Supreme Judicial Court of Massachusetts

Harvard Climate Justice Coalition, et. al., Appellants,
v.
President and Fellows of Harvard College,
Harvard Management Company, Inc.,
and Martha M. Coakley,
Respondents.

Suffolk ss.
Civil Action No. 2015-P-0905

Appellants' Application for Direct Appellate Review

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I. Request for direct appellate review

Pursuant to Mass. R. App. P. 11, Plaintiffs 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 respectfully request that the Supreme Judicial Court grant direct appellate review of Plaintiffs' appeal in this case. Direct appellate review by the Supreme Judicial Court is appropriate because this case raises novel questions of law that should be finally decided by the Supreme Judicial Court. Furthermore, the case presents questions of profound public interest such that justice requires their resolution by the Supreme Judicial Court.

II. Statement of prior proceedings

Plaintiffs filed their Complaint in Suffolk County Superior Court on November 19, 2014. Defendants filed Motions to Dismiss the Complaint on December 10, 2014. Plaintiffs filed their Memoranda in Opposition to the Motions to Dismiss on January 6, 2015.

A hearing on Defendants' Motions to Dismiss took place before Suffolk County Superior Court Judge Paul Wilson on February 20, 2015. Judge Wilson issued an order granting Defendants' Motions to Dismiss on March 17, 2015. Plaintiffs entered this appeal on June 26, 2015. Plaintiffs seek a reversal of the dismissal and an order remanding the case for trial.

III. Statement of facts relevant to the appeal

Fossil fuel corporations exist to profit from the extraction and sale of oil, gas, and coal. Indeed, they are bound to do so in order to maximize the profits of their shareholders. However, the extraction and sale of fossil fuels significantly contributes to climate change. In fact, all but a small fraction of fossil fuel corporations' proven reserves cannot be brought to market if international climate agreements are to be followed. Additionally, fossil fuel corporations promote scientific falsehoods the dissemination of which obstructs efforts to combat climate change.

Climate change is now of such a scale and intensity that underwriting the continued extraction and sale of fossil fuels will cause severe and irreversible impacts to the Earth's ecosystems. Unprecedented sea level rise will be among those impacts. For instance, as a result of sea level rise caused by climate change, portions of the Harvard University campus are at risk of flooding every two to three years by the year 2050.

Individual Plaintiffs are seven students of Harvard University. They are engaged in courses of study related to climate change and environmental sustainability and plan to devote their careers to progress in those areas. They benefit from Harvard Defendants' charitable obligations to manage the University in such a way as to promote "the advancement and education of youth" and to ensure the maintenance of the University's physical campus.

Harvard Defendants' past action and public statements demonstrate Harvard Defendants' awareness of the climate impacts of their investments, the contribution of fossil fuel corporations' business activities to climate change, and the threat posed by climate change to Plaintiffs Future Generations.

There is still time to avert the worst effects of climate change. The divestment of assets from companies whose activities run counter to the mission of nonprofit and educational institutions is an effective tool for changing such companies' behavior and that of other institutional investors. Harvard Defendants' influence, in particular, has received mention by researchers at Oxford University.

Harvard Defendants have previously divested the University's assets from companies doing business in apartheid-era South Africa and from tobacco companies because those companies' activities ran counter to the University's educational mission.

IV. Issues of law raised by the appeal

The following issues of law were raised and properly preserved in the lower court:

1. Does the fact that a plaintiff is a student preclude her/him from suing her/his university where the other requirements for special interest standing are satisfied?
2. Does M.G.L. c. 12, § 8 preclude tort claims that incidentally challenge the management of charitable assets?

3. Are Harvard Defendants' investments tortious under a theory of intentional harm or, alternatively, under a theory of negligence, such that they may give rise to injunctive liability?
4. May Plaintiffs assert the interests of future generations with respect to the harm done to the latter by Harvard Defendants' investments in fossil fuel corporations?
5. Did the Superior Court correctly apply the standard of review in granting Defendants' motions to dismiss?

V. Argument

I. Plaintiffs' standing claim is consistent with Massachusetts charitable enforcement law. The Superior Court applied an incorrect standard of review in dismissing the Complaint.

A. No precedent or legal principle precludes students from bringing special interest suits against their universities and student status alone should not bar meritorious claims.

1. We allege a legally sufficient special interest in the Harvard Defendants' fossil fuel investments.

Under M.G.L. c. 12, § 8, enforcement of the due application of charitable funds usually rests with the Attorney General. However, this Court has several times recognized the right of individual plaintiffs to sue charities when personal rights and harms are implicated. *See, e.g.*, *Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235 (2007). In analyzing standing, the Court has considered whether plaintiffs hold "personal rights," *Maffei*, 449 Mass. at 245, whether the claims are "readily distinguishable from those of the general class" of the charity's

beneficiaries, *id.*, and whether plaintiffs allege interests "distinct from those of the general public," *Lopez v. Medford Community Center, Inc.*, 384 Mass. 163, 167 (1981). Because Individual Plaintiffs' lives revolve around the university and its campus and we will permanently be part of the university's alumni community, decisions by Harvard Defendants that are seriously and demonstrably injurious to the university affect us differently than they do other members of the public. Furthermore, we have personal interests in the university's environmental studies programs and in academic treatment of climate change, interests that are especially implicated by the Harvard Defendants' fossil fuel investments. These interests are legally protected: Harvard Defendants' contribution to climate change violates our personal rights, recognized by the 1650 Charter, to a robust educational community and healthy physical campus. We have therefore asserted personal rights that are not shared by the general public, distinguish us from the rest of the Harvard community, and lie at the very heart of the Harvard Defendants' duties toward us.

2. Student status does not preclude us from bringing suit against the Harvard Defendants.

For reasons of law and policy, the mere fact that we are students should not bar our meritorious action against the Harvard Defendants. We do not assert an interest in conduct by the Harvard Defendants other than that which affects us personally (as defined by the *Maffei* decision and its antecedents) and do not claim any general right to oversee Harvard Defendants' investment decisions.

As far as we are aware this Court has never addressed the relevance of student status to special interest standing.[1] The mere fact that a plaintiff is a student should not foreclose her ability to satisfy the criteria for special interest standing. If anything, the large population of students in the Commonwealth and the presence of significant barriers to participation in university governance—for example, students lack charitable membership status and no student sits on the governing board of either Harvard Defendant—should incline this Court to look favorably upon standing claims brought by students, for whom charitable mismanagement actions are the sole avenue of redress.

B. Recognition of our special interest standing would further the purposes of the Commonwealth's charitable enforcement scheme.

The Attorney General enforces the public interest in charitable assets, M.G.L. c. 12, § 8, while individual plaintiffs enforce private interests. *See, e.g.*, *Lopez,* 384 Mass. at 167. This division of enforcement authority protects charities from excessive litigation and relieves courts of the burden of hearing every case in which only a general interest is asserted.

[1] The Supreme Court noted in dicta in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) that students generally lack "a vested interest in the institution" that would entitle them to standing. Students in that case made no claim of special interest, and the Court's remarks were limited to instances where nothing other than student status is alleged in support of standing. *See also Miller v. Alderhold*, 228 Ga. 65 (1971); *Russell v. Yale University*, 54 Conn. App. 573 (1999). On the other hand, the Alabama Supreme Court reached the opposite conclusion in *Jones v. Grant*, 344 So.2d 1210 (1977) *superseded by* Ala. Code § 10-A3-2.44 (1984) (general adjustment of state enforcement scheme without reference to students), ruling that mere student status *did* entitle plaintiffs to bring suit.

Recognition of our standing to sue in this case is consonant with the purposes of this scheme. We are definite (not potential) beneficiaries of Harvard Defendants' charitable activity, our interests are personal, and our injuries flow from conduct that demonstrably harms the university's long-term well-being, facts that few other potential plaintiffs are likely to be able to demonstrate. There is thus no risk of excessive litigation based on similar principles. Likewise, we seek only one-time injunctive relief. This obviates any concern that charitable coffers will be drained by similar actions.

C. The Superior Court erroneously ruled that the pleaded facts did not substantiate our claim for relief.

In granting Defendants' motion to dismiss, the Superior Court failed to view the pleaded facts in the light most favorable to us and reached factual conclusions inappropriate at the dismissal stage. First, the Superior Court viewed the seriousness of climate change as a matter of opinion, writing that "other students believe just as fervently in other causes." Mem. Decision and Order on Def. Mot. Dismiss at 17. However, the harms caused by global warming are scientifically certain. *See* Compl. ¶¶ 16-24.

Second, the Superior Court's analysis of our standing claim relied upon facts and assumptions that were not properly under consideration at the dismissal stage. The Superior Court first erred by finding that the Complaint failed to "account for breaks in causation" between Harvard's investments and climate change and the possibility of redressing our injuries through divestment.

Mem. Decision at 12. In fact, Paragraphs 36-40 of the Complaint detail the effectiveness of divestment in diminishing harms caused by climate change. Later, the Superior Court misapplied the standard by supplying its own inferences regarding whether our pleaded facts supported our claims of injury with regard to the academic effects of Harvard Defendants' fossil fuel investments. Such inferences are improper given that our complaint contains allegations sufficient to support those claims—specifically, allegations that such investments help fund fossil fuel companies' scientific falsehood campaigns, Compl. ¶ 33, and that these falsehoods interfere with our mission to educate students about climate change and our study of efforts to combat it, Compl. ¶ 54, 57-62. These facts "'raise our right to relief above the speculative level.'" *Iannachino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (internal quotation marks omitted).

Instead of "accept[ing] as true the allegations in the complaint and draw[ing] every reasonable inference in favor of the plaintiff[s]" as it was bound to, *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011, the Superior Court inferred from our identification of scientific falsehoods that Harvard Defendants' investments had "certainly not interfered with [our] academic freedom, or intellectual capability." Mem. Decision at 12. The court also concluded that the existence of our lawsuit disproved our allegation that academic freedom at the university had been chilled. Last, the court cited statements by Harvard

University President Drew Faust to conclude that the Corporation's support of fossil fuel companies had no deleterious effects on campus climate change advocacy. These are clearly inferences drawn *against* Plaintiffs, in effect requiring us to refute at the pleading stage any contrary conclusion that one could draw from the facts in the record. But factual support is enough at the dismissal stage, and Exhibits V and W detail the effects of fossil fuel companies' funding of climate falsehoods, including the use of Harvard's name and stature to perpetuate such falsehoods.

II. Our tort claim comports with precedent and public policy.

Our second claim is a novel theory[2] under which institutions would be subject to injunctive tort liability for investments in companies whose business practices cause severe and irreparable harm to Future Generations' persons or property when those institutions are or should be aware that their investments causally contribute to that harm.[3] We bring the claim on behalf of Future Generations because they are unable to appear in court.

A. Special interest standing is not required.

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[2] It is well established that Massachusetts litigants may advance novel arguments, including novel causes of action. *See, e.g.*, *George v. Jordan Marsh Co.*, 359 Mass. 244, 249 (1971); *Jenkins v. Jenkins*, 15 Mass. App. Ct. 934, 934 (1983).

[3] An injunction is the proper remedy because Harvard Defendants' harm-causing conduct is ongoing, the alleged harms cannot be redressed solely by financial means, and the value of a damage award to Future Generations would diminish over time. An injunction is, moreover, likely to mitigate the harm because Harvard Defendants' investments cause that harm both directly and indirectly, through their influence over the decisions of other institutional investors. *See* Compl. Ex. M.

The gravamen of our claim lies in tort rather than mismanagement. It asserts interests in the physical integrity of persons and property and is grounded in a general duty of care, not charitable duties. As such, Harvard Defendants may be liable for the harms we allege notwithstanding their charitable status. *See* M.G.L. c. 231, § 85K.

The question remains whether M.G.L. c. 12, § 8 may fairly be construed to preclude tort claims incidentally challenging the management of charitable assets, and our claim in particular. It cannot, for two reasons. First, charitable institutions may not use their charitable status as a form of immunity against tort claims. *See* M.G.L. c. 231, § 85K. Second, even if M.G.L. c. 12, § 8 could be construed to preclude such claims, it would be absurd to do so here: The Attorney General cannot adequately represent the interests of Future Generations insofar as those interests conflict with the interests of current members of the public.

B. Harvard Defendants' investments are tortious.

Harvard Defendants' investments are tortious notwithstanding the fact that no theory of liability currently encompasses them. Our theory rests principally upon the harms caused by the Harvard Defendants' investments and the Harvard Defendants' knowledge that their fossil fuel investments causally contribute to those harms.[4]

1. The activities in which Harvard Defendants invest are abnormally dangerous.

[4] We also allege negligence in the alternative. *See* Compl. ¶ 68.

Fossil fuel production is abnormally dangerous under the six-factor balancing test used in Massachusetts. *See* Compl. ¶¶ 16-28; *Clark-Aiken Co. v. Cromwell-Wright Co.*, 323 N.E.2d 876, 878, 886 (1975).[5] As we alleged in our Complaint, those activities are certain to harm Future Generations' persons and property severely and irreparably, Compl. ¶¶ 18-19;[6] such harms outweigh the value of fossil fuel production, *see id.* ¶¶ 16-28;[7] and fossil fuel companies cannot reduce the risk of such harms through the exercise of reasonable care, *see Compl.* ¶ 67.

2. *Harvard Defendants are aware of the harm caused by their investments.*

Intentional tort liability may be imposed where an actor "believes that the consequences [of his act] are substantially certain to result from [the act]." Restatement (Second) of Torts § 8A (1965). That is the case here: Past statements by members of the Harvard Corporation demonstrate Harvard Defendants' knowledge

[5] Those factors are: "(a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes." Restatement (Second) § 520 (1977). The use of Future Generations as the plaintiffs for this claim alters somewhat the application of the balancing test. However, there is no *a priori* reason that the balancing test could not be made to accommodate Future Generations as plaintiffs, or that a similar test could not be employed.

[6] It is production rather than consumption of fossil fuel products that is abnormally dangerous: Once extracted, fossil fuels must be burned to generate profits. Furthermore, fossil fuel corporations engage in subsidiary activities to shore up their market power that leave consumers little choice but to buy their products.

[7] The existential threat fossil fuels pose to human civilization by way of climate change outweighs even the most colossal value.

that the Corporation's investments create environmental impacts, including climate impacts; that fossil fuel production significantly contributes to climate change; and that climate change causes certain and severe harms to Future Generations. *See Compl.* ¶ 68. Moreover, this causal relationship is common knowledge.

3. Harvard Defendants' investments are a legal cause of the alleged harm.

In two recent cases, the Supreme Court held that alleged property damage and public nuisance caused by climate change met Article III causation requirements. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 521, 524 (2007); *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2535 (2011). As for tort causation, at least one court has found that lenders may be liable in tort when they knowingly fund the construction and sale of defective homes. *See Connor v. Great W. Sav. & Loan Ass'n,* 69 Cal. 2d 850 (1968).[8] Our claim's causal chain is no more attenuated or complex than those presented by the foregoing cases. In fact, it is simpler insofar as it requires neither estimation of damages nor tracing of Harvard Defendants' investments to harms suffered by particular individuals or groups.

C. Individual Plaintiffs properly assert Future Generations' interests.

It is axiomatic that the basic welfare interests of Future Generations merit legal protection and that Future Generations are

[8] While the California legislature subsequently overturned *Connor*, that fact does not alter the Court's legal analysis, including its finding of causation.

unable to secure it. Fortunately, there is ample precedent for legal protection of the interests of absent third parties in the context of problems of less recent historical vintage.

First, in at least two cases also involving injunctive relief for environmental harms, courts have allowed claims on behalf of future persons on the grounds that their interests converged with those of the individual plaintiffs. *See Oposa v. Factoran* (Supreme Court of the Philippines 1993); *Cape May Cnty. Chapter, Inc., Izaak Walton League of Am. v. Macchia*, 329 F. Supp. 504 (D.N.J. 1971). Second, numerous formal mechanisms allow for third-party representation, including those involving guardians ad litem, trustees, executors or administrators of estates, and "next friends." Finally, class action cases allow for representation of large groups of third-party individuals in circumstances similar to those of this case. *See, e.g.*, Mass. R. Civ. P. 23(a)-(b).[9]

D. Recognizing our claim would not create a slippery slope.

The Superior Court suggests that granting us standing would be to teeter on the edge of a slippery slope: "Tomorrow another group of students may decide that the most pressing need of Future Generations . . . is for green space." Mem. Decision 16. The court interprets our assertion of standing to be based upon subjective beliefs. That is not the case; under our theory, standing derives from the ability to furnish objective evidence that investments in the destruction of green space cause *severe and irreparable* harm to Future Generations.

[9] Indeed, the *Macchia* court invoked class action requirements. *See Macchia*, 329 F.Supp. at 514.

Furthermore, several limiting principles are implicit in our claim, including the severity and irreparability of the harms we allege, the existential threat posed by climate change, the one-time nature of the relief we request, the factual allegations supporting an inference of knowledge on the part of Harvard Defendants, the institutional identity and educational mission of Harvard Defendants, and the size of Harvard Defendants' investments. Of course, our complaint contains only short and simple allegations. Yet a court may, here as elsewhere, read our claim as broadly or as narrowly as legal precedent and public policy will allow, particularly given its novelty.

VI. Statement of reasons why direct appellate review is appropriate

1. Direct appellate review is appropriate because this case presents novel questions of law related to standing and tort liability. Specifically, it raises issues of law regarding the parameters of the Commonwealth's charitable enforcement scheme and the viability of a new cause of action to challenge intentional investments in activities that cause severe and irreparable harms to future generations. As the Superior Court noted, it is the proper role of the Supreme Judicial Court to recognize an extension of existing law. *See* Memorandum of Decision and Order on Defendants' Motions to Dismiss 15.
2. Direct appellate review is appropriate because this case presents issues of significant public import. The question

of whether student status precludes a plaintiff from alleging a special interest in charitable enforcement affects many residents of the Commonwealth. Furthermore, the availability of legal redress for climate change harms is an issue of enormous and growing importance. Absent a grant of direct appellate review, it is likely that this Court will eventually be asked to decide the issues presented in this case.

VII. Conclusion

For the foregoing reasons, the Plaintiffs-Appellants request that this application for direct appellate review be granted.

Respectfully submitted,

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Dated: July 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above application for direct appellate review was served upon Martin Murphy and Jennifer Kirby, attorneys for President and Fellows of Harvard College and Harvard Management Company, Inc., by email to MMurphy@foleyhoag.com and JKirby@foleyhoag.com and by first-class mail to Foley Hoag LLP, 155 Seaport Boulevard, Boston, Massachusetts 02210.

Dated this 16th day of July, 2015.

_____
Joseph Hamilton

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above application for direct appellate review was served upon Assistant Attorney General Brett Blank by email to brett.blank@state.ma.us and by first-class mail to 1 Ashburton Place, Boston, MA 02108.

Dated this 16th day of July, 2015.

_____
Joseph Hamilton

Appeals Court of Massachusetts
Docket for Case #: 2015-P-0905

HARVARD CLIMATE JUSTICE COALITION & others vs. HARVARD CORPORATION & others

Date Filed:	June 26, 2015
Status:	No briefs yet
Case Type:	Civil
Brief Due:	Aug 05, 2015
Brief Status:	Awaiting blue brief
Entry Date:	Jun 26, 2015
Lower Court:	Suffolk Superior Court
Nature:	Tort
Status Date:	Jun 26, 2015
TC Entry Date:	Nov 19, 2014
TC Number:	SUCV2014-03620

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Plaintiff/Appellant Alice M. Cherry	
Plaintiff/Appellant Benjamin A. Franta	
Plaintiff/Appellant Sidni M. Frederick	
Plaintiff/Appellant Joseph E. Hamilton	
Plaintiff/Appellant Olivia M. Kivel	
Plaintiff/Appellant Kelsey C. Skaggs	
Defendant/Appellee Harvard Corporation	Attorneys and Firms Martin F. Murphy , Esquire Jennifer Ann Kirby , Esquire
Defendant/Appellee	Attorneys and Firms

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Defendant/Appellee

Martha M. Coakley

Attorneys and Firms

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Nora J. Mann , A.A.G.
Brett Blank , A.A.G.

Docket Entries

Reverse Entries

BL Item #	Filing Date	Action	Description
BL-1	June 26, 2015	Request	Entered.
BL-2	June 26, 2015	Request	Notice of entry sent.

Massachusetts Superior Court
Suffolk County
Docket for Case #: SUCV2014-03620

Harvard Climate Justice Coalition et al v Harvard Corporation et

Date Filed:	Nov 19, 2014
Status:	Disposed: Appeal assembled
Jury demand:	No
Case location:	Civil H, 3 Pemberton Sq, Boston
Case Type:	Misc equitable remedy
Status Date:	Jun 18, 2015

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Calendar

Date	Time	Status	Description
Feb 10, 2015	14:00:00	Event not reached by Court	Motion/Hearing: Rule12 to Dismiss
Feb 20, 2015	14:00:00	Event held as scheduled	Motion/Hearing: Rule12 to Dismiss

Docket Entries

Reverse Entries

Numbers shown are court assigned numbers.

Entry #	Filing Date	Action	Description
			MANUALLY-COLLECTED COMPLAINT
1	Nov 19, 2014	Request	Complaint
	Nov 19, 2014		Origin 1, Type D99, Track F.
2	Nov 19, 2014	Request	Civil action cover sheet filed (n/a)
	Dec 10, 2014		DefendantS Harvard Corporation & Harvard Management Company, Inc.'s Notice of intent to file motion TO EDISMISS
	Dec 11, 2014		Notice of Motion to Dismiss
3	Dec 19, 2014	Request	Joint Stipulation to extend deadline for Plaintiffs' response to Defendants' motion to dismiss
	Dec 24, 2014		Motion (P#3) ALLOWED (Edward P. Leibensperger, Justice) Dated: 12/23/14 Notices mailed 12/23/2014
4	Jan 8, 2015	Request	President and Fellows of Harvard College and Harvard Management Company, Inc's MOTION to Dismiss (with Opposition)
5	Jan 8, 2015	Request	The Commonwealth;s Motion to Dismiss (w/opposition)
5	Mar 17, 2015	Request	Memorandum: of Decision & Order on defts Motion to Dismss The President & Fellows of Harvard College and Harvard Management Co Inc Motion to Dismiss is ALLOWED The Commonwealth's Motion to Dismiss is ALLOWED The case is DISMISSED (Wilson,J) Notice Sent 3/17/15 (entered 3/17/15)
6	Mar 18, 2015	Request	JUDGMENT ON MOTION TO DISMISS (MASS R CIV P 12(b) That the complaint of plffs is herby Dismissed agianst thed efts and defts recover costs entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)

7	Apr 13, 2015	Request	Plaintiffs' notice of appeal
8	Apr 13, 2015	Request	Letter received from the Plaintiffs informing us that they do not plan to order a transcript of the hearing on the motion to dismiss
	Apr 14, 2015		Notice of service of the filing of Notice of Appeal to: Harvard Climate Justice Coalition, Alice M. Cherry, Benjamin A. Franta, Sidni A. Frederick, Joseph E. Hamilton, Oliva M. KIvel, Talia K. Rothstein, Kelsey C. Skaggs; Martin M. Murphy, Esquire, Jennifer A. Kirbyy, Esquire, Foag Hoag LLP: Mary A. Beckman, Esquire, Nora J. Mann, Esquire, Brett J. Blank, Esquire, Mass Atty General's Office
	June 18, 2015		Notice of assembly of record on Appeal

NOTIFY

COMMONWEALTH OE MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2014-3620-H

Notice sent
3/17/2015
A. M. C.
B. A. F.
S. M. F.
J. E. H.
O. M. K.
T. K. R.
K. C. S.
H. C. J. C.
M. F. M.
J. A. K.
M. A. B.
N. J. M.
B. J. B.

HARVARD CLIMATE JUSTICE COALITION and others[1]

vs.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE ("HARVARD CORPORATION") and others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs, students at Harvard University, bring this lawsuit to challenge the manner in which the University is investing its considerable endowment. Harvard, however, says that the (sc) real issue here concerns not where Harvard should invest, but rather which members of the Harvard community should make its investment decisions. The Attorney General of the Commonwealth of Massachusetts, also a Defendant, asserts that this case is really about who has the power to challenge a charitable organization's decisions about the investment of its funds.

Both Harvard and the Attorney General have moved to dismiss the students' lawsuit. After reviewing the Complaint and the extensive written materials submitted by the parties, and hearing oral argument, I will allow both motions to dismiss, because standing to bring a lawsuit "is not measured by the intensity of the litigant's interest or the fervor of his advocacy." Enos v. Sec'y of Envtl. Affairs, 432 Mass. 132, 135 (2000) (internal citations omitted).

1. Alice M. Cherry, Benjamin A. Franta, Sidni M. Frederick, Joseph E. Hamilton, Olivia M. Kivel, Talia K. Rothstein, Kelsey C. Skaggs, and Future Generations

2. Harvard Management Company, Inc., and Martha M. Coakley as she is Attorney General of the Commonwealth of Massachusetts

Background

Plaintiffs are seven undergraduate, graduate and law students at Harvard University, along with an unincorporated association to which they and other students belong. Also named as a plaintiff is "Future Generations."[3] Plaintiffs believe that the use of fossil fuels is contributing to the problem of climate change, which they see as the most serious current threat to their own well-being, to future generations, and to the planet itself. Therefore Plaintiffs want Harvard to divest itself of investments in fossil fuel companies.

To that end, Plaintiffs brought this lawsuit, seeking a permanent injunction requiring that Harvard immediately sell off its direct holdings in fossil fuel companies, and begin divesting itself of its indirect holdings in those companies. Plaintiffs have named as Defendants the University (under its formal name, President and Fellows of Harvard College) and Harvard Management Company, which manages the University's endowment.[4] Because this lawsuit concerns investment decisions of a charitable corporation, an area regulated by the Attorney General, Plaintiffs have joined the Attorney General as a defendant, as required by G. L. c. 12, § 8G.

In deciding these motions to dismiss, I must deem all allegations in the Complaint to be true, Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), and I must consider those allegations generously and in Plaintiffs' favor. Vranos v. Skinner, 77 Mass. App. Ct. 280, 287 (2010). Those allegations, in brief, are as follows.

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3. Plaintiffs point to no precedent for naming "Future Generations" as a plaintiff in a lawsuit, and the parties disagree about whether an unincorporated association can sue in its own name. Because the individual plaintiffs have the capacity to file a lawsuit, I need not decide whether Future Generations and the Harvard Climate Justice Coalition are proper plaintiffs. In this Memorandum of Decision and Order, I will use the word "Plaintiffs" to refer to the seven individual plaintiffs.

4. Defendant Harvard Management Company, Inc. joins in the University's motion to dismiss, which means that all three Defendants are seeking dismissal.

The Complaint first alleges, in detail and at length, that the burning of fossil fuels results in the emission of greenhouse gases that is causing physical changes to the Earth's ecosystems, resulting in deleterious geopolitical, economic and social consequences. The Complaint further alleges that Harvard directly owns stocks in publicly traded fossil fuel companies worth at least $79 million, and indirectly owns additional shares in such companies.

The Complaint notes that the Charter of the Harvard Corporation imposes obligations on the University's President and Fellows to, among other things, advance the education of youth, and promote "the advancement of all good literature, arts, and sciences in Harvard College." Investment in fossil fuel companies, according to the Complaint, is at odds with these obligations, and harms Plaintiffs because that investment directly supports climate change denial by fossil fuel companies, which interferes with Plaintiffs' attempts to educate other students on the facts of climate change and to promote a safe transition to a healthy and secure energy future. Those fossil fuel investments also have a chilling effect on academic freedom, among other things by impeding Plaintiffs' ability to associate with like-minded colleagues and to avail themselves of the open scholarly environment that Harvard has a duty to maintain. Plaintiffs also allege "diminishment" of their educations because fossil fuel companies' promotion of scientific falsehoods, funded by Harvard, impedes Plaintiffs in preparing for their intended careers, in, among other areas, environmental law, renewable energy science, and organic farming.

The Complaint also notes that the Charter obligates the University's President and Fellows to maintain the University's physical campus. Harvard's investment in fossil fuel companies is at odds with that obligation, because even under optimistic scenarios, the

Complaint alleges, parts of the Harvard campus near the Charles River will be flooded every two to three years by 2050 as a result of climate change.

The Complaint points out that Harvard has divested from companies whose activities ran counter to the University's educational mission in the past. The Complaint alleges that a broad array of Harvard alumni and faculty, as well as political leaders and scientists, have called upon the University to sell its investments in fossil fuel companies.

From these allegations, Plaintiffs construct a two-count complaint. First, Plaintiffs accuse Harvard of mismanagement of charitable funds. Second, Plaintiffs assert the right of "Future Generations" to be free of what the Plaintiffs call "Intentional Investment in Abnormally Dangerous Activities."

ANALYSIS

In deciding these motions to dismiss, I must accept as true "all facts pleaded by the nonmoving party," Jarosz v. Palmer, 436 Mass. 526, 529 (2002) (citation omitted), in this case Plaintiffs. I also must accept as true "such inferences as may be drawn [from those facts] in the [nonmoving party's] favor." Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995). This deference to the nonmoving party's statement of the claim is not unbounded, however, because I must "look beyond the conclusory allegations in the complaint," Curtis v. Herb Chambers I-95 Inc., 458 Mass. 674, 675 (2011), and determine if the nonmoving party has pled "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief," which "must be enough to raise a right to relief above the speculative level." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007).

1. Standing to Sue Over Mismanagement of Charitable Funds

Count I of the Complaint charges Harvard with mismanagement of its endowment, which consists of funds given in trust to the University to further its charitable purposes, including the purposes set out in the Charter of the Harvard Corporation quoted above. Both Harvard and the Attorney General argue that Plaintiffs have no standing to maintain this claim.

Plaintiffs concede, as they must, that, under G. L. c. 12, § 8, "Authority to enforce the due application of charitable funds in Massachusetts normally rests with the Attorney General." Plaintiffs' Memorandum in Opposition to Defendant Martha M. Coakley's Motion to Dismiss ("Opp. to Attorney General's Motion") at 5. In fact, the Supreme Judicial Court has often stated that the Attorney General has exclusive jurisdiction in this area. See, e.g., Weaver v. Wood, 425 Mass. 270, 275 (1997). However, as Plaintiffs point out, the Supreme Judicial Court has also created a small chink in the armor of Attorney General exclusivity, through which private citizens can also assert claims that a public charity is mismanaging its assets – "but only where the plaintiff asserts interests in such organizations which are distinct from those of the general public." Id. at 276.

Plaintiffs in today's case claim that they are entitled to standing because they hold such "personal rights" distinct from those of the general public. Plaintiffs refer to two types of "personal rights."

Their first basis for standing, Plaintiffs say, is their status as Harvard students who "currently and actually enjoy the benefits of Harvard's charitable activity." Opp. to Attorney General's Motion at 10; see, e.g., Complaint ¶¶ 50(C), 51. Because they are students, Plaintiffs suggest, they have standing to enforce the terms of the Charter of Harvard College requiring Harvard to engage in "the advancement of education of youth" and the maintenance of the

University's physical campus, id. ¶ 49, and the "advancement of all good literature, arts, and sciences in Harvard College." Id. ¶ 50.

Second, Plaintiffs point to "the crucial, additional [to student status] factor that builds upon this [student] status: namely, the exceptional harms caused by investment in fossil fuels." Opp. to Attorney General's Motion at 12. The Complaint alleges that Plaintiffs are suffering these exceptional harms personally, as a result of Harvard's investment in fossil fuel companies. See Complaint ¶¶ 54-55, 57-62.

A. Standing Based on Status as Harvard Students

The Supreme Judicial Court has permitted persons other than the Attorney General to sue over mismanagement of charitable assets only on rare occasions. One recent case in which the court found such standing, discussed by all parties, provides a logical starting point for the analysis of Plaintiffs' claimed standing.

Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235 (2007), arose from the defendant Catholic Archbishop's decision to close a church in Wellesley. The lawsuit was filed by members of the family that had provided the land on which the church was built, who claimed that the closing of the church triggered an equitable reversionary interest in that land in their favor. Another plaintiff was a parishioner who was seeking the return of her substantial financial contributions to the parish, on a theory of negligent misrepresentation. The Supreme Judicial Court held that these plaintiffs "alleged personal rights that . . . entitle them to standing." Id. at 245. The Maffei plaintiffs had standing, the court said, because "the plaintiffs' claims are readily distinguishable from those of the general class of parishioner-beneficiaries." Id. The charitable entity assets over which they brought suit – the land in one case, and the financial contributions in the other – had belonged to the plaintiffs in the past, and would belong to them in the future if

they prevailed in their lawsuit. No other parishioners could make that claim, and thus the interests of these plaintiffs were specific and personal enough to give them standing to litigate the church's alleged misuse of those assets.[5]

If the general class of parishioners of the church lacked standing in Maffei, then the general class of students at the University lacks standing here, by the same reasoning. Supreme Judicial Court precedent on this point could hardly be clearer.

For example, Weaver v. Wood, 425 Mass. 270 (1997), arose when members of the Christian Science Church objected to church investments in ventures in electronic media. The church members claimed that this investment decision violated the church's governing documents – just as Plaintiffs claim here that the investment decisions of the University's President and Fellows violate the Charter of Harvard College. Even though the Weaver plaintiffs were "life-long members in good standing of the Church," 425 Mass. at 274 -- just as Plaintiffs here are students in good standing at Harvard – the Supreme Judicial Court "conclude[d] under well-settled principles of law long enforced by this court that the plaintiffs do not have standing to obtain judicial redress in this matter." Id. at 271.

In ruling that members of the church lacked standing to challenge the church's investment decisions, the Weaver court noted that the Attorney General had always had the exclusive right and duty to decide whether to sue a charitable organization over the alleged misuse of its assets. Quoting from a decision that it had issued more than a century earlier, the court remarked that the law "has not left it to individuals to assume this duty" of suing over misuse of charitable assets. "Nor can it be doubted that such a duty can be more satisfactorily

5. An older case to the same effect is Trustees of Dartmouth College v. Quincy, 313 Mass. 219, 225 (1954), where the court held that the plaintiff college had standing to challenge the administration of a trust fund because the college would be entitled to the entire fund upon the occurrence of a contingency, and the college's lawsuit raised the question of whether that contingency had occurred.

performed by one acting under official responsibility [that is, the Attorney General] than by individuals, however honorable their character and motives may be." Id. at 275, quoting Burbank v. Burbank, 152 Mass. 254, 256 (1890).

The Supreme Judicial Court has made similar rulings in cases involving governance of Harvard University itself. For example, Ames v. Attorney General, 332 Mass. 246 (1955), concerned the University's management of the Arnold Arboretum in West Roxbury, run by Harvard as the "trustee of a public charitable trust." Id. at 247. When Harvard decided to move the main body of the Arboretum's library and herbarium to Cambridge, the plaintiffs attempted to convince the Attorney General to challenge the decision. Failing in that effort, the plaintiffs sued the Attorney General, asking the court to force him to intervene. The plaintiffs claimed standing as financial contributors to the Arboretum who were actively interested in its welfare. In addition, all but two of them were "members of the visiting committee appointed by the board of overseers of [Harvard] College to visit the arboretum," which was, the court noted, an advisory committee "with no rights or powers." Id. at 249. Although these plaintiffs were members of the Harvard community as financial contributors and officially recognized advisers to the Harvard administration, the court said, "We are not convinced that the petitioners, with no other interest other than that of the general public, have any legal right to demand a decision of the court." Id. at 252. See also Harvard Law School Coalition for Civil Rights v. President & Fellows of Harvard College, 413 Mass. 66 (1992) (rejecting student standing, albeit under statutes not at issue in today's case, to challenge the allegedly discriminatory faculty hiring practices of Harvard Law School).

The cases on which Plaintiffs rely do not support Plaintiff's entitlement to standing. As one example, Trustees of Andover Theological Seminary v. Visitors of the Theological

Institution in Phillips Academy in Andover, 253 Mass. 256 (1925), concerned a challenge to a plan by the trustees of a theological seminary to more closely affiliate that entity with Harvard Divinity School. The court held that the Board of Visitors of Andover Theological Seminary had standing to mount such a challenge, because that Board of Visitors had been created at the founding of that seminary and given a "wide sweep of powers," id. at 255, "to see to it that there was no deviation in the management of that institution from the declared purposes of the founders," id. at 266, because the founders "were unwilling to trust the trustees with the management of their foundation in its theological aspects." Id. However, none of the litigants in that case were students,[6] and nothing in the court's opinion suggests that students at the seminary – who stood on far different footing than the institution's Board of Visitors – had standing to challenge the trustees' decisions about management of the seminary.

In fact, at least one case central to Plaintiffs' argument actually supports the position of Harvard and the Attorney General. In Lopez v. Medford Community Center, Inc., 384 Mass. 163 (1981), the court ruled that persons claiming to be members of a charitable corporation organized for civic and educational purposes had no standing to sue the organization over alleged corporate mismanagement. "It remains the general rule that 'it is the exclusive function of the Attorney General to correct abuses in the administration of a public charity by the institution of proper proceedings.'" Id. at 167, quoting Ames, 332 Mass. at 250-251. The court allowed the Lopez plaintiffs to litigate only the issue of whether they had been unlawfully denied membership status

6. The rights of students to challenge the reorganization of a divinity school was at issue in a much more recent case from another jurisdiction, Russell v. Yale University, 54 Conn. App. 573 (1999). There the Appellate Court of Connecticut held that the students lacked standing because, "absent special injury to a student or his or her fundamental rights, students do not have standing to challenge the manner in which the administration manages an institution of higher education." Id. at 579. Plaintiffs attempt to distinguish Russell by pointing out that they, unlike the Russell plaintiffs, do plead special injury. However, as explained elsewhere in this Memorandum and Order, Plaintiffs' allegations of special injury are insufficient for a variety of reasons.

status in the charitable organization. Here, Plaintiffs do not allege that the University has denied them student status.

In short, like the rights of "parishioner-beneficiaries" of the Catholic parish in Maffei, or the rights of "life-long members in good standing" of the Christian Science Church in Weaver, the rights of "students at Harvard University" are widely shared, because Harvard University has thousands of students. Plaintiffs' status as Harvard students, therefore, does not endow them with personal rights specific to them that would give them standing to charge Harvard with mismanagement of its charitable assets.

B. Standing to Sue Based on Particular Alleged Impacts

Plaintiffs also argue for standing on the theory that Harvard's investment in fossil fuel companies has impacts that interfere with rights personal to them. The education of each of the Plaintiffs suffers "diminishment," they allege, because Harvard's investment is funding "fossil fuel companies' promotion of scientific falsehoods," which "distorts academic research into scientific remedies for climate change and stymies efforts to make the transition to a clean energy economy." Complaint ¶¶ 57-62. This funded-by-Harvard "distort[ion of] academic research" results in "diminishment" of the educations of Plaintiff Cherry, Skaggs, and Hamilton in environmental law, the educations of Plaintiffs Rothstein and Frederick in history and literature as they prepare for careers in renewable energy and journalism, the education of Plaintiff Franta as he studies renewable energy technology in preparation for a career as a renewable energy scientist, and the education of Plaintiff Kivel in biology as she prepares for a career as an organic farmer. The "climate change denial" funded by Harvard also allegedly "has a chilling effect on academic freedom and the willingness of faculty, students, and administrators to publicly confront climate change," and impedes the ability of Plaintiffs "to associate with like-

minded colleagues and to avail themselves of the open scholarly environment that Defendant Harvard Corporation has a duty to maintain." Id. ¶ 55.

This argument for standing suffers from at least two flaws.

First, the universe of Harvard students who could claim these particular negative impacts is far broader than just these seven Plaintiffs. The basic right at issue, to learn in an academic environment unpolluted by scientific falsehoods, is held by the entire Harvard student body.

If the measuring rod for standing instead is the impact of these particular alleged falsehoods on a particular student's course of study, the pool of affected students is still quite large. The Complaint itself alleges that these falsehoods diminish the education of students in courses of study as diverse as renewable energy technology, id. ¶ 58, "organismic and evolutionary biology," id. ¶ 61, and history and literature. Id. ¶¶ 59, 62. But every Harvard student studying any aspect of environmental law or energy law is suffering the same "diminishment" of his or her education as that alleged by Plaintiffs Cherry, Skaggs, and Hamilton. Every Harvard student studying any aspect of science or engineering, relating at the very least to evolutionary biology, or the use of energy, or man-made impacts on our environment, or climate change, is suffering the same "diminishment" of his or her education as that alleged by Plaintiffs Franta and Kivel. In other words, the harm resulting from Harvard's financing of alleged scientific falsehoods by the fossil fuel industry is not personal to these seven Plaintiffs, in the way that the loss of their land was personal to the Maffei parishioners who donated that land for the construction of the church.

The second problem with Plaintiff's theory is that the allegations on which it is based are too speculative and conclusory to pass the test of Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008). While Iannacchino requires me to accept the allegations of the Complaint as true in

deciding these motions to dismiss, it also requires me to "look beyond the conclusory allegations in the complaint," Curtis v. Herb Chambers I-95 Inc., 458 Mass. 674, 675 (2011), and to determine if the nonmoving party has pled "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief," which "must be enough to raise a right to relief above the speculative level." Iannacchino, 451 Mass. at 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007). The allegations of this Complaint, as they attempt to connect Harvard's fossil fuel investments with the "diminishment" of Plaintiffs' educations and a chilling of academic freedom, are simply too speculative.

First, the allegations of the Complaint fail to account for breaks in the chain of causation leading from Harvard's investment in fossil fuel companies to the "diminishment" of Plaintiffs' educations. If this court ultimately directed Harvard to divest itself of all fossil fuel stocks, the fossil fuel companies would still exist, would still have every motive to continue to spread the alleged scientific falsehoods, and would certainly have the resources to continue to do so. The Complaint does not allege otherwise.

Second, although the Complaint alleges in conclusory fashion that Harvard's investment in fossil fuel companies "has a chilling effect on academic freedom and the willingness of faculty, students, and administrators to publicly confront climate change," Complaint ¶ 55, it leaves entirely to speculation how this can be so. Harvard's fossil fuel investments certainly have not interfered with the academic freedom, or the intellectual capability, of these Plaintiffs, who allege that they have successfully identified as false the fossil fuel companies' statements denying climate change. The Complaint also makes obvious that Harvard's investment in fossil fuel companies has not chilled academic debate on the topic of climate change; indeed, one of the putative Plaintiffs is a campus organization whose function is to "educate the Harvard

community about the facts of climate change and advocate for environmental and climate justice." Id. ¶ 2. The very existence of this lawsuit, filed by members of the Harvard community to stop Harvard from investing in fossil fuel companies, shows that Plaintiffs have failed to plead facts "plausibly suggesting" that Harvard's fossil fuel investments have had "a chilling effect on . . . the willingness of faculty, students, and administrators to publicly confront climate change." Id. ¶ 55.

In fact, other allegations in the Complaint and its exhibits point out the entirely speculative nature of Plaintiffs' allegation that Harvard's investment in fossil fuels has chilled academic freedom and affected the willingness of members of the Harvard community to publicly confront climate change. The Complaint acknowledges that Harvard "has recognized its obligation as an economic and intellectual leader to respond to climate change," id. ¶ 31 – and at the highest levels of the University at that. As Plaintiffs point out, "Harvard President Drew Faust has stated that 'climate change poses a serious threat to our future – and increasingly to our present.'" Plaintiffs' Memorandum in Opposition to Defendant President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss ("Opp. to Harvard's Motion") at 2. Plaintiffs are quoting the opening sentence of a three-page letter dated April 7, 2014 from President Faust to "Members of the Harvard Community,"[7] where she says that "[w]orldwide scientific consensus has clearly established" this serious threat to our future and our present. Exhibit J to Complaint at 1. Although in this letter President Faust reaffirms Harvard's decision not to divest from the fossil fuel industry, id. at 2, she also describes at length Harvard's academic research efforts to find solutions to climate change, Harvard's institutional

7. Although ordinarily a court deciding a motion to dismiss may consider only the allegations in the complaint itself, I may consider this document in deciding these motions to dismiss because Plaintiffs have attached it to the Complaint and referred to its terms in the Complaint. *See Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000), quoting 5A C.A. Wright & A.R. Miller, Federal Practice and Procedure § 1357, at 299 (1990).

efforts to reduce its own greenhouse gas emissions, and Harvard's efforts in its role as an investor to consider environmental, social and governance issues among the many factors that inform its investment decisions. Id. at 3.

"Alleged injury that is 'speculative, remote, and indirect' will not suffice to confer standing"; rather, the alleged injury "must be a direct consequence of the complained of action. Brantley v. Hampden Div. of Family and Probate Court Dept., 457 Mass. 172, 181 (2010), quoting Ginther v. Comm'r of Ins., 427 Mass. 319, 323 (1998). "Speculative, remote, and indirect" is a fair description of the allegations of the Complaint about how Harvard's investment in fossil fuel companies diminishes Plaintiffs' educations and chills debate at Harvard about climate change. More is required to establish standing.

In summary, although the Complaint alleges that Harvard's investment in fossil fuel companies diminishes Plaintiffs' educations, chills academic freedom, and makes students, faculty and administrators reluctant to confront climate change, those alleged impacts are not sufficiently personal to Plaintiffs to form a foundation for their standing to challenge how Harvard invests its endowment. Even if this were not so, those allegations are too conclusory and speculative to pass muster under Iannacchino, and cannot form a foundation for Plaintiffs' standing for that reason as well. Count I therefore must be dismissed, because Plaintiffs lack standing to bring it.[8]

8. Harvard also argues for dismissal of this count on the ground that the Complaint fails to allege that the President and Fellows have misappropriated charitable assets or engaged in self-dealing with regard to those assets, which, Harvard says, are the only forms of mismanagement of charitable assets that are unlawful. In light of my ruling that Plaintiffs lack standing, I need not, and do not, reach this argument.

2. Intentional Investment in Abnormally Dangerous Activities

In Count II, Plaintiffs assert the right of "Future Generations" to be free of what the Plaintiffs call "Intentional Investment in Abnormally Dangerous Activities." Plaintiffs refer to this count as a tort claim, see Opp. to Harvard's Motion at 15, 16, even though they seek an injunction rather than the usual tort remedy of money damages. This claim, too, must be dismissed, for three independent reasons.

First, as Plaintiffs conceded at oral argument, no court in any jurisdiction has ever recognized this proposed new tort. Plaintiffs are certainly entitled to argue for an extension of existing law, even to seek recognition of what Plaintiffs suggest is a "new or extreme theory of liability." Id. at 15, quoting Jenkins v. Jenkins, 15 Mass. App. Ct. 934, 934 (1983) (rescript opinion). However, a Superior Court judge, bound by existing precedent, must be circumspect in that regard, because it is more properly the function of the Supreme Judicial Court (or the state legislature) to extend the law by creating a new tort. And, indeed, that is exactly what happened at the birth of the tort of intentional infliction of emotional distress, cited by Plaintiffs as precedent; the Superior Court judge dismissed the complaint alleging this then-nonexistent tort, leaving it to the Supreme Judicial Court to recognize the tort on appeal. See George v. Jordan Marsh Co., 359 Mass. 244 (1971).

Second, Plaintiffs actually seek not one but two extensions of existing law. Plaintiffs apparently do not bring Count II on their own behalves; instead "Plaintiffs assert Plaintiffs Future Generations' rights on their behalf." Complaint ¶¶ 71-73. They must do this, Plaintiffs allege, because Future Generations, whom the Complaint defines as "individuals not yet born or too young to assert their rights," id. ¶ 2, are "unable to appear before the court." Id. ¶ 71. Therefore Count II, like Count I, raises the issue of standing.

Plaintiffs point out that a disinterested adult can be appointed by a court to "represent a child's basic welfare rights as a guardian ad litem." Opp. to Harvard's Motion at 18, citing G. L. c. 215, § 56A. But Plaintiffs have not moved for such an appointment, probably because that statute apples only in the Probate Court and limits the guardian's duties to investigating and reporting on the "care, custody and maintenance of minor children." Id. Plaintiffs' unilateral assertion of the interests of every not-yet-born or young person on earth is a far cry from representing the interests of a single child as guardian ad litem after convincing a court that such representation is necessary and that the proposed guardian is an appropriate person to provide it. I am unwilling to make this second extension of existing law by granting Plaintiffs a roving commission to litigate on behalf of Future Generations.

Finally, the overarching problem with Plaintiffs' position – again, like standing, arising as to both counts of their Complaint – is the absence of any limits on the subject matter and scope of lawsuits of this sort. These Plaintiffs assert that climate change is such a serious problem that they are entitled, on behalf of Future Generations, to seek a court order requiring Harvard to divest itself of fossil fuel company investments. Tomorrow another group of students may decide that the most pressing need of Future Generations of Allston and Cambridge is for green space, and so that student group may seek a court order requiring Harvard to abandon its plans to redevelop its property in Allston into academic buildings and instead build a park on that land. Or perhaps today's Plaintiffs, whose Complaint makes clear that they believe that fossil fuel companies are promoting "scientific falsehoods . . . [that] distort[] academic research" at Harvard, Complaint ¶ 57, will petition the court to ban such "falsehoods" from the Harvard curriculum so that Future Generations of Harvard students will not have their academic research distorted.

Plaintiffs apparently recognize that the governance of universities would be thrown into chaos if courts were to permit lawsuits such as this one to proceed, because Plaintiffs attempt to downplay that risk by pointing to a supposed limiting principle: "While we refrain to speculate whether any investments other than those in fossil fuels could rise to the level of certain and pervasive harm described in the Complaint, the exceptional risks posed by climate change readily provide a limiting principle." Opp. to Harvard's Motion at 8 n.3. Put more bluntly, the limiting principle, Plaintiffs assert, is that climate change is the most serious threat facing the world. These Plaintiffs fervently believe that, and perhaps they are right. But other students believe just as fervently in other causes. If Plaintiffs can bring this lawsuit, nothing would prevent other students from seeking court orders that Harvard – or any other charitable organization – take other actions to deal with the "exceptional risks" posed by whatever danger to Future Generations those other students fear above all others. Plaintiffs' suggested limiting principle imposes no limits at all.

I decline to recognize the tort of intentional investment in abnormally dangerous activities, or to allow these Plaintiffs to assert the rights of Future Generations. Count II must be dismissed.

Conclusion and Order

Plaintiffs note that Harvard "has several times *chosen* to divest from morally repugnant sectors." Opp. to Harvard's Motion at 3 (emphasis added). In none of those cases was Harvard ordered to do so by a court. Plaintiffs have brought their advocacy, fervent and articulate and admirable as it is, to a forum that cannot grant the relief they seek.

Notice sent
3/17/2015

The President and Fellows of Harvard College and Harvard Management Company, Inc.'s Motion to Dismiss is **ALLOWED**. The Commonwealth's Motion to Dismiss is **ALLOWED**. This case is **DISMISSED**. (sc)

Paul D. Wilson
Justice of the Superior Court

March 17, 2015