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March 27, 2019

VIA HAND DELIVERY

The Honorable Paul Innes, P.J.Ch.
Civil Courthouse
175 South Broad Street, 3rd Floor
Trenton, NJ 08650

Re: Proposed Sale of Westminster Choir College

Dear Judge Innes:

Two lawsuits are presently pending before the Court concerning Westminster Choir College ("WCC"), one by Princeton Theological Seminary and another by faculty, alumni, donors, and members of a foundation organized for the benefit of WCC. See Princeton Theological Seminary v. Rider University, Docket No. C-18-18; McMorris, et al. v. Rider University, Docket No. C-69-18, respectively. Both lawsuits arise out of Rider's proposed sale of WCC ("the Proposed Transaction"), although the Plaintiffs in each case oppose the sale for different reasons. The McMorris Plaintiffs have named the Attorney General as a nominal defendant. The Court has requested that the Attorney General's Office (the



"Attorney General" or the "State") explain its position with respect to the Proposed Transaction. The State submits this letter in compliance with that request.

SUMMARY OF FINDINGS

The State's review of the Proposed Transaction has two separate, but interrelated prongs. Prong one focuses on charitable trusts, and prong two focuses on charitable corporations.

First, the "Attorney General represents the public interest in a charitable trust" and has a common law duty to protect, monitor, and oversee such trusts. See Howard Savings Institution v. Peep, 37 N.J. 494, 500 (1961). In 1934 and 1935, Sophia Strong Taylor ("Taylor") donated land to WCC (collectively, the parcel conveyed in 1934 and the two parcels conveyed in 1935 are "the Taylor Property"). The State therefore has a duty to determine whether Taylor's donation created a charitable trust; if so, what the terms of the trust are; and what the consequences of a sale of WCC would be. As a result of its investigation into these issues and as explained more fully below, the Attorney General has concluded:

A) Taylor's donation of land to WCC created a charitable trust ("Taylor Trust" or "Trust") with WCC as the Trustee. See pp. 6-10, infra.

B) Taylor granted Princeton Theological Seminary ("PTS") a shifting executory interest in the Trust such that if WCC or its

successors ever violated the Trust terms, PTS would become the Substitute Trustee. See pp. 10-12, infra.

C) PTS' attempts in 1950 and in 1992 to relinquish its shifting executory interest and convey such interest to WCC were void as a matter of law. PTS therefore retains its shifting executory interest in the Trust. See pp. 12-15, infra.

D) After WCC and Rider merged, Rider stepped into WCC's shoes as Trustee. See pp. 15-16, infra.

E) The State does not currently have enough information to determine whether Rider has violated the Trust terms. If a violation has occurred, it triggered the shifting executory interest and PTS has replaced Rider as the Trustee. See pp. 16-18, infra.

F) If a violation has not occurred and Rider is still the Trustee, then Rider may, subject to the Attorney General's common law and statutory review of charitable corporations, sell the Taylor Property. See p. 18 and pp. 24-26, infra.

G) Under the charitable trust prong of the Attorney General's investigation, any purchaser of WCC would take the Taylor Property free of the Trust terms. See pp. 18-21, infra. However, the second prong of the Attorney General's review, which focuses on charitable corporations, might impose conditions on the sale of the charitable assets or recommend that the sale not be approved. See pp. 33-34, infra.

H) The proceeds of any sale would remain in Trust. Therefore, Rider (or PTS if the shifting executory interest has been triggered) would only be able to use the sale proceeds for Trust purposes. See pp. 18-21, infra.

I) If the sale proceeds could not be used for Trust purposes, then the Trustee (or the Substitute Trustee, as the case may be) would have to bring a cy pres proceeding and obtain Court permission to use the sale proceeds for a purpose closely related to, although not identical with, Taylor's intent. See pp. 19-21, infra.

J) WCC's \$19 million endowment fund should not be included as part of the Proposed Transaction absent a separate cy pres proceeding to determine how the donors' intent will be honored and protected. See pp. 21-24, infra.

Many of these findings touch upon issues already at play in the McMorris and PTS litigations. Further, many of these issues can be resolved apart from the question of whether the Attorney General will ultimately recommend that the Court approve or reject the Proposed Transaction. The State therefore has a number of ways in which it could proceed. The Attorney General could bring a Declaratory Judgment action seeking a judicial determination regarding these issues and the rights of the various parties. Alternatively, the State could move to intervene in PTS. Or the State, already a nominal defendant in McMorris, could seek to

include PTS as a necessary party and then bring a dispositive motion. The Attorney General will proceed in whatever manner the Court determines to be most efficient regarding this charitable trust prong of the Attorney General's investigation.

Second, the State has been reviewing the Proposed Transaction pursuant to the Attorney General's common law and statutory duty to oversee charitable corporations. The Attorney General has the duty to determine whether the trustees of Rider fulfilled their fiduciary duty when they made the decision to sell WCC. In furtherance of its responsibility, the Attorney General sent Rider two separate sets of questions concerning the sale so that the State may be in a position to recommend that the Court 1) approve the Proposed Transaction, 2) approve the Proposed Transaction with explicit conditions designed to protect the charitable assets, or 3) reject the Proposed Transaction. Due to Rider's six month delay in producing documents and eventual production of documents so heavily redacted as to hamper review, the Attorney General's review of the sale is incomplete as of this date and the State is not yet able to make a recommendation. A description of the nature of the State's inquiry; outstanding, yet critical issues; and the parties' on-going negotiations that have slowly been paying dividends can be found on pages 27-34 below. The State respectfully requests that the Court grant it more time to complete this review.

FINDINGS

I. TAYLOR CREATED A CHARITABLE TRUST; CONSEQUENCES FLOW THEREFROM.

A. Consistent with Long-Standing Principles of New Jersey Law, Taylor's Gift to WCC Created a Charitable Trust.

In a deed dated July 11, 1934 ("1934 Deed"), Taylor conveyed to WCC property located in Princeton Borough. See 1934 Deed (attached hereto as Exh. A to the Certification of Eileen Siegeltuch ("Siegeltuch Cert.")).¹ AGa9-12.² The 1934 Deed did not contain any restrictions. In a subsequent deed dated July 22, 1935 ("1935 Deed"), Taylor conveyed to WCC two additional parcels of land located in Princeton Borough. See 1935 Deed (attached hereto as Exh. B to the Siegeltuch Cert.). AGa14-18. The 1935 Deed contained the following provision restricting the uses to which the 1935 parcels could be put:

The party of the second part [i.e., WCC], as part of the consideration for this conveyance, covenants and agrees with the party of the first part [i.e., Taylor] that the premises hereby conveyed shall be used . . . for the purpose of training ministers of music for Evangelical churches; and that in connection with such use the Bible is to be taught to the whole school at least one hour per week in accordance with the principles of the Westminster Confession of Faith.

¹ Although the State has previously provided to the Court some of the documents attached hereto as Exhibits, the State has included them again for the Court's convenience.

² "AGa" refers to the Attorney General's appendix to this letter.

[Siegeltuch Cert. at Exh. B, p. 3; AGa16].

The 1935 Deed also contained a provision that WCC agreed to impose these same restrictions on the parcel that Taylor previously conveyed to it by the 1934 Deed:

And the said party of the second part [i.e., WCC] further covenants that, by its acceptance of this conveyance [i.e., the 1935 conveyance], the said condition as to the use of the property conveyed hereby [i.e., the training of music ministers and the teaching of the Bible], as well as of the parcel heretofore conveyed to it [i.e., the parcel conveyed by the 1934 Deed] by the party of the first part [i.e., Taylor], shall be imposed upon all said premises. This covenant shall run with the land and be binding upon the party of the second part, its successors and assigns.

[Ibid.]

In an undated letter addressed to Taylor, John Finley Williamson, the President of WCC, and his wife, Rhea B. Williamson, Secretary of WCC, indicated that they had "examined" the deed conveying two parcels of real estate in which "certain terms and conditions [were] set forth." See Williamson Letter (attached hereto as Exh. G to the Siegeltuch Cert.). AGa45. They indicated that, "in consideration of its execution and delivery" to them, they agreed with Taylor that they would be bound by all the "terms and conditions" and would "faithfully" comply with them. Ibid.

Both treatises and case law support the conclusion that, by virtue of the 1935 Deed, Taylor created a charitable trust. A trust requires: (1) the intent to create a trust and (2) the actual

transfer of property to the trust. See 3 Thompson on Real Property (Thomas Editions) at § 27.04. A trust is charitable if its purpose is "to bring benefits to the public or some portion of the public." Id. at § 27.04(f). "Support of religious institutions and activities is considered charitable." Ibid. Similarly, "[t]rusts for education of a substantial portion of the public have traditionally been upheld as charitable." Ibid. "Even if the class of persons to be educated is quite limited, the trust will be upheld as a valid charitable trust if it can be shown that the trust confers a substantial social benefit." Ibid.

Here, the transfer of the Taylor Property by the 1934 and 1935 Deeds is not in question; neither is the charitable purpose associated with the transfer. Rather, the issue at hand concerns whether Taylor had the requisite intent to create a trust when she transferred the Taylor Property by deed to WCC.

The Third Restatement of Trusts examines the presence or absence of intent in trust making. Specifically, the words "trust" or "trustee" are not required in property transfers to create a trust. "A property arrangement may constitute a trust . . . even though such terms as 'trust' or 'trustee' are not used." Restatement (Third) of Trusts § 5 cmt. a (2003). Similarly, New Jersey courts have held that it is immaterial whether the word used in the deed is "'trust,' 'intent,' 'purpose,' 'proviso,' or 'condition.'" Mills v. Davison, 54 N.J. Eq. 659, 665 (1896). A

charitable gift made with a condition contains "all the elements necessary to constitute what in modern jurisprudence is called a charitable trust." Ibid.; see also MacKenzie v. Trustees of Presbytery of Jersey City, 67 N.J. Eq. 652, 661 (1905) (determining that condition in deed was "declaration of trust").

While intention to create a trust relationship may sometimes be difficult to discern, the Third Restatement focuses on the imposition of enforceable duties as the key element in determining the requisite intent for trust making. "It is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not the settlor knows the precise characteristics of a trust relationship." Restatement (Third) of Trusts § 13 cmt. a (2003). "No trust is created unless the settlor manifests an intention to impose enforceable duties." Ibid.

Here, the 1935 Deed provides the necessary insight into Taylor's intent. Taylor expressly dictates that the Taylor Property "shall be used . . . for the purpose of training ministers of music for evangelical churches" and "the Bible is to be taught to the whole school at least one hour per week." See 1935 Deed (attached as Exh. B to the Siegeltuch Cert.) at p. 3. AGa16. These duties are enforceable because, should WCC fail to perform them, then "title" to the Taylor Property "shall be forfeited" and pass from WCC to PTS. See ibid. How strongly Taylor believed in

using the Taylor Property for the purpose of training ministers of music and in teaching the Bible to WCC students is reflected in the fact that Taylor included the same conditions in a 1935 Codicil to her Will.³ See First Codicil (attached hereto as Exh. H to the Siegeltuch Cert.). AGa47.

For all of the foregoing reasons, Taylor created a charitable trust when she conveyed the Taylor Property to WCC.

B. Taylor Gave Princeton Theological Seminary a Shifting Executory Interest in the Taylor Property.

The law of trusts provides that a person may "make a gift" for "charitable purposes" and include "a requirement about how the property should be used, and then provide that if the first charity ever fails to use the property as specified, a second charity will be entitled to the property." Bogert's Trusts and Trustees (June 2018 Update) § 346. The "restriction" as to use and the gift-over to the second charity serve "as a way to protect the settlor's intent, because the second charity will have an incentive to watch the first charity for compliance." Ibid. Further, by "specify[ing] the successor in interest," the settlor does not have to "depend on the application of cy pres." Ibid. The settlor's limitation as to use and the gift-over upon violation create a

³The Codicil was, to the best of the State's understanding, never probated because in 1935 she conveyed the same land by deed to WCC and inserted the same "express" duties. Compare Siegeltuch Cert. at Exh. B (1935 Deed) with Siegeltuch Cert. at Exh. H (Codicil). AGa14-18; AGa47.

"shifting executory interest" in the second charity. See The Restatement (First) of Property § 25 (1936). When a violation of the limitation occurs, the shifting executory interest divests the first charity of title and vests title in the second charity. See Restatement (Third) of Property: Wills and Donative Transfers § 25.2 (2011).

The courts of New Jersey have long recognized shifting executory interests. See, e.g., MacKenzie, 67 N.J. Eq. at 667-68 (holding that gift of real property with conditions and gift-over upon violation created "new or substituted trustees and secondary or shifting interests"); Claremont Health Sys., Inc. v. Point Pleasant Borough, 16 N.J. Tax 604, 621 (1997) (discussing fee simple subject to executory limitation).

Here, in the 1935 Deed, Taylor gave The Theological Seminary of Princeton a shifting executory interest in the Taylor Property. Specifically, the 1935 Deed provided:

Should the party of the second part [i.e., WCC] at any time violate its covenant with respect to the use of any part or all of said premises [i.e., the Taylor Property], then the title to all of such premises, including those heretofore conveyed, shall be forfeited by said party of the second part and such title shall thereupon pass to and vest in The Theological Seminary of the Presbyterian Church at Princeton, New Jersey, a corporation organized and existing under the laws of the State of New Jersey, its successors and assigns forever.

[Siegeltuch Cert. at Exh. B, p. 3; AGa16].

PTS was the successor in interest to The Theological Seminary of Princeton. PTS therefore has a shifting executory interest in the Taylor Property that would vest title in PTS if the Trust terms were violated.

C. PTS has Twice Attempted to Convey Its Shifting Executory Interest to WCC; Each Attempt Was Void as a Matter of Law.

In the period from 1950 to 1954, WCC was attempting to expand its campus. To facilitate that process, in April 25, 1950, WCC and PTS entered into an agreement "to enable Westminster to enlarge and expand its activities in training Ministers of Music for Evangelical Churches in accordance with the basic purpose and intent expressed by Sophia Strong Taylor" ("Agreement"). See Agreement (attached hereto as Exh. I to the Siegeltuch Cert.) at p. 1. AGa49. For its part, PTS agreed to release all of its "right, title and interest in and to" the Taylor Property. Ibid. In exchange, WCC agreed to the following:

1. To have its charter "irrevocably amended" by adding a clause that it would "forever be the purpose" of WCC to train Ministers of Music for Evangelical Churches; and that in connection therewith "the Bible shall be taught to the whole school at least one hour per week . . . in accordance with the Westminster Confession of Faith";
2. Subject to the rights of a mortgage to be given to Princeton University, "not to sell" the Taylor Property "to any purchase[r] not approved by the Seminary"; and
3. To impose by deed on the property it was acquiring the same covenant that Taylor had imposed on the

properties she had conveyed to WCC in 1934 and 1935 and, if WCC violated the covenant, to vest title to the property in PTS.

[Id. at pp. 1-2; AGa49-50].

In keeping with its obligations under the Agreement, on April 25, 1950, PTS executed a deed purporting to convey its interest in the Taylor Property to WCC. See 1950 Deed (attached hereto as Exh. C to the Siegeltuch Cert.). AGa20-25. Shortly thereafter, on May 3, 1950, Princeton University and WCC executed a mortgage on the Taylor Property. See Mortgage (attached hereto as Exh. E to the Siegeltuch Cert.). AGa34-38.

WCC then filed an Amended Certificate of Incorporation, which stated that the corporation's express purpose was to prepare "Christian young men and women for professional leadership as Ministers of Music in Protestant Evangelical churches throughout the world and for leadership in similar religious activities in colleges, communities, and elsewhere as opportunities arise." See Amended Certificate of Incorporation (attached hereto as Exh. D to the Siegeltuch Cert.) at p. 2. AGa28. The Amended Certificate further provided that "in connection therewith the Bible shall be taught to the whole school at least one hour per week . . . in accordance with the Westminster confession of faith." See ibid. WCC's expansion plans never materialized and, in a deed dated February 15, 1954, WCC conveyed back to PTS the Seminary's shifting

executory interest in the Taylor Property. See 1954 Deed (attached hereto as Exh. F to the Siegeltuch Cert.) at p. 2. AGa41.

WCC continued operating as a separate nonprofit corporation on the Taylor Property until 1991. Then, apparently facing financial difficulties and looking to attract a buyer, WCC again asked PTS to convey to it PTS' shifting executory interest. PTS complied, conveying a Quit Claim Deed to WCC in 1992 that released to WCC whatever interest PTS had in the Taylor Property. See 1992 Quit Claim Deed (attached hereto as Exh. J to the Siegeltuch Cert.) at p. 1. AGa52.

PTS' 1950 attempt to relinquish its shifting executory interest and its 1992 attempt to do the same both fail as a matter of law and are void and without legal effect. As the Court explained in MacKenzie, a shifting executory interest is "indestructible" and "inalienable." MacKenzie, 67 N.J. Eq. at 668. Specifically, the Court held that a shifting interest is "indestructible by any act or assurance" of the prior holder of the estate. Ibid. Thus, nothing WCC did - or can do - can destroy PTS' interest in the Taylor Property. Similarly, the Court held that a shifting executory interest is "inalienable by any act inter vivos of the person in whose favor" the trust was "limited." Ibid. The Court noted that, historically, the inalienability of shifting uses was premised on the notion that the shifting interest had not

yet vested and therefore could not be conveyed.⁴ Ibid. Thus, each of PTS' attempts to relinquish its interest in the Taylor Property by conveying its shifting executory interest to WCC was void.

D. After the Merger of WCC and Rider, Rider Stepped into WCC's Shoes as Trustee of the Taylor Property.

In 1992, Rider merged with WCC. See Merger Agreement (attached hereto as Exh. K to the Siegeltuch Cert.). AGa57-82. Under the law of merger governing nonprofit corporations, "[a]ll real property and personal property, tangible and intangible, of every kind and description, belonging to each of the corporations so merged . . . shall be vested in the surviving or new corporation without further act or deed." N.J.S.A. 15A:10-6(d). Notably, "the real and personal property shall be and remain subject to any trusts on which it may have been theretofore held." Ibid. The "trustees of the surviving corporation . . . shall for this purpose be deemed the trustees of each corporation merged or consolidated." N.J.S.A. 15A:10-6(g). "[T]itle to the property shall vest in the surviving or new corporation subject to any trust or other condition imposed in relation thereto." Ibid.

As the plain language of the statute indicates, following the merger Rider stepped into WCC's shoes as successor in interest and became the Trustee of the Taylor Property. Because

⁴The Rule against Perpetuities does not apply to charitable gifts with limitations and gift-overs. See Jones v. Habersham, 107 U.S. 174, 185 (1883).

PTS' attempt to relinquish its shifting executory interest was void, see pp. 12-15, supra, PTS retains a shifting executory interest in the Taylor Property.

E. The State Does Not Currently have Enough Information to Determine Whether Rider Violated the Terms of the Trust.

No matter how much time has elapsed between the creation of a charitable trust and the violation of its terms, courts will enforce a shifting executory interest. In Christ's Hospital, the testator, in a Will dated 1624, made a gift of real and personal property to the Town of Reading to be held in trust for the benefit of the poor. See Christ's Hospital v. Grainger, 16 Sim. 83 (Vice Chancellor), aff'd S.C. 1 Mac. & G. 460 (House of Lords 1848) (attached hereto as Exhs. L-M of the Siegeltuch Cert., respectively). AGa84-91; AGa93-95. The Will contained very specific directions about how the property was to be administered. See Christ's Hospital, 16 Sim. at 83-84. AGa84-85. The Will also provided that, if Reading should, for one entire year, neglect, omit, or fail to perform the directives in the Will, the gift would be void, and the property would be transferred to the Town of London, to be held in trust for the benefit of Christ's Hospital. Id. at 84. AGa85.

In 1842, more than *two hundred years* after the trust had been established, the Mayor of London brought suit against the trustees of the charity and the Town of Reading. Id. at 89-90.

AGa87. The suit alleged that Reading had for longer than a year "neglected, omitted and failed to" adhere to the trust terms. Id. at 90. AGa87. Plaintiffs alleged that this non-compliance with the Will's terms triggered the shifting executory interest. Ibid. Plaintiffs claimed that they were therefore entitled to have transferred to them for the benefit of Christ's Hospital the estates as well as property purchased with income from the estates and funds derived from the estates. Id. at 91. AGa87. The Court and, ultimately, the House of Lords, ruled for plaintiffs, specifically rejecting Reading's argument that the claims were barred by the statute of limitations. Id. at 100; Christ's Hospital, S.C. 1 Mac. & G at 465. AGa90-91; AGa95. The House of Lords reasoned that the passage of time could not be used as the basis for sanctioning the breach of trust that Reading had committed by deviating from the terms of the Will. Christ's Hospital, S.C. 1 Mac. & G. at 465. AGa95.

Both New Jersey courts and the United States Supreme Court have relied upon Christ's Hospital. See, e.g., MacKenzie, 67 N.J. Eq. at 669-70; Jones, 107 U.S. at 185.

Here, under the express terms of the Taylor Trust, if the Trustee violated the Trust terms, title to the Taylor Property vests in PTS as the holder of the shifting executory interest. See 1935 Deed (attached hereto as Exh. B to the Siegeltuch Cert.) at p. 3. AGa16. The State is currently investigating two matters

related to this, but does not yet have enough information to form an opinion. First, the State is seeking to determine whether Rider has violated the Trust terms in the past. Second, and perhaps more importantly, the State is exploring whether any sale of WCC - not merely the Proposed Transaction - would be a per se violation of the Trust terms.

F. The Trustee has the Statutory Ability to Dispose of the Taylor Property.

As Trustee of the Taylor Property, Rider has the ability to sell it on such terms "as in the opinion of the fiduciary shall be most advantageous to those interested therein." See N.J.S.A. 3B:14-2(e)(2).⁵ The second aspect of the Attorney General's common law and statutory review, described below on pages 24-26, addresses whether Rider was faithful to this fiduciary duty in the particular circumstances surrounding the Proposed Transaction. As a general matter, however, Rider has authority to dispose of the Property.

G.- I.⁶ Under the Law Governing Charitable Trusts, Any Purchaser of the Taylor Property Would Take it Free of the Trust Terms; Proceeds from the Sale Would Have to Remain in Trust.

Under the law governing charitable trusts, any purchaser of the Taylor Property would take it free of the Trust terms.

⁵ A trustee has the statutory power to sell trust property, but has to do so within the limitations contained in the trust.

⁶ Findings G., H., and I. are interrelated, and the State has combined them for the sake of efficiency.

Post-sale, however, the Trust would remain intact. The sale proceeds would become part of the Trust, and the Trustee would have to administer them in accordance with the Trust terms. If the Trustee wanted to use the sale proceeds for purposes other than those expressly permitted by the Trust, the Trustee would have to apply to the Court for permission in a cy pres proceeding.⁷

Again, the two seminal charitable trust cases, Mills and MacKenzie, provide guidance. In Mills, Arthur and Catharine Mills made a gift by deed of real property to a religious society so that the latter could erect a Church. Mills, 54 N.J. Eq. at 661. The deed contained the "express condition and limitation" that the land only be used "for the purpose of public worship and teaching in accordance with the usages, rites, and ceremonies of the Protestant Episcopal Church." Id. at 662. The religious society mortgaged the Church property, and the mortgage was eventually foreclosed upon. Ibid. The Court held: "The purchaser at a foreclosure sale will take the premises by a title free from the trust, but the surplus money arising from such sale will belong to the society, to be held upon the original trust." Id. at 667.

The Court in MacKenzie considered a similar situation and reached the same conclusion. In that case, George and Rebecca

⁷ At this point, the State neither endorses nor forecloses the possibility that Rider, through a cy pres proceeding, could ultimately recoup its own monies that it has spent over the years keeping WCC operational.

MacKenzie conveyed land by deed to the trustees of the Scotch Presbyterian Church of Jersey City. MacKenzie, 67 N.J. Eq. at 652. The deed contained a number of conditions, including that "no instrumental music shall at any time be used in the worship of the church" erected on the property. Ibid. The deed also contained a shifting executory interest, such that if the Scotch Presbyterian Church violated any of the conditions, title in the property would "vest in the Presbytery of Jersey City" for "Presbyterian religious purposes upon the same conditions." Ibid.

Several years later, when the Scotch Presbyterian Church ceased using the Church, the trustees, in accordance with the conditions of the deed, transferred the property to the Presbytery of Jersey City. Ibid. The trustees of the latter, in turn, sold the property to the Evangelical Lutheran Church of the Holy Trinity of Jersey City and intended to use the proceeds from the sale to benefit Churches "in which instrumental music is used in public worship." Ibid. The MacKenzie children, upon learning that the trustees did not intend to abide by the conditions contained in their late parents' deed, brought suit, asking the Court to restrain the trustees from utilizing the proceeds in any manner inconsistent with the conditions their parents imposed. Ibid. The Court held that the trustees' planned use of the sale proceeds was "not in exact accord with the original intent of the founder"

and therefore could "be permitted, if at all, only after" a cy pres proceeding. Id. at 687.

For all of the foregoing reasons, the proceeds from the Proposed Transaction would become part of the Trust, and Rider would have to use them in accordance with Trust terms or obtain the Court's permission in a cy pres proceeding to deviate from Taylor's purpose.

J. WCC's \$19 Million Endowment Fund Should Not be Included within Any Sale of WCC Absent a Separate Cy Pres Proceeding.

WCC has a \$19 million Endowment Fund that contains 197 gift instruments donated by many individuals over the course of several decades. See Siegeltuch Cert. at ¶ 20. AGa6. The Endowment Fund holds its principal in perpetuity and the income is used for specific purposes in accordance with donor intent, such as provision of a scholarship to allow a student to study voice, the organ, or sacred music. See ibid. The Proposed Transaction is structured so that the Endowment Fund is included as part of the sale of WCC to the Buyers. See Purchase and Sale Agreement ("PSA") (attached hereto as Exh. N to the Siegeltuch Cert.) at § 2.3. AGa121.

However, endowment funds must be "kept sacred for the purposes intended." See First Reformed Dutch Church of New Brunswick v. Lyon, 32 N.J.L. 360, 361 (1867). Where a donor gives a gift to a charitable trust and specifies that the trustee "shall

retain the principal and devote the income only to the accomplishment of" specific "purposes," the trustee "is under a duty, enforceable at the suit of the Attorney General, to retain the principal and to use the income for the designated purposes." See Restatement (Second) of Trusts § 348 cmt. f (1959). "The doctrine of cy pres" is "applicable to gifts to charitable corporations as well as to gifts to individual trustees for charitable purposes." Ibid.

Case law is in accord. Absent approval from the Court in a cy pres proceeding, endowment funds cannot be used for other than their intended purpose. For example, in Crane, creditors of a defunct school tried to reach the endowment fund, which had been set up to provide scholarships for worthy students. See Crane v. Morristown School Foundation, 120 N.J. Eq. 583, 585 (E. & A. 1936). The Court concluded that the donations given to and received by the endowment fund had created a charitable trust. Id. at 592. The Court also found that the future use of the endowment funds had to be determined in a cy pres proceeding to which the Attorney General was a necessary party. Id. at 589-91; see also Grand Lodge, Knights of Pythias of New Jersey v. German Lodge, No. 50, 56 N.J. Eq. 63, 72 (1897) (as soon as they are "paid in" to a charitable corporation, funds accumulated for a specified purpose are "impressed with a trust, with all of its consequences," and "cannot be lawfully diverted therefrom").

Here, the terms of the PSA emphasize the necessity of a cy pres proceeding concerning the Endowment Fund. Section 7.13 of the PSA provides that the Buyer "agrees to operate WCC at the Campus for not less than ten (10) years from the Closing Date." See PSA (attached hereto as Exh. N to the Siegeltuch Cert.) at p. 62. AGa165. Even assuming for the sake of argument that the income from the Endowment Fund could, within this 10-year period be used for the precise purposes that the donors intended, no provision is made for the disposition of the principle or interest at the conclusion of this ten-year period.

Further, Section 7.14 of the PSA provides that the Parties "agree that for a period of not less than five (5) years from the Closing Date," the Buyer "shall substantially maintain the current academic program offerings of WCC." See id. at p. 63. AGa166. Even assuming for the sake of argument that this "substantial" maintenance of WCC's curriculum permits all of the income from the Endowment Fund to be used for its designated purposes, no provision is made for use of the Endowment income or principle beyond the fifth year.

Finally, Section 7.15 of the PSA provides that, "[n]otwithstanding Section 7.13 and Section 7.14," the Buyer "shall not be obligated to continue any specific programs or the Programs of WCC, or to continue to operate or to maintain the College." See id. at p. 63. AGa166. The Buyer may invoke this

clause if it determines in "good faith" that "such continued action would be substantially impracticable, economically infeasible or would substantially adversely affect" its "business operations." See *ibid.* This ability to shut down WCC at any time if financial circumstances warrant, makes no provision at all for the disposition of the income or the principle of the Endowment Fund.

In short, in order to ensure that the principle and income of the Endowment Fund are used for the purposes that the donors intended, it will be necessary to have a cy pres proceeding distinct from any cy pres proceeding that would govern the Proposed Transaction generally. Recognizing, perhaps, the need for this separate determination, Section 3.6 of the PSA provides that the "Purchase Price shall be subject to a downward adjustment, dollar for dollar, if any portion of the Endowment is not permitted to be transferred to the" Buyer. See *id.* at p. 24. AGa127.

II. THE ATTORNEY GENERAL IS CONDUCTING A CY PRES REVIEW OF RIDER'S PROPOSED SALE OF WESTMINSTER CHOIR COLLEGE.

A. The Attorney General Has Common Law and Statutory Duties with Respect to Charitable Corporations.

The Attorney General has a common law duty to represent "the public interest" in charitable endeavors. See *Howard Savings Institution v. Peep*, 34 N.J. 494, 500 (1961). Among these responsibilities are the "enforcement and protection of public charities." See *Burke v. Director*, 11 N.J. Tax 29, 37 (1990). These duties extend to charitable corporations because they hold their

property for charitable purposes. See Paterson v. Paterson Gen. Hosp., 97 N.J. Super. 514, 527 (Ch. Div. 1967) (rule that party may sue to "compel performance" of "certain duties in the public interest" is "as applicable to the law of charitable corporations as to the law of charitable trusts"), aff'd, 104 N.J. Super. 472 (App. Div. 1969); Trustees of Rutgers College in New Jersey v. Richman, 41 N.J. Super. 259, 283 (Ch. Div. 1956) (Attorney General has "duty" to "raise objections to any violation of the duties" of trustees of Rutgers College).

Moreover, because charitable corporations are a type of nonprofit corporation, the Nonprofit Corporation Act, see N.J.S.A. 15A:1-1 to 16-2 ("NCA"), gives the Attorney General another tool to oversee the governance of charitable institutions. The Attorney General must ensure that a charitable corporation properly manages and spends its assets. See, e.g., N.J.S.A. 15A:2-1(a) (charitable corporation may not seek pecuniary profit); N.J.S.A. 15A:2-1(d) (nonprofit corporation may not issue stock, pay dividends, distribute profits); N.J.S.A. 15A:2-1(a) (nonprofit corporation must use its revenues to further its charitable purpose).

Further, trustees of nonprofit corporations are also required to act in accordance with their fiduciary duties. In general terms, these duties consist of: (1) the duty of due care, which requires trustees to make informed decisions and to conduct appropriate inquiries on the corporation's behalf; (2) the duty of

loyalty, which requires trustees to place the interests of the corporation ahead of their own personal and financial interests; and (3) the duty of obedience, which requires trustees to ascertain and follow the law and to adhere to the organization's mission and governing documents. See Thomas Lee Hazen & Lisa Love Hazen, "Punctilios and Nonprofit Corporate Governance - A Comprehensive Look at Nonprofit Directors' Fiduciary Duties," 14 U. Pa. J. Bus. L. 347, 356 (2012).

A charitable institution's directors, officers, and trustees are ordinarily subject to the business judgment rule. They have wide discretion in making decisions and are immune from accusations of wrongdoing if they can demonstrate that (a) they acted with ordinary prudence, and (b) they reasonably believed that their decisions - even if ultimately proven erroneous - were in the best interest of the corporation at the time and under the circumstances. Seidman v. Clifton Sav. Bank, 205 N.J. 150, 175 (2011) (quoting Green Party v. Hartz Mountain Indus., 164 N.J. 127, 147-48 (2000)). Moreover, if trustees of a nonprofit corporation acted in good faith reliance on opinions of counsel or on financial statements of an independent certified public accountant, the trustees will survive a claim of breach of fiduciary duty. See N.J.S.A. 15A:6-14.

B. The Attorney General Has Specific Lines of Inquiry Regarding the Proposed Transaction.

On June 18, 2018, Rider, a New Jersey nonprofit institution of higher education, notified the Attorney General that it had executed a PSA with various entities to sell the assets of WCC, an unincorporated operating division of Rider. See Certification of Jay A. Ganzman ("Ganzman Cert.") at ¶ 4 (attached hereto). AGa198. Under the PSA, the purchasing entities are Westminster Choir College Acquisition Corporation ("WCCAC"); Beijing Wenhua Xuexin Education Investment Limited Company ("Beijing Wenhua Xuexin"); and Princeton Westminster International, LLC, ("PWI") (collectively, "the Buyers"). Each of the Buyers is connected to Beijing Kaiwen Education Technology Co., Ltd ("Kaiwen Education"), a Chinese company. Specifically, WCCAC is a New Jersey nonprofit corporation that was established by a subsidiary of Kaiwen Education one month before the execution of the PSA; Beijing Wenhua Xuexin is a wholly owned subsidiary of Kaiwen Education; and PWI is a subsidiary of Beijing Wenhua Xuexin. Pursuant to the terms of the PSA, the Buyers will own and operate WCC, the Westminster Conservatory of Music, and Westminster Continuing Education (collectively, all three Westminster entities are "Westminster").

On June 25, 2018 - seven days after learning of the PSA - the State advised Rider that, in accordance with his common law

and statutory duty to oversee the activities of charitable corporations, the Attorney General would be examining the facts and circumstances surrounding the Proposed Transaction. See Ganzman Cert. at ¶ 5. AGa199. On this same date, the Attorney General sent Rider a list of forty-nine questions concerning the Proposed Transaction. See First Set of Questions (attached hereto as Exh. A to the Ganzman Cert.). AGa208-220. Broadly speaking, the questions concentrated on the following lines of inquiry:

(1) Rider's and the Buyers' reasons for entering into the Proposed Transaction, as well as the legitimacy of these reasons;

(2) the nature and extent of Rider's efforts to invite the greater educational community to consider purchasing Westminster;

(3) the asking price for Westminster, the methodology by which this price was determined, and the nature and extent of the negotiations that resulted in the final transaction price;

(4) Rider's exploration of the suitability and appropriateness of selling a specialized school such as Westminster to a newly incorporated New Jersey nonprofit that is affiliated with a foreign business conglomerate;

(5) Rider's efforts to secure from the Buyers legally binding commitments to continue Westminster's educational traditions and curriculum;

(6) the Buyers' willingness and ability to invest such money into Westminster as will be required to ensure the maintenance of

current educational standards;

(7) Rider's planned use of the sale proceeds;

(8) whether Rider entered into the Proposed Transaction solely for the benefit of Westminster, including its current and future students and its faculty, or whether there was any element of self-interest inherent in the Proposed Transaction; and

(9) the method and manner by which Westminster's donor-restricted Endowment Fund will be protected.

Upon completion of its comprehensive examination and in-depth analysis of the Proposed Transaction, the State will present to the Court its recommendation whether to approve the Proposed Transaction - with or without conditions - or to reject the Proposed Transaction. For the reasons outlined below, the Attorney General is not yet in a position to make any recommendation.

C. Rider's Response to the Attorney General's Questions has been Slow and Partial.

It was not until January 10, 2019, nearly *six months* after the State first submitted its forty-nine questions - and *one day* before the January 11, 2019 hearing on Rider's Motion to Dismiss the McMorris Complaint - that Rider responded to the Attorney General's inquiries. See Ganzman Cert. at ¶ 9. AGa200. The response was less than optimal. Rider submitted a binder containing documents that responded - in part - to *two* of the State's forty-nine inquiries. Id. at ¶ 11. AGa200-201. The

documents responding to Question 12, which asked for Meeting Minutes of the Rider Trustees for the prior three years, were partially redacted, with many pages completely blacked-out and hundreds of pages of minutes withheld in their entirety. See *ibid.* Rider's response to Question 24, which asked for a copy of the PSA and all accompanying schedules and exhibits, contained the PSA without the schedules and exhibits. See *ibid.* Rider also submitted a letter summarizing the Proposed Transaction and raising confidentiality considerations with respect to all of the documents that the Attorney General requested. See January 10, 2019 Letter (attached hereto as Exh. B to the Ganzman Cert.). AGa222-241. Rider stated that the documents "cannot be provided without [an] unequivocal assurance of confidentiality." See *id.* at p.4. AGa225. The State advised Rider that the Attorney General could not provide such an assurance with respect to the requested information because the State 1) needed a transparent record on which to base its recommendation concerning the Proposed Transaction, and 2) needed to comply with the dictates of the Open Public Records Act. See Ganzman Cert. at ¶¶ 12-13. AGa201.

Rider contended that if the Proposed Transaction fails to close, public disclosure of information concerning the substance of the Proposed Transaction would put Rider at a competitive disadvantage when dealing with potential future buyers of WCC. See *id.* at ¶ 14. AGa201-202. The State discussed with

Rider two possible approaches that would allow Rider to respond to the State's requests for information in full, while protecting the confidentiality of information Rider believed was proprietary or privileged. See id. at ¶¶ 12-13. AGa201. At that juncture, the parties still had not reached any decision regarding the production of the balance of the documents. See id. at ¶ 14. AGa202.

Rider submitted a follow-up letter dated February 6, 2019. See February 6, 2019 Letter (attached hereto as Exh. C to Ganzman Cert.). AGa243-278. That letter contained narrative responses to the balance of the State's forty-nine questions (although some of the responses were that answers were "pending"), along with binders containing partially redacted documents related thereto. See Ganzman Cert. at ¶ 16. AGa202. Voluminous redactions made it difficult to review some of the critical documents. See ibid. Rider did not provide any specific justifications for the redactions or for its withholding of hundreds of pages of Meeting Minutes and other documents. See ibid. In its letter, Rider claimed continuing confidential treatment for *all* of the documents accompanying its initial January 10, 2019 letter, as well as *all* of the documents submitted with the February 6, 2019 letter. See February 6, 2019 Letter (attached hereto as Exh. C to the Ganzman Cert.) at p. 2. AGa244.

In a subsequent discussion, the State asked Rider to release the gift instruments that comprised WCC's Endowment Fund.

See Ganzman Cert. at ¶ 13. AGa201. Rider provided access to the gift instruments and other documents via a password-protected data room. See id. at ¶ 17. AGa202-203. The data room permitted the State to review documents Rider deemed to be highly confidential. See ibid. The State was not permitted to copy, download, make detailed notes on, or otherwise reproduce the information provided via the data room. See ibid. Rider continued to assert that all documents provided to date - the partially redacted documents submitted in hard copy and the partially redacted documents submitted in the data room - were confidential. See ibid.

On March 1, 2019, Rider - at the State's repeated urging - released from the password-protected portal and transmitted to the State in hard copy, 197 gift instruments constituting WCC's Endowment Fund. See id. at ¶ 18. AGa203. Further, Rider ultimately agreed to designate as "non-confidential" certain of the documents it had submitted to the State in hard copy. See id. at ¶ 19. AGa203. Documents that Rider insisted remain confidential included all Meeting Minutes of the Rider Trustees and Committees thereof, a real estate appraisal of WCC, and the due diligence findings of Rider's consultant regarding the Buyers' suitability to purchase Westminster. See ibid.

The State asked Rider to 1) identify those documents that Rider had withheld in their entirety and explain why they were withheld, and 2) explain why Rider had redacted documents.

See id. at ¶ 20. AGa204. Rider explained that it withheld documents that it deemed to be irrelevant to the Attorney General's inquiries and redacted documents that were relevant, but contained information Rider deemed to be confidential or privileged. See ibid. The parties eventually agreed that the State would accept certifications from Rider that certain withheld documents were not relevant to the State's inquiry. See id. at ¶ 22. AGa204-205. The parties also agreed that the State would identify specific redacted documents that it wanted designated non-confidential and provided to the State free of redaction. See ibid. Finally, the State explained that should Rider choose to submit redacted copies of any of the documents the State requested, the State will insist that Rider submit a Privilege/Confidentiality Log stating the reasons for the redactions. See ibid.

In short, the State's attempted review of the Proposed Transaction has been a long process that is still incomplete.

D. The State Has Identified the Following Next Steps

Based on the information the State has been able to extract from Rider to date, the State has begun to discern the steps Rider has taken in deciding to sell Westminster's assets, the criteria Rider used in selecting the Buyers, and the manner in which Rider negotiated the PSA. The State's review, however, has raised additional concerns. For example, the Proposed Transaction

calls for transfer to the Buyers of WCC's \$19 million Endowment Fund without any mechanism to preserve the donors' intent that their gifts be restricted to certain uses. See generally pp. 21-24, supra.

On March 22, 2019, therefore, the State sent a second set of forty-five questions that addresses these and other concerns. See Second Set of Questions (attached hereto as Exh. E to Ganzman Cert.). AGa327-338. These questions probe the heart of the Proposed Transaction. The State hopes that Rider's answers to these supplemental questions will be responsive, forthcoming, and detailed. The information provided should enable the State to resolve critical issues such as the fate of WCC's Endowment Fund, Rider's contemplated use of the sale proceeds, and the fair market value for the assets. The State anticipates that, within 60 to 90 days from receipt of satisfactory responses to its second set of questions and any follow-up questions that the responses may engender, the State will be able to recommend in a cy pres proceeding whether the Court should approve the Proposed Transaction, approve it with express conditions, or reject it. The State respectfully asks that the Court permit it to continue to discharge its common law and statutory duties with respect to this matter.

Respectfully submitted,

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Dated: March 27, 2019

C: All Counsel of Record in McMorris and PTS (via email and regular mail)

⁸ Attorney General Gurbir Grewal has recused himself from this matter so as to avoid any appearance of a conflict of interest.