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December 10, 2014

Via E-mail
Via Hand Delivery

Harvard Climate Justice Coalition
309 Allston Street
Cambridge, MA 02139

Re: Civil Action No. 14-3620H

Dear Harvard Climate Justice Coalition, et. al.:

Pursuant to Superior Court Rule 9A, enclosed please find a copy of the following documents:

1. President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss;

2. Memorandum of Law in Support of President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss;

3. Copy of Superior Court Rule 9A; and

4. President and Fellows of Harvard College and Harvard Management Company, Inc.'s Notice of Motion to Dismiss filed today with the Court pursuant to Superior Court Rule 9E.

Under Rule 9A, you are required to serve an original and a copy of your opposition papers to me within 10 days. Understanding that this timeframe may be difficult to meet in light of your exam schedule, however, I would be happy to extend the deadline for your response to January 5, 2015. Please let me know if you would like this extension of time.

Cordially,

Martin F. Murphy

JAK:
Enclosures

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 14-3620H

HARVARD CLIMATE JUSTICE COALITION, ET. AL.,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, HARVARD MANAGEMENT COMPANY, INC., AND MARTHA COAKLEY.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE AND HARVARD MANAGEMENT COMPANY, INC.'S MOTION TO DISMISS

Pursuant to Mass. R. Civ. P. R. 12(b)(1) and 12(b)(6), Defendants President and Fellows of Harvard College and Harvard Management Company, Inc. (collectively "Harvard") hereby move that this Court dismiss the Complaint of Plaintiffs Harvard Climate Justice Coalition, et. al. ("Plaintiffs") for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Harvard's accompanying Memorandum of Law in Support of President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss sets forth the basis on which the Complaint should be dismissed, including:

1. Plaintiffs lack standing to bring a lawsuit to challenge Harvard's investment of charitable funds;

2. Harvard's investment strategy is entirely lawful and Plaintiffs fail to allege any unlawful conduct; and

3. Plaintiffs' claim that Harvard intentionally invested in "abnormally dangerous activities" fails to state a legally recognized basis for relief.

WHEREFORE, for the aforementioned reasons and those set forth in the accompanying Memorandum of Law in Support of President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss, Harvard respectfully requests that the Court dismiss Plaintiffs' Complaint.

Request for Hearing

Pursuant to Superior Court Rule 9A(c)(2), Harvard respectfully requests a hearing on its motion and states that Superior Court Rule 9A(c)(3) creates a presumptive right to a hearing on a Rule 12 motion to dismiss.

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE and
HARVARD MANAGEMENT COMPANY, INC.

By their attorneys,

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Dated: December 10, 2014

Certificate of Service

I hereby certify that a true copy of the above document was served upon Harvard Climate Justice Coalition, Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel, Talia K. Rothstein, and Kelsey C. Skaggs by hand at Harvard Climate Justice Coalition, 309 Allston Street, Cambridge MA 02139 and by e-mail and upon Assistant Attorney General Brett Blank by hand at the Massachusetts Attorney General's Office, 1 Ashburton Place, Boston, Massachusetts 02108 and by e-mail on December 10, 2014.

Jennifer A. Kirby

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 14-3620H

HARVARD CLIMATE JUSTICE COALITION, ET. AL.,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, HARVARD MANAGEMENT COMPANY, INC., AND MARTHA COAKLEY.

MEMORANDUM OF LAW IN SUPPORT OF PRESIDENT AND FELLOWS OF HARVARD COLLEGE AND HARVARD MANAGEMENT COMPANY, INC.'S MOTION TO DISMISS

I. Introduction.

Plaintiffs' Complaint alleges that President and Fellows of Harvard College and Harvard Management Company, Inc. (collectively, "Harvard") violated their duties as public charities by investing in fossil fuel companies. Plaintiffs also seek relief based on the claim that Harvard "intentionally invest[ed] in abnormally dangerous activities." While Harvard agrees that there is a need to address climate change, and continues to work toward that goal in a variety of ways, including through research, teaching and scholarship activities, Mass. R. Civ. P. 12(b)(1) and 12(b)(6) require that Plaintiffs' Complaint be dismissed for three main reasons.

- First, Plaintiffs have no standing to bring a lawsuit to challenge Harvard's investment of charitable funds. Under Massachusetts law, standing to contest a charitable organization's management is the exclusive province of the Attorney General, except in extraordinary circumstances not present here.
- Second, investments in fossil fuels are entirely lawful. Plaintiffs do not – and could not – allege that Harvard's investment strategy constitutes the kind of "misappropriation" or self-dealing in charitable funds that would permit even the Attorney General to act.
- Third, Plaintiffs' novel claim that Harvard intentionally invested in "abnormally dangerous activities" fails to state a legally recognized basis for relief.

While Harvard encourages vigorous debate about how society should best address climate change, Plaintiffs' Complaint is not the appropriate vehicle for such a debate. Permitting claims like the Plaintiffs' to proceed would improperly compromise the inherent authority of Harvard and other non-profit entities to manage their own affairs, entangling courts in the myriad internal decisions inherent in running a charitable organization—a result plainly inconsistent with the public interest and well-settled law.

II. The Allegations in the Complaint.

Plaintiffs identify themselves as an unincorporated organization with a "mission to educate the Harvard community on the facts of climate change" and seven currently enrolled students, each claiming an interest in promoting efforts to address climate change and in the "University's current and long-term reputational and physical health," and assert that they are also acting on behalf of "Future Generations," meaning "individuals not yet born or too young to assert their rights." *Id.* at ¶¶ 1-9, 50-62.

Plaintiffs seek injunctive relief as follows: (1) an order requiring Harvard's immediate withdrawal of direct holdings in fossil fuel companies; and (2) an order requiring Harvard to take "immediate steps to begin withdrawing indirect holdings" and to completely withdraw indirect holdings "within a reasonable period of time." Cplt. at ¶ 74. Plaintiffs also seek a declaratory judgment that Harvard breached the obligations contained in its Charter. *Id.* Plaintiffs allege that Harvard violated its duties as a public charity under M.G.L. c. 180, § 4 and c. 180A by mismanaging charitable funds and further allege that Harvard "intentionally invest[ed] in abnormally dangerous activities," a novel tort theory. *Id.* at ¶¶ 41-73.

As referenced in the Complaint, demands for Harvard to divest from fossil fuel companies also have been made outside this Court, and Harvard has concluded that its core mission as

an institution devoted to research and teaching would not be well-served by doing so. Harvard President Drew Faust has explained the reasons for that decision at length:

> Harvard is an academic institution. It exists to serve an academic mission — to carry out the best possible programs of education and research. We hold our endowment funds in trust to advance that mission, which is the University's distinctive way of serving society. The funds in the endowment have been given to us by generous benefactors over many years to advance academic aims, not to serve other purposes, however worthy. As such, we maintain a strong presumption against divesting investment assets for reasons unrelated to the endowment's financial strength and its ability to advance our academic goals.
>
> We should, moreover, be very wary of steps intended to instrumentalize our endowment in ways that would appear to position the University as a political actor rather than an academic institution. Conceiving of the endowment not as an economic resource, but as a tool to inject the University into the political process or as a lever to exert economic pressure for social purposes, can entail serious risks to the independence of the academic enterprise. The endowment is a resource, not an instrument to impel social or political change.
>
> We should also be clear-sighted about the risks that divestment could pose to the endowment's capacity to propel our important research and teaching sion. Significantly constraining investment options risks significantly constraining investment returns. The endowment provides more than one-third of the funds we expend on University activities each year. Its strength and growth are crucial to our institutional ambitions — to the support we can offer students and faculty, to the intellectual opportunities we can provide, to the research we can advance. Despite some assertions to the contrary, logic and experience indicate that barring investments in a major, integral sector of the global economy would — especially for a large endowment reliant on sophisticated investment techniques, pooled funds, and broad diversification — come at a substantial economic cost.[1]

Indeed, Plaintiffs' Complaint itself reflects the significant steps Harvard has taken to address climate change in ways consistent with its mission. Most importantly, Harvard has supported research and scholarship by faculty and students on the scientific, legal, economic, politi-

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[1] *See* Fossil Fuel Divestment Statement, October 3, 2013, available at www.harvard.edu/president/fossil-fuels (cited by Cplt. at Ex. J).

cal and public health aspects of climate change – the kind of work that is fundamentally at the heart of a university's enterprise. Cplt. at Ex. J. Beyond that, and as noted in President Faust's April 7, 2014 letter to the Harvard community, Harvard has reduced greenhouse gas emissions university-wide with a goal of a 30 percent reduction by 2016, has become a signatory to two organizations, United Nations-supported Principles for Responsible Investment and the Carbon Disclosure Project's climate change program, and is raising money for research through the Climate Change Solutions Fund. *Id.* at Exs. J, Y. In addition, Harvard Management Company recently hired a Vice President for Sustainable Investing who is "responsible for researching and understanding environmental, social, and governance (ESG) issues related to Harvard's endowment portfolio." *Id.* at Ex. X.

But Plaintiffs believe this Court should order Harvard to engage in a very different type of action: to use its endowment as a political instrument. They ask the Court to require Harvard to adopt Plaintiffs' views on its institutional responsibilities in place of the considered judgments of its own leadership and fiduciaries. Plaintiffs contend that the investments at issue constitute a breach of Harvard's "fiduciary and charitable duties as a public charity" because they "contribute to climate change" and conflict both with language in Harvard's Charter extolling "the advancement and education of youth," and with statements made by President Faust that Harvard "has a special obligation and accountability to the future, to the long view needed to anticipate and alter the trajectory and impact of climate change." *Id.* at ¶¶ 42-46. Plaintiffs further allege that Harvard's investment in fossil fuel companies supports the actions and influence of these companies, thereby impeding the mission of Plaintiffs' unincorporated organization and "contribut[ing] to the diminishment" of the individual Plaintiffs' educations. *Id.* at ¶¶ 52-62. Finally, Plaintiffs assert that Harvard knows or should know with substantial certainty that its investments support

fossil fuel companies' business activities, which Plaintiffs allege are abnormally dangerous because they contribute to climate change. *Id.* at ¶ 66, 68. For the reasons set forth below, Plaintiffs' claims should be dismissed.

III. The Standard for a Motion to Dismiss.

To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint "requires more than labels and conclusions . . . [w]hat is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citations omitted). The complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* (citations omitted). The Court need "not accept legal conclusions cast in the form of factual allegations." *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) (affirming dismissal of complaint against Brandeis). "The purpose of Rule 12(b)(6) is to permit prompt resolution of a case where the allegations in the complaint clearly demonstrate that the plaintiff's claim is legally insufficient." *Harvard Crimson, Inc. v. Pres. & Fellows of Harvard Coll.*, 445 Mass. 745, 748 (2006) (affirming dismissal of complaint against Harvard). Harvard also seeks dismissal under Mass. R. Civ. P. 12(b)(1); where, as here, Plaintiffs lack standing to assert a claim, the Supreme Judicial Court has held that courts lack subject matter jurisdiction. *Ginther v. Com'r of Ins.*, 427 Mass. 319, 322 (1998).

IV. Plaintiffs Lack Standing.

Both of Plaintiffs' claims are based on allegations that Harvard mismanaged charitable funds.[2] However, Plaintiffs lack standing to bring any such claim because the Attorney General has the "exclusive and discretionary role as a protector of the public interest in the efficient and lawful operation of charitable corporations." *Weaver v. Wood*, 425 Mass. 270, 276 (1997) (quot-

[2] Count I is entitled "Mismanagement of Corporate Funds." Count II, while framed as a novel tort action, necessarily also relates to Harvard's investment strategies.

ing *Lopez v. Medford Community Ctr., Inc.*, 384 Mass. 163, 167 (1981)); M.G.L. c. 12, § 8. In addition, as to Plaintiff Harvard Climate Justice Coalition, "[i]t is a well established principle that an unincorporated association cannot be a party to litigation." *Save the Bay, Inc. v. Dep't of Pub. Utilities*, 366 Mass. 667, 675 (1975) (citing cases); *see also, e.g., Harvard Square Defense Fund, Inc. v. Planning Board of Cambridge*, 27 Mass. App. Ct. 491, 495 (1989). Based on lack of standing alone, the Complaint should be dismissed.

A. The Attorney General Has Exclusive Authority to Enforce the Due Application of Funds of a Public Charity

Under Massachusetts common and statutory law, the Attorney General "shall enforce the due application of funds given or appropriated to public charities within the commonwealth." M.G.L. c. 12 § 8; *Ames v. Attorney General*, 332 Mass. 246, 250 (1955) ("The duty of taking action to protect public charitable trusts and to enforce proper application of their funds rests solely upon the Attorney General as the representative of the public interests."). The Supreme Judicial Court consistently has held that allegations of mismanagement of charitable funds – like those in Plaintiffs' Complaint – fall under the Attorney General's exclusive authority. In *Weaver v. Wood*, the directors of the First Church of Christ, Scientist appealed a finding that plaintiffs, members of the Church, had standing to litigate claims that the directors failed to abide by the charitable organization's governing documents and violated their fiduciary duties by authorizing investments in "television ventures." 425 Mass. 270, 271-74 (1997). The Court held that the plaintiffs lacked standing and lacked an enforceable legal interest in the administration of a charitable organization, noting, "the Legislature has determined that the Attorney General is responsible for ensuring that its charitable funds are used in accordance with the donor's wishes." *Id.* at 275-78; *see also Dillaway v. Burton*, 256 Mass. 568, 573 (1926) (no standing in suit alleging financial mismanagement of a charity brought by a plaintiff who was both a trustee of a will

directing gifts to the charity and a member of the charity because the Attorney General has sole authority to "correct abuses in the administration of a public charity").

Indeed, the Supreme Judicial Court has held that the exclusive responsibility of the Attorney General extends beyond enforcing the "due application of funds." In *Estate of Moulton v. Puopolo*, the plaintiff alleged, *inter alia*, breach of fiduciary duty arising from the adoption of certain policies by the directors of a charitable corporation. 467 Mass. 478, 479-80 (2014). The Court held that even if the complaint had alleged harm to the charitable corporation or the public, exclusive standing nonetheless would rest with the Attorney General. *Id.* at 492-93 ("[T]he plaintiff does not have standing to bring an action to protect the public interest in the efficient and lawful operation of a charitable corporation, or to correct any abuse or error in the administration of that corporation.").

The law's recognition of the Attorney General's exclusive authority to regulate public charities is grounded in sound public policy. Plaintiffs' contention that this Court should order Harvard to divest from fossil fuels would open the door to litigation over the management of charitable organizations' internal affairs without any limiting principle. Surely, the broad and aspirational language of Harvard's Charter—which seeks to promote "the advancement and education of youth"—cannot give Harvard students the right to ask this Court to supersede the University's investment decisions because the students disagree with them. Otherwise, Harvard's endowment would become fair game for a variety of claims seeking to vindicate the special interests of other segments of the University's remarkably diverse student body. Nor would there be anything to stop student plaintiffs from litigating an unlimited number of other grievances relating to their schools' internal management, all of which courts are ill-equipped to address, such as the content of the curriculum, the kind of housing offered, or the dates of the academic year,

to name just a few. Conferring standing on students to bring claims like these would enmesh the courts in day-to-day controversies that the law explicitly and for good reason has chosen to make the province of charitable organizations' governing bodies (with oversight, in extraordinary circumstances, of the Attorney General). *See Dillaway,* 256 Mass. at 575 ("The power and duty delegated to the Attorney General to enforce the proper application of charitable funds are a recognition by the Legislature not only of his fitness as a representative of the public in cases of this kind, but of the necessity of protecting public charities from being called upon to answer to proceedings instituted by individuals, with or without just cause, who have no private interests distinct from those of the public.").

B. Plaintiffs Have Failed to Allege a "Special Interest" Sufficient to Provide Standing to Litigate Their Claims

Student status alone has been found insufficient to confer standing. This is entirely consistent with the body of Massachusetts law that establishes the exceedingly narrow grounds on which individuals legally may challenge the actions of charitable organizations. Massachusetts courts have only "on occasion recognized a private plaintiff's standing to make claims against a public charity." *Weaver*, 425 Mass. at 276. Only when a plaintiff can assert "individual interests" that are "personal, specific, and exist apart from any broader community interest," including reversionary and other legal interests in property and the enforcement of individual voting rights under a charitable organization's bylaws, might he or she have standing to pursue a claim. *See Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007) (finding that the plaintiffs' claims of a reversionary interest in conditionally gifted property and a claim of the loss of "substantial personal funds" due to the defendant's negligent misrepresentation would "in the ordinary course, entitle them to standing"); *see also Trustees of Dartmouth College v. Quincy*, 331 Mass. 219, 225 (1954) (holding that petitioner had a "special interest" in mainte-

nance of a fund because the petitioner would be entitled to the fund on occurrence of a contingency stated in the will). In this case, Plaintiffs have failed to assert any "individual" or "special interests" sufficient to confer standing.

Essentially, Plaintiffs' claim of "special interest" can be reduced to their status as Harvard students—which, as discussed below, courts consistently have rejected as the basis for standing. Being a student of a charitable organization is an interest even more remote than being a member of a charitable organization, which the Supreme Judicial Court also has found insufficient "to give standing to pursue claims that a charitable organization has been mismanaged or that its officials have acted ultra vires." *Weaver*, 425 Mass. at 277. Plaintiffs' claims are closely analogous to those made in *Corrigan v. Roman Catholic Archbishop of Boston*, where the Appeals Court affirmed dismissal of a complaint brought by parishioners, both individually and on behalf of other parishioners, for injunctive and declaratory relief related to the defendant's management of property in a charitable trust. 2008 Mass. App. Unpub. LEXIS 332, at *1 (Mass. App. Ct. Sept. 19, 2008). The court held that the plaintiffs lacked standing because they failed to allege any personal interest in real or personal property conditionally donated to the church and did not claim to be "a successor in interest to any legal or beneficial interest in the items of property." *Id.* at *7. The court also held that to the extent that the plaintiffs were "acting in a representative capacity for other members, standing is not conferred upon plaintiffs acting in this capacity." *Id.* at *10.

Plaintiffs' assertion that they have personal and specific interests that exist apart from the broader community and have suffered "direct and particularized harms,"[3] Cplt. ¶¶ 49-52, and

[3] Notably, the harms alleged by Plaintiffs are not only legally deficient, but also factually undercut by the Complaint as a whole. Plaintiffs contend, for example, that Harvard's investment in fossil fuel companies "has a chilling effect on academic freedom and the willingness of faculty,

their companion assertion that investment in fossil fuels "directly affects" education, amount to nothing more than "legal conclusions cast in the form of factual allegations." As such, this Court need not accept them as true in analyzing the motion to dismiss. *See Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000). Indeed, the Court should reject these legal conclusions because Plaintiffs' alleged interests are indistinguishable from the public interest. Plaintiffs' recitation of their alleged harms—namely that Harvard's investment in fossil fuels "directly affects 'the advancement and education of youth' and the maintenance of the university's physical campus"—in fact undercuts their position; any other students or alumni, or even members of the public, also might be "affected by the University's current and long-term reputational and physical health." *Id.* at ¶¶ 52-53. The mere fact that Harvard's founding document focuses on the "advancement and education of youth" hardly confers on Plaintiffs the kind of special interest courts have viewed as sufficiently distinct to confer standing.[4]

Furthermore, courts firmly have rejected the notion that student status, without more, is sufficient to establish standing to challenge an educational institution's governance. As the Su-

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students, and administrators to publicly confront climate change;" "impedes their ability to associate with like-minded colleagues;" and "distorts academic research into scientific remedies for climate change." *See* Cplt. at ¶¶ 55-62. Even if these interests were legally protected – which they are not – the Complaint itself, which describes Plaintiffs' own student activities, including the formation of the Harvard Climate Justice Coalition, as well as the actions taken by Harvard to research and address climate change, undermines their very allegations of harm. *See* Cplt. ¶¶ 1-9, Exs. J, X, and Y.

[4] Even if Plaintiffs had alleged a recognized special interest, such as a reversionary interest—which they have not—they would have standing only to pursue a claim arising from that specific interest and would not have standing for the broader claims that they seek to advance. In *Lopez v. Medford Community Center, Inc.*, the plaintiffs raised several claims of corporate mismanagement and a claim related to the denial of their right to a membership vote in violation of the charitable organization's bylaws. 384 Mass. 163, 165 (1981). The Court held that the plaintiffs had standing to litigate only the claim that they were unlawfully denied a membership vote and had "no standing to prosecute their claims of corporate mismanagement." *Id.* at 169; *see also Weaver*, 425 Mass. at 276 (stating Court has recognized individual standing only for claims that have "arisen from a personal right that directly affects the individual member").

preme Court wrote nearly two centuries ago in *Trustees of Dartmouth College v. Woodward*, Dartmouth students had no vested rights in its governance and therefore would have no standing to sue under its charter. 17 U.S. (4 Wheat.) 518 (1819), 641-43. Indeed, the Court went on to hold that the Dartmouth corporation itself was a "trustee" for its students, which would "exercise[]... assert[]... and protect[]..." their aggregate potential rights. *Id.* at 642-43. Here, Plaintiffs seek to substitute their personal views about how they would like the institution to operate for the views of their "trustee," Harvard itself. The court must not, and indeed cannot, permit this. Harvard alone, not Plaintiffs (and, absent extraordinary circumstances, not even the Attorney General) is empowered to make decisions about its corporate governance.

Subsequent courts, citing *Dartmouth College,* also have held that students lack standing to sue over corporate governance. *See, e.g., Russell v. Yale University*, 737 A.2d 941, 946 & n.6 (Conn. App. 1999); *Miller v. Alderhold*, 184 S.E.2d 172, 174-75 (Ga. 1971). Notably, the *Russell* court denied standing to a group of Yale Divinity School students who challenged a vote by the Fellows of the Yale Corporation to reorganize the divinity school, including demolishing large portions of its campus—a far less attenuated "special interest" than that asserted by Plaintiffs in the current case, and yet still insufficient to establish standing. The Supreme Judicial Court also has rejected student standing in litigation involving the racial composition of a faculty—again, a far less attenuated interest for students than the composition of funds in their school's endowment. In *Harvard Law School Coalition for Civil Rights v. President & Fellows of Harvard College*, the Court held that law students did not have standing to sue Harvard for failure to hire a racially diverse law school faculty, stating that the students were "no more than incidental beneficiaries of [the faculty] contracts." 413 Mass. 66, 71 (1992).

In sum, as Plaintiffs have alleged no special interest sufficient to give them standing to contest Harvard's investment decisions, their Complaint should be dismissed in its entirety.

V. Plaintiffs' Complaint Must Be Dismissed Because They Have Failed to Allege Any Unlawful Conduct.

A. There is no Basis for the Allegation in Count I that Harvard Mismanaged Charitable Funds

Even if Plaintiffs had standing—which they do not—their Complaint must be dismissed because Harvard's investments in fossil fuel industries are entirely lawful. The law does not require a university to ensure that each investment choice is palatable to each of its students. Nor does the law permit courts (or students for that matter) to act as supervisory portfolio managers, picking and choosing which stocks a university—or any other charitable organization—should buy and sell. Rather, Massachusetts law requires charitable organizations to manage and invest funds "in good faith and with the care that an ordinarily prudent person in a like position would exercise under similar circumstances." M.G.L. c. 180A, § 2(b). Fiduciaries' judgments are accorded broad deference and, as a matter of law, Harvard's investment decisions are well within the zone of protected discretion.

The law states explicitly: "[A]n institution may invest in any kind of property or type of investment consistent with this section." M.G.L. c. 180A, § 2(e)(4). While, as Plaintiffs note, M.G.L. c. 180A, § 2(e)(viii) requires a charitable organization to consider an asset's relationship to its charitable purposes, Cplt. ¶ 45, other parts of the Chapter require charitable organizations also to consider "general economic conditions, the possible effect of inflation or deflation, the expected tax consequences..., the role that each investment... plays within the overall investment portfolio of the fund, the expected total return from income and the appreciation of investments, other resources of the institution, and the needs of the institution and fund to make distributions and to preserve capital." M.G.L. c. 180A, § 2(e). In other words, the law mandates a

number of factors that charitable institutions must consider when managing the assets in their trust—not just the one factor on which Plaintiffs have focused.

Plaintiffs claim that Harvard has breached its fiduciary duties by investing in fossil fuel companies because these investments "contribute to current and future damage" to Harvard's physical campus, to the reputation of the University and its students, and to the students' ability to "study and thrive" free from worries about climate change.[5] Cplt. ¶ 47. While Plaintiffs may disagree with Harvard's investment decisions, the facts alleged in the Complaint simply do not support a claim that Harvard acted outside the bounds of M.G.L. c. 180A. Indeed, Harvard's obligation to steward its endowment is one important reason why the University has chosen to address climate change not by divesting but instead through its core mission of teaching, research and scholarship.

In *Attorney General v. President & Fellows of Harvard College*, decided eleven years after *Ames, supra*, the Supreme Judicial Court analyzed whether Harvard's moving the library and herbarium of the Arnold Arboretum from Boston to Cambridge was a breach of the trust establishing the Arboretum. 350 Mass. 125, 126 (1966). Holding that Harvard did not violate its duties when, after considering the "overall welfare of the university and the ultimate purposes of all its foundations," it decided to move parts of the Arboretum, the Supreme Judicial Court

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[5] Plaintiffs do not allege that Harvard has misappropriated funds or that its investment decision makers have engaged in a self-interested transaction—two circumstances where the Attorney General and the courts might intervene in a charitable organization's decisions about investments. Assurance of Discontinuance, *In the Matter of the National Graduate School of Quality Management, Inc.*, C.A. No. 12-1874-D (Mass. Att'y Gen. Apr. 22, 2014), http://www.mass.gov/ago/docs/press/2014/ngs-aod.pdf (Attorney General alleged, *inter alia*, board members breached their fiduciary duty by misappropriating the organization's funds to purchase luxury items for personal use); *see also* Findings and Recommendations, Suffolk University (Mass. Att'y Gen. Jul. 9, 2009), http://www.mass.gov/ago/docs/nonprofit/findings-and-recommendations/suffolk-university-070909.pdf (Attorney General investigated transactions with a contractor in which a trustee held an interest).

acknowledged that "[r]esolution of possibly divergent interests is inherent in the holding and management by a single institution of a number of public trusts for independent, related or overlapping purposes." *Id.* at 139.

Plaintiffs cite no case where a court has substituted its judgment for a university's on investment (or divestment) matters and we have located no such decision. Massachusetts statutes and case law afford charities broad discretion in investing their funds and for good reason. Plaintiffs' attempt to have the Court intervene in the investment decisions of a charitable organization, however well-intentioned, has potentially far-reaching and problematic consequences. If Plaintiffs were able to compel Harvard to divest from a category of assets, would the University then be subject to suit by another group of students —perhaps those interested in reducing the costs of their education—claiming that its investment managers had failed to obtain the greatest return on investment? When, in 2002, some members of its community petitioned Harvard to divest from Israel, *see* Cplt. at Exs. N, should the courts, rather than the institution, have decided the question?

Not all of a university's investments will be popular with all of its students or other members of its community. But Plaintiffs cannot allege that investments in fossil fuel businesses are inherently unlawful. Universities are appropriately cautious about deploying their endowments for political purposes, as Plaintiffs would have them do, and courts should not second-guess their considered judgments.

B. "Intentional Investment in Abnormally Dangerous Activities" is not a Legally Cognizable Claim.

In Count II, Plaintiffs raise a novel tort theory: "Intentional Investment in Abnormally Dangerous Activities." Count II focuses on obtaining relief on behalf of Future Generations, asserting their rights "in recognition of the values enshrined in the Preamble[s]" of the Constitu-

tions of Massachusetts and of the United States. Cplt. at ¶¶ 72-73. Plaintiffs allege in particular that "fossil fuel companies' business activities . . . inevitably contribute to climate change, causing serious harm to Plaintiffs' Future Generations' persons and property" and further allege that Harvard's investments in fossil fuel companies "contribute[] directly and indirectly to Plaintiff Future Generations' harm." Cplt. at ¶¶ 66, 70. Like the rest of the Complaint, Count II must be dismissed both because Plaintiffs lack standing and because it fails to state a claim.

First, Plaintiffs do not explain why Future Generations, any more than current Harvard students, have standing to assert claims based on Harvard's investment activities. They do not claim that Future Generations stand as "a successor in interest to any legal or beneficial interest in the items of property" donated to Harvard—a circumstance that might permit such claims to be asserted. *See Corrigan v. Roman Catholic Archbishop of Boston*, 2008 Mass. App. Unpub. LEXIS 332, at *7 (Mass. App. Ct. Sept. 19, 2008). Nor do Plaintiffs explain why they in particular, as opposed to others, should be permitted to assert claims as the "next friend" of Future Generations.

Second, no court ever has recognized the tort of "Intentional Investment in Abnormally Dangerous Activity." While courts are not precluded from considering claims that do not allege an established common law tort, the Supreme Judicial Court has in the past recognized new tort actions when "there have been many persuasive decisions thereon in other jurisdictions." *George v. Jordan Marsh Co.*, 359 Mass. 244, 251 (1970) (first recognizing a claim for intentional infliction of emotional distress). That is not the case here.

Count II fails to allege the elements of any cognizable tort against Harvard. "All torts share the elements of duty, breach of that duty, and damages arising from that breach." *Ankiewicz v. Kinder*, 408 Mass. 792, 795 (1990). "Tort law provides damages only for harms to the

plaintiffs' legally protected interests . . ." *Correia v. Fagan*, 452 Mass. 120, 128 (2008) (quotation omitted); *see also Redgrave v. Boston Symphony Orchestra, Inc.*, 557 F. Supp. 230, 238 (D. Mass. 1983) ("tort actions protect interests in freedom from harms incident to intrusions upon legally protected interests"); Restat. 2d of Torts, §870(e) (to be cognizable, the injury must be "to a legally protected interest of the plaintiff"). Plaintiffs also must prove causation—that the defendant's actions caused their damages. *See Matsuyama v. Birnbaum*, 452 Mass. 1, 16 (2008). Because Plaintiffs, either on their own behalf or on behalf of Future Generations, cannot satisfy these necessary elements, Count II must be dismissed.

Harvard owes no duty to Plaintiffs to invest in or divest from particular industries. While Harvard must manage its charitable funds in good faith and with reasonable care, that duty does not run to Plaintiffs. Moreover, absent a legislative intention to create a private right of action for an alleged statutory violation, Massachusetts courts are reluctant to infer one. *Boston Med. Ctr. Corp. v. Sec'y of the Exec. Office of HHS*, 463 Mass. 447, 454 (2009). That concern is particularly salient here, as Massachusetts law vests enforcement of Chapter 180A to the sole discretion of the Attorney General.

It is also clear that there has been no breach of duty. As discussed above, provided that it takes into consideration the criteria listed in Chapter 180A, Harvard "may invest in any kind of property or type of investment." M.G.L. c. 180A, § 2(e)(4).

Nor have Plaintiffs alleged harm to a recognized, legally-protected interest. The harm they claim to have suffered—for example, the allegation that Harvard's "support of fossil fuel companies impedes their ability to associate with like-minded colleagues and to avail themselves of the open scholarly environment that Defendant Harvard Corporation has a duty to maintain"—is (even if true) simply not an interest that the law ever has chosen to protect. Cplt. at ¶

55. Plaintiffs' claim of harm to "Plaintiffs Future Generations' persons and property," likewise fails to assert harm to a legally protected interest. "With the exception of established torts deriving from the action of trespass, proof of actual harm is required." Restat. 2d of Torts, §870 (m). Possible future harm to the persons or property of future generations, without proof of actual harm or injury, is not a legal interest protected by tort law.

Finally, Plaintiffs cannot establish the element of causation. Even if they were able to demonstrate that they had a recognized, legally-protected interest that was damaged by the activities of the fossil fuel companies in which Harvard has invested, seeking to hold Harvard itself liable for the actions of these companies would run counter to black letter law insulating stockholders from liability for the actions of the companies in which they invest. *See Hanson v. Bradley*, 298 Mass. 371, 379-80 (1937) (stating that corporations are "an entity separate from the stockholders" so that stockholders may invest without risk to "their uninvested assets and their personal responsibility").

At heart, the novel tort theory Plaintiffs put forward in Count II is simply another attempt to challenge Harvard's investment decisions. For the reasons discussed at greater length above, allowing such a challenge would be contrary to the Commonwealth's settled law and established public policy, which appropriately protect charitable institutions' ability to make their own financial and other decisions, provided that their decisions comply with Chapter 180A.

VI. Conclusion

The Court should dismiss Plaintiffs' Complaint under Mass. R. Civ. P. 12(b)(1) and 12(b)(6). Massachusetts law wisely gives the governing bodies of institutions like Harvard broad discretion to manage their own affairs and the Attorney General exclusive authority to intervene when leaders of charitable organizations engage in misappropriation or self-dealing. This is not

one of those exceptional cases where a plaintiff claims harm to an individualized, legally-protected interest in a public charity's management of funds. Moreover, Harvard's investment decisions, which are its own to make, are entirely lawful. Harvard has made a considered judgment not to divest from fossil fuel companies. In keeping with its academic mission, Harvard of course welcomes discussion about this issue and other aspects of its governance, and actively promotes teaching about and research into the causes of and solutions to climate change, but allowing Plaintiffs to air their grievances with Harvard's fiduciary decisions in this Court would be both unprecedented and unwarranted.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE AND HARVARD MANAGEMENT COMPANY, INC.

By Its Attorneys,

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Dated: December 10, 2014

Certificate of Service

I hereby certify that a true copy of the above document was served upon Harvard Climate Justice Coalition, Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel, Talia K. Rothstein, and Kelsey C. Skaggs by hand at Harvard Climate Justice Coalition, 309 Allston Street, Cambridge MA 02139 and by e-mail and upon Assistant Attorney General Brett Blank by hand at the Massachusetts Attorney General's Office, 1 Ashburton Place, Boston, Massachusetts 02108 and by e-mail on December 10, 2014.

Jennifer A. Kirby

Superior Court Rule 9A: Civil Motions

(a) Form of Motions and Oppositions Thereto.

(1) Motions. A moving party shall serve with the motion a separate memorandum stating the reasons, including supporting authorities, why the motion should be granted and may include a request for a hearing. Affidavits and other documents setting forth or offering evidence of facts on which the motion is based shall be served with the motion.

(2) Oppositions to Motions. A party opposing a motion may serve a memorandum in opposition. The memorandum in opposition may include a statement of reasons, with supporting authorities, why the motion should not be allowed and may include a request for a hearing. Affidavits and other documents setting forth or offering evidence of facts on which the opposition is based shall be served with the memorandum in opposition.

(3) Reply and Sur-reply Memoranda. A reply memorandum may be filed only with leave of court. Such leave must be sought within 5 days of service of a memorandum in opposition. A reply memorandum shall be limited to addressing matters raised in the opposition that were not and could not reasonably have been addressed in the moving party's initial memorandum. In view of the limitations upon a reply memorandum, a sur-reply is strongly disfavored and may not be filed without leave of court sought within 5 days of service of the reply. To request leave of court, a party shall send a letter to the Session Judge setting forth the grounds to support the request and shall serve the letter on all other parties. If leave is granted, the requesting party shall serve notice of the grant of leave with its reply memorandum or sur-reply.

(4) Facts Verified by Affidavit. The court need not consider any motion or opposition thereto, grounded on facts, unless the facts are verified by affidavit, are apparent upon the record, or are agreed to in writing, signed by interested parties or their counsel.

(5) Format and Length. All motions, memoranda of law and other papers, except for exhibits, filed pursuant to this rule shall be filed on 8 1/2" by 11" paper and, except for exhibits, shall be typed in no less than 12-point type and double-spaced, provided that the title of the case, footnotes and quotations may be single spaced. The title of each document shall appear on the first page thereof. Unless leave of court has been obtained in advance, all memoranda of law and the oppositions thereto shall not exceed 20 pages, and any reply memoranda shall not exceed 10 pages. Any appendix permitted by Superior Court Rule 30A shall not be included in the page limit. To request leave of court, a party shall send a letter to the Justice presiding in the session where the motion will be filed stating the number of pages the party desires, and why the party's objective cannot be achieved within the applicable page limit. The letter shall be served on all other parties. Any leave of court obtained by a moving party shall apply to all opposing parties. The moving party shall serve notice of the grant of leave of court with the moving party's memorandum.

(6) Email Addresses. Each party or attorney filing motion or opposition papers shall include his or her email address on the papers, unless he or she does not have an email address.

(b) Procedure for Serving and Filing Motions.

(1) General. All motions and oppositions shall be served on all parties and filed with the clerk in accordance with the procedure set forth in this Paragraph (b). Compliance with this Paragraph is compliance with the "reasonable time" provisions of the first sentence of Mass. R. Civ. P. 5(d)(1).

(2) Service and Filing of Motions and Oppositions. The moving party shall serve a copy of the motion and the other documents specified by this rule on every other party. Every opposing party shall serve on the moving party an original and a copy, and on every other party a copy, of the opposition and the other documents specified by this rule. The opposition to a motion shall be served within (A) 10 days after service of a motion other than a motion for summary judgment, (B) 21 days after service of a motion for summary judgment or (C) such additional time as is allowed by statute or order of the court. If the motion is served by mail, these time periods shall be increased by 3 days pursuant to Mass. R. Civ. P. 6(d). Upon receipt of the opposition and associated documents, if any, the moving party shall attach the original of the opposition and associated documents to the original motion and associated documents and within 10 days shall file with the clerk the combined documents ("the Rule 9A package"), unless within the same 10-day period the moving party notifies all counsel that the motion has been withdrawn. If leave to file a reply memorandum is allowed, the reply shall be served and filed within 10 days of the allowance, unless the court orders otherwise. If leave to file a reply has been allowed, or, if a motion to strike has been served in response to the opposition to a motion or a cross-motion, the period for filing the Rule 9A package is extended to the time granted for serving the reply or the opposition to the motion to strike. If the party opposing a summary judgment motion serves an additional statement of material facts under Paragraph (b)(5)(iv), the moving party shall have 21 days to file the Rule 9A package or to notify all counsel that the motion has been withdrawn. If the moving party does not receive an opposition within 3 business days after expiration of the time permitted for service of an opposition, then the moving party shall file with the clerk the

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Adopted December 5, 2014, effective February 2, 2015.

BBE Rule III
Amended April 25, 2014, effective July 1, 2016.

material facts within the time prescribed by Paragraph (b)(2)(B) and in the manner required by Paragraph (b)(5)(ii), resulting in a single document for the court's consideration, unless the obligation to send the additional statement of material facts in electronic form has been excused. For purposes of summary judgment, the opposing party's additional statement of a material fact shall be deemed to have been admitted unless controverted as set forth in this paragraph.

(v) Cross-motions for summary judgment and oppositions thereto shall comply with the requirements of Paragraph (b)(5), with the result that there shall be a single consolidated document containing the respective statements of material facts and responses thereto, unless excused as provided in Paragraph (b)(5)(i).

(vi) All exhibits referred to in a motion, a cross-motion, or opposition thereto shall be filed as a joint appendix, which shall include an index of the exhibits. The initial moving party, with the cooperation of each opposing party, shall be responsible for assembling the joint appendix and the index. Unless all the pages of the joint appendix are consecutively numbered, each exhibit shall be separated by an off-set tab divider. Where such dividers are used, the exhibits in the joint appendix shall be numbered consecutively. The moving party shall serve a copy of its exhibits to each opposing party with the motion. If a party opposing the initial motion designates additional exhibits, the additional exhibits shall begin with the next consecutive designation following the last designation by the initial moving party. Where an opposing party relies upon any evidence contained in the exhibits supporting the motion for summary judgment, the opposing party in its memorandum shall cite to that evidence using the form of designation of the moving party. Where the opposing party relies upon evidence not contained in such exhibits, the opposing party shall treat such additional evidence as new exhibits. Such new exhibits, as well as an index of the new exhibits, shall be served with the opposition. The initial moving party shall certify that the joint appendix includes all exhibits served upon the initial moving party with the opposition to the summary judgment motion. If the initial moving party does not receive with the opposition an exhibit designated by the opposing party, then the moving party shall file with the clerk the joint appendix of exhibits without that designated exhibit, with the certification required by this rule. The burden will then rest with the opposing party to move to file any designated exhibit not timely submitted.

(vii) The initial moving party, upon filing a motion for summary judgment, shall serve upon the opposing parties, in paper and electronic form, unless electronic form is excused, the consolidated statement of material facts and responses filed with the clerk, unless the response is filed as a separate document in accordance with this rule. The moving party shall also serve upon the opposing parties the joint appendix of exhibits, including the index of the exhibits, filed with the clerk, unless the parties otherwise agree. If the joint appendix of exhibits, including the index, is in electronic form, an electronic copy shall also be sent, unless the parties otherwise agree.

(6) **Sanctions for Noncompliance.** The court need not consider any motion or opposition that fails to comply with the requirements of this rule.

(c) **Hearings on Motions.**

(1) Marking. No party shall mark any motion for hearing. In the event that the court believes that a hearing is necessary or helpful to a disposition of the motion, the court will set the time and date for the hearing and will notify the parties of that date and time.

(2) Request for Hearing. A request for a hearing shall set forth any statute or rule of court which, in the judgment of the submitting party, requires a hearing on the motion. After reviewing the motion, the court will decide whether a hearing should be held and, if a hearing is to be held, will notify the parties in accordance with Paragraph (c)(1) hereof. Failure to request a hearing shall be deemed a waiver of any right to a hearing afforded by statute or court rule.

(3) Presumptive Right to a Hearing. Requests for hearings on the following motions will ordinarily be allowed: Attachments (Rule 4.1), Trustee Process (Rule 4.2), Dismiss (Rule 12), Adopt Master's Report (Rule 53), Summary Judgment (Rule 56), Injunctions (Rule 65), Receivers (Rule 66), Lis Pendens (G.L. c. 184, sec. 15). Denial of a request for hearing on such motions will be accompanied by a written statement of reasons for the denial.

(d) **Disposition of Motions.**

Motions which are not set down for hearing in accordance with Paragraph (c) hereof will be decided on the papers filed in accordance with this rule.

(e) **Exceptions.** The provisions of this rule shall not apply to the following motions:

(1) **Ex Parte, Emergency, and Other Motions.** A party filing an ex parte motion, emergency motion, or motion for appointment of a special process server is excused from compliance with Paragraphs (b)(1) and (b)(2) of this rule. Ex parte motions shall be served within 3 days of a ruling on the motion. Emergency motions shall be served on all parties forthwith upon filing.

(2) **Motions Involving Incarcerated Parties.** Administrative Directive No. 92-1, which governs civil actions filed by a plaintiff who is incarcerated, waives that part of subdivision (b)(2) of this rule that requires the filing of the Rule 9A package. Such waiver also shall apply to motions in civil actions where a defendant is incarcerated and appearing pro se, but all parties, incarcerated or not, must serve copies upon all other parties in the case.

As added July 21, 1988, effective October 3, 1988; amended July 18, 1989, effective October 2, 1989; December 6, 1989, effective January 31, 1990; December 17, 1991, effective March 1, 1992; December 10, 1993, effective January 1, 1994; effective April 1, 1998; October 6, 2004, effective November 1, 2004; and January 22, 2009, effective March 2, 2009; October 24, 2012, effective January 1, 2013; September 24, 2013, effective January 1, 2014; February 20, 2014, effective April 1, 2014.

Previous Rule | Next Rule

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 14-3620H

HARVARD CLIMATE JUSTICE COALITION, ET. AL.,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE, HARVARD MANAGEMENT COMPANY, INC., AND MARTHA COAKLEY.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE AND HARVARD MANAGEMENT COMPANY, INC.'S NOTICE OF MOTION TO DISMISS

Pursuant to Superior Court Rule 9E, Defendants President and Fellows of Harvard College and Harvard Management Company, Inc. hereby give notice that on December 10, 2014, copies of the following documents were served on Plaintiffs Harvard Climate Justice Coalition, et. al. by hand delivery and e-mail:

1. President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss;
2. Memorandum of Law in Support of President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss; and
3. A copy of Superior Court Rule 9A.

In addition, copies of the following documents were served on Assistant Attorney General Brett Blank for Defendant Attorney General Martha Coakley by hand delivery and e-mail:

1. President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss; and

2. Memorandum of Law in Support of President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE and HARVARD MANAGEMENT COMPANY, INC.

By their attorneys,

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Dated: December 10, 2014

Certificate of Service

I hereby certify that a true copy of the above document was served upon Harvard Climate Justice Coalition, Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel, Talia K. Rothstein, and Kelsey C. Skaggs by hand at Harvard Climate Justice Coalition, 309 Allston Street, Cambridge MA 02139 and by e-mail and upon Assistant Attorney General Brett Blank by hand at the Massachusetts Attorney General's Office, 1 Ashburton Place, Boston, Massachusetts 02108 and by e-mail on December 10, 2014.

Jennifer A. Kirby