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

ORDER

AND NOW, this _____ day of _____, 2011, upon consideration of the Preliminary Objections of The Barnes Foundation 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 any responses thereto, it is

ORDERED THAT the Preliminary Objections are SUSTAINED, and it is

FURTHER ORDERED THAT the Petitioners shall pay The Barnes Foundation's costs and attorneys' fees incurred in responding to the Petition, and it is

FURTHER ORDERED THAT the Petition is DISMISSED.

BY THE COURT:

_____
Ott, J.

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IN RE:	:	**COURT OF COMMON PLEAS**
THE BARNES FOUNDATION,	:	**OF MONTGOMERY COUNTY**
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PRELIMINARY OBJECTIONS

Pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure, The Barnes Foundation ("The Foundation") preliminarily objects 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 (collectively "Petitioners") To Reopen the Matter Based on Newly Discovered Evidence of Improper Conduct Not Known During the Time of Trial by the Attorney General of Pennsylvania and the Governor of Pennsylvania, and in support thereof avers as follows:

THE PRESENT PETITION TO REOPEN

1. The Barnes Foundation is a non-profit charitable corporation.

2. Petitioners are thirteen individuals and two organizations who allege that they "have been actively involved in volunteer efforts to prevent the transfer of Dr. Albert C. Barnes' art collection to Philadelphia . . . ." Pet. ¶ 16.

3. Petitioners seek to reopen a matter that was made final when the Supreme Court of Pennsylvania dismissed the only appeal from this Court's final decree almost ***six years ago***. *See In re Barnes Found.*, 582 Pa. 370, 871 A.2d 792 (2005).

4. The grounds on which Petitioners seek to reopen these proceedings are that (1) Petitioners claim they will demonstrate that The Foundation's gallery collection should not be relocated to Philadelphia, on the basis of allegedly "new evidence" that (2) 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 (3) the Governor failed to disclose to the Court that funds were "appropriated" for The Foundation. 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"). In fact:

a. This Court already has held, following lengthy proceedings held in 2003 and 2004, that "The Foundation showed clearly and convincingly the need to deviate from the terms of Dr. Barnes' indenture, . . . and that the three campus model [including relocation of The Foundation's gallery collection to Philadelphia] 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).

b. The Attorney General's support for The Foundation's 2002 petition and his role in persuading Lincoln to withdraw its opposition to that petition was disclosed in Court and widely reported at that time — more than ***seven years ago*** — in the local press. *See, e.g.*, N.T. 9/21/2004 at 18-23 (opening statement of Attorney General at petition hearings); *In re Barnes Found. (No. 12)*, 24 Fid. Rep. 2d 94, 107 (O.C. Montg. 2004) (Court's critique of Attorney General's support for Foundation's petition); P. Horn, "Barnes, Lincoln Reach an Agreement," *Phila. Inquirer* (Sept. 13, 2003); P. Horn, "Barnes Agreement Took Frenzied Days of Hard Bargaining," *Phila. Inquirer* (Sept. 14, 2003); P. Horn, "Lincoln Board Accepts Smaller Role in Barnes," *Phila. Inquirer* (Sept. 21, 2003); D. Steinberg & P. Horn, "Scathing Critique of Pa.'s Barnes Role," *Phila. Inquirer* (Jan. 30, 2004); P. Horn, "The Deal of the Art," *Phila. Inquirer* (May 25, 2005) (articles detailing Attorney General's and Governor's roles in persuading Lincoln University to withdraw its opposition to The Foundation's petition and their support for the petition).

c. The contention that the Governor had "appropriated" $107 million for The Foundation in 2002 (which is wrong factually) was the precise basis for the 2007 petitions filed by various parties, ***including at least five of the current Petitioners*** (Friends of the Barnes Foundation, Sandra Bressler, Walter Herman, Nancy Herman, and Sue Hood), seeking to reopen the original proceedings. *See In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 259 (2008). This Court dismissed those petitions almost three years ago. *Id.* at 263.

5. For the reasons set forth below, this new Petition should be dismissed. In addition, the Court should award The Foundation costs and attorneys' fees incurred in responding to this Petition.

a. A party is entitled to attorneys' fees under the Judicial Code where the opposing party has commenced or conducted litigation in an arbitrary, vexatious, or bad faith manner. 42 Pa. C.S. § 2503(7), (9). "By definition, where there is no basis in law or fact for the commencement of an action, the action is arbitrary." *Thunberg v. Strause*, 545 Pa. 607, 619, 682 A.2d 295, 301 (1996). 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 also Old Forge Sch. Dist. v. Highmark, Inc.*, 924 A.2d 1205, 1212 (Pa. 2007).

b. The present Petition falls within Section 2503 and, thus, a sanction of attorneys' fees is warranted. Case law has established for more than a decade that persons and organizations in the same position as the 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. This Petition was brought in total disregard of this established law, as well as in the face of a public record that refutes Petitioners' core contention that they seek to bring "new evidence" to the Court's attention. 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 this arbitrary and vexatious Petition.

THE FOUNDATION'S 2002 PETITION

6. On September 24, 2002, The Foundation filed a petition with this Court (the "2002 Petition"), seeking permission to, among other things, amend its charter, bylaws, and Indenture. The changes that The Foundation sought were necessary to enable The Foundation to continue fulfilling the mission established for it by its founder, Dr. Albert C. Barnes. These changes included expansion of The Foundation's Board of Trustees and relocation of The Foundation's gallery collection to a new location in the City of Philadelphia.

7. The proceedings involving the 2002 Petition generated substantial publicity within Montgomery County and the Philadelphia region, as well as nationally and worldwide. As this Court noted in one of its opinions:

> 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).

8. Soon after The Foundation filed its petition, a number of persons or organizations sought to intervene in the proceedings. Among them was Lincoln University, which opposed The Foundation's request for permission to expand its Board of Trustees and change the way its Board members were selected. In its petition to intervene, Lincoln did not oppose that part of The Foundation's 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 makeup of The Foundation's Board of Trustees. This Court granted Lincoln's petition to intervene.

9. Among the others seeking to intervene were three students at The Foundation — Jay Raymond, Drew Saunders, and Harvey Wank. On February 12, 2003, this Court denied the intervention petition of Raymond, Saunders, and Wank, holding that "the Students can[not] be afforded standing in the matter now before us" because 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).

10. 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 the Attorney General and filed an amended petition on June 5, 2003 that made those changes. Once those changes were made, Attorney General Fisher expressed his support for The Foundation's petition. That support was expressed in the Attorney General's answer to the amended petition and in public statements made by Mr. Fisher that were quoted in a later filing by students (including Petitioner Sue Hood) seeking to intervene and thus were made part of the record before the Court.

11. On September 20, 2003, the Board of Trustees of Lincoln University voted to approve an agreement with The Foundation under which, in exchange for Lincoln's

withdrawal of its opposition, 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.

a. The Lincoln Board meeting was attended by Pennsylvania Governor Edward G. Rendell (an ex officio member of that Board) and Attorney General Fisher.

b. The agreement and its approval by the Lincoln Board was the subject of extensive press attention, including a number of articles in the *Philadelphia Inquirer* that purported to provide details about what happened at the meeting. *See, e.g.*, P. Horn, "Barnes, Lincoln Reach an Agreement" (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" (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 on its meeting, noting 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" (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 by Ms.

Horn 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."

c. On October 21, 2003, 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 shortly thereafter, Lincoln withdrew from the case.

12. On September 23, 2003, three days after Lincoln's Board voted to accept the deal with The Foundation and withdraw from the proceedings, another group of Foundation

students — Sue Hood, William Phillips, and Harvey Wank — sought to intervene or, in the alternative, to participate in the proceedings as *amici curiae*.

a. Sue Hood is one of the Petitioners in the present matter (and was a petitioner in one of the 2007 petitions discussed below).

b. In their petition, the student petitioners complained that Attorney General Fisher had expressed his support for The Foundation's petition, and they quoted his statement in a press release that The Foundation's proposal "is the best opportunity to prevent the foundation's failure." They alleged that the Attorney General's positions in the case had "demonstrated that [his] Office 'cannot and will not perform adequately' to preserve the unique interests of the Petitioners or of other current and future students." In their brief in support of their petition, the student petitioners further argued "that the Attorney General's approval of the Trustees' First Amended Petition before a single word of testimony has been taken dramatically alters the legal landscape of the case [emphasis omitted]."

c. On October 29, 2003, this Court denied the petition of Hood, Phillips, and Wank to intervene, finding that they did not have standing to do so. The Court nevertheless granted the three students *amicus curiae* status, and, represented by counsel, they then participated in all facets of the proceedings in this Court.

13. In December 2003 and September 2004, hearings were held before this Court regarding the 2002 Petition. A number of witnesses testified and hundreds of documents were offered into evidence.

a. 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.

b. 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. Inquirer* (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 Foundation is informed that this support continues under Acting Attorney General William H. Ryan, Jr.

14. 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).

15. On January 11, 2005, Raymond, one of the students who unsuccessfully sought to intervene 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 Raymond's appeal. *In re Barnes Found.*, 582 Pa. 370, 871 A.2d 792 (2005).

THE 2007 PETITIONS

16. 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 Commonwealth's Capital Budget for redevelopment assistance capital projects for the benefit of The Foundation.

17. A few weeks later, in September 2007, Montgomery County filed a petition, making similar allegations regarding the Capital Budget and seeking to reopen the proceedings on the 2002 Petition.

18. The Foundation filed preliminary objections to both 2007 petitions and, following full briefing and oral argument, this Court issued a decision in May 2008, dismissing the petitions for lack of standing. *See In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 263 (2008).

19. Following this Court's December 2004 final Decree and the dismissal of the 2007 petitions, the Office of the Attorney General continued to exercise oversight authority over The Foundation with regard to the conduct of its affairs, including its carrying out of the relief granted by this Court in its December 13, 2004 final Decree.

I. Lack of Jurisdiction and Demurrer (Rule 1028(a)(1) & (4))

Petitioners Are Not a Party to This Proceeding and May Not Petition to Reopen These Proceedings Without First Obtaining Leave To Intervene in the Proceedings

20. Respondent incorporates Paragraphs 1 to 19 as if fully set forth herein.

21. Petitioners seek to reopen proceedings on the 2002 Petition.

22. Petitioners may not seek to reopen proceedings to which they are not a party. *See, e.g., Admiral Homes, Inc. v. Floto Mgmt. Corp.*, 397 Pa. 509, 511, 156 A.2d 326,

327-28 (1959). "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); *cf. Hughes v. Pron*, 429 A.2d 9, 11, 286 Pa. Super. 419, 423 (1981) (holding that a non-party lacks standing to file exceptions to a non-jury decision).

23. Petitioners either already have been denied intervention or have not sought leave to intervene. Therefore, they have offered no basis on which they have standing to reopen proceedings to which they were not a party.

WHEREFORE, The Foundation respectfully requests that this Court sustain its preliminary objection under Rule 1028(a)(1) & (4) and dismiss the Petition and award The Foundation costs and attorneys' fees.

II. Lack of Jurisdiction and Demurrer (Rule 1028(a)(1) & (4))

Petitioners Have No Standing To Intervene in These Proceedings

24. Respondent incorporates Paragraphs 1 to 23 as if fully set forth herein.

25. Petitioners have no legal basis upon which they can seek to intervene in this matter.

a. Petitioners do not have a legally enforceable interest in the subject-matter of these proceedings. *See* PA. R. CIV. P. 2327(4) (a party may be permitted to intervene in an action if "the determination of such action may affect any legally enforceable interest of such person"). Although Petitioners allege that they are opposed to the relief that this Court already

has granted The Foundation in the 2002 Petition and that they have an interest in the continued operation of The Foundation's gallery at its present location, Petitioners allege no *legally enforceable* interest that is affected by the relief this Court has granted The Foundation, including the relocation of The Foundation's gallery collection to Philadelphia.

b. Petitioners' interests are already adequately represented by the Attorney General, thereby making intervention inappropriate under PA. R. CIV. P. 2329(2). Petitioners may not intervene in this matter simply because they are dissatisfied with the actions and positions taken by the Attorney General in the 2002 Petition, and Petitioners may not intervene in an effort to usurp the role of the Attorney General. *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 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). Petitioners' allegations that the Attorney General has not properly carried out his *parens patriae* role are based entirely on their contention that the Attorney General should not have concluded that The Foundation's 2002 Petition should be granted and should not have taken positions in the litigation and in negotiations with Lincoln University that would help to accomplish what he had concluded was in the best interest of The Foundation and the people of the Commonwealth. That contention reflects just a policy disa-

greement, and Petitioners have no standing to usurp the Attorney General's role by substituting their own views for those that the Attorney General reached.

c. Petitioners have delayed for ***more than seven years*** in seeking to intervene in these proceedings. *See* PA. R. CIV. P. 2329(3) (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"). They substantially, and without excuse, delayed in attempting to raise issues set forth in the Petition. As such, their belated attempt to insert themselves into these (concluded) proceedings should be denied. *Cf. Weinberg v. Commonwealth*, 509 Pa. 143, 148, 501 A.2d 239, 242 (1985). 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. Petitioners had ample opportunity to raise their objections to the relief sought by The Foundation and to seek to offer additional alternatives. Although Petitioners rely on purported "important new evidence" (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***.

d. The prejudice to The Foundation of allowing Petitioners to intervene in these proceedings and litigate the belated claims they seek to raise is patent. The Foundation already has expended substantial efforts and expense in litigating the 2002 Petition and in refuting the claims raised by the *amici curiae* in the proceedings regarding the 2002 Petition. 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. Stopping those 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. Similar concerns 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.

WHEREFORE, The Foundation respectfully requests that this Court sustain its preliminary objection under Rule 1028(a)(1) & (4) and dismiss the Petition and award The Foundation costs and attorneys' fees.

III. Lack of Jurisdiction and Demurrer (Rule 1028(a)(1) & (4))

Petitioners Lack Standing To Raise the Claims They Seek To Raise, and The Courts of the Commonwealth, Including This Court, Have Already Held That Petitioners and Those in the Position of Petitioners Do Not Have Standing To Bring This Petition

26. Respondent incorporates Paragraphs 1 to 25 as if fully set forth herein.

27. Petitioners lack standing to bring this Petition to reopen the proceedings regarding The Foundation's 2002 Petition.

28. "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) ("A proceeding to enforce a charitable trust may be brought . . . at any time by the Attorney General . . . or any other person who has standing to do so").

29. This Court, the Superior Court, and the Supreme Court of Pennsylvania 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.*, *In re Milton Hershey Sch.*, 590 Pa. 35, 42-43, 911 A.2d 1258, 1262 (2006); *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"); *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 abdicated his responsibility to ensure that The Foundation complied with its governing documents), *aff'd without published op.*, 803 A.2d 802 (Pa. Super. 2002). In this regard, the Supreme Court explained why an outside interested organization, the Milton Hershey School Alumni Association, did not have special interest standing to litigate issues regarding the Milton Hershey School 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).

30. In accord with this line of decisions, this Court and the Superior Court frequently have held that students, neighbors, and other organizations purporting to have an interest in the affairs of The Foundation do not have standing to challenge actions of The Barnes Foundation.

a. This Court and the Superior Court both have held that students of The Foundation do not have standing to "initiat[e] litigation to enjoin actions of the trustees" of The Foundation. *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).

b. The Superior Court also has held that an organization calling itself "Students of the Barnes Foundation" did not have standing to challenge actions by The Foundation. *In re Barnes Found.*, 453 Pa. Super. 436, 450, 684 A.2d 123, 130 (1996); *see also In re Barnes Found.*, 449 Pa. Super. at 85, 672 A.2d at 1366 (holding that the record did not support the lower court's decision in 1992 to grant standing to an entity called "Friends of Barnes Foundation").

c. 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).

d. In 2007, this Court dismissed the petitions filed by 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) and by Montgomery County. Relying heavily on the Supreme Court's decision in *Hershey*, this Court held that it was "clear" that the 2007 petitioners lacked standing to intervene in these proceedings. *In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 260-62 (2008). 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.

31. Petitioners' lack of standing has already been determined as a matter of *res judicata* or *stare decisis*.

a. This Court already has ruled during the proceedings on the 2002 Petition that Petitioner Sue Hood lacks standing to participate in proceedings involving The Foundation. That holding is *res judicata* with regard to Hood's attempt to bring the present 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"). Thus, Petitioner Hood may not bring this Petition.

b. This Court also has ruled during the proceedings on the 2007 petitions that Petitioners Friends of the Barnes Foundation, Bressler, Walter and Nancy Herman, and Hood lack standing to participate in proceedings involving The Foundation. *See In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 262-63 (2008). Again, this ruling is *res judicata* as to these Petitioners' attempt to participate in proceedings involving The Foundation.

c. Petitioners Broker, Gecker, Leisenring, and Rodriguez are alleged to be students or former students at The Foundation. Thus, they are similarly situated to Petitioners Hood and Bressler, and this Court's prior rulings regarding Hood and Bressler apply equally to Broker, Gecker, Leisenring, and Rodriguez, as a matter of either *res judicata* or *stare decisis*.

d. 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); *In re Barnes Found.*, 449 Pa. Super. at 85, 672 A.2d at 1366. Those holdings apply equally to Petitioners Friends of the Barnes Foundation and Barnes Watch, which are such organizations, as a matter of *stare decisis*. *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).

e. This Court and the Superior Court already have held that neighbors of The Foundation, and, in particular, Robert Marmon and Walter and Nancy Herman, do not have standing to initiate or intervene in litigation involving The Foundation. *In re Barnes Found. (No. 8)*, 18 Fid. Rep. 2d 33, 33 (O.C. Montg. 1997); *In re Barnes Found. (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); *In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 262 (2008). This holding is *res judicata* as to Marmon and the Hermans, and these holdings 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*.

f. This Court's ruling on the 2007 petitions applies to all of the Petitioners here, who purport to be (like the petitioners in 2007) students, neighbors, and other individuals or organizations with an alleged interest in keeping The Foundation's gallery collection in Lower Merion Township.

32. In addition to these prior adjudications regarding standing, the Petitioners have failed to allege sufficient facts to support their claim of standing.

33. Standing requires a substantial, direct, and immediate interest in the subject matter of the litigation. *See, e.g., William Penn Parking Garage 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).

34. Petitioners do not have a substantial interest in the subject matter of this litigation. In prior Barnes litigation, students, neighbors, or organizations were found to lack the substantial interest necessary for standing in cases such as this. *See, e.g., In re Barnes Found.*,

449 Pa. Super. 81, 85, 90-91, 672 A.2d 1364, 1366, 1369 (1996) (Foundation students lacked standing and organization called "Friends of Barnes Foundation" did not demonstrate that it had standing); *In re Barnes Found.*, 443 Pa. Super. 369, 380, 661 A.2d 889, 895 (1995) (Foundation students lacked standing); *In re Barnes Found.*, 453 Pa. Super. 436, 450, 684 A.2d 123, 130 (1996) (organization called "Students of the Barnes Foundation" did not have standing); *In re Barnes Found. (No. 10)*, 21 Fid. Rep. 2d 351, 353-54 (O.C. Montg. 2001) (neighbor of The Foundation lacked standing to challenge actions of The Foundation), *aff'd without published op.*, 803 A.2d 802 (Pa. Super. 2002); *In re Barnes Found. (No. 8)*, 18 Fid. Rep. 2d 33, 33 (O.C. Montg. 1997) (same); *see also Wiegand v. Barnes Found.*, 374 Pa. 149, 155-56, 97 A.2d 81, 83-84 (1953) (newspaper reporter concerned about conduct of Foundation affairs lacked standing).

35. Petitioners' claim that they have special interest standing cannot survive the Supreme Court's holding in *Hershey*, in which the Court stated:

> 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). This Court relied heavily on the Supreme Court's *Hershey* decision in dismissing similar claims by similarly situated petitioners in 2007. *See In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d 258, 260-62 (2008).

36. Petitioners have alleged no "special interest" sufficient to confer standing on them to bring this action. They 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." *See In re Barnes Found. (No. 14)*, 28 Fid. Rep. 2d at 262 (holding that 2007 petitioners had no special interest in proceedings involving The Foundation, despite their "intensity of concern" that the Court found to be "real and commendable").

37. Friends of the Barnes Foundation and Barnes Watch additionally lack standing because none of the purported members of these organizations has standing to bring this Petition and there is no basis on which the organizations could themselves have standing. *See, e.g., In re Application of Family Style Rest., Inc.*, 503 Pa. 109, 115, 468 A.2d 1088, 1090-91 (1983); *American Booksellers Ass'n, Inc. v. Rendell*, 332 Pa. Super. 537, 554-56, 481 A.2d 919, 927-28 (1984).

WHEREFORE, The Foundation respectfully requests that this Court sustain its preliminary objection under Rule 1028(a)(1) & (4) and dismiss the Petition and award The Foundation costs and attorneys' fees.

IV. Demurrer (Rule 1028(a)(4))

The Issues Raised by the Petition Have Already Been Decided by This Court

38. Respondent incorporates Paragraphs 1 to 37 as if fully set forth herein.

39. This Court's final judgment following the lengthy proceedings regarding the 2002 Petition, entered more than six years ago, forecloses this Petition. "Finality of litigation is essential so that parties may rely on judgments in ordering their private affairs so that the mor-

al 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).

40. The Petition seeks to reopen the proceedings on the 2002 Petition to relitigate the same issues that were the subject of this Court's final Decree in those proceedings, including whether The Foundation should be permitted to relocate its gallery collection to Philadelphia. The issues raised in this Petition thus have been fully litigated, adjudicated, and definitively decided by this Court, and the Petition should be dismissed.

41. In addition, the participation of the Attorney General as *parens patriae* in the proceedings on the 2002 Petition forecloses Petitioners from now attempting to relitigate the issues finally decided by this Court in the 2002 Petition. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(d) (1982); *see also id.*, cmt. b & illus. 6; *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). Moreover, 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.

WHEREFORE, The Foundation respectfully requests that this Court sustain its preliminary objection under Rule 1028(a)(4) and dismiss the Petition and award The Foundation costs and attorneys' fees.

V. Demurrer (Rule 1028(a)(4))

Because the Petitions Seek Reconsideration of This Court's Final Decree, the Petitions Are Foreclosed by Orphans' Court Rule 7.1

42. Respondent incorporates Paragraphs 1 to 41 as if fully set forth herein.

43. 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).

44. Because the Petition asks this Court to reconsider its December 13, 2004 final Decree, it is foreclosed by Rule 7.1(g).

WHEREFORE, The Foundation respectfully requests that this Court sustain its preliminary objection under Rule 1028(a)(4) and dismiss the Petition and award The Foundation costs and attorneys' fees.

VI. Demurrer (Rule 1028(a)(4))

The Petition Is Barred by Laches

45. Respondent incorporates Paragraphs 1 to 44 as if fully set forth herein.

46. 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).

47. The primary ground on which Petitioners rely for seeking to reopen the proceedings on the 2002 Petition is that this Court was allegedly unaware that the Attorney General was not acting neutrally in those proceedings (but instead supported the relief sought by The Foundation and then purportedly put pressure on Lincoln University in negotiations to withdraw its opposition to The Foundation's 2002 Petition), and that there supposedly was state money available for The Foundation that was not disclosed at the hearing. *See* Pet. ¶¶ 18-29.

48. Although Petitioners reference a documentary film as recent support for their allegations, 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 as long as seven years ago. Under these circumstances, 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); *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).

a. First, widely disseminated newspaper articles revealed more than seven years ago that Attorney General Fisher "helped negotiate the Lincoln – Barnes agreement." P. Horn, "Lincoln Board Accepts Smaller Role in Barnes," *Phila. Inquirer* (Sept. 21, 2003). Other articles published around the same time reported that Attorney General Fisher "played a key role in the deal" between The Foundation and Lincoln, and that he was one of the individuals involved in three days of negotiations over the deal. P. Horn, "Barnes, Lincoln Reach an Agreement," *Phila. Inquirer* (Sept. 13, 2003). The same articles (and many others) also reported that Attorney General Fisher and Governor Rendell met with Lincoln's Board to persuade it to support the deal, and that, at that time, Governor Rendell promised Lincoln substantial financial assistance from the Commonwealth. *Id.*

b. Second, a lengthy, front-page article in the *Philadelphia Inquirer*, published in May 2005, almost six years ago, described Attorney General Fisher's role in the negotiations between The Foundation and Lincoln in almost the exact same manner as Attorney General Fisher's role is described in the Petition. That article detailed the events leading up to Lincoln's withdrawal of its opposition to The Foundation's petition, and described the "good cop/bad cop" methods allegedly used by Attorney General Fisher and Governor Rendell to persuade Lincoln to accept the September 2003 deal.

c. Third, the Attorney General's support for the relief sought by The Foundation (after The Foundation amended its 2002 Petition to address concerns raised by the Attorney General) was repeatedly disclosed in Court, during the proceedings on the 2002 Petition and in this Court's opinions.

d. Finally, the Petitioners' allegations regarding the alleged $107 million state appropriation for The Foundation were the core basis for the 2007 petitions, filed (and dismissed) more than three years ago.

49. 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 and art appreciation mission, all on the basis that Petitioners were "disturbed" (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 this Petition now, years after the matters it seeks to raise were first disclosed, is the very opposite of due diligence.

50. The prejudice to The Foundation from 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 gallery will be completed in less than a year. 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.

WHEREFORE, The Foundation respectfully requests that this Court sustain its preliminary objection under Rule 1028(a)(4) and dismiss the Petition and award The Foundation costs and attorneys' fees.

VII. Motion to Strike Scandalous and Impertinent Matter (Rule 1028(a)(2))

The Petition's Allegations Regarding the Alleged $107 Million Appropriation to The Foundation Should Be Stricken As Scandalous and Impertinent

51. Respondent incorporates Paragraphs 1 to 50 as if fully set forth herein.

52. 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).

53. As the public record (set forth below) demonstrates, the Petition's suggestion that The Foundation (and Governor Rendell, who was not a party to the 2002 Petition) may have misled the Court during the proceedings on the 2002 Petition by withholding information regarding a $107 million "appropriation" for The Foundation by the Pennsylvania General Assembly is false, and the Petition's allegations regarding it should be stricken as scandalous and impertinent.

54. Petitioners claim that Governor Rendell had set aside "$107 million in an appropriation bill" for The Foundation and that these funds "could have easily supported the historic Merion location of the Barnes Foundation." Pet. ¶ 26. Public information, including legislative enactments, demonstrate that this statement is false.

55. The $107 million clearly refers to two separate redevelopment assistance capital project itemizations, for $7 million and $100 million, in the Capital Budget Project Itemi-

zation Act of 2001-2002, No. 2002-131 § 6(51)(i)(UU), (OOOOOOO), 2002 P.L. 891, 1017, 1026 (Oct. 30, 2002) ("Capital Budget Act").

56. The two itemizations 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 authorized the Commonwealth to issue bonds for any itemized projects that were later approved 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 P.L. at 891-92, 962, 1063, 1065, 1071.

57. Funds appropriated to redevelopment assistance capital projects itemized in the Capital Budget Act could be used only for the design and construction of facilities. *See* Capital Facilities Debt Enabling Act, No. 1999-1, § 302, 1999 P.L. 1, 5, 72 P.S. § 3919.302 ("Capital Facilities Act"). The funds could not be used for operating expenses.

58. The Capital Budget Act itemized hundreds of proposed redevelopment assistance capital projects (as well as capital projects in other categories), totaling more than $4.3 billion. *See* Capital Budget Act, § 6, 2002 P.L. at 962-1037, 1086-95. The itemized projects were listed by county (and, in some cases, by municipality). Both the $7 million and $100 million itemizations for The Foundation were listed under Philadelphia County. *Id.* § 6(51)(i)(UU), (OOOOOOO), 2002 P.L. at 1015, 1017, 1026. Therefore, if any of the items were eventually approved, they would have been approved for use in Philadelphia County, not for use in Montgomery County.

59. At the time the Capital Budget Act was enacted, only $1.45 billion of bonds could be outstanding at any one time to fund the redevelopment assistance capital projects itemized in the Capital Budget Act or projects that were itemized in prior capital budget acts. *See* Act of Oct. 28, 2002, No. 2002-130, § 2, 2002 P.L. 889, 890 (amending Capital Facilities Act § 317(b), 72 P.S. § 3919.317(b)).

60. No redevelopment assistance capital projects itemized in the Capital Budget Act could be funded until (1) the Governor approved funding for the project (in an amount up to the maximum itemized in the Capital Budget Act); (2) a detailed application for the project was submitted to the Commonwealth's Office of the Budget by the relevant governmental entity listed in the Capital Budget Act; (3) the Office of the Budget approved the application; and (4) bonds were issued and the proceeds appropriated to the Department of Community and Economic Development to fund the project. *See generally* Capital Facilities Act §§ 301 *et seq.*, 72 P.S. §§ 3919.301 *et seq.*

61. No portion of either of the redevelopment assistance capital project itemizations in the Capital Budget Act were approved to fund anything at The Foundation at the time of the proceedings on the 2002 Petition. In March 2006, almost four years after The Foundation filed the 2002 Petition and more than a year after this Court issued its final Decree, Governor Rendell approved $25 million of funding 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. In October 2008, 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.

62. The Capital Budget Act, the Capital Facilities Debt Enabling Act, and related public documents available from the Commonwealth (including the Application Materials Handbook for the Redevelopment Capital Assistance Program) unequivocally demonstrate that neither the Commonwealth nor Governor Rendell appropriated $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, including The Foundation's ability to remain financially viable and fulfill its mission in its original location in Marion. These statutes and other public materials demonstrate 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.

63. Moreover, the Petition does not allege that Respondent or anyone else involved in the proceedings regarding the 2002 Petition knew about the itemizations for The Foundation in the Capital Budget Act at the time of the proceedings, and Petitioners could not, consistent with PA. R. CIV. P. 1023.1(c)(3), make such an allegation. Indeed, the only such allegation they make is that *Governor Rendell*, a non-party to the 2002 Petition, stated *in a movie* that The Foundation was not fiscally sustainable in its original location. *See* Pet. ¶¶ 25-26.

WHEREFORE, The Foundation respectfully requests that this Court strike Paragraphs 25-28 of the Petition and award The Foundation costs and attorneys' fees.

Respectfully submitted,

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Dated: March 25, 2011

CERTIFICATE OF SERVICE

I, Bruce P. Merenstein, hereby certify that on March 25, 2011, I caused to be served the foregoing Preliminary Objections by the methods set forth below on the following:

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