

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
Pierre Ciric, Esq.,

Plaintiff,

For a Judgement Under Article 78 and
§§ 3001 and 6301 of the Civil Practice Law
and Rules

-against-

The New York State Department of Education, the
New York State Board of Regents, Dr. Betty A.
Rosa, in her capacity as the Interim Commissioner
of the New York State Department of Education,
and Lester W. Young Jr., in his capacity as Regent
at Large of the New York State Board of Regents
and its current Chancellor,

Defendants.

Index No.

**VERIFIED ARTICLE 78 &
DECLARATORY JUDGMENT
PETITION-COMPLAINT**

**ORAL ARGUMENT
REQUESTED**

Plaintiff Pierre Ciric, Esq. appearing *pro se*, for its verified complaint and petition pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”), upon information and belief, alleges the following against the New York State Department of Education, the New York State Board of Regents, Dr. Betty A. Rosa, in her capacity as the Interim Commissioner of the New York State Department of Education, and Lester W. Young Jr., in his capacity as Regent at Large of the New York State Board of Regents and its current Chancellor (collectively “the Defendants”).

PRELIMINARY STATEMENT

1. This Petition is submitted to challenge deaccession approvals that occurred in September 2020 and that were supervised, controlled, or ordered by the Defendants, and that

were made in favor of certain museum institutions located in the State of New York in violation of 8 NYCRR § 3.27, as well as in violation of the New York public trust doctrine and of the New York State Administrative Procedure Act (“SAPA”).

2. Following a series of deaccession decisions by certain cultural institutions following the 2008 financial crisis, the New York Board of Regents adopted restrictive deaccession rules in 2011, limiting the ability of New York’s cultural institutions to divest themselves of artworks belonging to their permanent collections to a limited number of strict criteria and purposes.

3. Based on multiple press reports published between September 14 -17, 2020, Defendants’ approval actions were issued in favor of an undetermined number of museum institutions, including the Brooklyn Museum, located at 200 Eastern Pkwy, Brooklyn, NY 11238, the Everson Museum of Art, located at 401 Harrison St, Syracuse, NY 13202, and the Georgi Museum, located at 21 Adams Lane, Shushan, NY 12873, which is controlled and owned by the town of Salem, NY.

4. Defendants issued authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed with specific deaccession-related transactions involving the sale through auctions of a number of artworks, including paintings, fine furniture, and other objects, for the purpose of raising funds entirely dedicated to pay for regular operating expenses of those institutions, in plain violation of 8 NYCRR § 3.27, the New York public trust doctrine and SAPA.

5. These auction sales rely on authorization, guidance, determinations, approvals, clearance or other consent, or permission issued by Defendants, which are in violation of 8 NYCRR § 3.27(c)(7).

6. Defendants' actions complained of herein violate SAPA, because Defendants' clearance to those museum institutions drastically modified deaccession rules as expressed in 8 NYCRR § 3.27(c)(7), and those modifications were done without submitting proposed rules to the Secretary of State for publication in the *State Register* in order to afford the public notice of the proposal and an opportunity for comment prior to adoption of a rule.¹

7. During the course of a FOIL request addressed to Defendants, Plaintiff obtained sufficient evidence to establish that the abovementioned deaccession transactions by auction in the town of Salem, NY involving the Georgi Museum directly relied upon the authorization, guidance, determinations, approvals, clearance or other consent, or permission issued by the Defendants, which violated 8 NYCRR § 3.27(c)(7).

8. Because these auction sales were authorized to proceed according to the clearance provided by Defendants, the art and furniture pieces were permanently removed from public display to the significant detriment of the New York public, representing an inherent injury to it, in violation of the public trust doctrine as recognized by New York courts, as well as in violation of 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i).

PARTIES

9. Plaintiff Pierre Ciric, Esq. is a New York attorney domiciled in New York City, and a citizen and resident of New York. Consequently, Plaintiff, as a member of the New York public, has been subjected to a significant injury from the approval of the auction sales described herein and will continue to be injured as significant artworks are removed from future viewing opportunities.

¹ SAPA § 202(1).

10. Defendant Dr. Betty A. Rosa, in her capacity as the Interim Commissioner of the New York State Department of Education, supervises the Director of the New York State Museum within the Office of Cultural Education (“OCE”), which is in charge of the advancement, promotion, stewardship, and protection of the State’s Cultural Assets. OEC was the issuer of two memos involving the implementation of restrictive deaccession rules implemented in 2008 and confirmed in 2011, and which provided the basis for the New York Board of Regents to render illicit the deaccession plans which were recently cleared by Defendants.² Defendant Dr. Betty A. Rosa has her principal place of business located at New York State Education Building, 89 Washington Avenue, Albany, NY 12234.

11. Defendant Lester W. Young Jr. is the Regent at Large of the New York State Board of Regents and its current Chancellor. In his capacity, Lester W. Young Jr. should have been previewed to and involved in the approvals to the deaccession plans. The Board of Regents is responsible for the general supervision of all educational activities within the State, presiding over the University and the New York State Education Department. The Board of Regents has broad authority to incorporate educational institutions, including museums. Other provisions of the Education Law, and the Rules of the Board of Regents, govern the purposes, creation, regulation and dissolution of education corporations.³ Defendant Lester W. Young Jr. has his principal place of business located at New York State Education Building, 89 Washington Avenue, Albany, NY 12234.

² See Memorandum from Jeffery W. Cannell, Deputy Comm’r for Cultural Educ., to Cultural Educ. Comm., re: Emergency Amendment of Regents Rule § 3.27, Relating to Museum Collections Mgmt. Policies (Dec. 1, 2008), available at <http://www.regents.nysed.gov/meetings/2008Meetings/December2008/1208cea3.htm> [hereinafter Dec. 01, 2008 Regents Memo] and Memorandum from Jeffery W. Cannell, Deputy Comm’r for Cultural Educ., to Cultural Educ. Comm., re: Amendment of Regents Rule §3.27, Relating to Museum Collections Mgmt. Policies (May 05, 2011), available at <https://www.regents.nysed.gov/common/regents/files/documents/meetings/2011Meetings/May2011/511bra6.doc> [hereinafter May 05, 2011 Regents Memo].

³ *Id.*

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803 because the body or officer, here Defendants, proceeded in excess of their jurisdiction, because the actions by Defendants constitute a final determination made in violation of lawful procedure, law or rule, and affected by an error of law.

13. This Court has subject matter jurisdiction to render a declaratory judgment pursuant to CPLR § 3001.

14. This Court has personal jurisdiction over Defendants pursuant to CPLR § 301.

15. Venue properly lies in the County of Albany pursuant to CPLR §§ 503(a), 505(a), 506(a), 506(b), and 7804(b), as Defendants' principal office is located in the County of Albany, as Defendants made the determination at issue in the County of Albany, and as material events took place in the County of Albany, and as claims are asserted against Defendants whose principal offices are in Albany County.

FACTUAL BACKGROUND**Recent New York museums announcements regarding deaccession of artworks**

16. Between September 14, 2020 and September 17, 2020, multiple articles reported that at least three New York museums were planning to sell through auction one or more artworks throughout October 2020.

17. First, the Brooklyn Museum confirmed it was planning to sell at least 12 artworks from its permanent collections, including its only painting by Lucas Cranach the Elder, a 16th-century oil on panel titled "Lucretia," as well as works by Donato de' Bardi, Giovanni dal Ponte, Francesco Botticini, Lorenzo Costa, Gustave Courbet, Camille Corot, Hendrik Willem Mesdag,

Charles-François Daubigny and Philip Wilson Steer. See Robin Pogrebin, *Brooklyn Museum to Sell 12 Works as Pandemic Changes the Rules*, THE NEW YORK TIMES, September 16, 2020, available at <https://www.nytimes.com/2020/09/16/arts/design/brooklyn-museum-sale-christies-coronavirus.html#:~:text=the%20main%20story-,Brooklyn%20Museum%20to%20Sell%2012%20Works%20as%20Pandemic%20Changes%20the,the%20care%20of%20the%20collection>. See also Angelica Villa, *Amid Pandemic-Era Financial Pressure, Brooklyn Museum to Sell 12 Works at Auction*, ARTNEWS, September 16, 2020, available at <https://www.artnews.com/art-news/market/brooklyn-museum-deaccessions-artworks-christies-1234570972/>. Below is a picture of its only painting by Lucas Cranach the Elder, a major 16th-century oil on panel titled “Lucretia.”



Lucas Cranach I (Kronach 1472-1553 Weimar), “Lucretia” signed with the artist’s winged-serpent device (lower right) oil on panel, transferred to board 24 x 16 in. (61 x 40.6 cm.)

18. These works were auctioned between October 5 and October 15, 2020. The grounds justifying the sales cited by the Brooklyn Museum are as follows, according to a

statement made to the press by Anne Pasternak, director of the Brooklyn Museum:

“The proceeds will be used to create a permanent restricted Collections Care Fund to support in perpetuity the work of our curators, registrars, conservators and others in preserving, protecting and caring for our collections—one of the most important functions of any museum.”

See Nancy Kenney, Cranach, Courbet and Corot: a closer look at what the Brooklyn Museum is selling off, THE ART NEWSPAPER, September 17, 2020, available at <https://www.theartnewspaper.com/news/a-closer-look-at-what-the-brooklyn-museum-is-jettisoning#:~:text=Taking%20advantage%20of%20recently%20relaxed,auction%20block%20on%2015%20October.>

19. In addition, the Everson Museum of Art in Syracuse, New York, announced it is scheduled to sell at auction on October 6 a major painting by Jackson Pollock, “Red Composition,” (1946). *See* Christopher Knight, *Commentary: A museum plans to auction a crucial Jackson Pollock painting. It’s inexcusable*, THE LOS ANGELES TIMES, September 14, 2020, available at <https://www.latimes.com/entertainment-arts/story/2020-09-14/syracuse-museum-jackson-pollock-auction>. Below is a picture of the major painting by Jackson Pollock, “Red Composition,” (1946).



Jackson Pollock (1912-1956)
Red Composition, signed 'Jackson Pollock'
(lower right); signed again and dated
'Pollock 46' (on the reverse), oil on

Masonite, 19¼ x 23¼ in. (48.9 x 59.1 cm.)
Painted in 1946.

20. The grounds justifying the sale cited by the Everson Museum of Art, according to an FAQ page appearing on its website, are as follows:

*“• Funds realized from the sale will be used to establish a fund for acquiring works created by artists of color, women artists, and other under-represented artists.
• Funds will also be used for the direct care of the museum’s collection of more than 10,000 pieces, in keeping with guidelines established by the American Alliance of Museums.
• In keeping with the Museum’s Collecting Priorities Plan, the sale of the Pollock will enable the Everson to significantly intensify its diversification initiative for the Collection at a critical time in the nation’s history and when the Museum is actively working to address inequality within the institution itself and the community it serves.”*

POLLOCK DEACCESSIONING FAQ, available at <https://everson.org/about/news/pollock-faq>.

21. The Everson Museum of Art acknowledged these deaccession-based transactions are not in any way the result of any financial pressure created by the COVID-19 pandemic, and are instead a “normal” source of financing similar to traditional fundraising efforts. *Id.*

22. On September 16, 2020, The Town of Salem, NY specifically announced that it has received permission from the New York State Education Department and the Offices of the Attorney General to deaccession and auction select furniture pieces from the Georgi Museum, which will be offered for auction on October 4, 2020. *See* Editorial Board, *Georgi Museum Collection Items to be Auctioned*, HUDSON VALLEY 360, Sep 16, 2020, available at https://www.hudsonvalley360.com/artsandlife/thescenc/georgi-museum-collection-items-to-be-auctioned/article_ed2141a9-e8e0-5aec-800e-3a662d007182.html.

23. The grounds justifying the sales cited by the press reports indicated that “[t]he

revenue generated from the sale of these items will be used toward repairs, restoration, and improvements to the Georgi Museum and its Collection.” *Id.*

24. In the case of the Georgi Museum, the press reports specifically refers to some form of pre-approval of those plans issued by the New York Education Department and the New York State Office of the Attorney General, by stating the following:

“The Town of Salem has received permission from the State Education Department and the Offices of the Attorney General to deaccession and auction select furniture pieces from the Georgi Museum. Carlsen Galleries will host a live auction on October 4, 2020 beginning at approximately 10:30 am and closing at 4:30 pm.”

See Editorial Board, *Georgi Museum Collection Items to be Auctioned*, HUDSON VALLEY 360, Sep 16, 2020, available at https://www.hudsonvalley360.com/artsandlife/these-ene/georgi-museum-collection-items-to-be-auctioned/article_ed2141a9-e8e0-5aec-800e-3a662d007182.html (emphasis added).

Museum Deaccession Rules in New York

a) The New York State Office of the Attorney General

25. The New York State Office of the Attorney General, through its Charities Bureau, has a significant oversight role in the administration of nonprofit charitable assets, including broad statutory authority to prosecute and defend legal actions to protect the interests of the State and the public.⁴ Furthermore, the Attorney General has broad statutory authority to “investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered.”⁵ In the case of museums, the New York State Office of the Attorney General has inherent powers to

⁴ Executive Law § 63 et seq. B.

⁵ EPTL § 8-1.4(i).

investigate whether deaccession plans violate New York law, the public trust doctrine, or the *cy pres* doctrine.⁶

26. Rooted in Roman and English law, "the public trust doctrine is based on the notion that the public holds inviolable rights in certain lands and resources, and that regardless of title ownership, the state retains certain rights in such lands and resources in trust for the public."⁷ Historically reserved to natural resources such as tidelands, bottoms of seas and oceans, and to navigable waters of lakes and streams,⁸ New York courts have extended the public trust doctrine beyond the waters to include parkland and other public assets.⁹ "It has long been the rule that a municipality, without specific legislative sanction, may not permit property acquired or held by it for public use to be wholly or partly diverted to a possession or use exclusively private."¹⁰ Because no deaccession of museum assets cases have ever made it to the New York Court of Appeals under this theory, New York courts have not barred its application to the present case.

27. In addition to the endorsement of the public trust doctrine by New York courts, the Board of Regents codified the public trust doctrine as the museum's responsibility to serve and hold assets in trust for the public benefit.¹¹

28. Therefore, a claim of violation of the New York public trust doctrine is viable before the courts because the full controversy surrounding the *ultra vires* acts of Defendants

⁶ See *In re Friends for Long Island's Heritage*, 911 N.Y.S.2d 412, 417 (N.Y. App. Div. 2010) (applying N.Y. NOT-FOR-PROFIT CORP. LAW § 513 (2010) & N.Y. EDUC. LAW § 220 (McKinney 2009), to hold that assets donated to a non-profit corporation for educational purposes could not be used towards paying off debts upon dissolution of the corporation).

⁷ 5 Grad, Environmental Law § 10.05 [1] (2005).

⁸ *Ibid.*; see e.g. *Coxe v State of New York*, 144 NY 396, 405-406 (1895).

⁹ See *Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 630 (2001); *Brooklyn Park Commrs. v Armstrong*, 45 NY 234 (1871).

¹⁰ *Matter of Lake George Steamboat Co. v Blais*, 30 NY2d 48, 51 (1972).

¹¹ 8 NYCRR § 3.27(a)(18), 8 NYCRR § 3.27(d)(2)(i).

involves the public trust doctrine as well.

29. Following the declaration issued by the World Health Organization of a global pandemic due to the spread of the severe acute respiratory syndrome coronavirus 2 (SARS-CoV2) on March 11, 2020, and the issuance by New York Governor of the "New York State on PAUSE" executive order on March 22, 2020, the New York State Office of the Attorney General did not issue, based on the publicly available record, any statement, memorandum or declaration describing any changes to its jurisdiction or its prior positions as described above.

b) The Board of Regents

30. In New York, the Board of Regents of the Department of Education charters museums as educational institutions.¹² Museums risk losing their Board of Regents charters if they violate any of the rules and regulations of the Board of Regents.¹³ The Board of Regents regulations relating to museum collections, effective May 2011 in their final form, restrict the use of deaccessioning sales proceeds to new acquisitions, prohibiting the use of any part of the collection as collateral for a loan and the use of deaccessioning sales proceeds for operating costs.¹⁴

31. The Regents Rules define deaccessioning as "(i) removing an object from an

12 N.Y. COMP. CODES R. & REGS. tit. 8, § 3.27(a)(10) (McKinney 2011).

¹³ Subsection(c)(7)Deaccessioning of Collectionsstates:

An institution may deaccession an item in its collection only in a manner consistent with its mission statement and collections management policy and where one or more of the following criteria have been met: (i) the item is inconsistent with the mission of the institution as set forth in its mission statement; (ii) the item has failed to retain its identity; (iii) the item is redundant; (iv) the item's preservation and conservation needs are beyond the capacity of the institution to provide; (v) the item is deaccessioned to accomplish refinement of collections; (vi) it has been established that the item is inauthentic; (vii) the institution is repatriating the item or returning the item to its rightful owner; (viii) the institution is returning the item to the donor, or the donor's heirs or assigns, to fulfill donor restrictions relating to the item which the institution is no longer able to meet; (ix) the item presents a hazard to people or other collection items; and/or (x) the item has been lost or stolen and has not been recovered.

¹⁴ Amy Goldrich, *Museum Deaccessioning in NY State*, ENTMT, ARTS & SPORTS L. BLOG (May 20, 2011), http://nysbar.com/blogs/EASL/2011/05/test_post.html.

institution's collection, or (ii) the act of recording/processing a removal from an institution's collection." The Regents Rules state that a decision to deaccession is appropriate only if the decision satisfies at least one of the provided criteria.¹⁵

32. The Regents Rules, as they now stand, originated in 2008 as an emergency rule-making in response to the plans of some New York museums in desperate financial situations to sell portions of their collections to raise funds for operating costs.¹⁶ In fact, a prior legislative proposal in 2008 would have allowed museums to sell paintings to pay for debts and avoid bankruptcy and dissolution.¹⁷ The proposal, however, did not pass. Instead, the approved temporary amendment prohibited museums from using their collections as collateral for loans and selling their collections to pay debts.¹⁸ Based on the concern that "[e]ven if a museum fails we want to keep collections in the public trust and not lose them to debt or insolvency,"¹⁹ the Board of Regents voted to disallow museums from using their collections as a means for escaping debt or insolvency.²⁰ The Board of Regents began with the intention to provide museums in financial straits with a means to survive, but concluded that it needed to focus restrictions on keeping museum collections intact.²¹

¹⁵ See Dec. 01, 2008 Regents Memo and May 05, 2011 Regents Memo.

¹⁶ *Id.*

¹⁷ *Id.* New York Education Law already restricts the use of deaccessioning funds on the New York State Museum, a state-run museum. N.Y. EDUC. LAW § 233- a (McKinney 2009). Originally, this statute restricting the New York State Museum was to apply to all museums. See generally Jason R. Goldstein, Note, *Deaccession: Not Such a Dirty Word*, 15 CARDOZO ARTS & ENT. L.J. 213, 213-18 (1997) (endorsing the application of the business judgment rule to museum director decisions and only codifying a standard of conduct as opposed to limiting directors' freedom of action).

¹⁸ *Id.*

¹⁹ Assemb. B. 6959-A, 2009-2010 Sess. (N.Y. 2009). Deaccessioning events that motivated the submission of the Brodsky Bill to the New York Assembly include those of the National Academy of Art (Robin Pogrebin, *Branded a Pariah, the National Academy is Struggling to Survive*, N.Y. TIMES, Dec. 22, 2008, at C1; Christopher Knight, *Art Museum Directors Call for Boycott*, CULTURE MON- STER, L.A. TIMES (Dec. 5, 2008), <http://latimesblogs.latimes.com/culturemonster/2008/12/national-academ.html>; Judith H. Dobrzynski, *The Academic Dilemma*, WALL ST. J. (Sept. 15, 2011), www.online.wsj.com/article/SB10001424053111903461304576526744239052266.html), the Rose Museum at Brandeis University, and Fort Ticonderoga, *infra* note 22 and accompanying text.

²⁰ See Robin Pogrebin, *Bill Seeks to Regulate Museums' Art Sales*, N.Y. TIMES, Mar. 18, 2009, at C1. See also May 05, 2011 Regents Memo.

²¹ *Id.* The current education law addresses policies for museums chartered by the Board of Regents. EDUC. § 233-aa. The Brodsky Bill proposes adding § 233-aaa, which delineates accessioning and deaccessioning policies. Assemb. B.

33. Finally, it is absolutely remarkable for the Deputy Commissioner of the New York State Department of Education and head of the Office of Cultural Education (“OCE”) in office in 2008, Jeffrey W. Cannell, to state in blunt terms the intent of the recommended regulations, issued right in the midst of a major financial crisis:

“We believe current Regents Rules on collections are inflexible if a museum faced a sudden, unexpected and critical financial reversal. We don’t want a major museum to close, and don’t want to lose collections held in the public trust to debt.”
Dec. 01, 2008 Regents Memo at 2.

34. Following the emergency adoption of the new rules in 2008, as well as the re-adoptions in 2009 and 2010, and following a comment period in full compliance with SAPA, the New York Board of Regents definitively adopted the new rules as permanent ones, with one addition:

“The proposed amendment would apply to chartered museums and historical societies authorized to own and hold collections under Rule §3.27, and would:

- Enumerate ten specific criteria under which an institution may deaccession an item or material in its collection.*
- Specify that proceeds from deaccessioning be restricted in a separate fund to be used only for the acquisition of collections or the preservation, conservation or direct care of collections.*
- Require that all museums report annually a list of all deaccessions.”*

May 05, 2011 Regents Memo at 2 (emphasis added).

35. Therefore, the May 5, 2011 regents Memo undisputedly confirms that any establishment of a restricted fund as a result of a deaccession measure must only include funds obtained on the basis of the enumerated ten specific criteria listed in the regulation, and on

6959-A § 2.

no other.

36. Since Defendants endorsed, not only the emergency rules, but its rationale as described in the December 1, 2008 memo, as well as the permanent rules adopted on May 5, 2011, it is clearly established that the intent behind those rules was to ensure the preservation of all museum collections' integrity in New York, regardless of the financial pressures those institutions would face.

37. Following the declaration issued by the World Health Organization of a global pandemic due to the spread of the severe acute respiratory syndrome coronavirus 2 (SARS-CoV 2) on March 11, 2020, and the issuance by New York Governor of the "New York State on PAUSE" executive order on March 22, 2020, the Board of Regents issued no less than 5 series of "Emergency Regulations to Ease the Burdens on Educators, Students and Professionals in the Wake of the COVID-19 Pandemic" (*see* New York State Education Department Recent News [2020] available at <http://www.nysed.gov/news/2020>). None of these measures make any reference to or include any changes to the rules indicated above. Since March 11, 2020, neither the Board of Regents, nor its Cultural Affairs Committee, nor any of the Defendants, did issue, based on the publicly available record, any other statement, memorandum or declaration describing any changes to the Board of Regents' deaccession rules.

38. Therefore, the powers vested in the New York State Office of the Attorney General as to the oversight of New York museums and in Defendants as to deaccession rules do not appear to have been changed, modified, altered or otherwise amended since March 11, 2020.

39. Based on the press reports described above and the statements made by the Brooklyn Museum, the Everson Museum of Art and the Georgi Museum, these deaccession plans were inconsistent and in conflict with both New York law and Board of Regents rules.

40. Finally, based on the press reports described above, those New York museums are alleged to have been provided with guidance, determinations, approvals, clearance or other authorization, consent, or permission to proceed by Defendants with the transactions as announced above.

41. If Defendants are not enjoined from future approval actions for the deaccession of artworks, other museums will seek approval and be able to continue or begin removing pieces to the detriment of the public in violation of the established rules.

New York Freedom of Information Law Requests

42. To clarify such approvals, Petitioner issued, on September 20, 2020, two Freedom of Information Law (“FOIL”) requests submitted to Defendants and to the New York State Office of the Attorney General seeking the following records, in full compliance with FOIL statutory provisions:²²

“All records created after March 11, 2020 by the New York State Office of the Attorney General, specifically, but not limited to, its Charities Bureau as well as any other New York State Office of the Attorney General’s subdivision and department, by, between and for its leadership and staff, including but not limited to any inter-agency or intra-agency materials including, but not limited to policy directives, guidance documents, position papers, memoranda, notices, advisory opinions, or similar records, as well as any information kept, held, filed, produced, or reproduced by, with or for an agency, in any physical form whatsoever, including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations, or codes, statistical or factual tabulations or data, instructions to staff that affect the public, final agency policy or determinations,

²² 22 N.Y. PUB. OFF. LAW § 84, *et seq.*

which directly or indirectly pertain to the authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed with a) any deaccession-related transaction involving any individual museum institution in New York or any museum group, union, or other trade association located in the United States, or b) any change to any deaccession-related policy involving all, some, or specific cultural institutions in New York.

All communications which directly or indirectly pertain to the authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed with a) any deaccession-related transaction involving any individual museum institution in New York or any museum group, union, or other cultural trade association located in the United States, or b) any change to any deaccession-related policy involving all, some, or specific cultural institutions in New York, between the New York State Office of the Attorney General, its subdivisions and departments, either through its leadership or staff, and:

A. Any museum institution located in New York State or their agents;

B. Any trade association involving museums, specifically, but not limited to the American Alliance of Museums ("AAM"), the Association of Art Museum Directors ("AAMD") or their agents;

C. Any other third-party, specifically, but not limited to, the Office of the Governor of the State of New York, as well as any of its subdivision and department, by, between and for its leadership and staff, and any committee or member of the New York state senate or of the New York State assembly."

REQUEST FOR RECORDS PURSUANT TO THE NEW YORK FREEDOM OF INFORMATION LAW ("FOIL"), Pierre Ciric, Esq., September 20, 2020.

43. As of the date of the present complaint, the New York State Office of the Attorney General, in its reply to the Petitioner's FOIL request dated September 28, 2020, stated

it would not provide any feedback to Petitioner's FOIL request until February 2, 2021. This FOIL request is currently subject to an administrative appeal pursuant to FOIL § 89(3)(a) in response to the New York State Office of the Attorney General's response extension referenced under file # G000532-092020.

44. Furthermore, on November 3, 2020, Defendants responded to the Ciric Law Firm, PLLC's FOIL request dated September 20, 2020. Defendants granted the FOIL Request in part and denied the FOIL Request in part. Seventy-nine records were disclosed in response to the FOIL Request, containing sixteen individual e-mails and three attachments. Defendants, however, denied access to documents numbered 1 through 16 pursuant to POL §87(2)(a) on the basis of CPLR §§ 4503, 3101(c), and 3101(d)(2) as well as POL §§ 87(2)(g). Furthermore, documents 1, 2, 7, 8, 9, 10, 13, 14, and 15 on the basis of POL § 87(2)(b). Only documents 11 and 16 were released in their entirety.

45. As a result, the vast majority of the released documents, including communications involving the museums referenced above, were redacted almost in their entirety.

46. However, the receipt of the FOIL Request response on November 3, 2020, allows Plaintiff to conclude that the Giorgi Museum did receive preclearance from Defendants for its proposed deaccession transactions. *See Exhibit A, Response from the New York State Education Department re: FOIL Request: FL-CE-20/913, November 3, 2020, page 55.* In an unredacted letter dated April 16, 2020 issued by Defendants to the attention of Nathan Courtney, Assistant Attorney General with the Charities Bureau of the Office of the Attorney General, Defendants state that "[t]he Department has no objection to the proposed sale."

47. Due to the significant amount of redaction in the rest of the November 3, 2020 submission issued by Defendants, Plaintiff cannot ascertain whether similar clearances were

provided for any institution other than the Georgi Museum. However, the confirmation that such clearance was provided at least to the Georgi Museum confirms that Defendants either engaged in regulatory action in violation of their own rules or created a new rule in violation of SAPA. Under either scenario, such clearance triggers this court's jurisdiction.

48. On November 28, 2020, The Ciric Law Firm, PLLC timely and appropriately submitted a FOIL Appeal in response to Defendants' denial of access to certain records referenced in the FOIL Request. The appeal challenged both the extensive redactions applied to each produced document, except for documents numbers 11 and 16 which were released in their entirety, as well as the grounds claimed by Defendants to justify those redactions and associated denials.

Prior Challenge before the New York State Commissioner of Education

49. A Plaintiff must have first submitted any challenges to the Commissioner of the administrative agency controlling the application of its regulations in accordance with New York laws,²³ and the doctrine of exhaustion of administrative remedies, before seeking redress from the judicial branch.²⁴

50. None of the exceptions to the administrative exhaustion requirements applied. Under Court of Appeals precedent, the exhaustion rule does not apply in four situations: (1) when an agency's actions are challenged as unconstitutional; or (2) when an agency's actions are wholly beyond its grant of power; or (3) when resorting to an administrative remedy would be futile; or (4) when pursuit of an administrative remedy would cause irreparable injury.²⁵ The

23 NY Educ L § 310 (2014).

24 "[i]t is well established that a person aggrieved by the action of a government agency is generally required to exhaust the available administrative remedies before seeking judicial review of the agency's action." Bankers Trust Corp. v. New York City, 750 N.Y.S.2d 29, 34 (1st Dep't 2002) (citations omitted). See also Young Men's Christian Assoc. v. Rochester Pure Waters Dist., 37 N.Y.2d 371, 375 (1975).

25 Watergate II Apts. v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978).

challenges presented in this verified complaint were not related to unconstitutional actions by Defendants, and did not describe actions beyond statutory authority given that the rules violated were derived from Defendant's rulemaking power. Furthermore, the administrative remedy, required by law, is and was not futile, since an administrative challenge affords an opportunity for the Commissioner to address Defendant's actions before any lasting damage on the New York viewing public was made. Finally, the pursuit of the administrative remedy was needed to avoid irreparable injury to the New York viewing public and was the means to avoid said injury.

51. The controversy presented before the Commissioner did not involve legal issues that are typically excluded from her jurisdiction by case law or statute, such as disputes based on the New York State Open Meetings Law (OML), the Freedom of Information Law (FOIL) (reserved to the New York State Committee on Open Government, supervised by attorney Robert Freeman), disputes involving alleged violations of the Family Educational Rights and Privacy Act (FERPA) (reserved to the U.S. Secretary of Education), disputes involving alleged violations of federal or state civil rights laws (adjudicated by state or federal courts), claims for money damages or claims that raise constitutional issues of first impression, appeals from hearings or determinations to discipline instructional or non-instructional staff, appeals relating to the identification, evaluation, program or placement of students with disabilities (reserved to the New York State Office of State Review), discrimination complaints on the basis of race, color, national origin, sex, disability, or age (reserved to the Department of Justice and the Office for Civil Rights (OCR) in the U.S. Department of Education), disputes involving collective bargaining issues in public school districts (reserved are handled by the Public Employment Relations Board). Therefore, Plaintiff was fully justified in filing the Verified Petition dated September 30, 2020 before the Commissioner on the basis of his general jurisdiction under N.Y.

Educ. L. §310.

52. As a result, on September 30, 2020, Plaintiff submitted a Verified Petition to the Commissioner of the New York State Education Department and a Request for Stay pursuant to N.Y. Educ. L. §310. This Verified Petition challenged approvals supervised, controlled or ordered by the Board of Regents that were made in favor of certain museum institutions located in the State of New York in violation of 8 NYCRR § 3.27, as well as in violation of the New York public trust doctrine and of the New York State Administrative Procedure Act (“SAPA”).

53. Based upon the above-referenced public announcements, the Verified Petition claimed that the Defendants issued authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed with specific deaccession-related transactions involving the sale through auctions of a number of artworks, including paintings, fine furniture, and other objects, for the purpose of raising funds entirely dedicated to pay for regular operating expenses of those institutions, in plain violation of 8 NYCRR § 3.27, the New York public trust doctrine and SAPA.

54. Following settlement discussions with counsels representing the Brooklyn Museum and the Everson Museum, Plaintiff agreed to strike down statements in the Verified Petition relating to these two institutions, as both counsels represented to Plaintiff that their clients did not seek pre-clearance from Defendants. However, Plaintiff maintained all other statements relating to the Georgi Museum, since the FOIL request response described above issued by Defendants allowed Plaintiff to confirm that Defendants did provide pre-clearance to the contemplated deaccession transactions.

55. On October 9, 2020, Plaintiff’s request for interim relief was denied. *See* Exhibit B. Decision No. 17935/Appeal No. 21479. The October 29, 2020 decision, which dismisses

Plaintiff's appeal for lack of jurisdiction, was received by Plaintiff on November 15, 2020. The Commissioner contended that N.Y. Educ. L. §310 does not authorize an appeal to the Commissioner from actions taken by employees or officers of the State Education Department.²⁶ Instead, the Commissioner stated that such actions could only be challenged in a proceeding brought in a court of competent jurisdiction pursuant to Article 78 of the Civil Proceedings Law and Rules. Finally, the Commissioner determined that Plaintiff could not challenge the Board of Regents or its members in an appeal pursuant to N.Y. Educ. L. §310.

56. Therefore, Plaintiff has exhausted his administrative remedies, and is fully justified in filing this Article 78 proceeding at this time.

LEGAL ALLEGATIONS

Petitioner has standing to file this verified complaint because it fully complies with New York law

57. New York courts have established a two-prong test for evaluating a petitioner's standing to challenge a governmental agency's actions.²⁷ Under this test, a petitioner need only show: (1) that there is "injury in fact," meaning that petitioner will actually be harmed by the administrative action; and (2) that the interest the petitioner asserts falls "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted."²⁸ The purpose of a standing analysis is to determine whether a party should have access to the court system.

58. Courts have relaxed their standing analyses in light of the increasingly pervasive

²⁶ See Commissioner's Dismissal of Appeal, Exhibit B.

²⁷ See e.g. *N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004); *Dairyalea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975).

²⁸ *Novello*, 2 N.Y.3d at 211; *Dairyalea*, 38 N.Y.2d at 9.

role that administrative agencies play in impacting the daily lives of citizens.²⁹ Petitioners have largely demonstrated that they suffered an injury-in-fact, since Plaintiff, as a member of the New York public with access to New York museums regulated by Defendants will be “conceiving himself aggrieved” by Defendants’ actions if they are not enjoined in the future. In the present, case, this requirement is largely fulfilled because, would these deaccession sales be authorized to proceed according to the clearance provided by Defendants, those artworks would be permanently removed from public display to the significant detriment of Plaintiff and the New York viewing public, representing an inherent injury to them, since they will no longer be able to enjoy the public viewing of these artworks in the future.

59. Furthermore, Plaintiff has standing to obtain the declaratory relief he seeks. New York courts may grant declaratory relief if a “justiciable controversy” exists. CPLR § 3001. A justiciable controversy exists when there is an actual controversy between adversarial parties who have a stake in the outcome.³⁰ Declaratory relief is appropriate when the challenged regulation proscribes or threatens, or may be interpreted as proscribing or threatening the plaintiff’s activity.³¹ Furthermore, reasonably certain future harm is sufficient to establish standing.³² Here, a genuine controversy between adversarial parties who have an interest in the outcome exists, since Plaintiff, as a member of the viewing public, will be injured by subsequent clearances issued by Defendants, would the change in established deaccession rules be

²⁹ See *Dairylea*, 38 N.Y.2d at 10 (noting that “[t]he increasing pervasiveness of administrative influence on daily life... necessitates a concomitant broadening of the category of persons entitled to judicial determination”); *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987) (recognizing that standing principles “should not be heavy handed”). “A fundamental tenant of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had.” *Dairylea*, 38 N.Y.2d at 10.

³⁰ *Doe v. Coughlin*, 71 N.Y.2d 48, 52 (1987); *Long Is. Light Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (1st Dep’t 2006); *United Water New Rochelle, Inc. v. City of N.Y.*, 275 A.D.2d 464, 466 (2nd Dep’t 2000).

³¹ See *Plaza Health Clubs, Inc. v. New York*, 76 A.D.2d 509, 513-14 (1st Dep’t 1980).

³² See *Police Benevolent Ass’n*, 29 A.D.3d at 70 (finding that petitioners had standing to seek declaratory relief where their harm was not actual or present, but was reasonably certain to occur under the challenged action).

maintained. Thus, Plaintiff has standing to seek declaratory and injunctive relief.

60. Finally, taxpayer standing can be conferred in favor of New York residents in such a case, since New York, beyond the federal tax code, has chosen to provide tax benefits targeted to nonprofit organizations such as museums (e.g., an exempt organization's purchases of tangible personal property and services, rent paid for hotel occupancy, and amusement charges are generally exempt from sales tax, provided the exempt organization is the direct purchaser, occupant or patron of record). In fact, New York courts have recognized taxpayer standing in a multitude of settings, when the petitioner-taxpayer challenges the legality of any state or local legislative action, and, more importantly, where an "impenetrable barrier" to judicial scrutiny of the challenged action exists.³³

61. In the present case, tax policy established by New York state has a direct bearing on the controversy at issue, because this policy is specifically dedicated to maximizing museum institutions' abilities to increase and maintain access of their collections to the New York public. Therefore, when this policy is directly contradicted by Defendants' actions, which lead to the sale and removal from major artworks from New York museums, the New York public is in a position to assert taxpayer standing, independently from the direct injury they will suffer from the removal of these artworks from public viewing.

Any clearance or approval issued by Defendants in favor of any New York museum to proceed with the announced transactions based on deaccession of artworks was provided in violation of the plain language of 8 NYCRR § 3.27

62. On their face, none of the grounds or rationales offered by the town of Salem, NY, the Everson Museum of Art or the Brooklyn Museum, meet the very specific and restricted requirements established by Defendants in 2008 to authorize the deaccession of artworks held in

³³ *Transactive Corp. v. New York State Dept. of Social Services*, 92 N.Y.2d 579, 684 N.Y.S.2d 156, 706 N.E.2d 1180 (1998); *Clark v. Town Board of Town of Clarkstown*, 28 A.D.3d 553, 812 N.Y.S.2d 643 (2d Dep't 2006).

public trust in New York museum institutions under 8 NYCRR § 3.27.

a. The town of Salem, NY

63. As to the Georgi Museum, the only grounds provided based on the public reporting was stated as follows:

“This is a very exciting time for the Georgi”, states Director, Wendy Bordwell. “This process actually began in 2014 with an emergency evacuation, mold abatement, and interior renovation. The decision to deaccession and auction the select items was not an easy one for the Town Board of Salem, NY, but was ultimately necessary as limited resources are preventing the restoration and proper care of the Facility and remaining Collection.”

See Editorial Board, Georgi Museum Collection Items to be Auctioned, HUDSON VALLEY 360, Sep 16, 2020, available at https://www.hudsonvalley360.com/artsandlife/these-ene/georgi-museum-collection-items-to-be-auctioned/article_ed2141a9-e8e0-5aec-800e-3a662d007182.html (emphasis added).

64. Here, the only grounds provided by the Georgi museum appear to be, on the basis of press reports, a financial shortfall, as well as increased repair needs of the facilities. However, not only are such grounds completely absent from the 10 specific and limited criteria for deaccession established by , 8 NYCRR § 3.27, but those reasons were precisely the kind of rationales that Defendants intended to reject and exclude when they endorsed those rules in 2008.³⁴ Therefore, it is clear on the face of the town of Salem, NY’s announcement that the clearance provided by Defendants, which was reported by the press, is unfounded and contrary to the rules it promulgated in 2008 and confirmed in 2011.

b. The Brooklyn Museum

65. Similarly, the Brooklyn Museum, on the basis of its public statements to the press,

³⁴ See Dec. 01, 2008 Regents Memo and May 05, 2011 Regents Memo.

did not even try to offer a single shred of justification as to the grounds for the deaccessions of major artworks that would fit in any of the 10 criteria mandated by 8 NYCRR § 3.27. It simply announced that:

“The proceeds will be used to create a permanent restricted Collections Care Fund to support in perpetuity the work of our curators, registrars, conservators and others in preserving, protecting and caring for our collections—one of the most important functions of any museum.”

See Nancy Kenney, Cranach, Courbet and Corot: a closer look at what the Brooklyn Museum is selling off, THE ART NEWSPAPER, September 17, 2020, available at <https://www.theartnewspaper.com/news/a-closer-look-at-what-the-brooklyn-museum-is-jettisoning#:~:text=Taking%20advantage%20of%20recently%20relaxed,auction%20block%20on%2015%20October.>

66. On the basis of these public statements, it is evident that the Brooklyn Museum failed to comply with 8 NYCRR § 3.27, since the creation of a fund cannot serve as a justification for the deaccession on its own, without a proper basis for the sale in the first place, as was clearly specified by Defendants in the May 05, 2011 Regents Memo.

67. Therefore, it is clear on the face of the Brooklyn Museum’s announcement that any clearance provided by Defendants is unfounded and contrary to the rules it promulgated in 2008 and confirmed in 2011.

c. The Everson Museum of Art

68. As to the Everson Museum of Art, a pale attempt to provide vague justifications based on the diversification of collections fails to satisfy the existing 10 criteria established by 8 NYCRR § 3.27(c)(7). In fact, none of the grounds provided in press reports qualify as proper justifications.

69. The Everson Museum of Art announces that “[f]unds realized from the sale will be used to establish a fund for acquiring works created by artists of color, women artists, and other under-represented artists.” In addition, the announcement asserts that, “[i]n keeping with the Museum’s Collecting Priorities Plan, the sale of the Pollock will enable the Everson to significantly intensify its diversification initiative for the Collection at a critical time in the nation’s history and when the Museum is actively working to address inequality within the institution itself and the community it serves.”³⁵ This statement, on its face, is clearly inconsistent with any of the 10 criteria allowing for a deaccession process described in 8 NYCRR § 3.27(c)(7).

70. First, “Red Composition,” (1946) by Jackson Pollock is not described as inconsistent with the rest of the collections or redundant with other contemporary art paintings in the collections. Furthermore, invoking the goal of diversification of collections is contrary to the actual language of the rule, which only limits deaccession of specific artworks for the purpose of refinement, as indicated in 8 NYCRR § 3.27(c)(7)(5), and not diversification. In fact, the word “to refine” means “to improve or perfect by pruning or polishing”, or “ to make improvement by introducing subtleties or distinctions.”³⁶ The deaccession decision by the Everson Museum of Art is a far cry from improving or perfecting a specific collection of the museum, since it states that it intends to create a completely different collection, focused on “*acquiring works created by artists of color, women artists, and other under-represented artists.*” The reason the word “refine” was chosen by Defendants in the 2008 emergency rule was to ensure that museums would improve the aesthetic consistency of a particular collection by trading one

³⁵ POLLOCK DEACCESSIONING FAQ, available at <https://everson.org/about/news/pollock-faq>.

³⁶ “Refine.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/refine>. Accessed 30 Sep. 2020.

artwork for another within the framework of a particular collection in order to improve its quality.

71. Second, the overwhelming artistic importance of “Red Composition,” (1946) by Jackson Pollock in the Everson Museum of Art’s collections makes it impossible for the museum to consider it a candidate for “improvement” or “refinement.” In fact, commentators have already concluded that it *“is by far the most important painting in the Everson, a small regional institution that specializes in American art. None of the other modern pieces in its permanent collection is remotely as significant, or as beautiful.”* Terry Teachout, *An Art Museum Sells Its Soul*, WALL STREET JOURNAL, September 22, 2020, available at <https://www.wsj.com/articles/an-art-museum-sells-its-soul-11600808127>. Therefore, the proposed deaccession of “Red Composition” is already considered by commentators to be a violation of the mission statement of the institution, which promotes “dynamic and meaningful encounters with modern and contemporary American art.”³⁷ Therefore, if selling the most important artwork in its contemporary American art collection is in conflict with the very mission of the museum, it can hardly be argued that such a transaction could be considered a “refinement” or an “improvement” of its contemporary American art collection!

72. Finally, the last justification provided by the Everson Museum of Art, the constitution of a restricted fund for the direct care of the museum’s collection, is similar to the one provided by the Brooklyn Museum, and should be dismissed for the same reasons:

“Funds will also be used for the direct care of the museum’s collection of more than 10,000 pieces, in keeping with guidelines established by the American Alliance of Museums.”

POLLOCK DEACCESSIONING FAQ, available at

³⁷ About the Everson Museum of Art, available at <https://everson.org/about#:~:text=Our%20Mission%3A,more%20vital%20and%20inclusive%20society.>

<https://everson.org/about/news/pollock-faq>.

73. For these reasons, would similar auction sales be authorized to proceed in the future according to the clearance provided by Defendants, they rely on authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed issued by Defendants which are in clear violation of 8 NYCRR § 3.27(c)(7).

Any approval issued by Defendants in favor of New York museums to proceed with announced deaccessions of artworks is in violation of the New York public trust doctrine, as well the long-lasting public policy established by both Defendants and the New York legislature

74. The public trust doctrine, as applied to museums, assumes that art owned by museums is part of the public domain for the public benefit.³⁸ In this regard, the public trust doctrine treats art as a trust held by public institutions as a public resource.³⁹ In this regard, the language of 8 NYCRR § 3.27(d)(2)(i) is abundantly clear, when it states that “[t]he institution shall organize its governing authority, staff, financial resources, collections, public programs and other activities to effectively achieve its mission statement and fulfill its public trust obligations.” (emphasis added).

75. After the Board of Regents incorporated the common law public trust doctrine into its own rules,⁴⁰ the New York State legislature attempted to go further, by tackling multiple legislative attempts to incorporate it via statute into New York Education Law. First, in 2009, a bill was introduced to codify deaccessioning procedures for all “museums” in New York State.⁴¹ In 2017, a similar attempt was made through the New York legislature. During the debate, New

³⁸ See Patty Gerstenblith, *The Fiduciary Duty of Museum Trustees*, 8 COLUM.-VLA J.L. & ARTS. 175, 184 (1983) (citing *Payne v. Kassab*, 361 A.2d 263 (1976)).

³⁹ *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 163 n.3 (Ct. App. 1987) (citing *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 431 (1983)).

⁴⁰ 8 NYCRR § 3.27(a)(18).

⁴¹ Assemb. B. 6959-A, 2009-2010 Sess. (N.Y. 2009).

York legislators asserted that monetizing the collections for purposes other than [their] protection and expansion... was inconsistent with the interests of the people of the state” thus [endangering] ... the integrity and existence of collecting institutions’ collections handed to us by earlier generations as a sacred, cultural and ethical trust.”⁴²

76. Since the Board of Regents already incorporated the New York public trust doctrine in its rules through the adoption of 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i), Petitioner does not need to assert or demonstrate whether Defendants’ actions violated the New York common law public trust doctrine. The only thing the court needs to evaluate is whether Defendants’ actions, by authorizing or otherwise clearing the deaccession decisions involving auction sales of artworks currently held by the Georgi Museum, the Brooklyn Museum and the Everson Museum of Art, violated, on their face, the plain language of 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i). In the present case, this conclusion is straightforward, since none of these approvals or clearances can fit in any of the deaccession criteria clearly delineated in 8 NYCRR § 3.27(c)(7).

77. Therefore, the Commissioner will easily conclude that the approvals or clearances provided by Defendants to those three museum institutions to proceed with those deaccession plans are in violation of 8 NYCRR § 3.27, as those rules imply the public trust doctrine.

Defendants violated SAPA by not giving the New York public an opportunity to comment on a substantially different rule introduced when they approved or cleared the announced deaccession-based transactions

78. The New York State Administrative Procedure Act (“SAPA”) requires agencies to submit proposed rules to the Secretary of State for publication in the *State Register* in order to afford the public notice of the proposal and an opportunity for comment prior to adoption of a

⁴² Senate A. 3302, 2017-2018 Sess. (N.Y. 2009).

rule. SAPA § 202(1).

79. If, after such notice and comment, the agency proposes to adopt a rule that “contains a substantial revision” to the proposed rulemaking, the agency “shall submit a notice of revised rulemaking to the secretary of state for publication in the state register.” SAPA § 202(4-a). For purposes of this requirement, a “substantial revision” is “any addition, deletion or other change in the text of a rule proposed for adoption, which materially alters its purpose, meaning or effect. . . .” SAPA § 102(9).

80. In the present case, Defendants failed to substantially comply with SAPA. Defendants did not submit a notice of revised rulemaking for publication even though, when they approved or otherwise cleared the deaccession-based transactions in favor of the town of Salem, NY, the Brooklyn Museum and the Everson Museum of Art, they actually modified, amended or otherwise changed the one described in 8 NYCRR § 3.27, since they authorized transactions which were previously banned under the 2008 rule.

81. Therefore, by applying a different rule to these deaccession-based transactions, Defendants engaged in unauthorized rulemaking, since the differences between the 2008 rule and their approval of these transactions materially and significantly alter the extent and nature of circumstances where deaccession of artworks is authorized. Furthermore, it is clear this change will create significant confusion in the industry, since Defendants failed to go through the process required to produce clarity and visibility to the New York public as well as to all New York museum institutions.

Seeking injunctive relief is fully justified because Petitioner’s claims are likely to succeed on the merits, the Petitioner will be irreparably injured absent a stay and the balance of equities strongly weighs in his favor.

82. New York law provides clear guidance to pursue injunctive relief as is requested

here.⁴³ Under those rules, temporary restraining orders or preliminary injunctions are remedies designed to “maintain the status quo until there can be a full hearing on the merits.”⁴⁴

83. Typically, a temporary restraining order or a preliminary injunction should be granted upon a showing that (1) the petitioner is likely to succeed on the merits; (2) the petitioner will be irreparably injured absent the injunctive relief; and (3) the balance of equities weighs in the petitioner’s favor.⁴⁵ When a party seeking injunctive relief merely seeks to preserve the status quo, the usual legal requirements are relaxed, “as the denial of injunctive relief would render the final judgment ineffectual.”⁴⁶ In such cases, the party has a “reduced degree of proof” in establishing its likelihood of success on the merits.⁴⁷ Further, the balance of equities tilts in favor of the party seeking to preserve the status quo.⁴⁸

84. Finally, a temporary restraining order or an injunction can be entered against a public officer, board or municipal corporation of the state where it appears that they will act illegally and thereby outside the performance of their statutory duties.⁴⁹

⁴³ CPLR §§ 6301, 6313.

⁴⁴ *Pamela Equities Corp. v. 270 Park Ave. Cafe Corp.*, 62 A.D.3d 620, 620 881 N.Y.S.2d 44, 45 (1st Dep’t 2009); see also *Gerald Modell Inc. v. Morgenthau*, 196 Misc. 2d 354, 359, 764 N.Y.S.2d 779, 784 (Sup. Ct. N.Y. Cnty. 2003). “A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” CPLR §§ 6301, 6313.

⁴⁵ See, e.g., *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 49 (2005); *Bernheim v. Matthew Bender & Co.*, 244 A.D.2d 161, 663 N.Y.S.2d 577 (1st Dep’t 1997). “[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction[.]” *Madden Int’l, Ltd. V. Lew Footwear Holdings Pty. Ltd.*, 50 Mis. 3d 1210(A), 2016 N.Y. Misc. LEXIS 160, *15 (Sup. Ct. N.Y. Cnty. Jan 15, 2016) (quoting *Reuters Ltd. v. United Press Int’l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)), *aff’d*, 143 A.D.3d 418, 2016 N.Y. App. Div. LEXIS 6333 (1st Dep’t 2016).

⁴⁶ See *State v. City of New York*, 275 A.D.2d 740, 741, 713 N.Y.S.2d 360, 361 (2d Dep’t 2000).

⁴⁷ *Id.*; *Masjid Usman, Inc. v. Beech 140, LLC*, 68 A.D.3d 942, 943, 892 N.Y.S.2d 430, 431 (2d Dep’t 2009).

⁴⁸ See *State v. City of New York*, 275 A.D.2d at 741, 713 N.Y.S.2d at 361; *CanWest Global Communications Corp. v. Mirkaei Tikshoret Ltd.*, 9 Misc. 3d 845, 868, 804 N.Y.S.2d 549, 568 (Sup. Ct. N.Y. Cnty. 2005); *Sp.Q.R. Co., Inc. v. United Rockland Stairs, Inc.*, 57 A.D.3d 642, 643, 868 N.Y.S.2d 318 (2nd Dep’t 2008).

⁴⁹ *Komyathy v. Board of Education*, 75 Misc. 2d 859, 862, 348 N.Y.S.2d 28, 33-34, 1973 N.Y. Misc. LEXIS 1387, *7 (citing *110 Manno Realty Corp. v. Town of Huntington*, 61 Misc 2d 702) (Sup. Ct. Dutchess Cnty. 1973); also see *Matter of Fortuna v. Prusinowski*, 22 Misc. 3d 974, 976, 870 N.Y.S.2d 742, 744, 2008 N.Y. Misc. LEXIS 7112, *4, 2008 NY Slip Op 28508, 2 (Suffolk Cnty. 2008) (“Being discretionary in nature, said decisions are not statutorily compelled and thus do not constitute “the performance of statutory duties” within the purview of CPLR § 6313(a).”). In short, “[i]f State officials act in excess of their legal authority or pursuant

85. As to the likelihood of prevailing on the merits and as established in the present complaint, Plaintiff is likely ultimately to prevail on the merits in the underlying proceeding because the claims against Defendants' approvals of the above-referenced deaccession actions are based on the plain language of the New York Board of Regents rules, such as 8 NYCRR § 3.27(c)(7), 8 NYCRR § 3.27(a)(18), and 8 NYCRR § 3.27(d)(2)(i). Furthermore, Defendants' actions fail to otherwise comply with SAPA.

86. All that is required to justify injunctive relief is a likelihood of success; the proponent of a temporary stay or a temporary injunction need not offer conclusive proof beyond any factual dispute establishing ultimate success in the underlying proceeding.⁵⁰

87. As to the irreparable harm prong, Plaintiff will unquestionably suffer significant irreparable harm if Defendants' actions as to their approval and clearance of the deaccession-related transactions are not restrained. To warrant injunctive relief, the irreparable harm alleged must be immediate, specific, nonspeculative, and nonconclusory.⁵¹ To prevail, petitioners must establish not a mere possibility that they will be irreparably harmed, but that they are likely to suffer irreparable harm if equitable relief is denied.⁵²

88. In the present case, the mere removal of major artworks from the viewing public is an obvious, irreparable, immediate, specific and nonspeculative harm, since auction sales are designed to transfer artworks to private parties, and forever withdraw them from any viewing

to an unconstitutional statute, such persons are stripped of their official character and undoubtedly could be enjoined as individuals." *Gaynor v. Rockefeller*, 21 A.D.2d 92, 99, 248 N.Y.S.2d 792, 802 (1st Dep't 1964).

⁵⁰ See *Moy v. Umeki*, 10 A.D.3d 604, 605, 781 N.Y.S.2d 684, 686 (2d Dep't 2004) ("[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction.") (quoting *Egan v. New York Care Plus Ins. Co.*, 266 A.D.2d 600, 601, 697 N.Y.S.2d 776 (3d Dep't 1999)).

⁵¹ *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo*, 64 N.Y.2d 233, 475 N.E.2d 90 (1984).

⁵² See *Bank of Am., N.A. v. PSW NYC LLC*, 29 Misc. 3d 1216A, 918 N.Y.S.2d 396 (Sup. Ct. N.Y. Cnty. 2010) (citing *Natsource LLC v Paribello*, 151 F. Supp. 2d 465, 469 (S.D.N.Y. 2001)).

opportunity by the New York public. Again, Plaintiff is not seeking from the court a remedy against the museums which engaged in those deaccession sales, but against the regulator, here Defendants, to prevent them from violating their own rules in the future.

89. As to the balance of equities prong of the analysis, the balance of equities and hardship unquestionably tilts in favor of Plaintiff. Defendants will not suffer any harm if the injunctive relief is granted, whereas the irreparable harm that Plaintiff faces in weighing such relief is the substantial damage to Petitioner's access to artworks subject to deaccession plans. Furthermore, the analysis should focus on the Defendants' harm, and not on the museums or auction houses' potential impact of the removal of Respondent's approval or ascent, since neither the museums involved in those deaccession measures, nor the auction houses hired to perform the sales are parties in the present proceeding. The injunctive relief is about preserving Petitioner's public access to those artworks, while Defendants will suffer absolutely no harm of any kind if the injunctive relief is granted. A granting of the requested relief will merely preserve the status quo. Traditionally the balance of equities tilts in favor of the party seeking to preserve the status quo.⁵³

90. Petitioner readily satisfies the elements required for temporary and preliminary relief to enjoin enforcement of Defendants' actions in the future. Accordingly, the court should issue a preliminary or permanent injunction seeking to stop Defendants to pre-approve deaccession plans by museums in the State of New York in the future as they just did, at least as it involved the Georgi Museum.

⁵³ See *State v. City of New York*, 275 A.D.2d 740, 741; *CanWest Global Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 574 (Sup. Ct. N.Y. Cnty. 2005); *Sp.Q.R. Co., Inc. v. United Rockland Stairs, Inc.*, 57 A.D.3d 642, 643, 868 N.Y.S.2d 318 (2d Dep't 2008).

FIRST CAUSE OF ACTION**Defendants Violated New York Board of Regents deaccession Rules as specified in 8 NYCRR § 3.27(c)(7)**

91. Petitioner incorporates by reference all of the preceding paragraphs.

92. Defendants, by providing authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed in favor of the above-referenced New York museums as to certain deaccession-related transactions, acted in clear violation of 8 NYCRR § 3.27(c)(7).

93. Therefore, such approvals are *ultra vires*, without lawful authority, and in violation of law. Therefore, Defendants should rescind those approvals, or, in the alternative, be enjoined from issuing such approvals in the future.

SECOND CAUSE OF ACTION**Defendants Violated the Public Trust Doctrine as specified in 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i)**

94. Plaintiff incorporates by reference all of the preceding paragraphs.

95. Defendants, by providing authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed in favor of the above-referenced New York museums as to certain deaccession-related transaction, acted in clear violation of 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i)

96. Therefore, such approvals are *ultra vires*, without lawful authority, and in violation of law. Therefore, Defendants should rescind those approvals, or, in the alternative, be enjoined from issuing such approvals in the future.

THIRD CAUSE OF ACTION**Defendants Violated SAPA by Not Giving the Public an Opportunity to Comment on its New Rulemaking**

97. Plaintiff incorporates by reference all of the preceding paragraphs.

98. Defendants failed to substantially comply with SAPA because they did not submit a notice of revised rulemaking for publication as they provided certain museums with authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed in favor of the above-referenced New York museums as to certain deaccession-related transaction, acted in clear violation of 8 NYCRR § 3.27(c)(7), 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i).

99. Therefore, by applying a different rule, Defendants engaged in unauthorized rulemaking, since the differences between the current rule and their approval of those transactions materially and significantly alter the extent and nature of circumstances where deaccession of artworks is authorized. Furthermore, it is clear that such a change will create significant confusion in the industry, since Defendants failed to go through the process required to produce clarity and visibility to the New York public as well as to New York museums.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests judgment as follows:

(a) Declaring, pursuant to N.Y.C.P.L.R. § 3001, any authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed in favor any New York museum as to any deaccession-related transactions since March 11, 2020 void because it violates 8 NYCRR § 3.27(c)(7), 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i),

(b) Enjoining and permanently restraining Defendants and any of their agents, officers, and employees, pursuant to N.Y.C.P.L.R. § 6301, from implementing or enforcing any

authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed in favor of any future deaccession-related transaction similar to those described above, as they will be in clear violation of 8 NYCRR § 3.27(c)(7), 8 NYCRR § 3.27(a)(18) and 8 NYCRR § 3.27(d)(2)(i),

(c) Directing the Defendants to issue immediately a press release notifying the public and the regulated community of museums and education institutions that such authorization, guidance, determinations, approvals, clearance or other consent, or permission to proceed in a similar manner has been vacated, is not in effect and will no longer be granted; and

(d) Granting such other and further relief as the Commissioner deems just and proper.

Dated: January 15, 2021
New York, New York



Pierre Ciric, Esq.
Pro Se Plaintiff

For mail service of papers, due to the COVID-19 pandemic, please deliver to:

The Ciric Law Firm, PLLC
335 East 14th Street, Suite #1171
New York, NY 10009-9306
Email: pciric@ciriclawfirm.com
Tel: (212) 260-6090
Fax: (212) 529-3647

For personal service of papers, due to the COVID-19 pandemic, please deliver to:

Pierre Ciric, Esq.
622 East 20th Street, Suite #2A
New York, NY 10009