

# **EXHIBIT 23**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

|  |   |                       |
|--|---|-----------------------|
| -----  | X |                       |
| In the Matter of the Application of              | : |                       |
|  | : |                       |
| DOWNSTATE AT LICH HOLDING COMPANY,               | : | Index No. _____       |
| INC.   | : |                       |
|  | : |                       |
| For an Order Approving the Sale of the Assets of | : | <b>AFFIRMATION OF</b> |
| Downstate at LICH Holding Company, Inc.,         | : | <b>KEVIN O'MARA</b>   |
| pursuant to Sections 510 and 511 of the          | : |                       |
| Not-for-Profit Corporation Law.                  | : |                       |
| -----  | X |                       |

**KEVIN O'MARA**, an attorney admitted to practice law in New York State, affirms the following under penalties of perjury and in accordance with C.P.L.R. § 2106:

1. I am Senior Managing Counsel in the State University of New York's (the "State University's") Office of General Counsel, assigned to Downstate Medical Center ("Downstate"). I have personal knowledge of the facts stated herein, and I submit this affirmation in support of Downstate at LICH Holding Company's ("Petitioner's") Petition for an order approving the sale of substantially all of its assets.
2. I represented Downstate and Petitioner as in-house counsel in the transaction (the "2011 Transaction") whereby, on May 29, 2011, Downstate and Petitioner acquired substantially all of the assets of the Long Island College Hospital (the "Hospital") from the not-for-profit corporation by the same name ("Old LICH"). Upon consummation of the 2011 Transaction, Downstate became the licensed operator of the Hospital. The Hospital became a second campus of Downstate's University Hospital of Brooklyn ("UHB").
3. The real property owned by Old LICH at the time of the 2011 Transaction included the real estate and improvements comprising the Hospital, as well as a parking garage

and certain other properties in the adjoining neighborhood (collectively, the “LICH Portfolio”). Substantially all of the properties within the LICH Portfolio were subject to a mortgage that could not, according to its terms, the terms of the bonds that were issued in connection with the mortgage, and provisions of State law applicable to the State University, be transferred to a government entity. Consequently, the State University established Petitioner as a private, not-for-profit corporation for the purpose of acquiring and holding the LICH Portfolio and assuming the bond debt, as well as some of the personal property used in connection with the Hospital. The value of the personal property was de minimus as compared to the value of the real property.

4. Petitioner’s main corporate purpose was to hold title to the LICH Portfolio acquired from Old LICH in the 2011 Transaction and lease such property to Downstate so that Downstate could (a) occupy and operate the Hospital; and (b) utilize other non-Hospital properties in support of the Hospital’s operation. The lease payments from Downstate to Petitioner were set to be equal to Petitioner’s carrying costs for the property, including but not limited to Petitioner’s mortgage payments.

5. The 2011 Transaction was enormously complex and took several years to complete. Negotiations began in 2008 when senior officials of Continuum Health Partners, Inc. (“CHP”), the sole corporate member of Old LICH, approached senior officials of Downstate about the possibility of Downstate acquiring the Hospital. CHP represented (a) that Old LICH was losing significant amounts of money in 2008, and had been operating on a deficit basis for years; (b) that there was no prospect of the CHP operating the Hospital at a surplus, or even at break-even; and (c) that Old LICH had at least two obstacles that precluded it from operating the Hospital successfully: (i) the significant malpractice expenses associated with the Hospital; and (ii) poor and deteriorating relations between Old LICH/CHP and the Hospital’s physicians. CHP

officials indicated that there were no other viable bidders for the Hospital and that absent a sale to Downstate, Old LICH likely would declare bankruptcy.

6. Downstate's management believed that it could operate the Hospital without encountering either of the main obstacles that had bedeviled CHP. First, the post-closing malpractice claims of the Hospital, as a State entity, would be defended by the Office of the Attorney General with indemnity or settlement payments made through the Court of Claims, and Downstate, therefore, would not be required to incur malpractice expenses for the Hospital. Second, Downstate officials believed at the time that they could repair the relationships with the Hospital's physicians.

7. Downstate believed it had a further financial advantage in that by operating the facility as a public hospital, it would be eligible for enhanced Medicaid rates and other State support. So, although Downstate anticipated significant *operating losses*, Downstate also anticipated that, after application of expected State support, the Hospital would actually generate a *surplus* in each of its first three years following the 2011 Transaction.

8. Additionally, at the time of the 2011 Transaction, the main campus of UHB was operating at or near inpatient bed capacity and experiencing continued inpatient growth. On numerous occasions, Downstate had to divert ambulances, because UHB had reached full inpatient bed capacity. This volume trend was expected to continue, and officials expected that it would result in Downstate requiring additional beds. The acquisition of the Hospital addressed that need. Downstate also had obtained approval to expand ambulatory (outpatient) services on its main campus and opened ambulatory facilities in southwest Brooklyn. These initiatives were expected to lead to even greater demand for access to inpatient services and, thus, the need for even more beds.

9. Downstate also believed that by virtue of the Hospital's location in a higher income area of Brooklyn than UHB's Main Campus, the Hospital would improve UHB's overall payer mix, thus positively affecting UHB's financial performance. Further, although the Hospital's physical plant was not new or in ideal condition, it was in better condition than the physical plant of UHB's Main Campus, and Downstate officials believed it would be more attractive to patients.

10. Ultimately, the aspirational and aggressive strategy with which the State University acquired the Hospital was unsuccessful. Downstate's anticipation that the average daily census would grow, that the overall payer mix would be improved, and that relationships with staff and local physicians could be repaired did not come to fruition. Downstate's financial advantages did not overcome years of declining performance and low utilization. Indeed, even some of the anticipated positives turned into negatives: for example, as the neighborhood surrounding the Hospital gentrified (which Downstate had hoped would result in a more favorable payer mix), more residents with generous insurance sought treatment across the river in Manhattan, particularly for high-margin, non-emergency procedures. Downstate also underestimated the challenges associated with incorporating a new campus into its operations, and overestimated its ability to effectively integrate the Hospital into UHB.

11. UHB had operated at a loss from calendar year 2007 through calendar year 2010, but those losses dramatically escalated in 2011, the year the Hospital was acquired and became a part of UHB. The Office of the State Comptroller issued an audit report on January 17, 2013 (the "OSC Audit Report") reporting, among other things, the following fiscal trends:

| <b>Summary of Financial Results<br/>Calendar Years 2007 through 2011<br/>(in Millions)</b> |                             |                                 |                             |
|--|-----------------------------|---------------------------------|-----------------------------|
| Year   | Operating Surplus<br>(Loss) | Non-Operating<br>Surplus (Loss) | Aggregate Surplus<br>(Loss) |
| 2007   | (\$70.5)                    | \$68.7                          | (\$1.8)                     |
| 2008   | (\$75.6)                    | \$74.3                          | (\$1.3)                     |
| 2009   | (\$78.8)                    | \$68.7                          | (\$10.1)                    |
| 2010   | (\$49.3)                    | \$34.3                          | (\$15.0)                    |
| 2011   | (\$117.3)                   | (\$158.5)                       | (\$275.8)                   |
| <b>Totals</b>  | <b>(\$391.5)</b>            | <b>\$87.5</b>                   | <b>(\$304)</b>              |

12. Despite the 2011-2012 initial year losses, Downstate hoped that the Hospital's performance would improve over time. The State University system took steps to help stabilize Downstate's (including the Hospital's) finances in the short term while the hoped-for turnaround was in process, including (i) State University system provided an infusion into Downstate of \$75,000,000 borrowed from the State University's other campuses in mid-2012; (ii) Petitioner and Downstate were able to refinance the mortgaged bond debt encumbering the LICH Portfolio in October 2012; and (iii) as recommended in the OSC Audit Report, senior management at Downstate was replaced. Unfortunately, despite these measures, losses at the Hospital continued to mount, which contributed to Downstate's already precarious financial position.

13. The State of New York issued Series 2012-D Personal Income Tax Bonds, and a portion of the proceeds from that bond series (the "PIT Bonds") was used to pay off then-existing mortgaged bond debt. As part of the refinancing, a debt premium was taken, thereby reducing the principal balance by over \$20,000,000, and the interest rates were substantially reduced.

14. Downstate incurred substantial losses in the operation of the Hospital, totaling well over \$185,000,000 for the period from May 29, 2011 through October 31, 2014, the date that Downstate exited all healthcare operations at the Hospital (other than a supporting laboratory service function that terminated on or about December 31, 2014).

New York, New York  
April 1, 2015



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**KEVIN O'MARA**