

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN**

| | |
|----------------------------|-------------------------|
| In re |) |
| |) Chapter 9 |
| |) |
| CITY OF DETROIT, MICHIGAN, |) Case No. 13-53846 |
| |) |
| Debtor. |) Hon. Steven W. Rhodes |
| |) |

MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

Syncora Capital Assurance Inc. and Syncora Guarantee Inc. (“Syncora”) submit this motion (the “Motion to Compel”) to compel the production of documents from the State of Michigan. In support of its motion, Syncora respectfully states as follows:

BACKGROUND

1. Pursuant to this Court’s Third Amended Order Establishing Procedures, Deadlines and Hearing Dates Relating to the Debtor’s Plan of Adjustment [Doc. No. 3632]¹, on March 28, 2014, Syncora filed with the Court subpoenas it planned to serve on certain parties, including the State of Michigan (the “State”), pursuant to Federal Rule of Civil Procedure 45(a)(4) [Doc No. 3315]. (Ex. 6-A.) On April 7, 2014, the subpoena directed to the State of Michigan was served on a representative at the Attorney General’s office.

¹ This Order has since been amended and replaced with the Fourth Amended Order Establishing Procedures, Dates, Deadlines and Hearing Dates Relating to the Debtor’s Plan of Adjustment [Doc. No. 4202].

2. The subpoena contained six document requests, including the following request at issue in this Motion to Compel (“Request No. 1”):

1. All documents and communications relating to Attorney General’s Opinion No. 7272.

Attorney General’s Opinion No. 7272 (the “Opinion”) is a legal opinion document that was issued by the Attorney General of the State of Michigan, Bill Schuette, on June 13, 2013 in response to a legislative request. The Opinion includes the Attorney General’s conclusions regarding the art collection held in the Detroit Institute of Arts (“DIA”)², including the conclusion that certain of the art in the DIA is held in charitable trust by the City of Detroit and, accordingly, no piece of the collection may be sold, transferred, or otherwise disposed of. (*See* Ex. 6-B.)

3. From April 8 until April 18, 2014, counsel for Syncora and counsel for the State and Attorney General spoke telephonically and via email to discuss and resolve certain issues raised by Syncora’s six document requests. Because of an ethical wall erected between the Attorney General and the State of Michigan, Syncora’s requests were divided into two groups. Though the State filed an objection to Syncora’s requests on April 17, 2014 [Doc. No. 4146], Syncora agreed

² The non-profit entity “Detroit Institute of Arts” has also conducted business as the Detroit Institute of Arts Founders Society and the Founders Society. Any references to the Founder’s Society in documents referenced in this Motion, such as the Operating Agreement, are also references to the non-profit entity the Detroit Institute of Arts.

to narrow certain of its requests and the State agreed to produce documents responsive to these narrowed requests.³

4. On April 21, 2014, counsel for Attorney General Bill Schuette sent counsel for Syncora the Attorney General's responses to objections to Request No. 1, with attachments, attached herein as Exhibit 6-B ("AG Objection"). The Attorney General agreed to produce three documents: the Opinion, the Request for Attorney General Opinion from Senate Majority Leader Randy Richardville, and the Common Interest Agreement between the Attorney General and the Detroit Institute of Arts (the "Common Interest Agreement"). The AG Objection stated that "Any other responsive documents are privileged." (AG Objection ¶ 3.) Among the allegedly privileged documents are "eleven communications" between the Attorney General and counsel for the DIA. (*Id.* at ¶ 6.)

5. Counsel for the Attorney General agreed to produce a privilege log related to the communications with the DIA and produced the log on April 25, 2014. (Ex. 6-C.) The privilege log contains 13 entries describing communications occurring between counsel for the Attorney General and the DIA's attorneys. According to the privilege log, these communications began on April 12, 2013 and

³ Counsel for Syncora wishes to specifically thank Steven Flancher, Matthew Schneider, Dawn R. Copley, Steven G. Howell, Margaret Nelson, Jeanmarie Miller, Eric Jamison, and Mark Donnelly for their assistance in these matters.

ended on June 13, 2013, the date the Attorney General's opinion was issued. Multiple of the entries describe attachments of memoranda or other information.

6. Syncora now moves to compel the production of documents responsive to its Request No. 1.

JURISDICTION

7. The Court has jurisdiction over this matter pursuant to 38 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

8. Syncora respectfully requests that the court enter an order compelling the State of Michigan to produce the documents requested by Syncora in Request No. 1 of Syncora's subpoena.

ARGUMENT

I. The Attorney General Must Produce Documents Responsive to Syncora's Request No. 1

9. The Attorney General must produce the documents requested by Syncora for three principal reasons. *First*, the Common Interest Agreement was signed by the parties months after the communications occurred, which militates against a finding that the common interest agreement applies to these communications. *Second*, the common interest privilege claimed by the Attorney General for his communications with the the DIA is not applicable because the

DIA acts as an agent of the City, and the Attorney General, the City, and the DIA do not share a common legal interest with respect to the artwork in the DIA. This is so notwithstanding the existence of a written common interest agreement between the Attorney General and the DIA. *Third*, the common interest privilege does not and cannot protect underlying non-privileged information provided in connection with privileged communications, and thus notwithstanding the application of any privileges, non-privileged attachments exchanged between the Attorney General and the DIA must be produced in response to Syncora's Request No. 1.

A. The Common Interest Agreement Does Not Apply to Communications Between the Attorney General and the DIA

10. Counsel for the DIA began communicating with the Attorney General's office regarding the artwork in the DIA well before the Attorney General issued his Opinion on June 13, 2013. (*See* AG Privilege Log, Ex. 6-C.) In fact, these communications began approximately two months prior to Senate Majority Leader Randy Richardville's June 11, 2013 request for an opinion regarding the art collection. (*See* Letter from Randy Richardville, Ex. 6-B.) As the Attorney General's privilege log reveals, in the two months leading up to Senator Richardville's request, counsel for the DIA and the Attorney General's office frequently corresponded. During that time, counsel for the DIA provided the

Attorney General with purportedly privileged information on a number of subjects relating to the DIA and the art. Such communications included the following:

- On April 12, 2013 an attorney for the DIA sent the Attorney General a letter containing the “Honigman opinion regarding DIA art.”
- On May 24, 2013, an attorney for the DIA forwarded three documents to attorneys for the Attorney General, including “Honigman-prepared work product.”
- On May 29, 2013, an attorney for the DIA forwarded “five attachments regarding ethics of art deaccession” to counsel for the Attorney General.
- On June 1, 2013 an attorney for the DIA forwarded a “DIA memo regarding the legal and practical constraints of selling the collection” to counsel for the Attorney General.
- On June 12, 2013, an attorney for the DIA forwarded “12 attachments regarding purpose of the museum over the years” to an attorney for the Attorney General.

(AG Privilege Log, Ex. 6-C.)

11. After counsel for the DIA and the Attorney General had been communicating and exchanging information regarding the DIA art and the legal and practical constraints of selling the art for several months, Senator Richardville requested the Attorney General’s opinion regarding the art. Then, just two days after Senator Richardville’s June 11, 2013 request, the Attorney General issued his Opinion. (*See* Opinion, Ex. 6-B.) Counsel for the Attorney General has stated that no additional responsive communications between the DIA and Attorney General exist following the final entry on the privilege log for June 13, 2013. However,

this is hard to imagine given that the DIA artwork and the Attorney General's position remained relevant to the ongoing proceedings in the Bankruptcy Court.

12. Approximately six months after the Attorney General issued his Opinion, the DIA and the Attorney General signed the Common Interest Agreement on December 2 and December 4, 2013. (*See* Common Interest Agreement, Ex. 6-B.) However, the fact that communications between the Attorney General and counsel for the DIA all occurred prior to the signing of a Common Interest Agreement in December 2013 show that a common legal interest did not exist at the time of the Attorney General's communications. *See Prowess, Inc. v. Raysearch Labs.* AB, CIV. WDQ-11-1357, 2013 WL 509021 (D. Md. Feb. 11, 2013) ("Prowess's assertion of the common interest privilege is deficient for several reasons. First, the "common interest agreement" was not executed until November 29, 2012. . . . Accordingly, all of the conversations at issue took place well before any common interest agreement existed.").

13. The AG Objection does not contain an assertion that a common interest agreement, written or otherwise, existed prior in time to the one attached to the AG Objection, which was signed in December 2013. Though paragraph K of the Common Interest Agreement purports to cover communications prior to the execution of the Common Interest Agreement, this bare assertion is not a sufficient basis to find that there was a common interest at the time the communications

occurred. *See Prowess, Inc. v. Raysearch Labs.* AB, CIV. WDQ-11-1357, 2013 WL 509021 (D. Md. Feb. 11, 2013).

14. Because the Common Interest Agreement was not executed until after the communications requested in Request No. 1, it does not apply to protect the communications from disclosure. The Attorney General must produce these communications because, as will be explained below, there is not a common legal interest between the Attorney General and the DIA.

B. There is No Common Interest Between the Attorney General and the DIA

(i) Legal Standard

15. The “common interest” privilege protects otherwise privileged communications from disclosure if the communicating parties have “an identical legal interest with respect to the subject matter of the communication.” *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 347-48 (N.D. Ohio 1999) (internal quotation omitted). *See also Cozzens v. City of Lincoln Park*, 08-11778, 2009 WL 2242396 (E.D. Mich. July 24, 2009) (“In order to be considered a “common interest” within the meaning of the common interest doctrine, the interest must be . . . a “legal” interest as perhaps contrasted to a mere business interest.”). The common interest privilege is construed narrowly. *Cigna Ins. Co. v. Cooper Tires & Rubber, Inc.*, 3:99CV7397, 2001 WL 640703 (N.D. Ohio May 24, 2001) (“[T]he

“common interest” extension of the privilege should be construed narrowly, rather than expansively.”)

16. In *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir.1998), the Sixth Circuit considered whether the common interest doctrine applied when counsel for a city met with two city employees regarding employment decisions the city employees had made. *Id.* The meeting was also attended by city council members. *Id.* Raising the issue on its own, the court found that the attendance of the city council members waived any privilege covering communications during the meeting, and that the common interest doctrine would not protect any such communications. The reason the court declined to apply the common interest doctrine was the disparity of interest between the city councilmembers and the city employees: it was only the city employees that were legally responsible for the actions resulting in the employment-related litigation at issue. *Id.* Though the council members were obviously part of the city’s organizational structure, they nevertheless lacked the requisite “interest” in the litigation necessary to afford the protection of the common interest doctrine to communications with them.

17. For the reasons articulated below, here, as in *Reed*, the Attorney General and DIA have disparate legal interests and communications between them cannot be protected by the common interest doctrine.

**(ii) The City and Attorney General Do Not Have a
Common Legal Interest**

18. Here, as in *Reed v. Baxter*, the Attorney General and the DIA, acting as agent for the City, have disparate legal interests with respect to the artworks in the DIA. This is evidenced, for example, by multiple public statements by City spokespersons regarding the status of the art that directly contradict the Attorney General's Opinion. See, e.g. Randy Kennedy, *Fate of Detroit's Art Hangs in the Balance*, N.Y. Times, December 3, 2013 ("Mr. Orr, in his presentation to the newspaper, added, referring to the art: "Let's be clear. That's a city asset."); Mark Stryker and John Gallagher, *DIA's art collection could face sell-off to satisfy Detroit's creditors*, Detroit Free Press, May 24, 2013 (quoting City spokesperson Bill Nowling as saying "But [the art] is an asset of the city to a certain degree. We've got a responsibility under the act to rationalize that asset, to make sure we understand what's it's [sic] worth."). See also Khalil AlHajal, *Detroit EM Kevyn Orr: Millionaires wanted to buy DIA works, turn Belle Isle into gated community* Mlive.com, March 24, 2014 (quoting Kevyn Orr as saying that, without an agreement regarding the DIA artworks, "I was going to be having a yard sale of DIA art.").

19. Similarly, the City's attempt to enter into a transaction (the "DIA Settlement") to transfer the art to the DIA in exchange for certain contributions in connection with the the so-called "Grand Bargain" depends on its view, contrary to

the Attorney General, that it may dispose of and transfer the City's assets in view of satisfaction of its debts and obligations. (Debtor's Second Amended Plan of Adjustment IV(F)1-3, Doc. No. 4140.) This is in direct contrast to the Attorney General's view that the art may not be "transferred." (Opinion p 13.)

20. There is no common interest between the Attorney General and the DIA and City because they do not share a common interest with respect to the subject matter of the Attorney General's opinion; in fact, they plainly disagree about the legal status of the artwork in the DIA. As in *Reed*, where the lack of relevance or involvement in a litigation on the subject matter of the communications prevented the invocation of the common interest doctrine, the fact that the Attorney General and the DIA are entities that express similar interests is not enough to protect their communications. Because only the City is the party with title to the assets that would be involved in potential litigation regarding the legal status of its assets, and because the City has publicly expressed views contrary to those expressed by the Attorney General, the Attorney General and the City do not have sufficiently common legal interests to protect their communications or the communications of their agents under the common interest doctrine. *See Reed v. Baxter*, 134 F.3d 351 (6th Cir.1998).

(iii) The DIA is an Agent of the City

21. The DIA is a contractor of the City, and the City specifically engaged and retained the DIA Corporation (referred to as the “Society” in the Operating Agreement) to manage and operate all aspects of the DIA. A party may be both a contractor and an agent of a principal. *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 219 (6th Cir. 1992) (citing the Restatement (Second) of Agency for the proposition that “a person may be both an independent contractor and an agent.”) Under Michigan law, to establish an agency relationship, it must be shown that the principal controls specific conduct of the alleged agent with respect to the matters entrusted to him. *St. Clair Intermediate Sch. Dist.t v. Intermediate Educ. Ass'n/Michigan Educ. Ass'n*, 458 Mich. 540, 558, 581 N.W.2d 707, 716 (1998) (finding an agency relationship existed between a Michigan entity and a nonprofit corporation it created to administer insurance benefits pursuant to an agreement).

22. The DIA is an agent of the City because, among other reasons, the Operating Agreement provides that the DIA must perform specific acts at the City’s request and control by and through the Arts Commission, to which the DIA must report and from which it must seek approvals. (*See* 1997 Operating Agreement, Ex. 6-D.) The DIA is specifically directed, for instance, that it may not encumber or cloud the title of the works in the art collection. (*Id.* at § F.7.) The DIA is also required to seek the Commission’s approval for various of the

museum's policies and to report to the Commission on, for example, any emergent matters. (*See, e.g., id.* at p 24.)

23. As an agent of the City, the DIA's legal interest with respect to the status of the artworks in the DIA is identical to the City, which holds legal title to the art collection. The DIA, because it may not encumber or cloud the City's title to the works in the art collection, (*see* Operating Agreement § F.7), therefore also cannot hold a common interest with the Attorney General with regard to the status of the art collection. Because the City has disparate interests from the Attorney General with respect to the art, the common interest privilege does not protect their communications.

24. The existence of a written common interest agreement is not alone enough to articulate a common interest sufficient to invoke the protections of the common interest doctrine. *See Prowess, Inc. v. Raysearch Labs.* AB, CIV. WDQ-11-1357, 2013 WL 509021 (D. Md. Feb. 11, 2013) (denying the existence of a common interest and noting that a signed common interest agreement "does not explain how [certain parties to the common interest agreement] could be affected by this litigation, and it does not explain the scope of the alleged common interest."). As in *Prowess*, the DIA and the Attorney General cannot articulate the DIA's legal interest because the art in question in the Attorney General's opinion is a City asset that the DIA manages pursuant to an Operating Agreement. The

Common Interest Agreement merely states that the parties sign the agreement regarding “potential litigation involving protecting the art collection of the Detroit Institute of Arts.” (Common Interest Agreement p 1.) The Common Interest Agreement does not specifically articulate how the Attorney General and DIA share a common legal interest, particularly in light of the legal disagreements between the Attorney General and the City, for whom the DIA acts as an agent. Instead, it merely memorializes the parties’ desire to prevent their communications from being disclosed.

C. Even If It Applies to the Communications, the Common Interest Privilege Does Not Shield Underlying Information

25. The common interest privilege, like all privileges, does not protect all information from disclosure. *UltiMed, Inc. v. Becton, Dickinson & Co.*, CIV. 062266(DSD/JJG), 2008 WL 4849034 (D. Minn. Nov. 6, 2008) (“Similar to the attorney-client privilege, a “joint-defense” or “common-interest” privilege protects confidential communications made by the client or his lawyer to a lawyer representing another in a matter of common interest. . . . These privileges, however, do not prevent disclosure of factual information.”) *citing Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981). *See also Dow Chem. Co. v. Reinhard*, 07-12012-BC, 2008 WL 2245007 (E.D. Mich. May 30, 2008) (“Attorney-client privilege protects communications for the purpose of obtaining legal advice. It does not protect communications of facts by the attorney to the client.”).

26. Thus, even if the common interest privilege (or any other privilege) applied to documents responsive to Syncora's Request No. 1, the non-privileged information underlying the communications as attachments would not automatically be privileged. *See, e.g. Flagstar Bank v. Fed. Ins. Co.*, 05-CV-70950-DT, 2006 WL 6651780 (E.D. Mich. Aug. 21, 2006) (finding a communication privileged, but ordering the production of attachments because "the attachments . . . relate to the underlying factual investigation and contain no legal advice or opinions. The attachments are not privileged."); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990) ("Where a privileged document has attachments, each attachment must individually satisfy the criteria for falling within the privilege. Merely attaching something to a privileged document will not, by itself, make the attachment privileged."); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996) ("Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney.").

27. The AG Objection states that the Attorney General "objects to producing eleven communications (some of which include attached documents) between the Attorney General and counsel for the Detroit Institute of Arts, which are protected by a Common Interest Agreement between the Attorney General and the Detroit Institute of Arts." (AG Objection ¶ 6.) The Privilege Log provide by

the Attorney General suggests that there may be at least 24 attachments to the communications between counsel for the Attorney General and counsel for the DIA. (*See* AG Privilege Log, Ex. 6-C.) These attachments are not listed separately, nor is their status as privileged justified independently from the communication to which they are attached. For example, on June 12, 2013, counsel for the DIA sent counsel for the Attorney General “12 attachments regarding purpose of the museum over the years.” (AG Privilege Log, Ex. 6-C.) There is no indication that these attachments were legal advice, attorney work-product, or otherwise confidential. Similarly, on May 28, 2013, counsel for the DIA forwarded the Attorney General’s counsel “five attachments regarding ethics of art deaccession.” (*Id.*) Again, there is no indication that these documents are themselves privileged. The fact that the attachments accompany potentially privileged communications does not shield them from production if they are not independently privileged. *See, e.g., Flagstar Bank v. Fed. Ins. Co.*, 05-CV-70950-DT, 2006 WL 6651780 (E.D. Mich. Aug. 21, 2006). As such, any attachments to these communications should be produced.

WHEREFORE, for the foregoing reasons, Syncora respectfully requests that this Court enter an order compelling the production of documents by the Attorney General for the State of Michigan.

Dated: April 25, 2014

Respectfully submitted,

KIRKLAND & ELLIS LLP

By: /s/ Stephen C. Hackney

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*Attorneys for Syncora Guarantee Inc. and
Syncora Capital Assurance Inc.*

Summary of Attachments

Exhibit 1 - Proposed Order

Exhibit 2 - Notice of Motion and Opportunity to Object

Exhibit 3 - None [Brief Not Required]

Exhibit 4 - None [Separate Certificate of Service to be Filed]

Exhibit 5 - Affidavits [Not Applicable]

Exhibit 6-A - Attorney General Subpoena

Exhibit 6-B - Attorney General Responses and Objections with Attachments

Exhibit 6-C - Privilege Log

Exhibit 6-D - Operating Agreement

Exhibit 1
Proposed Order

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN**

| | |
|----------------------------|-------------------------|
| In re |) |
| |) Chapter 9 |
| |) |
| CITY OF DETROIT, MICHIGAN, |) Case No. 13-53846 |
| |) |
| Debtor. |) Hon. Steven W. Rhodes |
| |) |

**ORDER GRANTING MOTION TO COMPEL THE PRODUCTION OF
DOCUMENTS**

This matter having come before the Court on the motion of Syncora to compel the production of documents by the Attorney General (the “Motion to Compel”), the Court having reviewed Syncora’s Motion to Compel; and the Court having determined that the legal and factual bases set forth in the Motion to Compel establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. Syncora’s Motion to Compel is GRANTED.
2. The Attorney General shall produce all communications responsive to Request No. 1 in Syncora’s subpoena.
3. The parties are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the motion.
4. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

IT IS SO ORDERED.

STEVEN W. RHODES
United States Bankruptcy Judge

Exhibit 2

Notice of Motion and Opportunity to Object

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN**

| | | |
|----------------------------|---|-----------------------|
| In re |) | |
| |) | Chapter 9 |
| CITY OF DETROIT, MICHIGAN, |) | |
| |) | Case No. 13-53846 |
| Debtor. |) | |
| |) | Hon. Steven W. Rhodes |
| |) | |

**NOTICE OF MOTION TO COMPEL THE PRODUCTION OF
DOCUMENTS**

PLEASE TAKE NOTICE that on April 25, 2014, Syncora filed the *Motion to Compel the Production of Documents* (the “Motion”) in the United States Bankruptcy Court for the Eastern District of Michigan (the “Bankruptcy Court”) seeking to compel the production of documents by the Attorney General for the State of Michigan.

PLEASE TAKE FURTHER NOTICE that your rights may be affected by the relief sought in the Motion. You should read these papers carefully and discuss them with your attorney, if you have one. If you do not have an attorney, you may wish to consult one.

PLEASE TAKE FURTHER NOTICE that if you do not want the Bankruptcy Court to grant the Objectors’ Motion or you want the Bankruptcy Court to consider your views on the Motion, by May 16, 2014¹, you or your attorney must:

¹ Concurrently herewith, Syncora is seeking expedited consideration and shortened notice of the Motion. If the Court grants such expedited consideration and shortened notice, Syncora will file and serve notice of the new response deadline.

File with the Bankruptcy Court a written response to the Motion, explaining your position, electronically through the Bankruptcy Court's electronic case filing system in accordance with the Local Rules of the Bankruptcy Court or by mailing any objection or response to:²

United States Bankruptcy Court
Theodore Levin Courthouse
231 West Lafayette Street
Detroit, MI 48226

You must also serve a copy of any objection or response upon:

James H.M. Sprayregen, P.C.
Ryan Blaine Bennett
Stephen C. Hackney
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
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- and -

Stephen M. Gross
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Joshua Gadharf
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Bloomfield Hills, MI 48304
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If an objection or response is timely filed and served, the clerk will schedule a hearing on the Motion and you will be served with a notice of the date, time and location of the hearing.

PLEASE TAKE FURTHER NOTICE that if you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the Motion and may enter an order granting such relief.

² A response must comply with F. R. Civ. P. 8(b), (c) and (e).

Dated: April 25, 2014

/s/ Stephen C. Hackney

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*Attorneys for Syncora Guarantee Inc. and Syncora
Capital Assurance Inc.*

Exhibit 3

None [Brief Not Required]

Exhibit 4

None [Separate Certificate of Service to be Filed]

Exhibit 5
Affidavits
[Not Applicable]

Exhibit 6-A

Attorney General Subpoena

UNITED STATES BANKRUPTCY COURT

Eastern District of Michigan

In re City of Detroit, Michigan
Debtor

Case No. 13-53846

(Complete if issued in an adversary proceeding)

Chapter 9

Plaintiff
v.

Adv. Proc. No.

Defendant

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: Michigan Department of Attorney General, Attn: Bill Schuette, Cadillac Place, 10th Floor, 3030 W. Grand Blvd., Suite 10-200, Detroit, MI 48202
(Name of person to whom the subpoena is directed)

[X] Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Exhibit A

Table with 2 columns: PLACE (McDonald Hopkins PLC, 39533 Woodward Avenue, Suite 318, Bloomfield Hills, MI 48304) and DATE AND TIME (April 25, 2014 at 5:00 p.m.)

[] Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Table with 2 columns: PLACE and DATE AND TIME

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: March 28, 2014

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

Handwritten signature of Stephen C. Hackney

The name, address, email address, and telephone number of the attorney representing (name of party) Interested Party Syncora et al., who issues or requests this subpoena, are:

Stephen C. Hackney, 300 N. LaSalle, Chicago, IL 60654 (312) 862-2000 stephen.hackney@kirkland.com

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)*: _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true and correct.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information concerning attempted service, etc.:

Federal Rule of Civil Procedure 45(c), (d), (e), and (g) (Effective 12/1/13)
(made applicable in bankruptcy cases by Rule 9016, Federal Rules of Bankruptcy Procedure)

(c) Place of compliance.

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

- (A) production of documents, or electronically stored information, or things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises, at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply in producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) *Contempt.* The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013)

EXHIBIT A
INSTRUCTIONS

1. Production shall be made as the records are kept in the usual course of business, or shall be organized and labeled to correspond with the categories of this request.

2. If any documents are not available for production because they have been misplaced, discarded, or destroyed, identify which documents cannot be produced for these reasons, and state fully in writing the reasons that the documents are unavailable.

3. If any document cannot be produced in full, it shall be produced to the maximum extent possible and the City shall specify in writing the reasons for its inability to produce the remainder.

4. If any documents are available but are not produced because of an objection, including an objection based on privilege, identify such documents with particularity as to date, subject matter and the nature of the objection or privilege claim.

5. If documents called for are not available to you because they are in the custody or in control of a third person, identify such documents and the third person in whose possession or control said documents are to be found.

6. Produce original documents whenever such documents are available to you.

7. Produce all documents available by virtue of being in possession of your attorneys or other agents.

8. In accordance with Fed. R. Bankr. P. 7026, where a claim of privilege is asserted in objecting to any Document Request or part thereof, and production is not provided on the basis of such as the responding party shall, in the objection, identify (a) the nature of the privilege that is being claimed; (b) the type of document; (c) the general subject matter of the document; (d) the date of the document; and (e) such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

9. The present tense includes the past and future tenses. The singular includes the plural, and the plural includes the singular. "All" means "any and all." "Any" means "any and all." "Including" means "including but not limited to." "And" and "or" encompasses both "and" and "or." Words in the masculine, feminine or neuter shall include each of the other genders.

10. Unless otherwise stated, the time period for these requests is January 2004 to the present.

DEFINITIONS

As used in these document requests, the following terms are to be interpreted in accordance with these definitions:

1. The term “City” shall mean the City of Detroit, Michigan, as well as any of its past or present divisions, such as, but without limitation, departments, officials, trustees, agents, affiliates, employees, attorneys, advisors, professionals, representatives, advisors, representatives, and all other persons acting or purporting to act on their behalf, including Kevyn D. Orr acting as Emergency Manager and any successors.

2. The term “State” shall mean the State of Michigan, as well as any of its past or present divisions, such as, but without limitation, departments, officials, trustees, agents, affiliates, employees, attorneys, advisors, professionals, representatives, advisors, representatives, and all other persons acting or purporting to act on their behalf.

3. “Concerning” means relating to, referring to, describing, evidencing, reflecting, embodying, or constituting.

4. The term “DIA Corp.” or “Detroit Institute of Arts” shall mean The Detroit Institute of Arts, a nonprofit corporation organized under the laws of the State of Michigan and any and all of its predecessors.

5. The term “Documents” and “Document” have the same full meaning as in Rule 34 of the Federal Rules of Civil Procedure and Rule 7034 of the Federal Rules of Bankruptcy Procedure and includes the original, any draft (whether disseminated or not) and any copy, regardless of origin or location, of any correspondence, letter, memorandum, electronic mail (e-mail), statement, summary, outline, contract, agreement, book, pamphlet, periodical, telegram, telecopy, telefax, wire, cable, record, study, report, schedule, diary, desk calendar, organizer, appointment book, photograph, reproduction, map, survey, drawing, chart, model, index, tape, data sheet or data processing card, computerized information, data base or disk (including without limitation hard, soft, floppy, or compact), invoice, purchase order, ledger, journal, check (front and back), check stub, note, bond, assignment, transfer, account statement, tax report, tax schedule, financial statement, workpaper, business form, timesheet, log, inventory, print-out, computer tape and notes of meetings, conferences, conversations or telephone conversations and any and all other written, printed, telecopied, telefaxed, transcribed, punched, taped, stored, filmed and graphic matter, however produced

or reproduced, and specifically includes any preliminary note, outline, or draft of any of the foregoing in your custody, possession, or control.

6. “You” or “Your” mean the parties to whom this request is directed, and shall include anyone acting on behalf of those parties, over whom the parties have control, or which is, or may be subrogated to the parties’ interests, including, without limitation, any officer, agent, servant, employee, attorney, insurance company, investigator, independent adjusting company, or other person or entity.

7. The term “Plan” means the City’s filed Plan of Adjustment [Doc. No. 2708].

8. The term “Foundations” refers to any entity that is a contributing party to the DIA Settlement.

Document Requests

1. All documents and communications relating to Attorney General’s Opinion No. 7272.

2. All documents and communications regarding the Plan GRS and Plan PFRS Settlements, as those terms are defined in the Plan, including, but not limited to, documents and communications relating to (a) the funds that the states

anticipates using or appropriating for the Plan GRS and Plan PFRS Settlements; and (b) the negotiation of the Plan GRS and Plan PFRS Settlements.

3. All documents created between January 1, 2005 and the present relating to the City's revenue-sharing arrangements with the State of Michigan.

4. All communications between the City and the State of Michigan regarding State-funding, -taxation, or -revenue-sharing for the time period January 1, 2005 to the present.

5. All documents relating to funding received by the City from the State of Michigan for any purpose from the time period January 1, 2005 to the present.

6. All documents and communications relating to any federal, state, or private money that the City of Detroit either (a) has received since January 1, 2010 or (b) expects to receive.

Exhibit 6-B

Attorney General Responses and Objections with Attachments

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



BILL SCHUETTE
ATTORNEY GENERAL

P.O. Box 30754
LANSING, MICHIGAN 48909

April 21, 2014

Via First-Class Mail

McDonald Hopkins PLC
39533 Woodward Avenue, Suite 318
Bloomfield Hills, MI 48304

Re: *In re: City of Detroit, Michigan*
Docket No. 13-53846

Dear Sirs:

Enclosed herewith and served upon you please find the *Attorney General's Response and Objections to Subpoena to Produce or Permit Inspection, with Proof of Service* thereof.

If you have any questions or concerns with regard to the enclosures, please do not hesitate to contact my office.

Very truly yours

A handwritten signature in black ink that reads "M. R. Bell".

Michael R. Bell
Assistant Attorney General
Revenue & Collection Division
517.373.3203

MRB:tjm
Enclosures

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

CITY OF DETROIT MICHIGAN,

Debtor.

Chapter 9

Case No. 13-53846

Hon. Steven W. Rhodes

PROOF OF SERVICE

I hereby certify that I have mailed by United States Postal Service the *Attorney General's Response and Objections to Subpoena to Produce or Permit Inspection* to the following:

McDonald Hopkins PLC
39533 Woodward Avenue, Suite 318
Bloomfield Hills, MI 48304

/s Michael R. Bell (P47890)
Assistant Attorney General

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: Chapter 9
Case No. 13-53846
CITY OF DETROIT, MICHIGAN, Hon. Steven W. Rhodes
Debtor.

**ATTORNEY GENERAL'S RESPONSE AND OBJECTIONS
TO SUBPOENA TO PRODUCE OR PERMIT INSPECTION**

Attorney General Bill Schuette hereby responds and objects, in part, to Syncora's March 28, 2014 subpoena (Dkt. #3315).

RESPONSE

1. On April 7, 2014, Syncora served the Attorney General with a subpoena dated March 28, 2014. Exhibit A of the subpoena included six document requests. Both the Attorney General and the State of Michigan have separately appeared in this Chapter 9 case through their respective counsel, and an ethical wall has been erected between these parties. Because of this wall, this pleading responds only to document request No. 1, requesting

“[a]ll documents and communications relating to Attorney General’s Opinion No. 7272.” It is the Attorney General’s understanding that counsel for the State will respond to document request Nos. 2 – 6.

2. Enclosed are three responsive documents, which the Attorney

General now produces:

- a. Attorney General Opinion No. 7272;
- b. Request for Attorney General Opinion from Senate Majority Leader Randy Richardville; and
- c. Common Interest Agreement between Attorney General and the Detroit Institute of Arts.

3. Any other responsive documents are privileged.

OBJECTIONS

4. Under Fed. R. Civ. P. 45(d)(2)(B), the Attorney General objects to document request No. 1 as it requests documents and communications that are protected by the attorney-client, work-product, deliberative process, common-interest, and other privileges.

5. The Attorney General objects to producing the following categories of documents, which are privileged materials subject to the attorney-client, work-product, and deliberative-process privileges:

a. Ten internal communications between assistant Attorneys General regarding Attorney General Opinion No. 7272.

b. Eighteen drafts of Attorney General Opinion No. 7272.

6. The Attorney General also objects to producing eleven communications (some of which include attached documents) between the Attorney General and counsel for the Detroit Institute of Arts, which are protected by a Common Interest Agreement between the Attorney General and the Detroit Institute of Arts and are privileged under to the following privileges: attorney-client, work-product, common-interest, and deliberative-process.

a. The Common Interest Agreement between the Attorney General and the Detroit Institute of Arts covers all materials exchanged “in connection with, relating to, or arising from potential litigation involving protecting the art collection of the Detroit Institute of Arts.” (Agreement preamble, p. 1.)

b. Paragraph C defines the term “Covered Communications and Information” expansively “to include, but not be limited to, oral and written communications between counsel, clients, witnesses, and other persons employed or retained by the Parties and their counsel, memoranda of law, factual

summaries, documents, and any other information in any form” (Agreement, p. 2.)

- c. Paragraph F of the Agreement requires the parties to take all necessary steps to protect the covered materials, including the appropriate invocation of any applicable privilege available under governing law. (Agreement, p. 3.)
- d. Paragraph K applies to materials exchanged “prior to the execution of this Agreement and is intended as the written embodiment of any prior understanding and agreement reached by and among the Parties.” (Agreement, p. 3.)
- e. Paragraph U acknowledges that the Agreement is “to be broadly construed so as to fully protect and preserve, to the fullest extent permitted by law, the confidentiality and secrecy of Covered Communications and Information.” (Agreement, p. 5.)

Respectfully submitted,

Bill Schuette
Attorney General

/s B. Eric Restuccia (P49550)
Deputy Solicitor General
Counsel of Record

Michael Bell (P47890)
William R. Bloomfield (P68515)
Assistant Attorneys General

The following opinion is presented on-line for informational use only and does not replace the official version.

STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

DETROIT INSTITUTE OF ARTS: Conveyance or transfer of Detroit
Institute of Arts collection.

CITY OF DETROIT:
CHARITABLE TRUSTS:

NONPROFIT CORPORATIONS ACT:

The art collection of the Detroit Institute of Arts is held by the City of Detroit in charitable trust for the people of Michigan, and no piece in the collection may thus be sold, conveyed, or transferred to satisfy City debts or obligations.

Opinion No. 7272

June 13, 2013

Honorable Randy Richardville
State Senator
The Capitol
Lansing, MI 48909

You have asked whether the art collected and displayed at the Detroit Institute of Arts may be sold, transferred, or otherwise disposed for the purpose of satisfying debts or obligations of the City of Detroit (City) unrelated to the operation or purpose of the Detroit Institute of Arts.

The Detroit Institute of Arts (museum) is an encyclopedic museum with an expansive collection of art. “The [museum’s] collection is among the top six in the United States, comprising a multicultural and multinational survey of human creativity from prehistory through the 21st century.”^{[1][1]} The museum is located in the City’s Cultural Center Historic District, which is listed in the National Register of Historic Places.^{[2][2]} The museum is operated by a nonprofit corporation, the Detroit Institute of Arts Founders Society (Founders Society).

The City itself is presently under the administration of an emergency manager as provided for in the Local Financial Stability and Choice Act, 2012 PA 436, MCL 141.1541 *et seq.* That act allows the emergency manager to sell, convey, or otherwise

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transfer assets of the City, if such is provided for in the manager's financial and operating plan,^{[3][3]} or otherwise with the prior written approval of the Governor. MCL 141.1552(r).^{[4][4]} As your request notes, some have suggested that the museum's art collection, to which the City has legal title, could be sold under this act in order to satisfy debts or obligations owed by the City, but unrelated to the art collection or the museum.^{[5][5]}

Before addressing your question, it is helpful to provide an overview of the museum's creation and present operations.

I. Historical Overview of the Detroit Institute of Arts.

The museum was incorporated by its founding members as a nonprofit charitable corporation 128 years ago pursuant to legislation enacted in 1885. In that year, the Michigan Legislature enacted 1885 PA 3, an "[a]ct for the formation of corporations for the cultivation of art." The act provided that a group of individuals could "become a body corporate" for "the purpose of founding a public art institute" "in the manner and for the purposes . . . set forth" in the act. Section 1, CL 1915, § 10759. The act stated that the corporation must have articles of incorporation setting forth its purpose, Section 2, CL 1915, § 10760, and further provided that:

Such corporations shall have power . . . to receive, acquire, collect, and own paintings, sculpture, engravings, drawings, pictures, coins, and other works of art, and to institute, maintain, or assist schools for the teaching of art.

The public exhibition of its collection of works of art shall be the duty of every such corporation, and, as soon as it shall be prepared to do so, it shall, under reasonable regulations, and without any improper discriminations, open its buildings and art collection to the general public.
[1885 PA 3, Sections 3 and 4, CL 1915, §§ 10761, 10762; emphasis added.]

The property of the corporation would be tax exempt, Section 18, CL 1915, § 10776, and the corporation would be managed by a board of trustees who served without compensation. Sections 6 through 11, CL 1915, §§ 10764 - 10769. The act required that "all gifts, devises, or requests" be "faithfully used for the purposes" of the corporation, and "no dividend in money or property" could be made among the corporation's members. Section 15, CL 1915, § 10773. The corporation was prohibited from changing

its “character and purposes,” and from selling “its general art collection.” Section 16, CL 1915, § 10774. And the corporation could only wind up its affairs if provided for by law. *Id.*

The museum, then known as the Detroit Museum of Art, was incorporated on April 16, 1885, pursuant to these requirements, and set forth its purpose in its articles of incorporation as “for the founding of a public art institute in the City of Detroit, which may . . . receive and use such gifts, contributions, devises and bequests as may be made for art purposes: receive, acquire, collect and own paintings, sculpture, engravings, drawings, pictures, coins and other works of art, and may do all things authorized by said Act” 1885 Articles of Incorporation, Detroit Museum of Art.^[6][6] The museum immediately thereafter began acquiring pieces of art for its collection through purchases, gifts, donations, and bequests.

Not long after the museum’s incorporation, the Legislature passed various acts empowering the City to appropriate money to support the museum, and to issue bonds for the construction of buildings. This expenditure of public money on behalf of the museum, a private nonprofit corporation, raised concerns and a lawsuit was filed. See *Detroit Museum of Art v Engel*, 187 Mich 432, 434-435; 153 NW 700 (1915). During this time period, the museum had conveyed its buildings and real estate to the City. (No art was conveyed to the City given the express prohibition in the incorporating legislation). However, the museum retained control of its collection and operation. *Detroit Museum of Art*, 187 Mich at 435.

The Michigan Supreme Court ultimately concluded that these appropriations violated the 1908 Constitution’s restrictions on a city’s lending of credit to an entity other than a public or “municipal agency.” *Id.* at 439-443. The Court agreed that the museum served a “public purpose,” but did not find that fact or the fact that the museum had conveyed its buildings and real property to the City dispositive since it did “not change the museum’s character as a private corporation.” *Id.* at 440. Presumably, after this decision, the museum no longer received appropriations from the City, and the museum apparently began to struggle financially. In response, in 1919 the Legislature amended 1885 PA 3, as amended by 1913 PA 245, to allow corporations formed under that act to convey their property. 1919 PA 67 provided that a “corporation organized under [1885 PA 3] situated in a city empowered to maintain a public art institute . . . may convey all or any of its property to said city. . . and said property so conveyed shall . . . be faithfully used for the purposes for which such corporation was organized” Section 20. 1885 PA 3, 1913 PA 245, and 1919 PA 67 were subsequently repealed by 1921 PA 84, as part of the consolidation of corporations law, but were subject to the savings provision in that act.

Pursuant to this statutory authorization and the City's 1918 Charter, which authorized the City to operate an art institute and to acquire art for the institute, Charter XIX, Sections 1, 7, the museum, in its corporate capacity as the Detroit Museum of Art, conveyed its buildings and art collection to the City in 1919. With the legal transfer of the properties and art collection to the City, the City was now free to support the museum; and it did so by funding both museum operations and by purchasing new art for the collection. The nonprofit corporation, however, did not wind up its affairs but rather continued to exist to assist the museum with gifts of art and with support of museum operations and their costs. That nonprofit corporation exists today as the Founders Society, as noted above.

Over the ensuing years, the museum's structure and funding sources changed as needed based on changing circumstances. By 1955, the City began to encounter financial problems, and its acquisitions for the museum collection largely ceased. In 1973, the museum temporarily closed due to lack of funding. Shortly thereafter, in 1977, the State began granting money to the City so that the museum could continue operating. In 1983, the City claimed greater control over the museum's operations: museum employees became employees of the City. These events led to the issuance of an opinion by Attorney General Frank Kelley, which confirmed the validity of State appropriations or grants to the City for the benefit of the museum.

In confirming State support for the museum, Attorney General Kelley recognized the museum's state or "public purpose" and status as a unique, cultural treasure of the people of Michigan:

Unquestionably, and uniquely in Michigan, the Detroit Institute of Arts, as a widely acclaimed cultural facility, is utilized by the citizens of this state without regard to residency in the city. The facility is an outstanding tourist attraction utilized by tourists and their families. Its vast displays and cultural facilities are readily and regularly available to Michigan students. Both the Governor in his Executive Budget, and the Legislature in the enactment of appropriations for the support of the Detroit Institute of Arts, have recognized its place in the cultural life of this state. [OAG, 1983-1984, No 6225, pp 303, 308 (May 7, 1984).]

Following the Attorney General's opinion, state grants for the museum continued; though by the 1990s, these grants began decreasing. From 1977 through 2011, state funding for the museum totaled roughly \$300 million.

In 1997, the structure and operation of the museum changed again. Under a 1997 Operating Agreement, the City maintained its legal title to the art collection, but transferred operations – and their entire cost – back to the Founders Society. From 1997 to the present, the museum has operated under this Agreement. And despite the Founders Society’s best efforts to support the museum with charitable dollars, it continued to face financial difficulties. In 2010, the Legislature enacted the Art Institute Authorities Act, 2010 PA 296, MCL 123.1201 *et seq.* This act authorized the establishment of an art institute authority for the levying of property taxes to support “art institute[s]” like the museum. MCL 123.1205.[7][7] In November 2012, voters of Oakland, Macomb, and Wayne Counties passed the millage to help support the museum. This millage supplements the museum’s charitable endowment and regular charitable contributions.

II. Present Operations.

To address your question, a closer examination of the 1997 Operating Agreement is also required. Other helpful documents include the Museum’s Collections Management Policy, which is referenced in the Operating Agreement; the ethical policies governing both American and international museums; and the accounting practices that apply to museum art collections.

A. 1997 Operating Agreement.

The 1997 Operating Agreement, which expires in 2018, currently governs the relationship between the Founders Society and the City. The Operating Agreement is referenced explicitly in the City’s charter: “The Arts Department shall maintain and operate the Detroit Institute of Arts directly or pursuant to an operating agreement.” 2012 Charter for the City of Detroit, § 7-301.

Several sections of the Operating Agreement are relevant to the ownership and disposition of the art collection.

Section E. of the Operating Agreement specifies that the City retains ownership of the art collection, the museum properties, and any newly acquired art. And Section F.12. requires the Founders Society to use best efforts to solicit gifts and donations of works of art for the benefit of the museum.

Section F.2.(a) of the Operating Agreement cedes responsibility for managing the City's art collection to the Founders Society in accord with the museum's Collections Management Policy, which is discussed below. In addition, Section F.2.(b) cedes the right to acquire and dispose of the museum's works of art to the Founders Society; providing that any funds it receives from any sale must be used solely to purchase other works of art for the art collection. In consideration for exclusive right to manage the museum and control the artwork, subject to the terms of the agreement, the Founders Society assumed full responsibility for all operating expenses of the museum, as well as other obligations that had previously been the responsibility of the City, including "management of the art collections; presentation of exhibitions and other events; maintenance of the museum building, the Frederick lot . . . and the employee parking lot; collection and expenditure of income; fundraising; marketing; acquisition/disposition of works of art; and all other financial operations" Section D.3. Although the City retains legal title to the museum and its artwork, the sale of the artwork by the City is not permitted under the Operating Agreement and would seriously undermine the ability of the Founders Society to fulfill its contractual responsibilities.

B. Collections Management Policy.

The museum's Collections Management Policy, to which Section F.2.(a) of the Operating Agreement requires the Founders Society to adhere, includes language restricting the disposition of the art collection.

Section V.A. states: "In considering objects or groups of objects, the Museum must be ever aware of its role as trustee of the collection for the benefit of the public." Section V.E. similarly states: "The manner of disposition should be in the best interest of the Museum, the public it serves, the public trust it represents, and the scholarly and cultural communities it serves." Section V.F. limits the use of the disposition proceeds: "Net proceeds derived from the sale of a deaccessioned object (i.e., the proceeds of the disposition less all related expenses) shall not be used as operating funds. Such net proceeds shall be placed in the selling curatorial department's Art Acquisition Fund"

C. Professional Codes of Ethics.

The museum's Collections Management Policy, which views museum assets as being held in "public trust"^[8][8] and which strictly limits deacquisition of art, is in accord with the professional codes of ethics adopted by the American Alliance of Museums and the International Council of Museums.^[9][9] Relevant sections from these ethical codes follow.

The American Alliance of Museum's Code of Ethics (adopted 1991, amended 2000) states:

Taken as a whole, museum collections and exhibition materials represent the world's natural and cultural common wealth. As stewards of that wealth, museums are compelled to advance an understanding of all natural forms and of the human experience. It is incumbent on museums to be resources for humankind and in all their activities to foster an informed appreciation of the rich and diverse world we have inherited. It is also incumbent upon them to preserve that inheritance for posterity.

Museums in the United States are grounded in the tradition of public service. They are organized as public trusts, holding their collections and information as a benefit for those they were established to serve. . . .

[D]isposal of collections through sale, trade or research activities is solely for the advancement of the museum's mission. Proceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collections.[10][10]

The International Council of Museums' Code of Ethics (adopted 1986, amended 2001, and revised 2004) gives similar principles:

Principle 2: Museums that maintain collections hold them in trust for the benefit of society and its development.

Principle 2.16: Museum collections are held in public trust and may not be treated as a realizable asset. Money or compensation received from the deaccessioning and disposal of objects and specimens from a museum collection should be used solely for the benefit of the collection and usually for acquisitions to that same collection.[11][11]

D. Accounting Practices.

In accord with the view that museum art collections are held in trust for the public and are not financial assets of the museum, neither the City nor the Founders Society
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have capitalized the art collection. In other words, the art collection is not considered on either the City's or the Founders Society's books as an asset with a monetary value because, though these assets have substantial monetary value, they are not assets that can simply be sold; rather, they are subject to the strict deaccessioning policies discussed above.

The decision not to capitalize the art collection accords with the American Association for State and Local History's policy against capitalization of museum collections. It also accords with the accounting principles of both the Financial Accounting Standards Board and the Governmental Accounting Standards Board, which each allow the non-capitalization of museum collections. See FASB, No. 116, ¶¶ 11-13; GASB No. 34. By contrast, the City has capitalized other City works of art that are outside the museum's collection; the City's 2012 Comprehensive Annual Financial Report lists these works of art as capital assets valued at \$29.8 million.^[12][12] It is understood that such works of art include the City's "Spirit of Detroit" statue, the Joe Louis "fist," and other works of art in City buildings.

III. The art collection is held in charitable trust and may not be sold to satisfy City debts.

Against this backdrop, you ask whether the art collected and displayed at the museum may be sold or transferred for purposes of satisfying debts or obligations of the City unrelated to the collection or the museum. The answer to this question is no. As explained below, this question is governed by the law of charitable trusts.

A. Michigan law favors the creation of charitable trusts.

Michigan charitable trust law is rooted in the common law. Much of that law is now codified in various statutes, such as the Supervision of Trustees for Charitable Purposes Act, 1961 PA 101, MCL 14.251 *et seq.*, the Charitable Gifts Act, 1915 PA 280, MCL 554.351 *et seq.*, the Nonprofit Corporation Act, 1982 PA 162, MCL 450.2101 *et seq.*, and the Estates and Protected Individuals Code (EPIC), 1998 PA 386, MCL 700.1101 *et seq.* Though the museum was incorporated before many of these statutes were enacted, the basic principles of charitable trust law are uniform and longstanding.

A Michigan court observed decades ago that "[c]haritable gifts and trusts are favorites of the law and of the courts, and the courts will declare valid, and give effect to, such gifts and trusts where it is possible to do so" *In re Rood's Estate*, 41 Mich 13-53846-swr Doc 4269-8 Filed 04/25/14 Entered 04/25/14 21:57:56 Page 15 of 29

App 405, 422; 200 NW2d 728 (1972), quoting 14 CJS, Charities, § 6, p 427. The Supervision of Trustees for Charitable Purposes Act echoes this sentiment, providing that “[i]t is hereby declared to be the policy of the state that the people of the state are interested in the administration, operation and disposition of the assets of all charitable trusts in the state.” MCL 14.251. That act further provides that the “act, in all of its provisions, in the interests of society and in conformity with public policy is intended to protect the rights and interest of the people of the state and the uncertain and indefinite beneficiaries of all charitable trusts” MCL 14.265.[13][13]

The EPIC defines the word “trust” in the following way:

“Trust” includes, but is not limited to, an express trust, private or *charitable*, with additions to the trust, wherever and however created. Trust includes, but is not limited to, a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. [MCL 700.1107(n); emphasis added.]

Case law confirms this, concluding that the term “trust” is not limited to express trusts and extends to corporations created to administer trusts. See *In re Americana Foundation*, 145 Mich App 735; 378 NW2d 586 (1985).

The EPIC defines a “charitable trust” as “a trust . . . created for a charitable purpose described in section 7405(1).” MCL 700.7103(c). Section 7405(1), MCL 700.7405(1), in turn, provides that a charitable trust “may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes, . . . or other purposes the achievement of which is beneficial to the community.” See also Restatement (Third) of Trusts §§ 27-28 (2003); 15 Am Jur 2d, Charities, §§ 5 and 32. Section 2(b), MCL 14.252 (b), of the Supervision of Trustees for Charitable Purposes Act similarly defines “charitable trust” as “the relationship where a trustee holds property for a charitable purpose.” While neither of these Acts expressly mention art museums, the public exhibition of art is generally considered a charitable purpose. See 15 Am Jur 2d, Charities, § 49. See also *Hardman v Feinstein*, 240 Cal Rptr 483, 486 (Cal Ct App 1987) (“Art museums advance education and therefore serve a charitable purpose.”). In fact, charitable trusts and nonprofit corporations “are the organizational structures generally available to private museums.” Sara Tam, Note, *In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, 39 Fordham Urb L J 849, 855-856 (2012).

These more recent statutory iterations of the term “charitable trust” are consistent with the Michigan Supreme Court’s past descriptions. In *Scarney v Clarke*, 282 Mich 56, 63-64; 275 NW 765 (1937), the Court observed:

In 2 Restatement of the Law of Trusts, p 1096, § 349, it is said:

“A charitable trust may be created by (a) a declaration by the owner of property that he holds it upon a charitable trust; or (b) a transfer inter vivos by the owner of property to another person to hold it upon a charitable trust.”

* * *

In charitable trusts, the public is the beneficiary. A distinguishing characteristic of such a trust is that the prospective beneficiary is undetermined and unknown, and while such a trust need not be for the benefit of the entire public, yet it must be public in nature and for unascertained beneficiaries. [See also *Scudder v Security Trust Co*, 238 Mich 318; 213 NW 131 (1927) (discussing requirements for creation of charitable trust).]

Historically, to create a charitable trust, no specific words needed to be used, rather “[i]t [was] sufficient . . . to show[] an intention that the property should be held subject to a legal obligation to devote it to purposes which are charitable.” *Knights of Equity Memorial Scholarships Comm v University of Detroit*, 359 Mich 235, 242-243; 102 NW2d 463 (1960) (affirming that agreement between voluntary association and university created a charitable trust), quoting 4 Scott, Trusts (2d ed.) § 351, at 2574. See also *In re Rood’s Estate*, 41 Mich App at 413 (“A determination that a charitable trust is created needs only a finding that ‘some charitable purpose’ exists.”) and *In re Americana Foundation*, 145 Mich App at 738-739. The EPIC similarly does not require any particular words be used to create a trust, MCL 700.7401(1) and MCL 700.7402, and a trust may even be created through oral statements, MCL 700.7407.

In general, any legal entity, including a municipality, may serve as trustee of a charitable trust. Restatement (Third) of Trusts, § 33; 15 Am Jur 2d, Charities § 83. The Supervision of Trustees for Charitable Purposes Act defines “[t]rustee” to “mean [] any individual, group of individuals, association, foundation, trustee corporation, or other legal entity holding property for any charitable purpose.” MCL 14.252(a) (emphasis added). See also *Hardman*, 240 Cal Rptr at 485-486 (Fine Arts Museums

of San Francisco is charitable trust administered by City of San Francisco as trustee). A city may thus act as trustee of a charitable trust established for the purpose of maintaining and operating an art museum.

A “trustee shall administer the trust in good faith, [] in accordance with its terms and purposes, for the benefit of the trust beneficiaries.” MCL 700.7801. See also MCL 700.7802. With a trust, whether charitable or otherwise, the trustee holds the legal interest – or legal title – in the assets, but the beneficiary holds the equitable interest. *Apollinari v Johnson*, 104 Mich App 673, 675, 305 NW2d 565 (1981) (“The separation of legal and equitable title is one of the distinctive features of the trust relationship. Legal title vests in the trustee to be held for the benefit of the beneficiary.”). See also *In re Americana Foundation*, 145 Mich App at 740 (Trustee foundation “held the legal estate whereas the public received the benefit and enjoyment.”); Restatement (Third) of Trusts, § 2, comment d, see also *id.*, § 42. Thus, while a trustee has legal title to the trust assets, a trustee may not dispose of trust assets as the trustee wishes; instead, a trustee is limited to using the assets for the designated purposes of the trust. MCL 700.7801. See also *In re Friends for Long Island’s Heritage*, 911 NYS2d 412 (NY App Div 2010) (nonprofit corporation could not sell assets donated for purpose of public exhibition and display to pay off corporate debts upon dissolution.).

B. The art collection is held in charitable trust for the people of Michigan and cannot be sold for purposes other than the acquisition of art.

With its incorporation in 1885, the museum was created as a nonprofit corporation with a specific charitable purpose: “the public exhibition of its collection of works of art.” 1885 PA 3, Section 4, CL 1915, § 10762. The museum’s 1885 Articles of Incorporation reflect this purpose. The museum was authorized to acquire art for that specific purpose, 1885 PA 3, Section 3, CL 1915, § 10761, and was required to “faithfully use[]” “[a]ll gifts, devises, or bequests made to” the museum for that purpose. *Id.*, Section 15, CL 1915, § 10773. The museum could not change its “character and purposes” or sell “its general art collection” unless authorized by the Legislature. *Id.*, Section 16, CL 1915, § 10774.

Thus, as a legal entity holding assets for a charitable purpose, the museum was founded as a charitable trust. The museum’s charitable purpose was the exhibition of art for the public; the art collection thereafter acquired by the museum became the res or assets of the trust. And as a charitable trustee, the Founders Society was limited to using its assets – the art collection – for its dedicated charitable purpose.

Moreover, the Legislature's intent was plain: once an art institution like the museum incorporated and began collecting art and dutifully exhibiting its collection for the public, it was to do so in perpetuity if possible. Hence, the Legislature created restrictions on a change to the character or purpose of the art institution, and the disposition of its general collection; and it required that any winding up be provided for by law so as to "best promote and perpetuate" "the purposes" of the institution. 1885 PA 3, Section 10774, CL 1915, § 10774.

In 1919, in the wake of the Michigan Supreme Court's ruling in *Detroit Museum of Art v Engel*, the Legislature determined that the best method to "promote and perpetuate" "the purposes" of the museum was to authorize the conveyance of all property to a "city empowered to maintain a public art institute." 1919 PA 67, Section 20. This conveyance would allow the City directly to support the museum consistent with the Supreme Court's ruling. The law also required the City to "faithfully[] use []" the art conveyed "for the purposes for which" the institution was organized, which was to operate a "public art institute" and exhibit art to the "general public." No provision was included for a city to change or modify the purpose, sell the art conveyed, or wind up or dissolve its public art institute.

Pursuant to these express statutory authorizations, the Founders Society transferred its art collection to the City in 1919. When the City accepted the transfer, it was bound by the language of 1919 PA 67 to perpetuate and "maintain a public art institute" that would exhibit art to the general public, and to "faithfully[] use []" the art conveyed for that purpose. Under charitable trust law, this transfer was a transfer of the Founders Society's legal interest or legal title in its charitable assets to a new charitable trustee – the City. Under those circumstances, the equitable interest in the art collection remained with the people of Michigan, the ultimate beneficiaries of the museum's or Founders Society's charitable purpose. *Appollinari*, 104 Mich App at 675. See also *Hardman*, 240 Cal Rptr at 486 ("[A]lthough the Fine Arts Museums [] is administered by City officials [as trustee], the trust assets do not constitute public assets but rather the res of a charitable trust.")^[14]^[14]

In accepting the trust, consistent with the statute, the City agreed at its own cost and expense to maintain and operate the trust, which by City Charter included the mandate that the City "[s]hall acquire, collect, own and exhibit, in the name of the city, works of art, books and other objects such as are usually incorporated in Museums of Art." 1918 City Charter, Chapter XIX, Section 7(c)^[15]^[15] Over the years, the museum's art collection grew through charitable donations of art and direct purchases by the City. As new pieces were added to the collection, the entire collection continued to be dedicated towards the museum's initial charitable purpose: the public display of its art collection.

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See MCL 700.1107(n) (term “trust” “includes . . . an express trust, private or charitable, *with additions to the trust, wherever and however created.*”) (Emphasis added). Thus, the entire collection – to this day – continues to be held in charitable trust for this same charitable purpose, including the pieces acquired by the City with City money that were purchased and added to the museum collection.^[16][16]

This conclusion is consistent with Michigan trust law, and restrictions found in the Nonprofit Corporation Act, the statute under which charitable, nonprofit corporations incorporate today. See MCL 450.2301(5) (“This act shall not be deemed to permit assets held by a corporation for charitable purposes to be used, conveyed or distributed for noncharitable purposes.”) Moreover, the museum’s current operations and policies under the 1997 Operating Agreement, the museum’s Collections Management policies, the ethical policies of the various museum associations, and the Founders Society’s and the City’s accounting practices, confirm this result. Rather, these documents, discussed above, expressly state that the entire collection is held in trust for the public and strictly limit the use of the art to its public exhibition, and any disposition of art or proceeds from the disposition of art can only be used to acquire additional art for the museum’s collection. Based on these facts and charitable trust law, the City, as charitable trustee, cannot sell art from the trust for the purpose of satisfying debts owed to its creditors.

Conclusion

It is my opinion, therefore, that the art collection of the Detroit Institute of Arts is held by the City of Detroit in charitable trust for the people of Michigan, and no piece in the collection may thus be sold, conveyed, or transferred to satisfy City debts or obligations. In issuing this opinion, I recognize the serious financial hardships that face the City, the difficulties that the people who live and work in the City have endured for decades, and the many challenges facing the citizens of the City of Detroit and the State in the future. Yet, in the 128 years since the creation of the Detroit Institute of Arts, at no time have the people demanded that their most precious cultural resources be sold in order to satisfy financial obligations. To the contrary, the citizens of this State recognize that abandoning or selling the public’s artwork would damage not only the City’s but the State’s cultural commonwealth. In Michigan, we not only appreciate our cultural treasures, we guard them zealously in charitable trust for all state residents, present and future.

[1][1] See www.dia.org/about/history.aspx.

[2][2] See <http://nrhp.focus.nps.gov/natregsearchresult.do?fullresult=true&recordid=55>.

[3][3] MCL 141.1551 requires an emergency manager to develop a written financial and operating plan addressing various issues, and to submit the plan to the State Treasurer.

[4][4] An emergency manager must first submit any proposed sale of assets to the local government unit's governing body for approval. MCL 141.1559(1). If the governing body disapproves the proposed sale, the governing body must present an alternative plan that yields a similar financial result. The local emergency financial assistance loan board then chooses between the options. MCL 141.1559(2).

[5][5] Because this opinion concludes that the art collection is held in charitable trust, it is unnecessary to address whether the collection is the type of asset that could be sold for purposes of MCL 141.1552(r). But arguably, the Legislature, in enacting the Local Financial Stability and Choice Act, did not intend that unique cultural assets of a local unit of government be sold since such a sale would not be in the best interests of the health, safety, and welfare of the citizens of this State. MCL 141.1543.

[6][6] The museum's corporate documents are available at www.dleg.state.mi.us/bcs_corp/sr_corp.asp.

[7][7] The act defines "art institute" as "an encyclopedic art museum whose primary art collection and facility, at the date an authority is established, are owned by a municipality located in this state." MCL 123.1203(a).

[8][8] The term "public trust" as used by museums and their associations should not be equated with the "public trust doctrine" that Michigan and other courts have applied to navigable waterways. See, e.g., *Glass v Goeckel*, 473 Mich 667, 694; 703 NW2d 58 (2005) (finding that the shores of the Great Lakes below the ordinary high water mark were held in public trust.). See also *Netweg v Wallace*, 237 Mich 14, 17; 208 NW 51 (1926) and *State v Venice of America Land Co*, 160 Mich 680, 702; 125 NW 770 (1910). While there has been debate in other states for extending this doctrine to apply to cultural resources, like museums, see Sara Tam, Note, 39 Fordham Urb L J 849, 861-863 (2012), In *Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust*, research discloses no Michigan cases that have applied the public trust doctrine outside of the natural resources context.

[9][9] Museums and professional organizations began promulgating ethical codes regarding deaccessioning and museum practices, after the Metropolitan Museum of Art in New York planned to sell several significant pieces in 1972. Tam, In *Museums We Trust*, 39 Fordham Urb L J at 864-865.

[10][10] Available at www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics-for-museums.

[11][11] Available at <http://icom.museum/the-vision/code-of-ethics/>.

[12][12] See City of Detroit's 2012 Comprehensive Annual Financial Report, pp 29, 95, available at <http://www.detroitmi.gov/DepartmentsandAgencies/Finance/AccountsDivision.aspx>.

[13][13] The Supervision of Trustees for Charitable Purposes Act provides that "[t]he attorney general . . . shall represent the people of the state and the uncertain or indefinite beneficiaries in all charitable trusts in this state, and may enforce such trusts by proper proceedings in the courts of this state." MCL 14.254(a). See also MCL 554.352 and MCL 700.7405(3).

[14][14] While the entire art collection is held in charitable trust, the plain language of 1919 PA 67 further protects any piece of art acquired from 1885 through the 1919 transfer from sale for a non-museum related purpose because the City of Detroit can only "use[]" that art "for the purposes for which" the museum was organized, which was to operate a "public art institute" and display art to the "general public." 1919 PA 67, Section 20; 1885 PA 3, Sections 1, 3, and 4, CL 1915, §§ 10759, 10761, and 10762. This language precludes a sale of artwork obtained through this transfer for the purpose of satisfying City debts unrelated to the art collection or the museum. And other Michigan laws add protection to those works of art that were gifts from charitable donors. See, e.g., MCL 554.352 (gifts for charitable purposes create a charitable trust that "shall be liberally construed by the court so that the intentions of the creator thereof shall be carried out whenever possible.").

[15][15] Notably, while the 1918 City Charter empowered the Arts Commission, subject to the approval of the city council, to sell, convey, and lease any real property, *Id.*, Section 7(g), no express provision was made for the sale or disposal of the art work.

[16][16] A contrary conclusion that some of the art collection is held in charitable trust and other art is not – for instance, the art purchased by the City – is neither consistent with trust law nor reasonable. If this were the case, assets held in charitable trust would necessarily reside in the same collection as non-charitable assets, despite the fact that the *whole collection* exists for the singular charitable purpose of the public exhibition of art. See MCL 700.7811(2) (A trustee shall keep trust property separate from the trustee's own property.) Moreover, under that view, as substantial charitable contributions continued to be made over the years both directly to the collection and in support of the collection, the commingling of charitable assets with non-charitable assets could be viewed as a breach of charitable trust. See MCL 700.7901. That untenable result further supports the conclusion that the entire collection existed – and continues to exist – in charitable trust.

[1] See www.dia.org/about/history.aspx.

[2] See <http://nrhp.focus.nps.gov/natregsearchresult.do?fullresult=true&recordid=55>.

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[4] An emergency manager must first submit any proposed sale of assets to the local government unit's governing body for approval. MCL 141.1559(1). If the governing body disapproves the proposed sale, the governing body must present an alternative plan that yields a similar financial result. The local emergency financial assistance loan board then chooses between the options. MCL 141.1559(2).

[5] Because this opinion concludes that the art collection is held in charitable trust, it is unnecessary to address whether the collection is the type of asset that could be sold for purposes of MCL 141.1552(r). But arguably, the Legislature, in enacting the Local Financial Stability and Choice Act, did not intend that unique cultural assets of a local unit of government be sold since such a sale would not be in the best interests of the health, safety, and welfare of the citizens of this State. MCL 141.1543.

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[14] While the entire art collection is held in charitable trust, the plain language of 1919 PA 67 further protects any piece of art acquired from 1885 through the 1919 transfer from sale for a non-museum related purpose because the City of Detroit can only "use[]" that art "for the purposes for which" the museum was organized, which was to operate a "public art institute" and display art to the "general public." 1919 PA 67, Section 20; 1885 PA 3, Sections 1, 3, and 4, CL 1915, §§ 10759, 10761, and 10762. This language precludes a sale of artwork obtained through this transfer for the purpose of satisfying City debts unrelated to the art collection or the museum. And other Michigan laws add protection to those works of art that were gifts from charitable donors. See, e.g., MCL 554.352 (gifts for charitable purposes create a charitable trust that "shall be liberally construed by the court so that the intentions of the creator thereof shall be carried out whenever possible.").

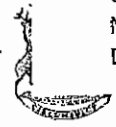
[15] Notably, while the 1918 City Charter empowered the Arts Commission, subject to the approval of the city council, to sell, convey, and lease any real property, *Id.*, Section 7(g), no express provision was made for the sale or disposal of the art work.

[16] A contrary conclusion that some of the art collection is held in charitable trust and other art is not – for instance, the art purchased by the City – is neither consistent with trust law nor reasonable. If this were the case, assets held in charitable trust would necessarily reside in the same collection as non-charitable assets, despite the fact that the *whole collection* exists for the singular charitable purpose of the public exhibition of art. See MCL 700.7811(2) (A trustee shall keep trust property separate from the trustee's own property.) Moreover, under that view, as substantial charitable contributions continued to be made over the years both directly to the collection and in support of the collection, the commingling of charitable assets with non-charitable assets could be viewed as a breach of charitable trust. See MCL 700.7901. That untenable result further supports the conclusion that the entire collection existed – and continues to exist – in charitable trust.

BILL SCHUETTE
Attorney General

<http://opinion/datafiles/2010s/op10351.htm>
State of Michigan, Department of Attorney General
Last Updated 06/17/2013 09:12:19

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RANDY RICHARDVILLE
SENATE MAJORITY LEADER
THE MICHIGAN SENATE

June 11, 2013

DEPT OF JUSTICE
ATTORNEY GENERAL

JUN 11 2013

Attorney General Bill Schuette
G. Mennen Williams State Office Building
P.O. Box 30212
Lansing, Michigan 48909

Signed to _____

Dear Attorney General Schuette:

As you may be aware from recent media reports, there has been much discussion regarding whether the Detroit Institute of Art's (DIA) collection is an asset of the City of Detroit that could be sold in order to satisfy City debts or other obligations. It is my understanding that the DIA's buildings and collection are owned by the City, but that the City contracts with the Detroit Institute of Arts, Inc., a non-profit organization, to operate the museum and manage the collection. Further, it is my understanding that various creditors or other individuals have suggested that pieces of the collection could be sold pursuant to the authority set forth in the Local Financial Stability and Choice Act, 2012 PA 436, MCL 141.1541 *et seq.*

Accordingly, I respectfully request a formal Attorney General opinion regarding whether the art collected and displayed at the DIA may be sold, transferred, or otherwise disposed for the purpose of satisfying debts or obligations of the City of Detroit unrelated to the operation or purpose of the DIA? Given the urgency of the matter, I also ask that this request be expedited.

Thank you in advance for your time and attention to this matter.

Sincerely,

Randy Richardville
Senate Majority Leader
The 17th District

COMMON INTEREST AGREEMENT
IN ANTICIPATION OF LITIGATION

This Common Interest Agreement (the "Agreement") is entered into by the Attorney General for the State of Michigan in his individual, official capacity as an interested party in the *In re City of Detroit*, bankruptcy proceeding, case number 13-53846, and by the Detroit Institute of Arts, f/k/a the Detroit Museum of Arts, Detroit Museum of Arts Founders' Society, and Founders Society Detroit Museum of Art (hereinafter, the "Society") (each individually a "Party" and collectively the "Parties"), in connection with, relating to, or arising from potential litigation involving protecting the art collection of the Detroit Institute of Arts (the "Matter").

WHEREAS, the Parties have a mutual interest in the Matter; and

WHEREAS, that mutuality of interest includes, but is not limited to, sharing points of view or defenses on some or all of the issues, facilitating fact-gathering and legal analysis, and preserving to the fullest extent permitted by law the protection against disclosure afforded under the work product doctrine, the attorney-client and deliberative process privileges, and other applicable rules of law; and

WHEREAS, the City of Detroit ("City") is a Michigan municipal corporation, previously governed by the Mayor of Detroit and the Detroit City Council and currently governed by Kevyn Orr, the Emergency Manager of the City of Detroit ("EM"), pursuant to the provisions of the Local Financial Stability and Choice Act, MCL 141.1541 et seq.;

WHEREAS, the Society manages the public art institute that is now commonly known as the Detroit Institute of Arts (the "Museum") pursuant to an operating agreement with the City;

WHEREAS, for the purpose of preventing any attempt to sell, encumber, or transfer and consult with each other and/or exchange certain information from time to time as part of the same; and

WHEREAS, in the course of their mutual interests in the Matter, and to further those mutual interests, the Parties intend that all their communications between them, in any form whatsoever, both before the execution of this agreement and thereafter, shall pursuant to this agreement be confidential and privileged information legally protected from disclosure by any means employed whatsoever; and

WHEREAS, execution of this Agreement is not intended to waive or diminish the effect of any privilege or protection; and

WHEREAS, this Agreement does not require any disclosure of information by any party to it; and

WHEREAS, the exchange of information contemplated by this Agreement is essential to the effective representation of the Parties by their respective counsel;

NOW, THEREFORE, in order to memorialize in writing the understanding and agreement under which the Parties have engaged in prior discussions and intend to engage in

future discussions, and to set forth the rights and obligations of the Parties under that understanding and agreement, the Parties hereby agree as follows:

A. Each of the undersigned represents and warrants that he or she is fully authorized to enter into the terms and conditions of this Agreement, and execute this Agreement on his or her own behalf and on behalf of the Party or Parties he or she represents and further represents that he or she has explained this Agreement to the Party or Parties he or she represents and has obtained the agreement of each such Party to abide by the terms and conditions of this Agreement.

B. The Parties may share documents, factual material, attorney-client communications, and any other information that the Parties may from time to time deem appropriate to share, subject to the terms set forth below.

C. "Covered Communications and Information" is defined to include, but not be limited to, oral and written communications between counsel, clients, witnesses, and other persons employed or retained by the Parties and their counsel, memoranda of law, factual summaries, documents, and any other information in any form, including information generated by or disclosed to any person covered by Paragraph J, below, that would be protected from disclosure to third parties by one or more of the Rules of Nondisclosure, as defined below, and which are designated by the disclosing counsel as "Privileged Common Interest Material." Covered Communications and Information under this Agreement shall not include information that is received from any person or entity not a signatory to this Agreement, or information that is now, or hereafter becomes, public knowledge without violation of this Agreement, or that is sought or obtained by the Parties to the Agreement in accordance with applicable discovery procedures, formal or informal, as may be agreed to by counsel for the Parties. Further, Covered Communications and Information shall not include any information that is subject to disclosure pursuant to the Freedom of Information Act, 5 United States Code section 552 *et seq.*, or the Michigan Freedom of Information Act, Michigan Compiled Laws 24.201 *et seq.*, subject to the obligations of Paragraph F, below.

D. "Rules of Nondisclosure" include but are not limited to the work product doctrine, the attorney-client and deliberative process privileges, and all other applicable rules of law and evidence regarding the confidentiality of information, including Covered Communications and Information.

E. Unless disclosure is required despite taking the steps contemplated in Paragraph F, or unless the Party that creates or originally conveys the Covered Communication and Information consents in writing, Covered Communications and Information that have been exchanged between or among any of the Parties shall be disclosed only to the Parties to this Agreement, their counsel, and any person covered by Paragraph J, below. Use of Covered Communications and Information by the recipients thereof shall be limited to common interest in the Matters and subject to the limitations of Paragraph J. Exchange of any Covered Communications and Information among or between the Parties, and persons covered by Paragraph J, shall not be deemed to be a waiver of any of the Rules of Nondisclosure.

F. Should any person who is not bound by this Agreement request or demand, whether by subpoena, discovery request, or otherwise, that any Party provide the requesting person with

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access to any communication or information that has been exchanged between or among any of the Parties and that may constitute a Covered Communication or Information under this Agreement, the Party receiving the request or demand shall immediately notify all the other Parties and shall inform the requesting person that the communication or information sought is subject to this Agreement and that a request should be made of the Party that originally created or conveyed the communication or information. The Party receiving the request or demand shall take all steps necessary to avoid any waiver of any Rule of Nondisclosure that may protect the confidentiality of the communications or information to which access is sought, including the appropriate invocation of any applicable privilege available under governing law, consistent with and subject to the requirements of applicable law.

G. The Parties shall mark documents subject to this Agreement as "Privileged Common Interest Material." However, the failure to so mark any such material does not waive any otherwise applicable protections allowed by law or by this Agreement. The Parties shall take all reasonable steps to safeguard and protect from disclosure all Covered Communications and Information.

H. The obligations provided in this Agreement shall be continuing obligations and shall survive the withdrawal of any Party hereto pursuant to Paragraphs L and M, below, the termination of this Agreement pursuant to Paragraph N and O, below, and the termination of the Matter, whether terminated by settlement or by final judgment after any rights of appeal have been exercised or waived.

I. Notwithstanding any other provisions of this Agreement, unless the Party that creates or originally conveys the Covered Communication or Information expressly consents, no Covered Communication or Information shall be offered in evidence or disclosed for any purpose in any trial, hearing, deposition, or other legal proceeding, unless the disclosure is required by law.

J. The obligations undertaken by the Parties in this Agreement shall be binding upon the Parties, their legal counsel, employees, agents, experts, consultants, successors, and assigns, and any other persons employed or retained by the Parties to perform any work or provide any service in connection with the Matter.

K. This Agreement shall apply to all Covered Communications and Information exchanged in connection with the Matter between or among the Parties prior to the execution of this Agreement and is intended as the written embodiment of any prior understanding and agreement reached by and among the Parties.

L. Any Party may withdraw from this Agreement with prior written notice to all other Parties. In the event of such a withdrawal, this Agreement shall continue to protect all Covered Communications and Information that have been exchanged between and among any of the Parties as of the date such withdrawal becomes effective. The withdrawing Party shall continue to be bound by the obligations provided in this Agreement as of the date of the withdrawal.

M. If allowed by governing law, within ten (10) business days following the date of withdrawal from this Agreement and upon the request of any non-withdrawing Party, the withdrawing Party shall return all written Covered Communications or Information that it has

received, and all copies thereof, excepting any Covered Communications or Information that the Party created or originally conveyed. If the Parties remaining as parties to this Agreement consent and the law so allows, the withdrawing Party may destroy all copies of such communications and information instead of returning them.

N. This Agreement may be terminated by the withdrawal of all but one remaining Party, or by written consent of all remaining Parties. Termination shall be effective upon the date of execution of the written notice of withdrawal of the last but one remaining Party, or the date of execution of the written consent of all remaining Parties. Termination shall operate prospectively only. Termination shall in no way affect the continued protected nature of the Covered Communications and Information exchanged prior to termination, nor shall termination affect the continuing obligations of restricted disclosure provided in this Agreement as to such Covered Communications and Information exchanged prior to termination.

O. If allowed by governing law, within ten (10) business days following the termination of this Agreement and upon the request of any Party, the Parties shall return all written Covered Communications or Information they received, and all copies thereof, excepting any Covered Communications or Information that the Parties created or originally conveyed. If the Parties consent and the law so allows, the Parties may destroy all copies of such communications and information instead of returning them.

P. Except as provided herein, any amendments or modifications to this Agreement must be agreed to by all Parties in writing. No other party may join this Agreement unless all parties to this Agreement agree in writing.

Q. Nothing in this Agreement shall be deemed to create an attorney-client relationship between counsel and anyone other than the client or clients of that counsel, or to modify in any way each Party's existing attorney-client relationships. The fact that the Parties, through counsel, have entered into this Agreement shall not in any way preclude counsel from meeting all professional and ethical obligations to represent the interests of their respective clients, including representing or advocating any interest, any legal theory, any factual matters of their respective clients that may be adverse to any of the interests, legal theories, and factual matters of any other Party to this Agreement, except that no Party may use any Covered Communications or Information received from another Party against that Party in this Matter. Nothing in this Agreement shall be used to seek the disqualification in this Matter or any subsequent matter of any counsel for any Party.

R. This Agreement does not cover any aspect of the relationship among the Parties other than what is explicitly addressed herein. This Agreement shall not constitute a waiver of any Party's claims, defenses, rights, or remedies with regard to any matter not specifically addressed herein. Neither the execution of this Agreement nor anything contained herein shall be deemed or construed as an admission by any Party of any wrongdoing or liability on the part of any Party or of the existence of facts upon which liability could be based.

S. This Agreement may be signed in copies and counterparts, and it shall be binding upon those Parties that have signed copies and sent a signed copy to every other Party.

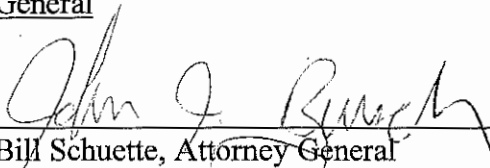
T. Any notices to be made under this Agreement shall be made by facsimile or electronic mail to counsel of record for a Party, followed by postal service delivery with proof of receipt.

U. The Parties agree and acknowledge that this Agreement is to be broadly construed so as to fully protect and preserve, to the fullest extent permitted by law, the confidentiality and secrecy of Covered Communications and Information. This Agreement shall be construed as if it were drafted by all Parties. If any provision of this Agreement shall be deemed invalid, unenforceable or illegal, then notwithstanding such invalidity, unenforceability or illegality, the remainder of this Agreement shall continue in full force and effect.

IN WITNESS WHEREOF, the Parties, by and through their undersigned duly authorized signers, agree to be bound by the terms of this Agreement and, in order to signify such agreement, have executed this Agreement on the dates indicated below.

Dated: 12-4-13

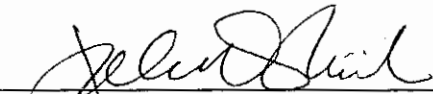
Interested Party, the Michigan Attorney General



Bill Schuette, Attorney General
or His Designee

Dated: 12.2.13

The Detroit Institute of Arts



By: John D. Pirich (P23204)
Attorney for the Detroit Institute of Arts

Exhibit 6-C

Privilege Log

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - DETROIT
In Re: City of Detroit, Michigan
Case No. 13-53846
State of Michigan
Privilege Log
April 25, 2014

| Item # | DocType | Date | To | CC | From | Subject | Notes | Privilege Reason |
|--------|---------|-----------|---|---|---------------------------------------|---|--|--|
| 1 | Letter | 4/12/2013 | William D. Schuette, Attorney General | | Alan S. Schwartz, Honigman attorney | Honigman opinion regarding DIA art. | | Attorney-Client; common-interest; deliberative process; work-product |
| 2 | Email | 5/24/2013 | AAG Jason Evans, AAG George Elworth, AAG Joshua O. Booth, AAG Daniel Sonneveldt, farrah.b@gcisonline.com, Chief Deputy AG Carol Isaacs, AG Bureau Chief Bob Ianni | Alan S. Schwartz, Arthur T. O'Reilly, and Joshua F. Opperer, Honigman attorneys | John D. Pirich, Honigman attorney | Forwarding three attachments: (1) 1997 DIA Operating Agreement, (2) Honigman-prepared work product, (3) Honigman-prepared work product. | | Attorney-Client; common-interest; deliberative process; work-product |
| 3 | Email | 5/28/2013 | AG Bureau Chief Bob Ianni | | John D. Pirich, Honigman attorney | Forwarding two cases for consideration. | | Attorney-Client; common-interest; deliberative process; work-product |
| 4 | Email | 5/28/2013 | AAG William R. Bloomfield | John D. Pirich, Alan S. Schwartz, Honigman attorneys | Joshua F. Opperer, Honigman attorney | Forwarding five attachments regarding ethics of art deaccession. | | Attorney-Client; common-interest; deliberative process; work-product |
| 5 | Email | 5/29/2013 | AAG William R. Bloomfield | John D. Pirich, Alan S. Schwartz, Honigman attorneys | Joshua F. Opperer, Honigman attorney | Regarding accession of art into the DIA collection. | | Attorney-Client; common-interest; deliberative process; work-product |
| 6 | Email | 5/31/2013 | Joshua F. Opperer, Honigman attorney | | AAG William R. Bloomfield | Questions regarding previous attachments and operation of museum; answer to questions and two attachments of responsive documents. | This is an email chain which includes an initial email and a response email. | Attorney-Client; common-interest; deliberative process; work-product |
| 7 | Email | 5/31/2013 | Joshua F. Opperer, Honigman attorney | | AAG William R. Bloomfield | This continues the previous email chain and includes a follow-up question and a follow-up response. | Email chain. | Attorney-Client; common-interest; deliberative process; work-product |
| 8 | Email | 6/1/2013 | AAG William R. Bloomfield | Joshua F. Opperer, Honigman attorney | Arthur T. O'Reilly, Honigman attorney | Forwarding attachment of DIA memo regarding legal and practical constraints of selling the collection. | | Attorney-Client; common-interest; deliberative process; work-product |
| 9 | Email | 6/4/2013 | AAG William R. Bloomfield | Arthur T. O'Reilly, and Alan S. Schwartz, Honigman attorneys | Joshua F. Opperer, Honigman attorney | Answer to a question regarding museum employees. | | Attorney-Client; common-interest; deliberative process; work-product |
| 10 | Email | 6/4/2013 | Arthur T. O'Reilly, Honigman attorney | | AAG William R. Bloomfield | Question regarding state support of DIA; answer with attachment. | Email chain, including question and the next day's response. | Attorney-Client; common-interest; deliberative process; work-product |
| 11 | Email | 6/12/2013 | AAG Heather Meingast | | Arthur T. O'Reilly, Honigman attorney | Forwarding contact information, and confirmation of receipt from AAG Meingast. | Email chain. | Attorney-Client; common-interest; deliberative process; work-product |

UNITED STATES BANKRUPTCY COURT
 FOR THE EASTERN DISTRICT OF MICHIGAN
 SOUTHERN DIVISION - DETROIT
 In Re: City of Detroit, Michigan
 Case No. 13-53846
 State of Michigan
 Privilege Log
 April 25, 2014

| Item # | DocType | Date | To | CC | From | Subject | Notes | Privilege Reason |
|--------|---------|-----------|---------------------------------------|---|---------------------------------------|---|---|--|
| 12 | Email | 6/12/2013 | AAG Heather Meingast | John D. Pirich, and Daniel N. Adams, Honigman attorneys | Arthur T. O'Reilly, Honigman attorney | Forwarding 12 attachments regarding purpose of the museum over the years; response from AAG Meingast confirming receipt; also includes internal Honigman communication inadvertently appended to email sent to Attorney General's office. | Email chain. | Attorney-Client; common-interest; deliberative process; work-product |
| 13 | Email | 6/13/2013 | Arthur T. O'Reilly, Honigman attorney | AAG William R. Bloomfield | AAG Heather Meingast | Forwarding finished DIA opinion after it was published. | This email chain is part of the previous email chain, but has been included as a separate entry for purposes of this log because the recipients and sender had changed. | Attorney-Client; common-interest; deliberative process; work-product |

Exhibit 6-D
Operating Agreement

OPERATING AGREEMENT
for
THE DETROIT INSTITUTE OF ARTS

Between

THE CITY OF DETROIT

and

**FOUNDERS SOCIETY
DETROIT INSTITUTE OF ARTS**

City Contract No. 77009

CORRECTED RESOLUTION OF THE
DETROIT CITY COUNCIL
NOVEMBER, 2007

WHEREAS the Detroit Institute of Arts has aggressively sought to increase both donations and earned income to address reduced public funding and increased operating costs, while also making extraordinary efforts to control expenses, and

WHEREAS the Detroit Institute of Arts has undertaken comprehensive building improvement and collection reinstallation plans that will showcase a dramatically different and more engaging museum for visitors that will lead to increased interest and visitation, and

WHEREAS other institutions governed by operating agreements with the City of Detroit are allowed by those agreements to set admission policies, and

WHEREAS the Detroit Institute of Arts will continue providing high quality service to the citizens of Detroit and the Detroit school system by programs such as Art Discovery, studio classes, gifted and talented student weekend classes, and the long-standing annual Detroit Public Schools Exhibition, and

WHEREAS the Detroit Institute of Arts will designate Friday as a free admission day to Detroit residents and to continue to assess a minimal donation for students participating in a guided tour,

WHEREAS the City of Detroit Arts Commission expresses its support for these plans and for the museum's proposal to institute a mandatory admission fee beginning in November 2007.

THEREFORE, BE IT RESOLVED that the rates for admission are \$8/adult and \$4/child 17 and under, and shall be determined in the future at the direction of the Detroit Institute of Arts, with admission fees not to exceed the range of sister institutions: Charles H. Wright Museum of African American History, Detroit Historical Museum and the Motown Historical Museum. The Arts Commission and Detroit City Council shall approve changes to admission fees prior to implementation. This resolution replaces Section F.35 of the 1998 Operating Agreement and supplants the resolution relative to the DIA passed on November 20, 2007.

November 28, 2007

OPERATING AGREEMENT
for
THE DETROIT INSTITUTE OF ARTS
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OPERATING AGREEMENT
for
THE DETROIT INSTITUTE OF ARTS

THIS AGREEMENT, made on the 12th day of December 1997 and effective as of the effective date, which is defined below, is between the City of Detroit ("*City*"), a municipal corporation organized and existing under the laws of the State of Michigan, acting by and through its Arts Commission ("*Commission*"), and Founders Society Detroit Institute of Arts ("*Society*"); a private nonprofit corporation organized and existing under the laws of the State of Michigan.

RECITALS:

1. The Detroit Institute of Arts ("*DIA*") is a unique cultural institution owned by the *City* and located therein. The *DIA* has a long and rich history. The *City* and the *Society* desire to continue to expand the tradition of excellence that exists at the *DIA*.
2. The *DIA* ranks among the leading museums in the world today because of its extensive art collections and community educational programs. The *DIA*, having a building of 600,000 square feet, is the fifth largest art museum in the United States. Each year the *DIA* hosts special exhibitions, as well as numerous community, educational and corporate events.
3. For many years, the *Commission* has contracted with the *Society* to provide services for the operation of the *DIA*. The *Society* also has provided substantial financial support and volunteer services to the *DIA*.
4. The historical contracting arrangement, however, has resulted in, among other things, dual sets of employees and personnel procedures, as well as dual administrative systems and procedures, including financial, accounting and purchasing procedures, and dual auditors.
5. The *City* desires to retain the professional services of the *Society* to provide a uniform system of management of, and fundraising for, the *DIA* so as to continue to promote and maintain the excellence of the *DIA*. The *City* shall continue to own the *City art collection*, including works of art acquired prior or subsequent to the *effective date*, as well as the *DIA's building* ("*DIA building*"), located at 5200 Woodward Avenue, Detroit, Michigan 48202, and other *DIA* properties described below.
6. The parties believe that this *agreement* for the operation of the *DIA* by the *Society* will produce (a) cost efficiencies for the *City*; (b) improved business

efficiencies and overall effectiveness of *DIA* operations; (c) improved employee morale and long-term career development opportunities for employees; (d) increased gifts of works of art to the *DIA* and increased contributions to the *Society's* endowment funds held on behalf of the *DIA*; (e) increased opportunity to secure federal, state, regional, county, *City* and other financial support; (f) an ability to respond more quickly to changing conditions, circumstances and priorities; (g) continuation and possible future expansion of the *DIA's* hours and number of open galleries; and (h) an ability to host additional special exhibitions, all of which are expected to contribute to the long-term viability and stability of the *DIA* as a first-class fine arts museum.

7. The *City* and the *Society* are parties to two existing contracts, one with a term commencing on July 1, 1994 (the "*1994 contract*") and a Deaccession Form Contract dated as of November 1, 1992 (together with the *1994 contract*, the "*contracts*"). This *agreement* between the *City* and the *Society* will supplant the *contracts* between the *City* and the *Society*, and the *Society* fully agrees to the abrogation of its *contracts* with the *City*, as set forth in Exhibit 1 hereto.
8. The Corporation Counsel of the *City* has rendered an opinion to the effect that the applicable law does not prevent the transaction embodied herein.
9. Among the purposes for which the *Society* was founded are (a) assisting the *Commission* in the operation of the *DIA*, performing such services as may be requested by the *Commission*, (b) promoting the public's interest in and knowledge of art matters by classes, lectures, exhibits and such other methods as may be thought to be appropriate to that end, and (c) soliciting, receiving and administering money, works of art and other property.
10. The *Society* is firmly committed to the goal of diversity in all ranks of its workforce.
11. Section 7-301 of the *City Charter* establishes an Arts Department, headed by the *Commission*, which consists of seven (7) members. Section 7-301 provides in part that "the arts department shall maintain and operate the Detroit Institute of Arts." The parties acknowledge the important role played by the *Commission* in overseeing the *DIA* and agree that its oversight role is not diminished by the terms of this *agreement*.

NOW THEREFORE, the *City* and the *Society* agree as follows:

A. DEFINITIONS

The following terms have the meanings specified:

1. **AAA** means the American Arbitration Association.
2. **Agreement** means this *agreement*, as originally executed or as amended, between the *City* and the *Society*.
3. **Associates** means the respective agents, officers, directors, employees, volunteers and contractors of, as well as other entities or persons associated with, affiliated with or subsidiary to, each party, now existing or hereafter created.
4. **City** means the City of Detroit, Michigan.
5. **City art collection** means the collection of works of art owned by the *City*, which currently includes the items listed in Exhibit 2 hereto and existing items owned by the *City* which may not be reflected on the inventory listing at Exhibit 2, the *DIA's* library, and subject to the terms of this *agreement* and the terms of any gift or bequest, works of art acquired during the *contract term*, whether by (a) gift directly to the *DIA* and/or the *City* or to any third person or entity for the benefit of the *DIA*; (b) purchase; or (c) otherwise. The *City art collection* will not, however, include any work of art disposed of in accordance with this *agreement* and the *DIA's* Collections Management Policy, lost, or destroyed. This definition is not intended to limit or diminish the *Society's* obligations under this *agreement*. The *City* makes no representation as to the completeness of Exhibit 2.
6. **City Charter** means the 1997 Charter of the *City* or the successor thereto.
7. **City Council** means the Detroit City Council or the successor thereto.
8. **City garage and lots** means (a) the parking garage on the South side of the *DIA building* (also known as the "*Cultural Center garage*"); (b) the parking lot located on Frederick Street, between John R and Brush Streets as described on Exhibit 3 hereto (together with any additional structure developed or constructed thereon, "*Frederick lot*"), and (c) the parking lot located on John R, which is used for employee parking ("*employee parking lot*").
9. **City intellectual property** means copyrights, trademarks, service marks, trade names, patents, mask works, and the like relating to the *City art collection* or

the operations of the *DIA*, presently existing or arising from or in the course of performance of this *agreement*, other than the *Society intellectual property*.

10. ***Claim*** means any action, liability, obligation, damage, penalty, cost, charge, demand, lawsuit, unfair labor practice charge, complaint, loss or expense (including fees and expenses for attorneys, expert witnesses and other consultants).
11. ***Commission*** means the Arts Commission of the *City* established by Section 7-301 of the *City Charter*.
12. ***Contract term*** means the initial term of this *agreement* and any extensions thereof in accordance with Subsection L2, *infra*.
13. ***DIA*** means the Detroit Institute of Arts.
14. ***DIA building*** means the museum building and grounds located at 5200 Woodward Avenue, Detroit, Michigan 48202, which are listed and described in Exhibit 3 hereto.
15. ***DIA records*** means the books, files, records, ledgers and other documents (whether on paper, computer, computer disk, tape or other storage media) presently existing and relating to the operations of the *DIA* or arising from the performance of this *agreement*.
16. ***DIA properties*** means the *DIA building* and the *City garage and lots*, which are listed and described in Exhibit 3 hereto.
17. ***Effective date*** means February 1, 1998, which is the date on which this *agreement* incepts.
18. ***Ferry Street properties*** means the properties owned by the *Society*, which are listed and described in Exhibit 4 hereto.
19. ***Force majeure event*** means prevention by governmental regulation or order other than a governmental regulation or an order issued by the *City*, wars, riots, sabotage, insurrection, terrorism, acts of God, fires, storms, natural disasters, strikes, work stoppages, power failures or other event or occurrence that (a) is beyond the control of the party claiming the *force majeure event* and (b) substantially impairs its ability to perform one or more of its obligations under this *agreement*.

20. ***Frederick lot ground lease*** means the Ground Lease executed by the *City* and the *Society* effective upon delivery of the specified premises to the *Society* and approved by the *City Council* by resolution dated March 14, 1997.
21. ***Society*** means Founders Society Detroit Institute of Arts.
22. ***Society art collection*** means the art collection owned by the *Society*, including the items listed on Exhibit 5 hereto and existing items owned by the *Society* which may not be reflected on the inventory listing at Exhibit 5, as well as items acquired by the *Society* during the *contract term*, but excluding items that have been disposed of, lost or destroyed. The *Society* makes no representation as to the completeness of Exhibit 5.
23. ***Society intellectual property*** means (a) trademarks, trade names, and service marks, whether presently existing or hereafter created, incorporating the name, assumed names, abbreviations or symbols of the *Society*, and (b) copyrights relating to publications, brochures, compilations or catalogues of works of art, which were obtained or applied for prior to the *effective date*.
24. ***Society properties*** means the *Society art collection*, the parking lot on Kirby (which is near the corner of John R), in which parking lot the *Society* has a 2/3 ownership interest, the *Ferry Street properties* and the *Society's* endowment funds established for the benefit of the *DIA*, together with any assets now owned or hereafter acquired by the *Society*. The *Society properties*, however, will not include any such properties or assets disposed of, lost or destroyed.

B. SOCIETY'S REPRESENTATIONS AND WARRANTIES

1. **Society's Authority.** The *Society* represents and warrants that it is a nonprofit corporation described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and that it has the power and authority to execute and deliver this *agreement* and to perform its obligations hereunder, and the execution, delivery and performance of this *agreement* have been or will be duly authorized by all necessary action, including the approvals and ratification by the *Society's* governing members prior to the *effective date* as contemplated by Subsection 11, *infra*. The opinion of the *Society's* legal counsel that this *agreement* shall be valid and binding on the *Society* is attached as Exhibit 6 hereto.
2. **Society Has No Conflicting Contractual Obligations.** The *Society* represents and warrants that, as of the execution date and the *effective date* of this *agreement*, it is not party to any agreement or understanding which would

prevent, limit or hinder in any material manner its performance of any obligations under this *agreement*.

3. **Society Has No Conflict of Interest.** The *Society* represents and warrants that, as of the execution date and the *effective date* of this *agreement*, it has no interest, and that, during the *contract term*, it shall not acquire any interest, which would conflict in any manner or degree with the performance of its obligations under this *agreement*. The *Society* further covenants that it shall employ no person or entity having such an interest unless full disclosure of the conflict has been made to the *Commission* and the *Commission* has approved in advance the proposed transaction. The *Society* represents and warrants that, throughout the *contract term*, it will comply with the *DIA's* Guidelines for Professional Practices (a copy of the most current version of which as of the execution date of this *agreement* has been provided to the *City*), as they may be modified from time to time. The *Commission* shall submit to the *City* Clerk a copy of the most current version of the *DIA's* Guidelines for Professional Practices as of the execution date of this *agreement* and any subsequent amendments thereto.
4. **Society Has No Conflict with Law.** The *Society* represents and warrants that neither the execution, delivery and performance of this *agreement* nor the consummation by the *Society* of the transactions contemplated herein (a) will conflict with, violate or result in a breach of any of the terms, conditions or provisions of any law, regulation, order, writ, injunction, decree, determination or award of any court, governmental department, municipality, board, agency, instrumentality or arbitrator or (b) require any consent, authorization or approval of any person or entity not a party hereto; provided that, in the case of each of clause (a) and clause (b), the approvals and ratification of the *Society's* governing members will be required as contemplated by Subsection 11, *infra*.

C. CITY'S REPRESENTATIONS AND WARRANTIES

1. **City's Authority.** The *City* represents and warrants that it has the power and authority to execute and deliver this *agreement* and to perform its obligations hereunder, and the execution, delivery and performance of this *agreement* have been duly authorized by all necessary action, including the approval of this *agreement* by the *City Council*, which approval has been obtained on or prior to the execution date of this *agreement*. The opinion of the Corporation Counsel of the *City* that this *agreement* shall be valid and binding on the *City* is attached as Exhibit 7 hereto.
2. **City Has No Conflicting Contractual Obligations.** The *City* represents and warrants that, as of the execution date and the *effective date* of this

agreement, it is not party to any agreement or understanding which would prevent, limit or hinder in any material manner its performance of any obligations under this *agreement*.

3. **City Has No Conflict of Interest.** The *City* represents and warrants that, as of the execution date and the *effective date* of this *agreement*, it has no interest, and that, during the contract term, it shall not acquire any interest, which would conflict in any manner or degree with the performance of its obligations under this *agreement*.
4. **City Has No Conflict with Law.** The *City* represents and warrants that neither the execution, delivery and performance of this *agreement* nor the consummation by the *City* of the transactions contemplated herein (a) will conflict with, violate or result in a breach of any of the terms, conditions or provisions of any law, regulation, order, writ, injunction, decree, determination or award of any court, governmental department, municipality, board, agency, instrumentality or arbitrator or (b) require any consent, authorization or approval of any person or entity other than the approval of *City Council*, which approval has been given on or prior to the execution date of this *agreement*.

D. ENGAGEMENT OF THE SOCIETY; RELATIONSHIP BETWEEN THE PARTIES

1. **Engagement.** In the exercise of the *Commission's* authority granted by *City Charter* § 7-301, and pursuant to its oversight function as delineated in this *agreement*, the *City* hereby engages the *Society* as manager and operator of the *DIA*, and the *Society* hereby agrees to faithfully and diligently manage and operate the *DIA* in accordance with the terms and conditions of this *agreement*, without any duty by the *City* of compensation of the *Society* for such services.
2. **Independent Contractor Relationship.** The *Society* is an independent contractor and as such shall have full authority and responsibility to discharge the duties imposed upon it hereunder without restrictions other than those imposed by or pursuant to this *agreement*. Neither the *Society* nor the *City* shall have the right or authority to bind the other party, without the express written authorization of such other party, to any obligation to a third party. Nothing contained in this *agreement* shall constitute the parties as partners or joint venturers for any purpose, it being the express intention of the parties that no such partnership or joint venture exist and that each party has only those duties to the other that are specified in this *agreement*.

3. **Scope of the Society's Duties.** The *Society's* duties include all aspects of the operations of the *DIA*, including day-to-day operations; management of art collections; presentation of exhibitions and other events; maintenance of the *DIA building*, the *Frederick lot* (consistent with the terms of the *Frederick lot ground lease*) and the *employee parking lot*; collection and expenditure of income; fundraising; marketing; acquisition/disposition of works of art; food service (including obtaining and maintaining any necessary liquor licenses); and all other financial operations. The *Society* is responsible for managing the *City art collection*, the *DIA building*, the *Frederick lot*, and the *employee parking lot* subject to the terms and conditions of this *agreement*.
4. **Final Accounting Under 1994 Contract.** The parties shall account to each other for all amounts due, through and including the *effective date*, under the *1994 contract* between them referred to in Recital 7, *supra*, which will be abrogated as of the *effective date* as evidenced by Exhibit 1 hereto.

E. RETENTION OF ASSETS BY THE CITY

1. **City Retains Title to Assets.** The *City* shall retain title to and ownership of the (a) *City art collection* and (b) the *DIA properties* (including fixtures).
2. **Acquisition of New Assets.** Subject to the terms of any gift or bequest, as between the *City* and the *Society*, the *City* shall also have title to all works of art acquired, whether by gift directly to the *DIA* and/or the *City* or to the *Society* or any other person or entity for the benefit of the *DIA*, purchase or otherwise, during the *contract term*. In cases in which an acquisition of art is made by the *Society*, whether by purchase or gift, the *Society* shall ensure that its right, title and interest, if any, to any such work is promptly transferred to the *City*. As between the *City* and the *Society*, title to works of art may be retained by the *Society* if and only if so specified by the terms of the gift or bequest or if approved by the *Commission*. To the extent that the *Society* acquires any right, title or interest in a work of art, the *Society* shall request that the interest being acquired include all copyright interests in the work, including a waiver of the artist's rights under the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A.
3. **Licensing of Intellectual Property.**
 - (a) The *Society* shall have the right to use, license, sublicense and exploit the *City intellectual property*, in accordance with the licensing agreement between the *City* and the *Society* executed on the date hereof and effective on the *effective date*, in the form attached as Exhibit 8 hereto. All revenues derived from the *Society's* use or exploitation of the *City*

intellectual property shall be used for the benefit of the *DIA*. As between the *City* and the *Society*, all *City intellectual property* relating to the *City art collection* or the operations of the *DIA* is owned by and shall be titled in the name of the *City*. Except for *Society intellectual property*, as defined in Subsection A23(a), any intellectual property rights, works, inventions or discoveries that relate to or arise from or in the course of performance of this *agreement* shall be owned by the *City*, and the *Society* agrees that it shall assign to the *City* any ownership interests in any such intellectual property.

- (b) The *Society's* employment policies and procedures shall specify that any intellectual property rights, works, inventions or discoveries by *Society* employees during and as a part of their *Society* employment that relate to or arise from or in the course of performance of this *agreement* shall be assigned to the *Society* or the *City* as the *City* may direct. The *Society* shall have the right to make exceptions to such policies and procedures if in the best interests of the *DIA* and consistent with state-of-the-art practices of leading fine arts museums. Further, the *Society* shall take reasonable steps to protect any such intellectual property rights at its own expense.

F. AGREEMENTS BY THE SOCIETY

1. Compliance with Laws; Standards.

- (a) During the *contract term*, the *Society* shall manage, preserve, maintain and seek to improve through new acquisitions the *City art collection*, and the *Society* shall develop and present exhibitions and education programs to benefit the community, including programs that attempt to stimulate interest in art and participation in *DIA* activities by all sectors of the greater Detroit community.
- (b) In conducting its activities pursuant to this *agreement*, the *Society* shall comply with all applicable federal, state and local laws and regulations, and the *Society* shall perform its duties in accordance with the standard of care required by state-of-the-art practices employed by leading fine arts museums (except insofar as limited by (1) features of the *DIA building* which cannot be modified without incurring unreasonable expense or (2) the unavailability of sufficient funding respecting the *DIA building* despite the *Society's* best efforts to raise such funding).

- (c) Consistent with the objective of promoting the excellence of the *DIA* and its facilities, the *Society* covenants that it shall not undertake to manage or operate any museum or art institution other than the *DIA*.

2. **Society's Duty to Manage the City Art Collection.**

- (a) The *Society* shall be responsible for managing the *City art collection* in accordance with the *DIA's* Collections Management Policy as in effect as of the execution date of this *agreement* and as modified from time to time hereafter in accordance with this *agreement*. Such policy shall be consistent with state-of-the-art practices that are generally recognized, accepted and followed by leading fine arts museums. The *DIA's* Collections Management Policy in effect as of the execution date of this *agreement* has been approved by the *Commission*, and the *Society* shall submit any proposed modification to the *Commission* for its approval of same. The *Society* shall also submit any such proposed modification to the *City Council*, which shall be deemed to have approved of such modification unless the *City Council* adopts a resolution rejecting such proposed modification within forty-five (45) days after receipt of such proposal.
- (b) Title to the *City art collection* remains with the *City*; however, the *Society* shall have the right to acquire and dispose of works of art in the *City art collection* in accordance with the *DIA's* Collections Management Policy. Any funds received from disposition of works of art in the *City art collection* shall be used solely to purchase other works of art for the *City art collection*. This Subsection F2 contains the *Society's* obligations with regard to collections management and pursuant to the Abrogation Agreement as set forth in Exhibit 1, as of the *effective date* will supersede the Deaccession Form Contract, dated as of November 1, 1992, between the *City* and the *Society*, the deaccession policies and procedures of which have been incorporated into the *DIA's* Collections Management Policy.

3. **Situs of the Collection; Loans of Works of Art.** The *Society* represents and warrants that during the *contract term* the *DIA building* shall continue to be the primary location for the exhibition of and storage of the *City art collection*. This Subsection F3 shall not limit or diminish the *Society's* ability to loan portions of the *City art collection* in accordance with the *DIA's* Collections Management Policy.

4. **Society's Duty to Inventory the City Art Collection.** Within two (2) years of the *effective date*, the *Society* shall complete a comprehensive inventory of the *City art collection*. Upon completion of the inventory, the *Society* shall submit a copy of the inventory to the *Commission*. Thereafter, the *Society* shall update said inventory consistent with state-of-the-art practices that are generally employed by leading fine arts museums.
5. **Society's Duty to Maintain the DIA Building and Parking Lots.** From and after the *effective date*, (a) the *Society* shall manage, preserve, maintain and seek to improve the *DIA building* and the *employee parking lot* and shall keep the mechanical systems and equipment therein or associated therewith in good condition and repair for the benefit of the *City*, including the maintenance of and capital improvements to the building systems, electrical systems and HVAC systems, subject to the standards set forth in Subsection F1(b), *supra*, and (b) except as provided in the *Frederick lot ground lease*, the *Society* shall maintain and operate the *Frederick lot* solely as a parking area (1) for the *Society*, visitors, employees, users and invitees of the *DIA* and the *Society*, and (2) also for any other arts and/or cultural institutions owned and/or operated by the *City* or other public or non-profit entities located in the vicinity of said parking lot, and the general public, all in accordance with the provisions of the *Frederick lot ground lease*.
6. **Additions, Improvements and Modifications to the DIA Building and Parking Lots.** The *Society* shall have the right to construct additions, improvements or modifications to any part of the *DIA building* and the *employee parking lot* as the *Society* may deem necessary or desirable for the benefit of the *City*, provided that as to additions, improvements or modifications that will either significantly change the appearance of and/or significantly affect the operations of the *DIA* or cost more than Five Hundred Thousand Dollars (\$500,000), the *Society* shall submit all architectural plans to the *Commission* for its review and approval in advance of the construction of any such project, and the *Society* shall not commence construction until such approval is received. As to all other additions, improvements or modifications, the *Society* shall report to the *Commission* about same. All resulting facilities shall become and remain the property of the *City*. The *Society* shall have the right to construct additions, improvements or modifications to any part of the *Frederick lot* consistent with the terms of the *Frederick lot ground lease*.
7. **Society Has No Right to Encumber.** The *Society* shall not encumber, hypothecate, mortgage, subject to a lien or otherwise cloud the title of (a) the *DIA properties* or any additions thereto as authorized by Subsection F6, *supra*; (b) works in the *City art collection*; or (c) the *City intellectual property*.

8. **Society's Duty to Pursue Funding.** The *Society* shall have the right and the duty to pursue additional sources of funding for the operations of the *DIA* and *DIA building* improvements, including public sector sources such as federal grants, state assistance, regional taxation, county and *City* grants, and private sector sources such as contributions from individuals, corporations, foundations and trusts, and the *City* agrees to cooperate with the *Society* in connection with the latter's efforts to secure funding.
9. **Use of Revenues.** The *Society* shall be entitled to receive and shall use all revenues derived from the operations of the *DIA*, the *DIA building*, the *Frederick lot* and the *employee parking lot*, including proceeds from ticket sales in connection with the Detroit Film Theater, Wassail, special exhibits or events, and from general admission to the *DIA*, licensing revenues resulting from the exploitation of the *City intellectual property* as set forth in Subsection E3, *supra*, and revenues otherwise received by or on behalf of the *DIA* by gift or otherwise, from whatever source, for the benefit of the *DIA*.
10. **Society's Duty to Provide Operating Expenses.** Except as specifically provided in this *agreement*, the *Society* shall be responsible for all operating expenses of the *DIA* after the *effective date*.
11. **Society's Pre-Effective Date Liabilities.** The *Society* shall remain responsible for all expenses, costs and liabilities incurred by it prior to the *effective date* (other than to the extent that such liabilities arose through the negligence or misconduct of the *City*), and the *Society* shall be solely responsible for all wages and obligations under retirement or other employee benefit plans by reason of employees' *Society* service prior to the *effective date*, and severance and termination costs payable to the *Society's* employees by reason of their service as such or the termination of that status.
12. **Solicitation of Donations of Works of Art; Certain Art Acquisitions.** The *Society* shall use its best efforts to solicit gifts and donations of works of art for the benefit of the *DIA*. The *Society* shall also continue to use its best efforts to increase the *DIA's* collections of works of art by artists of African, African-American, Central-American, South-American, Asian-American and Native-American descent consistent with the *DIA's* Collections Management Policy.
13. **Society's Duty to Establish Disaster Recovery Plan.** The *Society* shall establish and maintain a disaster recovery plan that satisfies the standard of care required by state-of-the-art practices of leading fine arts museums. The *Society* shall submit its disaster recovery plan to the *Commission* for the *Commission's* approval.

14. **Society's Duty to Establish Risk Management Programs.** The *Society* shall establish and maintain risk management programs, safety programs, and other similar controls consistent with the standard of care required by state-of-the-art practices of leading fine arts museums. The *Society* shall submit its risk management programs, safety programs, and other similar controls to the *Commission* for the *Commission's* approval.
15. **Society's Duty to Place Certain Insurance Policies.** Except as provided in the next sentence, the *Society* shall obtain at its sole expense the insurance coverages listed in this Subsection F15 from insurers rated "A" or better by *A.M. Best's Insurance Reports*, and which are authorized to transact insurance in Michigan, as evidenced by a subsisting certificate of authority issued by the Commissioner of Insurance of Michigan. The *Society* shall not have an obligation, however, to obtain the insurance coverages listed in Subsections F15(a) or F15(b) until from and after the expiration of such policies currently existing and maintained by the *City* as of the execution date of this *agreement*; the *Society* shall have a duty to maintain and administer such policies upon transfer by the *City* to the *Society* of the loss payee status and claims administration function as of the *effective date* as provided in Subsection H7(d), *infra*. The *Society* shall be obligated to reimburse the *City* for any portion of payments made by the *City* to obtain coverage under such existing policies referred to in Subsections F15(a) and (b) with respect to the period from and after the *effective date*. Each insurance policy required by this Subsection F15 shall be accompanied by an endorsement that states that the policy shall not be canceled or reduced without thirty (30) days prior written notice to the *City* and the *Society*. The *Society* has provided to the Risk Management Division Director and the Corporation Counsel of the *City*, and will provide at least once annually during the *contract term*, copies of the certificates of insurance evidencing the insurance and the endorsements required by this Subsection F15.
- (a) all risks fine arts insurance (subject to standard exclusions) covering the *City art collection* and the *Society art collection* providing as follows, which policy shall name the *City* and the *Society* as named insureds and the *Society* as the sole loss payee:
- (1) At least One Hundred Fifty Million Dollars (\$150,000,000) blanket loss limit covering the aggregate of all of the *City art collection* and the *Society art collection* when they, in whole or in part, are resident at the *DIA building*, and fine art of others on loan to the *DIA*;

- (2) At least Ten Million Dollars (\$10,000,000) blanket loss limit covering the aggregate of all of the *City art collection* and the *Society art collection* when they, in whole or in part, are (A) at a location other than the *DIA building*; or (B) in transit;
 - (3) At least One Hundred Fifty Million Dollars (\$150,000,000) blanket loss limit covering the aggregate of all of the *City art collection* and the *Society art collection* and fine art of others on loan to the *DIA* for any one loss or disaster, in case of either partial or total loss, or salvage charges, or any other costs or expenses or all combined;
 - (4) At least Five Million Dollars (\$5,000,000) for international coverage; and
 - (5) Not more than One Thousand Dollar (\$1,000) per occurrence deductible.
- (b) conservator's fine arts insurance providing as follows, which coverage may be included in the policy described in Subsection F15(a), *supra*, and which shall name the *City* and the *Society* as named insureds and the *Society* as the sole loss payee:
- (1) At least Two Million Dollars (\$2,000,000) for conservator's fine arts insurance at the *DIA building* and any one loss;
 - (2) At least One Million Dollars (\$1,000,000) for conservator's fine arts insurance at locations other than the *DIA building* and in transit via common carrier; and
 - (3) At least Two Hundred Fifty Thousand Dollars (\$250,000) for conservator's fine arts insurance in transit in the custody of an employee of the *Society*.
- (c) statutory Michigan Workers' Compensation Insurance and employer's liability insurance having at least a Five Hundred Thousand Dollar (\$500,000) per accident limit for bodily injury by accident, at least a Five Hundred Thousand Dollar (\$500,000) total policy limit for bodily injury by disease and at least a Five Hundred Thousand Dollar (\$500,000) per employee limit for bodily injury by disease;
- (d) automobile liability insurance for all vehicles owned, non-owned, hired by or used by the *Society*, including Michigan No-Fault Personal Injury

Protection and Property Protection insurance including liability insurance having at least a One Million Dollar (\$1,000,000) combined single limit. The *Society* shall purchase physical damage insurance on owned vehicles, and the *Society* shall be the sole loss payee thereof;

- (e) commercial general liability insurance, including blanket contractual liability and having at least (i) a One Million Dollar (\$1,000,000) per occurrence limit and (ii) a Two Million Dollar (\$2,000,000) aggregate limit. The commercial general liability insurance policy shall name the *City* and the *Society* as the named insureds and shall contain the following endorsements (to the extent that such coverage is not already included in the language of the insurance policy):
 - (1) During the term of this policy, it is agreed that this policy specifically covers bodily injury and property damage liability assumed by the insured under the provisions of Contract No. 77009, dated December 12, 1997, between the insured and the City of Detroit, based on occurrences after the effective date of such Contract.
 - (2) It is agreed that the inclusion of more than one (1) insured under this policy shall not affect the rights of any insured as respects any claim, suit or judgment made or brought or for any other insured or by or for any employee of any other insured. This policy shall protect each insured in the same manner as though a separate policy had been issued to each, except nothing herein shall operate to increase the insurer's liability beyond the amount or amounts for which the insurer would have been liable had only one (1) insured been named.
- (f) excess umbrella coverage above the coverages included in Subsections F15(c) to F15(e), *supra*, and F16, *infra*, and having at least a Five Million Dollar (\$5,000,000) per occurrence and annual aggregate limit;
- (g) directors and officers liability insurance having at least a Two Million Dollar (\$2,000,000) aggregate limit;
- (h) employee dishonesty insurance having at least a One Hundred Thousand Dollar (\$100,000) per occurrence limit, which policy shall name the *City* and the *Society* as named insureds as respects the *Society's* employees and the *Society* as the sole loss payee; and

- (i) theft, disappearance, and destruction of money and securities insurance having at least a Five Thousand Dollar (\$5,000) per occurrence limit, which policy shall name the *City* and the *Society* as named insureds and the *Society* as the sole loss payee.
16. **Society's Duty to Place Liquor Liability Insurance.** The *Society* shall obtain at its sole expense from an insurer rated "A" or better by *A.M. Best's Insurance Reports* and which is either authorized to transact insurance in Michigan, as evidenced by a subsisting certificate of authority issued by the Commissioner of Insurance of Michigan, or is an unlicensed insurer qualified to negotiate surplus lines insurance, as determined by the Commissioner of Insurance of Michigan, liquor liability insurance having at least a Three Hundred Thousand Dollar (\$300,000) each accident limit for bodily injury, property damage or loss of support. The insurance policy required by this Subsection F16 shall be accompanied by an endorsement that states that the policy shall not be canceled or reduced without thirty (30) days prior written notice to the *City* and the *Society*. The *Society* has provided to the Risk Management Division Director and the Corporation Counsel of the *City*, and will provide at least once annually during the *contract term*, a copy of the certificate of insurance evidencing the insurance and the endorsement required by this Subsection F16.
17. **Modifications to Terms or Conditions of Insurance Policies Required by Subsections F15 and F16.** Any increases in or improvements to any of the terms or conditions of the insurance policies required by Subsections F15 and F16, *supra*, may be made by the *Society*. Any elimination or reduction of any of the terms or conditions, of the insurance required by Subsections F15 and F16, *supra*, however, may be made by written agreement of the *Society* and the *Commission*.
18. **Society's Duty to Administer Insurance Policies, Handle Insurance Claims and Manage Insurance Proceeds.** The *Society* shall be responsible for administering all insurance policies required by Subsections F15 and F16, *supra*, and handling all claims thereunder. Further, the proceeds of the insurance policies described in Subsections F15(a) and F15(b), *supra*, and the proceeds of the insurance policies described in Subsection H7, *infra*, to the extent related to the *DIA* or the *DIA building*, shall be used solely to remedy the problem resulting in such payment of proceeds (unless otherwise agreed by the *Commission*), including the repair of damaged items and the acquisition of new replacement items for the benefit of the *DIA*. If, however, the proceeds of such insurance policies arising from any occurrence or casualty exceed One Million Dollars (\$1,000,000), the *Society* shall make a recommendation to the *Commission* concerning the use of the proceeds and shall hold such proceeds in an escrow account on behalf of the *City* until directed by the *Commission* as to how such

proceeds are to be used; provided that in all cases such proceeds shall be used for the sole benefit of the *DIA* and, in the event that any such proceeds arise from any occurrence or casualty involving loss of, damage to or destruction of any work of art, such proceeds shall be used solely to purchase replacement works of art for the *City art collection*.

19. **Society's Duty to Reimburse the City for the Placement of Other Insurance Policies.** The *Society* shall reimburse the *City* for the cost of the premiums of the risk of direct physical loss insurance coverage and boiler insurance coverage, as specified in Subsection H7, *infra*.
20. **Society's Duty to Renegotiate Insurance Coverages.** Every three (3) years during the *contract term*, or at such other times as the *Commission* and the *Society* deem appropriate, the *Society* shall negotiate in good faith with the *Commission* about the requirements for the types and limits of insurance listed in Subsections F15 and F16, *supra*.
21. **Society's Subcontractors to Carry Certain Insurance Coverages.** The *Society* shall require its subcontractors, except for those exempted by law, to maintain (a) employer's liability insurance, (b) worker's compensation insurance which meets State of Michigan statutory requirements, (c) automobile liability insurance and (d) commercial general liability insurance (in the case of this clause (d), except for subcontractors providing personal services).
22. **Society's Waiver of Subrogation.** The *Society* waives its rights of subrogation and recovery for *claims* against the *City* and the *City's associates*, to the extent that the *Society* or its *associates* are insured or required to carry insurance for such *claims*. The *Society* shall cause each of the insurance policies required by Subsections F15 (except for the policy referenced in Subsection F15(g), *supra*) and F16, *supra*, of this *agreement*, to contain a provision whereby the insurer waives any rights of subrogation against the *City* and the *City's associates*. If such provision cannot be obtained, then the policies shall name the *City* as an additional insured, even if not otherwise required by this *agreement*.
23. **Society to Follow Generally Accepted Accounting Principles.** The *Society* shall maintain and retain its books and records in accordance with generally accepted accounting principles.
24. **Compliance with Executive Orders; Construction Contracts.** The *Society* agrees that it will voluntarily comply with (a) City of Detroit Executive Order No. 4, dated October 28, 1994 and (b) Executive Order No. 22, dated August 29, 1983. Copies of Executive Orders 4 and 22 are attached as Exhibits 9 and 10 hereto, respectively. In addition, the *Society* shall ensure that at least 30% of

aggregate amounts expended by the *Society* under contracts entered into by the *Society* for any additions, improvements or modifications to the *DIA building*, the *Frederick lot* and the *employee parking lot* shall be paid to Detroit-based businesses, or minority business enterprises or women-owned businesses.

25. **Residency Requirement.** The *Society* shall require (a) the *Society's DIA* director; (b) the *Society's DIA* deputy director; and (c) at least sixty-eight percent (68%) of its full-time employees located at the *DIA building* to reside in the *City*. In addition, the *Society* shall require at least one-third of the elected members of its board of directors and at least one-fourth of the members of its board's executive committee (or any other board committee, whatever its title or designation, which exercises the authority or functions of the executive committee as described in Exhibit 13) to be residents of the *City*. The *Society* shall be in default under the obligations contained in the preceding two sentences only if it is not in compliance with the requirements set forth therein, measured quarterly on each September 30, December 31, March 31 and June 30, commencing June 30, 1998. The *Society* shall also use its best efforts to employ individuals residing in the *City* to work at the *Society's DIA* stores located at the Somerset Collection and Twelve Oaks Mall. Residency shall have the meaning ascribed by the *City Charter*, *City* ordinances and the relevant case law. The *Society* shall promulgate from time to time guidelines (the "*residency guidelines*") setting forth the *Society's* methodology for computation and verification of *City* resident workforce composition, which *residency guidelines* shall be approved by the *Commission*. The *Commission* shall monitor the *Society's* compliance with the residency requirements established by this Subsection F25. The *Society's* failure to strictly enforce this Subsection F25 shall constitute a material breach of this *agreement*, triggering the provisions of Sections L and M, *infra*.
26. **Affirmative Action.** The *Society* shall be committed to affirmative action programs to increase the numbers of minority and women employees in the professional ranks of the *DIA*, including curatorial, educational, art-related and management positions. To this end, the *Society* shall:
- (a) establish and update as necessary undergraduate, graduate, co-operative, and internship programs that focus on minorities and women, the aim of which is to develop a supply of talent for future employment by the *Society*;
 - (b) establish and update as necessary progressive training programs for current employees that focus on minorities and women, the aim of which

29. **Employee Selection Procedures.** To the extent that the *Society* employs any tests or other selection procedures as a basis for any employment decision, those tests or selection procedures shall satisfy the requirements of the Uniform Guidelines on Employee Selection Procedures, as amended from time to time, which are promulgated by the Equal Employment Opportunity Commission of the Department of Labor and which are codified at 29 C.F.R. § 1607, *et seq.*
30. **Recruitment of Volunteers.** The *Society* will recruit, train and deploy volunteers to assist in the operations of, and fund raising on behalf of, the *DIA*.
31. **Purchase of Utilities Other than Electricity, Water and Sewage Services and Regular Trash Collection Services.** Except as provided in Subsection F32, *infra*, the *Society* may purchase utility services, including steam, telephone services and trash collection (other than regular trash collection), as well as other support services, goods and commodities, from any provider, based on quality and cost of service and such other factors as the *Society* may deem relevant and in accordance with the procurement procedures established by the *Society*.
32. **Purchase of Electricity, Water and Sewage Services and Regular Trash Collection Services.** The *Society* shall purchase electricity from the *City's* Department of Public Lighting so long as those services are offered at rates and with services that are competitive with market rates and services. The *Society* shall purchase water and sewage services from the *City's* Department of Water & Sewerage and regular trash collection services from the *City's* Department of Public Works at prices and on the general terms and conditions offered by such *City* Departments to their other customers. To the extent that the *City* does not offer certain trash collection services, including collection of construction debris, the *Society* shall be entitled to obtain such trash collection services from any provider, based on quality and cost of service and such other factors as the *Society* may deem relevant and in accordance with the procurement procedures established by the *Society*.
33. **Use of the *DIA* Building and Parking Lots for City-Sponsored Functions.** The *Society* shall make the *DIA building*, the *Frederick lot* and the *employee parking lot* available for *City*-sponsored functions in accordance with *DIA* policies. Prior to modifying the *DIA's* policy concerning the availability of the *DIA building*, the *Frederick lot* and the *employee parking lot* for *City*-sponsored functions, the *Society* shall submit any proposed modification to the *Commission* for its approval of same.

is to equip those employees to assume positions in the *DIA's* professional and managerial ranks;

- (c) develop, implement and update as necessary employee progression and succession programs that incorporate the affirmative action objectives of Subsection F26;
- (d) implement, within one (1) year of the *effective date*, an affirmative action plan that satisfies the regulations promulgated, and amended from time to time, by the Office of Federal Contract Compliance Programs of the United States Department of Labor. Thereafter, the affirmative action plan shall be updated on an annual basis. A copy of the affirmative action plan, as well as all updates thereto, shall be provided to the *Commission*; and
- (e) incorporate management of workforce diversity as an express responsibility of the *Society's* human resources department.

To assist in the implementation of its affirmative action and other human resources initiatives the *Society* shall hire a full-time Director of Human Resources, whose duties shall include efforts to fulfill the *Society's* affirmative action objectives. The *Society's* failure to satisfy the requirements of this Subsection F26 shall constitute a material breach of this *agreement*, triggering the provisions of Sections L and M, *infra*.

- 27. **Non-Discrimination Policy.** The *Society* agrees to comply with all federal, state and local laws governing equal employment opportunity. The *Society* agrees that it shall not, and the *Society* shall use its best efforts to ensure that its contractors and subcontractors shall not, discriminate against any employee or applicant for employment with respect to the individual's hire, tenure, terms, conditions or privileges of employment, or a matter directly or indirectly related to employment, because of race, color, religion, national origin, age, sex, height, weight, physical disability not related to job requirements, marital status or sexual orientation. The *Society's* failure to satisfy the requirements of this Subsection F27 shall constitute a material breach of this *agreement*, triggering the provisions of Sections L and M, *infra*.
- 28. **Non-Discrimination Clauses in Subcontracts.** The *Society* shall notify its contractors and subcontractors that they shall comply with the requirements of Subsection F27, *supra*, of this *agreement*, and the *Society* further agrees that it shall include those provisions in all contracts and subcontracts.

29. **Employee Selection Procedures.** To the extent that the *Society* employs any tests or other selection procedures as a basis for any employment decision, those tests or selection procedures shall satisfy the requirements of the Uniform Guidelines on Employee Selection Procedures, as amended from time to time, which are promulgated by the Equal Employment Opportunity Commission of the Department of Labor and which are codified at 29 C.F.R. § 1607, *et seq.*
30. **Recruitment of Volunteers.** The *Society* will recruit, train and deploy volunteers to assist in the operations of, and fund raising on behalf of, the *DIA*.
31. **Purchase of Utilities Other than Electricity, Water and Sewage Services and Regular Trash Collection Services.** Except as provided in Subsection F32, *infra*, the *Society* may purchase utility services, including steam, telephone services and trash collection (other than regular trash collection), as well as other support services, goods and commodities, from any provider, based on quality and cost of service and such other factors as the *Society* may deem relevant and in accordance with the procurement procedures established by the *Society*.
32. **Purchase of Electricity, Water and Sewage Services and Regular Trash Collection Services.** The *Society* shall purchase electricity from the *City's* Department of Public Lighting so long as those services are offered at rates and with services that are competitive with market rates and services. The *Society* shall purchase water and sewage services from the *City's* Department of Water & Sewerage and regular trash collection services from the *City's* Department of Public Works at prices and on the general terms and conditions offered by such *City* Departments to their other customers. To the extent that the *City* does not offer certain trash collection services, including collection of construction debris, the *Society* shall be entitled to obtain such trash collection services from any provider, based on quality and cost of service and such other factors as the *Society* may deem relevant and in accordance with the procurement procedures established by the *Society*.
33. **Use of the *DIA* Building and Parking Lots for City-Sponsored Functions.** The *Society* shall make the *DIA building*, the *Frederick lot* and the *employee parking lot* available for *City*-sponsored functions in accordance with *DIA* policies. Prior to modifying the *DIA's* policy concerning the availability of the *DIA building*, the *Frederick lot* and the *employee parking lot* for *City*-sponsored functions, the *Society* shall submit any proposed modification to the *Commission* for its approval of same.

34. **Continuation and Possible Future Expansion of the DIA's Hours.** The *Society* shall not reduce the hours that the *DIA building* is open to the public unless (a) adequate funding to maintain those hours is unavailable and (b) the *Commission* approves any such change prior to reduction of the hours.
35. **General Admission to the DIA Building.** Other than for special exhibits or events, the *Society* shall not impose on visitors to the *DIA building* a mandatory general admission fee in excess of the current minimum requirement of One Cent (\$.01) per admission without the prior approval of the *Commission* and the *City Council*. The *Society* may continue to request voluntary contributions from visitors to the *DIA building*, as is the practice at the *DIA building* on the *effective date*.
36. **Policy Amendments Require Commission Approval.** The *Society* shall not establish or amend the following policies without the prior authorization of the *Commission*, except as provided in Subsection F2, *supra*, or I4, *infra*:
- (a) the *DIA's* Guidelines for Professional Practices, to which reference is made in Subsection B3, *supra*;
 - (b) the *DIA's* Collections Management Policy, to which reference is made in Subsection F2 *supra*;
 - (c) the disaster recovery plan, to which reference is made in Subsection F13, *supra*;
 - (d) the risk management programs, to which reference is made in Subsection F14, *supra*;
 - (e) the *residency guidelines*, to which reference is made in Subsection F25, *supra*;
 - (f) the *DIA's* policy concerning the availability of the *DIA building*, the *Frederick lot* and the *employee parking lot* for *City-sponsored* functions, to which reference is made in Subsection F33, *supra*; and
 - (g) the document retention policy, to which reference is made in Subsection F44, *infra*.
37. **Society's Duty to Submit Quarterly Reports on Employment Matters.** Within sixty (60) days of the expiration of each quarter ending each September 30, December 31, March 31 and June 30 during the *contract term*, the *Society*

shall submit to the *Commission* a written report in a form prescribed by the *Commission* covering the following:

- (a) a listing and description of (1) all pending employment-related and labor-related *claims* and (2) the resolution thereof; and
- (b) personnel matters, including the following:
 - (1) information reflecting compliance with the residency requirement of Subsection F25, *supra*;
 - (2) affirmative action and Equal Employment Opportunity data, as required by the regulations promulgated, and amended from time to time, by the Equal Employment Opportunity Commission of the Department of Labor and codified at 29 C.F.R. § 1602.1, *et seq.*;
 - (3) statistical data reflecting workforce composition and statistical data broken down by demographics for personnel transactions, including applications, hiring, performance evaluations, compensation changes, promotions, demotions, suspensions and discharges;
 - (4) the training and career development programs offered by the *Society*, including undergraduate, graduate, co-operative, internship, and progressive training programs required by Subsection F26, *supra*, and the number of participants in and outcome of any such training efforts; and
 - (5) the *Society's* efforts to recruit, train, promote and retain minorities and women in its workforce.

38. **Society's Duty to Submit Internal Quarterly Financial Statements.** The *Society* shall furnish to the *Commission* copies of any quarterly financial statements that the *Society* prepares in the ordinary course of business and submits to its own board of directors and/or officers. The *Society* shall provide all such documents to the *Commission* promptly after their distribution to the *Society's* directors. Upon receipt of such documents, the *Commission* shall provide copies thereof to the *City's* Auditor General.

39. **Society's Duty to Submit Annual Reports.** Within ninety (90) days of the expiration of each year ending June 30 during the *contract term*, the *Society* shall submit to the *Commission* a written report on the *Society's* compliance with the terms of this *agreement*. The report shall include appropriate

comparative schedules to analyze data with budgeted and/or prior years' figures. The form of the report shall be prescribed by the *Commission*. The report shall cover the following subject matters:

- (a) acquisitions and dispositions of works of art, presentation of exhibitions and presentation of educational programs;
- (b) itemized revenues and expenses;
- (c) fundraising activities;
- (d) balances of the *Society's* endowment funds established on behalf of or for the benefit of the *DIA*;
- (e) a listing and description of (1) all pending *claims* (other than employment-related *claims* covered by Subsection F37, *supra*) and (2) the resolution thereof;
- (f) an annual compilation of the data required by Subsection F37, *supra*;
- (g) the number of visitors to the *DIA* and public served by other *DIA* programs during the reporting period;
- (h) the schedule of hours of operation of the *DIA* during the reporting period and the average number of hours per week that the *DIA* was open to the public during the reporting period;
- (i) the condition of the *DIA building*, the *Frederick lot* and the *employee parking lot*, including any major repairs or renovations made thereto, and for the purposes of this Subsection F39(i), "major" means repairs and renovations other than those necessitated by normal wear and tear;
- (j) the condition of the *City art collection*, including any major repairs or renovations made to any work of art, and for the purposes of this Subsection F39(j), "major" means repairs and renovations other than those necessitated by normal wear and tear;
- (k) any changes in existing insurance coverages from the prior year, together with a report on the application of any insurance proceeds received by the *Society* in connection with this *agreement*, the *City art collection* or the *DIA building* during such year;

- (l) the adoption of and any material alteration to employee compensation or benefit plans for employees of the *Society* (other than any such alteration required by applicable law); and
- (m) compliance with Executive Order Nos. 4 and 22.

The *Commission* shall provide a copy of such report to the *City Council* and the *City's Auditor General*.

- 40. **Society's Duty to Submit Audited Financial Statements.** For the fiscal year ending June 30th of each year, and within ninety days (90) after that date, the *Society* shall deliver to the *Commission* the *Society's* annual financial statements, audited by an independent certified public accountant. Upon receipt of such statements, the *Commission* shall provide copies thereof to the *City's Auditor General*.
- 41. **Correction of Society's Reports.** The *Society* shall use its best efforts to correct any deficiencies noted in any report submitted to, or otherwise discovered by, the *Commission*.
- 42. **Society's Duty to Provide Other Information Requested by the Commission.** From time to time, the *Society* shall provide the *Commission* with such other information as the *Commission* may reasonably request.
- 43. **Society's Duty to Notify the Commission Concerning Emergent Matters.** The *Society* shall notify the *Commission* as soon as practicable concerning the destruction or loss of any part of the *DIA building*, the *Frederick lot* or the *employee parking lot* or of any work of art in the *City art collection*, where the reported damage, destruction or loss is estimated to exceed Fifty Thousand Dollars (\$50,000).
- 44. **Society's Duty to Establish Document Retention Policy.** The *Society* shall establish a written document retention policy governing retention, maintenance and destruction of *DIA records*. The *Society* shall submit its document retention policy to the *Commission* for the *Commission's* approval.
- 45. **Society's Duty to Submit to Audit.** The *Society* shall submit to the audits by the *Commission* or its designees, as specified in Subsection G5, *infra*.
- 46. **Society's Duty to Submit to Inspection.** The *Society* shall submit to the inspections by the *Commission* or its designees, as specified in Subsection G6, *infra*.

47. **Society's Duty to Appear Before the Commission.** The *Society* shall appear before the *Commission* for the hearings specified in Subsection G9, *infra*. The *Society's* duly authorized representatives shall also appear before the *Commission* for all other hearings that the *Commission* deems necessary or desirable.

G. ROLE OF THE COMMISSION

1. **Arts Commission Oversight of Agreement.** Pursuant to Section 7-301 of the *City Charter*, the Arts Department, headed by the *Commission*, shall continue to exercise its mandated responsibility for maintenance and operation of the *DIA*, and shall administer and monitor the performance by the *Society* of the *Society's* obligations, all as provided for in this *agreement*.
2. **Commission to Prescribe the Form of, Receive and Review Society's Reports.**
 - (a) The *Commission* shall prescribe the form of the reports to be submitted by the *Society* in accordance with Subsections F37 and F39, *supra*. Additionally, the *Commission* shall also receive and review the reports and financial statements submitted to it by the *Society* as required by Subsections F37 through F40, *supra*.
 - (b) The *Commission* shall also receive and review the *Society's* submissions required from time to time by this *agreement*, including those specified in Section F, *supra*.
3. **Commission May Request Additional Information.** From time to time, the *Commission* may reasonably request from the *Society* additional information concerning the operations and management of the *DIA*.
4. **Commission's Duty to Renegotiate Insurance Coverages.** Every three (3) years during the *contract term*, or at such other times as the *Commission* and the *Society* deem appropriate, the *Commission* shall negotiate in good faith with the *Society* about the requirements for the types and limits of insurance listed in Subsections F15 and F16, *supra*.
5. **Commission's Audit Rights.** Once per year, the *Commission* or its designees may audit on demand the operations and records of the *Society*, and the *Commission* or its designees may audit such operations and records at other times on which both the *Commission* and the *Society* agree.
6. **Inspection Rights.** The *Commission* or its designees may on demand conduct an annual inspection of the *City art collection* or any portion thereof specified

by the *Commission*, the *DIA building*, the *Frederick lot* and/or the *employee parking lot*, at reasonable time(s) to be arranged by mutual agreement of the *Commission* and the *Society*, but in any event to be commenced no later than fifteen (15) business days after demand is made. Additional inspections may be conducted of the *City art collection* or any specified portion thereof, the *DIA building*, the *Frederick lot* and/or the *employee parking lot* upon request by the *Commission*, at reasonable time(s) to be arranged by mutual agreement of the *Commission* and the *Society*. Neither the *Society* nor the *City* shall unreasonably request or withhold agreement as to inspections or inspection times. Such inspections shall be performed for the purposes of monitoring the status of the *City art collection*, and identifying and requesting that the following types of maintenance be performed by the *Society* with regard to the *DIA building*, the *Frederick lot* and the *employee parking lot*, subject to the availability of funding and to features of the *DIA building* that cannot be modified without incurring unreasonable expense:

- (a) maintenance reasonably necessary to correct or repair substantial structural, heating, plumbing or electrical problems; and
- (b) maintenance reasonably necessary to put the *DIA building*, the *Frederick lot* and/or the *employee parking lot* into the condition that an ordinary and reasonable owner or operator of a leading fine arts museum would maintain its museum.

The *City's* Auditor General shall have the authority to conduct audits of the *DIA properties* consistent with *City Charter* Section 4-205; the Auditor General may request additional audits in coordination with those conducted by the *Commission*, approval of which requests the *Society* shall not unreasonably withhold.

- 7. **Commission to Receive, Review and Approve Certain Society Policies and Amendments Thereto.** As provided in Subsection F36, *supra*, the *Commission* shall receive, review and approve certain of the *Society's* policies or amendments thereto. Based upon agreement of the *Commission* and the *Society*, the *Commission* may prescribe the establishment by the *Society* of additional policies consistent with generally recognized and generally followed state-of-the-art practices of leading fine arts museums.
- 8. **Commission to Receive, Review and Approve Certain Amendments to Society Articles of Incorporation and Bylaws.** The *Commission* shall receive, review and approve amendments to certain provisions of the *Society's* articles of incorporation and bylaws, as described in Subsection I2, *infra*. The *Society's* articles of incorporation and bylaws, effective as of the *effective date*, shall be

as set forth in Exhibits 13 and 14 hereto, and the *Commission* shall submit to the *City Clerk* copies of any subsequent amendments to the *Society's* articles of incorporation and bylaws that the *Commission* receives from the *Society*.

9. **Commission's Hearings.** During the two (2) year transition period after the *effective date*, and in its sole discretion, the *Commission* may require quarterly appearances of the *Society* at hearings and/or meetings with the *Society*, at which the *Society* shall report on and respond to the *Commission's* questions about the state of and operations of the *DIA*. The *Commission* shall have at least one (1) hearing during each of the two (2) years of the transition period. Thereafter, on at least an annual basis, the *Commission* shall hold a hearing at which the *Society* shall report on and respond to the *Commission's* questions about the state of and operations of the *DIA*. The *Commission* may schedule other hearings and/or meetings as it, in its sole discretion, deems necessary or desirable. The *Commission* shall establish the location of, date and time of, as well as the agenda for, any hearing. All such hearings and meetings shall be subject to the provisions of the Michigan Open Meetings Act, M.C.L. § 15.261, *et seq.*
10. **Commission to Review and Approve the Society's Director and Deputy Director of the DIA.** The *Commission* shall have the duty to receive the recommendations of the *Society* concerning candidates for the positions of the *Society's* director of the *DIA* and the *Society's* deputy director of the *DIA*, and the *Commission* and the Mayor of the *City* shall have the authority to approve or disapprove any such candidates, as provided in Subsection K7, *infra*. The *Commission* and the Mayor shall have the authority to remove the *Society's* *DIA* director or the *Society's* *DIA* deputy director but only if both the Mayor and the *Commission* determine that such director or deputy director has engaged in actions that are adverse to the best interests of the *City*, as provided in Subsection K7, *infra*.
11. **Commission to Report to the Mayor.** On at least an annual basis, the *Commission* shall report to the Mayor of the *City* as to the operations and management of the *DIA*.
12. **Commission to Evaluate Society's Services and to Provide Evaluation to the City Council and to the Society.** On an annual basis, the *Commission* shall evaluate the services provided by the *Society* under this *agreement* for the preceding year and shall provide a copy of such evaluation to the *City Council* and to the *Society*.

H. AGREEMENTS BY THE CITY

1. **City's Pre-Effective Date Liabilities.** The *City* shall remain responsible for all expenses, costs and liabilities incurred by it or arising prior to the *effective date* in connection with the ownership, operation and maintenance of the *DIA* (other than to the extent that such liabilities arose through the negligence or misconduct of the *Society*), which are not otherwise assumed by the *Society*. In furtherance thereof, the *City* shall be solely responsible for all wages and obligations under retirement or other employee benefit plans by reason of employees' *City* service prior to the *effective date*, and severance and termination costs payable to the *City's* employees by reason of their service as such or the termination of that status.
2. **City's Duty to Operate and Maintain Cultural Center Garage.** The *City* will continue to operate and maintain, for the benefit of the *DIA* (including its patrons and employees at the *DIA*) and the other cultural institutions in the vicinity, the *Cultural Center garage*, upon terms and hours determined by the *City*. As of the *effective date*, the *City* has no plan to reduce the hours of operation of the *Cultural Center garage*.
3. **Fees for Central City Services.**
 - (a) The Arts Department of the *City* has historically had an annual obligation to pay for certain personnel and central services and external police services (collectively "*annual expenses*"). The *City* no longer imposes on the Arts Department any charges for external police services. After the *effective date*, the *City* shall not impose the *annual expenses* or other charges on the *Society*, except that the *Society* will pay for personnel services provided by the *City* to the extent that such services are used by the *Society*.
 - (b) The *City* shall continue to provide police, fire and other municipal services to the *DIA* on the same basis as such services are provided to other cultural and commercial institutions located in the *City*.
4. **Annual Grant by the City.**
 - (a) For Fiscal Year 1997-1998, the *City* shall contribute \$1,100,000 for the support and operation of the *DIA*. To the extent that any portion of such budgetary appropriation has not been expended by the *City* prior to the *effective date*, the *City* shall provide such remaining funds to the *Society* prior to June 30, 1998 for the support and operation of the *DIA*.

(b) During the *contract term*, the *City* agrees that the *Society* may petition the Mayor of the *City* and the *City Council* for a *City* grant to the *DIA*, which shall be discretionary with the *City*.

5. **City's Duty to Transfer Funds Received by the City for the Benefit of the DIA.** The *City* agrees that all monies delivered to it for the benefit of the *DIA*, including all previously received but unexpended or future (a) donations, gifts and contributions from individuals, corporations, foundations and trusts, if any, and (b) federal, state, regional, county or local tax proceeds and grants from governmental or quasi-public entities, if any, shall be promptly paid to the *Society* for use in connection with the operations of the *DIA*, subject to any terms and conditions of any such monies received.

6. **City Sale of Certain Bonds.**

(a) Pursuant to a Resolution duly adopted by the *City Council* on June 10, 1988 and the affirmative vote of the electors of the *City* at a Primary Election held on August 2, 1988, the *City* was authorized to issue its general obligation bonds payable from taxes the *City* is allowed to levy in addition to *City Charter* and statutory limits in an amount necessary to pay the principal of and interest thereon in the principal sum of not to exceed \$25,000,000 ("*Maximum Authorized Bonds*") for the purpose of expansion, renovation or rehabilitation of the *DIA* facilities ("*Authorized Improvements*"). In accordance with the foregoing authorization, during the period of 1989 to 1991, the *City* issued three series of its General Obligation (Unlimited Tax) Bonds, portions of which aggregating \$8,405,000 in principal amount were allocated to the *Maximum Authorized Bonds* and were issued to pay a portion of the cost of the *Authorized Improvements* and the allocable costs of issuance thereof.

(b) On or about November 26, 1996, the *City* issued General Obligation (Unlimited Tax) Bonds, Series 1996-A ("*Series 1996-A Bonds*"), \$3,000,000 in principal amount of which were allocated to the *Maximum Authorized Bonds* and were slated to be used to pay additional portions of the cost of the *Authorized Improvements* and allocable portion of the costs of issuance thereof. As of the execution date of this *agreement*, \$210,065.70 of the *net proceeds* (as hereinafter defined) of the 1989-1991 issues have not been expended, and in addition, \$2,982,474.45 of the *net proceeds* of the *Series 1996-A Bonds*, have not been expended (collectively, and as such *net proceeds* may increase as a result of investment thereof, the "*Remaining Proceeds*").

- (c) \$13,595,000 in principal amount of the *Maximum Authorized Bonds* remain unissued as of the execution date of this *agreement* ("*Remaining Authorized Bonds*"). The *City* agrees to use its best efforts to sell the *Remaining Authorized Bonds* in one or more series to finance the costs of the *Authorized Improvements* to benefit the *DIA*, within three (3) years after the *effective date*. If the *City* is unable to sell the *Remaining Authorized Bonds* within the three (3) year period, the *City* will continue to use its best efforts to sell the *Remaining Authorized Bonds* as soon as practicable thereafter.
- (d) The *City* will utilize the *net proceeds* of such future sale or sales of the *Remaining Authorized Bonds* and the *Remaining Proceeds* to pay the costs of all or portions of the *Authorized Improvements* that are designated by the *Society*, subject to the provisions of Subsection F6, *supra*.
- (i) *Net proceeds* of any bond sale shall mean the proceeds of such bond sale, plus investment earnings on such proceeds pending their expenditure, less any investment proceeds that must be rebated to the federal government and less the *pro rata* portion of any expenses incurred with respect to the issuance of such bonds.
- (ii) Prior to their expenditure, the *net proceeds* of any such bond sale shall be held and invested by the *City* pursuant to the procedures established by the *City* to comply with its covenants regarding the use and investment of bond proceeds that were entered into in connection with the *Maximum Authorized Bonds* previously issued and will be entered into in connection with the issuance of the *Remaining Authorized Bonds*.
- (e) The use of the *Remaining Proceeds* and the *net proceeds* of the *Remaining Authorized Bonds* by the *Society* to finance the *Authorized Improvements* shall not be considered a loan to the *Society*, and the *Society* shall have no repayment obligations with respect to such amounts.

7. **City's Duty to Place Certain Insurance Policies.**

- (a) The *City* shall obtain the insurance coverages listed in this Subsection H7(a) from insurers rated "A" or better by *A.M. Best's Insurance Reports*, and which are authorized to transact insurance in Michigan, as evidenced by a subsisting certificate of authority issued by the

Commissioner of Insurance of Michigan, and the *City* shall be responsible for administering all insurance policies required by this Subsection H7(a) and handling all *claims* thereunder.

- (i) risk of direct physical loss property insurance subject to standard exclusions at 90% of the replacement values and endorsed with an agreed value clause, which insurance is in the amount of Ninety-Five Million Four Hundred Eighty-Two Thousand Two Hundred Ninety-Four Dollars (\$95,482,294) for the *DIA building* and Seven Million Six Hundred Eighty-Seven Thousand One Hundred Thirteen Dollars (\$7,687,113) for the contents thereof (excluding fine arts), which policy shall be part of the *City's* blanket limit and shall name the *City* as the insured, and the policy shall also name the *Society* as an additional insured with respect to the *DIA building* and contents; and
 - (ii) boiler and machinery insurance and extra expense, including coverage for machinery and pressure vessel exposure, covering the *DIA building* and having a single limit of at least One Hundred Million Dollars (\$100,000,000) and an extra expense limit of at least One Million Dollars (\$1,000,000), which policy shall name the *City* as the insured, and the policy shall also name the *Society* as an additional insured with respect to the *DIA building*.
- (b) Each insurance policy required by Subsection H7(a), *supra*, shall be accompanied by an endorsement that states that the policy shall not be canceled or reduced without thirty (30) days prior written notice to the *City* and the *Society*. The *City* has provided to the *Society*, and will provide at least once annually during the *contract term*, copies of certificates of insurance evidencing the insurance required by Subsection H7(a), *supra*, and the endorsement required by this Subsection H7(b).
 - (c) All proceeds of the insurance policies required by Subsection H7(a), *supra*, relating to the *DIA building* or the contents thereof, shall be paid by the *City* to the *Society*, and shall be used, subject to the provisions of Subsection F6, *supra*, solely to remedy the problem resulting in such payment of proceeds (unless otherwise agreed by the *Commission*), including the repair of damaged items and the acquisition of new replacement items, for the benefit of the *DIA*.
 - (d) As of the *effective date*, the *City* will cause the *Society* to be designated as an additional named insured and as the sole loss payee under the policies currently in effect for the insurance coverages listed in

Subsections F15(a) and F15(b), *supra*, and shall transfer to the *Society* administration of such policies. From and after such designation and transfer, the *Society's* rights and duties concerning such existing policies shall be as set forth in Subsections F15, F17 and F18, *supra*. The *City* shall maintain such coverages through the time of such transfer in accordance with the requirements of Subsections F15, F17 and F18, *supra*, that would otherwise be applicable to the *Society*.

8. **Modifications to Terms or Conditions of Insurance Policies Required by Subsection H7.** Any increases in or improvements to any of the terms or conditions of the insurance policies required by Subsection H7, *supra*, may be made by the *City*. Any elimination or reduction of any of the terms or conditions of the insurance required by Subsection H7, *supra*, however, may be made by agreement of the *Society* and the *Commission*.
9. **First-Party Claims in Excess of Insurance Limits.** The *City* agrees that neither the *Society* nor its *associates* will be held responsible for first-party *claims* of the *City*, in excess of the insurance coverages required by Subsections F15(a), F15(b) and H7, *supra*, unless the *claim* arose as a result of negligence of the *Society* or its *associates*, relating to the *DIA building*, the *Frederick lot*, the *employee parking lot*, the *City art collection*, or the operation of the *DIA*.
10. **City's Waiver of Subrogation.** The *City* waives its rights of subrogation and recovery for *claims* against the *Society* and the *Society's associates*, to the extent that the *City* or its *associates* are insured or required to carry insurance for such *claims*. The *City* shall cause each of the insurance policies required by Subsection H7, *supra*, of this *agreement*, to contain a provision whereby the insurer waives any rights of subrogation against the *Society* and the *Society's associates*. If such provision cannot be obtained, then the policies shall name the *Society* as an additional insured, even if not otherwise required by this *agreement*.
11. **Society's Purchase of Utilities.** The *City* agrees that the *Society* may purchase utility services (except for electricity, water and sewage services and regular trash collection services, which are the subject of Subsection F32, *supra*), including steam, telephone services and non-regular trash collection, as well as other support services, goods and commodities, from any provider, based on quality and cost of service and such other factors as the *Society* may deem relevant, and in accordance with the procurement procedures established by the *Society*.

12. **City's Responsibility for Property Taxes on the DIA Properties and the City Art Collection.** During the *contract term*, the *City* will be responsible for any real or personal property taxes relating to the *DIA properties* and the *City art collection*.
13. **City to Transfer to the Society Certain Tangible Personal Property Assets for DIA Operations.** As of the *effective date*, in consideration of the *Society's* obligations under this *agreement* to the *City*, the *City* will transfer to the *Society*, for continued use in the operation of the *DIA*, certain personal property assets (or, if applicable, the *City's* leasehold interest therein) currently used in the operation of the *DIA* and located at the *DIA building* or at the *DIA's* off-site storage facility located on Lynch Road. These transfers shall be effected by appropriate instruments of transfer, assumption and/or assignment and in accordance with the requirements of the *City Charter* and *City ordinances*. The assets subject to this Subsection H13 include the following categories of personal property:
- (a) all machinery, equipment, supplies, tools, spare parts, furniture, business machines, shop equipment, laboratory test fixtures, office furniture and equipment and other tangible personal property located at the *DIA building* or at the *DIA's* off-site storage facility located on Lynch Road, including those listed and described on Exhibit 11 hereto, except to the extent disposed of, lost or destroyed prior to the *effective date*; and
 - (b) the vehicles currently used by the *DIA* in the course of its business, which are listed and described on Exhibit 12 hereto.

Except for the completion of the transfers of the vehicles described in Subsection H13(b), as of the *effective date*, the *City* shall have no obligation to provide *City-owned* or *City-leased* vehicles to the *Society* or the *DIA*. For the sole benefit of the *DIA*, the *Society* shall have the right to sell, transfer, encumber, hypothecate or otherwise dispose of any of the property described in this Subsection H13 as the *Society* deems appropriate, without notice to or consent of the *City*.

14. **Limited Warranties.** Except for the representations and warranties in Section C, *supra*, the property referred to in Subsection H13, *supra*, shall be transferred to the *Society* without warranty or representation of any kind, including any warranty of merchantability or fitness for a particular purpose or any warranty or representation which might otherwise be inherent in a description or in specifications.

15. **Assumption of Leases and Service Contracts.** To the extent permitted by the terms of the relevant leases or similar agreements, the *City* agrees that the *Society* may assume any leases or similar agreements for copy machines and other equipment used in the operations of the *DIA* and any maintenance and service agreements relating to such equipment or *DIA* operations, and upon such assumption the *City* will assign its rights thereunder to the *Society*.
16. **Use of DIA Records.** The *City* agrees that *DIA records* created by the *City* and currently maintained at the *DIA building* shall continue to be maintained at the *DIA building* in accordance with the laws, rules and regulations governing management and retention of such *City* records. The *City* further agrees that the *Society* may use, add to or dispose of the *DIA records* in accordance with the *Society's* document retention policy required by Subsection F44, *supra*, and any applicable laws, rules and regulations governing management and retention of *City* records.
17. **Society Retains Title to Its Assets.** The *City* agrees that the *Society* shall retain title to and ownership of the *Society properties* and the *Society intellectual property*. The *City* will not have recourse to either the *Society properties* or the *Society intellectual property* for any noncompliance by the *Society* with any of the terms or conditions of this *agreement* or in connection with the *Society's* operation of the *DIA*, so long as the *Society properties* and the *Society intellectual property* continue to be used for the sole benefit of the *DIA*.

I. ESTABLISHMENT AND GOVERNANCE OF THE SOCIETY; ABOLITION OF JOINT COMMITTEES

1. **Board of Directors; Committees.**
 - (a) Not later than the *effective date*, (1) the *Society's* governing members will approve the *Society's* restated articles of incorporation as set forth in Exhibit 13, will approve the *Society's* amended bylaws as set forth in Exhibit 14 and will ratify the Mayor's appointment of the initial members of the board of directors of the *Society* pursuant to Subsection I1(b)(5), *infra*, and (2) the *Society* shall cause such restated articles of incorporation to become effective. If any of the actions contemplated by the preceding sentence do not occur prior to the *effective date*, this *agreement* shall be null and void and of no force or effect whatsoever. As specified in Exhibit 14 hereto, the amended bylaws shall be immediately effective upon effectiveness of such restated articles of incorporation.

- (b) Upon the effectiveness of such restated articles and amended bylaws:
- (1) the *Society* will be a nonprofit directorship corporation, the board of directors of which will consist of no more than sixty-eight (68) directors and will meet the requirements of Subsection F25, *supra*, which board of directors will be divided into three (3) classes, serving staggered three (3) year terms;
 - (2) a member of the *Commission* will not be eligible to serve as a member of the *Society's* board of directors;
 - (3) any vacancies occurring on the board of directors from time to time will be filled by the remaining members of the board;
 - (4) the board of directors will have the authority to establish such committees, consisting of members of the board of directors or other individuals, as are necessary or appropriate to assist the *Society* and the board of directors in performing their obligations under this *agreement*; and
 - (5) the appointments of the initial members of the board of directors of the *Society* made by the Mayor of the *City*, as reflected on Exhibit 15 hereto, will immediately become effective. Thereafter, the Board shall be self-perpetuating.
- (c) The *Society* shall deliver to the *Commission* and the Corporation Counsel of the *City* (1) proof of filing prior to the *effective date* of the restated articles of incorporation with the Michigan Department of Consumer & Industry Services, Corporation, Securities and Land Development Bureau, and (2) a certificate of an officer of the *Society* certifying that (A) the amended bylaws have been adopted and (B) the *Society's* governing members have ratified the Mayor's appointment of the initial members of the board of directors of the *Society* pursuant to Subsection I1(b)(5), *supra*.
2. **Certain Amendments Require Commission Approval.** Neither the articles of incorporation nor the bylaws of the *Society* may be amended from those set forth in Exhibits 13 and 14 insofar as they relate to the nonprofit status and directorship basis of organization of the *Society* as set forth in Subsection I1(b), *supra*, the organization and structure of the board and the executive committee as set forth in Subsections F25 and I1(b), *supra*, the approval and removal authorities of the Mayor of the *City* and the *Commission* with respect to the *Society's* *DIA* director and the *Society's* *DIA* deputy director as set forth in

Subsections G10, *supra*, and K7, *infra*, and the corporate purposes of the *Society*, without the prior authorization of the *Commission*.

3. **Ethical Standards.** The *Society*, and its board of directors, officers and employees, shall comply with the requirements of the Michigan Nonprofit Corporation Act, M.C.L. §§ 450.2101, *et seq.*, as well as the *DIA*'s Guidelines for Professional Practices. Prior to modifying the *DIA*'s Guidelines for Professional Practices, the *Society* shall submit any proposed modification to the *Commission* for its approval of same.
4. **Abolition of Joint Committees.** All existing joint committees consisting of *City* and *Society* representatives shall be automatically abolished as of the *effective date*, and all *DIA* policies and practices, including those relating to acquisitions and dispositions of works of art, shall be promptly and appropriately modified by the *Society* to reflect the abolition of the joint committees without the approval of the *Commission* being required.

J. INDEMNITY; ASSUMPTION OF RISK

1. **Indemnification Obligation.** The *Society* agrees at its sole cost to hold harmless, indemnify and defend the *City* and its elected officials, officers, employees, agents, assigns and legal representatives against and from any third-party *claim* which may be imposed upon, incurred by or asserted against the *City* that arises from or relates to the negotiation, execution or performance of this *agreement* by the *Society*, except for *claims* resulting or arising from the malfeasance or gross negligence of the *City* or its elected officials, officers, employees, agents, assigns or legal representatives. This indemnification obligation includes, but is not limited to third-party *claims* arising from:
 - (a) any negligent or tortious act, error or omission to the extent attributable in whole or in part to the *Society* or its *associates*;
 - (b) any failure by the *Society* or its *associates* to perform any duty either expressed in or implied by this *agreement*;
 - (c) any and all bodily injury, personal injury and property damage to an employee of the *City* which arises out of the *Society*'s performance under this *agreement*;
 - (d) any *claim* brought by an employee of the *Society* arising from or relating to his/her employment with the *Society*, including wrongful termination, workers' compensation, unemployment compensation, discrimination, violation of federal or state labor or employment laws, ERISA, bodily

injury, personal injury or defamation, but excluding any *claim* relating to the termination of such employee's employment by the *City*;

- (e) any *claim* brought by a labor organization relating to organizing efforts, unfair labor practices or any other violation of federal or state labor or employment laws arising from or relating to (i) this *agreement* or (ii) any act committed, in whole or in part, by the *Society* during the negotiations of this *agreement* or after the *effective date*, but excluding any *claim* relating to the termination of any employee's employment by the *City*;
 - (f) any third-party *claims* (including those of *Society* employees) based upon occurrences after the *effective date* arising from or relating to structural defects of or maintenance deficiencies in the *DIA building*, the *Frederick lot* or the *employee parking lot* or for bodily injury, personal injury or property damage sustained by the *Society* or its *associates* while on or about the *DIA building*, the *Frederick lot* or the *employee parking lot*;
 - (g) any *claim* for infringement of a copyright, trademark, patent or other intellectual property right, an artist's rights under the Visual Artists Rights Act of 1990, 17 U.S.C. §106A, or an artist's moral rights, as well as for antitrust, unfair competition or other unfair trade practice, which arises out of the *Society's* activities; or
 - (h) any *claim* arising from or related to a contract, either oral or written, or other instrument between the *Society* and any third party.
2. **Assumption of Risk.** From and after the *effective date*, the *Society* undertakes and assumes all risk of dangerous conditions, if any, on and about the *DIA building*, the *Frederick lot* or the *employee parking lot*. The *Society*, for itself, waives and releases any *claim* against the *City* for bodily injury, personal injury or property damage sustained by the *Society* or its *associates* while on or about the *DIA building*, the *Frederick lot* or the *employee parking lot*.
3. **Safeguarding of Personal Property.** The *Society* agrees that after the *effective date* it is the responsibility of the *Society* and not that of the *City* to safeguard the personal property transferred pursuant to Subsection H13, *supra*, that the *Society* and its *associates* use while performing this *agreement*, and that the *Society* will hold the *City* harmless for the loss of such personal property after the *effective date*.
4. **Indemnification Not Limited by Workers' Compensation or Employee Benefit Acts.** The indemnification obligation under Section J shall not be affected by

any limitation on the amount or type of damages, compensation, or benefits payable under worker's compensation acts or other employee benefit acts.

5. **Duty to Notify.** The *City* shall notify the *Society* within twenty-one (21) days of the receipt of any *claim* subject to this indemnification provision.
6. **Duty to Cooperate.** The *City* shall cooperate with the *Society* in the defense of any *claim* subject to this indemnification provision.

K. EMPLOYMENT MATTERS

1. Employment of Non-Unionized City Employees.

(a) (1) (A) On the date that is forty-five (45) days prior to the *effective date* (for purposes of this Subsection K1(a), the "*offer date*"), the *Society* shall offer employment to all non-unionized *City* employees who are actively employed (as defined in Subsection K1(a)(4), *infra*) on the *offer date*. Each such offer shall be conditioned on such employee being *actively employed* on the *effective date*.

(B) Such an offer by the *Society* shall be deemed accepted only if such employee advises the *Society* in writing of his or her acceptance thereof no later than fifteen (15) days prior to the *effective date*. By so accepting such an offer, such employee shall be deemed to have granted permission for the *City* to release to the *Society* such employee's complete employment records with the *City*. The commencement date of any such employee's employment with the *Society* shall be deemed to be the *effective date*. Any such employee who does not so accept such an offer shall be continued in *City* employment in accordance with *City* policies and procedures.

(2) (A) Any non-unionized *DIA City* employee who is not *actively employed* on the *offer date* (an "*Absent Non-Unionized Employee*") shall have the right to provide written notice to the *Society* that he or she is ready and wishes to become employed by the *Society* at the *DIA* (for purposes of this Subsection K1(a), the "*request notice*"), provided that such right shall not apply to any *Absent Non-Unionized Employee* who is not *actively employed* (I) on the execution date of this *agreement* on account of a physical or mental illness or injury lasting one year or more as of the execution date of this *agreement* or (II) on the *offer date* on

account of an unapproved or unexcused absence of more than fifteen (15) days as of the *offer date*.

(B) With regard to any employee described in Subsection K1(a)(2)(A) as to whom such right is applicable (a "*qualified non-unionized employee*"), any such *request notice* must be actually received by the *Society* prior to the *effective date* in order for such *request notice* to be effective. Upon receipt of any *request notice* from a *qualified non-unionized employee* in accordance with this Subsection K1(a)(2), the *Society* shall offer employment to such *qualified non-unionized employee*.

(C) Any offer of employment made by the *Society* to a *qualified non-unionized employee* in accordance with this Subsection K1(a)(2) shall be deemed accepted only if such *qualified non-unionized employee* advises the *Society* in writing of his or her acceptance thereof within the thirty (30)-day period after such offer was made and in fact returns to the active performance of services at the *DIA* within such period. By so accepting such an offer, such *qualified non-unionized employee* shall be deemed to have granted permission for the *City* to release to the *Society* such *qualified non-unionized employee's* complete employment records with the *City*. The commencement date of any such *qualified non-unionized employee's* employment with the *Society* shall be the later of the date on which such *qualified non-unionized employee* in fact returns to the active performance of services at the *DIA* or the *effective date*. Any such employee who does not so accept such an offer shall be continued in *City* employment in accordance with *City* policies and procedures.

- (3) The *Society* shall not, however, be obligated to offer employment to the one non-unionized employee operating in the *DIA's City* human resources function.
- (4) For purposes of this Subsection K1, a non-unionized employee is considered "*actively employed*" on a given date if the employee is (A) actively performing services at the *DIA* on such date or (B) employed at the *DIA* but absent from work on such date on account of an absence that was (1) approved or excused in accordance with applicable employment policies and procedures (other than an absence on account of a physical or mental illness or injury lasting two (2) weeks or more), including any such approved or excused absence on account of a regularly scheduled

day off, a vacation day, a regular paid sick day (other than on account of a physical or mental illness or injury lasting two (2) weeks or more), a holiday, a funeral leave, a leave for jury duty, a military leave, a suspension or a personal leave, or (II) unexcused but fifteen (15) days or less.

- (b) All *City* employees to be offered employment by the *Society* pursuant to Subsection K1(a)(1) or (2), *supra*, shall be offered employment in jobs at levels comparable to their present jobs and with salaries at least equal to their salary levels on the *effective date*, and the *Society* shall hire all those non-unionized *City* employees who accept such offers of employment in accordance with Subsection K1(a)(1) or (2), *supra*. Further, employees who so accept such offers shall receive from the *Society*, as of the date of commencement of their employment, benefits at least equal in the aggregate to the *City* benefits described in Exhibit 16 hereto. The *City* acknowledges that the benefits set forth in Exhibit 16 in the column titled "NPC" are at least equal in the aggregate to the *City* benefits described in Exhibit 16 hereto.
- (c) The *City* shall not be required to make any changes in its benefits programs as a consequence of the contents of Exhibit 16 hereto, nor shall the *City* be required to pay any benefits which may become due and owing to former *City* non-unionized employees as a consequence of their service to the *Society* after the *effective date*, except as contemplated by Subsection K3, *infra*. The *City* and the *City's* benefits plans shall, however, continue to be required to pay any benefits due and owing at any time after the *effective date* to former non-unionized *City* employees as a consequence of their service to the *City* prior to *effective date*.
- (d) Upon the *Society's* request, the *City* will assist the *Society*, for a two (2) year transition period after the *effective date*, in developing positive employer-employee relations with former *City* non-unionized employees hired by the *Society*.

2. **Employment of Unionized City Employees; Negotiation with Labor Organizations.**

- (a) (1) (A) On the date that is forty-five (45) days prior to the *effective date* (for purposes of this Subsection K2(a), the "*offer date*"), the *Society* shall offer employment to all unionized *City* employees who are actively employed (as defined in Subsection K2(a)(4), *infra*) on the *offer date*. Each such offer shall be conditioned on such employee being *actively employed* on the *effective date*.

(B) Such an offer by the *Society* shall be deemed accepted only if such employee advises the *Society* in writing of his or her acceptance thereof no later than fifteen (15) days prior to the *effective date*. By so accepting such an offer, such employee shall be deemed to have granted permission for the *City* to release to the *Society* such employee's complete employment records with the *City*. The commencement date of any such employee's employment with the *Society* shall be deemed to be the *effective date*. Any such employee who does not so accept such an offer shall be continued in *City* employment in accordance with *City* policies and procedures.

(2) (A) Any unionized *City DIA* employee who is not *actively employed* on the *offer date* (an "*Absent Unionized Employee*") shall have the right to provide written notice to the *Society* that he or she is ready and wishes to become employed by the *Society* at the *DIA* (for purposes of this Subsection K2(a), the "*request notice*"), provided that such right shall not apply to any *Absent Unionized Employee* who is not *actively employed* (I) on the execution date of this *agreement* on account of a physical or mental illness or injury lasting one year or more as of the execution date of this *agreement* or (II) on the *offer date* on account of an unapproved or unexcused absence of more than fifteen (15) days as of the *offer date*.

(B) With regard to any employee described in Subsection K2(a)(2)(A) as to whom such right is applicable (a "*qualified unionized employee*"), any such *request notice* must be actually received by the *Society* prior to the *effective date* in order for such *request notice* to be effective. Upon receipt of any *request notice* from a *qualified unionized employee* in accordance with this Subsection K2(a)(2), the *Society* shall offer employment to such *qualified unionized employee*.

(C) Any offer of employment made by the *Society* to a *qualified unionized employee* in accordance with this Subsection K2(a)(2) shall be deemed accepted only if such *qualified unionized employee* advises the *Society* in writing of his or her acceptance thereof within the thirty (30)-day period after such offer was made and in fact returns to the active performance of services at the *DIA* within such period. By so accepting such an offer, such *qualified unionized employee* shall be deemed to have granted permission for the *City* to release to the *Society* such *qualified*

unionized employee's complete employment records with the *City*. The commencement date of any such *qualified unionized employee's* employment with the *Society* shall be the later of the date on which such *qualified unionized employee* in fact returns to the active performance of services at the *DIA* or the *effective date*. Any such employee who does not so accept such an offer shall be continued in *City* employment in accordance with *City* policies and procedures.

- (3) The *Society* shall not, however, be obligated to offer employment to the three unionized employees operating in the *DIA's City* accounting function or to the two unionized employees operating in the *DIA's City* human resources function.
 - (4) For purposes of this Subsection K2, a unionized employee is considered "*actively employed*" on a given date if the employee is (A) actively performing services at the *DIA* on such date or (B) employed at the *DIA* but absent from work on such date on account of an absence that was (I) approved or excused in accordance with the applicable collective bargaining agreement (other than an absence on account of a physical or mental illness or injury lasting two (2) weeks or more), including, without limitation, any such approved or excused absence on account of a regularly scheduled day off, a vacation day, a regular paid sick day (other than on account of a physical or mental illness or injury lasting two (2) weeks or more), a holiday, a funeral leave, a leave for jury duty, a military leave, a suspension or a personal leave, or (II) unexcused but fifteen (15) days or less.
- (b) All *City* employees to be offered employment by the *Society* pursuant to Subsection K2(a)(1) or (2), *supra*, shall be offered employment in jobs at levels comparable to their present jobs and at their same salary and benefit levels on the *effective date*, and the *Society* shall hire all those unionized *City* employees who accept such offers of employment in accordance with Subsection K2(a)(1) or (2), *supra*.
 - (c) The *City* and the *City's* benefits plans shall continue to be required to pay any benefits due and owing at any time after the *effective date* to former *City* unionized employees as a consequence of their service to the *City* prior to the *effective date*.
 - (d) (1) Insofar as they concern *City* employees at the *DIA*, the collective bargaining agreements existing as of the *effective date* between

the *City* and the various labor organizations representing such *City* employees shall at the *effective date* continue to be in force and effect but shall be between those labor organizations and the *Society* by operation of the successor clauses in those agreements. Any modifications in such collective bargaining agreements as a result of the change in employer, and any other amendments thereto, shall be the subject of negotiations between the *Society* and the labor organizations representing such employees.

- (2) During the period between the execution date and the *effective date* of this *agreement*, (A) the *City* shall not enter into any amendments of any of the collective bargaining agreements between the *City* and the various labor organizations representing *City* employees at the *DIA* insofar as such agreements concern *DIA* employees without the prior written consent of the *Society*, and (B) the *City* shall give the *Society* written notice of any other agreements between the *City* and any such labor organization concerning a covered *DIA* employee.
 - (3) During the *contract term*, the *Society* shall have the sole right and duty to negotiate with labor organizations concerning covered *Society* employees as required by law.
 - (4) To the extent permitted by law and if agreed to by the *Society* and the applicable labor organization representing covered *DIA* employees in a collective bargaining agreement, or any amendment thereto, executed during the *contract term*, the *Society* shall provide a copy of such agreement or amendment to the *Commission*, which shall submit such agreement or amendment to the *City* Clerk.
- (e) Upon the *Society's* request, the *City* will assist the *Society*, for a two (2) year transition period after the *effective date*, in developing positive labor-management relations with former *City* unionized employees hired by the *Society*.
 - (f) The *City* represents and warrants that the terms and provisions of this Subsection K2 have been approved by the applicable labor organizations representing unionized *City* employees at the *DIA*.

3. Limited Right to Return to City Employment.

- (a) (1) During the sixteen (16) month period following the *effective date* ("*Initial Return Period*"), any *City* employee who accepts the *Society's* offer of employment pursuant to Subsection K1, *supra*, or Subsection K2, *supra* (each, a "*Transferred Employee*"), shall have an automatic right to return to employment with the *City* in accordance with the terms of this Subsection K3 unless the *Transferred Employee* has been discharged from the *Society's* employment during the *Initial Return Period* or during such period has commenced receiving *City* retirement benefits.
- (2) (A) In the event that the *Society* has discharged a *Transferred Employee* during the *Initial Return Period* and such discharge becomes final, (I) as a result of discharge of the *Transferred Employee* during the probation period (for unionized employees) or the orientation period (for non-unionized employees), (II) through failure of the *Transferred Employee* to appeal the discharge or (III) through confirmation of the discharge by arbitration pursuant to the *Society's* employment policies and procedures or collective bargaining agreements, as applicable, the *Transferred Employee* shall not have the right to return to *City* employment.
- (B) In the event of reversal of the *Society's* discharge of the *Transferred Employee* pursuant to arbitration under the *Society's* employment policies and procedures or collective bargaining agreements, as applicable, the *Transferred Employee* shall have the right to return to *City* employment in accordance with the terms of this Subsection K3, provided that the *Transferred Employee* so requests a return to *City* employment during the *Initial Return Period* or, in the event the arbitrator's decision is rendered after or less than thirty (30) days prior to the expiration of the *Initial Return Period*, during the thirty (30) days after the arbitrator's decision is rendered.
- (3) In addition, during the two years after the *Initial Return Period*, the *Society* shall provide written notice to any *Transferred Employee* of elimination of his or her position with the *Society*. Such *Transferred Employee* shall thereafter have the right to return to *City* employment in accordance with the terms of this

Subsection K3, provided that the *Transferred Employee* so requests a return to *City* employment during the thirty (30)-day period after the date of such notice of elimination of his or her position ("*Contingent Return Period*") in accordance with the terms of this Subsection K3.

- (b) (1) Any *Transferred Employee* eligible to return to *City* employment in accordance with Subsection K3(a), *supra*, who elects to do so, shall, during the time periods provided for in Subsection K3(a), *supra*, hand deliver a written request therefor to the Director of the *City's* Human Resources Department, with hand delivery of a copy to the *Society's* Human Resources Department. By such a request to return to *City* employment, the *Transferred Employee* shall be deemed to have granted permission for the *Society* to release to the *City* such *Transferred Employee's* complete employment records with the *Society*.
- (2) Each of the *City* and the *Society* shall immediately notify the other upon receipt of any such request for return to *City* employment. The *Society* shall advise the *City* of any discharge by the *Society* of a *Transferred Employee* who has made a written request to return to *City* employment.
- (c) (1) Each *Transferred Employee* who makes a request to return to *City* employment in accordance with this Subsection K3 shall automatically, without the necessity of any other action, become an employee of the *City* and be terminated from employment with the *Society* for all purposes (including benefits), on the earlier of (A) the date of re-entry into *City* service or (B) the thirtieth (30th) day after the date on which the *Transferred Employee's* request was hand delivered to the Director of the *City's* Human Resources Department (such earlier date, the "*re-transfer date*").
- (2) The *City* shall place such *Transferred Employee* in a position classification, other than at the *DIA* or any of the *DIA* stores, for which the *Transferred Employee* had displacement rights under the applicable collective bargaining agreement or the Civil Service Rules (or in another classification for which the *Transferred Employee* is qualified), at as similar a wage or salary rate as possible to that in effect for such *Transferred Employee* on the day before the *effective date* of the *agreement*.

- (3) The time during which such a *Transferred Employee* was employed by the *Society* from and after the *effective date* shall be counted by the *City* as service with the *City* for purposes of seniority and all benefits.
- (4) Effective upon the *re-transfer date* and except as provided in Exhibit 16 hereto, neither the *Society* nor any of the *Society's* benefits plans shall have any obligation whatsoever (including with regard to the period of time during which the *Transferred Employee* was employed by the *Society* from and after the *effective date* but prior to the *re-transfer date*) with respect to any such *Transferred Employee*, except for (A) obligations to such *Transferred Employees* arising from acts or omissions by the *Society* in violation of any law, regulation or collective bargaining agreement from and after the *effective date* but prior to the *re-transfer date* or (B) claims for welfare and other *Society* non-pension benefits incurred from and after the *effective date* but prior to the *re-transfer date* and actually paid on account of such period.
- 2/1/98 - 8/1/99
- (d) If, during the *Initial Return Period*, a *Transferred Employee* requests in writing a *City service retirement* to begin as soon as administratively feasible after such request, the time during which such *Transferred Employee* was employed by the *Society* from and after the *effective date* shall be counted by the *City* as service with the *City* for purposes of retirement benefits. The *Society* pension benefit of a *Transferred Employee* who requests such a *City service retirement* during the *Initial Return Period*, but who remains employed by the *Society* after beginning to receive such *City service retirement* benefits, shall be based on service and pay with the *Society* only, starting at zero (0) on the *effective date*; but such *Transferred Employee's* service time and seniority with the *City* which existed as of the *effective date* shall not be lost for other *Society* employment benefits and purposes (e.g., retiree medical, retiree dental and vacation time).
- (e) Any *Transferred Employee* who does not request a return to *City* employment in accordance with this Subsection K3 before expiration of the time periods provided for in Subsection K3(a), *supra*, shall continue to be considered separated from *City* service by layoff, with applicable rights as in effect on the day before the *effective date*.

- (f) To the extent that this Subsection K3 may apply to unionized *Transferred Employees*, the *City* represents and warrants that the terms and provisions of this Subsection K3 have been approved by the applicable labor organizations representing such *Transferred Employees*.
4. **Financial Responsibility for Pensions Earned by Former City Employees.** The *City* shall be financially responsible for only those *City* General Retirement System vested pension benefits which the former *City* employees are entitled to receive as a result of the services they provided as *City* employees in accordance with the applicable retirement regulations in effect while they were *bona fide City* employees prior to the *effective date*, except as contemplated by Subsection K3(c)(3) or (d), *supra*. Any pension amounts deemed payable as a consequence of service provided to the *DIA* under the employment of the *Society* from and after the *effective date*, even if those benefits become pension obligations as a result of utilizing the *City* General Retirement System pension calculation factors, shall be entirely the financial obligation of the *Society* and not that of the *City* or the *City* General Retirement System, except as contemplated by Subsection K3(c)(3) or (d), *supra*.
5. **IRS Approval of Pension Plan(s).** As soon as reasonably practicable, but in no event later than sixty (60) days after the *effective date*, the *Society* shall request a favorable determination from the Internal Revenue Service ("*IRS*") as to the tax-qualified status of pension benefit plans(s) which the *Society* will offer *City* employees who elect to join the *Society's* work force at the *DIA*. In the event that the *IRS* does not issue a favorable determination as to the tax-qualified status of the initial pension benefit plan(s) that the *Society* will offer *Transferred Employees*, the *Society* shall be obligated, within a reasonable period of time after the *IRS* rejection, to implement whatever steps may be necessary to obtain a favorable determination from the *IRS*.
6. **Hiring of Personnel.** During the *contract term*, the *Society* shall hire and employ such personnel as shall, in its judgment, be required to operate, manage and maintain the *DIA* in accordance with the provisions of this *agreement* and, in connection therewith, shall have sole authority and responsibility to determine the personnel policies and practices of the *DIA*, consistent with the *Society's* obligations under Subsections F25 through F27 and F29, *supra*.
7. **Society's Director and Deputy Director of the DIA.** The *Society* shall recommend to the *Commission* and the Mayor of the *City* candidates for appointment to the positions of the *Society's DIA* director and the *Society's DIA* deputy director. The *Commission* and the Mayor shall have the authority to approve or disapprove any such candidates, as provided in Subsection G10, *supra*. Once approved, the *Society's DIA* director and the *Society's DIA* deputy

director shall serve on terms and conditions determined by the *Society*. In addition, the *Society's DIA* director and the *Society's DIA* deputy director may be removed by the Mayor and the *Commission* but only if both the Mayor and the *Commission* determine that such director or deputy director has engaged in actions that are adverse to the best interests of the *City*. If the *Society* disputes any determination made or action taken pursuant to this Subsection K7, the *Society* will have the right to bring any such dispute to arbitration, as contemplated by Subsection M1, *infra*.

8. **Cooperation in Employee Transitions.** The *City* and the *Society* acknowledge that transfers of employees from the *City* to the *Society* and back to the *City* involve difficult regulatory and economic issues. Therefore, the *City* and the *Society* shall work together in good faith to effectuate the intent of Subsections K1 through K3, *supra*, in connection with transfers of employees from the *City* to the *Society* and from the *Society* back to the *City*.

L. TERM OF AGREEMENT; TERMINATION

1. **Initial Term.** The initial term of this *agreement* commences on the *effective date* and expires on June 30, 2018. The foregoing is not, however, intended to limit the rights of the *City* or the *Commission* under this *agreement*, including any of their rights under the provisions of this *agreement* relating to termination for material breach in accordance with the terms of this Section L and Section M, *infra*, or the *Commission's* rights of oversight in accordance with Section G, *supra*.
2. **Extensions of Term.** Provided this *agreement* is not earlier terminated pursuant to Subsection L3, *infra*, or by mutual consent of the parties, during the twelve-month period commencing on the sixteenth anniversary of the *effective date* and, if this *agreement* is extended beyond its initial term or any renewal term pursuant to this Subsection L2, during the twelve-month period commencing on the sixth anniversary of the first day of such extended term, the question whether this *agreement* will be extended for an additional ten years beyond the expiration of its then-current term shall be submitted to and voted upon by the *City Council*. Unless, during any such twelve-month period, the *City Council* votes against any such extension, this *agreement* will be extended and continue in effect after its then-current term for an additional ten-year period.
3. **Termination.** The *City* or the *Society* may terminate this *agreement* upon ninety (90) days' prior written notice in the event of a material breach by the other party of its obligations hereunder unless the cure for the material breach is commenced within ninety (90) days of receipt of the notice of termination. All

cures must be completed within a time which is reasonable, depending upon the nature of the breach, and in no event shall a cure period exceed one (1) year, unless the parties otherwise agree in writing. During the cure period described in this Subsection L3, the parties will negotiate in good faith to attempt to resolve the matter or matters in dispute. Failure to complete a cure within a one-year or mutually agreed upon extended period shall be grounds for termination consistent with the terms of this *agreement*.

4. **Material Breach.** An uncured breach by the *Society* of any the following provisions may be deemed a material breach by the *City*:
 - (a) Subsections B1-B4;
 - (b) Subsections E2 and E3;
 - (c) Subsections F1-F29, F32-F40, and F42-F47;
 - (d) Subsections I1-I3;
 - (e) Subsections J1 and J3;
 - (f) Subsections K1, K2, K4-K8;
 - (g) Subsection N1; and
 - (h) Subsection O3.

5. **Cure.** For the purposes of this *agreement*, a breach will be considered to have been "cured" if (a) to the greatest extent practicable, the non-defaulting party is placed in substantially the position as it was vis-a-vis the defaulting party prior to the breach and (b) the defaulting party takes steps that will make it less probable for a similar breach to occur in the future, which steps either have been agreed upon by the parties or have been determined in accordance with Subsection L6 and Section M, *infra*.

6. **Resolution of Disputes.**
 - (a) If the parties cannot resolve a disagreement with respect to compliance with the terms of this *agreement*, other than a material breach (the procedure concerning which is described in Subsection L6(b), *infra*), the parties shall submit the disagreement to binding arbitration in accordance with Section M, *infra*.

- (b) In the event a party (the "*complaining party*") alleges that a material breach of this *agreement* by the other party has not been cured within the time specified in Subsection L3, *supra*, the *complaining party* shall give written notice of such allegation to the other party within 45 days after expiration of the cure period. The parties shall then attempt in good faith to resolve the matter or matters in dispute. In the event that the parties, after negotiating in good faith for a period of 30 days, are unable to resolve the disputed matters, a determination of whether an uncured material breach of this *agreement* has occurred shall be resolved as provided in Section M, *infra*. The *complaining party* shall be required to serve upon the other party a written demand for arbitration within 45 days after expiration of such negotiation period. Upon request of either party, in matters that are arbitrated pursuant to Subsections M1 and M2(b) of this *agreement*, the arbitrators shall determine the steps to be taken to cure the material breach.

7. **Effect of Termination.** Upon the termination of this *agreement*,

- (a) the *Society* shall deliver to the *City* the possession, custody and control of the *DIA building*, the *employee parking lot* and the *City art collection* in no worse condition than they were at the *effective date*, allowing for normal wear and tear or, with respect to the *City art collection*, deterioration which could not be prevented with the exercise of reasonable care in accordance with state-of-the-art practices employed by leading fine arts museums;
- (b) the *Society* shall return to the *City* the title to, possession of, custody of and control of all assets transferred to the *Society* pursuant to Subsection H13, *supra*, and not previously sold or disposed of in accordance with this *agreement* or in the ordinary course of the *Society's* business, or lost or destroyed, together with replacements acquired during the *contract term*. This Subsection is not intended to limit or diminish the *Society's* obligations under this *agreement*. The aggregate value of those items transferred to the *City* pursuant to this Subsection L7(b) shall be substantially equivalent to the value of the items of personal property transferred to the *Society* as of the *effective date*;
- (c) the *Society's* right to utilize the *City intellectual property* will terminate in accordance with the licensing agreement, which is Exhibit 8 hereto;
- (d) the parties will resolve in good faith, and make payment for, any obligations outstanding under this *agreement* on the date of termination; and

- (e) the *Society* shall retain all of the *Society properties* and the *Society intellectual property*, including the possession, custody and control thereof, which assets shall then continue to be used by the *Society* for the benefit of the *DIA*.

M. ARBITRATION

1. **Arbitration.** Any controversy or *claim* arising out of or relating to this *agreement*, or the alleged breach hereof, other than those described in Subsection M2(a), *infra*, that is not cured by the defaulting party or resolved by the parties shall be resolved by binding arbitration administered by the AAA under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Any such controversy or *claim* shall be submitted to a panel of three (3) AAA arbitrators. The fees and expenses of the arbitrators shall be shared equally by the parties. The arbitrators shall provide any remedy at law or in equity, if any, they deem appropriate under the circumstances, including termination of this *agreement*, compensatory money damages, specific performance and/or injunctive relief.
2. **Covenant Not to Sue.**
 - (a) Where a party asserts an uncured or unresolved *claim* arising out of or relating to this *agreement*, based on gross negligence or willful misconduct, the aggrieved party must first present such a *claim* to a panel of three (3) AAA arbitrators for a determination based on an evidentiary hearing in accordance with the AAA's Commercial Arbitration Rules whether there is a likelihood that there has been gross negligence or willful misconduct. In the event that the arbitrators find that gross negligence or willful misconduct likely occurred, then the aggrieved party may file a civil action or suit at law or in equity against the defaulting party. The arbitrators' finding that gross negligence or willful misconduct likely occurred shall not be admissible in any ensuing civil action or suit at law or in equity. The fees and expenses of the arbitrators shall be shared equally by the parties.
 - (b) In lieu of initiating a civil action or suit at law or in equity as provided in Subsection M2(a), *supra*, the non-defaulting party may elect to proceed to binding arbitration, which arbitration shall be in accordance with Subsection M1, *supra*.
 - (c) For and in consideration of the mutual obligations, promises and covenants herein undertaken by the parties hereto, the *City* and the

Society hereby covenant that, with the exception of actions or suits based upon gross negligence or wilful misconduct in the performance of the terms of this *agreement*, as provided for in Subsection M2(a), *supra*, each will refrain from commencing any civil action or suit, at law or in equity, against the other party on account of any action or cause of action relating to, or that arises in any way, directly or indirectly, out of this *agreement*. In any court action predicated on gross negligence or willful misconduct, the parties reserve the right to seek any and all remedies provided in law or by equity.

N. NO ASSIGNMENT; NO THIRD-PARTY BENEFICIARIES

1. No Assignment.

- (a) The *Society* shall not assign its rights, interests or obligations under this *agreement* without the prior written consent of the *City*, as evidenced by a resolution of the *City Council* approving the assignment. The foregoing is not intended, however, to limit the right of the *Society*, consistent with other provisions of this *agreement* (including those of Subsection F28), to enter into subcontracts for the performance of portions of its obligations hereunder, but the *Society* in any event shall remain responsible to the *City* for the performance of all of its obligations hereunder.
- (b) The *City* shall not assign its rights, interests or obligations under this *agreement* without the prior written consent of the *Society*.

2. **No Third-Party Beneficiaries.** This *agreement* is for the sole benefit of the parties and their permitted successors and assigns, and no other person shall be deemed to be a third party beneficiary under or entitled to derive any benefit from this *agreement*.

O. AMENDMENTS; WAIVERS; FURTHER ASSURANCES

1. **Amendments.** This *agreement* may be amended only by an instrument in writing (a) signed by a duly authorized representative of each party and (b) which has received the approvals required by the *City Charter*.
2. **Waivers of Performance.** Provisions of this *agreement* may be waived only by an instrument in writing (a) signed by a duly authorized representative of each party and (b) which has received the approvals required by the *City Charter*. Further, a waiver by either party of a breach of any obligation contained in this

agreement shall not constitute a waiver of such obligation respecting any subsequent breach of that obligation.

3. **Further Assurances.** From time to time, at the request of either party to this *agreement*, the other party shall take such actions as may be reasonably requested in order to consummate the transactions contemplated by this *agreement*, but the party receiving the request shall be under no obligation to incur any expense, waive any condition to any of its obligations under this *agreement*, or to waive any breach of this *agreement* by the requesting party.

P. APPLICABLE LAW; RULES OF CONSTRUCTION

1. **Applicable Law.** This *agreement* shall be governed by and construed in accordance with the laws of the State of Michigan.
2. **Contra Proferentum Not Applicable.** The doctrine of *contra proferentum* shall not apply to this *agreement*.
3. **Headings.** The headings in this *agreement* are for convenience only and shall not affect the construction of this *agreement*.
4. **Severability.** If any court, agency, commission, legislative body or other authority of competent jurisdiction declares invalid, illegal or unenforceable any portion of this *agreement*, or its application to any person, that decision shall not affect the validity of the remaining portions of this *agreement*.

Q. NOTICES

1. **Addresses.** Except as otherwise provided in this *agreement*, all notices and other communications required by or related to this *agreement* shall be in writing and directed as follows:

To the Society:
Founders Society Detroit Institute of Arts
5200 Woodward Avenue
Detroit, Michigan 48202
Attention: Group Director of Finance and Administration
Telecopier No.: 313-833-0343

With a copy to:

Richard A. Manoogian
Chairman and Chief Executive Officer
Masco Corporation
21001 Van Born Road
Taylor, Michigan 48180
Telecopier No.: 313-374-6134

To the City:

Deputy Mayor
City of Detroit
1126 City-County Building
Detroit, Michigan 48226
Telecopier No.: 313-224-2129

2. **Change of Address.** Either party may change its address and/or telecopier number for the purposes of this Section Q upon written notice to the other party.
3. **Delivery Methods.** The following methods of delivery are acceptable: hand-delivery; telecopier transmission; overnight commercial air courier (such as FedEx or Airborne Express); or mail (either certified, return receipt requested, registered or first-class mail). Any such notice, communication or delivery shall be deemed delivered and effective upon the earlier to occur of the following:
 - (a) actual delivery; or
 - (b) the same day as confirmed telecopier transmission (or the first business day thereafter if telecopied on a Saturday, Sunday or legal holiday).

R. FORCE MAJEURE; OTHER EXCUSED NON-PERFORMANCE

1. **Force Majeure.** Neither party shall be liable for any delay in performance of any obligation under this *agreement* (other than the payment of money) or any inability to perform an obligation under this *agreement* (other than the payment of money) if and to the extent that such delay in the performance or inability to perform is caused by a *force majeure event*, so long as the party claiming the *force majeure event* is working diligently to terminate the *force majeure event*. A party claiming a *force majeure event* as an excuse for delay or nonperformance under this *agreement* shall provide the other party with prompt notice of the initiation of the *force majeure event*, when it is expected to terminate, and of the termination of such event. A *force majeure event* shall be deemed to be terminated with respect to a particular delay or

nonperformance when its effects on such future performance have been substantially eliminated.

2. **Other Excused Non-Performance.** The *Society* will not be deemed to be in violation of its obligations under this *agreement*, to the extent that the *Society's* failure to comply with such obligations arises because (a) the insurance required by this *agreement* is insufficient to cover any first-party *claims* relating to the *City art collection*, the *DIA building*, the *Frederick lot* or the *employee parking lot*, (b) insufficient funds are available for the *Society* to comply with such obligations because the *City* has not sold the remaining bonds from the August 1988 authorization described in Subsection H6, *supra*, or (c) the deficiency, defect or item to be preserved, maintained, repaired or improved in the *DIA building*, the *Frederick lot* or *employee parking lot* relates to a latent defect of which the *Society* did not have knowledge on the execution date of this *agreement*.

S. INTEGRATION CLAUSE

1. **Integration Clause.** This *agreement* (including the attached Exhibits), the Abrogation Agreement between the *Society* and the *City* in the form of Exhibit 1 which is being executed contemporaneously with the execution of this *agreement*, and the Licensing Agreement between the *Society* and the *City* in the form of Exhibit 8 which is being executed contemporaneously with the execution of this *agreement* constitute the entire agreement between the parties concerning the subject matter hereof. There are no promises, terms, conditions or obligations other than those contained herein or therein. This *agreement* (including the attached Exhibits) and such abrogation and licensing agreements supersede all previous agreements, communications, negotiations and representations, whether oral or written between the *City* and the *Society*.

IN WITNESS WHEREOF, the City and the Society, by and through their authorized officers and representatives, have executed this agreement as of the date stated on the first page of this agreement.

WITNESSES:

Tania Bennett

Shirley A. Jagoda
Shirley A. Jagoda

Tania Bennett

Shirley A. Jagoda
Shirley A. Jagoda

Tania Bennett

Shirley A. Jagoda
Shirley A. Jagoda

CITY OF DETROIT ARTS COMMISSION

By: A. Alfred Taubman

Title: President

CITY OF DETROIT ARTS DEPARTMENT

By: Maurice D. Parrish

Title: Interim Director

FOUNDERS SOCIETY DETROIT INSTITUTE OF ARTS

By: Richard A. Manoogian

Title: President

THIS AGREEMENT IS NOT VALID OR AUTHORIZED UNTIL APPROVED BY RESOLUTION OF THE DETROIT CITY COUNCIL AND SIGNED BY THE PURCHASING DIRECTOR.

THIS CONTRACT WAS APPROVED
BY THE CITY COUNCIL ON

Date: November 26, 1997

PURCHASING DIVISION

By: Carolyn Alney per
Carolyn Alney
Title: Purchasing Director
Date: 12/12/97

APPROVED BY LAW DEPARTMENT
PURSUANT TO SEC. 6-406 OF THE
CHARTER OF THE CITY OF DETROIT

By: Phyllis A. James
Phyllis A. James
Title: Corporation Counsel

FINANCE DEPARTMENT

No.: 77009 Date: 12/12/97

I hereby certify that an appropriation has
been made to cover the expenses to be
incurred under this Contract.

By: Valerie Johnson
Valerie Johnson
Title: Finance Director