COMMONWEALTH OF MASSACHUSETTS

Appeals Court

BERKSHIRE, SS. NO. 2017-P-1548

THOMAS ROCKWELL, JARVIS ROCKWELL, PETER ROCKWELL, TOM PATTI, TOM PATTI DESIGN LLC, JAMES LAMME, DONALD MACGILLIS, JONAS DOVYDENAS, AND JEAN ROUSSEAU,
Plaintiff-Appellants,

v.

TRUSTEES OF THE BERKSHIRE MUSEUM AND MAURA HEALEY, IN HER CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
Defendant-Appellees.

ON APPEAL FROM AN ORDER ON A MOTION FOR PRELIMINARY INJUNCTION OF BERKSHIRE COUNTY SUPERIOR COURT

BRIEF OF THE SUBSTITUTED PLAINTIFF-APPELLANT

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QUESTION PRESENTED

Whether the Superior Court abused its discretion in denying a motion for preliminary injunction brought by the Attorney General's Office ("AGO") where the AGO sought to halt a charitable museum from selling substantially all of the valuable pieces of art in its collection to fund operating deficits and new renovations, on the grounds that the sale would require court approval because it would change the fundamental purpose of the museum and the fundamental purpose for which the assets were given and would violate restrictions on the museum's art, and where the board of trustees did not properly consider legal limitations and less drastic alternatives to the proposed art sale.

STATEMENT OF THE CASE

A longstanding museum of art, natural science and history, Pittsfield's Berkshire Museum (the "Museum"), intends to sell its most valuable artwork, shift its focus to science and history, and use the proceeds to fund operating expenses and new renovations unrelated to operating an art museum.[1] The Museum intends to sell 40 works of art, works that constitute almost all of

[1] The Legislature incorporated the museum and named it the "Trustees of the Berkshire Museum." See 1932 Mass. Acts & Resolves Ch. 134. In this brief, the term "Museum" refers to the entity, while the term "Board" refers to all of the individual "trustees" who serve as the trustees of the Museum.

the Museum's valuable art and that include notable pieces such as two paintings created and donated by Norman Rockwell and 19 works owned by the Museum since it was incorporated in 1932.

The AGO is investigating the Museum's plan. The AGO contends that the sale cannot proceed because it would change the fundamental purpose of the Museum, violate restrictions on the Museum's art, and resulted from the Board's failure to exercise its fiduciary obligations. As a result, the AGO brought four claims against the Museum and asked the Superior Court to maintain the status quo by enjoining the sale pending this litigation, because once the artwork is sold, there is no way to get it back. SA3-28 (AGO's Superior Court memorandum).[2] The Superior Court declined to temporarily halt the proposed sale. ADD1-25. The AGO appeals that decision.

In the interim, the sale was enjoined, at least until the conclusion of the AGO's investigation on January 29, 2018, by a single justice of this Court. Dkt. RE23 (17-J-510). As the single justice ruled: "[t]he balance of the risk of irreparable harm to the [AGO] and the [Museum] in light of each party's chance

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[2] References to "A__" and "SA__" are to the three-volume appendix and single volume supplemental appendix, respectively. The material in the SA is no longer under an impoundment order. References to "ADD__" are to the addendum attached hereto.

of success on the merits weighs in favor of the [AGO].” A1418; Dkt. #12 (17-J-510).

Prior Proceedings

On October 20, 2017, several private citizens led by the children and beneficiaries of the estate of renowned artist Norman Rockwell (the “Rockwell Plaintiffs”) sued the Museum in Berkshire County Superior Court, alleging that the charity – through its officers and directors – had breached its fiduciary duties, breached charitable trusts, and breached contracts by proposing to sell the artwork and use the proceeds to fund major building renovations, cover operating deficits, and enlarge its endowment. A59, A76-7. The Rockwell Plaintiffs also named the Attorney General “as a necessary party pursuant to G.L. Ch. 12, § 8G,” and asked the court for a temporary restraining order and preliminary injunction to prevent the Museum’s sale of artwork through Sotheby’s, an auction house whose U.S. operations are based in New York City. A68, A78.[3]

[3] Shortly after the Rockwell Plaintiffs filed suit, the “Hatt Plaintiffs” (Berkshire residents and museum members) brought a second suit making similar allegations against the Museum and its board. James Hatt, et al. v. Trustees of the Berkshire Museum, Suffolk Super. Civ. A. No. 1784CV03439 (Sept. 25, 2017). The Superior Court consolidated the two suits on October 27, 2017. A61. The AGO is not a party to the Hatt Plaintiffs’ lawsuit.

The Rockwell Plaintiffs filed suit in the midst of the AGO's extensive investigation into the Museum's proposed sale, pursuant to the AGO's common law and statutory authority under G.L. c. 12, § 8 and G.L. c. 180, § 8(A)(c). While the investigation was not yet complete, it had progressed enough for the AGO to notify the Museum that the proposed sale would amount to a change in purpose and violation of certain charitable restrictions and thus would require court approval under *cy pres*. A1197. As part of its ongoing cooperation with the AGO, the Museum requested that the AGO not respond to the Rockwell Plaintiffs' motion for a preliminary injunction until after the Museum had an opportunity to respond. Id. Accordingly, the AGO joined the Rockwell Plaintiffs' motion after the Museum filed its opposition. A1200.

Following a November 1, 2017 hearing on the motions for preliminary injunctive relief, the AGO moved to substitute itself as plaintiff and for a preliminary injunction in the event the original plaintiffs were found to lack standing. A1163-65. The Superior Court substituted the AGO as a plaintiff, A63, and the AGO filed an answer and four-count claim against the Museum. A1180-94.

On November 7, 2017, the Superior Court found that the Rockwell and Hatt Plaintiffs lacked standing to sue, and concluded that the AGO was the proper

plaintiff to challenge the Museum's planned sale. ADD9. The Superior Court, however, denied the AGO's motion for preliminary injunctive relief. ADD25. The AGO timely appealed that decision pursuant to G.L. c. 231, § 118, ¶ 2. See A1477.

In addition, the AGO simultaneously sought an order from the single justice of this Court pursuant to Mass. R. App. P. 6(a), requesting that the single justice enjoin the Museum from selling, auctioning, or otherwise disposing of any of the 40 works of art the Museum identified for sale (some of which were scheduled for auction on November 13, 2017), pending the appeal of the Superior Court's decision. A1477; Dkt. #1 (17-J-510).

The single justice stayed the Superior Court proceedings (A1417) and enjoined the sale of the artwork until December 11, 2017 (A1418) based on the parties' chances of success on the merits and in light of the balance of harms. In so doing, the single justice ruled that, "[p]rior to the expiration of the injunction, the [AGO] may move to extend the injunction with a date certain by which the [AGO's] investigation will be completed." Id. On December 6, 2017, the AGO requested an extension of the injunction and stay until January 29, 2018, a date by which it anticipates completing the investigation – assuming continued cooperation from the Museum. Dkt. #23 (17-J-

510). On December 13, 2017, the single justice extended the injunction against the sale and the stay of the Superior Court proceedings until January 29, 2018. Dkt. RE23 (17-J-510).[4]

Statement of Facts

A. The Berkshire Museum is an Art Museum

The Museum serves several purposes, but it is – and always has been – a museum of fine art. The Museum, located in Pittsfield, had been a part of the Berkshire Athenaeum from 1903 until 1932. See 1903 Mass. Acts & Resolves Ch. 131 (the "1903 Act," ADD29-30); 1932 Mass. Acts & Resolves Ch. 134 (the "1932 Act," ADD31-35). The Athenaeum itself had been created by the state legislature in 1871, and when it was chartered, the Legislature required that "no part of such real and personal property, or such gifts, devises or bequests" as the Athenaeum receives "shall ever be removed from the town of Pittsfield." See 1871 Mass. Acts & Resolves Ch. 129 (the "1871 Act," ADD26-28).

Zenas Crane, the owner of Crane & Company, paper manufacturer and official supplier of paper to the

[4] Also pending before this Court are appeals filed by the Museum from the stay issued by the single justice (17-P-1528) and the extension of the stay (18-P-0033). In 17-P-1528, the Museum also noticed, but then abandoned, an appeal of the injunction against the sale issued by the single justice.

U.S. Treasury, is credited with founding the Museum in 1903, donating the building, and "purchas[ing] many of [the Museum's] first acquisitions, including a sizeable group of paintings from the revered Hudson River School." A1001.

When the Legislature separated the Museum from the Athenaeum in 1932, it was 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, the culture history of mankind and kindred subjects by means of museums and collections[.]

ADD34. From then until July 12, 2017, when it announced that it would sell substantially all of the valuable pieces of its fine art collection, the Museum honored its purposes, including "promoting for the people of Berkshire County and the general public the study of art . . . by means of museums and collections[.]" Id.[5]

In 1932, the newly-independent Museum held many exemplary works of fine art, such as Albert Bierstadt's "Giant Redwood Trees of California" (A299), Frederic Edwin Church's "Valley of Santa Isabel, New Granada" (A305), and the paintings from the Hudson River School (A1001), such as Thomas

[5] The Museum has also pursued its history and science mandates, although they are not the subject of this dispute. See, e.g., A464 (discussing historical and scientific aspects of Museum).

Moran's "The Last Arrow" (A307). Although highlighted on the Museum's website as integral to its history and mission, A1001, the Museum has identified these pieces for sale. SA61-74.[6]

In 1933, the Museum purchased two pieces by sculptor Alexander Calder, A87-88. These two pieces were the first of the famous sculptor's works that any museum purchased. A87. The Museum frequently loans Calder's works to other museums. Id. The Museum now seeks to sell them for an auction estimate of $3-4 million each. SA63.

Soon after purchasing the Calder works, the Museum sold several paintings for the purpose of improving its art collection. See A368 (newspaper article from March 1, 1935, stating that it sold one painting to the City Museum of St. Louis because, according to the Museum's director at the time: (1) the painting did not fit within the Museum's collection goals; (2) the sale was done with consent of the donor; and (3) proceeds of the sale were placed in a special fund to purchase works "more sorely needed"); A370 (newspaper article from February 9,

[6] These paintings are some of the more valuable paintings the Museum seeks to sell. See SA66 (auction estimate of $5-7 million for Valley of Santa Isabel, New Granada and $1.5-2.5 million for the Giant Redwood Trees of California); SA67 (auction estimate of $2-3 million for The Last Arrow).

1935, stating that, according to the Museum's director at the time, the Museum was selling 23 paintings of a style "adequate examples of which the Museum retain[ed,]" because "storage space was needed for works of art more necessary to the Museum program").

As with the Calder pieces, the Museum "was the first to display the work of Norman Rockwell as well as pieces by artists that challenged convention, such as Andy Warhol, Red Grooms, Robert Rauschenberg, Ellsworth Kelly, and Nancy Graves." A1002. Rockwell himself had a great affinity for the Museum and a lengthy friendship with its longtime Director, Stuart Henry. A1061-4; A1158. Rockwell donated two of his favorite paintings to the Museum – "Shuffleton's Barbershop" in 1958, and "Shaftsbury Blacksmith Shop" in 1966. A349, A352, A1159. The Museum now seeks to sell them for an auction estimate of $20-30 million and $7-10 million, respectively. SA68-9.

In 1972, the concept of "deaccessioning" – removing a piece of art from a museum's collection – first came to widespread attention when the New York Metropolitan Museum of Art sold a number of works. A1188. That same year, the Association of Art Museum Directors ("AAMD") began drafting a policy articulating proper deaccessioning and disposal criteria. A1156. The following year, Rockwell placed his art that he owned in the Rockwell Art Collection

Trust (“Rockwell Trust”) at the Old Corner House Stockbridge Historical Society (then known as the “Society” and now known as the “Norman Rockwell Museum”) and mandated that the art would transfer to the Museum if the Society could no longer fulfill the trust’s terms. A1127-52.

The Museum followed this formalizing trend. The Museum became a member of the American Alliance of Museums (“AAM”), A1184, which established a code of ethics that required its members to use proceeds from deaccessions for the purchase of new art or the direct care of existing art collections. A1006-8. By at least 2006, the Museum had formally adopted a Collections Management Policy governing the sale of art, which memorialized the practices it had employed when deaccessioning art in the 1930’s. A1010-36. One of these policies required the Museum to give other like organizations the “first option to purchase” artwork that the Museum planned to sell. A1020. Another policy required the Museum to use proceeds from any art sale to add to or preserve its art collection. Id.

As the Museum formalized its deaccessioning policies, it continued to acquire fine art such as Thomas Wilmer Dewing’s painting “The White Dress” and a statue of Diana of the Tower by Augustus Saint-Gaudens. A356-7.

Over the years, the Museum brought fine art to

the people of the Berkshires by exhibiting the works of some of the world's most accomplished artists on loan from other institutions. A1001-2. In turn, the Museum lent artworks in its collection to institutions such as the Metropolitan Museum of Art, Mystic Seaport, the Smithsonian Institution, the Guggenheim, and the Tate Gallery. A1002.

B. The Museum's Plan to Sell Its Art and Fund a "New Vision" and "Endowment"

The Museum now intends to sell its 40 most valuable works of art, including the Calder works, the Rockwell paintings, and all the other paintings mentioned above. SA61-74. These works of art were selected for sale not based on their role in the Museum's collection, but for their expected auction value. SA43-48. Unlike the Museum's earlier sales, the proceeds will not go to support its core art mission. Instead, $20 million will be used to convert the Museum into "an interdisciplinary museum with a heightened emphasis on science and history" and $40 million will go to a "new endowment." A378.[7]

[7] The term "endowment" generally refers to funds that donors restrict for long-term investment purposes to support charitable missions by generating expendable interest and growth. For example, the Massachusetts Uniform Prudent Management of Institutional Funds Act defines "endowment fund" as "an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis; provided, however,

(footnote continued…)

This proposed sale ostensibly was prompted by the Museum's financial situation. The Museum claims that for the past decade, it has operated at an average deficit of more than $1 million each year. A558. On November 1, 2017, the Museum reported an $8 million endowment and now contends that it "will be at the point of closing" in "a matter of years." A1371.[8]

Purportedly as a result of these alleged financial troubles, the Museum developed a "New Vision" between 2015 and 2017. A423-32. On June 22, 2015, the former President of the Museum's board reported that a consultant retained for a previously considered merger had recommended that the Museum undertake a process to address its long-term sustainability. A425. The former President also reported that "this process might lead to consideration of deaccession as a possible option," and for that reason, the Museum had asked two auction houses to value its collection. A426-27.

On November 30, 2015, the Board formally engaged the same consultant for its strategic planning

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that 'endowment fund' shall not include assets that an institution designates as an endowment fund for its own use." G.L. c. 180A, § 1.

[8] In contrast, when the Museum applied for money from the Massachusetts Cultural Facilities Fund in FY07, FY12, FY15 and FY16 (and was awarded multiple grants in this timeframe), it did not characterize itself as being under imminent threat of closing. A704.

process. A426. Over the next twenty months, the Board developed and considered various plans and discussed selling art to fund them. A426-29. On April 13, 2016, the Museum's consultant said that the Museum needed $25.6 million to address its deficit and stabilize its operations by building up its "endowment"; this was the so-called "Opening Bid." A32. In May 2016, the Board received the auction estimates from the prior year. A428. The 585 most valuable items in the Museum's collections had an estimated total market value of $54 million to $95 million, almost all of which ($47 million to $85 million) was attributed to the 40 most valuable artworks. SA46-48.

On October 24, 2016, the Board considered pursuing three options, all of which were far more expensive than the $25.6 million Opening Bid that was required to stabilize the Museum's operations. A472. The three proposed plans "ranged" in cost "from $52 million to $82 million." Id. "The Board discussed the likely need to deaccession objects from the collection to realize funds to achieve any of the three financial variations presented," id. and "agreed in concept to move forward with the deaccession process." A430.

On March 27, 2017, "the Board agreed to proceed with schematic design for architecture and experience for a $72 million scenario that remained in the existing footprint, recognizing that these plans might

need to be significantly adjusted if the sale yielded a lower than expected amount." A473. That is, the Board selected a plan going forward that was almost three times more expensive than what the Museum's consultant said it would take to buttress the institution's finances.

The Board did not immediately announce its March 27, 2017 plan, however. On June 13, 2017, the Museum entered into a consignment agreement with Sotheby's for the sale of the 40 most valuable pieces of art that Sotheby's had previously identified in the Museum's permanent collection, with an estimated value of $52-76 million. SA61. On June 22, 2017, the Museum notified the AGO of its planned sale for the first time.[9] A1042. On July 12, 2017, the Board voted to change the Museum's Collections Management Policy to conform retroactively to the contract with Sotheby's and planned use of proceeds. A431. At the same meeting, the Museum voted to deaccession the 40 most valuable works the Museum holds (and for which the consignment contract was already signed). Id.

Later that day, July 12, 2017, the Museum publicly announced "the creation of an exciting new interdisciplinary Museum." A377. That plan for the new

[9] The notice provided to the AGO, A1042-1048, failed to fairly characterize the nature of the transaction and its impact on the Museum's identity and mission.

Museum is called the "New Vision." See A423. The New Vision "is expected to cost $20 million; in addition, the Museum will create a new endowment of at least $40 million in order to provide financial stability for the future." A378.[10]

Although the Museum asserts it is now losing more than a million dollars a year, nothing in this New Vision indicates how the Museum's losses will decrease. See A993 (affidavit of the Director of the Peabody Essex Museum and a former president of AAM and AAMD). Moreover, the new exhibits "will not realistically be a greater visitor draw over time than exceptional works of art by Norman Rockwell, and many other major American artists." A1098.

C. A New Museum Emphasizing Science and History, Banished from the Art World

"The July 12 announcement unveiled a new vision for [the Museum's] future, that of an interdisciplinary museum with a heightened emphasis on science and history." A377. The Museum contended that it would still be a museum "of science, history, and the arts," but the announcement identified roles for science and history in the new Museum, without

[10] The Museum has not explained the apparent $12 million discrepancy between the "$72 million scenario" the Board approved on March 27, 2017, A473, and the "$60 million reinvention plan" the Board announced on July 14, 2017. A377.

identifying any place for art. A377-83. In fact, the Museum declared that:

> [the Rockwell paintings] as well as other works in the fine art categories of impressionist and Modern Art, Contemporary Art, 19th-Century European Paintings, American Art, Old Master Paintings, and Chinese Works of Art . . . have been deemed to be not essential to the Museum's refreshed mission and do not directly contribute to its new interdisciplinary interpretive plan with its heightened emphasis on science and history.

A381-2.

To impose this plan, the Museum ignored the art collection principles that had governed its sale processes since the Museum's founding. When the Museum repealed a number of its longstanding policies, it abandoned its commitment to offer the works first to other museums and to use the proceeds from any sale to acquire more art or to preserve pieces already in the collection. Compare A1020 (old policy) with A483 (new policy). The Museum is proposing an about-face with respect to its stewardship of art, now looking to treat art as an asset available to fund operations.

If the sale goes through, the new Museum will still own art. A232. The new Museum will also have more space in which to display the remaining art collection. A280. But the strength of the current collection, which the Museum characterizes as "American art with major works of the Hudson River School painters, Alexander Calder, and contemporary

regional artists," will be gone. A735. The 40 works designated for sale are "the most valuable and important works of art in its collection" and "the single part of the Berkshire Museum that makes it special." A194-195.

The new Museum will also lose the ability to borrow works and draw support from other major artistic institutions. A187 (Massachusetts Cultural Council opposing the plan and noting that, because the Museum is treating its art as a "disposable financial asset[,] . . . major national accrediting organizations for both art and history museums have condemned its plan, and the Museum was forced to sever its affiliation with the Smithsonian Institution and the benefits that came with it"); A190 (AAM and AAMD condemning the plan); A193-202 (the Peabody Essex Museum condemning the plan); A1155-7 (Affidavit of Lori Fogarty, President of AAMD describing past experience with museums that AAMD sanctions).

Indeed, as the head of the AAMD observed, "the Berkshire Museum sale is unprecedented in terms of the number, value and prominence of the works being proposed, the centrality of these works to the Berkshire Museum's collection, and the process the Berkshire Museum employed to select and dispose of the deaccessioned items." A1157 (emphasis added).

D. The Investigation of the Proposed Sale

As soon as the Museum notified the AGO of the proposed sale – after the deal with Sotheby's had been struck – the AGO began an investigation into the proposal pursuant to the AGO's common law and statutory authority. The investigation was not yet complete as the scheduled sale date (November 13, 2017) approached, but the AGO had learned enough to bring claims against the Museum (A1180-95) and move for a preliminary injunction (SA3-28) to maintain the status quo. In arguing for an injunction, the AGO advised the Superior Court that its investigation was not yet completed. See SA3.

The AGO continued with its investigation after the single justice's orders, and expects to conclude the investigation on January 29, 2018. The AGO believes that the additional material the Museum provided after the preliminary injunction hearing constitutes further support for the injunction, but because this is an appeal of the decision the Superior Court issued on November 7, 2017, the AGO does not now rely on facts that were not before the Superior Court.

SUMMARY OF ARGUMENT

The Superior Court erred in denying the AGO's motion to temporarily halt the imminent sale of the Museum's most valuable pieces in its art collection – the core of the artistic mission of the Museum –

during the pendency of this litigation.

Injunctive relief is warranted where, as here, the AGO shows a likelihood of success on the merits and that the injunction promotes the public interest. The Superior Court erred in holding that the AGO was required to show that it was more likely than not to prevail on the merits. See infra at 22-24.

The Superior Court erred by ignoring the public interest when it denied the AGO's motion. The Museum's radical decision to dispose of its most celebrated and valuable art would undeniably harm the public interest. If the sale proceeds, the art that the Museum has been holding in trust for the benefit of the community will likely be gone forever. Simply put, once the Museum sells the art outside of the Commonwealth, likely to private collectors, there will be no means to get it back, and the public will have no recourse in the event that the AGO is successful in this litigation. The injunction preserves the public interest in the art, at least until this dispute is resolved. See infra at 24-26.

The Superior Court also committed reversible error because the AGO is likely to succeed on the merits of each of its claims. The Museum holds the art in a quasi-trust and cannot move forward with the sale if the plan would violate the purposes for which – and restrictions under which - the Museum holds its art

collection. See infra at 26-29.

There are three such restrictions. First, the Museum's decision to reinvent itself by converting proceeds of an art sale into a history and science center that has no artistic mission is a departure from the Museum's charitable purpose. The Legislature chartered the Museum, in part, as an art museum and the Museum has held itself out to donors and the public as an art museum. Through the New Vision and planned sale to accomplish it, the Museum is turning its back on its legacy and mission. See infra at 29-35.

Second, the state statutes that created the Museum and its predecessor entity prevent it from selling any of its art collection acquired before 1932. Those statutes provide that no part of the real and personal property held by or given to the Museum "shall ever be removed from the town of Pittsfield." As donors are presumed to know the extent of a charity's powers and purposes, this restriction is implied on any gift of art made to the Museum before 1932. The court below committed legal error in holding otherwise. See infra at 35-39.

Third, the record demonstrates that Rockwell intended, and the Museum agreed, that his art would remain with the Museum on display for the community and the art museum. The AGO is thus likely to succeed

on its claim that the Museum cannot sell the two Rockwell paintings. See infra at 39-42.

Moreover, even if the restraints on art donated to the Museum did not bar the sale of the 40 works, the restraints would require the Museum to spend the proceeds on improving or maintaining the artistic mission of the Museum, and not the New Vision. See infra at 42-43.

In addition to the restraints on the sale, the Museum's fiduciaries breached their duty of care to the organization and its charitable purposes. The Museum's decision to proceed with the sale was not reasonable under the circumstances. The fiduciaries did not fully consider less drastic, available alternatives that would have allowed the Museum to stabilize its operations without having to dispose of the organization's and the community's art collection, and that would have preserved the art that had been donated to the Museum for the public. Instead, the Museum seriously considered only options with more than twice the cost of its identified need while taking actions that contravened the organization's longstanding policies. The Museum also ignored the reputational costs associated with the decision to dispose of its art collection and to transform itself into a different organization. See infra at 43-50.

ARGUMENT

I. Standard of Review

The Superior Court's decision denying preliminary injunctive relief is reviewed for an abuse of discretion, that is, "whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions." Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 741 (2008). Because the Superior Court's order "was predicated solely on documentary evidence[,]" this Court "may draw [its] own conclusions from the record" while according weight "to the exercise of discretion by the judge below[.]" Id. (quoting Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 616 (1980)). However, review of the Superior Court's "conclusions of law are subject to broad review and will be reversed if incorrect." Cheney, 380 Mass. at 616 (citation and internal quotation marks omitted).

II. The Superior Court Erred in Denying the AGO's Motion to Enjoin the Sale of the Museum's Most Valuable Art

A. The Superior Court Overstated the Showing Required of the AGO for Injunctive Relief

To warrant injunctive relief, the AGO must show "a likelihood of success on the merits of the case at trial," and also "'that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the

public.'" Commonwealth v. Fremont Investment & Loan, 452 Mass. 733, 741 (2008) (quoting Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984) ("CRINC")).

The relative harm dictates how much of "a likelihood of success" is necessary for an injunction to issue. See id. at 88-89 ("injunction generally may issue properly only if the judge concludes that the risk of irreparable harm to a plaintiff, in light of his chances of success on his claim, outweigh the defendant's probable harm and likelihood of prevailing on the merits of the case"); Cheney, 380 Mass. at 617, n.12 (where "granting the injunction poses no substantial risk of [irreparable] harm to the opposing party, a substantial possibility of success on the merits warrants issuing the injunction") (emphasis added). In addition, where, as here, the moving party alleges a statutory violation, there is no need "to find irreparable injury before issuing the preliminary injunction. Merely finding a likely statutory violation which adversely affected the public interest was sufficient." Edwards v. City of Boston, 408 Mass 643, 647 (1990).

The Superior Court recast this standard as requiring the AGO to show that "it is more likely than not that [it] will prevail on any of [its stated] grounds[.]" ADD12. This was error: the "more likely than not" formulation finds no support in

Massachusetts case law, and is inconsistent with Cheney's emphasis on assessing likelihood of success together with the risk of harm.[11] The Superior Court thus applied the wrong standard. See also Commonwealth v. Levin, 7 Mass. App. Ct. 501, 504 (1979) (explaining, in a related context, "the standard of 'reasonable likelihood of success on appeal' is not one of substantial certainty of success, but rather is one equivalent to the civil concept of 'meritorious appeal'; that is, an appeal which presents an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal").

B. The Court Overlooked the Harm to Public Interest that Would Result from the Sale

The Museum's proposed sale of substantially all the valuable art in its collection would have an undeniable adverse impact on the public interest. Without an injunction, the Museum will proceed with the sale and deprive the community of the ability to enjoy these treasures. See Museum of Fine Arts v. Beland, 432 Mass. 540, 544-45 (2000) (holding that

[11] In enjoining the sale, the single justice correctly balanced the relevant factors, holding that "[t]he balance of the risk of irreparable harm to the petitioner and the respondent in light of each party's chance of success on the merits weighs in favor of the petitioner." Dkt. #12, No. 2017-J-510 (citing Cheney, 380 Mass. at 615-17).

selling paintings intended for public display would be "the antithesis of [the donor's] intent because the sale could deprive the public of any opportunity to view them").

The Museum does not deny the strong likelihood that once the art pieces are sold and removed from the Commonwealth, there will be no opportunity to get them back even if the AGO succeeds in this suit. This harm to the public interest only increases where, as discussed below, the sale is a violation of the law of this Commonwealth and a violation of charitable restrictions.

The Superior Court erred by failing to weigh the public interest in its decision, except to note in passing that "many will be disappointed" by the loss of "timeless works," while shrugging off these concerns because of the Museum's supposed "right" to "steer" itself as an organization. ADD25. The Superior Court's analysis thus is contrary to Cheney, as an injunction would have "minimize[d] the harm that final relief cannot redress by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party." 380 Mass. at 616 (citation and internal quotation marks omitted).[12]

[12] Although the AGO was not required to show irreparable harm in order to prevail, see CRINC, 392

(footnote continued…)

By contrast, the Museum's contention that it will suffer harm if the sale is delayed rings hollow. Although the Museum contends that it is in some financial trouble, it is "years" away from facing closure. A1371. Whether the Museum sells the art now or at the conclusion of this litigation will not have any impact on its ability to fulfill its charitable purposes. See also A704-710 (Mass. Cultural Council's analysis of the Museum's finances). Furthermore, if the Museum had notified the AGO of its intention to sell its art collection earlier in its two-year planning process, then much of the Museum's claimed exigency could have been avoided.

In sum, the immediate sale of the Museum's most valuable art would irreparably harm the public, whereas pausing the sale until this case concludes visits no real harm on the Museum. As the single justice of this Court recognized, this factor weighs heavily in favor of entry of a preliminary injunction. See Cheney, 380 Mass. at 616-17.

C. The AGO is Likely to Prevail on the Merits of Each of its Claims

The Court also erred in finding that the AGO was not likely to succeed on the merits of its claims. The

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Mass. at 89, the irreparable harm here is severe, and therefore relevant when weighing whether or not to issue an injunction.

proposed sale violates the purposes for which the Museum holds the art, and the restrictions applicable to the art, in three ways: the sale would abandon the Museum's overall purpose, violate a statutory geographic restraint, and contravene Rockwell's intent in donating his art to the Museum. 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.

1. The Proposed Sale Would Violate Restrictions under which the Museum Holds Its Art

Even in hard times, charities cannot unilaterally sell their assets and use the proceeds for a purpose other than that for which they were intended. See Attorney General v. Hahnemann Hosp., 397 Mass. 820, 836 (1986) (criticizing argument that "would, in effect, grant to charitable corporations unfettered discretion to apply funds to any charitable purpose"). Charities hold their assets in quasi-trust for the purposes in effect when the assets were acquired. See Mass. Charitable Mechanic Ass'n v. Beede, 320 Mass. 601, 610 (1947). As the Supreme Judicial Court noted while describing the uses to be made by gifts to Wellesley College:

> Whether the gifts were made for some specified purpose of the college or unconditionally for any general purpose of the college, the petitioner holds the property in trust to carry out the terms and conditions under which it was given and

> accepted. Where no conditions were imposed by the donor, then it holds and must apply the property in carrying out the charitable object for which it was incorporated.

Wellesley College v. Attorney General, 313 Mass. 722, 724 (1943); see also Hubbard v. Worcester Art Museum, 194 Mass. 280, 290 (1907) (holding that gift to a charitable corporation, without more, adopts the "publicly avowed purposes of its organization and action").

If application of charitable assets to purposes in accordance with donor restrictions becomes impracticable or impossible, the doctrines of *cy pres* and "reasonable deviation" allow the charity to seek court permission to modify those restrictions while adhering as closely as possible to the original purpose. See Beland, 432 Mass. at 544 & n.7 (describing pertinent standards); Restatement (Second) of Trusts § 399 (1959) (describing applicability of *cy pres* process); Smith v. Livermore, 298 Mass. 223, 236 (1937) (gifts to charitable corporations are "referred to as gifts upon trust" subject to the *cy pres* doctrine). As a result, charities must obtain court permission to deviate from the original purpose or other donor restrictions. See Town of Brookline v. Barnes, 327 Mass. 201, 208 (1951) ("application of funds *cy pres* is a judicial function").

The Museum, however, has not petitioned for *cy*

pres relief. Absent such relief, the proposed sale cannot go forward because, as discussed below, three different restrictions bar the Museum's plan.

a. The Museum's Radical Plans Constitute an Abandonment of One of Its Purposes

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[.]" ADD34. As such, the Museum's plan is barred absent court approval under *cy pres*. See Hahnemann Hosp., 397 Mass. at 836 (holding that, where a charity modified its purpose, the charity could not "apply[] previously donated funds to its newly amended purposes"); Beland, 432 Mass. at 544 & n.7; Wellesley College, 313 Mass. at 724.

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. Even though it will still own some art, the Museum's art of significant value, the art for which it is known, and the great art with which it was founded and grew, will be gone. Compare A1001-2 (the Museum's description of

itself just before the New Vision, highlighting paintings by Bierstadt, Church, Calder, and Rockwell), with SA61-74 (the list of items to be sold). Gone too will be the stature of the art that led Rockwell to designate the Museum – his "favorite art museum" - as the default art museum for his other works. A1061; A1130. As the Museum freely admits, works of fine art are "not essential to the Museum's refreshed mission and do not directly contribute to its new interdisciplinary interpretative plan[.]" A382.

The reinvestment policies that the Museum followed for its entire existence, under which art was sold only to benefit the art collection, are also gone. See A368, A370 (describing sales in the 1930s); A1020 (the old policies); A483 (the new policies). So, too, will be the loans of fine art from other art museums. See, e.g., A187 ("the Museum was forced to sever its affiliation with the Smithsonian Institution and the benefits that came with it"); A1155-7 (describing AAMD sanctions levied on other museums).

The Museum counters that "[v]isual art will remain a focus of the Museum," A280, that the "renovated Museum will feature a new atrium that allows the display of more artistic works than ever before[,]'" A281, and that it seeks to sell just "40 works of art from the Museum's extensive collection numbering approximately 40,000 objects." A381. These

claims are irrelevant. They indicate only that the Museum will still have its non-art objects, and that the Museum will have more space. They do nothing to dispute the overwhelming evidence that the Museum will cease to be an art museum as it was established by the Legislature and held itself out to donors and the public throughout its existence. See, In re Troy, 364 Mass. 15, 57-58 (1973) (holding that charitable purposes and status are defined by actual activities since incorporation, as well as stated charter purposes); Hubbard, 194 Mass. at 290 (gift to a charitable corporation, without more, adopts the "publicly avowed purposes of its organization and action")(emphasis added); Attorney General v. Weymouth Agric. & Indus. Soc'y, 400 Mass. 475, 482 (1987)(corporation bound by its conduct when "holding [itself] out to be a charitable organization").

In short, under the New Vision, holding and displaying great art are no longer part of the Museum's mission; rather, its art collection is just another asset, like office equipment, that can be liquidated for any purpose. That cannot be what the Legislature and donors – especially donors of artwork - intended when creating and supporting an institution dedicated to "promoting for the people of Berkshire County and the general public the study of art . . . by means of museums and collections[.]" ADD34.

Despite these facts, the Superior Court found that the Museum's plan did not violate the artistic purpose of the Museum's charter because it saw "no reason to believe that, should there be any restriction on the use of funds generated from the Sotheby's auction, the Museum would violate the restriction rather than simply petitioning the probate court for a deviation in order to accomplish its goals." ADD22-23 (emphasis added). In reaching this conclusion, the Superior Court misconstrued the facts and committed an error of law.

As an initial matter, the sale and intended use of the money cannot be separated; the Museum authorized the sale for the sole purpose of spending the proceeds on its New Vision. See, e.g., A381-2; A430-1. As a result, the question presented is not whether the sale of the 40 works would be an abandonment of the artistic purpose of the Museum if the proceeds were spent on more art. The question is whether the sale of the 40 works in order to use the proceeds to fund the New Vision constitutes an abandonment of the Museum's artistic purpose. As argued above, the AGO has demonstrated a likelihood of showing the New Vision constitutes an abandonment of the artistic purpose of the Museum, and therefore the New Vision (including the sale) cannot proceed, unless and until the Museum makes a proper showing under *cy*

pres. Judicial approval is a prerequisite for the sale after the applicant shows "reasonable efforts to explore alternative[s]," Beland, 432 Mass. at 545, not a process to be undertaken after the art has been liquidated and the proceeds are being spent. The Superior Court's failure to understand this critical aspect of *cy pres* amounts to an error of law.

This would not be the first time a charity was required to pursue a *cy pres* petition before selling art. See Beland, 432 Mass. at 541; Trs. of the Corcoran Gallery of Art v. Dist. of Columbia, No. 2014-CA-3745-B, 2014 D.C. Super. LEXIS 17, (D.C. Super. Aug. 18, 2014) (ADD42-64). In Beland, the court held that "[a] sale of the fourteen paintings would be the antithesis of [the donor's] intent because the sale could deprive the public of any opportunity to view them." 432 Mass. at 544. The circumstances are similar here. The Museum's charitable purpose, as established by the Legislature and by the Museum through its actual operations and policies over many decades, resembles the donor's intent in Beland, which was "to create and gratify a public taste for fine art." 432 Mass. at 541.

In Corcoran Gallery, the gallery established financial impracticability of retaining its art collection and the court then approved a *cy pres* plan that preserved the collection's availability to the

public through an affiliation with a university. 2014 D.C. Super. LEXIS 17, at *35-36 (ADD52). Notably, the court rejected a competing proposal "to de-accession art to pay for the renovation of the Flagg building and pay for . . . operating expenses[,]" for several reasons, including the debilitating impact of sanctions. ADD57, 63.

Here, the Superior Court reasoned that unlike the institutions in Beland and Corcoran Gallery, art is not the Museum's sole purpose. See ADD23, n.25. This distinction is immaterial; art is one of three purposes for which the Museum was created and held itself out to donors, and the Museum cannot abandon that purpose by devoting its art sale proceeds to other purposes. See Samuels v. Attorney General, 373 Mass. 844, 848 (1977) (board could not vote to divert charitable contributions to a different purpose); Queen of Angels Hosp. v. Younger, 66 Cal. App. 3d 359, 367-68 (1977) (hospital could not abandon its primary purpose and devote assets to other purposes authorized in its charter for operating clinics and providing nursing education); Hahnemann Hosp., 397 Mass. at 830 n. 18 (1986) ("Those donating to a home for abandoned animals do not anticipate amending a charity's purposes to become 'research vivisectionists'"). The Superior Court thus erred in looking to the Museum's other purposes to justify the abandonment of its art

purpose.[13]

b. State Law Prevents the Museum from Selling Any Art it Acquired from Its Predecessor in 1932

Nineteen of the works that the Museum seeks to sell were first acquired by the Museum's predecessor: the Berkshire Athenaeum and Museum. A998. In the 1871 Act, the Legislature established the Berkshire Athenaeum. ADD27. In 1903, the Legislature changed the name of the Athenaeum to the Berkshire Athenaeum and Museum. ADD30. In 1932, the Legislature created the Museum, and permitted the Athenaeum to transfer to the Museum certain assets, ADD34, including 19 works the Museum now seeks to sell. A297-330.

The 1871 Act provides that:

> [A]ll gifts, devises and bequests [to the Athenaeum] shall be devoted to [the aforesaid] purposes exclusively, and used in conformity with the conditions made by any donor and expressed in writing *. . . provided, further,* that no part of such real and personal property, or such gifts, devises or bequests, shall ever be removed from the town of Pittsfield.

ADD28, § 2. That provision remains unchanged. Although the 1932 Act did not establish a similar provision for the Museum going forward, it did not repeal the

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[13] Although both Beland and Corcoran Gallery involved the application of *cy pres* to charitable trusts, the doctrine applies equally to assets held by charitable corporations. See Hahnemann Hosp., 397 Mass. at 836; Smith v. Livermore, 298 Mass. 223, 236 (1937) (gifts to charitable corporations are "referred to as gifts upon trust" subject to the *cy pres* doctrine).

existing Pittsfield provision. See Commonwealth v. Hayes, 372 Mass. 505, 511 (1977) (stating presumption against implied repeal).

This Pittsfield restriction applies to the 19 works transferred from the Athenaeum and Museum to the Museum in 1932. The Superior Court erred by misinterpreting these statutes, and the AGO is likely to prevail on this claim.

First, the Superior Court incorrectly found that the restriction ("no . . . personal property, or such gifts . . . shall ever be removed from the town of Pittsfield") falls outside the "purposes provision" of the enabling statute (as designated by marginalia) and that the restriction therefore is not enforceable. ADD17-18. The "word 'shall' is ordinarily interpreted as having a mandatory or imperative obligation," Galenski v. Town of Erving, 471 Mass. 305, 309 (2015), unless such interpretation would frustrate legislative intent. There is no basis here to accord the word "shall" other than its usual mandatory meaning.

Moreover, property given by donors is subject to the same restrictions as other property held by the charity; there is no authority for the proposition that such property may be used in any way that is consistent with corporate purposes, even if that use is inconsistent with other restrictions. See Trs. of Andover Theological Seminary v. Visitors of the

Theological Inst. of Phillips Acad., 253 Mass. 256, 272-3 (1925) ("It is considered that the donor intended that his gift should fall under the general statutes and rules of the institution and be regulated with the rest of its property."); Carey Library v. Bliss, 151 Mass. 364, 377 (1890) (holding that donor gifts were subject to trust conditions concerning board management and the investment and expenditure of trust funds).

Second, the statutory restriction attaches to the assets, not the Athenaeum. The language applies to any asset the Athenaeum acquired, and continues to bar the asset's removal from Pittsfield even if the Athenaeum transfers the asset to someone else. The Superior Court incorrectly concluded that the Pittsfield restriction was only "intended to restrict the authority of the Athenaeum trustees to keep Athenaeum property in other locations. In other words, the restriction is a limit on possession, not a limit on use." ADD18. This was a reversible error. See Freedman v. Freedman, 49 Mass. App. Ct. 519, 521 (2000) ("Error of law apparent on the record ... would constitute an abuse of discretion.").

If the Legislature had intended only the Athenaeum to keep its property in Pittsfield, it could have said so plainly. But that is not the statute the Legislature wrote. Instead, it mandated that no "real

or personal property" held by the Athenaeum "shall ever be removed from the town of Pittsfield," apparently by anyone. Thus, the restriction applies to the property and to any future owner, not just to the Athenaeum itself. Moreover, the Superior Court failed to give effect to the word "ever" in the phrase "shall ever be removed" by restricting the provision's application to property the Athenaeum held at a particular time. See Halebian v. Berv, 457 Mass. 620, 628 (2010) ("We give effect to each word and phrase in a statute, and seek to avoid an interpretation that treats some words as meaningless."). The Legislature's use of "ever" signals that the restriction must continue to apply to property owned or acquired by the Athenaeum, even after the Athenaeum transferred it.

Third, even if the statutory language applied only to items while they were held by the Athenaeum, the Pittsfield restriction would still apply by implication to donations made to the Athenaeum prior to 1932. Donors are presumed to know the extent of a charity's powers and purposes. Boston Athletic Ass'n v. Int'l Marathons, Inc., 392 Mass. 356, 367 (1984); Trs. of Andover Theological Seminary, 253 Mass. at 273 ("[D]onors presumably 'knew on what trusts the library was established and was to be managed, and that they made their gifts to be held under the same trusts.'") (citation omitted). As a result, the donors of the 19

pieces are presumed to have made their gifts subject to the Pittsfield restriction. Thus, any gifts transferred to the Museum from its predecessor retain the restrictions that attached to them, regardless of the Legislature's subsequent incorporation of the Museum. See In re Opinion of the Justices, 237 Mass. 613, 617 (1921).

Simply put, none of the 19 pieces the Museum acquired from its predecessor entity can be "removed from the town of Pittsfield." The Museum cannot send them to New York for auction, and certainly cannot sell them to private collectors across the world.

c. Rockwell Restricted His Gifts of His Artwork to the Museum

The AGO is also likely to succeed on its claim that the Museum is restricted from selling the two pieces of art that Rockwell donated to the Museum.

Rockwell intended to have the Museum keep his art in its permanent collection. This intention is demonstrated through his close relationship with the Museum and its director, correspondence from the Museum accepting his art in its permanent collection, Rockwell's control of the art after he donated it to the Museum, and the practice of gift giving and restrictions at the time. Rockwell was close friends with the Museum's director, interacted regularly with its staff, and checked in on the art he stored there

(of which he retained ownership). See, e.g., A1061 (Rockwell describing Director Henry as his "favorite director of [his] favorite art museum"); A1091 (letter describing the artist's involvement in the Museum's lending decisions); A1158-59 (affidavit of former Museum employee recounting the artist's visits).

When Rockwell donated his painting "Shuffleton's Barbershop" to the Museum, Director Henry sent Rockwell a letter stating: "I send to you the thanks of all of our Trustees for your generous gift of the painting, 'Shuffleton's Barber Shop.' We are delighted to have it for our permanent collection." A180. The Museum understood that the two pieces were his favorite paintings and that he donated them so they would remain on view in the Museum's permanent collection. A1159.

Director Henry and the Museum acted as agents on Rockwell's behalf to arrange for loan agreements, transportation, and insurance for Rockwell's paintings. A1075-8. Correspondence appears to treat both sets of works – those Rockwell had given to the Museum and those that the Museum was only storing – interchangeably, indicating that the Museum granted him some control even over the paintings he had donated. A1086. In addition, on at least one occasion, the Museum refused to loan out the paintings Rockwell had donated to the Museum without his prior approval.

A1088-91.

Although there is no specific written restraint on the paintings here, that is not dispositive. At the time Rockwell donated his works of art, it was "accepted as a 'given' that the works would be permanently retained in the collection." A1097; see also A1162 ("The more long-standing the relationship of trust between a donor and the museum, the stronger the indication that the donor and museum had mutually intended a gift of art to be part of the museum's permanent collection."). Years later, after a widely-publicized deaccession at the Metropolitan Museum of Art, Rockwell created the Rockwell Art Collection Trust (the "Rockwell Trust"), which mandates that his art be "in fact exhibit[ed]." A1131. The trust's terms are consistent with Rockwell's apparent intention and understanding at the time of his gifts to the Museum that the Museum would retain his art donations for public viewing.

Further, the Rockwell Trust provides that Rockwell's art would be distributed to the Museum if the Society cannot exhibit the art in a manner acceptable to the trustees. A1130. This provision makes clear that Rockwell always expected that the Museum would retain his art in its permanent collection.

Accordingly, this record demonstrates that

Rockwell intended, and the Museum agreed, that the Museum is restricted from selling the two pieces of art that Rockwell donated to the Museum.

d. If the Art Could Be Sold, the Museum Must Use Proceeds to Benefit the Art Collection

Even if the above restrictions did not operate as a complete bar on the proposed sale, the Museum could not sell its donated art in order to fund the New Vision. If art is donated for display in an art museum, and then sold, the proceeds must be spent to further the artistic mission of the museum. See Newhall v. The Second Church and Soc'y of Boston, 349 Mass. 493, 500 (1965).

This requirement is particularly relevant as to the Rockwell paintings, which the Museum kept in its "permanent collection" and acknowledged as such in writing to the artist. A180. The Superior Court concluded that, absent a specific restriction on a donation, works in the Museum's "permanent collection" can be sold because the phrase "implies no actual permanency." ADD20. But concluding that a work in the permanent collection can be sold does not mean that the work can be sold for any purpose. Even if the works can be sold, the "appropriate" use of donated art "distinguished from general [museum] use should guide the disposition of the proceeds should they be

sold." Newhall, 349 Mass. at 500.

Selling two Rockwell paintings donated by the artist in order to fund an interdisciplinary history and science experience is not a plan "guide[d]" by the appropriate use of the original gift. As such, the paintings cannot be sold to fund the New Vision. The Superior Court cited to Newhall, ADD21, but erred as a matter of law by not applying the holding of the case: proceeds from the sale of donated goods should be guided by the use of the original donation.

2. The Museum's Officers and Directors Breached the Fiduciary Duties They Owe to the Museum's Mission

The Superior Court erred in concluding that the AGO was not likely to demonstrate that the Museum's officers and directors breached their fiduciary obligations to the Museum's charitable purpose when the Museum authorized the sale of the art. With a charity like the Museum, fiduciaries breach their duty of care when they act unreasonably under the circumstances, and the Superior Court here incorrectly determined that the Museum, through its officers and directors, acted reasonably when it decided to sell substantially all the value of its art collection and devote the proceeds to a different purpose. A1403-04.

Fiduciaries must exercise the degree of care that a prudent person ordinarily would use in a like position and act with reasonable intelligence. See

G.L. c. 180, § 6C; Restatement of the Law of Charitable Nonprofit Org. § 2.03, comment b(2), TD No. 1 (2016) (providing that fiduciaries of charitable corporations are required "to consider what action an ordinarily prudent person engaged in similar activities and charged with carrying out purposes similar to those of the charity involved would take").

In addition, a fiduciary can be held liable for a breach of good faith for an action serving a legitimate business purpose if that purpose "could have been achieved through a less harmful, reasonably practicable, alternative mode of action." Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988). Further, fiduciaries "may not knowingly cause or permit [a] charity to violate the law or the charity's organizational documents and policies." Principles of the Law of Nonprofit Org. § 300, comment g(3), TD No. 1 (2007).

A charitable fiduciary cannot rely on the business judgment rule to escape scrutiny if the fiduciary fails to meet the standard espoused in G.L. c. 180, § 6C. Moreover, charitable boards' actions are subject to "heightened scrutiny" because they are stewards of the charitable assets donated to the particular mission and purpose of the charity they serve. Thus, there is "heightened public interest in the affairs of [charitable] organizations." Boston

Athletic Ass'n, 392 Mass. at 366 n.12.[14]

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.

First, the Museum's financial challenges could have been addressed "through a less harmful, reasonably practicable, alternative mode of action." Zimmerman, 402 Mass. at 657. Instead of 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

[14] There are no reported Massachusetts decisions applying the for-profit business judgment doctrine to fiduciaries of charitable corporations, and the doctrine's presumption of propriety for rational behavior cannot be squared with the "heightened scrutiny" standard articulated for charities. Boston Athletic, 392 Mass. at 362.

Bid, A992-5, the Museum selected a far costlier plan: a multi-million dollar upgrade to its facilities and significant addition to its "endowment." A1044-5.

The Superior Court maintained that the New Vision was reasonable, despite drastically overshooting the Opening Bid, because the Board considered multiple plans over a "two-year investigatory period." ADD14. But the Superior Court did not make any findings about the multiple plans under evaluation, and in so doing, the Superior Court essentially held that a two-year process is inherently reasonable, regardless of the content of that process. Id.

The Superior Court's decision to use time as a proxy for the content was an abuse of discretion. Moreover, this Court can "draw [its] own conclusions from the record[.]" Fremont Inv. & Loan, 452 Mass. at 741. The most reasonable conclusion is that 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. A482, A472-3. The Museum's decision to sell its purpose and heritage was unreasonable in light of the available $25.6 million option.

Compounding the Museum's failure to select the "less harmful, reasonably practicable, alternative

mode of action," Zimmerman, 402 Mass. at 657, the New Vision does not address the problems the Museum is facing. The Museum claims that the New Vision is necessary because the Museum is currently losing more than a million dollars a year. A423. But the New Vision does not solve that problem. Instead, the New Vision proposes more ways to spend money, without identifying savings. In fact, the Museum:

> has not released information regarding the cost of the new facilities, the cost to maintain those facilities, the number of 'interactive' exhibitions it plans to create, the anticipated initial cost of such exhibitions, the anticipated maintenance and replacement costs, projections that can be tested regarding anticipated annual attendance, revenue and contributed support. These factors are critically important to careful planning, particularly when an institution is embarking on a new direction. There is a lack of significant demographic projected attendance, financial and other analyses to support this new direction, which is critical to any decision of this magnitude.

A994 (affidavit of the Director of the Peabody Essex Museum and a former president of AAM and AAMD). See also A423-432 (affidavit of Ethan Klepetar, Museum trustee and Chair of the Governance Committee, which details the "Development of the New Vision & Deaccession Plan," ostensibly in response to the $1.15 million annual deficit, without identifying how the deficit will be closed); A1098 (the new exhibits "will not realistically be a greater visitor draw over time than exceptional works of art by Norman Rockwell, and many other major American artists").

At most, the New Vision provides more cash to burn in the form of an "endowment," but this does not fix the problems that Museum allegedly faces. An ordinarily prudent person engaged in similar activities and charged with carrying out purposes similar to those of the charity would not adopt a "solution" that involves selling the charity's most valuable art when a less expensive option was available, and an ordinarily prudent person certainly would not take such drastic steps without analysis projecting an increase in net income.

Second, the Board violated its fiduciary obligations by selecting artwork for sale based on auction value with no consideration for how the pieces contribute to the Museum's charitable mission. SA48. This act was a violation of the Museum's Collections Management Policies. A1012, A431, A475-99. Such an action is not reasonable. Fiduciaries "may not knowingly cause or permit [a] charity to violate ... the charity's organizational documents and policies." Principles of the Law of Nonprofit Org. § 300, comment g(3), TD No. 1 (2007). See A1096 ("Trustees of a nonprofit museum are fiduciaries who are responsible for representing and acting in prudent ways to assure that museum collections, facilities and funds are used as in intended to benefit the public."); A1007 (AAM ethics, identifying criteria for deaccessioning, of

which monetary value is not one).

Third, the Museum violated the same policies when it authorized a contract with Sotheby's to sell its art to the highest bidder to fund the New Vision. See A1020 (requiring the Museum to offer art first to other museums, and to use proceeds for the art collection). The Museum's actions also ran afoul of AAM's code of ethics, which the Museum had adopted. A1006-8, A1012-1036, SA50-79. There is no dispute that the Museum's deal with Sotheby's conflicts with these policies. In fact, the Museum retroactively eviscerated these policies after the agreement with Sotheby's already had been executed. A483.

Further, by violating these policies and ethical guidelines, the Museum's reputation in the art world has been severely damaged. The Museum's relationship with major museum organizations has been severed. See, e.g., A187; A190; A193-202. This severance prevents future loans of art and shared exhibitions with other museums and discourages future donations of art. Id.

Although the Museum makes a general allegation, without detail, that it considered the consequences of deaccession, A431, that assertion is not supported by the record. Moreover, the fact that the Museum did not amend its own policies until after entering into the contract with Sotheby's indicates the collections policies of the Museum were an afterthought –

paperwork to be cleaned up rather than a serious matter to be considered before deciding to sell the art. Reasonable board members do not disregard these critical factors and then adopt new policies after the fact to conform to already completed actions.

Fourth, the Museum was unreasonable in agreeing to sell art in violation of restrictions under which the Museum held the art. See supra at 27-43.

Individually and collectively, these failings constitute a breach of the duty of care.

CONCLUSION

For these reasons, this Court should reverse the Superior Court's decision and should order entry of a preliminary injunction.

Respectfully submitted,
MAURA HEALEY
ATTORNEY GENERAL

By: _/s/ Andrew Batchelor _____

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Date: _1/16/18_____

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss **SUPERIOR COURT**
CIV. NO. 17-0253

THOMAS ROCKWELL, JARVIS ROCKWELL, PETER ROCKWELL, TOM PATTI, TOM PATTI DESIGN LLC, JAMES LAMME, DONALD MACGILLIS, JONAS DOVYDENAS, and JEAN ROUSSEAU
Plaintiffs

v.

TRUSTEES OF THE BERKSHIRE MUSEUM and MAURA HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts.
Defendants

CONSOLIDATED WITH
CIV. NO. 17-0260

JAMES HATT, KRISTIN HATT, AND ELIZABETH WEINBERG, individually and derivatively on behalf of the Trustees of the Berkshire Museum
Plaintiffs

v.

TRUSTEES OF THE BERKSHIRE MUSEUM, et al.
Defendants

MEMORANDUM OF DECISON ON PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

The plaintiffs, under Civil Action Number 17-0253 ("Rockwell case"), have requested by way of motion that the Court enter a preliminary injunction prohibiting the defendant, Trustees of the Berkshire Museum ("Trustees" or "Board"), from selling, auctioning, or otherwise disposing of any of the artworks that have been listed for auction commencing on November 13, 2017. The defendant Trustees have opposed this motion. The co-defendant, Maura Healey, in her capacity as Attorney General of the Commonwealth of Massachusetts ("AGO" or "Attorney General"), initially supported the

plaintiffs' request for an injunction. After the hearing, the AGO sought and was granted plaintiff-status and is seeking an injunction on behalf of the Commonwealth, but only if the other plaintiffs fail to establish standing to file such claims.

In a related action initially filed in the Suffolk Superior Court but transferred and consolidated with the Rockwell case by order dated October 30, 2017, different plaintiffs also seek injunctive relief to prevent the sale of the artwork ("Hatt case"). The AGO is not involved in that litigation.

A non-evidentiary hearing was held on November 1, 2017. Based upon the submissions of the parties, including the affidavits and exhibits, as well as argument of counsel, I make the following findings and rulings.

A. BACKGROUND

The genesis of the Berkshire Museum goes back to 1903. Philanthropist Zenas Crane donated a building that was located behind the Berkshire Athenaeum to hold and display art and artifacts for the benefit of the public. This property was transferred to the management of the Athenaeum, and the name was changed to the Berkshire Athenaeum and Museum. Although the organizations maintained separate identities and collections, there was a single board of trustees.

Of significance, the Athenaeum was incorporated in 1871 as a library with the authority to provide "reading-room, lectures, museums, and cabinets of art and historical and natural curiosities." See St. 1871, c. 129, An Act to incorporate the Trustees of the Berkshire Athenaeum. The Act further stated that "no part of such real and personal property, or such gifts, devises or bequests, shall ever be removed from the town of Pittsfield." *Id.* at § 2.[1]

In 1932, a citizens' petition resulted in a separate legal existence for the Museum and a formal incorporation of the Trustees of the Berkshire Museum as the overseers of this entity.[2] The Act created this corporation "for the purposes 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, the cultural history of mankind and kindred subjects by means of museums and collection, with all the powers and privileges . . . set forth in all general laws now or hereafter in force relating to such corporations." See St. 1932, c.134, § 3. The Museum and the Athenaeum were now separate legal entities. As will be discussed in greater detail later in this

[1] These days, corporations, charitable or otherwise, can be created in the Commonwealth by filing documents with the appropriate department and sometimes paying a fee. See, e.g., G. L. c. 156B, §§ 12, 114. Historically, however, Massachusetts "had always been conservative in its corporation policy, having been among the last of the important states to allow incorporation without special legislative act . . . ." E. Merrick Dodd, Jr., Statutory Developments in Business Corporation Law, 1886-1936, 50 Harv. L. Rev. 27, 31 (1936).

[2] The official name of the Act was "An Act Changing the Name of the Trustees of the Berkshire Athenaeum and Museum to Trustees of the Berkshire Athenaeum, and Incorporating the Trustees of the Berkshire Museum and Authorizing the Transfer to it of Museum Property."

decision, the 1932 Act establishing the Museum as a separate legal entity did not include language prohibiting its property from being removed from Pittsfield. However, it did have language that any gift or bequest would be "used in conformity with the conditions made by any donor and expressed in writing provided, that such conditions are not inconsistent with the provisions of this act." *Id.* at § 4.

Over the years, the Berkshire Museum has matured and evolved into a repository of more than 40,000 items with a large concentration of items in the natural sciences, such as fossils, minerals, and reptiles. Since the seventies, the national economic winds have eroded the Berkshire County business environment, resulting in many industries and businesses dying off or relocating. The population has shrunk and, most importantly, generous benefactors have vanished. However, to its benefit, the County has supplanted its industries with recreational and cultural attractions as it progresses to a tourist-based economy. Of course, this has created greater stress on the existing non-profit institutions as they compete for tourist dollars and donor support.

There appears to be no dispute that the Museum is in serious financial trouble. It has operated at a deficit for many years causing it to rely on its endowment to sustain its operations. Although the extent of the financial woes is disputed, it is beyond cavil that the Museum's financial outlook is bleak.

Faced with these consequences, the Trustees initiated discussions, by way of a Master Planning Process ("MPP") to address the financial issues. They initially considered merging with another museum, however that was rejected, as both of these institutions had financial problems. The MPP also considered and adopted more aggressive fundraising, changes in programming, increasing ticket sales, grant writing and reduced operational costs through hiring freezes, reduced hours and reduced programming.

According to the information before the court, the Trustees first considered the issue of deaccession as a possible option in June 2015, when they began developing the MPP. At a retreat on October 24, 2016, the Board discussed the potential items for deaccession and, most importantly, moved forward with this method of financing. A meeting in December 2016, established a timeline for the proposed deaccession. Thus, over the course of two years, the Trustees and its subcommittees held numerous meetings regarding the economic future of the Museum.

On May 22, 2017, the Board voted to authorize the Board President to execute a consignment agreement with Sotheby's. An agreement was signed on June 13, 2017.

The proposed auction includes forty items, with the two garnering the most attention being the works of renowned artist and Berkshire County resident Norman Rockwell. The paintings identified as "Shuffleton's Barbershop" and "Shaftsbury Blacksmith Shop" were personally donated by Mr. Rockwell to the Museum. Judgment on art is subjective; however, these two paintings are considered his finest works and their value is in the millions.

Also included within the art works for deaccession are paintings from prominent artists and sculptors including Alexander Calder, Frederic Church, George Henry Durrie, William Adolphe Bouguereau and Albert Bierstadt. For all the items submitted to Sotheby's the range of "hammer" value (the winning bid at an auction) is approximately $46,000,000 to $68,000,000. The auction of these and other art works from around the country will be scheduled on different dates, commencing on November 13, 2017. On November 13, seven works from the Museum are up for sale, including the two Rockwell paintings. Twelve more art works will be sold in auctions stretching out into March. The sale of the remaining works have not been scheduled.

B. PARTIES AND CLAIMS

1. Rockwell Case

The first three plaintiffs identified in the Rockwell Complaint are Thomas Rockwell, Jarvis Rockwell and Peter Rockwell. They are the three children of Norman Rockwell and all are principal beneficiaries of the estate through testamentary trusts. The residue of the estate passed to trusts of which they are the beneficiaries. Thomas Rockwell was the executor of Norman Rockwell's estate.

The plaintiff Tom Patti is a prominent artist and owner of Tom Patti Design LLC, a Massachusetts limited liability company located in Pittsfield. The company entered into a contract with the Museum for the creation and installation of two items of glass affixed to the building.

The other plaintiffs in the Rockwell Complaint are James Lamme, Donald MacGillis, Jonas Dovydenas and Jean Rousseau. It is asserted that they are each members of the Museum and Dovydenas and Rousseau have made "substantial donations to the Museum." Membership in the Museum is afforded to any individual or family that provides a financial donation, with the level of donation determining the benefits available, including free admission, guest passes, reciprocal privileges to other museums, etc. The types of membership start with a $50 per year individual account and progress to Crane Society status for $1,000 per year. A member has no right to participate in the management or operation of the Museum.

The Rockwell Complaint asserts two claims: a breach of fiduciary duty, breach of trust and absence of authority under Count I, and breach of contract regarding the glass work of Tom Patti under Count II. The relief requested includes voiding the contract with Sotheby's, and enjoining the Museum from deaccessioning the forty items for sale, as well as preventing the Museum from "modifying or otherwise altering" the glass works of Tom Patti. The Patti plaintiffs are requesting specific performance of the contract.

The defendants in the Rockwell case are the Trustees of the Berkshire Museum and Maura Healey, in her capacity as Attorney General of the Commonwealth of

Massachusetts. Initially, there were no counterclaims or cross claims asserted by the defendants; however, after the hearing, the Attorney General filed an emergency motion to "convert from defendant to plaintiff if plaintiffs lack standing" and, if so, to seek a preliminary injunction on behalf of the Commonwealth. This motion was allowed.

2. Hatt Case

The plaintiffs in the Hatt case are James Hatt, Kristin Hatt and Elizabeth Weinberg. All are residents of Berkshire County and James and Kristin Hatt are members of the Museum. Elizabeth Weinberg is a former member of the Museum.

The claims raised in the Hatt litigation are breach of contract between the Trustees and its members and breach of fiduciary duty against the individual Trustees.

The defendants in the Hatt case are the Trustees of the Berkshire Museum and each of the 22 individual trustees. The Attorney General is not a defendant in this litigation. The Attorney General did not seek plaintiff-status with respect to this litigation.

ARGUMENT

The legal issue before the court is straightforward and well-traveled; the court must decide whether the plaintiffs are entitled to a preliminary injunction enjoining the Museum from selling or otherwise disposing of the 40 works of art under contract with Sotheby's. A preliminary injunction is an equitable remedy, and thus is not appropriately granted in those circumstances where it would impose an unfair or inequitable advantage on one party. *Cote-Whitacre* v. *Dep't of Pub. Health*, 446 Mass. 350, 357 (2006), abrogated on other grounds by *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015).

Generally, to prevail on a request for a preliminary injunction, the plaintiff must show (1) a strong likelihood of success on the merits of the claim, (2) that they will suffer irreparable harm without the requested injunctive relief and that (3) the harm, without the injunction, outweighs any harm to the defendant from being enjoined. *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 616-617 (1980). See *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue,* 406 Mass. 701, 710 (1990). In appropriate cases, the court may also consider the risk of harm to the public interest. *GTE Prods. Corp.* v. *Stewart*, 414 Mass. 721, 723 (1993). Relevant to this case, a governmental entity need not show irreparable harm in enforcing a legislative policy or statute. *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984).

Before addressing the merits of a preliminary injunction, a digression is required to put in context a core issue in this case. This case is essentially about art deaccessions. According to the Association of Art Museum Directors (AAMD), deaccession is the practice by which an art museum formally transfers its ownership of an object to another institution or individual by sale, exchange, or grant, or disposes of an object if its physical condition is so poor that it has no aesthetic or academic value. Deaccession is not a pejorative term; it is an integral part of collection management in museums. The failure

to periodically both pare down and complement a collection may render the art collection obsolete. Consequently, deaccession involves both artistic and financial decisions that go to the core of its mission. See generally, Michael Conforti, *Deaccessioning in American Museums: II Some Thoughts for England*, reprinted in A Deaccessioning Reader (Stephen E. Weil ed. 1997).

A conflagration occurs, not with deaccession, but the purpose or reason for the deaccession. If it is used to pay for a greater work of art or to change a collection's focus, deaccession is generally tolerated. However, if it is used for operations or capital expenses, it is discouraged, if not condemned. See Association of Art Museum Directors, *Policy on Deaccessioning* (October 2015). Deaccessioning items from a museum is neither illegal nor unethical per se and every proposed deaccession must be examined on its own merits.

Generally, the art world has relied on two tools to control deaccession: self-regulation and peer-regulation. Self-regulation is simply the policies and procedures that a museum promulgates to guide its operations. The Berkshire Museum allows deaccession and has enacted specific policies for such an event. Peer-regulations relies on accreditation and professional ethics codes. Accreditation is undertaken by the American Association of Museums and ethical considerations are generally regulated by the AAMD. Peer-regulations often have been a powerful tool in shepherding the herd of museums that are considering deaccession for financial reasons. However, there are numerous examples of museums deaccessioning artwork for operating or capital costs. See Ralph E. Lerner and Judith Bresler, Art Law, A Guide for Collectors, Investors, Dealers, & Artists, p. 1503-1504 (4th ed. 2012). To date, the courts have played a very limited role and there is scant legal authority, statutory or case law, when a conflict of this nature arises.[3]

The two issues before the court are (1) whether the plaintiffs (other than the AGO) have standing to assert their claims and, if the non-governmental plaintiffs have failed to establish standing, (2) whether the AGO has satisfied the requirements for a preliminary injunction.

A. Standing

It has long been the rule that only the Attorney General has standing "to protect public charitable trusts and to enforce proper application of their funds" and assets. *Degiacomo* v. *City of Quincy*, 476 Mass. 38, 45 (2016); *Maffei* v. *Roman Catholic Archbishop of Boston*, 449 Mass. 235, 244 n.20 (2007); *Dillaway* v. *Burton*, 256 Mass. 568, 573 (1926) (citing cases). See also G. L. c. 12, § 8. The law presumes that the Attorney General can protect public charitable trusts "more satisfactorily . . . than . . .

[3]New York has enacted a statute, applicable to state institutions, that provides guidelines for deaccessioning. See N.Y. Educ. Law sec. 233-aa (5) (a)-(b) (Consol. 2012). For museums chartered by the New York State Board of Regents, rules have also been adopted regarding deaccessioning. See N. Y. State Board of Regents, Rule sec. 3.27 *Relating to Museum Collections Management Policies*. Massachusetts has no such statute, regulations or case law on this issue.

individuals, however honorable their character and motives may be." *Burbank* v. *Burbank*, 152 Mass. 254, 256 (1890). Since the law authorizes only the AGO to enforce public rights in a public charity, it falls on would-be plaintiffs to demonstrate that they seek to enforce some kind of private right. See *Maffei* v. *Roman Catholic Archbishop of Boston*, 449 Mass. at 245, citing *Lopez* v. *Medford Community Ctr., Inc.*, 384 Mass. 163, 167 (1981).

The Rockwell plaintiffs, Norman Rockwell's heirs and the beneficiaries of his trust, argue that their unique right to enforce promises made to their father gives them standing in this case.[4] But the law does not allow them as heirs or beneficiaries to enforce their father's contracts; that responsibility generally belongs to Norman Rockwell's estate or his trust, which are not parties to this litigation. See *Kobrosky* v. *Crystal*, 332 Mass. 452, 461 (1955) (only executor can maintain action for personal property of deceased person); *Gulda* v. *Second National Bank*, 323 Mass. 100, 103 & n.1 (1948) (trustee generally represents estate unless "existence of the trust itself" is threatened, in which case beneficiaries have standing even if trustee fails to act).

More fundamentally, even if a legal representative of Norman Rockwell's interests had joined this case, the claim, as presented, nonetheless only seeks to enforce Mr. Rockwell's intent regarding the permanent domain of his two works. That private right, if it exists, is no different from the public right that may be enforced only by the Attorney General. See *Dillaway* v. *Burton*, 256 Mass. at 574 (general rule of Attorney General's exclusive standing "has been held applicable to heirs or other representatives of such donors or grantors"). Accordingly, the Rockwell plaintiffs do not have standing to enforce any promise made to their father that would bind a public charity.

Mr. Tom Patti contends that his unique private right to enforce his contract against the museum gives him standing in this action. It is difficult to see how the alleged breach of contract relates to the preliminary injunction the parties seek. Mr. Patti alleges that, pursuant to his contract, the Museum may not unilaterally move his artwork, and he complains that the Sotheby's sale would cause his artwork to be unilaterally moved. To repeat: Mr. Patti's works are not part of the forty artworks set to be sold at auction. "Not every person whose interests might conceivably be adversely affected is entitled to [judicial] review." *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 323 (1998), quoting *Group Ins. Comm'n* v. *Labor Relations Comm'n*, 381 Mass. 199, 204 (1980). A plaintiff must demonstrate injuries that are not "speculative, remote, [or] indirect," which must be "a direct consequence of the complained action" (citations omitted). *Ginther* v. *Commissioner of Ins.*, 427 Mass. at 323. Mr. Patti has failed to show any likelihood that his artwork will be unilaterally moved if the Sotheby's sale proceeds as scheduled; his allegations are too speculative to confer standing upon him to ask the court to enjoin the sale. See *id.*

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[4] For the purposes of standing, the merits of plaintiffs' claim that the parties entered into a binding contract or simply employed precatory language is irrelevant.

The remainder of the Rockwell plaintiffs are all members of the Museum who live in Berkshire County. Two of them (Dovydenas and Rousseau) have made substantial donations to the Museum. One of them is a resident of Pittsfield. These plaintiffs variously argue that they have standing to stop the Sotheby's sale by enforcing rights peculiar to them as members, donors, and residents of Pittsfield and Berkshire County. Unfortunately, none of these characteristics are sufficient to supply standing to enjoin the Sotheby's sale.

As the Attorney General conceded at the hearing, a member does not have standing to sue a public charity except in situations like those described in the *Lopez* case. See *Lopez* v. *Medford Community Ctr., Inc.*, 384 Mass. 163. *Lopez* is instructive: the plaintiffs attended a board meeting to mount a coup of the nonprofit's management by paying $2.00 to become associate members and attempting to vote out the board. *Id.* at 165. The board rejected the plaintiffs' membership and the plaintiffs sued alleging corporate mismanagement and seeking a declaration of their rights as members and an injunction against the board's enrolling new members. *Id.* at 165-166. The Supreme Judicial Court held that the plaintiffs did have standing to litigate their claim that the nonprofit unlawfully denied their membership. *Id.* at 168. The SJC, however, explained that only the Attorney General had standing to address the alleged corporate mismanagement, ruling that it was improper to take any evidence on corporate mismanagement without the Attorney General's involvement. *Id.* at 167-168.

The *Lopez* case perfectly illustrates that members may sue when enforcing a right or remedy only available to them, and that, otherwise, they do not have standing. See also *Jessie* v. *Boynton*, 372 Mass. 293, 305 (1977) (dues-paying members had standing where nonprofit hospital board allegedly tricked them into approving bylaws that disenfranchised them). The members in this case allege that, "[b]y planning and approving the sale," the Trustees breached their fiduciary duty. This claim is similar to the *Lopez* plaintiffs' claim of corporate mismanagement and, under *Lopez*, only the Attorney General has standing to bring it.[5]

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[5] The Hatt plaintiffs base their standing on the alternative theory that their membership entitles them to bring a derivative claim on behalf of the Museum against the Board. See generally *Bessette* v. *Bessette*, 385 Mass. 806 (1982) (derivative action, as opposed to personal action by shareholder, is appropriate method to resolve claims on behalf of corporation). They cite an unpublished decision for the proposition that such a claim can even be brought in the context of public charities. *Okafor* v. *Soverign Bank*, 2013 WL 6838599 (Mass. App. Ct. 2013) (rule 1:28 decision). The *Okafor* case, denying relief on procedural grounds, did not reach the issue of whether the Attorney General's exclusive standing barred the derivative action. *Id.* at *1; see, e.g., *Harvard Law Sch.* v. *President & Fellows of Harvard Col.*, 413 Mass. 66, 72 (1992) ("Because we affirm the judgment on other grounds, we need not reach the question of capacity of the plaintiffs to sue"). Although this court need not reach the issue either, it appears the Hatt plaintiffs' theoretical derivative rights also would fall within the Attorney General's exclusive purview because derivative actions may only be brought "to enforce a right of a corporation," and the Attorney General has the exclusive authority to enforce the rights of public charities. G. L. c. 12, § 8; Mass. R. Civ. P. 23.1. At any rate, the corporate "members" who may bring a derivative claim must be distinguished from mere dues-paying "members" who do not participate in corporate governance; the Museum's bylaws provide that the Trustees are the corporate members for purposes of G. L. c. 180, § 2 (e), and it follows that, if a derivative action were permissible, only a Museum trustee would be able to bring it.

The plaintiffs who made substantial donations to the Museum argue that they have a private right to sue by virtue of their gifts that is unique from the rights of the general public. They do not, however, allege that their donations conferred any special rights upon them. Since "the Legislature has determined that the Attorney General is responsible for ensuring that . . . charitable funds are used in accordance with the donor's wishes," it is difficult to see why a donor should also have standing to seek the same end. See *Weaver* v. *Wood*, 425 Mass. 270, 275 (1997). The donors in this case have failed to explain how their interest in enforcing the terms of their gifts is any different from the general public's right to have those terms enforced. Accordingly, they do not have standing because the Attorney General exclusively has that right. *Dillaway* v. *Burton*, 256 Mass. at 573-574 (the general exclusivity rule "has been held applicable to cases of donors or grantors of property devoted to charitable uses").

The plaintiffs who are residents of Berkshire County say they have a private right to sue because the Museum was incorporated to benefit "the people of Berkshire County and the general public." As the Trustees point out, this language shows that the "general public" in fact receives the same benefit as "the people of Berkshire County," and, accordingly, the Berkshire plaintiffs have an interest no different from the general public. Even if the charter gave the sole benefit to Berkshire residents, it has been long held that a charitable benefit to an indeterminate class of people is one for the general public and, therefore, members of that class have the same interest as the general public. See *Burbank* v. *Burbank*, 172 Mass. at 256 ("The petitioners show no other interest in these charitable devises and bequests than that of the general public and all other citizens of Pittsfield").

The Pittsfield plaintiffs assert that they have special standing to enforce the 1871 Berkshire Athenaeum restriction that no property of the Athenaeum "shall ever be removed from the town of Pittsfield." The 1871 Act does not expressly give citizens of Pittsfield any right to enforce this restriction. Accordingly, the Pittsfield plaintiffs have no more right to bring an enforcement claim than did the Pittsfield residents in the *Burbank* case; the Attorney General has exclusive authority to enforce any restrictions placed on gifts to the Athenaeum as a result of its statutory charter. G. L. c. 12, § 8 ("The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof").

In sum, none of the Rockwell non-governmental parties have standing to pursue Count I of the complaint and, as such their particular requests for a preliminary injunction with respect to that count will be denied. Further, none of the Hatt plaintiffs have standing to pursue their claims; their request for a preliminary injunction is denied and their complaint will be dismissed.[6]

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[6] The Attorney General did not move to pursue the Hatt litigation. As such, the Hatt plaintiffs' claims of breach of fiduciary duty by committing waste and breach by acting in contemplation of a related-party transaction need not be addressed. Suffice to say there is no evidence sufficient to enjoin the sale under

B. The Merits

1. The Attorney General's Posture

As should now be clear, the Attorney General does have standing to request that the court enjoin the Sotheby's auction. Yet this court has some threshold concerns.

There is no dispute that the AGO was initially made aware of the proposed sale of art by the Museum on June 23, 2017. A letter from Museum's counsel clearly revealed the plan to deaccession works of art and other items at public auctions. See G.L. c. 180, § 8A (a). In fact, this missive provided the AGO with a list of the items that it planned to sell, including the Rockwell paintings. The five page communication, together with two exhibits, outlined the reasons for this event and the expected results.

The AGO, through the Non-Profit/Public Charities Division, commenced a detailed and thorough review of this process. As noted in its memorandum, over the summer the Division requested and reviewed numerous documents, conducted over 20 informal interviews, met with Museum officials in Pittsfield, had no fewer than 20 conference calls with Museum counsel and fielded more than 400 contacts by individuals interested in the transaction. Clearly, during the last four months, the AGO was fully engaged in this controversy.

On September 6, Sotheby's announced that November 13, 2017, was the date of the first of a series of auctions. As the clock was ticking down in September and October, the AGO took no steps to intervene or even express dissatisfaction with the planned auctions to the Museum. Ultimately, the non-governmental plaintiffs were forced to file suit on October 20th and 25th, respectively, by asserting claims exclusively within the jurisdiction of the AGO. It was not until October 30, two days before the preliminary injunction hearing, that the AGO entered the fray.

After being dragged into the litigation as a defendant in the Rockwell case, the AGO did not file a cross-claim against the Museum and, more importantly, it did not seek an injunction to stop the art sale. Instead, shortly before the injunction hearing, the AGO filed a memorandum supporting the plaintiffs' request to stop the sale. In the memorandum, the AGO does not assert that the Museum breached its fiduciary duties, only that it has "concerns" and needs more time to complete its investigation.

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either ground even if the Attorney General were to request revival of these claims. Further, though the Hatt plaintiffs complain that the number of Museum Trustees is in violation of the charter limit, the Attorney General does not take up the Hatt plaintiffs' torch by arguing that that deviation, if it is one, somehow nullifies the Board's actions. The Hatt plaintiffs cited no authority for such a draconian result and this court has found none.

Putting aside the issue of why four months was insufficient to complete this inquiry,[7] at no point does the AGO seek a continuance of the hearing in order to reach a decision on the merits for such a sale; it simply wants the injunction, as asserted by the plaintiffs, to be allowed based on its "concerns." Of particular significance, the AGO does not specify, by affidavit or otherwise, what information is necessary to complete its review, what attempts it has made to obtain such information, and when it will be in a position to offer its opinion regarding the merits of the sale. Given the considerable financial consequences that will result in enjoining the sale, this request to enjoin based on concerns is unusual.[8]

At the hearing, the AGO admitted the obvious: that the other plaintiffs do not have standing to assert claims for breach of fiduciary responsibilities against the Museum. It was equally obvious that if the plaintiffs have no standing their motion for an injunction will fail. Consequently, at the close of business that day, the Commonwealth filed an emergency motion to convert the AGO to a plaintiff and assert a preliminary injunction on behalf of the Commonwealth, but only if the non-governmental plaintiffs have no standing. This motion was allowed the following day.

In this litigation, the AGO is a reluctant warrior. Most of those concerned find the sale of art in any form to be disconcerting, but conduct that raises concern or is troubling is not the legal standard. Whatever "concerns" remained with the AGO, they were insufficient to initially warn the Board that it intends to prevent the sale, nor were they sufficient to mount an injunction on behalf of the Commonwealth when the first auction became imminent. Instead, the burden of carrying this task fell to the non-governmental plaintiffs. This tactic required the AGO to take an astonishing position in its memorandum, a position that was simply anathema to its very core, i.e., members of a charitable corporation arguably have standing to sue a chapter 180 corporation and its board members for breach of their fiduciary duties.[9] The AGO evinced apprehension to the very end, even when it was forced to file a motion to attain plaintiff status, the injunction request was carefully limited to be operative only if the plaintiffs have no standing. In other words the AGO is making every effort to avoid the issuance of an injunction *under its name*. I suspect that if the other plaintiffs had not filed suit, the AGO would not have initiated any litigation.

Thus, the court once again takes particular note of the *Lopez* case. In *Lopez*, the Attorney General had "considered the allegations of corporate mismanagement and had determined that the public interest would not be served by his participation in the case."

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[7] Chapter 180, § 8A (a), requires that should a non-profit/charitable institution attempt to sell "substantially all" of its assets or that a sale will result in a material change in the nature of the activities conducted by the corporation, notice must be given to the AGO 30 days before the sale.

[8] In an effort to have cases decided on the merits, courts will typically continue any matter if a party so requests by way of motion and affidavit, establishes good reasons for the continuance and indicates when the reasons for the continence will likely be resolved. In this case, the AGO did not seek a continuance.

[9] See Attorney General's Response to Plaintiff's Motion for Temporary Restraining Order, p. 24 (noting that certain plaintiffs "arguably have stronger arguments for standing on particular claims in the Complaint than the other Plaintiffs" and concluding "the AGO respectfully defers on whether or not standing requirements are satisfied as to various plaintiffs").

384 Mass. at 166. Since the Attorney General declined to pursue the matter, the Supreme Judicial Court held that it was inappropriate for the trial court to consider any issues, such as the mismanagement allegations, that only the Attorney General could have litigated. *Id.* at 167. In this case, the AGO's deliberate course of action and general reluctance gives the court pause.

It is obvious that the AGO's lack of aggressiveness speaks volumes to this court. As such, this court takes the AGO at its word that its "concerns," are in fact concerns only, and that, absent these "concerns," the AGO would have no qualms with a museum in severe financial straits deaccessioning and selling some of its most valuable objects to finance a new approach for serving the purposes of its charter. See *Attorney General* v. *Hahnemann Hosp.*, 397 Mass. 820, 833 (1986) (not inappropriate for public hospital to convert its assets to meet amended purpose). Because the AGO has not argued otherwise, this court is constrained to consider only the arguments before it. See *Lopez*, 384 Mass. at 166-167.

In her brief in support of the injunction,[10] the Attorney General contends that (1) the AGO has yet to complete its review of the Trustees' plan to auction the art and there are aspects which "raise concerns"; and (2) allowing the sale to go forward before the AGO completes its investigation would "interfere irreparably with the AGO's duty to protect charitable assets and the public interest, as many of these valuable pieces of art could be sold to private buyers outside of Massachusetts beyond the reach of this Court."

The AGO's "concerns" are as follows: (1) the Museum may be prohibited from selling artwork acquired before 1932 due to the Pittsfield geographic restriction; (2) Norman Rockwell may have restricted his gifts by requiring that his artwork remain with the Museum permanently or that it only be used to benefit the Museum's art collection; and (3) the Trustees' plan may contravene its purpose. These three concerns essentially allege a breach of trust. AGO Memo, p. 24 ("there is substantial evidence to show that if the Museum were to proceed . . . it may violate constructive trusts placed on these objects . . ."). The AGO further argues that the "core issue" is whether the Trustees have breached or will breach their fiduciary duties by selling the objects as planned.

All told, the AGO asserts three grounds in support of her motion for a preliminary injunction to enjoin the sale: (1) the Sotheby's sale could be a breach of fiduciary duty; (2) the sale could be a breach of any of three alleged trusts; and (3) if the sale occurs before the AGO finishes its investigation, the public will have been deprived of the AGO's oversight. The Sotheby's sale must be enjoined if the court concludes it is more likely than not that the Attorney General will prevail on any of these three grounds and that, as a result, the sale would adversely affect the public interest. See *Edwards* v. *City of Boston*, 408 Mass. 643, 647 (1990).

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[10] The Rockwell and Hatt plaintiffs each initially moved for a temporary restraining order. The requested relief is treated as one for a preliminary injunction. See *Addison* v. *Belay*, 440 Mass. 1010, 1010-1011 (2003) (citing cases).

2. *Breach of Fiduciary Duty*

For a preliminary injunction to issue based on a breach of fiduciary duty, the Attorney General must show it is more likely than not that (1) the Trustees had a fiduciary duty to the public; (2) that the Trustees breached or will breach that duty; (3) that the public has been or will be damaged; and (4) that the Trustees' fiduciary breach has caused or will cause the public injury. See, e.g., *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. 153, 165 n.19 (1999).

The AGO argues that the Trustees breached or will breach their statutory duty of care as a charitable corporation. There is some dispute as to what rule the court should employ to determine whether the Trustees acted with the requisite care. While for-profit businesses are subject to the so-called business judgment rule, the Attorney General suggests that nonprofits should be scrutinized under a heightened standard in Massachusetts, as ostensibly implied by its case law. See *Boston Athletic Assn.* v. *International Marathons, Inc.*, 392 Mass. 356, 366 (1984).

However, the SJC's definition of the private business judgment rule is virtually indistinguishable from the statutory duty of care for nonprofits. Compare *Halebian* v. *Berv*, 457 Mass. 620, 627 n.11 (2010) (the business judgment rule requires a board to perform its duties "in good faith, with the care that a person in a like position would reasonably believe appropriate in similar circumstances, and in a manner . . . reasonably believe[d] to be in the best interest of the corporation"), *with* G. L. c. 180, § 6C (a nonprofit board must perform its duties "in good faith and in a manner [it] reasonably believes to be in the best interest of the corporation, and with such care as an ordinarily prudent person in a like position with respect to a similar corporation organized under this chapter would use under similar circumstances").

Interestingly, the *Boston Athletic Association* case, which is the Attorney General's sole support for a heightened standard, predated the Legislature's enactment of G. L. c. 180, § 6C, by about five years. See St. 1989, c. 644, § 5 (establishing statutory standard for due care). It would therefore appear that the Legislature intended for the usual "business judgment rule" to apply in the nonprofit context, which appears to reflect prior law. See, e.g., *Ames* v. *Attorney General*, 332 Mass. 246, 249 (1955) (Attorney General opined that "the judgment of trustees cannot be overridden by the courts unless the trustees decide arbitrarily, capriciously, or in bad faith"). That said, this court scrutinizes the Trustees' actions to confirm that their decisions measure up not only to the standard business judgment rule, but also that their choices reflect their "high degree of accountability to the individual donors as well as the community." *Boston Athletic Assn.*, 392 Mass. at 366.

The Attorney General, agreeing that the Museum was in dire straits, conceded at oral argument that the Trustees' decision to deaccession and sell the forty objects was in good faith. As such, she solely contends that the decision was unreasonable under the

circumstances. The court addresses each alleged unreasonable aspect of the decision in turn.

First, the Attorney General argues that the Trustees unreasonably chose an exorbitant revitalization plan. It is true that, while the Trustees' consultant found that it needed $25.6 million to stabilize its operations, they opted for a plan costing $60 million -- $20 million for upgrades and $40 million toward endowment. But the Trustees made reasonable efforts to consider multiple plans over a two-year investigatory period. Further, adding $40 million to the Museum's endowment is hardly an aggressive choice and demonstrates a commitment to the community to keep the Museum operational. The decision to maximize the Museum's endowment and to improve substantially its facilities was not unreasonable, nor did it fail to take into account the individual donors and the community.

Second, the Attorney General contends that the Trustees' decision to deaccession was unreasonable because it violated general museum ethics and would result in sanctions. The Attorney General cites no case, statute, or AGO policy in support of the proposition that, to be reasonable, corporate board decisions must follow the professional ethics of the field. The Trustees evidently considered the ethical implications of their decision and weighed those implications heavily. However, as noted, deaccessioning has become a necessary evil in the museum industry due in large part to loss of funding and economic upheaval. See generally Lerner & Bresler, *supra*, at p. 1503-1504. The Trustees have not spurned the ethical guidelines and exposed the Museum to sanctions without cause: indeed, as a result of the sale, the Museum will garner significant assets to tide it over during the expected freeze-out from the industry during which time the Museum will not be loaned exhibits from most, if not all, accredited museums. While public and professional dissatisfaction is understandable, that is not enough to render the decision unreasonable given the Museum's trying financial circumstances. The Trustees' decision to invest most of the proceeds in the Museum's endowment again indicates their careful consideration of the individual donors and the community when taking this difficult step.[11]

Third, the Attorney General argues that the Trustees unreasonably decided to violate the Museum's collections management policy by choosing to deaccession the Museum's most valuable artwork to pay for operational costs. Yet, as the Trustees explained, they are not bound by this policy. The policy is not referenced in the Museum's charter, its articles of incorporation, nor in its bylaws. Indeed, there is nothing requiring the Museum to even have a collections management policy at all. The Trustees' decision to override its policy was reasonable in this circumstance in light of the extreme financial concerns before them, which are absent from the day-to-day decisions governed by the policy. The Trustees' deliberate, two-year decision-making

[11] In a related argument, it is contended that deaccessions of this nature will chill relations with potential future donors to the Berkshire Museum, and to museums in general. The argument overlooks the simple fact that donors are free to restrict their gifts in express terms, and, quite often, they do.

process demonstrates that they were mindful of the donors and the community in that they did not disregard the collections management policy in haste.[12]

Fourth, the Attorney General faults the Trustees for failing to discover the purported Athenaeum-era restrictions on some of the deaccessioned objects and for failing to notify the AGO of those restrictions. The Attorney General believes these failures rendered the decision unreasonable, and she is also troubled that the Trustees did not contact the AGO until after they voted to deaccession all of the objects.

As an initial matter, there is no law nor AGO policy requiring museums to notify the AGO when deaccessioning objects. See G. L. c. 180, § 8A (c) (Attorney General notification required when liquidating all or substantially all assets). With respect to the supposed restriction that objects donated before 1932 cannot leave Pittsfield, the Trustees take the position that there is no such restriction and that no notice was necessary. Whether or not the Trustees were correct, the potential restriction did not render unreasonable their decision to deaccession these older objects. The Museum's accession slips did not reflect any restrictions on the pre-1932 objects. Further, one could fairly assume that, even if there was arguably a restriction on objects donated that long ago, there was little chance that someone would raise or attempt to enforce the restriction. Finally, a reasonable inquiry into the matter might have revealed that the provenance of all of its earliest objects is traced back to Zenas Crane when he started the Museum in 1903, and that, in 1932, when Mr. Crane's family donated sufficient money for the Museum to form a separate entity, the resulting charter contained no geographical restriction. Thus, the Trustees could well have concluded that Zenas Crane, who donated the earliest objects, and perhaps many of the pre-1932 objects up for auction, had no intention that they be kept in Pittsfield.

At any rate, the risks attendant to the Trustees' decision to deaccession these older items were so minimal that their failure to notice the possibility of a restriction (if that is what happened) or their failure to seek a declaration that there are no restrictions was reasonable under the circumstances. Notably, it took two months of substantial preliminary investigation by the AGO to discover the possibility that certain objects were restricted by the Athenaeum charter. And it was not the AGO that made the discovery; the information came from a member of the community. In light of the AGO's own failure to discover an arcane theory for restricting certain objects, the failure of the

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[12] The Attorney General's concern that the Trustees' methodology violated the Museum's charter or its core purposes is discussed *infra*. It is worth noting that, in her memorandum, the Attorney General seems to suggest the possibility that accessioning merely to deaccession to pay for operational costs could violate the fiduciary obligations of a museum's board of trustees. See AGO Memo at p. 23 & n.19. Of course, there is no allegation in this case that the Museum's "acquisitions policies," nor the way in which those policies were carried out by professional staff, have caused "certain types of deaccessioning." Compare Patty Gerstenblith, "Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public," 11 Cardozo J. Int'l & Comp. L. 409, 420 (2003) (stating that certain "acquisition policies" could breach of duty of care).

Museum's volunteer board to notice or raise the purported restriction does not seem unreasonable.[13]

The Trustees' decision was not unreasonable for any reason raised by the Attorney General. Nor did their decision fail to take into account the public interests at stake. Rather, they undertook a deliberate and careful review of the available options and chose what they believed to be the appropriate course. That was their duty. Though the Attorney General, the non-governmental plaintiffs, and perhaps many in the public might disagree with the resulting decision, the law does not hold the Trustees to a standard of popular or political approval. Rather, the law requires reasonable care under the circumstances, and there is no evidence that the Trustees afforded this decision less than reasonable care.

3. Breach of Fiduciary Duty by Breach of Trust

The Attorney General also complains that the sale must be stopped because it will breach one of three possible "constructive" trusts: the trust supposedly arising from the pre-1932 restrictions, Norman Rockwell's purported inter vivos trust, and the trust intrinsic to the Museum's charter.[14] To support a preliminary injunction, the Attorney General must demonstrate by a preponderance of the evidence that (1) a trust exists; (2) the Trustees breached or will breach the trust; (3) the public was or will be injured; and (4) that the Trustees' fiduciary breach caused or will cause the injury to the public. *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. at 165 & n.19. As a threshold matter, any breach of trust will depend on whether a trust exists. *Id.*

The Attorney General submits that the trusts at issue are not based on express declarations of trust, but rather are "constructive trusts." "A constructive trust is an equitable remedy used to avoid the unjust enrichment of one party at the expense of another, where legal title to the property in issue was obtained either by fraud, in violation of a fiduciary relationship, or where information confidentially given or acquired was used to the advantage of the recipient at the expense of the one who disclosed the information." Newhall, Settlement of Estates (5th ed.) § 36:2, p. 13. There is no allegation that any of the proposed trusts arose from fraud, a violation of a fiduciary relationship, or unfair use of secret information, so the doctrine of constructive trusts does not apply. See *Christian* v. *Mooney*, 400 Mass. 753, 764-765 (1987) (no basis of imposing constructive trust where defendant had no knowledge of alleged fraud and there had been no unjust enrichment).

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[13] Even if the Trustees breached their duty in this regard, this court, as discussed *infra*, concludes that the Pittsfield geographical restrictions do not apply to the objects transferred from the Athenaeum to the Museum. As such, the claim nonetheless fails because the Attorney General has not shown that the breach injured or will injure the public. See *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. at 165 & n.19.

[14] The Attorney General takes no position on the Rockwell plaintiffs' claim that assets received by the Museum prior to 2016 are restricted from ever being sold. In any event, the catch-all provision in the Museum's charter (affording it the ordinary powers of similar corporations) authorized such sales. St. 1932, c. 134, § 3.

However, elsewhere in her memorandum, the Attorney General refers to the proposed trusts as "implied trusts," and cites as an example language from an advisory Supreme Judicial Court decision. See AGO Memo, p. 13 (describing "gifts to trustees . . . accepted by them to be held upon trusts expressed in writing or necessarily implied from the nature of the transaction . . ."), quoting *Opinion of the Justices to the Senate*, 237 Mass. 613, 617 (1921). But the term "implied trusts" also does not seem to fit the circumstances presented in this case. See S.M. Dunphy, Probate Law and Practice § 37.2, at 3 (2d ed. 1997) (defining implied trusts as "involuntary trusts which are constructive or resulting . . . inferred by the rules and principles of equity"). Each of the trusts proposed by the Attorney General are actually best categorized as simply voluntary inter vivos (that is, lifetime) trusts, which are "direct or express trusts which spring from the agreement of the parties." *Id.* It is the terms of the trust that, according to the Attorney General, were implied, not the trusts themselves. See, e.g., *Cooney* v. *Montana*, 347 Mass. 29, 34 (1964) ("An express trust in personal property may be created and proved by parol"), quoting *Rugo* v. *Rugo*, 325 Mass. 612, 617 (1950).

A gift to a charity usually creates some kind of charitable trust, with terms that are either express or implied based upon the circumstances of the gift. See *Jackson* v. *Phillips*, 96 Mass. 539, 556 (1867) (defining charity as "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons" and explaining that it "is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature"). When, as in each of the proposed trusts in this matter, a donor gives property to an existing public charity, the donor can choose to donate with or without restrictions. See *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. 330, 333-334 (1941). When there are no restrictions on the gift, the public charity's use is confined "to the purposes for which it was organized." *Id.* at 334. The public charity could then use the gift "in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes . . . ." *Id.*

On the other hand, when the donor restricts the gift, the public charity's use is limited to "the particular purpose for which the property was given." *Id.* Accordingly, in this case, if the charitable trust is alleged to be unrestricted, the court must determine the scope of the corporate purposes to decide whether the Sotheby's sale would be in breach of trust. And if the charitable trust was allegedly restricted by the donor, then the court must determine the breadth of those restrictions to see if the Sotheby's auction would violate them, breaching the trust.

(a) The Pre-1932 Restrictions

The first charitable trust for consideration is that which allegedly governed all donations to the Berkshire Museum before it was separately incorporated in 1932. The Attorney General does not contend that any of these early gifts were expressly restricted by their donors, so they fall into the category of charitable gifts usable "in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes." *Id.* See *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 290 (1907) (gift to a charitable corporation, without more, adopts the "publicly avowed purposes of its

organization and action"). Accordingly, the Attorney General argues that these gifts are subject to the restriction in the Berkshire Athenaeum's charter prohibiting "real and personal property, or such gifts, devises or bequests" held by the Berkshire Athenaeum from ever being removed from Pittsfield.[15] The issue, for purposes of the preliminary injunction analysis, is whether it is more likely than not that the "corporate purpose[]" of the Berkshire Athenaeum encompasses the Pittsfield geographical restriction. See *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. at 334. See also *Commonwealth* v. *Fremont Investment & Loan*, 452 Mass. at 74.

Section 1 of the Berkshire Athenaeum's corporate charter provides that it was to be incorporated "for the purpose of establishing and maintaining in the town of Pittsfield an institution to aid in promoting education, culture and refinement, and diffusing knowledge by means of a library, reading-rooms, lectures, museums, and cabinets of art and historical and natural curiosities." It then goes on to provide (according to the marginal annotations) "Powers and duties," terms regarding "Real and personal property," authorization for "Pittsfield [to] appropriate money for support of library," and a stipulation that "Trustees may fill vacancies in board." See St. 1871, c. 129, as appearing in Acts and Resolves Passed by the General Court of Massachusetts in the Year 1871 at 507. The Pittsfield geographical restriction is listed in Section 2, describing "Real and personal property," according to the margin notes. *Id.* Since the geographical restriction neither appears within nor closely follows the purposes provision, the corporate purposes plainly do not encompass the restriction barring removal of items from Pittsfield. That is sufficient to end the inquiry for purposes of the preliminary injunction analysis. See *Commonwealth* v. *Fremont Investment & Loan*, 452 Mass. at 74.

Even if the fact that the restriction is not listed in the "purpose" section of the statutory charter was somehow unpersuasive, it appears that, on closer analysis, the Pittsfield geographical restriction is actually a proviso regarding corporate authority to hold property. Section 2, paraphrased, with punctuation and emphasis unchanged, provides as follows:

> The Athenaeum may hold up to $250,000.00 of property; the Athenaeum must honor restrictions on donor gifts expressed in writing: *provided*, that those restrictions are not inconsistent with "the provisions of this act"; and *provided, further*, that no property held by the Athaneum may be removed from Pittsfield.

St. 1871, c. 129, § 2. As parsed, the Legislative intent was not to limit the purpose of the Berkshire Athenaeum to holding objects in Pittsfield in perpetuity; rather, it intended to restrict the authority of the Athenaeum trustees to keep Athenaeum property in other locations. In other words, the restriction is a limit on possession, not a limit on use. To enforce this limitation as if it were impliedly adopted by donors would be no different from enforcing the first sentence of Section 2, limiting the amount of money the trustees

[15] In addressing this issue, the court assumes, but does not decide, that unrestricted donations of artifacts to the Museum and the Athenaeum prior to 1932 were subject to the Athenaeum's charter, as opposed to the incipient Museum's express or implied purposes.

could hold—which is a type of restriction that the SJC has found to be "merely directory." See *Hubbard* v. *Worcester Art Museum*, 194 Mass. at 285-286 (monetary limits in charitable corporate charters are "similar to [those] resulting from a statutory provision which is merely directory").

While the Attorney General doubtless could enforce these restrictions against the Athenaeum, see *id.*, it does not follow that "merely directory" provisions merged with the Athenaeum's core purpose, allowing enforcement against the Museum with respect to objects inherited from the Athenaeum. It is also worth noting that the clause immediately preceding the Pittsfield restriction essentially provides that donor-imposed restrictions should not conflict with the corporate purposes; if the geographical restriction was meant to modify the corporate purpose, it logically should have been listed before the clause referring to corporate purposes. See *Clarke* v. *Board of Appeals of Nahant*, 338 Mass. 473, 480 (1959) (drafters should have expressed "intention more clearly, if that was their purpose"). For all of these reasons, the Pittsfield geographical restriction cannot be considered part of the Berkshire Athenaeum's corporate purpose, and as such the Museum is not restricted from using objects received from the Athenaeum in a manner that removes those objects from Pittsfield.

(b) The Rockwell Charitable Trust

The Attorney General argues that the Rockwell gifts were subject to a charitable trust separate from that governed by the Museum's charter. It is contended, then, that the Rockwell gifts are governed by the second type of charitable trust, in which the donor makes particular restrictions, which, if accepted by the charity, bar the charity from using the gift in contravention of those restrictions. See *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. at 334. "Whether a trust is created depends primarily upon the manifestation by the parties of an intention to create a trust and that is ordinarily a question of fact." *Russell* v. *Meyers*, 316 Mass. 669, 672 (1944). The donor's intent "is to be ascertained from a study of the instrument as a whole in light of the circumstances attending its execution. Search should be made for a general plan, presumably designed to express a consistent and harmonious purpose." *Jewett* v. *Brown*, 319 Mass. 243, 248 (1946). If there is any doubt as to the donor's intent, the court should consider "the circumstances existing and known" to the donor at the time of the gift. *McKelvy* v. *Terry*, 370 Mass. 328, 334 (1976). See *Kendrick* v. *Ray*, 173 Mass. 305, 308 (1899) (where only evidence of trust was listing "trustee" after naming beneficiary, evidence of terms of trust and declaration to true beneficiary was admissible).

Extrinsic evidence relating to events taking place after the time of the gift cannot be considered when determining the donor's intent, but such evidence may be used "to show facts relevant to his knowledge, state of feelings toward or relation to the claimants." *Boston Safe Deposit and Trust Co.*, v. *Prindle*, 290 Mass. 577, 582 (1935). Words should be given their "ordinary meaning" unless it is shown that the parties intended to use them in a different sense. *Smith* v. *Livermore*, 298 Mass. 223, 234 (1937).

In 1958 and again in 1966, Norman Rockwell gave certain paintings to the Museum without declaring any trust. Shortly after Rockwell donated the first painting, he received a letter from Stuart Henry, the Museum's director, accepting the paintings and stating that they were to be part of the Museum's "permanent collection."[16] The Museum has attached affidavits, which the Attorney General has not contradicted, stating that "permanent collection" is and has long been museum parlance for objects accessioned by the museum and implies no actual permanency. These affidavits persuade the court that the phrase "permanent collection" should be accorded this specialized meaning, which would have been well-known by Rockwell and second nature to Henry.[17] See *id.* at 234. Accordingly, Henry's letter does not support the existence of a contemporary declaration by Rockwell that the paintings were to stay with the museum forever.

As the parties generally acknowledge, deaccession of artwork was not commonplace at the time of either of Rockwell's gifts. To the extent that may bear on the terms of a purported trust, it gives the court little reason to believe that, by gifting his paintings to the Museum without any express restriction, Rockwell nonetheless restricted the Museum from deaccessioning his work. If deaccessioning was so unheard of that Rockwell would not have thought to have restricted the Museum's right to deaccession his artwork, it suggests he did not restrict the Museum's rights in that fashion. On the other hand, if Rockwell and the Museum generally understood the possibility of deaccessioning, Rockwell's failure to expressly restrict the Museum from doing so suggests that restricting the gifts was not his intent.[18]

Based on the foregoing, the evidence of Rockwell's intent to create a restrictive, stand-alone trust (separate from the Museum's corporate purpose) is insubstantial. But even if the court were to agree that Rockwell's manifestation of intent is supported by the evidence, or that no such requirement is necessary under the circumstances, the Attorney General has still failed to submit sufficient evidence for the court to conclude it is more likely than not that Rockwell intended to restrict the use or sale of his paintings more or differently than any restrictions envisioned in the Museum's charter. The competent evidence submitted to show that Rockwell affirmatively restricted the Museum's use of his paintings is as follows. First, Thomas Smith, a retired curator of the Museum acquainted with Rockwell averred that it was his understanding, at the time of the donations, that Rockwell donated the paintings in question because "they were his favorite oil paintings and he wanted them to stay on display in the Berkshires." Second, contemporary correspondence between Rockwell and Stuart Henry seems to indicate a close relationship and also shows that Henry sometimes asked Rockwell before loaning

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[16] If a similar letter exists with respect to the 1966 donation, it was not presented to the court.

[17] In the current version of the Museum's collections management policy, "[t]he term 'Permanent' refers to those objects fully accessioned into the museum collection by following all standard procedures (see Accessions)." Klepetar Affidavit, Ex. F, at 7.a.

[18] In all likelihood, the possibility that the Museum might sell the works probably crossed their minds. Compare *Georgia O'Keeffe Foundation* v. *Fisk University*, 312 S.W.3d 1, 6 (Tenn.App. 2009) (noting that, in 1949, Georgia O'Keeffe expressed her intent that Fisk University would not sell or exchange any objects donated from her husband's estate). Rockwell donated his paintings to the Museum in 1958 and 1966.

out the gifted artwork. Third, the Attorney General submitted Rockwell's trust, which, having been drafted after deaccessioning became more common, conditioned gifts to museums on their promise not to sell his artwork.[19]

With respect to Mr. Smith's affidavit, he provides no evidence to support his belief that these paintings were Rockwell's favorites, or that Rockwell intended them to stay on display in the Berkshires. Indeed, although the parties submitted voluminous exhibits to support their claims, and although Rockwell's sons are parties to this litigation, there is no evidence before this court that Rockwell ever said—to anyone, let alone the Museum—that he wanted these paintings to remain with the Museum or to be displayed forever in the Berkshires. As far as the correspondence between Rockwell and Henry, it does little to move the needle in either direction. Henry had ample reason to seek out Rockwell's approval when dealing with his paintings: Rockwell was his friend, Rockwell was an iconic artist of international renown, and Rockwell had gifted the Museum with very valuable artwork. Henry's thoughtfulness in his dealings with Rockwell and his art was natural under the circumstances and thus is in no way suggestive of some express obligation.

Finally, while Rockwell's trust does tend to show his interest, later in life, in restricting the sale against his artwork, a close reading of the trust reveals that, if all gifts fail, the Museum is the default beneficiary of Rockwell's artwork—again, with no express restrictions. The sum total of the evidence tends to show that Rockwell simply wanted to benefit a museum that he particularly enjoyed.[20] It is public record that, by the time of the gift to the Museum, Rockwell's paintings had been featured on every *Saturday Evening Post* cover for some four decades. Rockwell was likely quite experienced with contracting his artistic rights and there is no reason to infer that he lacked the shrewdness needed to unequivocally restrict the valuable artwork when he gave it to the Museum.[21] As this court is unable to find any likelihood that Rockwell specially restricted his gift to the Museum, the gifts are instead controlled by the corporate purposes provided in the Museum's charter at the time of the gifts. See *Newhall* v. *Second Church and Soc. of Boston*, 349 Mass. 493, 500 (1965) ("That these three vessels were appropriate for covenanted church use distinguished from general parish use should guide the disposition of the proceeds should they be sold. It does not limit the right of the title holder to sell them").

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[19] The trust, and some of the correspondence, are dated after the time of Rockwell's gifts and are therefore irrelevant to the issue of his donative intent. See *Boston Safe Deposit and Trust Co.*, v. *Prindle*, 290 Mass. 577, 582 (1935). As such, this evidence is considered only to the extent it may bear upon the terms of any trust Rockwell may have created when he donated his paintings to the Museum. See *Kendrick* v. *Ray*, 173 Mass. 305, 308 (1899).

[20] The Attorney General argues that the fact that Rockwell was a Museum member and donated cash "helps explain" why he did not formalize his wishes with respect to the donated paintings. Indeed; Rockwell's close relationship with the Museum tends to show his interest in benefiting the Museum outweighed any interest in keeping his artwork permanently displayed in the Berkshires.

[21] There is no evidence before the court tending to show that Rockwell was overly trusting, unsophisticated, or careless in his professional or personal dealings.

(c) Charitable Trusts Based on the Museum's Charter

The Attorney General lastly seeks to enjoin the Sotheby's sale because the Museum's "New Vision" plan could contravene its corporate purposes. Unrestricted gifts to the Museum are only usable "in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes." *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. at 334. The Museum's statutory charter provides that it was to be incorporated "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, the culture history of mankind and kindred subjects by means of museums and collections . . . ." St. 1932, c. 134, § 3.[22] Thus, all unrestricted gifts donated to the Museum may only be used in advancement of maintaining the facilities, and promoting art, science, history, and "kindred subjects." *Id.* See *Hubbard* v. *Worcester Art Museum*, 194 Mass. at 290.

The question for this court is whether it is more likely than not that the sale of a substantial portion of the Museum's art would violate its corporate purposes. There is no evidence that the sale of art, alone, is in any way a violation of the Museum's charter. Indeed, deaccessioning itself is not even a violation of professional ethical standards, nor is there any prohibition against selling unrestricted donated objects in Massachusetts without Attorney General or court approval. See AAMD Code of Ethics, available at https://aamd.org/about/code-of-ethics ("A museum director shall not dispose of accessioned works of art in order to provide funds for purposes other than acquisition of works of art for the collection"); Attorney General Guidelines on Notice Requirements of G.L. c. 180, §8A(c) ("Notice to the Attorney General is required under Section 8A(c) only when the transaction involves all or substantially all of a charity's assets"). Because deaccession is neither barred by the Museum's charter, nor by any professional or legal authority, the sale, alone, does not violate the Museum's corporate purpose. See *Newhall* v. *Second Church and Soc. of Boston*, 349 Mass. at 500.

Recognizing this, the Attorney General contends that her problem is not with the sale alone, but rather with the Museum's bold New Vision (which incorporates the sale) because the New Vision allegedly could change the nature of the Museum. See *Attorney General* v. *Hahnemann Hosp.*, 397 Mass. 820, 836 (1986) (stating in dicta that a public charity must use donated funds for "similar public charitable purposes"). But there is scant authority for this court to enjoin a party, let alone a corporate board charged with a duty of reasonable care, from doing a lawful act for the sole reason that it anticipates that party will use that lawful act to springboard into an unlawful one. Cf. *Commonwealth* v. *Cantres*, 405 Mass. 238, 240 (1989) (criminal conspiracy punishes "unlawful agreement" to do unlawful act or "lawful act for unlawful purposes").

Even if such an injunction could ever be appropriate, the court has no reason to believe that, should there be any restriction on the use of funds generated from the

[22] The Museum amended its charter in 2016 by filing amended articles of incorporation in which the Trustees reiterated the charter purposes.

Sotheby's auction, the Museum would violate the restriction rather than simply petitioning the probate court for a deviation in order to accomplish its goals.[23] See *Trustees of Dartmouth College* v. *Quincy*, 357 Mass. 521, 534 (1970). Should the court deny the relief sought, the Museum would simply be constrained to take a less transformative approach.[24] See *Attorney General* v. *Hahnemann Hosp.*, 397 Mass. at 836. None of these likely results involves any breach of the Museum's charter.[25] Accordingly, it is unlikely that the Sotheby's sale will breach the Museum's charter and the court has no cause to grant injunctive relief on this ground.

4. The Attorney General's Incomplete Investigation

Lastly, the Attorney General requests injunctive relief because the AGO has not yet finished investigating its concerns.[26] The argument appears to imply that, should the AGO learn the Museum's planned action is more inappropriate than it seems, it would more vigorously protect the public rights at stake. Or, perhaps, the Attorney General suggests that, whenever the AGO opens an investigation, the proposed action should be enjoined until the investigation can be concluded as a matter of public interest. Neither argument is persuasive in this case.

The AGO's clear policy is that charities only need to give official notice when they seek to sell substantially all of their assets.[27] See Attorney General Guidelines on

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[23] Based on the AGO's involvement at this stage, it is probable that the AGO will monitor the Museum's use of the funds and it is possible that it might even spiritedly pursue further litigation to enforce the Museum's charter. Thus, although this court concludes that the motion for injunctive relief must be denied, it is suggested the Museum might do well to consider the AGO's continuing leverage before proceeding with the auction.

[24] It bears repeating that most of the auction funds, i.e., those in excess of $26 million, are expected to be invested in the Museum's endowment.

[25] The Attorney General attempts to argue that, in selling the Rockwell art in particular, the Trustees would ignore the "very essence" of the Museum. See *First Bostonview Management, LLC* v. *Bostonview Corp.*, 88 Mass. App. Ct. 89, 90 (2015). But, as stated, the core purpose of the Museum is not merely the preservation of art—it is to promote art, natural science, and cultural history. Thus, cases such as *Trs. of the Corcoran Gallery of Art* v. *District of Columbia*, in which the court rejected deaccessioning due in part to the fact that the gallery was dedicated solely to "the fine arts generally," are easily distinguished. See 2014 D.C. Super. LEXIS 17, at 67 (D.C. Super. Aug. 18, 2014). In fact, the Museum's corporate purposes are broader than those reviewed in *Buffalo Fine Arts*, where the proposed deaccession sale "in no way constitute[d] a departure, or an ultra vires act, in violation of its corporate purposes." See *Dennis* v. *Buffalo Fine Arts Acad.*, 2007 N.Y. Misc. LEXIS 941, *10 (N.Y. 2007). Compare *Museum of Fine Arts* v. *Beland*, 432 Mass. 540, 544-545 (2000) (donor's intent was "to create and gratify a public taste for fine art," thus, sale of paintings held inappropriate as "antitheses of [donor's] intent").

[26] The Attorney General's powers to investigate public charities are prescribed in G. L. c. 12, §§ 8H and 8I. Section 8H provides that the AGO "may conduct an investigation upon application to and with the approval of a judge of the trial court" whenever it suspects a breach of trust or other public charity malfeasance. G. L. c. 12, § 8H. It is not clear whether the AGO ever opened a formal, § 8H, investigation; there is no evidence before this court that the AGO's investigation was specifically authorized by any court.

[27] There is no evidence that the forty works set for auction comprise substantially all of the Museum's assets. See Affidavit of Gary J. Moynihan, CPA, Exhibits B, C, & D (indicating, on page 19 of each annual financial statement, that the Museum does not capitalize its collection for purposes of valuation). Of course, even if that is the case, the Trustees' courtesy notice to the AGO satisfied the G. L. c. 12, § 8A (c) notice requirement and the AGO does not contend otherwise.

Notice Requirements of G.L. c. 180, §8A(c) at 2. The Attorney General Guidelines recommend that boards "submit an informal written explanation" when the transaction is "significant," so the Public Charities Division can evaluate whether "the transaction raises other concerns under the law of public charities." *Id.* at 3. The Guidelines go on to explain that "[f]or example, other transactions may require court approval even where they do not involve substantially all of a charity's assets, such as transactions involving material changes in asset use, modification of donor restrictions, or sale of assets for less than fair market value." *Id.*

Here, the Trustees' proposed transaction, the Sotheby's sale, will be significant. However, as already explained, the sale, alone, does not change the asset use, does not modify any donor restriction, and will not be for less than fair market value. The Attorney General has not identified any other theory by which the proposed auction would violate the law of public charities. More to the point, the Attorney General has not moved for a continuance, stated the period of time required to investigate this matter, or in any way communicated why the AGO needs more time to complete its investigation than the four-month period that has already elapsed.

Tellingly, the Attorney General Guidelines conclude that "[i]t is in the organization's and the board members' best interest to maintain records of the decision-making process that was followed in the event that questions arise after a transaction is completed *that did not involve notice to the Attorney General*." *Id.* (emphasis added). This policy clearly contemplates occasions when a public charities issue was only noticed in hindsight. If the usual course is that a charity might sell an object without informing the Attorney General and be subject only to scrutiny to ensure it operated under the appropriate standard of care, it is surprising that the AGO would seek to enjoin such a transaction potentially jeopardizing millions of dollars of charitable funds.[28] It is bewildering that the AGO would seek such an injunction, at such a cost, when its investigation has uncovered no evidence of bad faith, no conflict of interest, no breach of loyalty, no express gift restrictions, and yielded unconvincing evidence of implied gift restrictions or a breach of reasonable care during a two-year decision-making process. Accordingly, while the AGO would be likely to succeed on the merits on its claim that proceeding with the auction would sidestep its investigative process in violation of G. L. c. 12, § 8, it cannot show that injunctive relief would promote the public interest. See *Commonwealth* v. *Mass. CRINC*, 392 Mass. at 89.

In the usual case, it probably promotes the public interest to empower the Attorney General to thoroughly investigate whatever it wishes to investigate on behalf of the public. But all investigations are not cut from the same cloth. This particular investigation has yielded unconvincing evidence of charities violations over a period of four months and the AGO has given this court utterly no reason to expect that convincing

[28] The Trustees attach credible affidavits stating that, if the auction should be delayed, Sotheby's will be unable to generate similar consumer interest if and when the injunction is lifted. The Attorney General has introduced no evidence to the contrary. As noted, the "hammer value" of the items up for auction is approximately $46,000,000 to $68,000,000. A decrease in consumer interest or a change in the national economy could be disastrous for the Museum.

evidence will ever be forthcoming. Indeed, the AGO's initial indifference to this litigation, compounded with its later faint-heartedness, strongly suggest that the AGO, too, has little expectation of discovering evidence supporting its concerns. The public's interest in having the AGO continue its tepid investigation pales in comparison to the public interest in ensuring that a public charity does not needlessly lose potentially millions of dollars by canceling a contract that it has every right to make. An injunction permitting the continuation of such an investigation under these circumstances would adversely affect the public and be inconsistent with the requirements for such request. See *id.*

CONCLUSION

For the foregoing reasons, the Attorney General's request to preliminarily enjoin the planned auction is denied. This may very well mean that timeless works by an iconic, local artist will be lost to the public in less than a week's time. No doubt many will be disappointed in this outcome, and they may take little comfort knowing that, in their loss, the rights of a charitable board to make thoughtful decisions to steer its charity through troubled times have been vindicated. However, it is the responsibility of the court to act dispassionately and decide cases solely on the legal merits of the claims presented.

ORDER

In Civ. Action No. 17-0253, it is ORDERED that the Plaintiffs' Motion for Preliminary Injunction is DENIED. It is further ORDERED that the non-governmental plaintiffs, Thomas Rockwell, Jarvis Rockwell, Peter Rockwell, James Lamme, Donald MacGillis, Jonas Dovydenas, and Jean Rousseau, are DISMISSED from this action for lack of standing. In Civ. Action No. 17-0260, it is ORDERED that the Complaint filed by Plaintiffs, James Hatt, Kristin Hatt, and Elizabeth Weinberg is DISMISSED.

SO ORDERED

_____
Date

_____
John A. Agostini
Associate Justice, Superior Court

HOUSE . . . . No. 178.

Commonwealth of Massachusetts.

HOUSE OF REPRESENTATIVES, March 11, 1871.

The Committee on Education, to whom was referred the petition of E. H. Kellogg, that Thomas Allen and others may be incorporated as the Pittsfield Athenæum, report the accompanying Bill.

Per order,

GEO. PUTNAM.

Commonwealth of Massachusetts.

In the Year One Thousand Eight Hundred and Seventy-One.

AN ACT

To incorporate the Trustees of the Berkshire Athenæum.

Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, as follows :—

SECT. 1. Thomas Allen, John Todd, Ensign H. Kellogg, Henry L. Dawes, Thomas Colt, Edwin Clapp, George Y. Learned, William R. Plunkett, Edward S. Francis, William P. Bartlett, James M. Barker, their associates and successors, are hereby made a body corporate by the name of the Trustees of the Berkshire Athenæum, for the purpose of establishing and maintaining in the town of Pittsfield an institution to aid in promoting education, culture and refinement, and diffusing knowledge by means of a library, reading-rooms, lectures, museums and cabinets of art and historical and natural curiosities; with all the powers and privileges, and subject to all

the duties, restrictions and liabilities set forth in all general laws which now are or may herafter be in force applicable to such corporations.

SECT. 2. Said corporation may hold real and personal property for the purposes aforesaid to the amount of two hundred and fifty thousand dollars; and all gifts, devises and bequests thereto shall be devoted to such purposes exclusively, and used in conformity with the conditions made by any donor and expressed in writing: *provided*, such conditions are not inconsistent with the provisions of this act; and *provided, further*, that no part of such real and personal property, or such gifts, devises or bequests, shall ever be removed from the town of Pittsfield.

SECT. 3. The town of Pittsfield, so long as said corporation maintains a public library for the use of the inhabitants thereof, is hereby authorized to appropriate and pay money to aid in supporting such institution, the same as may be done by law for the support of public libraries, and said corporation may receive such appropriations as may be made.

SECT. 4. The trustees of such corporation shall have authority to fill all vacancies in any manner occurring, but the number thereof shall never exceed eleven.

SECT. 5. This act shall take effect upon its passage.

HOUSE . . . . . No. 875.

[Bill accompanying the petition of Charles W. Kellogg and others, trustees, for legislation to change the name of the Trustees of the Berkshire Athenæum, and to enlarge the number of trustees and prescribe their term of office. Libraries. Feb. 4.]

Commonwealth of Massachusetts.

In the Year One Thousand Nine Hundred and Three.

AN ACT

To change the Name of the Trustees of the Berkshire Athenæum to Trustees of the Berkshire Athenæum and Museum, and Relative to the Election of Trustees of Said Corporation.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The name of the "Trustees of the Berkshire Athenæum" is hereby changed to the "Trustees of the Berkshire Athenæum and Museum."

SECTION 2. The corporation may elect nine trustees in addition to the number now authorized.

SECTION 3. The corporation may by its by-laws limit the term of office of all trustees hereafter elected, and from time to time reduce the number of trustees to not less than ten in number in addition to trustees holding office "ex officio," and may classify such trustees so that the terms of a certain number of trustees shall expire each year.

SECTION 4. This act shall take effect upon its passage.

HOUSE . . . . No. 1193

The Commonwealth of Massachusetts

DEPARTMENT OF CORPORATIONS AND TAXATION,
STATE HOUSE, BOSTON, January 12, 1932.

To the Honorable Senate and The House of Representatives.

There is just presented to me and hereby referred to you a petition of the Berkshire Athenaeum and Museum which has for its purpose legislation to authorize a change of name from The Trustees of Berkshire Athenaeum and Museum to the Trustees of Berkshire Athenaeum, and to establish another corporation under the name Trustees of the Berkshire Museum, and to authorize the transfer of certain property from the trustees of the old to the trustees of the new corporation.

The provisions of section 7 of chapter 3 of the General Laws, as last amended by chapter 107 of the Acts of 1926, require that this kind of a petition be filed with the Commissioner of Corporations and Taxation on or before November 1 of the preceding year. The filing not having been made in compliance with the statute, the General Court only is authorized to permit the consideration of the petition.

The Trustees of The Berkshire Athenaeum was incorporated by a special act, chapter 129 of the year 1871, as an educational corporation to encourage art, culture and refinement, through lectures, the maintenance of a library, and museums of historical and natural curiosities. In 1903, chapter 131, it was authorized to change its name to the present title. Through gifts or bequests the corporation has received and now owns a museum and a library, and they now desire to transfer museum and land connected to the proposed new corporation,

maintaining the ownership and control of the Athenaeum Library in the old corporation.

The corporation could probably change its name under general laws and a new corporation could be formed under general laws, but the petitioner evidently desires legislative sanction for the transfer of trust estate from the old to the new corporation, and feels that such sanction should also be received to the change of name and the establishment by a special act of incorporation for the new corporation.

There may be some questions as to whether any power exists in the Legislature to authorize a change in the management of trust fund, or whether consent of the Probate Court is essential.

No fee is required with this petition.

Respectfully yours,

HENRY F. LONG,
Commissioner of Corporations and Taxation.

By Mr. Sisson of Pittsfield, petition of Clement F. Coogan, George H. Tucker and others that the name of the Trustees of the Berkshire Athenaeum and Museum be changed to Trustees of the Berkshire Athenaeum and that the Trustees of the Berkshire Museum be incorporated. Mercantile Affairs.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Thirty-Two.

An Act changing the Name of the Trustees of the Berkshire Athenaeum and Museum to Trustees of the Berkshire Athenaeum, and to Incorporate the Trustees of the Berkshire Museum and Authorize the Transfer to it of Museum Property.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The name of the "Trustees of the Berkshire Athenaeum and Museum" is hereby changed to the "Trustees of the Berkshire Athenaeum."

SECTION 2. The Trustees of the Berkshire Athenaeum are authorized and empowered to transfer and convey to the Trustees of the Berkshire Museum, a body corporate chartered by this act, the museum building and the land used therewith given to said Trustees of the Berkshire Athenaeum by the late Zenas Crane. The Trustees of the Berkshire Athenaeum are also authorized to convey to the Trustees

of the Berkshire Museum, and to reserve to the Trustees of the Berkshire Athenaeum, any rights of way and other easements which they deem it expedient to create or reserve in either or both properties and to transfer to the Trustees of the Berkshire Museum the Zenas Crane endowment fund and all objects donated by the said late Zenas Crane and such other objects of or illustrating natural science, culture history or art as they deem proper.

SECTION 3. Zenas Marshall Crane, John Barker, Frances C. Colt, Henry A. Francis, Charles J. Kittredge, Josephine C. Robbins and George H. Tucker, their associates and successors, are hereby made a body corporate by the name of the Trustees of the Berkshire Museum 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, the culture history of mankind and kindred subjects by means of museums and collections with all the powers and privileges and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or may hereafter be in force applicable to such corporation.

SECTION 4. Said the Trustees of the Berkshire Museum may hold real and personal property for the purposes aforesaid; and all gifts, devises and bequests thereto shall be devoted to such purposes exclusively and used in conformity with the conditions made by any donor and expressed in writing, provided that such conditions are not inconsistent with the provisions of this act.

SECTION 5. The Trustees of the corporation hereby chartered as the Trustees of the Berkshire Museum shall have authority to fill all vacancies in any manner occurring, but the number of said trustees shall never exceed fifteen.

SECTION 6. The Trustees of the Berkshire Museum shall be entitled to receive any gifts, devises or bequests to the Trustees of the Berkshire Athenaeum and Museum which by their express terms are intended for the museum.

SECTION 7. This act shall take effect upon its passage; provided that whatever authority or right is granted or conferred by this act is hereby declared to be limited to such authority or right as the general court may constitutionally grant or confer, without prejudice to any proceeding that may be instituted in any court of competent jurisdiction to effect the purposes of this act.

Part I ADMINISTRATION OF THE GOVERNMENT

Title II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

Chapter 12 DEPARTMENT OF THE ATTORNEY GENERAL, AND THE DISTRICT ATTORNEYS

Section 8 DUE APPLICATION OF CHARITY FUNDS ENFORCED

Section 8. The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXII CORPORATIONS

Chapter 180 CORPORATIONS FOR CHARITABLE AND CERTAIN OTHER PURPOSES

Section 8A SALE, LEASE, OR EXCHANGE OF CORPORATE PROPERTY AND ASSETS; GRANT OF SECURITY INTEREST; PUBLIC CHARITIES; NOTIFICATION OF ATTORNEY GENERAL AND COMMISSIONER OF PUBLIC HEALTH; INVESTIGATION

Section 8A. (a) A corporation may authorize, by vote of two-thirds of its members entitled to vote thereon or, in the case of a corporation having capital stock, by the holders of two-thirds of its capital stock entitled to vote thereon, at a meeting duly called for the purpose, with notice given as provided in section six B, the sale, lease, exchange or other disposition of all or substantially all of its property and assets upon such terms and conditions as it deems expedient, except that no such vote shall be required if such transaction does not involve or will not result in a material change in the nature of the activities conducted by the corporation.

(b) The authorization by members of the mortgage or pledge of, or granting of a security interest in, property or assets of a corporation shall not be necessary except to the extent that the corporation's articles of organization or by-laws provide otherwise.

(c) A corporation constituting a public charity shall give written notice to the attorney general not less than thirty days before making any sale, lease, exchange, or other disposition not referred to in subsection (b) of all or substantially all of its property and assets if that sale, lease, exchange or other disposition involves or will result in a material change in the nature of the activities conducted by the corporation, except that no such notice shall be required if a written waiver of such notice is executed by the attorney general before or after such sale, lease, exchange or other disposition. A certificate signed by an officer of the corporation which states that notice was not required, that notice was given, or that notice was waived by the attorney general, with respect to any sale, lease, exchange or other disposition of property by the corporation shall be conclusive in favor of any purchaser, lessee, transferee or other person relying thereon for purposes of determining compliance with the provisions of this subsection.

(d)(1) A nonprofit acute-care hospital, as defined in section 25B of chapter 111, or a nonprofit health maintenance organization as defined in chapter 176G shall give written notice of not less than 90 days to the attorney general and to the commissioner of public health if such notice concerns a nonprofit health maintenance organization, before it enters into a sale, lease, exchange, or other disposition of a substantial amount of its assets or operations with a person or entity other than a public charity. No such notice shall be required if a written waiver of such notice is executed by the attorney general. When investigating the proposed transaction, the attorney general shall consider any factors that the attorney general deems relevant, including, but not limited to, whether:

(i) the proposed transaction complies with applicable general nonprofit and charities law;

(ii) due care was followed by the nonprofit entity;

(iii) conflict of interest was avoided by the nonprofit entity at all phases of decision making;

(iv) fair value will be received for the nonprofit assets; and

(v) the proposed transaction is in the public interest.

(2) The attorney general shall assess the entity proposing to receive such assets or operations for reasonable costs related to, and shall expend such amounts for the review of the proposed transaction, as determined by the attorney general to be necessary. Such reasonable costs may include expert review of the transaction, a process for educating the public about the transaction and obtaining public input, and administrative costs. All materials filed by the parties in the course of the attorney general's review shall be made available for public inspection pursuant to section 10 of chapter 66 and section 7 of chapter 4.

(3) The attorney general shall, during the course of his investigation, hold at least one public hearing, in a location convenient to the population served by the nonprofit entity, at which any person may file written comments and exhibits or appear and make a statement. At least 21 days in advance of the public hearing, the nonprofit entity shall publish notice of the hearing in a newspaper of general circulation where the entity is located. The notice shall include the name of the nonprofit entity, the name of the acquirer, or other parties to the proposed transaction, the nature of the proposed transaction and the anticipated consideration that will be paid by the acquirer. In addition, the notice shall offer to provide to any person upon request to the nonprofit entity a detailed summary of the proposed transaction and copies of all transaction and collateral agreements. As defined in section 7 of chapter 4, compliance with this notice requirement

will not require disclosure of confidential trade secret, commercial or financial information contained in schedules or exhibits of those agreements.

(4) If a charitable fund results from the transaction, and if the nonprofit entity making the disposition does not continue its operation of a nonprofit hospital or nonprofit health maintenance organization, the governance of the charitable fund shall be subject to review by the attorney general and approval by the court. The governance of the charitable fund shall be broadly based in the community historically served by the predecessor nonprofit acute care hospital or health maintenance organization and shall be independent of the new for-profit entity. The attorney general shall conduct a public hearing in connection with his review of the plan for the governance of the resulting charitable fund. An appropriate portion of any resulting proceeds shall, if determined to be necessary by the attorney general, be used for assistance in the development of a community-based plan for the use of the resulting charitable fund.

(5) The entity receiving such assets or operations shall, if determined to be necessary by the attorney general in consultation with the department of public health, provide the funds, in an amount determined by the commissioner of public health, for the hiring by the department of public health of an independent health care access monitor to monitor and report quarterly to the attorney general, the department of public health and the committee on health care on community health care access by the entity, including levels of free care provided by the entity. The funding shall be provided for three years after the transaction. The entity receiving such assets or operations shall provide the monitor with appropriate access to the entity's records in order to enable the monitor to fulfill this function. To prevent the duplication of any information already reported by the

entity, the monitor shall, to the extent possible, utilize data already provided by the entity to the center for health information and analysis under chapter 12C or to any other agency. No personal identifiers shall be attached to any of the records obtained by the monitor and all such records shall be subject to the privacy and confidentiality provisions of section 70E of chapter 111.

(6) No officer, director, incorporator, member, employee, staff, physician, expert or advisor of the nonprofit entity making the disposition shall derive improper benefit from the transaction. The officers, directors, incorporators, members, senior managers, staff, physicians, experts and advisors of the nonprofit entity making the disposition shall be prohibited from investing in the for-profit entity for a period of three years following such disposition.

Trs. of the Corcoran Gallery of Art v. District of Columbia

Superior Court of the District of Columbia, Civil Division

August 18, 2014, Decided

Case No. 2014 CA 003745 B, Case No. 2014 CA 003745 B

Reporter
2014 D.C. Super. LEXIS 17 *

THE TRUSTEES OF THE ***CORCORAN*** GALLERY OF ART, Petitioner, v. DISTRICT OF COLUMBIA, Respondent.SEBASTIEN ARBONA, et al., Intervenors/Plaintiffs, v. THE TRUSTEES OF THE ***CORCORAN*** GALLERY OF ART, Defendant.

Core Terms

Corcoran, cy pres, Gallery, museum, collection, renovation, impracticable, Trustees', institutions, parties, accreditation, funds, operations, de-accession, fundraising, estimated, sanctions, staff, clear and convincing evidence, terms, settlor's, deficit, original intent, witnesses, work of art, campaign, issues, charitable purpose, carry out, fine art

Case Summary

Overview

HOLDINGS: [1]-Given the immediate and substantial maintenance needs an art gallery and school was facing, and its operating deficits, the court determined that the trustees of the institution had established, by a preponderance of the evidence, that it was impracticable to carry out the existing deed of trust; [2]-There were substantial risks associated with the intervenors' proposal to de-accession art to pay for building renovations and operating expenses; [3]-The Trustees were entitled to cy pres relief, pursuant to *D.C. Code § 19-1304.13*, because the proposal advocated by the trustees was consistent with the settlor's primary intent in that the original building would be renovated, the school would continue and be strengthened by a partnership, both the school and a significant part of the collection would remain in the original building, and a gallery would be open to the public.

Outcome

Petition and motion granted.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Trusts > Trust Administration > Modification & Termination

Estate, Gift & Trust Law > Trusts > Charitable Trusts

Evidence > Burdens of Proof > Allocation

HN1[] **Trust Administration, Modification & Termination**

Courts in the District of Columbia have long possessed the equitable authority, under the cy pres doctrine, to modify a trust when a charitable purpose of the trust becomes impossible or impracticable to achieve, as long as the court does so in a manner that is as near as possible to the trustor's original intent. The Council of the District of Columbia codified this doctrine when it enacted the Uniform Trust Act of 2003. More specifically, *D.C. Code § 19-1304.13* authorizes the Superior Court of the District of Columbia to apply cy pres to modify a trust if a particular charitable purpose is or becomes unlawful, impracticable, impossible to achieve, or wasteful by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purpose. A "settlor" is defined under the Act as a person who creates or contributes property to a trust. *D.C. Code § 19-1301.03(16)*. Thus, a party seeking cy pres relief must establish, in relevant part, that: 1) a charitable purpose of the trust is or has become impracticable or

impossible to achieve; and 2) the proposed modification of the trust is as near as possible to the settlor's original charitable purpose.

Business & Corporate
Compliance > ... > Trusts > Trust Administration > Modification & Termination

Estate, Gift & Trust Law > Trusts > Charitable Trusts

HN2[] Trust Administration, Modification & Termination

D.C. Code § 19-1304.13 provides that the court may apply cy pres to modify a trust by directing that the trust property be applied or distributed in a manner consistent with the settlor's charitable purposes. Therefore, the statute only requires that the court modify the trust in a way that is "consistent with" the settlor's charitable purpose, not, as prior case law had mandated, in a manner "as near as possible to" the settlor's charitable purpose. But because this section explicitly incorporates the cy pres doctrine, it is clear that § 19-1304.13 authorizes modification under this provision only if the modification is both consistent with, and as near as possible to, the settlor's initial charitable purpose.

Business & Corporate
Compliance > ... > Trusts > Trust Administration > Modification & Termination

Estate, Gift & Trust Law > Trusts > Charitable Trusts

HN3[] Trust Administration, Modification & Termination

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 the party seeking cy pres relief establishes impossibility or impracticability, then the court must evaluate whether the cy pres proposal is as near as possible to the settlor's charitable intent. In making this fact-specific determination, the court must discern the intent of the settlor when creating the trust and should consider any relevant surrounding circumstances evidencing the settlor's intent.

Business & Corporate
Compliance > ... > Trusts > Trust Administration > Modification & Termination

Evidence > Burdens of Proof > Clear & Convincing Proof

Estate, Gift & Trust Law > Trusts > Charitable Trusts

HN4[] Trust Administration, Modification & Termination

The relevant statutory provision, D.C. Code § 19-1304.13, does not require that the clear and convincing evidence standard be applied in cy pres proceedings.

Business & Corporate
Compliance > ... > Trusts > Trust Administration > Modification & Termination

Estate, Gift & Trust Law > Trusts > Charitable Trusts

HN5[] Trust Administration, Modification & Termination

Insufficiency of funds is a basis for cy pres relief.

Counsel: [*1] Charles Patrizia, Counsel for Petitioner/Defendant.

Catherine Jackson, Counsel for Respondent.

Andrew Tulumello, Counsel for the Intervenors/Plaintiffs.

Judges: Robert Okun, Associate Judge.

Opinion by: Robert Okun

Opinion

MEMORANDUM OPINION

This case involves the District of Columbia's oldest

private art museum and its only college devoted solely to the teaching of art and design—the ***Corcoran*** Gallery of Art and the ***Corcoran*** College of Art + Design (collectively, "the ***Corcoran***"). Each party in this case cares passionately about the future of the ***Corcoran*** but the parties have very different views about how best to continue the ***Corcoran***'s mission and preserve its most important features. The question before the Court is not which of these visions the Court prefers. Rather, the issues before the Court are narrower and can be summed up as follows: 1) have the Trustees of the ***Corcoran*** Gallery of Art (the "Trustees") established that it is impracticable to carry out the Deed of Trust that created the ***Corcoran*** given the ***Corcoran***'s current financial condition; and 2) if so, is the plan proposed by the Trustees as near as possible to the intent of William Wilson ***Corcoran*** when he established the Trust. Although the question is **[*2]** a close one, about which reasonable minds could differ, this Court is persuaded that the Trustees have established that they are entitled to relief and will grant their Petition for Entry of *Cy Pres* Determination (the "Petition") and their Motion for Entry of Proposed *Cy Pres* Order (the "*Cy Pres* Motion") for the reasons set forth below.

I. PROCEDURAL HISTORY

The Trustees of the ***Corcoran*** Gallery of Art is a non-profit institution that oversees the ***Corcoran*** Gallery of Art ("***Corcoran*** Gallery") and the ***Corcoran*** College of Art + Design ("***Corcoran*** College"). On June 17, 2014, the Trustees filed their Petition, naming the District of Columbia as Respondent to represent the interests of the public in the *cy pres* proceeding. At the request of the parties, this Court expedited the *cy pres* proceedings and scheduled a hearing concerning the Petition for July 18, 2014. On June 25, 2014, the Trustees filed their Cy Pres Motion.[1] On July 2, 2014, ***Save the Corcoran***—an organization comprised of current and former students, faculty, and staff, as well as donors and friends of the ***Corcoran***—and a number of named or otherwise identified individuals (the "Proposed Intervenors") filed a Partially Opposed Motion **[*3]** to Intervene in *Cy Pres* Proceedings as well as a Partially Consented Emergency Motion to Expedite Consideration of ***Save the Corcoran***'s Motion to Intervene.[2] The Court granted, in part, the Proposed Intervenors' Motion to Expedite and implemented an accelerated briefing schedule.

After the parties briefed the intervention issue, and after hearings on July 18 and July 21, 2014, this Court granted, in part, the Proposed Intervenors' Motion to Intervene and Motion to File Opposition, allowing nine current students, faculty, and staff (the "Intervenors") to intervene in the proceedings, and denying the request as to ***Save the Corcoran***, donors to the ***Corcoran***, and former students, faculty, and staff.

The Court held a hearing on the merits of the Petition and *Cy Pres* Motion from July 28 to August 6, 2014. The Trustees called three witnesses on their behalf. The first witness was Lauren Stack, the Chief Operating Officer of the ***Corcoran***, who testified about the financial state of the ***Corcoran*** and the proposed transaction with The George Washington University **[*5]** ("GW") and the National Gallery of Art ("NGA"). The Trustees' second witness was Dr. Steven Knapp, the President of GW, who testified about the proposed transactions among the ***Corcoran***, GW, and the NGA, and his vision for the future of the ***Corcoran*** College. The Trustees' final witness was Sean O'Connor, a partner of Development Guild/DDI ("DDI"), a consultant to non-profit organizations, who testified about the 2012 report that DDI created and presented to the Trustees, as well as his own analysis of the ***Corcoran***'s past fundraising strategy and future fundraising prospects. At the conclusion of Mr. O'Connor's testimony, the Intervenors made an oral Motion for a directed verdict, asserting

[1] The Trustees attached four Exhibits to their *Cy Pres* Motion. Exhibit 4 consists of seven documents, each of which is part of the proposed transaction among the Trustees, The George Washington University, and the National Gallery of Art. The documents are not marked separately within the Exhibit, but for the purposes of this Order, the Court will refer to the different documents as follows: Exh. 4A is the Art Accession and Custodial Transfer Agreement; Exh. 4B is the License Agreement Between the Trustees and the National Gallery of Art; Exh. 4C is the Asset Contribution Agreement between the Trustees and The George Washington University; Exh. 4D is the License Agreement between the Trustees and The George Washington University; Exh. 4E is the License Agreement between The George Washington University and the National Gallery of Art; Exh. 4F is the Side Letter Regarding Distribution of Custodial Art; and Exh. **[*4]** 4G is the Side Letter Agreement Confirming Designation of Licensed Premises.

[2] Two of the individuals did not provide their names but were identified as John Doe 1 and 2. After this Court indicated that these individuals could not proceed anonymously, one John Doe agreed to disclose his name and proceed, and the other John Doe withdrew from the litigation and was replaced by a different individual who disclosed his name.

that the Trustees had not met their burden for *cy pres* relief. After hearing argument from all parties, the Court denied the Intervenors' Motion.

The Intervenors called eight witnesses to testify on their behalf. The Intervenors' first witness was Harry Hopper III, Chairman of the Board of Trustees for the ***Corcoran***, who testified about the various consulting reports the Trustees had commissioned, the size and giving history of the Board, the operations of the ***Corcoran***, and the options that the Trustees **[*6]** considered as alternatives to the proposed transaction. The Intervenors' second witness was Wayne Reynolds, a philanthropist and Chairman and Chief Executive Officer of the Academy of Achievement, who testified about his personal fundraising experience as the Chairman of the Board of Ford's Theater and his own vision and plans for the ***Corcoran***. The Intervenors' third witness was Dr. Wallace Loh, President of the University of Maryland ("UMD"), who testified about his interactions with the Trustees and the terms of the contemplated deal between UMD and the ***Corcoran***.

At the conclusion of Dr. Loh's testimony, the Intervenors called their first expert witness, Paul Johnson, a partner of the consulting company Alexander Haas. The Court qualified Mr. Johnson as an expert witness in the standards of fundraising practices for non-profit organizations; the general qualifications and standards for art museum directors; and the standards employed by the Association of Art Museum Directors ("AAMD"). Mr. Johnson provided his own assessment of the Trustees' fundraising and Board-building practices in light of the practices of other non-profits, and testified about the de-accessioning policies[3] of **[*7]** other museums and the potential consequences of an AAMD censure or the withdrawal of accreditation by the American Alliance of Museums ("AAM"). The Intervenors second expert witness was Kathy Raffa, a certified public accountant and partner of Raffa Accounting. The Court qualified Ms. Raffa as an expert in accounting for non-profit organizations. Ms. Raffa primarily testified about the fundraising efficiency of the ***Corcoran*** as compared to various peer institutions. The Intervenors' third and final expert witness was Chiara Trabucchi, a principal of the consulting firm Industrial Economics. The Court qualified Ms. Trabucchi as an expert in financial management and the design and implementation of trusts to fund organizations in perpetuity. Ms. Trabucchi's testimony focused on five possible options the ***Corcoran*** could employ to finance its operations in perpetuity.

The Intervenors' next witness was Anne Smith, a former Associate Director of Individual Giving at the ***Corcoran*** Gallery, who compared her fundraising experience at the Art Institute of Chicago with her experience at the ***Corcoran***. The Intervenors' final witness was Caroline Lacey, a current graduate student at the ***Corcoran*** College, who testified about her experience as a student at the ***Corcoran***, her understanding of the impact of the proposed transaction with GW, and her experiences in communicating with the Trustees about the proposed transaction with GW and NGA. After the conclusion of Ms. Lacey's testimony, the Intervenors rested their case. The District of Columbia did not present any witnesses and the Trustees did not call any rebuttal witnesses.

On August 6, 2014, each party presented closing arguments and answered questions from the Court.

II. FINDINGS OF FACT

A. History of the ***Corcoran***

The ***Corcoran*** Gallery was established in 1869 through a Deed of Trust created by William Wilson ***Corcoran***. *Cy Pres* Mot., Exh. 1. Mr. ***Corcoran*** created the Trust for the purpose of establishing "an institution in Washington **[*9]** City, to be 'dedicated to Art,' and used solely for the purpose of encouraging American Genius, in the production and preservation of works pertaining to the 'Fine Arts,' and kindred objects." *Id*., Exh. 1 at 1. Mr. ***Corcoran*** donated to the Trust the Renwick Building, located at 1661 Pennsylvania Avenue, N.W., a collection of art, and cash. Pet.¶6. The property that Mr. ***Corcoran*** donated was to be used "for the perpetual establishment and maintenance of a Public Gallery and Museum for the promotion and encouragement of the arts of painting and sculpture, and the fine arts generally." *Cy Pres* Mot., Exh. 1 at 6. In addition, the Deed of Trust created a Board of Trustees, which was granted the discretion to develop "appropriate measures for increasing the collection of paintings, statutes and kindred works of art" and the general management of the institution. *Id*. at 7.

[3] The formal definition of de-accession is: "[to] officially remove (an item) from the listed holdings of a library, museum, etc., esp. for sale or disposal." *Shorter Oxford English Dictionary* 607 (5th ed. 2002). The AAMD and the AAM have adopted guidelines as to when a museum might de-accession a work of art and how a museum **[*8]** might use the funds from such a de-accession. Test. Mr. Hopper, Hr'g Tr. at 510-11.

In 1870, the U.S. Congress incorporated the Trustees of the ***Corcoran*** Gallery of Art as a not-for-profit corporation, referring specifically to the Deed of Trust. *Cy Pres* Mot., Exh. 2. After the formation of the Trust and the grant of the federal charter, the original Trustees took possession of the Renwick Building and the art collection **[*10]** and began fulfilling the purposes of the Trust by establishing the ***Corcoran*** Gallery to display art to the public. Pet.¶8. Over the next decade, the Trustees established the ***Corcoran*** College, which was integrated into the overall institution and which emphasized student access to the art collection. *Id*.¶10. Although Mr. ***Corcoran*** was not a Trustee at the time the College was created, he gave funds in support of its creation and operation. *Id*.[4] In addition, although the Deed of Trust does not mention the College, the parties do not dispute that this Court's ruling on the Petition and Cy Pres Motion will apply to both the College and the Gallery.

By 1890, the ***Corcoran*** had outgrown the space in the Renwick Building. *Id*.¶11. The Trustees, therefore, acquired property and constructed a new building, designed by William Flagg and still known as the Flagg Building. *Id*. In the early twentieth century, Senator William Clark became involved with the ***Corcoran***, loaning art works to the ***Corcoran***, donating money, and becoming a Trustee. *Id*.¶12. Upon Senator Clark's death, the ***Corcoran*** received a significant portion of the art collection from his estate, as well as funds to construct an addition to the Flagg building, now known as the Clark Wing. *Id*.¶13. Since the completion of the Clark Wing in 1928, the Flagg Building has housed both the Gallery and major operations of the College. *Id*.¶14; Pet'r's Hr'g Exh. 5 at 2. Currently, Peggy Loar is the Interim President and Director of the Gallery and the College and Mr. Hopper is the Chairman of the Board of Trustees. Test. Mr. Hopper, Hr'g Tr. at 357:12-17; Test. Mr. Reynolds, **[*12]** Hr'g Tr. at 608-09.

[4] It also is worth noting that Mr. ***Corcoran*** had extensive ties to GW, which has agreed to renovate the Flagg Building and take over the operations of the College. Test. Dr. Knapp, Hr'g Tr. at 148:14-18. More specifically, Mr. ***Corcoran*** served on GW's Board of Trustees for several years, acting as President of the Board from 1869, when he created the Deed of Trust establishing the ***Corcoran*** Gallery, until 1872. *Id*. at 148:19-23. He also donated a building to house GW's School of Medicine, founded GW's School of Science (now called the School of Engineering **[*11]** and Applied Science), and donated his company's archives to GW. *Id*. at 148-49. In fact, the first building on GW's current Foggy Bottom campus was called ***Corcoran*** Hall, a building that is still in existence today. *Id*. at 149:17-21.

B. Financial Background

According to the Trustees, "the overall financial situation of the ***Corcoran*** has for several decades deteriorated." Pet.¶19; *see also* Pet'r's Hr'g Exh. 1 at CGT002444; Test. Ms. Stack, Hr'g Tr. at 48:7-8. The testimony at the hearing, however, focused on the financial condition of the ***Corcoran*** over the past twenty-five years, with the greatest emphasis on the last decade.[5]

Indeed, since 2001, the ***Corcoran*** has had a negative

[5] The Trustees noted two particular events within the past twenty-five years that, in their opinion, have had a negative impact on the ***Corcoran***'s reputation and fundraising capability: the Mapplethorpe exhibit and the Gehry capital campaign. In 1989, the ***Corcoran*** was scheduled to open an exhibition of photographer Robert Mapplethorpe's work. Test. Mr. Hopper, Hr'g Tr. at 444-46. The works that were to be displayed in the Mapplethorpe exhibit were provocative and controversial, and garnered negative attention from conservative politicians. *Id*. As a result of the political controversy, before the exhibit opened to the public, the ***Corcoran*** announced cancellation of the exhibit. *Id*. This action, which some regarded as an act of censorship, resulted in disapproval from many in the **[*13]** art community and reduced financial sponsorship of the ***Corcoran***. *Id*.

Following the Mapplethorpe exhibit, the Trustees determined that they needed to "provide a focus and vision of the ***Corcoran*** as an innovator and disruptor and more of the cutting edge." *Id*. at 447:10-12. As a result, in 1999, the Trustees undertook a major capital campaign to support construction of a new wing to the Flagg Building designed by architect Frank Gehry (the "Gehry campaign"). *Id*. at 446-47; Pet.¶22. The goal of the Gehry campaign was to raise $160 million. Test. Mr. Hopper, Hr'g Tr. at 447:18-21. In the early 2000s, the technology bubble burst and the major donations offered by technology sponsors fell through. *Id*. at 448:15-17. In 2005, the Trustees determined that the Gehry campaign had failed to gather adequate financial support and cancelled the campaign. *Id*. at 449:21-22; Pet.¶22. After the failure of the Gehry campaign, the ***Corcoran***'s director resigned and, after a nationwide search, eventually was replaced by Paul Greenhalgh, an academic and curator who had previous experience as the head of an art school. Test. Mr. Hopper, Hr'g Tr. at 450:8-15, 454:4-23. Unfortunately, Mr. Greenhalgh developed life-threatening **[*14]** cancer during his term as director and resigned from the position in 2010. *Id*. at 457:6-11, 460:13-15; Intervenors' Hr'g Exh. 8 at CGT000296. In 2010, the ***Corcoran*** also lost its Chief Financial Officer to health problems. Test. Mr. Hopper, Hr'g Tr. at 465:8-14.

"true change in net assets from operations" in eleven of the past thirteen years for which audited financial statements are available, and also had a negative "change in net assets from operations" in seven of those years.[6] Intervenors' Hr'g Exh. 2. When Mr. Hopper became Chairman of the Board in 2009, he inherited "an account that was frozen, a loan that was in default, and it was unclear that [the ***Corcoran***] would be able to make payroll. . . . [U]nless there was a change in how [the ***Corcoran*** was] doing business . . . the museum itself would have to be closed in a matter of a few months." Test. Mr. Hopper, Hr'g Tr. at 462. Mr. Hopper and the Chief Operating Officer Fred Bollerer pursued a plan to resolve these short-term issues, including orchestrating an arrangement with a bank to reschedule payments on $8 to $10 million worth of loans in default. *Id*. at 464:4-25, 520-21. The Board **[*15]** subsequently voted to increase tuition at the College and requested that staff cut fifteen percent from the ***Corcoran***'s budget so as to address the persistent deficits. Intervenors' Hr'g Exh. 8 at CGT000317, -369, -385. The ***Corcoran***'s staff most recently has tried to reduce expenses by consolidating departments, reducing travel expenses, and imposing greater oversight on expense items costing more than $2,500. Test. Ms. Stack, Hr'g Tr. at. 45-46.

Not only has the ***Corcoran*** suffered financial setbacks for much of the past decade, but the Trustees also have deferred much-needed maintenance of the Flagg Building. Pet.¶20; Pet'r's Hr'g Exhs. 1 at CGT002444, 3 at CGT002599. The Stuart Lynn Company estimated, in May 2011, that renovations to the Flagg Building would cost slightly more than $102 million. Pet'r's **[*16]** Hr'g Exh. 4 at 2; Test. Ms. Stack, Hr'g Tr. at 61:19-24. Likewise, an Altieri Sebor Wieber report indicated that renovations to address only HVAC, health, and safety issues, would cost $70 million. Pet'r's Hr'g Exh. 5, Master Plan 8/20/13 4:47 P.M. at 2; Test. Ms. Stack, Hr'g Tr. at 65:23-24.[7] Neither of these estimates included so-called soft costs, such as architectural fees, that might add 15% to the total cost of renovations. Test. Ms. Stack, Hr'g Tr. at 62:1-5.

Presently, the annual operating expenses of the Gallery and the College are between $28 and $30 million. Test. Ms. Stack, Hr'g Tr. at 33:7-12. To meet these expenses, the ***Corcoran*** depends on annual revenue from the following sources:

- $18 million from tuition, although the ***Corcoran*** receives only $13 million in net tuition after subtracting the financial aid that the ***Corcoran*** gives its students. *Id*. at 34:2-12.

- $1.5 to $1.7 million from admissions, special events, the retail shop, public programming, and ticket sales. *Id*. at 34:19-23.

- $3.8 million in charitable fundraising. **[*17]** *Id*. at 35:16-18.

Over the past several years, the Trustees have covered the remaining deficit through one-time fundraising events, such as the sale of the parking-lot property adjacent to the Flagg Building. *Id*. at 35-36. In addition, the Trustees have, in recent years, borrowed from restricted funds—such as the de-accessioning account—to finance the ***Corcoran***'s operating when they could rely on a guaranteed source of repayment. *Id*. at 44:19-22. The Trustees also have attempted to borrow funds commercially to cover the shortfall, but have been unable to do so. *Id*. at 45:7-8.

C. Concerns About Potential Loss of Accreditation and Sanctions

Throughout the hearing, the Trustees raised concerns about how the denial of *cy pres* relief and the implementation of the Intervenors' proposed alternatives might endanger the ***Corcoran*** College's accreditation from the Middle States Commission on Higher Education ("MSCHE") or the Gallery's accreditation from the AAM, or might cause the Gallery to incur sanctions from the AAMD.

Currently, the ***Corcoran*** is in the process of re-accreditation with MSCHE, the organization responsible for accrediting the College. In April 2014, an accreditation team from MSCHE visited the **[*18]** ***Corcoran*** College and prepared a report, which the Trustees received in July 2014. Pet'r's Hr'g Exh. 12; Test. Mr. Hopper, Hr'g Tr. at 503:10-19. While praising the College for its unique contributions to arts education,

[6] The parties dispute how annual gains and losses for the ***Corcoran*** should be calculated. The term "true change in net assets from operations" is derived by calculating the change in net assets from operations and subtracting the investment income earned that year, as illustrated in the Intervenors' Exhibit 2. The Court will address this dispute in the Conclusions of Law section of this Order.

[7] This $70 million estimate is a subset of the $102 million estimate to complete the whole renovation of the Flagg Building. Test. Ms. Stack, Hr'g Tr. at 66:2.

the MSCHE report stated that the College's

> financial model . . . is not sustainable. The College lacks the resources to operate much beyond the next academic year. Over the coming months, it must either be absorbed by a financially secure university, such as GW, or initiate a closure plan. Most of our negative evaluation judgments are about standards that are directly affected by dwindling resources, by the need to focus on core academic activities, and the need to withhold critical investments pending the finalization of a permanent solution.

Pet'r's Hr'g Exh. 12 at 5. The MSCHE report also endorsed the proposed transactions with GW and NGA, stating that the transactions would result in "an outstanding outcome" that would preserve "the core strengths of ***Corcoran*** while relieving it of its financial burden." *Id*. On June 26, 2014, MSCHE decided to postpone its decision on accreditation of the College and requested that, by September 1, 2014, the College submit supplemental **[*19]** information regarding, in part, "steps taken to improve the institution's short- and long-term financial viability, including updated cash and financial projections for the next five years . . . [and] steps taken to assure continuity and stability of institutional administration[.]" Pet'r's Hr'g Exh. 2 at 1. The implication of this decision is that MSCHE would withdraw the College's accreditation if it were unable to satisfy MSCHE regarding the five-year financial stability of the institution. Test. Ms. Stack, Hr'g Tr. at 43-44. Loss of MSCHE accreditation would have a negative impact on both the students working toward degrees from the College and the ***Corcoran***'s finances, because ***Corcoran*** students would not be eligible for federal financial aid. Test. Ms. Stack, Hr'g Tr. at 34:14-15, 44:6-8.

AAM accreditation of the ***Corcoran*** Gallery and AAMD's possible imposition of sanctions on the ***Corcoran*** Gallery are tied to another issue: the use of funds received from the de-accession of art toward operating expenses. Both the AAM and the AAMD have adopted policies that restrict how museums might use proceeds from the sale of art. Test. Mr. Johnson, Hr'g Tr. at 725-728. Although the specific policies **[*20]** were not entered into evidence, the parties do not dispute that, at a minimum, both AAM and AAMD policies prohibit the use of de-accessioning funds toward paying operating expenses, with the possible exception of use of these funds to pay for collection care. Test. Mr. Hopper, Hr'g Tr. at 509-510; Test. Mr. Johnson, Hr'g Tr. at 726-728, 744-745. Violation of the AAM's Code of Ethics might result in loss of AAM accreditation, which would have a negative impact on the ***Corcoran***'s ability to hire and retain qualified staff as well as its eligibility for grants and federal funding. Test. Mr. Hopper, Hr'g Tr. at 511-513; Test. Mr. Johnson, Hr'g Tr. at 726-727. Also, violation of the AAMD's Policy likely would result in sanctions, which would limit the ***Corcoran***'s ability to host traveling exhibitions, to loan and receive loans of art from other institutions, and to hire and retain qualified staff. Test. Mr. Hopper, Hr'g Tr. at 510-511; Test. Mr. Johnson, Hr'g Tr. at 726:1-19, 729-731. 779:18-22. In fact, the parties cited to the Maier Museum, Randolph-Macon College, the National Academy Museum, and the Delaware Art Museum as examples of institutions that were swiftly sanctioned by the AAMD **[*21]** after violating the AAMD's Policy on Deaccessioning. Test. Mr. Johnson, Hr'g Tr. at 731-732:6, 776:12-779:17; Test. Ms. Smith, Hr'g Tr. at 999:12-21. The Court also notes that the AAM and the AAMD have sent the Trustees letters in support of the proposed GW/NGA transaction. Test. Ms. Stack, Hr'g Tr. at 246:15-21.

D. Reports from Consultants

Over the past twenty-five years, the Trustees have sought the assistance of various consultants, commissioning studies of the ***Corcoran***'s fundraising practices and finances. Test. Mr. Hopper, Hr'g Tr. at 422:5-17. The two consulting reports specifically addressed at the hearing were the 2008 strategic development plan drafted by the consulting company Schultz & Williams and the 2011 report by Lord Cultural Resources that addressed the ***Corcoran***'s financial situation and how the Trustees could "create a sustainable future" for the ***Corcoran***. Intervenors' Hr'g Exh. 6; Pet'r's Hr'g Exhs. 1, 3; Test. Ms. Stack, Hr'g Tr. at 38:8-12.

As a result of Lord's report and the ***Corcoran***'s deteriorating financial condition, in June 2012, the Trustees instructed ***Corcoran*** staff to look into sustainability options available to the ***Corcoran***, including relocating the ***Corcoran*** **[*22]** to a site outside the Flagg Building or partnering with another institution that could support the ***Corcoran***. Test. Ms. Stack, Hr'g Tr. at 53-54. In fact, in June 2012, the Trustees announced that they would investigate the possibility of selling the Flagg Building. Test. Mr. Hopper, Hr'g Tr. at 427:8-12. By December 2012, staff had concluded that there was sufficient interest in partnerships with the ***Corcoran*** that it would be possible to remain in the

Flagg Building. Test. Ms. Stack, Hr'g Tr. at 54:13-17. The Trustees then began exploring various partnership and philanthropic opportunities, including potential partnerships with UMD and GW. Test. Mr. Hopper, Hr'g Tr. at 479:1-8. In January 2013, the Trustees determined that they would pursue a proposed partnership with UMD. Test. Ms. Stack, Hr'g Tr. at 55:2-14.

E. UMD and GW/NGA Proposals

In April 2013, the Trustees and UMD signed a memorandum of understanding (the "MOU"), which provided that a written agreement between the two entities would be completed by the end of summer 2013. Test. Mr. Hopper, Hr'g Tr. at 481: 5-20. In September 2013, the President of UMD, Dr. Loh, sent the Trustees an initial term sheet that Dr. Loh had authored **[*23]** himself. *Id*. at 482:5-7; Pet'r's Hr'g Exh. 10. Under this September term sheet, UMD would take full responsibility for managing and operating both the College and the Gallery; the Trustees would appoint new UMD-nominated trustees to their Board; UMD would invest $71 million over a 10-year period to renovate the Flagg Building; and UMD would subsidize the College and Gallery operations with $18 million in cash and $6 million in personnel over the first four years of the collaboration. Pet'r's Hr'g Exh. 10.

In December 2013, UMD sent Mr. Hopper a formal term sheet, which proposed to create a joint venture between UMD and the ***Corcoran***. Test. Dr. Loh, Hr'g Tr. at 647:9-13. The following terms of the December 2013 proposal[8] are relevant for the purposes of this Order:

> - Either UMD or the ***Corcoran*** could, for cause, walk away from the joint venture, and UMD could, without cause, walk away from the joint venture within the first five years. *Id*. at 650:8-12; Pet'r's Hr'g Exh. 11.
>
> - UMD made a commitment of $46 million over the first five years of the joint venture, but this commitment was structured as a loan that the ***Corcoran*** would have to repay if it were to walk away from the joint venture. **[*24]** Test. Dr. Loh, Hr'g Tr. at 650-52.
>
> - UMD would nominate potential trustees for the Board of Trustees, so that UMD nominees eventually would constitute a majority of the Board. *Id*. at 636:8-15.
>
> - While the Gallery would remain in the District, certain portions of the College, including specific kinds of studio space for students, would move to Maryland. *Id*. at 664-65; Test. Mr. Hopper, Hr'g Tr. at 482:3-17.
>
> - UMD would have special access to the ***Corcoran***'s collection, and would be able to exhibit and store pieces from the collection in Maryland. Test. Dr. Loh, Hr'g Tr. at 668:2-15; Test. Mr. Hopper, Hr'g Tr. at 485-86.
>
> - UMD would have a security interest in the Flagg Building and the ***Corcoran***'s collection. Test. Mr. Hopper, Hr'g Tr. at 489:17-23.

The Trustees had several concerns with UMD's proposal, which Mr. Hopper communicated to Dr. Loh in a letter, introduced into evidence as the Trustees' Exhibit 11. Pet'r's Hr'g Exh. 11. First, under the December proposal, in contrast to the September term sheet, UMD would not take full control of and responsibility for the College. **[*25]** *Id*. Second, UMD's financial commitment under the December proposal was approximately half of what the Trustees had expected, and was structured as a loan rather than a grant. Test. Mr. Hopper, Hr'g Tr. at 488:5-8; Pet'r's Hr'g Exhs. 10, 11. The Trustees' final concern about the December proposal was that UMD could terminate the venture without cause in the first five years. Pet'r's Hr'g Exh. 11. In his testimony, Mr. Hopper voiced a number of other concerns that were not included in his letter to Dr. Loh. Those concerns included UMD's nomination of a majority of the Board of Trustees, Test. Mr. Hopper, Hr'g Tr. at 489:11-16; the storage and exhibit of art from the collection in Maryland, *id*. at 486:1-4; the hierarchy and reporting structure of UMD officials over Gallery and College executives, *id*. at 487:1-12; and UMD's security interests in the Flagg building and the art collection. *Id*. at 489:17-23.

As a result of the Trustees' concerns with UMD's revised proposal, the Trustees informed UMD that they could no longer honor the exclusivity arrangement they had entered into with UMD, which precluded the Trustees from talking with other potential partners. Test. Mr. Hopper, Hr'g Tr. at **[*26]** 490:1-8. The Trustees then renewed their negotiations with GW and NGA. *Id*. at 490-91.

[8] The December 2013 UMD proposal was not entered into evidence, but was described by numerous witnesses, including Dr. Loh and Mr. Hopper.

At a meeting of the Trustees on February 5, 2014, Dr. Loh orally presented UMD's best and final offer, which addressed some of the above-mentioned concerns. Test. Dr. Loh, Hr'g Tr. at 648:15-18; Intervenors' Hr'g Exh. 8 at CGT000475-76. In presenting UMD's final offer, Dr. Loh stated that the capital investment was a loan in the sense that it was repayable if the Trustees terminated the venture, but otherwise was a grant. Test. Dr. Loh, Hr'g Tr. at 650:13-18. Dr. Loh also stated that UMD would give the Trustees the investment money "up front." Test. Dr. Loh, Hr'g Tr. at 650-651.[9] Although the written terms of the December proposal included a $46 million cap on the investment, Dr. Loh indicated, as part of the best and final offer, that UMD would make further investments after five years but would not put them in writing. *Id*. at 652:7-20. In addition, Dr. Loh offered to excise the provision allowing UMD to terminate the venture without cause. *Id*. at 650:8-12. Ultimately, however, the UMD cash commitment was reduced from $89 million to $46 million, despite UMD's estimate that renovation of the Flagg building would **[*27]** cost at least $71 million. *Id*. at 644:5-11. Furthermore, Dr. Loh declined to modify the terms relating to ***Corcoran*** College, stating that UMD would not take over the College. *Id*. at 653-54.

On February 4, 2014, the day before UMD presented its best and final proposal to the Trustees, GW and NGA presented their own best and final proposal. Test. Mr. Hopper, Hr'g Tr. at 494:4-25; Intervenors' Hr'g Exh. 8 at CGT000472-73. Although no evidence was presented as to the exact terms of the GW and NGA offers that were made in February 2014, no party has asserted that the terms were any different than those memorialized in the final agreements that have been presented to the Court. *Cy Pres* Mot., Exhs. 4A-4G. After considering both the UMD and the GW/NGA proposals, the Trustees decided, on February 6, 2014, to pursue the GW/NGA deal. Test. Mr. Hopper, Hr'g Tr. at 495:1-3; Pet.¶34. On May 15, 2014, after additional negotiations were completed, officers of NGA, GW, and the Trustees executed final agreements. Pet.¶35; *Cy Pres* Mot., Exhs. 4A-4G. The GW proposal includes the following **[*28]** relevant terms:

> - GW will acquire from the Trustees the Flagg Building, the Fillmore Building, and other real property, and will renovate the Flagg Building. *Cy Pres* Mot., Exh. 4C at 1, 10-12.

- GW will acquire from the Trustees all funds allocated to the operations of the College, estimated to be at least $8 million. *Id*. at 11.

- GW will acquire from the Trustees the sum of $35 million to be used for renovation of the Flagg Building. *Id*. at 9.

- GW will acquire from the Trustees certain works of art that have been deemed integral to the Flagg Building, collectively known as the Permanent Works, and display those works at the Flagg Building. *Id*. at 12, 15-16.

- GW will acquire from the Trustees the ***Corcoran*** College, and will establish within GW a new school for art and design "that will seek to preserve and maintain the mission, reputation and brand" of the College, and that incorporates the ***Corcoran*** name. *Id*. at 1, 27-31. GW will fund, and exercise oversight and control over, the new school. *Id*. at 29.

- Under GW's oversight, the ***Corcoran*** College will remain in the Flagg Building in perpetuity. *Id*. at 28; Test. Dr. Knapp, Hr'g Tr. at 154:16-20.

- GW has offered one-year employment contracts to all of the College's full-time faculty, semester-by-semester **[*29]** employment to approximately 100 part-time faculty, and six-month employment to non-faculty staff. *Cy Pres* Mot., Exh. 4C at 29-31; Test. Dr. Knapp, Hr'g Tr. at 155-56, 166.

- All students who have been admitted or enrolled at the ***Corcoran*** College will be admitted to the new college and will continue to enjoy "substantially similar" degree requirements at the new college. *Cy Pres* Mot., Exh. 4C at 28; Test. Dr. Knapp, Hr'g Tr. at 164:15-21.

- Students currently enrolled at ***Corcoran*** College, who continue their studies at the new college, will be charged the same tuition and fees that are in effect at the time the agreement is consummated, and the tuition and fees will not increase until the end of the 2017-2018 academic year. *Cy Pres* Mot., Exh. 4C at 28; Test. Dr. Knapp, Hr'g Tr. at 169-70.
- GW will continue to display student art at the Flagg Building. Test. Dr. Knapp, Hr'g Tr. at 154:1-6.

- If the transaction between GW and NGA should terminate at any time, GW would continue to dedicate space within the Flagg Building to the exhibition of art to the public. *Cy Pres* Mot., Exh.

[9] It is not clear from Dr. Loh's testimony exactly how much money UMD would provide "up front," or what "up front" meant in this context.

4F.

The NGA proposal includes the following relevant terms:

- NGA will acquire from the Trustees the custody, care, **[*30]** and possession of the collection of art, which is estimated to total between 17,000 and 18,000 works, but does not include the Permanent Works. *Cy Pres* Mot., Exh. 4A at 1.

- In accordance with the terms of a side-letter between the Trustees and NGA, NGA will distribute to other art museums and appropriate institutions those works of art that NGA does not absorb into its own collection. *Cy Pres* Mot., Exh. 4A at 9-10, Exh. 4F. NGA and the Trustees will work together to identify the museums or institutions within the District that would receive such works. *Cy Pres* Mot., Exhs. 4A, 4F; Pet.¶38. In cases where a museum or institution within the District is not identified, or where the museum or institution declines to accession a work, NGA and the Trustees will work together to identify museums or institutions outside the District, with preference given to museums and institutions within a 50 mile radius of the District, that would receive those other works. *Cy Pres* Mot., Exh. 4F; Pet.¶38. The Attorney General of the District of Columbia will have the authority to approve (or disapprove) the proposed de-accession or distribution of works to museums or institutions outside the District. *Id* ***[*31]*** .

- NGA will establish a new contemporary art program, incorporating the ***Corcoran*** name, for the purpose of exhibiting works of art from the ***Corcoran***'s collection and other works, and for the purposes of "preserving, maintaining and perpetuating the mission and reputation of" the ***Corcoran*** Gallery. *Cy Pres* Mot., Exh. 4A at 1, 15.

In addition, under a separate agreement between GW and NGA, GW will work with NGA to dedicate portions of the Flagg Building for continuous use as exhibition space for the new contemporary art program. *Cy Pres* Mot., Exhs. 4C at 2, 4E at 1-2. GW has agreed that, if its agreement with NGA is terminated, GW will continue to "dedicate substantially equivalent size space in the [Flagg Building] for use as gallery space." Pet.¶39; *Cy Pres* Mot., Exh. 4F. Also, "[a]s part of the transfers of art to the NGA and the College and [Flagg Building] to GW, any existing donor restrictions that are applicable to the particular assets" will remain in place and be fulfilled by NGA or GW. Pet.¶41.

F. Alternatives Presented by the Intervenors

Over the course of the Hearing, the Intervenors presented several alternatives that they contend would ***save the Corcoran*** and be more faithful to the **[*32]** Deed of Trust than the GW/NGA proposal. First, the Intervenors offered alternatives that would not require partnership with a major institution such as GW or NGA. Specifically, using the ***Corcoran***'s past financial records, expert witness Chiara Trabucchi designed five financial models that would allow "the ***Corcoran*** to finance their core operations in perpetuity." Test. Ms. Trabucchi, Hr'g Tr. at 888:21-25; Intervenors' Hr'g Exh. 23. Each of these options would involve the ***Corcoran*** establishing an endowment and seeding that endowment over time so that the endowment eventually would generate sufficient operating investment income to offset any deficits in the operating budget. Test. Ms. Trabucchi, Hr'g Tr. at 889:2-8; Intervenors' Hr'g Exh. 23. Each of these options also was based on an assumption that a substantial portion of future donor contributions were unrestricted and would include the use of funds from the de-accession of art. Test. Ms. Trabucchi, Hr'g Tr. at 936-37, 955.

In addition, the Intervenors presented Mr. Reynolds as an alternative chairman of the Board of Trustees who claimed he could turn around the financial condition and reputation of the ***Corcoran*** within eighteen months. **[*33]** Test. Mr. Reynolds, Hr'g Tr. at 587-88. Mr. Reynolds, as Chairman of the Board of Directors of Ford's Theater from 2006 to 2011, created an educational program and headed a capital campaign that raised $50 million over a period of five years, thereby effectively revitalizing a struggling Ford's Theater as a cultural institution in the District. *Id*. at 523-32. In his testimony, Mr. Reynolds minimized the ***Corcoran***'s annual budget shortfalls, stating that he could "close a 2 [to] 5 million-dollar gap. . . . at a dinner party." *Id*. at 561:14-16. In addition, Mr. Reynolds spoke passionately and at length about the ***Corcoran*** as "the greatest philanthropic opportunity in the District of Columbia for the next 25 years" and even proposed a list of twenty-three philanthropists who would be interested in becoming members of the Board. *Id*. at 560:4-7; Intervenors' Hr'g Exh. 15. Mr. Reynolds stated that he had a vision for the ***Corcoran*** and was interested in becoming chairman of the ***Corcoran***'s Board and building the Board to include as many as forty new members, who would be able to "give and get

money." Test. Mr. Reynolds, Hr'g Tr. at 556:1-5.[10] Mr. Reynolds further asserted that, "within 18 months of becoming **[*34]** the chairman of the ***Corcoran*** . . . the ***Corcoran*** will start making money. The ***Corcoran*** will start thriving. The number of students will go up. We'll start renovating the building. We will become the showcase of arts education and creativity of not just DC, but eventually of the country." *Id*. at 587-588.

Second, the Intervenors suggested that the UMD proposal was a viable alternative that more closely aligned with Mr. ***Corcoran***'s original intent in creating the Trust than the GW/NGA proposal because the UMD proposal allowed the Gallery and the College to remain independent institutions. Test. Dr. Loh, Hr'g Tr. at 636-37, Hr'g Tr. at 1140-42. To be clear, the original UMD proposal, the terms of which are discussed above, is no longer an option before the Trustees. Test. Dr. Loh, Hr'g Tr. at 661-63. But Dr. Loh testified that, were the Court to deny *cy pres* relief, he would attempt to submit a similar proposal, with some adaptations **[*35]** in light of the changed circumstances, within forty-five days of the Court's ruling. Test. Dr. Loh, Hr'g Tr. at 661-63, 681.

III. CONCLUSIONS OF LAW

A. Relevant Legal Standards

1. *Cy Pres* Standards

HN1[↑] Courts in this jurisdiction have long possessed the equitable authority, under the *cy pres* doctrine, to modify a trust when a charitable purpose of the trust becomes impossible or impracticable to achieve, as long as the court does so in a manner that is as near as possible to the trustor's original intent. *See, e.g.,* *Noel v. Olds, 138 F.2d 581, 586-87, 78 U.S. App. D.C. 155 (D.C. Cir. 1943)* (explicitly recognizing the doctrine of judicial *cy pres*, and describing the doctrine as "one of the most beneficent doctrines in the law of trusts").[11] The Council of the District of Columbia codified this doctrine when it enacted the Uniform Trust Act of 2003. More specifically, *D.C. Code § 19-1304.13* authorizes this Court to apply *cy pres* to modify a trust if "a particular charitable purpose is or becomes unlawful, impracticable, impossible to achieve, or wasteful . . . by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purpose."[12]

Thus, a party seeking *cy pres* relief must establish, in relevant part, that: 1) a charitable purpose of the trust is or has become impracticable or impossible to achieve; and 2) the proposed modification of the trust is as near as possible to the settlor's original charitable purpose.[13] The Court has not found, and the parties have not identified, any case law in this jurisdiction that explicitly defines the term "impracticable" in the *cy pres* context, although the D.C. Circuit has noted that a party fails to establish impossibility or impracticability when it seeks to modify a charitable trust "merely because it suits its own convenience to do so." *Connecticut College v. United States, 276 F.2d 491, 499, 107 U.S. App. D.C. 245 (D.C. Cir. 1960)*. Likewise, there is relatively little case law on this issue in other jurisdictions. *See, e.g., In re Elizabeth J.K.L. Lucas Charitable Gift, 125 Haw. 351, 261 P.3d 800, 807 (Haw. Ct. App. 2011)* (charitable purpose need not be impossible; it is sufficient if it would be "impracticable or unreasonable to effectuate"); *The Smith Memorial Home, Inc. v. Riddle, 1990 Conn. Super. LEXIS 1498 at *11 (Oct. 23, 1990)* (defining "impracticable" as "not being capable of being done or carried out"); *Hinckley v. Caldwell, 35 Ill. App. 2d 121, 182 N.E.2d 230, 235 (Ill. App. 1962)* (trust purpose was

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[10] Specifically, Mr. Reynold's vision for the College is to "re-brand it as a ***Corcoran*** Center for Creativity," expanding the number of students and creating programs on digital media, design thinking, computer animation, and cinematography. Test. Mr. Reynolds, Hr'g Tr. at 556:6-15.

[11] *Cy pres* is a doctrine based on the French phrase "*cy pres comme possible*," which means **[*36]** "as near as possible." Chester, *et al., The Law of Trusts and Trustees* § 431 (3d ed. 2005).

[12] A "settlor" is defined under the Act as a person who creates or contributes property to a trust. *See* *D.C. Code § 19-1301.03(16)*.

[13] As noted above, ***HN2***[↑] *Section 19-1304.13* provides that "[t]he court may apply *cy pres* to modify . . . the trust by directing that the trust property be applied or distributed . . . in a manner consistent with the settlor's charitable purposes." Therefore, the statute only requires that the Court modify the trust in a way that is "consistent with" the settlor's charitable purpose, not, as prior case law had mandated, in a manner "as near as possible to" the settlor's charitable purpose. But because this Section explicitly incorporates the *cy pres* doctrine, it is clear that *Section 19-1304.13* authorizes modification under this provision only if the modification is both consistent with, and as near as possible to, the settlor's initial charitable purpose.

impracticable where it was "no longer **[*37]** feasible"). Furthermore, the legislative history of the Uniform Trust Act does not elucidate this issue—it includes only a brief reference indicating that *cy pres* relief may be available if a charitable purpose becomes "unviable." *See* Committee on the Judiciary Report on Bill 15-234 at 4.

The Court of Appeals, however, has defined this same term in the analogous context of breach of contract cases, where a party claims that, due to unforeseen circumstances, it is no longer practicable **[*38]** to carry out the terms of a contract, just as the Trustees now claim it is no longer practicable to carry out the terms of the Trust. In the contract context, the Court of Appeals has defined "impracticable" to mean that a party is excused from performing its obligations under a contract due to an unexpected contingency only if that contingency causes the party "extreme or unreasonable difficulty" in performing its obligations under the contract, and not if the contingency is "a mere inconvenience or unexpected difficulty." *Island Development Corp. v. District of Columbia, 933 A.2d 340, 350 (D.C. 2007)*. It is particularly noteworthy that the Court of Appeals' language in the contract setting closely parallels the D.C. Circuit's language in the *Connecticut College* case, which states that a party fails to establish impracticability in the *cy pres* setting merely because "it suits its own convenience" for the party to modify the terms of the trust. *276 F.2d at 499*.

The Court's review of the cases discussed above leads to the conclusion that ***HN3***[] 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* **[*39]** 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 the party seeking *cy pres* relief establishes impossibility or impracticability, then the Court must evaluate whether the *cy pres* proposal is as near as possible to the settlor's charitable intent. *See Noel, 138 F.2d at 586-87*. In making this fact-specific determination, the Court must discern the intent of the settlor when creating the trust and should consider any relevant surrounding circumstances evidencing the settlor's intent. *Obermeyer v. Bank of America, 140 S.W.3d 18, 25-26 (Mo. 2004)*; *Olds v. Rollins College, 173 F.2d 639, 643-44, 84 U.S. App. D.C. 299 (D.C. Cir. 1949)* (examining settlor's will provisions and conversations concerning will in determining settlor's intent).

2. Standard of Review of the Trustees' Decision

Both the Trustees and the District argue that the Court should apply some measure of deference to the Trustees' *cy pres* proposal, while the Intervenors argue that the Court should afford no deference to this proposal, and instead should conduct a *de novo* review. More specifically, during its closing argument, the District urged the Court to give some deference to the Trustees' proposal, without specifying the exact level of deference, **[*40]** while the Trustees argued that the proposal should be approved if it was made in good faith, citing language from *Olds v. Rollins College, supra*, which states that "[i]t is settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting *bona fide*. To do so would be to substitute the discretion of the court for that of the trustee." *173 F.2d at 644, n.7*. The Intervenors, on the other hand, argued that this Court must apply "his or her independent power of review" to the Trustees' proposal, citing language from *In re Barnes Foundation, 453 Pa. Super. 243, 683 A.2d 894, 899 (Pa. Super. Ct. 1996)*.

The Court has found no case law in this jurisdiction, or elsewhere, that explicitly establishes a particular standard for reviewing a trustee's *cy pres* proposal, and the parties likewise have not identified any such case law. Nonetheless, the Court's examination of the relevant case law in the *cy pres* context suggests that the standards proposed by the Trustees and the Intervenors do not constitute the appropriate standard of review. The language from *Olds v. Rollins College*, cited by the Trustees, was not a holding in the case, and instead was a quotation from a Supreme Court opinion that did not involve a *cy pres* proceeding. *See Shelton v King, 229 U.S. 90, 94-95, 33 S. Ct. 686, 57 L. Ed. 1086 (1913)*. Moreover, **[*41]** adoption of a standard that would approve any *cy pres* petition, as long as it was made in good faith, would largely eviscerate the requirement that petitioners 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. Indeed, adoption of such a standard would be inconsistent with the numerous cases in which cy pres petitions have been denied without any mention of the trustees' lack of good faith. *See, e.g., Connecticut College, 276 F.2d at 499*; *Olds, 173 F.2d at 644*.

Likewise, the language from *In re Barnes Foundation*, cited by the Intervenors, does not resolve the question of what standard a judge should apply when making his own independent review of a trustee's proposal. To the contrary, the language cited by the Intervenors was not a holding in the case and must be viewed in the context in which it was given. The court in *In re Barnes Foundation* was responding to the trustees' argument that their petition should be granted, in part, because the Office of the Attorney General did not oppose the petition. In the course of rejecting that argument, the court stated that there was no support for the proposition **[*42]** "that the Court is bound by the position espoused by the Office of the Attorney General, and a reviewing judge must exercise his or her independent power of review." *683 A.2d at 899*. This Court agrees that it is not bound by the Office of the Attorney General's position and that it must exercise independent review of the Petition rather than merely accept the Attorney General's position, but agreement with that common-sense proposition does not answer the question of whether the Court owes any deference to the Trustees while exercising its own independent review.

Ultimately, the Court does not need to resolve this issue because the Court finds that the Trustees have satisfied the requirements for obtaining *cy pres* relief, even without deferring to the Trustees' assessment that it is impracticable to carry out the Deed of Trust and that the GW/NGA proposal is as close as possible to Mr. ***Corcoran***'s intent in establishing the Trust.

3. Burden of Proof

The Intervenors argue that the clear and convincing evidence standard applies to *cy pres* proceedings, while the Trustees and the District argue that the traditional preponderance of the evidence standard applies to these proceedings. The Court agrees with **[*43]** the Trustees and the District. Indeed, it is well established that the preponderance of the evidence standard is the standard of proof that applies in most civil cases in the District of Columbia. *See, e.g., In re E.D.R., 772 A.2d 1156, 1159 (D.C. 2001)*. The Court of Appeals has employed the clear and convincing evidence standard in civil cases only when the relevant statute dictates that standard or where the issues have "far-reaching effects on individuals or where the consequences of a court's decision will be severe." *Id*. Thus, the Court of Appeals has most often employed the clear and convincing evidence standard in civil cases where a liberty or fundamental interest is at stake, such as in cases involving termination of parental rights, *see In re J.M.C., 741 A.2d 418, 420-24 (D.C. 1999)*, civil commitments, *see In re Nelson, 408 A.2d 1233, 1236 (D.C. 1979)*, or do-not-resuscitate orders for minors. *See In re K.I., 735 A.2d 448, 456 (D.C. 1999)*.

In this case, ***HN4***[↑] the relevant statutory provision does not require that the clear and convincing evidence standard be applied in *cy pres* proceedings. *See D.C. Code § 19-1304.13*. Furthermore, although the Court of Appeals has not addressed the issue of whether the clear and convincing evidence standard applies in this context, this case does not involve the type of liberty interests or other fundamental interests for which the Court of Appeals **[*44]** usually has applied the clear and convincing evidence standard, absent a statutory mandate.[14] Moreover, although there is relatively little case law on this issue from other jurisdictions, it appears that the jurisdictions that have addressed this issue have employed a preponderance standard in *cy pres* proceedings. *See, e.g., Trevathan v. Ringgold-Noland Foundation, 241 Ark. 758, 410 S.W.2d 132, 136 (Ark. 1967)*; *George Sykes Memorial School Trustees v. Leiberman, 1990 Conn. Super. LEXIS 1687 at *5-6 (Conn. Super. Ct., Nov. 15, 1990)*; *cf. Colin McK. Grant Home v. Medlock, 292 S.C. 466, 349 S.E.2d 655, 658 (S.C. 1986)* (applying preponderance standard to establish equitable deviation of charitable trust); *but cf. Barnes Foundation*, 2004 WL 1960204 at *11 (Pa. Com. Pl., Jan. 29, 2004) (applying clear and convincing evidence standard to equitable deviation proceeding).

The Intervenors argue that the clear and convincing evidence standard should apply because it applies to both the creation of an oral trust and **[*45]** the modification of the terms of a trust, which they allege are less destructive of a trust's purposes than *cy pres* relief. The examples cited by the Intervenors, however, are distinguishable because the relevant statutory provisions in those contexts explicitly require proof by clear and convincing evidence, *see D.C. Code §§ 19-1304.07* and *-1304.15*, whereas the *cy pres* statutory

[14] The Court does not mean to minimize the importance of the parties' interests in the outcome of this case. Nonetheless, the parties' interests in the disposition of the ***Corcoran***, while important, do not equal a person's liberty interest in not being civilly committed, a parent's fundamental interest in not having his or her parental rights terminated, or a child's life-or-death interest in a do-not-resuscitate order, which are the situations in which the clear and convincing evidence standard most commonly has been applied in civil cases.

provision does not require proof by clear and convincing evidence. *See* D.C. Code § 19-1304.13. Moreover, all of these statutory provisions were enacted at the same time, when the Council enacted the Uniform Trust Act of 2003. Therefore, the Council's decision to require clear and convincing evidence for the creation of oral trusts and the modification of the terms of a trust stands in stark contrast to the lack of any such standard in the *cy pres* context, and strongly suggests that the Council chose not to adopt such a standard for *cy pres* proceedings. *See, e.g.*, 2A *Sutherland, Statutes and Statutory Construction* § 47.23 (7th ed. 2014) (where legislature "includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion **[*46]** and exclusion"); *Stevenson v. District of Columbia Bd. of Elections & Ethics, 683 A.2d 1371, 1375 (D.C. 1996)* ("when a legislature makes express mention of one thing, the exclusion of others is implied, because there is an inference that all omissions shall be understood as exclusions.").

Furthermore, even though the cases cited by the Intervenors pre-date the enactment of the statutory provisions cited above, those cases involve the markedly different context of determining the parties' intent when the challenged actions were based on alleged oral agreements or allegedly erroneous written modifications. The Court has applied the clear and convincing evidence standard in those contexts because "courts are properly hesitant" to create trusts based on oral agreements, *Duggan v. Keto, 554 A.2d 1126, 1133 (D.C. 1989)*, or permit modifications to trusts based on alleged mistakes contained in the original trust document. *In re Estate of Tuthill, 754 A.2d 272, 275 (D.C. 2000)*. By contrast, this case does not involve a dispute over an oral trust or a mistake in the terms of the trust document; instead, in this case, the Court must determine whether the current trust is impracticable or impossible in light of changed financial conditions and whether the *cy pres* proposal is consistent with the settlor's original intent. These issues, unlike the issues cited in the cases above, do not **[*47]** require a heightened burden of proof to ensure that the challenged actions are consistent with the settlor's original intent, and instead can be resolved under the burden of proof that typically applies in civil cases.

In sum, the applicable statutory provision in this case does not require that the Court apply the clear and convincing evidence standard and a review of the Uniform Trust Act as a whole suggests that the Council did not intend to heighten the burden of proof for *cy pres* proceedings. Furthermore, the issues presented in this case are distinguishable from the issues for which the Court of Appeals has required proof by clear and convincing evidence. Accordingly, the Court finds that the preponderance of the evidence standard applies in this proceeding and will evaluate the Petition and the *Cy Pres* Motion under that standard.

B. Application of Legal Standards to this Case

1. The Trustees Have Established That It Is Impracticable To Continue Under The Existing Deed Of Trust

The Trustees and the District both argue that it is impossible or impracticable for the Trustees to continue the ***Corcoran***'s operations under the existing Deed of Trust, while the Intervenors assert that it **[*48]** is entirely feasible for the ***Corcoran*** to do so, claiming that the Trustees and the District have overstated the severity of the ***Corcoran***'s current financial condition and understated its ability to raise the funds needed to address its financial condition. Although the Court agrees with the Intervenors that the Trustees have not established that it would be impossible to continue under the existing Deed of Trust, it also finds that the Trustees have established that it would be impracticable to do so. In other words, the Court agrees with the Trustees and the District that it would be unreasonably difficult, and that it is not feasible or viable, for the Trustees to continue operating under the existing Deed of Trust, for the reasons set forth below.

a. The ***Corcoran***'s Current Financial Condition

As an initial matter, the ***Corcoran*** has been operating at a deficit for the majority of the last thirteen years. Intervenors' Hr'g Exh. 2. Although the parties dispute whether the ***Corcoran*** has been operating at a deficit for seven of the past thirteen years or eleven of the past thirteen years, it is undisputed that the ***Corcoran*** has incurred a deficit in the majority of the last thirteen years, **[*49]** including sizable deficits for each of the last three fiscal years for which information is available. *Id.*[15]

[15] The dispute between the parties is tied to the issue of whether it is proper to consider change in net assets from operations, as proposed by the Intervenors, or change in net assets from operations minus investment income, as proposed by the Trustees, in determining whether the ***Corcoran***

In addition, the ***Corcoran*** has incurred these deficits even though it has deferred spending on maintenance for the Flagg Building for years. Pet'r's Hr'g Exh. 1 at 17 ("there has been massive under-investment in the **[*50]** maintenance and upkeep of the building . . . . If the ***Corcoran*** had been on a predictable infrastructure investment schedule, the current financial situation would be much worse."). The Flagg Building now has many pressing maintenance issues that cannot be deferred for much longer. *See, e.g.*, Pet'r's Hr'g Exhs. 3, 5. Specifically, the ***Corcoran***'s under-investment in maintenance and upkeep has created substantial and significant concerns about the Flagg Building's capacity to house both the Gallery and the College, ranging from inadequate building system controls and operation space to inadequate fire suppression systems. Pet'r's Hr'g Exh. 3 at CGT 002601-03. Indeed, the Altieri Sebor Wieber report from August 2013 stated that the "HVAC systems are not capable of reliably maintaining museum-level exhibit and conservation conditions," and that "[l]ife-safety systems are significantly below the standards required for large assembly occupancies." Pet'r's Hr'g Exh. 5 at 2. More alarmingly, this same report also stated that the sprinkler system in the basement and sub-basement levels of the Flagg Building provides "extremely poor" coverage and that the "ability of this system to provide any real **[*51]** fire protection to the ***Corcoran*** is highly suspect." *Id*. at 16.

Again, while the parties dispute the exact cost of renovating the Flagg Building, they do not dispute that this renovation will cost at least $71 million, and that there is an immediate need to spend at least $12 million to resolve critical health and safety problems in the building.[16] Thus, as an initial matter, the ***Corcoran*** currently faces the prospect of paying at least $71 million dollars to renovate the Flagg Building, including an immediate investment of more than $12 million, even though it is operating at a deficit.

Furthermore, although the Intervenors claim that the ***Corcoran*** has more than sufficient funds to pay for these renovations, despite the past annual deficits, the **[*52]** Intervenors overstate the amount of funds available to pay for these renovations, and understate the difficulties in raising the funds necessary to pay for these renovations. With respect to the funds currently available to pay for the renovations to the Flagg Building, the Intervenors have argued that the ***Corcoran*** has approximately $38 million in cash available as of August 2014, *see* Intervenors' Hr'g Exh. 23, but this estimate includes more than $11 million dollars from the settlement of the Clark estate, which the ***Corcoran*** has yet to receive. Test. Ms. Stack, Hr'g Tr. at 45:1-3.[17] In addition, while the ***Corcoran***'s most recent financial statement indicates that the ***Corcoran*** has net assets of more than $73 million dollars, almost all of that money is either temporarily restricted or permanently restricted. Intervenors' Hr'g Exh. 26 at CGT000150.[18] Thus, according to the 2013 financial statement, the ***Corcoran*** has slightly less than $4 million in unrestricted assets that could be devoted to the renovation efforts. *Id*.

b. The Intervenors' Alternative Proposals for Continuing Operations of the ***Corcoran***

Throughout this proceeding, the Intervenors have argued that the ***Corcoran*** can address this shortfall of funds both by selling some of the more than 17,000 pieces in the ***Corcoran***'s collection and by increasing its fundraising efforts. The Court is less optimistic than the Intervenors about the likelihood of success of these proposals. With respect to the Intervenors' proposal to

operated at a deficit. Two of the Intervenors' experts, Kathy Raffa and Chiara Trabucchi, testified that the financial statements of non-profit organizations commonly do not subtract investment income and instead focus on the change in net assets from operations in determining whether the organization operated at a profit or a deficit. Test. Ms. Raffa, Hr'g Tr. 812:10-20; Test. Ms. Trabucchi, Hr'g Tr. at 899-901. The Court need not resolve this dispute between the parties, because there is no dispute that the ***Corcoran*** has been running deficits in the majority of the past thirteen years.

[16] The parties presented the Court with several estimates of the costs involved in addressing the Flagg Building's immediate needs. Dr. Knapp estimated that these renovations would cost approximately $25 million, Test. Dr. Knapp, Hr'g Tr. at 159-60; Dr. Loh estimated these costs at approximately $15 million, Test. Dr. Loh, Hr'g Tr. at 684:10-16; and the Altieri Sebor Weber report estimated these costs at slightly more than $12 million. Pet'r's Hr'g Exh. 5 at 1.

[17] The Intervenors presented several options through the testimony of Ms. Trabucchi to show that it was practicable to continue operating the ***Corcoran*** in its current form. All **[*53]** of Ms. Trabucchi's options, however, assumed that the ***Corcoran*** had at its disposal the $11 million dollars that it has not yet received from the Clark estate. Test. Ms. Trabucchi, Hr'g Tr. at 931-32; Intervenors' Hr'g Exh. 23 at 4.

[18] The ***Corcoran***'s financial statements define "temporarily restricted" assets as those assets whose use has been donor restricted by specific time or purpose limitations. Intervenors' Hr'g Exh. 26, at CGT000154. "Permanently restricted" assets include donor-imposed restrictions and "proceeds from the sale of de-accessioned collection items that are required to be used to acquire other items for collections." *Id*.

de-accession some of the ***Corcoran***'s collection to pay for renovations to the Flagg Building and **[*54]** other operating expenses, this proposal has a serious downside. It is undisputed that the AAM and the AAMD can impose, and have imposed, sanctions on museums that have sold art to pay for operating expenses. Test. Mr. Johnson, Hr'g Tr. at 776-79. Although one of the Intervenors' experts, Paul Johnson, testified that these sanctions "would be unlikely to have a material impact on the ***Corcoran***'s near-term execution of its mission," *id*. at 729-30; Intervenors' Hr'g Exh. 16 at 6, Mr. Johnson acknowledged on cross-examination that one censured institution recently laid off eight of its twenty-three staff members and that it would be very difficult for a censured institution to hire or retain qualified curatorial staff. Test. Mr. Johnson, Hr'g Tr. at 775-79. In addition, Mr. Johnson's assessment was further weakened by other evidence indicating that the ***Corcoran*** would likely face the following sanctions: 1) the ***Corcoran*** would lose its AAM accreditation, which would disqualify it from receiving federal grants and other federal funds, and would limit its ability to attract and retain high-quality curatorial staff; and 2) the ***Corcoran*** would be censured by the AAMD, and would be precluded from hosting **[*55]** traveling exhibitions and loaning works of art to or from other institutions that are AAMD members. Test. Mr. Hopper, Hr'g Tr. at 510-13; Test. Ms. Smith, Hr'g Tr. at 998-99, 1019-20.

Indeed, despite testifying that the issue of sanctions was a "red herring," Mr. Johnson admitted on cross-examination that the Director of the National Academy Museum stated that the sanctions imposed against that museum had been "painful," that the museum could only mount minor shows while the sanctions were in place and had to cancel a major show due to the sanctions, and that donor support had dropped as a result of the sanctions. Test. Mr. Johnson, Hr'g Tr. at 734:21-25, 778:4-16. In fact, in direct contrast to Mr. Johnson's description of the impact of sanctions, the Director of the National Academy Museum, who has observed the impact of sanctions first-hand, described the effect of sanctions in the following terms: "sanctions, and you're dead." *Id*. at 778:16-17. Thus, this Court believes that there are substantial risks associated with the Intervenors' proposal to de-accession art to pay for the renovation of the Flagg Building and to pay for some of the ***Corcoran***'s other operating expenses.[19]

The Court also believes that the Intervenors are overly optimistic in their claim that the ***Corcoran*** can raise the needed funds through increased fundraising efforts. As many witnesses acknowledged, including some of the Intervenors' own witnesses, fundraising campaigns take significant time to plan and execute. Test. Mr. O'Connor, Hr'g Tr. at 277:1-16; Test. Mr. Hopper, Hr'g Tr. at 434-35; Test. Mr. Reynolds, Hr'g Tr. at 527-30; Test. Ms. Raffa, Hr'g Tr. at 828-29; Test. Ms. Smith, Hr'g Tr. at 1006-07. In fact, two of these witnesses testified that the planning alone of a capital campaign often takes at least 18 to 24 months and the campaigns themselves often last several years. Test. Mr. O'Connor, Hr'g Tr. at 277:1-16; Ms. Smith, Hr'g Tr. at 1006:5-7. Given the immediate and substantial maintenance needs the ***Corcoran*** is facing, such **[*57]** a campaign does not appear to be a viable alternative.[20]

Furthermore, the Court is not persuaded that the ***Corcoran*** can raise the necessary funds, in the necessary time period, through better "Board-building" practices.[21] The Court acknowledges that the current Board is relatively small compared to the Boards of comparable institutions and that a greater number of **[*58]** people on a Board can increase the Board's ability to raise money. Test. Mr. Johnson, Hr'g Tr. at 708-13. Nonetheless, the Court is not convinced that the ***Corcoran*** can address its serious financial difficulties

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[19] One of **[*56]** the Intervenors' other expert witnesses, Ms. Trabucchi, also failed to account for the possibility that the ***Corcoran*** would face sanctions if it de-accessioned some of its collection in order to pay for renovations to the Flagg Building or other operating expenses, thereby diminishing the utility of her testimony. Test. Ms. Trabucchi, Hr'g Tr. at 936-37.

[20] The Court notes that Mr. Reynolds testified that he could raise a few million dollars for the ***Corcoran*** "at a dinner party." Test. Mr. Reynolds. Hr'g Tr. at 561:14-16. Although the Court was impressed by the enthusiasm of Mr. Reynolds' testimony, and the success of his fundraising efforts at Ford's Theater, it was less impressed by some of Mr. Reynolds' other decisions, including his choice to withdraw a $38 million pledge to the Smithsonian Institution after a disagreement with a curator about curatorial decisions, and his decision to stop supporting the NGA after he and his wife were excluded from a private tour with former First Lady Laura Bush—decisions which cast some doubt on his stated commitment to the ***Corcoran***. *Id*. at 606-07, 621-24. The Court also notes that Mr. Reynolds has not contributed any money to the ***Corcoran*** to date. *Id*. at 610:1-8.

[21] "Board-building" refers to the practice of increasing the number of trustees or directors serving on the Board and increasing the monetary contributions given or otherwise obtained by Board members so as to increase the funds amassed by the Board. Test. Mr. Hopper, Hr'g Tr. at 294:8-14; Test. Mr. O'Connor, Hr'g Tr. at 294:10-22.

merely by increasing the number of Trustees on its Board, or by changing the composition of its Board. As the Intervenors' own witnesses testified, it is important to have a diverse Board, and not one comprised solely of high-net worth individuals. *Id*. at 708-09, 749. The Intervenors' witnesses also acknowledged that the process of choosing appropriate Board members can take substantial time and vetting. *Id*. at 746-51. Thus, even though Mr. Reynolds quickly compiled a list of twenty-three prominent individuals to serve on the Board of Trustees if he were chosen to be the Chairman of the Board of Trustees, it does not appear that Mr. Reynolds spent substantial time choosing or vetting these potential Board members. Test. Mr. Reynolds, Hr'g Tr. at 582-84. In addition, it does not appear that Mr. Reynolds obtained from these potential Board members a firm commitment to serve on the Board or to donate to the ***Corcoran***; to the contrary, it appears that they responded to a single phone call made by Mr. Reynolds **[*59]** during the week prior to his testimony. *Id*. at 582-84, 592:21-23.[22]

The ***Corcoran***'s inability to raise the needed funds immediately not only affects the operations of the Gallery, and the museum's accreditation, but it also will likely have a negative impact on the continued operation of the College. In fact, as noted above, MSCHE has postponed a decision on accreditation and has requested that the College provide supplemental information **[*60]** by September 1, 2014, documenting the "steps taken to improve the institution's short- and long-term financial viability, including updated cash and financial projections for the next five years, and multi-year budget projections aligned with the institution's mission, goals, and strategic plan and development and implementation of a comprehensive facilities master plan." Pet'r's Hr'g Exh. 2 at 1. In this regard, MSCHE also noted that the ***Corcoran***'s current "financial model . . . is not sustainable," and that "[m]ost of our negative evaluative judgments are about standards that are directly affected by dwindling resources . . . and the need to withhold critical investments pending the finalization of a permanent solution." Pet'r's Hr'g Exh. 12 at 5.

[22] The Court is aware that Mr. Reynolds had little time to amass a potential Board of Trustees given the expedited nature of these proceedings, and the Court in no way means to criticize his efforts in that regard. At the same time, the fact remains that this Court has little assurance, at this point, that the Board amassed by Mr. Reynolds would be able to raise the funds that the ***Corcoran*** needs, and that it would be able to do so on an expedited basis.

c. Case Law on Impracticability

The Court's determination that it is impracticable to carry out the existing terms of the Trust also is supported by the relevant case law. In fact, courts in numerous jurisdictions have granted *cy pres* relief where trustees faced financial obstacles like those faced by the ***Corcoran***. For example, in *In re Fisk University, 392 S.W.3d 582 (Tenn. 2011)*, the Court of Appeals of Tennessee upheld the grant of *cy pres* relief to Fisk University where it had become financially **[*61]** impracticable to display and maintain a collection of artwork donated to the University by Georgia O'Keeffe. There, the Court of Appeals held that the trial court did not err in finding that the University's financial condition made it impracticable for the University to spend $130,000 annually to display and maintain the collection, which consisted of 97 pieces of a collection formerly owned by Alfred Stieglitz and four pieces donated by Ms. O'Keeffe. *392 S.W.3d at 588*. Likewise, in *Sykes Memorial School Trustees, supra*, the Superior Court of Connecticut granted *cy pres* relief to the trustees of an industrial arts school for boys where the trustees established, by a preponderance of the evidence, that the trust's assets were insufficient to maintain such a school. *1990 Conn. Super. LEXIS 1687 at * 5*.

These cases are consistent with the general view of commentators and courts that ***HN5***[⬆] insufficiency of funds is a basis for *cy pres* relief. *See, e.g., Bogert on Trusts* § 438 at 194-96 (recognizing insufficiency of funds as the basis for the application of the *cy pres* doctrine); *The Smith Memorial Home, supra, 1990 Conn. Super. LEXIS 1498 at ** 5-6* (granting *cy pres* relief where the cost of operating a home for elderly indigent women, including the cost of maintaining a building built in 1932, made it **[*62]** impracticable to continue operating the home); *Will of Porter, 301 Pa. Super. 299, 447 A.2d 977, 982 (Pa. Super. 1982)* (granting *cy pres* relief where insufficient funds to build home for boys or girls); *cf. In re The Barnes Foundation, 2004 Pa. Dist. & Cnty. Dec. LEXIS 344 at *53, 69 Pa. D. & C.4th 129 (Comm. Pleas Ct., Dec. 13, 2004)* (granting equitable deviation from trust to allow an art school and museum to move from a Philadelphia suburb to the City of Philadephia, where the sale of an estate for approximately $20 million "would not halt the foundation's downward financial spiral.").

d. The Trustees' Management of the ***Corcoran***

The Intervenors argue that the Trustees have

mismanaged the ***Corcoran*** and contributed to the difficulties that now make it impracticable to carry out the Deed of Trust. To be sure, some of the Intervenors' criticisms are valid. For example, as one of the Trustees' own witnesses acknowledged, the Board consistently has had many vacancies over the past decade, which reduced its effectiveness and fund-raising capacity. Test. Mr. O'Connor, Hr'g Tr. at. 304-05; Test. Mr. Johnson, Hr'g Tr. at 707-08; Test. Ms. Smith, Hr'g Tr. at 987-89; Intervenors' Hr'g Exh. 6 at CGT001531-32. Furthermore, the ***Corcoran***'s fundraising department has been plagued by vacancies and high staff turnover, and has underperformed many of its peer institutions. Test. Ms. Smith, Hr'g Tr. **[*63]** at 986-87; Test. Mr. Johnson, Hr'g Tr. at 714-16, 723-24; Intervenors' Hr'g Exhs. 10, 19, 22. Finally, it appears that the ***Corcoran*** has hired senior staff members over the past few years who possessed considerable financial and management experience, but lacked experience in running either museums or colleges, let alone both. Test. Mr. Johnson, Hr'g Tr. at 785:3-7; Test. Ms. Stack, Hr'g Tr. at 73-74; Test. Ms. Smith, Hr'g Tr. at 1026.

On the other hand, some of the problems that the ***Corcoran*** now faces appear to have resulted from forces beyond the ***Corcoran***'s control, such as the global recession that began in 2008, which affected giving to charitable institutions across the country, and the untimely passing of the ***Corcoran***'s Chief Financial Officer, and a serious illness that forced the ***Corcoran***'s Director to resign. Test. Mr. Hopper, Hr'g Tr. at 457-59, 463; Test. Mr. O'Connor, Hr'g Tr. at 279. In addition, the Trustees presented evidence showing that they have worked extremely hard over the past several years to address the ***Corcoran***'s financial problems and to seek alternative solutions, with Mr. Hopper testifying that he personally devoted thousands of hours of his time to address **[*64]** these issues. Test. Mr. Hopper, Hr'g Tr. at 433-36; Test. Dr. Loh, Hr'g Tr. at 635, 647, 656; Pet'r's Hr'g Exh. 3. Likewise, during its most recent report, MSCHE noted that the Board is "deeply committed to the ***Corcoran***, working tirelessly through recent years to come to terms with the institution's significant financial challenges and to identify creative solutions that maintain and strengthen its core mission, even while changing its structure and form." Pet'r's Hr'g Exh. 12 at 10.

In any event, regardless of the merits of the criticisms of the ***Corcoran***'s past management practices, the issue before the Court is not whether the ***Corcoran*** could have been managed more efficiently over the past decade, but whether it currently is impracticable for the Trustees to carry out the existing Deed of Trust.[23] On that issue, for the reasons set forth above, the Court finds that the Trustees have established, by a preponderance of the evidence, that it is impracticable to carry out the existing Deed of Trust. Therefore, the Trustees have satisfied the first requirement for *cy pres* relief.

2. The Trustees Have Established That Their Proposed Modifications To The Deed Of Trust Are As Near As Possible To Mr. *Corcoran*'s Original Intent

The Trustees and the District argue that the GW/NGA proposal is as near as possible to Mr. ***Corcoran***'s intent in creating the Deed of Trust because it retains the ***Corcoran*** collection in the District of Columbia, maintains the College in the District of Columbia, and preserves the Flagg Building as the location that will house both the collection and the College in the District of Columbia. Hr'g Tr. at 1085-87. By contrast, the Intervenors assert that the GW/NGA proposal will needlessly dismantle the ***Corcoran***, an **[*66]** historic 145 year-old District of Columbia institution, by giving away the College and the Flagg Building to GW, and by giving away the ***Corcoran***'s collection to NGA. Hr'g Tr. at 1118. The Intervenors further argue that this proposal is inconsistent with Mr. ***Corcoran***'s intent, and that their alternative proposals from UMD and Mr. Reynolds are more consistent with ***Corcoran***'s original intent because they do not involve the dissolution of the ***Corcoran*** as an independent institution. *Id.* at 1118, 1140-43. Although the Intervenors' arguments have some force, this Court ultimately believes, for the reasons set forth below, that the GW/NGA proposal is the best way to effectuate Mr. ***Corcoran***'s original intent, given the ***Corcoran***'s current financial circumstances and the options that actually are available to the Trustees at this time.

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[23] There appears to be one exception to the general principle that a trustee's past management practices are not **[*65]** relevant in determining whether to grant *cy pres* relief. More specifically, the D.C. Circuit has noted that "a trustee will not be permitted to invoke the *cy pres* doctrine when his own deliberate act has prevented the fulfillment of the trustor's purpose." *Connecticut College, 276 F.2d at 497*. None of the parties presented any evidence at the Hearing showing that the Trustees deliberately placed the ***Corcoran*** in its current financial condition, and the Intervenors stated during closing argument that they are not making such an argument at this time. Hr'g Tr. at 1179-80.

a. The Intent of Mr. ***Corcoran***

As noted earlier, in determining whether the Trustees' proposal is as near as possible to Mr. ***Corcoran***'s original intent, this Court must examine both the Deed of Trust itself and any relevant surrounding circumstances evidencing Mr. ***Corcoran***'s intent. *Obermeyer, 140 S.W.3d at 25-26*; *Olds, 173 F.2d at 643-44*. The Deed of Trust demonstrates, first and foremost, that Mr. ***Corcoran*** intended to establish an institution **[*67]** "in Washington City" to be "dedicated to Art" and to be used "solely for the purpose of encouraging American genius, in the production and preservation of works pertaining to the 'Fine Arts,' and kindred objects." *Cy Pres* Mot., Exh. 1, at 1. The Deed of Trust further provides that the property received by the Board of Trustees pursuant to the Deed of Trust is to be used by the Trustees for "the perpetual establishment and maintenance of a Public Gallery and Museum for the promotion and encouragement of the arts of painting and sculpture, and the fine arts generally," and that this Gallery and Museum would be open to visitors "without any pecuniary charge whatever, at least two days a week." *Id*. at 6.[24] Finally, Mr. ***Corcoran***'s intent also is evidenced by his subsequent actions to establish a college of art and design, such as his gift of $100,000, in his will, for the creation of an art school, and his gift of more than $2,000 to the Board of Trustees "for the specific purpose of aiding in the establishment of a school of design in connection with the Gallery." Intervenors' Hr'g Exh. 13 at 28-29, 44.

Thus, a review of the relevant evidence demonstrates that Mr. ***Corcoran***'s primary intent was to create a gallery of fine art, along with a college of art and design, located in the District of Columbia, and to encourage the production and preservation of fine art through both the gallery and the college. With these parameters in mind, the Court will evaluate the GW/NGA proposal, as compared to maintaining the status quo or adopting an alternative proposal, to determine whether the Trustees' current proposal is as near as possible to Mr. **[*69]** ***Corcoran***'s original intent.

b. The GW/NGA Proposal

The Court finds that the GW/NGA proposal is consistent with Mr. ***Corcoran***'s primary intent. More specifically, under the proposal, GW will: 1) renovate the Flagg Building[25] so that it can continue to host both a gallery and a college of art and design in the District of Columbia; 2) establish a ***Corcoran*** School within GW that will seek to "preserve and maintain the mission, reputation and brand" of the ***Corcoran***, that will incorporate the ***Corcoran*** name, and that will remain in the Flagg Building in perpetuity; 3) continue to maintain gallery space in the Flagg Building even if the agreement between NGA and GW is terminated; and 4) continue to ensure that the works of art displayed in the Flagg Building remain open to the public. *Cy Pres* Mot., Exh. 4C. Furthermore, in an effort to provide continuity and to maintain the culture and the standards of ***Corcoran*** College, GW has offered contingent one-year contracts to all full-time ***Corcoran*** faculty, and contingent semester-long contracts to most of the adjunct faculty. *Cy Pres* Mot., Exh. 4C at 29-31; Test. of Dr. Knapp, Hr'g Tr. at 155-56, 166:1-17. Likewise, GW will grant admission to all students **[*70]** currently enrolled at or admitted to the ***Corcoran*** College. *Cy Pres* Mot., Exh. 4C at 29-31; Test. of Dr. Knapp, Hr'g Tr. at 164:15-21. Those students will continue to enjoy "substantially similar" degree requirements and their tuition and other fees will remain at the levels in effect at the time the transaction is consummated. *Cy Pres* Mot., Exh. 4C at 29-31; Test. of Dr. Knapp, Hr'g Tr. at 169-70. Finally, it is important to note that the GW transaction very likely will resolve the College's potential MSCHE accreditation issues, and that MSCHE has already expressed its "unanimous and enthusiastic support for the College's plan to merge into GW . . . with the belief that the most serious problems . . . will be solved by GW and will be evaluated as part of GW's accreditation." Pet'r's Hr'g Exh. 12 at 5.

The NGA portion of the proposal also is consistent with Mr. ***Corcoran***'s intent. Under the proposal, the NGA will:

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[24] The Court notes that the ***Corcoran*** currently is not open to visitors, free of charge, at least **[*68]** two days a week, in apparent contravention of the Deed of Trust. *See www.**corcoran**.org/visit*. The Court will not address this issue in greater detail because none of the parties has requested that the Court address this issue, and because this provision appears to be of less significance to the parties than the provisions that the Trustees seek to modify. Nonetheless, the Court notes that the GW/NGA proposal appears to be more consistent with the language of the Deed of Trust than the ***Corcoran***'s current admission practice, because the GW/NGA proposal would allow people to visit the ***Corcoran***, free of charge, every day that the Gallery is open. Pet.¶40.

[25] Although the Flagg Building itself is not part of the original Deed of Trust and was not even completed until after Mr. ***Corcoran***'s death, the parties do not dispute that it is consistent with Mr. ***Corcoran***'s original intent for the ***Corcoran*** to remain in the Flagg Building.

1) **[*71]** operate a Legacy Gallery at the Flagg Building, consisting of works from the ***Corcoran*** collection that are "intrinsically identified" with the Flagg Building and the history of the Gallery; and 2) operate a contemporary art gallery at the Flagg Building, consisting of works of art from both the ***Corcoran*** collection and the NGA's collection. *Cy Pres* Mot., Exhs. 4A, 4C, 4E, 4F. In addition, NGA will work with the Board of Trustees to identify other museums or institutions that would receive and display works of art that are not accessioned by the NGA and would give preference to institutions located in the District of Columbia. *Cy Pres* Mot., Exhs. 4A, 4F; Pet.¶38. Furthermore, the transfer of any works of art outside the District would require the approval of the Office of the Attorney General. *Cy Pres* Mot., Exh. 4F; Pet.¶38.

In sum, under the GW/NGA proposal, the Flagg Building will be renovated, the school will continue and be strengthened by its partnership with a financially sound university, both the school and a significant portion of the collection will remain in the Flagg Building, and a gallery, although smaller, will remain open to the public in the Flagg Building, all results **[*72]** that are consistent with Mr. ***Corcoran***'s intent.[26]

c. Alternatives to the GW/NGA Proposal

By contrast, the alternatives to the GW/NGA proposal likely would lead to results that are less consistent with Mr. ***Corcoran***'s intent. Indeed, none of the parties contend that maintaining the *status quo* is a viable option for the ***Corcoran***. Rather, as the Trustees have noted, if the GW/NGA proposal is not approved, the Trustees likely would have to close the Gallery, **[*73]** thus depriving the public of an important opportunity to see fine art in the District of Columbia, an opportunity that Mr. ***Corcoran*** hoped to provide. Hr'g Tr. at 1154. Furthermore, although the Trustees have committed to continuing the College for another academic year even if the Court does not approve the GW/NGA proposal, they could not commit to operating the College beyond that point. *Id*. In addition, the College is more likely to face the loss of MSCHE accreditation if the GW/NGA proposal is not approved, thereby further endangering fulfillment of Mr. ***Corcoran***'s intention to create and maintain a college of art and design in the District of Columbia. Potential loss of MSCHE accreditation is an important consideration because it would jeopardize the ability of students to receive federal financial aid, further limiting the opportunities for students to attend a college of art and design in the District. Test. Ms. Stack, Hr'g Tr. at 34:14-15, 44:6-8. Thus, the GW/NGA proposal appears more consistent with Mr. ***Corcoran***'s intent than simply maintaining the status quo.[27]

In addition, the GW/NGA proposal appears to be more consistent with Mr. ***Corcoran***'s intent than the alternatives considered by the Trustees. With respect to the proposal that UMD presented to the Trustees in February 2014, UMD **[*75]** committed to investing $46 million to renovate the Flagg Building over the first five years, but that payment was structured as a loan that the ***Corcoran*** would have to repay if the ***Corcoran*** were to opt out of the joint venture. Test. Dr. Loh, Hr'g Tr. at 650-52. By contrast, GW committed to investing the funds necessary for the entire renovation of the Flagg Building, which GW had estimated at $80 million and which the Trustees had estimated at $102 million, without any risk that the Trustees would have to repay the money. *Cy Pres* Mot., Exh. 4C at 1, 10-12. Furthermore, UMD would not agree to take

[26] The Court also notes that it reviewed all the public comments regarding the GW/NGA proposal that were submitted to the Trustees and the District and filed in this case. Although the majority of individuals who submitted comments opposed *cy pres* relief, a sizable number of institutions in the arts and academic communities supported the proposal. *See* Public Comments of John Cavanaugh, President and Chief Executive Officer, Consortium of Universities of the Washington Metropolitan Area; Ford Bell, President, American Alliance of Museums; Gwendolyn Everett, Director, Gallery of Fine Arts, Howard University; Steve Shulman, Executive Director, Cultural Tourism, DC. In addition, as noted previously, MSCHE enthusiastically supports the GW/NGA proposal.

[27] Ms. Trabucchi testified that the ***Corcoran*** can continue under its current Deed of Trust simply by cutting expenses or **[*74]** raising revenues. Test. Ms. Trabucchi, Hr'g Tr. at 894. The Court does not give great weight to Ms. Trabucchi's testimony, however, for a number of reasons. First, as a number of witnesses testified, the ***Corcoran*** already has tried to cut expenses and raise revenues, and its failure to do so successfully is what led to the filing of the Petition. *See, e.g.*, Test. Ms. Stack, Hr'g Tr. at. 45-46. Second, Ms. Trabucchi's model for raising revenue is premised, in part, on the ***Corcoran***'s ability to sell art to pay for operating expenses, cite, a premise that poses significant risks to the Gallery's viability. Ms. Trabucchi also did not account for the consequences of a possible loss of MSCHE accreditation, including the loss of federal financial aid for ***Corcoran*** students. *Id*. at 948-49. In addition, Ms. Trabucchi's analysis only accounted for $25 million in immediate renovation costs—it did not incorporate the more long-term renovation estimates of $71 million to $102 million. *Id*. at 949-50.

responsibility for the operating costs of the College, while GW has agreed to assume these costs and to continue operating the College. Test. Dr. Loh, Hr'g Tr. at 653-54; *Cy Pres* Mot., Exh. 4C. Finally, UMD's February 2014 best and final offer was significantly different and less favorable to the ***Corcoran*** than Dr. Loh's September 2013 draft term sheet. Pet'r's Hr'g Exh. 10 at 2. Given the pressing renovation requirements of the Flagg Building, and the dire financial circumstances of the ***Corcoran***, the Trustees' decision to pursue the GW/NGA proposal, which offered greater financial support **[*76]** and fewer risks than the UMD proposal, was not unreasonable. To the contrary, the GW/NGA proposal offers greater assurance that the Gallery and the College will be able to continue operations in the District of Columbia, and thereby offers greater certainty that the key components of Mr. ***Corcoran***'s Deed of Trust will remain intact.[28]

Finally, the GW/NGA proposal also appears to be more consistent with Mr. ***Corcoran***'s intent than the Intervenors' proposals involving UMD and Mr. Reynolds. In fact, there no longer is a UMD proposal before the Court—only the possibility of a future proposal that Dr. Loh stated would be substantially similar to the proposal that the Trustees previously rejected. **[*77]** Test. Dr. Loh, Hr'g Tr. at 663:1-4. Furthermore, Dr. Loh testified that the prior proposal would have to be revised to account for changed circumstances since February 2014, and that Dr. Loh would provide such a revised proposal within 45 days of any denial of *cy pres* relief. *Id*. at 661-63, 671-72, 681.

The Court accepts the genuineness of Dr. Loh's continuing interest in the ***Corcoran***. The Court questions, however, whether a substantially similar proposal is more consistent with Mr. ***Corcoran***'s intent than the GW/NGA proposal, for the reasons stated above, and also questions whether UMD actually could provide a new proposal within 45 days of an Order from this Court. To the contrary, Dr. Loh's optimistic timing estimate is directly undercut by the history of UMD's 2013-2014 negotiations with the Trustees; in fact, it took almost one year for UMD to provide its best and final offer in February 2014, after it signed a memorandum of understanding with the Trustees in April 2013. As Dr. Loh acknowledged in his testimony, the Board of Regents, the Governor's office, and the state legislature would have to review any new proposal before it could be submitted to the Trustees. Test. Dr. Loh, Hr'g Tr. at 658-59, 680-81. **[*78]** Furthermore, despite Dr. Loh's best intentions, the conditions of the December 2013 draft term sheet were substantially less favorable to the ***Corcoran***, and offered less certainty about the College's future, than those proposed by Dr. Loh in September 2013. Thus, the Court is not confident that UMD actually could submit a revised proposal within 45 days of a Court order denying the Trustees' request for *cy pres* relief, and is similarly unconvinced that such a proposal would be more consistent with Mr. ***Corcoran***'s intent than the proposal that is actually before this Court.[29]

The Court is similarly unconvinced that Mr. Reynolds' proposal is more consistent with Mr. ***Corcoran***'s intent or offers the ***Corcoran*** a better **[*79]** path forward than the GW/NGA proposal. As an initial matter, the contours of Mr. Reynolds' proposal are not clear to the Court. At most, Mr. Reynolds has offered assurances to the Court that, based on his past performance, he would do a better job fundraising than the ***Corcoran***'s current Board. But Mr. Reynolds' assurances do not assure the Court. To the contrary, the evidence does not establish that Mr. Reynolds could and would raise sufficient funds, in the time frame required, to renovate the Flagg Building and otherwise fund the operations of the College and the Gallery,

First, as noted earlier, although Mr. Reynolds achieved great success in revitalizing Ford's Theater, and although he is unquestionably enthusiastic about the ***Corcoran***, he has not demonstrated dependability in some of his other philanthropic endeavors, withdrawing his support from the NGA after being excluded from a private tour at that museum, and withdrawing a substantial pledge to the Smithsonian after becoming upset with a curator there. Test. Mr. Reynolds, Hr'g Tr. at 606-07, 621-24. And despite his enthusiasm for the

[28] The Court notes that the ***Corcoran*** is obligated to pay $35 million to GW to help pay for the renovation and additional $8 million in college transfer costs. *Cy Pres* Mot., Exh. 4C at 9, 11. Nonetheless, given the Trustees' estimate of the renovation costs to the Flagg Building, which did not include "soft costs," and given the operating deficits the ***Corcoran*** has incurred over the last decade, it was reasonable for the Trustees to conclude that GW's proposal provided the greatest amount of financial support.

[29] In noting its skepticism of UMD's stated time frame for a renewed proposal, the Court in no way means to criticize Dr. Loh, who impressed the Court with his sincerity and the clarity of his vision. Nonetheless, the Court is aware that Dr. Loh does not operate in a vacuum, and that any proposal he drafted would inevitably have to go through multiple layers of review where, as previously happened, it could be modified in ways that make it less favorable to the ***Corcoran***'s interests.

Corcoran, Mr. Reynolds has never provided it with any financial support to date. *Id*. at 610:1-8. **[*80]** Second, although Mr. Reynolds amassed an impressive list of possible Board members on short notice, the fact remains that the individuals on this list have not committed themselves to anything more than considering membership on the Board. Unlike GW, these individuals have not backed up their interest in the ***Corcoran*** with any financial commitment. In addition, Mr. Reynolds' single phone call to each of these individuals is far from the kind of thorough and deliberate Board member selection process that the Intervenors' own witnesses endorsed. Third, the Court is concerned that Mr. Reynolds endorsed the proposal to de-accession art in order to cover the ***Corcoran***'s renovation and operating expenses, suggesting that the ***Corcoran***'s non-American art could be sold to cover these expenses. *Id*. at 611-12. As discussed in detail above, this proposal carries significant risk to the ***Corcoran***'s accreditation as a museum and its relationships with the AAM and AAMD. Indeed, not only were the Trustees understandably reluctant to endorse such a proposal, but Dr. Loh explicitly testified that he was "philosophically opposed to de-accessioning art to pay the bills." Test. Dr. Loh, Hr'g Tr. at 654:15-19. *See also* ***[*81]*** *In re Barnes Foundation, 2004 Pa. Dist. & Cnty. Dec. LEXIS 344 at *31, 69 Pa. D. & C.4th 129 (Dec. 13, 2004)* ("there is a strong majority opinion among those in the museum community that the proceeds from sales should be used only for the acquisition of other materials or for the direct preservation and care of collections.").

In sum, the Court is not convinced that the Intervenors' proposals, amorphous and aspirational as they are, are more consistent with Mr. ***Corcoran***'s intent than the actual proposal that the Trustees have presented to this Court. The Court also notes that this case is distinguishable from *Museum of Fine Arts v. Beland, 432 Mass. 540, 735 N.E. 2d 1248 (Mass. 2000)*, cited by the Intervenors, where cy pres relief was denied because the trustees "ha[d] not made reasonable efforts to explore alternative[s]." *Id. at 1252*. In this case, as the record amply demonstrates, the Trustees explored numerous alternatives, over many years, before submitting their current proposal to the Court. Test. Ms. Stack, Hr'g Tr. at 55:5-14; Test. Mr. Hopper, Hr'g Tr. at 433-36.

At the same time, the Court is aware that the GW/NGA proposal is inconsistent with Mr. ***Corcoran***'s intent in one important respect—unlike the UMD proposal from February 2014, the GW/NGA proposal effectively eliminates the ***Corcoran*** as an independent institution, leaving behind only an untethered Board of Trustees to advise **[*82]** GW and NGA on future plans for the College and Gallery. Undoubtedly, Mr. ***Corcoran*** would not be pleased by this turn of events. It seems likely, however, that he would be pleased to see that the College will be preserved through its partnership with the very university to which he donated both property and his company's archives, and where he served as Chairman of the Board for several years, and that the Gallery will be preserved through its partnership with one of the country's pre-eminent art institutions. Test. Dr. Knapp, Hr'g Tr. at 148-49.[30]

Moreover, in weighing the various proposals, this Court must examine the entirety of the proposals at hand, including their plausibility and the definiteness of their terms, to determine which proposal most nearly effectuates Mr. ***Corcoran***'s original intent. In this case, the Trustees reasonably concluded that the UMD proposal in February 2014 had shortcomings and risks **[*84]** that the GW/NGA proposal did not have. And the two possibilities that the Intervenors now propose are just that—possibilities that lack definite terms, definite commitments, and definite means of support to preserve the College, the Gallery, and the Flagg Building itself. At the end of the day, after weighing numerous proposals, the Trustees reasonably

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[30] The GW/NGA proposal also may be inconsistent with Mr. ***Corcoran***'s intent to the extent that it authorizes the ***Corcoran***, in consultation with NGA, to de-accession some of the ***Corcoran*** collection and transfer it to other institutions. This proposal, however, is more consistent with Mr. ***Corcoran***'s intent than maintaining the *status quo*, which likely would lead to the dispersal of the entire collection if the Gallery were to close completely. Furthermore, the GW/NGA proposal appears to be more consistent with Mr. ***Corcoran***'s intent than Mr. Reynolds' proposal, which included some de-accession of the collection to fund operations, and which contained **[*83]** no limits on the type or location of the institutions to which the collection could be transferred. By contrast, pursuant to a side letter agreement between the ***Corcoran*** and NGA, any de-accessioned works of art presumptively would be transferred to a museum or other institution within the District of Columbia or within a 50 mile radius of the District of Columbia, and would be transferred in such a manner as to maximize the possibility that the works would be displayed to the public free of charge or under other reasonable terms, and that ***Corcoran*** students would have access to the works for educational purposes. *Cy Pres* Mot., Exh. 4F. In addition, if the ***Corcoran*** and NGA sought to transfer any works of art outside the District of Columbia, they would need to obtain the approval of the Office of the Attorney General. *Id*.

decided that the GW/NGA proposal was the best choice to further Mr. ***Corcoran***'s original intent. Likewise, this Court finds that the Trustees have established that the GW/NGA proposal is consistent with Mr. ***Corcoran***'s intent and effectuates that intent as nearly as possible in light of the ***Corcoran***'s current financial condition. Accordingly, this Court finds that the Trustees have satisfied both requirements for *cy pres* relief in this case, and will grant their Petition and *Cy Pres* Motion.

IV. CONCLUSION

This Court finds it painful to issue an Order that effectively dissolves the ***Corcoran*** as an independent entity. But this Court would find it even more painful to deny the relief requested and allow the ***Corcoran*** to face its likely demise—the likely dissolution of the College, the closing of the Gallery, and the dispersal of the Gallery's **[*85]** entire collection. Fortunately, two internationally recognized institutions, with strong and enduring commitments to education and the arts, have agreed to sustain the College under the ***Corcoran*** name, and to provide the same educational and employment opportunities to its students, faculty, and staff; to maintain the Gallery and much of the collection under the ***Corcoran*** name, and to keep it open to the public; and to renovate the iconic building which houses both the College and the Gallery. Furthermore, this proposal has been enthusiastically endorsed by the two national organizations that accredit the College and the Gallery, and by the Office of the Attorney General, which has statutory oversight over charitable trusts in the District of Columbia. In sum, this Court believes that approval of the Trustees' proposal is necessary, given the ***Corcoran***'s financial circumstances, and further believes that the proposal properly effectuates Mr. ***Corcoran***'s original intent to encourage "American Genius in the production and preservation of works pertaining to the 'Fine Arts,' and kindred objects."

Accordingly, it is this 18th day of August, 2014, hereby **ORDERED** that the Trustees' Petition and **[*86]** *Cy Pres* Motion are **GRANTED**. The Court will issue a separate Order providing the specific relief requested by the Trustees.

/s/ Robert Okun

Robert Okun

Associate Judge

(Signed in Chambers)

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CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that, to the best of my knowledge, the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.

_/s/ Andrew Batchelor____

Andrew M. Batchelor, AAG

CERTIFICATE OF SERVICE

I, Andrew Batchelor, hereby certify, under the penalties of perjury that on January 16, 2018, I filed the foregoing with the Clerk of the Appeals Court via the Court's electronic filing service and served by email on counsel of record listed below:

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