TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, April 05, 2023 3:00 p.m.
Courtroom 17 –Hon. Bradford DeMeo
3035 Cleveland Avenue, Santa Rosa

PLEASE NOTE: In accordance with the Order of the Presiding Judge, a party or representative of a party may appear in Department 17 in person or remotely by Zoom, a web conferencing platform. Whether a party or their representative will be appearing in person or by Zoom must be part of the notification given to the Court and other parties as stated below.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary via Zoom unless otherwise indicated.

TO JOIN ZOOM ONLINE:

D17 – Law & Motion
Meeting ID: 895 5887 8508
Passcode: 062178
https://us02web.zoom.us/j/89558878508?pwd=L2MySDFXWEtMa1JsdGUxUDFDOVNyZz09

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
+1 669 900 6833 US (San Jose)

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, **YOU MUST NOTIFY** Judge DeMeo's Judicial Assistant by telephone at **(707) 521-6729**, and all other opposing parties of your intent to appear, and **whether that appearance is in person or via Zoom**, by ***4:00 p.m. the court day immediately preceding the day of the hearing.***

1. SCV-268964, Barker v. Zatman

The previously ruled on special motion to strike under Cal. Code Civ. Proc. ("CCP") § 425.16 is pending before the First District Court of Appeal as to the whole complaint. The action being stayed pending this appeal (CCP § 916), the demurrer currently on calendar is continued to June 14, 2023, at 3:00 pm in Department 17. Assuming the case is no longer stayed at least 9

court days prior to that date, any briefing Will be in accordance with the timeline Within CCP § 1005.

2. SCV-270851, Eroh v. Colibri Grill Cafe

Motion to Compel Responses to Plaintiff's Form Interrogatories – General Set One, Form Interrogatories – Employment, Set One, and Special Interrogatories, Set One; and Request for Monetary Sanctions GRANTED as to special interrogatories 8-16s but the motion is **MOOT** with respect to compelling responses to the other items, as explained herein. Plaintiff's request for sanctions is **DENIED**, as explained herein.

Facts

Plaintiff complains that when she was an employee of Defendants at the Colibri Grill Café ("CGC") she suffered sexual harassment, a hostile work environment, and discrimination based on her gender. Plaintiff alleges that Defendant Alberto Gomez ("Gomez") owns and operates CGC and is the one who engaged in the alleged wrongful conduct.

On August 18, 2022, Plaintiff served Defendant Gomez with Form Interrogatories – General Set One; Form Interrogatories – Employment, Set One; Special Interrogatories, Set One; Request for Production of Documents, Set One ("RFPs"); and Request for Admissions, Set One ("RFAs"). O'Rourke Dec. Although Plaintiff received responses to the RFPs and RFAs on September 26, 2022, and although the deadline for responding has passed without an extension, Plaintiff never received any responses to the interrogatories, despite writing to Defendants On October 10 and October 27, 2022, to inquire about them.

Motion

This matter has come on calendar for Plaintiff's Motion to Compel Responses to Plaintiff's Form Interrogatories – General Set One, Form Interrogatories – Employment, Set One, and Special Interrogatories, Set One; and Request for Monetary Sanctions. Plaintiff moves the court to compel Defendant Gomez to respond to the interrogatories.

Gomez opposes the motion, asserting that he has responded, without objections although admitting that the responses were late and explaining that it took the attorney too long to prepare them all while attempting to obtain insurance coverage for the Defendant. Gomez asks the court to deny Plaintiff's request for sanctions on this basis.

In reply, Plaintiff admits that Gomez served late responses but demonstrates that Gomez did not respond to all of the interrogatories, failing to provide any response to special interrogatories 8-16. Plaintiff also asserts that many of the responses otherwise are deficient.

Where a party seeks to compel responses under CCP § 2030.290, the moving party need only demonstrate that the discovery was served, the time has expired, and the responding party failed to provide a timely response. See *Leach v. Sup.Ct.* (1980) 111 Cal.App.3d 902, 905-906; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 411. Failure to provide a timely response waives all objections. CCP § 2030.290. There is

no meet-and-confer requirement or a deadline for a motion to compel response where none has been made. CCP §2030.290.

The responding party must verify substantive responses. CCP § 2030.250. Where a response is unverified, the response is ineffective and is the equivalent of no response at all. See *Appleton v Sup.Ct.* (1988) 206 Cal.App.3d 632, 636.

Gomez shows that he has in fact responded, without objection. Fairbairn Dec. The responses are untimely but, to the extent that he responded, the motion is now MOOT.

Nonetheless, Plaintiff shows that Gomez failed to provide any response to special interrogatories 8-16. Lewis Dec. The motion is not moot as to those. The court GRANTS the motion as to special interrogatories 8-16.

Although Plaintiff contends that many of the responses which Gomez did provide are deficient, the responses still render this motion moot as to those items since this is a motion to compel responses where none have been provided. Plaintiff must bring a motion to compel further responses in order to challenge the sufficiency of those responses and obtain new or different responses.

Sanctions

Although the caption refers to a request for sanctions, the actual notice and motion do not request sanctions, do not indicate the type, the basis, or the amount, and do not indicate against whom sanctions are sought. In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. Code of Civil Procedure §2023.040. Plaintiff therefore may not recover sanctions.

Additionally, Gomez has responded, without objection, and demonstrates the delay was due to reasonable problems of the attorney, and that Gomez himself made a good-faith effort to respond. Sanctions, under these circumstances, may not be warranted even if Plaintiff had properly noticed a request for them.

The court DENIES the request for sanctions.

Conclusion

The court GRANTS the motion as to as to special interrogatories 8-16, but the motion is moot as to the other items and the court DENIES the request for sanctions. Plaintiff shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

3. SCV-271058, Pendergrass v. Finley Contracting, Inc,

Motion to Intervene as Party Plaintiff Pursuant to Labor Code §3853 and CCP §376
CONTINUED to June 7, 2023 at 3:00 P.M. in this department, for the reasons explained herein.

The moving party must file and serve new papers identifying the correct defendant by April 21, 2023 and must file proper proof of service of all papers and notice of the new hearing by April 24, 2023. Any new opposition papers must be filed and served by May 12, 2023. Any new reply papers must be filed and served by May 19, 2023.

Alternatively, the parties may resolve this matter by stipulating to a new Complaint-in-Intervention or they may appear and attempt to resolve the matter at the hearing. The court will continue the matter as specified above absent resolution.

Facts and History

Plaintiff complains that on May 28, 2021 he suffered injuries as a result of Defendants' negligence in maintaining safety on a construction site on real property at 4520 Old Barn Rd, Healdsburg ("the Jobsite"). He alleges that when injured he was lawfully on the Jobsite in the course and scope of his employment with Record Building, LLC ("Record"), a subcontractor which Defendant had hired for the work on the Jobsite ("the Project"), and that Defendants negligently and improperly had Plaintiff raised on a forklift without protection. This, he alleges, caused him to be raised and then fall twenty feet, suffering numerous bone fractures.

Plaintiff initially filed the complaint against only Defendant Ken Finley Construction, Inc. ("KFCI") but subsequently filed an amendment substituting in Defendant Finley Contracting, Inc. ("Defendant" or "Finley") as a Doe Defendant.

On August 23, 2022, Defendant answered and filed a cross-complaint for indemnity, contribution, and declaratory relief against "Roe" Cross-Defendants, alleging that the Cross-Defendants are responsible for any injuries to Plaintiff.

On September 22, 2022, Plaintiff filed a dismissal without prejudice of the claims against KFCI only, leaving Defendant Finley as the sole named Defendant.

Motion

Everest Premier Insurance Company, administered by American Claims Management, Inc. ("EPIC" of "Intervenor") moves the court to be allowed to intervene as a party plaintiff pursuant to Labor Code ("Lab.Code") section 3853 and Code of Civil Procedure ("CCP") section 376. It asserts that it is the carrier for the workers' compensation insurance policy ("the Policy") covering Plaintiff's employer and has become obligated to pay benefits under the Policy as a result of Plaintiff's injuries.

Defendant opposes the motion on the ground that the motion does not name the correct party as defendant, because it names KFCI, not Defendant Finley, even though Defendant's attorney informed Intervenor of the correct party.

Intervention

California Code of Civil Procedure §387 sets forth the basic standards for party intervention, including intervention as of right in §387(d)(1) and permissive intervention in §387(d)(2). This allows a party to join with a plaintiff or defendant in a lawsuit or take a position contrary to the other parties. A party may have a *right* to intervene if either the party's joinder is compulsory, or if a statute grants an "unconditional right" to intervene in the situation.

Joinder is compulsory where the nonparty seeking to intervene claims an interest in the property or transaction and is in such a situation that any judgment in the would-be intervenor's absence "may as a practical matter impair or impede his ability to protect that interest." CCP section 387(d)(1). As the statute itself says in subdivision (d)(1),

The court shall, upon timely application, permit a nonparty to intervene in the action or proceeding if either of the following conditions is satisfied:

> (A) A provision of law confers an unconditional right to intervene.
>
> (B) The person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties.

An insurer's subrogation right, for example, is an interest "relating to the property or transaction" that would support intervention. *Hodge v. Kirkpatrick Develop., Inc.* (2005) 130 Cal.App.4th 540, 548-549.

By contrast, a party *may* intervene, and the court has discretion to allow intervention, where the intervenor demonstrates 1) a "direct and immediate" interest in the outcome of the litigation; and 2) the intervention will not enlarge the issues; and 3) the reasons for the intervention outweigh the opposition. CCP section 387(d) (2). *Truck Ins. Exch. v. Sup.Ct.* (1997) 60 Cal.App.4th 342, 346; *Reliance Ins. Co. v. Sup.Ct.* (2000) 84 Cal.App.4th 383, 386. Subdivision (d)(2) states, in full, "[t]he court may, upon timely application, permit a nonparty to intervene in the action or proceeding if the person has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both.

Intervenor relies on Lab. Code section 3853, part of the employer subrogation chapter under the division governing "Workers' Compensation and Insurance." Section 3853 provides procedural details but must be read in light of section 3852, which provides the fundamental basis for the rights and which Intervenor fails to discuss. In fact, Intervenor spends all of its time discussing the timeliness of the motion without actually presenting the basis for its right to intervene in the first place.

That said, Intervenor does have a right to intervene. Section 3852 gives employees and employers rights to bring a claim against a third party for compensation. In pertinent part, it states:

> Any employer who pays, or becomes obligated to pay compensation [or salary, etc.] may likewise make a claim or bring an action against the third person. In the latter event the employer may recover in the same suit, in addition to the total amount of compensation,

damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee….

The employer's right extends, logically, to that of its workers' compensation insurer if the insurer paid the benefits to the injured employee on behalf of the employer. *Engle v. Endlich* (App. 2 Dist. 1992) 9 Cal.App.4th 1152, 1160 ("An employer or its compensation insurance carrier is entitled to recover the benefits paid or owed on behalf of the injured employee."); see also *California Ins. Guarantee Ass'n v. W.C.A.B.* (App. 3 Dist. 2003) 112 Cal.App.4th 358.

The court notes that Intervenor relies in part on CCP section 376 but this provision is inapplicable here. It applies only to the rights of parents and guardians to maintain an action on behalf of children or wards.

Defendant does not oppose the motion as such and it is clear that Intervenor has a right to intervene under these standards.

Defendant's Identity

Defendant only contends that Intervenor's proposed Complaint-in-Intervention identifies the incorrect party as defendant, naming KFCI instead of Defendant. Defendant is correct that the Complaint-in-Intervention identifies KFCI as the defendant and in fact KFCI is, as noted above, no longer a party to this action, while the moving papers also demonstrate service on Defendant Finley, instead of KFCI.

Conclusion

The court CONTINUES the motion in order to allow Intervenor to identify Finley, not KFCI, as the defendant, in the moving papers and proposed Complaint-in-Intervention, to refile and reserve the papers on all parties, and to file proper, timely, proof of service prior to the new hearing.

Intervenor must file and serve the new papers by April 21, 2023 and must file proper proof of service of all papers and notice of the new hearing by April 24, 2023. Any new opposition papers must be filed and served by May 12, 2023. Any new reply papers must be filed and served by May 19, 2023.

Alternatively, the parties may resolve this matter by stipulating to a new Complaint-in-Intervention or they may appear and attempt to resolve the matter at the hearing. The court will continue the matter as specified above absent resolution.

4. SCV-271465, Thomen v. Kaiser Foundation Hospitals

Petition to Compel Arbitration and Stay Action GRANTED.

Facts

Plaintiffs complain that Defendants negligently treated and diagnosed Plaintiff Tammy Y. Thomen ("Tammy"), failing to take proper measures to diagnose possible cancer, which went

undetected and thus untreated for several years until June 4, 2021. They also assert that Plaintiff Mark W. Thomen ("Mark") has suffered damages as a result of the damages to Tammy.

Petition

Defendants petition the court to compel Plaintiffs to submit their claims to arbitration and to stay this pending litigation, alleging that Defendant Kaiser Foundation Health Plan, Inc. ("Health Plan") is a non-profit public benefit corporation and licensed health care service plan under the Knox-Keene Health Care Services Plan Act of 1975("the Act") at H&S Code section 1340, Plaintiffs were, through Tammy's employment, enrolled in Health Plan with an Evidence of Coverage ("EOC") containing an arbitration agreement ("the Agreement") which applies to this dispute. They contend that Plaintiffs were at the time of Tammy's treatment enrolled as members through Tammy's employment with Defendant Permanente Medical Group, Inc. ("Permanente") due to an agreement with Health Plan and the Kaiser Permanent Union ("Union"). The Union membership agreement and EOC, they contend, includes the Agreement requiring the parties to submit to binding arbitration any claim which "arises from or is related to an alleged violation of any duty incident to or arising out of or relating to this EOC or a Member Party's relationship to [Health Plan], including any claim for medical or hospital malpractice…."

Plaintiffs oppose the motion by arguing that there is no signed arbitration agreement or provision and Tammy never was aware of waiving rights to a jury trial for malpractice claims and never consented to waiving such rights. They contend that the provision does not comply with Health & Safety Code ("H&S Code") section 1363.1 governing arbitration provisions for health care services plans.

Defendants have filed a reply, further explaining that the Arbitration Agreement complies with H&S section 1363.1.

Arbitration in General

Code of Civil Procedure ("CCP") sections 1281.2 and 1281.4 allow a party to an arbitration agreement to petition the court to compel arbitration and then to stay legal proceedings pending the outcome of the arbitration. *Nathan v. French Am. Bilingual School* (1969) 2 Cal.App.3d 279 states that if the parties entered into a binding, applicable arbitration agreement, generally it is "abuse of discretion not to stay proceedings and order arbitration unless record establishes waiver as matter of law."

Once this court, or another competent court with jurisdiction, has ordered the dispute to be submitted to arbitration, the court shall, upon application or motion, stay the pending litigation until the arbitration proceeding has been concluded. CCP section 1281.4 Section 1281.4 states, in pertinent part, that if such a court "has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before" the court, then the court "shall, upon motion of a party…, stay the action or proceeding until an arbitration is had or until such earlier time as the court specifies."

CCP section 1295 expressly allows arbitration of claims for medical malpractice. It states that a contract for medical services may contain "a provision for arbitration of any dispute as to professional negligence" and explains what the provision must state.

Under CCP section 1281.2, if the court finds that the parties have entered into an arbitration agreement and the right to arbitration has not been waived and the agreement should not be revoked, then the court must order arbitration unless a party to the arbitration is also a party to a related pending court action. If that is the case, then the court may 1) refuse to enforce arbitration and order joinder in the court action; 2) order joinder as to only some issues; 3) order arbitration among the parties who have agreed and stay the pending court action; or 4) stay arbitration pending the outcome of the court action.

There is a strong public policy favoring arbitration. *Marsch v. Williams* (1994) 23 Cal.App.4th 238; *United Firefighters of Los Angeles* (1991) 231 Cal.App.3d 1576. Quite logically, however, there is no public policy in favor of arbitrating claims that the parties did not agree to arbitrate. *United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021. The party seeking to compel arbitration also has the burden to "plead and prove" that the parties entered into the arbitration agreement. *Mansouri v. Sup.Ct.* (2010) 181 Cal.App.4th 633, 640-641.

An arbitration provision may also cover both contract and tort claims. *Merrick v. Writers' Guild of America West* (1982) 130 Cal.App.3d 212, 217-219; *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189-1190. Essentially, as long as the language of the arbitration provision is broad enough to go beyond mere contract claims, and the cause of action arises from the contractual relationship, the arbitration provision may apply.

Under CCP section 1281.2, if the court finds that the parties have entered into an arbitration agreement and the right to arbitration has not been waived and the agreement should not be revoked, then the court must order arbitration unless a party to the arbitration is also a party to a related pending court action. If that is the case, then under CCP section 1281.2(c), the court may 1) refuse to enforce arbitration and order joinder in the court action; 2) order joinder as to only some issues; 3) order arbitration among the parties who have agreed and stay the pending court action; or 4) stay arbitration pending the outcome of the court action.

The court in *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, held that the presence of some non-arbitrable claims does not alone necessarily give the court discretion to deny arbitration. It explained that the discretion only applies where there are claims involving third parties not covered in the arbitration provision. As it stated, "absent the presence of a third party, and a plaintiff's inclusion of a nonarbitrable cause of action in the complaint is not grounds to deny arbitration under the third-party exception. In other words, the presence of a nonarbitrable cause of action is not sufficient by itself to invoke the trial court's discretion to deny arbitration under [CCP section 1281.2(c)]."

Health Care Services Plans : H&S Code section 1340 et seq.

The Knox-Keene Health Care Service Plan Act of 1975, at H&S Code section 1340 et seq., governs health care service plans. H&S Code section 1363.1 governs binding arbitration in contracts for health care service plans and sets forth requirements for such provisions. It states, in full,

> 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.

H&S Code section 1363.1 resulted from Madden v. Kaiser Foundation Hospital (1976) 17 Cal.3d 699, in which the Supreme Court held that the Board of Administration of the State Employees Retirement System, as the agent for state employees authorized to negotiate contracts for group medical plans, had implied authority to provide for arbitration of malpractice claims, and that the principles governing contracts of adhesion did not bar enforcement of the arbitration amendment, because since the agreement was a product of negotiations between the board and the Kaiser, parties with a parity of bargaining strength. It explained, at 711,

> In the characteristic adhesion contract case, the stronger party drafts the contract, and the weaker has no opportunity, either personally or through an agent, to negotiate concerning its terms. [Citation.] The Kaiser plan, on the other hand, represents the product of negotiation between two parties, Kaiser and the board, possessing parity of bargaining strength. Although plaintiff did not engage in the personal negotiation of the contract's terms, she and other public employees benefitted from representation by a board, composed in part of persons elected by the affected employees, which exerted its bargaining strength to secure medical protection for employees on more favorable terms than any employee could individually obtain.

Accordingly, even though the employees, as is the case with Tammy, did not personally negotiate and had no option to reject the arbitration provision, and even though it was not specifically addressed, clear, and prominent, because the board had agreed to the terms in the negotiations on the employees' behalf, and was found to have a parity of bargaining power, the employees could not challenge the arbitration agreement on the ground that it was an improper contract of adhesion.

The court in *Robertson v. Health Net of California, Inc*. (1st Dist., 2005) 132 Cal.App.4th 1419 affirmed the trial court's order denying the health plan's motion to compel arbitration on the ground that it violated H&S Code section 1363.1. It found, among other things, that the arbitration provision was unenforceable because it was not "immediately before" the signature line since there were five sentences between the arbitration provision and the signature line. The health plan argued that "only" five sentences separated them so that the arbitration provision was "close by." The appellate court rejected this, explaining, at 1427, 'In plain and ordinary language, "immediately before" means that the arbitration agreement must be typed in directly before the signature line provided for the individual on the enrollment form without any intervening language.' The court also found that the arbitration clause was not "prominently displayed" because only the title was in bold while the rest of the language was not, the title simply said "Arbitration Agreement," and it was in the same typeface as the rest of the form.

The Evidence Presented

Defendants' evidence shows that all employees seeking to enroll in the Health Plan, including Tammy, could only enroll by clicking a button, in the online enrollment form, stating "By clicking Submit Final Choices, I agree to the Arbitration Agreement above." Lombardo Dec., ¶12. Defendants' Lombardo Declaration includes, as the identified exhibits, copies of the following:

A) the EOC, health care plan document from April 1, 2021 through December 31, 2021;
B) October 16, 2020 cover letter, signature page, information about disclosures, summary of changes, enrollment unit chart, Group Agreement for 2021;
C) the arbitration Agreement from January 1, 2021 through March 31, 2021;
D) the arbitration Agreement from the 2020 EOC;
E) the arbitration Agreement from the 2019 EOC;
F) the arbitration Agreement from the 2018 EOC
G) screen print showing the date the document packet was provided to Tammy;
H) excerpts from the Summary Plan Description ("SPD") in effect during the applicable time period;
I) the text of the notice of arbitration in the enrollment screens on the system as of January 1, 2016;
J) a power point demonstration created to illustrate the online enrollment process as it appeared on an employee's screen;
K) a printout from Health Plan's computer system showing Tammy's enrollment history.

The Arbitration Agreement begins on page 76 of the EOC at Lombardo Declaration Ex. A, Bates-stamped page 89. The Arbitration Agreement includes a bold title stating,

This Agreement applies ONLY to employees working in CA, CO, or HI. Kaiser Foundation Health Plan Arbitration Agreement:

Lombardo Dec., ¶10; Ex.A, page 76. It is otherwise in the same font style and size as the rest of the document. The language of the Agreement is not in bold or highlighted in any other way and likewise is in that same font style and size as the rest of the document. Lombardo Dec., ¶10; Ex.A, page 76. No signature line follows it anywhere in the document and in fact there are

about 10 pages with numerous sections and numerous paragraphs covering numerous different terms of the employment agreement following the Arbitration Agreement. The text of the arbitration "notice" from the enrollment screens at Ex. I is a dense statement in standard size font, stating, with the codes included as set forth in the exhibit with "B" meaning bold and "R" a carriage return,

> This Agreement applies ONLY to employees working in CA, CO, or HI.

Kaiser Foundation Health Plan Arbitration Agreement:

 I understand that (except for Small Claims Court cases, claims subject to a Medicare appeals procedure, and, if my Group must comply with ERISA, certain benefit-related disputes) any dispute between myself, my heirs or other associated parties on the one hand and Health Plan, its health care providers, or other associated parties on the other hand, for alleged violation of any duty arising out of or related to membership in Health Plan, including any claim for medical or hospital malpractice (a claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered), for premises liability, or relating to the coverage for, or delivery of, services or items, irrespective of legal theory, must be decided by binding arbitration under California law and not by lawsuit or resort to court process, except as applicable law provides for judicial review of arbitration proceedings. I agree to give up my right to a jury trial and accept the use of binding arbitration. I understand that the full arbitration provision is contained in the Evidence of Coverage.

The employee would not have seen the codes but Defendants could not access or display a copy exactly as it would have appeared to the employee, and instead at Ex.J provides a document from the instructions which Defendants claim does show how the notice would have looked to an employee enrolling. Lombardi Dec., ¶11. Defendants show that directly underneath the notice was the statement, "**By clicking Submit Final Choices, I agree to the Arbitration Agreement above**." Lombardi Dec., ¶12. Directly below the statement was a button called, "Submit Final Choices," and the enrolling employee had to click that button to enroll, which Tammy did. Lombardi Dec., ¶12.

Tammy states that she never was aware of waiving rights to a jury trial for malpractice claims and never consented to waiving such rights. Tammy Y. Thomen Dec.

Analysis

The Arbitration Agreement is very clear and broad in coverage, by its terms clearly applies to, and covers, Plaintiffs' claims here. There appears to be no dispute about this point. It appears to comply with H&S section 1363.1. Although the primary and full text of the Agreement is in a separate document with no signature line and many pages of other terms both before and after, the online enrollment page satisfies section 1363.1 It includes an electronic signature in the form of a button clearly marked for this purpose as stated above, and immediately below a bold, clear statement that clicking and enrolling includes agreement to the Arbitration Agreement. That agreement is immediately before the enrollment button and its statement. It includes clear language complying with section 1363.1

Conclusion

The court GRANTS the motion. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing counsel shall inform the preparing counsel of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.