

DISTRICT COURT, COUNTY OF DENVER,  
COLORADO

City & County Building  
1437 Bannock Street, Room 256  
Denver, CO 80202

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Plaintiff: EXEMPLA, INC., a Colorado nonprofit  
corporation,

v.

Defendants: SISTERS OF CHARITY OF LEAVEN-  
WORTH HEALTH SYSTEM, INC., a Kansas not-for-  
profit corporation, and COMMUNITY FIRST FOUNDA-  
TION, a Colorado nonprofit corporation, f/k/a LMC  
COMMUNITY FOUNDATION.

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corporation

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Case Number:

Div.:

Ctrm.:

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PLAINTIFF EXEMPLA, INC.'S COMPLAINT

Plaintiff Exempla, Inc., a Colorado nonprofit corporation (“Exempla”), through its undersigned counsel, for its Complaint against defendants Sisters Of Charity Of Leavenworth Health System, Inc., a Kansas not-for-profit corporation (“SCLHS”), and Community First Foundation, a Colorado nonprofit corporation (“CFF”), f/k/a LMC Community Foundation (SCLHS and CFF are sometimes referred to as “defendants”), states and avers as follows.

SUMMARY OF THIS CASE

1. Exempla Healthcare is the tradename used to describe the third largest healthcare system in Colorado, tending to the medical needs of 100,000’s of patients a year and generating gross annual revenues in excess of \$800 million.
2. Plaintiff Exempla, the company which manages Exempla Healthcare, has two nominal members, defendants SCLHS and CFF.

3. SCLHS and CFF have recently agreed to, but have not yet closed upon, a proposed transaction between themselves which will, if it is closed and effectuated, constitute an egregious breach of fiduciary duty by SCLHS and CFF, will reap huge, wrongful and undeserved monetary rewards (totaling \$100's millions) for each of SCLHS and CFF in their individual capacities, and will eliminate the non-sectarian approach to medical care which is at the core of Exempla Healthcare's mission at two of Exempla Healthcare's three acute care facilities, and which the founding parties of the Exempla Healthcare system agreed would be maintained until and unless that system was terminated on the specific and limited grounds set forth in the parties' agreements. The non-sectarian tradition and approach to medical care at these two facilities will be replaced by a religiously constrained approach to healthcare at those facilities which SCLHS and CFF themselves, in concert with other parties who formed Exempla Healthcare, expressly eschewed when the system was formed approximately ten years ago.

4. Further, if SCLHS's and CFF's self-serving transaction ("the proposed SCLHS/CFF transaction") is closed, the Exempla Healthcare system as it was intended, agreed upon, and constituted by its founders will be terminated, in direct violation of the termination agreement between the parties which sets forth the exclusive specific and limited bases upon which the Exempla Healthcare system can be terminated.

5. Hence, Exempla, which is a party to the agreements at issue, brings this action to stop this proposed transaction from closing and to protect Exempla itself, and the communities Exempla serves, from the irreparable injury which SCLHS and CFF are threatening to cause.

## FACTUAL ALLEGATIONS

### A. Parties And Venue.

6. Exempla is a Colorado nonprofit corporation whose principal office is located in Denver County. Exempla's business principally consists of the operation of three acute care facilities: Exempla Lutheran Medical Center, LLC 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").

7. SCLHS is a Kansas not-for-profit corporation whose principal office is in Lenexa, Kansas. SCLHS owns and operates a Catholic health care system which currently consists of nine hospitals and several clinics located in California, Colorado, Kansas and Montana. SCLHS owns ESJH. SCLHS is one of two members of Exempla.

8. CFF, formerly known as Lutheran Medical Center Foundation, Inc., and then as LMC Community Foundation, is a Colorado nonprofit corporation whose principal office is in Jefferson County. CFF is the other member of Exempla.

9. Venue is proper in this Court because plaintiff Exempla, Inc.'s principal place of business is in the City and County of Denver, because, upon information and belief, defendants SCLHS and CFF participated in discussions concerning the proposed transaction in Denver County, because effectuation of the SCLHS/CFF transaction will take place, in part, in

Denver County, and because actions and failures to act by SCLHS about which Exempla complains in this lawsuit include acts and failures to act in Denver County.

**B. The Formation Of Exempla Healthcare.**

10. In 1997 Exempla, SCLHS, CFF and Primera, LLC (which has since been dissolved), all of whom were involved in furnishing healthcare services (“the Organizing Parties”), engaged in discussions and negotiations which culminated in the establishing of a health care system envisioned as providing a “full continuum of integrated health care delivery services”. The system was to do business under the tradename Exempla Healthcare and it centered upon the operations of ELMC and ESJH, which are large, well-regarded and venerable hospitals in the Denver metropolitan area. By their formation of Exempla Healthcare, the Organizing Parties hoped to achieve economies of scale available to larger healthcare systems which would, among other things, enable Exempla Healthcare to compete effectively for large medical insurance contracts and programs.

11. The Organizing Parties negotiated and signed a number of organic documents and contracts which explain and memorialize their purposes in forming Exempla Healthcare and their expectations and commitments concerning its contemplated operations. One of these documents is entitled Affiliation Agreement. The Affiliation Agreement refers to the other documents executed in order to form the system as the Affiliation Documents. Two of the Affiliation Documents that are of particular relevance to this case are the Joint Operating Agreement, as amended and restated (the “JOA”), and the Termination Agreement, as amended and restated (the “Termination Agreement”).

12. An essential and defining attribute of the Parties’ agreement to form Exempla Healthcare — and, indeed, a condition without which Exempla Healthcare would not have been formed and a condition which, therefore, is inherent in all of the Affiliation Documents — was the Organizing Parties’ commitment that the Exempla Healthcare system would, throughout its existence, maintain and preserve the very different cultures and traditions of ESJH and ELMC.

13. Specifically, in forming the Exempla Healthcare system and executing the Affiliation Documents, the Organizing Parties agreed, and conditioned their agreement to go forward upon their commitment, to maintain (1) ESJH’s identity as a Catholic hospital where medical decisions, practices and counseling are subject to, and controlled by, the religious principles and doctrines of the Roman Catholic church, as expressed in the Ethical and Religious Directives for Catholic Health Care Services adopted by the United States Conference of Catholic Bishops (the “ERD’s”), and (2) ELMC’s identity as a non-sectarian community hospital where medical decisions, practices and counseling are not subject to, or controlled by, the religious principles and doctrines of any group or organization.<sup>1</sup>

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<sup>1</sup> The name “Lutheran” in ELMC’s name derives from the Lutheran Church’s donation of the land upon which Lutheran Hospital (the predecessor of Lutheran Medical Center) was built, (continued...)

14. In essence, the Parties' agreement underlying the formation of Exempla Healthcare called for the maintenance of two separate and inviolable medical traditions and of two physically separate healthcare facilities, with ESJH remaining Catholic and ELMC remaining non-sectarian. The concept and condition underlying the formation of Exempla Healthcare was that the hospitals would be jointly operated in a fashion intended to benefit both financially and to provide superior medical care for the 100,000's of patients annually treated by them, while maintaining the separate medical traditions of each.

15. Exempla Healthcare would not have been formed had the Organizing Parties not explicitly agreed upon the maintenance of these separate medical traditions throughout the prospective 65 year lifetime of the system.

16. The Affiliation Agreement, the other Affiliation Documents and other documents prepared by the Organizing Parties in 1997-1998 leave no question about the obligation to maintain the hybrid character of the Exempla Healthcare system. For example, the Affiliation Agreement itself expressly states that Exempla Healthcare will, "retain the Catholic identity, Sisters of Charity of Leavenworth sponsorship, and religious and community heritage of Saint Joseph Hospital *and the community heritage of Lutheran Hospital*" (emphasis supplied).

17. The mission and foundational purpose of Exempla Healthcare is defined similarly in an "Executive Summary" prepared on behalf of the Organizing Parties and stating as follows:

While operations will be combined, the history and traditions of the constituent entities will be preserved. Saint Joseph Hospital will remain a Catholic institution and Lutheran a secular institution, both continuing a strong community service orientation.

18. Similarly, the other Affiliation Documents refer to the maintenance of the separate traditions of "the constituent entities" and to the fact that ELMC would not be subject to the ERD's, although ESJH would be subject to the ERD's.

19. Hence, the formation of Exempla Healthcare did not involve a merger of ELMC into ESJH or *vice versa*. Nor did it involve any of the Parties' transfer of either of those hospital facilities, or any portion of those facilities, to one another. Instead, Exempla (which essentially was the renamed Lutheran Hospital) continued to own ELMC and SCLHS continued to own ESJH. Indeed, SCLHS refused to convey ESJH to Exempla, alleging that the hospital facility itself was an asset important to report upon on SCLHS's balance sheet for the entire SCLHS hospital system, and that the Roman Catholic church would be required to approve the alienation of this property were ESJH to be conveyed to Exempla. Thus, the Exempla Healthcare system was a business combination in which the focus was upon the benefits accruing from joint operations; Exempla Healthcare was not a combination of assets.

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not from Lutheran Hospital's formal affiliation with the Lutheran Church. Nor does the name reflect Lutheran Hospital's adoption of the Lutheran Church's religious principles and doctrines as controlling medical decision making, practices or counseling at ELMC.

20. Because Exempla was to manage jointly the operations of both ELMC and ESJH, and the assets of those entities were not to be transferred to any of the Organizing Parties, the parties did not execute any merger documents. Instead, they executed the JOA. The JOA is a long-term agreement, which is to govern Exempla Healthcare for approximately 65 years (initially stated as 35 years, with an anticipated renewal term of 30 years, but effectively confirmed as 65 years in 2002), and which sets forth Exempla's overall responsibilities, rights and obligations to manage Exempla Healthcare for that approximately 65 year period. Additionally, the parties executed a management agreement specifically vesting Exempla with the rights and the authority to manage the operations of ESJH as long as the JOA remained in effect (the "Management Agreement").

21. Further reflecting the long-term obligations created by the JOA and the other Affiliation Documents, the parties executed a Termination Agreement which states only five narrow grounds upon which Exempla Healthcare — *i.e.*, the dual tradition system created by the Affiliation Documents — could be terminated prior to expiration of the JOA's 65 year term. Those grounds are a failure to meet specified financial goals, the bankruptcy of one of the Organizing Parties, a finding that the Exempla Healthcare system was illegal, a material breach of the JOA, or a default under a Loan Agreement between SCLHS and ESJH. None of those grounds for termination are present today or have been present at any time since the formation of Exempla Healthcare.

22. As part of the formation of Exempla Healthcare, and in light of the dual tradition system that was being created, the Organizing Parties agreed to name two entities as "sponsors" of Exempla, expected to represent and to protect the two disparate traditions and cultures which were to be maintained throughout the life of the healthcare system.

23. To sponsor the non-sectarian tradition of ELMC (and, later, of EGS, a facility built after the formation of the Exempla Healthcare system and operated by Exempla), the Parties named CFF, then known as the Lutheran Medical Center Foundation, Inc. ("LMCF"). CFF was a small nonprofit foundation which had raised funds for ELMC before 1997. To sponsor the Catholic tradition, the Parties named SCLHS. Going forward, the principal role of SCLHS and ELMCF (CFF) as sponsors of Exempla was to preserve the different cultural traditions of ESJH and ELMC, respectively. SCLHS and CFF each were to be paid, and SCLHS and CFF each have in fact been paid, \$200,000 a year for their service as sponsors.

24. The Parties also agreed to name CFF and SCLHS as the two members of Exempla. The Parties' intention in so doing was to establish a governance arrangement that would permit both "sides" to have access to Exempla's management. The Parties also named these members for purposes of complying with Internal Revenue Service regulations concerning the formation and operation of tax-exempt charitable organizations and concerning the disposition of tax-exempt organizations' assets in the event of a dissolution. CFF was vested with what was referred to as a "Class A Membership Interest" in Exempla; SCLHS was vested with what was referred to as a "Class B Membership Interest".

25. Neither CFF nor SCLHS contributed any money into Exempla, or paid consideration of any other type, to receive the membership interest vested in it. Nor did CFF or SCLHS take any other action which could be construed as equivalent to making a "capital con-

tribution” in Exempla. Indeed, the only “asset” transferred by SCLHS in connection with forming the Exempla Healthcare system was its 50% membership interest in Primera which had no value because that entity, which consisted of a physician practice group, was losing millions of dollars per year.

26. The Organizing Parties’ naming of CFF and SCLHS as Exempla’s two members was not intended to, and did not, give either of those entities an economic interest in Exempla’s assets unless and until one of the few, and narrowly-defined, grounds for terminating the dual tradition Exempla Healthcare system, as stated in the Termination Agreement, arose. Nor did the naming of CFF and SCLHS as Exempla’s two members authorize them, whether directly or indirectly, to terminate the dual tradition Exempla Healthcare system prior to the expiration of the approximately 65 year term of the JOA, and to thereby reap for themselves economic benefits potentially flowing from such an early termination. After all, even as of 1997, Exempla’s assets had a value in excess of \$100 million, neither CFF nor SCLHS were contributing even a penny into Exempla and there was no basis or justification for vesting either member with a freely alienable economic interest in any portion of Exempla’s more than \$100 million in assets.

27. Thus, by vesting CFF and SCLHS with membership interests in Exempla, the Organizing Parties did not intend to make either CFF or SCLHS the holders of any economic rights in Exempla’s assets, prior to a termination of the Exempla Healthcare System, if any, which could only occur in accordance with the Termination Agreement. Instead, Exempla’s assets were, in effect, to be held in trust, to be used solely for the purpose of furthering the interests of the dual tradition Exempla Healthcare system.

C. The Role Of The ERD’s In Controlling The Delivery Of Medical Care At A Catholic Hospital.

28. The United States Conference of Catholic Bishops (“UCCB”) first promulgated the ERD’s in 1981. Since that time, the UCCB has published several new versions of the ERD’s. The UCCB published the most recent version of the ERD’s in or about 2001. The UCCB describes the ERD’s as “authoritative guidance on certain moral issues”. The ERD’s are, in fact, much more than merely “guidance”. The ERD’s are instructions to persons who operate Roman Catholic hospitals which identify those specific health care services and those specific medical procedures which the Roman Catholic Church prohibits from being carried out. A person’s failure to comply with the ERD’s exposes him or her to sanction and to obloquy by the Roman Catholic Church.

29. The ERD’s discuss, and include prohibitions against, medical services which might be furnished “at the beginning of life” and medical services which might be furnished “in care for the dying”. With respect to “beginning of life” medical services, the ERD’s, as written, prohibit a broad range of obstetrical and gynecological services, including:

- life saving abortions even after a fetus is no longer viable;
- emergency contraception provided in the case of sexual assault;

- sterilization (vasectomies and tubal ligations);
- non-emergency contraceptive and family planning services;
- counseling about the use of prophylactics to reduce the risk of HIV/AIDS;
- infertility treatments.

The ERD's dictate how Catholic hospitals are to administer end-of-life care, including prohibitions against honoring a dying patient's wishes to discontinue disproportionate medical care. The ERD's also prohibit research and therapy using fetal tissue or stem cells.

D. The Operations Of Exempla Healthcare Between 1998 And The Present.

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30. The Affiliation Documents were signed in late 1997 and early 1998 and Exempla Healthcare began conducting business as an active healthcare system at about that time. From that time to the present Exempla has been responsible for the operation of Exempla Healthcare. Exempla's responsibilities are substantial, given the complicated and demanding tasks involved in operating a healthcare system of this size, currently employing 6,000 persons and involving medical staffs of 2,000 physicians. For their part, and as envisioned by the Parties, SCLHS and CFF have had a largely passive role in Exempla Healthcare; they have continued to be identified as "sponsors" but their involvement in Exempla Healthcare has been nominal.

31. Since the formation of Exempla Healthcare in 1997-1998 Exempla has acquitted its management responsibilities admirably. Exempla has built and managed a healthcare system which has generated the equivalent, in a non-profit setting, of net profits totaling \$10's millions per year. Exempla has maintained substantial contracts with large and respected medical insurers and health management organizations, including, importantly, Kaiser Permanente ("Kaiser"). In fact, Exempla's affiliation with Kaiser helped to bring about Exempla's construction in 2002 of EGS, a non-sectarian community hospital in Lafayette, at a cost exceeding \$200 million. Exempla Healthcare has achieved the highest rating assigned by bond rating agencies to any hospital system located solely in Colorado. Exempla Healthcare's hospitals have received positive evaluations from the recognized healthcare facility evaluation associations, such as the Joint Commission.

32. Further, in accordance with the Organizing Parties' intentions, and as stated in the Affiliation Agreement and the other Affiliation Documents, Exempla has operated Exempla Healthcare as a dual tradition system and has therefore operated ESJH in accordance with the ERD's and has operated ELMC and EGS in accordance with their non-sectarian tradition, which does not enforce the ERD's.

33. Commencing in or about 2002, and notwithstanding Exempla Healthcare's considerable business and professional success, which redounded to the benefit of ESJH, ELMC and EGS, and to the benefit of Exempla Healthcare's many patients, SCLHS began to assert, in direct conflict with its agreement otherwise in the Affiliation Documents, that the ERD's should

be applied to ELMC and EGS, as well as to ESJH. Exempla responded to SCLHS's assertions by seeking to find solutions to SCLHS's concerns. However, SCLHS did not relent; SCLHS continued to seek to make Exempla Healthcare something which it was not, *to wit*, a healthcare system governed by the ERD's and thus in essence a Catholic healthcare system.

34. Initially, CFF, as it was contractually obligated to do as the "sponsor" of Exempla assigned the task of preserving and maintaining Exempla's non-sectarian tradition, and in accordance with the fiduciary duty imposed on it by virtue of that obligation, resisted SCLHS's efforts. Thus, CFF pointed out (as there can be no dispute) that SCLHS's assertions concerning the applicability of the ERD's were irreconcilable with the basic premises and the mission of Exempla Healthcare. CFF asserted that SCLHS's efforts to impose the ERD's upon EGS and ELMC were, therefore, unacceptable and wrong. CFF expressed impatience with SCLHS's efforts to impose the ERD's on EGS and ELMC, and CFF implied that SCLHS's assertions, if agreed to by Exempla, might constitute a basis for terminating Exempla Healthcare in its entirety.

E. SCLHS Develops A Plan To Acquire The Exempla Healthcare System In Violation Of The Organizing Parties' Intentions And Agreements.

35. In 2005, and against this backdrop of financial and professional success, but also a backdrop punctuated by SCLHS's assertions that the ERD's be applied to the Exempla Healthcare system in its entirety (assertions which became louder after the ERD's were revised in 2001), Exempla, in the normal course of carrying out its management responsibilities, brought to the attention of SCLHS that ESJH was in need of capital improvements. The problem was that the very age of the ESJH facility placed the facility out of compliance with Denver code regulations applicable to newly constructed healthcare facilities.

36. As discussed above, upon the formation of Exempla Healthcare, SCLHS had retained ownership of ESJH. As owner of ESJH, SCLHS therefore was the party responsible for funding capital improvements to ESJH. That obligation was also implicit in the Management Agreement concerning the operation of ESJH, which prohibited Exempla from ceasing to operate ESJH as an acute care hospital at any time during the term of that agreement (*i.e.*, at any time that the JOA was in effect) and which, therefore, obligated SCLHS, as the owner of that facility, to take the steps and to fund the capital improvements necessary to enable Exempla to continue to operate ESJH as an acute care hospital.

37. But, SCLHS rejected Exempla's requests to fund any capital improvements. Upon information and belief, and with the benefit of hindsight furnished by SCLHS's fashioning of the SCLHS/CFF proposed transaction which it is the purpose of this lawsuit to stop, it appears that SCLHS may have refused to finance capital improvements to ESJH, even though it is SCLHS's own facility, because SCLHS believed that, by starving ESJH of capital SCLHS was obligated to provide, it could create the false impression that the Exempla Healthcare system itself was unable to meet its capital needs. Upon information and belief, SCLHS refused to fund any capital improvements to ESJH, over a period of ten years, even though it concurrently was making millions of dollars of capital improvements (perhaps hundreds of millions of dollars) to the other healthcare facilities in SCLHS's nine hospital system.

38. In early 2006, and in the wake of SCLHS's refusal to contribute any funds for capital improvements for ESJH, SCLHS, CFF and Exempla agreed to engage in a dialogue that would address the overall capital needs of Exempla Healthcare going forward. Starting in February, 2006, SCLHS, CFF and Exempla began that three-party dialogue.

39. In May, 2006 these three-party discussions evolved into a two-party discussion between SCLHS and CFF. It was during these discussions that SCLHS and CFF fashioned the proposed SCLHS/CFF transaction which is the subject of this lawsuit.

40. More particularly, and as outlined in an October, 2006 letter of intent, during their bilateral discussions SCLHS and CFF agreed upon a transaction which calls for SCLHS to become the owner of all of Exempla's assets by paying a purchase price which represents one-half of the purported value of the combined system's assets, and to finance its purchase by use of the revenues generated by Exempla Healthcare's ongoing operations.

41. The proposed SCLHS/CFF transaction will leave SCLHS in control of the operation of Exempla Healthcare and will result in the application of the ERD's to all medical practices, decision making and counseling which takes place at ELMC and EGS. Thus, this transaction will result in termination of the dual tradition Exempla Healthcare system in violation of the agreements and conditions imposed by the Organizing Parties, and in violation of the provisions of the Termination Agreement setting forth the sole narrow grounds upon which the dual tradition Exempla Healthcare system can be terminated.

42. Although SCLHS and CFF disclosed their agreement in principle to Exempla in October, 2006, their discussions did not crystallize into a contract until October 18, 2007 when they signed a document entitled Membership Transfer Agreement (the "Transfer Agreement"). The Transfer Agreement is a lengthy document and includes a number of exhibits and schedules. The gist of the Transfer Agreement is the same as the deal SCLHS and CFF contemplated in the agreement in principle they revealed to Exempla a year earlier, under which CFF will transfer its membership interest in Exempla to SCLHS for \$311 million with that sum to be paid in the form of an initial payment of \$50 million, further payments made over a period of five years pursuant to a promissory note in the face amount of \$200 million, and issuance of a debenture by SCLHS in CFF's favor, in the face amount of \$61 million. Upon information and belief, SCLHS and CFF have asserted, in differing contexts, that the purported purchase price of \$311 million is based either on a valuation of Exempla Healthcare's (the combined system) assets and represents 50% of the fair value of those combined assets, or on the value of Exempla's assets standing alone.

43. The proposed SCLHS/CFF transaction will be extraordinarily profitable for SCLHS and CFF. For SCLHS's part, by effectuating the proposed transaction, SCLHS, an entity which already owns nine other hospitals (most much smaller than ESJH or ELMC) will be materially increasing the size of its Catholic hospital chain and thereby improving the efficiencies and economies of that chain, to SCLHS's benefit and in SCLHS's self-interest. Further, SCLHS, although it has publicly avowed not to use any revenues generated by the Exempla Healthcare system itself to fund its payments to CFF, has not made any contractual commitment not to do so. Nor has SCLHS contractually committed that all earnings of the Exempla Healthcare system will be retained within that system and will not be used for other purposes. Hence, there is a very

real likelihood that, notwithstanding its public protestations to the contrary, what SCLHS is really doing is effecting a leveraged buyout (“LBO”) of the Exempla Healthcare system, in which revenues generated by these Colorado non-profit entities will be used by a foreign entity to fund that foreign entity’s acquisition of Colorado-based assets.

44. In addition, by closing the proposed transaction, SCLHS will have succeeded in achieving its non-financial goal of bringing about the imposition of the ERD’s upon Exempla Healthcare in its entirety, an objective which SCLHS has previously advanced and which has been rejected by Exempla and CFF. The ERD’s will be imposed upon all of Exempla Healthcare’s facilities, upon Exempla Healthcare’s medical staff and upon the communities Exempla Healthcare serves. This large universe of patients, and the professionals who treat them, includes persons who subscribe to varying religious principles and doctrines. These are persons who seek access to medical practices, decision-making and counseling not crabbbed by any one religion’s principles and doctrines and not dictated by any one religion’s leaders.

45. SCLHS has attempted to publicly justify the SCLHS/CFF proposed transaction by “explaining” that Exempla Healthcare is not financially strong, in that Exempla allegedly cannot fund the rebuilding of ESJH. SCLHS has portrayed itself as coming to the rescue of a wounded and faltering healthcare system. But, SCLHS knows, and SCLHS has failed to disclose to the public, that it was *SCLHS’s responsibility* to fund the ESJH rebuilding and the only reason that rebuilding was not funded was that SCLHS refused to meet its responsibility and starved its own facility of capital. Thus, SCLHS, through its own actions, created the very alleged financial “problem” it now uses to justify its takeover of Exempla Healthcare, and its improper termination of the dual tradition Exempla Healthcare system.

46. The SCLHS/CFF transaction also will be very profitable to CFF. CFF made no investment of money or property into Exempla Healthcare, or into Exempla itself, at its formation or at any time thereafter. Nor was CFF entitled to receive any money or property, other than its \$200,000 annual payment, as a result of its serving as the sponsor of the non-sectarian tradition of ELMC and EGS. Yet, if SCLHS honors its obligations under the proposed SCLHS/CFF transaction, CFF will be transformed into a foundation having assets worth more than \$250 million (even more, if SCLHS retires the debenture), all in exchange for CFF’s having, in effect, agreed to ignore and to breach the terms of the Organizing Parties’ understandings, conditions and agreements, for CFF’s having abdicated its responsibility to protect the non-sectarian tradition of the ELMC “side” of the Exempla Healthcare system, and for CFF’s having willfully, and for its selfish purposes, abjured its responsibilities to the citizens of Jefferson and Boulder counties who rely on ELMC and EGS for non-sectarian health care services.

47. In contemplation of this development, which will entirely transform CFF, CFF has changed its purported mission as a non-profit corporation. Thus, CFF’s “purposes” no longer include its support of ELMC but instead now include such activities as “improving quality of life” and “increasing community generosity and involvement”. CFF’s most recent articulation of its mission indicates that the effect of the proposed transaction will be to transfer to CFF more than \$250 million in *hospital* assets which CFF will then use for *non-hospital* purposes. CFF will receive \$100’s millions which should be safeguarded for the continued improvement and expansion of ELMC and EGS but which will, in fact, wind up funding grants made by CFF to an assortment of miscellaneous, as yet unidentified, organizations who no doubt will earnestly seek

out the favor of this newly created, seemingly beneficent, charitable foundation which, in fact, will have been guilty of having brazenly violated its trust and its fiduciary duty.

F. Exempla's Opposition To The Proposed Transaction.

48. As discussed above, Exempla did not participate in the discussions that culminated in the execution of the Transfer Agreement and Exempla is not a party to the Transfer Agreement. Exempla's Board of Directors did not propose or agree upon the terms or the conditions of, or the adequacy of the consideration to be paid pursuant to, the Transfer Agreement, or to CFF's use of that consideration.

49. Beginning in October, 2006 when SCLHS and CFF first revealed their plan to Exempla and asked Exempla to agree to the transaction ultimately detailed in the Transfer Agreement, and continuing to the present, Exempla has stated that it could not support the proposed transaction and must object to it for numerous reasons, including the following:

- (a) If the proposed transaction is effectuated, Exempla Healthcare will no longer consist of a dual tradition healthcare system, in which the separate and distinct history and traditions of the two healthcare facilities that joined to form this system are maintained, because Exempla Healthcare would effectively become a Catholic health care system and ELMC and EGS, as Catholic hospitals, would be subject to the ERD's;
- (b) If the proposed transaction is effectuated, patients at ELMC and EGS will no longer be able to receive the important obstetrical and gynecological services, end-of-life medical services and other medical counseling and treatment which are banned by the ERD's, and physicians at ELMC and EGS will no longer be able to provide these prohibited services;
- (c) If the proposed transaction is effectuated, the contract between Exempla and Kaiser Permanente ("Kaiser") concerning the medical services to be furnished at EGS, and requiring that a full range of medical services be made available to EGS patients, including medical services prohibited by the ERD's, may be breached and the important and valuable relationship between Kaiser and Exempla may be irreparably damaged;
- (d) If the proposed transaction is effectuated, the payment to CFF of \$100's millions in consideration for CFF's sale to SCLHS of CFF's membership interest in Exempla, will result in funds which should be used to support and to expand Exempla Healthcare not being used for those purposes, but, instead, being diverted to non-hospital related purposes.

50. Despite their knowledge that Exempla — the entity which is responsible for and operates this very complicated and large undertaking involving the employment of thousands

of persons and the medical treatment of hundreds of thousands of patients — opposes their proposed transaction, and believes that the proposed transaction is wrongful and violates the terms and conditions of the parties' Affiliation Agreement and other Affiliation Documents, SCLHS and CFF have made it clear that they intend to close the proposed transaction.

G. Exempla's Purpose In Bringing This Lawsuit.

51. As described above, the SCLHS/CFF proposed transaction will result in the improper diversion of hospital assets to non-healthcare uses, the improper burdening of Exempla Healthcare with the obligation to pay the balance of SCLHS's purchase price for its acquisition of CFF's membership interest, the conversion of ELMC and EGS into sectarian hospitals, and the *de facto* termination of the dual tradition Exempla Healthcare system in violation of the conditions and understandings of the parties at the time that the system was formed and in violation of the Affiliation Documents themselves, including without limitation the Termination Agreement, which does not authorize termination of the dual tradition Exempla Healthcare system for the reasons advanced by SCLHS and CFF, and certainly not for the self-serving reasons which are motivating SCLHS's and CFF's unauthorized termination of the dual tradition Exempla Healthcare System. SCLHS's and CFF's termination of the dual tradition Exempla Healthcare System is directly contrary to the stated purpose and mission of Exempla Healthcare to maintain the two separate medical traditions, which mission gave birth to the system and which mission the system was formed to perpetuate.

52. Exempla therefore brings this lawsuit to obtain relief from this Court preventing SCLHS and CFF from closing their proposed transaction, preventing the diversion of charitable assets which will result from that transaction, preventing the breaches by both CFF and SCLHS of their contractual obligations and their fiduciary duties, and preventing the conversion of Exempla Healthcare, in general, to a Catholic healthcare system, and the conversion of ELMC and EGS, in particular, to Catholic hospitals, where the provision of medical care is constrained by the ERD's imposed by the Roman Catholic Church upon all health care facilities controlled by it.

FIRST CLAIM FOR RELIEF

(Breach Of Contract, Or Anticipatory Breach Of Contract, By Defendants CFF  
And SCLHS)

53. Exempla incorporates and realleges herein all allegations in paragraphs 1 to 52 above.

54. In 1997-1998, upon the formation of Exempla Healthcare and then in 2002, upon Exempla's construction of EGS, SCLHS, CFF, Exempla and other interested parties negotiated and entered into contracts with one another including, without limitation, the contract entitled Affiliation Agreement, pursuant to which SCLHS and CFF agreed that they would operate Exempla Healthcare as a dual tradition system in which they would preserve Exempla's mission of providing non-sectarian health care services at ELMC and EGS unrestricted by the ERD's.

55. By entering into the Transfer Agreement, SCLHS and CFF have stated their intention to effectuate an arrangement which, if effectuated, will breach covenants in the Affilia-

tion Agreement and in the other Affiliation Documents, including without limitation the provisions of the Termination Agreement which state the sole bases upon which the dual tradition Exempla Healthcare system can be terminated prior to expiration of the approximately 65 year period of the JOA.

56. The Affiliation Documents do not vest CFF and SCLHS with economic ownership interests in Exempla's assets that are freely alienable and may be transferred with the knowledge, let alone with the specific purpose, that an agreed-to transfer will cause the unauthorized termination of the dual tradition Exempla Healthcare system.

57. To the contrary: the Affiliation Documents vest CFF and SCLHS with membership interests for the very purpose of ensuring that Exempla Healthcare carries on and serves the dual traditions that animated, and the perpetuation of which was a condition underlying, the formation of that system. The Organizing Parties agreed that, absent the occurrence of one of the few and narrowly-defined extraordinary circumstances which potentially could call for a termination of Exempla Healthcare, in accordance with the Termination Agreement, Exempla Healthcare was intended to be maintained and to survive as a dual tradition system throughout the entire approximately 65 year period of the JOA.

58. CFF's and SCLHS's intention to now trade in CFF's membership interest by entering into a transaction serving their respective economic self-interests, while concurrently defeating the interests and purposes of Exempla Healthcare, will constitute a breach of the Affiliation Agreement and the other Affiliation Documents, including the Termination Agreement.

59. Exempla is a party to the Affiliation Agreement and to the other Affiliation Documents, including the Termination Agreement, which contain the covenants which SCLHS and CFF will be breaching should they effectuate their proposed transaction. Exempla therefore has standing to complain of those breaches and to seek relief to prevent the injuries that Exempla itself will suffer, that Exempla Healthcare will suffer, and that the communities Exempla Healthcare serves will suffer, should the threatened breaches take place.

60. In order to avoid the breaches of the Affiliation Agreement and the other Affiliation Documents threatened by effectuation of the transaction set out in the Transfer Agreement, Exempla requests that this Court enter an order temporarily, preliminarily and permanently enjoining SCLHS and CFF from closing upon the proposed transaction described in the Transfer Agreement.

### SECOND CLAIM FOR RELIEF

(Breach Of Fiduciary Duty By Defendants SCLHS And CFF)

61. Exempla incorporates and realleges herein all allegations in paragraphs 1 to 60 above.

62. In their capacities as members of Exempla, and as sponsors of Exempla and the Exempla Healthcare system, CFF and SCLHS owe fiduciary duties to Exempla which require them to hold their membership interests, and to exercise the powers inherent in their memberships, for the sole benefit of Exempla and Exempla Healthcare and not for their individual bene-

fit, and to not use their fiduciary positions to enrich themselves or to take actions to the detriment of Exempla and Exempla Healthcare.

63. CFF's and SCLHS's duties include the duty of care and the duty of loyalty. Those duties require that a fiduciary act in the best interest of the entity it represents, not in its self-interest.

64. In addition to owing a duty of care and a duty of loyalty to the nonprofit corporation of which they are fiduciaries, fiduciaries of a nonprofit corporation owe a duty of obedience to that corporation. The duty of obedience obligates the fiduciary to ensure that the nonprofit corporation is faithful to the purposes and goals it was formed to accomplish and to ensure that the corporation acts in accordance with its mission.

65. If SCLHS and CFF proceed to close their proposed transaction, they will, by so doing, breach the fiduciary duties they owe to Exempla and Exempla Healthcare. The proposed transaction not only does not serve Exempla's mission, or the mission of Exempla Healthcare, but it undermines those missions. The proposed restructuring serves the interests of CFF and SCLHS individually, as distinct from CFF's and SCLHS's interests as fiduciaries:

- (a) CFF, which never owned or contributed to the acquisition of Exempla's assets, intends to use the proceeds generated by its sale of its membership interest in Exempla, effectively constituting a sale of CFF's purported undivided interest in Exempla's assets, to increase the size of the corpus of the foundation which CFF administers and, thereafter, to use the proceeds for purposes unrelated to Exempla, Exempla Healthcare, or healthcare in general;
- (b) SCLHS, which never owned or contributed to the acquisition of Exempla's assets, intends to use the proceeds generated by the ongoing operation of Exempla Healthcare to pay the purchase price of CFF's membership interest. SCLHS also intends to integrate Exempla's operations into SCLHS's existing Catholic health care system, thereby increasing the size of that health care system and enhancing the financial status of that healthcare system;
- (c) CFF and SCLHS intend to abandon their responsibilities to maintain Exempla Healthcare as a dual tradition system for the entire approximately 65 year term of the JOA, and to abandon their responsibilities to take all actions necessary to maintain the dual tradition Exempla Healthcare system for the full term of the JOA.

66. Fiduciaries of a nonprofit corporation possibly may effect a change in the corporation's purpose or mission if the corporation is confronting extraordinary circumstances, financial or otherwise, which make it impossible for the nonprofit corporation to continue to carry out its mission. Exempla is facing no such circumstances. To the contrary, Exempla's financial circumstances are positive. Exempla's circumstances do not justify the dramatic and

fundamental change in Exempla Healthcare's mission which will result from the closing and the effectuation of the proposed transaction.

67. Indeed, if Exempla Healthcare presently faces any financial problem, that problem results from SCLHS's refusal to fund capital improvements to ESJH. ESJH is a facility which SCLHS owns and which SCLHS refused to transfer to Exempla Healthcare when the system was formed. SCLHS's refusal to fund capital improvements to ESJH in the past arguably constituted a breach of the fiduciary duties it owed to Exempla as both a member and a sponsor, and certainly constituted a breach of SCLHS's contractual obligations. Whether or not SCLHS violated its fiduciary obligations in the past by refusing to fund capital improvements to ESJH, SCLHS's intention to now sabotage Exempla Healthcare's mission to function as a dual tradition system going forward, and Exempla's mission to operate ELMC and EGS, based on SCLHS's alleged "justification" that ESJH needs capital improvements — a "justification" that SCLHS itself created through its own unjustified actions — is a breach of fiduciary duty by SCLHS.

68. In order to avoid the breaches of fiduciary duty constituted by, and the damages resulting from those breaches threatened by, a closing and effectuation of the proposed SCLHS/CFF transaction, Exempla requests that this Court enter an order temporarily, preliminarily, and permanently enjoining SCLHS and CFF from closing and effectuating the proposed transaction.

THIRD CLAIM FOR RELIEF  
(Conversion By Defendant CFF)

69. Exempla incorporates and realleges herein all allegations in paragraphs 1 to 68 above.

70. Exempla asks that this Court enter an order enjoining SCLHS and CFF from consummating their proposed transaction described above.

71. If this Court does not enter the injunction requested by Exempla, and if, as a result, the proposed transaction closes, Exempla nonetheless requests that this Court order relief relating to an important aspect of the transaction.

72. More particularly, in the event that the transaction closes, Exempla asks that this Court impose a constructive trust upon all money paid by SCLHS to CFF as consideration for CFF's membership interest. The Court should order that all money paid to CFF be held in trust and used only for purposes of supporting Exempla's ongoing furnishing of health care services, and not for other purposes.

73. All proceeds which CFF receives as a result of an effectuation of the proposed transaction will derive from Exempla's continued operation of a health care system, or constitute money derived from the sale of Exempla assets, to be dedicated to specific charitable purposes. Were CFF to use this money for matters unrelated to Exempla's operations, CFF would effectively be converting and misappropriating Exempla's assets. It is proper to impose a constructive trust upon this money to prevent such conversion and misappropriation.

#### FOURTH CLAIM FOR RELIEF

(Injunction Restraining Defendants CFF's And SCLHS's Violation Of The Colorado Revised Nonprofit Corporation Act)

74. Exempla incorporates and realleges herein all allegations in paragraphs 1 to 73 above.

75. The Colorado Revised Nonprofit Corporation Act, C.R.S. §7-121-101, *et seq.* (“CRNCA”), states the manner in which Colorado nonprofit corporations must be established and must be operated. CRNCA’s requirements are binding upon Exempla and upon Exempla’s members, SCLHS and CFF.

76. CRNCA contains specific provisions which prescribe the procedures to be followed by nonprofit corporations if they seek to sell or otherwise dispose of all or substantially all of their assets. CRNCA, Section 7-132-102, “Sale of property other than in regular course of activities”, provides that a nonprofit corporation may not sell or otherwise dispose of all or substantially all of its property in the absence of the corporation’s Board of Directors determining the adequacy of the consideration to be paid for the property and determining the other terms and conditions of the proposed transaction:

A nonprofit corporation may sell, lease, exchange or otherwise dispose of all, or substantially all, of its property, with or without its good will, other than in the usual and regular course of business *on the terms and conditions and for the consideration determined by the board of directors, if the board of directors proposes* and the members entitled to vote thereupon approve the transaction.

C.R.S. §7-132-102(1) (emphasis supplied).

77. SCLHS and CFF have described the proposed transaction to which they have agreed as the “transfer” of a membership interest in Exempla. Thus, the contract which sets forth their agreement is entitled “Transfer Agreement”. The substance of the transaction, however, involving as it does the projected payment of as much as \$311 million by SCLHS to CFF, is of the nature of a sale of assets and the assets being sold are Exempla’s assets. Indeed, SCLHS has represented that the transaction constitutes a sale of assets in various filings SCLHS has made with the United States Department of Justice.

78. Thus, CFF’s transfer of its Exempla membership interest to SCLHS for \$311 million constitutes, within the meaning of CRNCA, a sale of “all, or substantially all” of Exempla’s property. Further, this sale of Exempla’s property is not in the “usual and regular course of [Exempla’s] business”. For these reasons, SCLHS/CFF’s proposed transaction is a transaction which Exempla’s Board of Directors is required to propose and a transaction whose terms and conditions are to be set by Exempla’s Board.

79. Exempla’s Board of Directors did not “propose” the SCLHS/CFF transaction. Exempla’s Board did not determine the “terms and conditions” of the proposed transaction. Exempla’s Board did not determine the adequacy of the “consideration” to be paid by SCLHS in connection with the proposed transaction.

80. SCLHS and CFF intend to close their proposed transaction notwithstanding the fact that Exempla's Board of Directors did not propose the transaction and notwithstanding the facts that Exempla's Board of Directors did not determine the terms, the conditions or the adequacy of the consideration to be paid in connection with the transaction. Indeed, SCLHS and CFF intend to close their proposed transaction notwithstanding the fact that Exempla's Board of Directors has opposed the transaction and informed SCLHS and CFF that Exempla opposes the transaction.

81. Under these circumstances, SCLHS' and CFF's closing of their proposed transaction will violate CRNCA. Accordingly, Exempla requests that this Court enter an order temporarily, preliminarily and permanently enjoining SCLHS and CFF from taking any further steps to close their proposed transaction, unless and until Exempla's Board of Directors were to approve the transaction as it may be modified to protect and to preserve Exempla Healthcare's mission and purpose, approves the material terms and conditions of a modified version of the proposed transaction, and approves the adequacy and the use to be made of the consideration to be paid in connection with an effectuation of a modified transaction which has met with the approval of Exempla's Board of Directors.

#### FIFTH CLAIM FOR RELIEF

(Judgment Declaring That The Effectuation Of The Proposed SCLHS/CFF Transaction Will Undermine Exempla's Mission, And Injunction Restraining Defendants SCLHS and CFF From Consummating Their Proposed Transaction For That Reason)

82. Exempla incorporates and realleges herein all allegations in paragraphs 1 to 81 above.

83. Colorado's General Assembly has found and declared that all hospitals "provide a service to the public by making health care services available to the communities they serve", C.R.S. §6-19-101(1), and Colorado's General Assembly has found and declared that all nonprofit hospitals hold their assets *in trust*:

...all nonprofit hospitals shall be deemed to *hold all of their assets in trust and those 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 nonprofit entities that hold them in trust. The public is the beneficiary of this trust.

\* \* \*

The public also has an interest in knowing that the transfer of the assets of a nonprofit hospital, or the proceeds from the assets, *preserves, to the extent practicable, their charitable purpose.*

C.R.S. §6-19-101(2); emphasis supplied.

84. Colorado's General Assembly has found and declared as well that:

The general assembly further finds and declares that all transfers of hospital assets or control have the potential to *impact the communities they serve*.

C.R.S. §6-19-101(3); emphasis supplied.

85. The Affiliation Agreement and the Affiliation Documents are among the “organic documents” which state the “charitable purposes” of Exempla and the Exempla Health-care system. Those charitable purposes include the explicit purpose of preserving for the entire approximately 65 year term of the JOA the non-sectarian medical tradition at ELMC and EGS, to be maintained concurrently with the Catholic hospital tradition at ESJH, and *not* to be supplanted by the Catholic tradition constituted by the ERD’s.

86. The Uniform Management of Institutional Funds Act, C.R.S. §15-1-1101, *et seq.* (“UMIFA”), recognizes that funds given and entrusted by donors to the control of charitable institutions are to be used for the purposes of the donee-institution and not for other purposes, unless the contemplated and specific purposes of the donee institutions can be demonstrated by those who seek to use the funds for other purposes to be “obsolete, inappropriate or impracticable”.

87. Upon its formation in 1998 and to the present, Exempla has held its assets in trust and its assets have been dedicated to “specific charitable purposes”, *to wit*, its operation of a non-sectarian hospital. Exempla’s mission will be undermined and defeated by the effectuation of the transaction proposed by SCLHS and CFF. The assets which Exempla holds in trust will not be dedicated in the future to the charitable purposes to which those assets have been dedicated in the past.

88. Furthermore, CFF has stated that it intends to use the \$311 million in proceeds which it may receive for CFF’s “sale” to SCLHS of CFF’s membership interest in Exempla, for purposes other than the charitable purposes traditionally served by Exempla. If the restructuring transaction goes forward and CFF uses the \$311 million, or any material portion of those proceeds, for purposes other than the purposes served by Exempla, the communities historically served by Exempla will be negatively impacted, in that they will not be served in the future as they have been served in the past.

89. There is a dispute between Exempla, on the one hand, and SCLHS and CFF, on the other hand, concerning whether the effectuation of SCLHS/CFF’s proposed transaction will result in changes to the charitable purposes to which Exempla’s assets, and the proceeds resulting from the sale of those assets, must be dedicated and, therefore, whether the proposed transaction will change Exempla’s mission, in circumstances where there is no justification for any such change and in circumstances where Exempla’s intended purposes have not been rendered “obsolete, inappropriate or impracticable”. In accordance with Rule 57, C.R.Civ.P., and C.R.S. §13-51-101, *et seq.*, “the Uniform Declaratory Judgments Law”, Exempla requests that this Court enter a judgment declaring that the transaction proposed by SCLHS/CFF will result in an unjustified change in Exempla’s mission and a diversion of Exempla’s assets for purposes not consistent with Exempla’s mission and that, accordingly, SCLHS and CFF be ordered not to close or effectuate their proposed transaction.

SIXTH CLAIM FOR RELIEF

(Breach Of Covenant Of Good Faith And Fair Dealing Against SCLHS)

90. Exempla incorporates and realleges herein all allegations in paragraphs 1 to 89 above.

91. Under the Management Agreement, which constitutes one of the Affiliation Documents, Exempla was given the right and the authority, and Exempla was charged with the obligation, to manage ESJH. Exempla was specifically required to operate ESJH as an acute care hospital for the entire term of the Management Agreement, which is equal to the term of the JOA.

92. As the owner of ESJH, which it did not contribute to Exempla Healthcare, SCLHS retained the discretion to fund capital improvements needed to continue to operate that facility. Because SCLHS retained ownership and control of ESJH, however, Exempla could not meet its obligations to continuously operate ESJH as an acute care hospital unless SCLHS provided funding for capital improvements necessary to permit the parties to meet their shared goal and agreed common purpose of operating ESJH as an acute care hospital for the entire term of the Management Agreement, which is equal to the term of the JOA.

93. As a result, SCLHS had a duty of good faith and fair dealing to fund those capital improvements reasonably necessary to continue to operate ESJH as an acute care hospital throughout the entire term of the Management Agreement, which is equal to the term of the JOA.

94. SCLHS has breached its duty of good faith and fair dealing by denying that it is obligated to fund those capital improvements reasonably necessary to continue to operate ESJH as an acute care hospital throughout the entire term of the Management Agreement, which is equal to the term of the JOA; by, in fact, refusing to fund those capital improvements reasonably necessary to continue to operate ESJH as an acute care hospital throughout the entire term of the Management Agreement, which is equal to the term of the JOA; and by then using its failure to fund such capital improvements as the purported justification for its entering into the proposed transaction with CFF, which is improper for the reasons described throughout this Complaint.

95. Exempla accordingly seeks a declaration that SCLHS is obligated to fund those capital improvements reasonably necessary to continue to operate ESJH as an acute care facility throughout the entire term of the Management Agreement, which is equal to the term of the JOA. Exempla estimates that the capital improvements to ESJH which SCLHS was required to fund in the past, and those SCLHS is required, and should be ordered, to fund in the future, total \$100's millions.

WHEREFORE, for the reasons discussed above, Exempla respectfully requests that this Court enter judgment in its favor, ordering the injunctive and declaratory relief described above, awarding Exempla its costs and fees, and awarding Exempla such other relief as the Court finds is fair and just.

Dated: January 8, 2008  
Denver, Colorado

Respectfully submitted,

HOROWITZ/FORBES, LLP

*Original Signature On File*

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