

August 14, 2018

By E-Mail and First Class Mail

Mark C. Fleming, Esq.
WilmerHale
60 State Street
Boston, Massachusetts 02109

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

Dear Mark:

In response to your letter dated August 6, 2018, my clients do not intend to dismiss their meritorious appeal, and there is no reason even to ask them to do so. I look forward to seeing you and your colleagues on September 4, 2018 in the Appeals Court and to another spirited argument in this case of tremendous public importance and interest.

My clients have no obligation to argue the case outside the briefs and the record before the Appeals Court, but to avoid any doubt I will respond briefly. First, and with all due respect, the effect of the April 5, 2018 decision of the Single Justice of the Supreme Judicial Court is precisely the reverse of what you suggest. The decision *confirmed* that at the time the members 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, it is not possible to ask for permission to lift a restriction without conceding that the restriction is there. The Trustees cannot undo that now.

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 (which no one, including my clients, contests) is implicated in the pending appeal; if it did, my clients' 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 odds with your letter now). As it was, it was unnecessary. My clients happily provided their views to the Single Justice as *amici curiae* on the narrow question before him, the question of their standing in the Appeals Court case was not before the Single Justice in any respect.

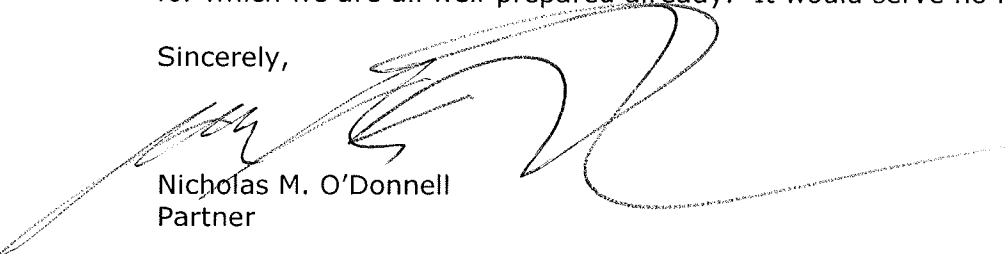
Again, my clients have no obligation to explain a fully-briefed case, but among the questions still on appeal now are whether the Superior Court's decision about my clients' standing to enforce the Trustees violation of the Berkshire Museum's governance can be sustained (it should not be), and whether 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 above; lifting the restrictions was merely one path forward necessitated by the Trustees' conduct to that point. That conduct itself remains very much an issue. Obviously the request for a preliminary injunction specifically for those paintings already

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sold is moot, but the underlying claims are unaffected (as is the request for an injunction on the paintings not yet sold). We have no doubt you will skillfully argue that the Superior Court's findings should be upheld, but it is premature to suggest that my clients have already failed to persuade the Appeals Court when the case has not been heard yet.

Finally, the not-so-veiled thread against my clients by calling their appeal "wholly insubstantial and frivolous" is unfounded, and did not go unnoticed. Your arbitrary deadline today presumably means you are planning some sort of motion practice, which would consume far more resources (over and above this letter exchange) than an oral argument for which we are all well-prepared already. It would serve no legitimate purpose.

Sincerely,



Nicholas M. O'Donnell
Partner

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