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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

PRIMECARE OF CORONA, INC. et al.,

Plaintiffs and Appellants,

v.

HEMET COMMUNITY MEDICAL  
GROUP, INC. et al.,

Defendants and Respondents.

E051306 & E052577

(Super.Ct.No. RIC515963)

OPINION

NASER W. AZAR, M.D., INC. et al.,

Plaintiffs and Respondents,

v.

PRIMECARE OF CORONA, INC. et al.,

Defendants and Appellants.

(Super.Ct.No. RIC516098)

CORONA FAMILY CARE, INC. et al.,

Plaintiffs and Respondents,

v.

PRIMECARE OF CORONA, INC. et al.,

Defendants and Appellants.

(Super.Ct.No. RIC10005667)

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.  
Reversed.

Bingham McCutchen, Jonathan A. Loeb, Robert A. Brundage, Jeffrey Rosenfeld  
and Jessica A. Mahon Scoles for Plaintiffs, Defendants and Appellants Primecare of  
Corona, Inc. et al.

Law Office of Russell D. Kinnier and Russell D. Kinnier for Plaintiffs and  
Respondents Naser W. Azar, M.D., Inc. et al.

Walker Trial Lawyers and Barry M. Walker for Plaintiffs and Respondents Corona  
Family Care, Inc. et al.

Davis & Wojcik, Robert A. Davis, Jr., Joseph M. Wojcik, Binu Varughese and  
Matthew B. Duarte for Defendants and Respondents Hemet Community Medical Group,  
Inc. et al.

This is an appeal by plaintiffs and appellants PrimeCare of Corona, Inc. and  
PrimeCare of Citrus Valley, Inc. (hereafter collectively referred to as PrimeCare) from  
the trial court's order staying arbitration of PrimeCare's breach of contract claim against  
defendants and respondents, Jeffery Muller and Corona Family Care, Inc. (hereafter  
collectively referred to as Muller) and denying PrimeCare's petition to arbitrate the  
claims set out in a lawsuit Muller filed against PrimeCare after the arbitration began.  
PrimeCare is an independent physician association (IPA). An IPA contracts with  
physicians to provide medical care to its members. Muller is a physician who contracted  
with PrimeCare to provide medical care to PrimeCare members; Corona Family Care,  
Inc. (CFC) is Muller's medical practice. The contract between Muller and PrimeCare  
included an arbitration clause that PrimeCare invoked after it concluded Muller was in

breach of that agreement. Muller and PrimeCare participated in arbitration for nearly a year before Muller filed a lawsuit against PrimeCare and two other entities allegedly affiliated with PrimeCare seeking damages and equitable relief on various theories of recovery including fraudulent inducement. Muller then moved to stay PrimeCare's arbitration against him and to consolidate that proceeding and his new lawsuit with two previously consolidated lawsuits that involved PrimeCare and other parties. PrimeCare, in turn, petitioned to compel Muller to arbitrate the claims set out in his lawsuit. The trial court granted Muller's motions and denied PrimeCare's petition to compel arbitration.

PrimeCare contends in this appeal that the trial court erred in staying the arbitration because Code of Civil Procedure section 1281.2, subdivision (c), the controlling statute, does not permit a party to an arbitration agreement to file a lawsuit in order to stay an ongoing arbitration. But even if the statute permitted such action, PrimeCare contends the trial court abused its discretion in finding that the statutory prerequisites for staying the arbitration were met in this case. PrimeCare also contends that if the statutory prerequisites were established, Muller nevertheless is equitably estopped from staying the arbitration because the claims alleged in his lawsuit should have been but were not timely asserted as counterclaims in the arbitration. PrimeCare also contends that the trial court abused its discretion by ordering the arbitration consolidated with the court proceedings. As its final claim, PrimeCare contends the trial court abused its discretion in denying its petition to compel Muller to arbitrate the claims Muller alleged in his lawsuit.

We agree with PrimeCare and therefore will reverse the trial court's orders.

## FACTUAL AND PROCEDURAL BACKGROUND

PrimeCare initiated arbitration with Muller in March 2009 by submitting a demand for arbitration and statement of claim to the American Arbitration Association in accordance with the arbitration clause in its contract with Muller. In its claim, PrimeCare alleged that its February 2007 contract with Muller, referred to as a provider services agreement (PSA), required among other things that Muller provide medical services exclusively to PrimeCare members during the five-year term of the PSA; the PSA prohibited Muller from disclosing any trade secrets or confidential information, which includes physician compensation, acquired in the course of his relationship with PrimeCare; and the PSA also prohibited Muller during the term of the agreement and for one year after its termination from soliciting PrimeCare members to switch to another IPA. PrimeCare alleged that in October 2008 it learned Muller was planning to breach the PSA by contracting with a competing IPA. In December 2008, PrimeCare notified Muller by letter that he was in breach of the PSA. Neither Muller nor CFC responded to the letter. PrimeCare alleged it had received information that Muller, and several other physicians who were subject to Muller's exclusive contract with PrimeCare, had joined Meadowview IPA Medical Group (Meadowview), or Hemet Community Medical Group (Hemet), both of which are IPA's that compete with PrimeCare. Meadowview was formed by Muller and other physicians who were parties to PSA's with PrimeCare. PrimeCare alleged that Muller was also soliciting PrimeCare members to transfer from PrimeCare to the competing IPA's.

In addition to the PSA, PrimeCare alleged in its arbitration demand that Muller was a party to an affiliation and exclusivity agreement with PrimeCare signed November

17, 2006. That agreement, which also was for a term of five years, required Muller to spend at least 25 hours per week providing primary care medical services to PrimeCare members, and prohibited Muller from entering into an agreement with any other IPA that contracted with health insurers that also contract with PrimeCare. PrimeCare alleged that Muller breached the affiliation and exclusivity agreement by contracting with Meadowview and by failing to provide at least 25 hours per week of services to PrimeCare members. After several time extensions, Muller filed his answering statement and counterclaim, dated March 2, 2010, asserting claims against PrimeCare for breach of contract and breach of the implied covenant of good faith and fair dealing.

Three months before submitting its claim and demand for Muller to arbitrate, PrimeCare filed a complaint in Riverside County Superior Court against the allegedly competing IPA's, namely Meadowview, Hemet, and Menifee Valley Community Medical Group, Inc.<sup>1</sup> In that pleading PrimeCare alleged tort theories of recovery based on interference with contractual relationships, and unfair competition.<sup>2</sup> The day after PrimeCare filed its complaint, Nasar W. Azar, M.D., Inc. and several other primary care physicians, all of whom were PrimeCare medical providers, filed a complaint against PrimeCare and North American Medical Management California seeking damages and

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<sup>1</sup> Appellants' Appendix includes the amended pleadings but not PrimeCare's original complaint. Respondents' Appendix contains PrimeCare's ex parte application for a temporary restraining order which was submitted to the superior court on December 23, 2008. We assume that also is the date PrimeCare filed its complaint against Hemet et al. PrimeCare named a fourth defendant in its complaint, Prime Partners of Temecula IPA, Inc., but later dismissed it from the lawsuit.

<sup>2</sup> We refer to this lawsuit as the Hemet action.

equitable relief based among other things on PrimeCare's alleged fraud in inducing them to renew their respective PSA's.<sup>3</sup> PrimeCare filed a petition to compel the Azar plaintiffs to arbitrate their claims, and the record reflects the trial court denied that motion following a hearing on June 16, 2009. PrimeCare did not appeal that ruling and therefore it is not an issue in this appeal. In February 2009, Meadowview answered PrimeCare's complaint and filed a cross-complaint seeking damages from PrimeCare and its alleged affiliates, based on various tort theories including interference with existing contractual relations and intentional interference with prospective economic advantage. Meadowview's cross-complaint includes the same theories of recovery alleged in the Azar action, except for the fraudulent inducement claim.

Muller participated in the arbitration with PrimeCare for a year. Then on March 29, 2010, six weeks before the scheduled evidentiary hearing, Muller filed a lawsuit in Riverside County Superior Court against PrimeCare, PrimeCare Medical Networks, Inc., and North American Medical Management California, Inc., seeking damages and equitable relief based on alleged fraudulent inducement to enter into the PSA, intentional interference with contractual relations, intentional interference with prospective economic advantage, violation of the Cartwright Act, and unfair competition.<sup>4</sup> Muller's complaint includes the same theories of recovery alleged in Azar, and is identical to the pleading in that action except that Muller's name is substituted for that of the Azar plaintiffs. On April 5, 2010, a week after he filed his complaint, Muller filed a motion to

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<sup>3</sup> We refer to this lawsuit as the Azar action.

<sup>4</sup> We refer to this lawsuit as the Muller action.

stay the arbitration with PrimeCare and consolidate it and his new lawsuit with the Hemet and Azar actions, which the trial court had previously consolidated on PrimeCare's motion. PrimeCare, in turn, opposed Muller's motions, and filed its own petition to compel Muller to arbitrate the claims set out in his lawsuit.

On May 13, 2010, the trial court conducted a combined hearing on Muller's motions and PrimeCare's petition to compel arbitration of the Muller action. The trial court granted Muller's motions and denied PrimeCare's petition to compel arbitration. As a result of those rulings, the trial court stayed PrimeCare's in-progress arbitration with Muller, and consolidated that arbitration and the Muller action with the previously consolidated Hemet and Azar actions.

PrimeCare appeals from the order staying the arbitration and consolidating that matter with the Hemet and Azar actions, and from the order denying its petition to compel arbitration of Muller's lawsuit.<sup>5</sup>

## **DISCUSSION**

We first address PrimeCare's appeal from the trial court's order staying the arbitration with Muller (hereafter the PrimeCare arbitration).

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<sup>5</sup> Following oral argument in this matter PrimeCare reached settlements with the Azar plaintiffs, and Meadowview. As a result, we dismissed the appeal with respect to those parties. However, we may refer to the Azar plaintiffs and Meadowview in this opinion when appropriate to an issue or necessary to provide context. As a result of these settlements and partial dismissals, there no longer is any risk of inconsistent verdicts.

1.

**MULLER’S MOTION TO STAY ARBITRATION**

Muller moved to stay the PrimeCare arbitration, and consolidate it and his newly filed lawsuit with the previously consolidated Hemet and Azar actions, under Code of Civil Procedure section 1281.2, which states in pertinent part that a party to an arbitration agreement may petition to compel the other party to arbitrate, and the court must order the parties to arbitrate the controversy, “if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] . . . [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.”<sup>6</sup> “This exception [to the preference for enforcing arbitration agreements] “addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement.” [Citation.]” (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1405 (*Laswell*), quoting *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 393.) “Moreover, [s]ection 1281.2(c) [*sic*] is not a provision designed to limit the rights of parties who choose to arbitrate or otherwise to discourage the use of arbitration. Rather it is part of California’s statutory scheme designed to enforce the parties’ arbitration agreements, as the FAA [Federal Arbitration Act] requires.” (*Cronus*, at p. 393.)

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<sup>6</sup> All further statutory references are to the Code of Civil Procedure unless indicated otherwise.

## A. Standard of Review

PrimeCare argued in the trial court as it does in this appeal that section 1281.2, subdivision (c) (hereafter section 1281.2(c)) is not applicable to an ongoing arbitration. We construe this assertion to mean that a motion under section 1281.2(c) to stay an arbitration can only be made in response to a petition to compel arbitration, but may not be used proactively, as Muller did in this case, to stay an arbitration that has been in progress for nearly a year. PrimeCare suggests that the issue is one of statutory interpretation, as indicated by its assertion that the de novo review standard applies. *Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, which PrimeCare cites to support the de novo standard, states, “An order denying arbitration is generally reviewed for abuse of discretion. [Citation.] The de novo standard of review applies only where the court’s denial of a petition to arbitrate presents a pure question of law. [Citation.] [¶] Here, the proper interpretation and application of section 1281.2, subdivision (c), is a legal question reviewed de novo. [Citations.] If the statute is properly invoked, then we review under the abuse of discretion standard the trial court’s decision to refuse to compel arbitration under section 1281.2, subdivision (c).” (*Id.* at pp. 1318-1319.)

Although PrimeCare contends as a matter of law that section 1281.2(c) does not apply to ongoing arbitrations, it does not cite any authority to support that assertion nor does it argue the point. Instead, PrimeCare focuses on the statutory prerequisites to denying a petition to compel arbitration under section 1281.2(c), which are that a party to the arbitration agreement is also a party to litigation with a third party, i.e., a party not bound by the arbitration agreement; the litigation arises out of the same transaction, or

series of related transactions, as that involved in the arbitration; and there is a possibility of conflicting rulings on common issues of law or fact.

With respect to those prerequisites, PrimeCare does not dispute that at the time Muller moved to stay the arbitration, PrimeCare was a party to litigation with Hemet and Azar. However, PrimeCare does not discuss whether Hemet and Azar are third parties who, therefore, would not be bound by the arbitration agreement. PrimeCare also does not discuss whether the consolidated Hemet and Azar actions arise out of the same transaction or series of related transactions at issue in PrimeCare's arbitration with Muller. PrimeCare focuses its discussion solely on whether there is potential for inconsistent results or duplication of effort in the arbitration and the consolidated Hemet and Azar lawsuits or the Muller action. Those are not issues that require statutory interpretation or challenge the applicability of the statute and therefore involve only questions of law; they are issues that concede, albeit implicitly, that the statute has been properly invoked but question the trial court's exercise of statutory discretion. We review a trial court's exercise of statutory discretion under the deferential abuse of discretion standard of review. (*Birl v. Heritage Care, LLC, supra*, 172 Cal.App.4th at pp. 1318-1319.)

In our view, the dispositive issues are whether (1) the exception to compelling arbitration set out in section 1281.2(c) applies in this case and (2) Muller is equitably estopped from staying the PrimeCare arbitration after having participated in that proceeding for over a year. Because the pertinent facts are undisputed, both issues raise only questions of law, and as such are subject to de novo review.

## **B. Analysis**

We note at the outset that we have not found a case that involves the same procedural facts as those presented here, namely, a case in which a party to an ongoing contractual arbitration files a lawsuit that names as defendants the other party to the arbitration as well as purported third parties, and alleges claims in its complaint that could have been but were not asserted in the arbitration, and then moves to stay the arbitration based on the new lawsuit. Although we question whether a party to an ongoing arbitration can invoke section 1281.2(c) in such circumstances, we will not resolve that issue because as previously noted PrimeCare has not cited any authority or made any argument to support such a claim. That said, we nevertheless conclude the statute does not apply because the other defendants in the Muller action are not third parties within the meaning of section 1281.2(c), and in any event the principle of equitable estoppel precludes Muller from avoiding arbitration.

### **(1.) *Applicability of Section 1281.2, subdivision (c)***

#### **a. Muller Action**

Our analysis of this issue is guided by *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, which held in part that whether a defendant is a third party within the meaning of section 1281.2(c) is a question of law subject to de novo review. (*Id.* at p. 1283.) ““The term “third party” for purposes of [Code of Civil Procedure] section 1281.2 . . . must be construed to mean a party that is not bound by the arbitration agreement.’ [Citation.] ‘[I]n many cases, nonparties to arbitration agreements are allowed to enforce those agreements where there is sufficient identity of parties.’ [Citation.]” (*Laswell, supra*, 189 Cal.App.4th at p. 1407.)

In *Rowe v. Exline*, the plaintiff sued a corporation and two individuals for breach of a contract to which the plaintiff and corporate defendant were signatories. The plaintiff alleged the individual defendants were the alter egos of the corporation. The individual defendants moved to compel arbitration under the arbitration clause in the contract between the plaintiff and the corporation. The trial court denied the motion because the individual defendants were not signatories to the contract, and therefore were not parties to the arbitration clause. The Court of Appeal (First Dist., Div. Five) reversed and held, in part, that the alter ego allegations against the individual defendants pursuant to which the plaintiff sought to hold them liable for breach of the corporate defendant's contract entitled them to the benefit of the arbitration provision in that contract. (*Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1285.) The appellate court reached its conclusion by extending the established principle that a nonsignatory who is the agent of a signatory can enforce an arbitration agreement. (*Id.* at p. 1284, citing *Dryer v. Los Angeles Rams* (1985) 40 Cal.3d 406, 418.) In fact, the court noted that “[a] nonsignatory who is the agent of a signatory can even be *compelled* to arbitrate claims against his will.” (*Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1285.) The appellate court reasoned that if an agent, who “is one who acts on behalf of a corporation” is entitled by law to enforce the arbitration provision, so should an alter ego, “who, effectively, *is* the corporation.” (*Ibid.*)

In this case, Muller sued PrimeCare and two other defendants, all of whom it alleged were the agents, servants and employees of each other in doing the acts alleged in the complaint. Muller incorporated that allegation by reference into each of the five purported theories of recovery set out in his complaint, including his first cause of action

which alleged that PrimeCare fraudulently induced Muller to enter into the PSA by representing that Muller would receive an equity share in the business. The allegation that all defendants were the agents, servants, and employees of each other effectively rendered all the named defendants signatories to the PSA, and thus parties to the arbitration clause, with the result that the Muller action does not involve third parties. Because it does not involve third parties, section 1281.2(c) is not applicable to the Muller action. (*Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1290.) To the extent the trial court relied on the Muller action to stay the PrimeCare arbitration, the trial court erred.

Moreover, although Muller named defendants in addition to PrimeCare in his complaint, that pleading does not allege that any defendant other than PrimeCare of Corona (referred to in the complaint as PCC) committed any wrongful act or violated any duty owed to Muller. Consequently, Muller's complaint does not allege facts that state a cause of action against the other named defendants. Absent such allegations, Muller has failed to allege claims against any of the so-called third parties. Therefore, even if we were to conclude the other defendants are nonsignatories to the PSA, we nevertheless would conclude those defendants are not third parties within the meaning of section 1281.2(c). The presence in the action of a third party not subject to arbitration is a prerequisite to application of the exception set out in section 1281.2. (See *Laswell, supra*, 189 Cal.App.4th at pp. 1405-1406 ["If the prerequisites of the exception exist in a particular case, i.e., there are third parties not subject to arbitration on claims arising out of the same transaction or related transactions, and a possibility of conflicting rulings on common issues of law or fact, then the trial court has discretion to deny or stay arbitration."].)

For each of these reasons we conclude the Muller action does not come within the exception to arbitration set out in section 1281.2(c). Therefore, that pleading cannot serve to stay the PrimeCare arbitration.

**b. Hemet and Azar Actions**

Muller presumably could have moved to stay the arbitration with PrimeCare on the ground that PrimeCare was a party to the Hemet and Azar actions, and those actions involve third parties. There are two defects with this approach. First, the Hemet and Azar actions were filed and pending before PrimeCare made its demand for arbitration with Muller. In our view, Muller should have made a motion to stay the PrimeCare arbitration pending resolution of those two lawsuits at or near the time PrimeCare made its arbitration demand. By participating without objection in the PrimeCare arbitration for nearly a year, Muller should be deemed to have waived any objection under section 1281.2 based on litigation that was pending at the time PrimeCare made its demand for arbitration.

The second defect with this approach is that Muller did not rely on the Hemet and Azar actions as the basis for his motion to stay the PrimeCare arbitration. In his moving papers, Muller asserted that inconsistent results would occur if the arbitration were to proceed because (a) PrimeCare seeks damages from Muller in the arbitration based on breach of a contract the validity of which Muller challenges “in the instant action,” i.e., the Muller action; (b) the fraudulent inducement claim in the Muller action is “explicitly intertwined” with the fraudulent inducement claims in the Azar action; (c) PrimeCare conceded, in moving to consolidate the Azar action with the Hemet action, that those two lawsuits involve similar issues of law and fact; and (d) the Muller action is identical to

the Azar action and the trial court denied PrimeCare's motion to compel arbitration in the Azar action because of the similarity between the issue in that case and the Hemet action. Simply put, Muller did not demonstrate that the Hemet and Azar actions considered alone and without the effect of the Muller action warranted a stay of PrimeCare's arbitration against Muller.

The defendants in the Hemet action and plaintiffs in the Azar action also did not assert such a claim. Two of the four defendants in the Hemet action filed points and authorities in support of Muller's motion to stay the PrimeCare arbitration and consolidate it with the various court actions. In that filing, the Hemet defendants quoted section 1281.2(c) and then asserted without discussion that the risk of conflicting rulings in the various actions compelled the trial court to stay the arbitration. Even if we were to assume without actually deciding that the prerequisites for application of that statute exist, staying the PrimeCare arbitration is only one of the alternatives offered to the trial court under section 1281.2: "If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (2) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." (§ 1281.2, 4th para.) In our view, the trial court abused its discretion in this case by not staying the court actions and allowing the PrimeCare arbitration to proceed apace.

## (2.) *Equitable Estoppel*

Apart from the reasons previously discussed, we would also conclude based on the undisputed facts of this case that Muller is equitably estopped from avoiding arbitration with PrimeCare. PrimeCare asserts the equitable estoppel claim on appeal even though it did not assert the claim in its trial court opposition to Muller's motion to stay the arbitration. None of the respondents raise this point on appeal. However, even if they had raised the point, we nevertheless would exercise our discretion to consider the issue because in this case the issue is based on undisputed facts and therefore raises only a legal question. (See *Rowe v. Exline*, *supra*, 153 Cal.App.4th at pp. 1287-1288.)

We begin our discussion by recognizing the strong public policy in this state, evidenced by the "comprehensive statutory scheme" set out in Title 9 of the Code of Civil Procedure, section 1280 et seq., that favors private arbitration "as a speedy and relatively inexpensive means of dispute resolution." (Vandenberg v. Superior Court (1999) 21 Cal.4th 815, 830.) "The fundamental premise of the scheme is that '[a] written agreement to submit [either a present or future controversy] to arbitration . . . is valid, enforceable and irrevocable, save upon grounds as exist for the revocation of any contract.'" (*Ibid.*)

With the foregoing in mind we turn to the doctrine of equitable estoppel, which generally described, "precludes a party from asserting rights "he otherwise would have had against another" when his own conduct renders assertion of those rights contrary to equity." (*Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1713 (*Metalclad*)). As applied to private arbitration agreements, "California courts . . . have embraced the estoppel theory, holding that a signatory

plaintiff who sues on a written contract containing an arbitration clause may be estopped from denying arbitration if he sues nonsignatories as related or affiliated persons with the signatory entity. [Citations.]” (*Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1287.) As more fully articulated in *Metalclad*, “[T]he equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but attempts to avoid arbitration by suing nonsignatory defendants for claims that are ““based on the same facts and are inherently inseparable”” from arbitrable claims against signatory defendants.” (*Metalclad, supra*, 109 Cal.App.4th at p. 1713.) “The doctrine thus prevents a party from playing fast and loose with its commitment to arbitrate, honoring it when advantageous and circumventing it to gain an undue advantage.” (*Id.* at p. 1714.) “Claims that rely upon, make reference to, or are intertwined with claims under the subject contract are arbitrable. [Citation.]” (*Rowe v. Exline, supra*, 153 Cal.App.4th at p. 1287, citing *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 269-270.)

The claims in the Muller action rely upon, make reference to, or are intertwined with the PSA. In his first cause of action, Muller alleges that PrimeCare induced him to execute the exclusive PSA by representing that he would receive an equity share in PrimeCare. The PSA, and Muller’s alleged breach of that agreement, is the subject of the PrimeCare arbitration. If Muller were fraudulently induced to enter into the PSA, that claim is subject to arbitration under the arbitration provision in the PSA, which expressly covers “any dispute or controversy . . . between the parties hereto with respect to the making, construction, application, term(s), condition(s), interpretation or implementation of this Agreement, or the right(s) of either party hereunder . . . .” In his second cause of action, which seeks damages based on intentional interference with contractual relations,

Muller alleges that in December 2008 PrimeCare effectively terminated the PSA with Muller; thereafter, Muller and the Azar plaintiffs formed Meadowview in order to compete with PrimeCare; and “defendants” interfered with Muller’s “valid and enforceable contracts with Meadowview” by attempting to prevent or dissuade health plan enrollees from remaining with or selecting Muller as their primary care provider. Muller’s recovery on this theory of liability depends on his claim that PrimeCare breached the PSA before Muller and the Azar plaintiffs formed Meadowview. As previously noted, Muller asserted the breach of contract claim in his counterclaim in the PrimeCare arbitration.

Muller’s third cause of action, which seeks damages based on intentional interference with prospective economic advantage, alleges that PrimeCare interfered with Meadowview’s ability to contract with specialty medical care providers. Muller’s ability to recover on this theory of liability again depends on whether Muller, by participating in the formation of Meadowview, breached the PSA with PrimeCare. Muller’s fourth cause of action alleges that the exclusive provider provision in the PSA constitutes an illegal tie-in agreement in violation of the Cartwright Act, and the fifth cause of action alleges PrimeCare’s acts and practices constitute unfair business practices that have caused damage to Muller in violation of Business and Professions Code section 17200. Both the fourth and fifth causes of action depend on the validity and enforceability of the PSA.

In short, the foregoing demonstrates that the claims in the Muller action against PrimeCare and the purported nonsignatories to the arbitration agreement all rely upon, make reference to, or are intertwined with the subject PSA. Consequently, we conclude the doctrine of equitable estoppel is applicable and Muller is precluded from avoiding the

PSA provision that requires him to arbitrate disputes with PrimeCare. Instead, Muller is contractually obligated to proceed with and complete the pending arbitration with PrimeCare. If, on remand, the trial court is persuaded that the Hemet action comes within the purview of section 1281.2(c), it has discretion to stay that action pending the outcome of the arbitration.

## 2.

### **PRIMECARE'S MOTION TO COMPEL MULLER TO ARBITRATE**

PrimeCare also appeals from the trial court's order denying its motion to compel Muller to arbitrate the claims alleged in the Muller action. The trial court did not expressly address this motion. Instead the trial court viewed PrimeCare's motion to compel arbitration as the flipside of Muller's motion to stay the PrimeCare arbitration and consolidate it with the pending lawsuits. Therefore, the trial court viewed its ruling granting Muller's motion to stay the arbitration as necessarily disposing of PrimeCare's motion to compel Muller to arbitrate.

We agree that the resolution of one motion necessarily dictates the result on the other. Accordingly, our conclusion that section 1281.2 is not applicable to Muller's lawsuit against PrimeCare because that action does not involve third parties, and in any event Muller is equitably estopped from evading its contractual duty to arbitrate, compels us to further conclude that the trial court should have granted PrimeCare's motion to compel Muller to arbitrate the claims alleged in his lawsuit. Therefore, we will reverse the trial court's order denying that motion.

In addition to staying the PrimeCare arbitration, the trial court ordered the arbitration “consolidated”<sup>7</sup> with the Muller action, which the trial court in turn ordered consolidated with the Hemet and Azar actions. Our conclusions set out above that the trial court should have denied Muller’s motion to stay the arbitration and should have granted PrimeCare’s petition to compel arbitration necessarily disposes of the so-called consolidation order. That order is symbiotic and cannot survive apart from the orders staying the PrimeCare arbitration and denying PrimeCare’s petition to compel arbitration of the claims alleged in the Muller action. Therefore, our reversal of those orders necessarily reverses the so-called consolidation orders.<sup>8</sup> To avoid potential confusion on remand, however, we expressly reverse the trial court’s order purporting to consolidate

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<sup>7</sup> Consolidation refers to the procedure by which several pending lawsuits are combined into a single action for purposes of trial. Joinder refers to combining causes of action or claims in a single lawsuit. (See, e.g., *Realty Construction & Mortgage Co. v. Superior Court* (1913) 165 Cal. 543, 546-547 [“The statutory provision relative to consolidation of actions which is pertinent here is section 1048 of the Code of Civil Procedure, which provides: ‘Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.’ There is no warrant for construing this section as requiring a consolidation simply because the causes of action might have been joined; in other words, there is no warrant for reading the word ‘may,’ contained therein, as equivalent to the word ‘must,’ as is true in some cases. The section simply expressly authorizes a court to consolidate cases involving causes of action which might have been joined, where, in its judgment, the interests of justice make it proper that a consolidation should be had.”].) Section 1281.2 authorizes a court to order “joinder” of the parties or claims, presumably because a contractual arbitration proceeding cannot be consolidated with a lawsuit; the claims asserted in the arbitration can however be joined with the claims alleged in a lawsuit.

<sup>8</sup> We initially limited PrimeCare’s appeal to the orders staying the arbitration and denying its petition to compel arbitration of the claims in the Muller action because orders consolidating actions are not appealable. PrimeCare petitioned for rehearing and we modified that order to allow the parties to address the appealability issue in their respective briefs. In retrospect, and with a more complete view of the procedural details in this case, we recognize we improvidently issued both orders.

the PrimeCare arbitration with the Muller lawsuit and the order consolidating the Muller action with the Hemet action and now dismissed Azar action.

3.

**PROCEDURAL ISSUE**

PrimeCare filed its notice of appeal on July 12, 2010, after the trial court (1) issued its order, dated and filed July 1, 2010, denying PrimeCare's petition to compel arbitration in the Muller action and granting Muller's motion to consolidate the Muller action with the consolidated Hemet and Azar actions, and (2) issued its order, dated and filed July 12, 2010, granting Muller's motion to stay the PrimeCare arbitration and consolidating it with the consolidated Muller, Hemet and Azar actions. On July 16, 2010, the trial court filed a second order, signed on July 13, 2010 by a different judge, but otherwise identical to the order filed on July 1, 2010. PrimeCare filed an appeal from that second order on December 21, 2010. This court consolidated the two appeals and requested further briefing limited to the issue of whether the trial court's second order is valid and if so whether it is appealable.

The record on appeal does not explicitly explain why the second order was prepared and filed. PrimeCare posits a plausible explanation: PrimeCare objected in its opposition papers and at the combined hearing on Muller's motions to stay the PrimeCare arbitration and consolidate it and the Muller action with the previously consolidated Hemet and Azar actions, that under the pertinent rule of the California Rules of Court, the motion should have been heard by the judge who ordered consolidation of the Hemet and Azar actions because that is the case with the lowest case number. That judge did not hear the motions at issue in this appeal but is the judge who signed the second order.

Whatever the explanation, we agree with PrimeCare that the second order is void. “Under section 916, ‘the trial court is divested of’ subject matter jurisdiction over any matter embraced in or affected by the appeal during the pendency of that appeal. [Citation.] ‘The effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court . . . .’ [Citation.] Thus, ‘that court is without power to proceed further as to any matter embraced therein until the appeal is determined.’ [Citations.] And any ‘proceedings taken after the notice of appeal was filed are a nullity.’ [Citations.] This is true even if the subsequent proceedings cure any purported defect in the judgment or order appealed from. [Citations.]” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-197.)

PrimeCare filed its notice of appeal on July 12, 2010. The filing of the notice of appeal divested the trial court of jurisdiction over the subject matter of the appeal. Therefore, the trial court lacked jurisdiction on July 16, 2010, to issue a second order regarding the same motions that are the subject of PrimeCare’s appeal. The July 16, 2010, order is void.

### **DISPOSITION**

The following orders are reversed:

(1) the order staying PrimeCare’s contractual arbitration with Muller in PrimeCare of Corona, Inc. and Jeffrey Muller, M.D., AAA case No. 772 193 Y 00359 09 TNM; and

(2) the order denying PrimeCare’s petition to compel arbitration of the claims in *Corona Family Care, Inc. et al. v. PrimeCare of Corona, Inc. et al.* (case No. RIC 10005667), and consolidating that case with *PrimeCare of Corona, Inc. et al. v. Hemet Community Medical Group, Inc. et al.* (case No. RIC 515963), and the now dismissed

Naser W. Azar, M.D., Inc. et al. v. PrimeCare of Corona, Inc. et al. (case No. RIC 516098), which both were previously consolidated under the master file case No. RIC 515963.

The case is remanded to the trial court with directions to:

(1) deny Muller’s motion to stay the arbitration in PrimeCare of Corona, Inc. and Jeffrey Muller, M.D., AAA Case No. 772 193 Y 00359 09 TNM; and

(2) grant PrimeCare’s motion to compel arbitration of the claims in Corona Family Care, Inc. et al. v. PrimeCare of Corona, Inc. et al. (case No. RIC 10005667).

Plaintiffs and appellants PrimeCare of Corona, Inc. and PrimeCare of Citrus Valley, Inc. to recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER  
J.

We concur:

RAMIREZ  
P.J.

KING  
J.