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June 24, 2014

***By Facsimile to 212.227.2919***

Hon. Sherry Klein Heitler  
Administrative Judge, 1st Judicial District  
Supreme Court of the State of New York  
60 Centre Street, Room 620  
New York, New York 10007

*Re: The Committee to Save Cooper Union, Inc. et. al., v. Board of Trustees of  
The Cooper Union, et. al., No. 155185/2014*

Your Honor:

We represent Petitioners in the above-captioned matter, a group of teachers and current, prospective and past students of The Cooper Union. We write in response to Respondents' June 23, 2014 letter request to transfer this Article 77 Proceeding from the Civil Branch of the Supreme Court of the State of New York to the Commercial Division ("Letter"). Petitioners initiated this proceeding in the Civil Branch of the Supreme Court, pursuant to Article 77, "to determine a matter relating to ... [the] express trust" that created The Cooper Union. CPLR § 7701. The Supreme Court is the appropriate forum for this action. Given the predominance of matters relating to the school's trust, if the Court is inclined to transfer this matter, it should be transferred to the Surrogate's Court, not the Commercial Division.

### ***Current Status of the Proceedings***

The case has been assigned to the Honorable Nancy M. Bannon. The parties appeared before the Court today (June 24) and Judge Bannon set the following schedule: service of Respondents' opposition papers and cross-motion to dismiss by July 18, 2014; service of Petitioners' reply papers and opposition to the cross-motion by July 28, 2014; service of Respondents' reply papers on their cross-motion by August 4, 2014; hearing on the Article 77 and cross-motion on August 13, 2014 at 11:00 AM.

***Background on The Cooper Union***

The Cooper Union was founded by Peter Cooper in 1859 on the pillars of free tuition, fiscal conservatism and transparency. The unequivocal requirement for The Cooper Union to provide free tuition is reflected in both the original and amended Deed of Trust that conveyed the land and building for The Cooper Union and which provided that classes should be “free to all who shall attend the same.” ¶ 57 (all references to “¶” are to the Petition, attached as Exhibit A to Respondents’ Letter). The original Charter of The Cooper Union, adopted by the State Legislature in 1859, similarly emphasized that classes should be “*free to all* who shall attend the same.” *Id.* With respect to fiscal conservatism, the original Charter forbade the Trustees to take on debt of more than \$5,000 and provided that if they did, those who voted for it would be personally liable. ¶ 62. The Charter also prohibited the Trustees from mortgaging the original building and the 1902 endowment of the land beneath what is now the Chrysler Building also prohibited mortgaging that property. ¶ 63. With regard to transparency, unlike other boards that require confidentiality, Peter Cooper’s Charter commanded that every Trustee “shall be at all times at liberty, in his discretion, freely to publish any matter within his knowledge relating to the institution herein contemplated, or to its management in any respect, including any discussions in the Board of Trustees.” ¶ 64. As an additional check on the Trustees, the Deed of Trust and the Charter provided for the Trustees to create a society to provide oversight of the Board, “The Associates of The Cooper Union for the Advancement of Science and Art” (the “Society”). ¶ 65. Pursuant to the Charter, the Society was to annually elect a Council of the Associates of The Cooper Union and was to have the power to remove trustees. ¶¶ 66, 67.

***Given the Predominance of Questions of Trust Interpretation, This Case Belongs in the Civil Part, or in the Surrogate’s Court – Not the Commercial Division***

This action challenges clear and unambiguous violations of the Trust that governs the Board members’ actions. Respondents’ arguments for transfer mistakenly focus on the financial and real estate transactions that gave rise to their claims of a current financial crisis. But these financial factual questions are secondary to the purely legal questions of Trust interpretation and will only become relevant in the event that the Court declines to rule on Petitioners’ claims for declaratory relief.

Petitioners have brought this proceeding, pursuant to Article 77, principally seeking three declarations, as a matter of law, that the school’s Trust, Charter, and other founding documents require: (i) The Cooper Union to be free; (ii) an accounting to shed light on the deterioration of the endowment; and (iii) the formation of a body called for in the Deed of Trust to provide oversight of the Trustees’ actions—the “Associates” of The Cooper Union. These three legal questions can be resolved by interpretation of the school’s Trust and the uncontested record.

First, the clear and unambiguous direction of the school’s Charter and Trust (and the corroborating extrinsic evidence) is that The Cooper Union shall be “free to all who shall attend.” These terms define and limit the Trustees’ powers and bar deviation from their clear direction. The Trustees are judicially estopped from arguing otherwise because they have repeatedly made that representation to the courts in prior proceedings where they obtained a favorable outcome, including most recently in a verified Article 78 petition in 2006 to obtain relief from a tax assessment. Despite the clear requirement of free tuition, and the Trustees’

repeated past reliance on that requirement to gain benefits from governmental entities for the school, the Trustees voted to impose tuition and rejected non-tuition alternatives. Given the clear direction of the Trust and the Charter, it was a breach of fiduciary duty to charge tuition without seeking *cy pres* relief from the Court to modify the terms of the Trust—which the Trustees did not do. The Trustees should be directed to abide by the terms of the Trust and Charter and maintain The Cooper Union as a school “free to all who shall attend.”

Second, Petitioners seek a direction that the Trust and Charter require an accounting, given the Board’s lack of transparency and the deterioration of the school’s endowment. The school’s Charter specifically provides “The Supreme Court shall possess and exercise a supervisory power over the Corporation hereby created, and 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.” Such an accounting is warranted here in light of the Board’s obfuscation of the school’s finances in contravention of its Charter-mandated transparency. An accounting is also necessary because there are grave questions about the health and stewardship of the endowment. Finally, the Board’s reliance on a defense of fiscal need to justify its decision to charge tuition itself commands an accounting, especially when it appears that the Board’s own profligacy is responsible for the school’s current financial problems.

Third, Petitioners seek a direction that the Board must create the “Associates of The Cooper Union,” an oversight body with the power to remove trustees. The “Associates” are explicitly contemplated by the school’s Charter and Deed of Trust. *See* ¶¶ 66-67. The plain language of the Charter requires the Board to recognize this body, but the school’s alumni association and others who have called for its creation have been met with Board indifference. The 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. Petitioners ask that the Court direct the Trustees to acknowledge the Associates in accordance with Peter Cooper’s wishes when he created the Trust that governs the school.

Petitioners’ appeal to the business judgment rule as a basis for transfer misses the mark. *See* Letter at 1. Unlike the directors of a corporation, who are given some leeway in the exercise of their business judgment, trustees of trusts are held to a higher standard. *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). In this case, the question of whether the Trustees breached their duties will be judged in light of the law of trusts, not corporations.

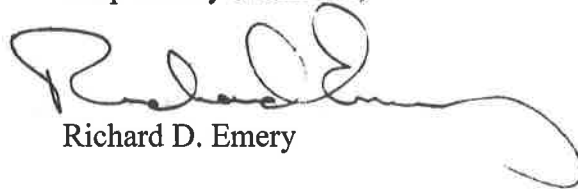
### ***Conclusion***

This Article 77 Proceeding was brought in the general part because it is a court of general jurisdiction. If this Court is inclined to transfer this matter to a Court with more specific expertise, the Surrogate’s Court, rather than the Commercial Division is the more natural fit as both the Supreme Court and the Surrogate’s Court have concurrent jurisdiction to adjudicate

matters arising under Article 77. *See Chiantella v. Vishnick*, 84 A.D.3d 797, 798 (2d Dep't 2011); 4C N.Y.Prac., Com. Litig. in New York State Courts § 106:9 (3d ed.).

We are available at the Court's convenience should any questions arise.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard D. Emery", with a long, sweeping flourish extending to the right.

Richard D. Emery

Enclosures

- c. Kenneth J. King, Esq. (*via email*)
- Michael E. Baughman, Esq. (*via email*)
- Barbara Mather, Esq. (*via email*)
- Angelo A. Stio, Esq. (*via email*)

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DATE: June 24, 2014

FROM: Richard D. Emery

TO: Hon. Sherry Klein Heitler  
Administrative Judge, 1st Judicial District  
Supreme Court of the State of New York  
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New York, New York 10007

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MESSAGE: