STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Addison Unit **Case No. 23-CV-01214**

HON. JAMES H. DOUGLAS,	)
Special Administrator of the	)
Estate of John Abner Mead,	)
	)
Plaintiff,	)
v.	)
	)
THE PRESIDENT AND FELLOWS	)
OF MIDDLEBURY COLLEGE,	)
	)
Defendant.	)

MIDDLEBURY COLLEGE'S REPLY
IN SUPPORT OF MOTION TO DISMISS

Reading Plaintiff's opposition memorandum (the "Opposition") in isolation, one might reasonably conclude that this court case is a referendum on Middlebury College and its historical connections with members of the American eugenics movement. Plaintiff devotes the first quarter of his submission to a scathing, over-the-top critique of Middlebury as a "eugenicist factory," relying on more than 700 pages of new exhibits that lie outside of the pleadings. This diatribe is, candidly, an odd turn—and wholly irrelevant. While Middlebury disagrees with former Governor Douglas's characterization of some of the historical evidence (as well as his sweeping condemnation of the College as a "racist and antisemitic institution" that was an "architect" of the eugenics movement), it has never in any way sought to "obscure" its history. To the contrary, Middlebury has embraced academic inquiry and dialogue around this shameful chapter for the College and the State of Vermont (indeed, the

records Plaintiff relies upon have been made available by Middlebury itself). But this has nothing to do with the questions before the Court; it is no more than misdirection. The only thing the Court must decide in this case is whether former Governor Mead's gift to Middlebury gave rise to a legally binding commitment to maintain his name in perpetuity on the chapel he funded, and, if so, whether Mead's estate has standing to enforce that commitment more than a century later.

Focusing on the pertinent questions—and stripping away the substantial quantity of invective and sharp rhetoric—the Opposition's arguments against dismissal reduce to a handful of dubious legal contentions. First, Plaintiff insists that former Governor Mead's gift must be interpreted as giving rise to a contract for permanent naming rights. Notwithstanding the vehemence of Plaintiff's assertions that such a contract was formed, the actual gift documents, which he himself attached to his Complaint, do not reflect any binding, contractual obligation to maintain the name Mead on the chapel in perpetuity. More to the point, interpreting the gift as a "contract" enforceable by the donor's estate would depart from traditional concepts of charitable gift law in most jurisdictions, including Vermont. There is simply no basis in the law to allow a contract claim to proceed on the allegations here.

Second, Plaintiff suggests—without much elaboration—that Mead's donation might alternatively be viewed as a conditional gift. Not so. Vermont law strongly disfavors conditional gifts and, to recognize one, requires a specificity and clarity as to the intended condition (and consequences of non-compliance) that is entirely absent in this case. Not surprisingly, Plaintiff's Opposition makes no serious effort

to address Vermont's authorities on this question nor to reconcile his arguments with the controlling law.

Third, Plaintiff dances around the issue of donor standing, casting it as a "complex problem without an easy answer" that could benefit from a legislative fix. Opposition at 42. Whatever academic debate there might be as to the merits of a potential legislative expansion of standing to permit donors to enforce gift restrictions, the present state of the law is no mystery. Vermont follows the traditional rule confining standing in suits to enforce gift restrictions to the Attorney General, and—as a number of courts in other jurisdictions have confirmed—the enactment of the Uniform Trust Act and UPMIFA have not disturbed that common law limitation. Plaintiff's Opposition does not address or attempt to distinguish the authorities cited by Middlebury on this issue, which are directly on point and require dismissal of the Complaint.

Overall, it is clear that Plaintiff would much prefer to focus the discussion on Middlebury's perceived transgressions, past and present, rather than on the legal basis for his suit. This is no surprise, as there *is* no basis for his claims to advance under the current state of Vermont law; to allow the estate of a donor to bring suit over a supposed gift restriction more than a century after the donor's death would radically transform the face of charitable gift law in Vermont, to the detriment of the large number of charitable organizations operating in the state. As Plaintiff has failed to offer any cogent argument for this suit to proceed, Middlebury respectfully requests that the Court grant its Motion and dismiss the Complaint.

ARGUMENT

A. The Grounds for Dismissal Properly Rest on the Allegations of the Complaint and Attached Exhibits, Consistent with Rule 12(b)(6).

Plaintiff starts his argument by accusing Middlebury of failing to abide by the standard of review on a Rule 12(b)(6) motion: the College's argument, he says, "impermissibly ignores the facts and documentary evidence and makes multiple contravening assertions, which . . . must be considered false on a motion to dismiss for failure to state a claim." Opposition at 14. This is simply not true. As is evident on the face of the Motion to Dismiss, Middlebury's arguments for dismissal rest entirely on the pleadings. While Middlebury does cite and rely on the exhibits appended to the Complaint, there is no question that the Court may properly examine the documents included as exhibits to the pleadings in ruling on a motion to dismiss. *See* V.R.C.P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n.4, 186 Vt. 605, 987 A.2d 258 (mem.) (noting that "when the complaint relies upon a document, [it] merges into the pleadings and the court may properly consider it under a Rule 12(b)(6) motion to dismiss").

Plaintiff does not clearly identify any of the supposedly "contravening assertions" upon which (he claims) Middlebury relies. To the extent he believes that the Court must accept as true his legal interpretation of Governor Mead's Gift Letter—i.e., that it constitutes a "contract" for perpetual naming rights—and disregard Middlebury's arguments on the point, he is wrong. It is well established

that the Court need not "accept as true 'conclusory allegations or legal conclusions masquerading as factual conclusions.'" *Vitale v. Bellows Falls Union High Sch.*, 2023 VT 15, ¶ 28, 293 A.3d 309 (quoting *Colby v. Umbrella, Inc.,* 2008 VT 20, ¶ 10, 184 Vt. 1, 955 A.2d 1082). Plaintiff's labeling of the Gift Letter as a naming rights "contract" is not a factual allegation that must be deemed true on a motion to dismiss.

In referring to "contravening assertions," Plaintiff may also have in mind the additional legislative materials Middlebury included with its Motion[1] reflecting the fact that, one month after Mead's farewell speech to the Vermont General Assembly, a bill was introduced that would have authorized forced sterilization of certain undesirables. It is true that Plaintiff's Complaint made no mention of this bill, nor the fact that it was passed by the legislature (albeit ultimately vetoed); the Complaint alleges only that "[n]o legislation was *signed into law* in Vermont as a result of Governor Mead's farewell address." Complaint, ¶ 155 (emphasis added). However, that these facts may be inconsistent with the overall narrative Plaintiff advances in his Complaint—namely, his suggestion that there was no action on eugenics in Vermont for roughly two decades after Mead's public endorsement of such policies, *id.*, ¶ 156—does not make them "contravening assertions." More to

[1] There can be no question that the Court may take judicial notice of the legislative journal excerpts attached to Middlebury's Motion, which are public documents and reflect passage of legislation by the General Assembly. *See Kaplan,* 2009 VT 78, ¶ 10 n.4 ("[I]t is well settled that, in ruling on a Rule 12(b)(6) motion to dismiss, courts may properly consider matters subject to judicial notice, such as statutes and regulations, and matters of public record."); *Ass'n of Home Appliance Mfrs. v. City of N.Y.*, 36 F. Supp. 3d 366, 371 (S.D.N.Y. 2014) ("Judicial notice may be taken of material that is a matter of public record, such as legislative history . . ." (citations omitted)).

the point, none of the historical facts about Governor Mead's advocacy for eugenics are directly material to the legal issues before the Court, and Middlebury's arguments for dismissal do not rely on them: the Court is not being asked to rule on whether Middlebury's decision to remove the name Mead from its chapel was justified, but simply whether Middlebury was legally obligated to maintain the name in perpetuity.

Notwithstanding Plaintiff's protestations, this is a case that is uniquely situated for determination at the pleadings stage. The relevant facts, comprehensively laid out in the allegations of the Complaint, took place generations ago, and Plaintiff has appended the documents at issue to his lengthy Complaint. Hence, Plaintiff's admonition that the Court should "be wary of striking too soon," Opposition at 13, while undoubtedly true in most cases, is unwarranted here: the record is not going to change with additional time for factual development, as all material witnesses have long lain in their graves. Moreover, the issues raised by Middlebury's Motion are questions of law that are appropriate for disposition up front, including, among others, whether Mead's estate has standing to enforce the supposed gift restriction; whether a gift restriction may be enforced in contract (and if such a contract may be found in the documents here); and whether a conditional gift may be found absent clear conditional language and any retention of a reversionary interest by the donor. As all of these issues may be determined on the pleadings—and, indeed, each requires dismissal—there is no basis to postpone ruling to a later stage in this case.

B. The New Materials Appended to Plaintiff's Opposition Are Irrelevant and Must Be Disregarded.

In an effort to paint Middlebury College as an institution with a "vast connection" to eugenics, Plaintiff submitted as exhibits to his Opposition more than 700 pages of course catalogs, newspaper articles, and speeches. The Court should disregard these newly introduced materials for two reasons.

First, Plaintiff's exhibits lie outside of the pleadings, and Plaintiff offers no argument that they are subject to judicial notice (nor are they). As such, they are not properly before the Court on the College's Rule 12(b)(6) motion and should be excluded from consideration. *Cf.* V.R.C.P. 12(b) (noting that a motion to dismiss for failure to state a claim must be treated as a summary judgment motion if "matters outside the pleading are presented to *and not excluded by* the court" (emphasis added)); *see also Tal v. Computech Intl., Inc.,* No. 21CV5773JMASIL, 2022 WL 18135290, at *3 (E.D.N.Y. Dec. 1, 2022) (disregarding exhibits submitted by plaintiff in opposition to Rule 12(b)(6) motion to dismiss on the ground that they lay outside the pleadings), *report & recommendation adopted*, 2023 WL 112804 (E.D.N.Y. Jan. 5, 2023).

Second, Plaintiff's exhibits are irrelevant to the issues actually before the Court for decision. As best as Middlebury can discern, Plaintiff may be offering the materials in support of his contention that Middlebury has breached the covenant of good faith and fair dealing by using Governor Mead as a "fall guy" to divert attention from and "cover up" its own "dreadfully shocking history." Opposition at

3, 11, 32. This is, to put it gently, an eccentric and far-fetched theory—and it has nothing to do with the grounds upon which Middlebury has moved for dismissal. Middlebury has asked the Court to dismiss the claim for breach of the covenant of good faith and fair dealing because (a) there is no underlying contract that would give rise to the implied covenant, *see* Motion to Dismiss at 28, and (b) even if there were, Plaintiff lacks standing to pursue such a claim, *id.* at 31-36. As Plaintiff's exhibits are wholly unrelated to the arguments Middlebury has advanced for dismissal of the Complaint, the Court should exclude them from consideration.

C. Plaintiff Has Failed to Offer a Plausible Basis Upon Which His Contract Claims May Proceed.

While Plaintiff may assert that this "case is first and foremost . . . a Breach of Contract action," Opposition at 14, it is unclear what basis there could be under Vermont law to allow a contract claim to move forward. The Opposition does little to illuminate the subject. Plaintiff's argument asks the Court to read a binding, perpetual naming rights agreement into the Gift Letter on the basis of one indeterminate phrase—referring to that supposed condition, on the strength of his own *ipse dixit*, as the "contract's most essential term." Opposition at 20. His reading is neither reasonable nor plausible in the context of the Gift Letter and associated correspondence. But, more importantly, Plaintiff fails to offer any convincing argument that Vermont law does in fact allow a donor (or the donor's estate) to pursue enforcement of a gift restriction in contract. That is fatal to Plaintiff's contract claims and requires dismissal.

1. Vermont Law Does Not Treat Restrictions on Completed Gifts as Enforceable Contractual Obligations.

Notably absent from Plaintiff's Opposition is any substantive discussion of the treatment of charitable gift restrictions under Vermont law. Plaintiff cites several Vermont authorities on questions related to the formation and interpretation of contracts generally, but not one of the cases cited involved a gift restriction[2]—nor, indeed, does Plaintiff point to any Vermont authority suggesting that gift restrictions may be enforced in a contract suit by donors. Plaintiff invites the Court to *assume* contract principles apply to donor-imposed restrictions on charitable gifts in Vermont, but, as discussed below, that assumption is not supported in the law.

What treatment of charitable gift law there is in Plaintiff's Opposition is taken, largely verbatim, from two articles and a student note discussing charitable gift issues nationally.[3] While not specific to Vermont, the discussion correctly notes

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[2] *See Sutton v. Vt. Reg'l Ctr.*, 2019 VT 71A, 212 Vt. 612, 238 A.3d 608 (addressing alleged contract between state agency and investors for oversight and administration of EB-5 projects) (cited in Opposition at 21); *Theberge v. Theberge*, 2020 VT 13, 211 Vt. 535, 228 A.3d 998 (addressing oral agreement between husband and wife as to funding of children's education) (cited in Opposition at 22-23); *Dakers v. Bartow*, No. 2:16-CV-00246, 2018 WL 8415310 (D. Vt. Sept. 10, 2018) (addressing interpretation of general release of claims related to lease of apartment) (cited in Opposition at 25).

[3] Except for the addition of two sentences and a handful of elisions, the *entire text* of the Opposition from pages 33 to 57 (beginning with Section VII to the end of Section X) appears to be copied word-for-word, with no quotation marks to indicate a direct quote, from the following three pieces: 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, 17 (2020); William A. Drennan, *Charitable Pledges: Contracts of Confusion*, 120 Penn St. L. Rev. 477 (2015); and Nicole Amaya Watson, Note, *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, 323 (2014).

that restricted gifts have been analyzed under various legal theories across different jurisdictions, including charitable trust law and the law of conditional gifts, both creatures of property law, and contract law. *See* Opposition at 44; *see also* Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 Ga. L. Rev. 1183, 1190–91 (2007) (noting that "there are actually four ways to analyze a restricted gift—three under property law (charitable trust, conditional gift, restricted gift to corporate charity), and then contract law").[4] However, to the extent Plaintiff suggests that all of these legal theories are equally valid and applicable in Vermont, he is mistaken. This is so for several reasons.

First, Vermont case law has treated gifts within the more traditional property law constructs of conditional gift and charitable trust. Thus, for example, gifts made to a charitable or educational institution without any specific restrictions are deemed under Vermont law to be held in trust for use consistent with the charitable purposes of the institution. *See Cramton v. Cramton's Estate,* 88 Vt. 435, 92 A. 814, 815 (1915) (citing 2 Perry, Trusts (3d Ed.) § 733). Likewise, where Vermont courts have recognized a right by donors to sue over restrictions placed on gifts, they have done so only upon finding an express, conditional gift. *See Ball v. Hall*, 129 Vt. 200, 206, 274 A.2d 516, 520 (1970) (recognizing that a "gift may be conditioned upon the donee's performance of specified obligations or the happening

[4] As Professor Brody (Reporter of the American Law Institute's project on Principles of the Law of Nonprofit Organizations) has observed, this has led to some confusion in the law, as courts "sometimes do not apply their chosen legal theory accurately, mixing up the doctrines of charitable trusts, conditional gifts, and contracts." Brody, 41 Ga. L. Rev. at 1189.

of a certain event" and finding that failure of express condition required reversion to plaintiffs).[5] To the best knowledge of the undersigned, no Vermont court has ever allowed a donor to pursue an action for breach of contract for violation of a gift restriction.

Second, applying contract principles to charitable gifts would be inconsistent with Vermont's statutory regime for management and oversight of charitable funds. Under UPMIFA, a charitable institution may modify or release a restriction on a charitable gift by petitioning the Probate Division (after notification of the Attorney General), consistent with the trust doctrine of *cy pres*; UPMIFA even allows, in the case of small gift funds in existence for more than twenty years, for institutions to unilaterally modify restrictions without judicial approval (although they are still required to provide notice to the Attorney General). *See* 14 V.S.A. § 3416(b)-(d). The requirement of notification of the Attorney General is consistent with the principle that "in all types of modification the attorney general continues to be the protector both of the donor's intent and of the public's interest in charitable funds." Uniform Prudent Management of Institutional Funds Act, Prefatory Note at 4. There is no requirement, however, that the donor be made a party to a modification proceeding or consulted in the case of unilateral modification. *See* 14 V.S.A. § 3416(b)-(d). If gift restrictions were independently enforceable in contract, a

[5] As noted in the College's Motion, while the Vermont Supreme Court in *Ball* referred to the terms of one of the gifts at issue as the "contract of the parties," *id.*, it is clear from the text of the discussion that the Court viewed the cause of action as breach of a conditional gift, only recognizing a remedy of restitution (consistent with the law of conditional gifts). *See Williamson v. Johnson,* 62 Vt. 378, 20 A. 279, 281 (1890) (upon failure of condition to gift, cause of action for recovery of gift arises).

statutory scheme that allowed courts and charitable institutions to modify or eliminate restrictions without involving the donor would make no sense—and would very likely run afoul of the Contracts Clause.

Third, outside of Vermont, recognition of a cause of action for enforcement of gift restrictions in contract is by far the minority position. *See* Brody, 41 Ga. L. Rev. at 1225 (noting that, despite occasional case law applying contract law to gifts, "the traditional view is that a restricted gift is not a contract"); Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 Vand. L. Rev. 1093, 1149 (2005) ("Traditional jurisprudence has seen [a restricted gift] as a gift . . . and subsumed it under property law (which is also consistent with allowing restricted gifts to be governed by the law of trusts)"). It is thus no surprise that Plaintiff cites only a single case in which a court has purported to recognize a cause of action in contract to enforce gift restrictions. And that case—*Stock v. Augsburg College*, No. C1-01-1673, 2002 WL 555944 (Minn. App. Ct. Apr. 16, 2002)—lends no real support to Plaintiff's arguments.

In *Stock*, the plaintiff donor gifted $500,000 to Augsburg College in exchange for an express agreement to name a wing of a new building after him; the school subsequently backed out of its naming agreement after a racist letter-writing campaign by plaintiff came to light, but the school kept the plaintiff's gift. A number of years later, the donor sued for breach of contract, and the trial court entered summary judgment for the school on statute of limitations grounds. In an unpublished opinion affirming summary judgment, a Minnesota intermediate

appeals court suggested that plaintiff *would have had* a cause of action for "breach of contract" at the time Augsburg College repudiated its express naming rights agreement, but agreed that any claim was time-barred. *Id.* at *4. Hence, the court's discussion of the claim is entirely dicta. Moreover, the court also went on, in a somewhat confused discussion, to analyze the issue as one of a "conditional gift," correctly identifying the available remedy as restitution of the original gift. *Id.* at *5-*7. It appears possible, if not likely, that the court's discussion of a "contract" claim was prompted solely by the fact that the plaintiff framed his complaint thusly. *Id.* at *3 (noting that plaintiff brought suit only for breach of contract and misrepresentation). Regardless, to the extent that one can read *Stock* as recognizing a cause of action in contract, the case is an outlier.[6]

There is one area of charitable gift law in which recognition of contract principles has been more widespread: enforcement of gift pledges. The Opposition makes much of this, citing a string of cases affirming the proposition that charities can, under some circumstances, pursue enforcement of a pledge by a donor on contract theories.[7] This is unremarkable—and irrelevant to the question of law

[6] Indeed, it is not clear that *Stock* reflects the state of the law in Minnesota. *See Lindmark v. St. John's Univ.*, No. 18-cv-1577, 2019 WL 1102721 (D. Minn. Mar. 8, 2019) (noting conclusion by Minnesota state court in parallel action that "charitable gifts may be subject to conditions without becoming a contract, and . . . conditions on a charitable gift may be enforced only by the Minnesota Attorney General").

[7] *See Paul & Irene Bogoni Found. v. St. Bonaventure Univ.*, No. 102095/08, 2009 WL 6318140 (N.Y. Sup. Ct. Oct. 6, 2009) (cited in Opposition at 53-54); *Woodmere Acad. v. Steinberg,* 385 N.Y.S.2d 549 (N.Y. App. Div. 1976), *aff'd*, 363 N.E.2d 1169 (N.Y. 1977) (cited in Opposition at 51-52); *Allegheny College v. Natl. Chautauqua County Bank of Jamestown*, 159 N.E. 173 (N.Y. 1927) (cited in Opposition at 48-51, 56).

governing enforcement of restrictions on completed gifts. As emphasized in *In re Carson's Estate* (cited in the Opposition at pages 52-53) the law distinguishes between treatment of a completed, "executed gift"—governed traditionally by trust law or conditional gift principles—and a pledge or offer of a gift, which, if supported by consideration, can be an enforceable contract. *See* 37 A.2d 488, 491-92 (Pa. 1944) (holding that the doctrine of *cy pres* had no application because "there was no *executed* gift to trustees for a charity" but only a pledge that "created, at most, an *executory* contract"). The distinction in bodies of law governing different aspects of the gift transaction is not atypical. In matters involving real property, for example, a purchaser might sue in contract to enforce a purchase and sale agreement, *see, e.g., Sisters & Brothers Inv. Group. v. Vermont Nat. Bank*, 172 Vt. 539, 773 A.2d 264 (2001) (claim for breach of contract and specific performance of purchase and sale agreement), but it is the law of property, not contracts, that governs the landowner's rights and obligations with respect to property once the transfer is completed. So too with respect to charitable gifts: the fact that an unfulfilled gift pledge may be enforceable in contract does not mean that contract law governs the management and administration of gifted funds or property once the transaction has been completed.

In sum, Vermont law provides no basis for Plaintiff to sue in contract for violation of any supposed naming rights condition to Governor Mead's gift, and expanding the law to recognize such a cause of action would be out of step with both the law of charitable gifts nationally and the legislative scheme adopted by

Vermont's General Assembly. The Court should dismiss Plaintiff's contract claims and claim for breach of the implied covenant of good faith and fair dealing on that basis.

2. Even Were Gift Restrictions Enforceable in Contract, Plaintiff Would Lack Standing.

As discussed in Middlebury's Motion and in this Reply further below, Vermont follows the common law rule limiting standing in suits over gift restrictions to the Attorney General. Plaintiff's Opposition emphasizes that the special administrator of a decedent's estate is authorized under Vermont law to pursue surviving contract claims in the name of the deceased in the Civil Division, *see* Opposition at 26-30, but this makes no difference: the limitation on standing applies with equal force to contract theories as it does to other causes of action. *See, e.g.*, *Siebach v. Brigham Young Univ.*, 361 P.3d 130, 137 (Utah App. Ct. 2015) (affirming dismissal of donor's contract claim on standing grounds); *Courtenay C. & Lucy Patten Davis Found. v. Colo. State Univ. Res. Found.*, 320 P.3d 1115 (Wyo. 2014) (affirming dismissal of donor's contract and implied covenant claims on standing grounds). Governor Mead, were he alive, would have no standing to pursue a contract or implied covenant claim for enforcement of a gift restriction, and the special administrator may only pursue claims that the decedent himself could have brought. Accordingly, even if Plaintiff had alleged a viable contract claim, it must be dismissed on standing grounds pursuant to V.R.C.P. 12(b)(1).

3. The Gift Letter Is Not a Contract for Perpetual Naming Rights.

Finally, even if a claim in contract to enforce gift restrictions were cognizable under Vermont law (and even if Plaintiff had standing to pursue it), Plaintiff's claim would fail for lack of an enforceable contract.

As Middlebury observed in its Motion, Governor Mead's Gift Letter was, at most, a contract to make a future contract: the letter noted Mead's desire to construct a chapel, represented that he "had in mind" the furnishing of some sum between $50,000 and $60,000 for construction, and represented that he would "bind [him]self and [his] estate" to provide funds for construction only upon the College securing plans that met his approval and forming a committee to oversee the project. Complaint at p. 36. As a general matter, a "mere agreement to agree at some future time is not enforceable." *Miller v. Flegenheimer*, 2016 VT 125, ¶ 12, 203 Vt. 620, 161 A.3d 524 (quoting *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996)). Plaintiff's Opposition, however, ignores the contingent nature of the Gift Letter, the absence of a definite sum to be donated, and the fact that the letter expressly contemplated that Mead would only "bind" himself to the commitment at a later date, instead presenting the letter as a firm "offer" that the College "enthusiastically and unanimously accepted." Opposition at 16. This it clearly was not. Consider what would have happened if Middlebury had sought to enforce this "contract" immediately upon accepting Mead's "offer": a court almost certainly would have dismissed suit for lack of the "substantial terms of a complete contract," based on the absence of a definite sum alone. *Evarts v. Forte*, 135 Vt. 306, 309, 376

A.2d 766, 768 (1977); *see also Miller*, 2016 VT 125, ¶ 21 ("While it is true that not all terms of a contract need to be fixed with absolute certainty, it is also true that an agreement in which a material term is left for future negotiations is unenforceable." (quotations omitted)); *Sinex v. Wurster*, No. 2010-407, 2011 WL 4977680, at *1 (Vt. June 1, 2011) (affirming ruling that there was no legally enforceable contract absent "agreement on the most essential term of the arrangement—the financial obligations of each party").

Moreover, even if the Gift Letter were deemed to have given rise to a contract, a perpetual naming rights condition cannot reasonably be inferred as an enforceable term thereof. Despite Plaintiff's repeated assertions that it was an "essential term" of the alleged contract that the chapel "bear[] [Mead's] name forever," Opposition at 20 (*see also id.* at 16, 17, 18), the Gift Letter says no such thing. Mead plainly knew how to impose conditions—as witnessed by his express requirement that the College secure plans subject to his approval and form a committee before he would bind himself—and he did not make naming rights a condition of his donation. Nor does the Gift Letter anywhere suggest that the use of the Mead name was required to be "perpetual," as Plaintiff suggests. *Compare Herron v. Stanton*, 147 N.E. 305 (Ind. Ct. App. 1920) (express naming rights agreement stating that the use of the donor's "name or names shall be perpetual, or so long as said art gallery and art school are severally maintained"). There can be no question that the duration of the claimed obligation would have been an essential term. *Cf. Shea v. Millett*, 36 F.4th 1, 8 (1st Cir. 2022) (duration of

agreement is a material term); *Jalor Color Graphics, Inc. v. Knoll Pharm. Co.*, 26 F. App'x 38, 39 (2d Cir. 2001) (same).

For all of these reasons, Plaintiff has not plausibly alleged—and cannot—an enforceable contractual obligation for Middlebury to maintain Mead's name on its chapel. His claims should be dismissed on that basis.

D. Plaintiff Fails to Offer Any Plausible Basis to Treat Mead's Donation as a Conditional Gift.

Plaintiff's overwhelming focus on his contract-based claims—neglecting the one theory upon which Vermont law will afford some measure of relief to donors—betrays a tacit concession: the facts here do not, and cannot, make out a plausible claim for breach of a conditional gift. While Plaintiff briefly describes the contours of the cause of action, *see* Opposition at 33, Plaintiff makes no effort to argue that the facts alleged here could satisfy the requirements of Vermont law. And indeed, given Vermont's strong presumption against conditional gifts, and the absence of any reservation of a reversionary interest by Mead, there would be no colorable basis upon which to argue the point. *See Wilbur v. Univ. of Vt.,* 129 Vt. 33, 44, 270 A.2d 889, 897 (1970) (absence of reversionary interest or provision for forfeiture is "a strong indication that the donor did not contemplate a failure of the ultimate purpose of his gift")*; Ball*, 129 Vt. at 209, 274 A.2d at 522 (same).

The Opposition contains a lengthy discussion of *Tennessee Division of United Daughters of the Confederacy v. Vanderbilt University,* 174 S.W.3d 98 (Tenn. App. Ct. 2005), where a Tennessee court found violation of a conditional gift after Vanderbilt

University removed the name "Confederate Memorial Hall" from a campus building. That case, however, just serves to underline the absence of any plausible claim for breach of a conditional gift here. While Tennessee law, like Vermont law, disfavors conditional gifts and strictly construes gift instruments, *Daughters of the Confederacy* presented two critical differences from this case: (1) the contracts at issue "expressly and unambiguously required [Vanderbilt] to place an inscription on the building naming it 'Confederate Memorial,'" and (2) the contracts "expressly reserve[d] to the Tennessee [United Daughters of the Confederacy] the right to recall the gift if [Vanderbilt] fail[ed] or cease[d] to comply with [the] conditions" of the gift. *Id.* at 113, 117. As Mead's gift letter neither expressly required a grant of naming rights as a condition of his gift nor reserved a reversionary interest if such condition were violated, Plaintiff's claim for breach of a conditional gift must be dismissed.

E. Plaintiff Advances No Plausible Argument that He Has Standing to Pursue Enforcement of the Alleged Gift Restrictions.

While acknowledging that donor standing is a "complex problem," the Opposition offers very little argument for the proposition that Plaintiff in fact could have standing under Vermont law to pursue the claims he has brought. The few points the Opposition does make are readily dismissed.

First, the Opposition notes that the Uniform Trust Code has expanded standing to sue for enforcement of a charitable trust to include the trust's settlor. *See* Opposition at 43; *see also* 14A V.S.A. § 405(c). However, as Middlebury explained in its Motion, that expansion applied only to *express* trusts and did not more generally

expand standing for enforcement of restricted gifts. *See* Motion at 34-35. Courts in other jurisdictions have affirmed this conclusion. *See Courtenay C. & Lucy Patten Davis Found. v. Colorado State Univ. Res. Found.*, 320 P.3d 1115, 1126 (Wyo. 2014) (holding that Uniform Trust Code did not alter common law restrictions on donor standing); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 137-140 (Mo. App. Ct. 2009) (same). Plaintiff does not acknowledge or address those authorities or make any effort to explain how § 405(c) would apply to his claims.

Second, the Opposition emphasizes that donors *do* have standing to sue for reversion of a conditional gift upon failure of the condition. *See* Opposition at 45-46. While this is unquestionably true, *see, e.g.*, *Ball v. Hall*, 129 Vt. 200, 274 A.2d 516 (1970), such standing depends upon the Plaintiff establishing a valid conditional gift (including retention of a reversionary interest). As discussed above, Plaintiff has failed to do so.

Third, the Opposition refers in passing to certain "recent . . . judicial opinions that allow donors to have standing." Opposition at 43. The only such "recent opinion" cited in the corresponding footnote is *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001)—a case which lies outside of the mainstream on this issue and, in any event, involved materially different considerations than are present here. *Smithers* concerned a $10 million gift by R. Brinkley Smithers to St. Luke's–Roosevelt Hospital Center for establishment of a treatment center for alcoholism. After Mr. Smithers' death in 1994, his widow became concerned with the Hospital's management of the donated funds and pressed for disclosure of financial

statements. The Hospital ultimately was forced to disclose that it had been misappropriating funds from Mr. Smithers' endowment and using them for other purposes. Upon being notified by Mrs. Smithers, the New York Attorney General investigated and entered into an assurance of discontinuance with the Hospital. Mrs. Smithers, unsatisfied with the terms of the Hospital's resolution with the Attorney General, obtained appointment as Special Administrator of her husband's estate for purposes of enforcing the terms of his gift and thereafter brought suit.

After the trial court dismissed Mrs. Smithers' claims for lack of standing, the intermediate appeals court reversed in a 3-1 decision. Instrumental to the decision was the court's conclusion (based on a 1900 opinion from the New York Court of Appeals) that there was "longstanding recognition under New York law of standing for a donor such as Smithers." *Id.* at 435. The court acknowledged the existence of contrary precedent in other jurisdictions reflecting the traditional bar on donor standing, but distinguished those authorities as "not addressing the situation in which the donor was still living or his estate still existed." *Id.*

Here, unlike *Smithers*, there is no history of Vermont courts recognizing donor standing outside of cases involving express conditional gifts. Nor is Governor Mead's estate "still existing," as was the case in *Smithers*; rather, it was reopened more than a century after his death for the purpose of pursuing the present claims.[8] Even in

[8] The New York Appellate Division's emphasis on the fact that the donor's estate was "still existing" at the time of suit is congruent with the law governing express charitable trusts, which recognizes that a settlor's estate may have standing "during a reasonable period of estate administration." Restatement (Third) of Trusts § 94, cmt. g(3) (2012).

New York, it is unlikely that courts would recognize standing for the estate of a donor to sue for enforcement of gift restrictions so very long after the estate had been closed. Regardless, there has been no indication that *Smithers* marks any larger change in the common law on donor standing outside of New York. *See, e.g., Siebach,* 361 P.3d at 135 and n.4 (citing *Smithers* for proposition that "[a]t least one American jurisdiction has expanded the common-law rule to permit donor standing in some circumstances," but finding that the plaintiff donors lacked standing to enforce charitable gift restrictions and noting that the parties did "not argue that *Smithers* altered the general common-law rule that donors to charitable institutions lack standing to enforce their donative intent"); *Hardt*, 302 S.W.3d at 139-140 (rejecting argument for expansion of common law standing on the basis of *Smithers*).

In sum, Plaintiff has not offered any colorable basis for the Court to depart from the common law rule on donor standing and allow his claims to proceed. The Complaint should be dismissed for that reason.

CONCLUSION

Perhaps the most fundamental blind spot in Plaintiff's Opposition is its failure to recognize the unique place that charitable gifts occupy within our system of laws. In Plaintiff's account, Governor Mead's donation of a chapel to Middlebury College was a contractual transaction for the primary purpose of aggrandizing his family name, just as the Coca-Cola Company might enter into an advertising contract with a college or university to place its corporate logo on a stadium scoreboard. But that is not how the law traditionally has viewed charitable gifts.

As the Vermont Supreme Court has explained, the "State affords various privileges and immunities to a donor," including "tax advantages," with "[s]uch concessions . . . founded on the belief that the public interest derives substantial benefit" from charitable giving. *Ball*, 129 Vt. at 211, 274 A.2d at 523. Thus, while the "personal gratification of the donor" may play a part in motivating a gift, the Court has emphasized that such "subordinate interest must yield" to the larger public interest. *Id.* For this reason, the law is hesitant to recognize restrictions burdening charitable gifts—and, where such restrictions are found, entrusts the Attorney General alone to oversee compliance with a view toward the public good.

Plaintiff has provided no compelling argument to upend the traditional legal framework governing charitable gifts in Vermont and treat Governor Mead's gift as a mere contractual obligation enforceable by his estate. As Vermont law does not recognize a right of action for a donor under the facts alleged here, Middlebury College respectfully requests that the Court grant its Motion and dismiss Plaintiff's Complaint.

Dated at Burlington, Vermont, this 14th day of July, 2023.

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