

DISTRICT COURT
BOULDER COUNTY, COLORADO
Boulder Justice Center
1777 6th Street
Boulder, CO 80302

Plaintiff:

AMI SADLER; COMPASSION & CHOICES;
COMPASSION & CHOICES OF COLORADO; and
STEPHEN KREBS, M.D.

Defendant:

COMMUNITY FIRST FOUNDATION f/k/a
LUTHERAN MEDICAL CENTER FOUNDATION;
SISTERS OF CHARITY OF LEAVENWORTH
HEALTH SYSTEM, INC.; EXEMPLA, INC., in its
corporate capacity and in its trade dress of EXEMPLA
LUTHERAN MEDICAL CENTER; EXEMPLA GOOD
SAMARITAN MEDICAL CENTER LLC; KAISER
HOSPITAL ASSET MANAGEMENT, INC.; and
KAISER FOUNDATION HEALTH PLAN OF
COLORADO

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System, Inc.

Case Number: 2007CV1113

Ctrm/Div: 2

**DEFENDANT SISTERS OF CHARITY LEAVENWORTH, INC.'S
MOTION TO DISMISS PLAINTIFFS' FIRST AND SECOND CLAIM FOR RELIEF**

Defendant, Sisters of Charity Leavenworth Health System, Inc. (“SCLHS”), through its counsel, respectfully moves the Court to dismiss Plaintiffs’ First and Second Claim for Relief for lack of subject matter jurisdiction and for failure to state a claim for which relief can be granted under Colorado Rule of Civil Procedure 12(b)(1) and 12(b)(5), respectively, for the following reasons:

- The Attorney General has exclusive jurisdiction over the proposed transaction and has already determined that there will be no material change in charitable purpose;
- Even if the Court has jurisdiction over the proposed transaction, Plaintiffs lack standing to maintain a suit for the enforcement of the alleged “Original Charitable Purpose” of Lutheran Medical and Good Samaritan; and
- The Uniform Management of Institutional Funds Act does not extend to CFF’s Membership Interest in Exempla and the application of the act to the proposed transaction would improperly preempt the Attorney General’s exclusive jurisdiction and authority.

INTRODUCTION

SCLHS and Defendant Community First Foundation (“CFF”) each hold a 50% membership interest in Defendant Exempla, Inc. (“Exempla”). This case involves an agreement between SCLHS and CFF whereby SCLHS will acquire CFF’s 50% membership interest in Exempla (the “proposed transaction”). Exempla owns Exempla Lutheran Medical Center (“Lutheran Medical”) and 100% of the economic membership interest in Good Samaritan Medical Center (“Good Samaritan”). As required under Colorado Revised Statute § 6-19-201 *et seq.*, SCLHS and CFF sent notice of the proposed transaction to the Attorney General on October 30, 2007. On December 27, 2007, the Attorney General exercised his exclusive jurisdiction over the proposed transaction and approved the proposed transaction pursuant to Colorado Revised Statute § 6-19-203, finding that the proposed transaction would not result in a material change in charitable purpose.

On December 20, 2007, Plaintiffs filed their Complaint seeking a finding and declaratory judgment that, among other things, the proposed transaction cannot go forward and be consummated without Court approval because of the alleged resulting change in the alleged “Original Charitable Purpose” of Lutheran Medical and Good Samaritan—defined by Plaintiffs as “the provisioning of broad non-sectarian health care services by Lutheran [Medical] and Good Samaritan.” *See* Pls.’ Compl., ¶ 23. In their First Claim for Relief, Plaintiffs argue that because Lutheran Medical and Good Samaritan are “institutional funds” as defined in the Uniform Management of Institutional Funds Act (“UMIFA”), the Court must approve any transaction which will result in a failure of the alleged “Original Charitable Purpose.” Similarly, in their Second Claim for Relief, Plaintiffs argue that the doctrine of *cy pres* mandates prior Court approval of the proposed transaction because of the change in the alleged “Original Charitable Purpose” that will result if the proposed transaction proceeds.

Plaintiffs' First and Second Claim for Relief fail as a matter of law and should be dismissed. The Attorney General has exclusive jurisdiction over the proposed transaction, including any determination of whether it will result in a material change in charitable purpose. Even if the Court has jurisdiction over the proposed transaction, Plaintiffs have not alleged an injury in fact to a legally protected interest sufficient to confer standing to maintain this lawsuit.

Plaintiffs' First Claim for Relief also fails as a matter of law because UMIFA is inapplicable to the proposed transaction in view of the fact that CFF's membership interest in Exempla is not an "institutional fund." Moreover, the application of UMIFA to the proposed transaction would improperly preempt the Attorney General's exclusive jurisdiction and authority.

Furthermore, SCLHS adopts and incorporates by this reference the arguments set forth by CFF in its Motion to Dismiss the Complaint for Lack of Standing and Subject Matter Jurisdiction, and Failure to State a Claim.

ARGUMENT

I. The Court Should Dismiss Plaintiffs' First and Second Claim for Relief for Lack of Subject Matter Jurisdiction because the Attorney General Has Exclusive Jurisdiction over the Proposed Transaction and Has Already Determined that There Will Be No Material Change in Charitable Purpose.

Under Colorado Revised Statute § 6-19-201, *et seq.* (the "hospital conversion statute"), notice must be provided to the Attorney General of any "covered transaction," which includes "the sale, transfer, or other disposition of the control of a parent company, holding company, or other entity controlling a hospital."¹ Colo. Rev. Stat. §§ 6-19-102, 6-19-202. The Attorney General may exercise his common law authority to assess and review or challenge such a transaction to determine whether it will result "in a material change in the charitable purposes to which the assets of the hospital have been dedicated." *Id.* at § 6-19-203(2).

If a transaction will not result "in a material change in the charitable purposes to which the assets of the hospital have been dedicated," the transaction will proceed without further review by the Attorney General. *Id.* at § 6-19-203(1). Otherwise, the Attorney General is authorized to hold a public hearing in the service area of the hospital involved in the transaction at which any person may either file written comments or appear and make a statement about any aspect of the transaction. *Id.* at §§ 6-19-2-3(2)(a)(IV), 6-19-404(1). The Attorney General has the authority to allow a transaction that results in a material change in charitable purpose if the transaction satisfies the following criteria: (1) the assets continue to be dedicated to charitable purposes; (2) the directors or trustees of the parties to the transaction have not acted unreasonably in light of the financial circumstances of the parties; (3) the directors or trustees of the parties to the transaction have not acted unreasonably in accommodating the affected communities; and (4) the directors or trustees of the parties to the transaction have not

¹ "Covered transaction" is also defined as "any transaction that would result in the sale, transfer, lease, exchange, or other disposition of fifty percent or more of the assets of a hospital." Colo. Rev. Stat. § 6-19-102.

breached their fiduciary duties or otherwise engaged in misconduct in such transaction. *Id.* at § 6-19-203(2)(a)(I)-(IV). These criteria are to be liberally construed by the Attorney General to favor approval of the transaction. *Id.* at § 6-19-203(2)(c).

Thus, the hospital conversion statute not only establishes the statutory procedures and criteria for evaluating proposed conversions, but specifically gives enforcement powers to the Attorney General rather than to courts. *See* Richard Westfall *et al.*, *Attorney General Review of Asset Transfers by Nonprofit Hospitals*, 28 Colo. Law. 37 (1999) (attached hereto as Ex. A). Indeed, the purpose of the hospital conversion statute was to avoid litigation: “The legislation...provides for a prompt and efficient review and assessment process to avoid costly and precedent-setting litigation.” *See Report of the Colorado Attorney General’s Hospital Conversion Task Force*, p. 5 (Feb. 1998) (attached hereto as Ex. B).

Moreover, the hospital conversion statute, and the authority it grants to the Attorney General, encompasses the cy pres doctrine and is considered its legislative equivalent. Colorado courts have found a similar legislative scheme giving the Commissioner of Insurance exclusive authority to approve conversions of health service corporations to stock insurance companies, thereby divesting courts of jurisdiction over such transactions. In *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1014 (Colo. 2003) (en banc) (attached hereto as Ex. C), a non-profit health service corporation submitted a plan to convert to a for-profit health insurer under Colorado Revised Statute § 10-16-324 which, similar to § 6-19-203, requires the Insurance Commissioner to approve a plan for conversion if the plan specifies “a reasonable treatment for the benefit of the citizens of Colorado of the value of the corporation.” The Commissioner’s approval of the plan was challenged by policyholders of the health-insurer and several organizations² who then sought attorneys’ fees and expenses. *Hawes*, 65 P.3d at 1014-15. The issue for the Colorado Supreme Court was whether the Commissioner had implied authority within any enabling acts or statutes to award attorneys’ fees or whether the legislature had intended to abrogate the common law right to fees. *Id.* In deciding that the Commissioner did not have such authority, the Court stated that by enacting § 10-16-324, the legislature provided the Commissioner with exclusive jurisdiction over conversions and, thus, divested jurisdiction from courts:

“The Commissioner of Insurance has exclusive jurisdiction over the conversion proceedings....Therefore, no suit could be brought in a court of general jurisdiction contesting the conversion....Although a conversion may generally be contested in a court under common law charitable trust and cy pres doctrines, our legislature has provided exclusive means to participate in a conversion through the conversion statute, divesting jurisdiction from the courts....The language of 10-16-324 makes clear that the Commissioner is presiding over an equitable proceeding, previously available under the common law principles of cy pres.”

Id. at 1021-22.

Similarly, by enacting the hospital conversion statute, the legislature has provided an exclusive means for the review of hospital conversions and the determination of whether such

² Under Colo. Rev. Stat. § 10-16-324(15), the Commissioner’s final action may be appealed by “any person that was a party to the agency proceeding and was adversely affected or aggrieved by the final agency decision.”

conversions result in a material change in charitable purpose—namely, through equitable proceedings by the Attorney General previously available under the common law cy pres doctrine. The Attorney General’s powers under the hospital conversion statute are actually much broader than the cy pres doctrine—the Attorney General may approve a hospital conversion that results in a material change in charitable purpose so long as the four criteria enumerated above are satisfied. Colo. Rev. Stat. § 6-19-203(a)(I)-(IV).

The hospital conversion statute, therefore, not only encompasses the cy pres doctrine, but provides the Attorney General more flexibility to approve transactions that would constitute a material change in charitable purpose. *See* Ex. B at p. 20 (“Attorney General Norton...was concerned that existing common law afforded too little flexibility to approving transactions that would constitute a material change in the charitable purposes to which the assets were dedicated. The additional flexibility to allow nonprofit to nonprofit conversions contained in section 6-19-203 of the bill reflects Attorney General Norton’s proposed modifications to common law.”).

The Attorney General himself acknowledges this interpretation and construction of the hospital conversion statute. On October 30, 2007, CFF and SCLHS filed its notice regarding the proposed transaction with the Attorney General as required under the hospital conversion statute. *See* Attorney General’s Finding of No Material Change in Charitable Purpose, p. 2 (attached hereto as Ex. D). On December 3, 2007, Plaintiff Compassion & Choices of Colorado (“Compassion & Choices”), along with several other state and national organizations, sent a letter to the Attorney General requesting him to defer jurisdiction over the proposed transaction to the Court:

“Under the Nonprofit to Nonprofit Hospital Transaction Act, § 6-19-203, the Attorney General may (but is not required to) review a transaction that ‘will result in a material change in the charitable purposes to which the assets of the hospital have been dedicated.’ While we believe that this transaction clearly meets the criteria and your office plays a vital role in its review, we would urge that your office defer jurisdiction to the district court since this transaction also implicates broader concerns for the institutions involved, as well as the communities they serve.”

See Letter Dated December 3, 2007, p. 4 (attached hereto as Ex. E).

Specifically, Plaintiff Compassion & Choices urged the Attorney General to acknowledge that he did not have primary jurisdiction over the proposed transaction under both the cy pres doctrine and UMIFA. *See id.* at p.1, 5.

Nevertheless, on December 27, 2007, the Attorney General approved the proposed transaction and ruled that it “may proceed without further review by him” after finding that it would not result in a material change in charitable purpose. *See* Ex. D at p. 2. Recognizing his enforcement and review powers under the hospital conversion statute, the Attorney General thus exercised his exclusive jurisdiction over the proposed transaction rather than deferring jurisdiction to the Court as suggested by Plaintiff Compassion & Choices.

As the Attorney General has exclusive jurisdiction under the hospital conversion statute to review the proposed transaction and to determine issues relating to a change in charitable purpose, this Court lacks subject matter jurisdiction to entertain Plaintiffs' First and Second Claim for Relief. Accordingly, the Court should dismiss Plaintiffs' First and Second Claim for Relief for lack of subject matter jurisdiction.

II. Even if the Court Has Jurisdiction over the Proposed Transaction, Plaintiffs Lack Standing to Maintain a Suit for the Enforcement of the Alleged "Original Charitable Purpose" of Lutheran Medical and Good Samaritan.

Standing is a jurisdictional prerequisite that must be satisfied in order for the Court to decide a case on the merits. *First Horizon Merch. Serv., Inc. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 179-80 (Colo. Ct. App. 2007) (attached hereto as Ex. F). "A plaintiff has standing if he or she has an injury in fact and that injury is to a legally protected interest." *Id.*, quoting *Durbin v. Cheyenne Mountain Bank*, 98 P.3d 899, 902 (Colo. Ct. App. 2004). In the absence of an injury in fact to a legally protected interest, not only does a plaintiff lack standing but there is no actual controversy on which to base a declaratory judgment action. *Am. Civil Liberties Union of Colo. v. Whitman*, 159 P.3d 707, 709 (Colo. Ct. App. 2007) ("A declaratory judgment action must be based on an actual controversy, and the plaintiff must allege an injury in fact to a legally protected or cognizable interest.") (attached hereto as Ex. G).

An injury in fact must be direct and palpable. *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. Ct. App. 2002) (attached hereto as Ex. H). An injury that "is presently speculative and that cannot be determined until a remote time in the future, is not sufficiently direct and palpable to support a finding of injury in fact." *Id.* A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff's legally protected interest—an interest protected under either the constitution, the common law, a statute, or a rule or regulation. *Reeves v. City of Fort Collins*, 170 P.3d 850, 851-52 (Colo. Ct. App. 2007) (attached hereto as Ex. I).

i. Plaintiffs Have No Legal Interest in Enforcing the Continuation of the Alleged "Original Charitable Purpose."

In their First and Second Claim for Relief, Plaintiffs seek to enforce a so-called special and legally protected interest in the continuation of the alleged "Original Charitable Purpose" of Lutheran Medical and Good Samaritan. Assuming for purposes of argument that Plaintiffs' characterization of CFF as a charitable trust is correct, as members of the general public, Plaintiffs do not have the requisite special or legal interest to maintain this lawsuit.

Because the beneficiary of a charitable trust is "the unspecified, indefinite general public to whom the social and economic advantages of the trust accrues," the responsibility for public supervision of a charitable trust falls to the Attorney General "who may maintain a suit to compel property to be held for the charitable purpose for which it was given." *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1125 (Colo. 2007) (en banc) (citing Colo. Rev. Stat. § 15-1-1005; Restatement (Second) of Trusts §§ 364 cmt. a; 391 cmt. a) (attached hereto as Ex. J).

A suit for enforcement of a charitable trust cannot be maintained by persons who have no special interest in the enforcement of the trust. Restatement (Second) of Trusts § 391 cmt. d

(attached hereto as Ex. K). A special interest arises where a charitable trust is created for the benefit of a particular person. *Id.* at cmt. c (emphasis added). For example, a charitable trust may be created for the benefit of the minister for the time being of a particular church. In such a case, the minister of the church can maintain a suit for the enforcement of the trust. *Id.* Or, a charitable trust created for the relief of poverty or for the promotion of education may provide that particular persons are entitled to a preference in receiving benefits under the trust. Any such person may then maintain a suit for the enforcement of the trust. *Id.* But the mere fact that members of the public benefit from the enforcement of a trust is not sufficient grounds to entitle them to sue since such a suit may be maintained by the Attorney General on the general public's behalf. *Id.* at cmt. d., *see also* Colo. Rev. Stat. §§ 2-4-211, 24-31-101(5) (recognizing that the Attorney General has all powers conferred by statute and common law for trusts established for charitable, educational, religious, or benevolent purposes).

Because Lutheran Medical and Good Samaritan are owned and operated for the benefit of the general public—not for the benefit of any particular persons—Plaintiffs' interest in the continuation of the alleged “Original Charitable Purpose” of Lutheran Medical and Good Samaritan arise only as members of the general public. As such, Plaintiffs do not have the requisite legal or special interest to seek enforcement since such a suit may be maintained by the Attorney General. *See id.* at cmt. d; *see also* *Fields v. Banner Health*, 2005 WL 4806305, 5 (D. Ariz. 2005) (“Standing is limited to those with a special interest in the enforcement of a trust, and there is no evidence that Plaintiff has any interest more specific or special than that derived from membership in a large class of beneficiaries.”) (attached hereto as Ex. L); *Feliciano v. Thomas Jefferson Univ. Hosp.*, 2005 WL 2397047, 5 -6 (D. Pa. 2005) (“Plaintiff lacks standing to enforce her claim. In this case, Plaintiff alleges that the class she hopes to represent contains ‘thousands of individuals and therefore is so numerous that joinder is impracticable.’ Plaintiff herself has therefore alleged that she shares her breach of public charitable trust claim with so many other persons that she has no interest distinct from other members of the public.”) (attached hereto as Ex. M).

Moreover, without the requisite legal or special interest, Plaintiffs cannot show an injury in fact. *See* *Reeves*, 170 P.3d at 851 (“A plaintiff establishes an injury in fact by alleging facts that show the defendant caused harm to the plaintiff's legally protected interest.”); *see also* *Board of County Comm'rs of County of Adams v. Colo. Dept. of Pub. Health and Env't*, 2007 WL 2874409, 2 (Colo. Ct. App. 2007) (“Thus, because Adams County does not hold a legally protected interest in the license, and because the complaint seeks judicial review of the license—not review of Adams County's authority over land use—Adams County has not shown any injury-in-fact.”) (attached hereto as Ex. N).

ii. Plaintiffs' Alleged Injuries Are Too Speculative and Remote to Constitute an Injury in Fact.

Even if Plaintiffs have a special or legal interest in the continuation of the alleged “Original Charitable Purpose” of Lutheran Medical and Good Samaritan, the injuries they allege will result from the proposed transaction do not constitute an injury in fact.

Plaintiff Compassion & Choices does not claim any injury in fact that it will face if the proposed transaction proceeds. Indeed, as a nonprofit corporation that is in no way affiliated

with Defendants in this case, it is impossible to see how Compassion & Choices will be directly injured by the proposed transaction. Compassion & Choices does, however, claim that members of the general public will be injured by the proposed transaction. *See* Pls.' Compl. ¶ 66. But a plaintiff who has not itself sustained an injury in fact has standing to sue only "if it has a valid assignment of a claim from one who has sustained such injury." *U.S. Fax Law Center, Inc. v. T2 Tech., Inc.*, 2007 WL 4336232, 2 (Colo. Ct. App. 2007) (attached hereto as Ex. O). As Compassion & Choices alleges no valid assignment of any claims from members of the general public who have sustained or will sustain an injury as a result of the proposed transaction, it does not have standing to sue even if it has a cognizable legal interest.

Moreover, the injuries alleged by Plaintiffs Sadler and Krebs are too speculative and remote to constitute an injury in fact. Plaintiff Sadler, for example, claims that if the proposed transaction proceeds, the advanced directives she executed in 2006 regarding her end-of-life choices at Good Samaritan will not be honored. *See* Pls.' Compl., ¶ 7. This injury, however, is purely speculative and cannot be determined until some remote time in the future if and when Plaintiff Sadler's end-of-life choices are at issue, and only if they are at issue at Good Samaritan. Plaintiff Krebs claims that if the proposed transaction proceeds, he will no longer be able to perform certain medical procedures at Lutheran Medical to the detriment of his patients. *See id.* at ¶ 10. Again, this injury is speculative and cannot be determined until some remote time in the future if and when Plaintiff Krebs is faced with a patient whom he believes should undergo a procedure at Lutheran Medical that is prohibited as a result of the proposed transaction. *See, e.g., GF Gaming Corp. v. Hyatt Gaming Mgmt., Inc.*, 77 P.3d 894 (Colo. Ct. App. 2003) (gaming licensee's alleged injury—that it could no longer "fairly compete"—was held insufficient to confer standing to challenge the issuance of licenses to two other gaming organizations; the court found that any injury inferred from casino patrons' hypothetical preference for the two gaming organizations' casinos over the gaming licensee's casinos was "both too speculative and indirect to be actionable.") (attached hereto as Ex. P).

Thus, Plaintiffs Sadler and Krebs cannot say with any certainty that their alleged injuries will ever occur—that the opportunity to use the "end of life" directives at Good Samaritan or the opportunity to advise patients on prohibited procedures at Lutheran Medical, respectively, will ever arise. Without such certainty, Plaintiffs not only lack standing but lack any actual controversy on which to base their declaratory judgment action. *See, e.g., Burkett v. Amoco Production Co.*, 85 P.3d 576 (Colo. Ct. App. 2003) (no actual controversy existed in landowners' action for declaratory judgment that they had a right to pick where defendant gas company would place its wells; defendant gas company had not yet chosen the location of its wells and, thus, landowners could not state with certainty that they would object to the location chosen) (attached hereto as Ex. Q).

Plaintiffs' First and Second Claim for Relief arise solely out of Plaintiffs' interest—as members of the general public—in the enforcement of the alleged "Original Charitable Purpose" of Lutheran Medical and Good Samaritan. Because Plaintiffs have no legal or special interest in such enforcement and because Plaintiffs' have not alleged an injury in fact sufficient to allow them to seek such enforcement, Plaintiffs lack standing. Accordingly, the Court should dismiss Plaintiffs' First and Second Claim for Relief for lack of subject matter jurisdiction.

III. The Court Should Dismiss Plaintiffs' First Claim for Relief for Failure to State a Claim because the Uniform Management of Institutional Funds Act Does Not Extend to CFF's Membership Interest in Exempla and Its Application to the Proposed Transaction Would Improperly Preempt the Attorney General's Exclusive Jurisdiction and Authority.

Plaintiffs' First Claim for Relief is based on UMIFA, adopted in Colorado under Colorado Revised Statute Section 15-1-1101, *et seq.* Plaintiffs argue that because Lutheran Medical and Good Samaritan are "institutional funds" held by CFF, the Court must approve any transaction which will result in a failure of the alleged "Original Charitable Purpose." Plaintiffs' argument, however, fails as a matter of law as UMIFA is inapplicable to the proposed transaction.

First, Plaintiff mistakenly equates CFF's membership interest in Exempla, which owns Lutheran Medical and 100% of the economic membership interest in Good Samaritan, as constituting "institutional funds"—a construction that is entirely inconsistent with the plain language of UMIFA. UMIFA provides in relevant part that "a restriction on the use or investment of an institutional fund imposed by the applicable gift instrument may be released, entirely or in part, by order of the district court after reasonable notice to the Attorney General and an opportunity for him to be heard, and upon a finding that the restriction on the use or investment of the fund is obsolete, inappropriate, or impracticable." (emphasis added).³ Colo. Rev. Stat. § 15-1-1109(2).

UMIFA defines "institution" as "an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes." *Id.* at § 15-1-1103(5). Moreover, an "institutional fund" is defined in relevant part as "a fund held by an institution for its exclusive use, benefit, or purpose." *Id.* at § 15-1-1103(6).

The common term "fund" is not defined by UMIFA. The comments to UMIFA, however, reveal that the term "fund" is a collection of pooled assets held for long or short term purposes. Specifically, the official comment to UMIFA states that "[a]n institutional fund is any fund held by an institution which it may invest for a long or short term." Unif. Mgmt. of Inst. Funds Act § 1 cmt. (1972) (attached hereto as Ex. R). Under this definition, the term "fund" is necessarily limited to liquid assets.

This construction of the term "fund" is in harmony with and supported by Colorado law which limits the term to currency and other resources which are readily converted into cash:

"In common parlance, the word 'funds' is understood to encompass more than currency. The scope of the term extends as well to 'negotiable paper readily convertible into cash' and 'available pecuniary resources.' . . . For example, 'funds' includes moneys, and much more, such as notes, bills, checks, drafts, stocks, and

³ UMIFA defines "gift instrument" as "a will, deed, grant, conveyance, agreement, memorandum, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund." Colo. Rev. Stat. § 15-1-1103(2).

bonds...In other words the general term can and does include not only currency but also other types of pecuniary resources which are readily converted into cash.”

In re Plich’s Estate, 348 P.2d 706, 708-09 (Colo. 1960) (emphasis added and citations omitted) (attached hereto as Ex. S).

Moreover, Black’s Law Dictionary (8th Ed. 2004) (attached hereto as Ex. T) defines the term “fund” as “[a] sum of money of other liquid assets established for a specific purpose.”

CFF does not own Lutheran Medical or Good Samaritan, nor does it hold Lutheran Medical and Good Samaritan as assets, liquid or otherwise. As stated in Plaintiffs’ Complaint, CFF has a membership interest in Exempla. Exempla owns Lutheran Medical and 100% of the economic membership interest in Good Samaritan. A membership interest in a nonprofit corporation such as Exempla clearly does not fall within any definition of the term “fund.” But even if CFF held Lutheran Medical and Good Samaritan as assets, such assets would constitute non-liquid assets—not, as Plaintiffs claim, assets that “may be invested for a long or short term” period of time such as money. As such, the provisions of UMIFA are wholly inapplicable to CFF’s transfer of its membership interest in Exempla.

Second, Plaintiffs’ application of UMIFA would improperly preempt the Attorney General’s exclusive jurisdiction and authority under the hospital conversion statute. As previously discussed, the hospital conversion statute gives the Attorney General exclusive jurisdiction to review transactions involving a non-profit hospital and another non-profit entity to determine whether the transaction will result “in a material change in the charitable purposes to which the assets of the hospital have been dedicated.” Colo. Rev. Stat. § 6-19-203.

UMIFA, on the other hand, requires district court approval of any transaction that changes the charitable purpose to which “institutional funds” are applied. *See* Colo. Rev. Stat. § 15-1-1109(2). If UMIFA were applicable to the proposed transaction—which would require assuming that Lutheran Medical and Good Samaritan constitute “institutional funds” and that the proposed transaction would result in failure of Lutheran Medical and Good Samaritan to provide broad non-sectarian health care services—the Court, not the Attorney General, would have exclusive jurisdiction over the proposed transaction.

Plaintiffs’ application of UMIFA is, thus, clearly in conflict with the hospital conversion statute—Plaintiffs would relinquish the Attorney General’s exclusive jurisdiction over the proposed transaction and defers such jurisdiction to the Court. But when there is an apparent conflict between two statutory sections that cannot be harmonized, the statute enacted later in time controls. *Salazar v. Indus. Claim Appeals Office of State of Colo.*, 10 P.3d 666, 667 (Colo. Ct. App. 2000) (attached hereto as Ex. U).

Because the hospital conversion statute was enacted by the Colorado Legislature in 1998, whereas UMIFA was enacted in 1972, its provisions providing the Attorney General with exclusive jurisdiction over the proposed transaction control over the provisions of UMIFA which require the Court’s approval.

Plaintiffs' First Claim for Relief is based on the application of UMIFA to CFF's transfer of its membership interest in Exempla to SCLHS. Because UMIFA is wholly inapplicable to the proposed transaction, Plaintiffs First Claim for Relief fails as a matter of law. Accordingly, the Court should dismiss Plaintiffs' First Claim for Relief for failure to state a claim for which relief can be granted.

Furthermore, SCLHS adopts the arguments set forth by CFF in its Motion to Dismiss the Complaint for Lack of Standing and Subject Matter Jurisdiction, and Failure to State a Claim.

IV. Conclusion

For the above-stated reasons, Defendant Sisters of Charity Leavenworth Health System, Inc., respectfully moves the Court to dismiss Plaintiffs' First and Second Claim for Relief, and to grant all other relief deemed just and equitable.

Dated January 18, 2008.

Original Signature on File

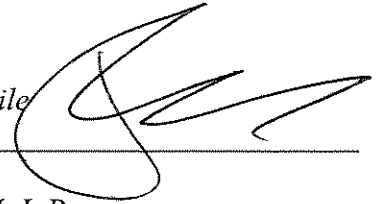
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2008, a copy of the foregoing **DEFENDANT SISTERS OF CHARITY LEAVENWORTH, INC.'S, MOTION TO DISMISS PLAINTIFFS' FIRST AND SECOND CLAIM FOR RELIEF** was e-served via LexisNexis File & Serve to the following:

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