

FRANKLIN CIRCUIT COURT  
DIVISION ~~VI~~ **II**  
CIVIL ACTION NO. 13-CI 1060

**FILED**  
TSC SEP 06 2013  
FRANKLIN CIRCUIT COURT  
SALLY JUMP, CLERK

**NORTON HEALTHCARE, INC.**  
200 East Chestnut Street  
Louisville, KY 40202

**PLAINTIFF**

v.

**UNIVERSITY OF LOUISVILLE**  
2301 S. 3<sup>rd</sup> Street  
Louisville, KY 40292

**DEFENDANT**

Serve: **Angela D. Koshewa**  
2301 South Third Street  
Louisville, KY 40292

**COMPLAINT FOR DECLARATORY RELIEF**

Plaintiff, Norton Healthcare, Inc., f/k/a Children's Hospital ("Norton"), by counsel, for its complaint against the Defendant, University of Louisville ("U of L"), states as follows:

**NATURE OF THE ACTION**

1. Norton brings this complaint because U of L has left it no other choice. U of L has threatened to divest Norton, the region's strongest, private, non-profit healthcare provider, of its ownership of Kosair Children's Hospital and to seize for itself Norton's hospital building and equipment. The hospital, under Norton's administration, serves as the primary pediatric hospital in the Commonwealth. Norton has invested over \$500 million in Kosair Children's Hospital and its pediatric programs and is in the midst of a renovation of the facility that will cost more than \$69 million. U of L's threats are without legal basis, but create a cloud of uncertainty that threatens to disrupt the medical care for thousands of Kentucky children and Norton's orderly administration of the hospital. Norton asks this Court to declare that U of L has no legal right to carry out its threats.

2. Norton has worked with U of L for more than half a century to provide healthcare for Kentucky children and to provide U of L with access to a first-class pediatric hospital at which its medical students, residents, and faculty may practice. In the 1980's, Norton built, at its own expense, the present Kosair Children's Hospital in downtown Louisville. Norton has spent hundreds of millions of dollars developing Kosair Children's Hospital into a preeminent institution. U of L medical students, residents, and faculty have enjoyed practicing in the present Kosair Children's Hospital facility for nearly 30 years.

3. The long relationship between Norton and U of L has been characterized by cooperation and a shared desire to provide excellent healthcare for Kentucky children. Any prior disagreements between the organizations were resolved amicably.

4. In late 2012, however, U of L entered into a sweeping 20-year affiliation agreement with Denver, Colorado-based hospital operator Catholic Health Initiatives ("CHI"). Under that deal, CHI took over the operation of most of U of L's University Hospital. The affiliation between U of L and CHI, which came after the Governor refused to approve a proposed merger between U of L and CHI, contemplated a future potential alliance in pediatric medicine. Neither U of L nor CHI currently operates a pediatric hospital in Kentucky.

5. Soon after it entered into its sweeping affiliation with CHI, U of L's posture toward Norton changed. U of L abandoned an executed non-binding term sheet for a new academic support agreement, that U of L and Norton had signed only a few months earlier, and U of L began making increasing and unreasonable demands on Norton which were contrary to how Kosair Children's Hospital had ever operated. U of L demanded, in its own words, a "radical change" in the historic relationship – one that would give U of L, and thus, CHI, control over Kosair Children's Hospital. U of L indicated that this was its final, non-negotiable position.

When Norton did not accede, U of L issued public threats, culminating on August 27, 2013, with a purported notice of breach of the ground lease for the hospital and a threat to seize Kosair Children's Hospital and medical equipment in it for itself. According to U of L, Norton will be required to "surrender to U of L the ownership and possession of the Real Property and all Buildings and Improvements" at the Kosair Children's Hospital site. ("Notice of Breach" attached and incorporated herein as Exhibit A.)

6. U of L's threats and Notice of Breach come close on the heels of Norton's announcement of a proposed affiliation with University of Kentucky ("UK") that would ensure that children in the Commonwealth, whether in Lexington, Louisville, or elsewhere, have the benefit of the best available doctors, regardless of whether they are affiliated with U of L, UK, or in private practice. U of L apparently contends that any provision of services by UK doctors at Kosair Children's Hospital is cause for Norton to forfeit ownership of the hospital itself.

7. U of L's threats and Notice of Breach have cast an untenable cloud of uncertainty over the operation of Kosair Children's Hospital, without any legal basis. Among other things, U of L has asserted that it may terminate Norton's lease of the land on which Norton built its hospital (the "Lease") if Norton does not agree to an affiliation agreement with U of L on terms dictated by U of L. Notwithstanding three separate requests by Norton that U of L withdraw its notice, U of L has refused to do so.

8. U of L has no legal right to threaten Norton's Lease or Norton's ownership of the Kosair Children's Hospital facility and improvements. The Court should so declare for three primary reasons.

9. First, U of L is not a party to the Kosair Children's Hospital Lease and thus has no right to purport to "terminate" the Lease. The "Lessor" under the Lease is the Commonwealth of

Kentucky, represented by the Secretary of the Finance and Administration Cabinet. The Commonwealth has not asserted any breach of the Lease. U of L's purported Notice of Breach is not signed by any representative of the Commonwealth and it is not evident that any representative of the Commonwealth authorized U of L's threats. The Court should declare that U of L is not a proper party to assert a breach under the Lease or terminate the Lease.

10. Second, in addition to U of L's lack of authority for its termination threat, there has been no breach of the Lease. None of U of L's allegations about Norton's conduct or positions (which are inaccurate) would, even if true, amount to a breach of the Lease. Nothing in the Lease (or any other agreement) requires that Norton pay U of L the millions of dollars it is demanding or restricts Norton's ability to affiliate with other medical groups or institutions, such as the Kentucky Children's Hospital at UK. The language in the Lease that U of L relies upon for its allegation of breach, a recital, provides only that the hospital will "serve the interest of and will be to the benefit of the [Commonwealth] by the availability of said new [hospital] for the programs and use of the University of Louisville's School of Medicine." Kosair Children's Hospital is plainly "available" for U of L's programs and use, as demonstrated by the many U of L medical students, residents, and faculty who practice at the hospital. This Court should declare that this recital does not impose any legal obligations on Norton and that, even if it did, that obligation would be reasonably limited to making the hospital available to faculty, medical students, and residents at U of L's School of Medicine, who may practice at the hospital, as they have historically, along with other doctors and professionals who provide pediatric care to the children of the Commonwealth.

11. Third, even examined on their own merits, U of L's assertions of "breach" have no basis. Norton has not restricted U of L from providing any type of pediatric care; the

financial amounts that U of L demands are not based on the parties' agreements; and Norton's letter of intent with UK is not a breach of the Lease and has not harmed U of L in any way. Norton has explained, in a September 4, 2013 response to the Notice of Breach, both that there is no plausible basis for asserting a breach and that it is nonetheless willing to address and accommodate U of L's concerns, but U of L has refused to withdraw its pending notice and the threats contained in it. ("Response to Notice" attached and incorporated as Exhibit B.) U of L's claims on these points—which appear to be a mere pretext for the threatened seizure of Kosair Children's Hospital—are mistaken.

12. Accordingly, Norton requests that this Court dispel the uncertainty that U of L has cast on Kosair Children's Hospital without any basis. Specifically, Norton requests that the Court declare:

- a. U of L has no authority to declare a breach under the Lease or to purport to terminate it;
- b. Norton has fulfilled all of its obligations under the Lease, including any obligation to make Kosair Children's Hospital available for U of L's use;
- c. U of L may not terminate the Lease by unilaterally terminating or non-renewing the parties' affiliation agreement; and
- d. U of L's various assertions of breach to date are without any legal or factual basis.

### **PARTIES**

13. Norton is a nonprofit healthcare company formed and existing under the laws of the Commonwealth of Kentucky and located in Louisville, Kentucky.

14. U of L is a Commonwealth-supported university located in Louisville, Kentucky.

## JURISDICTION AND VENUE

15. This Court maintains jurisdiction over this matter pursuant to KRS §§ 23A.010 and 418.040.

16. Franklin County is a proper venue for this action pursuant to KRS §45A.245.

## FACTS

### **A. Norton's Agreement To Build And Operate Kosair Children's Hospital.**

17. Norton and its predecessors have operated hospitals in Louisville since 1886. Norton's pediatric operations began as the Children's Free Hospital, established in 1892 at 220 East Chestnut Street in Louisville. The Children's Free Hospital later became Children's Hospital, which became part of Norton in 1969.

18. In 1962, U of L and Children's Hospital entered into an affiliation agreement that generally provided that U of L medical students, residents, and faculty would have privileges to practice and teach at Children's Hospital. For more than fifty years following that 1962 agreement, through a series of new affiliation agreements, U of L and the successors of Children's Hospital have maintained an affiliation and continue to maintain it to date. U of L and Norton currently are parties to a July 1, 2008 Master Affiliation Agreement (the "2008 Master Affiliation Agreement") attached and incorporated as Exhibit C).

19. In the late 1970's and early 1980's, Norton sought to build a new free-standing pediatric hospital in Louisville, the first such facility in Kentucky. U of L and the Commonwealth recognized the substantial benefits that would come from the construction of such a facility by Norton, but wanted Norton to bear the substantial expense of construction and maintenance of the hospital.

20. In 1981, Norton entered into two relevant agreements pertaining to the proposed new facility: (a) the Lease with the Commonwealth of Kentucky for approximately 2 acres of land owned by the Commonwealth at 231 East Chestnut Street in Louisville, for which Norton donated the then present value of the land; and (b) an agreement with U of L (the “1981 U of L Agreement”). A copy of the Lease is attached as Exhibit D and a copy of the 1981 U of L Agreement is attached as Exhibit E.

21. The 1981 U of L Agreement generally provided that the University would recommend and obtain authorization from the Kentucky Department of Finance for the Commonwealth to execute a lease to Norton for the referenced land, and that upon execution of the lease, Norton would donate to the University a sum equal to the present value of this land, and Norton would construct a pediatric hospital at its own expense on that land.

22. Under the Lease, Norton and the Commonwealth agreed that the hospital and improvements would remain the “sole property” of Norton during the term of the Lease. (Ex. D ¶ 4.) The term of the Lease is 99 years, with an option for an additional 50 years. (*Id.* ¶ 2.) The rent under the Lease is one dollar per year, which was paid in advance for 99 years. (*Id.* ¶ 3.)

23. Nothing in the Lease provides that the new hospital would be dedicated to U of L for its exclusive benefit or use. A preliminary recital in the Lease observed that the new facility “will serve the interest of and will be to the benefit of the [Commonwealth of Kentucky] by the availability of said new pediatric facility for the programs and use of the University of Louisville School of Medicine[.]” (*Id.* at 1.) A recital in the 1981 U of L Agreement similarly observed that the new hospital “will provide pediatric care, service and education benefitting the U of L Medical School and the citizens of the Commonwealth of Kentucky.” (Ex. E at 1.)

24. The 1981 U of L Agreement also provided Norton would invite a U of L representative to certain hospital board and committee meetings, and provide U of L with parking spaces at the new facility. Finally, the 1981 U of L Agreement provided that the 1962 affiliation agreement between U of L and Children's Hospital would be "reviewed and updated," and a "new revised Agreement [would be] executed by [Norton] and U of L." (*Id.* ¶ 3.) As described below, the contemplated new revised affiliation agreement was executed by Norton and U of L in 2003. Thereafter, in 2008, U of L and Norton entered into their current 2008 Affiliation Agreement.

25. Nothing in the 1981 U of L Agreement, the Lease, or the 2008 Affiliation Agreement provided that the new hospital would be dedicated for U of L's exclusive benefit or use.

**B. Norton's Construction And Operation Of Kosair Children's Hospital And Support For U Of L.**

26. Following the execution of the Lease, Norton constructed Kosair Children's Hospital. All told, since 1981, Norton has spent at least \$500 million on the construction, maintenance, pediatric programming, and upgrading of the facility. Norton is currently in the midst of a further \$69 million renovation project.

27. Norton has also paid for all of the high-tech medical equipment used at the hospital, in part with generous support and donations from the Louisville community. Norton has constantly upgraded this equipment as technology has improved. Those investments include tens of millions of dollars spent on equipment related to pediatric cardiac care, neonatal care, intensive care, surgical care, emergency care, diagnostic imaging, neurological disorders and cancer care, to name only a few.



28. The construction and operation of Kosair Children's Hospital has been a tremendous success for Norton, U of L, and the people of Kentucky. Kosair Children's Hospital is consistently recognized as one of the top pediatric hospitals in the nation. Kentucky families are able to obtain pediatric medical care and advanced procedures that, without Kosair Children's Hospital, would require travel to another state. The hospital, its facilities and equipment, and its culture also help attract top medical talent to Kentucky and to the U of L programs associated with the hospital.

29. Since construction of the new facility, Norton and Kosair Children's Hospital have also provided U of L with substantial financial and pediatric programmatic support. In 2012 alone, Norton provided U of L with more than \$21 million in financial support. Among those funds, Norton paid U of L approximately \$6.6 million in support of U of L's medical residents with the remaining amount of \$14.4 million supporting the operations of U of L's School of Medicine, Department of Pediatrics, and U of L pediatric faculty compensation. Norton has also hosted more than 100 U of L medical residents at Kosair Children's Hospital, more than any other private hospital.

**C. The Non-Exclusive Role of U of L at Kosair Children's Hospital.**

30. Although Norton is a substantial supporter of U of L, and although U of L-employed faculty physicians, residents, and medical students perform an important role at Kosair Children's Hospital, the parties' relationship has never been exclusive.

31. Only about 30% of Kosair Children's Hospital's medical staff are employed faculty physicians of U of L. Of the doctors who admitted at least one patient to Kosair Children's Hospital in 2012, fewer than half were employed faculty physicians of U of L.

32. Over the years, Norton has entered into agreements with numerous doctors, medical groups, and institutions not affiliated with U of L for the purpose of allowing them to practice in different capacities at Kosair Children's Hospital. For example, the anesthesiologists, neonatologists, radiologists, pathologists, and orthopedic surgeons who work at Kosair Children's Hospital include (or consist solely of) non-U of L doctors. There has never been a time that U of L was the exclusive supplier of medical care at the facility.

33. Until it sought to enter into a joint venture with CHI, U of L has never asserted that it has the right to the exclusive use of Kosair Children's Hospital and, in fact, U of L faculty have practiced side-by-side with private physicians and Norton-employed physicians for years.

**D. The Parties' Negotiations And Breakdown After U Of L/CHI Alliance.**

34. The 2008 Affiliation Agreement had an initial term of one year, with an automatic renewal thereafter absent termination. The term of the 2008 Affiliation Agreement renewed as of July 1, 2013.

35. Since 2010, Norton and U of L have had discussions about replacing the 2008 Affiliation Agreement and the Resident Limit Affiliation Agreement dated July 1, 2001. As part of those discussions, Norton and U of L executed a non-binding term sheet for an academic support agreement on September 28, 2012.

36. In November 2012, however, U of L announced that it had entered into a broad contractual affiliation with CHI. This contractual affiliation was reached only after the Governor refused to approve a merger between CHI and U of L. Following the Governor's rejection of the merger, U of L engaged in an "RFP" or "request for proposal" process with respect to certain opportunities to affiliate with of U of L. At the outset of that process, in a March 6, 2012 letter from U of L President Dr. Ramsey, U of L directly assured Norton that it was not necessary for

Norton to respond to the RFP because U of L “commit[ted]” that the then-pending discussions about “pediatric medical and surgical programs” would “suffice for defining the relationship between Norton Healthcare and University of Louisville Pediatrics in place of responding to the Requests for Proposals.”

37. U of L thereafter reached a contractual deal with CHI, in which U of L agreed that CHI would take over most of the operations of U of L’s University Hospital and that U of L would acquire an ownership interest in a private CHI entity, Kentucky One, that would operate the hospital. The U of L/CHI alliance does not cover pediatric care, but the affiliation agreement between them included language suggesting a future potential affiliation in that area and purports to give CHI certain rights in that regard. As noted, neither U of L nor CHI currently operates a pediatric hospital in Kentucky.

38. Soon after U of L’s affiliation with CHI, U of L began to take a dramatically different posture towards Norton and Kosair Children’s Hospital. Beginning in February 2013, U of L began proposing terms for the potential new affiliation agreement with Norton that were inconsistent with the September 2012 term sheet and that contemplated that U of L would take over control of Kosair Children’s Hospital. Several of the terms U of L proposed sought to give U of L the power to prevent non-U of L doctors and groups from practicing at Kosair Children’s Hospital. For example, one proposed term required Norton to maintain exclusivity for U of L in particular medical service lines. Another proposed term required exclusivity for academic training programs, which U of L said would “limit the ability of institutions other than University of Louisville to benefit from the use of Kosair Children’s Hospital.”

39. As Norton has explained to U of L, these proposed terms are not acceptable to Norton and contrary to the interests of children in the Commonwealth. There are specialized

areas in which Norton must arrange for non-U of L physicians to provide care because the most qualified physician may be in private practice or affiliated with another group. Although Norton has always made Kosair Children's Hospital available for U of L's use, including to permit hundreds of U of L residents and medical students to train at the facility, and although Norton values U of L's contributions in providing top-quality medical services to children in many specialized areas, Norton has never agreed to operate Kosair Children's Hospital exclusively for U of L's use or benefit and doing so would prevent Norton from providing the best possible medical care for the children of the Commonwealth. Because Kosair Children's Hospital is the primary pediatric facility in the Commonwealth, a decline in the scope or quality of service it provides would have substantial negative consequences for children in the Commonwealth.

40. By June 2013, U of L insisted that the "radical change" it demanded in a new Academic Support Agreement was final and non-negotiable and threatened to discontinue an affiliation with Norton, if Norton did not capitulate. U of L has expressed the view that if Norton does not agree to U of L's dictates in relation to a new affiliation agreement, then U of L somehow has the ability to terminate Norton's Lease of the land from the Commonwealth and seize Norton's hospital and improvements.

**E. U Of L's Purported Breach Notice And Threat To Terminate.**

41. On August 27, 2013, U of L, by counsel, sent Norton a letter purporting to set out a "notice of default and demand for cure" under the Lease. (Ex. A.) The Notice of Breach stated that it had been sent on behalf of U of L, not any representative of the Commonwealth, such as the Governor or the Secretary of Finance and Administration Cabinet (whose predecessor signed the Lease on behalf of the Commonwealth).

42. U of L has no authority to terminate a Lease to which the Commonwealth is a party, without express authorization from the Governor. This limit on U of L's authority was specifically recognized by the Commonwealth's Attorney General in his December 29, 2011 Report on the proposed merger between U of L and CHI (attached as Exhibit F), when U of L sought to modify other leases and affiliation agreements as part of the proposed merger. The Attorney General noted that University of Louisville Hospital was a public asset and that the Commonwealth was a party to an affiliation agreement and lease, and opined, "any modification of the Affiliation Agreement and related Lease requires the approval of the Governor." (Ex. F. at 14.) Similarly, the land that is the subject of the Lease to Norton is also a public asset, and any termination of that Lease necessarily also requires authorization from the Governor.

43. In its Notice of Breach, U of L purported to identify several breaches in Norton's performance under the Lease. U of L claimed that, under paragraph 12 of the Lease, "upon the expiration of thirty days without full and sufficient cure of such default, the 1981 Lease may be forthwith terminated, and whatever ownership or possessory rights held at that time by Norton Healthcare in the Real Property, including any buildings, structures, fixtures and building equipment, together with all additions, alterations and replacements thereof . . . shall terminate." U of L further claimed that Norton must, "upon such termination, surrender to U of L the ownership and possession of the Real Property and all Buildings and Improvements." (Ex. A at 1.)

44. In other words, U of L contended that if Norton did not meet U of L's demands, U of L would seize ownership of Kosair Children's Hospital, including all of the facilities and equipment that Norton has spent hundreds of millions of dollars building and acquiring.

45. The Notice of Breach purported to identify three breaches of the Lease by Norton. (Ex. A at 4 (“Norton Healthcare is in default in the prompt and full performance of the 1981 Lease as the result of three separate but related actions.”).) Not only was U of L not an appropriate party to assert breaches under the Lease, U of L also was mistaken as to each purported breach.

**F. Purported Breach No. 1: “Restricting U of L’s Practice.”**

46. U of L first asserted that “Norton Healthcare has breached its covenant to operate Kosair Children’s Hospital for the programs and use U of L’s School of Medicine by unilaterally restricting U of L from providing pediatric care, teaching and research at the hospital by physicians in the pediatric specialties of anesthesiology, radiology and neurosurgery.” U of L demanded that Norton “cure this breach within thirty days by confirming in writing that in the event U of L retains credentialed physicians in these specialties, they will be granted full privileges at Kosair Children's Hospital to render care, and teach and educate students and residents.” (Ex. A at 4.)

47. U of L was mistaken in the first instance because the Lease does not contain any “covenant” to operate Kosair Children’s Hospital for the use of U of L, much less the exclusive use of U of L, as U of L suggested. As noted, the Lease contains a preliminary recital observing that the new pediatric hospital “will serve the interest of and will be to the benefit of the [Commonwealth of Kentucky] by the *availability* of said new pediatric facility for the programs and use of the University of Louisville School of Medicine[.]” (Ex. D at 1, emphasis added.) Even if this recital imposed an affirmative duty on Norton, the only duty would be to make Kosair Children's Hospital available for the programs and use of U of L, which Norton has done since the hospital building opened.

48. U of L was also wrong factually. Norton has not “unilaterally restrict[ed]” U of L from providing care in anesthesiology, radiology and neurosurgery. In each of these specialties, Norton was required to recruit independent doctors due to problems experienced with some U of L-affiliated doctors who previously worked at Kosair Children’s Hospital, in most cases with U of L’s knowledge and consent. Nonetheless, Norton confirmed in writing in its September 4 Response to Notice of Breach that Norton would grant privileges to properly credentialed and qualified doctors that U of L employs in those fields. (Ex. B at 2.)

**G. Purported Breach No. 2: Alleged Financial And Negotiation Disputes.**

49. U of L next asserted in its Notice of Breach that Norton has breached the Lease by: (a) failing to pay amounts purportedly due under a separate contract and failing to pay “other funding commitments” not made in any contract; (b) supposedly failing to negotiate in good faith to amend the 2008 Affiliation Agreement; and (c) purportedly refusing to allow U of L representatives to attend board or executive committee meetings of Norton or Kosair Children’s Hospital. (Ex. A at 4-5.) Each contention is mistaken.

50. As to the first claim, nothing in the Lease requires Norton to pay U of L any funds. Norton has not withheld any funds from U of L, but any alleged “non-payment” of amounts due under some other agreement or commitment does not, as a matter of law, constitute a breach of the Lease. Likewise, nothing in the Lease requires U of L to negotiate to amend the 2008 Affiliation Agreement. Although Norton has negotiated in good faith for the potential replacement of that agreement, it has done so voluntarily, and any alleged failure to do so would not be a breach of the Lease. Similarly, nothing in the Lease requires that Norton and U of L remain parties to an affiliation agreement.

51. Moreover, even if the Lease were implicated, there has been no breach. Norton is current on all amounts due to U of L under the parties' contracts. Norton has also negotiated in good faith with respect to the affiliation agreement – the parties' negotiations only foundered when U of L and CHI announced their new alliance (including the terms U of L granted to CHI for a future pediatric academic affiliation). With respect to U of L's claim that it has been prevented from attending board or executive committee meetings, Norton has confirmed in writing that U of L may attend if it wishes. (Ex. B at 3.)

**H. Purported Breach No. 3: University of Kentucky Letter of Intent.**

52. U of L's last assertion of breach concerned Norton's entry into a letter of intent with UK on August 22, 2013 (the "UK LOI"). A copy of the UK LOI is attached as Exhibit G.

53. Norton entered into the non-binding UK LOI in order to explore with UK potential collaborative efforts to improve and expand the healthcare services each organization offers in Kentucky. The focus of the contemplated relationship would be to "minimize the outmigration of pediatric care from the Commonwealth, meet the needs and interest of the Commonwealth and pediatric patients and their families and maximize the impact of the resources, programs and services of Kosair Children's Hospital and Kentucky's Children's Hospital" (Ex. G ¶ 1) and further benefit the citizens of the Commonwealth.

54. As Norton explained in its response to U of L's Notice of Breach, the contemplated relationship with UK will allow U of L doctors and other qualified healthcare practitioners to provide the best medical care for children throughout the Commonwealth. (Ex. B at 3.) By increasing the network of available and qualified doctors, the relationship should also increase the flow of patients served by both U of L and UK, and as a consequence



help attract top medical talent to the Commonwealth. This collaboration is essential to ensuring the most comprehensive and qualified medical care for the children of the Commonwealth.

55. U of L asserted that the contemplated joint effort by Norton and UK would have a host of harmful effects on U of L, including the “use of Kosair Children’s Hospital in a manner that would restrict, diminish, damage, impair, and threaten the U of L School of Medicine and its Pediatric Department.” (Ex. A at 7.) U of L demanded that Norton “provid[e] adequate written assurance” that it will not “enter into any binding agreement” that would have those effects. (*Id.*)

56. U of L was again mistaken. First, nothing in the Lease gives U of L exclusive rights to Kosair Children’s Hospital or precludes Norton from undertaking joint efforts with other pediatric care providers such as UK. Nothing in Norton’s contemplated relationship with UK would make Kosair Children’s Hospital unavailable for U of L’s use. Nor would anything in Norton’s contemplated relationship with UK harm U of L in any way. Indeed, the August 22, 2013 UK LOI specifically provided: “Nothing in this LOI or any agreement contemplated by it shall operate or be construed as obligating either Party to violate any explicit or implied obligations or covenants under any other agreement to which it or one of its affiliates is a party.” (Ex. G ¶ 6.)

57. Second, Norton expects that any future relationship with UK will only benefit U of L and the overall cause of improved access to pediatric healthcare in Kentucky for the benefit of its citizens. Norton has therefore confirmed in writing that it would not enter into any agreement with UK that would delegate authority as U of L referenced in its Notice of Breach. (See Ex. B at 2.)

58. Finally, to the extent that U of L is deemed an arm of the Commonwealth, so too UK is an arm of the Commonwealth. And to that extent, the proposed venture with UK also

must be deemed to have been authorized by the Commonwealth. Accordingly, U of L cannot complain that UK's agreement with Norton violates Norton's Lease, because the Commonwealth will have approved both agreements.

59. Notwithstanding all of Norton's assurances, and despite three separate requests that U of L withdraw the Notice of Breach and engage in a constructive dialogue, U of L has refused to withdraw the Notice of Breach.

### **CLAIMS FOR RELIEF: DECLARATORY JUDGMENT**

60. The allegations contained in Paragraphs 1 through 59 above are hereby adopted and realleged as if fully set forth herein.

61. KRS § 418.040 authorizes the Court to make a binding declaration of rights,.

62. An actual, justiciable and present controversy exists between Norton and U of L, which requires an order declaring the rights and duties of the parties, including, but not limited to, a declaration that U of L has no authority to declare a breach under the Kosair Children's Hospital Lease or to purport to terminate the Lease.

63. Alternatively, if this Court finds U of L has authority to declare a breach or to terminate the Lease, then this Court should declare:

- a. Norton has fulfilled all of its obligations under the Lease, including any obligation to make Kosair Children's Hospital available for U of L's use;
- b. U of L may not terminate the Lease by unilaterally terminating or non-renewing the 2008 Affiliation Agreement; and
- c. U of L's various assertions of breach are without and legal or factual basis.

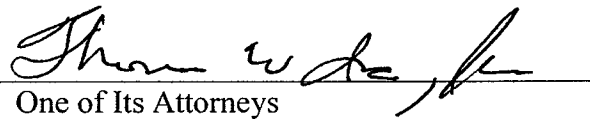
### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff, Norton Healthcare, Inc., respectfully requests that this Court enter judgment in its favor and grant it the following relief:

1. A declaration that U of L has no authority to declare a breach under the Kosair Children's Hospital Lease or to purport to terminate the Lease.
2. A declaration of the rights and duties of the parties under the 1981 Agreement and, under the Lease, to the extent that U of L is deemed a party in interest to the Lease, that: (a) Norton has fulfilled all of its obligations under the Lease, including any obligation to make Kosair Children's Hospital available for U of L's use; (b) U of L may not terminate the Lease by unilaterally terminating or non-renewing the 2008 Affiliation Agreement; and (c) U of L's various assertions of breach are without and legal or factual basis.
3. All other relief to which Norton may be entitled.

Respectfully submitted,

NORTON HEALTHCARE, INC.

By:   
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