

DISTRICT COURT BOULDER COUNTY, COLORADO Boulder Justice Center, 1777 6th Street Boulder, Colorado 80302	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiffs:</p> <p>AMI SADLER, <i>et al.</i>;</p> <p>Defendants:</p> <p>COMMUNITY FIRST FOUNDATION, <i>et al.</i></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	Case Number: 07CV1113 Ctrm/Div: 2
DEFENDANT COMMUNITY FIRST FOUNDATION’S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED COMPLAINT	

Defendant Community First Foundation (“CFF”) respectfully submits this Reply in Support of Its Motion to Dismiss First Amended Complaint.

I. INTRODUCTION

Plaintiffs’ Response to the Motion to Dismiss (“Response”) recites several inapplicable cases, ignores critical facts, and draws attention to irrelevant matters to obscure their lack of standing. It is apparent that Plaintiffs’ alleged interests in this lawsuit are in no way “special”

and bear little relation to Exempla’s overall charitable purpose. Accordingly, they do not have standing to pursue this case, and their claims should be dismissed.

II. ARGUMENT

A. *Exempla Is Already Pursuing Claims against CFF and the Sisters of Charity*

Plaintiffs essentially contend that the Court should permit their concerned-citizen lawsuit to proceed because they supposedly are the only ones willing and able to challenge the transaction between CFF and the Sisters of Charity. (Response at 10 (“[T]here is no one to protect Plaintiffs’ interest[s], except for Plaintiffs themselves.”).) Nothing could be further from the truth. First, the Colorado Attorney General has both the right and ability to challenge the transaction. He has considered it and elected not to challenge the transfer of membership interests.

Second, Exempla has filed a lawsuit in Denver District Court attempting to block the transaction, in which it asserts eleven claims for relief against CFF and the Sisters of Charity. among other things, Exempla alleges (incorrectly) that the transaction will violate Exempla’s “purpose of providing non-sectarian health care services” at Lutheran and Good Samaritan hospitals, as expressed in the Affiliation Documents. (Exempla’s First Amended Complaint ¶ 66, attached hereto as Exhibit A.) Exempla also claims (baselessly) that the transaction violates the Uniform Management of Institutional Funds Act. (*Id.* ¶ 108.) And Exempla further seeks (without factual or legal foundation) a constructive or resulting trust on the proceeds that CFF will receive from the transaction. (*Id.* ¶¶ 124-128.) Plaintiffs’ First Amended Complaint is based on substantially identical facts (mischaracterized in substantially the same fashion) and parallel legal theories. Indeed, Exempla’s Answer in this matter states as follows:

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.

(Answer of Exempla Defendants to First Amended Complaint at 8.) This lawsuit is basically duplicative of the Exempla's action pending in Denver and should be dismissed.

B. The Motion to Dismiss Properly Referred to the Affiliation Documents and the Attorney General's Finding of No Material Change in Charitable Purpose

Plaintiffs' insistence that this Court may not review the materials submitted with CFF's Motion to Dismiss should be rejected as the attempt to avoid indisputable facts. Plaintiffs must avoid at all costs the fact that the Attorney General – who has exclusive standing to challenge the transaction under the legal theories pursued here – found that the transaction would not effect a material change in Exempla's charitable purpose. As CFF explained in its Motion to Dismiss, it is completely proper for this Court to consider such information in ruling on the Motion to Dismiss. (*See* Motion to Dismiss at 3.)

C. The AG's Finding Did Not and Cannot Confer Standing

The Attorney General's decision not to challenge the transaction in court does not mean that he failed to review the transaction or "had not even exercised his non-exclusive jurisdiction," as Plaintiffs assert. (Response at 9.) Moreover, the Plaintiffs' claim that the Attorney General approved their lawsuit is baseless. (*Id.* at 9.) The AG's Finding merely stated

that “[n]othing in this Order precludes a party with standing to raise [statutory] claims from doing so in the appropriate court.” (AG’s Finding at 5 n.5.) The question presented here is whether the Plaintiffs have standing to pursue the common law claims asserted in their Complaint. As explained in the Motion to Dismiss, the Plaintiffs do not have standing to pursue these claims.

D. Plaintiffs’ Limited Interest as Members of the General Public Does Not Confer Standing to Bring Common Law Claims to Block the Transaction

In contrast to the Motion to Dismiss, Plaintiffs do not cite a single case in their Response decided under Colorado law holding that a member of the general public who may benefit from a charitable trust has standing to enforce that trust. Rather, they rely on numerous cases from outside of Colorado, none of which apply here.

In *L.B. Research & Education Foundation v. UCLA Foundation*, 29 Cal. Rptr. 3d 710, 716 (Cal. Ct. App. 2005), the only issue before the court was whether the *donor* had standing “to enforce the terms of the trust it created” under a unique California statutory scheme. Plaintiffs do not allege that they are donors seeking to enforce the terms of a trust they created or that California’s unique statutory scheme somehow applies here.

Similarly, none of the cited cases addressing the issue of “special interest” (*see* Response at 11) involved the transfer of an interest in a charitable hospital, which is governed by hospital transfer act in Colorado. Each of the alleged beneficiaries in those cases had a close connection to the charitable purposes of the trusts at issue such that their interests were distinct from the general public’s interest. *Hooker v. Edes Home*, 579 A.2d 608, 609 (D.C. App. 1990) (purpose of trust was to provide “a free Home for aged and indigent Widows” and the beneficiaries fit within that narrow class); *Alco Gravure, Inc. v. Knapp Found.*, 479 N.E.2d 752, 753 (N.Y. 1985)

(purpose of trust was to benefit a specific group of employees “employed in any printing, publishing or lithographing corporation of which Joseph P. Knapp has been or shall hereafter be a stockholder, director or officer” and the plaintiffs included employees who were within this narrow class); *YMCA v. Covington*, 484 A.2d 589, 590 (D.C. App. 1984) (YMCA was required to hold certain property, or to use the proceeds of its sale, “for the work of the said [YMCA] among colored men of the District of Columbia” and the plaintiffs were residents of the neighborhood around that property). These cases require a close nexus between the specific purpose of the trust and the beneficiary’s special interest in the trust for the beneficiary to have standing to enforce that trust. As the court stated in *Hooker v. Edes Home*, “a particular class of potential beneficiaries has a special interest in enforcing a trust *if the class is sharply defined and its members are limited in number.*” 579 A.2d at 614 (emphasis added).

Here, Plaintiffs are members of the general public with the same general interest in the nature of the hospitals near their general location as any other member of the general public. This is not a “sharply defined” class of limited number. If the Court were to conclude that this confers standing upon them, then any and every member of the public located near one of Exempla’s three hospitals would have standing to file suit over the transaction. Indeed, under Plaintiffs’ theory, anytime Exempla implements a policy that would impact or curtail any of the services it currently provides, any potential patient for such services, or any doctor providing them, would have standing to sue. If everyone has standing, then standing means nothing.

Plaintiffs’ assertion that they have standing because the Attorney General refused to file a lawsuit challenging the transaction is equally baseless. (Response at 11-12.) In each of the cases on which Plaintiffs rely, the Attorney General had a conflict of interest or refused to evaluate the

alleged breach of trust. *See Kapiolani Park Preservation Soc. v. City & County of Honolulu*, 751 P.2d 1022 (Haw. 1988) (beneficiaries would have standing where attorney general “actively joined in supporting the alleged breach of trust”); *In re Trust Created by Hill*, 509 N.W.2d 168, 171-72 (Minn. Ct. App. 1993) (trustees notified attorney general of the transaction and the attorney general refused to participate in the proceedings); *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 195 (Me. 1978) (beneficiaries had standing because the attorney general was “disabled from fulfilling his statutory duty and bringing suit” by a conflict of interest.

Here, the Attorney General received comments and reviewed of the transaction, then concluded that it would not cause a material change in Exempla’s charitable purpose. He therefore *executed* his responsibilities and *exercised* his discretion; he did not abdicate them. Nor may Plaintiffs appoint themselves as de facto attorneys general to police the transaction because the actual Attorney General sees no breach of trust.

Finally, Plaintiffs’ extensive reliance on a 40-year old decision, *City of Paterson v. Paterson General Hospital*, 235 A.2d 487 (N.J. Super. Ct. Ch. Div. 1967), is also misplaced. The court rejected plaintiffs’ claims on the merits and held that the trustees had the power to amend the hospital’s certificate of incorporation to allow the challenged relocation of the hospital. *Id.* at 518-21. The court’s discussion of the “subsidiary point” of standing consists of just two paragraphs and is based on the “important policy argument” that “in this State, and throughout the country as a whole, supervision of the administration of charities has been neglected” and supervision by the Attorney General “is necessarily sporadic.” *Id.* at 527. Therefore, “[w]hile public supervision of the administration of charities remains inadequate, a

liberal rule as to the standing of a plaintiff to complain about the administration of a charitable trust or charitable corporation seems decidedly in the public interest.” *Id.* at 528.

Here the Attorney General specifically reviewed the transaction at issue and approved it as being consistent with Exempla’s charitable purpose. The Plaintiffs cannot complain of neglect and simply reject the outcome. Plaintiffs do not have standing to bring a claim challenging the alleged breach of charitable trust.

E. Plaintiffs Lack Standing to Proceed under UMIFA

Plaintiffs’ argument with regard to their ability to bring a claim under UMIFA is equally unavailing. Plaintiffs offer no authority and identify no language from UMIFA that would suggest that the Colorado General Assembly ever intended to confer standing on beneficiaries to enforce that statute, and simply cite the statutory definition of “gift instrument” from the Act. This definition says nothing about who may bring a claim under the Act. For the reasons stated in the Motion to Dismiss, the Court should dismiss Plaintiffs’ UMIFA claim.

F. Plaintiff Has Failed to State a Claim for Relief under the Doctrine of Cy Pres

Plaintiffs also fail to articulate any reason not to dismiss their *cy pres* claim. As Plaintiffs concede, the doctrine of *cy pres* is “used to *expand a charitable purpose.*” (Response at 19.) In essence, *cy pres* is designed to avoid waste where trust assets would go unused because the purpose to which they must be applied is no longer possible. As the Colorado Supreme Court explained: “The result of a too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and *to render it useless is to defeat his intention.*” *Dunbar v. Bd. of Trustees of George W. Clayton Coll.*, 461 P.2d 28, 31-31 (Colo. 1969). Plaintiffs would turn this doctrine

on its head and use it to block a transaction rather than make a previously barred act permissible.

The claim should be dismissed.

III. CONCLUSION

Plaintiffs have failed to demonstrate that they have standing to bring their common law and statutory claims against CFF purporting to enforce the charitable purpose of Exempla.

Without standing, Plaintiffs claims must be dismissed.

DATED this 10th day of April, 2008.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of April, 2008, a true and correct copy of the foregoing **DEFENDANT COMMUNITY FIRST FOUNDATION'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT** was served via LexisNexis File & Serve as follows:

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