

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

BERKSHIRE COUNTY, ss.

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.

Defendant.

CASE NO.: _____

MEMORANDUM IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER

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I. INTRODUCTION

For nearly 150 years, the Berkshire Museum, and its predecessor the Berkshire Athenaeum, have collected and displayed fine art and other works for the benefit of the citizens of Pittsfield and Berkshire County, as well as the public at large. Over time, and in reliance on strict statutory restrictions that protect the collection from dissipation or other misuse, the residents of Pittsfield and Berkshire County donated to the Berkshire Museum one of the premier public collections of fine art in the United States.

This collection is now under imminent threat. The Museum has announced that, starting in mid-November, it will auction off the core of its collection—40 works of art (including two paintings by Norman Rockwell) estimated to be worth in excess of \$60 million. If the works are sold, it is likely they will be dispersed to private collections outside of Massachusetts, quite possibly to collectors in foreign countries beyond the jurisdiction of this or any other United States court. There is evidence that certain of the works have already been removed to locations outside the Commonwealth, including to Texas.

The planned sale will deprive the residents of Pittsfield and Berkshire County of the cultural and artistic legacy bequeathed to them by their fellow citizens through more than a century of charitable giving. It will also directly contravene the Museum's establishing statutes, the conditions promised to its donors, and the fiduciary duties of the Museum's trustees.

Accordingly, for all the reasons described herein, the Plaintiffs in this action—residents of Pittsfield and of Berkshire County, and the three children of Norman Rockwell—hereby seek a temporary restraining order prohibiting this unlawful sale and the removal of these works from Pittsfield. The purpose of such order is to preserve the status quo while the Attorney General completes her consideration of the issues raised herein, and pending a hearing on whether a preliminary injunction should issue. *See* Mass. R. Civ. P. 65(a).

II. FACTUAL BACKGROUND

A. The Museum Was Established By Statute On Petition Of The Citizens Of Pittsfield To Hold And Display Fine Art In Their City For Their Benefit.

In 1871, the Legislature incorporated the Museum's predecessor, the Trustees of the Berkshire Athenaeum (the "Athenaeum"), by statute. *See* An Act to Incorporate the Trustees of the Berkshire Athenaeum, 1871 Mass. Acts & Resolves Ch. 129.¹ That statute provided that the Athenaeum's purpose was "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." *Id.* § 1. It further authorized the Athenaeum to "hold real and personal property for the purposes aforesaid" and that "all gifts, devises and bequests [to the Athenaeum] shall be devoted to such purposes exclusively." *Id.* § 2 (emphasis added). The statute expressly ordered 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.* (emphasis added). This restriction has never been repealed.

Residents of Pittsfield and others subsequently donated numerous works of art and other items to the Athenaeum, where they were maintained for enjoyment by the town and general public. In 1903, Mr. Zenas Crane, a resident of Dalton in Berkshire County, gave to the public a museum building adjoining at the rear of the Athenaeum. McFadden Decl. Ex. B (1932 Petition). That property was transferred to the management of the Athenaeum. *Id.* That same year, the citizens of Pittsfield successfully petitioned the Legislature to change the name of the

¹ For the Court's convenience, a copy of this 1871 Act is enclosed as Ex. A to the Declaration of Daniel L. McFadden ("McFadden Declaration").

Athenaeum to the Trustees of the Berkshire Athenaeum and Museum. *See* An Act Relative to the Trustees of the Berkshire Athenaeum, 1903 Mass. Acts & Resolves Ch. 131; McFadden Decl. Ex. O (1903 Petition).

In 1932, the citizens of Pittsfield again petitioned the Legislature, this time “to separate the library and the museum, both of which are now held under one title by the Trustees of the Berkshire Athenaeum and Museum.” McFadden Decl. Ex. B (1932 Petition). The petition explained that “[d]uring the past year, Mrs. Zenas Crane and her son, Mr. Zenas Marshall Crane, have donated additional funds to the museum, enabling it to engage an enlarged working staff, and they plan to provide funds to amplify the work of the museum and toward this end it has been thought advisable that the museum have a separate charter and function as a separate organization.” *Id.* That same year, the Legislature accepted the citizens’ petition and enacted a statute to separate the Museum from the Athenaeum as a different corporate entity. *See* 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 (the “Museum Incorporating Act”), 1932 Mass. Acts & Revolves Ch. 134.²

The Museum Incorporating Act mandated that the Museum was 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.” *Id.* § 3 (emphasis added). It further mandates that the Museum “may hold real and personal property for

² For the Court’s convenience, a copy of this 1932 Act is enclosed as Ex. D to the McFadden Declaration.

the purposes aforesaid; and all gifts, devises and bequests thereto shall be devoted to such purposes exclusively and 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.* § 4.

As part of task of separating the Museum from the Athenaeum, the Act authorized the Athenaeum to transfer to the Museum “the museum building and the land used in connection therewith,” as well as “the Zenas Crane endowment fund and all objects donated by the said late Zenas Crane and such other objects of or illustrating natural science, culture history or art” as the Athenaeum deemed proper. *Id.* § 2. However, it did not reverse or revise the existing prohibition on removing these works from Pittsfield. *See id.* The Museum consequently received much of its collection from the Athenaeum subject to such restriction, including some of the artworks it now intends to sell.³ *See* Cmplt. Ex. B; McFadden Decl. Exs. E (“Works of Art Sold to Benefit the Berkshire Museum” catalogue by Sotheby’s), F (excerpt from “Seen in the World of Art,” N.Y. Sun, p. 34 (Feb. 13, 1910)) (“[T]he Pittsfield Museum of Art is highly appreciative of Zenas Crane’s recent gift of Benjamin West’s ‘Daniel Interpreting the Inscription to Belshazzar’.”).

³ The Museum filed a purported Restated Articles of Organization in January 2016, evidently in a preemptive attempt to insulate this sale from the operation of its establishing statutes and the conditions upon which it received its gifts. The new articles restate the corporate purpose established by the Museum Incorporating Act. However, they also purport to confer a new power to “sell, convey . . . or otherwise dispose of . . . all or any of [the Museum’s] property” pursuant to chapter 180 of the General Laws. As described below, such a change could not repeal the Legislature’s specific restrictions on the removal of artwork from the Museum, nor void enforceable restrictions on gifts made thereto.

B. The Museum Now Maintains One Of The Finest Public Collections Of Artwork In The United States, Subject Always To The Statutory Restrictions On Its Use And To Any Conditions On Gifts Expressed In Writing.

Over time, the Athenaeum and Museum have accumulated one of the premier public art collections in the United States, subject always to statutory restrictions described above. Most notably, the Museum's collection includes two paintings personally donated by Norman Rockwell, "Shuffleton's Barbershop" and "Shaftsbury Blacksmith Shop." Rockwell was a long-time resident of Berkshire County, and many of the subjects of his iconic paintings were residents there, as well. "Shuffleton's Barbershop" is widely considered by art historians to be Rockwell's finest work. Rockwell was also a personal friend of the Museum's then-director, Stuart Henry, and he donated the two paintings in 1958 and 1966, during Henry's tenure as director. Per the terms of the Museum Incorporating Act, these gifts "shall be devoted . . . exclusively" to the benefit of the people of Pittsfield, Berkshire county, and the general public. *See* Museum Incorporating Act, 1932 Mass. Acts & Revolves Ch. 134, §§ 3 & 4.

Further, after donating "Shuffleton's Barbershop," Rockwell received a letter from Henry on September 23, 1958 thanking him for the gift and memorializing their mutual agreement that the painting was donated to the Museum's "permanent collection." *See* Cmplt. Ex. A (Sept. 23, 1958 letter). This condition, expressed in writing, is binding per the terms of the Museum Incorporating Act. *See* Museum Incorporating Act, 1932 Mass. Acts & Revolves Ch. 134, § 4.

C. The Museum's Recently Disclosed Plan To Sell Artwork In Violation Of Its Public Trust.

For nearly two years now, the Museum has been working to implement a radically transformative "New Vision," including twenty million dollars of capital expenditures, and the creation of a forty million dollar endowment. McFadden Decl. Ex. G (July 24, 2017 Museum Press Release). However, it was not until July 24, 2017, that the Museum announced that, to

implement this “New Vision,” it had already engaged Sotheby’s to sell 40 works of art comprising the core of the Museum’s collection, including the two Rockwell works referenced above and, it appears, multiple works originally donated to the Athenaeum. *Id.* This announcement was evidently the culmination of months of secret planning by the Museum’s management and board to divest the Museum of its very essence as a collection of fine art for the benefit of the people of Berkshire County and the general public.

The Museum’s announcement was immediately met with widespread criticism, including by the Massachusetts Cultural Council (the “MCC”), the state agency that partially funds the Museum. After careful study, including two independent analyses and a review of the Museum’s financial statements, the MCC concluded in late September that the planned sale disregards “widely accepted museum standards” and that “the Museum could put itself in a healthy operating position without deaccessioning art.” McFadden Decl. Ex. H (MCC statement). The MCC’s investigation further found that the planned sale is “a violation of the Museum’s public trust.” *Id.*

Similarly, American Alliance of Museums and the Association of Art Museum Directors have also condemned the plan, noting that “one of the most fundamental and long-standing principles of the museum field is that a collection is held in the public trust and must not be treated as a disposable financial asset.” McFadden Decl. Ex. I (statement). Most recently, the Peabody Essex Museum expressed disapproval, stating that the Museum’s “present plan of action represents a fundamental and egregious violation of public trust and fiduciary duty and responsibility.” McFadden Decl. Ex. J (statement). The family of Norman Rockwell is reportedly “horrificed” by the planned sale, and announced that “[i]t’s totally against what

Norman Rockwell would have wanted.” McFadden Decl. Ex. K (Oct. 14, 2017 article). Indeed, all three of his children have joined this action as Plaintiffs to stop the sale.

According to estimates prepared by the Museum and Sotheby’s, the planned sale is expected to generate revenue between \$46,545,000 and \$68,080,000. *See* Cmplt. Ex. B; McFadden Decl. Ex. E (“Works of Art Sold to Benefit the Berkshire Museum” catalogue by Sotheby’s). The estimates appear to be far lower than the income that will actually be realized from the sale, however, given that the last Rockwell painting to be sold reportedly fetched a price of approximately \$46,000,000 *by itself*, more than double its previously estimated value. *See* McFadden Decl. Ex. L (Dec. 4, 2013 NPR article regarding sale of “Saying Grace”). In all events, given that the Museum’s most recent net valuation of its property and equipment outside of its collection was less than \$10 million, and that the sale includes many of the best known and revered works of art in that collection, it appears that the Museum is disposing of the very essence of its existence (*e.g.*, substantially all of its assets). *See* McFadden Decl. Ex. M (2016 financial statement). Moreover, the contemplated sale is clearly antithetical to the Museum’s statutory mission to receive, hold, and display works of fine art for the benefit of the people of Pittsfield, Berkshire County, and the general public.

On information and belief, these sales are slated to begin in mid-November, 2017 in New York, New York. If sold, the works are likely to be removed from this jurisdiction (possibly to private collections in other countries), where they will be difficult to recover in the event the sale is later deemed unlawful. It appears that at least two of the works—“Giant Redwood Trees of California” by Albert Bierstadt and “Santa Isabel, New Granada” by Frederic Edwin Church—have already been removed from Pittsfield to a pre-auction exhibition in Texas. McFadden Decl. Ex. N (Sotheby’s presentation “Masterworks Draw Crowds During Three Part Tour of Texas”).

Representatives of the plaintiffs, and others, have worked diligently with the office of the Attorney General, which is charged with the oversight of non-profit and charitable entities, to explain their concerns regarding the proposed sale of these works. Plaintiffs understand that the Attorney General's office is reviewing the matter, but has not yet acted. However, given that the sale is now approaching within a month, and that the works are already being dispersed outside of the Commonwealth, Plaintiffs had no choice but to take action independently. The Attorney General, in her official capacity, is named herein as a necessary party pursuant to G.L. Ch. 12, § 8G.

III. ARGUMENT

A. Temporary Relief Is Available To Maintain The Status Quo.

The purpose of preliminary relief is ordinarily “to preserve the status quo pending the outcome of litigation.” *See Doe v. Superintendent*, 461 Mass. 159, 164 (2011); *see also Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 616 (1980) (explaining that “the judge should seek to minimize the harm that final relief cannot redress by creating or preserving, in so far as possible, a state of affairs such that after the full trial, a meaningful decision may be rendered for either party” (internal quotation marks omitted)). Such relief is therefore available where a plaintiff shows “that success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party.” *See Doe*, 461 Mass. at 164. Here, as described below, the Plaintiffs have satisfied all elements of this standard.

B. Plaintiffs Are Likely To Show That The Contemplated Sales Are Unlawful.

The Plaintiffs in this action are likely to succeed in showing that the Museum's planned sales are unlawful because, among other reasons, the plan constitutes a breach the Museum's

duties to the citizens of Pittsfield and certain of its donors, and also involves the unlawful and unauthorized disposition of the very essence of the Museum. Further, as described below, in these unique circumstances, Plaintiffs have standing to bring these claims.

1. Plaintiffs Are Likely To Show That The Planned Sale Constitutes A Breach Of The Museum's Legal Duties.

As described above, the Museum is a charitable corporation that was established for the benefit of the people of Pittsfield and Berkshire County, and for the general public. Accordingly, the Museum and its individual trustees owe a series of interrelated duties to administer the Museum's property for the benefit of these groups. Plaintiffs are likely to show that the planned sale constitutes a breach of those duties.

First, the Legislature prescribed in 1871 that "no part" of the property held by or donated to the Athenaeum "shall ever be removed from the town of Pittsfield." *See* 1871 Mass. Acts & Resolves Ch. 129 § 2. When the Athenaeum and the Museum were divided into two separate entities by the Museum Incorporating Act in 1932, certain of this property was "authorized" for the Museum's use. *See* 1932 Mass. Acts & Resolves Ch. 134, § 2. However, the Legislature never repealed the restriction that such items remain in Pittsfield, nor authorized the transfer or sale of such object to any entity besides the Museum. It appears that at least 10 of the works slated for auction were donated to or otherwise acquired by the Athenaeum prior to 1932, and are therefore subject to this prohibition. *See* Cmplt. Ex. B; McFadden Decl. Exs. E ("Works of Art Sold to Benefit the Berkshire Museum" catalogue by Sotheby's), F (excerpt from "Seen in the World of Art"). Such works cannot be auctioned.

Second, the Museum Incorporating Act expressly provides that "all gifts" to the Museum must be "devoted" to "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” and other subjects. *See* 1932 Mass. Acts & Revolves Ch. 134, §§ 3 & 4. Further, any such gifts must be “used in conformity with the conditions made by any donor and expressed in writing.” *See id.* § 4. Similarly, general principles of governing law in Massachusetts require that a charity honor a donor’s intent and conditions. *See Newhall v. Second Church & Society of Boston*, 349 Mass. 493, 499, 502 (1965) (sale of charitable gift in contravention of written intent prohibited because “[t]he effect of the gift is to be determined as of the time when made,” as determined from contemporaneous inscriptions); *see also* Restatement (Second) of Trusts §§ 348 & 356(1).⁴ Here, there is express documentation recording that Norman Rockwell’s painting “Shuffleton’s Barber Shop” was donated with express and enforceable agreement that it would be part of the Museum’s “permanent collection.” *See* Cmplt. Ex. A (Sept. 23, 1958 letter) (emphasis added); *see also Newhall*, 349 Mass. at 499, 502. Further, it is also clear that many of the items scheduled to be sold were gifts to the Museum, and therefore must be “devoted” to the Museum’s corporate purpose of displaying art for study by the public “in the city of Pittsfield.” *See* Cmplt. Ex. B; 1932 Mass. Acts & Revolves Ch. 134, §§ 3 & 4. None of these items can be auctioned, particularly where the likely result is that the items will reside in private collections outside of Massachusetts.

Third, the Museum Incorporating Act authorizes the Museum to “hold” all of its property only “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.” 1932 Mass. Acts & Revolves Ch. 134, §§ 3 & 4. Nothing in the Act permits the

⁴ Section 348 of the Restatement (Second) of Trusts was adopted by the Supreme Judicial Court in *Weaver v. Wood*, 425 Mass. 270, 274 n.8 (1997).

Museum to exercise any power of sale over such property. Moreover, it is clear that the excessive and unnecessary sale contemplated here would needlessly dispose of such property, to the detriment of the Museum's stated purposes and in violation of the fiduciary duties of its Trustees. As stated above, the MCC, a state agency that partially funds the Museum, has already conducted multiple analyses and concluded that the planned sale (1) disregards "widely accepted museum standards;" (2) that "the Museum could put itself in a healthy operating position without deaccessioning art;" and (3) that the planned sale is "a violation of the Museum's public trust." See McFadden Decl. Ex. H (MCC statement). A public charity may not sell assets in such circumstances.

In response to these arguments, the Museum will likely argue that it *granted itself* an unfettered power of sale when it filed Restated Articles of Organization in January 2016 (evidently in an attempt to obstruct any challenge to the planned sale at issue here). The restated articles describe the Museum's corporate purpose as essentially identical to that stated in the Museum Incorporating Act.⁵ See 1932 Mass. Acts & Revolves Ch. 134, § 3. However, pursuant to G.L. Ch. 180, § 6, the restated articles also purport to add a generic power to "sell [and] convey . . . all or any of [the Museum's] property." The Museum will likely contend that it may now exercise this power in any manner it chooses, without regard for the restrictions in its founding statutes or the conditions upon which its gifts were tendered.

The Museum's position is not the law, however. The General Laws may permit a charitable corporation to restate its articles of organization to add a general power to sell property under G.L. Ch. 180, §§ 6 & 7. However, the Supreme Judicial Court has explained that

⁵ The Restated Articles of Organization update the words "culture history" to "cultural history" and change "mankind" to "humankind." See McFadden Decl. Ex. P (restated articles).

nothing in those statutes permits that power to be exercised in a manner inconsistent with the charity's founding documents, its charitable purposes, and/or the promises made to its donors. *See Attorney General v. Hahnemann Hospital*, 397 Mass. 820, 834-36 (1986). In *Hahnemann*, a hospital had been organized as a nonprofit, charitable organization. *See id.* at 823. It purchased land and constructed a hospital building with funds received from an *inter vivos* charitable trust, and received additional donations from the trust over many years. *See id.* at 823-24. The hospital's bylaws incorporated the terms of the trust and promised to remain consistent with those terms. *See id.* at 825. The hospital later amended its articles of organization under G.L. Ch. 180, §§ 6 & 7 to add a power of sale and to apply the proceeds to a new purpose "beyond the limits" of founding trust document. *See id.* at 835. The Supreme Judicial Court found that any such attempt to employ the general powers of Ch. 180 to circumvent the terms of the hospital's founding trust documents was impermissible. *See id.* The Court explained that such misuse of the general statutory authority impermissibly "breaks the promise" to the hospital's donors and that the hospital and its board would therefore "violate their fiduciary duties" by enacting such a plan. *See id.* at 835, 836. The Court also explained that a sale of the hospital's assets would be permissible only insofar as authorized by the founding trust's provisions, and would otherwise constitute a breach of fiduciary duty. *See id.* at 830-31.

Here, the situation is essentially identical. Between 1871 and 1932, donors to the Athenaeum were operating under a promise that "no part of . . . such gifts . . . shall ever be removed from the town of Pittsfield," a promise that was left intact when the Athenaeum and Museum were legislatively divided. *See* 1871 Mass. Acts & Resolves Ch. 129, § 2. Similarly, from 1932 to 2016, donors (like Norman Rockwell) were promised that any conditions on their gifts "expressed in writing" would be honored, and that their gifts would be "devoted . . .

exclusively” to promoting the study of art and other subjects “by means of museums and collections” (*i.e.*, public display) in Pittsfield. 1932 Mass. Acts & Revolves Ch. 134, §§ 3 & 4. The Museum cannot use generic statutory authorities to create a new power of sale that “breaks the promise” to these donors that their works of art would be used for public display in Pittsfield, not as a disposable asset to be auctioned to the highest private bidder in New York, Hong Kong, or anywhere else. *See Hahnemann*, 397 Mass. at 833-36.

2. *Plaintiffs Are Also Likely To Show That The Planned Sale Unlawfully Disposes Of The Very Essence Of The Museum.*

Plaintiffs are also likely to show that the planned sale of the core of the Museum’s collection is such an extraordinary transaction that it lies beyond the powers of its trustees to approve. In the case of charitable corporations, “the powers of its corporate officers are more strictly construed” than in the ordinary course. *See First Bostonview Management, LLC v. Bostonview Corp.*, 88 Mass. App. Ct. 89, 94 (2015) (citing *Boston Athletic Ass’n v. International Marathons, Inc.*, 392 Mass. 356, 366 (1984)). Accordingly, “only specific authorization can bind a charitable corporation to an extraordinary transaction entered into by its corporate officers.” *See id.* Additionally, the “authority to make a contract that divest[s] the charitable corporation ‘of the very essence’ of its existence . . . [is] beyond the power of the board to delegate to its president.” *See id.* (quoting *Boston Athletic*, 392 Mass. at 366-67).⁶

Here, as described above, the Museum is disposing of artwork likely worth substantially in excess of \$60 million dollars in order to implement a “New Vision” for the Museum’s

⁶ In 2015, in *First Bostonview Management*, the Appeals Court applied the Supreme Judicial Court’s 1984 ruling in *Boston Athletic Association* notwithstanding the enactment of G.L. Ch. 180, § 8A in 1989. Subsection (c) of that statute provides that a public charity must give written notice to that Attorney General before undertaking “any sale, lease, exchange, or other disposition . . . of all or substantially all of its property and assets if that sale, lease, exchange or other disposition involves or will result in a material change in the nature of the activities conducted by the corporation.”

services. From a purely monetary standpoint, the sale appears to encompass substantially all of the Museum's assets, as many of the Museum's finest works are being sold, and the net valuation of its other property and equipment (outside of its collection) is less than \$10 million. *See* McFadden Decl. Ex. M (2016 financial statement). However, more fundamentally, the Museum is abandoning its "very essence"—its statutory function as a permanent repository and public forum for the cultural legacy of Pittsfield and Berkshire County. Plaintiffs are likely to show that the Board has no authority to undertake such radical and transformative action. *See First Bostonview*, 88 Mass. App. Ct. at 94; *see also Hahnemann*, 397 Mass. at 823-25.

3. *In These Highly Unique And Unusual Circumstances, Plaintiffs Have Standing To Pursue These Claims.*

It is likely that the Museum will argue that, even assuming its planned sale is unlawful, the Plaintiffs lack standing to challenge the actions of a charitable organization, because only the Attorney General could pursue such an action. *See Weaver v. Wood*, 425 Mass. 270, 274-78 (1997); G.L. Ch. 12, § 8G. However, while the Attorney General has a critical role to play in this lawsuit, that authority is not exclusive in these highly unusual circumstances.

Private plaintiffs in Massachusetts do have standing to challenge the actions of a charitable organization to the extent the plaintiff possesses a special interest that is distinct from those of the general public. For example, in *Maffei v. Roman Catholic Archbishop of Boston*, the Supreme Judicial Court concluded that private plaintiffs, whose family had conditionally gifted property to the Archbishop of Boston subject to an oral agreement that it would forever be maintained as a church, had standing to challenge the transfer of that property, particularly where violation of the conditions could result in an equitable reversionary interest to them. *See* 449 Mass. 235, 245 (2007). Such claims were "personal, specific, and exist[ed] apart from any broader community interest in keeping [the church] open." *See id.*; *see also Lopez v. Medford Community Center, Inc.*,

384 Mass. 163, 167-70 (1981) (individuals had standing to litigate claim they were unlawfully denied membership in charitable corporation). Here, taking as true the allegations of the Complaint,⁷ multiple plaintiffs possess such interests and therefore have standing.

First, as discussed above, Norman Rockwell donated both “Shuffleton’s Barbershop” and “Shaftsbury Blacksmith Shop” to the Museum. Not only were these gifts subject the statutory requirement that they be devoted exclusively to benefit of the people of Pittsfield, *see* 1932 Mass. Acts & Revolves Ch. 134, § 4, but the donation of “Shuffleton’s Barbershop” was subject to the agreed condition, expressed in writing, that it be made part of the Museum’s “permanent collection.” *See* Cmplt. Ex. A (Sept. 23, 1958 letter). Like the plaintiffs in *Maffei*, the Plaintiffs Thomas, Jarvis, and Peter Rockwell (the three children of Norman) are uniquely situated to contest this breach, particularly where Thomas Rockwell was an executor of Norman Rockwell’s estate, and the three sons were principal beneficiaries, including its residuary interests. *See* Cmplt. ¶¶9. Their claim is personal, specific, and distinct from the general public. *See Maffei*, 449 Mass at 245.

Second, Plaintiffs Tom Patti and Tom Patti Design LLC are directly impacted by the planned implantation of the Museum’s “New Vision” plan, of which the sales are part-and-parcel. As described in the Complaint, Mr. Patti alleges that his site-specific works are being altered by this plan in violation of the Museum’s contractual obligations. Cmplt. ¶¶34 & 36. These proposed improper alterations are admittedly being pursued by the Museum as a direct consequence of the planned sales, which will provide the necessary funding. *See* McFadden Decl. Ex. G (July 24, 2017 Museum Press Release). These Plaintiffs have standing to challenge the “New Vision” as a

⁷ *See, e.g., Service Employees International Union v. Dep’t of Mental Health*, 469 Mass. 323, 329 (2014) (holding that, in considering question of standing, courts “take as true all facts alleged in the [plaintiff’s] complaint”).

whole. *See, e.g., Sullivan v. Chief Justice*, 448 Mass. 15, 21-23 (2006) (standing where the injury is “a direct and ascertainable consequence of the challenged action”).

Third, the residents of Pittsfield specifically, and Berkshire County generally, have a unique statutorily conferred interest in the Museum’s collection of artwork. Both the Athenaeum and the Museum were established with the express statutory purpose of benefiting the people of Pittsfield and (in the case of the Museum) of Berkshire County. *See* 1871 Mass. Acts & Resolves Ch. 129, §§ 1 & 2; 1932 Mass. Acts & Resolves Ch. 134, §§ 3 & 4. The Legislature specifically forbade the removal of any of the Athenaeum’s property from Pittsfield. *See* 1871 Mass. Acts & Resolves Ch. 129, § 2. Indeed, the Museum owes its very existence to the Legislature’s response to a petition by the citizens of Pittsfield that it be created. *See* McFadden Decl. Ex. B (1932 Petition). Although these statutes may not confer standing to challenge the general operations and governance of the Museum, they do bestow upon the people of Pittsfield and Berkshire County a special statutory right to have the Museum’s works present in their community. That right is now being infringed. Plaintiffs have standing to challenge the Museum’s violation of its special statutory duties *to them* to maintain these works in Pittsfield. *See Sullivan*, 448 Mass. at 21-23 (standing to challenge failure to comply with statutory duty where the injury “fall[s] within the area of concern of the statute” (internal quotation marks omitted)).

C. Without Preliminary Relief, Plaintiffs Will Suffer Irrevocable Harm.

In the absence of preliminary relief, the Plaintiffs, the citizens of Pittsfield, the citizens of Berkshire County, and indeed the general public will all suffer irreparable harm: the irreversible loss of culturally priceless works of fine art. As described above, these works were donated for public display in Pittsfield. Yet, starting in mid-November, the works will be auctioned to the highest bidder. It is highly likely that they will be removed from the jurisdiction of the

Massachusetts courts, possibly to private collections abroad. Moreover, the works may subsequently be transferred or resold to other private entities, and thus become effectively untraceable. Given that it is highly unlikely that the works can ever be retrieved if the sale proceeds, plaintiffs have demonstrated irreparable harm sufficient to justify the preliminary relief requested. *See Boston Athletic Ass'n*, 392 Mass. at 362 (affirming grant of preliminary injunctive relief to prevent “dispersal” of contested assets).

D. Preliminary Relief Will Not Harm The Museum.

In contrast to the irreparable harm that the Plaintiffs will suffer should these works be dissipated throughout the world, the Museum will suffer no apparent harm should its auction be briefly delayed. The Trustees only approved implementation of the “New Vision” last July. *See* McFadden Decl. Ex. G (July 24, 2017 Museum Press Release). There is no indication that construction is imminent, or that the Museum faces imminent bankruptcy.⁸ Nor is there any reason to believe that the works will depreciate in the short period of time necessary to resolve whether they may lawfully be sold. There is simply no demonstrable harm sufficient to overcome the need for preliminary relief, particularly where this case seeks purely equitable and declaratory relief and could therefore be resolved by bench trial on an expedited schedule.

⁸ The most recent publicly available financial statements indicate that the Museum had nearly \$1 million cash (and equivalents) on hand and nearly \$7 million in long-term investments. *See* McFadden Decl. Ex. M (2016 financial statement).

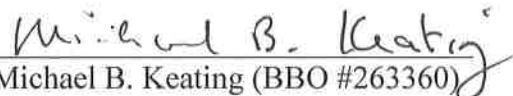
IV. CONCLUSION

For all the foregoing reasons, the Plaintiffs respectfully request that the Court enter a temporary restraining order barring the Museum from selling, auctioning, or otherwise disposing of any of the works identified in its July 24, 2017 press release, and from removing such works from Pittsfield, Massachusetts, pending expiration of the order or further order of the Court. Plaintiffs further request that the Court schedule a hearing on whether a preliminary injunction should enter, at which time the Attorney General will have an opportunity to be heard on the issues raised herein.

Respectfully submitted,

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

By their attorneys,


Michael B. Keating (BBO #263360)
Martha Coakley (BBO #087300)
Daniel McFadden (BBO #676612)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
mkeating@foleyhoag.com
mcoakley@foleyhoag.com
dmcfadden@foleyhoag.com

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