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.

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

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**APPELLANTS' REPLY BRIEF**

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# I. INTRODUCTION

The trial court ruled that PacifiCare irrevocably waived its right to arbitration because it filed a lawsuit challenging the validity of the contract that contained the arbitration provision—repudiating the contract, according to the court. PacifiCare apparently cannot enforce the arbitration provision of the contract, the court ruled, even if the contract is found to be valid and its other provisions are fully enforceable.

Saint Agnes argues that PacifiCare lost its right to enforce the arbitration provision of the June 2000 HSA because it repudiated the agreement and that repudiation was accepted by Saint Agnes when it filed its Fresno action. (RB 21.) But that's not what happened.

Although it trumpets that PacifiCare repudiated the June 2000 HSA by challenging the agreement's validity, Saint Agnes did not accept or accede to that supposed repudiation. Saint Agnes acquiesced only in a repudiation that PacifiCare never asserted—a non-existent repudiation of just the arbitration clause of the June 2000 HSA. At the same time, Saint Agnes continues to seek to selectively enforce other provisions of the supposedly-repudiated agreement for its own benefit. The trial court's Order grants Saint Agnes that one-sided remedy.

That's not the way the law of repudiation works. Saint Agnes cannot accept PacifiCare's suit as a repudiation of the June 2000 HSA, but treat it as though it repudiated only the arbitration clause of that agreement. It must either accept the repudiation that is supposedly offered by

PacifiCare's lawsuit, or reject it. PacifiCare's Los Angeles suit contended that the *entire* June 2000 HSA was void and unenforceable, because conditions to its validity had not occurred. If PacifiCare's Los Angeles suit repudiated the June 2000 HSA, it repudiated the *entire* agreement, not just a single clause. By choosing not to accede to a repudiation of the *entire* June 2000 HSA, Saint Agnes does not empower itself to pick and choose the contractual provisions it may discard. Rather it thereby keeps 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.* (1956) 47 Cal.2d 189, 197; see AOB 13-16.)

In this reply brief appellant PacifiCare demonstrates that the single decision on which the trial court's ruling rests is defective and should be rejected. Because the law and public policy with respect to arbitration requires enforcement of the arbitration agreement if the remainder of the parties' contract is determined to be enforceable, the Order denying arbitration should be reversed.

## II. PACIFICARE DID NOT WAIVE ARBITRATION UNDER THE JUNE 2000 HSA BY FILING THE LOS ANGELES ACTION.

### A. PacifiCare Did Not Repudiate The June 2000 HSA's Arbitration Provision, And Saint Agnes Did Not Accept Any Repudiation.

If it was ever the law that merely filing a complaint waives arbitration under the parties' agreement, that no longer is the law now. Nor, when one party to an agreement asserts the agreement's invalidity for failure of conditions, does the law permit the other party to pick and choose what provisions of that contract may be enforced. If the agreement is to be enforced, its terms must be enforced for the benefit of both parties.

The trial court's Order made crystal clear its holding that by filing the Los Angeles action PacifiCare waived any right to arbitration under the June 2000 HSA. (Order, AA tab 18, p. 779.) Respondent's brief expressly concedes the copious authority that no waiver of arbitration results from a party's filing of litigation. (RB 28-29 [Saint Agnes "does not disagree" that filing lawsuit alone cannot waive arbitration]; see AOB 17-18.)[1] Of the

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[1] The opening brief relies for that proposition the following authorities: *Keating v. Superior Court* (1982) 31 Cal.3d 584, 605-606 [mere participation in lawsuit does not waive arbitration]; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 188-189 [no arbitration waiver without proof of prejudice]; *Sobremonte v. Superior Court* (1998) 61

(continued...)

authorities on that point in the opening brief, respondent's brief cites none but *Doers* (RB 29, 32); even then, it never disputes that as a matter of law filing suit does not itself support a waiver of arbitration. But the waiver of arbitration in this case, Saint Agnes contends, arose not from PacifiCare's filing of the Los Angeles suit to rescind the June 2000 HSA, only from "the unequivocal repudiation of the agreement to arbitrate" asserted in that lawsuit. (RB 29.)

Nonsense. Saint Agnes' logic is circular, for the purported distinction reveals no difference. There was no "unequivocal repudiation of the agreement to arbitrate" apart from PacifiCare's Los Angeles suit challenging the entire June 2000 HSA. "PacifiCare's March 27, 2001 complaint *was itself* an unequivocal repudiation of the agreement to arbitrate contained within the June 2000 HSA," Saint Agnes argues. (RB 20, emphasis added.) It is PacifiCare's challenge to the June 2000 HSA as a whole, rather than any separate repudiation of the arbitration provision itself, that Saint Agnes characterizes as the "unequivocal repudiation of the agreement to arbitrate." (RB 20, see RB 17.)

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[1] (...continued)
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* (1996) 42 Cal.App.4th 1142, 1149-1151 [proof of intention to mislead or resulting prejudice is indispensable to arbitration waiver]; *A. D. Hoppe Co. v. Fred Katz 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].

That indefinite reasoning—equating the challenge to the entire agreement with a repudiation of the arbitration provision alone—is supported only in the *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213, nowhere else. The authorities on which *Bertero* purports to rely (the *Local 659* case and various treatises) support no such rule. Not a single case—not even *Bertero*—explains why a challenge or repudiation of an entire agreement should result in a selective waiver of one, and only one, of the agreement's provisions.

Nor is the equation of litigation with a waiver of arbitration supported by the law. In California, filing suit without first seeking arbitration does not—as a matter of law—prevent later enforcement of the parties' written arbitration agreement. That is demonstrated in the opening brief, amply confirmed by authorities that respondent's brief never addresses. (AOB 17-18; see fn. 1, above.)

Unless PacifiCare's Los Angeles lawsuit justifies forfeiture of its rights under the June 2000 HSA (and Saint Agnes seems to concede it does not) foundation for the trial court's Order is lacking. As the trial court has made clear, it was PacifiCare's filing of the Los Angeles pleading, without first "seek[ing] to invoke the arbitration provision of the HSA," that resulted in the irrevocable forfeiture of its contractual right to arbitration. (Order, AA tab 18, p. 779.) But mere litigation, short of the *merits of arbitrable issues*, cannot alone constitute a waiver of a contractual right to arbitration. (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 605-606, reversed in part on other grounds, *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., supra,* at pp. 188-189.)

**B. Saint Agnes' Procedural Responses To The Los Angeles Lawsuit Do Not Constitute Prejudice And Do Not Support Waiver.**

The rights of the parties to contractual arbitration are not so fragile as to evaporate automatically upon a whisper of controversy or upon the mere filing of a lawsuit. The true rule is that waiver of arbitration cannot be shown without affirmative proof of prejudice to the party opposing arbitration, resulting from the other party's acts inconsistent with the right to arbitration, demonstrated by clear and convincing evidence. (*Chase v. Blue Cross of California, supra,* 42 Cal.App.4th 1142; *Britton v. Co-op Banking Group* (9th Cir. 1990) 916 F.2d 1405; see *Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 234 [party showing waiver has "heavy burden"].)

Actual prejudice, demonstrated by clear and convincing evidence, is not established merely by the theoretical change in position evidenced by Saint Agnes' filing of a lawsuit. As we show above, suit on an arbitrable claim is not itself enough to result in a waiver of arbitration. (*Doers v. Golden Gate Bridge etc. Dist., supra,* 23 Cal.3d at p. 188; cf. *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784 [waiver found because party sued and pursued matter in bad faith for admitted purpose of

"procedural gamesmanship"]; *Davis v. Continental Airlines, Inc., supra*, 59 Cal.App.4th at pp. 212-216 [extensive discovery in litigation proceedings can support prejudice determination]; *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1364 [same].) In *Groom v. Health Net* (2000) 82 Cal.App.4th 1189, the Court of Appeal reversed a trial court's waiver finding, holding that the party's participation in litigation of a series of demurrers *did not* constitute prejudice that could support a waiver of arbitration. (*Id.* at pp. 1194-1195; see also *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, 1250-1251.)[2]

Saint Agnes seems to assume that the fact it filed its Fresno lawsuit demonstrates a change in its position or prejudice sufficient to support the waiver finding. But the record shows no fundamental change in position or substantial prejudice. One way or another, Saint Agnes at all times intended to seek enforcement of the June 2000 HSA. Its label of the Los Angeles lawsuit as "preemptive" openly implies its own imminent assertion of its claims. (E.g., RB 9.) The fact that PacifiCare challenged the validity of the June 2000 HSA in the Los Angeles suit two weeks before Saint Agnes filed the Fresno suit seeking its enforcement shows no fundamental prejudice or change in Saint Agnes' position.

There is another reason that Saint Agnes' evidence is insufficient to demonstrate prejudice or to support the trial court's waiver finding. The

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[2] In most of the cited cases suit was commenced by the party seeking to avoid arbitration. However, nothing in the reasoning of those decisions supports any different definition of "prejudice" depending upon which party first filed suit.

core of PacifiCare's Los Angeles lawsuit challenged the very validity of the June 2000 HSA, claiming that the agreement never became viable or enforceable due to the nonoccurrence of conditions to its existence. (Los Angeles compl., ¶¶ 9-24, 38-42, AA tab 3, pp. 100-104, 106-107.) If that contention turns out to be accurate—if the June 2000 HSA never became viable or enforceable—then neither did its arbitration clause. The arbitration clause itself does not require the arbitration of disputes about the existence of the June 2000 HSA, only about its "interpretation, performance, and breach." (June 2000 HSA ¶ 7.5.2, AA tab 1, pp. 50-51.) If the June 2000 HSA is determined to be valid, then arbitration is the appropriate forum for the evaluation of the parties' performance under it. But if the June 2000 HSA never became valid due to the nonoccurrence of conditions to its existence, then no arbitration is required under any agreement of the parties.

The act of filing a lawsuit to enforce viable claims under what PacifiCare reasonably contends are the parties' enforceable agreements therefore breached no duty, bypassed no obligation, perpetrated no wrong; it cannot imply an intention to forego arbitration. As the Supreme Court has repeatedly held, nothing less than the actual litigation of the merits of arbitrable issues will raise such an inference. (*Doers v. Golden Gate Bridge etc. Dist.*, *supra,* 23 Cal.3d at p. 188.) In *Doers*, the Supreme Court held that a waiver of arbitration cannot be based upon the fact that the party seeking arbitration had filed suit to enforce an agreement that contained the arbitration provision; even then, further prejudice would have to be shown

before a waiver could be found. (*Ibid.*) In so holding, the Court expressly disapproved cases that found waiver of arbitration on that ground, and disapproved contrary dicta in *Berman v. Renart Sportswear Corp.* (1963) 222 Cal.App.2d 385, and other cases. (*Doers, supra,* 23 Cal.3d at pp. 185-188.) In *Doers,* the Supreme Court found that there was no waiver of arbitration, although the defendant had been compelled to prosecute a motion to dismiss the plaintiff's lawsuit—far more extensive participation in litigation than anything shown by the record here. (*Id.* at p. 184.)[3]

Because the minor skirmishes involving demurrers and procedural motions do not support a waiver of arbitration, the fact that routine expenses inevitably accompany those procedures (and obviously accompanied them in the *Doers* case) cannot override the rule of *Doers* and other cases. If the sort of prejudice and change of position relied upon by Saint Agnes were sufficient to show waiver, those decisions would have had a different result.

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[3] Saint Agnes' reliance on *Taylor v. Johnston* (1975) 15 Cal.3d 130 (RB 34) is surprising in light of that case's holding that repudiation *cannot* be implied from conduct that does not put the performance of contractual obligations wholly beyond the party's power to perform. Far from supporting Saint Agnes' position, in *Taylor v. Johnston* the Supreme Court reached the unanimous conclusion that there had been no such repudiation.

## C. Saint Agnes Fails To Defend The Logic Of The *Bertero* Decision.

In the opening brief we squarely challenged the logic of *Bertero v. Superior Court, supra,* 216 Cal.App.2d 213. We showed that the facts in *Bertero* were wholly different from those of the decision on which it purports to rest, *Local 659, I.A.T.S.E. v. Color Corp. Amer., supra,* 47 Cal.2d 189. In *Bertero* the entire contract was repudiated, while in *Local 659* the union had specifically repudiated the arbitration provision of the parties' collective bargaining agreement. In *Local 659*, therefore, permitting the other party to accede to that repudiation—in effect accepting the other party's proffered cancellation of the arbitration provision by mutual agreement—made perfect sense. In *Bertero,* however, that result made no sense at all, because the studio had disclaimed the *entire agreement* between the parties and not specifically the arbitration provision. In that case, the repudiation had not been accepted; there was no justification for barring enforcement only of the agreement's arbitration clause.

The first prong of Saint Agnes' defense of the *Bertero* decision is confined to its conclusion that the factual differences between *Bertero* and *Local 659* cited above "are of no legal consequence." (RB 24.)[4] According

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[4] The second prong of Saint Agnes' defense of *Bertero* is a general effort to blur the issue by pretending that PacifiCare challenged not only *Bertero*, but also the *Local 659* case and other authorities cited in *Bertero*. (E.g., RB (continued...)

to Saint Agnes, the trial court was justified in treating PacifiCare's challenge to the entire June 2000 HSA as though it were a specific repudiation of the arbitration provision alone, which PacifiCare had not challenged. Never mind that not a single authority cited by respondent's brief or the trial court rests on such facts. Never mind that Saint Agnes offers no reasoned analysis why the facts in this case should be equated with a waiver specifically of the parties' arbitration agreement.

But without the equation of a repudiation of the entire agreement with repudiation of the arbitration provision, the repudiation theory fails altogether. Without that theory, there was no repudiation, and the Order rests on nothing more than PacifiCare's filing of the Los Angeles lawsuit—which Saint Agnes itself admits cannot show a waiver of the right to demand arbitration. (RB 28-29 [Saint Agnes "does not disagree" that filing lawsuit alone cannot waive arbitration].)

Respondent's brief defends only the general rule of the *Local 659* decision and dozens of other authorities, that a repudiation may result in a waiver. But that general rule is not the rule challenged by the opening brief in this appeal. In this appeal the opening brief challenged the application of that general rule to the very different facts presented here. Saint Agnes' brief ducks that issue, never addressing at all why that rule should apply here, where there was no repudiation of the arbitration agreement itself.

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[4] (...continued)
24-25, 31-33, 35.) But PacifiCare has no quarrel with those other authorities, because it is *Bertero* alone that misapplies the law of repudiation.

## D. Saint Agnes' Authorities Do Not Support The Trial Court's Order In This Case.

Pretending that PacifiCare has challenged the general principle of repudiation and not just its illogical and unfair application in this case, respondent's brief refers at length to the support for the concept of repudiation in various court decisions and in the treatises of *Corbin*, *Williston*, and *Farnsworth*. But those citations miss the issue entirely. Not surprisingly, none save the challenged decision in *Bertero v. Superior Court* even alludes to (let alone discusses or actually applies) the principle embodied in the trial court's ruling in this case is based. Save *Bertero*, not a single one of the cited authorities holds that a party's generalized challenge to an entire agreement can be taken as a selective repudiation of the agreement's arbitration provision alone, when the remaining provisions of the agreement are found to be fully enforceable. None holds that minor procedural litigation, undertaken without bad faith, waives a party's right to later enforce an applicable agreement to arbitrate related issues.

Certainly the decision in *Local 659, I.A.T.S.E. v. Color Corp. Amer.*, *supra*, 47 Cal.2d 189, provides no support for that result. The *Local 659* case involved repudiation only of the arbitration provision itself, not of the entire agreement of which the arbitration provision was just one part. (*Local 659, I.A.T.S.E. v. Color Corp. Amer.*, *supra*, 47 Cal.2d at p. 194 [the court is "not concerned here with any question involving the repudiation or violation of the terms of the bargaining agreement other than the arbitration

provision"].) Our case involves exactly what the *Local 659* case does not: a supposed repudiation of the *entire agreement*, without any reference specifically to the arbitration provision.

Misleading too is Saint Agnes' characterization as "black letter law" of the supposed rule on which the trial court's Order purports to rest, that waiver will result from "repudiating the contract that includes the arbitration clause." (RB 14.) For that proposition respondent's brief cites only *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24-25 [74 L.Ed.2d 765, 103 S.Ct. 927] ("*Moses H. Cone*"), and the beleaguered *Bertero* decision. Saint Agnes' version of the "black letter law" results not from anything in the *Moses H. Cone* decision, but only from jumbling the words of the true rule. The rule is not, as Saint Agnes puts it, that waiver results from "repudiating the contract that includes the arbitration clause" (RB 14); it is that repudiation *of an arbitration clause* may result in waiver of arbitration. (*Local 659, I.A.T.S.E. v. Color Corp. Amer., supra,* 47 Cal.2d at pp. 195-196.)

As for the *Moses H. Cone* decision, it does not even allude to any such rule, or to any rule involving the subject of waiver resulting from repudiation, the only subject for which Saint Agnes cites it. It merely refers to the general subject of "waiver," affirming that "any doubts concerning the scope of arbitrable issues"—even doubts raised by allegations of "waiver," delay, or like defenses—"should be resolved in favor of arbitration . . ." (*Moses H. Cone, supra*, 460 U.S. at pp. 24-25.)

Nor can the *Bertero* decision itself supply any underpinning for Saint Agnes' reference to "black letter law." (RB 14.) *Bertero* purports to rely on the *Local 659* decision, a reliance that the opening brief demonstrates is wholly unjustified. *Bertero* is not at all consistent with or supported by *Local 659.* (See AOB 14-16.)

The *Bertero* decision's prime defect is that it misapplies the *Local 659* decision's remedy—a remedy that is perfectly appropriate in that decision—to its own very different facts. The trial court's Order in this case embodies the same mistake. PacifiCare never told Saint Agnes (as the union had repeatedly told the company in the *Local 659* decision) that it would not arbitrate the parties' disputes. As far as the record shows, the issue never came up. But in *Local 659,* both parties apparently agreed that the agreement between them (the collective bargaining agreement) was enforceable, all except for its arbitration provision, that is. The union specifically repudiated only *the arbitration provision* of the agreement and the company called its bluff, accepting the repudiation and in effect eliminating that provision by mutual agreement. (*Local 659, I.A.T.S.E. v. Color Corp. Amer., supra,* 47 Cal.2d at p. 198.)

The *Local 659* decision thus makes perfect sense, but the *Bertero* decision and the decision of the trial court in this case do not. Beyond their common reference to "repudiation," nothing in the reasoning of the *Local 659* decision, nor in that of the contract treatises on which it relies, supports the one-sided result adopted by the *Bertero* court and by the trial court in this case.

Significantly, Saint Agnes never responds to this analysis. Just as significantly, the case from which Saint Agnes draws its own analysis of repudiation and waiver, *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236, strongly supports PacifiCare's position. In *Martinez*, the Court of Appeal affirmed a trial court determination that the plaintiff employee had waived the arbitration provision of the parties' written employment agreement. But in *Martinez,* unlike here, the waiver did not result from any repudiation of the parties' entire agreement. Rather, in *Martinez* the plaintiffs' counsel specifically and positively repudiated arbitration alone, vowing that in no event would the plaintiffs consent to participate in arbitration. Thus in *Martinez,* just as in *Local 659*, the plaintiffs' repudiation was specifically of *the arbitration* provision of their agreement, and not merely a challenge to the contract as a whole. *Martinez*, like *Local 659,* affirms an appropriate result on its own facts but provides Saint Agnes and the trial court no support with respect to the very different facts of this case.

In this context, Saint Agnes' extensive discussion of *Seidman & Seidman v. Wolfson* (1975) 50 Cal.App.3d 826 (RB 29-32), is puzzling at best, since that case, like *Martinez*, supports PacifiCare's analysis and is inconsistent with that of Saint Agnes and the trial court. In *Seidman & Seidman* the Court of Appeal reversed a finding that by filing suit the plaintiff had waived arbitration, where the plaintiff's suit had challenged the parties' entire agreement. Notwithstanding that the agreement provided for arbitration of the dispute asserted by the plaintiff's complaint, filing suit

did not waive arbitration. The plaintiff's challenge to the entire agreement, the *Seidman & Seidman* decision held, did not demonstrate any intention to relinquish the arbitration right within that agreement if the litigation found the agreement to be enforceable. (*Id.* at pp. 836-837.)[5]

In this case, just as in *Seidman & Seidman,* PacifiCare did not, by suing to challenge the agreement as a whole, waive its right to arbitration under the parties' agreement if that agreement is found to be viable. Thus Saint Agnes is only half right in contending that the *Seidman & Seidman* case does not disapprove "either *Bertero* or *Local 659*" (RB 31); the *Seidman & Seidman* analysis is consistent with the *Local 659* decision, but it is just as squarely *inconsistent* with both the *Bertero* decision and the trial court's Order in this case.[6]

The decision in *New Linen Supply v. Eastern Environmental Controls, Inc.* (1979) 96 Cal.App.3d 810, dispels the faulty dictum that arbitration may be waived by denying a contract in which an arbitration clause is contained. In *New Linen Supply*, the court held that in California

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[5] In *Seidman & Seidman* the plaintiff had in points and authorities later disclaimed an intention to repudiate the arbitration provision of the parties' agreement if the agreement as a whole were eventually found to be enforceable; but nothing in the *Seidman & Seidman* decision indicates that any such explicit affirmation of the arbitration clause was essential to his rights.

[6] Saint Agnes' point, that *Seidman & Seidman* does not disapprove the *Local 659* decision, is meaningless for another reason as well: The Court of Appeal was required to adhere to *Local 659*, a decision of our Supreme Court, even if it had wanted to disapprove it. (*Auto Equity Sales Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

the rule is that stated in *Reiss v. Murchison* (9th Cir. 1967) 384 F.2d 727, 733, 735, that "one who repudiates a contract containing an arbitration clause may nevertheless, under California law, claim the benefit of that clause by requiring arbitration." (*New Linen Supply, supra,* 96 Cal.App.3d at pp. 815-816, quoting *Reiss v. Murchison, supra,* 384 F.2d at p. 735.)

Neither the *Bertero* decision nor any other published decision in this state of which we are aware purports to explain why one party's repudiation of an entire agreement affords the other party the opportunity to avoid the agreement's arbitration provision while selectively enforcing its other terms. The principle makes no sense, and has no support in the law. It is the product of *Bertero v. Superior Court*, a single stray decision unsupported even by the authorities on which it purports to rest. It should be rejected here.

## III. SAINT AGNES' BRIEF DOES NOT ADDRESS THE VIOLATION OF THE FEDERAL ARBITRATION ACT RESULTING FROM THE TRIAL COURT'S SELECTIVE ENFORCEMENT OF THE JUNE 2000 HSA.

Saint Agnes relies upon *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394 for the well-accepted proposition that section 2 of the Federal Arbitration Act, 9 United States Code sections 1-16, precludes states from singling out arbitration provisions for suspect status and requires that substantive and procedural state law provisions be applied

to arbitration contracts that are within the Act's jurisdiction "'upon the same footing as other contracts.'" (*Rosenthal*, *supra*, 14 Cal.4th at p. 410; RB 34-35; see also AOB 23.) But the *Rosenthal* case has nothing to do with how the law of contract repudiation applies to arbitration provisions, and therefore does not support Saint Agnes' argument that the parties' arbitration provision was properly singled out for non-enforcement.

Apart from references to "repudiation" in general (RB 35), respondent's brief does not explain how the trial court's Order places arbitration provisions "upon the same footing" as other contractual provisions. In our opening brief we challenged Saint Agnes to address exactly that issue, arguing that

> "[n]o 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. " (AOB 23.)

Louder than any argument is Saint Agnes' deafening silence in response. Respondent's brief attempts no citation to any rule of state law that permits one party to pick and choose which contractual terms may be enforced and which may not—as the trial court's ruling does here—merely

because the other party has filed a lawsuit contending that the entire agreement is void.

The non-existence of any such rule of law demonstrates the very point that Saint Agnes denies. The rule applied by the trial court permits Saint Agnes to insist upon enforcement of the parties' contract, while at the same time singling out just one contractual provision—the arbitration provision—for selective non-enforcement. And it permits that selective enforcement on grounds that are apparently not applicable to other contractual provisions; respondent's brief certainly suggests no example of any other provisions that might be singled out for such a one-sided remedy. That disparity in treatment of arbitration provisions, by very definition, violates the Federal Arbitration Act and the parallel requirements of California law. (Code of Civ. Proc., § 1281.2, subd. (b).)

## IV. THE TRIAL COURT'S SELECTIVE ENFORCEMENT OF THE PARTIES' AGREEMENT IS UNJUSTIFIED BY PACIFICARE'S CONDUCT.

It is a fundamental tenet of law that contracts—including arbitration contracts—do not encompass terms beyond those intended by the parties. (Civ. Code, § 1648 [contract extends only to intended terms]; *Parker v. Twentieth Century-Fox Film Corp.* (1981) 118 Cal.App.3d 895 [courts must look to scope of arbitration clause in parties' contract to determine its application]; *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal.3d

473, 479 [same].) "The scope of arbitration is . . . a matter of agreement between the parties." (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323.) "'The powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.'" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8-9, quoting *O'Malley v. Petroleum Maintenance Co.* (1957) 48 Cal.2d 107, 110.)

The arbitration term of the June 2000 HSA is focused. It does not provide for arbitration of every dispute between the parties, nor of disputes generally "arising from" the parties' agreement, nor even of disputes about the agreement's existence. It provides for arbitration only of disputes over the agreement's "interpretation, performance, and breach." (Order, AA tab 18, p. 775; June 2000 HSA, ¶ 7.5.2, AA tab 1, pp. 50-51.)

The thrust of PacifiCare's claims in the Los Angeles action do not call for the "interpretation, performance, and breach" of the June 2000 HSA. Rather, the Los Angeles action arose from the nonoccurrence of conditions to the very existence of the June 2000 HSA, and PacifiCare contends in that lawsuit that the parties' relations therefore are governed by various other agreements that do not provide for arbitration. (Los Angeles compl., ¶¶ 9-24, 38-42, AA tab 3, pp. 100-104, 106-107.) Whether PacifiCare was technically correct or incorrect in determining that filing suit the Los Angeles action was appropriate without first seeking arbitration under the June 2000 HSA, PacifiCare did not lack probable cause in doing

so. Any misstep it might have made does not rise to the level of an unpardonable transgression.

Certainly, PacifiCare had no reason to suspect when it took that action that its rights under the June 2000 HSA would be forfeit if its understanding about the scope of the June 2000 HSA's arbitration provision, or the validity of the June 2000 HSA, turned out to be in error. Quite to the contrary, PacifiCare had every reason to believe when it filed the Los Angeles action that after the existence and validity of the June 2000 HSA was finally determined, the parties would receive equal treatment. The June 2000 HSA would either be disregarded as invalid as PacifiCare contended, or, if it were determined to be valid, its terms would be enforced equally with respect to all parties. PacifiCare had every reason to understand that if it were bound by the terms of the June 2000 HSA, so too would Saint Agnes by bound by those same terms.

The trial court's Order determines by implication that PacifiCare erred by passing over the June 2000 HSA's arbitration agreement in its Los Angeles action, and that the error was absolutely and irrevocably fatal to its rights—at least its arbitration rights—under the June 2000 HSA. Filing that suit so repudiated the June 2000 HSA, the Order holds, that the agreement's arbitration clause cannot be enforced for PacifiCare's benefit even in a suit, such as Saint Agnes' Fresno action, that squarely calls for rulings about the "interpretation, performance, and breach" of the June 2000 HSA.

Saint Agnes' suggestion (RB 19, 28, 36-37) that the rules of the American Arbitration Association somehow override the scope of the

parties' agreement with respect to arbitration is inconsistent with the law of contracts. But even if PacifiCare were found to have misjudged the impact of the arbitration rules on California contract law, that error provides no justification for the Order's one-sided forfeiture of contract benefits.

The question posed by this appeal is not, as Saint Agnes would have it, whether PacifiCare could have pursued a procedural path less likely in retrospect to have resulted in the forfeiture found by the trial court's Order. Rather, the question here is whether the procedure undertaken by PacifiCare was so outrageous and prejudicial as to justify the trial court's forfeiture of PacifiCare's rights under the circumstances.

The answer to that question should be obvious. Even if PacifiCare's decision to file the Los Angeles suit without first seeking arbitration amounted to a misinterpretation of the June 2000 HSA's arbitration provision, still its suit was neither undertaken in bad faith nor outrageous. Any potential resulting harm was certainly easily remedial. It therefore should be just as obvious that no forfeiture of PacifiCare's rights under the June 2000 HSA—if that agreement is eventually determined to be enforceable at all—can be justified.

## CONCLUSION

The challenged Order of the trial court expressly rests on *Bertero v. Superior Court*, a ruling that misapplied the facts even when it was decided and has never received significant analysis or inquiry since. Nevertheless,

numerous decisions—including decisions of our Supreme Court—have long since clarified the law with respect to waiver of arbitration, making clear the limitations that public policy imposes on *Bertero's* generalities.

Numerous decisions now make clear that the trial court's refusal to enforce arbitration under the circumstances of this case is contrary to public policy, and to the law. The trial court's Order therefore should be reversed with directions to enter an order granting arbitration with respect to issues that are within the June 2000 HSA arbitration agreement, if and when the June 2000 HSA is determined to be valid and enforceable in the first instance.

Dated: June 7, 2002

Respectfully submitted,


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## CERTIFICATION

Pursuant to California Rules of Court, Rule 14, subdivision (c), I certify that this Appellants' Reply Brief contains 5,586 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: June 7, 2002

Peter O. Israel