

<p>DISTRICT COURT, ARAPAHOE COUNTY, COLORADO</p> <p>7325 S. Potomac Street Centennial, Colorado 80112</p> <hr/> <p>STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL,</p> <p>Plaintiff,</p> <p>v.</p> <p>COLORADO HUMANE SOCIETY &amp; S.P.C.A., INC.; MARY C. WARREN, an individual; ROBERT WARREN, an individual; and STEPHENIE L. GARDNER, an individual;</p> <p>Defendants.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p>JOHN W. SUTHERS, Attorney General ALISSA HECHT GARDENSWARTZ Assistant Attorney General, 36126* LEEANN RICHEY Assistant Attorney General, 38724* JAY B. SIMONSON First Assistant Attorney General, 24077* 1525 Sherman Street, 7<sup>th</sup> Floor Denver, CO 80203 (303) 866-5079 (303) 866-4916 Fax *Counsel of Record</p>	<p>Case No.:</p> <p>Div:</p>
<p style="text-align: center;"><b>MOTION FOR PRELIMINARY INJUNCTION, ORDER APPOINTING RECEIVER AND FOR FORTHWITH HEARING</b></p>	

Plaintiff, the State of Colorado, upon relation of John W. Suthers, Attorney General for the State of Colorado, by and through undersigned counsel, herby moves this Court to issue a preliminary injunction pursuant to Colo. Rev. Stat. § 6-1-110(1), Colo. Rev. Stat. § 7-134-302(3) and Rule 65, C.R.C.P., and to issue an order appointing a custodian for the assets of the Colorado Humane Society & S.P.C.A., Inc. (“CHS”) pursuant to Colo. Rev. Stat. §§ 7-134-302(3) and 7-134-303. The Attorney General also requests the Court to schedule a forthwith hearing to address the Motion. In support of his Motion, the Attorney General states as follows:

## **INTRODUCTION**

1. This Motion is made pursuant to Colo. Rev. Stat. § 6-1-110(1), which permits the Attorney General to bring this action to enjoin violations of the Colorado Consumer Protection Act (“CCPA”), the purpose of which is to protect consumers. The Motion additionally is made pursuant to Colo. Rev. Stat. § § 7-134-302(3) and 303, which permit this Court, in a proceeding to judicially dissolve a nonprofit corporation, to issue an injunction and appoint a custodian to preserve corporate and charitable assets. The Attorney General hereby incorporates by reference his Complaint and Petition for Appointment of Custodian or for Dissolution (the “Complaint”) filed contemporaneously with this Motion.

2. The Attorney General seeks issuance of a preliminary injunction and appointment of a custodian in this matter because Defendants Mary Warren, Robert Warren, and Stephenie Gardner are operating CHS, a nonprofit corporation, in violation of Colorado law, and in violation of its own Articles of Incorporation and Amended Bylaws. Moreover, Individual Defendants’ financial mismanagement of CHS has led to significant diminishing of CHS assets, and there is imminent danger of CHS assets being further dissipated unless Individual Defendants are prevented from further operating CHS, and a custodian is appointed to manage the assets pending the resolution of the underlying action.

## **FACTUAL BACKGROUND**

3. Defendant CHS is a Colorado nonprofit corporation formed on August 6, 1881, with its principal place of business located at 2760 S. Platte River Drive, Englewood, CO 80110. CHS provides shelter, veterinarian care, and adoption services for surrendered and stray animals. Within the past four years, CHS also provided animal control services for the City of Colorado Springs, and has provided animal housing services for Arapahoe County, the City of Littleton, CO, and the City of Englewood, CO.

4. The Attorney General’s Complaint details numerous ongoing violations of the Colorado Charitable Solicitations Act, Colo. Rev. Stat. §§ 6-16-101 through 114 (2008) (“CCSA”), the Pet Animal Care and Facilities Act, Colo. Rev. Stat. §§ 35-80-101 through 117 (2008) (“PACFA”), the CCPA, Colo. Rev. Stat. §§ 6-1-101 through 1115 (2008), and the Colorado Revised Nonprofit Corporation Act, Colo. Rev. Stat. §§ 7-121-101 through 137 (2008) (“CRNCA”). The Complaint additionally alleges the continuing wasting and misuse of CHS assets by Defendants Mary Warren, Robert Warren and Stephenie Gardner (collectively “Individual Defendants”), who are respectively the Executive Director, Director of Development, and Director of Operations of CHS. Defendant Mary Warren is also a member of the CHS Board of Directors.

5. As is detailed in the Attorney General's Complaint, Individual Defendants have greatly compromised CHS assets by continually operating CHS in violation of Colorado law. For example, Individual Defendants did not properly register CHS with the Colorado Secretary of State Charities Division, allowing the organization to solicit over \$3 million in donations from 2004 through 2007 in violation of the CCSA. *See* Colo. Rev. Stat. § 6-16-111(1)(a). Individual Defendants also caused CHS to violate the CCSA by misrepresenting to Colorado consumers how their donations would be used. *See Id.* § 6-16-111(1)(g) and (i). Under Individual Defendants' control, CHS additionally violated PACFA by misrepresenting CHS's euthanasia policy and its euthanasia rate. *See Id.* § 35-80-108(2)(f). These violations of the CCSA and PACFA also constitute violations of the CCPA, subjecting CHS to significant financial liabilities, including potential civil penalties and attorneys fees. *See Id.* §§ 6-16-111(5), 6-1-105(1)(hh), 35-80-108(4), 6-1-105(1)(oo) and 6-1-112 and 113.

6. Individual Defendants also have run CHS without any regard to its Articles of Incorporation and Amended Bylaws, and without regard for certain required corporate formalities, such as keeping board meeting minutes and proper accounting records. *See* Affidavit of Rebecca Wild, attached hereto as **Exhibit A**, at ¶¶3 and 4.

7. In fact, CHS does not have a legitimate functioning Board of Directors to oversee its operations. According to filings with the Colorado Secretary of State, CHS currently has only two Board members: Defendant Mary Warren, and Stephen Hallberg. *See* The Colorado Humane Society & S.P.C.A., Inc. Registration Statement for Colorado Charitable Organizations, attached hereto as **Exhibit B**.

8. However, CHS's Articles of Incorporation and Amended Bylaws require that there be seven members on the CHS Board of Directors. *See* The Colorado Humane Society & S.P.C.A. Amended Bylaws, attached hereto as **Exhibit C**, at DAVIS 0157. Under Individual Defendants' control, CHS has not had a Board consisting of more than three members since at least 2004.

9. As is detailed in the Complaint, Individual Defendants have also significantly mismanaged CHS's finances, including co-mingling CHS assets with their own personal funds. Specifically, Defendants Mary and Robert Warren claim to have loaned CHS thousands of dollars without having any formal documentation of those loans, and without approval from the Board of Directors.

10. Moreover, as detailed in the Complaint, Individual Defendants squandered an opportunity to build a new CHS shelter with the support of the City of Littleton and the City of Englewood, who were willing to donate land for the new shelter so long as CHS raised money for and built the shelter. Despite having specific fundraising goals for a capital campaign to finance the construction of a new shelter and having architect plans developed

for the site, Defendant Robert Warren's inability to effectively raise funds rendered the land donations meaningless.

11. CHS's finances continue to founder under Individual Defendants' management. The last payment that CHS made for its workmen's compensation insurance bounced, and a recent payroll payment was made from the personal accounts of Defendants Mary and Robert Warren. *See Exhibit A* at ¶ 5.

12. Additionally, CHS derives significant monthly income from providing animal housing services for the City of Littleton and the City of Englewood. CHS has recently inexplicably terminated its animal housing contract with the City Of Littleton. *See Exhibit A* at ¶6.

13. Defendants Mary and Robert Warren are further compromising CHS assets by illegally operating a veterinary clinic in CHS's name in the City of Littleton. On December 8, 2008, a Summons and Complaint alleging an improper failure to file a site development plan was served upon Defendant Mary Warren. *See* Affidavits of Pam Hall and Rebecca Thompson, attached hereto as **Exhibits D and E**.

14. Finally, and perhaps most alarmingly, Individual Defendants purportedly have started removing records from the CHS premises upon learning of the Attorney General's intention to seek a custodian for the CHS assets. *See Exhibit A* at ¶5.

## **APPLICABLE LEGAL STANDARDS**

### **I. Preliminary Injunction**

15. This Court is expressly authorized to issue a preliminary injunction to enjoin ongoing violations of the CCPA by Colo. Rev. Stat. § 6-1-110(1):

(1) Whenever the attorney general or a district attorney has cause to believe that a person has engaged in or is engaging in any deceptive trade practice listed in section 6-1-105 or part 7 of this article, the attorney general or district attorney may apply for and obtain, in an action in the appropriate district court of this state, a temporary restraining order or injunction, or both, pursuant to the Colorado rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof.

C.R.S. § 6-1-110(1)

16. Additionally, the Attorney General is seeking potential judicial dissolution of CHS pursuant to the CRNCA, Colo. Rev. Stat. § 7-134-301(1)(b), for continuing to exceed or abuse the authority conferred upon it by law. In such a proceeding, the Court may issue an injunction to preserve corporate assets until a full hearing can be held. *See* Colo. Rev. Stat. § 7-134-302(3).

17. In order to obtain a preliminary injunction, a plaintiff must show (1) a reasonable probability of success on the merits; (2) a danger of immediate and irreparable injury; (3) that there is no adequate remedy at law; (4) that the public interest favors granting the relief; (5) that the balance of equities favors the relief sought; and (6) that the remedy will preserve the status quo. *See Rathke v. MacFarlane*, 648 P.2d 648 (Colo. 1982).

18. Because the Colorado Attorney General is seeking a preliminary injunction on behalf of the State of Colorado to enforce state laws affecting the public interest, he is not required to plead or prove immediate or irreparable injury. *Baseline Farms Two, LLP v. Hennings*, 26 P.3d 1209, 1212 (Colo. App. 2001); *Lloyd A. Fry Roofing Co. v. State Department of Air Pollution*, 553 P.2d 800 (Colo. 1976).

## **II. Appointment of a Custodian**

19. The Attorney General's petition for dissolution in the underlying Complaint in this matter additionally permits this Court to appoint a custodian for the CHS assets. Colo. Rev. Stat. § 7-134-302(3) states:

A court in a proceeding brought to dissolve a nonprofit corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the activities of the nonprofit corporation until a full hearing can be held.

20. Colo. Rev. Stat. § 7-134-303(1) further provides that:

A court in a judicial proceeding to dissolve a nonprofit corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the affairs of the nonprofit corporation. The court shall hold a hearing, after giving notice to all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the nonprofit corporation and all of its property, wherever located.

21. The appointment of a custodian or a receiver is an equitable remedy available when necessary to protect property or rights. *See Eureka Coal Co. v. McGowan*, 212 P. 521 (Colo. 1922). Whether to appoint a receiver is within the sound discretion of the trial court. *Joufflas v. Wyatt*, 646 P.2d 946, 947 (Colo. App. 1982); *GE Life and Annuity Assur. Co. v. Fort Collins Assemblage, Ltd.*, 53 P.3d 703, 704 (Colo. App. 2001). A receiver or custodian does not serve the plaintiff or the defendant – he is an officer of the Court charged with the impartial exercise of the duties thus prescribed by the Order appointing the custodian or receiver. *See Hart v. Ed-Ley*, 482 P.2d 421, 425 (Colo. App. 1971).

22. The appointment of a receiver or custodian is critical to preserve corporate or charitable assets. *See Waag v. Hamm*, 10 F. Supp.2d 1191, 1193 (D. Colo. 1998)(recognizing the necessity of receivers to protect property that may be in jeopardy). Among the factors courts have considered in appointing a receiver or custodian include: (1) the existence of a valid claim by the moving party; (2) the probability that fraudulent conduct has occurred or will occur to frustrate the claim; (3) the imminent danger that property will be lost, concealed or diminished in value; and (4) the likelihood that a receiver will do more harm than good. *Id.*

## ANALYSIS

### **I. A Preliminary Injunction is Necessary to Prevent Defendants from Continuing to Deceive and Mislead Colorado Consumers, and to Protect CHS Assets.**

23. Individual Defendants must be preliminarily enjoined from engaging in the conduct that has given rise to the Attorney General’s Complaint, and from operating CHS. Through their violations of the CCSA, PACFA, and the CCPA, Defendants have illegally obtained millions of dollars from Colorado consumers. Specifically, Defendants have solicited for donations in Colorado without being properly registered under the CCSA, in violation of Colo. Rev. Stat. § 6-16-111(1)(a) and misrepresented how donations to CHS would be used, in violation of Colo. Rev. Stat. § § 6-16-111(1)(g) and (i). Additionally, Defendants have induced and continue to induce Colorado consumers to make donations to CHS and to pay CHS for services related to taking in surrendered pets by misrepresenting CHS’s euthanasia rate and policies, in direct violation of Colo. Rev. Stat. § 35-80-108(2)(f). An injunction is required to prevent Defendants from illegally obtaining more money from Colorado consumers.

24. Moreover, an injunction is required to prevent Individual Defendants from further misusing and wasting CHS assets. Individual Defendants have been operating CHS in violation of its Articles of Incorporation and Amended Bylaws for a number of years, and continue to do so currently. Operating CHS without a valid Board of Directors renders all

actions taken by the corporation *ultra vires* and exposes the corporation to significant liabilities. Individual Defendants are also illegally operating a veterinary clinic under the CHS name, exposing the corporation to additional serious liabilities.

25. The elements for issuing a preliminary injunction are clearly present in this matter. First, the Attorney General is likely to succeed on the merits in this action. The Attorney General is filing his Complaint after investigating CHS for over a year, and has substantial evidence that CHS has violated the CCSA, PACFA, the CCPA and the CRNCA. For example, Colorado Secretary of State records show unequivocally that CHS solicited donations for three years without being properly registered under the CCSA. Similarly, Defendants have clearly misrepresented CHS's euthanasia policy, as the policy stated in the CHS Employee Handbook directly conflicts with CHS's publicly-stated euthanasia policy. Finally, Defendant Mary Warren has admitted to operating CHS with less than the requisite number of Board of Directors, and to serving on the CHS Board for over eighteen years, which is clearly prohibited by the CHS Amended Bylaws. In sum, the Attorney General is highly likely to show that Defendants have violated and continue to violate Colorado law.

26. While the Attorney General is not required to show immediate and irreparable injury because he is enforcing state laws that affect the public interest, there is no question that a danger of immediate and irreparable harm exists in this action. The Individual Defendants' deceptive practices are injurious to the public; and continued violations, if not enjoined, will cause immediate and irreparable injury. Immediate and irreparable injury to additional consumers will occur without a preliminary injunction because Defendants will continue to obtain money from Colorado consumers by deceptive and misleading representations. Additionally, immediate and irreparable injury will result to CHS if Individual Defendants are permitted to continue operating CHS. They have already subjected CHS to significant civil penalties pursuant to the CCPA, they have subjected CHS to a lawsuit by the City of Littleton by operating a veterinary clinic illegally, and they are jeopardizing CHS's financial health by terminating its contract for animal housing with the City of Littleton, leaving it with only one contract for animal housing. Moreover, Individual Defendants use of CHS assets for personal benefit jeopardizes the organization's tax-exempt 501(c)(3) status. If Individual Defendants are permitted to continue operating CHS, it is unclear whether CHS, an organization that has been in existence since 1881, will continue to survive.

27. Additionally, this Court should issue an injunction because there is no adequate remedy at law. As a preliminary matter, the relief sought in the underlying Complaint is solely equitable in nature – the Attorney General is seeking injunctive relief, restitution, disgorgement and civil penalties pursuant to the CCPA, as well as the appointment of a custodian pursuant to Colo. Rev. Stat. § 7-134-303. That aside, Individual Defendants' mismanagement of the CHS assets goes beyond depriving the organization of financial viability. As a charitable organization that relies on donations from the public, Individual

Defendants' mismanagement of CHS and the resulting damage to CHS's image, and possibly its tax-exempt 501(c)(3) status, severely hampers its ability to solicit donations going forward. An injunction must issue in this matter simply because no amount of monetary damages can restore CHS as a viable charity if Individual Defendants continue to waste its primary asset: its reputation.

28. Third, the public interest unquestionably favors granting a preliminary injunction in this matter. Defendants have violated laws intended to protect the public from being misled and deceived, and to protect the public from donating money to illegitimate charities. *See, e.g.*, Colo. Rev. Stat. § 6-16-102 (The General Assembly passed the CCSA to "protect the public's interest in making informed choices as to which charitable causes should be supported.") A preliminary injunction is necessary to ensure that Colorado consumers are not further misled into donating money to CHS, or misled into bringing their pets to CHS under the erroneous assumption that they have a better chance of not ultimately being euthanized there versus another animal shelter. Additionally, it is in the public interest to preserve CHS's remaining assets, and thus its ability to continue functioning as a viable animal welfare organization in Colorado.

29. Fourth, the balance of equities favors entering a preliminary injunction against Defendants. Individual Defendants have continued to benefit personally from their illegal activities, and preventing them from further engaging in these activities, which harm the public at large, far outweighs any hardship Individual Defendants might incur as a result of this Court issuing an injunction.

30. Finally, the issuance of a preliminary injunction is required to preserve the status quo, *i.e.*, the current state of CHS's assets. As stated above, Individual Defendants have purportedly started to remove CHS records from the premises. An injunction must issue with all due haste to ensure that CHS assets remain in tact.

## **II. A Court-Appointed Custodian is Required to Manage CHS Assets.**

31. Because Individual Defendants have misused and wasted CHS assets, and continue to misuse and waste CHS assets, and because Individual Defendants continue to operate CHS in violation of its own Articles of Incorporation and Amended Bylaws, it is proper and necessary for this Court to appoint a custodian for the CHS assets.

32. As stated above in paragraphs 7 and 8, CHS has been operating without a valid Board of Directors for a number of years. Under such circumstances, it is the duty of the Court to appoint a custodian to oversee CHS assets. *See Eureka Coal Co. v. McGowan*, 212 P. 521 (Colo. 1922)(where there is no board of directors to manage corporate property, it is the duty of the court to take charge of the property through a receiver until the emergency passes).

33. Moreover, an examination of the factors that courts typically look at in determining whether to appoint a receiver or custodian clearly shows that the facts here require such an appointment. First, it is without question that the Attorney General has a valid claim – he is statutorily authorized to seek judicial dissolution of a nonprofit corporation that has continued to exceed or abuse the authority conferred upon it by law. *See* Colo. Rev. Stat. § 7-134-301(b). Not only have Individual Defendants caused CHS to violate the laws that govern charities and nonprofit corporations in Colorado, but they have continually operated CHS without a valid Board of Directors for many years. The Attorney General therefore has a valid claim in seeking a custodian in this action pursuant to Colo. Rev. Stat. § § 7-134-302(3) and 303.

34. Second, a custodian or receiver is appropriate where “active fraud and deceit appear, where the corporation is insolvent . . . and because thereof its property and assets are in danger of being dissipated or lost . . .” *Diaz v. Fernandez*, 910 P.2d 96, 97 (Colo. App. 1995), citing *Savageau v. Savageau*, 285 P.2d 810, 813 (Colo. 1955). Under this standard, the facts in this matter strongly suggest that a custodian should be appointed for the CHS assets. As detailed in the Complaint, Defendants collected thousands of dollars from Colorado consumers ostensibly to support CHS efforts to rescue animals from Hurricane Katrina-affected areas only to use those monies for ordinary operating expenses. Moreover, Defendants cannot properly account for their expenditures related to Hurricane Katrina. Additionally, Individual Defendants Mary and Robert Warren claim to have “loaned” tens of thousands of dollars to CHS and received repayment for those loans without any formal documentation of the loans, and without reporting those loans to the CHS Board of Directors. Most recently, upon hearing of the Attorney General’s intent to seek a custodian for CHS assets, Defendants Mary and Robert Warren reportedly began removing documents from the CHS premises. A custodian must be appointed to remove current CHS management such that CHS assets can be maintained.

35. Third, there is an imminent danger that CHS assets will be significantly diminished in value if they continued to be managed by Individual Defendants. CHS has struggled in recent months to stay current on workers compensation insurance payments, and to make payroll. Despite these financial difficulties, Individual Defendants inexplicably terminated CHS’s animal housing contract with the City of Littleton, which is a source of reliable monthly income for the organization. Moreover, Defendants Mary and Robert Warren are illegally operating a veterinary clinic on another property under the CHS name, which is greatly diminishing the value of the corporation and subjecting it to legal action. It is imperative that the Court appoint a custodian such that the remaining value in CHS assets is preserved and not further diminished by Individual Defendants.

36. Finally, an appointed custodian will not do more harm than good. Individual Defendants’ mismanagement of CHS has compromised its assets, including its ability to properly raise and receive donations from the public. Appointing a custodian in this matter

to protect CHS assets will give CHS a greater chance of ultimately surviving and having an opportunity to fulfill its charitable mission of protecting stray and abandoned animals in Colorado.

### CONCLUSION

37. It is imperative that this Court issue a preliminary injunction and appoint a custodian to protect CHS assets pending the outcome of the underlying Complaint. The Individual Defendants have continually operated CHS in violation of Colorado law and have defrauded Colorado consumers. An injunction is necessary to prevent further damage to both CHS and the public. Moreover, a custodian is required to manage the CHS assets because CHS is not currently operating under a valid Board of Directors, and because Individual Defendants have mismanaged and continue to mismanage CHS assets such that they are in jeopardy of being significantly diminished in value, if not altogether extinguished.

WHEREFORE, the Attorney General respectfully requests that this Court issue an Order Issuing an Injunction and Appointing Receiver, in the form submitted, naming Richard A. Block custodian over Defendant The Colorado Humane Society & S.P.C.A., Inc., and enter and issue such further relief as this Court deems just and equitable.

Dated this 10th day of December 2008.

JOHN W. SUTHERS  
Attorney General

/s

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*Pursuant to C.R.C.P. 121, § 1-26(9), the original of this document with original signatures is maintained in the offices of the Colorado Attorney General, 1525 Sherman Street, Denver, CO 80203, and will be made available for inspection by other parties or the Court upon request.*

