DISTRICT COURT
CITY & COUNTY OF DENVER, COLORADO

City and County Building, Rm. 256
1437 Bannock Street
Denver, CO 80202

Plaintiffs: RICHARD L. ANDERSON, STEPHANIE ALLEN, JAMES N. DREISBACH, M.D., NICHOLAS G. MULLER, RAY BLUM, M.D., K. MASON HOWARD, M.D., SUSAN E. LJUNHAG, M.D., RICHARD SCHALER, M.D. and RICHARD PARKER, M.D.,

v.

Defendant: JOHN N. SUTHERS, in his official capacity as the Attorney General for the State of Colorado

Case Number:

Div.: Ctrm.:

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COMPLAINT PURSUANT TO C.R.CIV.P. 106(4)
AND SECTION 6-19-407(3), C.R.S.

Plaintiffs Richard L. Anderson, Stephanie Allen, James N. Dreisbach, M.D., Nicholas G. Muller, Ray Blum, M.D., K. Mason Howard, M.D., Susan E. Ljunhag, M.D., Richard Schaler, M.D. and Richard Parker, M.D., through their undersigned counsel, pursuant to C.R.Civ.P. 106(4) and Section 6-19-407(3), C.R.S., for their Complaint charging defendant John W. Suthers, in his official capacity as the Attorney General of the State of Colorado ("OAG"), with an abuse of discretion constituted by the OAG's October 13, 2011 Decision described below, state and aver as follows.

SUMMARY OF PLAINTIFFS' CLAIMS

1. On October 13, 2011 the OAG issued its Decision "In the Matter of the HealthOne System Membership Interest Purchase Agreement" approving the effectuation of perhaps the largest commercial transaction involving the purchase and sale of assets owned by or comprising hospitals, including nonprofit hospitals, ever to take place in the history of the State of Colorado (the "October 13, 2011 Decision"). More particularly, the OAG then approved the sale by The Colorado Health Foundation, a Colorado nonprofit corporation (sometimes, the "Foundation"), for $1.4 billion, of the Foundation's voting membership interest in HCA/Health One, LLC, a Colorado limited liability company (sometimes referred to as the "Joint Venture"), to HealthONE of Denver, Inc., a Colorado for-profit corporation, a wholly owned subsidiary of

HCA Holdings, Inc. and the only other voting member of the Joint Venture. This transaction is referred to hereinafter as the "Foundation/HCA Transaction".

2. The Foundation/HCA Transaction calls for the Foundation, a community foundation steeped in the history of Denver and Colorado and committed to the protection of the interests of Colorado's citizenry, to withdraw from its position as a "50/50 partner" in the Joint Venture, which owns and operates the largest hospital system in the Denver metropolitan area, and to relinquish control of the Joint Venture entirely to HealthONE of Denver, Inc. The Foundation will retain a temporary advisory role, but all control and ownership will be vested in HealthONE of Denver, Inc.

3. HealthONE of Denver, Inc. is one of many subsidiaries of HCA Holdings, Inc. HCA Holdings, Inc. is a for-profit corporation headquartered in Nashville, Tennessee which boasts that it is the largest non-governmental hospital operator in the United States. HCA Holdings, Inc. claims to provide almost 5% of all hospital services furnished in the United States and claims to furnish those services at approximately 170 hospitals located throughout the United States (sometimes, HealthONE of Denver, Inc., HCA Holdings, Inc., or both, are referred to as "HCA").

4. HCA is well-known, not only for its size and its ownership of these many hospitals but also because, in recent years, HCA or its subsidiaries paid criminal fines, civil fines and penalties totaling $1.7 billion levied against HCA by the Center for Medicare and Medicaid Services which had charged HCA with overpayment and with fraud. The fines paid by HCA reportedly constituted the largest recovery ever obtained by the United States as a result of a health care fraud investigation.

5. By approving the Foundation/HCA transaction, the OAG vested HCA with complete control and ownership of seven of the most respected and venerable hospitals in the Denver metropolitan area — Rose Medical Center, Presbyterian/St. Luke's Medical Center, Medical Center of Aurora, Swedish Medical Center, Sky Ridge Medical Center, North Suburban Medical Center and Spalding Rehabilitation Hospital. All future decisions concerning the Joint Venture and its hospitals, including such critical matters as whether to sell the hospitals or to limit the range of medical care historically furnished by the hospitals, will be made by HCA and by HCA alone. The Foundation which, since the formation of the Joint Venture in 1995, had been vested with a level of control over these and other critical matters equivalent to the level of control vested in HCA, no longer will have any control. The Foundation/HCA Transaction calls for the Foundation selling control of the Joint Venture and for HCA purchasing control of the Joint Venture.

6. Furthermore, all future decisions concerning the Joint Venture, and its hospitals, including the type of critical matters referenced above, inevitably, and properly from HCA's perspective, will be dictated by HCA's decisions concerning what best serves the interests of HCA's stockholders. HCA's stockholders' interests, *i.e.*, their interests in HCA's maximizing its profits, of course may be quite different than, even in conflict with, the interests of Colorado's citizens and patients, numbering in the hundreds of thousands on an annual basis, who have relied in the past and hope to continue to rely in the future upon the Joint Venture's hospitals for medical care. For example, HCA's stockholders may demand that HCA's management sell what

are perceived to be low-earning Colorado hospitals and purchase what are perceived to be more profitable hospitals located in some other state.

7. For these reasons, the effectuation of the Foundation/HCA Transaction means that there no longer will be any entity — such as the Foundation — whose mission entails speaking up for and representing the interests of Colorado's citizenry which may be threatened by, or differ from, the interests of HCA's stockholders. Since the Joint Venture was formed in 1995, the mission of the Foundation, which is a charitable trust, has included the mission of protecting Colorado's citizenry by the Foundation's involvement in the governance of the HealthONE/HCA hospital system. The effectuation of the Foundation/HCA Transaction means that the Foundation will abandon this mission and the OAG's October 13, 2011 Decision effectively sanctions this abandonment.

8. In its October 13, 2011 Decision the OAG acknowledges that it has jurisdiction to review the Foundation/HCA Transaction pursuant to both the Hospital Transfer Act, C.R.S. §6-19-101, *et seq*. and the OAG's common law authority to oversee charitable trusts such as the Foundation. The OAG's common law authority finds statutory recognition at C.R.S. §2-4-211 and C.R.S. §24-31-101(5). Plaintiffs agree that the OAG has such jurisdiction upon both of these grounds.

9. Plaintiffs are filing this Complaint, however, because plaintiffs — all of whom, as explained below, are persons who, as volunteers, served as directors of HealthONE or the Foundation, were involved in the creation and governance of the Joint Venture or have had extensive involvement with the HealthONE hospital system (including being on the medical staff) — maintain that the OAG's October 13, 2011 Decision, which comprises the OAG's exercise of its admitted jurisdiction, is erroneous as a matter of law, is arbitrary and capricious and constitutes an abuse of the OAG's discretion.

10. For these reasons plaintiffs are requesting that this Court enter an order requiring the OAG to withdraw and to reconsider its October 13, 2011 Decision and to examine the Foundation/HCA Transaction anew. The OAG's re-examination must proceed in accordance with the provisions of the Hospital Transfer Act which, contrary to one of the rulings contained in the OAG's October 13, 2011 Decision, *is* applicable to the Foundation/HCA Transaction (the OAG erroneously held that the Hospital Transfer Act is not applicable). The OAG's re-examination must proceed as well in accordance with uniformly accepted and well-established common law and statutory principles which guide the oversight of charitable trusts by all State Attorneys General, including Colorado's State Attorney General.

11. The principles of trust law, and the principles governing the proposed restructuring of any Colorado charitable trust or any Colorado nonprofit corporation, emphasize the importance and the generally unalterable nature of the specific charitable purposes and mission of a charitable trust which were staked out upon the formation of the trust. These principles permit the changing of a trust's mission under only the most exceptional circumstances.

12. The OAG's October 13, 2011 Decision is erroneous in part because, by approving the Foundation/HCA Transaction, the OAG failed to recognize, and wrongly permitted the Foundation to materially change, its mission and specific charitable purpose notwithstanding

that the Foundation had failed to demonstrate any exigency justifying such a change. The OAG's October 13, 2011 Decision wrongly permitted the Foundation to simply abandon one of its principal charitable purposes, *i.e.*, its community control role and responsibility as the co-owner of the Joint Venture and as co-governor of the Joint Venture's hospital system, *not* for reasons having anything to do with the ongoing successful operation of the Joint Venture's hospitals but, instead, and only, for reasons which relate to opinions held by persons on the Foundation's current Board of Directors concerning how the Foundation should invest the Foundation's funds in the future.

13. But, neither the Hospital Transfer Act nor applicable principles of trust law permit a charitable trust to materially change and alter its mission merely because current Board members of that trust have opinions about the trust's future investment policies which they would like to implement. The Board of a charitable trust is obligated to serve the trust's mission and the OAG is required to oversee the trust to ensure that the Board has fulfilled that obligation. Yet here, while it is apparent that the Foundation/HCA Transaction was driven not by reasons related to the Foundation's mission, but only by thoughts about the Foundation's future investment policy, the OAG, in its October 13, 2011 Decision, nonetheless approved the Foundation/HCA Transaction. The OAG's decision to do so, in these circumstances, is an abdication of its responsibility to exercise oversight of charitable trusts and constitutes an abuse of discretion.

FACTUAL ALLEGATIONS

A. The Formation Of HealthONE, A Colorado Nonprofit Corporation, And The Involvement Of HealthONE, As Succeeded By HealthONE Community Foundation, n/k/a The Colorado Health Foundation, In The Columbia/HealthONE Joint Venture.

14. In 1991, a Colorado nonprofit corporation known as PSL Healthcare Systems was formed for purposes of acquiring and, thereafter, operating two established nonprofit hospitals in Denver which had been purchased some years earlier by AMI, a for-profit public corporation. AMI's operation of those hospitals — Presbyterian St. Luke's Medical Center and Aurora Presbyterian — had been unsuccessful. Civic and community leaders in Denver, including persons familiar with, and involved in the oversight of, these particular hospitals formed PSL Healthcare Systems in hopes of enabling these nonprofit hospitals to survive.

15. In 1993, PSL Healthcare Systems merged with Swedish Medical Center, another venerable and well-regarded Denver nonprofit hospital. This merger resulted in the formation of HealthONE, a Colorado nonprofit corporation. In addition, in 1993 and at the same time as the formation of HealthONE, three separate community foundations, each of which had been formed and had operated in conjunction with each of the three separate nonprofit hospitals whose ownership and control was taken over by HealthONE, were themselves combined to form the HealthONE Community Foundation ("the Foundation").

16. As a result of the sequence of acquisitions and mergers described above, as of 1995 HealthONE owned and operated three sizeable nonprofit hospitals in Denver. These nonprofit hospitals owned or comprised assets having a net value in excess of $100 million. In

1995, the Foundation also controlled funds totaling approximately $17 million. But, notwithstanding these indicia of success, HealthONE faced challenges presented in part by the competition of for-profit hospitals from out of state who were entering the Denver market and were anxious to increase the size of their presence in the Denver market. The principal such for-profit entity was named Columbia/HCA of Denver, Inc., which is the predecessor of the entity referred to in this Complaint as HCA. One of HCA's incursions into the Denver market involved its 1993 acquisition of the Rose Medical Center.

17. In 1995, and based upon its study of the changes which the Denver health care market was experiencing, and its evaluation of the most beneficial and productive way to respond to these changes while at the same time preserving the community identification and orientation of the hospitals which it owned, HealthONE agreed with Columbia/HCA of Denver, Inc. ("HCA") to form Columbia-HealthONE, LLC, a Colorado limited liability company. Columbia-HealthONE, LLC is sometimes referred to in this Complaint, and has sometimes been referred to by the parties themselves in their dealings with one another, as the "Joint Venture." The Joint Venture was to become the owner and operator of all seven of the hospitals identified above — three of which were owned by HealthONE and four of which were owned by HCA.

18. The parties' agreements concerning the terms and conditions of the Joint Venture were memorialized in a detailed Amended And Restated Operating Agreement whose effective date is October 31, 1995 ("the Operating Agreement"), a copy of which is attached as Exhibit A. The Operating Agreement calls for HealthONE and HCA, identified as Class B members, to be the only members of the Joint Venture with voting rights respecting the affairs of the Joint Venture and the only members of the Joint Venture with the power to appoint persons to the Joint Venture's Governing Board.

19. During the negotiations which led up to and concluded with the formation of the Joint Venture, HealthONE had taken the nonnegotiable position that it would enter into the Joint Venture *only* if it would be vested with a level and degree of control of the Joint Venture equivalent to the level and degree of control to be possessed by HCA. HCA, anxious to increase its presence in Colorado, finally agreed to this condition, even though the market value of the hospitals which HCA was contributing to the Joint Venture exceeded the market value of the hospitals being contributed by HealthONE. The disparity in the amount of the members' respective capital contributions was accommodated by the parties agreeing to adjust the members' respective rights to income distributions by making the amounts of those distributions proportionate to the market value of their respective contributed capital. However, the parties agreed that HCA's and HealthONE's control and ownership of the Joint Venture would be equivalent. The parties' equivalence of voting membership interests in and control of the Joint Venture was a core principle of the Joint Venture.

20. Thus, the Operating Agreement embodied HCA's and HealthONE's agreement to be equal governing partners in the Joint Venture, with equal control of the Joint Venture, serving as the only two voting members of the Joint Venture and the only members with power to appoint persons to the Joint Venture's Governing Board. The Operating Agreement provided that each of HealthONE and HCA would appoint one-half of the persons constituting the Governing Board and the Operating Agreement, by design, included no provision for breaking a tie vote of the Governing Board. This was significant because the Governing Board was vested

with the sole power to approve all of the Joint Venture's major corporate and restructuring actions. The Governing Board's power also extended to such matters as adopting the company's budgets, approving major capital expenditures and approving the incurring of substantial indebtedness.

21. At the same time as HealthONE agreed with HCA to form the Joint Venture, HealthONE determined that the Foundation would be the appropriate party, on the non-profit side of the arrangement, to serve as the community based Class B Member of the Joint Venture. The Foundation agreed to take on this additional responsibility. But, in order for the Foundation to assume this role and to take on this responsibility, the Foundation was required to amend its Bylaws so that its mission and purpose going forward would reflect this major addition to its mission.

22. Until 1995, the Foundation's principal charitable purpose and mission had been to facilitate the making of grants by HealthONE to other Colorado nonprofit organizations who furnished health care services to the community.

23. By contrast, until 1995 HealthONE's mission and charitable purpose had been to own and operate the three nonprofit hospitals which it owned. It was for this reason that, as described above, in 1995, when HealthONE agreed to contribute to the Joint Venture these three nonprofit hospitals, it did so *only* upon HCA's agreement that HealthONE would have control over the Joint Venture's hospitals equivalent to HCA's control over the Joint Venture's hospitals.

24. Hence, as of 1995 the Foundation's Bylaws needed to be amended to refer not only to the Foundation's existing and continuing purpose of making grants, but also to include the Foundation's new purpose of carrying out what had been HealthONE's purpose of maintaining the existence and the community orientation of HealthONE's hospitals. In fact, the Foundation's Bylaws were specifically amended to address this concern.

25. The form of the Amendment to the Foundation's Bylaws was creative. HealthONE required that the Foundation's Bylaws call for the establishing of what would be known as the Joint Venture Committee. The Joint Venture Committee, the original members of which would originate from the membership of persons affiliated with HealthONE, would be vested with the sole power to initiate the sale of any of the Joint Venture's hospitals.

26. In this manner HealthONE, although its ongoing role in the Joint Venture generally would be assumed by the Foundation's becoming a Class B member in HealthONE's stead, sought to provide that its mission of ensuring the community identification of and control over the governance of Joint Venture's hospitals would be respected and maintained. HCA was aware of these provisions and, again, because of HCA's desire to "do the deal", HCA did not oppose the formation of the Joint Venture Committee. Based on this fact, and related facts, HCA knew that it was entering into a unique joint venture: a "50/50" partnership with a Colorado nonprofit organization which would have equal control over this health care system. The Joint Venture's hospitals were not simply to become additional hospitals in HCA's nation-wide system of for-profit hospitals, controlled out of Nashville, Tennessee.

27. In the years following the formation of the Joint Venture, the Foundation regularly described the Joint Venture as a unique "50/50" partnership between a nonprofit entity and a for-profit entity:

> We took the big step in 1995, and spent the next few years defining a 50-50 partnership between a nonprofit community advocacy group and the for-profit hospital system [as] Denver's largest health care delivery system,

(HealthONE Alliance's 1999 Annual Report); and,

> We are part of something uncommon in American health care — a 50-50 business partnership between a local nonprofit community advocacy group (HealthONE Alliance) and a national for-profit provider of hospital-based care (HCA),

(HealthONE Alliance's 2000 Annual Report); and,

> HealthONE was created in 1995 as a 50/50 joint venture between HCA, Inc. and HealthONE Alliance, a Colorado nonprofit organization.

(January 2003 Release of HCA-HealthONE LLC).

28. The Foundation's uniform descriptions of the Joint Venture through the years (representative descriptions are quoted above) were accurate. The Foundation's descriptions reflected the fundamental fact that the Joint Venture would not exist had HCA proposed in 1995 to simply purchase HealthONE's nonprofit hospitals and to incorporate those hospitals into HCA's national for-profit system. The Joint Venture that was agreed to was quite different than any such arrangement.

29. The Joint Venture also was advantageous from HealthONE's standpoint of fulfilling its charitable purpose, as that charitable purpose was adopted by the Foundation. Not only was HealthONE able to preserve its control over the three nonprofit hospitals it was contributing to the Joint Venture, but HealthONE also obtained control, through its equal voice in the "50/50" partnership, over all of the health care facilities owned and operated by the Joint Venture. During the 1990's, and until its contemplation of the instant Foundation/HCA Transaction the Foundation had this fundamental fact of joint control in mind, whenever it described the Joint Venture as a "50/50" arrangement, which it regularly did.

30. Significantly, it was only in 2010 and 2011, when persons serving on the Foundation's Board at the time decided, based on their opinions concerning investment policy, to sell the Foundation's interest in the Joint Venture to HCA and to abandon the major part of the Foundation's charitable purpose, that the Foundation began to describe its interest in the Joint Venture, *not* as a "50/50" interest but, instead, as a "minority interest" or as a "40%" interest. Upon information and belief, the Foundation adopted these characterizations because the Foundation knew that the OAG would be called upon to review any Foundation/HCA Transaction. The Foundation reasoned that, in the event of the OAG's review, the Foundation might more successfully argue that the Hospital Transfer Act was not applicable to the Foundation/HCA

Transaction if somehow — notwithstanding the body of evidence to the contrary generated through the years — the Foundation/HCA Transaction could be claimed to constitute the sale of less than 50% of the Joint Venture.

31. Upon information and belief, the Foundation's Board wanted to avoid the OAG's application of the Hospital Transfer Act to a Foundation/HCA Transaction, because, were the Foundation/HCA Transaction to actually take place, the current members of the Foundation's Board wanted to be the persons running the entity that wound up with the money paid by HCA for the Foundation's interest. The Hospital Transfer Act provides that, in the event it is applied to a transaction involving the disposition of hospital assets, those affiliated with the non-profit hospitals whose assets are disposed of, cannot continue as officers or directors of the entity receiving the proceeds from the disposition. The Foundation's Board did not want this to happen because they wanted to retain their positions on the Board of what they publicized would be the third largest health care foundation in the country.

B. The Colorado Health Foundation Decides, For Investment Purposes, To Sell Its Membership Interest In the Joint Venture And To Abandon Its Charitable Mission Of Ensuring Community Control Of The Joint Venture's Hospitals. The Course Of The Proceedings Before The OAG Concerning The Foundation's Proposal To Sell Its Interest And Culminating In The OAG's October 13, 2011 Decision.

32. Between 1995 and 2011 the Joint Venture prospered. The operations of the seven hospitals and ancillary health care facilities, such as ambulatory surgical centers, owned and operated by the Joint Venture, were profitable. On occasions during this sixteen-year period the Joint Venture generated annual gross revenues of as much as $2 billion.

33. In accordance with the Operating Agreement, each of the Joint Venture's two Class B voting members, the Foundation and HCA, received $100's millions of distributions generated by this large and thriving health care system. During this time, and because of the Joint Venture's profitability, HCA, the "for-profit" member of this unique "50/50" partnership, several times expressed interest in purchasing the Foundation's membership interest so that it would become the sole member of the Joint Venture. In addition to thereby gaining complete control of governance, and receiving 100% of the distributions generated by the Joint Venture's activities, HCA would continue to receive the income it was paid in accordance with the Management Services Agreement which called for HCA, or an entity controlled by HCA, to be in charge of the day-to-day management of the Joint Venture's hospitals and other health care facilities.

34. On these several occasions the Foundation, whose mission, as explained above, included ensuring community control of the Joint Venture's hospitals, rebuffed HCA's overtures on grounds that the Foundation's sale of its membership interest would result in an abandonment of the Foundation's charitable mission. Were the Foundation to accept HCA's offers, the Foundation would revert to its earlier status and mission as an entity involved principally in the making of grants to other entities furnishing health care services — not an unworthy mission but not the mission to which the Foundation agreed in 1995.

35. As shown above, the Foundation benefited enormously as a result of its membership interest in the Joint Venture. Correspondingly, the value of its membership interest also increased dramatically. But, as alleged above, during 2010 and 2011 the Foundation decided that it would sell its membership interest in the Joint Venture after all, apparently based principally, if not entirely, upon the opinions of some of the persons then serving on the Foundation's Board of Directors that the Foundation's membership interest in the Joint Venture should be liquidated and that the resulting funds should be invested differently going forward, than the funds had been invested during the preceding sixteen years. It was decided as well that the Foundation's principal charitable purpose going forward would be grant making.

36. These opinions overlooked the tremendously profitable returns which the Foundation had enjoyed from what constituted the Foundation's "equity investment" as a member of the Joint Venture. These returns, and the value of the Foundation's investment portfolio, were far greater than the Foundation's returns and portfolio value would have been had the Foundation never accepted the contribution of the membership interest from HealthONE and had the Foundation's previously existing corpus of funds been invested during this period of time in the public markets, rather than in the Joint Venture. These opinions also had nothing to do with the successful operation of the Joint Venture's health care system. These opinions were no more, and no less, than surmise by the Foundation's Board about how the public markets might perform in the future based on the assumptions that the Foundation should entirely liquidate its membership interest in the Joint Venture and should invest entirely in the public markets.

37. As a result of these considerations — considerations having nothing to do with the Foundation's mission of community based hospital governance — the Foundation agreed to sell its membership interest in the Joint Venture to HCAl. On June 15, 2011 the Foundation and HCA jointly issued a press release in which they announced that the Foundation would sell its membership interest to HCA for $1.45 billion and, following the closing of the Foundation/HCA Transaction, HCA would solely govern the HealthONE system which HCA then would own in its entirety.[1]

38. On June 15, 2011 also, the very day when the Foundation and HCA publicly announced their proposed deal — the existence of which ostensibly had been held confidential

[1] The Press Release contains a description of all of the Joint Venture's operations and facilities which reflects how substantially the Joint Venture (often referred to simply as HealthOne) had grown since its formation:

> HealthOne includes the following: The Medical Center of Aurora and Centennial Medical Plaza; North Suburban Medical Center; Presbyterian/St. Luke's Medical Center (P/SL) and Rocky Mountain Hospital for Children; Rose Medical Center; Sky Ridge Medical Center; Spalding Rehabilitation Hospital; Swedish Medical Center and Swedish Southwest ER; 13 ambulatory surgical centers; more than 30 occupational medicine/rehabilitation, specialty, and outpatient diagnostic imaging clinics; and AirLife Denver, which provides critical care air and ground transportation for an eight-state region.

until that time — the Foundation's attorneys delivered to the OAG a memorandum concerning the deal entitled Legal Background Memorandum. The Legal Background Memorandum contains language suggesting that representatives of the Foundation had discussed the Foundation/HCA Transaction with the OAG even before the Foundation and HCA publicly announced the Transaction.

39. Moreover, just as the Foundation itself had, in recent years, started to describe what all interested parties had described through the years as a "50/50" Partnership, *not* as a "50/50" Partnership but, quite differently, as a Joint Venture in which the Foundation had only a minority interest, the Foundation's attorneys refer repeatedly in the Legal Background Memorandum to the Foundation's so-called "minority economic interest" and to HCA's so-called "majority economic interest".

40. Upon information and belief, the Foundation itself first adopted these characterizations of the Joint Venture *only* in the context of the Foundation's Board deciding to sell the Foundation's interest in the Joint Venture and seeking to avoid the applicability of the Hospital Transfer Act. The Foundation's attorneys echoed the Foundation's refrain in the Legal Background Memorandum by their own repeated references to the Foundation's "minority interest". The Legal Background Memorandum asserted that the Hospital Transfer Act also was not applicable to the Foundation/HCA Transaction because, allegedly, no "hospital assets" would be transferred from the Foundation to HCA and because, allegedly, there would be no transfer of "control" from the Foundation to HCA.

41. Then, almost six weeks later, on August 2, 2011, the Foundation made a further submission pertaining to the Foundation/HCA Transaction to the OAG. According to the OAG (as stated in its October 13, 2011 Decision), the Foundation then delivered to it the documents counsel had drafted to effectuate the Foundation/HCA Transaction, including the so-called "Membership Interest Purchase Agreement". Yet later, on September 8, 2011, the OAG announced that it would conduct two public hearings into this matter, in order to "allow for public input into the review process, and, specifically, into whether the [Foundation/HCA] Transaction is in the public interest".

42. In fact, the OAG did preside over two short public hearings — one on the evening of September 26, 2011 and the other on the morning of September 27, 2011. At the September 26, 2011 hearing the Foundation made an oral presentation supporting the Foundation/HCA Transaction. At the same time some of the plaintiffs made an oral presentation opposing the Foundation/HCA Transaction.

43. On September 26, 2011 as well, plaintiffs, who include, as noted above, former members of the Foundation's Board of Directors and former members of the Joint Venture's Board of Governors and persons involved in creating the Joint Venture, submitted a Position Paper for the OAG's review. Plaintiffs' Position Paper explains the background leading to the formation of the Joint Venture and the terms and conditions of the Joint Venture. A copy of the Position Paper is attached and incorporated herein as Exhibit B.

44. Finally, on October 13, 2011 the OAG issued its eight-page Decision in which it orders that, "the Transaction is appropriate and may proceed." It is the OAG's October 13, 2011 Decision which gives rise to the filing of this Complaint.

THE OAG'S OCTOBER 13, 2011 DECISION IS ERRONEOUS AS A MATTER OF LAW, IS ARBITRARY AND CAPRICIOUS AND CONSTITUTES AN ABUSE OF DISCRETION

45. The OAG's October 13, 2011 Decision includes two separate rulings. Plaintiffs contend that both rulings are erroneous as a matter of law, arbitrary and capricious and an abuse of the OAG's discretion.

46. The first of these rulings is contained in a September 8, 2011 letter captioned "Attorney General Plan of Review for HealthONE Transaction" sent by the OAG to the Foundation's lawyers and attached as Appendix A to the OAG's October 13, 2011 Decision.

47. The OAG's September 8, 2011 letter states that the Foundation/HCA Transaction "is not technically subject to the Hospital Transfer Act". A copy of this ruling, hereinafter referred to as the OAG's "Hospital Transfer Act Ruling", is attached as Exhibit C to this Complaint and is incorporated herein.

48. The second of these rulings is described in the October 13, 2011 Decision itself — it is the OAG's ruling that the Foundation/HCA Transaction is "appropriate and may proceed" because, among other things, the Transaction is "in the public interest" and because, after the Transaction is completed, the Foundation will "continue to meet [sic] its charitable purposes." A copy of this ruling, hereinafter referred to as the OAG's "Charitable Purpose Ruling", is attached as Exhibit D and incorporated herein.

49. Plaintiffs set forth their contentions concerning the OAG's Hospital Transfer Act Ruling in Point A, below. Plaintiffs set forth their contention concerning the OAG's Charitable Purpose Ruling in Point B, below.

A. The OAG's Hospital Transfer Act Ruling Is Clearly Erroneous As A Matter Of Law And Constitutes An Abuse Of Discretion.

50. The OAG has ruled that the Foundation/HCA Transaction "is not technically subject to the Hospital Transfer Act" (Exhibit C, p. 1), for two reasons:

— (a) First, the OAG rules that the Foundation/HCA Transaction does not constitute a transaction to which the Hospital Transfer Act is applicable because the Foundation/HCA Transaction is not what the Act defines as a "covered transaction", under Section 6-19-102(1) (Exhibit C, p. 5); and,

— (b) Second, the OAG rules that, even were the Foundation/HCA Transaction a covered transaction, the Foundation/HCA Transaction does not come within "one of the three substantive parts of the Act that set

forth the process for approving a covered transaction" (*ibid.*).

As a matter of law, both of the OAG's rulings are wrong.

(a) The Foundation/HCA Transaction Is A "Covered Transaction" Within The Meaning Of The Hospital Transfer Act.

51. The Hospital Transfer Act, C.R.S. §6-19-101, *et seq.*, an act which the General Assembly explicitly states should be construed in a manner which "protects the public interest." Section 6-19-101(3) contains a very broad definitional provision. The definition of particular importance here is the definition of "covered transaction." That definition, in Section 6-19-102(1), provides in its entirety as follows:

> "Covered transaction" means *any transaction* that *would result in the sale, transfer, lease, exchange, or other disposition of fifty percent or more of the assets of a hospital.* A series of transactions taking place in any five-year period, which would result in the aggregate of the transfer of fifty percent or more of a hospital's assets, shall in all circumstances be deemed to be a covered transaction. *"Covered transaction" shall also include the sale, transfer or other disposition of the control of a parent company holding company or other entity controlling a hospital.* For the purposes of this subsection (1), "fifty percent or more of the assets" shall be based on the fair market value of all of the assets of the hospital

(emphasis supplied).

52. The OAG's October 13, 2011 Decision refers to this definition and rules that the Foundation/HCA Transaction is neither a "transaction that would result in the sale, transfer, lease, exchange or other disposition of fifty percent or more of the assets of a hospital," nor a transaction which includes "the sale, transfer, or other disposition of the control of a parent company, holding company or other entity controlling a hospital." The OAG's ruling is wrong on both counts.

(i) The Foundation/HCA Transaction Results In The Disposition Of Fifty Percent Or More Of The Assets Of A Hospital.

53. The OAG's ruling that the Foundation/HCA Transaction does not involve the disposition of "the assets of a hospital" is wrong, in the first instance, because the OAG has misinterpreted the definition of "covered transaction." The OAG assumes that a transaction is a "covered transaction" only if the transaction takes the form of a sale of assets. But, the definition does not state that a transaction is covered only if the transaction constitutes the "sale of assets".

54. Quite differently, the definition states that a transaction is "covered" if the transaction "results in" the "disposition of" the assets of a hospital. In other words, the General Assembly's focus was upon what a transaction "resulted in" — not in the mechanics or the par-

ticular form of the transaction which brings about that result. Accordingly, the OAG is obligated to apply the Act when a transaction "*has resulted"* in the "*disposition of*" hospital assets, whether or not the transactional documents themselves call for a sale of assets, or a sale, or a lease, or an exchange, of something altogether different.

55. With the benefit of this understanding of what the Act actually says, and what the Foundation/HCA Transaction will "result in," there can be no question that the Foundation/HCA Transaction is a covered transaction because it will "result in" the "disposition of … the assets of a hospital." Before the Foundation/HCA Transaction, the Joint Venture itself owned seven hospitals. After the Foundation/HCA Transaction, all of the assets of all seven hospitals will no longer be owned by the "Joint Venture", but, instead, will be owned by an entity or entities consisting entirely of HCA. Clearly, the "assets of hospitals" — the subject of concern to the General Assembly — have been "disposed of," and just as clearly 100% of those assets have been disposed of.

(ii) The Economic Reality Of The Foundation/HCA Transaction Is A Disposition Of Hospital Assets, Not A Sale Of A Membership Interest In A Limited Liability Company.

56. The OAG has erred by its misinterpretation of the definition of "covered transaction" and has erred also by focusing solely upon the fact that the sales contract is entitled "Membership Interest Purchase Agreement,". The OAG's apparent reasoning is that the title placed upon a document(s) memorializing a transaction is conclusive proof of the character of that transaction. The OAG concludes that the Foundation and HCA are not selling and purchasing assets in this case, but, instead, are selling and purchasing something different, *to wit*, a "membership interest", because that is what the attorneys have said in the contract.

57. The OAG's analysis in this respect is erroneous because, as discussed above, the Foundation/HCA Transaction, no matter what it might be called, "results in" the "disposition of" hospital assets and, therefore, is a "covered transaction". The OAG's analysis errs as well by focusing solely upon the form of the Foundation/HCA Transaction, rather than upon the economic reality of the Transaction.

58. The OAG's focus in the latter respect is an abuse of the OAG's discretion because: (a) the OAG's approach disregards a well-established body of law which directs regulatory and oversight authorities to examine the *substance* of a transaction, not merely the *form* of the transaction*;* (b) the OAG's application of the Hospital Transfer Act in this case is inconsistent with and impossible to reconcile with the OAG's application of the Hospital Transfer Act only four years ago, in a very similar case where the OAG did focus on substance and not on form; and (c) the OAG's focus on form, not substance, completely ignores evidence presented during the public hearings, including evidence generated by the Foundation's and the OAG's experts who opined concerning the alleged fairness of the $1.4 billion price being paid by HCA to the Foundation.

59. First, as to the "economic reality" of the Foundation/HCA Transaction: it is beyond dispute that neither HCA, nor anyone else, would have any interest in owning the Foun-

dation's "membership interest" in the Joint Venture as such, if that membership interest did *not* include the Joint Venture's ownership of assets. In other words: the substance and the economic reality of the Foundation/HCA Transaction is that ownership of assets is being sold, transferred or conveyed and, as a matter of law, it is this substance and economic reality which must control the OAG's evaluation of the Transaction. *See People v. Pahl*, 179 P.3d 179, 183 (Colo. App. 2006). *See also, Via Christie Regional Medical Center, Inc. v. Leavitt*, 509 F.3d 1259, 1276 (10thCir. 2007) (emphasizing, "the doctrine of substance over form… and the objective economic realities of a transaction rather than the particular form the parties employ"); *Jenkins v. Jacobs*, 748 P.2d 1318, 1320 (Colo. App. 1987) ("it is not the label given the transaction which controls but rather its substance and the economic realities of the situation"); *Raymond Lee Organization, Inc. v. Division of Securities*, 556 P.2d 1209, 1213 (Colo. 1996) ("form should be disregarded for substance and the emphasis should be placed on economic reality" (Erickson, J. dissenting). The substance of the Foundation/HCA Transaction is that the Foundation is selling, and HCA is purchasing, nonprofit hospital assets.

60. Second, the OAG itself recognized, and applied, the principles of law referenced above, in a recent case involving the Hospital Transfer Act which has many similarities to this case. In Fall 2007, the two members of Exempla, Inc., a Colorado nonprofit corporation and charitable trust which, like the Joint Venture, operates a large health care system, filed a petition with the OAG under the Hospital Transfer Act. Exempla's members had negotiated a transaction between themselves pursuant to which one member would sell its membership in Exempla to the other and they sought the OAG's approval of that transaction.

61. Although the purchasing member was seeking to acquire the assets of Exempla constructively owned by the selling member, the members called their contract a "Membership Transfer Agreement". The members appear to have done so for purposes of avoiding the provisions of the Colorado Revised Nonprofit Corporation Act, C.R.S. §7-121-101, *et seq.* ("CRNCA"), in particular CRNCA's Section 7-132-102 which prohibits a sale of all or substantially all of a nonprofit corporation's assets, unless approved by the nonprofit's Board of Directors. Exempla's Board had not approved the proposed transaction and the members sought to render that fact irrelevant by arguing that the Board's approval was not necessary, because the members were only selling a membership interest, they were not selling "assets".

62. The OAG, which reviewed this proposed transaction under the Hospital Transfer Act, did not hesitate in rejecting the members' self-serving characterization of their transaction and correctly referring to the proposed transaction as a sale of assets:

> This matter came before the Colorado Attorney General upon the application for the sale and transfer of Exempla Healthcare System *assets* between the Community First Foundation ("CFF") and the Sisters Of Charity of Leavenworth Health System, Inc. ("SCLHS"), the sole members in the Exempla Healthcare System ("Exempla").

OAG's December 27, 2007 "Finding Of No Material Change In Charitable Purpose", p. 1, ¶1; a copy of relevant pages is attached as Exhibit E. In other words, in the Exempla case, the OAG, presented with transaction documents which, like the "Membership Interest Purchase Agreement" entered into by the Foundation and HCA here, portrayed the transaction in question as a

sale of something other than a sale of assets, immediately understood that the Exempla transaction called for a sale or transfer of assets. It is just as obvious that the Foundation/HCA Transaction involves a sale or transfer of assets, not merely the sale of a "membership interest".

63. Third, the evidence presented during the September, 2011 public hearings, also supports the conclusion that the Foundation/HCA Transaction results in the disposition of assets. Kaufman Hall, the "financial advisor" retained by the Foundation to place a value upon what the Foundation was selling, employed standard business valuation methodologies in forming its opinion that $1.4 billion was a fair price. These standard methodologies call for an appraiser's review and evaluation of sales of *assets* — not sales of membership interests — by other health care companies whose size and operations arguably make those companies comparable to the company whose "fair" value is in question. Kaufman Hall's application of these particular business valuation methodologies indicates that Kaufman Hall certainly understood that the Foundation/HCA Transaction constituted a sale or transfer of assets, not simply the sale of a membership interest in a limited liability company.

64. Alix Partners, Inc., the appraisal firm retained by the OAG to review Kaufman Hall's work and to offer its own opinion concerning the fairness of the $1.4 billion price wrote an opinion further supporting the conclusion that the Foundation/HCA Transaction involves the disposition of assets. Thus, Alix Partners applied a Market Transaction Approach which it defined as follows:

> The Market Transaction Approach indicates the Fair Market Value *of a business or the assets of a business* by comparing it to other similar companies recently purchased.

(emphasis supplied). After comparing the Foundation/HCA Transaction to the sales of other businesses and the sales of the assets of other businesses, Alix Partners concluded that HCA was paying a fair price for the assets it was acquiring.

(iii) The Sale Of The Foundation's Membership Interest In The Joint Venture Involves The Sale Of A Membership Interest Effectively Controlling All Assets Owned By The Joint Venture.

65. In sum: whatever words the Foundation and HCA used in the Membership Interest Purchase Agreement or otherwise, the Foundation/HCA Transaction, at its core, is a transaction which results in the disposition or transfer of 100% of the assets of the Joint Venture hospitals to HCA. The OAG erred by ruling otherwise. The OAG compounded this error by its discussion in its Hospital Transfer Act Ruling (Exhibit C, p. 2) in which it concludes that HCA was buying, and the Foundation was selling, only the Foundation's ownership of 39.01% of the Joint Venture.

66. This analysis is wrong in the first place because, as discussed above, the reality of this transaction is that the Foundation/HCA Transaction is a transaction which results in the "disposition" of the assets of seven hospitals. Because the Foundation/HCA Transaction has this result, and because the assets of the hospitals are winding up in the hands of a for-profit

company, this is manifestly not a transaction which the OAG can side-step. Moreover, as described above, the OAG's reliance upon the parties' characterization of the Foundation/HCA Transaction as involving a sale of a membership in a limited liability company, and nothing more, is wrong because it elevates form over substance.

67. But, even were the parties correct in describing the *res* of the transaction as a membership interest in a limited liability company, *i.e.*, even if HCA were paying the Foundation $1.4 billion merely to acquire a membership interest in the Joint Venture and not to acquire the assets controlled by the Joint Venture, all relevant evidence before the OAG concerning the Foundation's role in the Joint Venture supports the conclusion that the Foundation's Class B membership interest vested it with control over all assets of the Joint Venture and that (under the rubric of acquiring the Foundation's membership interest), HCA, therefore, was acquiring 100% control of those assets. This evidence includes the following:

— the repeated statements by the Foundation itself (effectively constituting admissions for purposes of this case) throughout the existence of the Joint Venture, that it owned 50% of the Joint Venture and HCA owned 50% of the Joint Venture; the OAG ignores that large body of evidence;

— the relevant provisions of the Joint Venture's Operating Agreement (Exhibit A) which establish that, in deciding upon matters of corporate governance and matters of existential importance to the Joint Venture, the Foundation and HCA were 50/50 partners. *See, e.g.*, Exhibit A, pp. 29-30, ¶8.3, and pp. 37-39, ¶12.2;

— the oral testimony given by several plaintiffs during the September 26, 2011 public hearing and all of the plaintiffs' written testimony as comprised by the Plaintiffs' Position Paper (Exhibit B). This evidence — which was unrebutted — established that the Joint Venture would not have been formed had the Foundation and HCA not agreed upon their 50/50 relationship.

68. Indeed, the solitary piece of evidence which could be pointed to as indicating that the Foundation owned 39.01% of the Joint Venture is evidence reflecting the Foundation's and HCA's agreement upon a disproportionate distribution of income. This evidence does not have the meaning ascribed to it by the OAG. Partners in a partnership often have equal capital accounts and ownership status but, concurrently, have unequal claims upon the profits distributed by the partnership. By agreeing to a formula for the distribution of profits which was not 50/50, the Foundation did not agree that it was not a "50/50" partner or that it was not a co-owner controlling all of the Joint Venture's assets.

(iv) The Foundation/HCA Transaction Is A "Covered Transaction" In That The Foundation Is Selling Control Of The Joint Venture To HCA.

69. Finally, the OAG erred not only by ruling that the Foundation/HCA Transaction was not a "covered transaction" because it allegedly did not "result in" the "disposition" of hospital assets (when the Foundation/HCA Transaction obviously did have such a result), the OAG also erred by its alternative ruling that the Foundation/HCA Transaction was not encompassed by the other branch of the definition of a "covered transaction."

70. A "covered transaction" is a transaction which "results in" the "disposition of" more than 50% of the assets of a hospital, or a transaction which involves the "sale, transfer or other disposition of the control of a parent company, holding company or other entity controlling a hospital". C.R.S. §6-19-102(1). The Foundation/HCA Transaction obviously involves the transfer of "control" of an "entity controlling a hospital". The OAG's ruling otherwise, premised upon a finding that the Foundation is not selling control to HCA because "HCA already has control over the [Joint Venture]", Exhibit C, p. 4, is plain error.

71. First, the OAG's ruling is error because it directly contradicts, and cannot be reconciled, with unqualified opinions stated by the OAG itself, concerning this very Joint Venture, six years ago. At that time, the OAG authored a letter dated April 6, 2005 (a copy is attached as Exhibit F) responding to questions raised about the nonprofit nature of HealthONE's operations. The OAG explicitly found in his April 6, 2005 letter that the Foundation (referred to in the OAG's letter as HealthONE to contrast that entity with HCA) *had* significant control over the Joint Venture. The OAG's Findings are unqualified:

> **Control**. *HealthONE evidently has maintained significant control over the assets it transferred to the Joint Venture*. To that end, HealthONE currently retains the right to appoint the chair of the governing board of the Joint Venture (the "**Governing Board**") and half the Governing Board's members. The Governing Board must approve major matters affecting the Joint Venture. While the manager of the Joint Venture (the "**Manager**") is an affiliate of the for-profit HCA, the Manager is responsible only for the day-to-day operations of the Joint Venture. Moreover, the Manager must conduct the Joint Venture's business in a manner that satisfies the community benefits standard applicable to hospitals under the Code. *Our review did not find that the Joint Venture's assets are controlled in any material manner by a for-profit organization*.

(Exhibit F, p. 5; emphasis supplied). Indeed, the OAG specifically found that, when the Foundation and HCA formed the Joint Venture in 1995, the Foundation retained and did *not* surrender control to a for-profit entity:

> …[T]here is no basis to conclude that the charitable assets of HealthONE have been converted to impermissible uses controlled by a for-profit entity.

* * *

> Even if the transaction had occurred subsequent to 1998 it is not evident that the formal review process would apply *since HealthONE did not surrender control of its charitable assets to a for-profit entity*.

(Exhibit F, p. 3; emphasis supplied).

72. During the proceedings which give rise to this Complaint, and before the OAG rendered its October 13, 2011 Decision the OAG's April 6, 2005 letter quoted above (Exhibit F) was submitted by an interested party to the OAG; the OAG was thereby reminded about its earlier findings on this matter. Nevertheless, the OAG did not refer in its October 13, 2011 Decision (or the Hospital Transfer Act Ruling which is an Appendix to the October 13, 2011 Decision) to this earlier ruling by it which is directly on point and is squarely at odds with its current ruling. Nor was there any evidence presented during the instant proceedings which suggests that any facts relevant to the issue of "control" of the Joint Venture had occurred between 2005 and 2011 which could justify the OAG's arriving at an entirely different conclusion on the issue of control. Plaintiffs are aware of no such facts.

73. One of the documents most relevant to the issue of "control" is, of course, the Amended And Restated Operating Agreement (Exhibit A). The Operating Agreement is, in fact, one of the documents upon which the OAG relied in reaching the conclusions concerning the Foundation's "control" of the Joint Venture set forth in its April 2005 letter (Exhibit F). The Operating Agreement's provisions which establish the Foundation's "control" over the Joint Venture also are the basis for an expert opinion received in evidence at the proceedings giving rise to this Complaint. This expert opinion concludes that, based on the Foundation's control of the Joint Venture, the Foundation/HCA Transaction is a "covered transaction". This expert opinion, authored by John Moye, Esq., a highly experienced and well known corporate attorney who has practiced law for many years in Denver, is attached as Exhibit G.

74. The OAG's ruling on the issue of "control" fails to even acknowledge the OAG's directly contrary findings made six years earlier and fails to discuss, or even acknowledge, Mr. Moye's Opinion or the provisions of the Operating Agreement relied upon by Mr. Moye. Instead, the OAG relies entirely upon the fact that the Joint Venture had retained an affiliate of HCA to operationally manage the Joint Venture's hospitals, granting that entity broad powers under a contract entitled Management Services Agreement (Hospital Transfer Act Ruling, Exhibit C, pp. 3-4). But, the type of "control" which is granted to the manager employed by a business, is not the type of control over the assets and the governance of a business, which is spoken of in the Hospital Transfer Act. The OAG itself, evaluating this Joint Venture in 2005, and considering the very same Management Services Agreement which it discusses in its Hospital Transfer Act Ruling, recognized the proper distinction between "day-to-day control" and organizational "control":

> While the manager of the Joint Venture (the "Manager") is an affiliate of the for-profit HCA, the Manager is responsible only for the day-to-day operations of the Joint Venture.

(Exhibit E, p. 5). Nevertheless, the OAG's Hospital Transfer Act Ruling does not address the distinction it recognized and relied upon in 2005. The OAG's conclusions in 2005 remain correct in 2011.

75. The OAG justifies its reliance upon the Management Services Agreement by referring to the definition of the term "control" which appears in the Colorado Business Corporation Act, C.R.S. §7-101-101, *et seq*., at Section 7-101-401(9). But, the OAG cites no authority (and plaintiffs' research has disclosed no authority) for holding that the General Assembly intended the term "control", as used in the Hospital Transfer Act, to mean *management* control, as contrasted with *organizational or governing* control. The Colorado Business Corporation Act's definition of "control" clearly refers to operational control, not to organizational control. An apt analogy for the control discussed in the Hospital Transfer Act, is the "control" referenced in employment contracts which vest a corporate officer with rights to additional compensation in the event of a "change in control" of the company employing him. Indeed, in addressing this very issue HCA itself defines control as involving the ownership of a company, or the assets of a company, *not* as an operational issue.[2] Another apt analogy are the provisions respecting "control" which creditors include in documents memorializing lending transactions for purposes of accelerating the due date of a debtor's obligations when "control" of the debtor has changed. The creditor is much more concerned about whether the debtor is selling his store to someone else, than whether he has employed the best store manager.

(b) The Hospital Transfer Act Is Applicable To The Foundation/HCA Transaction — A "Covered Transaction" — Because This Transaction Constitutes A "Nonprofit To For-Profit" Transaction Within The Meaning Of The Act.

76. In its Hospital Transfer Act Ruling (Exhibit C, p. 5), the OAG rules that, even were it to find that the Foundation/HCA Transaction is a "covered transaction", the Hospital Transfer Act would not apply. The OAG states that this is so because, for the Act to apply to a transaction, it "must be covered by one of the three substantive parts of the Act that set forth the process for approving a covered transaction" (ibid). Assuming *arguendo* that the OAG's interpretation of what it calls the "three substantive parts of the Act" is correct (plaintiffs do not agree), the OAG's conclusion that the Foundation/HCA Transaction does not come within one of these "three substantive parts", is clear error.

77. There is no question that the Foundation/HCA Transaction is a transaction between a nonprofit entity — the Foundation, and a for-profit entity — HCA. Furthermore, as discussed above, the Foundation/HCA Transaction is a "covered transaction" on two separate grounds. The Transaction results in the "disposition of fifty percent or more of the assets of a hospital" (Section 7-19-102(1)); the Transaction involves the "disposition of the control of… [an] entity controlling a hospital…" (*ibid.*). The reality of this transaction, therefore, is exactly

[2] Attached as Exhibit H are provisions from HCA's Form 10-K for the year ended December 31, 2010 which define "change in control".

what the Colorado General Assembly intended that the OAG review, as the General Assembly states in its "Legislative Declaration":

> The general assembly also finds that transfers of the assets of nonprofit hospitals to the for-profit sector may directly affect the character and extent of the charitable use of those assets or the proceeds from those assets.

(Section 6-19-101(2)).

78. Applying the language of Section 6-19-101(2) there is no question that the Foundation/HCA Transaction involves a transfer of the assets of nonprofit hospitals to the "for-profit sector". Nor is there any question that, within the meaning of Section 6-19-101(2) this transfer may affect the "character and extent of the charitable use of those assets or the proceeds from the assets".

79. The OAG's conclusion otherwise is based upon the language of Section 6-19-401 which reads, in its entirety: "**Scope of part 4**. This part 4 applies to covered transactions involving a nonprofit hospital and a for-profit entity". The OAG reasons that this section means that the actual party to a covered transaction must itself be a "nonprofit hospital". The OAG's explanation of its reasoning is the following:

> Here the sold entity (the LLC) is not a nonprofit hospital. More specifically, the LLC is not a hospital and is a for-profit entity whose profits flow through to both HCA and the Foundation. Accordingly, the Transaction does not fit into Part 4.

(Exhibit C, p. 5). The OAG's conclusion is plain error.

80. The single sentence in Section 6-19-401 relied on by the OAG does not say that the only entity selling assets, or the control of assets, which might be a party to a covered transaction is a "nonprofit hospital" *per se*, or even a "hospital". As discussed above, any reasonable interpretation of the Hospital Transfer Act extends the Act to the sale of interests in artificial entities, such as corporations or limited liability companies, which own and operate hospitals. To rule otherwise would ignore the fact that most hospitals are owned by entities, be they corporations or partnerships or limited liability companies and, accordingly, transactions "involving" hospitals often are transaction "involving" interests in the entities which own the hospitals.

81. The OAG may also be contending (although it does not state that it is) that, the Joint Venture's seven hospitals are not nonprofit hospitals because they are owned by a Joint Venture, one member of which is a nonprofit entity and the other member of which is a for-profit company. This conclusion certainly is not self evident and the OAG cites no support for it.

82. Certainly at least the three hospitals owned solely by the Foundation until 1995 and contributed to the Joint Venture at that time, should not be stripped of their nonprofit character, or stripped of the protection accorded such hospitals, because these hospitals came to be owned by this hybrid Joint Venture. Given the history and the surrounding circumstances of HCA-HealthONE, LLC (the Joint Venture), the Hospital Transfer Act cannot sensibly be inter-

preted as not extending to a transaction in which $1.4 billion (which will not be a taxable gain or taxable income) is being paid by a for-profit company to an entity which has always been a non-profit corporation, in exchange for that nonprofit entity disposing of its ownership and control of the nonprofit hospitals' assets.

B. The OAG's Charitable Purpose Ruling Is Clearly Erroneous As A Matter Of Law And Constitutes An Abuse Of Discretion.

83. As pointed out above, the OAG states in its October 13, 2011 Decision (Exhibit D, p. 1), that it has reviewed the Foundation/HCA Transaction on two grounds: "The Attorney General has reviewed the Transaction pursuant to the Hospital Transfer Act ("the Act"), C.R.S. §§6-19-101 *et seq*. and the Attorney General's Common Law authority over charitable trusts. *See* C.R.S. §24-31-101(5), C.R.S. §6-19-104(1)".

84. Plaintiffs have set forth in this Complaint, in Point A above, the facts and the law which plaintiffs contend are applicable to the OAG's review of the Foundation/HCA Transaction pursuant to the Hospital Transfer Act. The OAG concluded its review by determining that the Hospital Transfer Act was not applicable to the Foundation/HCA Transaction. Plaintiffs contend, for the reasons discussed above, that the OAG's ruling in that regard, the OAG's "Hospital Transfer Act Ruling", is erroneous as a matter of law, is arbitrary and capricious and constitutes an abuse of discretion.

85. Plaintiffs set forth in this Point B the facts and the law which plaintiffs contend are applicable to the OAG's separate ruling constituting its exercise of its common law authority over charitable trusts. This ruling, referred to here as the OAG's "Charitable Purpose Ruling", is also erroneous as a matter of law, is arbitrary and capricious and constitutes an abuse of discretion.

86. In exercising its common law powers, the OAG first explains, in its Hospital Transfer Act Ruling (Exhibit C, p. 7) that it has decided to "adopt certain of the criteria in Section 6-19-403, C.R.S. to use to evaluate the Foundation/HCA Transaction" and that it has not adopted other criteria set forth in the statute. Then, in its Charitable Purpose Ruling itself (Exhibit D), the OAG discusses the criteria it has adopted as applicable to its exercise of its common law powers. The single criterion, of these criteria, which plaintiffs submit is the most important to the OAG's exercise of its common law authority, is the sixth criterion:

> The Foundation must maintain its historic charitable mission and function.

(Exhibit D, p. 1).

87. The OAG sets forth a very limited discussion of this criterion in its Charitable Purpose Ruling, Exhibit D, p. 8. Indeed, the OAG states only as follows:

> The by-laws of the Foundation set forth the charitable purpose for which the organization exists. It must make grants in accord with those purposes.

Charitable Purpose Ruling, p. 8, ¶38. The OAG then concludes:

> Therefore, the Attorney General is satisfied the Foundation will continue to meet its charitable purpose. To ensure that result, however, the Foundation is required to report to the Attorney General annually as to its grant making as set forth in paragraph 5 above.[3]

(*id.*, at ¶39). The OAG's findings and discussions of this matter, both its legal conclusions and its factual findings, are clearly erroneous and constitute an abuse of discretion.

88. First, the OAG's Charitable Purpose Ruling is erroneous as a matter of law because the OAG, although never explicitly stating as much, effectively has ruled that a charitable trust's purpose and mission are to be found only in the trust's by-laws. This is the necessary implication of the OAG's statement from paragraph 38 of its Charitable Purpose Ruling quoted above. The OAG cites no support for this proposition. There is no support.

89. In fact, the Hospital Transfer Act itself indicates that, while a trust's by-laws may contain statements relevant to defining the trust's charitable purpose, other documents are relevant as well. Thus, the Hospital Transfer Act itself states, in Section 6-19-101(2), as follows:

> Furthermore, for purposes of the attorney general's authority over the transfer of nonprofit hospital assets, all nonprofit hospitals shall be deemed to hold all of their assets in trust, and those assets shall be deemed to be dedicated to the specific charitable purposes set forth in the articles of incorporation *or other organic documents* of the nonprofit entities that hold them in trust.

(emphasis supplied). This phrase certainly would encompasses, for example, the Operating Agreement entered into upon the formation of the Joint Venture. Yet, the OAG does not refer to the Operating Agreement in reaching its conclusion concerning the Foundation's charitable purposes.

90. Furthermore, there is law holding that the charitable purposes of a trust not only are determined by the purposes stated in the trust's constituent documents, but include the purposes which the charitable trust acknowledges as its purposes and which the charitable trust represents and reports to the public that it is carrying out. *See*, *Queen of Angels Hospital et al. v. Evelle J. Younger*, 77 Cal.App. 3d. 359, 368 (Ct.App. 1977), the Court finding that a health care institution/charitable trust would not be permitted to alter the structure of its organization, in part because of its public representations concerning its mission which were inconsistent with the organizational changes which the trust was seeking to make:

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[3] Paragraph 5(d) of the Charitable Purpose Ruling to which the OAG refers, provides in its entirety as follows: "A complete listing of all grants made by the Foundation and HealthONE, including summary of health-related mission compliance and grants that materially impact communities outside Colorado…."

> Queen also represented to the public that it was a hospital. In its statement to the Franchise Tax Board, it stated that it was in the "business of running a hospital". Similar statements were made to the Internal Revenue Service and Los Angeles county tax authorities. Funds were solicited from the public for the hospital or hospital purposes. Such acts further bind Queen to its primary purpose of operating a hospital (*See Holt v. College of Osteopathic Physicians & Surgeons, supra*, 61 Cal.2d 750, 758).

Thus, the OAG's October 13, 2011 Decision, by effectively ruling that only the Foundation's bylaws are relevant to determining the Foundation's charitable purposes, has erred as a matter of law.

91. Second, the OAG's Charitable Purpose Ruling also is plainly erroneous as a matter of fact. This is so because the OAG's Ruling refers not at all to the substantial evidence in the record which establishes that the Foundation's charitable purpose includes maintaining the community identification and control over the governance of the Joint Venture's hospitals. As set forth in the factual allegations above, this particular charitable purpose was rooted in the Foundation's acceptance of HealthONE's membership interest in the Joint Venture and in the Foundation's acceptance of its accompanying responsibilities for protecting the Denver community through its governance of the Joint Venture's hospitals. This specific charitable purpose was the purpose served by the Foundation's creation and maintenance of its Joint Venture Committee and was the purpose served by the Foundation being vested with the power to appoint one-half of the members of the Joint Venture's Governing Board.

92. During the September 26, 2011 public hearing plaintiffs presented their Position Paper, identified and attached to this Complaint as Exhibit B. In that paper, and in their accompanying oral presentation, plaintiffs testified that the very purpose of the Joint Venture was, "[T]o maintain community control of decisions to close hospitals or reduce the quality of care" (Exhibit B, at p. 8). Plaintiffs expressed their concerns that the proposed Foundation/HCA Transaction would constitute an abandonment of this charitable purpose:

> If the proposed transaction proceeds, the Colorado community will no longer have an equal vote, power will have been ceded to HCA, and the Colorado community will not have its needs adequately represented when difficult decisions must be made. This is a substantial and irrevocable change that has great potential to be detrimental to the community.

(Exhibit B, pp. 8-9). Significantly, the Foundation/HCA Transaction would expose the Joint Venture to great risk:

> If this proposed transaction closes, the seven community hospitals and the rest of the [Joint Venture's] assets will become at risk for HCA's current debt which was $28.225 billion as of December 28, 2010, according to a recent 10K filing by HCA.

(Exhibit B, p.4).

93. Neither the Foundation's witnesses, nor any other person who testified or presented evidence during the OAG's proceedings, disputed plaintiffs' testimony summarized above, concerning the Foundation's charitable purposes and mission and concerning what would amount to the abandonment of the Foundation's purposes. To the contrary, the Foundation itself effectively admitted that the Foundation's important charitable purpose and mission of governance *was* being abandoned:

> Thus, there is less need for the Foundation to participate equally in strategic governance to ensure that the LLC continues to provide community benefits.

(June 15, 2011 Legal Background Memorandum, p. 6). The Foundation thereby acknowledged (albeit perhaps inadvertently) that its charitable purpose and role *had been to participate equally in strategic governance*", and that the Foundation was now proposing to abandon that role.

94. The Foundation's admission that it was abandoning its charitable purpose is confirmed as well by the Foundation's summary of the process it purportedly followed in evaluating the transaction in which it states as follows:

> A minority of Board members spoke in support of the Foundation's role as community benefit partner, while the majority felt, after discussion, that the community would be better served by the Foundation *exiting the acute hospital care space* and deploying those investment resources in other ways that benefit the community.

(Legal Background Memorandum, Board Evaluation Process Summary, October 5, 2010 entry; emphasis supplied). This is clear evidence that the Foundation fully understood, and was actively advocating, that its mission be changed. The Foundation was arguing that it wanted to "exit the acute hospital care space". Perhaps this would be an acceptable, and even a correct business decision by a for profit company, but this constitutes an abandonment of charitable purpose by a nonprofit, whose actions of this type must be closely examined by the OAG and are justified only in the rarest of circumstances.

95. The OAG's October 13, 2011 Decision, however, disregards all of the evidence and the concerns discussed above. The OAG's October 13, 2011 Decision says nothing about the Foundation's mission and purpose of being involved in the governance of the Joint Venture's hospitals. The OAG's October 13, 2011 Decision does not even refer to the Foundation's own admissions that it was seeking to change its mission. Those admissions, and the facts which support those admissions, however, should have been at the heart of the OAG's consideration of this matter, because the OAG's obligation is to ensure that a charitable trust *not* abandon its mission, absent extraordinary circumstances. The OAG's October 13, 2011 Decision does not even address the point.

WHEREFORE, for the reasons set forth above, plaintiffs respectfully request that this Court enter an order directing that the OAG withdraw and reconsider its October 13, 2011 Decision and examine the Foundation/HCA Transaction anew.

Dated: November 14, 2011
Denver, Colorado

Respectfully submitted,

HOROWITZ/FORBES, LLP

Original Signature On File

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