



## **THE ART OF MEDIATION: The Terra Museum War<sup>1</sup>**

by  
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Mediator

### **I. Introduction**

Dan Terra began collecting American art in 1976. By the time of his death he had expended \$174 million on 600 paintings and 350 drawings and prints now worth over \$300 million. He had also created the Terra Foundation for American Arts in 1978 with an endowment that grew through subsequent gifts to \$450 million. In 1978 he opened the Terra Museum of American Art in Evanston, Illinois which he relocated to North Michigan Avenue in Chicago in 1987.

Dan Terra died in 1996, and by 2000 all was not well:

The Terra Foundation had not diversified its endowment portfolio. In a free fall of its Mercury Financial stock it lost \$239 million by 2000. So instead of \$450 million it had \$211 million as endowment for the Foundation.

The Terra Museum experienced chronic staffing problems and poor attendance. In fiscal 2000 the Wall Street Journal reported the Terra Museum lost \$3.4 million on revenues of only \$652,975.

On September 22, 2000, two of the Terra Foundation Directors, Ronald Gidwitz and Dean Buntrock sued the Foundation and three of its directors, Judith Terra, Paul Tucker and former Senator Alan Simpson in the Circuit Court of Cook County. The suit alleged mismanagement and a plot by the three directors to transfer the Terra Foundation and its collection of American Art to Washington, D.C.<sup>2</sup> On September 25, 2000, the Attorney General of Illinois intervened in the suit on behalf of the People of Illinois asserting essentially the same allegations.

The lawsuit was a legal bombshell. It began a ten month legal battle which cost \$6 million in legal fees and generated national media coverage as reporters covered each twist and turn of the case.

### **II. The Mediation**

In January 2001, after 4 months of intensive litigation, the Court and counsel for the parties resolved to stay the court proceedings to enable the parties to pursue mediation. On February 5, 2001, Judge Dorothy Kirie Kinnaird appointed me to mediate the case on the recommendation of Judith Terra and the other individual defendants. Full disclosure was made that I was Vice Chairman of the Art Institute of Chicago and Chairman of the School of the Art Institute. As a first step I obtained the

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<sup>1</sup> A presentation to the Chicago Bar Association Creative Arts Committee.

<sup>2</sup> The complaint alleged that an additional defendant, Naftali Michaeli, consulted with and gave advice to Judith Terra in furtherance of the plot to abandon Chicago, but Michaeli did not participate actively in the litigation.

consent of counsel for the assistance of my partner, Brett August, as a fellow mediator.

The mediation was blessed by the participation of the best lawyers in the country as counsel for the parties.<sup>3</sup> At the very outset of the mediation a meeting was held with all counsel to clear up any concerns or impediments with the process which was about to begin. All counsel agreed, for example, to recuse themselves from the mediation sessions so that the Foundation directors could find a solution among themselves without interruption of counsel. Such a recusal is highly unusual, selfless and enlightened.

The greatest challenge was the Terra Foundation Trustees themselves, eleven extraordinarily distinguished individuals who, because so much was at stake, appeared to the media to be dysfunctional as a group. In fact each individual was at the peak of his or her accomplishments and intensely concerned with the well being of the Terra Foundation and collection.

The plaintiffs were:

- Ronald Gidwitz – former CEO, Helene Curtis; Chairman of the Board of Trustees of the Field Museum.
- Dean Buntrock – Founder, Chairman and CEO of Waste Management, Inc.

The individual defendants were:

- Judith Terra – widow of Don Terra, resident in Washington, D.C. and Giverney, France; Vice Chair of the Terra Foundation.
- Paul Tucker – Professor of Art, University of Massachusetts at Boston; Monet scholar; Chairman of the Terra Foundation.
- Senator Alan Simpson – Former U.S. Senator from Wyoming; friend of Mrs. Terra.

The other members of the Board of Trustees were:

- Madam Helene Ahrweiler – former Director of the Georges Pompidou Museum of Modern Art in Paris.
- Hon. Jacques Andréani – former French Ambassador to the United States.
- Margaret (Maggie) Daley – wife of the Mayor of Chicago; Chairman of After School Matters which supports innovative childrens education programs in Chicago.
- Hon. Arthur Hartman – former U.S. Ambassador to France; immediate past Chairman of the Terra Foundation.
- Stephanie Marshall – President of the Illinois Academy of Arts and Sciences.
- Theodore Stebbins, Jr. – Harvard professor, former John Moors Cabot Curator of

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<sup>3</sup> Former Circuit Court Judge Bill Quinlan of Quinlan & Carroll, counsel for the Plaintiffs; Steve Carlson of Sidley, Austin, Brown and Wood, counsel for the Terra Foundation; former Circuit Court Judge Brian Crowe of Shefsky and Forelich, counsel for the individual defendants; Floyd Perkins, Chief of the Charitable Trust Division, Attorney General of Illinois.

## American Painting at the Boston Museum of Fine Arts.

The first task of the mediator, in any dispute, is to develop trust among the litigants. A mediator must listen for options, resolve impasses, master the art of timing, and encourage patience among the litigants. To achieve a mediated settlement, a majority of the Terra Foundation Board, including the plaintiffs, would need to support the terms of any agreement and the Attorney General would need to add his endorsement. In the Terra case, because of the number of trustees and the issues at stake, the task had mathematical complexities.

To develop trust, the mediators met privately with each member of the Terra Foundation Board of Trustees individually, one by one, before the Board as a whole began its mediation sessions. For the individual meetings the mediators created a matrix to map out the position of each board member on 20 issues in four categories:

- Museum and collection
- Education
- Governance and
- A miscellaneous category.

The 20 issues were not identified as such but were imbedded in a free ranging discussion so as to elicit individual reactions and, in some cases, add to our list.

Mediation ferrets out issues and solutions that go beyond the pleadings in the complaint. In the Terra case, as revealed in the Final Court Order, money was not the issue, nor was the satellite museum operated by the Terra Foundation in Giverney, France.

The principle issues were governance and where the Foundation and its collection should be located. What should the Board of the future be like? Who should be on it? Should the Terra museum go to Washington, D.C.? If it stays in Chicago, should it remain free standing on Michigan Avenue or should it join forces with the Art Institute of Chicago or some other institution?

All of these questions were answered in the Final Court Order, as will be seen. However, the Uniform Mediation Act precludes my disclosure of the mediation communications. §5, UMA; *Cf.* Circuit Court Rule 20.7. Nevertheless, a great deal of information was leaked to the press by the parties and resulted in continuous news coverage despite a court imposed gag-order.

Mediation sessions were held from February through June, 2001. Impassioned speeches were given, angry denunciations were made, but gradually a consensus began to emerge among the majority of the Terra Board. The Chicago Sun Times reported on May 17th that tentative agreement had been reached.

### **III. The Settlement Agreement**

The tentative agreement sparked a firestorm of activity:

On May 24th, the Chicago Tribune reported that Judith Terra had written the Board and declared that she was terminating the mediation. As she was only one member of the Board of Trustees, however, she did not have the power to terminate.

The individual defendants attempted to hold a meeting of the Terra Board outside the mediation process but were enjoined by Judge Kinnaird on June 8, 2001 with the statement that she didn't think

mediation "has a prayer if these meetings go ahead!"

On June 29, 2001 suit was filed in the United States District Court by the individual defendants and the Terra Foundation seeking a Temporary Restraining Order to prevent a vote by the Board on the mediated settlement. New counsel argued the case for the individual defendants including Leonard Garment of Washington, D.C., former White House Counsel for President Nixon and Laurel Bellows, former President of the Chicago Bar Association. At 10:00 p.m. on June 29th, Judge Bucklo refused to involve the federal courts in a state court action and denied the motion (151 F. Supp.2d. 931). The Seventh Circuit dismissed the appeal on August 29, 2001.

The settlement agreement was attacked, principally, on the grounds that the Attorney General (1) had threatened to amend the complaint to add Board member Ted Stebbins as a defendant for breach of his fiduciary duties and (2) had initiated an informal inquiry into actions of another charity of which Board member Stephanie Marshall was a member. Both Board members denied that their vote had been influenced in a lengthy Board meeting on June 29, 2001 which was recorded and transcribed.

The final mediated agreement was approved by the Board by a vote of 6 to 2 with 3 members absent on June 29, 2001. A court order implementing the agreement was entered by Judge Kinnaird on July 26, 2001, after a full hearing before a packed courtroom which lasted well into the night.

The Final Consent Judgment and Order, a copy of which is attached, established six principles:

1. The Terra Foundation will remain an Illinois corporation with its corporate headquarters in Illinois for at least 50 years. (Par. 3). This provision insured that the Terra Foundation would remain under the jurisdiction of the Attorney General of Illinois.
2. The Terra collection of American art will stay in the Chicago metropolitan area by itself or in partnerships or arrangements with other institutions for at least 50 years. A specific exception is made for the Terra Foundation to loan art for display and exhibition at the Terra Museum in Giverney, France. (Par. 5).
3. The majority of the Terra Foundation Board shall be comprised of residents of Illinois for at least 25 years. (Par. 7). This provision eliminated majority control of the Terra Foundation by citizens of other states.
4. No current Board member shall be eligible to serve on the Board of the Terra Foundation after the 2002 annual meeting. (Par. 8). This provision sought to resolve the acrimonious relationships that had developed within the existing Board and eliminate the then existing 7 to 4 majority control of the Terra Board by citizens of other states.
5. Five new trustees were elected and tasked with choosing the new Chairman of the Terra Board. (Pars. 9 and 10). This provision resulted in the election of Marshall Field, former Chairman of the Board of Trustees of the Art Institute of Chicago and renown collector of American art, as Chairman of the Terra Foundation Board.
6. Even after 50 years, neither the Terra Foundation nor the Terra collection shall leave Illinois without first giving one-year prior notice to the Attorney General of Illinois to permit the Attorney General to take any action deemed appropriate. (Par. 5). This provision was intended to prevent a later takeover of the Terra Foundation and collection.

#### **IV. Afterward**

After the Court Order of July 26, 2001, Judith Terra, Paul Tucker and Senator Alan Simpson took action on two fronts:

First, they filed a second lawsuit against the Terra Foundation and its other directors seeking to have the July 26 order overturned. That case was stayed pending a final appellate ruling on the original case.

Second, they appealed the July 26, 2001 Court Order as a "naked seizure". On May 28, 2004, the Appellate Court of Illinois, in a twelve page opinion, affirmed the July 26 Order of the trial court. 348 Ill.App.3d 875. The Appellate Court specifically affirmed the Circuit Court finding that the decision of the two Terra Board members in favor of the settlement was not the product of coercion:

"I listened to [audio tapes of] the way Ms. Marshall voted and what she said and how she said it \* \* \* This was a lady who was in control."

With regard to Dr. Stebbins, the Appellate Court noted the trial court's conclusion that the recorded tape revealed "no shaky voice, nothing at all" that would indicate a conflict produced by any pressure by the Attorney General. On October 6, 2004 the Illinois Supreme Court denied defendants' Petition for Leave to Appeal.

In addition, a series of disputes swirled around the unpaid legal fees of various lawyers. Most recently, in February, 2004, Judge Paddy McNamara ordered Judith Terra to pay \$106,164 in outstanding legal fees for Robert Cummins' legal services for the individual defendants in the Summer of 2001, culminating in his lead role in the court hearing on July 26, 2001. On August 17, 2004, Judge Alexander White ordered Judith Terra to pay a \$50,000 fine and \$5,000 a day until she complied with previous orders to provide documentation of her financial status to Mr. Cummins.

## **V. Conclusion**

Today, the Terra Foundation Board is operating peacefully in Chicago under the leadership of Marshall Field, Chairman of the Board. It has reinvigorated its national and international support of education and scholarship in American Art.

Chicago embraced the Terra Museum as its own from the day Dan Terra first opened its doors. The City is proud of the Terra collection and exhibitions and identifies with them. As the collection grew, however, it needed a less valuable and expensive location and it needed space, context and conservation, as well as attendance, worthy of its greatness.

In October, 2004 the Terra Museum closed its costly facility on Michigan Avenue only to reopen at the Art Institute of Chicago in April, 2005, with 50 of the Terra collection's best paintings and all 350 of its works on paper on loan to the Art Institute. The combined American Arts collections of the two museums occupy two floors at the Art Institute and constitute the third or fourth best collection of American Art in the world. It has become an essential destination for scholars in the field of American Arts.