THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIMOTHY L. JENKINS, *ET AL.*	)	
	)	
PLAINTIFFS,	)	
	)	
V.	)	
	)	**CASE NO. 1-22-CV-00874 (RC)**
	)	
THE HOWARD UNIVERSITY, *ET AL.*	)	
	)	
DEFENDANTS.	)	
	)	

PLAINTIFFS' REPLY MEMORANDUM
TO DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO AMEND

Comes now Plaintiffs, by and through undersigned counsel, and respectfully Reply to Defendants' Opposition to Plaintiffs' Motion for Leave to file its Second Amended Complaint ("SAC") and state as follows:

I. BACKGROUND

On December 17, 2021 Plaintiffs filed the immediate case in the District of Columbia ("D.C.") Superior Court. On March 31, 2022, Defendants removed the matter to the United States District Court, thereby asserting and implicating the question of federal jurisdiction over this matter based upon the University's 1867 Congressional charter, which presented an issue of first impression for this court. On April 21, 2022, Plaintiffs filed a motion to remand the matter to the D.C. Superior Court, arguing the application of D.C. non-profit law based upon its theory that The Howard University ("Howard" or "the University") and its trustees (hereafter "Board" or "BOT") violated its By-laws in its July and November, 2021 removal of Alumni, Faculty, and standard

trustees – amendment of Article 4, Section 2. The Defendants' removal argument drew attention to D.C. Code, Mun. Regs. §17-705 governing non-profit corporations. Plaintiffs, however, not enjoying access to University Board minutes, would have no basis in which to ascertain the extent to which the Board considered and approved a corporate resolution pertinent to the requirements of this provision. Further, until the University's removal of the case, Plaintiffs did not deem its 1867 Charter to govern their challenge to the Board's alleged violation of its By-laws. This point was argued in Plaintiffs' remand motion at pps.8-10.

On May 2, 2022, Defendants filed a Motion to Dismiss in response to Plaintiffs' complaint. On May 5, 2022, Defendants filed an Opposition to Plaintiffs' remand motion further arguing this court's jurisdiction, noting: "the duties of Howard's federally authorized trustees with respect to those federally authorized documents are governed by federal law. Plaintiffs on May 6, 2022 filed a Motion to Stay Defendants' Motion to Dismiss, noting the significance of jurisdiction and applicable law influenced the substance and direction of Plaintiffs' response to Defendants' Motion to Dismiss. The University opposed said motion. On January 27, 2023 this court denied Plaintiffs' motion to remand and denied as moot its motion to stay. It further ordered Plaintiffs to file an Opposition to Defendants' pending Motion to Dismiss. On February 27, 2023 Plaintiffs filed a Motion for Leave to file a Second Amended Complaint and a Memorandum in Opposition to Defendants' Motion to Dismiss. On March 13, 2023 Defendants, subject to a motion for enlargement of time, filed a Reply to Plaintiffs' Opposition to its dismissal motion and an Opposition to Plaintiffs' Motion for Leave to Amend (hereafter "Opposition") and file a SAC.

The 1867 Howard University Charter at its initial section reads: " Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there

be established, and is hereby established, in the District of Columbia, a university for the education of youth in the liberal arts and sciences, under the name, style, and title of " The Howard University." The Charter language at Section 2, states that the original incorporators followed in succession by the Trustees as stated in Section 4, shall act as follows: "whatsoever, by the name, style, and title of "The Howard University," by which name and title they and their successors shall be competent, at law and in equity, to take to themselves and their successors *for the use of said university*, any estate whatsoever in any messuage, lands, tenements, hereditaments, goods, chattels, moneys, and other effects, by gift, devise, grant, donation, bargain, sale, conveyance, assurance, or will ; and the same to grant, bargain, sell, transfer, assign, convey, assure, demise, declare, to use and farm let, and to place out on interest, *for the use of said university*, in such manner as to them, or a majority of them, Section 10 of the Charter requires said corporation not to use funds to employ its funds or income, or any part thereof in banking operations or for any purpose or object other than those expressed in the first section of the charter. Hence, it establishes trustees, specific purposes and uses for any and all funds to be used for these specific purposes and benefits, and further restricted the use of any funds for any inconsistent purpose.

Defendants oppose Plaintiffs' Motion for Leave to Amend on futility and interests of justice grounds, which arguments as stated more fully below, are meritless.

II. STANDARD OF REVIEW

As this court stated in *Bronner v. Duggan*, 324 F.R.D. 285, 290 (D.D.C. 2018), under the Federal Rules of Civil Procedure, once a defendant has responded to a complaint and more than 21 days have elapsed, the plaintiff may amend his or her complaint "only with the opposing party's written consent or the court's leave." Fed.R.Civ.P. 15(a)(2). Because Defendants refuse to consent to an amendment, Plaintiffs have requested this Court's leave. "The grant or denial of leave to amend is committed to the sound

discretion of the district court." *De Sousa v. Dep't of State,* 840 F.Supp.2d 92, 113 (D.D.C. 2012) (citation omitted). However, "[t]he court should freely give leave when justice so requires," Fed.R.Civ.P. 15(a)(2), which "severely restrict[s]" the court's discretion to deny leave to amend and dismiss, *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC,* 148 F.3d 1080, 1084 (D.C. Cir. 1998) (quoting *Bank v. Pitt,* 928 F.2d 1108, 1112 (11th Cir. 1991)). Courts have also recognized a "policy in favor of hearing cases on their merits," which weighs in favor of permitting amendments. *Id.* Nevertheless, leave is properly denied in cases involving "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Foman v. Davis,*371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

III. ARGUMENT

A. PLAINTIFFS' SAC IS NOT FUTILE.

Plaintiffs' SAC, however, should survive a motion to dismiss, as its allegations of a trust relationship is clearly not futile and frivolous. See, *Depu v. Oath Holdings, Inc., No. 17-cv-635, 2022 WL 1500542 (D.D.C. May 5, 2022), Hooker v. Edes Home*, A.2d 608, 611 (D.C. 1990), and *YMCA v. Covington*, 484 A.2d 589, (D.C.1984). Each court considered similar phraseology as that in Howard's Charter and held the language created a trust relationship. Central to the proposed amendments is the extent to which Defendant The Howard University, as per its' 1867 Congressional charter is a charitable Trust, whether the BOT violated either the Trusts provisions, the University By-laws and a prior contract arrangement in amending its Article 1, Section 2 and removing alumni, students, and faculty, affiliate trustees, from the BOT, and doing such on the vote of one (1) board member. Notably, the University Charter requires a quorum of nine trustees to conduct its business, not one. See 39 Cong. Ch. 162, 12 Stat. 438 (March 2, 1867). § 4. After

one trustee effectively cancelled the election to replace affiliate trustees, the remaining Board members voted to amend the Bylaws, removing all Affiliate trustees, denying those trustees removed and alumni the opportunity to participate in the subsequent election of Trustees, governance decisions. At no time do Defendants argue that the BOT passed a formal corporate resolution authorizing said cancellation, which effectively resulted in the non-election of six of seven affiliate trustees. Rather, Defendants carefully use the word "accept" without more:

> To the contrary, Plaintiffs' Complaint makes clear that the Board, pursuant to its exclusive authority over affiliate trustee elections, accepted the Governance Committee's request to pause affiliate trustee elections. Thus, the letter cited by Plaintiffs announcing the decision states that: The board of Trustees has been engaged as these [pandemic-related] decisions were made for the health and safety of every member of the Howard Community... the [Governance] Committee has asked the Board of Trustees to pause on adding any new Board members including via elections for affiliate trustees.

The Congressional charter requires all BOT decisions to occur at a duly called meeting with a quorum of nine (9) trustees present, and makes not any allowance for the concept and process of "accepted" as being equivalent to "voted upon and approved a corporate resolution at a duly authorized board meeting." Ignoring clear corporate governance in its By-laws gives credence to Plaintiffs' challenge to the legality of this particular action before this Honorable court. Additionally, at the time of the BOT's November 2021 vote to amend its By-laws, the required full Board membership intentionally and by design did not exist. Contrary to Defendants' Opposition, Plaintiffs' SAC alleges in great detail BOT actions that violated the University's charter, By-laws and prior agreements with alumni.

1. The Existence of a Trust and Standing.

Defendants' treat Plaintiffs' trust claim as futile, hinting at frivolous, but Defendants notably and conspicuously omitted reference to footnote 8 in their reference to, and analysis. of *Hooker v. Edes Home, 579 A.2d. 608 (D.C. Cir. 1990).* On the fundamental question of Plaintiffs'

standing – which Defendants attack— our D.C. Circuit noted as follows regarding the issue of standing for a public charitable corporation created by Congress, such as Howard University: "Although *Edes* is technically a charitable corporation chartered by an Act of Congress, the trial court concluded, and the parties agree, that rules applying to charitable trusts govern the standing issue. *Id*. at fn 8. Instructively, the court goes on to state the following:

> As distinguished from a private trust, which is characterized by identified beneficiaries who enjoy equitable ownership of the property and for whose benefit the trustees are obliged to act, in a charitable trust "the obligation of the trustee is to apply the trust res for some form of public benefit, and persons who receive[ ] advantages from the administration of the trust do so because they are conduits through whom the social gains flow," and not necessarily because they have a property interest in the trust assets. G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 411, at 407 (2d ed. rev. 1977); RESTATEMENT (SECOND) OF TRUSTS, chap. 11 introductory note (1959) (fundamental distinction between private and charitable trusts is that, in charitable trust, "property is devoted to purposes beneficial to the community").

Hooker v. Edes Home, 579 A.2d 608, 611 (D.C. 1990).

Notably, the result in *Edes* is the same result reached in *YMCA v. Covington*, 484 A.2d 589, (D.C.1984). There, the YMCA covenanted "that it holds and will hold the land and premises herein before described ….for work of the said YOUNG MEN'S CHRISTIAN ASSOCIATION *colored men of the District of Columbia."* (Emphasis added.) Further, as per the D.C. Trust laws, the BOT does not have the power

Defendants go to great length to denigrate Plaintiffs' assertion regarding the existence of a trust relationship but the cited cases support the existence of a trust relationship. Defendants' argument at p. 8 of its Opposition references *Depu v. Oath Holdings, Inc., No. 17-cv-635, 2022 WL 1500542 (D.D.C. May 5, 2022)*. This case spells out the elements of a trust relationship: "For a charitable trust, like the one alleged by Plaintiffs, 'the obligation of the trustee is to apply the trust res for some form of public benefit."' *Id.* (quoting *Hooker v. Edes Home*, A.2d 608, 611 (D.C. 1990))." Instructively, the court noted: "All of this together," the court explained, "plausibly

signals the hallmark of a charitable trust: 'a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for a charitable purpose.'" *Id*. (quoting Restatement (Second) of Trusts § 348 (Am. L. Inst. 1959)). Finally, as argued here, the D.C. Circuit observed that "circumstances surrounding the creation of the Fund" were "probative of trust intent."

Against this backdrop, one need look no further than the 1867 Charter to determine if Congress intended to create a trust relationship with the University as the recipient of federal appropriations for youth seeking an education in the District of Columbia. To this point, (1) Congress limited the use of all funds received by the University BOT to "education of youth in liberal arts and sciences"; (2) restricted use of all funds to the " proper use and benefit of said university"; and the Board by this language is not free to expend funds for commercial housing developments not related to university or even religious education, and last, but certainly not least: (3) Sec. 3 of the Charter states "the government of the university shall be vested in a board of trustees" possessing "perpetual succession in deed or in law." Regarding the latter point, the Charter's use of the specific term "trustee" is unambiguous.

Rather strikingly, Defendants' Opposition agrees that funds specifically designated for the benefit of another (the Charter's education of youth) can create a trust relationship and a non-profit entity can serve as a trustee of such a trust, particularly, as here, where the elements of a trust are satisfied. Defendants' Opposition at 9. Further, Defendants have not cited one case which shows that Defendant University is not a trust. Moreover, they have not cited any conflict between D.C. Trust law and the Charter as it relates to the removal of trustees. Therefore, their supremacy clause argument is inapplicable. Howard's Congressional charter does not address the removal of trustees

or their nomination and election. Rather, it appears that the Charter itself subjected the University to D.C. trust law since all trusts are subjected to the jurisdiction in which they are founded.

Nor do Plaintiffs ignore *Hooker's* two separate requirements. Like the issues in *Hooker* and *YMCA*, granting Plaintiffs' standing to litigate the extraordinary and rare dispute herein, one which has not occurred in the University's 150 history, will not create a barn door which other litigants will exploit, subjecting the board to vexatious litigation. The Trustees here altered governance of the University trust in a manner, which after 96 years, effectively achieves a state of exclusive, unchecked, self-policing and non-disclosure of its entrusted safe-guarding of a significant publicly financed trust purpose.

Our Circuit's repeated finding of a charitable trust in charters with similar wording and phraseology is the essence and substance, we submit, of the University being deemed as a congressionally founded, funded and chartered charitable trust with a distinct public purpose following the civil war, concomitant with the end of slavery. This purpose recognized the need to educate youth suffering from the institutional implications of ignorance and subservience that education might cure. Howard is not just a Congressionally chartered corporation as is Georgetown University which received its charter 25 years after it was founded. Howard more like George Washington University, is both congressionally founded and funded. As such, it continues to receive annual appropriations from Congress. Congress founded Howard as a sort of reparatory aid to newly freed slaves in need of an education, and entrusted the accomplishment of this noble purpose to a trustworthy Board. Indeed, Defendants very argument that Congress created a trust relationship is radical and adverse to the University's interest unequivocally demonstrates why this suit was brought.

In their writings, Defendants do not see themselves has having an obligation or being accountable to anyone but themselves, and that essentially no one has standing to challenge their actions. Indeed, that Defendants challenge of Plaintiffs' trust relationship argument as "radically novel" and attempting to "hijack board governance", while simultaneously asserting the absence of any duty and accountability owed by the board whatsoever to anyone, speaks to the substantive basis for the alumni challenge here. Absent even a tinge of accountability and transparency, as evidenced by the BOT not releasing its minutes for twenty-five years. Defendants remain accountability free. And as such, Defendants believe that no category of affiliate trustee members enjoy standing to challenge their actions and the manner in which they removed elected affiliate trustee members. Plaintiffs challenge the University's extraordinary disenfranchisement measure and violation of its Bylaws and prior contractual agreement in a manner that, if unchecked, threatens the existence of the trust.

In fact, per Defendants' disdain for the trust beneficiaries, they have already dissolved the trust and the inherent and inseparable equitable duties attached thereto, and reconstituted themselves as not subject to trust laws of the District of Columbia, but only non-identified federal corporate laws which they argue existed in 1867. When Congress created this charitable trust, it was aware its beneficiaries enjoyed standing to sue trustees, particularly since the District of Columbia in 1867 could not issue federal charters. Nor was there in place a District Attorney to hold the BOT accountable. Circa 1923-1924, an unelected General Alumni Association successfully advocated that the Board should include an independent alumnus on the BOT and decided further in 1926 to appoint its first Black president, Mordecai Johnson. This very issue was so significant that it was considered by the Congress in 1926, which left in play the 1925

Bylaw amendment that created an Alumni board presence to support and check Board actions. Congress was comfortable with Alumni monitoring and safeguarding the Trust.

To reiterate, if this court were to accept Defendants' arguments, no one would have standing, including those with whom it has entered into contractual relationships and benefitted therefrom, such as Plaintiffs herein, thereby leaving the Congressional charter's trust relationship teeth without bite.

2. Contract and Third-Party Beneficiary Theory

Defendants overlook Plaintiffs have alleged the very existence of the Bylaws enacted in 1924 and meticulously followed by every BOT thereafter through 2020, and the current Trustee Board is the quintessential expression to the entire world of its intent to be bound by the inclusion of the Alumni, Students and faculty in the election of Trustees. Bylaws are corporate governance documents. Ignoring them and 96 years of compliance thereto, Defendants argue that Plaintiffs have not proven the university's intent to be bound by the procedure whereby Alumni, Students and Faculty participate in the governance of the University via nominating AffiliateTrustees from which the Board would exclusively elect, inexplicably citing cases involving student handbooks. See, *Basch v. George Washington University, 370 A.2d 1364, 1367 (D.C. Cir. 1977); see Shinabarger v. Bd. of Trustees of Univ. of District of Columbia, 164 F. Supp. 3d 1, 29 (D.D.C. 2016).* Unlike Bylaws student handbooks are not governance documents

Critical to the contract and third-party beneficiary issue, Defendants argue that Plaintiffs must plausibly allege a university's intent to be bound by a particular statement creating such an obligation. *Basch v. George Washington University, 370 A.2d 1364, 1367 (D.C. Cir. 1977); see Shinabarger v. Bd. of Trustees of Univ. of District of Columbia, 164 F. Supp. 3d 1, 29 (D.D.C. 2016)*. Contrary to Defendants' argument, the conduct of the parties combined with the advocacy

of alumni on the question of alumni representation on the Board of Trustees – including the specific selection of the first Alumni Trustee in 1924-25 – for a specific term of office, describes the material terms of the agreement between them – and the material benefit agreed thereupon: service on the board in return for alumni participation and support. The fact of the continued election of alumni to the Board of Trustees, codified into a 1925 by-law provision with almost a 100-year lifeline – demonstrates writing and facts that evidence the University's intent to bind itself to a permanent structure by a simple by-law amendment. The controversial unauthorized June 2020, Governance Committee Chairperson's solo suspension/cancellation of affiliate trustee elections, coupled with the BOT's July and November, 2021 votes to remove affiliate trustees further show the board's intent to reverse the 1923-1925 actions that resulted in the election of alumni to the Board and thereby, to we think illegally unbound itself from its agreed upon obligation to alumni and other affiliate trustees.

Defendants, recognized and followed these respective contractual obligations for nearly a century. But its recent non-recognition of these significant pages of the University's history and the historic role of Howard University alumni does not erase the formidable fact of the last century's General Alumni Association's advocacy, 100 years ago, which resulted in the agreed upon election of alumni to the Trustee Board. Defendants' argument at p. 15 regarding the Charter vesting the Board with exclusive authority over the content of its By-laws is unclear. The Charter authorized the Board to promulgate Bylaws – which it did – as its governing mandate. Plaintiffs, to be clear, do not argue that the Board is prevented from amending its Bylaws but elementarily if the Trustees do amend the By-laws as they are authorized to do, they simply cannot violate the charter, prior contractual arrangements and the Bylaws themselves in the process of doing such, particularly the applicable trust laws.

No case cited by Defendants on pps. 14-15 of Defendants' Opposition involve the question at hand, namely *Dyer v. Bilaul, 93 A.2d 349 (Settlement Agreement); Basch supra. (Involving George Washington University Bulletin: School of Medicine and Health Services) and Shinabarger supra. (Employment claim).* The facts here and the nature of Plaintiffs argument and agreements here – pertinent to permanent enfranchisement rights of Howard University alumni memorialized in governance documents – are obviously and clearly distinguishable from the employment documents and issues in Defendants' supporting cases. Nor does *Brooks v. Tr. of Dartmouth Coll*., 20 A3d 890 (N.H. 2011) apply. In addition to being a summary judgment ruling, the alleged agreement in Brooks was not reduced to writing and was never memorialized as a bylaw. A Bylaw amendment, governing in nature, provided that each alumni would enjoy the right to vote for alumni trustees. That arrangement was neither restricted in use nor limited to a time-frame, but contemplated and applied rather to then current and prospective alumni. All subsequent alumni were thus intended as successors and/or beneficiaries. These issues should, however, be resolved at best through discovery.

Defendants also argue, without citation, that the University cannot "confer upon individual alumni a right to sue over the internal governance of the institution and that a Charter amendment was required "to contract away that exclusive right and obligation." Opposition at 16. The Charter at Section 4, however, authorized the Board succession in deed or in law, which did not expressly prohibit the election of alumni to the Board. Defendants' BOT determined that elected alumni should serve on the BOT circa 1923, effective 1924-25. This is not inconsistent with expressed provisions of the Charter. This argument, absent more, is a red herring.

Critical to Plaintiffs' contract claims, Defendants argue that Plaintiffs must plausibly allege the university's intent to be bound by a particular statement creating such an obligation citing

Basch v. George Washington University, 370 A.2d 1364, 1367 (D.C. Cir. 1977); see Shinabarger v. Bd. of Trustees of Univ. of District of Columbia, 164 F. Supp. 3d 1, 29 (D.D.C. 2016). Contrary to Defendants argument, the conduct of the parties, including alumni advocacy circa 1923-1925 regarding alumni representation on the Board of Trustees and the initial selection of the first Alumni Trustee in 1924-25 for a specific term of office describes the material terms of the agreement between alumni and the University and the material benefit agreed thereupon: service on the board in return for alumni participation and support. The fact of the continued election of alumni to the Board of Trustees, codified into a 1925 written by-law provision demonstrates the University's intent to bind itself to a permanent governance structure. The controversial June 2020 solo suspension of board elections, coupled with the BOT's July and November 2021 votes to remove affiliate trustees show the board's intent to reverse the 1923-1925 board actions and thereby to legally unbound itself from its agreed upon obligation to alumni..

B. PLAINTIFFS' SAC IS CONSISTENT WITH THE INTEREST OF JUSTICE.

Defendants argue that Plaintiffs have been aware of the facts supposedly underlying the proposed SAC for more than a year and that Plaintiffs could have revised their new legal issues at any point during that time period, but made a tactical election not to do so. Defendants characterize Plaintiffs arguments among other things as: "hijacking the governance of the university", an "ignoble purpose", "desperate attempt", "one piece of coordinated publicity campaign", "casting a cloud on the university", "prejudicial to the university, alumni, and students", "inventing claims that have no basis in law", and "radical" but do little to appreciate or refute Plaintiffs' arguments

Contrary to Defendants' multitude of aspersions, the level of complexity in this case of first impression increasingly unfolded with the Defendants' arguments and factual assertions in

their filings, as well as this court's January 2023 ruling regarding federal jurisdiction. Given this court's ruling, the parties were faced with the newly emerged novel question regarding what body, if any, of applicable federal and/or state law governed the Charter and its application to Defendants' bylaws. Prior to that point, the question of jurisdiction and the procedural posture of the case precluded Plaintiffs' filings of any new pleadings as suggested by Defendants. The extensive procedural history of this case outlined in this court's Remand decision explains its' progression.

Also, this court opined as to the novelty of this case in its Memorandum Decision on Defendants' remand motion: "Moreover, even within the limited scope of suits against federally chartered universities, unlike other forms of routine commercial litigation that a university may engage in, only the rare case will involve a challenge like this *one* that requires interpretation of internal governance documents." By comparison, the only other case addressing alumni disenfranchisement involved Yale University, *Ashe, et al. v. Yale University*, filed in the Hartford, Connecticut Superior Court, regarding restrictions that Yale placed on the election of its Alumni Trustees. The court ruled on a pending motion to dismiss in that case on December 14, 2022 from which Plaintiffs SAC drew guidance. To argue that Plaintiffs were able through Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion to Remand, pending this court's respective rulings, including Plaintiffs'Motion to Stay the Motion to Dismiss, mistakenly suggests Plaintiffs could forecast this court's comprehensive January 27, 2023 Memorandum Opinion and explanation for its determination of federal jurisdiction rooted exclusively in the 1867 Charter.

The fundamental premise of Defendants' argument is that the BOT is self-policing and owes no duty to alumni, students, or faculty. Hence, there is no check and balance on its violation of its By-laws which in this case involves the removal of longstanding alumni trustees.

Desperation, hijacking the university, a publicity campaign, or suggested bad faith, this is not. Plaintiffs' arguments and SAC are rooted in meaningful legal analysis. Briefly, the history of the University's 1987 Charter, Plaintiffs discovered, did not exist in isolation. Within the prescribed time period imposed by the court, February 27, 2023, and prior thereto, the Plaintiffs identified significant facts and legal events which informed its interpretation of the Charter – as per an issue not previously explored by this court – and perhaps even the University. In developing its SAC, Plaintiffs carefully assessed: the language in the Charter and its stated purpose, circumstances surrounding the University's founding and funding (the end of the civil war and slavery 56 years before Alumni first served on the Board), Congressional charters to other Universities, the history of the University, its incorporation, the development of alumni involvement in the BOT governance of the University beginning in 1923-26 through 2021, and case law that govern the question borne from this court's remand ruling.

Defendants should be much more familiar than the alumni Plaintiffs with the historical issues at hand, particularly given its insistence that the 1867 Charter governs this dispute. Their conflation of corporate and trust law and inability to distinguish the existing elements of the trust relationship between the Congress and the University belie the burden that it seeks to impose here.

There is no "moving target" here, but rather an unavoidable evolving theory on which to pursue, not impede, justice! Defendants, having successfully asserted jurisdiction on the exclusive basis of the 1867 Charter should reasonably expect Plaintiffs to ascertain the procedural and substantive implications of the court's ruling. To argue that Plaintiffs were able, pending the court's respective rulings on Plaintiffs' removal and stay motions mistakenly suggest that Plaintiffs could have forecasted this court's rulings and filed its SAC without benefit of knowing whether state or federal court jurisdiction existed. Only since January 27, 2023 have the Plaintiffs enjoyed

clarity on the question of jurisdiction based on the 1867 Charter and the application of D.C. non-profit law. As this court has noted in *Bronner, Supra. at* 292: "Generally, [] a plaintiff is not dilatory in seeking to amend a complaint when no trial or pretrial dates have been scheduled." 27A T. Bateman, *et al.*, *Federal Procedure, Lawyers Edition* § 62:273 (2018)." Plaintiffs' SAC is a far cry from an 11th hour motion for leave to amend at the post-discovery or pre-trial stage of litigation. Plaintiffs advance their trust theory while the immediate case is in the pleading stage, which is hardly dilatory or in bad faith. Further, its claims are comprehensively supported by statutory and case law, including the plain unambiguous meaning of the 1867 Charter.

Further, "any amendment will [necessarily] require some expenditure of resources on the part of the non-moving party." *United States ex. Rel. Westrick*, 301 F.R.D. at 9. Here, there are no additional discovery expenses given the timing of this motion, and any additional expense otherwise as a justification for denial of the immediate motion would impede this court's legal standard of granting leave "freely when justice so requires." *Hisler v. Gallaudet Univ*., 206 F.R.D. 11, 14 (D.D.C. 2002) quoting Fed. R. Civ. P. 15(a).

Plaintiffs' SAC asserts plausible clarified distinct claims from those asserted previously against Defendants based upon the Board's inherent trust obligation to follow University By-laws, As the aforementioned arguments demonstrate, Plaintiffs hardly prejudice the University, its Board, its present students and alumni. The Plaintiffs' demand for accountability, transparency, and the BOT to act in accordance with its trust duties and obligations, and applicable By-laws in the removal of affiliate trustees justify the immediate action. Lastly, absent discovery, for example BOT minutes regarding the 1928 Charter amendment, BOT consideration of the 2013 Op Out decision as per the University President's letter to that effect, and any other actions regarding the Bylaws, Plaintiffs are unable to further develop the factual record. Defendants having failed to

demonstrate prejudice, undue delay, dilatory motive, futility, or a detriment to the public interest, the present record demonstrates Plaintiffs should be allowed to file the immediate SAC.

IV. CONCLUSION

WHEREFORE, Plaintiffs respectfully urge this honorable court to grant Plaintiffs' Motion for Leave to file the SAC.

Respectfully submitted,

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