

<p>DISTRICT COURT BOULDER COUNTY, COLORADO Boulder Justice Center, 1777 6th Street Boulder, Colorado 80302</p>	
<p>Plaintiffs:</p> <p>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.</p> <p>Defendants:</p> <p>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</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>HOLME ROBERTS & OWEN LLP Michael J. Hofmann, # 30207 Steven J. Perfremment, # 27442 1700 Lincoln Street, Suite 4100 Denver, Colorado 80203-4541 Telephone: (303) 861-7000 Facsimile: (303) 866-0200 E-mail: michael.hofmann@hro.com steven.perfremment@hro.com Attorneys for Community First Foundation</p>	<p>Case Number: 07CV1113</p> <p>Ctrm/Div: 2</p>
<p style="text-align: center;">DEFENDANT COMMUNITY FIRST FOUNDATION’S MOTION TO DISMISS FIRST AMENDED COMPLAINT</p>	

Defendant Community First Foundation (“CFF”) respectfully requests that the Court dismiss Plaintiffs’ First Amended Complaint (“Amended Complaint”) for lack of standing under Colorado Rule of Civil Procedure 12(b)(1), and failure to state a claim on which relief may be granted under Colorado Rule of Civil Procedure 12(b)(15). In support, CFF states as follows:

INTRODUCTION

Exempla, Inc. (“Exempla”), is a nonprofit corporation that operates a three-hospital healthcare system in the Denver metropolitan area. Exempla has two members, CFF and the Sisters of Charity of Leavenworth Health System, Inc. (“Sisters of Charity”), each of which owns a 50% membership in Exempla. The Plaintiffs are members of the general public who have no legal relationship to Exempla, but who object to decisions made by CFF and the Sisters of Charity about the funding and governance of Exempla.

CFF and Sisters of Charity have agreed to a transaction, under which CFF will transfer its 50% membership interest in Exempla to the Sisters of Charity. As a result of the transaction, the Sisters of Charity will make a \$1.1 billion new investment to fund needed capital improvements to the Exempla system. The Sisters of Charity will make an additional \$311 million payment to CFF, which will be used to further its charitable purposes in Colorado. The transaction is specifically authorized by Exempla’s Bylaws, which provide that “[a] member may transfer a membership to the other Member, if agreed by both of the Members” (Ex. A, Amended and Restated Bylaws of Exempla § 3.5), and has been approved by the Colorado Attorney General pursuant to his statutory authority over nonprofit licensed hospitals.

As a result of the transaction, two of the hospitals in the Exempla system will become subject to rules governing Catholic health care institutions. The Plaintiffs object to the

transaction for this reason, and as members of the general public ask this Court to intervene to override the decisions of CFF and the Sisters of Charity, and the ruling of the Attorney General. Colorado law, however, does not permit the public to interfere in this manner with the operation of licensed nonprofit hospitals, requiring dismissal of the Amended Complaint.

STATEMENT OF RELEVANT FACTS

The Amended Complaint references various documents, including the Exempla Bylaws and an October 30, 2007, notification of the anticipated transaction to the Colorado Attorney General, and the transfer agreement between CFF and the Sisters of Charity. (*See* Amended Complaint ¶¶ 41, 45, 62, 63). “[D]ocuments referred to in a pleading are, in effect, incorporated in that pleading, and may properly be considered by the trial court in deciding whether to dismiss a claim on any grounds.” *City of Boulder v. Public Serv. Co. of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999). Therefore, CFF has attached and will refer in this statement of facts to the Exempla Bylaws (Ex. A), the Membership Transfer Agreement (Ex. B), and the Attorney General’s Finding of No Material Change in Charitable Purpose (“AG’s Finding”) (Ex. C).

The current structure of Exempla was created in 1997, through the execution of an Affiliation Agreement and related documents. CFF and the Sisters of Charity together own 100% of the outstanding membership interests in Exempla, with each owning a 50% membership interest. (Amended Complaint ¶ 49). On November 8, 2002, the parties amended the Affiliation Agreement and Exempla’s Bylaws to provide that “[a] member may transfer a membership to the other Member, if agreed by both of the Members.” (Ex. A, Exempla Bylaws § 3.5).

Exempla operates a healthcare system that includes three acute care hospitals in the Denver metropolitan area. Exempla owns Exempla Lutheran Medical Center (“Lutheran

Medical”), located in Wheat Ridge, is the sole economic member of the entity that owns Exempla Good Samaritan Medical Center (“Good Samaritan”) in Lafayette, and manages Exempla St. Joseph Hospital (“St. Joseph”) located in Denver.¹

In October of 2007, CFF and the Sisters of Charity determined that restructuring the membership of Exempla was “necessary and appropriate in order to enhance the ability to fulfill their shared goals for assuring that Exempla is positioned to continue providing outstanding healthcare services within its communities.” (Ex. B, Transfer Agreement, Recitals C & D). Therefore, on October 18, 2007, the members entered into an agreement by which CFF would transfer its 50% membership interest to the Sisters of Charity in return for certain commitments. (Ex. B, Transfer Agreement). Under the Transfer Agreement, Sisters of Charity will pay \$311 million for CFF’s 50% membership interest in Exempla.² (Ex. B, Transfer Agreement § 2.2). In addition, the Sisters of Charity agreed to make equity contributions to Exempla totaling \$100 million, and to loan Exempla “at least \$200 million” to fund capital expenses. (*Id.* § 7.3(a)). The Sisters of Charity has separately indicated that, after the closing, they intend to provide approximately \$800 million to fund the reconstruction or replacement of St. Joseph Hospital, the economic benefit of which will accrue to Exempla.

On October 30, 2007, CFF and Sisters of Charity notified the Colorado Attorney General of the proposed transaction, as required by C.R.S. §§ 6-19-103 and 6-19-202. Under this statute,

¹ Due to restrictions on the alienation of property owned by Catholic organizations, an affiliate of the Sisters of Charity retains ownership of the St. Joseph Hospital facility. Exempla, however, receives all revenues and any profits from St. Joseph.

² In reviewing the transaction, the Colorado Attorney General found that “\$311 million is a fair and reasonable valuation of CFF’s 50% interest in the Exempla System.” (Ex. C, AG’s Finding ¶ 15).

the Attorney General has the authority to review proposed transactions involving non-profit hospitals. C.R.S. § 6-19-203. On December 27, 2007, the Attorney General determined that the transaction would not cause a material change in the charitable purpose of the hospitals in the Exempla system or divert charitable assets outside of Colorado, and therefore approved the proposed membership transfer without further review. (Ex. C, AG's Finding ¶ 28).

Before the Attorney General issued its finding, however, on December 19, 2007, Plaintiffs filed suit to preempt that decision and block the transaction. The Amended Complaint sets forth Plaintiffs' objection to the transfer of CFF's membership interest to the Sisters of Charity, because it is a Catholic-sponsored charity (Amended Complaint ¶ 42), and alleges two claims for relief. According to Plaintiffs, the Sisters of Charity's affiliation with the Catholic Church is problematic because Ethical and Religious Directives ("ERDs") of the Catholic Church may prohibit the performance of certain medical procedures at two hospitals in the Exempla system, Lutheran Medical and Good Samaritan. (*Id.*; see Ex. C, AG's Findings ¶ 14). The third Exempla hospital, St. Joseph, has long been subject to these ERDs.

Plaintiffs are members of the general public: (1) a woman who was treated at Good Samaritan in 2006 (Amended Complaint ¶ 23); (2) "Compassion & Choices," a national advocacy group that advocates for the expansion of end-of-life choices, including "patient-directed dying" (*i.e.* suicide)³ (*id.* ¶ 24-25); (3) the Colorado chapter of that organization (*id.* ¶ 26); (4) a doctor who currently "can recommend and link with others" to perform abortions at Lutheran Medical, and "frequently addresses the withdrawal of futile care at end of life" with

³ Compassion & Choices was formerly known as "The Hemlock Society." See <http://www.compassionandchoices.org/aboutus/themovement.php>.

patients (*id.* ¶ 27-30); (5) a pregnant woman who plans to give birth and have a tubal ligation sometime “in or around the summer of 2008” at Lutheran Medical (*id.* ¶¶ 31-32); (6) an abortion advocacy group “committed to maintaining the 1973 Supreme Court decision legalizing abortion” (Amended Complaint ¶ 331; *see* <http://www.corcrc.org/>); and (6) a small group of doctors (Amended Complaint ¶¶ 34-36).

The Colorado Attorney General considered and rejected objections regarding the ERDs in its review of the proposed transaction. First, the Attorney General determined that “the charitable purpose of the Exempla hospital system is to provide general health care services to the surrounding community.” (Ex. C, AG’s Finding ¶ 18). The Attorney General then compared the number of procedures that might have been effected by the application of ERDs to the number of total patient visits to the hospitals, finding that Lutheran Medical and Good Samaritan had nearly 500,000 patient visits in 2006, and the application of ERDs would have affected less than 700 of the procedures performed that year.⁴ (*Id.* ¶ 19).

In addition, the Transfer Agreement obligates CFF to commit \$2.9 million per year toward funding procedures that cannot be performed at Good Samaritan and Lutheran Medical due to the ERDs, or other projects to benefit Exempla. (*Id.* ¶ 15; Ex. B, Transfer Agreement § 7.3(b)). Based on all of these factors, the Attorney General concluded that the “reduction in certain ERD impacted services . . . is not a material change to the charitable purpose of the system as a whole to provide general health care services to the surrounding community.”

⁴ The Amended Complaint grossly exaggerates the potential impact of the ERDs on activities at the two affected hospitals, since most of the procedures referenced in the Amended Complaint are performed in doctors offices or clinics, not in acute care hospitals. For purposes of this motion, however, Plaintiffs’ allegations as to the impact of the ERDs are accepted as if they were true.

(Ex. C, AG’s Finding ¶ 18). Through this lawsuit, Plaintiffs would have this Court substitute their judgment on this issue for the considered judgment of the Colorado Attorney General, and the good faith business judgment of the members of Exempla.

ARGUMENT

The Amended Complaint here asserts two claims for relief. Specifically, Plaintiffs allege that the transaction cannot be consummated without Court approval under the Uniform Management of Institutional Funds Act (“UMIFA”) and the common law *cy pres* doctrine, because it would change the “original charitable purpose” of Lutheran Medical and Good Samaritan. (Amended Complaint ¶ 79 (capitalization removed)). Plaintiffs define this purpose as “the provisioning of broad non-sectarian health care services by Lutheran and Good Samaritan,” which is a definition of Plaintiffs’ own creation. (*Id.* ¶ 42). As noted by the Attorney General, the relevant organizational documents define the charitable purpose of Exempla rather differently. (*See* Ex B, AG’s Findings ¶ 18).

The Exempla Amended and Restated Articles of Incorporation, for example, state that the “purposes of this corporation are to engage directly or indirectly in activities related to healthcare provision, education, promotion, financing, research, development, and related activities, including but not limited to: the operation and management of clinics, medical practices and hospitals; health maintenance; managed care; the provision of ancillary services and products; and investment in related activities.” (Ex. D, Exempla Amended and Restated Articles of Incorporation, Article III(a)). The Exempla Amended and Restated Articles of Incorporation do not reference “broad non-sectarian health care services.” (*Id.*).

Regardless, even if Plaintiffs' allegations are accepted as true, the Amended Complaint fails as a matter of law. Plaintiffs have no standing to assert such a UMIFA or *cy pres* claim. Instead, the Attorney General has exclusive jurisdiction over the transaction, including determining whether it will result in a material change in charitable purpose and exclusive standing to challenge the use of charitable funds under UMIFA.⁵ In addition, Plaintiffs have not alleged a palpable and immediate injury in fact to a legally protected interest that confers standing to maintain this action under common law standing principles. The Amended Complaint should therefore be dismissed.

A. Plaintiffs Lack Standing To Challenge The Transfer Of CFF's Membership Interest In Exempla To The Sisters Of Charity

Standing is a jurisdictional prerequisite that must be satisfied for the Court to decide a case on the merits. *First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt, LLC*, 166 P.3d 166, 179-80 (Colo. App. 2007). "A plaintiff has standing if he or she has an injury in fact and that injury is to a legally protected interest." *Id.* (quoting *Durdin v. Cheyenne Mountain Bank*, 98 P.3d 899, 902 (Colo. App. 2004)). "[A]n actual injury is required in order to maintain the separation of powers of state government, much of the standard is a prudential exercise of judicial restraint. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). As in any other case, standing is an essential prerequisite to pursuit of a declaratory judgment action. *ACLU v. Whitman*, 159 P.3d 707, 709 (Colo. 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

⁵ CFF assumes for purposes of this motion that CFF's membership interest in Exempla can be considered "institutional funds" under the UMIFA. CFF understands that co-Defendant Sisters of Charity will be filing a motion to dismiss the UMIFA claim asserting that the membership interest is not "institutional funds" as defined by UMIFA, and joins in that motion.

cognizable interest.”). The Plaintiffs here do not have a legally protected interest in the transfer of CFF’s membership interest in Exempla.

1. The Attorney General has exclusive statutory jurisdiction over the transfer of CFF’s membership interest in Exempla to the Sisters of Charity.

In 1998, the Colorado General Assembly passed an act “to protect the public interest, to assure that nonprofit assets of hospitals are preserved to serve the charitable purposes to which they were dedicated, and to provide the public notice of all transfers of assets of hospitals” C.R.S. § 6-19-101(3).⁶ As a nonprofit to nonprofit transfer, the transaction at issue here is primarily governed by Part 2 of the hospital transfer act. C.R.S. § 6-19-201.

Section 202 of the hospital transfer act, C.R.S. § 6-19-202, requires parties to a “covered transaction” to provide notice of the transaction to the Attorney General. “Covered transactions” include “the sale, transfer, or other disposition of the control of a parent company, holding company, or other entity controlling a hospital.” C.R.S. § 6-19-102(1). The hospital transfer act then empowers the Attorney General to review the proposed transaction. C.R.S. § 6-19-203.

If the Attorney General determines that the transaction “will not result in a material change in the charitable purposes to which the assets of the hospital have been dedicated, and will not result in a termination of the attorney general’s jurisdiction over those assets caused by a transfer of a material amount of those assets outside of the state of Colorado,” the Attorney General must allow the transaction “proceed without further review.” C.R.S. § 6-19-203(1). When a covered transaction “will result in a material change in the charitable purposes to which the assets of the hospital have been dedicated, or a termination of the attorney general’s

⁶ This act, codified at C.R.S. §§ 6-19-101 to 6-19-407, is not given a specific name, and will be referenced as the “hospital transfer act” in this brief.

jurisdiction over the hospital assets caused by a transfer of a material amount of those assets outside the state of Colorado, the attorney general may exercise his or her common law authority to assess and review or challenge the transaction” C.R.S. § 6-19-203(2).

If, in reviewing a proposed transaction, the Attorney General is unable to conclude that there is no material change in charitable purpose, he 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. C.R.S. §§ 6-19-203(2)(a)(IV), 6-19-404(1). The Attorney General then has the authority to allow a transaction that results in a material change in charitable purpose if (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 affected communities; and (4) the directors or trustees of the parties to the transaction have not breached their fiduciary duties or engaged in misconduct. C.R.S. § 6-19-203(2)(a)(I)-(IV). These criteria are to be liberally construed to favor approval of the transaction. C.R.S. § 6-19-203(2)(c). Thus, the hospital transfer act establishes the statutory procedures and criteria for evaluating proposed transactions, and specifically gives enforcement power to the Attorney General alone.

This enforcement power effectively preempts the ability of any party to challenge a covered transaction under common law theories. This was demonstrated in *Hawes v. Colorado Division of Insurance*, 65 P.3d 1008, 1021 (Colo. 2003), where the Colorado Supreme Court reviewed a similar legislative scheme governing the conversion of nonprofit health service corporations into for-profit stock insurance companies under the oversight of the Commissioner

of Insurance. *See* C.R.S. § 10-16-324. In holding that the conversion statute did not abrogate the right to an award of common fund attorneys’ fees, the court made clear that the statute left no room for the common law of charitable trusts or *cy pres*: “Although a conversion may generally be contested in a court under common law charitable trust and *cy pres* doctrines, our legislature has provided the exclusive means to participate in a conversion through the conversion statute, divesting jurisdiction from courts.” *Hawes*, 65 P.3d at 1021-22.

Here, the Attorney General retains the ability to challenge transactions covered by the hospital transfer act in court. *See* C.R.S. § 6-19-104(1) (providing that “[n]othing in this article shall be construed as limiting the attorney general’s common law powers.”). However, the hospital transfer act provides no authority for the general public to challenge covered transactions – that right is held by the Attorney General alone.

2. The Attorney General has exercised his statutory authority and determined that the challenged transaction will not cause a material change in the charitable purposes of CFF or Exempla.

Transfer of CFF’s 50% membership in Exempla to the Sisters of Charity is a “transfer . . . of the control of a parent company, holding company, or other entity controlling a hospital” within the meaning of C.R.S. § 6-19-102(1). Therefore, in accordance with the hospital transfer act, the parties to the transaction gave the requisite notice to the Attorney General on October 30, 2007. The Attorney General then exercised his statutory authority to determine whether the transaction would “result in a material change in the charitable purposes to which the assets of the hospital have been dedicated,” or would “result in a termination of the attorney general’s jurisdiction over those assets caused by a transfer of a material amount of those assets outside of the state of Colorado.” C.R.S. § 6-19-203(1).

After considering the views of various parties, including those opposed to the transaction, the Attorney General determined that it would not cause a material change in the charitable purpose of Exempla or divert charitable assets outside of the State of Colorado. (Ex. C, AG's Finding ¶ 28). Therefore, the Attorney General was required to allow the transaction to "proceed without further review." C.R.S. § 6-19-203(1). The Plaintiffs have no power to ask this Court to reconsider or overrule that determination. Accordingly, the Court should dismiss Plaintiffs' Complaint for lack of standing.

3. Plaintiffs also lack standing under the common law to challenge an alleged change in the charitable purpose of CFF or Exempla; only the Attorney General would have had standing to file such an action.

The hospital transfer act's grant of exclusive jurisdiction to the Colorado Attorney General to review and challenge transactions involving nonprofit hospitals is largely a codification of an attorney general's previous common-law exclusive jurisdiction over the enforcement of charitable trusts. The beneficiary of a charitable trust "is the unspecified, indefinite general public to whom the social and economic advantages of the trust accrues." *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1125 (Colo. 2007). "[T]he responsibility for public supervision of charitable trusts traditionally has fallen to the state's Attorney General, who may maintain a suit to compel property to be held for the charitable purpose for which it was given." *Id.* at 1125-26. *See also Oleksy v. Sisters of Mercy of Lansing*, 253 N.W. 2d 772, 773-74 (Mich. Ct. App. 1977) (denying standing to a doctor who challenged the sale of a hospital under the laws of charitable trusts).

Therefore, members of the public do not have a legally protected interest allowing standing to sue to enforce a charitable trust, even if they would benefit from it, because a suit can

be maintained by the attorney general on the public's behalf. Restatement (Second) of Trusts § 391 cmt. d (1959) ("Restatement of Trusts"). This prevents trustees from being "vexed by frequent, ill considered suits leading to unnecessary litigation," George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 414 (3d ed. 2005) ("*Bogert on Trusts*"), and allows the attorney general to represent the public interest.

Other than the Attorney General, only a person with a "special interest in the enforcement of the charitable trust" has standing to enforce a trust. Restatement of Trusts § 391 (emphasis added). A special interest arises only when a charitable trust is created for the express benefit of a particular person or a narrow class of individuals. *Id.* at cmt. c. For example, if a charitable trust is created for the benefit of a minister of a church, the minister may bring suit to enforce it. *Id.* However, a suit for enforcement of a charitable trust "cannot be maintained by persons who have no special interest in the enforcement of the trust. The mere fact that as members of the public they benefit from the enforcement of the trust is not a sufficient ground to entitle them to sue" *Id.* at cmt. d; *see also Amato v. UPMC*, 371 F. Supp. 2d 752, 758 (W.D. Pa. 2004) ("[S]ince the plaintiffs allege that 'thousands of individual health care consumers' share their claims, the plaintiffs have no special interest in the enforcement of the alleged trust that is distinct from the general public.") (citation omitted).

The facts that Plaintiffs allege in an attempt to establish standing demonstrate that they are merely members of the general public and do not have standing to enforce their view of the charitable purpose of the Exempla hospitals under the common law. (Amended Complaint ¶ 84). In addition, Plaintiffs fail to allege any basis for a legally protected right allowing them to seek or provide specific services at a specific facility should the need arise in the future.

Plaintiffs allege three bases for their assertion of a special interest: “[1] they have sought or provided broad non-sectarian healthcare at Lutheran or Good Samaritan; [2] they have paid for treatment at these facilities, through insurance or otherwise, with the understanding that the facilities would continue to provide broad non-sectarian healthcare; and [3] they represent a particular segment of the public who needs, and wants, broad non-sectarian healthcare to be available in their communities.” (*Id.*). These allegations fall far short of establishing standing, and such a broad basis for standing has been repeatedly rejected in the hospital context.

For example, in *Burton v. William Beaumont Hosp.*, 347 F. Supp. 2d 486 (E.D. Mich. 2004), uninsured patients treated at a charitable hospital filed suit alleging that the hospital acted inconsistently with its charitable purpose by requiring them to sign forms that guaranteed payment of medical charges, and then billing them excessive rates and aggressively pursuing collection. *Id.* at 489. The court dismissed the plaintiffs’ claims, in part for lack of standing:

It is well established that private parties like the Burtons may not sue to enforce a charitable trust in circumstances like the Burtons claim here; rather, the Attorney General is the proper party. As one treatise summarizes:

As a general rule no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust and will receive charitable or other benefits from the operation of the trust. The courts usually require that suits for enforcement be brought by the established representative of the charity, the Attorney General, so that the trustees may not be vexed by frequent suits, possibly based on an inadequate investigation and brought by irresponsible parties, and so that the courts may not find their calendars clogged with an unnecessarily large amount of litigation.

Burton, 347 F. Supp. 2d at 494 (quoting *Bogert on Trusts* § 414, and citing Restatement of Trusts § 391 cmt. a.); see also *Feliciano v. Thomas Jefferson Univ. Hosp.*, 2005 U.S. Dist. LEXIS 21565, 17-18 (E.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.”).

Moreover, an injury in fact must be direct and palpable to support standing. *Olson v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002). 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 an interest legally protected under 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. App. 2007). Here, the Plaintiffs’ claims of injury are entirely speculative and “cannot be determined until a remote time in the future.” *Olson*, 53 P.3d at 752.

Ms. Sadler alleges only that she was once treated at Good Samaritan in 2006 for a life-threatening infection. (Amended Complaint ¶ 22-23). It is entirely speculative to conclude that she will in the future suffer the same fate. Any claimed harm to the Compassion & Choices, Compassion & Choices of Colorado, and Colorado Religious Coalition for Reproductive Choice is even more remote, since they merely allege that they are advocacy groups promoting “end-of-life choices” (such as physician-assisted suicide) and abortion. (*See id.* ¶¶ 23-26, 33). The application of EDRs at two additional Exemplar hospitals in the Denver area cannot interfere with this advocacy mission, and until such an impact occurs the allegation is purely speculative. *See Burkett v. Amoco Prod. Co.*, 85 P.3d 576 (Colo. App. 2003) (finding 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, since the gas company had not chosen a location and landowners could not state with certainty that they would object to the ultimate location).

Dr. Krebs asserts that some diseases or birth defects may cause expectant mothers to seek an abortion, and he “can recommend and link with others” to have abortions performed, or recommend surgical sterilization.⁷ (Amended Complaint ¶ 29). Such allegations are entirely remote and speculative, and do not provide a proper basis for standing.

The remaining Plaintiffs fare no better. Ms. Lewis failed even to allege that she explored the possibility of going to another hospital for the procedures that she desires, even assuming, as she speculates, that the transfer agreement would preclude that procedure from being performed at Lutheran Medical. (*Id.* ¶¶ 31-32.) AWH likewise fails to allege why it would not have other, readily available alternatives at other hospitals or clinics once the transaction is completed.⁸ (*Id.* ¶¶ 34-36.) Thus, any purported injury to these Plaintiffs is purely speculative, as well.

Plaintiffs’ lawsuit is simply “ill-considered” and “unnecessary” litigation brought by members of the general public who would elevate their self-interest over the judgment of CFF, the Sisters of Charity, and the Attorney General as to the proper management, development, and funding of the Exempla hospitals. Plaintiffs objections to aspects of the Catholic religion do not

⁷ Again, Dr. Krebs grossly exaggerates the potential impact of the ERDs by alleging that life-saving procedures would be denied even where they are “urgently necessary to save the mother.” This is false – indeed, if it were the case an obvious prudent course for Dr. Krebs would be to use a different hospital. Regardless, Dr. Krebs’ fanciful allegation is accepted as true for purposes of this motion, since the allegation would not support standing.

⁸ It is odd that AWH complains so vehemently here about the ERDs. According to its website, two of the AWH doctors, Dr. Sarah P. Ellis and Dr. Jill Serrahn are affiliated with St. Joseph’s Hospital, which operates under the ERDs. (*See* <http://www.awh.md/physicians.php>).

substitute for the particularized interest in Exempla that would confer standing to enforce their narrow view of its charitable purpose, and the Complaint should be dismissed.

4. The UMIFA does not expand the class of persons who have standing to enforce the charitable purposes of a charitable trust to include members of the general public such as the Plaintiffs here.

Plaintiffs allege that the UMIFA requires advance approval of a Colorado district court before CFF may transfer its membership interest in Exempla to the Sisters of Charity because the transfer will change the charitable purpose of Lutheran Medical and Good Samaritan (Amended Complaint ¶¶ 79-80). Although it is not clear from the Amended Complaint, it appears that Plaintiffs also contend that CFF's anticipated use of the proceeds of the transfer (\$311 million to be paid to CFF by the Sisters of Charity) for purposes other than the funding of Lutheran Medical and Good Samaritan constitutes a change in CFF's charitable purpose, also requiring advance approval of a Colorado district court under the UMIFA. (*See id.* ¶ 85 (requesting that the Court condition approval of the transfer on use of the proceeds received by CFF for specified purposes)). While CFF maintains that the transfer will not change the charitable purpose of CFF or Exempla, Plaintiffs lack standing to bring a claim under the UMIFA even if it would.

The UMIFA is designed to allow for the release of restrictions in gift instruments by the charity's governing board with the written consent of the donor, or by order of the district court after notice to the attorney general and opportunity for him to be heard. C.R.S. § 15-1-1109 (2007). Nothing in this act authorizes members of the public to bring suit to prevent action by a charity. To the contrary, the comments to the UMIFA note that even "[t]he donor has no right to enforce the restriction," making clear that the common law prohibition allowing only the

attorney general to enforce the restrictions on charitable donations continues with full force. (Ex. E, Uniform Management of Institutional Funds Act § 7 cmt.).

One of the few cases to address standing under the UMIFA is *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 699 A.2d 995 (Conn. 1997).⁹ In that case, the donor made grants to a university to be used “to provide need-based merit scholarship aid to disadvantaged students for medical related education.” *Id.* at 996. Upon learning that the university no longer provided medical-related education services, the donor brought suit to either enforce the restriction or revert the funds to the donor. *Id.* The Connecticut Supreme Court held that donors lack standing to bring UMIFA claims and dismissed the action. *Id.* at 1002.

First, the court noted that at common law, “a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so.” *Id.* at 997. Instead, only the attorney general had the common law authority – *i.e.* standing – to enforce the stated purpose of a donor’s charitable gift. *Id.* at 997-98. The court then rejected the plaintiff’s argument that the UMIFA expands standing to enforce the terms of a charitable gift to encompass the donor, holding that the UMIFA “does not establish a new class of litigants . . . who can enforce an unreserved restriction in a completed charitable gift.” *Id.* at 1002. Clearly, if the *donor* making a charitable contribution lacks standing to challenge the use it is put to, members of the *general public* such as Plaintiffs here cannot pursue such a claim.

⁹ In adopting the UMIFA, the Colorado Legislature stipulated that it “shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among the states which enact it.” C.R.S. § 15-1-1102. Therefore, foreign cases construing the UMIFA should be considered to be at least persuasive authority.

B. The *Cy Pres* Doctrine Does Not Authorize Injunctions To Control The Use Or Transfer Of Charitable Assets, And Plaintiffs’ “*Cy Pres*” Claim Therefore Fails To State A Claim On Which Relief May Be Granted

Plaintiffs’ assertion that “the doctrine of *cy pres* prohibits the proposed transaction” is nonsensical. (See Amended Complaint ¶ 92). The *cy pres* doctrine refers only to the power of the court to select a substitute purpose for a trust when a trust’s original purpose has become impossible or impracticable to administer. Restatement of Trusts § 399 cmt. a. Therefore, a *cy pres* action is an action properly brought by a trustee as a shield to avoid liability for breaching a trust by having it reformed, not a doctrine to be used by members of the public as a sword to challenge the use of charitable assets through a lawsuit. See *Bogert on Trusts*, § 435 (“If the trustees believe that [a change in circumstances making the trust impossible or impracticable] has arisen, they have a duty to bring a suit in equity to secure a decree applying *cy pres*.”).

For example, in *Dunbar v. Board of Trustees of George W. Clayton College*, 461 P.2d 28 (Colo. 1969), a trust was formed to be used for the education of “poor, white, male orphans between the ages of 6 and 10.” *Id.* at 29. Seventy years later the trustees petitioned the court to allow the inclusion of non-white students and orphans between the ages of 6 and 18. *Id.* The trial court reformed the trust pursuant to the *cy pres* doctrine, over the objection of the attorney general, because the race-based restriction was illegal and it was impracticable to only admit children 6 to 10 years old, and the Colorado Supreme Court affirmed the decision. *Id.* at 30-32.

Here, Plaintiffs attempt to turn the doctrine of *cy pres* on its head and use it, not to *expand* a charitable purpose that has become unworkable, but to *limit* the purposes for which charitable assets may be used. The proper – and only – mechanism for enforcing the charitable

purpose of a charitable organization is an action by the attorney general under its exclusive common law or statutory authority. Plaintiffs *cy pres* claim should be dismissed.

C. Plaintiffs' Request That The Court Impose A Resulting Trust On The Proceeds CFF Receives From The Transfer Should Be Dismissed For Failure To State A Claim

If Plaintiffs are allowed to pursue their lawsuit, their request that the Court “[i]mpose a resulting trust on the proceeds of the Proposed Transaction” to ensure that they are “used by CFF to provide for broad non-sectarian medical services” should nevertheless be summarily rejected. (Amended Complaint, Wherefore Clause (e)). A resulting trust is proper remedy “where [the] express trust fails in whole or in part.”¹⁰ *Shepler v. Whalen*, 119 P.3d 1084, 1089 (Colo. 2005) (quoting *Page v. Clark*, 197 Colo. 306, 314-15 (1979)).

“The mere fact that the trustees of a charitable trust commit a breach of trust does not cause the trust to fail and entitle the settlor or his successors to enforce a resulting trust. This is true not only where the trustees merely neglect to apply the property to the designated charitable purposes, but also where they divert it to other purposes. In such a case, if it is not impossible or impracticable to carry out the designated purposes, the remedy is by a suit brought by the Attorney General to compel the trustees to perform the trust, and not by a suit brought by the settlor or his successors to enforce a resulting trust.”

Louisa T. York Orphan Asylum v. Erwin, 281 A.2d 453, 456-57 (Me. 1971) (quoting *Scott on Trusts* (3rd ed.) § 401.1 at 3139). Therefore, even if Plaintiffs could prove that the proceeds of the transfer would be used improperly, the remedy action is a “suit brought by the Attorney General to compel the trustees to perform the trust,” not a suit by members of the general public

¹⁰ A resulting trust may also be proper where an express trust is fully performed without exhausting the trust estate, and where one person pays the purchase price for a property but at the purchaser’s direction the vendor conveys the property to another person. *Shepler*, 119 P.3d at 1089. These considerations, however, do not apply to this case.

to impose a resulting trust.¹¹ Plaintiffs' improper request for a resulting trust on the proceeds of the transfer of its membership interest in Exempla should be denied.

WHEREFORE, CFF respectfully requests that its Motion to Dismiss for Lack of Standing and Failure to State a Claim be granted.

DATED this 25th day of February, 2008.

s/ Steven J. Perfremment

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**Document was filed electronically. See C.R.C.P. 121, § 1-26. Original document on file.*

¹¹ Here, the Attorney General has already considered and rejected the objection that "CFF may not put the entire \$311 million in sale proceeds to the same charitable purpose, a non-profit hospital system, as before." (Ex. C, AG's Findings ¶ 16 n.2).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of February, 2008, a true and correct copy of the foregoing **DEFENDANT COMMUNITY FIRST FOUNDATION'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** was served via LexisNexis File & Serve as follows:

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