

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

THE TRUSTEES OF THE CORCORAN GALLERY OF ART, Petitioner, v. DISTRICT OF COLUMBIA, Respondent.	Case No. 2014 CA 003745 B Judge Robert Okun Calendar 10
SEBASTIEN ARBONA, <i>et al.</i>, Intervenors/Plaintiffs, v. THE TRUSTEES OF THE CORCORAN GALLERY OF ART, Defendant.	Case No. 2014 CA 003745 B Judge Robert Okun Calendar 10

MEMORANDUM OPINION

This case involves the District of Columbia’s oldest private art museum and its only college devoted solely to the teaching of art and design—the Corcoran Gallery of Art and the Corcoran College of Art + Design (collectively, “the Corcoran”). Each party in this case cares passionately about the future of the Corcoran but the parties have very different views about how best to continue the Corcoran’s mission and preserve its most important features. The question before the Court is not which of these visions the Court prefers. Rather, the issues before the Court are narrower and can be summed up as follows: 1) have the Trustees of the Corcoran Gallery of Art (the “Trustees”) established that it is impracticable to carry out the Deed of Trust that created the Corcoran given the Corcoran’s current financial condition; and 2) if so, is the plan proposed by the Trustees as near as possible to the intent of William Wilson Corcoran when

he established the Trust. Although the question is a close one, about which reasonable minds could differ, this Court is persuaded that the Trustees have established that they are entitled to relief and will grant their Petition for Entry of *Cy Pres* Determination (the “Petition”) and their Motion for Entry of Proposed *Cy Pres* Order (the “*Cy Pres* Motion”) for the reasons set forth below.

I. PROCEDURAL HISTORY

The Trustees of the Corcoran Gallery of Art is a non-profit institution that oversees the Corcoran Gallery of Art (“Corcoran Gallery”) and the Corcoran College of Art + Design (“Corcoran College”). On June 17, 2014, the Trustees filed their Petition, naming the District of Columbia as Respondent to represent the interests of the public in the *cy pres* proceeding. At the request of the parties, this Court expedited the *cy pres* proceedings and scheduled a hearing concerning the Petition for July 18, 2014. On June 25, 2014, the Trustees filed their *Cy Pres* Motion.¹ On July 2, 2014, Save the Corcoran—an organization comprised of current and former students, faculty, and staff, as well as donors and friends of the Corcoran—and a number of named or otherwise identified individuals (the “Proposed Intervenors”) filed a Partially Opposed Motion to Intervene in *Cy Pres* Proceedings as well as a Partially Consented Emergency Motion to Expedite Consideration of Save the Corcoran’s Motion to Intervene.² The Court granted, in

¹ The Trustees attached four Exhibits to their *Cy Pres* Motion. Exhibit 4 consists of seven documents, each of which is part of the proposed transaction among the Trustees, The George Washington University, and the National Gallery of Art. The documents are not marked separately within the Exhibit, but for the purposes of this Order, the Court will refer to the different documents as follows: Exh. 4A is the Art Accession and Custodial Transfer Agreement; Exh. 4B is the License Agreement Between the Trustees and the National Gallery of Art; Exh. 4C is the Asset Contribution Agreement between the Trustees and The George Washington University; Exh. 4D is the License Agreement between the Trustees and The George Washington University; Exh. 4E is the License Agreement between The George Washington University and the National Gallery of Art; Exh. 4F is the Side Letter Regarding Distribution of Custodial Art; and Exh. 4G is the Side Letter Agreement Confirming Designation of Licensed Premises.

² Two of the individuals did not provide their names but were identified as John Doe 1 and 2. After this Court indicated that these individuals could not proceed anonymously, one John Doe agreed to disclose his name and proceed, and the other John Doe withdrew from the litigation and was replaced by a different individual who disclosed his name.

part, the Proposed Intervenor's Motion to Expedite and implemented an accelerated briefing schedule.

After the parties briefed the intervention issue, and after hearings on July 18 and July 21, 2014, this Court granted, in part, the Proposed Intervenor's Motion to Intervene and Motion to File Opposition, allowing nine current students, faculty, and staff (the "Intervenor's") to intervene in the proceedings, and denying the request as to Save the Corcoran, donors to the Corcoran, and former students, faculty, and staff.

The Court held a hearing on the merits of the Petition and *Cy Pres* Motion from July 28 to August 6, 2014. The Trustees called three witnesses on their behalf. The first witness was Lauren Stack, the Chief Operating Officer of the Corcoran, who testified about the financial state of the Corcoran and the proposed transaction with The George Washington University ("GW") and the National Gallery of Art ("NGA"). The Trustees' second witness was Dr. Steven Knapp, the President of GW, who testified about the proposed transactions among the Corcoran, GW, and the NGA, and his vision for the future of the Corcoran College. The Trustees' final witness was Sean O'Connor, a partner of Development Guild/DDI ("DDI"), a consultant to non-profit organizations, who testified about the 2012 report that DDI created and presented to the Trustees, as well as his own analysis of the Corcoran's past fundraising strategy and future fundraising prospects. At the conclusion of Mr. O'Connor's testimony, the Intervenor's made an oral Motion for a directed verdict, asserting that the Trustees had not met their burden for *cy pres* relief. After hearing argument from all parties, the Court denied the Intervenor's Motion.

The Intervenor's called eight witnesses to testify on their behalf. The Intervenor's first witness was Harry Hopper III, Chairman of the Board of Trustees for the Corcoran, who testified about the various consulting reports the Trustees had commissioned, the size and giving history

of the Board, the operations of the Corcoran, and the options that the Trustees considered as alternatives to the proposed transaction. The Intervenor's second witness was Wayne Reynolds, a philanthropist and Chairman and Chief Executive Officer of the Academy of Achievement, who testified about his personal fundraising experience as the Chairman of the Board of Ford's Theater and his own vision and plans for the Corcoran. The Intervenor's third witness was Dr. Wallace Loh, President of the University of Maryland ("UMD"), who testified about his interactions with the Trustees and the terms of the contemplated deal between UMD and the Corcoran.

At the conclusion of Dr. Loh's testimony, the Intervenor's called their first expert witness, Paul Johnson, a partner of the consulting company Alexander Haas. The Court qualified Mr. Johnson as an expert witness in the standards of fundraising practices for non-profit organizations; the general qualifications and standards for art museum directors; and the standards employed by the Association of Art Museum Directors ("AAMD"). Mr. Johnson provided his own assessment of the Trustees' fundraising and Board-building practices in light of the practices of other non-profits, and testified about the de-accessioning policies³ of other museums and the potential consequences of an AAMD censure or the withdrawal of accreditation by the American Alliance of Museums ("AAM"). The Intervenor's second expert witness was Kathy Raffa, a certified public accountant and partner of Raffa Accounting. The Court qualified Ms. Raffa as an expert in accounting for non-profit organizations. Ms. Raffa primarily testified about the fundraising efficiency of the Corcoran as compared to various peer institutions. The Intervenor's third and final expert witness was Chiara Trabucchi, a principal of

³ The formal definition of de-accession is: "[to] officially remove (an item) from the listed holdings of a library, museum, etc., esp. for sale or disposal." *Shorter Oxford English Dictionary* 607 (5th ed. 2002). The AAMD and the AAM have adopted guidelines as to when a museum might de-accession a work of art and how a museum might use the funds from such a de-accession. Test. Mr. Hopper, Hr'g Tr. at 510-11.

the consulting firm Industrial Economics. The Court qualified Ms. Trabucchi as an expert in financial management and the design and implementation of trusts to fund organizations in perpetuity. Ms. Trabucchi's testimony focused on five possible options the Corcoran could employ to finance its operations in perpetuity.

The Intervenor's next witness was Anne Smith, a former Associate Director of Individual Giving at the Corcoran Gallery, who compared her fundraising experience at the Art Institute of Chicago with her experience at the Corcoran. The Intervenor's final witness was Caroline Lacey, a current graduate student at the Corcoran College, who testified about her experience as a student at the Corcoran, her understanding of the impact of the proposed transaction with GW, and her experiences in communicating with the Trustees about the proposed transaction with GW and NGA. After the conclusion of Ms. Lacey's testimony, the Intervenor rested their case. The District of Columbia did not present any witnesses and the Trustees did not call any rebuttal witnesses.

On August 6, 2014, each party presented closing arguments and answered questions from the Court.

II. FINDINGS OF FACT

A. History of the Corcoran

The Corcoran Gallery was established in 1869 through a Deed of Trust created by William Wilson Corcoran. *Cy Pres* Mot., Exh. 1. Mr. Corcoran created the Trust for the purpose of establishing "an institution in Washington City, to be 'dedicated to Art,' and used solely for the purpose of encouraging American Genius, in the production and preservation of works pertaining to the 'Fine Arts,' and kindred objects." *Id.*, Exh. 1 at 1. Mr. Corcoran donated to the Trust the Renwick Building, located at 1661 Pennsylvania Avenue, N.W., a collection of

art, and cash. Pet. ¶ 6. The property that Mr. Corcoran donated was to be used “for the perpetual establishment and maintenance of a Public Gallery and Museum for the promotion and encouragement of the arts of painting and sculpture, and the fine arts generally.” *Cy Pres Mot.*, Exh. 1 at 6. In addition, the Deed of Trust created a Board of Trustees, which was granted the discretion to develop “appropriate measures for increasing the collection of paintings, statutes and kindred works of art” and the general management of the institution. *Id.* at 7.

In 1870, the U.S. Congress incorporated the Trustees of the Corcoran Gallery of Art as a not-for-profit corporation, referring specifically to the Deed of Trust. *Cy Pres Mot.*, Exh. 2. After the formation of the Trust and the grant of the federal charter, the original Trustees took possession of the Renwick Building and the art collection and began fulfilling the purposes of the Trust by establishing the Corcoran Gallery to display art to the public. Pet. ¶ 8. Over the next decade, the Trustees established the Corcoran College, which was integrated into the overall institution and which emphasized student access to the art collection. *Id.* ¶ 10. Although Mr. Corcoran was not a Trustee at the time the College was created, he gave funds in support of its creation and operation. *Id.*⁴ In addition, although the Deed of Trust does not mention the College, the parties do not dispute that this Court’s ruling on the Petition and *Cy Pres Motion* will apply to both the College and the Gallery.

By 1890, the Corcoran had outgrown the space in the Renwick Building. *Id.* ¶ 11. The Trustees, therefore, acquired property and constructed a new building, designed by William Flagg and still known as the Flagg Building. *Id.* In the early twentieth century, Senator William

⁴ It also is worth noting that Mr. Corcoran had extensive ties to GW, which has agreed to renovate the Flagg Building and take over the operations of the College. Test. Dr. Knapp, Hr’g Tr. at 148:14-18. More specifically, Mr. Corcoran served on GW’s Board of Trustees for several years, acting as President of the Board from 1869, when he created the Deed of Trust establishing the Corcoran Gallery, until 1872. *Id.* at 148:19-23. He also donated a building to house GW’s School of Medicine, founded GW’s School of Science (now called the School of Engineering and Applied Science), and donated his company’s archives to GW. *Id.* at 148-49. In fact, the first building on GW’s current Foggy Bottom campus was called Corcoran Hall, a building that is still in existence today. *Id.* at 149:17-21.

Clark became involved with the Corcoran, loaning art works to the Corcoran, donating money, and becoming a Trustee. *Id.* ¶ 12. Upon Senator Clark’s death, the Corcoran received a significant portion of the art collection from his estate, as well as funds to construct an addition to the Flagg building, now known as the Clark Wing. *Id.* ¶ 13. Since the completion of the Clark Wing in 1928, the Flagg Building has housed both the Gallery and major operations of the College. *Id.* ¶ 14; Pet’r’s Hr’g Exh. 5 at 2. Currently, Peggy Loar is the Interim President and Director of the Gallery and the College and Mr. Hopper is the Chairman of the Board of Trustees. Test. Mr. Hopper, Hr’g Tr. at 357:12-17; Test. Mr. Reynolds, Hr’g Tr. at 608-09.

B. Financial Background

According to the Trustees, “the overall financial situation of the Corcoran has for several decades deteriorated.” Pet. ¶ 19; *see also* Pet’r’s Hr’g Exh. 1 at CGT002444; Test. Ms. Stack, Hr’g Tr. at 48:7-8. The testimony at the hearing, however, focused on the financial condition of the Corcoran over the past twenty-five years, with the greatest emphasis on the last decade.⁵

⁵ The Trustees noted two particular events within the past twenty-five years that, in their opinion, have had a negative impact on the Corcoran’s reputation and fundraising capability: the Mapplethorpe exhibit and the Gehry capital campaign. In 1989, the Corcoran was scheduled to open an exhibition of photographer Robert Mapplethorpe’s work. Test. Mr. Hopper, Hr’g Tr. at 444-46. The works that were to be displayed in the Mapplethorpe exhibit were provocative and controversial, and garnered negative attention from conservative politicians. *Id.* As a result of the political controversy, before the exhibit opened to the public, the Corcoran announced cancellation of the exhibit. *Id.* This action, which some regarded as an act of censorship, resulted in disapproval from many in the art community and reduced financial sponsorship of the Corcoran. *Id.*

Following the Mapplethorpe exhibit, the Trustees determined that they needed to “provide a focus and vision of the Corcoran as an innovator and disruptor and more of the cutting edge.” *Id.* at 447:10-12. As a result, in 1999, the Trustees undertook a major capital campaign to support construction of a new wing to the Flagg Building designed by architect Frank Gehry (the “Gehry campaign”). *Id.* at 446-47; Pet. ¶ 22. The goal of the Gehry campaign was to raise \$160 million. Test. Mr. Hopper, Hr’g Tr. at 447:18-21. In the early 2000s, the technology bubble burst and the major donations offered by technology sponsors fell through. *Id.* at 448:15-17. In 2005, the Trustees determined that the Gehry campaign had failed to gather adequate financial support and cancelled the campaign. *Id.* at 449:21-22; Pet. ¶ 22. After the failure of the Gehry campaign, the Corcoran’s director resigned and, after a nationwide search, eventually was replaced by Paul Greenhalgh, an academic and curator who had previous experience as the head of an art school. Test. Mr. Hopper, Hr’g Tr. at 450:8-15, 454:4-23. Unfortunately, Mr. Greenhalgh developed life-threatening cancer during his term as director and resigned from the position in 2010. *Id.* at 457:6-11, 460:13-15; Intervenor’s Hr’g Exh. 8 at CGT000296. In 2010, the Corcoran also lost its Chief Financial Officer to health problems. Test. Mr. Hopper, Hr’g Tr. at 465:8-14.

Indeed, since 2001, the Corcoran has had a negative “true change in net assets from operations” in eleven of the past thirteen years for which audited financial statements are available, and also had a negative “change in net assets from operations” in seven of those years.⁶ Intervenor’s Hr’g Exh. 2. When Mr. Hopper became Chairman of the Board in 2009, he inherited “an account that was frozen, a loan that was in default, and it was unclear that [the Corcoran] would be able to make payroll. . . . [U]nless there was a change in how [the Corcoran was] doing business . . . the museum itself would have to be closed in a matter of a few months.” Test. Mr. Hopper, Hr’g Tr. at 462. Mr. Hopper and the Chief Operating Officer Fred Bollerer pursued a plan to resolve these short-term issues, including orchestrating an arrangement with a bank to reschedule payments on \$8 to \$10 million worth of loans in default. *Id.* at 464:4-25, 520-21. The Board subsequently voted to increase tuition at the College and requested that staff cut fifteen percent from the Corcoran’s budget so as to address the persistent deficits. Intervenor’s Hr’g Exh. 8 at CGT000317, -369, -385. The Corcoran’s staff most recently has tried to reduce expenses by consolidating departments, reducing travel expenses, and imposing greater oversight on expense items costing more than \$2,500. Test. Ms. Stack, Hr’g Tr. at 45-46.

Not only has the Corcoran suffered financial setbacks for much of the past decade, but the Trustees also have deferred much-needed maintenance of the Flagg Building. Pet. ¶ 20; Pet’r’s Hr’g Exhs. 1 at CGT002444, 3 at CGT002599. The Stuart Lynn Company estimated, in May 2011, that renovations to the Flagg Building would cost slightly more than \$102 million. Pet’r’s Hr’g Exh. 4 at 2; Test. Ms. Stack, Hr’g Tr. at 61:19-24. Likewise, an Altieri Sebor

⁶ The parties dispute how annual gains and losses for the Corcoran should be calculated. The term “true change in net assets from operations” is derived by calculating the change in net assets from operations and subtracting the investment income earned that year, as illustrated in the Intervenor’s Exhibit 2. The Court will address this dispute in the Conclusions of Law section of this Order.

Wieber report indicated that renovations to address only HVAC, health, and safety issues, would cost \$70 million. Pet'r's Hr'g Exh. 5, Master Plan 8/20/13 4:47 P.M. at 2; Test. Ms. Stack, Hr'g Tr. at 65:23-24.⁷ Neither of these estimates included so-called soft costs, such as architectural fees, that might add 15% to the total cost of renovations. Test. Ms. Stack, Hr'g Tr. at 62:1-5.

Presently, the annual operating expenses of the Gallery and the College are between \$28 and \$30 million. Test. Ms. Stack, Hr'g Tr. at 33:7-12. To meet these expenses, the Corcoran depends on annual revenue from the following sources:

- \$18 million from tuition, although the Corcoran receives only \$13 million in net tuition after subtracting the financial aid that the Corcoran gives its students. *Id.* at 34:2-12.
- \$1.5 to \$1.7 million from admissions, special events, the retail shop, public programming, and ticket sales. *Id.* at 34:19-23.
- \$3.8 million in charitable fundraising. *Id.* at 35:16-18.

Over the past several years, the Trustees have covered the remaining deficit through one-time fundraising events, such as the sale of the parking-lot property adjacent to the Flagg Building. *Id.* at 35-36. In addition, the Trustees have, in recent years, borrowed from restricted funds—such as the de-accessioning account—to finance the Corcoran's operating when they could rely on a guaranteed source of repayment. *Id.* at 44:19-22. The Trustees also have attempted to borrow funds commercially to cover the shortfall, but have been unable to do so. *Id.* at 45:7-8.

C. Concerns About Potential Loss of Accreditation and Sanctions

Throughout the hearing, the Trustees raised concerns about how the denial of *cy pres* relief and the implementation of the Intervenor's proposed alternatives might endanger the Corcoran College's accreditation from the Middle States Commission on Higher Education

⁷ This \$70 million estimate is a subset of the \$102 million estimate to complete the whole renovation of the Flagg Building. Test. Ms. Stack, Hr'g Tr. at 66:2.

(“MSCHE”) or the Gallery’s accreditation from the AAM, or might cause the Gallery to incur sanctions from the AAMD.

Currently, the Corcoran is in the process of re-accreditation with MSCHE, the organization responsible for accrediting the College. In April 2014, an accreditation team from MSCHE visited the Corcoran College and prepared a report, which the Trustees received in July 2014. Pet’r’s Hr’g Exh. 12; Test. Mr. Hopper, Hr’g Tr. at 503:10-19. While praising the College for its unique contributions to arts education, the MSCHE report stated that the College’s

financial model . . . is not sustainable. The College lacks the resources to operate much beyond the next academic year. Over the coming months, it must either be absorbed by a financially secure university, such as GW, or initiate a closure plan. Most of our negative evaluation judgments are about standards that are directly affected by dwindling resources, by the need to focus on core academic activities, and the need to withhold critical investments pending the finalization of a permanent solution.

Pet’r’s Hr’g Exh. 12 at 5. The MSCHE report also endorsed the proposed transactions with GW and NGA, stating that the transactions would result in “an outstanding outcome” that would preserve “the core strengths of Corcoran while relieving it of its financial burden.” *Id.* On June 26, 2014, MSCHE decided to postpone its decision on accreditation of the College and requested that, by September 1, 2014, the College submit supplemental information regarding, in part, “steps taken to improve the institution’s short- and long-term financial viability, including updated cash and financial projections for the next five years . . . [and] steps taken to assure continuity and stability of institutional administration[.]” Pet’r’s Hr’g Exh. 2 at 1. The implication of this decision is that MSCHE would withdraw the College’s accreditation if it were unable to satisfy MSCHE regarding the five-year financial stability of the institution. Test. Ms. Stack, Hr’g Tr. at 43-44. Loss of MSCHE accreditation would have a negative impact on both

the students working toward degrees from the College and the Corcoran's finances, because Corcoran students would not be eligible for federal financial aid. Test. Ms. Stack, Hr'g Tr. at 34:14-15, 44:6-8.

AAM accreditation of the Corcoran Gallery and AAMD's possible imposition of sanctions on the Corcoran Gallery are tied to another issue: the use of funds received from the de-accession of art toward operating expenses. Both the AAM and the AAMD have adopted policies that restrict how museums might use proceeds from the sale of art. Test. Mr. Johnson, Hr'g Tr. at 725-728. Although the specific policies were not entered into evidence, the parties do not dispute that, at a minimum, both AAM and AAMD policies prohibit the use of de-accessioning funds toward paying operating expenses, with the possible exception of use of these funds to pay for collection care. Test. Mr. Hopper, Hr'g Tr. at 509-510; Test. Mr. Johnson, Hr'g Tr. at 726-728, 744-745. Violation of the AAM's Code of Ethics might result in loss of AAM accreditation, which would have a negative impact on the Corcoran's ability to hire and retain qualified staff as well as its eligibility for grants and federal funding. Test. Mr. Hopper, Hr'g Tr. at 511-513; Test. Mr. Johnson, Hr'g Tr. at 726-727. Also, violation of the AAMD's Policy likely would result in sanctions, which would limit the Corcoran's ability to host traveling exhibitions, to loan and receive loans of art from other institutions, and to hire and retain qualified staff. Test. Mr. Hopper, Hr'g Tr. at 510-511; Test. Mr. Johnson, Hr'g Tr. at 726:1-19, 729-731. 779:18-22. In fact, the parties cited to the Maier Museum, Randolph-Macon College, the National Academy Museum, and the Delaware Art Museum as examples of institutions that were swiftly sanctioned by the AAMD after violating the AAMD's Policy on Deaccessioning. Test. Mr. Johnson, Hr'g Tr. at 731-732:6, 776:12-779:17; Test. Ms. Smith, Hr'g Tr. at 999:12-

21. The Court also notes that the AAM and the AAMD have sent the Trustees letters in support of the proposed GW/NGA transaction. Test. Ms. Stack, Hr’g Tr. at 246:15-21.

D. Reports from Consultants

Over the past twenty-five years, the Trustees have sought the assistance of various consultants, commissioning studies of the Corcoran’s fundraising practices and finances. Test. Mr. Hopper, Hr’g Tr. at 422:5-17. The two consulting reports specifically addressed at the hearing were the 2008 strategic development plan drafted by the consulting company Schultz & Williams and the 2011 report by Lord Cultural Resources that addressed the Corcoran’s financial situation and how the Trustees could “create a sustainable future” for the Corcoran. Intervenor’s Hr’g Exh. 6; Pet’r’s Hr’g Exhs. 1, 3; Test. Ms. Stack, Hr’g Tr. at 38:8-12.

As a result of Lord’s report and the Corcoran’s deteriorating financial condition, in June 2012, the Trustees instructed Corcoran staff to look into sustainability options available to the Corcoran, including relocating the Corcoran to a site outside the Flagg Building or partnering with another institution that could support the Corcoran. Test. Ms. Stack, Hr’g Tr. at 53-54. In fact, in June 2012, the Trustees announced that they would investigate the possibility of selling the Flagg Building. Test. Mr. Hopper, Hr’g Tr. at 427:8-12. By December 2012, staff had concluded that there was sufficient interest in partnerships with the Corcoran that it would be possible to remain in the Flagg Building. Test. Ms. Stack, Hr’g Tr. at 54:13-17. The Trustees then began exploring various partnership and philanthropic opportunities, including potential partnerships with UMD and GW. Test. Mr. Hopper, Hr’g Tr. at 479:1-8. In January 2013, the Trustees determined that they would pursue a proposed partnership with UMD. Test. Ms. Stack, Hr’g Tr. at 55:2-14.

E. UMD and GW/NGA Proposals

In April 2013, the Trustees and UMD signed a memorandum of understanding (the “MOU”), which provided that a written agreement between the two entities would be completed by the end of summer 2013. Test. Mr. Hopper, Hr’g Tr. at 481: 5-20. In September 2013, the President of UMD, Dr. Loh, sent the Trustees an initial term sheet that Dr. Loh had authored himself. *Id.* at 482:5-7; Pet’r’s Hr’g Exh. 10. Under this September term sheet, UMD would take full responsibility for managing and operating both the College and the Gallery; the Trustees would appoint new UMD-nominated trustees to their Board; UMD would invest \$71 million over a 10-year period to renovate the Flagg Building; and UMD would subsidize the College and Gallery operations with \$18 million in cash and \$6 million in personnel over the first four years of the collaboration. Pet’r’s Hr’g Exh. 10.

In December 2013, UMD sent Mr. Hopper a formal term sheet, which proposed to create a joint venture between UMD and the Corcoran. Test. Dr. Loh, Hr’g Tr. at 647:9-13. The following terms of the December 2013 proposal⁸ are relevant for the purposes of this Order:

- Either UMD or the Corcoran could, for cause, walk away from the joint venture, and UMD could, without cause, walk away from the joint venture within the first five years. *Id.* at 650:8-12; Pet’r’s Hr’g Exh. 11.
- UMD made a commitment of \$46 million over the first five years of the joint venture, but this commitment was structured as a loan that the Corcoran would have to repay if it were to walk away from the joint venture. Test. Dr. Loh, Hr’g Tr. at 650-52.
- UMD would nominate potential trustees for the Board of Trustees, so that UMD nominees eventually would constitute a majority of the Board. *Id.* at 636:8-15.

⁸ The December 2013 UMD proposal was not entered into evidence, but was described by numerous witnesses, including Dr. Loh and Mr. Hopper.

- While the Gallery would remain in the District, certain portions of the College, including specific kinds of studio space for students, would move to Maryland. *Id.* at 664-65; Test. Mr. Hopper, Hr’g Tr. at 482:3-17.
- UMD would have special access to the Corcoran’s collection, and would be able to exhibit and store pieces from the collection in Maryland. Test. Dr. Loh, Hr’g Tr. at 668:2-15; Test. Mr. Hopper, Hr’g Tr. at 485-86.
- UMD would have a security interest in the Flagg Building and the Corcoran’s collection. Test. Mr. Hopper, Hr’g Tr. at 489:17-23.

The Trustees had several concerns with UMD’s proposal, which Mr. Hopper communicated to Dr. Loh in a letter, introduced into evidence as the Trustees’ Exhibit 11. Pet’r’s Hr’g Exh. 11. First, under the December proposal, in contrast to the September term sheet, UMD would not take full control of and responsibility for the College. *Id.* Second, UMD’s financial commitment under the December proposal was approximately half of what the Trustees had expected, and was structured as a loan rather than a grant. Test. Mr. Hopper, Hr’g Tr. at 488:5-8; Pet’r’s Hr’g Exhs. 10, 11. The Trustees’ final concern about the December proposal was that UMD could terminate the venture without cause in the first five years. Pet’r’s Hr’g Exh. 11. In his testimony, Mr. Hopper voiced a number of other concerns that were not included in his letter to Dr. Loh. Those concerns included UMD’s nomination of a majority of the Board of Trustees, Test. Mr. Hopper, Hr’g Tr. at 489:11-16; the storage and exhibit of art from the collection in Maryland, *id.* at 486:1-4; the hierarchy and reporting structure of UMD officials over Gallery and College executives, *id.* at 487:1-12; and UMD’s security interests in the Flagg building and the art collection. *Id.* at 489:17-23.

As a result of the Trustees' concerns with UMD's revised proposal, the Trustees informed UMD that they could no longer honor the exclusivity arrangement they had entered into with UMD, which precluded the Trustees from talking with other potential partners. Test. Mr. Hopper, Hr'g Tr. at 490:1-8. The Trustees then renewed their negotiations with GW and NGA. *Id.* at 490-91.

At a meeting of the Trustees on February 5, 2014, Dr. Loh orally presented UMD's best and final offer, which addressed some of the above-mentioned concerns. Test. Dr. Loh, Hr'g Tr. at 648:15-18; Intervenor's Hr'g Exh. 8 at CGT000475-76. In presenting UMD's final offer, Dr. Loh stated that the capital investment was a loan in the sense that it was repayable if the Trustees terminated the venture, but otherwise was a grant. Test. Dr. Loh, Hr'g Tr. at 650:13-18. Dr. Loh also stated that UMD would give the Trustees the investment money "up front." Test. Dr. Loh, Hr'g Tr. at 650-651.⁹ Although the written terms of the December proposal included a \$46 million cap on the investment, Dr. Loh indicated, as part of the best and final offer, that UMD would make further investments after five years but would not put them in writing. *Id.* at 652:7-20. In addition, Dr. Loh offered to excise the provision allowing UMD to terminate the venture without cause. *Id.* at 650:8-12. Ultimately, however, the UMD cash commitment was reduced from \$89 million to \$46 million, despite UMD's estimate that renovation of the Flagg building would cost at least \$71 million. *Id.* at 644:5-11. Furthermore, Dr. Loh declined to modify the terms relating to Corcoran College, stating that UMD would not take over the College. *Id.* at 653-54.

On February 4, 2014, the day before UMD presented its best and final proposal to the Trustees, GW and NGA presented their own best and final proposal. Test. Mr. Hopper, Hr'g Tr.

⁹ It is not clear from Dr. Loh's testimony exactly how much money UMD would provide "up front," or what "up front" meant in this context.

at 494:4-25; Intervenor's Hr'g Exh. 8 at CGT000472-73. Although no evidence was presented as to the exact terms of the GW and NGA offers that were made in February 2014, no party has asserted that the terms were any different than those memorialized in the final agreements that have been presented to the Court. *Cy Pres* Mot., Exhs. 4A-4G. After considering both the UMD and the GW/NGA proposals, the Trustees decided, on February 6, 2014, to pursue the GW/NGA deal. Test. Mr. Hopper, Hr'g Tr. at 495:1-3; Pet. ¶ 34. On May 15, 2014, after additional negotiations were completed, officers of NGA, GW, and the Trustees executed final agreements. Pet. ¶ 35; *Cy Pres* Mot., Exhs. 4A-4G. The GW proposal includes the following relevant terms:

- GW will acquire from the Trustees the Flagg Building, the Fillmore Building, and other real property, and will renovate the Flagg Building. *Cy Pres* Mot., Exh. 4C at 1, 10-12.
- GW will acquire from the Trustees all funds allocated to the operations of the College, estimated to be at least \$8 million. *Id.* at 11.
- GW will acquire from the Trustees the sum of \$35 million to be used for renovation of the Flagg Building. *Id.* at 9.
- GW will acquire from the Trustees certain works of art that have been deemed integral to the Flagg Building, collectively known as the Permanent Works, and display those works at the Flagg Building. *Id.* at 12, 15-16.
- GW will acquire from the Trustees the Corcoran College, and will establish within GW a new school for art and design "that will seek to preserve and maintain the mission, reputation and brand" of the College, and that incorporates the Corcoran name. *Id.* at 1, 27-31. GW will fund, and exercise oversight and control over, the new school. *Id.* at 29.
- Under GW's oversight, the Corcoran College will remain in the Flagg Building in perpetuity. *Id.* at 28; Test. Dr. Knapp, Hr'g Tr. at 154:16-20.

- GW has offered one-year employment contracts to all of the College's full-time faculty, semester-by-semester employment to approximately 100 part-time faculty, and six-month employment to non-faculty staff. *Cy Pres Mot.*, Exh. 4C at 29-31; Test. Dr. Knapp, Hr'g Tr. at 155-56, 166.
- All students who have been admitted or enrolled at the Corcoran College will be admitted to the new college and will continue to enjoy "substantially similar" degree requirements at the new college. *Cy Pres Mot.*, Exh. 4C at 28; Test. Dr. Knapp, Hr'g Tr. at 164:15-21.
- Students currently enrolled at Corcoran College, who continue their studies at the new college, will be charged the same tuition and fees that are in effect at the time the agreement is consummated, and the tuition and fees will not increase until the end of the 2017-2018 academic year. *Cy Pres Mot.*, Exh. 4C at 28; Test. Dr. Knapp, Hr'g Tr. at 169-70.
- GW will continue to display student art at the Flagg Building. Test. Dr. Knapp, Hr'g Tr. at 154:1-6.
- If the transaction between GW and NGA should terminate at any time, GW would continue to dedicate space within the Flagg Building to the exhibition of art to the public. *Cy Pres Mot.*, Exh. 4F.

The NGA proposal includes the following relevant terms:

- NGA will acquire from the Trustees the custody, care, and possession of the collection of art, which is estimated to total between 17,000 and 18,000 works, but does not include the Permanent Works. *Cy Pres Mot.*, Exh. 4A at 1.
- In accordance with the terms of a side-letter between the Trustees and NGA, NGA will distribute to other art museums and appropriate institutions those works of art that NGA

does not absorb into its own collection. *Cy Pres* Mot., Exh. 4A at 9-10, Exh. 4F. NGA and the Trustees will work together to identify the museums or institutions within the District that would receive such works. *Cy Pres* Mot., Exhs. 4A, 4F; Pet. ¶ 38. In cases where a museum or institution within the District is not identified, or where the museum or institution declines to accession a work, NGA and the Trustees will work together to identify museums or institutions outside the District, with preference given to museums and institutions within a 50 mile radius of the District, that would receive those other works. *Cy Pres* Mot., Exh. 4F; Pet. ¶ 38. The Attorney General of the District of Columbia will have the authority to approve (or disapprove) the proposed de-accession or distribution of works to museums or institutions outside the District. *Id.*

- NGA will establish a new contemporary art program, incorporating the Corcoran name, for the purpose of exhibiting works of art from the Corcoran's collection and other works, and for the purposes of "preserving, maintaining and perpetuating the mission and reputation of" the Corcoran Gallery. *Cy Pres* Mot., Exh. 4A at 1, 15.

In addition, under a separate agreement between GW and NGA, GW will work with NGA to dedicate portions of the Flagg Building for continuous use as exhibition space for the new contemporary art program. *Cy Pres* Mot., Exhs. 4C at 2, 4E at 1-2. GW has agreed that, if its agreement with NGA is terminated, GW will continue to "dedicate substantially equivalent size space in the [Flagg Building] for use as gallery space." Pet. ¶ 39; *Cy Pres* Mot., Exh. 4F. Also, "[a]s part of the transfers of art to the NGA and the College and [Flagg Building] to GW, any existing donor restrictions that are applicable to the particular assets" will remain in place and be fulfilled by NGA or GW. Pet. ¶ 41.

F. Alternatives Presented by the Intervenors

Over the course of the Hearing, the Intervenors presented several alternatives that they contend would save the Corcoran and be more faithful to the Deed of Trust than the GW/NGA proposal. First, the Intervenors offered alternatives that would not require partnership with a major institution such as GW or NGA. Specifically, using the Corcoran's past financial records, expert witness Chiara Trabucchi designed five financial models that would allow "the Corcoran to finance their core operations in perpetuity." Test. Ms. Trabucchi, Hr'g Tr. at 888:21-25; Intervenors' Hr'g Exh. 23. Each of these options would involve the Corcoran establishing an endowment and seeding that endowment over time so that the endowment eventually would generate sufficient operating investment income to offset any deficits in the operating budget. Test. Ms. Trabucchi, Hr'g Tr. at 889:2-8; Intervenors' Hr'g Exh. 23. Each of these options also was based on an assumption that a substantial portion of future donor contributions were unrestricted and would include the use of funds from the de-accession of art. Test. Ms. Trabucchi, Hr'g Tr. at 936-37, 955.

In addition, the Intervenors presented Mr. Reynolds as an alternative chairman of the Board of Trustees who claimed he could turn around the financial condition and reputation of the Corcoran within eighteen months. Test. Mr. Reynolds, Hr'g Tr. at 587-88. Mr. Reynolds, as Chairman of the Board of Directors of Ford's Theater from 2006 to 2011, created an educational program and headed a capital campaign that raised \$50 million over a period of five years, thereby effectively revitalizing a struggling Ford's Theater as a cultural institution in the District. *Id.* at 523-32. In his testimony, Mr. Reynolds minimized the Corcoran's annual budget shortfalls, stating that he could "close a 2 [to] 5 million-dollar gap. . . . at a dinner party." *Id.* at 561:14-16. In addition, Mr. Reynolds spoke passionately and at length about the Corcoran as

“the greatest philanthropic opportunity in the District of Columbia for the next 25 years” and even proposed a list of twenty-three philanthropists who would be interested in becoming members of the Board. *Id.* at 560:4-7; Intervenor’s Hr’g Exh. 15. Mr. Reynolds stated that he had a vision for the Corcoran and was interested in becoming chairman of the Corcoran’s Board and building the Board to include as many as forty new members, who would be able to “give and get money.” Test. Mr. Reynolds, Hr’g Tr. at 556:1-5.¹⁰ Mr. Reynolds further asserted that, “within 18 months of becoming the chairman of the Corcoran . . . the Corcoran will start making money. The Corcoran will start thriving. The number of students will go up. We’ll start renovating the building. We will become the showcase of arts education and creativity of not just DC, but eventually of the country.” *Id.* at 587-588.

Second, the Intervenor’s suggested that the UMD proposal was a viable alternative that more closely aligned with Mr. Corcoran’s original intent in creating the Trust than the GW/NGA proposal because the UMD proposal allowed the Gallery and the College to remain independent institutions. Test. Dr. Loh, Hr’g Tr. at 636-37, Hr’g Tr. at 1140-42. To be clear, the original UMD proposal, the terms of which are discussed above, is no longer an option before the Trustees. Test. Dr. Loh, Hr’g Tr. at 661-63. But Dr. Loh testified that, were the Court to deny *cy pres* relief, he would attempt to submit a similar proposal, with some adaptations in light of the changed circumstances, within forty-five days of the Court’s ruling. Test. Dr. Loh, Hr’g Tr. at 661-63, 681.

¹⁰ Specifically, Mr. Reynold’s vision for the College is to “re-brand it as a Corcoran Center for Creativity,” expanding the number of students and creating programs on digital media, design thinking, computer animation, and cinematography. Test. Mr. Reynolds, Hr’g Tr. at 556:6-15.

III. CONCLUSIONS OF LAW

A. Relevant Legal Standards

1. *Cy Pres* Standards

Courts in this jurisdiction have long possessed the equitable authority, under the *cy pres* doctrine, to modify a trust when a charitable purpose of the trust becomes impossible or impracticable to achieve, as long as the court does so in a manner that is as near as possible to the trustor's original intent. *See, e.g., Noel v. Olds*, 138 F.2d 581, 586-87 (D.C. Cir. 1943) (explicitly recognizing the doctrine of judicial *cy pres*, and describing the doctrine as "one of the most beneficent doctrines in the law of trusts").¹¹ The Council of the District of Columbia codified this doctrine when it enacted the Uniform Trust Act of 2003. More specifically, D.C. Code § 19-1304.13 authorizes this Court to apply *cy pres* to modify a trust if "a particular charitable purpose is or becomes unlawful, impracticable, impossible to achieve, or wasteful . . . by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purpose."¹²

Thus, a party seeking *cy pres* relief must establish, in relevant part, that: 1) a charitable purpose of the trust is or has become impracticable or impossible to achieve; and 2) the proposed modification of the trust is as near as possible to the settlor's original charitable purpose.¹³ The Court has not found, and the parties have not identified, any case law in this jurisdiction that

¹¹ *Cy pres* is a doctrine based on the French phrase "*cy pres comme possible*," which means "as near as possible." Chester, *et al.*, *The Law of Trusts and Trustees* § 431 (3d ed. 2005).

¹² A "settlor" is defined under the Act as a person who creates or contributes property to a trust. *See* D.C. Code § 19-1301.04(16).

¹³ As noted above, Section 19-1304.13 provides that "[t]he court may apply *cy pres* to modify . . . the trust by directing that the trust property be applied or distributed . . . in a manner consistent with the settlor's charitable purposes." Therefore, the statute only requires that the Court modify the trust in a way that is "consistent with" the settlor's charitable purpose, not, as prior case law had mandated, in a manner "as near as possible to" the settlor's charitable purpose. But because this Section explicitly incorporates the *cy pres* doctrine, it is clear that Section 19-1304.13 authorizes modification under this provision only if the modification is both consistent with, and as near as possible to, the settlor's initial charitable purpose.

explicitly defines the term “impracticable” in the *cy pres* context, although the D.C. Circuit has noted that a party fails to establish impossibility or impracticability when it seeks to modify a charitable trust “merely because it suits its own convenience to do so.” *Connecticut College v. United States*, 276 F.2d 491, 499 (D.C. Cir. 1960). Likewise, there is relatively little case law on this issue in other jurisdictions. *See, e.g., In re Elizabeth J.K.L. Lucas Charitable Gift*, 261 P.3d 800, 807 (Haw. Ct. App. 2011) (charitable purpose need not be impossible; it is sufficient if it would be “impracticable or unreasonable to effectuate”); *The Smith Memorial Home, Inc. v. Riddle*, 1990 Conn. Super. LEXIS 1498 at *11 (Oct. 23, 1990) (defining “impracticable” as “not being capable of being done or carried out”); *Hinckley v. Caldwell*, 182 N.E.2d 230, 235 (Ill. App. 1962) (trust purpose was impracticable where it was “no longer feasible”). Furthermore, the legislative history of the Uniform Trust Act does not elucidate this issue—it includes only a brief reference indicating that *cy pres* relief may be available if a charitable purpose becomes “unviable.” *See* Committee on the Judiciary Report on Bill 15-234 at 4.

The Court of Appeals, however, has defined this same term in the analogous context of breach of contract cases, where a party claims that, due to unforeseen circumstances, it is no longer practicable to carry out the terms of a contract, just as the Trustees now claim it is no longer practicable to carry out the terms of the Trust. In the contract context, the Court of Appeals has defined “impracticable” to mean that a party is excused from performing its obligations under a contract due to an unexpected contingency only if that contingency causes the party “extreme or unreasonable difficulty” in performing its obligations under the contract, and not if the contingency is “a mere inconvenience or unexpected difficulty.” *Island Development Corp. v. District of Columbia*, 933 A.2d 340, 350 (D.C. 2007). It is particularly noteworthy that the Court of Appeals’ language in the contract setting closely parallels the D.C.

Circuit's language in the *Connecticut College* case, which states that a party fails to establish impracticability in the *cy pres* setting merely because "it suits its own convenience" for the party to modify the terms of the trust. 276 F.2d at 499.

The Court's review of the cases discussed above leads to the conclusion that a party fails to establish impracticability in the *cy pres* context if it merely demonstrates that it would be inconvenient or difficult for the party to carry out the current terms and conditions of the trust. Rather, a party seeking *cy pres* relief can establish impracticability only if it demonstrates that it would be unreasonably difficult, and that it is not viable or feasible, to carry out the current terms and conditions of the trust.

If the party seeking *cy pres* relief establishes impossibility or impracticability, then the Court must evaluate whether the *cy pres* proposal is as near as possible to the settlor's charitable intent. *See Noel*, 138 F.2d at 586-87. In making this fact-specific determination, the Court must discern the intent of the settlor when creating the trust and should consider any relevant surrounding circumstances evidencing the settlor's intent. *Obermeyer v. Bank of America*, 140 S.W.3d 18, 25-26 (Mo. 2004); *Olds v. Rollins College*, 173 F.2d 639, 643-44 (D.C. Cir. 1949) (examining settlor's will provisions and conversations concerning will in determining settlor's intent).

2. Standard of Review of the Trustees' Decision

Both the Trustees and the District argue that the Court should apply some measure of deference to the Trustees' *cy pres* proposal, while the Intervenor argues that the Court should afford no deference to this proposal, and instead should conduct a *de novo* review. More specifically, during its closing argument, the District urged the Court to give some deference to the Trustees' proposal, without specifying the exact level of deference, while the Trustees argued

that the proposal should be approved if it was made in good faith, citing language from *Olds v. Rollins College, supra*, which states that “[i]t is settled principle that trustees having the power to exercise discretion will not be interfered with so long as they are acting *bona fide*. To do so would be to substitute the discretion of the court for that of the trustee.” 173 F.2d at 644, n.7. The Intervenor, on the other hand, argued that this Court must apply “his or her independent power of review” to the Trustees’ proposal, citing language from *In re Barnes Foundation*, 683 A.2d 894, 899 (Pa. Super. Ct. 1996).

The Court has found no case law in this jurisdiction, or elsewhere, that explicitly establishes a particular standard for reviewing a trustee’s *cy pres* proposal, and the parties likewise have not identified any such case law. Nonetheless, the Court’s examination of the relevant case law in the *cy pres* context suggests that the standards proposed by the Trustees and the Intervenor do not constitute the appropriate standard of review. The language from *Olds v. Rollins College*, cited by the Trustees, was not a holding in the case, and instead was a quotation from a Supreme Court opinion that did not involve a *cy pres* proceeding. *See Shelton v King*, 229 U.S. 90, 94-95 (1913). Moreover, adoption of a standard that would approve any *cy pres* petition, as long as it was made in good faith, would largely eviscerate the requirement that petitioners prove, as a factual matter, regardless of good faith, both that it is impracticable to carry out the existing trust and that the proposal is as near as possible to the intent of the trustor. Indeed, adoption of such a standard would be inconsistent with the numerous cases in which *cy pres* petitions have been denied without any mention of the trustees’ lack of good faith. *See, e.g., Connecticut College*, 276 F.2d at 499; *Olds*, 173 F.2d at 644.

Likewise, the language from *In re Barnes Foundation*, cited by the Intervenor, does not resolve the question of what standard a judge should apply when making his own independent

review of a trustee's proposal. To the contrary, the language cited by the Intervenor was not a holding in the case and must be viewed in the context in which it was given. The court in *In re Barnes Foundation* was responding to the trustees' argument that their petition should be granted, in part, because the Office of the Attorney General did not oppose the petition. In the course of rejecting that argument, the court stated that there was no support for the proposition "that the Court is bound by the position espoused by the Office of the Attorney General, and a reviewing judge must exercise his or her independent power of review." 683 A.2d at 899. This Court agrees that it is not bound by the Office of the Attorney General's position and that it must exercise independent review of the Petition rather than merely accept the Attorney General's position, but agreement with that common-sense proposition does not answer the question of whether the Court owes any deference to the Trustees while exercising its own independent review.

Ultimately, the Court does not need to resolve this issue because the Court finds that the Trustees have satisfied the requirements for obtaining *cy pres* relief, even without deferring to the Trustees' assessment that it is impracticable to carry out the Deed of Trust and that the GW/NGA proposal is as close as possible to Mr. Corcoran's intent in establishing the Trust.

3. Burden of Proof

The Intervenor argues that the clear and convincing evidence standard applies to *cy pres* proceedings, while the Trustees and the District argue that the traditional preponderance of the evidence standard applies to these proceedings. The Court agrees with the Trustees and the District. Indeed, it is well established that the preponderance of the evidence standard is the standard of proof that applies in most civil cases in the District of Columbia. *See, e.g., In re E.D.R.*, 772 A.2d 1156, 1159 (D.C. 2001). The Court of Appeals has employed the clear and

convincing evidence standard in civil cases only when the relevant statute dictates that standard or where the issues have “far-reaching effects on individuals or where the consequences of a court’s decision will be severe.” *Id.* Thus, the Court of Appeals has most often employed the clear and convincing evidence standard in civil cases where a liberty or fundamental interest is at stake, such as in cases involving termination of parental rights, *see In re J.M.C.*, 741 A.2d 418, 420-24 (D.C. 1999), civil commitments, *see In re Nelson*, 408 A.2d 1233, 1236 (D.C. 1979), or do-not-resuscitate orders for minors. *See In re K.I.*, 735 A.2d 448, 456 (D.C. 1999).

In this case, the relevant statutory provision does not require that the clear and convincing evidence standard be applied in *cy pres* proceedings. *See* D.C. Code § 19-1304.13.

Furthermore, although the Court of Appeals has not addressed the issue of whether the clear and convincing evidence standard applies in this context, this case does not involve the type of liberty interests or other fundamental interests for which the Court of Appeals usually has applied the clear and convincing evidence standard, absent a statutory mandate.¹⁴ Moreover, although there is relatively little case law on this issue from other jurisdictions, it appears that the jurisdictions that have addressed this issue have employed a preponderance standard in *cy pres* proceedings. *See, e.g., Trevathan v. Ringgold-Noland Foundation*, 410 S.W.2d 132, 136 (Ark. 1967); *George Sykes Memorial School Trustees v. Leiberman*, 1990 Conn. Super. LEXIS 1687 at *5-6 (Conn. Super. Ct., Nov. 15, 1990); *cf. Colin McK. Grant Home v. Medlock*, 349 S.E.2d 655, 658 (S.C. 1986) (applying preponderance standard to establish equitable deviation of charitable trust); *but cf. Barnes Foundation*, 2004 WL 1960204 at *11 (Pa. Com. Pl., Jan. 29, 2004) (applying clear and convincing evidence standard to equitable deviation proceeding).

¹⁴ The Court does not mean to minimize the importance of the parties’ interests in the outcome of this case. Nonetheless, the parties’ interests in the disposition of the Corcoran, while important, do not equal a person’s liberty interest in not being civilly committed, a parent’s fundamental interest in not having his or her parental rights terminated, or a child’s life-or-death interest in a do-not-resuscitate order, which are the situations in which the clear and convincing evidence standard most commonly has been applied in civil cases.

The Intervenor argues that the clear and convincing evidence standard should apply because it applies to both the creation of an oral trust and the modification of the terms of a trust, which they allege are less destructive of a trust's purposes than *cy pres* relief. The examples cited by the Intervenor, however, are distinguishable because the relevant statutory provisions in those contexts explicitly require proof by clear and convincing evidence, *see* D.C. Code §§ 19-1304.07 and -1304.15, whereas the *cy pres* statutory provision does not require proof by clear and convincing evidence. *See* D.C. Code § 19-1304.13. Moreover, all of these statutory provisions were enacted at the same time, when the Council enacted the Uniform Trust Act of 2003. Therefore, the Council's decision to require clear and convincing evidence for the creation of oral trusts and the modification of the terms of a trust stands in stark contrast to the lack of any such standard in the *cy pres* context, and strongly suggests that the Council chose not to adopt such a standard for *cy pres* proceedings. *See, e.g., 2A Sutherland, Statutes and Statutory Construction* § 47.23 (7th ed. 2014) (where legislature "includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion and exclusion"); *Stevenson v. District of Columbia Bd. of Elections & Ethics*, 683 A.2d 1371, 1375 (D.C. 1996) ("when a legislature makes express mention of one thing, the exclusion of others is implied, because there is an inference that all omissions shall be understood as exclusions.").

Furthermore, even though the cases cited by the Intervenor pre-date the enactment of the statutory provisions cited above, those cases involve the markedly different context of determining the parties' intent when the challenged actions were based on alleged oral agreements or allegedly erroneous written modifications. The Court has applied the clear and convincing evidence standard in those contexts because "courts are properly hesitant" to create

trusts based on oral agreements, *Duggan v. Keto*, 554 A.2d 1126, 1133 (D.C. 1989), or permit modifications to trusts based on alleged mistakes contained in the original trust document. *In re Estate of Tuthill*, 754 A.2d 272, 275 (D.C. 2000). By contrast, this case does not involve a dispute over an oral trust or a mistake in the terms of the trust document; instead, in this case, the Court must determine whether the current trust is impracticable or impossible in light of changed financial conditions and whether the *cy pres* proposal is consistent with the settlor's original intent. These issues, unlike the issues cited in the cases above, do not require a heightened burden of proof to ensure that the challenged actions are consistent with the settlor's original intent, and instead can be resolved under the burden of proof that typically applies in civil cases.

In sum, the applicable statutory provision in this case does not require that the Court apply the clear and convincing evidence standard and a review of the Uniform Trust Act as a whole suggests that the Council did not intend to heighten the burden of proof for *cy pres* proceedings. Furthermore, the issues presented in this case are distinguishable from the issues for which the Court of Appeals has required proof by clear and convincing evidence. Accordingly, the Court finds that the preponderance of the evidence standard applies in this proceeding and will evaluate the Petition and the *Cy Pres* Motion under that standard.

B. Application of Legal Standards to this Case

1. The Trustees Have Established That It Is Impracticable To Continue Under The Existing Deed Of Trust

The Trustees and the District both argue that it is impossible or impracticable for the Trustees to continue the Corcoran's operations under the existing Deed of Trust, while the Intervenor asserts that it is entirely feasible for the Corcoran to do so, claiming that the Trustees and the District have overstated the severity of the Corcoran's current financial condition and understated its ability to raise the funds needed to address its financial condition. Although the

Court agrees with the Intervenor's that the Trustees have not established that it would be impossible to continue under the existing Deed of Trust, it also finds that the Trustees have established that it would be impracticable to do so. In other words, the Court agrees with the Trustees and the District that it would be unreasonably difficult, and that it is not feasible or viable, for the Trustees to continue operating under the existing Deed of Trust, for the reasons set forth below.

a. The Corcoran's Current Financial Condition

As an initial matter, the Corcoran has been operating at a deficit for the majority of the last thirteen years. Intervenor's Hr'g Exh. 2. Although the parties dispute whether the Corcoran has been operating at a deficit for seven of the past thirteen years or eleven of the past thirteen years, it is undisputed that the Corcoran has incurred a deficit in the majority of the last thirteen years, including sizable deficits for each of the last three fiscal years for which information is available. *Id.*¹⁵

In addition, the Corcoran has incurred these deficits even though it has deferred spending on maintenance for the Flagg Building for years. Pet'r's Hr'g Exh. 1 at 17 ("there has been massive under-investment in the maintenance and upkeep of the building If the Corcoran had been on a predictable infrastructure investment schedule, the current financial situation would be much worse."). The Flagg Building now has many pressing maintenance issues that cannot be deferred for much longer. *See, e.g.*, Pet'r's Hr'g Exhs. 3, 5. Specifically, the Corcoran's under-investment in maintenance and upkeep has created substantial and significant

¹⁵ The dispute between the parties is tied to the issue of whether it is proper to consider change in net assets from operations, as proposed by the Intervenor's, or change in net assets from operations minus investment income, as proposed by the Trustees, in determining whether the Corcoran operated at a deficit. Two of the Intervenor's experts, Kathy Raffa and Chiara Trabucchi, testified that the financial statements of non-profit organizations commonly do not subtract investment income and instead focus on the change in net assets from operations in determining whether the organization operated at a profit or a deficit. Test. Ms. Raffa, Hr'g Tr. 812:10-20; Test. Ms. Trabucchi, Hr'g Tr. at 899-901. The Court need not resolve this dispute between the parties, because there is no dispute that the Corcoran has been running deficits in the majority of the past thirteen years.

concerns about the Flagg Building's capacity to house both the Gallery and the College, ranging from inadequate building system controls and operation space to inadequate fire suppression systems. Pet'r's Hr'g Exh. 3 at CGT 002601-03. Indeed, the Altieri Sebor Wieber report from August 2013 stated that the "HVAC systems are not capable of reliably maintaining museum-level exhibit and conservation conditions," and that "[l]ife-safety systems are significantly below the standards required for large assembly occupancies." Pet'r's Hr'g Exh. 5 at 2. More alarmingly, this same report also stated that the sprinkler system in the basement and sub-basement levels of the Flagg Building provides "extremely poor" coverage and that the "ability of this system to provide any real fire protection to the Corcoran is highly suspect." *Id.* at 16.

Again, while the parties dispute the exact cost of renovating the Flagg Building, they do not dispute that this renovation will cost at least \$71 million, and that there is an immediate need to spend at least \$12 million to resolve critical health and safety problems in the building.¹⁶ Thus, as an initial matter, the Corcoran currently faces the prospect of paying at least \$71 million dollars to renovate the Flagg Building, including an immediate investment of more than \$12 million, even though it is operating at a deficit.

Furthermore, although the Intervenors claim that the Corcoran has more than sufficient funds to pay for these renovations, despite the past annual deficits, the Intervenors overstate the amount of funds available to pay for these renovations, and understate the difficulties in raising the funds necessary to pay for these renovations. With respect to the funds currently available to pay for the renovations to the Flagg Building, the Intervenors have argued that the Corcoran has approximately \$38 million in cash available as of August 2014, *see* Intervenors' Hr'g Exh. 23,

¹⁶ The parties presented the Court with several estimates of the costs involved in addressing the Flagg Building's immediate needs. Dr. Knapp estimated that these renovations would cost approximately \$25 million, Test. Dr. Knapp, Hr'g Tr. at 159-60; Dr. Loh estimated these costs at approximately \$15 million, Test. Dr. Loh, Hr'g Tr. at 684:10-16; and the Altieri Sebor Weber report estimated these costs at slightly more than \$12 million. Pet'r's Hr'g Exh. 5 at 1.

but this estimate includes more than \$11 million dollars from the settlement of the Clark estate, which the Corcoran has yet to receive. Test. Ms. Stack, Hr’g Tr. at 45:1-3.¹⁷ In addition, while the Corcoran’s most recent financial statement indicates that the Corcoran has net assets of more than \$73 million dollars, almost all of that money is either temporarily restricted or permanently restricted. Intervenors’ Hr’g Exh. 26 at CGT000150.¹⁸ Thus, according to the 2013 financial statement, the Corcoran has slightly less than \$4 million in unrestricted assets that could be devoted to the renovation efforts. *Id.*

b. The Intervenors’ Alternative Proposals for Continuing Operations of the Corcoran

Throughout this proceeding, the Intervenors have argued that the Corcoran can address this shortfall of funds both by selling some of the more than 17,000 pieces in the Corcoran’s collection and by increasing its fundraising efforts. The Court is less optimistic than the Intervenors about the likelihood of success of these proposals. With respect to the Intervenors’ proposal to de-accession some of the Corcoran’s collection to pay for renovations to the Flagg Building and other operating expenses, this proposal has a serious downside. It is undisputed that the AAM and the AAMD can impose, and have imposed, sanctions on museums that have sold art to pay for operating expenses. Test. Mr. Johnson, Hr’g Tr. at 776-79. Although one of the Intervenors’ experts, Paul Johnson, testified that these sanctions “would be unlikely to have a material impact on the Corcoran’s near-term execution of its mission,” *id.* at 729-30; Intervenors’ Hr’g Exh. 16 at 6, Mr. Johnson acknowledged on cross-examination that one

¹⁷ The Intervenors presented several options through the testimony of Ms. Trabucchi to show that it was practicable to continue operating the Corcoran in its current form. All of Ms. Trabucchi’s options, however, assumed that the Corcoran had at its disposal the \$11 million dollars that it has not yet received from the Clark estate. Test. Ms. Trabucchi, Hr’g Tr. at 931-32; Intervenors’ Hr’g Exh. 23 at 4.

¹⁸ The Corcoran’s financial statements define “temporarily restricted” assets as those assets whose use has been donor restricted by specific time or purpose limitations. Intervenors’ Hr’g Exh. 26, at CGT000154. “Permanently restricted” assets include donor-imposed restrictions and “proceeds from the sale of de-accessioned collection items that are required to be used to acquire other items for collections.” *Id.*

censured institution recently laid off eight of its twenty-three staff members and that it would be very difficult for a censured institution to hire or retain qualified curatorial staff. Test. Mr. Johnson, Hr’g Tr. at 775-79. In addition, Mr. Johnson’s assessment was further weakened by other evidence indicating that the Corcoran would likely face the following sanctions: 1) the Corcoran would lose its AAM accreditation, which would disqualify it from receiving federal grants and other federal funds, and would limit its ability to attract and retain high-quality curatorial staff; and 2) the Corcoran would be censured by the AAMD, and would be precluded from hosting traveling exhibitions and loaning works of art to or from other institutions that are AAMD members. Test. Mr. Hopper, Hr’g Tr. at 510-13; Test. Ms. Smith, Hr’g Tr. at 998-99, 1019-20.

Indeed, despite testifying that the issue of sanctions was a “red herring,” Mr. Johnson admitted on cross-examination that the Director of the National Academy Museum stated that the sanctions imposed against that museum had been “painful,” that the museum could only mount minor shows while the sanctions were in place and had to cancel a major show due to the sanctions, and that donor support had dropped as a result of the sanctions. Test. Mr. Johnson, Hr’g Tr. at 734:21-25, 778:4-16. In fact, in direct contrast to Mr. Johnson’s description of the impact of sanctions, the Director of the National Academy Museum, who has observed the impact of sanctions first-hand, described the effect of sanctions in the following terms: “sanctions, and you’re dead.” *Id.* at 778:16-17. Thus, this Court believes that there are substantial risks associated with the Intervenor’s proposal to de-accession art to pay for the renovation of the Flagg Building and to pay for some of the Corcoran’s other operating expenses.¹⁹

¹⁹ One of the Intervenor’s other expert witnesses, Ms. Trabucchi, also failed to account for the possibility that the Corcoran would face sanctions if it de-accessioned some of its collection in order to pay for renovations to the Flagg

The Court also believes that the Intervenors are overly optimistic in their claim that the Corcoran can raise the needed funds through increased fundraising efforts. As many witnesses acknowledged, including some of the Intervenors' own witnesses, fundraising campaigns take significant time to plan and execute. Test. Mr. O'Connor, Hr'g Tr. at 277:1-16; Test. Mr. Hopper, Hr'g Tr. at 434-35; Test. Mr. Reynolds, Hr'g Tr. at 527-30; Test. Ms. Raffa, Hr'g Tr. at 828-29; Test. Ms. Smith, Hr'g Tr. at 1006-07. In fact, two of these witnesses testified that the planning alone of a capital campaign often takes at least 18 to 24 months and the campaigns themselves often last several years. Test. Mr. O'Connor, Hr'g Tr. at 277:1-16; Ms. Smith, Hr'g Tr. at 1006:5-7. Given the immediate and substantial maintenance needs the Corcoran is facing, such a campaign does not appear to be a viable alternative.²⁰

Furthermore, the Court is not persuaded that the Corcoran can raise the necessary funds, in the necessary time period, through better "Board-building" practices.²¹ The Court acknowledges that the current Board is relatively small compared to the Boards of comparable institutions and that a greater number of people on a Board can increase the Board's ability to raise money. Test. Mr. Johnson, Hr'g Tr. at 708-13. Nonetheless, the Court is not convinced that the Corcoran can address its serious financial difficulties merely by increasing the number of Trustees on its Board, or by changing the composition of its Board. As the Intervenors' own witnesses testified, it is important to have a diverse Board, and not one comprised solely of high-

Building or other operating expenses, thereby diminishing the utility of her testimony. Test. Ms. Trabucchi, Hr'g Tr. at 936-37.

²⁰ The Court notes that Mr. Reynolds testified that he could raise a few million dollars for the Corcoran "at a dinner party." Test. Mr. Reynolds, Hr'g Tr. at 561:14-16. Although the Court was impressed by the enthusiasm of Mr. Reynolds' testimony, and the success of his fundraising efforts at Ford's Theater, it was less impressed by some of Mr. Reynolds' other decisions, including his choice to withdraw a \$38 million pledge to the Smithsonian Institution after a disagreement with a curator about curatorial decisions, and his decision to stop supporting the NGA after he and his wife were excluded from a private tour with former First Lady Laura Bush—decisions which cast some doubt on his stated commitment to the Corcoran. *Id.* at 606-07, 621-24. The Court also notes that Mr. Reynolds has not contributed any money to the Corcoran to date. *Id.* at 610:1-8.

²¹ "Board-building" refers to the practice of increasing the number of trustees or directors serving on the Board and increasing the monetary contributions given or otherwise obtained by Board members so as to increase the funds amassed by the Board. Test. Mr. Hopper, Hr'g Tr. at 294:8-14; Test. Mr. O'Connor, Hr'g Tr. at 294:10-22.

net worth individuals. *Id.* at 708-09, 749. The Intervenor’s witnesses also acknowledged that the process of choosing appropriate Board members can take substantial time and vetting. *Id.* at 746-51. Thus, even though Mr. Reynolds quickly compiled a list of twenty-three prominent individuals to serve on the Board of Trustees if he were chosen to be the Chairman of the Board of Trustees, it does not appear that Mr. Reynolds spent substantial time choosing or vetting these potential Board members. Test. Mr. Reynolds, Hr’g Tr. at 582-84. In addition, it does not appear that Mr. Reynolds obtained from these potential Board members a firm commitment to serve on the Board or to donate to the Corcoran; to the contrary, it appears that they responded to a single phone call made by Mr. Reynolds during the week prior to his testimony. *Id.* at 582-84, 592:21-23.²²

The Corcoran’s inability to raise the needed funds immediately not only affects the operations of the Gallery, and the museum’s accreditation, but it also will likely have a negative impact on the continued operation of the College. In fact, as noted above, MSCHE has postponed a decision on accreditation and has requested that the College provide supplemental information by September 1, 2014, documenting the “steps taken to improve the institution’s short- and long-term financial viability, including updated cash and financial projections for the next five years, and multi-year budget projections aligned with the institution’s mission, goals, and strategic plan and development and implementation of a comprehensive facilities master plan.” Pet’r’s Hr’g Exh. 2 at 1. In this regard, MSCHE also noted that the Corcoran’s current “financial model . . . is not sustainable,” and that “[m]ost of our negative evaluative judgments

²² The Court is aware that Mr. Reynolds had little time to amass a potential Board of Trustees given the expedited nature of these proceedings, and the Court in no way means to criticize his efforts in that regard. At the same time, the fact remains that this Court has little assurance, at this point, that the Board amassed by Mr. Reynolds would be able to raise the funds that the Corcoran needs, and that it would be able to do so on an expedited basis.

are about standards that are directly affected by dwindling resources . . . and the need to withhold critical investments pending the finalization of a permanent solution.” Pet’r’s Hr’g Exh. 12 at 5.

c. Case Law on Impracticability

The Court’s determination that it is impracticable to carry out the existing terms of the Trust also is supported by the relevant case law. In fact, courts in numerous jurisdictions have granted *cy pres* relief where trustees faced financial obstacles like those faced by the Corcoran. For example, in *In re Fisk University*, 392 S.W.2d 582 (Tenn. 2011), the Court of Appeals of Tennessee upheld the grant of *cy pres* relief to Fisk University where it had become financially impracticable to display and maintain a collection of artwork donated to the University by Georgia O’Keeffe. There, the Court of Appeals held that the trial court did not err in finding that the University’s financial condition made it impracticable for the University to spend \$130,000 annually to display and maintain the collection, which consisted of 97 pieces of a collection formerly owned by Alfred Stieglitz and four pieces donated by Ms. O’Keeffe. 392 S.W.2d at 588. Likewise, in *Sykes Memorial School Trustees, supra*, the Superior Court of Connecticut granted *cy pres* relief to the trustees of an industrial arts school for boys where the trustees established, by a preponderance of the evidence, that the trust’s assets were insufficient to maintain such a school. 1990 Conn. Super. LEXIS 1687 at * 5.

These cases are consistent with the general view of commentators and courts that insufficiency of funds is a basis for *cy pres* relief. *See, e.g., Bogert on Trusts* § 438 at 194-96 (recognizing insufficiency of funds as the basis for the application of the *cy pres* doctrine); *The Smith Memorial Home, supra*, 1990 Conn. Super. LEXIS 1498 at ** 5-6 (granting *cy pres* relief where the cost of operating a home for elderly indigent women, including the cost of maintaining a building built in 1932, made it impracticable to continue operating the home); *Will of Porter*,

447 A.2d 977, 982 (Pa. Super. 1982) (granting *cy pres* relief where insufficient funds to build home for boys or girls); *cf. In re The Barnes Foundation*, 2004 Pa. Dist. & Cnty. Dec. LEXIS 344 at *53 (Comm. Pleas Ct., Dec. 13, 2004) (granting equitable deviation from trust to allow an art school and museum to move from a Philadelphia suburb to the City of Philadelphia, where the sale of an estate for approximately \$20 million “would not halt the foundation’s downward financial spiral.”).

d. The Trustees’ Management of the Corcoran

The Intervenors argue that the Trustees have mismanaged the Corcoran and contributed to the difficulties that now make it impracticable to carry out the Deed of Trust. To be sure, some of the Intervenors’ criticisms are valid. For example, as one of the Trustees’ own witnesses acknowledged, the Board consistently has had many vacancies over the past decade, which reduced its effectiveness and fund-raising capacity. Test. Mr. O’Connor, Hr’g Tr. at 304-05; Test. Mr. Johnson, Hr’g Tr. at 707-08; Test. Ms. Smith, Hr’g Tr. at 987-89; Intervenors’ Hr’g Exh. 6 at CGT001531-32. Furthermore, the Corcoran’s fundraising department has been plagued by vacancies and high staff turnover, and has underperformed many of its peer institutions. Test. Ms. Smith, Hr’g Tr. at 986-87; Test. Mr. Johnson, Hr’g Tr. at 714-16, 723-24; Intervenors’ Hr’g Exhs. 10, 19, 22. Finally, it appears that the Corcoran has hired senior staff members over the past few years who possessed considerable financial and management experience, but lacked experience in running either museums or colleges, let alone both. Test. Mr. Johnson, Hr’g Tr. at 785:3-7; Test. Ms. Stack, Hr’g Tr. at 73-74; Test. Ms. Smith, Hr’g Tr. at 1026.

On the other hand, some of the problems that the Corcoran now faces appear to have resulted from forces beyond the Corcoran’s control, such as the global recession that began in

2008, which affected giving to charitable institutions across the country, and the untimely passing of the Corcoran's Chief Financial Officer, and a serious illness that forced the Corcoran's Director to resign. Test. Mr. Hopper, Hr'g Tr. at 457-59, 463; Test. Mr. O'Connor, Hr'g Tr. at 279. In addition, the Trustees presented evidence showing that they have worked extremely hard over the past several years to address the Corcoran's financial problems and to seek alternative solutions, with Mr. Hopper testifying that he personally devoted thousands of hours of his time to address these issues. Test. Mr. Hopper, Hr'g Tr. at 433-36; Test. Dr. Loh, Hr'g Tr. at 635, 647, 656; Pet'r's Hr'g Exh. 3. Likewise, during its most recent report, MSCHE noted that the Board is "deeply committed to the Corcoran, working tirelessly through recent years to come to terms with the institution's significant financial challenges and to identify creative solutions that maintain and strengthen its core mission, even while changing its structure and form." Pet'r's Hr'g Exh. 12 at 10.

In any event, regardless of the merits of the criticisms of the Corcoran's past management practices, the issue before the Court is not whether the Corcoran could have been managed more efficiently over the past decade, but whether it currently is impracticable for the Trustees to carry out the existing Deed of Trust.²³ On that issue, for the reasons set forth above, the Court finds that the Trustees have established, by a preponderance of the evidence, that it is impracticable to carry out the existing Deed of Trust. Therefore, the Trustees have satisfied the first requirement for *cy pres* relief.

²³ There appears to be one exception to the general principle that a trustee's past management practices are not relevant in determining whether to grant *cy pres* relief. More specifically, the D.C. Circuit has noted that "a trustee will not be permitted to invoke the *cy pres* doctrine when his own deliberate act has prevented the fulfillment of the trustor's purpose." *Connecticut College*, 276 F.2d at 497. None of the parties presented any evidence at the Hearing showing that the Trustees deliberately placed the Corcoran in its current financial condition, and the Intervenor's stated during closing argument that they are not making such an argument at this time. Hr'g Tr. at 1179-80.

2. The Trustees Have Established That Their Proposed Modifications To The Deed Of Trust Are As Near As Possible To Mr. Corcoran's Original Intent

The Trustees and the District argue that the GW/NGA proposal is as near as possible to Mr. Corcoran's intent in creating the Deed of Trust because it retains the Corcoran collection in the District of Columbia, maintains the College in the District of Columbia, and preserves the Flagg Building as the location that will house both the collection and the College in the District of Columbia. Hr'g Tr. at 1085-87. By contrast, the Intervenors assert that the GW/NGA proposal will needlessly dismantle the Corcoran, an historic 145 year-old District of Columbia institution, by giving away the College and the Flagg Building to GW, and by giving away the Corcoran's collection to NGA. Hr'g Tr. at 1118. The Intervenors further argue that this proposal is inconsistent with Mr. Corcoran's intent, and that their alternative proposals from UMD and Mr. Reynolds are more consistent with Corcoran's original intent because they do not involve the dissolution of the Corcoran as an independent institution. *Id.* at 1118, 1140-43. Although the Intervenors' arguments have some force, this Court ultimately believes, for the reasons set forth below, that the GW/NGA proposal is the best way to effectuate Mr. Corcoran's original intent, given the Corcoran's current financial circumstances and the options that actually are available to the Trustees at this time.

a. The Intent of Mr. Corcoran

As noted earlier, in determining whether the Trustees' proposal is as near as possible to Mr. Corcoran's original intent, this Court must examine both the Deed of Trust itself and any relevant surrounding circumstances evidencing Mr. Corcoran's intent. *Obermeyer*, 140 S.W.3d at 25-26; *Olds*, 173 F.2d at 643-44. The Deed of Trust demonstrates, first and foremost, that Mr. Corcoran intended to establish an institution "in Washington City" to be "dedicated to Art" and to be used "solely for the purpose of encouraging American genius, in the production and

preservation of works pertaining to the ‘Fine Arts,’ and kindred objects.” *Cy Pres* Mot., Exh. 1, at 1. The Deed of Trust further provides that the property received by the Board of Trustees pursuant to the Deed of Trust is to be used by the Trustees for “the perpetual establishment and maintenance of a Public Gallery and Museum for the promotion and encouragement of the arts of painting and sculpture, and the fine arts generally,” and that this Gallery and Museum would be open to visitors “without any pecuniary charge whatever, at least two days a week.” *Id.* at 6.²⁴ Finally, Mr. Corcoran’s intent also is evidenced by his subsequent actions to establish a college of art and design, such as his gift of \$100,000, in his will, for the creation of an art school, and his gift of more than \$2,000 to the Board of Trustees “for the specific purpose of aiding in the establishment of a school of design in connection with the Gallery.” Intervenor’s Hr’g Exh. 13 at 28-29, 44.

Thus, a review of the relevant evidence demonstrates that Mr. Corcoran’s primary intent was to create a gallery of fine art, along with a college of art and design, located in the District of Columbia, and to encourage the production and preservation of fine art through both the gallery and the college. With these parameters in mind, the Court will evaluate the GW/NGA proposal, as compared to maintaining the status quo or adopting an alternative proposal, to determine whether the Trustees’ current proposal is as near as possible to Mr. Corcoran’s original intent.

b. The GW/NGA Proposal

The Court finds that the GW/NGA proposal is consistent with Mr. Corcoran’s

²⁴ The Court notes that the Corcoran currently is not open to visitors, free of charge, at least two days a week, in apparent contravention of the Deed of Trust. *See* www.corcoran.org/visit. The Court will not address this issue in greater detail because none of the parties has requested that the Court address this issue, and because this provision appears to be of less significance to the parties than the provisions that the Trustees seek to modify. Nonetheless, the Court notes that the GW/NGA proposal appears to be more consistent with the language of the Deed of Trust than the Corcoran’s current admission practice, because the GW/NGA proposal would allow people to visit the Corcoran, free of charge, every day that the Gallery is open. Pet. ¶ 40.

primary intent. More specifically, under the proposal, GW will: 1) renovate the Flagg Building²⁵ so that it can continue to host both a gallery and a college of art and design in the District of Columbia; 2) establish a Corcoran School within GW that will seek to “preserve and maintain the mission, reputation and brand” of the Corcoran, that will incorporate the Corcoran name, and that will remain in the Flagg Building in perpetuity; 3) continue to maintain gallery space in the Flagg Building even if the agreement between NGA and GW is terminated; and 4) continue to ensure that the works of art displayed in the Flagg Building remain open to the public. *Cy Pres Mot.*, Exh. 4C. Furthermore, in an effort to provide continuity and to maintain the culture and the standards of Corcoran College, GW has offered contingent one-year contracts to all full-time Corcoran faculty, and contingent semester-long contracts to most of the adjunct faculty. *Cy Pres Mot.*, Exh. 4C at 29-31; Test. of Dr. Knapp, Hr’g Tr. at 155-56, 166:1-17. Likewise, GW will grant admission to all students currently enrolled at or admitted to the Corcoran College. *Cy Pres Mot.*, Exh. 4C at 29-31; Test. of Dr. Knapp, Hr’g Tr. at 164:15-21. Those students will continue to enjoy “substantially similar” degree requirements and their tuition and other fees will remain at the levels in effect at the time the transaction is consummated. *Cy Pres Mot.*, Exh. 4C at 29-31; Test. of Dr. Knapp, Hr’g Tr. at 169-70. Finally, it is important to note that the GW transaction very likely will resolve the College’s potential MSCHE accreditation issues, and that MSCHE has already expressed its “unanimous and enthusiastic support for the College’s plan to merge into GW . . . with the belief that the most serious problems . . . will be solved by GW and will be evaluated as part of GW’s accreditation.” Pet’r’s Hr’g Exh. 12 at 5.

The NGA portion of the proposal also is consistent with Mr. Corcoran’s intent. Under the proposal, the NGA will: 1) operate a Legacy Gallery at the Flagg Building, consisting of

²⁵ Although the Flagg Building itself is not part of the original Deed of Trust and was not even completed until after Mr. Corcoran’s death, the parties do not dispute that it is consistent with Mr. Corcoran’s original intent for the Corcoran to remain in the Flagg Building.

works from the Corcoran collection that are “intrinsically identified” with the Flagg Building and the history of the Gallery; and 2) operate a contemporary art gallery at the Flagg Building, consisting of works of art from both the Corcoran collection and the NGA’s collection. *Cy Pres* Mot., Exhs. 4A, 4C, 4E, 4F. In addition, NGA will work with the Board of Trustees to identify other museums or institutions that would receive and display works of art that are not accessioned by the NGA and would give preference to institutions located in the District of Columbia. *Cy Pres* Mot., Exhs. 4A, 4F; Pet. ¶ 38. Furthermore, the transfer of any works of art outside the District would require the approval of the Office of the Attorney General. *Cy Pres* Mot., Exh. 4F; Pet. ¶ 38.

In sum, under the GW/NGA proposal, the Flagg Building will be renovated, the school will continue and be strengthened by its partnership with a financially sound university, both the school and a significant portion of the collection will remain in the Flagg Building, and a gallery, although smaller, will remain open to the public in the Flagg Building, all results that are consistent with Mr. Corcoran’s intent.²⁶

c. Alternatives to the GW/NGA Proposal

By contrast, the alternatives to the GW/NGA proposal likely would lead to results that are less consistent with Mr. Corcoran’s intent. Indeed, none of the parties contend that maintaining the *status quo* is a viable option for the Corcoran. Rather, as the Trustees have noted, if the GW/NGA proposal is not approved, the Trustees likely would have to close the Gallery, thus depriving the public of an important opportunity to see fine art in the District of

²⁶ The Court also notes that it reviewed all the public comments regarding the GW/NGA proposal that were submitted to the Trustees and the District and filed in this case. Although the majority of individuals who submitted comments opposed *cy pres* relief, a sizable number of institutions in the arts and academic communities supported the proposal. See Public Comments of John Cavanaugh, President and Chief Executive Officer, Consortium of Universities of the Washington Metropolitan Area; Ford Bell, President, American Alliance of Museums; Gwendolyn Everett, Director, Gallery of Fine Arts, Howard University; Steve Shulman, Executive Director, Cultural Tourism, DC. In addition, as noted previously, MSCHE enthusiastically supports the GW/NGA proposal.

Columbia, an opportunity that Mr. Corcoran hoped to provide. Hr’g Tr. at 1154. Furthermore, although the Trustees have committed to continuing the College for another academic year even if the Court does not approve the GW/NGA proposal, they could not commit to operating the College beyond that point. *Id.* In addition, the College is more likely to face the loss of MSCHE accreditation if the GW/NGA proposal is not approved, thereby further endangering fulfillment of Mr. Corcoran’s intention to create and maintain a college of art and design in the District of Columbia. Potential loss of MSCHE accreditation is an important consideration because it would jeopardize the ability of students to receive federal financial aid, further limiting the opportunities for students to attend a college of art and design in the District. Test. Ms. Stack, Hr’g Tr. at 34:14-15, 44:6-8. Thus, the GW/NGA proposal appears more consistent with Mr. Corcoran’s intent than simply maintaining the status quo.²⁷

In addition, the GW/NGA proposal appears to be more consistent with Mr. Corcoran’s intent than the alternatives considered by the Trustees. With respect to the proposal that UMD presented to the Trustees in February 2014, UMD committed to investing \$46 million to renovate the Flagg Building over the first five years, but that payment was structured as a loan that the Corcoran would have to repay if the Corcoran were to opt out of the joint venture. Test. Dr. Loh, Hr’g Tr. at 650-52. By contrast, GW committed to investing the funds necessary for the entire renovation of the Flagg Building, which GW had estimated at \$80 million and which the Trustees had estimated at \$102 million, without any risk that the Trustees would have to repay

²⁷ Ms. Trabucchi testified that the Corcoran can continue under its current Deed of Trust simply by cutting expenses or raising revenues. Test. Ms. Trabucchi, Hr’g Tr. at 894. The Court does not give great weight to Ms. Trabucchi’s testimony, however, for a number of reasons. First, as a number of witnesses testified, the Corcoran already has tried to cut expenses and raise revenues, and its failure to do so successfully is what led to the filing of the Petition. *See, e.g.*, Test. Ms. Stack, Hr’g Tr. at 45-46. Second, Ms. Trabucchi’s model for raising revenue is premised, in part, on the Corcoran’s ability to sell art to pay for operating expenses, cite, a premise that poses significant risks to the Gallery’s viability. Ms. Trabucchi also did not account for the consequences of a possible loss of MSCHE accreditation, including the loss of federal financial aid for Corcoran students. *Id.* at 948-49. In addition, Ms. Trabucchi’s analysis only accounted for \$25 million in immediate renovation costs—it did not incorporate the more long-term renovation estimates of \$71 million to \$102 million. *Id.* at 949-50.

the money. *Cy Pres* Mot., Exh. 4C at 1, 10-12. Furthermore, UMD would not agree to take responsibility for the operating costs of the College, while GW has agreed to assume these costs and to continue operating the College. Test. Dr. Loh, Hr’g Tr. at 653-54; *Cy Pres* Mot., Exh. 4C. Finally, UMD’s February 2014 best and final offer was significantly different and less favorable to the Corcoran than Dr. Loh’s September 2013 draft term sheet. Pet’r’s Hr’g Exh. 10 at 2. Given the pressing renovation requirements of the Flagg Building, and the dire financial circumstances of the Corcoran, the Trustees’ decision to pursue the GW/NGA proposal, which offered greater financial support and fewer risks than the UMD proposal, was not unreasonable. To the contrary, the GW/NGA proposal offers greater assurance that the Gallery and the College will be able to continue operations in the District of Columbia, and thereby offers greater certainty that the key components of Mr. Corcoran’s Deed of Trust will remain intact.²⁸

Finally, the GW/NGA proposal also appears to be more consistent with Mr. Corcoran’s intent than the Intervenor’s proposals involving UMD and Mr. Reynolds. In fact, there no longer is a UMD proposal before the Court—only the possibility of a future proposal that Dr. Loh stated would be substantially similar to the proposal that the Trustees previously rejected. Test. Dr. Loh, Hr’g Tr. at 663:1-4. Furthermore, Dr. Loh testified that the prior proposal would have to be revised to account for changed circumstances since February 2014, and that Dr. Loh would provide such a revised proposal within 45 days of any denial of *cy pres* relief. *Id.* at 661-63, 671-72, 681.

The Court accepts the genuineness of Dr. Loh’s continuing interest in the Corcoran. The Court questions, however, whether a substantially similar proposal is more consistent with Mr.

²⁸ The Court notes that the Corcoran is obligated to pay \$35 million to GW to help pay for the renovation and additional \$8 million in college transfer costs. *Cy Pres* Mot., Exh. 4C at 9, 11. Nonetheless, given the Trustees’ estimate of the renovation costs to the Flagg Building, which did not include “soft costs,” and given the operating deficits the Corcoran has incurred over the last decade, it was reasonable for the Trustees to conclude that GW’s proposal provided the greatest amount of financial support.

Corcoran's intent than the GW/NGA proposal, for the reasons stated above, and also questions whether UMD actually could provide a new proposal within 45 days of an Order from this Court. To the contrary, Dr. Loh's optimistic timing estimate is directly undercut by the history of UMD's 2013-2014 negotiations with the Trustees; in fact, it took almost one year for UMD to provide its best and final offer in February 2014, after it signed a memorandum of understanding with the Trustees in April 2013. As Dr. Loh acknowledged in his testimony, the Board of Regents, the Governor's office, and the state legislature would have to review any new proposal before it could be submitted to the Trustees. Test. Dr. Loh, Hr'g Tr. at 658-59, 680-81. Furthermore, despite Dr. Loh's best intentions, the conditions of the December 2013 draft term sheet were substantially less favorable to the Corcoran, and offered less certainty about the College's future, than those proposed by Dr. Loh in September 2013. Thus, the Court is not confident that UMD actually could submit a revised proposal within 45 days of a Court order denying the Trustees' request for *cy pres* relief, and is similarly unconvinced that such a proposal would be more consistent with Mr. Corcoran's intent than the proposal that is actually before this Court.²⁹

The Court is similarly unconvinced that Mr. Reynolds' proposal is more consistent with Mr. Corcoran's intent or offers the Corcoran a better path forward than the GW/NGA proposal. As an initial matter, the contours of Mr. Reynolds' proposal are not clear to the Court. At most, Mr. Reynolds has offered assurances to the Court that, based on his past performance, he would do a better job fundraising than the Corcoran's current Board. But Mr. Reynolds' assurances do not assure the Court. To the contrary, the evidence does not establish that Mr. Reynolds could

²⁹ In noting its skepticism of UMD's stated time frame for a renewed proposal, the Court in no way means to criticize Dr. Loh, who impressed the Court with his sincerity and the clarity of his vision. Nonetheless, the Court is aware that Dr. Loh does not operate in a vacuum, and that any proposal he drafted would inevitably have to go through multiple layers of review where, as previously happened, it could be modified in ways that make it less favorable to the Corcoran's interests.

and would raise sufficient funds, in the time frame required, to renovate the Flagg Building and otherwise fund the operations of the College and the Gallery,

First, as noted earlier, although Mr. Reynolds achieved great success in revitalizing Ford's Theater, and although he is unquestionably enthusiastic about the Corcoran, he has not demonstrated dependability in some of his other philanthropic endeavors, withdrawing his support from the NGA after being excluded from a private tour at that museum, and withdrawing a substantial pledge to the Smithsonian after becoming upset with a curator there. Test. Mr. Reynolds, Hr'g Tr. at 606-07, 621-24. And despite his enthusiasm for the Corcoran, Mr. Reynolds has never provided it with any financial support to date. *Id.* at 610:1-8. Second, although Mr. Reynolds amassed an impressive list of possible Board members on short notice, the fact remains that the individuals on this list have not committed themselves to anything more than considering membership on the Board. Unlike GW, these individuals have not backed up their interest in the Corcoran with any financial commitment. In addition, Mr. Reynolds' single phone call to each of these individuals is far from the kind of thorough and deliberate Board member selection process that the Intervenor's own witnesses endorsed. Third, the Court is concerned that Mr. Reynolds endorsed the proposal to de-accession art in order to cover the Corcoran's renovation and operating expenses, suggesting that the Corcoran's non-American art could be sold to cover these expenses. *Id.* at 611-12. As discussed in detail above, this proposal carries significant risk to the Corcoran's accreditation as a museum and its relationships with the AAM and AAMD. Indeed, not only were the Trustees understandably reluctant to endorse such a proposal, but Dr. Loh explicitly testified that he was "philosophically opposed to de-accessioning art to pay the bills." Test. Dr. Loh, Hr'g Tr. at 654:15-19. *See also In re Barnes Foundation*, 2004 Pa. Dist. & Cnty. Dec. LEXIS 344 at *31 (Dec. 13, 2004) ("there is a strong

majority opinion among those in the museum community that the proceeds from sales should be used only for the acquisition of other materials or for the direct preservation and care of collections.”).

In sum, the Court is not convinced that the Intervenor’s proposals, amorphous and aspirational as they are, are more consistent with Mr. Corcoran’s intent than the actual proposal that the Trustees have presented to this Court. The Court also notes that this case is distinguishable from *Museum of Fine Arts v. Beland*, 735 N.E. 2d 1248 (Mass. 2000), cited by the Intervenor, where *cy pres* relief was denied because the trustees “ha[d] not made reasonable efforts to explore alternative[s].” *Id.* at 1252. In this case, as the record amply demonstrates, the Trustees explored numerous alternatives, over many years, before submitting their current proposal to the Court. Test. Ms. Stack, Hr’g Tr. at 55:5-14; Test. Mr. Hopper, Hr’g Tr. at 433-36.

At the same time, the Court is aware that the GW/NGA proposal is inconsistent with Mr. Corcoran’s intent in one important respect—unlike the UMD proposal from February 2014, the GW/NGA proposal effectively eliminates the Corcoran as an independent institution, leaving behind only an untethered Board of Trustees to advise GW and NGA on future plans for the College and Gallery. Undoubtedly, Mr. Corcoran would not be pleased by this turn of events. It seems likely, however, that he would be pleased to see that the College will be preserved through its partnership with the very university to which he donated both property and his company’s archives, and where he served as Chairman of the Board for several years, and that the Gallery will be preserved through its partnership with one of the country’s pre-eminent art institutions. Test. Dr. Knapp, Hr’g Tr. at 148-49.³⁰

³⁰ The GW/NGA proposal also may be inconsistent with Mr. Corcoran’s intent to the extent that it authorizes the Corcoran, in consultation with NGA, to de-accession some of the Corcoran collection and transfer it to other

Moreover, in weighing the various proposals, this Court must examine the entirety of the proposals at hand, including their plausibility and the definiteness of their terms, to determine which proposal most nearly effectuates Mr. Corcoran's original intent. In this case, the Trustees reasonably concluded that the UMD proposal in February 2014 had shortcomings and risks that the GW/NGA proposal did not have. And the two possibilities that the Intervenor now propose are just that—possibilities that lack definite terms, definite commitments, and definite means of support to preserve the College, the Gallery, and the Flagg Building itself. At the end of the day, after weighing numerous proposals, the Trustees reasonably decided that the GW/NGA proposal was the best choice to further Mr. Corcoran's original intent. Likewise, this Court finds that the Trustees have established that the GW/NGA proposal is consistent with Mr. Corcoran's intent and effectuates that intent as nearly as possible in light of the Corcoran's current financial condition. Accordingly, this Court finds that the Trustees have satisfied both requirements for *cy pres* relief in this case, and will grant their Petition and *Cy Pres* Motion.

IV. CONCLUSION

This Court finds it painful to issue an Order that effectively dissolves the Corcoran as an independent entity. But this Court would find it even more painful to deny the relief requested and allow the Corcoran to face its likely demise—the likely dissolution of the College, the closing of the Gallery, and the dispersal of the Gallery's entire collection. Fortunately, two

institutions. This proposal, however, is more consistent with Mr. Corcoran's intent than maintaining the *status quo*, which likely would lead to the dispersal of the entire collection if the Gallery were to close completely. Furthermore, the GW/NGA proposal appears to be more consistent with Mr. Corcoran's intent than Mr. Reynolds' proposal, which included some de-accession of the collection to fund operations, and which contained no limits on the type or location of the institutions to which the collection could be transferred. By contrast, pursuant to a side letter agreement between the Corcoran and NGA, any de-accessioned works of art presumptively would be transferred to a museum or other institution within the District of Columbia or within a 50 mile radius of the District of Columbia, and would be transferred in such a manner as to maximize the possibility that the works would be displayed to the public free of charge or under other reasonable terms, and that Corcoran students would have access to the works for educational purposes. *Cy Pres* Mot., Exh. 4F. In addition, if the Corcoran and NGA sought to transfer any works of art outside the District of Columbia, they would need to obtain the approval of the Office of the Attorney General. *Id.*

internationally recognized institutions, with strong and enduring commitments to education and the arts, have agreed to sustain the College under the Corcoran name, and to provide the same educational and employment opportunities to its students, faculty, and staff; to maintain the Gallery and much of the collection under the Corcoran name, and to keep it open to the public; and to renovate the iconic building which houses both the College and the Gallery. Furthermore, this proposal has been enthusiastically endorsed by the two national organizations that accredit the College and the Gallery, and by the Office of the Attorney General, which has statutory oversight over charitable trusts in the District of Columbia. In sum, this Court believes that approval of the Trustees' proposal is necessary, given the Corcoran's financial circumstances, and further believes that the proposal properly effectuates Mr. Corcoran's original intent to encourage "American Genius in the production and preservation of works pertaining to the 'Fine Arts,' and kindred objects."

Accordingly, it is this 18th day of August, 2014, hereby **ORDERED** that the Trustees' Petition and *Cy Pres* Motion are **GRANTED**. The Court will issue a separate Order providing the specific relief requested by the Trustees.

A handwritten signature in black ink, appearing to read 'ROKUN', is written over a light beige rectangular background.

Robert Okun
Associate Judge
(Signed in Chambers)

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