5th Civil No. F039699

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SAINT AGNES MEDICAL CENTER,

Plaintiff and Respondent,

v.

PACIFICARE OF CALIFORNIA; SECUREHORIZONS USA, INC., et al.

Defendants and Appellants.

Appeal from the Fresno County Superior Court
Honorable Stephen J. Kane, Judge
Fresno Superior Court Case No. 01 CE CG 01243

APPELLANTS' OPENING BRIEF

KONOWIECKI & RANK LLP
Peter Roan (SBN 137379)
Karen S. Fishman (SBN 136675)
Cameron H. Faber (SBN 100643)
350 South Grand Avenue, Suite 2100
Los Angeles, California 90071
(213) 229-0990

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates (SBN 110364)
Peter O. Israel (SBN 50806)
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036
(310) 859-7811

Attorneys for Defendants and Appellants
PACIFICARE OF CALIFORNIA and SECUREHORIZONS USA, INC.

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INTRODUCTION

This appeal arises from the trial court's denial of a petition to compel arbitration of "any controversy, dispute or claim arising out of the interpretation, performance or breach" of an agreement between defendants and appellants PacifiCare of California and SecureHorizons USA, Inc. (collectively "PacifiCare"), and plaintiff and respondent Saint Agnes Medical Center. Citing *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213, the trial court denied the petition, concluding that by filing another action alleging the contract's invalidity, PacifiCare had summarily waived the right to enforce the contract's arbitration provision.

The rule announced by *Bertero* and embraced by the trial court here—that a party that disputes the validity of a contract automatically waives the right to enforce the provisions of that contract in the event it is determined to be valid—does not withstand scrutiny. It is flatly contrary to controlling California and United States Supreme Court authority, as well as federal and state statutes concerning arbitration. And it flies in the face of the fundamental right of access to the courts and all notions of equity.

The order denying arbitration must be reversed for the following reasons:

1. Neither *Bertero*, nor any authority upon which it purportedly relies, provides a principled basis to deny a party who seeks to contest the validity of a contract the right to enforce provisions of that contract in the event it is determined to be valid. *Bertero* stands alone in enunciating its unique rule that merely challenging the validity of a contract through

litigation summarily deprives a party of the right to later enforce any arbitration provision in the agreement. Indeed, the California Supreme Court has expressly held that merely filing suit and even participating in discovery and motion practice does not ipso facto waive a party's right to compel arbitration under an agreement. Both *Bertero* and the trial court's decision here clearly fly in the face of this controlling authority.

2. The Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA") expressly bars enforcement of state laws that single out arbitration provisions in contracts concerning interstate commerce for special treatment. In sum, a state may not bar enforcement of an arbitration provision on grounds not otherwise applicable to contracts in general. Yet, that is precisely the effect of the *Bertero* rule. It is arbitration provisions—*only* arbitration provisions—that are deemed unenforceable by a party who has initially challenged the validity of the underlying agreement. No one would seriously contend that a party who disputes the validity of a contract containing a liquidated damages provision thereby forfeits the right to enforce that provision should the contract be deemed valid and enforceable. Only arbitration provisions are impermissibly singled out for this special waiver rule.

3. The *Bertero* rule improperly penalizes a party for seeking judicial relief. It conditions access to the courts on foregoing a benefit to which a party is entitled under a contract. The threshold question in any contract dispute is whether or not a contract exists at all. It simply cannot be that merely by seeking a determination whether an agreement is valid a party must automatically jettison its right to enforce a provision of that

contract that requires arbitration of other disputes, concerning interpretation, breach and enforcement of the agreement. There is nothing equitable about such a rule.

The rule announced by the *Bertero* court and followed by the trial court here is squarely at odds with controlling case and statutory authority. It unjustly requires that the favored process of arbitration must be aborted simply because PacifiCare invoked its right to seek determination of the threshold question of contractual validity in court. The trial court's order must be reversed.

STATEMENT OF THE CASE AND RELEVANT FACTS

Appellants PacifiCare of California and SecureHorizons USA, Inc. (collectively "PacifiCare") are corporations licensed by the California Department of Managed Health Care under the Knox-Keene Health Care Service Plan Act of 1975, Health & Safety Code sections 1340 et seq. Respondent Saint Agnes Medical Center ("Saint Agnes") is a nonprofit public benefit corporation licensed to operate a general acute care hospital in Fresno, California. (Fresno Compl. ¶¶ 2-3, AA tab 1, p. 3.)[1]

On October 22, 2001 the Fresno Superior Court entered an Order (the "Order") denying PacifiCare's motion to compel the arbitration of issues raised in a suit filed by Saint Agnes in Fresno Superior Court against

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[1] Documents in Appellants Appendix are cited by tab number and page, e.g. "(Order, AA tab 18, p. 773.)"

PacifiCare and others (the "Fresno action"). (Order, AA tab 18, pp. 774-779.)

The Fresno and Los Angeles Actions.

Saint Agnes had filed the Fresno action on April 10, 2001, alleging PacifiCare's liability arising from the parties' rights and obligations under a health services agreement entered into effective as of June 1, 2000 (the "June 2000 HSA").[2] The Fresno action alleges causes of action for conspiracy, fraud, breach of contract, and interference with prospective economic advantage (among others). (Fresno Compl., AA tab 1, p. 1.)

> The June 2000 HSA contains a provision requiring the arbitration of "any controversy, dispute or claim arising out of the interpretation, performance or breach of this Agreement . . . at the request of either party . . . ." (Order p. 3, AA tab 18, p. 775; June 2000 HSA ¶ 7.5.2, AA tab 1, pp. 50-51.)

On March 27, 2001, about two weeks before Saint Agnes sued PacifiCare and others in the Fresno action, PacifiCare had filed an action in Los Angeles Superior Court entitled *PacifiCare Of California v. PriorityPlus of California, etc.*, LASC No. BC247515 (the "Los Angeles

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[2] Saint Agnes' Fresno complaint calls this agreement the "June 2000 HSA"; PacifiCare has referred to the same agreement as the "Saint Agnes HSA." Because the Order adopts the name "June 2000 HSA" (Order p. 3, AA tab 18, p. 775), we use that appellation here.

action"). (PacifiCare Req. for Jud. Ntc., AA tab 3, p. 98.)[3] The Los Angeles action sought declaratory relief and damages from Saint Agnes and others with respect to the parties' obligations under a number of contractual relationships. Most notably with respect to the issues in this appeal, however, the Los Angeles complaint seeks declaratory relief that the June 2000 HSA "is void ab initio" due to the nonoccurrence of contingencies in other agreements. (Los Angeles compl., ¶¶ 9-24, 38-42, AA tab 3, pp. 100-104, 106-107.) The Los Angeles action alleges that, because the June 2000 HSA is void and unenforceable, the parties' rights and obligations are governed by the various other agreements that the Los Angeles action seeks to enforce.

Petition To Compel Arbitration.

Contending that key claims in the Fresno complaint arise from "the interpretation, performance or breach" of the June 2000 HSA, PacifiCare petitioned to compel arbitration of the Fresno complaint's 4th and 6th through 11th causes of action, and sought a stay pending arbitration. (Pet. to Compel Arb., AA tab 2 pp. 72; Order p. 2, AA tab 18, p. 774.) The Fresno complaint's 4th cause of action alleged PacifiCare's tortious interference (by its disclaimer of obligations under the June 2000 HSA) with a hoped-for beneficial contractual relationship by Priority Health Services ("Priority"), an entity in which Saint Agnes was a substantial shareholder, with a medical group. (Fresno Compl. ¶¶ 48-54, AA tab 1, pp.

[3] The Los Angeles complaint is Exhibit 1 to Saint Agnes' Request For Judicial Notice In Opposition To Petition To Compel Arbitration. (AA tab 3, p. 98 et seq.)

15-16.) The 6th, 7th, 8th and 9th causes of action of the Fresno action sought enforcement and damages with respect to the June 2000 HSA. (Fresno Compl. ¶¶ 61-92, AA tab 1, pp. 18-23.) The Fresno action's 10th and 11th causes of action alleged fraudulent and negligent misrepresentations leading to amendment of the June 2000 HSA. (Fresno Compl. ¶ 93-109, AA tab 1, pp. 23-26.)

These claims, PacifiCare's arbitration petition contended, come within the terms of the June 2000 HSA's arbitration provision. It alleged that those claims of Saint Agnes' Fresno action arise from the June 2000 HSA's interpretation, performance, or breach; that the June 2000 HSA contains a clear and unambiguous agreement to arbitrate such disputes; that PacifiCare demanded arbitration and that Saint Agnes refused; and that because the June 2000 HSA affects interstate commerce, the arbitration clause is enforceable under the Federal Arbitration Act, 9 United States Code section 1 (the "FAA"), which requires its enforcement as a matter of federal law. (Petit., AA tab 2, pp. 73-86.)[4]

Saint Agnes opposed arbitration (Oppos. to Pet. to Compel Arb., AA tab 9, p. 370), arguing that by filing the Los Angeles action contending that the June 2000 HSA is void and unenforceable, PacifiCare had waived arbitration under the June 2000 HSA. (Oppos. pp. 6-11, AA tab 9, pp. 379-384.)

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[4] Saint Agnes has since amended its Fresno complaint in response to an order sustaining PacifiCare's demurrers. (Order, p. 13, AA tab 18, p. 785.) Pursuant to Saint Agnes' motion, the Los Angeles action has since been transferred to Fresno Superior Court and consolidated with the Fresno action. (Min. Ord. and Order, AA tab 13, pp. 716-717.)

The trial court refused to enforce the June 2000 HSA's arbitration provision. In denying the petition to compel arbitration, the trial court ruled that PacifiCare's Los Angeles pleading's allegation "that the June 2000 HSA never existed" "show[s] a clear attempt by PacifiCare to repudiate the June 2000 HSA." Filing the Los Angeles action "was inconsistent with any intent to invoke arbitration," the Order held, waiving PacifiCare's right to arbitration with respect to the June 2000 HSA's interpretation, performance or breach. (Order p. 7, AA tab 18 p. 779.)

On December 20, 2001, PacifiCare filed this appeal from the Fresno Superior Court's October 22, 2001 Order Denying PacifiCare's Petition To Compel Arbitration. (Ntc. of Appeal, AA tab 19, p. 787.) The Order denying arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a) [aggrieved party may appeal from "An order dismissing or denying a petition to compel arbitration. . . ."].)

BURDEN OF PROOF AND STANDARD OF REVIEW.

As the party opposing enforcement of the June 2000 HSA's arbitration provision, Saint Agnes bore the burden of proof as to any factual issue supporting its opposition to arbitration. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 984 [burden is on party opposing arbitration to prove that other party's conduct constitutes waiver]; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 [party challenging arbitration provision bears burden of proof].)

Not only was Saint Agnes required affirmatively to demonstrate that arbitration had been waived, that waiver showing was obligated to meet the heightened clear and convincing evidence standard of proof.

> "Forfeiture of a contractual right is not favored in the law. [Citation.] Conversely, . . . arbitration is favored in the law. Consequently, we hold that, as with waiver, the burden of proof is on the party asserting forfeiture and must be demonstrated by clear and convincing evidence." (*Chase v. Blue Cross of California* (1996) 42 Cal.App.4th 1142, 1157; see *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108 [judgment reversed where evidence does not show waiver by clear and convincing evidence].)

This heightened standard is consistent with the rule, applicable in other contexts, that waiver must be established by clear and convincing evidence. (E.g., *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60-61 [standard of proof for waiver is clear and convincing evidence].) The standard for imposing waiver of the right to compel arbitration can be no less than that for imposing waiver of any other contract provision. (E.g., *Erickson v. Aetna Health Plans of California, Inc.* (1999) 71 Cal.App.4th 646, 656 ["Under section 2 of the FAA, a court may not construe an arbitration agreement 'in a manner different from that in which it otherwise construes nonarbitration agreements under state law'"], citing *Perry v. Thomas* (1987) 482 U.S. 483, 492-493 fn. 9 [107 S.Ct. 2520, 96 L.Ed.2d 426].)

Interpretation of the parties' arbitration agreement, as well as determination whether particular undisputed conduct constitutes a waiver of arbitration, raise issues of law subject to de novo review. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212.) Although a determination that a party has waived arbitration is ordinarily subject to substantial evidence review, appellate courts will review the issue de novo where the facts before the court show that a nonwaiver finding is required as a matter of law. (*Keating v. Superior Court* (1982) 31 Cal.3d 584, 605, revd. in part on another point in *Southland Corp. v. Keating* (1984) 465 U.S. 1 [104 S.Ct. 852, 79 L.Ed.2d 1]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185 [trial court's finding of waiver reversed, holding as a matter of law that the mere filing of a complaint did not by itself waive plaintiff's right to compel arbitration]; see *NORCAL Mut. Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71-72 [where facts entitling parties to arbitration are not disputed, issue is one of law for de novo review].)

ARGUMENT

IF THE JUNE 2000 HSA IS VALID AND ENFORCEABLE AS TO SAINT AGNES AND PACIFICARE, ITS ARBITRATION PROVISION MUST BE ENFORCED EQUALLY AS TO BOTH PARTIES.

PacifiCare contended in the Los Angeles action—and continues to contend—that the June 2000 HSA is void and unenforceable against it. For asserting that contention, the trial court ruled that PacifiCare waived its right to compel arbitration of the otherwise-arbitrable claims raised by the Fresno action. (Order, AA tab 18, pp. 776-779.)

That ruling is wrong. If PacifiCare is determined to be correct that the June 2000 HSA was rendered void and unenforceable by the failure of various conditions, then no arbitration is required under it. But if the June 2000 HSA is found to be valid and enforceable as to PacifiCare, despite PacifiCare's contrary contentions, then the arbitration provision of that agreement is no less enforceable than its other provisions. Any other result violates California and federal law, as well as being irrational and unfair.

A. Saint Agnes' Fresno Action Claims Are Within The Arbitration Provision Of The June 2000 HSA.

The trial court and the parties apparently agree on one thing: the claims alleged against PacifiCare in the 6th through 11th causes of action of

the Fresno complaint are within the terms of the June 2000 HSA's arbitration provision. The Fresno complaint's 6th, 7th, and 9th causes of action allege breaches, past and anticipatory, of the June 2000 HSA. The 8th cause of action seeks its specific performance. The 10th and 11th causes of action allege that PacifiCare made fraudulent or negligent misrepresentations about payment rates during negotiations for an extension of the June 2000 HSA. (Fresno Compl. ¶¶ 61-92, 93-109, AA tab 1, pp. 18-26.) Each of those claims involves the June 2000 HSA's "interpretation, performance or breach"—the qualifying criteria for application of the agreement's arbitration provision. (Order p. 3, AA tab 18, p. 775; June 2000 HSA ¶ 7.5.2., AA tab 1, pp. 50-51.)[5]

In the trial court Saint Agnes did not dispute that its Fresno action issues are within the June 2000 HSA arbitration provision. Nor does the trial court's Order express any doubt that the Fresno action's claims are prima facie subject to arbitration under the agreement. Saint Agnes' opposition to arbitration of the issues raised by the Fresno action was based primarily upon two grounds: it argued that PacifiCare had waived

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[5] The 1st and 5th causes of action of the Fresno action allege claims that are not subject to arbitration in any event: violations of the Cartwright Act and Business and Professions Code section 17200. (Compl. ¶¶ 25-32, 55-60, AA tab 1, pp. 10-13, 16-18.) The 2nd and 3rd causes of action do not involve PacifiCare at all. (Compl. ¶¶ 33-47, AA tab 1, pp. 13-15.) The interference claim in the 4th cause of action (Compl. ¶¶ 48-54, AA tab 1, pp. 15-16) is entitled neither to litigation nor arbitration. As a mere shareholder of Priority, Saint Agnes lacks standing to prosecute a claim based on a supposed interference with *Priority's* rights. (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 [shareholder has no standing to sue for injuries suffered only by corporation].) Moreover, PacifiCare, as an interested party, was unquestionably privileged to inform Priority's prospective purchaser of its contention. (Civ. Code, § 47, subd. (c).)

arbitration of claims involving the June 2000 HSA by repudiating that agreement; and it argued that the arbitration of claims involving the June 2000 HSA could lead to inconsistent rulings. (Saint Agnes Oppos., p. 6, AA tab 9, p. 379.) The trial court's Order did not reach the second of these grounds, but rests solely on the first—that PacifiCare waived arbitration by repudiating the June 2000 HSA. (Order, AA tab 18, pp. 774-779.)[6]

PacifiCare has contended that the June 2000 HSA—the entire agreement—is void and unenforceable against it due to the failure of essential conditions. If PacifiCare's contention proves to be correct, the June 2000 HSA's interpretation, performance or breach will not be an issue in the dispute, and no arbitration will be required. However, if the June 2000 HSA binds Saint Agnes and PacifiCare to its terms contrary to PacifiCare's contention, the agreement's arbitration provision plainly applies to claims raised by the Fresno action.

B. The Arbitration Provision Of The June 2000 HSA Must Be Enforced If Its Remaining Provisions Are Enforceable.

PacifiCare's Los Angeles action sought primarily to enforce PacifiCare's rights under pre-existing agreements without regard to the void June 2000 HSA. (Los Angeles Compl., ¶¶ 9-56, 71-83 AA tab 3, pp. 100-

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[6] Saint Agnes made two additional arguments not reached by the trial court's decision: that the Fresno action's 4th cause of action does not come within the June 2000 HSA's arbitration agreement, and that PacifiCare's co-defendant, SecureHorizons USA, lacks standing to enforce the June 2000 HSA's arbitration provision. (Saint Agnes Oppos., p. 12-14, AA tab 9, pp. 385-387.)

109, 111-113.) Saint Agnes' Fresno action, on the other hand, seeks to enforce the June 2000 HSA against PacifiCare—all except its arbitration provision, that is. (Fresno Compl., AA tab 1.)

The trial court's ruling, that PacifiCare waived the agreement's otherwise-enforceable arbitration provision by contending that the June 2000 HSA is void, is incompatible with the law for at least three reasons.

First, the trial court's Order relies heavily on the decision in *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213, but that decision does not furnish the support with which the Order credits it. The *Bertero* decision's logic is faulty, and its implication that merely filing a lawsuit is sufficient to impose a waiver of arbitration is unfounded.

Second, not only is the *Bertero* decision unsupported, but binding Supreme Court authority prohibits the determination on which the trial court's Order rests. Arbitration is not waived, as a matter of law, merely by filing litigation that involves potentially arbitrable claims.

Third, by singling out the June 2000 HSA's arbitration provision for non-enforcement, notwithstanding that PacifiCare contends that the *entire* June 2000 HSA is void and unenforceable, the Order violates the Federal Arbitration Act and California's parallel statutory arbitration enforcement provisions.

The upshot of the trial court's Order in this case is more profound and far-reaching than merely countenancing a shaky analysis, a procedural snafu, or a technical defect. By refusing to enforce only the arbitration provision of the June 2000 HSA, and none other, the Order unjustly

punishes PacifiCare for ever having exercised its constitutionally protected right of access to the courts for the resolution of its tenable legal positions.

The trial court's Order thus broadcasts to PacifiCare, and to other litigants as well, a message that is as unfair and unwise as it is unconstitutional: If you challenge the validity of a contract you must abandon any hope that the contract, if found to be valid, will be enforced equally as to all its parties. In short, you risk forfeiture of your contractual rights by asserting a litigation position that is both reasonable and supported by probable cause.

The law neither requires nor permits any such trap. If PacifiCare's litigation contentions are correct—if the June 2000 HSA is found to be void as of its inception and unenforceable as to PacifiCare—then no arbitration would be appropriate. But if the June 2000 HSA is found to be valid and enforceable, then PacifiCare is no less entitled than is Saint Agnes to enforcement of *all* of that agreement's valid terms. PacifiCare's contention that the entire agreement is void, even if determined to be erroneous, does not empower Saint Agnes or the trial court to pick and choose which terms of the agreement may be enforced, or to enforce the agreement unequally.

For each of these reasons, the law requires reversal of the trial court's Order denying enforcement of the arbitration provision of the June 2000 HSA if that agreement is found to be otherwise valid and enforceable as to PacifiCare.

1. The decision in *Bertero v. Superior Court*—the sole authority for the trial court's Order—is both unsupported and wrong.

PacifiCare urged that *Bertero v. Superior Court*, *supra*, 216 Cal.App.2d 213 is "an anomaly" which should not be followed. (Order, p. 5, AA tab 18, p. 777.) The trial court found that the *Bertero* decision is controlling, and based its ruling on that case. That was its mistake.

The *Bertero* case arose from hardball negotiations in the 1950s between a former Hollywood studio mogul and the major studio he had previously headed, about his right to the benefits of a golden parachute compensation agreement he had negotiated for his retirement. After a few years of performance the studio's new management announced its position that the agreement was unenforceable for lack of consideration, and stopped paying. The former executive sued to enforce the agreement. The Court of Appeal held that, after repudiating the agreement, the studio could not enforce the arbitration provision of the agreement it had repudiated.

The *Bertero* decision has little to recommend it. Although it purports to render justice in the "eye for an eye" mold, its logic is specious and it gains little support from the authority upon which it purports to rest. Viewed in the context of its facts, it stands for the dubious proposition that a litigant forfeits any right to an appropriate contract right or remedy after urging—even unsuccessfully—a position inconsistent with that remedy. Upon that logic, incompatible with the principles on which our system of justice rests, the *Bertero* decision deprived the studio of the benefit of *one*

of the agreement's provisions—the arbitration provision— while enforcing the contract's other provisions against it.

And what was the authority for that ruling? Upon examination, it turns out there is very little. The *Bertero* decision purports to rely for its repudiation theory on *Local 659, I.A.T.S.E. v. Color Corp. Amer.* (1956) 47 Cal.2d 189, in which a union was party to a collective bargaining arrangement which included an arbitration provision. The union had steadfastly refused to arbitrate a pending dispute. Ruling that the union's repudiation *of the arbitration provision* waived its right *to arbitration*, the court found the rule to be "no more than an application of the familiar rule that if an agreement be breached the party against whom the breach is committed may refuse to accept the breach or terminate the contract, thus keeping the contract alive . . . ." "[B]ut," the court wisely added, "if he does so he keeps it alive both for the benefit of himself and for that of the other contracting party." (*Id.* at p. 197.)

For that holding the *Local 659* case cites *Alder v. Drudis* (1947) 30 Cal.2d 372, 381, standing for the obvious principle that parties are entitled to enforce only one or the other of inconsistent remedies. Because "[a] repudiation of a contract accepted by the promisor excuses performance by the promisee," in the *Local 659* case the union's repudiation of the arbitration agreement, accepted by the other party, had forfeited its right to arbitration. (*Local 659, I.A.T.S.E. v. Color Corp. Amer.*, *supra*, 47 Cal.2d at p. 198.)

The *Bertero* decision is significantly different. Factually it is different because in *Bertero,* unlike in the *Local 659* case, the studio had

repudiated not just the arbitration agreement but the parties' *entire* agreement of which the arbitration provision was just one term. And legally too, *Bertero* was different. In the *Local 659* decision, the court had refused to enforce the *reputiated term* of the parties' agreement—the arbitration provision; but in *Bertero*, notwithstanding that the studio had repudiated the *entire* agreement, the court refused to enforce only a single provision—the arbitration provision. In *Bertero,* the plaintiff was permitted to "keep[] the contract alive," but only for *his own benefit* and not "both for the benefit of himself and for that of the other contracting party," as equity dictates and as the Supreme Court had admonished it must. (*Local 659, I.A.T.S.E. v. Color Corp. Amer.*, *supra*, 47 Cal.2d at p. 197.) The *Bertero* decision thus kept the contract alive only for the benefit of one party, not both, as justice (and the authority on which the case purports to rest) required.

The trial court here adopted the *Bertero* decision's half-portion of logic and justice, while ignoring its equitable basis. Although Saint Agnes *did not* accede to PacifiCare's repudiation of the June 2000 HSA, nevertheless the trial court treated the agreement as repudiated, but only in part; it kept the agreement alive only for Saint Agnes' benefit, not for PacifiCare's. If the June 2000 HSA is enforceable despite PacifiCare's contention that it is void, PacifiCare loses the benefit of one of its provisions: PacifiCare must face Saint Agnes' challenges to its performance under the agreement, but it cannot enforce that very same agreement's unequivocal provision for arbitration of those issues.

The principle of equity that undergirds the authority on which the *Bertero* decision purports to rest requires the opposite result: By choosing not to accede to PacifiCare's repudiation of the June 2000 HSA, Saint Agnes keeps the agreement—the *entire* agreement—alive "both for the benefit of [itself] and for that of the other contracting party." (*Local 659, I.A.T.S.E. v. Color Corp. Amer.*, *supra*, 47 Cal.2d at p. 197; *Alder v. Drudis*, *supra*, 30 Cal.2d at p. 381.) The trial court's one-sided remedy, amounting to selective enforcement of the June 2000 HSA's provisions, is unsupported by logic, by authority, and—worse—by justice. Equity requires arbitration if the June 2000 HSA is determined to be otherwise enforceable.

2. Binding Supreme Court repudiates *Bertero's* rule that filing suit to challenge the validity of a contract waives the right to enforce an arbitration provision.

The trial court concluded that PacifiCare's mere filing of the Los Angeles action constituted an act so inconsistent with arbitration as to irrevocably waive the benefit of that contract provision, even if the June 2000 HSA is determined to be otherwise enforceable. (Order, p. 7:6-7, AA tab 18, p. 779:6-7.) The Order's reliance on that waiver theory is evident in its conclusion that PacifiCare was required to exercise just one or the other of only two choices. By initially filing the Los Angeles action seeking a judicial remedy, the Order finds, PacifiCare irrevocably waived arbitration. (Order, p. 7:14, AA tab 18, p. 779:14.)

But binding Supreme Court authority prohibits that finding. Merely commencing litigation, even if the suit involves issues that are subject to an arbitration agreement, *does not*—as a matter of law—constitute a waiver of arbitration. Filing a lawsuit does not alone waive arbitration:

> "Waiver does not occur by mere participation in litigation; there must be 'judicial *litigation* of the merits of arbitrable issues . . . ." (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 605.)[7]

That ruling is by no means alone. (E.g., *Doers v. Golden Gate Bridge etc. Dist., supra,* 23 Cal.3d at pp. 188-189 [no arbitration waiver without proof of prejudice]; *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 995 ["mere participation in litigation and discovery" does not establish waiver of arbitration]; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 216 ["mere participation in some litigation, without prejudice to the opposing party, does not establish waiver of arbitration"]; *Chase v. Blue Cross of California, supra,* 42 Cal.App.4th at pp. 1149-1151 [proof of intention to mislead or resulting prejudice is indispensable to proof of arbitration waiver]; *A. D. Hoppe Co. v. Fred Katz*

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[7] "'[A]s an abstract exercise in logic it may appear that it is inconsistent for a party to participate in a lawsuit for breach of a contract, and later to ask the court to stay that litigation pending arbitration. Yet the law is clear that such participation, standing alone, does not constitute a waiver, for there is an overriding federal policy favoring arbitration. . . . [M]ere delay in seeking a stay of the proceedings without some resultant prejudice to a party, cannot carry the day.'" (*Keating v. Superior Court, supra,* 31 Cal.3d at pp. 605-606, citations omitted.)

Constr. Co. (1967) 249 Cal.App.2d 154, 161-162 [no waiver of arbitration without showing of prejudice]; *Hall v. Nomura Securities International* (1990) 219 Cal.App.3d 43, 51 [noticing depositions does not waive arbitration].)

The trial court's Order erroneously holds the opposite. It holds that merely by filing the Los Angeles action—by seeking to litigate claims, some of which might be subject to arbitration if, contrary to the suit's contention, the June 2000 HSA is determined to be valid and enforceable—PacifiCare waived any rights it might otherwise have had under the June 2000 HSA's arbitration provision.

The Supreme Court's contrary rule requires reversal of that Order. Before waiver may be found to have resulted from litigation, the litigation must reach the *merits* of arbitrable issues (*Keating v. Superior Court*, *supra*, 31 Cal.3d at p. 605), and must have resulted in demonstrable prejudice (*Doers v. Golden Gate Bridge etc. Dist.*, *supra*, 23 Cal.3d at pp. 188-189). Moreover, the party opposing arbitration has the burden of establishing those circumstances under a heightened burden of proof. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 984 [burden of proof is on party opposing arbitration]; *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 426 [party asserting waiver of arbitration bears heavy burden].) Here, there has been no litigation on the merits of any arbitrable issue; and (despite its claims) there has been no cognizable prejudice to Saint Agnes.

The trial court made no finding that Saint Agnes was prejudiced, apparently believing erroneously that prejudice was not required to show a

waiver of arbitration. And even if the court had found prejudice, the supposed prejudice that Saint Agnes claimed it suffered—"significant" or "substantial" legal fees researching and filing the Saint Agnes complaint (Nickerson decl. ¶¶ 7-9, AA tab 12, pp. 408-409; Maurer decl. ¶ 2-4, AA tab 11, p. 398)— cannot possibly suffice. If litigation cannot establish waiver, then the fact that it carries with it the same routine expenses that all litigation carries adds nothing.

Indeed, if the routine expenses of appearance and motion practice could suffice to establish prejudice, the rule could not be as the Supreme Court has held that it is. Rather, in that case the law would require that a party to an arbitration agreement must *do nothing at all* before petitioning the court to enforce the agreement; that is so, because *anything at all* other than seeking enforcement of the arbitration agreement in the first instance would likely require some expense on the other parties' part. Because the courts have held that merely filing a lawsuit and even engaging in motion practice cannot constitute the sort of prejudice that is required to support a finding that arbitration is waived, the expense that routinely accompanies those activities plainly cannot supply the missing evidence of prejudice. (See *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, 1196 ["being forced to articulate a legal theory clear enough to withstand a demurrer is not in our opinion prejudice" sufficient to show waiver of arbitration]; *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1980) 105 Cal.App.3d 946, 951, 952, fn. 2 ["we are not holding that the filing of a demurrer or some other motion, in addition to the complaint or answer, is all that is required to find waiver in similar situations"].) In most cases the

courts have identified evidence of substantial practical prejudice, beyond routine litigation expenses, to support waiver. (E.g., *Davis v. Continental Airlines, Inc.*, *supra*, 59 Cal.App.4th at pp. 212-215 [substantial prejudice from disclosure of facts or litigation strategies through discovery]; *Sobremonte v. Superior Court*, *supra*, 61 Cal.App.4th at p. 996 [same]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 [same]; *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1364-1369 [same].)

The trial court here found a waiver of arbitration by PacifiCare merely because PacifiCare filed the Los Angeles action, nothing more. But even if it had reached the prejudice issue, Saint Agnes' assertions are insufficient to establish any cognizable prejudice. The Order should be reversed, because binding Supreme Court authority holds that merely filing a lawsuit—the conduct on which the trial court based its Order—cannot show waiver of arbitration.

3. The *Bertero* rule as interpreted by the trial court violates the Federal Arbitration Act and California law.

Even if the trial court had been justified in ruling that PacifiCare waived the arbitration provision of the June 2000 HSA by merely filing the Los Angeles action, still the Order must be reversed. It purports to impose a hybrid remedy markedly different from that generally applied to any other contract provision. That result is in stark violation both of the FAA and California's parallel statutory rules respecting enforcement of arbitration agreements.

a. The June 2000 HSA is governed by the FAA.

The June 2000 HSA contains an unambiguous agreement to arbitrate all disputes between its parties "arising out of the interpretation, performance or breach" of that agreement, and the June 2000 HSA affects interstate commerce. The enforceability of its arbitration provision therefore is governed by the FAA.

The FAA applies to any contract "evidencing a transaction involving interstate commerce" which contains an arbitration clause. (9 U.S.C. § 2.) The June 2000 HSA meets those criteria. Under it Saint Agnes is required to provide medical services and supplies that are manufactured, transported, and delivered in interstate commerce. It therefore is a contract in interstate commerce within the meaning of the Commerce Clause of the United States Constitution and the FAA. The definition of interstate commerce under the FAA is as broad as under the United States Constitution's commerce clause. (See *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 U.S. 265 [115 S.Ct. 834, 130 L.Ed.2d 753], AA tab 3, p. 224; *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1087.) The commerce clause power extends not just to interstate transactions, but to anything that *affects* interstate commerce. (E.g., *Summit Health, Ltd. v. Pinhas* (1991) 500 U.S. 322 [111 S.Ct. 1842, 114 L.Ed.2d 366] [hospital's use of out-of-state medicines affects interstate commerce]; *Daniel v. Paul* (1969) 395 U.S. 298, 305 [89 S.Ct. 1697, 1701, 23 L.Ed.2d 318] [judicially noticing that snack bar serving hot dogs, hamburgers and soft drinks moved in interstate commerce]; *Katzenbach v. McClung* (1964) 379 U.S. 294 [85 S.Ct. 377, 13 L.Ed.2d 290] [restaurant subject to civil rights regulation because it used

food products and supplies traveling in interstate commerce].) A contract "evidencing a transaction involving interstate commerce" is shown where the parties' transactions under the contract have merely turned out to involve or affect interstate commerce, not that they contemplated that impact when entering into the contract. (*Allied-Bruce Terminex Companies, Inc. v. Dobson*, *supra*, 513 U.S. at pp. 273-280; AA tab 3, pp. 228-231.) The threshold is extremely low. (E.g., *Erickson v. Aetna Health Plans of California, Inc.*, *supra*, 71 Cal.App.4th at p. 651 [in modern economy contracts for health care services necessarily affect interstate commerce].)[8]

Because the June 2000 HSA plainly falls within that description, its arbitration provision is governed by the FAA.[9]

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[8] PacifiCare's evidence in the trial court included numerous examples of transactions in interstate commerce that are necessarily required for performance of the June 2000 HSA, including the acquisition and sale of medications, medical equipment, and medical supplies distributed in interstate commerce. (Decl. of Faber, ¶¶ 2-6, AA tab 5, pp. 323-324; Decl. of Taketomo, ¶ 4, AA tab 7, p. 365; Decl. of Snediker, ¶¶ 4-5, AA tab 8, p. 368.) Saint Agnes interposed blanket objections to that evidence (AA tab 10, pp. 391-394), however its failure to obtain the trial court's ruling on the objections precludes reliance on them. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

[9] If the question whether the June 2000 HSA is a "contract evidencing a transaction involving commerce" under the Federal Arbitration Act (9 U.S.C. § 2) is unresolved by the record, the appropriate ruling would be to remand for determination of that issue and (if it is concluded that section 2 of the FAA does not apply), whether California law warrants a different result on the question of arbitrability than the FAA. (*Broughton v. Cigna Healthplans*, *supra*, 21 Cal.4th at pp. 1087-1088.)

b. The FAA and California law both preclude the Order denying the arbitration agreement's enforcement.

Section 2 of the FAA requires that arbitration provisions must be enforced except upon "such grounds as exist at law or in equity for the revocation of any contract." (*Erickson v. Aetna Health Plans of California, Inc.*, *supra*, 71 Cal.App.4th at p. 650.) A state court may thus refuse to enforce an arbitration provision only on the basis of "generally applicable contract defenses, such as fraud, duress or unconscionability." (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687 [116 S.Ct. 1652, 1656, 134 L.Ed.2d 902] [state law which conditioned enforceability of arbitration agreement on compliance with special notice requirement "not applicable to contracts generally" is preempted by FAA]; *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25 [103 S.Ct. 927, 941, 74 L.Ed.2d 765] [allegation of waiver must be resolved according to FAA's strong preference for arbitration, not state law].)

Even without the FAA, the same mandate for the enforcement of arbitration agreements is set forth in California law, as the California Supreme Court recently reaffirmed. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-10 [California public policy favors enforcement of arbitration agreements].)

The *Bertero* rule as applied by the trial court in denying enforcement of the June 2000 HSA's arbitration provision flunks the mandates of federal and state law for evenhanded enforcement of arbitration agreements. No generally-applicable state law requires or permits the non-enforcement of

one isolated contract provision without regard to the enforceability of the remainder of the agreement, merely because a party has contended that the entire agreement is void and unenforceable. No generally-applicable state law provides that a party may take no position inconsistent with any litigation contention, even if the court finds against it as to that contention. When contracts are determined to be valid and enforceable despite a party's contrary contention, the contract is ordinarily enforced in its entirety for the benefit of *all* parties, even those who initially challenged its validity.

Because the one-sided remedy fashioned by *Bertero* and embodied in the trial court's Order is neither permitted nor required by any state law that is applicable to the enforcement of contracts generally, the Order violates the FAA, Code of Civil Procedure section 1281.2, subdivision (b), and California public policy.

4. The *Bertero* rule inequitably and improperly burdens access to the court by conditioning the right to litigate the validity of a contract on forfeiture of arbitration even if the contract is deemed enforceable.

The trial court's Order—based on *Bertero*—finds that, even if the agreement is otherwise enforceable, the June 2000 HSA's provision for arbitration of disputes about its "interpretation, performance, and breach" cannot be enforced by PacifiCare. According to the court, PacifiCare's contention that the June 2000 HSA is void and unenforceable in its entirety due to failure of conditions bars enforcement of the agreement's arbitration

provision. (Order, pp. 2-7, AA tab 18, pp. 774-779.) Yet, there is nothing equitable about such a result, which requires a party to forfeit a substantive contractual right simply in order to litigate the threshold question of validity of the underlying contract.

Parties are constitutionally entitled to assert their reasonable contentions in litigation, without risking sanction for having done so. It is part of the right to petition for redress of grievances, guaranteed by the First Amendment and by Article I, section 3 of the California Constitution. Parties are not strictly liable for the correctness of their reasonable contentions in litigation. For the same reason, a party's contention that a contract is not enforceable cannot forfeit that party's right under the contract if it is nevertheless determined to be enforceable. The mere fact that a party's litigation contentions are incorrect provides no basis for civil liability. Indeed, if the rule were otherwise, few litigants could risk pleading uncertain contract disputes out of fear that they would lose what few benefits *the opposing parties* contend the agreement affords. (*Pacific Gas & Electric Co. v. Bear Sterns & Co.* (1990) 50 Cal.3d 1118, 1131, 1133 ["Obviously if the bringing of a colorable claim were actionable, tort law would inhibit free access to the courts and impair our society's commitment to the peaceful, judicial resolution of differences"]; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871, 885 ["Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win . . . ."]; *City of Long Beach v. Bozek* (1983) 33 Cal.3d 727, reiterating opinion at 31 Cal.3d 527.)

The one-sided remedy articulated in *Bertero* and adopted by the trial court here has the effect of punishing PacifiCare for asserting a reasonable litigation position that (even if it were not correct) is unquestionably supported by probable cause. Moreover, the erroneous Order steadfastly binds PacifiCare alone to its litigation contentions, while permitting Saint Agnes to inconsistently contend that the June 2000 HSA's arbitration provision cannot be enforced, but at the same time to seek enforcement of the agreement's remaining terms.

If the June 2000 HSA is enforceable against PacifiCare, then *all* of its provisions must be enforceable. PacifiCare's contention that the entire agreement is void does not entitle Saint Agnes to pick and choose those provisions it wishes to enforce and those it does not. Logic requires no such one-sided remedy, and the applicable presumptions favoring arbitration forbid it. The appropriate remedy is enforcement of the June 2000 HSA's arbitration agreement, if the June 2000 HSA is found to be otherwise valid and enforceable.

CONCLUSION

The rule advanced by the *Bertero* court and adopted by the trial court here puts PacifiCare—as well as other such litigants—in a classic "Catch-22": By suing to protect its rights under other agreements without first seeking arbitration under the June 2000 HSA (because it contends that agreement is void), PacifiCare has been held to have waived its right to arbitration. But if PacifiCare were first to have requested arbitration under

the June 2000 HSA, it would have been seeking enforcement of an agreement that it contends is void and unenforceable— thereby risking waiver of its position on *that* issue.

The quandary spawned by *Bertero* and perpetrated in the trial court's Order is neither necessary nor permitted by law. The Order's one-sided remedy is not supported by sound logic, it is not grounded on authority that deserves adherence, and it runs afoul of controlling California and United States Supreme Court authority, as well as federal and state statutes governing arbitration. And, it advances principles that are incompatible with the rights of litigants to free and fair access to the courts for the resolution of their legitimate disputes.

PacifiCare is entitled to contend *both* that the June 2000 HSA is void and unenforceable, and that if it nevertheless is determined to be valid and enforceable it must be enforced in its entirety—including its arbitration provision. That is all PacifiCare asks, and it is entitled to no less. The trial court's Order should be reversed.

Dated: April 17, 2002

Respectfully submitted,

KONOWIECKI & RANK LLP
Peter Roan
Karen S. Fishman
Cameron H. Faber

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates
Peter O. Israel

By _____
Timothy T. Coates

Attorneys for Defendants and Appellants PACIFICARE OF CALIFORNIA and SECUREHORIZONS USA, INC.

CERTIFICATION

Pursuant to California Rules of Court, Rule 14, subdivision (c), I certify that this Appellants' Opening Brief contains 7,340 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: April 17, 2002

Timothy T. Coates