IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

GEORGE T. KELLY, III, and THOMAS BOOGHER, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO. 3:20-CV-05083-MDH**
v.	)	
THE ALIERA COMPANIES, INC.; formally known as Aliera Healthcare, Inc., a Delaware corporation, and TRINITY HEALTHSHARE, a Delaware Corporation,	)	
Defendants.	)	

DEFENDANTS' REPLY SUGGESTIONS IN FURTHER SUPPORT OF MOTION TO ALTER OR AMEND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS OR STAY PENDING ARBITRATION AND REQUEST TO STAY PROCEEDINGS PENDING RESOLUTION WITH SUGGESTIONS IN SUPPORT

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INTRODUCTION

Defendants The Aliera Companies Inc. ("Aliera") and Trinity Healthshare, Inc. ("Trinity") moved to alter or amend this Court's November 23, 2020 Order (the "Order") denying their motions to dismiss or stay pending arbitration on two primary grounds: (1) the erroneous application of law to facts; and (2) that the disputed facts regarding the making of an arbitration agreement should be decided in a proceeding pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 2, *et seq.* ("FAA"). (Doc. 62.) Under applicable Missouri law, parties may assent to an agreement not just by a signature, but also by their conduct, as Plaintiffs did in this matter. If this Court determines that there are factual disputes regarding whether the Parties formed an agreement to arbitrate, these should be resolved by a trial pursuant to Section 4 of the FAA. For example, the Court's Order found that the Parties did not form agreements to arbitrate, which are included in the applicable Member Guides. Based on Plaintiffs' own allegations, however, the Member Guides are the operative agreements among the Parties. Should the Member Guides be set aside, then there are no agreements among the Parties, and there is no basis for any of Plaintiffs' claims in this action.

Accordingly, Defendants request that this Court alter or amend its judgment denying their motions to dismiss or stay pending arbitration and either (a) compel arbitration of Plaintiffs' claims and stay this matter pending arbitration, or (b) allow disputed issues of fact regarding the making of an agreement to arbitrate to be determined in a Section 4 proceeding.

ARGUMENT

A. Plaintiffs Acknowledge Receiving the Member Guides and Voluntarily Remaining Enrolled in the Sharing Programs.

Notably, Plaintiffs do not dispute receiving their Member Guides *before* their memberships became active. Thus, the sole evidence at this stage indicates that Plaintiffs

received Member Guides containing arbitration provisions before the start dates of their participation in the health care sharing ministry ("HCSM") sharing programs.

1. Plaintiffs Cannot Avoid Arbitration while Suing to Enforce the Benefits of their Agreements with Defendants.

Both George Kelly and Thomas Boogher acknowledge that they received the Member Guides containing arbitration provisions, and in this action, they also seek to enforce the terms of those Member Guides concerning healthcare sharing as insurance contracts. (*See* Doc. 30.) Plaintiffs allege they were wrongly denied certain benefits of their agreements with Defendants – the same agreements that contain the arbitration provisions at issue. (*See id.*) Plaintiffs allege in their Second Amended Complaint that the Member Guides contain representations to Plaintiffs that are similar to insurance. (Doc. 30, ¶¶ 49(e), 57, 69 & Appx. B.) Plaintiffs even attach the Member Guides to the Second Amended Complaint and request that the Court "reform the unauthorized health insurance plans" to comply with state insurance laws. (Doc. 30, at p. 34, ¶ (g).) Accordingly, it is undisputed that Plaintiffs' claims are based on the Member Guides that they allege control the Parties' agreement. It is also undisputed that these same Member Guides contain the arbitration provisions at issue.

Plaintiffs cannot pick and choose what portions of their agreements to comply with. They cannot contend, on the one hand: (a) this Court should declare that the sharing guidelines in the Member Guides should be treated as insurance contracts and that the Member Guides are really insurance policies, and on the other hand, (b) they did not enter into agreements to arbitrate – which are included in these same Member Guides. Federal law and U.S. Supreme Court law have long held that arbitration provisions cannot be singled out for unfavorable treatment, and this is precisely what Plaintiffs seek to do in this matter. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("By enacting § 2, we have several times said, Congress

precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts."); *see also Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) ("A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.").

2. Defendants Presented Evidence Showing Assent to the Terms of the Member Guides Containing Arbitration Provisions.

Plaintiffs made voluntary member contributions each month after receiving their Member Guides, which include the arbitration provisions at issue. (Doc. 38-1, ¶¶ 6, 19; *see also* Doc. 30-2, at p. 13 (Kelly Member Guide containing arbitration provision at issue); Doc. 38-5, at p. 17-18 (Boogher Member Guide containing arbitration provision at issue).) Plaintiffs' respective signature emails and Member Guides state that membership is entirely voluntary and, thus, may be cancelled at any time. (Doc. 38-2, at pp. 6-7; Doc. 38-4, at p. 4.) Thus, Plaintiffs received written notice that the operative documents contained arbitration provisions and that membership was entirely voluntary. Plaintiffs then elected to voluntarily continue their memberships month after month, long after they received their respective Member Guides.

Plaintiffs argue that they were unable to cancel their memberships because they could not obtain alternative healthcare. But Plaintiffs do not submit any cognizable evidence to support this claim or their actual inability to obtain an alternative healthcare program. Plaintiffs' alleged inability to cancel due to lack of a substitute healthcare is further undermined by the fact they received adequate notice of the terms *prior to* their memberships becoming active. And, in any event, any party wishing to cancel any agreement may then need to find an alternative, but this does not *invalidate* the original agreement. The fact is Plaintiffs could have cancelled their memberships at any time, but they chose not to. Indeed, while Boogher complains in the Second

Amended Complaint that potential medical expenses may not be covered, he did not choose to join another HCSM, which can be joined at any time of the year and not only at open enrollment. Boogher did not choose to purchase an insurance policy during open enrollment. The Court should reject Plaintiffs' unsupported contention.

Plaintiffs also argue that Defendants present no evidence that Plaintiffs actually reviewed their Member Guides. But this is irrelevant to the making of the agreement, given the clear evidence that they received the terms before their memberships became effective. *Margulis v. HomeAdvisor, Inc.*, No. 4:19-CV-00226-SRC, 2020 WL 4673783, at *4 (E.D. Mo. Aug. 12, 2020) (whether party actually reviewed terms and conditions was not relevant when the conduct showed assent to those terms). To the extent that this fact would be relevant to the making of an agreement, Plaintiffs did not present any evidence one way or another as to whether they reviewed their Member Guides.[1]

As to Plaintiffs' argument that the Member Guides lack consideration, this is unsupported by a reading of the plain terms of the Member Guides. Among other matters, the Member Guides set out guidelines for share requests, where if members submit share requests for various medical expenses, then they will be considered for sharing in light of the applicable guidelines and available member contributions. There is no guarantee of indemnification, but there is a promise to duly consider requests for sharing pursuant to the Member Guides. This is valuable and good consideration to support an enforceable contract. Moreover, the arbitration provisions are not one-sided or unconscionable, and at any rate, these are arbitrability issues to be decided by the arbitrator. For example, Trinity "shall pay" the arbitration filing fees and the arbitration in full at

[1] In *Margulis v. HomeAdvisor, Inc.*, No. 4:19-CV-00226-SRC, 2020 WL 512402, at *2 (E.D. Mo. Jan. 31, 2020), before the Court concluded the plaintiffs assented to arbitration, it permitted limited discovery into same.

the time of filing. (Doc. 30-2, Appx. B, at ECF p. 13.) And, there is no exception or exclusion from arbitration for any claims that may be asserted by Defendants.

B. Employment Cases Do Not Apply Here.

Plaintiffs' Suggestions in Opposition rely heavily on employment cases involving clearly distinct facts. The employment decisions Plaintiffs cite considered whether an employer could unilaterally impose arbitration on an employee by giving that employee an opportunity to review the provisions and then claiming their continued employment constituted assent to the terms. In contrast, the Parties here had no existing relationship that Defendants sought to unilaterally alter. Indeed, Plaintiffs sought out and voluntarily elected to join the HCSM. And from their first interaction, Defendants notified Plaintiffs that the relationship would be governed by Member Guides. Plaintiffs agreed through their conduct.

The instant action is distinguishable from *Shockley v. PrimeLending*, 929 F.3d 1012, 1019 (8th Cir. 2019), where the Eighth Circuit declined to find that continued employment after reviewing an employee handbook that included arbitration provisions constituted "acceptance" of an offer. That decision, in turn, relied on *Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W.3d 476, 484 (Mo. App. 2010), where a Missouri court refused to find a constructive agreement to arbitrate by a Jack-In-The-Box employee who had worked at the company since 1987 and refused to sign an arbitration agreement in 2004. His decision to remain employed there could not reasonably be construed as assent to the unilateral arbitration agreement *after nearly two decades* with the company because by remaining employed, the employee had "only evinced his intent to maintain the status quo." *Id.* Likewise, in *Esser v. Anheuser-Busch, LLC,* 567 S.W.3d 644, 647 (Mo. App. 2018), the court refused to find that continued employment – *after 14 prior years* with the company – constituted acceptance of any type of offer when Anheuser-Busch sought to impose arbitration on longstanding employees. Plaintiffs' cases are factually

distinguishable and merely go to show that an employer cannot unilaterally propose arbitration to *existing* employees and then rely on their continued employment as evidence of their consent to arbitration.

Here, Defendants provided evidence of relevant terms and conditions of their agreement at the outset of the Parties' relationship, and by all objective measures, Plaintiffs accepted them. Plaintiffs did not notify Defendants that they wished to remain enrolled but refused to accept arbitration as a condition of enrollment. Kelly and Boogher are situated far differently from long-term employees who sought to maintain the status quo of their employment. In the instant matter, Plaintiffs could have rejected Defendants' proposed relationship and their Member Guides. But they did not. Instead, they performed pursuant to them, submitted share requests outlined in them, and now assert claims for damages based on them.

Plaintiffs further substantially rely on inapposite authority. For example, in *Baier v. Darden Restaurants*, 420 S.W.3d 733, 741 (Mo. App. 2014), the court refused to find an agreement where the party seeking to enforce the agreement, which it had drafted, failed to sign the blank signature line left for it. In *Holley v. Bitesquad.com LLC*, 416 F. Supp. 3d 809, 823 (E.D. Ark. 2019), the court compelled arbitration even where one plaintiff denied ever seeing the arbitration provision and claimed that his signature was forged. In *Kauders v. Uber Technologies, Inc.*, 486 Mass. 557, 572 (Mass. 2021), the court made negative inferences about Uber's terms and conditions being presented to consumers by a buried hyperlink in contrast to the clearer procedure Uber used to notify drivers of the terms and conditions, and concluded that users could have registered for Uber without ever seeing the terms and conditions. However, the court expressly stated that "[Actual notice of terms] will also generally be found where the user must somehow interact with the terms before agreeing to them." *Id.* Here, Defendants obtained Plaintiffs' signatures expressly acknowledging they intended to be bound by Defendants'

guidelines, terms and conditions – thereby interacting with the terms. And, they received the Member Guides containing arbitration provisions prior to the active dates of their sharing programs.

Plaintiffs' arbitration provisions are also in the same size font, same style font, and include the same bold-faced heading as the other provisions of the Member Guides that form the basis for Plaintiffs' claims in this action. They are not tucked away in a footnote or an endnote. The arbitration provisions are consistent with the other terms of the Member Guides that Plaintiffs choose to otherwise freely acknowledge during their relationship with Defendants and in this matter.[2]

C. Disputed Facts Regarding Formation of Arbitration Agreements Should Be Tried.

Where the making of an agreement to arbitrate is in issue, the dispute should be resolved summarily by trial. 9 U.S.C. § 4 ; *see also Nebraska Mach. Co. v. Cargotec Solutions*, LLC, 762 F.3d 737, 743-44 (8th Cir. 2014) ("[B]ecause issues of fact remained on the formation of the arbitration agreement, the district court erred in failing to summarily proceed to trial on those issues as the FAA instructs."); *see also Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 980 (10th Cir. 2014) (if a court finds disputed issues of fact after evaluating a motion to compel arbitration in the light most favorable to the non-movant, "the court must lift that thumb from the scales, evaluate the conflicting evidence even-handedly, and decide which side's account is more likely true" through a Section 4 trial).

[2] Plaintiffs complain that the arbitration provisions are not printed on every explanation of benefits ("EOB") that Plaintiffs received regarding their medical expenses. However, Plaintiffs cite no applicable law – and Defendants are aware of none – that holds arbitration provisions must be re-printed and re-stated on every EOB. Moreover, an EOB is not a contract between the parties, and Defendants do not so contend in this matter.

The same principle applies here. There are unresolved issues of fact regarding formation of the arbitration agreements. Specifically, Plaintiffs purport to reject the arbitration provisions in the Member Guides setting forth the terms and conditions of their memberships in the respective HCSM programs. However, if the arbitration provisions are rejected, the Member Guides they are contained in would also be rejected. In that situation, there is no agreement among the parties at all. There are no terms upon which Plaintiffs may base their Second Amended Complaint. Indeed, the signature email does not contain the alleged promises for payment of medical expenses at issue in Plaintiffs' Second Amended Complaint. Thus, in light of the fact that the Member Guides include the arbitration provisions and Plaintiffs can identify and allege no other agreements except the Member Guides, the question of whether the parties formed an agreement to arbitrate remains to be determined should this Court decline to apply Missouri law discussed herein and elsewhere in Defendants' pleadings.[3]

D. Chase Moses' Affidavit Should Not Be Considered and is Due to Be Stricken.

Plaintiffs improperly seek to introduce the affidavit of Chase Moses as an exhibit to their Opposition to Defendants' Motion to Alter or Amend. Not only is this procedurally improper under Federal Rule of Civil Procedure 59, but the affidavit of Mr. Moses from an unrelated case in Georgia state court between Unity HealthShare, LLC ("Unity") and Aliera is also not relevant to the making of an agreement to arbitrate in the instant matter.[4] *See Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills,* 141 F.3d 1284, 1286 (8th Cir. 1998) ("Such

[3] As noted above, the practical effect of Plaintiffs' own allegations that the Member Guides are the operative agreements among the Parties is that, should the Member Guides be set aside, there are no agreements among the Parties, and there is no basis for any of Plaintiffs' claims in this action.

[4] Trinity is not a party to the Georgia state court litigation.

motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.").

The affidavit, which Plaintiffs take out of context, explains measures Aliera undertook upon the dissolution of Aliera's relationship with Unity – a separate and distinct HCSM from Trinity that is not named as a party in this litigation. It describes measures taken to effectuate the administrative transition from Aliera working as a third-party administrator for Unity's sharing program to working as a third-party administrator for Trinity's sharing program. Mr. Moses testified that Aliera could not unilaterally terminate members' sharing programs – unbeknownst to and unauthorized by the members. Indisputably, these facts are not at issue in this matter. The affidavit has no bearing on whether Plaintiffs here voluntarily participated in the sharing programs or have made a showing of impossibility of obtaining alternative healthcare provisions – which they have not. Accordingly, the affidavit should be stricken and not considered here.

CONCLUSION

Defendants respectfully request this Court alter or amend its Order and either (1) compel arbitration on the basis that the Parties formed agreements to arbitrate, or (2) order summary trial under Section 4 of the FAA as to factual issues regarding formation of an agreement to arbitrate.

Respectfully submitted,

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