SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK

THE COMMITTEE TO SAVE COOPER UNION, INC., by its president and alumnus, ADRIAN JOVANOVIC, MICHAEL ESSL, TOBY CUMBERBATCH, ISABELLA PEZZULO, and CLAIRE KLEINMAN, Petitioners, v. BOARD OF TRUSTEES OF THE COOPER UNION, JAMSHED BHARUCHA, ROBERT BERNHARD, JEFFREY GURAL, MARK EPSTEIN, RICHARD S. LINCER, FRANCOIS DE MENIL, BRUCE PASTERNACK, THOMAS DRISCOLL, CHARLES S. COHEN, DANIEL OKRENT, RAYMOND G. FALCI, LEE H. SKOLNICK, JOSEPH B. DOBRONYI, JR., RACHEL L. WARREN, JEREMY WERTHEIMER, EDGAR MOKUVOS, CATHARINE HILL, JEFFREY HERSCH, ERIC HIRSCHHORN, MALCOLM KING, JOHN LEEPER, KEVIN SLAVIN, JOHNNY C. TAYLOR, JR., and MONICA VACHHER, Respondents.	Index No. 155185/2014

MEMORANDUM OF LAW
IN FURTHER SUPPORT OF PETITIONERS' ARTICLE 77 PETITION
AND IN OPPOSITION TO RESPONDENTS' CROSS-MOTION TO DISMISS

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Petitioners submit this memorandum of law in further support of this special proceeding pursuant to CPLR 7701 *et seq.* to enforce the terms of the Deed of Trust and Charter that established The Cooper Union, and in opposition to Respondents' cross-motion to dismiss.

PRELIMINARY STATEMENT

> "I am determined to secure to our country a perpetual course of free lectures and instruction." *Peter Cooper, September 17, 1853*
>
> "In short, there is no mandate under the Founding Documents to provide free tuition to all, as Petitioners contend." *Current Board of Trustees, Op. Br. at 24.*

In a betrayal of Peter Cooper's legacy of free education, the current Trustees now claim that there is *nothing* in the school's founding documents that constrains the Trustees' radical choice to depart from more than 155 years of tradition and begin charging tuition in the fall of 2014. The school's Trust and Charter make it clear: A free course of instruction is their single most important object, which both founding documents state "shall have the preference over all the other objects of expenditure . . . and shall forever stand pre-eminent among them." The primacy of a free education at The Cooper Union is plain from the text of the Trust and Charter, the school's 155-year tradition, and the corroborating extrinsic evidence.

The current Trustees' effort to obscure the primacy of free education at The Cooper Union is fatally undercut not only by the school's founding documents, but by their own sworn interpretation of those documents. For example, in support of the Trustees' 2006 *cy pres* application, then-Cooper Union President Campbell swore that "a free education is an integral part of the institution and an essential means to fulfilling Peter Cooper's legacy," and stated that there is a "*mandate* of providing full scholarships at The Cooper Union." SA Ex. 53 at ¶ 23 (emphasis added).[1] Inexplicably, the Trustees now claim that "no such mandate exists." Op. Br.

[1] SA Exhibits 53 – 61 are attached to the Second Affirmation of Zoe Salzman, Esq. in Further Support of Petitioners' Article 77 Petition and In Opposition to Respondents' Cross-Motion to Dismiss (dated July 28, 2014).

at 1. But the school's own representations judicially estop the Trustees from arguing here that there is no mandate for free education. The decision to charge tuition also jeopardizes the school's tax exemption, which is another, free-standing breach of fiduciary duty.

As troubling as the Trustees' mangled, result-determinative interpretation of the Trust and Charter is, their cynical response to Petitioners' request for oversight and transparency is even more disturbing. Instead of embracing the fiscal transparency of an accounting specifically contemplated by Mr. Cooper in the Charter (SA Ex. 2 at p. 15, § 12), the Trustees fight to hide the documents that might shed light on their claimed crisis. As part of their campaign to support non-transparency, the Trustees assert that Petitioners lack standing and that the statute of limitations has run. These arguments are unpersuasive on the law and, on the facts, only raise more questions that highlight the need for an accounting by an independent Special Master with access to all of the underlying records.

Instead of accommodating the call for the creation of the Associates of The Cooper Union, as they concede is contemplated by the Charter (Op. Br. at 9), the Trustees try to avoid oversight by claiming the discretion to never create this body at all. Though the Trust and Charter provide discretion as to *when* the Associates should be created, they do not permit the Trustees to *never* create them. Respondents fail to offer a single reason why the Associates should not be created now, to help shepherd the school through the greatest crisis in its history. In the absence of any stated reason not to create the Associates, the only apparent basis for this refusal is the Trustees' impermissible attempt to entrench their power and insulate themselves from potential removal.

Instead of joining Petitioners' application for a Court interpretation of the school's founding documents, the Trustees challenge the standing of The Cooper Union's students and

faculty to even ask those questions. In stark contrast to their founder's courageous commitment to transparency, the current Board tries to block the students of The Cooper Union from access to this Court to inquire about the Board's decision to charge tuition. But the law is clear that a narrowly defined group, with a special interest in a trust, has standing. Petitioners—students and faculty of The Cooper Union—are just such a narrowly defined group. They are distinct from the public at large because they have a direct and special interest in the school's continued provision of free education which affects them in distinct, identifiable ways.

Given the Trustees' continued intransigence, Petitioners are now compelled to seek a declaration from this Court that (i) charging tuition is a breach of the Trustees' fiduciary duty and Trustees who voted to charge tuition and/or voted against the options to keep the school tuition-free should be removed from office for breaching that duty; (ii) the lack of transparency and deterioration of the endowment command an accounting; and (iii) the Trust and Charter require the creation of the Society referred to as the Associates of The Cooper Union.[2]

FACTS

The facts necessary to determine the declaratory relief sought are largely uncontested and set forth in the Petition. To balance Respondents' presentation of facts in their memorandum, three issues bear emphasis: (a) the extrinsic evidence concerning Peter Cooper's intent in creating The Cooper Union; (b) the current financial crisis; and (c) Petitioners' standing.

A. Peter Cooper's Vision For a Free Education

Respondents' characterization of the facts in this case is notable for its complete failure to address the voluminous evidence that Peter Cooper intended his school to be *completely* free—not just that it provide a few free night classes, as Respondents strain to argue.

[2] At the time of this writing, all Respondents have been served, and every Trustee (except Messrs. Wertheimer and Epstein) has responded. *See* Dkt. Nos. 71-73 & 77.

By their terms, the Trust and Charter explicitly direct The Cooper Union's education to be "based upon the great fundamental law that nations and men should do unto each other as they would be done by." SA Exs. 2 & 3, Art. Fourth § 1. Mr. Cooper invoked this exact principal himself when he explained the purpose of his school at its corner-stone ceremony: In "the golden rule of doing unto others as we would that others should do unto us," he said, "rests all our hope for the future progress and improvement of mankind. Believing thus, I am determined to secure to our country *a perpetual course of free lectures and instruction*." SA Ex. 6 (emphasis added). In the cornerstone ceremony, Mr. Cooper also explained: "I design to provide for a continued course of night and day lectures and discussions on the most useful and practical sciences, *to be open and free to all . . .*" *Id.* (emphasis added).

In an April 29, 1859 letter, that accompanied the Deed of Trust, Peter Cooper wrote: "In order to encourage the young to improve and better their condition, I have provided for a continued course of lectures, discussions and recitations in the most useful and practical sciences, to be open and *free to all . . .* " SA Ex. 7 at pg. 2, "Encourage the Young" (emphasis added). Five years later, in 1864, when Peter Cooper addressed his first graduating class, he again emphasized that he viewed the school as "an institution where a course of instruction would be open and *free to all*." SA Ex. 8 at 18 (emphasis added). Peter Cooper's son-in-law, Abram Hewitt (who helped found the school and was chair of the Board of Trustees until 1903) explained it thus in 1899 when he spoke at the 40th Annual Exercises of The Cooper Union: "Peter Cooper declared that what was most needed was *a school that should be absolutely free*, so he founded and endowed Cooper Union." SA Ex. 54 (emphasis added).[3]

[3] In the words of current President and Respondent Jamshed Bharucha: "[Peter Cooper] believed deeply in access to education based on merit, without regard to family income or religion or connections." SA Ex. 55.

In making their counter-intuitive textual arguments interpreting the stylized, legal trust language of 1859, Respondents do not address any of these contemporaneous statements by Mr. Cooper; nor do they offer a single statement by him (or anyone else) that supports their claim that he intended only free night classes. Respondents instead place all of their eggs in the fragile basket of an anomalous exception to 155 years of free education—a small amateur art class that existed between 1860 and 1885 for which wealthy women paid a small fee. Most tellingly, Respondents obscure evidence that the Trustees at the time only reluctantly agreed to allow that art class as "a departure from the invariable rule in the other department of the Union, that the *instruction shall in all cases be entirely gratuitous*." SA Ex. 37 at 17-18 (emphasis added); *see also* SA Ex. 38 at 11 ("It is proper to remark, that *all the classes of this Institution with one exception*, and all its privileges, *are absolutely free*") (emphasis added).

In short, Respondents studiously avoid the overwhelming contemporaneous statements of everyone who mattered, which unequivocally support the clear intention of the grantor, Peter Cooper, to provide for an institution of perpetual free education—willful omissions that are regrettably consistent with the Trustees' tactics in this litigation.

B. The Current Financial Crisis

Respondents' "financial crisis" justification requires an accounting given the school's past-president's statements, contradictory financial disclosures, and financial history and future.

The Cooper Union's previous President George Campbell, Jr. has stated that the school can weather this financial challenge. After stating that he was "deeply disappointed to learn that the Cooper Union is contemplating the elimination of its historic mission: providing a full-tuition scholarship to every admitted student," President Campbell explained to the Chronicle of Higher Education in 2011 his view that charging tuition was unnecessary. SA Ex. 56. President Campbell emphasized: "[T]he college is in a far superior financial state than during similar

external conditions in the past, and I firmly believe that it has the potential, the short-term resources and long-term assets, the creative capacity, and the intellectual capital to address the current challenge and to carry on its extraordinary mission [of free tuition]." *Id.*

Similarly, the school's posted financial analysis provides a more complex picture than the series of negative net operating deficits Respondents present in their litigation-chart. Op. Br. at 12. For example, the school's report of its net assets (exclusive of non-cash items) between 2000 and 2011 suggests The Cooper Union had positive cash-flow in half of these years:

Year	Increase (decrease) in net assets exclusive of non-cash items
2000	$19,410,448
2001	($29,489,144)
2002	($15,803,371)
2003	($16,674,166)
2004	$2,706,757
2005	$16,573,934
2006	$5,355,441
2007	$7,459,007
2008	($989,897)
2009	($30,762,810)
2010	($397,405)
2011 (draft)	$10,207,398

See SA Ex. 60 at 5.

Even Respondents' litigation chart portrays substantial, unexplained fluctuations in the school's net operating deficit—jumping from $62,136 in 2002 to $11,867,647 in 2003; almost doubling from $11,929,730 in 2009 to $21,425,753 a year later in 2010; then dropping from $17,859,465 in 2012 to $13,874,139 in 2013. *See* Op. Br. at 12.

Respondents' portrayal of the fiscal crisis as a relatively recent phenomenon also distorts the school's past and future. Since its inception, the school has endured frequent variations

between deficit years and surplus years. As then-President Dr. Richard Humphreys discussed in 1964: "It is a startling fact that in the 67 years between 1859 and 1926 there were 35 deficit years—in effect, in one year out of every two the income was insufficient to meet the expenses." SA Ex. 57 (quoting Autumn, 1964 edition of "At Cooper Union," at 15).[4] Despite this volatility, The Cooper Union has endured as a free institution through two World Wars, the Great Depression, and numerous economic downturns. And the school's finances will be positively impacted in 2018 by the Chrysler Building's $25 million annual rent increase. Pet. ¶ 122.

C. Petitioners' Standing

The Cooper Union's faculty and students (past, present, and admitted) have standing because they are the latest direct beneficiaries of Mr. Cooper's vision for a free school.

Two of the Petitioners are students. Petitioner Claire Kleinman is an incoming student in the School of Art and a member of the class of 2018, the first class in the school's history that the Trustees want to pay tuition. Petitioner Isabella Pezzulo dreamed of going to The Cooper Union when she was growing up, and was accepted into the class of 2018, but, because she can't afford to pay tuition without taking on debt, she cannot attend her top choice college. SA Ex. 36.

Petitioners Toby Cumberbatch and Michael Essl are tenured professors at The Cooper Union (in the Schools of Engineering and Art, respectively). Because a school's ranking depends significantly on its acceptance rate, the Trustees' decision to charge tuition has already negatively impacted the ranking of the academic institution at which Professors Cumberbatch and Essl have tenure and teach.[5] The Board's decision to charge tuition has also already had an

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[4] This historical perspective comes from an open letter to the Trustees from former Trustee and Chair of the Working Group Michael Borkowsky (previously the Vice President for Corporate Development at Bristol-Myers Squibb Company and President of Prince Manufacturing, Inc.) wherein he criticizes their decision to charge tuition instead of cutting costs and choosing "the difficult but more certain path of living within our means." SA Ex. 57.

[5] The Respondents do not address the significant financial (and other) implications that flow from the school's "deterioriating" ranking as a result of the tuition plan. *See* SA Exs. 35 & 57.

immediate and deteriorating impact on the school's admissions: This year, overall applications were down by over 20 percent and the school's acceptance rate almost doubled—from 7.7 percent last year, to 14.4 percent this year. SA Ex. 35.

Petitioner Adrian Jovanovic is an alumnus of The Cooper Union who benefited from Mr. Cooper's gift of free education and is committed to ensuring that students like Claire and Isabella do too. (The negative impact on the school's admissions ratio and corresponding decline in rank also threatens to dilute the value of his Cooper Union degree.) When it became clear that the Trustees were going to charge tuition, despite viable alternatives, Mr. Jovanovic helped found The Committee to Save Cooper Union, an organization of students, faculty, and alumni, dedicated to upholding Mr. Cooper's vision for his school. The Committee determined, as a last resort, to bring this matter to the courts if all other efforts to dissuade the Trustees failed.

ARGUMENT

Pursuant to the Deed of Trust, Petitioners are entitled to the declaratory relief sought in this Article 77 special proceeding. Alternatively, Petitioners are entitled to discovery, should the Court deny Petitioner's requests for an accounting or the creation of the Associates. Finally, Respondents' cross-motion to dismiss should be denied: Petitioners have standing to enforce the Trust because they are its clear beneficiaries.

I. PETITIONERS ARE ENTITLED TO THE DECLARATORY RELIEF SOUGHT

Petitioners are entitled, as a matter of law based on the plain terms of the Trust and Charter, and the extrinsic evidence, to a declaration that (a) charging tuition is a breach of the Trustees' fiduciary duty; (b) the lack of transparency and deterioration of the endowment command an accounting; and (c) the Trustees must create the Associates of The Cooper Union.

A. The Trustees' Decision to Charge Tuition Was a Breach of Fiduciary Duty

As the Trustees have stated over and over again to courts for the last 155 years, The Cooper Union is *mandated* to provide free education. These representations foreclose the Trustees' opportunistic efforts to argue the opposite. The language of the Trust and Charter (together with appropriately considered extrinsic evidence) compels this conclusion. Finally, the Trustees cannot shield the consequences of their misinterpretation of the Trust under the business judgment rule because a plain misinterpretation of a trust is not an act of business judgment.

1. The Trustees' Tuition Decision is Judicially Estopped And Its Threat to Tax Exemption is Another Breach of Fiduciary Duty

The Trustees' reversal of representations that The Cooper Union must be free is judicially estopped; and its resulting threat to the school's tax exemption is an independent breach of duty.

a. The Trustees are Judicially Estopped

The Cooper Union's previously asserted position—testimony from its President and many other Trustee statements submitted to the courts to successfully defend its tax exemption for the last century and to obtain *cy pres* relief to undertake a loan—judicially estops the current Trustees from claiming they are free to charge tuition now. *See* SA Ex. 9 at ¶¶ 20 & 19(b); SA Ex. 10 at 2-3; SA Ex. 48 at 4, 33, 36, 42; SA Ex. 40; SA Exs. 53 & 58. Respondents' argument against judicial estoppel fails to address their many past representations that the school, under the Trust and founding grants, is *required* to be free. Respondents also misleadingly alter selective quotations to put them in the past tense and misrepresent the law of judicial estoppel.

Respondents' attempt to run away from their prior statements to the courts, by selectively quoting certain passages from their prior court papers and using square brackets to modify them to the past tense, constitutes a shockingly strained argument that Cooper Union only "stated that it offered free education because at the time, that was true." Op. Br. at 30 (*e.g.* "Cooper Union

'provide[d] free instruction'"). But Respondents do not address the fact that the school's Trustees have previously represented to the courts that The Cooper Union was *required* by its founding documents to provide free tuition—not just that it happened to be doing so when it sought relief from the courts.

In addition to the multiple unrebutted examples listed in Petitioners' opening papers, *see* Br. at 22-23 (citing SA Exs. 9 & 48), Petitioners have since acquired the sworn affidavits submitted by the school's President and Treasurer in support of the 2006 *cy pres* petition (to modify the Trust to be able to mortgage the Chrysler Building), which contain additional examples of the Trustees' representation to the courts that The Cooper Union is required to be tuition-free. SA Exs. 53 & 58. For example, when the school sought *cy pres* relief in 2006, then-treasurer Robert Hawks echoed President Campbell's affidavit that The Cooper Union had a "mandate" to provide free education (SA Ex. 53) when he swore: "The Cooper Union, in accordance with the vision of its founder, Peter Cooper, has never collected tuition from its students." SA Ex. 58 at ¶ 5. "Instead," he explained, "all students receive full-tuition scholarships. . . This commitment to its students is fundamental to The Cooper Union's tradition. As a result, the school is in the uncommon situation of relying solely on other sources of revenue to maintain the costs of its programs." *Id*. Based on this and other representations, The Cooper Union obtained a favorable judgment in the 2006 *cy pres* proceeding. SA Ex. 11.

Having represented to the courts on multiple occasions that The Cooper Union was *mandated* to provide free tuition, and having benefited from those statements in defending its tax exemption and obtaining *cy pres* relief, the Trustees are now judicially estopped from claiming the opposite here. Op. Br. at 1. This kind of cynical duplicity to manipulate the courts is the very kind of misconduct that the doctrine of judicial estoppel exists to prevent. *See generally All*

Terrain Properties, Inc. v. Hoy, 265 A.D.2d 87, 93 (1st Dep't 2000); *Ennismore Apartments, Inc. v. Gruet*, 29 Misc. 3d 48, 49-50 (1st Dep't App. Term 2010).

Respondents' mistaken argument that "judicial estoppel can only be invoked by the party in the prior litigation," (Op. Br. at 30), is a clear (and patently desperate) attempt to mislead this Court by confusing judicial estoppel with *equitable* estoppel. While equitable estoppel applies only when there is identity of the parties in both proceedings, judicial estoppel is based on a different rationale. As the First Department recently explained, "[t]he doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed." *Becerril v. City of New York Dept. of Health and Mental Hygiene*, 110 A.D.3d 517, 519 (1st Dep't 2013) (quotations omitted) *lv. to appeal denied*, 2014-422, 2014 WL 2609500 (June 12, 2014). The First Department noted judicial estoppel, "[a]lso known as the doctrine of estoppel against inconsistent positions, . . . rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise." *Id.* In *Becerril*, the First Department held that the doctrine of judicial estoppel applied because the plaintiff had taken an inconsistent position in a prior federal case—notwithstanding the fact that the federal case was against an entirely separate entity from the defendant City in the state case. *See id.*[6]

[6] Respondents' only support for their judicial estoppel argument, an unappealed Supreme Court decision from 1979, is inapposite and uncontrolling. Op. Br. at 30 (citing *Chem. Bank v. Aetna Ins. Co*., 99 Misc. 2d 803, 805 (Sup. Ct. 1979)). In that case, there was no favorable judgment in the prior proceeding, a requirement for judicial estoppel which Respondents do not dispute is satisfied here. The court's discussion of party privity is *dicta* at best, and to the extent it suggests that such privity is required, it mistakes the doctrine of judicial estoppel and should not be followed given contrary controlling precedent from the First Department in *Becerril*.

In this case, Respondents are judicially estopped from taking the position that the school's founding documents do not mandate free tuition, because they took the exact opposite position in multiple prior judicial proceedings in which they obtained favorable outcomes.

b. Charging Tuition Threatens The School's Tax Exemption

The Trustees' tuition reversal also jeopardizes The Cooper Union's valuable tax exemption, which is another, free-standing breach of fiduciary duty. *See Ault v. Soutter*, 204 A.D.2d 131 (1st Dep't 1994); *Milea v. Hugunin*, 24 Misc. 3d 1211(A), at *11 (Sup. Ct. Onondaga Cnty 2009). The Cooper Union's Charter contains an (apparently unique) tax exemption, which allows it to avoid paying taxes on all its properties, including those that are not used for education purposes, like the Chrysler Building. *See* SA Ex. 2 at § 11. As a result of this tax exemption, The Cooper Union receives tax equivalency payments under the Chrysler Building lease, representing the amount of taxes that would otherwise be paid to the City, which are currently worth $19 million annually. *See* SA Ex. 61. Over the years, the City of New York has repeatedly challenged this tax exemption (*see* Br. at 6) and The Cooper Union has vigorously litigated and defended its tax exempt status by representing that it is tuition-free. *Id*. If the school begins charging tuition, it will lose its asserted justification for its preferential tax treatment. The Trustees are therefore exposing the school to renewed litigation by the City and to a financial loss far greater than what the school estimates it will get from tuition. *See* SA Ex. 31 at 53. The Trustees are also exposing the school to the risk that the New York State legislature could decide to amend or repeal the tax exemption, which it has acted to curtail before and which the Court of Appeals has held can constitutionally be repealed. *See* SA Ex. 51 at § 11 (limiting tax exemption to provide that real property acquired after 1969 would only be tax exempt if used for educational purposes); *People ex rel. Cooper Union for Advancement of Sci.*

& Art v. Gass, 190 N.Y. 323, 330 (1907) (holding legislature has "the constitutional power to revoke the exemption").

2. The Trust Requires The Cooper Union To Be Free and The Trustees Failed to Seek *Cy Pres* Relief From That Mandate

The Trust, the Charter, and the extrinsic evidence of Mr. Cooper's intent all show The Cooper Union's core curriculum must be "free to all who shall attend."

a. The Trust and Charter Require Free Education

The plain text of the Trust and Charter command The Cooper Union to provide free education, above all else. The Trust and Charter define the core curriculum as follows:

> 1. To regular courses of instructions, at night, free to all who shall attend the same, under the general regulations of the trustees, on the application of science to the useful occupations of life, on social and political science, meaning thereby not merely the science of political economy, but the science and philosophy of a just and equitable form of government, based upon the great fundamental law that nations and men should do unto each other as they would be done by, and on such other branches of knowledge as in the opinion of the Board of Trustees will tend to improve and elevate the working classes in the City of New York.

SA Exs. 2 & 3, Art. Fourth § 1. According to basic rules of statutory interpretation, this sentence provides for a unified definition of the education to be provided for by The Cooper Union, not merely "lectures at night" as the Trustees argue. *Cf.* Op. Br. at 2.

The Charter is a legislative statute subject to traditional cannons of statutory interpretation. *See* SA Ex. 2 at 1. "Common marks of punctuation are used to clarify the writer's intended meaning and thus form a valuable aid in determining legislative intent." *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc.*, 87 N.Y.2d 574, 581 (1996) (citations omitted). "Where, as here, a descriptive or qualifying phrase follows a list of possible antecedents, the qualifying phrase generally refers to and modifies all of the preceding clauses." *Id*. at 580; *see also Albany Law School v. New York State Off. of Mental Retardation*

and Dev. Disabilities, 81 A.D.3d 145, 150 (3d Dep't 2011) *aff'd as mod*, 19 N.Y.3d 106 (2012) ("Our interpretation of this statute, however, is aided by the presence of a comma . . . the words separated by the comma [can be viewed] as one thought . . . "). "Where the sense of the entire [document] requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent." *In re Sheba Realty Corp.*, No. 12-75455-DTE, 2014 WL 1373094, at *8 (Bankr. E.D.N.Y. Mar. 27, 2014) (quoting Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 Legal Writing: J. Legal Writing Inst. 81 (1996) at 87). In this case, the plain interpretation of the Charter and Trust require the provision of free education as the primary mission of the school. Thus, each of the commas that separate the components of the paragraph at issue should be read as "and"—just as the final "and" which begins the last phrase commands.

The plain reading of this comprehensive definition directs that the school provide: regular courses, [and] at night, [and] free to all, [and] regulated by the Trustees, [and] that apply science to life occupations, [and] on social and political science, [and] more than just "the science of political economy," [and] including the science and philosophy of just government, [and] based on the Golden Rule, and such other subjects that "will tend to improve and elevate the working classes in the City of New York." SA Exs. 2 & 3, Art. Fourth § 1. The requirement that this education be free modifies the entire sentence and definition.

Moreover, the definition of The Cooper Union's curriculum is not an ancillary instruction: It is the school's core mission. The Trust and Charter provide five enumerated "objects and purposes" for The Cooper Union: (1) a free course of instruction; (2) a reading room, galleries and scientific collections; (3) a women's school of design; (4) a polytechnical

school; and (5) meeting space for the Associates of Cooper Union. SA Exs. 2 & 3, Art. Fourth §§ 1-5.[7] These objects and purposes, however, are not equal, as the Respondents suggest. *Cf.* Op. Br. at 22-23. Both the Trust and Charter direct the Trustees to prioritize the free course of instruction they specifically define:

> [I]t being left discretionary with such board when and to what extent they shall carry out any of such objects and purposes, *save and excepting* that the course of instruction on social and political science, hereinafter provided for, *shall have the preference* over all the other objects of expenditure specified herein, in case there shall not be means adequate for them all, and shall *forever stand pre-eminent* among them.

SA Ex. 2, Art. Fourth (emphasis added). The object of providing the free "course of instruction" is not merely "one of five objects and purposes that the Board may provide for in its discretion," (Op. Br. at 22), rather, the Trust and Charter make clear that, in the event that there are not enough funds to address all the school's objectives, the object of free education "shall forever stand pre-eminent among them." SA Ex. 2, Art. Fourth.

Peter Cooper's idea—giving free education because that is what one would want to receive—is the *sine qua non* of his school. Presciently, Mr. Cooper anticipated that there could come a time when there might not be means adequate for satisfying all the potential objects or purposes of his school. But he was perfectly clear that, when considering all demands on the school's finances, his vision of instruction—based on the golden rule and thus free to all—"shall forever stand pre-eminent among them." *Id.* The Trustees have no discretion to depart from this plain instruction to aggrandize other objects or principals at the expense of free education.[8]

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[7] Respondents notably fail to mention creating space for the Associates of Cooper Union in their summary of the five objects and purposes of the Charter and Trust, while they list the other four. *Cf.* Op. Br. at 23.

[8] While trusts commonly afford trustees the discretion necessary to carry out their duties, that discretion is not a blank check to re-write the plain terms of the trust. *See In re Estate of Wallens*, 9 N.Y.3d 117, 123 (2007); *Boles v. Lanham*, 55 A.D.3d 647, 648 (2d Dep't 2008); *In re Rivas*, 30 Misc. 3d 1207(A), at *5 (Sur. Ct. Monroe Cnty. 2011) (trustee "power is not unlimited and must not be used in contravention of the state [sic] purpose of the

b. The Extrinsic Evidence Also Supports Free Education

All of the extrinsic, contemporaneous evidence also overwhelmingly illustrates that Peter Cooper intended that his school be absolutely free—not just that it offer the occasional free night class. *See supra* at Facts (A); Br. at 20-21; *contra* Op. Br. 24-25.[9] Should the Court have any lingering concern that Respondents' reading creates ambiguity, it must resort to the extrinsic evidence to discern Peter Cooper's intent. *See Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 267 (1990); *In re Accounting by Fleet Bank*, 10 N.Y.3d 163, 166 (2008); *see, e.g.*, *In re Goldstein's Will*, 46 A.D.2d 449, 451-52 (4th Dep't 1975) *aff'd sub nom. Estate of Goldstein*, 38 N.Y.2d 876 (1976) (relying on extrinsic evidence because "[t]here are innumerable cases in this state which demonstrate the reluctance of courts to permit a misdescription to frustrate the testator's intention"); *In re Potskowski*, 15 Misc. 3d 1110(A), at *3 (Sur. Ct. Essex Cnty 2007). Respondents do not dispute that the Court must consider extrinsic evidence if there is ambiguity and they utterly fail to address, or even mention, the voluminous record of extrinsic evidence demonstrating Peter Cooper's intent that the school be free.

Given the plain language of the Deed of Trust and all the extrinsic evidence, the only legal way the Trustees could have charged tuition was to seek court intervention to change the terms of the Trust pursuant to the *cy pres* doctrine. *Compare Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458, 468 (1985) (charter amendment "to change the purpose for which funds

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Trust.") *aff'd*, 93 A.D.3d 1233 (4th Dep't 2012); *Milea*, 24 Misc. 3d 1211(A), at *5-*6. Here, where the Deed of Trust explicitly provides for free tuition, the Trustees do not have the discretion to simply ignore that mandate. *See id.*; SA Exs. 2 & 3, Art. Fourth § 1.

[9] Another example of Respondents' strained focus on the inclusion of the word "night" in the school's curriculum definition comes from Peter Cooper's cornerstone ceremony statement that "I design to provide for a continued course of night *and day* lectures and discussions on the most useful and practical sciences, to be open and free to all . . . " SA Ex. 6 (emphasis added). While Peter Cooper's intent was to provide free education that was also accessible to the working class (and therefore offered at night), he plainly did not limit his school to providing education at night; The Cooper Union has provided classes in the day since its founding.

given" to foundation required court approval). The Trustees' position here that no *cy pres* is necessary contradicts their own previous statements in multiple representations in prior proceedings before this Court, where they swore that the school was required and mandated to provide free education.

3. Misinterpretation of a Trust Is Not an Act of Business Judgment

Contrary to Respondents' arguments, they cannot take refuge in the business judgment rule. As Judge Heitler already found when she rejected Respondents' attempt to transfer this case to the Commercial Division, "[t]his matter does not involve 'business dealings.'" SA Ex. 59. Respondents are trustees—not directors—and their interpretations of the Trust are not subject to the business judgment rule.

Trustees are held to the higher standard of fiduciary duty to honor the terms of the trust and may not invoke the business judgment rule that governs the conduct of directors of a corporation. *See Estate of Sakow*, 160 Misc. 2d 703, 709-10 (Sur. Ct. Bronx Cnty 1994) ("the fiduciary is judged by the standards of a trustee rather than the 'business judgment rule' which is usually applied to the conduct of a corporate officer and directors") (citing *Matter of Estate of Schulman*, 165 A.D.2d 499, 502 (3d Dep't 1991)) *aff'd as mod sub nom. Accounting of Sakow*, 219 A.D.2d 479 (1st Dep't 1995). Respondents do not dispute that trust law rests on a higher standard than the corporate law standard of the business judgment rule. Instead they argue that they are not subject to trust law because "Cooper Union functions as a corporation." Op. Br. at 27. But the Trustees' reliance on the business judgment rule fails because The Cooper Union was created by a Trust and is governed by that Trust, which they must honor. Their interpretation of that Trust is not an act of business judgment.

While Respondents in this proceeding attempt to ignore it, The Cooper Union was created by virtue of Peter Cooper's Deed of Trust. *See* SA Ex. 3. It is not, therefore, merely a

non-profit corporation founded upon articles of incorporation. Despite their emphasis on the school's non-profit corporation status here, in their own *cy pres* petition, brought in 2006, the Trustees confirmed that The Cooper Union was a trust because they brought that action pursuant to trust law (EPTL 8-1.1(c)). *See* SA Ex. 11 at ¶ 1. If The Cooper Union was only a non-profit corporation, then the Trustees would have proceeded pursuant to the lower standard of the *quasi-cy pres* doctrine codified in the Non-For-Profit Corporation Law. *See Alco Gravure,* 64 N.Y.2d at 467 (explaining that quasi-cy pres considerations are codified in the N-PCL). They did not. Nor should they have, given The Cooper Union's roots in the Deed of Trust. Similarly, Respondents have conceded the primacy of the Trust in these proceedings by not disputing that this action is properly brought pursuant to CPLR 7701 *et seq.*, a provision of the CPLR that provides for a special proceeding relating to an express trust (*i.e.* the Deed of Trust).

None of Respondents' authority for invoking the business judgment rule involves a Deed of Trust like Peter Cooper's. *See* Op. Br. at 28. Instead, these cases simply confirm that there is a difference between a trust and a nonprofit corporation, and that principles of corporate law apply to nonprofit corporations, while principles of trust law apply to trusts. Because none of those cases involve express trusts, the courts necessarily applied corporate law principles. For example, in *Dodge v. Trustees of Randolph-Macon Woman's Coll.*, the court held that trust law did not apply because "[t]he College is not an express *inter vivos* trust, charitable trust, or noncharitable trust created pursuant to a statute, judgment, or decree." 276 Va. 10, 17 (Va. 2008). Similarly, in *Corp. of Mercer Univ. v. Smith* (another of Respondents' cases), the court found trust law did not apply because the school was not a trust, but clearly explained: "Of course the administration of assets held by colleges as trustees under the terms of a specific trust

for the benefit of a college or university is subject to trust principles." 258 Ga. 509, 511 n. 6 (Ga. 1988) *abrogated by Warren v Bd. of Regents of Univ. Sys. of Georgia*, 272 Ga. 142 (2000).

In sharp contrast, here, The Cooper Union was founded by both a legislative charter *and* Peter Cooper's Deed of Trust—an express *inter vivos* trust. *See* SA Ex. 3. The Cooper Union holds the assets given to it by Mr. Cooper in trust, pursuant to the terms of the Trust; therefore, it is subject to trust principles. Respondents' attempt to conflate the non-profit corporation with the Trust fails. As the court explained in *Oberly v. Kirby* (another case cited by Respondents), the distinctions between trusts and charitable corporations matter:

> The founder of a charitable trust binds its funds by the express limitations and conditions of the trust document and imposes upon its trustees the strict and unyielding principles of trust law. By contrast, the founder of a charitable corporation makes a gift outright to the corporation to be used for its corporate purposes, and invokes the far more flexible and adaptable principles of corporate law . . . . One of the cardinal principles of trust law is that the intention of the settlor is paramount.

592 A.2d 445, 466-67 (Del 1991) (internal quotations and citations omitted). In this case, the presence of the Deed of Trust demonstrates Mr. Cooper's intent to create a trust—not just a non-profit corporation, as Respondents suggest.[10]

Peter Cooper's choice to create his school with a trust subjects the Trustees to the application of trust principals, not the business judgment rule. *See Estate of Sakow*, 160 Misc. 2d at 709-10. As Respondents concede, "a trustee's discretion cannot run afoul of the trust's express language." Op. Br. 29. The Trustees, as fiduciaries, are required to strictly honor the terms of the trust document, even in the case where the trust document affords the trustees

[10] The fact that some of Respondents' cases refer to directors of nonprofit organizations as "trustees" does not mean that there was a Deed of Trust comparable to Peter Cooper's. *See Corp. of Mercer Univ.*, 258 Ga. at 511 n. 5 ("The fact that the term 'trustee' is used for the Tift directors has no bearing on the question here."); *Stern v. Lucy Webb Hayes Nat. Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003, 1007 n. 1 (D.DC 1974) ("The directors of the Hospital are termed 'trustees' under the by-laws. However, the use of the term by the Court does not imply a legal conclusion as to the duty they owe the Hospital and its patients.").

broad discretion. *See In re Estate of Wallens*, 9 N.Y.3d at 123; *Boles*, 55 A.D.3d at 648; *In re Rivas*, 30 Misc. 3d 1207(A), at *5; *Milea*, 24 Misc. 3d 1211(A), at *5-*6. Respondents' only answer to the application of trust law to their decision to charge tuition is to circularly state "the Founding Documents' clear language does not require free tuition for all." Op. Br. 29. But, as detailed at length *supra*, the Trustees' own prior statements to the courts, the Deed of Trust, the Charter, and the other contemporaneous documents all refute that position: The Trust requires free tuition.

Finally, the inapplicability of the business judgment rule to the Trustees' actions is further supported by the policy reasons underlying that rule. Courts give deference pursuant to the business judgment rule on issues such as "[q]uestions of policy of management, expediency of contracts or action, adequacy of consideration, [and] lawful appropriation of corporate funds to advance corporate interests" out of the recognition that "courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments." *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (1979). The issue of whether to impose tuition for the first time in The Cooper Union's history is a matter of interpreting the language of the Deed of Trust and the Charter and determining whether the Trustees can depart from that language without seeking *cy pres* relief first. Far from being "ill equipped" to assess these sorts of inquiries, courts are frequently called upon to decide exactly these types of questions.[11]

[11] Even if the business judgment rule were applicable to some of the Trustees' actions (like those that truly concern the day-to-day operations of the school), it would not be available to shield their decision to impose tuition for the first time in the school's history in contravention of the explicit mandate of the Trust. The business judgment rule does not protect *ultra vires* actions, nor does it protect against breaches of fiduciary duty. *Auerbach*, 47 N.Y.2d at 629; *GPS Global Parking Solutions, LLC v. 151 W. 17th St. Condominium*, 93 A.D.3d 463, 464 (1st Dep't 2012) (alleged breach of fiduciary duty, "not protected by the business judgment rule, is sufficient to withstand the motion to dismiss"); *e.g. Tung v. Flushing Tower Condominium, Inc.*, No. 1935222011, 2012 WL 10008002 (Sup. Ct. Queens Cnty Apr. 16, 2012) (business judgment rule inapplicable to *ultra vires* act and breach of fiduciary duty).

B. An Accounting is Necessary to Determine The Cause and Extent of The Trustees' Claimed Fiscal Crisis

Pursuant to the express terms of The Cooper Union Charter, "[t]he Supreme Court . . . may at any time, on reasonable notice of application thereof to the Board of Trustees, compel from the Trustees, collectively or individually, a full account of the execution of their trust." SA Ex. 2, p. 15, § 12; *see generally Palazzo v. Palazzo*, 121 A.D.2d 261, 264 (2d Dep't 1986); *In re JP Morgan Chase Bank*, 27 Misc. 3d 1205(A), at *3 (Sur. Ct. Westchester Cnty 2010) *aff'd sub nom. In re Hunter*, 100 A.D.3d 996 (2d Dep't 2012). If, as Respondents assert, the school's finances have compelled them to charge tuition, then they should welcome an accounting as a means of justifying their actions. Their resistance to an accounting in this proceeding mirrors their attempts to mask their dealings with non-disclosure agreements (SA Ex. 24), which are contrary to transparency required by the Charter, SA Ex. 2, p. 11, § *Thirteenth*, and calls into question their claimed financial justification and their good faith. None of the Trustees' excuses for not having an accounting (standing, statute of limitations, or their previous disclosures) justifies maintaining further secrecy concerning The Cooper Union's finances.

Respondents' first argument against an accounting, based on Petitioners' standing, duplicates their other standing arguments and fails for the same reasons. As detailed at length *infra* Part III, Petitioners are the beneficiaries of Peter Cooper's Trust and therefore have standing to sue for the accounting specifically provided for in the Charter. SA Ex. 2, p. 15, § 12.

Respondents' effort to rely on the statute of limitations fares no better. The primary breach of fiduciary duty alleged in the Petition is the Trustees' decision in 2013-2014 to impose tuition in violation of the Trust's mandate for free tuition and in the face of viable alternatives that would have cut costs rather than impose tuition. *See* Pet. ¶¶ 159-95 & 211-20. Plainly, that breach is not time-barred. Respondents have never justified their rejection of those alternatives.

The Working Group plan demonstrated financial superiority to the Tuition plan in each and every year. SA Ex. 31 at 53. Respondents fail to adequately support their assertion that the Working Group proposal "would close only about one-third of the deficit" and do not offer any explanation for their rejection of "Trustee Gural's proposal to cover shortfalls from free tuition for one year while Cooper Union considered alternatives to a sliding scale tuition model." Op. Br. at 13.[12] Respondents' tuition plan also jeopardizes the school's valuable tax exemption, which is a stand-alone violation of their fiduciary duty that also occurred within the statute of limitations. *See supra* (I)(A)(1)(b).

There are other examples of mismanagement and breaches of fiduciary duty in the Petition that are similarly within the statute of limitations. For example, the Board has required Trustees to sign non-disclosure agreements (SA Ex. 24), which are contrary to the Charter-mandated transparency (SA Ex. 2, p. 11, § *Thirteenth*). *See* Pet. ¶ 82. Between 2009 and the present, the Board chose not to penalize its lessee Minskoff Equities for its failure to develop 51 Astor Place on time, including potentially reclaiming the property and retaining $97 million. *See id.* at ¶¶ 132-34. In addition, the Trustees have doled out excessive compensation to both previous President Campbell and current President Bharucha, making them some of the most highly compensated college presidents in the country, in violation of Not-for-Profit Corporation Law § 202(a)(12). *See id.* at ¶¶ 110-11 & 158. Further, after representing to the Court in the 2006 *cy pres* proceeding that it would cut costs by ten percent, the Board instead allowed expenses to rise dramatically from $43.7 million in 2006, to $66.8 million in 2010. Even excluding debt service and depreciation, the rise was from $39.4 million to $49.8 million. *See*

[12] Contrary to Respondents' assertion that "only one current Board member who served on the Board at the time of the activities that Petitioners question," Op. Br. at 25 n. 12, in fact, *all* of the current members of the Board were members in January 2014, when the Board decided to reject the Working Group and Trustee Gural proposals and reaffirm its commitment to charge tuition. *See* Pet. ¶¶ 17-40 & 211-20.

id. at ¶ 109.[13] Also within the statute of limitations period, the Trustees consolidated over sixty percent of the school's managed portfolio assets in risky hedge funds, in violation of the Prudent Investor Act; over the course of a single year, these investments plummeted in value from $103 million in 2008 to $19 million in 2009. *See id.* at ¶¶ 143-49. Finally, and more recently, the Trustees wasted the school's assets on lavish expenses for President Bharucha's inauguration celebration and house. *See id.* at ¶ 157.

Finally, Respondents' effort to deter further inquiry into their financial dealings by pointing to documents they have already posted on their website falls far short of the necessary disclosure and only raises more questions (*see* discussion *supra* Facts (B)) that highlight the need for an independent accounting with access to the underlying documents (*e.g.* books, records, spreadsheets, receipts, contracts, compensation and benefits records, leases, conflict of interest reports, and investment account and hedge fund reports and bills).

C. The Trust Requires the Creation of the Associates of The Cooper Union

While they readily disregard the precedent of 155 years of free education, Respondents are quick to invoke tradition in attempting to deny the need for Board oversight. "At the very least," Respondents now argue, "the fact Cooper Union has gone over 150 years without a Society reaffirms the notion that the Board may form the Society 'at any time' the Board deems appropriate." Op. Br. at 31. But supporting the Society called "The Associates" is one of five objectives identified in the Trust and Charter; the Board cannot use its discretion to indefinitely postpone its creation without some justification. Here, Respondents' failure to provide any basis for their refusal to create this vital oversight body is a telling violation of their fiduciary duties.

[13] Respondents' claim that the *cy pres* court "approved" their financial planning (Op. Br. at 26) is disingenuous, since the Trustees promised significant cost reductions which they never implemented.

Again and again, the Trust and the Charter refer to, and describe in great detail, the Society, its powers, its membership, and its methods of operation. SA Ex. 2, p. 7, § *Third* & p. 13, § 8; SA Ex. 3, p. 19, § *Third*. Provision of space for the Society to meet is listed as one of the school's five objectives. SA Exs. 2 & 3, Art. Fourth § 5. Now, in the face of repeated requests to form the Society, Respondents baldly assert that there is "no obligation to establish a Society." Op. Br. at 31.[14] Much like Respondents' strained argument that Peter Cooper did not intend his school to be free, this position ignores the plain import of the language of the Trust and the Charter. "[E]ven when the trust instrument vests the trustee with broad discretion to make decisions regarding the distribution of trust funds, a trustee is still required to act reasonably and in good faith in attempting to carry out the terms of the trust." *In re Estate of Wallens*, 9 N.Y.3d at 123. Respondents' argument that they are not required to *ever* create the Associates is neither reasonable nor a good faith interpretation of the unambiguous intent of Peter Cooper set forth in great detail in the Deed of Trust and Charter.

Respondents' refusal to create the Associates is particularly troubling because it is an obvious attempt to avoid oversight and entrench themselves in power by refusing to create the very body empowered by the Trust and the Charter to remove Trustees. *See* SA Ex. 2, p. 7, § *Third* & p. 13, § 8; SA Ex. 3, p. 19, § *Third*. Trustees may not disregard the terms of the trust to which they owe a fiduciary duty, in order to entrench themselves in power and avoid oversight of their actions. *See Delbene v. Estes*, 15 Misc. 3d 481, 485-86 (Sup. Ct. Westchester Cnty 2007) *aff'd*, 52 A.D.3d 647 (2d Dep't 2008). But, in resisting calls for the creation of the oversight body Peter Cooper intended, the Trustees have done just that.

[14] Following the Friends of Cooper Union's call for creation of the Associates, The Cooper Union Alumni Association formed a Committee to study The Associates and make recommendations regarding its formation. The Alumni Association Committee conducted textual and historical research for months before recommending formation of the Associates through collaboration with the Board of Trustees. *See* http://www.cualumni.com/s/1289/indexNoRtcol.aspx?pgid=1147&gid=1.

The Trustees have some discretion regarding when—but not whether—they must create the Associates. After deferring this act for 155 years, refusing it now without explanation and in the face of repeated calls from The Cooper Union community during the greatest crisis in the school's history is a violation of fiduciary duty.

II. ALTERNATIVELY, THE COURT SHOULD ORDER LIMITED DISCOVERY

In the alternative, should the Court deny either of Petitioners' declaratory relief claims for an accounting or breach of fiduciary duty, Petitioners are entitled to conduct discovery in this Article 77 proceeding, to further support these claims. *See* Br. at 32.

Respondents' opposition to discovery is limited to repeating their arguments for dismissal and requesting, in effect, a stay pending the outcome of that request. Op. Br. at 34. But Petitioners do not seek discovery prior to the Court's determination of the three questions for declaratory relief (and Respondents' motion to dismiss based on standing). In the event that the Court denies Respondents' motion and still requires additional discovery prior to determining the declaratory relief, however, there is no dispute that such discovery is available as "Article 77 proceedings are subject to the usual rules of civil practice in New York." Op. Br. at 34.

III. RESPONDENTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE STUDENTS AND FACULTY OF THE COOPER UNION HAVE STANDING

In a further effort to deny oversight of their actions, Respondents move to dismiss this Petition by arguing that neither current, former, nor prospective students of The Cooper Union, nor its faculty, have standing to question their actions. Op. Br. at 15-21. Separate and apart from whether this position is a betrayal of their Charter-mandated duty of transparency, Respondents' argument fails because Petitioners are not members of the public at large, but rather of a precise class of beneficiaries—students and faculty—that is "sharply defined and limited in number" and has a "special interest" in the Trust's assets. *See Alco Gravure*, 64

N.Y.2d at 465-66 (granting standing to employees to challenge trustees' decision to transfer foundation's assets).[15]

The Restatement (Third) of Trusts provides an example of standing to challenge trust-created educational opportunities that is directly applicable here. If a trust provides that a college is to be a trustee of a scholarship and directs "that its income be used to provide graduate-study scholarships each year to selected students graduating from the college, based on prescribed procedures and criteria," the Restatement explains, "the trust purpose may be enforced by one or more of the current students who might reasonably expect to meet the criteria." Restatement (Third) of Trusts § 94 (2012). That is exactly the case here: Claire Kleinman, a current student, has clear standing to enforce the purpose of Peter Cooper's Trust because it directs that she should receive a "free" education. *See* Part I, *supra*. Claire's admission to The Cooper Union places her (like other admitted and former students and current faculty) in a narrow class of interested individuals with standing to enforce Peter Cooper's Trust under *Alco Gravure*.

Respondents' attempt to distinguish *Alco Gravure* by characterizing Claire and the other student and professor petitioners as mere members of "the public as a whole and not a well-defined, limited particular group" fails. Op. Br. at 18. The students and teachers of The Cooper Union is a group "sharply defined and limited in number." Contrary to Respondents' claim that the potential beneficiaries of Peter Cooper's Trust are all of "the inhabitants of the United States," Op. Br. at 20, the Trust is clear that the school is to be "free to all *who shall attend* the same." SA Ex. 3, Art. Fourth § 1 (emphasis added). Far from being open to all of the residents

[15] Not only do Petitioners have standing but, contrary to Respondents' claim, Boards of Trustees are capable of being sued, and regularly are in New York. *Compare* Op. Br. at 4 n. 2 *with, e.g.*, *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989); *Norris v. Walcott*, 950 N.Y.S.2d 535 (Sup. Ct. 2012); *Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York*, 713 N.Y.S.2d 908 (N.Y. Sup. Ct. 2000) *aff'd in relevant part Bd. of Educ. of Roosevelt Union Free Sch. Dist. v. Bd. of Trustees of State Univ. of New York* 723 N.Y.S.2d 262 (2001). Respondents do not cite a single New York case to the contrary; their authority from Delaware and Ohio is distinguishable because neither case involved declaratory judgment claims against a school board of trustees.

of the United States, The Cooper Union is a small and highly selective school with a student body of 1,000 students. *See* SA Ex. 13. Petitioners Claire Kleinman and Isabella Pezzulo are some of the very few students selected for admission to The Cooper Union's Class of 2018. The intended beneficiaries for purposes of standing are limited to the admitted and actual students of The Cooper Union—those who have brought this petition. The Petitioners are not residents from far corners of the United States with amorphous or generalized interests in the future of the school. Each of the Petitioners has a clearly defined link to The Cooper Union.

The Petitioners here are not the remote parties denied standing in the cases upon which Respondents rely. Unlike *Consumers Union of U.S., Inc. v. State*, where plaintiffs were like any member of the public who could choose to purchase health insurance from Empire, here only a select few are admitted to attend The Cooper Union and benefit from Peter Cooper's gift of free education. *Cf.* 5 N.Y.3d 327, 351 (2005). For the same reason, Judge Wooten's decision in *Libraries v. Marx*, No. 652427/13, 2014 WL 2472103, at *9-*10 (Sup. Ct. N.Y. Cnty May 30, 2014) is inapplicable because there the plaintiffs expressly acknowledged that they were members of the "public at large" all of whom had access to the library. Nor is the group here anywhere near as broad as "virtually everyone with an interest in Italian culture." *Italic Institute of America, Inc. v. Columbia University*, No. 652948/2012, 2013 WL 3070513, at *3 (Sup. Ct. N.Y. Cnty June 14, 2013).[16]

Instead, this case falls squarely into the facts contemplated by *Alco Gravure* and the Restatement of Trusts. In *Alco Gravure,* the Knapp Foundation was a nonprofit corporation

[16] Respondents' reliance on *Comm. to Save Polytechnic Univ. v. Bd. of Trustees of Polytechnic Univ*. is misplaced as it involved neither student petitioners nor efforts under Article 77 to enforce a trust by its intended beneficiaries. *See* 22 Misc. 3d 1116(A)(Sup. Ct. N.Y. Cnty 2009) Moreover the holding in *Comm. to Save Polytechnic Univ.* is questionable given its reliance—without explanation—on the faulty premise that alumni and a would-be adjunct professor are indistinct from the public at large with respect to their connection to the school.

established in 1923 by a special act of the legislature, designed "to assist employees of the founder's corporations and their families," usually through loans. 64 N.Y.2d at 462-63. Many years later, in 1983, citing "the absence of individual applications and its continued liability for Federal income tax, the Foundation's trustees resolved that the original intent of the founder would best be served by the dissolution of the Foundation and the transfer of its assets" to another foundation established by the same founder, which was tax exempt. *Id.* at 463. The plaintiffs who brought the action were "a corporation claiming to be a 'successor corporation' within the meaning of the 1923 act, whose employees are intended beneficiaries of the Foundation, as well as two individual employees of the corporate plaintiff." *Id.* at 464. They sought *inter alia* an accounting and a declaration and injunction against the transfer of the Foundation's assets. *Id.* The Court of Appeals held that both the individual plaintiffs and the corporate plaintiff had standing to bring the suit, based on an "analogy to trust law." *Id.* at 465. The Court acknowledged "[t]he general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust," and only the Attorney-General has standing to represent the beneficiaries of a charitable disposition. *Id.* "There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number." *Id.* The Court held that the well-defined and limited class of beneficiaries in that case were the employees of the Knapp corporations, including the plaintiffs. *Id.* at 465-66. The plaintiffs in *Alco Gravure* were limited to the employees of the Knapp corporation, thus eliminating the risk of "vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter," *id.* at 466. Similarly,

here, the plaintiffs are limited to the students and faculty of The Cooper Union, who have a similarly clear "tangible stake in the matter."[17]

In *Hooker v. Edes Home*, the District of Columbia Circuit applied the *Alco Gravure* rationale and found standing to challenge the trustees' decision to relocate the free Edes Home for elderly, indigent widows, which was established by a testamentary bequest and special charter. 579 A.2d 608, 608 (D.C. Cir. 1990). The court held that "elderly, indigent widows satisfying the Trustees' own eligibility requirements have standing to challenge the actions proposed by the Board here, which may affect their 'special interest' as a class in the continued administration of the Edes trust in a manner consistent with the will and charter." *Id.* at 617. The court reasoned that "[a]ll such members have a present opportunity to enjoy a direct benefit differing markedly from the incidental and indirect benefit the public realizes from the housing of indigent elderly widows." *Id.* Petitioners (*i.e.* The Cooper Union's actual students and faculty) are a narrower group than in *Hooker* (*i.e.* all elderly and indigent widows such as Ms. Hooker, who *desired* to live in the Edes Home, even though they were not actually living in the home). *Id.* at 617-18. The *Hooker* court emphasized that the risk of "vexatious litigation is minimal," since the suit sought to challenge the trustees' "proposed exercise of discretion that will change the nature of the institution"—just as this case seeks to challenge the Trustees' decision to change the fundamental nature of The Cooper Union. *See id.* at 617.

Petitioners have standing here, just as in *Alco Gravure* and *Hooker*, because they are members of a "sharply defined and limited in number" class, which has "a special interest" in The Cooper Union. Petitioners are current and former students and faculty of the school—the clearly intended beneficiaries of Peter Cooper's gift. *See Alco-Gravure*, 64 N.Y.2d at 465-66;

[17] *Alco Gravure* is not limited to cases involving dissolution (*contra* Op. Br. at 16); as here, it was concerned with honoring the grantor's intent and preserving the fundamental nature of the foundation.

Restatement (Third) of Trusts § 94 (2012).[18] Moreover, even if the Court finds that the *Alco Gravure* standing requirements are not met, the Trustees' troubling pattern of attempting to avoid scrutiny is a "special interest" factor that should cause the Court "to relax the usual rules of standing" in this particular case. *See Consumers Union of U.S., Inc.*, 5 N.Y.3d at 353-54. Respondents' decision to dispute the standing of their own students and faculty is part of the Trustees' pattern of attempting to insulate their actions from any review or accountability—by failing to create the Associates (which would have the capacity to remove Trustees), by failing to seek *cy pres* (which would have involved scrutiny by the Attorney General and the Court), by insisting on non-disclosure agreements in contravention of the undisputed Charter requirement for transparency (SA Ex. 24), and by resisting an accounting into the school's finances which they should welcome if their claims of financial necessity are true. Given the consequences for The Cooper Union presented by the Petition, the Court should hear Petitioners' claims and deny Respondents' cross-motion to dismiss in its entirety.[19]

CONCLUSION

The Court should issue an order declaring the Board's decision to charge tuition was a breach of fiduciary duty (and removing Trustees who voted for tuition and/or against alternatives), appointing a Special Master to conduct an accounting, and directing the creation of the Society and Council of the Associates. Respondents' motion to dismiss should be denied.

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[18] The Committee to Save Cooper Union has standing based on that of its members (including Petitioners). *See Mulgrew v. Bd. of Educ. of City School Dist. of City of New York*, 75 A.D.3d 412, 413 (1st Dep't 2010).

[19] Respondents' reply in support of their cross-motion to dismiss must be limited to addressing Petitioners' arguments in opposition to the cross-motion to dismiss; any new arguments are improper and should be stricken. *See Gard Entertainment, Inc. v. Country in New York, LLC*, 96 A.D.3d 683, 684 (1st Dep't 2012): *Dannasch v. Bifulco*, 184 A.D.2d 415, 417 (1st Dep't 1992).

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