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VOLUME III

2

IN THE COURT OF COMMON PLEAS IN AND FOR

3

THE COUNTY OF MONTGOMERY, PENNSYLVANIA

4

ORPHANS' COURT DIVISION

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IN RE: : NO. 58,788

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THE BARNES FOUNDATION,

a corporation :

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Petition to Amend Charter and Bylaws

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Courtroom B

Wednesday, September 22, 2004

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Commencing at 9:30 a.m.

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Volume III
Morning Session

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W. Byron Battle, RPR
Official Court Reporter
Montgomery County Courthouse
Norristown, Pennsylvania

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BEFORE: THE HONORABLE STANLEY R. OTT, JUDGE

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COUNSEL APPEARED AS FOLLOWS:

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RALPH G. WELLINGTON, ESQUIRE

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ARLIN M. ADAMS, ESQUIRE
BRUCE P. MERENSTEIN, ESQUIRE
for the Petitioner, The Barnes
Foundation

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

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

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Volume III

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1 I N D E X

2 WITNESS Direct Cross Redirect Recross

3 HARRY PERKS (Cont' d)

By Mr. Wellington 6 32

4 By Mr. Barth 19

By Mr. Cyr 22

5

6 HARVEY WANK (As on Cross)

By Mr. Wellington 49 72

7 By Mr. Cyr Volume III
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 By Mr. Barth 69

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9 MATTHEW SCHWENDERMANN 79
 (Voir Dire - 74)

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11

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12

13 PETITIONER'S

14 Number Marked Admitted

15 62 Deloitte & Touche 80
 Operating Expense and Revenue
 16 Analysis

17 63 Curriculum Vitae 78
 Matthew Schwenderman

18

64 Capital Cost Analysis 5

19

65 Curriculum Vitae 5
 20 Harry Perks

21 66 Masterson Gurr Johns Appraisal 5

22 67 Appraisal Valuation Report 5
 Glenn W. Perry

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23	68 Report of Mr. Wood	5
24		
25	117 Chart	5

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4

1 THE BARNES FOUNDATION

2 PROCEEDINGS

3 THE COURT: We had mixed

4 success on the amplification system. It is hard

5 for me to believe this County does not own a

6 portable microphone, I am told. However, this

7 courtroom does have an amplification system. The

8 people who understand it have apparently turned it

9 on, so we will see.

10 I am told it works well for the

11 witness. The microphone at the counsel table
12 works, so you have got to be fairly close to them.
13 If you are a podium user, I will ask you to keep
14 your voice up so we all can hear you.

15 Mr. Perks is still on the
16 stand, is he?

17 MR. WELLINGTON: Yes, Your
18 Honor.

19 Yesterday, we left with one
20 unfinished housekeeping and that is just exhibits.
21 If I can move the Exhibit 68, the report of Mr.
22 Wood; Exhibit 67, the report of Mr. Perry; Exhibit
23 66, the report of Masterson Gurr Johns, and its
24 supplemental report, which is part of Exhibit 66.

25 The Exhibit 64, Mr. Perk's

1 THE BARNES FOUNDATION

2 report that he already identified; Exhibit 65, his
3 curriculum vitae; and Exhibit 117, which was added
4 yesterday and passed out. It was a chart in
5 response to Mr. Feigen's amended report over the
6 weekend.

7 THE COURT: All right. You're
8 moving all of those?

9 MR. WELLINGTON: We're moving
10 those into admission.

11 THE COURT: Mr. Barth, any
12 objection to any of those exhibits?

13 MR. BARTH: None, Your Honor.

14 THE COURT: Mr. Cyr or

15 Mr. Kline?

16 MR. CYR: No objection.

17 THE COURT: Then those exhibits
18 are admitted by agreement.

19 (Exhibits 64, 65, 66, 67, 68
20 and 117, received in evidence.)

21 THE COURT: We have a rule that
22 we swear in a witness every day, but not in
23 between. So if you don't mind, Mr. Perks, we will
24 do that again.

25 - - -

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1 HARRY PERKS - DIRECT By Mr. Wellington

2 CONTINUED DIRECT EXAMINATION

3 HARRY PERKS, having been first
Page 9

4 duly sworn, was examined and testified as follows:

5 BY MR. WELLINGTON:

6 Q. Mr. Perks, yesterday when we broke, we had in
7 front of you a table that is in your report. And
8 is it most convenient for you, Mr. Perks, to look
9 at it up there on the screen, or on the exhibit in
10 front of you?

11 THE COURT: Too many choices,
12 Mr. Perks (laughter).

13 THE WITNESS: Actually, I think
14 I would rather have the book.

15 BY MR. WELLINGTON:

16 Q. First of all, can you just tell the Court,
17 Mr. Perks, what this museum construction cost
18 analysis chart intends to do?

19 A. It is an effort to show on a single piece of
20 paper how we arrived at what we thought was some
21 comparable museums, that we can make some judgment
22 and convince others that our judgment was
23 reasonable by putting it together this way.

24 Q. Now, when you were choosing what you say is
25 comparables, what qualifications or specifications

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7

1 HARRY PERKS - DIRECT By Mr. Wellington

2 did you have to decide if a museum was comparable
3 or a facility was comparable to be put in this
4 chart?

5 A. We tried to approximate the size. We
6 established the size of 100 to 200 thousand. We
7 tried to get things recent, so we established a

8 criteria of either under construction or
9 construction in the last two years.

10 We have two exceptions to that.

11 One is the Holocaust Museum, which is larger and
12 older. But because it is a popular museum that
13 everybody seems to be aware of, and close by to
14 visit, if that was necessary, we included that one.

15 We also included the Wright
16 Museum in Detroit, because Ms. Camp was the
17 executive director of that facility when it was
18 built, and she was in charge of the design and
19 construction.

20 Q. So that the two, I will say, exceptions beyond
21 the comparables that you would normally -- the two
22 exceptions that you just identified, you said the

23 Holocaust Museum, because it is close in

24 Washington. What was the time that that was

25 constructed, sir?

♀

8

1 HARRY PERKS - DIRECT By Mr. Wellington

2 A. I think it was seven or eight years ago.

3 Q. The other was the Wright Museum, because

4 Ms. Camp was executive director of that during the

5 construction period?

6 A. They were both built seven to ten years ago.

7 I don't know exactly which was which.

8 Q. Let's, if we can take one of these

9 construction projects and walk it across the chart

10 so that you can explain to the Court why this

11 information was helpful to you in comparing your

12 estimate.

13 Let's just take the Denver Art

14 Museum as an example. First of all, let's start

15 with this column here, construction cost column.

16 It says 54.2. What does that mean?

17 A. Could I make just a general discussion of how

18 this was done, rather than try to talk about a

19 specific one?

20 Q. Okay.

21 A. Because that would require specific examples

22 in that particular case, and it didn't apply to all

23 of the cases. I'm not sure I can remember which is

24 which.

25 But, in general, we scoured the

1 HARRY PERKS - DIRECT By Mr. Wellington

2 literature and magazines, newspapers and the
3 internet. We talked to current managers of
4 facilities, because they were built relatively
5 recent.

6 We talked to, in some cases,
7 the contractor that actually built them. But our
8 objective in that research was to try to find
9 construction costs and to make them truly
10 comparable.

11 A lot of construction costs,
12 when they are published, include the land costs, or
13 include the architectural fees, or include
14 furniture and fixtures, and include things that we
15 had already excluded.

Volume III

16 We wanted to try to purify the
17 construction number to make it as comparable as
18 possible.

19 The first column is a column,
20 the net of that result, what we consider to be the
21 net construction cost with everything that was
22 estimated elsewhere taken out.

23 Once we made that correction,
24 then we took the area of the facility and divided
25 it in, and got a dollars per square foot.

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1 HARRY PERKS - DIRECT By Mr. Wellington

2 Q. With respect to this Denver Art Museum, you
3 determined that the comparable construction cost of

Volume III

4 that museum to the gallery estimate that you
5 prepared for the Barnes Museum, that that
6 construction project cost 54.2 million?

7 A. Yes.

8 And then the area would be the
9 146,000. Dividing that out, it is \$371 per square
10 foot.

11 The only correction being that
12 the dollars included the same items for
13 construction and excluded things that we didn't
14 think was worthy. There were other corrections
15 that we felt necessary to make to make them
16 comparable.

17 Q. Then the next column, location index, it has a
18 95.8 here. Tell us what a location index is.

19 A. There is a publication called Means Building
Page 17

20 Construction Data that has an index for cities that
21 enables you to compare costs in one city with
22 another.

23 And those indexes are in there.

24 You can see the Denver index was 95.8, and the
25 Philadelphia index was 112.1. So to correct the

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11

1 HARRY PERKS - DIRECT By Mr. Wellington

2 371 to a Philadelphia cost, we took that ratio and
3 arrived at \$434.

4 Q. So if that building, what this tells us,

5 Mr. Perks, is if that building had actually been

6 constructed in Philadelphia in the same time

7 period, it would have cost \$434 a square foot

8 instead of \$371 a square foot?

9 A. Yes, sir.

10 Q. And then?

11 A. And then we took the date that it was opened

12 and corrected that with an Engineering News Record

13 index of construction costs year by year. And in

14 this case that wasn't applicable because it isn't

15 open yet.

16 Q. But for museums or galleries that had opened,

17 for example the Holocaust Museum, you updated that

18 cost to a 2004 cost?

19 A. Yes.

20 Q. And then the last column here is a 2007 cost.

21 What is that, sir?

22 A. Well, if I was on a line where a correction

23 was necessary, the correction and the Engineering

24 News Record index was to March 2004. And then we
25 took it out to the midpoint of construction on this

♀

12

1 HARRY PERKS - DIRECT By Mr. Wellington
2 project, which it was 2007.

3 And since the last three years
4 of the Engineering News Record's index was one
5 percent a year, we just took the difference between
6 March and our mid-construction date of 2007, and
7 multiplied that by one percent per year to arrive
8 at the final estimate.

9 Q. Now, having done the analysis of these various
10 buildings on this chart, how did it help you
11 confirm the professional opinion that you have

12 already testified that you had arrived at, that the
13 Barnes Foundation could construct a new gallery on
14 the Parkway of Philadelphia for 100 million dollars
15 for square footage between 120 and 150 thousand
16 square feet?

17 A. That was a judgment call based on my
18 experience and the data that we arrived at that we
19 chose to put in this report.

20 Q. Was there anything in looking at these other
21 galleries, other buildings that you looked at that
22 made you think that the judgment that you had made
23 before was wrong in some way?

24 A. No, sir.

25 Q. I notice that, although you were the

1 HARRY PERKS - DIRECT By Mr. Wellington
2 construction manager of the Kimmel Center, the
3 Regional Performing Arts Center that is downtown,
4 here in Philadelphia, that that is not one of the
5 comparables here.

6 Why is that, Mr. Perks?

7 A. There are so many things different between a
8 gallery and educational facilities than the Kimmel
9 Center. The Kimmel has literally tens of millions
10 of dollars that are in nothing but acoustical
11 requirements.

12 The reverberation chambers, big
13 concrete structures that are 60 feet high and 15
14 foot across with big opening doors, a tremendous
15 expense that you wouldn't have in a museum like we

16 are contemplating.

17 If I could say the other side

18 of that example, I mean, museums usually have

19 higher security costs than what you would have at a

20 Kimmel Center. So, I mean, they are very

21 different --

22 Q. Different elements that didn't make that

23 particular building a comparable in your

24 professional view?

25 A. Yes, sir.

♀

14

1 HARRY PERKS - DIRECT By Mr. Wellington

2 Q. Although I'm curious, what was the per square

3 foot cost of the Kimmel Center?

Volume III

4 A. As a matter of fact, it was somewhere around
5 \$440, somewhere between 400 and 450.

6 Q. Right within the midrange of your estimate for
7 the Barnes Foundation gallery?

8 A. Yes, sir.

9 Q. Did the Kimmel Center come in around budget?

10 A. The Kimmel Center is a good example of how
11 construction projects run. It came within the
12 budget, but the budget was adjusted during
13 construction based on what they felt was things
14 that the architect was recommending or the
15 acoustician was recommending that they should
16 consider.

17 Then they decided whether they
18 could raise that much more money, and then they
19 would change the budget. I would say that it came

20 in within the budget that the client expected,
21 given that there were a lot of changes to that
22 budget based on opportunities for fund raising or
23 orchestra contributions or whatever.

24 THE COURT: Mr. Perks, by that,
25 do you mean that certain extras were added as fund

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1 HARRY PERKS - DIRECT By Mr. Wellington
2 raising improved?

3 THE WITNESS: There were
4 certain extras that were brought to the board as
5 to, let's say, discretionary: You could do this or
6 you could not do this, but if do you this, it is
7 going to cost four million dollars more or eight

8 million dollars more --

9 THE COURT: You are not talking
10 about unforeseen problems that arose in the course
11 of construction?

12 THE WITNESS: No.

13 THE COURT: Such as having to
14 blast rock or that?

15 THE WITNESS: No.

16 THE COURT: You are talking
17 about a situation where, if you have got another X
18 number of million dollars, you could do this, by
19 way of an upgrade?

20 THE WITNESS: Yes.

21 BY MR. WELLINGTON:

22 Q. All right. Now, Mr. Perks, have you reviewed
23 a report produced by counsel for amici from a James

24 Abruzzo?

25 A. Briefly, yes.

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16

1 HARRY PERKS - DIRECT By Mr. Wellington

2 Q. There are portions of this report that comment
3 on your report, are there not, sir?

4 A. Yes, sir.

5 Q. I am going to hand you a copy of that, because
6 I want to ask you a few questions concerning that
7 report.

8 Could you turn to page 7 of
9 this document?

10 A. (Witness complies with counsel's request.)

11 Q. There is, in this one page, Mr. Abruzzo makes

12 some comments about your capital cost analysis,

13 doesn't he, sir?

14 A. Are you talking about the second paragraph?

15 Q. Well, the page, capital cost analysis for a

16 new facility for the Barnes Foundation. That is

17 your report, isn't it?

18 A. Yes.

19 Q. So these are comments that he made about it?

20 A. Yes.

21 Q. One of the things that he says is that your

22 capital cost analysis is insufficiently detailed.

23 I want to ask you, from your experience and

24 knowledge of these construction projects, at this

25 stage of assessing the constructability of such a

1 HARRY PERKS - DIRECT By Mr. Wellington

2 facility, is this in the profession sufficiently

3 detailed, what you have done?

4 A. Yes, sir.

5 Q. Mr. Abruzzo goes on to say that a detailed

6 construction cost estimate, including actual

7 construction materials, design, so forth, needs to

8 be done. Why didn't you do that here?

9 A. I don't think it was appropriate at this time.

10 I don't think that was my mission. And there would

11 have to be a lot more information than what was

12 available to me in order to do that.

13 Q. To do what Mr. Abruzzo is suggesting, what

14 would be required in terms of time and money?

15 A. As I recall, without rereading this, he talked

Volume III

16 about hiring an estimator to take off some
17 materials and quantities, and that would require
18 that a program be established, and from that
19 program an architect would have to make some
20 schematic drawings so that areas could be taken and
21 materials could be discussed.

22 And usually architects charge
23 to get through that schematic phase about 15
24 percent of their total fee. In this case, it would
25 be a million dollars.

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18

1 HARRY PERKS - DIRECT By Mr. Wellington

2 Q. What period of time would we be talking about
3 to accomplish this?

4 A. Eight months to a year.

5 Q. And if you went through that process that

6 Mr. Abruzzo suggests, would you then know precisely

7 how much such a project would cost.

8 A. You would know what it would cost based on

9 those schematic drawings and that program. These

10 construction programs are kind of a dynamic, and

11 usually we make estimates, make a budget as we are

12 talking about now.

13 We make estimates at the end of

14 schematic phase. We make estimates at the end of

15 design development phase. We make estimates when

16 we are ready to go out for construction. Even then

17 a prudent manager would allow five or seven percent

18 contingency or in reserve before he would let the

19 contract to allow for changes during construction.

20 So it is a live thing.

21 THE COURT: It is fluid?

22 THE WITNESS: Fluid thing, yes,

23 sir.

24 BY MR. WELLINGTON:

25 Q. On the assessment that you have done, the

‡

19

1 HARRY PERKS - CROSS By Mr. Barth

2 analysis that you have done, you have included a

3 ten percent contingency at this stage, correct?

4 A. Yes.

5 Q. Do you still believe, despite the comments of

6 Mr. Abruzzo on this page, within a reasonable

7 degree of professional certainty, Mr. Perks, that

8 based upon your experience and your knowledge, the
9 Barnes Foundation could construct a new gallery on
10 the Benjamin Franklin Parkway for 100 million
11 dollars?

12 A. Yes, I do.

13 MR. WELLINGTON: Thank you. I
14 have nothing further of Mr. Perks.

15 THE COURT: Mr. Barth?

16 CROSS-EXAMINATION

17 BY MR. BARTH:

18 Q. Mr. Perks, why didn't you use architectural
19 drawings or detailed plans in the preparation of
20 your report as Mr. Abruzzo criticized you for not
21 doing?

22 A. They weren't available to me.

23 Q. And why weren't they available?

24 A. Nobody had been commissioned to do them.

25 Q. Do you know why no one had been commissioned

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20

1 HARRY PERKS - CROSS By Mr. Barth

2 to do them?

3 A. I don't think that it would be appropriate to

4 spend that kind of money until a project was

5 approved.

6 Q. So Mr. Abruzzo is criticizing your report for

7 following the ground rules that were set up by the

8 Court in this particular case?

9 MR. CYR: Objection.

10 THE WITNESS: As I understand

11 it, yes, sir.

Volume III
THE COURT: Objection to the

12
13 characterization, but it is cross-examination, so
14 he has some leeway. That is his characterization.

15 I figured out the answer before
16 he gave it.

17 MR. BARTH: Just making a
18 record, Your Honor.

19 THE COURT: I understand.

20 BY MR. BARTH:

21 Q. Mr. Abruzzo also points out that there are
22 many, many instances where mature museums have
23 miscalculated the cost of new construction; is that
24 true?

25 A. I think if they miscalculated it by more than

1 HARRY PERKS - CROSS By Mr. Barth

2 five percent, it was poorly managed.

3 Q. Let me ask you this, Mr. Perks, have you ever

4 miscalculated the cost of a new museum construction

5 by that degree of inaccuracy?

6 A. That is a very specific question, museum.

7 Q. Of a building of the type that you would

8 consider similar to that which the Barnes

9 Foundation is contemplating?

10 A. Somewhere in my career I might have, but I

11 don't recall.

12 Q. I just have one other line of questioning, and

13 I want to return to your testimony from yesterday

14 where it was indicated that you were the individual

15 who gave the direction to the real estate

16 appraisers, and in doing so suggested that they use

17 a 12 acre curtilage around the Ker-Feal buildings.

18 Can you tell us why you

19 selected that number of acres?

20 A. I took a map, showed the buildings, and the

21 access road, which was several hundred feet long,

22 just drew a line around the access road and the

23 buildings, and measured the acreage, and it was 12

24 acres. Nothing more.

25 MR. BARTH: Thank you.

‡

22

1 HARRY PERKS - CROSS By Mr. Cyr

2 THE COURT: Mr. Cyr.

3 BY MR. CYR:

4 Q. Good morning, Mr. Perks.
Page 37

5 A. Good morning, sir.

6 Q. Just to follow up on the questioning by

7 Mr. Barth. I am curious, why were you involved

8 with the real estate appraisal of Ker-Feal?

9 A. I was asked to be involved by the Barnes

10 Foundation.

11 Q. Do you have any particular expertise in real

12 estate appraisal?

13 A. I have written specifications for them before.

14 I have done before exactly what I have done on this

15 project.

16 Q. I guess my question is, was this part and

17 parcel of any capital project that you were

18 designing for the Ker-Feal facility?

19 A. No, sir, not really.

20 Q. I note in your report there is an appendix
21 listing a gentleman by the name of a Dean Anderson;
22 is that correct?

23 A. Yes.

24 Q. Who is Mr. Anderson?

25 A. He was a museum consultant that was hired by

♀

23

1 HARRY PERKS - CROSS By Mr. Cyr

2 Perks-Reutter in order to run or manage or be a
3 facilitator of the charrette that we had held.

4 Q. So Mr. Anderson did not participate in the
5 preparation of this report?

6 A. No, he did not.

7 Q. Did you prepare the report, yourself?

8 A. With the exception of an architect who works

9 for me who did a lot of the research on the
10 building costs.

11 Q. Perks-Reutter, how many museums has your firm
12 been involved with in the construction phase?

13 A. This is the only one.

14 Q. What types of projects does Perks-Reutter
15 typically do?

16 A. Projects that I described yesterday. We have
17 been involved in all sorts of institutions,
18 educational facilities, hospitality facilities,
19 performance facilities, a wide range of facilities.

20 Q. But, again, your firm has no firsthand
21 knowledge of working in the construction of a
22 museum; is that correct?

23 A. That is correct.

24 Q. Now, I think that we have heard from your
25 direct testimony that this is what could be fairly

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24

1 HARRY PERKS - CROSS By Mr. Cyr

2 characterized as a preliminary analysis, because no
3 architectural drawings have been prepared for such
4 a facility; is that correct?

5 A. Yes.

6 Q. And because it is a preliminary analysis, you
7 have accounted for a contingency in the cost of the
8 construction, correct?

9 A. That contingency was provided to cover any
10 deviations in costs of anything that was in that
11 report, including non-construction items, but would
12 be charged to the capital budget.

13 Q. Your contingency is ten percent; is that
14 correct?

15 A. Yes.

16 Q. Do you consider that to be a conservative
17 estimate at this preliminary stage or a fairly
18 aggressive one?

19 A. I think it is reasonable, and I thought it was
20 important to isolate that in this particular
21 instance. I would say, generally, in preparing
22 budgets for new projects, a contingency at the
23 budgeting establishing stage isn't an important
24 issue.

25 I only say that because when

1 HARRY PERKS - CROSS By Mr. Cyr

2 you get to the schematic drawings and make an
3 estimate from schematic drawings, then I would
4 recommend even a 15 percent contingency on that,
5 because now you are starting to get very
6 definitive.

7 But when you talk about just
8 preparing a budget, that budget is the target that
9 the architect when you hire him would work toward.
10 When he would be finished and an estimate would be
11 made, if the estimate was higher than the budget,
12 then he would correct either the space or the
13 quality of construction to get it back to the
14 budget.

15 So it is very easy to handle at
16 that stage. It is very difficult to handle

17 starting with the schematic phase and the design
18 development phase and the construction phase. You
19 have less opportunity for savings, but you have
20 tremendous opportunities for savings between the
21 budget and the schematic phase.

22 I can make an estimate from the
23 schematic phase and it is over the budget, then I
24 make a new schematic drawing within the budget.
25 That's the dynamics of how it occurs.

♀

26

1 HARRY PERKS - CROSS By Mr. Cyr
2 Q. You would agree with me, would you not, that
3 at the schematic phase, it is normal and customary
4 to use a contingency of approximately 15 percent,

5 correct?

6 A. The architectural fee is about 15 percent.

7 Q. The contingency?

8 A. The contingency at the schematic phase, I

9 would recommend a 15 percent contingency, yes.

10 Q. That is five percent greater than what is

11 listed in your report, correct?

12 A. I would be happy to recite that explanation

13 for that over if it would be necessary.

14 Q. The question just required a yes or no answer.

15 A. I'm sorry, then repeat the question, please.

16 Q. You would agree with me that the 15 percent

17 contingency is five percent over the ten percent

18 contingency in your report, correct?

19 A. Yes, sir.

20 Q. And that in this case --

21 THE COURT: Even I can do that

22 math.

23 BY MR. CYR:

24 Q. Of course, that would be five million dollars,

25 correct?

⊕

27

1 HARRY PERKS - CROSS By Mr. Cyr

2 A. Yes.

3 Q. Now, your site preparation, you have 2.2

4 million dollars allocated for that, correct?

5 A. Yes.

6 Q. Tell me, what would that include?

7 A. It included different things for different

8 properties. One property had a building on it, and

9 it would include demolition of that building. And
10 that building also had some underground facilities
11 that required some special foundation design.

12 Those two items, I estimated to
13 a cost of about 2.2 million.

14 The other site had two very
15 large water mains. You know, by "large," I mean
16 larger than four feet that would have to be
17 relocated.

18 I estimated that that would be
19 around two million dollars. I used the highest of
20 the two estimates.

21 Q. Now, as I read your report, you estimate the
22 cost of construction at approximately between four
23 to five hundred dollars per square foot; is that
24 correct?

25 A. Yes.

♀

28

1 HARRY PERKS - CROSS By Mr. Cyr

2 Q. But for one part of the facility, the didactic
3 exhibit area, you estimated at \$200 a square foot;
4 is that correct?

5 A. Yes.

6 Q. Why the difference there?

7 A. Because the \$200 a square foot is strictly the
8 exhibit costs. Those things that are not part of
9 the building construction, not part of the
10 construction, probably wouldn't even be attached to
11 the construction, because they would just be
12 freestanding exhibits, or, perhaps, something that

13 would be mounted on the wall.

14 Q. So that you weren't taking out 8,000 square
15 feet and saying that the square foot construction
16 costs of that would differ than the rest of the
17 facility?

18 A. No. That 8,000 square foot construction cost
19 would be the same as the rest of the building.

20 Q. Now, in looking at your report, you estimate
21 future costs, because this project will take, you
22 estimate, three years to construct, correct?

23 A. Three years for the total program.

24 Q. Well, you look at 2004 to 2007, correct?

25 A. 2007 actually was the mid-date of the

1 HARRY PERKS - CROSS By Mr. Cyr
2 construction. Usually, when somebody bids a job,
3 if they bid it in January and the project is going
4 to last 18 months, they would estimate what their
5 costs would be in September, which would be the
6 average during the construction period.

7 And 2007, for the accuracy of
8 this report, is about the midpoint of the
9 construction. The construction wouldn't be
10 complete then.

11 Q. I'm directing you to page 8 of your report.
12 You talk about inflating the cost from March 2004
13 to 2007, and you use a one percent per year cost
14 estimate, correct?

15 A. Yes.

16 Q. What was the reason that you used the one

17 percent per year?

18 A. The Engineering News Record index that I was
19 using had a one percent increase in construction
20 costs in the last three years, and I just used that
21 as a basis of estimating what it would be going
22 forward.

23 Q. Okay. So you looked at the inflation from the
24 Engineering News Record from 2000 to 2003 and got
25 that figure?

♀

30

1 HARRY PERKS - CROSS By Mr. Cyr

2 A. I don't remember the exact years, 2000 to
3 2003, or 2001 to 2004, but that's the principle
4 that I used, yes.

Volume III

5 Q. But you are aware that recently construction
6 costs have increased dramatically, have they not?

7 A. Yes, I am.

8 Q. In fact, if we look at the Engineering News,
9 we know that the construction costs for 2003 to
10 2004 has gone up 6.4 percent, correct?

11 A. Yes.

12 Q. And the billing cost index for the same time
13 period has gone up eight percent, correct?

14 A. Yes.

15 Q. Okay. So now, your projection of one percent
16 per year from 2004 to 2007, at one percent a year,
17 do you still think that is a reasonable cost
18 inflation factor?

19 A. I think that if I was asked to do it again, I
20 would take those factors into account. I only took

21 into account what was available to me in March, and

22 I think that something would be revised, yes, sir.

23 Q. Well, what percentage increase would you take

24 then?

25 A. I would take another three-year rolling

‡

31

1 HARRY PERKS - CROSS By Mr. Cyr

2 average, or I would take the one percent for a

3 couple years and then the most recent data for that

4 year and make an estimate that way.

5 Q. It is reasonable to assume that that would

6 increase the projected total cost of this project,

7 correct?

8 A. I'm sorry?

9 Q. It is reasonable to assume that that would
10 increase the total projected cost for this project,
11 correct?

12 A. Yes, or reduce the contingency. The
13 contingency was provided for things just like that.

14 THE COURT: Or reduce the
15 space?

16 THE WITNESS: I'm sorry?

17 THE COURT: Or reduce the
18 space?

19 THE WITNESS: Or reduce the
20 space, yes, sir.

21 BY MR. CYR:

22 Q. You mentioned the Kimmel Center. Is it fair
23 to say that the ultimate cost of the Kimmel Center
24 exceeded the original projections for that

25 facility?

♀

32

1 HARRY PERKS - REDIRECT By Mr. Wellington

2 A. Yes, it did.

3 Q. Do you know by how much?

4 A. No, I don't.

5 MR. CYR: That's all I have.

6 Thank you.

7 THE COURT: Redirect,

8 Mr. Wellington?

9 MR. WELLINGTON: Yes.

10 REDIRECT EXAMINATION

11 BY MR. WELLINGTON:

12 Q. Mr. Perks, Mr. Cyr asked you a number of

Volume III

13 questions. He asked you whether or not Perks had
14 ever built a museum. I think that you said no to
15 that.

16 But the gallery that is being
17 proposed on the parkway is not just a museum, is
18 it, sir? It is essentially an educational facility
19 with some museum space; isn't that correct?

20 A. Yes, sir.

21 Q. In fact, the core space of the permanent
22 gallery currently at Merion is currently how many
23 square feet?

24 A. The core space?

25 Q. The permanent gallery at Merion?

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A. The gallery, itself is only 10,000 square foot, but the building that the gallery is in, including the stairways and the aiseways and the mechanical rooms and all the things that are in that building is about 28,000 square foot.

Q. The commitment to reconstruct the main gallery, that is about a 10,000 square foot piece of that new gallery downtown, correct?

A. Well, I suspect that we would replicate not only the gallery but that entire building, or at least that is what the Barnes Foundation expressed that they would like to see happen.

Q. But there are a number of other educational aspects to that proposed facility, are there not, sir?

- 17 A. Over and above that?
- 18 Q. Yes.
- 19 A. Yes, sir, there are.
- 20 Q. There are many classrooms proposed for that?
- 21 A. Yes, sir.
- 22 Q. And have you personally and as Perks-Reutter
- 23 been involved in construction management of
- 24 educational facilities?
- 25 A. Yes, we have.

‡

34

1 HARRY PERKS - REDIRECT By Mr. Wellington

- 2 Q. Give us some examples, sir.
- 3 A. I have probably been responsible for 30 new
- 4 schools.

5 Q. Is there anything in the proposed gallery, as
6 you understand it, that would be outside of your
7 expertise in doing this construction cost analysis?

8 A. No, there isn't.

9 MR. WELLINGTON: Thank you,
10 sir.

11 MR. BARTH: No questions.

12 THE COURT: Mr. Barth?

13 MR. BARTH: Nothing, Your
14 Honor.

15 THE COURT: Mr. Cyr?

16 MR. CYR: Nothing further.

17 THE COURT: Mr. Perks, let me
18 see if I understand what you are telling me,
19 boiling this all down. This is a preliminary
20 budget?

Volume III

21 THE WITNESS: Yes, sir.

22 THE COURT: What you do at the
23 next stage is, you select an architect?

24 THE WITNESS: Yes, sir.

25 THE COURT: You go to that

♀

35

1 HARRY PERKS - REDIRECT By Mr. Wellington

2 architect and you say, this is what we are

3 envisioning, this is what the building has to

4 include -- has to include -- show us what we could

5 get for X number of dollars.

6 Is that what you do?

7 THE WITNESS: Yes. And the

8 architect would work with you to, you know, try to

9 draw out of you how many classrooms would you

10 want --

11 THE COURT: I understand.

12 THE WITNESS: -- and how big?

13 THE COURT: I'm assuming that

14 you have done that. You have presented to the

15 architect: I need X number of classrooms. I have

16 to have a gallery that replicates the one that is

17 in Merion. These are the things we have to have.

18 Here is our wish list. Here is our budget. Come

19 back to me with some preliminary drawings to show

20 me what you can do for that.

21 Is that essentially what you

22 are telling me happens?

23 THE WITNESS: Yes.

24 THE COURT: Then the architect

25 comes back to the client and says, here is what I

♀

36

1 HARRY PERKS - REDIRECT By Mr. Wellington

2 think we can build, and here I have accounted for

3 all of the things that you say you must have. I

4 think I can give you these item off of your wish

5 list. Here is what I think it would look like. Do

6 you like that? Shall I go ahead and do a

7 schematic?

8 Is that what the next page

9 stage is?

10 THE WITNESS: And checking that

11 against the budget.

12 THE COURT: Of course.

Volume III
THE WITNESS: If he does it

13
14 within the budget and it satisfies the program, or
15 most of the high priority items on the program, you
16 go to the next step, yes, sir.

17 THE COURT: You're using the
18 architect's expertise, also, to project, if you
19 will, the cost of building this, right?

20 THE WITNESS: Very definitely.

21 THE COURT: He or she knows
22 essentially the same information that you do?

23 THE WITNESS: Right.

24 THE COURT: And perhaps a
25 little bit more when it comes to actual

♀

37

2 construction?

3 THE WITNESS: Yes.

4 THE COURT: And what I

5 understand you to be saying is the architect can

6 tinker or tweak the plans as the calculations go in

7 this fluid situation if it looks like the cost is

8 exceeding the original projection. Is that a fair

9 statement?

10 THE WITNESS: Yes. He can

11 tweak the area. He can tweak the quality of the

12 building. He can suggest different floor finishes,

13 different wall finishes, different exterior

14 finishes, granite versus limestone.

15 THE COURT: He or she could

16 eliminate certain of the items from the wish list

17 that aren't essentials?

18 THE WITNESS: Yes, sir. Or

19 reduce their size, not eliminate it.

20 THE COURT: Or reduce the size.

21 All right. I understand. I

22 don't know if that prompts any more questions.

23 (No response.)

24 THE COURT: Thank you, Mr.

25 Perk.

♀

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1 THE BARNES FOUNDATION

2 (Witness excused.)

3 - - -

4 MR. WELLINGTON: Your Honor,

5 the Foundation would like to call as its next

6 witness Dr. Harvey Wank, who is one of the amici
7 who is present in the courtroom. I have a few
8 questions I would like to ask him.

9 THE COURT: As on cross?

10 MR. WELLINGTON: As on cross,
11 Your Honor.

12 THE COURT: Any objection?

13 MR. CYR: I would object, Your
14 Honor. He wasn't listed as a witness by the
15 Foundation.

16 THE COURT: Response?

17 MR. WELLINGTON: We reserve the
18 right, as they did, to amend our witness list. He
19 is a party in the case. I have case citations for
20 Your Honor about the right to --

Volume III
THE COURT: I think I probably

21

22 know that.

23

MR. WELLINGTON: -- the right

24

to call him.

25

THE COURT: I think what I

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THE BARNES FOUNDATION

2

would like to --

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MR. WELLINGTON: I apologize.

4

One more thing, Your Honor. Obviously, Mr. Wank

5

has made certain representations to the Court, in

6

seeking to become a party, is now a party in the

7

case, in the role of amici. Some of those are

8

relevant to the very issues at play here.

9

THE COURT: I think what I
Page 67

10 would like to do is have an in camera conference on
11 this and ask you for an offer of proof in that
12 regard. All right.

13 MR. WELLINGTON: Can we put
14 that on the record, Your Honor?

15 THE COURT: We can after we
16 have our preliminary discussion.

17 (The following proceedings were
18 held in chambers:

19 THE COURT: We discussed
20 generally the issue that was raised by
21 Mr. Wellington regarding his desire to call
22 Mr. Wank, one of the students named, as on cross at
23 this point.

24 We basically discussed the

25 following principles of law: Mr. Wank was not,

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1 THE BARNES FOUNDATION

2 apparently, put on the Foundation's witness list.

3 My response to that was, that

4 my understanding of the settled law in this regard

5 is that a named party is always subject to

6 cross-examination, whether put on a required

7 witness list or not, and can be compelled to

8 testify regarding the facts relevant in the case.

9 The issue then arose as to

10 whether or not Mr. Cyr and/or Mr. Kline had the

11 right to prepare, if you will, or counsel Mr. Wank

12 before he was called as on cross.

13 Mr. Wellington pointed out
Page 69

14 that, once I asked him and he gave an offer of
15 proof as to where his examination will be focused,
16 the request to counsel or prepare Mr. Wank is the
17 equivalent of discussing testimony with a witness
18 in the midst of cross-examination.

19 Candidly, I had not considered
20 that, and I don't know that I have ever seen a case
21 to that effect. But I do believe that that point
22 is well taken. And so to allow counseling or
23 preparation, if you will -- and I use those terms
24 only in the proper sense as counsel understands
25 those terms to be used -- once the offer of proof

♀

2 has been made, is, in fact, the equivalent of
3 counseling a witness in the midst of
4 cross-examination.

5 Consequently, I have ruled that
6 I will allow Mr. Wank to be called as on
7 cross-examination pursuant to the offer made by
8 Mr. Wellington.

9 Now, Mr. Cyr, if you haven't
10 had enough time to look at that, I will give you
11 time.

12 MR. CYR: Could I just have a
13 minute, Your Honor?

14 THE COURT: Off the record.

15 (Discussion off the record.)

16 MR. CYR: On behalf of the

17 amici, we object. Today is September 22nd. We
Page 71

18 have just been advised that counsel for the
19 Foundation wished to call our client, Mr. Wank, as
20 a witness as on cross-examination. On the witness
21 list as directed by Court order, Mr. Wank was not
22 listed as a witness on that list.

23 Furthermore, pursuant to the
24 Pennsylvania Rules of Civil Procedure, Rule 234.3,
25 which states that a party may compel the attendance

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1 THE BARNES FOUNDATION
2 of another party by serving upon that party a
3 notice to attend, substantially in form as
4 prescribed by Rule 234.7, a notice shall be served
5 reasonably in advance of the date upon which the

6 attendance is required.

7 I would suggest to you that no
8 such notice has been served upon us. The oral
9 notice of same is not in reasonably advance of Mr.
10 Wank's attendance at trial.

11 I would further state for the
12 record that we believe that we are being prejudiced
13 and our client is being deprived of its right to
14 the counsel by his attorneys with respect to any
15 potential testimony at trial.

16 THE COURT: You may have
17 respond.

18 MR. WELLINGTON: Rule 232
19 applies to the subpoena provisions of a person who
20 is not in court. Mr. Wank, a party, is sitting in
21 court. It is not applicable. That is number one.

22 Number two, the practice of
23 calling an adverse party who is present in court is
24 a typical practice and there are cases that say it
25 is appropriate. Leek versus Commonwealth, 746 A.2d

♀

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1 THE BARNES FOUNDATION
2 1171 is another Superior Court affirmation of that.
3 This is not untoward here. The
4 Barnes Foundation is not attempting to do anything
5 other than have some testimony presented by one of
6 the amici who has given sworn statement to the
7 Court.

8 That is something we are
9 permitted to do when they are a party on the other

10 side. We did reserve as to the amici the right to
11 supplement our witness list.

12 I will move to supplement it
13 and add Mr. Wank if that is a technical issue, but
14 I don't think that it is required when it is a
15 party who has been admitted as a party by the
16 Court.

17 THE COURT: Yes, rule 234
18 clearly applies to compelling of a party who
19 doesn't wish to appear voluntarily.

20 You think I am wrong?

21 MR. WELLINGTON: No.

22 THE COURT: I remember doing
23 it. I represented a plaintiff in a motor vehicle
24 case. She was elderly and wasn't going to come. I
25 wanted her there because I wanted the jury to see

1 THE BARNES FOUNDATION

2 that she was basically unable to drive. I had to
3 use that rule or its equivalent at the time to get
4 her there.

5 But I think it only applies to
6 compelling the attendance of a witness who is not
7 otherwise willing to appear in court.

8 Obviously, Dr. Wank is here. I
9 have seen him. And his attendance is mooted by
10 that.

11 The only issue is, of course,
12 that witness list. Without doing the research, I
13 feel fairly confident that the case law supports

14 the right to call a party, an adverse party, as on
15 cross, despite the failure to list them on that
16 list.

17 MR. KLINE: Your Honor, you
18 point out, I think quite rightly, that the Orphans'
19 Court is not subject strictly to the Rules of Civil
20 Procedure. It is not a court of equity either, but
21 rules of --

22 THE COURT: Although we
23 frequently apply equitable principles.

24 MR. KLINE: Rules of equity do
25 apply in the Orphans' Court in every county in the

2 Commonwealth of Pennsylvania. We ask that equity
3 be applied in this situation. Even though the
4 technical rules of the Rules of Civil Procedure may
5 not, equity does.

6 THE COURT: Equity, we would
7 hope, would always apply in every situation.
8 Certainly, that is the intent of the Court.

9 On balance, what I think it
10 comes down to is, did Dr. Wank by means of
11 identifying himself as one of the named students,
12 represented as a party in the case, and by taking
13 certain affidavits, the pleadings and the like, did
14 he subject himself to examination on those
15 pleadings and those affidavits?

16 I think the answer to that
17 clearly has to be yes, whether one is applying

18 rules of equity or Rules of Civil Procedure or the
19 like.

20 The only issue that is causing
21 me any hesitation on this is the fact that the
22 failure to name him on that witness list may have
23 created a sense on the part of counsel for the
24 amici that they didn't have to prepare for this.

25 MR. CYR: Your Honor, if I

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1 THE BARNES FOUNDATION
2 could just interject. Something else has occurred
3 to me. I don't think we are technically a party.
4 We are amici. And I don't know if Mr. Wank can be
5 considered as a party, and, therefore, the case law

6 referenced by Mr. Wellington as to their right to
7 just call an adverse party as a witness --

8 THE COURT: I understand the
9 distinction you are talking about. But, I mean,
10 the fairness meter in me says you really can't have
11 it both ways. You can't be here admittedly in a
12 limited role, but you can't be here even in that
13 limited role and then not claim, it seems to me --
14 this is not criticism. I am just responding to
15 what you are saying -- I don't think you can be
16 here in your limited role and then say but we are
17 not subject to the same rules that apply to people
18 who are here in a full role.

19 MR. KLINE: Your Honor, I'm not
20 sure either of the offer of proof, because it seems
21 to me what Mr. Wellington wants to speak to is the

22 petition to intervene that was filed, and I think
23 under Pennsylvania law clearly is not part of the
24 pleadings of the case. A petition to intervene is
25 not a pleading.

♀

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1 THE BARNES FOUNDATION

2 THE COURT: I won't attempt to
3 respond to that, because I don't know whether it is
4 or whether it isn't. I would have thought that it
5 was, but you say that with such certainty, I am
6 willing to bet that you are probably right.

7 If he had made a sworn
8 statement, if he had given a deposition, if you
9 guys had agreed that there would be depositions in

10 this case and given a deposition, that's not a
11 pleading either. I don't even know that it has to
12 be a sworn statement. I think it can be a
13 statement. Inconsistent is what he is really
14 talking about. Is it admissible as an inconsistent
15 statement as impeachment.

16 Again, what we are talking
17 about back here has probably great academic
18 interest. From a practical standpoint, I don't
19 know how much, whether it is really worthy of the
20 considerable efforts and the intellect being
21 bantered back here. Myself, notwithstanding, I
22 don't consider myself in that group.

23 But, let me put it this way,
24 this really comes down, in the final analysis, to
25 the Court weighing the evidence against what the

1 THE BARNES FOUNDATION

2 Court deems the standard to be. I have made my
3 understanding of that standard as clear as I can by
4 telling you how I view the law of deviation in
5 Pennsylvania, which is a bit of a fluid standard,
6 as we speak.

7 So it really doesn't much
8 matter, for instance, that the Barnes, through its
9 employees, say it is clear, or that Dr. Wank, in
10 his capacity as a student, says it is clear the
11 other way. The only thing in the end is what is
12 clear to me.

13 I say that so that you

Volume III

14 understand and you all understand, although this
15 may be interesting to hear, I don't know that it
16 makes a tinker's damn worth of difference whether
17 you can make Dr. Wank look like a pretzel out there
18 or not.

19 MR. WELLINGTON: I will be very
20 respectful, Your Honor.

21 THE COURT: It doesn't really
22 matter, I think, in the long run.

23 But I have done the best I can
24 to work my way intellectually through the issue.
25 Sometimes you just have to make the call and live

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THE BARNES FOUNDATION

2 with the uncertainty that surrounds it. I don't
3 know that this is that big an issue anyway.

4 I appreciate all of the
5 argument that I have heard. I don't know that I
6 will get wiser than I am already. So I am going to
7 allow it to happen, subject to the arguments made
8 on the record.

9 Did you have ample opportunity
10 to put it on the record what you wanted?

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

13 THE COURT: Mr. Kline?

14 MR. KLINE: Yes.

15 THE COURT: Fair enough. Let's
16 go.

17 (The proceedings in chambers)

18 were concluded.)

19 THE COURT: Dr. Wank, would you

20 mind coming up here and be sworn.

21 - - -

22 HARVEY A. WANK, having been

23 first duly sworn, was examined and testified as

24 follows:

25 AS ON CROSS-EXAMINATION

♀

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 BY MR. WELLINGTON:

3 Q. Dr. Wank, good morning.

4 A. Good morning.

5 Q. I want to hand you a copy of a document

6 entitled petition to intervene and in the
7 alternative for leave to file an amicus curiae
8 brief for current and future students of the Barnes
9 Foundation in the action of the Barnes Foundation
10 to amend the Foundation's charter and bylaws.

11 I would actually, Dr. Wank, if
12 I could, ask you to turn to the page that has a
13 verification, and ask you whether or not your
14 signature appears on that page?

15 A. Yes, it does.

16 MR. CYR: Objection. May I
17 have a copy of the document that was handed to the
18 witness?

19 MR. WELLINGTON: Yes. I'm
20 sorry.

21 MR. CYR: Thank you.

22 BY MR. WELLINGTON:

23 Q. I will put a similar copy up here.

24 That bears your signature, sir?

25 A. Yes.

‡

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 Q. And would you read that out loud, sir?

3 A. The verification?

4 Q. Yes.

5 A. I, Harvey A. Wank, verify that I am one of the

6 petitioners named in the foregoing petition to

7 intervene, and in the alternative for leave to file

8 an amicus curiae brief, and that the statements set

9 forth herein are true and correct, to the best my

10 knowl edge, i nformation and belief, and that this
11 veri fication is subject to the penal ties of 18
12 Pennsylvani a C. S. Secti on 4904, relating to unsworn
13 falsi fications to authori ties.

14 Q. And did you read that before you signed it,
15 Dr. Wank?

16 A. I believe so.

17 Q. And did you understand that that was a
18 veri fication of the truthfulness of the statements
19 in the peti tion to which it was attached?

20 A. To the best of my knowl edge.

21 Q. And the peti tion, did you understand that it
22 was your making statements to the Court as to the
23 reason why you, as one of the students, needed to
24 intervene in order to protect certain interests of
25 the Barnes Foundati on?

1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 A. Yes.

3 Q. And I turn to paragraph 26 of that petition,

4 which is on page 10. You are welcome to turn

5 there, if you wish, or review it on the screen,

6 Dr. Wank.

7 The middle sentence says that

8 they -- and I think that means you and the other

9 students, does it not, sir? Does the "they" mean

10 you and the other students who intervened? Please

11 take an opportunity to read it.

12 A. (Witness complies with counsel's request.)

13 Yes, okay.

14 Q. The sentence that I just highlighted there
15 says, they also have a special interest in the
16 indenture language that protects from sale
17 paintings that Dr. Barnes intended for use and
18 were, in fact, used for decades in the art
19 education program.

20 Is that a statement that you
21 believe was true when you had it made in the
22 verification or the petition?

23 A. Yes.

24 Q. And that statement refers to all paintings,
25 gallery and non-gallery art, does it not, sir?

♀

1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 A. My reading of this was for the paintings and
Page 91

3 the ensembles that were hanging in the gallery.

4 Q. Let's look at your statement on paragraph 21.

5 MR. CYR: Objection, Your

6 Honor, to the characterization. He keeps referring

7 to this as Mr. Wank's statement. This is not an

8 affidavit offered by Mr. Wank.

9 THE COURT: I do believe it

10 would be more accurate to characterize it as the

11 language of the petition.

12 BY MR. WELLINGTON:

13 Q. The language of the petition that you signed

14 verification in support of.

15 The language of the petition,

16 Dr. Wank, page 21 says, the paintings in non-public

17 areas of the Barnes Foundation gallery and

18 administration building were intended to serve the
19 same purpose as the rest of the collection.

20 Is that a statement that you
21 made or verified to the Court?

22 A. Yes, I believe --

23 MR. CYR: Objection, Your
24 Honor. Again, this is improper questioning. This
25 is not an affidavit. He is verifying certain

♀

1 HARVEY WANK - AS ON CROSS By Mr. Wellington
2 statements, along with other parties, and it is the
3 language of counsel.

4 THE COURT: I am going to ask
5 you to be careful in your characterization of it,
6 Mr. Wellington. It is not his statement. It is a

7 statement within the petition to which he verified.

8 BY MR. WELLINGTON:

9 Q. Did you read the petition before you signed

10 the verification that it was true, Dr. Wank?

11 A. Yes, Mr. Wellington.

12 Q. Did you agree with the statements in the

13 petition?

14 A. The way that I interpreted it, yes.

15 Q. This statement says, the paintings in the

16 non-public areas of the Barnes Foundation gallery

17 and administration building were intended to serve

18 the same purpose as the rest of the collection.

19 Did you agree with that

20 statement when you signed the verification that was

21 submitted to the Court?

22 A. Yes. There are paintings in some of the
23 non-public areas that are used for teaching
24 purposes. There are also a number of paintings in
25 some of those areas that are not, that are just

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 hanging as decorations in the administrators'
3 offices, which, to me, have a great deal of value,
4 which are not used for teaching purposes.

5 Q. Does the petition that you verified somewhere
6 in it distinguish between the two types of
7 paintings that you just mentioned?

8 A. I would have to reread the petition to see
9 that, sir.

10 Q. Would you look at paragraph 22: The paintings
Page 95

11 in the administration building and other non-public
12 areas of the Barnes Foundation gallery have
13 traditionally been used in its art education
14 program.

15 Is that a statement that you
16 believed was true when you signed the verification
17 of this petition?

18 MR. CYR: Your Honor, I will
19 again object. I think this whole line of
20 questioning is inappropriate. He is attempting to
21 cross-examine a witness, not only on his own
22 statement, but the legal language of counsel, I
23 think that this is entirely inappropriate.

24 THE COURT: I think that
25 question as put by Mr. Wellington is a fair and

1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 permissi ble questi on.

3 So I understand the objecti on.

4 It is overruled.

5 Do you remember the questi on,

6 Doctor, or would you like it repeated?

7 THE WITNESS: Please.

8 THE COURT: Would you read it

9 back?

10 (The court reporter read back

11 as follows:

12 "Questi on: Would you look at

13 paragraph 22: The paintings in the administrati on

14 building and other non-publ ic areas of the Barnes

15 Foundation gallery have traditionally been used in
16 its art education program.

17 Is that a statement that you
18 believed was true when you signed the verification
19 of this petition?")

20 THE WITNESS: Generally, yes.

21 BY MR. WELLINGTON:

22 Q. Do you still today believe that that is a true
23 statement?

24 MR. CYR: Same objection.

25 THE COURT: The basis for the

♀

1 HARVEY WANK - AS ON CROSS By Mr. Wellington
2 objection, Mr. Cyr, is?

3 MR. CYR: The basis, Your
4 Honor, is that he is asking whether a statement is
5 put forth to the Court in a legal pleading or other
6 document petition is indeed true or not. I don't
7 believe that is appropriate. This is not an
8 affidavit to which Mr. Wank has attested to having
9 personal knowledge of all of the statements.

10 This petition was verified by
11 other parties, and it uses the language of counsel.
12 It is not the language of Mr. Wank.

13 MR. WELLINGTON: Your Honor, if
14 I may, counsel are not the parties here. Mr. Wank
15 is the part of the amici who asked for
16 intervention, signed the verification, said that he
17 read this beforehand.

18 I am entitled to ask him
Page 99

19 whether a statement in a verification that he made
20 to the Court in 2003 is still a statement that he
21 agrees with.

22 THE COURT: All right. I think
23 the basis for the objection that has been stated in
24 the Court is the same objection that was made
25 earlier that I ruled on. On that basis, it is

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 overruled.

3 Dr. Wank, you may answer that

4 question. Is this the statement that you still

5 adhere to?

6 Is that what your question was?

7 MR. WELLINGTON: Yes, Your

8 Honor. Thank you.

9 THE WITNESS: Okay. The

10 paintings in the administration building, or at

11 least some of the paintings are used as

12 educational -- in the educational program. Yes, I

13 believe that, if that is what the question that you

14 are asking me is.

15 BY MR. WELLINGTON:

16 Q. In paragraph 20, if I can turn your attention

17 to paragraph 20, it states in part that indenture

18 paragraph 10 protects all of the paintings in the

19 Foundation's collection from sale.

20 Is that a statement with which

21 you agree?

22 MR. CYR: I have a continuing
Page 101

23 objection.

24 THE COURT: You can have an
25 objection to that, because that requires a legal

♀

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 conclusion that you have not laid a foundation for
3 with this witness. I will sustain that. That is
4 an interpretation of a legal indenture which
5 lawyers have a difficult time with, and indeed this
6 Court has struggled with for 40 years.

7 So to think that this witness,
8 however bright, would have a better view of that
9 than we do, I am skeptical. The objection is
10 sustained.

11 BY MR. WELLINGTON:

12 Q. A statement was made in the petition,
13 paragraph 23, that you verified, that indicated
14 that eliminating protection from the sale of
15 paintings not currently on public display would
16 have a deleterious effect on the Foundation's art
17 education program.

18 Is that a statement with which
19 you agreed at the time that you signed the
20 verification?

21 A. I agree with that.

22 Q. Is that a statement that you still agree with
23 today, sir?

24 A. Again, there are some paintings that are not
25 in public areas that are used for teaching

1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 purposes, and there are a number that are not, at

3 least in the classes that I have had.

4 Q. In the classes that you have had personally,

5 not all of the non-gallery paintings have been

6 used; is that what you are saying?

7 A. The classes that I have had, and I have been

8 there, this is my 8th year of being there. I have

9 taken various classes with various instructors, and

10 there are a number of paintings that are in

11 non-public areas that we have not looked at from an

12 educational point of view that are in these

13 non-public areas.

14 Q. In paragraph 24, did you agree with the

15 statement made that the elimination of protection
16 against the sale of paintings used in the
17 Foundation's art education program will have a
18 substantial, direct and immediate effect on the
19 petitioners and all future students of the
20 Foundation's art education program?

21 A. I do agree with that. And my interpretation
22 is the paintings that are in the gallery that are
23 hanging as part of the ensembles.

24 Q. Where in that paragraph is that distinction
25 made?

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 A. I said that is my interpretation of what --

3 how I interpreted this.

4 Q. Among the works that you have stated,

5 Dr. Wank, that are used in the education program,

6 do they include any of the Soutines that are in the

7 administration building?

8 A. There are Soutines in the education building

9 that I saw that we have never spoke about that are

10 in some of the rooms, administrative offices

11 upstairs.

12 I haven't been in that building

13 in a year or two. And previous to that, there were

14 paintings in the administrative offices that are

15 not -- that are hanging there that are decorating

16 those offices that are not used for educational

17 purposes.

18 And I remember there definitely

19 was a Soutine up there.

20 Q. So you would sell those?

21 A. Excuse me?

22 Q. You would sell those?

23 A. Would I sell it?

24 Q. Yes.

25 A. If it depended on whether the Barnes

♀

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 Foundation stayed in Merion, and this was a viable

3 option, yes.

4 Q. And would you sell the Glackens and the

5 Prendergast and the Courbet and the portrait of

6 Dr. Barnes that has been appraised?

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7 A. If it depended on whether the viability of the
8 Barnes Foundation staying in Merion, that I -- it
9 is my belief that if they were sold and that helped
10 support the Foundation staying in Merion, yeah, I
11 would sell those.

12 Q. And would you sell paintings from the gallery,
13 itself, as well?

14 A. No.

15 Q. And would you sell Ker-Feal?

16 A. Yes.

17 Q. Have you ever been to Ker-Feal?

18 A. Yes.

19 Q. Have you taken classes out there?

20 A. Yes.

21 MR. WELLINGTON: I have nothing
22 further, Your Honor. Thank you.

23 THE COURT: My understanding of
24 the somewhat arcane rules of examination as on
25 cross would allow direct examination at the option

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1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 of counsel for the --

3 MR. WELLINGTON: Excuse me,

4 Your Honor, and I apologize. I have another

5 question --

6 THE COURT: Go ahead.

7 MR. WELLINGTON: -- while we

8 are thinking about that arcane situation.

9 BY MR. WELLINGTON:

10 Q. As a long-time student, you said that you have

11 been taking classes there. As a long-time student
12 of the Barnes Foundation, do you have any belief or
13 understanding whether Dr. Barnes thought that the
14 Soutines and the Glackens and the Prendergast, so
15 forth, in the administration building were somehow
16 less valuable than the ones in the gallery?

17 A. I never met Dr. Barnes, unfortunately. I wish
18 I could have. I don't know what the man was
19 thinking or not thinking.

20 MR. WELLINGTON: Thank you.

21 THE COURT: I assume that there
22 will not be direct at this juncture? I am asking
23 counsel of Dr. Wank first.

24 Yours is a more difficult
25 question procedurally.

1 HARVEY WANK - AS ON CROSS By Mr. Wellington

2 MR. CYR: I would like to

3 proceed, Your Honor.

4 THE COURT: You do want to do

5 direct at this point?

6 MR. CYR: Yes, just briefly.

7 THE COURT: Okay. You

8 certainly have that right. My difficulty is, to

9 what extent is the attorney general in its capacity

10 entitled. I think you have to do direct if you are

11 going to do anything. Do you agree with me?

12 MR. BARTH: I think perhaps so,

13 Your Honor, unless the students' counsel decides to

14 do direct and then I have the right to cross.

15 THE COURT: I think that's

16 true. An interesting mix, if you will.

17 Do you wish to defer your

18 direct until after the direct of Mr. Cyr?

19 MR. CYR: Exactly, Your Honor.

20 THE COURT: Go ahead, Mr. Cyr.

21 MR. CYR: I am somewhat

22 confused as to what Mr. Barth is going to do at

23 this point, but I will proceed, Your Honor.

24 DIRECT EXAMINATION

25 BY MR. CYR:

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1 HARVEY WANK - DIRECT By Mr. Cyr

2 Q. Mr. Wank, you were asked several questions

3 about a petition that was filed on behalf of the
4 students to intervene in this litigation back in
5 September of last year, 2003; is that correct?

6 A. Yes.

7 Q. And Mr. Wellington went through some of the
8 statements that were set forth in there about the
9 art in the gallery and the non-gallery, correct?

10 A. Yes.

11 Q. Now, since that time, there was a trial, was
12 there not, back in December of 2003, correct?

13 A. Yes.

14 Q. It was your understanding that the issue --

15 MR. BARTH: Your Honor, I would
16 like to object. These are leading questions.

17 THE COURT: Are you saying it
18 is leading?

19 MR. BARTH: Yes.

20 THE COURT: I think it is true
21 that it is leading. My thought is that there was
22 nothing controversial, and, however, it was more by
23 way of background. Do you agree with me?

24 MR. BARTH: Not entirely, Your
25 Honor, but I think that counsel is helping to

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1 HARVEY WANK - DIRECT By Mr. Cyr
2 suggest answers.

3 THE COURT: Well, we will do it
4 this way. I don't think that there is any
5 controversy there was a trial in December of 2003.
6 Most of us were there.

Volume III
In terms of where you go from

7

8 here, don't lead, Mr. Cyr.

9

MR. BARTH: Fair enough, Your

10 Honor.

11

MR. CYR: Your Honor, I was

12 leading, but I thought they were preliminary

13 matters for which there would be no contest.

14 BY MR. CYR:

15 Q. As a result of that trial, Dr. Wank, Judge Ott

16 rendered a decision, did he not?

17 A. Yes.

18 Q. Okay. What is your understanding of what the

19 Court ruled with respect to the trial that was held

20 in December of 2003?

21

MR. WELLINGTON: Objection,

22 Your Honor, relevance.

23 THE COURT: Well, I was
24 thinking of a different reason, which was, the
25 thing speaks for itself. It's an unusual

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1 HARVEY WANK - DIRECT By Mr. Cyr
2 application of res ipsa loquitur. But I think I
3 understand why you are laying the foundation, so I
4 am going to overrule the objection and you may
5 proceed.

6 THE WITNESS: Do I understand
7 Judge Ott's ruling in December?

8 BY MR. CYR:

9 Q. Yes.

10 THE COURT: Careful (laughter).

11 THE WITNESS: Yes. It was a
12 wonderful ruling (laughter).

13 MR. CYR: He is not too far
14 from you so be careful what you say (laughter).

15 THE COURT: I'm not violent
16 (laughter).

17 BY MR. CYR:

18 Q. What is your understanding of the ruling?

19 A. Well, my understanding was a few different
20 things: One, that the Barnes Foundation did not
21 make a strong enough case to move the collection
22 to the Parkway, that they did not explore other
23 less drastic alternative methods or means of how to
24 preserve the collection in the Merion location.

25 And the other part was that the

1 HARVEY WANK - DIRECT By Mr. Cyr
2 Attorney General's Office didn't do their job in
3 looking at the -- I think that it was kind of that
4 they were somewhat partisan.

5 Q. Why don't we go about it this way. What is
6 your understanding as to what this particular
7 hearing is about currently?

8 A. The hearing is whether the -- whether the sale
9 of Ker-Feal and certain other objects that the
10 Foundation owns could possibly be one of the less
11 drastic alternatives to preserve the Foundation
12 staying in Merion and that they don't have to move.

13 Q. Now, in the context of that issue as you
14 understand it, as it has been framed by the Court,

15 what are your present opinions or feelings with
16 respect to the sale of the non-gallery art?
17 A. I think that there are -- and, again, I have
18 not seen everything that the Barnes Foundation
19 owns, but I have -- I know that there are a number
20 of paintings and works of art that are not used on
21 a routine basis for the educational program that
22 could possibly be sold and used to keep the
23 Foundation in Merion.

24 As far as Ker-Feal goes, I was
25 there a few times for classes, and the educational

♀

1 HARVEY WANK - CROSS By Mr. Barth
2 program there is pretty much non-existent, and the
3 cost benefit ratio or the, you know, selling that

4 versus keeping the Foundation in Merion, to me,
5 would be worth it to preserve the main Foundation
6 staying in Merion.

7 Q. So, Dr. Wank, if the Court ultimately
8 determines that a way to keep the Foundation in
9 Merion is to sell the non-gallery art, and sell
10 Ker-Feal, it would be your preference to do that,
11 rather than move the gallery to Center City?

12 A. Yes.

13 MR. CYR: Thank you.

14 THE COURT: Mr. Barth?

15 CROSS-EXAMINATION

16 BY MR. BARTH:

17 Q. I just have several questions, Dr. Wank.

18 Dr. Wank, have you taken every

19 course and every seminar with every teacher offered

20 by the Barnes Foundation?

21 A. No.

22 Q. Do you, as a student, presume to determine or

23 dictate which paintings collected by Dr. Barnes are

24 appropriate to be used in the educational program?

25 A. No.

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1 HARVEY WANK - CROSS By Mr. Barth

2 Q. Yet, you object to the sale of some paintings

3 that have been used in the administration building

4 in the educational program?

5 MR. CYR: Objection.

6 THE COURT: Help me out.

7 MR. CYR: Objection. I think
Page 121

8 it is an improper characterization of his
9 testimony.

10 THE COURT: Well, it is cross
11 as to that I believe, and he can phrase it the way
12 he wants. Unless the witness says he doesn't
13 understand the question, I will say he can answer
14 it.

15 So if you understand it,
16 Doctor, go ahead.

17 THE WITNESS: In being there
18 for eight years and taking various courses -- now,
19 I haven't -- when you asked me previously have I
20 had every instructor? No, because there are new
21 instructors there, so I have not.

22 But I have had, every year, and

23 I have repeated years, I have taken courses in all
24 of the -- in the administration building, in the
25 main gallery. I have been at Ker-Feal. And the

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1 HARVEY WANK - CROSS By Mr. Barth

2 usage of the art in the administration building is
3 really minimal.

4 When we would meet in there,
5 the reason we met in there is because there was a
6 classroom in there. But using that artwork was
7 really a minimal purpose. The main teaching
8 purpose was in the main gallery with the ensembles.

9 BY MR. BARTH:

10 Q. You admit that some of the paintings in the
11 administration building, and indeed not in the

12 gallery, have been used in the educational program?

13 A. Peripherally, yes.

14 MR. BARTH: Thank you. That is

15 all.

16 MR. WELLINGTON: I have just a

17 little recross, Your Honor?

18 THE COURT: I was hoping that

19 you would say otherwise.

20 MR. WELLINGTON: I will be

21 mercifully brief, Your Honor.

22 THE COURT: Please.

23 RECCROSS-EXAMINATION

24 BY MR. WELLINGTON:

25 Q. Mr. Cyr asked you, Dr. Wank, about if you

1 HARVEY WANK - RE-CROSS By Mr. Wellington

2 understood the purpose of this hearing. You

3 testified at the prior hearing, didn't you?

4 A. Yes.

5 Q. And what I wanted to ask you is, the purpose

6 of this hearing, even if it is changed from what

7 you thought the prior one was, wouldn't change

8 facts that you had affirmed, would they, sir?

9 A. I am not sure I understand your question.

10 MR. CYR: Objection.

11 BY MR. WELLINGTON:

12 Q. Let me look at paragraph 21 again, where your

13 verification of this paragraph said, two parts of

14 it, the paintings in the non-public areas of the

15 Barnes Foundation gallery and the administration

16 building were intended to serve the same purpose as
17 the rest of the collection.

18 The fact that you perceived
19 this hearing to have a different purpose doesn't
20 change, does it, your verification of that
21 statement?

22 A. Well, what I think the intent was, and what
23 the reality is are two different things.

24 Q. So are you now saying that statement is not
25 something you verified?

‡

1 HARVEY WANK - RECROSS By Mr. Wellington

2 A. No, I said that I verified it before, and I
3 will say it again. But as far as those paintings

4 and other objects in the administration building,
5 at least in the courses that I have taken, were
6 used minimally.

7 Q. In the petition that you verified that we have
8 been looking at, did you suggest to the Court in
9 verifying that petition, that selling paintings
10 would be the least drastic alternative for the
11 Barnes Foundation?

12 MR. CYR: Objection, Your
13 Honor. I think that is an inappropriate question.
14 That wasn't the issue before the Court at the time
15 that that petition was filed. I think that that is
16 an inappropriate question.

17 THE COURT: I don't want to
18 appear impatient, but this witness' testimony can
19 be summarized as follows: In an ideal world,

20 nothing would be sold. If it is a choice between
21 moving to Philadelphia or selling some art, he
22 prefers to sell the art.

23 I don't think, no matter how
24 many times you ask the question surrounding that,
25 it changes the substance of his view.

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1 MATTHEW SCHWENDERMANN - VOIR DIRE By Mr. Wellington

2 Now, if you feel you need to
3 follow up on that, go ahead, Mr. Wellington.

4 MR. WELLINGTON: That's fine,
5 Your Honor. Thank you very much. I have no
6 further questions.

7 THE COURT: Thank you.

Volume III

8 (Witness excused.)

9 - - -

10 THE COURT: We will take a
11 ten-minute break.

12 - - -

13 (Brief recess.)

14 - - -

15 MR. WELLINGTON: The Foundation
16 calls Matthew Schwenderman.

17 - - -

18 MATTHEW J. SCHWENDERMAN, having
19 been first duly sworn, was examined and testified
20 as follows:

21 VOIR DIRE EXAMINATION

22 BY MR. WELLINGTON:

23 Q. Good morning, Mr. Schwenderman.
Page 129

24 A. Good morning.

25 Q. You are a partner in what institution, sir?

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1 MATTHEW SCHWENDERMANN - VOIR DIRE By Mr. Wellington

2 A. I am a principal with Deloitte Consulting,

3 which is a subsidiary of Deloitte and Touche.

4 Q. Where do you live, Mr. Schwenderman?

5 A. Lafayette Hill, Pennsylvania.

6 Q. How long have you been at Deloitte?

7 A. Since March of 1998.

8 Q. As a principal of Deloitte Consulting, what

9 are your general areas of expertise and

10 professional responsibility?

11 A. I am a principal in one of our service groups,

12 referred to as CFO Services. I provide management
13 consulting to for-profit and not-for-profit
14 organizations, largely within the realm of finance,
15 operations, management reporting, and also support
16 projects by other elements of our firm.

17 Q. Do you prepare financial analyses for
18 entities?

19 A. Yes, we do.

20 Q. Have you prepared financial analyses for arts
21 or cultural institutions, putting aside for a
22 moment the Barnes Foundation.

23 A. Yes. I have done that both as a member of the
24 firm, as well as in previous jobs.

25 Q. Are you able to give us some examples of

1 MATTHEW SCHWENDERMANN - VOIR DIRE By Mr. Wellington

2 those, or not? Are they private?

3 A. Well, without naming specific clients, I have

4 done financial and strategic analyses for national

5 museums of maritime and industrial history. I have

6 done cash analyses and performance management

7 analyses for cultural service organizations.

8 I have also done strategic

9 information systems plans for organizations, as

10 well.

11 Q. Before becoming a principal or before joining

12 Deloitte, what was your professional employment?

13 A. I was employed by the Zoological Society of

14 Philadelphia in various management capacities.

15 Q. Tell us a bit about that experience

16 Mr. Schwenderman, what your responsibilities were?

17 A. I was employed by the Zoo from 1990 through
18 '98, beginning as a director of finance, finishing
19 my tenure as a senior vice-president for business
20 affairs. In the most recent capacity, I had
21 responsibility for all financial affairs of the
22 organization, human resources, legal and
23 administrative information systems.

24 During my tenure there, I also
25 supervised marketing and development departments.

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1 MATTHEW SCHWENDERMAN - VOIR DIRE By Mr. Wellington

2 And the Zoo had a for-profit subsidiary of which I

3 was a secretary and treasurer that provided

4 consulting services to, among other clients, the

5 New Jersey State Aquarium.

6 Q. How many years were you at the Zoo?

7 A. Approximately seven and a half.

8 Q. Did you work professionally before then?

9 A. I did. I worked for two and a half years as a

10 Certified Public Accountant with Laventhol and

11 Horwath?

12 Q. Have we worked you back through your

13 professional experience back to your education?

14 A. I graduated from LaSalle University, summa cum

15 laud with honors in 1998, with a dual degree in

16 finance and accounting.

17 Q. Do you have any experience in your field,

18 Mr. Schwendeman, as a lecturer?

19 A. I have lectured on a couple of occasions, on

20 issues of financial management for not-for-profits,
21 both to a conference, riverfront development
22 conference, regarding aquarium, potential aquarium
23 developments, as well as I was a member and served
24 on the conference program committee for the
25 American Aquarium Association for three years and

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1 MATTHEW SCHWENDERMANN - VOIR DIRE By Mr. Wellington
2 provided annual round-table break-outs for finance
3 professionals of that industry.

4 Q. I will put up here on the screen a copy of
5 what has been previously marked as Exhibit 63 .

6 Does this serve as a copy of
7 your current CV?

8 A. Yes, it is.

9 (Curriculum Vitae was marked as
10 Petitioner's Exhibit P-63, for identification.)

11 MR. WELLINGTON: The Barnes
12 Foundation would offer Mr. Schwendeman as an
13 expert in business planning and financial
14 operations for profit and nonprofit institutions.

15 THE COURT: On qualifications,
16 Mr. Barth?

17 MR. BARTH: No questions. No
18 objections.

19 THE COURT: Mr. Cyr?

20 MR. CYR: I reserve any
21 questions on qualifications.

22 THE COURT: You may proceed,
23 Mr. Wellington.

24 MR. WELLINGTON: Thank you,
25 Your Honor.

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1 MATTHEW SCHWENDERMANN - DIRECT By Mr. Wellington

2 DIRECT EXAMINATION

3 BY MR. WELLINGTON:

4 Q. Mr. Schwenderman, were you retained to do a
5 financial analysis of a proposed 3-campus model of
6 the Barnes Foundation?

7 A. Yes, I led a team of four consultants at my
8 firm that was retained to provide such an analysis
9 for the Barnes Foundation.

10 Q. And, by the way, are you or the Deloitte firm
11 current accountants for the Barnes Foundation?

12 A. No, we are not.

13 Q. Have you ever been?

14 A. Not to my knowledge.

15 Q. Have you worked previously with or for the

16 Barnes Foundation?

17 A. Yes, I have worked on projects for the Barnes

18 Foundation on two previous occasions.

19 Q. What were those matters that you worked on?

20 A. In roughly July to September time frame of

21 2002, our firm conducted a cash analysis for the

22 Barnes Foundation's board of trustees.

23 And in 2000 our firm provided

24 assistance to the Foundation as they developed a

25 strategic plan.

1 MATTHEW SCHWENDERMANN - DIRECT By Mr. Wellington

2 Q. Did you prepare a report of this financial
3 analysis of the 3-campus model?

4 A. Yes.

5 Q. If you would turn in front of you,
6 Mr. Schwenderman, to what I think is Exhibit 62.
7 Is that a copy of the Deloitte report?

8 A. Yes, it is.

9 (Deloitte Report was marked as
10 Petitioner's Exhibit P-62, for identification.)

11 BY MR. WELLINGTON:

12 Q. When you were retained to undertake this
13 project, Mr. Schwenderman, what specifically were
14 you asked to do?

15 A. In general, our firm was asked to provide an

16 analysis that would estimate the financial impact
17 on the Barnes Foundation if it moved to a 3-campus
18 model.

19 The financial analysis would be
20 done in a cash-based analysis and cover a
21 multi-year period.

22 Q. How did you begin to undertake that project?

23 A. We had several discussions with the Foundation
24 and other representatives of the Foundation in
25 terms of what information they needed to present to

♀

1 MATTHEW SCHWENDERMANN - DIRECT By Mr. Wellington
2 Orphans' Court for this proceeding to determine
3 what that scope would be, what the parameters of

4 the analysis should be.

5 We then engaged a group of
6 consultants within Deloitte that we felt had, you
7 know, a reasonable complement of skills to
8 accomplish the work. We developed a work plan
9 accordingly, sought to gain an understanding of the
10 program that the Barnes was contemplating, gathered
11 what we felt to be representative historical
12 information that was needed, and then conducted a
13 series of surveys, interviews and financial
14 analyses.

15 Q. How long did this project take?

16 A. Approximately three months.

17 Q. Was Deloitte paid for this?

18 A. Yes, we were.

19 Q. How much were you paid for this?

20 A. The firm was paid \$125,000.

21 Q. Did you have any key assumptions that you use
22 in beginning or in preparing this analysis?

23 A. Yes. I mean, there were a number of key
24 assumptions. I think, as Mr. Perks testified this
25 morning, there was a charrette, which I attended.

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1 MATTHEW SCHWENDERMANN - DIRECT By Mr. Wellington

2 Many of the key assumptions were around the general
3 operations of the Barnes in the 3-campus model.

4 Among them were that the Center
5 City facility, that the gallery there would be
6 reconstructed, if you will, exactly as it exists in
7 Merion with the same installations, same flow

8 constraints, if you will; that individuals would be
9 admitted in the same manner as they are admitted
10 today; that the education programs would continue
11 to have dedicated hours; that there would be
12 expanded hours of operation for the Foundation,
13 particularly at the Center City location; that
14 Merion would remain; that the horticulture program
15 would remain in Merion and that the grounds would
16 become a public arboretum; and that the main
17 building that exists today would be renovated to be
18 archives, library, and a research center; and that
19 Ker-Feal would be developed as funds were available
20 to have more of an education and modest external
21 visitors.

22 Q. You mentioned the word flow --

23 A. Yes.

24 Q. -- in one of those assumptions. The same
25 flow, I think you said?

♀

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1 MATTHEW SCHWENDERMANN - DIRECT By Mr. Wellington

2 A. Right.

3 Q. What does that mean?

4 A. There were many considerations about how the
5 collection should be available to be viewed at the
6 Center City location. The flow refers to the fact
7 that the main design concept is that the gallery
8 would have the same number of rooms as it has now.
9 It would have the same dimensions.

10 The works would be displayed
11 and arranged in the same way, thereby providing

12 a certain maximum capacity that the facility could
13 handle, based on that, as opposed to having a wide
14 open room, such as this, where many more people
15 could circulate.

16 Q. I want to turn to some of these assumptions
17 that are in your report. Let's look at them more
18 specifically and talk about where they might come
19 from.

20 First of all, let me ask you
21 this: Is there a summary page or summary section
22 in your report, Mr. Schwendeman, that gives us a
23 conclusion that we can then sort of back up from?

24 A. Yes. Our report is laid out primarily in
25 three main components. There is an initial

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2 executive summary, which I believe to be about 16
3 or odd pages. There is, then, a detailed, more
4 detailed analysis of assumptions by general revenue
5 and expense category.

6 And then there is an appendix,
7 which lays out detailed assumptions, a detailed
8 consolidated financial analysis and other relevant
9 information.

10 Q. In terms of giving an overall picture of your
11 conclusion that we would then back into talking
12 with some specifics, what would be the best thing
13 for us to look at?

14 A. Beginning at the bottom of page 5, and
15 probably continuing for another page or two beyond

16 that.

17 Q. It says the financial analysis shows the

18 projected results of the 3-campus model for a

19 six-year period including both pre and

20 post-operations.

21 Tell us about that six-year

22 period.

23 A. We were asked to lay out the analysis for a

24 period prior to and after opening of a new

25 facility, largely to give a picture of what the

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2 financial impact might be on the organization prior

3 to it being able to open the doors at a new

4 location, and then a initial three-year period

5 after.

6 Q. If we go to the next page, is there a summary
7 chart that would help us?

8 A. Yes, at the top of the page.

9 Q. Tell us what this chart overall represents.

10 A. This is a very high level summary of total
11 attendance to the three campuses, total income,
12 total expense and an annual and cumulative surplus
13 of deficit of revenues to expenses for 3-campus
14 model as it goes through that transformation
15 period.

16 Q. So if we look across the top, the years from
17 transition move, you have negative two, negative
18 one, zero, one, two, three. Tell us what those
19 years represent.

20 A. What they represent is at this point in time,
21 for many of the reasons that Mr. Perks mentioned
22 this morning, there is not a definitive date as to
23 when the new facility would open.

24 So what we endeavored to do is
25 take you back again three years from the date of

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2 open and then three years forward from the date
3 that it opens.

4 Minus two and minus one are
5 projected pre-opening years. So continued 2-campus
6 existence as is, with preparations being made for
7 the third location.

8 Year zero is the move year,
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9 where much of the collection and the staff that
10 would be moving from Merion to Center City, that
11 activity would be taking place primarily during
12 that period.

13 Years one, two and three are
14 the inaugural year of a Center City location, and
15 then the second and third years of operation.

16 Q. Is there a more detailed summary of the
17 financial results in Table 1 near the back of your
18 report?

19 A. Yes. This is actually an aggregation of main
20 components of Table 1.

21 Q. Let's go back to Table 1.

22 Let's focus at the moment up to
23 the top.

Volume III
Let's focus on the two-year,

24
25 the baseline 2003/2004, and talk to us about just

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2 the baseline, what they represent, both attendance,

3 income, expenses, et cetera.

4 A. What we felt was necessary was to develop some

5 baseline for what the Barnes' operations on a cash

6 basis are today.

7 We took what we believe to be

8 the two most relevant current years, 2003, which

9 had ended, and 2004, which was roughly, you know,

10 one-half complete at the time of the study.

11 The 2004 budget column is

12 actually an adjusted budget, more of a forecast, if

13 you will.

14 THE COURT: Does the Foundation
15 operate on a calendar year?

16 THE WITNESS: Yes, they do.

17 We use that to understand kind
18 of what the -- also, we use those two years,
19 because they are largely years in which the
20 Foundation has been operating under the knowledge
21 of an existing petition. Therefore, it took into
22 account certain other elements.

23 So that was used to largely
24 ground us in what the state of the organization is
25 since our last involvement with it.

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2 BY MR. WELLINGTON:

3 Q. Move us then to the pre-opening years, the
4 years minus two, minus one.

5 What essentially changes from
6 the baseline, if anything?

7 A. You know, in large part, what changes is that
8 the organization is undergoing preparations for the
9 new facility.

10 So I believe it is somewhere in
11 year minus one they begin to bring on additional
12 required staff. They also begin to seek -- they
13 are also in the midst, obviously, it is significant
14 on fund raising for both the move initiative, as
15 well as the go-forward requirements. And the
16 endowment begins to take place, begins to generate

17 income from the endowment.

18 Q. Begin to generate income from the endowment,

19 which line are you looking at there?

20 A. The first line under income in thousands. It

21 is called investments and includes endowment.

22 Q. Right there? Is that what we are talking

23 about (indicating)?

24 A. That's correct.

25 Q. Any other significant changes in the

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2 pre-opening two years that you see?

3 A. In year minus one is the year that is

4 contemplated that Ker-Feal would begin to be built

5 out for greater education programs and potential
6 public visitation.

7 Q. How much is in the budget, projection for
8 that, if you know?

9 A. It is very minor. If you look at the
10 attendance and enrollment line, you see the total
11 attendance is 62,400 in year minus two. In year
12 minus one, it is approximately 68,700. So that is
13 an increase of roughly 65 hundred, K to 12, and
14 general visitors.

15 Q. Let's move along the column to move year.
16 Tell us what happens there.

17 A. The majority of what happens there is that the
18 gallery, itself, and for conservative assumptions,
19 is closed to the general public for the year.

20 Q. Does that mean education programs still

21 continue?

22 A. The majority of the education programs, I

23 believe, are assumed to continue for that year, you

24 know, obviously, as best possible during that

25 period of time.

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2 All of the horticulture

3 programs would obviously continue and Ker-Feal

4 would continue to ramp up.

5 But the majority of that

6 activity, being a significant transition year, is

7 focused on the move to the Center City location,

8 hiring of appropriate staff, training of

9 appropriate staff, removing the gallery from
10 Merion, packing it, shipping it over, uncrating it.

11 Also, there is a significant
12 period of, quote, unquote, normalization of the
13 systems within the new facility. I think we would
14 note that at one point in our report.

15 Q. I want to point down here at this capital
16 budget transfer?

17 A. Yes.

18 Q. Yesterday, Mr. Perks -- I think it was
19 yesterday -- mentioned that there was a number
20 which is equivalent to that, if I recall correctly,
21 in his budget that he said that he had gotten from
22 Deloitte and Touche, and that he had put in as part
23 of the capital budget?

24 A. Correct.

25 Q. Could you tell us what that number is and how

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2 they interrelated?

3 A. There are two main components. The first main

4 component is lost revenue to the organization from

5 not being able to operate, particularly visitation,

6 the retail parking, everything that might be

7 associated.

8 So if you look at certain

9 lines, like gallery shop sales, it goes from half a

10 million dollars to \$30,000.

11 The second main component is

12 staff, whose jobs, for retail sales manager, or

13 part-time staff, who you really would not be
14 engaging them in the daily operations of the
15 Foundation, but you would like to have them either
16 working on the move and ramping up the new
17 facility, or you would like to retain them.

18 As you may be aware, the
19 Aquarium is currently going through a transition,
20 and they have shut down for a period of time. They
21 laid off a number of people. The Barnes would
22 prefer to not have to lose valid employees as they
23 go through a nine to 12 month transition period.

24 So accounting for that in the
25 capital program budget is one way of using people

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2 with institutional knowledge to facilitate a better

3 transition, as well as to be on staff when they

4 open the doors.

5 Q. Move us forward into operating year one, and

6 tell us what significant changes are there and the

7 assumptions that underlie them?

8 A. All right. For the purpose of this analysis,

9 we assume that the Barnes would open their doors

10 January 1. That not being the height of a visitor

11 season, that may not, in fact, be the case, but to

12 have this be, since we didn't do a monthly

13 analysis, that is the assumption.

14 So, obviously, the main spikes,

15 as we work our way down from the top, is attendance

16 is not only increased, obviously, over the move

17 year, but it increased significantly over both the
18 baseline and the pre-opening years, largely driven
19 by the downtown facility.

20 Investment income reaches would
21 be considered to be the high end of the range,
22 based on having a 50 million dollar endowment in
23 place.

24 Q. The 2,500,000?

25 A. 2.5 million, yes, is five percent of the 50

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2 million dollar endowment.

3 Virtually, all of the income

4 lines obviously go up.

Volume III

21 doubles with the increase in attendance in the
22 increased square footage.

23 Dropping down to the expenses,
24 many of the individual line items that are driven
25 by either the size of the organization; i.e., the

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2 number of campuses they support, the number of
3 visitors they support, the number of programs they
4 support, have risen accordingly. Obviously, the
5 two largest line items there are the staff costs
6 and the guard and security costs.

7 Two new line items occur at the
8 bottom, one being capital equipment, which is the

9 Barnes taking its modest ability of roughly \$15,000
10 a year to replace necessary equipment for the
11 operations and increase that to a quarter of a
12 million dollars.

13 And, you know, without the
14 operating constraints on visitation, they would
15 embark upon more, you know, public relations
16 marketing and advertising to promote, not only the
17 organization as a whole, but all of the
18 programmatic efforts that the organization would
19 offer to the public.

20 Q. If we move from the opening year one to
21 post-opening years two and three, tell us what
22 transitions there. Some of the numbers at opening
23 year one are larger, both in the revenue and
24 expense line than the following years.

25 Could you walk us through that

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2 transition from one to two?

3 A. Yes. The organizations generally experience a

4 significantly greater level of interest in their

5 first year of opening than they would do in

6 outgoing years.

7 For the purposes of this

8 analysis, there is approximately a 17 percent, or

9 something of that nature, drop-off in attendance at

10 the Center City location from the first year it

11 opens to the ongoing years. That drives the drop

12 in the attendance number up above.

13 The main income items that
14 would follow, obviously, all of the earned revenue
15 that is associated with visitors would reduce
16 accordingly. And as the expense requirements, the
17 variable expense requirements, of serving 17
18 percent fewer visitors, might drop the development
19 requirement, you know, would normalize a little
20 more at four and a quarter million versus 5.1
21 million.

22 Running down the expense lines,
23 you can see that the line items that are changing
24 are less fixed and more variable with attendance.
25 Q. I want to focus on a couple of these and ask

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2 for your analysis or assumptions behind them,

3 Mr. Schwenderman.

4 Visitor levels, can you either

5 refer to the report or give us an explanation about

6 where those assumptions come from?

7 A. Those assumptions were driven on a

8 per-location basis, first of all.

9 So there are separate

10 assumptions for Ker-Feal, Merion, and Center City

11 locations.

12 Q. Are they all lumped into that?

13 A. They are all lumped into that.

14 So to the best of my

15 recollection, the general visitors number of

16 200,000 per year is approximately 180,000 in Center

Volume III

17 City, and 20,000 between Merion and Ker-Feal.

18 Of the 20,000, Ker-Feal visitors

19 is approximately 16,000 in Center City, and the

20 remaining 4,000 between Merion and Ker-Feal.

21 The split between Merion and

22 Ker-Feal is roughly a three-to-one, I believe.

23 The 180,000, since that is the

24 more material number downtown, represents roughly

25 about an 80 percent capacity level of the gallery,

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2 if it is replicated in the same manner as it exists

3 in Merion, and open for the number of hours that

4 the Foundation has indicated, and it has the same

5 per-hour limit on the visitor experience.

6 So, said another way, if the

7 roughly 42 hours, I think, of general visitation

8 that the Foundation indicated it would like to

9 have, at 100 new visitors per hour into the gallery

10 is calculated across the entire year, the capacity

11 of the facility is about 220, 225 thousand

12 visitors.

13 This assumption is about

14 180,000.

15 Q. So the assumption on visitation, non-student

16 visitation at the moment, is that there would be 42

17 hours on an average basis where that visitation is

18 permitted?

19 A. The only correction I would make to that is it

20 is not non-student visitation. It is general

21 public visitation. So any paying member of the
22 public or any enrolled student could attend at that
23 period of time. It is open hours, not dedicated
24 hours.

25 Q. That compares to how many open hours today?

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2 A. There is a chart in the report.

3 Q. Would 27 be the correct number?

4 A. I believe 27 is the right number (pause).

5 It is actually 24.

6 Q. Now, but with those additional open hours, is
7 there any reduction in the dedicated hours for
8 classes?

9 A. No. Currently, the program assumes the
10 dedicated hours actually increases from 24 to 27.

11 Q. Is there an assumption about an increase in
12 admission price built in here?

13 A. Yes.

14 Q. Can you tell us about that?

15 A. The assumption is that the blended admission
16 rate during general visitation is nine dollars.

17 The definition of the blended
18 rate is that the actual market price to someone
19 paying off the street would probably be, you know,
20 perhaps as much as, you know, 30 percent higher
21 than that.

22 The nine dollars accounts for
23 the fact that you would have discounted admissions.
24 You would have underwritten admissions,

25 potentially, and you would have students visiting

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2 at that time, as well, all of whom may pay a

3 reduced or no fee.

4 The K to 12 visitors assume a

5 five dollar admission fee per student, which is

6 consistent with what they currently pay.

7 Q. You have already talked to us about the

8 endowment investment assumption here?

9 A. Yes.

10 Q. Another significant one is the admissions and

11 related?

12 A. Yes.

13 Q. Tell us about that.

14 A. Admissions and related include several

15 components; obviously, the admission fee which we

16 spoke about. I want to make sure I have all of the

17 details right here.

18 In admission and related for

19 the three campuses includes primarily the admission

20 fee, the audio tours, which would continue within

21 the gallery, and parking. Now, parking for this

22 analysis is assumed to only still exist on a paid

23 basis in Merion.

24 There is no assumption that the

25 Barnes would run or benefit from any paid parking

‡

2 in Center City or Ker-Feal.

3 THE COURT: Mr. Wellington,

4 would this be a convenient time to break?

5 MR. WELLINGTON: Absolutely,

6 Your Honor.

7 THE COURT: I have some

8 additional obligations today. I am wondering if

9 1:30 works for people, to reconvene at 1:30?

10 MR. WELLINGTON: Yes.

11 MR. CYR: Yes, Your Honor.

12 THE COURT: Great. Let's pick

13 up at 1:30 then. Thank you.

14 (The morning session concluded

15 at 12:00 noon.)

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C E R T I F I C A T I O N

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I hereby certify that the

4

proceedings and evidence are contained fully and

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accurately in the notes taken by me, to the best of
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6 my ability and skill, in the above cause and that
7 this is a correct transcript of the same.

8

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W. BYRON BATTLE, RPR
Official Court Reporter

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Received and directed to be

17 filed this _____ day of _____, 2004.

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THE HONORABLE STANLEY R. OTT, JUDGE

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