

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

<p>MARY MISS</p> <p>Plaintiff</p> <p>v.</p> <p>EDMUNDSON ART FOUNDATION, INC., d/b/a DES MOINES ART CENTER</p> <p>Defendant</p>	
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COMES NOW, the Plaintiff, Mary Miss, by and through the undersigned, and submits the following brief in support of a preliminary injunction in this matter.

INTRODUCTION AND STATEMENT OF INTENT ..... 2

RELEVANT FACTUAL BACKGROUND..... 2

I. The Art Center’s Misleading Narrative Regarding the True Condition of GPDS Lacks Support. .... 2

II. Deaccession Is Not the Norm and Is Not Warranted..... 3

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It is not clear from the documents produced by the Art Center whether Neumann Brothers believes the site is in such a poor condition that it must be torn out in its entirety.

In fact, it appears that the only analysis commissioned and received by the Art Center in 2023 or 2024 was from Raker Rhodes Engineering (hereinafter "Raker Rhodes"). . . at 190-191. The analysis states that Raker Rhodes "walked through" GPDS in October 2023. . . . It nowhere reports undertaking any sort of structural analysis, instead merely stating that in the opinion of engineer John Rhodes, the wood on the warming hut and the wood comprising the southern boardwalk needs to be replaced. Mr. Rhodes updated his report in February of 2024; yet, that update states he was still relying on the "walk through" from October of 2023. . . . at 190.

Mr. Rhodes did not advise replacing the entirety of GPDS. The Art Center has no documentation from any source suggesting GPDS is in such poor condition that an entire rebuild is necessary, and yet, the estimate from Neumann Brothers addresses only the cost for rebuilding almost the entire project.

All other documentation from the Art Center points to the existence of reasonable, much less costly steps, that it could take for the reasonable maintenance and upkeep of GPDS. For example, a 2004 condition report opines that the Art Center could undertake preventative maintenance at GPDS for \$2,500 per year. . . ., pg. 106. Much more recently, in July of 2022, the Midwest Art Conservation Center [MACC] noted that GPDS is "in fair condition overall, with some elements in poor condition due to structural instability." . . . at 138. MACC also urged the Art Center to "Develop a comprehensive maintenance plan that includes regular graffiti removal, hardware checks, pump maintenance, repair or replacement of broken elements, etc." . . .

To date, the Art Center has declined to share the entirety of MACC's recommendations, but from what is known, MACC informed the Art Center that MACC could begin caring for GPDS for as little as \$1,600.00 in under 10 hours. . . .

"Deaccession" is the official removal of a listed item from the holdings of a library,

museum, or art gallery. Deaccession is not something lightly undertaken by such entities.

Marie C. Malaro & Ildiko Pogany DeAngelis, A Legal Primer on Managing Museum Collections, 256-66 (3d Ed. 2012); Walter G. Lehmann, Museum Administration, Law and Practice, 508-12 (2d Ed. 2022). When deaccession occurs, the expected result is a transfer donation, trade, or sale of the deaccessioned piece to another reputable owner, at 23, IV(A), not its destruction.

The Art Center a





pg. 5-6]; \_\_\_\_\_, 2015 WL 12791408 at \*1 (D. Cal., June 3, 2015).

Referred to in this Circuit as the \_\_\_\_\_ factors, in order to obtain a preliminary injunction the moving party must show: (1) threat of irreparable harm absent an injunction; (2) that the balance of harms between the harm movant seeks to prevent and the harm imposed on the opposing party by the granting of an injunction; (3) that the movant is likely to succeed on the merits; and; (4) that the public interest favors the entry of injunctive relief. \_\_\_\_\_, 640 F.2d 109, 113 (8<sup>th</sup> Cir. 1981).

While all elements must be balanced, the “likelihood of success” is typically considered the most important factor. However, it is a “speculative” question, and therefore no “wooden or mathematical” formula exists for determining a likelihood of success on the merits. \_\_\_\_\_, 140 F.3d 1175, 1179 (8<sup>th</sup> Cir. 1998). Rather, “a court should flexibly weigh the case’s particular circumstances to determine” the appropriateness of a preliminary injunction. \_\_\_\_\_.

If a material factual controversy exists, the Court must hold an evidentiary hearing prior to the issuance of a preliminary injunction.

\_\_\_\_\_, 316 F.3d 737, 744 (8<sup>th</sup> Cir. 2002) (citation omitted). During the hearing, the Federal Rules of Evidence should be less strictly applied, and an injunction may issue even if the proffered evidence in support of the injunction would ultimately be found to be inadmissible. \_\_\_\_\_, 2016 WL 4098541 at \*3, fn. 1 (N.D. Iowa July 28, 2016) (quoting \_\_\_\_\_, 602 F.3d 879, 885 (7<sup>th</sup> Cir. 2010)); \_\_\_\_\_, 2020 WL 6948364 at \*1 (N.D. Iowa Oct. 14, 2020) (finding affidavits submitted at a preliminary injunction hearing also to not need to meet Rules of Civil Procedure or Evidence requirements, but rather the contents of the affidavit go to its weight) (citing





favor of the moving party, and thus an injunction is warranted.

640 F. Supp. 386, 390 (D. Minn 1986)

("When the claimed injuries resulting from the issuance of an injunction to the non-moving party are as speculative on one hand and as disingenuous on the other, the Court

as its less well-

1990 U.S.C.C.A.N. 6915, 6927 (emphasis added). The record suggests Congress anticipated the issue of site-specific art and wanted VARA protection to apply if “removal” of the art would cause “intentional distortion, mutilation, or modification,”<sup>5</sup> as would happen in this case.

The First Circuit’s categorical exclusion of any art that can be said to be site-specific is also incorrect in that it fails to recognize VARA’s desire to promote art:

Finally, the holding should not apply here because it is entirely factually distinguishable from this case. In , the defendant owner had proposed to move the artwork to a different location to satisfy the artist. 288 F. Supp.2d at 99. By contrast, the Art Center's intended course of action involves the destruction, and not the presentation, of the art at issue, in direct contravention of the artist's desire to protect GPDS (not to mention her contractual rights). There is no plan to relocate GPDS – the plan is to destroy it.

## 2. GPDS Is Contractually Protected

Mary Miss's request for a preliminary injunction is also predicated on her contractual rights her agreement with the Art Center that prohibits destruction of GPDS without her approval. There is a strong likelihood that she will succeed in holding the Art Center accountable for its alleged breach in destroying GPDS and in failing to maintain it up to this point. This is so given the clear language of the contract between the parties and the ease with which it can be read in tandem with the Art Center's 28E Agreement with the City of Des Moines. Because the factors are identical, the Court's analysis and conclusion that Mary Miss is likely to prevail on the merits in its TRO Order applies with equal force here to support the issuance of a preliminary injunction.<sup>6</sup>

Iowa law is well-settled that "[t]he cardinal rule of contract interpretation is the determination of the intent of the parties at the time they entered into the contract."

, 795 N.W.2d 65, 77 (Iowa 2011). Contractual language is the most important evidence of the parties' intentions. The Court must "strive to give effect" to all of the language used and assume none of it is superfluous. Moreover, "an

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<sup>6</sup> Although the Court in its TRO signals some agreement (and/or potential for agreement) with the stage of the proceedings that Mary Miss is likely to prevail on the merits. In citing to th TRO Order and arguing that the Court should reach the same conclusion to enter a preliminary injunction, Mary Miss does not waive or otherwise concede any of these points. She expressly reserves the right to present alternative argument to the Court at the appropriate stage in the proceedings.



Art Center's contractual promise to "reasonably assure that the Project is properly maintained and protected," and its explicit, specific contractual promise to "reasonably protect and maintain the Project against the ravages of time, vandalism and the elements." Doc. 1-1 at 8, § 9.2.

There is nothing in the Artist Agreement or in the Art Center's 28E Agreement with the City of Des Moines that overcomes the Art Center's promise to Mary Miss that it will not remove or demolish GPDS without her approval. The Court has already rejected the Art Center's attempts to argue otherwise (as it concerns the likelihood of Mary Miss prevailing on the merits). Doc. 12 at 7-9 (finding that Section 9.3(i) of the Artist Agreement does not give the Art Center unilateral authority to remove the artwork; that Paragraph III.A of the 28E Agreement does not graph III.A of the 0 612 792 reW\* nBT/9(Art)-3(i)3(st

4116, 2007 WL 2493514, at \*1 (D.S.D. Aug. 29, 2007) (finding a neutral public interest and granting injunctive relief).

For the reasons set forth herein plaintiff has carried her burden and met all elements necessary for the entry of a pred grafor the