

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

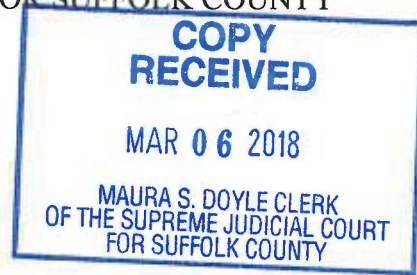
TRUSTEES OF THE
BERKSHIRE MUSEUM,

Plaintiff,

v.

MAURA HEALEY,
ATTORNEY GENERAL
OF THE COMMONWEALTH
OF MASSACHUSETTS,

Defendant.



Civil Action No. 2018-SJ-0065

**RESPONSE OF THE TRUSTEES OF THE BERKSHIRE MUSEUM
TO BRIEFS OF AMICI CURIAE**

The Berkshire Museum is fortunate to serve a diverse community. Many members of that community strongly support the Museum’s plans for its future; some do not. The Museum recognizes that its master planning process and development of a New Vision, necessary for the Museum to survive and fulfill its mission, have sparked a robust public discussion. It also spawned litigation—filed first by private plaintiffs, and then by the Attorney General, who conducted a contemporaneous investigation. The conclusion of that investigation has led the Attorney General to agree that the Museum requires a “significant capital infusion” and that “the Museum cannot practicably survive” absent the relief to which the Attorney General has assented, and which the Attorney General and the Museum jointly ask this Court to approve.

Eight private citizens—a subset of the private plaintiffs whose litigation was dismissed when they sought to enjoin the Museum’s plans—have now submitted two

amicus briefs expressing their disapproval of the proposed course of action.¹ (Former plaintiffs Thomas Rockwell, Jarvis Rockwell, and Peter Rockwell—sons of the artist Norman Rockwell—have not joined either amicus brief and have publicly stated that their litigation objective has been achieved based on the terms associated with the Museum’s contemplated sale of *Shuffleton’s Barbershop*.) The opinions of these eight individuals, however deeply held and fervently expressed, do not justify discarding the solution that the Museum and the Attorney General have jointly presented to resolve this very difficult situation. Only the relief jointly proposed by the Museum and the Attorney General will allow the Museum to continue fulfilling its mission and purpose: promoting the study of art, history, and science for the people of Berkshire County.

While these eight private citizens may well believe that they can discern or implement the public interest better than the Attorney General, or run the Museum better than its Board, the law does not permit them to do so. As the Museum’s Verified Complaint explains, the Museum proposes to sell 40 works from its collection of 40,000 objects. To the extent these items are encumbered by any restrictions—and the Museum believes they are not—complying with any such restrictions is impracticable and impossible, and the best means of effectuating the intent behind any restrictions is to allow the sales to proceed on the terms carefully crafted by the Museum and the Attorney General.

¹ Amici are James Hatt, Kristin Hatt, and Elizabeth Weinberg (“Hatt amici”); and Tom Patti, Jean Rousseau, Jonas Dovydenas, James Lamme, and Donald MacGillis (“Patti amici”).

The eight amici offer critiques of the Museum's plan that are substantively incorrect and have been assessed and rejected by the Museum's Board of Trustees in a two-year process, the Berkshire County Superior Court in its careful opinion, and the Attorney General through her seven-month investigation. Neither the arguments amici offer, nor the documents that they have improperly sought to include in this proceeding, warrant a different conclusion. Amici have shown no reason why the Court's equitable powers should not be exercised to permit the Museum to proceed in the manner proposed.

The Museum respectfully requests that the Court grant its motion and bring an end to months of costly and divisive litigation, thus allowing the Museum to move forward with what its Board and the Attorney General agree is the only practicable means by which the Museum may continue to serve its purpose and community. In light of the Museum's rapidly deteriorating financial situation, the unpredictability of the art market, and the time-limited nature of the offer of a non-profit United States museum to purchase *Shuffleton's Barbershop*, the Museum further respectfully requests that the Court act on its Assented-To Motion for Judgment as expeditiously as possible. The alternatives to the proposed relief—continued litigation over whether the works at issue are in fact restricted in any way, or the collapse of the Museum and failure of its entire charitable purpose—are untenable and unnecessary.

ARGUMENT

I. The Opinions Of The Private Citizen Amici Do Not Bear On The Issue Before The Court

Most of amici's submissions are not actually relevant to the narrow issue before this Court, but rather seek to advance their own individual opinions as fact; to urge that only they can properly defend the public interest; and to suggest that those who disagree with them are incompetent, dishonest, or insufficiently dedicated to "idealism and virtue" (Hatt Br. 45). The Museum does not begrudge these individuals their genuinely-held opinions, but respectfully notes that, under Massachusetts law, private citizens do not have authority to ordain the fate of a public charity. Rather, the management and oversight of public charities is consigned to (1) a public charity's board of trustees, whose actions are reviewed under the deferential standard set forth in G.L. c. 180, § 6C; (2) the Attorney General, who is directed to "enforce the due application of [charitable] funds" and "prevent breaches of trust in the administration thereof," G.L. c. 12, § 8; and (3) the courts, which oversee both charitable boards and the Attorney General in their fulfillment of their respective duties. *See Degiacomo v. Quincy*, 476 Mass. 38, 46 (2016) ("[T]he Attorney General is the *only* person apart from a trustee who, *on behalf of the general public* served by [a public charity's] charitable mission, has standing" to "correct abuses in the administration of a charitable trust" (emphases added)); *Dillaway v. Burton*, 256 Mass. 568, 575 (1926) (observing that Attorney General has exclusive standing to sue public charities to prevent lawsuits "instituted by individuals ... who

have no private interests distinct from those of the public”).²

If anything, amici’s submissions show the wisdom of this Court’s consistent recognition of the Attorney General’s exclusive standing. While these individuals evidently hold passionate personal opinions, their advocacy rests not on a neutral view of the facts or impartial application of the law, but on an incomplete, mostly inaccurate, and tendentious narrative, including unseemly personal invective and unjustified *ad hominem* attacks against the Museum’s volunteer Board, its hard-working staff, and its outside counsel. *See, e.g.*, Hatt Br. 26; Patti Br. 12-13. The Patti amici go one step further, attempting to submit hundreds of pages of one-sided and self-serving material, which they did not seek or receive leave to file,³ and which they invoke in service of a selective and deeply misleading portrayal of the more extensive record considered by the Superior Court in November and the yet more extensive factual material developed and considered by the Attorney General through her seven-month investigation.

In any event, even if amici’s critiques were based in fact rather than fervor, they have been carefully considered by the Museum’s Board of Trustees in the course

² Contrary to the Hatt amici’s unexplained suggestion (Br. 8-9), there is no tension between the Museum’s recognition of the Attorney General’s exclusive standing to *sue* public charities on behalf of the public and the Museum’s questioning—in an appeal that has now been dismissed—whether the Attorney General may *formally investigate* a public charity without complying with the statutory requirement of “approval of a judge of the trial court.” G.L. c. 12, § 8H.

³ The Patti amici sought and received (with the Museum’s assent) leave to file “an amicus brief.” Dkt. 7 at 1; Dkt. 8. They did not inform the Museum or the Court of their intent to submit a 497-page appendix, to which the Museum would not have agreed. The Museum respectfully submits that the Court should disregard the appendix as unauthorized and irrelevant to the issues presented.

of a two-year process of community input and financial modeling, as the Museum’s Verified Complaint describes. Compl. ¶¶ 16-27. The Museum, informed by both community input (including three formal advisory groups, as well as 22 focus groups involving over 200 people) and the guidance of a respected nonprofit consultant, determined its facilities and financial needs, assessed the fundraising climate in Berkshire County, and developed a New Vision for fulfilling the Museum’s interdisciplinary purpose. *Id.* The Museum further carefully reviewed its records and determined that the 40 works proposed for sale were donated (or in some cases purchased) free of any restriction. Compl. ¶ 23. And notwithstanding amici’s vociferous disagreement, the Museum continues to receive significant, broad-based public support.⁴

⁴ See, e.g., Editorial, *A Reasonable Price to Save the Berkshire Museum*, BOSTON GLOBE (Feb. 19, 2018), <https://www.bostonglobe.com/opinion/editorials/2018/02/19/reasonable-price-save-berkshire-museum/q1Pj3ZUJ9SnyExSPheu5dL/story.html> (“Pittsfield needs a museum more than it needs approval from the museum police. This agreement ensures it will have one.”); Jeff Jacoby, *The Berkshire Museum Defends Its Most Important Asset: Its Open Doors*, BOSTON GLOBE (Jan. 27, 2018), <https://www.bostonglobe.com/opinion/2018/01/27/the-berkshire-museum-defends-its-most-important-asset-its-open-doors/M92tisiPanIT93ZHXXysCP/story.html> (“Many people would regard such a plan—which the Berkshire board shaped during two years of intensive discussion with hundreds of community residents—as the very essence of prudent, thoughtful management.”); Letter to the Editor, *A Bold Step Forward For Berkshire Museum*, BERKSHIRE EAGLE (Oct. 6, 2017), <http://www.berkshireeagle.com/stories/letter-a-bold-step-forwardfor-berkshire-museum,521361> (“We are [195] artists, small business owners, parents, and Berkshire community members, and we support the Berkshire Museum’s bold plan and vibrant vision to bring the museum into the 21st century so it can continue to creatively serve all of us.”); Larry Parnass, *Rep. Farley-Bouvier Backs Berkshire Museum Board, Calls For Civil Debate*, BERKSHIRE EAGLE (Sept. 22, 2017), <http://www.berkshireeagle.com/stories/rep-farley-bouvier-backs-berkshire-museum-board-calls-for-civil-debate,520097> (“‘I stand firmly with the board of the Berkshire Museum,’ said state Rep. Tricia Farley-Bouvier, D-Pittsfield. ‘I do believe it’s the right course.’ ... [S]he believes most of the criticism of the museum’s planned sale of artworks is coming from outside the city.”).

II. The Attorney General And Superior Court Have Concluded That The Museum's Plans Advance The Public Interest

The Board is not the only entity to have considered the issues amici now raise. In October and November 2017, the Berkshire County Superior Court received and considered over 1,000 pages of briefing and two and a half hours of argument from the Hatt amici, the Patti amici, the Museum, and the Attorney General. The Superior Court had the benefit of extensive written submissions from all parties, including the materials that the Patti amici have selectively sought to submit here. In a November 7, 2017 decision, the Superior Court decisively rejected amici's arguments. *Rockwell v. Trustees of Berkshire Museum*, No. 17-cv-253, 2017 WL 6940932 (Mass. Super. Ct. Nov. 7, 2017). Most notably, the Superior Court ruled that private citizens—and specifically each of the eight individuals who joined the amicus briefs submitted to this Court—lack standing to represent the public interest, reaffirming the well-established principle that the Attorney General is the exclusive representative of the public interest before the courts in matters relating to non-profit administration. *Id.* at *4-7.

The Superior Court also considered and rejected amici's suggestion that the Museum is not in dire financial straits, *see Rockwell*, 2017 WL 6940932, at *2 ("it is beyond cavil that the Museum's financial outlook is bleak"), reaching this conclusion after receiving both the third-party financial analysis on which amici extensively rely (Hatt Br. 26-27, 37; Patti Br. 10-11) and the sworn affidavit of the Museum's auditor accompanied by several years of financial reports. The Superior Court likewise

rejected amici's argument that the Board's decisionmaking process was substantively or procedurally deficient. *Rockwell*, 2017 WL 6940932, at *12 ("The Trustees ... undertook a deliberate and careful review of the available options and chose what they believed to be the appropriate course. That was their duty.").

In addition to the Board and the Superior Court, the Attorney General has also considered and rejected the arguments proffered by amici. Over the course of a seven-month investigation, the Attorney General reviewed thousands of pages of Museum documents and interviewed Museum Trustees, management, current and former employees, and third parties. In December and January alone, the Attorney General interviewed three Trustees (including the President of the Board, a Vice President of the Board, and the Chair of the Museum's Collections Committee), seven Museum employees (including the Museum's Executive Director and the staff responsible for finances, fundraising, exhibits, and collections management), and the Museum's consulting firm. Based on its findings in this investigation—much of which post-dated the Superior Court's decision—the Attorney General has agreed that, if the Court approves the Museum's and Attorney General's proposed course of action, such a result "supports the public's interest in charities generally and its interest in the continuation of the Berkshire Museum." Dkt. 4 Ex. A at 5.

As amici emphasize, the Attorney General initially expressed concerns about the Museum's plans based on the preliminary injunction record and in appellate arguments based on that record. Now that the investigation is completed, however, the Attorney General's conclusion is clear: "Ultimately, after reviewing the financial

status of the Museum and coming to understand the Museum’s decision making process, the Attorney General believes that, in these circumstances, the Museum has reasonably concluded that *it does not have any alternative sources for the significant infusion of funds it needs* in order to continue to fulfill its mission, and the Museum *cannot practicably survive*” without the relief sought in the Museum’s Verified Complaint, which the Attorney General called “appropriate,” “warranted in charities law,” and “designed to preserve as nearly as possible the restrictions the [Attorney General] believes apply.” Dkt. 4 Ex. A at 4-5 (emphases added). Amici’s disdain for the conclusion the Attorney General reached after this exhaustive investigation cannot be squared with amici’s previous praise for the Attorney General’s investigation, which amici called “thoughtful and measured.”⁵

III. The Museum’s And The Attorney General’s Proposed Framework Meets The Standard For Deviation Or *Cy Pres* Relief

The Museum has contended from the beginning that the works at issue are unrestricted. No party to this or the prior related litigation has contended that any work is subject to an express written restriction to purposes narrower than the Museum’s overall charitable purpose. *See* Compl. ¶ 23 (detailing Museum’s 18-month review of gift records); *Rockwell*, 2017 WL 6940932, at *18. And the Superior Court concluded that the theories of implied restrictions advanced against

⁵ Appeals Court No. 2017-P-1556, Dkt. 7 at 49 (Hatt amici); *see also* Appeals Court No. 2017-J-0510, Dkt. 18 at 1 (Patti amici urging the Appeals Court to “permit[] a complete investigation by the Attorney General” because “the Attorney General’s filing of a cross-claim *was in no sense an admission that its investigation was completed*” (emphasis added)).

the Museum lacked merit. *See Rockwell*, 2017 WL 6940932, at *9-19 (concluding that sale of art would not violate Museum’s purpose of “promot[ing] art, natural science, and cultural history,” *id.* at *17 & n.25; that requirement that *Athenaeum* keep its property in Pittsfield did not “allow[] enforcement against the Museum,” *id.* at *14; and that “there is no evidence before this court that Rockwell ever said—to anyone, let alone the Museum—that he wanted these paintings to remain with the Museum,” *id.* at *16).

But rather than litigate that issue to final judgment, the Attorney General and the Museum arrived at a practical and reasonable approach that would make continued litigation unnecessary: explaining to this Court the Museum’s dire financial condition, as found by both its Board and the Attorney General, and the fact that it cannot be remedied by measures short of the relief sought, such that—to the extent the Attorney General’s claimed restrictions even apply—it is appropriate to lift or deviate from them in the manner proposed.

The Museum’s Verified Complaint laid out the impracticability of complying with the purported restrictions (¶¶ 50-58), as well as a detailed framework under which those restrictions are lifted only to the extent necessary to ensure the Museum’s survival, many of the 40 works can be retained for public access, and the Attorney General will continue her oversight of the Museum (¶¶ 39-49). This proposed relief is wholly consistent with the principles of deviation and *cy pres*. *See Boston Seaman’s Friend Soc’y, Inc. v. Att’y Gen.*, 379 Mass. 414, 418 (1980) (where trust “can no longer practically be fulfilled[,] [t]he question then is how the general

charitable intent can best be effectuated”); *Woodward Sch. For Girls, Inc. v. City of Quincy*, 469 Mass. 151, 166 n.26 (2014) (“‘courts of equity’ have general power ‘in the administration of charitable trusts to permit deviations short of cy pres applications’” (quoting *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521, 531 (1970))).

A. The Proposed Relief Is Essential To The Museum’s Survival

The Museum’s Verified Complaint clearly lays out the financial and physical reality the Museum faces: its endowment is dwindling, ceilings leak, walls weep, interior floors grow icicles, and storage areas are threatened by mold. Compl. ¶ 13. Meanwhile, the regional economy in which the Museum operates is in decline, the population base has shrunk, businesses have left town, and an increasing number of non-profit organizations compete for a smaller pool of donor dollars. Compl. ¶¶ 6-15. As the Attorney General concluded following the seven-month investigation during which it “reviewed financial reports, met with the Museum’s nonprofit consultants, and spoke with individuals with nonprofit financial expertise” in order to understand the “true financial need of the institution,” the evidence supports the conclusion that the Museum “does not have any alternative sources for the significant infusion of funds it needs in order to fulfill its mission, and the Museum cannot practicably survive” without the relief sought. Dkt. 4 Ex. A at 4.

Most of amici’s objections do not focus on any dispute with the facts laid out in the Museum’s Verified Complaint or the Attorney General’s submission, but rather address issues peripheral to the question whether the Museum cannot survive without

the proposed relief. To the extent amici address this question at all, they engage in flippant and unsupported accusations, such as blaming (without support or even elaboration) the Museum’s financial troubles on poor management. Hatt Br. 25-27, 37; Patt Br. 10-11. But their assertions rest on claims made by the same third parties whose views the Superior Court—with the benefit of a thousand-page record—decisively rejected. *Rockwell*, 2017 WL 6940932, at *2. The Attorney General considered an even broader set of materials bearing on the Museum’s financial position, and concluded that “a significant capital infusion is necessary to secure the future of the institution.” Dkt. 4 Ex. A at 4. The mere fact that amici have taken different views that serve their own agendas is no reason to discount the considered judgment of the volunteer board members in charge of keeping the Museum alive, the Superior Court judge who considered whether to enjoin its plan, and the Attorney General in charge of overseeing public charities. All reached the same conclusion: “the Museum’s financial outlook is bleak.” *Rockwell*, 2017 WL 6940932, at *2; *see also* Dkt. 4 Ex. A at 4; Compl. ¶¶ 10-12, 19-21, 39(a)-(f).

Notwithstanding amici’s insistence to the contrary, the simple math faced by the Museum, as detailed in the Verified Complaint, is straightforward. By the end of 2017, the Museum’s endowment had shrunk to approximately \$6.2 million. Compl. ¶ 11. Over the past decade, the Museum faced an average annual operating deficit of \$1.15 million. Compl. ¶ 10. Assuming a conservative annual inflation-adjusted rate of return of 3%, the Museum requires a \$40 million endowment to yield \$1.2 million

in yearly investment returns and cover the structural deficit.⁶

Amici invoke a preliminary estimate by the Museum’s consultant that \$25.6 million might stabilize the Museum’s finances, but they themselves admit this figure was simply to provide “an initial consensus on how to think of the size and scope of the Museum’s capital needs *in the event that nothing changes.*” Hatt Br. 23 (internal quotation mark omitted; emphasis added). After interviewing the consultant whose preliminary analysis amici rely on, the Attorney General addressed this \$25.6 million preliminary estimate:

With the benefit of our full investigation, we understand that the consultant advised the board that providing a firm foundation for sustainable operations would require considerably more than the “opening bid” of \$25.6 million, which the consultant had presented as only addressing current deficits.

Dkt. 4 Ex. A at 4. Indeed, having the benefit of the full picture, the Attorney General explains that the consultant’s ultimate recommendation was that “continued operation would require a larger infusion of at least \$50 million, and ideally more than that.”

Id.

Accordingly, the record that is properly before this Court—the Museum’s Verified Complaint and the Attorney General’s assent—amply explains why the Museum needs the funds that the proposed relief would permit. The Museum has not

⁶ In another attempt at substituting their personal judgment for that of the Board and the Attorney General, the Hatt amici fault the Board for making what they speculate are insufficient investments in “the securities and real estate markets” given recent “record investment growth.” Hatt Br. 37. The job of the Board is to make measured decisions that will ensure the Museum’s future over the long term, not to maximize the exposure of the Museum’s assets to risky investments in the hope of realizing near-term gains.

sought more than it needs, and has agreed to the Attorney General’s continued monitoring of its use of the funds. Compl. ¶ 48. And the Museum’s Complaint explains in detail why, in light of this financial situation, the Museum and the Attorney General agree that compliance with the purported restrictions is not practicable. *See* Compl. ¶¶ 51-53 (impracticability of alleged requirement that Museum use funds only for artistic component of purpose); Compl. ¶¶ 54-55 (impracticability of alleged requirement that works never leave Pittsfield); Compl. ¶¶ 56-57 (impracticability of alleged implied restrictions on Norman Rockwell works).

B. The Proposed Framework Appropriately Addresses The Alleged Restrictions While Allowing The Museum To Fulfill Its Charitable Purpose

Consistent with the principles of deviation and *cy pres*, to the extent restrictions exist, the proposed relief modifies any restrictions only to the extent compliance is impracticable, and ensures the charitable purposes for which those works were donated will continue to be fulfilled. As the Museum has explained, the existence of any restrictions on the items at issue is a matter of disagreement between the Attorney General and the Museum. This proceeding acknowledges that even if the Attorney General’s claimed restrictions existed, equity justifies authorizing the specific relief sought.

First, the proposed relief limits the Museum to the sale of only those out of the 40 works that are necessary to raise the funds required. Compl. ¶ 45(a). Contrary to the *Hatt amici*’s suggestion that there is “no limiting principle” (Br. 2), the limiting

principle is manifest: The Museum may sell works only to the extent necessary to raise the funds without which it could not continue fulfilling its purpose and its mission, and is doing so only with the assent of the Attorney General and according to specific procedures and standards. Compl. ¶¶ 44, 45, 47.

Second, the proposed relief contains detailed provisions directed at continued public access. If the Court endorses the Museum’s and Attorney General’s proposal, *Shuffleton’s Barbershop* would be sold not at public auction, but to a non-profit museum in the United States that would loan the painting to the Norman Rockwell Museum in Stockbridge for 18-24 months, subsequently explore loaning the painting to other Massachusetts museums, and ultimately display the painting in its own museum while considering periodic loans to museums in Berkshire County and elsewhere. Compl. ¶ 44.⁷ Moreover, the Museum and Attorney General have agreed that the Museum may sell works below fair market value if the works are sold to a buyer who will ensure continued public access. Compl. ¶¶ 45(c), 46. And the Museum will sell other works in tranches, so as to ensure that it can raise the needed funds without selling substantially more works than necessary. While auction proceeds are unpredictable—and proceeds may be reduced by further delays, Compl.

⁷ Even amici offer scant objection to the sale of *Shuffleton’s Barbershop* on the proposed terms. See Hatt Br. 46 (seeking alternative remedy of denying Museum’s motion except as it relates to the proposed sale of *Shuffleton’s Barbershop*); Patti Br. 16 (asking the Court to deny only “so much of the Museum’s petition as relates to the proposed sale of any work of art other than ‘Shuffleton’s Barbershop’”); see also Larry Parnass, *Foes of Berkshire Museum Art Sale to File with Top Court Tuesday*, BERKSHIRE EAGLE (Feb. 26, 2018), <http://www.berkshireeagle.com/stories/foes-of-art-sale-to-file-with-top-court-tuesday,533160> (“[Patti amici’s co-plaintiffs] had included three of Rockwell’s sons, but they left the case last week, saying they had achieved their main goal of keeping ‘Shuffleton’s Barbershop’ in the public realm.”).

¶ 35—the Museum hopes it will be able to retain many of the 39 other works.

Compl. ¶¶ 45(a)-(b).

Finally, under both the proposed relief and Massachusetts public charities law, the Attorney General can and will continue oversight of the Museum, including as to its proposed sales, financial planning, and fundraising. The Museum has agreed to provide the Attorney General with reports at least 14 days in advance of each proposed sale, detailing how the works selected for sale comply with the detailed set of principles set out in the Complaint. Compl. ¶¶ 45(b), 48. The Museum will also hire a consultant to support its continued fundraising efforts and ongoing refinement of its New Vision business plan, which will be completed once the funds are received and implementation of the New Vision may begin. And the Attorney General of course retains her powers, under G.L. c. 12, §§ 8 *et seq.*, to monitor the Museum’s finances and take appropriate action, obviating any need for the “special master” the Patti amici suggest.

The Hatt amici attack the proposed relief primarily by mischaracterizing it and distorting the Museum’s purpose and mission. Contrary to the Hatt amici’s assertion (Hatt Br. 45), the mission of the Museum is not changing. Nor is the Museum proposing anything resembling a “liquidation sale” (Hatt Br. 2, 5, 18, 19, 20, 25, 26, 27, 28, 29)—a point that counsel for the Hatt amici conceded before the Superior

Court.⁸ As the Complaint explains, the Museum will continue to hold and display objects from its collection, which includes 5,000 artistic works out of 40,000 objects in total. Compl. ¶¶ 22, 40. This includes many works more valuable than some of the 40 works proposed for sale, and will include some of the 40 works if sufficient funds are raised by initial sales. Compl. ¶¶ 41, 45(a)-(c). And, under the New Vision, the collection of works and objects retained by the Museum will be prominently and more effectively displayed to the public in fulfillment of the Museum’s interdisciplinary mission. Compl. ¶¶ 24-26. The Hatt amici’s unsourced musings on the Museum’s statutory purpose, which suggest that the scientific and historical components of the Museum’s statutory purpose are mere “rungs” subordinate to its artistic purpose, find no support in the Museum’s charter. *See* Dkt. 1 Ex. A (Stat. 1932, c. 134) at § 3 (identifying Museum’s purpose as promoting “the study of art, natural science, the cultur[al] history of mankind and kindred subjects”). The Museum is committed to serving its *entire* statutory purpose—which remains unchanged—and that is what the proposed relief will enable.

The Hatt amici recognize the logical conclusion of their argument, which is that the Museum should be required to *close its doors* rather than pursue the agreed course of action. Hatt Br. 45-46. Far from advancing the Museum’s mission, that outcome would completely undermine it, as there would no longer be “in the city of

⁸ Berkshire County Superior Court No. 17-cv-253, Nov. 1, 2017 Tr. 9:21-23 (“THE COURT: And you’re not holding yourself to a higher burden, that there is, in fact, a liquidation sale going on? MR. O’DONNELL: No, Your Honor.”).

Pittsfield *an institution* to aid in promoting for the people of Berkshire county and the general public the study of art, natural science, the cultur[al] history of mankind and kindred subjects *by means of* museums and collections.” Dkt. 1 Ex. A (Stat. 1932, c. 134) at § 3 (emphases added). To be sure, other Massachusetts museums have charters directed primarily to the “preservation” of art. *See, e.g.*, Stat. 1870, c. 4 (establishing Museum of Fine Arts “for the purpose of erecting a museum for the *preservation* and exhibition of works of art” (emphasis added)). But the Berkshire Museum’s charter explicitly states a different purpose: maintaining “*an institution*” and “*promoting ... the study*” of art, history, and science, with a collection serving only as a “*means*” to that purpose.

The Patti amici attack the proposed relief primarily by suggesting that the Museum’s Complaint lacks details that it in fact includes. For example, the Patti amici allege that the Complaint “suggests that there may be some separate reporting agreement” but that such an “agreement has not been provided.” Patti Br. 13. But paragraph 48 of the Complaint clearly describes the reports the Museum will provide to the Attorney General:

The Museum has agreed to provide reports to the Attorney General on the progress of the sales and the Museum’s implementation of the New Vision. Such reports will be provided no fewer than 14 days before the sale of works from any tranche identified in paragraph 45(a) and shall include the number and identity of the works to be included in each tranche and a description of how each tranche meets the elements identified in paragraph 45(b) [identifying four requirements the Museum must follow in selecting works to be sold].... Six to twelve months after the Museum has attained \$55 million in net proceeds from the sales as described herein, the Museum shall provide the Attorney General with a final report on the progress of its

implementation of the New Vision.

Compl. ¶ 48. The Patti amici further suggest that the Museum and the Attorney General have not addressed the question “How is the Museum deciding which works to sell and in what order?” Patti Br. 12. Again, the Verified Complaint answers the Patti amici’s question: the Museum and the Attorney General have proposed *extensive* procedural and substantive requirements regarding how the Museum will select works to be sold and in what order:

The Museum shall utilize the following principles in identifying the works to be included in each tranche:

- i. The Museum will consider whether to include works in any given tranche for sale based on both the interpretive and financial value of the works to the Museum.
- ii. The tranches shall be structured and implemented sequentially to accommodate the Museum’s desire to sell only those works [of the 40 works] that will allow the Museum to best further its interpretive mission as well as the Museum’s desire to achieve, as reasonably close as possible, net proceeds received by the Museum from the sales that will reach but not substantially exceed \$55 million.
- iii. The number and identity of the works in the first tranche shall be at the Museum’s sole discretion and shall be reasonably calculated to arrive at the difference between \$55 million and the net proceeds received by the Museum from the sale of *Shuffleton’s Barbershop* such that the Museum may not need to proceed with any further tranches. In selecting the number and identity of the works to be included in the first tranche, in addition to considering the interpretive mission of the Museum, the Museum shall use the median of contemporaneous auction estimates received by the Museum from Sotheby’s to estimate the financial value of the works to be included in that tranche.
- iv. The number and identity of the works to be included in any subsequent tranches shall be at the Museum’s sole discretion, but the number of works in any subsequent tranche shall not exceed 15 items, and shall be reasonably calculated to arrive at the difference between \$55 million and the net proceeds received by the Museum from the sale of *Shuffleton’s Barbershop* and net proceeds received by the

Museum from the sale of previous tranches. In selecting the number and identity of the works to be included in any subsequent tranche, in addition to considering the interpretive mission of the Museum, the Museum shall use the median of contemporaneous auction estimates received by the Museum from Sotheby's to estimate the financial value of the works to be included in that tranche, and to minimize the further sale of artwork.

Compl. ¶ 45(b); *see also* Compl. ¶¶ 44(a)-(c), 45(a), 45(c), 46. The Patti amici's claim that these details have not been provided is simply wrong.⁹

IV. Amici's Remaining Objections Are Inconsistent With The Facts And Law

Amici's remaining grab bag of objections recycles assertions against the Museum's earlier plan, which did not include the many "conditions and limitations around the structure of the sale that are designed to preserve as nearly as possible the restrictions the [Attorney General] believes apply." Dkt. 4 Ex. A at 5. None of amici's arguments presents any basis for denying the relief that the Museum and Attorney General agree is "necessary to secure the future of the institution so that it may continue to fulfill its charitable purposes." Dkt. 4 Ex. A at 4.

1. *The Museum's Deliberative Process.* Amici object to the Museum's process of deliberation, including the manner in which it sought and received community input (Hatt Br. 18), the manner in which it completed its diligence (Patti

⁹ Other critiques of the proposed relief are so contradictory as to suggest that amici will find fault with *any* attempt to address their concerns. For example, the Hatt amici complain that auctioned works could be sold to private purchasers outside Massachusetts (Br. 42), and suggest that "works now on the auction block [instead] be displayed permanently in another museum" (Br. 45-46). To address precisely this concern, the Attorney General has agreed that the Museum may sell works, including *Shuffleton's Barbershop*, at "a price lower than the price that could be achieved through an unrestricted sale at public auction" in order to ensure they continue to be publicly displayed. *See* Compl. ¶ 46. But the Hatt amici elsewhere attack precisely this possibility, describing any such "failure to maximize the prices" as a "fiduciary lapse." Hatt Br. 12. They cannot have it both ways.

Br. 10-12), the timing of its announcements (Hatt Br. 24-25; Patti Br. 5, 9), and its continued engagement with the community (Hatt Br. 12; Patti Br. 13). Amici do not explain what possible relevance this has to the question before the Court.¹⁰ In any event, the Museum consulted extensively with the public and detailed its deliberative process and the New Vision in a July 12 news conference and accompanying materials, in extensive litigation filings and affidavits over the past four months, and in the Complaint now before this Court. Amici appear to fault the Museum for conducting a diligent process *before* announcing its plans, rather than announcing its plans *in advance* of any diligence (Patti Br. 9; Hatt Br. 24-25); of course, no competently managed institution would announce a potential decision before having completed its diligent evaluation of all options.

2. **Fundraising.** Amici inaccurately accuse the Museum of having “ceased” fundraising. Hatt Br. 31; Patti Br. 8-9. As the Complaint makes clear, the Museum has *not* ceased fundraising, and “fundraising w[ill] always be an important part of the Museum’s financial future.” Compl. ¶ 20; *see also* Compl. ¶ 26 (“The \$60 million to fund the New Vision is to be raised through **a combination of fundraising** and the planned sale.” (emphasis added)). Amici confuse the Museum’s decision to

¹⁰ Somewhat ironically, amici’s submissions rely extensively on the opinions of Peabody Essex Museum Director Dan Monroe, who recently argued that his museum has *no* obligation to consult with the public. *See* Malcolm Gay, *Salem Residents Angry Over Museum’s Plan To Move Historical Records*, BOSTON GLOBE (Jan. 13, 2018), <http://www.bostonglobe.com/arts/art/2018/01/12/salem-residents-angry-over-museum-plan-move-historical-records/8k6firnLfZVG1wcLTVciFO/story.html> (“‘There was an expectation by a number of people that we had a responsibility to consult with them about what would be done with the Phillips collection,’ said Monroe. ‘That’s an expectation that we didn’t particularly share or understand.’”). *See* Hatt Br. 15 n.4, 28; Patti Br. 6 & n.2, 8-9, 11.

temporarily pause a major capital campaign during the Master Planning Process with the Museum's continued, and ongoing, fundraising efforts. The Museum's reasons for pausing its capital campaign are simple and uncontroversial: it would be irresponsible to solicit major gifts in a capital campaign in the months *before* a major announcement of how those gifts would be expended. The Museum never stopped fundraising, and the capital campaign resumed after the announcement of the New Vision and will continue.¹¹ The only point of relevance to this Court's decision is that fundraising alone will not save the Museum, as the Board's master planning process and the Attorney General's investigation equally confirmed. Compl. ¶ 20 ("As a result of that analysis, the Board determined that, while fundraising would always be an important part of the Museum's financial future, fundraising alone would not be sufficient to secure the Museum's survival."); Compl. ¶ 39(e); Dkt. 4 Ex. A at 4 ("The final stage of the [Attorney General's] investigation ... also revealed that the Museum had engaged in fundraising efforts, but had determined, in part with the assistance of its consultant, that its fundraising potential would not come close to yielding the level of funds it needed."). Although amici do not like that conclusion, they offer no valid reason to doubt it. The Hatt amici, for instance, baldly assert that three Berkshire County institutions that are *not museums* (a dance festival, an historic home, and a theatre company) experienced financial turnarounds in recent years,

¹¹ See, e.g., Press Release, Berkshire Museum (July 18, 2017), <https://berkshireremuseum.org/2015site/wp-content/uploads/2014/01/Feigenbaum-Foundation-pledges-lead-gift-for-Berkshire-Museums-New-Vision.pdf> (announcing, several days after New Vision announcement, \$2.5 million donation).

without explaining whether fundraising played any role, or why their example is in any way relevant to the Berkshire Museum. Hatt Br. 39-41.¹²

3. *The New Vision.* The Patti amici claim that the Museum has “never publicly disclosed” an answer to the question “What exactly is the ‘New Vision’ project?” Patti Br. 11. Yet the document amici quote—the Museum’s July 12, 2017 press release—dedicates seven pages to answering that very question, describing the planned facilities renovations and the specific ways in which planned exhibits will continue to fulfill the Museum’s long-standing interdisciplinary mission of promoting the study of art, history, and science. Press Release, Berkshire Museum (July 12, 2017).¹³ Beyond this detailed description, the Museum maintains an extensive website dedicated to the New Vision. See “Berkshire Museum: Creating a New Vision to Serve the Community” (featuring nine subsections including “The Master Planning Process,” “Financial Summary,” and a “Frequently Asked Questions” page answering 38 questions about the New Vision).¹⁴ It is unclear how much additional detail the Patti amici expect the Museum to provide, much less why the level of detail

¹² If anything, the Hatt amici describe turnarounds driven in substantial part by programmatic changes aimed at serving the institutions’ purposes in new ways that are most relevant to the Berkshire County community. See, e.g., Hatt Br. 40-41 (“The Mount invited theater companies, prominent writers and intellectuals to come in and give talks to what turned out to be sold-out auditoriums of locals.”). The New Vision seeks to do exactly that for the Berkshire Museum, yet the Hatt amici would deny it that opportunity, insisting that the Museum as it exists today is “modest,” and “that is what it must remain.” Hatt Br. 43. Nothing in the Museum’s charter or Massachusetts law confines the institution in that way.

¹³ Available at https://berkshiremuseum.org/2015site/wp-content/uploads/2014/01/pr.BerkshireMuseumNewVisionannounce_FINAL_8.4.17.pdf.

¹⁴ Available at <https://berkshiremuseum.org/newvision>.

in the Museum’s public disclosure of the New Vision affects the disposition of the narrow question before this Court.

4. ***Preferences Of Other Museums.*** Amici suggest that the preferences of the “professional museum community” should guide the outcome here (Hatt Br. 28), even to the point of closing the Berkshire Museum in service of the institutional goals of other, better-funded museums. *See, e.g.*, Hatt Br. 28-29 (quoting museum association concern that Berkshire Museum’s plans would affect other museums’ fundraising); Patti Br. 6 & n.2 (quoting two directors of other museums, including “the second largest art museum in New England,” who do not claim personal knowledge of Berkshire Museum or its community); Hatt Br. 45-46 (arguing that Berkshire Museum “is not guaranteed immortality” and suggesting that its collection should “be displayed permanently in another museum”). The statutory duty of the Board is to “*maintain[] in the city of Pittsfield an institution to aid in promoting for the people of Berkshire county and the general public the study of art, natural science, the cultur[al] history of mankind and kindred subjects by means of museums and collections.*” Dkt. 1 Ex. A (Stat. 1932, c. 134) at § 3 (emphases added). The Board is not allowed to let its institution slide into bankruptcy in service of the goals of other museums, many of which serve wealthier communities. The children attending under-resourced regional schools (Compl. ¶ 5), who will lose educational experiences and opportunities if the Museum closes, will take little solace in amici’s assurances that such a course reflects “the considered wisdom of museum professionals” (Hatt Br. 1). As to the Hatt amici’s invocation of professional association guidelines, they

themselves concede that such guidelines “are not laws.” Hatt Br. 16.

5. *Prior Litigation Positions.* Amici attempt to invoke prior litigation positions taken by the Attorney General and the Museum as a basis for rejecting the relief the parties now jointly seek. Hatt Br. 5-9, 11-12, 45; Patti Br. 7-8. Amici have it backwards: the fact that the Attorney General initially expressed strong concerns—based on a preliminary injunction record that was fixed on November 10, 2017—but upon completion of the investigation, worked with the Museum to develop a solution that is warranted in fact and law, illustrates the deliberate and independent judgments that have led to this proposal. Similarly, the Museum’s legal filings in connection with the Appeals Court’s prior stay of trial court proceedings consistently stated that the Museum was fully complying with the Attorney General’s investigation in the hopes of achieving resolution and avoiding further litigation. Appeals Court No. 2017-P-1523, Dkt. 4 at 27. That is precisely what the Museum and Attorney General seek through this proceeding.

Ultimately, amici provide no reason for substituting the preferences of eight private citizens for the Board’s diligent two-year decisionmaking process or the Attorney General’s expertise as informed by a seven-month investigation. And few of their critiques actually have any bearing on the questions before this Court: is the Museum’s continued existence impracticable or impossible absent the proposed relief, and does the proposed relief ensure, as close as possible, the continued fulfillment of the charitable purposes associated with any of the asserted restrictions? On those questions, amici’s scattershot objections to the Museum’s plan are

inaccurate, irrelevant, or both.¹⁵

CONCLUSION

The Museum's Complaint sought equitable relief authorizing up to 40 works to be sold under the proposed framework. The Museum believes that none of the 40 works is subject to any restriction, express or implied. *See supra* 9-10. But more importantly, the Museum and the Attorney General agree that the Court would be justified in granting the relief jointly requested as an exercise of its equitable powers, because even if any restrictions exist, complying with any restrictions would make the Museum's continued existence impracticable and the proposed framework addresses the alleged restrictions as closely as possible.

If the Court determines that the relief sought should not be granted, the Attorney General and the Museum will face two equally undesirable options: either the Museum will begin preparations for insolvency, or the Attorney General and the Museum will be forced to return to the Superior Court to litigate the question whether the 40 works are actually subject to any restriction. Such prolonged litigation—with the attendant delay in the Museum's ability to proceed with its only means of ensuring its survival—would be costly for the Attorney General, divisive for the

¹⁵ Nor should the Court countenance amici's efforts to gin up alternative arrangements (Hatt Br. 46; Patti Br. 14-16), as the alternatives all assume the correctness of amici's faulty position that any of the works is actually restricted or their spurious suggestion that the Museum and the Attorney General will not comply with or enforce the proposed conditions. The Museum and the Attorney General have resolved their disagreement on the question whether the works are restricted on the terms expressed in the Museum's Complaint, not on other terms; should the relief requested be denied for any reason, the Museum and the Attorney General will be forced to either begin preparing for the Museum's insolvency or return to Superior Court.

community, and potentially catastrophic for the Museum's continued operations. More importantly, it is completely unnecessary. The Museum and Attorney General have addressed the alleged restrictions as closely as possible, such that equity justifies the relief sought. The joint proposal appropriately serves both the Museum's needs and the public interest. Amici may well dislike the outcome, but they have no legal basis to block it.

The Court should grant the Museum's Assented-To Motion for Judgment.

Respectfully submitted,



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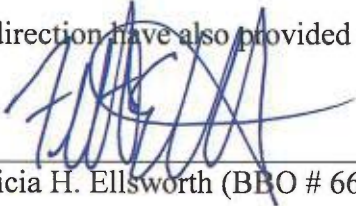
Date: March 6, 2018

CERTIFICATE OF SERVICE

I, Felicia H. Ellsworth, hereby certify, under the pains and penalties of perjury, that on March 6, 2018, I or those working at my direction filed the foregoing document and supporting materials with the Clerk of the Supreme Judicial Court for The County of Suffolk via hand delivery, and served true and correct copies by email and hand delivery on counsel for the Attorney General listed below:

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As a courtesy, I or those working at my direction have also provided copies of this filing to counsel for amici curiae by email.



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