

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**MARK ZEMBSCH et al.,**

**Petitioners,**

**v.**

**THE SUPERIOR COURT OF  
ALAMEDA COUNTY,**

**Respondent;**

**HEALTH NET OF CALIFORNIA,  
INC., et al.,**

**Real Parties in Interest.**

**A114157**

**(Alameda County  
Super. Ct. No. RG 05 240793)**

Petitioners Mark and Kimberly Zembsch seek writ review of an order compelling them to arbitrate their claims against their health insurance provider, Health Net of California, Inc., and Alta Bates Medical Group, the physician group that provides medical care to the Zembsch family. In the published part of our opinion, we hold that writ review is appropriate and grant the petition for writ of mandate. We address whether the Health Net enrollment form signed by Mark Zembsch complied with Health and Safety Code section 1363.1, subdivision (b). That statute requires health care service plans that require binding arbitration to settle disputes to provide a disclosure of arbitration that is “prominently displayed on the enrollment form signed by each

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\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

subscriber or enrollee.” (Health & Saf. Code, § 1363.1, subd. (b).<sup>1</sup>) We hold that the enrollment form does not comply with the statutory requirement that the arbitration disclosure be “prominently displayed.” Noncompliance with the statute renders any arbitration agreement between Health Net and the Zembschs unenforceable.

In the unpublished part of our opinion, we consider whether Health Net met its burden of proving the existence of an arbitration agreement applicable to the Zembschs’ claims. We hold that Health Net did not meet its burden of proving the existence of an arbitration agreement for the years 2002 through 2004. We do not decide whether Health Net met its burden of proving an applicable agreement in 2005 because the arbitration disclosure signed by Mark Zembsch does not comply with section 1363.1, subdivision (b).

#### FACTUAL AND PROCEDURAL BACKGROUND

Although the parties offer sharply divergent versions of the facts surrounding the Zembschs’ underlying claims, the Zembschs’ petition for writ of mandate seeks review only of the trial court order compelling them to arbitrate. The facts relevant to the issue of arbitrability, and thus to our disposition of this writ petition, are largely undisputed. We summarize these facts below.

##### *The Health Net Plan*

Petitioner Mark Zembsch is an attorney employed by the City of Berkeley (the City). As an employee of the City, Zembsch and his family were eligible for group health insurance coverage under a group hospital and professional service agreement

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<sup>1</sup> Health and Safety Code section 1363.1 provides in pertinent part: “Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions: . . . [¶][¶] (b) The disclosure shall appear as a separate article in the agreement issued to the employer group or individual subscriber and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee.”

All further statutory references are to the Health and Safety Code unless otherwise indicated.

between the City and Health Net of California, Inc. (Health Net). On May 9, 2002, Zembsch signed a form enrolling himself, his wife, and his two children in a Health Net plan. The plan Zembsch elected provided health maintenance organization (HMO) coverage. With this type of coverage, most services are provided by or coordinated with a member's primary care physician and a contracting physician group. Alta Bates Medical Group (Alta Bates) is the physician group that, in contract with Health Net, provides medical care to the Zembsch family.

Although the plan contemplates that most medical care will be provided by the contracting physician group, Health Net's plan permits members to receive a "standing referral" to a specialist. Such a referral allows a member to see a specialist without receiving a specific referral from the member's primary care physician for each visit. A standing referral is authorized by the plan if it is determined to be necessary by the primary care physician, Health Net's medical director, and the member.

#### *The Health Net Enrollment Form*

The enrollment form that Zembsch signed when he joined the Health Net plan is a one-page document entitled "Member Enrollment and Change Form."<sup>2</sup> Most of the form is a series of blank spaces in which the enrollee fills in personally identifying information. The blanks appear in four boxes separated by boldface black lines. Beneath a boldface black line at the very bottom of the page are two single-spaced, unindented "paragraphs" printed in the smallest typeface used on the form.<sup>3</sup> The first and longer of these two paragraphs concerns the enrollee's authorization for the release of medical information. Immediately above the signature line the following paragraph appears: "Arbitration Agreement: I understand that any dispute or controversy, except medical malpractice, that may arise regarding the performance, interpretation or breach of the agreement between myself (and/or any enrolled family member) and Health Net, Health

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<sup>2</sup> A redacted copy of the enrollment form is attached as appendix A to this opinion. Its quality is poor, but this is the copy of the form that was before the trial court.

<sup>3</sup> Because a new topic is generally introduced by an indented line or, in the block style, a line of white space, we hesitate to call the provision a "paragraph."

Net Life Insurance Company or any Participating Physician Group/Independent Physicians Association, whether arising in contract, tort or otherwise, must be submitted to arbitration in lieu of a jury or court trial. Please sign and date this application below. Your signature indicates that you have completed all requested information as accurately as possible and understand all agreements implied including your agreement to submit disputes to binding arbitration.”

### *The Dispute Over a Standing Referral*

The Zembschs’ five-year-old son, Jack, suffers from a life threatening condition known as metatropic dysplasia. Metatropic dysplasia is an extremely rare form of dwarfism characterized by shortened limbs and a badly deformed spine. Jack suffers from multiple orthopedic problems including severe kyphoscoliosis, torticollis, and hip flexion contracture. The small thoracic cavity and stiff chest wall resulting from the condition cause severe restrictive lung disease and can result in cardiopulmonary compromise later in life. Children afflicted with metatropic dysplasia may require tracheotomy and ventilator support. The severity of the condition increases as Jack’s skeleton grows, which adds urgency to this writ proceeding.

Given the rarity of Jack’s condition, there are very few physicians with any substantial experience in treating it. As a consequence, in August 2004 the Zembschs sought a standing referral to Dr. William G. Mackenzie at the Alfred I. duPont Hospital for Children in Wilmington, Delaware. According to the Zembschs’ primary care physician, Dr. Mackenzie is recognized as the leading expert in the treatment of metatropic dysplasia. Alta Bates denied the Zembschs’ request because Dr. Mackenzie was an out-of-network provider and Alta Bates determined that the services requested were available “within the Alta Bates Medical Group Network.” The Zembschs then filed a number of appeals of Alta Bates’ decision, all of which were denied by Health Net.

*The Zembschs' Action Against Health Net and Alta Bates*

On November 7, 2005, the Zembschs filed an action against Health Net and Alta Bates in the Superior Court of Alameda County. Two days later, Health Net issued a standing referral for Jack Zembsch to obtain ongoing consultations with Dr. Mackenzie. According to the Zembschs, this standing referral was inadequate because it was for consultation only.

The Zembschs then filed a first amended complaint on December 5, 2005, alleging breach of contract and a number of other causes of action arising out of the defendants' alleged refusal to honor their obligations under the Health Net plan. Both Health Net and Alta Bates moved to compel arbitration and stay the action. Petitioners opposed the motions by raising various defenses. Among these defenses was the argument that the arbitration disclosure on Health Net's enrollment form failed to comply with section 1363.1 because the arbitration disclosure was not "prominently displayed" on the enrollment form signed by Zembsch. The Zembschs also argued later that Health Net had failed to establish the existence of an arbitration agreement applicable to their claims.

After extensive briefing and argument, the trial court granted the defendants' motions in an order filed June 1, 2006. It rejected petitioners' argument that Health Net had failed to comply with section 1363.1. Specifically, the trial court concluded that the disclosure did not violate section 1363.1, subdivision (b) because it was sufficiently prominently displayed to comply with the statute. The trial court noted that "the subject disclosure is contained in a separate paragraph, and the heading is in bold type. While there is no doubt that the disclosure could have been made *more* prominent, the Court concludes that it adequately fits the standard definition of 'prominent,' i.e. 'standing out' . . . or 'readily noticeable.'" The trial court rejected the Zembschs' other arguments and accordingly held that "there is an enforceable written agreement between Health Net and [the Zembschs] to arbitrate the disputes set forth in [the Zembschs'] complaint herein." It ordered the Zembschs to submit their claims against Health Net and Alta Bates to arbitration.

On June 16, 2006, the Zembschs filed a petition for writ of mandate and/or prohibition in this court seeking review of the trial court order compelling arbitration. On June 22, 2006, we issued an order staying the action below and permitting real parties in interest to file points and authorities in opposition to the petition. Both Health Net and Alta Bates filed oppositions, to which petitioners replied.

## DISCUSSION

Petitioners raise challenges to the existence and enforceability of the arbitration agreement. We agree with petitioners that Health Net failed to meet its burden of proof with respect to the 2002 and 2004 agreements and that, in any event, the arbitration disclosure on Health Net's enrollment form does not comply with section 1363.1. Our conclusion renders consideration of petitioners' other arguments unnecessary.

### I. *Writ Review Is Appropriate*

Before discussing the merits of the parties' contentions, we address the propriety of granting writ review. Since review by extraordinary writ is rarely warranted, we explain our reasoning in some detail.

The Legislature has specifically made orders *denying* a petition to compel arbitration appealable. (Code Civ. Proc., § 1294, subd. (a).) In contrast, orders *compelling* arbitration are considered interlocutory and are not appealable. (*International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699, 703 (*International Film Investors*).) "The rationale behind the rule making an order compelling arbitration nonappealable is that inasmuch as the order does not resolve all of the issues in controversy, to permit an appeal would delay and defeat the purposes of the arbitration statute." (*Wheeler v. St. Joseph Hospital* (1976) 63 Cal.App.3d 345, 353 (*Wheeler*).) Thus, writ review of orders directing parties to arbitrate is available only in "unusual circumstances" or in "exceptional situations." (*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court* (2005) 133 Cal.App.4th 396, 405; *Wheeler*, at p. 353.)

Nevertheless, California courts have held that writ review of orders compelling arbitration is proper in at least two circumstances: (1) if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement or (2) if the arbitration would appear to be unduly time consuming or expensive. (*International Film Investors, supra*, 152 Cal.App.3d at p. 704; *Atlas Plastering, Inc. v. Superior Court* (1977) 72 Cal.App.3d 63, 68 (*Atlas Plastering*)). This case presents similar circumstances.

First, petitioners attack both the existence and enforceability of the arbitration agreement. They contend that Health Net has failed to prove the existence of an arbitration agreement applicable to this dispute. In addition, they argue that even if an arbitration agreement exists, it is unenforceable because the disclosure provision on the Health Net enrollment form signed by Zembsch does not comply with section 1363.1. As we explain below, we agree and conclude that the matters ordered arbitrated are not within the scope of an enforceable arbitration agreement. In such a case, this court may properly review the trial court's order compelling arbitration by writ of mandate. (*Pagarigan v. Superior Court* (2002) 102 Cal.App.4th 1121, 1124 [granting petition for writ of mandate where court agreed with petitioner that § 1363.1 was not preempted by federal law]; *Ramirez v. Superior Court* (1980) 103 Cal.App.3d 746, 757-758 [issuing writ of mandate annulling order compelling arbitration where it was unclear whether party had knowingly waived right to jury trial and voluntarily agreed to arbitration of claims]; see also *Atlas Plastering, supra*, 72 Cal.App.3d at pp. 72-73 [issuing peremptory writ of mandate vacating order of joinder to arbitration of parties not in privity].)

Second, because we conclude that the trial court order compelling arbitration was improper, “the expense to the parties in participating in and seeking review of the arbitration is apparent.” (*Atlas Plastering, supra*, 72 Cal.App.3d at p. 68; see also *Bertero v. Superior Court* (1963) 216 Cal.App.2d 213, 222 [parties improperly ordered to arbitrate “would be put to the unnecessary delay and expense of an arbitration, further court proceedings, and an appeal, after which they would be required to start over”], disapproved on other grounds in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1192.) Furthermore, the arbitration provision in the Health Net

contract would require petitioners and Health Net to “share equally the arbitrator’s fees and expenses of administration involved in the arbitration.” Petitioners presented declarations to the trial court demonstrating that the daily rate for arbitrators ranges from \$4,000 to \$10,000 and fees for a single arbitrator range from \$200 to \$600 per hour. And Zembsch declared that his family could not afford the expense of such an arbitration. These averments provide further support for our conclusion that the unique circumstances of this case justify granting writ review.<sup>4</sup>

Before concluding our discussion, we must dispose of one additional contention regarding the adequacy of petitioners’ remedy. Health Net asserts that writ relief should be denied because petitioners have an adequate remedy under the independent medical review process prescribed by section 1374.30.<sup>5</sup> That statute establishes the Independent Medical Review System within the Department of Managed Health Care. (§ 1374.30, subd. (a).) It permits review of enrollee grievances involving “disputed health care service[s]” provided that certain requirements are met. (§ 1374.30, subd. (d)(1).) Health Net’s argument is misconceived, however, for it confuses petitioners’ underlying claims on the merits with the matters raised by their petition for writ of mandate. In this court, petitioners challenge only the trial court order directing that their claims against Health Net and Alta Bates be resolved in an arbitral forum. The dispute over whether petitioners’ claims on the merits are arbitrable is not one that can be resolved by the Department of Managed Health Care pursuant to section 1374.30. We are not persuaded

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<sup>4</sup> After granting writ review, we discovered that another case currently pending before this Division also raised the issue of the adequacy of a Health Net arbitration disclosure. (*Monroe v. Health Net of California, Inc.* (A111815).) In contrast to the trial court’s ruling in the matter below, in *Monroe* the superior court denied Health Net’s petition to compel arbitration, holding that a very similar arbitration disclosure failed to meet the requirements of section 1363.1. The existence of conflicting trial court rulings on this issue further strengthens the case for granting writ review. (See, e.g., *Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 657.)

<sup>5</sup> By issuing the order to show cause, we have decided this issue against Health Net. (See *Atlas Plastering, supra*, 72 Cal.App.3d at p. 68.)



that the administrative process constitutes an adequate remedy for petitioners' challenge to the trial court's order compelling arbitration.

Having concluded that writ review is appropriate, we turn to the merits.

II. *Health Net Failed to Meet Its Burden of Proving the Existence of an Arbitration Agreement Applicable to the Zembschs' Claims for the Years 2002 to 2004*

Petitioners initially dispute whether Health Net has met its burden of establishing the existence of an arbitration agreement applicable to petitioners' claims. (See, e.g., *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 ["Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence"]; *Larian v. Larian* (2004) 123 Cal.App.4th 751, 760 [party petitioning to compel arbitration must prove existence of valid arbitration agreement and that dispute is covered by that agreement].) The 2002 Group Hospital and Professional Service Agreement between Health Net and the City, the agreement in effect when Zembsch enrolled in the Health Net plan, provides for arbitration of disputes "between Group [the City] and Health Net." Thus, while the 2002 agreement clearly required *the City* to arbitrate disputes with Health Net, it did not require *members* to do so. This reading is reinforced by language in the 2002 agreement that specifically requires the Group and Health Net to resolve disputes by arbitration "whether or not *other parties such as Members*, health care providers, or their agents or employees, are *also* involved." From the documents in the record, it appears that the arbitration disclosure on the Health Net enrollment form signed by Zembsch did not accurately reflect the terms of the Health Net plan as it then existed. (Cf. § 1363.1, subd. (a) ["The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes . . ."].) That is, the disclosure stated that Zembsch would be required to arbitrate disputes with Health Net, while the contract itself contained no such requirement. If the arbitrability of this dispute is determined by the

terms of the 2002 plan, then Health Net plainly has not met its burden of establishing the existence of an arbitration agreement that applies to this controversy.<sup>6</sup>

Petitioners make the further argument that because Health Net denied the Zembschs' first request for a standing referral in September 2004, the 2004 contract determines whether they are required to arbitrate their claims. The 2004 agreement is not part of the record. In fact, Health Net's motion to compel arbitration was based on the 2005 agreement between Health Net and the City. Unlike the 2002 agreement, the 2005 agreement clearly requires that *both* the group and plan members arbitrate their claims against Health Net. Health Net maintains that the 2004 agreement contains an arbitration provision like the one contained in the 2005 agreement, but it failed to produce the 2004 agreement in the trial court. Health Net failed to meet its burden of proving the existence of an arbitration agreement applicable to petitioners' claims with respect to the 2004 agreement. In the absence of any evidence, we cannot accept Health Net's representations about the provisions of an agreement that is not part of the record. There is no evidence to establish the existence of an arbitration agreement between Health Net and the Zembschs for the year 2004.

For its part, the trial court appears to have concluded that the operative arbitration agreement was contained on the enrollment form itself. Its order compelling arbitration alludes to "the subject agreement to arbitrate, contained in the Health Net enrollment form signed by plaintiff Mark Zembsch." If, as the quoted statement seems to indicate, the trial court believed that the enrollment form itself constituted the arbitration agreement, this was error. (See *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1232-1233.) The enrollment form contains only the arbitration disclosure. The arbitration agreements are contained in the contracts signed by the City and Health Net.

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<sup>6</sup> Citing *Condee v. Longwood Mgmt. Corp.* (2001) 88 Cal.App.4th 215, Health Net claims that it could satisfy its burden of proof simply by alleging the existence of a contract that required arbitration. Health Net's reliance on *Condee* is mistaken. That case does not discuss the *evidentiary* burdens of the parties when the existence of an arbitration agreement is contested. (See *id.* at p. 218.) Instead, *Condee* addresses only the *pleading* requirements of a petition to arbitrate. (*Ibid.*)

Health Net did provide the trial court with a copy of its 2005 agreement with the City and the accompanying evidence of coverage booklet. That agreement does require that members arbitrate their disputes with Health Net. Thus, for the year 2005, Health Net produced evidence of an arbitration agreement. The Zembschs challenge the applicability of this agreement. They note that “the arbitration clause was changed in a critical manner affecting petitioners sometime between 2002 and 2005 without notice to either petitioners or the City.” Petitioners contend that the arbitration clause cannot be enforced because the City did not sign an arbitration disclosure as required by section 1363.1, subdivision (d). We need not resolve this question. Even if Health Net has met its burden of proof with respect to the 2005 agreement, it is undisputed that the only arbitration disclosure ever signed by Zembsch appeared on the 2002 enrollment form. As we explain below, that disclosure does not comply with section 1363.1, and thus any arbitration agreement to which petitioners may have been subject is unenforceable.

### III. *Petitioners Cannot Be Compelled to Arbitrate Their Claims*

#### A. *Standard of Review*

We next consider whether the disclosure on the Health Net enrollment form complies with section 1363.1 so that any arbitration provision in Health Net’s contracts with the City may be enforced against petitioners. Where the material facts are undisputed, a trial court’s determination regarding compliance with section 1363.1 is subject to de novo review. (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425 (*Robertson*).) In a mandate proceeding challenging an order compelling arbitration, we decide the issue of enforceability of the arbitration clause de novo. (See *Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court, supra*, 133 Cal.App.4th at p. 405.)

#### B. *The Arbitration Disclosure Is Not “Prominently Displayed”*

Petitioners argue that even if Health Net has proven the existence of an agreement to arbitrate, any such agreement is unenforceable because the arbitration disclosure on the

enrollment form signed by Zembsch fails to comply with section 1363.1, subdivision (b) because it was not prominently displayed on that form.<sup>7</sup>

1. *Case Law Applying Section 1363.1, Subdivision (b)*

Subdivision (b) of section 1363.1 requires that the arbitration disclosure required by the statute be “prominently displayed on the enrollment form signed by each subscriber or enrollee.” Three recent reported opinions have addressed whether arbitration disclosures complied with this requirement. In each case, the courts concluded that they did not. (See *Imbler v. PacifiCare of Cal., Inc.* (2002) 103 Cal.App.4th 567, 579 (*Imbler*); *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 61-62 (*Malek*); *Robertson, supra*, 132 Cal.App.4th at pp. 1428-1429.)

In *Imbler*, Division Two of the Fourth District affirmed an order denying an insurer’s petition to compel arbitration. (*Imbler, supra*, 103 Cal.App.4th at pp. 568, 579.) In discussing the statute’s requirement that the arbitration disclosure be “prominently displayed,” the *Imbler* court explained that “ ‘[p]rominent’ is defined as ‘standing out or projecting beyond a surface or line,’ or ‘readily noticeable.’ ” (*Ibid.*) The court concluded that the arbitration disclosure provision failed to comply with the statute’s prominence requirement because: (1) the disclosure was written in the middle of an authorization for the release of medical records and an authorization for payroll deduction of premiums; and (2) the disclosure was in the same font as the rest of the paragraph and was not bolded, underlined, or italicized. (*Ibid.*) The court expressly rejected the insurer’s arguments that section 1363.1, subdivision (b) was satisfied because the arbitration disclosure appeared just above the enrollee’s signature line, was printed in typeface no smaller than the majority of text used on the page and was not appreciably smaller than the few headings on the page, and was “ ‘neither hidden nor buried.’ ”

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<sup>7</sup> Petitioners also contend that Health Net’s disclosure was not phrased in the “clear and understandable language” that the statute requires and that Health Net failed to comply with subdivision (d) of section 1363.1 because the City did not sign an arbitration disclosure. (§ 1363.1 & subd. (d).) We do not address these arguments because we conclude that the disclosure violates subdivision (b) of the statute. (See *Robertson, supra*, 132 Cal.App.4th at p. 1431, fn. 7.)

(*Imbler*, at p. 579.) The court held that the disclosure did not comply with the statute. (*Ibid.*)

The arbitration disclosure in *Malek* was preceded by the words “**ARBITRATION AGREEMENT**” printed in capital letters in boldface type. (*Malek*, *supra*, 121 Cal.App.4th at p. 51, fn. 2.) The disclosure itself was in the same type size and font as other provisions authorizing deductions and the release of medical information but was contained in a separate numbered paragraph. (*Id.* at p. 61.) The Second District concluded that the disclosure did not stand out and was not readily noticeable. (*Ibid.*) The court held that the disclosure did not comply with section 1363.1, subdivision (b). (*Malek*, at p. 61.)

In *Robertson*, Division Two of this District reviewed the arbitration disclosure on a Health Net enrollment form, but that form differs from the one before us. (See *Robertson*, *supra*, 132 Cal.App.4th at pp. 1423 & fn. 3, 1433.) The arbitration disclosure at issue in *Robertson* was located on the second page of the enrollment form within a section entitled “ACCEPTANCE OF COVERAGE.” (*Id.* at p. 1423.) The disclosure was preceded by the boldface subheading “**Arbitration Agreement**” and was separated from the other paragraphs in the section by an extra space added before and after the first and last sentences of the disclosure. (*Ibid.*) The text of the disclosure was printed in the same font and size as the other paragraphs in the section in which it appeared. (*Ibid.*) The court first held that the disclosure did not satisfy the requirements of section 1363.1, subdivision (d), because it was not placed “ ‘immediately before the signature line provided for the individual enrolling in the health care service plan.’ ” (*Robertson*, at pp. 1426-1428, quoting § 1363.1, subd. (d).) The court next held that the disclosure failed to meet the prominence requirement of the statute because “(1) the provision is some distance from the enrollees’ signature line, (2) the provision is printed in the same font or typeface as the rest of the form, and (3) only the title is in bolded type.”<sup>8</sup> (*Robertson*, at p. 1429.)

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<sup>8</sup> Health Net argues that *Robertson*’s discussion of subdivision (b) of section 1363.1 was “pure *dicta*” because the court had already concluded that the disclosure violated

2. *The Health Net Arbitration Disclosure Does Not Stand Out and Is Not Readily Noticeable*

Our review of the relevant case law and the enrollment form at issue leads us to conclude that the arbitration disclosure on Health Net’s enrollment form does not satisfy the prominence requirement of section 1363.1, subdivision (b). First, we agree with the definition of “prominent” used by both *Imbler*, *supra*, 103 Cal.App.4th 567 and *Robertson*, *supra*, 132 Cal.App.4th 1419. To satisfy the requirements of the statute, the disclosure must “ ‘stand[] out or project[] beyond a surface or line’ ” or be “ ‘readily noticeable.’ ” (*Imbler*, at p. 579; accord, *Robertson*, at p. 1429.) The instant disclosure does neither.

Like the disclosure in *Robertson*, the disclosure before us is printed in the same font or typeface as most of the form; the disclosure heading appears to be in faint boldface type.<sup>9</sup> (*Robertson*, *supra*, 132 Cal.App.4th at p. 1429.) The disclosure is the second of two single-spaced paragraphs of small, condensed type located at the bottom of

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subdivision (d) of the statute. This argument is answered by the concluding footnote of *Robertson*, where the court explained that it would not address Health Net’s other arguments because “Health Net has not complied with section 1363.1, subdivisions (b) and (d).” (*Robertson*, *supra*, 132 Cal.App.4th at p. 1431, fn. 7, italics added.) Moreover, the California Supreme Court has observed, “ ‘where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and is of equal validity. [Citations.]’ [Citation.]” (*Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431, fn. 3.)

<sup>9</sup> Petitioners argue that the heading is not in bold, despite the trial court’s finding that it was. Health Net contends that we must defer to the trial court’s factual finding on this issue. We do not agree. Whether this heading is in boldface or not may be determined from an examination of the document itself. The enrollment form is part of the record, and “we believe that a trial court is in no better position than an appellate court to evaluate a document against [the] statutory standard.” (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 214; accord, *Dorman v. International Harvester Co.* (1975) 46 Cal.App.3d 11, 18, fn. 8.) Our independent examination of the document leads us to conclude that the boldface is slight, and the font is small and virtually indistinguishable from the remainder of the text.

the enrollment form. Neither the disclosure nor the preceding paragraph is indented, and the two paragraphs are not separated from each other by any lines or spacing. The disclosure is in the same font as the preceding paragraph, and it is “not bolded, underlined or italicized.” (*Imbler, supra*, 103 Cal.App.4th at p. 579.) In contrast, some of the text of the form is printed in boldface type, in all capitals or in larger fonts, so Health Net clearly could have made the text of the disclosure more prominent had it chosen to do so. The disclosure does not stand out from the remainder of the document and is not readily noticeable.

The Health Net disclosure before us is *less* prominent than the disclosures discussed in *Robertson, supra*, 132 Cal.App.4th 1419 and *Malek, supra*, 121 Cal.App.4th 44. As is clear from the form attached as an appendix to the *Robertson* opinion, that disclosure paragraph was set off from the remainder of the text by blank lines before the first and after the last sentences. (*Robertson*, at pp. 1423, 1433.) This spacing gives it greater prominence and makes it easier to read than the disclosure we are considering. The disclosure in *Malek* was preceded by the heading “**ARBITRATION AGREEMENT**” in clear, boldface type. (*Malek*, at p. 51, fn. 2.) In addition, the disclosure in *Malek* was contained in a separate numbered paragraph. (*Id.* at p. 61.) Neither of these two distinguishing features is present here.

In sum, we conclude that the arbitration disclosure on the enrollment form signed by Zembsch was not “prominently displayed” and, therefore, does not comply with the terms of section 1363.1, subdivision (b).

### 3. *The Disclosure Does Not Substantially Comply with the Statute*

Health Net argues that even if its disclosure does not comply with the literal terms of section 1363.1, the arbitration agreement may be enforced because there has been substantial compliance with the statute. According to Health Net, the purpose of section 1363.1 was served because there is no claim that Zembsch did not read or understand the arbitration disclosure. Thus, the statute’s objective—“to safeguard against

patients unknowingly waiving their constitutional right to a jury trial” (*Malek, supra*, 121 Cal.App.4th at p. 64)—has been achieved.

At the outset we observe that there is some doubt whether section 1363.1 permits mere substantial compliance with its provisions. As the court in *Malek* noted, the statute is phrased in clearly mandatory terms and provides that disclosures “shall be prominently displayed.” (*Malek, supra*, 121 Cal.App.4th at p. 72.) The language of the statute “does not expressly sanction mere substantial compliance with its provisions.” (*Ibid.*) Nevertheless, the court in *Malek* refused to rule out the application of the doctrine of substantial compliance in an appropriate case. (*Ibid.*) *Malek* narrowly held that the disclosure it was reviewing did not substantially comply with the statute. (*Ibid.*) Even assuming that section 1363.1 does not foreclose application of the doctrine of substantial compliance, we hold that there has not been substantial compliance here.

The doctrine of substantial compliance does *not* allow an excuse to literal noncompliance in every situation. (*Robertson, supra*, 132 Cal.App.4th at p. 1430.) It “excuses literal noncompliance *only* when there has been ‘actual compliance in respect to the substance essential to *every reasonable objective of the statute.*’ [Citations.]” (*Ibid.*, italics added.) Logically, then, we must examine the objectives of section 1363.1 to determine whether Health Net’s disclosure substantially complies with its goals. “The purpose of section 1363.1 is to disclose the requirement to arbitrate *and* to ensure a knowing waiver of the right to a jury trial.” (*Malek, supra*, 121 Cal.App.4th at p. 72, italics in original.) To ensure that the requirement to arbitrate is adequately disclosed, the Legislature has directed that the disclosure be “prominently displayed on the enrollment form signed by each subscriber or enrollee.” (§ 1363.1, subd. (b).) Without a proper disclosure, we cannot be certain that a subscriber has knowingly waived the right to jury trial. In this case, the failure of Health Net to display its disclosure with the prominence required by the statute casts doubt on whether Zemsch knowingly waived his rights. (See *Robertson*, at p. 1431; *Malek*, at p. 73.) In such circumstances, we are unwilling to hold that there has been “ ‘actual compliance in respect to the substance essential to every



reasonable objective of the statute.’ [Citations.]” (*Robertson*, at p. 1430.) Therefore we reject Health Net’s claim that its disclosure substantially complies with the statute.

C. *The Administrative Remedies in the Knox-Keene Act Are Not Exclusive and Noncompliance with Section 1363.1 Renders an Arbitration Agreement Unenforceable*

Health Net argues that the arbitration agreement may be enforced despite the violation of the statute because the only remedies for violations of section 1363.1 are the administrative enforcement remedies contained in the Knox-Keene Health Care Service Plan Act of 1975, section 1340 et seq. (the Knox-Keene Act). *Malek* rejected a very similar argument, and we follow its reasoning. (*Malek, supra*, 121 Cal.App.4th at pp. 67-70.)

Health Net first relies on cases holding that various provisions of the Knox-Keene Act do not create either private rights of action or independent bases for liability. (See *Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 792; *Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 791; *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1299.) Health Net then reasons that the enforcement of section 1363.1 is vested exclusively in the Department of Managed Health Care. As a consequence, Health Net argues, courts have no business refusing to enforce arbitration agreements merely because there has been a violation of the disclosure requirements of section 1363.1. This argument misses the mark. The Zombschs do not contend that section 1363.1 gives them any private right of action against Health Net. Their reliance on the statute is purely defensive. They do not assert that Health Net is liable to them, in damages or otherwise, because it has violated the statute. They argue only that Health Net’s failure to comply with section 1363.1 means that the arbitration provision of Health Net’s contract with the City may not be enforced as to them.

Nor are we persuaded that the Legislature intended that the sole consequence of a violation of section 1363.1 should be administrative penalties imposed by the Department of Managed Health Care. As *Malek* explained, section 1363.1 is more than a pure notice

statute. (*Malek, supra*, 121 Cal.App.4th at p. 69.) The notice requirements of the statute are intended “to ensure consent to a *binding agreement to arbitrate*.” (*Ibid.*, italics in original.) The manifest purpose of the statute is to make certain that the parties have agreed to be bound to contractual arbitration. (*Ibid.*) We agree with Justice Croskey’s well reasoned conclusion in *Malek* that “[i]t would be absurd to impose an administrative penalty on a health service plan provider for failure to comply with the arbitration disclosure requirements but permit arbitration to go forward. Under those circumstances, there would be no consent to arbitrate.” (*Ibid.*)

Health Net also argues that nothing in the language or legislative history of section 1363.1 indicates that the Legislature intended that violation of the statute would render an arbitration agreement unenforceable.<sup>10</sup> But as *Malek* explains, the Legislature’s failure to spell out the consequences of a violation of section 1363.1 is of no legal significance. (*Malek, supra*, 121 Cal.App.4th at pp. 67-68.) The statute is phrased in mandatory terms, and “[t]here is no need to explicitly state the consequences of failure to comply when this statutory language is clear and unambiguous.” (*Id.* at p. 68.) The objectives of the statute would be subverted if a health care service plan could compel a member to arbitrate even if the plan had failed to provide the statutorily required notice. The effect would be to compel a member to arbitrate a dispute although the member’s knowing consent to waiver of the right to jury trial has not been obtained.

Moreover, the fallacy of Health Net’s position—that a violation of the statute does not preclude enforcement of an arbitration agreement—becomes obvious if we consider some of its implications. For example, subdivision (a) of the statute requires that the arbitration disclosure “clearly state whether the plan uses binding arbitration to settle disputes[.]” (§ 1363.1, subd. (a).) If a violation of the disclosure provisions of section 1363.1 did not render an arbitration agreement unenforceable, then a health care service plan could compel a subscriber to arbitrate even if it had not disclosed “whether

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<sup>10</sup> Health Net’s request for judicial notice of certain legislative history material is denied because the language of the statute is unambiguous. (*Malek, supra*, 121 Cal.App.4th at p. 64.)

the plan uses binding arbitration to settle disputes.” The absurdity of permitting enforcement of an undisclosed arbitration agreement is obvious, but if we were to follow Health Net’s reasoning to its logical conclusion, the only remedy for such a violation of section 1363.1, subdivision (a) would be administrative penalties.

We hold that a violation of section 1363.1 renders an arbitration agreement unenforceable. (*Robertson, supra*, 132 Cal.App.4th at p. 1429; *Malek, supra*, 121 Cal.App.4th at pp. 62-70; see *Imbler, supra*, 103 Cal.App.4th at p. 579.) As a consequence, any arbitration agreement between the Zembschs and Health Net is unenforceable, and the trial court erred in compelling petitioners to arbitrate.<sup>11</sup>

#### DISPOSITION

The order to show cause is discharged, and the petition is granted. Let a peremptory writ of mandate issue directing the trial court to vacate its order compelling arbitration, and to enter a new and different order denying the motions to compel

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<sup>11</sup> Because there is no independent arbitration agreement between the Zembschs and Alta Bates, our conclusion that the Health Net arbitration agreement may not be enforced against petitioners necessarily means that the Zembschs are not required to arbitrate with Alta Bates either.

arbitration. The previously issued stay shall dissolve upon the finality of this decision in this court. (Cal. Rules of Court, rule 24(b)(1).) In the interests of justice, this decision shall be final as to this court 15 calendar days after filing. (*Id.* rule 24(b)(3).) Petitioners shall recover their costs. (*Id.* rule 56(m).)

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GEMELLO, J.

We concur.

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JONES, P.J

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BRUINIERS, J.\*

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\* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Trial court: Alameda County Superior Court

Trial judge: Hon. Winifred Y. Smith

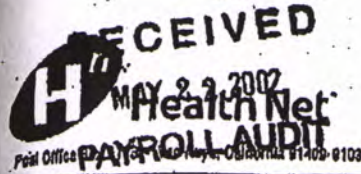
Arnold R. Levinson, Terrence J. Coleman, Rebecca Grey, Pillsbury & Levinson, LLP for Petitioners.

No appearance of counsel for respondent.

Raul L. Martinez, Elise D. Klein, Lewis Biribois Bisgaard & Smith LLP for Real Party in Interest Health Net of California, Inc. and Health Net, Inc.

John E. Dittoe, Joseph P. Mascovich, Reed Smith LLP for Real Party in Interest Alta Bates Medical Group.





MEMBER ENROLLMENT AND CHANGE FORM

CHECK DESIRED PLAN AS OFFERED BY EMPLOYER:

- HMO  
 SELECT (POS)  
 ELECT Open Access  
 ELECT (POS)  
 EPO  
 PPO  
 FLEX NET  
 OTHER

Please contact the appropriate Member Services 800 # indicated on the back of this form for assistance in completing this form.

- REASON FOR APPLICATION:
- NEW HIRE  
 LOSS OF PRIOR COVERAGE DATE \_\_\_\_\_  
 ADD DEPENDENT  
 DATE OF MARRIAGE \_\_\_\_\_  
 DATE OF BIRTH \_\_\_\_\_  
 DATE OF ADOPTION \_\_\_\_\_

- REASON FOR CHANGE:
- PLAN CHANGE  
 CHANGE ADDRESS/NAME  
 DELETE DEPENDENT (List names below)  
 PPO/PCP CHANGE  
 OTHER

SUBSCRIBER INFORMATION

SOCIAL SECURITY NUMBER \_\_\_\_\_ LAST NAME \_\_\_\_\_ FIRST NAME \_\_\_\_\_ MI \_\_\_\_\_ HOME PHONE \_\_\_\_\_ WORK PHONE \_\_\_\_\_

RESIDENCE ADDRESS \_\_\_\_\_ CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_ SEX \_\_\_\_\_ MARRIED \_\_\_\_\_ BIRTHDATE \_\_\_\_\_

MAILING ADDRESS (IF APPROPRIATE) \_\_\_\_\_ MEMBER EMAIL (OPTIONAL) \_\_\_\_\_ MEDICARE PART A  PART B  PHYSICIAN GROUP NO. \_\_\_\_\_ PHYSICIAN NO. \_\_\_\_\_ PHYSICIAN NAME (LAST, FIRST) \_\_\_\_\_ CURRENT PATIENT? \_\_\_\_\_

EMPLOYEE TYPE:  RETIRED (DEPT. NO. \_\_\_\_\_) CLOCK NO. \_\_\_\_\_ EMPLOYEE NO. \_\_\_\_\_ HRS/WEEK \_\_\_\_\_ JOB TITLE \_\_\_\_\_ DATE OF HIRE \_\_\_\_\_ RESIRE DATE \_\_\_\_\_

DECLARATION OF COVERAGE

This section is to be completed ONLY if declining coverage for self or eligible dependents.

Declining coverage for:  Self  Spouse  Dependent(s) Reason:  Other group coverage  Individual coverage  Other \_\_\_\_\_

The available coverages have been explained to me by my employer. I have been given the chance to apply for the available coverages. I have decided not to enroll myself and/or my dependent(s). By declining coverage I acknowledge that my dependents and I may have to wait to be enrolled until the next Open Enrollment period or qualifying event.

Employee Signature (ONLY IF DECLINING COVERAGE; if signed in error, please cross out and initial) \_\_\_\_\_ Date \_\_\_\_\_

MEMBER INFORMATION

Do not members to be enrolled below. Incorrect or omitted information may delay enrollment or affect payment of claims. To enroll more than two dependents, attach another form.

Last Name	First Name	MI	Mo / Day / Yr	Birth Date	Medicare	Review the Health Net Provider Directory and choose a Participating Physician Group and Primary Care Physician for each family member.	For HMO, SELECT, ELECT, ELECT Open Access and EPO Enrollees only.	Participating Physician Group / Primary Care Physician selection	Current Patient?
_____	_____	_____	_____	_____	<input type="checkbox"/> Part A <input type="checkbox"/> Part B	_____	_____	PPG No. _____ PCP No. _____	_____
_____	_____	_____	_____	_____	<input type="checkbox"/> Part A <input type="checkbox"/> Part B	_____	_____	PPG No. _____ PCP No. _____	_____
_____	_____	_____	_____	_____	<input type="checkbox"/> Part A <input type="checkbox"/> Part B	_____	_____	PPG No. _____ PCP No. _____	_____

If available, I would prefer to receive materials in the following language \_\_\_\_\_

The following information is voluntary. By indicating your ethnicity you are helping us to better serve your needs.

Ethnicity (Voluntary):

American/Alaskan Native  
 Black/African-American (Non-Hispanic)  
 Caucasian (Non-Hispanic/White)  
 Chinese  
 Filipino  
 Hispanic/Latino  
 Japanese  
 Korean  
 Vietnamese  
 Other \_\_\_\_\_

OTHER COVERAGE

Have you and/or any of your eligible family members been covered by other medical insurance in the past six (6) months or expect to have other medical coverage in addition to your Health Net coverage?

Yes  No:  Self  Spouse  Children. Attach additional sheets if needed.

NAME OF INSURED \_\_\_\_\_ SOCIAL SECURITY NUMBER \_\_\_\_\_ NAME OF INSURANCE COMPANY \_\_\_\_\_ GROUP NO. \_\_\_\_\_

TYPE OF COVERAGE:  HEALTH  OTHER

COVERAGE BEGAN \_\_\_\_\_ COVERAGE ENDED \_\_\_\_\_

Coverage under PPO or Flex Net may be subject to preexisting condition limitations for certain enrollees. Please check with your employer and see the back of this form for additional information.

Health Net HMO, SELECT, ELECT and ELECT Open Access are administered and underwritten by Health Net. FLEX NET, PPO and EPO benefits are fully underwritten by Health Net Life Insurance Company. Authorization to obtain or release medical information explanation: The authorization below to obtain and release medical information is being requested of you to comply with the terms of the Confidentiality of Medical Information Act, effective January 1, 1980, Section 56 et seq. of the California Civil Code. Your cooperation is requested. Authorization to obtain or release medical information: I hereby authorize my physician, health care practitioners, hospital, clinic, or other medically related facility to furnish to Health Net, or its representative or designee, any and all records pertaining to medical history, services rendered or treatment given to anyone enrolled under the policy for the purpose of review, investigation, or evaluation of an application, claim, appeal (including the release to an independent review organization) or grievance, or for preventive health or health management purposes. I authorize Health Net, or its representative or designee, to disclose to a hospital or health care service plan, self-insurer, any such medical information obtained if such disclosure is necessary to allow the processing of any claim.

Arbitration Agreement: I understand that any dispute or controversy, except medical malpractice, that may arise regarding the performance, interpretation or breach of the agreement between myself (and/or any enrolled family member) and Health Net, Health Net Life Insurance Company or any Participating Physician Group / Independent Physicians Association, whether arising in contract, tort or otherwise, must be submitted to arbitration in lieu of a jury or court trial. Please sign and date this application below. Your signature indicates that you have completed all requested information as accurately as possible and understand all agreements implied including your agreement to submit disputes to binding arbitration.

Employee Signature \_\_\_\_\_ Date \_\_\_\_\_