COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss **SUPERIOR COURT**
CIV. NO. 17-0253

THOMAS ROCKWELL, JARVIS ROCKWELL, PETER ROCKWELL,
TOM PATTI, TOM PATTI DESIGN LLC, JAMES LAMME, DONALD MACGILLIS,
JONAS DOVYDENAS, and JEAN ROUSSEAU
Plaintiffs

v.

TRUSTEES OF THE BERKSHIRE MUSEUM and
MAURA HEALEY, in her capacity as Attorney General
of the Commonwealth of Massachusetts.
Defendants

CONSOLIDATED WITH
CIV. NO. 17-0260

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, et al.
Defendants

MEMORANDUM OF DECISON ON PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

The plaintiffs, under Civil Action Number 17-0253 ("Rockwell case"), have requested by way of motion that the Court enter a preliminary injunction prohibiting the defendant, Trustees of the Berkshire Museum ("Trustees" or "Board"), from selling, auctioning, or otherwise disposing of any of the artworks that have been listed for auction commencing on November 13, 2017. The defendant Trustees have opposed this motion. The co-defendant, Maura Healey, in her capacity as Attorney General of the Commonwealth of Massachusetts ("AGO" or "Attorney General"), initially supported the

plaintiffs' request for an injunction. After the hearing, the AGO sought and was granted plaintiff-status and is seeking an injunction on behalf of the Commonwealth, but only if the other plaintiffs fail to establish standing to file such claims.

In a related action initially filed in the Suffolk Superior Court but transferred and consolidated with the Rockwell case by order dated October 30, 2017, different plaintiffs also seek injunctive relief to prevent the sale of the artwork ("Hatt case"). The AGO is not involved in that litigation.

A non-evidentiary hearing was held on November 1, 2017. Based upon the submissions of the parties, including the affidavits and exhibits, as well as argument of counsel, I make the following findings and rulings.

A. BACKGROUND

The genesis of the Berkshire Museum goes back to 1903. Philanthropist Zenas Crane donated a building that was located behind the Berkshire Athenaeum to hold and display art and artifacts for the benefit of the public. This property was transferred to the management of the Athenaeum, and the name was changed to the Berkshire Athenaeum and Museum. Although the organizations maintained separate identities and collections, there was a single board of trustees.

Of significance, the Athenaeum was incorporated in 1871 as a library with the authority to provide "reading-room, lectures, museums, and cabinets of art and historical and natural curiosities." See St. 1871, c. 129, An Act to incorporate the Trustees of the Berkshire Athenaeum. The Act further stated that "no part of such real and personal property, or such gifts, devises or bequests, shall ever be removed from the town of Pittsfield." *Id*. at § 2.[1]

In 1932, a citizens' petition resulted in a separate legal existence for the Museum and a formal incorporation of the Trustees of the Berkshire Museum as the overseers of this entity.[2] The Act created this corporation "for the purposes 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, the cultural history of mankind and kindred subjects by means of museums and collection, with all the powers and privileges . . . set forth in all general laws now or hereafter in force relating to such corporations." See St. 1932, c.134, § 3. The Museum and the Athenaeum were now separate legal entities. As will be discussed in greater detail later in this

[1] These days, corporations, charitable or otherwise, can be created in the Commonwealth by filing documents with the appropriate department and sometimes paying a fee. See, e.g., G. L. c. 156B, §§ 12, 114. Historically, however, Massachusetts "had always been conservative in its corporation policy, having been among the last of the important states to allow incorporation without special legislative act . . . ." E. Merrick Dodd, Jr., Statutory Developments in Business Corporation Law, 1886-1936, 50 Harv. L. Rev. 27, 31 (1936).

[2] The official name of the Act was "An Act Changing the Name of the Trustees of the Berkshire Athenaeum and Museum to Trustees of the Berkshire Athenaeum, and Incorporating the Trustees of the Berkshire Museum and Authorizing the Transfer to it of Museum Property."

decision, the 1932 Act establishing the Museum as a separate legal entity did not include language prohibiting its property from being removed from Pittsfield. However, it did have language that any gift or bequest would be "used in conformity with the conditions made by any donor and expressed in writing provided, that such conditions are not inconsistent with the provisions of this act." *Id*. at § 4.

Over the years, the Berkshire Museum has matured and evolved into a repository of more than 40,000 items with a large concentration of items in the natural sciences, such as fossils, minerals, and reptiles. Since the seventies, the national economic winds have eroded the Berkshire County business environment, resulting in many industries and businesses dying off or relocating. The population has shrunk and, most importantly, generous benefactors have vanished. However, to its benefit, the County has supplanted its industries with recreational and cultural attractions as it progresses to a tourist-based economy. Of course, this has created greater stress on the existing non-profit institutions as they compete for tourist dollars and donor support.

There appears to be no dispute that the Museum is in serious financial trouble. It has operated at a deficit for many years causing it to rely on its endowment to sustain its operations. Although the extent of the financial woes is disputed, it is beyond cavil that the Museum's financial outlook is bleak.

Faced with these consequences, the Trustees initiated discussions, by way of a Master Planning Process ("MPP") to address the financial issues. They initially considered merging with another museum, however that was rejected, as both of these institutions had financial problems. The MPP also considered and adopted more aggressive fundraising, changes in programming, increasing ticket sales, grant writing and reduced operational costs through hiring freezes, reduced hours and reduced programming.

According to the information before the court, the Trustees first considered the issue of deaccession as a possible option in June 2015, when they began developing the MPP. At a retreat on October 24, 2016, the Board discussed the potential items for deaccession and, most importantly, moved forward with this method of financing. A meeting in December 2016, established a timeline for the proposed deaccession. Thus, over the course of two years, the Trustees and its subcommittees held numerous meetings regarding the economic future of the Museum.

On May 22, 2017, the Board voted to authorize the Board President to execute a consignment agreement with Sotheby's. An agreement was signed on June 13, 2017.

The proposed auction includes forty items, with the two garnering the most attention being the works of renowned artist and Berkshire County resident Norman Rockwell. The paintings identified as "Shuffleton's Barbershop" and "Shaftsbury Blacksmith Shop" were personally donated by Mr. Rockwell to the Museum. Judgment on art is subjective; however, these two paintings are considered his finest works and their value is in the millions.

Also included within the art works for deaccession are paintings from prominent artists and sculptors including Alexander Calder, Frederic Church, George Henry Durrie, William Adolphe Bouguereau and Albert Bierstadt. For all the items submitted to Sotheby's the range of "hammer" value (the winning bid at an auction) is approximately $46,000,000 to $68,000,000. The auction of these and other art works from around the country will be scheduled on different dates, commencing on November 13, 2017. On November 13, seven works from the Museum are up for sale, including the two Rockwell paintings. Twelve more art works will be sold in auctions stretching out into March. The sale of the remaining works have not been scheduled.

B. PARTIES AND CLAIMS

1. Rockwell Case

The first three plaintiffs identified in the Rockwell Complaint are Thomas Rockwell, Jarvis Rockwell and Peter Rockwell. They are the three children of Norman Rockwell and all are principal beneficiaries of the estate through testamentary trusts. The residue of the estate passed to trusts of which they are the beneficiaries. Thomas Rockwell was the executor of Norman Rockwell's estate.

The plaintiff Tom Patti is a prominent artist and owner of Tom Patti Design LLC, a Massachusetts limited liability company located in Pittsfield. The company entered into a contract with the Museum for the creation and installation of two items of glass affixed to the building.

The other plaintiffs in the Rockwell Complaint are James Lamme, Donald MacGillis, Jonas Dovydenas and Jean Rousseau. It is asserted that they are each members of the Museum and Dovydenas and Rousseau have made "substantial donations to the Museum." Membership in the Museum is afforded to any individual or family that provides a financial donation, with the level of donation determining the benefits available, including free admission, guest passes, reciprocal privileges to other museums, etc. The types of membership start with a $50 per year individual account and progress to Crane Society status for $1,000 per year. A member has no right to participate in the management or operation of the Museum.

The Rockwell Complaint asserts two claims: a breach of fiduciary duty, breach of trust and absence of authority under Count I, and breach of contract regarding the glass work of Tom Patti under Count II. The relief requested includes voiding the contract with Sotheby's, and enjoining the Museum from deaccessioning the forty items for sale, as well as preventing the Museum from "modifying or otherwise altering" the glass works of Tom Patti. The Patti plaintiffs are requesting specific performance of the contract.

The defendants in the Rockwell case are the Trustees of the Berkshire Museum and Maura Healey, in her capacity as Attorney General of the Commonwealth of

Massachusetts. Initially, there were no counterclaims or cross claims asserted by the defendants; however, after the hearing, the Attorney General filed an emergency motion to "convert from defendant to plaintiff if plaintiffs lack standing" and, if so, to seek a preliminary injunction on behalf of the Commonwealth. This motion was allowed.

2. Hatt Case

The plaintiffs in the Hatt case are James Hatt, Kristin Hatt and Elizabeth Weinberg. All are residents of Berkshire County and James and Kristin Hatt are members of the Museum. Elizabeth Weinberg is a former member of the Museum.

The claims raised in the Hatt litigation are breach of contract between the Trustees and its members and breach of fiduciary duty against the individual Trustees.

The defendants in the Hatt case are the Trustees of the Berkshire Museum and each of the 22 individual trustees. The Attorney General is not a defendant in this litigation. The Attorney General did not seek plaintiff-status with respect to this litigation.

ARGUMENT

The legal issue before the court is straightforward and well-traveled; the court must decide whether the plaintiffs are entitled to a preliminary injunction enjoining the Museum from selling or otherwise disposing of the 40 works of art under contract with Sotheby's. A preliminary injunction is an equitable remedy, and thus is not appropriately granted in those circumstances where it would impose an unfair or inequitable advantage on one party. *Cote-Whitacre* v. *Dep't of Pub. Health*, 446 Mass. 350, 357 (2006), abrogated on other grounds by *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015).

Generally, to prevail on a request for a preliminary injunction, the plaintiff must show (1) a strong likelihood of success on the merits of the claim, (2) that they will suffer irreparable harm without the requested injunctive relief and that (3) the harm, without the injunction, outweighs any harm to the defendant from being enjoined. *Packaging Indus. Group, Inc.* v. *Cheney*, 380 Mass. 609, 616-617 (1980). See *Planned Parenthood League of Mass., Inc.* v. *Operation Rescue,* 406 Mass. 701, 710 (1990). In appropriate cases, the court may also consider the risk of harm to the public interest. *GTE Prods. Corp.* v. *Stewart*, 414 Mass. 721, 723 (1993). Relevant to this case, a governmental entity need not show irreparable harm in enforcing a legislative policy or statute. *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984).

Before addressing the merits of a preliminary injunction, a digression is required to put in context a core issue in this case. This case is essentially about art deaccessions. According to the Association of Art Museum Directors (AAMD), deaccession is the practice by which an art museum formally transfers its ownership of an object to another institution or individual by sale, exchange, or grant, or disposes of an object if its physical condition is so poor that it has no aesthetic or academic value. Deaccession is not a pejorative term; it is an integral part of collection management in museums. The failure

to periodically both pare down and complement a collection may render the art collection obsolete. Consequently, deaccession involves both artistic and financial decisions that go to the core of its mission. See generally, Michael Conforti, *Deaccessioning in American Museums: II Some Thoughts for England*, reprinted in A Deaccessioning Reader (Stephen E. Weil ed. 1997).

A conflagration occurs, not with deaccession, but the purpose or reason for the deaccession. If it is used to pay for a greater work of art or to change a collection's focus, deaccession is generally tolerated. However, if it is used for operations or capital expenses, it is discouraged, if not condemned. See Association of Art Museum Directors, *Policy on Deaccessioning* (October 2015). Deaccessioning items from a museum is neither illegal nor unethical per se and every proposed deaccession must be examined on its own merits.

Generally, the art world has relied on two tools to control deaccession: self-regulation and peer-regulation. Self-regulation is simply the policies and procedures that a museum promulgates to guide its operations. The Berkshire Museum allows deaccession and has enacted specific policies for such an event. Peer-regulations relies on accreditation and professional ethics codes. Accreditation is undertaken by the American Association of Museums and ethical considerations are generally regulated by the AAMD. Peer-regulations often have been a powerful tool in shepherding the herd of museums that are considering deaccession for financial reasons. However, there are numerous examples of museums deaccessioning artwork for operating or capital costs. See Ralph E. Lerner and Judith Bresler, Art Law, A Guide for Collectors, Investors, Dealers, & Artists, p. 1503-1504 (4th ed. 2012). To date, the courts have played a very limited role and there is scant legal authority, statutory or case law, when a conflict of this nature arises.[3]

The two issues before the court are (1) whether the plaintiffs (other than the AGO) have standing to assert their claims and, if the non-governmental plaintiffs have failed to establish standing, (2) whether the AGO has satisfied the requirements for a preliminary injunction.

A. Standing

It has long been the rule that only the Attorney General has standing "to protect public charitable trusts and to enforce proper application of their funds" and assets. *Degiacomo* v. *City of Quincy*, 476 Mass. 38, 45 (2016); *Maffei* v. *Roman Catholic Archbishop of Boston*, 449 Mass. 235, 244 n.20 (2007); *Dillaway* v. *Burton*, 256 Mass. 568, 573 (1926) (citing cases). See also G. L. c. 12, § 8. The law presumes that the Attorney General can protect public charitable trusts "more satisfactorily . . . than . . .

[3]New York has enacted a statute, applicable to state institutions, that provides guidelines for deaccessioning. See N.Y. Educ. Law sec. 233-aa (5) (a)-(b) (Consol. 2012). For museums chartered by the New York State Board of Regents, rules have also been adopted regarding deaccessioning. See N. Y. State Board of Regents, Rule sec. 3.27 *Relating to Museum Collections Management Policies*. Massachusetts has no such statute, regulations or case law on this issue.

individuals, however honorable their character and motives may be." *Burbank* v. *Burbank*, 152 Mass. 254, 256 (1890). Since the law authorizes only the AGO to enforce public rights in a public charity, it falls on would-be plaintiffs to demonstrate that they seek to enforce some kind of private right. See *Maffei* v. *Roman Catholic Archbishop of Boston*, 449 Mass. at 245, citing *Lopez* v. *Medford Community Ctr., Inc.*, 384 Mass. 163, 167 (1981).

The Rockwell plaintiffs, Norman Rockwell's heirs and the beneficiaries of his trust, argue that their unique right to enforce promises made to their father gives them standing in this case.[4] But the law does not allow them as heirs or beneficiaries to enforce their father's contracts; that responsibility generally belongs to Norman Rockwell's estate or his trust, which are not parties to this litigation. See *Kobrosky* v. *Crystal*, 332 Mass. 452, 461 (1955) (only executor can maintain action for personal property of deceased person); *Gulda* v. *Second National Bank*, 323 Mass. 100, 103 & n.1 (1948) (trustee generally represents estate unless "existence of the trust itself" is threatened, in which case beneficiaries have standing even if trustee fails to act).

More fundamentally, even if a legal representative of Norman Rockwell's interests had joined this case, the claim, as presented, nonetheless only seeks to enforce Mr. Rockwell's intent regarding the permanent domain of his two works. That private right, if it exists, is no different from the public right that may be enforced only by the Attorney General. See *Dillaway* v. *Burton*, 256 Mass. at 574 (general rule of Attorney General's exclusive standing "has been held applicable to heirs or other representatives of such donors or grantors"). Accordingly, the Rockwell plaintiffs do not have standing to enforce any promise made to their father that would bind a public charity.

Mr. Tom Patti contends that his unique private right to enforce his contract against the museum gives him standing in this action. It is difficult to see how the alleged breach of contract relates to the preliminary injunction the parties seek. Mr. Patti alleges that, pursuant to his contract, the Museum may not unilaterally move his artwork, and he complains that the Sotheby's sale would cause his artwork to be unilaterally moved. To repeat: Mr. Patti's works are not part of the forty artworks set to be sold at auction. "Not every person whose interests might conceivably be adversely affected is entitled to [judicial] review." *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 323 (1998), quoting *Group Ins. Comm'n* v. *Labor Relations Comm'n*, 381 Mass. 199, 204 (1980). A plaintiff must demonstrate injuries that are not "speculative, remote, [or] indirect," which must be "a direct consequence of the complained action" (citations omitted). *Ginther* v. *Commissioner of Ins.*, 427 Mass. at 323. Mr. Patti has failed to show any likelihood that his artwork will be unilaterally moved if the Sotheby's sale proceeds as scheduled; his allegations are too speculative to confer standing upon him to ask the court to enjoin the sale. See *id*.

[4] For the purposes of standing, the merits of plaintiffs' claim that the parties entered into a binding contract or simply employed precatory language is irrelevant.

The remainder of the Rockwell plaintiffs are all members of the Museum who live in Berkshire County. Two of them (Dovydenas and Rousseau) have made substantial donations to the Museum. One of them is a resident of Pittsfield. These plaintiffs variously argue that they have standing to stop the Sotheby's sale by enforcing rights peculiar to them as members, donors, and residents of Pittsfield and Berkshire County. Unfortunately, none of these characteristics are sufficient to supply standing to enjoin the Sotheby's sale.

As the Attorney General conceded at the hearing, a member does not have standing to sue a public charity except in situations like those described in the *Lopez* case. See *Lopez* v. *Medford Community Ctr., Inc.*, 384 Mass. 163. *Lopez* is instructive: the plaintiffs attended a board meeting to mount a coup of the nonprofit's management by paying $2.00 to become associate members and attempting to vote out the board. *Id*. at 165. The board rejected the plaintiffs' membership and the plaintiffs sued alleging corporate mismanagement and seeking a declaration of their rights as members and an injunction against the board's enrolling new members. *Id*. at 165-166. The Supreme Judicial Court held that the plaintiffs did have standing to litigate their claim that the nonprofit unlawfully denied their membership. *Id*. at 168. The SJC, however, explained that only the Attorney General had standing to address the alleged corporate mismanagement, ruling that it was improper to take any evidence on corporate mismanagement without the Attorney General's involvement. *Id*. at 167-168.

The *Lopez* case perfectly illustrates that members may sue when enforcing a right or remedy only available to them, and that, otherwise, they do not have standing. See also *Jessie* v. *Boynton*, 372 Mass. 293, 305 (1977) (dues-paying members had standing where nonprofit hospital board allegedly tricked them into approving bylaws that disenfranchised them). The members in this case allege that, "[b]y planning and approving the sale," the Trustees breached their fiduciary duty. This claim is similar to the *Lopez* plaintiffs' claim of corporate mismanagement and, under *Lopez*, only the Attorney General has standing to bring it.[5]

[5] The Hatt plaintiffs base their standing on the alternative theory that their membership entitles them to bring a derivative claim on behalf of the Museum against the Board. See generally *Bessette* v. *Bessette*, 385 Mass. 806 (1982) (derivative action, as opposed to personal action by shareholder, is appropriate method to resolve claims on behalf of corporation). They cite an unpublished decision for the proposition that such a claim can even be brought in the context of public charities. *Okafor* v. *Soverign Bank*, 2013 WL 6838599 (Mass. App. Ct. 2013) (rule 1:28 decision). The *Okafor* case, denying relief on procedural grounds, did not reach the issue of whether the Attorney General's exclusive standing barred the derivative action. *Id*. at *1; see, e.g., *Harvard Law Sch.* v. *President & Fellows of Harvard Col.*, 413 Mass. 66, 72 (1992) ("Because we affirm the judgment on other grounds, we need not reach the question of capacity of the plaintiffs to sue"). Although this court need not reach the issue either, it appears the Hatt plaintiffs' theoretical derivative rights also would fall within the Attorney General's exclusive purview because derivative actions may only be brought "to enforce a right of a corporation," and the Attorney General has the exclusive authority to enforce the rights of public charities. G. L. c. 12, § 8; Mass. R. Civ. P. 23.1. At any rate, the corporate "members" who may bring a derivative claim must be distinguished from mere dues-paying "members" who do not participate in corporate governance; the Museum's bylaws provide that the Trustees are the corporate members for purposes of G. L. c. 180, § 2 (e), and it follows that, if a derivative action were permissible, only a Museum trustee would be able to bring it.

The plaintiffs who made substantial donations to the Museum argue that they have a private right to sue by virtue of their gifts that is unique from the rights of the general public. They do not, however, allege that their donations conferred any special rights upon them. Since "the Legislature has determined that the Attorney General is responsible for ensuring that . . . charitable funds are used in accordance with the donor's wishes," it is difficult to see why a donor should also have standing to seek the same end. See *Weaver* v. *Wood*, 425 Mass. 270, 275 (1997). The donors in this case have failed to explain how their interest in enforcing the terms of their gifts is any different from the general public's right to have those terms enforced. Accordingly, they do not have standing because the Attorney General exclusively has that right. *Dillaway* v. *Burton*, 256 Mass. at 573-574 (the general exclusivity rule "has been held applicable to cases of donors or grantors of property devoted to charitable uses").

The plaintiffs who are residents of Berkshire County say they have a private right to sue because the Museum was incorporated to benefit "the people of Berkshire County and the general public." As the Trustees point out, this language shows that the "general public" in fact receives the same benefit as "the people of Berkshire County," and, accordingly, the Berkshire plaintiffs have an interest no different from the general public. Even if the charter gave the sole benefit to Berkshire residents, it has been long held that a charitable benefit to an indeterminate class of people is one for the general public and, therefore, members of that class have the same interest as the general public. See *Burbank* v. *Burbank*, 172 Mass. at 256 ("The petitioners show no other interest in these charitable devises and bequests than that of the general public and all other citizens of Pittsfield").

The Pittsfield plaintiffs assert that they have special standing to enforce the 1871 Berkshire Athenaeum restriction that no property of the Athenaeum "shall ever be removed from the town of Pittsfield." The 1871 Act does not expressly give citizens of Pittsfield any right to enforce this restriction. Accordingly, the Pittsfield plaintiffs have no more right to bring an enforcement claim than did the Pittsfield residents in the *Burbank* case; the Attorney General has exclusive authority to enforce any restrictions placed on gifts to the Athenaeum as a result of its statutory charter. G. L. c. 12, § 8 ("The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof").

In sum, none of the Rockwell non-governmental parties have standing to pursue Count I of the complaint and, as such their particular requests for a preliminary injunction with respect to that count will be denied. Further, none of the Hatt plaintiffs have standing to pursue their claims; their request for a preliminary injunction is denied and their complaint will be dismissed.[6]

[6] The Attorney General did not move to pursue the Hatt litigation. As such, the Hatt plaintiffs' claims of breach of fiduciary duty by committing waste and breach by acting in contemplation of a related-party transaction need not be addressed. Suffice to say there is no evidence sufficient to enjoin the sale under

B. The Merits

1. The Attorney General's Posture

As should now be clear, the Attorney General does have standing to request that the court enjoin the Sotheby's auction. Yet this court has some threshold concerns.

There is no dispute that the AGO was initially made aware of the proposed sale of art by the Museum on June 23, 2017. A letter from Museum's counsel clearly revealed the plan to deaccession works of art and other items at public auctions. See G.L. c. 180, § 8A (a). In fact, this missive provided the AGO with a list of the items that it planned to sell, including the Rockwell paintings. The five page communication, together with two exhibits, outlined the reasons for this event and the expected results.

The AGO, through the Non-Profit/Public Charities Division, commenced a detailed and thorough review of this process. As noted in its memorandum, over the summer the Division requested and reviewed numerous documents, conducted over 20 informal interviews, met with Museum officials in Pittsfield, had no fewer than 20 conference calls with Museum counsel and fielded more than 400 contacts by individuals interested in the transaction. Clearly, during the last four months, the AGO was fully engaged in this controversy.

On September 6, Sotheby's announced that November 13, 2017, was the date of the first of a series of auctions. As the clock was ticking down in September and October, the AGO took no steps to intervene or even express dissatisfaction with the planned auctions to the Museum. Ultimately, the non-governmental plaintiffs were forced to file suit on October 20th and 25th, respectively, by asserting claims exclusively within the jurisdiction of the AGO. It was not until October 30, two days before the preliminary injunction hearing, that the AGO entered the fray.

After being dragged into the litigation as a defendant in the Rockwell case, the AGO did not file a cross-claim against the Museum and, more importantly, it did not seek an injunction to stop the art sale. Instead, shortly before the injunction hearing, the AGO filed a memorandum supporting the plaintiffs' request to stop the sale. In the memorandum, the AGO does not assert that the Museum breached its fiduciary duties, only that it has "concerns" and needs more time to complete its investigation.

---

either ground even if the Attorney General were to request revival of these claims. Further, though the Hatt plaintiffs complain that the number of Museum Trustees is in violation of the charter limit, the Attorney General does not take up the Hatt plaintiffs' torch by arguing that that deviation, if it is one, somehow nullifies the Board's actions. The Hatt plaintiffs cited no authority for such a draconian result and this court has found none.

Putting aside the issue of why four months was insufficient to complete this inquiry,[7] at no point does the AGO seek a continuance of the hearing in order to reach a decision on the merits for such a sale; it simply wants the injunction, as asserted by the plaintiffs, to be allowed based on its "concerns." Of particular significance, the AGO does not specify, by affidavit or otherwise, what information is necessary to complete its review, what attempts it has made to obtain such information, and when it will be in a position to offer its opinion regarding the merits of the sale. Given the considerable financial consequences that will result in enjoining the sale, this request to enjoin based on concerns is unusual.[8]

At the hearing, the AGO admitted the obvious: that the other plaintiffs do not have standing to assert claims for breach of fiduciary responsibilities against the Museum. It was equally obvious that if the plaintiffs have no standing their motion for an injunction will fail. Consequently, at the close of business that day, the Commonwealth filed an emergency motion to convert the AGO to a plaintiff and assert a preliminary injunction on behalf of the Commonwealth, but only if the non-governmental plaintiffs have no standing. This motion was allowed the following day.

In this litigation, the AGO is a reluctant warrior. Most of those concerned find the sale of art in any form to be disconcerting, but conduct that raises concern or is troubling is not the legal standard. Whatever "concerns" remained with the AGO, they were insufficient to initially warn the Board that it intends to prevent the sale, nor were they sufficient to mount an injunction on behalf of the Commonwealth when the first auction became imminent. Instead, the burden of carrying this task fell to the non-governmental plaintiffs. This tactic required the AGO to take an astonishing position in its memorandum, a position that was simply anathema to its very core, i.e., members of a charitable corporation arguably have standing to sue a chapter 180 corporation and its board members for breach of their fiduciary duties.[9] The AGO evinced apprehension to the very end, even when it was forced to file a motion to attain plaintiff status, the injunction request was carefully limited to be operative only if the plaintiffs have no standing. In other words the AGO is making every effort to avoid the issuance of an injunction *under its name*. I suspect that if the other plaintiffs had not filed suit, the AGO would not have initiated any litigation.

Thus, the court once again takes particular note of the *Lopez* case. In *Lopez*, the Attorney General had "considered the allegations of corporate mismanagement and had determined that the public interest would not be served by his participation in the case."

---

[7] Chapter 180, § 8A (a), requires that should a non-profit/charitable institution attempt to sell "substantially all" of its assets or that a sale will result in a material change in the nature of the activities conducted by the corporation, notice must be given to the AGO 30 days before the sale.

[8] In an effort to have cases decided on the merits, courts will typically continue any matter if a party so requests by way of motion and affidavit, establishes good reasons for the continuance and indicates when the reasons for the continence will likely be resolved. In this case, the AGO did not seek a continuance.

[9] See Attorney General's Response to Plaintiff's Motion for Temporary Restraining Order, p. 24 (noting that certain plaintiffs "arguably have stronger arguments for standing on particular claims in the Complaint than the other Plaintiffs" and concluding "the AGO respectfully defers on whether or not standing requirements are satisfied as to various plaintiffs").

384 Mass. at 166. Since the Attorney General declined to pursue the matter, the Supreme Judicial Court held that it was inappropriate for the trial court to consider any issues, such as the mismanagement allegations, that only the Attorney General could have litigated. *Id*. at 167. In this case, the AGO's deliberate course of action and general reluctance gives the court pause.

It is obvious that the AGO's lack of aggressiveness speaks volumes to this court. As such, this court takes the AGO at its word that its "concerns," are in fact concerns only, and that, absent these "concerns," the AGO would have no qualms with a museum in severe financial straits deaccessioning and selling some of its most valuable objects to finance a new approach for serving the purposes of its charter. See *Attorney General* v. *Hahnemann Hosp.*, 397 Mass. 820, 833 (1986) (not inappropriate for public hospital to convert its assets to meet amended purpose). Because the AGO has not argued otherwise, this court is constrained to consider only the arguments before it. See *Lopez*, 384 Mass. at 166-167.

In her brief in support of the injunction,[10] the Attorney General contends that (1) the AGO has yet to complete its review of the Trustees' plan to auction the art and there are aspects which "raise concerns"; and (2) allowing the sale to go forward before the AGO completes its investigation would "interfere irreparably with the AGO's duty to protect charitable assets and the public interest, as many of these valuable pieces of art could be sold to private buyers outside of Massachusetts beyond the reach of this Court."

The AGO's "concerns" are as follows: (1) the Museum may be prohibited from selling artwork acquired before 1932 due to the Pittsfield geographic restriction; (2) Norman Rockwell may have restricted his gifts by requiring that his artwork remain with the Museum permanently or that it only be used to benefit the Museum's art collection; and (3) the Trustees' plan may contravene its purpose. These three concerns essentially allege a breach of trust. AGO Memo, p. 24 ("there is substantial evidence to show that if the Museum were to proceed . . . it may violate constructive trusts placed on these objects . . ."). The AGO further argues that the "core issue" is whether the Trustees have breached or will breach their fiduciary duties by selling the objects as planned.

All told, the AGO asserts three grounds in support of her motion for a preliminary injunction to enjoin the sale: (1) the Sotheby's sale could be a breach of fiduciary duty; (2) the sale could be a breach of any of three alleged trusts; and (3) if the sale occurs before the AGO finishes its investigation, the public will have been deprived of the AGO's oversight. The Sotheby's sale must be enjoined if the court concludes it is more likely than not that the Attorney General will prevail on any of these three grounds and that, as a result, the sale would adversely affect the public interest. See *Edwards* v. *City of Boston*, 408 Mass. 643, 647 (1990).

[10] The Rockwell and Hatt plaintiffs each initially moved for a temporary restraining order. The requested relief is treated as one for a preliminary injunction. See *Addison* v. *Belay*, 440 Mass. 1010, 1010-1011 (2003) (citing cases).

2. Breach of Fiduciary Duty

For a preliminary injunction to issue based on a breach of fiduciary duty, the Attorney General must show it is more likely than not that (1) the Trustees had a fiduciary duty to the public; (2) that the Trustees breached or will breach that duty; (3) that the public has been or will be damaged; and (4) that the Trustees' fiduciary breach has caused or will cause the public injury. See, e.g., *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. 153, 165 n.19 (1999).

The AGO argues that the Trustees breached or will breach their statutory duty of care as a charitable corporation. There is some dispute as to what rule the court should employ to determine whether the Trustees acted with the requisite care. While for-profit businesses are subject to the so-called business judgment rule, the Attorney General suggests that nonprofits should be scrutinized under a heightened standard in Massachusetts, as ostensibly implied by its case law. See *Boston Athletic Assn*. v. *International Marathons, Inc*., 392 Mass. 356, 366 (1984).

However, the SJC's definition of the private business judgment rule is virtually indistinguishable from the statutory duty of care for nonprofits. Compare *Halebian* v. *Berv*, 457 Mass. 620, 627 n.11 (2010) (the business judgment rule requires a board to perform its duties "in good faith, with the care that a person in a like position would reasonably believe appropriate in similar circumstances, and in a manner . . . reasonably believe[d] to be in the best interest of the corporation"), *with* G. L. c. 180, § 6C (a nonprofit board must perform its duties "in good faith and in a manner [it] reasonably believes to be in the best interest of the corporation, and with such care as an ordinarily prudent person in a like position with respect to a similar corporation organized under this chapter would use under similar circumstances").

Interestingly, the *Boston Athletic Association* case, which is the Attorney General's sole support for a heightened standard, predated the Legislature's enactment of G. L. c. 180, § 6C, by about five years. See St. 1989, c. 644, § 5 (establishing statutory standard for due care). It would therefore appear that the Legislature intended for the usual "business judgment rule" to apply in the nonprofit context, which appears to reflect prior law. See, e.g., *Ames* v. *Attorney General*, 332 Mass. 246, 249 (1955) (Attorney General opined that "the judgment of trustees cannot be overridden by the courts unless the trustees decide arbitrarily, capriciously, or in bad faith"). That said, this court scrutinizes the Trustees' actions to confirm that their decisions measure up not only to the standard business judgment rule, but also that their choices reflect their "high degree of accountability to the individual donors as well as the community." *Boston Athletic Assn.*, 392 Mass. at 366.

The Attorney General, agreeing that the Museum was in dire straits, conceded at oral argument that the Trustees' decision to deaccession and sell the forty objects was in good faith. As such, she solely contends that the decision was unreasonable under the

circumstances. The court addresses each alleged unreasonable aspect of the decision in turn.

First, the Attorney General argues that the Trustees unreasonably chose an exorbitant revitalization plan. It is true that, while the Trustees' consultant found that it needed $25.6 million to stabilize its operations, they opted for a plan costing $60 million -- $20 million for upgrades and $40 million toward endowment. But the Trustees made reasonable efforts to consider multiple plans over a two-year investigatory period. Further, adding $40 million to the Museum's endowment is hardly an aggressive choice and demonstrates a commitment to the community to keep the Museum operational. The decision to maximize the Museum's endowment and to improve substantially its facilities was not unreasonable, nor did it fail to take into account the individual donors and the community.

Second, the Attorney General contends that the Trustees' decision to deaccession was unreasonable because it violated general museum ethics and would result in sanctions. The Attorney General cites no case, statute, or AGO policy in support of the proposition that, to be reasonable, corporate board decisions must follow the professional ethics of the field. The Trustees evidently considered the ethical implications of their decision and weighed those implications heavily. However, as noted, deaccessioning has become a necessary evil in the museum industry due in large part to loss of funding and economic upheaval. See generally Lerner & Bresler, *supra*, at p. 1503-1504. The Trustees have not spurned the ethical guidelines and exposed the Museum to sanctions without cause: indeed, as a result of the sale, the Museum will garner significant assets to tide it over during the expected freeze-out from the industry during which time the Museum will not be loaned exhibits from most, if not all, accredited museums. While public and professional dissatisfaction is understandable, that is not enough to render the decision unreasonable given the Museum's trying financial circumstances. The Trustees' decision to invest most of the proceeds in the Museum's endowment again indicates their careful consideration of the individual donors and the community when taking this difficult step.[11]

Third, the Attorney General argues that the Trustees unreasonably decided to violate the Museum's collections management policy by choosing to deaccession the Museum's most valuable artwork to pay for operational costs. Yet, as the Trustees explained, they are not bound by this policy. The policy is not referenced in the Museum's charter, its articles of incorporation, nor in its bylaws. Indeed, there is nothing requiring the Museum to even have a collections management policy at all. The Trustees' decision to override its policy was reasonable in this circumstance in light of the extreme financial concerns before them, which are absent from the day-to-day decisions governed by the policy. The Trustees' deliberate, two-year decision-making

[11] In a related argument, it is contended that deaccessions of this nature will chill relations with potential future donors to the Berkshire Museum, and to museums in general. The argument overlooks the simple fact that donors are free to restrict their gifts in express terms, and, quite often, they do.

process demonstrates that they were mindful of the donors and the community in that they did not disregard the collections management policy in haste.[12]

Fourth, the Attorney General faults the Trustees for failing to discover the purported Athenaeum-era restrictions on some of the deaccessioned objects and for failing to notify the AGO of those restrictions. The Attorney General believes these failures rendered the decision unreasonable, and she is also troubled that the Trustees did not contact the AGO until after they voted to deaccession all of the objects.

As an initial matter, there is no law nor AGO policy requiring museums to notify the AGO when deaccessioning objects. See G. L. c. 180, § 8A (c) (Attorney General notification required when liquidating all or substantially all assets). With respect to the supposed restriction that objects donated before 1932 cannot leave Pittsfield, the Trustees take the position that there is no such restriction and that no notice was necessary. Whether or not the Trustees were correct, the potential restriction did not render unreasonable their decision to deaccession these older objects. The Museum's accession slips did not reflect any restrictions on the pre-1932 objects. Further, one could fairly assume that, even if there was arguably a restriction on objects donated that long ago, there was little chance that someone would raise or attempt to enforce the restriction. Finally, a reasonable inquiry into the matter might have revealed that the provenance of all of its earliest objects is traced back to Zenas Crane when he started the Museum in 1903, and that, in 1932, when Mr. Crane's family donated sufficient money for the Museum to form a separate entity, the resulting charter contained no geographical restriction. Thus, the Trustees could well have concluded that Zenas Crane, who donated the earliest objects, and perhaps many of the pre-1932 objects up for auction, had no intention that they be kept in Pittsfield.

At any rate, the risks attendant to the Trustees' decision to deaccession these older items were so minimal that their failure to notice the possibility of a restriction (if that is what happened) or their failure to seek a declaration that there are no restrictions was reasonable under the circumstances. Notably, it took two months of substantial preliminary investigation by the AGO to discover the possibility that certain objects were restricted by the Athenaeum charter. And it was not the AGO that made the discovery; the information came from a member of the community. In light of the AGO's own failure to discover an arcane theory for restricting certain objects, the failure of the

[12] The Attorney General's concern that the Trustees' methodology violated the Museum's charter or its core purposes is discussed *infra*. It is worth noting that, in her memorandum, the Attorney General seems to suggest the possibility that accessioning merely to deaccession to pay for operational costs could violate the fiduciary obligations of a museum's board of trustees. See AGO Memo at p. 23 & n.19. Of course, there is no allegation in this case that the Museum's "acquisitions policies," nor the way in which those policies were carried out by professional staff, have caused "certain types of deaccessioning." Compare Patty Gerstenblith, "Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public," 11 Cardozo J. Int'l & Comp. L. 409, 420 (2003) (stating that certain "acquisition policies" could breach of duty of care).

Museum's volunteer board to notice or raise the purported restriction does not seem unreasonable.[13]

The Trustees' decision was not unreasonable for any reason raised by the Attorney General. Nor did their decision fail to take into account the public interests at stake. Rather, they undertook a deliberate and careful review of the available options and chose what they believed to be the appropriate course. That was their duty. Though the Attorney General, the non-governmental plaintiffs, and perhaps many in the public might disagree with the resulting decision, the law does not hold the Trustees to a standard of popular or political approval. Rather, the law requires reasonable care under the circumstances, and there is no evidence that the Trustees afforded this decision less than reasonable care.

3. Breach of Fiduciary Duty by Breach of Trust

The Attorney General also complains that the sale must be stopped because it will breach one of three possible "constructive" trusts: the trust supposedly arising from the pre-1932 restrictions, Norman Rockwell's purported inter vivos trust, and the trust intrinsic to the Museum's charter.[14] To support a preliminary injunction, the Attorney General must demonstrate by a preponderance of the evidence that (1) a trust exists; (2) the Trustees breached or will breach the trust; (3) the public was or will be injured; and (4) that the Trustees' fiduciary breach caused or will cause the injury to the public. *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. at 165 & n.19. As a threshold matter, any breach of trust will depend on whether a trust exists. *Id*.

The Attorney General submits that the trusts at issue are not based on express declarations of trust, but rather are "constructive trusts." "A constructive trust is an equitable remedy used to avoid the unjust enrichment of one party at the expense of another, where legal title to the property in issue was obtained either by fraud, in violation of a fiduciary relationship, or where information confidentially given or acquired was used to the advantage of the recipient at the expense of the one who disclosed the information." Newhall, Settlement of Estates (5th ed.) § 36:2, p. 13. There is no allegation that any of the proposed trusts arose from fraud, a violation of a fiduciary relationship, or unfair use of secret information, so the doctrine of constructive trusts does not apply. See *Christian* v. *Mooney*, 400 Mass. 753, 764-765 (1987) (no basis of imposing constructive trust where defendant had no knowledge of alleged fraud and there had been no unjust enrichment).

---

[13] Even if the Trustees breached their duty in this regard, this court, as discussed *infra*, concludes that the Pittsfield geographical restrictions do not apply to the objects transferred from the Athenaeum to the Museum. As such, the claim nonetheless fails because the Attorney General has not shown that the breach injured or will injure the public. See *Hanover Ins. Co.* v. *Sutton*, 46 Mass. App. Ct. at 165 & n.19.

[14] The Attorney General takes no position on the Rockwell plaintiffs' claim that assets received by the Museum prior to 2016 are restricted from ever being sold. In any event, the catch-all provision in the Museum's charter (affording it the ordinary powers of similar corporations) authorized such sales. St. 1932, c. 134, § 3.

However, elsewhere in her memorandum, the Attorney General refers to the proposed trusts as "implied trusts," and cites as an example language from an advisory Supreme Judicial Court decision. See AGO Memo, p. 13 (describing "gifts to trustees . . . accepted by them to be held upon trusts expressed in writing or necessarily implied from the nature of the transaction . . ."), quoting *Opinion of the Justices to the Senate*, 237 Mass. 613, 617 (1921). But the term "implied trusts" also does not seem to fit the circumstances presented in this case. See S.M. Dunphy, Probate Law and Practice § 37.2, at 3 (2d ed. 1997) (defining implied trusts as "involuntary trusts which are constructive or resulting . . . inferred by the rules and principles of equity"). Each of the trusts proposed by the Attorney General are actually best categorized as simply voluntary inter vivos (that is, lifetime) trusts, which are "direct or express trusts which spring from the agreement of the parties." *Id*. It is the terms of the trust that, according to the Attorney General, were implied, not the trusts themselves. See, e.g., *Cooney* v. *Montana*, 347 Mass. 29, 34 (1964) ("An express trust in personal property may be created and proved by parol"), quoting *Rugo* v. *Rugo*, 325 Mass. 612, 617 (1950).

A gift to a charity usually creates some kind of charitable trust, with terms that are either express or implied based upon the circumstances of the gift. See *Jackson* v. *Phillips*, 96 Mass. 539, 556 (1867) (defining charity as "a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons" and explaining that it "is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature"). When, as in each of the proposed trusts in this matter, a donor gives property to an existing public charity, the donor can choose to donate with or without restrictions. See *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. 330, 333-334 (1941). When there are no restrictions on the gift, the public charity's use is confined "to the purposes for which it was organized." *Id*. at 334. The public charity could then use the gift "in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes . . . ." *Id*.

On the other hand, when the donor restricts the gift, the public charity's use is limited to "the particular purpose for which the property was given." *Id*. Accordingly, in this case, if the charitable trust is alleged to be unrestricted, the court must determine the scope of the corporate purposes to decide whether the Sotheby's sale would be in breach of trust. And if the charitable trust was allegedly restricted by the donor, then the court must determine the breadth of those restrictions to see if the Sotheby's auction would violate them, breaching the trust.

(a) The Pre-1932 Restrictions

The first charitable trust for consideration is that which allegedly governed all donations to the Berkshire Museum before it was separately incorporated in 1932. The Attorney General does not contend that any of these early gifts were expressly restricted by their donors, so they fall into the category of charitable gifts usable "in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes." *Id*. See *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 290 (1907) (gift to a charitable corporation, without more, adopts the "publicly avowed purposes of its

organization and action"). Accordingly, the Attorney General argues that these gifts are subject to the restriction in the Berkshire Athenaeum's charter prohibiting "real and personal property, or such gifts, devises or bequests" held by the Berkshire Athenaeum from ever being removed from Pittsfield.[15] The issue, for purposes of the preliminary injunction analysis, is whether it is more likely than not that the "corporate purpose[]" of the Berkshire Athenaeum encompasses the Pittsfield geographical restriction. See *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. at 334. See also *Commonwealth* v. *Fremont Investment & Loan*, 452 Mass. at 74.

Section 1 of the Berkshire Athenaeum's corporate charter provides that it was to be incorporated "for the purpose of establishing and maintaining in the town of Pittsfield an institution to aid in promoting education, culture and refinement, and diffusing knowledge by means of a library, reading-rooms, lectures, museums, and cabinets of art and historical and natural curiosities." It then goes on to provide (according to the marginal annotations) "Powers and duties," terms regarding "Real and personal property," authorization for "Pittsfield [to] appropriate money for support of library," and a stipulation that "Trustees may fill vacancies in board." See St. 1871, c. 129, as appearing in Acts and Resolves Passed by the General Court of Massachusetts in the Year 1871 at 507. The Pittsfield geographical restriction is listed in Section 2, describing "Real and personal property," according to the margin notes. *Id*. Since the geographical restriction neither appears within nor closely follows the purposes provision, the corporate purposes plainly do not encompass the restriction barring removal of items from Pittsfield. That is sufficient to end the inquiry for purposes of the preliminary injunction analysis. See *Commonwealth* v. *Fremont Investment & Loan*, 452 Mass. at 74.

Even if the fact that the restriction is not listed in the "purpose" section of the statutory charter was somehow unpersuasive, it appears that, on closer analysis, the Pittsfield geographical restriction is actually a proviso regarding corporate authority to hold property. Section 2, paraphrased, with punctuation and emphasis unchanged, provides as follows:

> The Athenaeum may hold up to $250,000.00 of property; the Athenaeum must honor restrictions on donor gifts expressed in writing: *provided*, that those restrictions are not inconsistent with "the provisions of this act"; and *provided, further*, that no property held by the Athaneum may be removed from Pittsfield.

St. 1871, c. 129, § 2. As parsed, the Legislative intent was not to limit the purpose of the Berkshire Athenaeum to holding objects in Pittsfield in perpetuity; rather, it intended to restrict the authority of the Athenaeum trustees to keep Athenaeum property in other locations. In other words, the restriction is a limit on possession, not a limit on use. To enforce this limitation as if it were impliedly adopted by donors would be no different from enforcing the first sentence of Section 2, limiting the amount of money the trustees

[15] In addressing this issue, the court assumes, but does not decide, that unrestricted donations of artifacts to the Museum and the Athenaeum prior to 1932 were subject to the Athenaeum's charter, as opposed to the incipient Museum's express or implied purposes.

could hold—which is a type of restriction that the SJC has found to be "merely directory." See *Hubbard* v. *Worcester Art Museum*, 194 Mass. at 285-286 (monetary limits in charitable corporate charters are "similar to [those] resulting from a statutory provision which is merely directory").

While the Attorney General doubtless could enforce these restrictions against the Athenaeum, see *id*., it does not follow that "merely directory" provisions merged with the Athenaeum's core purpose, allowing enforcement against the Museum with respect to objects inherited from the Athenaeum. It is also worth noting that the clause immediately preceding the Pittsfield restriction essentially provides that donor-imposed restrictions should not conflict with the corporate purposes; if the geographical restriction was meant to modify the corporate purpose, it logically should have been listed before the clause referring to corporate purposes. See *Clarke* v. *Board of Appeals of Nahant*, 338 Mass. 473, 480 (1959) (drafters should have expressed "intention more clearly, if that was their purpose"). For all of these reasons, the Pittsfield geographical restriction cannot be considered part of the Berkshire Athenaeum's corporate purpose, and as such the Museum is not restricted from using objects received from the Athenaeum in a manner that removes those objects from Pittsfield.

(b) The Rockwell Charitable Trust

The Attorney General argues that the Rockwell gifts were subject to a charitable trust separate from that governed by the Museum's charter. It is contended, then, that the Rockwell gifts are governed by the second type of charitable trust, in which the donor makes particular restrictions, which, if accepted by the charity, bar the charity from using the gift in contravention of those restrictions. See *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. at 334. "Whether a trust is created depends primarily upon the manifestation by the parties of an intention to create a trust and that is ordinarily a question of fact." *Russell* v. *Meyers*, 316 Mass. 669, 672 (1944). The donor's intent "is to be ascertained from a study of the instrument as a whole in light of the circumstances attending its execution. Search should be made for a general plan, presumably designed to express a consistent and harmonious purpose." *Jewett* v. *Brown*, 319 Mass. 243, 248 (1946). If there is any doubt as to the donor's intent, the court should consider "the circumstances existing and known" to the donor at the time of the gift. *McKelvy* v. *Terry*, 370 Mass. 328, 334 (1976). See *Kendrick* v. *Ray*, 173 Mass. 305, 308 (1899) (where only evidence of trust was listing "trustee" after naming beneficiary, evidence of terms of trust and declaration to true beneficiary was admissible).

Extrinsic evidence relating to events taking place after the time of the gift cannot be considered when determining the donor's intent, but such evidence may be used "to show facts relevant to his knowledge, state of feelings toward or relation to the claimants." *Boston Safe Deposit and Trust Co.*, v. *Prindle*, 290 Mass. 577, 582 (1935). Words should be given their "ordinary meaning" unless it is shown that the parties intended to use them in a different sense. *Smith* v. *Livermore*, 298 Mass. 223, 234 (1937).

In 1958 and again in 1966, Norman Rockwell gave certain paintings to the Museum without declaring any trust. Shortly after Rockwell donated the first painting, he received a letter from Stuart Henry, the Museum's director, accepting the paintings and stating that they were to be part of the Museum's "permanent collection."[16] The Museum has attached affidavits, which the Attorney General has not contradicted, stating that "permanent collection" is and has long been museum parlance for objects accessioned by the museum and implies no actual permanency. These affidavits persuade the court that the phrase "permanent collection" should be accorded this specialized meaning, which would have been well-known by Rockwell and second nature to Henry.[17] See *id*. at 234. Accordingly, Henry's letter does not support the existence of a contemporary declaration by Rockwell that the paintings were to stay with the museum forever.

As the parties generally acknowledge, deaccession of artwork was not commonplace at the time of either of Rockwell's gifts. To the extent that may bear on the terms of a purported trust, it gives the court little reason to believe that, by gifting his paintings to the Museum without any express restriction, Rockwell nonetheless restricted the Museum from deaccessioning his work. If deaccessioning was so unheard of that Rockwell would not have thought to have restricted the Museum's right to deaccession his artwork, it suggests he did not restrict the Museum's rights in that fashion. On the other hand, if Rockwell and the Museum generally understood the possibility of deaccessioning, Rockwell's failure to expressly restrict the Museum from doing so suggests that restricting the gifts was not his intent.[18]

Based on the foregoing, the evidence of Rockwell's intent to create a restrictive, stand-alone trust (separate from the Museum's corporate purpose) is insubstantial. But even if the court were to agree that Rockwell's manifestation of intent is supported by the evidence, or that no such requirement is necessary under the circumstances, the Attorney General has still failed to submit sufficient evidence for the court to conclude it is more likely than not that Rockwell intended to restrict the use or sale of his paintings more or differently than any restrictions envisioned in the Museum's charter. The competent evidence submitted to show that Rockwell affirmatively restricted the Museum's use of his paintings is as follows. First, Thomas Smith, a retired curator of the Museum acquainted with Rockwell averred that it was his understanding, at the time of the donations, that Rockwell donated the paintings in question because "they were his favorite oil paintings and he wanted them to stay on display in the Berkshires." Second, contemporary correspondence between Rockwell and Stuart Henry seems to indicate a close relationship and also shows that Henry sometimes asked Rockwell before loaning

[16] If a similar letter exists with respect to the 1966 donation, it was not presented to the court.
[17] In the current version of the Museum's collections management policy, "[t]he term 'Permanent' refers to those objects fully accessioned into the museum collection by following all standard procedures (see Accessions)." Klepetar Affidavit, Ex. F, at 7.a.
[18] In all likelihood, the possibility that the Museum might sell the works probably crossed their minds. Compare *Georgia O'Keeffe Foundation* v. *Fisk University*, 312 S.W.3d 1, 6 (Tenn.App. 2009) (noting that, in 1949, Georgia O'Keeffe expressed her intent that Fisk University would not sell or exchange any objects donated from her husband's estate). Rockwell donated his paintings to the Museum in 1958 and 1966.

out the gifted artwork. Third, the Attorney General submitted Rockwell's trust, which, having been drafted after deaccessioning became more common, conditioned gifts to museums on their promise not to sell his artwork.[19]

With respect to Mr. Smith's affidavit, he provides no evidence to support his belief that these paintings were Rockwell's favorites, or that Rockwell intended them to stay on display in the Berkshires. Indeed, although the parties submitted voluminous exhibits to support their claims, and although Rockwell's sons are parties to this litigation, 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 or to be displayed forever in the Berkshires. As far as the correspondence between Rockwell and Henry, it does little to move the needle in either direction. Henry had ample reason to seek out Rockwell's approval when dealing with his paintings: Rockwell was his friend, Rockwell was an iconic artist of international renown, and Rockwell had gifted the Museum with very valuable artwork. Henry's thoughtfulness in his dealings with Rockwell and his art was natural under the circumstances and thus is in no way suggestive of some express obligation.

Finally, while Rockwell's trust does tend to show his interest, later in life, in restricting the sale against his artwork, a close reading of the trust reveals that, if all gifts fail, the Museum is the default beneficiary of Rockwell's artwork—again, with no express restrictions. The sum total of the evidence tends to show that Rockwell simply wanted to benefit a museum that he particularly enjoyed.[20] It is public record that, by the time of the gift to the Museum, Rockwell's paintings had been featured on every *Saturday Evening Post* cover for some four decades. Rockwell was likely quite experienced with contracting his artistic rights and there is no reason to infer that he lacked the shrewdness needed to unequivocally restrict the valuable artwork when he gave it to the Museum.[21] As this court is unable to find any likelihood that Rockwell specially restricted his gift to the Museum, the gifts are instead controlled by the corporate purposes provided in the Museum's charter at the time of the gifts. See *Newhall* v. *Second Church and Soc. of Boston*, 349 Mass. 493, 500 (1965) ("That these three vessels were appropriate for covenanted church use distinguished from general parish use should guide the disposition of the proceeds should they be sold. It does not limit the right of the title holder to sell them").

---

[19] The trust, and some of the correspondence, are dated after the time of Rockwell's gifts and are therefore irrelevant to the issue of his donative intent. See *Boston Safe Deposit and Trust Co.*, v. *Prindle*, 290 Mass. 577, 582 (1935). As such, this evidence is considered only to the extent it may bear upon the terms of any trust Rockwell may have created when he donated his paintings to the Museum. See *Kendrick* v. *Ray*, 173 Mass. 305, 308 (1899).

[20] The Attorney General argues that the fact that Rockwell was a Museum member and donated cash "helps explain" why he did not formalize his wishes with respect to the donated paintings. Indeed; Rockwell's close relationship with the Museum tends to show his interest in benefiting the Museum outweighed any interest in keeping his artwork permanently displayed in the Berkshires.

[21] There is no evidence before the court tending to show that Rockwell was overly trusting, unsophisticated, or careless in his professional or personal dealings.

(c) Charitable Trusts Based on the Museum's Charter

The Attorney General lastly seeks to enjoin the Sotheby's sale because the Museum's "New Vision" plan could contravene its corporate purposes. Unrestricted gifts to the Museum are only usable "in such manner as those in control of the corporation deem best for the accomplishment of the corporate purposes." *Animal Rescue League of Boston* v. *Assessors of Bourne*, 310 Mass. at 334. The Museum's statutory charter provides that it was to be incorporated "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, the culture history of mankind and kindred subjects by means of museums and collections . . . ." St. 1932, c. 134, § 3.[22] Thus, all unrestricted gifts donated to the Museum may only be used in advancement of maintaining the facilities, and promoting art, science, history, and "kindred subjects." *Id*. See *Hubbard* v. *Worcester Art Museum*, 194 Mass. at 290.

The question for this court is whether it is more likely than not that the sale of a substantial portion of the Museum's art would violate its corporate purposes. There is no evidence that the sale of art, alone, is in any way a violation of the Museum's charter. Indeed, deaccessioning itself is not even a violation of professional ethical standards, nor is there any prohibition against selling unrestricted donated objects in Massachusetts without Attorney General or court approval. See AAMD Code of Ethics, available at https://aamd.org/about/code-of-ethics ("A museum director shall not dispose of accessioned works of art in order to provide funds for purposes other than acquisition of works of art for the collection"); Attorney General Guidelines on Notice Requirements of G.L. c. 180, §8A(c) ("Notice to the Attorney General is required under Section 8A(c) only when the transaction involves all or substantially all of a charity's assets"). Because deaccession is neither barred by the Museum's charter, nor by any professional or legal authority, the sale, alone, does not violate the Museum's corporate purpose. See *Newhall* v. *Second Church and Soc. of Boston*, 349 Mass. at 500.

Recognizing this, the Attorney General contends that her problem is not with the sale alone, but rather with the Museum's bold New Vision (which incorporates the sale) because the New Vision allegedly could change the nature of the Museum. See *Attorney General* v. *Hahnemann Hosp.*, 397 Mass. 820, 836 (1986) (stating in dicta that a public charity must use donated funds for "similar public charitable purposes"). But there is scant authority for this court to enjoin a party, let alone a corporate board charged with a duty of reasonable care, from doing a lawful act for the sole reason that it anticipates that party will use that lawful act to springboard into an unlawful one. Cf. *Commonwealth* v. *Cantres*, 405 Mass. 238, 240 (1989) (criminal conspiracy punishes "unlawful agreement" to do unlawful act or "lawful act for unlawful purposes").

Even if such an injunction could ever be appropriate, the court has no reason to believe that, should there be any restriction on the use of funds generated from the

[22] The Museum amended its charter in 2016 by filing amended articles of incorporation in which the Trustees reiterated the charter purposes.

Sotheby's auction, the Museum would violate the restriction rather than simply petitioning the probate court for a deviation in order to accomplish its goals.[23] See *Trustees of Dartmouth College* v. *Quincy*, 357 Mass. 521, 534 (1970). Should the court deny the relief sought, the Museum would simply be constrained to take a less transformative approach.[24] See *Attorney General* v. *Hahnemann Hosp.*, 397 Mass. at 836. None of these likely results involves any breach of the Museum's charter.[25] Accordingly, it is unlikely that the Sotheby's sale will breach the Museum's charter and the court has no cause to grant injunctive relief on this ground.

4. The Attorney General's Incomplete Investigation

Lastly, the Attorney General requests injunctive relief because the AGO has not yet finished investigating its concerns.[26] The argument appears to imply that, should the AGO learn the Museum's planned action is more inappropriate than it seems, it would more vigorously protect the public rights at stake. Or, perhaps, the Attorney General suggests that, whenever the AGO opens an investigation, the proposed action should be enjoined until the investigation can be concluded as a matter of public interest. Neither argument is persuasive in this case.

The AGO's clear policy is that charities only need to give official notice when they seek to sell substantially all of their assets.[27] See Attorney General Guidelines on

---

[23] Based on the AGO's involvement at this stage, it is probable that the AGO will monitor the Museum's use of the funds and it is possible that it might even spiritedly pursue further litigation to enforce the Museum's charter. Thus, although this court concludes that the motion for injunctive relief must be denied, it is suggested the Museum might do well to consider the AGO's continuing leverage before proceeding with the auction.

[24] It bears repeating that most of the auction funds, i.e., those in excess of $26 million, are expected to be invested in the Museum's endowment.

[25] The Attorney General attempts to argue that, in selling the Rockwell art in particular, the Trustees would ignore the "very essence" of the Museum. See *First Bostonview Management, LLC* v. *Bostonview Corp*., 88 Mass. App. Ct. 89, 90 (2015). But, as stated, the core purpose of the Museum is not merely the preservation of art—it is to promote art, natural science, and cultural history. Thus, cases such as *Trs. of the Corcoran Gallery of Art* v. *District of Columbia*, in which the court rejected deaccessioning due in part to the fact that the gallery was dedicated solely to "the fine arts generally," are easily distinguished. See 2014 D.C. Super. LEXIS 17, at 67 (D.C. Super. Aug. 18, 2014). In fact, the Museum's corporate purposes are broader than those reviewed in *Buffalo Fine Arts*, where the proposed deaccession sale "in no way constitute[d] a departure, or an ultra vires act, in violation of its corporate purposes." See *Dennis* v. *Buffalo Fine Arts Acad.*, 2007 N.Y. Misc. LEXIS 941, *10 (N.Y. 2007). Compare *Museum of Fine Arts* v. *Beland*, 432 Mass. 540, 544-545 (2000) (donor's intent was "to create and gratify a public taste for fine art," thus, sale of paintings held inappropriate as "antitheses of [donor's] intent").

[26] The Attorney General's powers to investigate public charities are prescribed in G. L. c. 12, §§ 8H and 8I. Section 8H provides that the AGO "may conduct an investigation upon application to and with the approval of a judge of the trial court" whenever it suspects a breach of trust or other public charity malfeasance. G. L. c. 12, § 8H. It is not clear whether the AGO ever opened a formal, § 8H, investigation; there is no evidence before this court that the AGO's investigation was specifically authorized by any court.

[27] There is no evidence that the forty works set for auction comprise substantially all of the Museum's assets. See Affidavit of Gary J. Moynihan, CPA, Exhibits B, C, & D (indicating, on page 19 of each annual financial statement, that the Museum does not capitalize its collection for purposes of valuation). Of course, even if that is the case, the Trustees' courtesy notice to the AGO satisfied the G. L. c. 12, § 8A (c) notice requirement and the AGO does not contend otherwise.

Notice Requirements of G.L. c. 180, §8A(c) at 2. The Attorney General Guidelines recommend that boards "submit an informal written explanation" when the transaction is "significant," so the Public Charities Division can evaluate whether "the transaction raises other concerns under the law of public charities." *Id*. at 3. The Guidelines go on to explain that "[f]or example, other transactions may require court approval even where they do not involve substantially all of a charity's assets, such as transactions involving material changes in asset use, modification of donor restrictions, or sale of assets for less than fair market value." *Id*.

Here, the Trustees' proposed transaction, the Sotheby's sale, will be significant. However, as already explained, the sale, alone, does not change the asset use, does not modify any donor restriction, and will not be for less than fair market value. The Attorney General has not identified any other theory by which the proposed auction would violate the law of public charities. More to the point, the Attorney General has not moved for a continuance, stated the period of time required to investigate this matter, or in any way communicated why the AGO needs more time to complete its investigation than the four-month period that has already elapsed.

Tellingly, the Attorney General Guidelines conclude that "[i]t is in the organization's and the board members' best interest to maintain records of the decision-making process that was followed in the event that questions arise after a transaction is completed *that did not involve notice to the Attorney General*." *Id*. (emphasis added). This policy clearly contemplates occasions when a public charities issue was only noticed in hindsight. If the usual course is that a charity might sell an object without informing the Attorney General and be subject only to scrutiny to ensure it operated under the appropriate standard of care, it is surprising that the AGO would seek to enjoin such a transaction potentially jeopardizing millions of dollars of charitable funds.[28] It is bewildering that the AGO would seek such an injunction, at such a cost, when its investigation has uncovered no evidence of bad faith, no conflict of interest, no breach of loyalty, no express gift restrictions, and yielded unconvincing evidence of implied gift restrictions or a breach of reasonable care during a two-year decision-making process. Accordingly, while the AGO would be likely to succeed on the merits on its claim that proceeding with the auction would sidestep its investigative process in violation of G. L. c. 12, § 8, it cannot show that injunctive relief would promote the public interest. See *Commonwealth* v. *Mass. CRINC*, 392 Mass. at 89.

In the usual case, it probably promotes the public interest to empower the Attorney General to thoroughly investigate whatever it wishes to investigate on behalf of the public. But all investigations are not cut from the same cloth. This particular investigation has yielded unconvincing evidence of charities violations over a period of four months and the AGO has given this court utterly no reason to expect that convincing

[28] The Trustees attach credible affidavits stating that, if the auction should be delayed, Sotheby's will be unable to generate similar consumer interest if and when the injunction is lifted. The Attorney General has introduced no evidence to the contrary. As noted, the "hammer value" of the items up for auction is approximately $46,000,000 to $68,000,000. A decrease in consumer interest or a change in the national economy could be disastrous for the Museum.

evidence will ever be forthcoming. Indeed, the AGO's initial indifference to this litigation, compounded with its later faint-heartedness, strongly suggest that the AGO, too, has little expectation of discovering evidence supporting its concerns. The public's interest in having the AGO continue its tepid investigation pales in comparison to the public interest in ensuring that a public charity does not needlessly lose potentially millions of dollars by canceling a contract that it has every right to make. An injunction permitting the continuation of such an investigation under these circumstances would adversely affect the public and be inconsistent with the requirements for such request. See *id*.

CONCLUSION

For the foregoing reasons, the Attorney General's request to preliminarily enjoin the planned auction is denied. This may very well mean that timeless works by an iconic, local artist will be lost to the public in less than a week's time. No doubt many will be disappointed in this outcome, and they may take little comfort knowing that, in their loss, the rights of a charitable board to make thoughtful decisions to steer its charity through troubled times have been vindicated. However, it is the responsibility of the court to act dispassionately and decide cases solely on the legal merits of the claims presented.

ORDER

In Civ. Action No. 17-0253, it is ORDERED that the Plaintiffs' Motion for Preliminary Injunction is DENIED. It is further ORDERED that the non-governmental plaintiffs, Thomas Rockwell, Jarvis Rockwell, Peter Rockwell, James Lamme, Donald MacGillis, Jonas Dovydenas, and Jean Rousseau, are DISMISSED from this action for lack of standing. In Civ. Action No. 17-0260, it is ORDERED that the Complaint filed by Plaintiffs, James Hatt, Kristin Hatt, and Elizabeth Weinberg is DISMISSED.

Deleted:

SO ORDERED

_____
Date

_____
John A. Agostini
Associate Justice, Superior Court