SAMUEL C. STRETTON, ESQUIRE
301 SOUTH HIGH STREET
P.O. BOX 3231
WEST CHESTER, PA 19381-3231
ATTORNEY I.D. NO. 18491
(610) 696-4243

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

BRIEF OF THE PETITIONERS IN SUPPORT OF THEIR PETITION TO OPEN AND IN SUPPORT OF THEIR POSITION THEY HAVE STANDING AND IN OPPOSITION TO THE PRELIMINARY OBJECTIONS

Samuel C. Stretton, Esquire
Attorney for Petitioners
301 S. High Street
P.O. Box 3231
West Chester, PA 19381
610-696-4243
Attorney I.D. No. 18491

TABLE OF CONTENTS

TABLE OF CITATIONS

I. BRIEF FACTUAL AND PROCEDURAL HISTORY

The Petitioners, two non-profit corporations and concerned neighbors, residents, students, and others, have a direct interest in ensuring that the Barnes Foundation art collection remain in its present Lower Merion location, and not be moved to Philadelphia. The Petitioners are as follows: 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, Barnes Watch.

The Petitioners, in or about February of 2011, filed a Petition to Open the Captioned Matter Based on Newly Discovered Evidence. The newly discovered evidence was found in the movie entitled *The Art of the Steal*, which was shown widely in 2010 throughout the United States and resulted in considerable comment publicly and in newspaper articles. In essence, the article featured comments, particularly by former Attorney General Fisher as to his direct and coercive involvement in forcing Lincoln University to drop (withdraw) its Petition opposing changes to the Barnes Board, which would ensure the change of location of the Barnes art collection. This was not known during the 2003 and 2004 hearings before the Honorable Stanley Ott.

After the Petition to Open was filed, Preliminary Objections were filed by both the Attorney General's Office and by the Barnes Foundation. A brief hearing was held before the Honorable Stanley Ott on March 29, 2011. At that time, it was agreed that the Attorney General and the Barnes Foundation had thirty days to file a Brief and Mr. Stretton had twenty days to respond. The Barnes Foundation filed a Brief, but the Attorney General has not. Mr. Stretton asked for an additional three days until Friday May 20, 2011, to file his Answers and Brief, because of the Primary Election Day and the fact he is a candidate for the District Attorney's Office in Chester County. Judge Ott entered an Order on May 12, 2011, granting Mr. Stretton's request for an extension to file the Brief, giving him until Friday, May 20th to file his Answers to the Preliminary Objections and Brief.

A brief background is needed. Under Article II of the Barnes Foundation By Laws, Dr. Albert Barnes, founded the Barnes Foundation "to promote the advancement, education and promotion of fine arts." (See Article II of the Barnes Foundation By Laws). In the Barnes Foundation's indenture, the Art Gallery and the Arboretum are "integral parts of its education resources (paragraph 17, which was amended in 1950)." The Barnes Foundation location in Lower Merion was specifically selected and developed by Dr. Barnes and, besides the paintings on the

walls, Henry Matisse created a site-specific mural in the main gallery to reflect the design desired by Dr. Barnes.

In fact, Dr. Barnes and John Dewey, on January 30, 1934, testified in the proceeding before the Pennsylvania Supreme Court about its purpose. Dr. Barnes noted as follows:

> "Our charter calls for a plan for advancement of education by instruction in knowledge of the fine arts and the maintenance of an arboretum. These two aspects of one in the same purpose cannot be separated: they are one and indivisible and both are educational in their essence...in short, the Foundation as it exists at present may be compared to a composition by Titian of a symphony by Beethoven; that is, every unit was studied in relation to what was the ultimate composite entity, which prompted us to establish the foundation and devote our money and the rest of our individual lives to make the foundation the servant of educational authorities in advancing the knowledge and happiness of mankind." (Testimony of Albert C. Barnes from the case Barnes Foundation v. Keely, Appellate No. 268 Supreme Court of Pennsylvania (January 30, 1934).

During the same testimony, the famous philosopher, John Dewey, and Director of Education at the Barnes, explained as follows:

> "The art gallery and arboretum make a unit each of a definite educational value and one must reinforce the other." (Testimony of John Dewey from the case of Barnes Foundation v. Keely, Appellate No. 268 Supreme Court of Pennsylvania (January 30, 1934).

The Barnes Foundation sought permission in 2002 with the Montgomery County Orphans' Court to amend its Charter and By Laws to increase the number of trustees and to relocate the art gallery located in Lower Merion, Pennsylvania to Philadelphia,

Pennsylvania. This request was contrary to every wish and desire of the late Dr. Barnes.

The case was assigned to the Honorable Stanley Ott of the Orphans' Court of Montgomery County. Judge Ott held hearings in December of 2003 and then again a second series of hearings in September of 2004. Judge Ott issued his first opinion on January 29, 2004, indicating that more evidence was needed to be presented. A second Opinion was issued on December 13, 2004 and In re Barnes Foundation, 69 D&C 4th 129 (Montgomery County Orphans' Court, 2004). As noted in the Opinion, the attorneys who appeared were Attorney Arlin Adams for the Barnes Foundation, and Deputy Attorney General Lawrence Barth for the Attorney General's Office. No student or petitioner had standing and only three students had Amicus Curiae status. But the laboring oar was with the Attorney General.

In the decision of January 29, 2004 (and this Opinion does not appear to be reported or at least could not be found on West Law), Judge Ott in this January 30, 2004 Opinion, was extremely critical of the Attorney General's role. Judge Ott noted also that the Amicus parties had very limited roles in the hearing and were unable to obtain any discovery.

> "We find nothing, however, to commend the Office of Attorney General's action in this regard. The Attorney General, as parens patria for charities, had an absolute duty to probe, challenge and question every aspect of the monumental changes now under consideration. The law of

> standing, which has been repeated so many times in opinions concerning the Barnes Foundation by this Court and Pennsylvania Appellate Courts, permits only Trustees, the Attorney General, and parties with a special interest in a charitable trust, to participate in actions involving the trust. In these proceedings, the three students were granted Amicus Curiae status, but their participation was limited to exploring the legal impact of the proposals on the Foundation's education programs. Thus, the Attorney General was the only party with authority to demand, via discovery or otherwise, information about other options. However, the Attorney General did not proceed on its authority and even indicated its full support for the Petition before the hearings took place. In court in December, the Attorney General's Office, merely sat as second chair to counsel for the Foundation, cheering on its witnesses and undermining the students' attempts to establish their issues. The course of action chosen by the Office of the Attorney General prevented the Court from seeing a balanced, objective presentation of the situation and constituted an abdication of that office's responsibility. Indeed it was left to the Court to raise questions relating to the finances of the proposed move and the plans' financial liability." (See Judge Ott's Opinion dated January 29, 2004, pages 20 and 21 of the Slip Opinion).

As a result of the Attorney General's non-involvement as described by Judge Ott and the limitation of the Amicus Curiae, a full and complete record was never developed. There was a second set of hearings, but the Attorney General's role was again limited in nature.

What was not known or ever disclosed in any of these hearings was the Attorney General's direct involvement in causing the Foundation By Law changes and move to Philadelphia due to the coercive and threatening actions of the Attorney General of Pennsylvania, which were later admitted by the

Attorney General in the film *The Art of the Steal*. Only now is the conflict finally known which was the cause of the failure of the Attorney General. With a record not completely made, based on the evidence at hand, Judge Ott granted the petition to change the By Laws and to allow the move to Philadelphia. The petition was granted by Order dated December 13, 2004 as part of the Opinion.

A student, Jay Raymond, filed an appeal to the Pennsylvania Supreme Court on the inability to intervene. The Supreme Court of Pennsylvania, in the case of In re: Barnes Foundation, 871 A.2d 792 (Pa., 2005), held that only a party could appeal the decision and an Amicus Curiae participants could not. Since the student was denied intervention and was not allowed status as a party, the Pennsylvania Supreme Court dismissed his appeal.

In 2007, some of the current Petitioners, including Friends of Barnes Foundation, sought to reopen the case. A Petition was filed by Attorney Mark Schwartz on behalf of Ann Barnes, Sue Hood, Friends of the Barnes, Dr. Walter Herman and Nancy Herman, Sandra Bressler and others. This Petition was denied in an Opinion by the Honorable Stanley Ott on May 15, 2008, which appears to be an unreported decision. Judge Ott never discussed the merits of the Petition (although he criticized the scatter gun approach of Mr. Schwartz's Petition). Judge Ott then

concluded that Friends of Barnes and the other Petitioners did not have standing and dismissed the petition.

Judge Ott, in his Opinion, emphasized the role of the Attorney General.

> "As the Attorney General and the Trustees point out, the county's special interest in protecting historical resources and nurturing economic welfare are matters within the purview of the Attorney General's Office. That office as parens patriae protects the general public and there is no authority for a second sovereign to participate on behalf of a subset of the general public." [See In re Barnes Foundation, Memorandum Opinion of Judge Ott (May 15, 2008, page 6].

There is no discussion in the Opinion or any reference to the conflict of the Attorney General, the extent of which was not known at the time by Judge Ott and the Petitioners.

Of significance is the fact that there was a newspaper article in the Philadelphia Inquirer sometime in 2005 discussing some aspects of the Attorney General's early involvement. But as far as can be seen, there was nothing of record in any proceeding where the Attorney General made a full and complete disclosure or any disclosure to Judge Ott of the conflict of interest the Attorney General labored under.

Everything lay dormant after that until late 2009 and 2010 when a very interesting documentary, *The Art of the Steal* was shown throughout the country. Shockingly, former Attorney General Fisher, described his direct involvement in forcing and threatening Lincoln University to drop its opposition to the

Barnes Petition to change its By Laws and to ensure the move to Philadelphia. His description reflected strong coercive tactics. The following was said by then-Attorney General Michael Fisher, in this particular documentary:

> "I'm sure I saw the letter (from Richard Glanton, warning the Barnes would be 'run into a brick wall.') I'm not going to say that his predictions were accurate *per se*. But once he left, there was not the same level of drive with those who remained. And in the long run, I thought that was going to continue to drag the Barnes down."
>
> "It was pretty clear to me they (the three foundations championing the move) weren't just going to give 50, 70, 100 million dollars without getting control of the Barnes board."
>
> "I don't know that we were ever as direct as saying (to Lincoln University), 'We can take this (the Barnes Foundation) away from you.', because that would take a court to do that, but I had to explain to them that, you know, maybe the Attorney General's office would have to take some action, involving them that might have to change the complexion of the board. And, whether I said that directly or I implied it, I think they finally got the message."
>
> "And when they say...you mentioned...that it was portrayed that I was the bad cop and the Governor was the good cop, the Governor had the money and the Governor had some money he was willing to add onto it. So that automatically made him a good cop."
>
> "There was some money proposed for Lincoln to offset some of the perhaps perceived losses that they might have."

The statements by Mr. Fisher demonstrated a course of threatening and direct involvement by him to change the complexion of the Board to force the Philadelphia move. The Attorney General from the beginning had already decided that the

Barnes Foundation had to be moved and the Board changed and he was doing everything in his power to threaten and coerce until he got his way. This conduct is highly inconsistent with his assigned parens patriae role to protect the public.

The same film contains statements by then Governor of Pennsylvania, Ed Rendell. Once the statements in the film became known, the Friends of the Barnes and the Petitioners ultimately came to Attorney Sam Stretton. Mr. Stretton reviewed this matter and filed a Petition in February of 2011 to reopen the matter, primarily based on the fact that the Attorney General had a gross conflict of interest, which was undisclosed and prevented the Attorney General from fulfilling his parens patriae role. Mr. Stretton is seeking intervention and standing for the Petitioners, some of whom were denied standing in the past. Mr. Stretton had alleged the conflict of the Attorney General was blatant and clear and prevented an appropriate hearing record from being made. This conflict explained why the Attorney General was not able to perform its role, as noted by Judge Ott in his earlier January, 2004 Opinion. Mr. Stretton, in essence, is asking to reopen the case and provide standing to the Petitioners under a private Attorney General theory.

Preliminary Objections and a Briefing Schedule, as noted, were established by Judge Ott.

The Petitioners are also alleging that, given the opportunity, they will demonstrate there was and is still sufficient revenue to keep the Barnes Foundation at its current location. Further, the concept of three-campuses, including the property in Chester County, will be demonstrated not to have any validity. The Chester County property could have been sold to provide sufficient revenue.

The Petitioners are asking that the Preliminary Objections be denied and the case be reopened and they be given standing and an opportunity for a hearing.

II. ARGUMENT

A.) Standard of Review for Deciding Preliminary Objections.

The present matters before this Honorable Court are on Preliminary Objections to the Motion to Open in the captioned matter. The standard and scope of review for evaluating Preliminary Objections is set forth as follows:

> "When reviewing an order granting preliminary objections in the nature of a demurrer, an appellate court applies the same standard employed by the trial court; all material facts set forth in the Complaint, as well as all inferences reasonably deducible therefrom, are admitted as true for the purpose of review." [Werna v. J. Plater-Zyberk, 799 A.2d 776 (Pa. Super., 2002)].

> "We begin our analysis with our well-settled standard of review:

> A preliminary objection in the nature of a demurrer is properly granted where the contested

> pleading is legally insufficient. Preliminary objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true.
>
> In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven. This Court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion. When sustaining the trial court's ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case is (sic) free and clear of doubt." [Lugo v. Farmers Pride, Inc., 967 A.2d 963, 966 (Pa. Super., 2009)].

B.) The Attorney General of Pennsylvania had a conflict of interest when he failed to reveal his early direct and coercive involvement and, therefore, could not fulfill his role in representing the public's interest. The Petition to Open should be granted and the Preliminary Objections denied.

The most striking aspect of this case is the blatant and obvious conflict of interest of the Attorney General of Pennsylvania, and even more importantly, the failure to reveal this conflict in open court. Nowhere in the hearings in 2003 and 2004, is there any disclosure by the Attorney General, or

suggestion that the Attorney General's involvement in forcing Lincoln University to drop (withdraw) its petition opposing changes to the Barnes Board, which would ensure the transfer of the art collection to Philadelphia might preclude the Attorney General from fulfilling its mission. Nor is there any disclosure by the Barnes Foundation of this blatant conflict of interest by the Attorney General, which apparently was well known by the Barnes Foundation at all pertinent times.

The first issue to discuss is what is the conflict? The conflict arises out of the Attorney General's traditional role. The Honorable Stanley Ott, in his Opinion, In re: Barnes Foundation, decided January 29, 2004, which apparently is not reported, in the Slip Opinion, defines the role of the Attorney General and clearly found the Attorney General lacking in performing that role in the Barnes case.

> "We find nothing, however, to commend the Office of Attorney General's actions in this regard. The Attorney General, as parens patriae for charities, had an absolute duty to probe, challenge and question every aspect of the monumental changes now under consideration. The law of standing, which has been repeated so many times in Opinions concerning the Barnes Foundation by this Court and Pennsylvania Appellate Courts, permits only Trustees, the Attorney General and a party with special interest in the Charitable Trust to participate in actions involving the trust. In these proceedings, the three students were granted Amicus Curiae status, but their participation was limited to exploring the proposals on the Foundation's education programs. Plus the Attorney General was the only party with authority to demand, via discovery or otherwise, information about other options. However, the Attorney General did not proceed on its authority and even indicated

> its full support for the Petition before the hearings took place. In court in December, the Attorney General's Office merely sat as a second chair to counsel for the Foundation, cheering on its witnesses and undermining the students' attempts to establish their issues. The course of action chosen by the Office of Attorney General prevented the Court from seeing a balanced, objective presentation of the situation and constituted an abdication of that office's responsibility. Indeed it was left to the Court to raise questions relating to the finances of the proposed move and its planned visibility." [See Opinion of the Honorable Stanley Ott dated January 29, 2004 in the case of The Barnes Foundation, A Corporation, Orphans' Court No. 58-788, Pages 20 and 21 (2004].

A review of the subsequent trial records did not show much change in the Attorney General's effort. The Attorney General failed to reveal any disclosure of any conflict or any reason why the Attorney General's Office would not be able to perform its parens patriae role. That role is set forth very clearly in Estate of Pruner, 136 A.2d 107 (Pa., 1957). The Pruner case noted the following:

> "The beneficiary of charitable trust is the general public to whom the social and economic advantages of the trust accrue. But because the public is the object of the settlors' benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform the function if the charitable trusts are to be preserved. The responsibility for public supervision traditionally has been delegated to the Attorney General to be performed as the exercise of his parens patriae powers...these are the ancient powers of guardianship over persons under disability and a protectorship of the public interest, originally were held by the crown of England as the father of the country..." Id 531, 532.

The Pennsylvania Supreme Court then noted that in all matters involving charitable trusts, the Attorney General must

be a party of record because the public has an interest in the trust. Id 532, 533.

Therefore, it is clear that in Pennsylvania law, the Attorney General's role is very important to represent the public in these issues. This duty was applicable at all pertinent times during this litigation.

With such a duty, the Attorney General could not engage in its duty to the public with the present conflict of interest. In other words, if the Attorney General's duty is to protect and represent the public, the Attorney General cannot be a participant in undermining the purpose of a public trust by coercion and threatening conduct and then not revealing this conflicting role to the Court. An Attorney General's client is the public. The Attorney General has no way to waive a conflict of interest with the public. But, the Attorney General could make full disclosure in the Orphans' Court and seek a wavier or withdraw if a waiver was not appropriate. None of that was done. The record is devoid of any disclosures by the Attorney General's Office of this blatant conflict of interest in the hearings leading to the decision of Judge Ott in 2004, which allowed changes to the Barnes Board and the art collection to be removed to Philadelphia. And, what was the conflict of interest? As quoted previously, the conflict was set forth by the then Attorney General, Michael Fisher, who is now a judge on

the United States Court of Appeals for the Third Circuit. He made the statement in an interview for the documentary, *The Art of the Steal*. He stated as follows:

> "I'm sure I saw the letter (from Richard Glanton, warning the Barnes would be 'run into a brick wall.') I'm not going to say that his predictions were accurate *per se*. But once he left, there was not the same level of drive with those who remained. And in the long run, I thought that was going to continue to drag the Barnes down."
>
> "It was pretty clear to me they (the three foundations championing the move) weren't just going to give 50, 70, 100 million dollars without getting control of the Barnes board."
>
> "I don't know that we were ever as direct as saying (to Lincoln University), 'We can take this (the Barnes Foundation) away from you.', because that would take a court to do that, but I had to explain to them that, you know, maybe the Attorney General's office would have to take some action, involving them that might have to change the complexion of the board. And, whether I said that directly or I implied it, I think they finally got the message."
>
> "And when they say...you mentioned...that it was portrayed that I was the bad cop and the Governor was the good cop, the Governor had the money and the Governor had some money he was willing to add onto it. So that automatically made him a good cop."
>
> "There was some money proposed for Lincoln to offset some of the perhaps perceived losses that they might have." (See movie *The Art of the Steal*).

As seen from the above interview, the Attorney General was involved from the very beginning, coercing Lincoln University to drop its petition opposing changes to the Barnes Board, which would allow the Barnes art collection to be taken to Philadelphia. The Attorney General threatened and used coercive

action with Lincoln University. In essence, he was threatening to take away the Barnes Foundation from Lincoln University as said in the quote. He also in the quote suggested he was doing this to allow three foundations to gain control of the Barnes Board.

Therefore, the Attorney General of Pennsylvania played a major role in forcing the change of the Board and forcing Lincoln University to give up its control and to allow the Barnes art collection to be removed from Lower Merion to Philadelphia. Having done that, the Attorney General of Pennsylvania then, during the proceedings before Judge Ott, appeared in Court in the parens patriae role, unfortunately neglecting to tell the Court that there was not a chance his office could represent the public's interest because the matter at issue had been instituted and caused by the course of conduct by the Attorney General himself.

Whether the Attorney General is right or wrong in what he did earlier, he had an absolute duty of disclosure to the Court to get a waiver of a conflict and he could only do that through presenting the issue to the Orphans' Court. The Attorney General failed to do that and never disclosed the conflict in the proceeding with Judge Ott during 2003 and 2004. The full extent of the Attorney General's involvement was only brought to the Court by the present Petitioners in the February 2011

Petition to Open by quoting the above language in the film, *The Art of the Steal.*

The Barnes Foundation, which apparently knew of this conflict, did nothing. The Barnes Foundation, in their Brief, takes the position the Petitioners should have known because of the Philadelphia Inquirer article in 2005. Although the article does detail some of the actions by the Attorney General, it doesn't set forth the coercive and threatening conduct of the Attorney General as the Attorney General described it in the movie, *The Art of the Steal*, as quoted above. None of that was revealed. Even during the 2007-2008 proceedings where standing was denied, the Attorney General's full role was not revealed and discussed by the Attorney General in Court.

The Attorney General, as the Chief Legal Officer in Pennsylvania, surely knows that he must comply with the Rules of Professional Conduct. The general Rules of Conflict of Interest are clearly set forth in Rule of Professional Conduct 1.7. Rule 1.7 precludes a concurrent conflict of interest. A concurrent conflict of interest under Rule 1.7 is representation of one client directly adverse to another client or where there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or the personal interest of the lawyer. Although the Rules of

Professional Conduct have been amended since 2003-2004, it appears that Rule 1.7 has remained the same.

Under Rule 1.7, in comment number one, it is noted that loyalty and independent judgment are essential elements in a lawyer's relationship to a client. Comment 3 notes a conflict of interest may exist before representation is undertaken, in which case the representation must be declined (see Comment 3 of the Rule 1.7 of the Rules of Professional Conduct). Rule of Professional Conduct 1.11 involving special conflict of interest for former and current government employees does not deal directly with the situation on point where the Attorney General acted in an improper fashion by coercion and threats and then attempted to play his parens patriae role.

Further, for public officials, the standard for conflict does not require actual prejudice. In Commonwealth v. Breighner, 684 A.2d 143 (Pa. Super., 1996), in a conflict caused by the District Attorney's representation of a victim of a crime in a civil case, no prejudice was required to cause the disqualification of the District Attorney. Further, the District Attorney was forbidden from appointing someone else in its office or elsewhere from prosecuting the case. Id 148.

Once there is a conflict of interest, particularly under Rule 1.7, then the imputation of conflict of interest applies to all members of the Firm [see Rule of Professional Conduct, Rule

1.10(a)]. It is important to note, although at some point Attorney General Fisher left the Office and became a judge of the Court of Appeals, his conflict would cause his entire office to have to disqualify under the general imputation of conflict of interest rules (see Rule 1.10).

In this case, it is clear the Attorney General had an absolute conflict of interest which did not appear to be waivable. But, in any event, the Attorney General never sought a waiver or permission to seek a waiver from the Court because the Attorney General and the Barnes Foundation failed to disclose this conflict to Judge Ott. This is serious misconduct when an office, with a historic duty to the public, fails to disclose its conflict and would undermine its ability to represent the public.

If the Attorney general has the responsibility for overseeing a trust in a parens patriae role, the Attorney General must fulfill that role appropriately. The Attorney General cannot take steps of coercion to undermine the trust and change it and then go into Court acting as if the Attorney General was representing the public's interest on actions that were initiated by the Attorney General prior to any litigation being filed.

The adverse result of this conflict is clearly seen in the above quoted language of Judge Ott in his Opinion dated January

29, 2004. Judge Ott noted the Attorney General did nothing and was really a cheerleader for the Barnes Foundation. The Attorney General, he noted, did not seek discovery or take any appropriate actions. Now the reason is known why the Attorney General failed in its responsibilities. The reason was, the Attorney General had an absolute conflict of interest and could not represent the public's interest.

Even more damning is the failure to disclose this conflict to the Court. If a private lawyer had used his position as a lawyer to undermine his client's interest, and then didn't disclose the conflict, causing prejudice, the lawyer would be suspended or disbarred due to the gross conflict of interest. The Attorney General, in representing the public, must at least disclose the fact that the Attorney General created the situation for the transfer of the art collection and the reconfiguration of the Barnes Board. The Barnes Foundation also has such an obligation of disclosure. Neither fulfilled this obligation.

Under Rule of Professional Conduct, Rule 3.3, Candor to a Tribunal, a lawyer cannot knowingly make false statements of material fact or law to a tribunal or fail to correct such misstatements.

The Attorney General opposed the standing of the Petitioners and others under the theory that only the Attorney

General could fulfill the Common law and statutory requirement of parens patriae role of overseeing charitable trusts. But the Attorney General failed to reveal to the Court that it couldn't fulfill that role because of its involvement early on. This is very serious misrepresentation and failure.

Therefore, the conflict of interest of the Attorney General was a serious breach of its fiduciary obligations to the public and to the Court. The Attorney General cannot play both sides of the fence. The Attorney General either represents the public or represents the trust in changing its configuration and moving the paintings elsewhere. The Attorney General chose to do both, which would be an impossible situation with the resulting problems, as noted by Judge Ott.

Because of the Attorney General's historic role acting in parens patriae, Judge Ott denied standing to anyone else, including students, neighbors, etc. If Judge Ott had known of the conflict, the private Attorney General theory could have provided a basis for standing.

This absolute conflict taints the entire proceedings. One could argue until they are blue in the face that there was still enough evidence for Judge Ott to make a decision. But, there was not and the extent of the conflict undermined the fairness of the proceeding. Charitable trusts should not be changed. A wonderful institution and museum in Lower Merion was established

pursuant to the direct wishes of Dr. Barnes and should not be destroyed with the art collection sent to Philadelphia based on hearings tainted by the Attorney General's conflict. The taint is like the proverbial drop of ink in the milk. No matter how the bottle of milk is strained, the ink can never be removed. Similarly, the conflict of interest of the Attorney General has tainted this and all proceedings in the Barnes litigation.

Any suggestion that the Petitioners should have some how known of this conflict or read newspaper articles cannot remove the responsibility of the Attorney General's Office and the Barnes Foundation to reveal and disclose the conflict to the Court. The Rules of Professional Conduct apply to both the powerful and those who don't have power. They apply both to the rich and to the poor. The highest elected attorney in the Commonwealth of Pennsylvania or not, these rules apply. There was absolutely no excuse for the Attorney General not to reveal the role it played in the Barnes move and its coercive and threatening actions in an open Court disclosure. Instead, the Attorney General kept asserting its parens patriae role and misleading the Court. The Barnes Foundation sat there and made no revelations. This is not acceptable conduct.

In conclusion, the Attorney General of Pennsylvania had an absolutely blatant conflict of interest. This affected the Attorney General's performance and tainted the entire

proceeding. The Petitioners now should not have to attempt to delineate in detail all of the taint. The only just and fair action is to open the proceedings, allow standing to the Petitioners, and allow presentation of evidence as to why the move should not be allowed.

C.) The Petitioners should have standing as should the earlier Petitioners. The Petition to Open should be granted and the Preliminary Objections denied.

Judge Ott, in his Opinions and the Pennsylvania Supreme Court all denied standing to the Barnes Petitioners and students (some of whom are Petitioners in the present matter) because of the role of the Attorney General. Case law, as suggested in the earlier Estate of Pruner, 136 A.2d 107 (Pa., 1957), was cited that only the Attorney General had standing in the parens patriae role and members of the public did not have the special interest necessary for standing.

If the Attorney General had done its job and didn't have this blatant conflict of interest, then the above statement would be the correct statement of the law. But the Attorney General did have the conflict, as noted above and could not fulfill its responsibility.

Under the law, there is a doctrine of a private Attorney General, which would allow standing when the Attorney General was unable to perform its role. The Respondents never mentioned

the private Attorney General's theory in their Brief, but this is a recognized exception when the Attorney General is not available to fulfill its public role.

In the case of Society Created to Reduce Urban Blight (SCRUB) v. Zoning Board of Adjustment of the City of Philadelphia, 729 A.2d 117 (Pa. Comm., 1999), the Commonwealth Court discussed the concept of a private Attorney General theory in footnote 13. In that footnote, the Commonwealth Court summarized the private Attorney General theory, but did not reach it in that case. The Commonwealth Court noted as follows:

> "Protestors also contend that they are 'persons aggrieved' and can challenge the Board's grant of Landowner's variance under the 'zone of interest' test as well as the 'private attorney general' theory of standing. For purposes of the standing requirement that a party have an immediate interest in the outcome of litigation, the interest that is sought to be protected will be immediate if it is within "zone of interest" that is protected by the statute or constitutional guarantee in question. Ken R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267 (1996); Jefferson Bank v. Newton Associates, 454 Pa. Super. 654, 686 A.2d 834 (1996). The 'private attorney general theory' is where one party who may not carry a substantial, direct or immediate interest in the subject matter of the litigation may be conferred with standing because he shares a common interest with citizens or taxpayers in general, see Jones v. Muir, 511 Pa. 535, 515 A.2d 855 (1986), and the only challenge to the action in question would derive from that taxpayer's intervention. Rizzo v. City of Philadelphia, 136 Pa. Cmwlth. 13, 582 A.2d 1128 (1990), petition for allowance of appeal denied, 527 Pa. 659, 593 A.2d 429 (1991). Because of the way we have resolved this case, we will not address the merits of either of these claims of standing presented by Protestors. Id 121.

In Jones v. Muir, 515 A.2d 855 (Pa., 1986), there was a discussion of whether attorney's fees could be awarded under the private Attorney General theory. The Pennsylvania Supreme Court recognized the private Attorney General theory and noted it developed in the Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240, 95 Sup. Ct. 1612 (1975) case.

The Court, in Jones v. Muir, would not allow funds to be paid but recognized the private attorney theory.

> "In a public interest litigation such as Alyeska and, as we perceive it in the instant case, counsel fees are awarded, if at all, under a private Attorney General theory." Id 861.

A noted case on the private Attorney General theory is Rizzo v. City of Philadelphia, 582 A.2d 1128 (Pa. Comm., 1990). The case went up to the Pennsylvania Supreme Court, which denied review. The case involved a former Police Commissioner in Philadelphia who sought certain pension benefits. Frank Rizzo, the former mayor, challenged this. The Court noted that Mayor Rizzo had standing when government actions would go unchallenged unless the taxpayer has the ability to intervene by judicial process.

> "A taxpayer may in the appropriate case, therefore, have standing to challenge the action pursuant to his or her common interest as a citizen to ensure the legality or propriety of the acts of the government." Id 1130.

In the case of Sprague v. Casey, 550 A.2d 184 (Pa., 1988), Attorney Richard Sprague challenged an election to the Supreme

Court. The Pennsylvania Supreme Court noted generally a person, to have standing, has to have an interest that is distinguishable from the interest shared by other citizens. Id 187. But the Court noted an exception:

> "...where this Court announced that although many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of government activity would be unchallenged in the Courts." Id 187.

In the case of In re Milton Hershey School, 911 A.2d 1258 (Pa., 2009), the Supreme Court held that members of an Alumni Association do not have standing to challenge the charitable trust. The reason in that case was due to the involvement of the Attorney General.

> "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 a trust to enforce them. Those who may bring an action for the enforcement of charitable trusts includes the Attorney General, a member of the charitable trust, or anyone having a special interest in the trust." Id 1262.

In that case, the Alumni Association was upset with the Attorney General's modification of a 2002 trust agreement. This was fully known during the litigation.

The current case is different, as noted from the above discussion. The Attorney General's Office in the present case played a covert role while masquerading as the representative of the public in the proceedings before Judge Ott.

Further, besides the private Attorney General's theory, the Courts have granted standing to private, non-profit organizations that have been involved directly in issues that are the subject of the litigation. The case of Society Hill Civic Association v. Pennsylvania Board of License and Inspection Review, 905 A.2d 579 (Pa. Comm., 2006) is an example. In that case, intervention of Society Hill Civic Association was allowed since it had a substantial, direct and immediate interest in the outcome of an appeal. The interest was due to the Association's involvement to preserve and protect historic buildings in the community and it had many members.

The two non-profit organizations (Friends of the Barnes and Barnes Watch) here have similar purposes in terms of the Barnes Foundation and the prevention of the removal of the Barnes art collection to Philadelphia. The Petitioners, Friends of the Barnes and Barnes Watch, should also be allowed standing separate and apart from the private Attorney General theory under the aforementioned Society Hill Civic Association case.

In conclusion, the Petitioners have standing due to the failure of the Attorney General to perform its role and responsibility as parens patriae. The Petitioners ask that they be allowed to intervene for all of the above reasons.

D.) The Petitioners have sought to intervene and their intervention should be granted and the Preliminary Objections denied.

The Respondent contends that the Petitioners need to seek to intervene. Five of the Petitioners sought intervention before in 2007 and were denied standing due to the Attorney General's involvement. Prior to that, at least one of the Petitioners was denied standing in the earlier hearings in 2003 and 2004. The Petitioners and some additional Petitioners based on newly discovery evidence have asked the Court, in essence in this Petition, to open and reconsider the standing. Therefore, they did not think they needed to refile intervention petitions.

In any event, the Petitioners are concurrently filing a Nunc Pro Tunc Petition to Intervene now. This petition should be considered by this Honorable Court and this case decided on the merits and not on whether the Petition to Intervene was filed in February or now. Therefore, this issue seems to be moot in any event with the Petition to Intervene being filed concurrently with these answers and this Brief.

E.) The final decree should not bar reopening this matter under laches, res judicata or collateral estoppel. The Petition to Open should be granted and the Preliminary Objections denied.

The Respondents have argued that the Petitioner should not be allowed to open these proceedings because there has been a

final decision by Judge Ott. There is no question there was a final decision by Judge Ott, as set forth in the Procedural History section of this Brief. But the reason the res judicata or collateral estoppel or laches should not apply is due to the bad conduct of the Attorney General in not revealing the conflict. As a result, the proceedings were tainted. The newly discovered evidence by the Attorney's General's role set forth in the movie entitled *The Art of the Steal* clearly is a basis to reopen these matters due to the tainted proceedings.

There cannot be res judicata or collateral estoppel where a party representing the public's interest was burdened by a gross and adverse conflict of interest, which was not disclosed timely. The 2008 proceedings never got to the merits because standing was denied and the merits were not discussed.

The first issue is that of laches. In the aforementioned Sprague v. Casey, 550 A.2d 184 (Pa., 1988), the Doctrine of Laches was discussed. To establish laches, the Respondents have to establish a delay arising from Petitioner's failure to exercise due diligence with prejudice to the Respondents resulting from the delay. Id 187, 188. Sprague involved an election case where there was a delay of six and a half months. The Petitioners argue that a 2005 Inquirer article set forth the Attorney General's involvement. But, as noted above, that article did not reflect the full extent of the Attorney

General's involvement as seen from the movie, *The Art of the Steal*. But, the reason laches is not applicable is because it is an equitable request and the Respondents must have clean hands.

> "Respondents are requesting that this Court use its equitable power to deny Petitioner relief; Yet, they have made no effort to seek judicial approval of the scheduled election. He who seeks equity must do equity...To find that the Petitioner was not duly diligent in pursuing his claim would require this Court to ignore the fact that the Respondents failed to ascertain the same facts and legal consequences and failed to diligently pursue any possible action." Id 188.

In this case, both Respondents, Attorney General and the Barnes Foundation, were well aware of the conflict of interest of the Attorney General. They were aware of the lack of performance by the Attorney General, as noted by Judge Ott. Yet, they never revealed the conflict. The Respondents do not have clean hands required for laches.

The Supreme Court noted in the aforementioned Sprague case the following:

> "What Respondents fail to realize, however, is that some sort of prejudice required to raise the defense of laches is some changed condition of the parties which occurs during the period of and in reliance on the delay. The prejudice cannot be based on a change of position taking place before the complainant could have and unreasonably should have brought suit." Id 188.

In this case, the problems are not the Petitioners, but the Respondents. Any prejudice they might sustain is due to their failure of full disclosure and failure to tell the Court. The

Respondent's try to blame the Petitioners. But, the duty was on the Respondents to disclose.

In reference to res judicata, four things must be met for res judicata to apply. They are: (1) the identity of the things sued upon; (2) identity of the case or causes of action; (3) identity of the persons or parties to the action and; (4) identity of the quality or capacity of the persons sued or being sued. J.S. v. Bethlehem Area School District, 794 A.2d 936, 939 (Pa. Comm., 2002). Obviously there can be no res judicata because the Petitioners were not parties to the earlier decision since they were not given standing. Without standing they could not be parties.

For collateral estoppel, four elements also must be made. The first element is to whether or not a prior action is identical to the later one, whether the prior action resulted in a final judgment on the merits. The next prong is whether the party against whom collateral estoppel is asserted was a party to the prior action and the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issues in the prior action. Id 939.

For collateral estoppel, clearly again, the Petitioners were not parties because they were not given standing. Further, there was no full and fair opportunity to litigate the issues due to the gross conflict of interest by the Attorney General

and the Attorney General's failure to vigorously present issues, as noted by Judge Ott and discussed above.

In the aforementioned J.S. v. Bethlehem Area School District, the students alleged they did not have a full hearing. But the Court noted they were represented by counsel and testified fully.

In the present case, the Petitioners were not allowed to participate with standing and the Attorney General, who had the standing, did not do the job the Attorney General was supposed to do. Therefore, the Petitioners contend that the Doctrine of Collateral Estoppel and Res Judicata would not be applicable under these circumstances. As noted, the Doctrine of Laches should not be applicable due to the failure to disclose the conflict and the lack of clean hands by the Respondent.

F.) The Petitioners have offered a factual and legal basis to open this matter. The Petition to open should be granted and the Preliminary Objections denied.

The Petitioners have set forth in facts and issues why the case should be reopened because of the taint in the original hearings due to the failure of the Attorney General to disclose the conflict of interest and the resulting failure of the court to provide the Petitioners standing and other people similarly situated standing. Those arguments are incorporated by reference.

There are factual issues that would have been presented and explored if standing had been given. The Respondents make a major argument that the $107 million appropriated was for capital improvements that could not be used until the government exercised authority. The Respondents note that these funds could not be used for operating expenses.

That may well be true, but the issue is the failure to reveal this appropriation, even though it still needed the Governor's approval and release to spend it. Certainly, it would have been of interest to Judge Ott that in 2001, an appropriation was set forth for capital improvements of $107 million to pay for the building of a Philadelphia museum for the Barnes collection. This was set forth even before a Petition was filed. This could have also been explored during a hearing, if known, as to why an appropriation could not have been given for operating expenses to assist the Barnes Foundation to maintain its current position. But, no one knew about it since it was not disclosed.

Other issues are important. If the Petitioners had standing, they would have presented expert witnesses. Attached and marked as Exhibit "A" to this Brief is a report from James Abruzzo, an expert on museums. His chart discusses evidence that would have been presented if the Petitioners had standing, to show that the Barnes Foundation was not in a dire financial

situation in 2001. The Report notes that the funds to continue to maintain the building in Lower Merion improved. The Report notes that the Barnes Foundation had not requested gifts or fundraising activities to maintain its current location. The chart shows a significant increase in revenues earned over the period from 2004 to 2009. This Report is incorporated by reference. The Report also shows the cost cutting that could have contributed enough monies to allow the Barnes to remain in its current location. All of these issues would be explored if there had been standing and someone able to present the issues as opposed to an Attorney General's Office that was burdened by its conflict of interest and its prior conduct supporting the move and the course of conduct.

Further, other facts and issues would have been presented. Clearly the Barnes Foundation, during pertinent times, suggested it needed more parking spaces and couldn't raise its ticket prices, etc. But the ticket prices have tripled since the hearings in the early 2000's and the parking rates have gone up. Further, the township has allowed additional parking and other matters. There was no indication that the Barnes Foundation ever asked the township for additional visitation.

Further, this tri-campus concept doesn't make any sense. The Chester County property perhaps could have been sold. There

is no evidence that it is being used in any effort for some tri-campus concept.

These issues were not adequately raised and discussed because the Attorney General was not doing its job because it couldn't do its job. It was burdened by the conflict created by Attorney General Fisher.

The Petitioners respectfully request this Honorable Court dismiss the Preliminary Objections and reopen the matter.

G.) There is no scandalous and impertinent information and there should be no award of counsel fees.

Both the Attorney General and the Barnes Foundation, having hidden the conflict of interest and not disclosed it, have the audacity to blame the Petitioners and ask for counsel fees and costs. There is nothing more important than a fair and complete hearing. There is nothing more important that lawyers do their job and represent their clients without being burdened by conflicts, which are not disclosed.

The Petitioners are all people who feel very strongly on this issue of moving the Barnes art collection to Philadelphia. These are not people who are making money off their opposition. These are people who believe strongly that the intentions of Dr. Barnes should be fulfilled and believe strongly in the fact that the Lower Merion gallery and the manner in which it is structured go to the essence of Dr. Barnes' philosophy and

education in art. The Petitioners believe that moving and changing this will utterly destroy and alter Dr. Barnes' intent and the education programs, which he established.

The Petitioners and others similarly situated were denied standing under the theory that the Attorney General was doing their job. The Attorney General did not do its job and did not disclose a major conflict. The Petitioners have now discovered this and raised the issue. Whether the Petitioners win or lose, their Petition to Open is clearly a good faith effort. If there is any bad faith, it falls on the Respondents, both of whom were well aware of the conflict from the beginning and never told the judge. The scurrying around of the Respondents to try to justify the claims by pointing to a 2005 newspaper article and other matters, cannot justify or explain their lack of diligence and candor to the Court with this conflict.

This issue has to be raised. The documentary film, *The Art of the Steal,* clearly raised questions due to the comments by the then-Attorney General and then-Governor. These matters have to be explored to ensure the integrity of the process.

Whether the Petitioners win or lose, there clearly is no vexatious or bad faith action by the Petitioners. This is done in good faith for a good reason, for a good cause, and supported by many people who care about the art collection and what is happening.

The suggestion that there should be counsel fees is totally unwarranted and should be dismissed.

Respectfully submitted,

Samuel C. Stretton, Esquire
Attorney for Petitioners
301 South High Street
P.O. Box 3231
West Chester, PA 19381-3231
(610) 696-4243
Attorney I.D. No. 18491

SAMUEL C. STRETTON, ESQUIRE
301 SOUTH HIGH STREET
P.O. BOX 3231
WEST CHESTER, PA 19381-3231
ATTORNEY I.D. NO. 18491
(610) 696-4243

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

CERTIFICATE OF SERVICE

I hereby certify I am this date serving a copy of Petitioners' Brief in the captioned matter upon the following persons in the manner indicated below.

Service by First Class Mail addressed as follows:

1. Honorable Stanley R. Ott
   Montgomery County Courthouse
   P.O. Box 311
   Norristown, PA 19404-0311

2. Lawrence Barth, Esquire
   Senior Deputy Attorney General
   Commonwealth of Pennsylvania
   Office of the Attorney General
   Charitable Trusts & Organizations Section
   21 South 12th Street, 3rd Floor
   Philadelphia, PA 19107-3603

3. Ralph G. Wellington, Esquire
   Schnader, Harrison, Segal & Lewis
   1600 Market Street, Suite 3600
   Philadelphia, PA 19103

4. Richard R. Feudale, Esquire
   33 E. 3rd Street
   P.O. Box 227
   Mount Carmel, PA 17851-0227

5. Eveyln Yaari
35 Overhill Road
Bala Cynwyd, Pennsylvania 19004

Respectfully submitted,

5/18/11
Date

Samuel C. Stretton, Esquire
Attorney for Petitioners
301 S. High Street
P.O. Box 3231
West Chester, PA 19381
610-696-4243
Attorney I.D. No. 18491

Barnes Foundation Report: Part 2

Review of financial statements and conclusions

Submitted by James Abruzzo, President
Abruzzo Associates
May 15, 2011

Introduction

The data presented are from 2001 through 2009 taken form 990s filed by the Foundation. The revenue and bottom line expenses replicate the data from the form 990s. The data in the enclosed schedules are organized to segregate the operating expenses (of the museum building, educational activities, arboretum, etc.) from those associated with the new building project. The amount of contributed income is not segregated and is not estimated.

Chart 1 is the bottom line from 2001 through 2009. The profit or loss before contributions are taken from the form 990. From that, investments losses and depreciation are subtracted.

The Barnes Foundation was not in a dire financial situation in 2001. In the ensuing years its core operations, not including the costs associated with the move to a new building, continued to improve. But the Barnes cannot exist in its present location, nor in any planned relocation, without unearned income. For a museum and for an arts educational institution (particularly one offering private lessons and small class situations) fundraising is required. However, not counting some bequests, the Barnes Foundation had not requested gifts nor engaged in fundraising activities.

The Barnes Foundation, in its present location, could continue to operate with significant increases in earned income while mounting a fundraising campaign that would more than adequately subsidize the operating costs.

The revenue, as demonstrated in **chart 2** and **Graph A** shows significant increases in earned income over the five-year period from 2004 through 2009. Its earned revenue from admissions and related income was increasing significantly and due to changes in the stock market (and perhaps better investment advice) the net contributions from investments were changed from a loss over $585,000 in 2002 (line 13) to a slight gain. A few noteworthy aspects of the financial conditions that existed during the time that the Foundation was arguing the instability and financial fragility of the organization:

The investment activity (line 14, Chart 3), rather than contributing to and supporting the operations, was adding to the losses, specifically $283k loss in 2001 and $586k loss in 2002.

Exhibit A

The depreciation[1], which is not an operating expense, also increased the annual operating losses by $496,193 in 2002 on a budget of $2 million.

Therefore, without fundraising, assuming no contribution (positive or negative from the endowment) and not counting depreciation, the earned income amounted to a significant portion of the total operating expenses during a time that the board was claiming a dire situation.

Chart 2 shows healthy and steady increases in earned income from 2001 through 2009. Graph A is a graphic representation of that increase. With little attention to public relations and marketing and with more negative than positive publicity, the revenue from the public increased significantly from 2001 through 2009. The demand from the general pubic far exceeded the availability of admissions (and likely still does) as demonstrated by the significant increases in admission income over the 9-year period. While ticket prices have risen, the price of tickets for the Barnes is not elastic and raising ticket prices and better management of the gift shop and licensing could raise additional income. Graph A demonstrates the steady and significant increases in earned income over the nine-year period.

Chart 3 shows significant increases in senior management costs related to the move. It also demonstrates significant increases in operating costs, line 14, but because the museum/education operations have not increased, those costs are related also to the relocation. In addition to outside contractors, travel expenses (presumably to visit other new buildings) increased significantly (line 12).

Chart 4 indicates the significant increases in personnel costs and outside contractor costs related to the move.

Beginning in 2006 a new Director was hired. This report is not to comment on the qualifications or the value of the Director but rather to note that for an education organization/museum of the operating size of the Barnes: the Director's compensation is much higher than that of comparables (similar organizations with similar operating budgets). Also, beginning in 2006 through 2009, senior management personnel were added anticipating the move: legal counsel, SVP of Business Planning and others.

Chart 5 elaborates on the personnel related costs associated with the museum operations line 23 and building related personnel costs (line 16).

To provide a fair comparison of the viability of the Barnes Foundation continuing in its current location, these expenses and the expenses for related outside contractors are segregated. The

[1] In tax paying institutions, depreciation offers tax advantages. For nonprofit organizations, depreciation (normally a balance sheet item) is used as a placeholder for capital replacement. It does not represent an actual cost – like repairing the front steps or replacing the heating plant. The depreciation costs of almost $500,000 per annum have a significant effect on the overall operating costs of the Foundation and must be considered within that context.

result is a picture of the normal operating costs (misc expenses) of the Barnes in its current state and the costs associated with the move (move related expenses).

It is difficult to determine from financial statements alone which contributions were dedicated to the new building project or the costs associated thereof. These contributions are significant in the latter years under consideration. However, it is common for an organization with a program and budget size of the Barnes, to raise approximately the same amount as the earned income, and in most cases more.

The Barnes, however, is not just any organization. It has a unique and magnificent collection; it is located close to a major metropolitan area and has a long and distinguished history. There is no doubt that admissions and related income could continue to rise significantly for operations in its present location. Given a serious but not unreasonable fundraising effort, the operation is more than viable it could be healthy.

The present Barnes is viable, but how much of a risk is the planned move?

What is less sure is the potential of the ongoing viability of the Foundation operating in new facilities.

The new building project requires identifiable contract specialties – (architectural, building, etc), and services (legal) and specialized staff were required for the project and were added (SVP, Project Director, Legal Counsel) etc. The costs of the new construction project can be separate from the total expense budget and a picture of the ongoing operations of the Barnes Foundation emerges. Table 3 shows the total personnel cost, misc. ongoing operating costs of the Barnes while Table 2 shows the ongoing revenue not including contributions. Not including depreciation, the financial picture is quite positive. It should be noted that most institutions with the amount of attendance and earned income (and history and quality of collections of the Barnes) could be expected to supplement the earned income through fundraising).

There are a few troubling questions surrounding the planned relocation:

- As of the end of 2009 less than $70 million had been raised (Chart 8).
- The operating costs of any new museum are much higher than anticipated and the feasibility study does not demonstrate adequate income for operations
- The only high profile bankruptcy of a museum occurred recently relocated from its home to a larger facility in a "better location" only to suffer from cost overruns, debt service and a paucity of attendees to make up the income gap.

The contributions edged for the new building may not be able to be transferred to the Foundation in its present location. If that were the case, The Barnes would the strong financial footing to sustain itself for a very long time through a combination of earned income and endowment income.

The Barnes Foundation Financial Analysis Chart 2 Income and Income related

Form 990

Analysis Income Producing Activities Notice that Net Investments are significant negatives in 2001, 2002 and that net gain from investments is significantly less than 5%

	2001	2002	2003	2004	2005	2006	2007	2008	2009	
Admission, Audio Rental	$513,567	$571,776	$594,104	$601,914	$727,192	$860,668	$855,993	$933,759	$1,225,282	
Education	$177,511	$227,501	$253,251	$199,335	$136,722	$163,699	$250,633	$281,893	$157,080	
Licensing & Merchandise	$48,402	$45,680	$52,201	$53,672	$64,722	$43,642	$36,625	$28,389	$43,440	
Investment income	$209,997	$215,792	$91,918	$99,296	$120,203	$163,337	$205,776	$163,726	$464,260	
Net gain from investments	-$272,997	-$585,565	-$29,921	-$3,349	$101,500	-$6,344	-$4,198	$32,460	$177,706	
Net sale of inventory	$233,917	$243,479	$262,806	$300,790	$324,447	$302,249	$314,737	$317,958	$343,738	
Total Revenue excl. Contribution	**$913,046**	**$720,145**	**$1,228,219**	**$1,252,810**	**$1,478,290**	**$1,527,251**	**$1,659,566**	**$1,758,185**	**$2,411,506**	**Graph A**
Contribution	$2,166,319	$3,411,604	$3,834,551	$1,683,753	$5,572,562	$4,329,215	$2,151,826	$27,404,745	$31,625,453	Unclear which are for new bu
Total Revenue	**$3,079,365**	**$4,131,749**	**$5,062,770**	**$2,936,563**	**$7,050,852**	**$5,856,466**	**$3,811,392**	**$29,162,930**	**$34,036,959**	buildings

Barnes Foundation Graph A
Revenue from Admissions, Education, Licensing, Gift Shop
Before Contributions and not including changes in endowment