

JUDICIAL ARBITER GROUP, INC.

JAG Case No. 08-1074

Parties:

EXEMPLA, INC.,
SISTERS OF CHARITY OF LEAVENWORTH HEALTH SYSTEM, INC.

and

COMMUNITY FIRST FOUNDATION.

DECISION AND AWARDS

The Arbiter issues this Decision and Awards, after an arbitration hearing was held from March 16- April 3, 2009 and after the parties submitted proposed findings of fact and conclusions of law. Herewith, but by separate document, the Arbiter made detailed findings of fact and conclusions of law.

I. Parties and Nature of the Dispute

Exempla, Inc., (Exempla) is a Colorado nonprofit corporation which owns and operates Lutheran Hospital, Good Samaritan Medical Center (GSMC) and related healthcare providers. Exempla also operates St. Joseph Hospital (SJH). Exempla-Healthcare is a service mark which is used to refer to the three hospital systems operated by Exempla.

Exempla Healthcare and Exempla, Inc., were formed in 1997, pursuant to the parties' execution of the Affiliation Agreements. As a not for profit corporation, Exempla named Community First Foundation (CFF) and Sisters of Charity of Leavenworth Health System (SCLHS) as Exempla's members or sponsors.

CFF, a Colorado nonprofit corporation, was formed in 1975 as Lutheran Medical Center Foundation. Later it was known as LMC Community Foundation. When CFF was formed, Lutheran Medical Center was the sole member of CFF.

SCLHS is a nonprofit Kansas corporation, formed by the Sisters of Charity of Leavenworth. In addition to owning SJH in Denver and operating SJH before the 1997 affiliation, SCLHS owns and operates nine hospitals in four states. Prior to the Affiliation Agreements, Sisters of Charity of Leavenworth operated SJH through Hospital Services Corporation (HSC).

Both LMC and SJH have an extended and noteworthy healthcare history and devoted community service in the Denver metropolitan area. SJH was founded by Sisters of Charity of Leavenworth over 130 years ago. SJH has always had a Catholic identity. Although owned by the Sisters of Charity of Leavenworth, SJH has been operated by Exempla since the Affiliation Agreement of 1997. SJH is located in downtown Denver at 17th and Franklin. LMC was originally a tuberculosis hospital when founded in 1906, but has operated as a full service acute care hospital for over forty years. Although its name implies otherwise, LMC is a secular community hospital. LMC is located in Westminster, Colorado and is the only acute care hospital in Jefferson County.

GSMC is located in Lafayette, Colorado and was opened in 2005. It is wholly owned by an Exempla subsidiary and operated by Exempla.

On January 8, 2008, Exempla filed suit in Denver District Court requesting that the Court invalidate a membership transfer agreement between CFF and SCLHS. Pursuant to the October 1, 1997 Affiliation Agreements between the parties, which contained an arbitration clause, on June 28, 2008, District Judge William Robbins compelled arbitration.

The parties entered into an Arbitration Process Agreement which appointed William Meyer as the sole arbiter and adopted the American Arbitration Association Rules for the Resolution of Commercial Disputes for procedural guidance.

The parties submitted Motions to Dismiss, Strike and for Summary Judgment. The Arbiter denied all motions with the exception of SCLHS/CFF's summary judgment motion. The Arbiter dismissed Exempla's Seventh Claim for Relief asserting that the proposed transfer violated Exempla's Articles of Incorporation. The Arbiter converted Exempla's Tenth Claim for Relief requesting a constructive trust into a potential remedy.

The arbitration hearing was held for three weeks beginning March 16, 2009. Twenty-five fact and expert witnesses testified. 276 exhibits were offered and received. The parties submitted proposed findings of fact and conclusions of law on May 4, 2009. The Arbiter closed the hearing on the date of the parties' submissions and, therefore, the arbitration is due on or before July 2, 2009.

II. Decision and Awards on Specific Claims for Relief

A. Exempla's Claims for Relief

1. Exempla's First Claim for Relief

a. Exempla's First Claim for Relief asserts that the proposed transaction will undermine Exempla's charitable purposes and specific objectives because the proposed transaction will violate the "dual tradition". The "dual tradition" is having a sectarian Catholic community tradition at SJH and a secular community tradition at LMC.

b. Exempla has failed to prove that Exempla's charitable purpose is to maintain a "dual tradition" hospital system.

c. Exempla has failed to establish that the transfer of CFF's membership to SCLHS would cause an unlawful change in Exempla's charitable purposes or specific objectives.

d. Exempla has not established that the charitable purposes and specific objectives of Exempla would prohibit the application of the Catholic doctrine or Ethical and Religious Directives (ERDs) at LMC and GSMC as a result of such transfer.

Exempla's First Claim for Relief is DENIED.

2. Exempla's Second Claim for Relief

a. Exempla's Second Claim for Relief alleges that the transfer of CFF's membership to SCLHS will breach the Affiliation Documents among the parties because it would result in Exempla no longer being operated as a "dual tradition" healthcare system.

b. Exempla has failed to establish that the Affiliation Documents require that the Exempla Healthcare System (the "Exempla System") be maintained for its entire existence as a "dual tradition" system.

c. Exempla has not established that the Affiliation Documents prohibit, or would otherwise be violated by, the mere transfer of CFF's membership to SCLHS or the application of the ERDs at LMC and GSMC as a result of such transfer.

Exempla's Second Claim for Relief is DENIED.

3. Exempla's Third Claim for Relief

a. Exempla's Third Claim for Relief alleges CFF and SCLHS owe fiduciary duties to Exempla and those duties will be violated as a result of the transfer of CFF's membership to SCLHS.

b. Assuming that CFF and SCLHS have a fiduciary duty to Exempla, there is no proof that such duty was violated or breached.

Exempla's Third Claim for Relief is DENIED.

4. Exempla's Fourth Claim for Relief

a. Exempla's Fourth Claim for Relief alleges that the transfer of CFF's membership to SCLHS would result in the Exempla directors breaching their fiduciary duties to Exempla.

b. Exempla has failed to prove that the directors or officers of Exempla would breach any fiduciary duties to Exempla by taking action to assist the members in connection with the transfer of CFF's membership to SCLHS.

Exempla's Fourth Claim for Relief is DENIED.

5. Exempla's Fifth Claim for Relief

a. Exempla's Fifth Claim for Relief alleges that the transfer of CFF's membership to SCLHS should not be permitted because the transfer constitutes a sale of Exempla's assets without the requisite approval of the Exempla Board, and because CFF is prohibited from selling its membership to SCLHS.

b. The transfer of CFF's membership to SCLHS is not a sale of Exempla's assets requiring approval by the Exempla Board under the Colorado Revised Nonprofit Corporation Act ("CRNCA"), §7-121-101, *et seq.*, CRS.

c. The transfer of CFF's membership for value to SCLHS violates the Colorado Revised Nonprofit Corporation Act. A transfer under the CRNCA cannot be for value since the member has no vested property rights in a membership and a member has no equity interest in a charitable nonprofit corporation.

Exempla's Fifth Claim for Relief is GRANTED, in part.

6. Exempla's Sixth Claim for Relief

a. Exempla's Sixth Claim for Relief alleges that the proposed transfer of CFF's membership to SCLHS violates Exempla's Bylaws because the Bylaws do not permit a change in Exempla's "secular community purpose".

b. Exempla has failed to prove that any section of the Exempla Bylaws bars the members from completing the transfer of CFF's membership to SCLHS, or that the members otherwise are barred from transferring a membership, except where the transfer is for value, which is prohibited.

Accordingly, Exempla's Sixth Claim for Relief is DENIED.

7. Exempla's Seventh Claim for Relief

a. Exempla's Seventh Claim for Relief alleges that the proposed transfer of CFF's membership to SCLHS violates Exempla's Articles of Incorporation.

b. The Arbitrator granted summary judgment in favor of the Respondents on this claim in the Arbitrator's Order on Respondents' Joint Motion for Summary Judgment dated March 13, 2009.

Exempla's Seventh Claim for Relief is DENIED.

8. Exempla's Eighth Claim for Relief

a. Exempla's Eighth Claim for Relief alleges that the Exempla Board concluded that the Exempla Bylaws do not permit the transfer of CFF's membership to SCLHS and acted reasonably in so doing. Therefore, Exempla contends this decision of the Exempla Board must be accepted if the Board acted reasonably in making that determination because of the doctrine of judicial nonintervention..

b. Exempla failed to prove that the transfer alone of CFF's membership to SCLHS is not permitted by the Exempla Bylaws.

c. The doctrine of judicial intervention does not apply to the instant determination of the Exempla Board of Directors.

Exempla's Eighth Claim for Relief is DENIED.

9. Exempla's Ninth Claim for Relief

a. Exempla's Ninth Claim for Relief requests a declaration from the Arbitrator that the members have forfeited their rights under the Amended and Restated Termination Agreement.

b. Exempla has failed prove that the transfer of CFF's membership in Exempla to SCLHS would constitute a breach of the Amended and Restated Termination Agreement.

Exempla's Ninth Claim for Relief is DENIED.

10. Exempla's Tenth Claim for Relief

a. Exempla's Tenth Claim for Relief requests that the Arbitrator impose a constructive trust upon any proceeds received by CFF as a result of the transfer of CFF's membership to SCLHS.

b. The Arbitrator previously concluded that a constructive trust is a remedy, not a claim for relief, and therefore granted summary judgment in favor of SCLHS/CFF on March 13, 2009.

c. Exempla has failed to prove its breach of fiduciary claim, the only claim upon which a constructive trust could be a proper remedy.

Exempla's Tenth Claim for Relief is DENIED.

B. SCLHS's Claims for Relief

1. SCLHS's First Claim for Relief

a. SCLHS's First Claim for Relief alleges that the proposed membership transfer is a lawful and proper exercise of the members' rights, and requests the Arbitrator

to enter an award providing appropriate relief and orders enabling SCLHS and CFF to consummate the transfer of CFF's membership to SCLHS.

b. The Exempla Bylaws permit and authorize either member of Exempla to transfer its membership to the other if both members agree, unless the transfer is for value.

c. The transfer of CFF's membership to SCLHS does not require approval by Exempla or the Exempla Board, is permitted under Exempla's Affiliation Documents, and does not violate Colorado law, as long as the transfer is not for value.

SCLHS's First Claim for Relief is GRANTED, in part.

2. SCLHS's Second Claim for Relief

a. SCLHS's Second Claim for Relief alleges that any payments to be made by SCLHS to CFF in connection with the transfer of CFF's membership to SCLHS are lawful and proper, and requests the Arbitrator to enter an award providing appropriate relief and orders that any consideration to CFF in connection with the membership transfer may be paid.

b. The CRNCA prohibits a transfer of a membership to another nonprofit member for value. A transfer under the CRNCA cannot be for value since the member has no vested property rights in a membership and a member has no equity interest in a charitable nonprofit corporation.

SCLHS's Second Claim for Relief is DENIED.

3. SCLHS's Third Claim for Relief

a. SCLHS's Third Claim for Relief alleges that SCLHS, as the sole remaining member of Exempla upon the consummation of the transfer of CFF's membership to SCLHS, will have the power under Section 3.6 of the Exempla Bylaws. membership to SCLHS.

b. Section 3.6 of the Exempla Bylaws is binding upon the parties and is not inconsistent with, nor does Section 3.6 violate, Colorado law or any Affiliation Document.

c. In accordance with Section 3.6 of Exempla's Bylaws, immediately upon the consummation of the transfer of CFF's membership to SCLHS, for no consideration, SCLHS shall have the sole and exclusive right to amend the Exempla Articles of Incorporation and Bylaws to make changes thereto, as well as exercise the other powers given SCLHS by §3.6.

SCLHS's Third Claim for Relief is GRANTED.

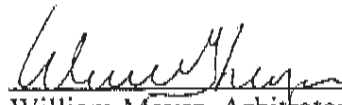
4. SCLHS's Fourth Claim for Relief

a. SCLHS's Fourth Claim for Relief alleges that Exempla has disputed the members' right to consummate the transfer of CFF's membership to SCLHS, and the members requests the Arbiter enter an award requiring Exempla's officers, directors and employees cooperate in the membership transfer and assumption of control by the sole remaining member.

b. The members of Exempla have the legal authority and right to transfer its membership to the other member.

c. Exempla and its agents should cooperate in any legal transfer of membership and assumption of control by the remaining member.

SCLHS's Fourth Claim for Relief is GRANTED.



William Meyer, Arbitrator
Judicial Arbiter Group
DATE: 6/5/09

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2009, I faxed by facsimile transmission, and mailed by U.S. Mail, postage pre-paid, a true and correct copy of the foregoing **Decision and Award** to the following:


B. Lawrence Theis, Esq.
Steven J. Perfrement, Esq.
James N. Philips, Esq.
Michael J. Hoffman, Esq.
Paul E. Smith, Esq.
Holme Roberts & Owen LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
FAX: 303-866-0200

Jay S. Horowitz, Esq.
Peter C. Forbes, Esq.
Horowitz/Forbes, LLP
1700 Lincoln Street
Suite 2940
Denver, CO 80203
FAX: 303-572-5111

Robert P. Thomasch, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
1225 17th Street
Suite 2300
Denver, CO 80202
FAX: 303-296-3956

William A. Lynch, Esq.
Robin V. Foster, Esq.
Sudee Wright, Esq.
Sudee Mirsafian Wright Husch Blackwell
Sanders, LLP
1200 Main Street, Suite 2300
Kansas City, MO 64105
FAX: 816-421-0596

The Honorable Layn R. Phillips
Alternative Dispute Resolution Center
Irell & Manella, LLP
840 Newport Center Drive, Suite 450
Newport Beach, CA 92660-9324
(U.S. Mail only)



Leah Stevens, Administrative Clerk
Judicial Arbitrator Group, Inc.