IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 1:20-cv-02130-RBJ

REBECCA SMITH,
ELLEN LARSON,
JUSTINE LUND,
JAIME BEARD, and
JARED BEARD, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE ALIERA COMPANIES, INC., f/k/a Aliera Healthcare Inc., a Delaware corporation,
TRINITY HEALTHSHARE INC., a Delaware corporation, and
ONESHARE HEALTH, LLC, f/k/a Unity Healthshare, LLC and as Kingdom Healthshare Ministries, LLC, a Virginia limited liability corporation,

Defendants.

ORDER ON DEFENDANTS' MOTION TO COMPEL ARBITRATION

This case is a class action brought by certain individuals in Colorado who purchased "health care plans" from defendants. Plaintiffs contend that these plans are illegal health insurance, and that defendants unlawfully denied them coverage for healthcare treatments that they were told fell under the plans. Before the Court is defendants' motion to compel arbitration. ECF No. 50. For the reasons discussed below, defendants' motion is DENIED.

I. FACTUAL BACKGROUND

I summarize facts from plaintiffs' amended complaint, ECF No. 39, as necessary to decide the motion to compel arbitration. I presume these facts to be true for purposes of this

motion. I also consider attachments to the complaint and the parties' briefs on arbitration as permitted on a motion to dismiss. *Cty. of Santa Fe, N.M. v. Pub. Serv. Co. of N.M.*, 311 F.3d 1031, 1035 (10th Cir. 2002).

A. The parties

The named plaintiffs in this case are Rebecca Smith, Ellen Larson, Justine Lund, and Jaime and Jared Beard. They are all residents of Colorado. ECF No. 39 at ¶¶1–4. Defendant the Aliera Companies, Inc. ("Aliera") is a Delaware corporation incorporated as a for-profit entity without any religious affiliation. *Id.* at ¶5. Defendant Trinity Healthshare, Inc. ("Trinity") is a Delaware corporation that purports to be a nonprofit entity. Defendant OneShare Health, LLC is a Virginia limited liability corporation. It was previously known as Kingdom Healthshare Ministries, LLC and as Unity Healthshare, LLC. The parties refer to it as "Unity" because the majority of the actions relevant to the case occurred when it was called Unity Healthshare, LLC. *Id.* at ¶7. The Court therefore also refers to Oneshare Health, LLC as "Unity."

Defendants Trinity and Unity claim to be Health Care Sharing Ministries ("HCSMs") under the Patient Protection and Affordable Care Act ("ACA"). Members of an HCSM are exempt from the ACA's requirement that all individuals be covered by health insurance or pay a penalty. *Id.* at ¶14. To be an HCSM an entity must meet five requirements. *Id.* Plaintiffs contend that neither Unity nor Trinity meet the requirements. *Id.* at ¶¶16–17.

B. Aliera, Unity, Trinity, and the Member Guides

Aliera was incorporated in Delaware in December 2015 by Timothy Moses, his wife Shelley Steele, and their son Chase Moses. *Id.* at ¶33. It began by selling "direct primary care medical home" ("DPCMH") plans, which cover limited services such as certain doctors' visits

and basic lab services. *Id.* at ¶35. According to plaintiffs, Aliera realized it could increase sales of its healthcare products if it took advantage of the HCSM tax exemption under the ACA, and if it avoided state insurance regulation by selling products that were "not insurance." *Id.* at ¶36. In 2015 Timothy Moses approached Anabaptist Healthcare ("Anabaptist"), a small Mennonite entity with a few hundred members located in Virginia that was recognized as an HCSM. Moses convinced Anabaptist to market Aliera's DPCMH plans alongside Anabaptist's sharing plan through a new subsidy created by Anabaptist called "Unity Healthshare, LLC." *Id.* at ¶38.

Aliera and Anabaptist/Unity entered into a contract for this purpose on February 1, 2017. Aliera had its customers join Unity, while Aliera took over all responsibility to create, design, market, and administer products sold under the Unity name. *Id.* at ¶39. All members enrolled through Aliera's website and made payments to Aliera. When members signed up for an Aliera/Unity plan, they were required to attest to a "generic spiritual and ethical belief," not the Mennonite beliefs of Anabaptist. *Id.* at ¶42. Plaintiffs contend that Unity was effectively just a shell and was not and could not be an HCSM under federal law. *Id.* at ¶¶40–41.

In 2018 Anabaptist discovered that Timothy Moses had written himself about $150,000 in checks from Unity funds without board approval and had not maintained assets reserved for payment of benefits. In July 2018 Anabaptist demanded that Aliera turn over control of Unity funds. *Id.* at ¶43. Aliera and Unity terminated their relationship on August 10, 2018. *Id.* at ¶45.

Following the fallout between Aliera and Unity, on June 27, 2018 Aliera and its principals created Trinity Healthshare, LLC as a non-profit. *Id.* at¶44. Aliera and Trinity represent that Trinity is "recognized" as a qualified HCSM, but plaintiffs contend that it cannot be an HCSM under the federal regulations. *Id.* at ¶¶46–47, 49. On August 13, 2018 Aliera and

Trinity signed an agreement in which Trinity delegated to Aliera authority to create, market, sell, and administer the purported HCSM plans under Trinity's name. *Id.* at ¶51. Members of Trinity were asked to affirm an identical "statement of beliefs" as that of Unity. *Id.* at ¶47. Aliera began selling healthcare plans through Trinity in Colorado in the fall of 2018. *Id.* at ¶52.

Aliera sued Anabaptist/Unity in Georgia in late 2018, and Anabaptist counterclaimed. *See Aliera Healthcare v. Anabaptist Health Share et al.*, No. 2018-cv-308981 (Hon. Alice D. Bonner, Ga. Sup. Ct.) (the "Georgia litigation"); ECF No. 39 at ¶53. On November 15, 2018 Aliera sent an email to all Unity members informing them that their plan would automatically change to a Trinity plan, and that no action was required on the members' part. Aliera informed its members that the only change to their plans would be the name. ECF No. 39 at ¶54. Aliera sent members new identification cards and member guides that were largely identical to the cards and member guides under Unity, but for replacement of the name "Unity" with "Trinity." *Id.*

In December 2018 the court in the Georgia litigation issued a temporary restraining order enjoining Aliera from transferring any Unity members to Trinity and requiring Aliera to notify members that their plans would not automatically transfer. *Id.* at ¶55. On April 25, 2019 the court entered an interlocutory injunction that prevented Aliera from unilaterally transferring members from Unity to Trinity, but that permitted Aliera and Unity to solicit those "legacy" members over to Trinity. *Id.* at ¶57. Aliera then began soliciting members to switch. *Id.* at ¶58.

C. <u>Arbitration provisions of the member guides</u>

At issue in defendants' motion to compel arbitration is the "Dispute Resolution and Appeal" provision included in the member guides for Aliera and Unity and/or Trinity. The provision in each of the guides from both Trinity and Unity is substantially the same. The

Trinity guide for 2018-2019 attached to the amended complaint states that "by becoming a Sharing Member of Trinity HealthShare you agree that any dispute you have with or against Trinity HealthShare its associates, or employees will be settled using the following steps of action, and only as a course of last resort." ECF No. 39-2 at 18. The dispute resolution process then describes three levels of appeal that aggrieved members may go through. If the aggrieved member disagrees with the final appeal outcome, the process calls for mediation next. *Id.*

The Trinity member guide dispute resolution section then reads:

> If the dispute is not resolved the matter will be submitted to legally binding arbitration in accordance with the Rules and Procedures of the American Arbitration Association. Sharing members agree and understand that these methods shall be the sole remedy to resolve 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; except to enforce an arbitration provision. Any arbitration shall be held in Atlanta, Georgia, and conducted in the English language subject to the laws of the State of Georgia. Trinity HealthShare shall pay the filing fees for the arbitration and arbitrator in full at the time of the filing. All other expenses of the arbitration shall be paid by each party including costs related to transportation, accommodations, experts, evidence gathering, and legal counsel. Further agreed that the aggrieved sharing member shall reimburse the full costs associated with the arbitration, should the arbitrator render a judgment in favor of Trinity HealthShare and not the aggrieved sharing member.
>
> The aggrieved sharing member agrees to be legally bound by the arbitrator's final decision. The parties may alternatively elect to use other professional arbitration services available in the Atlanta metropolitan area, by mutual agreement.

Id. One of the rules of the American Arbitration Association, incorporated by reference, reads, "[t]he 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 or to the arbitrability of any claim or counterclaim." American Arbitration Association, *Consumer Arbitration Rules*, Rule 14, https://www.adr.org/sites/default/files/Consumer_Rules_Web_1.pdf.

The dispute resolution provision of the Unity member guide attached to plaintiffs'

amended complaint is identical except for its reference to "Unity HealthShare, LLC" instead of Trinity. ECF No. 39-3 at 17–18. Like the Trinity guide, it references the methods of the American Arbitration Association ("AAA") and provides for arbitration in Atlanta, Georgia. *Id.*

Named plaintiff Justine Lund purportedly received the Trinity guide that referenced the AAA rules and that provided for arbitration in Georgia. ECF No. 50-9 at 35. Meanwhile, plaintiffs Rebecca Smith, Ellen Larson, and the Beards received a Unity member guide that differs somewhat from the one attached to the complaint. The arbitration clause in those member guides provides for arbitration in accordance with "the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Industries." ECF Nos. 50-3 at 18; 50-7 at 18; 50-12 at 18.[1] Finally, those guides state that arbitration shall be held in Fredericksburg, Virginia, in accordance with Virginia state law, instead of in Georgia. *Id.* Apart from these differences, however, the arbitration provision in the guides these plaintiffs received is the same as Ms. Lund's and the versions attached to the amended complaint.

D. Enrollments of individual plaintiffs

On April 12, 2018 Rebecca Smith spoke to Aliera representative John Ortiz who enrolled her in an Aliera plan after she provided her bank account information for payment. ECF No. 54-28 at ¶2. Smith received a welcome email from Aliera six days later on April 18, 2018. The email said "[y]our AlieraCare Quick Guide contains everything you need to know regarding your healthcare plan. For your product Quick Guide, please click here." ECF No. 50-2 at 2. It said that the "Quick Guide booklet" would be mailed to the Smiths' address fourteen days after her

[1] Like the AAA rules, the Christian Conciliation rules state that the arbitrator shall have the power to rule on his or her own jurisdiction. Institute for Christian Conciliation, *Rules of Procedure for Christian Conciliation*, Rule 34(B), https://www.instituteforchristianconciliation.com/rules-2019.

plan took effect. *Id.* Further down it referenced a "Member Guide" and included a hyperlink to access the guide. *Id.* at 5. There is no evidence that Ms. Smith received notice of the arbitration provision prior to enrolling in Aliera's healthcare plan. The first time she would have had notice of it is when the member guide link was provided to her in the welcome email.

Ellen Larson enrolled in AlieraCare through Aliera representative Ms. Frost on June 18, 2018, paying a one-time application fee and her first monthly payment at that time. ECF No. 54-11 at ¶2. She received an email confirming her enrollment that same day. Neither the email nor the attached enrollment confirmation mentioned anything about arbitration. *See* ECF Nos. 54-12, 54-13. When she enrolled Ms. Larson electronically signed an agreement with Unity. ECF No. 50-5. The form included a variety of questions about her health and laid out "Terms and Conditions for Unity HealthShare Premium." Under a subsection of Terms and Conditions called "Cost Sharing Understanding" the agreement mentions guidelines. It says in relevant part

> I understand that the guidelines in effect on the date of medical services supersede any spoken or verbal communication and all previous versions of the guidelines. I also understand that with notice to the general membership the guidelines may change at any time based on the preferences of the membership, and decisions, recommendations and approval of the Board of Trustees. . . . I understand that the guidelines are not a contract and do not constitute a promise or obligation to share, but instead are for UHS' reference in following the Membership Escrow Instructions. I also understand that the guidelines are part of and incorporated into this UHS Application as if appended to it.

Id. at 4. The end of the document states "[b]y electronically acknowledging this authorization, I acknowledge that I have read and agree to the terms and conditions set forth in this agreement," and below that is Ms. Larson's electronic signature. *Id.* at 6. Arbitration is mentioned nowhere in the agreement. Nor did the application include a link to the member guide so that Ms. Larson could read it before signing, even though it was supposedly "incorporated" into the application.

On June 30, 2018 Ms. Larson received a welcome email that referenced the "AlieraCare

Quick Guide" and the "AlieraCare Member Guide" as "everything you need to know regarding your healthcare plan." ECF No. 50-6 at 2, 5. It included a hyperlink to the member guide, and it said that a copy of the guide would be sent in the mail fourteen days after her plan's effective date. *Id.* This was the first time Ms. Larson received and had notice of the member guide's contents, including the arbitration provision.

Justine Lund enrolled in the AlieraCare Gold plan on January 16, 2019, and she received an email confirming her payment by credit card. ECF No. 54-23 at ¶2. The effective date of her plan was February 1, 2019. ECF No. 50-8 at 4. When enrolling in AlieraCare, Ms. Lund filled out an online application form similar to Ms. Larson's. Under a "Terms and Conditions" section, it mentioned the guidelines for sharing and stated, "[t]he Guidelines are not a contract of insurance. They do not constitute an agreement, a promise to pay, or an obligation to share." ECF No. 55-2 at 5. She electronically signed the agreement on January 15, 2019. *Id.* at 7. Neither the email she received nor the agreement included a link to the member guides or mentioned arbitration. Ms. Lund then received a welcome email on January 17, 2019. That email did reference and link to a member guide that "contains everything you need to know regarding your healthcare plan." ECF No. 54-25 at 2. This was the first time Ms. Lund received the member guide and was able to read its contents, including the arbitration provision.

Jared Beard spoke to Aliera representative Jenovia Jarboe on August 6, 2018 and received an email with AlieraCare plans that day. ECF Nos. 54-3 at ¶2; 54-4 at 2–4. Mr. Beard enrolled online on August 8, 2018. He too completed and signed an electronical application form. The application included identical language to that in Ms. Larson's application, including the statement "I understand that the guidelines are not a contract and do not constitute a promise

or obligation to share . . . .” ECF No. 55-3 at 4. The application did not include a link to the member guides or mention arbitration. Mr. Beard provided his credit card information and was charged for a one-time fee and his first monthly fee when he enrolled. ECF No. 54-3 at ¶2. Later that day Mr. Beard also received a welcome email that referenced the member guide and included a link to it. ECF No. 50-11 at 2, 5. That email was the first time the Beards had notice of the member guide and its contents, including the arbitration provision.

Plaintiffs contend that the products defendants create, market, sell, and administer are health insurance, and that defendants’ plans violate both the ACA and Colorado law. ECF No. 39 at ¶¶61–78. Each of the plaintiffs joins this lawsuit because they sought coverage for medical treatment under the healthcare plans provided through Aliera, Trinity, or Unity, and defendants denied coverage for their claims. *Id.* at ¶¶86–124.

II. PROCEDURAL BACKGROUND

Plaintiffs initially filed this case in state court. Defendants removed it to federal court on July 20, 2020. ECF No. 1. Plaintiffs filed their amended class action complaint on August 18, 2020. ECF No. 39. A bit over a month later, on September 28, 2020, defendants filed a combined motion to compel arbitration. ECF No. 50. Plaintiffs responded on October 19, 2020, and defendants replied on November 2, 2020. ECF Nos. 54, 55. The parties also filed a series of briefs with supplemental authorities for the Court’s consideration. ECF Nos. 58, 59, 60, 62, 64.

III. STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(1) “allows a court to dismiss a complaint for lack of subject matter jurisdiction.” *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015). A court lacking jurisdiction “must dismiss the cause at any stage of the proceedings in which it becomes

apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974) (citation omitted). The dismissal is without prejudice. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso*, 495 F.2d at 909.

When a party moves to dismiss a pleading based on insufficient grounds for jurisdiction, whether the district court has jurisdiction "must be determined from the allegations of fact in the complaint, without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When reviewing an attack on jurisdiction, a court may consider information beyond allegations in the complaint, such as affidavits, other documents, and an evidentiary hearing. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). A valid, enforceable arbitration clause divests a trial court of jurisdiction over all issues that must be submitted to arbitration, pending conclusion of the arbitration proceeding. *Hughley v. Rocky Mountain Health Maint. Org., Inc.*, 927 P.2d 1325, 1330 (Colo. 1996).

IV. ANALYSIS

The core question is whether the Court lacks jurisdiction over this case because a mandatory arbitration provision applies. Defendants argue that plaintiffs' claims are subject to arbitration because the member guides include arbitration clauses. ECF No. 50 at 7–8. Defendants also contend that the arbitrator must decide the arbitration clause's validity. *Id.* at 9–10. Plaintiffs assert that the Court, not the arbitrator, should determine arbitrability, and that plaintiffs never agreed to arbitrate their claims. ECF No. 54 at 5–9. I address the threshold question of who determines arbitrability first. I then turn to the question of whether plaintiffs agreed to arbitrate.

A. Whether the Court or the arbitrator determines arbitrability

The healthcare plans at issue in this case involve interstate commerce, and thus the Federal Arbitration Act ("FAA") applies. 9 U.S.C. §§ 1–2. The FAA reflects a "liberal federal policy enforcing arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Supreme Court has emphasized that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25. However, when there is a dispute as to the existence of a valid and enforceable arbitration clause, "the presumption of arbitrability falls away." *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998). Plaintiffs contend that no valid and enforceable arbitration clause exists because they never agreed to one.

"[T]he question of *who* should decide arbitrability precedes the question of *whether* a dispute is arbitrable." *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1281 (10th Cir. 2017). "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). "Because arbitration is simply a matter of contract, just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question [of] who has the primary power to decide arbitrability turns upon what the parties agreed about that matter." *Belnap*, 844 F.3d at 1280 (internal quotation marks and citations omitted).

Defendants argue that the arbitration provisions potentially applicable to plaintiffs' claims incorporated by reference a set of arbitration rules—either the AAA Rules or the Rules of

Procedure for Christian Conciliation—that require the arbitrator to determine questions of arbitrability. Defendants assert that because plaintiffs are bound by the dispute resolution provisions of the member guides, they are also bound by this indirect delegation of arbitrability to the arbitrator through the AAA and Christian Conciliation Rules. However, the authorities defendants cite for this argument are all distinguishable because none of them involved plaintiffs who contested signing or knowing about the arbitration clause.

In *Dish Network*, for example, the Tenth Circuit considered an agreement to arbitrate that incorporated by reference the AAA Rules, though the actual text of the rules was not in the agreement. The AAA Rules included a rule stating that the arbitrator had the power to rule on his or her own jurisdiction. *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1245 (10th Cir. 2018). The court ruled that the agreement's breadth and its incorporation of the rules "clearly and unmistakably show[ed] the parties intended for the arbitrator to decide all issues of arbitrability." *Id.* According to defendants, the same analysis applies in this case. I disagree.

The plaintiff in *Dish Network* undisputedly agreed to and signed an arbitration agreement drafted by the defendant. *Id.* at 1242–42. By contrast, here plaintiffs dispute that they agreed to the arbitration clause at issue. Plaintiffs enrolled in healthcare plans with Aliera and Trinity and/or Unity, but those agreements did not include arbitration provisions. Plaintiffs did not receive the member guides containing the arbitration clauses until after their agreements were formed. Thus, unlike in *Dish Network*, there is no evidence that plaintiffs even knew about any arbitration provision when they entered into agreements with Aliera, Trinity, or Unity for healthcare "sharing" services, much less entered into contracts with the provision. The court in *Dish Network* could assume that the plaintiff there was on notice of the AAA Rules, including

the arbitrator's power to determine its own jurisdiction. The same is not true here, where the arbitration clause was not part of the agreement that plaintiffs entered into by enrolling.

Similarly, in *Belnap* a physician entered into an employment agreement with a hospital, and the agreement included a dispute resolution clause requiring arbitration. *Belnap*, 844 F.3d at 1275–76. The Tenth Circuit agreed with the district court that there was clear and unmistakable evidence that the parties had agreed that an arbitrator should decide all questions of arbitrability. This was because Judicial Arbitration and Mediation Services ("JAMS") arbitration rules were incorporated by reference into the agreement. *Id.* at 1281. But in *Belnap* the plaintiff did not dispute that he signed a contract including the arbitration agreement—he instead argued that the JAMS Rules were only one option for arbitration, and thus not binding, an argument the court rejected. *Id.* at 1282. By contrast, here there is a dispute between the parties as to whether plaintiffs entered into an agreement that included the arbitration clause.

Plaintiffs' situation in this case is analogous to *Fedor*, a recent decision in which the Tenth Circuit concluded that the court, not the arbitrator, must decide whether an arbitration clause applied. *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1106–07 (10th Cir. 2020). The *Fedor* court wrote that "[plaintiff's] challenge to the 2016 arbitration policy must be heard by a court instead of an arbitrator. By claiming that neither she nor the other class members read or accepted the 2016 arbitration agreement, [plaintiff] raised an issue of formation which . . . cannot be delegated to an arbitrator." *Id.* at 1106–07. The Tenth Circuit noted, "a court cannot order arbitration of a particular dispute unless it is 'satisfied that the parties agreed to arbitrate *that dispute*.'" *Id.* at 1106 (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010)). Finally, it concluded that "[t]his is an issue of formation that inherently calls into

question whether she agreed to the delegation clause within the policy." *Id.* at 1107. The same issue of formation is before me here, and thus the Court should decide arbitrability.

Defendants next argue that the arbitrator must determine arbitrability because plaintiffs' objection to arbitration is actually an objection to the entire healthcare plans, which plaintiffs claim are "illegal health insurance programs." ECF No. 50 at 10. In support of this position defendants point to numerous cases, the most significant of which is *Buckeye*. *Buckeye* stands for the proposition that "a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 440 (2006). The Supreme Court in *Buckeye* concluded that "because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." *Id.* at 446. *See also In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1211 (10th Cir. 2016) (holding that plaintiffs' challenge to the arbitration provision as illusory "is a challenge to the entire agreement, because the arbitration provision would be unenforceable only if the entire agreement is unenforceable."); *BigBen 1613, LLC v. Belcaro Grp., Inc.*, No. 17-CV-00272-PAB-STV, 2018 WL 4257321, at *4 (D. Colo. Sept. 6, 2018) (applying *In re Cox* to hold that the parties delegated arbitrability to the arbitrator because plaintiffs' challenges to the contract and the arbitration provision as illusory were one and the same).

In applying *Buckeye* to these facts, defendants urge me to come to the same conclusion as the Western District of Washington did in a case called *Jackson*. *Jackson* is a lawsuit brought against Aliera for the same sorts of misconduct by defendants alleged here, and it involved the

same member guides and arbitration provisions at issue here. *Jackson v. Aliera Cos., Inc.*, No. 19-CV-01281-BJR, 2020 WL 4787990, at *1–2 (W.D. Wash. Aug. 18, 2020), *reconsideration denied*, No. 19-CV-01281-BJR, 2020 WL 5984075 (W.D. Wash. Oct. 8, 2020). The Washington court granted defendants' motion to arbitrate because it ruled that plaintiffs' challenge was to the contract overall, and that therefore the question of arbitrability was delegated to the arbitrator. *Id.* at *4. It wrote, "Plaintiffs' basis for arguing that AlieraCare is illegal and their basis for arguing that the arbitration clause is void are the same: AlieraCare is an unauthorized health insurance plan that runs afoul of Washington insurance law." *Id.*

I disagree with defendants that plaintiffs' arguments can characterized the same way as those in *Jackson*. Plaintiffs do challenge the healthcare plans running afoul of Colorado insurance law. *See, e.g.*, ECF No. 39 at ¶19 (noting that the plans "are unauthorized under C.R.S. § 10-3-105" and "are illegal contracts"). But their challenge to the arbitration provision is separate—they argue that the arbitration provision is not part of the contract at all, not that it is part of an allegedly unlawful contract. ECF No. 54 at 6. Their challenge to the arbitration provision is thus not a "challenge[] to the contract as a whole" because it is distinct from their broader claims against defendants. *Buckeye*, 546 U.S. at 444. I decline to follow the ruling in *Jackson* given the differences in how plaintiffs challenge arbitration in this case.

Buckeye calls for a different outcome here than in *Jackson*, *In re Cox*, or *BigBen*. Here, the enforceability of the arbitration agreement is not dependent on the enforceability of the agreement between the parties overall, because plaintiffs have presented evidence that the arbitration provision was not part of their healthcare plan agreements. Unlike the plaintiffs in those decisions, plaintiffs' argument against the arbitration provision is based on a different legal

theory and different facts than their claims on the merits. Their challenge to the arbitration provision is thus not "a challenge to the contract as a whole."

I conclude that there is not clear and unmistakable evidence that the parties agreed to have an arbitrator decide the question of arbitrability. Nor is plaintiffs' challenge to the arbitration provision the same as their challenge to the healthcare plans. Plaintiffs did not agree to delegate the question of arbitrability to an arbitrator, and the Court must therefore determine whether plaintiffs agreed to arbitration.

B. Whether the parties agreed to arbitrate

"The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked." *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1287 (10th Cir.1997). "The party seeking to stay proceedings in a judicial forum and to compel arbitration has the burden of establishing that the matter is subject to arbitration." *Smith v. Multi-Fin. Sec. Corp.*, 171 P.3d 1267, 1270 (Colo. App. 2007) (citing *GATX Mgmt. Servs., LLC v. Weakland*, 171 F. Supp. 2d 1159, 1162 (D. Colo. 2001)). "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs.*, 475 U.S. at 648 (internal quotation omitted). Courts "ascertain the parties' intent by looking to the plain language of the arbitration agreement." *Lane v. Urgitus*, 145 P.3d 672, 677 (Colo. 2006). "The formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." *Pierce v. St. Vrain Valley Sch. Dist. RE–1J*, 981 P.2d 600, 603 (Colo. 1999) (quoting Restatement (Second) of Contracts § 17(1) (1981)).

Defendants contend that the member guides prove plaintiffs agreed to arbitrate their

claims. They note that each of the guides includes a "clear statement" saying that "by becoming a Sharing Member of [Unity or Trinity], you agree that any dispute you have with or against [the HCSM], its associates, or employees will be settled using the [dispute resolution steps]." ECF No. 50 at 7. According the defendants, plaintiffs agreed to the "terms and conditions in the Member Guides" by "joining and participating in" the healthcare plans that defendants offered. *Id.* Defendants further assert that plaintiffs reaffirmed their consent to the member guides each time they made contributions and relied on Trinity or Unity to facilitate their "sharing." *Id.* at 8.

I am not convinced that plaintiffs entered into an agreement to arbitrate their claims. Arbitration is a "matter of contract," *AT & T Techs.*, 475 U.S. at 648, and a contract requires offer, acceptance, and consideration. The agreement that each named plaintiff in this case entered into is reflected in their enrollment process. Each plaintiff spoke to an Aliera representative about the healthcare "sharing" plans offered by one or more defendants, and each paid an application fee and a first month "contribution" in exchange for (supposedly) facilitation of healthcare cost sharing through Aliera and either Trinity or Unity. The terms to which the plaintiffs agreed would have been either discussed on the phone or provided in the various AlieraCare pamphlets that plaintiffs were sent. Their acceptance of any offer by Aliera was *before* each plaintiff received the member guide—either by paying the fee and first month's contribution (as Ms. Smith did), or by signing their application electronically (as Ms. Larson, Ms. Lund, and the Beards did). Though the member guides were referred to by name in and allegedly incorporated into the applications, the applications did not include a link to or instructions for accessing the guides prior to accepting and enrolling. Thus, none of the plaintiffs had notice of the arbitration provision until after they had entered into an agreement with Aliera

and Trinity and/or Unity.

The fact that the member guides might reflect some terms and conditions to which plaintiffs did agree by enrolling (such as which healthcare services were covered by the plan and how much they were required to pay in monthly contributions) does not mean everything in the member guides became part of their contracts. Defendants point out that the member guides state, "[b]y participation in the membership, the member accepts these conditions as enforceable and binding." *See, e.g.*, ECF No. 50-3 at 15. However, the guides also contain language that effectively disclaims any contractual relationship with defendants:

> The HCSM guidelines are provided as an outline for eligible needs in which contributions are shared in accordance with the membership's escrow instructions. They are not for the purpose of describing to potential contributors the amount that will be shared on their behalf and do not create a legally enforceable right on the part of any contributor. Neither these guidelines nor any other arrangement between contributors and Unity HealthShareSM creates any rights for any contributor as a reciprocal beneficiary, as a third-party beneficiary, or otherwise.

Id. at 12.

Furthermore, the application forms that Ms. Larson, Ms. Lund, and the Beards signed—and that set out specific terms and conditions—specifically say that the guidelines "are not a contract." ECF Nos. 50-5 at 4; 55-2 at 5; 55-3 at 4. In their applications plaintiffs had to affirmatively indicate their understanding that the member guides were not a binding agreement. They thus could not have been on notice that they were bound by the arbitration provision of those same documents. Defendants cannot disavow the contractual nature of the member guides and then expect the Court to enforce the arbitration clauses in these supposed non-contracts.

Two decisions by other district courts addressing the member guides from Aliera, Trinitu, and Unity are instructive. In *Kelly* the Western District of Missouri considered the same

arbitration provision. The court held that there was no enforceable agreement to arbitrate based on facts nearly identical to those here. *Kelly v. Aliera Cos., Inc.*, No. 6:20-CV-05038-MDH, 2020 WL 6877574, at *5 (W.D. Mo. Nov. 23, 2020). It noted that the *Kelly* plaintiffs received a copy of the member guides only after they completed the online enrollment forms and paid, and that there was no evidence plaintiffs "received, reviewed, or specifically acknowledged the specific terms of the Member Guide when they electronically signed the online forms to become a member." *Id.* At most, the court stated, plaintiffs acknowledged in the online application that the member guides were "not a contract." *Id.* The court rejected defendants' argument that plaintiffs signed a document saying the member guides would govern because that document "repeatedly state[d]" it was not a contract, and plaintiffs were not provided the document until after they signed the online form. *Id.* I find the *Kelly* court's analysis highly persuasive given the parallel facts and formation issues the court pointed out.

By contrast, in *Harris* the Eastern District of Wisconsin compelled arbitration, finding that the plaintiff agreed to the arbitration clauses in two member guides. *Harris v. Aliera Healthcare, Inc.*, No. 20-CV-492-JPS, 2021 WL 763856, at *7 (E.D. Wis. Feb. 26, 2021). But the plaintiff there did not make the same challenges to contract formation as the plaintiffs here. The court in *Harris* noted that the plaintiff's response merely "insinuate[d], with little to no explanation, that the aforementioned membership guides are invalid." *Id.* at *4. The plaintiff also challenged the arbitration provision on the basis that the two relevant membership guides constituted one contract with contradictory provisions, and that the arbitration clause forced plaintiff to forfeit her statutory rights and was therefore unenforceable. The Wisconsin court rejected both of these arguments. *Id.* at *4–5. But the *Harris* plaintiff did not contend, as the

plaintiffs do here, that the member guides were not part of the plan to which she agreed.

Plaintiffs' arguments and the evidence the parties have put before me make this case more similar to *Kelly* than to *Harris*. I therefore come to the same conclusion as the court in *Kelly*. Whatever the scope of the agreement plaintiffs entered into—a question that goes to the merits of this case, and that I do not address now—the arbitration provision was not part of it.

Defendants next point to plaintiffs' "making monthly contributions and enjoying the benefits of membership" as evidence that plaintiffs repeatedly assented to the terms and conditions of the member guides. They point to cases from this District to support their position that this is sufficient to bind plaintiffs. These decisions are readily distinguishable, however.

In *Vernon*, the first of defendants' authorities, Judge Schaffer held that plaintiffs were bound by an arbitration provision contained in a "Subscriber Agreement" for new internet services that plaintiffs purchased either online or over the phone. *Vernon v. Qwest Commc'ns Int'l, Inc.*, 857 F. Supp. 2d 1135, 1144–48 (D. Colo. 2012), *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013). In my order affirming the decision, I wrote that "plaintiffs had a reasonable opportunity to access the Subscriber Agreement had they wished to do so. They received repeated instructions to do so as well as warnings that by enrolling in the Program they were agreeing to be bound by the terms and conditions of the program." *Vernon*, 925 F. Supp. 2d at 1191.

However, the agreement to which the *Vernon* plaintiffs said "I accept," either orally or by clicking a button online, specifically referenced and linked to the Subscriber Agreement; told the purchasers they would be bound by its terms, including an arbitration provision; and directed purchasers to review the agreement. *Vernon*, 857 F. Supp. 2d at 1144–48. The key differences between *Vernon* and this case are that the *Vernon* plaintiffs were on notice of the Subscriber

Agreement and its arbitration clause before they entered into the contract with Qwest, and that they were explicitly informed they were bound by all its terms before agreeing. The opposite is true here. Plaintiffs had no way of knowing the arbitration clause existed, much less reading and agreeing to it, before entering into contracts with Aliera, Trinity, or Unity. Furthermore, the only reference to the member guide before their enrollment stated that it was *not* binding.

In *Wagner* the plaintiff applied for and received a Discover credit card. *Wagner v. Discover Bank*, No. 12-CV-02786-MSK-BNB, 2014 WL 128372, at *2–3 (D. Colo. Jan. 13, 2014). After plaintiff opened his account, Discover mailed him a "fulfillment kit" that included a Cardmember Agreement with an arbitration provision that said plaintiff had thirty days to reject the arbitration provision, which he did not. The court enforced the arbitration agreement. *Id.* But plaintiff's only argument against enforcement was that he did not receive the Cardmember Agreement, even though the bank had evidence it was mailed to him. *Id.* at *3. He did not claim, as plaintiffs do here, that the contract to which he agreed did not include or reference a binding arbitration agreement.

Similar to *Wagner*, in *Martinez* the court enforced a dispute resolution process against an at-will employee at a bank. *Martinez v. TCF Nat'l Bank*, No. 13-CV-03504-PAB-MJW, 2015 WL 854442, at *1 (D. Colo. Feb. 25, 2015). The new process, which required arbitration, was instated after plaintiff began working. The bank sent a letter to employees informing them of the process and indicating that continued employment constituted agreement. It also posted the letter on the company's intranet. *Id.* at *2–3. Plaintiff claimed that she could not be bound to arbitrate because she never received or saw the letter. Judge Brimmer rejected this argument because there was sufficient evidence the bank had provided notice to her through multiple

avenues and made clear the process was binding. *Id.* at *2. In *Martinez* the plaintiff's contract was validly modified to encompass the arbitration process. By contrast, defendants here have not proven the arbitration provision validly modified plaintiffs' agreements even after they received it, as any "notice" would have been rendered ambiguous by defendants' express disavowal of the binding nature of the guides.

Defendants bear the burden of establishing that plaintiffs agreed to the arbitration provision. *Smith*, 171 P.3d at 1270. They have not met this burden. The evidence before this Court indicates that whatever contracts plaintiffs entered into, an agreement to arbitrate was not part of them. I therefore find that plaintiffs did not agree to arbitrate their claims.

C. Enforceability and scope of the arbitration provision

The parties raise two additional issues. The first is whether, even if plaintiffs did agree to arbitrate, the arbitration clause is unconscionable and therefore unenforceable. ECF No. 54 at 10–13. The second is whether Aliera may invoke the arbitration clause even though plaintiffs contracted with Unity and/or Trinity, not Aliera. ECF No. 50 at 13–14. Because I have concluded that plaintiffs did not agree to arbitrate their claims, I need not reach these arguments.

ORDER

Defendants motion to compel arbitration, ECF NO. 50, is DENIED.

DATED this 16th day of April, 2021.

BY THE COURT:

R. Brooke Jackson
United States District Judge