IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

MARGARET HARRIS **Plaintiff,** **v.** **ALIERA HEALTHCARE, INC., n/k/a THE ALIERA COMPANIES, INC.** **Defendant.**	)	**CASE NO. 2:20-CV-00492**

REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE TO COMPEL ARBITRATION

Defendant The Aliera Companies Inc., f/k/a Aliera HealthCare, Inc. ("Aliera") hereby replies in further support of its Motion to Dismiss or in the Alternative to Compel Arbitration (the "Motion"). (Doc. 4.) The Court should grant Aliera's Motion for the following additional reasons:

INTRODUCTION

Plaintiff Margaret Harris ("Plaintiff") makes three arguments to this Court in her Response brief, and none of them is availing. First, this Court is not responsible for deciding the threshold issue of arbitrability. Wisconsin case law and ample authority from Seventh Circuit courts provide that an arbitration agreement that adopts arbitration rules permitting the arbitrator to rule on questions of his or her own jurisdiction clearly and unmistakably signal that the parties intended to have the arbitrator, not a court, decide questions of arbitrability. The contract documents in this action unambiguously adopt such rules. Second, this dispute is plainly within the scope of the arbitration provisions at issue, which apply to "any dispute" between Plaintiff and Unity, Trinity, or their associate Aliera. Finally, an arbitrator can award Plaintiff full relief without infringing

upon any substantive right set forth in Wisconsin's declaratory judgment and punitive damages statutes.[1]

Aliera has presented the Court with proof of a valid arbitration agreement governing Plaintiff's claims. Plaintiff's arguments in response are unavailing, and the Court should therefore dismiss this case and order Plaintiff to bring her claims in arbitration, or, in the alternative, the Court should stay this case pending the outcome of arbitration.

ARGUMENT & ANALYSIS

A. The Parties Agreed to Arbitrate the Issues of Arbitrability and the Scope of their Arbitration Agreement.

Generally, courts are to decide questions of arbitrability unless the parties "clearly and unmistakably provide otherwise." *Boehm v. Getty Images (US), Inc.*, 2016 WL 6110058, at *2 (W.D. Wis. Oct. 19, 2016) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). Plaintiff fails to recognize, however, that an agreement to have arbitration conducted according to specific rules and procedures, like those of the AAA or another arbitral forum, incorporates those rules into the agreement. *In re Dealer Mgmt Sys. Antitrust Litig.*, 2020 WL 832365, at *5 (N.D. Ill. Feb. 20, 2020) (quoting *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1272 (7th Cir. 1976)). With this in mind, the consensus view is that "reference to the AAA's Rules [or other arbitral forum] in an arbitration clause reserves threshold questions of arbitrability to the arbitrator." *Boehm*, 2016 WL 6110058, at *2 and n.4.; *Gilman v. Walters*, 61 F. Supp. 3d 794, 800-01 (S.D. Ind. 2014) (incorporation of AAA Rules was a "clear and unmistakable expression" of the parties' intent to arbitrate arbitrability). The Wisconsin Court of Appeals

[1] Plaintiff, in her Introduction, states that Aliera has not asked the Court to stay these proceedings pending resolution of an ongoing inquiry by the Wisconsin Office of the Commissioner of Insurance. This does not affect in any way this Court's ability to grant the relief that Aliera requests in its Motion.

adopted this consensus view in *Mortimore v. Merge Technologies Inc.*, 824 N.W.2d 155, 161 (Wis. Ct. App. 2012).

Henry Schein v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019), does nothing to upset this general rule. *Henry Schein* merely confirms that (1) "who decides arbitrability is itself a question of contract;" and (2) where parties contracted to let an arbitrator decide arbitrability, courts have "no business" looking at the underlying merits of the grievance stated. *Id.* at 527, 529. Yes, clear and unmistakable evidence of an intent to arbitrate arbitrability is required. *Id.* at 531. But, while the United States Supreme Court has not directly addressed the issue, six United States Courts of Appeals have unanimously held that incorporation of the AAA or similar arbitral rules in an arbitration agreement is a clear and unmistakable sign that the parties intended the arbitrator, and not the court, to decide arbitrability. *See Allscripts Healthcare, LLC v. Etransmedia Tech., Inc.*, 188 F. Supp. 3d 696, 701 (N.D. Ill. 2016) (citing federal courts of appeals that have considered the issue and reached the same conclusion). Numerous district judges in the Seventh Circuit have adopted the consensus view for this very reason. *See, e.g., id.*; *Boehm*, 2016 WL 6110058, at *2 and n.4; *Gilman*, 51 F. Supp. 3d at 800-01.

The Trinity Sharing Guidelines and the Unity Sharing Guidelines incorporate just such rules, and the arbitrator should therefore decide arbitrability. The Trinity Sharing Guidelines provide that arbitration arising thereunder will be conducted "in accordance with the Rules and Procedure of the American Arbitration Association." (*See* Doc. 4-3, at 35.) In *Mortimore*, the arbitration provision at issue had a near identical provision, namely that claims "shall be submitted to arbitration conducted in accordance with the Commercial Arbitration Rules … of the American Arbitration Association … except as amplified or otherwise varied hereby." 824 N.W.2d at 157. Those Rules, specifically Rule 7(a), provide that "the arbitrator shall have the power to rule on his

or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* at 161. Incorporating these rules meant that the parties "intended to leave the question of arbitrability … to an arbitrator." *Id. See also Boehm*, 2016 WL 6110058, at *2 (arbitration agreement referenced the AAA Rules, thus leaving questions of arbitrability and scope to the arbitrator).

The only difference in the Unity Sharing Guidelines is that they incorporate the Rules of Procedure for Christian Conciliation (the "RPCC") of the Institute for Christian Conciliation. (*See* Doc. 4-2, at 17.) Under the Federal Arbitration Act, "parties are free to agree to any governing rules, and the courts will enforce whatever system they choose." *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 573 (7th Cir. 2007). *See also Easterly v. Heritage Christian Schools, Inc.*, 2009 WL 2750099, at *2-4 (S.D. Ind. Aug. 26, 2009) (quoting *Kearney* and compelling arbitration pursuant to the RPCC); *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112-13 (D. Colo. 1999) (compelling arbitration via the process of Christian Conciliation). Incorporation of rules similar to the AAA's can also compel the conclusion that parties intended to arbitrate disputes over the arbitrability and scope of an agreement. *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989) (where the parties incorporated the Rules of Arbitration of the International Chamber of Commerce (the "ICC")); *Boehm*, 2016 WL 6110058, at *2 (referencing the ICC Rules). Just like the AAA and ICC Rules, RPCC Rule 34(B) provides the arbitrator with "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (*See* RPCC Rules, available at http://www.crossroadsresolution.com/wp-content/uploads/2019/04/Rules-of-Procedure-for-Christian-Conciliation.pdf, at 29.) The text of this rule exactly mirrors the text of the AAA Rule that courts have consistently held leaves questions of arbitrability and scope to the arbitrator.

By incorporating specific arbitration rules giving the arbitrator the power to decide on his or her own jurisdiction, the Parties manifested a clear and unmistakable intent to have issues of arbitrability and the scope of their agreement decided by an arbitrator. This dispute has no place in this forum, and the Court should grant Aliera's Motion.

B. This Dispute Plainly Falls Within the Scope of the Arbitration Agreements.

The contracts governing the Parties' relationship each state three times, unambiguously, that the ADR provisions contained therein apply to any controversy between the Parties. First, as Aliera pointed out in its Motion, both the Unity Sharing Guidelines and the Trinity Sharing Guidelines are to govern "any dispute" that Plaintiff has with Unity, Trinity, or their associate Aliera. (*See* Doc. 4-2, at 18; Doc. 4-3, at 36.) Second, both provide that: "Sharing members agree and understand that [the ADR provisions] shall be the **sole remedy** for **any controversy or claim** arising out of the Sharing Guidelines and **expressly waive their right to file a lawsuit** in any civil court against one another for such disputes." (*See* Doc. 4-2, at 18; Doc. 4-3, at 37 (emphasis supplied).) Third, both provide that the rules incorporated shall be the "sole and exclusive procedure for resolving any dispute." (*Id.*)

Broad arbitration provisions such as these are to be accorded "a presumption of arbitrability," and this Court must compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Int'l Broth. of Elec. Workers, Local 21 v. Ill. Bell Tel. Co.*, 491 F.3d 685, 687-88 (7th Cir. 2007). In other words, any "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). And, "[o]nce it is clear that the parties have a contract that provides for arbitration of some issues between them, any doubts concerning the scope of the arbitration clause are resolved in favor of arbitration." *Miller v. Flume*, 139 F.3d 1130, 1136 (7th Cir. 1998).

Plaintiff argues that the arbitration clauses at issue "solely reference disputes related to medical care, treatment, or coverage," (Doc. 6, at 5) but this is simply wrong. As stated above, the arbitration clauses unambiguously refer to "any dispute" between the Parties. Plaintiff next argues that the membership guides apply only to determination with which a "member disagrees," and therefore are inapplicable here. (*Id.*) This argument is unavailing for multiple reasons. First, there is no support whatsoever from the applicable dispute resolution provisions that they should be read so narrowly. Second, issues of contract interpretation like this one are "the province of the arbitrator—not of this court." *See Int'l Broth. of Elec. Workers*, 491 F.3d at 689 (where clause was susceptible to multiple constructions, it was the arbitrator's job to construe it). Third, this *is* a dispute over a determination related to medical care, treatment, or coverage. Plaintiff alleges in her Complaint that she incurred medical expenses that Aliera should have paid, that she made a claim for those expenses, and Aliera denied it. (*See* Doc. 2, at ¶¶ 15, 19, 20.) Those allegations form the substance of her claims for declaratory judgment, breach of contract, and bad faith. (*See id.* at ¶¶ 25, 30, 38.) Plaintiff cannot assert a claim for breach of an agreement containing an arbitration clause governing "any controversy or claim" arising from the contract, and then argue that her claims are not within the scope of the arbitration clause.[2]

Plaintiff's argument that the Trinity Sharing Guidelines and the Unity Sharing Guidelines set forth different procedures for arbitration and therefore indicate there was no meeting of the minds between the Parties is likewise unavailing. As set forth in the declaration of Kathleen

[2] Plaintiff also seizes on the language in both member guides that the nature of an HCSM "does not lend itself well to the mentality of legally enforceable rights." (Doc. 6, at 5.) Plaintiff's argument on this point is misguided. In both member guides, the sentence that immediately follows provides: "However, it is recognized that differences of opinion will occur, and that a methodology for resolving disputes must be available." (Doc. 4-2, at 17; Doc. 4-3, at 36.) This does not make it "apparent" that the only way for a sharing member such as Plaintiff to enforce her rights is in a court of law, as Plaintiff argues. (Doc. 6, at 5.) Rather, it is a prefatory acknowledgement of the nature of the relationship between members and the HCSM, immediately followed by the recognition that, unfortunately, disputes will arise and there must exist a procedure for addressing them – arbitration.

Kromodimedgo, Aliera ceased offering products with the Unity HCSM component and began offering products with a Trinity HCSM component during the timeframe set out in Plaintiff's Complaint. (*See* Doc. 4-1, at ¶ 7.) When Plaintiff enrolled in the Unity HCSM in May of 2018, Plaintiff received the Unity Sharing Guidelines and affirmed her understanding that those Guidelines applied to any request for reimbursement of medical expenses. (*Id.* at ¶ 11-12.) After Aliera ceased offering products with a Unity component, Plaintiff enrolled in an Aliera product including the Trinity HCSM on July 15, 2019. (*Id.* at ¶ 13.) Plaintiff contemporaneously affirmed her acceptance of the Trinity Sharing Guidelines. (*Id.* at ¶ 16.) In other words, Plaintiff entered into two successive contracts with Aliera containing different terms. Plaintiff failed in her Complaint to specify the date on which she received the allegedly covered services, so Aliera included both contracts in its Motion.[3] That the two agreements set forth differing arbitration forums and procedures does nothing to indicate there was no meeting of the minds between the Parties when the contracts were executed.

For the reasons stated in Section A, *supra*, the Parties have already agreed that an arbitrator is to determine the scope of the arbitration provisions at issue. The Court, therefore, need not consider the arguments as to scope set out in Section I(B) of Plaintiff's response. *See also Corrigan v. Domestic Linen Supply Co.*, 2012 WL 2977262, at *2-3 (N.D. Ill. July 20, 2012) ("[W]hen parties agree in a valid arbitration agreement that the AAA's rules apply, an arbitrator should decide the scope of arbitrability …. Therefore, whether plaintiff's claims fall within the scope of the arbitration provisions is to be decided by the arbitrator."). The proper forum for Plaintiff to make her arguments regarding the scope of the arbitration provisions is before an arbitrator. In any

[3] Information as to the date of the alleged medical expenses and alleged wrongful termination of agreement is within Plaintiff's possession. Depending on the date of those allegations, Plaintiff's complaints may be submitted to arbitration pursuant to the Unity Member Guidelines or the Trinity Member Guidelines.

event, it cannot be said "with positive assurance" that the arbitration provisions at issue do not cover Plaintiff's claims, and the Court should grant Aliera's Motion. *See Int'l Broth. of Elec. Workers*, 491 F.3d at 687-88.

C. An Arbitrator Can Apply the Wisconsin Statutes Plaintiff Cites Without Limiting Plaintiff's Substantive Rights.

Plaintiff next argues that compelling arbitration would force her to forego certain statutory rights set out in Wisconsin's declaratory judgment and punitive damages statutes. As to the punitive damages statute , Plaintiff is incorrect that she would be forced to give up her right to seek punitive damages in arbitration—both the AAA Rules and the RPCC permit the arbitrator to award any damages he or she deems "just and equitable." (*See* AAA Rules, § 7(a); RPCC Rules, available at http://www.crossroadsresolution.com/wp-content/uploads/2019/04/Rules-of-Procedure-for-Christian-Conciliation.pdf, at 30.) The Wisconsin Court of Appeals has already concluded that such rules permit arbitrators to award punitive damages. *See Winkelman v. Kraft Foods, Inc.*, 693 N.W.2d 756, 764 (Wis. Ct. App. 2005) (citing *Mastobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-63 (1995)).

Plaintiff's arguments regarding the declaratory judgment statute fare no better. First, as to jury trials, when a declaratory judgment action requires a finding of fact, such factual issue may be tried to a jury in the same manner as any other civil action.[4] In arbitration, Plaintiff may present her factual issues to be tried by the Arbitrator. No rights are abridged; issues are simply tried to a differing trier of fact. By Plaintiff's logic, this would push any cause of action triable by jury—including her claims for breach of contract, bad faith, and punitive damages—outside of the realm

[4] Wisconsin's declaratory judgment statute provides as follows: "When a proceeding under this section involves the determination of an issue of fact, such issues may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions." Wis. St. § 806.04(9).

of arbitration. That is entirely inconsistent with the Federal Arbitration Act and nearly a century of case law applying it.[5]

Plaintiff's second argument relating to the declaratory judgment statute is that it permits an award of costs on terms the court deems equitable and just, and forcing her to arbitrate her claims would preclude her right to seek court costs based on the provisions of the Sharing Guidelines. Wisconsin precedent forecloses this argument. Plaintiff has no existing right – in any forum – to an award of costs based on the claims asserted. Under the declaratory judgment statute, the award of costs is wholly discretionary. *See* Wis. St. § 806.04(10). Further, pursuant to the AAA and RPCC Rules, the Arbitrator may award arbitration costs as he or she deems appropriate. (*See* AAA Rules, available at https://adr.org/Rules, and RPCC Rules, available at http://www.crossroadsresolution.com/wp-content/uploads/2019/04/Rules-of-Procedure-for-Christian-Conciliation.pdf.) Thus, Plaintiff is not foreclosed from seeking costs concerning arbitration.

CONCLUSION

WHEREFORE, for the reasons stated above and in Defendant The Aliera Companies, Inc.'s Motion and supporting documents (Doc. 4), the Court should dismiss this case and compel Plaintiff Margaret Harris to bring her claims in arbitration, or, in the alternative, stay this case pending the outcome of arbitration.

Respectfully submitted on May 7, 2020.

[5] *McCaskill v. SCI Management Corporation*, 298 F.3d 677 (7th Cir. 2002), does not apply here. First, *McCaskill* dealt with a federal statute—Title VII—and relied on Supreme Court authority addressing federal statutory rights. *Id.* at 684. Second, the arbitration agreement in *McCaskill* directly contradicted the substantive rights available under Title VII, namely the right to seek attorney's fees, which was "integral" to the statute's purposes and "central to the ability of persons to seek redress." *Id.* at 684-85. As discussed in this section, the ADR provisions in the Sharing Guidelines contain no such direct contradiction of an integral statutory right. In the arbitration of this case, Plaintiff may "effectively vindicate her statutory cause of action in the arbitral forum, and the statute[s] will continue to serve [their] remedial and deterrent purposes." *Id.* at 684.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE TO COMPEL ARBITRATION** has been filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

s/ Kristen P. Watson
OF COUNSEL