THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 07-E-289

Association of Alumni of Dartmouth College

vs.

Trustees of Dartmouth College

ORDER ON THE MOTION TO DISMISS

Before the Court is a Motion to Dismiss filed by the respondent, Trustees of Dartmouth College ("College"), to which the petitioner, the Association of Alumni of Dartmouth College, ("Association") has objected. A hearing was held on January 10, 2008. For the reasons set forth below, the Motion to Dismiss is DENIED.

LEGAL STANDARD

In ruling on a motion to dismiss, the Court must determine "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Hobin v. Coldwell Banker Residential Affiliates, Inc.*, 144 N.H. 626, 628 (2000) (quoting *Miami Subs Corp. v. Murray Family Trust & Kenneth Dash P'ship*, 142 N.H. 501, 516 (1997)). This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. *Williams v. O'Brien*, 140 N.H. 595, 598 (1995). Dismissal is appropriate "[i]f the facts as pled cannot constitute a basis for legal relief." *Hobin*, 144 N.H. at 628 (quoting *Buckingham v. R.J. Reynolds Tobacco Co.*, 142 N.H. 822, 825 (1998)). When the Court tests the pleadings, it "assume[s] the truth of the facts alleged in the plaintiff's pleadings and construes [a]ll reasonable inferences in the light most favorable to him." *Hobin*, 144 N.H. at 628 (citation omitted). However, the Court "need not accept allegations in the writ that are merely conclusions of law." *Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998) (quoting *Gardner v. City of Concord*, 137 N.H. 253, 255-56 (1993)).

FACTUAL BACKGROUND

Taken in the light most favorable to the non-moving party, the Court finds the

following facts to be relevant. The parties confirmed the Court's understanding of the facts during the January 10 hearing on the Motion to Dismiss.

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 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.

The Alumni Association initially filed a request for Preliminary Injunction and Declaratory Relief (index #1). The Alumni Association has agreed to withdraw its request for preliminary injunction pending the Court's ruling on Dartmouth College's Motion to Dismiss, assuming the ruling occurs prior to the implementation of the seating of new charter trustees. The parties have agreed that no new trustees will be seated prior to the February meeting.

DISCUSSION

Count I: Breach of Contract

The Parties' Arguments

The College argues that the Court, while bound to accept all facts alleged by the Association as true under the standard of review for a Motion to Dismiss, need not accept as true the Association's claim that the parties have a legally binding contract. Citing *Provencal v. Vermont Mutual Insurance Co*., 132 N.H. 742 (1990) and *Chasan v. Village District of Eastman*, 128 N.H. 807 (1986), the College asserts that the Association's allegation that a contract exists is a legal conclusion, rather than an allegation of fact that a court should accept as true for the purposes of a Motion to Dismiss. The College relies on the same authority for its argument that, in a breach of contract action, the court is free to consider the documents reflecting on the existence of the contract, as well as documents relied upon in the contract, at the Motion to Dismiss stage of proceedings. Specifically, the College directs the Court to the signed

documents that the Association alleges contain the written elements of the agreement; namely the texts of the Board meeting of June 23, 1891, and the minutes of the Association's meeting the following day.

The College asserts five legal theories to support its claim that the Association's case should be dismissed for lack of a binding contract. First, the College asserts that the Association has not alleged facts establishing that the members of the Board in 1891 intended to contractually bind the College to a system of "parity" in perpetuity. Second, the College alleges that the Association has not established that the alumni provided any legal consideration for the Agreement. The College argues that, even accepting as true the allegations in the Petition that the Association agreed to raise funds and to take a livelier interest in, and direct responsibility for, the College, this does not constitute valid consideration for a binding contract. Third, the College claims that the terms of the alleged contract, particularly as they relate to the Association's required performance, are insufficiently definite to be enforceable. The College argues that absent reasonably certain terms, this Court cannot determine whether there was a mutual assent or whether the Association or its members complied with their contractual obligations. Fourth, Dartmouth College argues that the Board in 1891 lacked the authority to delegate to a third party in perpetuity its fiduciary responsibility to select trustees. Dartmouth College's fifth argument is that the Alumni Association, as an unincorporated association, lacked legal capacity to enter into the contract in 1891.

The College also denies the Association's claims of implied contract in fact and promissory estoppel, as well as the applicability of collateral estoppel and/or judicial estoppel to prevent the College from arguing against the existence of a binding contract.

The Association counters that it has alleged sufficient facts to establish a potential legal claim, and therefore a Motion to Dismiss is improper. It asserts that the existence and terms of a contract are fact-specific questions that must be determined by the fact-finder after discovery, and that it would be inappropriate for the Court to consult documents beyond the pleadings at this stage of proceedings, citing *Durgin v. Pillsbury Lake Water Dist.*, 153 N.H. 818, 821 (2006) and *Chisholm v. Ultima Nashua*

Indus. Corp., 150 N.H. 141, 145 (2003).

In support of its substantive arguments for the existence of a binding contract, the Association argues that judicial estoppel bars the college from denying the existence of a contract between the College (through the Board) and the Association. The Association argues that the College has, in prior proceedings unrelated to this matter, taken an inconsistent position with respect to the enforceability of the 1891 agreement, and accordingly, is now barred from arguing that there is no agreement. Secondly, the Association argues that its Petition does state a claim for breach of a contract, formed in 1891, under Count I of its pleadings. The Association asserts that its Petition sets forth a basis, on the face of its pleadings, to require that the College seat alumni trustees equal to one-half of the members of the Board. The Association argues that the Agreement of 1891 consisted of definite, enforceable terms, and that its terms and consideration were the result of extensive bargaining and therefore not a suitable subject for the Court's inquiry. The Association also denies that, as an unincorporated association, it had no authority to enter into a contract with the College. Moreover, the Association asserts that the College is estopped from denying the Association's capacity to contract, since the College had entered into a contract with the Association and enjoyed the benefits of this Agreement. The Association argues that the Board had actual authority to enter into the agreement; or, even if no actual authority existed, apparent authority binds Dartmouth College to the 1891 agreement.

The Association argues that even if the Court were to dismiss its express contract claim set out in Count I, its implied in-fact contract claim pled in Count II should bar the College's Motion to Dismiss. Finally, the Association argues in Count III of its complaint that it has a claim under the doctrine of promissory estoppel sufficient to prevent the College from succeeding on its Motion to Dismiss.

Standard of Review for a Motion to Dismiss Allegations of Contract

While a "plaintiff's factual allegations are assumed to be true, [a plaintiff's] assertion that a contract had been formed represents a legal conclusion. Conclusions of law need not be accepted as true in ruling on motions to dismiss." *Provencal v. VT Mut. Ins. Co.,* 132 N.H. 742, 745 (citing *Chasan v. Village District of Eastman*, 128 N.H.

807, 814 (1986)). "[W]hen there is a disputed question of fact as to the existence and terms of a contract it is to be determined by the trier of fact." *Maloney v. Boston Dev. Corp.*, 98 N.H. 78, 82 (1953) (citations omitted). "Before such issues can be submitted to a jury for determination, however, there is a preliminary question of law for the Trial Court[:] Is there any evidence from which it could be found that there was a contract between the parties?" *Id.* (citations omitted).

> Normally, a ruling on [a motion to dismiss] is made on the basis of the facts alleged on the face of the complaint. In the instant case, however, the plaintiffs, having themselves submitted documents along with their briefs in opposition to the motion, cannot object to the court's consideration of those documents in making its ruling. The plaintiffs' objection to summary judgment treatment of the pleadings is inconsistent with their acts, in submitting documents in addition to the bare pleadings. Having acquiesced in the procedure employed, the plaintiffs cannot now object to the form of the proceeding.

Chasan v. Village District of Eastman, 128 N.H. 807, 813 (1986) (citations omitted).

Thus, if the Association has produced "any evidence from which it could be found that there was a contract between the parties," then the existence and terms of such a contract become an issue of fact, inappropriate for disposition by a Motion to Dismiss. *Maloney*, 98 N.H. at 82. In determining whether or not the Association has produced sufficient evidence to allow such a factual finding, the Court will consider the pleadings, as well as the documents attached to those pleadings.

Judicial Estoppel

The Association's first argument, the application of judicial estoppel to prevent the College from denying the existence of a contract, would be dispositive as to the Motion to Dismiss, if successful.

> The doctrine of judicial estoppel is as follows: Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, it may not thereafter, simply because its interests have changed, assume a contrary position. While the circumstances under which judicial estoppel may be invoked vary with each situation, the court considers the following three factors: (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position; and (3) whether the party seeking to assert an inconsistent position would derive

> an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Porter v. City of Manchester, 155 N.H. 149, 156-157 (2007) (citing *Kelleher v. Marvin Lumber & Cedar Co.,* 152 N.H. 813, 848 (2005)).

The Association argues that the College's position in the case of *Tell v. Trustees of Dartmouth College*, No. 95-E-58 (Oct. 23, 1995) (Order, McGuire, J.) was directly inconsistent with the College's position in the current case in that the College had previously acknowledged the Association's "rights" in the composition of the Board of Trustees. The Association further alleges that the College succeeded in persuading a court to accept that contrary earlier position, and that the College would derive an unfair advantage or impose an unfair detriment if not estopped from asserting this contrary position.

The College argues that its position was not inconsistent, as the College did not argue that a binding agreement existed between the Association and the College in either the *Tell* case or the current litigation. While the College did prevail on appeal of its earlier litigation by asserting that the plaintiffs had failed to join the Association as a necessary party to a lawsuit regarding the composition of the Board of Trustees, it argues that this position is not inconsistent with its current claim that no binding contract exists between the College and the Association mandating parity of Alumni Trustees and Charter Trustees on the Board. The College argues that there is nothing unfair about its argument, since it is not inconsistent.

The Court agrees with the College. The prevailing arguments in the *Tell* case, both in the New Hampshire Superior Court and the related federal litigation, centered on (a) the doctrine of judicial interference, attempting to minimize the court's role in the internal affairs of associations; and (b) the plaintiffs' failure to join a necessary party, the Association, where the procedures generating the plaintiffs' complaints had been adopted and implemented by the Association, rather than the College. Neither of these arguments so much as suggests that the College was under contractual obligation to the Association. On the contrary, when referring to the Tell plaintiffs' claims, the College frequently referred to the alleged "contract" in quotation marks, in an implied disavowal of the

existence of such a contract. *See, e.g., Tell v. Trustees of Dartmouth College*, No. 97-2098, Brief for Defendant-Appellee at 6. (Pl. Obj. Mot. to Dismiss, Ex. 3). The College also explicitly argued in the *Tell* litigation that "the '1891 agreement' cannot constitute a legally binding contract because it does not contain sufficiently certain terms as a matter of basic contract law." *Id*. at 12, 32-34. In addition, the College claimed during the *Tell* litigation that the aggrieved alumni plaintiffs had no property interest in the composition of the Board, a position entirely consistent with its arguments in the present case.

The Association appears to rely on the College's statement that "The Association has a long-standing interest and role, acting on behalf of all alumni, in the process of selecting College Trustees." *Tell v. Trustees of Dartmouth College*, No. 97-2098, Brief for Defendant-Appellee at 9. (Pl. Obj. Mot. to Dismiss, Ex. 3). The truth of this statement is uncontested in either litigation. However, in order for judicial estoppel to apply, the College's current position must be "clearly inconsistent with its earlier position." The College's current position, that no binding contract exists between the College and the Association, is not "clearly inconsistent" with its earlier assertion that the Association has long been involved in the Trustee selection process. The College's former position is consistent with its current argument that the Association was granted a role in the Trustee selection process by a resolution of the Board in 1891. In the current litigation, the College argues that a new Board resolution can overrule the 1891 resolution; in the *Tell* litigation, the College suggested that the 1891 resolution granted the Association certain non-property rights in the Trustee selection process. The two positions are not "clearly inconsistent."

The second factor of the judicial estoppel test, "whether the party has succeeded in persuading a court to accept that party's earlier position" is similarly unmet. *Porter*, 155 N.H. at 156-157 (2007). The College did prevail in the prior litigation, and thus could be said to have "persuaded the court," but the courts' decisions reflect a basis in the doctrine of judicial interference, as well as the plaintiffs' failure to join an indispensable party, the Association, the entity whose actions caused the plaintiffs' complaints. The state Superior Court and the First Circuit Court of Appeals decisions do not appear to rely on a finding of the existence of a contract between the College and the Association.

As for the third factor of the judicial estoppel test, since the College's positions are not inconsistent, the Court need not address whether permitting the College to assert an inconsistent position would be unfair or result in prejudice to the Association.

In this case, the Court finds and rules that the College is not judicially estopped from denying the existence of a contract.

Elements of a Contract

"A contract may be established by spoken or written words or by acts or conduct." *Harrison v. Watson*, 116 N.H. 510, 511 (1976). "Offer, acceptance and consideration are essential to contract formation." *Chisholm v. Ultima Nashua Indus. Corp.*, 150 N.H. 141, 144 (2003) (citing *Tsiatsios v. Tsiatsios,* 140 N.H. 173, 178 (1995)). Consideration "may consist either in a benefit to the promisor or a detriment to the promisee." *Chasan v. Village District of Eastman*, 128 N.H. 807, 816 (1986) (citations omitted). "There must be a meeting of the minds on all essential terms in order to form a valid contract. A meeting of the minds is present when the parties assent to the same terms." *Syncom Indus. v. Wood*, 155 N.H. 73, 82 (2006) (citations omitted). This is analyzed under an objective standard. *Estate of Younge v. Huysmans*, 127 N.H. 461, 465 (1985) (citations omitted). "Moreover, the terms of a contract must be definite in order to be enforceable." *Syncom Indus.*, 155 N.H. at 82 (citing *Behrens v. S.P. Constr. Co.*, 153 N.H. 498, 501 (2006)).

In order to survive the College's Motion to Dismiss, the Association must have advanced sufficient evidence, through its pleadings and attached materials, to allow a finding of each essential element of a contract: (1) offer and acceptance objectively manifesting an agreement (2) with definite terms (3) supported by consideration. *See*, *Chasan*, 128 N.H. at 813.

Meeting of the Minds

The Association explains that the Agreement was not encapsulated in any single document, but that a contract was formed and manifested by the combination of the College's 1891 Board resolution, minutes of the Association meeting of June 24, 1891, oral representations, and a course of conduct.

"When a court determines whether such a mutual understanding exists, the evidence is viewed objectively; undisclosed meanings and intentions are 'immaterial in

arriving at the existence of a contract between the parties.'" *Simonds v. City of Manchester*, 141 N.H. 742, 744 (1997) (quoting *Seal Tanning Co. v. City of Manchester*, 118 N.H. 693, 698 (1978)). In this case, the clearest objective evidence of the parties' intent is their course of conduct for the 116 years since the Agreement: the Board has continued to consist of one half Alumni Trustees, and one half Charter Trustees. On both occasions of expansion, the number of Alumni Trustees increased accordingly in order to maintain the same ratio.

Interpreting the facts in the light most favorable to the Association, the Court finds that the Association has raised sufficient evidence of a meeting of the minds to survive a Motion to Dismiss.

Terms

The pleadings describe an agreement, reached after decades of negotiations, where, "[i]n exchange for the right to appoint one-half of Dartmouth's board, the Association agreed to assume responsibility for recruiting qualified trustee candidates, to drop a threatened lawsuit, and to mail an appeal to its members seeking contributions to the College," as well as withdrawing a public ultimatum urging alumni not to donate to the College until the Association had gained a right of representation on the Board. Pet. Obj. Mot. to Dismiss at 1.

"Reasonable certainty is all that is demanded, and that requirement is fulfilled if the meaning of the contract, taken as a whole, is intelligible to the court." *Kann v. Wausau Abrasives Co.,* 85 N.H. 41, 48 (1931) (quotation and citations omitted). These terms are not so vague and indeterminate as to completely invalidate any standing Agreement between the parties. The Association has continued on a yearly basis to fulfill its responsibility of providing competent trustee candidates for confirmation by the Board, and the Board has fulfilled its obligation of seating those candidates. The Association appears to have fulfilled its 1891 obligations as well, by lifting its moratorium on alumni donations and sending a fundraising appeal on behalf of the College. It appears that the terms understood by the parties have been followed. Accordingly, the Court considers the Association to have set forth sufficient evidence to avoid finding the contract invalid as a matter of law.

Consideration

"When the parties have bargained for an item, promise or forebearance, the adequacy of the exchange should not be examined except in unusual situations. Only in the absence of bargaining will the court weigh the relative values of the benefits and detriments." *Burgess v. Queen*, 124 N.H. 155, 160 (1983).

The Association has pled that negotiations between the College and the Association to grant the Association representation on the Board began as early as the 1860s. After over twenty years of difficult negotiations, throughout which time the Association was pressing the College for greater involvement in the governance of the College, the result was the 1891 Agreement. The Association therefore pleads that sufficient bargaining went into the Agreement that the Court ought not engage in a weighing of the consideration provided. The Association explained that the consideration the College offered it was an equal role in the governance of the College through nominations to the Board; the consideration that the Association offered the College was principally financial. Specifically, the Association claims that it provided consideration by: 1) seeking out and nominating suitable individuals to fill the Trustees' seats, 2) forbearing from filing a lawsuit against the Board, 3) lifting its public moratorium on alumni donations, and 4) soliciting alumni donations to the College by sending a mailing to alumni on the College's behalf.

Taking the parties' decades of bargaining into account, the Court finds that "the consideration provided was more than the peppercorn of consideration the law requires to save the contract from unenforceability." *Hobin v. Coldwell Banker*, 144 N.H. 626, 631 (2000) (quotation and citations omitted). The Association has thus established sufficient evidence to go forward with its claim of breach of contract.

Capacity and Authority to Contract

The College argues that whatever arrangement was agreed upon between the Association and the College in 1891 lacks binding contractual effect because an unincorporated association lacks the authority to contract. Furthermore, the College argues, the Board lacked the authority to delegate its governance powers in perpetuity, as that would constitute a violation of its fiduciary duty.

The Association responds that the New Hampshire Supreme Court has repeatedly enforced agreements entered into by unincorporated associations, and that to accept the College's argument would disrupt settled economic relationships throughout the state by divesting associations of their rights to contract. The Association further asserts that the College, having contracted with the Association and reaped the benefit of its bargain, is estopped from denying the capacity of the Association to contract. As to the Board's authority to delegate its governance powers, the Association argues that there has been no violation of fiduciary duty over the 116-year period of performance of the contract, during which the Association filled half of the Board's seats, and there would be no such violation if the Association were to continue to do so.

The College relies on *Shortlidge v. Gutoski*, 125 N.H. 510 (1984), which indicated that a not-for-profit, unincorporated association has no legal existence apart from the members who compose it and that the individuals who compose an association act by virtue of an agency, with their privileges and duties defined by the contract they have made. The *Shortlidge* court does not, however, take priority over the legislature. RSA 292:12-:14 provide a corporate status for an unincorporated association engaging in certain activities, including taking, conveying, and holding land, receiving and using donations, and suing and being sued in relation to its holdings.

In *State v. Settle*, 129 N.H. 171, 178-9 (1987), the New Hampshire Supreme Court held that an unincorporated association, "merely a group of individuals voluntarily joined together to further a common purpose," was precluded from pro se legal representation because "its very nature as a collection of individuals necessarily and by definition precludes its appearance pro se by one individual" and agreed with other states' authority holding "that a mere association must appear by licensed attorney, whether the association be treated simply as a collection of individuals or as a partnership." (Citations omitted.) This conclusion would require an unincorporated association to make at least one contract—with an attorney. If contracts with unincorporated associations were *per se* void, this would be a nonsensical result.

The Association also points out in its brief numerous cases where the New Hampshire Supreme Court has honored contracts made by unincorporated

associations. The authority is extensive. The Association emphasizes the importance of the case closest in time to the 1891 Agreement, *Curtis v. City of Portsmouth*, 67 N.H. 506 (1893), where the New Hampshire Supreme Court upheld an agreement between a city and an unincorporated association, awarding the association damages for the city's breach.

The Court finds and rules on this basis that the Association had the legal capacity to contract with the Board in 1891.

Even if the Association lacked such capacity, however, the College would be estopped from arguing the Association's lack of capacity to contract by virtue of having received the benefit of its bargain. The College asserts that, since it argues that no contract was formed, it is not estopped from arguing the Association's lack of capacity. The Court disagrees. "[O]ne who enters a contract with an unincorporated association as a legal entity may be estopped to deny the validity of the contract on the ground that the association did not have a legal existence." *Wilson & Co. v. United Packinghouse Workers*, 181 F. Supp. 809, 816 (N.D. Iowa 1960), *accord Cox v. GEICO*, 126 F.2d 254, 256 (6th Cir. 1942) ("A person who enters into a contract with an unincorporated association is, of course, legally liable for the fulfillment of his undertakings under the contract.") The Court adopts the logic of other jurisdictions. The College, having agreed with the Association such that the Association undertook to raise funds for the College, modified its constitution, lifted an embargo on alumni donations, and forbore to file suit, ought not reap the benefit of its bargain and then deny that the Association had the capacity to make such an agreement. Such a notion offends the obligation of good faith and fair dealing implicit in any contract.

The Court further finds and rules that the Board had the requisite authority to enter into the Agreement, and that the Agreement did not represent an improper delegation of the Board's duties. Dartmouth's charter gave the 1891 Board the authority to "make and establish such Ordinances[,] Orders & Laws as may tend to the good and wholesome government of the said College." Resp. Mot. to Dismiss at 12. The College argues that any agreement delegating governing duties would be void as a violation of fiduciary duty. However, the 1891 Board addressed and rejected that

argument in its deliberations leading up to the 1891 Agreement. *See* Lord's *History of Dartmouth College* at 456 (Pl. Obj. Mot. to Dismiss, Ex. 5). The Court finds that it would be improper to hold as a matter of law that the Board's action in 1891 was illegitimate for lack of authority, when it has been ratified by the actions of both parties for 116 years thereafter.

Count II: Implied in Fact Contract Claim

The College's Motion to Dismiss this Count does not make any arguments beyond those it advanced in favor of dismissal of Count I. The Association claims that further discovery is required in order to discover more facts supporting the claim.

"An implied in fact contract is a true contract that is not expressed in words; the terms of the parties' agreement must be inferred from their conduct." *Morganroth & Assoc. v. Town of Tilton*, 121 N.H. 511, 514 (1981). Thus, even if the 1891 express contract were to be unenforceable, the Association has pled that it could proceed with its claim for breach of the implied in fact contract that arose from the parties' mutual performances since 1891. The Association and its members have sought out, vetted, and nominated trustees to fill one-half of the seats on the Board; the Board has seated every such nominee. The same terms and consideration apply to this implied contract as to the express contract.

The Court finds that, construing the pleadings in the light most favorable to the Association, it has established sufficient evidence to proceed with a claim for an implied in fact contract.

Count III: Promissory Estoppel

Promissory estoppel is a remedy for "breach of a legally binding promise." *Jackson v. Morse*, 152 N.H. 48, 51 (2005). "It 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 (1992). A promise which may be enforced under the doctrine of promissory estoppel is one which "reasonably induces action or forbearance." *Jackson*, 152 N.H. at 52.

The Association has alleged that the College promised it the right to seat one-half of the members of the Board. Furthermore, the Association has pled that it acted in reliance upon this promise when it forbore to file suit against the College, when it sent out a letter requesting that alumni donate funds to the college, and when it lifted its moratorium on alumni donations. The Association suggests that the ongoing donation to the College by the alumni is continually based in reliance upon the alumni participation on the Board. The Association further alleges that the Board's expansions in 1961 and 2003, each maintaining parity, represented renewed promises, and the Association's actions in seating additional trustees, as well as all fundraising ventures, represent actions taken in reliance on the renewed promises.

Construing the pleadings in the light most favorable to the Association, the Court finds that it has established a claim in promissory estoppel.

The Motion to Dismiss is accordingly DENIED as to all three counts.

SO ORDERED.

Dated: February 1, 2008

Timothy J. Vaughan,
Presiding Justice