

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

AFFIRMATION

**AFFIRMATION OF ARTHUR R. BLOCK IN SUPPORT OF THE PTA’S MOTION FOR
LEAVE TO REARGUE FOR LEAVE TO RENEW AND FOR AN AWARD OF
ATTORNEYS’ FEES AND EXPERT APPRAISER’S FEES**

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 the attorney for the objector-respondent-intervenor 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 combined motions for leave to reargue, for leave to renew, and for an award to the PTA of fees arising from litigation of valuation and standing issues and of the cost of its independent expert appraisal report.

2. The Court granted the instant petition after the petitioner, Japanese Educational Institute of New York (“JEI”), and the proposed purchaser, Westchester Fairfield Hebrew Academy (“WFHA”), made material modifications in the terms of the Agreement of Sale (Petition, Exh. D) (the “Contract”).

3. The seller and purchaser made the modifications in direct response to the Court’s statements to their counsel in two telephonic conferences that the Contract was insufficient to assure that JEI would realize fair consideration.

4. This sequence of events is described in the Court's Decision dated May 31, 2006 ("Decision"), copy annexed hereto as Exhibit A. The result is reflected in the Court's Order dated June 6, 2006 and entered on June 7, 2006 ("Order"), copy annexed hereto as Exhibit B.

5. While the PTA believes that it was error for the Court to grant the petition even after the Contract was modified, it is not the purpose of this motion to ask the Court to reconsider its basic decision.¹ Rather, the PTA wants to persuade the Court that the details of the contract modification and the terms of the Order approving the sale pose a substantial risk that JEI (and its beneficiaries) will never realize the \$5 million value that JEI attributed to the last five years of JEI's leaseback period.

6. The other prong of the PTA's motion seeks an award for the cost of the independent expert appraisal report obtained by the PTA, and for reasonable attorneys' fees arising from litigating the valuation and standing issues.

7. This joint motion is brought pursuant to CPLR § 2221(d), motion for leave to reargue, and CPLR § 2221(e), motion for leave to renew. In addition, the PTA's motion for an award of attorneys' fees and appraisal fees stands on its own, separate from reargument or renewal. There are both statutory and common law grounds for issuing this award. These procedural and legal issues are discussed later in this affirmation.

¹ The PTA has filed a timely Notice of Appeal. The PTA will present its arguments for vacating the decision and denying the petition in the appellate forum.

The Need To Modify The Order

The Genesis Of The Order

8. After the petition and objections were submitted and orally argued, the Court arranged a telephonic conference with the attorneys for JEI and PTA, and also included the counsel for nonparty WFHA.

9. The Court told counsel that it set up the conference to inform counsel that it believed that the Contract, as submitted with the petition, did not guarantee that JEI would receive fair consideration. As the Court made this point subsequently in its Decision (at p. 3): “[I]f the school vacates the property before eight years have elapsed, then the school has not received the total value of the leaseback that [JEI and WFHA] assert is worth \$8 million.”

10. A week later, JEI proffered a modification to the Contract, in the form of affidavits by JEI’s counsel and WFHA’s President (Marc Schulman), with exhibits.

11. After reviewing the proffer the Court conducted a second telephonic conference with counsel. There, the Court indicated that the modification was insufficient because it omitted compensation for years four or five of the leaseback.

12. In that second telephonic conference, your affirmant, on behalf of the PTA, said that the structure and terms of the modification had problems for implementation and enforcement.

13. As an example, I pointed to a huge loophole in the wording of the Affidavit of Marc Schulman sworn to May 1, 2006 (“First Schulman Affidavit”), which set forth WFHA’s understanding of the terms of the modification. According to Mr. Schulman’s description of the modification agreement, WFHA would not be obligated to pay JEI any compensation at all if JEI

vacated the Greenwich Campus in years one, two, three, four, or five of the leaseback. Twice he chose phrases that would lead to this result. He said that WFHA would pay JEI up to an additional \$3 million should JEI leave the campus “during the last three years of the leaseback.” (emphasis supplied) First Schulman Aff. par. 3. Later on he said that the \$3 million would be paid if JEI leaves the campus “in the last three years of the lease.” (emphasis supplied) First Schulman Aff. par. 18. Nowhere does he state that WFHA will have to pay compensation to JEI if JEI leaves the campus before the sixth year of the lease begins.

14. JEI’s proffer did not include any document signed by JEI and WFHA that memorialized the terms of the modification. Moreover, it was JEI that submitted the First Schulman Affidavit to the Court. JEI thereby acquiesced in Mr. Schulman’s wording of the modification, which could make the entire compensation obligation illusory.

15. The Court precluded the PTA from submitting a written response, analysis or objection to the proffer.

16. After the second telephonic conference, JEI and WFHA made a second proffer to the Court, again consisting of affidavits by JEI’s counsel and Mr. Schulman, with exhibits.

17. The second proffer added \$2 million to the compensation provision for years four and five. The wording of the second proffer was changed to close the giant loophole in the first modification that I had pointed out in the second telephonic conference.

18. This time, there was a two-paragraph memorandum signed by JEI and WFHA describing the agreement. See Memorandum dated May 19, 2006, copy annexed as Exhibit A to Supplemental Affirmation of Douglas Schwarz dated May 22, 2006 (the “Modification Agreement”).

19. As it did with the first proffer, the Court precluded the PTA from submitting any papers in response to the second proffer.

20. The Court did not hold a telephonic conference to entertain oral argument by the PTA's counsel about the need for the Court, if it granted the petition as modified, to set forth conditions in its order that would address implementation and enforcement problems that loomed ahead.

21. Thus, without accepting any further oral or written comment from the PTA, the Court issued the Decision. The Decision approved the modified Contract, denied JEI's motion to dismiss for lack of standing, and granted the PTA's motion for intervention.

22. The Decision instructed JEI to "SUBMIT ORDER" (Decision at p. 3) rather than to "settle" an order on notice. JEI delivered a proposed form of order to the Court on June 6, 2006. On June 7, 2006, your affirmant called the Court to inquire as to an appropriate means to submit proposed corrections to the form of the order. Your affirmant was informed that it was not possible to communicate changes to the wording of the order because Court had already signed the proposed order on the same day it was received.²

Implementation And Enforcement Problems

23. The PTA submitted substantial evidence to the Court indicating that from the inception of JEI's selling of the Greenwich Campus until the signing of the Contract more than two years later, JEI treated WFHA as a favored buyer.

² The errors and omissions in the proposed form of order included the following. First, the order did not state that JEI's application to dismiss was denied and that PTA's cross-motion for intervention was granted. Second, it stated that the petition "is hereby granted in its entirety." In fact, the Court twice indicated that it would not grant the original petition in its entirety. The Court granted the petition as modified. Third, the recitation of filings did not include the Objector-Respondent's Notice of Appearance dated March 28, 2006. Furthermore, if the PTA had been given the chance, it would have proposed to the Court that the Order include other provisions that to increase the likelihood that the modification would be implemented and enforced in the future.

24. The PTA also presented substantial evidence, both documentary and testimonial, that from the WFHA side of the transaction the key originator and organizer of the relationship with JEI and the selling of the Greenwich Campus was David A. Messer, WFHA's Vice President. Mr. Messer lived on the adjoining property. He befriended JEI's Executive Secretary. He arranged for a summer camp his family was involved with to rent the Greenwich Campus from JEI. He was the point person for WFHA in negotiating the terms of a purchase of the property. He ultimately was the signatory of the Contract on behalf of WFHA.

25. Mr. Messer and his wife were major campaign contributors to Sen. Joseph Lieberman (and to his party and political allies). Sen. Lieberman used his political/governmental influence on WFHA's behalf by contacting the Consul General of Japan in New York City and urging that JEI conclude the deal with WFHA.

26. Mr. Messer was the President and CEO of Sempra Energy Trading. A related Sempra company awarded a major share of a half billion dollar contract to Mitsubishi Heavy Industries, Ltd., a company related to Mitsubishi International Corp. Mitsubishi International Corp.'s Chief Executive Officer, Motoatsu Sakurai, was a member of the control group of JEI trustees, a chief advocate to the parents of selling to WFHA. Shortly after the signing of the JEI contract, he was appointed Consul General of Japan in New York City.³

27. In this proceeding JEI's officers have continued to subordinate their fiduciary duty to protect a not-for-profit organization's assets to their goal of giving the Greenwich Campus to WFHA at a below market price and thereby satisfy various business, political and governmental interests that should have been extraneous to this transaction.

³ The expertise of Mr. Messer's company, Sempra Energy Trading, in manipulating pricing transactions is reflected in new evidence presented herewith. Annexed hereto as Exhibit C is a covering press release and a copy of the Complaint in a suit filed by the Attorney General of the State of California against Sempra Energy Trading Corporation alleging "Large-Scale Fraud in Manipulating of Electricity Prices."

28. If they were acting in the interests of JEI, the officers would have welcomed the PTA's appraisal and the Greenwich Township valuation of the Greenwich Campus and acknowledged that JEI needed to receive more guaranteed consideration for the sale than the Contract provided. (Actually, it was not in the interests of JEI to sell the Greenwich Campus at all. But that point is within the scope of the PTA's appeal, not the instant motion.)

29. JEI's failure to exercise due diligence regarding valuation of its assets was manifest right up until the conclusion of this proceeding. JEI submitted to the Court both the First Schulman Affidavit as well as the Affidavit of Mark Schulman sworn to on May 22, 2006 ("Second Schulman Affidavit"), both containing bold assertions that the PTA's independent appraisal and the Greenwich Valuation are extremely inaccurate. In the affidavits, however, Mr. Schulman says that WFHA has incurred costs for appraisal fees, and that it is planning to finance most of the purchase price with a mortgage loan from a commercial lending institution. Surely WFHA and its potential lender(s) have had one or more appraisal reports prepared. What property value is WFHA representing to potential lenders when it is seeking financing? Has JEI seen any such reports? Did JEI ask to see them? Did JEI's counsel decline the Court's offer to hold an evidentiary hearing on the valuation issue because it knew that such a proceeding would result in disclosure of appraisal reports that would corroborate or exceed the PTA's appraisal?

30. When the Court questioned the value of the leaseback provision, JEI first came back with a proposed modification of the Contract that was worded by WFHA so as to make the promise of \$5 million in potential compensation illusory if JEI and WFHA coordinated the timing of JEI's ending of its leasehold.

31. There is also new evidence that JEI will fail to enforce its rights under the Contract in order to give WFHA money that it has no right to collect from JEI. The PTA has

been informed that JEI has agreed to pay \$100,000 up front to WFHA for part of the installation cost of a new electronic security system. The Contract provides, to the contrary, that any such cost is to be amortized over the eight-year maximum term of the lease and passed through as additional monthly rent. See Affidavit of Emil F. Jachmann sworn to on July 5, 2006 at ¶¶ 4-18 (Jachmann Affidavit”). Obviously, the present value of eight years of monthly installment payments totaling \$100,000 is much less than \$100,000. Furthermore, under the Contract, JEI would not have to make all of the installment payments if it left the premises before the end of the eight-year maximum term.

32. Throughout these proceedings, JEI ridiculed the PTA’s evidence and arguments about JEI’s favored treatment of WFHA. In fact, it is hard to see how any impartial decision-maker can look at the PTA’s previous evidence of favoritism, the recent coordinated behavior of JEI and WFHA regarding the two proffers, and the new evidence submitted with this motion, and not be concerned about the future implementation and enforcement of the \$5 million compensation provision.

Scenarios

33. Under the Order, the soonest that any of the \$5 million in compensation could become due is five years in the future.

34. In five years, JEI and WFHA can devise innumerable ways to defeat the intent of this provision, if the Order is not strengthened. Here are some examples of potential stratagems that readily come to mind.

35. The Notice Requirement. The Modification Agreement requires that JEI give nine months prior written notice to WFHA that it intends to vacate the premises and terminate the lease. It further provides that each lease year runs from April 1 to March 31, and that no

payment of compensation shall be made for a partial lease year. Thus, unless JEI gives prior written notice on or before July 1 of a given year, it will not be paid compensation for any unused lease term for 21 months after the July 1 deadline (nine months advance notice plus the 12 month indivisible school year).

36. Thus, JEI could orally inform WFHA that it is going to terminate the lease but delay giving written notice until after July 1. That would immediately save WFHA \$1 million out of the compensation intended by this Court to be paid to JEI.

37. If JEI vacates the premises but deliberately fails to send written notice at all, then all \$5 million in compensation is lost.

38. Default provision. The Modification Agreement also says that no payment shall be due “if the Lease shall terminate by reason of your default thereunder.” JEI can easily vitiate the \$5 million compensation by collusively committing a default and letting WFHA terminate the lease. This would be as simple as not paying a month’s rent.

39. Keeping A Token Presence On The Campus. Reserving 250 slots for JEI students, as nominally set forth in the Contract, puts JEI’s rights of occupancy on a collision course with WFHA’s plans for growth. Jachmann Aff. at ¶¶ 23-27. It is not credible that JEI and WFHA really intend for JEI to occupy the premises for eight years and to enforce the reservation of 250 slots for JEI students.

40. As the Order is presently worded, it is possible for JEI to turn over almost all of the Greenwich Campus to WFHA and without requiring WFHA to pay JEI a penny of the \$5 million in compensation.

41. JEI could move most but not all of its operations to a new school facility but keep a token presence at the Greenwich Campus. For example, it might start a new facility with some

of the lower grades and keep one or two upper grades to finish at the Greenwich Campus. Or JEI might vacate the classroom buildings entirely and make occasional use of the sports and recreational facilities. Or it might solely keep some administrative offices on the campus. The Order does not provide for any compensation to JEI if it gives back 95% of its space to WFHA but does not completely vacate the premises.

42. Gratuitous Payments To WFHA. As illustrated by the JEI's agreement to make a gratuitous up front payment of \$100,000 to WFHA, there are numerous ways that JEI can transfer back to WFHA some or all of the \$5 million in consideration provided for in the Modification Agreement.

Remedial Provisions

43. N-PCL § 511 authorizes the Court to attach conditions to an order granting approval of a disposition of assets. The Court should use that authority to issue a supplemental Order that contains effective means for enforcement and implementation of the not-for-profit organization's rights under the Modification Agreement. Here is a non-exclusive list of suggested remedial provisions.

44. Intended Beneficiary Standing. The Order should be conditioned upon the designation of the PTA as an intended beneficiary (a/k/a third party beneficiary) of the Contract with respect to enforcement of JEI's rights under the Modification Agreement. If JEI's officers are not diligent in enforcing JEI's rights to receive up to \$5 million in compensation, or if JEI acted to defeat the purpose of the compensation provision, then the PTA will have undisputed standing to seek to enforce the Modification Agreement.

45. Continuing Jurisdiction. The Order should provide that if the PTA believes that the terms or intent of the Order and the Modification Agreement are not being enforced for the

benefit of JEI, then the PTA may return to this Court for relief. Furthermore, the Court should provide for JEI to file semi-annual reports with the Court regarding the implementation of the Order and the Modification Agreement, with copies served on the Attorney General and the PTA.

46. Compensation For Partial Surrender. The Court should specify terms of compensation that will apply during the last five years of the lease if and when JEI surrenders some but not all of its space or student slots to WFHA.

47. PTA Participation In Planning For New Facility. In order to monitor implementation of the Order, the approval of the sale should be conditioned upon an official role for the PTA in the planning for and activities involving finding and establishing a new school facility and moving out of the Greenwich Campus. One means of doing that would be to require an ex officio seat for a PTA representative on the Board of Trustees until JEI vacates the Greenwich Campus.

48. Advance Payment Of \$5 Million. The Order should provide that the \$5 million in potential compensation be paid by WFHA to JEI as part of the purchase price. The Order would further provide that the \$5 million would be placed in an escrow account with interest being paid to WFHA for three years. The Order would further provide for disbursement of the funds in years 3-8 of the lease to either JEI or to WFHA, depending upon whether JEI is continuing to occupy the space. Disbursements would have to be approved by application to the Court on notice to the Attorney General and to the PTA.

Award Of Counsel Fees And Expert Appraiser Fee

49. One prong of the PTA's motion asks the Court for an award of expert appraiser fees and reasonable counsel fees arising from its litigation of property valuation and standing issues.

50. The rationale for this relief is the PTA succeeded in protecting the charitable assets of the corporation when JEI's Board of Trustees tried to sell substantially all of its assets for less than fair consideration.

Facts

51. Over the objections of the PTA, JEI entered into the Contract to sell the Greenwich Campus to WFHA for \$20 million, subject to a leaseback of part of the property to JEI.

52. JEI instituted this proceeding seeking the Court's approval of the transaction. JEI's petition alleged that the value of the Greenwich Campus was \$21.7 million dollars. The only support for this valuation was an old appraisal for \$20 million and a short letter purporting to update the latter figure to \$21.7 million.

53. Before the JEI Board voted to enter into the Contract, the Town of Greenwich issued a real property tax assessment notice stating that the fair market value ("FMV") of the Greenwich Campus was \$28.3 million. JEI officers did not give this information to the trustees before they voted. JEI's lawyers did not tell the Court about this valuation of \$28.3 million in the petition.

54. But for the diligence of the PTA, the Court would not have known that JEI was seeking approval of a transaction that was potentially wasting millions of dollars of charitable assets.

55. The PTA commissioned a property valuation report by an independent expert appraiser, Christopher K. Kerin, MAI, CCIM of Kerin & Fazio, LLC. In accordance with well-settled case law applying N-PCL § 511, the PTA instructed the appraiser to determine the fair market value of the property as of the date of the Contract, December 12, 2005.

56. Mr. Kerin produced a comprehensive, professional report using timely data (the “Kerin Appraisal”). The Kerin Appraisal determined that the value of the Greenwich Campus was \$26.8 million.

57. The cost to the PTA of the Kerin Appraisal was \$9,500.00, which has been paid. See copy of Account Statement, annexed hereto as Exhibit D.

58. The PTA appeared before the Court on the return date for the petition and submitted objections.

59. The PTA’s objections included a strong evidentiary challenge to JEI on the issue of fair consideration.

60. The PTA gave the Court the Kerin Appraisal, valuing the Greenwich Campus at \$26.8 million. The PTA supplied the Court with a copy of the Greenwich Township notice that valued the property at \$28.3 million. Also, the PTA showed that the old appraisal report and letter update used by JEI to bolster the allegations in its petition were not credible evidence of the FMV of the Greenwich Campus on December 12, 2005.

61. Given the weakness of its appraisal evidence, JEI developed a fall back argument. JEI said that the lease back provision in the Contract had a value to JEI that should be added to amount of consideration realized by JEI through the transaction.

62. In its objections, however, the PTA anticipated this argument.

63. Mr. Jachmann, the PTA's President, told that Court that "[t]he 'saving' [from the leaseback] is reduced further if JEI leaves the premises before the maximum term of eight years." Affidavit of Emil F. Jachmann sworn to on March 28, 2006 at ¶ 65.

64. Similarly, the PTA's brief in support of its objections argued: "Any purported savings to be made on this leaseback can only be made significant provided that JEI rents the property for a long term." Memorandum of Law of Japanese School of New York PTA in Opposition to Petition dated March 28, 2006 at p. 7.

65. JEI's response to the PTA's well-founded objections was to try to kill the messenger that brought the bad news.

66. At the first court hearing, JEI's attorney asked the Court to strike the PTA's objections and to dismiss the PTA from the proceeding because of an alleged lack of standing.

67. The Court granted JEI leave to file papers in support of its oral application to strike and to dismiss, and for the PTA to file opposition papers.

68. Ultimately, the PTA prevailed on the standing issue. The Court denied JEI's application and it granted the PTA's protective cross-motion for intervention.

69. But for the PTA's victory on the standing issue, however, the Court could not have considered the PTA's evidence on the valuation issue. Therefore, the considerable counsel fees incurred by the PTA to protect its standing in this proceeding should be included in the counsel's fees that are to be reimbursed.

70. On the merits of the valuation issue, the Court determined that the Contract as written did not give fair consideration to JEI.

71. The Court principally relied upon two points in the PTA's objection -- the Kerin Appraisal of \$26.8 million; and the argument that JEI's claim of value for the leaseback was not reliable because JEI might end its occupancy before the maximum lease term had expired.

72. The Decision states (p. 3):

At oral argument and in my conference calls with the parties, I expressed my view that the leaseback provision is only valuable to JEI so long as the GJS continues to operate on the campus, and that if the school vacates the property before eight years have elapsed, then the school has not received the total value of the leaseback that they assert is worth \$8 million.

73. In response to the Court's determination about the leaseback, JEI and WFHA ended up proffering to the Court the modification to the Contract.

74. Pursuant to the modified Contract, JEI will be compensated by WHFA at the rate of \$1 million per year if JEI vacates the Greenwich Campus prior to or during the last five years of the lease.

75. As a result of the PTA's objections, the transaction that was approved by the Court contained protection for \$5 million of charitable assets that could easily have been lost if the original transaction had been unopposed.

Legal Grounds For The Award

76. There are two independent but related grounds for awarding the PTA expert appraisal fees and attorneys' fees.

77. As noted above, N-PCL § 511(d) authorizes the Court to attach conditions to an order approving a transfer of assets transaction:

If it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, as described in the

petition, for such consideration and upon such terms as the court may prescribe.

(Emphasis supplied). This section concludes by requiring that the court's order specify how the proceeds of the sale will be applied: "The order of the court shall direct the disposition of the consideration to be received thereunder by the corporation."

78. Pursuant to § 511, the Court should issue a supplemental order that conditions the consummation of the Contract upon applying part of the proceeds to reimburse the PTA for the Kerin Appraisal and for its reasonable attorneys' fees arising from litigating the valuation and standing issues.

79. Alternatively, this relief is based upon the common law. A recent case in point is In re Estate of R. Brinkley Smithers, 195 Misc.2d 510, 760 N.Y.S.2d 304 (Surr. Ct. Nassau Co. 2003) (Estate of Smithers).

80. Estate of Smithers was a follow-up to the Appellate Division, First Department's precedent setting decision in Smithers v. St. Luke's-Roosevelt Hospital Ctr., 281 A.D.2d 127, 723 N.Y.S.2d 426 (1st Dept. 2001) (Smithers v. St. Luke's).

81. In Smithers v. St. Luke's, the First Department held that a decedent's widow had standing to sue a charitable organization that was the beneficiary of restricted gifts made to it by her late husband. The object of her suit was to stop the organization from using the proceeds of the bequest in a manner contrary to her late husband's restrictions and donative intent.

82. After prevailing in her case against the organization, the widow brought the Surrogates Court proceeding asking to be reimbursed for the attorneys' fees she had incurred.

83. Referring to common law principles applying to fiduciaries, trusts, estates and charitable assets, the Surrogates Court held that the widow would be reimbursed for those

expenses out of the estate's assets. "To deny this court the right to award reasonable counsel fees to this fiduciary," it said, "would vitiate the right of a private right of action created by the Appellate Division." 195 Misc.2d 510, 516.

84. The PTA's claim for reimbursement of litigation costs is directly analogous. N-PCL § 511 conferred on the PTA statutory standing to appear in this proceeding and to object to the proposed disposition of charitable assets. Like the widow, the PTA used its standing to present evidence to court that a not-for-profit organization was not using diligence in administering its charitable assets.

85. In each instance the Court found that the organization's disposition of assets had to be modified. In each case the vigilant party that checked the conduct of the not-for-profit organization did not have any pecuniary motive of its own or realize any pecuniary gain. The PTA, like the widow, is entitled to be reimbursed for the reasonable costs it incurred.

86. The PTA requests that the Court award \$9,500, for the cost of the Kerin Appraisal. The PTA requests that the Court refer the matter of reasonable attorneys' fees on the issues of valuation and standing to a Special Referee to hear and report pursuant to CPLR § 4311, and that the Court, upon consideration of the Special Referee's report and any objections thereto, enter an award of reasonable attorneys' fees.

CPLR § 2221

87. CPLR § 2221(d)(2) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion."

88. In this case, the Court apparently overlooked or misapprehended its legal authority under N-PCL § 511(d) to “prescribe” terms, and to make its approval of a disposition of assets conditioned upon the fulfillment of those terms.

89. In two telephonic conference calls the Court articulated her concern about the ability of JEI to realize the alleged value of the leaseback agreement. The Court could have set down in an order a compensation provision and enforcement mechanism to achieve a realization of fair consideration in the transaction. Instead, the Court improperly included the purchaser’s attorney in the court proceedings and tried to have the petitioner and the purchaser come up with their own modifications to the Contract.

90. The Court found that the first proffer did not fulfill its objective. When the petitioner and buyer made a second proffer, the Court accepted it, even though the terms of the second proffer were woefully inadequate to assure that the compensation provision would not turn out to be illusory.

91. The PTA is asking the Court to reconsider its authority under § 511 and to order additional terms that will make proper implementation of the compensation arrangement much more feasible and likely.

92. The Court also overlooked that it had authority under § 511 to condition the approval of the sale on an award of attorneys’ fees and appraisal costs, and/or to direct that the award be paid out of the proceeds of the sale; and that it had common law authority to make an award based upon the successful effort of the PTA to protect the corporation’s charitable assets.

93. The Court also overlooked or misapprehended important facts pertinent to the modification of the Contract.

94. The Court did not comment specifically on the PTA's extensive evidence of favoritism and political and legal pressure and manipulation. These forces gave rise to the plan to sell the Greenwich Campus with WFHA to be the designated buyer. Once the decision to sell became official, these forces then were responsible for steering the sale to WFHA at a below market price. The PTA is not now citing those facts to reargue the Court's decision to grant the petition as modified -- that argument an issue for appeal. But even though the Court did not find that these facts required denial of the petition altogether, the Court overlooked the relevance and importance of these facts to the sufficiency of the terms of the Modification Agreement and of the Order.

95. Furthermore, as noted above, the collusion between JEI and the purchaser continued in front of the Court during the post-hearing proceedings.

96. The Court overlooked the fact that there were many ways that the Modification Agreement, as worded by JEI and WFHA, gave leeway for JEI to not enforce its rights for compensation that the Court was counting on to reach a threshold of fair consideration. JEI and WFHA have the ability to see to it that their original intent of a \$20 million deal is fulfilled, even if JEI vacates the Greenwich Campus within the next eight years.

97. CPLR § 2221(c)(2) provides, in pertinent part, that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination"

98. The new facts presented in the Jachmann Affidavit are ones that if proffered on the prior motion should have caused the Court to change its prior determination at least to the extent that is it would have strengthened the terms of the Order in order to effectuate proper

implementation and enforcement of the \$5 million compensation provision. The affidavit shows that even before the Court issued its Decision, JEI was giving away \$100,000 to WFHA.⁴

Conclusion

99. For all of the aforesated reasons, objector-respondent-intervenor PTA's motion should be granted in its entirety.

100. The Court should issue a supplemental order that provides appropriate guarantees for enforcement of the \$5 million compensation provision, and that makes an award to the PTA of \$9,500 for appraisal fees and the reasonable attorneys' fees it incurred on the valuation and standing issues.

Dated: New York, New York
July 6, 2006

ARTHUR R. BLOCK

⁴ Other pertinent new facts that were in existence prior to the issuance of the Decision are set forth in this affirmation and Exhibit C.