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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 Hon. Sheila Abdus-Salaam

PETITIONER'S MEMORANDUM OF LAW CONCERNING THE PTA'S LACK OF STANDING TO OBJECT TO THE PROPOSED TRANSACTION UNDER N-PCL § 511

Petitioner Japanese Educational Institute of New York ("Petitioner" or "JEI"), by its attorneys Bingham McCutchen LLP, respectfully submits this memorandum of law concerning the Japanese School of New York PTA's ("PTA") lack of standing under N-PCL § 511 to appear in this proceeding and interpose objections to JEI's proposed sale and leaseback of its property located at 270 Lake Avenue, Greenwich, Connecticut (the "Greenwich property").

PRELIMINARY STATEMENT

Having failed to persuade either the New York State Attorney General ("Attorney General") or the New York State Education Department ("Education Department") to oppose the proposed transaction, the PTA now attempts to interpose itself in this special proceeding – despite its lack of standing – in a last-ditch effort to block JEI's sale and leaseback of the Greenwich property.[1]

[1] This memorandum of law does not address the merits of the opposition papers submitted by the PTA, which will be addressed in a subsequent memorandum of law to be submitted to the Court. Further, Petitioner has not formally moved to strike papers submitted by the PTA for lack of standing in light of the expedited briefing schedule. However, if a formal motion becomes necessary, Petitioner will prepare and submit a motion to strike.

Approval of the proposed transaction is governed by N-PCL § 511, Education Law § 216-a, and the related case law, which set forth a detailed statutory scheme governing the disposition of assets of not-for-profit education corporations. The statutes comprise carefully devised safeguards to ensure that a proposed disposition of assets is fair and reasonable to the not-for-profit corporation and promotes its charitable purpose. Specifically, N-PCL § 511 and Educ. Law § 216-a contemplate the involvement of certain specified parties in proceedings under N-PCL § 511 for judicial approval of a proposed sale of assets. These parties are: (1) the New York State Attorney General ("Attorney General"), (2) the Commissioner of Education ("Education Commissioner"), and (3) "interested persons," defined as "members, officers or creditors" of the corporation.

The PTA does not argue – indeed, it cannot argue – that it is a "member, officer or creditor" of JEI, such that it is entitled to participate in this proceeding pursuant to N-PCL § 511 in its own right. Rather, N-PCL § 511 and Educ. Law § 216-a provide that the interests of groups such as the PTA are represented in this proceeding by the Attorney General, in his supervisory role with respect to not-for-profit corporations and in his capacity as *parens patriae*, and the Education Commissioner, who must receive notice regarding a proposed sale of assets by a not-for-profit education corporation. Educ. Law § 216-a(4)(d)(3).

In January 2006, the PTA submitted formal objections to both the Attorney General and the Education Commissioner – as it was entitled to do – that set forth all of its arguments in opposition to the transaction. Both the Attorney General's Charities Bureau and the Education Department reviewed the PTA's opposition papers, yet declined to appear in this proceeding in opposition to JEI's petition, moreover waiving statutory notice. Having submitted its objections to the Attorney General and the Education Department to solicit their participation

in this proceeding, the PTA has exhausted the remedies available to it under N-PCL § 511 and Educ. Law § 216-a. As the PTA lacks standing under N-PCL § 511 to appear in this proceeding in its own right, the PTA should not be permitted to reiterate before this Court the same arguments that it has unsuccessfully presented to the Attorney General and Education Department.

FACTUAL BACKGROUND

JEI operates four education programs for Japanese-speaking students in the New York metropolitan area, including two weekend and two full-day schools. Verified Petition, at ¶ 2. In addition to the 220 students enrolled at the Greenwich Japanese School ("GJS"), which is operated on the Greenwich property, JEI programs serve nearly 1,300 children in addition to the 220 enrolled at GJS. Verified Petition, at ¶ 6.

Confronted with the financial realities of a large, aging campus and a sharply declining enrollment, JEI's Board considered and rejected a number of options before reaching the conclusion in March 2004 that a sale and leaseback arrangement would best enable JEI to meet its financial needs while still providing a stable learning environment for its students. Verified Petition, at ¶¶ 21-22. After thorough marketing through an experienced, independent real estate broker, JEI's Board decided to enter into an advantageous sale and leaseback agreement (the "Agreement") with the Westchester Fairfield Hebrew Academy ("WFHA"). Verified Petition, at ¶¶ 35-39. Under this agreement, JEI will receive $20 million in cash and extremely favorable lease provisions valued at well over $5 million. Verified Petition, at ¶¶ 40, 47. Most importantly, the extended eight-year leaseback provision will enable JEI to provide a stable learning environment for its students while finding a location more suited to its needs. Verified Petition, at ¶¶ 6, 43-44.

JEI has provided the PTA with numerous meaningful opportunities to be heard and has opened the organization's books to review by the parents. Verified Petition, at ¶¶ 54-55. Large, formal meetings between the Trustees of JEI and parents of children enrolled at GJS regarding the proposed sale and leaseback took place in March, May, September and November of 2005, during which many parents expressed their opposition to the transaction. *Id.* Seeking to address the PTA's concerns, a Trustee committee spent hours meeting with, and produced and explained voluminous financial documents to, a parent committee. *Id.* Nevertheless, the PTA rejected the Board's explanations and continued to oppose the transaction. Verified Petition, at ¶ 56.

Having carefully considered the objections of the PTA, the Board of JEI concluded that the sale and leaseback transaction was the most appropriate action to ensure the future of all of JEI's education programs. Verified Petition, at ¶ 56. As required by the Agreement, JEI initiated the process for seeking approval of the transaction under N-PCL § 511 by submitting its Verified Petition on December 29, 2005 to the Attorney General and the Education Department for review. Schwarz Aff. at ¶ 7-8. On January 17, 2006, the PTA submitted to both offices its formal objections to the proposed transaction – as it was entitled to do. *Id.* JEI submitted a response to the PTA's objections to the Attorney General and the Education Department on February 21, 2006. *Id.* Upon review of all the papers, neither the Attorney General nor the Education Department found merit in the PTA's arguments, and neither saw fit to object to the sale. *Id.* at ¶ 9.

ARGUMENT

I. The PTA has not met its burden to establish standing to object to the proposed sale.

As a matter of law, it is the burden of a litigant to demonstrate that it has standing to commence an action, seek relief or intervene in a pending proceeding. *Society of the Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y. 2d 761, 769 (1991); *Patrolmen's Benevolent Ass'n of City of New York, Inc. v. District Council 37*, No. 117494/04, 2004 WL 3470347, at **2 (Sup. Ct. N.Y. County 2005) ("The burden of establishing standing to raise a claim is on the party seeking review."). Moreover, as the Court of Appeals held in *Society of Plastics Industry*, "[w]hether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation." *Society of the Plastics Industry,* 77 N.Y.2d at 769 (citing *Matter of Dairylea Coop., Inc. v. Walkley*, 38 N.Y. 2d 6, 9 (1975)).

That the PTA is concerned about the implications of the proposed transaction does not entitle it to appear before this Court in this special proceeding. The Court of Appeals made clear in *Society of the Plastics Industry* that, in contrast to other forums, a party must establish standing to seek judicial review:

> That an issue may be one of "vital public concern" does not entitle a party to standing. Courts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures, both of which have functioned here. By contrast to those forums, a litigant must establish its standing in order to seek judicial review.

Society of Plastics Industry, 77 N.Y.2d at 769 (finding that representatives of the plastics industry lacked standing to challenge a Suffolk County law prohibiting the use of certain plastic products by retail food establishments). As contemplated by the Court of Appeals in *Society of Plastics Industry*, the PTA aired its objections at length before the Board of JEI, the Attorney

General, and the Education Department – as it was entitled to do. However, the PTA cannot establish standing to appear in opposition to JEI's petition under N-PCL § 511.

The PTA does not and cannot argue that it is a "member, officer, or creditor" of JEI such that it is entitled to appear before this Court under N-PCL § 511. Because the PTA has no legally cognizable interest in this proceeding under N-PCL § 511, it cannot meet its burden to establish standing to appear before the Court in opposition to the petition.

II. Under the plain terms of N-PCL § 511, the PTA lacks standing to appear in this proceeding in opposition to the proposed transaction.

The starting point for an analysis of standing must be the language of the statute at issue. *See Society of the Plastics Industry*, 77 N.Y.2d at 769; *Patrolmen's Benevolent Ass'n*, 2005 WL 3470345 at **2. Under the plain terms of N-PCL § 511, the PTA is barred from appearing in this proceeding.

A. Under N-PCL § 511, only members, officers or creditors of the corporation are entitled to appear as parties in opposition to § 511 petitions.

N-PCL § 511(b) states: "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.*" N-PCL § 511(b) (emphasis added). Having defined "person interested," the statute in the same section then states: "Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted." *Id.*

The "member" referred to in this section is a "member of the corporation" whose consent to the proposed transaction is required by law. N-PCL § 511(a)(8). JEI has no members, and the PTA also is not an "officer" or "creditor" of JEI. Verified Petition, Ex. C (By-

Laws of the Japanese Educational Institute of New York, Arts. III-V, at 1-3). The PTA therefore has no legally cognizable interest under N-PCL § 511 such that it may intervene as a party to these proceedings.

B. New York courts have consistently interpreted N-PCL § 511 to deny standing to parties who are not members, officers or creditors.

The Second Department has consistently stated that parties who are not members, officers or creditors of the corporation lack standing to object to petitions pursuant to N-PCL § 511. *Bridge to Spiritual Freedom, Inc. v. Cubides*, 304 A.D.2d 574, 574, 759 N.Y.S.2d 328, 328 (2d Dep't 2003) (affirming trial court's determination that a group of individuals who opposed a religious corporation's § 511 petition to sell real property lacked standing to object to the sale because they were not members of the religious corporation); *Friends World College v. Nicklin*, 249 A.D.2d 393, 394, 671 N.Y.S.2d 489, 490 (2d Dep't 1998) (individuals who were not "trustees, officers, or directors" of the college did not have standing to challenge the college's proposed sale of real property). Moreover, the Second Department has very recently reaffirmed this analysis of standing under N-PCL § 511. *See Congregation Atzei Chaim v. 26 Adar N.B. Corp.*, 2006 WL 552633 (2d Dep't March 7, 2006) (finding that the Supreme Court correctly determined that mortgagors lacked standing under N-PCL § 511 to challenge religious corporation's transfer of mortgage) (citing *Bridge to Spiritual Freedom*; *Friends World College*, *supra*).

Moreover, *Application of Sculpture Center, Inc.*, a case from a court in the First Department, cited by the PTA in its papers, is consistent with the case law in the Second Department on this issue. In *Sculpture Center*, Justice Figueroa adopted the Second Department's interpretation of N-PCL § 511, stating, "[p]etitioner duly served [Friends of the Sculpture Center], but nevertheless challenges their standing under N-PCL § 511(b), *which states*

that only a member, officer or creditor of the corporation may be entitled to notice of the proceeding." *See Application of Sculpture Center, Inc.*, No. 113773/01, 2001 WL 1568739 (Sup. Ct. N.Y. County 2001) (emphasis added) (citing *Friends World College*, *supra*).

Justice Figueroa decided, however, that under the circumstances, the Friends of the Sculpture Center should participate in the proceedings, and in his discretion, permitted the group to intervene under CPLR § 1013. *Id.* ("The court, in turn, on its own motion, and in the exercise of discretion (CPLR 1013), deems FOSC an intervenor and will consider its position in opposition to the transaction."). Ultimately, Justice Figueroa granted the petition in *Sculpture Center* as fair and reasonable under N-PCL § 511(d). *Id.*

In short, New York courts in both the First and Second Departments have consistently ruled that N-PCL § 511(b) does not provide standing to parties who are not members, officers, or creditors of not-for-profit corporations. Therefore, under the plain terms of the statute and related case law, the PTA lacks standing to appear in this proceeding.

III. The PTA's objections do not merit the granting of intervenor status under CPLR § 1013.

Lacking standing under N-PCL § 511, the PTA may seek the Court's permission to intervene in the proceedings under CPLR § 1013. That statute provides: "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." CPLR § 1013. Additionally, § 1013 provides: "In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR § 1013.

While the standard under CPLR § 1013 initially appears to be a liberal one, New York courts have made clear that a proposed intervenor must also establish that he or she has a "real and substantial interest in the outcome of the litigation." *Hernandez v. Robles*, 5 Misc.3d 1004(A), 798 N.Y.S.2d 710, 2004 WL 2334289, at ***2 (Sup. Ct. N.Y. County 2004); *Perl v. Aspromonte Realty Corp.*, 143 A.D.2d 824, 825, 533 N.Y.S.2d 147, 148 (2d Dep't 1988). Moreover, intervention should be denied where outcome of the matter will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute. *Quality Aggregates Inc. v. Century Concrete Corp.*, 213 A.D.2d 919, 920, 623 N.Y.S.2d 957, 958 (3d Dep't 1995); *Reurs v. Carlson*, 66 Misc.2d 968, 968, 323 N.Y.S.2d 370, 371 (Sup. Ct. Westchester County 1971).

As the participation of the PTA in this proceeding would likely substantially delay the proceeding, the interests of the PTA have been and are well represented by the Attorney General, and the PTA has no legally cognizable, real present interest in the proposed transaction, the PTA should not be permitted to intervene under CPLR § 1013.

A. <u>The PTA has not met the requirements of CPLR § 1013 on its face.</u>

CPLR § 1013 provides that a person may be permitted to intervene where a statute of the state "confers a right to intervene in the discretion of the court." CPLR § 1013. Significantly, N-PCL § 511 does not "confer a right to intervene" on *any person* "in the discretion of the court," but rather confers a right to intervene on any "person interested . . . *as member, officer or creditor of the corporation.*" N-PCL § 511(b) (emphasis added). As the PTA cannot argue that it is a member, officer or creditor of JEI, it may not intervene as a party in this proceeding. Finally, the PTA does has *no* "claims or defenses" such that it may intervene in this

proceeding, much less a claim or defense based on a "common question of law or fact" as provided by CPLR § 1013.

B. The PTA cannot assert an interest in the outcome of this proceeding that is real and substantial, rather than merely speculative.

The PTA lacks the "real and substantial" interest in the outcome of this proceeding that New York courts have required for intervention pursuant to CPLR § 1013. *See Hernandez*, 2004 WL 2334289, at ***2; *Perl v. Aspromonte Realty Corp.*, 143 A.D.2d at 825, 533 N.Y.S.2d at 148. That the PTA is concerned about the consequences of the proposed transaction does not in itself amount to a "real and substantial interest" in the outcome of this proceeding.

For example, in *Reurs v. Carlson*, a court denied a motion to intervene by defendant's second wife in an action involving the interpretation of defendant's separation agreement with his first wife. *Reurs*, 66 Misc.2d at 969, 323 N.Y.S.2d at 371. The *Reurs* court reasoned that, "[w]hile it cannot be disputed that a decision against defendant will affect his children, and might lower their standard of living, the question remains as to whether they have sufficient interest in the 'property' of their father to warrant intervention." *Id.* The court went on to determine that the children did not have such an interest, as "[a]ny other decision would open the floodgates to infant intervention whenever a parent is sued based solely upon the possibility that the prospective estate of the infant might be diminished if plaintiff prevailed." *Id.* *See also Hernandez*, 2004 WL 2334289, at ***2 (legislators sponsoring a bill related to the subject matter of the action did not have a "real and substantial interest" such that intervention under CPLR § 1013 was appropriate; moreover, business owners seeking intervention lacked a real interest in the litigation as their asserted interests were "no more than speculative"); *Pier v. Bd. of Assessment Review of Town of Niskayuna*, 209 A.D.2d 788, 788, 617 N.Y.S.2d 1004,

1005 (3d Dep't 1994) (affirming denial of motion to intervene brought by Commissioner of Mental Retardation and Developmental Disabilities, because the effect of litigation involving tax certiorari proceeding on the level of neighborhood opposition to group homes for the mentally disabled and the Commissioner's actual ability to establish such homes was "wholly speculative").

While the PTA may be concerned about the ramifications of the proposed transaction, its opposition papers entirely fail to show that approval of the transaction will substantially impact the real interests of the children currently enrolled at GJS. As the effect of the proposed transaction on the PTA's interests is "wholly speculative," intervention under CPLR § 1013 is inappropriate.

CONCLUSION

The PTA has already substantially delayed the successful conclusion of a transaction highly beneficial to JEI and the entire JEI community. It would be inappropriate to grant the PTA a further opportunity to employ dilatory tactics to block the sale and leaseback of the Greenwich property, especially when the PTA has availed itself of all the remedies legitimately available to it under N-PCL § 511, and now seeks to appear in this proceeding – in the absence of standing – to reiterate its objections to the transaction. Therefore, Petitioner respectfully requests that the PTA not be permitted to appear in this proceeding.

Dated: New York, New York
April 3, 2006

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