SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE COMMITTEE TO SAVE COOPER UNION, INC., *et al.*, Petitioners, - against - THE BOARD OF TRUSTEES OF THE COOPER UNION, *et al.*, Respondents.	Index No. 155185/2014 **[PROPOSED] VERIFIED CROSS-PETITION OF INTERVENOR ATTORNEY GENERAL OF THE STATE OF NEW YORK**
PEOPLE OF THE STATE OF NEW YORK, by ERIC SCHNEIDERMAN, Attorney General of the State of New York, Intervenors/Cross-Petitioner, - against - THE BOARD OF TRUSTEES OF THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, *et al.*, THE COMMITTEE TO SAVE COOPER UNION, INC., *et al.*, and THE COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, Intervenors/Cross-Respondents.	

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The People of the State of New York, by their attorney, ERIC SCHNEIDERMAN, Attorney General of the State of New York, respectfully allege, upon information and belief:

NATURE OF THE ACTION

1. The Cooper Union for the Advancement of Science and Art ("Cooper Union"), a New York not-for-profit corporation, is a historical treasure and a living legacy of Peter Cooper, one of New York's greatest champions of social and economic justice.

2. From its foundation in 1859, Cooper Union was at the vanguard, admitting students regardless of race, sex, or religion, and charging no tuition to ensure equal access regardless of means. The school's Great Hall became an epicenter for the defining civic movements of American history. Abraham Lincoln, Frederick Douglass, Susan B. Anthony, and Samuel Gompers all delivered landmark addresses from its platform. The NAACP and the forerunner of the American Red Cross were both founded there. In subsequent years, the school has graduated some of the country's most accomplished artists, architects, and engineers, while continuing to provide a unique forum for debate and discussion of public interest.

3. The Attorney General intervenes here to safeguard Peter Cooper's irreplaceable gift to the people of New York Cooper Union is in distress, having suffered financial reverses that recently prompted the end of the 150-year-old free-tuition policy. The school's underlying economic problems, and the stakeholder conflicts that have grown out of them, have left the institution vulnerable as it faces emerging challenges.

4. There is now an opportunity to join the Cooper Union community in a way forward that will allow every constituency to collaborate in the work of saving Cooper Union for future generations.

5. The original parties in this case are the petitioner, the Committee to Save Cooper Union ("CSCU") and the respondents, all the individual trustees of Cooper Union at the time the

petition was filed.[1] Cooper Union and the Attorney General now intervene as cross-petitioners. The Court has jurisdiction[2] and venue is proper.[3]

6. The Cooper Union is a necessary party to the resolution being jointly requested by the parties.[4]

7. The Attorney General has a right to intervene in this case pursuant to several statutory and common law authorities regulating New York's Not-For-Profit Corporations. The Attorney General "may investigate transactions…for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered," and "may institute appropriate proceedings…to secure the proper administration of any trust."[5] The Attorney General represents the beneficiaries of such trusts, and "it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts."[6] The Attorney General has the power to file actions seeking to restrain non-profits "from carrying on unauthorized activities."[7] The Attorney General has authority to compel an accounting of the management and disposition of a non-profit's assets, or any waste thereof.[8] The Attorney General may also seek to remove directors and officers of a non-profit for cause.[9] The Attorney General may also file any action and seek any relief available to directors, officers, or members of a non-profit,[10] including *cy pres* relief to modify the effective terms of a charitable trust.[11] Finally, the Attorney

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[1] The following five respondents resigned as trustees on June 10, 2015: Mark Epstein, Francois de Menil, Daniel Libeskind, Monica Vachher and Catharine Bond Hill.
[2] CPLR 301 and 302.
[3] CPLR 503.
[4] CPLR 1001.
[5] EPTL 8-1.4(i) and (m).
[6] EPTL 8-1.1(f).
[7] N-PCL § 112(a)(1).
[8] N-PCL § 720(a)(1)(A) and (B).
[9] N-PCL § 112(a)(4).
[10] N-PCL § 112(a)(7).
[11] EPTL 8-1.1(c).

General stands as *parens patriae* to the beneficiaries of charitable trusts, and therefore has authority to seek protective remedies as a matter of common law.

8. This cross-petition consists primarily of the investigative findings of the Office of the Attorney General ("OAG") concerning the management of Cooper Union, focusing on the past decade. That investigation, which commenced in August 2014, has relied since inception on Cooper Union's Board of Trustees to produce information and documents on request. The Board has cooperated in that effort.

9. The cross-petition also includes a separate recitation of the facts relevant to the underlying dispute between the original parties concerning the meaning of Cooper Union's Charter and Deed of Trust.

10. The cross-petition concludes by identifying the key facts relevant to both subjects that support the proposed *cy pres* ruling and the accompanying Consent Decree annexed hereto as Exhibit 1.

11. The *cy pres* and other relief requested by the parties on consent will: (1) end this lawsuit, (2) modernize Cooper Union's Charter and Deed of Trust; (3) increase representation of students, faculty, staff, and alumni on Cooper Union's Board of Trustees; (4) implement transparency and monitoring in Cooper Union's management and finances; (5) reform Cooper Union's internal governance; and (6) require a review of whether Cooper Union can revert to a tuition-free policy.

INVESTIGATIVE FINDINGS

I. Introduction

12. Cooper Union flourished over its first 150 years, evolving from a night school for working people into one of the nation's premier undergraduate schools for artists, architects, and engineers, all while remaining tuition-free. Since at least the 1970's, financial problems and labor disputes emerged and lingered, but the school managed to avoid any existential crisis until recently.

13. In 2006, Cooper Union borrowed $175 million as part of a complex and risky plan promoted by then-President George Campbell to finance a new academic building. The plan immediately began failing, with its key assumptions steadily unraveling over the first two years. When the stock market collapsed in late 2008, the damage already promised by the plan's failure was greatly magnified, and transformed the entire project into an albatross. The new building was finished, but the school's finances were broken in the process.

14. Cooper Union remained in denial of this development for three years. Instead of confronting the impending insolvency, President Campbell and the then-chairman of the Board of Trustees, Mark Epstein, provided the community with misleading information suggesting that Cooper Union's finances were strong.

15. In late 2011, a new President, Jamshed Bharucha, revealed to the community that the school's finances were in dire straits. In 2013, President Bharucha announced that the only way for the school to recover from its weakened condition was to charge tuition and expand tuition-based programs to generate more revenue. After students opposed to the change occupied his office, President Bharucha agreed to the formation of a working group to study alternatives.

16. The working group was given seven weeks to provide an answer to a problem that had festered for nearly seven years. It was denied access to information. When the working group presented its report suggesting alternatives to tuition to the Board of Trustees, President Bharucha's appointees to the working group issued a "minority report" that undermined it.

17. In 2014, the Board of Trustees voted to begin charging tuition. It also adopted President Bharucha's Financial Sustainability Plan ("FSP"), which he projected would ensure continual growth in revenues and a steady recovery for the school's depleted investment pool. But the FSP suffered from similar drawbacks as the 2006 plan, mainly optimistic assumptions and inadequate risk-assessment.

18. One part of the FSP that suffered from both problems was the concept of generating revenue by offering new programs, the first of which was supposed to be a new bachelor's degree in computer science.

19. Instead of demonstrating the value of new offerings, the events surrounding the failed launch of the computer science program in April 2015 helped confirm a pattern of continuing weaknesses in Cooper Union's management and oversight practices.

20. Since that time, President Bharucha, the Chief Academic Officer and Engineering Dean, and five trustees have resigned.

21. A new interim administration has been appointed, with William Mea acting as Interim President. President Mea's initial decisions reflect acknowledgment of and responsiveness to both economic reality and the concerns of the broader Cooper Union community.

II. Historical Background: Cooper Union from 1859 to 2000

22. Peter Cooper founded Cooper Union in 1859. He gave it its first endowment, including the Foundation Building that he had built the year before at his own expense in anticipation of the school's creation.

23. In Cooper Union's Charter and Deed of Trust, Peter Cooper outlined his goals for the school. They included immediate provision of a free night school to educate working people in practical sciences, a free art school for women,[12] and a free reading room for the public. They also included aspirational goals of establishing a degree-granting polytechnic school and an organization of "Associates" to support Cooper Union's mission.

24. For the first 24 years of its existence, Peter Cooper personally oversaw Cooper Union as its first President and Founding Trustee. During that time, Cooper Union grew steadily both as a school and as a civic institution. .

25. In February 1860, Peter Cooper invited a little-known Illinois lawyer to give an address that became known as the "right makes might" speech. President Lincoln would later say he owed his election to Cooper Union. In 1863, Peter Cooper invited Frederick Douglass to respond to the Emancipation Proclamation, and again in 1865, as the Civil War was ending, to address the need for meaningful civil rights protections to overcome the legacy of slavery. In the 1870's, he provided offices and a regular platform for Susan B. Anthony and the nascent women's rights movement.

26. Peter Cooper died in 1883, and was succeeded in turn by his son Edward Cooper and his son-in-law Abram Hewitt. They continued his personal style of oversight for the next

[12] For most of its first fifty years, Cooper Union allowed a small number of "amateur" art students to be admitted to the Art School on a tuition-paying basis. These paying "amateurs" never made up a substantial portion of the overall student body.

twenty years. The funded the school's deficits, and were intimately involved in the school's academics and management.

27. This changed in the 20th century, as the role of Cooper's family diminished, and academic governance, management, and oversight were gradually professionalized to accord with the evolving modern assignments of those functions to faculty, administration, and trustees, respectively.

28. In 1902, Peter Cooper's descendants gave Cooper Union just under an acre of vacant land at the northeast corner of Lexington Avenue and 42nd Street. The school leased it to Walter Chrysler in 1928, and the Chrysler Building was constructed over the next two years. From then on, Cooper Union's finances and the leasing of this property would be inextricably linked.

29. Also in 1902, Andrew Carnegie gave the school a large cash gift, and the Board of Trustees announced that earnings on this endowment would be sufficient to fund Peter Cooper's ambition of a "thorough polytechnic school," "equal to the best."

30. Between 1902 and the 1960's, the income from the Lexington Avenue property and the Carnegie endowment funded the creation and expansion of the undergraduate engineering, art and architecture programs that the school is known for today.

31. In 1970, the night school was closed. The free public reading room had already effectively became a private college library in 1963.

32. In the late 1960's and early 1970's, general economic conditions and the school's unique financial structure collided to produce substantially larger and more persistent deficits. In order to address this problem, at least temporarily, Cooper Union sold its Green Camp property, which had served as a retreat and recreation space for the community.

33. Throughout the mid-1970's, differences between the administration and the faculty increased, leading to the creation of the Cooper Union Federation of College Teachers ("CUFCT"), a bargaining unit for the full-time faculty. In requiring the school to bargain with the CUFCT, the NLRB noted several factors indicating that the school was not able to effectively share managerial authority with the faculty:

> the administration's creation and elimination of entire degree programs without faculty input or over faculty opposition, the exclusion from academic governance of a large proportion of the faculty for a number of years, the amendment of governances without faculty vote, creation of a special admissions program without faculty approval, and the key roles played by administrators in chairing the faculties, chairing the joint faculty, chairing the administrative committees…and extending a library consortium agreement over faculty objection on academic grounds.

34. During the remainder of the 1980's and 1990's, Cooper Union's income from its investments and from the Chrysler Building lease were sufficient to maintain general fiscal stability, notwithstanding occasional years of deficit spending.

35. In 1998, Cooper Union negotiated a new 99-year lease of the Chrysler Building property with a new counterparty, Tishman/Speyer. At the time, the new lease was viewed a significant accomplishment for the school. It cured all of what were perceived as the defects of the prior lease, and ensured that when rents were reset in 2018 based on a new valuation of the property, the process and range of options would strongly favor Cooper Union. However, the rents established for the time leading up to 2018 did not create a stream of income sufficient to eliminate the need for deficit spending, which climbed to approximately $10 million in 1999.

III. Campbell Administration: 2001 to 2010

36. George Campbell became President of Cooper Union in 2001. One of his first initiatives was to design a Master Plan for fundraising and for the development of Cooper

Union's real-estate holdings in a way that would maximize their value and utility for the school, while eliminating deficit spending.

37. President Campbell's Master Plan called for the school to raise $120 million to build a New Academic Building ("NAB") at 41 Cooper Square, the site of the former Hewitt Building, a property Cooper Union leases from the city on a long-term basis. When 70% of the funds were in hand, the school would begin construction.

38. That would set in motion a process to demolish the existing Engineering School Building at 51 Astor Place, a property Cooper Union owns outright, and to lease that lot to a commercial developer for profit.

39. Through this series of events, Cooper Union would receive a modern main building for its undergraduate programs free and clear, as a result of its capital campaign, while simultaneously unlocking substantial additional revenue from the new commercial lease on 51 Astor Place.

40. The Master Plan projected that this revenue would allow Cooper Union to avoid deficit spending completely in the near and intermediate term. This in turn would lead to sustained growth in the school's liquid investment pool, which would eventually become large enough that occasional future deficit spending would not substantially impair yearly returns. The end result would be long-term financial stability for Cooper Union.

41. Over the next five years, the administration solicited design concepts for the NAB. Eventually, a design was chosen, and presented to the Engineering School faculty. They voted to reject building a NAB along the proposed lines, in part because it would reduce useable classroom space by about 20,000 square feet in comparison with the existing

Engineering building. The administration made no significant changes in its plans based on the Engineering faculty's rejection of the NAB proposal.

42. By late 2005, Cooper Union had received less than $40 million in donations to the Building Fund, which was less than half of what had been deemed necessary to commence construction.

43. President Campbell told the Board of Trustees that any substantial delay in beginning construction would lead to a sharp increase in costs. At that point, the Board of Trustees began exploring alternatives to raise the needed funds to start the building.

44. Initially, the Board considered two options that did not involve Cooper Union actually borrowing money: getting an advance from Tishman/Speyer on future lease payments, and sub-leasing a "sandwich" position of intermediate lease years to a third party. However, it was discovered that in both cases the amount of up-front funding that could be obtained was insufficient to support the project.

45. The Board then decided to explore options for putting Cooper Union into debt to finance the building. But the Board's attempts to locate financing in the market yielded only one offer that met the plan's needs.

46. MetLife offered a 30-year, $175 million loan at 5.85%, to be secured by a mortgage on the Chrysler Building property. A prepayment-penalty clause would make refinancing the loan nearly impossible. Debt service would begin at about $10 million a year in interest-only payments (or about one-fifth of Cooper Union's annual revenue), building to $15 million a year with amortization starting in 2018.

47. About $35 million of the loan proceeds were to be assigned to the investment pool to preserve adequate liquidity. These proceeds were expected to reduce the overall price of the loan by generating investment returns in excess of the loan's 5.85% interest rate.

48. Cooper Union would be required to use about $25 million of the loan proceeds to pay off other bonds encumbering the property.

49. Cooper Union would also need to renegotiate the Tishman/Speyer lease to fix the rents at specific levels for the duration of the loan term to provide security of income to MetLife. Cooper Union would have no bargaining power in fixing these rents, which would be set at levels Tishman/Speyer was willing to offer for three ten-year terms: $32.5 million a year from 2018-2028, $41 million a year from 2028-2038, and $55 million a year from 2038-2048 These fixed amounts would not be adjusted upward for inflation during the course of these ten-year spans.

50. Finally, Cooper Union would have to get *cy pres* relief to allow it to mortgage the property.

A. Cooper Union's Internal Analysis of 2006 Transactions Disregards Risks

51. Deficit spending had become an increasing challenge for Cooper Union by the time that the 2006 loan plan was decided on. In 1999, the school ran an operating deficit exceeding $10 million, consuming almost all of the school's returns from its liquid investment pool. In 2000, the deficit shrank to $5 million, but in 2001, it rose to over $11 million. The school almost broke even in 2002, but in then in 2003 through 2006, the school ran deficits of approximately $8 million to $12 million annually. (*See* Figure 5 on p. **___**)

52. The Campbell administration and the Board generated several reports indicating that the loan plan would curtail this ongoing deficit spending and secure Cooper Union's

solvency for the following 30 years. But these reports, and related discussion by the Board, either ignored or glossed over discernible risks involved in the transactions.

53. There was no debate over four key optimistic assumptions that were at the heart of the loan plan. There was no substantive discussion of an apparent conflict of interest involving a key decision maker. There was no review of the future downsides to the overall plan even if it worked properly, and no acknowledgment of or planning for the potential failure of the plan.

i. Four Key Assumptions

54. The first key assumption relied on by the loan plan was that Cooper Union would achieve unprecedented expense reductions. The growth of expenses would need to be limited to 4.5% annually, and a sustainable, 10% topline cut in expenses would need to be imposed by 2011.

55. The then-chairman of the Board's Finance Committee told the Board that this 10% cut was essential to the success of the plan. Despite the finance chair's repeated emphasis of that point, the Board did not address the risk of relying on a campaign of expense control more rigorous than had never been achieved in the school's modern history. It established no safeguards, early-warning system, or contingency plans to control and respond to this easily-monitored, internal, administrative component of the loan plan's success.

56. The second key assumption was that the school would receive tax benefits worth about $6 million a year in connection with its commercial property developments at 51 Astor Place and 26 Cooper Square.

57. In September 2006, a Finance Committee report noted that these tax benefits were being challenged by the City. It further reminded the Board that receipt of these benefits was assumed by the loan plan, and that their loss would have a significant impact on the plan.

A related document states that the loan plan "is not a long-term solution without the [tax benefits]….Unless subsequen[t] changes are made we will run out of money."

58. The third key assumption was that Cooper Union would receive at least $40 million in Building Fund contributions over the five years beginning in 2007, and Annual Fund contributions of $2.4 million in 2007, escalating at 5% per year.

59. These projections substantially exceeded Cooper Union's demonstrated fundraising capabilities. And since the building itself would be finished in 2008, most contributors would be being asked not to make a new building possible, but to retire debt on a completed project.

60. The evidence does not reflect that the Board ever established any safeguards, early-warning systems, or contingency plans to allow it to respond if contribution levels did not meet those assumed by the Board.

61. The fourth key assumption was that the investment pool would earn 7% annual returns, sufficient to generate a profit on the $35 million in excess borrowing from MetLife being carried at 5.85%. The $35 million infusion and the assumption of 7% returns allowed for the board's projection that under the loan plan, the investment pool's value would continue rising during the loan term, notwithstanding the added pressure of debt service.

ii. Apparent Conflict of Interest

62. President Campbell's employment contract created an apparent conflict of interest in connection with the 2006 loan plan. In March 2005, the contract was amended to entitle him to a $175,000 bonus if the New Academic Building was built, and another $175,000 for leasing out the property at 51 Astor Place.

63. The entire Board had constructive knowledge of the terms of President Campbell's employment contract, and thus the conflict, in that the Board negotiated and

possessed the contract. There is no record of any specific discussion of this conflict by the Board. Some board members would later report that there was no such discussion, and that they not actually aware that the incentives were in the contract when deliberating on the 2006 loan plan.

64. In presentations to the board in 2005 and 2006, President Campbell concluded that completing the new building and the related 51 Astor Place transaction were necessary to secure Cooper Union's financial future. When the loan plan was proposed, President Campbell advocated in its favor before the Board, and stated that further delay in commencing construction would be unacceptably costly.

iii. No Analysis of Risk to Cooper Union, or Planning for Potential Failure

65. There is no evidence that the Board discussed the disadvantages of the loan plan, even though there were several that would apply even if the plan were more or less successful.

66. Specifically, there is no evidence that the Board discussed the constraints the loan and lease deals would impose on the school for the next 30 years as a result of the loan being impossible to refinance and the lease payments from Tishman/Speyer remaining flat, with no inflation adjustment, for ten years at a time.

67. There is also no evidence that the Board discussed the benefits in the existing lease that Cooper Union would sacrifice by signing the lease amendment with Tishman/Speyer. These included the chance to have the annual rent reset in an arbitration in 2018, which would rely on residential property valuations if they were higher than commercial valuations. This would, in turn, create the opportunity to obtain possession of the entire Chrysler Building (and not just the land) if Tishman/Speyer defaulted, which could substantially expand Cooper Union's options in handling the property. Instead, by fixing the rents at figures selected by

Tishman/Speyer, Cooper Union accepted that it would be receiving rents in the lower end of the range that could have been anticipated through the revaluation/reset procedure through 2048.

68. There is also no evidence that the Board considered what Cooper Union would do if the loan plan did not work. There is no record of any contingency planning for the failure of one or more of the plan's key assumptions.[13] There is no record that the Board ever discussed the potential need to charge tuition, and the likely impact of that decision, if the plan did not perform as expected.

B. Cooper Union Obtains Cy Pres Relief to Mortgage Chrysler Property

69. Because the Chrysler Building property was a restricted asset, the school was required to obtain the approval of the Court for its plan in a *cy pres* proceeding. OAG reviewed Cooper Union's *cy pres* petition, and relied on the accuracy of the information in that petition when it determined whether or not to raise any objection with the Court.

70. The *cy pres* petition acknowledged that Cooper Union wanted to take out a $175 million loan mainly to pay for construction of the NAB. The petition did not explain that the loan plan was, in effect, a "bet the school" series of transactions, under which a series of optimistic assumptions would all need to come to fruition to avoid the school becoming locked into an unsustainable cycle of mounting debt and deficit spending.

71. The only one of these assumptions specifically addressed in the petition concerned future expenses, which the petition specifically stated would be cut by 10% across the board by 2011.

[13] One board member wrote an email to President Campbell and three other trustees raising concerns about the loan plan's effect on solvency after 2038, and the "wisdom of borrowing at 6% to invest at 7%," and stating that these issues should be addressed by the full Board. There is no record that they ever were.

72. The petition staetd that the old engineering building needed to be replaced because its outmoded character threatened continuing student recruitment as well as re-accreditation by the Middle States Commission on Higher Education ("Middle States").

73. The petition did not acknowledge that the engineering faculty of the school did not agree that the building needed to be replaced, or that Middle States had not actually said anything connecting its replacement with re-accreditation.

74. Relying on the accuracy and completeness of the contents of the petition, OAG filed a statement of no objection with the Court. The Court granted Cooper Union *cy pres* relief in October 2006. The deal documents were promptly executed, Cooper Union got its loan proceeds, and the plan was set in motion.

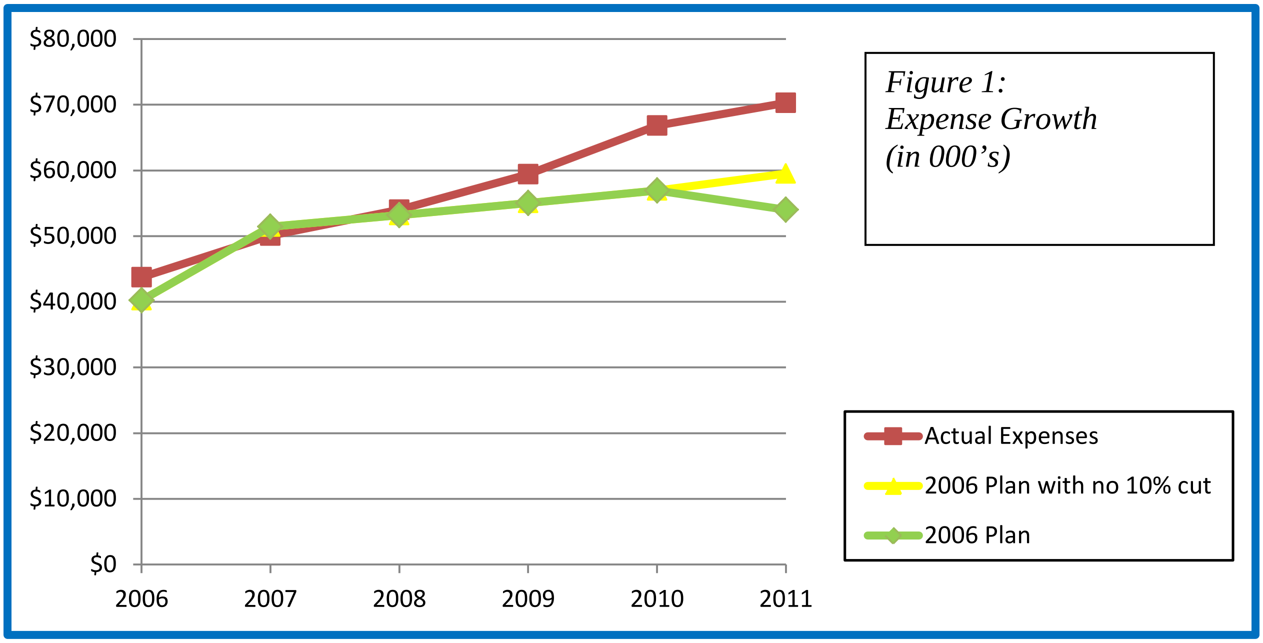
C. 2006 Loan Plan Fails

75. The loan plan did not fail because of construction-cost overruns on the new building, which were modest. Nor did it fail because of any problem with the revenue-generating 51 Astor Place commercial lease transaction, which was actually very successful as a stand-alone negotiation. The plan failed because its four key, inadequately-assessed assumptions all went unrealized.

76. First, in June 2007, less than one year after representing to the Court and OAG that Cooper Union was committed to a sustainable 10% expense reduction by 2011, the board explicitly abandoned that goal, replacing it with a 5% reduction goal. This change was made after assurances by President Campbell that prior projections of contribution revenue were too pessimistic, and that a deeper expense cut would damage the school.

77. In any event, not only was there no overall expense reduction at all by 2011, expenses grew by an average of nearly 10% annually from 2006 to 2011, compared to the

4.5% limit the board had incorporated into the assumptions that supported the viability of the loan plan. (*See* Figure 1)



78. Second, in 2007, New York City formally challenged Cooper Union's right to the tax benefits relating to commercial leases on 26 Astor Place and 51 Astor Place. The school settled for 50% of the benefits rather than risk losing them all. Annual income of $3 million (plus 3% annual escalations) was lost. (*See* Figure 2)

Figure 2:

Lost Tax Benefits

79. Third, in 2007 contributions to the Building Fund were well below target, and although giving to the Building Fund spiked temporarily in 2009, fundraising all but collapsed over the next two years following the actual completion of the NAB. By 2011, only about $25 million of the $40 million in contributions budgeted for the five-year campaign had been raised. (*See* Figure 3)

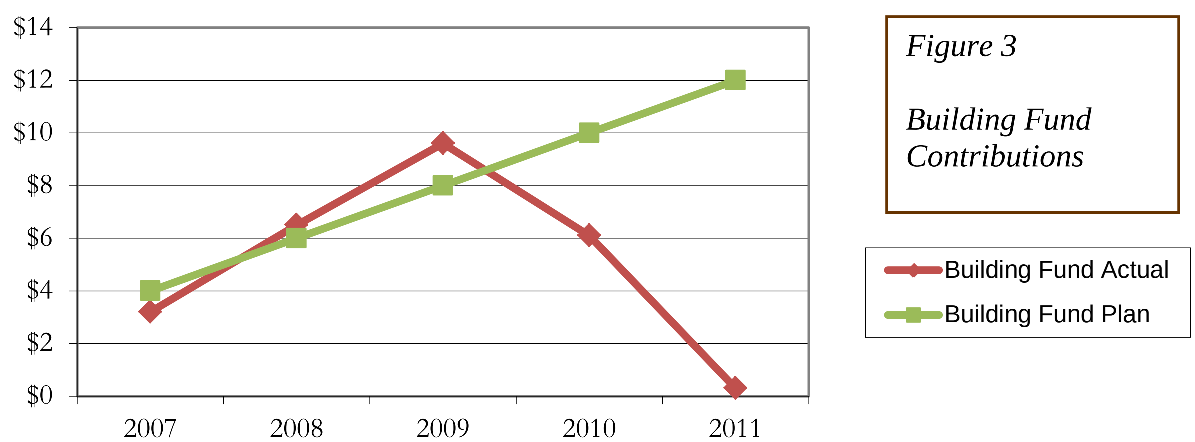


Figure 3

Building Fund Contributions

80. Fourth, at the end of 2008, when the stock market collapsed, the liquid portion of CU's endowment suffered major losses, and below-target returns continued through 2011. As a result, the investment pool, which under the 2006 plan was supposed to have nearly $160 million at the end of 2013, instead had just over $120 million. (*See* Figure 4)

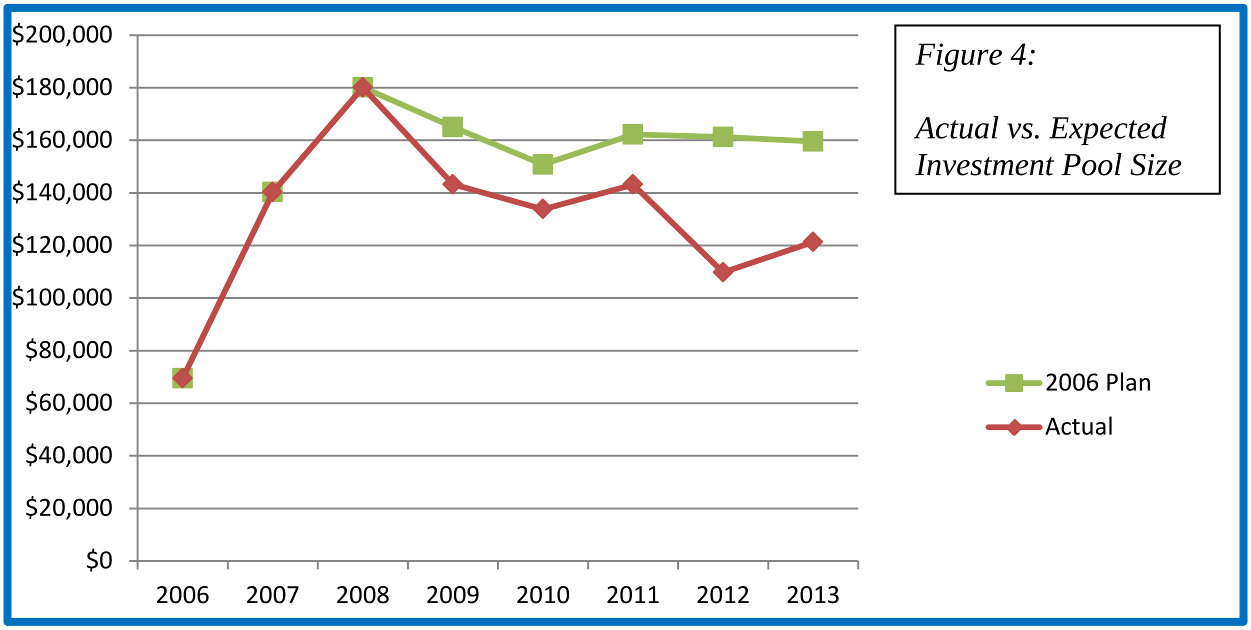


Figure 4:

Actual vs. Expected Investment Pool Size

81. According to the 2006 loan plan, the failure of any one of these four assumptions would undermine the school's ability to remain solvent through the 30-year loan term.

82. The failure of all four assumptions within the first couple of years meant that Cooper Union was likely to run out of cash to fund its deficits before the 2018 reset of the Chrysler Building rents. Instead of enjoying a planned $15 million surplus in 2018, Cooper Union could expect to still be $5 million in deficit, even with the receipt of the increased rent in that year boosting revenue to its highest level ever. And instead of solving Cooper Union's near-term issue with ongoing deficit spending, the plan's failure instead accelerated that problem. Annual deficits averaged about $13.6 million in the seven years after the plan, compared with the $7.8 million during the previous seven years (*See* Figure 5)

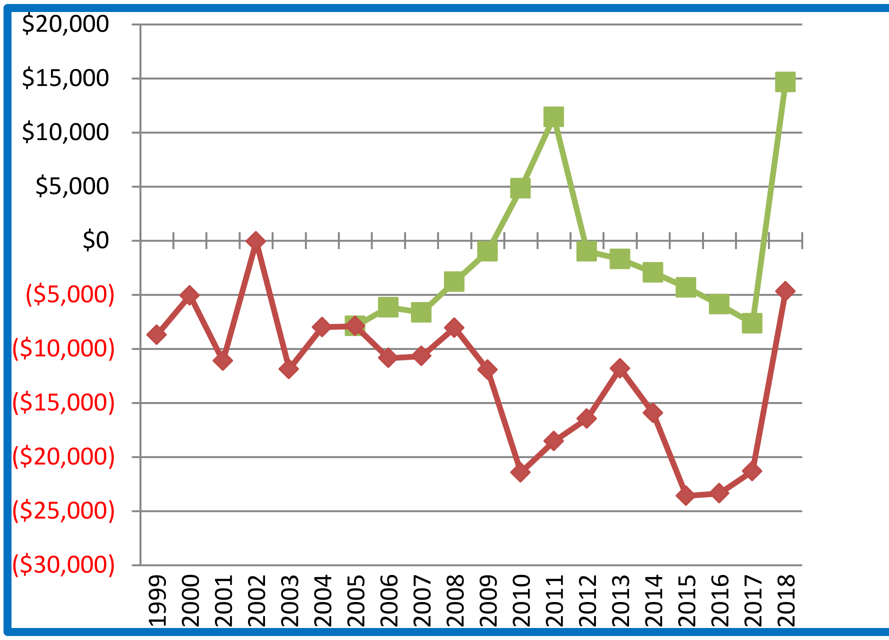


Figure 5:

Actual vs. Planned Operating Deficits

83. At the time the assumptions began failing, and at all relevant times thereafter, President Campbell and the Board possessed information evidencing that the plan's failures would have a severe impact on the school's mission if not addressed.

D. President Campbell and the Board Fail to Address Plan's Failure

84. President Campbell gave an interview to the *New York Times* in February 2008, in which, according to the Times, he noted that Cooper Union had balanced its budget for the first time in 25 years, and that Cooper Union had grown its endowment from a mere $138 million to more than $600 million "with some smart real estate deals."

85. President Campbell's reported statement that Cooper Union had balanced its budget was technically true, in that for the first time in 25 years Cooper Union did not need to dip into its existing investment pool to cover an actual $10 million operating deficit, but only because it received $175 million in loan proceeds that year. President Campbell's reported statement that the value of the endowment had been increased from $138 million to more than $600 million was based on an accounting change, not an actual increase in value. Prior to 2002,

the Chrysler Building land was carried on the school's books at its 1902 price of $600,000. The increase in the endowment reportedly cited by Mr. Campbell came from changing that value to reflect the property's actual modern appraised price, which exceeded $400 million.

86. In a June 30, 2009 interview with the *Wall Street Journal,* President Campbell reportedly claimed that Cooper Union was following a conservative investment approach, because "[w]e knew that if we took a big risk and lost, we couldn't recover." The article praises Cooper Union for "quietly skirting the crunch in higher education," and notes that Cooper Union's total endowment would be worth as much, if not more, at the end of fiscal 2009 as at the end of fiscal 2008

87. At the time of the Journal interview, it was known by Cooper Union that the key expense-reduction projections had been undermined by substantial increases in spending, that half the tax-benefit payments on the non-Chrysler properties had been lost, that the investment pool had suffered a 13% loss instead of earning the needed 7% return, and that contributions to the Building Fund were already well short of the totals required to backstop the financing plan. The school was locked into a cycle of debt service and deficit spending that was likely to consume all of its available cash in a decade or less.

88. The only reason the endowment could break even on paper between 2008 and 2009, as claimed in the article, was the infusion of borrowed money and the accounting change relating to the value of the Chrysler Building property. The *Wall Street Journal* article allowed readers to conclude that Cooper Union had "skirted" disaster, when Cooper Union had information sufficient to know that without radical changes, insolvency had become inevitable.

89. Until the end of his term in June 2011, President Campbell provided reports and projections to the Board and the community that did not reflect an accurate depiction of the

school's finances and its future prospects. For example, in his annual review for 2010, presented to the Board in early 2011, President Campbell understated the school's operating deficit by half, and projected that the school was on track to escape its deficit-spending trap by 2018, in line with the original forecast of the 2006 loan plan.

90. At the time President Campbell reportedly made the statements described above concerning the school's financial condition between 2008 and 2011, the Board possessed sufficient information to determine that the statements, as reported, were most likely inaccurate.

91. The Board did not take any discernible action to address the failure of the 2006 loan plan during the remainder of the Campbell administration. OAG has found no record that the Board discussed the failures of the four key assumptions as they happened, or that it discussed the ramifications of the plan's overall failure

92. Instead, the Board repeated, and adopted, President Campbell's reported claims about the school's finances. In a letter to the community on the occasion of President Campbell's retirement announcement in April 2010, Chairman of the Board Mark Epstein stated that:

> In 2008, the college achieved a balanced operating budget and positive cash flow for the first time in decades. Through a combination of fundraising, real estate development, and other asset management strategies, we have rebuilt the endowment from a low of under $100 million in 2001 to more than $600 million in 2008.

93. At the time he made that statement, Mr. Epstein possessed information sufficient to inform him that the school had not actually balanced its budget in 2008, and that the endowment figures he cited reflected only an accounting change regarding the Chrysler

property's carrying value, that the value of the endowment had not increased at all, and that in fact, the endowment, and the school, were in jeopardy.

IV. Bharucha Administration: July 2011 to June 2015

94. In 2010 the, Board had begun conducting a search process for a new president, in anticipation of President Campbell's retirement. Using a consultant, the board developed a list, and narrowed the candidates down to a list of finalists. Its next president did not come from this group.

95. Instead, a trustee telephoned Jamshed Bharucha, who was never identified as a candidate by the search process, on a Saturday morning in early 2011. The two had lunch that day in New Hampshire. Bharucha flew to New York the next day to meet some of the Board members. That night, the Board (most of whom never met him in person) voted to offer him Cooper Union's presidency, which he accepted.

96. President Bharucha did not take office until months later, in July 2011. It is not known what information concerning the school's financial condition was shared with him by the Board either in the two days of contacts with him prior to his hiring, or in the interim between the hiring and his investiture.

97. From at least his first day as President, July 1, 2011, President Bharucha possessed sufficient information to know that the 2006 loan plan had failed, that the school's finances faced an imminent crisis, and that the previous president and the Board had communicated inaccurate information to the public and the community.

98. For the next four months, President Bharucha did not publicly communicate any concerns about the condition of Cooper Union's finances.

A. The Crisis is Revealed, and Tuition is Imposed Amidst Centralized Decision-Making

99. On October 31, 2011, President Bharucha announced that Cooper Union's most recent annual deficit was $16 million, or twice that reported by President Campbell. President Bharucha also announced that the liquid portion of the school's endowment was greatly depleted, posing a serious risk to the school's viability. In an interview with the *New York Times* on that day, President Bharucha mentioned charging tuition as a possible solution to the crisis.

100. On November 2, 2011, President Bharucha announced in a letter to the community that he had a "reinvention plan" for Cooper Union. He did not specifically mention charging tuition, but he did reference the *New York Times* article in which he discussed that possibility.

101. Over the following months, the faculties of Cooper Union's three schools were each told to present a document to President Bharucha indicating their support for the reinvention plan. The Art faculty declined. President Bharucha and the Board told the Art School faculty in March that no new class would be admitted to the Art School that fall unless the faculty reconsidered. Shortly thereafter the Art faculty endorsed a document supporting the reinvention plan.

102. In April 2013, President Bharucha and the Board announced that they had determined to charge tuition, beginning with the class expected to matriculate in September 2013, to help solve the school's financial problems.

103. In early May 2013, students began an occupation of President Bharucha's office to protest the decision to impose tuition.

104. In July 2013, the occupation ended when President Bharucha and the Board agreed to the formation of a "Working Group" that would be charged with exploring alternatives

to tuition. The Working Group would consist of students, alumni, administrators, and trustees. In the meantime, tuition would not be charged for undergraduates entering the school that fall.

105. The Working Group was given seven weeks in October and November 2013 to figure a way out of the debt-and-deficit trap created by the failure of the 2006 loan plan without resorting to tuition.

106. The Working Group did not have direct access to Cooper Union's books and records, despite the fact that two trustees who had the right to such access were participants. Instead, Working Group requests for information were relayed through consultants hired by the administration, and were subject to limitation on unknown bases and to an unknown extent.

107. By the end of the process, the Working Group produced a plan it said would achieve a combined $8 to 10 million in savings and additional revenue, avoiding the need to charge tuition. In November 2013, a duly-noticed vote was held among the Working Group's members to approve or reject the proposed plan for presentation to the Board. The plan was approved, but President Bharucha's three representatives to the Working Group did not attend the meeting or vote on the plan.

108. When the Working Group forwarded its plan to the Board, President Bharucha's three representatives, led by the Engineering Dean, forwarded to the Board their own "minority report," the contents of which had never been discussed with or disclosed to the other members of the Working Group.

109. The "minority report" disputed the accuracy of figures and the viability of concepts cited in the Working Group report, based on information provided by the administration's consultants.

110. In December 2013, the Board received the Working Group report and determined that the issues it raised required additional study. The Board stated that it would not take the "minority report" into account in evaluating the Working Group report.

111. In January 2014, the Board announced its decision. It recognized that the Working Group plan "put[] forward a number of recommendations that are worth pursuing under any financial model. However," it said, "we believe that the contingencies and risks inherent in the 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."

B. Bharucha Administration Budgeting Relies on Unsupported Assumptions

112. In 2013, when President Bharucha first proposed charging tuition, and then again in 2014, after the Working Group plan had been rejected, he gave the Board detailed budget plans that purported to make the school financially secure for the long term by relying on tuition revenues.

113. These budget analyses, which culminated in the publication of a "Financial Sustainability Plan" in late 2014, relied, like the 2006 plan, on unrealistically optimistic assumptions.

114. Specifically, the Financial Sustainability Plan relied on the following assumptions: (1) limitation of annual operating-expense growth to less than 4.5%; (2) generation of $4 million in profits, plus annual escalations, from new programs to be launched starting Fall 2015; (3) unrestricted Annual Fund contributions approximately level with past levels of support, while contributions to endowment at consistently higher level than past levels of support; (4) continual growth in enrollment and in tuition-revenue yield per student.

115. First, as in the 2006 loan plan, the Financial Sustainability Plan bases its projection of future solvency on a commitment to restrict the school's future operating expense growth to about 4.5%. The FSP assumes that after operating expense growth rates of about 8% between 2013 and 2014, and about 17% between 2014 and 2015, the school will manage to restrict expense growth to just under 4.5% on a sustainable basis through 2034. Unlike in the 2006 plan, the FSP does not also count on any one-time top-level actual reduction in expenses.

116. If expenses were to grow at the school's historical average rate, approximately 7.5% annually, actual outlays would be about twice what the FSP anticipates by the time of the second Chrysler Building rent reset in 2028, and the projected surplus would disappear. (*See* Figures 6 and 7).

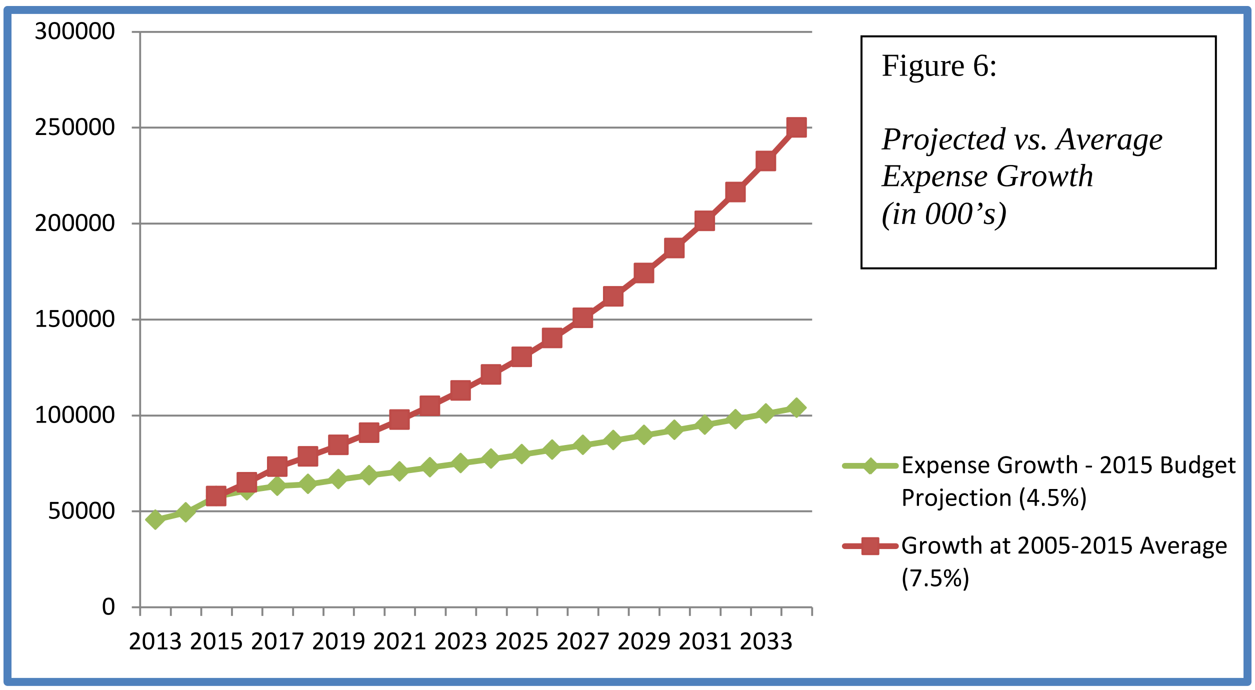


Figure 6:

Projected vs. Average Expense Growth (in 000's)

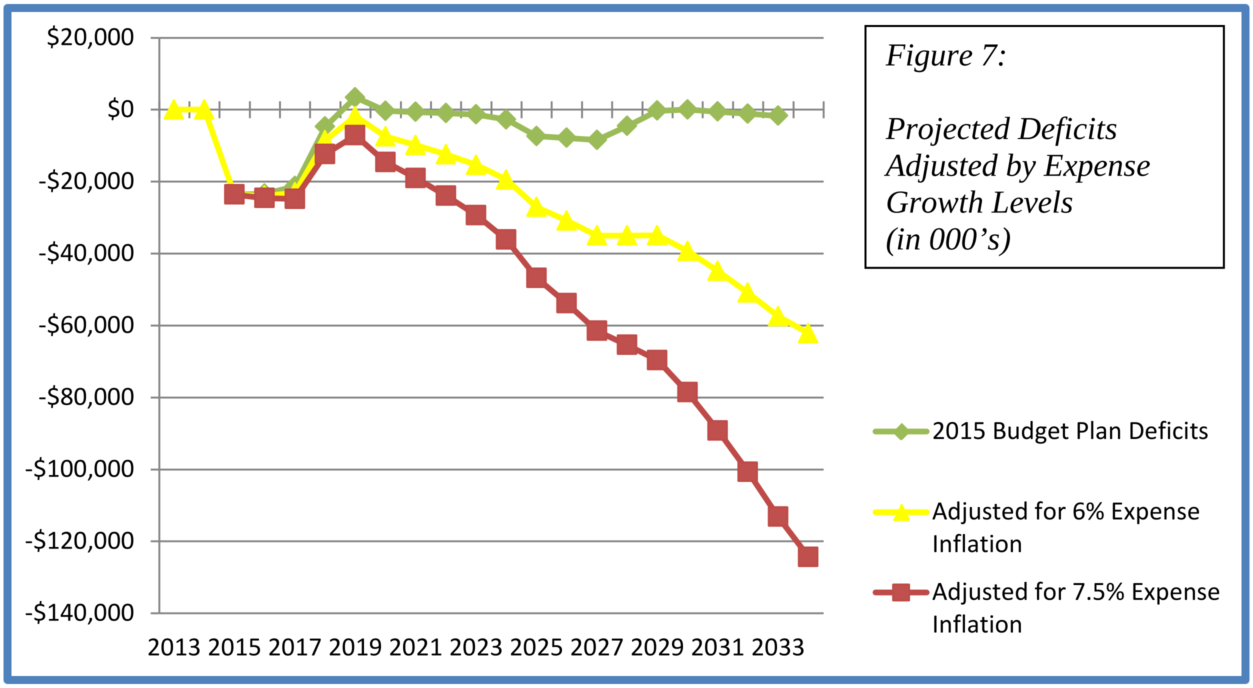


Figure 7:

Projected Deficits Adjusted by Expense Growth Levels (in 000's)

117. Second, the FSP projects that Cooper Union would generate about $4 million in revenues from new programs by 2020, rising steadily thereafter, with the overwhelming majority of that being profit, due to the low marginal cost to Cooper Union to teach a limited number of additional classes. (*See* Figure 8)

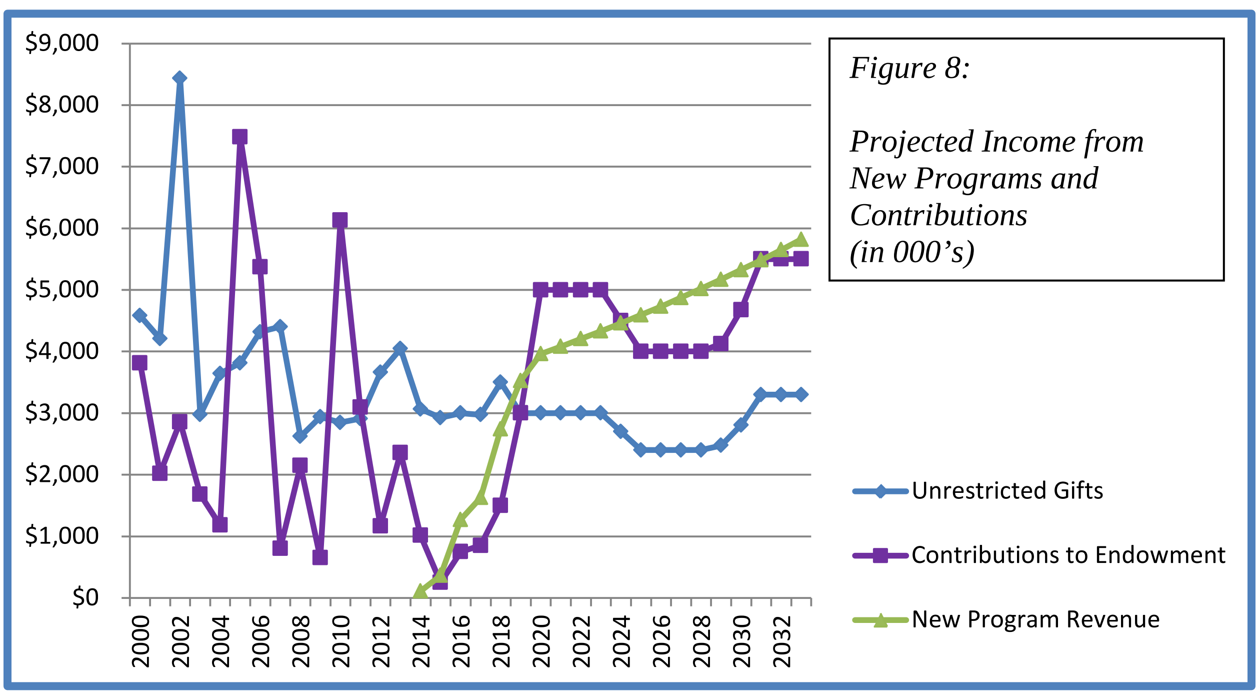


Figure 8:

Projected Income from New Programs and Contributions (in 000's)

118. The FSP projected that these programs were expected, by themselves, to equal or exceed the operating deficit, except in the three lean years right before the 2028 rent reset, when the school in its weakest relative condition. The failure of these proposed new programs to deliver the projected income in those most vulnerable years would add 50% to the projected deficit.

119. Cooper Union has not launched new programs on the proposed scale in its modern history, and the plan counted on the school succeeding in this effort, at least to start, amidst considerable public controversy. Expenses could run significantly higher, and enrollment could turn out significantly lower, than forecast, limiting or eliminating any net revenue to the school. And the success of such a program would depend on comity between the administration, board, and faculty. The risk of relying on positive outcomes for new revenue-generating programs would later be demonstrated when the first effort, the planned bachelor's degree in computer science, failed at startup in April 2015.

120. Third, the FSP made unrealistic assumptions about contributions. On the one hand, it forecasted a continuation of recent trends in unrestricted giving to the Annual Fund, while at the same time, counting on a dramatic, sustained increase in direct yearly contributions to the school's endowment. The effect is that the FSP included an unrealistic built-in cushion against expected future deficits, allowing it to appear more squarely on track for long-term solvency than the underlying conditions can justify. (*See* Figure 8)

121. Fourth, the FSP relied on continual growth in enrollment, and a higher tuition yield per student as time goes on. But this assumption presumed that Cooper Union actually has physical space for the additional students. It also presumed that Cooper Union would succeed in disproportionately recruiting students who do not qualify for aid and would pay full price, while

maintaining a need-blind admission process. The first presumption is false, in that Cooper Union is already suffering from a space shortage, having replaced its old academic building with a smaller one. The second is speculative and difficult to assure.

122. The FSP presented an ideal scenario for future solvency, but only if its assumptions were not inquired into. OAG has found no evidence that the Board identified or analyzed these assumptions when discussing the FSP or its predecessor proposals.

123. Based on the projections of the FSP, the Board determined in mid-2014 that even with the expected new revenue from tuition, the school could not make it to the 2018 Chrysler Building rent reset without threatening the invasion of the school's endowment corpus. As a result, after conducting due diligence concerning various options in terms of lenders and loan structures, the Board obtained a $50 million bridge loan in August 2014, secured by future tax-benefit payments from 51 Astor Place, to carry the school through to the 2018 rent increase.

C. Communication Regarding Financial Condition Remains Inadequate

124. Throughout most of President Bharucha's term, the administration and the Board continued the prior pattern of communicating inaccurate information to the community regarding the school's financial condition. Although the administration and Board were no longer claiming that the school's finances were strong, they continued to deny that the failure of the 2006 loan plan was at the root of the school's immediate financial crisis.

125. On December 15, 2011, the Board released a written statement that purported to explain the causes of Cooper Union's recently-revealed financial crisis. It focused on three items: (1) stock market losses; (2) poor alumni donation efforts; and (3) failure to control expenses.

126. First, with respect to the stock market losses, the statement noted that the endowment performed better than 98% of its peers between 2007 and 2011. But the Chrysler Building land, which gained value over that time, is by far the largest component of the endowment, and it is effectively illiquid under the constraints of the loan plan transactions. The liquid investment pool actually performed relatively poorly during that time, and the total loss of the extra $35 million borrowed from MetLife for investment purposes resulted in a substantial increase in long-term debt-service costs, resulting in an added drain on the endowment.

127. The Board's statement did not explain in its statement that Cooper Union had borrowed an extra $35 million to invest, in the hopes of beating a nearly 6% loan interest rate with expected annual returns of 7% or better. It also did not reveal that regardless of the claimed relative performance of the endowment to other schools' investments, Cooper Union knew that it had not achieved the returns its own plan established as a prerequisite to continued solvency. It did not explain the actual losses suffered by the endowment in the 2008-2009 crash, or the relatively poor returns earned in the following years. And it did not explain what information is available to the community to monitor the liquid investment pool's performance, and to this date, there has been no fully transparent disclosure of such information by Cooper Union at any time.

128. Second, the board's discussion of alumni financial support in the statement was also not accurate:

> In 2009, contributions to annual giving came in $2 million under forecast; in 2010, $7 million under and in 2011, close to $12 million dollars less. Over the five-year period, giving was $10 million short of what was projected in the fall of 2006. Unfortunately, only approximately 20 percent of Cooper Union alumni donate to the annual fund compared to, for instance,

> Princeton, Williams and Amherst, all of which charge significant tuition and have over 60% of alumni giving annually.

129. This depicts the alumni as having failed to support the school's annual fund at the level assumed in the board's 2006 projections when it decided to build the NAB. This is inaccurate. Both alumni contributions to the annual fund, and the total contributions to the annual fund, exceeded the board's 2006 projections in every year between 2007 and 2011. The problem was not lack of support for annual giving. The problem was that the school was counting on receiving twice as much again in contributions to its separate Building Fund as it ordinarily got in contributions to just the Annual Fund. The shortfalls cited in the board's statement were not shortfalls in Annual Fund giving, but in Building Fund giving during the period *after* the NAB had already been constructed.

130. Third, with respect to expenses, the Board did acknowledge that Cooper Union failed to control them, but never mentioned that the administration abandoned the 10% expense reduction plan less than a year after committing to it. The Board's statement also fails to acknowledge the substantial extent to which actual spending exceeded the projections in the 2006 loan plan, and how badly that excess spending had exacerbated the budget deficit and compromised the solvency projections the Board had relied on.

131. Finally, the Board added a note about what, in their view, did *not* cause the financial crisis:

> It is also important to state that [the NAB] was not the cause of the current financial dilemma. Its construction relieved Cooper Union of the costs that would have had to be incurred to renovate the old engineering building and the Hewitt Building to make them acceptable sites for a 21st century education and meet accreditation standards…It would have cost far more in the long run not to have built the building.

132. This portrayal of the NAB transactions as beneficial or at least cost-neutral was incorrect, in that it fails to acknowledge the substantial detriments and long-term constraints imposed by the loan and lease terms, especially given the total loss of the $35 million borrowed for investment purposes. It also repeats a theme from the time of the *cy pres* application regarding accreditation, in which CU incorrectly indicates that there was an actual, articulated challenge to CU's future accreditation based on the purported inadequacy of the then-current facilities.

133. In October 2012 Cooper Union posted a "Financial FAQ" to its website that contained several items that were inaccurate or did not disclose relevant information.

134. First, the FAQ notes that the school is expecting a 5% annual increase in annual fund giving from 2013 forward. The FAQ does disclose that this is higher than the historical average growth of 3%, but does not disclose that annual fund giving had declined sharply between 2009 and 2012. The FAQ also notes that the board is counting on raising an average of $10 million per year for the ten years starting in 2013, but does not disclose the failure of the 2007-2011 Building Fund drive to meet the same target for contributions in excess of the annual fund.

135. Second, the FAQ states that the school assumes expense inflation of 3%, except for employee benefits, which it expected to escalate at 7.5%. Blending these rates based on Cooper Union's proportional expenses, and excluding debt-service expenses (which would escalate at higher average annual rates over the 30 years of the loan), results in an expense-escalation projection of less than 4%. The FAQ does not disclose that the 2006 loan plan relied on a goal of 4.5% expense-growth limitation, and that the school overshot that target substantially, contributing to the failure of the 2006 loan plan.

136. Finally, the FAQ accurately describes the 2018 rent reset, and explains how the non-escalating fixed rent for the three decades thereafter disadvantage Cooper Union. However, in response to the question "why do the Chrysler Buildng revenues go up in 10-year increments," the FAQ does not disclose that the school agreed to the fixed rent resets in order to secure the MetLife loan, or that by doing so, the school gave up the chance for substantially higher rent resets fixed by appraisals, or, alternatively, the chance to foreclose on control of the Chrysler Building itself.

137. In an interview in May 2013, Chairman of the Board of Trustees Mark Epstein blamed the alumnae for the school's financial crisis:

> So, the problem is that the school—let me first categorically state that had we had enough money and were able to generate enough revenue to cover our expenses and keep the school with 100 percent scholarship policy, that was our intention. But we can't. We don't have the ability to raise enough revenue.
>
> A big part of that problem—and I've made this public before—is that we don't have enough alumni support. Traditionally, only 20 percent of our alumni, who have gotten 100 percent scholarships, give back to the school on a regular basis…And most—some of the loudest voices of our alumni against this new change in policy—you know, without giving out confidential information—their names do not appear on donor lists. So, I question their commitment to the school other than verbal.

138. Mr. Epstein's statement that only 20 percent of alumni traditionally give to Cooper Union on a regular basis was not accurate. As of 2000, when the capital campaign began, over 30% of alumni gave to the annual fund. That percentage did go down over the decade, but did not go under 25% until after the 2008 market crash, and did not fall to 20% until 2012. In any event, in addition to annual fund giving, the alumni donated more than $50

million to the capital campaign over the years 2000-2010, an average of $5 million a year, or about three times the alumni yield from the annual fund.

D. Oversight and Management Weaknesses Undermine Further Progress

139. During the Bharucha administration, weaknesses in oversight and management practices created difficulties in making progress in key, self-identified areas of needed reform and improvement. Most significantly, they resulted in the cancellation of the flagship new revenue-generating project, the computer science degree program.

140. In mid-2013, the faculty of the Engineering School promulgated a new governance to regulate academic affairs. But the Engineering Dean objected to the proposed governance, on the grounds that it incorporated Robert's Rules of Order, which in turn allowed for secret balloting, and she refused to submit it to the Board for approval. As a result, the Engineering School's governance has still not been reformed.

141. With respect to a separate issue, in 1998 Cooper Union had identified a need for enhanced planning and assessment functions in its self-study report to the Middle States accreditors. In connection with this self-recommendation, the school established the Planning and Assessment Council ("PAC"), which would have broad participation among faculty and administrators. In August 2014, the Engineering Dean, who was President Bharucha's representative on the PAC, announced that the council's activities would be suspended. There would be no further non-administrative input on matters of planning and assessment during the remainder of the Bharucha administration.[14]

1. [14] As of June 2015, the school's website still promoted the PAC and its original faculty-member participants as the vehicle for planning and assessment functions.

142. Subsequently, the Engineering Dean recommended against a grant of tenure to a professor who had gained the unanimous recommendations of the faculty promotion and tenure committee and the relevant department in the engineering school. This professor had chaired the Working Group committee that included the Engineering Dean, had chaired of the faculty committee that promulgated the new Engineering governance that the Engineering Dean opposed, and had chaired the Planning and Assessment Council that the Engineering Dean unilaterally dissolved. President Bharucha followed the Dean's recommendation, and denied the professor tenure despite the unanimous recommendations of the faculty.

143. In June 2014, the Board approved the concept of adding a Bachelor of Science in Computer Science (the "CS Program") as a new major in the Engineering School, with students to be admitted for Fall 2015. This was to be the first of President Bharucha's new revenue-generating programs under the FSP. The Engineering Dean was principally responsible for the design of the proposed new CS Program curriculum.

144. Between June and September 2014, the Engineering Dean circulated drafts of the proposed curriculum to all full-time faculty in the Electrical Engineering Department of the Engineering School, which was the department expected to house the CS Program. During this first review, the faculty criticized the proposed curriculum for its lack of academic rigor.

145. In September 2014, a second draft of the curriculum was submitted to the Engineering faculty's curriculum committee for formal review, and again it was rejected for lacking academic rigor, and, in addition, for including material copied verbatim from the work of faculty at other schools. The Engineering Dean declined to ask the full Engineering School faculty to take a vote to override the Curriculum Committee's determination to reject the

curriculum. At that point, the CS Program was not eligible to be offered by the Engineering School

146. On November 12, 2014, President Bharucha and the Engineering Dean submitted an application for registration of the CS Program with the New York State Education Department ("NYSED"). The application stated that "the Department of Computer Science will be a new department in the School of Engineering." The application listed the faculty and resources of the Engineering School as the faculty and resources that would be available to the CS Program. It stated that admissions would be governed by the standards of the Engineering School.

147. The application did not acknowledge that the CS Program had been rejected by the Engineering School faculty, and therefore could not be offered within the Engineering School. It also did not acknowledge that several of the actual course descriptions and syllabi submitted as an exhibit to the application were copied verbatim from other sources, without appropriate attribution.

148. In February 2015, NYSED approved the application for the CS Program to be offered within the Engineering School.

149. On March 11, 2015, the Board of Trustees held a meeting at which they considered President Bharucha's request to establish an Institute for Design and Computation as a new degree-granting entity within Cooper Union, with the CS Program as its first undergraduate program.

150. In their presentation to the Board, President Bharucha and the Engineering Dean acknowledged that the Engineering School's Curriculum Committee had rejected the CS Program, but they inaccurately characterized the reason. Specifically, they stated that the

rejection had been due to a perceived lack of "fit" between the CS program and the existing Engineering curriculum. They did not explain that the Curriculum Committee had actually rejected the CS Program because it failed to meet Cooper Union's standards of academic rigor, and was, in part, copied from other school's curriculum materials.

151. President Bharucha and the Engineering Dean did not explain to the Board that the CS Program had already been approved by NYSED based on an application that contained inaccurate statements regarding the CS Program's incorporation into the Engineering School.

152. Finally, President Bharucha and the Engineering Dean did not reveal to the Board that because of the timing of their action in establishing the institute, and the absence of information about it to be given to prospective students, those students could not apply to the program directly. They did not explain that CS Program students for Fall 2015 would have to be solicited into the program by telephone after they applied to the Engineering School.

153. That day, the Board passed a resolution establishing the institute and placing the CS Program under its purview.

154. The Board's resolution specifically called on President Bharucha and/or the Engineering Dean to inform the full-time faculty union regarding the establishment of the institute and the CS Program. Neither of them ever did so.

155. Immediately following the Board's March 11, 2015 decision, Cooper Union began making phone calls to prospective students who had applied to the Engineering School prior to the January cut-off date. These individuals were solicited to join the CS Program instead of joining the engineering degree programs they had applied to. These individuals were not told that the CS Program was not part of the Engineering School, and instead would be part of a just-created institute.

156. Follow-up documents sent by the administration to the prospective students to further solicit them did not mention the institute, or indicate that the CS Program was separated in any way from the Engineering School.

157. 31 prospective students who had applied to the Engineering School accepted placement in the CS Program as a result of these solicitations. In connection with "Admitted Students Day," these 31 admitted students were sent materials inviting them to Engineering-School-related functions.

158. At all relevant times, the Cooper Union's website and other publications made no mention whatsoever of the institute, provided no course information for the CS Program, no information regarding faculty who would teach the CS Program, no information regarding the resources available to the CS Program students, and no information regarding graduation rates or job-placement results. The only mention of the CS Program on the website stated that students interested in the school's prospective Bachelor of Science in Computer Science degree should apply to the Engineering School's BSE program.

159. On April 15, 2015, OAG met with the Executive Committee of Cooper Union's Board of Trustees to discuss concerns about the content of the CS Program application filed with NYSED, and about the then-ongoing solicitation of Engineering-school applicants into the program without disclosure that the CS Program was not part of the Engineering school.

160. Later that day, the Executive Committee voted to terminate the CS Program. Students who had been admitted to the CS Program were instead offered admission to the Engineering school programs they had originally applied to.

161. On May 4, 2015, the Engineering Dean announced that she would resign as Engineering Dean and Chief Academic Officer, effective June 30, 2015.

162. On June 10, 2015, President Bharucha announced his resignation, effective June 30, 2015.

V. Interim Administration: July 2015 to Present

163. On June 11, 2015, the Board announced that the school's Vice President for Administration and Finance, William Mea, would become Interim President upon the resignation of President Bharucha.

164. Since then, President Mea and the Board have taken actions that address some long-standing issues relating to budgeting and administration at Cooper Union.

165. First, in a new budget proposal to the Board, President Mea re-evaluated the FSP and its related assumptions and projections. He determined that the FSP was too reliant on expectations of additional revenue from new programs and increased contributions, and that cost-cutting efforts would need to be revisited.

166. As to the vestigial Institute for Design and Computation, which had been created by the Board in March 2015, but had no programming after the elimination of the CS Program, President Mea said "there is no money for an institute."

167. President Mea also determined that the school's physical footprint could not accommodate the expansionist enrollment policy envisioned by the FSP, and called for a reduction in admitted class size to return to historical enrollment levels.

168. Finally, President Mea determined that any expansion of enrollment or new programs carried risks to academic quality and reputation, and needed to be carefully monitored.

169. Taking all of these issues into account, President Mea proposed a new budget aimed at achieving fiscal and academic stability in the near term, to provide maximum support for whatever revised medium and long term plans might be developed later. The Board approved President Mea's revised budget proposals.

170. On a separate matter, President Mea directly solicited the opinions of the Engineering faculty in deciding who to name as Acting Dean of the Engineering School. After considering the faculty's views he named Richard Stock, the chair of the Chemical Engineering Department, and President of CUFCT, the full-time faculty members' union, as Acting Dean. This was the first time a CUFCT officer was named a Dean at Cooper Union since the founding of the bargaining unit.

VI. Summary of Investigative Findings

171. In its modern incarnation, Cooper Union has had difficulties effectively distributing and discharging oversight and management responsibilities among its trustees, administrators, and faculty. These difficulties have played a substantial part in causing the problems now faced by the school.

172. The decision to pursue the 2006 loan plan when contributions to the Building Fund fell short demonstrated a weakness in trustee oversight functions that would persist over the following decade. The trustees did not inquire into the reliability of the four key assumptions that the plan rested on, even when they were warned (at least with respect to the expense-cut assumption) that the plan would fail if the assumptions failed. They did not attempt to assess the likelihood that the overall plan would fail to meet its 30-year stability objective because one or more of the assumptions were not realized, and the varying degrees of damage to the school's finances that might be inflicted by varying degrees of failure. They did not maintain effective systems to detect and resolve conflicts of interests. They did not make any contingency arrangements. They did not review the bases for the Engineering faculty's position that the new building would damage the school's finances and shrink its classroom footprint. They did not

discuss, among themselves, or with the community, the possibility that if the plan failed, the school might have to quickly choose between closure and charging tuition.

173. Then, when the plan's assumptions began to fail, the trustees did not respond appropriately. They did not seek out updated projections or forecasts of future solvency based on known negative developments. They did not discuss how Cooper Union could enact any mid-course corrections to preserve the budgetary aims of the plan.

174. The Board at first stood silent, and then its chair Mr. Epstein joined in, as President Campbell misinformed the community as to the strength of Cooper Union's finances, when they had sufficient information to know the truth of the school's increasingly dire condition.

175. After President Bharucha's administration began, these problems continued, even when the financial crisis was acknowledged. Responses to community objections to the new plans to charge tuition, and questions as to the results of the 2006 plan and the school's investment strategies, were ineffective and misleading. The Working Group, which was supposed to validate and channel the energies of those in opposition, was deprived of the time and resources to offer comprehensive, responsible alternatives to tuition, and its conclusions were then rejected as administration appointees criticized the effort.

176. While deeming the Working Group's work product to be unreliable, the Board failed to subject President Bhaurcha's proposals, including the Financial Stability Plan, to rigorous analysis. Unexamined, optimistic assumptions were permitted to supply key support for the FSP's projections, upon which the Board relied when it finally determined to charge tuition, and to obtain a bridge loan to conform with the FSP's long-term planning, which the Board had adopted wholesale.

177. Throughout the Bharucha administration, over-centralization of management and the failure to communicate with non-administrative constituencies caused multiple problems apart from the presentation of unreliable budget assumptions. The Engineering Dean was recruited from outside the institution with little or no input from existing faculty. Her elevation to Chief Academic Officer, as she retained her title as Dean of the Engineering school, collapsed a potentially useful division of administrative review in Cooper Union's largest academic division. Her issuance of the "minority report" in response to Working Group served to alienate the wider community from the administration. Planning and assessment functions, governance reform, and tenure review became opaque, one-or-two-person operations under President Bharucha's and the Engineering Dean's direction. And if the Board was aware of the risks these trends of concentration and insularity posed, they did not leave a record of having considered them.

178. The culmination of these adverse trends in management and oversight was the failure of the CS Program launch in April 2015. The Bharucha administration did not appropriately source and vet this new program with the existing faculty, did not accurately describe the program when registering it with the state, and did not design an admissions process that provided timely information to applicants about key facts relevant to their decision to enter the program.

179. The Bharucha administration did not reveal these problems to the Board prior to its request for approval for the program to be included in the new institute in March 2015, even though the problems were by then unavoidable. And the Bharucha administration failed to inform the faculty union about the existence of the CS Program, and the creation of the institute, despite being explicitly instructed to do so by the Board. That lack of communication deprived

the Board of the chance to learn about these problems from its own faculty and respond before any third parties became involved, as opposed to learning about them from OAG, after students had already been admitted to an ill-fated new program.

180. .The Interim Administration has been in place for less than two months. It has already taken steps to address some of the weaknesses in management and communication that were present throughout the prior two administrations. Additional efforts along these lines, in concert with complementary efforts among the trustees and faculty, students, staff and alumni, and the wider community of Cooper Union supporters, will be indispensable in overcoming persistent patterns of centralization, insularity, and inattention to knowable risks.

DISPUTES CONCERNING CHARTER AND DEED OF TRUST

181. In May 2014, the Committee to Save Cooper Union ("CSCU") filed the underlying lawsuit challenging, among other things, the Board's authority to charge tuition.

182. CSCU contends that the Charter and Deed of Trust prohibit the charging of tuition, and that they also require the Board to establish the Associates of Cooper Union.

183. The Board responds that the Charter and Deed of Trust grant the Board discretion as to when and how to pursue any of the educational objectives in the charter, except that they admit that the school must provide free public instruction of some kind in the field of political science. The Board also responds that the Charter and Deed of Trust grant the Board discretion as to when and how (if ever) to organize the Associates.

184. There are several practical problems involved in trying to judicially resolve this dispute in way that would actually benefit Cooper Union.

185. First, the Charter and Deed of Trust are ancient documents, and the specific terms at issue here have never been subject to judicial scrutiny. If any of the relevant provisions are deemed ambiguous, both sides could marshal substantial parol evidence to support their claimed

interpretation. Any judicial resolution would then be forced to rely on educated guesswork as to the contours of the heretofore-unexplored legal intention of a donor who died over a century ago.

186. Second, resolution of the question through all levels of appeal could take years, and then that resolution could ultimately become meaningless. Even if CSCU prevailed, Cooper Union could then apply for *cy pres* relief from any responsibilities identified in the Charter and Deed of Trust, on the grounds that compliance is impracticable. In the process, substantial resources would continue to be diverted from efforts to repair the school's damaged finances.

187. Third, even if the question of whether the Charter and Deed of Trust require free tuition (or the establishment of the Associates) were to be answered as a legal exercise, any attempt at implementation would immediately bring the matter back into dispute. How free is free enough? Can the school charge student "fees" as it has already been doing for many years? How much can it increase those fees before they become "tuition"? What sacrifices must be made to keep the school free, if that is the mandate? Is Cooper Union required to close one or more of its schools, or cut class sizes to a fraction of their current state, or cut salaries at the expense of academic standards? If necessary to avoid tuition, must Cooper Union eliminate formal administration and its associated costs and attempt to move on as something akin to a free academic commune?

188. None of those questions, or the dozens of others that would automatically arise, are even before the Court as yet. But confronting these many additional obstacles would be unavoidable if answers to Cooper Union's problems continue to be sought from strict application of whatever might now be thought to be the most reasonable interpretation of the Charter and Deed of Trust. As such, even if the central questions to this lawsuit were to be resolved, the controversy would not end.

189. The original parties have determined that an alternative resolution, where the school's practical problems are addressed, even though the legal questions may not be fully answered, is a preferable course of action.

CONCLUSION

190. OAG's investigation reveals that Cooper Union has paid a steep price, including, at least temporarily, its free-tuition tradition, as a result of shortcomings in its oversight and management functions over the past decade.

191. Better practices could have enabled Cooper Union to identify and analyze the risks in the 2006 loan plan, and avoid the resulting financial catastrophe.

192. Better practices could have allowed the detection and resolution of conflicts of interest among decision-makers in the 2006 loan plan.

193. Better practices could have led the Board to observe and respond to the 2006 plan's failure as it happened, allowing the school to take steps to mitigate its financial losses.

194. Better practices could have led the President and Chairman of the Board to transparently disclose the effects of the 2006 plan's failure, instead of promoting misleading financial information to the public.

195. Better practices could have led the Board to independently evaluate the reasonableness of assumptions in President Bharucha's budget presentations, including the FSP.

196. Better practices could have led to more effective internal control and governance, and communication with other stakeholders, which may have counteracted the negative effects of management centralization and insularity.

197. Better practices could have prevented the CS Program from being improperly implemented.

198. Better practices could have led to the exploration of the tuition issue in an open and collaborative process satisfactory to the Cooper Union community, regardless of the outcome.

199. OAG's investigation also shows that conducting extended disputes over the meaning of the Charter and Trust deed will not help Cooper Union recover its losses, implement better practices, or explore alternatives to tuition.

200. The parties agree that what will help Cooper Union achieve these goals is to terminate this litigation and to implement direct reforms and supervision of the institution, in the manner called for in the Consent Decree.

201. Specifically, the Consent Decree calls for (1) expansion of the Board to include student trustees, additional alumni trustees, and faculty and staff representatives; (2) appointment of an independent financial monitor; (3) transparent disclosure of Board materials, budget documents, and investment results; (4) a requirement to develop reforms of the school's outdated governances; (5) an inclusive search committee to identify the next full-term president; and (6) a special-purpose committee of the Board dedicated to development of a strategic plan to return the school to its traditional tuition-free policy.

202. Cooper Union is now well-positioned to meet the challenges that lie ahead. The Board's recent progress in addressing the issues raised here, and its commitment to further reforms, shows that Cooper Union is now moving quickly in the right direction. With the support of the Consent Decree, Cooper Union's devoted community of trustees, administrators, alumni, students, faculty, staff, and supporters can now work together to meet the challenge of honoring Peter Cooper's legacy and preserving his irreplaceable gift for future generations.

CAUSE OF ACTION FOR CY PRES RELIEF AND REQUEST FOR RELIEF

203. The Attorney General repeats and realleges paragraphs 1 through 202 above as if fully set forth herein.dd

204. Section 8-1.1(c) of the New York Estates, Powers and Trusts law states that

> whenever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application of the trustee or of the person having custody of the property subject to the disposition and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein[.]

205. Respondents, who are current trustees of Cooper Union, join in the request of the Attorney General, who has the rights of a trustee, for *cy pres* relief described in paragraphs 220 through 224, below.

<u>Dispute Over Compliance with Terms of Cooper Union Trust Deed</u>

206. <u>Section Fourth (1):</u> There is a dispute as to whether Cooper Union is in compliance with this section, which calls for:

> regular courses of instruction, at night, free to all who 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 of a just and equitable form of government, 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.

207. <u>Section Fourth</u>: There is a dispute as to whether Cooper Union is in compliance with this section, which calls for Cooper Union's:

> course of instruction on social and political science…[to] 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.

208. Section Fourth (2): There is a dispute as to whether Cooper Union is in compliance with this section, which calls for Cooper Union to "support and maintain[] a free reading room.

209. Section Fourth (3): There is a dispute as to whether this section requires Cooper Union to "provide and maintain a school for the instruction of respectable females in the arts of design," which must be "entirely or approximately free," and if so, whether Cooper Union is in compliance with this section.

210. Section Fourth (4): There is a dispute as to whether this section requires Cooper Union to "maintain[] a thorough polytechnic school…which shall, as far as possible…be made equal to the best technological schools now established, or hereafter to be established," which school must be "entirely or approximately free," and if so, whether Cooper Union is in compliance with this section.

211. Section Third, Fourth (5) and Fifth: There is a dispute as to whether this section requires Cooper Union to "maintain, provide rooms for, and allow the visitation and examination of its premises by, the Associates of the Cooper Union for the Advancement of Science and Art and the council thereof", and for the establishment of a Council of the Associates with power to petition the Supreme Court of New York for removal of individual Trustees for cause, and if so, whether Cooper Union is in compliance with this section.

212. Section Thirteenth: There is a dispute as to whether Cooper Union is in compliance with this section, which calls for Cooper Union to ensure that:

> [e]very 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[.]

<u>Impracticality of Compliance with Disputed Interpretations of Trust Deed</u>

213. Even assuming that disputes regarding interpretations of the above-cited sections of the Trust Deed were to be resolved in a way that required literal compliance with any of the purported requirements therein, it would be impractical for Cooper Union to comply, whether in part or in whole, as set forth below.

214. <u>Section Fourth (1):</u> Cooper Union does not now, and will not at any time in the foreseeable future, have the resources to re-start and maintain a free night school providing regular courses of instruction in “the application of science to the useful occupations of life” and “social and political science,” without significantly impairing, if not terminating, its existing world-renowned degree-granting programs in Art, Architecture, and Engineering.

215. <u>Section Fourth (2):</u> Cooper Union does not now, and will not at any time in the foreseeable future, have the resources to re-start and maintain a free reading room without significantly impairing, if not terminating, its existing world-renowned degree-granting programs in Art, Architecture, and Engineering.

216. <u>Section Fourth (3):</u> The current financial circumstances of Cooper Union preclude the School of Art and the Irwin S. Chanin School of Architecture from immediately returning to a tuition-free model, and they can only return to a tuition-free model, that maintains Cooper Union’s strong reputation for academic quality within its Art, Architecture and Engineering programs at their historical levels of enrollment, if at all, through a careful, deliberative process in which Cooper Union attempts to develop a plan for a return to a tuition-

free model in the context of a supervised reformation of Cooper Union's finances and governance.

217. Section Fourth (4): The current financial circumstances of Cooper Union preclude the Albert Nerken School of Engineering from immediately returning to a tuition-free model that maintains Cooper Union's strong reputation for academic quality within its Art, Architecture and Engineering programs at their historical levels of enrollment, and it can only return to a tuition-free model, if at all, through a careful, deliberative process in which Cooper Union attempts to develop a plan for a return to a tuition-free model in the context of a supervised reformation of Cooper Union's finances and governance.

218. Section Third, Fourth (5) and Fifth: In the original Trust Deed, each member of the Associates was designated as a Member of the corporation, and a Council of the Associates, elected by these members, could sue to remove trustees for cause. Under modern law, this would give each of those individuals standing to sue on behalf of the corporation, and give a council elected by uninvolved third parties power seek removal of trustees, which would subject Cooper Union to substantial uncertainty and unreasonable exposure to ongoing, unchecked litigation.

219. Section Thirteenth: The Trust Deed's language granting Trustees absolute, unfettered discretion to disclose all matters relating to Cooper Union, including matters discussed at Board of Trustee meetings, is not compatible with modern application of legal privileges.

Appropriate Modifications of Trust Requirements to Achieve Trust's Purposes

220. Sections Fourth (1) and (2), which cannot practicably be satisfied in the foreseeable future, should be interpreted as discretionary goals, except that there shall be a

requirement that Cooper Union provide at least twelve evening lectures or other presentations per year on social or political science that are free to the public.

221. Sections Fourth (3) and (4) should be construed as imposing the following general, ongoing requirements on Cooper Union:

i. At any time tuition is being charged for the Schools of Art, Architecture, or Engineering, Cooper Union is required to make ongoing, good faith efforts to determine whether it is practical to return to a free-tuition model that maintains Cooper Union's strong reputation for academic quality within its Art, Architecture and Engineering programs at their historical levels of enrollment;;

ii. If it is practical to return to such a free-tuition model, Cooper Union must expeditiously develop and implement a plan to do so;

iii. If Cooper Union returns to such a free-tuition model, it must maintain that model as long as it remains practical.

222. During the pendency of the annexed Consent Decree, Cooper Union should be presumed to be in compliance with the above requirements if it is in compliance with the terms of the Consent Decree, which is intended to provide specific mechanisms for institutional reform and oversight that will maximize the possibility of Cooper Union returning to a free-tuition model.

223. Sections Third, Fourth (5) and Fifth as regards the Associates should be interpreted as not requiring Cooper Union to revive and implement the Associates as an active organization, or to do so according to any particular formula. Instead, all current students, all current full-time faculty, and all alumni of Cooper Union should collectively be deemed to constitute the Associates of the Cooper Union for the Advancement of Science and Art, but they shall not be members of the corporation. The elected alumni, full-time faculty, and students who

serve as members of or representatives to the Board of Trustees should collectively constitute the Council of the Associates. The Board may approve any plan for further organization or expansion of the Associates that is presented to it by a majority of the Council of the Associates

224. With respect to Section Thirteen, the Trust Deed's and Charter's requirement that all Trustees be free to disclose information should be reaffirmed, subject to prohibitions against disclosure of proprietary, confidential, and/or privileged material.

225. No previous applications have been made to this or any other court for the relief sought herein.

WHEREFORE, the Cross-Petitioner respectfully prays that this Court:

(a) Declare that the Trust Deed and Charter of the Cooper Union for the Advancement of Science and Art are modified as set forth in Paragraphs 220 to 224, above;

(b) Require all parties hereto to comply with the terms of the annexed Consent Decree;

(c) Grant such other and further relief as it deems proper.

Dated: New York, New York
September 1, 2015

Respectfully submitted,

ERIC T. SCHNEIDERMAN
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Attorney for Plaintiffs

By: ______________________________
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Of Counsel:

James Sheehan, Bureau Chief, Charities Bureau

VERIFICATION

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss:

JOHN OLESKE, being duly sworn, deposes and says: I am an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York, and am duly authorized to make this verification.

I have read the foregoing cross-petition and know the contents thereof, which are to my knowledge true, except as to matters stated to be alleged on information and belief, and as to those matters, I believe them to be true. The grounds for my belief as to all matters stated upon information and belief are investigative materials contained in the files of the Attorney General's office.

The reason this verification is not made by Petitioner is that Petitioner is a body politic and the Attorney General is its duly authorized representative.

____
JOHN OLESKE

Sworn to before me this
____ day of September, 2015

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