

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

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.,

Plaintiffs,

v.

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

Defendants.

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Case Number: 07CV1113

Div.: 2

Ctrm:

**PLAINTIFFS' RESPONSE TO DEFENDANT SISTERS OF CHARITY OF
LEAVENWORTH HEALTH SYSTEM, INC.'S MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED COMPLAINT**

Plaintiffs, Ami Sadler (“Ms. Sadler”), Compassion & Choices, Compassion & Choices of Colorado (collectively “Compassion & Choices”), Stephen Krebs, MD (“Dr. Krebs”), Shannon Lewis (“Ms. Lewis”), Colorado Religious Coalition for Reproductive Choice (“CRCRC”), and Associates in Women’s Health, P.C. (“AWH”) (collectively the “Plaintiffs”), through their counsel, Koncilja & Associates, P.C. and Heizer Paul LLP, respond to Defendant Sisters of Charity of Leavenworth Health System, Inc.’s (“SCLHS”) Motion to Dismiss Plaintiffs’ First Amended Complaint, on the following grounds:

I. INTRODUCTION

There is no legal basis to dismiss Plaintiffs’ First Amended Complaint. In its Motion to Dismiss, Defendant ignores the standard of review and asserts factual matters that are directly contrary to Plaintiffs’ allegations in the First Amended Complaint. Plaintiffs’ claims are necessary to protect both their significant individual interests in the treatments they seek to receive from or provide through the impacted hospitals, as well as the substantial public interest in ensuring the provision of broad non-sectarian health care services to the communities of Jefferson and Boulder Counties.

Exempla Lutheran Medical Center (“Lutheran”) is a non-profit hospital that provides, and has historically provided, broad non-sectarian health care services to the public, including the Jefferson County community. For most of its 100 years, Lutheran has been a full service, community based hospital. Lutheran is the only such health care facility in Jefferson County,

Colorado's second most populous county. Lutheran is the hospital of first resort for most Jefferson County residents.

Exempla Good Samaritan Medical Center, LLC ("Good Samaritan") is also a non-profit hospital that provides, and has historically provided, broad non-sectarian health care services to the public, including the Boulder County community.

In 1997, SCLHS and Defendant Community First Foundation ("CFF") entered into an affiliation agreement ("Affiliation Agreement") dated October 1, 1997. Pursuant to that Affiliation Agreement, SCLHS, CFF, Exempla, Inc. ("Exempla"), and Primera, LLC agreed to affiliate St. Joseph Hospital,¹ owned by SCLHS, and Lutheran, which was owned by Exempla. SCLHS and CFF agreed that the respective religious and broad non-sectarian identities of the respective institutions were of equal and significant importance and would continue. Indeed, this affiliation would not have taken place without such an understanding.

Lutheran, as noted, has no religiously based restrictions on the services it provides. Also, pursuant to the Affiliation Agreement and related documents, CFF and SCLHS became the two sole members of Exempla. Thus, as a consequence of the affiliation, CFF acquired an apparent sponsorship or membership interest in Lutheran.

In 2004, Exempla developed and opened Good Samaritan, which, as noted, is operated as a broad non-sectarian facility with no religiously based restrictions. Exempla operates and manages Good Samaritan. CFF, through Exempla, acquired an apparent sponsorship or membership interest in Good Samaritan.

¹ St. Joseph is a Catholic hospital run in accordance with the Catholic Directives, and is located in Denver, Colorado. Pursuant to the Affiliation Agreement and related documents, SCLHS maintained its ownership of St. Joseph, but agreed that Exempla would operate and manage St. Joseph. Pursuant to the Affiliation Agreement and related documents, St. Joseph would continue to operate under the Catholic Directives.

On October 30, 2007, CFF and SCLHS notified the Colorado Attorney General that CFF intended to transfer its apparent sponsorship or membership interest in Exempla to SCLHS, in exchange for payment by SCLHS to CFF in the reported amount of \$311 million (hereafter, the “Proposed Transaction”).²

CFF and SCLHS have indicated that one result of the Proposed Transaction will be that neither Lutheran nor Good Samaritan will continue to provide broad non-sectarian health care services to their communities. Instead, Lutheran and Good Samaritan will be run by SCLHS in accordance with the Ethical and Religious Directives for Catholic Healthcare Services (the “Catholic Directives”). Thus, the Proposed Transaction will deprive the public, specifically the communities of Jefferson County and Boulder County, of the broad non-sectarian health care services to which those hospitals have always been dedicated. More specifically, the Proposed Transaction will directly injure Plaintiffs by prohibiting them from receiving, providing, and supporting certain medical care prohibited by the Catholic Directives. SCLHS’s Motion to Dismiss contends that Plaintiffs’ injuries are speculative; however, Plaintiffs’ injuries are direct and palpable as alleged in the First Amended Complaint. *See* First Amended Complaint, ¶¶ 22-37.

Upon completion of the Proposed Transaction and adoption of the Catholic Directives, Lutheran and Good Samaritan will be required to eliminate access to a significant range of services formerly provided by the institutions, including end-of-life care and reproductive health

² It should also be noted that the Proposed Transaction has generated litigation in Denver District Court, including an action filed by Exempla, Inc. against CFF and SCLHS (No. 2008CV188) and an action brought by CFF and SCLHS against Exempla’s Board of Directors (No. 2008CV856). Exempla, Inc. is challenging the Proposed Transaction, claiming, among other things, that CFF and SCLHS breached contracts and their fiduciary duties owed to Exempla, Inc. CFF and SCLHS, in a derivative action on behalf of Exempla, Inc. against Exempla’s Board of Directors, are claiming that the Board of Directors improperly interfered with CFF’s and SCLHS’s interests in Exempla, Inc.

choices, among others, thereby reducing health care access in Jefferson and Boulder counties. SCLHS argues in its Motion to Dismiss that there is a question as to whether the Catholic Directives will be enforced at Lutheran or Good Samaritan pursuant to the Proposed Transaction. *See* SCLHS’s Motion to Dismiss, p. 8. However, there is no question that they will be applied. *See* First Amended Complaint, ¶¶ 42-43, 59-60.

In addition, CFF does not plan to use all or materially all of the funds it will receive, as a result of the Proposed Transaction, to further the original charitable purpose of providing broad non-sectarian health care services.³ Instead, CFF has indicated its intent to abandon its historical role as Lutheran’s fundraising arm. CFF has indicated that it will use its charitable assets, including the reported \$311 million it will receive from the Proposed Transaction to “provide financial support and innovative education to improve quality of life and increase community generosity and involvement” – a purpose so vague as to be meaningless. Indeed, CFF’s most recent Colorado Registration Statement does not even mention Lutheran in the description of its charitable purpose.

Thus, in violation of Colorado law, which requires a judicial determination to be made *before* charitable assets are diverted from their original intended purpose, CFF has instead proceeded to enter into a proposed transfer of its sponsorship or membership interest, in Exempla, to SCLHS. This proposed transfer diverts Lutheran and Good Samaritan from their original intended purpose of providing broad non-sectarian health care, and will prohibit Lutheran and Good Samaritan from providing broad non-sectarian health care. Furthermore, as

³ Rather than confronting this issue, SCLHS ignores it and makes arguments outside of the pleadings regarding its ownership interest. *See* SCLHS’s Motion to Dismiss, p. 10.

part of this proposed transfer, CFF will receive a reported \$311 million, which, it has indicated, it does not plan to dedicate exclusively towards the provision of broad non-sectarian health care.

II. ARGUMENT

A. Legal Standard of Review

For purposes of a motion to dismiss under C.R.C.P. 12(b)(5), this Court must construe all well-pleaded allegations of the complaint in the light most favorable to Plaintiffs. *See Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995). Furthermore, a complaint may not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claims. *See Grizzell v. Hartman Enterprises, Inc.*, 68 P.3d 551 (Colo. App. 2003). In addition, when considering standing, a court must determine whether the plaintiff has asserted a legal basis upon which a claim for relief may be predicated and, in doing so, a court must accept as true all allegations of material fact as presented in the complaint. *See Board of Commissioners v. Broomfield*, 7 P.3d 1033 (Colo. App. 1999).

Here, Plaintiffs have alleged facts that demonstrate the existence of UMIFA and breach of charitable trust claims, as well as a legal basis upon which these claims may be predicated. SCLHS, however, has ignored the standard of review and has argued for dismissal by asserting disputed factual matters outside of the pleadings. Consequently, Plaintiffs should not be prohibited from bringing such claims and SCLHS's Motion to Dismiss should be denied.

B. Plaintiffs Have Standing to Challenge the Proposed Transaction

1. The Colorado Attorney General Does Not Have Exclusive Jurisdiction Over the Proposed Transaction

A. The Colorado Attorney General Does Not Have Exclusive Jurisdiction

Plaintiffs' claims are not barred by the Colorado Attorney General's December 27th, 2007 finding regarding the Proposed Transaction. SCLHS contends that the Colorado Attorney General has exclusive jurisdiction over the Proposed Transaction pursuant to C.R.S. § 6-19-201, *et seq.* However, Colorado case law and the Colorado Attorney General's own finding and statements establish that Plaintiffs are entitled to pursue their claims here.

SCLHS asserts, without any basis or support, that the statute at issue here "specifically gives enforcement powers to the Attorney General rather than to courts." SCLHS's Motion to Dismiss, p. 4. In support of this position, SCLHS relies only upon an *article* that discusses in general terms the statute in question (along with other types of hospital conversions not at issue here). Indeed, this article does not even stand for the proposition that SCLHS cites. Rather, the article merely provides a generalized explanation of the workings of the statute, for purposes of quick digestion by the public. *See* SCLHS's Motion to Dismiss, Ex. A.

Defendant's argument that the Colorado Attorney General has exclusive jurisdiction is also based on a strained interpretation of *Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1014 (Colo. 2003) (*en banc*). In that case, the Colorado Supreme Court addressed whether the Commissioner of Insurance had the authority to award attorney fees under the common fund doctrine in a proceeding that had taken place before the Commissioner of Insurance that concerned the conversion of a health insurer from a non-profit corporation to a for-profit stock insurance company.

In its decision, the Colorado Supreme Court examined the statute that expressly authorized the Commissioner of Insurance to perform such conversions, C.R.S. § 10-16-324. *Id.* at 1019. That statute provides for a specific procedure for such conversions, including submittal

of a conversion plan, impact analysis, standards for assessment, notice, and a hearing. *See* C.R.S. § 10-16-324. That Court found that the Commissioner of Insurance had exclusive jurisdiction over that type of conversion proceeding. The Court arrived upon this determination by relying upon a particular, highly specific provision of the conversion statute, stating that “[t]he language of section 10-16-324(4)(e) makes clear that the Commissioner is presiding over an equitable proceeding, previously available under the common law principles of cy pres.” *Hawes*, 65 P.3d at 1022. Specifically, section 10-16-324(4)(e) provides that the proponent of conversion shall submit a plan to the Insurance Commissioner which includes, among other things, specification regarding “a reasonable treatment for the benefit of the citizens of the state of Colorado of the value of the corporation on all of the following terms that must be approved by the commissioner.”

In contrast, the language of § 10-16-324(4)(e), or any similar language, was not included in the statute that is relevant here – i.e., the statute governing a non-profit to non-profit hospital transfer. In other words, Defendant’s argument relies upon a case that interprets an entirely different statute than the statute at issue, and that has entirely different and distinct language than the statute at issue here.

B. The Colorado Attorney General Has Not Exercised His Non-Exclusive Authority

The Colorado Attorney General expressly recognized that Plaintiffs were not barred from bringing claims against Defendants in his December 27th finding. Specifically, the Colorado Attorney General acknowledged Plaintiffs’ lawsuit and stated that Plaintiffs’ “claims fall outside the scope of C.R.S. 6-19-203(1), and are not before the Attorney General. Nothing in this Order precludes a party with standing to raise these claims from doing so in the appropriate court.” *See*

SCLHS's Mot. to Dismiss, Ex. D, Note 5. Thus, the Colorado Attorney General specifically acknowledged Plaintiffs' lawsuit and found that his finding under C.R.S. 6-19-203(1) did not preclude Plaintiffs from raising such claims.

Furthermore, the Colorado Attorney General again recognized that he did not have exclusive jurisdiction over the Proposed Transaction, and, moreover, acknowledged that he had not even exercised his non-exclusive jurisdiction, in his Motion to Dismiss filed in response to a complaint filed by Exempla, Inc. challenging the Colorado Attorney General's opinion regarding the Proposed Transaction.⁴ Specifically, in that Motion to Dismiss, the Colorado Attorney General stated that his opinion regarding the Proposed Transaction was not a final action, and, as such, a "complainant could still file an action in district court to seek redress." See Ex. A, ¶ 27. The Colorado Attorney General then went on to state that "[i]n this case, the Attorney General took no final action. Rather, as discussed above, he declined to exercise his common law discretionary jurisdiction to review the Transaction further." See Ex. A, ¶ 33 (emphasis supplied).

Thus, the Colorado Attorney General specifically and expressly recognized that his jurisdiction was not exclusive and that he had not even exercised his non-exclusive jurisdiction over the Proposed Transaction and, as a result, the Proposed Transaction could be challenged in court. The Colorado Attorney General's conclusion is consistent with numerous court decisions. See, e.g., *L.B. Research and Education Foundation v. The UCLA Foundation*, 29 Cal. Rptr. 3d

⁴ That action, filed in Denver District Court, is titled *Exempla, Inc. v. John W. Suthers*, case number 2008-CV-613. The parties to that action recently stipulated to its dismissal, in which the Colorado Attorney General again expressly recognized that his December 27th finding "does not constitute 'final agency action'" and that the "[f]inding is a determination only of 'whether or not to exercise [the Attorney General's] common law powers [and therefore] a mental process, not a quasi-judicial hearing.'" See Ex. B, ¶ 5.

710, 716 (Cal. App. 2005) (Attorney General does not have exclusive jurisdiction to enforce charitable trust) (citing cases from various jurisdictions).

Accordingly, the Colorado Attorney General does not have exclusive jurisdiction over the Proposed Transaction and Plaintiffs' claims are not barred.

2. Plaintiffs Have Common Law Standing to Challenge the Proposed Transaction

A. Plaintiffs have a Special Interest

Plaintiffs have standing under the common law to challenge the Proposed Transaction. Plaintiffs hold a special interest, distinct from that of the general public, in the enforcement of Lutheran and Good Samaritan's charitable purposes. Specifically, Plaintiffs are a defined group who benefit as recipients of and providers of the specific types of services that will no longer be afforded if the Proposed Transaction occurs. Moreover, as the Colorado Attorney General has declined to address the issue, there is no one to protect Plaintiffs' interest, except for Plaintiffs themselves.

As recognized by SCLHS in its Motion to Dismiss, § 391 of the Restatement (Second) of Trusts provides guidance as to who may enforce a charitable trust. *See* SCLHS's Motion to Dismiss, pp. 6-7. Section 391 states that:

A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, but not by persons who have no special interest or by the settler or his heirs, personal representatives or next of kin.

Restatement, Second, Trusts § 391 (emphasis added); *see also Denver Foundation v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1125-26 (Colo. 2007) (citing § 391).

Although Colorado courts have yet to expressly address the issue, other courts have recognized the principle emphasized in § 391 that certain persons with special interests in a charitable trust have standing to maintain an action to enforce such a trust. *See Hooker v. Edes Home*, 579 A.2d 608, 612 (D.C. App. 1990) (“An exception to the general rule . . . exists in situations where an individual seeking enforcement of the trust has a ‘special interest’ in continued performance of the trust distinguishable from that of the public at large.”); *Alco Gravure, Inc. v. Knapp Foundation*, 479 N.E.2d 752, 755 (N.Y. 1985) (“There is an exception to the general rule, however, when a particular group of people has a special interest in funds held for a charitable purpose . . .”); *Valley Forge Historical Soc. v. Washington Memorial Chapel*, 426 A.2d 1123, 1127 (Pa. 1981) (“An action for the enforcement of a charitable trust can be maintained by . . . someone having a special interest in the trust.”); *Young Men’s Christian Ass’n v. Covington*, 484 A.2d 589, 591 (D.C. 1984) (“Persons who have a special interest in the enforcement of a charitable trust may maintain a suit for the trust’s enforcement.”).

Furthermore, courts have found that where the attorney general has declined to address the enforcement of a charitable trust, or has been disabled from addressing such enforcement, leaving no one to protect the public interest, members of the public may have standing to enforce the trust. *See Kapiolani Park Preservation Soc. v. Honolulu*, 751 P.2d 1022, 1025 (Haw. 1988) (“ . . . where, in such a case, the attorney general as *parens patriae*, has actively joined in supporting the alleged breach of trust, the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to

the attention of the court.”); *In re Trust Created by Hill*, 509 N.W.2d 168, 172 (Minn. App. 1988) (“When the attorney general does not appear to represent the interest of the trust beneficiaries, other courts have granted standing to members of the public in order to protect the public interest.”); *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 195 (Me. 1978) (Plaintiff beneficiaries found to have standing to sue the park authority to enforce provisions of the park trust where “the Attorney General is disabled from fulfilling his statutory duty and bringing suit against the State of Maine.”). Here, Plaintiffs have a special interest in the operation of Lutheran and Good Samaritan – specifically in Lutheran and Good Samaritan’s provision of broad, non-sectarian healthcare. Moreover, Plaintiffs may be the only persons to protect the public interest from the Proposed Transaction, as the Colorado Attorney General has declined to address the issue, as discussed above.

Further, “Colorado has a tradition of conferring standing to a wide class of plaintiffs” and Colorado recognizes “a relatively broad definition of standing.” *Ainscough v. Owens*, 90 P.3d 851, 853, 855 (Colo. 2004); *see also Garhart ex rel. Tinsman v. Columbia/Healthone, LLC*, 95 P.3d 571, 579 (Colo. 2004).

Thus, here, this Court should find that Plaintiffs have standing because they hold a special interest in the operation of Lutheran and Good Samaritan – specifically in Lutheran and Good Samaritan’s provision of broad, non-sectarian healthcare. Moreover, the Colorado Attorney General has declined to address the issue.

As articulated in the complaint, Lutheran and Good Samaritan are charitable hospitals – i.e., they provide health care services to the public – and both hospitals’ core

purpose, as reflected in the Affiliation Agreement and Exempla's Bylaws, has always been the provision of broad non-sectarian health care to the communities they serve. *See* Plaintiffs' First Amended Complaint, ¶¶ 61-64. The Proposed Transaction will prohibit Lutheran and Good Samaritan from pursuing broad non-sectarian health care. Lutheran and Good Samaritan's failure to provide non-sectarian services will be to the great detriment of Plaintiffs. In other words, Plaintiffs are a defined group who benefit from the specific types of services that will no longer be afforded if the Proposed Transaction occurs.

Specifically, Ms. Sadler's end-of-life advanced directives would not be honored at Good Samaritan; Dr. Krebs would not be able to provide his best medical care for certain of his patients; Ms. Lewis' existing plans and arrangements for a tubal ligation to be performed at Lutheran, at the same time she gives birth, will not be honored; the physicians at AWH would also not be able to provide their best medical care for certain of their patients, including patients seeking care identical to that planned by Ms. Lewis; and Compassion & Choices and CRCRC would not be able to sufficiently support and represent their members who seek full service non-sectarian health care – particularly in the areas of family planning and honoring end-of-life choices, such as advanced directives. *See* Plaintiffs' First Amended Complaint, ¶¶ 22-37. Plaintiffs' interests are all direct and defined interests that are distinct from those of the general public. Plaintiffs here are seeking to both uphold the best interests of Lutheran and Good Samaritan, and to protect their special interests in receiving or providing individualized care that would be prohibited to them if the Proposed Transaction is consummated as presently structured.

This case is not unlike *City of Paterson v. Paterson General Hospital*, 235 A.2d 487 (N.J. Super. Ch. 1967). In *City of Paterson*, the court specifically affirmed that residents who would be impacted by the relocation of a charitable hospital had a sufficient special interest to maintain a suit challenging the relocation. *See id.* at 495 (finding that the plaintiffs “had every right to bring this suit” and that “a liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly [sic] in the public interest.”). Here, the Plaintiffs’ interests are more acute and concrete; not only are the Plaintiffs residents, but they will be denied planned or expected treatment when the non-sectarian care they have planned and come to expect is effectively relocated out of Jefferson County by the operation of the Catholic Directives and similarly relocated out of Good Samaritan.

SCLHS’s reliance on *Fields v. Banner Health*, 2005 WL 4806305 (D. Ariz. 2005), an unpublished case from the United States District Court for the District of Arizona, to support its argument that Plaintiffs lack the requisite special interest, is misplaced. As an initial matter, the *Fields* case is not authoritative, and cannot be relied on for support here, because it is an unpublished opinion. Indeed, even an Arizona state court would prohibit citation to this unpublished case.⁵ *See Hourani v. Benson Hosp.*, 122 P.3d 6, 14 (Ariz. App. 2005) (“unpublished decisions ‘shall not be regarded as precedent nor cited in any court.’”) (citation omitted). Moreover, SCLHS’s reliance on

⁵ This point is further evidenced by the fact that the *Fields* case has never been cited, in any case or reference material in the Westlaw database.

the *Fields* case is misplaced.⁶ See SCLHS’s Motion to Dismiss, p. 7. That case briefly addressed whether the plaintiff, who was an uninsured patient, had standing to assert a breach of charitable trust claim against a non-profit hospital on the basis that the hospital had acted inconsistently with its charitable purpose by requiring the plaintiff to sign forms that guaranteed payment of medical charges. The *Fields* court summarily concluded that “there is no evidence that Plaintiff has any interest more specific or special than that derived from membership in a large class of beneficiaries.” *Fields*, 2005 WL 4806305 *5. Thus, the *Fields* court recognized that persons with special interest may maintain a suit to enforce a charitable trust. Moreover, the *Fields* plaintiff clearly had no specific, defined interest; in contrast, Plaintiffs here, as noted above, represent a defined group who benefit from or provide the specific types of services that will no longer be afforded if the Proposed Transaction occurs.

B. Plaintiffs’ Injuries are not Speculative

SCLHS also argues that Plaintiffs’ claims of injury are “speculative” and, as such, cannot support standing under the general standing requirements that a plaintiff incur an injury-in-fact to a legally protected interest. See SCLHS’s Motion to Dismiss, p. 7. Again, SCLHS makes numerous factual arguments outside of the pleadings that fail to accept as true the allegations of material fact presented in Plaintiffs’ First Amended Complaint. See *Board of Commissioners v. Broomfield*, 7 P.3d 1033 (Colo. App. 1999); see, e.g., SCLHS’s Motion to Dismiss, pp. 7-8; First Amended Complaint, ¶¶ 22-37.

⁶ SCLHS similarly relies on *Feliciano v. Thomas Jefferson University Hosp.*, 2005 WL 2397047 (E.D. Pa. 2005), which is distinguishable from the case at issue here because that court never addressed whether the plaintiffs held a “special interest” in the operation of the hospital and, rather, simply summarily concluded that the plaintiffs lacked standing.

First, although the Colorado courts have yet to address the specific issue, many courts recognize the legally protected interest of a plaintiff with a “special interest” to enforce a charitable trust. Second, Plaintiffs’ injuries-in-fact are not speculative, but instead are direct and palpable, and satisfy Colorado’s “relatively broad definition of standing.” *Ainscough*, 90 P.3d at 854. “A plaintiff satisfies the injury in fact requirement by demonstrating that the activity complained of has caused or has threatened to cause injury to the plaintiff . . .” *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992). Moreover, as the *Ainscough* court discussed, the “[d]eprivations of many legally created rights, although themselves intangible, are nevertheless injuries-in-fact.” *Id.* at 856. For instance, Colorado courts have found that citizens suing to protect a great public concern regarding the constitutionality of a law have standing, even though the plaintiffs in such cases have only a generalized injury-in-fact. *See Id.* at 856; *see also Colo. State Civil Serv. Employees Ass’n v. Love*, 448 P.2d 624, 627 (1968). In addition, when addressing whether a plaintiff has alleged an injury sufficient to confer standing, a court must accept as true the allegations set forth in the complaint and may weigh other evidence supportive of standing. *See Dunlap*, 829 P.2d at 1289.

Thus, Plaintiffs’ injuries-in-fact support standing in this case. For example, Ms. Lewis is currently pregnant and has planned and arranged with her physicians to give birth at Lutheran, and for a tubal ligation to be performed at the same time she gives birth. Under the Proposed Transaction, Mr. Lewis will not be able to pursue this medical care at Lutheran. This constitutes an injury to Ms. Lewis. Moreover, Ms. Sadler, who has existing advanced medical directives regarding end-of-life treatment, and who has

been previously hospitalized at Good Samaritan in a life threatening situation, will be forced to locate and travel to a different medical facility if those directives are to be honored. Similarly, Dr. Krebs and AWH will be directly and immediately deprived of the right to provide services they currently provide to patients, and that their hospital privileges contemplate. Finally, CRCRC and Compassion & Choices' members residing in Jefferson and Boulder County will be directly and adversely impacted by the loss of available, planned and expected health care in their respective locales.

Accordingly, Plaintiffs have common law standing to challenge the Proposed Transaction.

3. Plaintiffs Have Stated a Claim Under UMIFA

A. CFF's and SCLHS's Interests in Exempla Constitute "Institutional Funds" Under UMIFA

Contrary to the SCLHS's assertions, CFF's apparent sponsorship and/or membership interest in Exempla, including its interest in Exempla's real estate, money and other property, as well as its interest in shares or obligations of Exempla, are "institutional funds" under UMIFA. SCLHS argues that this Court should narrowly construe the term "fund" under UMIFA to mean only a collection of pooled assets (presumably liquid assets such as negotiable paper) held for long or short term purposes. Here again, SCLHS makes factual arguments outside of the pleadings that fail to accept as true the allegations of material fact presented in Plaintiffs' First Amended Complaint.

As SCLHS acknowledges, there is no case law directly on point in Colorado or elsewhere. Therefore, SCLHS's reliance on *In re Pilch's Estate*, 348 P.2d 706 (Colo. 1960) is

misplaced. Moreover, SCLHS's proposed interpretation of the definition of "institutional fund" is in not supported by the plain language of UMIFA.

First, C.R.S. § 15-1-1101(b) states as follows:

(6) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purpose but does not include a fund held for an institution by a trustee which is not an institution or a fund in which a beneficiary which is not an institution has an interest other than possible rights which could arise upon violation or failure of the purposes of the fund.

This provision does not contain any language limiting the meaning of "institutional fund" to that which SCLHS suggests should be adopted by this Court. The official comments to UMIFA are not to the contrary.

Second, SCLHS's proposed definition is in direct contravention of the investment authority provisions of UMIFA, which contemplate that the trustees of a UMIFA-governed institution may:

(a) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks and bonds, and other securities of profit or nonprofit corporations, shares in or obligations of associations, partnerships, or individuals, and obligations of any government or subdivision or instrumentality thereof;

C.R.S. § 15-1-1106 (a) (emphasis supplied). SCLHS's argument that its membership interest in Exempla cannot be governed by UMIFA is directly contrary to UMIFA itself, which provides that an institutional fund may include securities of profit or nonprofit corporations or shares in or obligations of associations.

Third, if UMIFA’s definition of “institutional fund” was limited to pooled assets that were liquid, there would be no need for the investment authority provisions of UMIFA to single out and provide trustees with authority to: “(c) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution.” C.R.S. § 15-1-1106 (c) (emphasis supplied). Nor would there be a need to distinguish the broad definition that provides an institutional fund may include any type of “real or personal property,” or “shares in or obligations of associations,” contained in C.R.S. § 15-1-1106 (a), from holdings that are generally understood to be liquid investments.

Such liquid investments are particularly described in C.R.S. § 15-1-1106 (d) to include, but clearly are not limited to:

any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

C.R.S. § 15-1-1106 (d).

Fourth, the only holdings that are not expressly included within UMIFA’s definition of “institutional fund” is: “a fund held for an institution by a trustee which is not an institution or a fund in which a beneficiary which is not an institution has an interest other than possible rights which could arise upon violation or failure of the purposes of the fund.” C.R.S. § 15-1-1103 (6).

An institutional fund governed by UMIFA can and does include both CFF’s and SCLHS’s apparent sponsorship and/or membership interests in Exempla. Therefore, SCLHS’s motion to dismiss on this ground should be denied.

B. The Hospital Conversion Statute does not Preempt UMIFA

As set forth in detail above in section II(B)(1), the Colorado Attorney General's jurisdiction is not exclusive, and, moreover, the Colorado Attorney General has not even exercised his non-exclusive jurisdiction. Moreover, the Hospital Conversion Statute does not state that it is exclusive or that it preempts other statutes. As such, the Hospital Conversion Statute neither occupies the field nor directly conflicts. And, contrary to SCLHS's contention that the Hospital Conversion Statute preempts UMIFA, *see* SCLHS's Motion to Dismiss, p. 10, the rules of statutory construction first require that UMIFA and the Conversion Statute be read together and their purposes harmonized by this Court. *See Henderson v. RSI, Inc.*, 824 P.2d 91, 94 (Colo. App. 1991) (A comprehensive statutory scheme should be construed "in a manner that gives consistent, harmonious, and sensible effect to all of its parts."); *Salazar v. Industrial Claim Appeals Office of State of Colo.*, 10 P.3d 666, 667 (Colo. App. 2000) ("[W]hen there is an apparent conflict between two statutory schemes, [a court] must attempt to harmonize the statutes in order to give effect to the legislative intent of both statutes.") (citation omitted).

III. CONCLUSION

Therefore, for the reasons stated herein, Plaintiffs ask the Court to deny SCLHS's Motion to Dismiss.

WHEREFORE, Plaintiffs respectfully request the Court enter an order denying Defendant Sisters of Charity of Leavenworth Health System, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint; or in the alternative, allowing Plaintiffs to file a second amended complaint, and for such other and further relief as the Court deems appropriate.

Respectfully submitted this 20th day of March, 2008.

KONCILJA & ASSOCIATES, P.C.

In accordance with C.R.C.P. 121 §1-29(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

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By: s/ Dean C. Heizer
Dean C. Heizer

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2008, I caused a true and correct copy of the above and foregoing PLAINTIFFS' RESPONSE TO DEFENDANT SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC.'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT to be served upon the following via the method indicated for each:

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