

## TABLE OF CONTENTS

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. 103400/06

IAS Part 13

Hon. Sheila Abdus-Salaam

**MEMORANDUM OF LAW OF JAPANESE SCHOOL OF NEW YORK PTA  
IN OPPOSITION TO APPLICATION FOR CONSENT TO PROPOSED  
PLAN FOR DISPOSITION OF ASSETS**

Objector-respondent the Japanese School of New York PTA respectfully submits this Memorandum of Law in opposition to the application of the Japanese Educational Institute of New York (JEI) for consent to a proposed plan for the disposition of charitable assets.

**Introduction**

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,<sup>1</sup> the property at issue is JSNY’s educational campus in Greenwich, Connecticut (“Greenwich Campus”). JEI owns the Greenwich Campus and operates JSNY as well as other educational programs in New York State and New Jersey.

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

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<sup>1</sup> After its move to Connecticut, JSNY also has sometimes been referred to as the Greenwich Japanese School (“GJS”).

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. See Point I, infra.

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.

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. 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.

In support of their position, the PTA is submitting to the Court an extensive and comprehensive set of affidavits and documents, together with an independent expert property appraisal report. The Court is referred to the Affirmation of Arthur R. Block dated March 28, 2006, for an overview of the PTA's factual submissions. Among the PTA's affidavits, the most complete statement of the relevant facts is found in the Affidavit of Emil F. Jachmann sworn to on March 28, 2006 ("Jachmann Aff.").

## ARGUMENT

### **I. THIS PETITION SHOULD BE DENIED BECAUSE JEI HAS NOT CARRIED ITS BURDEN OF PROVING THAT THE PROPOSED SALE MEETS THE TWO-PRONG TEST OF N-PCL § 511**

Under N-PCL §§ 510-511, a Type B corporation is required by law to obtain leave of court to sell, lease, exchange or otherwise dispose of all or substantially all its assets. N-PCL §§ 510(a)(3), 511(a). The corporation must present a petition that asserts a number of facts and shows that certain conditions have been met.<sup>2</sup> N-PCL § 511(a). Next the court fixes a date for a hearing upon the application, allowing time for “any person interested, whether or not formally notified, [to] appear at the hearing and show cause why the application should not be granted.” N-PCL § 511(b).

This Court has clearly stated that the statute “casts the burden on the not-for-profit corporation’s Board of Directors” to prove that statutory requirements are satisfied. In re Sculpture Ctr., Inc., No. 224774/02, 3002 N.Y. Misc. LEXIS 1019, at \*1-2 (Sup. Ct., N.Y. Co. Aug. 24, 2001). Thus, while the PTA is providing substantial evidence in opposition to the Petition, it must be kept in mind that the burden of proof is on JEI, not the PTA. Specifically, JEI must produce evidence that the proposed transaction meets the statutory two-prong test: (1) that the consideration and terms of the transaction are fair and reasonable to the corporation, and (2) that the purposes of the corporation or the interests of the members will be promoted. N-PCL § 511(d); see also Sculpture Ctr., Inc.

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<sup>2</sup> The first five items are matters of fact (the name of the corporation, the names of its directors, the activities of the corporation, the description of the assets, and the consideration to be received for the assets); the next three items require the petitioner to set forth evidence in support of certain conditions (that the consideration and terms of the sale are fair and reasonable and that the purposes of the corporation are promoted; that the sale was recommended or authorized in accordance with law; that proper consent was given); the final item required is simply the prayer for leave to sell the assets. N-PCL § 511 (a) 1-9.

Such special procedures and judiciary oversight is common in a number of sections of the New York Not-for-Profit Corporation Law that govern a category of fundamental corporate changes, such as merger and consolidation, dissolution, and amendment of corporate purposes. N-PCL §§ 901 *et seq.*, 1001 *et seq.*, 804 (respectively). The policy rationale is that unlike a for-profit corporation, where shareholders ordinarily have incentives and opportunities to protect their economic interest, no such natural system of checks and balances is in place in the not-for-profit corporation realm. Therefore, it falls to the Court to take on a *parens patriae* role on behalf of the oft powerless beneficiaries to protect not-for-profit or charitable assets from improvident transactions. See William Josephson, *Guiding the Way Through Changes in Charities Law*, NYLJ, Sept. 18, 2000, at 1; see also *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 186 Misc.2d 126, 151-52, 715 N.Y.S.2d 575, 592-93 (Sup. Ct., N.Y. Co. 1999) (hereinafter cited as MEETH).

Clearly such additional protections are absolutely necessary in the case of the sale of all or substantially all of a not-for-profit corporation's assets, since the very life of the charitable organization is put at risk by such a transaction. Any argument that the Court must defer to JEI's decision because of the business judgment rule must be rejected. The whole point of the statute is to require an independent outside Supreme Court review of the proposed transaction. In the special case of a N-PCL §§ 510-511 proceeding, the Court must look into the business decisions of the nonprofit's corporate board to ensure that the two prongs are met. See Leo T. Crowley, *Hospital Case: Significant Governance Questions*, NYLJ, February 10, 2000, at 3 ("... the governance decisions of the [not-for-profit corporation] board can nonetheless be subject to judicial review or even reversal"); see also MEETH, 186 Misc.2d at 157 (in denying the petition, the Court reprimanded, "[i]t appears that the Board confused preservation of the Hospital with

preservation of the Board, when the appropriate calculus should be what is good for the Hospital is good for the Board”).

The Court must deny the Petition because JEI has failed to carry its burden of proof regarding the statutory requirements of N-PCL §§ 510-511. JEI only makes a superficial attempt to demonstrate either of the two prongs listed above, and such a base *prima facie* showing is not enough to warrant court approval of the sale. See infra at Points II-IV. In any event, the PTA, as an objecting interested party, has set forth strong and persuasive rebuttals to JEI’s allegations.

**II. THE SALE OF THE GREENWICH CAMPUS FOR \$20M SHOULD NOT BE JUDICIALLY APPROVED IN THE FACE OF A PROFESSIONAL VALUATION OF \$26.8M**

A. JEI’S Petition Should Be Denied On The Basis That JEI’s Appraisal Fails To Demonstrate Fair and Reasonable Consideration

JEI does not provide adequate support to demonstrate the first prong of the N-PCL § 511 test - that the consideration and terms of the transaction are fair and reasonable. N-PCL § 511(b) requires the corporation to provide the court a “description, with reasonable certainty, of the assets to be sold, leased, exchanged, or otherwise disposed of...; and a statement of the fair value of such assets...” -- typically a professional appraisal. This is because among the foremost of concerns in determining whether the first prong is met is how the consideration to be received by the corporation compares to the fair market value (“FMV”). While this is not the only analysis that needs to be made, it is a critical factor.

“Absent any special circumstances... the current market value is the most reliable index for calculation of what constitutes a fair consideration for real property.” Wolkoff v. Church of St. Rita, 132 Misc.2d 464, 505 N.Y.S.2d 327 (Sup. Ct., Richmond Co. 1986), aff’d, 133 A.D.2d 267, 518 N.Y.S.2d 1020 (2d Dept. 1987) (emphasis added). In Wolkoff the court held that the

contract price was inadequate consideration and issued an interim order denying the petition to sell. Likewise, in the instant case the Court should deny JEI's petition.

*1. The JEI appraisal is based on stale data and does not provide a reliable FMV as of the date of the Contract*

Whether the “consideration and terms of the transaction are fair and reasonable to the corporation” is to be evaluated at the time that the contract to sell is entered into. MEETH 186 Misc.2d at 150; Wolkoff, 132 Misc.2d at 471; Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, 76 A.D.2d 712, 717-18 (2d Dept. 1980), aff'd, 54 N.Y.2d 742 (1981); Matter of Church of St. Francis de Sales, 110 Misc.2d 511, 512 (Sup. Ct., N.Y. Co. 1981).

The appraisal proffered by JEI (the “JEI Appraisal”) must be rejected as being untimely and inaccurate. The JEI Appraisal is effectively more than 1½ years premature relative to the date of the contract – December 12, 2005. The JEI Appraisal initially valued the Greenwich Campus as of May 20, 2004 at \$20 million, and although there is page and a half supplementary letter valuing the Greenwich Campus at \$21.7 million, this perfunctory “update” merely applies general percentage increases and completely subtracts out the value of a building destroyed by arson without any further analysis. Therefore the JEI Appraisal is entirely based on stale 2003 data, ignoring nearly 2 years of new data between the date of the appraisal and the date of the contract.

*2. The JEI appraisal does not use timely or accurate comparables*

Second, even if the values reflected by the August 2005 update, which is still 4 months prior to the date of the Contract, can be considered timely, the JEI Appraisal neither considers the most recent comparable sales nor the most accurate comparables. The JEI Appraisal is based on old lot sales that took place in 2003, ignoring drastic increases in property values over the following two years prior to JEI's entering into the contract of sale; and fails to review any bulk

land sales that would be more similar in size to the Greenwich Campus. See Kerin Aff. at ¶¶ 12-13.

In contrast, an independent appraisal commissioned by the PTA to determine the FMV as of the contract date (the “Kerin Appraisal”), valuing the Greenwich Campus at \$26.8 million, does take into account recent lot sales – including one from August 31, 2005, and two 2005 bulk land sales of properties each in excess of 20 acres. Thus, in the face of such stark comparison, the JEI Appraisal, lacking any use of current or accurate comparables, cannot be considered fair or reasonable by the Court. See Wolkoff, 132 Misc.2d at 473 (In comparing varying appraisals, the court considered those based primarily on comparable sales valid because such use of comparables “is a proven measure of market value”).

*3. JEI’s argument that the contract price is favorable in light of the leaseback provision is not sound.*

JEI further argues that the \$20 million price is favorable because the Contract offers a leaseback provision at a substantially low rent and freedom from obligation for certain capital improvements. First, the rent being charged is hardly any lower than what would be JEI’s pro rata share of its rental “cost” as described in JEI’s most recent Financial Statement, appended to its Petition. Second, because JEI as owner pays no actual rent, the only costs that would really be defrayed by a leaseback are maintenance costs, which JEI is still paying pro rata. Third, JEI received a purchase offer of \$23 million in March 2005 from a school that also was willing to lease back space to JEI for at least four years.

Any purported savings to be made on this leaseback can only be made significant provided that JEI rents the property for a long term. But it is not in the best interests of the school to remain for a long term in a temporary facility without a new permanent home in sight. Moreover, JEI’s analysis fails to take into account the revenues, such as rental income from the

Chapel and the summer school, that would be lost after a transfer in ownership. See Jachmann Aff. at ¶¶ 62-65. Therefore, the leaseback does not create any significant savings for JEI, and the weaknesses of the JEI Appraisal remain an important issue in the court's analysis of the first prong.

Furthermore, JEI's contention that the five year leaseback<sup>3</sup> is more valuable than any difference between the contract price and the FMV is made even more questionable in that JEI does little to nothing to explain why the March 2005 (nine months prior to the contract date) School A proposal of \$23 million with a leaseback of four years had to be rejected. Surely this alternate proposal should have at the least impacted JEI's negotiations with WFHA for a better price. JEI similarly ignored the November 23, 2005 valuation by the Township of Greenwich in the far greater amount of \$28,286,100.00.<sup>4</sup> Any prudent seller would have used either of these two pieces of information to at least renegotiate a higher price.

Given the inadequacy of the JEI Appraisal, direct contradiction by a professional appraisal, and at least one competing offer, the Court must deny JEI's petition as not meeting the first prong of the N-PCL § 511 test.

**B. In The Alternative An Evidentiary Hearing On Valuations Issue Must Be Held Before Further Consideration Of The Merits**

The PTA contends that the Petition must be denied on the valuation issue alone without an evidentiary hearing, because the only credible and applicable appraisal report in the record is

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<sup>3</sup> The Petition characterizes the leaseback as being for a term of eight years, but the term of the lease is actually for five years, with an option to extend the lease for another term of three years.

<sup>4</sup> This is not an assertion that a local property assessment valuation should be considered conclusive proof of the fair market value of a tax-exempt property, but rather is a suggestion that given this public information, JEI, as fiduciaries for the JSNY, should have considered the valuation a good indication that an offer of \$20 million would be underselling the campus. The Petition does not even aver that the Greenwich Valuation was reported to each of the trustees before they voted on this transaction on November 29, 2005, or before JEI signed the contract on December 12, 2005.

the Kerin Appraisal. In other words, this is not a case of “conflicting” appraisals because JEI does not have an appraisal that is adequate to raise an issue of fact about the accuracy of the Kerin Appraisal. This is analogous to the situation in Wolkoff, where the Court did not order a hearing even though four appraisals were offered, including one ordered by the court. The court found that there was no need for an evidentiary hearing because three of the four appraisals, based primarily on comparable sales, conclusively showed that the contract price was insufficient consideration, and no further evidence would be reviewed to reverse this decision.<sup>5</sup> 132 Misc.2d at 472-73.

However, if the Court should find that JEI has raised an issue of fact with respect to the Kerin Appraisal, then under controlling authority an evidentiary hearing needs to be held. Where there are conflicting appraisals and the possibility of higher offers, the Court must conduct an evidentiary hearing. See e.g., In re Church of St. Francis de Sales, citing In re Congregation B’Nai Abraham of East Flatbush, Inc., 73 A.D.2d 646, 422 N.Y.S.2d 1016 (2d Dept. 1979).

Thus, in the alternative the PTA requests that an evidentiary hearing be scheduled on the issue of value.

### **III. THE PETITION ALSO FAILS THE FIRST PRONG ON FAIR CONSIDERATION BECAUSE JEI HAS NOT PROVED IT DILIGENTLY MARKETED THE PROPERTY AND THE PTA SHOWS THAT JEI SELECTED A FAVORED BUYER**

In addition to the gross underselling of the Greenwich Campus, another reason why JEI fails to meet the first prong of the § 511 test is that JEI pre-selected WFHA as the purchaser and then it failed to make a bona fide effort to test the market and obtain a better price. See

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<sup>5</sup> The fourth appraisal was rejected because it did not produce either comparable sales or a similarly reliable basis for its valuation, and even if the other three appraisals indicated some variation in valuation, they were each at least 80% above the contract price, which was all that was necessary to defeat the first prong.

Jachmann Aff. at ¶¶66-84 (failure to market) and ¶¶ 85- 100 (favored bidder). See also Affidavit of Tatsuo Takahashi sworn to on March 21, 2006 (“Takahashi Aff.”).

Fair market value “fundamentally is predicated on what a willing buyer is prepared to pay to a willing seller who is not under a compulsion to sell.” In re Sculpture Ctr., Inc., at \*3. Because JEI limited its field of willing buyers and compelled itself to sell to WFHA, \$20 million cannot be considered fair consideration.

In MEETH, Justice Fried set forth other considerations critical in determining the fairness and reasonableness of the contract price that go beyond the value obtained by an appraisal. See MEETH, 186 Misc.2d at 154 (“the transaction as a whole must be examined, not just the ‘fair market value’ of the real estate”). Among the other considerations was the requirement that the petition demonstrate “whether the board exercised due diligence in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the disposition.” MEETH, 186 Misc.2d at 153.<sup>6</sup> In its Petition, JEI attempts to rely on vague statements about marketing the property. When it does offer an example of its marketing, that is, the example of the proposal to purchase the Greenwich Campus for \$23 million and to give a lease back for at least four years, JEI only succeeds in dramatizing how negligent it was. Having received an offer like that in March 2005, it is incredible that the Board approved a sale for \$20 million in December 2005.

The PTA has produced a chilling description of JEI’s gross negligence, if not deliberate indifference, in attracting bidders to compete with the offer of WFHA. See Letter dated March 13, 2006 from Mie Glenn, Sotheby’s International Realty, to E. Jachmann, copy annexed to Jachmann Aff. as Exhibit L. Ms. Mie Glenn is an agent with a major real estate company in

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<sup>6</sup> To set forth more specific standards for satisfying the first prong of the N-PCL § 511 test, Justice Fried turned to parallel Nebraska legislation that details additional queries that the Attorney General must analyze prior to approving the sale of a charitable organization’s assets.

Greenwich, Sotheby's International Realty. She reports that she received a call from a local attorney in April 2004, asking her to find out if the Japanese School was for sale, because he had a client who was a potential buyer. Next, she says:

I immediately called our commercial division in my office to find out if the school is on the market for sale. (We have MLS system to find any properties for Sale in the state of Connecticut, if they are listed for sale.) After I spoke with a sales representative of commercial division, I found out that they could not find the school listed for sale, and I had to find out the fact from the school directly.

Id.

This led Ms. Glenn to JEI's Executive Secretary and to the office of JEI's President, to no avail:

I immediately called Mr. Matsumura at Japanese School and reported him that I have a potential buyer for the school, and I wanted discuss about it. Mr. Matsumura asked me to call Mr. Kashima at Marubeni [JEI President Sakamoto is CEO of Marubeni] regarding any sales transactions of Japanese school. I called Mr. Kashima and left a message instantly with my phone numbers to call me back to talk about the sale of Japanese school. Since I did not receive any calls back, I left at least 4 messages over the next 2 weeks to call me back in Japanese and English explaining that I have a potential buyer. I never received any calls back after several attempts to talk to him, so I finally spoke with Mr. Kashima's secretary and left a message to call me back, but I never heard back from him.

Id.

Furthermore, JEI refused to test the market for alternative ways to realize value from the real estate without selling it. JEI was aggressively hostile to the PTA Task Force's successful solicitation of an excellent rental offer from the British Schools of America (BSA). JEI had its lawyer send a demand letter to the PTA President telling him to stop testing the market for renters or purchasers of the property. In its Petition JEI tries to justify its failure to follow up the BSA offer by falsely stating that BSA was not credit worthy. Compare Pet. ¶ 33 with Letter dated September 19, 2005 from D. Hallahane, CEO of WCLS Group, to K. Sakamoto, JEI President; Letter dated March 15, 2006 from Daniel A. Lukas of Structured Development, LLC

to Whom It May Concern re: business reputation, operating standards and financial viability of WCLS Group Limited (parent of British Schools of America); and Press Release dated March 6, 2006, “The British School of Chicago Announces Plans for New Location in Lincoln Park.” (The foregoing documents are annexed to the Jachmann Aff. respectively as Exhs. M – O.).

The final proof that JEI was entering into this transaction for reasons other than market values was how it responded to extraneous pressures to sign the Contract – the intervention of a United States Senator at a high diplomatic level and threats of litigation.

#### **IV. JEI’S PETITION SHOULD BE DENIED BECAUSE THE PROPOSED SALE FAILS TO PROMOTE JEI’S EDUCATIONAL PURPOSES**

##### **A. Underselling the Greenwich Campus Will Not Solve a Financial Crisis; And There Is No Such Crisis To Begin With.**

JEI’s Petition must be denied because it also fails to meet the second prong of the N-PCL § 511 test -- that the corporation’s purposes must be promoted by the transaction. First, drastically undervaluing the Greenwich Campus, and thereby wasting \$6.8 million in corporate assets, certainly does not support JEI’s contention that the whole purpose of the sale is to address a serious financial deficit. In Rose Ocko Found., Inc. v. Lebovits, 259 A.D.2d 685, 688, 686 N.Y.S.2d 861, 864 (2d Dept. 1999), the Appellate Division found that “the sale of the property for inadequate consideration severely hampered the Foundation’s ability to carry out its charitable mission.” In the instant case, the giving away of \$6.8 million of JEI assets to a favored buyer will hamper JEI’s ability to acquire and furnish an optimal facility to serve as a new permanent home for the school.

Furthermore, the Court should carefully scrutinize JEI’s claims that it is under such financial stress to begin with. A closer look at the financial statements reveals that JEI is actually in a good financial position, with cash, cash equivalents, and investments totaling

\$4,468,364.00, and with very limited long term debt. JEI does not explain its claim that the organization's cash on hand decreased by \$1.06 million in 2004. JEI's manipulated its accounting categories to make it look like the JSNY is the cause of a fiscal crisis for the corporation. See Jachmann Aff. at ¶¶ 101-138. JEI Executive Secretary Matsumura had revamped the manner of accounting for the JSNY revenues and expenses in a manner that would lay the basis for a proposal to sell the Greenwich Campus. Takahashi Aff. at ¶ 33.

B. The Sale And Leaseback Actually Furthers Enrollment Instability

Even though the underlying rationale for the sale was essentially falsified, JEI also claims that the sale is necessary to address a declining enrollment that cannot be resolved due to forces beyond their control. Ironically, this sale and leaseback actually puts enrollment at even greater risk since it creates enormous uncertainty and worry about the future of the JSNY among parents and prospective enrollees. See Jachmann Aff. at ¶ 39. In the first place, the terms of the lease explicitly allow JEI to terminate the agreement in three years, and given that JEI is apparently paying below market rental rates, WFHA has every incentive to encourage JEI to leave sooner than later. A court should not approve or enforce a contract to sell a principal program facility of a not-for-profit organization if the organization is unable to show that it has a sound plan for a new home for the program. See In re Agudist Council of Greater New York, 158 A.D.2d 683, 551 N.Y.S.2d 955 (2d Dept. 1990) (court will not enforce contract of sale); In re Sculpture Center, Inc. (court approves contract of sale but only after careful determination that the proposed new facility will be suited to the needs of organization's educational program.).

Second, JEI has already itself demonstrated an inability or at least great difficulty in finding a suitable alternative campus for its school. According to the Petition, JEI had been looking for a new location midway between the New Jersey and New York Day Schools in order

to consolidate the schools since March 2002. After two years, JEI agreed to further postpone this plan in order to pursue a sale and leaseback agreement instead. Therefore, JEI allowed another year and a half to lapse before finding a concrete plan for JSNY. See Pet. at ¶ 22.

Having lost the parents' confidence in the past and providing no sense of stability for current and prospective students, the sale and leaseback will likely cause current enrollments to drop.

### CONCLUSION

For all of the aforesaid reasons, the PTA respectfully submits that the Petition should be denied.

Dated: New York, New York  
March 28, 2006

Respectfully Submitted,

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