NO. 14-CI-02523

JEFFERSON CIRCUIT COURT
DIVISION THREE (3)
JUDGE MITCH PERRY

KOSAIR CHARITIES COMMITTEE, INC. PLAINTIFF

v.

NORTON HEALTHCARE, INC., et al. DEFENDANTS

KOSAIR'S RESPONSE IN OPPOSITION TO NORTON'S MOTION TO DISMISS

I. INTRODUCTION

"A motion to dismiss is governed by a rigorous and sweeping standard which dictates that it should be granted only where 'it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.' Peri-Mutuel Clerks' Union v. Kentucky Jockey Club, 551 S.W.2d 801 (Ky. 1977)." Snowden v. City of Wilmore, 412 S.W.3d 195, 206 (Ky. App. 2013). "Civil Rule (CR) 8.01 requires pleadings to contain 'a short and plain statement of the claim showing that the pleader is entitled to relief . . .' It is not necessary to state a claim with technical precision under this rule as long as a complaint gives a defendant fair notice and identifies the claim. Cincinnati Newport & Covington Transp. Co. v. Fischer, 357 S.W.2d 870, 872 (Ky. 1962)." Grand Aerie Fraternal Order v. Carneyhan, 169 S.W.3d 840, 844 (Ky. 2005), *see also* Pete v. Anderson, 413 S.W.3d 291, 301 (Ky. 2013), where the Kentucky Supreme Court recognized that ". . . Kentucky is a notice pleading jurisdiction, where the 'central purpose of pleadings remains notice of claims and defenses.' Hoke v. Cullinan, 914 S.W.2d 335, 339 (Ky. 1995) (citing Lee v. Stamper, 300 S.W.2d 251 (Ky. 1957))."

Despite this clear law in Kentucky, the Defendants, Norton Healthcare, Inc., Norton Hospitals, Inc. and NKC, Inc. (collectively "**Norton**") have nevertheless filed a Motion to

Dismiss the First Amended Complaint ("**Amended Complaint**") filed by Kosair Charities Committee, Inc. ("**Kosair**"), based almost exclusively on the failure by Kosair to allege sufficient facts to assert several of its claims. Norton has made this Motion despite the fact that Kosair's Amended Complaint is approximately 27 pages in length, includes 166 separately number paragraphs and asserts claims for declaratory judgment/accounting; breach of contract; breach of trust; breach of fiduciary duties; unjust enrichment; constructive trust; resulting trust; entitlement to an accounting; reformation of contract; and violations of KRS 367.667 and state trademark/service mark law. Based solely upon a perfunctory review of the record in this case, it is clear that Norton has failed to meet its burden as it relates to its present Motion to Dismiss. However, as will be demonstrated in the following Memorandum, all of the grounds asserted for entitlement to relief in Norton's Motion to Dismiss are unsupported by the record and Kentucky law.

II. BACKGROUND

For the last 90 years, Kosair's mission has been to protect the health and well-being of children by providing funding support for clinical services, research, pediatric care, education and child advocacy. (Amended Complaint, p. 1, ¶ 2). Between 1926 and 1982, Kosair operated its own children's hospital on Eastern Parkway called Kosair Crippled Children Hospital. In the early 1980's, Kosair decided to expand its children's hospital from the Eastern Parkway location through an affiliation with Norton for the purpose of developing a pediatric hospital in downtown Louisville called Kosair Children's Hospital ("**KCH**"). (Id. at pp. 1, 2, ¶ 4). From the beginning of their relationship, Norton has known that Kosair can only make financial contributions to KCH to the extent that

those contributions are consistent with the mission of Kosair, which (as Norton knows) is to provide support to children in the Louisville area.[1]

Accordingly, in 1981 Norton and Kosair entered into a 30 year Affiliation Agreement. (Id. at p. 2, ¶ 6). The initial Affiliation Agreement was actually executed between Kosair and Norton-Children's Hospitals, Inc. Then, in 1982, Norton and Kosair executed the Restated Affiliation Agreement ("**Restated Agreement**"). During that time, Norton also changed its name to NKC, Inc. ("**NKC**") and its organizational structure to accommodate that affiliation.

The Restated Agreement outlined certain obligations of Norton in its use of Kosair's funds at KCH. These obligations consisted of essentially two parts. First, Norton and Kosair's respective children's hospitals would be consolidated into the single facility, KCH. (Id. at p. 7, ¶ 35). KCH would thereafter operate with an independent financial structure. (Id. at p. 8, ¶¶ 38-39). Particularly, Norton agreed that it would after consolidating, "continue to operate its *fiscal affairs in substantially the same manner as Norton Children's Hospital, Inc. is currently doing*." (Id. at p. 8, ¶ 39). In other words, the funds of the consolidated hospital, KCH, would be maintained separate and distinct from other Norton's operations. Post-construction of KCH, Norton was also required to preserve the institutional identity of Kosair. (Id.). Part two of the Agreement was that Kosair would, over a 30 year period, fund KCH with a portion of its endowment income through Norton. (Id. at p. 7, ¶ 34).

In December 2006, with Kosair's financial commitments under the Restated Agreement nearing their expiration, Norton and Kosair entered into the Second Restated

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[1] Id. at p. 6, ¶ 27 ("More than anything this lawsuit is about Kosair . . . ensuring that charitable donations intended to benefit Louisville's sick and injured children at KCH *do just that*.").

Agreement of Affiliation ("**Second Agreement**") wherein Kosair agreed to make annual support payments totaling $117 million to KCH through the year 2026. While the Restated Agreement was entered into for the purpose of "consolidat[ing] the hospital operations of [Kosair] and [Norton]," the purpose of the Second Agreement was simply to "*continue* and *further develo*p the long-standing relationship" between Norton and Kosair, while "provid[ing] both parties with *greater access* and resources to help ***further their respective charitable missions***." *Compare* (**Exhibit A, p. 2, § 1**) *with* (**Exhibit B, p. 2 § 1**).

When the Restated Agreement was executed in 1982, KCH had yet to open, which is why the Restated Agreement addresses issues such as the architectural design of KCH and the placement of signs and logos at KCH. Unlike the Restated Agreement, when the Second Agreement was executed, Norton and Kosair had been in affiliation and KCH had been operating for 25 years. In its Motion to Dismiss, Norton acknowledges that the Second Agreement merely involved ongoing financial contributions and naming rights to KCH, admitting that "the basic agreement [was] . . . that [Kosair] would provide financial support to be used by Norton at KCH for the next twenty years (through 2026), in exchange for Norton providing [Kosair] exclusive naming rights . . ." (Motion to Dismiss, p. 5).

Under the terms of the Second Agreement, Norton was required to "expend" the funds contributed by Kosair, and expend the funds "at KCH or in association with KCH's delivery of pediatric healthcare services in a manner supportive of the mission of KCH." (**Exhibit A, p. 3, § 2D**). Thus, money disbursed by Kosair was contractually required to be *spent* at KCH and not at some other Norton facility, nor one of its affiliated foundations.

In addition to imposing limitations on how and where Kosair disbursements could be used, the Second Agreement limited Norton's use of the name "Kosair". Specifically, the Second Agreement provided that Norton could not, without the prior written consent of Kosair, use the "Kosair" name in connection with any facility or entity other than KCH. **(Exhibit A, p. 6, § 7)**.[2] Contrary to the Second Agreement, it has recently become known that Norton has placed the "Kosair" name on more than a dozen pediatric offices, outpatient centers and specialist offices throughout Kentucky and Southern Indiana. (Amended Complaint, p. 18, ¶ 96). It has also registered, at least, eleven assumed corporate names that contain the word "Kosair," and is currently trying to develop a Kosair Children's Hospital facility in Shelbyville. (Id. at p. 18, ¶¶ 96-98). In addition, Norton has improperly used Kosair's name in a misleading manner in fundraising communications through its own foundation. (Id. at p. 18, ¶ 99).

In a letter to Kosair dated April 27, 2012, Norton's CEO Stephen Williams admitted that such misuse of the Kosair name had occurred at Norton, while "apologiz[ing] for any confusion or communication which has occurred as a result of any actions or omissions of any employees or contracted parties of Norton Healthcare ("NHC") or Children's Hospital Foundation ("CHF") regarding the use of the Hospital name, the Foundation's name or any combination thereof." Despite this apology, Norton's misuse continues to this day.

As a result of the actions of Norton, Kosair was compelled to file the present action on May 8, 2014. Then, on June 9, 2014, Kosair filed its Amended Complaint with this

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[2] Kosair provided such written consent in 2009 to Norton in relation to the pediatric facility that was, at that time, under construction on Chamberlain Lane. That facility is now known as Kosair Children's Medical Center-Brownsboro. (See Exhibit C to Motion to Dismiss, p. 2, § 3).

Court. In addition, on July 30, 2014, the Kentucky Office for the Attorney General ("**the Commonwealth**") filed its Motion to Intervene as of right in this proceeding pursuant to CR 24.01, citing its interest in protecting charitable assets. The Commonwealth filed its complaint for breach of trust, constructive trust, resulting trust and an accounting against Norton, which must also be considered when making this CR 12.02 determination. This intervening party, who is in charge of regulating charities in Kentucky, made several allegations including the following:

- Norton, acting as trustee, has wrongfully disposed of trust property.
- The contributions paid by Kosair to Norton established a charitable trust with an ascertainable *res*.
- The beneficiary of the charitable trust was sufficiently identified and Norton was the trustee.
- Norton breached the trust by comingling the trust funds with other funds of Norton's.
- Norton breached the trust by failing to account to Kosair for the use of the funds.
- Norton breached the trust by using the funds in a manner inconsistent with the trust documents and the donor's intent.

The Commonwealth's Complaint supports Kosair's allegations in its Amended Complaint. It is against this background of facts and the record that Norton's Motion to Dismiss must be evaluated.

III. ARGUMENT

A. Under Kentucky Law, the Amended Complaint Need Only Provide with Fair Notice of the Underlying Claims.

Kentucky is a notice pleading state, where the "central purpose of the pleadings remains notice of claims and defenses."[3] The "notice pleading" theory as adopted by the Kentucky Rules of Civil Procedure is a "rigorous and sweeping standard" in favor of the plaintiff, which dictates that a complaint will not dismissed for failure to state a claim, "unless it appears to a certainty" that "the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim."[4] When considering a motion to dismiss, "the allegations contained in the pleading are to be treated as true and must be construed in a light most favorable to the pleading party."[5]

Contrary to this unambiguous law in Kentucky, Norton cites to two federal court cases for the proposition that, when reviewing a motion to dismiss, a state court sitting in Kentucky must remove all conclusory allegations or statements from a complaint. (Motion to Dismiss, p. 9). First, Norton cites Mezibov v. Allen, 411 F.3d 712, 716 (6th Cir. 2005). However, the Court must disregard Norton's reliance on the Sixth Circuit's decision in Mezibov, being that Kentucky "ha[s] considered the federal authorities" concerning the "function of a notice pleading" on a motion to dismiss, and "declined to follow what appears to be the more rigorous requirements," in favor of the "liberal construction rule."[6]

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[3] *See e.g,* Pete v. Anderson, 413 S.W.3d 291, 301 (Ky. 2013), *citing* Hoke v. Cullinan, 914 S.W.2d 335, 339 (Ky. 1995).

[4] See e.g. Snowden v. City of Wilmore, 412 S.W.3d 195, 206 (Ky. App. 2013) *and* Pierson Trapp Co. v. Peak, 340 S.W.2d 456, 460 (Ky. 1960), *citing* CR 12.02; *see also* Spencer v. Woods, 282 S.W.2d 851, 852 (Ky. 1955).

[5] Snowden, 412 S.W.2d at 206, *citing* Gail v. Scroggy, 72 S.W.2d 867 (Ky. App. 1987).

[6] *See e.g.,* Edmonson County v. French, 394 S.W.3d 410, 416 (Ky. App. 2013); *see also*, McCollum v. Garrett, 880 S.W.2d 530, 533 (Ky. 1994).

Additionally, the Court must disregard Norton's reliance upon Clark v. Cincinnati Ins. Co., 2006 WL 1044461, at *1, *3 (Ky. App. Apr. 21, 2006), first, being that the statement that "a court must strip a complaint of its conclusory statements" was attributed to the appellee (not to the court, itself), and also because this unpublished opinion clearly defers to CR 76.28(4) before any citation is allowed.[7] Rule 76.28 expressly prohibits citation to an unpublished opinion when there is a published opinion that would "adequately address the issue."[8] In this case, there are *several* published opinions that adequately address the issue, and thus, Norton's reliance on Clark is improper under the Kentucky Rules of Civil Procedure. When considering a 12.02 motion in Kentucky, it is improper to "strip" a complaint of its legal conclusions. According to Kentucky's highest court, "it is immaterial whether the complaint ***states conclusions*** or facts as long as ***fair notice is given***."[9]

B. The Breach of Contract Claim Must Not Be Dismissed.

In its Motion, Norton initially argues that Kosair's breach of contract claim should be dismissed due to the merger clause contained in the Second Agreement. First, according to Kentucky law, the best test of whether the parties intended to integrate part of the transaction is whether the written contract deals with *that part of the transaction*.[10] Likewise, "merger clauses are not effective to collateral agreements."[11]

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[7] Clark, 2006 WL 1044461, at *1-*3.
[8] *See* CR 76.28(4).
[9] Pierson Trapp Co., 340 S.W.2d at 460 (emphasis added); *see also* Worrix v. Medtroni, Inc., 2013 WL 6834719, at *3 (E.D. Ky. Dec. 23, 2013) ("The central purpose remains notice . . . [and] [p]leading **legal conclusions** is not fatal as long as the complaint gives the defendant fair notice of the claim.") (emphasis added), *and* Natural Resources and Environmental Protection Cabinet v. Williams, 768 S.W.2d 47, 51 (Ky. App. 1989).
[10] *See* Bullock v. Young, 67 S.W.2d 941, 946 (Ky. 1934), *citing* Wigmore on Evidence, Vol. 2 § 2430.
[11] Drees Co. v. Osburg, 144 S.W.3d 831, 833 (Ky. App. 2003), *see also* Pittman v. Santander Consumer USA, Inc., 2014 WL 1652376 at *4 (M.D. Ala. Apr. 24, 2014) (the District Court rejected reference to the recitals in an agreement to determine the subject matter of the agreement, while finding that, when an

The merger clause within the Second Agreement only superseded agreements and understandings concerning the same "subject matter," which, under the Second Agreement, was the amount of Kosair's *ongoing* financial contributions at KCH and the naming rights of KCH.[12] This was sufficiently alleged.[13] Under the Second Agreement, the merger clause stated as follows:

> Entire Agreement; Amendment; Waiver. This Agreement sets forth the entire agreement of **the parties** with respect to the subject matter of this Agreement, supersedes all existing agreements or understandings between them **concerning that subject matter**, and may be modified or amended only by a written instrument signed by each party.

(**Exhibit A, p. 9, § 12D**) (emphasis added).

In KFC Corp. v. Collectramatic, 547 A.2d 245, 246 (N.H. 1988), the Supreme Court of New Hampshire interpreted Kentucky law concerning the rights of two parties who executed two successive contracts, where an integration clause in the latter purported to supersede the former. The Supreme Court determined that the insertion of an integration clause does not work to abandon "vested rights," i.e., "a right previously bargained for and acquired" and had no effect to "duties undertaken in completed transactions."[14]

Obviously, there are *some* vested rights under the Restated Agreement, being that Kosair could not ask for a refund of its contributions between 1982 and 2006, claiming

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agreement states that it is "the entire agreement only as to the subject matter of the contract itself, is not effective as a complete supersession of the previous contract.").

[12] Exhibit A, pp. 2-3, § 2A-C superseded all but year 2006 of the annual support payments under Exhibit B, pp. 18-21, § G[1][a]-[c]. Additionally, Exhibit A, p. 6, § 7 superseded the Second Amendment to the Restated Agreement, § 1 which concerned naming rights.

[13] Amended Complaint, p. 10, ¶ 52 ("Simply put, the Second Agreement involved different subject matter than the Restated Agreement and varied in effect.").

[14] Collectramatic, 547 A.2d 248-249, *see also* OSU Pathology Services, LLC v. Aetna Health, Inc., 2011 WL 1691830 at *11 (S.D. Ohio 2011) ("Turning to the case at bar, the aforementioned discussion in [Collectramatic] provides the best guidance for analyzing the effect of a subsequent agreement on the obligations of a prior agreement. The [subsequent] Agreement contains language indicating it is intended to be prospective in nature, like the subsequent agreement in [Collectramatic].").

that the financial support provisions for 2007 through 2026 (i.e. its commitments under the Second Agreement) represented its "entire" contractual obligation to Norton. Norton's proposition that the Second Agreement, as the latter contract, supersedes the former agreement is misplaced. Neither party disputes that the rights and obligations between the parties are governed by multiple contracts executed at multiple times and that the Second Agreement does not constitute the "entire" contract. Kosair's position is that the Restated Agreement establishes the institutional identity of the parties and the pre-affiliation fiscal independence requirement of Norton.

Unlike the cases that Norton cites in its Motion to Dismiss, absent from the merger clause was any additional provision stating that the Second Agreement "*terminated*" the Restated Agreement.[15] Norton, obviously, does not allege that the Second Agreement superseded all the terms of the Restated Agreement. If this was the case, as stated above, Kosair would be entitled its previous contributions under the Restated Agreement, since Norton would have no contractual rights under that Agreement. Furthermore, the Second Agreement expressly contemplates that the Restated Agreement remains in effect with respect to separate accounts designated for Kosair, and that if such funds are held by a third party they are to "revert" to Kosair. According to Section 6D of the Second Agreement, "the parties agree . . . any and all funds remaining in [Kosair's] restricted . . . fund, as such was contemplated in the **Restated Agreement of Affiliation**, as amended shall revert to and remain the separate property of [Kosair]." (**Exhibit A, p. 6, § 6D**) (emphasis added).

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[15] *See* Motion to Dismiss, pp. 12-13, *citing* Schulte v. Schulte, 2004 WL 1299992, at *1, *3 (Ky. App. June 11, 2004) and Jacob v. Dripchack, 331 S.W.3d 278, 280, 284 (Ky. App. 2011).

The fact is the parties were not required to address the fiscal independence and institutional identity in the Second Agreement because these were rights previously "bargained for and acquired" under the Restated Agreement, like in Collectramatic, and were not retroactively abandoned. This is supported by Section 6D of the Second Agreement. This "vested right" was sufficiently alleged in the Amended Complaint, providing Norton with fair notice of Kosair's contract claim. *See* Amended Complaint, p. 9, ¶ 43 (". . . 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 accounts from its own because that duty already existed.") (emphasis added).

Second, the merger clause within the Second Agreement on its face is unambiguous as to whom it applies. The Second Agreement identifies "the parties" as Norton Healthcare and Kosair, while stating that the Second Agreement represented "the entire agreement of ***the parties***" concerning the subject matter, superseded all existing agreements between "***them***" and could only be modified by a writing "signed by ***each party***." (**Exhibit A, p. 9, § 12D**) (emphasis added). The language of Section 12D of the Second Agreement makes clear, on its face, that the Second Agreement was not intended to relinquish any agreements or understandings between Kosair and "Norton's predecessors," and Kosair never entered into any agreement to this effect. (Id.).

Until now, the Defendants have been referred to in generalities as "Norton" for the purpose of a basic understanding of the Restated Agreement and the Second Agreement. More precisely, however, the Restated Agreement was executed between Kosair and a party known as "NKC" (which of the two NKC's is not altogether clear, being that Norton

registered two entities with the Secretary of State with that name: NKC Org. No. 178953 and NKC Org. No. 178909). (Amended Complaint, pp. 6-8, ¶¶ 32, 42). The Restated Agreement was then made binding on the successors to "NKC," whomever that may be. (Id.).

On the other hand, the Second Agreement was executed between *Norton Healthcare* and Kosair. At some point prior to its execution, "NKC" transferred certain duties under the Restated Agreement to Norton Hospitals. (Id. at p. 11, ¶¶ 55-57). Then, the Second Agreement (between Norton Healthcare and Kosair) superseded prior agreements of the same subject matter between only Norton Healthcare and Kosair. (Id. at p. 11, ¶¶ 55-56). As alleged, Norton Healthcare only claims to "oversee" and "develop" the operations and activities of Norton Hospitals. (Id. at p. 6, ¶ 29). To cover its bases, Kosair served Norton Healthcare, Norton Hospitals and both NKC's.

The point is neither the plain language of the Second Agreement, nor the parties to the Second Agreement, support a finding that it represents the entire agreement between Kosair and *all* four Defendants. Without sufficient proof, which Norton has failed to provide,[16] the Court would be superseding, in its entirety, any rights Kosair has against non-signatories (Norton Hospitals and both NKC's) with a contract signed only by Norton Healthcare. However, the Second Agreement on its face does not require this, stating that the merger clause is only effective between "the parties" to the Agreement. (Id. at p. 10, ¶ 52). Whatever the relationship is between "NKC" and Norton Healthcare, the Court cannot dismiss a claim for breach of contract in its entirety based on a clause in the Second Agreement that may be ineffective as to three of the four Defendants.

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[16] Id. at pp. 6-7, ¶ 32 ("The corporate structure of NKC is of ongoing dispute . . .").

Norton knows this, which is why Norton attempts to deflect the "NKC" issue altogether, arguing the "inexistence" of "NKC," despite the fact that both NKC's are "inactive but in good standing" on the Secretary of State website and despite the fact that Kosair did not allege its inexistence in the Amended Complaint.[17] By arguing that the Second Agreement supersedes any understandings or agreements as to *all* Defendants, Norton completely glosses over the fact that the two contracts at issue were executed between different parties and that all the parties are in good standing. But why let the facts (as alleged by Kosair) get in the way of a good argument?

Third, in order to find that a third party's obligations are superseded by an agreement to which it is not a party, the Court must find that a novation has occurred.[18] This requires clear proof of the parties' intent, and the burden rests on the party seeking to enforce it.[19] Norton has not satisfied this burden. In fact, the term "novation" does not appear anywhere in Norton's brief, not to mention in Kosair's Amended Complaint, which must be the sole basis for this a motion to dismiss.

Obviously, the Second Agreement does not represent the *entire* agreement between Norton and Kosair. 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.[20] Then, in March of 2009, Kosair and Norton entered into the Additional Projects Funding Agreement, wherein

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[17] Id. at p. 6, ¶ 31; *see also* Taylor v. Southern Belle Dairy Co., 2008 WL 682211, at *1 fn. 2 (Ky. App. March 14, 2008) ("Judicial notice can be taken of records from the secretary of state.").

[18] *See* Ashland Sales and Service Co. v. Dysard, 145 F.3d 1329, at *4 (6th Cir. May 21, 1998) (citing Restatement (Second) of Contracts § 279 (1979)) (When new parties are included in substitute contract, and the contract discharges pre-existing duties, including the obligor's right to enforce the original duty, "it is called a novation.").

[19] *See* G.D. Deal Holdings v. Baker Energy, Inc., 501 F. Supp. 2d 914, 919-920 (W.D. Ky. 2007) (". . . the burden of proving a novation is on the party seeking to enforce it.").

[20] Amended Complaint, p. 11, ¶ 58.

Kosair agreed to fund certain projects each year through 2026 and allowed Norton to place the Kosair name on Norton's new Kosair Children's Medical Center Brownsboro.[21] If the Second Agreement permitted the use of Kosair's name on hospitals other than KCH, as Norton insists in its Motion to Dismiss, why was this consent necessary? This question was raised in the Amended Complaint and remains unanswered.[22]

The supplemental agreements incorporated the same merger clause found in the Second Agreement, but like the Second Agreement, only superseded prior agreements concerning the "subject matter" and did not work to supersede all prior agreements in their entirety between the parties whatsoever.[23] If the Court were to accept Norton's contention that the presence of these merger clauses supersedes all prior agreements, regardless of their content, then Kosair's entire commitments to Norton would be determined by the *last* agreement between the parties in 2009 (the Additional Projects Funding Agreement), which of course Norton does not allege.

Fourth, the recitals of an agreement do not "***set forth specific rights*** or obligations of the parties," and are merely interpreted as background material.[24] Like the preamble of a legislative measure, a "whereas clause" of a contract is simply an introductory or prefatory statement meaning "considering that" or "that being the case," and is "***not an essential part of the operative portions of the contract and its provisions are not binding***."[25] If the provisions of an agreement are unambiguous, there is no need to

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[21] *See* Exhibit C to Motion to Dismiss, § 3.
[22] Amended Complaint, pp. 17-18, ¶ 95.
[23] *See* Motion to Dismiss, Exhibit B § 8, Exhibit C § 8, Exhibit D § 6.
[24] Cain Restaurant Co. v. Carrols Corp., 273 Fed. Appx. 430, 434 (6th Cir. 2008) (emphasis added), *see also* City of Elizabethtown v. Cralle, 317 S.W.2d 184, 187 (Ky. 1958) (finding that "statements in a preamble cannot be the foundation of an agreement.").
[25] *See* Pannell v. Shannon, 425 S.W.3d 58, 64 (Ky. 2014) (emphasis added), Jones v. City of Paducah, 142 S.W.2d 365, 367 (Ky. 1940), and Jasper v. Com., 375 S.W.2d 709, 710 (Ky. 1964).

address the inconsistency of preliminary recitals, since they are "not essential parts of the contract," and serve only to aid if construction is unclear.[26]

In Robert H. Clarkson Ins. Agency v. Professionals' Purchasing Group, Inc., 2003 WL 1860561, at *1 (Ky. App. April 11, 2003), the plaintiff brought a breach of contract claim against the defendant, relying upon the interpretation of the recitals in an agency agreement which referred to the plaintiff as "[the defendant's] exclusive agency representative." The Court of Appeals focused on the parties' intent, finding that "in the absence of a specific exclusivity clause . . . the "'exclusive agency' reference in the 'Background Section' section was ***not sufficient to impose a contractual obligation which the parties did not articulate***." (Id. at *3) (emphasis added).

In this case, the unincorporated recitals relied on by Norton were never part of the Second Agreement, nor were they negotiated between the parties. Under well-settled law, recitals are not an "essential part" of the terms of the contract and cannot be used to "set forth" specific rights, nor to "impose contractual obligations, especially if they are unincorporated."[27] By relying upon this language, Norton has asked the Court to find the terms of the Second Agreement to be unclear. On the other hand, Kosair takes the position that the operative terms of the Second Agreement and the Restated Agreement are unambiguous and that the merger clause clearly states it is only effective to agreements and understandings concerning the "subject matter" of the Second Agreement. Furthermore, if the Second Agreement completely superseded the Restated Agreement, then Section 6D of the Second Agreement, which references obligations

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[26] *See* Gentry v. Gentry, 798 S.W.2d 928, 933 (Ky. 1990).
[27] *See* Pannell, 425 S.W.3d at 64, Robert H. Clarkson Ins., 2003 WL 1860561, at *3, Jones, 142 S.W.2d at 367, Cain Restaurant Co., 273 Fed. Appx. At 434.

under the Restated Agreement, would be rendered meaningless, which is contrary to basic rules of construction.[28] Moreover, Kosair would be entitled to a refund of its 1982 through 2006 contributions, since those contributions were made pursuant to the Restated Agreement.

In support of its reliance on these recitals, Norton cites only two cases: Schulte v. Schulte, 2004 WL 1299992 (Ky. App. June 11, 2004) for the claim that Norton's breach of contract claim was "clearly merged" into a subsequent agreement and Jacob v. Dripchak, 331 S.W.3d 278 (Ky. App. 2011) for the proposition that "[p]reliminary recitals may be used as an aid in contract interpretation."[29] Before reviewing Schulte and Jacob, it must be noted that Norton is not using the recitals as a means of "interpretation" (as Norton claims to be doing), but rather as a means of *imposing* and *setting forth* terms the parties did not articulate, which, as stated above, is contrary to Kentucky law.

Unlike the case at hand, in both cases cited by Norton, Schulte and Jacob, the merger clauses in those cases included a "termination" provision, expressly stating that the subsequent agreement terminated the previous agreements between the parties.[30] Furthermore, in Jacob, the Court of Appeals in fact rejected reliance upon the recitals since the terms were **clear** on their face, finding that the "recital language . . . does not add or aid to interpreting the operative terms of the . . . agreements."[31] Not only do these

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[28] *See* Killion v. Com., 2014 WL 3021316, at *4 (Ky. App. July 3, 2014), *citing* Harbison–Walker Refractories Co. v. United Brick and Clay Workers of America, 339 S.W.2d 933, 935 (Ky. 1960) (". . . a basic tenant of contract construction [is] that the court should adopt the interpretation that gives meaning to the terms . . .").

[29] Motion to Dismiss, pp. 12-13.

[30] *See* Schulte, 2004 WL 1299992, at *1, *3 (the merger clause "clearly stated" that "it **terminated** any and all rights . . . arising out of the marriage relationship.") (emphasis added); Jacob, 331 S.W.3d at 284 the "Entire Agreement" clause stated that the "prior . . . Agreement . . . shall be deemed **terminated**.") (emphasis added).

[31] Jacob, 331 S.W.3d at 283.

cases fail to lend *any* support to Norton's claim, Jacob makes clear that the recitals cannot be used to interpret terms when the terms of an agreement are clear—as they are here.[32]

Likewise, where a recital of an integrated agreement contains a statement of fact, "contrary facts may be proved," and the result may be that the integrated agreement is not binding or "has a different effect from the effect if the recital had been true."[33] Here, under Norton's approach which focuses attention on the recitals, the Court would be required to weigh the credibility of non-binding recitals against provable facts to the contrary, which is an improper function of a CR 12.02 motion.

In any event, if Norton is permitted to offer these nonbinding recitals to prove a complete supersession of the Restated Agreement, then the Court must find the binding terms of the Second Agreement to be unclear. If this is the case, Kosair is entitled to introduce its own evidence demonstrating that this is not the case. Whatever the Court's determination is on the merger clause, the Court would have to resolve the issue of whether the Second Agreement was executed on the basis of fraud, mutual mistake or illegality[34] — all of which were sufficiently alleged in the Amended Complaint. As a result, Norton's Motion to Dismiss Kosair's claims for breach of contract must be denied.

C. Kosair has Established a Breach of Contract Claim Based on Norton's Misuse of the Kosair name.

In its Motion to Dismiss, Norton claims that Kosair alleges no facts in support of its claim that Norton misused the "Kosair" name in fundraising and that Kosair must identify

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[32] Id.

[33] Restatement (2d) of Contracts § 218, (1981), *see also e.g.* Mattingly Bridge Co. v. Holloway & Son Const., 694 S.W.2d 702, 704-705 (Ky. 1985) demonstrating the Restatement (2d) of Contracts is applicable under Kentucky law.

[34] Under Kentucky law, merger and integration clauses have no preclusive effect on claims of fraud, illegality, duress or mutual mistake. *See* Radioshack Corp. v. ComSmart, Inc., 222 S.W.3d 256, 259 (Ky. App. 2007), Childers & Venters, Inc. v. Sowards, 460 S.W.2d 343, 345 (Ky. 1970).

specific statements, advertisements or brochures in which Norton misused the "Kosair" name in fundraising.[35] These claims are based on Norton's misplaced theory that Kentucky is a fact-based pleading state. This is simply not the law. Under Kentucky law, Kosair is merely required to put Norton on notice of its claims, and the allegations of breach must be treated as true and construed in a light most favorable to the pleading party.[36]

Applying Kentucky law to Kosair's breach of contact claim, the inescapable conclusion is that Norton's Motion to Dismiss must be denied. Kosair's breach of contract claim incorporates by reference all allegations contained in paragraphs 1 through 114. (Amended Complaint, p. 20, ¶ 115). Paragraphs 95 through 105 provide specific references to certain acts which support Kosair's claims. For example, Kosair has pled that Norton improperly used the name in fundraising efforts in connection with its own foundation CHF in a manner that is both confusing to the public and competitive with Kosair. (Id. at p. 18, ¶ 99). The Amended Complaint also identifies certain medical practices, facilities and corporate registrations wherein Kosair has utilized the "Kosair" name without obtaining prior approval form Kosair. (Id. at p. 18, ¶¶ 96-98). As such, the Amended Complaint clearly provides Norton with fair notice of Kosair's breach of contract claim.

D. The Court Must Not Dismiss Kosair's Claim that Norton Breached the Implied Covenant of Good Faith and Fair Dealing.

In Kentucky, it is well established that every contract has an "implied covenant of good faith and fair dealing" that imposes upon the parties a duty to conduct itself in a

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[35] Motion to Dismiss, p. 14.
[36] Pete, 413 S.W.3d at 301, Snowden, 412 S.W.3d at 206.

"bona fide manner."[37] This duty requires the parties to act "honestly, openly, and sincerely; without deceit or fraud . . ."[38]

Norton claims that there are no allegations in the Amended Complaint of "bad faith, dishonesty, deceit, or fraud — let alone any *facts* supporting for such allegations."[39] Once again, Norton's argument in this regard ignores the fact that Kosair's breach of contract Count incorporates all allegations contained in paragraphs 1 through 114 of the Amended Complaint. (Amended Complaint, p. 20, ¶ 114). Indeed, Kosair's *entire* Amended Complaint is laced with allegations of Norton's bad faith, dishonesty, deceit and fraud. While Norton agreed to maintain a separate account for Kosair's funds, the Amended Complaint asserts: "[i]nstead, Norton places Kosair's donations in a bank account with Norton's other funds." (Id. at p. 13, ¶ 70). While Norton agreed to use Kosair's funds solely for the benefit of KCH, the Amended Complaint asserts: "it is not possible for Norton to demonstrate that it has in fact expended *any* of Kosair's donations to benefit KCH." (Id. at p. 13, ¶ 73). While the parties always intended that Kosair's funds were to be used for improvements at KCH, Norton now commingles Kosair's donations in a general pot and utilizes the funds "for the payment of salaries, travel and the making of other grants." (Id. at p. 23, ¶ 141).

Since Kosair has alleged a set of facts that has placed Norton on notice of its claim that Norton has not acted with good faith and fair dealing with Kosair, the Court must deny Norton's Motion to Dismiss this claim.

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[37] Pearman v. West Point Nat'l Bank, 887 S.W.2d 366, 368 (Ky. App. 1994).
[38] Id. *citing* Black's Law Dictionary 177 (6th ed.1990).
[39] Motion to Dismiss, p. 15.

E. The Claim for Breach of Trust Must Not Be Dismissed because Kosair's Donations Create a Charitable Trust Under the Restatement and Kosair Has Standing Pursuant to KRS 386B.4-050.

Under Kentucky law, Kosair's donations for the benefit of KCH create a charitable trust, and Norton, as the trustee, has breached that trust. Kentucky courts often cite favorably to the Restatement (3d) of Trusts, which addresses the creation of charitable trusts and states as follows:[40]

> An outright devisee or donation to a nonproprietary hospital or university or other charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust as that term is used in this Restatement. ***A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee for purposes of the terminology and rules of this Restatement.***

Here, the agreements show that Kosair expressly stated Kosair's contributions must be used for a specific purpose – pediatric care at KCH – and not just to benefit Norton generally. (Amended Complaint, pp. 3, 24, ¶¶ 15-16, 149). As a result, the parties expressed an intention to make a trust. According to the Restatement, Kosair's contributions to Norton for the benefit of KCH constitute a charitable trust since they are a "disposition" for a "specific" charitable purpose. KCH only provides pediatric care and, consistent with Kosair's longstanding mission, Kosair's contributions were for additive purposes to be used for the well-being of the children at KCH. In fact, since its inception, Norton has taken the position that donations by the founders of its charitable institutions create a charitable trust.[41]

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[40] Restatement (3d) Trusts § 28, Comment A, *see also,* e.g., Jarvis v. National City, 410 S.W.3d 148, 156 (Ky. 2013).

[41] *See for example,* Cook v. John N. Norton Memorial Infirmary, 202 S.W. 874, 875, 876 (Ky. 1918) (in its answer, Norton "[i]s a charitable institution. . . it was founded on donations made by charitably disposed

Furthermore, a number of cases have held that a donation or an agreement for a charitable purpose may constitute a charitable trust. In Kentucky Children's Home, Lyndon v. Woods, 157 S.W.2d 473, 475 (Ky. 1941), the Court found that a trust existed while applying the *cy pres* trust doctrine, where the party bequeathed a remainder to "the Children's Orphans Homes at Lyndon, Kentucky," despite the absence of any particular trust language. Similarly, in Woman's Hospital League v. City of Paducah, 223 S.W. 159, 160, 163 (Ky. 1920), the Court found that an agreement between the plaintiff and the city for the establishment of facility devoted to the "isolation and care of persons afflicted with contagious diseases" was devoted to a single charitable object, and thus a trust existed even in the absence of trust language. The fact that Kosair's donations constitute a trust is also supported by cases in other jurisdictions.[42]

Norton's argument that a charitable trust does not exist because the agreements do not use the terms "trust" or "trustee" fails. As demonstrated, "[a] charitable trust may be created although the settlor does not use the word 'trust' or 'trustee.'"[43] Moreover, "[i]t is immaterial whether or not the settlor knows that the intended relationship is called a trust, and whether or not the settlor knows the precise characteristics of a trust relationship."[44] A gift with a general charitable intent imposes a trust. The key here is

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persons, which donations were according to the founders, to be devoted solely to such charitable purposes, and the funds thus collected are devoted by its trustees exclusively to the support and maintenance of the institution as a charitable one," as a result the court recognized the founders created "a **charitable trust fund**.") (emphasis added), *overruled, on other grounds, by* Mallikin v. Jewish Hospital Ass'n of Louisville, 348 S.W.2d 930 (Ky. 1961).

[42] *See also* In re Parkview Hospital, 211 B.R. 619, 633-634 (N.D. Ohio Bank. 1997) (donations created charitable trust even though there was no express trust agreement); Banner Health System v. Long, 663 N.W.2d 242, 247 (S.D. 2003) (assets of health care facilities may constitute charitable trust).

[43] Restatement (Second) of Trusts § 351, Comment B; *see also* Restatement (Third) of Trusts § 13, Comment B (2003) ("No particular manner of expression is necessary to manifest the trust intention. Thus, a trust may be created without the settlor's use of words such as "trust" or "trustee . . .")

[44] Restatement (Third) of Trusts § 13, Comment A.

whether Kosair manifested a specific charitable purpose to benefit KCH, which was certainly expressed in the agreements. (**Exhibit A, p. 2, § 17**).

While Norton argues extensively to the contrary, Kosair's relationship with Norton is not some sort of arm's length business transaction, like Yum! Brands purchasing the naming rights to the downtown arena. Norton cites to Light v. Third-Woodland Presbyterian Church, Inc., 311 S.W.2d 386 (Ky. App. 1958), however, Light is inapposite. In that case the buyer paid the seller an amount equal to half the value of the land. (Id. at 388). That is certainly not the case here since there is no evidence that placing Kosair's name on the hospital conferred an economic value to Kosair equal to half of its donations –over $50 million. At any rate, the economic value of placing Kosair's name on the hospital would be an issue of fact which cannot be resolved on a motion to dismiss. Ultimately, following Norton's argument to its logical end, anytime a donee recognized a donor – by placing their name on a plaque or otherwise – a charitable trust would *not* be created. That is simply not what the law provides.

Furthermore, Norton claims that if Kosair's contributions constitute a charitable trust, the only party with standing to enforce the trust is the Kentucky Attorney General. (Motion to Dismiss, p. 18). Being that the Attorney General has moved to intervene, this will ultimately become a moot point. However, KRS 386B.4-050 states that "[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust."[45] This statute makes clear that Kosair has standing to maintain an action to ensure Norton uses its contributions in the manner intended by the terms of the trust. The Second

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[45] *See* KRS 386B.4-050(3), which is based on Uniform Trust Code § 405 (2000), and the official comments to § 405, which that "[t]he grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests."

Agreement, itself, supports the fact that Kosair has standing to bring this suit. The parties contractually agreed that any dispute relating to the Second Agreement would be brought in this Court, and thus reserved the right to bring suit in this Court to enforce the trust, which is consistent with the Restatement (3d) of Trusts.[46]

As shown, the agreements between Norton and Kosair concerning Kosair's donations create a charitable trust. As alleged, the parties always intended this to be the case. There is an "ascertainable res," Kosair's financial support, a "sufficiently certain beneficiary," KCH, and a "trustee who owns and administers the *res* for benefit of another," Norton.[47] As demonstrated above, Kosair has sufficient standing to bring this action concurrent with the Attorney General, who has moved to intervene. As a result, Kosair has established its breach of trust claim, and the Court must deny Norton's Motion to Dismiss this claim.

F. The Claim for Breach of Fiduciary Duty Must Not Be Dismissed. (Count IV)

Under Kentucky law, "[t]rustees are fiduciaries and must conduct themselves accordingly."[48] Although Norton cites to an unpublished opinion to define fiduciary duty, the Court need only look to the often-cited Kentucky Supreme Court opinion of Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 485 (Ky. 1991), which characterizes a fiduciary relationship as follows:[49]

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[46] *See* **Exhibit A, p. 9, § 12F** Governing Law ("The parties consent to exclusive jurisdiction and venue of any state or federal court located within . . . Louisville, Kentucky and irrevocable agree that any actions relating to this Agreement shall be litigated in such courts . . ."); *see also* Restatement (3d) of Trusts § 94 (2012) g(2) ("[t]he terms of a charitable trust may reserve to the settlor or confer upon others power to enforce the trust . . .").

[47] Motion to Dismiss, pp. 15-16, *citing* Benjamin v. JP Morgan Chase Bank, N.A., 305 S.W.3d 446, 453 (Ky. App. 2010).

[48] Jarvis, 410 S.W.3d at 158; *see* Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield, 110 F.3d 318, 324 (6th Cir. 1997) ("The director of organization impressed as charitable trust is a fiduciary.").

[49] Id., *citing* Security Trust Co. v. Wilson, 210 S.W.2d 336, 338 (1948).

> The relationship may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.

The existence of a fiduciary relationship is an issue "determined by the facts established," and the tendency of the courts is to "construe the term confidence or confidential relationship liberally in favor of the confider and against the confidant . . ."[50]

In addressing the claim for breach of fiduciary duty, Norton again attempts to characterize the relationship between Norton and Kosair as an "ordinary business relationship" and an "arm's length business relationship," however, nothing could be further from the truth.[51] The Second Agreement, on its face, demonstrates that this was not simply a "commercial" endeavor between the parties, that the Agreement was "intended to help further [Norton and Kosair's] respective charitable missions" and that the funds were to be used "solely for charitable, scientific, or educational purposes." (**Exhibit A, pp. 2-3, §§ 1, 2**). Kosair confided in Norton and trusted that it would use Kosair's funds for additive purposes at KCH. (Amended Complaint, pp. 2, 22, 24, ¶¶ 7, 132, 149). Indeed, as stated above, Norton's corporate structure was changed to accommodate this affiliation. (Id. at p. 11, ¶ 57). Furthermore, if it is Norton's contention that the naming rights conferred made this an even-handed commercial exchange, then why were restrictions placed on Norton's use of the Kosair name if its use was so valuable and why was Kosair so concerned with enforcing these restrictions?

The fact that Norton believes it holds no position of trust and confidence with its largest donor, a charitable organization, who has contributed over a hundred million

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[50] Keeney v. Keeney, 223 S.W.3d 843, 849-850 (Ky. App. 2007).
[51] Motion to Dismiss, pp. 18-19.

dollars to Norton for the care of sick children over the last 34 years, is simply absurd. Norton was bound to act in good faith and with due regard to the interest of Kosair, as trustee for contributions to KCH, as the beneficiary. Furthermore, as stated above, Steelvest indicates that the existence of the fiduciary duty is an issue of fact, which is not a proper inquiry on a Motion to Dismiss. As alleged in the Amended Complaint, Norton breached this duty by "mishandling the funds donated by Kosair." (Id. at p. 22, ¶ 135). Norton, who carries the burden, has failed to establish it has not breached its fiduciary duties to Kosair and thus the court must deny Norton's Motion to Dismiss this claim.

G. The Unjust Enrichment Claim Must Not Be Dismissed. (Count V)

Norton argues that Kosair's unjust enrichment must fail because there is an express contract between the parties. However, under Kentucky law, "[n]o election is required as between the allegations of an implied and express contract," and thus the claimant may rely on both.[52] Furthermore, if a contract has a missing term necessary to determine the rights of the parties in a dispute, courts will imply a reasonable term.[53]

Merely because Kosair has pled a claim for breach of an express contract along with a claim for unjust enrichment does not require the Court to dismiss the *quantum meruit* claim, and the Plaintiff need not "elect" between the two at this point in the proceedings. In support of its unjust enrichment claim, Kosair pled that Norton has been unjustly enriched by its use of Kosair's funds, in a manner not contemplated by the intent of the parties, that Norton received a benefit and that Norton's retention of that benefit

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[52] Staples' Ex'r v. Barrett, 242 S.W.2d 996, 998 (Ky. 1951), *see also* Rider v. Combs, 256 S.W.2d 749 (Ky. 1953).

[53] Mason v. Underhill, 2008 WL 1917179, at *5 (Ky. App. May 2, 2008) (refusing to dismiss an unjust enrichment claim based on the presence of a contract), *citing* Humphreys v. Central Ky. Natural Gas Co., 229 S.W.117, 119 (Ky. 1920).

would be unjust. (Amended Complaint, p. 23, ¶¶ 139-144). At this stage, dismissing the unjust enrichment claim would be premature, because it would require the Court to determine whether Norton received a benefit that it should not equitably retain regardless of the terms of the Second Agreement, which is not a proper question on a Motion to Dismiss in Kentucky. Since Kosair has established a viable claim for unjust enrichment, the Court must deny Norton's Motion to Dismiss this claim.

H. The Claims for Constructive Trust and an Accounting Must Not Be Dismissed. (Counts VI, VIII)

In attempts to dismiss Kosair's equitable claims for constructive trust and an accounting, Norton claims that a court should not resort to equitable remedies when adequate legal remedies are available.[54] Norton cites to no Kentucky case where a court applied this notion of an "adequate legal remedy" in order to dismiss a claim for constructive trust. Likewise, the only circumstances when a court dismisses an equitable accounting claim based on an adequate legal remedy is when the discovery process would suffice. Here, the Court is faced with a completely different set of circumstances.

Under Kentucky law, courts have extensive equitable powers "in seeing that trust estates are preserved to the advantage of beneficiaries."[55] The standards as to pleading equitable claims are more relaxed than legal claims, and "may be pled even in the absence of an enforceable contract."[56]

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[54] Motion to Dismiss, p. 23.
[55] Breetz v. Hill, 169 S.W.2d 632, 634 (Ky. 1943).
[56] O'Bryan v. Bickett, 419 S.W.2d 726, 728 (Ky. 1967), Schenk's Committee v. Riedling, 171 S.W.2d 251, 252 (Ky. 1943) ("Strictness of specification is not required in pleading an accounting.").

Norton, as the trustee for funds used at KCH, carries the burden on an accounting claim, and all doubts should be resolved against Norton.[57] Admittedly, when a complainant seeks an accounting and the defendant has all "relevant books and records," courts will deny an equitable claim, since discovery is available for that purpose.[58] However, this lawsuit stems from Norton's failure to *have relevant books and records* for KCH. Norton does not contest this fact.

If Norton's argument were true and an adequate legal remedy was unavailable here, then the discovery process would completely subsume a party's right to an equitable accounting in *every* case. Simply put, this rule is inapplicable in preliminary stages of lawsuits involving complex accounting matters between fiduciaries, where the fiduciary has admitted it does not keep separate records, as is the case here.[59] As alleged in the Amended Complaint, Norton did not keep proper accounting of Kosair's funds to KCH, and Norton owed fiduciary duties to account for Kosair's funds.

For purposes of the constructive trust claim, Kentucky law is clear that a claim for breach of contract does not subsume a claim for constructive trust.[60] Execution of the agreement between Norton and Kosair alone, is sufficient to invoke a constructive trust

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[57] Pendleton v. Strange, 381 S.W.2d 617, 619 (Ky. 1964), Burton v. Clere, 112 S.W.2d 57, 60 (Ky. 1937), *see* also Geiger v. First Troy Nat. Bank & Co., 30 F.2d 7, 8 (6th Cir. 1929) (plaintiff need not allege disposition peculiarly within defendant's knowledge of funds where he seeks an accounting).

[58] City of Owensboro v. Kentucky Utilities Co., 2008 WL 4642435, at *2 (W.D. Ky. Oct. 15, 2008).

[59] *See* U.S. v. Stevens, 605 F. Supp.2d 863, 870 (W.D. Ky. 2008). (denying dismissal equitable claim against opponent who argued "adequate legal remedy," since dismissal would be premature); Ronald A. Chisholm, Ltd. v. American Cold Storage, Inc., 2013 WL 2242648, at *9 (W.D. Ky. May 21, 2013) (no adequate remedy of law if the accounts between the parties "are of such a complicated nature that only a court of equity can satisfactorily unravel them."); Comm. Union Assur. Co. v. Howard, 76 S.W.2d 246, 248 (Ky. 1934) ("equity has concurrent jurisdiction in matters where they are of such a complex nature to render the remedy inadequate.").

[60] *See* Appleby v. Buck, 351 S.W.2d 494, 498 (Ky. 1961). ("[s]ince a constructive trust is enforceable regardless of whether the agreement from which it arises is oral or written, the existence of a writing was immaterial in both Whitsell v. Porter, 1949, 309 Ky. 247, 217 S.W.2d 311 and Antle v. Haas, Ky. 1952, 251 S.W.2d 290.").

under Kentucky law.[61] Additionally, courts in Kentucky may also impress a constructive trust upon one who obtains legal title "not only by fraud or by violation of confidence or of fiduciary relationship, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another."[62] Here, Kosair has pled that Norton wrongfully disposed of trust property, and that the Court ought to impose constructive trust on Kosair's contributions, which Norton should not be allowed to equitably retain for the general benefit of Norton. (Amended Complaint, p. 24, ¶¶ 146-147). As a result, the Court must deny Norton's Motion to Dismiss both Kosair's claims for equitable accounting and constructive trust.

I. The Claim for Resulting Trust Must Not Be Dismissed. (Count VII)

Norton lumps Kosair's claim for resulting trust in with its claims for an accounting and constructive trust and argues that the claim for a resulting trust should be dismissed as an equitable claim. However, Norton does not cite to any case which applied this "adequate legal remedy" theory to a resulting trust claim. Furthermore, Norton's citation to Ewing v. Clore, 292 S.W. 824, 825 (Ky. 1927) in support of its argument that "resulting trusts seek an equitable remedy" is misplaced. (Motion to Dismiss, p. 22). Kentucky's highest court, in Appleby v. Buck, 351 S.W.2d 494, 498 (Ky. 1961) stated that Ewing had exposed "the unmistakable tendency to confuse" the concept of "resulting trust" with "constructive trust" under Kentucky law. The distinction is that constructive trusts are

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[61] *See* O'Bryan, 419 S.W.2d at 728 (finding that a partnership agreement to deal in land for profit "creates a confidential relationship" which will "give rise to a constructive trust.").

[62] Keeney, 223 S.W.3d at 849, *quoting* Scott v. Scott, 183 Ky. 604, 210 S.W. 175, 176 (1919), *see also* Suess v. Stapp, 407 F.2d 662, 664 (7th Cir. 1969) ("[i]t is well settled law that a constructive trust may be imposed even though a plaintiff may have a legal remedy for damages.").

constructed by a court "to satisfy the demands of equity," but resulting trusts *arise* out of the "presumed intent of the parties."[63]

When funds are donated for a certain definite charitable purpose, the donee has no right to apply the same to any other purpose, and "when the purpose for which the contributions fails, a resulting trust will arise for the benefit of the donors."[64] Kosair has adequately pled a claim for resulting trust, stating that the parties always contemplated a trust for a certain charitable purpose and that Norton used those funds for other purposes. (Amended Complaint, p. 24, ¶ 149). Norton cites to no viable reason why the resulting trust claim should dismissed. As a result, Norton's Motion to Dismiss Kosair's claim for resulting trust must be denied.

J. The Reformation Claim Must Not Be Dismissed. (Count IX)

For purposes of reformation based on fraud or mistake, Norton claims that, pursuant to CR 9.02, all claims of fraud or mistake must be stated with "particularity." (Motion to Dismiss, p. 23). However, under Kentucky law, the rule requiring pleading of fraud or mistake with particularity is to be considered "in light of the entire spirit of modern pleading," "which lays emphasis on short, concise and direct pleadings."[65] Likewise, the "[f]ailure to use the word 'mistake' in a pleading does not deprive the pleader of the right to rely on mistake when the sense of the language in the pleading encompasses mistake."[66] All that is required is facts from which fraud or mutual mistake could be "readily

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[63] Wright v. Yates, 130 S.W. 1111, 1112-1113 (Ky. 1910), Val-Land Farms, Inc. v. Third Nat. Bank in Knoxville, 937 F.2d 1110, 1116 (6th Cir. 1991).
[64] Bible Institute v. Kiddy, 187 N.E. 846, 848 (Ind. App. 1933), *see* Greenway v. Irvine's Trustee, 131 S.W.2d 705, 709 (Ky. 1939).
[65] Denzik v. Denzik, 197 S.W.3d 108, 110 (Ky. 2006).
[66] Murphy v. Torstrick, 309 S.W.2d 767, 769-770 (Ky. 1958).

inferred."[67] Specifically, in Conrad Chevrolet, Inc. v. Rood, 862 S.W.2d 312, 314, 314 (Ky. 1993), the Kentucky Supreme Court found that the allegations in the plaintiff's complaint were "sufficient to raise an issue as to the fraud," where the count in the complaint was "headed FRAUD" and "allege[d] that . . . the acts complained of were fraudulent and that [the defendant] used and abused the trust and confidence reposed in her by [the plaintiff]."[68]

Kosair has established a claim for reformation based upon Norton's misstatements in the Second Agreement that led Kosair to believe its funds would be "maintained in a segregated fashion from other funds of Norton." (Amended Complaint, p. 25, ¶ 155). As stated above, the express terms of the Second Agreement required Norton to "*expend*" Kosair's funds, expend the funds "*at KCH* or in association with KCH's delivery of pediatric healthcare," and ensure the funds were not used directly or indirectly "to influence legislation" or for "a grant to another organization." (Id. at p. 9, ¶¶ 45-47). Likewise, as alleged, the Second Agreement "required donations, where the donor intended gifts to benefit KCH, to be used solely to benefit KCH and not Norton." (Id. at p. 9, ¶ 46). Instead, Norton commingles Kosair's donations, wrongfully disposes of those donations and uses them for the general benefit of Norton and not for KCH. (Id. at pp. 4, 24, ¶¶ 20, 147). Norton has also disclosed it no longer prepares separate budgets for KCH, which directly conflicts with Norton's duties to maintain a separate account for KCH. (Id. at pp. 13, 25, ¶¶ 69, 155). For the reasons set forth under Conrad Chevrolet, Kosair has sufficiently

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[67] Angel v. Brown, 308 S.W.2d 286 (Ky. 1958) (emphasis added). (Kentucky's highest court discussed CR 9.02 with respect to a count for reformation of a deed, "a pleading which alleges facts from which a mutual mistake may be **readily inferred** is generally regarded as sufficient.")

[68] Id., *see also* Todd v. Kentucky Heartland Mortg., 2003 WL 21770805, at *2 (Ky. App. Aug. 1, 2003) (complaint which stated the defendants' "unfairly and falsely mislead and deceived them" was sufficiently stated with specificity).

pled both "fraud" and "mistake" adequately under Kentucky law. (Id. at pp. 25-26, ¶¶ 154-158). Additionally, Kosair has demonstrated a set of facts that if proven would establish fraud or mistake. Since Kosair has sufficiently established a claim for reformation, Norton's Motion to Dismiss this claim must be denied.

K. Count X Must Not be Dismissed.

Kosair has pled that "Kosair" constitutes a protected mark, that Norton has used the mark on facilities without Kosair's consent, that Norton used the mark in association with fundraising activities and that the use has damaged the goodwill and reputation of Kosair. (Id. at pp. 26-27, ¶¶ 160-163). KRS 365.241 penalizes use of unauthorized intellectual property, which Kosair sufficiently alleged. Furthermore, Norton's actions constitute false and misleading activities in connection with charitable solicitations, specifically utilizing a name, symbol or statement closely related or similar to another charitable organization in a confusing manner violates of KRS 367.667(2). As stated above, Norton has admitted having done so in the past.

Norton's cites to KY. State Police Prof'l Ass'n v. Gorman, 870 F. Supp. 166 (E.D. Ky. 1994), stating that KRS 367.667 was made unconstitutional. However, Norton admits that Gorman had no effect on KRS 367.667(2), which is the basis of Kosair's claim, but only on KRS 367.667(3). (Motion to Dismiss, p. 25). Norton claims it is confused by this claim, because of Kosair's citation to "KRS 466.070" in the heading, despite the fact that the statute is cited to as "KRS 466.070" in the same manner in at least four different Kentucky decisions.[69] Moreover, KRS 446.070 simply allows for private actions to award

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[69] Froman v. Leach, 2003 WL 22064137 at *2 (Ky. App. Sept. 5, 2003), Arnold v. Microsoft, 2001 WL 1835377 at *4 (Ky. App. Nov. 21, 2001), Daugherty v. American Express, 2010 WL 4683757 at *7 (W.D. Ky. Nov. 12, 2010), Cummins v. Bic USA, Inc., 2011 WL 1399768 at *3 (W.D. Ky. April 13, 2011).

civil recovery for violations of criminal law. Citation to a statute authorizing a private right to bring a civil action based on a criminal statute does not affect whether Norton is on fair notice of Kosair's claim for its criminal violations. Norton is on notice as to the statute Kosair was referring to and is merely attempting to avoid the merits of Kosair's claims based on a scrivener's error, given the fact that Norton continues to engage in criminal misconduct to this day.

Even if none of these statutes applied, Kosair's trademark claim would survive, since Kosair's claim is not limited by these statutes. Kosair has a common law trademark rights and infringement of a common law trademark is a claim that Kentucky has recognized for decades.[70] It follows that under the common law, Kosair is entitled to the relief it has requested.

For the reasons set forth, Kosair has set forth valid claims for criminal acts involving charitable solicitations and state trademark and service mark violations and thus Norton's Motion to Dismiss Count X must be denied.

IV. CONCLUSION

Kosair respectfully requests that the Court deny Norton's Motion to Dismiss in its entirety.

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[70] *See*, e. g. Stratton & Terstegge Co. v. Sitglitz Furnace Co., 81 S.W.2d 1, 3 (Ky. App. 1935).

Respectfully submitted,

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It is hereby certified that on this 15 day of August, 2014, the foregoing document was served via electronic mail to the following:

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