COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 13-CI-1060

NORTON HEALTHCARE, INC. PLAINTIFF

v.

UNIVERSITY OF LOUISVILLE DEFENDANT

PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

Norton respectfully moves this Court pursuant to CR 12.02 for an Order dismissing Defendant University of Louisville's ("U of L") Counterclaims.

1. Count I, which alleges breach of contract, should be dismissed for failure to state a claim upon which relief can be granted and improper venue. By their plain language, none of the legal obligations that U of L claims were breached are found in the contracts between U of L and Norton. Furthermore, U of L's claim that Norton breached the Critical Care Agreement also should be dismissed for improper venue. Finally, U of L has not alleged sufficient facts showing a breach of the implied covenant of good faith and fair dealing.

2. Count II, for breach of fiduciary duty, should be dismissed for failure to state a claim upon which relief can be granted, because U of L has not alleged sufficient facts showing the existence of a fiduciary relationship.

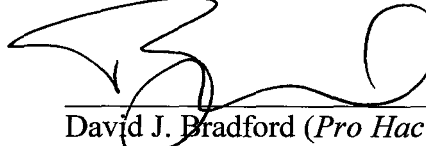
3. Counts III and IV, for promissory estoppel and unjust enrichment, are barred as a matter of law because the parties' relationship is governed by contract.

4. Count V, which seeks declaratory relief for breach of the Ground Lease and other agreements, should be dismissed for the same reasons as Count I.

NOTICE

Please take notice that undersigned counsel for Plaintiff, Norton Healthcare, Inc., ("Norton"), will make this motion and tender the attached Order in the courtroom of the above Court on June 23, 2014, at 9:00 a.m.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Motion to Dismiss, Supporting Memorandum and tendered Order were delivered via email and U.S. mail on this the 16th day of June 2014 to:

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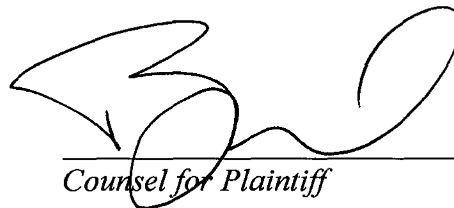

Counsel for Plaintiff

COMMONWEALTH OF KENTUCKY
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v.

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS

For 32 years, from 1981 until 2013, U of L never once suggested that Norton had any financial obligation to U of L under the 1981 Agreement between Norton and U of L or the Ground Lease between Norton and the Commonwealth. During the same 32 year period, U of L never once contended that it had a contract right to dictate which doctors could serve children at Kosair Children's Hospital ("KCH"), and Norton made KCH available not only to U of L residents and doctors, but also to scores of private doctors not affiliated with U of L.

All of that changed in 2013. Following U of L's affiliation with Catholic Health Initiatives, a competitor to Norton, U of L demanded a "transformational change" in the parties' relationship. U of L has now asserted that doctors from University of Kentucky ("UK") could not practice at KCH, claimed that Norton had agreed in 1981 to assume full financial responsibility for the U of L School of Medicine's Department of Pediatrics, and threatened to try to expel Norton from the hospital that Norton built and owns. U of L's unsupported demands and threats led Norton to file this lawsuit to obtain a judicial declaration of its rights.

After suit was filed, the parties reached a settlement agreement on January 17, 2014, which was confirmed in writing three days later. The following day, however, U of L repudiated

its acceptance of the settlement agreement. A week later, U of L filed the Counterclaims that are the subject of this Motion.

U of L's Counterclaims depend on the false premise that KCH is a "public asset whose mission is dedicated to serve the interests of and benefit U of L's pediatric teaching programs." (Counterclaims ("CC") ¶ 2.) KCH serves the public in important ways, but it is not a "public asset." Rather, KCH is a private hospital built by Norton at its own expense and owned by Norton. The fact that KCH is situated on land that is leased to Norton by the Commonwealth, pursuant to a 99-year lease with all rent prepaid (the "Ground Lease"), does not make the hospital itself a "public asset." From this false "public asset" premise, U of L asserts five counts, each of which should be dismissed:

In Count I, U of L alleges that Norton breached five contracts, which U of L misleadingly treats as a single agreement and labels the "Lease." (CC ¶ 8.) However, none of the five contracts, either individually or collectively, requires Norton to do or refrain from doing any of the acts alleged by U of L. For example, the contracts do not impose any funding obligation on Norton, do not prevent Norton from exploring a potential affiliation with UK's pediatric hospital, or require that Norton operate KCH for U of L's "exclusive" benefit. U of L's theory that these obligations have secretly existed for 33 years are based on strained interpretations of recitals in two of the contracts.

U of L's non-contract claims fare no better. Count II, for breach of fiduciary duty, fails because U of L has not alleged facts establishing the existence of any fiduciary relationship with Norton. *E.g.*, *Quadrille Bus. Sys. v. Ky. Cattlemen's Ass'n,* 242 S.W.3d 359, 364-65 (Ky. App. 2009) ("An ordinary business relationship or an agreement reached through arm's length

transactions 'cannot be turned into a fiduciary one absent factors of mutual knowledge of confidentiality or the undue exercise of power or influence.'") (citation omitted).

Counts III and IV, for promissory estoppel and unjust enrichment, are barred as a matter of law because the parties' relationship is governed by contract. *E.g.*, *Stewart Title Guar. Co. v. Hayden & Butler, P.S.C.*, 2010 WL 3292931, at *3-4 (Ky. App. Aug. 6, 2010) (affirming dismissal of unjust enrichment claim because express contract governed parties' relationship). And Count V, which seeks declaratory relief for breach of the Ground Lease and other agreements, should be dismissed for the same reasons that Count I should be dismissed.

For those reasons, as further demonstrated below, the Court should dismiss U of L's Counterclaims. Because amendment would be futile, the dismissal should be with prejudice.

BACKGROUND

Norton is a non-profit healthcare provider that owns and operates five hospitals, including KCH. In addition to serving the citizens of the Commonwealth, KCH serves as a teaching hospital for the U of L School of Medicine. Norton's relationship with U of L is governed by a master affiliation agreement that was entered into in 2008 (the "2008 Affiliation Agreement," *see* Ex. A),[1] as well as over 135 stand-alone contracts negotiated at arm's length.

In its Counterclaims, U of L asserts that Norton breached five contracts, which U of L lumps together into a bundle that it defines as the "Lease." (CC ¶ 8.) In reality, however, the

[1] U of L refers extensively in its Counterclaims to the 2008 Agreement, but instead of attaching it as an exhibit, cross-references the copy attached to Norton's Complaint. (*E.g.*, CC ¶ 18.) In ruling on a CR 12.02 motion, the Court may consider documents, like the 2008 Agreement, that are not attached to the complaint, but that are referred to in the complaint and are "central" to the plaintiff's claims. *See Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.") (quotations and citations omitted); *Bus. Payment Sys., LLC v. Nat'l Processing Co.*, 2012 WL 6020400, at *1 n.1 (W.D. Ky. Dec. 3, 2012) ("Because the marketing agreement is referred to in Plaintiffs' complaint and is central to certain of Plaintiffs' claims, the court may consider the marketing agreement when deciding the motion to dismiss for failure to state a claim.").

contracts are separate, stand-alone agreements that were executed over a period of <u>46</u> years. To eliminate the confusion U of L's pleading has created, Norton has separately identified and described each contract below.

A. The Agreements.

1. The 1981 Agreement.

In August 1981, Norton and U of L entered into a contract that called for U of L to recommend to the Commonwealth that it lease to Norton a tract of land in downtown Louisville, which was owned by the Commonwealth, upon which Norton would build (at its own expense) and own a private hospital, KCH (the "<u>1981 Agreement</u>"). (CC Ex. C.) The only other substantive provisions of the four-page 1981 Agreement were as follows:

- Norton agreed to continue its practice of inviting a member of the U of L medical staff and Board of Trustees to Norton's Board of Directors and Executive Committee meetings (*id.* ¶ 1);
- Norton and U of L agreed to "review[] and update[]" their then-existing affiliation agreement, which had been in place since 1962, and then execute "a" new, revised agreement (*id.* ¶ 3); and
- Norton agreed to make a grant to U of L's foundation in an amount equal to the appraised value of the land to be leased from the Commonwealth ($592,041.67) (*id.* ¶ 4).

To make its new argument that the 1981 Agreement imposed a financial obligation on Norton, U of L relies on a recital that reads as follows (*id.* at 1, emphasis added):

> WHEREAS, it will be to the mutual interests and benefit of the parties hereto, in the conduct of their respective programs, that said new pediatric facility be constructed on said property where *it will provide pediatric care, service and education benefitting the U of L Medical School and the citizens of the Commonwealth of Kentucky[.]*

As explained below, U of L seeks to rewrite this recital by substituting the words "Norton will pay for" for the words "it will provide."

2. The Ground Lease.

In December 1981, Norton and the Commonwealth executed the ground lease contemplated by the 1981 Agreement (again, the "Ground Lease"). (CC Ex. B.) The substantive terms of the Ground Lease were as follows: (a) Parties: the Commonwealth as "Lessor," and Norton as "Lessee"; (b) Term: 99 years, plus a 50 year renewal term at Norton's option (*id.* ¶ 2); (c) Rent: one dollar per year, prepaid (*id.* ¶ 3); and (d) Ownership of KCH and Improvements: Norton's "sole property" (*id.* ¶¶ 4, 14).

U of L's Counterclaims, to the extent based on the Ground Lease, also depend on a misreading of a preliminary recital of that lease (*id.* at 1-2, emphasis added):

> WHEREAS, the University of Louisville, an agency of the Commonwealth of Kentucky, and Lessee have entered into an Agreement dated August 12, 1981, providing for a long term lease to Lessee of the property needed for such new pediatric facility, *which facility will serve the interests of and will be to the benefit of the Lessor by the availability of said new pediatric facility for the programs and use of the University of Louisville's School of Medicine* . . . .

Contrary to U of L's new argument, this "whereas" clause does not require Norton to financially support U of L's School of Medicine, nor does it require Norton to limit the use of KCH exclusively to U of L doctors.

3. The 1962 Affiliation Agreement.

As noted, the 1981 Agreement required Norton and U of L to "review and update" their then-existing affiliation agreement, which had been in place since 1962 (the "1962 Affiliation Agreement," CC Ex. D), and execute a new, revised agreement. The only funding commitment contained in the 1962 Affiliation Agreement was Norton's agreement to "reimburse the University for the costs of stipends and interns and residents assigned to Children's Hospital." (*Id.* ¶ 4.) As noted, this agreement has now been updated and superseded.

4. The 2003 and 2008 Affiliation Agreements.

In 2003, Norton and U of L entered into a new affiliation agreement that superseded and replaced the 1962 Affiliation Agreement, satisfying Norton's obligation to "review[] and update[]" that agreement. (CC Ex. C ¶ 3.) Although Norton was not required to do so, it executed a new affiliation agreement with U of L in 2008—the 2008 Affiliation Agreement—which superseded all prior affiliation agreements (Ex. A ¶ 12) and remains in effect.

The initial term of the 2008 Affiliation Agreement was one year, with automatic one year renewal terms, provided that either party can terminate the agreement for any reason or no reason at all. (*Id.* ¶ 1.) The 2008 Affiliation addresses basic administrative issues, and in no way implies that Norton would undertake multimillion obligations or agree to far-reaching restrictions on who could practice at the hospital or what specialties of pediatric care Norton could offer. Indeed, the only mention of any funding in the 2008 Affiliation Agreement provides that the parties "will negotiate resident stipends and benefits annually" so that they remain competitive. (*Id.* at Attachment A1, ¶ 2.)

5. The Critical Care Agreement

On July 1, 2006, Norton and U of L entered into a "Critical Care Agreement" as one of many "stand-alone agreements" that govern the relationship between Norton and U of L concerning specific medical faculty and residency programs. (CC Ex. E.) Attachment D to the Critical Care Agreement governed the compensation provided by Norton to U of L for pediatric critical care services. (*Id.* at Attachment D.) Norton guaranteed U of L $1,583,209 per year, which was to be paid only if U of L's net income (as computed per the terms of the agreement) fell short of that amount, and then only in the amount of the shortfall. (*Id.* at Attachment D.)[2]

[2] In February 2014, the parties entered into a "First Amendment" to the Critical Care Agreement, in which Norton agreed to increase the income guarantee to $2,495,709.

B. Procedural Background.

1. Norton Filed This Lawsuit In September 2013, In Response To U of L's Claim That Norton Was In Breach Of The Ground Lease.

Norton filed this lawsuit on September 6, 2013, approximately one week after receiving a letter from U of L purporting to assert a breach of the Ground Lease and threatening to terminate the Ground Lease and force Norton to "surrender" KCH if the alleged breaches were not cured within 120 days ("Notice of Breach"). Norton sought declarations that U of L, as a non-party to the Ground Lease, lacks standing to assert a breach of the Ground Lease or seek to terminate it; U of L's allegations, even if true, would not establish a breach of the Ground Lease; and that in all events, Norton has not breached the Ground Lease.[3]

One of the alleged breaches raised by U of L in its Notice of Breach was Norton's August 22, 2013 letter of intent with the University of Kentucky ("UK"), in which Norton and UK announced their intention to explore potential collaborative efforts between the Commonwealth's two pediatric hospitals—KCH and UK's Kentucky Children's Hospital—to improve and expand the healthcare services each organization offers in Kentucky (the "UK LOI," *see* Ex. B).[4]

The UK LOI reflects Norton and UK's mutual belief that "the cooperation and affiliation of Kosair Children's Hospital and Kentucky Children's Hospital is in the best interests of the citizens of the Commonwealth." (*Id.* at 1.) Norton and UK's goal was to establish a comprehensive statewide network of pediatric care that would "minimize the outmigration of

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[3] Norton continues to assert that U of L, as a non-party to the Ground Lease, lacks standing to assert a breach of the Ground Lease or seek to terminate it. Indeed, in Kentucky, an entity that is not a party to a lease lacks standing to enforce it. *E.g.*, *Anderson v. United Fuel Gas Co.*, 351 S.W.2d 520, 521–22 (Ky. 1961) (holding that "a stranger to the lease" had no standing to claim that the description of the property in the lease was misleading or insufficient). However, because there are numerous other bases for dismissal, the Court need not decide that issue on this Motion directed to the Counterclaims.

[4] In its Counterclaims, U of L quotes from the UK LOI and cites to it as "Exh. G" (CC ¶ 2), but did not attach it by apparent mistake. The Court may nevertheless consider the UK LOI, *see supra* n.1.

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." (*Id.* ¶ 1.)

Norton and UK expressly agreed, however, that any collaboration between the parties will not interfere with either party's contractual obligations to third parties, including Norton's obligations to U of L. Section 6 of the UK LOI provides (*Id.* ¶ 6):

> Nothing in this Letter of Intent 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 its affiliates is a party.

This intent also is reflected in a preliminary recital, which provides: "Norton and UK will continue to meet the obligations and opportunities of their children's hospitals relative to the teaching, research, and clinical service needs of the Schools of Medicine of the University of Louisville and UK and will expand such opportunities where possible." (*Id.* at 1.)

2. The Parties Reached A Settlement Agreement, Which U of L Refuses To Honor.

Shortly after Norton filed this lawsuit, the parties agreed to stay the litigation while they engaged in settlement discussions. On January 17, 2014, Norton and U of L agreed on the terms of a binding settlement agreement, which were discussed on a telephone call and confirmed in an email exchange on January 20, 2014. However, on January 21, 2014, U of L repudiated the agreement, taking the position that the parties were "awfully close" to a settlement, but no agreement was reached. Thereafter, on February 6, 2014, Norton filed a motion to amend its Complaint to assert a claim for breach of the settlement agreement.

3. U of L Then Filed Its Counterclaims.

On January 29, U of L terminated the parties' tolling agreement, answered Norton's complaint, and filed its Counterclaims. On February 12, the parties agreed to mediate, without

prejudice to Norton's claim for breach of the settlement agreement, and the litigation was stayed pending the outcome of the mediation. Consistent with the stay order, the Court "held in abeyance" Norton's motion to amend. On May 6 and June 4, 2014, the parties participated in a mediation, but did not reach a settlement. Contemporaneous with the filing of this motion, Norton has filed a motion to lift the stay, and a new motion to amend its Complaint.

ARGUMENT

CR 12.02(f) authorizes motions to dismiss for failure to state a claim upon which relief can be granted, and 12.02(c) for improper venue. A motion to dismiss for failure to state a claim under CR 12.02 should be granted if "the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Edmonson Cty. v. French*, 394 S.W.3d 410, 413 (Ky. App. 2013) (quotation marks and citation omitted).

I. U of L's Contractual Theories Do Not State A Claim For Relief (Count I).

In Count I, U of L alleges that Norton breached five agreements—the Ground Lease, the 1962 Affiliation Agreement, the 1981 Agreement, 2008 Affiliation Agreement, and the Critical Care Agreement—in the following ways (CC ¶ 53):

> (1) unilateral and secret negotiation of an agreement to share joint operational control of Kosair Children's Hospital with a different university; (2) refusal to update the Master Affiliation Agreement and programmatic agreements in good faith; (3) failure to provide for care[,] service and education at Kosair Children's Hospital; (4) actions which have eroded UofL's ability to provide pediatric teaching programs at Kosair Children's Hospital; and (5) refusals to reimburse UofL as Norton committed to do for accumulated cost deficits, [sic].

As demonstrated below, Count I should be dismissed because Norton does not have a contractual obligation, in any of the five agreements asserted by U of L, to do or refrain from doing any of these acts. *Ky. Farm Bureau Mut. Ins. Co. v. Blevins*, 268 S.W.3d 368, 374 (Ky. App. 2008) (quoting *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001))

("Under Kentucky law, in order to recover in any action based on breach of a contract, a plaintiff must show the existence and the breach of a contractually imposed duty."); *see also Shane v. Bunzl*, 200 F. App'x 397, 401 (6th Cir. 2006) (affirming dismissal of claims where plaintiff "alleged a breach of contract without alleging the existence of the contractual terms that required [Defendant] to perform those acts"); *Adler v. Elk Glenn, LLC*, 2013 WL 6632057, at *2 n.5 (E.D. Ky. 2013) ("It is a basic tenet of contract law that a party can only advance a claim of breach of written contract by identifying and presenting the actual terms of the contract allegedly breached") (quotation marks and citation omitted).

A. The UK LOI Did Not Breach Any Contractual Obligation.

U of L first alleges, without identifying any contractual provision, that Norton breached all five agreements through its alleged "unilateral and secret negotiation of an agreement to share joint operational control of Kosair Children's Hospital with a different university." (CC ¶¶ 3, 53.) This aspect of U of L's claim is directed at the UK LOI.

Initially, U of L grossly mischaracterizes the UK LOI. The LOI on its face is not an "agreement to share joint operational control" of KCH. It is a *non-binding* statement of intent to *explore* a potential affiliation between KCH and UK's Kentucky Children's Hospital, and expressly creates no joint venture or obligations with respect to the operational control of a joint venture (*id.* ¶ 14, emphasis supplied):

> Except for Sections 10, 12, 13, 14, 15 and 20 of this Letter of Intent, which shall be binding on the Parties and their respective successors and assigns (the "Binding Provisions"), this Letter of Intent is not intended to be a binding agreement ***and shall not give rise to any obligations between the Parties.*** Except for the Binding Provisions, no binding contractual agreement shall exist between the Parties unless and until the Parties have executed and delivered the Joint Venture Documents. ***Nothing in this Letter of Intent shall obligate a Party to execute the Joint Venture Documents.***

In addition, as noted, the UK LOI expressly provides that nothing in the 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." (*Id.* ¶ 6; *see also id.* at 1.) This provision defeats U of L's claim, because it expressly provides that notwithstanding anything else in the UK LOI, Norton will not be required to do anything that would cause Norton to breach its agreements with U of L.

In addition, U of L makes no attempt to identify any provision in the Ground Lease, or any of the other four agreements, that prohibits Norton from exploring—or even finalizing—an affiliation with UK, or from doing so without U of L's involvement. Nor can it.

Throughout its Counterclaims, U of L relies on a preliminary recital to the Ground Lease that includes the phrase that KCH "will be to the benefit of the [Commonwealth] by the *availability* of [KCH] for the programs and use of the University of Louisville's School of Medicine." (CC Ex. B at 1, emphasis supplied.) However, even if that recital is binding, its plain and unambiguous language only reflects an intent in 1981 that KCH would be "available" to U of L's School of Medicine.[5] But that recital does not prohibit Norton from making KCH available to other doctors (from UK or anywhere else), as Norton has done for the last 32 years without any claim by U of L that Norton was breaching this recital. Any such obligation would constitute a restrictive covenant that would prevent Norton from bringing the best available doctor to the hospital to treat a child in need—which is not something the Commonwealth or

[5] Under Kentucky law, "[i]n the absence of ambiguity a written instrument will be enforced strictly according to its terms." *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (quoting *O'Bryan v. Massey–Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. 1966)). Where an agreement's terms are unambiguous, they will be interpreted "by assigning language its ordinary meaning and without resort to extrinsic evidence." *Id.*

Norton would ever agree to. Similarly, nothing in the "whereas clause" or any agreement prevents Norton from negotiating with UK without U of L's involvement.[6]

B. Norton Has No Contractual Obligation To "Update" The 2008 Affiliation Agreement.

U of L next alleges that Norton breached the five agreements by its "refusal to update the Master Affiliation Agreement and programmatic agreements in good faith." (CC ¶ 53.) Again, even if that allegation were true, it does not constitute a breach of any contractual provision.

U of L alleges that this obligation arises under the 1981 Agreement. (CC ¶ 11.) To be sure, Norton and U of L agreed in the 1981 Agreement that the 1962 Affiliation Agreement, which was in effect at that time, "shall be reviewed and updated by the appropriate officers of the parties hereto, and *a* new revised Agreement executed by [Norton] and U of L." (CC Ex. C ¶ 3, emphasis added.) But that obligation was a *one-time* obligation to enter into "*a*"—*i.e.*, one—new revised agreement, which was satisfied in 2003 when the parties entered into a new affiliation agreement which superseded the 1962 Affiliation Agreement. The parties amended their affiliation agreement again in 2008—without obligation—entering into the 2008 Affiliation Agreement, which automatically renews every year and remains in effect to this day. (Ex. A.)[7]

Recognizing that Norton does not have a *contractual* obligation to continue to be a party to (or update) an affiliation agreement with it, U of L disingenuously argues that Norton has an obligation to update the 2008 Affiliation Agreement because "UofL cannot maintain accreditation for pediatric teaching programs unless it has a current updated Master Affiliation

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[6] A collaboration between Norton and UK also will not jeopardize U of L's accreditation. The Accreditation Council for Graduate Medical Education ("ACGME")—the accrediting body for U of L's residency program—has never required "Major Participating Sites" (such as KCH) to affiliate with only a single institute for that institution to maintain accreditation.

[7] The 2008 Affiliation Agreement states that the parties will "amend this agreement and their relationship as necessary to meet changing accreditation standards applicable to each party" (*id.* at ¶ 11); however, U of L does not and cannot allege that there have been any changes in accreditation standards that have required an amendment.

Agreement in place with KCH." (CC ¶ 11.) For this assertion, U of L misleadingly cites the 2007 ACGME Institutional Requirements. (*Id.*) But no such ACGME accreditation requirement existed in 1981 when the Ground Lease and 1981 Agreement were entered into; and the current ACGME Institutional Requirements, which go into effect on July 1, 2014, contain no such requirement.[8] In all events, Norton never agreed in any contract to be responsible for U of L's accreditation with ACGME. Thus, U of L has identified no contractual obligation for Norton to renegotiate the current affiliation agreement.

C. Norton Has No Contractual Obligation To Provide Funding To U of L.

U of L next alleges that Norton failed "to provide for care[,] service and education at Kosair Children's Hospital," by not reimbursing U of L approximately $21 million in costs related to medical education, fellowships, hiring additional doctors, clinical investments, and research investments. (CC ¶¶ 53; *see also id.* ¶¶ 12-13, 32-39.) U of L's claim that Norton has refused "to reimburse UofL as Norton committed to do for accumulated cost deficits" (*id.* ¶ 53) appears to be based on the same allegations. We therefore address both claims in this section.

U of L's claims fail because, under the plain language of the contracts asserted by U of L, Norton has no general funding obligation to U of L. Recognizing this, U of L alleges that Norton's supposed open-ended financial obligation is set forth in a *preliminary recital* to the 1981 Agreement, which provides (CC Ex. C at 1, emphasis supplied):

> WHEREAS, it will be to the mutual interests and benefit of the parties hereto, in the conduct of their respective programs, that said *new pediatric facility* be constructed on said property *where it will provide pediatric care, service and education benefitting the U of L Medical School and the citizens of the Commonwealth of Kentucky*[.]

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[8] *See* ACGME Institutional Requirements (eff. July 1, 2014), available at https://www.acgme.org/acgmeweb/Portals/0/InstitutionalRequirements_07012014.pdf.

U of L contorts the phrase "where *it* will *provide* pediatric care, service and education," as used in the preliminary recital, to mean "*Norton* will *pay* for all pediatric care, service and education." (CC at p. 23 and ¶¶ 12-13.) However, the "it" refers to the "pediatric facility," not to Norton. And the term "*provide* pediatric care, service and education" does not mean "*pay* for pediatric care, service and education." The recital makes no mention of Norton, imposes no obligation on Norton, and makes no reference to payment or funding.

The plain meaning of the preliminary recital is simply that the KCH facility, once built, would benefit Norton, the U of L Medical School and the citizens of the Commonwealth because it is a place "where" pediatric care, services and education" will be provided. This is consistent with the Ground Lease recital which observed that KCH facility would benefit the Commonwealth through its "availability" to the U of L School of Medicine. (CC Ex. B at 1.) There was and never has been an agreement that Norton had funding obligations to U of L under the 1981 Agreement or the Ground Lease. In the 32 years since those agreements were executed, until 2013, U of L has never before made this unsupported contention.

Of course, the parties knew how to create a funding obligation. In paragraph 4 of the 1981 Agreement, the parties wrote that Norton "will make a grant to the University of Louisville Foundation, Inc. in an amount equal to one hundred percent (100%) of the appraised value of the land" upon which KCH would be built, which was $592,041.67. (CC Ex. C ¶ 4.) If the parties had intended to create a further funding obligation in the 1981 Agreement, requiring Norton to pay U of L unlimited millions of dollars to U of L, it simply is implausible that they would have done so in a preliminary recital—and nowhere else—or that they would have described that obligation by saying the facility is a place "where" pediatric services will be provided.

D. Norton Has No Contractual Responsibility For The Quality Of U of L's Programs.

U of L next alleges that Norton has "eroded U of L's ability to provide pediatric teaching programs at Kosair Children's Hospital." (CC ¶ 53.) U of L alleges that Norton has done so by (1) restricting the ability of U of L's doctors to practice at KCH "in the pediatric specialties of anesthesiology, radiology, and neurosurgery by closing service lines for these specialties"; (2) diverting patients away from U of L doctors, and to Norton-employed doctors and other Norton hospitals; and (3) hiring a private neonatology practice group that practices at KCH alongside doctors from U of L. (*Id.* ¶¶ 24-31.)

However, even assuming Norton engaged in these acts, U of L does not identify a contractual provision that prohibits them or that requires Norton to maintain the quality of U of L's programs. To the extent U of L relies on the Ground Lease, plainly no such obligation exists. As explained, the Ground Lease at most requires Norton to make KCH "available" to U of L. (CC Ex. B at 1.) But the Ground Lease does *not* require Norton to make KCH *exclusively* available to U of L, or even to give U of L doctors priority at KCH. U of L has acknowledged this, by admitting in its Answer to Norton's Complaint that non-U of L doctors have always practiced at KCH. (U of L Am. Answer ¶ 32 ("UofL admits that it has not exclusively supplied *all* medical care at Kosair Children's Hospital . . . and states that doctors who are not UofL employees provide certain services at the Hospital.") (emphasis in original).)

Thus, nothing in the Ground Lease or any other agreement prohibits Norton from giving patients the right to be treated by non-U of L doctors in favor of private doctors who have better qualifications, or from hiring a private practice group or bringing in faculty from UK to work alongside U of L doctors at KCH.

E. U of L's Claim for Breach of the Critical Care Agreement Should Be Dismissed Based On Improper Venue.

Additionally, to the extent Count I is predicated on a breach of the Critical Care Agreement, that claim should be dismissed for the additional reason that it was brought in the wrong court. The Critical Care Agreement calls for the "*exclusive* jurisdiction of the Circuit Court for the County of Jefferson Kentucky, and/or the United States District Court for the Western District in Louisville, Kentucky . . . ." (CC Ex. E § 13.02.)

II. U of L's Non-Contractual Theories Also Do Not State A Claim For Relief.

As explained below, U of L's non-contractual theories also should be dismissed for failure to state a claim upon which relief can be granted.

A. U of L Has Not Stated A Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.

U of L's claim for breach of the implied covenant of good faith and fair dealing should be dismissed because U of L does not allege facts demonstrating that Norton acted in a non-"bona fide" manner.

Within every contract, there is an implied covenant of good faith and fair dealing, which "imposes a duty to act in a 'bona fide' manner, defined by Kentucky law as being '[i]n or with good faith, honesty, openly and sincerely; without deceit or fraud . . . Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned.'" *Combs v. Int'l Ins. Co.*, 163 F. Supp. 2d 686, 696 (E.D. Ky. 2001) (quoting *Pearman v. W. Point Nat'l Bank*, 887 S.W.2d 366, 368 n.3 (Ky. App. 1994)).

The implied covenant, however, "does not prevent a party from exercising its contractual rights," *Farmers Bank and Trust Co. v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005), or "create new contractual rights or obligations." *In re MERV Props., LLC*, 2014 WL 801509, at

*5 (Bankr. E.D. Ky. Feb. 27, 2014); *see also Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 512 (6th Cir. 2012) ("Chicago Title's argument—that we should read into the contract a condition that Fifth Third adopt sound underwriting standards—amounts to nothing more than an attempt to add [ ] to the contract a substantive provision not included by the parties.") (citations and quotations omitted); *Johnson Controls, Inc. v. Anson Stamping Co., Inc.*, 2000 WL 34249108, at *4 (W.D. Ky. Mar. 27, 2000) (dismissing claims for breach of covenant of good faith and fair dealing because the alleged duties did not exist in contracts at issue); *Mid-America Real Estate Co. v. Iowa Realty Co., Inc.*, 406 F.3d 969, 974 (8th Cir. 2005) ("[T]he covenant does not give rise to new substantive terms that do not otherwise exist in the contract") (citations and quotations omitted).

U of L does not allege any facts demonstrating that Norton acted in a non-"bona fide" manner, as required by Kentucky law to state a claim. U of L attempts to do so by alleging that Norton engaged in a "secret negotiation" with UK, and by refusing to update the 2008 Affiliation Agreement "in good faith." (CC ¶ 53.) However, nothing in any agreement prohibits Norton from negotiating with UK or requires Norton to disclose negotiations with UK; and, as noted, Norton is under no obligation to update the parties' existing affiliation agreement (or even to be a party to an affiliation agreement). (*See supra* Part I.B.) Because Norton's conduct was not prohibited by or inconsistent with the parties' agreements, it is not prohibited by an implied covenant of good faith and fair dealing. To hold otherwise would create substantive terms that do not exist in the parties' contracts, which the law does not permit.

B. U of L Fails to State a Claim for Breach of Fiduciary Duty (Count II).

U of L's claim for breach of fiduciary duty should be dismissed because U of L has failed to allege the facts necessary to establish a fiduciary relationship.

In Kentucky, "[a] fiduciary relationship creates the highest order of duty imposed by law." *In re Sallee*, 286 F.3d 878, 891 (6th Cir. 2002). Such a relationship "necessarily involves an undertaking in which a duty is created in one person to act *primarily* for another's benefit in matters connected with such undertaking." *Hinton Hardwoods, Inc. v. Cumberland Scrap Processors Transp.*, 2008 WL 5429569, at *6 (Ky. App. Dec. 31, 2008) (quotations and citations omitted). To plead a fiduciary relationship, facts must be pled to "show that the nature of the relationship imposed a duty upon the fiduciary to act in the principal's interest, even if such action were to the detriment of the fiduciary." *In re Sallee*, 286 F.3d at 892.

Only in "rare commercial cases" will Kentucky courts find that a business relationship rises to this level. *Id.* "The fact that one businessman trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship." *Id.* at 891 (quotation marks and citation omitted). "Neither is the fact that the relationship has been a cordial one, of long duration, evidence of a confidential relationship." *Id.* at 891–92 (quotation marks and citation omitted). Instead, "[e]xtraordinary facts are necessary to make this latter kind of trust plausible and reasonable." *Id.* at 892 n.10 (quotation marks and citation omitted).

U of L has not alleged the "extraordinary facts" necessary to establish that Norton owed it a fiduciary duty. U of L's argument that a fiduciary relationship exists is based entirely on its allegation that in exchange for the Ground Lease, Norton agreed "to operate Kosair Children's Hospital to 'serve the interest of' - and 'for the benefit of' - U of L's School of Medicine." (CC ¶ 14.) That allegation is based on U of L's misreading of the preliminary recital described above, which states that the KCH facility "will serve the interests of and will be to the benefit of the Lessor [the Commonwealth] by the availability of said new pediatric facility for the programs and use of the University of Louisville's School of Medicine." (CC Ex. B at 1.) As explained,

the statement that KCH will be "available" to U of L's programs describes nothing more than what it says—the KCH facility would be available for U of L's programs and use. It does not establish that Norton agreed to make the facility available exclusively or "primarily for another's benefit." *See Hinton Hardwoods*, 2008 WL 5429569, at *6.

Nor do U of L's allegations support its assertion that because of their current academic affiliation, Norton and U of L are "partners." (CC ¶ 57.) On the contrary, the parties' contracts show an arms-length commercial relationship—the 1981 Agreement, for example, notes that "it will be to the mutual interests and benefit of the parties thereto" (CC Ex. C at 1) and the 2008 Affiliation Agreement recognizes that "the benefits of such training and research programs accrue to both parties" (Ex. A at 1). In this type of "arms-length commercial transaction, where each party is assumed to be protecting its own interest, no [fiduciary] duty arises." *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 5 (Ky. App. 2012).

C. The Court Should Dismiss U of L's Counterclaims for Promissory Estoppel and Unjust Enrichment (Counts III and IV).

Counts III and IV should be dismissed because they are duplicative of and precluded by U of L's claims for breach of contract.

Numerous courts applying Kentucky law have recognized that "estoppel cannot be the basis for a claim if it represents the same performance contemplated under a written contract." *Shane v. Bunzl*, 200 F. App'x 397, 403 (6th Cir. 2006) (quoting *Tractor & Farm Supply, Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1198, 1205 (W.D. Ky. 1995)); *Johnson Controls*, 2000 WL 34249108, at *5 (dismissing estoppel claim that represented same performance contemplated by written contract). This is so because "promissory estoppel is not designed to give a party to a negotiated contract a second bite at the apple in the event it fails to prove breach of contract." *Derby City Capital, LLC v. Trinity HR Servs.*, 949 F. Supp. 2d 712, 728-29 (W.D.

Ky. 2013) (internal quotation marks omitted) (plaintiff failed to state claim for promissory estoppel based on oral promises made with respect to alleged breach of contract). For the same reason, an unjust enrichment claim will be "barred as a matter of law [if] it was based on the same subject matter as [the] breach of contract claim." *Shane*, 200 F. App'x at 404. "[W]here a claim for unjust enrichment tracks an underlying breach of contract claim, such an action is fatally defective." *Ham Broad. Co., Inc. v. Cumulus Media, Inc.*, 2011 WL 1838911, at *6 (W.D. Ky. May 13, 2011); *see also Stewart Title Guar. Co. v. Hayden & Butler, P.S.C.*, 2010 WL 3292931, at *3-4 (Ky. App. Aug. 6, 2010) (affirming dismissal of unjust enrichment claim because express contract governed parties' relationship).

U of L acknowledges that claims for promissory estoppel and unjust enrichment are based on the same conduct as its claim for breach of contract, stating that the "acts and omissions" that give rise to its claim for breach of contract "also give rise to causes of action for promissory estoppel and equitable relief." (CC ¶ 3.) Accordingly, U of L's claims for promissory estoppel and unjust enrichment are barred.

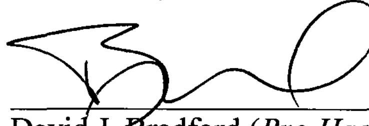
D. The Court Should Dismiss U of L's Claim for Declaratory Judgment (Count V).

For the reasons previously stated, *see supra* Part I, U of L has failed to state a claim for breach of the Ground Lease or any other agreement, and the Court should deny U of L the declaratory relief it seeks in Count V.

CONCLUSION

Norton respectfully requests that the Court grant its motion and dismiss U of L's Counterclaims in their entirety. Because the relevant agreements, on their face, do not contain any of the obligations that U of L alleges, and because the non-contractual claims are barred as a matter of law, the Court's dismissal should be with prejudice.

Respectfully submitted,



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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 13-CI- 1060

NORTON HEALTHCARE, INC. PLAINTIFF

v. **ORDER GRANTING MOTION TO DISMISS**

UNIVERSITY OF LOUISVILLE DEFENDANT

* * * * *

Plaintiff, Norton Healthcare, Inc., having moved pursuant to CR 12.02 for an Order dismissing Defendant University of Louisville's Counterclaims,

IT IS SO ORDERED that Norton's motion is GRANTED. University of Louisville's Counterclaims are dismissed with prejudice.

Entered: ______________________ ______________________________________
Judge, Franklin Circuit Court

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