

**BEFORE THE OHIO ATTORNEY GENERAL  
CIVIL DIVISION**

<b>OTHA DAVENPORT,</b>	:	Case No. _____
<b>CONCERNED CITIZENS OF</b>	:	
<b>GREENE COUNTY , et al.</b>	:	
c/o Robert J. Fitrakis, Attorney at Law	:	
Arnebeck and Fitrakis Law Offices	:	
1021 East Broad Street	:	
Columbus, Ohio 43205	:	
	:	
<b>v.</b>	:	
	:	
<b>ANTIOCH UNIVERSITY</b>	:	
<b>BOARD OF TRUSTEES</b>	:	
795 Livermore Street	:	
Yellow Springs, Ohio 45387	:	

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**PETITION TO ENFORCE  
PURSUANT TO O.R.C. §1713.31**

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Come now Otha Davenport and the concerned citizens of Greene County, Ohio,  
(Petitioners, or the petitioners) by and through counsel, and hereby state as follows:

- 1) Antioch College is the flagship institution of Antioch University, an Ohio Non-Profit Corporation originally organized in 1852.
- 2) Antioch College is an Ohio educational institution organized pursuant to Ohio Revised Code §1713.01 *et. seq.*
- 3) Antioch College is physically located and has its principal place of business in Yellow Springs, Greene County, Ohio.
- 4) Petitioners allege that the Antioch University Board of Trustees has violated the various fiduciary duties of care, compliance, loyalty and the duty to maintain accounts imposed under Ohio Revised Code Sections 1713.01 *et. seq.*, 1716.01 *et. seq.*, and 109.23-33, as outlined in the attached Statement of Facts, which said facts are incorporated herein by reference.

WHEREFORE, in light of the above and in the interest of justice, the petitioners submit the following Petition executed by over five electors and citizens of Greene County, Ohio, and respectfully request that the Ohio Attorney General exercise its investigative and enforcement powers pursuant to Ohio Revised Code 1713.31 to hold that the Antioch Board of Trustees decision to close the College was *ultra vires* and/or a breach of fiduciary duty.

Respectfully submitted,

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Robert J. Fitrakis,  
Ohio # 0076796  
Attorney at Law  
1021 East Broad Street  
Columbus, Ohio 43205  
(614) 374-2380  
truth@freepress.org

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon the following person(s) by regular U.S. Mail on this \_\_\_ day of \_\_\_\_\_, 2009:

Antioch University Board of Trustees  
795 Livermore Street  
Yellow Springs, Ohio 45387

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Robert J. Fitrakis  
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Columbus, Ohio 43205  
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## **STATEMENT OF FACTS**

### **Introduction**

Otha Davenport, Concerned Citizens of Green County, et. al., (Petitioners, or the petitioners) allege that the Antioch University Board of Trustees violated their fiduciary duties of care, compliance, loyalty and the duty to maintain accounts imposed under Ohio Revised Code Sections 1713.01 *et. seq.*, 1716.01 *et. seq.*, and 109.23-33.

In fulfilling the duty of care, Board members must act in good faith, with the degree of diligence, care and skill that a prudent person would use in similar circumstances.<sup>1</sup> The duty of care entails that Board members should attend all Board and Committee meetings, that they should be well prepared for meetings and have read materials that were distributed prior to meetings, and that they should understand the financial documents that they give their approval. If they do not understand the financial documents they are given, they should ask for clarification, look to peers and staff for advice, and take steps to improve their financial literacy skills.<sup>2</sup> Attendance at meetings and dutiful participation of Board members is critical to ensuring that the duty of care is being fulfilled. Without the regular and attentive participation of Board members, the Board risks sliding down the slippery slope of mismanagement of a Non-profit and violating the Duties of Care, Loyalty, Compliance and Managing Accounts.

The duty of compliance requires that Board members conduct business in a manner that obeys all legal requirements and other obligations, which may be imposed by

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<sup>1</sup> “Guide for Foundation Members,” p. 6. Nancy H. Rogers, State of Ohio Attorney General.  
[www.ag.state.oh.us/business/pubs/char/05guide\\_boardmembers.pdf](http://www.ag.state.oh.us/business/pubs/char/05guide_boardmembers.pdf)

<sup>2</sup> Id at 7.

Federal and State laws and regulations, the organization's own governing documents, or agreements with and representations made to donors and others.<sup>3</sup>

The duty of loyalty requires that board members hold the interest of the organization and the public first and foremost in their minds as they make decisions, furthering the charitable purposes of the organization. The duty of loyalty may be violated when a director or trustee has a financial interest in a decision or a loyalty that could influence the decision, even where no personal financial interest is at stake. The breach of the duty of loyalty does not have to be a monetary gain, but can be an advantage that does not have to do with money. Examples of the breach of duty of loyalty include engaging in competing enterprises to the detriment of the foundation, diverting an organization's assets for personal gain, and deriving any kind of secret profit or other advantage in dealing with or on behalf of the organization.<sup>4</sup> Literature from the Ohio Attorney General<sup>5</sup> and other guides for non-profit board members<sup>6</sup> warn Board members against taking actions that are not in the best interest of the institution they are serving. Even the mere appearance of impropriety should be avoided when it comes to self-dealing and in dealing with third parties; the trustee should avoid any act that may be construed as an act that benefits the trustee in some way, to the detriment of the trust beneficiary. Trustees must manage the trust solely for the benefit of the trust's beneficiaries, and must follow the terms and purposes of the trust in good faith. Trustees should not favor a third party over the beneficiaries, and trustees should also not discriminate among beneficiaries of a trust if there are multiple beneficiaries.

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<sup>3</sup> "Guide for Foundation Board Members"

<sup>4</sup> From "Guide for Foundation Members," Nancy H. Rogers, State of Ohio Attorney General.

<sup>5</sup> "Guide for Foundation Members," p. 6. Nancy H. Rogers, State of Ohio Attorney General.

<sup>6</sup> See <http://www.lincoho.org> and <http://nonprofitrisk.org>

The duty to maintain accounts requires that the directors properly manage financial accounts and records, keep accurate records related to grant making activities, and invest charitable assets prudently.<sup>7</sup> To fulfill this duty, Board members must keep clear and accurate records of income, expenditures and transactions.

The facts that follow support the claims that Board members violated their fiduciary duties to the College.

### **Duty of Care**

Petitioners allege that the Antioch University Board of Trustees violated the duty of care they owe as board members of a non-profit corporation, resulting in the unnecessary closing of Antioch College. Many documented actions of the Board members resulted in the underfunding and closure of the College, including but not limited to: negligently having too few board members to raise sufficient funds; allowing some board members with little or no experience in running a Liberal Arts college to set the direction of the College;<sup>8</sup> and restructuring the University for short-term growth when a long-term growth plan agreed upon by the Antioch College community was in effect and was working; and mismanaging funds including depositing approximately five million dollars (\$5,000,000) into a general account for the University instead of the Antioch College account, as reported by the Dayton Daily News,<sup>9</sup> which may have contributed to the apparent necessity of closing the College. Finally, Board members

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<sup>7</sup> “Guide for Foundation Members,” Nancy H. Rogers, State of Ohio Attorney General.

<sup>8</sup> Antioch Confidential, p. 5. - [http://theantiochpapers.org/file\\_download/148/AntiCon\\_final.pdf](http://theantiochpapers.org/file_download/148/AntiCon_final.pdf)

<sup>9</sup> Article in Dayton Daily News.

<http://www.daytondailynews.com/n/content/oh/story/news/local/2007/07/11/ddn071107antiochmeet.html>

have been negligent in maintaining the buildings of Antioch College since its closing, resulting in severe damage, waste, and loss.<sup>10</sup>

In a memo dated May 7, 2008,<sup>11</sup> the Board's attorneys felt it necessary to remind Board members of their fiduciary duties. The memo indicated there were many possible areas of improvement for the Board members, and it may have also indicated very problematic areas in which the Board Members were neglecting their duties to the detriment of the non-profit.

**There were attendance problems at Board Meetings.**

There is evidence that meetings were poorly attended, and that Board members left meetings early or arrived late, were distracted at meetings, or failed to prepare properly for meetings by reading relevant materials.<sup>12</sup> The memo dated May 7, 2008 from the Board's attorneys warn Board members about lax attendance at meetings and indicate that Board members' poor attendance and attention at Board meetings may have been a problem for the non-profit.<sup>13</sup>

**The Board negligently had too few Board Members.**

It is well known in the world of non-profits that a certain number of committed board members and "fresh blood" are required to keep a non-profit going, in terms of staffing and fundraising.<sup>14</sup> The Board members were aware that they did not have enough Board members to raise enough funds from alumni,<sup>15</sup> but they did not increase the size of the board in order to meet their fund raising needs. Worse, the size of the

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<sup>10</sup> Appendix G, Water Damage, attached. [http://theantiochpapers.org/file\\_download/213/zero2fifty.pdf](http://theantiochpapers.org/file_download/213/zero2fifty.pdf)

<sup>11</sup> Appendix C, attached. [http://theantiochpapers.org/file\\_download/232/rtr\\_lgl\\_259.pdf](http://theantiochpapers.org/file_download/232/rtr_lgl_259.pdf)

<sup>12</sup> Appendix C, p. 3.

<sup>13</sup> Id.

<sup>14</sup> Appendix B, p. 2. Tom Ingram states how important board members are to the financial vitality of an organization. [http://theantiochpapers.org/file\\_download/234/ag\\_Appendix\\_B.pdf](http://theantiochpapers.org/file_download/234/ag_Appendix_B.pdf)

<sup>15</sup> Id.

board actually decreased between the years of 1999 and 2008 from twenty-five voting members to eighteen.<sup>16</sup> This low number of board members may have violated the bylaws of the non-profit, which specifically stated that there should be between fifteen and forty members of the board, but with a default of thirty members unless otherwise stated.<sup>17</sup>

**People with little or no experience with a liberal arts college were allowed to set the course of its deterioration.**

Mr. Bruce Bedford had a military background but had no experience running a residential liberal arts college.<sup>18</sup> Although he had the duty to understand what he was doing and to seek the advice of qualified people who could advise him if he did not understand something, he instead surrounded himself with people who also did not have experience at a liberal arts college and could not advise him how to run this sort of organization.<sup>19</sup> University CFO Glenn Watts ordered a 15% cut in the College's expense budget and the elimination of twenty positions in the College as part of a short-term stabilization program, and also had no experience running a residential liberal arts campus.<sup>20</sup> Bedford and Watts were aware or should have been aware of their duty to inform themselves about how to effectively run the University and make financial decisions at a Liberal Arts College.

**Board Members took actions that resulted in lower student enrollment.**

Board members violated their duty of care when they took actions that resulted in lower student enrollment, which meant that tuition funds were not available for the

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<sup>16</sup> Id.

<sup>17</sup> Bylaws of Antioch University, §2.2.1. [http://theantiochpapers.org/file\\_download/227/rtr\\_lgl\\_195.pdf](http://theantiochpapers.org/file_download/227/rtr_lgl_195.pdf)

<sup>18</sup> Antioch Confidential, p. 5.

<sup>19</sup> Id.

<sup>20</sup> Id.

College. Student enrollment was negatively affected by a reduction in support staff at the College,<sup>21</sup> and by the implementation of a growth plan for the College that did not work.

First, board members drastically reduced the number of support staff at the College in order to save money, which resulted in lower enrollment because of the reduced capacity to handle student needs.<sup>22</sup> Some of the staff reductions were in the area of diversity programming which had the effect of increased tensions surrounding identity politics at the campus, as well as the threat of possible legal problems which could have been averted by having the proper staff.<sup>23</sup>

Board members also violated their duty of care when they implemented a plan for growth at the College that was not effective, and actually resulted in decreased enrollment at the College. College faculty and other community members had developed a plan for long-term growth that was in effect and progressing at predictable rates.<sup>24</sup> The increase in enrollment was progressing at a slow but steady rate of 4% increase every year from 1998 to 2002, according to a plan that had been agreed upon and created with the input of faculty.<sup>25</sup> Inexperienced board members, such as Bruce Bedford, terminated the use of this plan and replaced it with a plan for short-term growth. It was soon clear that the implementation of the short-term plan had a detrimental effect upon enrollment at the College.<sup>26</sup> As soon as the short-term plan was implemented, enrollment in the

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<sup>21</sup> Antioch Confidential, p. 6.

<sup>22</sup> Id.

<sup>23</sup> Antioch Confidential, p. 9. The position of Director of Multicultural Affairs was vacant when a student made a claim of reverse discrimination. Since there was no Director of Multicultural Affairs to engage the students and moderate a meaningful conversation about identity politics, the tense situation escalated out of control. As a result, the press was called about the situation and the KKK came to the campus to gain publicity and to recruit.

<sup>24</sup> “Antioch Confidential” p. 4.

<sup>25</sup> Id.

<sup>26</sup> Id.

College began to drop at a steady rate. There is some evidence indicating that the short-term plan was implemented in order to liquidate the assets of the College.<sup>27</sup>

**Board members have been negligent in the maintenance of the property since the closing of Antioch College, resulting in severe damage to South Hall and Antioch Hall.**

The Board violated the duty of care by neglecting the property and allowing water damage to occur at the College at South Hall, the Theater building, and Antioch Hall, also known as the Main Building. The Board ignored warning signs that damage was likely to occur, and did not follow the standards of the National Park Service Brief 31 for maintaining historic buildings.<sup>28</sup>

In South Hall, a water pipe burst on the fourth floor on December 24, 2008, resulting in a flow of approximately 104 gallons of water per minute or 150,000 gallons per day.<sup>29</sup> Damaged occurred initially on the fourth floor and spread to the floors below it, causing the collapse of dry wall in the building and other extensive damage.

Witnesses stated that they observed water gushing out of the fourth floor windows out of the building.<sup>30</sup> Similar damage occurred to Antioch College's historic Main Building on February 7, 2009,<sup>31</sup> when a sprinkler pipe broke in the attic.

### **Duty of Compliance**

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<sup>27</sup> Please see the section entitled **Duty of Loyalty** for further discussion.

<sup>28</sup> Appendix G, p.1. [http://theantiochpapers.org/file\\_download/213/zero2fifty.pdf](http://theantiochpapers.org/file_download/213/zero2fifty.pdf)

<sup>29</sup> Meeting Minutes, Miami Township Trustees, January 5, 2009. Attached as Appendix H. [http://theantiochpapers.org/file\\_download/211/fl\\_004.pdf](http://theantiochpapers.org/file_download/211/fl_004.pdf)

<sup>30</sup> Id.

<sup>31</sup> Appendix G, p. 2.

Board members violated the duty of compliance when they violated the University's Donor Bill of Rights, which was an internal governing document and an agreement with and representation to donors. The Board misled donors by not informing them of the dire circumstances of the College, and the Board did not honor the donative intent of the Donors when they used funds designated for the College as a general fund.

The Antioch College Board of Trustees adopted the Donor Bill of Rights on November 4, 2006.<sup>32</sup> Antioch University may have violated its own Donor Bill of Rights from January 2007 through May 2007.<sup>33</sup> The Bill of Rights had been created to promote transparency and accountability to donors, and to encourage Alumni and others to donate, as a Donor Bill of Rights was standard at many other non-profits.<sup>34</sup> The Bill of Rights states that all donors have the right "to be informed... of the way the organization intends to use donated resources, and of its capacity to use donations effectively for their intended purposes."<sup>35</sup> Donors had given money with the expectation that their money would be used for specific donative purposes, but they did not expect that operations at the College would be suspended. Most of them did not know that the Board members felt that the College was in danger of being closed. The Board did not disclose this to donors.

### **Duty of Loyalty**

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<sup>32</sup> See Exhibit A citing Donor's Bill of Rights p. 1 citing 136 6-11-02 BOT Regular Meeting- OPEN and CLOSED minutes, Nov 6. [http://theantiochpapers.org/file\\_download/233/ag\\_Appendix\\_A.pdf](http://theantiochpapers.org/file_download/233/ag_Appendix_A.pdf)

<sup>33</sup> See Exhibit A, p. 1, citing 258 7-02-01 BOT Regular Meeting Minutes - Open and Closed.

<sup>34</sup> Id.

<sup>35</sup> See Exhibit A citing Donor's Bill of Rights and 136 6-11-02 BOT Regular Meeting- OPEN and CLOSED minutes, Nov 6.

The petitioners allege that the Antioch University Board of Trustees violated the duty of loyalty they owe as Board members of a Non-Profit corporation. Antioch University Board of Trustees violated the duty of loyalty when they re-purposed assets of Antioch College for the building of the McGregor Campus, which housed the Center for Business and Education; and by attempting to restructure the University for short-term growth without gaining the input of the faculty and other community members who were stake-holders in the non-profit, who had previously agreed collectively upon the long-term plan. The Board violated its duty of loyalty to the College by favoring the University over the College, by favoring one of the trust's beneficiaries (the McGregor Campus) over the interests of the College, and by implementing an ineffective growth plan for the College against the advice of the College community, who had previously agreed upon a different, effective growth plan.

**The Board was loyal to the University over the College.**

The petitioners allege that the Board violated their duty of loyalty to the College when they re-purposed assets restricted for use at the College to increase the debt capacity of the University at large. The Board members owe a duty to the organization they serve; in this case they owed a duty of loyalty to the University on the whole, but they also owed their loyalty to the College, the founding organization of the University and the organization through which the University was chartered. Board members should have made sure that assets that were designated specifically for use for the College were only being used for the College and not for the University at large. Endowments specifically designated for the College were being used to increase the debt capacity of the entire University, which would help the University meet its goals of expanding and

adding campuses.<sup>36</sup> The Board privileged expansion of the other campuses over keeping the original campus alive even though keeping the College alive was the money's designated purpose and in the interest of the College and its stakeholders. This breach of the duty of loyalty to the College could have resulted in an unwillingness of Alumni to donate to the College.

**Board members favored one of the University's beneficiaries over another, to the detriment of Antioch College.**

Board members favored one of the University's beneficiaries over another when it used assets designated for the College to benefit the McGregor campus. Assets of Antioch College were used to finance the McGregor campus by increasing the University's debt capacity. Trustees favored one of the University's beneficiaries over another when they used funds allocated for use at Antioch College to finance McGregor, discriminating against one of the Trust's beneficiaries.

**Board members restructured the growth plan for the College against the advice of the entire College Community.**

Antioch College faculty, students and many others from the community had thoughtfully prepared a long-term plan for growth at the college,<sup>37</sup> and growth at the College was happening at expected rates according to this plan.<sup>38</sup> Board members badly represented the interests of the College community by disregarding this plan and implementing a plan which doomed the College to failure, against the advice and wishes

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<sup>36</sup> See Appendix F, Memo Re: McGregor Bond, Brian Springer.  
[http://theantiochpapers.org/file\\_download/235/ag\\_Appendix\\_F.pdf](http://theantiochpapers.org/file_download/235/ag_Appendix_F.pdf)

<sup>37</sup> Antioch Confidential, p. 6.

<sup>38</sup> Id.

of the College community. This was an act of disloyalty to the College community and the stakeholders of the non-profit, and a breach of the Board member's duty of loyalty.

### **Duty to Maintain Accounts**

The Antioch University Board of Trustees violated their duty to maintain accounts when they did not effectively maintain the bank accounts of the University such that the College could continue running. Board members made several accounting errors which made it appear that it was necessary to close the College, when in fact the situation was not as dire as the Board members predicted.<sup>39</sup> The University and College were involved in many confusing accounting issues which indicate that the Board did not do their duty to maintain accounts with transparency and in a way which kept track of the money donors had donated for certain purposes. There were accounting errors and discrepancies which called into question the ability of the board to manage the finances of the College.

Namely, there was the \$5 million accounting hole that seems to have begun on February 2, 2006.<sup>40</sup> Board members violated the duty to maintain accounts when they deposited a sum in the amount of \$5 million into a discretionary spending account, instead of the restricted account for the College for which it was intended. Additionally, there was an accounting error of approximately \$1 million in Antioch University's cash

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<sup>39</sup> Appendix E, Antioch Budget for Dummies, The Antioch Papers 2008, p. 3.

[http://theantiochpapers.org/file\\_download/143/ABD.pdf](http://theantiochpapers.org/file_download/143/ABD.pdf)

<sup>40</sup> Article in Dayton Daily news.

<http://www.daytondailynews.com/n/content/oh/story/news/local/2007/07/11/ddn071107antiochmeet.html>

flow analysis, which was the main budget projection used to close Antioch College.<sup>41</sup> These major breaches of the duty to maintain accounts had the detrimental effect of the under-funding of the College and creating the appearance that the closing of the College was necessary.

### **Conclusion**

For the foregoing reasons, the petitioners respectfully request that the Attorney General of Ohio investigate this matter and make a determination by the evidence whether the Antioch University Board of Trustees has violated its fiduciary duties of care, compliance, loyalty, and the duty to maintain accounts imposed under Ohio Revised Code Sections 1713.01 *et. seq.*, 1716.01 *et. seq.*, and 109.23-33, and take action in the Franklin County Common Pleas Court, and if needed remove the Antioch University Board of Trustees from governing Antioch College, and replace them with an independent board, entrusted to govern the Ohio chartered non-profit educational institution.

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<sup>41</sup> Appendix E, p. 3.

