

August 16, 2018

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Clerk of the Court
Massachusetts Appeals Court
John Adams Courthouse
One Pemberton Square
Suite 1200
Boston, MA 02108

Re: Hatt et al. v. Trustees of the Berkshire Museum, et al., 2017-P-1556

Dear Sir or Madam:

We represent Plaintiffs-Appellants James Hatt, Kristin Hatt, and Elizabeth Weinberg (the "Member Plaintiffs") in the above-captioned appeal. I write in response to the letter dated August 15, 2018 from counsel to Defendants-Appellees the Trustees of the Berkshire Museum (the "Trustees" and the "Museum," respectively). The Trustees' letter is out of order and should be stricken from the docket. It presents no cognizable basis to dismiss a fully-briefed case that is scheduled for argument in less than three weeks. The Trustees' desperation to avoid scrutiny for their mismanagement may be understandable, but it is no excuse to deprive the Member Plaintiffs of their case.

Procedurally, the Trustees have no right to request dismissal on matters outside the record. See Mass. R. App. P. 8(a) ("The original papers and exhibits on file, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases."). The Court should simply ignore the Trustees' defective filing.

Substantively, the Member Plaintiffs have appealed the dismissal by the Superior Court of their case, a case brought to address the Trustees' breach of their fiduciary duty to the Museum as a corporation and to the Member Plaintiffs as representatives of the Museum's members. The intended sale of certain of the Museum's works of art was the clearest manifestation of that breach at the time of that filing—and an injunction against it was part of the relief sought—but it was by no means the only reason or basis for the suit. The sale of the works already auctioned cannot be enjoined, but everything else about the case remains in play.

Among the questions still on appeal now are whether the Superior Court's decision about the Member Plaintiffs' standing to enforce the Trustees violation of the Berkshire Museum's governance can be sustained (it should not be), and whether the Trustees breached their

fiduciary duties (they did). That breach was not remedied by obtaining the Single Justice's permission to lift the restrictions noted below; lifting the restrictions was merely one path forward necessitated by the Trustees' conduct to that point. That conduct itself remains very much an issue.

The Single Justice's opinion addressed a single question: could the Trustees and the Museum modify the restrictions on the art collection that prohibited their sale? The decision *confirmed* that at the time the Member Plaintiffs filed their original action in the Superior Court last year, the forty works of art that the Trustees proposed to sell were, in fact, restricted. As the Single Justice noted at the hearing on the petition, it is not possible to ask for permission to lift a restriction without conceding that the restriction is there.

Moreover, the fact that the Single Justice accepted the Trustees' representations about the Berkshire Museum's then-financial condition in permitting a waiver of those restrictions says nothing about how the institution came to be in those circumstances at the hands of these Trustees, among other things. Nothing about the Single Justice's authority to approve the *cy prè*s petition (authority which no one, including the Member Plaintiffs, contested) is implicated in this pending appeal; if it did, the Member Plaintiffs' intervention in the *cy prè*s proceeding would have been a foregone conclusion (yet of course the Museum made quite clear it opposed intervention at the time, at odds with its claim now that the outcome of the Single Justice petition is still somehow binding on them). The Member Plaintiffs were pleased to provide their views as *amici curiae* on the narrow question before the Single Justice, the question of their standing in this case was not before the Single Justice in any respect, however.

The Museum quotes selectively from the Single Justice opinion to argue about the Member Plaintiffs' standing. The Single Justice's statement was necessarily *dicta* in a case to which the Member Plaintiffs were not a party, but more importantly the instant appeal goes far beyond strict enforcement of the now-lifted conditions to stop the sale. The Member Plaintiffs sued in their own right as members of the non-profit corporation, and derivatively on behalf of the corporation. See, e.g., Jessie v. Boynton, 372 Mass. 293, 303-05 (1977) (members of a charitable corporation had standing to contest the defendants' allegedly dishonest method of disenfranchising them); Okafor v. Sovereign Bank, N.A., No. 13-P-214, 2013 Mass. App. Unpub. LEXIS 1225, *1 (Dec. 30, 2013) (issued pursuant to Rule 1:28) ("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."). The Superior Court disagreed with the Member Plaintiffs' position, but review of that decision is what this Court—not the Museum—will decide. The Attorney General Office's ("AGO's") denigration of the Member Plaintiffs' standing ignores established case law in seeking to over-amplify the AGO's role. Member standing is neither novel nor controversial, it is the law of the Commonwealth and coextensive with the AGO's authority as stated by the Supreme Judicial Court and explained in the Member Plaintiffs' brief.

Lastly, the Trustees' letter suggests that the Member Plaintiffs simply "refused" to dismiss their appeal. In fact, the Member Plaintiffs explained the foregoing to the Trustees on August 14, 2018. The Trustees' letter to the Court makes no reference to this, tellingly.

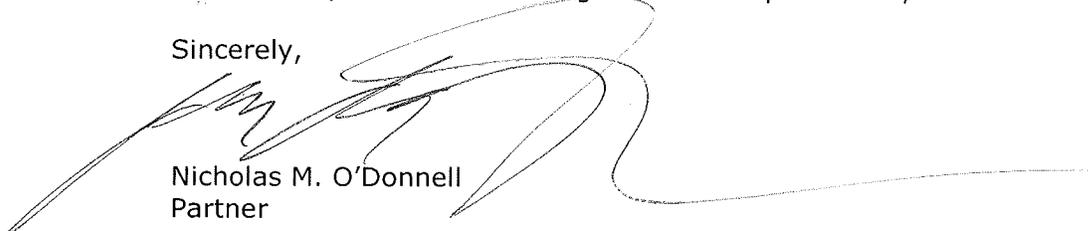
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This is a case of ongoing and tremendous public importance, and the Member Plaintiffs respectfully request that the Court strike the Trustees' August 15, 2018 letter from the docket and proceed to hear argument on September 4, 2018 as scheduled.

Sincerely,



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Partner

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cc: Counsel of Record (by e-mail)