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No.:

SUPREME COURT OF THE UNITED STATES

Li Qin Petitioner

vs.

Barbara Kong-Brown et al. Respondents

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

APPENDIES TO THE PETITION FOR A WRIT OF CERTIORARI

INDEX OF APPENDICES

(Volume One)

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Appendix A

NOT FOR PUBLICATION

FILED

APR 16 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LI QIN, Plaintiff-Appellant, v. BARBARA KONG-BROWN, is an arbitrator; et al., Defendants-Appellees.	No. 19-16194 D.C. No. 5:19-cv-00311-LHK MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

Submitted April 7, 2020**

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

We sua sponte grant Qin leave to proceed in forma pauperis on appeal.

Li Qin appeals pro se from the district court's judgment dismissing her 42 U.S.C. § 1983 action alleging constitutional claims challenging the validity of a private arbitration award. We have jurisdiction under 28 U.S.C. § 1291. We

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

review de novo. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003) (dismissal under the *Rooker-Feldman* doctrine). We affirm.

The district court properly dismissed Qin's action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine because it is a "de facto appeal" of prior state court decisions and Qin raises claims that are "inextricably intertwined" with those state court decisions. *See id.* at 1163-65 (discussing the *Rooker-Feldman* doctrine); *see also Cooper v. Ramos*, 704 F.3d 772, 782 (9th Cir. 2012) (explaining that claims, as well as requests for damages, are "inextricably intertwined" with the state court decisions where federal adjudication "would impermissibly undercut the state ruling on the same issues" (citation and internal quotation marks omitted)).

To the extent that Qin challenges the district court's order denying her motion for reconsideration, we lack jurisdiction over that decision because Qin did not file an amended notice of appeal after the district court denied the motion. *See* Fed. R. App. P. 4(a)(4)(B)(ii); *Harris v. Mangum*, 863 F.3d 1133, 1137-38 n.1 (9th Cir. 2017).

AFFIRMED.

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Appendix B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LI QIN,

Plaintiff,

v.

BARBARA KONG BROWN, et al.,

Defendants.

Case No. 19-CV-00311-LHK

ORDER ADOPTING REPORT AND RECOMMENDATION RE GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS AND DISMISSING CASE WITH PREJUDICE

Re: Dkt. Nos. 18, 20

The Court has reviewed United States Magistrate Judge Susan van Keulen's Report and Recommendation Re: granting Plaintiff leave to proceed in forma pauperis and dismissing case with prejudice. ECF No. 20. The time for objections has passed, and the parties have filed none. *See* 28 U.S.C. § 636(b)(1). The Court finds the report correct, well-reasoned and thorough, and accordingly adopts it in every respect. Accordingly, Plaintiff's motion for leave to proceed in forma pauperis is GRANTED. Moreover, the Court hereby DISMISSES the instant case with prejudice because the Court lacks subject matter jurisdiction, the *Rooker-Feldman* doctrine prevents Plaintiff from refiling her claims in any federal district court, and the Court cannot identify a competent court where Plaintiff could reassert her claims.

IT IS SO ORDERED.

Dated: May 29, 2019

Lucy H. Koh

LUCY H. KOH
United States District Judge

United States District Court
Northern District of California

No.:

SUPREME COURT OF THE UNITED STATES

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Appendix C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LI QIN,

Plaintiff,

v.

BARBARA KONG BROWN, et al.,

Defendants.

Case No. 19-cv-00311-SVK

ORDER FOR REASSIGNMENT TO A DISTRICT JUDGE

REPORT AND RECOMMENDATION TO GRANT PLAINTIFF'S AMENDED IN FORMA PAUPERIS APPLICATION AND DISMISS PLAINTIFF'S AMENDED COMPLAINT WITH PREJUDICE PURSUANT TO 28 U.S.C. § 1915

Re: Dkt. Nos. 17, 18, 19

Plaintiff Li Qin, appearing pro se, filed an amended motion for leave to proceed in forma pauperis ("IFP") (ECF 18) and an amended complaint ("Amended Complaint") (ECF 17) in response to this Court's February 7, 2019 order (ECF 5), denying Plaintiff's original IFP application without prejudice and ordering Plaintiff to amend her complaint ("Complaint") (ECF 1). Plaintiff's Amended Complaint challenges the dismissal of her medical malpractice claims in an arbitration case against the Permanente Medical Group. *See* ECF 17. Plaintiff's original Complaint named three defendants: the arbitrator, Defendant Barbara Kong Brown, and the two attorneys who represented the Permanente Medical Group, Defendants John Steward Simonson and Matthew Allen Bisbee. ECF 1 at 2–3. The Amended Complaint adds Kaiser Foundation Hospitals, Kaiser Foundation Health Plan and the Permanente Medical Group (collectively "Kaiser") as defendants. ECF 17 at 8.

This is the second order in the Court's initial screening review for civil actions filed in forma pauperis. 28 U.S.C. § 1915. After reviewing Plaintiff's financial information in her amended IFP application ("Amended IFP Application"), the Court finds that Plaintiff qualifies for

IFP status. The Court has also reviewed Plaintiff's attempt to remedy the issues in her original Complaint, and the Court concludes that the *Rooker-Feldman* doctrine bars this Court from asserting federal subject matter jurisdiction over Plaintiff's Amended Complaint. Accordingly, the Court **RECOMMENDS** that the District Judge **GRANT** Plaintiff's Amended IFP application and **DISMISS** Plaintiff's Amended Complaint **WITH PREJUDICE**.

I. BACKGROUND

Plaintiff's medical malpractice claims arise from medical treatment she received from the Permanente Medical Group in 2013 and 2014. ECF 17 at 9–12. In 2013, Plaintiff received a total hip replacement, which she alleges was misdiagnosed and wrongfully treated. *Id.* at 9, 16–17. Plaintiff's second set of malpractice allegations center on a 2013 cesarean section allegedly performed without her consent. *Id.* at 9–11. She further alleges that her cesarean section resulted in complications including a hernia that required surgery to repair. *Id.* at 10–12. Plaintiff additionally alleges that the Permanente Group unlawfully refused to continue with the surgery to repair her hernia after her insurance would not cover it, forcing her to seek treatment at another hospital. *Id.* at 11–12. In her Amended Complaint, Plaintiff challenges the January 26, 2016 dismissal of the medical malpractice case that she brought against the Permanente Medical Group through a private arbitration process. *Id.* at 8, 12–27. Plaintiff alleges that Defendants Brown, Simonson and Bisbee conspired to unlawfully deny her claims. *Id.* at 12–27. In particular, she alleges that Defendant Brown, the arbitrator, engaged in numerous ex-parte communications with the lawyers representing the Permanente Medical Group, Defendants Simson and Bisbee. *Id.* at 13–16. Plaintiff also contends that Defendants falsified evidence. *Id.* at 16–18, 26–27. Based on these allegations, Plaintiff seeks compensatory and punitive damages, including $200,000 for her medical costs. *Id.* at 38.

On February 7, 2019, the Court denied Plaintiff's IFP application without prejudice based on Plaintiff's failure to provide the date of her last employment and salary per month that she received as well as indicate whether her spouse is employed and her spouse's income. ECF 5 at 2. The Court also conducted an initial screening review of Plaintiff's Complaint pursuant to 28 U.S.C. § 1915 and found that the Complaint did not establish federal subject matter jurisdiction

because it failed to state a viable federal claim. *Id.* at 3– 11. In particular, the Court found that Plaintiff's claims under 42 U.S.C. § 1983 failed to plead that the dismissal of her arbitration claim was a state action and that Defendants' actions are fairly attributable to the State. *Id.* at 5–6. The Court also found that Plaintiff's Federal Arbitration Act ("FAA") claim failed to provide facts to establish the applicability of the FAA or a basis to conclude to that the statute of limitations did not bar her claim. *Id.* at 6–8. The Court thus instructed Plaintiff to submit an amended IFP application and an amended complaint.

Plaintiff filed an Amended IFP Application and an Amended Complaint on April 10, 2019. ECF 17; ECF 18. The Amended Complaint sets forth similar allegations as the original Complaint, but the Amended Complaint adds allegations regarding Plaintiff's previous attempt to challenge her arbitration decision in California Superior Court and then at the California Court of Appeal. ECF 17 at 29–26. Plaintiff's state court action ended after the California Court of Appeal affirmed the denial of her petition to vacate the arbitration award, a decision that the California Supreme Court declined to review. *Id.*; *see also Li Qin v. Kaiser Found. Hosps.*, No. H044035, 2018 WL 3135414, at *4 (Cal. Ct. App. June 27, 2018), *review denied* (Sept. 12, 2018).[1] The Amended Complaint pleads claims for violations of Plaintiff's civil and due process rights, discrimination and "corruptive arbitration." ECF 17 at 36–38.

II. PLAINTIFF'S AMENDED IFP APPLICATION

If the Court is satisfied that an applicant cannot pay the requisite filing fees, the Court may grant an IFP application. 28 U.S.C. § 1915(a)(1). Although § 1915(a)(1) "does not itself define what constitutes insufficient assets," a plaintiff seeking IFP status "must allege poverty with some particularity, definiteness, and certainty." *Balik v. City of Cedar Falls*, No. 16-CV-04070-LHK, 2016 WL 4492589, at *2 (N.D. Cal. Aug. 26, 2016) (quoting *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th Cir. 2015)).

Plaintiff's Amended IFP Application is complete and states that she receives $950 a month from government programs. ECF 18 at 2. Her spouse receives an additional $890 a month in

[1] Plaintiff attaches a copy of the Court of Appeal's decision as Exhibit 10 to her Amended Complaint. ECF 19 at Ex. 10.

social security benefits, making their combined income $1,840. *Id.* Her monthly expenses total $1,760, which leaves Plaintiff with a monthly surplus of roughly $80. *Id.* at 3. Accordingly, the Court finds that Plaintiff satisfies the financial requirements for IFP status and **RECOMMENDS** that the District Judge **GRANT** her Amended IFP Application.

III. PLAINTIFF'S AMENDED COMPLAINT

A. Screening under § 1915(e)(2)

District courts must screen civil actions filed in forma pauperis to ensure that the complaint states a claim, is not frivolous and does not seek monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2); *Lopez v. Smith*, 203 F.3d 1122, 112–27 (9th Cir. 2000) (en banc). A "frivolous" complaint "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). The Ninth Circuit has noted that § 1915(e)(2)(B)(ii) parallels the language of Federal Rule of Civil Procedure 12(b)(6). *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Both Rule 12(b)(6) and § 1915(e)(2)(B) require a district court to dismiss a complaint that fails to state a claim upon which relief can be granted.

The plaintiff's "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Pursuant to a § 1915 review, "[d]ismissal is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that would entitle him to relief." *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (citations omitted). In its review, the Court liberally construes pro se pleadings. *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012).

B. Federal Subject Matter Jurisdiction and the *Rooker-Feldman* Doctrine

1. Legal Background

A lack of subject matter jurisdiction may support a finding that a complaint is frivolous. *See Pratt v. Sumner*, 807 F.2d 817, 819 (9th Cir. 1987). The Court similarly has a continuing duty to determine whether it has subject matter jurisdiction. Fed. R. Civ. Proc. 12(h)(3). Federal question jurisdiction under 28 U.S.C. § 1331 and diversity jurisdiction under 28 U.S.C. § 1332 are the two most common forms of federal subject matter jurisdiction. Federal question jurisdiction

exists over actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The well-pleaded complaint rule governs whether a complaint establishes federal question jurisdiction and "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted). Diversity jurisdiction requires that all plaintiffs be of diverse citizenship from all defendants and that the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a); *Exxon Mobil Corp. v. Allapattah Svcs., Inc.*, 545 U.S. 546, 553–54 (2005).[2]

Under the *Rooker-Feldman* doctrine, federal district courts do not have subject matter jurisdiction over cases where the loser of a state court case seeks to overturn a state court decision or obtain relief from that decision. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). This is because "[t]he United States Supreme Court is the only federal court with jurisdiction to hear such an appeal." *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003). As a result, a federal district court must refuse to hear a "de facto appeal from a judicial decision of a state court," and "[a]s part of that refusal, it must also refuse to decide any issue raised in the suit that is 'inextricably intertwined' with an issue resolved by the state court in its judicial decision." *Id.* at 1158.

2. Analysis

Plaintiff's Amended Complaint seeks to overturn the denial of Plaintiff's previous challenge to the arbitration decision by California Superior Court, which the California Court of Appeal affirmed. ECF 17 at 29–26. Although Plaintiff does not explicitly request relief from the Court of Appeal's decision, the Amended Complaint details how the Court of Appeal rejected the same arguments raised by Plaintiff here. *Id.* Specifically, all four of Plaintiff's claims center on the allegedly "corruptive arbitration" conducted by Defendants:

- Plaintiff's first and second claims allege that through their "corruptive arbitration," Defendants deprived Plaintiff of her civil rights under the Fifth and Fourteenth

[2] Plaintiff does not attempt to plead diversity jurisdiction, nor could she given that the Amended Complaint alleges Plaintiff and all Defendants reside in California. ECF 17 at 8.

Amendments. *Id.* at 36–37.

- Plaintiff's third claim alleges that Defendants engaged in unlawful disability discrimination by imposing a "corruptive arbitration" and denying her scheduled hernia repair surgery. *Id.* at 37.
- Plaintiff's fourth claim alleges that "Defendants conducted a corruptive, conspiratorial arbitration" in violation of the FAA and other statutes. *Id.*

Plaintiff's claim that Defendants conducted a corrupt arbitration directly contradicts the conclusion of the California Court of Appeal, which found that "none of the situations in which a court is authorized to vacate an arbitration award is present" in Plaintiff's case. *Qin*, 2018 WL 3135414, at *1. The Court of Appeal further considered and rejected the same factual and legal arguments that Plaintiff's Amended Complaint raises:

- The Court of Appeal held that the arbitrator properly dismissed Plaintiff's misdiagnosis claim based on the statute of limitations "because her demand for arbitration was submitted more than one year after the diagnosis in question." *Id.* at 2.
- The Court found that "the record does not support" Plaintiff's claim "that Kaiser's attorneys 'fabricated a false [demand for arbitration] via some computer technic [sic].'" *Id.*
- The Court considered Plaintiff's argument regarding improper ex parte emails between Kaiser's lawyers and the arbitrator. *Id.* at 3. The Court concluded that "the messages predating the arbitrator's decision relate only to scheduling various hearings" and found no evidence "in the emails to indicate the arbitration award was obtained by fraud, corruption, or other improper means." *Id.*
- The Court held that Plaintiff "provide[d] no facts to support" her theory that the arbitrator, Defendant Brown, is biased because she "receives most of her income from Kaiser." *Id.* The Court also found evidence that Defendant Brown granted "at least two of [Plaintiff's] motions" contrary to Plaintiff's argument that she denied all Plaintiff's motions. *Id.*

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- The Court also upheld the dismissal of Plaintiff's arbitration claim "based on a failure to comply with the rules governing expert witness disclosure, a lack of any medical expert testimony to support the claim, and disruptive conduct by Qin during her deposition amounting to an abuse of the discovery process." *Id.*
- The Court held that Plaintiff's assertions that "Kaiser did not obtain her informed consent as required by law before performing a surgical procedure" and that "her deposition was 'torturing and oppressive'" do not provide "a basis to vacate an arbitration award," even if true. *Id.* \
- Lastly, the Court rejected Plaintiff's argument that "her constitutional right to due process was violated by the arbitration" because "an arbitration award is the product of a private arrangement, not state action." *Id.* Thus, the "arbitration proceedings do not implicate the right to due process." *Id.*

A significant portion of Plaintiff's Amended Complaint details Plaintiff's allegations regarding why the Court of Appeal erred in these conclusions. ECF 17 at 31-35. Ruling on any of Plaintiff's claims in her Amended Complaint would require the Court to review these conclusions, rendering Plaintiff's Amended Complaint a de facto appeal of the Court of Appeal's decision. Furthermore, Plaintiff asserts that the Superior Court's and the Court of Appeal's affirmation of the arbitration decision "constituted the state action" necessary for a 42 U.S.C. § 1983 claim. *Id.* at 29; *See also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (holding that under 42 U.S.C. § 1983, "the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State"). As a result, Plaintiff argues that the state courts' actions, including the California Supreme Court's refusal to review her appeal, form a necessary component of the claims in her Amended Complaint. Accordingly, the Court finds that the *Rooker-Feldman* doctrine bars this Court from asserting subject matter jurisdiction over Plaintiff's Amended Complaint.

The Ninth Circuit generally recognizes that "[d]ismissals for lack of jurisdiction 'should be . . . without prejudice so that a plaintiff may reassert his claims in a competent court.'" *Freeman v. Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (9th Cir. 1999) (quoting *Frigard v. United*

States, 862 F.2d 201, 204 (9th Cir. 1988)). However, in this instance, the Court lacks subject matter jurisdiction, and the *Rooker-Feldman* doctrine bars Plaintiff from refiling her claims in any federal district court. Indeed, the Court cannot identify a competent court where Plaintiff could reassert her claims. The Court thus **RECOMMENDS** that Plaintiff's Amended Complaint be **DISMISSED WITH PREJUDICE**.

IV. CONCLUSION

For the reasons discussed above, this Court **RECOMMENDS** that the District Judge **GRANT** Plaintiff's Amended IFP application and **DISMISS** Plaintiff's Amended Complaint **WITH PREJUDICE**. Any party may object to this recommendation but must do so within fourteen days of being served. Fed. R. Civ. P. 72(b). A failure to file a timely objection will waive any opposition to the recommendation.

The Court reminds Plaintiff that the Federal Pro Se Program at the San Jose Courthouse provides free information and limited-scope legal advice to pro se litigants in federal civil cases. The Federal Pro Se Program is available by appointment and on a drop-in basis. The Federal Pro Se Program is available at Room 2070 in the United States Courthouse in San Jose (Monday to Thursday 9:00 a.m.–4:00 p.m., on Friday by appointment only), or by calling (408) 297-1480. Parties may make appointments by contacting the program's staff attorney, Mr. Kevin Knestrick, at (408) 297-1480 or kknestrick@asianlawalliance.org. In addition, the Court offers a pro se handbook free of charge; a copy may be obtained from the Clerk's office or downloaded from http://cand.uscourts.gov/prosehandbook.

SO RECOMMENDED.

Dated: May 6, 2019

SUSAN VAN KEULEN
United States Magistrate Judge

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Appendix D

Filed 6/27/18 Qin v. Kaiser Foundation Hospitals CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

LI QIN, Plaintiff and Appellant, v. KAISER FOUNDATION HOSPITALS, ET AL., Defendants and Respondents.	H044035 (Santa Clara County Super. Ct. No. 16-CV-291867)

Li Qin appeals an order denying her petition to vacate an arbitration award. Because none of the situations in which a court is authorized to vacate an arbitration award is present here, we will affirm the order.

I. BACKGROUND

Qin brought a medical malpractice claim in arbitration against Kaiser Foundation Hospitals, under the provision in her Kaiser health plan requiring that any such dispute be resolved by private arbitration. She alleged two unrelated incidents of medical negligence: the misdiagnosis of a fracture in her leg, and a cesarean section procedure that left her with an incisional hernia.

Kaiser asked the arbitrator to summarily adjudicate the case in its favor because there were no disputed factual issues to be resolved at the arbitration hearing. The arbitrator ruled that Kaiser was entitled to summary adjudication of Qin's misdiagnosis claim because it was undisputed that the diagnosis occurred more than a year before the demand for arbitration, so the claim was barred by the statute of limitations. But the

arbitrator determined there were disputed facts precluding summary adjudication of the hernia claim: Though Kaiser's expert witness opined that the treatment provided to Qin was not negligent, Qin submitted a declaration from her own medical expert indicating that the treatment fell below the standard of care. Her expert's declaration contained a significant disclaimer, however: "I hereby emphasize that this opinion is based upon information which has been provided to me by the claimant and her husband. I reserve the right to modify this opinion in the event that additional information is brought to my attention."

Before the date of the arbitration hearing, Kaiser moved to dismiss Qin's remaining claim. Kaiser argued that at the time Qin's expert rendered his opinion, he had not reviewed all the relevant medical records and was therefore not sufficiently familiar with the case to provide an expert opinion. In support of the motion, Kaiser submitted a recent email the expert sent to Qin, in which he told her (as foreshadowed by his earlier disclaimer) that he was now unable to testify there was negligence. He stated that after reviewing the records he saw nothing to indicate that Qin ever reported a problem after her cesarean section, which left him "unable to testify that there is evidence that an incisional hernia occurred at a very early post op time."

The arbitrator dismissed the claim, finding Qin had failed to comply with the rules regarding expert witness disclosure by not initially giving the expert the records necessary to assess the case. The arbitrator also found dismissal appropriate because expert medical testimony was required for Qin to prove her claim, and the expert's retraction of his opinion left her without any. The arbitrator further found that Qin and her husband had engaged in obstructive behavior during her deposition and therefore dismissal was warranted as a sanction for abusing the discovery process.

Qin petitioned the Superior Court for an order vacating the arbitration award. She appeals the denial of that petition.

II. DISCUSSION

A. LIMITATIONS ON JUDICIAL REVIEW OF ARBITRATION AWARDS

The role of courts in reviewing arbitration awards is very limited. When parties agree to resolve a dispute by private arbitration, they typically expect the dispute will be resolved outside the judicial system. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) "The arbitrator's decision should be the end, not the beginning of the dispute. [¶] ... Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." (*Id.* at p. 10.) For that reason, a court has no power to set aside the decision of an arbitrator even when the decision is obviously wrong, either because of a legal error or a mistake of fact. (*Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1105.) The parties' agreement is that the arbitrator's decision, even if incorrect, will be final. (*Moncharsh*, at p. 12, citing *Griffith Co. v. San Diego College For Women* (1955) 45 Cal.2d 501, 515–516.)

The Legislature has mitigated the risk of an erroneous arbitration decision by providing for limited judicial review "in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process." (*Moncharsh*, *supra*, 3 Cal.4th at p. 12.) The grounds for vacating an arbitration award are set forth in Code of Civil Procedure, section 1286.2, subdivision (a), which provides that a court shall vacate an award if (1) it was procured by corruption, fraud, or other undue means; (2) there was corruption in the arbitrator; (3) a party was prejudiced by the arbitrator's misconduct; (4) the arbitrator exceeded his or her powers; (5) a party was prejudiced by the arbitrator's refusal to postpone the hearing, refusal to hear evidence, or other conduct contrary to law; or (6) the arbitrator failed to disclose a conflict of interest. Those are the only circumstances under which a court is authorized to vacate an arbitration award. (*Moncharsh*, at p. 33.) We review de novo a trial court's order denying a petition to

vacate an arbitration award, though we defer to the trial court's findings regarding any disputed facts so long as they are supported by substantial evidence. (*Maaso v. Signer* (2012) 203 Cal.App.4th 362, 371.)

B. NO GROUNDS FOR VACATING AN ARBITRATION AWARD ARE PRESENT

Qin, who is representing herself on appeal (as she did below), primarily contends that the arbitrator's decision was incorrect because her case is meritorious. That is not a basis for a court to vacate an arbitration award. (See *Moncharsh*, *supra*, 3 Cal.4th at p. 12.) But she also asserts that the arbitration was corrupt and the procedure unfair, circumstances which potentially could allow for the award to be vacated. Though Qin has not specified the precise legal grounds on which she relies, we analyze her arguments under the framework of section 1286.2, subdivision (a) (unspecified statutory references are to the Code of Civil Procedure), since that statute provides her only possible avenue for relief.[1]

Qin asserts that the arbitrator's ruling summarily adjudicating the claim for misdiagnosis of her leg fracture was based on false evidence. We construe that as a contention under section 1286.2, subdivision (a)(1) that the arbitration award was based on corruption or fraud. We note that it is permissible for an arbitrator to employ a summary adjudication procedure for resolving claims with no disputed material factual issues. (*Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1104.) The arbitrator here determined it was undisputed that Qin's misdiagnosis claim was time

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[1] Qin's failure to provide legal authority to support her arguments is a violation of the California Rules of Court. (Cal. Rules of Court, rule 8.204(a)(1)(B).) So too is her failure to support most of the factual assertions in her brief with citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Not being represented by an attorney does not excuse a party from complying with the rules. (*Nowusa v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.) We will nonetheless exercise our discretion to reach the merits of Qin's contentions. (Cal. Rules of Court, rule 8.204(e)(2)(C).) But her disregard of the rules could be deemed a waiver of her arguments on appeal, and provides an alternative ground for affirmance.

barred because her demand for arbitration was submitted more than one year after the diagnosis in question. Qin asserts that Kaiser's attorneys "fabricated a false [demand for arbitration] via some computer technic [sic]," presumably a demand showing a later filing date. But nothing in the record supports that assertion, and the burden is on Qin as the party attacking the arbitration award to show why it should be vacated. (*Lopes v. Millsap* (1992) 6 Cal.App.4th 1679, 1685.) Since the record does not support the contention, we must reject it.

Qin also contends that the award in Kaiser's favor resulted from improper ex parte communication between its lawyers and the arbitrator. This argument too can be construed as a contention that the award was procured by fraud or corruption (§ 1286.2, subd. (a)(1).) The record does contain several emails between Kaiser's attorneys and the arbitrator, but the messages predating the arbitrator's decision relate only to scheduling various hearings. While it would have been advisable for counsel to copy Qin on every communication with the arbitrator to avoid accusations of improper ex parte contact, we see nothing in the emails to indicate the arbitration award was obtained by fraud, corruption, or other improper means.

Qin argues that the result of the arbitration was essentially preordained because the arbitrator was biased in Kaiser's favor, given that, according to Qin, the arbitrator receives the majority of her income from arbitrating claims brought against Kaiser. We treat that as a contention under section 1286.2, subdivision (a)(2) that there was corruption in the arbitrator. In pressing the point, Qin asserts that Kaiser pays its lawyers and the arbitrator premium salaries "like a tyrannical master raises and feeds two teams of dogs" for protection. The argument is not without eloquence. But again, Qin provides no facts to support it. There is nothing in the record showing that the arbitrator receives most of her income from Kaiser, so the premise for the bias argument fails. Qin also asserts as evidence of bias that the arbitrator denied every motion she brought. Contrary

to that assertion, the record reveals that the arbitrator granted at least two of her motions (to compel certain depositions).

Qin contends that the arbitrator improperly dismissed her hernia claim. We construe that as a contention under section 1286.2, subdivision (a)(4) that the arbitrator exceeded her powers. The arbitrator's order dismissing the claim was based on a failure to comply with the rules governing expert witness disclosure, a lack of any medical expert testimony to support the claim, and disruptive conduct by Qin during her deposition amounting to an abuse of the discovery process. Qin argues that the dismissal was legally incorrect and that the facts do not support the decision. She asserts, for instance, that her expert submitted to a deposition and that she otherwise complied with the applicable discovery rules. But an arbitrator does not exceed her powers by making a decision that is legally or factually wrong. (*Moncharsh*, *supra*, 3 Cal.4th at p. 28.) And an arbitrator generally has the power to order any relief that can be ordered by a court (*Advanced Micro Devices, Inc. v. Intel. Corp.* (1994) 9 Cal.4th 362, 384), including discovery sanctions. (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1089.) Qin has not shown that the arbitrator exceeded her powers by dismissing the hernia claim.

Qin argues that the award should be vacated because Kaiser did not obtain her informed consent as required by law before performing a surgical procedure, and because her deposition was "torturing and oppressive" and should have resulted in discovery sanctions against Kaiser's counsel. Even if true, neither of those circumstances would be a basis to vacate an arbitration award. (See § 1286.2, subd. (a).) Qin argues in passing that her constitutional right to due process was violated by the arbitration. But since an arbitration award is the product of a private arrangement, not state action, arbitration proceedings do not implicate the right to due process. (*Rifkind & Sterling, Inc. v. Rifkind* (1994) 28 Cal.App.4th 1282, 1292.)

C. QIN'S MOTIONS ARE DENIED

Qin filed various motions in this court that we ordered considered with the merits of her appeal. She moved to compel Kaiser to produce documents in response to a discovery request, but discovery is not allowed while an appeal is pending unless necessary to preserve evidence and then only after obtaining an order from the trial court. (Code Civ. Proc., §§ 2036.010, 2036.030). And a motion to compel discovery responses can only be brought in the trial court. We therefore deny the motion.

Qin moved to augment the record on appeal to include certain emails attached to the motion and other documents, such as the arbitration agreement, which she does not have but asserts are in Kaiser's possession. Some of the emails attached to the motion are already contained in the record, as is the arbitration agreement. The other identified documents were not before the trial court. For those reasons, the motion to augment is denied.

Qin also filed a document entitled "Appeallant's [*sic*] Petition for the Hearing of Her Case of Appeal," which appears to have been prompted by a misperception that our order deferring her motions for consideration with the appeal was an order dismissing the appeal. She asks that this court not dismiss the appeal without first "schedul[ing] a hearing." We have not dismissed the appeal, and we heard oral argument before the matter was submitted and decided, so that request is moot.

III. DISPOSITION

The order denying the petition to vacate the arbitration award is affirmed. Respondents shall recover costs on appeal.

Grover, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.

No.:

SUPREME COURT OF THE UNITED STATES

Li Qin Petitioner

vs.

Barbara Kong-Brown et al. Respondents

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

APPENDIES TO THE PETITION FOR A WRIT OF CERTIORARI

Appendix E

(ENDORSED)
FILED
MAR 24 2016
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA, County of Santa Clara
By _____ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

LIN QIN

Plaintiff,

vs.

KAISER FOUNDATION

Defendant.

CASE NO.: 16CV291867

ORDER RE: Motion to Vacate Arbitration Award

Plantiff's Motion to Vacate the Arbitration Award came on regularly for hearing on March 24, 2016, in Department 7. After considering the submissions of the parties and the arguments presented, the tentative ruling is adopted and the motion is denied.

DATED: 3.24.16

BETH MCGOWEN
JUDGE OF THE SUPERIOR COURT

No.:

SUPREME COURT OF THE UNITED STATES

Li Qin Petitioner

vs.

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Appendix F

Court of Appeal, Sixth Appellate District - No. H044035

S250376

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LI QIN, Plaintiff and Appellant,

v.

KAISER FOUNDATION HOSPITALS, et al., Defendants and Respondents.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

No.:

SUPREME COURT OF THE UNITED STATES

Li Qin Petitioner

vs.

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APPENDIES TO THE PETITION FOR A WRIT OF CERTIORARI

Appendix G

1-26-2016

BARBARA KONG-BROWN, ESQ.
ARBITRATOR
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IN THE ARBITRATION OF

LI QIN Claimant, Vs. KAISER FOUNDATION HOSPITALS, KAISER FOUNDATION HEALTH PLAN, INC., THE PERMANENTE MEDICAL GROUP, INC.	ORDER RE MOTION TO DISMISS Case No. 13284 Date: January 26, 2016

Respondents KAISER FOUNDATION HOSITALS, KAISER FOUNDATION HEALTH PLAN, INC., and THE PERMANENTE MEDICAL GROUP, INC.(Respondents) Motion to Dismiss Claimant Li Qin's Demand for Arbitration was scheduled for Hearing on January 7, 2016, before Neutral Arbitrator Barbara Kong-Brown, Esq. The Hearing on the Motion to Dismiss was properly noticed on December 23, 2015, and Claimant was provided the opportunity to submit documents in opposition to Respondent's motion. Claimant submitted a document entitled "Claimant's Arbitration Brief" which was received by the Arbitrator on January 6, 2016, one day prior the hearing on the Respondent's motion.

Contentions of the Parties

The Respondent served its Notice of Motion and Motion to dismiss on the grounds that:

1. The Claimant's husband, Zhi Xun Sun (Zhixun Sun) violated the Arbitrator's Order not to speak on behalf of his wife;

2. Claimant failed to comply with expert disclosure requirements pursuant to Code of Civil Procedure 2034, and cannot meet her burden of proof of establishing the essential elements of her claim for medical malpractice. Respondents further object to any expert opinion offered by the Claimant at the Arbitration pursuant to Code of Civil Procedure 2034.260.

The Respondent contends that the Claimant has not served a timely Exchange of Witness Disclosure. She served a late Exchange of Witness Disclosure which is substantially defective as well as being untimely.

The Claimant contends that the Respondent failed to inform the Claimant about the surgical risks and did not consult the claimant about a consent for the operation, anesthesia, procedure and medical service; that the Respondent did not provide all the Claimant's medical records to their expert, Dr. Wachtel; that the Respondent failed to provide Claimant's complete medical records to Claimant's expert for his review and the Claimant's Exchange of Expert Witness Disclosure was only one week late.

The Respondent stated that it is not the Claimant's right to tell the Respondent's expert what records he should review, that this is the Respondent

Counsel's responsibility and there is no merit to the contention that Dr. Priver was deprived of an opportunity to review the Claimant's medical records. It is not the Respondent's responsibility to provide records to an expert retained by the Claimant.

Claimant's Deposition

During Mrs. Qin's deposition, her husband, Sun Zhi Xun, constantly interrupted the deposition, and coached the Claimant in her responses to the Respondent Counsel's questions,[1] despite the Arbitrator's Order that he had no authority to represent the Claimant.[2]

The Claimant also refused to cooperate during her deposition and refused to answer questions posed by the Respondent Counsel numerous times.[3] This constitutes a misuse of the discovery process pursuant to Section 2023.10 (d) of the California Code of Civil Procedure, which states the following: Misuses of the discovery process include, but are not limited to, the following:

(f) Making an evasive response to discovery.

Demand for Exchange of Expert Witness Disclosure

Respondent served a timely Demand for Exchange of Expert Witness Disclosure on April 8, 2015.[4]

Section 2034.230 of the California Code of Civil Procedure requires the following:

---

[1] Qin deposition,pages 17,18,19, 43,45,55,60,73-74,78,81,83,84,87,89,90,94,95,96,97,98,99,104,105,110-113

[2] Arbitrator's Order dated December 1, 2015, clearly refers to the Claimant's husband; pages 17,18,19, 43,45,55,60,73-74,78,81,83,84,87,89,90,94,95,96,97,98,99,104,105,110-11

[3] Deposition of Mrs. Qin, December 22, 2015;pages 27,29,30,40,41,42,48,49,51,52,53,54,56,66,67,70, 85,86,91,105-106

[4] Exhibit 1-Respondent's Demand for Exchange of Expert Witness Disclosure

(a) A demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. The demand shall state that it is being made under this chapter.

(b) The demand shall specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange.

(c) If any witness on the list is an expert as described in subdivision (b) of Section 2034.210, the exchange shall also include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney. This declaration shall be under penalty of perjury and shall contain:

(1) A brief narrative statement of the qualifications of each expert.

(2) A brief narrative statement of the general substance of the testimony that the expert is expected to give.

(3) A representation that the expert has agreed to testify at the trial.

(4) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific

testimony, including any opinion and its basis, that the expert is expected to give at trial.

(5) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

Late Submission of Claimant's Written Exchange of Required Expert Witness Disclosure

The due date for the Exchange of Expert Witness Disclosure was December 7, 2015.

On December 7, 2015, Respondents served their Written Exchange of Required Expert Witness Information and Expert Witness Declaration. They designated John Steven Wachtel, M.D., an obstetrician, as their retained expert and provided an Expert Witness Declaration signed by John S. Simonson, Respondents' attorney.[5] Claimant did not serve its Exchange of Expert Witness Disclosure until December 25 or 26, 2015, after the Respondent served its Notice of Motion and Motion to Dismiss.[6] The Claimant's Written Exchange of Required Expert Witness Information and Expert Witness Declaration is dated December 26, and 25, 2015, respectively.

Claimant's Written Exchange of Required Expert Witness Information and Expert Witness Declaration

The Claimant's Expert Witness Declaration states, inter alia, the following:

"I, Li Qin, Claimant in pro per, declare:

I. I am Claimant in pro per of record in this action. I make this Expert Witness Declaration as required by section 2034.260 of the Code of Civil Procedure.

[5] Exhibit 2-Respondent's Written Exchange of Required Expert Witness Information and Expert Witness Declaration; Expert Witness Declaration; Expert Witness Declaration and Curriculum Vitae of Dr. Wachtel
[6] Ex. 3

2. Dr. David Michael Priver, M.D. As to this expert, I am informed and believe that the following is true:

A. Qualifications: Please see attached CV.

B. This expert had been retained to provide expert opinion testimony concerning the standard of care applicable to the diagnosis and treatment of Claimant and whether the standard of care was met in regard to the care to rendered Claimant by Respondents. This expert will also give opinion testimony regarding medical causation and damages.

C. Dr. David Wachtel has agreed to testify at arbitration.

D. This expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning his testimony, including any opinion and its basis that he may provide at arbitration.

E. This expert's fee for providing deposition testimony is $1,500.00 per half day or portion thereof.

I declare under penalty of perjury under the laws of the State of California that this declaration was executed on December 24, 2016(sic), and that the foregoing is true and correct of my own personal knowledge.

Date: December 25, 2015 Li Qin, Claimant in pro per".

This Declaration by Claimant did not specify that Dr. Priver was prepared to testify; only that Dr. David Wachtel was prepared to testify, and Dr. Wachtel is not the Claimant's expert. The Claimant also got Dr. Wachtel's first name wrong. It is not David. The Claimant submitted a subsequent notice dated after the Hearing, on January 9, 2016, which now states that Dr. Priver will appear at the Arbitration Hearing.[7]

The late disclosure by the Claimant is not dispositive of this matter.

Dr. Wachtel, in his declaration of April 8, 2015, opined that based on his careful and thorough review of the Claimant's medical records, as well as his professional and academic experience and training, to a reasonable medical probability all of the obstetrical care and treatment received by Mrs. Qin from

[7] Ex. No. 4

Kaiser was within the applicable standard of care. He also opined that no act or omission attributable to Kaiser caused Mrs. Qin to experience harm related to her birth. This included the treatment that she received from Kaiser before, during and after her December 18, 2013 C-section.[8]

Dr. Priver initially stated in a report dated July 18, 2015, that "an incisional hernia appeared essentially immediately following surgery and he concluded that, more likely than not, the fascial incision was not properly repaired".[9] He based his opinion totally on what the Claimant and her husband told him. This report was not a declaration submitted under penalty of perjury. He submitted a subsequent declaration dated November 3, 2015, which was identical in substance to the July 18, 2015, report.[10]

Dr. Wachtel replied to Dr. Priver's report on September 29, 2015, and stated the following:

> "Dr. Priver's report did not state which medical records he reviewed and it does not appear that he carefully reviewed the medical records because his statements in the Report do not conform to the facts stated in records. Mrs. Qin's records reflect no apparent hernia until at the earliest, February 19, 2014, two months after her surgery of December 18, 2013, and his statement that "the fact than an incisional hernia appeared essentially immediately following surgery leads to the conclusion that, more likely than not, the fascial incision was not properly repaired" **is completely in error.**[11]

Furthermore, the Respondent took Dr. Priver's deposition on January 4, 2016. During his deposition Dr. Priver stated that he had not been provided with

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[8] Ex. 8, Wachtel Declaration dated 4/8/15
[9] Ex. No. 9 Priver Declaration dated 7/18/15
[10] Ex. No. 10, Priver Declaration dated 11/3/15
[11] Ex. No. 11, Wachtel Declaration dated 9/29/15

complete records in this case[12]. However, he sent an email on January 7, 2016, to the parties and the Arbitrator in which he stated the following:

> "Hello Sam,
> In carefully reviewing Li's records on a disc which I must admit I had forgotten about, but just found buried in a drawer..."[13]

Therefore, Dr. Priver's declarations and reports were not in compliance with Section 2034.260 (c) (4) of the California Code of Civil Procedure (CCP) which requires that the expert be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

During his deposition Dr. Priver testified as follows:

> Q. Okay. So if the records show that Mrs. Qin brought the bulge that she claims was present to the attention of personnel at Kaiser before she was discharged—
>
> A. And they did an appropriate type of evaluation to either confirm or deny this, then that would modify my opinion. Like I said in my declaration, if more information is brought to my attention, I reserve the right to modify my opinion....
>
> Q. What if the records reveal no indication that Mrs. Qin ever brought the bulge, the claimed bulge to anyone's attention at Kaiser before she was discharged?
>
> A. Well, then, I think that—that that changes things because there-there would be no way for the personnel, the staff to harbor the suspicion --that--that there was a hernia here.
>
> Q. And how would that impact your opinion in this case?
>
> A. Oh, I think it would change my opinion because the patient has to bear a certain amount of responsibility. We're not doing veterinary medicine here. We expect people to talk to us. And if something as dramatic as they seem to be thinking happened was never brought to anyone's attention,

[12] Ex. No. 5, Priver deposition testimony, Tr.66:15-25
[13] Ex. No. 6, 1/7/16 email from Priver

then I would have to --I would have to doubt the veracity of it.

Q. And doubt the veracity of what Mr. Sun is telling you?

A. Correct. So I think –

Q. and where would that leave you in terms of your opinion?

A, Well, it would do away with my opinion that there was negligence here".[14]

Dr. Priver's initial opinion finding an incisional hernia almost immediately after surgery was based on what the Claimant and/or her husband told him[15] Dr. Priver, in his January 7, 2016, email stated the following:

"I have been able to locate both nursing notes and OB MD progress notes for the days immediately following the CS. In so doing, I find no evidence that either Li nor you ever reported her sudden incisional pain and bulging to anyone. Unfortunately, this leaves me unable to testify that there is evidence that an incisional hernia occurred at a very early post op time".[16]

Reading this email in conjunction with his deposition testimony, it is reasonable to conclude that Dr. Priver cannot provide any expert testimony that the Respondents were negligent in providing medical care to the Claimant regarding the caesarian section and the incisional hernia.

Moreover, Dr. Priver has no opinion regarding the issue of informed consent.[17] Although the Claimant stated that she did not sign an informed consent form there is no requirement in the State of California for such a form. During the Hearing the Arbitrator requested that Respondent's Counsel provide documentation regarding the issue of informed consent. Respondent provided the following documents:

[14] Ex. No. 14, Priver deposition testimony, Tr. 75:5-25; 76:1-18
[15] Ex. No. 15, Priver deposition testimony, Tr. 48:21-25;49:1-13
[16] Ex. No. 13
[17] Ex. No. 16, Priver deposition testimony, Tr. 71:4-10

1. Progress Noted dated 11-22-13 by Steven Chen, M.D. (Kaiser Foundation Hospitals, Outpatient Records, p. 530.

2. OB Admission History and Physical note dated 12-17-13 by Joanna Stark, M.D. (Kaiser Foundation Hospitals, Inpatient Records, pp. 103-108.)[18]

The progress note contains a notation by Dr. Steven Chen, which states

"She is scheduled for elective RCD on 12/23/13. Reviewed R/B of CD. Questions answered. Will need to review pre-op and lab instruction at future appt".

The OB Admission History and Physical note by Dr. Joanna Stark states

"Cesarean Section: Mrs. Qin and I reconfirmed the indication for Cesarean delivery. I explained the relevant risks, including, but not limited to anesthesia, hemorrhage, infection, damage to adjacent structures, venous thrombosis/pulmonary embolism, neonatal complications and even death. We discussed the alternative of vaginal delivery which is not recommended in her case. I explained the probable length of stay and criteria for discharge. I described the normal discomforts, activity restrictions and recovery period for the procedure. I answered all her questions, and Mrs. Qin indicated her understanding and desire to proceed".

These documents indicate that the risks of the cesarean section surgery were discussed with Mrs. Qin and she consented to the surgery. She has not provided any competent expert medical evidence to support her contention regarding the issue of informed consent.

Medical negligence requires competent medical testimony. Without a qualified expert the Claimant lacks competent expert testimony to establish the prima facie elements of her claim. Since Dr. Priver is unable to provide any expert testimony that the Respondents were negligent in providing medical care to the Claimant regarding the cesarean section and the incisional hernia, which

[18] Ex. No. 17

goes to the essence of the Claimant's claim, it would be pointless to proceed to Hearing regarding this matter.

During his deposition on January 4, 2016, Dr. Priver stated the following: A. "Because I'm quite sure if I were told by him that she developed this incisional hernia weeks or months later, I would have told him there's no reason to pursue a case like this. That's not-that's not substandard".[19]

Dismissal

The issue of malpractice requires that expert testimony be provided to support the Claimant's claims on the standard of care and causation. It is well settled that expert testimony is ordinarily required to prove the material or relevant issues in an action for malpractice. Simmons v. West Covina Medical Clinic (1989) 212 Cal. App.3d, 696, 702; Sinz v. Owens (1949), 33 Cal.2d 749; 753; Landeros v. Flood (1976) 17 Cal.3d 399, 410). In Landeros, the Court explained the requirement for expert testimony necessary to establish the standard of care as follows:

"The standard of care against which the acts of a physician are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and could only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of the laymen... (ibid).

The Claimant was allowed to submit a late expert witness exchange disclosure. However, Dr. Priver's reports and deposition testimony and email of January 7, 2016, are fatally defective and do not constitute competent expert evidence to support the Claimant's claim of medical negligence

[19] Ex. No. 15, Priver Deposition, Tr. 49:18-22

In any medical malpractice action, the plaintiff must establish (l) the duty of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; Hanson v. Grode, 76 Cal. App. 4th 601, 606 , 90 Cal. Rptr. 2d 396, (1999).

In the instant case, there is no medical evidence that Mrs. Qin or her husband reported an incisional hernia or a bump immediately after her C-section or at the time of her discharge on December 18, 2013. Dr. Priver testified in his deposition that the basis for his opinion was based on the report by the Claimant's husband that there was sudden onset of pain and a bulge the next day after surgery.

At the time of his deposition Dr. Priver had not reviewed the complete medical records of the Claimant although he had them. He recanted his opinion in his January 7, 2016, email because upon further review of the Claimant's Kaiser medical records, he stated that there was no evidence of any report of this complaint by the Claimant or her husband in the records. The first mention of the incisional hernia occurred on February 24, 2014. Regarding the issue of informed consent, Dr. Priver testified in his deposition that he has no opinion regarding the issue of informed consent. [20] The claimant has provided no competent expert testimony from a physician to support a prima facie claim of medical negligence and the Respondents have met their burden of producing evidence on the issues of negligence and causation. Respondents have established facts sufficient to

[20] Ex. 17

negate Mrs. Qin's claim via the declarations of Dr. John Wachtel in conjunction with Dr. Priver's deposition testimony and subsequent email of January 7, 2016.

California Code of Civil Procedure Section 2023.020 (d) (3) states the following: To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to the affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

(d) The court may impose a terminating sanction by one of the following orders:

(3) An Order dismissing the action, or any part of the action, of that party.

Based on the Claimant's and her husband's conduct during her deposition which constitutes a failure to participate in a meaningful deposition, this constitutes a misuse of the discovery process pursuant to Section 2023.010 of the California Code of Civil Procedure.

Moreover, based on the Claimant's failure to submit a competent expert witness disclosure, her expert's failure to participate in a meaningful deposition, and his subsequent reversal of his opinion to support her claim, and the absence of expert medical testimony to support her claim, the Respondents' motion to dismiss is granted. Based on the foregoing and GOOD CAUSE having been shown, **IT IS HEREBY ORDERED THAT**

1. Respondents Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc., and The Permanente Medical Group, Inc. Motion to Dismiss Claimant Li Qin's Demand for Arbitration is GRANTED with prejudice.

2. The Arbitration Hearing scheduled on February 2, 2016, is vacated.

3. **Nothing in this arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision to the Department of Managed Health Care.**

Date: January 26, 2016

BARBARA KONG-BROWN, ESQ.

ARBITRATOR

No.:

SUPREME COURT OF THE UNITED STATES

Li Qin Petitioner

vs.

Barbara Kong-Brown et al. Respondents

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Appendix H