At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of October, 2013.

P R E S E N T:
HON. CAROLYN E. DEMAREST,
Justice.

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In the Matter of the Application of

THE LONG ISLAND COLLEGE HOSPITAL,

for an Order Approving the Sale of the Assets of the Long Island College Hospital, pursuant to Sections 510 and 511 of the Not-For-Profit Corporation Law

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Index No. 9188/11

DECISION AND ORDER

The following papers numbered 1 to 11 read on this motion: Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	1,2,7,8
Opposing Affidavits (Affirmations)	4,10
Reply Affidavits(Affirmations)	6
Affidavits(Affirmations)	
Other Papers (Memoranda of Law)	3,5,9,11

BACKGROUND

The present proceeding before this Court derives from a petition filed pursuant to Not For Profit Corporation § 511 ("NFPCL") by petitioner Long Island College Hospital (LICH) in April 2011, to obtain the approval of this Court for the transfer to State University of New York, as the owner-operator of its Health Sciences Center at University Hospital-Downstate ("SUNY-Downstate"), of virtually all of LICH's assets pursuant to an Asset Purchase Agreement, executed on April 18, 2011, by Stanley Brezenoff as Chief Executive Officer of LICH and as President and Chief Executive Officer of Continuum Health Partners, Inc. ("CHP"), the sole member of LICH, and by SUNY-Downstate's President John LaRosa. As required by statute, the Attorney General had reviewed the proposed transaction and advocated approval. At a public hearing held on May 12, 2011, no opposition to the proposed transaction, which was promoted as a way to save the insolvent LICH hospital, was voiced and the Court subsequently approved the transaction upon the express finding that "upon the closing of the Transaction, SUNY-Downstate will continue Petitioner's operation as a hospital" and the

transfer of assets would therefore "be fair and reasonable and in furtherance of the purposes of the Petitioner" (Order of May 13, 2011). The May 13, 2011 Order provided that "the Court will retain jurisdiction of this matter for purposes of enforcing this Order."

Having become aware through the public media and litigation before my colleague, Justice Johnny Lee Baynes, beginning in March 2013, that SUNY was in the process of closing LICH, less than two years from the date of approval of the transfer, and intended to sell off the transferred assets, this Court was compelled to act upon its inherent power to supervise enforcement of the May 13, 2011 Order. After a careful review of the petition, the terms of the Asset Purchase Agreement between LICH and SUNY, the reports submitted to the Court by the parties, and various reports and documents issued by components of State government, the Court determined to vacate the May 13 Order in the interest of justice (see Decision and Order of August 20, 2013). Upon recission of this Court's prior approval of the transfer of assets, the closing upon the Asset Transfer Agreement was rendered null and void (see *Rose Ocko Foundation, Inc. v Lebovits*, 259 AD2d 685 [2d Dept 1999])[1] and the transferred assets reverted to LICH. The Court is therefore presently required to retrospectively reconsider the merits of its earlier grant of approval and has scheduled a hearing for that purpose.

One of the more troubling aspects of this very complex situation is the fact that the sole member of LICH, CHP, has adamantly refused to assume responsibility for operating the LICH hospital, notwithstanding that CHP controls and operates a substantial number of other hospitals in New York City and is uniquely qualified, by its past experience in operating LICH, to assume such responsibility, and the fact that SUNY has integrated the operation of LICH into its operating certificate for SUNY's Univerity Hospital, thus eliminating LICH's separate certificate to operate the hospital. Thus, in order to preserve what remains of LICH as an operating hospital, SUNY's continued operation of the hospital is necessary, at least until another entity can be qualified by the State Department of Health to assume such responsibility. A further concern of this Court is the apparent abdication of its fiduciary duty to safeguard the mission of LICH as a charitable entity incorporated under New York State's Not For Profit Corporation Law by the Board of Regents of LICH (see *Matter of Manhattan Eye, Ear & Throat Hospital v Spitzer*, 186 Misc 2d 126, 152 [Sup Ct, New York County 1999] ("It is axiomatic that the Board of Directors is charged with the duty to ensure that the mission of the charitable corporation is carried out")). The three-member self-perpetuating Board of Regents responsible to govern LICH, apparently appointed by CHP, appears to be unwilling to act on LICH's behalf, thus raising the need to create an alternative governing body for LICH.

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[1] Courts have consistently held that transactions that do not further the charitable purposes of the not-for-profit corporation should not be approved and are deemed void (see, e.g., *Rose Ocko Foundation, Inc., id., Matter of Agudist Council v Imperial Sales Co.*, 158 AD2d 683 [2d Dept 1990]; *Church of God of Prospect Plaza v Fourth Church of Christ*, 76 AD2d 712, 716-18 [2d Dept 1980]; *In re 51-53 West 129th Street HDFC v Attorney General*, 95 AD3d 674, 675 [1st Dept 2012]).

Thus, in the current posture of this matter, the Court is called upon to re-evaluate the propriety of approving the transfer of substantially all of LICH's assets to SUNY-Downstate, which has essentially reneged upon its purported commitment,[2] as represented to this Court as the primary consideration for the transfer, to continue LICH's mission "to provide, on a nonprofit basis, hospital facilities and services for the care and treatment of persons who are acutely ill or who otherwise require medical care . . . furnished most effectively by hospitals" and "to establish, operate and maintain a voluntary, general hospital" (LICH Certificate of Incorporation). Untangling this complex transaction, which has already closed, is a daunting task, however, the difficulty of the problem should not preclude this Court from the effort in light of SUNY's declared abandonment of LICH's purpose. It is recognized that the beneficiaries of the charitable purpose of the not-for-profit corporation here are the members of the public who would directly avail themselves of the services of the hospital. Because such beneficiaries lack control over the management of the corporation, the Not For Profit Corporation Law "contemplates significant public oversight of the finances and major transactions of such entities (*64th Associates, LLC v Manhattan Eye, Ear & Throat Hospital*, 2 NY3d 585, 590 [2004]). Such oversight is achieved through the Supreme Court's review as provided in NFPC Law §§ 510 and 511.

By orders dated August 23, 28, September 4, 11, and October 1, 2013, this Court has stayed that aspect of its August 20 decision as immediately reverted operation of the LICH hospital to its sole member Continuum pending an attempt to resolve the issues that precipitated this Court's *sua sponte* order. The Court has, however, conditioned the stay upon continued operation of LICH as a hospital and has imposed a constructive trust for the benefit of the Othmer Endowment Fund on all real property in control of SUNY-Downstate in the Downstate at LICH Holding Company and enjoined all parties "from encumbering or conveying any property of LICH previously transferred to SUNY." SUNY-Downstate has now moved to vacate the order of August 20, 2013. That motion has been adjourned pending an evidentiary hearing.

THE MOTIONS TO INTERVENE

Proposed intervenors Boerum Hill Association, Brooklyn Heights Association, Carroll Gardens Neighborhood Association, Cobble Hill Association, Riverside Tenant's Association, Wykoff Gardens Association, Inc. (collectively, "Community Groups"), and the New York City Public Advocate move to intervene in this action, impose a

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[2] SUNY has argued that, as it was not the petitioner, nor was it a party to the original proceeding, it made no commitment to this Court, or otherwise, to continue to operate LICH in conformity with its charitable purpose. This argument is undermined by the terms of the Asset Purchase Agreement, executed by SUNY, which was submitted in support of the petition and by its own application in 2012 to obtain additional funds from the LICH liability reserves.

constructive trust on all assets of Long Island College Hospital, and appoint a trustee to oversee the constructive trust.[3]

Proposed intervenors 1199SEIU United Healthcare Workers East ("1199")[4] and New York State Nurses Association ("NYSNA")[5] (collectively, "Healthcare Groups")[6], the union representatives of LICH employees, also move to intervene in this action and join the Community Groups and Public Advocate in their request for the imposition of a constructive trust and the appointment of a trustee.

At oral argument on September 11, 2013, this Court granted the motion to intervene as to the Community Groups and reserved decision as to the Public Advocate's motion. At oral argument on September 25, 2013, this Court reserved decision on the Healthcare Groups' motion.

The Community Groups argue that they are the intended beneficiaries of the Othmer Endowment Fund and the charitable purposes of LICH. The Community Groups argue that they bring "a unique perspective to the community's need for hospital services" developed "through years of direct community involvement." The Public Advocate argues that he is "charge[d] with standing up for the delivery of key services - such as health care - to all New Yorkers" pursuant to §24(f) of the New York City Charter.

The Healthcare Groups argue that no party to this action represents the collective bargaining rights of the members of the Healthcare Groups, a determination in this action may result in a change to the corporate structure of the hospital, and the Healthcare Groups will be bound by the ramifications of those determinations in their collective bargaining. The Healthcare Groups further argue that the relief sought in this action, the transfer of LICH assets to SUNY-Downstate, will affect the relief sought by the Healthcare Groups in their action before Justice Baynes, *The Matter of The New York State Nurses Association, et al.*, index No. 5814/13.

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[3] It is noted that the Community Groups and the Public Advocate are represented by the same counsel.

[4] 1199 is the exclusive bargaining representative of approximately 1,000 clerical, technical, professional, and service healthcare workers employed at LICH.

[5]NYSNA represents approximately 400 registered nurses employed at LICH and is a party to a collective bargaining agreement covering the nurses employed at LICH.

[6] Both Healthcare Groups had collective bargaining agreements with Staffco of Brooklyn, LLC, a professional employer organization created upon the transfer to SUNY and engaged by SUNY-Downstate for the purpose of operating LICH, that expired on May 28, 2012. Both Healthcare Groups entered into extension agreements. 1199's continuing extension agreement is terminable on 10 days notice by either party and NYSNA's extension agreement appears to have expired on December 31, 2012.

Both the Community and Healthcare Groups argue that this Court should expand the constructive trust already in place in this action, pursuant to this Court's order of August 28, 2013, to include all of LICH's assets and records and appoint a trustee to preserve the assets and records.

SUNY-Downstate opposes the motions to intervene, the imposition of an expanded constructive trust, and the appointment of a trustee. While initially disputing its role as a party in the proceeding before the Court, arguing that the petition was brought exclusively by LICH, by letter dated September 20, 2013, from SUNY-Downstate's counsel, SUNY-Downstate has taken the position that "it became a party to this proceeding in May 2012, when, pursuant to the Court's retention of jurisdiction in its May 2011 order, SUNY applied for and obtained an order authorizing distribution of funds from the LICH Liability Fund." As this position is uncontested, and whereas SUNY-Downstate currently has site control of LICH and would therefore be a necessary party to this proceeding in any case (CPLR § 1001(a)), SUNY-Downstate is added as a party to this proceeding and the caption shall be amended to reflect its joinder as a petitioner.

SUNY-Downstate argues that the proposed intervenors failed to object to the petition at the open hearing on May 12, 2011 and the petition was ruled upon, thereby disposing of the petition. SUNY-Downstate also argues that the proposed intervenor's motion is procedurally defective as it should not have been brought pursuant to §§ 1012 and 1013 because this is a special proceeding governed by Article 4 of the CPLR. SUNY-Downstate further argues that the community's interests are represented by the Attorney General's office and that the proposed intervenors do not have an interest in the LICH property.

ANALYSIS

"Upon a timely motion, a person is permitted to intervene in an action as of right when, inter alia, 'the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment' (CPLR 1012 [a] [2]). Additionally, the court, in its discretion, may permit a person to intervene, inter alia, 'when the person's claim or defense and the main action have a common question of law or fact' (CPLR 1013). 'However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013 is of little practical significance [and that] intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings'" (*Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 843 [2d Dept 2009], quoting *Perl v Aspromonte Realty Corp.*, 143 AD2d 824, 825 [2d Dept 1988]; *see Matter of Bernstein v Feiner*, 43 AD3d 1161, 1162 [2d Dept 2007]; *Sieger v Sieger*, 297 AD2d 33, 36 [2d Dept 2002]; *County of Westchester v Department of Health of State of N.Y.*, 229 AD2d 460, 461 [2d Dept 1996]; *Plantech Hous. v Conlan*, 74 AD2d 920, 920-921 [2d Dept 1980]).

CPLR 105(b) states, "[t]he word 'action' includes a special proceeding." Accordingly, SUNY-Downstate's argument that CPLR 1012 and 1013 are inapplicable to this special proceeding is unavailing as CPLR 1012 and 1013 provide for intervention in an "action" which, by definition, includes this special proceeding (*see* CPLR 105[b]). SUNY-Downstate's argument that the motions to intervene are untimely, as the hearing regarding the transfer of LICH assets occurred more than two years ago, is similarly unavailing. The issues presently before the Court, particularly SUNY-Downstate's decision to eliminate services and close LICH, which prompted this Court's decision to vacate the approval of the transfer of LICH, did not arise until well after the hearing was conducted and represent a change in circumstances that this Court has determined must be addressed, pursuant to its continuing jurisdiction, under its May 13 Order, to enforce the terms of that order.

The Community Groups

In its petition, LICH represented that "SUNY-Downstate will operate LICH as a second campus of SUNY-Downstate's University Hospital of Brooklyn, with both campuses holding a single state hospital license. LICH will remain a full-service acute care hospital at its existing site, and LICH's employees and physicians will continue to work and care for patients at the site." The petition further represented that, "[t]he absence of cash consideration to LICH is reasonable in these circumstances because in return for the conveyance of LICH's assets, SUNY-Downstate will continue to operate the Hospital, taking on LICH's significant current annual operating deficits as a going concern." The petition specifically noted that "the government agencies that supervise the Hospital's and SUNY-Downstate's operations have or will approve the Transaction *as set forth in this Petition*" (emphasis added). The Board of Trustees of SUNY-Downstate was included in the list of government agencies whose approval of the proposed sale was required prior to closing.

The Community Groups collectively represent thousands of individuals in the neighborhoods surrounding LICH. Affidavits in support of the motion to intervene demonstrate that the Community Groups represent numerous individuals who have been treated at LICH for life-threatening conditions where immediate care was vital. The affidavits make it clear that the residents of these communities will be directly impacted by the closure of the hospital and emergency room at LICH. Accordingly, the Community Groups have established that its members possess a real and substantial interest in the outcome of this action and their motion to intervene is granted (*see* CPLR 1013, *Town of Southold v Cross Sound Ferry Servs.*, 256 AD2d 403, 404 [2d Dept 1998] (holding that an organization representing homeowners effected by the operation of a ferry service were permitted to intervene in action); *Clinton v Summers*, 144 AD2d 145, 147 [3d Dept 1988] (holding that an organization whose members either owned property near a lake, or utilized the lake for recreational purposes, was permitted to intervene in an action

addressing traffic patterns near the lake).[7] Moreover, as heretofore noted, the community residents are the true beneficiaries of the charitable entity known as LICH and it is their interests that must be evaluated in light of LICH's charitable purpose.

The Public Advocate

The Public Advocate argues that §24(f) of the New York City Charter charges the Public Advocate "with standing up for the delivery of key services - such as health care - to all New Yorkers"[8] and that he therefore "has the capacity to bring this litigation, as the closure of LICH has had a profound impact on the city services provided by the New York City Fire Department ("FDNY") which operates ambulance service, and the New York City Health and Hospitals Corporation ("HHC")." The Public Advocate indicated that the LICH closure has resulted in numerous complaints from the public, including the discontinuation of ambulance services to LICH's emergency room. In the written communications and conferences with this Court, SUNY-Downstate explained that it advises the FDNY of LICH's ability to receive ambulances and, at a date not known to the Court at this time, LICH advised the FDNY that it would no longer accept ambulances at its emergency room.[9]

SUNY-Downstate opposes the Public Advocate's motion, arguing that the Public Advocate does not have an interest in the LICH assets, which are the subject of this proceeding, and "[i]t is not enough that [the Public Advocate has] an opinion about how the assets should be used in the future."

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[7] Although not cited by SUNY-Downstate, *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, in which the Second Department Appellate Division denied a community group's motion to intervene, is distinguishable from the present action as the group in that action failed to establish that the defendant's representation would not be adequate (*see Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844 [2d Dept 2009]). In this proceeding, the Attorney General is charged by statute with the duty to represent the community. However, the Attorney General has a conflicting duty to represent agencies of the state, including SUNY. Moreover, the Attorney General also originally approved the transfer here. Although the Attorney General has indicated that he does not have a conflict of interest in this action, he has not opposed the Community Groups' motion to intervene. Such circumstances suggest that the Attorney General may not adequately represent the interests of the proposed intervenors.

[8] Section 24(f) of the New York City Charter states that, "[i]n addition to other duties and responsibilities, the public advocate shall serve as the public advocate and shall (1) monitor the operation of the public information and service complaint programs of city agencies and make proposals to improve such programs; (2) review complaints of a recurring and multiborough or city-wide nature relating to services and programs, and make proposals to improve the city's response to such complaints; (3) receive individual complaints concerning city services and other administrative actions of city agencies; and (4) investigate and otherwise attempt to resolve such individual complaints . . .."

[9] On or about September 6, 2013, SUNY-Downstate restored ambulance receiving status, for basic life support, with the NYFD.

The Public Advocate's motion to intervene is granted.[10] Although the City Charter does not specifically authorize the Public Advocate to commence litigation, "the right to bring suit to implement the power set forth in the Charter" has been recognized as "implied from the functional responsibility of the [Public Advocate]" (*Matter of Green v Safir*, 174 Misc 2d 400, 406, *affd* 255 AD2d 107 [1st Dept 1998], lv denied 93 NY2d 882 [1999]; *see Green v Giuliani*, 187 Misc 2d 138, 144 [Sup Ct, New York County, 2000] (holding, "[t]he Public Advocate is an independently elected official with capacity to sue")). Although several authorities, including my colleague, Justice Baynes (*Matter of de Blasio v State University of New York*, Sup Ct, Kings County, September 12, 2013, Baynes, J., index No. 13007/13) have found that the Public Advocate does not have authority to bring an Article 78 proceeding against a state government agency (*see Matter of Madison Sq. Garden, L.P. v New York Metro. Transp. Auth.*, 19 AD3d 284, 285 [1st Dept 2005], *lv den'd*, 5 NY3d 878 [2005]), in granting the Public Advocate intervenor status here, this Court does not deviate from those rulings as the instant matter does not challenge the actions of a state agency acting as such, but relates to the exercise by LICH's Board of Regents of its fiduciary duty to preserve the mission of LICH to serve the public need for medical care and the adequacy of consideration provided by SUNY for LICH's assets. Moreover, the Public Advocate has not "initiated" this proceeding, but merely seeks to participate as a representative of that public interest which may not be adequately represented by the original parties to the proceeding.

The Healthcare Groups

The Healthcare Groups' motion to intervene is denied. This petition was initially brought pursuant to NFPCL §§ 510 and 511, the purpose of which "is to protect the beneficiaries of a charitable organization from 'loss through unwise bargains and from perversion of the use of the property'" (*Rose Ocko Foundation*, 259 AD2d at 688). Although the staffing requirements for employees at the hospital may be affected by the outcome of this matter and members of the moving collective bargaining units may lose their jobs, unlike the residents of Brooklyn, the employees of LICH are not the intended beneficiaries of the not-for-profit corporation (*see Manhattan Eye, Ear & Throat*, 186 Misc 2d at 151 (holding that the ultimate beneficiary of a not for profit corporation is the public), citing *Rose Ocko*, 259 AD2d at 688, *Church of God*, 76 AD2d at 716). Further, the collective bargaining agreements between the Healthcare Groups and Staffco[11] have apparently expired or may be terminated on ten days written notice. Thus the Healthcare

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[10] It is noted that proposed intervenor Bill de Blasio will no longer occupy the office of Public Advocate effective December 31, 2013; however, correspondence dated September 26, 2013 from both of the remaining Public Advocate candidates, Letitia James and Daniel Squadron, one of whom is expected to be elected to that office in November, indicated support for the Public Advocate's motion to intervene and their intent to continue to pursue the Public Advocate's position should they be elected.

[11] At oral argument on September 25, 2013, SUNY-Downstate represented, and the Healthcare Groups agreed, that Staffco was specifically created at the employees' request so as to preserve the benefits the members had accrued pursuant to collective bargaining agreements.

Groups lack the real and substantial interest in the outcome of this proceeding to permit their intervention (*see Berkoski*, 67 AD3d at 843).

Constructive Trust and Appointment of a Trustee

The motion for the expansion of the constructive trust and the appointment of a trustee by the Public Advocate and Community Groups is premature at this time. This motion will be held in abeyance pending the hearing, as directed by this Court on October 4, 2013, to be held on October 21, 2013.

CONCLUSION

Boerum Hill Association, Brooklyn Heights Association, Carroll Gardens Neighborhood Association, Cobble Hill Association, Riverside Tenant's Association, Wykoff Gardens Association, Inc., and the New York City Public Advocate's motion to intervene is granted.

Boerum Hill Association, Brooklyn Heights Association, Carroll Gardens Neighborhood Association, Cobble Hill Association, Riverside Tenant's Association, Wykoff Gardens Association, Inc., and the New York City Public Advocate's motion for the imposition of a constructive trust and appointment of a special trustee is held in abeyance pending hearing.

1199SEIU United Healthcare Workers East and the New York State Nurses Association's motion to intervene is denied.

This constitutes the decision and order of the Court.

CAROLYN E. DEMAREST

JUSTICE OF THE SUPREME COURT