

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO

Court Address: City & County Building
1437 Bannock Street
Denver, Colorado 80202

**Plaintiff(s): EXEMPLA, INC., a Colorado nonprofit
corporation,**

v.

**Defendant(s): SISTERS OF CHARITY OF
LEAVENWORTH HEALTH SYSTEMS, INC., a
Kansas not-for-profit corporation, ST. JOSEPH
HOSPITAL, a Colorado nonprofit corporation, and
COMMUNITY FIRST FOUNDATION, a Colorado
nonprofit corporation, f/k/a LMC COMMUNITY
FOUNDATION**

v.

**Third-Party Defendants: WILLIAM F. JESSEE;
THOMAS T. GRIMSHAW; DENNIS CLIFFORD;
HOWARD P. DOERR; JOANN SOKER; LILLEE
SMITH GELINAS; RICHARD HESKY; DOROTHY
A. HORRELL; CLEYON LEE MULDER; ARNOLD
F. ROANE; JEFFREY D. SELBERG; JAMES D
THOMPSON; and DAVID A. WESTERLUND, all of
whom are members of the Exempla, Inc. Board of
Directors.**

▲ COURT USE ONLY ▲

Case Number: 2008CV188

Ctrm.: 7

COURT ORDER

Motion to Compel Arbitration and for Stay of Proceedings

THIS MATTER is before the Court pursuant to Defendants' Motion to Compel Arbitration and Stay Proceedings, filed through counsel on February 11, 2008. The Court has reviewed the motion, the response and reply filed thereto, as well as the Court's file and applicable authorities. Upon consideration thereof, the Court enters the following findings and order.

STANDARD OF REVIEW

An arbitration clause connected to interstate commerce is subject to the Federal Arbitration Act (“FAA”). *Grohn v. Sisters of Charity Health Services Colorado*, 960 P.2d 722 (Colo. App. 1998); *State Farm Mut. Auto. Ins. Co. v. Corviello*, 233 F.3d 710, 713 n.2 (3d Cir. 2000).

Whether arbitration has been waived is a question for the arbitrator, and “not for the judge.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Ansari v. Qwest Communications Corp.* 414 F.3d 1214, 1220 (10th Cir. 2005). According to the FAA, if the Court believes an arbitration agreement exists between the parties, “or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. §§ 3, 4. To compel arbitration, an agreement to arbitrate must be established and the issue “to be arbitrated” must be within the “scope of the arbitration clause.” *State Farm Mut. Auto. Ins. Co. v. Stein*, 886 P.2d 326, 328 (Colo. App. 1994).

Colorado public policy “favors arbitration and, conversely, waivers of arbitration are disfavored.” *Cordillera Corp. v. Heard*, 592 P.2d 12 (Colo. App. 1978).

STATEMENT OF FACTS

Exempla Healthcare System is comprised of three acute care hospitals, as follows: Exempla Saint Joseph Hospital (“ESJH”), Exempla Lutheran Medical Center (“ELMC”), and Exempla Good Samaritan Hospital (“EGS”). Exempla Healthcare is managed by Exempla, a nonprofit corporation, with two members, as follows: Sisters of Charity of Leavenworth Health System (“SCLHS”) and Community First Foundation (“CFF”).

In the Fall of 2006, SCLHS and CFF informed Exempla Healthcare that a contract involving the transfer of CFF’s membership interest to fellow member SCLHS, in return for \$311 million dollars, had been negotiated. In compliance with C.R.S. § 6-19-103, SCLHS and CFF notified the Colorado Attorney General of the proposed membership transfer. Under C.R.S. § 6-19-203(1), a proposed transaction of this type must “not result in a material change in the charitable purposes to which the assets of the hospital have been dedicated.” C.R.S. § 6-19-203(1). The Colorado Attorney General determined that a material change would not result as the charitable purposes of the three hospitals will remain unchanged post-transfer. (Finding, ¶¶6, 26, 27, and 28).

In response to the contract and proceedings before the Colorado Attorney General, Exempla Healthcare filed suit against SCLHS and CFF. They also filed suit against the Colorado Attorney General alleging his findings were arbitrary and capricious. The suit against the Attorney General was ultimately dismissed. Subsequently, SCLHS and CFF filed suit against Exempla Healthcare and also against the individual members of Exempla’s Board of Directors seeking injunctive relief.

The Affiliation Agreement includes Exempla’s Restated Bylaws. (Affiliation Agreement § 26.1(b)). The Exempla Bylaws permit that “[a] Member may transfer a membership to the other member, if agreed by both members....” (Ex. A Part 2, Exempla Bylaws § 3.5). The Dispute Resolution clause, included in the Affiliation Agreement, stipulates that arbitration procedures are limited to “System Disputes”. A System Dispute is defined in the Affiliation Agreement as

“21.2 **Dispute Resolution.** The Parties shall attempt to resolve *any and all disputes regarding or under any Affiliation Document*, except as specifically provided otherwise in the Affiliation Document (each, a “*System Dispute*”) in accordance with the following procedures and without resulting in litigation...” (emphasis added).

The arbitration agreement states that any arbitration will take place in Denver, Colorado, and in accord with the Commercial Rules of the American Arbitration Association.

FINDINGS AND CONCLUSION

Plaintiffs allege that SCLHS and CFF waived any right to arbitration. Any issue of waiver, regardless if it is an issue of law or fact, will be determined by the arbitrator, not by a judge. *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214, 1221 (Colo. 2005).

Under Exempla’s Bylaws, a member can transfer his membership interest to another member. Thus, the bylaws contain a specific provision by which CFF may transfer membership to SCLHS. If the “issue sought to be arbitrated is beyond the scope of the arbitration clause, a court cannot order arbitration.” *State Farm Mut. Auto. Ins. Co. v. Stein*, 886 P.2d 326 (Colo. App. 1994). Exempla’s Bylaws are a part of the Affiliation Documents. The Dispute Resolution clause calls for arbitration for “any and all disputes regarding or under the Affiliation Documents.” (Ex. A Part 1, Affiliation Agreement § 21.2). Therefore, the dispute is within the scope of the arbitration clause.

The Third-Party Defendant’s are subject to arbitration as the dispute raised by Exempla’s Board of Directors is based on the transfer of membership interests between CFF and SCLHS. Further, the Directors defense is based upon Exempla’s Bylaws and Articles of Incorporation which are part of the Affiliation Agreement, and thus, within the scope of the arbitration clause.

The Plaintiffs allege that besides waiver and arbitrability, arbitration would run afoul of public policy. Plaintiffs argue that the repercussions, from the transfer of ownership interest, generate great public concern which should be addressed in a courtroom, not behind closed doors. It is recognized these are serious concerns; however not only Colorado policy, but federal policy strongly favor arbitration. The bylaws expressly allow for the transfer of membership interest and call for arbitration of System Disputes. The transfer of membership interests qualifies as a System Dispute. Colorado public policy favors arbitration to such an extent that any doubts “are to be resolved in favor of arbitration.” *Rains v. Foundation Health Systems Life & Health*, 23 P.3d 1249 (Colo. App. 2001). The parties are bound by their agreement.

The Court finds this to be an arbitrable System Dispute. Accordingly, the Defendants’ Motion to Compel Arbitration and For Stay of Proceedings is **GRANTED**.

SO ORDERED this 23rd Day of June 2008

BY THE COURT



William D. Robbins
District Judge