SCHNADER HARRISON SEGAL & LEWIS LLP
By: Ralph G. Wellington (I.D. No. 10068)
Carl A. Solano (I.D. No. 23986)
Bruce P. Merenstein (I.D. No. 82609)
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103
(215) 751-2000

Attorneys for The Barnes Foundation

IN RE:	:	**COURT OF COMMON PLEAS**
THE BARNES FOUNDATION,	:	**OF MONTGOMERY COUNTY**
A CORPORATION	:	**ORPHANS' COURT DIVISION**
	:	
	:	**No. 58,788**

MEMORANDUM OF LAW OF THE BARNES FOUNDATION IN SUPPORT OF ITS PRELIMINARY OBJECTIONS TO:

THE PETITION OF FRIENDS OF THE BARNES FOUNDATION, EVELYN YAARI, SANDRA G. BRESSLER, HOPE BROKER, RICHARD FEIGEN, SIDNEY GECKER, DR. WALTER HERMAN, NANCY CLEARWATER HERMAN, SUE HOOD, JULIA BISSELL LEISENRING, ROBERT MARMON, TOBY MARMON, COSTA RODRIGUEZ, BARBARA B. ROSIN, AND BARNES WATCH,

AND

THE PETITION OF RICHARD R. FEUDALE, ESQUIRE

Ralph G. Wellington (I.D. No. 10068)
Carl A. Solano (I.D. No. 23986)
Bruce P. Merenstein (I.D. No. 82609)
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2000
(215) 751-2205 (fax)

Attorneys for The Barnes Foundation

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INTRODUCTION

Respondent The Barnes Foundation ("The Foundation") files this consolidated brief in support of its Preliminary Objections to (1) the Petition of Friends of the Barnes Foundation, Evelyn Yaari, Sandra G. Bressler, Hope Broker, Richard Feigen, Sidney Gecker, Dr. Walter Herman, Nancy Clearwater Herman, Sue Hood, Julia Bissell Leisenring, Robert Marmon, Toby Marmon, Costa Rodriguez, Barbara B. Rosin, and Barnes Watch ("Friends Petition"), and (2) the Petition of Richard R. Feudale, Esquire ("Feudale Petition"). Each petition should be dismissed.

More than eight years ago, in 2002, The Barnes Foundation petitioned to make changes to its governing documents that were necessary to ensure The Foundation's survival and the continued fulfillment of its mission to promote the advancement of education and the appreciation of fine arts (the "2002 Petition"). Two years later — more than six years ago — this Court entered a final decree approving The Foundation's petition in full. Four months later, in April 2005, the Pennsylvania Supreme Court dismissed the only appeal from this Court's final decree.

Undeterred by the finality of that decree and indifferent toward the time and expense incurred by The Foundation in carrying out the relief awarded by the Court, a group of organizations and individuals filed a petition almost four years ago, in 2007, seeking to reopen the proceedings that led to the 2005 decree (the "2007 Friends Petition"). The 2007 Friends Petitioners contended that new information regarding an alleged state budget appropriation for The Foundation justified the reopening of the proceedings. At the same time, the County of Montgomery also petitioned to reopen the concluded proceedings; its petition claimed that the County had a better solution for solving The Foundation's financial difficulties than the one approved by the Court two years earlier. Both petitions were dismissed by this Court in May 2008 on the

ground that the petitioners lacked standing to reopen the proceedings. No one took an appeal from that decision.

Now, with nearly three more years having passed, another group of individuals and organizations that again is led by the Friends of the Barnes Foundation and includes four of the 2007 Friends Petitioners (Sandra Bressler, Walter Herman, Nancy Herman, and Sue Hood) has filed yet another petition to reopen the 2004 judgment. The current Friends Petitioners claim that they have standing to reopen the closed proceedings because they are students, neighbors, or supporters of The Foundation who "have been actively involved in volunteer efforts to prevent the transfer of Dr. Albert C. Barnes' art collection to Philadelphia . . .," Friends Pet. ¶ 16 — the same types of standing grounds that have been rejected repeatedly in Foundation cases. They contend that the matter should be reopened because they wish to present evidence to try to demonstrate that The Foundation's gallery collection should not be relocated to Philadelphia, *id.* ¶¶ 17-27 — evidence that they call "new" but that has been in the public record for many years. Like the Friends Petitioners, Petitioner Feudale similarly claims an interest as a student of The Foundation and also claims to have a better solution to The Foundation's financial problems than the relief approved by this Court in 2004.

The Friends and Feudale Petitioners offer no grounds that would justify reopening the proceedings that led to the 2004 decree. Most fundamentally, they offer no basis on which ***they*** may seek such relief. Both of their petitions should be dismissed because (1) the petitioners have not sought to intervene in the proceedings involving The Foundation and, in any event, do not have standing to do so, and (2) the petitions are untimely and improperly seek to relitigate

matters that this Court already has decided. In addition, scandalous and impertinent accusations that are included in the Friends Petition should be stricken.

As a result of the many proceedings involving The Foundation that have come before it in the past two decades, this Court is familiar with The Foundation's recent history. As the Court knows, one of the causes of the financial distress that led to the 2002 Petition was the proliferation of litigation involving The Foundation in the 1990s. Yet, the present petitions, one of which is brought by some of the same litigants that have sued it in the past, seek to burden The Foundation with still more litigation expenses, thus impairing The Foundation's ability to move forward under this Court's decree and diverting to litigation defense costs those valuable funds that are needed to fulfill The Foundation's charitable mission. The Court should make clear that vexatious filings like these are impermissible and should impose sanctions against the Friends Petitioners and Feudale that require them to pay The Foundation's attorneys' fees and costs associated with responding to these petitions.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Foundation's 2002 Petition.

On September 24, 2002, The Foundation filed the 2002 Petition, which sought permission to amend its charter, bylaws, and Indenture. The requested amendments were necessary to enable The Foundation to continue fulfilling the mission established for it by its founder, Dr. Albert C. Barnes. They included expansion of The Foundation's Board of Trustees and relocation of its gallery collection from Lower Merion Township to Philadelphia.

Participants in the 2002 Proceedings. The 2002 Petition and the two sets of hearings that this Court held regarding that petition generated substantial publicity within Montgomery County and the Philadelphia region, as well as nationally and worldwide. In one of its opinions regarding the 2002 Petition, this Court noted:

> At the outset, we must comment on the unprecedented public interest in this case. Since the filing of the original petition, rarely a day has gone by without a letter or phone call arriving at the undersigned's chambers from someone wanting to weigh in on this matter. Politicians, art scholars, financial experts, and former students have sent suggestions for saving The Foundation. Major newspapers have published endless dialogues of letters to the editors, as well as editorials endorsing one outcome or another, as if this were a political race. Even legal scholars, attorneys, and law professors, who know that cases are determined by applying the law to the evidence produced in court and not by public opinion, have sent unsolicited opinion letters for our edification.

In re Barnes Found. (No. 12), 24 Fid. Rep. 2d 94, 95 (O.C. Montg. 2004) (emphasis omitted). Despite the substantial publicity surrounding the 2002 Petition, none of the current Friends Petitioners sought to intervene in the proceedings regarding the 2002 Petition when the 2002 Petition was filed. Nor did petitioner Feudale.

Others did seek to intervene, however, including (1) a group of three Foundation students — Jay Raymond, Drew Saunders, and Harvey Wank; (2) Lincoln University, which claimed a right under The Foundation's Indenture to nominate individuals for four of the positions on The Foundation's Board of Trustees; (3) the Violette de Mazia Trust; and (4) a former Foundation student, Ronald Taylor. In its petition to intervene, Lincoln University opposed The Foundation's request for permission to expand its Board of Trustees and change the way its Board members were selected, but it did not oppose that part of the 2002 petition that requested permission to move The Foundation's gallery collection to a new gallery in Philadelphia. The

only relief Lincoln sought in its answer to The Foundation's petition involved the size and make-up of The Foundation's Board of Trustees.

On February 12, 2003, following briefing and oral argument, this Court denied the intervention petitions of all parties except Lincoln University. In denying the petitions of Raymond, Saunders, and Wank, the Court held that their "inchoate concerns do not give rise to any interest beyond that of the general public in The Foundation's art program." *In re Barnes Found. (No. 11)*, 23 Fid. Rep. 2d 127, 131 (O.C. Montg. 2003).

In addition to Lincoln, the Attorney General of Pennsylvania was automatically a party to the proceedings on The Foundation's petition because of his role as *parens patriae* with respect to public charities like The Foundation. After reviewing The Foundation's original petition, Attorney General D. Michael Fisher informed The Foundation that he did not fully agree with the relief sought in the 2002 Petition as originally drafted and that the petition should be amended to make changes to that relief. The Foundation agreed to the changes sought by Attorney General Fisher and filed an amended petition on June 5, 2003 that made those changes. Once those changes were made, Attorney General Fisher filed an answer to The Foundation's amended petition that expressed his support for the relief sought by The Foundation.[1]

The Lincoln Settlement. On September 12, 2003, after protracted discovery and negotiations between Lincoln University and The Foundation, the parties reached an agreement

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[1] The Attorney General's support for The Foundation's petition was also described in a petition filed shortly after his answer by three students seeking to intervene (including current Friends Petitioner Sue Hood). In that petition and a supporting brief, the students quoted public statements made by Attorney General Fisher expressing support for the relief sought in The Foundation's 2002 Petition.

under which, in exchange for Lincoln's withdrawal of its opposition to the 2002 Petition, The Foundation would make agreed-upon changes to those parts of its petition regarding the number of persons who could serve on its Board of Trustees and the way Board members would be selected. The agreement was approved by Lincoln's Board of Trustees at a September 20, 2003 meeting that was attended by Governor Edward G. Rendell (an ex officio member of that Board) and Attorney General Fisher.

The agreement with Lincoln and its approval by the Lincoln Board were the subjects of extensive press attention, including a number of articles in the *Philadelphia Inquirer* that purported to provide details about what happened during the negotiations and at the Lincoln Board meeting. *See, e.g.*, P. Horn, *Barnes, Lincoln Reach an Agreement*, PHILA. INQ. (Sept. 13, 2003) (reporting that agreement followed "three days of negotiations involving leaders of the Barnes and Lincoln, Rendell, Fisher," and others); P. Horn, *Barnes Agreement Took Frenzied Days of Hard Bargaining*, PHILA. INQ. (Sept. 14, 2003) (reporting that "Gov. Rendell brought his charm and negotiating skills — and the power of the state purse — to the table when he helped broker [the] deal," and that "Fisher, whose office oversees the state's charities and has a role in the court petition, worked closely with Rendell").

The day after the Lincoln Board vote, the *Inquirer* reported that Governor Rendell "laid out to the trustees how the university could benefit financially by approving the agreement" and that "he would seek $50 million from the legislature this year for the state-related university." P. Horn, *Lincoln Board Accepts Smaller Role in Barnes*, PHILA. INQ. (Sept. 21, 2003). The newspaper also reported that, "[a]fter Rendell's speech, but before the vote, trustees met with Fisher in executive session," and noted that the Attorney General "has already said he supports

the petition" and that, "[a]long with Rendell, he helped negotiate the Lincoln – Barnes agreement." *Id.* On May 22, 2005, the *Inquirer* published another lengthy (4,419-word) front-page article entitled "The Deal of the Art" that purported to detail what occurred during the September 2003 negotiations leading to the Lincoln-Barnes agreement. Among other things, the article reported on the events of September 12, 2003:

> Alerted that the deal was collapsing, Rendell called Fisher, and the two old rivals concocted a last-ditch plan to persuade [Lincoln Board vice-chairman Frank] Gihan to approve the deal.
>
> ***Rendell would play good cop — he had the money to offer. Fisher would play bad cop — he could intervene in court.***
>
> At 3 p.m., Gihan's cell phone rang. He had to step out of a meeting to take the call.
>
> "I have until 3:30 to talk," Rendell told him. "I have two minutes," Fisher said. "Then I am going."
>
> Make a decision now, Rendell said. There was no more time. Are you a leader? the governor asked. Leaders take risks.
>
> Gihan still wanted six seats, not five. And Lincoln's lawyers wanted some changes in the agreement.
>
> "That's nitpicking," Fisher snapped.
>
> ***"If you don't do this," Rendell said, "the attorney general may be forced, whether he wants to or not, to go into court and say that these guys cannot financially continue in this vein and ask that, according to the will, it be turned over to an art museum."***
>
> If that happens, the governor said, "You have nothing."

P. Horn, *The Deal of the Art*, PHILA. INQ. (May 22, 2005) (emphasis added).

On October 21, 2003, a month after Lincoln's Board approved the agreement, The Foundation requested leave to file a Second Amended Petition that incorporated the changes to which it had agreed with Lincoln. The Court granted The Foundation leave to do so on October 29, 2003, and Lincoln then withdrew from the case.

The Hearings and Decision. Meanwhile, three days after the Lincoln Board approved the agreement, another group of Foundation students — Sue Hood (one of the current Friends Petitioners), William Phillips, and Harvey Wank — sought to intervene or, in the alternative, to participate in the proceedings as *amici curiae*. On October 29, 2003, the same day the Court approved the filing of The Foundation's Second Amended Petition, the Court denied the second student petition to intervene, but allowed Hood, Phillips, and Wank to participate in the proceedings as *amici curiae*. *See In re Barnes Found.*, No. 58,788, Order at 1 (O.C. Montg. Oct. 29, 2003). Thereafter, the *amici*, represented by counsel from two law firms, participated in all facets of the proceedings regarding the 2002 Petition.

In December 2003 and September 2004, hearings were held before this Court regarding the 2002 Petition. Almost two dozen witnesses testified and scores of documents were offered into evidence. The *amici curiae* participated fully in these hearings, cross-examining The Foundation's witnesses and offering the testimony of their own witnesses, including both fact and expert witnesses.

The Office of Attorney General also participated and continued to support the relief sought by The Foundation. This Court noted and criticized that support in its January 2004 opinion, expressing the view that the Attorney General should have presented evidence that would present the Court with contrary viewpoints. *See In re Barnes Found. (No. 12)*, 24 Fid. Rep. 2d 94, 107 (O.C. Montg. 2004). The Court's view was widely reported in the press. *See, e.g.*, D. Steinberg & P. Horn, *Scathing Critique of Pa.'s Barnes Role*, PHILA. INQ. (Jan. 30, 2004). Nevertheless, the Office of Attorney General continued its support of the petition, and Mr. Fisher's successor, Gerald J. Pappert, personally expressed that continued support in an

opening statement at the next stage of the hearing. *See, e.g.*, N.T. 9/21/2004 at 18-23. Mr. Pappert explained:

> My office was consulted before the petition was filed; and my predecessor and I, as well as many members of our staff, met several times with Foundation trustees and representatives, representatives of Lincoln University and the funding foundations. . . .
>
> . . . . My staff, both lawyers and accountants, carefully reviewed the averments of the amended petition, as well as thousands of pages of documents which pertain to the relief requested by the Foundation. After this review, we came to the conclusion communicated to the trustees, as well as to this Court, that we were satisfied that if the averments of the amended petition were proven and supported by competent and credible evidence presented at these hearings, that we were prepared to offer our support and recommend that the relief requested be granted.

Id. at 18-19. The Office of Attorney General also continued to support the relief requested in the petition under Mr. Pappert's successor, Thomas W. Corbett, Jr., until he was elected Governor, and the Attorney General's response to the new petitions makes clear that this support continues under Acting Attorney General William H. Ryan, Jr.

On December 13, 2004, this Court issued a final Decree and Opinion granting The Foundation leave to amend its charter, bylaws, and Indenture in the manner that The Foundation had requested in its 2002 Petition, as amended. The Court concluded, "The Foundation showed clearly and convincingly the need to deviate from the terms of Dr. Barnes' indenture, . . . and that the three campus model represents the least drastic modification necessary to preserve the organization." *In re Barnes Found.*, 69 Pa. D. & C.4th 129, 170-71 (O.C. Montg. 2004). The relief granted by the Court included permission to expand The Foundation's Board of Trustees from five to fifteen members and to relocate The Foundation's gallery collection to Philadelphia.

On January 11, 2005, Jay Raymond, one of the students who unsuccessfully sought to intervene in the proceedings in 2002, filed a notice of appeal to the Superior Court from this Court's final Decree. On March 28, 2005, the Supreme Court of Pennsylvania granted The Foundation's King's Bench Petition, taking jurisdiction over Raymond's appeal, and on April 27, 2005, the Supreme Court quashed that appeal. *In re Barnes Found.*, 582 Pa. 370, 871 A.2d 792 (2005). No one else who participated in the proceedings regarding the 2002 Petition, including the *amici curiae*, filed an appeal from this Court's December 13, 2004 final decree or any other order of this Court regarding the 2002 Petition.

B. Implementation of This Court's Decision on the 2002 Petition.

Following entry of this Court's 2004 final decree approving The Foundation's 2002 Petition, The Foundation undertook to implement the decree. The Foundation has provided the Court with status reports on its progress in implementing the decree, and it remains willing to provide further reports at the Court's direction. The Foundation also has provided reports to the Office of Attorney General. As has been reported, The Foundation has (among other things) expanded its Board of Trustees from five to thirteen members, and is currently working toward filling the two open positions. With respect to relocation of the gallery collection, the Foundation has acquired a site on the Benjamin Franklin Parkway in Philadelphia, hired architects who designed the new building, continued to raise funds to finance the move (and also to establish an endowment), and completed construction of approximately 50% of the new facility, which is scheduled to be completed in January 2012 and to open to the public in spring 2012.

C. The 2007 Friends and County Petitions, and Their Allegations Regarding the 2001-2002 Capital Budget Act.

In August 2007, a group of individuals and organizations, including five of the present Petitioners (Friends of the Barnes Foundation, Sandra Bressler, Walter Herman, Nancy Herman, and Sue Hood), filed a petition in this Court to reopen the proceedings on the 2002 Petition. Among other things, they contended that the Court would have decided the 2002 Petition differently if it had known of itemizations in the Capital Budget Project Itemization Act of 2001-2002, Act No. 2002-131, 2002 Pa. Laws 891 (Oct. 30, 2002) ("Capital Budget Act") for redevelopment assistance capital projects that included The Foundation as a potential beneficiary. A few weeks later, in September 2007, Montgomery County filed its own petition to reopen the proceedings, in which it made similar allegations regarding the Capital Budget and also argued that a purchase-and-lease offer it purportedly had made to The Foundation offered a better solution for solving The Foundation's financial difficulties than the relief approved by this Court in 2004. The Foundation filed preliminary objections to both 2007 petitions.

The Capital Budget Act. The heart of the 2007 Friends Petition (and a major thrust of the 2007 County Petition) was the allegation that the Legislature had made a $107 million "appropriation" to The Foundation in the Capital Budget Act. The Foundation explained in its preliminary objections and supporting brief to the 2007 Petitions that, as public documents and state law made abundantly clear, The Foundation had not received $107 million from the Commonwealth, the funds at issue were not an "appropriation," and no funds had been made available to aid The Foundation's Merion operations. Details regarding the Capital Budget are set forth in The Foundation's filings regarding the 2007 Friends Petition, and The Foundation incorporates those filings here. However, because the current Friends Petitioners cite the supposed

$107 appropriation in support of their own petition (and make scandalous and impertinent allegations about it as they do so), a summary of the events regarding the Capital Budget is reproduced here from the 2007 filings. What The Foundation explained in 2007 remains true today, four years later: There was no $107 million appropriation, and the Legislature made no funds available to assist The Foundation in Merion. Rather, capital budget itemizations were included in the Capital Budget Act for possible future approval by the Governor to assist The Foundation's construction of its new gallery in Philadelphia.

On November 16, 2001, Senate Bill 1213 was introduced in the Pennsylvania Senate and referred to the Senate's Appropriations Committee.[2] As set forth in its title, the bill provided "for the capital budget for the fiscal year 2001-2002," including, among other things:

> itemizing . . . redevelopment assistance capital projects, . . . to be constructed or acquired or assisted by . . . the Department of Community and Economic Development . . ., together with their estimated financial costs; authorizing the incurring of debt without the approval of the electors for the purpose of financing the projects to be constructed or acquired or assisted by the [Department]; stating the estimated useful life of the projects; making appropriations; and making repeals.

S.B. 1213, Pr. No. 1532, at p. 1 (2001-2002 Reg. Sess.). Section 6 of the bill (at pp. 66-105) contained a lengthy "itemization of redevelopment assistance projects" that were to be funded under the Housing and Redevelopment Assistance Law, Act No. 493, 1949 Pa. Laws 1633 (May 20, 1949), 35 P.S. §§ 1661 *et seq.* The funding would be accomplished by incurring debt authorized elsewhere in the bill pursuant to the Capital Facilities Debt Enabling Act, Act No. 1999-1, §§ 301 *et seq.*, 1999 Pa. Laws 1 (Feb. 9, 1999), 72 P.S. §§ 3919.301 *et seq.* ("Debt Enabling

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2 The legislative history of the Capital Budget Act is reported on the Pennsylvania General Assembly's web site, at *http:/www.legis.state.pa.us/WU01/LI/BI/BH/2001/0/SB1213.HTM.*

Act"). *See* S.B. 1213 § 15(d), Pr. No. 1532, at p. 133 (authorizing the Governor, Auditor General, and State Treasurer to incur debt "to carry out the redevelopment assistance and the redevelopment assistance capital projects specifically itemized" in section 6 of the bill).

The itemizations were listed by county and, in most cases, by municipality. The original bill contained no itemizations for The Barnes Foundation, either in its listing of projects for Montgomery County, *see id.* § 6(46), at p. 97, or in its list for Philadelphia, *see id.* § 6(51), at pp. 98-102. On June 26, 2002, an amended Senate Bill 1213, Pr. No. 2163, was reported from the House Appropriations Committee. It contained a $7 million redevelopment assistance capital project itemization for "restoration, stabilization and site enhancements for the Barnes Foundation" ***in the list for the City of Philadelphia***. S.B. 1213 § 6(51)(i)(UU), Pr. No. 2163, at p. 203. There was ***no*** Barnes-related itemization in the list for Montgomery County. *See id.* § 6(46), at pp. 194-96. Senate Bill 1213 was re-committed to the House Appropriations Committee the next day.

On October 8, 2002 (about two weeks after the 2002 Petition was filed with this Court), a version of Senate Bill 1213 that had been further amended, Pr. No. 2292, was re-reported from the House Appropriations Committee. In addition to the $7 million itemization in Section 6(51)(i)(UU), Pr. No. 2292 at p. 229, the list for the City of Philadelphia in this version contained a second redevelopment assistance capital project itemization for The Foundation — up to $100 million for "design and construction of a museum facility to house the Barnes art collection." S.B. 1213 § 6(51)(i)(OOOOOOO), Pr. No. 2292, at p. 244. That same day, the House of Representatives passed the bill by a vote of 195-3, and the next day the Senate unanimously concurred in the amendments made by the House of Representatives.

On October 30, 2002, after exercising his line-item veto as to parts of the bill not relevant here, Governor Mark S. Schweiker signed Senate Bill 1213 into law as the Capital Budget Act, Act No. 2002-131. The two itemizations for The Foundation remained in the final version of the enacted bill. *See* Capital Budget Act § 6(51)(i)(UU), (OOOOOOO), 2002 Pa. Laws at 1015, 1017, 1026. There was no itemization for The Foundation in the list for Montgomery County. *See id.* § 6(46), 2002 Pa. Laws at 1012-13.

Thus, at the time the 2002 Petition was under consideration by this Court, the General Assembly had enacted legislation that contained a total of $107 million in itemizations for the potential benefit of The Barnes Foundation. But all of those itemizations were listed for The Foundation in the City of Philadelphia, and no money was itemized for The Foundation's benefit in Montgomery County. And because the Barnes itemizations were for redevelopment assistance capital projects, any money under them could be used only for the design and construction of facilities, and not for operating expenses. *See* Debt Enabling Act § 302, 1999 Pa. Laws at 5, 72 P.S. § 3919.302.

Moreover, none of the $107 million was funded. The Capital Budget Act authorized the Commonwealth to issue bonds for any itemized projects that were approved pursuant to the Debt Enabling Act and to appropriate the bond proceeds to pay for the approved projects. *See* Capital Budget Act §§ 2(d), 6, 18(d), 22(d), 2002 Pa. Laws at 891-92, 962, 1063, 1065, 1071. It did not authorize immediate expenditures from the Commonwealth's General Fund. *See id.* And because of limits in the Debt Enabling Act, it would have been impossible for the Commonwealth to issue bonds at the time of the Capital Budget Act's enactment that would be sufficient to fund all of the itemized projects. As finally enacted, and following the Governor's

line-item veto, the Capital Budget Act itemized hundreds of redevelopment assistance capital projects that together totaled more than $4.3 billion. *See* Capital Budget Act §§ 6, 22(d), 2002 Pa. Laws at 962-1037, 1063, 1086-95. However, the Debt Enabling Act provided that only $1.45 billion of bonds could be outstanding at any one time to fund these projects, as well as redevelopment assistance capital projects that were itemized in prior capital budget acts. *See* Act of Oct. 28, 2002, Act No. 2002-130, § 2, 2002 Pa. Laws 889, 890 (amending Debt Enabling Act § 317(b) (since further amended)).[3] Thus, less than a third of the project itemization amounts could be financed. In addition, the Capital Budget Act itemized hundreds of capital projects that were not redevelopment assistance projects and that would require nearly $5.6 billion in additional debt obligations if all of them were to be fully funded. *See* Capital Budget Act §§ 3–5, 7, 22(a)-(c) & (e), 2002 Pa. Laws at 893-962, 1037-43, 1063, 1070-86. In all, the total itemizations under the Capital Budget Act were about $10 billion.

Like other Commonwealth expenditures, actual spending on a redevelopment assistance capital project was subject to the Governor's discretion, and it was up to the Governor to decide whether to implement a particular project and to determine what amount of debt financing, if any, to approve for that project in any fiscal year. *See* Housing and Redevelopment Assistance Law § 14, 1949 Pa. Laws at 1639-40, 35 P.S. § 1674 (requiring review of project and ap-

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[3] Section 317(b) has been amended to raise the debt limit in most years since 2002, as hundreds of new redevelopment assistance capital projects have been added to the itemized lists in each year's budget enactment. The debt limit now stands at $4.05 billion. *See* Debt Enabling Act § 317(b), 72 P.S. § 3919.317(b), *as amended by* Act of July 7, 2010, Act No. 2010-48, § 1, 2010 Pa. Laws 339, 339.

proval by Governor).[4] None of these steps were taken to provide funding for either of the projects itemized for The Barnes Foundation while proceedings on the 2002 Petition were pending before this Court. Rather, it was not until more than a year after this Court entered its final decree on The Foundation's 2002 Petition that Governor Edward G. Rendell approved $25 million from the $100 million itemization for The Foundation in Section 6(51)(i)(OOOOOOO) of the Capital Budget Act, to be used in Philadelphia County.[5]

In sum, at the time of the 2002 Petition, the Capital Budget Act provided only an unfunded itemization for design and construction of possible future Foundation capital projects in Philadelphia, and nothing more. It was not an appropriation of funds for use by The Foundation in Merion or anywhere else. This information was readily available to the 2007 Petitioners and was equally available to the current Friends Petitioners.

The Court's Decision. The Foundation provided Capital Budget information to the Court in its briefing on the 2007 Petition, in addition to arguing that the Friends and County

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4 In addition, Section 318(a) of the Debt Enabling Act, 72 P.S. § 3919.318(a), required that a detailed application for the project be submitted to the Governor's Budget Office by the relevant governmental entity listed in the Capital Budget Act (in the case of both Barnes Foundation itemizations, the City of Philadelphia) and that the Office then approve that application. Since redevelopment assistance capital projects are funded through debt obligations, bonds would have to cover the cost of the project, and the proceeds of those bonds then would be remitted to the Department of Community and Economic Development for payment to the City.

5 Subsequently, in October 2008, after this Court had dismissed the 2007 Friends and County Petitions, the Governor approved an additional $5 million of funding, which was increased by $6 million in mid-2010, in three $2 million increments. In November 2010 and January 2011, the Governor authorized a total of $11,450,000 of additional funding from the $100 million itemization; this latter amount is awaiting final approval by the Commonwealth's Office of the Budget.

Petitioners lacked standing to seek the relief they requested. In May 2008, this Court dismissed the 2007 Petitions. The Court held that each of the petitioners lacked standing to pursue their claims. *See In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 263 (O.C. Montg. 2008). None of the 2007 Friends or County Petitioners appealed that decision.

D. The Present Petitions.

The current Friends' Petition was filed on February 17, 2011. The Friends Petitioners are thirteen individuals (students and neighbors of The Foundation) and two organizations (Friends of the Barnes Foundation and Barnes Watch) who allege that they "have been actively involved in volunteer efforts to prevent the transfer of Dr. Albert C. Barnes' art collection to Philadelphia . . . ." Friends Pet. ¶ 16. Five of the Friends Petitioners (Friends of the Barnes Foundation, Sandra Bressler, Walter Herman, Nancy Herman, and Sue Hood) previously sought to intervene in the proceedings on the 2002 Petition or to reopen those proceedings after they were concluded. These requests to intervene or reopen were all denied for lack of standing.

The Friends Petitioners claim that the proceedings on the 2002 Petition, which concluded more than six years ago, should be reopened because the Friends Petitioners can demonstrate, on the basis of allegedly "new evidence," that The Foundation's gallery collection should not be relocated to Philadelphia. The supposedly new evidence on which the Friends Petitioners rely are that (1) the Attorney General, as *parens patriae* for charitable institutions, operated under an undisclosed conflict during the prior proceedings because he supported The Foundation's petition and persuaded Lincoln University to drop its opposition to the petition, and (2) the Governor failed to disclose to the Court that funds were "appropriated" for The Foundation. Friends Pet. ¶¶ 17-27; *see also id.* ¶ 28 ("The major reason to reopen this matter is the fact that

this Court was misled as to the role of the Attorney General and misled as to the availability of public funds").

On March 28, 2011, Petitioner Feudale filed a fourth petition to reopen the proceedings on the 2002 Petition. Feudale allegedly is an attorney, a student of The Foundation, and the author of a book that purportedly "reveals an aspect of The Barnes which has not been previously publicly presented" (an aspect apparently relating to some supposed religious message conveyed by the way the art is arranged in the galleries). Feudale Pet. ¶¶ 1-2. He claims that the closed proceedings should be reopened because his newly completed study of The Foundation leads him to believe that the gallery collection should not be relocated and that its continued presence in Merion offers a better solution to The Foundation's financial problems than the relief approved by this Court in 2004. He also claims the relocation of The Foundation's gallery collection to Philadelphia violates his state constitutional rights.

ARGUMENT

No less than the 2007 Friends and County Petitions, the present petitions represent an extraordinary attempt by individuals and organizations to interfere in the operations of a charitable foundation. As with the 2007 Petitions, these latest petitions are brought by parties having no standing to inject themselves into the affairs of The Barnes Foundation, are based on patently false or unsupportable allegations, blithely ignore that the matters at issue here were fully litigated and concluded many years ago, and base their interference on information that has been publicly available for more than half a decade. The Foundation's preliminary objections to these petitions should be sustained, the petitions should be dismissed, and the Friends and Feu-

dale Petitioners should be sanctioned for their vexatious filings by an order requiring them to pay The Foundation's attorneys' fees and costs of responding to these petitions.

I. THE PETITIONS SHOULD BE DISMISSED BECAUSE PETITIONERS ARE NOT AND CANNOT BE PARTIES TO THIS PROCEEDING.

A. Petitioners Have Not Sought To Intervene As Parties.

As a preliminary matter, these petitions should be dismissed because neither the Friends Petitioners nor Feudale have filed petitions to intervene as required by the Pennsylvania Rules of Civil Procedure. Therefore, they are not parties, and they may not participate in proceedings involving The Foundation. A non-party cannot file a pleading in a matter "unless he has first intervened in the action and [become] a party." *Wilson v. State Farm Mut. Ins. Co.*, 339 Pa. Super. 576, 582 n.8, 489 A.2d 791, 794 n.8 (1985) (quotation omitted), *rev'd on other grounds*, 512 Pa. 486, 517 A.2d 944 (1986); *cf.* PA. R. CIV. P. 205.3(a) (pleadings may be filed by "a party"). On this ground alone, the petitions to reopen should be dismissed.

Petitioners' failure to take this most basic step for obtaining the party status necessary for filing a pleading renders their petitions to open this Court's earlier judgment "a legal non-entity." *Acumix, Inc. v. Bulk Conveyor Specialists, Inc.*, No. 2003 CV 424, 2007 Pa. Dist. & Cnty. Dec. LEXIS 62, at *6 (C.P. Dauphin Mar. 23, 2007). "A petition to open a judgment made by a person not a party of record to the proceeding resulting in the judgment will not be heard unless an application is first made on sufficient grounds for leave to intervene." *Howell v. Franke*, 393 Pa. 440, 443, 143 A.2d 10, 11 (1958). Petitioners have not made any such application and their petitions therefore should be dismissed.

B. Even If They Had Sought To Intervene, Petitioners Could Not Do So Because They Lack Standing.

Even if petitioners had sought leave to intervene, such a request would be unavailing because petitioners do not have standing to participate in matters involving The Foundation, whether as intervenors or in any other capacity. This was the basis for this Court's ruling in 2008, dismissing the 2007 Friends and County Petitions, and the present petitions should be dismissed on the same grounds.

"The matter of standing is jurisdictional." *In re Barnes Found.*, 449 Pa. Super. 81, 84, 672 A.2d 1364, 1366 (1996). "Before a court can proceed to address the merits of a controversy, it must determine whether standing exists to maintain the action." *In re Barnes Found.*, 443 Pa. Super. 369, 377, 661 A.2d 889, 894 (1995); *see also* 20 PA. C.S. § 7735(c) (2007) (proceeding must be brought by a "person who has standing to do so"). Standing requires a substantial, direct, and immediate interest in the subject matter of the litigation. *See, e.g., William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 191, 346 A.2d 269, 280 (1975). "A litigant possesses a substantial interest if there is a discernible adverse effect to an interest *other than that of the general citizenry*. It is direct if there is harm to that interest. It is immediate if it is not a remote consequence of a judgment." *In re Milton Hershey Sch.*, 590 Pa. 35, 42, 911 A.2d 1258, 1262 (2006) (citations omitted; emphasis added).

Moreover, where, as here, the matter in question involves a charity, the person seeking to participate must have a "special interest" that distinguishes him from the public in general and therefore entitles him to assert a position different from that advocated by the Attorney General on behalf of the Commonwealth and its citizens. *Wiegand v. Barnes Found.*, 374

Pa. 149, 153, 155, 97 A.2d 81, 82-83 (1953). Neither the Friends Petitioners nor Feudale have standing to participate in this case.

1. Petitioners lack the "special interest" that is required for standing in a case involving public charities.

The courts of the Commonwealth frequently have held that the proper parties in a matter involving a charity like The Foundation are the charity itself and the Attorney General. *See, e.g.*, *Hershey*, 590 Pa. at 42-43, 911 A.2d at 1262; *In re Barnes Found.*, 453 Pa. Super. 243, 253, 683 A.2d 894, 899 (1996) ("the law requires the participation of the Attorney General's Office in any proceeding to modify the terms of a charitable trust"); *In re Barnes Found.*, 453 Pa. Super. 436, 463, 684 A.2d 123, 136 (1996) (noting that the Attorney General is "the statutorily designated guardian of the interest of the general public").

More than a half-century ago, in an earlier case involving The Foundation, the Supreme Court explained the limited nature of standing in cases involving charitable foundations:

> In the absence of statutory authority, no person whose interest is only that held in common with other members of the public, can compel the performance of a duty owed by the corporation to the public. Only a member of the corporation itself or someone having a special interest therein or the Commonwealth, acting through the Attorney General, is qualified to bring an action of such nature. . . . "[I]f one individual may interpose, any other may, and as the decision in one individual case would be no bar to any other, there would be no end to litigation and strife. The general laws of order so necessary to good government forbid anything like this." . . . The protection of the public generally against the failure of a corporation to perform the duties required by its charter is the concern of the sovereign, and any action undertaken for such purpose must be by the Attorney General on its behalf.

Wiegand, 374 Pa. at 153, 155, 97 A.2d at 82-83 (citation omitted); *see also Valley Forge Historical Soc'y v. Washington Mem'l Chapel*, 493 Pa. 491, 498, 426 A.2d 1123, 1127 (1981).

The Friends Petitioners and Feudale have alleged no special interest that entitles them to standing here. The petitioners allege that they are opposed to the relief that this Court already has granted The Foundation in the decree approving the 2002 Petition, and they say that they have an interest in having The Foundation's gallery collection remain at its present location in Lower Merion. But these are not special interests or legally enforceable ones. They are nothing more than petitioners' personal preferences that The Foundation operate in a place and in a way contrary to that chosen by its own governing Board and approved by this Court.

In this regard, the Supreme Court has explained why an outside interested organization, the Milton Hershey School Alumni Association, did not have the "special interest" required to litigate issues regarding the Milton Hershey School Trust, despite its close connection to the Trust:

> Nothing in this litigation would affect the Association itself; it loses nothing and gains nothing. The Association's intensity of concern is real and commendable, but it is not a substitute for an actual interest. Standing is not created through the Association's advocacy or its members' past close relationship with the School as former individual recipients of the Trust's benefits. . . .
>
> The Attorney General is granted the authority to enforce charitable trusts. Current law allowed the Association, an outside group, to urge the Attorney General to enforce the Trust. However, the Association's disagreement with the Attorney General's decision to modify the 2002 agreement does not vest the Association with standing to challenge that decision in court. Ultimately, the Association's dismay is more properly directed at the Attorney General's actions and decisions; it is insufficient to establish standing here.

Hershey, 590 Pa. at 44-45, 911 A.2d at 1263 (citations omitted). Petitioners are in the exact position of the alumni association in *Hershey*, and, therefore, the Supreme Court's decision in that case disposes of their claim of a "special interest" that gives them standing to bring these petitions. As the court further explained in *Hershey*:

> Private parties generally lack standing to enforce charitable trusts. Since the public is the object of the settlor's beneficiaries in a charitable trust, private parties generally have insufficient interest in such trusts to enforce them. Those who may bring an action for the enforcement of a charitable trust include the Attorney General, a member of the charitable organization, or ***someone having a special interest in the trust***. A person whose only interest is that interest held in common with other members of the public cannot compel the performance of a duty the organization owes to the public.

Hershey, 590 Pa. at 42-43, 911 at 1262 (citations omitted; emphasis added).

The Foundation was established as a charitable foundation for the benefit of the public, with a mission of promoting the advancement of education and the appreciation of the fine arts. While petitioners may profess a desire to preserve that mission and claim to know the best means of doing so, such an "interest" is not the type of substantial, direct, and immediate interest required for standing under *Hershey*. *See also Spahn v. Zoning Bd. of Adjustment*, 602 Pa. 83, 116, 977 A.2d 1132, 1152 (2009) (reiterating narrow standing rule from *Hershey*). Nor is petitioners' purported personal concern about the location of The Foundation's gallery collection and other matters involving The Foundation sufficient to establish the "special interest" demanded by *Wiegand*. *See, e.g., In re Estate of Nevil*, 414 Pa. 122, 129, 199 A.2d 419, 423 (1964) (Pennsylvania Society for the Advancement of the Deaf, an agency devoted to aiding the blind and the deaf, lacked standing to challenge proceedings concerning Nevil Asylum for the Deaf,

Dumb or Blind); *In re McCune*, 705 A.2d 861, 865 (Pa. Super. 1997) (distribution committee of charitable foundation lacked substantial interest and standing to challenge trustee's accounting).

Although the Friends and Feudale Petitioners appear to acknowledge the foregoing case law, they claim it should not be applied here and they should "be given standing" because the Attorney General "forfeited his neutrality and parens patriae role" when he took a position in favor of the relief sought in The Foundation's 2002 Petition and worked to secure a settlement of Lincoln's opposition to that Petition. Friends Pet. ¶¶ 17, 22. In particular, the petitioners complain about the Attorney General's participation with Governor Rendell in the negotiations with Lincoln and accuse him of secretly pressuring Lincoln to withdraw its opposition. Not only do these allegations fail to provide a basis upon which the petitioners may claim standing, but they reveal a misunderstanding of the facts and of the Attorney General's role in this case.

First of all, contrary to petitioners' allegations, there was nothing secret or improper about what how the Attorney General exercised his *parens patriae* function. The Attorney General must look out for the interests of the Commonwealth's citizens as a whole, balancing the needs of various constituencies as he determines what would be best for the public charity at issue. His job is not to remain neutral, but instead to advocate the result he concludes is best. Here, he concluded that the relief sought in The Foundation's 2002 Petition was in the best interests of The Foundation and the public it serves. He reached that conclusion only after what Attorney General Pappert described as numerous meetings with the parties involved and a review of thousands of relevant documents. N.T. 9/21/2004 at 18-19. Before agreeing to support The Foundation's request for relief, Attorney General Fisher sought and obtained amendments to The

Foundation's petition that would satisfy his demands.[6] Then he and his successors publicly announced support for the requested relief in an answer to The Foundation's amended petition and in other public statements, including Attorney General Pappert's statement in open court during the hearing. There was no secrecy, and the mere fact that the present petitioners do not agree with the position the Attorney General took does not mean that there was any impropriety; it just establishes a difference of opinion.

The allegations about the negotiations with Lincoln add nothing to this analysis. The Friends Petitioners claim those facts "were not known" until they were discussed in a 2010 film that criticizes The Foundation and the decision to grant its requested relief. Friends Pet. ¶ 19. But that is not true. The participation of the Attorney General and the Governor in the Lincoln negotiations was done openly. Indeed, it was reported extensively at the time of those negotiations and thereafter, including in articles published by *The Philadelphia Inquirer* on September 13, 14, and 21, 2003 (well before the start of hearings on The Foundation's petition) and May 22, 2005. Petitioners' allegations include no information that is materially different from what was reported in those articles. Petitioners' complaint appears to be that, having already announced his support for the relief sought by The Foundation, the Attorney General worked actively with the Governor to try to secure that relief, and that his actions included advising Lincoln of adverse ramifications if Lincoln would not agree to resolve its differences regarding nomination of members to The Foundation's Board of Trustees. Rather than suggesting impro-

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6 For example, he obtained assurances that The Foundation's educational program would not be adversely affected by relocating the gallery collection. In the proceedings on the 2002 Petition, the *amici curiae* challenged those assurances, and their challenge was found to be without merit. *In re Barnes Found.*, 69 Pa. D. & C.4th 129, 170-71 (O.C. Montg. 2004).

priety, that allegation shows that the Attorney General actively fulfilled his obligations by working diligently to achieve what he concluded was a result in the best interests of The Foundation, Lincoln, and the people of the Commonwealth who are beneficiaries of public charities.

The current petitioners cannot gain standing simply because they disagree with how the Attorney General proceeded in the litigation. *See, e.g., In re Barnes Found. (No. 10)*, 21 Fid. Rep. 2d 351, 351-52 (O.C. Montg. 2001) (rejecting argument of petitioner that he had standing to bring action against The Foundation because the Attorney General purportedly did not do what he should have done to ensure that The Foundation complied with its governing documents), *aff'd without published op.*, 803 A.2d 802 (Pa. Super. 2002). Allowing petitioners to challenge The Foundation's conduct of its affairs merely because of such a disagreement would eviscerate the well-established standing requirements for initiating or intervening in litigation involving charitable institutions. If petitioners have standing to bring these petitions, any putative litigant would be able to assert an inchoate "interest" in the affairs of any charity and bring litigation challenging that entity's conduct of its own affairs. That is not the law of this Commonwealth. Because petitioners do not have standing to participate in these proceedings in ***any*** capacity, their petitions should be dismissed.

2. Judicial precedents, including those involving many of these same petitioners, confirm petitioners' lack of standing.

This Court and the Commonwealth's appellate courts frequently have held that students, neighbors, and other organizations situated precisely like the petitioners in these two petitions do not have standing to challenge actions or intervene in proceedings involving The

Foundation. Indeed, in a number of cases, the courts have rejected standing arguments of the very same petitioners who seek to reopen these proceedings now.

Students Lack Standing. Most of the Friends Petitioners, as well as Feudale, ground their claim to standing in their status as students or former students. Pennsylvania's courts repeatedly have rejected such "student standing" in matters involving The Foundation. For example, this Court ruled during the proceedings on the 2002 Petition that Friends Petitioner Hood lacked standing to participate in proceedings involving The Foundation. *See In re Barnes Found.*, No. 58,788, Order at 1 (O.C. Montg. Oct. 29, 2003). This holding is *res judicata* with regard to Hood's attempt to bring the current Friends Petition. *See, e.g., Wilkes v. Phoenix Home Life Mut. Ins. Co.*, 587 Pa. 590, 607, 902 A.2d 366, 376 (2006) ("*Res judicata*, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication").

Similarly, this Court ruled in 2008 that Friends Petitioners Hood and Bressler had no standing as students to reopen proceedings involving The Foundation. *See In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 263 (O.C. Montg. 2008). Friends Petitioners Broker, Gecker, Leisenring, and Rodriquez, as well as separate petitioner Feudale, are alleged to be students or former students at The Foundation, and thus are similarly situated to Hood and Bressler. Thus, this Court's prior rulings regarding Hood and Bressler apply equally to them.

This result is consistent with earlier rulings of this Court and the Superior Court, which have held that students of The Foundation do not have standing to "initiat[e] litigation to enjoin actions of the trustees" of The Foundation. *Barnes Found., In re Barnes Found.*, 443 Pa. Super. 369, 379-80, 661 A.2d 889, 895 (1995); *In re Barnes Found. (No. 2)*, 14 Fid. Rep. 2d 337,

337 (O.C. Montg. 1994); *see also In re Barnes Found.*, 449 Pa. Super. 81, 90-91, 672 A.2d 1364, 1369 (1996) (holding that students who the lower court had permitted to intervene in proceedings involving The Foundation did not have standing). Thus, as this Court and the Superior Court frequently have held, those in the position of Hood, Bressler, Broker, Gecker, Leisenring, Rodriquez, and Feudale do not have standing to intervene in the affairs of The Foundation.

Most recently, this Court reiterated these rulings in rejecting the attempt by the 2007 Friends Petitioners to reopen the proceedings involving The Foundation. In its 2008 ruling, this Court held that it was "clear" that the 2007 Friends Petitioners lacked standing to intervene in proceedings involving The Foundation. *Barnes Found. (No. 14)*, 28 Fid. Rep. at 260-62. The Court also emphasized (in finding that Montgomery County did not have standing) that the Attorney General "as *parens patriae* protects the general public" and alone has standing to represent the interests of the general public. *Id.* at 262.

As discussed above, there is no merit to the Friends and Feudale Petitioners' attempt to avoid this latter ruling by leveling accusations (like those of their predecessor putative intervenors) that the Attorney General has not fulfilled his *parens patriae* role. The Attorney General has fulfilled his role properly, and petitioners cannot obtain standing by attacking the Attorney General.

Organizations of Students or Friends Lack Standing. Like that of the students, the standing of organizations such as Friends of the Barnes Foundation and Barnes Watch has been previously determined. A number of times, the Superior Court has held that organizations of students or "friends" who purport to represent the interests of The Foundation do not have standing to initiate or intervene in litigation involving The Foundation. *In re Barnes Found.*, 453

Pa. Super. 436, 450, 684 A.2d 123, 130 (1996) (organization calling itself "Students of the Barnes Foundation" did not have standing to challenge actions by The Foundation); *Barnes Found.*, 449 Pa. Super. at 85, 672 A.2d at 1366 (record did not support the lower court's decision to grant standing to an entity called "Friends of Barnes Foundation"). Those holdings apply equally to current Petitioners Friends of the Barnes Foundation and Barnes Watch. *See also In re Milton Hershey Sch.*, 590 Pa. 35, 44-45, 911 A.2d 1258, 1263 (2006) (organization of alumni did not have standing). Moreover, this Court held in 2008 that Friends of the Barnes Foundation did not have standing to seek to reopen proceedings involving The Foundation, *Barnes Found. (No. 14)*, 28 Fid. Rep. 2d at 262, and that ruling is *res judicata* as to Friends of the Barnes Foundation's current attempt to involve itself in these proceedings.

Neighbors Lack Standing. This Court and the Superior Court also have held that neighbors of The Foundation do not have standing to initiate or intervene in litigation involving The Foundation. In 1997 and again in 2001, this Court specifically held that one of the present Petitioners, Robert Marmon, who the Court described as "an individual who lives across the street from the Barnes Foundation," did not have standing to bring a petition challenging The Foundation's conduct of its affairs and its purported failure to follow the terms of its governing documents. *In re Barnes Found. (No. 8)*, 18 Fid. Rep. 2d 33, 33 (O.C. Montg. 1997); *see also In re Barnes Foundation (No. 10)*, 21 Fid. Rep. 2d 351, 353-54 (O.C. Montg. 2001), *aff'd without published op.*, 803 A.2d 802 (Pa. Super. 2002).

Moreover, in 2008, this Court dismissed for lack of standing the 2007 Friends Petition, in which certain neighbors (including current Friends Petitioners Walter and Nancy Herman) sought to reopen proceedings involving the 2002 Petition. *Barnes Found. (No. 14)*, 28 Fid.

Rep. 2d at 262. These rulings apply equally to Petitioners Yaari and Toby Marmon, each of whom claims standing as a neighbor of The Foundation or a resident of Lower Merion Township, as a matter of *stare decisis*.

* * * *

The Friends Petitioners and Feudale cannot overcome the foregoing case law simply by asserting a passionate interest in matters involving The Foundation or alleging that new evidence warrants revisiting prior decisions of this Court in matters in which they were not parties (and had no standing to be parties). These petitioners, like others that have come before them in cases such as this, do not have the necessary substantial, direct, and immediate interest in The Foundation's affairs to give them standing. Their petitions must be dismissed.

C. Petitioners Also Could Not Meet the Other Requirements for Intervention Under the Rules of Civil Procedure.

A person cannot intervene in an action unless "the determination of such action may affect any legally enforceable interest of such person." PA. R. CIV. P. 2327(4). Since the petitioners do not meet the foundational requirements for standing to participate in proceedings involving The Foundation or to seek to reopen proceedings involving The Foundation's 2002 Petition, the proceedings on the 2002 Petition do not affect a "legally enforceable interest" of the petitioners. *See, e.g., In re Pa. Crime Comm'n Subpoena*, 453 Pa. 513, 524 n.11, 309 A.2d 401, 408 n.11 (1973).[7]

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[7] Petitioners plainly do not fall within the other three categories for intervention: the Court's final decree in the 2002 Petition proceedings do not "impose any liability" upon petitioners; petitioners will not be "adversely affected by a distribution or other disposi-

Moreover, intervention also is unwarranted because (1) petitioners' interest is already adequately represented by the Attorney General (PA. R. CIV. P. 2329(2)); (2) petitioners either have sought intervention previously and been denied, or they have delayed for years in seeking to participate (PA. R. CIV. P. 2329(3)); and (3) allowing petitioners to inject themselves into proceedings involving The Foundation at this time would substantially prejudice The Foundation and its efforts to eliminate its financial problems and continue fulfilling its mission (*id.*).

1. Petitioners' interests are adequately represented by the Attorney General.

A request to intervene may be denied where "the interest of the petitioner is already adequately represented," as is the case here. PA. R. CIV. P. 2329(2). Petitioners' interests as members of the public (students and neighbors of The Foundation, and organizations interested in The Foundation) are already adequately represented by the Attorney General. As explained above, petitioners may not intervene in this matter simply because they disagree or are dissatisfied with the actions or positions taken by the Attorney General in the case, and Petitioners may not intervene in an effort to usurp the Attorney General's role. *See, e.g.*, *In re Estate of Pruner*, 390 Pa. 529, 532, 136 A.2d 107, 109 (1957) ("The responsibility for public supervision [of charitable trusts] traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers."); *In re Estate of Feinstein*, 364 Pa. Super. 221, 225 n.3, 527 A.2d 1034, 1036 n.3 (1987) ("The Attorney General represents a broader interest than that of the charity alone. He must protect the interests of the public at large to whom the social and economic benefits of charitable trusts accrue." (internal quotation and brackets omitted)); *see also In*

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tion of property in the custody of the court"; and petitioners could not "have joined as an original party" in the 2002 Petition. PA. R. CIV. P. 2327(1)-(3).

re Barnes Found. (No. 3), 15 Fid. Rep. 2d 38 (O.C. Montg. 1994) (denying petition to recuse Office of Attorney General in prior Foundation proceedings).

Indeed, petitioners' disagreement with the Attorney General underscores why they may not be permitted to intervene. Their intervention would place members of the public with no standing of their own in a position at odds with that of the public's representative. It is the role of the Attorney General, as *parens patriae*, to decide what is best in these cases and to advocate accordingly. That decision may not always be popular; in a Commonwealth of more than 12 million inhabitants, there are bound to be those who disagree. But such disagreement confers no right to participate in the case in order to advocate an opposing point of view.

2. Those petitioners who have not already been denied intervention delayed unreasonably in seeking to participate in this matter.

This Court already has denied petitions by Friends of the Barnes Foundation, Bressler, Walter and Nancy Herman, and Hood to intervene in this matter, and those decisions are *res judicata* and binding here. Any request by the remaining petitioners to intervene also should be denied because those petitioners have delayed for ***more than eight years*** in seeking to participate in proceedings involving The Foundation's 2002 Petition. Moreover, it has been ***at least seven years*** since the facts at the heart of the Friends Petition — the Attorney General's support for The Foundation's 2002 Petition and his role in persuading Lincoln to withdraw its opposition — were publicly disclosed. Intervention may be denied if "the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." PA. R. CIV. P. 2329(3).

Here, petitioners not only delayed until years after they could have sought to participate in the case, but they delayed for years after the case ended. Pennsylvania's rules of civil procedure allow intervention "only during the pendency of an action; thus, after final adjudication such an application comes too late." *Barasch v. Pennsylvania Public Util. Comm'n*, 115 Pa. Commw. 147, 157, 540 A.2d 966, 970 (1988) (en banc). The applications thus are very late here. *See also Township of Radnor v. Radnor Rec., LLC*, 859 A.2d 1, 5-6 (Pa. Commw. 2004) (petitioners unduly delayed in filing petition to intervene shortly after dispute was settled); *cf. Weinberg v. Commonwealth*, 509 Pa. 143, 148, 501 A.2d 239, 242 (1985).

There is no excuse for petitioners' delay. In the extensive litigation regarding the 2002 Petition, a number of alternative solutions to The Foundation's financial and programmatic problems were presented to the Court. The Friends Petitioners had ample opportunity to raise their objections to the relief sought by The Foundation and to seek to offer additional alternatives. Although the Friends Petitioners rely on purported "important new evidence" (Friends Pet. ¶ 18) to justify their delay in seeking to offer an alternative solution, the undisputed public record demonstrates that the supposed "new" evidence on which Petitioners rely was disclosed and available to Petitioners ***more than seven years ago***.

The rule precluding intervention after undue delay was established for precisely this type of situation. As discussed next, the prejudice to The Foundation of allowing intervention at this late date is substantial; yet, petitioners can offer no basis for their significant delay in seeking to reopen the proceedings involving the 2002 Petition except, in effect, that "we did not think of these arguments earlier." The purported "new evidence" invoked by petitioners is neither new nor relevant. In short, petitioners have sought to involve themselves well past the time

for doing so, and even if they met the other requirements for intervention (which they do not), their delay would preclude such intervention now.

3. Allowing petitioners to intervene in proceedings involving The Foundation's 2002 Petition would substantially prejudice The Foundation.

The Foundation already has expended substantial efforts and significant expense in litigating the 2002 Petition and in refuting the claims raised by the *amici curiae* in those proceedings. The Foundation also has undertaken substantial steps and incurred significant expense to carry out the relief awarded by this Court more than six years ago. It has acquired a site for its gallery in Philadelphia, retained and paid architects to produce designs for the new building, made detailed preparations to relocate its gallery collection to the new building, and made significant progress on construction of the new facility, which is expected to be completed in less than a year. The Foundation also has spent considerable good will raising funds and collecting pledges of financial support in reliance on its announced plans of relocating its gallery collection. Its primary focus since 2004 has been on implementation of this Court's decree. Stopping these efforts in their tracks or even delaying their further implementation will cause The Foundation irreparable harm and may put it in an even worse financial state than the one it faced when it filed the 2002 Petition eight years ago. Petitioners should not be permitted to harm The Foundation in that way.[8]

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[8] Similar concerns regarding the prejudice to The Foundation caused the Supreme Court to grant The Foundation's King's Bench petition in 2005 to achieve an expedited resolution of the putative intervention claim raised on appeal at that time, and those concerns are even stronger now, six years later.

In sum, petitioners not only lack the standing and legally enforceable interest necessary to intervene in matters involving The Foundation, but they fail to meet the other requirements for intervention under the applicable rules. Accordingly, any request to intervene at this time should be denied.

II. THE PETITIONS SHOULD BE DISMISSED BECAUSE THE ISSUES RAISED BY THE PETITIONS HAVE ALREADY BEEN DECIDED BY THIS COURT IN A FINAL DECREE.

This Court already has decided the issues raised in these petitions. More than six years ago, the Court issued a thorough opinion encompassing the Court's factual findings and legal conclusions, and entered a final and binding decree granting the relief sought by The Foundation. All appeals have been exhausted, and this matter is now closed. Even if petitioners had standing (which they do not), there is no factual or legal basis for this Court to reopen the prior proceeding or to reconsider its prior rulings on this matter.

A. The Petitioners Offer No Factual or Legal Basis for This Court To Reopen the Prior Proceedings.

This Court's final judgment in 2004 forecloses these petitions. "Finality of litigation is essential so that parties may rely on judgments in ordering their private affairs and so that the moral force of court judgments will not be undermined." *Clark v. Troutman*, 509 Pa. 336, 340, 502 A.2d 137, 139 (1985). "One trial of an issue is enough." *Haefele v. Davis*, 380 Pa. 94, 98, 110 A.2d 233, 235 (1955). Litigation over an issue is foreclosed where the issue has been "litigated, adjudicated and definitively decided." *Helmig v. Rockwell Mfg. Co.*, 414 Pa. 518, 520, 201 A.2d 205, 205 (1964).

Both the Friends Petition and the Feudale Petition seek to reopen the proceedings on the 2002 Petition to relitigate the same issues that were the subject of this Court's final decree, including whether The Foundation should be permitted to relocate its gallery collection and whether there are alternative means of solving The Foundation's financial problems that are more appropriate than the planned relocation of the gallery collection. The issues raised in these petitions have been fully litigated and definitively decided by this Court, and there is no reason to revisit them.

In addition, the participation of the Attorney General as *parens patriae* in the proceedings on the 2002 Petition forecloses the Friends Petitioners and Feudale from now attempting to relitigate the issues finally decided in those proceedings, since the Attorney General represented the petitioners' interests and thereby caused them to be bound by the Court's decree. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(d) (1982); *id.*, Cmt. *d* & Illus. 6 (explaining application of principle to representation by Attorney General as *parens patriae*); *cf. Sica v. City of Phila.*, 77 Pa. Commw. 97, 98-99, 465 A.2d 91, 92-93 (1983) (applying Section 41 of the *Restatement* and dismissing taxpayer lawsuit because of an earlier lawsuit on the same subject matter filed by a different taxpayer). Despite petitioners' argument to the contrary, this Court was fully aware of the Attorney General's position regarding the 2002 Petition, *see In re Barnes Found. (No. 12)*, 24 Fid. Rep. 2d 94, 107 (O.C. Montg. 2004), prior to granting the relief sought by The Foundation. And finally, the Friends Petitioners also were represented by the *amici curiae*, including Friends Petitioner Hood herself, at the hearing on the 2002 Petition, adding further to the binding effect of the 2004 decree.

The only basis that the Friends Petitioners offer to revisit this Court's prior ruling is the allegedly "new" information regarding the Attorney General's role in the prior proceedings and the funds allegedly available in the capital budget. Feudale similarly invokes this allegedly new information, as well as his own ideas for solving The Foundation's financial problems by reinterpreting the gallery ensembles without relocating the gallery collection. None of these grounds justifies reopening the 2002 Petition proceedings.

The allegations regarding the Attorney General have already been discussed. And even aside from the inaccuracies in petitioners' representation of the Capital Budget Act (discussed below, in Part III), the information regarding that Act and the itemizations in it for The Foundation have been available for at least eight years — since the statute was enacted in October 2002 — and were the subject of proceedings before this Court almost four years ago — following the filing of the 2007 Friends Petition. Thus, this second basis for the Friends Petition is also old news and offers no justification for revisiting decided issues.

Feudale's argument that the Court should revisit its prior rulings because he has now (eight years after The Foundation first filed the 2002 Petition) discovered "an aspect of The Barnes which has not been previously publicly presented," Feudale Pet. ¶ 2, and that this discovery would allow The Foundation's gallery collection to remain in Merion, *id.* ¶ 7, is equally meritless. If the Commonwealth's courts were to accept Feudale's notion that litigation could be reopened every time a party (or, in this case, a non-party) offers another purported solution to the problem at the center of the litigation, there would be endless adjudication of all disputes before the Commonwealth's courts. Indeed, there is no reason to believe that, if the Court allowed Feudale to litigate his proposal and ruled that it was inadequate, Feudale — or some other individual

or entity waiting in the wings — will not seek to reopen these proceedings *again* at some point down the road, when another proposal pops into his head (or he publishes another book about The Foundation). Moreover, the fact that Feudale purports to cast his claims in constitutional terms does not provide an exception to these well-established principles precluding the relitigation of concluded matters.

That is not how cases are litigated in the courts of the Commonwealth and, in particular, it is not how matters involving charitable foundations are addressed by the Commonwealth's Orphans' Courts. As the Supreme Court said more than a century ago, after a case has ended and appeals have been exhausted, a party cannot "begin over again and state another fact, and in case of judgment against him take another appeal, and so on. This would be vexatious, dilatory and expensive to an intolerable degree." *Pennock v. Kennedy*, 153 Pa. 579, 582, 26 A. 217, 217 (1893). Even if they had standing, petitioners' requests to revisit matters concluded many years ago should be denied.

B. The Petitioners' Request That This Court Reconsider Its Prior Rulings Is Foreclosed by Orphans' Court Rule 7.1.

The petitioners' request that this Court reopen the proceedings involving the 2002 Petition and reconsider its prior rulings is procedurally defective, in addition to being substantively meritless. Orphans' Court Rule 7.1(g) provides, "Exceptions shall be the exclusive procedure for review by the Orphans' Court of a final order, decree or adjudication. *A party may not file a motion for reconsideration of a final order.*" O.C. R. 7.1(g) (emphasis added); *see also In re Estate of Janosky*, 827 A.2d 512, 521-22 (Pa. Super. 2003) (holding that a motion for reconsideration of a final Orphans' Court ruling is "an improper filing" under Rule 7.1(g)); *In re Estate*

of Rosser, 821 A.2d 615, 619 (Pa. Super. 2003) (noting that Orphans' Court Rule 7.1 "governs the procedure for challenging the entry of a final order, decree or adjudication in orphans' court proceedings"). The rule contains no exceptions. Because the petitions ask this Court to reconsider its December 13, 2004 final decree (and its prior rulings denying standing to many of these petitioners), they are foreclosed by Rule 7.1(g).

C. The Friends Petition Also Should Be Dismissed Because It Is Barred by Laches.

As set forth above (in Part I.C.2), the Friends Petition seeking to reopen proceedings commenced more than eight years ago was filed after substantial delay, without any justification for such delay. In such circumstances, the petition is subject to dismissal for the additional reason that it is barred by laches. A claim is barred by laches when the claimant fails to exercise due diligence in bringing the claim, thereby causing prejudice to the respondent. *See, e.g.*, *Stilp v. Hafer*, 553 Pa. 128, 134, 718 A.2d 290, 293 (1998) (finding challenge to statute passed eight years earlier was barred by laches).

Although the Friends Petitioners reference a film released in 2010 as support for their supposedly "new" allegations, Friends Pet. ¶¶ 19-20, the public record unequivocally reveals that the information on which those allegations are based was available at least four years ago, and in many cases more than seven years ago. *See* Part I.B.1, *supra*; *see also* pages 6-8, *supra*. Under these circumstances, the Friends Petitioners clearly have not exercised due diligence in bringing their claims in a timely manner. *See, e.g.*, *Abbdulaziz v. City of Phila.*, No. 00-5672, 2001 U.S. Dist. LEXIS 16972, at *21-*23 (E.D. Pa. Oct. 18, 2001) (applying Pennsylvania law and citing *A. McD. v. Rosen*, 423 Pa. Super. 304, 309, 621 A.2d 128, 131 (1993)) (finding that

plaintiffs' claims were time-barred when they brought them in response to the publication of a book, but "numerous newspaper articles, court records, and public hearings" already had disclosed the basis for plaintiffs' claims), *aff'd*, 47 Fed. Appx. 131 (3d Cir. 2002); *see also Meunier v. Wyeth (In re Diet Drugs Prods. Liab. Litig.)*, 352 F. Supp. 2d 533, 541 (E.D. Pa. 2004) (noting that a plaintiff "who fails to make any inquiry or take any action in the face of extensive media coverage fails to exercise reasonable diligence as a matter of law"); *Sudarkasa v. Glanton*, 57 Pa. D. & C.4th 472, 490-91 (C.P. Phila. 2002) (statute of limitations was not tolled where plaintiff easily could have discovered the alleged cause of her injury by reviewing article in local Philadelphia media), *aff'd without published op.*, 855 A.2d 146 (Pa. Super. 2004).[9]

The Friends Petitioners seek to reopen these proceedings, burden this Court, and require The Foundation to expend funds to defend this litigation (rather than use that money for its educational mission), all on the basis that the Friends Petitioners were "disturbed" (Friends Pet. ¶ 21) by comments of a former Attorney General and a Governor in a movie. The time is long past for petitioners (and others similarly situated) to litigate the issues raised in The Foundation's 2002 Petition, which were thoroughly addressed by this Court following two hearings conducted more than six years ago. Bringing their petition now, years after the matters they seek to raise were first disclosed, is the very opposite of due diligence.

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[9] Like the statutes of limitations at issue in the cases cited in the text, laches requires the exercise of due diligence to avoid the bar of a time limit on bringing suit. *See Stilp*, 553 Pa. at 134, 718 A.2d at 293. And as with a statute of limitations, the issue of due diligence focuses on what a party could have discovered through the exercise of due diligence, not what the party actually knew. *See Kern v. Kern*, 892 A.2d 1, 9-10 (Pa. Super. 2005). The Friends Petitioners and Feudale plainly could have discovered the information in *The Philadelphia Inquirer* articles through the exercise of due diligence, just as the courts found that the plaintiffs in *Abbdulaziz*, *Meunier*, and *Sudarkasa* could have learned of their claims from media reports if they had exercised due diligence.

The prejudice to The Foundation from the Friends Petitioners' delay also is clear. The Foundation has expended substantial efforts and expense in litigating the 2002 Petition, as well as the 2007 petitions. The Foundation also has undertaken substantial steps and incurred significant expense to carry out the relief awarded by this Court more than six years ago, including entering into numerous agreements in reliance on this Court's decree. The Foundation's new facility will be completed in less than a year and open to the public shortly thereafter. Stopping those efforts now or even delaying their further implementation will cause The Foundation irreparable harm and may put it in an even worse financial state than the one it faced when it filed the 2002 Petition eight years ago. The Friends Petition is plainly barred by laches.

III. THE FRIENDS PETITIONERS' SCANDALOUS AND IMPERTINENT MATTER RELATING TO THE CAPITAL BUDGET ACT SHOULD BE STRICKEN.

Allegations that are scandalous or impertinent should be stricken from a pleading. PA. R. CIV. P. 1028(a)(2). Scandalous and impertinent material includes allegations that are immaterial or inappropriate. *See Piunti v. Unemployment Comp. Bd. of Review*, 900 A.2d 1017, 1019-20 (Pa. Commw. 2006). The Friends Petitioners' suggestion that The Foundation (and former Governor Rendell) withheld material information about the Capital Budget Act during the hearings on the 2002 Petition should be stricken as scandalous and impertinent. Establishment of the facts regarding these charges does not require a factual hearing. The ***public*** record, which was readily available to the Friends Petitioners before they filed their petitions,[10] belies any

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10 The public record includes not only the relevant legislation itself, but a wealth of information on the redevelopment assistance capital program that includes the Barnes itemizations, which is available from the Internet web site for the Governor's Office of the Budget. *See http://www.budget.state.pa.us/portal/server.pt/community/redevelopment_assistance_capital_program/4602.*

claim that The Foundation misled the Court during the 2002 Petition proceedings by withholding material information regarding the budget statute. Therefore, if the Friends Petition is not dismissed in its entirety, as it should be, Paragraphs 25-28 of the Friends Petition should be stricken as scandalous and impertinent on the basis of that public record.

A. The Itemizations Did Not Constitute Appropriations of Funds for The Foundation.

The basic premise underlying the Friends Petitioners' assertions about the Capital Budget Act is that it constituted a $107 million "appropriation" of funds for use by the Barnes Foundation. *See* Friends Pet. ¶ 27. In fact, the two itemizations at issue — for $7 million and $100 million — did not constitute authorization for the Commonwealth to expend ***any*** *funds* from the Commonwealth's General Fund at the time the Capital Budget Act was passed in October 2002. Rather, the Capital Budget Act simply authorized the Commonwealth to issue bonds for any itemized projects *that were* ***later*** *selected for funding* by the Executive Branch and to appropriate the proceeds of those bonds to pay for the approved projects. *See* Capital Budget Act §§ 2(d), 6, 18(d), 22(d), 2002 Pa. Laws at 891-92, 962, 1063, 1065, 1071.

Itemization in a budget bill is the just the first step in a lengthy process of financing capital projects. By an itemization, the Legislature determines "the maximum amount of [debt] obligations which may be incurred" to fund capital project costs. Debt Enabling Act § 303(b)(4), 72 P.S. § 3919.303(b)(4). Just as a household budget may place spending limits on the homeowner's "wish list" of potential expenditures, subject to the homeowner's later decision whether to actually make any of those expenditures during the coming year, so too does a Commonwealth budget limit the maximum amount that the Commonwealth may spend on each

project that is itemized in it *if the Commonwealth decides to spend money on that project in the future.* A capital budget under the Debt Enabling Act sets limits on potential expenditures that must be funded by borrowing money, but its itemizations apply only *if the Commonwealth later decides to spend money on that project.*

The decision whether to spend the money is committed to the Governor and Executive Branch officials. As the Governor's Office of the Budget explains:

> Passage of a Capital Budget Itemization Act does not mean that all projects authorized in the act will be implemented or that a project will be activated in a short period. The timetable for capital project implementation is determined by the Governor. . . .
>
> The immediate implementation of all authorized capital projects is not practicable administratively or fiscally. As noted above, projects must be consistent with the current Governor's program priorities and fiscal policies to prudently manage debt service.

OFFICE OF THE BUDGET, THE BUDGET PROCESS IN PENNSYLVANIA 18 (2007).[11]

Given that there was a total of $10 billion in itemized projects in the Capital Budget Act, the possibility of The Foundation receiving ***any*** money as a result of its two itemiza-

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[11] This publication is available on the Budget Office's web site, at *http://www.portal.state.pa.us/portal/server.pt/document/318373/budgetprocess_pdf.* The publication (at p. 18) points out constraints on the Governor's decision whether to implement itemized projects:

> Debt financing a capital project creates a 20-year repayment obligation. In releasing capital projects for design and construction, consideration is given to the Commonwealth's ability to market bonds to finance capital projects, the extent to which revenues in succeeding years can finance increased debt service, the outstanding debt in relation to the Commonwealth's Constitutional debt limit, and operating cost impacts on agency programs or opportunity cost impacts on the Commonwealth's overall operating budget.

tions in the Act was purely speculative. Moreover, because the cap in the Debt Enabling Act on the amount of outstanding debt that could be used to fund redevelopment assistance capital projects was significantly lower than the total amount of itemized projects, there was a substantial possibility that bond funds would not be available to fund ***any*** portion of the itemizations for The Foundation. *See* Debt Enabling Act § 317(b), *as amended by* Act of Oct. 28, 2002, Act No. 2002-130, § 2, 2002 Pa. Laws 889, 890 (since further amended).

Finally, the approval process required for receipt of any funds from the itemizations is lengthy and uncertain. Before The Foundation could receive any money from the itemizations, the Governor first had to decide to support the project and to decide the funding amount to approve (which Governor Rendell initially did only in 2006, and only for a fraction of the amount itemized). Then, the City of Philadelphia had to file a detailed application for the project with the Office of the Budget, which had to approve the application. *See* Debt Enabling Act § 318(a), 71 P.S. § 3919.318(a). Only then could bonds be issued and their proceeds appropriated to the Department of Community and Economic Development to fund the project.

Thus, the public record that was readily available to the Friends Petitioners before they filed their petitions makes clear that there were ***no*** funds available to The Foundation during the time of the proceedings regarding the 2002 Petition. Moreover, The Foundation had no assurance that it would receive ***any*** money from the itemizations in the Capital Budget Act until many more actions — all of them outside of The Foundation's control — were taken by various government entities. The first of these actions, approval by the Governor of $25 million for The Foundation's new gallery in Philadelphia, did not even occur until fifteen months after this Court entered a final decree approving the relief sought in the 2002 Petition.

B. The Itemizations Were Not Relevant to Maintenance of The Foundation's Gallery Collection in Merion.

Contrary to the Friends Petitioners' implication that the $107 million was somehow available to help plug the substantial hole in The Foundation's operating budget in Merion, any money appropriated to redevelopment assistance capital projects itemized in the Capital Budget Act (such as the two itemizations for The Foundation) could be used ***only*** for the design and construction of facilities. *See* Debt Enabling Act § 302, 72 P.S. § 3919.302. The funds could not be used for operating expenses. Thus, even leaving aside that the Governor did not authorize the expenditure of ***any*** funds from the itemizations until after the proceedings regarding the 2002 Petition were concluded, whatever funds (if any) that The Foundation would receive from the itemizations would have had no relevance to the issues before the Court, *i.e.*, whether "The Foundation's finances have reached a critical point," and whether "the move to Philadelphia is the least drastic deviation that will stabilize The Foundation's future." *In re Barnes Found. (No. 12)*, 24 Fid. Rep. 2d 94, 110 (O.C. Montg. 2004).

In addition, the funds were itemized for use ***in Philadelphia***. *See* Capital Budget Act § 6(51)(i)(UU), (OOOOOOO), 2002 Pa. Laws at 1015, 1017, 1026. Thus, the additional implication of the Friends Petitioners that the Court was not informed of funds available for The Foundation's gallery ***in Merion*** is misplaced. The funds could not have been used for The Foundation in Merion even if they were available at the time of the 2002 Petition. They could only be used in Philadelphia. Their potential availability thus ***supported*** the 2002 Petition by making funding of the new gallery possibly more feasible. They were not, as the Friends Petitioners suggest, evidence that would undermine the case for the relief sought in the 2002 Petition.

In short, the Capital Budget Act, Debt Enabling Act, and related public documents unequivocally demonstrate that the Commonwealth did not appropriate $107 million in October 2002 for The Foundation to use in any manner that would have been material to the issues before the Court at any time during the proceedings regarding the 2002 Petition. These statutes make clear that the Commonwealth had ***not*** committed to provide $107 million (or any amount of funding) to The Foundation at the time of the proceedings regarding the 2002 Petition; that the Commonwealth has ***never*** appropriated (or itemized) any funds for The Foundation to use for regular operating expenses or to create an endowment; and that the Commonwealth has ***never*** appropriated (or itemized) any capital funds for The Foundation to use in Lower Merion Township. The Friends Petitioners' allegations to the contrary are scandalous and impertinent, and they therefore should be stricken.

IV. THE FOUNDATION IS ENTITLED TO COUNSEL FEES FOR PETITIONERS' ARBITRARY AND VEXATIOUS CONDUCT.

Upon dismissal, the Friends and Feudale Petitioners should be required to pay The Foundation's counsel fees under the Judicial Code, 42 PA. C.S. § 2503, which provides:

> The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:
>
> . . . .
>
> (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.
>
> . . . .
>
> (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

Conduct is "arbitrary" if it "is based on random or convenient selection or choice rather than on reason or nature." *Thunberg v. Strause*, 545 Pa. 607, 615, 682 A.2d 295, 299 (1996). "By definition, where there is no basis in law or fact for the commencement of an action, the action is arbitrary." *Id.* at 619, 682 A.2d at 301. Similarly, a suit is "vexatious" if it was filed "without sufficient grounds in either law or in fact and if the suit served the sole purpose of causing annoyance." *Id.* at 615, 682 A.2d at 299; *see Old Forge Sch. Dist. v. Highmark, Inc.*, 592 Pa. 307, 318-20, 924 A.2d 1205, 1212 (2007). The Supreme Court has described repeated litigation of the same claims as "vexatious." *Pennock v. Kennedy*, 153 Pa. 579, 582, 26 A. 217, 217 (1893).

The Friends and Feudale Petitions fall within the parameters of Section 2503 and, thus, a sanction of attorneys' fees against each set of petitioners is warranted. Case law has established for more than a decade that persons and organizations in the same position as these petitioners have no standing to bring an action of this type. Indeed, many of these very same petitioners have been denied standing by this Court in previous stages of this litigation or other litigation involving The Foundation, some of them more than once. These petitions were brought in total disregard of this established law, as well as in the face of a public record that refutes the petitioners' core contention that they seek to bring "new evidence" to the Court's attention. In particular, as set forth in detail above (in Part I.B.1 and pages 6-8), the "new evidence" involving the Attorney General's position regarding The Foundation's 2002 Petition, the Attorney General's and Governor's roles in persuading Lincoln to withdraw its opposition to the 2002 Petition, and the facts surrounding the Capital Budget issue, have been well-known and widely reported for years. There was simply no basis and no justification for bringing these arbitrary and vexatious petitions.

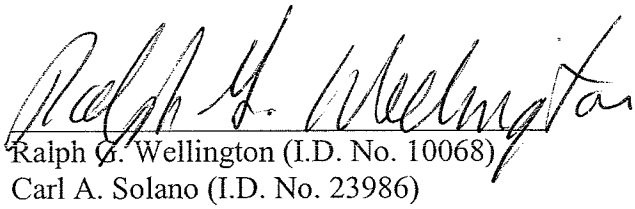
These petitions, like the 2007 Friends Petition, risk disrupting The Foundation's essential task of carrying out this Court's 2004 decree by relocating its gallery collection. And in the process, they have forced The Foundation, which is already strapped for funds, to expend more money and energy defending against stale and already litigated claims. This is particularly egregious in that many of these petitioners — specifically Friends of the Barnes Foundation, Sandra Bressler, Walter Herman, Nancy Herman, and Sue Hood — have been through this before and know full well that they have no standing to raise these issues and that these issues have been fully litigated. Indeed, this is Friends Petitioner Sue Hood's *third* attempt to intervene in the proceedings involving The Foundation's 2002 Petition — and this is in addition to her actual participation in those proceedings as one of the *amici curiae* granted leave by the Court to participate in the 2003 and 2004 proceedings. It is well past the point where these serial litigators and others similarly situated should accept that they lack standing to interfere in The Foundation's affairs.

In sum, the Foundation respectfully requests that both the Friends and Feudale Petitioners be required to reimburse The Foundation for its attorneys' fees and costs incurred in responding to these unnecessary and vexatious petitions.

CONCLUSION

For the foregoing reasons, The Barnes Foundation respectfully requests that the Court sustain its preliminary objections to the Friends Petition and the Feudale Petition, dismiss both Petitions with prejudice, and provide the additional relief requested in the preliminary objections and supporting memorandum.

Respectfully submitted,



Ralph G. Wellington (I.D. No. 10068)
Carl A. Solano (I.D. No. 23986)
Bruce P. Merenstein (I.D. No. 82609)
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2000
(215) 751-2205 (fax)

Attorneys for The Barnes Foundation

Dated: April 27, 2011.

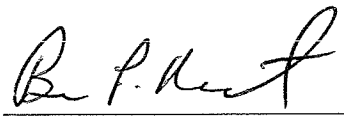
CERTIFICATE OF SERVICE

I, Bruce P. Merenstein, hereby certify that I caused to be served the foregoing Memorandum of Law in Support of Preliminary Objections on April 27, 2011, by the following methods:

Via Hand Delivery
Lawrence Barth, Esquire
Senior Deputy Attorney General
Office of Attorney General
21 South 12th Street, 3rd Floor
Philadelphia, Pennsylvania 19107
Office of the Attorney General

Via UPS Next-Day Delivery
Richard R. Feudale, Esquire
33 E. 3rd Street
P.O. Box 227
Mount Carmel, Pennsylvania 17851-0227
Counsel for Petitioner Richard R. Feudale

Via UPS Next-Day Delivery
Samuel C. Stretton, Esquire
301 South High Street
P.O. Box 3231
West Chester, Pennsylvania 19381-3231
Counsel for Friends Petitioners



Bruce P. Merenstein
Attorney for The Barnes Foundation