

DISTRICT COURT, COUNTY OF BOULDER

Boulder Justice Center
177 Sixth Street
Boulder, Colorado 80302

Plaintiffs: AMI SADLER; COMPASSION & CHOICES; COMPASSION & CHOICES OF COLORADO; STEPHEN KREBS, MD; SHANNON LEWIS; COLORADO RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; and ASSOCIATES IN WOMEN'S HEALTH, P.C.

Defendants: 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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Case Number: 2007 CV 1113

Div.: Ctrm.:

ANSWER OF THE EXEMPLA DEFENDANTS TO FIRST AMENDED COMPLAINT

Defendants Exempla, Inc., whom plaintiffs identify as “in its corporate capacity and its trade dress of Exempla Lutheran Medical Center”, and Exempla Good Samaritan Medical Center, LLC (the “Exempla defendants”), through their undersigned counsel, for their Answer to the First Amended Complaint filed on behalf of plaintiff Ami Sadler, *et al.* (“plaintiffs”), state and aver as follows:

ANSWER TO I. INTRODUCTION

1-2. The Exempla defendants admit and aver that Colorado law supports the appropriateness and the necessity of a court first making a determination concerning the legality of charitable assets being diverted from their original intended purpose before the assets legally

can be diverted, that defendants Community First Foundation, f/k/a Lutheran Medical Center Foundation (“CFF”), and Sisters of Charity of Leavenworth Health Systems, Inc. (“SCLHS”) have proposed a transaction involving CFF’s proposed sale to SCLHS of what CFF claims is its undivided interest in Exempla, Inc. assets or its membership interest in Exempla, Inc., that one consequence of the SCLHS/CFF proposed transaction will be that two of the three acute care hospitals which are part of the Exempla Healthcare System will be prevented from performing their intended purposes in that those hospitals, Exempla Lutheran Medical Center (“ELMC”) and Exempla Good Samaritan (“EGS”) will not be permitted to furnish a full spectrum of beginning of life and end of life medical care, and will not be permitted to furnish other medical services, all as prohibited by the Roman Catholic Church in the Church’s ethical and religious directives (“ERD’s”) and in other Roman Catholic Church pronouncements, that CFF will, if the proposed SCLHS/CFF transaction is closed and effectuated, receive very substantial money, totaling perhaps as much as \$311 million, which CFF has stated will not be used by it for funding healthcare services, and that the purpose of furnishing non-sectarian healthcare services by ELMC and EGS is not an “obsolete, inappropriate or impracticable” purpose, and the Exempla defendants deny all other allegations contained in paragraphs 1 and 2 of plaintiffs’ First Amended Complaint.

ANSWER TO II. JURISDICTION AND VENUE

3. The Exempla defendants admit that this Court has jurisdiction of this case.

4. The Exempla defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff Ami Sadler and the Exempla defendants admit and aver all other allegations contained in paragraph 4 of plaintiffs’ First Amended Complaint.

5. The Exempla defendants admit and aver that plaintiffs purport to be prosecuting this case in accordance with the common law principles and doctrines referenced by them in paragraph 5 of plaintiffs’ First Amended Complaint and in accordance with the Uniform Management And Institutional Funds Act, C.R.S. §15-1-1101, *et seq.*

6. The Exempla defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of plaintiffs’ First Amended Complaint.

ANSWER TO III. PARTIES

7-13. The Exempla defendants deny knowledge or information sufficient to form a belief as to the truth of all allegations contained in paragraphs 7-13, inclusive and, therefore, deny the same.

14-15. The Exempla defendants admit all allegations contained in paragraphs 14 and 15 plaintiffs’ First Amended Complaint.

16-17. The Exempla defendants admit all allegations contained in paragraph 16 and 17 of plaintiffs’ First Amended Complaint except the allegation referring to Exempla Lu-

theran Medical Center as a “trade name”, as to which allegation Exempla denies knowledge or information sufficient to form a belief as to the truth of such allegation.

18.-19 Upon information and belief, the Exempla defendants admit all allegations contained in paragraphs 18 and 19, with the exception that the Exempla defendants deny plaintiffs’ allegation that Kaiser and Exempla “collaborated” to form EGS because the Exempla defendants do not know what meaning plaintiffs ascribe to the word “collaboration” and, except the Exempla defendants deny knowledge or information sufficient to form a belief concerning the truth of the allegations made with respect to the Boulder County Assessor’s Office in the second sentence of paragraph 19 of plaintiffs’ First Amended Complaint.

20. The Exempla defendants admit and aver that each of CFF and SCLHS is a member of Exempla, Inc., although the membership of each has been suspended, and the Exempla defendants also admit that each is designated as a sponsor.

21. Plaintiffs advance allegations of law in paragraph 21 of their First Amended Complaint which do not call for an answer by the Exempla defendants but, to the extent that paragraph 21 of plaintiffs’ First Amended Complaint does call for an answer by the Exempla defendants, the Exempla defendants deny paragraph 21 of plaintiffs’ First Amended Complaint.

ANSWER TO IV. FACTUAL ALLEGATIONS

22-37. The Exempla defendants deny knowledge or information sufficient to form a belief as to the truth of all allegations contained in paragraphs 22-37, inclusive of plaintiffs’ First Amended Complaint and, therefore, deny all such allegations.

38.-39. The Exempla defendants admit all allegations contained in paragraphs 38 and 39 of plaintiffs’ First Amended Complaint.

40. The Exempla defendants admit that CFF, which formerly was known as Lutheran Medical Center Foundation, is a member of Exempla, Inc. (currently suspended), and that CFF is designated as a sponsor of Exempla, Inc., and the Exempla defendants deny all other allegations contained in paragraph 40 of plaintiffs’ First Amended Complaint.

41. The Exempla defendants admit and aver that in October, 2007 CFF and SCLHS filed what they called a “Notice” with the Office of the Attorney General of the State of Colorado in which they discussed the transaction proposed by them pursuant to which CFF will be selling to SCLHS its purported undivided interest in the assets of Exempla, Inc. or its interest as a member of Exempla, Inc. and will allegedly be receiving consideration from SCLHS including \$50 million in cash, a promissory note with a term of five years and in the face amount of \$200 million, and an instrument which CFF and SCLHS describe as a “debenture” which is in the face amount of \$61 million, and the Exempla defendants admit and aver that plaintiffs’ First Amended Complaint refers to the SCLHS/CFF transaction as the “proposed transaction”.

42. The Exempla defendants admit and aver that CFF and SCLHS have made statements indicating that, following the closing of the proposed transaction, both ELMC

and EGS will be “Catholic hospitals”, meaning that they will be operated in accordance with and subject to the requirements of the ERD’s and CFF and SCLHS have made statements indicating that these two hospitals no longer will be furnishing non-sectarian healthcare services which are prohibited by the ERD’s, the current and historical furnishing of which services has been an important and material part of the charitable purposes of Exempla, Inc. and Exempla Healthcare, and the furnishing of which is referred to by plaintiffs as the “original charitable purpose” of Exempla, Inc., and the Exempla defendants deny all other allegations contained in paragraph 42 of plaintiffs’ First Amended Complaint.

43. The Exempla defendants admit and aver that CFF has made public statements indicating that, following the closing of the proposed SCLHS/CFF transaction, CFF will no longer further the “original charitable purpose” of Exempla, Inc. and Exempla Healthcare, in that the proceeds which CFF receives from its sale of its purported undivided interest in Exempla, Inc. assets and its membership interest in Exempla, Inc., totaling as much as \$311 million, will be used by CFF for purposes not contemplated or intended when CFF was named as a member of Exempla, Inc. and designated as a sponsor, and that CFF’s recent filings with the Colorado Secretary of State do not refer to ELMC as one of the beneficiaries of CFF’s future funding activities, and the Exempla defendants deny all other allegations contained in paragraph 43 of plaintiffs’ First Amended Complaint.

44. Plaintiffs describe, in paragraph 44 of their First Amended Complaint, the relief which they are seeking and, accordingly, paragraph 44 of plaintiffs’ First Amended Complaint does not call for an answer by the Exempla defendants but, to the extent that paragraph 44 of plaintiffs’ First Amended Complaint does call for an answer, the Exempla defendants agree that the relief sought by plaintiffs is relief which this Court should award in plaintiffs’ favor.

45-48. The Exempla defendants admit and aver that plaintiffs’ allegations concerning the formation of Exempla, Inc. in 1997-1998 are generally correct.

49. The Exempla defendants admit and aver that CFF became the sole member of Exempla, Inc. in Fall, 1997 and that thereafter, and in accordance with the Affiliation Agreement and other documents known as the “Affiliation Documents”, CFF and SCLHS were identified as the two members of Exempla, Inc., and the Exempla defendants further admit and aver that CFF also was designated as a sponsor of Exempla, Inc.

50. The Exempla defendants admit and aver that in and about 2002 and 2003 Exempla, Inc. had discussions with various parties, including SCLHS and CFF, concerning the construction and operation of EGS and that EGS was intended to serve as an acute care hospital facility in Boulder County serving the medical needs of a universe of patients which includes persons who are insured members of Kaiser, and the Exempla defendants deny all other allegations contained in paragraph 50 of plaintiffs’ First Amended Complaint.

51-52. The Exempla defendants admit the allegations contained in paragraphs 51 and 52 of plaintiffs’ First Amended Complaint.

53. The Exempla defendants admit and aver that Exempla, Inc. and Exempla Healthcare are financially successful and that Exempla, Inc. enjoys a high bond rating.

54. The Exempla defendants deny knowledge or information sufficient to form a belief concerning the allegations contained in paragraph 54 of plaintiffs' First Amended Complaint and, therefore, deny the same.

55. The Exempla defendants admit and aver that the Board of Directors of Exempla, Inc. participated in discussions with representatives of CFF and SCLHS which concerned, among other things, the preservation of Exempla, Inc.'s and Exempla Healthcare's original charitable purpose, that CFF and SCLHS ultimately decided to proceed with their proposed transaction in the face of objections by Exempla, Inc. and regardless of the fact that doing so would result in imposing the ERD's upon EGS and ELMC, and the Exempla defendants admit and aver that Exempla, Inc. has opposed the SCLHS/CFF proposed transaction for a number of reasons including the fact that the proposed transaction will result in the imposition of the ERD's upon the furnishing of healthcare services at EGS and ELMC, contrary to the charitable purposes of Exempla, Inc. and the Exempla Healthcare System.

56. The Exempla defendants admit all allegations contained in paragraph 56 of plaintiffs' First Amended Complaint.

57. The Exempla defendants admit and aver that CFF has refused to make a commitment to use the funds, or any portion thereof, which it may derive from its sale of its purported undivided interest in the assets of Exempla, Inc., or of its membership interest in Exempla, Inc., for the original charitable purpose of Exempla, Inc. or Exempla Healthcare.

58-60. The Exempla defendants admit the allegations contained in paragraphs 58, 59 and 60 of plaintiffs' First Amended Complaint.

61-64. The Exempla defendants admit the allegations contained in paragraphs 61-64, inclusive, of plaintiffs' First Amended Complaint.

65-66. The Exempla defendants admit and aver that the ERD's broadly impact the furnishing of medical care, the making of medical decisions and the conduct of medical practice and medical counseling at hospitals, including by establishing the prohibitions upon medical services and counseling described in paragraph 66 of plaintiffs' First Amended Complaint.

67(a)-(m). The Exempla defendants admit and aver that, based on their understanding of the ERD's, the ERD's, on their face or as applied, prohibit the performance of abortions, the counseling of contraceptive practices or the administration of contraceptives, except in extraordinary circumstances, the performance of elective tubal ligations, the furnishing of family planning services, the furnishing of counseling about the use of prophylactics relative to reducing the risk of HIV/AIDS, and the furnishing of certain infertility treatments and certain end of life care, and the Exempla defendants admit and aver that the ERD's also prohibit research and therapy using embryonic stem cells. Upon information and belief, the Exempla defendants understand that the ERD's have been interpreted and applied at various Catholic hospitals throughout the United States to prohibit the types of medical services, counseling and practices described in paragraphs 67(a)-67(m) of plaintiffs' First Amended Complaint.

68. The Exempla defendants understand, upon information and belief, that the Roman Catholic Church has promulgated opinions and pronouncements requiring the use of feeding tubes for patients in a “persistent vegetative state” and that these pronouncements have the same applicability to Catholic hospitals as do the ERD’s.

69. The Exempla defendants admit all allegations contained in paragraph 69 of plaintiffs’ First Amended Complaint.

ANSWER TO FIRST CLAIM FOR RELIEF

70. The Exempla defendants incorporate all allegations, averments and denials made by them in paragraphs 1 to 69 above.

71. The Exempla defendants admit and aver that CFF has been designated as a sponsor of Exempla, Inc., that CFF is one of two (currently suspended) members of Exempla, Inc. and that all assets which CFF holds, as a consequence and function of its status as a member and a sponsor are held and intended to be used only for purposes of furthering the original charitable purposes of Exempla, Inc. and Exempla Healthcare.

72. Upon information and belief, the Exempla defendants admit and aver that donors who have contributed through the years to ELMC or to entities related to ELMC have understood that their donations would be used in accordance with the non-sectarian character of that hospital and its affiliated entities.

73. The Exempla defendants admit the allegations contained in paragraph 73 of plaintiffs’ First Amended Complaint.

74-76. The allegations contained in paragraphs 74-76 of plaintiffs’ First Amended Complaint concern matters of law which do not call for an answer by the Exempla defendants but, to the extent that an answer is called for from the Exempla defendants, the Exempla defendants, upon information and belief, believe that the Uniform Management And Institutional Funds Act is applicable to CFF.

77. The Exempla defendants admit and aver that CFF is one of two (currently suspended) members of Exempla, Inc., that Exempla, Inc. owns ELMC and that Exempla, Inc. is the economic member of a limited liability company which owns EGS.

78-79. The Exempla defendants admit the allegations made in paragraphs 78 and 79 of plaintiffs’ First Amended Complaint.

80-81. Plaintiffs allege matters of law in paragraphs 80 and 81 which do not call for an answer by the Exempla defendants but, to the extent that an answer by the Exempla defendants is called for, the Exempla defendants agree that CFF is required to seek and to obtain judicial approval of its plan to use funds which it may obtain as a result of the effectuation of the SCLHS/CFF transaction if CFF plans to use those funds for any purposes other than Exempla, Inc.’s original charitable purpose, and that CFF’s use of funds for such other purposes is illegal

for a number of reasons, including the fact that the original charitable purpose of Exempla, Inc. and Exempla Healthcare has not been rendered “obsolete, inappropriate or impracticable”.

82-83. The Exempla defendants admit the allegations contained in paragraphs 82 and 83 of plaintiffs’ First Amended Complaint.

84. The Exempla defendants deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 84 of plaintiffs’ First Amended Complaint.

85. The Exempla defendants agree with the allegations contained in paragraph 85 that SCLHS’s application of the ERD’s to ELMC and EGS will work a material change in the charitable purposes served by Exempla, Inc. and the Exempla Healthcare System, and that the imposition of the ERD’s at ELMC and EGS is contrary to the agreements between the parties entered into in Fall, 1997 upon the formation of Exempla, as those agreements have been supplemented and reaffirmed in contracts and by discussions since that time.

86. The Exempla defendants deny knowledge or information sufficient to form a belief concerning the truth of the allegations contained in paragraph 86.

87. Plaintiffs advance an allegation in paragraph 87 of their First Amended Complaint stating their construction of C.R.Civ.P. 57(j) which does not call for an answer by the Exempla defendants but, if the allegations do call for an answer by the Exempla defendants, the Exempla defendants deny knowledge or information sufficient to form a belief as to the truth or correctness of plaintiffs’ allegations.

ANSWER TO SECOND CLAIM FOR RELIEF

88. The Exempla defendants incorporate all allegations, averments and denials made by them in paragraphs 1 to 87 above.

89. The Exempla defendants admit and aver that CFF is a non-profit organization which was designated as a sponsor of Exempla, Inc. and which is a member (currently suspended) of Exempla, Inc. and that CFF is aware that the mission of ELMC and EGS is to provide broad, non-sectarian healthcare to the communities which they serve.

90. The Exempla defendants admit that an important charitable purpose of ELMC and EGS is to provide broad, non-sectarian healthcare to the communities in which those healthcare facilities are located.

91-93. The Exempla defendants are uncertain what plaintiffs mean by the phrase “breached the trust CFF holds in Lutheran and Good Samaritan” but, putting that allegation aside, the Exempla defendants admit and aver all allegations contained in paragraphs 91, 92 and 93 of plaintiffs’ complaint.

FIRST AFFIRMATIVE DEFENSE

The Exempla defendants deny each and every allegation and averment in plaintiffs' First Amended Complaint except for those specific allegations and averments which the Exempla defendants explicitly admit above.

SECOND AFFIRMATIVE DEFENSE

The Exempla defendants do not understand that plaintiffs, through their First Amended Complaint, are seeking any relief in the form of an order requiring the Exempla defendants to perform any action or to desist from performing any action, or that plaintiffs are seeking any other relief against Exempla, Inc., but, if plaintiffs are asking that this Court enter an order seeking the awarding of relief against the Exempla defendants, plaintiffs have failed to state a claim upon which relief can be granted against the Exempla defendants.

WHEREFORE, the Exempla defendants, who have filed a lawsuit in Denver District Court which advances allegations and makes claims for relief similar to the allegations advanced and the claims for relief made by plaintiffs in this case, agree, as plaintiffs assert, that this Court should declare that the proposed SCLHS/CFF transaction should not be permitted to close, that this Court should order CFF and SCLHS to abandon their proposed transaction and to comply with their fiduciary obligations, contractual obligations and other covenants as explained in the lawsuit brought by Exempla, Inc. against CFF and SCLHS in Denver District Court, that plaintiffs, in addition to the other relief they request, may be entitled to the imposition of the trust also requested by them and that the Court should award the Exempla defendants such other relief as the Court finds is fair and just.

Dated: February 25, 2008
Denver, Colorado

Respectfully submitted,

HOROWITZ/FORBES, LLP

Original Signature On File

By: _____

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Attorneys For The Exempla Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2008 a true and correct copy of the foregoing Answer Of The Exempla Defendants To First Amended Complaint was served via JusticeLink and/or was placed in the United States mail, postage prepaid, properly addressed to:

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