

NO. 14-CI-02523

JEFFERSON CIRCUIT COURT  
DIVISION THREE (3)  
JUDGE MITCH PERRY  
2014 JUN 30 P 3:53

KOSAIR CHARITIES COMMITTEE, INC.

PLAINTIFF

v.

NORTON HEALTHCARE, INC., *et al.*

DEFENDANTS

**NORTON'S MOTION TO DISMISS**

1. Defendants Norton Healthcare, Inc. and Norton Hospitals, Inc. (collectively "Norton") respectfully move this Court pursuant to CR 12.02 and 9.02 for an Order dismissing Plaintiff Kosair Charities Committee, Inc.'s ("KCC") First Amended Complaint as set forth below. Additionally, Defendant NKC, Inc.—which is "is no longer in existence" as KCC alleged in its original complaint—joins this motion to the extent it is deemed a proper party to this action, but in doing so does not concede that it is a proper party and reserves all rights to challenge the same.<sup>1</sup>

2. Count II, which alleges breach of contract, should be dismissed, in part, for failure to state a claim upon which relief can be granted. KCC has alleged that Norton breached five contracts in six different ways, including by: "failing to keep separate accounting of Kosair's contributions to KCH"; "not operating its fiscal affairs in the same way it had been doing before affiliating with Kosair"; and "failing to preserve Kosair's institutional identity in a manner consistent with Kosair's mission." However, these purported obligations are allegedly contained in the parties' 1982 affiliation agreement, which was expressly "superseded" by a new agreement in 2006, and are not contained in any of the contracts currently in effect. KCC also does not

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<sup>1</sup> Given KCC's acknowledgement that NKC, Inc. is "no longer in existence" and public records confirming the same, Norton has asked KCC to voluntarily dismiss NKC, Inc. from this lawsuit. KCC has refused.

allege any facts showing that Norton breached any contract by using the "Kosair" name in "fundraising efforts." Finally, KCC has not stated a claim for breach of the implied covenant of good faith and fair dealing.

3. Count III for breach of trust must be dismissed because KCC fails to allege facts establishing that the parties intended to create a charitable or other trust, and in all events, KCC would lack standing to bring such a claim.

4. Count IV for breach of fiduciary duty must be dismissed because KCC fails to allege facts demonstrating a fiduciary relationship.

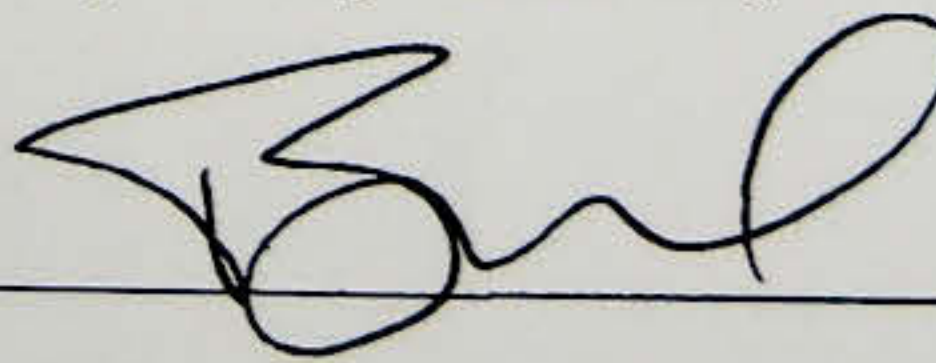
5. Count V for unjust enrichment must be dismissed because KCC fails to allege a factual basis for an unjust enrichment claim where the parties' relationship is governed by contract.

6. Counts VI, VII, and VIII for resulting trust, constructive trust, and an accounting must be dismissed because KCC has not (and cannot) allege that it lacks a legal remedy. The portion of Count I that requests an accounting should be dismissed for the same reason.

7. Count IX for reformation must be dismissed because KCC fails to allege any facts—let alone with the level of "particularly" required by CR 9.02—supporting its allegations of "mistake and/or fraud."

8. Count X, which alleges various statutory claims, must be dismissed because KRS § 365.241 is a *criminal* statute, KRS § 466.070 does not exist in the Kentucky Revised Statutes, and KCC fails to allege facts sufficient to show that that Norton improperly used the "Kosair" name in "fundraising activities" pursuant to KRS § 367.667.

Respectfully submitted,



A handwritten signature in black ink, appearing to be 'Boul', written over a horizontal line.

David J. Bradford (*pro hac vice*)  
Bradley M. Yusim (*pro hac vice*)  
JENNER & BLOCK LLP  
353 North Clark Street  
Chicago, Illinois 60654  
Telephone: (312) 923-2975

David Tachau  
Dustin Meek  
TACHAU MEEK PLC  
3600 National City Tower  
101 South Fifth Street  
Louisville, Kentucky 40202  
Telephone: (502) 238-9900

*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

It is hereby certified that copies of Norton's Motion To Dismiss and Memorandum in support were delivered via email and U.S. mail on this the 30th day of June 2014 to:

Donald L. Cox  
Matthew P. Cox  
Lynch, Cox, Gilman & Goodman, P.S.C.  
500 W. Jefferson Street, Suite 2100  
Louisville, Kentucky 40202  
(502) 589-4215  
[doncox@lynchcox.com](mailto:doncox@lynchcox.com)  
[mcox@lynchcox.com](mailto:mcox@lynchcox.com)



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DEFENDANTS

**MEMORANDUM IN SUPPORT OF NORTON'S MOTION TO DISMISS**

David J. Bradford (*pro hac vice*)  
Bradley M. Yusim (*pro hac vice*)  
JENNER & BLOCK LLP  
353 North Clark Street  
Chicago, Illinois 60654  
Telephone: (312) 923-2975

David Tachau  
Dustin Meek  
TACHAU MEEK PLC  
3600 National City Tower  
101 South Fifth Street  
Louisville, Kentucky 40202  
Telephone: (502) 238-9900

*Counsel for Defendants*

Date: June 30, 2014

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## Introduction

In KCC's strained effort to find a pretext for avoiding its remaining contractual obligation to provide approximately \$100 million in charitable funds to Norton, for use to support the mission of Kosair Children's Hospital ("KCH"), KCC alleges breaches of contracts and obligations that do not exist or have been expressly superseded. KCC also asks this Court to "reform" or rewrite the parties' agreements, without providing any basis for this Court to do so. KCC even alleges violation of a criminal statute and a statute that does not exist. As set forth below, virtually all of KCC's claims fail as a matter of law and should be dismissed.

Norton is the owner and operator of KCH, one of the nation's premiere children's hospitals, and KCC is Norton's largest financial supporter. Pursuant to the parties' "2006 Affiliation Agreement," KCC agreed to pay Norton an average of approximately \$6,000,000 per year through 2026, in exchange for exclusive naming rights to the hospital and other public recognition that has helped KCC amass an enormous treasury.

For the first 32 years of the parties' relationship, KCC and Norton enjoyed a generally harmonious relationship. However, in 2012, KCC apparently became envious of the success achieved by Norton, and began pressing Norton to share with KCC funds contributed by the public to Norton for the benefit of KCH. In November 2013, without any factual basis and for what appears to be the first time in the history of the parties' relationship, KCC asserted that Norton was not properly using KCC's annual contributions. Days later, KCC refused to make its 2013 contribution. KCC now owes Norton over \$6 million, yet to this day, continues to falsely represent to the public that it is supporting KCH and is current on its obligations to Norton.

KCC filed this lawsuit in an effort to justify its refusal to pay Norton and, more fundamentally, to rewrite the parties' contract so as to excuse KCC's continuing obligations of

approximately \$100 million. KCC specifically alleges that Norton breached the 2006 Affiliation Agreement and four other agreements, two of which are no longer in effect. To the extent KCC alleges that Norton breached its obligation to use KCC's payments "at KCH or in association with KCH's delivery of pediatric healthcare services in a manner supportive of the mission of KCH," Norton will demonstrate through a motion for summary judgment that KCC's allegation is misplaced and false—Norton has *always* used KCC's payments at KCH or for the benefit of KCH, and for no other purpose. Norton also will demonstrate through a motion for summary judgment that it has not misused the "Kosair" name because each allegedly improper use is either expressly permitted by the 2006 Affiliation Agreement or KCC has consented to its use.<sup>2</sup>

However, the remainder of KCC's claims must be dismissed for failure to state a claim upon which relief can be granted:

- Three of its remaining contract claims (Count II), directed to Norton's fiscal affairs, are based on obligations supposedly contained in the parties' 1982 affiliation agreement, which was expressly "*superseded*" by the 2006 Affiliation Agreement. KCC's claims that Norton breached the contracts through its "fundraising efforts" and the implied covenant of good faith and fair dealing also must be dismissed because KCC does not allege any facts in support.
- Its quasi-contractual claims (Count III for breach of trust, Count IV for breach of fiduciary duty, Count V for unjust enrichment) must be dismissed because KCC fails to allege facts establishing the parties intended to create a charitable or other trust, demonstrating a fiduciary relationship, and a factual basis for an unjust enrichment claim where the parties' relationship is governed by contract.
- Its claims for resulting trust (Count VI), constructive trust (Count VII), and an accounting (Counts I and VIII) must be dismissed because KCC has not (and cannot) allege that it lacks a legal remedy.
- Its claim for reformation (Count IX) must be dismissed because KCC fails to allege any facts—let alone with the level of "particularly" required by CR 9.02—supporting its allegations of "mistake and/or fraud."

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<sup>2</sup> Norton also will seek summary judgment on KCC's claim for declaratory relief (Count I), in which KCC seeks a declaration that it is permitted to terminate the parties' agreements based on Norton's alleged breaches.

- Finally, KCC's statutory claims (Count X) are frivolous, as one of the claims is based on a *criminal* statute and another is based on a statute that *does not exist*.

The Court should dismiss those claims, narrowing this case to two fundamental issues that can be resolved through summary judgment: (1) whether Norton has used KCC's payments "at KCH or in association with KCH's delivery of pediatric healthcare services in a manner supportive of the mission of KCH," as required by the 2006 Affiliation Agreement, and (2) whether Norton is permitted by contract to use the "Kosair" name on facilities affiliated with KCH. Norton will demonstrate on summary judgment that the answer to both of these questions is "yes."

### Background

Norton's relationship with KCC dates back to 1981. At that time, Norton and KCC, both not-for-profit organizations, operated separate children's hospitals: Norton's Children's Hospital and Kosair Crippled Children's Hospital. Occupancy at Kosair Crippled Children's Hospital had fallen considerably, and instead of continuing to operate the existing facility, KCC decided to use its funds to support a more vibrant pediatric hospital. At the same time, Norton agreed to construct a new pediatric hospital, based in part on a promise of financial support from KCC.

In 1982, the parties entered into an affiliation agreement under which Norton acquired from KCC all of the assets and liabilities of Kosair Crippled Children Hospital, and KCC agreed to pay Norton a one-time sum of \$2,000,000 and 70% of KCC's annual endowment income for thirty years to be used for the new hospital, which Norton otherwise agreed to build at its own expense and operate. To provide recognition for KCC's financial support, Norton agreed to use the "Kosair" name in the name of the hospital, calling it "Kosair Children's Hospital."

In reliance on KCC's funding commitments, Norton completed construction of KCH in 1986, and it quickly became one of the nation's premiere children's hospitals. The current 263-



bed hospital serves as the primary pediatric teaching facility for the University of Louisville School of Medicine and is Kentucky's only full-service, free-standing pediatric care facility dedicated exclusively to caring for children.

From 1981 to 2012, Norton and KCC's relationship was generally harmonious, successful, and collaborative. However, in March 2012—coinciding with an increase in fundraising activity by Norton's charitable arm, Children's Hospital Foundation—KCC commenced a letter-writing campaign in which it accused Norton of breaching the 2006 Affiliation Agreement in its fundraising efforts, and demanded that Norton share with KCC the charitable contributions made to Children's Hospital Foundation for the benefit of KCH. For the next year and a half, KCC created a moving target of allegations, culminating in November 2013 when it alleged for the first time that Norton had misused KCC's annual support payments. KCC then refused to make the support payment due under the affiliation agreement on November 15, 2013.

In this lawsuit, KCC alleges that Norton breached five contracts, two of which are no longer in effect, and lumps them together into a bundle that KCC defines as the "Various Agreements." (First Amended Complaint ("FAC") ¶ 19.) To eliminate the confusion KCC's pleading has created, Norton has separately identified and described each contract below, starting with the three contracts that are currently in effect.

**A. Agreements Currently In Effect.**

The parties' relationship is now governed by three contracts: (1) the "Second Restated Agreement of Affiliation," dated December 5, 2006 ("2006 Affiliation Agreement," Ex. A); (2) the "Special Projects Funding Agreement," dated December 5, 2006 ("Special Projects Funding Agreement," Ex. B), and (3) the "Additional Projects Funding Agreement," dated March 1, 2009 ("Additional Projects Funding Agreement," Ex. C).

**1. The 2006 Affiliation Agreement.**

In or about 2006, KCC asked Norton to amend the parties' then-existing affiliation agreement (which had been executed in 1982) to include a fixed payment schedule, in lieu of KCC paying Norton 70% of KCC's annual endowment income. Norton agreed to accommodate KCC, and on December 5, 2006, the parties executed the 2006 Affiliation Agreement, which remains in effect today.

Importantly, the 2006 Affiliation Agreement expressly superseded all prior affiliation agreements between the parties, including by specific reference the 1982 affiliation agreement discussed below (Ex. A § 12(D)):<sup>3</sup>

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.

The parties' intent to supersede the 1982 affiliation agreement also is set forth in a preliminary recital to the 2006 Affiliation Agreement, which provides (*id.* at p.2):

WHEREAS, the parties now desire to again restate their affiliation in the manner set forth herein and *all prior understandings or agreements* concerning the subject matter of this Agreement, including the [1982 Affiliation Agreement Agreement] and all four amendments thereto, *shall be superseded by this Agreement.*

The basic agreement between the parties in the 2006 Affiliation Agreement was that KCC would provide financial support to be used by Norton at KCH for the next twenty years (through 2026), in exchange for Norton providing KCC exclusive naming rights and other recognition which has helped KCC amass an enormous treasury. The following are the pertinent sections of the contract.

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<sup>3</sup> All emphasis is supplied unless otherwise noted.

1. *Purpose.* The very first section of the 2006 Affiliation Agreement lays out the mutual consideration each party would receive under the agreement (*Id.* § 1): guaranteed funding from KCC, and recognition of KCC by Norton:

Commitment and Purpose. Through this affiliation, Norton Healthcare and KCC intend to continue and further develop the long-standing relationship between them wherein KCC will provide certain significant financial support of Kosair Children's Hospital ("KCH") and its pediatric services while Norton Healthcare will provide KCC with certain recognition, naming rights and sponsorship opportunities associated with KCH. This affiliation will provide both parties with greater access and resources to help further their respective charitable missions.

2. *KCC's Annual Payments.* KCC agreed to make an annual support payment to Norton on November 15 of each year, starting with \$4,318,860 in 2007 and increasing by approximately 3% each year to \$7,685,691 in 2026, for a total of \$116,998,390. (Ex. A § 2(A)(2).) This funding was in lieu of KCC paying 70% of its annual endowment income to Norton, which was required under the 1982 affiliation agreement.

3. *Permitted Uses of Payments.* The agreement provides that all funds provided by KCC under the 2006 Affiliation Agreement "shall be expended by Norton Healthcare at KCH or in association with KCH's delivery of pediatric healthcare services in a manner supportive of the mission of KCH." (*Id.* § 2(D).) Consistent with that defined use, Section 2(A)[2] provides that all monies paid by KCC "shall be used to further and support the mission and programs of KCH as determined by Norton Healthcare and KCH." (*Id.* § 2(A)[2].)

4. *KCC's Naming Rights and Recognition.* Norton agreed to give KCC broad naming rights and recognition, including the promise to use the "Kosair" name in the name of KCH and its programs, activities, and services, which the parties contemplated would help KCC raise money in support of its charitable mission. This is set forth in Section 7 of the 2006 Affiliation Agreement:

Currently named "Kosair Children's Hospital," the parties agree that for the term of this Agreement, Norton Healthcare's pediatric hospital shall use the word "Kosair" as the first word of its institutional name, as may be changed from time to time. Norton Healthcare and KCH may use the Kosair name in association with and when referring to KCH, its programs, activities and services. Otherwise, Norton Healthcare shall not use the "Kosair" name in any manner without the prior written consent of KCC, which consent shall not be unreasonably withheld.

Norton also recognizes KCC's contributions to KCH in many other ways, including by hosting an annual news conference at which KCC presents its annual support payment, placing and maintaining a Shriner's statue at the front entrance of KCH, and displaying pictures of KCC's board members and the executive director, as well as the KCC "Funsters," in the lobby of KCH. (Ex. A §§ 2(A)(3), 10.) This public association with KCH, a highly successful and deserving institution, has contributed substantially to KCC's own fundraising and ability to amass hundreds of millions of dollars, much of which it uses to support causes other than KCH.

## **2. The Special Projects Funding Agreement.**

On December 5, 2006, the parties also executed the Special Projects Funding Agreement. (Ex. B.) Under that agreement, KCC agreed to pay Norton \$10 million (\$500,000 per year for 20 years) to be used on "Special Projects," which the parties defined as "including capital items, equipment or special programmatic support initiatives." (*Id.* at p. 1.) In return, Norton agreed to give KCC "appropriate means of recognition" for each special project it funds, such recognition to be agreed to by the parties and provided "for the life of the respective project, equipment, program or initiative." (*Id.* § 3.)

## **3. The Additional Projects Funding Agreement.**

On March 1, 2009, KCC and Norton entered into the Additional Projects Funding Agreement. (Ex. C.) In that agreement, KCC agreed to provide Norton \$500,000 each year

from 2010 through 2026 (except the final year, in which the payment is \$1,000,000), to “be used or allocated by Norton Healthcare consistent with its Mission and strategic plan regarding the development, operation and expansion of KCH and further, shall be used to support new or existing pediatric services, programs, equipment, technology or facilities whether they are located at the downtown KCH campus or such other location or locations as may be determined appropriate by Norton Healthcare.” (*Id.* § 2.)

In return, Norton agreed to use the “Kosair” name in the name of its new pediatric outpatient facility, which was then under construction, calling it “Kosair Children’s Medical Center Brownsboro,” and to give other recognition to KCC including signage within the new Brownsboro facility and a Shriner’s statue outside the facility. (*Id.* § 3.)

#### **B. Expired or Superseded Agreements.**

KCC also asserts claims based on two contracts that are no longer in effect: (1) the “Magnetic Resonance Imaging Funding Agreement,” dated December 5, 2006 (“MRI Funding Agreement,” Ex. D), and (2) “Restatement Agreement of Affiliation,” dated September 13, 1982 (“1982 Affiliation Agreement,” Ex. E).

##### **1. MRI Funding Agreement.**

In the MRI Funding Agreement, KCC agreed to make a one-time payment to Norton, on the date the agreement was executed, in the amount of \$3,000,000 to “be used or allocated by Norton Healthcare for the acquisition of MRI equipment and related supplies to be used by Norton Healthcare at KCH in association with KCH’s delivery of pediatric healthcare services in a manner supportive of the mission of KCH.” (Ex. D at § 1(A).) In return, Norton agreed to “recognize KCC’s gift by affixing a plaque on or in close proximity to the MRI equipment” for the life of the equipment. (*Id.* at § 2.)

## 2. 1982 Affiliation Agreement.

As noted above, the parties' relationship began in 1981 and was formalized in 1982 when they entered into the 1982 Affiliation Agreement to consolidate children's hospital operations. Among other terms in that agreement, KCC agreed to pay Norton a lump sum of \$2,000,000 and contribute annually to Norton "an amount equal to not less than 70% of its endowment income . . . for a period of thirty (30) years." (Ex. E at § 11(G)[1].) Norton agreed to name the new hospital "Kosair-Children's Hospital" and to use the money received from KCC "primarily for the benefit of" KCH. (*Id.* at § 11(G)[5].)

In 2006, the 1982 Affiliation Agreement was expressly "superseded" by the 2006 Affiliation Agreement. (Ex. A § 12(D), p. 2.)

### Argument

CR 12.02(f) authorizes motions to dismiss for failure to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim should be granted if "the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Edmonson Cty. v. French*, 394 S.W.3d 410, 413 (Ky. App. 2013) (quotation marks and citation omitted). In deciding a motion to dismiss, the Court is required to accept as true all well-pleaded facts, but is not required to consider conclusory statements. *Clark v. Cincinnati Ins. Co.*, 2006 WL 1044461, at \*3 (Ky. App. Apr. 21, 2006) ("CR 12 requires that the trial court accept as true all facts in the complaint when reviewing a motion to dismiss, but shall strip the complaint of its conclusory statements"); *see also Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").<sup>4</sup>

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<sup>4</sup> In ruling on a CR 12.02 motion, the Court may consider documents that are not attached to the complaint, but that are referred to in the complaint and are "central" to the plaintiff's claims. *See, e.g.*,

**I. Several Of The Breach Of Contract Claims Must Be Dismissed Because They Depend On A Contract That Has Been Superseded (Count II).**

KCC alleges six separate breaches of the “Various Agreements.” Specifically, KCC alleges that Norton breached the agreements by (FAC ¶¶ 119-24):

1. “failing to keep separate accounting of Kosair’s contributions to KCH”;
2. “not operating its fiscal affairs in the same way it had been doing before affiliating with Kosair”;
3. “failing to preserve Kosair’s institutional identity in a manner consistent with Kosair’s mission”;
4. “not expending Kosair’s donations and by not applying those donations at KCH”;
5. “expending Kosair’s funds on lobbying expenses and grants to third parties”; and
6. “using Kosair’s name in a manner inconsistent with the terms of the Various Agreements.”

Norton will demonstrate through a motion for summary judgment that it is entitled to judgment with respect to the last three alleged breaches (items 4-6 above), because: (a) its only obligation under the 2006 Affiliation Agreement with respect to its use of KCC’s contributions is, as the agreement provides, to use the money “at KCH or in association with KCH’s delivery of pediatric healthcare services in a manner supportive of the mission of KCH (Ex. A at § 2(D)); (b) it has fully satisfied that obligation and has not spent any of KCC’s payments on lobbying expenses or grants to third parties; and (c) it has never used the “Kosair” name in a manner not permitted by the contracts.<sup>5</sup>

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*Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) (“Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to her claim.”) (quotations and citations omitted); *Bus. Payment Sys., LLC v. Nat’l Processing Co.*, 2012 WL 6020400, at \*1 n.1 (W.D. Ky. Dec. 3, 2012) (“Because the marketing agreement is referred to in Plaintiffs’ complaint and is central to certain of Plaintiffs’ claims, the court may consider the marketing agreement when deciding the motion to dismiss for failure to state a claim.”).

<sup>5</sup> Where, as here, a count sets forth multiple discrete claims, a motion to dismiss need not be directed at the entire count but rather may be directed at one or more of the discrete claims. *Manhattan Assocs., Inc. v. Rider*, 2002 WL 1774056, at \*1 (W.D. Ky. Aug. 1, 2002) (dismissing portion of claim for breach of an

However, this Court should dismiss KCC's breach of contract claims based on the first three alleged breaches (items 1-3 above), because the relevant agreements do not impose the obligations identified by KCC. *See Ky. Farm Bureau Mut. Ins. Co. v. Blevins*, 268 S.W.3d 368, 374 (Ky. App. 2008) ("Under Kentucky law, in order to recover in any action based on breach of a contract, a plaintiff must show the existence and the breach of a contractually imposed duty.") (quoting *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001)).<sup>6</sup> Not only does KCC fail to identify a contractual source for these alleged obligations, KCC expressly acknowledges that these purported obligations "were not made the subject of the" 2006 Affiliation Agreement (*id.* ¶ 41, emphasis added), and alleges instead that they were set forth in the 1982 Affiliation Agreement. (*Id.* ¶¶ 38-40.) However, the 1982 Affiliation Agreement was expressly "superseded" by the 2006 Affiliation Agreement, a fact KCC conspicuously omits from its complaint. (Ex. A § 12(D), p. 2.)

Additionally, KCC's claims that Norton breached the "Various Agreements" by improperly using the "Kosair" name in fundraising (FAC ¶ 22, 99) and that it breached an implied covenant of good faith and fair dealing (*id.* ¶ 118) must be dismissed because KCC does not allege any facts in support of those claims.

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employment agreement to the extent it was based on unenforceable nonsolicitation and noncompete provisions, but not the portion that was based on breach of a nondisclosure provision); *Renasant Bank v. Park Nat. Corp.*, 2013 WL 1499580, at \*5-6 (S.D. Ala. Apr. 10, 2013) (dismissing only the claims for breach of contract alleged in paragraph 112.a-c, but not other breach claims alleged in the same count); *One Beacon Ins. Co. v. T. Wade Welch & Assocs.*, 2012 WL 2403500, at \*3-4 (S.D. Tex. June 25, 2012) (dismissing part of count alleging breach of three different insurance policies from 2006, 2007, and 2008 where the pleading contained sufficient factual assertions to support the claims for breach of the 2007 and 2008 policies, but not the 2006 policy), amended on other grounds by 2012 WL 5456111 (S.D. Tex. Nov. 7, 2012).

<sup>6</sup> *See also Strong v. Louisville & N. R. Co.*, 240 Ky. 781 43 S.W.2d 11, 12-13 (1931) (affirming demurrer because plaintiff failed to identify the existence of contractual duty, and therefore it was "not possible to determine from the facts appearing in the petition how the carrier breached its contract"); *Shane v. Bunzl*, 200 F. App'x 397, 401 (6th Cir. 2006) (affirming dismissal of claims where plaintiff "alleged a breach of contract without alleging the existence of the contractual terms that required [Defendant] to perform those acts") (applying Kentucky law).



**A. The 1982 Affiliation Agreement Was Expressly “Superseded” By The 2006 Affiliation Agreement, And Thus Cannot Support A Claim For Breach Of Contract.**

KCC admits that Norton has not obligation in any *existing agreement* to “keep separate accounting of KCC’s contributions at KCH,” “operat[e] its fiscal affairs in the same way it had been doing before affiliating with Kosair,” or “preserve Kosair’s institutional identity in a manner consistent with Kosair’s mission,” and alleges instead that were contained in the *now-superseded 1982 Affiliation Agreement* (FAC ¶¶ 39-41):

39. *According to the [1982 Affiliation Agreement], after construction [of KCH], 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.

41. *The provisions in the [1982 Affiliation 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 [2006 Affiliation Agreement].* Instead, these were permanent conditions upon which the affiliation of the Parties was dependent.

The plain language of the 2006 Affiliation Agreement, Additional Projects Funding Agreement, and Special Projects Funding Agreement confirm the same: none contains any requirement that Norton account for KCC’s contribution in any way, conduct its fiscal affairs in any way, or “preserve Kosair’s institutional identity.” (See generally Exhs. A-C.)

Furthermore, as noted, the 1982 Affiliation Agreement was expressly “superseded” by the 2006 Affiliation Agreement, and thus cannot support a claim for breach of contract. *Schulte v. Schulte*, 2004 WL 1299992, at \*3 (Ky. App. June 11, 2004) (dismissing claim for breach of contract which “was clearly merged into and/or was substituted” by a subsequent contract).

Indeed, the 2006 Affiliation Agreement provides: “This Agreement . . . *supersedes all existing agreements or understandings between them concerning that subject matter . . . .*” (Ex. A § 12(D).)

There can be no doubt that the 1982 Affiliation Agreement and 2006 Affiliation Agreement concern the same “subject matter.” In a preliminary recital to the 2006 Affiliation Agreement, the parties expressly identified the 1982 Affiliation Agreement as one of the “agreements concerning the *subject matter of this Agreement*” that was “superseded” by the 2006 Affiliation Agreement (*id.* at p.2, emphasis added):<sup>7</sup>

WHEREAS, the parties now desire to again restate their affiliation in the manner set forth herein and all prior understandings or agreements concerning the *subject matter* of this Agreement, including the [1982 Affiliation Agreement] and all four amendments thereto, *shall be superseded by this Agreement.*<sup>8</sup>

As a result, even if Norton had obligations as alleged by KCC under the 1982 Affiliation Agreement to keep a separate accounting of KCH’s contributions, operate its fiscal affairs in any particular way, or “preserve Kosair’s institutional identity”—which Norton did not—plainly those obligations no longer exist. *Schulte*, 2004 WL 1299992, at \*2-3. As a result, KCC’s claims that Norton breached the “Various Agreements” in these ways must be dismissed. (FAC ¶¶ 119-21.)

<sup>7</sup> Preliminary recitals may be used as an aid in contract interpretation. *Jacob v. Dripchak*, 331 S.W.3d 278, 283 (Ky. App. 2011).

<sup>8</sup> KCC’s allegation that the 1982 Affiliation Agreement and 2006 Affiliation Agreement concern “different subject matter” (FAC ¶ 52) is patently inaccurate and directly contrary to the plain language of the 2006 Affiliation Agreement, and thus need not be accepted as true for purposes of this Motion. See *Weaver v. Gaskins*, 1999 WL 397713, at \*1 (9th Cir. May 14, 1999) (“we need not accept as true conclusory allegations contradicted by documents referred to in the complaint”); *Francis v. Giacomelli*, 588 F.3d 186, 195 (4th Cir. 2009) (granting motion to dismiss because allegations were “patently untrue”); *Currier v. First Resolution Inv. Corp.*, 956 F. Supp. 2d 747, 749 (E.D. Ky. 2013) (“the Court need not accept as true allegations that are contradicted by public record”). Additionally, if the 1982 Affiliation Agreement were not superseded, then KCC would be responsible for paying Norton 70% of its endowment income every year (Ex. E at § 11(G)[1]), on top of the annual support payments it makes under the 2006 Affiliation Agreement, which of course KCC does not allege it does.

**B. KCC Does Not Allege Any Facts Showing That Norton Breached The Agreements By Using The “Kosair” Name In “Fundraising Efforts.”**

KCC also alleges that Norton breached the “Various Agreements” by improperly using the “Kosair” name in “fundraising efforts” for KCH. (FAC ¶¶ 22, 99.) However, KCC does not allege any *facts* supporting its claim. For example, it does not identify a single statement, advertisement, or brochure in which Norton allegedly misused the “Kosair” name in fundraising. Its only allegations are conclusory in nature:

- “Additionally, in breach of the Various Agreements, Norton is improperly using Kosair’s name in fundraising efforts . . . .” (*Id.* ¶ 22.)
- “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.” (*Id.* ¶ 99.)
- “Norton has breached the Various Agreements by using Kosair’s name in a manner inconsistent with the terms of the Various Agreements.” (*Id.* ¶ 124.)

Accordingly, to the extent Count II alleges that Norton breached the Various Agreements by misusing the “Kosair” name in fundraising, that claim must be dismissed.

**C. KCC Has Not Stated A Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing.**

Within every contract, there is an implied covenant of good faith and fair dealing, which “imposes upon the parties a duty to conduct itself in a ‘bona fide’ manner.” *Enjoy Snax Vending, Inc. v. Williams Food Serv., Inc.*, 2004 WL 2149193, at \*2 (Ky. App. Sept. 24, 2004) (quoting *Pearman v. W. Point Nat’l Bank*, 887 S.W.2d 366, 368 n.3 (Ky. App. 1994)). “This duty requires the parties to act in ‘good faith; honestly, openly, and sincerely; without deceit or fraud.’” *Id.* (quoting same).<sup>9</sup>

<sup>9</sup> The implied covenant “does not prevent a party from exercising its contractual rights,” *Farmers Bank and Trust Co. v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005), or “create new contractual

KCC's claim for breach of the implied covenant of good faith and fair dealing consists of a single, conclusory allegation that "Norton has breached the duty of good faith and fair dealing with respect to the Various Agreements." (FAC ¶ 118.) As there are no allegations of bad faith, dishonesty, deceit, or fraud—let alone any *facts* supporting for such allegations—KCC's claim for breach of the implied covenant of good faith and fair dealing must be dismissed.

## II. The Claim For Breach Of Trust Must Be Dismissed (Count III).

Recognizing the defects in its contract-based claims, KCC attempts to create obligations never agreed to by the parties, by invoking the law of "charitable trusts." Specifically, KCC alleges that the "Various Agreements" established a "charitable trust" which Norton allegedly breached by "commingling" KCC's contributions with other funds, "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." (FAC ¶¶ 130-33.) This claim must be dismissed because KCC has not alleged a single fact demonstrating that the parties *intended* to create a charitable trust, a necessary element to the claim. Nor can it. The parties' intent, as reflected within the four corners of the 2006 Affiliation Agreement, was to create an arm's length business relationship pursuant to which Norton receives financial support from KCC in exchange for providing KCC exclusive naming rights and other recognition that has helped KCC amass a massive treasury.

A charitable trust requires proof of four elements: (1) "an express intent to create a trust"; (2) "an ascertainable res"; (3) "at least one sufficiently certain beneficiary"; and (4) "a

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rights or obligations." *In re MERV Props., LLC*, 2014 WL 801509, at \*5 (Bankr. E.D. Ky. Feb. 27, 2014); *see also Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 512 (6th Cir. 2012) ("Chicago Title's argument—that we should read into the contract a condition that Fifth Third adopt sound underwriting standards—amounts to nothing more than an attempt to add [ ] to the contract a substantive provision not included by the parties.") (citations and quotations omitted); *Johnson Controls, Inc. v. Anson Stamping Co., Inc.*, 2000 WL 34249108, at \*4 (W.D. Ky. Mar. 27, 2000) (dismissing claims for breach of covenant of good faith and fair dealing because the alleged duties did not exist in contracts at issue).

trustee who owns and administers the *res* for the benefit of another (the beneficiary).” *Benjamin v. JP Morgan Chase Bank, N.A.*, 305 S.W.3d 446, 453 (Ky. App. 2010); *see also* RESTATEMENT (SECOND) OF TRUSTS § 351 (“A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust.”).

Where a party alleges that a charitable trust was created by contract, courts evaluate the contract’s language and surrounding circumstances to determine whether a charitable trust was intended. *Trs. of Transylvania Presbytery, U. S. A., Inc. v. Garrard Cnty. Bd. of Ed.*, 348 S.W.2d 846, 850-51 (Ky. 1961). Where there is insufficient evidence of intent, Kentucky courts refuse to infer the existence of a charitable trust. *Id.* Moreover, a charitable trust will not be found where the contract reflects an arm’s length business relationship supported by adequate consideration. *Light v. Third-Woodland Presbyterian Church, Inc.*, 311 S.W.2d 386, 388-89 (Ky. 1958) (holding that a conveyance of land “for the use and purpose of a Presbyterian church” did not create a charitable trust, but rather merely a business transaction as evidenced by grantor’s receiving consideration for the conveyance of land). A charitable trust also will not be found merely because a person makes a donation to an entity such as a hospital or university. *L.B. Research and Educ. Found. v. UCLA Found.*, 130 Cal. App. 4th 171, 179-80 (Cal. App. 2005) (\$1 million endowment for a chair at medical school did not create a charitable trust, but instead was a conditional contract).<sup>10</sup>

Here, KCC does not allege any facts demonstrating that either party intended the 2006 Affiliation Agreement (or any other agreement) to constitute a charitable trust. To the contrary,

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<sup>10</sup> *See also Patton v. Coldiron*, 213 Ky. 709, 281 S.W. 812, 813 (1926) (holding trust not created because there was “no evidence of any contract or agreement creating an express trust”); *Grant v. Trinity Health-Michigan*, 390 F. Supp. 2d 643, 652 (E.D. Mich. 2005) (no charitable trust because there was no language reflecting specific intent to create a charitable trust).

all of its allegations of charitable trust are conclusory in nature, completely devoid of any facts related to the parties' "intent":

- "The contributions paid by Kosair to Norton pursuant to the Various Agreements established a charitable trust with an ascertainable *res*" (FAC ¶ 130);
- "[T]he Second Agreement established a trust and continued the previously created trust with Norton as a trustee . . ." (*Id.* ¶ 15); and
- "Contrary to its obligations as a charitable trustee . . ." (*Id.* ¶ 19.)

Furthermore, the only expressions of intent in the 2006 Affiliation Agreement and other agreements establish that the parties did *not* intend to create a charitable trust. The defined "Purpose" of the 2006 Affiliation Agreement reflects an arm's length business transaction benefitting both parties—Norton by receiving financial support for its hospital, and KCC by receiving exclusive naming rights and other recognition to help it raise money in support of its charitable mission:

Commitment and Purpose. Through this affiliation, Norton Healthcare and KCC intend to continue and further develop the long-standing relationship between them wherein KCC will provide certain significant financial support of Kosair Children's Hospital ("KCH") and its pediatric services while Norton Healthcare will provide KCC with certain recognition, naming rights and sponsorship opportunities associated with KCH. This affiliation will provide both parties with greater access and resources to help further their respective charitable missions.<sup>11</sup>

Thus, as in *Light*, the 2006 Affiliation Agreement does not create a charitable trust. This is supported by the fact that none of the agreements describe the creation of a "trust" or designate Norton as a "trustee."<sup>12</sup>

<sup>11</sup> A similar *quid pro quo*—financial support in exchange for naming rights—appears in each of the other agreements currently in effect. (Ex. B at §§ 1(A), 1(B), 3; Ex. C at §§ 2, 3; Ex. D at §§ 1(A), 2.)

<sup>12</sup> Even if any of the agreements mentioned the word "trust," which none do, that alone would be insufficient to establish the existence of a trust. In *Acuity, A Mutual Insurance Co. v. Planters Bank, Inc.*, 362 F. Supp. 2d 885, 889-91 (W.D. Ky. 2005), the court held that an indemnity agreement did not create a trust, even though it required a contractor to receive, hold, and pay such funds to another party, and it

At all events, even if a charitable trust were created, which it was not, KCC would lack standing to enforce it. It is settled Kentucky law that a donor lacks standing to enforce a charitable trust—only the Attorney General or a beneficiary can do so. *Greenway v. Irvine's Trustee*, 131 S.W.2d 705, 709-11 (1939) (affirming dismissal of action by donor's heirs to enforce charitable trust); *Pennebaker v. Pennebaker Home for Girls*, 163 S.W.2d 53, 56-58 (1942) (same). Accordingly, Count III must be dismissed.

### III. The Claim for Breach Of Fiduciary Duty Must Be Dismissed (Count IV).

Next, KCC's claim for breach of fiduciary duty must be dismissed because KCC has not pleaded facts establishing the existence of a fiduciary relationship.

In Kentucky, “[a] fiduciary relationship creates the highest order of duty imposed by law.” *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 5 (Ky. App. 2012) (quoting *In re Sallee*, 286 F.3d 878, 891 (6th Cir. 2002)). Such a relationship “necessarily involves an undertaking in which a duty is created in one person to act *primarily* for another's benefit in matters connected with such undertaking.” *Hinton Hardwoods, Inc. v. Cumberland Scrap Processors Transp.*, 2008 WL 5429569, at \*6 (Ky. App. Dec. 31, 2008) (quoting *Steelvest, Inc. v. Scansteel Serv. Center, Inc.*, 807 S.W.2d 476, 485 (Ky. 1991)). To plead a fiduciary relationship, the plaintiff must plead facts showing “that the nature of the relationship imposed a duty upon the fiduciary to act in the principal's interest, *even if such action were to the detriment of the fiduciary.*” *Holmes*, 2008 WL 2468764, at \*7 (quoting *In re Sallee*, 286 F.3d at 892).<sup>13</sup>

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expressly stated that “all payments received for or on account of said contract shall be held as a trust fund.”

<sup>13</sup> “An ordinary business relationship or an agreement reached through arm's length transactions cannot be turned into a fiduciary one absent factors of mutual knowledge of confidentiality or the undue exercise of power or influence.” *Quadrille Bus. Sys. v. Ky. Cattlemen's Ass'n, Inc.*, 242 S.W.3d 359, 364–65 (Ky. App. 2007) (holding no fiduciary relationship) (quotations omitted). Only in “rare commercial cases” will a business relationship rise to this level. *In re Sallee*, 286 F.3d at 892. “The fact that one businessman trusts another, and relies upon his promise to perform a contract, does not rise to a

KCC makes no attempt to plead facts showing that Norton agreed to act “primarily” for KCC’s benefit, “even if such action were to the detriment” of Norton. Nor can it. As explained above, the parties’ relationship is that of an arm’s length business relationship, by which Norton receives annual donations in exchange for giving KCC exclusive naming rights and recognition, as reflected in the first paragraph of the 2006 Affiliation Agreement. (Ex. A § 1.) Further evidence that the parties did not intend to create a fiduciary relationship is their agreement that neither party is an agent of the other and lacks authority to bind the other. (Ex. A § 12(B); Ex. B § 6.)

KCC nevertheless alleges that Norton owes it fiduciary duties (1) “through its position as trustee,” and (2) because “the relationship between the Parties constitutes a joint venture.” (FAC ¶ 136.) As to the first assertion, KCC has not alleged facts establishing the existence of a trust, as demonstrated above; thus, its allegation that Norton serves “as trustee” cannot support a claim for breach of fiduciary duty.

KCC also has not alleged facts showing that the parties formed a “joint venture.” Under Kentucky law, a joint venture (also called a “joint adventure”) is “an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses.” *Giverny Gardens, Ltd. P’ship v. Columbia Housing Partners Ltd. P’ship*, 147 Fed. App’x. 443, 450 (6th Cir. 2005) (quoting

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confidential relationship.” *Id.* (quotation marks and citation omitted). “Neither is the fact that the relationship has been a cordial one, of long duration, evidence of a confidential relationship.” *Id.* at 891–92 (quotation marks and citation omitted). Instead, “[e]xtraordinary facts are necessary to make this latter kind of trust plausible and reasonable.” *Id.* at 892 n.10 (quotation marks and citation omitted). Indeed, typically in an “arms-length commercial transaction, where each party is assumed to be protecting its own interest, no [fiduciary] duty arises.” *Snow Pallet, Inc.*, 367 S.W.3d at 5.



*Roethke v. Sanger*, 68 S.W.3d 352, 364 (Ky. 2001)). A joint venture requires proof of the following (*id.*):

- (1) an agreement, express or implied, among the members of the group;
- (2) a common purpose to be carried out by the group;
- (3) a community of pecuniary interest in that purpose among the members; and
- (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

KCC has failed to allege facts satisfying at least the third and fourth elements. “As to element number 3, it is necessary to the relationship that there be a sharing of the profits and losses,” *Roethke*, 68 S.W.3d at 364, which KCC does not (and cannot) allege. Nor does KCC allege any facts demonstrating that it has an “equal right of control.” To the contrary, the 2006 Affiliation Agreement expressly provides that all spending decisions shall be made “by Norton Healthcare and KCH,” not KCC. (Ex. A § 2(A)[2], emphasis added).<sup>14</sup> See *Roethke*, 68 S.W.3d at 364 (“There was no express agreement that [defendant] would share in the profits of the Gamble Brothers job and he did not do so. Nor did he have an equal right of control with respect to the manner in which the job was performed. Thus, the theory of joint enterprise has no application to this case.”).

For these reasons, KCC has failed to allege facts demonstrating that the parties have a fiduciary relationship, which requires dismissal of Count IV.

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<sup>14</sup> Similarly, the Additional Projects Funding Agreement provides: “Norton Healthcare agrees that all funds disbursed by KCC to Norton Healthcare pursuant to this Agreement will be used or allocated by Norton Healthcare consistent with its Mission and strategic plan regarding the development, operation and expansion of KCH and further, shall be used to support new or existing pediatric services, programs, equipment, technology or facilities whether they are located at the downtown KCH campus or such other location or locations as may be determined appropriate by Norton Healthcare.” (Ex. C § 2, emphasis added.)

#### IV. The Unjust Enrichment Claim Must Be Dismissed (Count V).

Count V, for unjust enrichment, must be dismissed because the parties' relationship is governed by contract.

Under Kentucky law, a claim for unjust enrichment will be "barred as a matter of law [if] it was based on the same subject matter as [a] breach of contract claim." *Shane v. Bunzl Distrib. USA, Inc.*, 200 F. App'x 397, 404 (6th Cir. 2006) (affirming dismissal because "facts alleged in [plaintiff]'s unjust-enrichment claim mirror[ed] those alleged in his breach-of-contract claim"; applying Kentucky law); *Ham Broad. Co., Inc. v. Cumulus Media, Inc.*, 2011 WL 1838911, at \*6 (W.D. Ky. May 13, 2011) ("where a claim for unjust enrichment tracks an underlying breach of contract claim, such an action is fatally defective"; applying Kentucky law). Where a claim for unjust enrichment "is actually a contract claim in disguise, it must fail." *Ham*, 2011 WL 1838911, at \*6 (dismissing because court was "incapable of divorcing the current claim of unjust enrichment from the subject matter of the Agreement").<sup>15</sup>

Here, KCC's unjust enrichment claim is based on Norton's supposed refusal to use funds "in the manner contemplated by the donor Plaintiff and pursuant to the Various Agreements." (FAC ¶ 140, emphasis added.) As the unjust enrichment claim is explicitly based on the same subject matter as KCC's underlying claim for breach of contract, it must be dismissed.

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<sup>15</sup> See also *Codell Constr. Co. v. Com.*, 566 S.W.2d 161, 165 (Ky. App. 1977) ("the doctrine of unjust enrichment has no application in a situation where there is an explicit contract which has been performed"); *Stonestreet Farm, LLC v. Buckram Oak Holdings, N.V.*, 2010 WL 2696278, at \*14 (Ky. App. July 9, 2010) (same); *Mid-State Sur. Corp. v. Louisville and Jefferson Cty. Metro. Sewer Dist.*, 2005 WL 1993525, at \* (Ky. App. Aug. 19, 2005) (same).

**V. The Claims For Constructive Trust, Resulting Trust, And An Accounting Must Be Dismissed (Counts VI, VII, VIII).**

While asserted as claims, Counts VI-VIII actually seek remedies for Norton's alleged breaches of trust and fiduciary duty, in the form of a resulting trust, a constructive trust, and an accounting. (FAC ¶¶ 145-52.)<sup>16</sup>

It is axiomatic that "a court should not resort to equitable remedies when adequate legal remedies are available." *Stewart Title Guar. Co. v. Hayden & Butler, P.S.C.*, 2010 WL 3292931, at \*3-4 (Ky. App. Aug. 6, 2010) (quoting *Bolen v. Bolen*, 169 S.W.3d 59, 65 n.14 (Ky. App. 2005)). A claim for equitable relief must plead an inadequate legal remedy; where it is not pleaded, the claim should be dismissed. *Id.* (affirming order granting motion to dismiss); see also *Ronald A. Chisholm, Ltd. v. Am. Cold Storage, Inc.*, 2013 WL 2242648, at \*9 (W.D. Ky. May 21, 2013) (dismissing claim for accounting); *Brownsville Auto Co. v. Peaslee Gaulbert Co.*, 242 Ky. 519, 46 S.W.2d 1088, 1089 (1932) (dismissing claim for equitable lien).<sup>17</sup>

Claims for resulting trust, constructive trust, and an accounting all seek equitable relief. *Terrill v. Estate of Terrill*, 217 S.W.3d 858, 859 (Ky. App. 2006) (constructive trust); *Ewing v. Clore*, 219 Ky. 329, 292 S.W. 824, 825 (1927) (resulting trust); *Ronald A. Chisholm, Ltd.*, 2013 WL 2242648, at \*9 (accounting). Because KCC does not allege that it lacks a legal remedy,

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<sup>16</sup> KCC's duplicative claim for an accounting in Count I (FAC ¶ 114) should be dismissed for the same reason set forth in this section.

<sup>17</sup> A resulting trust "arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest therein, unless the inference is rebutted or the beneficial interest is otherwise effectively disposed of." *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000) (quoting RESTATEMENT (SECOND) OF TRUSTS § 404). "[A] constructive trust arises when a person entitled to property is under an equitable duty to convey it to another because he would be unjustly enriched if he were permitted to retain it." *Terrill v. Terrill*, 217 S.W.3d 858, 860 (Ky. App. 2007) (quoting *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985)). An accounting is a "species of disclosure, predicated upon the legal inability of a plaintiff to determine how much, if any, money is due to him from another. It is an extraordinary remedy . . ." *Ronald A. Chisholm, Ltd.*, 2013 WL 2242648, at \*9 (quoting *Bradshaw v. Thompson*, 454 F.2d 75, 79 (6th Cir. 1972)).

these claims must be dismissed. Indeed, KCC cannot allege an inadequate legal remedy because if Norton is found to be in breach of contract, KCC can recover monetary damages, which it seeks in its complaint. (FAC ¶ 127 (“Kosair has suffered damages . . . in an amount in excess of this Court’s jurisdictional minimum”); see also p. 28, subsection (v) (seeking “[a]n award of compensatory damages”).)

Additionally, KCC’s claim for a resulting trust must be dismissed because a resulting trust “requires a finding of an intention to create a trust,” *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000), which as demonstrated above, KCC has not alleged.

#### **VI. The Reformation Claim Must Be Dismissed (Count IX).**

KCC’s claim for reformation of the “Various Agreements” must be dismissed because KCC failed to plead “with particularity” the specific “mistake and/or fraud” that supposedly requires reformation. CR 9.02 (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”).

Where a reformation claim is based on mistake:

The pleading must show the particular mistake, how it occurred, and that it existed at the time of the execution of the instrument in question. In other words, the pleader should show why the terms of the actual contract happened to be left out, or how terms not agreed on came to be inserted. It must be distinctly alleged that the mistake was common to both parties, or to all, if more than two, or it must be alleged that the instrument failed to express the real agreement or transaction because of mistake of one party and fraud or inequitable conduct of the other.

*Dulworth v. Hyman*, 246 S.W.2d 993, 995 (Ky. 1952) (citations and quotations omitted).<sup>18</sup>

<sup>18</sup> Courts will dismiss a reformation claim that “fail[s] to show what the particular mistake was, or how it occurred, or why the terms of the actual contract happened to be omitted,” and instead “merely refers to the intention of the parties.” *Dulworth*, 246 S.W.2d at 995; see also *Brown v. Brown*, 265 S.W.2d 484, 485 (Ky. 1954) (affirming dismissal of claim to avoid antenuptial agreement because the pleadings “merely charge that the wife was not advised as to the value or extent of the husband’s estate or the legal effect of the contract on June 29, 1950, when the agreement was signed”); *Smith v. BAC Home Loans*

Similarly, “an allegation of fraud in a pleading must set forth the time, place, and substance of the allegedly fraudulent statements.” *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. App. 2008) (dismissing fraud claim under CR 9.02 where plaintiff merely alleged “actions of inaction’s [sic] of the Defendant constitute fraud, both common law and statutory”); *Sunnyside Homes of Rockledge, Inc. v. Gordon*, 2006 WL 572920, at \*4 (Ky. App. Mar. 10, 2006) (finding dismissal of fraud claim would have been proper under CR 9.02 for failure to “plead the time, place, and substance of the fraud or facts misrepresented”) (citing *Scott v. Farmers State Bank*, 410 S.W.2d 717 (Ky. 1966)); see also *Republic Bank & Trust Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 255-56 (6th Cir. 2012) (dismissing under FRCP 9(b) for failure to specify “the who, what, when, where, and how” of fraud claim).

Here, KCC does not identify the “mistake” that allegedly occurred, much less “how it occurred.” Likewise, KCC does not identify any supposedly fraudulent statement, much less the “time, place, and substance of the fraud.” Instead, KCC just generically states that the parties intended a different result and that “the Various Agreements did not reflect the Parties’ intentions.” (FAC ¶¶ 154-56.) Such ill-defined assertions lack the particularity required by CR 9.02, requiring dismissal of KCC’s reformation claim.

**VII. Count X Must Be Dismissed Because None Of The Statutes Asserted By KCC Are Applicable.**

In Count X, KCC alleges that Norton violated three statutes—KRS §§ 365.241, 466.070, and 367.667—by using the “Kosair” name for supposedly improper purposes. These claims are fundamentally without merit.

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*Servicing, LP*, 552 Fed. App’x. 473, 477 (6th Cir. 2014) (affirming dismissal of claim to reform loan documents under FRCP 9(b) because plaintiffs failed to “identify any false statements made,” but instead “merely state[d] that the loan documents ‘led them to believe they would always have a traditional lender/borrower relationship’ and they did not know that they could end up with a loan servicer”).

*First*, KRS § 365.241 is a *criminal* statute for “counterfeiting intellectual property.” Nothing in KRS § 365.241 gives a private party such as KCC the right to bring a claim.

*Second*, KRS § 466.070 does not exist in the Kentucky Revised Statutes, as chapters 455-499 are not utilized. (See <http://www.lrc.ky.gov/statutes/>.)

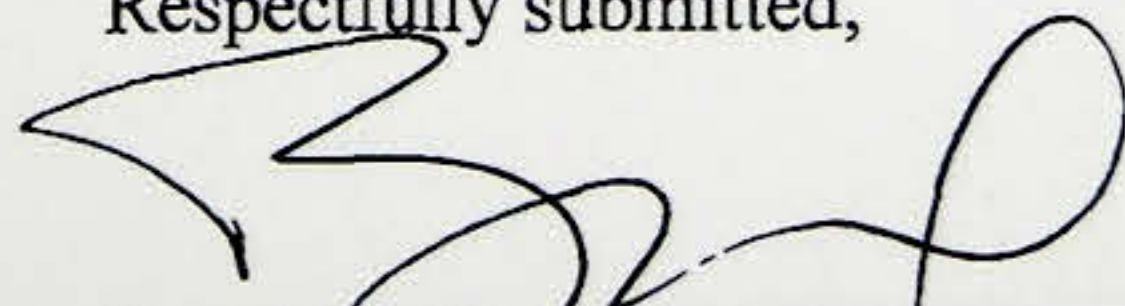
*Finally*, KRS § 367.667 prohibits certain “acts and practices in the conduct of *charitable solicitation*,” *id.* (emphasis added), where “solicitation” is defined as “the act of [] requesting, directly or indirectly, that an addressed person or limited audience or the public generally make a contribution.” KRS § 650(4). As demonstrated above, KCC *concludes* in the FAC that Norton improperly used the “Kosair” name in “fundraising activities,” but does not allege a single *fact* showing that Norton has done so. KCC also alleges that Norton used the “Kosair” name on various buildings without KCC’s consent, but fails to allege how the use of a name on a building constitutes a “request” for a contribution. *Id.*<sup>19</sup>

For these reasons, Count X must be dismissed in its entirety.

### Conclusion

Norton respectfully requests that the Court grant its Motion, dismissing the Counts (and portions thereof) described above. Because the pleading defects identified herein cannot be corrected, the dismissal should be with prejudice.

Respectfully submitted,



David J. Bradford (*pro hac vice*)  
Bradley M. Yusim (*pro hac vice*)  
JENNER & BLOCK LLP  
353 North Clark Street  
Chicago, Illinois 60654

<sup>19</sup> Additionally, to the extent that KCC is trying to enforce KRS § 367.667(3), that section has been declared unconstitutional. *Ky. State Police Prof'l Ass'n v. Gorman*, 870 F. Supp. 166, 169 (E.D. Ky. 1994).

Telephone: (312) 923-2975

David Tachau  
Dustin Meek  
TACHAU MEEK PLC  
3600 National City Tower  
101 South Fifth Street  
Louisville, Kentucky 40202  
Telephone: (502) 238-9900

*Counsel for Defendants*

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KOSAIR CHARITIES COMMITTEE, INC.

PLAINTIFF

v.

**ORDER GRANTING MOTION TO DISMISS**

NORTON HEALTHCARE, INC., *et al.*

DEFENDANTS

\*\*\*\*\*

Defendants Norton Healthcare, Inc. and Norton Hospitals, Inc. (collectively "Norton"), having moved pursuant to CR 12.02 and 9.02 for an Order dismissing Plaintiff Kosair Charities Committee, Inc's ("KCC") Claims,

IT IS HEREBY ORDERED that Norton's motion is granted. KCC's claims are dismissed with prejudice as follows:

1. Count I is dismissed to the extent that it requests an accounting.
2. The following claims contained in Court II are dismissed:
  - a. KCC's claim that Norton breached the Various Agreement by "failing to keep separate accounting of Kosair's contributions to KCH";
  - b. KCC's claim that Norton breached the Various Agreement by "not operating its fiscal affairs in the same way it had been doing before affiliating with Kosair";
  - c. KCC's claim that Norton breached the Various Agreement by "failing to preserve Kosair's institutional identity in a manner consistent with Kosair's mission";
  - d. KCC's claim that Norton breached the Various Agreement by misusing the "Kosair" name in "fundraising efforts";



e. KCC's claim that Norton breached the implied covenant of good faith and fair dealing.

3. Counts III, IV, V, VI, VII, VIII, IX, and X are dismissed in their entirety.

4. All dismissals are with prejudice.

DATED: \_\_\_\_\_

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Judge, Jefferson Circuit Court, Division 3

**Tendered by:**

David J. Bradford (*Pro Hac Vice*)  
Bradley M. Yusim (*Pro Hac Vice*)  
JENNER & BLOCK LLP  
353 North Clark Street  
Chicago, Illinois 60654  
Telephone: (312) 923-2975

David Tachau  
Dustin Meek  
TACHAU MEEK PLC  
3600 National City Tower  
101 South Fifth Street  
Louisville, Kentucky 40202  
Telephone: (502) 238-9900

**Distribution to:**

David J. Bradford (*Pro Hac Vice*)  
Bradley M. Yusim (*Pro Hac Vice*)  
JENNER & BLOCK LLP  
353 North Clark Street  
Chicago, Illinois 60654  
Telephone: (312) 923-2975

David Tachau  
Dustin Meek  
TACHAU MEEK PLC  
3600 National City Tower

101 South Fifth Street  
Louisville, Kentucky 40202  
Telephone: (502) 238-9900

Donald L. Cox  
Matthew P. Cox  
Lynch, Cox, Gilman & Goodman, P.S.C.  
500 W. Jefferson Street, Suite 2100  
Louisville, Kentucky 40202  
Telephone: (502) 589-4215

PLAINTIFF

DEFENDANTS

**NOTICE**

Please take notice that Royal Charles Committee, Inc. ("RCC"), through undersigned counsel, will, on Monday, June 30, 2014 at 9:45 a.m., or as soon thereafter as may be heard, in the above Courtroom, make the following Motion set forth below and request the attached Order.

**NOTICE**

Plaintiff, RCC, moves the Court to schedule a conference on this matter.

Respectfully submitted,



Donald L. Cox  
Matthew P. Cox  
LYNCH, COX, GILMAN & GOODMAN, P.S.C.  
500 West Jefferson Street, Suite 2100  
Louisville, KY 40202  
Telephone: (502) 589-4215  
doncox@lynchcox.com  
mcox@lynchcox.com  
Counsel for Plaintiff