

AOC-105 Doc. Code: CI
Rev. 1-07
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Commonwealth of Kentucky
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CR 4.02; CR Official Form 1



CIVIL SUMMONS

Case No. 14-CI-02523
Court Circuit District
County Jefferson

KOSAIR CHARITIES COMMITTEE, INC.

FILED IN CLERK'S OFFICE
DAVID L. NICHOLSON, CLERK
JUN 09 2014
BY _____
DEPUTY CLERK

PLAINTIFF

VS.

NORTON HEALTHCARE, INC.,
NORTON HOSPITALS, INC., AND
NKC, INC.

DEFENDANT

Service of Process Agent for Defendant:

NKC, INC.

c/o William O. Price, Registered Agent

224 E. Broadway Street, 2nd Floor

Louisville

Kentucky

40202

**THE COMMONWEALTH OF KENTUCKY
TO THE ABOVE-NAMED DEFENDANT(S):**

You are hereby notified a **legal action has been filed against you** in this Court demanding relief as shown on the document delivered to you with this Summons. **Unless a written defense is made by you or by an attorney on your behalf** within **20 days** following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached Complaint.

The name(s) and address(es) of the party or parties demanding relief against you are shown on the document delivered to you with this Summons.

Date: _____, 2____ Clerk
By: _____ D.C.

Proof of Service

This Summons was served by delivering a true copy and the Complaint (or other initiating document) to:

_____ this ____ day of _____, 2____.

Served by: _____
_____ Title

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DEFENDANT

NORTON HEALTHCARE, INC.,
NORTON HOSPITALS, INC., AND
NKC, INC.

Service of Process Agent for Defendant:

NKC, INC.

c/o James R. Peterdorf, Registered Agent

200 E. Chestnut Street, PO Box 35070

Louisville

Kentucky

40202

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Served by: _____
_____ Title

CASE NO. 14-CI-02523

JEFFERSON CIRCUIT COURT

FILED IN CLERK'S OFFICE	DIVISION NO. THREE (3)
DAVID L. NICHOLSON, CLERK	JUDGE MITCH PERRY
JUN 09 2014	
BY _____	DEPUTY CLERK

KOSAIR CHARITIES COMMITTEE, INC.

PLAINTIFF

v.

FIRST AMENDED COMPLAINT

NORTON HEALTHCARE, INC.,
NORTON HOSPITALS, INC., and
NKC, INC.

DEFENDANTS

Kosair Charities Committee, Inc. ("**Kosair**") for its Complaint against Norton Healthcare, Inc. ("**Norton Healthcare**"), Norton Hospitals, Inc. ("**Norton Hospitals**"), and NKC, Inc. ("**NKC**") (collectively, "**Norton**") states as follows:

I. NATURE OF THE ACTION

1. In 1926, as the charitable arm of the Kosair Shrine Temple, Kosair opened the first hospital exclusively for children in Louisville, Kentucky at 982 Eastern Parkway.
2. For ninety years, Kosair's mission has been to protect the health and well-being of the children in Kentucky and Southern Indiana, by providing funding support for clinical services, research, pediatric healthcare, education and child advocacy.
3. Because of its unwavering commitment in its efforts to fund pediatric care locally, Kosair garners considerable respect as a charitable institution in the Louisville community.
4. In the early 1980s, Kosair decided to expand from its Eastern Parkway location where it operated Kosair Crippled Children's Hospital for 54 years, while affiliating

itself with Norton for the purpose of developing a pediatric hospital in downtown Louisville called Kosair Children's Hospital ("**KCH**").

5. Kosair was instrumental in founding KCH, and since its opening, Kosair has made \$100 million in donations intended for the benefit of KCH.

6. To memorialize the affiliation agreement, a thirty-year agreement was executed in 1981, which was subsequently restated in 1982 (hereafter, "**Restated Agreement**") between Kosair and Defendant NKC, the predecessor in interest to Defendants Norton Healthcare and Norton Hospitals (collectively, "**the Parties**").

7. The Restated Agreement was structured as follows: first, consistent with its mission, Kosair agreed to raise contributions for improvements to be expended annually at KCH above the hospital's operational costs; second, after receiving the funds from Kosair, NKC, as the trustee, agreed to apply those contributions directly to KCH for additive purposes to benefit KCH; and third, Kosair would have significant oversight over how NKC spent the significant monies contributed by Kosair.

8. According to the Restated Agreement, after the affiliation, Kosair's institutional identity would be preserved in a manner supportive of its mission.

9. Additionally, after affiliating with Kosair, NKC agreed thereafter to operate its fiscal affairs in the same way it had pre-affiliation: as an entity separate or divisive from Kosair and KCH.

10. This arrangement was consistent with the fiduciary duties of NKC (and, later, the duties of Norton Healthcare and Norton Hospitals) as trustee (at a minimum, as constructive trustee), including: (i) the duty to hold the property for KCH's benefit, (ii) the

duty to segregate and identify accounts for KCH as the trust beneficiary, and (iii) the duty to refrain from self-dealing.

11. In 1989, the Restated Agreement was amended so that NKC's contractual obligations under the Restated Agreement also bound its successors in interest and its assignees (i.e., Norton Healthcare and Norton Hospitals).

12. On or about April 13, 1999, Defendants Norton Healthcare and Norton Hospitals replaced NKC as trustees (at a minimum, as constructive trustees), responsible for ensuring that Norton's finances were held separately from those of Kosair and KCH.

13. Then, in 2006, Kosair and Norton Healthcare executed the Second Restated Agreement of Affiliation (hereafter, "**the Second Agreement**") (along with the Restated Agreement, referred to as "**the Affiliation Agreements**"), where Kosair agreed to pledge an additional \$117 million in donations to be "expended by Norton Healthcare at KCH" over a twenty-year period.

14. However, Norton Hospitals was not a party to the Second Agreement and nowhere within the Second Agreement did Kosair waive its right to hold any successor in interest to or assignee of NKC to the duties of NKC under the Restated Agreement.

15. Furthermore, the Second Agreement established a trust and continued the previously created trust with Norton as a trustee (at a minimum, as a constructive trustee), having fiduciary obligations to Kosair as the donor.

16. In any event, Kosair has a continuing responsibility to its donors to ensure that their contributions are being directed to KCH and KCH-related projects and not to simply line the pockets of Norton's executives.

17. Additionally, under the Second Agreement, Norton agreed that it was only allowed to use the name "Kosair" in non-KCH related instances with Kosair's consent.

18. The Second Agreement was then supplemented by two multi-year agreements and a one-time agreement for the purchase of hospital equipment to be used at KCH (collectively, "**the Supplemental Agreements**"). The Supplemental Agreements increased the total contributions from Kosair to KCH to \$139 million for a total of around \$6 million a year.

19. Contrary to its obligations as a charitable trustee, the terms of the Affiliation Agreements and the Supplemental Agreements (collectively, "**the Various Agreements**") and general charitable and trusteeship standards and practices, Norton has informed Kosair that it does not prepare separate financial statements for KCH. Additionally, Norton has informed Kosair that it does not prepare independent budgets or maintain separate bank accounts for KCH.

20. Instead, Norton commingles Kosair's donations to KCH with its other funds and is using Kosair's donations for its own benefit. As a result, Kosair's donations are merely applied to Norton's corporate totals. This constitutes breaches of trust as Kosair's donations create charitable trusts.

21. From a financial standpoint, KCH simply does not exist. Over the years, Norton has removed Kosair from any participation in management of KCH, branding Kosair as "community volunteers." Consequently, it is impossible to establish that Kosair's donations provide any sort of net benefit to KCH, nor possible for Kosair to ensure that the contributions provide any benefit to KCH that would have accrued apart from the normal funding efforts of Norton.

22. Additionally, in breach of the Various Agreements, Norton is improperly using Kosair's name in fundraising efforts for its own causes and allowing the "Kosair" name to be placed on medical clinics and practices wholly without Kosair's consent. Under the Various Agreements, Kosair specifically permitted Norton to place its name on KCH and Kosair Children's Medical Center – Brownsboro, but Norton has gone far beyond by placing and allowing to be placed the "Kosair" name on medical clinics and practices located some 200 miles from Louisville.

23. When asked by Kosair to provide an accounting of annual charitable contributions applied by Kosair at KCH, Norton ignored its obligations and produced documents indicating that Norton –rather than complying with its obligations– applied rates to uninsured patients, allegedly supported by Kosair's contributions which exceeded those of the chargemaster rates— extremely high rates hospitals set, but never actually charged to anyone. This was Norton's reasoning, as if Norton's billing practices somehow had some net charitable benefit for KCH (and its donors) and somehow were a proper expenditure of Kosair's charitable donations.

24. What this in fact shows is that Norton is actually making *more* money off of unpaid accounts at KCH allegedly sponsored by Kosair than it would from patients who received the same services but were covered by private insurance.

25. Norton's actions have undermined Kosair's attempts to directly fund KCH and have undercut the extraordinary efforts of the doctors, nurses and staff serving the children treated at KCH.

26. Despite the millions of dollars in donations provided by Kosair to KCH each year, the performance of KCH lags far behind that of its peers in the region and elsewhere.

27. More than anything this lawsuit is about Kosair protecting the integrity of its endowment, while ensuring that charitable donations intended to benefit Louisville's sick and injured children at KCH *do just that*.

II. THE PARTIES

28. Kosair Charities Committee, Inc. is a Kentucky nonprofit corporation, which has devoted hundreds of millions of dollars in support of charitable pediatric and children's causes within the community.

29. Norton Healthcare, Inc. is a Kentucky nonprofit healthcare system and signatory to the Second Agreement. Additionally, Norton Healthcare claims to "oversee" and "develop" the operations and activities of Norton Hospitals. Finally, Norton Healthcare is a party to the Second Agreement with Kosair.

30. Norton Hospitals, Inc. is a Kentucky nonprofit corporation and affiliate of Norton Healthcare which purports to own KCH. Additionally, Norton Hospitals controls the assets of at least five hospitals within the Louisville area, including those of KCH. While Norton Hospitals is not a party to the Various Agreements, according to its Articles of Organization, Norton Hospitals has assumed certain duties as ongoing co-trustee for funds contributed by Kosair at KCH. As a result, Norton Hospitals has authority to bind the principal, Norton Healthcare, for actions under Norton Healthcare's control.

31. NKC, Inc. is a Kentucky corporation that is inactive but in good standing. NKC was set up to manage the operations of KCH and was a party to the Restated Agreement.

32. The corporate structure of NKC is a subject of ongoing dispute. While it is unclear from the information received to date, it appears that on April 30, 1981, an entity

either named Norton-Children's Hospitals, Inc. or Norton-Children's Hospital, Inc. changed its name to NKC, Inc. This Complaint is directed at the party which executed the Restated Agreement as NKC, Inc. and any of its successor companies, assigns or affiliates.

III. FACTUAL BACKGROUND

1. The Restated Agreement and the Formation Of KCH

A. Since affiliating with Kosair, Norton has been contractually and legally obligated to maintain separate accounts for KCH.

33. Prior to the 1980s, Kosair and Norton's predecessors operated their own independent children's hospitals, Kosair Crippled Children's Hospital and Norton-Children's Hospital.

34. In 1982, under the Restated Agreement, Kosair agreed to close its children's hospital and make significant asset and cash contributions over a thirty-year period to build and improve a large children's hospital in downtown Louisville. Kosair's intent was to create the best children's hospital in the region. It has become increasingly apparent in recent years that Norton does not share this goal.

35. The new children's hospital, which was to be owned and operated by NKC (the predecessor in interest to Norton Healthcare and Norton Hospitals), was to be named "Kosair Children's Hospital" in recognition of Kosair's significant and ongoing contributions and the goodwill that Kosair had generated for decades while funding and operating its own children's hospital.

36. Kosair donated assets and/or funds to Norton, expended funds and fundamentally altered its operations in accordance with and in consideration of this commitment.

37. Thereafter, Norton was entrusted to hold the charitable contributions made by Kosair and apply those funds solely for the benefit of KCH.

38. When the Restated Agreement was executed, Norton and Kosair had neither consolidated operations nor had construction of KCH been completed.

39. According to the Restated Agreement, after construction, Norton was required to (i) preserve the institutional identity of Kosair, and to (ii) “continue to operate its fiscal affairs in substantially the same manner as Norton-Children’s Hospitals, Inc. [wa]s currently doing.”

40. In order to preserve Kosair’s institutional identity and to ensure that Norton operated its fiscal affairs in the same manner as it had prior to consolidating, any and all financial commitments of Kosair to KCH would necessarily be held by Norton in segregated accounts—not to be commingled with Norton’s own finances.

B. Certain rights and obligations of the Parties under the Restated Agreement survive the Second Agreement.

41. The provisions in the Restated Agreement concerning the preservation of Kosair’s institutional identity and the obligation of Norton to operate its fiscal affairs in a pre-affiliation manner were not made the subject of the Second Agreement. Instead, these were permanent conditions upon which the affiliation of the Parties was dependent.

42. Indeed, in subsequent amendments to the Restated Agreement, NKC and Kosair agreed that the Agreement “survive[d] corporate changes of NKC, Inc.” and bound any “successor in interest to NKC or its assigns and . . . survive[d] any present or future merger, consolidation or combination contemplated by NKC,” (which was ultimately the formation of Norton Healthcare and Norton Hospitals).

43. As a result, when entering into the Second Agreement, Kosair was not required to –once again, post-construction of KCH– negotiate its vested right to maintain Kosair’s institutional identity nor to hold Norton to the duty to segregate KCH’s account from its own because that duty already existed.

2. The Second Agreement

A. The Second Agreement contains enforceable obligations, but does not supersede certain pre-existing obligations under the Restated Agreement.

44. In December 2006, with Kosair’s financial commitments about to expire under the Restated Agreement, Kosair and Norton Healthcare entered into the Second Agreement, whereby Kosair committed to provide Norton \$139 million over the span of 20 years for the benefit of KCH.

45. The parties to the Second Agreement conditioned the “[p]ermitted [u]ses” of Kosair’s financial commitments upon the stipulation that the funds would both be “expended by Norton Healthcare,” and “expended . . . at KCH or in association with KCH’s delivery of pediatric healthcare services in a manner supportive of the mission of KCH.”

46. The Second Agreement required donations, where the donor intended the gifts to benefit KCH, to be used solely to benefit KCH and not Norton. Upon information and belief, Norton receives millions in such donations each year.

47. The Second Agreement also provides that Kosair’s funds cannot be used “directly or indirectly, (i) to carry on propaganda, or otherwise attempt to influence legislation; . . . or (iv) for any grant to another organization.”

48. Additionally, under the Second Agreement, the parties agreed that Norton was limited to using the “Kosair” name “in association with” KCH’s “programs, activities

and services.” Under any other circumstances, Norton was prohibited from “us[ing] the name “Kosair” in any manner without the prior consent of KCC . . .”

49. Finally, Kosair had the right to terminate the Second Agreement in the event of a material breach, if Kosair, as the terminating party, provided written notice to Norton detailing the breach, while giving Norton 120 days to cure before terminating.

50. Despite its execution, the Second Agreement was never intended to abrogate the obligation of Norton to operate its fiscal affairs in the manner that Norton Children’s Hospitals, Inc. (i.e. Norton’s predecessor) “[wa]s currently doing” pre-affiliation.

51. Nor was the Second Agreement intended to interfere with the agreed-upon preservation of Kosair’s institutional independence, post-consolidation under the Restated Agreement.

52. Simply put, the Second Agreement involved different subject matter than the Restated Agreement and varied in effect.

B. The failure of Norton Hospitals to be made a party to the Second Agreement in it of itself binds Norton to the relevant provisions of the Restated Agreement.

53. At a minimum, Norton Hospitals should have been made a party to the Second Agreement which was executed in 2006, being that, back in 1999, Norton Healthcare attempted to disclaim responsibility for managing its own hospital and KCH, while contemporaneously designating Norton Hospitals as the entity responsible for “own[ing] and operat[ing]” KCH.

54. At the time of the execution of the Restated Agreement, NKC was responsible for managing services for its affiliated companies. However, in 1999, prior to the execution of the Second Agreement, Norton Healthcare attempted to divest itself of this management duty under an amendment to its Articles of Incorporation.

55. On or about April 13, 1999, Norton Healthcare and Norton Hospitals divided certain duties that were previously at the execution of the Restated Agreement reserved for their predecessor in interest— NKC. Being that Norton has undergone multiple stages of corporate restructuring, it is unclear from the information received whether all obligations under the Restated Agreement were wholly transferred to Norton Healthcare and Norton Hospitals.

56. Then, when the Second Agreement was executed in 2006, Norton Hospitals –the entity that, since 1999, owned and operated KCH– was not expressly made a party to the Second Agreement.

57. Furthermore, Norton Hospitals’ Articles of Organization expressly acknowledge that Norton Hospitals was, at least in part, responsible for ensuring that funding to KCH was separate and distinct from Norton’s funding, while stating as follows:

Contributions of endowment heretofore or hereafter made to or for the John N. Norton Memorial Infirmary shall be used for Norton Hospital or its successors. **Contributions of endowment heretofore or hereafter made to or for Children’s Hospital, or Kosair Crippled Children Hospital or Kosair Children’s Hospital shall be used for Kosair Children’s Hospital or its successors.**

See Second Amended and Restated Articles of Incorporation of Alliant Hospitals, Inc., Article V, Contributions to Norton Hospital and Kosair Children’s Hospital (emphasis added).

C. Along with the Second Agreement, Norton and Kosair executed three Supplemental Agreements under which Kosair has donated \$37 million to Norton.

58. Contemporaneously with the Second Agreement, Kosair and Norton entered into two additional agreements: the Magnetic Resonance Imaging Funding Agreement and the Special Projects Funding Agreement.

59. Under Magnetic Resonance Imaging Funding Agreement, Kosair agreed to donate \$3 million to Norton for the purchase of an MRI machine and related equipment to be installed at KCH.

60. Under the Special Projects Funding Agreement, Kosair agreed to donate \$10 million to Norton (\$500,000 per year, for 20 years) for specific projects that Norton identifies through 2026.

61. Then, in March 2009, Kosair and Norton entered into the Additional Projects Funding Agreement, wherein Kosair agreed to donate an additional \$9 million (\$500,000 per year, for 18 years) for additional projects each year through 2026.

62. Under the Supplemental Agreements, Norton also agreed to use the funds to benefit KCH.

63. Both the Special Projects Funding and Additional Projects Funding Agreements indicate that they terminate if the Second Agreement terminates.

64. Since KCH's opening, Kosair has donated over \$114 million for the benefit of KCH under the Various Agreements. Apparently, \$37 million of these donations have occurred since 2006.

65. For the above reasons, the rights of the Parties should be interpreted in conjunction with the Various Agreements.

3. Norton's Practices Post-Execution of the Second Agreement

A. Norton has stopped operating fiscally independent of Kosair and KCH.

66. A determination as to Kosair's rights moving forward will necessarily impact significant contributions in the future.

67. Kosair has donated assets and funds to Norton, expended funds and fundamentally altered its operations in accordance with and in consideration of this commitment of Norton under the Various Agreements.

68. At some point, Norton asserts that it has changed its practices and does not presently separate its finances for KCH from those of some or all other Norton facilities.

69. As late as 2007, Norton disclosed that it prepares separate budgets for KCH. However, it allegedly no longer does so.

70. In addition, Norton has stated that it no longer maintains separate bank accounts for KCH. Instead, Norton places Kosair's donations in a bank account with Norton's other funds. In effect, Kosair's donations never leave this account.

71. Thus, while Norton denotes a facility "Kosair Children's Hospital," from a fiscal standpoint, KCH does not exist.

72. This is contrary to how Norton holds KCH out to the public. For instance, KCH's online donation webpage states, "[t]here are many ways to help, but as **a not-for-profit health care system**, Kosair Children's Hospital is especially grateful to our donors." (emphasis added).

73. With all accounts and expenditures of KCH lumped together with those of Norton's other hospitals, it is not possible for Norton to demonstrate that it has in fact expended *any* of Kosair's donations to benefit KCH.

74. KCH's lack of separate financial statements stands in stark contrast to the children's hospitals that outperform KCH. Many of these children's hospitals — such as those in Ohio (Akron, Cincinnati, and Columbus) — are standalone entities that file their

own tax returns. Others, like Riley Children's Hospital in Indianapolis, Indiana, at least maintain separate financial statements.

75. In general, higher insurance reimbursement rates are applied to pediatric care than adult care, and, correspondingly, margins at children's hospitals are better than margins at non-pediatric hospitals.

76. Maintaining separate financial statements for a children's hospital means that the margin generated by the children's hospital stays with the children's hospital, and donations to the cause of children's care are additive to the services provided there.

77. Without separate financial statements for KCH, all of the revenue it generates is lumped together with revenue generated by Norton's other facilities and affiliates. As a result, Norton takes the superior margins generated by KCH and spends them wherever it wants from a Norton system-wide standpoint, rather than spending them for the benefit of KCH, as was always intended.

78. In addition, the Second Agreement states that Norton cannot use Kosair's donations for lobbying expenses or grants to other organizations. Norton's 2011 tax returns disclose that Norton expended over \$200,000 in lobbying expenses and made over \$3 million in grants to third parties. With Kosair's donations housed in Norton's general bank accounts, Norton cannot show that Kosair's funds did not go towards these expenses — another breach of the Various Agreements.

B. Instead of using Kosair funds for improvements at KCH, Norton is applying contributions to unpaid accounts in excess of even the chargemaster rates.

79. Even if Norton were operating Kosair as a separate fiscal entity, as it should be, the manner in which Norton is using Kosair's donations is inconsistent with the Various

Agreements between the Parties and fails to provide the maximum benefit to the children treated at KCH, as was always intended.

80. The children's hospitals in Akron, Ann Arbor, Birmingham, Cincinnati, Cleveland, Columbus (Ohio), Detroit, Indianapolis, Iowa City, Kansas City, Madison (Wisconsin), Milwaukee, Nashville, Pittsburgh and St. Louis all outperform KCH, according to the U.S. News rankings.

81. KCH's underperformance exists despite the fact that Kosair gives over \$6 million to KCH each year. This support, coupled with the \$4 million given to KCH by the Children's Hospital Foundation, should ensure that KCH is a world class institution if KCH is structured properly and the donations are expended for improvements at KCH.

82. However, instead of using the donations to hire additional specialists or purchase new equipment that would not have otherwise occurred, contrary to the Parties' understanding and intent, Norton applies Kosair's donations to certain accounts where its "gross" or retail charges, also known as "chargemaster" rates, have not been fully paid. Chargemaster rates at hospitals like Norton are very high and are generally the starting point for negotiations with insurers and Medicaid; both of whom negotiate the rates that are charged much lower.

83. Thus, most of Kosair's donations are not paying for pediatric services that otherwise would be denied, and are instead benefiting only Norton.

84. Each year, Norton sends Kosair a report showing how its money donated under the Second Agreement has been spent by Norton. The reports identify the "total charges" based on Norton's chargemaster rates incurred by the patient and the amount of the total charges applied to Kosair's donations. There are literally thousands of entries

on these reports. Each entry falls into one of three categories, and each category is problematic.

85. First, for numerous entries the amount applied to the Kosair donation exceeds the total charges incurred by the patient. For instance, for one such patient, total charges of \$1,526.00 were incurred, but Norton applied \$9,711.20 of Kosair's donation to these charges. The difference between these two amounts – \$8,185.20 in this instance – went back to Norton and did not benefit KCH at all.

86. There are in excess of 75 instances where the amount of Kosair's donation applied to the account is more than the total charges. In these instances, the difference between the total charges and the amount applied totals over \$500,000.

87. Second, for a number of entries, the total gross charges to the patient equals the amount Norton applied to Kosair's donation. There are two problems with this practice.

88. Initially, Norton is not just covering its costs using Kosair's donations, nor its reasonably anticipated revenue for the services rendered. Instead, Norton is actually making more off of uninsured patients that it would from patients covered by private insurance or Medicaid by applying Kosair's donations in this manner.

89. In 2012, the entries where the total charges (again based on Norton's chargemaster rates) matched the amount applied to Kosair's donation totaled \$3,810,432.09.

90. The Kentucky Department of Labor publishes “cost-to-charge” ratios for each Kentucky hospital comparing the cost to deliver services to the revenue generated by the hospital. In 2012, Norton's cost-to-charge ratio was 36.8308%.

91. Applying this ratio to the \$3,810,432.09 in donations that were applied by Norton in 2012, Norton benefited to the tune of over \$2.4 million dollars by applying Kosair's donations to its chargemaster rates instead of its actual costs to deliver services.

92. Even if it did maintain separate finances for Kosair, the way in which Norton alleges it uses Kosair's donations does not benefit KCH. Norton is applying Kosair's donations to unpaid accounts. But instead of discounting the unpaid accounts to rates consistent with insurer or Medicaid reimbursement rates – rates that are consistent with Norton's cost to deliver care – Norton is using its chargemaster rates, the extremely high rates hospitals set, but never actually charge, on these accounts. Thus, Norton is making *more* money off of unpaid accounts by applying Kosair's donations to these chargemaster rates. This breaches the Various Agreements.

93. Third, for the balance of the entries on the reports, the amount applied to Kosair's donations is less than the total charges. However, the total charges are still based on the chargemaster rates, and Norton has admitted it is using Kosair's donations to make up the difference between the payments it is receiving from both insurers and Medicaid, and the total charges based on its chargemaster rates.

94. Insurer and Medicaid reimbursement rates are based on standard allowances for provision of services, so Norton is already fully compensated for the services it renders to the patient before it taps Kosair's donation. Yet again, Kosair's donations are flowing back to Norton and not benefiting KCH.

C. In violation of the Various Agreements, Norton has misused Kosair's name.

95. The Second Agreement states that Norton may use the "Kosair" name when referring to KCH, its "programs, activities, and services," but "[o]therwise, Norton

Healthcare shall not use the name “Kosair” in any manner without the prior written consent of KCC, which consent shall not be unreasonably withheld.” Later, in 2009, under the Additional Projects Funding Agreement, Kosair consented to allowing Norton to place its name on Kosair Children's Medical Center – Brownsboro. If the Second Agreement permitted the use of Kosair's name on hospitals other than KCH, why was this consent necessary?

96. While the Second Agreement and the Additional Projects Funding Agreement only allow Norton to place Kosair's name on its children's hospitals located in downtown Louisville and on Brownsboro Road in Louisville, recently Norton has placed the “Kosair” name on more than a dozen pediatrician offices, outpatient centers, and specialist offices *throughout* Kentucky and Southern Indiana.

97. For instance, Norton has named an outpatient center located in Paducah, Kentucky “Kosair Children's Hospital Outpatient Center – Paducah.”

98. It has also registered eleven assumed corporate names that contain the word “Kosair.” For instance, it has registered the names “Kosair Children's Neonatal Specialists” and “Kosair Children's Hospital Gynecology Specialists.”

99. In addition, Norton has improperly used Kosair's name in its fundraising efforts related to its own foundation. In fundraising communications, Norton, through Children's Hospital Foundation, has used the “Kosair” name in a manner that is confusing to the public and is competitive with Kosair, which is contrary to the Second Agreement and the Additional Projects Funding Agreement. The Second Agreement allows Norton to use the “Kosair” name for KCH and its “programs, activities and services” — not for fundraising.

100. Norton's misuse of Kosair's name has caused considerable confusion to potential donors and damaged Kosair.

D. Norton has failed to cure its various breaches.

101. On July 11, 2013 and November 6, 2013, pursuant to the notice provisions set forth in the Various Agreements, Kosair sent letters to Norton specifying material breaches of the Various Agreements that Norton had committed.

102. Additionally, on February 7, 2014, Kosair sent Norton a letter explaining in more detail the breaches discussed in its July 11, 2013 letter.

103. Under the terms of the Various Agreements, Norton had 120 days from receipt of the July 11, 2013 and the November 6, 2013 letters to cure the material breaches identified therein.

104. Despite Kosair giving Norton an extension of time until March 6, 2014 to cure its breaches, while engaging in considerable dialogue with Norton, Norton has failed to cure its breaches.

105. To the extent necessary, this Complaint constitutes further notice by Kosair of breach under the Various Agreements.

IV. CLAIMS

COUNT I – DECLARATORY JUDGMENT/ACCOUNTING

106. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 105 as if fully set forth herein.

107. Kosair has performed under the Various Agreements and paid all other amounts purportedly due into escrow, and Norton breached first.

108. Norton breached the Various Agreements by, *inter alia*, not using Kosair's donations to benefit KCH and by using Kosair's name in a manner inconsistent with the terms of the Various Agreements and the donor's intent.

109. Kosair sent notices to Norton specifying the material breaches that Norton has committed.

110. Per the terms of the Second Agreement and Additional Projects Funding Agreements, these agreements may be terminated at Kosair's option as a result of the above.

111. Although no decision to this effect has been made at this time, the Court should determine whether Kosair is entitled to terminate the Various Agreements.

112. Kosair is entitled to a declaration that it has no obligation to make any future donations under the Various Agreements.

113. Kosair is entitled to a declaration that Norton must remove Kosair's name from its facilities and publications.

114. Kosair is entitled to an accounting for all donations that it has made for the benefit of KCH.

COUNT II – BREACH OF CONTRACT

115. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 114 as if fully set forth herein.

116. In 1982, Kosair and NKC entered into the Restated Agreement, which was subsequently made binding upon NKC's successor, Norton.

117. In 2006 and in 2009, Norton entered into the Second Agreement and the Supplemental Agreements.

118. Norton has breached the duty of good faith and fair dealing with respect to the Various Agreements.

119. Norton has breached the Various Agreements by failing to keep separate accounting of Kosair's contributions at KCH.

120. Norton has breached the Various Agreements by not operating its fiscal affairs in the same way it had been doing before affiliating with Kosair.

121. Norton has breached the Various Agreements by failing to preserve Kosair's institutional identity in a manner consistent with Kosair's mission.

122. Norton has breached the Various Agreements by not expending Kosair's donations and by not applying those donations at KCH.

123. Norton has breached the Various Agreements by expending Kosair's funds on lobbying expenses and grants to third parties.

124. Norton has breached the Various Agreements by using Kosair's name in a manner inconsistent with the terms of the Various Agreements.

125. All conditions precedent to suit have been satisfied.

126. Kosair has performed all of its obligations under the Various Agreements.

127. Kosair has suffered damages as a result of Norton's breaches in an amount in excess of this Court's jurisdictional minimum.

128. Norton should return to Kosair all donations Norton failed to expend in accordance with the terms of the Various Agreements and compensate Kosair for the unauthorized use of the "Kosair" name.

COUNT III – BREACH OF TRUST

129. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 128 as if fully set forth herein.

130. The contributions paid by Kosair to Norton pursuant to the Various Agreements established a charitable trust with an ascertainable *res*.

131. The beneficiary of the trust was sufficiently identified and Norton was the trustee.

132. Norton breached the trust by, among other actions as described above, comingling the trust funds with other funds of Norton's, failing to account to Kosair for the use of the funds and using the funds in a manner inconsistent with the trust documents and the donor's intent.

133. Accordingly, the Court should order Norton to account for all funds it has received and to refund to Kosair all funds which Norton cannot establish were utilized pursuant to the trust instruments — the Several Agreements — and consistent with Plaintiff's intent.

COUNT IV – BREACH OF FIDUCIARY DUTIES

134. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 133 as if fully set forth herein.

135. For the reasons set forth above, a fiduciary relationship exists between the Parties, and Norton breached that relationship by *inter alia* mishandling the funds donated by Kosair.

136. In the alternative to Norton's duties through its position as trustee, the relationship between the Parties constitutes a joint venture which also invokes fiduciary

duties upon Norton, where Norton is a constructive trustee. Norton breached that relationship by mishandling the funds donated by Kosair.

137. Kosair has sustained losses as a result of Norton's actions.

138. Kosair is entitled to damages in a substantial amount in excess of this Court's jurisdictional minimum and an accounting for all funds contributed.

COUNT V – UNJUST ENRICHMENT

139. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 138 as if fully set forth herein.

140. Norton has been unjustly enriched by its use of the charitable funds contributed by Kosair.

141. Specifically, by refusing to utilize the funds in the manner contemplated by the donor Plaintiff and pursuant to the Various Agreements, Norton retained a part of the monies for its own uses including for the payment of salaries, travel and the making of other grants.

142. As a result, Norton received a benefit, and Norton's retention of that benefit without payment would be unjust.

143. Kosair never gave consent, written or oral, for Norton to use its name or its funds for these purposes.

144. Accordingly, the Court should order an accounting for all funds received by Norton and order repayment of any of the funds which were expended in a fashion contrary to those consistent with the donor Plaintiff's intent and the Various Agreements. In addition, the Court should order Norton to compensate Kosair for its unauthorized use of Kosair's name.

COUNT VI – CONSTRUCTIVE TRUST

145. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 144 as if fully set forth herein.

146. Norton, acting as trustee, has wrongfully disposed of trust property and, upon information and belief, in so doing, has acquired other property. As a result, Kosair is entitled to either a constructive trust on the property so acquired or to the imposition of an equitable lien upon the property to secure its claim against Norton for breach of trust.

147. Accordingly, this Court ought to order an accounting and determine whether the property has been wrongfully disposed of by Norton and, as to such property wrongfully disposed of, this Court ought to enforce a constructive trust on any property acquired as a result or enforce an equitable lien upon that property.

COUNT VII – RESULTING TRUST

148. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 147 as if fully set forth herein.

149. Because the Parties have always contemplated that a trust would be created, where Norton would act as trustee for all monies transferred for the benefit of KCH by Kosair, and in view of the fact that Norton did not treat the donations from Kosair as trust property, this Court ought to impose a resulting trust upon any funds remaining, identified by an accounting, which should be ordered by this Court.

COUNT VIII – ACCOUNTING

150. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 149 as if fully set forth herein.

151. The Parties' lengthy relationship and the Various Agreements over the years establish that Norton owes fiduciary and other duties to Kosair including duties to account for the funds contributed for the benefit of KCH by Kosair.

152. Accordingly, this Court ought to order an accounting by Norton of all funds contributed by Kosair for the benefit of KCH.

COUNT IX – REFORMATION

153. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 152. However, this Count is pled in the alternative to the preceding Counts.

154. In the event it is determined that the expenditures by Norton have not violated the strict and express terms of the Various Agreements, this Court should determine that, by virtue of mistake and/or fraud, the Various Agreements ought to be reformed to reflect the Plaintiff donor's intentions –indeed all of the Parties' intentions– with respect to the funds in question.

155. Specifically, this Court ought to determine that it was the intention of, not only the donor, but of all of the Parties that the funds in question would be handled as trust funds and maintained in a segregated fashion from other funds of Norton as also required by applicable law.

156. This Court ought to further determine that it was, as a result of fraud and/or mistake, the Various Agreements did not reflect the Parties' intentions that KCH would be maintained as a financially separate entity and that the Various Agreements ought to be reformed to require that it be so maintained.

157. Furthermore, as a result of fraud or mistake, the Court ought to determine and as a result reform the Various Agreements to require regular and periodic reporting by Norton, setting forth in detail the nature of the expenditures made from the funds contributed by Kosair.

158. As a result of fraud and/or mistake, this Court ought to determine that the Various Agreements should be reformed to reflect that the contributions of Kosair are to be used only to advance programs which, but for the contributions in question, would not be established and maintained.

COUNT X – VIOLATIONS OF KRS 367.667 AND STATE TRADEMARK/SERVICE MARK LAW INCLUDING KRS 365.241 AND KRS 466.070

159. Kosair realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 158 as if fully set forth herein.

160. Kosair has adopted, used and extensively advertised its charitable services in association with the trademarks and/or service marks “Kosair,” “Kosair Charities,” and “Kosair Kids” and others (collectively, “Marks”), which have become well-known throughout the region and in the donor community, are emblematic of Kosair's goodwill and good reputation, and are so associated with Kosair's services that these Marks have acquired secondary meaning.

161. Under the Second Agreement and the Additional Projects Funding Agreement, Kosair allowed Norton to use the name “Kosair” with regard to its downtown children's hospital and its children's medical center on Brownsboro Road. However, Norton has, without authorization from Kosair, placed the “Kosair” name on the various other facilities and used the “Kosair” name in its marketing and advertising for these facilities without Kosair's consent.

162. Norton has also improperly employed Plaintiff's name "Kosair" and other of Plaintiff's Marks in their fundraising activities which has diverted funds otherwise destined for Kosair to charities associated with Norton.

163. Norton's improper use of Kosair's Marks falsely suggests the endorsement and sponsorship by Kosair of Norton's activities, which erodes prospective donor confidence, and the good reputation and goodwill that Kosair and its services enjoy in the industry and market. In addition, it has led to confusion among actual and potential consumers and donors.

164. Kosair has demanded that Norton cease and desist from infringing upon and misusing its trade names and Marks.

165. Norton has ignored this demand and its continued infringement is causing irreparable injury to Kosair's trade, reputation and goodwill, and will continue to cause irreparable injury to Kosair unless enjoined by this Court.

166. Accordingly, this Court ought to enjoin Norton from infringing upon Kosair's Marks and trade names, order an accounting for all funds raised and profits received through the use of confusing advertisements and other usages of the Marks and trade names and award damages in a substantial amount in excess of this Court's jurisdictional minimum.

WHEREFORE, Kosair Charities Committee, Inc., by counsel, respectfully requests that this Court enter a judgment in its favor and against Norton Healthcare, Inc., Norton Hospitals, Inc. and NKC, Inc. providing the following:

- i. A declaration of the Parties' rights as set forth above;

- ii. An accounting of all funds paid by Kosair to Norton and its predecessors, affiliates and subsidiaries;
- iii. An injunction against the misuse of Kosair's name;
- iv. Establishment of constructive and resulting trusts;
- v. An award of compensatory damages against Norton;
- vi. In the alternative to certain of the above, a reformation of the Various Agreements;
- vii. A trial by jury;
- viii. Its attorneys' fees;
- ix. Its costs herein expended; and
- x. Any and all further relief to which it may appear entitled.



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CERTIFICATE OF SERVICE

It is hereby certified that on this 9 day of June, 2014, the foregoing document was served via electronic mail and/or U.S. mail, first class, postage prepaid, to the following:

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