

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Application of The Japanese Educational Institute
of New York,

Petitioner.

For an order approving the sale of assets pursuant to
N-PCL §§ 510 and 511.

Index No. 06-103400

IAS Part 13

Hon. Sheila Abdus-Salaam

**AFFIRMATION IN
OPPOSITION**

**AFFIRMATION OF ARTHUR R. BLOCK IN OPPOSITION TO THE PETITION AND
IN SUPPORT OF OBJECTIONS OF THE JAPANESE SCHOOL OF NEW YORK PTA**

ARTHUR R. BLOCK, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms, pursuant to CPLR 2106, the truth of the following under penalty of perjury:

1. I am Of Counsel to Szold & Brandwen, P.C., the attorneys for objector-respondent The Japanese School of New York PTA (“PTA”) and as such I am fully familiar with the facts described herein. The purpose of my affirmation is to give the Court an overview of the comprehensive set of papers that the PTA is submitting in opposition to the Verified Petition (“Petition”)¹ of the Japanese Educational Institute of New York (“JEI”). The PTA’s papers are organized into three packages, each with its own backer. In addition, we are submitting a Memorandum of Law.

2. The Japanese School of New York (“JSNY”) is an all-day private school that originally was located in New York State but moved to Connecticut in 1992. The name of the school notwithstanding,² the property at issue is JSNY’s educational campus in Greenwich,

¹ The Petition was verified on December 28, 2005.

² After its move to Connecticut, JSNY also has sometimes been referred to as the Greenwich Japanese School (“GJS”).

Connecticut (“Greenwich Campus”). JEI owns the Greenwich Campus and operates JSNY as well as other educational programs in New York State and New Jersey.

3. This is a special statutory proceeding pursuant to N-PCL §§ 510-511. JEI is an education corporation chartered by the Board of Regents of the University of the State of New York and is deemed a Type B not-for-profit corporation. Therefore, it is required to petition the Court for approval of its plan to sell all or substantially all of its assets. It has the burden of proving that the proposed sale meets substantive standards set forth in N-PCL § 511 and that the organization duly approved the transaction pursuant to the procedures set forth in N-PCL § 510.

4. A hearing on JEI’s application is scheduled for March 29, 2006. “Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.” N-PCL § 511(b).

5. The PTA membership includes approximately 170 families with children enrolled at JSNY. The PTA is appearing as an objector-respondent to the Petition in accordance with § 511(b) and well established case law. The parents ask the Court to deny the Petition, based upon facts that are set forth in considerable detail in the PTA’s affidavits and documents.

Summary of Objections

6. JEI is asking the Court to approve a proposed sale of the Greenwich Campus to a favored bidder for a price that is at least \$6.8 million below fair market value (FMV). The Court should deny the Petition because:

- The consideration and terms of the proposed sale are not fair and reasonable.
- JEI’s plan for a sale and lease back of the Greenwich Campus fails to promote JEI’s not-for-profit educational corporate purposes and is actually detrimental to those purposes.
- The vote of the JEI Board of Trustees on November 29, 2005 allegedly approving the sale did not meet statutory requirements and must be disregarded.

Fair Consideration Lacking

7. JEI proposes to sell the Greenwich Campus for \$20 million. The property is worth at least \$26.8 million.
8. On November 23, 2005, the Town of Greenwich issued a real property assessment notice to JEI stating that the fair market value (“FMV”) of the Greenwich Campus as of October 1, 2005 was \$28,286,100.
9. In light of the dramatic discrepancy between JEI’s sale price and the Township determination, the PTA, through its counsel, engaged a highly qualified independent appraiser to conduct a complete professional valuation of the Greenwich Campus as of the JEI contract date.
10. The independent appraisal report finds that as of December 12, 2005, the Greenwich Campus had a FMV of \$26.8 million.
11. There are overwhelming facts to suggest that this transaction was always intended to be a sweetheart deal for a pre-selected buyer. A buyer that appeared to have (through one of its trustees) a special relationship with the Executive Secretary of JEI, submitted a detailed purchase proposal to JEI in February 2004, before JEI’s Board of Directors even authorized putting the property up for sale. Once the Board approved the concept of selling the property, JEI’s subsequent marketing efforts ranged from feeble to non-existent. JEI’s actions seemed designed to avoid receiving any bids that would be competitive with the favored buyer.
12. The PTA’s papers show that JEI does not have a valid argument for selling the property at all, and that JEI certainly cannot justify wasting charitable assets by selling the property for \$6.8 million below FMV.

Failure to Promote Corporate Purposes

13. Even if JEI was not wasting \$6.8 million in corporate assets by selling the Greenwich Campus for far less than FMV, the proposed sale and lease back transaction must be rejected as contrary to the purposes of JEI's educational charter.

14. To rationalize the sale of the property, JEI has greatly exaggerated its financial issues, wrongly blamed the JSNY program for JEI's trumped up crisis, and come up with a "solution" that will only worsen JEI's long-term financial position and its ability to increase or even sustain enrollments and to provide a quality educational program.

15. JEI claims that its underlying reason for selling the Greenwich Campus is declining enrollment at JSNY. But JEI's plan will only make the problem worse. If the Greenwich Campus is to be sold at all, that should occur after JEI has made definite arrangements for a new school facility with a plan that shows the excellent facilities promised the parents, in a location that is within a realistic commuting distance for the students, together with the fiscal improvement the JEI claims can be achieved. Selling the Greenwich Campus without plans for a new school location will create enormous uncertainty and worry about the future of the JSNY among parents and prospective enrollees.

16. Furthermore, the obvious alternative to selling the Greenwich Campus for so far below FMV is to increase JEI's revenues substantially by leasing out unused space to one or more other educational organizations and increasing income during the summer recess from camps or other summer rentals. JEI would hold on to tax exempt real estate that is rapidly appreciating in value, would turn its alleged deficit into a surplus, and would encourage families to enroll their children at JSNY.

17. The financial flaws in JEI's justification for the proposed sale are set forth in the PTA's affidavits, particularly the Affidavit of Emil F. Jachmann.

The Trustees' Approval Vote Is Not Valid

18. JEI says that a vote by its Trustees on November 29, 2005 satisfied the statutory requirements for corporate approval of a disposition of substantially by all of JEI's assets. In fact, the November 29th vote was not valid.

19. The trustees of a not-for-profit educational organization should be informed of all of the material terms and material facts pertaining to a proposed disposition of assets in order for a board of trustees vote pursuant to N-PCL §§ 510 and 511 to be valid.

20. JEI does not aver or prove that in advance of the meeting on November 29, 2005 all of the trustees had been notified that on November 23, 2005 the Assessor of the Township of Greenwich had issued a determination that the FMV of the property was \$28,286,100.

21. The Assessor's determination certainly was a material fact that the JEI trustees had to know about and consider with due care before voting to approve the sale on November 29, 2005, and before allowing the corporation to sign a contract on December 12, 2005. The huge jump in the five-year re-valuation from \$15,268,500 to \$28,286,100 would cause any prudent person to obtain a new independent appraisal and to carefully re-examine the proposed sale.

22. Also missing from the Petition is any evidence as to what information was circulated to the trustees before the meeting, or discussed at the meeting. A copy of the Notice of Meeting is not attached. There is no indication of what, if any, briefing package was circulated to the Trustees. The meeting minutes – if there are any – are omitted from the Petition and JEI attempts to substitute an “extract” consisting of a resolution that does not even recite the

facts on which it is based, but merely says the decision “is in the best interest of JEI.” Petition Ex. H.

23. The second reason why the November 29th vote does not satisfy statutory requirements is that it was the product of a governance structure and process that violates fundamental principles of not-for-profit governance. A detailed analysis of the JEI governance practices is provided to the Court in the Affidavit of Yukio Sasaki.

24. JEI’s board of trustees was comprised of 37 Japanese business corporation executives, one corporate lawyer, two Japanese diplomats, and JEI’s chief executive officer. Not one of them is a woman.

25. Upon information and belief, not one of the men on the JEI board is academically or professionally trained as an educational administrator, elementary/secondary school teacher, developmental psychologist, private school recruitment/admissions director, or private school development professional.³ There is no representation on the board for the beneficiaries of the corporation, i.e., the mothers and fathers of the children enrolled in JEI programs.⁴ JEI has not even placed on its governing board a non-voting trustee chosen by any of the parent groups or any of the PTAs existing at JEI’s four programs. Additionally, board meetings are conducted off-site in Manhattan.

26. According to its charter and by-laws, JEI has no members. In fact, approximately 37 of the 40 trustees are representatives of 37 different corporations that have many business and

³ A minor exception may be JEI’s new Executive Secretary, who also is listed as a trustee. My understanding, however, is that this individual’s experience in educational administration is limited to on the job experience as an administrator of one of JEI’s programs, and that he had no prior credentials in the field of educational administration. I am referring to the list of trustees that is attached to the Petition as Exhibit B.

⁴ In 2005 there was a trustee representing one of the business corporations on the board and he also happened to have a child enrolled in JSNY. He was not selected by the parents to represent parents on the board.

cross-ownership interrelationships.⁵ The de facto members of JEI are the corporations in this business group plus the Consul-General of Japan and his deputy.

27. The JEI board follows the common practice in the Japanese business corporate world of letting a small control group make decisions. Unanimous support for the control group's policies and decisions is expected and the voting record shows that unanimous decisions are the rule. Although the trustees nominally serve as individuals, for the most part they are neither independent of their corporate employers that put them on the board of trustees nor of the JEI control group.

28. The vote of 26 in favor and 0 opposed to this controversial transaction is a symptom of the trustees' failure to exercise independent judgment in carrying out their functions.

29. The November 29, 2005 vote is not valid because it is the product of a governance structure and practice in which trustees do not exercise judgment independent of a control group of JEI trustees, or independent of their corporate employers who select them for the trustee positions.

The PTA's Papers

30. First, I would like to direct the Court's attention to the Complete Appraisal and Self Contained Report dated January 17, 2006, by Christopher K. Kerin, MAI, CCIM ("Kerin Appraisal"). The Kerin Appraisal is a careful and comprehensive professional analysis that makes the determination that the FMV of the Greenwich Campus is \$26.8 million.

31. JEI's attorney wrote a letter that criticized the Kerin Appraisal. Mr. Kerin rebutted the criticism in an affidavit, sworn to on March 20, 2006.

⁵ Upon information and belief the law firm of the attorney trustee has represented some of the business corporations whose executives fill 37 seats on the board, and the diplomat trustee works for a Japanese consulate which lends assistance to Japanese business interests in the United State.

32. One of the sets of papers we are providing the Court has the Kerin Affidavit on top, his CV annexed as Exhibit A, and the Kerin Appraisal annexed as Exhibit B.

33. Another separately bound set of papers consists of affidavits by five of the PTA parents. On top is the affidavit of the current PTA President, Mr. Emil F. Jachmann, sworn to on March 28, 2006, supported by Exhibits A-Z (“Jachmann Aff.”).

34. I refer the Court to the Jachmann Affidavit as the most comprehensive account of the facts and evidence underlying the PTA’s objections.

35. The second parent affidavit is made by Mr. Takanori Adachi, sworn to on March 23, 2006 (“Adachi Aff.”). Mr. Adachi was PTA President during a key phase of this dispute and has continued to be involved as a member of the PTA Task Force that was set up to develop alternatives to JEI’s sale plan. Mr. Adachi was repeatedly summoned to private meetings with JEI officials to discuss the matter of the parents’ objections to the sale of the Greenwich Campus. In his affidavit he relates several relevant statements and admissions made by JEI officials regarding this matter.

36. The next two affidavits are by PTA mothers who have been involved in advocating for the PTA’s position. See Affidavits of Kyoko Kajiwara and Hamado King, both sworn to on March 27, 2006. Mrs. Kajiwara and Mrs. King report on significant statements and admissions made by JEI Trustee Hiroshi Sato at a meeting he held with four PTA representatives. The meeting was held at the Japanese Consulate, where Mr. Sato is the Deputy Consul-General.

37. The last item in this package is the Affidavit of Norman King sworn to on March 27, 2006. Mr. King describes his attempt to investigate further the circumstances surrounding a phone call regarding this matter made by Sen. Joseph Lieberman to Ambassador Hiroyasu Ando,

General-Consul of Japan in New York, and a trip by Amb. Ando to meet with Sen. Lieberman in Washington about the sale of the Greenwich Campus. Amb. Ando at that time was the Honorary President of JEI.

38. In this package, which is under cover of my Notice of Appearance, there are three affidavits following my affirmation.

39. First, is the Affidavit of Tatsuo Takahashi sworn to on March 21, 2006. Mr. Takahashi has been a JEI employee since 1992, and he has been working at the Greenwich Campus since 1998. He currently is the Facility Supervisor. As a JEI employee, Mr. Takahashi has displayed courage and integrity in offering his testimony to the Court. Mr. Takahashi gives an objective account of events and communications that the PTA wants to call to the Court's attention as supporting evidence of the PTA's allegations that there was a special relationship between the prospective buyer and JEI, and that JEI did not use due diligence in marketing the property.

40. Second, is the Affidavit of Jade Joan Hon sworn to on March 21, 2006. Ms. Hon is an associate in this firm. She did a public records search to determine if there was a political/financial relationship between the WFHA officer who initiated the buying of the Greenwich Campus (and who ultimately executed the Contract on behalf of WFHA) and Sen. Joseph Lieberman, who intervened with Amb. Ando when the signing of the Contract was put into doubt by the PTA's objections.

41. Ms. Hon reports that Federal Election Commission records directly confirm that the WFHA officer and his wife have been major financial contributors to Sen. Lieberman, to the Democratic National Committee, and to other candidates affiliated with Mr. Lieberman's party. For example, on September 30, 2005, when the signing of the Contract was still in doubt, the

WFHA officer and his wife each contributed the legally allowed maximum amount for an entire two-year election cycle to Sen. Lieberman's principal campaign committee. Attached to Ms. Hon's affidavit are print-outs of contribution reports and records from the FEC and from other organizations.

42. Third, is the Affidavit of Yukio Sasaki sworn to on March 15, 2006. Mr. Sasaki is a PTA parent. He also has extensive education and experience regarding the ownership relationships among Japanese business corporations, and the governance practices of large Japanese corporations. He demonstrates that although JEI is a not-for-profit corporation it is closely controlled by a set of Japanese business corporations that are related to one another through a web of ties involving cross-ownership, financial/debt relationship, cooperation in trading and manufacturing activities, vendor/vendee relationships, and historical connections, among others. He also shows that the board composition and governance practices at JEI follow the Japanese business model and lack the elements of diversity, democracy, disclosure and checks and balances that are expected of not-for-profit organizations in the United States.

Conclusion

43. The PTA respectfully submits that upon reviewing this evidence, the Court should determine that JEI's Petition must be denied.

44. JEI clearly has not carried its burden of proving that the proposed transaction realizes fair consideration, or that it is in the educational interests of JEI or JEI's beneficiaries – the students and their families.

45. Moreover, the PTA's evidence reveals serious problems with every step of JEI's attempted sale process – the lack of justification for selling the Greenwich Campus, the pre-

selection of a favored buyer, the failure to market the property, the setting of a sale price that is 34% below FMV, and the buckling under to political influence and unfounded legal threats.

46. The PTA respectfully requests that the Court's disposition of the Petition include directions to JEI to reform its governance structure and practices to ensure that in the future fundamental corporate decisions will be made in accordance with the principles governing not-for-profit organizations in New York State.

Dated: New York, New York
March 28, 2006

ARTHUR R. BLOCK