STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Addison Unit **Case No. 22-PR-02895**

Hon. James H. Douglas,	)
Special Administrator of the	)
Estate of John Abner Mead,	)
Plaintiff	)
v.	)
	)
The President and Fellows of	)
Middlebury College	)
Defendant	)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

NOW COMES Plaintiff, Honorable James H. Douglas, Special Administrator of the Estate of John Abner Mead, by and through his attorneys of the firm Valsangiacomo, Detora & McQuesten, P.C., and hereby opposes Defendant's Motion to Dismiss as follows:

I. INTRODUCTION

Defendant Middlebury College begins its Motion to Dismiss with an outlandish statement that ostensibly lays blame for the Holocaust on Governor John Abner Mead, for his single public statement in 1912:

> *Plaintiff does not, nor could he, dispute former Vermont Governor John Abner Mead's vocal advocacy for the eugenics movement – a movement which would later serve as an inspiration for the Nazi's program of forced sterilization.*

(Motion to Dismiss at p. 1). This offensive declaration is the pinnacle of hypocrisy from an institution that was a eugenicist factory for over 50 years, "espous[ing] inhumane policies that are uniformly condemned today," teaching eugenics principles until well after the atrocities of the Holocaust were fully known.

Middlebury College's vast involvement in the eugenics movement was exponentially more significant than Mead's single public statement on the topic, and, contrary to Defendant's opinion, the circumstances surrounding who the parties were and what their inter-relationships were, as well as their actual roles in the Eugenics Movement, are indeed before this Court because that evidence is essential to the Court's determination of the intent of the parties to the contract, including the duration of the name of the chapel as well as to the Defendant's bad motive.

Defendant not only breached its contract with Governor Mead who offered to erect a chapel, "the same to be known as the "Mead Memorial Chapel,"" it breached the Covenant of Good Faith and Fair Dealing implicit in that contract, for a bad motive: it used Governor Mead as a scapegoat, overemphasizing his role, and using him to create a smokescreen to obscure the vile history of Middlebury College as a racist and antisemitic institution.

By stripping the chapel of the Mead family name, Defendant offered up Governor Mead as a symbol of its contempt and condemnation of eugenics, while failing to acknowledge or apologize for Middlebury College's vast and significant role in the Eugenics Movement. To this day, Middlebury College has made no public apology for its monumental role in the Eugenics Movement in Vermont and beyond, despite training generations of eugenicists and promoting eugenics policies for more than a half century. In short, Governor Mead, has been sacrificed on the altar of public relations and used as a pawn to divert attention

away from Middlebury College's abominable history and to absolve it of 50 + years of Eugenic Sin by claiming to severe its only apparent "connection" to eugenics by throwing its "fall guy," Governor John Abner Mead "under the bus."

According to the United States Holocaust Memorial Museum's website, by 1945, the majority of European Jews, two out of every three, had been exterminated by the Nazi regime. However, three years earlier, in 1942, when the US State Department confirmed Hitler's plan to murder all the Jews in Europe and verified reports that 2 million Jews had already been killed, it authorized the press to inform the American public.

Yet, during the 1945-1946 academic year, with full knowledge of the atrocities of the Nazi's systematic genocide of 6 million Jews in Europe, Middlebury College continued teaching eugenics to its students, as it had for more than 50 years. The 1945-46 Middlebury College Course Catalogue offered Eugenics in its Sociology course "Population" and in its Biology course "Genetics:"

34.1 POPULATION *Fall term*
Theories of population. World and American trends. Immigration, ethnic groups, and internal migration in the United States. Problems. Eugenics. (Soc. 21.1. Sophomores by permission) Mr. SHOLES

42.1 GENETICS* *Fall term*
A study of genic action and the physical basis of heredity in plants and animals, including some aspects of eugenics. (Biol. 11.1 and 11.2) 3 hrs. lect., 6 hrs. lab.—5 credits. *Lab. fee,* $5 Miss WRIGHT

Ex. 21, 1945-46 Middlebury College Course Catalogue (Sociology & Biology).

However, even before the turn of the 19th century, more than a half-century earlier, Middlebury College began teaching eugenics principles. For example, the 1895 Middlebury College Course Catalogue described the "Sociology" course of study, referencing Race Characteristics, Heredity, Pauperism, Insanity, Crime and Punishment:

Sociology. — This course includes a study of Race Characteristics, Heredity, Environment, Education, Pauperism, Insanity, Crime and its Punishment, Hospitals, Prisons, and Almshouses. Lectures and readings. Two hours a week. PROFESSOR HOWARD.

Ex. 9, 1895 Middlebury Course Catalogue, p. 30. The 1895 Catalogue also offered "Zoology," explaining the purpose of the course was to prepare the student to read "current literature relating to variation, heredity and other biological problems." Ex. 9, p.43-44.

By 1908, Middlebury College's Sociology course of study was described using the terms "regeneration" and "defectives and degenerates" in addition to referencing hospitals, almshouses (poor farms) and prisons:

II. *Sociology*

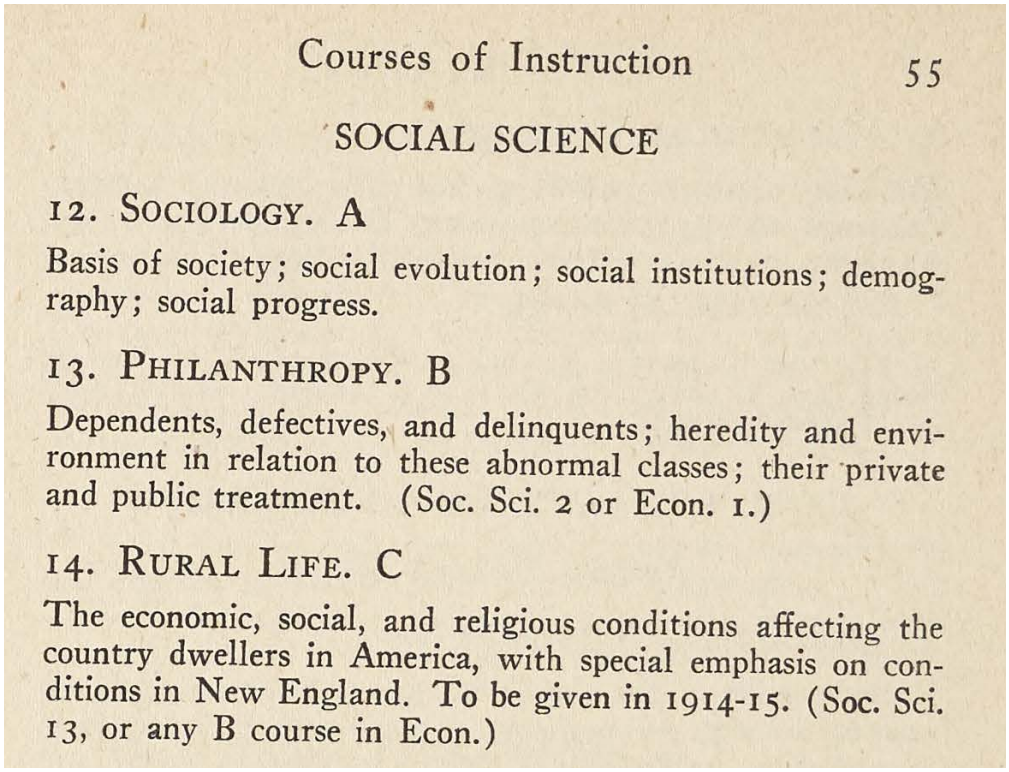
A study of race characteristics, heredity, environment, subjective and objective regeneration, education, pauperism, defectives and degenerates, crime and its punishment, hospitals, almshouses, and prisons. Lectures and readings.

Second semester; three hours a week. Required for Seniors.

Ex. 10, 1908 Middlebury Course Catalogue. It is interesting to note that Sociology was a required course for Seniors at Middlebury College in 1908, so all

Middlebury College students would learn about "defectives and degenerates," the identical labels that Defendant condemns Governor Mead for using four years later in his 1912 Farewell Address.

The Social Science Department continued to expand its eugenics offerings and by 1913, "Philanthropy" was added to the curriculum and described as: "Dependents, defectives, and delinquents; heredity and environment in relation to these abnormal classes; their private and public treatment" as was "Rural Life" a study of the economic, social, religious conditions affecting country dwellers:



Courses of Instruction 55

SOCIAL SCIENCE

12. SOCIOLOGY. A

Basis of society; social evolution; social institutions; demography; social progress.

13. PHILANTHROPY. B

Dependents, defectives, and delinquents; heredity and environment in relation to these abnormal classes; their private and public treatment. (Soc. Sci. 2 or Econ. 1.)

14. RURAL LIFE. C

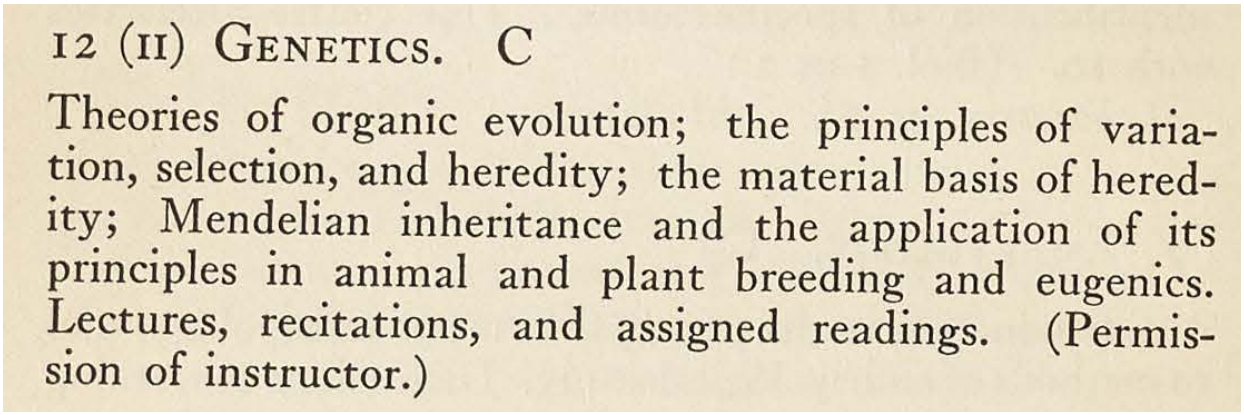
The economic, social, and religious conditions affecting the country dwellers in America, with special emphasis on conditions in New England. To be given in 1914-15. (Soc. Sci. 13, or any B course in Econ.)

Ex. 11, 1913 Middlebury Court Catalogue, p. 55.

In July 1913, Middlebury College President Thomas hosted the "Rural Life Conference," a week-long eugenics conference held in connection with the regular summer session of Middlebury College. The object of the conference was

to promote the "increasingly important county life movement" and included a week-long course of lectures in Rural Sociology. Ex. 12, Addresses given at the Rural Life Conference Middlebury College Middlebury, Vermont July 7 to 13, 1913.[1]

The 1914 Journal *Heredity* listed Middlebury College as one of 44 colleges and universities who taught Eugenics in its curriculum.[2] Ex. 13. By 1918, the term "Eugenics" had been introduced into the Middlebury College Course Catalogue describing the Genetics course of study, and remained there until 1945, long after the genocide of 6 million jews was known in the United States and the world over:



12 (II) GENETICS. C

Theories of organic evolution; the principles of variation, selection, and heredity; the material basis of heredity; Mendelian inheritance and the application of its principles in animal and plant breeding and eugenics. Lectures, recitations, and assigned readings. (Permission of instructor.)

Ex. 15, 1918 Middlebury Course Catalogue.

In 1925, freshmen were required to take a mandatory course which included a lecture on "What Has Civilization to Expect From Eugenics." Among

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[1] https://www.uvm.edu/~eugenics/primarydocs/orrlcmc070713.xml

[2] It appeared in a similar list published by *The Eugenics Review* in 1925.

the topics students were expected to study were "Eugenics" and "Galton's Experiments and Observations." (Francis Galton, who coined the term "eugenics," was an early proponent of the notion that "undesirable" people should be discouraged or prevented from having children.)[3]

As Middlebury College Associate Professor Daniel Silva explained in his December 9, 2021 article "Eugenics, Dispossession and Reparations at Middlebury, published in the Middlebury Campus:

> One only needs to browse the college's course catalogs of the first decades of the 20th century to see the emergence of eugenics in the curriculum and across departments such as Pedagogy (later renamed Education and Psychology), Biology and Sociology. Looking at the 1931 course catalog alone, eugenics and ideas of social progress and pathology based on heredity and environment can be found in the descriptions of courses such as "Genetics and Embryology," "Social Psychology" and "Educational Psychology," in addition to nearly the entire course offering of the Sociology department. In this regard, Middlebury's curriculum followed national and international trends of Europe and North America. **It is, therefore, not a stretch to consider that eugenicists and eugenics sympathizers, were, to some degree, trained at Middlebury.**[4]

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[3] https://www.bostonglobe.com/2023/06/18/opinion/jeff-jacoby-middlebury-hypocrisy-eugenics/

[4] https://www.middleburycampus.com/article/2021/12/eugenics-dispossession-and-reparations-at-middlebury (emphasis supplied).

In addition, Professor Silva notes the close relationship that Middlebury College had with "eugenicists and eugenics supporters, which included trustees, donors, professors and administrators." *Id.*

Indeed, Middlebury College employed eugenicists as Professors and Administrators and appointed Trustees, many of whom were active participants in the Eugenics Movement. For example, Middlebury College Professor A.E. Lambert, a Eugenicist who delivered a eugenics lecture at the Rutland Woman's Club on January 4, 1916 stating: "We are living in an age of reason . . . when science predominates. **We must blot out the unfit in our race and to do this we must prevent marriages which are not eugenic**." Ex.14.

Another notable Middlebury College Eugenicist was Owen Wesley Mills, Biology Professor who taught Eugenics in his Genetics course from 1918-1924. During his tenure at Middlebury College, **Professor Mills was a Fellow for the American Association for the Advancement of Science** and **a Member of the Second International Congress of Eugenics.**[5] Ex. 16.

Vermont Governor John E. Weeks, Middlebury College Trustee from 1909 to 1949, who hosted a Eugenics Conference at the Vermont Statehouse in 1927

[5] The 1921 Second International Congress of Eugenics, was a gathering that promoted humanity's control of its evolutionary future through selective breeding and reducing "unfit" populations. The history of nearly every major museum and scientific society in Western Europe and the United States is intertwined with the scientific, public, and political acceptance of this now-discredited movement. *Science* and the American Association for the Advancement of Science (AAAS, the publisher of *Science*) are no exception.

titled the "Vermont Conference of Social Work" which was an open forum on "Social Legislation" with presentations by many notable eugenicists including UVM Professor Henry F. Perkins, Director of the Eugenics Survey of Vermont. Ex. 19, Burlington Free Press, Jan 19, 1927, page 2.

The Eugenics Survey of Vermont and Middlebury College President Paul Moody

Paul Dwight Moody, Middlebury's president from 1921 to 1942, like so many other leading academics of the era, was "all in on eugenics." In 1931, he was Chairman of the Committee on the Human Factor, part of the Eugenics Survey of Vermont working in concert with UVM's Professor Henry F. Perkins, the most influential eugenicist in Vermont at the time. President Moody's Committee on the Human Factor recommended a major public relations effort to promote eugenics among the public. That recommendation appeared in the final report: "Rural Vermont: A Program for the Future," a manifesto replete with eugenics content, including a "Chart of Defects Found Among 55 Degenerate Families Studied."[6]

President Moody, was not only an active and influential Eugenicist, but he was a documented racist, infamous for the most abhorrent comments which

[6] See Jeff Jacoby, Hypocrisy at Middlebury College, 6/18/2023, https://www.bostonglobe.com/2023/06/18/opinion/jeff-jacoby-middlebury-hypocrisy-eugenics/

were famously quoted by UVM Professor Henry F. Perkins in a 1932 interview. When Dr. Perkins asked Paul Moody of Middlebury College if he had had any students of French Canadian descent who had made a name for themselves in any type of endeavor Mr. Moody immediately said no, and even on consideration said he thought a lot about it and checked up that not one Canadian had risen to a place of responsibility. When asked if they hadn't contributed much to the community of Middlebury itself, **Mr. Moody added another vehement no, stating that the whole French Canadian population could be wiped out of Middlebury and no one would miss it.** Vermont Eugenics: A Documentary History: *Ethnic Study of Burlington: Interview with Dr. Perkins re French Canadians* , Anderson, Elin L.. 1932 (emphasis supplied).[7]

Indeed, Middlebury College's vast connection to eugenics spanned over half a century, continuing years after the world's knowledge of Hitler's death camps and the mass murder of 6 million Jews in Europe.[8] Even Defendant's cited article, "US Scientists' Role in the Eugenics Movement (1907-1939)" details that "by 1936 . . . both England and the U.S. genetic scientific communities

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[7] https://www.uvm.edu/~eugenics/primarydocs/ofesbfc000032.xml.

[8] By 1942, the American press carried a number of reports about the ongoing mass murder of Jews. The US government confirmed this information in late 1942 . . . In January 1944, President Roosevelt created the War Refugee Board, which took significant measures to aid Jews and other victims. https://encyclopedia.ushmm.org/content/en/article/the-united-states-and-the-holocaust-1942-45.

finally condemned eugenical sterilization."[9] Yet, inexplicably, Middlebury College continued teaching Eugenics for another decade

Having discovered the evidence of Middlebury's early and prominent involvement in eugenics, it seems far more likely that Mead was influenced by the men that he knew at Middlebury College, and it is obvious that Middlebury College itself and its President Moody, were the architects who built the bridge spanning three decades after Mead's 1912 speech, acting as the catalyst of promotion, advocacy, and teaching of eugenics which did, in fact, lead to the enactment of eugenics sterilization legislation in Vermont. Reviewing the long history of eugenics at Middlebury College from 1895 to 1945, brings one to the inescapable conclusion that it was Middlebury College itself which contributed to the philosophical and scientific basis for the Nazi program of eugenics, not a year or two of brief querying by Governor Mead.

Governor Mead was used as a public relations diversion to cover up Middlebury College's dreadfully shocking history. Defendant embraced a false narrative, declaring the erasure of the Mead name, which they thought would instantly purify their unclean hands and sever Middlebury College's only perceived affiliation with Eugenics. Instead of taking responsibility for its own history and learning from it, and apologizing to the victims who were harmed by Middlebury College, a Eugenics Institution, they doubled-down and arrogantly

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[9] See Steven A. Farber, U.S. Scientists' Role in the Eugenics Movement (1907–1939): A Contemporary Biologist's Perspective, 5 Zebrafish 243, 244 (2008). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2757926/

asserted that the name "Mead Memorial Chapel" was a vague reference, an after-thought.[10] Such a callous and demeaning statement denigrates a sacred space dedicated as a holy temple, built to memorialize the deep religious faith of his ancestors, and designed to symbolize the strength of character of Vermont.

Defendant's Motion to Dismiss

The problem for Middlebury College is, that its Trustees made a contract with and sacred promise to Governor Mead and accepted his offer to erect and complete, the "Mead Memorial Chapel." The offer was made and accepted for valid consideration, and the contract performed – on both sides. The removal of the Mead name from the chapel is a breach of the Trustee's agreement and the College's obligations, for which there are legal consequences.

On a Rule 12(b)(6) motion, the factual allegation contained in the Complaint, if well-pled, are taken as true and all reasonable inferences are to be given in Plaintiff's favor. Moreover, all countervailing assertions are taken as

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[10] "In short, eugenics was for decades entwined in the intellectual culture and public image of Middlebury College. Yet no one would have any inkling of that history from the college's current president and board of trustees. In their long document justifying the removal of Mead's name from the chapel, they made no mention of the school's extensive connection to the eugenics movement. They condemned Mead for holding views that were considered progressive and scientific at the time without acknowledging that those views for many years were taught, promoted, and applauded by the faculty and administrators of Middlebury itself. It's hardly surprising that as a loyal and active Middlebury alumnus, Mead was influenced by the views of his alma mater and fellow alums." See Jeff Jacoby, Hypocrisy at Middlebury College, 6/18/2023 https://www.bostonglobe.com/2023/06/18/opinion/jeff-jacoby-middlebury-hypocrisy-eugenics/

false. Therefore, there is no basis to Dismiss the Complaint, the Motion should be denied, and the Plaintiff should be allowed to proceed with Discovery.

II. LEGAL STANDARD OF REVIEW

"A motion to dismiss for failure to state a claim is not favored and rarely granted." *Gilman v. Maine Mut. Fire Ins. Co.,* 175 Vt. 554, 557 (2003); *Ass'n of Haystack Property Owners v. Sprague*, 145 Vt. 443, 446-447, 494 A.2d 122 (1985). "A motion to dismiss for failure to state a claim upon which relief can be granted should not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle [plaintiff] to relief." Powers v. Office of Child Support, 173 Vt. 390, 395 (2002); *Levinsky v. Diamond,* 140 Vt. 595, 600 (1982). On a motion to dismiss for failure to state a claim, the question is whether, assuming all facts pleaded in the complaint are true, all reasonable inferences that can be drawn from the complaint are true, and all contravening assertions in the movant's pleadings are false, there exists a basis for relief. *See Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, 117,10, -- Vt. --, 208 A.3d 609; *White Current Corp. v. State*, 140 Vt. 290, 292 (1981).

Furthermore, "[t]he trial court's proper course of action when granting a Rule 12(b) motion to dismiss prior to the service of a responsive pleading is to dismiss with leave to amend." *Neal v. Brockway*, 136 Vt. 119, 122, 385 A.2d 1069 (1978). However, the Court must be wary of striking too soon. *Blum v. Friedman*, 172 Vt. 622, 624 (2001).

While the Defendant's Motion to Dismiss appears to recite the correct standard of review on a Rule 12(b)(6) motion, Defendant's arguments for dismissal contradict the standard of review because they disregard the facts pleaded and the reasonable inferences that can be drawn from the Complaint. Instead, Defendant impermissibly ignores the facts and documentary evidence provided and makes multiple contravening assertions, which of course, must be considered false by the Court in deciding a motion to dismiss for failure to state a claim. Consequently, Defendant's Motion to Dismiss must be Denied because the Defendant has failed to meet its burden of proof.

III. BREACH OF CONTRACT

This case is first and foremost, as Counts I through III of the Complaint provide, a Breach of Contract action against The President and Fellows of Middlebury College ("Middlebury College"), who in 1914, accepted former Governor of Vermont, Dr. John Abner Mead's offer:

". . . *to erect a chapel to serve as a place of worship for the college,* ***the same to be known as the "Mead Memorial Chapel.***"
Ex. 1-001 (*emphasis supplied*).

Dr. Mead also reserved approval of the chapel design and suggested a Building Committee including President Thomas and Mead himself, to supervise the chapel construction project. Ex. 1–002. Notably, the offer was not a donation

or pledge of funds to the College[11], with the hope that some building wing or scholarship fund would be named after Governor Mead. Instead, it was an offer to erect a building which would be named, as a memorial[12] to the Mead family ancestors[13], and which would serve as a sacred place of worship and contemplation for the generations of students to come and provide the desperately needed meeting house space to accommodate the growing College community.

The Complaint's Well-Peaded Facts and Reasonable Inferences

The deal proposed by Governor Mead was that the College would receive a spectacular, iconic, turn-key chapel and meeting house in exchange for the

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[11] The Offer letter stated: "I have in mind the furnishing of from $50,000 to $60,000 for the erection of such a structure" and suggests the immediate appointment of a Building Committee (consisting of President Thomas, former President Brainerd and Governor Mead) to be appointed "to make the necessary contracts for such a structure and to supervise the erection of the same, and I will then bind myself and my estate to provide the necessary means for its erection and completion in accordance with the suggestions of this letter and with the contracts to be made by your committee." Ex. 1 – 001-002 (emphasis supplied).

[12] "Memorial" is defined as, "something (such as a monument or ceremony) that honors a person who has died" (https://www.britannica.com/dictionary/memorial) or "something, especially a structure, established to remind people of a person or event." (https://www.dictionary.com/browse/memorial).

[13] The Mead Memorial Chapel was a memorial to Governor Mead's great-great-grandfather, Colonel James Mead and his wife, Mercy Holmes Mead, who were the embodiment of what the chapel was designed to convey: "a dignified and substantial structure . . . expressive of the simplicity and strength of character of the inhabitants of this valley and the State of Vermont have always been distinguished." The Governor's Offer letter then explained the role his ancestors played in not just settling the wilderness, but bringing their religious faith to the valley and sharing community with the Caughnawaga Tribe. Ex. 1-001, Ex. 8-009.

chapel being known as the "Mead Memorial Chapel" and built according to "appropriate plans for its erection which shall meet with [Mead's] approval." Ex. 1–001. **Governor Mead also represented that he would "bind myself and my estate to provide the necessary means for its erection and completion in accordance with the suggestions of this letter and with the contracts to be made by your committee."** Ex. 1-002. Thus, the plain language of the Offer itself indicated that Mead was offering to erect and complete the construction of a chapel, that would be named the "Mead Memorial Chapel" and would bind himself and his estate to ensure the completion of the building.

The iconic building would help to establish the legitimacy and stature of Middlebury College as a reputable institution while Governor Mead's connection to the chapel and the Mead family name were used, marketed and promoted by the College, which benefited greatly from its association with Governor Mead. In essence, the "Mead Memorial Chapel," including its connection to a former governor of Vermont, would put Middlebury College "on the map."

While Middlebury College clearly benefitted from the chapel being named the "Mead Memorial Chapel," that essential term, that the chapel was to be known as the "Mead Memorial Chapel," which was clearly expressed in the Offer and enthusiastically and unanimously accepted by the Trustees without reservation or objection, did constitute valid consideration to support the contract, and in fact, was actually performed by the Defendant - the chapel was named the "Mead Memorial Chapel."

If there is any ambiguity to whether there was a meeting of the minds regarding whether the name "Mead Memorial Chapel" was an essential term of the contract, the extrinsic evidence,[14] provides overwhelming support for the "meeting of the minds" between Mead and the other Trustees.:

The Middlebury College Trustees agreed that the chapel would be known as the "Mead Memorial Chapel" as a memorial to Mead's ancestors (See Ex. 1-006 Trustee Hepburn's Letter: "it shows respect and reverence to your forebearers"). See also other Trustee's correspondence (Partridge, Weeks, Hepburn, Barton, Kellogg) and Middlebury College Treasurer Fletcher, enthusiastically agreeing to accept the offer to construct the "Mead Memorial Chapel" at Exs. 1-004-009.

The Middlebury College Trustees also confirmed their agreement that the chapel would be known as the "Mead Memorial Chapel" when it held the Groundbreaking Ceremony for the Mead Memorial Chapel in 1914, during which Middlebury President Rev. Thomas used the Mead family Bible, the very one that was first brought to this wilderness by Colonel James Mead, and allowed Governor Mead's 3 year old grandson and namesake "Little John" to place his Bible and Mead Family Tree into the Cornerstone and also arranged for Governor

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[14] The Exhibits provided with the Complaint are merely public information currently available, as Plaintiff has had no opportunity for Discovery. Thus, all the materials reviewed by Middlebury College's Prudential Committee in deciding to strip the Mead name from the Chapel have not been accessible to the Plaintiff. For the list of items reviewed by Middle College in making the decision to remove the Mead name, see: https://www.middleburycampus.com/article/2021/09/john-meads-name-removed-from-chapel-for-role-in-eugenics.

Mead, as a "party specially interested" to remove sod from the site to transplant onto the 50' X 75' Mead Family burial plot in Evergreen Cemetery in Rutland. See Ex. 2-030, Ex. 2-031, and Ex. 8-003 and Ex. 2-002.

Also at the 1914 Groundbreaking Ceremony, Trustee James L. Barton's Acceptance Speech, on behalf of the Middlebury College Trustees, stated:

> It is doubly gratifying to me, as it is to the Board of Trustees, ***that this building, as a memorial, will bear the name of one so long and so honorably connected with this institution*** and who in the state and nation has always upheld and promoted true piety and civic and national righteousness. . .***We then, the Trustees of this College, on behalf of ourselves and our successors, in the name of the generations of students it will serve***, in full recognition of the supreme importance of such a religious center to the life of the institution, ***and in loving memory of him whose name this structure is to bear***, gratefully accept at your hand this Chapel as we pledge ourselves ***to safeguard to the limit of our capacity the gift and the ideals it is intended to perpetuate.***

Ex. 1-020 to 1-026.

Professor Charles B. Wright also gave an address on behalf of the Faculty in which he stated:

> You have bodied forth our dream of years; you have given to an airy nothing a local habitation – ***and not the least of our pleasure is the thought <u>that through all the days to be it will bear your honored name.</u>***

Ex. 1-027 to 1-029.

Then 2 years later, in 1916, when the Mead Memorial Chapel was completed, Middlebury College actually performed the essential term of the contract when it accepted the Keys to the "Mead Memorial Chapel" at the Dedication Ceremony, with the name "Mead Memorial Chapel" affixed to the

white marble chapel's portico, directly above the front entrance. During the Ceremony, the Keys to the Mead Memorial Chapel were presented by Governor Mead's grandson, now 5 years old and were accepted by Trustee Rev. James L. Barton who stated in his acceptance speech the following:

> ***I am honored*** in being permitted, ***upon behalf of the trustees of Middlebury College, to accept*** from the hands of one of their number, a graduate of the College and a revered citizen of this commonwealth, *this corner stone and that for which it stands, namely, a fitting chapel to be erected upon this site* ***to embody and represent and perpetuate the religious life of this College.***
>
> ***It is doubly gratifying to me, as it is to the Board of Trustees, that this building, as a memorial, will bear the name of one so long and so honorably connected with this institution and who in the state and nation has always upheld and promoted true piety and civic and national righteousness.***
>
> . . . Today we see ***the religious ideals of our forefathers*** emancipated and exalted to this loftier position and ***embodied in a structure worthy of the College and its resplendent history***. Here upon this hilltop it will, by the outlines and symmetry of its architecture, proclaim that this College believes in God, in the supremacy of righteousness, in the creation of a safe, sane and just society, the triumph of justice, the transcendent worth of character, the reality of the unseen, and in the immortality of the soul. . . .
>
> ***This chapel will provide for the generations of students and faculties of this college that to which the other buildings cannot minister.*** To this place all will turn in order to experience the reality of the unseen, to satisfy the thirst of the soul for God. . . .

We then, the Trustees of this College, on behalf of ourselves and our successors, in the name of the generations of students it will serve, in full recognition of the supreme importance of such a religious center to the life of the institution, and in loving memory of him whose name this structure is to bear, gratefully accept at your hand this Chapel as we pledge ourselves to safeguard to the limit of our capacity the gift and the ideals it is intended to perpetuate.
Ex. 2-021 to 2-026 (emphasis supplied).

The 2021 removal of "John Mead's name"[15] from the Mead Memorial Chapel was a breach of the contract's most essential term, the consideration expected by and bargained for by John Abner Mead, that the chapel he was erecting for the college would be a memorial to his ancestors, bearing his family name forever. Given the evidentiary record already assembled, could any reasonable person actually believe that the Trustees did not agree to name the chapel the "Mead Memorial Chapel" or that Mead would have built the chapel if his term or condition were denied? Regardless, because facts well-pled and the reasonable inferences to be drawn therefrom, must be construed in favor of the Plaintiff, the Defendant's assertions must be disregarded as false.

[15] Claiming that Mead Memorial Chapel bore "John Mead's name" is an erroneous historical statement. As explained in the Complaint, the chapel was not a memorial to John Abner Mead, it was built by John Abner Mead to memorialize his ancestors.

Vermont Law - Breach of Contract Claim

It is telling that Defendant does not address the Plaintiff's contract claims until page 23 of its Motion, after it has attempts to confuse the law of an alternate claim made in the Complaint, i.e. Conditional Gift.

In the recent case of *Sutton v. Vermont Reg'l Ctr.*, the Vermont Supreme Court clearly articulated:

> The essential requirements for a contract as "a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (Second) of Contracts § 17(1) (1981). A unilateral contract will form where an offeror makes an offer that can be accepted by performance, and the offeree performs. *Ragosta v. Wilder*, 156 Vt. 390, 394, 592 A.2d 367, 370 (1991) (stating that "'under a unilateral contract ... the offeree must accept, if at all, by performance, and the contract then becomes executed' " (*quoting Multicare Med. Ctr. v. State Soc. & Health Servs.*, 114 Wash.2d 572, 790 P.2d 124, 131 (1990))). Consideration sufficient for contract formation can include a broad range of benefits: The **"definition of a benefit is extremely broad, and requires simply that [promisors] receive something desired for [their] own advantage."** *Kneebinding, Inc. v. Howell*, 2014 VT 51, ¶ 17, 196 Vt. 477, 99 A.3d 612 (quotation omitted).

Sutton v. Vermont Reg'l Ctr., 2019 VT 71A, ¶ 60, 212 Vt. 612, 238 A.3d 608, 631 (2020)

The Defendant's challenge to the Contract claims, is completely without merit. Defendant claims that the naming of the chapel was a "vague" reference and likely an "afterthought," and not an essential term of the contract. Defendant references the Trustee's resolution, claiming "there is no indication that either Mead or the Trustees understood it to be an essential element of the transaction" (Motion to Dismiss at 26) and then Defendant astonishingly,

selectively quotes from Mead's Offer letter without mention of the plain, clear and unequivocal language: **"the same to be known as the 'Mead Memorial Chapel.'"** Defendant's assertion rests upon a false narrative and ignores the well pled facts which are supported by documentary evidence. See Exhibit 1-010 to 012.

The Defendant also makes the countervailing assertion that the Trustees did not agree to the name "Mead Memorial Chapel" and that there was no meeting of the minds on essential terms, claiming that the Trustee's resolution does not indicate an acceptance of the name. However, these are unsupported mischaracterizations of the evidence. In reality, the Trustee meeting minutes recorded a resolution to accept Mead's Offer, copying into the minutes by hand, Mead's Offer Letter in full and *verbatim*, including the quotation marks around "Mead Memorial Chapel" to ensure that the offer that was being accepted was adequately described. Thus, the minutes themselves recorded the very words "the same to be known as 'Mead Memorial Chapel,'" and to suggest otherwise is disingenuous and totally unsupported by the record evidence. Moreover, thus, the assertion violates the standard of Rule 12(b)(6), and should be disregarded as false.

Next, Defendant claims that the naming of the chapel does not provide sufficient consideration to support a contract. Nothing could be further from the truth. As the Vermont Supreme Court has just recently explained:

> The existence of a contract or contracts between the parties is a question of fact subject to the latter standard of review. See Sweet

> v. St. Pierre, 2018 VT 122, ¶ 11, 209 Vt. 1, 201 A.3d 978. However, "[t]he existence of sufficient consideration for a contract is a question of law." Bergeron v. Boyle, 2003 VT 89, ¶ 19, 176 Vt. 78, 838 A.2d 918.

Theberge v. Theberge, 2020 VT 13, ¶ 7, 211 Vt. 535, 541, 228 A.3d 998, 1002 (2020). The Theberge Court then went on to explain the concept of consideration in full:

> . . . consideration exists only where a promisee "giv[es] up something which the promisee was theretofore privileged to retain, or doing or refraining from doing something which the promisee was then privileged not to do, or not to refrain from doing." 3 R. Lord, Williston on Contracts § 7:4 (4th ed. 2019). A promise to refrain from doing something which the promisee was never legally empowered to do—like a promise to do what one is already legally bound to do—"creates no new duty and cannot support an action; nor does it afford a consideration for a promise by the other party." Manley v. Vt. Mut. Fire Ins. Co., 78 Vt. 331, 336, 62 A. 1020, 1021 (1906) (holding that "if one promises to do what he is already legally bound to do, the promise is nude").
>
> We first observe that mutual promises may provide the necessary consideration for contract formation. H.P. Hood & Sons v. Heins, 124 Vt. 331, 337, 205 A.2d 561, 565 (1964) (" 'Mutual promises, in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another.' " (quoting 1 Williston on Contracts § 103, at 395-96 (3d **1004 ed. 1957)); see also Bergeron, 2003 VT 89, ¶ 19, 176 Vt. 78, 838 A.2d 918 (finding "bargained for exchange of mutual promises was sufficient consideration to support the contract")....
>
> "Simply put," in order to satisfy the consideration requirement, "the promisor must receive something desired for his or her own advantage." Lloyd's Credit Corp. v. Marlin Mgmt. Servs., Inc., 158 Vt. 594, 599, 614 A.2d 812, 815 (1992) (explaining that "a mere expectation or hope of benefit is sufficient to serve as consideration" (quotation omitted)).

> Nor does the fact that the benefits obtained in this agreement may flow largely to third parties preclude a determination of consideration. Restatement (Second) of Contracts § 71 cmt. e (1981) ("It matters not from whom the consideration moves *544 or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous."); see also Kneebinding, Inc. v. Howell, 2014 VT 51, ¶ 17, 196 Vt. 477, 99 A.3d 612 (noting that "[t]he definition of a benefit is extremely broad" (quotation omitted)). See Lloyd's Credit Corp., 158 Vt. at 599, 614 A.2d at 815 ("[C]onsideration can exist without economic benefit or advantage; a benefit need not be measurable in money. The extent of a benefit is not important; a very slight advantage is sufficient to constitute consideration." (quotation and citation omitted)); see also Restatement (Second) of Contracts § 79 ("If the requirement of consideration is met, there is no additional requirement of ... equivalence in the values exchanged.").
>
> . . .
>
> Town of Rutland v. City of Rutland, 170 Vt. 87, 90, 743 A.2d 585, 587-88 (1999) (explaining that existence of contract "depends on facts as well as the reasonable inferences to be drawn from them, and is also influenced by the situation of the parties and the subject matter").

Id. at ¶ ¶11-14 & 21 (2020).

Turning to the case at bar, Plaintiff has clearly laid out and pled well-supported facts to establish a contract by mutual consent to the contract term that the chapel would bear the name "Mead Memorial Chapel" which was supported by valid consideration: a benefit to John Mead to have a Memorial to his ancestors and his family name forever remembered, and a detriment to Middlebury College who had no obligation or duty to name the chapel after the Mead ancestors.

Furthermore, if the court finds that there was no consideration or mutual consent, a unilateral contract still existed and was consummated when Middlebury College performed by affixing the name to the Chapel. Either way, a

contract was formed, performed and thereby consummated during the lifetime of Governor Mead.

Also of recent vintage, the Vermont Federal District Court has explained that in interpreting any contract:

> . . . courts should "presume" that the parties' intent **"is reflected in the contract's language when [it] is clear."** *Kneebinding, Inc. v. Howell*, 2014 VT 51, ¶ 10, 196 Vt. 477, 99 A.3d 612; *see also Dumont*, 2012 WL 1599868, at *4. ("[I]f the terms of the contract are plain and unambiguous, 'they will be given effect and enforced in accordance with their language.") (alterations and internal quotation marks omitted). Courts must also "give effect to every part of the instrument and form a harmonious whole from the parts[,]" *In re Grievance of Verderber*, 795 A.2d 1157, 1161 (Vt. 2002), and **"assume that the parties included contract terms for a reason and [should] not embrace a construction that would render a provision meaningless."** *Kneebinding*, 2014 VT 51, ¶ 15 (citing *Southwick v. City of Rutland*, 2011 VT 53, ¶ 4, 190 Vt. 106, 35 A.3d 113).
>
> Where "**the scope of the release cannot be determined from the language alone, it must be 'resolved in the light of the surrounding facts and circumstances under which the parties acted**.' " *Inv. Props., Inc. v. Lyttle*, 739 A.2d 1222, 1229 (Vt. 1999) (quoting *Economou*, 399 A.2d at 500). As a result, "**when the language of the document is ambiguous and must be clarified by reference to external evidence, construction becomes a question of fact.**" *Id.* (citing *Housing Vt. v. Goldsmith & Morris*, 685 A.2d 1086, 1088 (1996)).

Dakers v. Bartow, No. 2:16-CV-00246, 2018 WL 8415310, at *4–5 (D. Vt. Sept. 10, 2018).

In the instant case, if the court determines that the contract is ambiguous with regard to whether the name was agreed to as an essential term, or what the timeframe that the Name was to adorn the building, then such an ambiguity is easily resolved by the hefty extrinsic evidence that portrays the surrounding facts

and circumstances under which the parties acted. Such evidence is overwhelming: clearly there was an agreement to name the chapel "Mead Memorial Chapel" - forever.

IV. SPECIAL ADMINISTRATOR'S STANDING TO SUE

Vermont law permits a special administrator to "commence, prosecute, or defend, in the right of the deceased, actions that survive to the executor or administrator and are necessary for the recovery and protection of the property or rights of the deceased," and to "prosecute or defend the actions commenced in the lifetime of the deceased." 14 V.S.A. § 1401; see also id. § 1451 (surviving actions include "actions that survive by common law"). A special administrator "may commence and maintain actions as an administrator." Id. § 963. *Maier v. Maier*, 2021 VT 88, ¶ 11, 216 Vt. 33, 39–40, 266 A.3d 778, 783 (2021).

Vermont law also permits a special administrator to "commence, prosecute, or defend, in the right of the deceased, actions that survive to the executor or administrator and are necessary for the recovery and protection of the property or rights of the deceased," and to "prosecute or defend the actions commenced in the lifetime of the deceased." 14 V.S.A. § 1401; see also id. § 1451 (surviving actions include "actions that survive by common law"). A special administrator "may commence and maintain actions as an administrator." Id. § 963. *Maier v. Maier,* 2021 VT 88, ¶ 11, 216 Vt. 33, 39–40, 266 A.3d 778, 783 (2021). See also *State v. Therrien*, 1993, 161 Vt. 26, 633 A.2d 272, on

subsequent appeal 175 Vt. 342, 830 A.2d 28, reargument denied. (Wife of developer, against whom state brought claim on behalf of buyers of lots with defective septic and well systems, was proper party for substitution after developer's death, both as executrix and distributee. Rules Civ.Proc., Rule 25(a)(1); 14 V.S.A. §§ 1401, 1417.); Estate of Kuhling by Kuhling v. Glaze, 2018, 196 A.3d 1125, 208 Vt. 273, reargument denied.)(An executor of an estate may commence, in the right of the deceased, actions which survive, and are necessary for the recovery and protection of the property or rights of the deceased.)

Vermont law also permits Special Administrators, as the Settlor, a co-trustee, or a person with a special interest in the charitable trust may maintain a proceeding to enforce the trust:

> **§ 405. Charitable purposes; enforcement**
> (a) A charitable trust may be created for the relief of poverty; the advancement of education or religion; the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes; or other purposes the achievement of which is beneficial to the community.
> (b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary or if the designated charitable purpose cannot be completed or no longer exists, the trustee, if authorized by the terms of the trust, or if not, the Probate Division of the Superior Court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.
> **(c) The settlor of a charitable trust,** the Attorney General, **a cotrustee, or a person with a special interest in the charitable trust may maintain a proceeding to enforce the trust.**

Vt. Stat. Ann. tit. 14A, § 405 (West). Furthermore, Vermont statutory law imposes principles of equity not inconsistent with Vermont statutes:

§ 106. Common law of trusts; principles of equity
The common law of trusts and principles of equity supplement this title, except to the extent modified by this title or another statute of this State.

Vt. Stat. Ann. tit. 14A, § 106 (West).

Enforcement in the Civil Division

In the 2021 Vermont Supreme Court case *Maier v. Maier*, 2021 VT 88, the special administrator sought enforcement of the parties' agreement which was executed during husband's lifetime by his guardian on his behalf, and the parties intended to be bound by it independent of any divorce action. The Court explained:

> ¶ 35. The civil division is a court of general jurisdiction. See 4 V.S.A. § 31; *Quinlan v. Five-Town Health All., Inc.*, 2018 VT 53, ¶ 27, 207 Vt. 503, 192 A.3d 390. As such, we presume that the civil division has "jurisdiction over all civil actions unless the Legislature has clearly indicated to the contrary." *Lamell Lumber Corp. v. Newstress Int'l, Inc.*, 2007 VT 83, ¶ 7, 182 Vt. 282, 938 A.2d 1215. . . . we see no other statutory provision that would divest the civil division of its jurisdiction to entertain a breach of contract claim in this case.
> . . .
> ¶ 36. . . . Consistent with the civil division's role as the court of general civil jurisdiction, such suits by executors or administrators of an estate to enforce a contract of the decedent are typically brought in the civil division of the superior court. See, e.g., *Baldauf v. Vt. State Treasurer*, 2021 VT 29, —— Vt. ——, 255 A.3d 731 (involving suit filed in civil division by wife as administrator of deceased husband's estate alleging breach of contract); *Estate of Kuhling v. Glaze,* 2018 VT 75, 208 Vt. 273, 196 A.3d 1125 (involving suit filed in civil division by estate against decedent's surviving niece for breach of contract); *Benson v. MVP Health Plan, Inc.,* 2009 VT 57, 186 Vt. 97, 978 A.2d 33 (involving suit filed *49 in civil division by administrator of estate alleging breach of contract against health insurer).

> ¶ 37. Accordingly, the special administrator may seek to enforce the parties' agreement in the civil division of the superior court.[5]

Maier v. Maier, 2021 VT 88, ¶¶ 35-37, 216 Vt. 33, 48–49, 266 A.3d 778, 788–89 (2021).

Lastly, Plaintiff does not quarrel with Defendant that a lawfully appointed fiduciary of an estate has standing to bring an action on behalf of the estate within a reasonable time. However, Vermont's statute of limitations for breach of contract is six years from the date the cause of action accrues, which was in 2021 when the Mead name was stripped from the Mead Memorial Chapel.[16] Therefore, there can be no valid argument that the administrator did not bring the action in a reasonable time. The contract was breached in 2021, the Probate Court empowered the Special Administrator to pursue the breach of contract and/or breach of conditional gift claims in 2022. After conducting historical research, a Complaint was filed in 2023, unquestionably within a reasonable time as it is still four (4) years before the statute of limitations would bar the claim.

In summary, Plaintiff has well-pled all of the elements of breach of contract which is supported by the record evidence, and is fully authorized, as a duly

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[16] **§ 511. Civil action**
A civil action, except one brought upon the judgment or decree of a court of record of the United States or of this or some other state, and except as otherwise provided, shall be commenced within six years after the cause of action accrues and not thereafter. Vt. Stat. Ann. tit. 12, § 511 (West)

appointed Special Administrator by the Vermont Superior Court, Rutland Unit, Probate Division, under the laws of the State of Vermont, to bring suit on behalf of the Estate of John Abner Mead for breach of contract for a contract performed during his lifetime, and now breached after his death. There was valid consideration, i.e. the naming of the chapel and the design control and the extrinsic evidence supports the well-pleaded facts and reasonable inferences in favor of the Plaintiff. Therefore, the Court should deny the Defendant's Motion to Dismiss the Breach of Contract claim.

V. BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Parties in a contractual relationship have an obligation to treat each other in good faith and deal with each other fairly. This is known as the covenant of good faith and fair dealing and it is implied in every contract. The definition of the "covenant of good faith and fair dealing" is broad. See *Carmichael v. Adirondack Bottled Gas Corp.*, 161 Vt. 200, 208-09 (1993) (citing Restatement (Second) of Contracts § 205). It is an underlying principle implied in every contract that each party promises not to do anything to undermine or destroy the other's rights to receive the benefits of the agreement. *Id.* (citing *Shaw v. E.I. DuPont de Nemours & Co.*, 126 Vt. 206, 209 (1966)). The implied covenant of good faith and fair dealing exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistently with the justified expectations of the other party. *Id.* (quoting Restatement (Second) of Contracts §

205 comment a). The covenant of good faith and fair dealing protects against conduct that violates community standards of decency, fairness, or reasonableness. *Id.* (quoting Restatement (Second) of Contracts § 205 comment a).

A party asserting this claim does not need to demonstrate a breach of the underlying contract to succeed on their claim for breach of the implied covenant of good faith and fair dealing. *Id.* at 1216 (affirming jury award for breach of the implied contract of good faith and fair dealing even though no breach of express term in the underlying contract was alleged). However, the party must identify conduct separate from that which breached the underlying contract to form the basis for the breach of the implied covenant. See *Langlois v. Town of Proctor*, 2014 VT 130, ¶ 59; see also *Monahan v. GMAC Mortg. Corp.*, 2005 VT 110, ¶ 54 n.5. Stated differently, the party cannot argue that the conduct that breached the underlying contract is the same conduct that breached the implied covenant of good faith and fair dealing. *Langlois*, 2014 VT 130, ¶ 59.

The factual question in this case is whether each party acted in good faith and dealt fairly and consistently with the justified expectations of the other in the performance of their agreement. *Id.* Plaintiff asserts that Defendant stripped the Mead family name by erroneously recounting the Mead Memorial Chapel's own history, that the chapel was named in honor of Governor Mead, instead of his building of a memorial chapel to honor his ancestors. Defendant's removal of the name "Mead" from the Chapel in direct defiance of its covenant and the

expectation that the College will act honestly and reasonably in the faithful pursuit of the agreed common purpose of the contract.

In addition, the College used Mead as a scapegoat, portraying itself as an innocent bystander which naively accepted money from an unknown bad guy who had fallen from grace. Middlebury College created a story to hide its staggering half-century of Eugenics teaching and advocacy, all at the expense of an honorable man who, no matter his limitations and context, spent his life caring for and serving his patients, neighbors, church, city, college, state and nation.

The 1914 Trustees of Middlebury College knew exactly who Governor Mead was, and regrettably, Mead helped to further Middlebury College's institutional Eugenics agenda, at least for a moment in time, in one speech, in 1912. Middlebury College's hypocritical gaslighting and framing of Mead for its crimes, was more than a breach of contract, it was for a bad motive, to lay blame elsewhere. Therefore Defendant has acted in bad faith with improper motive and with wanton disregard for the rights of the Plaintiff , and constitutes a breach of the covenant of good faith a scapegoating a man for the college's public relations purposes while erasing John Mead's lifetime of accomplishments and philanthropy that benefitted the State of Vermont and its people as well as generations of Middlebury College students.

VI. BREACH of CONDITIONAL GIFT

The Plaintiff has also pled an alternate claim, Breach of a Conditional Gift. A valid gift generally requires three elements: donative intent (no consideration), delivery, and acceptance by the donee. *University of Vermont v. Wilbur's Estate*, 105 Vt. 147, 155, 163 A. 572. There must be acceptance of the gift by the done, but acceptance may be implied. Blanchard v. Sheldon, 43 Vt. 512 (1871). A gift may be conditioned upon the donee's performance of specified obligations or the happening of a certain event.; *Id.*; *Hackett v. Moxley*, 65 Vt. 71, 75, 25 A. 898; *Blanchard v. Sheldon,* 43 Vt. 512, 514. If the obligation is not performed, the donor is entitled to restitution. *Williamson v. Johnson*, 62 Vt. 378, 384, 20 A. 279; Restatement, Restitution, Comment c; 28 Am.Jur.2d, Gifts s 61.

VII. Naming Rights – Contract, Conditional Gift or Charitable Trust

Exchanging naming rights for monetary donations generates significant funds for institutions. Name recognition can also help an institution to promote its overall brand. For instance, a college or university may opt to name a structure or academic program after a prominent figure in politics, business, or athletics to instill a greater sense of prestige for the named entity.[17] Such is the case with the Middlebury College promoting its iconic flagship as the gift of

[17] Kelly N. Smith Marion, Neal H. Hutchens, When Naming Rights Go Wrong: The Roles of Gift and Contract Law, State Statutes, and Institutional Policies Surrounding Campus Naming Controversies in Higher Education, 372 Ed. Law Rep. 1, 4–5 (2020).

Governor Mead one of the most prominent citizens of Vermont and marketing the Mead Memorial Chapel as their brand identity and trademark.

In 1948, for example, Princeton University renamed its School of Public and International Affairs after Woodrow Wilson, a former U.S. President, governor of New Jersey, and alumnus and past president of Princeton University. The renaming of the school not only allowed the university to honor one of its own, but simultaneously heightened the institution's credibility and institutional profile. [18]

But, indicative of how names can also create controversy, Wilson's views and policies supportive of racial segregation have in recent years resulted in opposition to the school's name, including a round of campus protests in 2015. Campus community members called on the university to remove Wilson's name from the School of Public and International Affairs as part of a larger list of demands to improve the campus racial climate.[19] The institution's board of trustees issued a press release announcing that the name would stay "in recognizing Wilson's failings and shortcomings as well as the visions and

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[18] *Id. (citing Our History, Woodrow Wilson School of Public & International Affairs*, Woodrow Wilson School of Public & International Affairs, http://wws.princeton.edu/about-wws/our-history. (last visited Oct. 2, 2019)).

[19] *Id. (citing* Nick Anderson, *Princeton Will Keep Woodrow Wilson's Name on Buildings, But Also Expand Diversity Efforts*, The Washington Post (April 4, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/04/04/princeton-will-keep-woodrow-wilsons-name-on-buildings-but-it-will-take-stepsto-expand-diversity-and-inclusion/?utm_term'.e6d4cab0ee95).

achievements that led to the naming of the school and the college in the first place."[20] The announcement also stated that "contextualization is imperative."[21]

Other institutions have opted to change the names of buildings or programs following controversy over a namesake or efforts to be more inclusive in bestowing campus naming honors. Yale University, for example, renamed one of its residential colleges after alumna Grace Murray Hopper, a computer scientist, mathematician, and Navy veteran.[22] The residential college's former namesake, John C. Calhoun, held several public offices including U.S. Vice President and Secretary of State. His vehement support of the institution of slavery and white supremacy influenced administrators at Yale, after a sustained public outcry, to rename the college.

Founding dean and the first woman president of Bryn Mawr College, M. Carey Thomas, was honored with several named buildings, awards, and spaces on campus until the college stripped formal mentions of her name, but it did not remove permanently affixed facades with her name. The institution took the

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[20] *Id. (citing Call for Expanded Commitment to Diversity and Inclusion*, Princeton University (April 4, 2016), https://www.princeton.edu/news/2016/04/04/trustees-call-expanded-commitment-diversity-and-inclusion).

[21] *Id.*

[22] *Id. (citing Yale Changes Calhoun College's Name to Honor Grace Murray Hopper*, Yale News (Feb. 11, 2017), https://news.yale.edu/2017/02/11/yale-change-calhoun-college-s-name-honor-grace-murray-hopper--0).

action following consideration of Thomas' public anti-Semitic views, including those at the 1916 academic year opening address.[23]

Conflicts over naming rights at colleges and universities on occasion result in legal disputes. When such litigation arise over naming rights, a common issue to be settled by courts involves the applicable legal standards that cover the naming agreement between the donor and the institution. Namely, courts must consider whether the parties have entered into a contract, a type of gift, or a charitable trust.[24]

A case involving Vanderbilt University provides one of the relatively small number of disputes over naming rights in higher education that have resulted in a published legal opinion.[25] The case centered on a disagreement involving the university's changing the name of a campus building constructed in part using funds donated by the Tennessee United Daughters of the Confederacy (U.D.C).[26] The building, originally dedicated in 1935, came under Vanderbilt's control in

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[23] *Id. (citing* Scott Jaschik, *Racist, Anti--Semitic Champion of Women's Education*, Inside Higher Education (Aug. 9, 2018), https://www.insidehighered.com/news/2018/08/09/bryn-mawr-reconsiders-how-it-has-honored-its-bigoted-second-president .

[24] *Id. (citing* Kelly N. Smith Marion, Neal H. Hutchens, (For consideration of applicable law in the context of naming rights, see generally William A. Drennan, *Charitable Naming Rights Transactions: Gifts or Contracts?*, Mich. St. L. Rev. 1267 (2016). The author argues that the law of contract should guide naming agreements between parties.)

[25] *Id. (citing Tenn. Division of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 203 Ed. Law Rep. 396 (Tenn. Ct. App. 2005).

[26] *Id.* at 103-04.

1979 as a result of its merger with Peabody College.[27] Under the merger agreement, Vanderbilt was to assume all the legal obligations of Peabody College.[28] The building was named “Confederate Memorial Hall,” which was also on the structure in incised lettering.[29]

Peabody College's agreements with the U.D.C. specified for the building to contain the inscription “Confederate Memorial.”[30] In 2002, the university announced that it would change the building's name to “Memorial Hall.” The building's name had long stirred controversy at the institution, and the university stated that it was motivated by a desire to promote a more inclusive and welcoming environment.[31] The U.D.C. sued the university, claiming that the name change violated the contracts.[32] The trial court held that the university had substantially complied with the agreements and could rename the building.[33]

On appeal, the Court of Appeals of Tennessee's initial analytical step in its opinion was determining the “precise nature of the legal relationship” between U.D.C. and Peabody College in the agreements.[34] These agreements, concluded the court, had resulted in a charitable gift subject to conditions.[35] The court

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[27] *Id.* at 105-06.
[28] *Id.* at 106.
[29] *Id.* at 105.
[30] Id.
[31] *Id.* at 107.
[32] *Id.* at 109.
[33] *Id.* at 111. The court did conclude that the plaque had to remain.
[34] *Id.* at 112.
[35] *Id.* at 114.

stated that under Tennessee law a "conditional gift is enforceable according to the terms of the document or documents that created the gift."[36] Rejecting arguments from Vanderbilt to void the agreements, the court determined that the contracts imposed three conditions: (1) the gift from U.D.C was required to be used in the construction of a dormitory; (2) women descendants of Confederate soldiers nominated by the U.D.C. and accepted by Peabody were to be allowed to live in the dormitory rent free; and (3) Peabody was required to inscribe "Confederate Memorial" on the building.[37] Furthermore, as the contract did not specify an end date, the court concluded that the agreement was coterminous with the building's existence.[38]

The court rejected arguments from Vanderbilt that the U.D.C. should not prevail because the university had "substantially performed" its legal obligations under the charitable gift agreement so that the U.D.C. had received "full consideration" for its gift.[39] The court stated that it could not take "seriously" the position that a contextual plaque near the building, with the name changed, constituted substantial performance. According to the court, "the 1933 contract expressly and unambiguously required Peabody College to place an inscription on the building naming it "Confederate Memorial," and we have already concluded that the parties intended the inscription to remain until the building

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[36] *Id.*
[37] *Id.* at 116.
[38] *Id.* at 117.
[39] *Id.*

was torn down."[40] Additionally, the court dismissed the university's argument that the U.D.C. had "already received enough value for its original contribution."[41] The court interpreted the contractual obligations as existing for the life of the building. For the court, the university's "unilateral assessment that Peabody College gave away too much in the agreements does not constitute a legal defense" to void Vanderbilt's legal duties under the agreements.[42]

The court also rejected the university's arguments that academic freedom principles provided a basis to renounce the agreement. It noted that the U.S. Supreme Court had "long been solicitous of the independence of private colleges from government control," but the controversy at hand dealt with action by Peabody and then Vanderbilt to enter into a binding legal obligation with another private party.[43] The court also questioned whether permitting institutions to avoid contractual agreements when its leaders felt the agreement had begun to hamper the institution's academic mission would actually advance academic freedom. Instead, stated the court, such a rule would likely create reluctance by parties to enter into gift agreements with colleges and universities.[44]

Having ruled in favor of the U.D.C., the court turned to the issue of remedy. The court stated that it would not be equitable to allow Vanderbilt to give back

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[40] *Id.*
[41] *Id.* at 118.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 118-19. Having determined that Vanderbilt had violated a binding legal agreement with the U.D.C., the court then considered the appropriate remedy.

the original gift amount. To adjust the gift amount to account for current value, the court directed for the amount to be determined by using the consumer price index.[45]

Another naming dispute case dealt with the naming rights of a building wing at Augsburg College.[46] Institutional officials learned that the donor for the wing had been espousing racially discriminatory views in letters anonymously mailed to individuals and families of "mixed race and religion."[47] The college communicated to the donor that the wing would not be named after him but that the institution would retain the $500,000 given by the individual. In ensuing litigation, the court decided that the statute of limitations precluded any contract claims by the individual who had given the money.[48]

While ruling in favor of the college on the statute of limitations, the court did reject an alternative argument put forth by the institution as a basis not to have to repay the money, namely that the individual had made a charitable donation not subject to revocation or a conditional gift.[49] The court stated that a clear intent existed to support that a conditional gift was intended.[50] For this

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[45] *Id.* at 119.

[46] *Id. (citing Stock v. Augsburg College*, 2002 WL 555944 (Minn. Ct. of App. April 16, 2002) (unpublished opinion).

[47] *Id.* at *1.

[48] *Id. (citing* William A. Drennan, *Charitable Naming Rights Transactions: Gifts or Contracts?*, MICH. ST. L. REV. 1267 (2016) at 1302-03 (stating "The court's focus on the College's *promise* to name indicates that [the plaintiff] made an offer for a bilateral contract, which the College accepted by its *promise* to name the building after [the plaintiff]."

[49] *Id. (citing Stock v. Augsburg College*, 2002 WL 555944 at *5.

[50] *Id.* at *6.

determination, the court noted in its opinion multiple actions on the part of the institution indicative of an agreement for the building wing to be named after the individual in exchange for the donation. In rejecting the college's reasoning for a charitable donation, the court stated:

> We suggest it would be startling news to Augsburg's alumni that their college's "charitable and educational mission" includes specifically soliciting contributions for a particular purpose, formalizing that solicitation by a specific vote of the board of regents, and then claiming the power to say, "Oops, we changed our mind. We are not going to give your money back, instead we are going to keep it."[51]

Similar to the Vanderbilt case, the court was willing to interpret an agreement for naming rights as a conditional gift when clear donor intent existed. Additionally, as in the Vanderbilt case, the court was leery of granting colleges and universities additional legal leeway not to fulfill gift conditions in the name of an institution's educational mission.

Construing naming stipulations as either a conditional gift or a contractual agreement, legal opinions, even though few in number involving higher education, suggest that colleges and universities can incur legal obligations to adhere to a naming agreement and may not be able to walk away without incurring a substantial financial obligation, such as in the Vanderbilt case. If viewed as a gift and if donor intent is clear, then a court will likely be

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[51] *Id.*

willing to view the gift as one conditional in nature. Alternatively, a court may interpret a naming agreement as contractual in nature.[52]

VIII. DONOR STANDING

Ultimately, the issue of donor standing in enforcing the terms of a charitable donation is a complex problem without an easy answer. Many scholars have proffered methods by which legislatures could bring uniformity to this issue where courts have previously been unsuccessful in doing so. This could create both some uniformity among jurisdictions as well as some certainty for both the donor and the recipient institution in terms of what to expect if the terms of the gift are not met.[53]

The issue of standing is one of the most fundamental aspects of litigation. In order to bring a claim, a plaintiff must have standing.[54] In order to show standing in a federal court, the plaintiff must prove three elements: 1) that an injury occurred; 2) that this injury was caused by the defendant; and 3) that a favorable judgment would redress this injury.[55] If the plaintiff does not meet one of these elements, there is no standing and the complaint is dismissed.[56]

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[52] *Id.* at 10-11.

[53] Nicole Amaya Watson, *The Issue of Donor Standing and Higher Education: Will Increased Donor Standing Be Helpful or Hurtful to American Colleges and Universities?*, 40 J.C. & U.L. 321, 358 (2014).

[54] *Id. (citing* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 541 (8th ed. 2008)).

[55] *Id. (citing United States v. Windsor,* 133 S. Ct. 2675, 2685-86 (2013)).

[56] *Id.*

Settlor enforcement of trusts is codified in Section 405(c) of the Uniform Trust Code, which states, "The settlor of a charitable trust .... may maintain a proceeding to enforce the trust."[57] As of 2015, twenty-four states including Vermont and the District of Columbia allowed donors standing by formally adopting the UTC,[58] while other states have recent legislation or judicial opinions that allow donors to have standing.[59] The problem arises from among the other twenty-six states. To complicate matters even further, charitable gifts are not always given in the form of trusts. Charitable gifts can be classified in multiple ways and may be treated under both property law and contract law.[60]

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[57] *Id. (citing* UNIFORM TRUST CODE § 405(c) (2010)).

[58] *Id.* (*See* ALA. CODE § 19-3B-405(c) (2007); ARIZ. REV. STAT. ANN. § 14-10405(C) (Supp. 2008); ARK. CODE ANN. § 28-73-405(c) (Supp. 2007); D.C. CODE § 19-1304.05(c) (Supp. 2009); FL. STAT. ANN. § 736.0405 (Supp. 2009); KAN. STAT. ANN. § 58a-405 (2005); MASS. GEN. LAWS ANN. § 405(c) (West 2012); ME. REV. STAT. ANN. TIT. 18-B, § 405(3) (Supp. 2008); MICH. COMP. LAWS § 700.7405(3) (2009); MO. ANN. STAT. 456.4-405 (West 2007); NEB. REV. STAT. § 30-3831 (2008); N.H. REV. STAT. ANN. §564-B:4-405(C))) (2007); N.M. STAT. § 46A-4-405(C) (2007); N.C. GEN. STAT. § 36C-4-405.1 (2007); N.D. CENT. CODE § 59-12-05(3) (Supp. 2009); OHIO REV. CODE ANN. § 5804.05(A) (West 2007); OR REV. STAT. § 130.170(3) (2007); 20 PA. CONS. STAT. ANN. § 7735(c) (West Supp. 2009); S.C. CODE ANN. § 62-7-405(c) (2009); TENN. CODE ANN. § 35-15-405 (2007); UTAH CODE ANN. § 75-7-405(3) (Supp. 2008); VT. STAT. ANN. TIT. 14A, § 405(c) (Supp. 2009); VA. CODE ANN. § 64.2-723 (West. 2012); W. Va. Code, § 44D -4-405(2011); WYO. STAT. ANN. § 4-10-406(c) (2007) [hereinafter UTC States]).

[59] *Id.* (*See, e.g.,* Smithers v. St. Luke's Roosevelt-Hosp. Ctr., 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (holding that the settlor's wife, as special administratix, had standing to bring an action enforcing the charitable trust)).

[60] *Id. (citing* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing,* 41 GA. L. REV. 1183, 1190-91 (2007) (hereinafter Brody, *Dead Hand*)).

A restricted gift can be analyzed under at least three legal theories: 1) as a charitable trust; 2) as a conditional gift; 3) as a contract subject to a condition subsequent. Property law governs the first two options while contract law governs the fourth option.[61]

Charitable Trusts

A charitable trust is similar to a private trust, but rather than benefiting a particular ascertainable beneficiary who may bring suit to enforce the trust, a charitable trust must be for the benefit of a charitable purpose.

The Restatement (Third) of Trusts Section 94 reflects a modern shift which allows a settlor to bring an enforcement suit regardless of whether or not an interest is retained in the property:

> (2) A suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officer or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust.[62]

Because enforcement by the attorney general has shown itself to be an inadequate enforcement mechanism, the recent trend has been towards allowing donors standing.[63] Attorneys general are not always the best situated to redress

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[61] *Id.*

[62] *Id. (citing* RESTATEMENT (THIRD) OF TRUSTS § 94(b) (2012)).

[63] *Id. (citing* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 415 (2012). *See, e.g.,* Holt v. Coll. Of Osteopathic Physicians & Surgeons, 394 P.2d 932, 935 (Cal. 1964) ("The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to

a problem because of political considerations, which may motivate them not to pursue the enforcement of certain charitable trusts.[64] in addition, the attorney general of a given state has limited resources and--especially in an era where state governments are increasingly affected by severe budgetary constraints--may not deem it prudent to divert these resources towards enforcing charitable trusts.[65]

Conditional Gifts

The second way in which a restricted gift can be classified is as a conditional gift.[66] Conditional gifts differ from charitable trusts in that donors have the ability to sue for the return of the property in instances where the conditions of the gift are not satisfied.[67] The Restatement (Third) of Trusts, Section 5(h) specifies that conditions and equitable charges do not result in

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appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment."). *See also* Brody, *Dead Hand, supra* note 51, at 1244 (quoting MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 333 (2004) ("The overriding factor in almost every one of the cases in which individuals were granted standing was the *lack of effective enforcement by the attorney general* or other government official") (emphasis added); Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board,* 19 CORNELL J. L. & PUB. POL'Y 1, 20 (2009) ("Government entities lack adequate funding and qualified personnel to enforce existing laws. Very few states attempt to ensure that charitable fiduciaries obey their duties of loyalty and care.").

[64] *Id.* (*See, e.g., In re Milton Hershey Sch.*, 911 A.2d 1258 (Pa. 2006) (holding that the alumni association did not have a special interest to vest it with standing)).

[65] *Id.* (citations omitted).

[66] *Id. (citing* Brody, *Dead Hand* at 1201-02).

[67] *Id. (citing Id.* at 1191-92).

trusts.[68] The Comments in that subsection further explain that when a donor gives a conditional gift to another person, and the gift recipient "commit[s] or fails[s] to perform a specified act, the transferred interest shall be forfeited."[69] The Comment further distinguishes a conditional gift from a trust by noting that no fiduciary relationship is created by the condition and therefore beneficiaries of the gift have no standing to enforce the condition.[70] **In sum, donors--but not beneficiaries--of conditional gifts have standing to sue over problems with enforcement. Whether or not a gift is conditional requires a fact-based inquiry into the donor's intent at the time that the gift was made.**[71]

Contract Subject to a Condition Subsequent

Finally, a contract subject to a condition subsequent is analyzed under contract law. If there is a condition in the contract, the contract may be frustrated by the occurrence or non-occurrence of the stipulated event.[72] This type of restricted gift is unequivocally analyzed under contract principles.[73] The problem with viewing a donative transfer as a contract subject to a condition subsequent, however, is that many such transfers are testamentary dispositions and not bargained-for exchanges; so it can easily become problematic to

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[68] *Id. (citing* RESTATEMENT (THIRD) OF TRUSTS § 5(h) (2003)).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id. (citing* Brody, *Dead Hand,* at 1202-03).
[73] *Id.*

construe them as contracts.[74] However, such is not the case in with the "Mead Memorial Chapel" which was a bargained-for-exchange during the lifetime of John Abner Mead.

The fact that there are so many different methods under which a court can analyze any given gift leads not only to confusion among different jurisdictions, but also to a major divergence among the kinds of cases in which donor standing is recognized and those in which it is not. Additionally, the ability to analyze a case under so many legal theories leads to several different types of remedies available to plaintiffs. While specific performance of the terms of the gift could be ordered if the gift were classified under property law, it may be more likely for the remedy to be damages if the gift was seen as a contract.[75]

IX. NAMING RIGHTS AS CONSIDERATION

Whether the parties intend naming rights to be consideration, and whether the naming rights were bargained for, will depend on the particular facts. If the parties actually negotiated over naming rights or other public recognition, then

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[74] *Id.* at 1192.

[75] Nicole Amaya Watson, *The Issue of Donor Standing and Higher Education: Will Increased Donor Standing Be Helpful or Hurtful to American Colleges and Universities?*, 40 J.C. & U.L. 321, 327–33 (2014)

the parties likely intended the recognition to be consideration, and the recognition induced the pledge.[76]

There is ample judicial authority that a charity's promise of naming rights can constitute consideration to make a pledge an enforceable contract. The seminal case on the enforceability of charitable pledges[77] involved a naming right, but the facts are so unusual, and Justice Cardozo's analysis is so esoteric,[78] that the opinion perhaps has created more confusion than clarity.

Allegheny College sent Mary Yates Johnston an "appeal to contribute" as part of a drive to add $1.25 million to its endowment.[79] There is no indication that the college sent a standard pledge form; instead, Mary wrote a letter providing on the front:

> Estate Pledge . . . In consideration of my interest in Christian Education, and in consideration of others subscribing, I hereby subscribe and will pay to . . . Allegheny College . . . $5,000. This obligation shall become due thirty days after my death . . . . The proceeds of this obligation shall be added to the Endowment . . . or expended in accordance with instructions on [[the] reverse side of this pledge.[80]

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[76] William A. Drennan, *Charitable Pledges: Contracts of Confusion*, 120 Penn St. L. Rev. 477, 505 (2015).

[77] *Id. (citing Allegheny Coll. v. Nat'l Chautauqua Cty Bank*, 159 N.E. 173 (N.Y. 1927)).

[78] Id. at 535 (*See* Arthur B. Schwartz, Note, *The Second Circuit "Estopped:" There Is No Promissory Estoppel in New York*, 19 Cardozo L. Rev. 1201, 1217 (1997) ("*Allegheny* is quite possibly the most misunderstood case dealing with consideration theory and promissory estoppel in New York.")).

[79] Id. (citing *Allegheny Coll. v. Nat'l Chautauqua Cty Bank*, 159 N.E. 173-74 (N.Y. 1927).

[80] *Id. (citing Id.* at 174).

The reverse side stated in part, "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund . . . [and] shall be used to educate students preparing for the Ministry." Although the letter provided that the pledge would be paid from her estate, Ms. Johnston paid $1,000 to the college during her lifetime, and the college "set the [$1,000] aside to be held as a scholarship fund for the benefit of [ministry] students." Eight months later, Ms. Johnston "gave notice to the college that she repudiated the promise." Thirty days after her death, Allegheny College sued her estate for the $4,000 pledge balance.[81]

Justice Cardozo initially indicated that the doctrine of promissory estoppel was the likely approach for enforcing a charitable pledge.[82] As a policy argument, he quoted with approval those courts stating that to argue a charitable pledge is unenforceable for lack of consideration is a breach of "faith toward the public" and an "unwarrantable disappointment of the reasonable expectations of those interested."[83]

Although Justice Cardozo stated that the promissory estoppel cases should not be overruled in part because the consideration requirement is a "concept which . . . came into our law, not so much from any reasoned conviction

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[81] *Id.*

[82] *Id.* (*citing Id.* at 175, *citing with approval Barnes v. Perine*, 12 N.Y. 18 (N.Y. 1854) (asserting that "we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions.")).

[83] *Id. (citing Allegheny Coll.*, 159 N.E. at 175, *quoting with approval* Barnes v. Perine, 12 N.Y. 18 (N.Y. 1854) and other cases).

of its justice, as from historical accidents of practice and procedure,"[84] ultimately he did not rest the holding on promissory estoppel. Instead, Justice Cardozo concluded that the arrangement was an enforceable bilateral contract.[85] Justice Cardozo said Ms. Johnston "wished to have a memorial to perpetuate her name," and "[t]he moment that the college accepted $1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary . . . in the spirit of its creation."[86] He asserted that if the college received the full $4,000 balance of the pledge, it would have a duty to publicize the Mary Yates Johnston Scholarship.[87] Justice Cardozo stressed the mutual obligations,[88] noting that if the college ever treated the $1,000 as an "anonymous donation . . . the [donor] would have been at liberty to treat this . . . as the repudiation of a duty impliedly assumed . . . justifying a refusal" to pay the $4,000 pledge balance.[89]

In regard to whether there is consideration in a part-gift and part-bargain transaction, Justice Cardozo had two replies. First, "[i]f a person chooses to make

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[84] *Id. (citing Allegheny Coll.*, 159 N.E. at 175. Justice Cardozo stated that, under the traditional law of contract, "[i]f A promises B to make a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept." *Id.* at 174).

[85] Id. (citing *Id.* at 176).

[86] Id. (citing Id. at 175).

[87] *Id.* at 176 (finding that "the time to affix her name to the memorial will not arrive until the entire fund has been collected").

[88] *Id.* (stating that the "[o]bligation in such circumstances is correlative and mutual").

[89] Id.

an extravagant promise for an inadequate consideration[,] it is his own affair . . . be it never so small, [there] is a sufficient consideration . . . .” Second, “[t]he longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.” In his most important conclusion on charitable naming rights, Justice Cardozo stated that the consideration requirement was satisfied here, and that the college and Ms. Johnston were parties to a bilateral contract, because “the duty assumed by the [college] to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the [pledge] within the rules that define consideration . . . .”[90]

Allegheny College draws a great deal of attention, but other cases also support the view that charitable naming rights are adequate consideration for an enforceable contract. For example, in *Woodmere Academy v. Steinberg*,[91] the donor signed a pledge to contribute $375,000, contributed $175,000, and paid no more.[92] In exchange, the school named its library after the donor's spouse. In correspondence, the school told the donor “[y]ou have our unconditional and unqualified assurance that the [library] will continue to be so [named] as long as it is a part of the school . . . .”[93] When the charity sued to enforce the pledge, the court stated that the charity “did all that the [donor] expected . . . including . . .

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[90] Id. at 505–07
[91] *Id. (citing Woodmere Acad. v. Steinberg*, 385 N.Y.S.2d 549 (N.Y. App. Div. 1976).
[92] Id. at 550, 551.
[93] Id. at 551.

naming [the library] after [the donor's spouse]" and concluded that the pledge was enforceable as a unilateral contract.[94]

In *Stock v. Augsburg College*, as discussed *supra*, the court agreed with Stock that there was a contract and concluded that the college breached that contract in 1989 when it completed the building and failed to name the communications wing after Stock.[95] The court rejected the college's argument that Stock made a conditional gift, saying Stock "intended that his $500,000 donation was in exchange for [the college's] promise to name the wing after him. His intent was not . . . a donation to the general building fund."[96] Nevertheless, the court held that Stock's breach of contract claim was barred by the statute of limitations.[97] As a result, the court never reached the issue of damages for breach of a naming rights deal.[98]

In the *Carson's Estate* case, a school "embarked upon an ambitious program" to raise $500,000 for multiple projects including building a new three-story auditorium and gymnasium to be named the "John F. Carson Memorial Hall" in honor of the school's founder.[99] The sister-in-law of John F. Carson signed a pledge, stating in part, "I promise to pay [the sum of $5,000] . . . as follows . . . $2,000 when construction of the John F. Carson Memorial building

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[94] Id. at 552.
[95] Id. (citing *Stock*, 2002 WL 555944, at *4).
[96] Id. (citing Id. at *7).
[97] Id. (citing Id. at *4).
[98] Id. (citing Id. at *4).
[99] Id. (citing *In re* Carson Estate, 37 A.2d 488, 489 (Pa. 1944)).

is begun and [the] balance at my convenience within [five] years." The school raised only $95,000, paid $30,000 to a professional fundraiser, and used part of the balance to improve the existing auditorium and gymnasium.[100] The school placed an inscription over the door reading, "The John Carson Auditorium and Gymnasium," and the school sued the sister-in-law to collect the $5,000 pledge.[101] The Pennsylvania Supreme Court rejected the school's claim, stating, [The school] and the court below treat the [sister-in-law's] subscription as if it were an executed gift. It was a *contract*. There is no question at this time that it was a valid contract, and that it was supported by consideration sufficient to contracts of this sort. Under the contract both [the sister-in-law] and [the school] had mutual obligations.[102] The *Carson* case is particularly interesting because the naming right did not publicize the donor, instead, it publicized the donor's in-law.

In *Paul & Irene Bogoni Foundation v. St. Bonaventure University*,[103] the Bogoni Foundation signed a gift commitment document providing, "We . . . agree to give . . . [$1.5 million] . . . for the following purposes: 'The Paul and Irene Bogoni Library Addition."[104] The Bogonis subsequently pledged an additional

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[100] *Id. (citing In re* Carson Estate, 37 A.2d 488, 489 (Pa. 1944)).

[101] *Id.* at 490-91.

[102] *Id.* at 491 (emphasis added).

[103] *Id. (citing Paul & Irene Bogoni Found. v. St. Bonaventure Univ., No. 102095/08*, 2009 WL 6318140 (N.Y. Sup. Ct. Oct. 6, 2009) (order granting motion to dismiss)).

[104] *Id.* at 4-5 ("We recognize that [St. Bonaventure University] will rely on our gift in authorizing expenses to be paid in anticipation of the payment of our pledge and in securing any additional pledges from others.").

$500,000 and contributed $1.1 million, and the university sued to collect the $900,000 balance.[105] The court concluded the parties entered into a unilateral contract, and the university prevailed.[106]

X. Conditional Gift or Contract?

Leading authorities acknowledge the potential difficulty of distinguishing a conditional gift from a contract imposing one or more conditions.[107] Courts may find the conditional gift label attractive because the remedy is clear if the charity fails to fulfill the naming rights condition; the charity simply returns the amounts donated, perhaps with interest.[108]

The distinction between a contract and a conditional gift is "well illustrated" by Professor Williston's story of the benevolent man and the tramp: "If a benevolent man says to a tramp,--'If you go around the corner to the clothing shop . . . you may purchase an overcoat on my credit."' The benevolent man is making a conditional gift, and no contract is formed because "no reasonable

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[105] *Id.* at 1, 5.

[106] *Id.* at 12, 17-18 (relying on *Cohoes Mem'l Hosp. v. Mossey*, 25 A.D.2d 476 (N.Y. App. Div. 1966)).

[107] *Id. (*S*ee* RESTATEMENT (SECOND) OF CONTRACTS §71 cmt. c (AM. LAW INST. 1981) (noting "the distinction... may... depend[] on the motives manifested by the parties"); *see also Carlisle v. T & R Excavating*, 704 N.E.2d 39 (Ohio Ct. App. 1997); *see also* KNAPP ET AL. at 109.

[108] *Id. (See Vanderbilt*, 174 S.W.3d at 114, 119 (increasing the amount Vanderbilt University must repay "based on the consumer price index published by the [U.S.] Bureau of Labor Statistics")(other citation omitted).

person would understand that the short walk was requested as the consideration for the promise . . . ." [109]

Professor Williston stresses that in drawing the line between (i) a conditional gift and (ii) an enforceable contract supported by consideration, the key decisional exercise is making a *reasonable interpretation.*[110] Professor Williston describes the decision process as follows:

> Although no conclusive test exists for making the determination, an aid in determining which interpretation of the promise is more reasonable is an inquiry into whether the happening of the condition will benefit the promisor. If so, it is a fair inference that the happening was requested as a consideration. On the other hand, if, as in the case of the tramp suggested above, the happening of the condition not only will not benefit the promisor but is obviously for the purpose of enabling the promisee to receive a benefit (a gift), the happening of the event on which the promise is conditional, though brought about by the promisee in reliance on the promise, will not be interpreted as consideration.[111]

In applying this Williston decision model to charitable pledges, the donor takes the role of the benevolent man, as the promisor, and the charity takes the role of the tramp. The inquiry should be whether the condition, namely the naming rights or other public recognition, is more (i) in the nature of a benefit to the donor, or (ii) to allow the charity to receive the gift.

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[109] *Id. (citing Pennsy Supply, Inc. v. Am. Ash Recycling Corp.*, 895 A.2d 595, 600 (Pa. Super. Ct. 2006) (*quoting* 1 SAMUEL WILLISTON & GEORGE J. THOMPSON, WILLISTON ON CONTRACTS §112, at 380 (Rev. ed. 1936)).

[110] Id. (*citing* 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §7:18, at 417-18 (Thomson West 2008) (4th ed. 1990).

[111] *Id. (citing* WILLISTON & LORD at 415-18, *quoted in* Fritz v. Fritz, No. 08-1088, 2009 WL 779544, at *5 (Iowa Ct. App. Mar. 26, 2009)(other citation omitted).

Focusing on the latter test first, it seems difficult to make a case that the charity's grant of naming rights was something that had to happen for the charity to receive the gift. Unlike the tramp needing to go to the clothing store or another similar establishment to receive the gift of a coat, the charity could accept the donor's cash or property regardless of whether the condition--specifically the granting of the naming rights--occurs. The charity would enjoy the gift whether it is anonymous, or it comes with naming rights.[112]

Under the first test, Professor Williston calls for an analysis of any benefit to the promisor.[113] This precise matter is addressed in the seminal case of contract law. In *Allegheny College*, Justice Cardozo made a rather direct response regarding naming rights and those who choose to give postmortem: "The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good."[114]

An even stronger case can be made that those who give during their lifetime benefit from charitable publicity which may include (i) a monetary payment if the charity tries to renege on the naming rights; (ii) publicity; (iii) a reputation for wealth, generosity, and power; and perhaps (iv) inclusion on the charity's board of directors or committees and the associated opportunity to do

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[112] *Id. (commenting* Perhaps an advocate of the conditional gift theory would argue that the naming rights enable the charity to receive other benefits, namely other gifts, from other donors who tend to follow the herd mentality.)

[113] *Id.* (*See* WILLISTON & LORD at 415-18.

[114] *Id. (citing Allegheny Coll. v. Nat'l Chautauqua Cty. Bank*, 159 N.E. 173, 176 (N.Y. 1927)).

business with high-net worth individuals and their affiliated business enterprises. In searching for consideration, Professor Williston focuses on whether the promisor, the donor, receives a benefit, but it should also be relevant whether the promisee, the charity, incurs a non-trivial legal detriment.[115]

Hamer v. Sidway[116] established that an agreement to do what the law does not require, such as refraining from smoking or drinking liquor, can be sufficient consideration for a bilateral contract.[117] In a naming rights transaction, the charity typically agrees either to inscribe an object with the donor's name or commission, mount, and preserve a plaque with the donor's name on its property. As a charity is not legally bound to take any of these actions, one could technically say the charity always incurs a detriment.[118]

XI. Restatement of the Law, Charitable Nonprofit Organizations

According to the Restatement of Charitable Nonprofit Organizations, these differences in terminology stem from an early period in U.S. history when charitable trusts were invalid in some jurisdictions. Courts in those jurisdictions

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[115] *Id.* (*See Pennys Supply, Inc. v. Am. Ash Recycling Corp of Pa.*, 895 A.2d 595, 602 (Pa. Super. Ct. 2006) (emphasizing that the promisee incurred a detriment by collecting materials, even though the promisee paid nothing for the material).

[116] *Id. (citing Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891).

[117] *Id.* at 544-45, 551.

[118] William A. Drennan, Charitable Pledges: Contracts of Confusion, 120 Penn St. L. Rev. 477, 535 (2015)

validated a donation made for a specific purpose to a charity that was a corporation by characterizing the donation as an absolute, conditional, or restricted gift, rather than as a technical trust. However, as with donations in the form of trusts, such donations had to be applied according to the terms and for the purposes specified by the donors. This rule remains the law today. Despite the fact that a term like "absolute" gift may sound as if it means that the gift was made without a specific restriction, it does not. Regardless of the terminology used, if a donation is made to a charity subject to a valid specific restriction regarding the purpose to which the donated asset is to be devoted or the terms by which the donated asset is to be administered, the charity is legally bound by the restriction. Restatement of the Law, Charitable Nonprofit Orgs. § 4.01 TD No 3 (2019).

With regard to Naming restrictions, the Restatement provides that "[t]he terms governing a gift may specify the duration of a naming restriction, which may be, for example, a term of years or in perpetuity. If the terms governing a gift do not specify the duration of a naming restriction, a court will determine the duration based on the nature and circumstances of the gift." Id.

In some cases, courts have analyzed a donation involving a naming restriction in primarily charitable gift terms and have refused to modify the naming restriction via cy pres or have held that failure to comply with a naming restriction in the form of a condition would trigger a reversion. In other cases, courts have analyzed a donation involving a naming restriction in primarily

contractual terms and have mandated the charity's specific performance of the naming restriction. Id.

WHEREFORE, because the Defendant has failed to meet its burden of proof, Plaintiff respectfully requests that Defendant's Motion to Dismiss be Denied.

DATED at Town of Randolph, County of Orange, and State of Vermont this 19th day of June 2023.

The Honorable James H. Douglas,
Special Administrator of the
Estate of John Abner Mead,
Plaintiff

By: */s/ L. Brooke Dingledine*

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