UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD McMORRIS, MONA DAVIDS, ELIZABETH COOKSEY, CHRISTIAN KOLLER, MATTHEW KOLLER, MARK D. HAFFNER, MYMONENA DAVIDSM CHARLES GOLDBERG, JOSEPH G. BECK, JONATHAN RYAN SALWSON and PALMER HAFFNER, *Plaintiffs*, against RIDER UNIVERSITY, *Defendant*.	17-CV-4611 (RA)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR ORDER TO SHOW CASE FOR A PRELIMINARY INJUNCTION

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Table of Contents

Table of Authorities

Cases

Moving Plaintiffs ("*Movants*" or "*Plaintiffs*") respectfully submit this Memorandum of Law in support of the entry of an Order to Show Cause requiring defendant Rider University ("*Rider*") to show why, pursuant to F.R.C.P. 65(a) and 65(e), a preliminary injunction should not be entered enjoining Rider from selling, relocating or closing Westminster Choir College ("*WCC*"), or making public announcement relating to the same.

PRELIMINARY STATEMENT

Movants easily satisfy the requirements for injunctive relief. First, Movants are likely to succeed on the merits – or, at a minimum, can show serious questions going to the merits concerning defendant Rider University's ability under the 1991 merger agreement (the "Merger Agreement") to sell, relocate or close WCC because the said defendant cannot demonstrate that it is either "impracticable" or adverse to its interests to continue the operation of WCC.

Second, without injunctive relief, the defendant's continued public statements or actions concerning the sale, relocation or closure of WCC, or the laying off of its faculty will suffer irreparable harm to WCC.

Third, the balance of hardships tilts decisively in Movants' favor. A limited and temporary injunction – pending only the quick resolution of the merits of this action – will affect no unfair hardship on Rider. Indeed, there is no sale of WCC currently pending.

Fourth, the narrow injunction sought by Movants will serve the public interest in the (i) enforcement of contracts; (ii) integrity of the judicial process and (iii) preserving an educational institution.

STATEMENT OF FACTS

On December 1, 2016 defendant Rider announced publically that it was seeking to sell WCC and relocate its facilities to its Lawrenceville campus. The plan to relocate proved unfeasible, so by

March of the following year Rider announced that it simply would seek to sell WCC. On March 29, 2017 Rider had sent a letter to prospective students that it was not feasible to maintain the WCC campus. Several months later this action was filed. On October 31, 2017 an Article XV Notice was served on all faculty at Rider informing them that they would no longer be employed as of August 31, 2018 and that the school may be closed.

WCC operated at a $2.9 surplus for the academic year 2016/2017. Only recently is was learned that Rider secured $57 million in financing in the form of municipal bonds and a credit line, utilizing the WCC campus as collateral, covering the 2017/2018 academic and beyond.

Rider made no effort to comply with the Merger Agreement of June 1991 which requires under paragraph 2.3 that only in the event that it is "impracticable" to continue operate WCC or adverse to Rider interest may Rider change WCC's programs, degrees or activities.

The net effect of these announcements to date has been to decrease enrollment by 35%, imperil accreditation, stop donations entirely and threaten to lose of a significant portion of the faculty. The continued operation of WCC is at stake at the present time.

ARGUMENT

I. LEGAL STANDARD

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A party seeking a preliminary injunction must show that he "is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.,* 555 U.S. 7, 20 (2008). "A movant . . . need not show that success is an absolute

certainty. He need only make a showing that the probability of his prevailing is better than fifty percent. There may remain considerable room for doubt." *Abdul Wali v. Coughlin,* 754 F.2d 1015, 1025 (2d Cir. 1985). In the Second Circuit, if a balancing of the hardships tips decidedly in the plaintiff's favor, the plaintiff need only show that there is "a serious question going to the merits to make them a fair ground for trial*." Red Earth LLC v. United States,* 657 F.3d 138, 143 (2d Cir. 2011). Plaintiffs meets the standards under either the "likely to succeed" test or the "serious question" test. Accordingly, this Court should grant the injunction.

To obtain a preliminary injunction, a moving party must show: (1) "a likelihood of success on the merits or . . . sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor"; (2) a likelihood of "irreparable injury in the absence of an injunction"; (3) that "the balance of hardships tips in the plaintiff's favor"; and (4) that the "public interest would not be disserved." See *Benihana, Inc. v. Benihana of Tokyo*, LLC, 784 F.3d 887, 894-95 (2d Cir. 2015) (internal citations omitted). The temporary restraining order standard is the same. See, e.g., *Echo Design Grp. v. Zino Davidoff S.A.,* 283 F. Supp. 2d 963, 966 (S.D.N.Y. 2003).

II. MOVANTS SATISFY THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION

A. Movants Will Succeed On The Merits.

To establish a likelihood of success on the merits, a plaintiff "need not show that success is certain, only that the probability of prevailing is 'better than fifty percent'". *BigStar Entm't, Inc. v. Next Big Star, Inc.,* 105 F. Supp. 2d 185, 191 (S.D.N.Y. 2000) (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)). While Movants surpass this standard, they can certainly satisfy the alternative test of "sufficiently serious questions going to the merits to make

them a fair ground for litigation" given that the balance of hardships stemming from any limited and temporary relief tips decidedly in their favor. See, *Benihana,* 784 F.3d at 894-95 (internal citations omitted).

In this case, a simple review of the Merger Agreement will show that Rider has violated the agreement because it cannot show impracticability or adverse consequences given WCC's finances.

Although Rider obtained the Westminster Choir College ("WCC") essentially as gift through a Merger Agreement it has sought over the past 2 years to sell WCC to developers and private companies, including a private Chinese company to sell WCC under terms they have not disclosed. To move toward that transaction, Rider has taken certain actions, including the public statement set forth in the Statement of Facts, that has been severely damaging to WCC and now threatens the continued operation of WCC.

B. Movants Will Suffer Irreparable Harm Absent Injunctive Relief

To demonstrate irreparable harm, a plaintiff must show an injury that is "actual and imminent" and "cannot be remedied by an award of monetary damages." *Shapiro v. Cadman Towers, Inc.,* 51 F.3d 328, 332 (2d Cir. 1995) (citation and internal quotation marks omitted). An award of money damages is inadequate "where a non-movant's assets may be dissipated before final relief can be granted, or where the non-movant threatens to remove its assets from the court's jurisdiction, such that an award of monetary relief would be meaningless[.]" *Firemen's Ins. Co. of Newark, New Jersey v. Keatin*g, 753 F. Supp. 1146, 1153 (S.D.N.Y. 1990) (citation omitted); see also *Itek Corp. v. First National Bank*, 730 F.2d 19, 22–23 (1st Cir. 1984).

The defendant's public statements touting the sale, relocation or closure of WCC or the

laying-off of the school's faculty have caused substantial harm to the school including without limitation significant decrease in enrollment, a cessation of donations to the school and the potential lose of the schools faculty. Left unchecked, the continued operation of WCC could be entirely threatened.

Rider's current actions threaten the continued operation of one of the preeminent choir colleges in the world. Plaintiff only seek to maintain the *status quo* and preserve WCC until this Court has determined and declared that Rider is acting within its right and obligations under the Merger Agreement.

C. The Balance Of Hardships Tilts Decidedly Toward Movants

Plaintiffs are likely to succeed on the merits of its claims at trial, but because the balance of hardships in this case tips so decidedly in favor of Plaintiffs and the public, an injunction would be warranted even if Plaintiffs merely showed "serious questions going to the merits to make them a fair ground for litigation." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.,* 598 F.3d 30, 35 (2d Cir. 2010) (internal citations omitted). Either Rider is acting illegally or it is not. Plaintiffs submit that Rider's actions are violation of paragraph 2.3 of the Merger Agreement: that the predicate under the Merger Agreement, *to wit,* that it is "impracticable" to continue to operate WCC and adversity to Rider.

The balance of the harms decidedly supports injunctive relief. If Rider were permitted to violate the Merger Agreement and pursue an illegal sale, then the WCC would be forced to close and lost forever. On the other hand if this Court determines that Rider's actions are consistent with the Merger Agreement, then no injunction would be granted. There is absolutely nothing at stake for Rider, which is why no bond should be necessary.

Furthermore, Plaintiffs only seek a preliminary review and determination of the rights and obligations of the Merger Agreement, which according to its plain language does not permit defendant to sell or close WCC under the present circumstances. As a result plaintiffs are likely to succeed on the merits of its claims at trial, but because the balance of hardships in this case tips so decidedly in favor of Plaintiffs and the public, an injunction would be warranted even if Plaintiffs merely showed "serious questions going to the merits to make them a fair ground for litigation." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (internal citations omitted).

The newly acquired bond issuance and line of credit, which collateralized WCC property calls another section of the Merger Agreement into question. Specifically, the agreement stated that Rider shall "Utilize WCC's resources in support of WCC's programs", Merger Agreement at §2.1(c), and that Rider may make use of the Westminster campus lands only for the purpose of continuing to support the Westminster programs, mandating that Rider shall be entitled to collateralize the Westminster property for the purpose of borrowing to support the Westminster programming, a further demonstration of the intended limits placed on Rider's use of this property. Merger Agreement at §2.1(c). As such this court should as part of its injunction, require that the proceeds of the line of credit, and bonds as well if applicable, should be held in trust for the benefit of WCC only.

D. The Public Interest Favors Granting Injunctive Relief

The public interest also favors holding Rider to the terms of the Merger Agreement. Indeed, the public interest is served by requiring parties that enter binding contracts such as the Merger Agreement, "to honor [their] terms." See NML II, 727 F.3d at 248. The public interest is also served by safeguarding the integrity of the judicial process. See *Williams-Yullee v. Florida*

Bar, 135 S. Ct. 1656, 1659 (2015) ("Public perception of judicial integrity is accordingly a state interest of the highest order") (internal citation omitted). The plaintiffs are also seeking to preserve a treasured educational institution making this application one to serve the public interest.

E. The Rule 65(c) Bond requirement should be waived.

The Court should also grant plaintiffs' motion to waive the posting of a bond required under Fed. R. Civ. P. 65(c). The Court should find it appropriate to waive Rule 65(c)'s bond requirement in view of the facts that plaintiffs are indigent and have brought an action that promotes the public's interest. See *Pharmaceutical Soc'y v. New York State Dep't of Social Services,* 50 F.3d 1168 (2nd Cir. 1995); *Acorn v. United States,* 662 F. Supp. 2d 285 (E.D.N.Y. 2009); *Johnson Controls v. APT Critical Sys*, 323 F. Supp 2d 525 (no harm to non-movant); *Greenwich Bd of Education v. Torok,* 2003 LEXIS 18985 (requiring a bond might discourage children and their parent from enforcing their legal rights); *Cosgrove v. Bd of Educ.,* 175 F. Supp. 2d 375 (N.D.N.Y. 2001); and *LIH v. New York City Bd of Educ.,* 103 F. Supp. 2d 658 (N.D.N.Y. 2001) (finding district court properly exercised discretion to allow plaintiffs to proceed without posting a bond because district court had discretion to dispense with the security requirement where requiring security would effectively deny access to judicial review); *Miller v. Carlson*, 768 F. Supp. 1331, 1340–41 (N.D.Cal.1991) (bond waived as plaintiffs are "indigent persons" and the preliminary injunction "is consistent with public policy").

CONCLUSION

For the foregoing reasons, Movants respectfully request that their motion by order to

show cause for the entry of (1) preliminary injunction pending the resolution on the merits of the present action be granted.

Dated New York NY
Janaury 28, 2018

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