

Volume XIII

VOLUME XIII

IN THE COURT OF COMMON PLEAS IN AND FOR
THE COUNTY OF MONTGOMERY, PENNSYLVANIA
ORPHANS' COURT DIVISION

- - -
IN RE: : NO. 58,788

THE BARNES FOUNDATION, :
a corporation

:
- - -

Petition To Amend Charter and Bylaws

- - -

Courtroom A

Thursday, September 30, 2004

Commencing at 1 p.m.

- - -

Amy Beth Boyer, R. P. R.
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

Volume XIII

- - -

BEFORE: THE HONORABLE STANLEY R. OTT, JUDGE

- - -

1

COUNSEL APPEARED AS FOLLOWS:

RALPH G. WELLINGTON, ESQUIRE
HONORABLE ARLIN M. ADAMS
CARL A. SOLANO, ESQUIRE
BRUCE P. MERENSTEIN, ESQUIRE

Volume XIII
for the Petitioner,
The Barnes Foundation

LAWRENCE BARTH, ESQUIRE
Deputy Attorney General
for The Commonwealth of Pennsylvania
as parens patriae for charities

TERRANCE A. KLINE, ESQUIRE
HOWARD MASON CYR, III, ESQUIRE
PAUL M. QUINONES, ESQUIRE
for the Intervenors,
The Students of The Barnes Foundation

- - -

1

1a

2

I N D E X

3

I N T E R V E N O R ' S E V I D E N C E

4

W i t n e s s V o i r D i r e D i r e c t C r o s s R e d r R e c r

5

PAUL E. KELLY, JR. 2 12

By Mr. Wellington 7

6

By Mr. Barth 9

7

- - -

8

E X H I B I T S

9

I N T E R V E N O R ' S

10

	Volume XIII		Marked	Rec' d
Number				
11				
	A-48	4/18/04 Philadelphia Inquirer article	20	--
12				
	A-49	Map Accompanying Exhibit A-48	20	--
13				
	A-50	Marie Malaro Curriculum Vitae	--	20
14				
	A-51	8/27/04 James Abruzzo Barnes		
15		Foundation Case Analysis	21	--
16	A-52	Debra Force Curriculum Vitae	--	22
17	A-53	9/8/04 Debra Force Report	--	22
18	A-54	Richard Feigen Curriculum Vitae	--	23
19	A-55	Richard Feigen Report	--	23
20	A-57	Feigen report on Lipchitz Bather	--	25
21	A-58	Kenneth Barrow Curriculum Vitae	--	26
22	A-59	Kenneth Barrow Report	--	26
23	A-65	Comparison chart of appraisal values	--	28
24	A-66	Summary of the Opined Values of Buildings and Land at Ker-Feal	--	30
25				

(con' t)

Volume XIII

1 1c

2 E X H I B I T S, CON' T

3 I N T E R V E N O R ' S

4	Number	Marked	Rec' d
5	A-67 5/4/90 Eml en Wheeler report	31	--
6	A-68 5/30/96 2nd Draft Request for Proposal	34	--
7	A-69 Value of Barnes' Works in Storage	35	--
8	A-70 A-70.1 through A-70.20, digital images	--	35
9	A-71 Fundraising requirements of 3-Campus Model	--	36
10	A-72 Ker-Feal Attendance and Revenue		
11	Projecti ons	37	--
12	A-73 Merion Arboretum Attendance and Revenue Projecti ons	38	--
13	A-74 Mathematical equati on	--	38
14	A-75 Compari son of Before and After Total		
15	Total Vi si tors and Revenue	--	39
16	A-76 The Barnes Foundati on Sensi ti vi ty		

		Volume XIII		
		Anal ysi s	40	--
17				
	A-77	Mathemati cal equati on	--	41
18				
	A-78	The Barnes Foundati on Sensi ti vi ty		
19		Anal yses	41	--
20	A-79	Post Openi ng Attendance Projecti ons (based on D&T detai led assumpti ons)	42	--
21				
	A-80	"As-Is" Scenari o	--	45
22				
	A-81	Constructi on Economi cs	--	47
23				
	A-82	Wal l Street Journal arti cle	48	--
24				
	A-83	Barnes Marketi ng Brochure	--	49
25				

(con' t)

1 1c

2 E X H I B I T S, CON' T

3 I N T E R V E N O R ' S

4 Number Marked Rec' d

5 A-84 Barnes Marketi ng Brochure -- 49

6 A-85 Web si te pages -- 49

Volume XIII

7	A-86	Web site pages	--	49
8	A-87	Affidavit of Kimberly Camp	--	49
9	A-88	5/3/01 Notes of Testimony	--	49
10	A-89	Excerpt from 3/29/01 Camp - NY Times Letter	--	51
11				
12	A-90	The Barnes Foundation: There's More to the Story	--	51
13	A-91	Comparables	--	52
14	A-92	Property from the Collection of Violette DeMazia	--	52
15				
16	A-93	Property from the Collection of Mr. & Mrs. John Hay Whitney	--	52
17	A-94	Resolution	--	53
18	A-95	Ker-Feal Parcel with lots drawn	--	53
19	A-96	Art and Painting, 3rd Edition	--	54
20	A-97	9/27/04 Kelly - Camp Letter	5	55
21		- - -		
22				

23

24

25

1

KELLY - DIRECT

2

2

INTERVENOR'S EVIDENCE

3

THE COURT: All right. Mr. Kline,

4

Mr. Cyr, we were still in your case when we broke.

5

MR. CYR: That's correct, Your

6

Honor. At this time, the amicus call Paul E. Kelly to

7

the stand.

8

THE COURT: All right.

9

MR. WELLINGTON: Your Honor, we

10

need to see you at sidebar or conference.

11

THE COURT: We can do that.

12

(A conference was held at sidebar,
Page 9

13 not reported.)

14 THE COURT: You were in the process
15 of calling Mr. Kelly?

16 MR. CYR: That's correct, Your
17 Honor. So at this time, I call Mr. Kelly to the stand.

18 - - -

19 PAUL E. KELLY, JR., having been
20 duly sworn, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. CYR:

23 Q Good afternoon, Mr. Kelly.

24 A Good afternoon.

25 Q Mr. Kelly, can you state your address for the

1 KELLY - DIRECT 3

2 record?

Volume XIII

3 A 242 Righters Mill Road, Narberth, Pa.

4 Q Mr. Kelly, do you hold a position with the Paul E.

5 Kelly Foundation?

6 A Yes. I'm the president and a board member.

7 Q And what, briefly, is the Kelly Foundation?

8 A It's a private charitable foundation that has a

9 pool of money, and it gives away a certain amount of

10 money every year to charitable causes.

11 Q And where is the foundation located?

12 A In Narberth. Not in my house, but in Narberth.

13 Q Are you acquainted with the Barnes Foundation?

14 A I am.

15 Q And how did you become acquainted with the Barnes

16 Foundation?

17 A Well, I've just known about it for a long time. I

18 actually live about five minutes from it.

Volume XIII

19 Q Have you recently visited the Barnes Foundation?

20 A Yes. Last Sunday.

21 Q And what were the circumstances that caused you to

22 travel to the Barnes last Sunday?

23 A Well, I've been meaning to get there for about 15

24 years. And my daughter just entered St. Joe's

25 University as a freshman, and they had parents weekend

1 KELLY - DIRECT 4

2 and one of things they offered was tickets to the

3 Barnes. So, I decided to take advantage of it. I took

4 my wife and some of my kids.

5 Q Mr. Kelly, have you approached the Barnes

6 Foundation with an offer of a charitable contribution

7 recently?

8 A Yes.

Volume XIII

9 Q And that's on behalf of the Foundation, correct?

10 A Yes.

11 Q And what are the terms of your offer of a gift to
12 the Barnes Foundation?

13 A Well, we pledged \$100,000 over two years, on the
14 condition that the Barnes collection remains where it
15 is and that this case is resolved and any possible
16 appeals are resolved. If it stays in Merion, then we
17 would fulfill the pledge.

18 Q And did you communicate that gift offer to the
19 Barnes by way of letter dated September 27, 2004, which
20 I'll show you in a minute and we'll mark as Exhibit
21 Amicus 97?

22 A I did.

23 MR. CYR: May I approach, Your
24 Honor?

25 THE COURT: Yes.

1 KELLY - DIRECT 5

2 (Photocopy of 9/27/04 Kelly - Camp

3 letter marked A-97 for identification.)

4 BY MR. CYR:

5 Q Is Amicus A-97 a copy of that letter?

6 A Excuse me?

7 Q Is the letter that's been marked as Exhibit A-97 a

8 copy of the letter that you sent to Ms. Kimberly Camp

9 on September 27, 2004?

10 A It is.

11 Q Have you received any response yet from Ms. Camp?

12 A I have not.

13 Q What motivated you to make the offer of this gift

14 to the Barnes Foundation at the present time?

15 THE COURT: Can you clarify whether

16 the "you" that you use is directed to Mr. Kelly

17 personally or to the Foundation? Unless he's one in

18 the same. I don't know.

19 MR. CYR: Well, I'll rephrase the

20 question, Your Honor.

21 BY MR. CYR:

22 Q What has caused the Kelly Foundation to make the

23 offer of a gift to the Barnes Foundation at the present

24 time?

25 A Well, I followed this case in the newspapers for

1

KELLY - DIRECT

6

2 some time. And I came to the conclusion, after going

3 to the Barnes, after coming to part of the hearing on

Volume XIII

4 Monday, that the Barnes could use some help. And there
5 was some testimony on Monday that the Barnes was having
6 trouble with fundraising. I don't really know how much
7 fundraising they have been doing of late. And I
8 thought, I was of the opinion that the Barnes should
9 stay where it is. So I thought making a pledge would
10 be some small way to indicate that.

11 Q To your knowledge, has the Kelly Foundation ever
12 been approached by the Barnes prior or had they ever
13 been approached for a charitable contribution?

14 A By the Barnes?

15 Q Yes.

16 A No.

17 Q Have you personally ever been approached for a
18 charitable contribution to the Barnes?

19 A No.

Volume XIII

20 Q Is there any reason that the Foundation did not
21 consider giving a gift earlier than this week to the
22 Barnes Foundation?

23 A No. I think having gone to the Barnes and having
24 come to this hearing sort of energized me to do
25 something.

1 KELLY - CROSS 7

2 MR. CYR: Thank you. That's all I
3 have.

4 THE COURT: Mr. Wellington?

5 CROSS-EXAMINATION

6 BY MR. WELLINGTON:

7 Q Mr. Kelly, good afternoon. My name is Ralph
8 Wellington.

9 A Good afternoon.

Volume XIII

10 Q The Kelly Foundation does some support for some
11 cultural organizations in this Philadelphia area and a
12 number of, I think, schools? That's fair?

13 A Among other things, yes.

14 Q And it's my recollection of the contributions of
15 the Kelly Foundation is but for a rather larger
16 contribution to St. Joe's Prep, the largest commitment
17 the organization makes is \$50,000; is that correct?

18 A No.

19 Q Your commitment is for a total of \$100,000 -- or
20 your pledge is for a total of \$100,000 over two years,
21 correct, sir?

22 A Yes.

23 Q Mr. Cyr asked you about prior requests from the
24 Barnes Foundation. Let me show you a letter from
25 Kimberly Camp addressed to you October 30, 2002 at the

1 KELLY - CROSS 8

2 Kelly Foundation, asking for \$7,500 to assist in
3 providing educational opportunities at the Barnes
4 Foundation. Would you review that, please, sir?

5 A (Witness complies.)

6 Q Did the Kelly Foundation or did you provide any
7 funding to the Barnes Foundation in response to that
8 request in 2002?

9 MR. CYR: Objection. Foundation,
10 Your Honor.

11 THE COURT: Sustained.

12 BY MR. WELLINGTON:

13 Q Do you recall receiving that?

14 A I do not.

15 Q Does that refresh your recollection about the
Page 19

16 testimony you gave that you've not been asked before by
17 the Barnes Foundation for support?

18 A We receive hundreds of requests every year. I'm
19 the one that goes over them. The vast majority go in
20 the wastebasket. I don't know whether I received that.
21 I could have.

22 Q And if I showed you letters from other years,
23 would your answer be the same?

24 A I do not recall ever receiving one from the
25 Barnes.

1 KELLY - CROSS 9

2 Q Okay. Whether you recall receiving this letter
3 from Ms. Camp or not, I think you've testified that you
4 live five minutes or so from the Barnes?

5 A Yes.

Volume XIII

6 Q For the last 15 years or so?

7 A Almost 20. Yes.

8 Q Have you ever given a contribution to the Barnes
9 Foundation at any time?

10 A I have not.

11 MR. WELLINGTON: Thank you. I have
12 nothing further.

13 THE COURT: Mr. Barth?

14 BY MR. BARTH:

15 Q Mr. Kelly, is the Paul E. Kelly Foundation named
16 after you?

17 A After my father.

18 Q And your father was the founder of the Foundation?

19 A It was his idea to create the Foundation.

20 Q And when was it created?

21 A 1952, I believe.

Volume XIII

22 Q And you are its president; is that correct?

23 A Its present president?

24 Q Yes.

25 A Yes.

1

KELLY - CROSS

10

2 Q And how many people serve the Paul E. Kelly

3 Foundati on?

4 A There is myself, there is my secretary, and there

5 are several board members.

6 Q Are the board members all family members?

7 A Yes.

8 Q And by what vote is necessary for the Foundati on

9 to agree to give a donati on or make a pl edge?

10 A We basi cally do thi ngs by consensus.

11 Q And is this offer a result of a formal meeting of

Volume XIII

12 the Board?

13 A It's myself and my two sisters. We don't really

14 have formal meetings on a monthly basis. We may meet

15 two or three times a year, communicate by telephone, by

16 e-mail.

17 Q Did you communicate with them about this

18 particular gift?

19 A Yes.

20 Q Is there a resolution of the trust which evidences

21 that this has been authorized by the trust or

22 Foundation?

23 A Not yet.

24 Q Have you ever been to the Barnes Foundation before

25 the time you went on Sunday?

Volume XIII

2 A No.

3 Q That was the first time?

4 A Yes.

5 Q You also indicated that you were in the courtroom

6 on Monday. Can I ask why?

7 A Because I have been curious about the case, and

8 having gone to the Barnes -- I actually was hoping to

9 get here last week, but I couldn't find the time. So I

10 found some time Monday. I couldn't stay the whole day.

11 Q Okay. And as a result of that, you decided to

12 offer the Barnes Foundation \$100,000 over the course of

13 two years?

14 A Yes.

15 Q Can you tell us what the purpose is or mission of

16 the Paul Kelly Foundation is?

17 A Our articles of incorporation are broad. For the
18 last seven years or so, I would say our main focus has
19 been Catholic education primarily, with some
20 exceptions, elementary and secondary education. Also,
21 Catholic University education, too. That's been our
22 main thrust.

23 MR. BARTH: All right. Thank you.

24 I have nothing else.

25 THE COURT: Will there be redirect,

1 KELLY - REDIRECT 12

2 Mr. Cyr?

3 MR. CYR: Just very briefly.

4 REDIRECT EXAMINATION

5 BY MR. CYR:

6 Q Mr. Kelly, your letter of September 27 to

7 Ms. Camp, I see a carbon copy is to a Judith Kelly Shea

8 and a Christine Kelly Kiernan. Who are those
9 individuals?

10 A They are my two sisters.

11 Q So they agreed with this offer to the Barnes
12 Foundation?

13 A Yes.

14 MR. CYR: Thank you. That's all I
15 have.

16 THE COURT: Mr. Wellington?

17 MR. WELLINGTON: Thank you,
18 Mr. Kelly, for your potential offer.

19 THE COURT: Mr. Barth?

20 MR. BARTH: Nothing else.

21 THE COURT: Thank you, Mr. Kelly.

22 You may step down.

Volume XIII
(Witness excused.)

23

24

- - -

25

THE COURT: Mr. Cyr, Mr. Kline, any

1

INTERVENOR'S EVIDENCE

13

2 additional witnesses?

3

MR. CYR: Your Honor, at this time

4

the amicus will rest, with the exception of moving into

5

evidence our exhibits.

6

THE COURT: Are you seeking to move

7

them en masse?

8

MR. CYR: We can go through them

9

individually. That would probably be the best, I

10

guess. And we can either do that in open court or

11

otherwise.

12

THE COURT: Do you know what your

13

position is going to be, Mr. Wellington, as to their

Volume XIII

14 exhi bi ts?

15 MR. WELLINGTON: Yes. We know our
16 posi ti on on each of the exhi bi ts.

17 THE COURT: Will there be
18 objec ti ons to some?

19 MR. WELLINGTON: Yes, there will
20 be, Your Honor.

21 THE COURT: Will it take some time
22 to do thi s?

23 MR. WELLINGTON: My guess, Your
24 Honor, would be five or ten minutes. I mean, they have
25 a rela ti vely long li st. We have objec ti ons to, I would

1 INTERVENOR' S EVIDENCE 14

2 guess, seven or eight of them.

3 THE COURT: All right. Let me ask
Page 28

Volume XIII

4 this. Do you contemplate any rebuttal testimony?

5 MR. WELLINGTON: No, Your Honor.

6 THE COURT: All right.

7 Does the attorney general

8 contemplate rebuttal?

9 MR. BARTH: No, Your Honor.

10 THE COURT: All right. So the only

11 thing left before closings, to the extent you wish to

12 do them, is this, correct? I think we ought to do it

13 now.

14 MR. WELLINGTON: We're prepared to

15 do it.

16 THE COURT: I think we ought to do

17 it now.

18 MR. WELLINGTON: I agree. I'm

19 going to have Mr. Merenstein handle that, Your Honor.

20 THE COURT: Sure.

21 MR. WELLINGTON: Mr. Merenstein

22 told me I made a misrepresentation to the Court, Your

23 Honor, for which I apologize. He indicates that we

24 have more than seven or eight objections.

25 THE COURT: Well, I don't think you

1 INTERVENOR'S EVIDENCE 15

2 should be able to bind him anyway, Mr. Wellington,

3 personally.

4 The only binder I have in front of

5 me, Counsel, is the one with Exhibits 48 through 75.

6 And, of course, I have the ones that were introduced

7 subsequent to that. I'm assuming that you will refresh

8 my recollection and tell me that 1 through 47 were used

9 at the December hearing?

Volume XIII

10 MR. CYR: That's correct, Your
11 Honor.

12 THE COURT: Okay. And I assume
13 that we dealt with those at the close of that hearing;
14 am I right?

15 MR. CYR: I believe that's correct,
16 Your Honor.

17 THE COURT: Do you agree with that,
18 Mr. Merenstein?

19 MR. MERENSTEIN: Yes.

20 THE COURT: All right. So what
21 we're really dealing with are Exhibit 48 et seq.,
22 right?

23 MR. CYR: That's correct.

24 THE COURT: All right.

25 MR. CYR: Your Honor, I have
Page 31

1 INTERVENOR'S EVIDENCE 16

2 another binder to supplement the binder that you have.

3 THE COURT: All right.

4 MR. CYR: So I'd like to hand that
5 up.

6 THE COURT: This contains 48
7 through whatever you used in the course of the hearing?

8 MR. CYR: Yeah. The numbering is
9 off a little bit, Judge.

10 THE COURT: Okay.

11 Mr. Merenstein, you don't have to
12 go along with this suggestion, but if you know which
13 ones you're going to object to -- for instance, if we
14 don't have to deal with Nos. 48 through such and such,
15 why don't you just tell me, if you can, and then we'll

Volume XIII

16 go right to the first one that you have a problem with.

17 MR. MERENSTEIN: That's fine, Your

18 Honor. I can just list the ones -- I would just point

19 out that with at least a couple of these, we did not

20 receive these when they were used with witnesses. And

21 the book that I was just handed is the first chance to

22 truly look at them, other than perhaps seeing them up

23 on the Elmo.

24 THE COURT: Okay. Well, if you

25 want to look at them --

1 INTERVENOR'S EVIDENCE 17

2 MR. MERENSTEIN: I think there is

3 just one or two, Your Honor.

4 THE COURT: -- we can take a break

5 and you can do that. I don't want to rush you. I'm

6 just saying if you know which ones you have a problem
7 with, we don't need to spend a lot of time simply
8 detailing what's already in the record about the
9 others.

10 MR. MERENSTEIN: Okay. I can go
11 through those right now.

12 THE COURT: Go ahead.

13 Do you mind if we do it that way?

14 MR. CYR: That's fine, Your Honor.

15 I just think the record would be
16 clearer, Your Honor, if we went through each exhibit.

17 THE COURT: No problem. Go ahead.

18 MR. CYR: Okay. Your Honor,

19 Exhibit 48 is the Philadelphia Inquirer article dated

20 April 18, 2004, a Merion Option for Barnes: A New Way

21 into the Gallery Could Provide a Way out of a Move to
22 Philadelphia.

23 THE COURT: All right.

24 MR. MERENSTEIN: We would object
25 that it's hearsay and not relevant. I'm not sure how

1 INTERVENOR'S EVIDENCE 18

2 it's relevant to the proceedings.

3 THE COURT: I know that you used
4 this for the purpose of questioning some witnesses, and
5 I permitted that to a degree. But the article itself,
6 in terms of a substantive exhibit and as evidence,
7 you'll have to explain to me how that is admissible,
8 per se.

9 MR. CYR: Your Honor, this
10 Exhibit 48 and 49, which is the map of the proposal in
11 the April 18, 2004 article, was used to examine

12 witnesses. So, at a minimum, I think it should be
13 marked for purposes of the record. I think it's also
14 relevant, Your Honor, to the various options that have
15 been discussed, and several witnesses were questioned
16 on that. And I think, for those purposes, it should be
17 admitted into the record.

18 THE COURT: All right. I agree
19 with you in part. I agree that to the extent it was
20 used in the examination of witnesses, in order to have
21 a complete record of that examination and an
22 understanding of it, it should be marked and available
23 as part of the overall record of the case.

24 I do not think that that makes it
25 independently admissible as such, because if I were to

2 take that step, I can only imagine the floodgates that
3 will open, given the number of newspaper articles
4 written across the country, indeed the world, about
5 these proceedings. And I am loath to take that step.

6 So, I agree with you. And I
7 remember these -- I mean, as I page through it, I
8 remember these various things being put on the overhead
9 projector and having witnesses comment on it. And I
10 think in order for that testimony, which is already in
11 the record, to make sense, this has to be there in
12 order to put it in context.

13 But if you're objecting to the
14 admission of them as substantive documents, I sustain
15 that objection.

16 MR. MERENSTEIN: And if I can just
17 clarify? For the rest of them, Your Honor, we agree

18 entirely that in terms of marking them for
19 identification for the record, obviously, we don't have
20 any objection. It's really just the substantive
21 evidence we're talking about.

22 THE COURT: I think I'm going to
23 have to deal with them individually anyway.

24 MR. MERENSTEIN: Okay.

25 THE COURT: But I think that that's

1 INTERVENOR'S EVIDENCE 20

2 got to be the Court's position, simply because the idea
3 of admitting newspaper articles as substantive
4 certified violates virtually every rule of evidence
5 that I can think of, even the classes that I missed.

6 So, let's go. We took care of 48
7 and 49.

Volume XIII

8 MR. CYR: Okay. Your Honor,
9 Exhibit 50 is a curriculum vitae of expert Marie
10 Malaro.

11 MR. MERENSTEIN: No objection.

12 THE COURT: It's admitted by
13 agreement.

14 (Intervenor's Exhibit A-50
15 received in evidence.)

16 THE COURT: 51?

17 MR. CYR: 51, Your Honor, is the
18 report of an expert, James Abruzzo. We obviously did
19 not call Mr. Abruzzo, but I think his report was
20 referenced in some of the testimony of the Barnes
21 witnesses. So if anything, it would be just marked for
22 identification purposes.

23 THE COURT: If you are right -- and
24 I do remember the name being mentioned, I couldn't
25 accurately comment beyond that -- then we'll leave this

1 INTERVENOR'S EVIDENCE 21

2 marked. But he, not having testified, it cannot be
3 admitted as an exhibit.

4 MR. CYR: Exhibit 52 is the
5 curriculum vitae of expert Debra Force.

6 THE COURT: It may be. It's not in
7 my binder. Let me check the one you just -- it's not
8 in mine, because my 52 says about the author of this
9 report, and then it goes on to describe Mr. Abruzzo.
10 Do you have something different in yours?

11 MR. CYR: Yeah.

12 THE COURT: Who did you say it was
Page 40

13 the CV of?

14 MR. CYR: Debra Force.

15 THE COURT: Well, if it's the CV of

16 Debra Force --

17 Is it in your book, also, Debra

18 Force?

19 MR. MERENSTEIN: I don't have the

20 book here. I have the list that the amici provided us,

21 and on their list, it does say biography of Debra

22 Force.

23 THE COURT: Well, there be can no

24 doubt that her CV is admissible.

25 MR. MERENSTEIN: Yeah. We have no

1 INTERVENOR'S EVIDENCE

22

2 objection.

Volume XIII

3 MR. BARTH: Your Honor, my notes

4 show that, indeed, Amici Exhibit 52 is her CV.

5 THE COURT: All right. So, I have

6 a lot of notepads in which I made those notations. I

7 didn't bring those out because it's easier for me to

8 just go through the binder that's been provided to me,

9 and in my binder, that's not it.

10 But if we agree that that's what it

11 was, then clearly that's admissible. By the way, in my

12 binder, Debra Force's CV is 53.

13 (Intervenor's Exhibit A-52 received

14 in evidence.)

15 MR. CYR: Okay. The Exhibit 53, by

16 my list, Your Honor -- and we'll clarify this -- is the

17 expert report of Debra Force dated September 8, 2004.

18 THE COURT: All right. That's my

19 54.

20 Position on that?

21 MR. MERENSTEIN: No objection.

22 THE COURT: All right. Then it's

23 admitted.

24 (Intervenor's Exhibit A-53 received

25 in evidence.)

1 INTERVENOR'S EVIDENCE 23

2 MR. CYR: Next, Your Honor --

3 again, by my list, Exhibit 54 is the curriculum vitae

4 of Richard L. Feigen.

5 MR. MERENSTEIN: No objection.

6 THE COURT: It's admitted.

7 (Intervenor's Exhibit A-54 received

8 in evidence.)

9 MR. CYR: Okay. Next, Your Honor,

10 Exhibit 55 would be the report of Richard L. Feigen.

11 THE COURT: Any objection?

12 MR. MERENSTEIN: No objection, Your

13 Honor.

14 THE COURT: All right. It's

15 admitted.

16 (Intervenor's Exhibit A-55 received

17 in evidence.)

18 MR. CYR: Exhibit 57 would be the

19 expert report of Richard Feigen regarding the --

20 THE COURT: Did you mean to skip

21 past 56?

22 MR. CYR: Yeah, my list does skip.

23 And I apologize, Your Honor. I don't have that binder

24 with me.

25 THE COURT: Okay. If it skips,

1 INTERVENOR'S EVIDENCE 24

2 it's convenient to me because you've now meshed up.

3 57, you were about to tell me, I'm

4 sure, is the supplemental report of Mr. Feigen; am I

5 right?

6 MR. CYR: That's correct, Your

7 Honor.

8 THE COURT: And that's what I have.

9 Any problem with that,

10 Mr. Merenstein?

11 MR. MERENSTEIN: Which one? My

12 numbers are off, as well. I don't have a 56.

13 THE COURT: 57 is the supplemental

14 report of Mr. Feigen dated 31 August 2004.

15 MR. BARTH: That's what I have, as

16 well, Your Honor, for 57.

17 MR. MERENSTEIN: Originally, the

18 amici had listed 57 as Mr. Feigen's appraisal of the

19 carved stone piece. So, I'm going off the list --

20 THE COURT: Well, that's what it

21 is.

22 MR. MERENSTEIN: That's not the

23 supplemental report. Okay? Because he also issued a

24 supplemental report.

25 THE COURT: You are correct. You

1 INTERVENOR'S EVIDENCE 25

2 are correct.

3 MR. MERENSTEIN: Which I don't

4 think is listed.

5 THE COURT: And 57 is the carved

6 stone piece.

7 MR. MERENSTEIN: Okay. No

8 objection.

9 THE COURT: I saw the short length

10 of it, and I thought oh, this is where he changed the

11 appraisal on the Courbet, but it's not. You're right.

12 MR. MERENSTEIN: So, no objection

13 to the carved stone.

14 THE COURT: All right. 57 is

15 admitted.

16 (Intervenor's Exhibit A-57

17 received in evidence.)

18 THE COURT: 58, in my book, is the

19 supplemental report on the Courbet.

20 MR. BARTH: Not mine. My 58 is

21 Mr. Barrow's CV.

22 MR. MERENSTEIN: That's what I

23 have.

24 THE COURT: What do you have it as,

25 Mr. Cyr?

1 INTERVENOR'S EVIDENCE 26

2 MR. CYR: I had it as 58, also.

3 THE COURT: Had what as 58?

4 MR. CYR: The supplemental report.

5 THE COURT: Well, I imagine you

6 would agree that the supplemental report, whatever its

7 number, is admissible. Agreed?

8 MR. MERENSTEIN: Yes.

9 THE COURT: As is Mr. Barrow's CV,

10 right?

11 MR. MERENSTEIN: Yes. Even if

12 they're both A-59.

13 THE COURT: That's what I have as

14 59.

15 (Intervenor's Exhibits A-58 and

16 A-59 received in evidence.)

17 THE COURT: What's the next one you

18 want to move the admission of?

19 MR. CYR: The curriculum vitae of

20 Kenneth P. Barrow.

21 THE COURT: Well, I thought we did

22 that already.

23 MR. CYR: I have him as Exhibit 58.

24 THE COURT: Okay. We've already

25 agreed that that may be admitted.

1 INTERVENOR'S EVIDENCE 27

2 MR. MERENSTEIN: No objection.

3 THE COURT: What's the next matter

4 that you want?

5 MR. CYR: Exhibit 59 would be the

6 expert report of Mr. Barrow.

7 THE COURT: Okay. Whether 59 or

8 60, no objection?

9 MR. MERENSTEIN: No objection.

10 THE COURT: Okay.

11 MR. CYR: Your Honor, then -- and

12 this is turning to the binder that's in front of you.

13 THE COURT: Yes.

14 MR. CYR: Exhibit 65 is the chart

15 of the comparison of the art appraisal values.

16 THE COURT: Yes. I'm certainly
17 familiar with this.

18 Any problem with that,
19 Mr. Merenstein?

20 MR. MERENSTEIN: I did notice at
21 least one mathematical error, but other than
22 mathematical errors, we don't have a problem
23 substantively admitting this.

24 THE COURT: Well, I imagine if
25 there is a mathematical error, it is apparent upon

1 INTERVENOR'S EVIDENCE 28

2 review --

3 MR. MERENSTEIN: Right.

4 THE COURT: -- and therefore, it
5 shouldn't --

6 MR. MERENSTEIN: So no substantive
7 objection.

8 THE COURT: All right. 65 is
9 admitted.

10 (Intervenor's Exhibit A-65 received
11 in evidence.)

12 MR. BARTH: If I may, Your Honor?
13 Just so I can keep track, we have skipped several
14 numbers.

15 THE COURT: We have.

16 MR. CYR: That's correct.

17 THE COURT: And I thought that was
18 intentional.

19 MR. CYR: Your Honor, Exhibit A-66
20 is a summary of the opined values of the building and

21 Land at Ker-Feal.

22 THE COURT: Yes.

23 Any problem with that?

24 MR. MERENSTEIN: Well, our only

25 objection, Your Honor, would be that Mr. Barrow's

1 INTERVENOR'S EVIDENCE 29

2 testimony, which I assume is how they authenticate the

3 figures there for Mr. Barrow in the last column, he

4 testified that he did not appraise the land, but he

5 appraised approved lots.

6 And so, with that note, we don't

7 have a substantive objection again, but I don't think

8 it accurately reflects his testimony, in items of this

9 being a demonstrative --

10 THE COURT: I recollect this being

11 put up as a demonstrative exhibit during his testimony

12 and he being asked questions about it. So I imagine on
13 that score, you would agree it's admissible.

14 MR. MERENSTEIN: Well, Your Honor,
15 I believe that even the demonstratives must
16 be authenticated by a witness. And, again, all I'm
17 saying is that --

18 THE COURT: I think you're right
19 about that.

20 MR. MERENSTEIN: I believe that in
21 terms of Mr. Barrow authenticating his part, we don't
22 have a problem with the description of Mr. Perry or Mr.
23 Wood's testimony. But Mr. Barrow's testimony again,
24 just to clarify for the record, was that he appraised
25 approved lots, not raw land. And that's the only thing

2 that I would point out, that to that extent, I don't
3 believe he authenticated this precisely the way it is.

4 THE COURT: Well, in fairness, I
5 don't see those terms used on this chart. It simply
6 says Summary of the Opined Values of Buildings and
7 Land. It doesn't have descriptions about law or
8 approved, agreed?

9 MR. MERENSTEIN: Yes. I agree,
10 Your Honor.

11 THE COURT: So I think that is not
12 inconsistent with the testimony and is admissible.
13 I'll admit 66.

14 MR. MERENSTEIN: Okay.

15 (Intervenor's Exhibit A-66 received
16 in evidence.)

17 MR. CYR: Your Honor, Exhibit A-67
Page 55

18 is the May 4, 1990 Emlen Wheeler report.

19 THE COURT: Mr. Merenstein?

20 MR. MERENSTEIN: We would object to

21 this, again, as hearsay. Certainly, no witness

22 authenticated this.

23 THE COURT: I'm inclined to think

24 that that's a good objection, Mr. Cyr. Obviously to

25 the extent that this was used in the examination of

1 INTERVENOR'S EVIDENCE 31

2 other witnesses and they commented upon it, those

3 answers are already in the record. But to offer this

4 as a substantive opinion, I don't believe it was

5 properly authenticated. Would you choose to argue?

6 MR. CYR: No, Your Honor. We're

7 marking that for identification purposes only, not for
8 the truth of the matter asserted.

9 THE COURT: All right.

10 MR. CYR: Exhibit 68 is May 30,
11 1996, 2nd Draft Request for a Proposal.

12 Mr. Merenstein?

13 MR. MERENSTEIN: Same objection,
14 Your Honor, that it's hearsay. And no witness
15 authenticated what this is. I believe even Mr. Cyr
16 pointed out that he didn't know what it was.

17 MR. CYR: Your Honor, this was an
18 exhibit of the Barnes Foundation in the December trial.

19 THE COURT: Was it admitted in the
20 December trial, if you know?

21 MR. CYR: I don't recall. I don't
22 know, Your Honor.

23 THE COURT: Well, if it's admitted,
24 then you don't need to admit it again because these
25 proceedings are deemed to be cumulative. If it wasn't

1 INTERVENOR'S EVIDENCE 32

2 offered for admission by the Barnes in the first trial,
3 then it would depend on my ability to recall what
4 foundation was laid at that time and how it was
5 supplemented here, which, frankly, goes well beyond the
6 ability of this simple country boy.

7 MR. MERENSTEIN: If I can just
8 clarify a little bit? I think this document was part
9 of a series of documents related to the Lincoln
10 University that the Foundation submitted. I honestly
11 don't remember whether it was actually moved into
12 evidence, but it's a small part of a larger set of

13 documents. I don't believe there was any testimony on
14 it because, as Your Honor knows, the whole issues
15 relating to Lincoln were not really dealt with in the
16 December hearings. There was no testimony or
17 foundation laid for it, certainly not as a stand-alone
18 document.

19 THE COURT: All right. Well, let's
20 talk -- obviously, what happened in December happened.
21 We won't change that. But assume for the sake of
22 discussion, Mr. Cyr, that it was not admitted then.
23 For what purpose should I consider its admission now?

24 MR. CYR: Your Honor, for the
25 purpose that I believe it was used in cross-examination

1 INTERVENOR'S EVIDENCE 33

2 of the Foundation's art appraisal experts in which a
3 prior opinion had been rendered by somebody from the

Volume XIII

4 Foundation that the collection at Ker-Feal of furniture
5 and pottery was valued at approximately \$4 million.

6 THE COURT: Say it again. Was
7 valued at?

8 MR. CYR: Referring to Page 3 of
9 the exhibit, Your Honor.

10 THE COURT: Okay.

11 Ah, now I understand.

12 MR. CYR: And it talks about the
13 Ker-Feal collection and it says the more than 1,500
14 piece collection of furniture and pottery was valued at
15 more than 4 million. And this was used to impeach the
16 valuation placed upon the Ker-Feal collection by the
17 Barnes Foundation's appraisal experts.

18 THE COURT: I do have a vague
Page 60

19 recollection now of your having pointed that out to a
20 witness in questioning. So that questioning is in the
21 record. I guess to that extent, you used it for
22 impeachment. I don't know that merely reading from a
23 document authenticates it otherwise.

24 So, if it's not already admitted,
25 the use of it for impeachment purposes does not make it

1 INTERVENOR'S EVIDENCE 34

2 admissible. I would sustain the objection.

3 That's not to suggest that I'm
4 striking the testimony whereby the witness was
5 questioned and responded to it. That's legit.

6 In any event, it's marked and it's
7 in the record. So, if reference needs to be made to
8 where you came up with that question, that's there.

9 That brings us to 69.

10 MR. CYR: 69, Your Honor, is a
11 demonstrative exhibit entitled the Value of the Barnes'
12 Works in Storage.

13 THE COURT: This is really
14 argument, is it not? It's a summary of positions and
15 essentially arithmetic calculations made therefrom,
16 right?

17 MR. CYR: That's correct, Your
18 Honor.

19 THE COURT: What's your position?

20 MR. MERENSTEIN: Well, Your Honor,
21 if you recall --

22 THE COURT: Do you object?

23 MR. MERENSTEIN: We object.

24 THE COURT: Sustained. Sustained.

25 MR. MERENSTEIN: Thank you. I'll

1 INTERVENOR'S EVIDENCE 35

2 shut up.

3 THE COURT: 70.

4 MR. CYR: 70, Your Honor, are
5 copies of the digital images that were provided to the
6 art appraisal experts with respect to the 20 most
7 valuable pieces of art.

8 THE COURT: So what you're
9 representing is there are 19 or 20 of these in this
10 exhibit?

11 MR. CYR: That's correct.

12 THE COURT: All right.

13 Any objection to that?

14 MR. MERENSTEIN: No objection, Your
Page 63

15 Honor.

16 THE COURT: All right, then. 70 is
17 admitted by agreement.

18 (Intervenor's Exhibit A-70 received
19 in evidence.)

20 MR. CYR: Your Honor, 71 is a
21 demonstrative exhibit entitled Fundraising Requirements
22 for the 3-Campus Model that was used during the
23 cross-examination of Mr. Schwendeman.

24 THE COURT: Any objection to that?

25 MR. MERENSTEIN: Again, no

1 INTERVENOR'S EVIDENCE 36

2 substantive objection. Really just the terminology is
3 certainly argument, fundraising requirements.

4 THE COURT: I remember the use of
Page 64

5 this. I don't think you have to worry that I'm going
6 to be overwhelmed by it. We'll admit it.

7 (Intervenor's Exhibit A-71 received
8 in evidence.)

9 MR. CYR: 72, Your Honor, is a
10 demonstrative exhibit entitled Ker-Feal Attendance and
11 Revenue Projections.

12 THE COURT: What this really comes
13 from, you've just excerpted a portion of the document
14 used by the Foundation, right, and wrote one number at
15 the bottom totaling it?

16 MR. CYR: That's not entirely
17 accurate, Your Honor.

18 THE COURT: Did you create this?

19 MR. CYR: I created this from
20 numbers taken from the Deloitte report.

21 THE COURT: Okay. I remember these
22 numbers on the Foundation's exhibits. That's why I
23 said what I did. But you're saying this isn't a
24 photocopy of a portion of it?

25 MR. CYR: No. No.

1 INTERVENOR'S EVIDENCE 37

2 THE COURT: You extracted them and
3 put them on a separate --

4 MR. CYR: We created this chart,
5 Your Honor.

6 THE COURT: Okay.

7 MR. CYR: We extracted information
8 from various parts of the Deloitte report.

9 THE COURT: What's your position?

10 MR. MERENSTEIN: We would object to
Page 66

11 this. Again, you may recall that Mr. Cyr tried to
12 authenticate this document through questioning of
13 Mr. Schwenderman, and Mr. Schwenderman actually took
14 issue with the assumptions, particularly the labeling
15 of this as Ker-Feal revenue projections, and indicated
16 that it did not include such things as development
17 revenue and unearned revenue.

18 THE COURT: Well, you're kind to
19 suggest that I'll remember, because I don't. But I
20 will comfort myself with the knowledge that all of
21 these numbers are in and are available to me, and the
22 rest is argument. So I'll sustain the objection.

23 MR. CYR: Your Honor, 73 is a like
24 demonstrative exhibit on the Merion Arboretum
25 Attendance and Revenue figures.

1

INTERVENOR'S EVIDENCE

38

2

THE COURT: Mr. Merenstein?

3

MR. MERENSTEIN: Same objection.

4

THE COURT: Objection sustained.

5

It's argument.

6

MR. CYR: 74, your Honor, is a

7

demonstrative exhibit that I created during

8

cross-examination of Mr. Schwendeman.

9

THE COURT: Well, I certainly don't

10

disagree with your math. That's pretty simple. It's

11

not even algebra.

12

Do you object to this?

13

MR. MERENSTEIN: I guess not. I

14

mean, as you say, it's just a bunch of numbers on a

15

piece of paper.

16

THE COURT: Okay.

17 MR. MERENSTEIN: To that extent,

18 Your Honor --

19 THE COURT: 74 is admitted without

20 objection.

21 (Intervenor's Exhibit A-74 received

22 in evidence.)

23 THE COURT: 75, is this another

24 document that you prepared?

25 MR. CYR: Yes, Your Honor.

1 INTERVENOR'S EVIDENCE 39

2 THE COURT: Extracting numbers and

3 extrapolating numbers?

4 MR. CYR: Another demonstrative.

5 THE COURT: Objection?

6 MR. MERENSTEIN: No. We have no

7 objection to this one.

8 THE COURT: You do not?

9 MR. MERENSTEIN: No.

10 THE COURT: Okay. Then it's

11 admitted.

12 (Intervenor's Exhibit A-75 received

13 in evidence.)

14 MR. CYR: 76, Your Honor, is

15 another demonstrative exhibit.

16 THE COURT: Did someone

17 authenticate this, Mr. Cyr?

18 MR. CYR: Your Honor, I went

19 through this on cross-examination with

20 Mr. Schwenderman.

21 THE COURT: Mr. Merenstein, do you

22 remember? Did he have a problem with anything that was
23 on here?

24 MR. MERENSTEIN: Your Honor, he
25 did. In fact, I think Mr. Cyr's words that he went

1 INTERVENOR'S EVIDENCE 40

2 through it with him are accurate, but he certainly
3 didn't authenticate it. Mr. Schwendeman had a number
4 of objections to the assumptions of, for example, the
5 adult general ticket price is not nine dollars. And,
6 again, that's explained more fully in
7 Mr. Schwendeman's report.

8 THE COURT: Okay. Objection
9 sustained to No. 76. I'll deal with the substantive
10 testimony of the witnesses.

11 MR. CYR: Your Honor, Exhibit 77 is
Page 71

12 another demonstrative exhibit which reflects
13 calculations I went through with Mr. Schwendeman
14 during my cross-examination.

15 THE COURT: Well, I will agree with
16 your math.

17 What do you say to that exhibit,
18 Mr. Merenstein?

19 MR. MERENSTEIN: Same thing. I had
20 the same reaction, Your Honor. The math looks okay to
21 me. I don't honestly recall what this is. It's just a
22 few members on a piece of paper. It's hard for me to
23 object, Your Honor.

24 THE COURT: If I have a question
25 about whether 1.2 million minus .3 million equals

Volume XIII

2 900,000, I'll come back to it. So I'll admit it --

3 how's that -- because I think that that's a truism.

4 MR. MERENSTEIN: No problem.

5 MR. CYR: At least I get an A in

6 math, Your Honor.

7 THE COURT: By the math that I

8 studied. I don't know if that's still good math,

9 Mr. Cyr. But when I took it, it was. Twelve minus

10 three is nine, almost every time.

11 (Intervenor's Exhibit A-77 received

12 in evidence.)

13 MR. CYR: Your Honor, Exhibit A-78

14 is another demonstrative exhibit that was reviewed with

15 Mr. Schwendeman on cross-examination.

16 THE COURT: Well, if it was

17 cross-examination, are you objecting to it?

Volume XIII

18 MR. MERENSTEIN: We object to the
19 substantive evidence. Mr. Schwenderman completely did
20 not authenticate this, and no other witness was asked
21 about it.

22 THE COURT: All right. Okay.
23 Objection is sustained.

24 79 is what, Mr. Cyr?

25 MR. CYR: 79 is another

1 INTERVENOR'S EVIDENCE 42

2 demonstrative exhibit of various calculations that,
3 again, was reviewed with Mr. Schwenderman on
4 cross-examination.

5 THE COURT: These look like they
6 come from a Foundation exhibit. Would I be right in

7 that assumption?

8 MR. CYR: No, Your Honor. This was
9 an exhibit that we prepared.

10 THE COURT: So you needed to do
11 calculations to reach it?

12 MR. CYR: That's correct.

13 THE COURT: Okay.

14 Any objection to that?

15 MR. MERENSTEIN: Really just the
16 same objection.

17 THE COURT: I'll sustain the
18 objection.

19 MR. CYR: Your Honor --

20 THE COURT: Let me make clear what
21 I understand the law of demonstrative exhibits to be.
22 If someone has merely extracted numbers from documents

23 that are admissible one can do that, and you can
24 introduce that demonstrative exhibit as an aide to the
25 fact finder in looking at certain parts of testimony.

1 INTERVENOR'S EVIDENCE 43

2 If the demonstrative exhibit
3 contains calculations that are not part of an admitted
4 document and includes some reasoning or rationale, then
5 it needs to be authenticated in its own right. And
6 although one can authenticate a document by means of
7 cross-examination of another party, that's usually not
8 the way that you get in what you need by it. And I
9 have to confess, I don't have instant recall of the
10 answers -- Mr. Schwendeman was on the stand a long
11 time, almost all day. And without going through the
12 transcripts or my notes, I can't recollect now whether

13 he took issue with any of these calculations that are
14 not just lifted from the Foundation exhibits. So
15 that's my problem when I deal with these.

16 So what I'm trying to figure out is
17 whether or not you're just presenting to me numbers in
18 a different fashion that are already in, or whether
19 you're making an argument tool which you used for
20 cross-examination. To the extent that you had
21 cross-examination, obviously all of that's part of the
22 record and is not being extinguished, but I don't know
23 that that means the documents that you fashioned for
24 the purpose of creating the question is independently
25 admissible. I think, to the contrary, it is not.

1 INTERVENOR'S EVIDENCE 44

2 MR. CYR: Your Honor, in response

3 to that, I would state that it's my recollection that
Page 77

4 Mr. Schwenderman agreed with the financial calculations
5 that the extent that they were financial calculations
6 presented on this demonstrative exhibit.

7 THE COURT: On this one, No. 80,
8 you mean?

9 MR. CYR: Well, on the previous
10 ones also, Your Honor. They were based upon
11 assumptions in Mr. Schwenderman's report, and I won't
12 represent to the Court that I went through every single
13 calculation, but it was my recollection of
14 Mr. Schwenderman's testimony that --

15 THE COURT: Well, for instance, if
16 you look at No. 80, this clearly is from the
17 Foundation's document. The only thing that's different
18 is in the column for 2003, one number is lined out and

19 a handwritten number replaces it, right? Or does that
20 represent an aggregate of the five members above it?

21 MR. CYR: That's a replacement
22 number, Your Honor.

23 THE COURT: Yeah. See, I can't
24 remember the context in which you did that. I'm not
25 criticizing you, but it would have been easier to do

1 INTERVENOR'S EVIDENCE 45

2 this if you had moved it at the time when it was fresh
3 in my mind.

4 This exhibit is one that's
5 important to you, No. 80? If it is, I'll admit it
6 conditionally until I can go back and read the record.

7 MR. CYR: Yes, Your Honor.

8 THE COURT: All right. I'm going

9 to admit it, conditionally.

10 And if it turns out that you're

11 right, that there is no authentication, I'll correct

12 myself, Mr. Merenstein.

13 (Intervenor's Exhibit A-80 received

14 in evidence.)

15 MR. MERENSTEIN: We're talking

16 about 80, the As-Is Scenario?

17 THE COURT: 80, As-Is Scenario.

18 MR. MERENSTEIN: Again, I think

19 Your Honor will recall, this is part of a document that

20 definitely was admitted at the December hearing. So

21 you're right. Other than that one number, we certainly

22 don't have a problem with the page. I don't honestly

23 recollect where that number came from.

24 And I would just agree that, I

25 mean, if they were intended to admit these as

1 INTERVENOR'S EVIDENCE 46

2 substantive evidence, they should have done that when

3 Mr. Schwenderman was on the stand.

4 MR. CYR: Well, that wasn't our

5 case.

6 THE COURT: Right. I understand.

7 That's fair, too. If you're going to follow the rules

8 correctly -- and you did -- you can't move your

9 exhibits during the other parties' case in chief. So

10 that's a good response to what I had indicated would

11 have been a better practice.

12 81 is a document entitled

13 Construction Economics. It's obviously lifted from

14 something. What is this?

Volume XIII

15 MR. CYR: Your Honor, 81 was used
16 during the cross-examination of Mr. Perks. It's a page
17 from the Engineering News Record, and it was used. And
18 I believe Mr. Perks authenticated it.

19 THE COURT: Yeah, my recollection
20 is Mr. Perks did authenticate this.

21 Do you remember differently,
22 Mr. Merenstein?

23 MR. MERENSTEIN: I just remember
24 that he was asked if this looks like it comes from the
25 Engineering News. I believe that that's what it comes

1 INTERVENOR'S EVIDENCE 47

2 from.

3 THE COURT: Yeah, and I think he

4 said he relied on this and things like this to make --

5 MR. MERENSTEIN: Well, things like

6 this. I don't think this exact one.

7 THE COURT: Yeah.

8 MR. CYR: And specifically, Your

9 Honor, we asked him about the inflation factor and the

10 building costs and the construction costs over the last

11 year and --

12 THE COURT: And he acknowledged

13 that they had increased.

14 MR. CYR: -- and he acknowledged

15 that it was accurate.

16 THE COURT: Yeah, he acknowledged

17 that. I agree. I'll admit that.

18 (Intervenor's Exhibit A-81 received

19 in evidence.)

20 MR. CYR: Exhibit 82, Your Honor,
21 is --

22 THE COURT: -- the Wall Street
23 Journal article. I guess my earlier rant about
24 newspaper articles generally ought not be qualified by
25 my attempt to evaluate their quality subjectively.

1 INTERVENOR'S EVIDENCE 48

2 What do you think? In other words, does the Wall
3 Street Journal get a pass because it's the Wall Street
4 Journal? My father-in-law would say yes, but I don't
5 know that he gets to make this decision.

6 Does it have an independent basis
7 for admission, other than the fact that, you know, it's
8 a newspaper article from the Journal?

9 MR. CYR: Well, Your Honor, for
Page 84

Volume XIII

10 identification purpose, at a minimum, it was used

11 during the cross-examination, I believe --

12 THE COURT: There is no question

13 that's true, but that doesn't admit it. I don't think

14 it's substantively admissible, but I recognize it for

15 what it's proffered to be. In fact, I read it the day

16 after it came out.

17 MR. CYR: It's obviously hearsay,

18 Your Honor.

19 THE COURT: Yeah, it is.

20 MR. CYR: I can't represent to you

21 it's anything other than that.

22 THE COURT: 83 is, obviously, a

23 brochure that you used, I believe, to cross-examine a

24 Foundation witness as to what was or wasn't -- it was

25 authenticated, I believe, by the witness as a brochure

1 INTERVENOR'S EVIDENCE 49

2 from the Barnes, and you were using it to show what was
3 not in it, I think --

4 MR. CYR: That's correct.

5 THE COURT: -- if my memory serves
6 me right.

7 Any objection to that?

8 MR. MERENSTEIN: No.

9 And to move things along a little
10 quicker, I would note that the next six, we have no
11 objection to, Your Honor.

12 (Intervenor's Exhibits A-83 through
13 A-88 received in evidence.)

14 THE COURT: Okay. So where does
15 that take us up to, 90?

16 MR. MERENSTEIN: 89, Your Honor, is
17 the next one we have an objection to.

18 THE COURT: Okay.

19 MR. CYR: 89, Your Honor, is a
20 letter from Ms. Camp to the editor of New York Times on
21 March 29, 2001, used in cross-examination of Ms. Camp.

22 THE COURT: Yeah. My relation of
23 Ms. Camp's testimony on this was yes, however they had
24 edited the letter substantially, I think is what she
25 said to me. And I think the rule on that would be, by

1 INTERVENOR'S EVIDENCE 50

2 her acknowledgement that it is part of her writing,
3 that authenticates it. It would have given the
4 Foundation the right to, by nature of the rule of
5 completeness, to put the whole thing in if it wanted

Volume XIII

6 to. It elected not to. I think that this is
7 authenticated.

8 Am I missing your point somehow,
9 Mr. Merenstein?

10 MR. MERENSTEIN: Well, I guess one
11 problem I have is it just looks like it's typed on a
12 piece of paper. It doesn't even look like it came from
13 the New York Times. It just looks like somebody typed
14 it up --

15 THE COURT: Well, what it really
16 looks like to me, being the technological genius that I
17 am, is that it was an attachment to an e-mail sent
18 across the Internet. And I think it doesn't really
19 matter how it's reproduced if the witness acknowledges
20 it as authentic, which I believe Ms. Camp did. Her
21 criticism was -- and I can understand this -- it's not

22 the whole thing I wrote, they only put a part of it
23 down. But to the extent that she acknowledges that
24 what they reproduced was her words, I think it's
25 admissible and I will admit it. So that takes us to

1 INTERVENOR'S EVIDENCE 51

2 90.

3 (Intervenor's Exhibit A-89 received
4 in evidence.)

5 MR. CYR: Your Honor, 90 is a copy
6 of an article authored by Dr. Watson and posted on the
7 web site.

8 THE COURT: Yeah, and I believe he
9 did acknowledge it as such.

10 Do you agree --

11 MR. MERENSTEIN: No objection, Your

12 Honor.

13 THE COURT: All right. 90 is

14 admitted.

15 (Intervenor's Exhibit A-90 received

16 in evidence.)

17 THE COURT: And then 91 is?

18 MR. CYR: 91 is --

19 THE COURT: These are the

20 comparables that were used by --

21 MR. CYR: -- by Ms. Force.

22 THE COURT: By Ms. Force.

23 Any problem with this?

24 MR. MERENSTEIN: No.

25 (Intervenor's Exhibit A-91 received

2 in evidence.)

3 MR. CYR: 92, Your Honor, is the --

4 again, Your Honor --

5 THE COURT: More comparables?

6 MR. CYR: That Ms. Force used

7 during her examination.

8 THE COURT: Any problem?

9 MR. MERENSTEIN: No, Your Honor.

10 (Intervenor's Exhibit A-92 received

11 in evidence.)

12 MR. CYR: Of the DeMazia estate.

13 93, again, is another demonstrative

14 exhibit used by Ms. Force with the --

15 THE COURT: I think this was on the

16 issue of blockage. That's my recollection.

17 MR. CYR: That's correct, Your
Page 91

18 Honor.

19 THE COURT: Any problem with this,

20 Mr. Merenstein?

21 MR. MERENSTEIN: No, Your Honor.

22 (Intervenor's Exhibit A-93 received
23 in evidence.)

24 MR. CYR: 94, Your Honor, is the
25 Lower Merion Township Resolution.

1 INTERVENOR'S EVIDENCE 53

2 THE COURT: Yeah. Any problem with
3 that?

4 MR. MERENSTEIN: No.

5 THE COURT: It's admitted.

6 (Intervenor's Exhibit A-94 received

7 in evidence.)

8 THE COURT: 95 is one of the

9 expert's plot plan wherein the -- yeah, this is

10 Mr. Barrow, where he drew the lots, right?

11 MR. CYR: Yes.

12 THE COURT: Any problem with that?

13 MR. MERENSTEIN: No, Your Honor.

14 (Intervenor's Exhibit A-95 received

15 in evidence.)

16 MR. CYR: 96, Your Honor, is the

17 Art and Painting, the third edition, which was referred

18 to --

19 THE COURT: Right. Because the

20 earlier edition was referred to in the Foundation's,

21 and then you used this for cross-examination purposes?

22 MR. CYR: That's correct, Your

23 Honor.

24 THE COURT: Any problem with that?

25 MR. MERENSTEIN: I would just note

1 INTERVENOR'S EVIDENCE 54

2 that on one of the pages, there is notes. I don't know

3 whether those are notes of counsel --

4 THE COURT: Well, here is what I'll

5 say to you to alleviate any concern you have. I can't

6 read them.

7 MR. MERENSTEIN: Neither can I,

8 Your Honor.

9 THE COURT: So you don't have to

10 worry --

11 MR. MERENSTEIN: No objection.

12 THE COURT: You don't have to worry

13 about me drawing any inference from that which I don't

14 understand. 96 is admitted.

15 (Intervenor's Exhibit A-96 received

16 in evidence.)

17 MR. CYR: And, Your Honor, 97 is

18 the letter from Mr. Paul E. Kelly to Ms. Camp dated

19 September 27, 2004.

20 THE COURT: Right. Any objection

21 to that? That was used today.

22 MR. MERENSTEIN: It's certainly

23 authenticated. I believe it's hearsay, but we have no

24 objection, Your Honor.

25 THE COURT: All right.

1 INTERVENOR'S EVIDENCE

55

2 (Intervenor's Exhibit A-97 received

3 in evidence.)

Volume XIII

4 THE COURT: Now, you've got more
5 tab than that, but I think that that's all the exhibits
6 you've used. Am I right?

7 MR. CYR: That's correct, Your
8 Honor.

9 THE COURT: Okay. So, have we done
10 them all?

11 MR. CYR: I think so, Your Honor.

12 THE COURT: Okay. Good.

13 MR. MERENSTEIN: Your Honor, I
14 believe we've already moved.

15 THE COURT: You have.

16 MR. MERENSTEIN: But I believe
17 there is one that I'm not sure that you have a copy of.
18 We gave you our original exhibit, and then a

19 supplemental exhibit about the House and Garden
20 article. But there was one that we admitted and moved
21 into evidence that Mr. Wellington used with one of the
22 appraisers. And I just want to hand that up to Your
23 Honor, because I don't believe Your Honor's got it.

24 THE COURT: I'll take it.

25 MR. MERENSTEIN: Thank you, Your

1 PETITIONER'S CLOSING STATEMENT 56

2 Honor.

3 THE COURT: I think you are good.

4 Now, I understand that counsel

5 would like to make brief closings. Are you prepared to

6 do it now or do you need a break to do it?

7 MR. WELLINGTON: Prepared now, Your

8 Honor.

Volume XIII

9 THE COURT: And I understand,
10 Mr. Wellington, you and Judge Adams are going to split
11 yours?

12 MR. WELLINGTON: Yes, if that's
13 acceptable.

14 THE COURT: Of course it's
15 acceptable. And you can do that at your pleasure.

16 Nice to see you again, Judge Adams.

17 JUDGE ADAMS: It was a pleasure,
18 Your Honor, to see you in your court.

19 THE COURT: It doesn't seem
20 entirely fair, me looking down at you.

21 JUDGE ADAMS: I'm satisfied.

22 In any event, with submission to
23 Your Honor and to this great Court, at the beginning of

24 this set of hearings, the second set of hearings, you
25 very graciously permitted me to make a few introductory

1 PETITIONER'S CLOSING STATEMENT 57

2 remarks. In those, I referred to our original petition
3 as amended. We sought two principal changes to the
4 indenture: First, the increase of the Barnes Board
5 from five to fifteen; Second, permission to relocate
6 the gallery from Lower Merion to the Parkway. You
7 granted the first request, and you had a few things to
8 say which I think are quite pertinent.

9 You stated that the Foundation had
10 met its burden of establishing, under the doctrine of
11 deviation, and I'm quoting, that Barnes could not have
12 foreseen the complicated, competitive, and
13 sophisticated world in which nonprofits now operate,

14 nor the range of expertise and influence that the
15 members of the governing boards must now possess, that
16 the expansion of the Board was not only appropriate --
17 your words -- but necessary.

18 On the relocation issue, you
19 elected not to decide that issue at the time you wrote
20 the Opinion, but concluded, and I quote, that the
21 Foundation had established beyond, per indenture, that
22 its finances had reached a critical point, that in
23 recent years the current board had professionalized the
24 management of the Foundation, that efforts by the
25 Foundation to increase revenues by increasing

1 PETITIONER'S CLOSING STATEMENT 58

2 admissions had been stymied by the Lower Merion
3 Township's limits on the number of visitors allowed per

Volume XIII

4 week, namely 1,200 persons, which had put a
5 stranglehold on the Foundation's admissions policy.
6 That's all quotes. You then added, and I'm still
7 quoting, that the present location of the gallery is
8 not sacrosanct, and relocation may be permitted to
9 achieve the settlor's ultimate purposes. You proceeded
10 to request that Barnes present additional information
11 to help the Court determine whether relocation of the
12 gallery from Lower Merion to the Parkway was the least
13 drastic solution that would provide the financial
14 stability of the Foundation and to allow it to realize
15 Dr. Barnes' mission of promoting the advancement of
16 education and the appreciation of fine arts and
17 horticulture, all in quotes.

18 Then you asked a number of
19 questions. First, could \$50 million or more be raised

20 for the Foundation's endowment through the sale of
21 nongallery artwork and/or the Ker-Feal property in
22 Chester County?

23 B. Could adequate capital be
24 raised by selling nongallery assets or deaccessioning,
25 or do the general principles that cause museums to

1 PETITIONER'S CLOSING STATEMENT 59

2 avoid that practice apply to educational institutions
3 like the Barnes? And, if so, should those principles
4 yield to the reality of the Barnes' need for funding?

5 C. You also ask for assurance that
6 if the Court ultimately approved the relocation,
7 whether the proposed \$100 million for construction of
8 the gallery would be sufficient to accomplish that

9 goal, and whether the Barnes Foundation that included
10 this new facility, the so-called 3-campus model, be
11 financially viable.

12 My esteemed colleague

13 Mr. Wellington will refer to the evidence which has
14 been presented to provide positive answers to the very
15 same questions that you have propounded, but I also
16 posed a separate and different question, if you recall,
17 and I resubmit it to the Court.

18 When all the rhetoric is stripped

19 from the dispute, what is it that the Court and counsel
20 are addressing? I think we're addressing the question
21 whether it's more appropriate, given the Barnes will
22 and indenture, to let the situation remain as it has
23 been -- not a very satisfactory situation, as your
24 Opinion indicates -- in order to benefit a very limited

25 number of students who would prefer to take their

1 PETITIONER'S CLOSING STATEMENT 60

2 education instruction in Lower Merion rather than at
3 the Parkway, even though such a course would require
4 the sale of Ker-Feal, its real estate, and its
5 invaluable collection, the sale of many of the
6 wonderful paintings that are presently not in the
7 gallery, but which from time to time have been in and
8 out of the gallery, as the witness' testimony, and to
9 continue Barnes in the position they've been over
10 several decades, arguing with the local authorities and
11 neighbors, and even more important, limiting their
12 ability to permit thousands of people, including of
13 course, and I quote, the common people that Dr. Barnes
14 expressed deep concern about -- the common people not

15 only in Montgomery County, but throughout Pennsylvania.

16 In my opening remarks -- and this
17 is my concluding comment -- I expressed the view of
18 what Dr. Barnes would do if he were alive. And I
19 reminded the Court that I did know Dr. Barnes
20 personally. I did not testify because it would have
21 disqualified me as counsel. But it's interesting that
22 that observation has been sustained by the testimony in
23 this case. Fortunately, we were able to obtain various
24 items of the archives that established that what I had
25 told Your Honor was, indeed, the fact.

1 PETITIONER'S CLOSING STATEMENT 61

2 I thank you not only for the Barnes
3 Foundation, but personally for myself, for the
4 continuous courtesy that you have shown me throughout
5 these proceedings. Thank you.
Page 105

Volume XIII

6 THE COURT: Thank you, Judge Adams.

7 Mr. Wellington?

8 MR. WELLINGTON: Your Honor, I want

9 to add my personal thanks for your patience and

10 attention during these couple of sessions of our

11 hearings.

12 THE COURT: The high level of

13 counsel all around made this difficult case as easily

14 triable as it was.

15 MR. WELLINGTON: Kind of you to

16 say, Your Honor, and I agree certainly with respect to

17 my colleagues on the other side of the table here.

18 I will try to be as nonduplicative

19 of Judge Adams' comments as possible, but I do want to

20 review the way we have sort of seen the hearing,

21 without spending a lot of detail time on the evidence,
22 which I know Your Honor is going to address.

23 The case presents, in our view, a
24 stark contrast between two visions of what the Barnes
25 Foundation not only is, but can be and should be. The

1 PETITIONER'S CLOSING STATEMENT 62

2 one thing that everyone agrees on, I think on both
3 sides of this aisle, is that the Foundation can't
4 continue as it is, something drastic must be done. And
5 the fundamental legal question is, what is the least
6 drastic solution? And to get to the heart of the
7 issue, Your Honor asked several questions that Judge
8 Adams has just reviewed.

9 Your Honor heard the testimony by
10 Dr. Watson and Judge Allen at the prior hearing, and
11 it's Mr. Harmelin at the current hearing, about the how

12 the Foundation's Board has carefully considered these
13 options and has sought a solution that is faithful, in
14 their view, to Dr. Barnes' mission as they understand
15 it and as the Courts, as this Court and the Supreme
16 Court, have defined it. And we find ourselves at the
17 end of this proceeding, I think, with two options on
18 the table.

19 One of those options is the as-is
20 scenario that Judge Adams referred to, presented by
21 amici, but with one very drastic change. Under that
22 scenario, the main gallery remains in Merion, with all
23 of the difficulties presented by that location's
24 restrictions, the history of local difficulties, the
25 inadequate access for the public, as it would continue

Volume XIII

18 These would include the paintings that Dr. Barnes used
19 in the permanent gallery sometimes, as we've heard,
20 significant works by Courbet and Prendergast and
21 Soutine and Glackens and perhaps even the de Chirico
22 painting of Dr. Barnes himself, paintings that he and
23 his colleagues used in the education text of the
24 Foundation to explicate the ideas of education and art
25 appreciation. They would have what Dr. Wade called one

1 PETITIONER'S CLOSING STATEMENT 64

2 of the -- they would have the Foundation sell what
3 Dr. Wade called one of the greatest collections of
4 Native American textiles and art in the world. They
5 would sell the renowned collection of Colonial American
6 ceramics, the Pennsylvania Dutch Iron Works, the Early
7 American furniture at Ker-Feal, art objects that

Volume XIII

8 Dr. Barnes personally arranged in ensembles at that
9 location, which he described as equivalent in learning
10 experience to the ensembles in the Merion gallery. And
11 they would have us sell, as well, Ker-Feal itself, the
12 1775 colonial house, with its 1940s addition that
13 Dr. Barnes so proudly said could not be distinguished
14 from the original frame. And they would sell the
15 expansive grounds that Dr. Barnes conceived as an
16 integral part of his educational facilities and
17 program, as detailed in his own last will and
18 testament.

19 As you saw from correspondence,
20 Dr. Barnes himself told us that Ker-Feal was not his
21 country home, it was part of the Foundation's
22 educational mission, part of the program. Those who
23 hold this Foundation in their hands, the people

14 would be wrong to sell these things he collected.

15 Even Mr. Feigen, you may recall,

16 Your Honor, called by amici, when pressed as to whether

17 the Barnes Foundation should sell the remarkable

18 Courbet, which is one third of the appraised value of

19 the art that amici looked at completely, said no,

20 quote, this is not a painting, were it up to me, that I

21 would sell. And he said no when he was asked whether

22 they should sell the portrait of Dr. Barnes himself.

23 Quote, I think it should hang somewhere in the

24 foundation. I wouldn't sell it. It's common sense,

25 Your Honor, and it's the right choice.

1

PETITIONER'S CLOSING STATEMENT

66

2

And Your Honor has also heard from

3

testimony of three witnesses on ethical propriety of

4 deaccessioning. Not just what trustees think, but what
5 is the broader issue of ethics involved? Drs. Wade and
6 Sabloff cited these principles of nonprofit
7 organizations, precepts that govern their collections,
8 explained about the public trust in which they are
9 held, and that they shouldn't be sold to raise
10 operating revenue. And Dr. Wade described his personal
11 experience of an institution that crossed that line and
12 the consequences from that decision.

13 We heard from Ms. Camp and
14 Ms. McClea that they're working to make more and better
15 use of these parts of the collection in the
16 Foundation's educational programs. There was no
17 confusion or murkiness in the testimony by the
18 Foundation's experts on deaccessioning. Where the
19 works to be sold are an important part of the mission,

20 deaccessioning to raise operating revenue is simply
21 wrong.

22 Then there was the testimony by
23 Professor Malaro, and it's difficult to know exactly
24 what to say about that. She has been a respected voice
25 in opposition to deaccessioning for most of her career

1 PETITIONER'S CLOSING STATEMENT 67

2 and then, for some reason, came into court to argue in
3 favor of selling these works of Dr. Barnes, works that
4 in her own words are of high importance. Professor
5 Malaro admitted that she was not in court for the
6 testimony from the Foundation's archivist that showed
7 much of Dr. Barnes' own intentions, and perhaps her
8 views would have been different if she had. But her
9 position, apparently, is that the ethical precepts that

10 forbid deaccession do not apply to an organization that
11 is not purely a museum, although her writings which
12 specifically reference the Barnes Foundation from time
13 to time have suggested otherwise. Her argument to us
14 is as baffling as it is astonishing. Under it,
15 apparently, there would be no ethical bar to selling
16 works in the gallery itself. Her argument, if
17 accepted, would make terrible public policy for
18 nonprofit institutions.

19 In short, deaccessioning, in our
20 view, would be contrary to the intent of Dr. Barnes and
21 the mission he established. It would be unethical and
22 it would create bad public policy. And finally, Your
23 Honor, it would also be bad business because selling
24 Dr. Barnes' personal collected works doesn't raise

25 enough money to keep the Foundation stable.

1 PETITIONER'S CLOSING STATEMENT 68

2 One of Your Honor's questions in
3 January was whether the sale of Ker-Feal and the
4 nongallery art can raise \$50 million for endowment.
5 And not even the amici suggested that it can. Nobody
6 knows for sure what Ker-Feal would sell for or what the
7 art would sell for if it was all on the market. We do
8 know that amici's real estate appraiser, Mr. Perry,
9 valued Ker-Feal at double what the other two appraisers
10 did, not on what it could raise today, but what it
11 might be able to raise years from now, assuming after
12 hundreds of thousands of dollars in opposition from the
13 Township and the local community would oppose such
14 development, that it happened at all.

5 risky. But even if there were revenues there, what
6 then? We still have a million or \$2 million
7 developmental gap each year, and where is that going to
8 come from? Not from foundations like Pew, for reasons
9 made clear at the December hearing. Not from the
10 opposing Barnes students, who have never given much to
11 the Foundation. Not from Lower Merion Township, as
12 Mr. Manko testified. And what major donors are going
13 to contribute to an institution that's already sold
14 parts of its collection, incurred much of the wrath of
15 the arts community, restricted by zoning ordinance,
16 mired in controversy and disputes? The amici have not
17 identified any that we know of and, in short, the
18 option floated by amici dissolved under the light of
19 reality.

20 So what's left? The alternative

21 presented by the Foundation, Your Honor, has three
22 things going for it. And I, in a couple of minutes,
23 will close with why that's the less drastic
24 alternative.

25 First, it's viable. The Foundation

1 PETITIONER'S CLOSING STATEMENT 70

2 never said it would be easy. The Foundation's
3 witnesses have been careful to point out that what the
4 Foundation proposes is a challenge. But witnesses have
5 testified it is a challenge that can be accomplished.

6 The Court asked if a new building
7 could be built with \$100 million. Mr. Perks answered
8 yes. And that building will be more than twice as
9 large as the present gallery, though the gallery space
10 within it will not be bigger or different from what it

11 is now. There it is no counter testimony in this case.

12 The Court asked if a 3-campus

13 foundation can exist, despite the new expenses and

14 fundraising challenges that it will face. And

15 Mr. Schwenderman answered yes, and explained where the

16 money will come from. And there is no counter

17 testimony in this case. And because Mr. Schwenderman's

18 analysis showed the goal of raising development funds

19 of four and a quarter million dollars a year, the

20 foundation asked Mr. Callahan whether such a

21 fundraising goal is feasible, and he answered yes.

22 It's ambitious, but it's doable. And there is no

23 counter testimony.

24 So the Foundation's options have

25 been shown that they will work. And it brings us to

2 the final, most important advantage of the Foundation's
3 proposal. It fulfills the mission in the way that
4 Dr. Barnes would have wanted it fulfilled, by bringing
5 his theories to the public in a way that educates men
6 and women of all walks of life and those theories of
7 aesthetics and philosophy used in the gallery not as an
8 art museum's collection of pretty pictures, but as
9 ensembles, teaching lessons of aesthetics on scale
10 about which Dr. Barnes may only have dreamed.

11 The idea that he wanted to keep
12 this out of the public and to keep the public out of
13 his gallery and to deprive people of these benefits of
14 his collection is just wrong. To be sure, at times he
15 expressed concerns about the demands of public access

7 Philadelphia's public schools and others in the
8 suburbs, and had made broad proposals to the Department
9 of Education of the Commonwealth.

10 When the Supreme Court decided 44
11 years ago and found, one, that public access is an
12 important part of the Foundation's mission, it is far
13 too late to be arguing about the benefits of public
14 access again now. The Foundation's proposal will
15 enable it to fulfill its mission in a way that
16 Dr. Barnes would have been proud.

17 And finally, Your Honor, the third
18 advantage of the Foundation's proposal is that it keeps
19 together all of the works that Dr. Barnes collected
20 personally and made part of the Foundation for use in
21 its programs. Amici had it right when they filed their

22 petition to intervene. Selling the Foundation's
23 nongallery art and other assets would harm its
24 students -- not just today, but for all time. Once
25 sold, they are gone forever. It is an irrevocable act.

1 ATTORNEY GENERAL'S CLOSING STATEMENT 73

2 Construction of a new gallery is not. The Foundation
3 is here to protect its educational mission using the
4 educational tools that Dr. Barnes gave to it, all of
5 it. Yes, this is a grand vision and, we concede, an
6 audacious one. But as Mr. Callahan pointed out to Your
7 Honor, great things require great ambitions. And who
8 had grander vision or who was more audacious than
9 Dr. Barnes?

10 We urge the Court to give the
11 Foundation permission to realize its full potential.

12 Thank you very much, Your Honor.
Page 125

Volume XIII

13 THE COURT: Thank you,

14 Mr. Wellington.

15 Mr. Barth?

16 MR. BARTH: Thank you, Your Honor.

17 Over the course of this proceeding,

18 we have learned that Dr. Barnes wanted many things.

19 From his indenture, his will, writings, and

20 correspondence, we have learned that he meant to

21 establish an educational institution where his

22 collection could be exhibited in a very precise manner

23 and could be used to educate students in his theory of

24 aesthetic. He wanted, as part of that institution, an

25 arboretum and a school of horticulture. His goal was

Volume XIII

2 to educate the plain people in the values of democracy
3 through the study of art, to become better citizens
4 thereby. We also learned, however, that he had other
5 wishes that are currently not being honored.

6 For example, he wanted his school
7 to be closed in July and August. He directed that the
8 Foundation's art director should be paid a maximum of
9 \$5,000 per year. He left an endowment which he
10 anticipated would be sufficient to maintain his
11 institution into the future, and he believed that five
12 trustees could effectively manage it in today's art
13 environment. All of these wishes, we came to realize,
14 however, are complementary to and were designed to
15 serve his one overriding purpose, the existence of an
16 institution bearing his name to promote the advancement
17 of education and appreciation of fine arts.

Volume XIII

18 The trustees of that institution,
19 the Barnes Foundation, have brought a petition under
20 the doctrine of deviation seeking to depart somewhat
21 from his indenture, and it admittedly subordinates some
22 additional ancillary directives to insure the survival
23 of his paramount, again, the continued existence of the
24 Barnes Foundation to promote the advancement of
25 education and the appreciation of fine arts.

1 ATTORNEY GENERAL'S CLOSING STATEMENT 75

2 The law of deviation requires
3 exactly what the trustees have shown in this case, that
4 there have been some unforeseen changes in
5 circumstances, the financial distress of the
6 Foundation, and that settlor's main objective, the
7 continued existence of his Foundation, will be

Volume XIII

8 frustrated by strict adherence to all of his
9 directions, a five-person Board and the gallery's
10 presence in Merion.

11 For four days in December and
12 almost five this month we have heard the Barnes
13 Foundation present evidence to support the averments of
14 its amended petition. We now know the Barnes
15 Foundation's history and of its educational program, of
16 its collection both in and out of the gallery and how
17 it has been used to foster Dr. Barnes' educational
18 theory. The trustees have shared their plans for the
19 future and how they hope to promote and extend
20 Dr. Barnes' theory to a wider audience thereby. We
21 have been made aware of the unfavorable environment in
22 which the Foundation now operates, of its precarious
23 financial condition and of its inability under the

24 present circumstances to earn sufficient revenues or to
25 raise adequate donations to remain solvent, despite the

1 ATTORNEY GENERAL'S CLOSING STATEMENT 76

2 best efforts of its Board of Trustees.

3 Finally, we have learned of an
4 incredible bridge offered by the Pew, Lenfest, and
5 Annenberg Foundations, which give the Barnes Foundation
6 its greatest chance for long-term survival by providing
7 it with \$150 million for new facilities and endowment
8 if it would relocate its gallery to Philadelphia and
9 reorganize its governance to allow for it to achieve
10 stability and success.

11 We have also heard from some
12 students who, having already benefited from the
13 Foundation of Dr. Barnes' largess, seek to limit and

Volume XIII

14 constrain it and deny that to the wider audience its
15 present situation does not allow it to reach. They
16 challenge the degree of the Foundation's financial
17 difficulty and maintain that success can be achieved
18 just where it is and that there is no need to broaden
19 the Foundation's availability beyond the small group it
20 currently serves. They provide criticism, but no
21 alternative. They say there are less drastic
22 alternatives, but offer none that are realistic,
23 viable, or likely in the long-term to free the Barnes
24 Foundation from the serial crisis it repeatedly finds
25 itself in. They claim that they knew Dr. Barnes'

1 ATTORNEY GENERAL'S CLOSING STATEMENT 77

2 intent and maintain that that intent would be to sell
3 off those items he collected over the course of a

19 save the Foundation and, at the same time, honor
20 Dr. Barnes' paramount and most of his secondary wishes.
21 Such a decision would at the same time serve the
22 general public by allowing Dr. Barnes' vision to touch
23 many, many more.

24 Attorney General Pappert feels
25 strongly that this should be accomplished now. There

1 ATTORNEY GENERAL'S CLOSING STATEMENT 78

2 is simply no more time to explore other unarticulated,
3 unlikely, or Band-Aid less drastic alternatives. A
4 decision and action is needed immediately. Anything
5 less than a restructuring with a new board and moving
6 to Philadelphia would result in the Foundation being
7 back in this court again and again and again, always
8 under praeipecte, making continual requests for relief.

9 If prompt action is not
Page 133

Volume XIII

10 forthcoming, the funding foundations may well withdraw
11 their bridge finance, and I believe we can all agree
12 that there are worthy charitable alternatives to which
13 they can devote their funds, and the Barnes Foundation
14 will almost certainly fail. However, if this
15 unprecedented opportunity is embraced, the Barnes
16 Foundation is likely to remain independent and thrive
17 for a lifetime. The stars are simply not likely to be
18 set so favorably aligned again. The consequences of
19 not accomplishing this now will inevitably be more
20 crises, more petitions, ever diminishing public
21 support, and at best a marginal Barnes Foundation. At
22 worst, the Barnes Foundation will fail, the collection
23 will be disbursed, and the Barnes educational program
24 at the institution he created will cease to exist.

25 Your Honor, the attorney general,

1 AMICI'S CLOSING STATEMENT 79

2 as parens patriae, as representative of and protector
3 of the public interest, and as an advocate for those of
4 Dr. Barnes' wishes which would promote the continued
5 existence of his Foundation, urges you to grant the
6 prayer of the Barnes Foundation's second amended
7 petition. Thank you.

8 THE COURT: Thank you, Mr. Barth.

9 MR. CYR: Your Honor, could we
10 indulge the Court in a brief recess?

11 THE COURT: Of course. Let's take
12 10 minutes. Okay.

13 - - -

14 (Recess, 2:30 - 2:41 p.m.)

Volume XIII

16 MR. CYR: May it please the Court.
17 Mr. Kline, Mr. Quiñones, and I, at
18 the outset, wish to thank the Court on behalf of our
19 clients for the Court's attention and hard work in
20 adjudicating the difficult issues before it in this
21 matter. The amicus and their counsel, likewise, have
22 taken their charge very seriously in this case and have
23 worked very hard to provide the Court with balanced
24 evidence, the best experts in their fields, and
25 carefully crafted legal arguments for the Court's

1 AMICI'S CLOSING STATEMENT 80

2 consideration in these very weighty matters.
3 Additionally, there are many other people behind the
4 scenes that have aided us, and for whose support we are
5 eternally grateful.

21 be permitted if necessary to achieve the settlor's
22 ultimate purposes. The element of necessity has not
23 been established clearly and convincingly. As a
24 consequence, the Court gave the trustees another
25 opportunity to prove its case of deviation and

1 AMICI'S CLOSING STATEMENT 81

2 instructed, again quoting, we need to be persuaded that
3 the move to Philadelphia is the least drastic deviation
4 that will stabilize the Foundation's future.

5 It is the position of the amicus
6 that the trustees did not sustain the burden of proof
7 that the move to Center City was the least drastic
8 deviation. Indeed, the move to Center City was
9 presented as the only feasible option; however, nothing
10 has changed in this regard since the Court's

11 adjudication in January of this year. Where was the
12 evidence that the trustees considered other less
13 drastic alternatives?

14 The only testimony or evidence on
15 this point came during the cross-examination of
16 Dr. Watson. Dr. Watson testified only that the
17 trustees reviewed all their options, but did not give
18 any specifics as to whether the other options were
19 seriously considered or explored. Instead, the
20 trustees marshaled evidence for this Court case to
21 suggest that the move to Center City was the only
22 viable option. In other words, to draw upon the
23 Court's metaphor, after the January decision, the
24 trustees continued to float the Center City move as the
25 only boat in the sea.

2 Here are the options that the
3 trustees did not seriously consider as less drastic
4 alternatives to moving the gallery to Center City:

5 Increased admission fees. Despite
6 the fact that the petition seeks permission from the
7 Court to set the admission fees as the trustees deem
8 appropriate, there has been no consideration or
9 calculation by the trustees of what increased admission
10 fees could do to alleviate the present financial
11 problems. We do know, however, that the Center City
12 proposal contains a plan to increase the admission fees
13 to approximately \$12 a ticket. Simple arithmetic will
14 show that a similar increase to ticket prices at Merion
15 will lead to an additional \$400,000 in revenue, with no
16 change in the number of visitors.

17

18

acknowledged that formal fundraising that had just

19

commenced under her tenure was just starting to bear

20

fruit. Despite this, the trustees warn that

21

fundraising will shrivel up if the Barnes remains in

22

Merion; however, the trustees do not back up its

23

assertions with any facts or figures. This is in spite

24

of testimony you hear today from unsolicited friends of

25

the Barnes who want to support it in its present

1

AMICI'S CLOSING STATEMENT

83

2

location.

3

Additionally, the trustees have not

4

taken any steps beyond the fledgling effort spearheaded

5

by Ms. Camp to develop a permanent endowment from which

6

funds could be drawn to continue operations in Merion.

7

No formal capital campaign has been launched to develop

8 a permanent endowment other than what a prior Board did
9 in the 1990s to develop funds for renovation of the
10 gallery and for a building maintenance fund. Also, no
11 outside consultant has been sought, like expert
12 Mr. Callahan, who's only been retained in this
13 litigation to ratify the very ambitious fundraising
14 goals necessary to make the 3-campus model pass muster.

15 Finally, there has been almost no
16 evidence of any inability of the trustees to increase
17 the Foundation's annual fundraising with fundraising
18 events in its present location. The trustees would
19 undoubtedly again point to the Township and its
20 neighbors as a convenient scapegoat for its failings in
21 this regard, but no affirmative evidence has been put
22 to this Court as to whether the trustees have been

23 thwarted in this regard and why it has not been able to
24 accomplish more, other than the self-serving testimony
25 that no one wants to give support to an institution

1 AMICI'S CLOSING STATEMENT 84

2 afflicted with difficulties.

3 The expanded Board of Trustees. It
4 must be recognized that the Court has given the
5 trustees permission to expand its board. This will
6 undoubtedly enhance its ability to raise funds, as
7 stated by the trustees' expert in the December trial.
8 The board has not yet done this, but one can safely
9 predict that the newly expanded board will generate
10 increased annual giving and capital fundraising ability
11 for the facility in Merion if given the opportunity to
12 do so.

13 Increased attendance. No
Page 143

4 Ker-Feal, it will undoubtedly come to the conclusion
5 that Ker-Feal was the country estate home of Dr. Barnes
6 which houses a collection of furniture, pottery, and
7 miscellaneous art which could easily be displayed in
8 many other settings. Additionally, Ker-Feal is at best
9 used only sporadically by the education programs. It
10 can hardly be viewed essential to the mission of the
11 Barnes Foundation.

12 As Professor Malaro stated, unless
13 there is a specific prescription against the alienation
14 of property, the property of the donor cannot be sold.
15 At a minimum, the property surrounding buildings at
16 Ker-Feal can be sold; however, the maintenance of, let
17 alone the expansion of Ker-Feal, is a luxury which the
18 Barnes in its present financial condition can ill
19 afford.

Volume XIII

10 recall, it calculated the \$50 million endowment goal
11 based upon an average stated deficit of \$2.5 million,
12 as represented to the Court during the December, 2003
13 trial. It quickly became apparent, however, in this
14 proceeding, the projected deficit was not \$2.3 million
15 for 2003, nor will it be \$2.7 million for 2004; but
16 instead, as Mr. Schwenderman and Mr. Harmelin
17 testified, the deficit is something more akin to
18 \$1 million. Mr. Schwenderman acknowledged under
19 cross-examination that without increased income from
20 any other source, an endowment of approximately
21 twenty-four to twenty-five million dollars would
22 eliminate a structural deficit of a million or a
23 million point two. Accordingly, Your Honor, the
24 primary underpinning of the trustees' case of financial
25 distress was severely weakened when the trustees

1 AMICI'S CLOSING STATEMENT 87

2 revealed the actual size of the deficit.

3 What else did the trustees do with

4 respect to the Court's mandate to explore less drastic

5 alternatives? They conducted appraisals of the

6 nongallery art in Ker-Feal and they produced valuations

7 which at best could be called very conservative

8 estimates. The trustees retained Masterson Gurr Johns

9 to value the nongallery art. They enlisted the

10 appraisal expert of a Mr. Ruzicka, who our experts did

11 not recognize as an authority in this field, and indeed

12 specializes in the valuation of prints and not

13 paintings. Further, Mr. Ruzicka rendered his valuation

14 opinions on the basis of viewing tiny postage stamp

15 size digital images which showed little of the details

Volume XIII

16 of the original painting. Thus, it is not surprising
17 that the original evaluation of the 19 most valuable
18 paintings was way off the mark to the tune of almost
19 \$10 million as compared against the amicus experts.

20 The amicus then had two preeminent
21 experts in their fields of American and European Art,
22 Ms. Debra Force and Mr. Feigen, appraise the art
23 without the benefit of looking at the Masterson
24 original evaluation. They found the art to be
25 substantially more valuable. It was only then, after

1 AMICI'S CLOSING STATEMENT 88

2 the amicus presented their appraisals, that the
3 trustees had a change of heart and retained a
4 generalist who substantially increased the trustees
5 values, but only after looking at the Feigen and Force

6 valuation.

7 The trustees have attacked the

8 valuation of the Courbet as being an unsubstantiated

9 guess by Mr. Feigen. The stature and authority of

10 Mr. Feigen in the field of art is unparalleled, and

11 Mr. Feigen would not stake his reputation on some

12 baseless hunch of the value of this piece. Mr. Feigen

13 spoke with unchallenged authority with respect to his

14 value based upon his intimate knowledge of the very

15 rarified world of art valuation. Indeed, the trustees

16 only sought to challenge Mr. Feigen's bias based upon

17 statements he made many years ago with respect to

18 previous attempts to sell the permanent gallery

19 collection.

20 One can only conclude that the rest

21 of the valuations commissioned by the trustees is
22 equally flawed by the same tendency of undervaluation,
23 approximately 50 percent, as is demonstrated in our
24 demonstrative Exhibit A-69. If the rest of the
25 collection was as undervalued as the original estimate,

1 AMICI'S CLOSING STATEMENT 89

2 simple math shows that the art collection's worth much
3 more, by amicus' estimate approximately \$30 million.
4 If you add to that the Lipchitz sculpture of the Bather
5 at \$1.6 million, you have a total of \$32.7 million.

6 The same is true of the real estate
7 appraisal. Instead of valuing the real estate at
8 Ker-Feal at fair market value, which would assume the
9 highest and best use, the trustees valued the land
10 as-is, of a value which they should have known would be
11 substantially less than the fair market value

12 determined by the highest and best use. Kenneth
13 Barrow, the real estate expert for the amicus,
14 testified that the highest and best use is land ready
15 for development, which would more than double the
16 trustees' value to \$10.3 million. The trustees defense
17 to this approach is that it will take some time to sell
18 the land, but certainly bridge financing secured by the
19 land as collateral could provide funds in the
20 short-term.

21 In summary, the amicus demonstrated
22 that the trustees' appraisal of the real estate and art
23 was grossly undervalued by nearly \$18 million. Of more
24 importance is the fact that the trustees' undervalued
25 assets could easily provide adequate capital to

18 current level of giving and exceeds the benchmark of
19 institutions with a median attendance substantially
20 higher than the projected attendance of the Barnes.
21 The AAAM survey concluded that museums in the 90th
22 percentile which had annual attendance of 347,000
23 visitors, as opposed to the 200,000 projected by the
24 Barnes, will only raise \$3.9 million on average. Even
25 the custom survey commissioned by the Barnes where the

1 AMICI'S CLOSING STATEMENT 91

2 institutions had median attendance of 490,000
3 visitors -- more than double the projection of the
4 Barnes -- did not equal the average of the annual
5 project giving at the Barnes. Even Mr. Callahan, the
6 ever-optimistic fundraiser, admitted that this is a
7 very ambitious fundraising goal.

8 The financial model was further
9 premi sed on a break-even of the surplus of \$25,000 per
10 year. As was pointed out, the revenue model for the
11 Barnes is extremely sensi tive. Small swings in revenue
12 assumptions can lead to large swings from profit to
13 loss.

14 The Court rightly raised the
15 question of what is the trustees' solution if
16 everything does not go as planned? Other than the
17 modest contingency in the construction budget of 10
18 percent, there appears to be no stated fallback plan to
19 address cost overruns and revenue shortfalls.

20 Remember, Mr. Perks used an inflation factor of 1
21 percent going forward, when construction and building
22 costs have increased over from 6 to 8 percent in just
23 the last year. However, what was not stated but

24 demonstrated to the Court was the tremendous expense of
25 running the Merion and Ker-Feal facilities in the face

1 AMICI'S CLOSING STATEMENT 92

2 of de minimis revenues supporting these facilities. It
3 is not beyond peradventure that after the Barnes has
4 ensconced itself on the Parkway, that it will be back
5 in court seeking approval to sell off Merion and
6 Ker-Feal and even the nongallery art which they so
7 adamantly oppose at the present.

8 In summary, when the Court
9 evaluates the risk of uprooting the Barnes,
10 transforming its very nature by moving it to the
11 Parkway, it must balance that against the much smaller
12 risk of maintaining and enhancing its present operation
13 with the multiple revenue tools at its disposal.

4 THE COURT: Thank you, Mr. Cyr.

5 MR. KLINE: Your Honor, this week

6 we've heard testimony from Professor Malaro on the

7 ethics guidelines used by museums when they sell art.

8 She acknowledged this Court's 2001 Order that the

9 nongallery assets are not subject to restrictions

10 against sale that are set forth in the indenture. She

11 was clear that there are no legal impediments to the

12 sale of nongallery assets. And as to the application

13 of the museum ethics guidelines, Professor Malaro, who

14 is the most respected authority in the nation on the

15 subject, said that those museum guidelines do not apply

16 to the Barnes Foundation because the mission of the

17 Barnes Foundation is not of a public museum, but a

18 school.

19 Your Honor, the amicus curiae does

20 not relish the sale of the nongallery assets held in
21 storage by the Foundation. We invite a sale only to
22 the extent that it is necessary to keep the gallery in
23 Merion. And based on the values of the nongallery
24 assets that we presented to the Court this week, we
25 believe that a sufficient endowment can be raised while

1 AMICI'S CLOSING STATEMENT 94

2 retaining much of the nongallery art.

3 Testimony was given in December
4 suggesting that Lower Merion Township bear some
5 responsibility for the Barnes' financial problems. In
6 response to that record, the Township unanimously
7 passed a resolution against the proposed move. Since
8 that resolution, the record shows that the trustees
9 failed to approach the Township for any relief from

10 zoning restrictions that might have enhanced revenues
11 at the Barnes Foundation. Instead, the trustees said
12 that they were waiting for the commissioners to come to
13 them. And, with all due respect to the trustees, that
14 was not an effective way to explore less drastic
15 deviations.

16 When we asked Commissioners Manko
17 and Ettelson whether they would support reasonable
18 efforts by the trustees to enhance access to the Barnes
19 Foundation, both said yes. When we asked them whether
20 they would support reasonable efforts to enhance
21 fundraising efforts at the Barnes Foundation, both said
22 yes. Their testimony establishes for the record the
23 willingness of Lower Merion Township to cooperate with
24 the Barnes Foundation.

1 AMICI'S CLOSING STATEMENT 95

2 Mr. Wellington asked Dr. Sabloff whether the least
3 drastic deviation would be moving to the City or
4 selling the nongallery art. Dr. Sabloff chose the
5 move, but prefaced his answer by saying, quote, neither
6 one of those alternatives are ones that I would like to
7 see for the Barnes.

8 During this hearing, the trustees
9 presented two stark alternatives, move to the City of
10 Philadelphia or sell all the nongallery assets. No
11 other alternatives, no other options were considered by
12 the trustees, notwithstanding that they had the burden
13 to show by clear and convincing evidence that the move
14 to the City of Philadelphia is the least drastic of all
15 available alternatives.

16 We asked Dr. Sabloff about a third
17 alternative, the trustees redoubling their efforts to
18 develop funds to keep what they have in Merion. And
19 Dr. Sabloff said he would choose that alternative,
20 quote, if it could be achieved. We believe it can be
21 achieved, and at a less financial risk to the
22 Foundation than moving it to the City of Philadelphia
23 and simultaneously maintaining three campuses.

24 The third alternative is really a
25 menu of options, Your Honor, including increasing the

1 AMICI'S CLOSING STATEMENT 96

2 admission fee to \$12, adding new trustees, professional
3 fundraising, alternative access routes, the selective
4 -- not wholesale -- sale of nongallery assets. Many of
5 these options are simple to implement. Some are

6 available immediately. And collectively, these options
7 will satisfy the million-dollar deficit -- not the \$2
8 million deficit, not the \$2.5 million deficit, because
9 that doesn't exist. These options will satisfy the
10 million-dollar deficit and put the Barnes Foundation in
11 strong financial footing.

12 Your Honor, we have done our best
13 in these proceedings to test the evidence presented by
14 the trustees, but as the Court is aware, our rule as
15 amicus curiae was limited. We had no right to
16 discovery, so we could not verify whether extrinsic
17 evidence such as historical documents submitted by the
18 trustees accurately reflected Dr. Barnes' intent when
19 the trust was written or when he died, or whether there
20 were other historical documents that might have refuted
21 those that were introduced. We were not allowed to

22 depose any of the trustees' witnesses, so many of the
23 statements from them must, of necessity, go
24 unchallenged, although we leave for the Court the task
25 of determining the veracity of such testimony. We were

1 AMICI'S CLOSING STATEMENT 97

2 denied access to the work papers of the Deloitte report
3 which might have allowed us to challenge the trustees'
4 unstated financial assumptions. But at the end of the
5 day, on the major issue of least drastic deviation, we
6 were able to penetrate the trustees' plan and provide
7 independent advice to the Court about the impact of
8 their plan on the educational programs at the
9 Foundation. We trust that no matter what the outcome
10 of this proceeding, the interest of the students of the
11 Barnes Foundation will continue to be heard by this

12 Court.

13 We are fortunate in this country to
14 have a strong nonprofit sector of diverse institutions
15 that offer us a wide range of intellectual
16 opportunities, many of which do not conform to the
17 norm. Albert Barnes contributed a school, unique in
18 the world, idiosyncratic, intimate, so that those
19 people who have an interest could learn to see and
20 appreciate the art in painting. This Court has long
21 protected his mission against trustees who would
22 deviate from it, reminding those men and women of their
23 duty of obedience and of the importance of adhering to
24 donor intent so that all of us may have the opportunity
25 to experience the full richness of the Barnes

1

2 Foundati on.

3 On behalf of my cocounsel, Howard
4 Cyr and Paul Quiñones, on behalf of the amicus curiae,
5 my clients, we respectfully request that this Court
6 deny the balance of the trustees' second amended
7 petition to amend the charter and bylaws of the Barnes
8 Foundation. Thank you.

9 THE COURT: Thank you, Mr. Kline.

10 I would be remiss at the conclusion
11 of this trial if I did not comment on the caliber of
12 counsel before me. I did allude to it earlier.
13 Without exception, you have conducted yourselves as
14 professionals with integrity and character throughout,
15 extending all appropriate courtesies to this Court, for
16 which I thank you. I hope I've done the same in a
17 reciprocal fashion. You have not required the Court to

18 move the case along, indeed sometimes you dragged me
19 with you, appropriately so. So, thank you for your
20 efforts, all of you. I will take your arguments under
21 advisement. I understand the importance of the
22 decision. I will do my best to render something
23 coherent as quickly as can be done in a professional
24 manner.

25 MR. WELLINGTON: Just one question.

1 BARNES FOUNDATION 99

2 Is there a date by which Your Honor would like any post
3 hearing memorandum?

4 THE COURT: As I indicated in one
5 of our discussions in camera, Mr. Wellington, I am
6 inclined to make briefs optional, if you choose to
7 enter them. I will not be requesting formal findings

8 of fact and conclusions of law, simply because that's
9 not the way I operate my Opinion writing. But if you
10 choose to do so, you may submit them, of course. I
11 would never say that I wouldn't find them helpful.

12 MR. WELLINGTON: If we chose to do
13 so, if we did so within the next 10 days, would that --

14 THE COURT: Oh, my goodness, yes.
15 Yes.

16 MR. WELLINGTON: All right.

17 THE COURT: I would suggest if you
18 did them within the next 20, that would be fine.

19 MR. WELLINGTON: Thank you, Your
20 Honor.

21 THE COURT: Okay. And we'll give
22 it our --

23 MR. WELLINGTON: Mr. Merenstein
Page 168

24 thanks you for that.

25 THE COURT: I was actually thinking

1 PROCEEDINGS IN CHAMBERS 100

2 of Mr. Merenstein.

3 MR. MERENSTEIN: Thank you, Your

4 Honor.

5 THE COURT: Thank you.

6 (At 3:10 p.m., proceedings were

7 adjourned.)

8 - - -

9 (At 3:11 p.m., the following

10 proceedings were held in chambers with the Court and

11 all counsel being present:)

12 THE COURT: At an earlier sidebar

13 off the record, there was a challenge raised to the

14 students' attempt to call Mr. Kelly, really the only
15 witness who testified today. And as I understand it --
16 and of course I'll give Mr. Wellington and his team a
17 chance to embellish this, but my understanding of the
18 objection was Mr. Kelly was not on the list of proposed
19 witnesses that the students had earlier submitted
20 pursuant to the agreement and Court-directed, and that
21 the Foundation was only made aware of the intent to
22 call him on Tuesday of this week by fax --

23 MR. WELLINGTON: Wednesday.

24 THE COURT: Wednesday, I'm sorry,
25 by faxed communication from Mr. Kline or Mr. Cyr.

1 PROCEEDINGS IN CHAMBERS 101

2 In response to that, I'm told that
3 Mr. Cyr and/or Mr. Kline only became aware of the offer

4 being made by the so-called Kelly Foundation on Tuesday
5 of this week. When this subject began being discussed,
6 I recognized it as something I had read in this
7 morning's Philadelphia Inquirer. That's the first I
8 had heard of it.

9 And in making my ruling that
10 Mr. Kelly would be permitted to testify, my analysis
11 went along these lines. I think prejudice is the
12 overriding concern whenever an issue about a surprise
13 witness is raised. And I did not determine that this
14 was something that would likely prejudice the ability
15 to do whatever cross-examination would be necessary.

16 More to the point, this did not appear to be the type
17 of situation where a surprise was planned and sprung
18 upon the other side in the nature of a sandbagging
19 technique.

20 I find the statements of Mr. Kline
21 and Mr. Cyr credible, to the effect that they did not
22 know about it before Tuesday and under those
23 circumstances -- and finally, as was pointed out, it
24 was also offered partly in rebuttal to the testimony
25 offered by the Foundation last week that it is unlikely

1 PROCEEDINGS IN CHAMBERS 102

2 that the Foundation could obtain additional
3 contributors of any significance if the move were not
4 permitted, because the financial situation would remain
5 in flux and it's hard to attract donors to a program
6 with questionable financial stability. So, for all of
7 those reasons, I thought it was all right for Dr. Kelly
8 to testify, and I so ruled.

9 Now, Mr. Wellington, if you wish to
Page 172

10 further state any objection, then go ahead.

11 MR. WELLINGTON: Just very

12 concisely, Your Honor. There were two reasons, I

13 understand, that Mr. Kelly was asked to testify. His

14 Honor sustained one of them, and that was eliminating

15 potential testimony about hearsay of what others might

16 do, and he did limit Mr. Kelly, as I understood the

17 Court's ruling, to just his own decision or his

18 foundation's decision to contribute. And we just

19 wanted to put on the record a relevancy and materiality

20 objection to that testimony.

21 I have nothing further, Your Honor.

22 Thanks for the preservation.

23 MR. CYR: I have nothing further to

24 add, Your Honor.

25 THE COURT: Thank you. The
Page 173

1 PROCEEDINGS IN CHAMBERS 103

2 record's closed.

3 (At 3:14 p.m., proceedings were

4 concluded.)

5 - - -

6

7

8

9

10

11

12

13

14

15

Volume XIII

16

17

18

19

20

21

22

23

24

25

1

104

2

C E R T I F I C A T E

3

4

I hereby certify that the

5

proceedings and evidence are contained fully and

6 accurately in the notes taken by me in the above cause

7 and that this is a correct transcript of the same.

8

9

10

11

Amy Beth Boyer, R. P. R.
Official Court Reporter

12

- - -

13

14

Received and directed to be filed

15 this _____ day of _____, 2004.

16

17

18

19

20

Stanley R. Ott, Judge

21

Volume XIII

22

23

24

25