

<p>DISTRICT COURT, COUNTY OF DENVER, COLORADO</p> <p>City & County Building 1437 Bannock Street, Room 256 Denver, CO 80202</p> <hr/> <p>Plaintiff: EXEMPLA, INC., a Colorado non-profit corporation</p> <p>v.</p> <p>Defendant: JOHN W. SUTHERS, in his official capacity as the Attorney General for the State of Colorado</p> <hr/> <p>Attorneys for Plaintiff Exempla, Inc., a Colorado non-profit corporation</p> <p>Jay S. Horowitz, #7467 Peter C. Forbes, #14081 Horowitz/Forbes, LLP 2940 Wells Fargo Center 1700 Lincoln Street Denver, Colorado 80203 303 572-5100 (telephone) 303 572-5111 (facsimile) jhorowitz@hflitig.com pforbes@hflitig.com</p>	<hr/> <p>Case Number:</p> <p>Div.: Ctrm.:</p>
<p>COMPLAINT</p>	

Plaintiff Exempla, Inc., a Colorado non-profit corporation (“Exempla”), through its undersigned counsel, for its Complaint against defendant John W. Suthers, in his official capacity as the Attorney General of the State of Colorado (the “Attorney General”), states and avers as follows.

1. On or about December 27, 2007 the Attorney General issued an opinion entitled “Finding Of No Material Change In Charitable Purpose” in connection with a matter he captioned “In The Matter Of The Exempla Healthcare System Membership Transfer” (the “Attorney General’s Opinion”). A copy of the Attorney General’s Opinion is attached as Exhibit A and is incorporated into this Complaint.

2. The Attorney General’s Opinion, p. 1, states that the matter being addressed had come before the Attorney General as the result of an application made by Community First Foundation (“CFF”) and Sisters of Charity of Leavenworth Health System, Inc. (“SCLHS”) for review of a proposed transaction between themselves (the “Proposed Transaction”). CFF and SCLHS represented to the Attorney General that the matter of their Proposed Transaction was

properly submitted to the Attorney General for consideration under the Hospital Transfer Act, C.R.S. §6-19-101, *et seq.* (the “HTA”).

3. The Attorney General sets forth in the Attorney General’s Opinion what he describes as his “findings” that “the sale and transfer of 50% of the assets of the non-profit Exempla Healthcare System from [CFF] to [SCLHS]: (i) does not result in a material change in the charitable purposes to which the assets of the three hospitals in the Exempla Healthcare System have been dedicated; and (ii) will not result in a loss of jurisdiction by the Attorney General through a transfer of charitable assets outside the State of Colorado.” Attorney General’s Opinion, Exhibit A, p. 2. On this basis the Attorney General concludes that the “sale of 50% of the assets of the non-profit Exempla Healthcare System from [CFF] to [SCLHS] may proceed without further review” by his Office. (*Id.* at p. 2.)

4. Exempla is a Colorado non-profit corporation whose principal office is located in Denver County. Exempla has two members, CFF and SCLHS, but neither member has an economic interest in Exempla and neither member has played a meaningful role in the operation of Exempla’s business. Exempla’s business principally consists of the operation of three acute care hospital facilities: Exempla Lutheran Medical Center which is located in Wheat Ridge, Colorado (“ELMC”), Exempla Good Samaritan Medical Center, which is located in Lafayette, Colorado (“EGS”), and Exempla Saint Joseph Hospital, which is located in Denver (“ESJH”). Exempla is the owner of ELMC and, through a subsidiary, Exempla is the owner of EGS. Exempla does not own ESJH. ESJH is owned by SCLHS.

5. Exempla operates ESJH pursuant to agreements with SCLHS and other parties whereby ESJH, and the two hospitals owned by Exempla, ELMC and EGS, are operated jointly under the trade name “Exempla Healthcare”. The Exempla Healthcare system is a healthcare system which was founded to carry on the non-sectarian tradition and approach to medical care of ELMC (as later shared by EGS) and, concurrently, but separately, the Roman Catholic tradition and approach to medical care of ESJH. The Proposed Transaction would drastically change that fundamental character of Exempla Healthcare, making the system in its entirety a Roman Catholic healthcare system, and would also drastically change the fundamental character of Exempla, converting ELMC and EGS into Roman Catholic hospitals.

6. The Attorney General’s Opinion directly and materially impacts Exempla’s business, economic and charitable interests and the Attorney General’s Opinion exposes Exempla to the potential loss of or injury to those interests. Exempla is, therefore, within the meaning of the Colorado State Administrative Procedure Act, C.R.S. §24-4-101, *et seq.* (the “APA”), a party “aggrieved” by the Attorney General’s Opinion and Exempla has standing to challenge that opinion. In addition, the Attorney General’s Opinion constitutes “final agency action” within the meaning of the APA and the Attorney General’s Opinion is subject to judicial review pursuant to the APA for that reason as well.

7. In the alternative, C.R.Civ.P. 106 vests this Court with jurisdiction to review the Attorney General’s Opinion. Rule 106(4) vests this Court with jurisdiction to review any decision made by “any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions” when such decision is challenged on grounds that the officer or body has “exceeded its jurisdiction or abused its discretion” and when “there is no plain, speedy and

adequate remedy provided by law”. If the Attorney General’s Opinion is not subject to judicial review pursuant to the APA, and assuming that the Attorney General’s Opinion constitutes the exercise of a judicial or quasi-judicial function, the Attorney General’s Opinion is subject to judicial review pursuant to C.R.Civ.P. 106.

8. Venue is proper in this Court because Exempla’s principal place of business is located in the City and County of Denver, State of Colorado, and because the Attorney General is a department of the State of Colorado, whose place of residence in his official capacity is also in the City and County of Denver.

9. SCLHS and CFF have described the Proposed Transaction in different ways, as they apparently believe will serve one or another of their purposes at one or another time. For example, SCLHS and CFF have described the Proposed Transaction as involving merely CFF’s transfer of its membership interest in Exempla to SCLHS. At other times SCLHS and CFF have described the Proposed Transaction as involving CFF’s sale of its purported undivided interest in Exempla’s assets to SCLHS. At yet other times SCLHS and CFF have described the Proposed Transaction as involving CFF’s sale of its purported undivided interest in the assets of the “Exempla Healthcare System” to SCLHS. The Attorney General’s Opinion also contains varying descriptions of the Proposed Transaction, *e.g.*, “The Matter Of The Exempla Healthcare System *Membership Transfer*” (Attorney General’s Opinion, Exhibit A, p. 1; emphasis supplied); the “sale and transfer of *the assets of the non-profit Exempla Healthcare System*” (*ibid.*; emphasis supplied).

10. Regardless of how SCLHS and CFF have described the Proposed Transaction, and regardless of how the Attorney General has described it, the Proposed Transaction was and is a transaction which is not subject to review under the HTA. Thus, while SCLHS and CFF delivered to the Attorney General what they denominated a “Notice” concerning the Proposed Transaction and while they requested the Attorney General’s review under the HTA, and while the Attorney General’s Opinion includes a statement that he has jurisdiction under the HTA, the Attorney General in fact lacks jurisdiction to review the Proposed Transaction. For that reason, the Attorney General’s Opinion should be set aside because it was issued in excess of the Attorney General’s jurisdiction.

11. If the Attorney General had jurisdiction to review the Proposed Transaction under the HTA, the Attorney General’s Opinion should be set aside as arbitrary, capricious and an abuse of discretion, for numerous reasons, including, but not limited to, the following reasons.

12. First, the Attorney General provided inadequate notice to the public of his consideration of the Proposed Transaction and of the steps and procedures which he intended to follow in conducting the review called for by the HTA. The Attorney General concurrently adopted an interpretation of critical terms in the HTA that defeats the very purposes of the HTA and renders it meaningless, including, in particular, the Attorney General’s interpretation of the term “charitable purpose” as used in the HTA. Even at that, before issuing his Opinion, the Attorney General did not disclose to interested parties the interpretation of charitable purpose, or the standard of review, he intended to use to review the Proposed Transaction. As a result there was no opportunity for interested parties to offer their views concerning the Attorney General’s

interpretation of the HTA's terms or the Attorney General's decision as to the appropriate standard of review.

13. Second, while the Attorney General met with representatives of several interested parties, he received no sworn testimony, whether in the form of affidavits, depositions or testimony at a hearing, from any persons. The Attorney General's several meetings were private, not public hearings which would have permitted an exchange and airing of views and an examination into how the effectuation of the Proposed Transaction, which would repudiate the non-sectarian tradition and regime of ELMC and EGS and convert them into Catholic hospitals and convert Exempla Healthcare into a Catholic hospital system, would impact the communities served by those hospitals.

14. Third, the Attorney General accepted at face value, and did not investigate, assertions made by CFF and SCLHS that are wrong or unsupported. CFF and SCLHS made assertions concerning the financial aspects of the Proposed Transaction which are not even supported by the contract into which SCLHS and CFF entered. Yet, it does not appear that the Attorney General, who did refer to some of the financial aspects, Attorney General's Opinion, p. 3, even inquired into these assertions or determined whether they were accurate or could be relied upon.

15. Fourth, the Attorney General conducted a woefully incomplete review and investigation of Exempla's history and its mission. The Attorney General did not inquire into the reasons why Exempla had been established in the first place, or an inquiry into Exempla's mission. The HTA, §6-19-101(2), emphasizes that a hospital's assets "shall be deemed to be dedicated to the specific charitable purposes set forth in the articles of incorporation *or other organic documents* of the non-profit entities that hold them in trust" (emphasis supplied). Exempla's "organic documents" include a number of detailed and lengthy contracts which explain Exempla's specific charitable purposes, including the preservation of the non-sectarian practice of medicine at ELMC and EGS. Upon information and belief, and with the exception of making a passing reference to one of these affiliation documents in the Attorney General's Opinion, the Attorney General made no review, and undertook no analysis, of Exempla's organic documents.

16. Fifth, the Attorney General's Opinion, p. 4, ¶18, includes the finding that the "charitable purpose of the Exempla hospital system is to provide general health care services to the surrounding community". This finding reflects a conception and interpretation of HTA's term "charitable purpose" which renders the HTA meaningless, in that *all* licensed hospitals provide "general health care services" and, accordingly, under the Attorney General's Opinion, *all* sales and transfers of hospitals necessarily would be approved as long as the hospital continued to be a hospital. The HTA, §6-19-101(2), includes the General Assembly's finding that "transfers of the assets of nonprofit hospitals to the for-profit sector may directly affect the *character and extent of the charitable use* of those assets or the proceeds from the assets" (emphasis supplied). The "character...of the charitable use" to which Exempla's assets will be put as a consequence of the Proposed Transaction should have been examined (even though the Proposed Transaction involves non-profit entities), but the Attorney General entirely failed to do so.

17. Sixth, the Attorney General's Opinion, p. 4, is based entirely upon a single finding of fact (which no one would dispute) that only a small percentage of inpatient admissions

and visits which occurred at ELMC and EGS during 2006 would have been prohibited had the Proposed Transaction occurred at that time and had ELMC and EGS then been Catholic hospitals. By relying upon this finding, to the exclusion of all other facts bearing upon the furnishing of medical care, counseling and decision-making at Exempla Healthcare, the Attorney General wrongly found that Exempla's specific charitable purpose was to be defined *only by* considering the number of medical "procedures performed", rather than by considering the nature of the particular procedures performed (Exhibit A, p. 4, ¶¶19, 23).

18. Seventh, the Attorney General did not consider the impact which an effectuation of the Proposed Transaction will have upon the availability of a full range of healthcare services, apart from the conducting of medical procedures, and including medical counseling, to the communities served by Exempla, including the Proposed Transaction's impact upon 10,000's of the following patients and potential patients:

- *Every woman of child-bearing age who is a potential patient seeking obstetrical and gynecological services at EGS and ELMC, who will no longer have available to them at those hospitals the full range of such services currently available to them and historically available to them, because of the prohibitions upon such services insisted upon by the Roman Catholic Church at Catholic hospitals;*
- *Every child, man and woman who is a potential surgical patient at EGS or ELMC, required to undergo a surgery which could result in a development threatening his/her life who will no longer have confidence that his/her directions with respect to life support services will be respected or honored because of the rules and directives of the Roman Catholic Church which concern the administration of "end-of-life" medical services.*

In other words, the Attorney General, by focusing entirely upon "procedures performed", entirely ignored the importance of healthcare counseling and planning as to procedures which *might, could* or *should* be performed, and the impact of those procedures which cannot be performed.

19. Eighth, the Attorney General recognized that judicial decisions concerning non-profit entities and their operations are relevant to the review process to be undertaken under the HTA. But, the Attorney General's Opinion, p. 4, contains a reference to only one judicial decision and, even at that, to a decision which does not examine the issues implicated when parties are concerned about the change of charitable purpose of a charitable trust, or similar non-profit entity.

20. There is a large body of law which has addressed and often sustained claims (similar to the claims advanced by some of those opposed to the Proposed Transaction who wrote letters to the Attorney General) that a transaction which will change a trust's "charitable purpose" must not be permitted. The Attorney General's Opinion refers to none of those decisions. Upon information and belief, the Attorney General did not review any of this body of relevant law. Thus, the "standard of review" by which the Attorney General measured the Proposed Transaction, *i.e.*, a standard constituted by law dealing with the "determination of an en-

tity's status as a charity for income tax purposes", Attorney General's Opinion, Exhibit A, p. 4, was the wrong standard.

21. Ninth, in rendering his Opinion, the Attorney General purported to be proceeding under Section 6-19-203(1) of the HTA, rather than under Section 6-19-203(2). Yet, the Attorney General's Opinion, Exhibit A, p. 4, refers to the latter section of the HTA as support for the Attorney General's findings. This reference is wrong in part because the Attorney General did not employ any of the procedures, *e.g.*, hiring of experts, holding of public hearings, *etc.*, authorized by Section 6-19-203(2) and, therefore, should not have applied the standard of review contained in Section 6-19-203(2).

22. Tenth, upon information and belief, the Attorney General did not investigate the many transactions which have occurred throughout the United States in which a non-sectarian or secular hospital has been converted to a Catholic hospital, to determine the effect of such a change upon the communities which depend upon the converted hospital for the provision of healthcare services. The HTA, §6-19-101(3), contains the General Assembly's finding that "all transfers of hospital assets or control have the potential to impact the communities they serve". The Attorney General failed to examine the "potential impact" of the Proposed Transaction upon the ELMC and EGS communities (which communities include patients, potential patients, physicians and other healthcare professionals) and the Attorney General's Opinion contains no discussion of the "potential impact" of the Proposed Transaction.

23. Eleventh, the Attorney General received more than 100 letters from citizens and from organizations in the affected communities, only three of which supported the Proposed Transaction and the remainder of which expressed varied, and often strong and passionate concerns about how their lives would be negatively impacted by the Proposed Transaction. Yet, with the exception of informal meetings with representatives of Exempla, SCLHS and CFF (and perhaps one or two other organizations), the Attorney General met with none of those people and essentially ignored this outpouring of concern which constituted evidence that these persons most directly and personally affected by the Proposed Transaction view that transaction as materially changing the charitable purposes of ELMC and EGS, the hospitals upon which they have relied and depended, in certain cases, for decades.

WHEREFORE, Exempla respectfully requests that this Court enter an Order vacating and setting aside the Attorney General's Opinion on the grounds set forth above, or on such other grounds as the Court finds proper.

Dated: January 25, 2008
Denver, Colorado

Respectfully submitted,

HOROWITZ/FORBES, LLP

Original Signature On File

By: _____

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