

December 1, 2017

William F. Lee

By E-mail and First Class Mail

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Jeffrey J. Pyle, Esq.
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Re: *Rockwell, et al. v. Trustees of the Berkshire Museum*, Civ. No. 17-0253 (Mass. Super. Ct.)

Dear Mr. Pyle:

I write in connection with New England Newspapers Inc.'s Emergency Motion to Terminate Impoundment, filed in the above-captioned action on November 29, 2017.

While we continue to consider the Berkshire Museum's response to your motion, we would ask that you please provide the following information, which is highly relevant to your client's motivations in bringing the motion. Given the assertions in your motion, we assume you accept that the *Berkshire Eagle* and its owners owe the public full disclosure of their interests and motivations, especially concerning decisions to provide anonymity when reporting matters in which the *Berkshire Eagle* is directly involved.

1. On August 25, 2017, the *Berkshire Eagle* reported that an "anonymous group, made up of at least three people," "communicated" an "offer through The Eagle" to "contribute up to \$1 million" to the Berkshire Museum subject to various conditions. A *Berkshire Eagle* reporter presented that "offer" to the Museum and simultaneously sought comment on the "offer" from the Museum. A copy of the article is attached for your reference. Please identify:
 - a. the members of the "anonymous group," including the "three people" specifically mentioned, and the "spokesperson for the group of donors" mentioned later in the article;
 - b. any relationship between any employee or person affiliated with the *Berkshire Eagle* and/or New England Newspapers Inc. and any member of the "anonymous group," the "three people," and/or the "spokesperson."
2. With respect to the *Berkshire Eagle*'s determination to "communicate[]" the "offer" on behalf of the "anonymous group," please identify:
 - a. all individuals involved in making the determination to communicate the offer;
 - b. what information they considered in making that determination;
 - c. what, if any, evaluation was done of the anonymous group's motivations and/or ability to fulfill any pledge were it accepted.

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3. With respect to the *Berkshire Eagle*'s decision to keep the identity of the "anonymous group," the "three people," and the "spokesperson" secret in its August 25 article and subsequent reporting about the "offer," please identify:

- a. all individuals involved in making the determination to keep those persons' identities secret;
- b. what information they considered in making that determination.

4. On October 31, the *Berkshire Eagle* posted an editorial (attached hereto), which stated that the *Berkshire Eagle* "revise[d] its original endorsement of the Berkshire Museum plan" and "urge[d] the trustees to halt the sale of the artwork." Please identify:

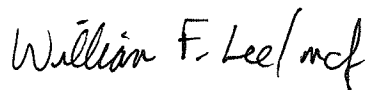
- a. any involvement by members of the "anonymous group," the "three people," and/or the "spokesperson" in the formulation of the *Berkshire Eagle*'s editorial position regarding the Museum's plans, including the October 31 editorial;
- b. what "offers" are referred to in the following sentence in the October 31 editorial: "Offers — real offers — of expertise and financial safety nets have been made to the museum to clear a different path forward without having to sell the art";
- c. to the extent one of the "real offers" referenced in the sentence quoted above is the "offer" of the "anonymous group," how and why the Eagle determined to refer to it as "real," who made that determination, and what information they considered in doing so.

5. Please identify any and all communications, oral or written, by your declarant, Mr. Fredric D. Rutberg, regarding the "offer" reported in the August 25 article and/or the "offers" mentioned in the October 31 editorial. Please provide the timing, content, and recipients of all such communications. If you believe any such communications are privileged, please state the timing, recipients, and general subject matter of such communications in a manner sufficient to evaluate your claim of privilege.

This request is without prejudice to any further information we may seek in connection with your motion, including but not limited to depositions of Mr. Rutberg and other involved persons.

I look forward to your response at your earliest convenience.

Yours sincerely,



William F. Lee

The Berkshire Eagle

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Donors offer Berkshire Museum \$1 million to delay, study art sale; board president turns it down

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(/uploads/original/20170825-185735-ArtSaleProtest-5-T5_78738.jpg)

Opposition, and now a new monetary offer, have not affected the Berkshire Museum plan to sell artwork to fund a renovation and create an endowment. Pictured above are protesters in front of the museum on August 12.

GILLIAN JONES - THE BERKSHIRE EAGLE

Posted Friday, August 25, 2017 6:57 pm

By Larry Parnass lparnass@berkshireeagle.com (<mailto:lparnass@berkshireeagle.com>)

PITTSFIELD — A group that emerged Friday has company in wanting the Berkshire Museum to hit the brakes on a planned auction.

But what it put on the table may stand alone: \$1 million.

The anonymous group, made up of at least three people who communicated their offer through The Eagle, pledged to contribute up to \$1 million to the Pittsfield museum if its board agrees to pause an auction of 40 works of art at Sotheby's and to allow outside experts to provide a second opinion on the advisability of the controversial sale.

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Elizabeth McGraw, president of the museum's board of trustees, said the offer falls short.

Subscribe (<https://nen.newzware.com/ss70v2/neni/common/template.jsp?nwmodule=nonsubscribers&nwpage=nonsubstart>) for as little as \$13.00 for unlimited web "All the time we can decline, we are grateful for the offer," McGraw said in a statement, in response to questions from The Eagle.

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She faulted both the nature of the proposed donation and its conditions.

The money would be given only if the board suspends the auction for up to a year while the donors moved swiftly to convene an outside panel to study the institution's financial condition.

Its members would review the circumstances that led the board to announce July 12 it plans to sell works of art to avert a financial crisis that could force it to close in six to eight years and to "reboot" the museum experience for patrons.

"The board of trustees cannot respond to an offer that has not been made directly to them in writing, with details and definitive terms," McGraw said of the proposal.

She said the board welcomes any "concrete, substantive offer from a specific individual, group of individuals, or entity, provided it directly addresses completely and immediately the urgency and magnitude of our present and future needs and is submitted directly to the Board of Trustees."

McGraw suggested that no second opinion is needed, given the research conducted by her team.

"The work preceding our decision to embark on a New Vision has been thorough and comprehensive. It would not be appropriate for me to ask my fellow board members to cover ground that we have already covered," she said.

Before Friday, Berkshire Museum leadership has said consistently that no one has stepped forward with an alternative financial solution to its problem. But The Eagle has learned at least two other groups of people have done just that in recent weeks.

Some of the ideas were presented to museum leaders, who rejected them. At least one other idea brought to the attention of museum Executive Director Van Shields was not responded to, sources said.

All sources contended their ideas would have relieved the financial burden Berkshire Museum faces and allowed some, or all, of the 40 artworks the museum plans to auction to remain in its possession.

Works to be sold include two Norman Rockwell paintings the artist donated to the museum, "Shuffleton's Barbershop" and "Shaftsbury Blacksmith Shop."

The museum has said it expects to raise \$50 million. The sales will take place in auctions over six months starting in November, according to Lisa Dennison, chairwoman of Sotheby's

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A spokesperson for the group of donors that emerged Friday said the group wanted to reconsider the need for the art sale and to examine the institution's underlying economics.

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The museum's board says it needs proceeds from the auction to strengthen its endowment and assure its future. Leaders say they would steer an estimated \$40 million — the bulk of the auction proceeds — into an endowment now valued at about \$8.6 million.

The outside panel would also review planned renovations and program changes and consider whether the museum's re-invention plan is in the best interests of the community.

The volunteer panel would be made up of people with expertise in art, finance and nonprofit management, according to the donors.

Under the offer, the auction would be suspended until the outside group makes recommendations to the museum board.

At that point, it would remain the board's duty to chose the best path for the 39 South St. museum, founded in 1903 by Zenas Crane.

The donors are willing to provide funding as soon as possible, the spokesperson said, and would work to shape the volunteer commission within weeks. That person also spoke on condition of anonymity.

The donors are described as people of "impeccable" financial status and are adamant they remain unnamed.

Sotheby's penalty

Even if the board were interested, a key question is whether the offer comes too late.

Shields, the museum's executive director, previously told The Eagle that its agreement with Sotheby's does not allow works to be removed from a planned auction.

The Eagle this week reviewed terms of an unrelated Sotheby's consignment contract from this month. It states that the penalty for withdrawing a work or works from sale after a contract is signed is 20 percent of the midpoint between the low and high estimates.

The museum did not respond to questions Friday about the withdrawal terms of its contract with Sotheby's.

If auction prices for the museum's works come in at the midpoint of estimates, the standard 20 percent withdrawal penalty listed on the consignment contract terms shared with The Eagle

would come to \$10 million.

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If the middle non-subscribers (twpage-anonsubstat) for as little as \$3.00 a week, the donors had said they were interested in approaching the auction house on the museum's behalf, seeking terms that allow for the pause, the spokesperson said.

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The auction house sets what one former Sotheby's employee called "a tight [and] prohibitively high withdrawal clause exactly to dissuade sellers from pulling out their art from the sale/catalogue."

The former employee, who spoke with The Eagle on the condition of anonymity, said the high withdrawal penalties are used to protect the auction house from losing money after investing in travel expenses and advertising.

"Even if other seller fees are waived for a major consignment, this one probably wouldn't be," the employee said of the Berkshire Museum consignment. "Sounds like a done deal."

Daniel Farrell, an art adviser and appraiser from Old Chatham, N.Y., who has worked with the PBS program "Antiques Roadshow," said all contracts are negotiable, so the standard withdrawal terms of 20 percent might not have applied to the Berkshire Museum consignment.

"That's in the boilerplate but that of course could be negotiable," Farrell said.

Sotheby's contract allows the auction house to withdraw works from sale for a variety of reasons. But sellers get far less latitude.

Sellers are spared penalties if a work is damaged before sale or if doubt arises about its authenticity.

Farrell said he believes both the museum and Sotheby's would be interested in avoiding bad publicity stemming from a dispute about a withdrawal fee.

"The force of public opinion and negative publicity are the most powerful arguments on both sides to abrogate this sale," he said.

Leslie Ferrin, owner of Ferrin Contemporary & Independent Art Projects in North Adams and Cummington, is helping to manage a Facebook group opposed to the art sale. She expressed hope that Sotheby's might be willing to forgo imposing a financial penalty on the museum.

"It can happen. You sign contracts. You back out of contracts," Ferrin said, "and find a way out that is amenable to both parties."

The 114-year-old museum's collection encompasses 440 paintings, 277 works on paper, 248 Asian works and 91 sculptures, among other pieces. The 40 works to be auctioned represent 1.67 percent of the museum's 2,395 fine art pieces.

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Eagle reporter Carria Saldo contributed to this report.

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The Berkshire Eagle

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Our Opinion: Berkshire Museum, halt the art auction

Posted Tuesday, October 31, 2017 7:03 pm

Imagine if Berkshire County didn't care about its museum.

If anything, this season of tumult for the Berkshire Museum has proved the folks in these hills very much care for their oldest museum, established by Zenas Crane Jr., a son of the Berkshires whose curiosity about nature and art created a "window on the world" through which this community has been looking for 114 years.

On July 12, the museum's leadership announced a plan to sell 40 artworks to fund a \$60 million New Vision plan that builds a massive endowment and renovates the building.

Rolling out the New Vision, the museum rang alarm bells it hadn't sounded before. Two years ago, when the museum announced it was entering a process to create a master plan for the future, it did so declaring publicly that its financial picture was healthy. It emerged from that security process promoting a dire narrative that the museum would close in six to eight years, but that its \$60 million New Vision would save it. The museum's cry for help was a startling turn of events. **Subscribe (https://nen.newzware.com/ss70v2/neni/common/template.jsp?module=nonsubscribers&nwpage=nonsubstart)** for as little as \$13.00 for unlimited web & eEdition access.

At the time of the New Vision announcement, The Eagle's editorial board supported the museum's plan, believing that course necessary to ensure its survival and redefine its purpose.

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But since then, reporting and investigation by this newspaper have raised serious questions about just how distressed is the museum's financial situation. We now know the New Vision has been from the start a *fait accompli*, a process that composed a grand, but flawed, solution for a simpler problem. Indeed, the attorney general's office believes this deaccessioning warrants further legal review.

The deaccessioning is not a survival plan; it's a perilous gambit.

In polite terms, the New Vision is nebulous; the museum has not articulated this plan in sufficient detail. Outside of a few renderings of what the museum might look like in the New Vision, this particular venture has not inspired the confidence to justify either the \$20 million renovation or the \$40 million endowment, even if the sale was an acceptable path.

All of this has caused us to revise our original endorsement of the Berkshire Museum plan. We urge the trustees to halt the sale of the artwork.

The extent of the proposed sale — including two Norman Rockwell paintings, a significant collection of Hudson River School paintings, including works by Albert Bierstadt, William-Adolphe Bouguereau and Frederic Church, as well as two sculptures by Alexander Calder — set off a vibrant discussion of its propriety and necessity, much of which has appeared in this newspaper. The Massachusetts Cultural Council, under the leadership of Executive Director Anita Walker, calls this sale "a violation of the museum's public trust." The Berkshire Museum's deaccessioning plan cost it long-term relationships with well-respected national arts organizations, including the Smithsonian.

Experts, including those at the Cultural Council, have disputed the severity of the museum's proclaimed financial distress. Undoubtedly, the museum could use millions more dollars to add to its endowment, but the method chosen to get this money resembles throwing out the baby to save the bath water.

Fundraising is difficult, but necessary and achievable: The museum already has \$5 million pledged toward its renovation, an amount experts say is at least what the museum needs to recompose its endowment. Offers — real offers — of expertise and financial safety nets have been made to the museum to clear a different path forward without having to sell the art. The trustees rejected them.

The long-term success of the museum can only be assured by the continued support of the larger Berkshire community, and for that to occur, the community needs transparency from museum leadership.

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The benefit provided the sale does not come to fruition. The museum has time to explore various forms of fundraising, both conventional and innovative, that might obviate, or substantially reduce, the need to sell its art to build an endowment and carry out a renovation. The spirited

debate that has occurred might assist such fundraising.

The brief filed Monday by the Massachusetts attorney general's office finds clear fault with how the museum's leaders have handled this sale. The attorney general's office has joined a pair of lawsuits calling for a halt to the sale. In its filing, the attorney general's office cited its "significant concerns about the board's decision to sell the 40 pieces of art that warrant further consideration and investigation." In contrast, the museum leadership continues to assert its "strong legal grounds to move forward and secure the future of the Berkshire Museum as an invaluable asset to the educational, cultural and economic life of our community."

One would be hard-pressed to find anyone in this county who doesn't want a secure future for the Berkshire Museum. That's not the disagreement; the argument is over the path being proposed.

If the Berkshire Museum's best art is sold under this cloud of questions, it will be gone from the community forever. The decision is irreversible.

Today, a Berkshire Superior Court judge will hear arguments for and against a pause to the sale as the clock ticks toward a Nov. 13 auction date for the first batch of artworks. The decision will be eagerly awaited on both sides.

The Berkshire Museum's deaccessioning breaks a covenant with the citizens of Berkshire County. The Berkshire Museum — and this collection of art that rivals the Smithsonian American Art Museum in Washington, D.C. — is this community's "window on the world," as the Berkshire Museum itself puts it. It's a window that must not be broken.

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