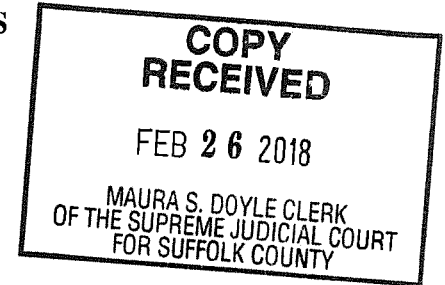


COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Suffolk County

SJ-2018-065



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TRUSTEES OF THE BERKSHIRE MUSEUM,

Plaintiff,

v.

MAURA HEALEY, ATTORNEY GENERAL OF THE COMMONWEALTH  
OF MASSACHUSETTS,

Defendant.

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CY PRES PROCEEDING

BRIEF OF *AMICI CURIAE* JAMES HATT, KRISTIN HATT, AND  
ELIZABETH WEINBERG

February 26, 2018

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Has the Plaintiff Trustees of the Berkshire Museum (the "Museum") carried its burden to show that the charitable purpose of the Museum and of certain specific gifts it has received are impossible or impracticable without selling its forty (40) most important works of art?

(2) Even if the status quo of the Museum were impossible or impracticable, is the proposed remedy of selling the core of its art collection "as near as possible" to the charitable purpose for which the Museum was created and many of the specific works at issue were donated?

II. STATEMENT OF THE CASE

A. Nature of the Case

This case concerns a critical question for the protection of cultural artifacts in the Commonwealth: should a non-profit be permitted to cash in on the market value of objects donated to and restricted for the public good when mismanagement has led to short-term financial difficulty? As explained further below, the considered wisdom of museum professionals resoundingly and unanimously rejects this mercantilist approach to cultural stewardship. Until a recent, inexplicable reversal, the Office of the Attorney General (the "AGO") seemed prepared to defend the important principle of the public trust; this Court is

now the last resort to avoid the Commonwealth becoming a shameful opening salvo in the pillaging of museum collections nationwide by opportunists. If permitted, the evisceration of the Museum collection will pour more than \$50 million into the very hands that steered the Museum into the ditch, and the precedent will leave no limiting principle by which the museum collections of the Commonwealth can be protected from the ravages of the commercial art market.

"Deaccessioning" is the sale or other transfer of an object of visual art or cultural property from a museum's collection. This proposed deaccession to fund a dramatic "New Vision" would sell up to forty of the Museum's most important pieces of art (the "Artwork"), which include masterpieces by Norman Rockwell and Frederic Edwin Church and paintings by several members of the Hudson River School, inextricably connected to the area in which Pittsfield is located ("the Liquidation Sale"). The "New Vision" is just that: a vision. It is not a plan, or a business model, and has no structure concerning what will happen to the enormous sums that will flow unrestricted into the Museum's coffers. The sale violates governing statutes that chartered the Museum, the Museum's Collection Policy, and fundamental ethical rules that govern how art museums steward their collections consistent with their fiduciary duties.

**B. Course of Proceedings and Disposition**

The Initial Litigation

James Hatt, Kristin Hatt, and Elizabeth Weinberg (collectively the "Member Plaintiffs") filed a Verified Complaint and a motion for a preliminary injunction last year in the Business Litigation Session ("BLS") of the Suffolk Superior Court, asking to enjoin the sale because of the Museum's violation of specific restrictions in its bylaws and charter, and because of the Trustees' fiduciary breaches. This followed the stunning announcement of the "New Vision" with no warning. A separate group of plaintiffs that included Norman Rockwell's three sons (collectively, the "Rockwell Plaintiffs") had filed a different lawsuit in Berkshire County earlier that week, likewise concerning the Museum's plan to auction its most valuable artwork, and the Berkshire Superior Court consolidated the two cases. The Rockwell Plaintiffs named the AGO as a necessary party defendant and sought a temporary restraining order against the sale of the art. That case asserted specific restrictions on the gift of two paintings by Norman Rockwell himself, broader applicable geographic restrictions on certain parts of the collection, rights of Berkshire County residents conferred by the Museum's chartering documents, and contractual rights

by artist Tom Patti for an installation that will be altered if the Museum's plans are allowed to proceed.

The AGO concurred and supported the requested injunctions (including the Member Plaintiffs') on October 30, 2017. RA<sup>1</sup>-0762-0787. On November 7, 2017, the Berkshire Superior Court issued a decision and order denying the Member Plaintiffs', the Rockwell Plaintiffs', and the AGO's requests for injunctive relief. The Berkshire Superior Court also *sua sponte* dismissed the Member Plaintiffs' case in its entirety, and dismissed the Rockwell Plaintiffs from their action, despite the fact that no party had asked it to, leaving only the AGO's claims and the Patti contract claims. The Berkshire Superior Court misconstrued the record on the fundamental question of deaccessioning in its denial of the AGO's motion, incorrectly holding that museums considered the practice a "necessary evil," and citing additional

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<sup>1</sup> As discussed herein, parallel litigation has resulted in the development of a substantial record now on file at the Appeals Court, of which this Court may take notice (or direct appellate review). Most of the citations to this record are to affidavits or filings in the related litigation, which in the posture as *amici curiae* the Member Plaintiffs are not in a position to submit to the Court. See *Jarosz v. Palmer*, 436 Mass. 526, 530 (2002) ("a judge may take judicial notice of the court's records in a related action"). The Member Plaintiffs remain ready, at the Court's instruction and in this somewhat unusual procedural dynamic, to submit any portions of the record so cited if the Court should advise.

sources not in the record. The ruling fundamentally confuses the Trustees' power to sell paintings as a matter of title (for which they submitted expert testimony, but which is not actually in dispute) with their ability to do so consistent with their duties of stewardship. The Member Plaintiffs appealed the Superior Court's judgment, currently pending in the Appeals Court<sup>2</sup> as *Hatt et al. v. Trustees of the Berkshire Museum*, 2017-P-1556.

On November 10, 2017, the AGO noticed its appeal from the injunction denial and moved pursuant to Mass. R. App. P. 6 for an injunction pending appeal from the Single Justice of the Court. A Single Justice (Trainor, J.) granted its motion that same day and later extended the injunction multiple times to restrain the Museum from proceeding with the Liquidation Sale through February 5, 2018 – each time in response to requests by the AGO to do so.

On January 16, 2018, the AGO filed its principal brief appealing the denial of the preliminary injunction. The AGO's January 16, 2018 brief demonstrated, in detail, numerous governance failings and violations of enforceable restrictions on the sale

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<sup>2</sup> Because the Museum has now filed a complaint for cy prè before this Court, this Court may find that it would serve judicial efficiency to exercise direct appellate review over the Member Plaintiffs' appeal pursuant to Mass. R. Civ. P. 11(f).



or disposition of the Museum's art collection. Among the most damning evidence articulated by the AGO:

The Museum's officers and trustees also breached their fiduciary duties to the organization and its mission by pursuing a plan that violated its charitable purposes.

See Brief of the AGO, Appeals Court Docket No. 2017-P-1548, at p. 27 (emphasis added). Similarly, an entire section of the AGO's argument is entitled "The Museum's Officers and Directors Breached the Fiduciary Duties They Owe to the Museum's Mission." *Id.* at p. 43. Leaving no remaining doubt and with considerable investigative substantiation, the AGO advised the Appeals Court:

The Museum - through its officers and directors - breached its fiduciary obligations in several ways: (1) it failed to consider less drastic alternatives to liquidating its fine art collection, particularly where it did not need to do so in order to stabilize its operations and the New Vision does not resolve the annual shortfalls; (2) it selected artwork for sale based solely on auction value with no consideration for how the pieces contribute to the Museum's charitable purposes; (3) it entered into a contract with Sotheby's in violation of self-imposed Collections Management Policy and industry guidelines that the Museum had agreed to; and (4) it sought to sell artwork that was subject to restrictions.

*Id.* at p. 45.

The Museum was no bystander to this investigation. In its filings, the Museum repeatedly belittled the authority of the AGO. When the AGO first sought an injunction from the Appeals Court after the Superior Court's order, the Museum spared no level of scorn, referring to the AGO's "course of conduct that the Superior Court correctly identified as 'bewildering' and 'astonishing,'" and calling the AGO's position to the Appeals Court - *i.e.*, the court properly reviewing the injunction ruling in the first instance - "a tired recitation of the same arguments rejected by the Superior Court." Museum's Opposition to Motion For Injunction Pending Appeal, No. 2017-J-510, November 10, 2017, at p. 10. Notable to present purposes, the Museum flatly accused the AGO of lying, by claiming that any need to seek *cy prè*s relief of precisely the sort that the Museum now seeks was "a hypothetical on top of a falsity." *Id.* at p. 12, n.4. The Museum concluded by referring to the AGO's motion as "truly remarkable" and blaming the AGO for all possible harm that would result from the Museum's inability to hold the auction immediately (*Id.* at p. 17) - before the Single Justice granted all the relief that the AGO had requested. Similarly, the Museum moved to stay the Single Justice's injunction with this attack:

every day that the Museum is prevented from litigating the meritless claims the AGO has filed against it interferes with its governance, harms its reputation, and prevents it from moving forward with its painstakingly-developed plans to secure its future.

See Memorandum in Support of Emergency Motion For A Stay Pending Appeal And To Expedite Appeal, Appeals Court Docket No. 2017-P-1523, at p. 15. This assault on the AG's office continued after the AGO filed its status report and requested that the injunction be extended (which the Single Justice allowed):

The reason for the AGO's languid pace in prosecuting its appeal, and its refusal to accept the Museum's proposed agreement, is plain: it is now operating in a situation of complete unilateral advantage, as the Museum not only stands enjoined, but also completely unable to advance the progress of the litigation. . . .

See Response to AGO's Status Report and Motion to Extend Injunction, No. 2017-J-510, December 11, 2017, at p. 1.

And finally, in its reply brief appealing the Single Justice's injunction, the Museum heaped all of the invective it could muster:

The Attorney General's Office ("AGO") seeks to justify a stay that it did not seek, based on statutes that neither it nor the Single Justice invoked, in service of an "investigation" it has no authority to pursue.

Reply Brief, Appeals Court Docket No. 2017-P-1523, January 16, 2018, at p. 1 (emphasis added). This

derogation of the AGO's authority was, of course, at complete odds with the brief that the Museum just filed in the Member Plaintiffs' appeal, which extolled the Museum's abiding respect for the "unique" standing of the AGO.

The Current Petition

On February 5, 2018 the AGO revealed that it had reached an agreement with the Museum. Barely two weeks after laying out just how derelict the Trustees' performance had been, the AGO's "settlement" was in effect a complete capitulation to what the Museum had always stated it intended to do: sell as many of the forty works of art as it pleases until the total reaches \$50 million, with no meaningful oversight over the very Trustees who presided over the institution's supposed financial ruination. (The settlement merely includes a notification requirement for impending sales, which the AGO duly promised not to protest.) The present petition followed on February 9, 2018, ostensibly to seek cy près modification of the various restrictions that the AGO determined were indeed enforceable, to allow the sales to proceed. The petition pretends to treat revenues between \$50 and \$55 million more consistently with appropriate deaccessioning guidelines that deaccessioning funds be used for acquisition or collections care, but it defines "care of the collection" to include the

boundless "New Vision," which defines the restriction out of existence.

The AGO filed its assent to the proposed judgment (the "AGO Assent") on the same date. The AGO Assent acknowledged that "all of the works of art deaccessioned and proposed for sale are subject to one or more restrictions that limit the Museum's ability to proceed with its planned sale and use of proceeds to fund an endowment, pay for operating expenses and fund renovations." AGO Assent at p. 2. With regard to the existing mission, it observed: "[t]he Museum has also long represented itself to donors and the public as an art museum." *Id.* Summing up the baseline against which the current petition must be judged, the AGO concluded:

Thus, the Museum's historical treatment of the objects presented for sale, representations to donors and the public about the role of art at the Museum, as well as the Museum's own policies and guidelines for deaccessioning, reflect that the works of fine art are restricted for use to further the Museum's art purpose, or more specifically, to promote the study of art for the people of Berkshire County by means of museums and collections.

*Id.* at p. 3. Moreover:

[T]he Museum holds 19 of the 40 works of art pursuant to Chapter 134 of the Acts of 1932, which established the Museum as its own institution and authorized the transfer of a number of objects to the Museum from the Trustees of the Berkshire Athenaeum.

*Id.* And lastly:

Rockwell donated the paintings with the intent that they be used to benefit the Museums permanent collection, and especially with regard to Shuffleton's Barbershop, that it remain in the permanent collection.

*Id.*

With regard to what is to be done about this, the AGO Assent is oddly credulous. It first cites the Museum's consultant report that the "stabilization" number is \$25.6 million. *Id.* It then goes on to say that this same consultant now claims the "stabilization" number is supposedly higher, yet the AGO Assent conspicuously provides no support for that conclusion nor, to be fair, does it actually endorse it. The AGO Assent instead merely states the obvious: the Museum has made the claim of impossibility or impracticability, not that the Museum has actually proved it. The AGO conspicuously does not retract its January 16, 2018 statement that the Museum's officers and directors breached their fiduciary duty by choosing "a multi-million dollar upgrade to [the Museum's] facilities and significant addition to its 'endowment'" rather than "developing a plan centered around the \$25.6 million purportedly needed to stabilize the Museum's operations as identified by the Museum's own consultant's Opening Bid[.]" Brief of

the AGO, Appeals Court Docket No. 2017-P-1548 at p. 45-46.

The settlement does purport to have reached agreement with an unnamed and therefore unverifiable museum buyer for *Shuffleton's Barbershop*, created by Norman Rockwell in 1950 for the *Saturday Evening Post*, and gifted to the Museum by the artist in 1958. The painting is the crown jewel of the proposed sale, estimated by Sotheby's to fetch upwards to \$30 million. The petition places great emphasis on having "secured" a temporary loan back to the Berkshire area of no more than two years (contrasted with Norman Rockwell's gift to the Berkshires . . . forever) but it is anyone's guess as to what that unnamed museum has actually agreed to in an enforceable way (or who may enforce it). The public will apparently have to wait until the day that Museum X announces its loan of *Shuffleton's Barbershop*. No one knows what the sale price is, yet the AGO has agreed to excuse a failure to maximize the prices, meaning that the one sale if not maximized will leave a greater number to be raised before reaching the "cap." One fiduciary lapse will beget more. No change in the composition of the Trustees is agreed upon or, apparently, was even requested by the AGO.

C. Statement of Relevant Facts

1. The Museum's Art Collection Was Established to Serve the Residents of Berkshire County, and Statutory Restrictions Protect This Purpose.

The Museum, now a cornerstone of culture in the Berkshires, first grew as a natural extension of the Berkshire Athenaeum (the "Athenaeum"). The Athenaeum was incorporated in Pittsfield in 1871. RA-0216. Established by an act of the Legislature, the Athenaeum's stated mission was "promoting education, culture, and refinement, and diffusing knowledge by means of a library, reading-rooms, lectures, museums, and cabinets of art and historical curiosities. . . ." *Id.* The Athenaeum's property is, and always was, subject to a geographic restriction:

no part of such real and personal property, or such gifts, devises or bequests, shall ever be removed from the town of Pittsfield.

*Id.* A second act of the Legislature on March 6, 1903 changed the name of the Athenaeum to the "Berkshire Athenaeum and Museum." RA-0218. It limited the number of Trustees of the Athenaeum to twenty (20), nine (9) new seats in addition to the eleven (11) created in the 1871 charter. *Id.* It made no change to the Athenaeum's geographic restriction. *Id.*

On or about April 2, 1903, Zenas Crane deeded the land where the Museum now stands by gift "for the purpose of establishing a Berkshire Museum of Natural



History and Art in connection with the Athenaeum." RA-0220 (emphasis added). He also bequeathed monetary gifts to the Athenaeum, and his son Zenas Marshall Crane later bequeathed \$200,000 and certain of the Artwork. RA-0223-44; RA-0248-69.

In 1932, the Legislature once again amended the governing documents of the Museum. RA-0246-47. On March 31, 1932, the Legislature passed a resolution creating a new entity named the Berkshire Museum, and it authorized the existing Athenaeum to transfer its property to the newly-chartered entity:

for the purpose of establishing and maintaining in the city of Pittsfield an institution to aid in promoting for the people of Berkshire county and the general public the study of art, natural science, and culture history of mankind and kindred subjects by means of museums and collections. . . .

RA-0246 (emphasis added). The number of Trustees is limited to fifteen. RA-0247. Once again, no alteration was made to the geographic restriction on the works in the original Athenaeum collection, nor has the Legislature ever changed that restriction, which remains in force today. RA-0195.

**2. The Museum's Collections Management Policy Provides Additional Safeguards.**

Internal rules further protected the Museum's collection. At all relevant times - from 2012 through July 11, 2017 - the Collections Management Policy set

forth the following "Criteria for Deaccession and Disposal":

1. That the work does not represent the standard of quality which the Museum seeks to maintain for exhibition or scholarly purposes.
2. That the object is no longer relevant or the object is clearly outside the scope of the museum's mission.
3. That the work is in poor condition and/or beyond the museum's capacity to maintain. The work is beyond restoration or the cost of restoration exceeds the value of the work.
4. That the work is a duplicate of another work in the collection - i.e., as in the case of prints and photographs.
5. That after consulting with acknowledged specialists in the field, the work is found to be a facsimile or unauthentic work.

RA-0819-20. The Collections Management Policy<sup>3</sup> also sets forth "Deaccession Ethics," including: "At all times the original donor's wishes will be considered[.]" RA-0821.<sup>4</sup> Deaccession may take place "[o]nce the Collections Manager and Executive Director have surveyed the collections and noted those works of

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<sup>3</sup> The Member Plaintiffs, through counsel, had specifically requested this and other documents related to the governance of the Museum. See RA-0207; RA-0282-83. The Museum never even responded to this request, understandably, as it turned out, because the Museum had already violated this and other policies as explained herein.

<sup>4</sup> Norman Rockwell donated art to the Museum with the wish and intent that his works be displayed at the Museum for the benefit of the people of Berkshire County. See, e.g., RA-0791-2 (Thomas Smith aff.); RA-0321 (Dan Monroe aff.).

art and objects which meet with one or more of the aforementioned criteria in the Collections Management policy, and have satisfied themselves that no legal obstacles impede the process of deaccessioning[.]” RA-0833.

The pre-2017 Collections Management Policy - the enactment of which was ironically one of the last prudent things that the Trustees did - existed within the context of museum ethics on deaccessioning. Those ethics are not laws - the Member Plaintiffs have never suggested otherwise - but they are critical context for understanding the Trustee defendants’ discharge of their fiduciary duties. In turn, those ethical rules are articulated in policies promulgated by the Association of Art Museum Directors (“AAMD”), the American Alliance of Museum (“AAM”), and others. Deaccessioning is an issue unique to museums because art and cultural artifacts are both property in one sense, but something of different and larger significance in another sense. RA-0318.

One of the most fundamental and long-standing principles of the museum field is that a collection is held in the public trust and must not be treated as a disposable financial asset. RA-0320. The AAMD’s Policy on Deaccessioning “sets forth the critical requirements for collections management to be consistent” with a museum’s “duties to the public.”

RA-0318. One such requirement is that "Museums must not capitalize or collateralize collections or recognize as revenue the value of works of art." *Id.* Donated items should be "subject to an organizational policy that requires the proceeds from sales of collection items to be used to acquire other items for the collection." RA-0319. Similarly, the AAM, of which the Museum is a member, requires that "in no event" shall proceeds from the sale of art "be used for anything other than acquisition or direct care of collections." RA-0320.

These principles are not merely aspirational; they are existential to safeguard otherwise commercially valuable property from the temptations of the skyrocketing art market:

Museum collections in Massachusetts alone are worth billions of dollars. If museums were allowed to monetize their collections by selling art or other objections in their collections to pay for deficits, new exhibits, staff salaries or other expenses, then public trust in museums would be severely compromised and the financial underpinning of museums would be severely eroded. Individuals will not contribute works of art or other objects to museums for their collections if museums could sell objects from their collections to generate cash. That is a model of untrustworthy practice and an assured way to undermine the financial base of American museums.

RA-0320. Lori Fogarty, current President of the AAMD and Executive Director of the Oakland Museum of California, explained further in an affidavit that forms part of the record below:

For donors to continue to donate art, they must trust that the institution receiving their gifts will transparently follow accepted deaccessioning and disposal practices, and that the donor's intent will be followed if the museum considers their work for deaccession and sale.

RA-0794. Ms. Fogarty went on to say:

I have never seen a proposed deaccession in violation of AAMD policy of the scale and enormity as the proposed deaccession and sale that the Berkshire Museum has planned.

RA-0795 (emphasis added).

As the authoritative state agency - the Massachusetts Cultural Council ("MCC") - explained: "The Museum disregarded these important guidelines in its deaccessioning process." RA-0128.<sup>5</sup>

The Museum publicly announced the Liquidation Sale in July of 2017. The Rockwell paintings proposed to be sold first, *Shuffleton's Barbershop*, is widely considered his greatest work. For a few weeks in August, the Museum pretended to participate in public dialogue about its plans, which the Museum announced without any specific timetable. On September 6, 2017, however, Sotheby's announced the dates and sequence on which the Artwork would be sold, with the first

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<sup>5</sup> In particular, the MCC acknowledged "longstanding, widely accepted museum standards that require that funds generated from deaccessioning must be used for the care and preservation of artwork, or to purchase new art. Museum collections should never be treated as disposable financial assets." RA-0128. The Member Plaintiffs understand that the MCC will ask the Court to consider its views as *amicus curiae* as well.

auction scheduled for November 13. The two litigations followed soon after.

The Museum has argued publicly and in this petition that the Liquidation Sale is the result of impending financial needs. Yet as recently as December 2015, the Museum proudly reported to the MCC:

**The Berkshire Museum has a proven record over the past ten years of successfully raising capital funds. Between 2005 and 2008, it secured more than \$9 million for major improvements in the building . . . . Between 2012 and 2014, the Museum raised \$1.6 million to fund building improvements for energy conservation and architectural accessibility and safety requirements . . . . The current project is part of an ongoing \$16 million capital campaign, for which we have secured nearly \$5 million.**

RA-1043 (emphasis added).<sup>6</sup> Similarly, in October 1, 2015, Museum Director Van Shields publicly touted the Museum's fiscal health. RA-0202. In an interview with the *Berkshire Eagle*, Shields argued: "We're in a good financial position[.]" *Id.* He discussed the Museum's budget and made no mention of a deficit or any other problem. *Id.* The MCC noted: "The Berkshire Museum applied to the Cultural Facilities Fund in FY07, FY12, FY15 and FY16 and had been awarded multiple grants in this timeframe. The narrative in those applications

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<sup>6</sup> In 2014, the Museum reported: "In 2012, the Museum initiated an 'invest and grow' strategy designed to increase annual contributed and earned income in order to reduce the gap between the operating budget and revenue sources. This has yielded positive results to date, through increases in membership, fundraising event income, program fees, shop sales, and facility rentals." RA-1016.

did not characterize the museum being under imminent threat of closing." RA-1004.

The real genesis of the Liquidation Sale was the hiring of Shields. Shields spoke of "monetizing" the Museum's collection almost as soon as he arrived in 2011. RA-0200. At his prior post as Executive Director and CEO of the Culture & Heritage Museums in Rock Hill, South Carolina, Shields adopted a similar hostility toward fundraising and transparency. *Id.* Shields left his South Carolina position in 2011 and was hired by the Museum. RA-0201.

Shields was guided in pursuing this strategy by the Museum's then- and current counsel in this petition. In 2015, Attorney Mark Gold candidly advocated for what is asked for in this petition. Attorney Gold contributed a chapter<sup>7</sup> for *The Legal Guide for Museum Professionals* (Rowman & Littlefield Publishers (2015)) quite literally entitled "Monetizing the Collection: The Intersection of Law, Ethics and Trustee." Attorney Gold applauded the deaccession at the Delaware Art Museum that, as detailed in the Member Plaintiffs' papers in the Superior Court and the Appeals Court, resulted in the ostracizing of that museum and no appreciable

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<sup>7</sup> In full disclosure, undersigned counsel for the Member Plaintiffs also wrote a chapter in the same book.

stabilization of its finances. He wrote further  
(emphasis added):

To date, the trustees of the Berkshire Museum have honored the restriction of the use of the proceeds from this sale, as required by the ethical rule. Since the proceeds are otherwise unrestricted as to use, if the trustees were to apply those proceeds to fund operating or capital expenses for the museum, all in support of its articulated mission, they would unquestionably be within their legal right to do so. Indeed, one might speculate that at some point, if conditions became dire, they would be violating their fiduciary duties to the institution by declining to do so.

In 2015 – the same year when the Museum lauded its fundraising ability to the MCC, the same year when Shields commended the Museum’s financial position in an interview, and the same year as Attorney Gold’s chapter – “[t]he Museum contacted Christie’s and Sotheby’s to get a valuation of the collection[.]” RA-0852 (presentation from Museum Board’s 2016 retreat). Both “auction houses evaluated objects with the highest values, those they would be best positioned to assist with selling” (RA-0853) – not the objects that met the Museum’s deaccessioning criteria. The Museum has tried to downplay the total number of objects as a percentage of the collection. According to the papers filed in the Superior Court, however, the objects now



proposed for sale constitute nearly 85% of the market value of the entire Museum collection.

The distance between profitability and "impossibility" is illustrated by the Museum's own consultant, TDC of Boston. TDC noted that an additional \$13 million in general endowment would close the annual structural deficit that it estimates to be \$923,000. Assuming the board raises minimal funds, which is addressed later, the amount increases to \$25.6 million in order to fund additional needs: the Museum's finances in the last two years of public disclosure (ended June 30, 2016) show an annual expense level of \$3.2 million. In addition, TDC noted that several changes, such as the storage of inventory off-site, would reduce its expense base. TDC was provided a list of potential capital expenditures in their "base plan."

So much attention has understandably focused on the plans for the sale itself that the original basis to which the Trustees pointed – financial stabilization – have been largely ignored. At the Trustees retreat at which the Museum's consultant, TDC, presented various options, the "stabilization" figure was \$25.6 million. Not \$50 million, certainly not \$70 million. An argument for a figure to stabilize the Museum somehow morphed into a "need" for a dramatic expansion. The TDC study outlines what the

authors call the "Opening Bid" of "Phase I of the Master Planning process." The "Opening Bid" describes the "baseline capital needs the Museum would require" to stabilize its facilities and finances without "significant change in the Museum's business model or operations." "Our primary goal in this exercise is to reach an initial consensus on how to think of the size and scope of the Museum's capital needs in the event that nothing changes," the report explained. In other words, the memo is a blueprint of how the Trustees could to make the Museum whole without gutting either its collections or mission.

The final area, balance sheet strengthening, placed the greatest emphasis on building an endowment of \$20 million. Of this amount, the Museum had an existing endowment of slightly more than \$7 million at the time. (According to the current petition, "At the end of 2017, [the] endowment had shrunk to approximately \$6.2 million.") In total, the TDC report estimated a "total baseline need" of \$32.9 million, of which the Museum had about \$7 million. The outstanding capitalization amount came to some \$25.6 million, about \$19 million of which could be deemed immediately necessary. The report characterized the remaining \$6.6 million as "incremental."

Notably, however, as noted in the AGO's January brief, "the Trustees of the Museum did not spend two

years identifying a solution to its financial and operational needs. Instead, once the Board learned the value of its art, it dropped the \$25.6 million plan to stabilize the organization's finances and pursued options that were more than twice that price." Thus, there was never any discussion of what was actually necessary (or, by implication, what would be impossible without such an infusion). This is the true "vision" the Trustees are pursuing. It begins with "Exhibit F," a TDC report that outlines the estimated dollar value of the collection as determined by the auction houses Christies and Sothebys. The six-page report, dated May 6-7, 2016 and labelled "BM Board Retreat: CONFIDENTIAL FOR DISCUSSION ONLY," summarizes the case for monetizing the collection. Of 35,000 items in the Museum's collection, it explained, Christies valued 503 items, including 296 objects and 207 artworks. Sotheby's valued 270 items, 63 objects and 207 artworks. The total number of unique objects valued by the two houses was 585, of which 207 were artworks and 378 objects. Although TDC found that \$19.5 would keep the doors open with a significantly upgraded museum, the Trustees pushed ahead with the grander scheme.

On May 25, 2017, Board President Elizabeth McGraw sent her fellow Trustees an email with the subject line "loose lips sink ships." RA-1052. She wrote: "We

are now two months away from officially revealing our plans for the Berkshire Museum's transformation and THE NEED FOR CONFIDENTIALITY HAS NEVER BEEN GREATER. . . . Please, Please, Please refrain from discussing the details of our strategy with anyone." *Id.* Although the Museum conducted much-touted focus groups about the New Vision, Shields has now admitted that the focus groups had not been told about how the New Vision would be funded, *i.e.*, by the Liquidation Sale. RA-0203. Similarly, the MCC "*repeatedly requested the Museum's New Vision Business Plan but the request was denied.*" RA-1007 (emphasis original to MCC document).

Although the Sotheby's contract was signed on June 13, 2017, the Museum did not tell the public or its members for over a month. RA-0274-80; RA-0624. Compounding this deceit, in the Museum's 2017 filing to the MCC, submitted after the release of the "New Vision," the Museum answered "no" to a question about whether any material changes had taken place in the year prior or were planned in the year ahead. RA-0203. While it did tell the AGO, this notice was of a piece with the Museum's correspondence through this case: denying the AGO's authority to do anything and announcing its intention to do as it wished.

As discussed above, the claim of financial distress contradicts the Museum's own representations in 2015, when the Museum was already in discussions

with Sotheby's and Christie's. Moreover, Stephen C. Sheppard ("Professor Sheppard"), a professor of economics at Williams College and director of the Center for Creative Community Development, which studies nonprofits, said the Museum could sustain itself on an endowment a fraction of the one that it claims it needs the Liquidation Sale to realize. RA-0290-91.

At least one Trustee will benefit personally from the Liquidation Sale. Trustee Jeffrey Noble is the President of Hill-Engineers, Architects, Planners, Inc., which has "completed several renovation projects for the Berkshire Museum, including architectural and engineering design and construction supervision for a recently completed \$2.3 million energy and accessibility project." RA-1049. Noble's company has also been awarded work associated with the "New Vision." RA-0279. The AGO Assent is conspicuously silent on this question. Under the settlement, Noble may continue to serve as a Trustee and may direct astronomically expensive projects toward his company with no discernable limitation.<sup>8</sup>

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<sup>8</sup> This plainly violates the AGO's guidelines on conflicts of interest, which state:

Any conflict transaction should be scrutinized very closely by the board, both because of the dynamic it creates within the board and because of the predictable skepticism with which the public and [con't]

Notably, the Museum had tried to draft Professor Sheppard to endorse its public pronouncements about its finances, and he pointedly declined. Professor Sheppard analyzed fifteen years of Museum financial documents. RA-0308. Sheppard studied the Museum's audited annual financial statements, which show that the Museum could operate for eight additional years at its present operating deficit. RA-0290. Professor Sheppard observed critical flaws in the "New Vision." RA-0289-90. First, the Museum has an endowment, but the Trustees failed to account for income that the existing endowment will generate. RA-0289. In addition, the fictional endowment that the Liquidation Sale is supposed to create is not part of any actual plan; indeed, the Museum has no business plan. RA-0288. As the Museum acknowledged, it put its successful fundraising campaign "on hiatus" while it created the new plan that relies upon the Liquidation Sale (RA-1049), knowing that cashing in paintings would make fundraising unnecessary.

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regulators will view the transaction, no matter how scrupulously a careful policy is followed.

See "The Attorney General's Guide for Members of a Charitable Organization," available at <http://www.mass.gov/ago/docs/nonprofit/guide-for-board-members.pdf>, at p. 9.

The professional museum community is vehemently opposed to the Museum's plan to sell art to support operations and capital improvements. See, e.g., RA-0317-52 (Monroe Aff.); RA-0793-95 (Fogarty Aff.) . The MCC explained: "We fear . . . that [the Museum's] broader plans rely on uncertain market and cost projections, and that widespread public opposition to the deaccession will erode the very base of support upon which the Museum must depend to realize its ambitions." RA-0129.

After the announcement of the Liquidation Sale,<sup>9</sup> the AAM and the AAMD stated in no uncertain terms what a catastrophe it would be if implemented. RA-0271-72.<sup>10</sup> The two organizations issued a joint statement. *Id.* In relevant part:

Selling from the collection for purposes such as capital projects or operating funds not only diminishes the core of works available to the public, it erodes the future fundraising ability of museums nationwide. **Such a sale sends a message to existing and prospective donors that museums can raise funds by selling parts of their collection, thereby discouraging not only financial supporters, who may feel that their support isn't needed, but also donors of artworks and artifacts, who may fear that**

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<sup>9</sup> Deaccessioning was already on the docket in 2015. Rather than follow the AAM or AAMD guidelines or the Museum's policy, Shields proposed his own line of inquiry: "Is it mission critical? Is it necessary to continue to meet our interpretive goals? And what is the financial value?" RA-0210 (emphasis added).

<sup>10</sup> The AAM "represent[s] the entire scope of the museum community," and the AAMD "represent[s] 243 directors of North America's leading art museums[.]" RA-0271.

their cherished objects could be sold at any time to the highest bidder to make up for a museum's budget shortfalls. That cuts to the heart not only of the Berkshire Museum, but every museum in the United States.

*Id.* (emphasis added). Based on this, the Museum will almost certainly be sanctioned by the AAMD and the AAM if the Liquidation Sale proceeds. RA-0205. AAMD President Lori Fogarty attested in an affidavit to the Berkshire Superior Court: "The AAMD board of trustees has imposed sanctions on museums which have violated its deaccessioning policy and applied sale proceeds for something other than future acquisitions . . . . [A] major result of AAMD sanctions is that traditional loaning and borrowing activity with the sanctioned museum effectively halts." RA-0794. Prior targets of AAMD and/or AAM sanctions for deaccessioning violations included the National Academy Museum in New York and the Delaware Art Museum (lauded by the Museum's advisors). RA-0205. Despite the initial receipt of significant sale proceeds, those museums' management crises continued unabated. *Id.*

These consequences are neither theoretical nor speculative. *Id.* As a result of the Liquidation Sale's defiance of AAM and AAMD rules, the Museum has already been forced to withdraw its relationship with the Smithsonian Institution (the "Smithsonian"). *Id.* The Smithsonian, America's premier public cultural



steward, affiliates with museums around the country to cultivate educational opportunities. *Id.*

### III. INTEREST OF THE *AMICI CURIAE*

The Member Plaintiffs are or were dues-paying members of the Museum, invested in the purposes for which the Museum has always held itself out to the public. As noted above, the Member Plaintiffs sought timely enforcement of principles of good governance, claims that are still pending in the courts of the Commonwealth (and which the Court may elect to review now if it determines it to be prudent). The Member Plaintiffs' interest remains focused on the proper governance of this institution. It is simply impossible to reconcile the contradictory public statements that the Museum's leadership has made about the Museum's financial condition. After destroying their own credibility, the Trustees ask for this Court's blind trust. The Museum's pronouncements about the reasons for the "New Vision" cannot be taken at face value. The Member Plaintiffs have watched in dismay as the Executive Director has explicitly endorsed the idea of "monetizing" the cultural assets of the Museum against all prevailing wisdom.

The Member Plaintiffs' interest in the current proceeding is to oppose the *cy près* petition that is the final stage of the solution in search of a

problem. The current petition effectively substitutes a standard of "difficult" in place of the actual legal requirement that the status quo be impossible or impracticable, and the petition leaves the museum public and the Commonwealth with no voice or advocate. Regrettably, the AGO has acceded to this disastrous outcome even as it confirms the Museum's mismanagement. The Member Plaintiffs come to the Court as *amici curiae* to seek the only safeguard left for the cultural artifacts - and reputation - of the Commonwealth.

Given the highly unusual posture of the case and that both initial parties to the proceeding support the petition, Member Plaintiffs respectfully request the opportunity to address the Court at any hearing that may be scheduled.

#### IV. SUMMARY OF THE ARGUMENT

The Museum's petition to permit deviation from restrictions on the sale of the core of its art collection should be denied. The further management of the Museum is not impossible or impracticable - the first element of a *cy près* petition - it is difficult because the board of Trustees ceased fundraising years ago and chose instead to try to be an iconoclast of museum ethics by bartering paintings that the

Pittsfield community has cherished for over a century. Bent on "monetizing" a collection that was assembled for precisely the opposite reason, the petition fails to persuade. The AGO's endorsement, or at least refusal to oppose, this abandonment of the Museum's charitable restrictions is particularly disappointing; after assembling a months-long record of the Museum's mismanagement, the AGO now waives the Trustees through the gate that it should be guarding.

Even if one accepts at face value the supposed financial needs of the Museum, the evisceration of a collection of American art unique to Pittsfield and the Berkshire community is the very worst remedy, not the nearest to the original purpose. The proposed sale of *Shuffleton's Barbershop*, while painful to contemplate, at least makes some gesture towards the public accessibility of a work that Norman Rockwell gave for that purpose in perpetuity. The proceeds of that sale would more than satisfy the amount that the Museum has said for months that it needed to stabilize its finances.<sup>11</sup> Cy prè is not to turn an institution inside out; it is to return it "as near as possible"

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<sup>11</sup> Although the Museum refuses to disclose the sale price in its petition, Sotheby's previously valued this work at \$20-30 million. RA-0888.

to where it began. *If* this Court finds that the Museum has met its burden of establishing impossibility, it should permit only the one sale of *Shuffleton's Barbershop* and then entrust the Museum to different Trustees and leadership who will do their job.

## V. ARGUMENT

### A. A Petition for Cy Près Requires the Non-Profit to Demonstrate Impossibility and a Narrow Remedy.

Cy près exists as a tool to respect donors' wishes once their original intentions have become impossible. "Unless a charitable bequest is impossible or impractical to effect as written, a court need not reach the question whether the gift evidences a specific or a general charitable intent." *Pritchard v. Att'y Gen.*, 77 Mass. App. Ct. 494, 496 (2010) (citing *Richardson v. Mullery*, 200 Mass. 247, 249 (1908) and *Davenport v. Att'y Gen.*, 361 Mass. 372, 376 (1972)) (finding that gift did not fail); see also *Trs. of Putnam Free Sch. v. Att'y Gen.*, 320 Mass. 94, 98 (1946) ("if it has become impracticable or impossible to carry out the testator's intent in the precise manner designated by him, the property may be applied by the doctrine of cy pres to some charitable purpose within his general charitable intent."); see

*also Trs. of the Corcoran Gallery of Art v. D.C.*, 2014 D.C. Super. LEXIS 17, at \*38-39 (D.C. Sup. Ct. Aug. 18, 2014) ("a party fails to establish impracticability in the *cy pres* context if it merely demonstrates that it would be inconvenient or difficult for the party to carry out the current terms and conditions of the trust. Rather, a party seeking *cy pres* relief can establish impracticability only if it demonstrates that it would be unreasonably difficult, and that it is not viable or feasible, to carry out the current terms and conditions of the trust.").

If impossibility is established, the petitioner must next prove that "the testator has a more general intention to devote the property to charitable purposes" and that the proposed deviation is consistent with those purposes. *Wesley United Methodist Church v. Harvard Coll.*, 366 Mass. 247, 250 (1974); *see also Teele v. Bishop of Derry*, 168 Mass. 341, 344-45 (1897) ("But if the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object . . . the doctrine of *cy pres* does not

apply, and, in the absence of any limitation over or other provision, the legacy lapses.") (finding that the testatrix had a specific purpose "to build a chapel in Carndrine," not "a general intent to advance religion in the parish"). At all times, the donor's intention must be respected. See *Museum of Fine Arts v. Beland*, 432 Mass. 540, 544 (2000) ("A sale of the fourteen paintings would be the antithesis of Wolcott's intent because the sale could deprive the public of any opportunity to view them.") (also holding that, on the record, impossibility had not been established); *Corcoran*, 2014 D.C. Super LEXIS 17, at \*41 (petitions must "prove, as a factual matter, regardless of good faith, both that it is impracticable to carry out the existing trust and that the proposal is as near as possible to the intent of the trustor.").

1. **The Charitable Purpose of the Berkshire Museum is Neither Impossible Nor Impracticable.**

In its Verified Complaint, the Museum states that it has "faced an annual operating deficit of \$1.15 million." Verified Complaint at ¶ 10. Assuming this verified allegation is true, it means that the Museum and its director were deliberately misleading the

public and relevant state regulators during that same decade, which undermines everything about this institution's credibility and that of its leadership. Even if the deficit alleged in the Verified Complaint were accurate, in no way does it make the century-old charitable purpose of the Museum impossible or impracticable, and it would not require the Trustees to seek tens of millions of dollars.

It is essential in considering the current petition to distinguish the Trustees' burden of establishing "impossibility" of the actual mission of the museum, from the implausibility of the fanciful "New Vision" that seeks to create a state of the art institution with a vast endowment where none was ever created or anticipated. What, after all, is the Museum? It is a charitable museum dedicated to art, science, and history. The shiny-object "New Vision," whose cost was never explained to the focus groups on whose endorsement the Museum now relies so heavily, is not the charitable purpose of the Museum. While all might hope that some version of the Getty Institute would parachute into Pittsfield, it does not justify deviation from the carefully placed restrictions on the institution.

Yet even assuming the operating deficit claimed by the Museum, it is scarcely "impossible" to continue. It is key to recall that the Museum itself tried to draft Professor Sheppard to speak for the wisdom of the New Vision after revealing its plans to him. Rather than credulously accept the Museum's ill-conceived plan, Professor Sheppard actually examined the Museum's finances and concluded that even taking a pessimistic view, the capital needs of the Museum (to be sustainable, as opposed to purchasing everything on its wish list) were dramatically lower. With a properly-managed endowment, the infusion of sum more in the range of \$10-15 million was more than enough.

The question of the endowment's management is no small thing when the Court considers the "impossibility" of the status quo. The past eight years have seen record investment growth in essentially all components of the securities and real estate markets, yet these Trustees somehow managed against all odds not to make any investment income.

The nature of what the Museum claims is "impossible" is little mentioned in the petition, and its understanding is necessary to adjudge the relief requested. The Museum's placement in Pittsfield was in



part geographical: the city, founder Zenas Crane said, was "most central and conveniently accessible" to all the people of the Berkshires. The museum never was just a Pittsfield institution. The collection was based in part on the Victorian model of a "cabinet of curiosity," offering an eclectic array of specimens, artifacts and relics "to aid in promoting education, culture, and refinement," Crane said. His vision was to provide his Berkshire neighbors a "window on the world," a phrase from the original mission.<sup>12</sup> But Crane's vision cannot be understood without understanding the place of the art in this mission.

Crane was no P.T. Barnum, and the "window" he constructed was no mere aperture on the passing parade. The "world" Crane envisioned existed on three levels: a foundational, physical level of natural

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<sup>12</sup> Crane's vision is consistent with the 1871 Act of the Legislature that created the Athenaeum, and which required all gifts, devises, and bequests to the Athenaeum to remain in Pittsfield in perpetuity. That restriction applies to all objects acquired before 1932, and it specifically applies to nineteen of the objects that the Museum now seeks to sell. AGO Assent, p. 3; see also RA-0798 (affidavit of Assistant Attorney General Emily Gabrault). The Museum still stands in Pittsfield; it is hardly impossible to keep its art collection there. Even if the Museum had proven an inability to care for these nineteen pieces (which it has not), the Museum may sell them only to another institution or collector in Pittsfield.

history; an intermediate anthropological level of human endeavor and achievement; and a spiritual level of ideals and morals. This last, highest level, one of essence and existence, was the domain the fine art collection was formed to reveal and promote. Its idealism represents the apogee of the museum's *raison d'être* and the ground of its significance and worth. The spiritual level was the top the other levels were rungs toward attaining. For the Trustees to quote Crane's mission in one breath, then advocate for the sale of the art in the next, is to debase the founder's intent by appropriating his words while ignoring their spirit. The threat of being robbed of this highest vision lies at the root of the failure of the Museum's petition.

It cannot be repeated enough that the claim of "impossibility" rests on the faulty premise of an inability to raise funds. Having ceased trying, the Trustees are in no position to opine about the difficulty of what they gave up on. But the idea that the fundraising climate in the Berkshires is a lost cause is simply false. Numerous not-for-profits have returned from the brink of failure in the region,

three notably among them: Jacob's Pillow; The Mount (Edith Wharton's home); and Shakespeare & Company.

Jacob's Pillow, an outstanding dance organization in Beckett, MA, was buckling under the debt of \$4.8 million and \$432,000 annual interest payments in the mid-1990s. Neil Chrisman, an executive from J.P. Morgan, took the reins as chair, and restructured its \$4.8 million in borrowing and its unmet \$432,000 annual interest payments, avoiding foreclosure. He reorganized the board and its leadership. Ella Baff, who was brought on soon thereafter as Executive Director, recently retired after seventeen years, having won a National Medal of Arts from President Obama.

The Mount faced defaulting on an \$8.5 million foreclosure, at which point its leadership and the board were changed in a very public turnaround. Susan Wissler, who came into a career in preserving Edith Wharton's legacy, has brought the Mount back to solvency and emerged as a shrewd and subtle evangelist for the cause. Without any real funds to contribute while they were in the grips of their lenders, Wissler relied on outside organizations to help her maintain the vibrancy of the place. The Mount invited theater

companies, prominent writers and intellectuals to come in and give talks to what turned out to be sold-out auditoriums of locals.

Lastly, Shakespeare & Co. (Berkshire County's forty-year old theatre company) was suffering under a \$10 million debt load five years ago, similar to a ten-year accumulation of the losses claimed by the Museum here. Sometime after its founder, Tina Packer, retired, Allyn Burrows became Executive Director and has experienced new level of success. The Company now has nearly 200 people on staff, more than 10,000 have gone through their training program, and more than one million students have gone through its education program. Today, nearly 33,000 patrons flock to Shakespeare and Company's plays each season to experience the Bard in the Berkshires.

**2. Nothing About the Museum's Proposed Remedy is "As Near as Possible" to its Original Charitable Purpose.**

Whether the status quo is impossible or impracticable is only half of the Museum's burden, of course. Of equal relevance is what the Museum proposes to do. The Museum falls short in this regard as well, in particular because the compromise to which it has agreed with respect to *Shuffleton's Barbershop*

demonstrates that it knows full well how to at least attempt to accommodate the original charitable restriction by which it is bound. Yet the Museum's agreement to sell *Shuffleton's Barbershop* with restrictions to keep it in public view underscores that the fire sale of the remaining thirty-nine objects abandons the original intent entirely. The Court should reject outright the proposed disposition of those thirty-nine works. If the sale of *Shuffleton's Barbershop* can be justified, then it must at least be the firewall against the remaining dissolution, for which there is no provision at all for the public interest. The other work by Rockwell will almost certainly be next on the block, sold to hang over the mantle of a collector in Oklahoma or a sovereign wealth fund in Dubai. Little could be further from Rockwell's intent. Critically, the Museum can no longer fall back on disputing whether the Rockwells were an enforceable restricted gift; it must show that the emptying of the art collection is as near as possible to the Museum's original purpose. And even taking the AGO Assent at face value, the *Shuffleton's* sale is enough to stabilize the Museum. Cy près means as near as possible. It does not mean

reinvention into a deep pocketed institution now bereft of meaningful purpose. Not every museum can be the Getty, and not every museum should try to be. The Museum has been for over a century a base of cultural expression in the Berkshires, however modest; that is what it must remain, as closely as possible. The immodest petition before the Court is nothing of the sort.

The AGO previously acknowledged this to the Court of Appeals. It wrote:

The Museum's reversal of its long-standing adherence to art-museum norms and practices as part of its plan to sell substantially all of its valuable fine art to fund operating deficits and a New Vision unrelated to its art mission amounts to an abandonment of one of its three statutory purposes: 'promoting for the people of Berkshire County and the general public the study of art . . . by means of museums and collections[.]' . . . . If the Museum follows through with its New Vision, it will cease to be an art museum within the meaning of its charter and past practices.

Brief of the AGO, Appeals Court Docket No. 2017-P-1548, at p. 29 (emphasis added). In addition to a dramatically inappropriate scope of relief, the present petition would hand the keys right back to the driver who crashed the car. There is no way to reconcile Shields's and the Museum's public statements over the past several years with this petition. And

even if that could be forgiven - which it cannot - the best the board can say for itself is that it was merely incompetent as it presided over mounting deficits with no plan. No group has ever less deserved a \$50 million slush fund. This Court is once again the last resort; the AGO has stood for this principle before but, apparently unaccustomed to a strong-willed adversary, the AGO blinked first. The AGO specifically promised that, notwithstanding the Museum's obligation to inform the AGO ahead of time of which other pieces it will sell, it will do nothing about it. Only this Court can stop it now.

What the settlement fails to address, and what the AGO failed to protect, is the essential element of the Museum's identity. Remove the collection's highest values by selling the art treasures, and all that is left is a building transformed into a kind of animate textbook or illustrated lecture. Future trustees, administrators, and patrons may wish to reclaim the Museum's highest vision, but the institution will never again be able to rise above its own base meaning, for it will no longer own the art or the means to attain it.

The Museum claims that the artworks proposed for sale "have been deemed to be not essential to the Museum's refreshed mission." By changing the mission from one *essentially* of idealism and virtue to one of spectacle and display, the Trustees and leadership make a radical claim - that the community it serves has neither the need nor desire for such aspirational values. In its January 16, 2018 brief, the AGO poignantly noted that the Trustees' decision to "dispose of its most celebrated and valuable art would undeniably harm the public interest," an interest the final settlement failed utterly to defend. How can the most important things be the ones that are now least protected?

Lastly, the unspoken component of the petition is one that the Museum has adopted as its PR mantra: that the Museum's "greatest asset is its open doors." The arrogance in this statement is staggering. The Museum exists to safeguard and protect its collection; the collection does not exist to perpetuate the position of the Trustees and the Executive Directors. Is there any question that Norman Rockwell and Zenas Crane would rather the works now on the auction block be displayed permanently in another museum in Berkshire



County rather than have a memorial to their former museum where their gifts cannot be seen? The Museum is a treasure that these Trustees did not create and that this board has done its level best to destroy, but it is not guaranteed immortality at the expense of common sense.

#### VI. CONCLUSION

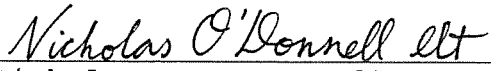
For the foregoing reasons, the Member Plaintiffs respectfully request that this Court DENY the present petition or, in the alternative, DENY so much of the petition as relates to the proposed sale of any work of art other than *Shuffleton's Barbershop* by Norman Rockwell.

February 26, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

RULE 16(k) CERTIFICATE OF COMPLIANCE WITH  
RULES OF APPELLATE PROCEDURE

Counsel for Appellants James Hatt, Kristin Hatt,  
and Elizabeth Weinberg hereby certifies that the  
foregoing Brief of *Amici Curiae* James Hatt, Kristin  
Hatt, and Elizabeth Weinberg complies with the Rules  
of Appellate Procedure, including Rules 16, 18 and 20,  
that pertain to the filing of briefs.

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CERTIFICATE OF SERVICE

I certify and state under the pains and penalties of perjury that on February 26, 2018, I served the foregoing Brief of *Amici Curiae* James Hatt, Kristin Hatt, and Elizabeth Weinberg on William Lee, Esq.; Felicia Ellsworth, Esq.; and Andrew Dulberg, Esq.; counsel for Defendants-Appellees Trustees of the Berkshire Museum (William.Lee@wilmerhale.com; Felicia.Ellsworth@wilmerhale.com; and Andrew.Dulberg@wilmerhale.com), and upon Courtney M. Aladro, Esq. (courtney.aladro@state.ma.us), Chief of the Division of Public Charities of the Office of the Attorney General, all by e-mail, as agreed upon beforehand between counsel as to the manner of service.

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