UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 18-6691-MWF (ASx) **Date: October 30, 2018**
Title: Ohad Barkan v. Health Net of California, Inc. et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE: DEFENDANTS' MOTION TO COMPEL BILATERAL ARBITRATION [22]

Before the Court is Defendants Health Net of California, Inc. et al.'s (collectively, "Health Net") Motion to Compel Bilateral Arbitration (the "Motion"), filed September 7, 2018. (Docket No. 22). Plaintiff Ohad Barkan filed an Opposition on October 1, 2018. (Docket No. 24). Health Net filed a Reply on October 9, 2018. (Docket No. 26).

The Court has read and considered the papers on the Motion and held a hearing on October 22, 2018.

For the reasons stated below, the Motion is **DENIED**. Health Net's arbitration agreement is unenforceable because the online enrollment form fails to comply with statutory disclosure requirements. Health Net's Reply mistakenly assumes the only issue here is whether Ms. King signed the online form or not. The Court assumes that she did, but the online form is simply inadequate under the pertinent California statute as construed by the California Court of Appeal. In other words, *Rodriguez* controls and Health Net has failed to distinguish that case.

I. BACKGROUND

In January 2018, Plaintiff enrolled as a covered family member under a health plan provided by the University of California (the "University") to his wife, Rachel King, an English Literature professor at the University. (Complaint ("Compl.") at

¶¶ 18, 34, 39 (Docket No. 1-1)). Plaintiff, who was diagnosed with amyotrophic lateral sclerosis in October 2016, had previously received health coverage through an employer-provided plan with Cigna. (*Id.* ¶¶ 36, 39).

To enroll Plaintiff in her plan, Ms. King filled out an online open enrollment form. (Mot. at 1). The online enrollment form referenced arbitration twice.

The first mention of arbitration ("First Disclosure") occurs on the "Participation Terms & Conditions" page of the application. (Mot. at 1). The applicant is presented with a scroll box, in which the first numbered paragraph reads in its entirety:

> UC-sponsored medical plans require resolution of disputes through arbitration. With regard to each plan, by your written or electronic signature, IT IS UNDERSTOOD AND YOU AGREE THAT ANY DISPUTE AS TO MEDICAL MALPRACTICE – THAT IS, AS TO WHETHER ANY MEDICAL SERVICES RENDERED UNDER THE CONTRACT WERE UNECESSARY OR UNAUTHORIZED OR WERE IMPROPERLY, NEGLIGENTLY OR INCOMPETENTLY RENDERED – WILL BE DETERMINED BY SUBMISSION TO ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND NOT BY A LAWSUIT OR RESORT TO COURT PROCESS, EXCEPT AS CALIFORNIA LAW PROVIDES FOR JUDICIAL REVIEW OF ARBITRATION PROCEEDINGS. BOTH PARTIES TO THE CONTRACT, BY ENTERING INTO IT, ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE ANY SUCH DISPUTE DECIDED IN A COURT OF LAW BEFORE A JURY AND INSTEAD ARE ACCEPTING THE USE OF ARBITRATION. For more information about each plan's arbitration provision please see the appropriate plan booklet or call the plan.

(Mot., Ex. 1 at 1-2 (Docket No. 22-3); Declaration of Esther Cheung Hill ("Hill Decl.") ¶ 2 (Docket No. 26-1)).

On page 59 of the 94-page "appropriate plan booklet," or the "Evidence of Coverage" booklet ("EOC"), the arbitration provision states:

> **Binding Arbitration**
> Sometimes disputes or disagreements may arise between you (including your enrolled Family Members, heirs or personal representatives) and Health Net regarding the construction, interpretation, performance or breach of this *Evidence of Coverage* or regarding other matters relating to or arising out of your Health Net membership. Typically such disputes are handled and resolved through the Health Net Grievance, Appeal and Independent Medical Review process described above. However, in the event that a dispute is not resolved in that process, Health Net uses binding arbitration as the final method for resolving all such disputes . . . In addition, disputes with Health Net involving alleged professional liability or medical malpractice (that is, whether any medical services rendered were unnecessary or unauthorized or were improperly, negligently or incompetently rendered) also must be submitted to binding arbitration.
>
> As a condition to becoming a Health Net Member, you agree to submit all disputes . . . to final and binding arbitration. Likewise, Health Net agrees to arbitrate all such disputes. This mutual agreement to arbitrate disputes means that both you and Health Net are bound to use binding arbitration as the final means of resolving disputes that may arise between the parties, and thereby the parties agree to forego any right they may have to a jury trial on such disputes . . . .

(Mot., Ex. 2 at 59 (Docket No. 22-4)).

The second mention of arbitration ("Second Disclosure") in the online enrollment form occurs on the confirmation page, immediately above the signature line. The entire provision provides:

> By signing this contract you are agreeing to have an issue of medical malpractice decided by neutral arbitration and you are giving up your right to a jury or court trial. See appropriate plan booklet for more information. (Not applicable to plans administered or provided by HealthEquity of CA and Optum Behavioral Health.).

(Mot., Ex. 1 at 3).

After the transition from Cigna to Health Net, Plaintiff continued seeking medical treatment from his doctor, Karen DaSilva, M.D., who was a provider in both networks. (Compl. ¶ 39). Dr. DaSilva determined that it was medically necessary for Plaintiff to use a ventilator and take the prescription medication Radicava to treat his condition. (*Id.* ¶ 40). On January 10, 2018, Dr. DaSilva requested Health Net's authorization for the medical equipment and prescription medication. (*Id.* ¶ 41). Health Net denied authorization in a letter dated January 18, 2018, explaining that the ventilator was experimental or investigational and the prescription was not medically necessary. (*Id.* ¶¶ 42, 45). Plaintiff appealed the denials with Health Net. (*Id.* ¶¶ 47, 55).

In a letter dated January 27, 2018, Health Net reversed its prior determination and approved authorization for the ventilator and a six-month prescription of Radicava. (Compl. ¶¶ 55-56). In a letter dated February 8, 2018, Health Net expressed its position on coverage for the ventilator and prescription. (*Id.* ¶ 57). Health Net explained that at the time when the request for authorization was received and initially denied, Health Net was not Plaintiff's primary insurer, and so the request should have been directed to Cigna. (*Id.* ¶ 58).

On June 29, 2018, Plaintiff filed a class action Complaint in the Los Angeles County Superior Court asserting five claims for relief: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*; (4) violations of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*; and (5) declaratory relief. (Compl. ¶¶ 73-126).

On August 3, 2018, Defendants removed the action to this Court. (*See* Notice of Removal (Docket No. 1)).

II. EVIDENTIARY OBJECTIONS

To authenticate the online open enrollment form, Health Net submitted a declaration from Irene Y. Wong, an account service representative for Health Net. (*See* Declaration of Irene Y. Wong ("Wong Decl.") (Docket No. 22-2)). Plaintiff objects to the declaration on the bases that it lacks personal knowledge, is speculative, violates the best evidence rule, and lacks authentication. (*See* Plaintiff's Evidentiary Objections (Docket No. 25)). Plaintiff primarily objects to Ms. Wong's declaration because she "admits that 'Health Net does not maintain the online enrollment form through which the University of California employees can sign up for health insurance from Health Net.'" (Opp. at 6 (citing Wong Decl. ¶ 2)).

In conjunction with its Reply to the Motion, Health Net submitted a declaration from Esther Cheung Hill, the director of Benefits Information Systems at the University, who testified that she has personal knowledge of the documents and screenshots attached to Ms. Wong's declaration. (Hill Decl. ¶¶ 1-2). In light of Ms. Hill's testimony that she is familiar with the University's health coverage system processes, Plaintiff's personal knowledge, speculation, and lack of authentication objections are moot. (*Id.* ¶ 1).

Next, Plaintiff objects to the online enrollment form on the basis that it violates the best evidence rule. The best evidence rule states that, "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed. R. Evid. 1002. "A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Fed. R. Evid. 1003. Here, the screenshots are duplicates of the online enrollment form generally, even if not Ms. King's form as filled out by her when she applied for Plaintiff's coverage.

Therefore, to the extent the Court relies upon evidence to which Plaintiff objects, the objections are **OVERRULED**. To the extent the Court does not, the objections are **DENIED *as moot***.

III. LEGAL STANDARD

The Federal Arbitration Act ("FAA") requires the district courts to compel arbitration on all claims subject to arbitration agreements. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.") (citing 9 U.S.C. §§ 3, 4). However, every arbitration agreement is subject to generally applicable contract defenses, including waiver and unconscionability. *See Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 719 (9th Cir. 2012) (stating that "the FAA's savings clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability" or waiver, and analyzing whether the defendant waived its right to arbitration through its litigation conduct) (internal quotations omitted).

The Supreme Court has counseled that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . ." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Id.*

Because the FAA favors arbitration, the burden is on the plaintiff to prove that the arbitration agreement is, in fact, not enforceable. *See Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) ("[T]hose parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable."). Even if the plaintiff meets that burden, the district court has the discretion to sever the unconscionable portions of the arbitration provision, if severance would cure the unconscionability. *See Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 847 (N.D. Cal. 2012) (severing problematic portions of the arbitration

provision and compelling arbitration); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 122, 99 Cal. Rptr. 2d 745 (2000) (holding that severance is proper unless the arbitration agreement contains more than one unlawful provision and is "permeated by an unlawful purpose").

IV. DISCUSSION

A. Statutory Disclosure Requirements

Plaintiff argues that Health Net's failure to comply with statutory disclosure requirements renders the arbitration clause unenforceable. (Opp. at 1). Specifically, Plaintiff argues that Health Net failed to display the arbitration disclosure immediately ***before*** the signature line of the online application in violation of the Knox-Keene Act, Cal. Health & Safety Code § 1363.1, and that the disclosure is limited only to claims of medical malpractice. (*Id.* at 6).

Section 1363.1 reads in its entirety:

> Any health care service plan that includes terms that require binding arbitration to settle disputes and that restrict, or provide for a waiver of, the right to a jury trial shall include, in clear and understandable language, a disclosure that meets all of the following conditions:
>
> (a) The disclosure shall clearly state whether the plan uses binding arbitration to settle disputes, including specifically whether the plan uses binding arbitration to settle claims of medical malpractice.
>
> (b) The disclosure shall appear as a separate article in the agreement issued to the employer group or individual subscriber and shall be prominently displayed on the enrollment form signed by each subscriber or enrollee.
>
> (c) The disclosure shall clearly state whether the subscriber or enrollee is waiving his or her right to a jury trial for medical malpractice, other

> disputes relating to the delivery of service under the plan, or both, and shall be substantially expressed in the wording provided in subdivision (a) of Section 1295 of the Code of Civil Procedure.
>
> (d) In any contract or enrollment agreement for a health care service plan, the disclosure required by this section shall be displayed immediately before the signature line provided for the representative of the group contracting with a health care service plan and immediately before the signature line provided for the individual enrolling in the health care service plan.

Cal. Health & Safety Code § 1363.1.

The parties do not dispute that Health Net's insurance policies sold through the Covered California exchange must comply with section 1363.1. Rather, Health Net argues that Plaintiff's "entire argument is directed at the wrong form; Plaintiff does not challenge the adequacy of the arbitration agreement in the ***online*** form." (Reply at 1-2 (emphasis in original)). In the correct form, Health Net explains, "[d]irectly above the 'electronic signature' statement, the form contains a provision again informing the applicant that claims submitted under the plan must be arbitrated." (Mot. at 2).

Health Net is mistaken in its description of the relevant disclosure. Nowhere in the Second Disclosure, the one immediately above the signature line, is there ***any*** indication that a signatory agrees to submit any claims other than those concerning ***medical malpractice*** to binding arbitration. The Second Disclosure reads in its entirety:

> By signing this contract you are ***agreeing to have an issue of medical malpractice decided by neutral arbitration*** and you are giving up your right to a jury or court trial. See appropriate plan booklet for more information. (Not applicable to plans administered or provided by HealthEquity of CA and Optum Behavioral Health.).

(Mot., Ex. 1 at 3 (emphasis added)).

The only other arbitration disclosure in the online enrollment form also appears to be limited to medical malpractice. As already quoted above, the First Disclosure states in relevant part:

> With the exception of benefits provided or administered by Optum Behavioral Health, UC-sponsored medical plans require resolution of disputes through arbitration. With regard to each plan, by your written or electronic signature, IT IS UNDERSTOOD AND YOU AGREE THAT ANY DISPUTE AS TO MEDICAL MALPRACTICE . . . WILL BE DETERMINED BY SUBMISSION TO ARBITRATION . . . BOTH PARTIES TO THE CONTRACT, BY ENTERING INTO IT, ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE ANY SUCH DISPUTE DECIDED IN A COURT OF LAW BEFORE A JURY AND INSTEAD ARE ACCEPTING THE USE OF ARBITRATION.

(Mot., Ex. 1 at 1; Hill Decl. ¶ 2). Although the first sentence states generally that "disputes" require resolution through arbitration, the very next sentence appears to limit the disputes to those concerning medical malpractice. And the only portion of the disclosure mentioning that the applicant agrees to waive his or her right to a jury trial is in the capitalized text flowing from the disclosure as its relates to medical malpractice. Furthermore, the online enrollment form appears to double-down that it is limited to medical malpractice by explicitly failing to mention "disputes" generally in the Second Disclosure, instead mentioning only those claims concerning medical malpractice.

The Court finds persuasive *Rodriguez v. Blue Cross of California*, in which the California Court of Appeal dealt with similar disclosures. 162 Cal. App. 4th 330, 75 Cal. Rptr. 3d 754 (2008). There, Blue Cross argued that its arbitration disclosure complied with section 1363.1 because it was "set off in a separate paragraph, the title [was] emphasized, a majority of the text [was] bolded, the most important notices [were] written in bold with uppercase lettering, and it [was] the last disclosure on the page with no intervening language before the signature." *Id.* at 338. However, the Court of Appeal found that the disclosure failed to comply with section 1363.1 where (1) the only sentence indicating that binding arbitration was required for all disputes

was not prominently displayed because it was in plain text; (2) the only portion of the disclosure that was prominently displayed related specifically to medical malpractice; and (3) the disclosure failed to clearly state whether the enrollee was waiving his or her right to a jury trial for disputes other than those related to medical malpractice. *Id.* The Court of Appeal explained that "the emphasis on the arbitration of disputes involving medical malpractice serves to de-emphasize, rather than make prominent, the general reference to arbitration of all disputes against Blue Cross." *Id.* at 339 (internal quotation marks omitted).

With respect to the jury trial waiver specifically, the Court of Appeal explained that the disclosure violated section 1363.1 because,

> absent from the disclosure is any indication that the subscriber is waiving his or her right to a jury trial for the delivery of service under the plan other than malpractice. While Blue Cross argues the disclosure applies to all disputes, the majority of the disclosure is limited to disputes involving medical malpractice. The discrepancy between the first sentence, which is expansive, and the remainder of the disclosure, which is limited to medical malpractice, creates confusion. The confusion regarding the extent of the jury trial waiver violates section 1363.1, subdivision (c), which requires a clear statement of the extent of the waiver.

162 Cal. App. 4th at 339.

The Court of Appeal further explained that the disclosures in the plan were not relevant to the validity of the disclosures in the online ***enrollment form***, as section 1363.1 requires that the mandated disclosures be present in both. *Rodriguez*, 162 Cal. App. 4th at 341 ("To comply with section 1363.1, subdivision (b), the disclosure provision must be contained both in the agreement and in the enrollment form . . . Placement of the provision in one does not excuse its inclusion in the other.").

As in *Rodriguez*, the disclosures in Health Net's online enrollment form violate section 1363.1 on multiple independent levels:

First, the First Disclosure violates section 1363.1(b) because the first, more expansive sentence relating to "disputes" generally is not prominently displayed and is in fact overshadowed by the immediately succeeding sentence emphasizing binding arbitration for claims of medical malpractice.

Second, the First Disclosure violates section 1363.1(c) because it fails to clearly state whether the enrollee waives his or her right to a jury trial for non-malpractice claims.

Third, the Second Disclosure fails to mention non-malpractice claims at all and lacks any distinguishing features other than its placement above the signature line. *See Schlegel v. Kaiser Found. Health Plan, Inc.*, No. 2:07-CV-00520-MCEKJM, 2007 WL 2492393, at *2 (E.D. Cal. Aug. 30, 2007) ("Placing the arbitration clause immediately before the signature line does not by itself fulfill the requirement of prominence.").

And even if the inadequacies of the disclosures in the online enrollment form could be remedied by the arbitration provision in the EOC, the EOC would likewise fail to comply with section 1363.1. The arbitration provision in the EOC is utterly indistinguishable from the other surrounding provisions. For example, the subsection immediately below the arbitration provision, which deals with involuntary transfer to another primary care physician, is nearly identical in format and style to the arbitration provision. And though the subheading "Binding Arbitration" is bolded, so too are the surrounding subheadings unrelated to arbitration. The arbitration clause is also inconspicuously buried at page 59 of the 94-page EOC, and without the aid of a sufficiently detailed table of contents to guide the reader, the reader is left to flip through the document relatively unaided to locate the relevant provision. *Cf. Uptown Drug Co. v. CVS Caremark Corp.*, 962 F. Supp. 2d 1172, 1182 (N.D. Cal. 2013) (finding arbitration clause was not hidden in 200-page document where there was a "thorough table of contents that very clearly states that the arbitration clause at issue is located on pages 49 and 50" of the document).

In its Reply, Health Net does not address its arguments under *Rodriguez* at all. At the hearing, however, Health Net distinguished *Rodriguez* by arguing that the plaintiff in that case did not have adequate notice of the arbitration clause because (1)

the plaintiff was a Spanish speaker and thus could not appreciate that the form required arbitration; (2) Blue Cross filled out the form for the plaintiff; and (3) the form was at the end of the disclosure, not at the beginning.

Health Net's argument is unavailing, as *Rodriguez* did not turn on any of these distinguishing facts. Rather, the Court of Appeal focused on the express language of the disclosure, which is a near mirror image of the disclosure at issue here. As in *Rodriguez*, the language and style of the First and Second Disclosures fail to comply with section 1363.1 and therefore fail to confer adequate notice.

Health Net also suggested at the hearing that arbitration was the preferable means of resolving this dispute. If so, then no doubt Plaintiff will agree and freely consent to arbitration. Health Net's belief is hardly a basis to determine that Plaintiff consented to waive his Seventh Amendment rights.

Because the Court concludes that the arbitration agreement is unenforceable, it need not consider whether the arbitration agreement is unconscionable or permits class arbitration.

Accordingly, the Motion is **DENIED**.

IT IS SO ORDERED.