

1 jurisdiction pursuant to the Medicare Act, 42 U.S.C. § 1395
2 et seq., and the Employee Retirement Income Security Act of 1974
3 ("ERISA"), 29 U.S.C. § 1001, et seq. See id. Defendants now move
4 the Court to compel arbitration of all claims other than the claim
5 for injunctive relief, and to stay this action pending
6 arbitration. Mot. to Compel Arbitration ("Motion"), Docket No. 8.
7 Plaintiffs filed an Opposition to the Motion, and Defendants filed
8 a Reply. See Docket Nos. 27, 28. The parties appeared before the
9 Court and argued the merits of the Motion on November 30, 2007.

10 Having considered all of the arguments and submissions of the
11 parties, the Court hereby GRANTS Defendants' Motion.

12
13 **II. BACKGROUND**

14 In November 1991, Deborah Clay enrolled herself and her
15 husband Rodney Clay as members of the Health Plan, pursuant to an
16 agreement between the Health Plan and her employer, Integrated
17 Device Technology. Dean Decl. ¶ 3. In 1994, the Health Plan
18 entered into a Medicare Risk Contract with the Health Care
19 Financing Administration to provide medical and hospital services
20 for enrolled Medicare beneficiaries.¹ See Hall Decl. ¶¶ 2, 4.

21 When a Health Plan member expressed interest in enrolling in
22 the Health Plan Senior Advantage program (Health Plan's name for
23 its Medicare Advantage offering), Health Plan sent the member

24
25 _____
26 ¹The Health Care Financing Administration was renamed the
27 Centers for Medicare & Medicaid Services ("CMS"). Hall Decl. ¶ 2.
28 The Medicare Risk Contract was renamed Medicare+Choice Contract in
1999, and then renamed again as Medicare Advantage. Id. ¶ 3. The
Court will use the current terms, CMS and Medicare Advantage.

1 copies of the Health Plan Senior Advantage Election form and the
2 Health Plan Senior Advantage Membership Agreement, also known as
3 the Evidence of Coverage ("EOC"). Hall Decl ¶ 5. The EOC
4 summarizes the Health Plan Senior Advantage coverage, and is
5 subject to the Health Plan's Medicare Advantage contract with the
6 CMS. Id. The Health Plan Senior Advantage EOC has always
7 contained an arbitration clause. Id.

8 The Health Plan revises the EOC annually. Id. ¶ 6. Each
9 year, the Health Plan submits to the CMS its proposed changes to
10 the EOC for the following year. Id. Once CMS approves the
11 changes, Health Plan mails a copy of the EOC and a letter
12 summarizing the revisions to all Health Plan Senior Advantage
13 enrollees. Id.

14 In July 2000, Rodney Clay enrolled as a member of the Health
15 Plan Senior Advantage. See Dean Decl. ¶ 4. On the Senior
16 Advantage Election form which Mr. Clay signed, the following text
17 appears above his signature:

18 I have read, understand, and agree to the statements on
19 the reverse side of this Election Form including the
20 restrictions on the use of non-Plan providers. I hereby
21 apply for Kaiser Permanente Senior Advantage membership.
22 I understand that except for Small Claims Court cases
23 and claims subject to the Medicare Appeals Procedure,
24 any claim that I, my heirs, or other claimants
25 associated with me, assert for alleged violation of any
26 duty arising out of or relating to membership in Health
27 Plan, including any claim for medical or hospital
28 malpractice, 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 a lawsuit or
resort to court process except as California 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.

1 Id. Ex. C. Mr. Clay's coverage under the Health Plan Senior
2 Advantage program became effective on August 1, 2000. Id. ¶ 4.

3 Plaintiffs are the wife and grown children of Rodney Clay.
4 Compl. ¶¶ 3-7. Plaintiffs allege as follows. In early 2000, Mr.
5 Clay suffered kidney failure. Because Kaiser did not at that time
6 operate its own kidney transplant center, Kaiser referred Mr. Clay
7 to the UCSF Medical Center's kidney transplant program. Id. ¶¶
8 29, 31. UCSF informed Mr. Clay that the typical wait was two to
9 three years for a replacement kidney. Id. ¶ 31. Four years later,
10 when Mr. Clay was supposedly near the top of the UCSF transplant
11 list, Kaiser informed Mr. Clay that it had opened a transplant
12 center and that he would be transferred to the Kaiser program that
13 September. Id. ¶¶ 32, 33. Finally, Plaintiffs allege that in the
14 year following Mr. Clay's transfer to the Kaiser transplant
15 program, Kaiser repeatedly delayed the transplant, only to refer
16 him back to UCSF. Id. ¶ 37. Before Kaiser completed the
17 paperwork necessary for the transfer, Rodney Clay died of chronic
18 renal failure. Id. ¶ 39.

19 Based on these allegations, Plaintiffs brought nine causes of
20 action against Kaiser: (1) survival and wrongful death based on
21 negligence; (2) fraud, deceit, and fraudulent concealment; (3)
22 negligent misrepresentation; (4) negligence per se; (5)
23 intentional infliction of emotional distress; (6) negligent
24 infliction of emotional distress; (7) violation of California
25 Business & Professions Code section 17200, et seq.; (8) violation
26 of California Business & Professions Code section 17500, et seq.;
27 and (9) wrongful death due to breach of contract and tortious

1 breach of the implied covenant of good faith and fair dealing.
2 See id. Plaintiffs seek to recover compensatory and punitive
3 damages, attorneys' fees and costs, and injunctive relief.

4 Defendants asked if Plaintiffs would agree to submit this
5 dispute to arbitration. Plaintiffs refused. Lamb Decl. ¶ 2.
6 Defendants therefore brought this Motion.

7
8 **III. ANALYSIS**

9 **A. Applicability of the Federal Arbitration Act**

10 Section 2 of the Federal Arbitration Act ("FAA") provides
11 that "a contract evidencing a transaction involving commerce to
12 settle by arbitration a controversy thereafter arising out of such
13 contract or transaction . . . shall be valid, irrevocable, and
14 enforceable, save upon such grounds as exist at law or in equity
15 for the revocation of any contract." 9 U.S.C. § 2. Kaiser
16 asserts that Health Plan's Senior Advantage Election Form involves
17 commerce, and that the arbitration provision in that document is
18 therefore enforceable under the FAA. See Mot. at 5-6. The
19 Supreme Court has interpreted the phrase "involving commerce" very
20 broadly, holding that it extends beyond "persons or activities
21 within the flow of interstate commerce" to include anything that
22 affects commerce. See Allied-Bruce Terminix Cos. v. Dobson, 513
23 U.S. 265, 273, 277 (1995). In certain circumstances, the Health
24 Plan pays for its members to receive medical services when they
25 are traveling outside of California. See Hall Decl. Ex. A at 11,
26 16. Health Plan also provides coverage authorized by Medicare, a
27 federal statute exercising the Commerce power. Applying the broad

1 legal standard described above, the Court concludes that Health
2 Plan's Senior Advantage Election form evidences a transaction
3 involving commerce, and that the FAA is therefore applicable.
4 Other courts have reached the same conclusion. See Schlegel v.
5 Kaiser Found. Health Plan, Inc., No. 07-CV-00520-MCE,
6 2007 U.S. Dist. LEXIS 64299, *3-4 (E.D. Cal. Aug. 30, 2007);
7 Mannick v. Kaiser Found. Health Plan, Inc., No. C 03-5905 PJH,
8 2005 U.S. Dist. LEXIS 40405, *6-7 (N.D. Cal. Dec. 16, 2005);
9 Toledo v. Kaiser Permanente Med. Group, 987 F. Supp. 1174, 1180
10 (N.D. Cal. 1997).

11 Where a valid and enforceable written arbitration agreement
12 governs a dispute in litigation, the FAA authorizes the Court to
13 "stay the trial of the action until such arbitration has been had
14 in accordance with the terms of the agreement. . . ." 9 U.S.C. §
15 3. "[Q]uestions of arbitrability must be addressed with a healthy
16 regard for the federal policy favoring arbitration. . . . The
17 Arbitration Act establishes that, as a matter of federal law, any
18 doubts concerning the scope of arbitrable issues should be
19 resolved in favor of arbitration" Moses H. Cone Mem'l
20 Hosp. v. Mercury Constr. Corp., 460 U.S. 1., 24-25 (1983).

21 **B. California Health & Safety Code Section 1363.1**

22 The FAA encourages arbitration where there is a valid and
23 enforceable agreement. Here, Plaintiffs argue that the
24 arbitration agreement contained in the enrollment form Mr. Clay
25 signed is unenforceable because it violates the notice and
26 disclosure requirements of California Health & Safety Code section
27 1363.1.

1 Section 1363.1 establishes conditions for any health care
2 service plan that "includes terms that require binding arbitration
3 to settle disputes and that restrict, or provide for a waiver of,
4 the right to a jury trial. . . ." Cal. Health & Safety Code §
5 1363.1. Plaintiffs assert that Defendants' arbitration agreement
6 violates Section 1363.1(b), which requires that the arbitration
7 agreement be "prominently displayed on the enrollment form signed
8 by each subscriber or enrollee;" Section 1363.1(c), which requires
9 that the arbitration agreement be "substantially expressed in the
10 wording provided in subsection (a) of Section 1295 of the Code of
11 Civil Procedure;" and Section 1363.1(d), which requires that the
12 disclosure be displayed "immediately before the signature line for
13 the individual enrolling in the health care plan." Id.

14 Under California law, compliance with Section 1363.1 is
15 mandatory, and failure to comply voids an arbitration agreement:

16 Section 1361.1, therefore, establishes the requirements
17 that must be satisfied in order to arbitrate disputes
18 involving a health care service plan. Accordingly, even
19 though section 1363.1 is silent on the effect of
20 noncompliance, because the disclosure requirements are
21 mandatory, the failure to comply with those requirements
22 renders an arbitration provision unenforceable.

23 Malek v. Blue Cross of Cal., 121 Cal. App. 4th 44, 64 (Ct. App.
24 2004) (emphasis in original).

25 **C. The Medicare Act Preempts Section 1363.1**

26 Although Defendants assert that their enrollment form and EOC
27 comply with Section 1363.1, their primary position is that the
28 Court need not consider Section 1363.1 because it is preempted by

1 the Medicare Act.² The Court agrees.

2 1. Preemption Standards

3 "Where (as here) Congress regulates a field historically
4 within the police powers of the states (public health), we proceed
5 from the assumption that state law is not superseded unless there
6 is a 'clear and manifest purpose of Congress' to foreclose a
7 particular field to state legislation." Pagariqan v. Sup. Ct. of
8 Los Angeles County, 102 Cal. App. 4th 1121, 1128 (Ct. App. 2002)
9 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

10 Preemption may be either express or implied. Id. "[W]hen
11 Congress has 'unmistakably. . . ordained,' that its enactments
12 alone are to regulate a part of commerce, state laws regulating
13 that aspect of commerce must fall." Jones v. Rath Packing Co.,
14 430 U.S. 519, 525 (1977) (quoting Fla. Lime & Avocado Growers,
15 Inc. v. Paul, 373 U.S. 132, 142 (1963)). Implied preemption may
16 take either of two forms:

17 Absent explicit pre-emptive language, we have recognized
18 at least two types of implied pre-emption: field
19 pre-emption, where the scheme of federal regulation is so
20 pervasive as to make reasonable the inference that
21 Congress left no room for the States to supplement it, and
22 conflict pre-emption, where compliance with both federal
23 and state regulations is a physical impossibility, or
24 where state law stands as an obstacle to the

22 ²Defendants initially took the position that the FAA also
23 preempts application of Section 1363.1, but abandoned this argument
24 in their Reply and did not assert it at oral argument. See Reply
25 at 1 ("Defendants acknowledge that the McCarran-Ferguson Act
26 immunizes section 1363.1, Calif. Health & Safety Code, from what
27 would otherwise be a clear-cut case of preemption by the Federal
28 Arbitration Act."); see also Smith v. Pacificare Behavioral Health
of Cal., Inc., 93 Cal. App. 4th 139, 162 (Ct. App. 2001) ("[T]he
FAA, a federal statute of general application, which does not
'specifically relate' to insurance, is foreclosed from application
to prevent the operation of section 1363.1.").

1 accomplishment and execution of the full purposes and
2 objectives of Congress.

3 Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)
4 (internal citations and quotations omitted).

5 Where there is a question about the scope of a statute's
6 preemptive effect, courts look to the congressional purpose, "as
7 revealed not only in the text, but through the reviewing court's
8 reasoned understanding of the way in which Congress intended the
9 statute and its surrounding regulatory scheme to affect business,
10 consumers, and the law." Medtronic, 518 U.S. at 485.

11 2. Applicable Law

12 The Court examines the Medicare Act "as it read at the time
13 relevant to this case." See McCall v. Pacificare of Cal., 25 Cal.
14 4th 412, 422 (2001). Congress amended the preemption provisions
15 of the Medicare Act in 2000 and in 2003. See Medicare, Medicaid,
16 and SCHIP Benefits Improvement and Protection Act of 2000, H.R.
17 5661, enacted by Pub. L. No. 106-54, 114 Stat. 2763 (2000)
18 ("BIPA"); Medicare Prescription Drug, Improvement, and
19 Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066
20 (2003) ("MMA").

21 Mr. Clay enrolled in the Health Plan Senior Advantage program
22 in July, 2000. The front of the enrollment form mentions binding
23 arbitration in a block of text immediately preceding Mr. Clay's
24 signature, but it also says, "Please read the Conditions of
25 Election and Authorization to Exchange Information on the back of
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1 this form." Dean Decl. Ex. C.³ On the back of that form, the
2 first paragraph appears as follows:

3 Conditions of Election

4 If you are electing Kaiser Permanente Senior Advantage
5 Coverage, be certain that you fully understand the
6 arbitration provision, benefits, limitations and
7 conditions, which are described in the Kaiser Permanente
8 Senior Advantage Group Disclosure Form and Evidence of
9 Coverage or the Individual Membership Agreement and
10 Disclosure Form and Evidence of Coverage.

11 Id. Ex. D. The Court interprets this text to mean that the full
12 terms of the enrollee's agreement with Defendants, including the
13 arbitration provision, are set forth in the Senior Advantage Group
14 Disclosure Form and Evidence of Coverage. Jason Hall, Health
15 Plan's Director of Medicare Compliance, testified by declaration
16 that Health Plan sends the current EOC to any Health Plan member
17 who expressed interest in the Senior Advantage Program. Hall
18 Decl. ¶ 5. Hall further states that the EOC has always contained
19 an arbitration provision. Id. Each year, when Health Plan sends
20 its proposed revisions to the EOC to CMS for review, it sends an
21 Annual Notice of Changes describing the revisions to each Senior
22 Advantage enrollee, followed by a copy of the final, approved EOC.
23 Id. ¶ 6.

24 The series of events purportedly giving rise to Plaintiffs'
25 claims appears to have begun on June 22, 2004, when Defendants

26 ³This text appears in bold print, in a different font from
27 other parts of the enrollment form, and is surrounded by a black
28 box which separates it from the rest of the form. See Dean Decl.
Ex. C. At oral argument, Plaintiffs' counsel repeatedly drew the
Court's attention to this box as an example of Defendants' ability
to highlight important text on the enrollment form, purportedly to
support Plaintiffs' claim that the arbitration provision was not
itself prominently displayed.

1 told Mr. Clay he would have to transfer out of the UCSF transplant
2 program and into Kaiser's program. See Compl. ¶ 33. The
3 operative version of the EOC, then, is the version that took
4 effect on June 1, 2004. See Hall Decl. Ex. A. The Health Plan
5 submitted this version to the CMS for review during 2004. See id.

6 Because the events giving rise to this suit took place in
7 2004, and the arbitration provision governing the suit was
8 executed in that year (by CMS-approved amendment to the prior
9 EOC), the Court concludes that the applicable version of the
10 Medicare Act is that which was in effect in June of 2004, and
11 which remains in effect today.

12 3. Preemption Analysis

13 The Medicare Act explicitly preempts application of state law
14 to the arbitration agreement at issue here. After the most recent
15 amendment, the Medicare Act preempts all state regulation of
16 Medicare Advantage plans not relating to licensing or plan
17 solvency:

18 Relation to State laws. The standards established under
19 this part shall supersede any State law or regulation
20 (other than State licensing laws or State laws relating
to plan solvency) with respect to MA plans which are
offered by MA organizations under this part.

21 42 U.S.C. § 1395w-26(b)(3). The standards established under this
22 statute include 42 C.F.R. § 422.80, "Approval of marketing
23 materials and election forms," and 42 C.F.R. § 422.111,
24 "Disclosure requirements." These regulations set forth the rules
25 governing approval and distribution of Medicare Advantage
26 information to enrollees.

27 Specifically, 42 C.F.R. § 422.80(c) provides the guidelines

1 for CMS review of Medicare Advantage marketing materials. The CMS
2 review process checks to make sure that the disclosure is printed
3 in a proper format and text size. Id. § 422.80(c)(1). The CMS
4 also reviews the marketing materials to determine whether they
5 include an "[a]dequate written explanation of the grievance and
6 appeals process, including differences between the two, and when
7 it is appropriate to use each." Id. § 422.80(c)(1)(iii).

8 These regulations apply to all "marketing materials," as that
9 term is defined in 42 C.F.R. § 422.80(b). This includes any
10 informational materials targeted at Medicare Advantage
11 beneficiaries which, among other things, "explain the benefits of
12 enrollment in an MA plan, or rules that apply to enrollees." Id.
13 § 422.80(b)(3) (emphasis added). The regulation provides a number
14 of examples of marketing materials, including, "[m]embership
15 communication materials such as membership rules, subscriber
16 agreements (evidence of coverage), member handbooks and wallet
17 card instructions to enrollees." Id. § 422.80(b)(5)(v) (emphasis
18 added).

19 The operative arbitration provision in this dispute is
20 contained in the June 2004 EOC. By federal regulation, the EOC is
21 considered "marketing material" and must be approved by the CMS.
22 The CMS has a set of standards it uses in evaluating marketing
23 materials, including the adequacy of the formatting and font size
24 and the adequacy of the description of any grievance procedures.
25 Pursuant to 42 U.S.C. § 1395w-26(b)(3), these regulations
26 supersede any state law or regulation with respect to Medicare
27 Advantage plans such as the Health Plan Senior Advantage plan in
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1 which Mr. Clay was enrolled. To the extent California Health &
2 Safety Code section 1363.1 purports to regulate the adequacy of
3 any disclosures in the EOC, it is superseded by federal law, and
4 its application here is preempted.

5 Congressional intent confirms this result. The Conference
6 Report accompanying the MMA clearly demonstrates that, in amending
7 42 U.S.C. 1395w-26, Congress intended to broaden the preemptive
8 effects of the Medicare statutory regime, and that it intended to
9 apply the new rules to all subsequent litigation:

10 The conference agreement clarifies that the MA program
11 is a federal program operated under Federal rules. State
12 laws, do not, and should not apply, with the exception
13 of state licensing laws or state laws related to plan
solvency. There has been some confusion in recent court
cases. This provision would apply prospectively; thus,
it would not affect previous and ongoing litigation.

14 H.R. Rep. No. 108-391, at 557 (2003).

15 At oral argument, Plaintiffs' counsel advanced two arguments
16 against preemption. First, counsel asserted that because Section
17 1363.1 does not conflict with federal law - that is, compliance
18 with one does not require violation of the other - federal law
19 does not preempt. Second, counsel relied on the decision in
20 Pagargigan, where the California Court of Appeal, on very similar
21 facts, found that the Medicare Act did not preempt application of
22 Section 1363.1. See 102 Cal. App. 4th at 1135-36. Both arguments
23 fail because they rely on older versions of the Medicare Act.

24 Prior to the passage of the BIPA in 2000, Congress had not
25 explicitly preempted state regulation of Medicare Advantage
26 marketing materials. As such, preemption analysis required a
27 court to consider whether compliance with both federal and state
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1 law was possible. In that situation, it was permissible for
2 states to impose higher standards than federal law did.
3 Because the preemption is now explicit, the state regulations must
4 fall. See Jones, 430 U.S. at 525.

5 The Pagarigan court followed the implied preemption analysis
6 in reaching its conclusion that Section 1363.1 was not preempted.
7 See 102 Cal. App. 4th at 1147 ("As Congress has expressly stated,
8 state standards regarding matters outside the specified areas are
9 superseded only to the extent any state regulation is
10 'inconsistent' with such federal regulations." (citing previous
11 version of 42 U.S.C. § 1395w-26(b)(3)(A)) (emphasis in original).
12 Under the facts of that case, application of the older preemption
13 statute was appropriate. Pagarigan had enrolled in the Medicare
14 program in 1995, the governing EOC had been approved in January
15 2000, and Pagarigan died in June 2000. Id. at 1149. All of this
16 preceded passage of the BIPA, when Congress first made the
17 decision to explicitly preempt state regulation of Medicare
18 marketing materials such as the EOC. Id. The same was true in
19 Zolezzi v. Pacificare of Cal., 105 Cal. App. 4th 573 (Ct. App.
20 2003), on which Plaintiffs also rely. Id. at 588 ("However, that
21 provision was added by BIPA's amendment of the Act on December 21,
22 2000, which was subsequent to all of the relevant or operative
23 acts and omissions of which Zolezzi complains in her first amended
24 complaint."). Here, the explicit preemption was well-established
25 before the CMS reviewed and approved the governing EOC, and before
26 Defendants are alleged to have committed any of the wrongful acts
27 identified in the Complaint. Nothing in Pagarigan compels a

1 different result.

2 **D. Applicability of the Arbitration Agreement to Plaintiffs**

3 Plaintiffs argue that because they are not signatories to the
4 arbitration agreement, even if the Court finds that agreement
5 enforceable, it should not apply to them. Opp'n at 11.

6 Defendants argue that the arbitration provisions in the applicable
7 EOC extend to the enrollee's heirs or personal representatives
8 (i.e., Plaintiffs), and that because Plaintiffs bring claims on
9 behalf of the estate, they stand in Mr. Clay's shoes and are bound
10 by his agreement.

11 The EOC includes the following provisions regarding the scope
12 of arbitration:

13 Any dispute shall be submitted to binding arbitration if
14 all of the following requirements are met:

- 15 1. The claim arises from or is related to an alleged
16 violation of any duty incident to or arising out of
17 relating to this EOC or a Member Party's
18 relationship to Kaiser Foundation Health Plan,
19 Inc., (Health Plan), including any claim for
20 medical or hospital malpractice, for premises
21 liability, or relating to the coverage for, or
22 delivery of, Services, irrespective of the legal
23 theories upon which the claim is asserted.
- 24 2. The claim is asserted by one or more Member Parties
25 against one or more Kaiser Permanente Parties or by
26 one or more Kaiser Permanente Parties against one
27 or more Member Parties.

28 Hall Decl. Ex. A (2004-2005 EOC), at 35-36.⁴ The EOC further
defines "Member Parties" to include the plan member, the member's
heir or personal representative, or any "person claiming that a
duty to him or her arises from a Member's relationship to one or

⁴The EOC includes other requirements not material to this dispute.

1 more Kaiser Permanente Parties." Id. at 36.

2 Because Mr. Clay agreed to the terms of the EOC, his estate
3 is bound by its terms. Therefore, the various causes of action in
4 the Complaint which are brought on behalf of the estate must be
5 submitted to arbitration. At a minimum, this includes the first,
6 second, third, and fourth causes of action, each of which alleges
7 that Defendants caused some financial injury to Mr. Clay and seeks
8 to recover for that injury. See County of Los Angeles v. Super.
9 Ct., 21 Cal. 4th 292, 304 (1999) ("In a survival action by the
10 deceased plaintiff's estate, the damages recoverable expressly
11 exclude 'damages for pain, suffering, or disfigurement.' . . .
12 They do, however, include all 'loss or damage that the decedent
13 sustained or incurred before death, including any penalties or
14 punitive or exemplary damages.'") (citing Cal. Code Civ. Proc. §
15 377.34).

16 Plaintiffs correctly identify a split in the California
17 Courts of Appeals regarding the applicability of binding
18 arbitration provisions to non-signatory adult heirs. Two lines of
19 cases may apply. The first follows Rhodes v. California Hospital
20 Medical Center, 76 Cal. App. 3d 606 (Ct. App. 1978); the second
21 follows Herbert v. Superior Court of Los Angeles County, 169 Cal.
22 App. 3d 718 (Ct. App. 1985). Though Plaintiffs identify the
23 split, they fail to provide any reason the Court should follow one
24 line of cases over the other in this matter.

25 Plaintiffs rely on Rhodes and its progeny. For the reasons
26 set forth in Herbert, on which Defendants rely, Rhodes is
27 distinguishable. Unlike the arbitration provision in Herbert and
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1 the one in the EOC, the agreement in Rhodes did not have a
2 provision through which the signing party intended to bind her
3 heirs. See Herbert, 169 Cal. App. 3d at 725 n.2; Rhodes, 76 Cal.
4 App. 3d at 608-09. It is also relevant that in Rhodes, the estate
5 was not a plaintiff and there were no survival claims at issue.
6 See Rhodes, 76 Cal. App. 3d at 609 ("This arbitration proceeding
7 does not, at this stage, involve any question as to the existence
8 of a cause of action in Mrs. Rhodes. . . . We are here concerned
9 solely with the forum in which a new cause of action in the heirs
10 may be brought.").

11 Similarly, in Baker v. Birnbaum, 202 Cal. App. 2d 288, 292
12 (Ct. App. 1988), which follows Rhodes, there was "nothing on the
13 face of the . . . contract that extend[ed] it to any claim by" the
14 plaintiff. Other facts in Baker distinguish it from the present
15 matter as well. The suit did not involve a claim for wrongful
16 death, and the plaintiff, who was not required to arbitrate, was
17 not suing on behalf of a decedent's estate. Id. at 290. As
18 discussed below, in reference to Herbert, each of these factors is
19 significant. In Baker, a husband and wife each brought claims
20 against the wife's doctor. The wife's claim was for negligence,
21 the husband's for loss of consortium. Id. at 290. The court
22 compelled arbitration of Mrs. Baker's claim because she had signed
23 the arbitration agreement, but not Mr. Baker's claim. Id. at 292.

24 Plaintiffs' final authority, Buckner v. Tamarin, 98 Cal. App.
25 4th 140 (Ct. App. 2002), is also distinguishable. In Buckner, the
26 decedent had signed an arbitration agreement purporting to bind
27 his heirs. Id. at 141. His grown children brought an action for
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1 wrongful death. Id. Unlike the present action, the decedent's
2 spouse was not a co-plaintiff and the plaintiffs did not bring any
3 claims on behalf of the estate. Here, the Plaintiffs include, in
4 addition to Mr. Clay's grown children, his wife, suing
5 individually and on behalf of his estate. As noted above, the
6 estate must submit to arbitration. The Buckner court
7 distinguished its facts from those in the Herbert line of cases in
8 part because there was no plaintiff or group of plaintiffs in
9 Buckner that was required to arbitrate, so there was no concern of
10 splitting a wrongful death suit across forums or reaching
11 inconsistent results. Id. at 142-43.

12 The Court finds the facts in Herbert more analogous, and
13 adopts the reasoning of that case and its progeny. The Herbert
14 plaintiffs were the wife, five minor children, and three adult
15 children of the decedent. 169 Cal. App. 4th at 720. They brought
16 a suit for wrongful death, fraud, and negligent infliction of
17 emotional distress against hospital, health plan, and doctors
18 involved in Mr. Herbert's care. Id. at 721. The decedent's
19 estate also filed claims for medical negligence and fraud, but
20 those claims were dropped after the defendants filed a motion to
21 compel arbitration. Id. As here, the arbitration agreement in
22 Herbert applied to any claim brought by the health plan member or
23 his heir or personal representative. Id. at 720. The court found
24 that the decedent's wife was bound by the arbitration agreement.
25 Id. at 723. The court relied on a prior decision which found that
26 the fiduciary relationship between spouses establishes the power
27 to contract for health care on one another's behalf, which implies

1 the authority to agree on one another's behalf to arbitrate claims
2 arising out of that health care. Id. (citing Hawkins v. Super.
3 Ct., 89 Cal. App. 3d 413, 418-19 (Ct. App. 1979)). Here, Rodney
4 and Deborah Clay were both enrolled in the Health Plan through
5 Deborah Clay's employer, and Deborah Clay remains enrolled. Dean
6 Decl. ¶ 3. That is sufficient basis to bind Mrs. Clay to the
7 arbitration provisions.

8 The Herbert court found that because some of the plaintiffs
9 were bound by the arbitration agreement, the remaining plaintiffs
10 had to submit their wrongful death claims to arbitration,
11 regardless of the fact that they had signed the agreement. 169
12 Cal. App. 3d at 725. Under the "one action rule," "there may be
13 only a single action for wrongful death, in which all heirs must
14 join. There cannot be a series of such suits by individual
15 heirs." Gonzales v. S. Cal. Edison Co., 77 Cal. App. 4th 485, 489
16 (Ct. App. 1999). "Because a wrongful death cause of action may
17 not be split, the case must be tried in a single forum." Herbert,
18 169 Cal. App. 3d at 722.

19 In addition to the one action rule requiring that all the
20 heirs litigate together, the Herbert court identified other policy
21 concerns favoring arbitration of all the heirs' claims:

22 [I]t is obviously unrealistic to require the
23 signatures of all the heirs, since they are not even
24 identified until the time of death, or they might not be
25 available when their signatures are required.
26 Furthermore, if they refused to sign they should not be
27 in a position possibly to delay medical treatment to the
28 party in need. Although wrongful death is technically a
separate statutory cause of action in the heirs, it is
in a practical sense derivative of a cause of action in
the deceased.

1 Id. at 725. The Herbert facts are very similar to those now
2 before the Court, and the Herbert reasoning is persuasive. The
3 Court therefore holds that the arbitration agreement in the EOC,
4 which binds the estate and Mrs. Clay, also binds the remaining
5 Plaintiffs.

6
7 **IV. CONCLUSION**

8 For the reasons set forth above, the Court GRANTS Defendants'
9 Motion to Compel Arbitration and ORDERS as follows:

- 10 1. Plaintiffs are hereby ORDERED to submit all claims other
11 than that seeking injunctive relief to binding
12 arbitration.
- 13 2. This action is hereby stayed pending the outcome of the
14 arbitration, pursuant to 9 U.S.C. § 3.

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18 IT IS SO ORDERED.

19
20 December 14, 2007

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23 UNITED STATES DISTRICT JUDGE