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MEMORANDUM OF LAW OF JAPANESE SCHOOL OF NEW YORK PTA IN SUPPORT OF THE PTA'S STANDING AND CROSS-MOTION FOR INTERVENTION

PRELIMINARY STATEMENT

Objector-respondent the Japanese School of New York PTA ("PTA") respectfully submits this Memorandum of Law in opposition to the petitioner Japanese Educational Institute of New York's ("JEI") objection to the PTA's standing and in support of the PTA's cross-motion in the alternative for intervention.

This Court's Order to Show Cause ("OSC") specifically directed JEI to serve the PTA with the OSC and petition. On the return date, March 29, 2006, the PTA submitted substantial evidence and legal authorities demonstrating the well-settled right of the PTA to appear in this proceeding as an objector-respondent. Nevertheless, JEI's counsel orally requested that the PTA be excluded from the hearing and that the PTA's extensive evidentiary submissions, which are directly on point in challenging JEI's compliance with N-PCL § 511, be completely disregarded by the Court.

On April 3, 2006, JEI served a Memorandum of Law ("JEI Memorandum") in support of its oral application. JEI's brief is asking Your Honor to reject the unanimous judgment of the Justices of the New York County Supreme Court that parties such as the PTA have standing to appear and submit objections in proceedings brought under § 511. See Matter of National Council of Young Israel, 2003 NY Slip Op 51716U; 2 Misc.2d 1003A, 785 N.Y.S.2d 923, 2003 N.Y.Misc. LEXIS 1775 (Sup. Ct. N.Y. Co. 2003); In re Manhattan Eye, Ear & Throat Hosp., 186 Misc.2d 126, 715 N.Y.S.2d 575 (N.Y. Co. 1999); Matter of Standup Harlem, Inc., 1 Misc.3d 904A, 781 N.Y.S.2d 628 (Sup. Ct. N.Y. Co. 2003); In re Church of St. Francis de Sales of New York City, 110 Misc.2d 511, 442 N.Y.S.2d 741 (N.Y. Co. 1981); In re Sculpture Ctr., Inc., 2001 NY Slip Op 40368U, 2001 N.Y.Misc. LEXIS 1019 (Sup.Ct. N.Y. Co. 2001). See Points I.A and I.B infra. JEI's challenge to this well-settled line of authorities is based entirely on a misinterpretation and misapplication of three decisions from the Second Department. See Point I.C, infra.

In addition to this Memorandum of Law the PTA's response to JEI's application includes five affidavits responding to JEI's factual argument that the PTA lacks a substantial interest in this proceeding. In addition, while the PTA clearly has statutory standing in this proceeding under N-PCL § 511(b), the PTA is also asserting, in the alternative, a right of intervention under CPLR §§ 1012-1013. See Notice of Cross-Motion dated April 10, 2006

STATEMENT OF FACTS[1]

The Japanese School of New York PTA was founded in 1976. For 30 years the PTA has represented and furthered the interests of the JSNY parents and the school community. The families that are members of the PTA are JEI's beneficiaries. The PTA has an organizational interest in preserving, protecting and developing the school not only for the families of current enrollees, but also for the families of enrollees or potential enrollees for many years to come. Jachmann Standing Aff.

There is no representation for the PTA or any beneficiaries of any of JEI's programs on the JEI Board of Trustees. There are no women, parents of JSNY students, educators, or even outside businessmen on the 40-member board. JEI is governed by a closed, insular, undemocratic group of top executives of giant Japanese business corporations plus two diplomats from the Japanese consulate and one lawyer who represents some of these companies. There are many interdependent relationships among the corporations whose executives form the JEI Board. Sasaki Aff.

[1] The following is a list of affidivats and affirmations submitted by the PTA in this proceeding with abbreviations that are used in this brief: Affidavit of Emil F. Jachmann sworn to on March 28, 2006 ("Jachmann Aff."); Affidavit of Takanori Adachi sworn to on March 23, 2006 ("Adachi Aff."); Affidavit of Kyoko Kajiwara sworn to on March 27, 2006 ("Kajiwara Aff."); Affidavit of Hamako King sworn to on March 27, 2006 ("H. King Aff."); Affidavit of Norman King sworn to on March 27, 2006 ("N. King Aff."); Affirmation of Arthur R. Block dated March 28, 2006 ("Block Aff."); Affidavit of Tatsuo Takahashi sworn to on March 21, 2006 ("Takahashi Aff."); Affidavit of Jade Joan Hon sworn to on March 21, 2006 ("Hon Aff."); Affidavit of Yukio Sasaki sworn to on March 15, 2006 ("Sasaki Aff."); Affidavit of Christopher K. Kerin, MAI, CCIM sworn to on March 20, 2006 ("Kerin Aff."); Affidavit of Emil F. Jachmann sworn to on April 7, 2006 ("Jachmann Standing Aff."); Affidavit of Hamako King sworn to on April 6, 2006 ("H. King Standing Aff.); Affidavit of Hiroyoshi Watanabe sworn to on April 6, 2006 ("Watanabe Aff."); Affidavit of Kunion K. Nitta, Ph.D. sworn to on April 9, 2006 ("Nitta Aff."); Affirmation of Jade Joan Hon dated March 10, 2006 ("Hon Standing Aff.").

After years of relocating, JEI purchased a 16.5 acre educational campus in Greenwich, CT ("Greenwich Campus") in 1991 to serve as JSNY's permanent home. For the past 14 years, the Greenwich Campus has been the only program operated on JEI-owned operated.

Mr. David A Messer and his wife live at 1 Zaccheus Mead Lane, Greenwich CT, one of the properties bordering JEI's Greenwich Campus. The Messer home is connected by a path and driveway to the campus. A relationship between JEI and the Messers began when, in 1999, Mr. Messer's wife inquired about leasing the campus during the summer for a camp that she was involved with (the "Camp"). A leasing arrangement was implemented in Summer 2000. Takahashi Aff.

In 2000, Shigehiko Matsumura became the Executive Secretary of JEI, which is its chief executive office. In September 2000, Mr. Matsumura was introduced to Mr. Messer and Mr. Matsumura said that his previous experience was in energy related matters for a corporation in the Mitsubishi group. Mr. Messer was the President and CEO of Sempra Energy Trading, a major American energy company. Subsequently, Mr. Messer and Mr. Matsumura frequently spoke on the telephone and met in person. Takahashi Aff.

On April 25, 2001, Mr. Matsumura gave JEI's Deputy Officer and Facility Manager, Tatsuo Takahashi, a handwritten memo directing that several favors concerning the Greenwich Campus be performed for Mr. Messer and for the Camp. Mr. Matsumura personally told Mr. Takahashi that these favors must be carried out. It became a general practice for JEI to afford Mr. Messer and his guests privileges regarding the Greenwich Campus that were not afforded to other neighbors. Takahashi Aff.

In or about 2003 or the beginning of 2004, Mr. Messer was communicating with counsel, among others, to work out the details of a bid by the Westchester Fairfield Hebrew Academy ("WFHA") to purchase the Greenwich Campus from JEI. Jachmann Aff. Exh. E.

WFHA presented JEI with a formal written purchase offer dated February 5, 2004. Jachmann Aff. Exh. D. The structure of the proposed deal was a sale with a lease back.

On March 24, 2004, JEI's Board of Trustee voted to authorize putting the Greenwich Campus up for sale subject to a lease back of part of the campus. Jachmann Aff. Exh. Z. Although the Board ostensibly was merely beginning the process of exploring the possibility of a sale, the WFHA proposal was already presented to the Trustees for the meeting. For the next twelve months the Board decision to pursue a sale was kept secret from the parents and the PTA.

The rationale for selling that was presented to the Board was economic, not educational. Jachmann Aff. Exh. Z. Mr. Matsumura laid the basis for this rationale by revamping the JEI accounting system in 2001, to make it appear in future accounting periods that the ownership of the Greenwich Campus was causing financial problems that could only be solved by liquidating the asset. Takahashi Aff. ¶ 30.

In fact, the alleged financial problems of JEI as portrayed by Mr. Matsumura in 2004 and now presented to the Court in JEI's Petition, are inaccurate and misleading. Jachmann Aff. ¶¶ 101-38.

The ownership of the Greenwich Campus is an extremely positive and important factor for JEI's economic well-being. The value of this asset is appreciating rapidly in a very strong real estate market without any offsetting carrying costs from real estate taxes because the property is exempt. But for JEI's imprudent and irrational refusal to consider renting out unused

space to a quality educational institution, this asset could also be producing substantial rental income.[2] Jachmann Aff.

JEI asserts in its Petition that the purpose of the proposed sale is to address an irreversibly declining enrollment, Pet. ¶¶ 14-16, yet selling the Greenwich Campus without having a firm plan for a new quality facility in this area is already causing lack of confidence and declining enrollments at JEI. Nitta Aff.; See also H. King Standing Aff.; Watanable Aff.; and Jachmann Standing Aff. Also, the lease back agreement puts a cap on JEI enrollment, precluding any meaningful growth. In contrast, it is possible to increase enrollment at JSNY if JEI would practice normal outreach and marketing efforts and involve the parents in a meaningful way in the effort. Nitta Aff.

JEI pre-selected WFHA as the purchaser of the property and treated WFHA as a favored buyer. Jachmann Aff.; Takahashi Aff. JEI failed to follow minimally adequate procedures for marketing the property and acted in ways that seemed designed to deflect or discourage brokers and potential purchasers from learning about the property and making a bid that would be competitive with WFHA. Jachmann Aff. Exh. L; Takahashi Aff. ¶¶ 29-36.

JEI admits that it received an offer in March 2005 by an unidentified school to purchase the Greenwich Campus for $23 million with a four year lease back. Pet. ¶ 39. JEI has not presented evidence proving that it exploited that offer to pursue the school as purchaser instead of WFHA, or to use the offer to obtain a better price and terms from WFHA.

[2] The PTA in a very short period of time obtained a written offer from the British Schools of America ("BSA") to rent part of the campus for $500,000 per year plus paying $300,000 in maintenance expenses. Jachmann Aff. Exh. M. JEI's response was to send a legal cease and desist letter to the PTA telling it not to bring any such opportunities to the attention of JEI. Jachmann Aff. Exh. Q. JEI's Petition states that the offer from BSA could not be considered because of lack of credit worthiness and lack of a track record. These reasons are false and pretextual. Jachmann Aff. Exhs. N, O.

The parents were not told about JEI's plan to sell the school until March 6, 2005.

In response to this news the PTA began to gather information and to try to analyze the justification for the sale and to see what other steps could be taken to deal with JEI's alleged concerns. The PTA formed a Task Force of parents to work on these issues. Jachman Aff.; Adachi Aff.

On May 29, 2005, a prestigious JEI Trustee, Motoatsu Sakurai,[3] gave a speech on behalf of JEI to the parents about JEI's plan to sell the Greenwich Campus. Mr. Sakurai said that he had a business meeting with a corporate executive who also was a WFHA trustee, and that in that meeting the other businessman said that WFHA had been given information that caused it to blame opposition to the sale on anti-Semitism. He told the parents this allegation was a special reason to go through with the sale.

Ambassador Hiroyasu Ando, the Consul-General of Japan in New York, and the Honorary President of JEI, received a telephone call from Sen. Joseph Lieberman regarding WFHA. He brought up the allegation of anti-Semitism and asked Amb. Ando to watch over the situation so the sale would go through. Amb. Ando made a special trip to Washington, D.C. to meet with Sen. Lieberman and reassure him about the situation. Jachmann Aff.

On July 13, 2005, a lawyer for WFHA wrote to JEI accusing it of anti-Semitism and threatening to sue JEI if it did not close the deal with WFHA. Id.

The parents' opposition to the sale has nothing to do with anti-Semitism. The parents are opposed to a sale to anyone at this time. To make the record clear, the PTA had its attorney

[3] Mr. Sakurai was CEO of Mitsubishi International Corporation until his recent appointment to Consul-General of Japan in New York. See Jachmann Aff. Exhs. F&K.

write a letter to JEI's counsel stating that the parents would like JEI to offer space on the campus to WFHA on a long-term rental basis, and they would be happy to share the campus with the WFHA children without giving up the school's permanent home. Jachmann Aff. Exh. P.

A Jewish teacher at JSNY wrote an eloquent letter describing the respect and support she received at JSNY for herself and her Jewish heritage. Jachmann Aff. Exh. T. A copy was provided to JEI.

On September 30, 2005, Mr. Messer and his wife contributed a total of $8,400 to Sen. Lieberman's primary and general election campaign committees, the maximum legal hard money contribution for the pending 2-year reporting cycle. Hon. Aff. Exh. C. Over the past four election cycles Mr. Messer, his wife, and the connected PAC of Mr. Messer's company, have contributed over $300,000 to Sen. Lieberman, to his party, and to a number of candidates of his party. Hon Aff. Exhs. B, D.

On October 25, 2005, the Deputy Consul-General of Japan in New York, Mr. Hiroshi Sato, met with the PTA President, the former PTA President, and two PTA parents regarding the proposed sale. Mr. Sato is a JEI Trustee. He told the four PTA representatives that JEI was going to go through with the sale to WFHA, regardless of the merits of the PTA's criticisms of the sale plan or of the PTA's alternative rental proposal. He said that two of the reasons were a) that the Trustees were angry at the parents for challenging their authority; and b) the Trustees were afraid of a race discrimination suit by WFHA. Mr. Sato also confirmed the account of Sen. Lieberman's phone call to Amb. Ando and Amb. Ando's trip to Washington. H. King Aff.; Kajiwara Aff.; Takahashi Aff.; Jachmann Aff.

On or about November 22, 2005, the Town of Greenwich Assessor's Office mailed JEI a notice that the assessed fair market value of the Greenwich Campus as of October 1, 2005 is $28,286,100. Jachmann Aff. Exhs. A-B.

On November 29, 2005, the JEI Board of Trustees passed a resolution approving selling the Greenwich Campus for $20 million. JEI has produced no evidence that the Trustees were informed of the Greenwich Township valuation of over $28 million and had considered that information before they voted on the resolution. Pet. Exh. H.

On December 12, 2005, an Agreement of Sale ("Contract") was executed by David A. Messer as Vice President of WFHA and by Kazuhiko Sakamoto as President of JEI.

As of the Contract date, the fair market value ("FMV') of the Greenwich Campus was $26.8 million. Complete Appraisal and Self-Contained Report dated January 17, 2006 by Christopher K. Kerin, MAI, CCIM, copy annexed as Exhibit B to the Kerin Aff. (the "Kerin Appraisal"). The Contract undervalued the property by $6.8 million.

JEI petitioned this Court to approve the Contract. At the hearing date, March 29, 2006, the PTA appeared to show cause why the petition should be denied, because of JEI's failure to prove that the Contract satisfies the two prong test of N-PCL § 511. The PTA submitted affidavits, documents, and an independent expert appraisal report in support of its objections.

ARGUMENT

I. THE PTA HAS STATUTORY STANDING TO "APPEAR AT THE HEARING AND SHOW CAUSE WHY THE APPLICATION SHOULD NOT BE GRANTED."

A. The Unambiguous Language Of N-PCL § 511(b) Confers Statutory Standing On The PTA.

The last sentence of N-PCL § 511(b) states that:

> Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

(emphasis added). It is beyond dispute that the PTA is "interested" in JEI's application to sell the Greenwich Campus, and that the PTA's position is that the application should "not"[4] be granted. Under the plain wording of the statute the PTA clearly has standing to appear at the hearing and submit opposition and objections.

JEI asserts that the phase "Any person interested" in the last sentence of § 511(b) is "defined" in the statute. But the simple fact is that § 511 does not have a list of defined terms. Indeed, nowhere in the N-PCL can be found a list of definitions that assigns a meaning to the phrase "Any person interested" as it appears in the last sentence of § 511(b).

JEI's empty claim that there is a "definition" of the phrase is based on the first sentence of § 511(b), which says:

> Upon presentation of the petition, the court shall direct that a minimum of fifteen days notice be given by mail or in person to the attorney general, and in its discretion may direct that notice of the application be given, personally or by mail, to any person interested therein, as member, officer or creditor of the corporation.

JEI Mem. at 6. This sentence is merely the description of the first of several steps in a proceeding brought pursuant to § 511. Notably, the statute does not precede this sentence with a directive that "any person interested" is defined for all purposes in § 511 to have a limited meaning referring only to members, officers and creditors of a corporation.

[4] This, of course, distinguishes the PTA from a party such as WFHA. No statutory standing exists for the proposed contract purchaser of a corporation's assets, because the purchaser is a proponent of the sale, not an objector. The phrase "should not be granted" excludes outside parties such as the WFHA from appearing in this proceeding. See, e.g., 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) (holding that purchaser of property under contract subject to judicial approval is not entitled to appear at the hearing to promote the contract).

The first sentence of § 511(b) is not restrictive, but permissive. The first official step in the § 511 proceeding is the Court's issuance of an Order to Show Cause ("OSC"). The OSC provides for notice of the hearing to the Attorney General and possibly to other parties. The first sentence of the subsection confirms that the Court has discretion to direct that the petition and notice of hearing be given to any person interested therein, "as" member, officer or creditor of the corporation.

Accordingly, the well-established practice in § 511 proceedings is for the Court, often upon recommendation of the Attorney General, to direct that notice be given to persons that may be adversely affected by the proposed transaction.[5] As demonstrated by the five New York County Supreme Court cases cited in the Introduction, supra, the types of interested parties that are routinely named in the OSC goes far beyond officers, members and creditors. In other words, the Honorable Justices of the Supreme Court and the Attorney General routinely read "as" to mean "such as."[6]

This practice was followed by the Attorney General and the Court in the instant proceeding. The Attorney General directed JEI's attorney to inform the Court that the PTA should be served with the petition and notice of its opportunity to appear at the hearing and show cause why the petition should not be granted. The Court issued such an order and the PTA duly appeared.

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[5] For a recent and representative example of this practice, see Attorney General's Order to Show Cause, copy annexed as Exhibit D to Affirmation of Jade Joan Hon dated April 10, 2006 ("Hon Standing Affirmation") and discursion at ¶¶ 19-23 of the Hon Standing Affrmation.

[6] This practice and interpretation is consistent with, and arguably required by, CPLR § 2214(d), which gives the Court broad discretion to require that an Order to Show Cause be served "at a time and in a manner specified therein."

Hence, the first sentence of § 511(b) does not even restrict the class of persons to be served with notice. It is frivolous for JEI to assert that a phrase which does not even operate as a restriction in the very sentence in which it appears must be read as a severe restriction in a separate sentence (later in the statute) that deals with a different phase of the proceeding altogether. Furthermore, the last sentence of § 511(b) is worded differently than the first sentence. The permissive phrase, "as member, officer or creditor," is not repeated in the last sentence. If the Legislature intended for "Any party interested" in the hearing phase of the proceeding to have the same meaning as it did in its description of the notice phase, then it would have repeated the "as" phrase.

The final sentence of § 511(b) stands on its own two feet. The three sentences that precede it deal with the Court's discretion as to giving notice. The final sentence addresses the hearing itself. The statute says that "Any person interested, whether or not formally notified" (emphasis supplied) may appear at the hearing. This sentence is plainly intended to make the hearing as inclusive as possible of interested parties who want to object to the petition. The phrase "whether or not formally notified" makes clear that the Court's implementation of the notice provision of the first sentence shall not restrict or limit the parties who have statutory standing to be heard at the hearing. This point is summarized, and emphasized with italics, in a treatise on this subject:

> At such a hearing, *any* interested person, whether or not formally notified, and including other potential buyers, may appear and show cause why the application should not be granted.

(italics in original; footnote omitted)[7] Victoria Bjorkland, James J. Fishman & Daniel L. Kurtz, New York Nonprofit Law and Practice: With Tax Analysis 248 (1997 & Supp. 2005).[8]

B. It Is Well-Settled In This Court That Persons Who Assert That They Might Be Adversely Affected By A Proposed Sale Have Statutory Standing To Object

The Justices of this Court have repeatedly determined that a party asserting that it might be adversely affected by a proposed sale of real property by a not-for-profit organization has standing to appear at the § 511 hearing and to have the Court receive its evidence and hear its objections. National Council; MEETH; Standup Harlem; St. Frances de Sales; Sculpture Center. Time and again this Court has recognized that the statutory directive that "Any party interested" in the proposed transaction must be allowed to show cause in opposition is not limited to parties who also are members, officers and creditors of the petitioner.

The PTA is the quintessential example of a party that must be granted standing in order to effectuate the letter, purpose and spirit of the statute. First, the PTA represents the current direct beneficiaries of the organization – the families who send their children to JSNY. Second, the PTA has been operating for 30 years to foster and improve the school program. As an organization it is concerned about the future of the school beyond the longevity of the current enrollees.

[7] The 2005 Cumulative Supplement of the treatise includes a "But see" reference to two of the cases cited by JEI in its brief. Hence, those cases did not convince the authors of the treatise to revise their emphatic statement quoted above. In Point I.C, infra, we will show that JEI's cases are not a basis for changing the long-standing interpretation of the statute.

[8] One of the authors of the treatise is listed on the instant petition as "Of Counsel," and was noted as a "cc" on correspondence by JEI's counsel to the Attorney General. On JEI's brief asserting its frivolous standing argument, however, the author's name is omitted.

Third, that the PTA is not a "member" or "officer" of the petitioner is all the more reason why it should be heard. The governance structure and practices of JEI are a travesty. On paper, JEI has no members at all. But it has a de facto membership consisting solely of American branches of giant Japanese multinational business corporations, and the Japanese Consulate in New York, which has a mission to promote the interests of the multinational corporations in the United States. This business-political-diplomatic nexus is exemplified by the recent appointment of Motoatsu Sakurai to be Consul-General of Japan in New York, a transfer from his position as President and CEO of Mitsubishi International Corporation.

Having excluded the parents, educators and PTA from any position as a "member" or "officer," JEI now invokes its undemocratic and exclusionary governance structure as a technical legal justification for this Court to exclude the PTA and parents from the courtroom. As the settled line of authority shows, however, JEI's attempted technical semantic argument is not only contrary to the statutory intent, is has no legal merit at all. We will now elaborate on the authorities cited above.

National Council

In National Council this Court dismissed a § 511 petition based upon objections that were presented to the Court by a party that was neither a member, director or creditor of the petitioner. The procedural status of the case was very similar to the instant proceeding.

The National Council of Young Israel ("National Council") went before Justice Debra James in New York County to petition the court pursuant to § 511 for approval of the sale of its property to 3 West 16th Street Associates, LLC. As in the instant case, the Attorney General did a preliminary review of the petition and issued a notice of "no objection." On the hearing date,

however, a party interested in the transaction appeared and submitted opposition. The objector was Young Israel of Fifth Avenue ("YIFA"), an Orthodox synagogue that was a month-to-month tenant in part of a multistory building that was under contract to be sold. YIFA said that it would be adversely affected by the sale of the building, even though National Council had provided for the use of some of the proceeds of the sale to help YIFA relocate. Notably, YIFA was not a member, officer or creditor of the National Council. Nevertheless, Justice James recognized that YIFA was entitled to be heard because of the plain language of the last sentence of § 511(b). The Court explained,

> Not-for-Profit Corporations Law § 511(b) provides that *notice* of a petition for leave of court 'to sell… all or substantially all of its assets' be given to the Attorney General. That provision also states that any person interested whether or not formally notified, may *appear* at the hearing and show cause why the application should not be granted.

2 Misc.3d at *4 (emphasis added). Thus, the Court made a point of noting that the first sentence of § 511(b) regarding issuing notice is not any kind of restriction on the last sentence of § 511(b) regarding the statutory right to appear at the hearing. YIFA had statutory standing regardless of whether it was named in the OSC and notwithstanding the Attorney General's no objection notice.

As objector, YIFA brought to light questions as to the validity of the sale's authorization, as well as arguments going to the two-pronged test of N-PCL § 511. The Court concluded that proper consent of National Council's board of directors was not obtained and, in spite of the Attorney General's lack of objections, that the sale could not be approved. (Having made a threshold determination that the petition must be dismissed, the Court did not need to reach the questions whether the proposed sale is for fair and reasonable consideration and promote the

National Council's corporate purpose of the interest of its members.) In the instant case, the Court similarly needs to hear the objections of the PTA to JEI's proposed sale, and PTA believes that upon consideration of those objections the Court should not approve the transaction.

MEETH

MEETH involved the future direction of a venerable New York City specialty nonprofit hospital. For our purposes, the course of the litigation is striking for the breadth of representation in the proceeding that was accepted by this Court. Besides the petitioner and the Attorney General, six other parties appeared and presented their positions. Among the objectors were a) three organizations that had offered competing proposals for the hospital; b) the board of surgeon directors at the hospital; and c) the hospital employees' national union. Apparently each of the objectors was heard merely on the basis of the filing of a notice of appearance, without the need to make motions to intervene, even though none of the above was a member, officer[9] or creditor of the petitioner. On the basis of the evidence and arguments submitted to the Court by the objectors and the Attorney General, the Court rejected the proposed transaction and denied the petition.

Standup Harlem

In Standup Harlem the petitioner wanted to sell a property that was used to provide housing for homeless and/or drug addicted members of the Harlem HIV/AIDS community. The proposed purchaser was a nonprofit organization that would be required by the contract of sale to continue to provide services for those beneficiaries. The objector was a homeowners' association, advocating on behalf of its members. The objector did not want the property to be sold under those terms of use because if the building was to be sold they wanted it to cease use as

[9] The board of surgeon directors is not the corporation's board of directors.

a program for transient and homeless people. The Attorney General gave a no objections notice, but it also directed (as in the instant case) that the petitioner give notice of the hearing to the homeowners' association.

Obviously, the homeowners' association in Standup Harlem was not a "member, officer or creditor" of the petitioner. In contrast to the PTA in the instant case, the homeowners' association did not even represent the interests of the beneficiaries of the petitioner organization. Just the opposite, the objector's asserted interest was in "improving" the neighborhood environment by opposing the continuation of services in that facility for the beneficiaries. Notwithstanding the character of the objector's interest, and the lack of objection by the Attorney General, this Court gave the homeowners association a full hearing on the merits of its objections.

St. Frances de Sales

In St. Frances de Sales a competing potential buyer was granted objector status by this Court under § 511(b). See 110 Misc.2d at 511. In fact, because of this competing buyer's objection, the Court held a full evidentiary hearing on the question of the fair market value of the property. The objector submitted an appraisal indicating that the property was worth more than the proposed contract price. This Court determined that a hearing was necessary to resolve the conflicting valuations provided by petitioner and objector. Once again, this Court did not restrict objector status to members, officers or creditors.

Sculpture Center

Because the statutory standing of parties like the PTA is so firmly established before this Court, challenges to objector standing are infrequent. When this Court was presented with such a rare challenge in Sculpture Center, the Court resolved the issue in favor of the objector by sua

sponte deeming the objector to be an intervenor-respondent. The challenge arose in a similar procedural posture as the instant case – the Attorney General did not object to the proposed sale but it directed the petitioner to give notice of the hearing to the objector. The objector, Friends of the Sculpture Center (FOSC), was an organization advocating on behalf of current and former attendees of the organization.

Even though this Court ruled in Sculpture Center that the objector would be fully heard in the § 511 proceeding, JEI argues that the decision supports its attempted reliance on Friends of World College v. Nicklin, 249 A.D.2d 393, 671 N.Y.S.2d 489 (2d Dept. 1998) for a restrictive interpretation of § 511(b). This is not a valid argument. The Sculpture Center decision merely notes that the petitioner in that case was relying on Friends of World College as a basis to challenge the objector's standing. But the Court did not find that the challenge had merit. Rather, the Court noted that the "State Attorney General who has reviewed petitioner's request for approval of the sale, favors FOSC's participation in this proceeding," and went on to deem the objector an intervenor. 2001 N.Y.Misc. LEXIS 1019 *2.

As will be discussed in Point I.C, infra, the Second Department decision in Friends World College affirmed a lower court ruling about standing to bring an action under N-PCL § 720 to overturn a corporate decision; there was no holding pertaining to "Any party interested" in § 511(b). In Sculpture Center this Court did not address the petitioner's flawed interpretation of Friends World College. Perhaps in the instant case the Court will put that issue to rest so that the sparse wording of the Second Department decision does not cause confusion in the future about the firmly established right of objectors like the PTA to appear in these proceedings.

This Court's line of authority on objector standing in § 511 proceedings is not only solidly based upon the plain language of the statute, it also fulfills the purpose of Supreme Court review of proposed dispositions of charitable assets. Bear in mind that Supreme Court approval only is needed with respect to Type B and Type C not-for-profit organizations. Type B and C corporations must have purposes that benefit a larger public interest than merely the members, officers and creditors of the organizations. Most Type B corporations are recognized as exempt from taxation under I.R.C. § 501(c)(3), as are many Type C corporations. JEI, for example, is a Type B corporation that is recognized as exempt under § 501(c)(3), so it is supposed to benefit the public. However, JEI does not have any members, and its Board of Trustees has absolutely no representation for JEI's direct beneficiaries let alone the larger public. This Court's sound interpretation of "Any party interested" makes it possible for interested parties who may be beneficiaries of the organization or simply affected and interested members of the public, to present the Court with evidence and arguments as to whether the petition would commit a waste of charitable assets or otherwise impede the mission of the organization.

C. JEI's Second Department Cases Are Distinguishable[10]

JEI's subpoint II.B declares that "New York courts" have consistently denied standing to parties like the PTA in § 511 proceedings. JEI immediately backpedals from this bold (and false) claim. The first sentence under the heading revises the claim to read, "The Second Department has consistently . . . . ." The truth is that JEI's request to exclude the PTA from the hearing is based upon misinterpretation of three sparsely worded Second Department decisions.

[10] JEI's digression on standing in Point I of its brief is irrelevant to the issue of the PTA's standing under § 511(b). This is a unique statutory proceeding under the N-PCL which has a statutorily grant of standing and a clear line of authority in the Court affirming the standing of a party like the PTA.

JEI's root case for its alleged line of authority is Matter of Friends World College v. Nicklin, 259 A.D.2d 393 (2d Dept. 1998). This is an affirmance of the Order of Hon. Marquette L. Floyd, J.S.C., Suffolk County Supreme Court, dated November 25, 1996 ("Floyd Order"). A copy of the Floyd Order is annexed as Exhibit A to the Affirmation of Jade Joan Hon dated April 10, 2006 ("Hon Standing Affirmation"). The underlying case involved a § 511 petition. The lower court's ruling on standing, however, solely concerned whether parties had standing to assert affirmative defenses under N-PCL § 720. Specifically, the Floyd Order stated (at p. 2):

> Although not counterclaiming herein, the effect of Nicklin and Raphael's affirmative defenses, as proposed, would be to limit the corporation's activities, and as such, they may be considered to come within § 720 N-PCL as to actions against directors and officers, to set aside or enjoin conveyances, an accounting, neglect of duties, etc. This statute specifies who may bring such action (in relevant part): "(a) a director or officer of the corporation." Nicklin or Raphael are neither.

There is no indication in the lower court decision that Nicklin or Raphael even attempted to appear in the proceeding as objectors pursuant to § 511(b). Justice Floyd did not make any ruling applying the "Any party interested" phrase at the beginning of the final sentence of § 511(b). Rather, as shown in the above-quoted passage, the motion court found that two parties did not qualify to assert affirmative defenses pursuant to N-PCL §720.

Because the Second Department order notes that it concerns a § 511 proceeding and only makes brief reference to the lower court's standing holding, a superficial review of the decision may give the inaccurate impression that this is a § 511 standing precedent. As soon as one looks closely at the wording of the appellate decision, however, one sees a disjunction between the words of the decision and § 511(b).

JEI relies upon a single sentence in Friends World College, to wit:

> The Supreme Court properly granted the College's motion to strike the appellants' answer on the ground that they did not have standing to challenge the proposed sale because they were not trustees, officers, or directors of the College.

(emphasis supplied) A careful reading of this sentence alongside §§ 511(b) and 720 yields a clue to JEI's misinterpretation. There is a major discrepancy between the phrase "member, officer or creditor" in the first sentence of § 511(b) and the Second Department's reference to "trustees, officers, or directors." There is only one of three operative terms in common – "officer[s]." The terms "member" and "creditor" are completely omitted from the sentence in the Second Department decision.

The reason for this discrepancy is that the lower court was referring to § 720, not § 511(b), as shown above in our quotation from the Floyd Order. Section 720 specifies that certain parties have standing to bring certain affirmative actions against the directors or officers of a not-for-profit corporation. The parties with standing include, among others, a "director or officer" and a "trustee in bankruptcy." A member or creditor of the organization, on the other hand, has no right to sue under § 720.[11] That is why the Second Department quote does not mention "member" or "creditor."

The other two cases in JEI's alleged line of Second Department authority are Bridge to Spiritual Freedom v. Cubides, 304 A.D.2d 574, 759 N.Y.S.2d 328 (2d Dept. 2003) (hereinafter Bridge to Spriritual Freedom) and Congregation Atzei Chaim v. 26 Adar N.B. Corp., 2006 WL 552633 (2d Dept. 2006) (hereinafter Congregation Atzei Chaim). In neither of these cases, however, is there a holding that is applicable to the PTA's standing in the instant proceeding. This conclusion can initially be gleaned from the short Second Department decisions. The

[11] With regard to members, § 720 makes a cross reference to § 623, members' derivative actions.

conclusion becomes even more clear when we examine the unpublished lower court decisions that were affirmed. The lower court decisions in these cases are annexed as Exhibits B and C to the Hon Standing Affirmation.

Bridge to Spiritual Freedom involved a petition pursuant to RCL §12 o sell real property. The respondents only asserted one reason to be allowed to participate in the proceeding – they claimed that they were members of the religious corporation. The Court took this assertion seriously. An evidentiary trial was held to determine whether the objectors were actual members of the corporation, pursuant to its by-laws. The court concluded that the objectors had never complied with the formal requirements for membership. Having lost on the membership issue, the objectors apparently made no other argument for standing. The lower court decision reveals that there was no holding on the question of the meaning of "Any person interested" in the beginning of the last sentence of § 511(b). In the instant case, by contrast, PTA forcefully argues its interest in the petition, and thus, its standing.

Finally, Congregation Atzei Chaim does not support JEI's standing argument. It is necessary to read the lower court decision (Hon Standing Aff. Exh. C) to know what the affirmance of that decision represents as a precedent. The lower court decision reveals that Congregation Atzei Chaim is a mortgage foreclosure action involving a religious corporation with a long and complicated history in the courts. The lower court's holding in relation to § 511 was that the statute was not relevant to the case at all because Religious Corporations Law § 12 "specifically exempts a purchase money mortgage or purchase money security agreement" from the procedures of §§ 510-511. In dictum the lower court said that two parties in the case would lack standing to challenge the transaction. But there is no reference to the "Any party interested"

phrase of § 511, only a citation to Friends World College. As noted above, the standing ruling in Friends World College was based upon § 720, not the "Any party interested" phrase of § 511.

In conclusion , JEI's argument that Friends World College, Bridge to Spiritual Freedom, and Congregation Atzei Chaim add up to a line of Second Department precedent for denying objector standing to the PTA under § 511(b), and for overturning well-established precedents in the First Department, is completely without merit.

Furthermore, there is a recent Second Department precedent illustrating that the First Department's approach to § 511(b) standing is also practiced in the Second Department. In re Matter of Noble Drew Ali Plaza Hous. Corp., 24 A.D.3d 578, 808 N.Y.S.2d 302 (2d Dept. 2005) is a case in which the Attorney General successfully moved to vacate the order of the Supreme Court which had approved a N-PCL § 511 petition upon learning of new evidence. The Attorney General, following its regular policy, took an inclusive view of "Any party interested" standing under § 511(b), and its approach was accepted by the lower court and by the Appellate Division.

Three documents from the record on appeal corroborate the expansive view of standing applied in that proceeding. First, the Attorney General's proposed Order to Show Cause lists eight interested parties that should be given the opportunity to appear, including parties that would be affected by the order even though they are not officers, members or creditors. See Exh. D annexed to Hon Standing Aff. Next, is the Order of Hon. Gerard H. Rosenberg dated August 29, 2003 which determines, in part, what parties must be allowed to participate in a renewed § 511 proceeding. See Exh. E annexed to Hon Standing Aff. Finally, there is the order appealed from, Order of Hon. Gerald H. Rosenberg dated February 19, 2004. See Exh. F annexed to Hon Standing Aff. A review of this decision confirms that right through the completion of the lower

court's deliberations on the merits, there was no question raised about the standing of any of the eight parties that the Attorney General indicated must be given an opportunity to be heard.

II. IN ADDITION TO ITS STATUTORY STANDING THE PTA IS ENTITLED TO INTERVENOR STATUS UNDER CPLR §§ 1012 AND 1013

As demonstrated in Point I, infra, the PTA clearly has objector standing under N-PCL § 511(b) to appear in this proceeding and to show cause why the petition should be denied. In the alternative, or as a supplement to its objector standing, the PTA should be granted intervention under CPLR §§ 1012 (as of right) and 1013 (by permisson).

The PTA is serving and filing a Notice of Cross-Motion in order to formalize this application. We note, however, that in other cases under N-PCL § 511 this Court has sua sponte deemed an objector to be an intervenor, see Sculpture Center, or has automatically referred to an objector as an "intervenor," see Standup Harlem, merely based upon the filing by the objector of a notice of appearance, which the PTA already accomplished at the original hearing date.

A. The PTA Is An Intervenor As Of Right

CPLR § 1012(a)(1) provides that "when a statute of the state confers an absolute right to intervene" a person shall be permitted to intervene upon timely motion. Based on the language of N-PCL § 511(b) cited above, the PTA clearly is an interested party upon whom the N-PCL has conferred an absolute right to be heard in this proceeding.

The PTA also qualifies for intervention as of right under subparagraphs (a)(2) and (a)(3) of § 1012. The former applies "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment;" and the latter applies "when the action involves the disposition or distribution of… property and the person may be affected adversely by the judgment."

The PTA's interests certainly are not represented by any current party in this proceeding. JEI's argument that the Attorney General is representing the PTA's objections to the petition is frivolous given that a) the Attorney General is not objecting; and b) the Attorney General directed JEI to serve the PTA with the petition and notice of hearing so the PTA could represent itself in making its objections to the Court. Further, the PTA will be bound by a judgment in the special proceeding that allows the sale of the permanent home of the JSNY without a new permanent home having been secured. With regard to subsection (a)(3), this petition does involve the disposition of property, and again, the members of the PTA and the ongoing school community that the PTA has represented for 30 years would be adversely affected by a judgment approving a sale.

B. The PTA Should Be Granted Permissive Intervention

The PTA may intervene by permission of the court, in accordance with CPLR § 1013, which provides, in part:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact.

The PTA believes it is appropriate for the Court to exercise its discretion to grant intervention under both prongs of this provision. First, N-PCL § 511(b) clearly is "a statute of the state [that] confers a right to intervene in the discretion of the court." It is the routine practice of this Court, typically upon recommendation of the Attorney General, to initiate the giving of notice and an opportunity to be heard to beneficiaries of nonprofit organizations that might be adversely affected by the proposed disposition of charitable assets. Second, the PTA's objections "have a common question of law and fact" relative to the petition. The objections are a direct response

and challenge to JEI's claim that it meets the burden of the two prong test of § 511 – fair consideration for the property and furthering the purposes of the organization.

It has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR § 1012 or as a matter of discretion under CPLR § 1013, it ought to be granted so long as the intervenor has a real and substantial interest in the outcome of the proceedings. Sieger v. Sieger, 297 A.D.2d 33, 35, 747 N.Y.S.2d 102, 104 (2d Dept. 2002); Perl v. Zuvvo, 143 A.D.2d 824, 533 N.Y.S.2d 147 (2d Dept. 1988).

The PTA has amply demonstrated that it has such an interest as an organization and as representative of its members' interests. For example, the PTA has a strongly documented allegation that the proposed sale would waste at least $6.8 million in charitable assets. As a matter of law, the beneficiaries of an organization have a substantial interest in preventing a waste of the organization's assets. 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."

Even apart from wasting of millions of dollars in charitable assets, this Court ruled in Sculpture Center that the current and former students of a school have a substantial interest in a proposal to sell a current facility and relocate to a different one. In response to the objections, the Court made a careful inquiry into whether or not a proposed new facility will be suited to the needs of an organization's educational program. Furthermore, 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 held that it would not enforce contract of sale). Here, it is undisputed that JEI does not even have a new school facility identified.

Also, the PTA has also shown that re-enrollments, new enrollments, and morale of the school community are already suffering due to the proposed plan to sell the Greenwich Campus without any plan for a new permanent home for the school. JEI has lost the parents' confidence and is providing no sense of stability for current and prospective students. If the Court approves the sale, these adverse impacts will continue and accelerate.[12]

JEI says that this Court is not the proper forum for PTA to voice its concern over the implications of the proposed transaction because its forum was limited to the Attorney General and the Commissioner of Education. JEI Mem. at 5. JEI cites Society of Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761 (1991), where plaintiff-organization, in an attempt to overturn legislation by way of the courts, failed to demonstrate any special injury to itself, especially where only one member of the organization actually resided within the jurisdiction that the legislation affected. This is clearly inapplicable here, where the PTA has demonstrated that it, and its members, are directly affected by a potential sale of its campus and where the law has clearly established that only the Supreme Court shall be the forum for interested persons to express objections. The Attorney General and the Commissioner of Education merely have to be given notice of the petition. Typically, a draft petition is submitted to the agencies for review, but the agencies have no authority to approve or disapprove the sale. That is the sole province of the Supreme Court.

[12] JEI's brief cites decisions denying intervention in cases not involving § 511 proceedings. Those cases are so inapposite as to not need detailed commentary. They clearly cannot overcome the established line of § 511 cases before this Court in which objectors were heard.

JEI makes the frivolous argument that the PTA should not be granted intervenor status because it would "unduly delay the determination of the action or prejudice the substantial rights of any party." Pet. Mem. at 8, citing CPLR § 1013. In making such a consideration, however, the court must determine whether the action will be "needlessly delayed, and the rights of the prospective intervenors are already adequately represented." Quality Aggregates, Inc. v. Century Concrete Corp., 213 A.D.2d 919, 623 N.Y.S.2d 957 (1995). The PTA has not caused any delay at all in this case. It appeared on the very first hearing date, as provided for in the statute, and presented substantial evidence supporting its objections.

If any party has caused "needless" delay it is JEI. Even though JEI had the PTA's Appraisal Report and many other documents and statements in its possession for about two months prior to filing its court petition, JEI chose not to supplement its petition with any affidavits or documents replying to the PTA's objections.[13] Evidently JEI's litigation strategy was to hope that the PTA would be intimidated from appearing in Court at all, or that JEI's lawyer could convince the Court at the hearing date to exclude the PTA's objections from the record. If JEI had succeeded in either of those tactics, then the Court would have approved the petition without the Court ever seeing the PTA's objections.

In any event, it is well known that Supreme Court review of a § 511 petition takes time if there are serious objections, as in this case. JEI's Contract with WFHA takes this into account. It contains five single spaces pages of contingency arrangements regarding the timing and outcome of the Supreme Court review proceeding. Pet. Exh. D, Article 2.3 at pp. 8-12.

[13] The better practice is for a petitioner that has been subject to objections before the Attorney General to supplement its initial petition filing with affidavits and documents explaining the objections that were presented to the Attorney General and they trying to rebut them. Such a presentation allows for a joinder of issue at the hearing date.

Finally, in its attempts to discredit the PTA's obvious and substantial interests in the proposed sale of the Greenwich Campus, JEI completely ignores that N-PCL § 511 is no ordinary litigation, but instead is a special proceeding particularly engineered to address the situation that the beneficiaries of a Type B or C nonprofit organization need to have a guaranteed opportunity to voice objections to a proposed disposition of an organization's assets. The two-pronged test against which the transaction must be measured goes hand in hand with the right of interested persons (especially beneficiaries) to object. That this Court consistently allows participation in § 511 proceedings by parties like the PTA is consistent with the fact that the two prong test and the hearing procedure create a per se substantial interest in this proceeding.

CONCLUSION

For all of the aforestated reasons, the Court should deny JEI's request to bar the PTA from this proceeding. The Court should declare that the PTA has statutory standing under N-PCL § 511 (b) and is an interested party that may show cause why the petition should not be granted. In addition, the Court should grant the PTA's cross-motion for intervention, thereby granting the PTA an alternative basis for party status based upon CPLR §§ 1012-13.

Dated: New York, New York
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Respectfully Submitted,
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