2014 WL 4055965 (D.C.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of the District of Columbia.
Civil Division

THE TRUSTEES OF THE CORCORAN GALLERY OF ART, Petitioner,

v.

THE DISTRICT OF COLUMBIA, Respondent.

No. 2014CA003745.
July 14, 2014.

Next Event: July 18, 2014

Petitioner's Memorandum of Points and Authorities in Opposition to Motion to Intervene

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Judge Robert Okun.

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INTRODUCTION AND SUMMARY:

Movants seek to intervene in this proceeding to delay or even stop the only available arrangement that will assure the opening and operation of the Corcoran College of Art Design for the coming academic year, and the most appropriate arrangement to preserve the Corcoran's collection of art and the renovation of the Corcoran's nationally registered building, including its continued use for gallery space and college. Offering no alternative, the Movants instead seek obstruction for the sake of obstruction, asking the Court to substitute their demands for the considered judgment of the Corcoran's Board of Trustees. The Motion to Intervene should be denied.

First, under long-settled law of the District of Columbia, only the Attorney General has standing to assert the public interest in this cy pres proceeding, and Movants do not qualify as “others” under D.C. Code Section 19-1304.05. Anyone seeking to intervene must be able to point to specific provisions of the trust instrument — in this case the Deed of Trust — that confer standing by giving them some identified interest that is distinct from those which the general public may enjoy by virtue of the Trust's operation. Movants have not cited any such provision, and none exists. The cases relied upon by Movants are distinguishable. None are pertinent to the type of interests they allege here.

Even if Movants could establish standing, the relief they request — an independent review of the Corcoran's financial records and the removal or termination of the current Board on grounds of alleged financial mismanagement — is beyond the purview of a cy pres proceeding. Movants do not have standing under the D.C. Code to require an accounting or to remove directors.

Nor is there any reason in equity to grant the Motion, as the relief Movants seek would deepen the Corcoran's financial difficulties, increase uncertainties about the School's future to the detriment of the School's current students, faculty and staff, and degrade the operations of the Corcoran Gallery, further jeopardizing its continued existence and standing. Because the academic year is scheduled to begin in August, in order to provide certainty to the students, faculty and staff, it is important that the Court determine promptly after the hearing on July18 the pending Petition for Cy Pres, and resolve all the issues, including intervention.

FACTUAL BACKGROUND

The Trustees of the Corcoran Gallery of Art is a corporate entity, chartered by Congress in 1870. See 16 Stat. 139 (1870). [1] The Deed of Trust given by William H. Corcoran to initially establish the Corcoran specifically contemplated that the Trustees would

seek and obtain a Congressional Charter. While the Movants assert, with neither citation nor foundation, that the Corcoran is a "trust" as defined in DC Code §19-1301.03, in fact it is a nonprofit corporation which holds some property as a result of a trust. The DC Code Provisions on nonprofit corporations specifically contemplate that situation. *See, e.g.*, DC Code §29-401.05.

Both the Deed of Trust, and the Charter which created the corporation that manages the property, specifically refer to the creation of the Corcoran Gallery, and grant the Board of Trustees full discretion in the management of the instituion.[2] The Deed and Charter do not refer in any way to the Corcoran College, or indeed to any educational program at all. The College was created by the Board, some 20 years after the Deed, not as part of the obligations under the Deed or the Charter, but as an additional mechanism by which to foster the use of the Corcoran's collection and to allow a formalized means of assuring access and training for students who had sought to use the Gallery to study and copy the paintings on exhibition.[3]

For the reasons set forth in the Petition that initiated this proceeding, and further explained in the pending Motion for the Entry of Cy Pres, the Corcoran Board has determined that the long term operation of the Gallery and College has become financially impossible. The financial circumstances of recurrent deficits for many years are beyond question. To resolve those circumstances, the Corcoran's Board considered available alternatives in light of the standards they had identified for a long term future: that the collection be preserved and appropriately displayed; that the College have a long term future while continuing to have a relationship with the collection; that the Corcoran's Beaux Arts building be renovated and continue in use for the College and as a gallery; and that the Corcoran name and legacy would continue as it relates to the College, the collection, and the museum. To meet those standards, the Trustees negotiated and have executed — and sought the Court's approval to implement — agreements with the National Gallery of Art ("NGA") and The George Washington University ("GW").

Movants now seek to intervene in this proceeding. While asserting a variety of putative "special interests," the Movants do not identify any actual alternative to the agreements between the Corcoran and the NGA, or between the Corcoran and GW. Rather than identifying an alternative, the Movants argue for two distinct measures of relief as the basis for their intervention — first, they attack the financial management of the Board, demanding that there be an accounting by "outsiders," and demanding that the Court effectively relieve or replace the current Board; and second, apparently recognizing that accounting and removal from office are not relevant in cy pres, they mention, almost offhandedly, minor changes to the agreements, which are neither required to achieve the relevant ends of the proceeding, nor do they have a basis in the Deed or the Charter.

In effect, Movants ask the Court, without any proper basis, to substitute the Movants and their demands for the considered judgment of the Corcoran's Board. In doing so, they request remedies related to accounting (which are not available in a cy pres process), and do so with no showing that they have standing or a proper basis for their claims. Because they have no standing to make the claims that they put forward, and because the relief they seek is not available in this proceeding, the motion to intervene should be denied in all respects.

ARGUMENT

A. Legal Standard for Establishing Standing in the District of Columbia

(1) Movants Have No Standing to Bring This Motion.

Movants pay, at best, lip service to the applicable standard for intervention in proceedings related to charitable organizations. They recurrently assert a "special interest," but fail to even mention the Deed or Charter provision which would identify them or their class as being specially entitled as a beneficiary under which the putative interest arises, and wrongly assert that courts have "regularly" granted standing and intervention to movants in their circumstances.

Movants' claim to standing rests exclusively on D.C. Code Section 19-1304.05, which permits the settlor and "others" to maintain a proceeding to enforce a trust. Clearly, they are not the settlor of the trust they seek to invoke, but neither are

they proper members of the statutory class of "others." The two cases on which Movants primarily rely involved parties and circumstances wholly different from those presented here. Thus, Movants do not meet the standard for intervention.

Under longstanding precedent and the DC Code, only the Attorney General has standing to protect the public interest. The standard was first enunciated by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 17 US 518, 587 (1819) (State has preclusive power of enforcement with regard to charities; private citizens and organizations have no standing). [4] "[B]ecause the interest in ensuring that charitable trust property is put to proper purposes is properly that of the community at large, the traditional rule has been that only a public officer, usually the state Attorney General, has standing to bring an action to enforce the terms of the trust." *Hooker v. The Edes Home*, 579 A.2d 608, 612 (D.C. 1990). Those who are beneficiaries of the charitable trust have no standing to enforce the conditions of the trust, because the trust is dedicated to the public benefit. To do otherwise would create vexatious and improper litigation. Id. at 612 ("[T] he rationale for vesting exclusive power in a public officer stems from the inherent impossibility of establishing a distinct justiciable interest on the part of a member of a large and constantly shifting benefited class, and the recurring burdens on the trust res and the trustees of vexatious litigation that would result from the recognition of a cause of action by any and all of a large number of individuals who might benefit incidentally from the trust.") And see *Alco Gravure v. Knapp Foundation*, 479 N.E.2d 752, 756 (NY 1985).

That standard has remained a constant. Courts have only reluctantly and in selected instances permitted those who are members of a small and identified group of direct beneficiaries to intervene — to meet the test. It is not enough that the group be "identified" and small, but that the identity arise directly under the trust itself. *See Alco Gravure, supra,* at 765 (a special interest arises when the members of the class are entitled to a preference in the distribution of the funds, and the class is sharply defined and limited in number). The mere receipt of benefits previously is not by itself sufficient.

Nor does a cy pres proceeding provide an opportunity by which to seek to enforce claims unrelated to the proposed change in the governing arrangements. Rather, the relief that Movants seek, effectively an accounting and changes in the Trustees' themselves, are not cy pres related. Because the Corcoran is a corporate entity, any action seeking to review or overturn a corporate action must be brought under the DC Non-Profit Corporations Act. There is no provision in the Act for the relief that these Movants seek — those rights lie exclusively in the Attorney General, or in members of "designated bodies," i.e., the Trustees themselves. See infra. This court has recognized, following the Court of Appeals, that where the alleged injury flows from an ordinary exercise of discretion by the trustees in administering the trust, no standing lies in putative beneficiaries. *The Family Federation for World Peace and Unification International v. Moon*, 2012 WL 3070965 at 10 (D.C. Super. Ct.) citing Hooker, supra, at 617.

B. Movants Fail to Demonstrate Standing

Even a cursory review of Movants' allegations establishes three points — first, while recurrently postulating a "special interest," they fail completely to tie that putative interest to any requirement of the Deed or Charter; second, they are not in any way the equivalent to those whose interests have been held to grant standing in the cases they cite; and third, their claims are precisely the vexatious and improper claims that courts have held not to be proper.

(1) Movants Have No Special Beneficial Interest Under the Deed or Charter.

Movants assert rights arising from essentially two kinds of status — ties to the Corcoran College of Art Design; and action as a donor of specific artwork for three of the movants.

As already noted, Movants' papers repeatedly cite their putative rights and interests as "students," or as "alumni" or as "faculty or staff" of the Corcoran College or the Gallery. But they fail just as often to tie that putative interest to any specific provision or requirement of the Deed or the Charter. And the reason is obvious — William Corcoran did not establish a trust, or contemplate that trust would become a corporation, for the purpose of creating the College. There is no provision, indeed not a single word,

in the Deed of Trust about the Corcoran College, or about any requirement of the Trustees to open, operate, fund, or continue a college or other educational institution. Rather, the Deed was directed exclusively to the collection of art and its display in a gallery.

However sincere the Movants' opposition to the transfer of the College's operation to a well-funded University may be, the simple fact is that their interest in the College has no relation to the Deed or the Charter (which specifically references the Deed as the source of the activities of the Corporation created by the Congressional Act). In their roles as students, alumni or faculty, the movants are only the beneficiaries (in most instances, former beneficiaries) of a separate program created by the Board, and in no way are they entitled to any preference in distributions or benefits initially transferred by the Deed and implemented through the Charter since the Corcoran's establishment. They can point to no required element of the Charter that supports their putative interest. In purporting to seek to "enforce" any element of the Deed or Charter, the Movants simply ignore that there is no charter provision to enforce in relation to the College.

(2) The Cases Cited by Movants are Distinguishable.

The weakness of Movant's position is even more plain when compared with the circumstances of those in the two cases on which they primarily rely. In *Hooker v. The Edes Home,* 579 A.2d 608 (1990), the underlying will, charter and bylaws of the charitable corporation were specifically devoted to establishing and maintaining a free home for **elderly**, indigent widows. The plaintiffs were individuals specifically within the group for whose benefit the charity had been established, and thus the court found them to be within the category of a "clearly identified special beneficiary" for whom the trust was created. Id. at 612-613. Here, Mr. Corcoran established an entity to operate a gallery not a college, and no person associated with the College can claim to be a "beneficiary" for whose specific and special benefit the Corcoran was created.

Similarly in *Young Men's Christian Association of the City of Washington v. Covington,* 484 A.2d 589 (D.C. 1984), the trust under which the YMCA held the building specifically covenanted that the YMCA would hold the land (or use the proceeds) for work of the YMCA among defined residents. The plaintiffs were members who received a particular benefit with special privileges that others did not have. Id. at 592. Here, the underlying Deed and Charter have no reference to the College, and the Movants are merely persons who have received a benefit that is separate and distinct from the specific terms of the Deed and Charter. [5] The mere fact that a person is a potential beneficiary is not sufficient to grant standing. *Family Federation for World Peace, supra.*

Courts have recurrently denied standing to students precisely because the group is large, changeable, and amorphous. *See, e.g.*, *Miller v. Aderhold*, 184 S.E.2d 172 (Ga. 1971); Associated Students of the University of Oregon v. Oregon Investment Council, 728 P.2d 30 (Or. Ct. App. 1986) *review denied*, 734 P.2d 354(Or. 1987).

The standing of alumni cannot be better — they are not current recipients of any benefit under the Deed or Charter, and they are an even larger and more amorphous group than current students. *See, e.g., Milton Hershey School v. Hershey* Trust Company as Trustee of the Milton Hershey School Trust, No. 712 (Dauphin County, PA 1963). Indeed, one movant, Avijit Gupta, graduated more than 10 years ago, and Rueben Breslar graduated more than 8 years ago. Movants cite no case granting alumni standing.

There is also no standing for Robin Bell and Jayme McLellan as putative "faculty," or for Carolyn Campbell, Elizabeth Punsalan, and Linda Simmons as former staff of the Gallery. None are in fact current employees, and none can make any claim to receiving current benefits even if the Deed and Charter related to the College or had any provisions related to faculty and staff. Ms. McLellan is only a former adjunct faculty, having resigned in the fall of 2012 and she has not taught at the Corcoran since. Mr. Bell, another former adjunct faculty, has not taught since the Spring of 2013

Ms. Campbell, Ms. Punsalan, and Ms. Simmons all worked in relation to the Gallery, but left the employ of the Corcoran before 2008. That they were once employees gives no rise to any basis on which they can assert that they have an entitlement to receipt of benefits that differs in any way from any member of the public — which is in fact all they currently are.

Given that none of the Movants are current faculty or staff, it would be particularly inappropriate for them to be seen as in any way representing the actual faculty or staff of the Corcoran, especially when the relief they seek will harm the current faculty and staff by creating uncertainty and financial risk. Even if Movants attempted to add current faculty or staff, for the reasons already stated, they would still lack standing.

Nor are Movants as donors entitled to standing. It is universally acknowledged that a donor, having surrendered all property rights, cannot post hoc seek to create conditions on the gift. *Dartmouth, supra; Carl J. Herzog Found. Inc. v. University of Bridgeport*, 699 A. 2d 995, 997 (Ct. 1997); Restatement of Trusts 2d at §391, cmt. e ("A suit for the enforcement of a charitable trust cannot be maintained by the settlor..."). Here of course, the situation is even more attenuated — the Movant donors did not create the trust. [6] At most, they could seek to enforce the conditions that are associated with the gifts that they gave. Copies of the deeds of gift associated with the Movants are attached [7] — the gifts were not conditioned and thus they have no basis on which to attack the Corcoran's ongoing decisions with regard to those works. Even if the gifts were conditioned, a donor who has no standing to enforce any aspect of conditions related to his or her gift has even less basis on which to challenge the Board's actions with regard to the original gift of Mr. Corcoran. In effect, Movants seek to substitute themselves to enforce a public interest when they have no standing to enforce any interest of their own.

(3) Movants Have not Shown the Required Nexus Between the Alleged Injury and the Proposed Transactions.

Even assuming arguendo that the Movants could show that they possessed some "special interest," the generalized grievances that they cite are contradicted by the agreements and terms in place.

a. Sebastien Arbona

Arbona's declaration asserts that he has been offered financial aid in the past and offered housing in the past. He apparently fears that tuition would increase, and that his housing circumstances might change. The Corcoran/GW agreement specifically provides at Section 7.1(b)(vi) that students currently enrolled and in good standing "will continue to be charged tuition and all other fees at the level existing at the Legacy College as of the Closing Date (subject to adjustment on annual basis consistent with past practices...)..." The tuition for the academic year about to start was set by the Corcoran Board, without regard to the GW agreement. There is no link between the alleged injury and the proposed transactions.

b. Reuben Breslar

Breslar is an alumnus, who graduated more than eight years ago. He describes no benefits which arise under the Deed or Charter. He is simply a member of the public, and his interests are those of the public, represented by the Attorney General.

c. Lorenzo Cardim

Cardim graduated in May 2014, having completed his degree and is set to begin master's studies at a different institution. Having received his degree, he describes no benefits which arise under the Deed or Charter. He is simply a member of the public, and his interests are those of the public, represented by the Attorney General.

d. Avijit Gupta

Gupta, as noted above, graduated more than 10 years ago. His only link is through an alumni group, and he describes no benefits which arise under the Deed and Charter. He is simply a member of the public, and his interests are those of the public, represented by the Attorney General.

e. Carolyn Lacey

Lacey is a current master's level student. She alleges that in enrolling she considered the faculty, and the links of the School to the collection. The GW/Corcoran Agreement specifically provides that in operating the School, "the University shall endeavor to maintain the academic quality and artistic mission of the Legacy College as of the Closing Date, including by seeking to preserve and foster the culture, character and diverse nature of the student body." The existing full time faculty have all been offered positions by GW under Section 7.5 of the Agreement, and the adjunct faculty who are needed for scheduled classes have been offered contracts. Lacey's alleged injuries reflect her projections and fears, and she identifies no actual injury which has occurred, and no entitlement to any special benefit or right.

f. Patrick Masterson

Masterson is in a joint program to complete his bachelor's and master's degrees. He alleges that the Corcoran's location in the District was a key factor in his decision to enroll, along with the ability to exhibit his senior project in the Gallery. The GW/Corcoran Agreement specifically provides that "The GW Corcoran School shall continue to have a significant presence in the District of Columbia and at the 17th Street Building in perpetuity..." The parties contemplated the continuation of the student exhibitions as part of the ongoing use of the renovated building as both gallery and college, and GW has agreed to display student art, including faculty and alumni. Masterson's fears are neither well founded, nor do they rest on any entitlement to any special benefit or right.

g. Natalie Perez

Perez is a student in the master's program. She alleges that a factor in her decision to enroll was the link between the College and the Gallery, and the faculty's experience. She raises fears regarding her tuition. As noted above, the GW/Corcoran Agreement specifically provides that the GW Corcoran School will remain in the Corcoran building, with access for the students to the galleries, including the Corcoran Legacy Gallery, and the changing exhibition program of the Corcoran Contemporary, National Gallery of Art, and specifically establishes the basis on which tuition will be continued. The faculty have been offered contracts. Her allegations, like those of Lacey, reflect ill-founded projections and fears, not actual injuries, and in any event do not reflect any special entitlement or right.

h. Thomas Pullin

Pullin is an alumnus, who graduated in 2013. He makes no allegations related to any continuing links to the College, or any benefits to which he would be entitled under the Deed or Charter. He is simply a member of the public, and his interests are those of the public, represented by the Attorney General.

i. Jayme McLellan

As noted above, Ms. McLellan was an adjunct faculty member who resigned in 2012 and has not taught at the College since. She has donated works, in each instance on an unrestricted basis as shown in the deeds attached as exhibits to this Memorandum. Her declaration asserts fears, but identifies no actual benefit to which she is entitled under the Deed or Charter. She is simply a member of the public, and her interests are those of the public, represented by the Attorney General.

j. Robin Bell

Bell was an adjunct faculty member, but has not taught since the Spring of 2013. He makes no allegations of any current entitlement to any benefit. He is simply a member of the public, and his interests are those of the public, represented by the Attorney General.

k. Elizabeth Punsalan

Punsalan was a staff member of the Gallery who resigned in 2008. She is a member of the public and makes no allegations of any current benefit to which she would be entitled.

1. Carolyn Campbell

Campbell is a former staff member of the Gallery. She donated works in each instance on an unrestricted basis as shown in the deeds attached as exhibits to this Memorandum. She makes no allegation of any current benefit, and is simply a member of the public.

m. Linda Simmons

Ms. Simmons and her late husband donated works in each instance on an unrestricted basis as shown in the deeds attached as exhibits to this Memorandum. She is a member of the public and alleges no special interest that is cognizable.

As the short descriptions establish, most of the Movants are simply members of the public, who are represented by the Attorney General and who have no rights to intervene. They allege and can allege no “special interest” to receive benefits. They are in no way akin to those granted standing in *Hooker* or *YMCA.* The few who are current students allege no right to receive any specific benefit and indeed are not contemplated within the Deed and Charter, and rather than identifying any actual injury or current interest, give voice to fears and projections of events that might occur, but which are contradicted by the terms of the very agreements they seek to oppose.

Put differently, the statements in the Movants' declarations establish that they have no actual “special interest,” but rather reflect that they oppose the NGA and GW arrangements, and wish that there were some other arrangement. Their unhappiness at changes to the Corcoran is no substitute for an actual special interest that arises directly under the Deed or Charter. Even if there were a legal basis for standing, which there is not, Movants have not established a factual basis on which to claim standing.

C. The D.C. Code Does Not Give Movants Standing for the Accounting Relief They Seek, and that Relief is Not Related to Cy Pres

Even assuming arguendo that Movants had standing to seek enforcement of Deed and Charter provisions, they have no standing on that basis to demand the primary relief that they seek — an “independent” review of the Corcoran's financial records and the effective removal or termination of the current Board. Those elements of requested relief are not related to cy pres, but rather go directly to the ordinary financial operations and corporate governance of the Corcoran. Those aspects in turn are subject to the provisions of the DC Non-Profit Corporations Act, DC Code Article 29, Chapter 4, which makes no provision for these Movants to seek the results they demand.

A significant portion of the allegations made by Movants, and the litany recited in their declarations about their “belief” that allegations of financial mismanagement are true, are simply not relevant to cy pres. Under the relevant code provisions, the grant of cy pres turns on whether continued activity by the entity is impossible or impracticable. DC Code, §19-1304.13. The

Petition and the Motion to Enter Cy Pres establish that in the long term, the Corcoran lacks the financial resources to continue in its historic pattern. Indeed, to operate the College for the upcoming academic term would require that the Board violate the standards imposed by the relevant museum associations by requiring the use of proceeds from the sale of art to be used for operating expenses. The grant of Movants' requested relief would result in the destruction of the Corcoran's reputation as a museum and the dissipation of its limited resources with no benefit to the collection or the Corcoran building.

The Movants have no standing with regard to cy pres, but even if they did, they have no standing to demand financial accounting or to raise issues of putative financial mismanagement. As noted above, the Corcoran is a nonprofit corporate entity, chartered by Congress. Its charter specifically provides that it is governed by a Board of Trustees. There are no persons who are entitled to vote for members of the Board except the sitting Board members themselves, and thus there are no persons who are "members" of the Corcoran as defined in the DC Code. DC Code §29-401.02(24) ("Member" is a person with the right to select or vote for election of directors or to vote on any type of fundamental transaction).

Because there are no "members" as defined in the code, only the Attorney General or a director may bring proceedings related to a challenge to corporate action, or to seek access to the financial information of the Corcoran. See DC Code §§29-401.22, 411.02. Only a member or director can seek removal of another director. DC Code §29-406.09. The transactions at issue here, effectively a disposition of assets, do not require approval by "members" (compare DC Code §29-410.01), but do require approval of the Court, with the involvement of the Attorney General. DC Code §§29-401.05, 29-410.03.

In effect, Movants seek to avoid the limitations and requirements of the DC Code by seeking to cloak their demands in the rubric of cy pres. They cite no cases that would permit that result. Indeed, the case law is clear — a charitable organization, organized as a corporation, is subject to the laws of its jurisdiction with regard to the powers and duties of its directors. [8]

Moreover, the allegations that Movants make, baseless as they are, are not newly discovered. Save the Corcoran, the organization on whose behalf the Movants putatively act, raised these same issues more than two years ago, threatened at the time to bring an action, and did not, apparently recognizing that they had neither basis nor standing under the DC Code to do so. The assertion now that their allegations are timely simply ignores history.

D. Equity Does Not Permit the Granting of the Motion

Courts have sometimes granted standing to those alleged to have a special interest in order to assure that there was some review of the activities of the charity. Here, Movants show no basis on which to assert the transactions would otherwise escape review.

First, the Attorney General of the District has actively reviewed the transactions, and has actively engaged in this proceeding. There cannot be assertions that the Attorney General has **neglected** his role. The role of the Attorney General is of longstanding — indeed Justice Story, in concurring in the Dartmouth case cites a number of such cases. 17 US at 676-77. And see Vidal v. Girard's Executors, 43 US 127 (1844). As noted above, the DC Code in addressing non-profit corporations such as the Corcoran defines a clear and specific role for the Attorney General, but provides no role for Movants or those in their shoes. Of course, that is precisely because what Movants seek is the equivalent of a strike suit in a for profit corporation — an effort by one without a direct and significant interest to interfere in a transaction in the hopes of achieving some private gain, without consideration of the public interest. Where the Attorney General has an active and robust role, the courts will not grant standing to private parties seeking their own advantage. See, e.g., Dillaway v. Burton, 153 N.E. 13 (Mass. 1926), cited in Lopez v. Medford Community Center, 424 N.E. 2d 229 (Mass 1981).

Second, the Attorney General and the Corcoran were acutely conscious of the potential for public concern and the need for a mechanism by which those without standing could nonetheless express their views. It was precisely for that reason that the Attorney General and the Corcoran sought the Court's permission to announce the hearing date and to seek public comment, promising to provide those to the Court. Indeed, the Movants could have made exactly the same points by commenting to the

Attorney General and the Corcoran, and those comments would have been provided to the Court. Instead, the Movants have chosen to impose costs and burdens on the process, by insisting improperly that they have "special interests."

Third, the allegations made by Movants are unfounded and the relief inappropriate to the claims made. In their motion for intervention and the supporting memorandum, Movants make general, and generally unsupported, statements of "interest" that, as shown above, are not the interests that the courts have recognized as giving rise to standing. The complaint they would file in intervention if allowed is filled with misstatement, innuendo, and outright conjecture.

Throughout Movant's Complaint they rest their unfounded claims on newspaper articles and opinion pieces and then cloak those assertions in their "belief" as if the unsubstantiated statements become fact merely because they believe and repeat them. Although they have no plan of their own, they seek to delay the Court's approval of the existing arrangements on the fond hope that, if given the chance, they will find something better.

The Corcoran's troubles are not new. This same group has assailed the efforts of the Trustees at every turn. They apparently now seek to revisit other possibilities, e.g., the University of Maryland proposal, which they attacked at the time it was first announced; or an inchoate proposal by a wealthy individual, whose "rescue plan" depended heavily on selling the Corcoran's collection and devoting the resulting proceeds to operational and capital expenses. That process (as already laid out in the Petition and the Motion by the Corcoran) would violate applicable museum standards and do exactly what the Movants now assert they do not want — the dissipation of the collection and its removal from the District. And of course, under the DC Code, those actions could not occur without this court's review.

The putative complaint is not filed and, therefore, no answer is due to its litany of innuendo. However, because the Movants have publicly asserted that they must stand in for the public interest (even though that is the Attorney General's role) it is important to be clear that the allegations they raise are demonstrably untrue. Some examples will suffice:

● In Paragraph 7(a) of the Proposed Complaint Movants allege that the Board "announced it would sell" the Corcoran Building. In fact, the Board announced only that in light of the financial circumstances, it was considering that issue — to do otherwise would breach the Board's fiduciary duty to consider all available mechanisms to resolve the financial constraints that the Corcoran faced and faces. As soon as the Board identified feasible and available alternatives that would not involve the sale of the building, they announced that they would no longer consider that option, and in fact set a standard that any transaction must involve the renovation of the building and its continued use as College and Gallery — exactly what the proposed arrangements with GW and NGA would assure.

● In that same paragraph, and at Paragraphs 42 and 43, the Movants allege that the Board "inflated" renovation costs. The Board has consistently referred to specific studies by qualified consultants in estimating renovation costs.[9] It is not surprising that those estimates have varied with the scope of the renovations to be conducted and as some costs (e.g., for a new roof, for a new HVAC system) have been incurred and the work completed. In any event, the essential point remains unchallenged — the building requires major and substantial renovation that will cost more than the Corcoran has in available financial resources.

● In paragraph 7(b) the Movants assert that the "Board spent more than a year pursuing a plan to relocate the Corcoran Gallery to Alexandria" when in fact the well documented record establishes that Corcoran personnel met repeatedly with officials from the District's Office of Development, seeking locations in the District, and met with officials in Maryland and Virginia only to assess alternatives for a sustainable future. There is no evidence of any effort to move the Corcoran to Alexandria because no such effort or plan was ever considered.

● In paragraphs 16 and 73(e) the Movants allege that there will no longer be the "opportunity for students to show their artwork in the Corcoran Gallery" when in fact GW has agreed to display student art, including the NEXT exhibit of art by graduating students, as well as the art of Corcoran faculty and alumni in the building.

● In paragraphs 73(d) and 74(c) the Movants indicate that “The National Gallery has not committed to hiring any of the staff, including the curators, at the Corcoran Museum” and that college faculty and staff have not been hired by GW. In fact, the NGA has made offers to 19 employees including the entire curatorial and registration staff, and GW has hired the entire ranked-faculty as well as made offers to over 25 Corcoran staff members and over ninety adjunct faculty.

The remainder of the proffered complaint is no more than the Movants' assertions that they would do things differently and the unlawful demand that the Court replace the Board because the Movants would prefer that others make decisions. As Movants confess, they have sought for several years to replace the current Board, and they have no lawful mechanism to enforce their disagreement to compel the Board to adopt Movants' preferences as their own. Movants have therefore seized on this proceeding as a lever to accomplish what the law does not allow them to do.

At bottom, the unhappiness that Movants voice in their papers is no basis on which to grant them standing or the relief that they request. Whatever the depth of their emotional response, it is no substitute for an actual, substantive interest under the Deed and Charter. Nor does it create a factual basis for allegations of mismanagement or the standing to bring those issues to the court.

Worse, the relief that Movants seek will harm the very interests they purport to seek to protect:
● A new academic term is about to start. A delay in approval of cy pres will make it impossible to give students, faculty and staff any certainty about the new term and impose substantial hurdles on the mechanics of opening and operating the College as well as creating personal confusion and financial hardship on the students in distribution of financial aid, registration for courses, and similar matters.

● Movants' proposal for delay would effectively require the Corcoran to dissipate its remaining limited financial resources to maintain some staff (although staff is already reduced) and to operate the building. Instead of the Corcoran being able to devote some financial resources to the necessary and significant renovation of the Building they profess to love, the Movants would have those funds poured into temporary operations while they seek some inchoate different future.

● In doing so, Movants would require the Corcoran to violate the standards applied by the Museum Association and Museum Directors Association that collections acquisitions funds cannot be used for operations. The result would likely be the exodus of professional staff, and the destruction of the very reputation that Movants allege is important to them.

● Movants criticize the Corcoran repeatedly for management issues, yet the Trustees proposed solution provides for two distinguished Washington, DC based institutions to manage respectively and jointly the College (GW) and the Corcoran Collection (NGA).

● The Board has proposed a specific set of arrangements that assure that the collection will be preserved and be available for display. Movants urge that the NGA be required to accession the entire collection “in order to keep it in the District.” But doing so would result in less District public access to the Corcoran Collection. If NGA were to accession the entire Corcoran Collection its ability to display the works in DC would be limited to its current space, plus the additional space at the Corcoran. The Corcoran's proposal would specifically seek to place works that NGA does not accession in DC institutions that will preserve them and undertake their display in appropriate arrangements. That proposal in fact better assures that works will remain in the District and be available for display. And, under the agreements negotiated with the Attorney General, no works will leave the District without the Attorney General's concurrence, or a further order of this court.

● The Board's proposal assures the continued use of the Corcoran building as both college and gallery. It specifically contemplates that works intrinsically identified with the Corcoran will be displayed there, and specifically contemplates that major contemporary works will be displayed, continuing the Corcoran's tradition of showcasing the best of contemporary works. Movants instead seek a parochial and cramped focus on local artists, rather than the best of contemporary works. Mr. Corcoran's

legacy was a national, indeed international collection. The works were displayed in the District, but did not have a requirement to originate here.

● The Board's proposal assures that the Corcoran building will be renovated, overcoming years of deferred maintenance. The Movants argue instead for continued deferral in the fond hope that some future and unspecified arrangement will occur.

Movants do not in fact represent the current staff or students. The relief they seek will only harm those interests. The Court should deny the Motion to Intervene, and promptly approve the requested cy pres.

Dated: July 14, 2014

Respectfully submitted,

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Footnotes

1 A copy of the congressional charter is in the record in this proceeding as Exhibit 2 to the Declaration of Lauren Stack, filed with the Motion to Enter filed on June 25, 2014.

2 The Deed at Paragraph Sixth, grants to the “discretion and judgment of the Trustees” the “management generally of the institution.”

3 Indeed, it appears that in 1877, an artist unaffiliated with the Corcoran conducted classes, using the Corcoran's collection as study materials. While Mr. Corcoran contributed money that was used to support classes, it was not until after his death that a separate building was constructed in 1889, and the Corcoran College of Art first opened its doors in 1890 under that name. The Trustees' determination to create a formal structure to control the educational activities making use of the Corcoran Gallery and its collection is

not surprising, but the College or an education program as such were not contemplated, and are never referred to, in the Deed of Trust or the corporate charter. Movants point to no document or other indication that Mr. Corcoran established a "trust" for the College, as opposed to his giving money to the Corcoran to support its programs.

4 every every...charitable institution..., the whole legal interest is in the trustees and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees, and their rights are to be defended and maintained by them." *Dartmouth,* 17 US at 645-46.

5 The issue in *Alco Gravure, supra,* 479 NE 2d 752, is identical. There, the plaintiffs were a class specifically designated as having preferential rights under the relevant trust documents — they were employees for whom the Foundation's original purpose was to provide aid. No such link can be demonstrated by the Movants here.

6 Some lower courts have occasionally permitted one standing in the shoes of the settlor with regard to enforcement of the underlying original gift, but have been reversed on appeal. *See, e.g., Georgia O'Keefe Foundation v. Fisk University,* 312 S.W.3d 1 (Tenn. Ct. App. 2009). Here, however, the Movants as "donors" are not seeking to enforce conditions related to their gifts — there were none — but rather seek to enforce what they believe to be conditions in Mr. Corcoran's gift. Of course, as already described, there are no conditions in the Corcoran Deed that relate to the College, but even if there were, the Movants as donors have no standing in relation to those conditions because they did not define or impose those conditions, and cannot stand in the shoes of Mr. Corcoran.

7 For these purposes, the Corcoran has assumed that gifts given by both Mrs. Simmons and her husband would be within the scope of Movants' claims. Thus, several of the deeds reflect gifts by Mr. Simmons rather than Mrs. Simmons herself, but they were in all events unrestricted.

8 *Family Federation, supra,* 2012 WL 3070965 is not to the contrary. There the court expressly refused to interpret the amended Non-Profit Corporations Act as now in effect, *Id.* at 13, fn. 11, even though noting that the new Act had express provisions that were relevant. *Id.* at 13-14 and fn. 12. Moreover, the court's determination was that the plaintiffs there were equivalent to directors or trustees, and thus had a special relationship. That relationship is addressed in the nonprofit code, but it certainly does not apply to Movants.

9 Specifically, a May 10, 2011 Master Plan report by Stuart Lynn for renovation of entire museum and college estimated the total cost to be $102,000,000 exclusive of soft costs. A separate Altieri Seibor Weber, LLC report dated August 6, 2013 and limited to necessary HVAC, Electrical, Plumbing, and Fire Protection estimated those renovation costs to be $70,860,000.

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