

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

**CIVIL APPEAL PRE-
ARGUMENT STATEMENT**

Objector-Respondent JAPANESE SCHOOL OF NEW YORK PTA, by its attorneys,
Arthur R. Block, Attorney at Law, for its Pre-argument Statement pursuant to Appellate Division
First Department Rule 600.17 respectfully alleges as follows:

1. The title of this action is set forth in the above caption.
2. The full names of the original parties are:

Petitioner – Japanese Educational Institute of New York (“JEI”)

Objector-Respondent – Japanese School of New York PTA (“PTA”)

In its Order dated May 31, 2006, the Court granted the PTA’s cross-motion for intervention. Accordingly, the PTA is presently an objector-respondent-intervenor.

The Attorney General of the State of New York waived statutory notice and indorsed the petitioner’s proposed form of order with the Attorney General’s notice of appearance.

The Commissioner of Education of the State of New York waived statutory notice and did not appear in the proceeding.

3. The name, address and telephone number of counsel for objector-respondent-intervenor-appellant is:

ARTHUR R. BLOCK
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14 Wall Street
New York, New York 10005-2101
(212) 405-3838

Attn: Arthur R. Block, Esq.

4. The name, address and telephone number of counsel for petitioner-respondent is:

Bingham McCutchen LLP
399 Park Avenue
New York, New York 10022-4689
(212) 705-7000
Attn: Douglas T. Schwarz, Esq.

The name, address and telephone number of the Attorney General of the State of New York is:

New York State Department of Law
Charities Bureau
120 Broadway
New York, NY 10271
(212) 416-8400
Attn: Paula Gellman, Esq.

5. The appeal is taken from a Long Form Order dated May 31, 2006 (the “Decision/Long Form Order”) and an Order dated June 6, 2006 (the “Second Order”). The Decision/Long Form Order and the Second Order (collectively referred to as the “Order”) were issued by the Hon. Sheila Abdus-Salaam, Justice of the Supreme Court of the State of New York, County of New York.

Upon information and belief a copy of the Decision/Long Form Order was filed with the Clerk on June 7, 2006. Petitioner served a copy of the Decision/Long Form Order on respondent without a notice of entry or cover letter on June 7, 2006. The Second Order was entered on June 7, 2006 and served by petitioner on respondent with notice of entry on same date.

6. The case involves a statutory proceeding pursuant to Not-For-Profit Corporation Law section 511. JEI is a New York State not-for-profit corporation. It filed a petition seeking leave to sell its property located at 270 Lake Avenue, Greenwich, Connecticut pursuant to a

conditional contract of sale to the proposed purchaser, Westchester Fairfield Hebrew Academy (“WFHA”). The property consists of an educational campus of about 16.5 acres in Greenwich, CT, with numerous school building and facilities located thereon. Because the property constitutes all or substantially all of JEI’s assets, the N-PCL required Supreme Court approval as a condition of consummating the sale.

JEI gave notice to the Attorney General of the State of New York and to the Commissioner of Education of the State of New York of JEI’s intention to file the petition with the Supreme Court. The Attorney General indorsed a notice of appearance on JEI’s initial form of proposed order that was submitted with the Order to Show Cause and the petition. The Attorney General’s notice of appearance stated that it did not object to the petition. Subsequently in the proceedings the Attorney General submitted an affidavit to the Court in which the Attorney General opposed JEI’s assertion that the PTA lacked standing to be heard in opposition to the petition. The Commissioner of Education did not enter an appearance.

The PTA filed a notice of appearance together with objections to the petition and to the proposed sale of the property. At the first hearing date, JEI asserted that the PTA lacked standing to submit the objections. The PTA disputed the challenge to its standing as an objector and also responded by filing a motion for intervention.

7. The Supreme Court reached the following results in the Order appealed from. The Supreme Court did not approve the terms of sale as set forth in the contract annexed to the petition. It did, however, grant the petition after JEI presented a material amendment to the contract which the Court believed was sufficient to guarantee that an additional \$5 million in value would be assured in the transaction in addition to the original proposed purchase price of

\$20 million. The Court denied JEI's application (on standing grounds) to dismiss the PTA's objections, and it granted the PTA's cross-motion for intervention.

8. The grounds for seeking reversal of the Order include but are not limited to the following:

- a. The Court below erred in that it should have denied the denied the petition in its entirety.
- b. JEI did not carry its burden of proof on the statutory prong requiring that the consideration and terms of the transaction were fair and reasonable. JEI's real property appraisal report was based on stale data; on its face the report was not probative of the fair market value of the property on the contract date. The petition admitted that JEI had received an offer of \$23 million nine months before entering into the subject contract for \$20 million. The Court below erred in adjudicating the petition on the merits after it should have been apparent to the Court below that the petition did not present a prima facie case of fair consideration.
- c. The PTA overwhelmingly rebutted JEI's allegation that a purchase price of \$20 million was fair consideration for the property. The PTA submitted an independent expert appraisal report based upon timely data that found a fair market value of \$26.8 million, as well as a timely government real property tax assessment notice finding that the fair market value was \$28.3 million. It was error for the Court to fail to make a finding of fact that the fair market value was no less than \$26.8 million; to fail to make a finding that the proposed purchase price of \$20 million was not fair consideration; and to fail

to make any finding of fact setting forth the fair market value of the property as of the date of the contract.

- d. The Court below erred in approving the proposed contract on a record that overwhelmingly demonstrated that JEI had not engaged in minimally adequate affirmative efforts to advertise and market the property; that JEI and the exclusive broker had acted to deflect, discourage, and suppress competitive bids from the marketplace; and that JEI steered the sale of the property at far below fair market value to a party that had significant political, business, and personal connections to the Japanese Government, to multinational corporations whose chief executives were JEI trustees, and to the Executive Secretary of JEI.
- e. The Court below erred in assuming that the fair market value of the property sold subject to a leaseback provision could be measured by taking the contract purchase price and adding on top of that the alleged future savings in opportunity costs to the seller resulting from the leaseback provision. In fact, only by diligently marketing the property and offering it for sale upon terms that that included the leaseback provision could there be a factual basis for determining whether buyers would pay more or less money for title to the 16.5 acre campus when the terms included a built in tenant for part of the space. Because JEI did not market the property there was no basis for determining the fair market value other than applying the fair market value of \$26.8 established by the independent expert appraisal submitted by the PTA. Furthermore, the Court below erred in accepting an incorrect and

methodologically invalid calculation which concluded that the “present value” of the leaseback provision was \$8 million, notwithstanding an expert analysis by the PTA’s expert demonstrating to the Court the errors in JEI’s present value analysis and leaseback valuation. The Court below erred by basing its decision on a sub silentio finding that the leaseback provision in the proposed contract increased the consideration for the sale of the property to JEI from the actual contract price of \$20 million to a speculative value of \$28 million.

- f. The Court determined that “the leaseback provision is only valuable to JEI so long as the [day school] 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” Decision/Long Form Order at p. 3. Then the Court approved the petition based upon JEI’s submission of a contract modification that is so full of potential loopholes that the Court’s supposed remedy is illusory. Given that the Court found that it could not approve the contract without amendments to the transactions guaranteeing the realization of at least \$5 million in value above and beyond the purchase price, the Court erred by accepting amendments that are not effective guarantees.
- g. JEI failed to carry its statutory burden of proving that the proposed transaction would promote the petitioner’s charitable and educational not-for-profit corporate purposes. Furthermore, the Court disregarded compelling objections by the PTA which demonstrated that the proposed transaction would be detrimental to the very goals highlighted in the petition --

maintaining and increasing enrollment at the day school and putting the finances of the corporation on a sounder basis.

- h. The vote of the JEI Board of Trustees on November 29, 2005 allegedly approving the sale did not meet statutory requirements. The officers of JEI submitted the contract of \$20 million for a Board of Trustees vote without informing the Trustees of material facts regarding the proposed transaction, most notably the fact that the Township of Greenwich had assessed the fair market value of the property at \$28.3 million. Also, the composition of the Board of Trustees and the strict insider control of the Board by a core group of chief executives of giant corporations, and Japanese Government officials, prevented the exercise of independent judgment by the Trustees, and the Board was rife with potential conflicts of interest. Furthermore, the PTA submitted uncontroverted evidence that the Board voted to approve the transaction because of political pressure exerted on the Japanese Consul General (who was JEI's Honorary President) by Sen. Joseph Lieberman on behalf of a major campaign finance contributor to Sen. Lieberman and to his political party, and because of a threat by the purchaser to sue JEI. It was error for the Court below to hold, sub silentio, that the vote taken on November 29, 2005 constituted compliance with N-PCL section 510. The Court should have found that compliance with section 510 could only be achieved after the Board of Trustees had been reconstituted and after the Board was presented with all of the material facts pertaining to any subsequently proposed sale transaction.

- i. The Court below committed material and prejudicial errors of procedure and denial of due process, including but not limited to the following:
 - i. Twice the Court solicited from JEI and from a non-party, WFHA, a material modification of the proposed transaction and twice the Court accepted submissions of documents and affidavits regarding contract modifications from JEI and WFHA. The Court refused to allow the PTA to submit to the Court any objections to the new matter, even after the PTA asserted that the material modifications constituted material amendments to the petition and the PTA had a statutory right to notice and an opportunity to be heard with respect to the amendments.
 - ii. Over the objection of the PTA the Court had the attorney for the purchaser participate in two post-hearing conferences with the Court and to prepare and submit two affidavits to the Court to which the Court prohibited any written response by the PTA. It is well established as a matter of law that a contract purchaser that wants the Court to approve the transaction is not a statutory “objector” and, therefore, lacks standing to participate in a sec. 511 proceeding. There was no precedent or authority under the N-PCL for the Court below to initiate and require the participation of the purchaser’s counsel in material post-submission supplemental oral arguments. This error is aggravated by the fact that the purchaser had not even made an application to appear in or intervene in the proceeding. It was

especially prejudicial because the Court also allowed the non-party to insert prejudicial representations and statements into the record but barred the objector-respondent PTA from submitting any response to the non-party submissions. The Court below gave improper “favored” status in the proceeding to the purchaser and its counsel, just as JEI had given “favored bidder” status to the purchaser throughout the underlying transaction.

- j. Given that the Court relied upon the PTA’s objections and particularly its independent expert appraisal report in requiring that \$5 million in value be added to the proposed transaction, the Court erred in not using its powers under N-PCL section 511 to make it a condition of approval of the proposed transaction that part of the proceeds of the sale be used to reimburse the PTA for the expert appraiser’s professional fees and for the PTA’s reasonable attorney’s fees incurred in presenting the valuation issues to the Court.
- k. Such other and different grounds as may become apparent upon a reading of the pleadings and the other records comprising the Record on Appeal.

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9. No other appeal is pending in this action. To the best of the undersigned's information and belief there is no related action pending before any other court.

Dated: New York, New York
June 27, 2006

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