pleadings. Referring therefore to the Petition, the Plaintiffs point out that allegations of fact supporting their standing as third-party beneficiaries of the 1891 Agreement appear in numerous places. For example:

1. ¶5 alleges that in entering into the 1891 Agreement, the Association sought "to secure to the alumni an active participation in the management of the college."

2. ¶9 alleges that in the years leading up to the formation of the 1891 Agreement, the Association formed a committee to give "graduates a fixed voice in the election of trustees" and that their goal was "that the alumni should be granted a definite voice in [the College's] management".

3. ¶15 alleges that, under the 1891 Agreement, "the alumni" would appoint one-half of the non-*ex officio* trustees.

More important, by alleging that the alumni were "foreseeable and intended beneficiaries" of the 1891 Agreement, ¶31 of the Petition is sufficient in and of itself to satisfy the Plaintiffs' burden of pleading their third-party beneficiary status:

> The Plaintiffs and the other alumni, the Association's members, were foreseeable and intended beneficiaries of the Defendant's agreements and repeated promises (over the decades) that present and future alumni would have and preserve the right to elect one-half of the non-*ex officio* trustees. The 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.[28]

[28] The only factual material that the College supplies to the Court which could arguably require the Plaintiffs to produce any evidence to support these allegations in order to respond to that portion of the College's Motion for Summary Judgment which raises the standing issue is Dartmouth Exhibit C, a copy of the June 23, 1891 Resolution of the Board of Trustees. This document, of course, is only one in a series of documents which memorialize the 1891 Agreement and, thus, cannot be taken as a full expression of the contract between the parties. Nevertheless, even Dartmouth Exhibit C by itself contains evidence supporting the Plaintiffs' allegation that the alumni were intended to be the beneficiaries of the parties' contract because Resolution I specifically grants the right to nominate Alumni Trustees to "the graduates of the College".

Moreover, without waiving its contention that the College's Motion for Summary Judgment on the standing issue cannot be based upon a "no evidence" assertion, the Plaintiffs point to their Exhibit FF, the June 25, 1891,

The College nevertheless claims that evidence of an intent to *benefit* non-parties to a contract is insufficient to give such non-parties standing to sue on the contract. The College argues that the parties to the contract must also express therein their specific intent to empower the non-parties to *enforce* the contract. Dartmouth Memo, p. 18-20. Note that the College cites no New Hampshire cases for this proposition. Additionally, the two cases which the College does cite, Consolidated Edison, Inc. v. North East Utilities, 426 F.3rd 524 (2d Cir. 2005) and Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 485 N.E. 2d 2008 (N.Y. 1985), only state the College's proposition in dictum.[29]

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report of the Association to the alumni. The report describes the background of the 1891 Agreement and includes the Association's contribution to the contract, the resolutions adopted by the alumni in response to the resolutions of the Board. The Plaintiffs respectfully suggest that this document is replete with statements which evidence the intent of the parties to benefit the alumni and, thus, supports their third-party beneficiary status. An example is the following excerpt:

> "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." (emphasis in original)

Indeed, the College itself has taken certain actions which essentially acknowledge that whatever rights exist with respect to alumni representation on the Board of Trustees, the alumni themselves possess those rights. 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. 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).

[29] In a footnote, the College cites two other cases which supposedly stand for its position. Dartmouth Memo, p. 19, n. 4. Both of these cases, however, involved attempts by non-parties to enforce provisions of a judicially-approved consent decree which allegedly conferred some type of benefit upon them. Although subject in some regards to contract rules of construction, consent decrees involve additional considerations. Suffice it to say that, unlike the question of who can sue to enforce a contract, determinations as to who can enforce, get around or undo a consent decree involve considerations of the finality of judgments and the conservation of judicial resources. Accordingly, these two cases are not germane to the issue in this case. (Moreover, a close reading of these cases reveals that neither one is even good authority for the proposition that non-parties to a consent decree may not enforce the decree unless the parties specifically express therein that this was what they intended. For example, in the SEC case, the Court states that this rule only applies where the government is a party to the consent decree. Similarly, in the Pure

In any case, the law of New Hampshire does not support the College on this point. New Hampshire generally follows the RESTATEMENT OF CONTRACTS on these types of issues. 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"). 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).

Note that there is no mention in this rule of any requirement that the parties express a specific intent to confer upon a third-party beneficiary the right to sue on the contract. 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.

As noted above, it is enough under the RESTATEMENT rule that the parties to the contract intended to confer a benefit upon non-parties. Citing to the RESTATEMENT, our Supreme 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

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Country case, the entire discussion is pure dictum because the Court had already concluded that the parties to the consent decree in question had not even intended the plaintiff to be benefited by it.)

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).

Once this intent-to-benefit test has been satisfied, 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 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*. Accordingly, the lack of an allegation by the Plaintiffs that the Association and the College specifically intended to confer upon individual alumni a right to sue on their contract is not fatal to the Plaintiffs' standing in this case.

On the other hand, the College claims that it is not even enough that the Plaintiffs are intended beneficiaries of the 1891 Agreement (the RESTATEMENT test) or that the College had reason to know that benefiting the alumni was one of the "motivating causes" in the Association's entering into the 1891 Agreement (the New Hampshire elaboration of the RESTATEMENT test); the College claims that the Plaintiffs must also demonstrate that the alumni were intended to be "directly" benefited.

This suggestion is based upon language appearing in several cases from New Hampshire and other jurisdictions which the College takes out of context in an attempt to make it appear as if there is some hurdle *in addition* to the RESTATEMENT test that must be overcome by the Plaintiffs in order for them to establish their third-party beneficiary status.

The language in question about the need for a "direct" benefit comes from several New Hampshire cases which are quite unlike the case at bar. The first of these, Numerica Savings Bank v. Mountain Lodge Inn, Corp., 134 N.H. 505 (1991), involved the attempt by a

shareholder of a corporation to assert third-beneficiary status solely on account of his pecuniary interest as a shareholder in the fortunes of the corporation. In ruling that such a claim was insufficient to establish third-party beneficiary standing, the Court noted that, "[e]very act which benefits a corporation will benefit, *indirectly*, its shareholders." Id. at 512 (emphasis in original). Taken in the context in which it was used, the Court's observation that the benefits which may accrue to a shareholder from a corporation's contracts are only "indirect" is not remarkable.

The second New Hampshire case upon which the College relies is the case of Grossman v. Murray, supra. The nature of the standing claim in that case is also quite different from the Plaintiffs' claim in the case at bar. In Grossman, an individual was attempting to sue the holder of an interest in real property for his alleged breach of a contract to transfer the property to a party with whom the claimant had a completely *separate* agreement for a finder's fee payable upon the property's successful transfer. Quoting from a federal case applying Massachusetts law, the Court stated as follows: "Unless the performance required by the contract will directly benefit the would-be intended beneficiary, he is at best an incidental beneficiary". Id. at 348. Again, taken in context, this statement is unremarkable because the law of New Hampshire has consistently held that, without more, the payment of a fee by the buyer of real estate to a broker is not the "motivating cause" of the buyer entering into an agreement with the seller to purchase the property. Ibid; Tamposi Associates v. Star Market Co., supra. See also, Arlington Trust Co. v. Estate of Wood, 123 N.H. 765 (1983).[30]

[30] The federal decision quoted by the Court in Grossman was Public Service Co. of N.H. v. Hudson Light & Power, 938 F.2d 338 (1st Cir. 1991). Like the New Hampshire cases denying third-party beneficiary status to brokers attempting to collect their fee from the seller of real estate, this case also involved parties attempting to claim third-party beneficiary status under a contract between a promisor and a promisee where the interest of the alleged third-party beneficiaries was actually created by a *separate* agreement with the promisee. In other words, despite the Court's reference to the need for a "direct" benefit to establish third-party beneficiary status, what the Court actually

It should be noted that the RESTATEMENT rule does not make any reference to the need for a "direct" benefit. New Hampshire almost invariably follows the RESTATEMENT and, despite our Supreme Court's reference to "direct" benefits, there is no indication whatsoever in the New Hampshire cases that the Court sees itself as departing from the RESTATEMENT rule.[31]

Finally, the College argues that the seven Plaintiffs who brought the Current Lawsuit cannot be third-party beneficiaries of the 1891 Agreement because the parties to the Agreement obviously did not intend to benefit *only* these particular alumni. The simple answer to this contention is that the mere fact that the 1891 Agreement has third-party beneficiaries in addition to the Plaintiffs in no way diminishes the standing of the Plaintiffs.[32] Not surprisingly, the College cites no law to the contrary. Dartmouth Memo, p. 20.

In summary, to the extent that the College's Motion for Summary Judgment with respect to the Plaintiffs' standing to sue as third-party beneficiaries of the Association-College contract

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found was that because of the terms of the two contracts at issue (the contract between the promisor and the promisee and the separate contract between the promisee and the alleged third-party beneficiaries), performance of the promisor's contract with the promisee would not *necessarily* benefit the alleged third-party beneficiaries. Id. at 343-344 (emphasis supplied). If one were to apply such a test to the case at bar, the Plaintiffs would qualify as third-party beneficiaries because performance by the College of the 1891 Agreement would necessarily benefit the Plaintiffs by giving them (and their fellow alumni) representation on the Board of Trustees equal to the College's self-appointed Charter Trustees.

[31] The current edition of CORBIN ON CONTRACTS criticizes the use of the term "direct" and other such adjectives as potentially confusing glosses on the RESTATEMENT rule. As the authors state, "[I]t is not a question of whether the third party will be directly benefited; the issue is whether he should have a right to enforce the promise." 9 CORBIN ON CONTRACTS § 44.6, p. 67 (2007 ed.).

[32] Note that the College's observation that, "To the extent that the alleged contract directly benefits alumni, it benefits the entire body of alumni as a whole, not any individual alumnus directly and in particular" (Dartmouth Memo, p. 20) is a *non sequitor*. To the contrary, the fact that the College's performance of the 1891 Agreement benefits all of the alumni means that it also benefits individual alumni. (On the other hand, if one were to follow the logic of the College's suggestion that the focus of the third-party beneficiary inquiry ought to be upon whether there is some type of personal relationship between individual alumni and the 1891 Agreement, one should note that the consideration for the College's promise to provide the alumni with representation on its Board of Trustees does indeed flow to the College from the alumni as individuals and not from "the entire body of alumni as a whole". 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) are all the acts of *individual* alumni.)

is essentially a motion to dismiss on the pleadings, it should be denied as a matter of law. On the other hand, to the extent that the motion is deemed to effectively raise the question of whether there are undisputed facts which entitle the College to judgment as a matter of law on this issue, the motion should be denied on the grounds that the undisputed facts offered by the parties actually *support* the Plaintiffs' third party beneficiary status.

3. The Plaintiffs have standing to sue under the doctrine of promisory estoppel.

New Hampshire recognizes promisory 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.

The Plaintiffs have alleged all of the necessary elements of a promisory estoppel claim in their Petition, especially in paragraphs 30 and 31. See also, Petition, ¶77-81.[33] As is the case with respect to the Plaintiffs' third-party beneficiary claims, since the College does not support its Motion for Summary Judgment on the Plaintiffs' promisory estoppel claims with *any* evidence, the College's motion should be treated as a motion on the pleadings and, based on the Plaintiffs' aforementioned allegations, the motion should be denied. [34] However, to the extent that the College can properly raise this issue in a motion for summary judgment by simply claiming that

[33] 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.

[34] Indeed, the College's SJ Motion doesn't even *mention* the Plaintiffs' promisory estoppel claims. However, since the College's motion requests a total dismissal of the Petition, the Plaintiffs cannot ignore the issue.

"there is no evidence" of a fact, the Plaintiffs have supplemented their objection to the College's motion with ample evidence of facts which support their promisory estoppel claims. See Affidavit of John Steel and Ex. FF. Accordingly, like its motion to dismiss the Plaintiffs' third-party beneficiary claims, the College's motion to dismiss on this issue should be denied because the undisputed facts offered by the parties tend to *establish* , not refute, the Plaintiffs' standing.

B. Dartmouth's Claim That The Current Lawsuit Is Barred By The Doctrine of *Res Judicata*

By way of introduction, the Plaintiffs' note that the question of whether their claims are barred by the doctrine of *res judicata* is a matter to be decided by the Court, not the jury. See Sleeper v. Hoban Family Partnership, 157 N.H. 530, 533 (2008). Accordingly, although the plaintiffs suggest that there is no material conflict between the factual material submitted by the College and the material submitted herewith by the Plaintiffs, if the Court discerns a conflict, the Court may determine the facts and then proceed to apply the relevant law. However the Court resolves any potential disputes of fact, the Plaintiffs respectfully suggest that, insofar as it is based on principles of *res judicata,* the College's Motion for Summary Judgment must be denied.

1. The Plaintiffs were not in formal privity with the Association and, thus, *res judicata* does not bar their claims.

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.

There are two types of privity for purposes of *res judicata*. The first type is what is sometimes described as "formal" privity. This depends upon the existence of certain substantive legal relationships between the parties. Sleeper v. Hoban Family Partnership, supra. See generally, RESTATEMENT (SECOND) OF CONTRACTS, § 41. Qualifying relationships for formal privity include the following:

1. A property owner and his/her successor in interest. Sleeper v. Hoban Family Partnership, supra; RESTATEMENT (SECOND) OF JUDGMENTS, § 43(1)(b).

2. The executor of an estate and the beneficiaries thereof. Tsiatsios v. Tsiatsios, 144 N.H. 438 (1999); RESTATEMENT (SECOND) OF JUDGMENTS, § 41 (c);

3. The State and its executive agencies. Day v. N.H. Retirement System, 138 N.H. 120 (1993); RESTATEMENT (SECOND) OF JUDGMENTS § 41 (d);

4. A corporation and its shareholders. Numerica Savings Bank v. Mountain Lodge Inn, Corp., supra. RESTATEMENT (SECOND) OF JUDGMENTS, § 59(2).

The first possible application of formal privity to the case at bar is with respect to the Plaintiffs' claims as members of an unincorporated association. In the RESTATEMENT, the *res judicata* effect upon the members of an unincorporated association of prior litigation by the association itself 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 the College was correct in arguing in the Prior Lawsuit that unincorporated associations do not have the right to sue in New Hampshire, the RESTATEMENT would not treat the Plaintiffs as being in formal privity

with the Association and would not bar them from proceeding with the Current Lawsuit. RESTATEMENT (SECOND) OF JUDGMENTS, § 35, *comment d*.

The Plaintiffs take the position that, under New Hampshire law, *both* the unincorporated association and its members may sue to enforce the association's contracts. (This is especially true as to individual members who have personally assented to and ratified those contracts by acting in reliance thereon - which the Plaintiffs have done.) Ironically, the question of whether or not, for purposes of *res judicata,* there is formal privity between the Association, on the one hand, and the Plaintiff as members of the Association, on the other hand, may well turn upon who is right about the standing of the Association, not the standing of the Plaintiffs.[35]

The other possible application of the concept of formal privity to this case is with respect to the Plaintiffs' claims as third-party beneficiaries of the 1891 Agreement. 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 had the right to cut off the third-party beneficiary rights of the alumni under the 1891 Agreement, the dismissal of the Prior Lawsuit has no *res judicata* effect upon the Current Lawsuit. As stated in *comment a* to § 56, whether the Association had such a power is determined by the rules stated in RESTATEMENT (SECOND) OF CONTRACTS § 311. RESTATEMENT (SECOND) OF CONTRACTS § 311(3), in turn, provides that the power of the

[35] Nevertheless, even if the Court were to conclude that there is formal privity between these parties, that does not automatically mean that *res judicata* bars the Plaintiffs' claims as Association members. As is discussed post, it is the Plaintiffs' position that the circumstances surrounding the execution and filing of the stipulation render it unworthy of honor for *res judicata* purposes.

promisee to cut off the rights of a third-party beneficiary terminate "when the beneficiary … 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." In the case at bar, all of the Plaintiffs claim that they have taken actions in reliance upon the 1891 Agreement. Petition, ¶30. [36] Accordingly, under the rules of the RESTATEMENT, since their third-party beneficiary rights were, in essence, "vested" at the time that the Association dismissed the Prior Lawsuit, [37] the Plaintiffs were not in formal privity with the Association and the doctrine of *res judicata* does not operate to bar their claims. [38]

2. The Plaintiffs were not in functional privity with the Association and, even if they had been, nothing was decided in the Prior Lawsuit so no claim or issue is barred from re-litigation in the Current Lawsuit.

The Plaintiffs acknowledge that the gravamen of the College's *res judicata* argument is not that they are barred from proceeding with the Current Lawsuit by their *formal* relationships with the Association. On the contrary, the College relies primarily upon the other subset of *res judicata* privity known as "functional" privity. As described in Day v. N.H. Retirement System, supra at 123, this involves "a functional relationship in which, at a minimum, the interests of the non-party were in fact represented and protected in the prior litigation."

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[36] By way of example, factual support for the Plaintiffs' allegations in this regard is supplied by the affidavit of Plaintiff John Steel III.

[37] Even if the Plaintiffs' third-party beneficiary rights had not vested, the RESTATEMENT provides that a second suit by such parties is only barred if, at the time of first suit, the contract promisee had the "power to discharge the obligation" of the promisor. As the Plaintiffs discuss post, because it was never authorized by the body of the alumni, the filing of the dismissal "with prejudice" was *ultra vires*. The only way that the then-reigning Executive Committee of the Association could even arguably have obtained the authority to discharge the College's obligation under the 1891 Agreement would have been to secure a 2/3rds vote of the alumni. They did not do this and, therefore, they had no such power.

[38] Plaintiffs suggest that the effect of *res judicata* upon their independent claims under the theory of promisory estoppel should properly be governed by the same principles as apply to their third-party beneficiary claims and, therefore, that they are not in formal privity with the Association with respect to these claims either.

Although the Plaintiffs will establish post that there was in fact no functional privity between themselves and the Association, they pause here to point out that the College faces an insurmountable hurdle in its effort to bar them from proceeding with the Current Lawsuit under this theory. The basic problem is that parties in functional privity with each other are only barred from re-litigating issues that were *actually decided* in the earlier lawsuit. In other words, where only functional, but not formal, privity applies, the issue is one of collateral estoppel, not *res judicata*.[39] RESTATEMENT (SECOND) OF JUDGMENTS § 39; Tsiatsios v. Tsiatsios, supra at 441-443; Aranson v. Schroeder, 140 N.H. 359, 368-9 (1995); see RESTATEMENT (SECOND) OF JUDGMENTS, § 59(3) (owner of closely held corp. who is in control of the corp. only bound by issues actually decided in suit against the corp.)

The problem for the College is that *nothing* was resolved in the Prior Lawsuit. The Plaintiffs acknowledge that, under New Hampshire law, a dismissal with prejudice is the equivalent of a judgment for the purposes of *res judicata*. E.g., Concrete Constructors v. Manchester Bank, 117 N.H. 670, 672 (1977); Merchants Mutual Casualty Co. v. Kiley, 92 N.H. 323 (1943); Moore v. Lebonon, 96 N.H. 20 (1949). Accordingly, although the voluntary dismissal of a case may well constitute a *judgment* which bars the parties and their formal privies from re-litigating the case, that does not mean that any issue was *actually decided*. 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

[39] One reason for this rule is that the doctrine of *res judicata* not only bars litigation of matters that actually were decided in a prior suit, but also bars those which reasonably could have been decided. Since functional privity serves to bar claims by parties who were technically not involved in a prior litigation, but who are only *deemed* to have been involved, the doctrine should only bar the re-litigation of issues that have received a full and fair airing. As stated by Chief Justice Brock, dissenting in Moulton – Garland v. Cabletron Systems, Inc., 143 N.H. 540, 546 (1999), "In New Hampshire, however, 'we make every effort to reach a judgment on the merits, to achieve the ends of justice unobstructed by imaginary barriers of form'." (quoting Roberts v. General Motors Corp., 140 N.H. 723, 729 (1996)). See also, N.H. Motor Transport Association v. Town of Plaistow, 67 F.3d 326, 329 (1st Cir. 1995) (when applying functional privity, doubts about whether or not to bar the non-party from suing should be resolved in favor of allowing the suit to proceed).

estoppel] does not apply with respect to any issue in a subsequent action." Accord, Waters v. Hedberg, 126 N.H. 546, 549 (1985). Accordingly, even if the Plaintiffs were in functional privity with the Association with respect to the Prior Lawsuit, the Plaintiffs are not barred by its dismissal from proceeding with the Current Lawsuit and the College's Motion for Summary Judgment on the grounds of *res judicata* should be denied.

Another reason that the motion should be denied is that the Plaintiffs were, in fact, not in functional privity with the Association with respect to the Prior Lawsuit. The College bases its claim of functional privity on its contention that the Plaintiffs supposedly "contributed money, via the Hanover Institute, that helped to finance the Prior Lawsuit." Dartmouth Memo, p. 13. As noted above in the Statement of Undisputed Facts, this is not true. Although all of the Plaintiffs have made contributions to the Institute, there is nothing to indicate that their contributions were on account of or used for the purposes of financing the Prior Lawsuit. Having not only pre-dated that litigation and having stayed level during the litigation's active prosecution, the Plaintiffs' contributions to the Institute are in no way linked to the financing of the Prior Lawsuit.

It is also not the law of New Hampshire that participating in the financing of litigation puts one in functional privity with the parties to that litigation. Not surprisingly, the College cites no New Hampshire case for such a proposition. Moreover, to the extent that there is law anywhere on this issue, it is to the effect that a non-party's contribution of funds to finance an earlier litigation may only be considered in determining whether the non-party should be bound by a judgment in that earlier litigation where there is evidence of the non-party's *actual* involvement in the prior suit. For example, in the case of Sheldon v. Amperex Electronic Corporation, 52 F.R.D. 1 (DC, E.D. New York, 1971) a similar contention was rejected by the

Court as follows: "The mere payment by Amperex of Field's counsel fees or participation in the trial would be insufficient to bind Amperex by a decision in that case. However, *active participation* in the defense of Field would alter the situation considerably." Id. at 11, n. 8 (emphasis supplied). To the same effect is the case of McKeown v. Wheat, 231 F.2d 540 (5th Cir., 1956) (applying Georgia law) (payment of a party's legal fees "does not add up to the *command and direction* of the litigation by the outsider required under the Georgia rule." Id. at 543 (emphasis supplied).[40]

As even the College recognizes, the real issue is *control*. 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.") Accord, Aranson v. Schroeder, supra at 369. As recited above, none of the Plaintiffs personally participated in any way in – never mind controlled – the Prior Lawsuit.

The College, however, attempts to supply the missing evidence of control which could put the Plaintiffs in functional privity with the Association by attributing to them the actions of the Institute. Besides the fact that there is no legal basis for imputing the Institute's conduct to the Plaintiffs, the underlying assumption that the Institute itself was in control of the Prior Lawsuit and therefore in functional privity with the Association is also flawed. The engagement letter with Williams & Connolly stated clearly that the Association was the "client"

[40] Indeed, if a non-party's financing of someone else's litigation were deemed to constitute the "command and direction" that is required to create functional privity, the law would be establishing a presumption that the attorney whose fees were being paid was in breach of his/her code of professional ethics. In this regard, Rule 5.4(c) of the New Hampshire Rules of Professional Conduct provides as follows: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering legal services." See also, Rule 1.8 (f)(2).

and was the party entitled to control the litigation. Although the College points out that Mr. MacGovern, as President of the Institute, was kept in the communications loop concerning developments in the litigation, he did not exercise – or even attempt to exercise – any supervision or direction over its prosecution.[41]

Functional privity also requires that, "at a minimum, the interests of the non-party were in fact represented and protected in the prior litigation." Cook v. Sullivan, 149 N.H. 774, 779 (2003). See RESTATEMENT (SECOND) OF JUDGMENTS § 42 (1) (d) & § 42 (1)(e). Suffice it to say that the interests of the Hanover Institute in supporting the alumni's right to parity were not "represented and protected" when the newly-elected Executive Committee of the Association dismissed the Prior Lawsuit with prejudice. Equally apparent is the fact that the Institute was totally unable to do anything about it.[42]

3. The stipulation for dismissal is so tainted that it should be given no *res judicata* effect of any kind.

The final reason that the College's *res judicata* motion must fail is that the Association's dismissal of the Prior Lawsuit with prejudice 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, supra at 327. For example, in Beliveau v. Amoskeag Manufacturing Co., 68 N.H. 225 (1894), a plaintiff attempted to strike a

[41] All that the College is left with is the fact that the Hanover Institute financed the Prior Lawsuit. The Plaintiffs have already pointed out that, without other indicia of control, paying another's legal bills does not place the payor in functional privity with the party who is actually conducting the litigation. Moreover, if that were enough, this would be the end to all sorts of celebrated public interest litigation that is so often paid for by organizations such as the American Civil Liberties Union, the Sierra Club or the Conservation Law Foundation. The Institute's role in the Dartmouth parity litigation is entitled to no lesser respect.

[42] Despite the insinuations of the College, the Institute was no more in control of the litigation through Mr. Gado than it was in control of the litigation through Mr. MacGovern. The College points out that Mr. Gado was both a director of the Institute and the Executive Committee's designated liaison to Williams & Connolly with respect to the handling of the Prior Lawsuit. Dartmouth Memo, p. 7. Nevertheless, the record clearly establishes that Mr. Gado set up a proverbial "Chinese wall" between his two roles. (Ex. EE) More importantly, when it came to the Association's critical decision to dismiss the Prior Lawsuit, Mr. Gado was no longer in office and, therefore, not in a position to control anything. (Ex. GG)

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 entered by counsel without 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".[43] Suffice it to say that the Association gave up something of value because it had just received a favorable order from the Court denying the College's motion to dismiss; this was 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. Accordingly, to the extent that the stipulation is a type of contract and subject to contract rules of interpretation,[44] it should be deemed unenforceable because there was no consideration for the Association's relinquishment of the alumni's rights.

The execution of a "with prejudice" stipulation was also without proper authority.[45] It is the position of the Plaintiffs that any attempted relinquishment by the Association of the alumni's right to parity would have required a vote to that effect by the alumni. As noted

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[43] 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. Although the College could have objected to such a dismissal, there is no reason to assume that it would have done so. Moreover, even if the College had objected to the Association taking a dismissal without prejudice, its objection undoubtedly would not have been sustained by the Court because the case had only been in litigation for about 8 months, no discovery had been conducted, and no trial or other hearing had been scheduled. Compare, Total Service, Inc. v. Promotional Printers, Inc., 129 N.H. 266 (1987). See also, Fed. Rule Civil Proc. 41 (a) (voluntary dismissals are generally without prejudice).

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

[45] The College does not directly address the issue of whether the Executive Committee had the authority of the alumni to execute the stipulation. On the contrary, the only issue of authority that the College discusses is whether Mr. Mathias had the authority of the new Executive Committee. See, e.g., Mathias Affidavit, ¶5. The Plaintiffs' do not challenge Mr. Mathias' authority; they challenge whether the Executive Committee had the power to give him that authority

above, the only such vote that was ever taken was the poll taken by the Executive Committee that filed the Prior Lawsuit and the result of that vote was *in favor* of parity.

In addition, since a relinquishment of the alumni's right to parity would be tantamount to an amendment of the Association's constitution, such a measure would have had to pass by a two-thirds supermajority vote. Dartmouth Ex. D, Article VII. Although the Association's constitution does not expressly mention the 1891 Agreement, it presupposes the Agreement's existence. Indeed, 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, therefore, the Executive Committee could, on its own, cancel the 1891 Agreement, it could essentially put the Association out of business.

It is important to understand the implications of what it means to say that the Executive Committee did not need a vote of the Association's members to dismiss the Prior Lawsuit with prejudice. 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 presumably also had the unilateral power to give up the alumni's right to *any* representation on the Board. [46] Merely to state so monstrous a proposition is to refute it.

The final 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

[46] Note that the 1891 Agreement was originally adopted by the Association through a vote of its *members*. (Ex. FF) 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 been adopted by its *members*.

College that 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.

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%." (Ex. Y). The point is that the College understood that if the dismissal with prejudice were effective to extinguish the alumni's right to parity,[47] the act of the Association's new Executive Committee in agreeing to such a thing was beyond the scope of its authority. That, of course, is precisely why the college orchestrated a public relations campaign designed to keep the terms of the stipulation secret.

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

[47] And, as Ms. Pearson's notes reflect, this is precisely what Mr. Spalding and Mr. Mathias were hoping to accomplish: "1891 dead forever." (Ex. Y).

bringing the Current Lawsuit, either as members of the Association[48] or as third-party beneficiaries.

IV. CONCLUSION

For the reasons stated above, the Plaintiffs respectfully pray that the Court find and 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 Petition sufficiently alleges that the Plaintiffs have standing to bring the Current Lawsuit as third-party beneficiaries of the 1891 Agreement;

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[48] The College contends that by prosecuting the Current Lawsuit, the Plaintiffs are going against the wishes of the Association. The College therefore attempts to avail itself of the so-called Bricker doctrine. Dartmouth Memo, p. 17-18. 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 Association *was* a party). (Note that the College's submission of the affidavit of Mr. Mathias, President of the Association, does not change the situation; the Association is still not a party and the College may not act as its proxy.)

More important, the Bricker doctrine has no application to this case. Although the Plaintiffs do take the position that the "with prejudice" portion of the stipulation dismissing the Prior Lawsuit would not be binding upon a future Executive Committee, the Plaintiffs are not seeking to have that issue determined in the current litigation. The Plaintiffs are not asking the Association to do anything and they are not asking this Court to allow the Association to do anything. Indeed, the best evidence of the fact that the Association is not adversely affected by the Current Lawsuit is that it has not voluntarily moved to intervene as a party. The second-best evidence of this is that even the College has not moved to have it joined involuntarily.

On the other hand, even if the Plaintiffs were seeking in the Current Litigation to have this court somehow determine the rights of the Association, the Bricker doctrine would not bar such an effort 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*, without consideration and a product of collusion with the College certainly qualifies as sufficient "injustice" to warrant judicial scrutiny of the issue.

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 irrelevant to the Plaintiffs' independent claims as third-party beneficiaries of the College-Association contract and as parties entitled to recover under principles of promisory estoppel. These claims are based solely upon a breach by the College of its legal obligations to the Plaintiffs and do not in any way depend upon whether the Association chooses to assert its legal rights or to sit upon them.

4. That the undisputed facts with respect to the Plaintiffs' standing as third-party beneficiaries actually support the Plaintiffs' claims on this issue;

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

6. That the Petition sufficiently alleges that the Plaintiffs have standing to sue on the grounds of promisory estoppel;

7. That the undisputed facts with respect to the Plaintiffs' standing to sue on the grounds of promisory estoppel actually support the Plaintiffs' claims on this issue;

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

And, therefore:

The Court should deny the College's Motion for Summary Judgment.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on _____, 2009, 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,.

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