

BEFORE THE ATTORNEY GENERAL

STATE OF COLORADO

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**FINDING OF NO MATERIAL CHANGE IN CHARITABLE PURPOSE**

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IN THE MATTER OF THE EXEMPLA HEALTHCARE SYSTEM MEMBERSHIP  
TRANSFER

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**JURISDICTION OF THE ATTORNEY GENERAL**

1. This matter came before the Colorado Attorney General upon the application for the sale and transfer of Exempla Healthcare System assets between the Community First Foundation ("CFF") and the Sisters of Charity of Leavenworth Health System, Inc. ("SCLHS"), the sole members in the Exempla Healthcare System ("Exempla").
2. Pertinent to this matter, the Attorney General has two types of jurisdiction relating to oversight of charitable trusts. First, C.R.S. 2-4-211 and C.R.S. 24-31-101(5) recognize that the Attorney General has all powers conferred by statute and by common law for trusts established for charitable, educational, religious, or benevolent purposes. Second, pursuant to C.R.S. 6-19-101 et. seq., the Attorney General has the jurisdiction to review and approve or challenge certain transactions involving licensed hospitals.
3. C.R.S. 6-19-101 et. seq. was enacted by the Colorado General Assembly to ensure "that the transfer of the assets of a non-profit hospital, or the proceeds from the assets, preserves, to the extent practicable, their charitable purpose."
4. Pursuant to C.R.S. 6-19-203 regarding nonprofit to nonprofit licensed hospital transactions, the Attorney General has jurisdiction to review and approve or challenge the proposed sale and transfer of 50% of the assets of the non-profit Exempla hospital system from Community First Foundation to the Sisters of Charity of Leavenworth Health System, Inc.
5. In the exercise of his jurisdiction, the Attorney General has conducted a review based upon the criteria in C.R.S. 6-19-203. For purposes of this review, he has considered documentary information from numerous interested parties, including numerous parties opposed to the transfer.

**FINDINGS AND ORDER**

6. Pursuant to C.R.S. 6-19-402(2), based upon his review of the relevant information and applying the facts and the standard of review for such transactions in C.R.S. 6-19-203(1), the Attorney General finds that the sale and transfer of 50% of the assets of the non-profit Exempla

Healthcare System from the Community First Foundation to the Sisters of Charity of Leavenworth Health System, Inc.: (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 the charitable assets outside of the state of Colorado.

7. The Attorney General therefore finds that the sale of 50% of the assets of the non-profit Exempla Healthcare System from the Community First Foundation to the Sisters of Charity of Leavenworth Health System, Inc. may proceed without further review by him under C.R.S. 6-19-203.

8. The Attorney General finds that while he has completed the review under C.R.S. 6-19-203(1), this order does not terminate his jurisdiction under C.R.S. 2-4-211 and C.R.S. 24-31-101(5) to continue to provide charitable trust oversight of Community First Foundation in regard to the use for charitable purposes of the proceeds derived from this transaction.

9. Pursuant to the common law powers afforded the Attorney General under C.R.S. 2-4-211 and C.R.S. 24-31-101(5), if the transfer of proceeds is finalized, the Attorney General directs SCLHS to provide on or before June 1<sup>st</sup> of each year an annual report to the Attorney General: i) certifying that no Exempla assets have been transferred outside of the state of Colorado, and ii) detailing any significant financial investments made in the Exempla system. This reporting requirement will begin on June 1<sup>st</sup> following the completion of the transfer, and continue until such time the Attorney General affirmatively states that such reports are no longer required.

10. Pursuant to the common law powers afforded the Attorney General under C.R.S. 2-4-211 and C.R.S. 24-31-101(5), if the transfer of proceeds is finalized, the Attorney General directs CFF to provide on or before June 1<sup>st</sup> of each year an annual report to the Attorney General (i) certifying that no proceeds of the sale have been transferred out of the state of Colorado, (ii) certifying that no proceeds of the sale have been utilized outside of the scope of the September 23, 1997 Amended and Restated Articles of Incorporation of Lutheran Medical Center Foundation, which is the governing document for CFF, and (iii) detailing additional use of proceeds to support general health care services for the benefit of the greater Denver community. This reporting requirement will begin on June 1<sup>st</sup> following the completion of the transfer and continue until such time the Attorney General affirmatively states such reports are no longer required.

#### **BASIS FOR FINDINGS AND ORDER**

11. On October 30, 2007, CFF and SCLHS submitted their notice of intent to sell and transfer CFF's 50% interest in Exempla to SCLHS. The filing triggered the Attorney General review set forth in C.R.S. 6-19-201.

12. The Exempla hospital system consists of three hospitals: Exempla Lutheran Medical Center ("Lutheran") located in Wheat Ridge, Colorado; the Exempla Good Samaritan Medical Center ("Good Samaritan") located in Lafayette, Colorado and; Exempla Saint Joseph Hospital ("St. Joseph"), located in Denver, Colorado.

13. The basis for the management of the three hospitals through the Exempla Healthcare System is the October 1, 1997 Affiliation Agreement between Exempla, SCLHS, CFF (then known as the Lutheran Medical Center Foundation), Primera, LLC, and Saint Joseph Hospital.

14. Ethical and Religious Directives<sup>1</sup> ("ERDs") prohibit the performance of certain medical procedures at Saint Joseph. The parties to the Affiliation Agreement agreed at Exempla's creation that the ERDs would not apply to Lutheran and Good Samaritan, so the three hospitals could not be fully merged into a single system. Exempla owns Lutheran and Good Samaritan, but manages Saint Joseph, which is owned by an affiliate of SCLHS. Notwithstanding this unique ownership and management arrangement, the Attorney General finds that for purposes of his review under C.R.S. 6-19-203(1), SCLHS and CFF are the sole economic members of Exempla.

15. SCLHS will purchase CFF's interest in Exempla for \$311 million, consisting of \$50 million in cash, a \$200 million promissory note with a five year maturity date, and a \$61 million debenture, the principal of which is payable at SCLHS's discretion. Additionally, CFF will annually commit \$2.9 million to apply to Discontinued Procedures that may arise from the ERDs. The Attorney General has not ordered an independent valuation of the Exempla system, but based on the record, finds that \$311 million is a fair and reasonable valuation of CFF's 50% interest in the Exempla system.

16. CFF will keep the proceeds of the sale in Colorado, and dedicate them to the charitable purposes in CFF's Amended and Restated Articles of Incorporation, dated September 23, 1997. The Attorney General finds that the funds resulting from the sale of CFF's interest in Exempla will remain in the state of Colorado, and that the Attorney General will retain jurisdiction over these assets.<sup>2</sup>

17. The principal objection raised by many to the transfer of CFF's interest in Exempla to SCLHS is the application of the ERDs to the entire Exempla system. The question is whether

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<sup>1</sup> According to the Catholic Church generally, the Ethical and Religious Directives (ERDs) are intended to provide normative guidance and ethical direction to providers of health care in a Catholic-sponsored health care setting.

<sup>2</sup> Opponents have objected to the fact that CFF may not put the entire \$311 million in sale proceeds to the same charitable purpose, a non-profit hospital system, as before. That is not the standard of review. The Attorney General has found that the sale of CFF's interest in the hospital system will not materially change the charitable purposes to which the hospitals were dedicated. The law does not require CFF to reinvest in a nonprofit hospital system under the facts of this case. CFF's use of these funds is bound rather by their Amended and Restated Articles of Incorporation of Lutheran Medical Center Foundation, dated September 23, 1997, and subject to continued charitable trust oversight by the Attorney General.

this constitutes a “material change” to the hospitals’ charitable purpose. As discussed below, the Attorney General finds it does not.<sup>3</sup>

18. The Attorney General finds that the charitable purpose of the Exempla hospital system is to provide general health care services to the surrounding community.

19. Information provided to the Attorney General by Exempla’s Board shows that in 2006, Lutheran had 22,629 inpatient admissions, 68,671 emergency visits, 160,821 outpatient visits, 118,103 physician group visits. Only 389 of the procedures performed in 2006 would likely be prohibited under the ERDs after the sale and transfer. In 2006, Good Samaritan had 10,330 inpatient admissions, 32,780 emergency visits, 75,587 outpatient visits. Only 265 of the procedures performed in 2006 would likely be prohibited under the ERDs. St. Joseph already operates under ERDs, and is therefore unaffected by the membership transfer.

20. The statute does not provide a definition of a “material change”. It is true that any change in the services provided by a hospital would be material to a person who can no longer receive an eliminated service there. While the Attorney General’s review under C.R.S. 6-19-203(1) does not reach the secondary analysis contained in C.R.S. 6-19-203(2), part (c) of that section directs the Attorney General to liberally construe the criteria for reviewing a transaction in favor of allowing a transaction to proceed. Accordingly, a “material change” must mean something more significant than “any change”.

21. In researching the appropriate standard of review for this transaction, the Attorney General concluded that the source for such a standard should be the case law relating to charitable entities. The most developed area of such case law relates to the determination of an entity’s status as a charity for income tax purposes.

22. In determining whether a hospital qualifies for tax-exempt status, the hospital must show, based on the totality of the circumstances, that it is entitled to an exemption. St. David’s Health Care System v. United States, 394 F.3d 232, 236 (5<sup>th</sup> Cir. 2003).

23. The three hospitals in the Exempla system will continue to provide general inpatient, outpatient and emergency health care services after the sale and transfer. Admissions impacted by the ERDs would likely constitute less than 1% of the admissions at Lutheran and Good Samaritan.

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<sup>3</sup> The Attorney General recognizes the strong emotional and political issues surrounding the ERDs. However, the General Assembly mandated that a single standard of review – the standard of “material change in the charitable purposes” – should apply to all sales governed by C.R.S. 6-19-203. Therefore, while recognizing the significant emotional and political concerns regarding the likely cessation of certain medical procedures, those concerns cannot and do not change the legal standard of review under this statute.

24. In response to questions from the Office of the Attorney General, the Exempla Board stated that: (i) it expects all three Exempla System hospitals to remain accredited by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) after the consummation of the sale and transfer<sup>4</sup>; (ii) the sale and transfer is not expected to adversely affect any of the System hospital's licensure status with the Colorado Department of Public Health and Environment, and; (iii) the sale and transfer is not expected to result in the loss of any of the Exempla system hospitals' Medicare/Medicaid certification. These conclusions support a finding that there will be no material change in the Exempla system's charitable purposes after the sale and transfer.

25. Based on the totality of the circumstances in this case, the Attorney General finds that there will be no material change in the charitable purposes of the Exempla system hospitals to provide general health care services to the surrounding community after the sale and transfer.<sup>5</sup> While there will be a specific reduction in certain ERD impacted services, this is not a material change to the charitable purpose of the system as a whole to provide general health care services to the surrounding community.

26. The Attorney General finds that the Exempla system hospitals will remain dedicated to their charitable purposes after the sale and transfer. The monies received by CFF, if utilized in accordance with its current articles of incorporation, will remain dedicated to CFF's charitable purposes within the state of Colorado and under the jurisdiction of the Attorney General.<sup>6</sup>

27. The Attorney General finds that there will be no material change in the charitable purposes of the Exempla system or of CFF after the sale and transfer of the Exempla system to SCLHS.

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<sup>4</sup> JCAHO evaluates and accredits more than 15,000 health care organizations and programs in the United States. An independent, not-for-profit organization, JCAHO is the nation's predominant standards-setting and accrediting body in health care.

<sup>5</sup> Some opponents have objected to the sale and transfer based on a disruption of services to its members and potential breaches of its contracts with the Exempla System. While the disruption of services due to the application of the ERDs to all three Exempla hospitals is of concern to the Attorney General, it does not rise to the level of a material change in the charitable purposes of the Exempla System. Any alleged breach of contract is a civil matter not under the Attorney General's jurisdiction, and any challenge should proceed under the normal judicial process. Further, some opponents have alleged several other statutory violations that may result from the sale, some of which are raised in the recently filed case Sadler, Compassion & Choices, and Krebs v. Community First Foundation, Sisters of Charity of Leavenworth Health System, Inc, Exempla, Inc, Kaiser Hospital Asset Management, Inc. and Kaiser Foundation Health Plan of Colorado. These include violations of the Colorado Revised Nonprofit Corporation Act (C.R.S. 7-121 to 137) and the Colorado Uniform Management of Institutional Funds Act (C.R.S. 15-1-1109). These 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.

<sup>6</sup> The charitable purposes of CFF are guided by their Amended and Restated Articles of Incorporation of Lutheran Medical Center Foundation, dated September 23, 1997.

## SUMMARY

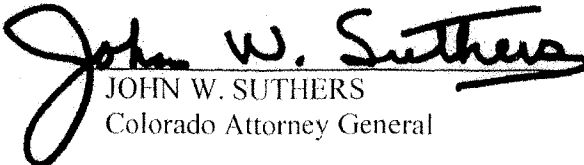
28. Pursuant to C.R.S. 6-19-402(2), and based on his review of the relevant information and applying the facts and the standard of review for such transactions in C.R.S. 6-19-203(1), the Attorney General finds that the sale and transfer of 50% of the assets of the non-profit Exempla Healthcare System from the Community First Foundation to the Sisters of Charity of Leavenworth Health System, Inc.: (i) does not result in a material change in the charitable purposes to which the assets of the three hospitals in Exempla Healthcare System have been dedicated and; (ii) will not result in a loss of jurisdiction by the Attorney General through a transfer of the charitable assets outside of the state of Colorado.

29. The Attorney General therefore finds that the sale of 50% of the assets of the non-profit Exempla Healthcare System from the CFF to the SCLHS may proceed without further review by him under C.R.S. 6-19-203.

30. Pursuant to the common law powers afforded the Attorney General under C.R.S. 2-4-211 and C.R.S. 24-31-101(5), if the transfer of proceeds is finalized, the Attorney General directs the SCLHS to provide on or before June 1<sup>st</sup> of each year an annual report to the Attorney General: i) certifying that no Exempla assets have been transferred outside of the state of Colorado, and ii) detailing any significant financial investments made in the Exempla system. This reporting requirement will begin on June 1<sup>st</sup> following the completion of the transfer and continue until such time the Attorney General affirmatively states that such reports are no longer required.

31. Pursuant to the common law powers afforded the Attorney General under C.R.S. 2-4-211 and C.R.S. 24-31-101(5), if the transfer of proceeds is finalized, the Attorney General directs the CFF to provide on or before June 1<sup>st</sup> of each year an annual report to the Attorney General (i) certifying that no proceeds of the sale have been transferred out of the state of Colorado, (ii) certifying that no proceeds of the sale have been utilized outside of the scope of the September 23, 1997 Amended and Restated Articles of Incorporation of Lutheran Medical Center Foundation, and (iii) detailing additional use of proceeds to support general health care services for the benefit of the greater Denver community. This reporting requirement will begin on June 1<sup>st</sup> following the completion of the transfer and continue until such time the Attorney General affirmatively states such reports are no longer required.

Issued this 27<sup>th</sup> day of December, 2007.

  
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JOHN W. SUTHERS  
Colorado Attorney General