

**COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT**

**2017-P-1556**

---

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

Plaintiffs-Appellants,

v.

TRUSTEES OF THE BERKSHIRE MUSEUM, a/k/a the Berkshire Museum of  
Art, History and Science, a corporation, and ELIZABETH MCGRAW; STACEY  
GILLIS WEBER; ETHAN KLEPETAR; STEPHEN BAYNE, LYDIA S.  
ROSNER; MIKE ADDY; JAY BIKOFSKY; DOUGLAS CRANE; HOWARD J.  
EBERWEIN III; URSULA EHRET-DICHTER; DAVID GLODT; WENDY  
GORDON; WILLIAM M. HINES, JR.; JOAN HUNTER; ERIC KORENMAN;  
BARBARA KRAUTHAMER; DONNA KRENICKI; SUZANNE NASH;  
DAVID NEUBERT; JEFFREY NOBLE; CAITLIN PEMBLE; AND MELISSA  
SCARAFONI, individuals in their capacity as Trustees of the Berkshire Museum  
of Art, History, and Science,

Defendants-Appellees.

On Appeal from Denial of a Preliminary Injunction  
and Judgment of Dismissal by the Berkshire Superior Court

---

**BRIEF OF PLAINTIFFS-APPELLANTS**

January 16, 2018

Nicholas M. O'Donnell (BBO No. 657950)  
Erika L. Todd (BBO No. 689053)  
SULLIVAN & WORCESTER LLP  
One Post Office Square  
Boston, MA 02109  
617 338-2800

**TABLE OF CONTENTS**

**I . STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....1**

**II . STATEMENT OF THE CASE.....1**

    A . Nature of the Case.....1

    B . Course of Proceedings and Disposition..3

    C . Statement of Relevant Facts.....7

        1 . The Museum’s Art Collection Was Established to Serve the Residents of Berkshire County, and Statutory Restrictions Protect This Purpose.....7

        2 . The Museum’s Collections Management Policy Provides Additional Safeguards.....9

**III . SUMMARY OF THE ARGUMENT.....22**

**IV . ARGUMENT.....24**

    A . A Court May Not *Sua Sponte* Dismiss a Complaint for Lack of Standing by Going Beyond the Pleadings and Ignoring One of the Grounds for Standing.....24

        1 . The Museum Members Have Standing to Enforce the Museum’s Governing Documents.....25

        2 . The Museum Members Have Standing to Enforce Their Right of Participation.....26

3 .	The Museum Members Have Derivative Standing to Pursue a Claim on the Museum's Behalf for the Trustee's Fiduciary Breaches.....	29
B .	The Berkshire Superior Court Should Have Enjoined the Liquidation Sale....	36
1 .	The Museum Members Are Likely to Succeed in Enforcing the Museum's Incorporating Statute and Deaccessioning Policy.....	37
2 .	Museum Members Are Likely to Succeed in Their Derivative Action to Prevent the Museum's Administration from Destroying the Institution.....	39
3 .	Museum Members and the Museum Will Suffer Irreparable Harm Without an Immediate Restraint.....	45
4 .	The Museum Would Suffer No Irreparable Harm.....	47
5 .	The Balance of Equities Favors the Plaintiffs and Favors the Public Interest.....	48
V .	<b>RELIEF SOUGHT.....</b>	<b>49</b>

## Table of Authorities

### Cases

<u>Callahan v. First Congregational Church of Haverhill,</u> 441 Mass. 699 (2004) .....	32
<u>Capricorn Corp. v. Niemszyk,</u> No. 03-1827-B, 2003 Mass. Super. LEXIS 351 (Oct. 21, 2003) .....	35
<u>Chokel v. Genzyme Corp.,</u> 449 Mass. 272 (2007) .....	25
<u>Commonwealth v. Mass. CRINC,</u> 392 Mass. 79 (1984) .....	37
<u>Commonwealth v. Rice,</u> 441 Mass. 291 (2004) .....	35
<u>Commonwealth v. Rzepphiewski,</u> 431 Mass. 48 (2000) .....	35
<u>Estate of Moulton v. Puopolo,</u> 467 Mass. 478 (2014) .....	40
<u>General Accident Insurance Co. v. Bank of New England- West, N.A.,</u> 403 Mass. 473 (1988) .....	37
<u>Georges v. Boston Police Badge No. 2239,</u> No. 15-P-367., 2016 Mass. App. Unpub. LEXIS 418 (Mass. App. Ct. Apr. 15, 2016) .....	24
<u>Hanover Insurance Co. v. Sutton,</u> 46 Mass. App. Ct. 153 (1999) .....	40
<u>Jackson v. Stuhlfire,</u> 28 Mass. App. Ct. 924 (1990) .....	30
<u>Jessie v. Boynton,</u> 372 Mass. 293 (1977) .....	27
<u>Johnson v. Witkowski,</u> 30 Mass. App. Ct. 697 (1991) .....	44
<u>LeClair v. Town of Norwell,</u> 430 Mass. 328 (1999) .....	37
<u>Lopez v. Medford Cmty. Center, Inc.,</u> 384 Mass. 163 (1981) .....	27

<u>Mass. Charitable Mech. Ass'n v. Beede,</u> 320 Mass. 601 (1947) .....	25, 26
<u>Merriam v. Demoulas Super Mkts., Inc.,</u> 464 Mass. 721 (2013) .....	25
<u>O'Brien v. Dwight,</u> 363 Mass. 256 (1973) .....	44, 46
<u>Official Committee of Unsecured Creditors for the Bankruptcy Estate of Boston Regional Medical Center, Inc. v. Ricks,</u> 328 F. Supp. 2d 130 (D. Mass. 2004) .....	29
<u>Okafor v. Sovereign Bank, N.A.,</u> No. 13-P-214, 2013 Mass. App. Unpub. LEXIS 1225 (Mass. App. Ct. Dec. 30, 2013) .....	31, 34
<u>In re Opinion of Justices,</u> 237 Mass. 619 (1921) .....	25-26
<u>Packaging Industry Group, Inc. v. Cheney,</u> 380 Mass. 609 (1980) .....	36
<u>In re Petition of an Adult &amp; Two Minors for Change of Name ,</u> No. 08-P-689, 2009 Mass. App. Unpub. LEXIS 296 (Mass. App. Ct. Mar. 6, 2009) .....	35
<u>Primate &amp; Bishops' Synod of the Russian Orthodox Church Outside Russia v. Russian Orthodox Church of the Holy Resurrection ,</u> 35 Mass. App. Ct. 194 (1993) .....	25, 27
<u>Trustees of the Corcoran Gallery of Art v. District of Columbia,</u> No. 2014 CA 003745 B, Case No. 2014 CA 003745 B, 2014 D.C. Super. LEXIS 17 (Aug. 18, 2014) ....	41-42
<u>Zimmerman v. Bogoff,</u> 402 Mass. 650 (1988) .....	40
<b>Other</b>	
Mass. R. App. P. 6 .....	<u>passim</u>
Mass. R. Civ. P. 12(b)(1) .....	24
Mass. R. Civ. P. 12(b)(1), 12(b)(6) .....	24
Mass. R. Civ. P. 23.1 .....	30

## **I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

(1) Did the trial court err in dismissing *sua sponte* Appellants' claims to prevent the dissolution of the Appellees' unique art collection, accepting oral representations by Appellees' counsel as evidence rather than the specific allegations and record evidence to support those claims?

(2) Did the trial court abuse its discretion in denying a motion for a preliminary injunction where the Appellees' actions pose the immediate risk of irreparable harm in breach of Appellants' rights and against the public interest?

## **II. STATEMENT OF THE CASE**

### **A. Nature of the Case**

This case concerns the Trustees of the Berkshire Museum (the "Museum") and its governing body's attempt to eliminate the core of the Museum's art collection and use the resulting proceeds for its operating expenses. Such a dissipation of cultural property in service of short-term finance, if permitted, would be without precedent in American history. While other museums have attempted similar monetization of their cultural property to disastrous result, none have ever done so on the scale proposed here.

"Deaccessioning" is the sale or other transfer of an object of visual art or cultural property from a museum's collection. This proposed deaccession would

sell the Museum's forty most important pieces of art (the "Artwork"), which include masterpieces by Norman Rockwell and Frederic Edwin Church and paintings by several members of the Hudson River School, inextricably connected to the area in which Pittsfield is located ("the Liquidation Sale"). It violates governing statutes that chartered the Museum, the Museum's Collection Policy, and fundamental ethical rules that govern how art museums steward their collections consistent with their fiduciary duties, and which forbid their capitalization. The Trustees devised the proposed liquidation in secret and without any opportunity for Museum members to participate as was their contractual right.

James Hatt, Kristin Hatt, and Elizabeth Weinberg (collectively the "Museum Members") brought this action for breach of contract claim on their own behalf as Museum members, and they brought a derivative claim on the Museum's behalf for the individual Trustees' breach of fiduciary duty. The Berkshire Superior Court summarily dismissed the action without even being asked to do so. Only the reinstatement of the case and a preliminary injunction until a trial on the merits can prevent irreparable harm.

**B. Course of Proceedings and Disposition**

On October 25, 2017, the Museum Members filed a Verified Complaint and a motion for a preliminary injunction in the Business Litigation Session ("BLS") of the Suffolk Superior Court. On October 26, the BLS judge assigned to the Museum Members' case scheduled a hearing on the earliest available date – Wednesday, November 1. As it happened, a separate group of plaintiffs that included Norman Rockwell's three sons (collectively, the "Rockwell Plaintiffs") had filed a separate lawsuit in Berkshire County. Although that lawsuit made different claims, it likewise concerned the Museum's plan to auction its most valuable artwork. The Rockwell Plaintiffs named the Attorney General as a necessary party defendant and sought a temporary restraining order against the sale of the art. That case asserted specific restrictions on the gift of two paintings by Norman Rockwell himself, broader applicable geographic restrictions on certain parts of the collection, rights of Berkshire County residents conferred by the Museum's chartering documents, and contractual rights by artist Tom Patti for an installation that will be altered if the Museum's plans are allowed to proceed.

Still in the midst of her own investigation but with the point of no return fast approaching, the Attorney General concurred and supported the requested



injunction (including the Museum Members') on October 30, 2017 so that she could complete that investigation. RA-0762-0787.

The Berkshire Superior Court scheduled an injunction hearing in the Rockwell Plaintiffs' case for November 1, although at a different time than the BLS hearing. The Museum moved to consolidate this case with the Rockwell Plaintiffs', which the Berkshire Superior Court allowed before awaiting any other parties' position.<sup>1</sup> On October 31, the Museum filed a consolidated<sup>2</sup> response to the Rockwell Plaintiffs' motion for a temporary restraining order and to the Attorney General's response joining that request. Although this "response" briefly mentioned the Museum Members, it was not directed at their separate motion for a preliminary injunction, and it barely acknowledged this case's existence.

The Berkshire Superior Court held a hearing on November 1, 2017. It was apparent from the Court's

---

<sup>1</sup> The cases were by then consolidated because the Museum moved in Berkshire County for transfer and consolidation on Friday afternoon, October 27, 2017. RA-0756-59. The Berkshire Superior Court consolidated the cases by order faxed to the Museum – but not to the Museum Members – on Monday morning, before any party could respond. RA-0760-61. The Museum Members respectfully submit that any claims reinstated here should be remanded to the BLS, where they were duly filed.

<sup>2</sup> The Museum also filed an opposition to the Rockwell Plaintiffs' motion for preliminary injunction on October 26, 2017.

questioning that it had conducted its own inquiry beyond the record before that hearing. For example, demonstrating a clear misunderstanding of the ethics of deaccessioning, the Court suggested that the Museum's actions were similar to those of the Metropolitan Museum of Art in New York in the 1970s. See RA-1308 ("I think it started with Hoving in the Metropolitan"). They are not, but more importantly for appellate purposes, the record contains no mention whatsoever of the Metropolitan Museum of Art. At the hearing, the Museum's counsel argued for the first time that the Trustees are the only members of the Museum. See RA-1316-17. This was purportedly based on the language of the bylaws – which the Museum Members had requested to see but which the Museum refused to provide. Notwithstanding, Court admonished the Museum Members, the Attorney General, and the Rockwell Plaintiffs at the hearing that nothing outside the record could be considered. RA-1346 ("I have to deal with facts. If it is not in an Affidavit, or if not an exhibit, it's not before me."). As it happens, the bylaws say only that the Trustees have the powers of members of a corporation, not that the Trustees are the only members. RA-0600.

After the Museum suggested that the Attorney General had not actually sought an injunction – which of course she had – the Attorney General filed an

emergency motion to convert to plaintiff standing and for a preliminary injunction in an abundance of caution to avoid the form over substance that the Museum was urging to avoid the real issue.

On November 7, 2017, the Court issued a decision and order denying the Museum Members', the Rockwell Plaintiffs', and the Attorney General's requests for injunctive relief. The Court never reached the question of the Museum Members' substantive claims or the relative harms because it held that the Museum Members lacked standing. The Court also *sua sponte* dismissed the Museum Members' case in its entirety, and dismissed the Rockwell Plaintiffs from their action, despite the fact that no party had asked it to, leaving only the Attorney General's claims and the Patti contract claims. Judgment entered against the Museums Members on November 14, 2017. The dismissal is not explained or justified; it merely appears at the end of the opinion. Compounding the errors of law, the Berkshire Superior Court misconstrued the record on the fundamental question of deaccessioning in its denial of the Attorney General's motion, holding that museums considered the practice a "necessary evil," citing additional sources not in the record (again erroneously, as with the reference to the Metropolitan Museum at the hearing). Confusing the Trustees' power to sell paintings as a matter of title (for which they

submitted expert testimony, but which is not actually in dispute) with their ability to do so consistent with their duties of stewardship (about which they submitted no evidence other than their own affidavits), the Berkshire Superior Court not only excused the Liquidation Sale, it applauded the plan. Not a single outside museum director or association cited in the record supports the Liquidation Sale.

On November 10, 2017, The Attorney General noticed her appeal from the injunction denial and moved pursuant to Mass. R. App. P. 6 for an injunction pending appeal from the Single Justice of the Court. The Single Justice granted her motion that same day and later extended the injunction to restrain the Museum from proceeding with the Liquidation Sale through January 29, 2018.

**C. Statement of Relevant Facts**

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

The Museum, now a cornerstone of culture in the Berkshires, first grew as a natural extension of the Berkshire Athenaeum (the "Athenaeum"). The Athenaeum was incorporated in Pittsfield in 1871. RA-0216. Established by an act of the Legislature, the Athenaeum's stated mission was "promoting education, culture, and refinement, and diffusing knowledge by means of a library, reading-rooms, lectures, museums,

and cabinets of art and historical curiosities. . . .”

Id. The Athenaeum’s property is, and always was, subject to a geographic restriction:

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

Id.

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

On or about April 2, 1903, Zenas Crane deeded the land where the Museum now stands by gift “for the purpose of establishing a Berkshire Museum of Natural History **and Art** in connection with the Athenaeum.” RA-0220 (emphasis added). He also bequeathed monetary gifts to the Athenaeum, and his son Zenas Marshall Crane later bequeathed \$200,000 and certain of the Artwork. RA-0223-44; RA-0248-69.

In 1932, the Legislature once again amended the governing documents of the Museum. RA-0246-47. On March 31, 1932, the Legislature passed a resolution creating a new entity named the Berkshire Museum, and

it authorized the existing Athenaeum to transfer its property to the newly-chartered entity:

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

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

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

Internal rules further protected the Berkshire Museum's collection. At all relevant times – from 2012 through July 11, 2017 – the Collections Management Policy set forth the following “Criteria for Deaccession and Disposal”:

1. That the work does not represent the standard of quality which the Museum seeks to maintain for exhibition or scholarly purposes.
2. That the object is no longer relevant or the object is clearly outside the scope of the museum's mission.
3. That the work is in poor condition and/or beyond the museum's capacity to maintain. The work is beyond restoration or the cost of restoration exceeds the value of the work.

4. That the work is a duplicate of another work in the collection - i.e., as in the case of prints and photographs.
5. That after consulting with acknowledged specialists in the field, the work is found to be a facsimile or unauthentic work.

RA-0819-20. The Policy<sup>3</sup> also sets forth "Deaccession Ethics," including: "At all times the original donor's wishes will be considered[.]" RA-0821.<sup>4</sup> Deaccession may take place "[o]nce the Collections Manager and Executive Director have surveyed the collections and noted those works of art and objects which meet with one or more of the aforementioned criteria in the Collections Management policy, and have satisfied themselves that no legal obstacles impede the process of deaccessioning[.]" RA-0833.

The pre-2017 Collections Management Policy - the enactment of which was ironically one of the last prudent things that the Trustees did - existed within the context of museum ethics on deaccessioning, all of which was in the record and presented to the Berkshire Superior Court. Those ethics are not laws - the Museum

---

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

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

Members have never suggested otherwise – but adherence to them is critical to understanding the Trustee defendants' discharge of their fiduciary duties. In turn, those ethical rules are articulated in policies promulgated by the Association of Art Museum Directors ("AAMD"), the American Alliance of Museum ("AAM"), and others. Deaccessioning is an issue unique to museums because art and cultural artifacts are both property in one sense, but something of different and larger significance in another sense. RA-0318 (Dan Monroe aff.).

One of the most fundamental and long-standing principles of the museum field is that a collection is held in the public trust and must not be treated as a disposable financial asset. RA-0320. The AAMD's Policy on Deaccessioning "sets forth the critical requirements for collections management to be consistent with museum's [sic] duties to the public." RA-0318. One such requirement is that "Museums must not capitalize or collateralize collections or recognize as revenue the value of works of art." Id. Donated items should be "subject to an organizational policy that requires the proceeds from sales of collection items to be used to acquire other items for the collection." RA-0319. Similarly, the AAM, of which the Museum is a member, requires that "in no event" shall proceeds from the sale of art "be used for



anything other than acquisition or direct care of collections." RA-0320.

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

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

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

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

RA-0794. As the authoritative state agency – the Mass Cultural Center ("MCC") – explained: "The Berkshire Museum disregarded these important guidelines in its

deaccessioning process.” RA-0128.<sup>5</sup>

The Museum publicly announced the Liquidation Sale in July of 2017. One of the Rockwell paintings proposed to be sold first, *Shuffleton’s Barbershop*, is widely considered his greatest work. For a few weeks in August, the Museum pretended to participate in public dialogue about its plans, which the Museum announced without any specific timetable. The Museum Members are not professional litigants; they observed the public conversation and hoped the Museum would respond to reason.

On September 6, 2017, however, Sotheby’s announced the dates and sequence on which the Artwork would be sold, with the first auction scheduled for November 13. The Museum Members retained counsel, who reached out as promptly as possible to ask for information concerning the Museum’s corporate governance and decision making-process. RA-0282-83. The Museum *ignored the Museum Members entirely*. Consistent with their rights as members, the Museum Members made demand on the Museum on October 17, 2017. RA-0285-86. The Museum, through counsel, responded dismissively on October 20, 2017 asserting that

---

<sup>5</sup> In particular, the MCC acknowledged “longstanding, widely accepted museum standards that require that funds generated from deaccessioning must be used for the care and preservation of artwork, or to purchase new art. Museum collections should never be treated as disposable financial assets.” RA-0128.

Plaintiffs have no rights to object to the Liquidation Sale or the Museum's mismanagement. RA-0208. The Museum Members then filed this action immediately.

The Liquidation Sale is not the result of any impending financial needs, as the Museum has tried to portray as *post hoc* justification. RA-0200. It is a lazy alternative to the financial challenges of running a non-profit museum. Id. As recently as December 2015, the Museum proudly reported to the MCC:

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

RA-1043 (emphasis added).<sup>6</sup> Similarly, in October 1, 2015, Museum Director Van Shields publicly touted the Museum's fiscal health. RA-0202. In an interview with the *Berkshire Eagle*, Shields argued: "We're in a good financial position[.]" Id. He discussed the Museum's budget and made no mention of a deficit or any other problem. Id. The MCC noted: "The Berkshire Museum

---

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

applied to the Cultural Facilities Fund in FY07, FY12, FY15 and FY16 and had been awarded multiple grants in this timeframe. The narrative in those applications did not characterize the museum being under imminent threat of closing." RA-1004.

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

In 2015 – the same year when the Museum lauded its fundraising ability to the MCC, and the same year when Shields commended the Museum's financial position in an interview – "[t]he Museum contacted Christie's and Sotheby's to get a valuation of the collection[.]" RA-0852 (presentation from Museum Board's 2016 retreat). Both "auction houses evaluated objects with the highest values, those they would be best positioned to assist with selling" (RA-0853) – *not* the objects that met the Museum's deaccessioning criteria.

In 2016, the Trustees' paid consultants presented four "scenarios" to consider. RA-1000. The first scenario, of maintaining current practices, was

summarily dismissed as “unsustainable.” Id. From there, the Trustees were presented with three options: an “opening bid” that would cost \$25.61M, a “bronze” option that would cost \$52.09M, and a “silver” option that would cost \$69.78M. Id. The Trustees ultimately selected the silver option.

In exchange for giving up the jewels of its collection, the Museum was expected to receive between \$52,615,000–\$76,180,000. RA-0881 (Sotheby’s Auction Estimate for forty works of art). In other words, the resulting cash influx could substantially exceed even the most expensive, “silver” budget.

On May 25, 2017, Board President Elizabeth McGraw sent her fellow Trustees an email with the subject line “loose lips sink ships.” RA-1052. She wrote: “We are now two months away from officially revealing our plans for the Berkshire Museum’s transformation and THE NEED FOR CONFIDENTIALITY HAS NEVER BEEN GREATER. . . . Please, Please, Please refrain from discussing the details of our strategy with anyone.” Id. Although the Museum conducted much-touted focus groups about the New Vision, Shields has now admitted that the focus groups had not been told about how the New Vision would be funded, i.e., by the Liquidation Sale. RA-0203. Similarly, the MCC “repeatedly requested the Museum’s New Vision Business Plan but the request was denied.” RA-1007 (emphasis original to MCC document).

Although the Sotheby's contract was signed on June 13, 2017, the Museum did not tell the public or its members for over a month. RA-0274-80; RA-0624. Compounding this deceit, in the Museum's 2017 filing to the MCC, submitted after the release of the "New Vision," the Museum answered "no" to a question about whether any material changes had taken place in the year prior or were planned in the year ahead. RA-0203.

The Liquidation Sale plainly violates the Museum's own Collections Management Policy that was applicable when it made its decision. The pieces were chosen because of their cash value, and not for the acceptable reasons set forth in the Policy. No effort was made to investigate whether another museum (such as, for example, the Norman Rockwell Museum just one town away) might be interested in buying the works so that they would remain available for public enjoyment. Nor did the Museum consider donors' wishes. Seeking to excuse this breach of its own policy, the Trustees voted on July 12, 2017 to amend the policy to allow the now-committed sale, as though this tactic could retroactively justify the binding contract it had already formed with Sotheby's. See RA-0592 (Klepetar aff.); RA-0636-60 (revised policy).

The Trustees' argument that drastic financial need somehow justifies their wrongful actions wilts under scrutiny. RA-0205. As discussed above, the claim

of financial distress contradicts the Museum's own representations in 2015, when the Museum was already in discussions with Sotheby's and Christie's. Moreover, the MCC recently examined the Museum's finances in detail, and concluded: "[T]wo independent analyses, along with our own review of the Museum's audited financial statements, show clearly that the Museum could put itself in a healthy operating position without deaccessioning art." RA-0128-9.

Stephen C. Sheppard ("Professor Sheppard"), a professor of economics at Williams College and director of the Center for Creative Community Development, which studies nonprofits, said the Museum could sustain itself on an endowment a fraction of the one that it claims it needs the Liquidation Sale to realize. RA-0290-91.<sup>7</sup>

Professor Sheppard analyzed fifteen years of Berkshire Museum financial documents. RA-0308. Sheppard studied the Museum's audited annual financial

---

<sup>7</sup> At least one trustee will benefit personally from the Liquidation Sale. Defendant Jeffrey Noble is the President of Hill-Engineers, Architects, Planners, Inc., which has "completed several renovation projects for the Berkshire Museum, including architectural and engineering design and construction supervision for a recently completed \$2.3 million energy and accessibility project." RA-1049. Noble's company has also been awarded work associated with the "New Vision." RA-0279. There is zero indication in any of the Trustees' self-serving affidavits that this conflict of interest was ever even acknowledged, let alone vetted or considered properly.

statements, which would allow it to operate for eight additional years at its present operating deficit. RA-0290. Professor Sheppard observed critical flaws in the "New Vision." RA-0289-90. First, the Museum has an endowment, but the Trustees failed to account for income that the existing endowment will generate. RA-0289. In addition, the fictional endowment that the Liquidation Sale is supposed to create is not part of any actual plan; indeed, it has no business plan. RA-0288. The Liquidation Sale is nothing more than a substitute for the hard work of fundraising and non-profit management. RA-0290. As the Berkshire Museum acknowledged, it put its successful fundraising campaign "on hiatus" while it created the new plan that relies upon the Liquidation Sale (RA-1049), knowing that cashing in paintings would make fundraising unnecessary.

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



After the announcement of the Liquidation Sale,<sup>8</sup> the AAM and the AAMD stated in no uncertain terms what a catastrophe it would be if implemented. RA-0271-72.<sup>9</sup> The two organizations issued a joint statement. Id. In relevant part:

Selling from the collection for purposes such as capital projects or operating funds not only diminishes the core of works available to the public, it erodes the future fundraising ability of museums nationwide. **Such a sale sends a message to existing and prospective donors that museums can raise funds by selling parts of their collection, thereby discouraging not only financial supporters, who may feel that their support isn't needed, but also donors of artworks and artifacts, who may fear that their cherished objects could be sold at any time to the highest bidder to make up for a museum's budget shortfalls.** That cuts to the heart not only of the Berkshire Museum, but every museum in the United States.

Id. (emphasis added). Based on this, the Museum will almost certainly be sanctioned by the AAMD and the AAM if the Liquidation Sale proceeds. RA-0205. AAMD President Lori Fogarty attests: "The AAMD board of trustees has imposed sanctions on museums which have violated its deaccessioning policy and applied sale proceeds for something other than future acquisitions

---

<sup>8</sup> Talking in 2017 about the process, Shields revealed that deaccessioning was already on the docket in 2015. Rather than follow the AAM or AAMD guidelines or the Museum's policy, Shields proposed his own line of inquiry: "Is it mission critical? Is it necessary to continue to meet our interpretive goals? And what is the financial value?" RA-0210 (emphasis added).

<sup>9</sup> The AAM "represent[s] the entire scope of the museum community," and the AAMD "represent[s] 243 directors of North America's leading art museums[.]" RA-0271.

. . . . a major result of AAMD sanctions is that traditional loaning and borrowing activity with the sanctioned museum effectively halts.” RA-0794. Prior targets of AAMD and/or AAM sanctions for deaccessioning violations included the National Academy Museum in New York and the Delaware Art Museum. RA-0205. Despite the initial receipt of significant sale proceeds, those museums’ management crises continued unabated. Id. The Museum will suffer the same fate. Id.

These consequences are neither theoretical nor speculative. Id. As a result of the Liquidation Sale’s defiance of AAM and AAMD rules, the Museum has already been forced to withdraw its relationship with the Smithsonian Institution (the “Smithsonian”). Id. The Smithsonian, America’s premier public cultural steward, affiliates with museums around the country to cultivate educational opportunities. Id.

Dan Monroe is the Rose-Marie and Eijk van Otterloo Director and CEO of the Peabody Essex Museum in Salem, Massachusetts, as he has been since 1993. He is also past President of the AAMD and the AAM, and of the Western Conference of Museums. Monroe provided detailed explanation of the harm the Museum is doing to itself, against which the Museum offered no contrary evidence: “[B]ased on my decades of experience at specific institutes and in museum

associations, I know that cultivating relationships with donors, both large and small, is fundamentally an exercise in trust. The Berkshire Museum's plan breaks faith with that trust and with a broad spectrum of potential donors." RA-0323.

This damage will endure for decades and is not merely a matter of fewer exhibition loans. It is a question of irreparable breach with its community. Christine McCarthy, the Executive Director of the Provincetown Art Association and Museum ("PAAM") since 2001, speaks from experience. When she joined PAAM she

initially found it difficult to cultivate donors of either funding or art. In the 1970s, PAAM had deaccessioned a valuable piece of art by Charles Hawthorne, founder of the art colony [in Provincetown], in order to raise funds to address its budget needs. That deaccessioning had severe adverse consequences, and potential donors seemed to have lost trust that any gifts to PAAM would be honored.

RA-0789 (emphasis added).

### **III. SUMMARY OF THE ARGUMENT**

The Berkshire Superior Court erred in dismissing the Museum Members' claims because the Verified Complaint set forth allegations of contractual injuries that stated claims for relief that the Museum Members have standing to enforce. (pp. 24-29). This error was compounded by the Berkshire Superior Court's reliance on documents not within the pleadings, and on

construing those documents entirely in the Museum's favor (rather than the reverse). (pp. 24-25). Further, the Trustees' self-inflicted harm is properly remedied by a derivative action, of the sort that this Court has recognized is available in circumstances like this. (pp. 29-34). Lastly, the Berkshire Superior Court credulously accepted argument made at the November 1, 2017 hearing in place of fact, particularly when that argument was contradicted by record evidence. (pp. 34-35).

The Museum Members were also entitled to a preliminary injunction against the Liquidation Sale. (pp. 35-50). The Museum has violated statutory and geographic limitations, its bylaws and policies, and sought to conceal all of it from the Museum Members, the public, and the Attorney General until after the fact. (pp. 37-39). The supposed "New Vision" that will be subsidized by the sale of art also contains related-party components that were never properly scrutinized (pp. 44-45). The balance of equities is entirely in the Museum Members' favor: once sold, the art and the Museum's - indeed the Commonwealth's - cultural reputation will never recover. (pp. 45-50).

#### IV. ARGUMENT

##### **A. A Court May Not Sua Sponte Dismiss a Complaint for Lack of Standing by Going Beyond the Pleadings and Ignoring One of the Grounds for Standing.**

The Museum never sought dismissal of the Museum Members' Complaint. (The Museum never even filed an opposition to the Museum Members' motion for a preliminary injunction.) Yet the Berkshire Superior Court dismissed the complaint *sua sponte*, presumably (but not explicitly) based on its erroneous holding about the Museum Members' standing. This ruling was erroneous. This Court will also be left to guess as to the standard under which the Berkshire Superior Court dismissed the claims (e.g., Mass. R. Civ. P. 12(b)(1), 12(b)(6), or 56), since its opinion is silent on that question.

"[A] dismissal for lack of standing" is reviewed "using the same standards for dismissal under Mass. R. Civ. P. 12(b)(1) and (6) . . . . A dismissal under Mass. R. Civ. P. 12(b)(1) and (6) requires a de novo standard of review. 'In reviewing a dismissal under rule 12(b)(1) or (6), we accept the factual allegations in the plaintiff['s] complaint, as well as any favorable inferences reasonably drawn from them, as true.'" Georges v. Bos. Police Badge 2239, 2016 Mass. App. Unpub. LEXIS 418, at \*1-2 (Apr. 15, 2016) (unpublished decision pursuant to Rule 1:28) (quoting Ginther v. Comm'r of Ins., 427 Mass. 319, 322 (1998));

citing Bevilacqua v. Rodriguez, 460 Mass. 762, 764 (2011) and Housman v. LBM Fin., LLC, 80 Mass. App. Ct. 213, 216 (2011)).

**1. The Museum Members Have Standing to Enforce the Museum's Governing Documents.**

The Museum's governing documents invested its members with contractual rights. See Merriam v. Demoulas Super Mkts., Inc., 464 Mass. 721, 727 (2013) ("Agreements in a corporation's articles of organization or bylaws are treated as contracts between the shareholders and the corporation."); Chokel v. Genzyme Corp., 449 Mass. 272, 275 (2007) ("Under Massachusetts law, a corporation's articles of organization form a contract between the corporation and its shareholders.") (citing Jessie v. Boynton, 372 Mass. 293, 303 (1977) (case concerned a charitable corporation)).<sup>10</sup>

Furthermore, because the Museum is a charitable corporation, its governing statute has contractual force. In re Op. of Justices, 237 Mass. 619, 622

---

<sup>10</sup> Articles of incorporation are superior to by-laws, which are superior to amendments. Mass. Charitable Mech. Ass'n v. Beede, 320 Mass. 610, 609 (1947) ("amendments were not in accordance with the by-laws and were not validly adopted."). "[W]here by-laws are in conflict with the articles, the by-laws being subordinate, the articles of organization control." Primate & Bishops' Synod of the Russian Orthodox Church Outside Russ. v. Russ. Orthodox Church of the Holy Resurrection, 35 Mass. App. Ct. 194, 200 (1993), aff'd 418 Mass. 1001 (1994).

(1921) ("The grant of the charter to be a charitable and religious corporation constituted a contract between the Commonwealth and the society."); see also Mass. Charitable Mech. Ass'n, 320 Mass. at 610 (unlike a charitable trust, "the purposes for which a charitable corporation holds its own property not given to it on any express trust are determined by general statute or by its charter rather than by contract with some founder or his estate") (internal citation omitted). The originating statute therefore binds the charitable corporation. Id. at 611 ("[A]ny action of the corporation, at least in the absence of statutory authority, whereby it attempted to divest itself of a large part of its assets by creating a charitable trust with individuals as trustees, must be deemed beyond its powers and ineffectual.").

**2. The Museum Members Have Standing to Enforce Their Right of Participation.**

Individual members of a charitable corporation may sue when rights and privileges of membership are

wrongfully denied.<sup>11</sup> See Lopez v. Medford Cmty. Ctr., Inc., 384 Mass. 163, 168 (1981) (“In the instant case, the plaintiffs had standing only to litigate their claim that they were unlawfully denied membership in MCC, and that that denial was caused by a general policy of the directors to perpetuate themselves in office in violation of those provisions of the corporation’s by-laws defining its governance.”); Jessie v. Boynton, 372 Mass. 293, 303-05 (1977) (members of a charitable corporation contested the defendants’ allegedly dishonest method of disenfranchising them; the Court agreed that they had standing, and explained that “[t]he by-laws of a corporation are a contract between the corporation and its members,” and that a close corporation has “an even higher standard than fair dealing”).

The Museum’s deliberate, years-long deception<sup>12</sup> disenfranchised all its members, including the plaintiffs. The Museum itself touts on its website

---

<sup>11</sup> The Berkshire Superior Court’s ruling was particularly misguided on this point. It treated member standing as some kind of novel theory, ignoring the Supreme Judicial Court’s longstanding and black-letter law under Lopez. The long line of First Amendment cases concerning the governance of non-profits presupposes the standing of members of those institutions to enforce proper governance. See, e.g., Primate & Bishops’ Synod, 35 Mass. App. Ct. at 200. It is only the First Amendment’s protections (irrelevant here) that shielded those religious organizations from such scrutiny.

<sup>12</sup> See discussion at 14-18, supra.



that membership includes “opportunities to provide feedback and shape your benefits.” This inducement to support the Museum was a sham, and the Museum Members specifically alleged as much, entitling those allegations to a presumption of truth for purposes of the dismissal and this appeal. The putative outreach and feedback efforts were deliberately misleading, such as when the Museum discussed programming changes with focus groups but never told those focus groups how the programming would be funded. When the Museum finally announced the Liquidation Sale, it refused to engage with alarmed members of the Museum (including the plaintiffs).<sup>13</sup> This denied Museum Members the opportunity to participate in the manner promised by the Museum. Everything that followed—the Liquidation Sale and the so-called “New Vision” most particularly—breached the relevant contracts.

The Berkshire Superior Court did not even discuss the Museum Members’ allegations that their rights under the Museum’s governing documents and as members had been violated. It incorrectly stated: “The Hatt plaintiffs base their standing on the alternative theory that their membership entitles them to bring a derivative claim[.]” RA-1414. While that is one basis for the Museum Members’ standing, it was never set

---

<sup>13</sup> See discussion at 13-14, supra.

forth as their only basis. It was a plain error for the Berkshire Superior Court to ignore the Museum Members' contractual standing.<sup>14</sup>

**3. The Museum Members Have Derivative Standing to Pursue a Claim on the Museum's Behalf for the Trustee's Fiduciary Breaches.**

The Museum Members do not merely allege that they have been harmed themselves by the Museum's breaches of its relevant contracts, but further that the Museum itself is being harmed by the Trustees' fiduciary failures, and has failed to act to protect itself. The Plaintiffs thus have standing to enjoin the Trustee Defendants' harmful course of action. A nonprofit corporation may vindicate its own legal rights. Official Comm. of Unsecured Creditors for the Bankr. Estate of Bos. Reg'l Med. Ctr., Inc. v. Ricks, 328 F. Supp. 2d 130, 147 (D. Mass. 2004) ("[A] Massachusetts nonprofit corporation has standing to sue any individual, including a trustee or former trustee, who has allegedly committed a tort against the corporation, including the tort of breach of fiduciary duty.") (cited favorably by DeGiacomo v. Quincy, 476 Mass. 38, 46 (2016)). The Plaintiffs therefore sued on behalf of the Museum itself pursuant to Mass. R. Civ.

---

<sup>14</sup> The Berkshire Superior Court elsewhere acknowledged that members of public charities have standing to vindicate their own rights. RA-1414.

P. 23.1, which allows members and shareholders to bring derivative suits under certain circumstances.

This rule is relatively untested in the non-profit context, but this Court's decisions provide useful guidance that preclude the Berkshire Superior Court's hasty dismissal of the Museum Members' valid claims. Jackson v. Stuhlfire was a suit brought by the members of the Norfolk Fellowship Foundation, Inc., a non-profit corporation created "to assist inmates in adjusting to prison life and to prepare them for return to their communities." 28 Mass. App. Ct. 924, 924 (1990). The plaintiffs took issue with decisions about running the organization. The Appeals Court found that these allegations supported a derivative action. Id. at 924-25.

This Court ultimately upheld summary judgment in favor of the defendants, but it implicitly agreed that, under different facts, members of a charitable corporation could pursue a derivative action. The Appeals Court explained: "The primary basis upon which the judgment rests is the plaintiffs' failure to allege with particularity their efforts to obtain the action desired from the defendants or the NFF membership or to explain the futility in making such effort, as required by rule 23.1[.]" Id. at 925. The Court therefore saw "no error in the judge's conclusion that the plaintiffs' failure 'to allege in

their complaint either those efforts that have been made to persuade the members of the majority to seek redress or, in the alternative, those conditions which would have excused their failure to request such action,' was dispositive of the defendants' motion for summary judgment." Id. at 926. This lawsuit, which does allege such efforts and the futility of making them, confers standing on the Museum Members.

A recent unpublished decision in this Court shows the same reasoning. Okafor v. Sovereign Bank, N.A. was "a derivative action brought by a number of individuals (members) who claim to either be or to have been members of the Peoples Club of Nigeria, a charitable corporation." No. 13-P-214, 2013 Mass. App. Unpub. LEXIS 1225, \*1 (Dec. 30, 2013) (issued pursuant to Rule 1:28) (claim dismissed where plaintiffs failed to make pre-suit demand without excuse).

In a footnote, the Berkshire Superior Court briefly considered whether the Museum Members have standing to bring a derivative claim. The Berkshire Superior Court did not reach the issue of whether a derivative action is permissible in the charitable corporation context. Instead, the Berkshire Superior Court held that only a Museum Trustee could possibly bring derivative action. . . . to correct their own malfeasance. The practical implication of this

circular logic is that trustees would be immunized from accountability.

The Berkshire Superior Court's conclusion was impermissibly based on a finding of fact. The Verified Complaint plainly alleges that the Museum Members are just that—members. At oral argument, the Museum's counsel argued that only the Trustees are "members of the corporation." RA-1322-23. The Berkshire Superior Court wrongly adopted that bare argument as fact.

First, this argument was based on the Museum bylaws, which are not within the pleadings, and which the Museum decided not to provide to the Member Defendants when requested.<sup>15</sup> While, as it turns out, the language of those bylaws does nothing to undercut the Museum Members' standing, the present point is that a court may not consider materials beyond the pleadings unless the defendant brings "a rule 12(b)(1) motion supported by affidavits," which "places the burden on the plaintiff to prove jurisdictional facts." Callahan v. First Congregational Church of Haverhill, 441 Mass. 699, 710 (2004). Because there was no Rule 12(b)(1) motion, the Court's *sua sponte* decision could rely only on the pleadings. The result

---

<sup>15</sup> In fact, the Museum flatly refused to provide the bylaws to the Museum Members in response to a pre-suit request. Given the language of the bylaws, and the Collections Management Policy that the Museum violated in signing the Sotheby's contract, it is little surprise why.

is no different because the Museum happened to include affidavits in its response to separate parties' (the Rockwell Plaintiffs and the Attorney General) motions for preliminary relief.

Second, the referenced provision in the bylaws does not even address dues-paying Museum members and thus provides no support for the Museum's arguments (nor is it even clear from the Opinion that the Berkshire Superior Court reviewed the bylaws' text in reaching its conclusion). Moreover, the Museum Members know of the bylaws' text only because the Museum provided them to the Attorney General, who filed them with her brief. The bylaw provision contains a *non-exclusive* statement that the Trustees have the powers of members of a corporation. RA-0600. That provision may be part of the factual picture that emerges during discovery, but it is not a basis for dismissing the entire action out of hand. Put another way, a statement that the Trustees are members is irrelevant to whether the Museum Members are not. The bylaws could have created such an exclusive category, but they do not. The Trustees may well attempt another self-serving amendment as with the Collections Management Policy, but it does not change what the bylaws said at all relevant times. At the very least it poses a question of fact.

Finally, this circular reasoning defeats the purpose of derivative suits. To posit that only a trustee can bring a derivative suit in the nonprofit context would be akin to holding that only a Board of Directors member can bring a derivative suit in the corporate world. Derivative suits exist precisely to fill the gap when that leadership fails, as it has here. The Berkshire Superior Court's holding, which contradicts a long history of shareholder derivative suits, would shield faithless and self-interested nonprofit leaders from any meaningful oversight.<sup>16</sup> Yet the Berkshire Superior Court would appoint that very fox to guard the henhouse.

The Berkshire Superior Court barely considered the Museum Members' allegations (in considering dismissal) or evidence (in entertaining the preliminary injunction, below), and relied instead upon the Museum's counsel's oral representation at the hearing in holding that only Trustees are "members" of the Museum for the purposes of derivative standing (since that oral representation is the only place in the record where this argument is articulated, rebutted by the non-exclusive language in the bylaws

---

<sup>16</sup> In Okafor v. Sovereign Bank, N.A., the plaintiffs were individual members (not members of the board of directors), and this was not the basis for dismissal. No. 13-P-214, 2013 Mass. App. Unpub. LEXIS 1225 (Dec. 30, 2013).

discussed above).<sup>17</sup> RA-1316-7; RA-1414. See Commonwealth v. Rice, 441 Mass. 291, 308 (2004) (trial judge “instructed the jury that statements of counsel are not evidence”); Commonwealth v. Rzepphiewski, 431 Mass. 48, 50 n.5 (2000) (“The defendant’s appellate counsel represented in a reply brief, at oral argument, and in a letter submitted after argument, that the defendant currently is an alien with an application for permanent residency pending. Such unsworn representations by counsel to an appellate court, however, are not evidence.”); In re Petition of an Adult & Two Minors for a Change of Name, No. 08-P-689, 2009 Mass. App. Unpub. LEXIS 296, at \*4 (Mar. 6, 2009) (issued pursuant to Rule 1:28) (“Further indication that the motion to dismiss was granted improvidently is found in the judge’s reliance on factual representations made by counsel and by the parties at a nonevidentiary hearing.”); Capricorn Corp. v. Niemszyk, No. 03-1827-B, 2003 Mass. Super. LEXIS 351, at \*3-4 (Oct. 21, 2003) (discussing an injunction hearing: “The court declined to accept oral representations by [] counsel at the hearing[.]”).

---

<sup>17</sup> Ironically, in the very same hearing, the Museum’s counsel attempted to chide the Museum Members and the Rockwell Plaintiffs by arguing that the plaintiffs came to court with “great emotion and few facts[.]” RA-1359. The Museum, of course, submitted no facts specifically in opposition to the Museum Members’ motion.



**B. The Berkshire Superior Court Should Have Enjoined the Liquidation Sale.**

The Berkshire Superior Court went far beyond the Verified Complaint in dismissing the Museum Members' claims, an error of law that the Museum Members ask this Court to reverse. But the Berkshire Superior Court's creative findings of fact also compel reversal because it abused that Court's discretion—particularly given the emphasis the trial court put on the need to stay within the record before it. Had the Berkshire Superior Court heeded its own admonition, the result should have been an injunction.

Denials of injunctions are subject to an "abuse of discretion" standard of review. Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 615 (1980). This is not mere "rubber-stamp[]" review, and the appeals court "must look to the same factors properly considered by the judge in the first instance. . . . [I]f the order was predicated solely on documentary evidence [the reviewing court] may draw [its] own conclusions from the record." Id. at 615-16. Precisely such an abuse of discretion happened here.

The standard for granting interlocutory injunctive relief involving private parties is well-settled in Massachusetts. A party is entitled to a preliminary injunction if it demonstrates (i) a likelihood of success on the merits; (ii) irreparable injury; and (iii) a balance of harms in its favor.

See, e.g., Gen. Accident Ins. Co. of Am. v. Bank of New England-W., N.A., 403 Mass. 473, 475 (1988); Packaging Indus. Grp., Inc., 380 Mass. at 615. When a purpose of an action by a governmental body or a private party acting is enforcing a statute or a declared policy of the Legislature, irreparable harm does not have to be shown. LeClair v. Town of Norwell, 430 Mass. 328, 331 (1999) (citing Edwards v. Boston, 408 Mass. 643, 646-47 (1990)). Furthermore, the Court may consider how a statutory violation affects the public interest. Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984).

**1. The Museum Members Are Likely to Succeed in Enforcing the Museum's Incorporating Statute and Deaccessioning Policy.**

There is no real dispute that the Museum is in breach of its contracts to which the Museum Members are parties. The Museum is obliged by statute to be an art museum in Pittsfield, subject to geographic limitations on some of its objects (those that were in the Athenaeum's possession before being transferred to the Museum in 1932 pursuant to restrictions that the Legislature never changed). It has a roster of Trustees that exceeds the permissible number. Moreover, the Museum breached its own deaccessioning policy when it signed the contract with Sotheby's. See RA-0819-21; RA-0870-99.

The movement of property from Pittsfield to New York City for sale – whether or not the sale ever took place – to further points unknown alone is a breach of the geographic restriction. RA-0209. Similarly, the Museum is and has always been a museum created by the Legislature for the display of art, among other things. As explained in the Sheppard and Monroe Affidavits, the Liquidation Sale makes this an impossibility going forward. First, the reputation of the Museum as an art museum is tied inextricably to the very Artworks it now proposes to liquidate. Since it announced the Liquidation Sale, the Museum has played a shell game that tries to substitute a discussion about the number of objects or paintings or objects in the Museum's collections for their significance. The Artworks were on display for a reason. *Shuffleton's Barbershop* is a work of unique quality and importance. RA-0190. Its presence in Berkshire County is no coincidence; Rockwell's personal connection to the area is a matter of public record. The Museum will henceforth be known as a *former* art museum.

These breaches were not accidental. The Museum deliberately concealed the plans for the Liquidation Sale from its own members until the last possible moment, and even from the "focus group" participants on whose "enthusiasm" the Museum now relies. See 17-

18, supra. Then, when the Museum finally shared its plan to sell its crown jewels, it refused to engage with concerned members. See 13-14, supra. This violated the Museum's assurance that one of the benefits of membership is a right of participation. See 28, supra.

**2. Museum Members Are Likely to Succeed in Their Derivative Action to Prevent the Museum's Administration from Destroying the Institution.**

The Museum Members are similarly likely to succeed in their derivative action as well against the Trustees' breaches of their fiduciary duty. In 2015, the Museum abandoned its fundraising and focused (in secret) on selling off its art collection, and went so far as to seek appraisals from Christie's and Sotheby's – even though it assured the MCC and the public that the Museum was doing well financially. See 14-15, supra. In 2017, the Museum secretly signed a contract with Sotheby's to sell its forty most valuable pieces, including many works that have unique significance to the region. See 17-18, supra. The Artwork will fund a "New Vision," and the Museum has hired Trustee defendant Jeffrey Noble's firm for the project. See 20, supra. The Museum Members, members of the art community, and Berkshire residents all voiced their concern to no avail. See 13-14, supra. The

Museum (or, more particularly, the trustee defendants) refused to correct course.

"A fiduciary relationship is one founded on the trust and confidence reposed by one party in the integrity and fidelity of another. To establish a breach of fiduciary duty, there must be a duty owed to the plaintiff by the defendant and injury to the plaintiff proximately caused by the breach." Estate of Moulton v. Puopolo, 467 Mass. 478, 492 (2014) (internal citations omitted); see also Hanover Ins. Co. v. Sutton, 46 Mass. App. Ct. 153, 164 (1999) (jury instructions on "duty, and breach, and damage, and causation" found to "adequately address each element of the claim"). In particular, "[d]irectors of a corporation stand in a fiduciary relationship to that corporation and have a duty to protect its interests 'above every other obligation.'" Estate of Moulton, 467 Mass. at 492 (quoting Am. Disc. Corp. v. Kaitz, 348 Mass. 706, 711 (1965)). Even if "the alleged wrongdoer can demonstrate a legitimate business purpose for his action," liability may attach where "the proffered legitimate objective could have been achieved through a less harmful, reasonably practicable, alternative mode of action." Zimmerman v. Bogoff, 402 Mass. 650, 657 (1988).

In considering the impact of deaccessioning on the Trustees' discharge of their financial duty, what

the Berkshire Superior Court failed to confront is that the impact is a practical one that in turn affects whether the Trustees are exercising their duties properly. The example of the Corcoran Gallery of Art and Design in Washington, DC (the "Corcoran") is instructive in this regard. The Corcoran and its affiliated Corcoran College of Art + Design sought approval of a cy-près petition to permit a merger with the National Gallery of Art and George Washington University. The petition asked to reform the trust of William Corcoran – who, much like Zenas Crane, endowed the museum with his collection. Like the Museum's Trustees here, the Corcoran's trustees sought the merger because, they argued, the institution's financial condition was unsustainable. Quite unlike these Trustees, however, the Corcoran had conducted an exhaustive capital campaign (including their own contributions, conspicuously absent here) and was orders of magnitude closer to real, as opposed to imagined, financial collapse. Relevant for present purposes, they sought a merger because they recognized that the solution that the Museum seeks here – deaccession – was completely unacceptable. The Superior Court of the District of Columbia agreed, and took note of the catastrophes that had befallen similarly misguided museums. Trs. of the Corcoran Gallery of Art v. District of Columbia, Case No. 2014

CA 003745 B, Case No. 2014 CA 003745 B, 2014 D.C. Super. LEXIS 17, at \*54 (D.C. Sup. Ct. Aug. 18, 2014) (it would be very difficult for "a censured institution to hire or retain qualified curatorial staff."). Far from the "necessary evil" standard that the Berkshire Superior Court here invented out of whole cloth, the record is undisputed about the consequences.

When the Corcoran case was decided, such a thing had simply never happened (despite the Berkshire Superior Court's expressed astonishment, the record is unequivocal), and been proposed only once in the disastrous but thankfully abortive attempt to liquidate the Rose Art Museum at Brandeis University in 2009. As AAMD President Lori Fogarty attested, and which the Museum provided no evidence or testimony to the contrary:

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

RA-0795 (emphasis added).

Notwithstanding its own admonishment that only evidence before the Court could be considered, the Berkshire Superior Court attempted independent research on this topic. The Court, satisfied with its own research, declined to consider evidence on the record about how deaccessioning ruins museums. The Court explained:

Well, no. I don't want to go to examples, because I've been reading books and they list many examples in Delaware and elsewhere where these things, Arizona, where these things have been done. . . . But to have an absolute decision, an absolute statement, "This has never been done," flies in the face with my little understanding of what happens in the art world.

RA-1345. (In fact, the Court misconstrued the Delaware example. It is a matter of fact, on the record, that the Delaware Art Museum's "management crisis continued unabated" after deaccessioning. RA-0205.).

At the injunction hearing, the Museum staked its ground on the idea that the Trustees had acted in good faith. The Museum Members respectfully suggest that the record says quite the opposite; actors in good faith who are proud of their decisions do not send emails entitled "Loose lips sink ships," or say one thing publicly about the institution's financial condition if they believed the opposite. But the fact is that it does not matter, because even if in good faith, the Liquidation Sale is objectively unreasonable even under the standard by which the



Trustees argue they should be judged. Sticking to the record rather than the Berkshire Superior Court's admitted research outside of it, there are not two sides to this argument. The record is bereft of the view that deaccessioning is the "necessary evil" that the Berkshire Superior Court deemed it to be. Even to consider the sale of the Artwork at all was a breach of fiduciary duty.

Finally, the Liquidation Sale is a related party transaction that fails facial scrutiny and which the Trustees, not the Museum Members, bear the burden to justify. See, e.g., Johnson v. Witkowski, 30 Mass. App. Ct. 697, 706 n.12 (1991) ("A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."). See also O'Brien v. Dwight, 363 Mass. 256, 283 (1973) (trustee may not "derive any personal gain or advantage, either directly or indirectly" from property held in trust).

Hill-Engineers, Architects, and Planners Inc. had been "tapped to develop" the Museum's renovation plans pursuant to the "New Vision." Trustee Defendant Jeffrey Noble is the President and a Director of Hill Engineers, according to its website and the Massachusetts Secretary of State. This raises a stark

conflict of interest to say the least, and the Museum Members are left to wonder what the Museum's policy on conflicts is and how this one was considered. The Trustees can attempt to defend themselves, but the Museum Members are entitled to their day in court.

**3. Museum Members and the Museum Will Suffer Irreparable Harm Without an Immediate Restraint.**

If the status quo is not preserved, the Museum will be a shell of an institution that can never recover.<sup>18</sup> This will harm the Plaintiff as members and community constituents deprived of their institution, and it will damage the Museum on whose behalf the claims are also brought. Either satisfy the standard of establishing irreparable harm.

Paintings scheduled for auction under a standard consignment contract can be and often are sold prior to the public auction date. RA-0208. If the Single Justice's preliminary injunction is lifted for even a moment on January 29, 2018 or any time after, the Museum could dispose of any or all of the Artwork at any time absent the Court's injunction. Id.

The opprobrium of the AAM and AAMD is not a trivial concern. Those organizations' standards are not a means unto themselves, rather, they articulate

---

<sup>18</sup> The Single Justice's injunction, which the Museum is working furiously to undo, ameliorates but does not solve the problem. What is needed is a restraint until the trial on the merits.

the critical policy threatened by actions like the Liquidation Sale. Specifically, every museum holds objects that independently are worth vast sums. All are held because they were given for a purpose: their public display and educational use. Stripping them out like used furniture violates the very reason for museums to exist. Thus, the AAMD and AAM speak and act forcefully to protect this vital principle. The need to withdraw from the Smithsonian presages a taste of the irreparable harm to come.

Past is prologue here. Apart from the Corcoran, the National Academy and Delaware Museum, to cite two examples, embarked on an eerily similar course. RA-0205. Both reaped short term significant monetary receipts – and both were soon right back where they started. Id. Here, the Museum will realize a sum of money that is unknowable. Regardless, some amount of money will result – but the Museum has no plan for how to use it. RA-0288 (Sheppard Aff.). Plainly, the status quo can never be restored if the Liquidation Sale goes forward. Against this the Berkshire Superior Court cited a treatise (inaccurately, no less) that was not in the record for the conclusion that deaccession is a “necessary evil.” The record is clear that in addition to the harmful consequences of these prior examples, none have ever remotely approached the

size and scale of this proposed evisceration. That should have been enough.

**4. The Museum Would Suffer No Irreparable Harm.**

The Berkshire Superior Court misunderstood the record when it stated: "There appears to be no dispute that the Museum is in serious financial trouble. . . . Although the extent of the financial woes is disputed, it is beyond cavil that the Museum's financial outlook is bleak." RA-1409. Those are contested points, and the evidence is with the Museum Members. If the Museum's outlook is bleak, that is only because the Trustees stopped a successful fundraising effort and substituted it with a plan that severs the Museum's connections with nearly the entire museum community. Even taking the Museum at its word, the last-ditch Liquidation Sale is not necessary to stave off some impending insolvency. The record evidence on this issue – consisting mainly of financials filed by the Museum with the MCC, or in Shields's public statements – prove that there is a vast distinction between a net operating loss and irreparable harm. Professor Sheppard – whom the Museum tried to draft as an endorsement, but who reached the opposite conclusion – confirmed as much in his disinterested analysis.

**5. The Balance of Equities Favors the Plaintiffs and Favors the Public Interest.**

The equities favor the Museum Members conclusively. As members, and as derivative claimants in the best interests of the Museum, they seek to protect the public interest. There is no stake in this for the Museum Members, the membership, or the Museum as a derivative party other than the preservation of a unique cultural institution. These Museum Members have had the courage to step forward to lend their names and resources to a cause in which there is no pecuniary interest. It is for the good not only of the Museum and Pittsfield, but for the sake of all American museums. See RA-0323 (Monroe aff.).

Compared to this, the Museum has no equitable position. It deceived the public while conducting misleading focus groups designed to rationalize a fundamental shift in purpose that the Museum did not disclose to participants or members. It has lied, either now or in 2015, about the financial state of the Museum. It rewrote its Collections Management Policy to cover up its prior breaches, only to violate the articles of incorporation by endorsing the shipment of restricted works out of Pittsfield. It has refused to engage in conversations with any real possibility of discussion (as opposed to staged meetings where participants are ignored or misled).

And it has done all this to prove some misguided point about getting away with breaking the prevailing ethics of museum management, while doubling down on the invective and *ad hominem* attacks on the Attorney General's thoughtful and measured investigation.

The public interest weighs in favor of injunctive relief. The stakes of the Liquidation Sale could not be higher: if allowed to proceed, the Commonwealth will gain infamy as the first domino to fall in the short-sighted liquidation of cultural treasures. The citizens of the Commonwealth surely deserve better.

#### **V. RELIEF SOUGHT**

The Museum Members respectfully request that this Court:

1. Reverse the Berkshire Superior Court's decision dismissing their action;
2. Reverse the Berkshire Superior Court's denial of the Museum Members' motion for a preliminary injunction, and enjoin the Museum from any sale or other conveyance of its artwork; and
3. Remand this case to the BLS where it was filed.

January 16, 2018

Respectfully submitted,

JAMES HATT, KRISTIN  
HATT, AND ELIZABETH  
WEINBERG

By their attorneys,

/s/ Nicholas M. O'Donnell

Nicholas M. O'Donnell

(BBO No. 657950)

nodonnell@sandw.com

Erika L. Todd

(BBO No. 689053)

etodd@sandw.com

SULLIVAN & WORCESTER LLP

One Post Office Square

Boston, MA 02109

(617) 338-2800 (phone)

(617) 338-2880 (fax)

**CERTIFICATE OF COMPLIANCE**

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

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

/s/ Nicholas M. O'Donnell

Nicholas M. O'Donnell

(BBO No. 657950)

nodonnell@sandw.com

Erika L. Todd

(BBO No. 689053)

etodd@sandw.com

SULLIVAN & WORCESTER LLP

One Post Office Square

Boston, MA 02109

(617) 338-2800 (phone)

(617) 338-2880 (fax)