COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

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, 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.	CIVIL ACTION NO.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR AN *EX PARTE* TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AFTER NOTICE AGAINST THE BERKSHIRE MUSEUM'S SALE OF ART

Pursuant to Mass. R. Civ. P. 65, Plaintiffs James Hatt, Kristin Hatt (together the "Hatts"), and Elizabeth Weinberg ("Weinberg," with the Hatts, the "Member Plaintiffs"), individually and derivatively and on behalf of the class of members that they represent, by their undersigned attorneys, Sullivan & Worcester LLP, submit this Memorandum of Law in support of their emergency motion for (1) an immediate *ex parte* temporary restraining order; and (2) a

preliminary injunction after notice to enjoin Defendants Trustees of the Berkshire Museum, a/k/a the Berkshire Museum of Art, History, and Science (the "Museum") and its Trustees[1] from their imminent dissolution of one of the great collections of American paintings, which is uniquely important to the history and culture of Pittsfield and the Commonwealth. Member Plaintiffs also submit their Verified Complaint, Motion for Short Order of Notice, and the Affidavits of Stephen C. Sheppard (the "Sheppard Aff.") and Dan L. Monroe (the "Monroe Aff.").

INTRODUCTION

The Trustee Defendants and the Museum are planning at the earliest opportunity to dispose of a collection of paintings, sculpture, and decorative arts that is unique. Forty paintings, sculpture, and works of decorative art (the "Artwork") are scheduled for auction at Sotheby's in New York beginning in November. The Artwork includes masterpieces by Norman Rockwell and Frederic Edwin Church, and by several members of the Hudson River School whose work is inextricably connected to the Hudson River watershed in which Pittsfield is located and to the economic and cultural history of Pittsfield specifically.

This intended fire sale is not intended for the health of the institution, or fiscal prudence, or any financial emergency. It is rather the result of a deceitfully orchestrated campaign to avoid the hard work of running a non-profit, particularly fundraising and growing revenue. The Liquidation Sale violates critical tenets of responsible museum management because it treats timeless objects given charitably for permanent public display as short term assets for disposal.

---

[1] 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 (the "Trustee Defendants," together with the Museum, the "Defendants").

Numerous examples in the Commonwealth and around the country demonstrate that this treatment of objects held in trust for the public ensures precisely the opposite of the intended result: isolation, further financial problems, and ultimately ruin. No responsible museum or trustee would even consider the Liquidation Sale. Yet the Museum not only endorses it, it has planned a sophisticated campaign of deception to deliver the Artwork to auction.

These derelictions violate the contracts that the Museum has with its members and the citizens of the Commonwealth. An *ex parte* restraining order and preliminary injunction after notice is necessary because there is nothing to prevent the Museum from selling the works at any time even before the scheduled auctions, as often happens. The harm to Member Plaintiffs, Pittsfield, and the Commonwealth would be irreparable, and the Museum would not be harmed in the slightest by waiting to begin its sale until it can be heard on Member Plaintiffs' motion for a preliminary injunction. Moreover, the Museum's inequitable conduct disqualifies it from any discussion about the equities relative to Member Plaintiffs.

FACTS

The Museum is a jewel in the culture of Berkshire County and the Commonwealth. Verified Complaint at ¶ 33. One of the oldest continuing museums in Massachusetts, it presents a classical encyclopedic collection of art and natural history. Id. Its history also parallels the development and industry of Pittsfield. Id. The Museum's founding was a milestone in the history of Pittsfield and its presence at the very heart of downtown anchors the community. Id.

The Hatts are members of the Museum and full-time residents of Lenox, Berkshire County, Massachusetts. Id. at ¶ 8. Weinberg was a member of the Museum at all relevant times until she terminated her membership in July, 2017 in disappointment over the Liquidation Sale and the Museum's refusal to listen to reason. See id. at ¶ 9. The Museum is a corporation

organized pursuant to an act of the Legislature, and G.L c. 180, *et seq.*, located at 39 South Street, Pittsfield, Berkshire County, Massachusetts. Id. at ¶ 10. Member Plaintiffs bring this case on their own behalf and as representatives of the Museum's members, as well as derivatively on behalf of the Museum.

The origins of the Museum begin in 1871 with the incorporation of the Berkshire Athenaeum and Museum (the "Athenaeum") in Pittsfield. Id. at ¶ 34. Established by an act of the Legislature on March 24, 1871, 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.; see also Verified Complaint Exhibit A (emphasis added). The Athenaeum's property is restricted as follows:

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

Verified Complaint at ¶ 34. A second act of the Legislature on March 6, 1903 changed the name of the Athenaeum to the "Berkshire Athenaeum and Museum." Id. at ¶ 35; *see also* Verified Complaint Exhibit B. 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. Verified Complaint at ¶ 35. 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 Berkshire Athenaeum." Id.; see also Verified Complaint Exhibit C (emphasis added). Crane also specified a bequest of $100,000 to the Athenaeum in his will. By later codicil, he added another $100,000 to the Athenaeum. Id., Exhibit D. His son Zenas Marshall Crane later bequeathed $200,000 and certain of the Artwork. Id. at ¶ 40, Exhibit F.

In 1932, the Legislature once again amended the governing documents of the Museum. Verified Complaint at ¶ 38. On March 31, 1932, the Legislature passed a resolution creating a new entity named the Berkshire Museum, and 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. . . .

Id.; see also Verified Complaint Exhibit E (emphasis added). The number of Trustees is limited to fifteen. Id. Once again, no alteration was made to the geographical restriction on the works in the original Athenaeum collection, nor, on information and belief, has the Legislature ever changed that restriction, which remains in force today. Verified Complaint at ¶ 39.

The Liquidation Sale is not the result of any impending financial needs. Verified Complaint at ¶ 42. It is a lazy solution to the financial challenges of running a non-profit museum. Id. The Museum's Director Van Shields ("Shields") spoke of "monetizing" the Museum's collection almost as soon as he arrived in 2011. Id. at ¶ 43. At his prior post as Executive Director and CEO of the Culture & Heritage Museums in Rock Hill, South Carolina, Shields attempted a makeover of the collection. Id. at ¶ 44. According to the *Berkshire Eagle*:

> Shields and his museum allies failed to win the community acceptance and donations the ambitious effort needed, an investigation by *The Eagle* found.
>
> They missed project deadlines, churned through staff even as the museum expanded its upper ranks, fumbled politics in a conservative county, and resisted public and private calls to be more open about the project's challenges.

Id. Worse yet, Shields's project resulted in an inquiry from the South Carolina secretary of State's office. Id. at ¶ 45. In a letter from the deputy general counsel for the secretary of state:

> It does not appear that much effort was made to actually begin the museum project for which the land was donated — a lot of money was spent but it appears that there is nothing to show for it. . . . Also, it appears that hundreds of thousands of dollars were spent annually on professional fundraisers and public relations firms with little return on investment."

Id. Shields left his South Carolina position in 2011 and was hired by the Museum. Id. at ¶ 46.

The prior Museum administration oversaw a successful capital campaign that raised millions of dollars. Id. at ¶ 47. The Museum has portrayed that capital campaign as a failure because it did not secure the financial stability of the Museum indefinitely, but few if any such campaigns accomplish that. Id. Non-profit fundraising is a never-ending pursuit, and the Museum and the Trustee Defendants have apparently concluded that they can no longer be bothered with the hard work of charitable work. Id. The Museum sold a number of Russian artworks in 2008, not as part of the separate capital campaign, but to enhance the collection. Id. at ¶ 48. The then-director Stuart Chase summarized succinctly why those works were being sold:

> The proceeds from the auction will allow us to focus our energy on acquisitions, an equally important part of the institution's growth, which will help enrich the Berkshire Museum's special niche as the premier family institution in the area.

Id. at ¶ 49. While some of those proceeds were used to acquire other art, on information and belief other of those funds have been commingled and dissipated for overhead and expenses, not dedicated to the acquisition of additional art. Id. at ¶ 50. The full extent of that inappropriate expenditure is unknown because the Museum has refused to provide information concerning it. Id. at ¶ 51. The 2008 consignment contract did not contain what is known as a reserve clause, a provision requiring the item to be withdrawn from sale if bids do not reach a certain level. Id. at ¶ 52. The Liquidation Sale may also include no reserve clause, requiring the artwork to be sold to the highest bidder. Id. Given the Museum's breach of ethics, no museum will bid on the artwork. Id. Thus, the speculative amounts bandied about by the Museum may not happen. Id.

As recently as October 1, 2015—well into what Shields has now described as a period of financial need—he touted the fiscal health of the Museum. Id. at ¶ 54. In an interview with the *Berkshire Eagle*, Shields argued, "[w]e'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. That same interview touted the Museum's various regional and community partnerships, all of which are now threatened by the Liquidation Sale because a flagrant breach of ethics will almost certainly turn the Museum into a pariah in the art world. Id.

In July, 2017 the Museum announced the Liquidation Sale without warning. Id. at ¶ 55; Verified Complaint Exhibit G. Poorly disguised with a catchy "New Vision" slogan, the *Berkshire Eagle* reported that it was approved by certain of the Trustee Defendants "just hours" before it was announced to the world, and without any word to members or the community. Verified Complaint at ¶ 55. It is unknown by what margin, majority, or plurality the Trustee Defendants approved the Liquidation Sale, even though the Hatts requested information about resolutions concerning acquisition policy.[2] Id. The July statement (which claimed unanimity without substantiation) touted how many retreats the Board had taken and made reference to paid consultants and "focus group" testing. Id. at ¶ 56. In a letter to members after the announcement of the Liquidation Sale, Shields admitted that the focus groups had not been told about how the New Vision would be funded, i.e., by the Liquidation Sale. Id. at ¶ 57. Compounding this deceit, in the Museum's 2017 filing to the Massachusetts Cultural Council, submitted after the release of the "New Vision," the Museum answered a question about whether any material changes had taken place in the year prior or were planned in the year ahead in the negative. Id. at ¶ 58.

[2] The number of Trustee Defendants (including Life Trustees) currently exceeds the statutory allowance of fifteen considerably, casting all votes into question. Id. at ¶ 38, 53.

After the announcement of the Liquidation Sale,[3] the American Alliance of Museums ("AAM") and the Association of Art Museum Directors ("AAMD") stated in no uncertain terms what a catastrophe it would be if implemented. Id. at ¶¶ 4; 62. The two organizations issued a joint statement. Verified Complaint at ¶ 62; Exhibit H. In relevant part (emphasis added):

> 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. Based on this, the Museum will almost certainly be sanctioned by the AAMD and the AAM if the Liquidation Sale proceeds. Id. at ¶ 63. Other American museums will be forbidden to lend the Museum works for temporary exhibition, or participate in any way with the Museum's programming. Id. Prior targets of AAMD and/or AAM sanctions for deaccessioning violations included the National Academy Museum in New York and the Delaware Art Museum. Id. 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. at ¶ 64. 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

---

[3] 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, 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?"

Smithsonian, America's premier public cultural steward, affiliates with museums around the country to cultivate educational opportunities. Id.

The Museums' asserted need for such a dramatic endowment is illusory. Id. at ¶ 65. The Massachusetts Cultural Council (the "MCC") condemned the Liquidation Sale forcefully. Id. at ¶ 66. The MCC examined the Museum's finances in detail, and concluded that:

> the Museum could put itself in a healthy operating position without deaccessioning art. We fear, moreover, that its 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.

Id. Independent financial experts have also examined the supposed fiscal emergency and found it illusory. Id. at ¶ 67. 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. Id.

Professor Sheppard analyzed eight years of Berkshire Museum financial documents. Id. at ¶ 68. Sheppard studied the Museum's audited annual financial statements, which would allow it to operate for eight additional years at its present operating deficit. Id. Professor Sheppard observed critical flaws in the "New Vision." Id. at ¶ 69. First, the Museum has an endowment, the failed to account for income that the existing endowment will generate. Id. 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. Id. at ¶ 70. The Liquidation Sale is nothing more than a substitute for the hard work of fundraising and non-profit management. Id. at ¶ 71. The money will neither simply materialize nor solve anything. Id.

To understand how the Museum could possibly claim to have made the decision to move forward with the Liquidation Sale in good faith, the Hatts reached out through counsel to request documents that would support the Museum's right and authority to do so. Id. at ¶ 75, Exhibit I. The Museum simply ignored the Hatts. Id. at ¶ 76. The Hatts made a final demand that the Museum change course. Id. at ¶ 77, Exhibit J. The Museum, through counsel, responded dismissively on October 20, 2017 asserting that Plaintiffs have no rights to object to the Liquidation Sale or the Museum's mismanagement. Id. at ¶ 78. The Museum made no effort to supply the information previously requested by the Hatts. Id. The Liquidation Sale is currently scheduled to begin November 13, 2017 at Sotheby's, and while the roster of paintings up for auction that first night has changed in public announcements, it is moving ahead and the scheduling remains entirely within the control of the Museum. Id. at ¶ 41.

ARGUMENT

I. STANDARD ON A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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-West, N.A., 403 Mass. 473, 475 (1988); Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 615 (1980). 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, if a plaintiff alleges a statutory violation, the Court may consider how this violation affects the public interest. Commonwealth v. Mass. CRINC, 392 Mass. 79, 89 (1984).

II. THE MEMBER PLAINTIFFS WILL PREVAIL ON THEIR CLAIMS FOR BREACH OF CONTRACT AND BREACH OF FIDUCIARY DUTY.

The statute creating the Trustees of the Berkshire Museum created a contract between the Museum and Massachusetts. See In re Op. of Justices, 237 Mass. 619, 622 (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 v. Beede, 320 Mass. 601, 610 (1947) (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."). Corporations are also contractually bound to follow their articles of organization and their bylaws. 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)); Mass. Charitable Mech. Ass'n, 320 Mass. at 609 ("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 Russia v. Russian Orthodox Church of the Holy Resurrection, 35 Mass. App. Ct. 194, 200 (1993). aff'd 418 Mass. 1001 (1994).

Individual members of a charitable corporation may sue[4] where rights and privileges of membership are wrongfully denied. 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").

A. The Museum is in Breach of its Governing Documents.

There is no real dispute that the Museum is in breach of its contracts. 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 has withheld requested information about its bylaws, acquisition policies, and the decision making process. Verified Complaint at ¶ 79, Exhibit J. That concealment supports the conclusion that they have been withheld because they undercut the Museum's asserted rationale.

[4] The Museum clearly wishes to hide behind the prerogatives of the Attorney General, but this is unavailing. It is interesting to note that in its contempt for its own members the Museum conceded in its October 20, 2017 refusal that the Attorney General may supervise the Liquidation Sale. She is not the only one with the power to do so, however. With that said, Member Plaintiffs have no objection to the intervention or separate enforcement by the Attorney General, which they encourage.

The movement of property from Pittsfield to New York City for sale to points unknown alone is a breach. Id. at ¶ 88. Similarly, the Museum is and has always been a museum created by the Legislature for the display of art, among other things. As explained it the Sheppard Aff. and Monroe Aff., 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. The Museum has played a shell game since the announcement of the Liquidation Sale 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. See Verified Complaint at ¶ 1. Its presence in Berkshire County is no coincidence, Rockwell's personal connection to the area is a matter of public record (Joe's Diner in Lee featuring prominently, for example, in Rockwell's iconic 1958 *Saturday Evening Post* illustration *The Runaway*). The Museum will henceforth be known as a *former* art museum, or a museum that chose to turn out its meaningful collection for supposedly interactive displays.

The Museum and the Trustee Defendants have shown through experience that they lack either the will, interest, or sophistication to learn how to use an endowment properly. The Museum already has an endowment. Verified Complaint at ¶ 67-69. Yet even without considering the impact of the Liquidation Sale, the Museum's finances show that the Museum has failed to account even in the most basic terms for how the endowment affects its finances or plan for its use. Id. at ¶¶ 69, 70. As Professor Sheppard notes:

> [I]n my opinion the "New Vision" proposed by the museum does not reflect a consideration of the real expense of running a museum in the manner suggested. The idea of a large endowment is attractive in the abstract, but I do not perceive a sophisticated understanding on the part of the museum as to how that would

> work. Even if all of the art works proposed for deaccessioning were sold and the Museum's endowment was increased by $40 million dollars, there would be no impact on the structural deficit as it is currently being measured because the Museum's financial reports do not consider a normal draw on endowment funds as part of available resources.

Sheppard Aff. at ¶ 12. In fact, the Museum could add all of the planned "New Vision" programs by raising several million dollars, a difficult task to be sure, but one that the Museum accomplished less than ten years ago. Id. at ¶ 13; Verified Complaint at ¶ 47.

That is the most charitable interpretation of the Museum's and the Trustee Defendants' actions. A more realistic view compels a far less beneficent conclusion. Less than a year after Shield's public statements about the financial well being of the Museum, the Museum filed the purported Articles of Incorporation in 2016. This document is legally meaningless as it relates to the 1932 act or prior acts of the Legislature, it purports to exercise a power that the Legislature never granted to the Museum. Verified Complaint at ¶ 89. And, of course, the entire "focus group" exercise—in which participants were asked about a shiny new museum—was unconnected to the reality of implementation that the Museum was already planning. Id. at ¶ 57.

These breaches harm Member Plaintiffs, both those named and the class which they represent. The Museum itself touts on its website that membership includes "opportunities to provide feedback and shape your benefits." This inducement to support the Museum was a sham. As detailed above, the putative outreach and feedback efforts were deliberately misleading. This denied Member Plaintiffs 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 harmed the Member Plaintiffs.

B. Member Plaintiffs Have Derivative Standing to Prevent the Museum's Administration from Destroying the Institution.

The Member Plaintiffs do not merely allege that they have been harmed, but that the Museum itself is being harmed and has failed to act to protect itself. Member Plaintiffs thus have standing to enjoin the Museum's and 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)). Member Plaintiffs therefore bring this suit on behalf of the Museum itself. Mass. R. Civ. 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 there is some useful guidance. 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." Jackson v. Stuhlfire, 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.

The Appeals 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. A lawsuit that does allege such efforts, or the futility of making such an effort, should therefore confer standing on the Member Plaintiffs. A recent unpublished decision 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." 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).

In view of the foregoing Member Plaintiffs are likely to succeed in their derivative action as well. This is an action to rein in the reckless and destructive management that has gone unchecked to the Museum's detriment. The Museum's administration has repeatedly disavowed its obligation to do the right thing. After seeking in good faith to investigate the Museum's rationale for a decision so clearly at odds with what was publicly knowable, Member Plaintiffs were completely ignored. A derivative action is the only avenue available to save the Museum from itself and the Trustee Defendants.

At minimum, the question is a close one that may need to be answered by the Supreme Judicial Court in the derivative action's application to a charitable context such as this one where the non-profit has embarked on a material shift to its mission and activities that threatens its very existence. If this Court perceives the question to be close, Plaintiffs respectfully suggest that it should err on the side of the caution given the imminent and irreparable harm that would soon follow, as discussed below.

C. The Trustee Defendants Have Breached Their Fiduciary Duties By Wasting the Museum's Most Significant Assets.

"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, 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 v. Puopolo, 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).

When the Trustee Defendants joined the board of the Museum, it was in service of that highest and utmost duty to the Museum above all else. Here, whether for self-interest in wishing to avoid the hard work that being a trustee entails, or for any other reason, they have decided (by an unknown procedure or vote tally) to waste literally the most important assets that the Museum possesses, and which it holds in trust for the public in any event. Wasting property held as a fiduciary for another is the clearest sort of breach, and Member Plaintiffs expect to prevail on this count as well.

Finally, the Liquidation Sale itself may be a related party transaction. 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 would raise a potential conflict of interest to say the least, and the Member Plaintiffs are left to wonder what the Museum's policy on conflicts is and how this one was considered.

III. MEMBER PLAINTIFFS AND THE MUSEUM WILL SUFFER IRREPARABLE HARM WITHOUT AN IMMEDIATE RESTRAINT

The Museum stands at a crossroads. Either it will be permanently ruined on the evening of November 13, 2017, or the sales will be enjoined or postponed while the Trustee Defendants' and Shield's profound and bad faith mismanagement is adjudicated. If the Defendants have to wait and they ultimately prevail, the Artwork will be sold as they want. But if the status quo is not preserved, the Museum will be a shell of an institution that can never recover. 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. Verified Complaint at ¶ 80. The first of the Artwork is currently scheduled for auction beginning November 13, 2017, but the Museum could seek to dispose of any or all of the Artwork at any time absent the Court's intervention. 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 the critical policy threatened by actions like the Liquidation Event. 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. The National Academy and Delaware Museum, to cite two examples, embarked on an eerily similar course. Verified Complaint at ¶ 63. Both reaped short term significant monetary receipts—and both were soon right back where they started. Verified Complaint at ¶ 63. Here, the Museum will realize a sum of money that is unknowable (and likely far less than it believes, because museums of American art that form an important component of the market for such works will not participate in the Sotheby's auction). Without a reserve clause, the Artwork may yet be liquidated for paltry sum. Regardless, some amount of money will result—but the Museum has no plan for how to use it. Sheppard Aff. at ¶ 4. Plainly, the status quo can never be restored if the Liquidation Sale goes forward.

IV. THE BALANCE OF EQUITIES FAVORS THE PLAINTIFFS AND FAVORS THE PUBLIC INTEREST

The equities favor the Member Plaintiffs 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 Member Plaintiffs, the membership, or the Museum as a derivative party other than the preservation of a unique cultural institution. These Member Plaintiffs 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* Monroe Aff. at ¶ 16).

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 has refused to engage in conversations with any real possibility of discussion (as opposed to staged meetings where participants are ignored or mislead). And it has done all this to prove some misguided point about getting away with breaking the prevailing ethics of museum management.

The public interest weighs in favor of injunctive relief. The stakes of the Liquidation Sale could not be higher: of 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.

CONCLUSION

For the foregoing reasons, Member Plaintiffs respectfully request that the Court enjoin the Museum against the sale or any other conveyance of the Artwork.

October 25, 2017

Respectfully submitted,

JAMES HATT, KRISTIN HATT, AND ELIZABETH WEINBERG

By their attorneys,

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)

Okafor v. Sovereign Bank, N.A.

Appeals Court of Massachusetts

December 30, 2013, Entered

13-P-214

Reporter

2013 Mass. App. Unpub. LEXIS 1225 *; 84 Mass. App. Ct. 1126; 1 N.E.3d 293; 2013 WL 6838599 (Mass., Mar. 7, 2014)

ICHIE EMMANUEL OKAFOR & others[1] vs. SOVEREIGN BANK, N.A.,[2] & another;[3] Victor Udoji, third-party defendant.

Notice: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by Okafor v. Soverekin Bank, 467 Mass. 1105, 2014 Mass. LEXIS 159, 6 N.E.3d 546

Disposition: [*1] Judgment affirmed.

Judges: Fecteau, Brown & Hines, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is 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. Defendant Sovereign Bank, N.A. (Sovereign), in turn, filed a third-party complaint against Victor Udoji, the club's president.

Udoji filed a motion, in which Sovereign joined, to dismiss on the ground that the members had failed to demonstrate derivative standing. A Superior Court judge allowed the motion and dismissed the action.[4] As to the plaintiffs' first contention on appeal, we note that it is a court's duty to make independent inquiry into its subject matter jurisdiction. Litton Bus. Sys., Inc. v. Commissioner of Rev., 383 Mass. 619, 622, 420 N.E.2d 339 (1981). The record presently before the panel fully supports the Superior Court judge's conclusion that the plaintiffs lack standing to seek redress on behalf of the corporation, as they have failed to make demand on the corporation before pursuing this action. See Mass.R.Civ.P. 23.1, 365 Mass. 768 (1974); Harhen v. Brown, 431 Mass. 838, 844, 848-849, 730 N.E.2d 859 (2000). Even liberally construed, [*2] as best as we can discern, the plaintiffs have

[1] Sir Gogo Joe Nwabinwe, Prince Okey Onochie, Chief Sir Mike Okafor, Sir Willy Okwerekwu, Emmanuel Ezeonyido, Emmanuel Obierika, Chief Chris Okafor, Chike Onuorah, Francis Ibili, Raphael Ebozue, Suny Okoye, Dr. Jason Nwankwo, Gina Maduegbunam, Chief Kpajie Nnamdi Onochie, Joseph Onyejose, Stanley Ibeabuchi, Chief (Sir) Stanley Chukwu, Chief Dr. Richard Ihenetu, Dr. Herold Molokwu, Okwudilichukwu Okeke, Ikwuanusi Ifeanyi, Chuba Chibueze, Chuks Ekwelum, Felix Okwesa, Sir Ositadima Nwokolo, and Chinwe Okosi-Lane, individually and as members of Peoples Club of Nigeria (Boston Branch).

[2] During the pendency of this appeal, Sovereign Bank, N.A., officially changed its name to Santander Bank, N.A.

[3] Peoples Club of Nigeria Boston Branch Inc., was named in the amended complaint as a nominal defendant.

[4] Although denominated as a rule 12 motion, see Mass.R.Civ.P. 12, 365 Mass. 754 (1974), for all practical intents and purposes the motion was one for summary judgment and the judge, without explicitly indicating, treated it so, as both parties relied on extensive nonpleading materials. The plaintiffs do not claim that the procedure prejudiced them and do not otherwise complain about the nature of the motion.

established that no more than two of the corporation's at least sixteen member board are "interested." This is far less than a majority and thus does not excuse the plaintiffs' failure to make demand.

We thus affirm the judgment on the ground, if no other, of the plaintiffs' failure to have made demand.

Deciding as we do, we need not, and do not discuss the additional grounds supporting dismissal cited by the Superior Court judge and discussed by the defendants in their responsive briefing.[5]

Judgment affirmed.

By the Court (Fecteau, Brown & Hines, JJ.),

Entered: December 30, 2013.

End of Document

[5] The defendants' request for costs on appeal requires no action. See Mass.R.A.P. 26(a), as amended, 378 Mass. 925 (1979).