

objections led to the Court's decision to safeguard an additional \$5 million of value in the sale and leaseback transaction, the costs incurred by the PTA in achieving this should be reimbursed to the PTA out of the estate of the charitable organization whose assets were protected.

3. The accompanying Affirmation of Arthur R. Block ("Block Affirmation") sets forth the rationale and grounds for granting the requested relief. In this affidavit I will merely set forth evidence supporting some of the elements of those grounds.

JEI's New Act of Giving Away Assets to WFHA

4. The Court would not approve the proposed sale and leaseback of the Greenwich Campus until JEI and WFHA amended the Agreement of Sale (Petition, Exh. D) (the "Contract") to provide, in theory, that WFHA will pay JEI the sum of \$1 million per year for each of the back end five years of the leaseback period that JEI does not occupy the property.

5. The Block Affirmation shows that this remedial amendment of the Contract is not, by itself, a reliable mechanism to ensure that JEI in the long run realizes fair consideration for the sale of the Greenwich Campus, as intended by the Court.

6. There is new evidence that JEI's officers and trustees are already failing to enforce against WFHA some of JEI's financial rights and entitlement under the Contract.

7. On April 24, 2006, the Court informed counsel for JEI and WFHA in a conference call that there had to be a guarantee that JEI would be compensated for the lost value of the leaseback provision if and when JEI waived its right to remain on the campus.

8. Less than two weeks later, the PTA learned that JEI had agreed to make a payment to WFHA of \$100,000 even though JEI was not required to make that payment under the Contract.

9. JEI informed PTA representatives that JEI had agreed to pay WFHA \$100,000 for one half the cost of a new security system on the campus.

10. The Contract anticipates the upgrading of the campus security system. It clearly states, however, that JEI's contribution to the installation cost shall be amortized over the term of the lease and shall be paid by JEI in monthly installments added to the rent. JEI absolutely does not have to hand over \$100,000 to WFHA at the beginning of the lease term.

11. A copy of the Contract is annexed to the petition as Exhibit D. I have attached hereto as Exhibit A copies of the relevant pages from the Lease that is part of the Contract.

12. Article 2.01(g)(3) provides that JEI's share of the cost of a new security system will be passed through to JEI in the form of additional rent.

13. Article 5.04 recites that "the parties have agreed to modify" security services on the campus. They shall agree, it continues, "upon installation of electronic security devices in and about the Premises, and Lessor [WFHA] shall install and maintain same." Then it spells out JEI's responsibility to pay part of the installation costs over time:

The installation cost of the system shall be amortized on a straight-line basis over the remainder of the Demised Term (including any further renewal terms), and Lessee shall pay each month fifty percent (50%) of the monthly portion of such amortization. The maintenance cost of this system shall be shared equally with Lessor and Lessee each to pay fifty percent (50%) thereof.

14. In other words, assuming JEI has a responsibility of \$100,000, it is only required to pay out this amount in monthly installments over the next eight years, and its installment payments should end before eight years if it leaves the campus.

15. The present value of an income stream over eight years totaling \$100,000 is far less than \$100,000. (The methodology used by JEI's expert, Mr. Katz, to come up with a present

value of nearly \$8 million for the leaseback provision, makes this quite clear.) Therefore, by paying WFHA the sum of \$100,000 today, JEI is giving away substantial charitable assets.

16. JEI's waste of assets will be even larger JEI it does not stay for the full eight years of the lease. JEI will not be getting the benefit of the security system if it is not on the campus. That, presumably, is why the installation cost was amortized over the maximum lease term and made part of the rent. Under the terms of the Contract, if JEI did not stay for eight years then it would not be obligated to pay the entire sum of \$100,000.

17. This, of course, is directly analogous to the defect that the Court highlighted regarding JEI's attempts to assign value to the entire theoretical lease term of eight years even though JEI had the right to end the term after a mere three years.

18. If JEI is already giving \$100,000 to WFHA at the front end of the transaction, then the Court should be concerned about the magnitude of the give-backs or waivers JEI may grant to WFHA over the entire 8 year term of the leaseback if the Court's Order does not have an enforcement mechanism.²

The Order Needs To Be Modified To Protect JEI's Charitable Assets

19. Perhaps JEI will respond to these new facts about the security system payment with some rationalization, or even with a new contract modification in which WFHA agrees to refund part of the \$100,000 if JEI does not stay for eight years. But that would miss the point of this new revelation.

² Furthermore, JEI did not act in its educational and financial interests by agreeing to the security installation selected by WFHA that has an installation cost of \$200,000. The system is a complicated high-end system that is not suitable for an environment where young children need to move about the campus going in and out of buildings. First graders would have to know how to swipe key cards at security checkpoints, or else school staff will have to be disrupted from educational duties in order to escort the children through security. JEI has the right under the Contract to object to a particular new security system proposed by JEI and, if differences are not resolved, to take the matter to arbitration. JEI rejected the parents' request that JEI at the very least try to negotiate an arrangement with WFHA whereby an alternative system be used in the buildings occupied by the JEI students.

20. The point is that this behavior demonstrates that without stronger conditions attached to the Court's order, effectuation of the Contract modification that the Court required is vulnerable to avoidance and undermining.

21. It is extremely important that the Court put teeth into its order that approves the modified Contract.

22. As described in the Block Affirmation, in response to the Court's comments in a first telephonic conference, JEI and WFHA came up with a modification worth \$3 million. In a second telephonic conference the Court said that this modification was insufficient. JEI and WFHA quickly agreed to add another \$2 million. JEI and WFHA reached agreement about each of these multi-million dollar changes in a matter of days. Now that the Court approval is granted, however, there will be a period of 3-8 years in which arrangements and transactions – like the \$100,000 payment for the security system – can be made that result in JEI leaving the Greenwich Campus during the five year compensation period but not receiving the millions of dollars in payments.

23. One fact pointing in that direction is that it is very likely that either JEI will not stay on the Greenwich Campus for eight years, or else JEI will deliberately reduce the size of its student body and give WFHA space that is freed up by its shrinkage.

24. This is because the continuation of the New York Japanese School on the Greenwich Campus is on a direct collision course with WFHA's plans to grow into the facility.

25. WFHA's plan is to rapidly grow to a K-8 school with two classes of 18 students each per grade.³ That is 324 students. WFHA's fundraising appeals are based on achieving this growth.

26. The zoning cap for the school is 450 students. The Contract provides that JEI shall have up to 250 students. The combined affect of the zoning cap and JEI's allocation is that WFHA can only count on having room for an enrollment of 200 students for the next eight years. That is merely 62% of its goal. It is inconceivable that WFHA expects to be subject to that limit for eight years.

27. One way to for WFHA to escape this limitation is for JEI to reduce the size of its student body and give space to WFHA. If that is what happens then JEI will not be realizing the supposed value of the leaseback, because it will be leasing less space. Furthermore, if JEI serves fewer students and families in its day school program in order to confer a benefit on WFHA, that would be directly contrary to JEI's not-for-profit corporate purposes.

28. Of course the other possibility is for JEI to leave the campus long before the eight years have run. The wording of this Court's order does not provide for adequate enforcement of the requirement that WFHA compensate JEI in that situation.

29. The PTA respectfully requests that the Court strengthen its order and protect the charitable estate of JEI by issuing an amended order that contains the enforcement mechanisms and guarantees that are proposed in the Block Affirmation.

³ This is a recent statement on the WFHA web site (www.wfha.org/Campus.html):

The Hebrew Academy will continue to maintain its small teacher/student ratio and a targeted size of 18 students per class. It is expected that with the dramatic improvement in the school facility, steady growth will be experienced for many years to come.

"Ensuring a strong future for the Hebrew Academy within a thriving Jewish community is a fervent goal for us," explained Nora Anderson, head of school for WFHA. "At the same time, we will maintain an intimate school with only two classes per grade."

Reimbursement Of Attorneys' Fees and Costs

30. The PTA has incurred substantial costs in order to protect the interests of the not-for-profit organization and its beneficiaries. While the Court did not agree with all of the PTA's objections, the PTA did prevail on a substantial issue.

31. The PTA proved that JEI's proffered appraisal setting the value of the property at \$21.7 million was neither methodologically valid nor substantively accurate. The PTA commissioned and submitted a credible independent expert appraisal report setting the value at \$26.8 million. Also, the PTA brought to the Court's attention that a current assessment notice by the Township of Greenwich set the value at \$28.3 million – a fact omitted from the petition altogether.

32. The PTA also pointed out to the Court that JEI's asserted valuation of the 8 year leaseback was flawed because JEI was free to leave the campus after three years and could probably leave even sooner without objection from the landlord if its rent was truly under the market value. The Court recognized the multi-million dollar implications of the point, and caused JEI to produce an amendment to the Contract as a condition to granting approval.

33. Before incurring any expenses for counsel fees, the PTA tried for months to get JEI to acknowledge and remedy the serious flaws in the proposed deal. After learning about proposed sale in March 2005, the PTA set up a Task Force to study JEI's plan for selling the Greenwich Campus. The PTA Task Force developed critiques and alternatives and tried to get JEI's officers and trustees to take the PTA's analysis of the situation seriously.

34. JEI's response was to be unremittingly hostile, dismissive and patronizing to the PTA. That forced the PTA to seek out legal advice and guidance in order to see if the parents had any legal right to have their objections and alternatives heard.

35. When the PTA learned from counsel about the need for JEI to obtain Court approval of its proposed transaction, and to give notice of its plans to the Commissioner of Education and to the Attorney General, then the PTA began making use of counsel's advice and representation in communicating its objections and alternatives to JEI.

36. JEI, however, submitted its petition to the Court without meeting the PTA's objections, including its objection that JEI was selling the Greenwich Campus for far below its value and thereby wasting charitable assets that were needed to establish a quality new school facility to replace the existing one.

37. When the PTA presented its objections to the Court, JEI's response was to challenge the PTA's standing even to be heard.

38. If JEI's officials and attorneys had looked objectively at the PTA's valuation data, and its argument about the leaseback, then they would have embraced these points and looked out for the interests of the not-for-profit organization. Instead, JEI forced the PTA to incur even more legal expense in order to protect the charitable assets of the organization in the face of the failure of the JEI fiduciaries to carry out that function themselves.

39. It is only fair that the PTA be reimbursed for the direct costs of stepping in to protect the charitable assets of the corporation, especially given the thousands of hours of volunteer time that PTA members devoted to these issues for which no material compensation is requested.

WHEREFORE your deponent respectfully prays that the PTA's motion be in all respects granted.

EMIL F. JACHMANN

Sworn to before me
this 5 day of July, 2006

Notary Public