

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 13

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APPLICATION OF THE JAPANESE EDUCATIONAL  
INSTITUTE OF NEW YORK,

Petitioner(s)

Index No.  
06-103400

FOR AN ORDER APPROVING THE SALE OF ASSETS  
PURSUANT TO N-PCL SECTIONS 510 AND 511,

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April 20, 2006  
71 Thomas Street  
New York, New York

B E F O R E:       HONORABLE SHEILA ABDUS-SALAAM, JSC

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1 (Off-the-record discussion held)

2 THE COURT: Sorry for the interruption,  
3 counsel, and everybody else. I am sure you have fire  
4 drills at the school, so you know what they are all  
5 about. I think we are ready.

6 MR. SCHWARZ: Good afternoon, your Honor.

7 If I may, your Honor, my name is Douglas  
8 Schwartz with the law firm of Bingham McCutchen. I  
9 represent the petitioner in this matter, the Japanese  
10 Educational Institute of New York.

11 This is a special proceeding pursuant to the  
12 Not for Profit Corporation Law Section 511 for approval  
13 of the sale of a piece of property in Connecticut owned  
14 by a New York not for profit corporation. Petitioner  
15 is the Japanese Educational Institute of New York which  
16 I will refer to as JEI.

17 JEI is a New York not for profit educational  
18 corporation that operates four schools serving some  
19 1500 students in the New York metropolitan area. I  
20 will say only one or two things about standing, your  
21 Honor, and or those are that the only New York State  
22 appellate courts to have considered the question in any  
23 form have uniformly concluded that standing is limited  
24 under Section 511 to the people identified in the  
25 statute. In this case, that means the Attorney

1 General, the State Education Department, members,  
 2 officers or creditors of the corporation. The fact is  
 3 that the Friends World College case and its progeny  
 4 can't be distinguished, which is, in my view, why you  
 5 have so many papers in front of you trying to do that.

6 THE COURT: Mr. Schwarz, I usually don't like  
 7 to interrupt, and I am not sure if it is because we  
 8 have a reporter that you want to make these arguments,  
 9 but you have made them in your papers and I have read  
 10 the papers. So can we sort of focus on things you  
 11 might want to highlight? As you said, you don't want  
 12 to spend a lot of time on standing, and I hope you  
 13 won't.

14 That's all I wanted to say. You can  
 15 highlight your arguments. You don't have to give me it  
 16 from scratch. I have seen the papers.

17 MR. SCHWARZ: Thank you, your Honor. I  
 18 appreciate that. I will only highlight the public  
 19 policy addressed in the Breaker Memorial Home case  
 20 which is a case earlier, much earlier than Friends  
 21 World College rejecting standing and indicating that  
 22 there is a good reason for the legislative policy to  
 23 limit standing here, because the parties other than the  
 24 statutorily enumerated parties have an opportunity  
 25 before the administrative bodies, the Attorney General,

1 and here the State Education Department, to be heard.  
 2 So it is not they aren't heard. It is that not for  
 3 profit organizations such as the one that I represent  
 4 shouldn't be forced into lengthy expensive legal  
 5 proceedings. That's the legislative policy. And I  
 6 just wanted to point that out under the Breaker  
 7 Memorial Home case. But I will now move on to the  
 8 merits.

9 As your Honor is aware, the property at issue  
 10 is a 16-and-a-half acre campus in Greenwich. And the  
 11 Greenwich Japanese School is one of JEI's four schools.  
 12 The transaction at issue is a sale and leaseback. The  
 13 lease permits the Greenwich Japanese School -- sorry,  
 14 the sale and leaseback is between JEI and the  
 15 Westchester Fairfield Hebrew Academy. And under the  
 16 lease, JEI has agreed to sell and simultaneously lease  
 17 back the property on which the Greenwich School is  
 18 currently operating, and the lease permits JEI to  
 19 remain in the space that it is currently using for  
 20 eight years at a guaranteed extremely low rent.

21 THE COURT: Can I stop you there,  
 22 Mr. Schwarz, because that sort of leads to the heart of  
 23 the merits that I have been thinking about after  
 24 reading the papers. Of course, I will admit that I did  
 25 not read the entire agreement between the WFHA and the

1 JEI. I did try to focus on certain provisions of the  
 2 leaseback, though. And My understanding is that the  
 3 leaseback is up to eight years, that the lease is only  
 4 for three years and -- I'm sorry, for five years, and  
 5 after three years the JEI may terminate the lease on  
 6 six months' notice to WFHA, correct?

7 MR. SCHWARZ: (Nod)

8 THE COURT: So if that is true and if JEI  
 9 doesn't use the entire lease term of either five years  
 10 or the extensions -- and I also meant to mention that.  
 11 As I understand it, the lease can be extended for up to  
 12 nine years. So the lease term is five years and can be  
 13 extended to nine years, and after three years either  
 14 party can terminate on six months' notice. Am I  
 15 correct about that?

16 MR. SCHWARZ: Not entirely --

17 THE COURT: Oh.

18 MR. SCHWARZ: -- but very close.

19 It is an initial five years and JEI is  
 20 required to remain for three. Then at JEI's option it  
 21 can be extended. After the five it can be extended for  
 22 an additional three, which is why I refer to it as  
 23 eight years guaranteed, then there is an additional two  
 24 beyond that which would have to be by agreement of both  
 25 parties. So it is up to ten but eight is guaranteed to

1 JEI, and the rent is guaranteed as well.

2 THE COURT: Now, if JEI decides, for whatever  
 3 reason, that it will leave after three years or even  
 4 before three years because there is something that  
 5 occurs that would permit it to break the lease before  
 6 three years is up, what then is the value of the  
 7 leaseback?

8 MR. SCHWARZ: The value of the leaseback  
 9 is -- the present value of the leaseback is  
 10 \$7.945 million, your Honor, because JEI has a legal  
 11 right to that property at, as you have seen, a  
 12 substantially below market rent for the entire eight  
 13 years. Someone would have to come along and be willing  
 14 to pay JEI more than \$8 million to get JEI to leave.  
 15 No one can force JEI to leave. No one. That's why  
 16 there are 120 pages here.

17 THE COURT: Are you saying then that the  
 18 guarantee of eight years is worth present value  
 19 \$8 million? I mean, I am thinking that -- and this is  
 20 just practical, I am not an economist. Practically  
 21 thinking, if JEI leaves the campus before the  
 22 eight-year lease is up, then the value of the lease is  
 23 diminished, no?

24 MR. SCHWARZ: Well, theoretically. But the  
 25 only thing this could get them to do that would have to

1 be something that was worth more than the \$8 million.

2 THE COURT: Does WFHA pay to end the lease,  
3 would they be paying JEI to end the lease sooner?

4 MR. SCHWARZ: There is no provision in the  
5 lease, but they would have to because there is no other  
6 way for them to end the lease. I mean, that's why it  
7 is a very real value.

8 Your Honor, as an analogy, if I may, this is  
9 like having -- this lease is like having a rent  
10 controlled Classic 6 on Central Park West. They have a  
11 guarantee.

12 THE COURT: So, essentially, JEI wouldn't  
13 want to walk away from their rent controlled Classic 6?

14 MR. SCHWARZ: They wouldn't. JEI wouldn't  
15 and WFHA couldn't.

16 THE COURT: Well, then, what about -- I am  
17 not sure if JS New York or JSNY and JEI or is it GS --

18 MR. SCHWARZ: GJS.

19 THE COURT: They are the same entities?

20 MR. SCHWARZ: Yes.

21 THE COURT: Greenwich School and JS New York  
22 are the same?

23 MR. SCHWARZ: Right.

24 THE COURT: So the PTA says that there was a  
25 vote taken by JEI to combine or to put off combining

1 the New Jersey school and the New York school for about  
2 three years from when the vote was taken some time in  
3 2004. And so by the PTA's calculation, that means in  
4 the next, I think, three to five years. So in the next  
5 three to five years the New Jersey school and the New  
6 York school might be combined. So as early as 2007 it  
7 may be possible for a combination of the New York  
8 school and New Jersey school. And if the Greenwich  
9 school is the New York school, then can you explain  
10 what impact that decision to combine the schools might  
11 have on this lease that is on the Greenwich property,  
12 the leaseback?

13 MR. SCHWARZ: Your Honor, first of all, if  
14 the schools were to be combined in Greenwich, that  
15 would not have an impact. Although, the trustees have  
16 said in the past that that's not a workable solution.  
17 And the only way that the board would -- your Honor,  
18 the board has committed to remain in Greenwich for the  
19 eight years unless there is some offer, as I have said,  
20 some opportunity that is worth more than the \$8 million  
21 value of the lease. There is no board action that  
22 indicates that the board is in any way committed to  
23 making a combination of the schools during that period.

24 THE COURT: Thank you. You may go ahead with  
25 your argument.

1 MR. SCHWARZ: Your Honor, if I may just  
2 address the two elements essentially of the standard?  
3 One element is that the transaction as a whole has to  
4 be fair and reasonable to the corporation, and the  
5 second is that the transaction must promote the  
6 charitable purposes of the corporation.

7 There has been some question raised about the  
8 process in obtaining this transaction, and I think it  
9 is worth spending just a minute talking about how the  
10 board got to this decision to enter into the  
11 transaction with the Westchester Fairfield Hebrew  
12 Academy.

13 They did engage in extensive efforts to sell  
14 the property. They began in 2002 to study the market.  
15 And they did this when they saw these serious financial  
16 problems looming on the horizon. They engaged a  
17 professional commercial real estate broker,  
18 Mr. Robertson, who determined that because of the  
19 nature of the highly restrictive zoning limitations on  
20 the property that the likely purchaser would have to be  
21 a school. And it wouldn't just have to be any school  
22 because the restrictions include limitations on the  
23 grades. It couldn't be a high school because it is  
24 limited to Grades 1 through 9. It couldn't be a big  
25 school because it is limited to 450 students. There

1 are parking limitations. There is also a limitation  
2 that says that 90 percent of the students have to  
3 arrive by school bus. So there is a limited group.

4 THE COURT: Again, I hate to interrupt,  
5 counsel, but I have a question.

6 MR. SCHWARZ: Fine, your Honor.

7 THE COURT: Is the reason that the school is  
8 not placed in a multiple listing Mr. Robertson's  
9 analysis that there would be a limited market for the  
10 school?

11 MR. SCHWARZ: It is. And his ability, as was  
12 evident from the fact that he was dealing with five  
13 different schools in the Greenwich area fairly quickly,  
14 his ability to market the property through discussions  
15 with developers and discussions with brokers and  
16 letting the market be aware of the property  
17 that way was -- again, this is not like selling a home  
18 or even an ordinary commercial property. The reason it  
19 is not in a commercial listing is because it is an  
20 extraordinarily unique property, your Honor.

21 THE COURT: With respect to the timing of the  
22 sale or the listing, I should say, of the sale itself  
23 or the attempt to sell it, as I understand it,  
24 Mr. Robertson was engaged in the summer of 2002. And  
25 as you indicated from the documents that were submitted

1 in your papers in reply, there was pretty quick  
 2 interest in the school. In fact, practically  
 3 simultaneously with Mr. Robertson's retention, I think  
 4 it was the Stanwich School or someone else that came to  
 5 look at the premises. Why then was the PTA not  
 6 informed until 2005 that the school was for sale?

7 MR. SCHWARZ: Your Honor, it is incorrect.  
 8 It is just simply not true.

9 THE COURT: Or 2004 even?

10 MR. SCHWARZ: There was general notification  
 11 to the parents even earlier than 2004. 2004 is the  
 12 first time that we have in the record a formal  
 13 notification, but there were regular communications  
 14 from the board about its board meetings and to the  
 15 principals, and the principals are essentially members  
 16 of the PTA. So there was no denial of information. It  
 17 was contrary to what is suggested in one of the PTA's  
 18 documents. It was not 2005, but it was March of 2004  
 19 when the board made the decision that the consolidation  
 20 was not feasible because the enrollment and the tuition  
 21 had continued to decline and, therefore, the sale and  
 22 leaseback was going to be most likely the best option.  
 23 It was then that they notified the parents of that  
 24 option.

25 THE COURT: Then I would like to understand

1 the timing again.

2 Mr. Robertson was retained in 2002. Explain  
3 to me why the school retained him exclusively to  
4 attempt to sell the school if you were also exploring  
5 consolidating the school in Greenwich. I am a little  
6 confused.

7 MR. SCHWARZ: They retained him to explore  
8 both the possibility of purchasing another location for  
9 consolidation and to explore the market for potentially  
10 selling the Greenwich school; if that's responsive,  
11 your Honor? So it was not only to sell the school.

12 And I might also add that they retained him  
13 to explore the market and to advise them. It was not  
14 that they had made an absolute decision to sell or not  
15 to sell the school or to buy another property or to  
16 consolidate at that point. They wanted to be advised  
17 by a professional on what was available and what the  
18 market looked like; which is also, your Honor, one of  
19 the reasons why a multiple listing at that point was  
20 not advisable.

21 THE COURT: Forgive me, but I am just reading  
22 from Mr. Robertson's affidavit because what you said  
23 didn't comport with my recollection of what he said in  
24 his affidavit.

25 In Paragraph 4, Mr. Robertson said: "In

1 July 2002 during my tenure at his firm or another firm,  
2 JEI retained me as the exclusive broker for the sale of  
3 the Greenwich property and acquisition of a new  
4 property."

5 That's all he says. He doesn't say he was  
6 retained to explore whether we should sell or whether  
7 we should combine or what the market is. He says he  
8 was retained to sell the property and to find a new  
9 one.

10 Maybe his understanding -- there was no  
11 retainer agreement, so I can't check, but maybe his  
12 understanding was different than the school's  
13 understanding of what his retention was. But that's  
14 what he says.

15 MR. SCHWARZ: Your Honor, let me just --

16 THE COURT: It is suggested that there had  
17 been some sort of decision by the board to sell the  
18 Greenwich property and to buy something else.

19 MR. SCHWARZ: Mr. Sakamoto was the board  
20 chair, your Honor, who attested to the petition, the  
21 verified petition. And at Paragraph 22 he explains the  
22 background to the retention of a real estate broker.  
23 It is Page 9 of the petition, your Honor. And he  
24 explains that there was initially a plan, as you see,  
25 to temporarily move students from New Jersey to

1 Greenwich while looking for a new location midway  
 2 between the schools. And at that time JEI began to  
 3 work with the real estate broker to study the market in  
 4 connection with the relocation.

5 THE COURT: Again, as I said, perhaps  
 6 Mr. Robertson misunderstood his retention. He was  
 7 ready to sell the school as soon as he got a buyer,  
 8 apparently, that the board would approve. He wasn't  
 9 just exploring. Apparently, he -- well, I don't know.

10 Anyway, go ahead. I'm sorry.

11 MR. SCHWARZ: I mean, I think that  
 12 Mr. Sakamoto's explanation on that view is the one that  
 13 indicates the board's view.

14 Does your Honor have anything further on that  
 15 point?

16 THE COURT: No. You can proceed. But,  
 17 actually, before you do, something occurred to me on  
 18 the lease that I didn't ask.

19 Why doesn't the proposed lease just have a  
 20 straight eight-year leaseback instead of the graduated  
 21 five years then possibly three more years and then  
 22 another two, why not just eight straight years?

23 MR. SCHWARZ: My understanding of that, your  
 24 Honor, is that it is an artifact of the negotiation.  
 25 In other words -- and this actually does bring me back,

1 but I will try to move through it.

2 We had a series of offers. There was a  
3 \$12 million offer from Stanwich and then a \$15 million  
4 offer from the Berkley School. And then some time went  
5 by, and in early 2004 there was an \$18 million offer  
6 from Stanwich and an \$18.5 million offer from the  
7 Westchester Fairfield Hebrew Academy. And that was the  
8 first offer that introduced the concept of a leaseback  
9 at five years. Mr. Robertson then went back to other  
10 parties and said this concept of a leaseback is  
11 something that is of serious interest to the board, and  
12 one of the other bidders or potential bidders, French  
13 Academy, if I have it right, they said we are not  
14 interested in a leaseback, and Stanwich at that point  
15 said we are not interested in the leaseback but we will  
16 offer \$20 million.

17 At that point -- and I believe I have this  
18 correct -- Mr. Robertson on behalf of the board went  
19 back to the Westchester Fairfield Hebrew Academy, and  
20 after conferring with the board said that the board  
21 wants a leaseback that is eight years so that they can  
22 provide an opportunity for every child who is currently  
23 enrolled and every parent who enrolled expecting that  
24 this would be the location to be able to complete  
25 school at this location even though, your Honor, as was

1 made clear in the petition, there is a very, very, very  
2 small number of students who stay for more than three  
3 years. No student, essentially, ever goes from the  
4 first grade through ninth grade at the school because  
5 of the nature of the student body. Most students stay  
6 in the school for the three years that their parent is  
7 working in the United States. So the three-year  
8 addition was added at that time as an option to JEI,  
9 but a guaranteed option. In other words, JEI has the  
10 right to exercise it.

11 The other reason why it is differentiated is  
12 that the rent does escalate by 25 percent during the  
13 last three years of the lease. And then the last --  
14 the additional two years was also another artifact of  
15 the negotiation, your Honor. And I am afraid that I  
16 don't have a detailed answer for you on how that one  
17 came about.

18 THE COURT: I was just reminded of a question  
19 that I raised in some of my discussions after reading  
20 the papers, and that was the point made by the PTA  
21 about the Sotheby's attempt to find out about the sale  
22 of the school, and Mr. Robertson doesn't address that.  
23 Perhaps it is because he never got that inquiry. But  
24 can you address why Sotheby's had a hard time finding  
25 out, assuming that that's correct.

1                   MR. SCHWARZ: That's a big assumption, your  
2 Honor. And first I would remind you that there is an  
3 unnamed attorney, there is a letter from a broker,  
4 there is -- I mean, I would say multiple levels of  
5 hearsay in that assertion. And we did address it, it  
6 is addressed in Mr. Kashima's affidavit who is the  
7 person that the person from Sotheby's said she called.  
8 He has no memory of any such call and said that, you  
9 know, had he received one his practice was to refer the  
10 person to the executive secretary of the organization  
11 who would then, it was his understanding, refer the  
12 person to Mr. Robertson.

13                   I mean, the fact that -- you can see the  
14 correspondence that Mr. Robertson was having with  
15 numerous representatives of numerous schools in the  
16 Greenwich area. It was no secret that this school was  
17 available and was interested in talking to people who  
18 were interested in making offers. And, you know, the  
19 fact that the Sotheby's person now says that she wasn't  
20 able to contact them, I think, may say something about  
21 her persistence, frankly. I don't know. But  
22 Mr. Kashima has no record or memory of such an inquiry.

23                   THE COURT: Okay.

24                   I guess I have taken up so much of your time  
25 with questions, Mr. Schwarz, so if you want to just

1 close out, please do so.

2 MR. SCHWARZ: I do hear you, your Honor. I  
3 think I have covered at least most of what I wanted to  
4 say about the process and the value of the leaseback.  
5 I just remind your Honor about the standard, that the  
6 organization is not required under that first prong to  
7 squeeze every last dollar out of the transaction. But  
8 the trustees have done a remarkable job of maximizing  
9 the value here in this sale and leaseback transaction.

10 What I would now like to do just briefly,  
11 your Honor, is to move on to the second piece of the  
12 standard, which is whether the transaction promotes the  
13 organization's charitable purpose. Because the last  
14 time we were here, your Honor asked Mr. Block if he had  
15 any objection other than to the value of the  
16 transaction, and I listened carefully to the answer,  
17 and I did not hear anything. And I believe that is  
18 because there is no legitimate objection on educational  
19 grounds to this transaction. The students will go to  
20 school in the same classrooms with the same teachers.  
21 They will play on the same playgrounds they are  
22 currently playing on. And the board has ensured the  
23 right to do that for eight years. The trustees made  
24 the decision to enter into the transaction for a very  
25 straightforward fundamental reason which is illustrated

1 on Page 6 of the verified petition which is that the  
2 enrollment numbers have plummeted, they have been cut  
3 in half. And the revenues of the school have similarly  
4 declined. And that's not a temporary decline. The  
5 trustees looked at the data, and it is in the petition  
6 about the declining number of expatriate Japanese  
7 business and government people in the metropolitan  
8 area.

9 They made efforts, numerous efforts to reduce  
10 expenses in other ways. They explored all sorts of  
11 ways to try not to do this, but they continue to face a  
12 substantial cash outflow every year. And they made the  
13 determination that they couldn't wait until they had no  
14 money in order to accept an opportunity such as this  
15 one. And they did it in a way that assures that they  
16 have substantial funds to go out and find an  
17 appropriately sized outstanding facility and that they  
18 have a full eight years to do that. That's a very long  
19 time.

20 The last thing, your Honor, before I conclude  
21 that I think is important to point out is what the  
22 State Education Department and the Attorney General are  
23 charged by statute with reviewing the merits of  
24 transactions like this one. And they take that  
25 statutory responsibility seriously, as you know. As

1 Ms. Gelman told you in the affidavit that she filed  
 2 this week on behalf of the Attorney General, the  
 3 Attorney General's office reviewed this matter  
 4 carefully. They reviewed the PTA's voluminous  
 5 objections carefully, and they concluded that the  
 6 proposed sale satisfies the statutory requirements of  
 7 the not for profit corporation law and the State Ed did  
 8 the same thing. They are charged, of course, State Ed,  
 9 with looking specifically at the educational issues  
 10 affected by the transaction. And they likewise had the  
 11 PTA's voluminous objections in front of them when they  
 12 concluded that they had no objection.

13 Your Honor, I will close at this point. We  
 14 have provided lots of material that shows you an in  
 15 excruciating detail how the transaction meets the  
 16 standard. We have only done all this volume -- and I  
 17 apologize for that -- because of what I characterize as  
 18 the scurrilous attacks on JEI and its board of  
 19 trustees.

20 This has been a difficult time for JEI. It  
 21 is often the case that difficult economic times bring  
 22 discord, but they also bring creativity and  
 23 resourcefulness. And through this sale and leaseback  
 24 transaction, once it is approved, JEI's trustees will  
 25 manage to end JEI's period of financial burden and

1 allow the organization to move forward financially  
2 secure. They will at the same time have been admirably  
3 obedient to the organization's educational mission  
4 putting all of the four schools and 1500 students on  
5 sound financial ground and providing a guarantee of  
6 eight years at the current GJS location and plenty of  
7 time and money to locate and create the next more  
8 appropriately sized location.

9 This transaction is truly a labor of love and  
10 a masterpiece by the board. It more than comfortably  
11 meets both of the statutory requirements, and we  
12 request that you approve it forthwith because, as you  
13 know, the transaction was scheduled to close at the end  
14 of March and the parties have work to do before the  
15 start of school for the Westchester Fairfield Hebrew  
16 Academy in September.

17 Unless you have any more questions, your  
18 Honor, I will now --

19 THE COURT: I hate to beat a dead horse, but.  
20 Counsel, I agree with you that the standard  
21 is two-pronged and that the Court has to consider  
22 whether this is a fair and reasonable transaction. And  
23 I just am still just a tad stuck on this \$8 million  
24 leaseback.

25 I understand that if -- that the overall

1 position of JEI is that we have to get a better deal,  
2 at least one that is worth at least \$8 million, before  
3 we leave this campus. But the fact remains that if JEI  
4 does leave the campus before the eight years is up,  
5 then the lease doesn't have an \$8 million value, and  
6 what JEI has retained is \$20 million for a property  
7 that -- let's just say for the sake of the argument  
8 here because I am not suggesting that I completely  
9 agree with the appraisal report submitted by the PTA,  
10 but let's say for the sake of argument is a \$26 million  
11 to \$28 million property that JEI has received \$20  
12 million for. And even assuming that the trustees don't  
13 have to bring every dollar out of this transaction,  
14 there is a huge difference between \$20 million and  
15 \$28 million, so -- or \$23 million, assuming that the  
16 lease can be prorated and JEI stays only three years.  
17 There is a huge difference. It is either \$8 million or  
18 \$5 million. So I still am a little concerned about  
19 whether JEI is properly valuing this property if they  
20 include the \$8 million present value of the lease that  
21 you say is guaranteed but that JEI can break or  
22 terminate at will. So why not get \$28 million right up  
23 front, buy another property and be done with it?

24 MR. SCHWARZ: Well, I have a lot to say as to  
25 that question.

1           One reason is because there was communication  
2 with the PTA there was a desire not to abruptly move.  
3 There was a feeling of value, frankly, beyond the \$8  
4 million in that the kids can go to school in the same  
5 classrooms and play on the same playgrounds for as long  
6 as the board thinks that that's the right thing to do  
7 up to eight years. That's one thing. So it is more  
8 than \$8 million. Because there is a priceless -- I  
9 don't want to sound like a MasterCard commercial but --

10           THE COURT: That's all right. We can all  
11 relate to it. It is harder to relate to these numbers  
12 than it is to something like that.

13           MR. SCHWARZ: But there is that. And that's  
14 substantial. You know, that's in the papers. That's  
15 why the board wanted the eight years.

16           Another point you actually made yourself,  
17 which is that -- and, you know, I want you to  
18 understand that I am not deviating from the first  
19 answer that I gave you which is that this is worth,  
20 that this really is worth \$8 million. We can keep it,  
21 take it to the bank. You know, if we start breaking up  
22 the place or something, then yes, they can evict us.  
23 But we can take this eight-year lease to the bank. But  
24 if someone does come along and gives us a better offer,  
25 as you said, the WFHA would have to pay us that much to

1 buy us out, or someone else might.

2 If for some reason we want to leave early, it  
3 is not that we wouldn't get, as you put it, a prorated  
4 value. Actually, the value is greater at the beginning  
5 because what you are seeing is a present value, and the  
6 value of the lease is actually front loaded. I can get  
7 you those numbers if you want, but you know -- maybe it  
8 is a little more than \$3 million after three years and  
9 a little more than \$5 million after five years. But we  
10 would have gotten that benefit, plus we would have to  
11 get the benefit of somebody gifting us money for the  
12 portion of the \$8 million that we were giving up.

13 The other thing I want to point out, your  
14 Honor, is two cases. I have to hope that I get them  
15 right. One is Wolkoff where there is a rejection of a  
16 deal based on a inadequate value, but the value is  
17 80 percent less than the what the appraisal said. And  
18 there is another case, St. Francis de Sales where the  
19 Court talks about a 10 percent variation between the  
20 appraised value and the purchase price and says that's  
21 okay, 10 percent.

22 So 10 percent in this case, your Honor, is,  
23 you know, in between \$2 million and \$3 million. And  
24 that's what Courts are talking about when they say, you  
25 know, you don't have to squeeze every last dollar out

1 if you have a transaction that has other kinds of value  
2 as we do here.

3 So that's what I have to say about the dead  
4 horse.

5 THE COURT: Okay. Thank you, counsel.

6 Mr. Block?

7 MR. BLOCK: Good afternoon. Arthur Block  
8 representing the PTA of the Japanese school of New  
9 York.

10 Your Honor, I am trying in my mind to  
11 completely re-sort the argument I had prepared for you  
12 because your questions have intersected all the  
13 important issues here in dispute, and you will find  
14 that my responses to them provide quite different  
15 evidence and arguments than what you have been hearing  
16 in response to those questions from Mr. Schwarz.

17 I also have to say that with regard to this  
18 argument -- and this is one reason why we requested the  
19 court reporter -- is that although Mr. Schwarz says  
20 that we presented all these arguments before, even at  
21 the Attorney General, which isn't completely true  
22 because we have a lot of new material here, they saved  
23 for their reply this new material, especially the  
24 documents attached to the Robertson affidavit which is  
25 a real bombshell in our favor which I will get to in a

1 minute, so we wouldn't have a chance to respond to  
2 them. Therefore, I have to respond here orally to your  
3 Honor, and I beg to have the time to do that before you  
4 ask me to sit. But I will get right to the question  
5 you asked twice today about the leaseback valuation.

6 Number one, although this number of  
7 \$8 million has been stated as if that was the value,  
8 that is based on this in their reply suddenly giving  
9 this Katz affidavit, which we sent to our expert in  
10 Rome, we faxed it to him, and he e-mailed back to me --

11 THE COURT: Rome, New York, I hope, and not  
12 Rome, Italy.

13 MR. BLOCK: No, Italy.

14 THE COURT: Oh?

15 MR. BLOCK: He is overseas.

16 He read this thing and he told me there are  
17 serious problems with this.

18 Number one, they use this Cushman & Wakefield  
19 office, you know? This is not a prime office building  
20 in Greenwich, Connecticut. There is nothing in the  
21 Cushman & Wakefield market survey that has square  
22 footage prices for a property like this. These are  
23 unair-conditioned classrooms in a school building. You  
24 can't use Cushman & Wakefield figures if they haven't  
25 gone out and gotten comparables for renting school

1 property of this kind. And especially a school in that  
2 condition.

3 Secondly, the present value which figures  
4 into that \$8 million to a great extent is much too low,  
5 according to our expert.

6 So I just want to say at the outset -- and I  
7 hope the Court might give us an opportunity to respond  
8 to this more through our expert eventually -- this \$8  
9 million is not even a correct theoretical value for the  
10 leaseback. But now let's get back to basics.

11 First, as to your question about what if they  
12 are not there for eight years. Well, this goes to one  
13 of the prime concerns of the PTA as you noted at the  
14 beginning of today's session. JEI made a plan to close  
15 both the New Jersey operation and the Greenwich  
16 operation and consolidate them somewhere in between.  
17 And the last official act of the board regarding this  
18 unification was the March 2004 meeting when they  
19 postponed it for three years, and that brings us to  
20 2007. So the parents are the beneficiaries of this  
21 organization. They are the constituency, a unique  
22 constituency, because this organization is designed to  
23 serve a very discrete group of people. There aren't  
24 that many people who need the Japanese government  
25 curriculum for their; children for primary and middle

1 school. And the parents' perception -- and it is a  
2 reasonable one, and perception is reality when you deal  
3 with your beneficiaries and their willingness to  
4 participate -- is that JEI has no intention of  
5 remaining for eight years. They want to get this  
6 through the court, sell this property, and then they  
7 are going to find an office building somewhere like in  
8 Tarrytown, which is one of the places where they had  
9 information back in '04, and they are going to put a  
10 much inferior facility in a different location that's  
11 far from where any of the parents live and far from the  
12 New Jersey parents as well. And this is going to be a  
13 huge demise in the school. Whether or not JEI does  
14 that in the next two years, it is their official  
15 position, still unchanged, to unify by 2007. And who  
16 is going to -- if they sell this permanent home that  
17 they have had for 14 years and theoretically they are  
18 going to linger there for eight years with a cap on  
19 enrollment so they can't grow, what parents are going  
20 to want to enroll first-graders in that school?

21 THE COURT: The cap on enrollment is nothing  
22 new, though, is it? Is this news to the PTA?

23 MR. BLOCK: There is the cap for the  
24 property, 450. The present PTA -- the present  
25 enrollment of the school is about 220. But under the

1 leaseback they have a limit of 250, and so there is a  
 2 limit on their growth. And that isn't even realistic  
 3 in terms of what JEI is planning because that puts them  
 4 on a collision with WFHA's plans.

5 Your Honor, on a website that my clients  
 6 read, they said that their goal is to increase from 125  
 7 to 400 as soon as possible, hopefully within five  
 8 years. That only leaves 50 spaces for JEI students.  
 9 So they must have some idea that JEI is leaving sooner  
 10 if that's their goal for fundraising letters and what  
 11 is on their website. So the parents also have to  
 12 think: How can I believe that this is going to be here  
 13 for eight years? Does that mean that JEI is going to  
 14 wait until the last minute to find a school? So for  
 15 the next five years or six years, we are still not  
 16 going to know where the school will be, whether it will  
 17 be too far for our children, for the younger siblings  
 18 or whatever.

19 So as to your Honor's first question about  
 20 what if they weren't there for eight years, how does  
 21 that affect the valuation, it is a very relevant issue  
 22 which also goes with the educational issue to which  
 23 Mr. Schwarz says we have no objection, which is  
 24 completely untrue.

25 I would not that they finally attached some

1 minutes to the latest submission, minutes of the  
 2 meeting that approved this sale. And the principal,  
 3 Mr. Toki is quoted in the minutes as saying, "I believe  
 4 there is no clear vision for the future." That's the  
 5 Tomida affidavit, Exhibit A, the minutes of 11/29.

6 Part of the problem, according to JEI, is  
 7 enrollment dropped at the Greenwich Japanese School.  
 8 We don't agree with the financial analysis that's  
 9 created as being a problem. But if you look at the  
 10 page of the petition that Mr. Schwarz directed you to  
 11 where there is the chart on enrollment, you will see  
 12 that the enrollment in Greenwich has stabilized for the  
 13 past three years that are reported. It isn't going  
 14 down. But what the parents say, your Honor, is that if  
 15 they sell their prime asset, this campus, without  
 16 having a new permanent home, you are going to see  
 17 enrollments drop, and you will have more of a fiscal  
 18 problem. But let me get back to the leaseback --

19 THE COURT: Before you do that, the  
 20 enrollment in the school is what it is. You know, we  
 21 are not going to change that essentially. But my  
 22 understanding is that this is the only property owned  
 23 by JEI, that the other schools operate in leased  
 24 property. Though Mr. Toki may not see a future for the  
 25 school, there has been no real discussion of -- are you

1 suggesting that JEI is going to shut down school  
 2 operations totally? I don't think there is any  
 3 suggestion that JEI is going to shut down the school  
 4 operations.

5 MR. BLOCK: No. I am saying they are going  
 6 to move New Jersey and Greenwich to someplace in New  
 7 York State --

8 THE COURT: Which they presumably will own.  
 9 If this sale goes through and JEI spends the proceeds  
 10 appropriately, the thought is to get another permanent  
 11 home, correct?

12 MR. BLOCK: But at this moment if your Honor  
 13 were to approve this sale and it were to go through,  
 14 the enrollments are going to drop because the parents  
 15 don't know what is going to happen. They expect that  
 16 there is going to be this move. It might be too far  
 17 away for them. It might be a facility not suitable for  
 18 them. But JEI is throwing away \$7 million that could  
 19 be used to buy a good facility.

20 I mean, your Honor, the location is  
 21 important. You only send children so far to school.

22 THE COURT: JEI presumably knows that, too.  
 23 That's why you are attempting, apparently in part, to  
 24 sell this Greenwich property and find a location that  
 25 would be suitable between New Jersey and New York.

1           That's what they say.

2                         MR. BLOCK:  They --

3                         THE COURT:  But I have another question.

4                         Mr. Schwarz indicated that it is rare that  
5           the students stay more than three years in the school  
6           anyway because of the nature of their parents' tenure  
7           here.  So are we talking about -- you seem to be  
8           indicating that these particular parents might not keep  
9           their children enrolled in the school, and these  
10          particular parents, if they just came this year, would  
11          leave three years from now.  I would imagine some have  
12          been here before that.

13                        MR. BLOCK:  Mr. Schwarz's statement is not  
14          true.  We put in affidavits on standing in terms of the  
15          parents' interest about that, where it is stated that I  
16          think it is approximately 40 percent or somewhere in  
17          the neighborhood of half of the families who are here  
18          on some kind of, you know, temporary stay in the United  
19          States for five years or so.  But about half of them  
20          are Japanese or Japanese American mixed families that  
21          are permanent residents here or are Americans, so that  
22          is not an accurate statement.

23                        Plus, you have to look to the future of the  
24          school and whether it has a future if the parents are  
25          convinced that they have no idea where a permanent home

1 is going to be. It might be too far from where they  
2 are. They are going to be, perhaps, in these temporary  
3 quarters under the lease for an unknown amount of time  
4 where there is now a new cap on how many students can  
5 be there. So if you were to try to, you know, increase  
6 enrollment of the school, which is the purpose of the  
7 organization, you get to a point where you can't enroll  
8 more kids and you can't enroll young siblings in first  
9 grade. So that's a real concern.

10 THE COURT: Do you dispute the numbers  
11 presented in the petition on Page 6 regarding  
12 enrollment from a high of 409 in '97 to 219 in 2005?

13 MR. BLOCK: We don't dispute them. But as I  
14 was saying before, I want to note that 2003, '04, '05  
15 the last three years, the enrollment has stabilized.  
16 But we think that's now going to start going way down  
17 sale is approved.

18 Also, we have the affidavit of Dr. Nitta, the  
19 head of the English department, saying JEI just won't  
20 recruit kids in a normal way.

21 There is plenty of possibility for increasing  
22 enrollment. Mr. Jackman notes the over enrollment of  
23 the Japanese kindergarten --

24 THE COURT: Let me ask you a question.

25 What accounts for the decline over that

1 period of time -- even if I agree that the numbers have  
 2 stabilized since 2003, what would account for the  
 3 decline between '97 and '03 when the school was -- the  
 4 PTA didn't know the school was up for sale allegedly,  
 5 so why weren't the parents enrolling more students at  
 6 that time before this whole controversy about the  
 7 school being sold came about?

8 MR. BLOCK: As Dr. Nitta's affidavit says,  
 9 the JEI doesn't involve the parents in recruiting. It  
 10 has a very onerous way of having -- they only have an  
 11 open school day for people who have expressed serious  
 12 interest. They only have a visiting for prospective  
 13 student where they have to pay tuition for --

14 THE COURT: So are you saying the PTA was  
 15 ignorant of the declining enrollment, is that what you  
 16 are saying?

17 MR. BLOCK: I imagine the PTA was aware of  
 18 the declining enrollment. I wasn't meaning to -- did I  
 19 seem to be disputing that, your Honor?

20 THE COURT: No. I am curious. You said the  
 21 school didn't involve the parents. If the parents want  
 22 to enroll their children in the school, are you saying  
 23 that the JEI would object?

24 MR. BLOCK: No. No. They didn't involve the  
 25 parents in having a better outreach in recruitment to

1 get other parents interested in bringing their children  
2 to the school.

3 Even in the petition they have some reference  
4 to some feeble things about having meetings. But what  
5 we understand is that you have these 37 corporate heads  
6 who are the trustees, businessmen; and they basically  
7 have some kind of outreach to their own companies or  
8 companies, but the school has not and JEI has not tried  
9 to reach out to the broader Japanese community.

10 THE COURT: But weren't the parents' tuition  
11 payments increasing? Didn't they think perhaps maybe  
12 if we recruited more students our tuition payments  
13 would be lower or stabilize if there are more students  
14 in the school? Did anybody question the fact that  
15 tuition was increasing?

16 MR. BLOCK: I can't speak to that  
17 specifically. I can speak to the point that the PTA  
18 has wanted to be more involved in the school for years  
19 because of things such as declining enrollment. And as  
20 you can see, there is no -- in the minutes of March '04  
21 attached to the Jackman exhibit, there is one loan  
22 trustee what says we really should have representation  
23 from the board of the principals. There should be more  
24 communication. But the board, just as with their  
25 standing argument which is legally frivolous and I

1 think that's why I will not spend time on it, but they  
2 do not want their constituency to be represented on the  
3 board, to be informed of things. And it is not true  
4 that they were told in 2004 about the decision to sell.  
5 They have not produced any letter, any documentation to  
6 that effect. They have -- and he talks about hearsay.  
7 They have a hearsay letter from Mr. Sato that is  
8 addressed to Mr. Jackman cc'd to someone and they put  
9 that in. And he says I thought, to those of you who  
10 put in your affidavits, that there was some  
11 correspondence to you in 2004. And so I have gotten a  
12 flood of e-mails from the parents who have read that  
13 saying we never -- nothing like that ever registered.  
14 And they searched through their files and found a  
15 letter from Mr. Sakamoto dated shortly after that  
16 meeting which is a rambling letter about mainly the  
17 unification being postponed with a passing reference  
18 that we are considering a possibility of selling the  
19 school. But at that moment they just had a meeting  
20 where they had in their package a proposal from WFHA,  
21 and they passed a resolution to put it up for sale and  
22 negotiate with WFHA. They didn't tell the parents that  
23 they were seriously, you know, working to sell the  
24 property. That was a false statement by Mr. Schwarz.

25 Your Honor, I want to be sure not to lose the

1 thread on your questions about the leaseback. This is  
2 very important.

3 THE COURT: Go ahead, Mr. Block.

4 MR. BLOCK: We got into this whole issue  
5 about what does the future of the school would look  
6 like if they are under a lease and the likelihood that  
7 it won't last eight years at all, but the second -- and  
8 the other issue was that it isn't worth \$8 million.  
9 That's not true.

10 The third point, your Honor, is this: When  
11 the Court is deciding whether the buyer is paying fair  
12 consideration to the seller, the non-profit  
13 organization, the question is not what is the  
14 theoretical value of the leaseback to the seller. The  
15 question is: If you market this property, what will a  
16 buyer pay for that property, that campus with the  
17 leaseback? And that has got to be answered by the  
18 market. And the reason is that having that leaseback  
19 could be a decrease or an increase in the value to the  
20 buyer of that property. And this deal is a perfect  
21 example of that because you have a situation where the  
22 buyer would be paying \$20 million for a property worth  
23 \$26.8 million or more. And it is a school with 125  
24 children buying a property that has a capacity of 450  
25 children. It is claiming to grow in the next five

1 years up to 400 and, basically, to fill up the campus.  
2 But in the meantime, all this empty space is not going  
3 to list with Cushman & Wakefield to rent to a  
4 Fortune 500 company in Greenwich. It is pretty much  
5 unmarketable except to a school that has a need for  
6 that.

7 So from the point of view of what the market  
8 value is to the buyer of this property, a buyer like  
9 WFHA or another school like the Stanwich School which  
10 had about 300 kids, can increase because you are not  
11 only getting a \$26.8 million property for \$20 million,  
12 you are getting this found money. You are getting all  
13 this income, all unused space you are not going to need  
14 for five years.

15 So the issue is the market. That's the  
16 issue, not some theoretical evaluation of market value.  
17 You can't subtract that way.

18 And here is the clincher, your Honor. Where  
19 did the \$20 million purchase price come from? Where  
20 does that come from? Well, May 2004 is the appraisal  
21 that JEI tried to rely on but now has abandoned relying  
22 on. May 2004 they got an appraisal for \$\$20 million.  
23 That dovetailed with the purchase price that was then  
24 being discussed with WFHA.

25 Well, under their reasoning, the leaseback

1 was already in there. By their reasoning the purchase  
2 price should have been \$12 million not \$20 million if  
3 you are saying that you take the value of the property  
4 by taking the fair market value and subtracting the  
5 value to the seller, the tenant-to-be, of the  
6 leaseback. It makes no sense. Why wasn't the price  
7 \$12 million in 2004? It was \$20 million. The whole  
8 thing about the leaseback and saying you can take the  
9 value, present value of this supposed savings and this  
10 leaseback arrangement and you can use that in a 511  
11 proceeding to subtract that value from the fair market  
12 value of the property is illogical, nonsense and  
13 unprecedented, and it is totally contradicted by their  
14 own practice in setting the price with the leaseback  
15 'based on the \$20 million appraisal in '04.

16 So the whole concept -- aside from the fact  
17 that the \$8 million is wrong, aside from the fact that  
18 that they are going to leave before eight years, the  
19 whole concept is wrong.

20 So that gets us to the key issue. And you  
21 were focusing on the Robertson affidavit. I will turn  
22 to that and the very significant documents withheld  
23 from us until the last minute to show further -- we  
24 already showed quite a bit in our papers -- about the  
25 lack of marketing effort.

1           You asked about Sotheby's inability to reach  
2 these people, and we get this affidavit in reply. Gee,  
3 I don't recall anything like that. That's all the  
4 affidavit says. And it was my practice to refer such  
5 calls to Mr. Matsumura. Well, Mr. Matsumura is the one  
6 who Ms. Glenn says told her to call this guy.

7           You have a perfect runaround situation here.  
8 She calls Matsumura. Matsumura says call this person.  
9 The next person doesn't return the calls. And then we  
10 get an affidavit a year later saying that, Oh, the  
11 practice was to refer these calls to Mr. Matsumura. It  
12 is nonsense. The Robertson affidavit basically says  
13 they got -- marketed this property by word of mouth,  
14 told some people in the office. It wasn't listed.  
15 This is a property that should be marketed nationally.  
16 Even if it is for a school or religious organization or  
17 spiritual organization or something of that nature, it  
18 should be marketed nationally. Greenwich, Connecticut  
19 is nationally and internationally known. The proof of  
20 this is shown quite easily in how the British Schools  
21 of America, which now is opening a school in Chicago  
22 that we presented documentation on, was dying to open a  
23 school here in Greenwich, Connecticut, and offered in  
24 writing \$500,000 a year in rent and \$300,000 a year for  
25 shared costs in order to share the space with WFHA.

1           And what do they do? From these affidavits now,  
2           Mr. Sakamoto has his assistant get a D&B report on the  
3           organization, find something mildly negative, it isn't  
4           even a bad report. It showed they paid 100 percent of  
5           their bills on time. It was a young organization so it  
6           couldn't have a long credit history. And they pull it  
7           out in court from their file to act as if they took  
8           that seriously. Why didn't they call Mr. Hallahane and  
9           ask, Can you respond to these D&B report? Often the  
10          reports don't have up-to-date data or whatever or are  
11          misleading.

12                        There was just no interest. There was no  
13          marketing. It was always WFHA.

14                        So let me point your Honor directly to the  
15          exhibits, the smoking gun exhibits, I will say,  
16          attached to Robertson which we only saw for the first  
17          time a couple of days ago as did your Honor.

18                        Exhibit E is a proposal dated February 5,  
19          2004. This is a very important date, as the Court will  
20          see in a moment. This is a proposal by the Stanwich  
21          School for purchase of the Greenwich property,  
22          Exhibit E, an offer for \$18 million cash. And it  
23          states at the bottom of Page 1: "We will be pleased to  
24          discuss with the Japanese School the possible  
25          relocation of the Japanese School to all or part of the

1 space now occupied by the Stanwich School."

2 This has never been mentioned to the Court,  
3 to the Attorney General, to the PTA, to anyone, that  
4 the Stanwich school made an offer, a written offer on  
5 that date which already was trying to find a solution  
6 to the JEI's need for a new home. This would be a home  
7 in Greenwich, Connecticut. That was a school with 300  
8 students. The facility would be a perfect size.  
9 That's February 5, '04.

10 If you turn to the next exhibit the date is  
11 also February 5, '04. This is the proposal from WFHA  
12 for \$18.5 million with a leaseback for five years  
13 subject to further negotiation.

14 Now, this Exhibit F, we already gave a copy  
15 to your Honor because we had this, and the reason why  
16 we had this was very important. The WFHA offer of  
17 February 5 '04, that written offer was included in a  
18 briefing package for the board of trustees of JEI for  
19 its crucial meeting on March 24, 2004. That was the  
20 meeting when it decided to postpone unification and to  
21 try to sell and lease back the school. They were given  
22 this, but they were not given the Stanwich proposal.  
23 That's why we never saw it until two days ago. what is  
24 going on here? The JEI board is being presented with  
25 the WFHA proposal and not with the Stanwich proposal?

1 We didn't know about this until, as I say, a couple of  
2 days ago. It is unbelievable.

3 And then, you know, my client now looks back  
4 at the Japanese language materials that were part of  
5 that package -- and we would be happy to supplement the  
6 record with the documents and certified translation to  
7 prove this -- and they say that in the Japanese  
8 language briefing materials that went along with the  
9 WFHA. It said that what was going to be proposed to  
10 the trustees at that meeting was to authorize  
11 specifically negotiating with WFHA in accordance with  
12 the attached proposal. There was nothing about  
13 Stanwich at all, okay?

14 So this was presented by the officers of JEI  
15 in that fashion on February 5, 2004 to its board.

16 From there we go to the next exhibit,  
17 Exhibit G, June 4, 2004, four months later. It takes  
18 four months. The February 5 proposal of WFHA is  
19 presented to the board of trustees with the request to  
20 resolve that you negotiate with them. The Stanwich  
21 proposal of the same date is not presented to them and  
22 it takes four months for Mr. Robertson to even write  
23 back a, sort of, pushing off letter here to Stanwich  
24 keeping them at bay while the negotiations with WFHA  
25 are going.

1                   Then we skip to Exhibit I, November 19, '04.  
2                   This is a letter from Robertson to the broker for the  
3                   Stanwich School setting forth an outline of terms and  
4                   conditions for a sale and leaseback. The Stanwich  
5                   School, if nothing else, was very interested in this  
6                   property. They made a first offer in '02 and they kept  
7                   coming back and coming back and coming back and were  
8                   blown off and blown off and blown off. Excuse the  
9                   colloquial term.

10                   So here they finally force them to present  
11                   these terms and conditions which are, you know, pretty  
12                   serious; more serious than, I think, the ones that were  
13                   deemed acceptable with WFHA at the same time.

14                   But putting that aside for a minute, as you  
15                   go down the bullet points, the third one is about  
16                   exclusive occupancy by the Japanese School for the  
17                   first two years requested by their broker. That's  
18                   something, you know, not part of the WFHA deal at all.  
19                   And then as you go down to the sixth bullet point: "GJS  
20                   will pay operating expenses proportionate share, but  
21                   not obligated for any rent during the lease period."

22                   It is going to become very important when we  
23                   get to Mr. Robertson's affidavit in a moment. But now  
24                   let's move on to Exhibit K. We are up to, now,  
25                   February 22, 2005. The Stanwich School will not go

1           away. After making no headway dealing with the broker,  
 2           here the director of the school writes directly to  
 3           Mr. Sakamoto, the president of JEI, saying that we  
 4           really want to make a deal to buy the school and move  
 5           the Stanwich School there. We really want to find a  
 6           way to work with you.

7                         Exhibit L, a follow-up letter, March 10, '05.  
 8           Now, here is the offer for -- again, none of this  
 9           documentation was disclosed until a few days ago -- for  
 10          \$23 million. It says: "The Japanese School could  
 11          continue to occupy the property on an exclusive basis  
 12          for one year." That already is a leasing provision  
 13          that is better than WFHA's exclusive occupancy for one  
 14          year. "And we would agree a sharing arrangement over  
 15          the following three years such that the Stanwich School  
 16          would have full occupancy by September 2009."

17                        Now, what happened to this very good  
 18          proposal? You asked Mr. Schwarz that question last  
 19          time we were here. Well, Mr. Robertson states, it is  
 20          Paragraph 28 in the middle: "I assume that the  
 21          Stanwich School would be requiring JEI to pay market  
 22          rent during this four-year period."

23                        He assumed that? How did he get that  
 24          assumption? He recently had written a proposal to the  
 25          Stanwich School saying that the terms of a leaseback

1           must be that JEI pay operating expenses and pay no  
2           rent. So he writes that to them, they write back and  
3           say we will give you \$23 million, one year exclusive,  
4           three years shared occupancy, saying nothing about  
5           rent. The assumption should be that they have just  
6           accepted that term of the demand by Robertson which was  
7           that it be that. And if Mr. Robertson wanted to  
8           clarify this, why didn't he pick up the phone and find  
9           out instead of assuming the worst? He is assuming the  
10          worst because he knows that JEI doesn't want to sell  
11          this property to the Stanwich School. They don't want  
12          to sell it to anyone other than WFHA no matter what.  
13          That is what was going on here.

14                        This documentation which was served in the  
15          reply just shows it as clear as daylight together with  
16          Mr. Robertson's incredible statement that they didn't  
17          pursue the \$23 million and four-year leaseback offer  
18          because he assumed that they were going to have to pay  
19          a market rent during that period.

20                        So let's put this all together. The lack of  
21          marketing, the deflection of interested parties who  
22          found out about this property on the market, together  
23          with the leaseback point that we started with. Going  
24          back to my point about how the argument on the  
25          leaseback argument is illogical and not lawfully

1 relevant, you see that they didn't market this property  
 2 properly, so you don't know what price the market would  
 3 bear for the Greenwich campus which we know now is  
 4 worth \$26.8 million, fair market value appraisal, with  
 5 leaseback terms. We don't know. We know the Stanwich  
 6 School was willing to pay \$23 million with a four-year  
 7 leaseback, and apparently they were willing to not even  
 8 charge rent; whereas WFHA is charging rent.

9 So if this was marketed nationally, if  
 10 people's phone calls were being answered, if brokers'  
 11 inquiries were being answered, if it had got into  
 12 commercial multiple listings, who knows what price  
 13 would have been offered for this property over a period  
 14 from 2002 to the end of '05? It could have been  
 15 \$30 million. We could have had another party like WFHA  
 16 for which a leaseback was a perfect solution to their  
 17 problem that they wanted to buy a bigger facility and  
 18 grow into it, but in the meantime they would have all  
 19 this vacant space. And here with a leaseback they  
 20 could make money on that vacant space. So this could  
 21 have been \$30 million, this could have been \$32  
 22 million. Who knows what the value of this could have  
 23 been?

24 So at this point on the first prong of 511,  
 25 the valuation, the JEI has not challenged the current

1 appraisal. It has not challenged it. Their petition  
2 was based on a prima facie insufficient documentation  
3 of that value, a May 2004, \$20 million figure with a  
4 page-and-a-half letter update which didn't have --  
5 which still used the old data. Even prima facie, as  
6 far as we are concerned, even if we didn't get the  
7 current appraisal, this petition could not have been  
8 granted by the Court. At the very least, it would have  
9 ordered them to go out and get a fresh independent  
10 expert appraisal. But the PTA has unfortunately had to  
11 bear the expense of doing that.

12 They are not in their reply papers  
13 challenging the current appraisal. They are putting  
14 all their eggs in the leaseback basket. And as we have  
15 now shown, the leaseback basket is completely full of  
16 holes. It is not even a viable argument to make.

17 THE COURT: The only thing left is -- you  
18 already indicated that the PTA does object on  
19 educational purposes grounds, so I think we can move  
20 on.

21 MR. BLOCK: Yes, your Honor.

22 As I mentioned before -- oh, could I just say  
23 this? I would also request leave of the Court to  
24 submit a surreply affirmation specifically addressing  
25 the new documentation that we recently received from

1 JEI that should have been produced months ago at the  
2 Attorney General level and not saved for now. And I  
3 have prepared last night and this morning a short  
4 affirmation along those lines. It has no exhibits, it  
5 is just addressing a new matter. I would be prepared  
6 to hand a service copy to Mr. Schwarz and hand it to  
7 the Court. I am making that application.

8 MR. SCHWARZ: I would object to that, your  
9 Honor. This petition is an extremely thorough  
10 petition. It has been in the hands of Mr. Block since  
11 the day it was filed with the Attorney General back in  
12 December. And there is no obligation to provide  
13 documents of any particular kind. The arguments were  
14 laid out before him, they have been laid out before  
15 him.

16 When we were here last, your Honor, I believe  
17 you said that there would be no surreply. He has had  
18 every opportunity in his opening papers to take  
19 whatever shots he wants at this process, and he has  
20 done that. And Rule 14(c) of the Rules of the Justices  
21 states that the CPLR does not provide for a surreply no  
22 matter how denominated.

23 MR. BLOCK: But the Court has discretion.

24 You see, your Honor, the problem is I would  
25 have asked to strike the new documents except for the

1 fact that they help us prove our case, so I don't have  
2 that remedy to say they have new matter here. So I  
3 would just say, your Honor -- and I don't want to  
4 deflect the momentum of the argument. The way the  
5 surreply is prepared, is set up, the first part is  
6 grounds -- basically the application for permission.  
7 Perhaps the Court could take it and --

8 THE COURT: Counsel, is it what you just  
9 argued?

10 MR. BLOCK: Much of it is, but here it is  
11 laid out. I may have missed a few points in my  
12 argument.

13 You know, it also addresses the fact that  
14 there was no notice to parents in '04. It also  
15 addresses the fact that they haven't submitted any  
16 letter to that effect, and that the parents searched  
17 their records and what they found. It has excerpts  
18 from an e-mail from Mr. Kerin in which he specifically  
19 says why this expert valuation report which should have  
20 been included. If they are basing the whole case on  
21 the leaseback, we should have had that before. He is  
22 saying why that \$8 million figure is wrong and it is  
23 not appropriate. And that's a very minimal thing. It  
24 is just a couple of paragraphs from an e-mail. He  
25 hasn't had the benefit to really, you know, write an

1 expert affidavit about that.

2 THE COURT: Counsel, the danger of allowing  
3 you a surreply is they want a sur-surreply. So it can  
4 be never ending here.

5 MR. SCHWARZ: That's right, your Honor.

6 On that point about the value of the  
7 leaseback; again, in the petition it was made clear the  
8 value of the leaseback was a fundamental part of the  
9 argument and of the justification and of the petition.  
10 It was only when the PTA challenged it that JEI said,  
11 Okay, let's find out what it is really worth. Let's  
12 get a professional to evaluate. In the leaseback it  
13 says it is \$5 million. They had every opportunity to  
14 attack that in their papers. They didn't miss too much  
15 else. I would renew my objection.

16 MR. BLOCK: Should I proceed on the  
17 educational issue?

18 THE COURT: Yes, you proceed. I will think  
19 about your application.

20 MR. BLOCK: I am sorry for the diversion, but  
21 it seemed to be in sync with what was just covered.

22 THE COURT: Go ahead.

23 MR. BLOCK: Your Honor, as I mentioned, the  
24 principal said to the board at the meeting where the  
25 vote was taken that the board has no vision. And the

1 other comments by the board members were, Well, this  
2 isn't an educational decision, this is a financial  
3 decision. It is a very lengthy document, but that's  
4 basically the point.

5 So the principal's opposition or his lack of  
6 support for this sale was disregarded. And a school  
7 that is run by an organization that has no vision, and  
8 a school that has for 14 years had a permanent home,  
9 and that home which is also the main asset of the  
10 organization and which provides the ability through  
11 renting out the unused space to solve all of JEI's  
12 financial problems and make it unnecessary to even look  
13 for a new home, this transaction is not in the  
14 educational interest of the organization. The  
15 organization exists to serve these beneficiaries, and  
16 if this sale goes through, these beneficiaries are  
17 going to be not knowing where their school -- how far  
18 away, when, where or what their school will be, and  
19 that's one, two, three, four, whatever years in the  
20 future. They don't know when the change will take  
21 place. They are being told that they are going to be  
22 on this campus sharing space, which is fine. They are  
23 willing to rent the space, the unused space. They  
24 don't mind sharing. But they are being told, Well, you  
25 are going to share it with an organization that is

1 planning to grow to 400 as soon as possible. So it  
2 puts the idea of the Greenwich school population  
3 growing and increasing on a collision course with the  
4 proper and legitimate goal of the purchaser which is  
5 to, you know, fill up the space and take over as much  
6 of the space as possible. That's not a very good  
7 environment.

8 The parents -- it is not in the educational  
9 interest of the organization because, as I said before  
10 and now I think there is a better understanding of it,  
11 after our discussion, if you are throwing away millions  
12 of dollars that you need, if you are going to have a  
13 new school, how is that in the interest?

14 We have recited one case -- it is not on the  
15 tip of my tongue, but it is in the brief -- which  
16 stated that it is a per se educational harm to the  
17 not-for-profit organization's purposes to significantly  
18 underasset a value that you sell because you need money  
19 to run the programs. They need money to get a new  
20 home.

21 Furthermore, the way this sale decision came  
22 about was one in which the parents were excluded. This  
23 organization has a structure that is a completely  
24 closed, controlled, insider operation of corporate  
25 executives with no educators, no independents, not even

1 a business person who is independent of this group of  
2 Japanese companies that, as Mr. Sasaki's affidavit  
3 mapped out in considerable detail, are enmeshed in all  
4 kinds of relationships of cross-ownership, of selling  
5 to each other, of lending to each other. The bank that  
6 is going to be paid back if this were sold is one of  
7 these corporations. You have this totally closed  
8 organization that won't let the educators or the PTA --  
9 and we think there should be four PTA's that -- every  
10 PTA should have a representative on this board. But  
11 they completely exclude them. And the result is having  
12 an organization run like this in violation of basic  
13 not-for-profit principles without checks and balances,  
14 with high secrecy, with a board that is full of  
15 potential conflicts of interest.

16 THE COURT: That sounds like another  
17 Article 78. Not this one, counsel. That argument  
18 sounds like a different proceeding to me than this one.

19 MR. BLOCK: That might be. But this is in  
20 terms of how an educational organization that's  
21 nonprofit can carry out its functions when the decision  
22 to sell the permanent home of the school of 14 years  
23 without a plan and without a vision, as the principal  
24 says, for the future. And when that is done by an  
25 organization run like this, you are destroying the

1 fabric of the trust and the confidence and the belief  
2 in the organization that is running the school that is  
3 necessary in order to have a future for the school of  
4 growth, vitality. Joint effort and support.

5 THE COURT: Is this an argument that was made  
6 to the Attorney General and the State Department of  
7 Education, or is this an argument you have just made to  
8 the Court?

9 MR. BLOCK: Well, we reference -- we made a  
10 brief reference to it there. And I think with the  
11 information that we have developed since those  
12 submissions it might get more of a hearing, but their  
13 attitude in large part is that the Court has the legal  
14 authority to decide, that they only get notice, and  
15 that their review role is much more limited. Although,  
16 the way Mr. Schwarz describes it, it would make you  
17 think there was some kind of notice procedure and due  
18 process procedure at those levels. There isn't. They  
19 don't have any procedures. If you are lucky enough to  
20 know something is going to be presented to them you try  
21 to get your opinions in.

22 And the Education Department or the Regents  
23 of the State of New York, they have -- there is a  
24 particular provision in the Education Law which  
25 provides that you can file a complaint with the Board

1 of Regents asking that they remove directors of a  
2 nonprofit organization corporation. That's what  
3 happened in the Adelphi case where almost all of the  
4 directors were thrown out by the Board of Regents.

5 So there is a particular procedure when it  
6 comes to the Education Department if you are trying to  
7 restructure a board like this. I am merely stating,  
8 your Honor, that with regard to this proceeding, it is  
9 one of the subpoints with regard to seeing how the  
10 educational purposes of this organization are not  
11 served by having a board governed like that making a  
12 decision like this because it totally ruptures the  
13 relationship between the beneficiaries and the  
14 organization.

15 Thank you.

16 THE COURT: Mr. Schwarz, I hope this is a  
17 brief reply.

18 MR. SCHWARZ: It is difficult to keep it very  
19 brief, your Honor, because we have entered a different  
20 universe. We have left planet earth.

21 The allegations against the board that you  
22 just heard -- I mean, the point is that's the kind of  
23 stuff that's in these papers we received. Really the  
24 only thing that the Attorney General didn't see was the  
25 stuff about Senator Liebermann. Everything else really

1 was before the Attorney General. And I am not making  
2 it up. Ms. Gelman, Paula Gelman, Assistant Attorney  
3 General's affidavit says: "After a review of the  
4 application including the verified petition with  
5 annexed exhibits, this office concluded that the  
6 proposed sale satisfied the statutory requirements.  
7 During the course of our review, we were contacted by  
8 Arthur Block. Before concluding our review, we  
9 considered and reviewed the written objections and  
10 other documents submitted to this office on behalf of  
11 the PTA and concluded that we had no objection to the  
12 proposed sale but asked to give notice to Mr. Block."

13 And we agreed with that, and have agreed with  
14 right along. And we gave him voluntary notice of the  
15 fact that we were submitting the petition to the  
16 Attorney General and so forth.

17 The allegations against the board are  
18 offensive allegations for more reasons than I would  
19 care to address, but let me just say that the  
20 allegation of conspiracy just doesn't hold together.  
21 Ridiculous claims. And political contributions and  
22 special business deals? This is mud slinging. There  
23 is no basis.

24 Your Honor, this is a board which spent years  
25 struggling with the finances of this organization and

1           created this transaction to -- there is just no reason  
2           that they would have done it for any other reason than  
3           in their estimable judgment.  These are leaders of  
4           businesses, your Honor.  These are people who are on  
5           the board of the Metropolitan Museum of Art, the Board  
6           of Regents of Georgetown University.  These are people  
7           who have experiences in --

8                         THE COURT:  I read that, counsel.  I mean, I  
9           am allowing you to make your record on it, but that's  
10          not an argument that is swaying me right now.

11                        What I do want to know, though, is I asked  
12          Mr. Block if this argument regarding the board was  
13          something that was made before the Attorney General and  
14          the State Department of Education; but I wonder, was  
15          the value with the leaseback argument made before the  
16          Attorney General as well?

17                        MR. SCHWARZ:  Yes.

18                        THE COURT:  Okay.

19                        MR. SCHWARZ:  What Mr. Block has done with  
20          respect to the documentation of the vigorous  
21          negotiating process that went on is to do what he has  
22          done throughout these dealings, which is to try to turn  
23          on to the offensive.  What these documents show is that  
24          there is extensive communication between Mr. Robertson  
25          and interested buyers.  And, in particular, what it

1 gets down to after some period of time is two  
2 particular buyers.

3 Now, Mr. Robertson laid out in one of these  
4 letters, essentially, the terms of the transaction in  
5 the November 19, 2004, the terms of the transaction to  
6 Stanwich; and what they came back with was not what he  
7 had indicated was going to be necessary. And then he  
8 jumps ahead to February of 2005, your Honor, after  
9 there has been -- after the controversy over this  
10 matter begins to boil up to some degree and somebody  
11 burns down the office of the then executive secretary,  
12 Mr. Matsumura. And a week after that, a letter comes  
13 from the Stanwich School saying they want to talk  
14 again, okay? And what does Mr. Robertson say? He says  
15 we are always willing to listen and we are always  
16 willing to talk, and I have a good relationship with  
17 Mr. Grasso and I will continue to talk with him. He  
18 says I have had good communications with Mr. Grasso.  
19 There is no response to that. So this is just trying  
20 to make a silk purse out of a sow's ear. And what  
21 Mr. Robertson did was perfectly appropriate. There was  
22 a vigorous process there.

23 You know, with respect to the point about the  
24 value of the leaseback; the rent that the WFHA is  
25 getting is a pittance. It is a tiny fraction of what

1           it could get. And the point of the valuation is that  
2           under the \$26.8 million appraisal -- and I am willing  
3           to accept that the value is somewhere between the  
4           \$26.8 million that they got and they paid for and the  
5           \$21.7 million appraisal which was the appraisal  
6           submitted with the petition. But under that  
7           \$26.8 million appraisal, your Honor, you sell the  
8           property and you have to move out. There is no ability  
9           to stay. The buyer gets the property. So WFHA would  
10          be able to rent that property out. What they are  
11          getting for it is about something like 23 percent of  
12          the market value. JEI, under those circumstances, if  
13          it got that \$26.8 million would have to go out and find  
14          a new place. And to do that, the people at Cushman &  
15          Wakefield who are experts in this have said there is  
16          only a certain amount of properties out there that are  
17          big enough to accommodate this school. There is  
18          Class A, B and C. We took a mid-range of potential  
19          properties and gave you this figure. But if JEI had  
20          that \$26.8 million in their pocket, they would have to  
21          go out and pay the market price for space.

22                        So the calculation that Mr. Katz has done  
23                        could not be more clear, and it is the same basic  
24                        calculation that was set forth in the petition. It is  
25                        just that some actual numbers were found to show what

1           that value really is. And it really is, as we talked  
2           about, close to \$8 million.

3                       THE COURT: Well, if it really is \$8 million  
4           based upon space that, according to the PTA, is not the  
5           kind of office space that Cushman & Wakefield normally  
6           looks for, it is an unair-conditioned school building  
7           essentially. That is what I am told. So if that  
8           valuation by Mr. Katz is based on a false premise that  
9           this space is comparable to some office space, is it  
10          really \$8 million?

11                      MR. SCHWARZ: That's not a valuation of  
12          what -- it is not purported to be a valuation of what  
13          the Greenwich property would fetch. That's different.  
14          That's a different calculation. If JEI got a greater  
15          amount for its property it wouldn't have the property  
16          anymore, so the value is that number.

17                      Your Honor, just a couple more points.

18                      The cases where transactions are rejected  
19          based on failing to meet the charitable purpose are  
20          almost exclusively cases where the organization is  
21          being shut down. That is not what is happening here by  
22          any stretch of the imagination. This is, as I said, a  
23          transaction in which the educational purpose is  
24          furthered in an exact way. I mean, nothing changes for  
25          at least an eight-year period. Then the only thing

1           that changes is the location.

2                   The other point about the educational  
3           purpose, your Honor, what the principal's basis has  
4           been that he stated for the educational purpose or the  
5           educational problem has been listened to very carefully  
6           by the board. And you will see it in the minutes of  
7           the meeting where they finally voted to go forward with  
8           the transaction. He says the problem is that there is  
9           tension between the PTA and the board. And that's  
10          really the sum and substance of the educational  
11          purpose.

12                   And, you know, your Honor, that is circular.  
13          I mean, that's the ultimate bootstrap. That's a  
14          heckler's veto, essentially, that the PTA can create  
15          the tension and then can say that that's the  
16          educational basis. The principal, your Honor, is  
17          essentially a member of the PTA, and that he can do  
18          that is not a true educational purpose.

19                   Also, your Honor, the affidavit of Mr. Omori  
20          speaks to the issue and a question about the  
21          principal's view of this. Mr. Omori indicates that the  
22          principal did say to the board that he was not, in  
23          fact, opposed to a sale and leaseback transaction but  
24          that he was opposed to a transaction with this  
25          particular buyer.

1 THE COURT: All right, counsel. I thank you.  
 2 With respect to the application for the  
 3 submission of a surreply, counsel, I am denying it. I  
 4 think the arguments have been made. I don't think I  
 5 need any more paper to add to this.

6 MR. BLOCK: I understand, your Honor. May I  
 7 point, then, on the record to one of these documents he  
 8 made a statement about that is in my surreply but you  
 9 are not accepting?

10 THE COURT: Go ahead.

11 MR. BLOCK: The letter of March 18, 2005,  
 12 Exhibit M, to Robertson which Mr. Schwarz just referred  
 13 to as, you know, some kind of good faith response to  
 14 the Stanwich school. The second bullet point,  
 15 Mr. Robertson states: "A total value of current  
 16 transaction" -- meaning with WFHA, the other buyer --  
 17 "will give GJS more benefits and more economical sense  
 18 as well as any offers, inquiries we have received."

19 Now, he made that statement in this letter to  
 20 the Stanwich School, and the Stanwich School had an  
 21 offer on the table for \$23 million, four-year  
 22 leaseback, exclusive occupancy for one year. WFHA's  
 23 offer and price was \$20 million, and, at that point,  
 24 five years, just one more year without exclusive  
 25 occupancy. How can he say that we are really not

1 interested? It is a false statement that he is saying  
2 to the Stanwich School about the competing transaction.

3 MR. SCHWARZ: Your Honor, he did not say he  
4 was not interested. He said: "We maintain a good  
5 relationship. I will keep the dialogue open." That's  
6 what he said, your Honor.

7 THE COURT: Okay. Thank you, counsel. We  
8 will get you a decision as quickly as we can.

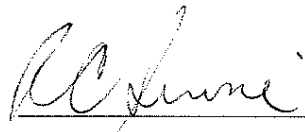
9 MR. SCHWARZ: Thank you, your Honor. As I  
10 mentioned earlier, we have a closing.

11 THE COURT: Yes, I understand.

12 \* \* \*

13 The foregoing is hereby certified to be a true and  
14 accurate transcript of the proceedings.

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Rachel C. Simone

Senior Court Reporter