

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

SURREPLY AFFIRMATION
IN OPPOSITION

SURREPLY 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. I am submitting this affirmation in support of the PTA’s application to submit a short surreply affirmation, and then to set forth the substance of the surreply.

Grounds for Submitting Surreply

2. JEI submitted reply papers that included a considerable amount of documentation that attempts to answer objections that the PTA submitted long ago to the Attorney General. JEI decided to withhold this information both from the Attorney General process and, initially from the Court. It saved the material to submit in a “reply” so that the PTA would not have an opportunity to analyze and respond in its papers.

3. Most significant is the correspondence with “School A” (as denoted in the Petition) showing School A’s persistent efforts to purchase the Greenwich Campus, and the

various ways that JEI's broker and the officers deflected, ignored, or failed to pursue serious negotiations with "School A." See Exhibits B, E, G, I, K, L, & M annexed to the Affidavit of Mariyon Robertson sworn to on April 17, 2006 ("Robertson Aff.").

4. At the hearing before the Court on March 29, 2006, Justice Abdus-Salaam pressed JEI's attorney to provide more details about JEI's response to "School A"'s offer in March 2005 to purchase the Greenwich Campus for \$23 million with a four-year leaseback. Apparently JEI felt it could withhold this documentation no longer.

5. The documents strongly support the PTA's position that JEI treated WFHA as a favored purchaser and as a result is attempting to sell its main asset for far less than it is worth. See discussion infra.

6. Second, JEI belatedly produced an expert affidavit that attempts to refute the PTA's argument that the property is undervalued. The PTA's expert is in Europe. However, he reviewed a fax of the JEI affidavit and he e-mailed two strong criticisms of the analysis, which we want to submit to the Court. See discussion infra.

7. Third, JEI belatedly provides a copy of a D&B report which it claims was the reason why it concluded that the rental offer from British Schools of America should not be considered. A review of the document shows that it does not justify JEI immediate dismissal of the BSA offer. See discussion infra.

8. Fourth, JEI attaches a copy of an unsworn letter from Deputy Consul-General Sato partially disputing sworn affidavits of four eyewitnesses to statements he made to them at a meeting on October 25, 2005. See Exhibit A to Omori Affidavit. Mr. Sato claims in the letter that he said that JEI sent letters to the parents in early 2004 telling them of JEI's plan to sell the

Greenwich Campus. Notably, JEI's reply papers nowhere identify such a letter. Nor does JEI produce a copy of such a letter.

9. My client has conducted an initial search for a copy of any letter that could meet Mr. Sato's description. The PTA located a letter (in Japanese) from Mr. Sakamoto that seems to be the one referred to. My client informs me that the letter is principally a letter about the abandonment of the Unification Plan. It has a passing reference to "considering" the option of giving up the ownership of the Greenwich property.

10. Back in 2004, when parents received this letter they obviously did not perceive this as notice that JEI had authorized negotiating a deal with WFHA or putting the property actively on the market. Those facts were kept secret from the PTA for a year.

11. If given sufficient time, the PTA with leave of Court will obtain a translation of the letter and submit it for the record.

The Stanwich School

12. "School A" denoted in the Petition turns out to be Stanwich School, located in Greenwich, CT.

13. On September 18, 2002, the Stanwich School submitted a written offer to JEI for the purchase of the Greenwich Campus. Robertson Aff. Exh. B.

14. On February 5, 2004, the Stanwich School submitted another written offer to JEI. Robertson Aff. Exh. E. The new offer was for \$18,000,000, coupled with this significant additional term, that JEI has not previously disclosed to the PTA or the Court:

We will be pleased to discuss with the Japanese School the possible relocation of the Japanese School to all or part of the space now occupied by the Stanwich School.

15. February 5, 2004 is also the precise date of the written offer from WFHA. Jachmann Aff. Exh. D; Robertson Aff. Exh. F. WFHA's offer was for \$18.5 million, plus a leaseback of part of the campus for five years.

16. On March 24, 2005, the JEI Board of Trustees held a meeting which was largely devoted to issues surrounding the difficulties in implementing the NJ – Greenwich Unification Plan and the future of the Greenwich Campus. The minutes of that meeting are Jachmann Aff. Exh. Z.

17. The Trustees received a briefing package for that meeting, in anticipation of a proposed resolution to authorize marketing the Greenwich Campus for sale, with a leaseback provision included in the deal.

18. The JEI officers included the WFHA offer in the briefing package, but not the Stanwich School proposal. (It is from a copy of the briefing package that the PTA obtained a copy of the WFHA offer that was attached to the Jachmann Aff.)

19. Furthermore, my client informs me that the one of the Japanese language documents in the briefing package explains that the intent of the proposed resolution is to authorize negotiating a sale agreement with WFHA. I will provide the Court with a corroborating translation if given sufficient time to accomplish that task.

20. The withholding of the Stanwich offer from the Trustees and the proposing of a resolution intended to make a deal with WFHA is an additional objective proof that JEI's officers steered this deal to WFHA as a favored buyer.

21. The sweetheart nature of the deal with WFHA is further highlighted by the subsequent brush off of the Stanwich School a year later, when it offered JEI \$23 million and a four-year leaseback.

22. JEI's broker delayed four months before responding in writing to the Stanwich proposal on June 4, 2004, and then with no real expression of interest. Robertson Exh. G.

23. Another five months passed and then JEI's broker sent Stanwich a term sheet, on November 19, 2004. Robertson Aff. Exh. I. It included very onerous provisions that were not required of WFHA, such as exclusive full occupancy by JEI for two years after closing, and then partial occupancy for three more years with an option to lease for another five years.

24. On January 20, 2005, Mr. Messer, on behalf of WFHA, executed acceptance of a term sheet for the sale and leaseback of the property. Robertson Exh. J.

25. On February 22, 2005, the Stanwich School wrote to the JEI President renewing its interest in purchasing the Greenwich Campus. Robertson Exh. K.

26. On March 10, 2005, Stanwich submitted a written offer to purchase the Greenwich Campus for \$23 million. Robertson Exh. L. The offer included a significant leaseback:

The Japanese School could continue to occupy the property on an exclusive basis for one year, and we would agree [to] a sharing arrangement over the following three years “

27. The offer does not provide for any payment of rent by JEI during the leaseback period. Furthermore, its offer of exclusive occupancy for one year surpasses WFHA's offer. And that is on top of an extra \$3 million in the purchase price.

28. This leads us to Robertson's incredible statement that “I assumed that the Stanwich School would be requiring JEI to pay market rent during this four-year period.” (emphasis supplied) Robertson Aff. ¶ 28.

29. First, this assumption is incredible given that the last written statement about rental costs was Robertson's letter to Stanwich dated November 19, 2004 which explicitly stated that JEI was "not obligated for any rent during the lease period." Robertson Exh. I.

30. Second, Robertson shouldn't have based a decision about pursuing the Stanwich offer on any "assumption." If there was any doubt about this, then Robertson should have immediately determined the offered terms for the leaseback period.

31. That Robertson did not do that consistent with the fact that JEI wanted to sell only to WFHA, and the excellent offer from Stanwich was an inconvenience.

32. Thus, when Robertson responded with unusual alacrity to the Stanwich offer, the response was a brush-off. Letter dated March 18, 2005, Robertson Exh. M.

33. One of Robertson's statements in the letter was that WFHA had made an offer with a "total value" that is more economical to JEI than the Stanwich offer. But that statement is surely untrue, unless, perhaps one uses the completely unsupported "assumption" that Stanwich would be charging JEI "market rent" during the leaseback period.

Katz's Present Value Analysis

34. The Affidavit of Bernard Katz sworn to on April 17, 2006 asserts that JEI would realize a present value of \$7,945,783 from the leaseback provision in the Contract with WFHA.

35. His analysis is deeply flawed.

36. Mr. Christopher K. Kerin, MAI, CCIM, states to me in an e-mail:

The study derives market rent from a report of OFFICE rents performed by Cushman and Wakefield. The subject property is a school and is not comparable to office properties. As we all know, there are restrictions on the use of the property as a school - and the property cannot be leased as office space - both legally and physically. The property would need to be substantially renovated to be leased as office space.

The correct study would be to look at leases for comparable school space in Greenwich and nearby towns. The problem is that Cushman and Wakefield leases office properties and a study of office rents is easy for them to do - unfortunately an office rent study is not applicable to the problem at hand.

37. The analysis is also flawed because:

Katz uses a discount rate of 4.50% (10-year U.S. treasury note interest rate) in the study (see spreadsheet). The lower the discount rate, the higher the NPV (net present value). The discount rate reflects the relative risk in the income stream. The higher the risk, the higher the rate. The rate used by Katz is a low safe rate - guaranteed by the U.S. Government. Our rental stream is not U.S. Government guaranteed - and thus carries a higher risk. The discount rate should be higher than 4.50%, and the NVP should be lower than \$8,000,000.

38. Besides the serious technical problems with the Katz analysis, the whole report is not probative to the legal issue before the Court.

39. The FMV of the Greenwich Campus - without a leaseback in the deal - is \$26.8 million. The question is what price JEI should be able to get on the market for this \$26.8 million property if you add the leaseback provision. The answer is independent of what the leaseback is worth to JEI. What matters is what positive or negative value prospective buyers attach to the provision. In the case of WFHA, for example, no matter how valuable the leaseback provision is or isn't to JEI, the provision is a positive value to WFHA.

40. WFHA has an enrollment of about 125 and will not be using most of the campus until it grows. Having a compatible tenant occupying the rest of the otherwise unused space and paying rent and a share of operating costs is an excellent financial situation for WFHA. WFHA would not otherwise be listing the unused space (classrooms without air conditioning) with Cushman & Wakefield to find a Fortune 500 company as a prime office tenant.

41. If JEI had diligently marketed the property it surely would have sold it for substantially more than \$20 million with the leaseback, either to WFHA or to another party. .

The D&B Report

42. Robertson says in ¶ 31 that the rental offer from British Schools of America (BSA) was rejected in part because BSA “posed a higher than average credit risk.” JEI has finally produced the supposed basis for this accusation, a D&B report annexed as Exhibit A to the Kashima Affidavit. In fact, the D&B report shows that the company reported on was doing well for a young company. It reportedly paid all its bills and paid them on time. For Robertson or JEI to brush off BSA’s offer based upon this D&B report is gross negligence. At the very least, you call the company and tell them what you don’t like about the report and give the company an opportunity to rebut the information or supplement it with newer and more positive financial data. As the PTA’s submissions show, BSA has been doing very well. Jachmann Aff. Exhs. N & O.

Conclusion

43. The Court’s consideration of these comments mitigates but does not eliminate the prejudice to the PTA’s right to object to the petition caused by JEI’s withholding documentation until the PTA would not be able to respond to it. We assume that if there are material issues of fact in dispute on the current record, however, there will be an evidentiary hearing and the PTA will have a better opportunity to respond fully to the new matter.

Dated: New York, New York
April 20, 2006

ARTHUR R. BLOCK