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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac Street Centennial, Colorado 80112	
Plaintiff: BARBARA MORRIS, MD v. **Defendants:** CENTURA HEALTH CORPORATION, a Colorado non-profit corporation, and CATHOLIC HEALTH INITIATIVES COLORADO d/b/a CENTURA HEALTH-ST. ANTHONY HOSPITAL, a Colorado non-profit corporation,	**▲COURT USE ONLY▲**
Attorneys for Plaintiff: Steven J. Wienczkowski (Reg. No. 33105) Jason Spitalnick (Reg No. 51037) Katherine A. Roush (Reg. No. 39267) Melanie MacWilliams-Brooks (Reg. No. 45322) FOSTER GRAHAM MILSTEIN & CALISHER, LLP 360 South Garfield Street, 6th Floor Denver, Colorado 80209 Telephone: 303-333-9810 Email: swienczkowski@fostergraham.com; jspitalnick@fostergraham.com Qusair Mohamedbhai (Reg. No. 35390) Matthew J. Cron (Reg. No. 45685) Felipe Bohnet-Gomez (Reg. No. 53013) RATHROD MOHAMEDBHAI, LLC 2701 Lawrence Street, Suite 100 Denver, Colorado 80205 Telephone: 303-578-4400 Email: qm@rmlawyers.com; mc@rmlawyers.com; fbg@rmlawyers.com	Case No.: 2019 CV 31980 Division: 21

PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM FOR DECLARATORY RELIEF PURSUANT TO RULE 12(b)(1), RULE 12(b)(5) AND RULE 57

Plaintiff Barbara Morris, M.D. ("Dr. Morris"), through her undersigned counsel, submits the following Motion to Dismiss Defendants' Counterclaim for Declaratory Relief Pursuant to Rule 12 (b)(1), Rule 12 (b)(5) and Rule 57 as follows:

Certificate of Compliance Pursuant to C.R.C.P. 121: Undersigned counsel conferred with Defendants' counsel regarding the relief requested herein. Defendants' counsel objects to Plaintiff's Motion to Dismiss Defendants' Counterclaim for Declaratory Relief.

I. INTRODUCTION

The End-Of-Life Options Act ("EOLOA" or the "Act") was passed by an overwhelming majority of Colorado voters in 2016 to provide compassionate end-of-life care for terminally ill patients. In particular, the Act mandates that Colorado employees are protected from discipline or other penalty for their good-faith participation in the prescribing of aid-in-dying ("AID") medication as permitted by the statute.

Dr. Morris is a board-certified medical doctor who had practiced medicine at Centura Health Corporation for over seven years, specializing in primary care and geriatrics. On July 16, 2019, Neil Mahoney, a patient in the final stages of adenocarcinoma cancer, was referred to Dr. Morris. Mr. Mahoney sought a prescription for AID medication, which he intended to self-administer at home to facilitate his peaceful passing.

Dr. Morris, however, was aware that Defendants had promulgated a policy (the "Policy") prohibiting their physicians from prescribing such medication and did not want to violate the Policy without first obtaining a court order determining her legal rights, and Mr. Mahoney's rights, under the Act and other relevant laws. Accordingly, Dr. Morris and Mr. Mahoney filed a request for declaratory relief with this Court seeking a judicial declaration that Defendants could not

lawfully prohibit Dr. Morris from providing AID related services to Mr. Mahoney under the terms of EOLOA and Colorado's Corporate Practice of Medicine statute.

Nevertheless, only a few days after the action was filed, the claims seeking declaratory relief were rendered moot. This is because Defendants terminated Dr. Morris' employment and she could therefore no longer treat any patients, including Mr. Mahoney, at Defendants' facilities. Dr. Morris therefore filed an amended complaint, dropping the claims for declaratory relief and instead asserted employment claims relating to her unlawful termination by Defendants.

In their Answer, Defendants assert 21 affirmative defenses, including numerous defenses arguing that Plaintiff's employment claims are barred by the United States Constitution and the Colorado Constitution. (Defs. Answer at 20-21, ¶¶ 2-11). In the same pleading, Defendants also bring a single counterclaim against Plaintiff seeking the following declaratory relief:

> [A] judicial declaration that neither the EOLOA nor the Corporate Practice of Medicine statute can, consistent with the First and Fourteenth Amendments…be applied to the activities of a religious healthcare organization in a way that compels it to allow its employees to participate in providing services that support or carry out assisted suicide, which is contrary to its strongly held, fundamental beliefs, mission and purposes.

(*Id*. at 23, ¶ 6).

In this Motion, Dr. Morris asks the Court to dismiss Defendants' counterclaim for declaratory judgment under C.R.C.P 12(b)(1) and C.R.C.P. 12(b)(5) because (1) this Court lacks subject matter jurisdiction over the claim, (2) Defendants have failed to state a claim under which relief may be granted under C.R.C.P. 57, and (3) Defendants' counterclaim will serve no useful purpose because it is duplicative of their affirmative defenses.

II. STANDARDS OF REVIEW

A. Subject Matter Jurisdiction

Motions to dismiss for lack of subject matter jurisdiction are governed by C.R.C.P. 12(b)(1). In considering a motion to dismiss for lack of subject matter jurisdiction, a trial court examines the substance of the claim based on the facts alleged and the relief requested. *W. Colo. Motors, LLC v. Gen. Motors, LLC*, 411 P.3d 1068, 1078 (Colo. App. 2016). When the trial court's subject matter jurisdiction is challenged, the party-proponent of a claim has the burden of proving that jurisdiction exists. *Bazemore v. Colorado State Lottery Div.*, 64 P.3d 876, 878 (Colo. App. 2002). If no such jurisdiction exists, any action taken by the court is a nullity, and thus dismissal is required if the court determines that it lacks subject matter jurisdiction. *People v. Sandoval*, 383 P.3d 92, 101 (Colo. App. 2016).

B. Failure to State a Claim

Claims (including counterclaims) that are legally insufficient or fail to plead an entitlement to relief must be dismissed under C.R.C.P. 12(b)(5). In evaluating motion to dismiss a complaint for failure to state a claim for relief, a court must consider only matters stated in the complaint and must not go beyond the confines of the pleading. *English v. Griffith*, 99 P.3d 90, 92 (Colo. App. 2004). While motions to dismiss for failure to state a claim are viewed with disfavor, they may properly be granted where "it appears beyond doubt that the [party-proponent] can prove no set of facts to sustain the claim." *Id*. Likewise, a complaint that fails to establish facts to sustain a claim for declaratory relief should be dismissed at the motion to dismiss stage. *Smith v. Krieger*, 643 F. Supp. 2d 1274, 1295 (D. Colo. 2009) (affirming dismissal of claims for declaratory relief).

III. ARGUMENT

A. Pursuant to C.R.C.P. 12(b)(1), the Court Lacks Subject Matter Jurisdiction to Adjudicate Defendants' Counterclaim.

Although district courts in Colorado are courts of general jurisdiction, "an actual controversy in an essential requisite to jurisdiction." *See* Colo. Const. art. VI, § 9; *Robertson v. Westminster Mall Co.*, 43 P.3d 622, 628 (Colo. App. 2001). Therefore, "[w]hen there is no **live** controversy between the parties, the trial court lacks subject matter jurisdiction to proceed." *Robertson,* 43 P.3d at 628 (emphasis added). Furthermore, any potential resolution by the court of a declaratory judgment action "must relieve the parties of uncertainty and insecurity with respect to their rights, status, and legal relations" to establish jurisdiction. *See id.* (reversing trial court declaration that regulation was unconstitutional, where trial court lacked subject matter jurisdiction over the issue).

Similar to *Robertson*, Defendants' counterclaim does not present the live controversy needed to establish this Court's subject matter jurisdiction. Defendants admit they terminated Dr. Morris on August 26, 2019, severing the employment relationship and rendering the instant claim for declaratory judgment moot. (Defs. Answer at ¶¶ 145-46). Defendants now attempt to recreate a live controversy by asserting:

1. A controversy exists between Plaintiff and Defendants regarding whether the EOLOA or the Corporate Practice of Medicine statute can be applied so as to force a religious healthcare organization to provide AID medication; and

2. A controversy exists between them and Plaintiff "as to whether [they] must employ and retain a physician who--in open violation of her agreement with the Defendants, Defendants' values and practices, and Defendants' published policy--began the process of qualifying a patient for the administration of lethal drugs."

(Defs. Answer at 23) (emphasis added).

These assertions may well present a live controversy between Defendants and one of their currently employed physicians. But Dr. Morris is not employed by Defendants, and any controversy between Centura and Dr. Morris regarding the legality of Centura's Policy as applied to Dr. Morris became moot when her employment was terminated.

In addition, Defendants ask the Court to determine whether they must employ and retain a physician who began the process of qualifying a patient for the administration of lethal drugs. However, during the time that Plaintiff was employed by Defendants she never "began the process of qualifying" Mr. Mahoney for the administration of AID medication.[1] Thus, as applied to Dr. Morris, Defendants' request for declaratory judgment seeks an answer to a purely hypothetical question that doesn't involve Dr. Morris in any way. Because Dr. Morris is neither employed by Defendants nor ever began the process of qualifying Mr. Mahoney for AID medication, Defendants' declaratory judgment action seeks answers to hypothetical questions that may affect Defendants' relationships with its current employees, but does not portend to Dr. Morris, a former employee. *See Stell v. Boulder Cnty. Dep't of Soc. Servs.*, 92 P.3d 910, 914 (Colo. 2004) (courts lack subject matter jurisdiction under the doctrine of ripeness to consider uncertain or contingent future matters because the injury is speculative and may never occur); *Bd. of Directors v. Nat'l Union Fire Ins. Co.*, 105 P.3d 653, 656 (Colo. 2005) (ripeness requires that the issue be "real, immediate, and fit for adjudication.").

Notably, Defendants' framing of the counterclaim undermines their contention that the counterclaim presents an actual controversy. By asking the Court to decide, for example, the

[1] Defendants' Counterclaim is noticeably bereft of factual allegations supporting its request for declaratory relief. Defendants have not pled any facts, nor could they, that Dr. Morris took any steps to qualify Mr. Mahoney for aid-in-dying.

alleged "controversy" of whether Defendants must employ and retain a physician who began the EOLOA process, this query necessarily contemplates a current employee. But Dr. Morris is not employed by Defendants and so cannot be retained. Rather than wait for this Court to resolve the legality of Defendants' Policy regarding aid-in-dying, Defendants deprived this Court of subject-matter jurisdiction by terminating Dr. Morris without awaiting a judicial order declaring the parties' respective rights. This case is no longer about the legality of Defendants' Policy. It is strictly about whether Defendants lawfully terminated Dr. Morris' employment.

Accordingly, Defendants have not established this Court's subject matter jurisdiction over their counterclaim against Dr. Morris for declaratory relief and thus it should be dismissed pursuant to C.R.C.P. 12(b)(1).

B. Defendants' Counterclaim Fails to State a Claim Upon Which Relief May be Granted Under C.R.C.P. 57.

Even if the Court were to find subject matter jurisdiction, Defendants have failed to state a claim for relief and the counterclaim should be dismissed. The general or primary purpose of declaratory judgments statute is to provide "ready and speedy remedy, in case of actual controversy, for determining issues and adjudicating legal rights, duties or status of parties to action for such judgment before controversies with regard thereto lead to repudiation of obligations, invasion of rights and commission of wrongs." *Am. Family Mut. Ins. Co. v. Bowser*, 779 P.2d 1376, 1380 (Colo. App. 1989) (emphasis added); *see also Smith*, 643 F.Supp. 2d at 1295 ("A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act.") (emphasis added). As such, declaratory judgments are intended to provide early relief from uncertainty as to the future obligations for one who would normally be a defendant and who otherwise would not

have his questions adjudicated until his adversary takes the initiative. *Id.* "It is a procedural, not a substantive, remedy." *Id.*

Although declaratory relief is generally subject to the discretion of the trial court, the trial court must declare the rights of the parties only when the complaint sets forth a viable claim for such relief. This requires sufficient facts to demonstrate the existence of a "justiciable controversy." *See Heron v. City & Cty. of Denver*, 411 P.2d 314, 316 (Colo. 1966) ("Declaratory judgment proceedings may not be invoked . . . unless and until a justiciable issue or a specific legal controversy involving the application of the [law] in question is actually before the court for determination."). And in general, "no justiciable controversy is presented when . . . there is no standing to maintain the action." *Flast v. Cohen,* 392 U.S. 83, 95 (1968).

i. Defendants' Counterclaim Seeks an Advisory Opinion

Declaratory judgment actions call, "not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." *Id*. (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937)); *see also Alvarez v. Smith*, 558 U.S. 87, 93 (2009) ("a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words "Cases" and "Controversies.").

In this case, Defendants are seeking a declaration that the EOLOA and the Corporate Practice of Medicine statute cannot compel them to permit their employees to provide aid-in-dying medication to patients. (Defs. Answer at 23, ¶ 6). This request calls for the exact type of advisory opinion the courts have long prohibited. Defendants have not asserted any present dispute with an actual (as opposed to former) employee who is currently attempting to provide such medication in

purported contravention of the Policy. Thus, any type of harm to Defendants is merely speculative and a declaration by this Court would have no present effect.[2]

ii. Defendants Lack Standing

To have standing to bring a declaratory judgment action, the party seeking a declaration must assert a legal basis on which a claim for relief can be grounded. *Farmers Ins. Exch. v. Dist. Court for Fourth Judicial Dist.*, 862 P.2d 944, 947 (Colo. 1993). The plaintiff must allege an injury in fact to a legally protected or cognizable interest. *Id.* Any indirect, incidental pecuniary injury is not sufficient to confer standing. *Id.*

In addition to Defendants' request for an advisory opinion, Defendants have failed to establish standing to assert a claim for declaratory relief. In their counterclaim, Defendants fail to allege any type of present or future injury they are currently suffering or will suffer should this court decide not to afford declaratory relief. Given that Defendants have brought numerous affirmative defenses, the lack of declaratory relief will not affect its ability to defend this case. Thus, Dr. Morris (and the Court) can only speculate about any injury to Defendants.

Because Defendants are seeking an advisory opinion from this Court and lack standing, Defendants have failed to assert, within the confines of their pleading, a justiciable controversy. The counterclaim should be dismissed.[3]

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[2] Indeed, if the counterclaim were to proceed, it would raise legitimate questions regarding (1) the joinder of necessary parties (i.e., current employees who are actually subject to the Policy) and (2) the fairness of requiring Dr. Morris to litigate issues that apply exclusively to others.

[3]Having challenged the constitutionality of two Colorado statutes in their counterclaim, Defendants were also required to serve a copy of their pleading to the Attorney General within 21 days of the filing. *See* C.R.C.P 57(j). To date, Plaintiff's counsel has not seen any record of the required notice.

C. Defendants' Counterclaim Serves No Useful Purpose and is More Appropriately Litigated through Defendants' Own Affirmative Defenses.

A court may refuse to render or enter a declaratory judgment or decree "where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." C.R.C.P. 57. A court may also refuse to grant declaratory relief where the relief will neither serve a valid legal purpose nor have a practical effect upon a controversy. *See President's Co. v. Whistle*, 812 P.2d 1194, 1197 (Colo. App. 1991) (upholding the dismissal of a request for declaratory relief where the action presented an issue that would necessarily be settled in another pending state or federal action).

Even if this Court were to find proper jurisdiction over Defendants' counterclaim and a justiciable controversy, this Court should dismiss the claim because it is duplicative of Defendants' affirmative defenses and thus serves no useful purpose in this pending action.[4] In fact, courts have repeatedly held that declaratory judgments are unnecessary, improper, and should be dismissed where, as here, there is an actual pending controversy before the court that is an appropriate vehicle for resolution of the issues raised. *See, e.g, Murray v. Kerr-McGee Oil & Gas Onshore, LP*, No. 17-CV-02174-RM-KMT, 2018 WL 4697329, at *9 (D. Colo. July 26, 2018) ("[T]his court has found no authority to allow parties to assert a counterclaim while simultaneously asserting an affirmative defense on precisely the same grounds."); *L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.*, 69 F. Supp. 3d 1136, 1145 (D. Colo. 2014) (dismissing counterclaim "duplicative of

[4] C.R.C.P. 12(f) allows the court to strike from any pleading "any redundant, immaterial, impertinent, or scandalous matter." (emphasis added). In addition, "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court . . . shall treat the pleading as if there had been a proper designation." C.R.C.P. 8(c) (emphasis added); *see also Murray v. Kerr-McGee Oil & Gas Onshore, LP*, No. 17-CV-02174-RM-KMT, 2018 WL 4697329, at *9 (D. Colo. July 26, 2018) (discussing the analogous Fed. R. Civ. P 8(c)).

the Defendants' pending affirmative defense"); *Encore Furniture Thrifts & More, LLC v. Doubletap, Inc.,* 281 F. Supp. 3d 665, 669 (M.D. Tenn. 2017) (presumption that a declaratory judgment action should be dismissed or stayed in favor of a substantive suit, even when filed first); *Riviera Distrib., Inc. v. High-Top Amusements, Inc.,* No. 07-1239, 2008 WL 687385, at *4 (C.D. Ill. Mar. 11, 2008) ("declaratory relief is not available when a lawsuit is already pending and requires resolution of the same issues").

Defendants' counterclaim "assert[s] no more than what would be a defense to the . . . action brought by [Dr. Morris] . . . ." *Product Engineering & Mfg., Inc. v. Barnes,* 424 F.2d 42 (10th Cir. 1970). Thus, if this Court dismisses the declaratory judgment action, Defendants will still have every opportunity to assert their constitutional defenses, which have been appropriately pled as affirmative defenses. Defendants have a "meaningful remedy"—they "may seek summary judgment on [their] affirmative defense[s]"—that is no less effective or efficient than pursuing a separate counterclaim. *L-3 Commc'ns Corp.*, 69 F. Supp. 3d at 1145. The counterclaim is thus redundant and unnecessary as the legal issues raised are appropriately resolved in the normal course of litigation.

IV. CONCLUSION

Defendants' counterclaim for declaratory judgment should be dismissed for a lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1) because Defendants have failed to prove the existence of a live controversy between the parties. Similarly, Defendants have failed to plead a justiciable controversy as required to sustain an action for declaratory relief under C.R.C.P. 57 and the counterclaim should be dismissed pursuant to C.R.C.P. 12(b)(5). Lastly, if the Court were to somehow find jurisdiction and a properly plead claim for declaratory relief, the counterclaim

should still be dismissed at the Court's discretion because it is duplicative of Defendants' affirmative defenses.

WHEREFORE, Plaintiff Barbara Morris, MD, requests that Defendants' counterclaim be dismissed with prejudice, and for such other relief as the Court deems just and proper.

DATED this 24th day of January, 2020.

FOSTER GRAHAM MILSTEIN & CALISHER, LLP

/s/ Jason M. Spitalnick
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of January, 2020, a true and correct copy of the foregoing **PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM FOR DECLARATORY RELIEF PURSUANT TO RULE 12(b)(1), RULE 12(b)(5) AND RULE 57** was electronically served via *Colorado Courts E-Filing* upon all parties/counsel of record.

/s/ Tiffany Noel
Tiffany Noel