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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

11 ANDREW A. ARCE, a minor, by and
12 through his Guardian ad Litem,
13 GUILLERMO ARCE; GUILLERMO
14 ARCE,

15 Plaintiffs,

16 vs.

17 KAISER FOUNDATION HEALTH PLAN,
18 INC., AND DOES 1 THROUGH 100,
19 INCLUSIVE,

20 Defendants.

Case No.: BC 388689

[Assigned to the Hon. Emilie H. Elias]
Dept. 308

Complaint Filed: April 8, 2008

**PLAINTIFF'S EX-PARTE
APPLICATION FOR AN ORDER (1)
LIFTING STAY TO ALLOW
PLAINTIFF TO TAKE PMK
DEPOSITION AND (2) CONTINUING
HEARING DATE ON KAISER'S
MOTION TO COMPEL ARBITRATION
AND DEMURRER; MEMORANDUM
OF POINTS AND AUTHORITIES;
DECLARATION OF SCOTT C.
GLOVSKY**

Date: Tuesday, September 4, 2008

Time: 8:30 a.m.

Dept: Dept. 308

Trial Date: None Set

1 TO THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2
3 PLEASE TAKE NOTICE that on Tuesday, September 4, 2008 at 8:30 a.m. in Department
4 308 of the above-entitled court, located at 600 S. Commonwealth Avenue, Los Angeles, CA
5 90005, Plaintiff will make an ex parte application for an order by the Court: (i) lifting the stay in
6 this case to allow Plaintiff to take the deposition of Defendant Kaiser's person most
7 knowledgeable regarding Kaiser's enrollment forms and its Newborn Information form, which
8 forms are squarely put at issue by Kaiser's pending Petition to Compel Arbitration, and (ii)
9 continuing the hearing on Kaiser's Petition to Compel Arbitration and Demurrer to allow time for
10 Plaintiff to conduct the foregoing discovery. This ex-parte application is made on the grounds
11 that the discovery sought relates to the validity and enforceability of the arbitration agreement
12 that Kaiser is attempting to enforce, and not to the underlying merits of the case. Because the
13 discovery goes to the issues of whether the arbitration agreement is enforceable in the first place,
14 it should not be subject to the Court's prior stay of the litigation.

15 This ex-parte application is based on this Notice, the attached Memorandum of Points and
16 Authorities, the attached Declaration of Scott C. Glovsky, Kaiser's Petition to Compel Arbitration
17 on file with the Court, and on such other and further argument and evidence as may be presented.

18 Dated: September 3, 2008

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20 LAW OFFICES OF SCOTT C. GLOVSKY

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22 By: _____
23 SCOTT C. GLOVSKY
24 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **I.**

4 **INTRODUCTION**

5 Plaintiff Andrew Arce is a two and one-half year old boy with autism. Kaiser wrongfully
6 refused Andrew, and probably thousands of other autistic Kaiser patients, necessary treatment for
7 his autism. Although California’s Mental Health Parity laws require Kaiser to provide care for
8 the treatment of autism, and early treatment leads autistic children to make substantial and
9 sustained gains in IQ, language, academic performance, and adaptive behavior, Kaiser refuses to
10 provide the care that autistic children desperately need to achieve their full potential. Plaintiffs
11 have brought this action to force Kaiser to stop its wrongful, unfair, and, ultimately, unlawful
12 actions.

13 In the Petition to Compel Arbitration pending before the Court, Kaiser argues that
14 Plaintiffs are required to arbitrate their claims based on the arbitration provision found in Kaiser’s
15 Newborn Information form that Andrew Arce’s mother signed at a Kaiser hospital soon after
16 Andrew was born. Kaiser has represented to the Court that the Newborn Information form is an
17 “enrollment form” – an apparent effort to establish that Kaiser has complied with the mandatory
18 arbitration disclosure requirements for enrollment forms contained in Health & Safety Code §
19 1363.1. But, in fact, the Newborn Information form is not an enrollment form for Andrew and it
20 indicates that it is simply a “temporary ID card.” Plaintiff seeks to conduct discovery directly
21 relevant to the Newborn Information form and Kaiser enrollment forms. Because this discovery
22 is necessary to fully brief the issues presented by Kaiser’s Petition, and because this discovery is
23 not related to the underlying issues presented by this case, it should not be subject to the stay
24 imposed by the court.

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II.

LEGAL ARGUMENT

Kaiser admits that it is a health care service plan. Kaiser Petition to Compel Arbitration ¶

2. As such, if Kaiser wants to enforce an arbitration clause against one of its members, it is required to comply with Health & Safety Code § 1363.1, which by its terms applies to “[a]ny health care service plan that includes terms that require arbitration.”

In its entirety, § 1363.1 provides:

Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions:

(a) The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice.

(b) The disclosure shall appear as a separate article in the agreement issued to the employer group or individual subscriber and shall be prominently displayed on the *enrollment form signed by each subscriber or enrollee*.

(c) The disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other disputes relating to the delivery of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure.

(d) In any contract or *enrollment agreement for a health care service plan*, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for *the individual enrolling in the health care service plan*.

1 (Emphasis added.)

2 A health care plan's failure to comply with the disclosure requirements of § 1363.1
3 renders an arbitration clause unenforceable. *Robertson v. Health Net of California* (2005) 132
4 Cal. App. 4th 1419; *Malek v. Blue Cross of California* (2004) 121 Cal. App. 4th at 50; *Pagarigan*
5 *v. Superior Ct.* (2002) 102 Cal. App. 4th 1121; *Imbler v. PacificCare* (2002) 103 Cal. App. 4th 567;
6 *Smith v. PacificCare Behavioral Health of Cal., Inc.* (2001) 93 Cal. App. 4th 139.

7 In its Petition, Kaiser argues that the Newborn Information form that Maria Arce signed at
8 a Kaiser hospital shortly after Andrew's birth is the "enrollment form" in this case, and that
9 arbitration should be compelled based on the arbitration provision found in the Newborn
10 Information form. See Kaiser's Petition ¶ 6 & Ex. B thereto. The Newborn Information form,
11 however, does not identify itself as an enrollment form *on its face* and is markedly different from
12 the enrollment forms Kaiser typically uses to enroll persons in its health care plans. See attached
13 Dec. of Scott Glovsky, Ex. A (copy of *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160
14 Cal. App. 4th 1021, which includes a Kaiser enrollment form in its appendix). It is Plaintiff's
15 position that this Newborn Information form is not an enrollment form, but rather is a form
16 simply used to identify new babies born at Kaiser hospitals, and, therefore, cannot be the § 1363.1
17 compliant "enrollment form" in this case.

18 Plaintiff seeks to take the deposition of Kaiser's "person most knowledgeable" ("PMK")
19 regarding its enrollment forms and the Newborn Information form because this testimony will be
20 central to the issues presented by Kaiser's Petition to Compel Arbitration. Plaintiff's deposition
21 notice for this PMK deposition is attached as Exhibit B to the attached Declaration of Scott
22 Glovsky. This discovery should be allowed because it does not involve the merits of the
23 underlying controversy, but rather goes to the heart of whether there is an enforceable arbitration
24 agreement in this case.

25 Plaintiffs expect Kaiser to argue that Code of Civil Procedure § 1281.4 governs a stay
26 pending a court's determination on a petition to compel arbitration. The legislative history of
27 Code of Civil Procedure section 1281.4 supports the conclusion that discovery on proceedings
28

1 relating to the *determination of the petition or arbitration itself* are not subject to stay. When
2 originally enacted in 1851, the statute provided that a stay could be imposed in any action
3 “brought upon *any issue arising out of* an agreement providing for the arbitration thereof . . .”
4 See Historical and Statutory Notes, West’s Ann. Cal. C.C.P. § 1281.4. Thus, under that broad
5 language, it could be argued that the stay applies to all the issues, including the issue of the
6 enforceability of the arbitration provision itself.

7 The statute was amended in 1961 to its current form. In its current form, the statute now
8 expressly limits the application of the stay to the issues “involved in [the] action or proceeding”
9 by providing that severable issues which are *not* the subject of the arbitrable controversy may be
10 severed and that *the stay applies only to the issues which are arbitrable*. As discussed above, the
11 determination of whether, in fact, the controversy must be submitted to arbitration *is not*
12 *arbitrable*. Thus, under the terms of CCP § 1281.4, proceedings -- including discovery -- which
13 relate to the enforcement of the arbitration agreement itself can be severed while the remainder of
14 the action remains stayed.

15 It would be anomalous -- not to mention fundamentally unfair -- to preclude Plaintiffs
16 from obtaining discovery on the gateway issue of whether there is an enforceable arbitration
17 agreement in this case. Since the issues to which the discovery is sought do not relate to the
18 fundamental issues in this case itself, but only to the whether there is an enforceable arbitration
19 agreement, permitting discovery does not undermine the purpose of CCP § 1281.4, *i.e.*, to assure
20 that all of the arbitrable issues related to the controversy itself are decided by the arbitrator if, in
21 fact, the arbitration is required.

22 23 24 III.

25 CONCLUSION

26 Because the issues relevant to the discovery sought by Plaintiffs relate to the question of
27 whether there is an enforceable arbitration agreement in the first instance, the Court should allow
28 this discovery to proceed. Further, the hearings on Kaiser’s Petition to Compel Arbitration and its

1 Demurrer, which are both set for September 22, 2008, should be continued to allow Plaintiffs to
2 conduct the foregoing discovery.
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4 Dated: September 3, 2008
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6 LAW OFFICES OF SCOTT C. GLOVSKY
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8 By: _____
9 SCOTT C. GLOVSKY
10 Attorneys for Plaintiff
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DECLARATION OF SCOTT C. GLOVSKY

I, SCOTT C. GLOVSKY, DECLARE:

1. I am an attorney admitted to practice before the courts of this State and am the attorney of record for plaintiff. I have personal knowledge of the information contained in this declaration, and if called to do so, could and would competently testify thereto.

2. Attached hereto as Exhibit A is a true and correct copy of the court of appeal's opinion in *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal. App. 4th 1021. In the appendix to this decision, there is a copy of a Kaiser enrollment form.

3. Plaintiff seeks to take the deposition of Kaiser's "person most knowledgeable" ("PMK") regarding its enrollment forms and the Newborn Information form attached to Kaiser's Petition to Compel Arbitration because this discovery is central to the issues presented by Kaiser's Petition. Specifically, Kaiser contends that the Newborn Information form is an enrollment form. It is Plaintiff's position, however, that the Newborn Information form is not an enrollment form, but rather is simply used to provide temporary identification for babies born at Kaiser hospitals. Attached hereto as Exhibit B is a true and correct copy of Plaintiff's Notice of Taking Deposition of Kaiser's person most knowledgeable regarding Kaiser enrollment forms and Kaiser's Newborn information form. In this deposition notice Plaintiff also seeks the production of Kaiser's enrollment forms and related documents because Plaintiffs believe that these enrollment forms will be directly relevant to, and will support, their argument that the Newborn Information form is not an enrollment form.

4. On September 3, 2008, at approximately 9:30 a.m., I called Kent Brandmeyer, one of Kaiser's counsel, and gave his assistant Emmy notice that on Thursday, September 4, 2008 at 8:30 am in Dept. 308 of the above-captioned Court Plaintiff would be making an ex parte application for an Order (1) lifting the stay to allow Plaintiff to take the deposition of Kaiser's person most knowledgeable regarding its Newborn Information forms and Kaiser's enrollment forms used for enrolling persons in its health care plans, and (2) continuing the hearing on

1 Kaiser's Petition to Compel Arbitration and its Demurrer, which are both currently set for hearing
2 on September 22, 2008 at 9:00 a.m. I asked Emmy to have Mr. Brandmeyer call me back to
3 discuss this application and to let me know if Kaiser would oppose this application, and Emmy
4 told me that she would have him call me on August 29, 2008.

5 I declare under penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct and that this declaration was executed on September 3, 2008 at
7 Pasadena, California
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SCOTT C. GLOVSKY
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