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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 SUPPORT OF PETITIONERS' ARTICLE 77 PETITION

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The Committee to Save Cooper Union, Inc., Adrian Jovanovic, Michael Essl, Toby Cumberbatch, Isabella Pezzullo, and Claire Kleinman ("Petitioners"), as beneficiaries of the trust established by Peter Cooper, and with a special interest in its assets and funds, submit this memorandum of law in 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.

PRELIMINARY STATEMENT

As he laid the cornerstone of his new school, in 1859, Peter Cooper explained to those in attendance his belief that in "the golden rule of doing unto others as we would that others should do unto us, rests all our hope for the future progress and improvement of mankind. Believing thus," he explained, "I am determined to secure to our country a perpetual course of free lectures and instruction." The promise of free education made The Cooper Union unique: free education is as radical a premise today as it was 155 years ago when Mr. Cooper enshrined it in the school's Trust, Charter, and other founding documents. But this legacy is now imperiled by the very people who have a fiduciary duty to uphold it. In April 2013, the Board of Trustees voted to radically alter the central defining feature of The Cooper Union and to begin charging tuition starting this fall 2014. This action is a clear and unambiguous violation of the Trust that governs the Board members' actions.

Petitioners bring this proceeding, pursuant to Article 77, principally seeking three declarations that, as a matter of law, 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. Each of these determinations is manifestly supported by the uncontested record.

First, Petitioners seek a declaration that charging tuition violates the Trust, Charter, and other founding documents. 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 this Court jurisdiction to order an accounting and one 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. 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. The Court should direct them to acknowledge the Associates in accordance with Peter Cooper's wishes when he created the Trust that governs the school.

In the alternative, if the Court declines to determine any of the preceding declaratory questions on the current record, Article 77 provides for discovery pursuant to Article 31. Absent a decision as a matter of law, additional discovery is mandated here because of the Board's failure to disclose adequate information about its rejection of non-tuition alternatives and the Board's management of the endowment. Such discovery would shed light into the Board's deliberations concerning the need for tuition and its stewardship of the endowment. The Trustees' extravagant expenditures on a lavish new academic building and excessive presidential compensation and expenditures, as well as their apparently gross undervaluation of the school's real estate assets (including the iconic Chrysler Building), conflicts of interest, and consolidation of the school's non-real estate assets in risky hedge funds all command further inquiry and explanation.

The Trustees' tuition decision betrays a loss of direction. Their disturbing economic justification commands inquiry. And their failure to create a Charter-mandated oversight body demands action. The Cooper Union is unique—not because of its stature,

endowment, or programming, but because it applies the golden rule to education by making it free.

Petitioners respectfully request the Court to re-orient the Trustees to the pole star of free tuition, order an accounting, and require the acknowledgment of the Associates to guide the Board back to the unique vision of the school's founder, Peter Cooper.

FACTS

I. Peter Cooper Founds The Cooper Union in 1859 as a University "Free to All"

Peter Cooper founded The Cooper Union for the Advancement of Science and Art in 1859 on the principle that every student should be entitled to a free education. ¶ 49; SA Exs. 2 & 3.[1] This principle was codified in the school's Deed of Trust, Charter, and other founding documents.[2] *Id.*; *see*, *e.g.*, SA Exs. 2, 3, 5, 6, 7, 8. Under this principle, the school flourished for 155 years.

A. The Vision of Peter Cooper

Mr. Cooper was an iconic figure of New York City—a renowned inventor and an industrialist, but above all a philanthropist. ¶ 50; SA Ex. 4. He believed in giving back to the City and central to that vision was his dream of a school where education would be free. ¶ 51; SA Ex. 4. As explained on The Cooper Union website, Mr. Cooper "believed that education should be 'as free as water and air' and so created The Cooper Union for the Advancement of Science and Art, one of the first colleges to offer a free education to working-class children and to women." ¶ 52; SA Ex. 4. Peter Cooper described his motivation to found The Cooper Union

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[1] All references to "¶" are to the Petition, attached as Exhibit 1 to the Affirmation of Zoe Salzman, dated June 13, 2014 ("SA").

[2] All citations to the Charter and the Deed of Trust are to the originals (SA Exs. 2 and 3, respectively). The current versions of both documents (which have been amended without materially altering these operative provisions) are attached as SA Exs. 51 and 52, respectively.

by explaining: "there must be a great many young men in this country, situated as I was, who thirsted for the knowledge they could not reach, and would gladly avail themselves of opportunities which they had no money to procure. I then determined, if ever I could acquire the means, I would build such an Institution . . .". ¶ 53; SA Ex. 5 at 19.

In the cornerstone ceremony on September 17, 1853, Mr. Cooper explained in his address: "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* . . ." ¶ 55; SA Ex. 6 (emphasis added).

B. The Cooper Union's Founding Documents: Free Education, Transparency, Fiscal Conservatism

From the outset, The Cooper Union's founding documents identified three pillars to support the school's governance: 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; SA Ex. 3 at § Fourth(1) (emphasis added). 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." ¶ 57; SA Ex. 2 at § Fourth(1) (emphasis added).

This principle is reiterated in other founding documents, such as a letter dated April 29, 1859, that accompanied the Deed of Trust, and in which Peter Cooper explained: "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*…" ¶ 58; SA Ex. 7 at pg. 2, "Encourage the Young" (emphasis added). In a pamphlet published by The Cooper Union on October 9, 1956, the then-

Trustees presented Peter Cooper's April 29, 1859 letter "on the eve of a major effort to prepare The Cooper Union to enter its second century of *free educational service* to the people of America. Whoever reads this letter can better understand the far-reaching vision of Peter Cooper, which is fundamental to the aspirations of The Cooper Union today." ¶ 59; SA Ex. 7 (emphasis added). 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." ¶ 60; SA Ex. 8 at 18.

The school's original Charter was enacted as a statute by the New York State legislature. SA Ex. 2. The legislature granted, and the Charter provides, that The Cooper Union's property would not be subject to taxation. *Id.* at § 11. Over the years, The Cooper Union has vigorously litigated and defended its tax-exempt status against attempts by the City of New York to access the significant tax dollars associated with the school's lucrative real estate, including the school's properties at Astor Place and the Chrysler Building.[3]

The Cooper Union has repeatedly justified its tax exemption based on the fact that it is tuition-free. For example, in 1936, the school successfully defended its tax-exempt status before the Court of Appeals, highlighting that the trial court had taken judicial notice of the fact that in providing "free instruction," SA Ex. 48 at 4, "without charge," *id.* at 33, the school was for "all intents and purposes a part of the educational system of the City of New York," *id.* Most recently, in an Article 78 Petition dated September 21, 2006 and verified by the school's then Vice-President for Business Affairs and Treasurer, Robert E. Hawkes, which challenged the

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[3] *See People ex rel. Cooper Union for Advancement of Sci. & Art v. Wells*, 98 A.D. 623 (1904); *People ex rel. Cooper Union for Advancement of Sci. & Art v. Wells*, 180 N.Y. 537 (1905); *People ex rel. Cooper Union for Advancement of Sci. & Art v. Gass*, 190 N.Y. 323, 325-26 (1907); *People ex rel. Cooper Union for Advancement of Sci. & Art v. Sexton*, 247 N.Y. 371, 372-73 (1936); *People ex rel. Cooper Union for Advancement of Sci. & Art v. Sexton*, 273 N.Y. 461, 273 (1936); *Cooper Union for Advancement of Sc. & Art v. City of New York*, 272 A.D. 438, 439-40 (1947).

City's attempt to tax certain school property, The Cooper Union argued that it was tax exempt because, in return for its tax exemption, its Charter "placed significant restrictions and conditions on Cooper Union … [including that] Cooper Union must provide 'regular courses of instruction . . . free to all who shall attend the same . . .'" SA Ex. 9 ¶¶ 19(b) & 20 (quoting Charter, § 2, ¶ *Fourth*.1).

With respect to fiscal conservatism, Mr. Cooper knew that operating a school without tuition would require careful management of debt. He initially founded The Cooper Union with a gift of land and the original Foundation Building, to be held in trust by the school. ¶ 54; SA Ex. 3. Later, the school received generous gifts from Peter Cooper's descendants and Andrew Carnegie, including the land beneath what is now the Chrysler Building, which is the school's largest asset. ¶ 54; SA Ex 11 ¶¶ 11-13. Having provided a substantial endowment, 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; SA Ex. 2, p. 11, § *Twelfth*. 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; SA Ex. 2, p. 11, § *Eleventh*.

With regard to transparency, unlike other boards that command 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; SA Ex. 2, p. 11, § *Thirteenth*. The Charter also provides for unique oversight by this Court: "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." SA Ex. 2, p. 15, § 12.

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; SA Ex. 2, p. 7, § *Third* & p. 13, § 8; SA Ex. 3, p. 19, § *Third*. The Associates' Society was to include graduates and trustees of The Cooper Union. *Id.* Pursuant to the Charter, the Associates' Society was to annually elect a Council of the Associates of The Cooper Union for the Advancement of Science and Art (the "Council"). ¶ 66; SA Ex. 2, p. 13, § 8. The Council was to be made up of at least twenty-four members of the Society and have the power to remove trustees. ¶ 67; SA Ex. 2, p. 7, § *Third* & p. 13, § 8; SA Ex. 3, p. 19, § *Third*.

C. Vision in Practice: Cooper Union's Ascendency

From the outset, consistent with the Deed of Trust and its Charter, The Cooper Union's goal has been to admit undergraduates solely on the basis of merit and to award full scholarships to all enrolled students. Year after year, for almost 155 years, the Trustees acknowledged their duty to honor Peter Cooper's vision, and the school became known for its full-tuition scholarships. *See* SA Ex. 10; SA Ex. 12.

Under the policy of free tuition, The Cooper Union flourished. In 2011, Newsweek ranked The Cooper Union as the most desirable small school in the United States, and the seventh most desirable school overall. ¶ 189; SA Ex. 13. Currently, The Cooper Union offers degrees in architecture, art, and engineering, and also has a Faculty of Humanities and Social Sciences. ¶ 79.

II. In 2013, the Board of Trustees Decides to Charge Tuition

After more than a century and a half of free tuition, on April 23, 2013, the Board of Trustees announced its decision that The Cooper Union would begin charging tuition in the fall of 2014. ¶ 167; SA Ex. 14.

According to the Board's tuition plan, starting with the entering class of 2014, undergraduate students will be charged $19,500 in tuition (50 percent of what the Trustees claim is actual tuition of $39,000). *Id.* Although the Current Board's consultants recommended charging only 25 percent of tuition, the Trustees rejected that recommendation and decided to charge 50 percent instead, apparently without regard for how this might affect the school's ability to recruit the most talented applicants. *Id.* Under the new scheme, tuition will be charged on a sliding scale, with some students paying the full $19,500, others (purportedly estimated to be approximately 25 percent) paying nothing, and another estimated 25 percent paying some amount in between. *Id.*

The central justification for the Board's split with the school's Trust, Charter, founding documents, and tradition is what the Board has portrayed as a fiscal crisis. SA Ex. 15. While the Board has concealed the cause and extent of the school's financial difficulties, the Board seems to attribute the financial urgency of its tuition decision to recurring deficits that it largely attributes to interest payments on a $175 million loan the Board obtained in 2006 on the Chrysler Building and the resulting failures of its investments of some of those loan proceeds.[4] For example, at the end of 2010, when Vice President Westcott reported on the "changes to the

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[4] There is also evidence of potential waste of school assets through conflicts of interest involving the construction of a new building for the engineering school (¶¶ 97-99; SA Ex. 44 at pg. 6, pg. 1 of Schedule A, & TY 2006 Relationship Schedule; SA Ex. 45 at pg. 6, pg. 1 of Schedule A, & TY 2007 Relationship Schedule; SA Ex. 46 at pg. 4, pg. 8, Schedule L, Schedule O; SA Ex. 47 at pg. 6, Schedule L, Schedule O) (all describing conflict of interest between Trustee Sandra Priest Rose and her son, Jonathan Rose, who oversaw construction of the new academic building), conflicts regarding investment (¶ 138), and the apparent undervaluation of the Chrysler Building in the re-negotiation of its lease, which the tenant, Tishman Speyer, has since described as "a two-thirds discount from the value of midtown Manhattan space at the time." *See* ¶ 128; ¶¶ 120-131; SA Ex. 41.

unrestricted net assets," she observed that the school's "[o]verall expenses exceeded revenues; [and its] expense increases were due primarily to additional depreciation from 41 Cooper Square [the new engineering building], interest expenses from MetLife loan (now an operating expense) [the $175 million loan], and increases in medical benefit expenses." ¶ 151; SA Ex. 16 at 4.

The Board obtained the $175 million loan in 2006 via a *cy pres* application to this Court, which authorized it to use the loan proceeds "for the construction and related costs of a new academic building, for renovations to its Foundation Building, to divest funds invested in the ground lease in the Chrysler Building, to defease the Dormitory Authority of the State of New York's interest in the Chrysler Building . . ., for general working capital, and/or for its other charitable purposes." ¶ 107; SA Ex. 11 (Order, ¶ 3). The Board obtained *cy pres* relief by telling the Court that it required the loan, in part, because of its unique tuition-free mission. ¶ 103; SA Ex. 11 ¶ 20. "Unlike most other schools," the Board told the Court, "The Cooper Union does not receive any revenues in the form of tuition. All students admitted to The Cooper Union's degree programs receive a full-tuition scholarship, which allows talented students of all economic background to attend, in accordance with Peter Cooper's vision." *Id.* The Board also emphasized its $250 million capital campaign and its commitment to reduce operating expenditures by 10 percent by 2011. ¶ 105; SA Ex. 11 ¶¶ 28-29.

Contrary to its representations to the Court, however, The Cooper Union did not need the lavish new building envisioned by the Trustees, its capital campaign foundered, and its promises for fiscal responsibility were unfulfilled. ¶ 108.

Despite six years of trying, the capital campaign failed to reach much more than half of its goal: $130 million of its $250 million objective. ¶ 94; SA Ex. 17 at 4. Nor had a single donor made a large gift to fund the construction of the new building in exchange for his or

her name on the building. SA Ex. 15 at 2. Nonetheless, the Trustees pushed forward with the plans for the extravagant new building, even though the Engineering School faculty voted against it and asked the President and Board to explain how the new building was to be paid for. ¶ 114; SA Ex. 18 at 1.

Instead of the promised ten percent reduction in costs, expenses steadily rose from $43.7 million in 2006, to $66.8 million in 2010. ¶ 109; SA Ex. 19 at 4; SA Ex. 20 at 4; SA Ex. 21. Even excluding debt service and depreciation, the rise was from $39.4 million to $49.8 million. ¶ 109; SA Ex. 19 at 6; SA Ex. 20 at 6; SA Ex. 21. Non-full time faculty salaries and wages (including those of the school's growing administrative staff) also rose substantially during a similar time period, from $12.5 million in 2005 to roughly $17.5 million in 2010. *Id.* Meanwhile, full-time faculty wages and salaries remained flat at roughly $5 million from 2005 to 2010. *Id.*[5]

The Board has also acknowledged that its investment of loan proceeds in hedge funds "on the assumption that existing high rates of return would continue and exceed the costs of interest on the loans, resulting in a net gain . . . proved overly optimistic, compounded by the ensuing financial meltdown." ¶ 118; SA Ex. 15 at 2. As of May 2013, the New York Times reported that "Cooper Union's endowment is lower than it was at the end of fiscal year 2008, even as the Standard & Poor's 500-stock index has hit new highs." ¶ 152; SA Ex. 23. Simon Lack, an investment adviser and author of "The Hedge Fund Mirage," described The Cooper Union's heavy reliance on hedge funds as "irresponsible." ¶ 156; SA Ex. 23.

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[5] President Bharucha has also indulged in luxuries that a school dedicated to free tuition and allegedly strapped for cash could not afford, including personal security guards, an extravagant inauguration celebration in 2011 ($350,000, including $50,000 for a celebrity guest speaker Fareed Zakaria), and expensive furnishings for his house ($23,000, including almost $10,000 on new blinds and over $8,000 for a custom buffet). ¶ 157; SA Ex. 22.

Contrary to the Trustees' claims of fiscal crisis, however, the Trustees have also in recent years championed the school's financial performance post-2008. For example, in 2009, just two years before they officially began exploring tuition, the Trustees boasted to the Wall Street Journal about their "conservative approach" to the school's endowment which they valued at $600 million on June 30, 2008 and which they "expected to be about the same -- or even up slightly -- when the school's fiscal year ends." ¶ 142; SA Ex. 41.

The murkiness surrounding the actual state of the school's endowment is due in part to the Board's reluctance to reveal details of its finances. For example, since at least 2011, in direct violation of the unique transparency guarantees of the Charter, (SA Ex. 2, p. 11, § *Thirteenth*), some Trustees have been required to sign non-disclosure agreements, which provide that material discussed at Board meetings is strictly confidential and prohibit the disclosure of all documents containing financial and other information concerning The Cooper Union. ¶ 82; SA Ex. 24.

III. The Board Ignores Calls for Further Oversight

The Board's tuition announcement was met with a massive protest from students, alumni, and faculty, including votes of no-confidence in the leadership of Cooper Union from the School of Art full-time faculty and the Faculty of Humanities. ¶ 168. Students occupied the office of the President for two months. SA Exs. 25 & 30. Part-time faculty also dissented with the administration, voting against the administration's decision to start charging tuition. *Id.* Architecture students painted the lobby of the Architecture School black. ¶ 171; SA Ex. 25. Free Cooper Union, an association of current students, demanded that the Board abandon its plans to charge tuition, commit to increased transparency, and remove President Bharucha. *Id.*

Faculty, students, and alumni have expressed their lack of confidence in the President and Board Chair in a petition with over 2,300 signatures. ¶ 186; SA Ex. 25.

In the midst of these protests, on July 5, 2013, The Friends of Cooper Union, a coalition of students, faculty, staff, alumni, and friends, called for the creation of the "Associates of the Cooper Union for the Advancement of Science and Art," and of the "Council of the Associates of the Cooper Union for the Advancement Science and Art," which are provided for in the Charter as a check on the power of the Board of Trustees. SA Ex. 26.

On July 24, 2013, The Cooper Union alumni association created an *ad hoc* committee with fifteen members to study the history of the Associates and make recommendations regarding its formation. SA Ex. 27. Two months later, on September 17, 2013, the committee recommended the creation of the Associates in conformity with the Charter and "call[ed] upon the Trustees to play their essential part in the formation of the Society of Associates of The Cooper Union and its Council, by supporting, endorsing, and recognizing its formation." SA Ex. 28 at 19.

In a meeting with the alumni association, on January 15, 2014, in response to questions about the Associates, Chairman of the Board of Trustees, Richard S. Lincer, stated: "In 150 years it hasn't been formed. I don't know that there is an immediacy to it now. It is something we will look at." SA Ex. 29 at 2:32:23. The Board has yet to constitute or recognize the Associates.

IV. The Board Rejects Proposed Alternatives to Tuition

To resolve the student protests and two-month student occupation of the President's office, on July 15, 2013, the Board formed a "Working Group" to explore ways to preserve free tuition. ¶ 174; SA Ex. 30. With elected representatives from alumni, faculty, and

students, and members appointed by the administration, the Working Group produced a plan to maintain Cooper Union's free tuition. ¶ 175; SA Ex. 31. Published in December 2013, the detailed fifty-four-page report was prepared by three subcommittees: the subcommittee for academic opportunities, the subcommittee for administration and compensation, and the subcommittee for space utilization. ¶ 176; SA Ex. 31.

Each subcommittee examined the school's operations and budgets at a granular level, then proposed cuts and re-structuring throughout the school, ranging from cutting administrative salaries that exceeded the median by 200 percent, to reallocating space to increase the amount of space available for revenue-generating rentals. ¶ 177; SA Ex. 31. The Working Group plan received the support of the majority of faculty and students, as well as the full and part-time faculty unions, and the alumni association. ¶ 178; SA Ex. 32. According to then-Trustee Michael Borkowsky, who was a chair of the Working Group and a member of the Board, the Working Group plan would have had a cumulative advantage of up to $18 million in the next five years over the Board's proposal to charge tuition. ¶ 179; SA Ex. 32. And, over the course of twenty-five years, the Working Group plan resulted in either a smaller deficit or a larger surplus than the Board's proposal to charge tuition. ¶ 181; SA Ex. 32.

Trustee Jeffrey Gural also proposed a plan by which he would make a large donation to keep the school tuition-free for one more year, to allow additional time to develop an alternative plan and avoid charging tuition. ¶ 185.

On January 10, 2014 the Current Board voted against adopting the Working Group plan. ¶ 183; SA Ex. 33. The Gural plan was also rejected. In a statement published on the school's website, the Trustees summarily concluded, without any underlying comparison or analysis, and without acknowledging the risks inherent in the plan to charge tuition, that "the

contingencies and risks inherent in the [Working Group] proposals are too great to supplant the need for new revenue sources. Regrettably, tuition remains the only realistic source of new revenue in the near future." ¶ 184; SA Ex. 33.

V. The Decision to Charge Tuition Negatively Impacts Admissions

The Board's decision to charge tuition had an immediate and deleterious impact on admissions. Last year, prior to the announcement that it would start charging tuition, the school received 13 applications for every student it accepted, had an acceptance rate of 7.7 percent, and was ranked number one of regional colleges in its region by U.S. News. ¶ 189; SA Exs. 34 & 35. According to the New York Times, following the Board's decision to change its policy and charge tuition, overall applications were down this year by over 20 percent and the school's acceptance rate almost doubled—from 7.7 percent last year, to 14.4 percent this year. ¶ 190; SA Ex. 35. Many admitted students have already declined their admission because of financial concerns. ¶ 191; *see also*, *e.g.*, SA Ex. 36.

VI. Petitioners Commence An Article 77 Petition

In order to preserve the Cooper Union's free tuition policy, obtain information about the apparent erosion of the endowment, and increase governance oversight, Petitioners commenced this proceeding on May 27, 2014. Petitioner Claire Kleinman is an incoming freshman student in the class of 2018 who will be required to pay tuition. Petitioner Isabella Pezzulo is a student who was accepted by The Cooper Union to be a member of the class of 2018, but had to decline her spot because of the decision to charge tuition. Petitioners Toby Cumberbatch and Michael Essl are professors at The Cooper Union who will see the quality of their students and their academic institution suffer if tuition is charged and the school's unique history and status and elite ranking suffer. Petitioner Adrian Jovanovic is the president of the

Committee to Save Cooper Union, Inc. and an alumnus of The Cooper Union who will lose the full value of his degree if tuition is charged and the unique history and status of the school and its elite ranking suffer. Petitioner the Committee to Save Cooper Union, Inc. is a voluntary association comprised of faculty, students, and alumni and formed December 16, 2013 in order to investigate and remedy serious issues regarding the school's fiscal and academic management.

ARGUMENT

This is an Article 77 proceeding, brought to enforce and uphold the terms of the Deed of Trust of The Cooper Union. Because Peter Cooper's founding gift to establish the school was given in trust, the Trustees owe an enforceable fiduciary duty of loyalty and obedience to the terms of the Trust, which provides the legal framework that limits and controls their conduct. Petitioners have standing because they are a class of beneficiaries that is "sharply defined and limited in number" and which has a "special interest" in the Trust's assets. *See Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458, 465-66 (1985); *Mulgrew v. Bd. of Educ. of City School Dist. of City of New York*, 75 A.D.3d 412, 413 (1st Dep't 2010).

Petitioners seek a declaration 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 and Council of the Associates of The Cooper Union.

I. THE BOARD'S DECISION TO CHARGE TUITION WAS A BREACH OF FIDUCIARY DUTY

The Deed of Trust, the Charter, and the school's other founding documents are explicit and unambiguous: Peter Cooper intended and directed that his school be "free to all."

The Trustees are judicially estopped from claiming otherwise. The decision to charge tuition was a breach of the Trustees' fiduciary duties to honor the terms of the Trust.

A. Charging Tuition Is Contrary to the Terms of the Deed of Trust, the Charter, the Other Founding Documents, and the Trustees' Own Prior Statements to This Court

Because The Cooper Union was established as a trust, the terms of the Deed of Trust limit the actions of the Trustees. The Trustees owe a fiduciary duty to uphold Peter Cooper's clear and unambiguous direction that The Cooper Union be free.

1. The Trustees' Powers Are Defined and Limited by the Plain Language of the Deed of Trust Which Mandates a Free School

The explicit, plain language of the Deed of Trust set the parameters and boundaries for the Trustees' actions because "the duties and powers of a trustee are defined by the terms of the trust agreement and are tempered only by the fiduciary obligation of loyalty to the beneficiaries." *In re IBJ Schroder Bank & Trust Co.*, 271 A.D.2d 322, 322 (1st Dep't 2000) (citations omitted).

In construing the terms of a trust, the Court must look first and foremost to the plain language of the trust document; extrinsic evidence may be considered "only where the court determines the words of the trust instrument to be ambiguous." *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 267 (1990) (citations omitted) (holding that the language of the deed was unambiguous, therefore it was improper to resort to extrinsic evidence). "The rationale underlying this basic rule of construction is that the words used in the instrument itself are the best evidence of the intention of the drafter of the document." *Id.*; *see also Cent. Union Trust Co. of New York v. Trimble*, 255 N.Y. 88, 93 (1930); *Raine v. Gleason*, 174 A.D.2d 531, 533 (1st Dep't 1991); *In re Huntingdon College*, 22 Misc.3d 1124(A) at *2 (Sur. Ct. Nassau Cnty. 2009) (rejecting school's attempt to rely on extrinsic evidence to construe

the testator's intent because trust document's reference to "endowment fund" was "unambiguous").

The terms of a trust document bind and limit the trustees even where the trust document grants the trustees some discretion in their execution 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) ("As a fiduciary, a trustee bears the unwavering duty of complete loyalty to the beneficiaries of the trust no matter how broad the settlor's directions allow the trustee free rein to deal with the trust."); *Milea v. Hugunin*, 24 Misc.3d 1211(A) at *5-*6 (Sup. Ct. Onondaga Cnty. 2009).[6] In *Milea*, for example, the trustees argued that the trust gave them broad discretion and power to subdivide the property at issue between the beneficiaries and that they had "made extensive efforts to address the host of issues in making the property division, hired appropriate professionals, and that the final decision was one that was thoroughly considered and researched and made for the benefit of all beneficiaries." 24 Misc.3d 1211(A) at *5. The court nevertheless held that the subdivision created by the trustees breached the "simple and clear" language of the trust and ran afoul of the creator's intention. *Id.* at *6.

Trustees' financial decisions are subject to the same strict analysis. For example, in the case of *In re Rivas*, the Deed of Trust and accompanying Agreement set up the Helen Woodward Clinic at the University of Rochester and provided that the income generated from the trust be used to operate and maintain the Clinic. *In re Rivas*, 30 Misc.3d 1207(A) at *1 (Sur. Ct. Monroe Cnty. 2011) *aff'd,* 93 A.D.3d 1233 (4th Dep't 2012). Some fifty-five years later, the

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[6] Unlike the directors of a corporation, who are given some leeway in the exercise of their business judgment, trustees 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).

Advisory Committee in charge of administering the trust (construed by the court to be acting as *de facto* co-trustee) voted to invest all of the trust's assets in the University's long-term investment pool. *Id.* at *2. The court rejected this decision as not in compliance with the stated purpose of the trust, holding: "While the Agreement confers broad authority upon the Advisory Committee, that power is not unlimited and must not be used in contravention of the state [*sic*] purpose of the Trust. The Trustee and the Advisory Committee, as a de facto co-trustee, have a shared responsibility to invest and manage the assets while maintaining an allegiance to Helen Rivas' desire to have income from the trust fund the Psychiatry Department." *Id.* at *5.

Here, the plain language of the Deed of Trust unambiguously requires that The Cooper Union shall be "free to all who shall attend." SA Ex. 3 at p. 19-20, § *Fourth* (1)). The Charter that established the school also explicitly requires that the school shall be "free to all who shall attend." SA Ex. 2 at p. 7 , § *Fourth*(1).

There is no ambiguity: Peter Cooper clearly directed that the Trust he had established be used to fund a school that was "free to all." Because the Deed of Trust is unambiguous, no further inquiry is necessary to determine Peter Cooper's intention. *See Mercury Bay Boating Club Inc.*, 76 N.Y.2d at 267. As in *Milea*, the Trustees' decision to charge tuition is a breach of the "simple and clear" language of the Trust and runs afoul of the Trust creator's (Peter Cooper's) intention. 24 Misc.3d 1211(A) at *6. Just as in *In re Rivas*, where the university was not at liberty to take funds put into trust to fund the psychiatry department and clinic and move them into the university's general investment pool, here too, the Trustees are not at liberty to co-opt the funds that Peter Cooper put in trust for a free school, in order to run a school that is not free. *See* 30 Misc.3d 1207(A) at *5.

2. All of the Extrinsic Evidence Also Demonstrates That Peter Cooper Intended His School To Be Free

Even if the Deed of Trust was not clear and unambiguous, and the Court was to consider extrinsic evidence, the extrinsic evidence overwhelmingly demonstrates that Peter Cooper intended his school to be free. Indeed, the Trustees have so interpreted Mr. Cooper's intention for more than a century and a half.

As Peter Cooper explained when describing how he first conceived of the idea for The Cooper Union: "I then reflected upon the fact that there must be a great many young men in this country, situated as I was, who thirsted for the knowledge they could not reach, and would gladly avail themselves of opportunities which they had no money to procure. I then determined, if ever I could acquire the means, I would build such an Institution…". ¶ 53; SA Ex. 5 at 19. In the cornerstone ceremony on September 17, 1853, Mr. Cooper explained in his address 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...*" ¶ 55; SA Ex. 6 (emphasis added). In his letter dated April 29, 1859, which accompanied the Deed of Trust, Peter Cooper explained: "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…*" ¶ 58; SA Ex. 7 at pg. 2, "Encourage the Young" (emphasis added). 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." ¶ 60; SA Ex. 8 at 18.

That understanding of the Deed of Trust has been adhered to and ratified by the Trustees who stewarded the school's 155-year history of free tuition. In prior litigation (concerning the school's entitlement to be tax exempt), the school unequivocally stated that The

Cooper Union has been "offering tuition without charge to the inhabitants of the City of New York continuously since its incorporation." SA Ex. 10 at 2-3.[7] A review of the school's founding documents and other contemporaneous statements made by Peter Cooper leave no doubt: Peter Cooper intended the school he created with his Deed of Trust to be free.

3. The Trustees Are Judicially Estopped From Disputing That the School Is Required to Be Free

In former proceedings to defend The Cooper Union's tax exemption, the Trustees themselves have, on multiple occasions, affirmatively asserted that they are bound by the school's Charter to provide free tuition as a basis for receiving the benefits of tax exempt status. Because the school obtained a favorable outcome in those cases, the doctrine of judicial estoppel bars the Trustees from asserting otherwise in this proceeding, simply because their interests have changed.

The doctrine of judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." *All Terrain Properties, Inc. v. Hoy*, 265 A.D.2d 87, 93 (1st Dep't 2000) (quotation omitted). "The doctrine 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.* (quotation omitted).

[7] Nevertheless, recently, the Trustees have tried to justify their decision to charge tuition by pointing out that a few amateur art students paid a fee to attend art classes at The Cooper Union between 1860 and 1885. SA Ex. 15. Not only does this contradict the school's prior representations to the First Department, but this exception only proves the rule. As the First Annual Report of Trustees noted in 1860, this art class was "a departure from the invariable rule in the other department of the Union, that the instruction shall in all cases be entirely gratuitous," which the Trustees reluctantly agreed to when the pre-existing art class was folded into The Cooper Union. ¶ 74; SA Ex. 37 at 17-18.; *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).

Here, the Trustees have, on multiple occasions, asserted that The Cooper Union is required to be tuition-free. For example, in a brief to the Court of Appeals in 1936 in litigation surrounding the school's tax exempt status, the school told the Court that "Peter Cooper conceived of the idea of founding an institution in the City of New York to provide *free instruction* in science and art for the people of the city and of conveying certain property to such institution in aid of its purposes." SA Ex. 48 at 4 (emphasis added). The school went so far as to argue that its provision of free education made it a *de facto* part of the City's educational system, stating: "It cannot be denied that the activities of this Relator [Cooper Union] have been of the greatest benefit to the inhabitants of the City of New York . . . in offering *without charge* to the inhabitants of New York tuition, instruction, library, laboratory facilities, etc., and its work in furnishing free adult technical education is not duplicated in the city's educational system." *Id.* at 33 (emphasis added); *see also id.* at 36 & 42.[8] The Cooper Union obtained a judgment in its favor in these proceedings. *See People ex rel. Cooper Union for Advancement of Sci. & Art v. Sexton,* 273 N.Y. 461, 273 (1936); *see also* SA Ex 48 at 33 (explaining that the trial court took "judicial notice of that fact" that the school "is to all intents and purposes a part of the educational system of the City of New York" as a result of its provision of free education).

More recently, in 2006, the Trustees commenced an Article 78 proceeding in this Court to challenge the City's assessment of tax on certain property owned by The Cooper Union. SA Ex. 9. In a verified petition, then-treasurer Robert Hawks explained that the New York State Legislature provided a tax exemption in the school's Charter "in exchange for accepting various restrictions and conditions on Cooper Union," including that "Cooper Union must provide 'regular courses of instruction . . . free to all who shall attend the same.'" *Id.* at ¶¶ 20 & 19(b)

[8] The Cooper Union took the same position in its brief to the First Department. *See*, *e.g.*, SA Ex. 49 at 2.

(quoting Charter, § 2, ¶ *Fourth*.1).[9] That proceeding was resolved in a settlement agreement in which The Cooper Union agreed to pay taxes to the City of New York on certain property but not on other property. SA Ex. 40. That settlement agreement was annexed to and incorporated by reference into a stipulation of discontinuance, which was filed with the Court and so-ordered. *Id.* The so-ordered stipulation satisfies the "prior success element necessary for judicial estoppel." *Ennismore Apartments, Inc. v. Gruet*, 29 Misc.3d 48, 49-50 (1st Dep't App. Term 2010) (quoting *Manhattan Ave. Dev. Corp. v. Meit,* 224 A.D.2d 191 (1st Dep't 1996), *lv. denied* 88 N.Y.2d 803, (1996)).

Having taken the position that the Charter required the school to be free in order to obtain favorable outcomes in prior proceedings so as to avoid paying taxes, the Trustees cannot now come into this Court and claim that the Charter does *not* require the school to be free. That is precisely the sort of misuse of the court system that the doctrine of judicial estoppel is designed to prevent.[10]

B. The Trustees Failed to Seek *Cy Pres* Relief

Given the plain language of the Deed of Trust, all the extrinsic evidence, and the Board's previous representations to this Court, 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. But they never made such an application. To obtain such relief, they would have had to surmount the high bar of proving that circumstances had changed so dramatically that it had become "impossible or impracticable to carry out the direct purpose [of the trust]." *In re*

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[9] The Board also relied on the school's tuition-free status in its 2006 *cy pres* petition to obtain a $175 million loan (¶ 103, SA Ex. 11 ¶ 20), and in representations to the City Planning Commission to obtain zoning changes and tax relief. SA Ex. 39.

[10] Similarly, the Trustees should be deemed judicially estopped from disputing their prior statement to the First Department (where they obtained a ruling in their favor), The Cooper Union has been "offering tuition without charge to the inhabitants of the City of New York continuously since its incorporation." SA Ex. 10; *Cooper Union for Advancement of Sc. & Art v. City of New York*, 272 A.D. 438, 440-41 (1st Dep't 1947).

Niven's Estate, 180 Misc. 767, 771 (Sur. Ct. N.Y. Cnty. 1943) (denying *cy pres* to use trust funds for other purpose where trust was set up to maintain church in France that had ceased operating due to World War II); *In re Thorne's Will*, 200 Misc. 30, 33-34 (Sur. Ct. Westchester Cnty. 1951) (denying *cy pres* as contrary to the "plain mandate" of the trust and because it was not "impracticable or impossible" to use other funds to cover operating deficits); *see generally* Restatement (Second) of Trusts § 399 Comment (q) (collecting cases denying *cy pres* where accomplishment of trust purpose is not impossible).

The Trustees' decision to impose tuition without attempting to obtain *cy pres* relief prevented any judicial oversight and scrutiny into their decision. By failing to seek *cy pres*, the Trustees evaded the burden of demonstrating that it is "impossible or impracticable" for them to honor Peter Cooper's "plain mandate" that the school be "free to all who shall attend." *In re Thorne's Will*, 200 Misc. at 33-34. The Trustees could not have made this showing absent disclosure of the true state of the school's finances, the extent of the school's deficit, and a showing that no combination of any of the alternatives to tuition they summarily rejected (*see infra* (C)) could have allowed them to continue to operate The Cooper Union with free tuition. As discussed below, an accounting (pursuant to the explicit provision in the Charter) would have needed to precede or accompany any *cy pres* proceeding in order to assess the truth behind the Trustees' claims of fiscal crisis. The presence of viable alternatives to tuition—even viable alternatives that the Trustees otherwise view as being less desirable than tuition—would have foreclosed *cy pres* relief. Other sacrifices (to administrative costs, programming, or other expenditures) needed to have been exhausted before a claim of fiscal expediency could trump the clear intent expressed in the Trust. Given the unbroken record of 155 years of creative fiscal problem-solving that has allowed The Cooper Union to survive as a tuition-free school, it is

unlikely that these Trustees, for the first time, could make a showing that operating The Cooper Union as a tuition free school is impossible. To impose tuition despite the clear language in the Deed of Trust to the contrary, without obtaining an amendment to that language via *cy pres*, was a clear breach of the Trustees' fiduciary duty.

C. The Trustees Disregarded Viable, Tuition-Free Alternatives

Despite their fiduciary duty to honor the clear language of the Deed of Trust, and their prior representations to this Court, the Trustees decided to impose tuition. The Trustees' breach of fiduciary duty is particularly egregious here, not only because the intent of Peter Cooper is so clear, but also because it was made in the face of viable alternatives that would have avoided tuition.

First, the school's endowment remains sufficiently large that there was no need to impose tuition this year in order to stave off an immediate fiscal crisis. In a May 2013 interview with The New York Times, Trustee and Chairman of the Board's investment committee Mr. Michaelson conceded that the school did not need to charge tuition and could have continued to use the endowment to cover deficits and would have survived until 2018, when substantially higher payments from the Chrysler lease will be triggered by the terms of the lease. SA Ex. 23.

But even without relying on the endowment, the Trustees could have avoided charging tuition by reducing the school's over-bloated expenses. On January 10, 2014, the Board rejected the Working Group plan, which would have closed the school's budget gap with cost reductions and other new sources of revenue rather than charge tuition and which would have had a cumulative advantage of up to $18 million in the next five years over the Board's proposal to charge tuition. ¶ 179; SA Ex. 32. The Working Group plan was similar in principle to the Board's unfulfilled commitment in the 2006 *cy pres* petition to reduce expenses by ten percent. ¶ 109; SA Ex. 11 ¶¶ 28-29. But the Board rejected this plan without any underlying

comparison or analysis, and without acknowledging the risks inherent in the plan to charge tuition. ¶ 184; SA Ex. 33. The Trustees' summary rejection of the detailed Working Group plan calls into question whether their actions were taken in good faith.

The Board even rejected a plan proposed by Trustee Jeffrey Gural which included a large donation to keep the school tuition-free for one more year, to allow additional time to develop an alternative plan and avoid charging tuition. ¶ 185. Trustee and Chairman of the Board Richard S. Lincer was recorded stating that the Gural option "doesn't do me any good unless Jeff [Gural]'s going to commit for thirty years." SA Ex. 50 at Ex. A. This cavalier attitude towards an option that would have preserved the school tuition-free for another year, thereby providing another year to assess the viability of the Working Group plan and other possibilities for avoiding tuition, shows that the Trustees did not exercise the due diligence required of them in honoring the terms of the Trust.

If they were true to the vision of Peter Cooper, and obeying their fiduciary duty to honor the terms of his Deed of Trust, the Trustees of The Cooper Union should have tried every alternative to avoid tuition. Instead, they summarily rejected those alternatives and attempted to avoid judicial scrutiny into their actions by not filing a *cy pres* petition. Pursuant to EPTL 7-2.6(a)(2), this Court has the power to remove any trustee "who has violated or threatens to violate his trust . . . or who for any reason is a person unsuitable to execute the trust." EPTL 7-2.6(a)(2); *see, e.g., In re Mergenhagen*, 50 A.D.3d 1486, 1488 (4th Dep't 2008). The egregious nature of the breach of fiduciary duty here compels the removal of those Trustees who voted to impose tuition and/or who rejected the Working Group and Gural proposals to avoid tuition.

II. THE BOARD'S LACK OF TRANSPARENCY AND THE DETERIORATION OF THE ENDOWMENT REQUIRE AN ACCOUNTING

While the concept of "free to all" is the school's core, guiding principle, Peter Cooper was equally explicit in his unique commitment that his school must be transparent. To that end, he provided that the Supreme Court would have jurisdiction to compel an accounting from the Trustees.

Section 12 of the Charter of The Cooper Union 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." SA Ex. 2, p. 15, § 12.

"The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Palazzo v. Palazzo*, 121 A.D.2d 261, 264 (2d Dep't 1986). The initial burden of proof in an accounting proceeding is on the fiduciary to prove that "it has fully accounted for all of the assets of the trust and that the accounting itself is complete and accurate." *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).

Here, as set forth *supra*, the school was established through the Deed of Trust and the Trustees owe a fiduciary duty in their administration of that trust. Petitioners in this case have an interest in the current state of the trust established by Peter Cooper. As admitted students, faculty, and alumni of the school, they are beneficiaries with a "special interest" in the trust's assets. *See Alco Gravure, Inc.*, 64 N.Y.2d at 465-66.

An accounting is required because the Trustees have justified their decision to impose tuition for the first time in the school's history on an alleged financial crisis, claiming that tuition "was an option of last resort to prevent insolvency in 2013." SA Ex. 15. But the actual state of the school's finances (and the reason for any decline in the endowment) remains extremely unclear—not least because the Trustees have, in recent years, presented the press and the public with contradictory accounts of the school's finances.

For example, in 2009, just two years before they officially began exploring tuition, the Trustees boasted to the Wall Street Journal about their "conservative approach" to the school's endowment, which they valued at $600 million on June 30, 2008 and which they "expected to be about the same -- or even up slightly -- when the school's fiscal year ends." ¶ 142; SA Ex. 41. Even today, amidst their assertions of the financial necessity of charging tuition, the Trustees claim on the school's website that their investments in hedge funds were sound. "For fiscal years 2006 to 2012," they argue, "The Cooper Union's cash endowment, largely invested in hedge funds, returned 6.35% per annum, after fees. The average return reported by National Association of College and University Business Offices (NACUBO) for the nation's colleges and universities for the same seven years was 4.5%. In 2012 the hedge funds returned more than 10%. In the first quarter of 2013 they returned 5.3%." ¶ 143; SA Ex. 15.

On the other hand, other Trustee statements about the endowment have been more pessimistic. For example, according to the New York Times in 2013, Trustee and Chairman of the Board's investment committee "Mr. Michaelson said Cooper Union's returns for the managed endowment, excluding the Chrysler asset and cash, were negative 14 percent in fiscal year 2009, 10 percent in 2010 and 17 percent in 2011. Cooper Union's portfolio lost 5 percent in fiscal year 2012. That portion of the endowment fell to about $85.9 million at the end of fiscal

year 2012, from about $169 million in 2008, and the total endowment dropped to $666.7 million from $710 million in 2008." ¶ 144; SA Ex. 23. In the course of a single fiscal year, from the end of FY 2008 (June 30) to the end of FY 2009 (June 30), the value of The Cooper Union's non-real estate investments declined from $180 million to $144 million, a 20 percent drop in a single year. ¶ 148; SA Ex. 42 at 11. Hedge fund investment value plummeted from $103 million to $19 million. *Id.*

The Trustees' attempts to conceal the actual state of the school's finances is in direct conflict with the terms of the Charter. While the Charter provides that the every Trustee "shall be at all times at liberty, in his discretion, freely to publish any matter within his knowledge relating to the institution," (¶ 64 SA Ex. 2, p. 11, § *Thirteenth*), in a complete contradiction of that principle, the Board has repeatedly taken steps to conceal the details of its financial transactions including requiring Trustees to sign non-disclosure statements (¶ 82; SA Ex. 24) and refusing to disclose which hedge funds The Cooper Union has invested in. ¶ 140; SA Ex. 43 at 3. The questions raised by this lack of transparency and the Board's widely divergent statements about the state of the school's finances are not resolved by the school's audited financial statements, which do not account for the conflicts of interest and other concerns that the Trustees' have undervalued the school's real estate and mismanaged the school's investments.

An independent accounting is therefore required, pursuant to the Charter, to determine the actual state of the school's finances and to assess the Trustees' management of the school's endowment and substantial real estate assets.

III. THE BOARD'S FAILURE TO CREATE THE SOCIETY AND THE COUNCIL REQUIRES INTERVENTION

Despite the request of students, faculty, and alumni, the Trustees have also disregarded the Deed of Trust's provision for an oversight body, The Associates of The Cooper Union, which (not coincidentally) is empowered to remove trustees. As described *supra*, the Trustees owe a duty of loyalty and obedience to the terms of the Trust established by Peter Cooper. *See In re Estate of Wallens*, 9 N.Y.3d at 123; *Boles*, 55 A.D.3d at 648; *Milea*, 24 Misc.3d 1211(A) at *6. The Trustees' refusal to create the Associates is an attempt to entrench themselves in power and insulate themselves from the oversight and accountability that the Deed of Trust intended.

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). In *Delbene*, the trustees adopted amendments to the trust agreement's provisions concerning the power of the collective bargaining unit and the Board of Directors to appoint and remove trustees, "which essentially insulate the trustees from responsibility for failing to carry out their fiduciary duties and place them beyond the oversight of the bargaining unit." *Id.* On appeal, the Second Department agreed, holding that "the defendant trustees violated their common law duty of loyalty to act in the sole interest of the participants in the trust and effectively insulated themselves from accountability to Trust participants by entrenching themselves in office." *Delbene v. Estes*, 52 A.D.3d 647, 648 (2d Dep't 2008) (citations and quotations omitted).

Here, as in *Delbene*, the Deed of Trust and the Charter provided for another governance body to have oversight over the Trustees. The Deed of Trust and the Charter provided for the Trustees to create the Society of the Associates of The Cooper Union. ¶ 65; SA Ex. 2, p. 7, § *Third* & p. 13, § 8; SA Ex. 3, p. 19, § *Third*. The Associates' Society was to include graduates and trustees of The Cooper Union. *Id.* Pursuant to the Charter, the Associates' Society was to annually elect the Council of the Associates. ¶ 66; SA Ex. 2, p. 13, § 8. The Council was to comprise at least twenty-four members of the Society. Critically, the Council is supposed to have the power to remove trustees. ¶ 67; SA Ex. 2, p. 7, § *Third* & p. 13, § 8; SA Ex. 3, p. 19, § *Third*.

In the midst of the protests about the Trustees' decision to charge tuition, on July 5, 2013, The Friends of Cooper Union, a coalition of students, faculty, staff, alumni, and friends, called for the creation of both the Associates and the Council. SA Ex. 26. On September 17, 2013, a committee of The Cooper Union alumni association recommended the creation of the Associates in conformity with the Charter and "call[ed] upon the Trustees to play their essential part in the formation of the Society of Associates of The Cooper Union and its Council, by supporting, endorsing, and recognizing its formation." SA Ex. 28 at 19. In a meeting with the alumni association, on January 15, 2014, in response to questions about the Associates, Chairman of the Board of Trustees, Richard S. Lincer, stated "In 150 years it hasn't been formed. I don't know that there is an immediacy to it now. It is something we will look at." SA Ex. 29 at 2:32:23. But the Board has yet to constitute or recognize the Associates.

In the midst of the greatest crisis in governance since The Cooper Union's founding, the Trustees' refusal to create the Associates is an attempt to avoid oversight and entrench themselves in power, in violation of their fiduciary duty to honor the terms of the Deed

of Trust and place the interests of the beneficiaries over their own. The Court should direct the creation of the Society and the Council, pursuant to the terms of the Trust and the Charter, to restore the check on the Trustees' power that Peter Cooper intended.

IV. IN THE ALTERNATIVE, PETITIONERS REQUEST LIMITED DISCOVERY ON THEIR BREACH OF FIDUCIARY DUTY AND ACCOUNTING CLAIMS

In the alternative, should the Court deny either Petitioners' declaratory relief claims for an accounting or breach of fiduciary duty, Petitioners are entitled to conduct discovery to further support these claims.

A. Article 77 Allows Petitioners To Conduct Discovery

Unlike most special proceedings, where discovery is rare and only permitted by leave of court, discovery is explicitly contemplated and permitted in an Article 77 proceeding such as this. CPLR 408, which governs special proceedings in general, provides that the limits on discovery in special proceedings "shall not be applicable . . . to proceedings relating to express trusts pursuant to article 77 . . . which shall be governed by article 31." Article 31's full panoply of discovery (depositions, document demands, interrogatories, and requests for admission) is therefore available to Petitioners in this proceeding. *See also Milea*, 24 Misc.3d 1211(A) at *12 ("Petitioner and petitioner's attorney shall be entitled to full and complete discovery with regard to all previous actions taken by the respondents, as Trustees, and shall be entitled to inspect and/or copy any and all documents and/or things which evidence their administration of trust assets."). Here, Petitioners seek to conduct only limited discovery to further support their claims for breach of fiduciary duty and an accounting in the event that these claims cannot be resolved as a matter of law.

B. The Board Has Not Disclosed Adequate Information Concerning Their Rejection of Alternatives to the Tuition Plan

The law requires trustees to act in good faith and to exercise reasonable care and due diligence in their administration of the trust. *See In re Estate of Wallens*, 9 N.Y.3d at 123; *In re JP Morgan Chase Bank, N.A.*, 38 Misc.3d 363, 377 (Sur. Ct. N.Y. Cnty. 2012) ("the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.'") (quoting Restatement [Third] of Trusts § 50, Comment (b)).

As described *supra*, the Trustees rejected the Working Group plan and the Gural option summarily, without providing the public any written analysis or comparison to the plan to charge tuition. By failing to file for *cy pres*, the Trustees have attempted to avoid their burden of proving that it is not possible to operate the school without tuition. Petitioners are entitled to conduct discovery into the reasons for the Current Board's rejection of these proposals and into the actual state of the school's finances to determine the viability of these alternative proposals.

C. The Board Has Not Disclosed Adequate Information Concerning Its Management of the Endowment

Petitioners are also entitled to discovery of the school's books and records to understand the actual state of the school's finances and to understand how the deterioration of the school's substantial assets occurred.

The initial burden of proof on the accounting claim rests with the Trustees to show that they have "fully accounted for all of the assets of the trust and that the accounting itself is complete and accurate." *In re JP Morgan Chase Bank*, 27 Misc. 3d 1205(A) at *3. If the Trustees carry that burden, then the burden will shift to Petitioners to show that the accounting is either "inaccurate or incomplete." *Id.* The burden will then shift back to the Trustees to prove that the accounting is "in fact, accurate and complete." *Id.* In order to carry

their burden, Petitioners are entitled to discovery of the school's books and records. *See In re Salkin*, 8 A.D.2d 712 (1st Dep't 1959) (reversing denial of discovery motion, upholding "the right to discover books and records"); *Levine v. Levine*, 276 A.D. 1086, 1087 (2d Dep't 1950) ("Discovery and inspection of the books and records is warranted in order that plaintiff, who has no personal knowledge, may be enabled to prepare to meet defenses which would bar her right to an accounting.").

Here, the Trustees have concealed the true state of the school's finances, through widely differing accounts to the press and to the public, and through the use of non-disclosure agreements that contravene the explicit language of the Charter. What little information exists, however, is extremely troubling, suggesting that the Trustees have lavishly spent beyond the school's means on everything from an extravagant new building to excessive presidential compensation and personal bodyguards and other private security, have grossly undervalued the school's real estate assets (including the iconic Chrysler Building), and have consolidated the school's non-real estate assets in risky hedge funds. ¶¶ 97-99; 120-31. These concerns are amplified when the apparent conflicts of interest are considered—such as school assets being invested in funds managed by at least one Trustee and real estate negotiations overseen by a Trustee with professional ties to the entity with which The Cooper Union was negotiating. ¶¶ 129-31; 138. In light of these concerns, discovery into the school's books and records is warranted.

CONCLUSION

For all the foregoing reasons, the Court should issue an order declaring that the Board's decision to charge tuition was a breach of fiduciary duty and removing those Trustees who voted to impose tuition and/or against the alternative options, appointing a Special Master and directing an accounting, and directing the creation of the Society and Council of the Associates of The Cooper Union.

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New York, New York

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