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

IN RE: THE BARNES FOUNDATION, A CORPORATION

No. 58,788

PETITION TO REOPEN PROCEEDINGS, TO RECONSIDER AND RESCIND THE ORDERS OF JANUARY 29, 2004 AND DECEMBER 13, 2004, TO GRANT AN INJUNCTION BARRING ANY MOVE OF ART COLLECTION, TO COMPEL AN ACCOUNTING, TO DECLARE THE BOARD THEREOF IN VIOLATION OF ITS FIDUCIARY RESPONSIBILITIES, TO COMPEL SURCHARGE PROCEEDINGS AGAINST BOARD MEMBERS, TO REMOVE BOARD MEMBERS, AND TO PLACE THE BARNES FOUNDATION IN RECEIVERSHIP

Come now, the following Petitioners by their counsel, Mark D. Schwartz, Esquire, who aver as follows:

I. Petitioners

1. Petitioner Ann C. Barnes was first a student in the Art Department of the Barnes Foundation in its Philosophy of Art Course in 1959-62, followed by five years of Seminar work there in the 1970's. She was again a student of the Art Department in 2002-2003. She was a founding member of the early Friends of the Barnes Foundation (hereinafter "Friends-1) in 1960 serving for over 30 years. Ms. Barnes has been permitted to participate in proceedings as a result of the special, long-term and symbiotic relationship that Friends-1 has had with the Barnes Foundation. In its successful Petition to intervene in prior proceedings, Friends-1 emphasized that "Our group is concerned with preservation of the

Barnesian method of art education set forth by Dr. Barnes and Professor Dewey. The Friends of the Barnes Foundation seeks to continue the study of the Barnesian philosophy within our group and to convey it to the community at large." Friends-1 was found to have that "special interest", in contrast to any interest common with the general public or with the Attorney General, as *parens patriae*.

2. Ms. Sue Hood has been a student of the Barnes Foundation for the academic years of 1998 through 2001, in the winter term of 2003 and the fall term of 2004. Pursuant to an Order of this Court dated October 29, 2003 she was granted standing as *amicus curiae* appointed by the Court. In accordance with that status and her continuing obligations therewith Ms. Hood wishes to bring to this Court's attention, facts submitted herein that were subsequently learned and not presented to this Court in its prior proceedings.

3. Petitioner "Friends of the Barnes" (hereinafter "Friends -2"), was founded in 2004 with many of the same goals as Friends-1, and a membership that extends to others beyond alumni of the Barnes Foundation programs. Its express purposes include maintenance and preservation of the Trust Indenture of the Barnes Foundation, as set forth by Dr. Barnes.

4. Petitioners Walter W. Herman, M.D and Nancy Herman. live directly across the street from the Barnes Foundation at 275 North Latch's Lane, Merion, PA 19066, property owned by Dr. Barnes from 1911 to 1913. Dr. Herman is a retired physician. Mrs. Herman is an artist. Both are founding members of Friends-2. They specifically purchased their home in 1971 relying upon the continued presence of the Barnes in its entirety, as arboretum, gallery space and buildings incorporated into a seamless whole. They have a special interest which includes and transcends their economic interest in maintaining their

property's value, as a function of whether or not the Barnes collection is removed from its venue of installation.

5. Petitioner Sandra Gross Bressler is presently a student in the Art Department of the Barnes Foundation. In 2006, she graduated from the three-year horticulture program at the Arboretum School of the Barnes Foundation. Previously, she served as an arts administrator in museums and then for the City of Philadelphia, first as staff person for the first Mayor's Cultural Advisory Council, then as Coordinator of Cultural Programs in the Office of Arts and Culture, and finally as Executive Director of the Philadelphia Art Commission. A Philadelphia resident, she is also a founding member of Friends-2.

6. Petitioner Jay Raymond is presently a student in the Art Department at the Barnes Foundation. Mr. Raymond has been a student at the Barnes Foundation every semester since the spring of 2000 with the exception of academic year 2003-4 and the fall semester of academic year 2006-2007. He completed the two year course in Philosophy of Art at the Barnes Foundation in 1978 and served as a teacher for the first year of the Philosophy of Art course in 2000-2001. He now resides in Jenkintown. Mr. Raymond is a handyman and is a founding member of Friends-2.

7. Petitioner J. Margot Flaks is currently the President of the Merion Civic Association, one of the goals of which is the preservation and protection of Merion's cultural assets. Ms. Flaks has served as the Historian of the Merion Civic Association and has researched original documents and written of the role of Albert Barnes in the Merion community. After close to 40 years, she retired as teacher in the School District of

Philadelphia. She has been a resident of Merion and a neighbor of the Barnes Foundation for 36 years.

II. Standing

8. The Petitioners should be granted standing because they, unlike the Attorney General, will zealously represent the interests of the trust as expressed through its indenture. The students and former students have a natural interest in preserving the role of the Foundation as an educational institution. The neighbors have an interest in preserving the symbiotic relationship between the Barnes and the community which lasted between 1923 and 1995. It is asserted that all Petitioners, as described hereinbefore, and given previous participation allowed by this Court, have the requisite special interest to confer standing upon them.

A. Students and The Role as *Amicus*

9. Special emphasis should be placed on the role of *amicus* and students. Petitioner Sue Hood was granted *amicus* status to this Court in previous proceedings. As such, she wishes to bring to this Court's attention matters that have since been uncovered and were not divulged to this Court in accordance with prior proceedings.

10. In prior proceedings before this Court, current and former students of the Barnes Foundation have been granted leave to intervene and to be appointed trustees *ad litem* in disputes surrounding the Barnes Foundation. The student Petitioners, Sandra Gross Bressler and Jay Raymond, have a special interest in the art gallery and the arboretum in their present location, with their composition and arrangement as essential and integral parts of the educational mission of the Barnes Foundation; and they have a special interest in the

maintenance of the class and seminar offerings in the present location so that they may continue the courses of study created by Dr. Barnes in the location selected and developed by him.

11. Dr. Albert Barnes founded the Barnes Foundation to “promote the advancement, education, and promotion of fine arts”. (Article II of the Bylaws). As is explicitly provided in the Foundation’s indenture, the art gallery and the arboretum are “integral parts of [its] educational resources.” (Paragraph 17 as amended October 20, 1950). Historically, the Courts of this Commonwealth have recognized the Barnes as such.

12. The Barnes Foundation’s current location was selected and developed by Dr. Barnes for that institution. If the Barnes Foundation is split and moved from its current and historical location, the education mission of the Foundation will be fatally compromised because the relationship between the galleries and arboretum cannot be recreated elsewhere.

13. Current and former Barnes Foundation students have a special interest in the continued operation of the Foundation as described in its indenture. No other party can represent this unique interest.

14. The interests of the students, as the primary beneficiaries of the indenture, are in opposition to the interests of the general public. The students want to maximize the galleries and gardens for classroom use in contradistinction to members of the public who want to maximize visitation access. The interests of current and future students on the one hand; and the public, on the other, collide. They can not fairly be represented by the same party.

B. Issues Presented Because of the Position of the Attorney General

15. As *parens patriae*, the Attorney General of Pennsylvania (“Attorney General”) is required to advocate and protect charitable trusts. However, the Attorney General has not fulfilled that role and clearly has not represented the interests of student beneficiaries for the kind of education that Albert Barnes intended for his institution.

16. Historically, this Court has agreed with various students that the Attorney General could not adequately represent their special interest. Proceedings before this Court have proven that position to be an understatement. This Court has noted the difficult position it found itself in, trying to conduct an adversarial proceeding. In the Court’s own words:

.....The Attorney General was the only party with the 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’ attempt to establish their issues. The course of action chosen by the Office of Attorney General prevented this court from seeking a balanced, objective presentation of the situation, and constituted an abdication of the office’s responsibility. [January 29, 2004 opinion by this Court, p.20]

17. In breach of its duties, the Attorney General has failed to investigate multiple fiduciary failures by the Board of the Barnes Foundation. For example:

a) The Attorney General was noticeably absent during the many years of mismanagement and questionable financial dealings of the Barnes Foundation that brought it to the alleged point of insolvency. The office initiated no investigation of questionable activities which could have resulted in a surcharge action.

b) The Attorney General was noticeably absent when the Barnes Foundation instituted litigation, ultimately determined by the federal court to be cynical, frivolous, and spurious, diverting \$8 million that could have been used for programs and a fundraising campaign. This included the Barnes spending a high multiple of the amount in issue for legal fees regarding the court ordered payment of legal fees of defendant neighbors. The Attorney General instituted no investigation of questionable activities which could have resulted in a surcharge action.

c) The Attorney General, instead of assuring adversarial proceedings in this matter, became an active co-conspirator with Governor Ed Rendell to pressure Lincoln University trustees to withdraw their opposition to the Barnes Foundation's Petition in exchange for a commitment by the Commonwealth to give Lincoln University millions of dollars of taxpayer money. The Attorney General did not recognize its conflicts or those of others.

18. In prior proceedings, this Court has granted various student petitioners standing in recognition of the inability of the Attorney General to adequately represent their interests. Here again, this Court should confer full standing on the Petitioners to insure that their unique interests are represented, to ensure an adversarial proceeding, and to ensure that material matters, not previously brought to this Court's attention, are considered. Petitioners are qualified to have all the rights and liabilities of a party to the proceeding. If the Court deems it appropriate, the student Petitioners request to be named Trustees *ad litem* to represent the interests of current and future students of the Barnes Foundation as permitted in the Pennsylvania Estates and Fiduciaries Code.

C. A Request that this Court Should Consider the Issues *Sua Sponte*

19. If this Court is not to grant full standing to Petitioners, it is incumbent upon it *sua sponte* to consider the issues presented in this Petition, given the Court's equitable powers and continued jurisdiction over the governance and preservation of the Barnes Foundation, as well as its obligation to consider material and relevant facts not raised in the prior proceedings, now being raised by those whose prior status was *amicus* to the Court. In the event that this Court decides to proceed *sua sponte*, it would be appropriate for this Court to grant all or some of these Petitioners *amicus* standing and such a request is hereby made..

III. Statement of Jurisdiction

20. This Orphans' Court has exclusive and continuing civil and equitable jurisdiction with respect to the Barnes Foundation and the fiduciary responsibilities of its Board members pursuant to the Commonwealth of Pennsylvania's statutory and case law.

IV. Statement of Relief Requested

21. As a result of their Petition set forth herein, Petitioners request that this Court:
- 1) reopen the proceedings in this matter;
 - 2) rescind its prior orders dated December 13, 2004 and January 29, 2004 and enjoin the Barnes Foundation from moving its art collection from its present locale;
 - 3) compel an accounting from the last accounting to the present;
 - 4) declare the Barnes Foundation Board of Trustees thereof in violation of its fiduciary responsibilities;
 - 5) pursue appropriate surcharge proceeding against the Board;
 - 6) remove the present Board members;

- 7) place the Barnes Foundation in Court-imposed and supervised receivership to be run by a responsible party proposed by Petitioners with the mandate of returning the Barnes Foundation to solvency in accordance with the least drastic initiatives available; including consideration of a plan put forth by Montgomery County to purchase the present site and lease it back to the Barnes Foundation; and
- 8) provide such other relief as is appropriate.

V. Summary of Argument

22. Relevant and material information was not brought to the Court's attention prior to its rulings allowing the move, all as detailed herein. A host of conflicting associations were not brought to the Court's attention. Moreover, years after the Court hearings, came the revelation that 107 million dollars was appropriated by the Commonwealth of Pennsylvania to pay for the move of the collection from Montgomery County. The failure to bring this appropriation to the attention of the Court calls into question the veracity of testimony concerning genuine efforts of the Barnes Board to solve financial issues by attracting private funds. The Court's lack of knowledge of the appropriation alone, let alone the nature of the conflicts present, affected the entire outcome of those proceedings.

23. This Court previously permitted a move. It did not mandate a move, nor did it absolve the Board of its responsibility to try to achieve the Settlor's intent to have the facility remain in Merion. Since the granting of that permission, there have been significant events that represent a substantial change of circumstances, demonstrate that the Board of the Barnes continues to violate its fiduciary responsibilities, and justify this Court's reopening these proceedings and revisiting those orders.

24. These significant events include the offer by Montgomery County of at least \$50,000,000 to purchase and lease back the building and grounds which would have the effect of generating an additional \$1,000,000 in earnings per year to close any alleged funding gap.

25. Also, the Township of Lower Merion, on its own motion, amended its ordinance to allow significantly more visitors to the Barnes and would generate an approximate additional \$1,092,000 dollars to further close any funding gap, excluding usual fund raising efforts.

26. In addition, there has been a determination of eligibility by the US Secretary of the Interior that the Barnes could be certified as a National Historic Landmark which could generate additional dollars to the Barnes.

27. The last two and one half years have been witness to continued breach of fiduciary duty, as well as disregard for the expectations of this Court, by the Barnes Board: (1) not responding to legitimate offers of assistance by Montgomery County; (2) not maintaining the facility in Merion; (3) not naming members to an expanded Board, which they claimed was necessary for fundraising; (4) continuing to squander valuable resources; and (5) not pursuing policies which would generate funds for the facility in its current location.

28. What has not occurred during the past two and a half years, despite representations made by Board members to this Court, is that the Barnes Board has: (1) not acquired land or definitively secured a site on the Benjamin Franklin Parkway to build a new gallery as no provision has been found to move the Philadelphia Youth Detention Center; (2)

not selected an architect; (3) not developed architectural plans; and (4) not developed a feasibility study and budget.. No construction has commenced. Given this and the misrepresentations made to the Court in those hearings, the Barnes can not claim that there has been detrimental reliance by the Barnes Board.

29. The continued destruction of the Trust Indenture over the years has not resulted in a new and improved Barnes Foundation. Accordingly, this Court needs to focus on the root problem which is the Barnes Board itself, a board of directors adrift from its fiduciary mission and devoid of credibility.

30. Petitioners implore this Court to exercise its continued supervisory role over this Foundation. This is especially critical given the posture of the Commonwealth Attorney General.

31. This Court has allowed the proposed changes requested by the Barnes without deciding whether fault lay with the Barnes Foundation Board. These Petitioners are prepared to demonstrate that the Foundation Board had unclean hands, and that it is no accident that this Foundation had not been able to raise funds as it was too busy squandering those funds. At no time has the Barnes Foundation Board pursued actions against prior trustees for breach of their fiduciary duties and the recoupment of squandered funds. Instead, the current board has adopted a policy of conveniently not looking back, sitting on those hands, and imploding the Barnes.

32. A mid- 2006 proceeding showed the Barnes still lacked funds for basic upkeep. A frustrated Judge Ott mused about whether he could do better than the current board. These

Petitioners feel that, in fact, he *can* do better. It is certainly possible for the Barnes to raise funds, but not with a Board that does not wish to do so, is conflicted, and has abdicated its fiduciary responsibilities. The time has come for this Court to do better, by dismissing the board and putting the Barnes Foundation into receivership. This is the way to insure a responsible stewardship consistent with the designs of Dr. Barnes.

A. Subversion of Donor Intent

33. Beginning with the administration of Richard Glanton and continuing through the present leadership of the Barnes Foundation, the intent of the Donor, Dr. Albert Barnes, has been subverted to serve the aims of others. Ignoring the financial mismanagement of the recent past, the Board has taken no action whatsoever to recover funds that were squandered .

34. Instead, the Barnes Foundation Board pursued an option consistent with their having long abandoned any notion of fiduciary responsibility. In the words of Board member Stephen Harmelin, they put themselves “in play” to the highest bidders, abandoning Dr. Barnes’ requirements, supplicating themselves before and ingratiating themselves with Philadelphia’s self-proclaimed arbiters of taste and with certain politicians.

35. It is now known that before announcing the plan to move, \$107 million in state aid had already been lined up in Harrisburg, earmarked for a new Barnes building in Philadelphia. This fact makes clear that the underlying premise for the move, made before this Court by the Barnes Foundation and The PEW Charitable Trusts was simply a charade.

36. The Barnes Foundation has not made a sincere effort to find a way to remain in Merion. It has only sought to find a way out, and has sidestepped any means that would undermine that course. It is now apparent that the overriding mission of the Barnes Board has been to move the gallery art to Philadelphia, in contempt of the Donor's clear intention that his institution remain, as a whole, in Merion. As such, the Barnes board came to this Court with unclean hands, making its plea, while deliberately ignoring its fiduciary responsibilities.

37. Petitioners are a small set of many who are opposed to the move and have put forth, in a combination of proposals, acts and legislation, a simple and clear path to a thriving and accessible Barnes in Merion. In spite of the fact that building a gallery in Philadelphia is at least three years behind schedule and the Barnes Foundation is many millions of dollars short of what is needed to underwrite their "three campus model," those proposals were summarily dismissed by the present Barnes Board.

38. What was supposed to be paramount; i.e, education at the Barnes Foundation, of the specific sort envisioned by Dr. Barnes, is in decline. What little effort there has been made towards education is of the sort commonly available at art schools and museums.

39. It is understood throughout the world that a Barnes on the Parkway means the desecration of a world treasure. It will always be understood, no matter how expensive and beautiful the new container for the paintings is, that the Barnes on the Parkway will not be the work of art that Albert Barnes created, it will be the work of commercialism that together with others, the Pew, Lenfest and Annenberg foundations created, subverting Barnes's legacy so it can become their own. Numerous conflicts of interest suggest a greater concern for

third party aims and ambitions as opposed to realizing the least intrusive solutions to the financial needs of the Barnes Foundation in honoring Dr. Barnes Indenture.

B. Violation of the Barnes-PEW/Lenfest Agreement

40. The most recent actions directed towards the repeal and repudiation of Dr. Barnes' Indenture were brought to "effectuate" the arrangement between the Barnes Foundation, the Pew Charitable Trusts and the Lenfest Foundation. This arrangement was memorialized in the "Barnes/Foundations Agreement," executed on September 13, 2002 (hereafter the "Barnes-PEW/Lenfest Agreement.") Its proponents implored this Court that this was all done in the name of making the Barnes Foundation modern and fiscally solvent.

41. Pertinent sections of the Barnes- PEW/ Lenfest Agreement are as follows:

- Section 1.2 provides that the collection would be moved to land on the Benjamin Franklin at the site of the current Youth Study Center. It also provides that "if another site is selected, it shall be capable of accomplishing the purposes of this Agreement and acceptable to The Foundation, Pew and Lenfest."

- Section 1.3 provides for the Barnes to undertake a "comprehensive development plan."

- Section 2.2 provides that the number of trustees on the Board shall be increased from five to fifteen.

- Section 3.1 provides for two years of funding from September 13, 2002.

- Section 3.2 provides for the City of Philadelphia to provide annual security and maintenance services and/or financial support for the new location.

- Section 3.4 provides that the Barnes is to receive and have transferred to it the property on the presently occupied by the Youth Study Center, which is to be demolished.

- Section 3.5 provides for a Project Director

-Section 3.6 provides for the arrangement of long term funding not to exceed \$150 million.

42. It has been almost five years from the execution of that Agreement. The question arises as to whether the Agreement has been terminated. The twenty-four month term is long over. Moreover, Pew CEO Rebecca Rimel has stated that PEW would no longer be raising funds for this project “and we’re standing off to stage left.” (*Philadelphia Inquirer*, May 16, 2006.)

43. There is also the matter of whether the Agreement has been breached. Specifically, it is unknown whether the funding commitment has been met (3.6) or whether a development plan has been created (1.3). Clearly the Youth Study Center has not been demolished and a substitute facility has been delayed for years (3.4). What is more, the Agreement contemplates that the Barnes receive title to the property. However, recent legislation passed by Philadelphia City Council indicates that the Barnes Foundation will not be acquiring the land but will simply be a sublessee (3.3). Further, that legislation does not provide annual services and/or financial support for the new facility (3.2). The Barnes Foundation does have a new Executive Director, Mr. Derek Gillman, but it is unclear whether or not a “Project Director” (3.5) has been chosen or approved. In addition, and of grave consequence, is the fact that the number of Barnes Trustees has not been increased to fifteen (2.21) despite this Court having been convinced of this arguably -critical imperative.

44. Given this Court’s continuing jurisdiction regarding the implementation of this Agreement, it is appropriate that this Court reconvene the proceedings in this matter.

C. Conflicting Interests and Collusion Arising From the Barnes-PEW/Lenfest Agreement

45. Former Barnes Foundation Board Chairman Richard Glanton's name is conspicuous by its absence from the 2003-4 proceedings, but his words have rung true, words quoted in John Anderson's book *Art Held Hostage*: "I can go to court and get it all changed." With and without him, Barnes Foundation Board members have repeatedly abdicated their fiduciary requirements because they could do exactly that, go to court and "get it all changed." The move has nothing to do with the vision or indenture of Dr. Barnes, and everything to do with Philadelphia tourism, the development of Museum Row, access to the Barnes collection for the Philadelphia Museum of Art, and the PEW Charitable Trusts' goals of qualifying as a public charity – all third party interests with diametrically opposed ambitions.

46. These Petitioners contend that the process of 'getting it all changed' has taken the focus away from the real problem, namely, the Board itself.

47. Petitioners note these facts, perhaps unknown to the Court, which demonstrate, at a minimum, certain parties with potentially conflicting loyalties:

– Gerry Lenfest, Chairman of the Lenfest Foundation, is also Chairman of the Board of Trustees of the Philadelphia Museum of Art (PMA). Mr. Lenfest was the corporate counsel of Walter Annenberg's Triangle Publications in 1965 before serving as managing director of the company's communications division. In 1974 he started Lenfest Communications after purchasing several companies from Mr. Annenberg. In 2000, he sold his interests to Comcast Corporation.

- Lenore Annenberg, President of the Annenberg Foundation (begun by her husband, Walter Annenberg, who had a long standing animus toward Albert Barnes) is on the PMA Board.

- Judge Arlin Adams is an honorary trustee of PMA and served as counsel for the Barnes in support of the move.

- Petitioners believe that the majority of Barnes Board members have been nominated by PEW, which is a major booster of Philadelphia's "Museum Row" and the Philadelphia Museum of Art. PEW used the Barnes Foundation move as a centerpiece in its application to change from private foundation to public charity status.

- Sheldon Bonovitz is a trustee of both the Barnes Foundation and the PMA.

- Joseph Neubauer is on the Barnes board while his wife, Jeanette Lerman-Neubauer, is on the PMA board. Mr. Bonovitz is also member of the Board of Trustees of Comcast.

- Barnes Board member Eileen Roberts' husband is Comcast CEO Brian Roberts. Comcast used images from the Barnes collection as part of Comcast's "GalleryPlayer On Demand" television programming (<http://www.comcast.com/galleryplayer/>). Since there has not been a full financial audit of the Barnes Foundation since 1996, it is not clear what financial benefits from this arrangement have accrued to the Barnes.

- Barnes Board Member Stephen J. Harmelin manages a law firm that has represented the Barnes Foundation, the Annenberg Foundation, Walter Annenberg personally, and the Estate of Walter Annenberg. A skeptic might ask if this is why the Barnes-PEW/Lenfest Agreement only made mention of an "additional third party" that was involved, and did not mention the Annenberg Foundation by name.

48. Lawyers were paid by those third parties to prompt this Court to put a final spike in the heart of Dr. Barnes deliberately-crafted plan and sever the corpus into three campuses; the main one promising to be Disneyland-like, as a prime tourist attraction subsumed in Philadelphia's "Museum Row."

49. In the resounding words of Richard Glanton, it *has* all been changed, but not to the benefit of the cestui que trust or the vision of the man who established that trust.

50. Those lawyers got the relief that they sought from this Court for those third parties. However, those lawyers, together with their clients, failed to bring to the Court's attention the nature of the conflicts present and what actually transpired.

51. It was not clear what took place until years after the proceedings. Years later, it did come to light in the press that Lincoln University's involvement in this case was silenced by the Commonwealth's infusion of \$80 million of appropriations and Governor Ed Rendell's promises of additional fundraising. This is evidence of the abdication of fiduciary responsibility by Lincoln University's trustees as they sacrificed their control over the Barnes board for financial relief. Had this Court known the specifics, Petitioners contend that this Court would have conducted the proceedings differently.

52. In the proceedings, Pennsylvania's watch-dog over charitable trusts, its Attorney General, stood second chair to the proponents. Except for the Judge's questions, the proceedings resembled a testimonial dinner instead of an adversarial proceeding. Non-adversarial proceedings bring about decisions that fit certain assumptions, but not necessarily the facts as they exist at the time, let alone as they materialize, or fail to do so, over time.

53. The proponents of the Barnes-PEW/Lenfest Agreement in the proceedings also failed to bring other material facts to the attention of this court. This includes the insertion of \$107 million of taxpayers' funds in the Commonwealth's Capital Budget for the move and construction of a Philadelphia facility. If any of the parties knew of or sought this appropriation, not bringing it to the attention of this Court was nothing less than a fraud perpetrated upon this Court. A hearing is necessary to determine if such a fraud was perpetrated and to take the appropriate sanctions.

54. Much in the case initiated in 2002 dealt with Barnes Foundation Chairman Dr. Bernard C. Watson's statement that he approached the PEW only after he had exhausted all means of raising funds. Petitioners believe that much more took place than Dr. Watson's sudden epiphany to approach the PEW. It is simply incomprehensible that a former President of the William Penn Foundation, Vice President for academic administration at Temple University, Vice-Chairman of the Pennsylvania Council of the Arts, and member of the Pennsylvania Convention Center could not raise any money; that is unless he chose to sit on his hands. Dr. Watson's testimony conflicts with fellow Board Member Stephen Harmelin about the years of collaboration to bring the collection downtown. An investigative article in *The Philadelphia Inquirer* of May 22, 2005 by Patricia Horn casts aside Dr. Watson's hollow testimony as to the genesis of the plan brought before this Court, goes into detail conveniently omitted by the proponents, and raises issues that should have been brought to this Court's attention. Ms. Horn depicts a team effort in the works since 2001 between the Barnes Foundation, PEW, and former Judge Arlin Adams. Apparently another team player was none other than the Commonwealth of Pennsylvania.

55. Given the connections and conflicts, this Court needs to reopen these proceedings and conduct an examination as to the extent of those connections and conflicts and how they impacted and compromised a board that was to guard Dr. Barnes' and the students' interests.

D. Events Subsequent to this Court's Orders of January 29, 2004 & December 13, 2004

56. Events subsequent to the Court proceedings provide a contrast to the assertions and testimony of the Barnes and its witnesses where this Court provided that the Barnes may, not must, move.

57. The years have not shown the promised feasibility study, a budget, a site, the realization of the hopes for funding, an enhanced educational program, let alone the full complement of a board of trustees.

58. To the contrary, the years have shown how empty those promises were as the Barnes has continued to suffer from mismanagement.

59. This Court has been a frustrated witness to that decline. Court proceedings in July, 2006 show that, despite all that has come before in terms of the destruction of the Trust Indenture's restrictions, in reality, things have not changed at all. Despite the assertions in the prior proceedings that today's sophisticated world of charitable fundraising required an expanded Board (which has yet to be fully named) and the \$150 million that would come from the Barnes –PEW/Lenfest Agreement, this Court was left with a new and improved Barnes Foundation that was pretty much like the old one; i.e, unable to pay for ordinary upkeep in the form of a paint job.

60. Witness the deservedly frustrated words of this Court:

I mean what we've got here is a world class art collection, at least world class. Some people would characterize it as greater than that. But—which would suggest, on the one hand, well, if you've got 181 Renoirs and you want to have, you know, a Louie, the 14th, Versailles type place to put them in, because, what the hell,-you've got 181 Renoirs. On the other hand, what I've got consistently in the twelve years that I have been in this court is a foundation that can't meet its budget, that can't meet its bills. And again, I don't mean to—I'm not trying to pick on anybody. I'm not saying I could do it any better than they can do it but that's reality. (Hearing of July 6, 2006, N.T. page 28)

Then the Court goes on to state:

That is what I think concerned Judge Stefan, and I think, in fairness, that's what concerns me. Because what I'm saying to myself is, yeah, you've got a world class collection, and in an ideal world, a world class collection ought to be housed in a world class building and maybe, ultimately, will be, but in the meanwhile, I've got an organization that can't meet its budget. (Hearing of July 6, 2006, N.T. page 47)

61. In its opinion of October 19, 2006 denying the Foundation's request to be able to remove money from a long established escrow account, this Court went back to Judge Stefan's words:

Aside from the funds to be generated by the present tour, and the money paid over to the Trustees by the DeMazia Trust, there is no history of any effective fundraising attempts on behalf of the Barnes Foundation." (*The Barnes Foundation*, 12 Fiduc.Rep.2d 349.)

62. True to form, the Barnes Foundation professed to be lacking in funds, ever so full of hope. When asked by the Court if she had any confidence that operating funds will be more available in the future to pay for basic maintenance and repair items, Ms. Emily Croll, Interim Executive Director of the Barnes Foundation, replied, "I think that there might be a possibility that there would be more funds available in the future but I can't say beyond that." (Hearing of July 6, 2006, N.T. page 33.) In the words of this Court, "She explained

this answer, however lukewarm, on her hopes for the fundraising abilities of the Foundation's newly-expanded Board of Trustees." (Hearing of July 6, 2006, N.T. page 34)

The testimony was simply a replay of hopes wished for years before.

63. In addition to the recent lack of funds for basic upkeep, the position of Director of Education has long remained unfilled and the educational program has suffered. Notwithstanding, there seems to be money for lawyers, in-house and otherwise.

64. Then, as already referenced herein, recent events have shown a Barnes Board dismissive of alternatives which would have provided the necessary funding without the need for a move.

65. In the prior proceedings this Court mused about that endgame when Judge Ott observed that he expected to see Barnes administrators back in Court seeking relief from the likely consequences of their plan. Given the passage of time and the attendant failure of what was promised, the Barnes Foundation should have already returned to Court. Instead, preferring to assume that it has a blank check from this Court, the Barnes goes at its own pace with its own plan, in its own way; contrary to its own promises and the expectations of this Court.

66. Petitioners believe and affirm that the final endgame may come when the compromised and co-opted Barnes Foundation, decides that the collection needs to be housed in a place of last resort that just so happens to have some space, e.g. the Philadelphia Museum of Art. Of grave concern to the Petitioners is that Section 1.2 of the Barnes-PEW/Lenfest Agreement allows for this possibility of an alternate site without court approval. This is fully in keeping with historical precedent of the evisceration of the John G.

Johnson art collection by the Philadelphia Museum of Art. Johnson, who was one of Philadelphia's most eminent corporate attorneys (as well as a friend and attorney of Dr. Albert Barnes) who

left his entire collection (valued between five and twelve million dollars [in 1941]), along with his house, to the City of Philadelphia. He stipulated that his paintings should never leave his house for permanent exhibition 'unless some extraordinary situation shall arise making it extremely judicious.' Before he died, he had barked: 'I don't intend my pictures shall ever be used as bait for the construction of any blankety-blank marble palace.'

But when Philadelphia's palatial Museum of Art was built a few years later, Philadelphians began to wonder whether its empty spaces might not constitute a 'situation' extraordinary enough to warrant moving Lawyer Johnson's art. The trustees finally decided it needed the museum's fireproof housing. (*Time Magazine*, Nov. 10, 1941)

Now, the "John G. Johnson Collection" has been subsumed into the general collection.

According to the Museum's own website, "in 1989, the court authorized the Museum's plan to integrate galleries of the Johnson Collection with the Museum's own holdings, allowing for a more unified presentation of European art between the fourteenth and the late-nineteenth centuries." (<http://www.philamuseum.org/information/45-231-27.html>)

67. Even prior to the move, the Barnes evisceration is well underway as it was announced in the August, 2007 Bulletin of the Philadelphia Museum of Art that private tours of the Barnes, from October 9-December 18, 2007, would be available for members and guests, on a day when the Foundation is customarily closed to the public. Special access to the Barnes, at a cost far in excess of the Barnes admission fee, is available for the Philadelphia Museum of Art's member and guests. (Query: which institution financially

benefits?) This is simply indicative of and portends a future where the Barnes art collection is stripped from its context and eclipsed by other interests.

68. Only this Court, through reopening these proceedings, can protect and preserve the integrity and identity of the Barnes collection.

VI. Newly Discovered Evidence Not Brought to the Attention of the Court

A. The Immaculate Appropriation

69. One matter which, had it been revealed to this Court would have had a material effect on the outcome of the proceedings was the fact that the sum of \$107 million was appropriated by the General Assembly in the Commonwealth's Capital Budget and signed into law by the Governor on October 30, 2002.

70. Specifically, Act 131 of 2002 provided \$100,000,000 for the "DESIGN AND CONSTRUCTION OF A MUSEUM FACILITY TO HOUSE THE BARNES ART COLLECTION" and \$7,000,000 for "RESTORATION, STABILIZATION AND SITE ENHANCEMENTS FOR THE BARNES FOUNDATION."

71. By coincidence, the \$100,000,000 number is the very same amount that the proponents of the move later told this Court that it would cost for construction of the new facility.

72. All through the prior proceedings in this Court, the Court knew nothing of this \$107 million in taxpayer money. No one brought this matter to the Court's attention. The impression given to this Court was that monies would be privately raised.

73. It seems hard to believe that those connected with the Barnes Foundation and the rescuing foundations knew nothing about this appropriation. PEW's Rebecca Rimel claims that she had no involvement. The Annenberg and Lenfest foundations have refused to answer inquiries. There seems to be collective amnesia about this matter of \$107 million inserted in Pennsylvania's Capital Budget bill.

74. Budgets in the General Assembly of Pennsylvania are negotiated and written by and between the Governor and the Appropriations Committee Republican and Democrat chairpersons of the respective Senate and House appropriations committees.

75. It was none other than long term Senate Appropriations Co-Chair and Dilworth Paxson lawyer Vincent Fumo who was a sponsor of the appropriations bill containing the provisions. Senator Fumo has had a long relationship with that law firm managed by Barnes Foundation Board member Stephen Harmelin.

76. Senator Fumo has also had a long-term involvement with Lincoln University and the Barnes. Most recently, when it came to zoning matters pertaining to what has been called the "Barnes Tower Condominium" slated for construction in his neighborhood, the Senator has been active. After his federal indictment, Senator Fumo now remains a member of the State Senate, but has severed his ties with the law firm of Dilworth Paxson. Despite the history of various relationships, and his self-touted resume including a law degree, MBA, bank chairmanship, and MENSA membership, Senator Fumo seems also to have contracted amnesia as his spokesman was quoted in *Art News*, December, 2006 stating that Senator Fumo "doesn't remember" who requested the money.

77. In tracking the legislative history, \$7 million was inserted into the budget on June 26, 2002. Another \$100 million was added within weeks after PEW and the other foundations announced their plan to petition this Court. It is also an interesting coincidence that the appropriation appeared after the February, 2002 appointment to the Barnes Board of Dilworth Paxson's Managing Partner, Stephen Harmelin, who testified on September 23, 2003 that there had been talks about moving the Barnes for the past two and a half years. (9/23/03, Volume VII, page 48)

78. One does not have to be a skeptic to know that, clearly, this appropriation was something other than that which simply appeared in the budget without request; a sudden divine revelation or epiphany that came to budget makers; a veritable "immaculate appropriation."

79. In the words of Christopher Knight of *The Los Angeles Times*, "Whatever the solution to these puzzles, one thing is clear. A Pennsylvania court spent two years deliberating in the glare of an international spotlight over the fiscal stability of an unparalleled artistic resource whose fate hung in the balance—a decision that might set a dramatic precedent. Meanwhile, several Pennsylvania elected officials knew about \$107 million in appropriations nestled inside the state capital budget. No one said a word. We can only wonder how, if he had known, Ott might have ruled..." (*Los Angeles Times*, October 16, 2006)

80. Petitioners would suggest that this Court must conduct a hearing and take testimony under oath of relevant parties, to determine who was involved with the genesis of

this appropriation and whether the parties involved in this proceeding withheld material evidence from the Court. If this is the case, then the offending parties should be sanctioned.

B. Lincoln University's Exit from the Litigation

81. Lincoln University took strong exception to the Barnes Foundation's Petition to change the Board composition and the implications thereof. Then Lincoln did a total about face and withdrew from the proceedings. These Petitioners question whether this Court knew anything about the terms of Lincoln's exit. If the Court knew the full extent of the reasons behind its withdrawal, and other material and relevant facts, then it would have conducted the proceedings differently and reached a different outcome.

82. Again, that investigative article in *The Philadelphia Inquirer* of May 22, 2005 by Patricia Horn reveals facts not made known to this Court. When the Barnes Foundation decided to initiate the proceedings complained of herein, the players, including Dr. Watson, deliberately excluded Lincoln University from that team. The decision to proceed with the petition to expand the Board and the move was not disclosed by Dr. Watson to the party that appointed him, until it was to be filed. This was a conflict. Lincoln University did assert itself into the legal proceedings, but then disappeared altogether.

83. The article explains: "At a memorial service for Walter Annenberg in December 2002, Arlin Adams, the distinguished former federal judge who was leading the Barnes' legal team, asked Rendell to help persuade Lincoln to drop its legal fight against the Barnes' petition." Otherwise they were prepared to withdraw their Court Petition. Of course, Edward Rendell was sworn in as Governor of the Commonwealth of Pennsylvania the next

month, after announcing that he would help broker a solution and this is exactly what he did. In September of 2003, he convened a meeting in his Philadelphia offices and achieved success in cajoling Lincoln University to sacrifice its principles, abandon its fiduciary responsibilities, and withdraw itself and its opposition in the Court proceedings.

Suddenly, compromise was in the air....

Lincoln, a state-supported university, needed new buildings. Rendell pointed out that Pitt, Temple and Penn State had received extra state money for new buildings. In fairness he would consider the same for Lincoln.

And while it was no 'quid pro quo,' Rendell said he was a pretty good fundraiser and could help Lincoln with its \$100 million capital campaign. Tapping Philadelphia's wealthiest for money would be easier, he said, if Lincoln would help the Barnes move downtown.

'I looked at what their needs were, what their maintenance costs were, and I was astounded at how we had neglected Lincoln,' Rendell said later. 'We had made it a stepchild.' Regardless of what happened with the Barnes, he said, 'I wanted to rectify that.' (Patricia Horn, "The Deal of the Art," *The Philadelphia Inquirer* May 22, 2005)

84. The Governor took a big step towards demolishing the Barnes Indenture with an unexpected ally, none other than Commonwealth *parens patriae* for charitable trusts and estates, Attorney General, Michael Fisher. Playing good cop and bad cop, they got Lincoln to capitulate with the help of Pennsylvanians tax dollars. As per the article, "On September 9, Rendell, with Fisher at his side, presented specific offers to Lincoln's team: \$50 million for two new academic buildings at Lincoln, \$30 million for 10 other Lincoln projects," together with assured funding for a joint arts program with the Barnes. Lincoln capitulated on September 20, 2003 and was subsequently out of the Court case. Rendell was later awarded an honorary degree from Lincoln University.

85. While this Court was certainly powerless to prevent Lincoln University from abandoning its fiduciary responsibilities to the Barnes and withdrawing from the litigation, the facts pertaining to its withdrawal are material and relevant when it comes to how this Court would have handled the proceedings. Accordingly, this Court should reopen these proceedings, which were not fully adversarial, given the role played by the Attorney General.

C. Barnes Resources Squandered and Fiduciary Standards Unmet

86. The lack of adversarial proceedings made for a situation where present Board members told a self-serving story of woe, that over time the Foundation just ran out of money because of investment restrictions and due to the small size of the Board of Directors, neither of which was the problem. A lovely gloss was put on an ugly situation in the opening statement of Judge Arlin Adams, brought into this matter by the PEW to be the Barnes Foundation's lawyer:

The Foundation was established with an endowment of approximately six million dollars provided by Doctor Barnes, but that endowment has proved inadequate as a revenue source for operating expenses, repairs and renovations to the Foundation's facilities. In recent years, the endowment was used primarily to pay for operating expenses, including legal bills of more than six and a half million dollars. It arose mainly from disputes with Lower Merion Township, where the main gallery is located, and with residential neighbors who objected to the Foundation's effort to maximize its mission. By 1999 no funds remain in the original endowment. (Morning Proceedings of 12/08/03, NT. Page 9)

Its ability to raise revenues and meet its expenses is seriously limited by the small size of its Board of Trustees. The Foundation's current physical [fiscal] situation is now dire and puts at risk its ability to fulfill its primary purpose and, indeed, it threatens its survival." (Morning Proceedings of 12/08/03, NT. Page 10)

87. Then there is the testimony of Barnes Foundation Board Chairman Dr. Bernard Watson, a former foundation head who, despite his prominence in the foundation

world, could or would only come up with one small grant for collection assessment. His preposterous testimony characterizes the problems of an institution that could not take advantage of market conditions. In Dr. Watson's words:

They had six million dollars in 1922 and that grew to ten million dollars, but, unfortunately, because of the restrictions based upon the kind of investments that could be made with that endowment, by the time I got to the Foundation, it was still worth about ten million dollars, which means that, because it could invest only in government securities and there were restrictions on that, we were not able to take advantage of the growth in the economy and other kinds of investments which would have increased that endowment.
(Morning Proceedings of 12/08/03, NT. Pages38, 39)

88. Board Chairman Watson seemed confused about what an endowment is, much less what has been depleted or why:

Q. Well, what is the value of that endowment today ?

A. Ten million dollars.

Q. I read that the endowment has been exhausted, Doctor Watson.

A. The endowment has been exhausted. The fact is that we have a small amount of money, approximately five million dollars, in a restricted fund, which is not the endowment, which we have to get permission from the Court to use.

Q. The endowment was about ten million when you came?

A. That is correct. It is not exhausted. It may have been less than ten million dollars.

Q. And what was the reason for the exhaustion of the endowment in the last five, six, seven, eight or nine years.?

A. A variety of reasons. One, we had to dip into it more than we should have dipped into it because of litigation expenses and the constant difficulties dealing with zoning and our costs for legal expenses, and also, when we had to pay them, we lost cases growing out of the litigation, all of which preceded the litigation, my joining the Board and the current Board members.

89. Leaving aside the question of whether his fiduciary responsibilities required an attempt by him and his fellow Board members to recoup monies that were mis-spent by prior Board members, the expenditure of \$6.5 million hardly constituted a “dip”. Nor was that “dip” caused by outside forces. It was occasioned by the Barnes Board itself.

90. No less an authority than Donald W. Kramer, Esquire, Chairman of the Nonprofit Law Group at the law firm of Montgomery, McCracken, Walker & Rhoads, LLP. and editor of the newsletter “Nonprofit Issues” (www.nonprofitissues.com) has discussed the Barnes Foundation Board as one of the great failures with respect to performance of fiduciary responsibilities. In his article, “Barnes ‘Audit’” (NONPROFIT ISSUES, VOL XIII, No. 4), he details the Board’s failures:

It shows a Board rife with personal acrimony, which failed to enforce its own governance policies, failed to approve annual budgets and control expenditures, failed to meet with its auditors, who would have raised issues about possible improper expenditures, and failed to operate at full strength for several years. It shows contracts between the president and persons with whom he had close business relationships which were not reviewed or approved by the Board, failure to develop a serious fund raising plan while suffering consistent annual deficits, failure to change investment policies when authorized by the court, and a number of odd real estate and other transactions not considered by the Board.

Although the Board policy called for Board approval of all significant contracts, Glanton frequently entered into contracts without Board review or approval. Several of the contracts involved individuals with whom he then had or thereafter developed personal business relationships.

91. From the time that Richard Glanton began his tenure at the Barnes in 1990 through to the tenure of Kimberly Camp, costs skyrocketed. In 1990, Barnes Foundation

wages, salaries, benefits and the costs of security amounted to roughly \$700,000. In 1998, when Ms. Camp began her tenure, that number exceeded \$1.2 million. Actual costs in 2002 approximated \$1.9 million. All the while, the Barnes Foundation Board sat on its hands abdicating its role, only to be replaced by a Board intent on ignoring the past and the remedies that it could have pursued for the recovery of any funds mis-spent.

D. The Barnes Foundation's Real Beneficiaries—Lawyers, not Students

92. A review of the Foundation's IRS Forms 990 for the past decade or so might lead the reader to conclude that the Barnes' primary beneficiaries were not art and horticultural students, but law firms instead. A *Philadelphia Inquirer* story by Stephan Salisbury of October 28, 2001 cites the following:

-According to the Internal Revenue Service filings, from 1996 to 1998 the Barnes Foundation doled out \$1,178,906 to the Philadelphia law firm of Blank Rome Comisky & McCauley LLP.

-In 1998, \$1,173,658 went to the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison.

-From 1992 to 1997, \$1,013,714 went to Pittsburgh-based Buchanan Ingersoll.

-From 1992 to 1998, \$2,054,591 was paid to Philadelphia-based Dilworth Paxson LLP.

-From 1996 to 1997, \$388,618 went to the Philadelphia firm of Sugarman & Associates.

Absent the lawyers fees and the frivolous litigation, there might have been some money left for building and arboretum maintenance, the development of art and horticultural education programs and realization of a fundraising campaign.

93. Stephen Harmelin, managing partner of Dilworth Paxson, joined the Board on February 21, 2002, with his law firm having previously represented the Barnes Foundation.

94. The outrageous amount of money devoted to litigation was surprisingly admitted to by none other than Mr. Hamelin's then partner and now Federal Judge, Bruce Kauffman, Esquire, who stated before this Court in the DeMazia Trust/The Barnes Foundation litigation. "Well, I assure Your Honor that the number of dollars spent on legal fees on this two million dollars" (the amount in controversy), "which over the years has a present value considerably less, is approaching the ridiculous to spend that much money." (Hearing of April 10, 1995, N.T. pages 25, 26)

95. Then there were all of the fees generated by the spurious case of *Barnes Foundation vs. Township of Lower Merion*. Here, the Barnes Foundation went from the ridiculous to the absurd, backing Mr. Glanton's lawsuit vendetta against the neighbors in what was referred to by the Third Circuit Court of Appeals as a "groundless action against [its neighbors] thereby trampling their First Amendment rights." *Barnes Foundation v. The Township of Lower Merion*, 242 Fed 151 (3d Cir., 2001) Petitioners estimate that approximately \$6.5 million in legal fees were paid by the Barnes Foundation for what the judiciary found to be "cynical" and "frivolous" litigation

96. For the year 1998, legal fees constituted \$1,882,107.51 of \$2.6 million in professional and consulting fees, as testified to by Joseph M. Kistner, CPA an outside auditor of the Barnes Foundation (Hearing of 12/9/03. N.T. page 50).

97. IRS filings from 2002 through 2005 show that legal fees and related legal costs were exceedingly high in relation to program costs.

- In 2002, expenditures for art education and horticulture totaled \$997,938 in comparison to legal costs of \$746,603 and fees for Deloitte and Touche of \$165,078, totaling \$911,681.
- In 2003, expenditures for art education and horticulture totaled \$1,045,342 with payments to Judge Adams firm of \$1,011,132 and Pepper Hamilton of \$60,223 totaling \$1,071,355.
- In 2004, expenditures for art education and horticulture totaled \$1,093,319 with payments to Judge Adams' firm of \$351,964 and Pepper Hamilton of \$131,863, totaling \$483,827.

98. Despite the obscene amount of money mis-spent on litigation, apparently not one member of the Barnes Foundation Board raised the question of whether surcharge actions would be appropriate to recover mis-spent millions of dollars. Not one.

99. Despite the obscene amount of money mis-spent on litigation, the Attorney General of Pennsylvania, as *parens patriae*, never investigated, let alone brought a surcharge action to recover the misspent millions of dollar.

100. If this Court had been made aware of the magnitude of the funds squandered by a board with unclean hands, the nature of the conflicts, and its failure to recoup those dollars, instead of hearing testimony mischaracterizing matters as "dipping" into endowment, clearly the Court would have reached a different outcome.

E. Third Party Influence on the Barnes

101. Also not revealed to the Court was the extent of third party influences upon the Barnes. Board members Bernard Watson and Stephen Harmelin were the principal

witnesses at the proceedings on behalf of the Barnes Foundation. In the words of this Court, a “skeptic might” say that all of what has been orchestrated by PEW, Lenfest, Annenberg, Watson, and Harmelin, allowed them to be on all sides of the table without revealing the extent of conflicts to this Court. Given those conflicts, that skeptic might view the entire proceedings before this Court as being merely a prelude for an endgame where the Barnes collection finally ends up in the Philadelphia Museum of Art, presently chaired and generously supported by Mr. Gerry Lenfest. There was plenty of third party benefit to go around. Let’s look at the PEW’s application for change of IRS status from private foundation to public charity as well as the IRS Form 990’s filed by those involved.

1. Pew’s Application for Change of Charity Status

102. PEW head Rebecca Rimel testified that PEW’s involvement with the Barnes was “an exception to virtually every policy we have with respect to our criteria of supporting organizations,” She continued:

...So if a long-term solution is not forthcoming, we couldn’t do it because we would be in violation of our own policy and every other organization in the Delaware Valley would ask for the same kind of dispensation; major deficits, not able to balance their budgets, not a fundraising program that’s been successful, not able to earn revenue. To earn revenue is just as important as contributed income.....(Morning Proceedings of 12/11/03, N.T. pages 29,30)

103. Just before this testimony, Ms. Rimel volunteered her opinion that this decision on the Barnes, which violated PEW’s own guidelines, had nothing to do with PEW’s application to the IRS for a change from private to public charity status, as the application was “not based on anything that may or may not happen with the Barnes... It has no implications whatsoever.” (Morning Proceedings of 12/11/03, N.T. pages 29, 30) The

plain words of that application tell a very different story, emphasizing the central role of the Barnes initiative:

...The PCT (Pew Charitable Trusts) Division may be the only institution in Philadelphia with the credibility and the resources to work with the Barnes Foundation, the donors, the City agencies, and other interested parties to make the move happen. Most of the corporate, individual and small foundation donors do not have the infrastructure or expertise to oversee and administer the support for the project. These donors have confidence in the PCT Division's ability to oversee the funding and implementation of the project, and are willing to rely on the PCT Division to carry the project to fruition.

The Barnes project is a prime example of the valuable role that TPCT will play. Although the PCT Division can assist in planning and coordinating a project like this, it is difficult for the Trusts, as private foundations, to carry the project to completion by receiving and administering funding from other sources....

If TPCT receives recognition of its public charity status, it will assume the PCT Division's role in the Barnes Foundation project. **As a public charity, TPCT will be in a position not only to continue the PCT Division's role in planning and coordinating the project**, but also to receive grants and contributions from the Trusts and from other donors, and to hold and administer those funds until the Barnes project is completed. **Putting TPCT in this position presents a significant advantage because it allows TPCT not only to develop a plan and a vision for the project, but also to raise the funds and then administer the project to ensure that the plan and the shared vision are realized....** [emphasis added].

Going forward, TPCT's public charity status will put it in a position to build on and expand the role that the PCT Division has previously played in raising public support from foundations, businesses, governmental units and individuals for important civic and community programs and initiatives. Accordingly, TPCT will clearly 'be so organized and operated as to attract new and additional public or governmental support on a continuous basis' as required by Reg. Section 1.170 A-9(e) (3)(ii). (Internal Revenue Service Application of Pew Charitable Trust for Public Charity Status, filed December 30, 2002)

2. The Lenfest Foundation

104. An examination of the Lenfest Foundation's 990 for 2004 show \$50,000 paid for the Barnes relocation, another \$24,486 allocated and another \$31,250 funneled to the PEW for relocation of the Barnes. The 990 also reveals that of \$20 million pledged for the Philadelphia Museum of Art, an additional \$5 million has already been paid. Of course, Mr. Gerry Lenfest is Chairman of the Philadelphia Museum of Art. Given his levels of pledges and his fiduciary responsibilities to the Philadelphia Museum, it seems clear that it is not the Barnes, but rather the Philadelphia Museum of Art that is the real beneficiary of his foundation's alliance with PEW and Annenberg.

3. PEW

105. The PEW's 990 for 2003 lists \$39,755 to the Barnes for technical assistance, another \$64,738 for technical assistance and \$250,000 for general operations. The PEW 990 for 2004 lists \$1 million for general operations, \$116,213 for special technical assistance and another \$151,385 in special technical assistance.

4. The Annenberg Foundation

106. An examination of the Annenberg Foundation's 990s show some interesting connections and conflicts, none of which were brought to the attention of this Court.

107. The Annenberg 990 for 2002 reveals that Stephen Harmelin's law firm, Dilworth Paxson LLP was paid \$412,500 in 2002, the third highest expenditure listed by the Annenberg Foundation. When it came to its support of the Barnes, the Annenberg

Foundation also listed \$500,000 for fiscal year 2003 for operations of the Barnes, \$255,095 for legal costs for 2003 and another \$25,244 for legal costs for 2004.

108. In 2003, Annenberg again lists Mr. Harmelin's firm as among the five highest payees, at \$283,783. That year the Barnes was paid \$375,000 for continuing operations with another \$125,000 slated for 2005. Barnes legal fees were listed at \$243,416. Additionally, the 990 indicates a \$20 million pledge for the Art Museum.

109. In the 990 for 2004, Mr. Harmelin's law firm is again listed as one of the five highest payments for \$369,589 although there is a reference to payments as per the books of \$408,185.

110. As for payments to the Barnes for 2004, the 990 lists \$140,000 for legal, \$125,000 for operations and \$10,000,000 for continuing operations. A section pertaining to long term pledges and payments (paid through 2006 and planned thereafter) lists \$638,511 paid in legal fees and \$24,486 for 2006; \$10 million for relocation in 2007, \$625,000 for continuing operations in 2006 and \$320,000 in 2007.

111. Other payments include \$10 million for the Philadelphia Museum of Art.

112. In addition to references made earlier herein to the web of multiple connections of members of the Barnes Foundation Board, it is clear that its Board, particularly those who testified before this Court, do not meet the fiduciary standard of being solely and principally devoted to the interests of the Barnes Foundation and the preservation of its Indenture.

F. Third Party Payment of Barnes Legal Fees

113. The fact is that third parties were paying the Barnes Foundation counsel, former Judge Arlin Adams and the law firm of Schnader Harrison Segal & Lewis? In Ms. Rebecca Rimel's testimony she admits that she got Judge Adams involved in January, 2002. (Morning Session, 12/11/03, N.,T. Page 12) Query: whose lawyer was he?

114. Evidently seeking to underline the beneficence of these suitors as opposed to the inherent conflict presented, Deputy Attorney General Lawrence Barth asked the following question of Dr. Watson with respect to the Pew and Lenfest Foundations:

- Q. And have they underwritten, as well, the costs of the petition and the legal fees and professional fees involved in this proceeding?
- A. They certainly have, and absent that kind of support, we would not have been able to afford it.

115. Simply stated, there was no inquiry as to what third party underwriting of these Foundations meant in terms of this proceeding, let alone whether it was in the power of third party foundations to destroy another foundation.

116. There is also the matter of Pennsylvania's Rules of Professional Conduct, pertaining to conflicts of interest and problems sometimes inherent with respect to third party payment of legal fees. Since pertinent information was not shared with the Court, it is understandable why there was no inquiry on this matter posed by this court.

117. Regardless of whether or not there was informed consent by the PEW, Lenfest and Annenberg foundations on the one hand and the Barnes on the other, there needs to be an

examination of what took place with respect to third party payment and retention of counsel. After all, it was the benefited third party non-profits which retained counsel to represent the Barnes and at the same time to destroy the Barnes Indenture, all in contravention of the Settlor's specific intentions and choice of location. It is submitted that this is not a matter that can be cleansed by "informed consent."

G. The Barnes Foundation's Failure to Meet the Legal Standard of a Non-Profit

118. Foundation President Watson stated that "Our Board would never relinquish our governance and our control over the Foundation." (Morning Proceedings of 12/08/03, NT. Page 70, 71). His actions belie that statement; actions that culminated in the Barnes-PEW/Lenfest Foundations Agreement, ripping apart the very essence and integrity of the Barnes Foundation, all done in the name of money that he and his fellow Board members declined to raise.

119. The Pennsylvania Nonprofit Corporation Act; 15 Pa. C.S.A. Section 5712, states that "A director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the Board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances."

120. It is black letter law that a fiduciary is supposed to display an undivided loyalty to the trust that for which he is responsible. This is hardly the case when it comes to the Barnes Foundation. There was no inquiry into questions of divided loyalty.

121. These definitions of the term fiduciary seem to have eluded Stephen Harmelin, Dilworth Paxson Managing Partner and Barnes Foundation Board Finance Committee Chairman, in his testimony, where he speaks not about his affirmative responsibilities, but about doing the least harm. “Well, when you’re charged with, you know, **sort of a fiduciary responsibility**, what you’re constantly doing is weighing the alternatives to do the least harm in your own heart and mind and based upon the information that is available.” [emphasis added] (Hearing of 9/23/03, Volume VII, N.T. page 31)

122. Equally troubling are Mr. Harmelin’s references to a corporate takeover as he referred to the Barnes Foundation as “in, quote, play.” (Hearing of 9/23/03, Volume VII, N.T. page 31). In fact the Foundation was “in play,” placed there by a compromised and conflicted board, that included Mr. Harmelin, also managing partner of a law firm that had long represented the Barnes Foundation, as well as representing the Estate of Dr. Barnes’ nemesis, Walter Annenberg, the Annenberg Foundation and other Annenberg entities.

123. Under Pennsylvania law, the duty of a fiduciary is to administer the estate’s assets solely in the interests of the beneficiaries. A fiduciary relationship with another involves the duty to act solely in the interest of that person.

124. Moreover, the Barnes Board members are agents of the Foundation who are required to be loyal in all matters affecting the subject of that agency, and where the agent

must act with the utmost good faith in the furtherance and advancements of the interests of their principal, the Barnes Foundation. A fiduciary may not engage in self-dealing with the property entrusted to him/her for himself/herself or others.

125. Given the issues raised herein, it is appropriate now for this Court to make an inquiry as to the nature of the conflicts present and the fact that they tainted the outcome of prior proceedings and to take remedial actions including removal of Barnes Foundation Board members. Sufficient reason for removal exists when a fiduciary's personal interest is in conflict with that of the estate.

VII. An Examination of the Record in Light of New Evidence

126. This Court has observed that it would not be surprised to see Barnes administrators back in this court seeking relief from the likely consequences of their plan and his decision to authorize it. In fact, the Barnes should already have returned to this Court, not from unqualified success, but because of things promised that have not come to pass; i.e. articulated assumptions and expectations set forth in support of the Barnes Foundation Petition initially filed in September, 2002 that gave rise to this Court's subsequent decisions of January 29, 2004. Simply stated, the Barnes said one thing in Court proceedings to get the relief desired, and then did otherwise.

127. The testimony in support of that 2002 Petition can be characterized in one word that recurs – “hope.” For example, during the testimony of Kimberly Camp, this Court asked her to reaffirm Bernard Watson's testimony that “the hope at the moment is that if the charities are successful in raising the \$150 million, that \$100 million would be dedicated to

the building and moving the collection, leaving an endowment of \$50 million, right ?”

(Hearing of 12/10/03, N.T. 92, 93)

THE COURT: But because you are the honest person you are, you’re telling me there’s a lot of hope out there, but there’s also a big unknown involved in this, true?

THE WITNESS: Yes.

THE COURT: A sceptic [sp] might say, “Well, we’ll do this in pieces, then. if we get the Court to say things are bad enough and you can move the collection to Philadelphia, if the hope does not bear out, then the next step is a petition that lets you sell the Gallery to get rid of that albatross, gain some capital, and ultimately will sell the whole thing”—you understand a sceptic [sp] might say that ?

THE WITNESS: Yes.

(Hearing of 12/10/03, N.T. 94-99)

Well, it is 2007 and Ms. Camp, along with her hopeful persona, is long gone.

128. Another hopeful, but non-committal witness was PEW Charitable Trusts’ Ms. Rebecca Rimel. The Court tried to pin her to a specific commitment for future funding to which the Judge responded: “And your optimism, may be well placed, but I think you would concede, as least at this point, it’s speculative; agreed?” Ms. Rimel’s answer was “Yes.”

(Hearing of 12/11/03, N.T 76). When it came to her avoiding answers, the Court said “You’re as smooth as they get” and “That was an artful dodge also.” (Hearing of 12/11/03, N.T. 77, 78)

129. Another colloquy between this Court and Ms. Rimel went through the time frame attendant to getting plans together, naming an architect, preparation of feasibility studies, the giving of public land, razing structures on it, and subsequent construction:

THE COURT: Do you agree with me that, under the most optimistic of scenarios, we're probably at least three years away from opening any doors on the parkway?

A. Three is ambitious. Four is realistic.

THE COURT: Three is ambitious, is it not?

A. Yes.

THE COURT: If history is prolonged, then for at least the next three years, one has to expect that this Foundation will be operating at a deficit as it has before; agreed?

A. Not necessarily.

THE COURT: Tell me why it changes during that three to four-year period we're discussing.

A. Because its whole future is different. I believe their ability to raise funds for general operations will go up exponentially because people will understand the long-term plan and the stability that this institution will have and the educational programs that it will be able to offer. I have at least three donors in the wings who have a particular interest in educational programs for youth.....
I should also say that many donors are already eager to start paying on their pledges.

THE COURT: And your optimism may be well placed, but I think you would concede, at least at this point, it's speculative; agreed?

A. Yes. ... (Morning Session 12/11/2003, N.T. pages 72-76)

130. It is now more than four and one half years since the filing of the Barnes Foundation's petition to facilitate the Barnes-PEW/Lenfest Agreement. And four and one-half years have shown these results: no plans; no budget; no feasibility study; no architect retained, no "giveaway" of public land; no razing of any building on that public land; and

certainly no “exponential growth” of fundraising for operations, as the 2006 proceedings showed that the Barnes can’t even pay for routine maintenance as the facilities continue to deteriorate. In addition, despite testimony about benefactors in the wings, there is no Director of Education, nor any expanded programs for art or horticulture.

131. It is appropriate for this Court to exercise its continuing jurisdiction over this matter and re-examine what was testified to and promised in light of what has been accomplished. Let us examine them in the rough order that they were presented in the proceedings.

A. An Expanded Board

132.. The very first argument set forth in Barnes Foundation attorney, Judge Adams’ opening was that the Barnes’ “ability to raise revenues and meet its expenses is seriously limited by the small size of its Board of Trustees.” (Morning Proceedings of 12/08/03, N.T. page 10)

133. Witness after witness, including the Barnes Foundation’s fundraising expert, Ms. Maureen Robinson, opined that the small number of Board members limited the Barnes’ ability to attract dollars. Time and again, the mantra was that the size and structure of the Board severely limits its ability to fulfill its mission. The Court approved the Board revisions in its opinion of January 29, 2004.

134. In the words of Foundation Attorney, Judge Arlin Adams, “Barnes could not have foreseen the complicated, competitive and sophisticated world in which nonprofits now

operate, nor the range of expertise and influence that the members of the governing Boards must now process.” (9/21/04. N.T. page 5)

135. The Court relied on the testimonial imperatives of Ms. Robinson and Ms. Rebecca Rimel of the PEW, that there was a need for an expanded Board of “additional trustees to assure potential donors to the Foundation that its Board is ‘of absolute exceptional quality and up to the task of managing a very complex institution.’” (N.T.12/11/03, morning session, page 27.) This Court went on to state:

In light of the testimony summarized, *supra*, we find ample support for the proposal that the Board of Trustees of The Foundation should be expanded. It is clear that the stewardship of a modern-day nonprofit must rest on many shoulders. It is imperative that the trustees have wide-ranging experience, expertise, and contacts, and the ability to attract donors of substance. A Board of only five trustees, no matter how talented and dedicated the individuals may be, cannot meet the enormous responsibility of carrying The Foundation into the twenty-first century. (Opinion of Judge Ott, 1/29/04, page 9)

136. While an expanded Board was portrayed as being absolutely critical and dire, those same proponents have not bothered to secure a full fifteen member Board named. As of now, only twelve have been named.

137. This Court needs to review what has transpired with respect to the fundraising abilities of the Board, particularly in light of the hearing of 2006 which showed that despite the relief that this Court granted, the Barnes Board still failed to produce enough money for a routine paint job.

138. Failure to have a full Board in place shows a contemptuous disregard for the arguments proffered to this Court as well as a disregard for the expectations of this Court. It

conveys an attitude and approach that a party can say one thing in court to obtain a desired result and then do another thing afterward

B. Dire Situation

139. The second argument set forth in Barnes Foundation attorney, Judge Adams opening was that “The Foundation’s current physical [fiscal] situation is dire and puts at risk its ability to fulfill its primary purpose and, indeed, it threatens its survival.” (Morning Proceedings of 12/08/03, N.T. page 10) The argument was that no money could be raised for a Barnes collection in its present location.

140. What was proposed was a move, without taxpayer dollars, costing in excess of \$150,000,000 to plug what was a deficit of 1.2 million dollars. Now we can add into the mix \$107 million of State taxpayers’ money and another \$10 million of Philadelphia city taxpayer funds, annually estimated for the temporarily relocation of what may be an immovable Youth Study Center.

141. According to an affidavit signed by former Executive Director Kimberly Camp, “Deloitte & Touch projected that The Foundation’s unrestricted expenses will exceed its unrestricted income by more than \$800,000 in 2002 (excluding additional expenses of almost \$600,000 that Deloitte & Touche estimated will be incurred but which were not included in The Foundation’s budget). (Paragraph 22, Declaration of Kimberly Camp, dated September 3, 2002)

142. The court proceedings did not evidence the fact that there were much less drastic options available to plug what Deloitte and Touche established as being a \$1.2 million

deficit. Instead, the Barnes Foundation proposed plugging the hole with a multi-hundred million spending spree. While this Court approved the option of the move, the clear wording of the Order implied that the Barnes Foundation could, and perhaps should, pursue less drastic options. An alumni fundraising drive, which would be a logical first step, was not even conducted.

143. At this point, neither these Petitioners, nor this Court know the projected costs of the total package for the move and for maintenance of the three-campus model. To the best of these Petitioners' knowledge, no study has been done to confirm the rosy projections represented to this Court.

144. Again, in light of the subsequent events this Court needs to conduct an inquiry.

C. Maintenance of Central Purpose

145. The third argument set forth in Barnes Foundation attorney Adams' opening was that "the Foundation does not seek alteration of the central purpose and thus maintains that the doctrine of *cy-pre* would not be applicable....." (Morning Proceedings of 12/08/03, N.T. page 17)

146. The Barnes Trust Indenture includes the statement that "Donor (Albert C. Barnes) desires to endow said art gallery and arboretum to the end that the educational work for which Donee (the Barnes Foundation) is organized may be adequately accomplished."

147. Given the fact that the Barnes is an historic art and horticulture educational institution, have the ensuing years since this Court's approval brought about enhancement of that "central purpose: of education," or as Petitioners contend, continued decline?

148. In light of its continuing jurisdiction, this Court needs to reopen proceedings to determine whether in fact there has been enhancement or continued decline in serving that central purpose of the Barnes.

D. Foundations to the Rescue

149. Barnes Foundation Chairman Dr. Watson claimed that the Foundations had agreed to provide financing in excess of \$3 million over a two year period for operating expenses.

150. He also stated that "The fact is, we have pledges of approximately a hundred-million dollars already. And that is primarily local money." (Afternoon Proceedings of 12/08/03, N.T. page 143) He testified further that the Barnes Foundation "needs \$4 million a year to break even," if the art collection is moved to Philadelphia. (Afternoon Proceedings of 12/08/03, N.T. page 148)

151. PEW head Rebecca Rimel testified that with the September, 2002 Barnes-PEW/Lenfest Agreement, some \$3.1 million in bridge financing would be provided, for two years from September of 2002. (Morning Proceedings, 12/11/03, N.T. page 11) She testified that this all goes back to Dr. Watson and her meeting in 2001.

152. Ms. Rimel announced that fundraising was complete on May 16, 2006, while acknowledging that there were cost increases. Nonetheless, a Barnes supposedly flush with

cash in July, 2006 told this Court that it lacked money for basic upkeep, routine maintenance, such as paint job.

153. Moreover, if fundraising was such a smashing success, the question recurs as to why it was necessary for Ms. Rimel and the Barnes to include \$25 million in grant monies from the State, referred to as “one of the largest such grants ever dispensed from Harrisburg.” (“Pa. gives a \$25 million boost to the Barnes,” *Philadelphia Inquirer*, March 29, 2006).

154. There has been no indication of exactly how much money has been provided and whether that amount has been sufficient. Again, given the lack of care and attention to the mission and physical condition of the Barnes, together with this Court’s exasperation in the July, 2006 proceeding, this “fundraising success” has not been evidenced.

155. This Court, in its oversight capacity, needs a full accounting of the finances of the Barnes Foundation since its January, 2004 Order

E. Approval of Petition Would Boost Education

156. The fourth argument set forth in Barnes Foundation attorney, Judge Adams’ opening was that “If our petition is granted, the Foundation has every intent to accommodate both interests by setting aside at least as much time for classes as now exists and providing as much of an opportunity for educational public access as is possible without infringing on those classes.” (Morning Proceedings of 12/08/03, N.T. page 19)

157. William Phillips, Sr. a student of the Barnes going back to 1941, described education at the Barnes, which stands in distinction to the typical museum’s educational program: “The Barnes Foundation is a gradual immersion into a method for seeing that takes

a lot of time. A lot of time. It's not for people who pass by and are charmed by a nude picture or an outdoor scene." (Afternoon session of 12/11/03, N.T. pages 72)

158. It is these Petitioners position that nothing has been done in the way of enhancing educational programs and that in fact they have deteriorated. Again, Attorney Adams' assurances have proven to be hollow. The position of Director of Education at the Barnes Foundation has been vacant since the departure of Kimberly Camp. Enrollment is down as well.

159. Now is an appropriate time for this Court to review the specifics of those programs and classes, both as to what is being conducted and what is planned in terms of preserving the discrete educational program of the Barnes. Will the art program remain as it has been conducted or will a new location require the program to incorporate such other works, such as the Philadelphia Museum of Art's new houseguest, the Rocky statue?

F. Deaccessioning

160. As this Court has recognized, the Barnes Foundation may sell any of its art not protected by the Indenture. Yet, witnesses for the Barnes Foundation strenuously objected to deaccessioning non-gallery art during the September 2004 hearings, preferring instead to be "saved" by the foundations. As mentioned herein before, recent events cast a new light on the integrity of the saviors of the Barnes Foundation.

161. The so-called "public outcry" over the proposed sale of Thomas Eakins' painting "*The Gross Clinic*" was a charade, coordinated by the local art establishment, and

included none other than the Pew, Lenfest and Annenberg Foundations. These foundations came to the rescue of *The Gross Clinic* by donating tens of millions to preserve that painting in *its* home, Philadelphia. Thus, the “patron saints” of the Barnes Foundation helped save one painting for \$68 million, a price far beyond what it would cost to save a thousand paintings in Merion and keep them in *their* rightful home.

162. Deaccessioning made that feat possible. In order to purchase *The Gross Clinic*, the Pennsylvania Academy of the Fine Arts sold another, very significant Eakins painting, *The Cello Player*. The Philadelphia Museum of Art announced that it will be deaccessioning artworks to pay its share of *The Gross Clinic*.

G. The Sale of Non Gallery Assets

163. This Court’s Order of March 17, 2001 granted permission to sell non gallery works, noting that much of the work had been in storage for 50 years. Board Chairman Dr. Watson recognized that the contents and grounds of Dr. Barnes’ country residence, Ker Feal, are not tied to the indenture restrictions and are also available for sale. Yet, without the benefit of any financial data, he dismissed a sale out of hand. “However, selling that would not come near to providing the kind of income or endowment that we would need to address our long-term problems as a Foundation. We don’t know how much that property would bring, but we know it would not come near to solving the kind of long-term financial problems that we have.” Clearly, having no familiarity with Ker Feal’s long lack of use, he chose to refer to it as a “living history museum” (Morning Proceedings of 12/08/03, N.T. page 67), even though it is not open to the public and is not used as part of either the Barnes art or horticulture programs.

164. “Experts” were significantly apart in terms of valuation of the Ker Feal collection and real estate when they testified in 2004. Note: paragraph was deleted.

165. As to the sale of non-gallery assets at Ker-Feal, the Barnes Foundation presented an appraiser who did a limited appraisal and found that the 2,734 objects at Ker Feal were worth \$725,209. That appraiser was unaware of the fact that the Barnes had done its own valuation of the collection that came in at more than \$4 million. (Hearing of 9/21/04, afternoon session, pages 21, 22)

166. These Petitioners believe that the \$725,000 number would be surpassed many times over, given the fact that one single plate by 18th century potter Gottfried Aust sold in June, 2007 for over \$100,000. Ker Feal has two of them, as well as plates by an important pupil of his. Moreover, there are dozens of pieces of pottery by Jean Renoir. At the last hearing, much of the pottery collection at Ker Feal was described as “common” and “not necessarily valuable.” (Hearing of 9/21/04, afternoon session, page 34) In reality, Ker Feal is regarded as the third most important pottery collection in the country, after those at the Philadelphia Museum of Art and Winterthur. This is to say nothing of Ker Feal’s very valuable collection of 18th and 19th century American furniture.

167. There was extensive testimony about the valuation of paintings that are not subject to the restrictions of the Barnes Indenture. Since the time of the hearings before this Court, the entire art market has exploded exponentially with no end in sight.

168. At this juncture, it is important for the Court to revisit and have revalued Ker Feal and other non-gallery assets as a possible component of a financial solution.

H. The Neighbors

169. Former Executive Director, Ms. Kimberly Camp testified that the move to Philadelphia was necessary because it was her expectation that the neighbors would continue to be a problem and posed a “hostile environment” (Hearing of 12/10/03, page 53). This oft-repeated argument about problems posed by the neighbors is nothing more than a smokescreen for the excuse to move the Barnes art collection to Philadelphia.

170. The hearing failed to include the fact that for more than 70 years the neighbors lived in perfect harmony with the Barnes Foundation. It should also be noted that the Barnes was solvent, as well, with twenty-five to forty thousand visitors a year, no gift shop, an entrance fee of \$1.00 and no parking lot.

171. Beginning in late 1995, with the great push to commercialize the Barnes Foundation, the neighbors gathered to discuss matters and exercise their first amendment rights with respect to such commercialization. As a result they were sued by the Barnes for conspiracy to discriminate along racial lines and the federal courts saw this litigation for what it was; oppressive and totally without basis.

172. Hearings of the Lower Merion Township Zoning Board were a result of the Barnes Foundation seeking permission to create a parking lot. There were elements of the original proposal that were problematic: the lot's location in the front of the building, possible water run-off, increased impermeable surfaces, and destruction of portions of the Arboretum. Since those hearings eight years ago, with the construction of a parking facility at the rear of the property and with the disappearance of large tour buses, the neighborhood has been at ease with the reservation system and the use of shuttle buses. In fact, there could

be no greater endorsement of the Barnes in its present location than the neighbors' initiative to have Lower Merion Township's increase visitation limits.

I. The Township of Lower Merion

173. Another straw man put up by the Barnes Foundation is that the move was necessitated by virtue of alleged obstructionism of Lower Merion Township. Board Chairman Watson testified that he concluded that it was necessary to move because of Merion's restrictions. (Morning Proceedings of 12/08/03, N.T. page 79) Ms. Kimberly Camp testified that "Ongoing discussions with the township commission and the township commissioner have suggested there is absolutely no will to work with us to try and change any of the existing restrictions. " (Afternoon Proceedings of 12/10/03, N.T. page 10)

174. A review of the actual history indicates that while the Township has been willing to accommodate the Barnes, the Foundation historically has not bothered to even comply with applicable zoning decisions, instead simply ignoring those requirements and attempting to proceed.

175. Since the zoning decisions of 1996 and 1998, the traffic in the vicinity of the Barnes has been rationalized. There has in fact been a marked increase in visitation without complaint by the neighbors.

176. Since those decisions, that is for almost ten years, the Barnes has never applied to the Township for increased visitation or any relief whatsoever despite professed concerns about the need to increase attendance. Ironically it was the neighbors— some of whom include Petitioners herein, never the Barnes— who took the initiative to have Lower

Merion Township Commissioners increase visitation. On July 18, 2007, the Lower Merion Township Board of Commissioners passed an Ordinance amending its zoning code, that permits up to 140,000 visitors to the Barnes Foundation. This more than doubles the number of annual visitors, and is in addition to elementary and secondary school students who are not counted against the total, as is the current Barnes policy. This significant increase in visitation should cover the purported annual financial shortfall of the Barnes.

J. The Site in Philadelphia

177. Without indicating any specific location, Board Chairman Watson testified of a new Parkway site for the Barnes, indicating that the property would be donated and that money being raised would go to the construction of a new building. (Morning Proceedings of 12/08/03, N.T. page 81) Of course this testimony is belied by the Commonwealth appropriation that was already in place.

178. There has been recent focus on the site occupied by the Youth Study Center, which is the City's sole juvenile detention facility that has some 5,400 youths pass through every year. However, media reports indicate that it was the administration of Philadelphia Mayor Ed Rendell which picked the Youth Study Center as the site for a relocated Barnes.

179. There are a plethora of problems that have prevented Philadelphia's city government from obtaining a site and building a substitute facility for the long-troubled Youth Study Center, which should have been completed by now. Notwithstanding, City government has no apparent problem with proceeding to lease the site to the Barnes Foundation. Perhaps there is a creative mixed use of this site to accommodate both a correctional facility and an art gallery.

180. Given the City's history, it is more likely that any action by the City with respect to the proposed site of the Barnes facility remains an empty gesture; too little and too late. Moreover as already noted herein, the Ordinance passed by City Council, with other steps still not taken, violates the express terms of the Barnes-PEW/Lenfest Agreement that called for land to be transferred to the Barnes Foundation. That Agreement and testimony before this Court indicated that what was to be provided would amount to a fee interest. Instead, all the Barnes is getting, under the Philadelphia ordinance, is a sub tenancy in the land.

K. Replication

181. Testimony was inconsistent when it came to whether the Barnes gallery would be replicated. Board Chairman Bernard Watson testified about a sacrosanct commitment to replicate the gallery and ensembles as they are at present. (09/27/04, NT. p. 80) But then fellow Board Member and attorney Stephen J. Harmelin could not have been more inconsistent and non-committal when it came to the Court's questions characterizing replication of the gallery. There was also the testimony of Executive Director Kimberly Camp who testified that accurate replication of the gallery was nonnegotiable and that dimensions of the new gallery would be the same as in the existing gallery. (Morning Proceedings, 12/10/03 N.T. page 89) Later, when asked if she had publicly stated that they might be enlarged by some twenty-five to thirty percent, she admitted that she had. (Morning Proceedings, 12/10/03 N.T. page 93)

182. Further equivocation was evidenced about the fate of "*La Danse*," the massive, site-specific mural by Henri Matisse designed and created for the Barnes

Foundation Art Gallery in relation to the views outside to the arboretum and to the paintings that hang in the main gallery. Considerable scholarly work verifies the fact that Matisse had very specific intentions about his work being one with the gallery building, and that he designed the mural in relation to the paintings inside and to the surrounding arboretum outside. Notwithstanding, Ms. Camp equivocated aloud:

- A. I don't know, maybe one piece stays there. The idea behind this petition is to create the kind of situation where the Foundation can continue to do its work. There may be some shifts in it. Maybe *La Danse* stays there **so people can see it in the environment in which it was intended**, [emphasis added] and maybe a replication of it goes in a space that might be downtown where it says to people, this is a replica of *La Danse*. It was initially designed for this space and you can see it over here and the shuttle leaves every fifteen minutes. (Afternoon Proceedings of 12/09/03, N.T. page 112)

183. Her admission that *La Danse* was designed for the space speaks volumes about the integral importance of the present locale and the impossibility of its replication, buttressing the testimony of long term Barnes Foundation teacher Harry Sefarbi who characterized the entire move initiative as an attempt at Disneyfication. It is indisputable that not only *La Danse* but every object of art, fine and decorative, was intentionally situated in its existing environment.

184. The question remains for this Court as to whether this sacrosanct commitment to replication is being, or more fundamentally, can be followed. Will a new facility include:

- the footprint and dimensions of the galleries, halls, and balconies that display the artwork;

- the walls in a number of galleries that were specially designed at other than right angles to each other, to enable the art on the walls perpendicular to the light emitting windows to capture additional ambient light;
- the bas relief frieze that forms a boundary between the walls and the ceiling around the entire main gallery;
- the exterior and its entrance containing a columned alcove with specially commissioned Enfield tiles;
- the windows and availability of natural light and provision of trees, grass and gardens presently visible and integral to the fine art and horticultural experience;
- the display of not only the paintings, but hardware, tapestries and other artwork;
- the upstairs rooms heretofore known as the “Dutch Room” and “Mezzanine,” obliterated to facilitate installation of the elevator, and recreation of the “Directors” room ?

185. The Barnes Foundation’s answer to replication is: to strip the contents of the intimate Merion gallery; cocoon them in a building over seven times the size of the original; locate the gallery on a busy city thoroughfare; and sever the art from the tranquility of its historic gallery building and arboretum. This was the setting specifically selected and designed by Dr. Barnes for his aesthetic masterpiece, which Henri Matisse called “the only sane place” in America to view art.

186. The words of Mr. Harry Sefarbi remain on the affect the move would have

A. As I said before, any changes changes everything. You could make a complete facsimile of the gallery and move it downtown, but then it would be a facsimile. If you moved the Taj Mahal to the Parkway, would it be the Taj Mahal? People would say, you should go to India if you want to see it. It wouldn't be there. It would just be a different experience. Like Disneyland ... It's a complete betrayal to do anything to those paintings, to the way it's set up. (Afternoon session of 12/11/03, N.T. pages 48-51)

187. Now is the time for this Court to define what was characterized as a "non-negotiable" issue: "replication." A hearing on what is intended versus what is proposed is in order and a determination is necessary as to whether "replication" is even possible in the proposed venue?

L. Costs of Relocation

188. The Barnes Foundation produced a construction consultant who came to the conclusion that a new Barnes on the Parkway could be done for \$100 million, a number coinciding in amount to the "immaculate appropriation;" the new building to be between 120,000 and 150,000 square feet, as opposed to the gross square footage of the present facility which is 20,000. The amount of space actually allotted to the display of art in Merion is approximately 10,000 square feet, divided among twenty-three rooms. The analysis as described by Mr. Perks was all 'ball park,' really only extrapolating per square foot costs of construction. In his words, "We concluded four to five hundred dollars a square foot would be the right amount and we divided that into sixty million and concluded that we could build a 120 to 150,000 square foot facility." (9/21/04, N.T. pages 141,142) This approach is essentially a back-of -the envelope analysis.

189. What was being posited was a new facility of 120,000 to 150,000 square feet; a far cry from the existing 20,000 square foot space.

190. Estimates and indexes used to conclude that \$60 million would be sufficient for construction of a new facility were low and are now woefully out of date. Recent increases in construction costs have far outpaced historical averages and, further, the project is now at least three years behind the schedule outlined in testimony. The cost for demolition, site preparation, fees, moving, etc. should likewise be re-established and compared to the previous projections. The Contingency Fee of 10% as presented was a low estimate.

191. Given the lack of site-specific construction costs, now is an appropriate time for this Court to be satisfied about the nature of the construction budget and what is contemplated for the new facility.

M. Overall Budget

192. It was repeatedly emphasized that swift aggressive action was and would be taken to raise funds; words to the effect that the organization needed to “be very swift out of the blocks” (9/34/04, N.T. John Callahan, Jr., page 19). Now the years have passed on and so has Ms. Camp. Moreover, as noted by a *Philadelphia Inquirer* story of May 16, 2006, Ms. Rimel announced that the PEW would not attempt to raise further funds despite the fact that insufficient money had been raised to carry out the project.

193. This Court, pursuant to its continued jurisdiction, needs to see what funds have been raised as well as to review the budget specifications. The question remains as to how much is truly necessary to cover a deficit, which according to Deloitte was only **\$1.2 million**. Now is an appropriate time for this Court to see if those hopes and promises have

been actualized or whether they were empty expressions designed to lead the Court to grant the relief requested. The question is whether there are sufficient monies raised and whether more cost-effective alternatives should be pursued to keep the collection in its present locale.

VIII. Recent Events

194. Recent events have shown that the Barnes Foundation Board continues to ignore its fiduciary responsibilities. First, there is the recent financial offer of Montgomery County that would have satisfied this Court's concerns with respect to the size of endowment necessary to sustain the Barnes in its present location, at a fraction of the cost of the plan undertaken by the Barnes Foundation Board. Second, the Barnes Foundation was similarly dismissive of the July 18, 2007 Ordinance passed by the Township of Lower Merion increasing the number of visitors to a level that would stabilize the Barnes finances. Third, there is the matter of the historic nature of the Merion grounds, buildings, and collection as a collective entirety which has been ignored.

A. Montgomery County's Offer – Spurned

195. Montgomery County has recently made an offer to purchase and lease back the real estate and buildings owned by the Barnes in Merion and in Chester County which would have provided the endowment that this Court felt was necessary, as well as allow the collection to remain in its present location.

196. On June 12, 2007 an offer was submitted to Barnes Foundation Board Chairman Bernard Watson requesting that the Barnes agree to enter into negotiations with Montgomery County, whereby the County would purchase the land and buildings owned by

the Barnes Foundation for a purchase price equal to or in excess of the \$50 million that this Court felt was necessary for a sustaining endowment. Ker-Feal would be able to remain as open space. This would be accomplished by the Barnes Foundation entering into a long-term lease with Montgomery County. This proposal, not relying on taxpayer funds, stands in stark contrast to the hundreds of millions needed for the move, the \$107 million of Pennsylvania tax payer money, and the attendant millions of Philadelphia taxpayer funds necessary for a temporary Youth Study Center.

197. By letter dated June 18, 2007, Dr. Watson dismissed Montgomery County's offer out of hand reaffirming the Barnes commitment, not to its indenture or fiduciary responsibilities, but to its "mission;" namely, the move to Philadelphia. Then, claiming that the Barnes has previously considered all "reasonable proposals presented to us," Dr. Watson failed to set forth what was unreasonable about the proposal. Fiduciary responsibility requires the Barnes Board to explore proposals such as the financing plan presented by Montgomery County. In fact, the Barnes Board should have initiated that proposal. Clearly, a bond issue is envisioned for the Philadelphia site. Given the broad resources of the Barnes Foundation, with an art collection valued at over \$20 billion, it was incumbent upon its members to originate and present the very same proposal to Montgomery County in the first instance. Finally, Dr. Watson mischaracterized what has occurred to date as "binding commitments" which make the move of the gallery collection to Philadelphia "irreversible." To the contrary, nothing that the Barnes Foundation has done is binding, nor is it irreversible. No architect has been selected. No city site is available. There are no architectural plans. There is no feasibility study. The fundraising is not complete. Costs continue to escalate. The Board is not in place. The Barnes can not claim that it has relied to its detriment. An

elementary understanding of fiduciary responsibility would have compelled Dr. Watson and his Board to explore Montgomery County's offer as it was clear that this Court simply permitted the move as one alternative. It did not mandate the move.

198. Aside from the glaring public policy questions of priorities when it comes to taxpayer and foundation funding of the move of an art collection and the breaking of a trust, given the deplorable financial state of programs that government is responsible for, there is something absurd about plugging an annual of \$1.2 million deficit with a change of locale that could cost in excess of \$300 million dollars in public and private funds and that will saddle the Foundation with an annual deficit of \$4.2 million. Accordingly, given the option posed by Montgomery County, this Court must intervene

B. The Township of Lower Merion's Ordinance Increasing Visitation – Ignored

199. As noted previously herein, on July 18, 2007, the Lower Merion Township Board of Commissioners passed an Ordinance amending its zoning code, that permits up to 140,000 visitors to the Barnes Foundation by expanding visitation to six days per week at 450 visitors per day plus 100 students per day. This more than doubles the number of annual visitors, and is in addition to elementary and secondary school students who are not counted against the total, as is the current Barnes policy. This significant increase in visitation should cover the purported annual financial shortfall of the Barnes.

200. In a response to a July 19, 2007 letter from Lower Merion Township Commissioner Brian Gordon which enclosed the provisions, Derek Gillman, current Executive Director and President responded on August 3, 2007 in lockstep with Dr. Watson. The mission is the move, not fiduciary responsibility.

C. Eligibility for Historic Designation – No Reply

201. The Barnes Foundation Board has not viewed the Barnes as a cultural and historical asset worth preserving in its collective entirety. In contrast, historic preservation professionals, experienced with the National Historic Landmarks Program of the United States Department of the Interior, have indicated that the collection, gallery building and arboretum, as a unified whole serving the educational purpose of the Barnes Foundation, would qualify for National Historic Landmark status.

202. Petitioner Friends-2 has commissioned the Cultural Resource Consulting Group (CRCG) to perform an assessment for National Historic Landmark Eligibility for the Barnes Foundation. In its report dated June 5, 2007 CRCG indicates that from its inception, the 13-acre Arboretum of the Barnes Foundation was an integral part of the institution.

Referencing the Indenture of Trust. Dr. Barnes's testified as such:

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 and 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 from the case, Barnes Foundation v. Keely et al., Appellants No. 268 Supreme Court of Pennsylvania, January 30, 1934.)

203. Citing the Trust Indenture, CRCG emphasizes that it is the totality of the art collection, gallery, and thirteen acre arboretum, all serving the educational purpose of the

Barnes, that makes it eligible for the National Register of Historic Places as well as for listing as a National Historic Landmark.

204. By letter dated July 31, 2007 Friends-2 has been advised by the U.S. Department of Interior that the Barnes Foundation can be considered eligible for National Historic Landmark Status based upon the CRCG eligibility assessment, and that the Department looks looking forward to reviewing a draft nomination.

205. By letter of August 8, 2007, Friends -2 transmitted this news to Dr. Bernard Watson, indicating that National Historic Landmark status is the highest level of cultural and historical significance conferred by the US government, opening up funding opportunities that are otherwise unavailable. Friends -2 indicated that all that was necessary from the Barnes Board was a simple letter of support, and that if funding was a problem for the Barnes, then Friends-2 would assume all costs associated with the nomination process. A response has not been forthcoming.

206. Again, as a matter of fiduciary responsibility, there is no justification for the Board of the Barnes Foundation not to have pursued this important option, not only for the importance of historic preservation in and of itself, but also for the attendant funding opportunities.

IX. The Mission is the Move and the Problem is the Board

207. The Barnes Board's repeated failure to pursue less drastic and eminently workable options including the Montgomery County solution, Lower Merion Township

solution, and the historic preservation option, demonstrate that the mission is the move, not financial solvency.

208. As has repeatedly been said by this Court over the years, the problem has been and remains the Board itself; a board unable and unwilling to do its job. The problem is a Board that has affirmatively violated its trust and needs to be replaced as such by this Court.

X. The Need for a Different Approach

209. At the end of its opinion of December 13, 2004 permitting the move, this Court expressed a final note of uncertainty; stating, “We will not speculate about the nature of future petitions that might come before this court; however, we are mindful of the vehement protestations, not so long ago, that The Foundation would never seek to move the gallery to Philadelphia, and, as a result, nothing would surprise us.” This statement, combined with the expressions of a clearly frustrated Court in 2006, underline the need for a tack different from that taken by this Court on behalf of a Barnes Foundation Board which time and again has proven to be adrift from its fiduciary mission and devoid of credibility.

210. In light of matters that were not brought to the Court’s attention, as well as subsequent events and the passage of time, Petitioners assert that Court must exercise its continued supervisory role over this Foundation. This is especially critical given the inaction of the Commonwealth Attorney General. This is simply one indication of how the Attorney General of Pennsylvania simply abdicated its responsibility of enforcing the sanctity of trusts.

211. This Court has allowed the proposed changes without making a decision about whether fault lay with the Barnes Foundation Board. These Petitioners are prepared to demonstrate that the Foundation Board had unclean hands, that it is no accident that it has not been able to raise funds, as it was too busy squandering those funds. At no time has the Barnes Foundation Board seen fit to pursue actions against prior trustees for breach of their fiduciary duties and the recoupment of squandered funds. Instead, the current Foundation board has adopted a policy of conveniently not looking back, sitting on those hands, and imploding the Barnes. A hearing conducted by this Court on this issue is in order.

212. It is time for this Court to bring the Barnes back from the brink. The only hope is this Court. Clearly there was material evidence not brought to its attention at the time that it made its decision that could have produced a different outcome. If nothing else, the passage of time from this Court's permission of the move dictates that this Court utilize its continuing supervisory powers to determine whether or not the rosy predictions of petitioners have been validated or whether they were merely the articulation of aspirations designed to gain the approval of the Court, only to be subsequently forgotten.

213. Petitioners contend that the progressive chipping away at the Barnes Indenture has done nothing to foster the profitability or responsible stewardship of the Barnes. An alternative approach is necessary. Petitioners agree with the most recent observations of Judge Ott in the 2006 proceeding. Moreover, this Court can do better than this Board. This Court is the only party with any independence in this sordid failure of the adversarial process. It is certainly possible for this entity to raise funds, but not with a Board that is conflicted, and that has abdicated its fiduciary responsibilities. The time has come for this Court to do

better, by putting the Barnes under court-supervised receivership. This is the way to insure a responsible stewardship consistent with the designs of Dr. Barnes.

XI. Governing Documents

214. Given the fact that the Trust Indenture and other applicable documents are already filed of record in this proceeding, reference is made to them as if they were attached hereto and made a part hereof.

XII. Notice to Attorney General of Pennsylvania

215. Simultaneously with this Petition's filing, Petitioners have transmitted a copy of it to the Attorney General of Pennsylvania. Moreover the 15 day notice as per court rule has been given.

216. Previous requests to the Attorney General for intervention by the Friends-2, in addition to the August 1, 2007 written request by Petitioner Montgomery County, U.S. Congressman Jim Gerlach, and Lower Merion Township Commissioner Brian Gordon of the Barnes Foundation to the Attorney General for intervention, have been refused.

XIII. RELIEF REQUESTED

A. Request to Reopen Proceedings

217. Given the contents of this Petition, Petitioners request that this Court reopen the proceedings in this matter as a result of new, relevant and material information, changed circumstances, and the issues presented herein, not presented in the original proceedings, and to reconsider and revoke its rulings of January 29, 2004 and December 13, 2004.

B. Request for an Injunction

218. Given the contents of this Petition, Petitioners request that this Court issue an injunction to enjoin the Barnes Foundation Board from taking any further steps in any way relating to moving the art collection from its present location, including pursuing any further planning or expenditures in conjunction therewith.

C. Request for an Accounting

219. Given that questions have arisen herein with respect to the finances of the Barnes Foundation and since it appears the last accounting was filed in 1996, Petitioners request this Court to order the Barnes Foundation to submit an accounting from the last accounting to the present.

D. Surcharge Action

220. As this Court expressed most recently in the 2006 action, the problem with the Barnes Foundation's finances has been the Barnes Board, which has not attended to its fiduciary responsibilities.

221. Despite the rose-colored picture painted as to investment limitations and unexpected "dipping" into endowment, the facts are something quite different, and those facts were not presented to this court in its prior proceedings.

222. Neither the Board, nor the Attorney General of the Commonwealth of Pennsylvania, pursued repayment from former Board Members for what truly brought on the purported "crisis."

223. The fact is that the former Barnes Board and its agents were the genesis of the problem and the current Barnes Foundation Board has been derelict in rectifying those problems by failing to exercise its responsibilities to recover funds mis-spent.

224. When a fiduciary of an estate fails to fulfill his fiduciary duty of care, the court may impose a surcharge against him. A surcharge is a penalty imposed to compensate the beneficiaries for loss of estate assets due to the fiduciary's failure to meet his duty of care; namely common prudence, common skill and common caution in the performance of fiduciary duties, unless, as the case here, where a fiduciary is appointed because he represents that he or she has a greater skill than a person of ordinary skills. If a breach arises from a conflict of interest or self-dealing, a loss to the estate is not required to give the beneficiaries a remedy against the fiduciary.

E. Removal Action

225. This Petition raises serious breaches of fiduciary trust of the Barnes Foundation Board, not to mention their failure to carry out what was promised to this Court. This Orphans' Court has exclusive jurisdiction over the removal of fiduciaries of estates and trusts.

226. Grounds for complete removal include waste and mismanagement of the estate by a board whose continuance in office jeopardizes the interest of that estate. Where a conflict of interest or self-dealing is apparent from the circumstances, there is no need to demonstrate that the fiduciary acted in bad faith or with fraudulent intent.

227. Further grounds for removal would include the Board's deliberate withholding of information pertaining to the Commonwealth appropriation, should a hearing before this Court and testimony taken in conjunction therewith show that the information was kept from the Court.

228. There are two mechanisms available to this court to commence the process for removal. This may be done by petition of any party in interest, or it may be done by the Court on its own motion, requiring the fiduciary to appear and show cause why he should not be removed.

229. Accordingly, these Petitioners hereby request that this Court commence the process for removal. Alternatively, they ask that this Court do so on its own motion.

F. Place the Barnes Foundation in Receivership

230. This Court has been sitting as an equity court in this matter. Receivership is an equitable remedy available at the discretion of this court in its continuing jurisdiction. Grounds for the appointment of a trustee in receivership include the showing of fraud or imminent danger of property being lost, injured, diminished in value, or squandered. Receivership is an appropriate remedy in this instance. Given the continued unclean hands of the Barnes Foundation Board and this Court's repeated finding of the unwillingness and inability of this Board to manage and administer the *trust res* and effectuate the terms of that trust, it is now appropriate for this Court to exercise those equitable powers and appoint a trustee in receivership who can do what this Board has been unwilling to do; namely adhere to its fiduciary obligations pursuant to the Indenture and raise the necessary funds to maintain the Barnes Foundation in its present locale.

231. Less drastic and costly alternatives to the move have been dismissed out of hand by the Board, which a receiver could bring to fruition, including but not limited to: pursuit of the financing arrangement with Montgomery County, creating the very endowment that this Court envisioned as being necessary for continued viability in conformity with the Trust Indenture.

Wherefore, Petitioners request this Court to award the relief requested herein and such other relief as it sees fit.

Respectfully submitted

Mark D. Schwartz, Esquire
Attorney for all Petitioners

PA ID#30527
P.O. Box 330
Bryn Mawr, PA 19010

Telephone and fax: 610 525-5534

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA

ORPHANS' COURT DIVISION
No. 58788

IN RE: THE BARNES FOUNDATION,
A Corporation

[PROPOSED] ORDER

AND NOW, this day of 2007, upon consideration of the
Petition to Reopen Proceedings, to Reconsider and Rescind The Orders of January 29, 2004
and December 13, 2004, to Compel an Account, to Declare The Board Thereof in Violation
of its Fiduciary Responsibilities, to Compel Surcharge Proceedings Against Board
Members, to Remove Board Members and to Place the Barnes Foundation in Receivership,
it is hereby Ordered and Decreed that :

a. That the Barnes Foundation and Attorney General are directed to file an
answer to the above-referenced Petition within twenty (20) days of the date of this Order.

b. Petitioners Sandra Gross Bressler and Jay Raymond are appointed Trustees *ad
litem* to represent the interests of other past, current and future students of the Barnes
Foundation in this proceedings, as such trustees *ad litem* they shall serve without
compensation.

BY THE COURT:

CERTIFICATION

I hereby certify that I have served a copy of the attached Petition by sending the same via regular mail to the following this ____ day of August, 2007:

Counsel to the Barnes Foundation

Ralph G. Wellington, Esquire
Schnader Harrison Segal & Lewis LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103-7286

Attorney General of the Commonwealth of Pennsylvania

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

Mark D. Schwartz, Esquire
Counsel for Petitioners