

COLUMBIA JOINT VENTURE STOPPED IN MICHIGAN

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The major challenge facing Attorneys General in the area of healthcare is the transformation of our national base of community and religious affiliated nonprofit hospitals into investor-owned for-profit hospital chains. The major players in this paradigm shift have been the healthcare conglomerates such as Columbia/HCA, Tenet and OrNda.

The formula for the takeover of our nonprofit hospitals usually falls within one of three types of transactions: (a) the "whole hospital" joint venture between a nonprofit hospital and the for-profit chain; (b) conversion of the nonprofit hospital to for-profit status; and (c) the outright sale of the nonprofit hospital to the for-profit chain.

I want to share with you my recent victory against a planned Columbia joint venture with Michigan Affiliated Healthcare System, Inc. ("MAHSI"), which operates Michigan Capital Medical Center, a 360 bed hospital in Lansing.

The proposal was straight from Columbia's cookbook recipe for a joint venture. Michigan Capital was a debt laden hospital, which itself had been formed only three years earlier when an osteopathic hospital had purchased a county owned general hospital. MAHSI and Columbia negotiated a limited partnership where MAHSI would serve as the limited partner, and an affiliate of Columbia would serve as the general partner, and exercise day to day management of the facility. MAHSI would contribute most of its physical assets (valued at \$87.5 million by Dean Witter), while Columbia would infuse cash equal to 50% of the value of the contributed assets and provide for-profit management skills.

My office learned of this proposed joint venture by reading the local newspapers. A letter was sent to the hospital trustees notifying them of the Attorney General's oversight responsibilities when charitable assets were being disposed, and reminding them of their fiduciary duty. Two weeks later, the hospital requested a meeting with my staff. Altogether, my staff met with the hospital's lawyers three times. An overview of the joint venture was presented, and my staff was allowed to look at (but not copy) some of the agreement documents.

Since we weren't getting answers, we followed up with a "20 questions" letter seeking detailed answers to specific aspects of the transaction. A month later, with no response to us other than a promise of a response, the hospital trustees voted to proceed with the joint venture.

The following week, still without answers, we filed a ten-count complaint seeking to block consummation of the joint venture. Michigan, like most states, does not have a specific statute addressing hospital conversions. Accordingly, our complaint was grounded in principles of charitable trust and nonprofit corporation law. The specific allegations were:

1. violating Michigan's Charitable Trust Act by failing to provide information as requested by the Attorney General.
2. complaint in *quo warranto* for an *ultra vires* abuse of corporate power and exceeding the hospital's corporate charter.
3. the proposed joint venture amounted to a *de facto* dissolution of the nonprofit triggering advance notice requirements under Michigan's Dissolution of Charitable Purposes Corporation Act.
4. the trustees' breach of fiduciary duty by failing to give adequate consideration to other options to protect the charitable assets.
5. the trustees' breach of fiduciary duty for failing to seek a private letter ruling from the IRS on legality of the transaction.
6. illegally transferring assets that had been received as charitable gifts to a noncharitable purpose.
7. failure to secure court approval through a *cy pres* proceeding to use charitable assets for the joint venture.
8. violating the Uniform Management of Institutional Funds Act by failure to secure judicial release of restricted funds.
9. violation of terms of a 1992 agreement with the county to provide medical care for indigents, and improper use of restricted gifts.
10. failure to hold a public forum or disclose documents to the public.

In response to the suit, the hospital agreed to hold the joint venture in abeyance until after the court ruled on its motion for summary judgment. At the first hearing, the court dismissed six of our counts, while allowing us to take discovery on four counts: *quo warranto* for an *ultra vires* act, the fiduciary duty counts, and the *cy pres* count.

A public hearing was convened by my office in conjunction with a community health advisory group. The daylong public hearing was attended by over 300 people, who presented both oral and written comment. Local and national media were present, including the news magazine, *60 Minutes*.

At the second court hearing in September, 1996, Ingham County Circuit Court Judge James Giddings granted our request for summary judgment on our *ultra vires* theory. We had argued that the proposed whole hospital joint venture exceeded the corporate authority of the charitable purpose corporation and violated the Nonprofit Corporation Act's prohibition against assets of a charitable purpose corporation being used, conveyed or distributed for a noncharitable purpose. Judge Giddings reasoned in his opinion that:

Here we have taken very substantial assets belonging to a nonprofit, established under Michigan law and allowed those--and will allow. . . those assets to be used to generate benefits for the hospital, but also to generate profits for Columbia/HCA. I do not believe that is permissible under Michigan law under these circumstances.

* * *

The problem is that I do not believe that these assets can be disposed of under the mechanism [joint venture] that has been proposed.

The court ruled against us on the fiduciary duty counts, finding the hospital board had exercised a satisfactory level of due diligence. In dicta, the court found that the Attorney General had *cy pres* jurisdiction, but that count was moot given our victory on the *ultra vires* theory.

The hospital filed a Motion for Rehearing and/or Reconsideration. Another round of briefs and oral argument followed. On January 3, 1997, Judge Giddings issued his opinion denying the motion, in which he amplified his reasons against the joint venture:

What is critical, indeed dispositive, in this situation is that the hospital will be operated henceforth as a for-profit entity. Not unimportantly, both the physical assets and day-to-day hospital operations will be managed by Columbia. One half of the profits will be directed to MAHSI and the other half will be received by the Columbia affiliate. It is these features that are fatal to Defendant's motion and ultimately to Defendant's case.

* * *

This Court can easily agree with the Attorney General that MAHSI's "core assets that previously gave it a charitable mission" will now be used by the proposed joint venture to earn a profit. In short, the hospital will be operated as a profit making venture. The proposed joint venture would result in the use, conveyance, or distribution of assets held for charitable purposes "for non-charitable purposes" in violation of . . . the Non-profit Corporation Act.

As it stands now, the hospital plans to appeal the court's decision to our Court of Appeals, while at the same time pursuing negotiations with Columbia for an outright sale of the hospital facility. I have met with top Columbia officials who have assured me that they understand the role of my office in the acquisition of any Michigan healthcare facility.

This decision is significant because it is the first time any court has ruled that a Columbia joint venture with a nonprofit hospital was illegal. Hopefully, our case will add to your arsenal of weapons in your own battles against for-profit healthcare chains.

In most states only the Attorney General has the "standing" to raise these important issues. No matter what our personal philosophy of health care is, or the relative merits of for-profit vs. nonprofit, the public interest must be served and protected. Without the involvement of our offices the unsophisticated trustees of an in debt hospital are an inviting target to the entrepreneurial "Wall Street" approach to health care. The C.E.O. of Columbia/HCA recently said in an interview on National Public Radio that they wanted to be the WalMart of healthcare, based on quality, services and cost. A "bottom line" driven system may not always fulfill a community's needs for health care. Hospital departments cannot be viewed as profit centers, or needed services such as neonatal ICU's and burn centers will not be available when needed.

The "Wall Street" companies cannot skim the cream and leave the non-profit institutions with the high cost, low return services. Our citizens need more than high profit cardiac and orthopedic procedures. My staff and I stand ready to share our experience in applying the traditional role of the Attorney General to this emerging phenomenon in our society.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

FRANK J. KELLEY, Attorney General
of the State of Michigan,

Plaintiff,

File No. 96-83848 CZ

v

Hon. James R. Giddings

MICHIGAN AFFILIATED HEALTHCARE
SYSTEM, INC., a Michigan nonprofit
corporation, and COLUMBIA/HCA
HEALTHCARE CORPORATION, a Delaware
corporation,

OPINION AND ORDER

Defendants.

At a session of said
court held in the County
of Ingham, State of
Michigan, this 3d day
of January, 1997.

PRESENT: HONORABLE JAMES R. GIDDINGS, Circuit Judge

This matter having come before the Court on Plaintiff's ten count complaint challenging a proposed joint venture between Michigan Affiliated Healthcare System, Inc. (MAHSI) and Columbia/HCA Healthcare Corporation (Columbia); Defendants MAHSI and Columbia having filed Motions for Summary Disposition; the Court having granted summary disposition in favor of Defendants MAHSI and/or Columbia HCA on eight of the ten counts; the Court having granted summary disposition in favor of Plaintiff Attorney General Frank J. Kelley on count II of Plaintiff's complaint and having dismissed as moot count VII (an allegation of cy pres); Defendant MAHSI having filed a Motion for Rehearing and/or

Reconsideration with regard to the count II allegation of *ultra vires*; Plaintiff having responded to the Motion for Rehearing and/or Reconsideration; the Court having heard the matter in open court and being advised in the premises;

THEREFORE IT IS HEREBY ORDERED AND ADJUDGED that Defendant MAHSI's Motion for Rehearing and/or Reconsideration be and the same is hereby DENIED. Motions for rehearing or reconsideration are governed by MCR 2.119(F) and generally, the moving party must demonstrate "palpable error." However, a review of the pertinent case law makes it apparent that the decision to grant or deny rehearing/reconsideration is a matter within the sound discretion of the trial court. Cason v Auto Owners Ins Co, 181 Mich App 600; 450 NW2d 6 (1989); Michigan Bank-Midwest v D J Reynaert, Inc, 165 Mich App 630; 419 NW2d 439 (1988); Brown v Northville Regional Psychiatric Hospital, 153 Mich App 300; 395 NW2d 18 (1986).

MAHSI argues that this Court should exercise its discretion and overturn the prior ruling, thus permitting the proposed joint venture to proceed. This Court may not do so based on its firm conviction that to allow the assets of MAHSI to be employed in this fashion contravenes long established principles of Michigan law.

The proposed arrangement anticipates that MAHSI will convey the major portion of its physical plant and assets, valued at approximately \$87,500,000, to a joint venture limited partnership. The Columbia affiliate will participate in the joint venture as the general partner and a limited partner owning 50% of the assets of the limited partnership. The affiliate's share will be acquired

from MAHSI for an amount of \$43,750,000. Upon completion of the transaction, MAHSI and the affiliate will be equal partners, each owning an undivided one-half interest in the partnership assets. A portion of MAHSI's assets, approximating \$18,000,000, will not become a part of the joint venture. What is critical, indeed dispositive, in this situation is that the hospital will be operated henceforth as a for-profit entity. Not unimportantly, both the physical assets and day-to-day hospital operations will be managed by Columbia. One half of the profits will be directed to MAHSI and the other half will be received by the Columbia affiliate. It is these features that are fatal to Defendant's motion and ultimately to Defendant's case.

The Non-profit Corporation Act grants non-profit corporations numerous powers. However, those powers are not without limit. MCL 450.2301(5); MSA 21.197(301)(5) provides that a non-profit corporation shall not "permit assets held by a corporation for charitable purposes to be used, conveyed, or distributed for non-charitable purposes." The proposed conveyance contravenes this statute.

That conclusion is compelled by several Michigan cases, among which is Michigan Sanitarium & Benevolent Ass'n v Battle Creek, 138 Mich 676; 101 NW 855 (1904). There, the Michigan Supreme Court found that a sanitarium did not operate as a charity where it collected more for services "than are needed for its successful maintenance." Id., at 683. The hospital operation proposed here must not only generate the revenue necessary for its continuance

but generate as well a profit for the private partner. Another measure for determining whether a hospital is charitable in nature is set forth in Bruce v Henry Ford Hospital, 254 Mich 394, 399-400; 236 NW 813 (1931), quoting 30 CJ at 462:

"The test which determines whether a hospital is charitable or otherwise is its purpose, that is, whether it is maintained for gain, profit, or advantage or not. And the question of whether a hospital is maintained for the purpose of charity or for that of profit is to be determined, in case the hospital is incorporated, not only from its powers as defined in its charter but also from the manner in which it is conducted."¹

While a portion of the proceeds generated from the profit making joint venture will be directed to MAHSI's charitable goals, a significant portion of the revenue will be directed to the private profit making corporation.

This Court can easily agree with the Attorney General that MAHSI's "core assets that previously gave it a charitable mission" will now be used by the proposed joint venture to earn a profit. In short, the hospital will be operated as a profit making venture. The proposed joint venture would result in the use, conveyance, or distribution of assets held for charitable purposes "for non-charitable purposes" in violation of section 2301 of the Non-profit Corporation Act. Defendant has offered no persuasive authority that the commitment of these charitable assets to the proposed joint venture complies with the requirements of Michigan law.

¹This case was overruled in part by Parker v Port Huron Hospital, 361 Mich 1; 105 NW2d 1 (1960). However that case did not change or abrogate the test set forth above.

Rather, Defendant offers in support of its position a series of private letter rulings. They are not persuasive for several reasons. First, there is some doubt about the precedential effect of a private letter ruling. Liberty National Bank & Trust Co v United States, 867 F2d 302, 305 (CA 6, 1989).

Second, even if they had value as precedent, each is factually distinguishable. Most of the private letter rulings have no pertinence because they address situations involving a limited undertaking to provide services not previously available in an area. For example, PLR 9518014 involved establishment of a new elder care facility; PLR 9407022 involved the construction and sale of a surgery center; PLR 8939024 involved the expansion of home health care services; PLR 8909036 permitted tax exempt hospital to expand its cardiac diagnostic activity; and PLR 8717057 involved the development of a new long-term care nursing facility.

Defendant argues that PLR 9308034 is similar in that it involved a joint venture in the operation of an entire hospital. While true, that is about the only similarity to this case. There, a not for profit corporation operated three acute care hospitals and apparently would continue to operate those hospitals as non-profits following the proposed joint venture. The subject of the joint venture was an acute care hospital which historically had been operated on a profit making basis. Under that joint venture, assets would be contributed both by the profit making corporation and the non-profit corporation which would permit that hospital to continue to operate as a profit making venture. A significant

factor in that case which is not present here is that the non-profit entity there was not required to put its assets at risk for the benefit of the for-profit corporation. Defendant's reliance on Plumstead Theater Society, Inc v Commissioner, 74 TC 1324 (1980), *aff'd* 675 F2d 244 (CA 9, 1982), is also misplaced. The joint venture there was very limited in scope and the non-profit maintained "full management control."

While this Court can appreciate Defendant's disagreement as to the applicability of general counsel memorandum 39862 (1991), this Court shares the Attorney General's view that it is analogous to our situation. While a revenue stream is not being sold by a tax exempt entity to a profit making operation, substantial assets which would generate such a stream are being conveyed. The conclusions of the Internal Revenue Service there apply with equal force here:

"[W]e believe these arrangements create a substantial conflict between the charitable purposes of a hospital and its fiduciary duty or natural desire to further the pecuniary interests of the [for-profit] physician-investors. Charitable hospitals regularly proclaim that what distinguishes them from their investor-owned counterparts is their willingness to subjugate concern for the bottom line to concern for mission. This will no longer be the case, at least for the facilities subject to the joint ventures."

And that will no longer be the case with regard to the hospital operation which will be conveyed by MAHSI to the joint venture and operated for its benefit. It is difficult to see how this proposed joint venture would further the exempt purposes of MAHSI. What we have here is simply the conversion of an on-going hospital

operation from non-profit charitable status to a profit making joint venture.

Third, whether a particular financial activity can be undertaken by a non-profit charitable entity without disturbing its tax exempt status for federal tax purposes is not dispositive on the question of whether this proposed arrangement complies with state law. Distinct considerations come into play with regard to these questions. While this Court does not share Defendant's confidence that the proposed arrangement would pass muster with the Internal Revenue Service, whether it can or not is of no consequence. This proposed conversion of Defendant's "core assets" is simply not permissible under Michigan law.

Finally, for the same reason that the proposed joint venture is violative of the statute, the Court concludes that the proposed venture also runs afoul of MAHSI's corporate charter. This case is not about whether there is financial benefit to be realized to MAHSI or Columbia or the community as a whole as a result of this transaction. Nor is this case about whether, in the long run, changes in the structure of health care delivery systems, including hospitals, in the metropolitan Lansing area are needed to meet the challenges of the Twenty-first Century. There may be persuasive economic and social reasons for permitting this joint venture to go forward. There may also be compelling reasons for pausing before proceeding with this or similar proposals. None of that, however, may properly control the outcome in this matter. The question pure and simple is whether the proposed joint venture transaction meets

the requirements of Michigan law and MAHSI's corporate charter. This Court finds that it cannot do so as presently configured.

Defendant has shown no proper basis upon which this Court could properly reconsider its prior ruling and the motion must therefore be denied.

IT IS SO ORDERED.

A handwritten signature in black ink, consisting of several large, sweeping loops and a long horizontal stroke at the end.

James R. Giddings, Circuit Judge

1 STATE OF MICHIGAN

2 IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

3
4 FRANK J. KELLEY, Attorney General of
the State of Michigan,

5 Plaintiff,

6
7 -v-

File No. 96-83848-CZ

8 MICHIGAN AFFILIATED HEALTHCARE
9 SYSTEM, INC. a Michigan nonprofit
corporation, and COLUMBIA/HCA
10 HEALTHCARE CORPORATION, a
Delaware corporation,

11 Defendants.

12
13 COURT RULING

14
15 BEFORE THE HONORABLE JAMES R. GIDDINGS, Circuit Judge

16 LANSING, MICHIGAN - THURSDAY, SEPTEMBER 5, 1996

17
18 In behalf of the Plaintiff: FREDERICK H. HOFFECKER
DAVID W. SILVER
19 MICHIGAN DEPT. ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION
20 P. O. Box 30213
Lansing, Mi 48909

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24 Reported by Dorothy M. Dungey, CSR/RPR
Official Court Reporter

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Dorothy M. Dungey, Official Court Reporter CSR/RPR-0260

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APPEARANCES CONTINUED:

In behalf of Defendant
MAHCSI:

ROBERT W. STOCKER, II
MARK A. BUSH
FRASER, TREBILCOCK, DAVIS & FOSTER
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Lansing, Michigan 48933

In behalf of Defendant
Columbian:

WILLIAM M. NEWMAN
LAGUE, NEWMAN & IRISH
600 Terrace Plaza
P. O. Box 389
Muskegon, Michigan 49443

Evening Session

September 5, 1996

6:01 p.m.

R E C O R D

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5 THE COURT: We can go back on the
6 record in the matter Kelley vs. Michigan Affiliated
7 Healthcare System, Inc. docket number 83848-CZ.

8 And, I want to deal initially with --
9 let me deal initially with the motion for summary
10 disposition as to Counts 4 and 5, I believe it is, the
11 alleged violation of fiduciary duty by the Board of
12 Directors in this matter. As to that Count I don't
13 believe there is any genuine issue of material fact, and
14 the Court will grant summary disposition in favor of the
15 Defendants.

16 There is a very substantial amount of
17 documentation that's been presented here indicating a due
18 diligence, if you will, affected by them on behalf of the
19 Board. They did not have to obtain the valuation by that
20 stock brokerage firm, the name of which now escapes me
21 this late in the day.

22 MR. BUSH: Dean, Witter.

23 THE COURT: Dean, Witter, Reynolds;
24 but, the fact that they did, simply underscores the
25 concerns that they had in their commitment to carry out

1 their responsibility in an effective and appropriate way.
2 I don't see that in terms of those counts their failure
3 to obtain a Private Letter Ruling from the Internal
4 Revenue Service is significant. There is case law that
5 supports some requirement that they do that, and in this
6 context, again, I don't believe that that is sufficient
7 to raise a fact -- genuine fact question with regard to
8 whether or not they've violated their duties pursuant to
9 Michigan law.

10 There doesn't appear to be any
11 question about their good faith. It appears their
12 responsibilities were carried out by whatever standard
13 you want to apply; gross negligence, exercise judgment of
14 the ordinarily prudent person, in my view there is no
15 reason to believe and nothing has been presented here
16 that suggests any impropriety or basis for successful
17 prosecution. Therefore, the Court will grant the motion
18 to dismiss with prejudice, summary disposition motion.

19 With regard to Count 2, that really
20 is the heart of this case. We've spent a long time
21 talking about the amount of money, given the outcome, the
22 amount really doesn't make a great deal of difference.
23 The question is simply this, whether the MAHSI working in
24 conjunction with Columbia/HCA can structure an
25 arrangement in the fashion that they have and commit

1 their assets to the joint venture and do that consistent
2 with the requirements of Michigan law for a nonprofit
3 corporation. And, in that regard everybody talked about
4 it and we can just go back to the corporate purpose, as
5 set forth in paragraph 29 of the Plaintiff's Complaint
6 and has been made a part of this record, and I quote:

7 "The corporation is organized specifi-
8 cally for charitable, scientific and
9 educational purposes as a nonprofit
10 corporation; and that that activity
11 shall be conducted for the aforesaid
12 purposes in such a manner that no part
13 of its net earnings shall inure to the
14 benefit any member, director, trustee or
15 individual."

16 In short, no one is entitled to
17 profit from this operation. I have no doubt that this
18 corporation could sell all of its assets for fair
19 consideration to a profit making entity; and if they did,
20 such as occurred in Nashville Memorial Hospital --
21 actually, **State of Tennessee vs. Nashville Memorial**
22 **Hospital**, case opinion cited in -- attached as Exhibit 2
23 to a brief filed behalf of the Attorney General, they
24 could do that. For whatever reason MAHSI has elected not
25 to do that, but intends to sort of bifurcate this

1 transaction.

2 I'll assume for the purpose of this
3 argument, no one -- it's not my purpose here to question
4 the wisdom of this transaction; whether or not it makes
5 economic good sense; whether or not it's good for the
6 community; whether or not it enhances the quality of
7 medical care, those are not the questions that I'm called
8 upon to address here. That's not really the purpose.
9 The purpose is whether or not we can take assets, that
10 are unquestionably nonprofit assets, and commit them in
11 this way. And I find no authority to suggest that one
12 can do that.

13 I do not believe it is appropriate to
14 take these assets and commit them to a profit making
15 joint venture. If all the profits from that joint
16 venture were to inure to MAESI, it might pass muster.
17 That's another situation, all the profit.

18 There are other cases that talk about
19 it, the Georgia case that was cited in this matter, I
20 believe. Actually, cited by both parties, but
21 essentially, hits the nail on the head, when it describes
22 this kind of activity and what I believe the requirements
23 are. And, Georgia Osteopathic Hospital, Inc. vs.
24 Alford, 217 Ga 663, a 1962 decision, which involved a
25 profit making operation, but this is more the definition,

1 if you will, being when they talked about what a
2 charitable institution -- that's what we're talking
3 about, MAHSI here is a charitable institution, quote:

4 "A purely charitable institution, a
5 hospital, was not removed from that
6 category simply because it derived a
7 profit from the patronage of patients
8 who were able to pay, so long as the
9 money earned was reserved for the
10 purpose of carrying out its purely
11 charitable purposes."

12 And, the Michigan statute itself
13 makes clear, Section 305.301(5) of the NonProfit
14 Corporation Act quoted by the Attorney General states
15 that the Act, quote:

16 "Shall not be deemed to permit assets
17 held by the corporation for charitable
18 purposes to be used, conveyed or distributed
19 for non charitable purposes, MCL
20 45.2301(5)."

21 Shall not be deemed to permit assets
22 held by the corporation for charitable purposes to be
23 used, conveyed or distributed for non charitable
24 purposes. We are taking all the physical plant, as a
25 practical matter, and giving it to a joint venture and

1 allowing a profit making entity, Columbia/HCA, and as
 2 well advised as this may be, to make a profit off of it.
 3 Whether or not MAHSI could hire someone to manage their
 4 hospital consistent with their corporate charter, perhaps
 5 they could. I believe they could sell it, all their
 6 assets. They could sell part of their assets, if, in
 7 fact, that is what they do.

8 If they sold the Greenlawn campus for
 9 \$30 million, we sell that and we take our \$30 million and
 10 we commit our 30 million to purposes consistent with the
 11 corporate charter, consistent with the statute. Here we
 12 have taken very substantial, very substantial assets
 13 belonging to a nonprofit, established under Michigan law
 14 and allowed those -- and will allow, as I understand it,
 15 those assets to be used, quote, to generate benefits for
 16 the hospital, but also to generate profits for
 17 Columbia/HCA. I do not believe that is permissible under
 18 Michigan law under these circumstances.

19 The Court denies the motion for
 20 summary disposition as to Count 2 for the Defendant;
 21 grants motion for summary disposition as to Count 2 in
 22 favor of the Plaintiff, Attorney General.

23 With regard to the Cy Pres Count,
 24 it's kind of academic under the circumstances, but I
 25 believe this is implied trust and could be established as

1 an implied trust under the circumstances, beneficiary
 2 being, at least, the people of the State of Michigan,
 3 more direct beneficiary, the people of this community.
 4 And that these assets must be -- albiet, not considered
 5 as a principle, the Attorney General has a role. I'm not
 6 sure that the Court needs to make some further comment,
 7 again, the same standard comes into play there.

8 The problem is that I do not believe
 9 that these assets can be disposed of under the mechanism
 10 that has been proposed. And again, I'm not unmindful of
 11 the tremendous amount of the work and the dedication of
 12 the People involved, the good faith to try to deal with
 13 the changing situation heard in terms of the medical
 14 economics situation of the late 20th century. I
 15 understand that, and I have sympathy for that, but my
 16 role here, again, is very limited, not to pass on the
 17 wisdom of it; the economic commensense of it; whether
 18 it's workable; whether it shares, profit, first rate
 19 medical care for the people of this community over the
 20 next ten or twenty years, that's not the standard.

21 The standard is whether we meet the
 22 requirements of state law, and that's why I asked Mr.
 23 Bush if I could find a single case where you had a
 24 venture that in affect took assets from a nonprofit and
 25 committed them to a profit making enterprise as is

1 proposed here. And really, respectfully, there wasn't
2 any such case. I have not been made apprised of any such
3 case, other than to say what that says, and even those,
4 the public authority have looked very closely at to
5 assure that the sale occurs in a manner consistent with
6 the public interest as well as the public requirements of
7 state sanctions. But, this in my view simply cannot meet
8 those requirements. So, as I said, motion will be
9 granted in favor of the -- pursuant to the Court Rule,
10 favorable to the Attorney General as to Count 2.

11 Any questions about that, Mr.
12 Hoffecker?

13 MR. HOFFECKER: None, your Honor.

14 Thank you very much for your hard
15 work on this case?

16 MR. BUSH: Your Honor, could you
17 articulate a ruling for Count 7 for the record, please?

18 THE COURT: That's the Cy Pres?

19 MR. BUSH: Yes.

20 THE COURT: Well, in my view, it's
21 kind of academic. I will say this, that it's my view
22 that there is a trust within the meaning of that, under
23 these circumstances, and again, that the Attorney General
24 would have a role. The Attorney General is here already,
25 so, I guess, I grant motion for summary disposition,

1 denying -- I'll deny it clearly on behalf of the
2 Defendants, but I'm not -- I guess, really what I'm
3 asking, I'm not sure it's necessary to grant judgment
4 favorably to the Attorney General in that context, given
5 that they are here and I've made a determination as to
6 the legal propriety of the entire transaction under these
7 circumstances. I guess I'm willing to say they have a
8 role and that it is a trust, if that's necessary.

9 Anything else?

10 You'll draft an order, Mr. Hoffecker?

11 MR. HOFFECKER: Yes, we will, your
12 Honor. I want to thank the Court for its hard work in
13 expediting the way we handled this matter.

14 THE COURT: That's all on the record.

15 MR. BUSH: Thank you, your Honor.

16 MR. NEWMAN: Thank you, your Honor.

17 (End of Court's Ruling)
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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

FRANK J. KELLEY, Attorney General
of the State of Michigan,

Plaintiff,

v

File No. 96-83848-CZ
Hon. James R. Giddings

MICHIGAN AFFILIATED HEALTHCARE
SYSTEM, INC., a Michigan nonprofit corporation,
and COLUMBIA/HCA HEALTHCARE
CORPORATION, a Delaware corporation,

Defendants.

Frederick H. Hoffecker (P15029)
David W. Silver (P24781)
Attorneys for Plaintiff
Michigan Department of Attorney General
Consumer Protection Division
P. O. Box 30213
Lansing, MI 48909
(517) 335-0855

There is no other pending or resolved civil
action arising out of the transaction or
occurrence alleged in the complaint.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF,
QUO WARRANTO,
INSTITUTION OF CY PRES PROCEEDING AND
EX PARTE PETITION FOR TEMPORARY RESTRAINING ORDER
AND
ORDER TO SHOW CAUSE

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

FRANK J. KELLEY, Attorney General
of the State of Michigan,

Plaintiff,

v

File No. 96-83848-CZ
Hon. James R. Giddings

MICHIGAN AFFILIATED HEALTHCARE
SYSTEM, INC., a Michigan nonprofit corporation,
and COLUMBIA/HCA HEALTHCARE
CORPORATION, a Delaware corporation,

Defendants.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF,
QUO WARRANTO,
INSTITUTION OF CY PRES PROCEEDING AND
EX PARTE PETITION FOR TEMPORARY RESTRAINING ORDER
AND
ORDER TO SHOW CAUSE

NOW COMES FRANK J. KELLEY, Attorney General of the State of Michigan,
and complains against Michigan Affiliated Healthcare System, Inc. and
Columbia/HCA Healthcare Corporation as follows:

Introduction

1. The Plaintiff, Frank J. Kelley, Attorney General of Michigan, brings this action seeking a temporary restraining order, order to show cause, injunctive relief, *quo warranto*, and institution of a *cy pres* proceeding against Michigan Affiliated Healthcare System, Inc. (MAHSI), pursuant to his supervisory authority over charitable trusts.

2. On June 6, 1996 MAHSI entered into an agreement whereby a nonprofit,

charitable purpose Michigan hospital corporation will become a limited partner in a for-profit joint venture partnership with Columbia/HCA Healthcare Corporation, or one of its subsidiaries or affiliates (Columbia).

3. MAHSI's agreement, if implemented, will result in a drastic change in the use of its charitable assets, is an *ultra vires* act exceeding the exclusively "charitable, scientific and educational purpose" of its non-profit corporate charter, is a matter of first impression in Michigan, and runs afoul of the statutes governing charitable trusts and charitable assets.

Parties

4. The Plaintiff, Frank J. Kelley, is the Attorney General of the State of Michigan and is vested with common law and statutory authority to represent the People of the State of Michigan and the uncertain or indefinite beneficiaries in all charitable trusts. The Attorney General is authorized to bring actions in *quo warranto* against the *ultra vires* acts of nonprofit corporations.

5. Defendant Michigan Affiliated Healthcare System, Inc. (MAHSI) is a Michigan nonprofit charitable purpose corporation which does business as Michigan Capital Healthcare, which is the parent over Michigan Capital Medical Center, an acute care hospital with two campuses in Lansing, Michigan.

6. Defendant Columbia/HCA Healthcare Corporation (Columbia) is a for-profit health care conglomerate, incorporated in Delaware with principal business offices at One Park Plaza, Nashville, Tennessee. Columbia presently operates over 343 for profit hospitals, 135 outpatient surgery centers, and 200 home health agencies in 38 states, Great Britain and Switzerland.

Jurisdiction

7. Jurisdiction is proper in this court pursuant to the Supervision of Trustees for Charitable Purposes Act, 1961 PA 101, MCL 14.251 *et seq*; MSA 26.1200(1) *et seq*; the Revised Judicature Act, 1961 PA 236, MCL 600.3601; MSA 27A.3601 and MCL 600.4521; MSA 27A.4521, the Dissolution of Charitable Purpose Corporations Act, 1965 PA 169, MCL 450.251 *et seq*; MSA 21.290(1) ; the charitable gifts act, 1915 PA 280,

MCL 554.351 *et seq* ; MSA 26.1191 *et seq* , the Uniform Management of Institutional Funds Act, 1976 PA 157, MCL 451.1201 *et seq*; MSA 26.1199(1) *et seq*, and the equitable jurisdiction of this court.

8. Venue is proper in this court as the matters complained of arise in Ingham County.

The Proposed Transaction

9. MAHSI proposes to enter into a joint venture with Columbia to operate its acute care hospital facilities. MAHSI's Board of Trustees voted on June 6, 1996 to proceed with the joint venture. Columbia will be meeting on June 21, 1996 to approve the deal. The parties contemplate an effective date in July 1996. The proposed joint venture will be a limited partnership in which MAHSI is a limited partner and a Columbia affiliate will be the general partner. MAHSI will place most of its hospital assets into the joint venture as its contribution to the joint venture. Columbia will capitalize its portion of the joint venture with cash equal to 50% of the value of the assets MAHSI places in the joint venture.

10. As the general partner, Columbia will exercise overall management of the hospitals and health care delivery systems of Michigan Capital Healthcare as a for-profit enterprise.

11. MAHSI will use the cash it receives from Columbia to a) retire its outstanding debt, b) to meet outstanding account payable obligations, c) to fund contingent liabilities and d) to supplement the endowment of the MCH Foundation, a charitable trust.

12. As the limited partner, MASHI is relying on the for-profit methods of business operation Columbia will bring to this association in hopes of turning its history of operating in debt to a profitable venture.

13. As a limited partner to the joint venture, MAHSI will have an Advisory Board which can exercise reserve powers in certain areas. Advisory Board approval will be necessary to a) amend the joint venture's mission statement, b) approve agreements between the limited partnership and any of the partners of the limited partnership (including any parent, subsidiary or affiliate of a partner), c) approve the sale of assets of the limited partnership and/or merger or consolidation of the

limited partnership with any other business entity, d) approve dividends and other distributions to any of the partners of the limited partnership, e) selection of the Chief Executive Officer of the joint venture, f) approval of the annual capital budgets of the joint venture, and g) amendment of the limited partnership agreement.

14. The joint venture will be treated as a for-profit entity for tax purposes.

15. If consummated, the proposed transaction will drastically alter the delivery of health care services in mid-Michigan. This deal will abrogate a heritage of nonprofit, community-based health care grounded in principles of charity and benevolence, in exchange for a delivery system driven by shareholder greed and motivated by profit and return on investment.

Count I

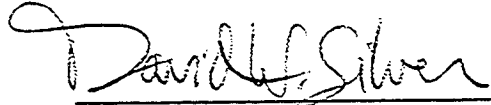
Violation of Supervision of Trustees for Charitable Purposes Act

16. MAHSI holds property for a charitable purpose, thus is a charitable trust subject to the provisions of the Supervision of Trustees for Charitable Purposes Act, *supra*.

17. MCL 14.254(b); MSA 26.1200(4)(b) makes the Attorney General a necessary party to all proceedings "to modify or depart from the objects or purposes of a charitable trust" or "to construe the provisions of an instrument with respect to a charitable trust." In addition, "no compromise, settlement agreement, contract or judgment agreed to by any or all parties having or claiming to have an interest in any charitable trust shall be valid unless the attorney general was made a party to such proceedings and joined in the compromise, settlement agreement, contract or judgment, or unless the attorney general, in writing, waives his right to participate therein" (emphasis added). The Attorney General has not given approval to or joined in this contract between MAHSI and Columbia, and has not waived any of

Verification

I declare that the statements above are true to the best of my information,
knowledge and belief.



David W. Silver (P24781)
Assistant Attorney General

Date: June 17, 1996



Linda M. Droste
Notary Public, Ingham County, Michigan
My commission expires February 4, 2000.