NO. 20-3702

IN THE

United States Court of Appeals For The Eighth Circuit

GEORGE KELLY, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; THOMAS BOOGHER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

VS.

THE ALIERA COMPANIES, INC., FORMERLY KNOWN AS ALIERA HEALTHCARE, INC., A DELAWARE CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
NO. 3:20-CV-0583-MDH

REPLY BRIEF OF APPELLANT THE ALIERA COMPANIES INC.

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ARGUMENT

A. Given their affirmative claims, Kelly and Boogher's argument that the only agreement is their application documents makes no sense.

In their operative complaint,[1] Kelly and Boogher[2] spend a lot of ink and paper discussing the Member Guides. They mention them at least thirteen times.

- They allege that the Sharing Ministry pays medical bills "in accordance with a benefits booklet or 'Member Guide' for the selected program." (JA 92.)
- They allege that the Sharing Ministry makes payments from the program "purportedly according to the terms in the Member Guide" and "according to the Member Guide, the members must accept Trinity's adjudication of benefits." (JA 94.)
- They allege the Member Guides "contain[] inconsistent and contradictory coverage terms and conditions." (JA 96.)

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[1] The operative complaint is the Second Amended Class Action Complaint. (JA 77–113.)

[2] Aliera carries forward all naming abbreviations from its principal brief.

- They allege the Member Guides states that the Sharing Ministry complies with the Affordable Care Act. (JA 96.)
- They allege "[t]he Member Guides provide the amounts and types of benefits that are covered …." (JA 96.)
- They allege the Member Guide defines the Sharing Ministry as an "opportunity for members to care for one another in a time of need, [and] to present their medical needs to other members …." (JA 97.)
- They allege that Kelly received a Member Guide. (JA 99.)
- They allege that Kelly's medical costs "were identified as covered in the PrimaCare Member Guide," but that the Sharing Ministry refused to pay his claim. (JA 99.)
- They allege that Boogher received Member Guides from first the Unity and then the Trinity Sharing Ministry. (JA 101.)
- They allege the "Member Guides contain inconsistent and contradictory coverage terms and conditions that allow [Aliera and Trinity] to arbitrarily deny coverage." (JA 103.)

- They allege that Aliera and Trinity "claim members are legally obligated to follow the multilevel Dispute Resolution Procedure outlined in the Member Guides." (JA 105.)

Kelly and Boogher allege four claims. (JA 103–09.) They cite to the Member Guides as a basis to conclude the Sharing Ministry is an illegal contract—an illegal health insurance plan—under Missouri Law. (JA 103.) They cite to the plans including "a binding arbitration procedure illegal under Missouri law," a procedure that appears only in the Member Guide. (JA 103.) They cite to the Member Guide's dispute-resolution provision and its discussion of "guidelines" as bases to conclude the Sharing Ministry violates the Missouri Merchandising Practices Act. (JA 105.) They cite to statements in the Member Guide as a basis for their claim of breach of fiduciary duty. (JA 107–08.) And they cite to "Appendix B" to their complaint at least fifteen separate times—Appendix B being the Member Guide. (*See* JA 89, 92, 94, 105–08.)

Given Kelly and Boogher's repeated reliance on the provisions of the Member Guide as the basis for their claims, it is hard to imagine them disputing that the Member Guide is part of their agreement with the Sharing Ministry. Indeed, Kelly and Boogher's claims treat the Member

Guide and its terms as an integral part of their contract—the supposedly illegal one they have asked the district court to reform or rescind. (JA 81, 83, 104, 110.)

Not so, at least if Kelly and Boogher's brief is to be believed. Twisting themselves in knots to avoid arbitration, the general tenor of their brief is that the Member Guide is worth little more than a puff of hot air. They argue the Member Guide formed no part of their application documents, (Appellees' Br. 21–22), even though those documents explicitly reference being bound by the Sharing Ministry's guidelines, (JA 546, 563). They argue the Member Guide's inclusion in their welcome email is irrelevant. (Appellees' Br. 22–26.) Further, they argue that the Member Guide is not binding on anyone even though Kelly and Boogher remained members of the Sharing Ministry long after they received it and voluntarily chose to make sharing contributions every month of their Sharing Ministry memberships. (Appellees' Br 26–30.) They even argue that the Member Guide does not impose any obligations of any kind on the Sharing Ministry. (Appellees' Br. 30–34.)

Finally, Kelly and Boogher come right out and say what is implicit in their arguments. They are not arguing the Member Guides are

contracts. (Appellees' Br. 34.) "Instead, [they] claim [Aliera and Trinity's] health care **plans** are insurance …." (*Id.*) And "[t]he contract that [they] seek to enforce is the enrollment agreement that Aliera and Trinity represented as providing certain levels of coverage for health care costs. … That is the operative agreement." (Appellees' Br. 35.) And again: "The Member Guide is not a contract that [Kelly and Boogher] seek to enforce." (*Id.*)

But wait! When defining the "enrollment agreement that Aliera and Trinity represented as providing certain levels of coverage for health care costs," Kelly and Boogher are again inconsistent. (Appellees' Br. 35.) They cite to the application documents. (*See id.* (citing JA 487–94, 505–08).) But they also cite to the Member Guide. (*See id.* (citing JA 95–100).)[3]

[3] It is not always clear if Kelly and Boogher are citing to the Joint Appendix in this appeal (No. 20-3702) or the Trinity appeal (No. 20-3709). Based on the other citations in the same paragraph, it appears Kelly and Boogher are citing to the Joint Appendix in the Trinity appeal. If their citation to JA 95–100 is a citation to the Joint Appendix in this case, it is a citation to a section of their operative complaint that discusses the Member Guide.

Inconsistency aside, if the Member Guide is not a contract, what is the contract? All that is left is Kelly and Boogher's application documents. (*See* JA 543–50 (Kelly); JA 561–64, 596 (Boogher).)

Viewing the application documents alone as the agreement makes no sense given Kelly and Boogher's claims. The thrust of those claims is that they were misled into believing the Sharing Ministry was the equivalent of a health insurance policy. But no reasonable person could believe that the barebones application forms (containing little or no explanation of coverage, how the sharing system worked, or other expected terms and conditions) was an insurance policy. In fact, as a matter of black letter insurance law, those applications cannot be an insurance policy. *See* 1A Steven Plitt, et al., *Couch on Insurance* § 11.1 (3d ed. updated Dec. 2020) (stating that an application is merely an offer for an insurance contract); 3–11 Eric M. Holmes, *Appleman on Insurance Law & Practice Archive* § 11.1 (2d ed. 1998) ("A mere proposal or application for insurance standing alone does not constitute a contract upon which judgment can be recovered."); *see also Mitchell v. AARP Life Ins. Program, NY Life Ins. Co.*, 779 A.2d 1061, 1069–70 (Md. Ct. App. 2001).

Further, it would give the district court no contract to reform. To give the depth of terms and conditions one expects in an insurance policy without relying on the Member Guide, the district court would have to create a new policy from whole cloth, which is not reformation. *See Bohiken v. Monsees*, 655 S.W.2d 604, 608 (Mo. Ct. App. 1983) ("Equity cannot make a new agreement for the parties under the color of reforming the one made by them, or add a provision which they never agreed upon.") (citation omitted). Thus, Kelly and Boogher's argument that the only contract is their enrollment forms erodes the foundation of their claims and does severe, if not fatal, damage to their ability to prevail on any of those claims.

Kelly and Boogher might argue that some of the details of the "health care plan" come from oral representations made to them by Aliera or Trinity agents. (*See* JA 99–101.) Setting aside the unusual nature of an oral insurance contract, the sparsity of Kelly and Boogher's allegations about oral representations come nowhere near meeting the elements of an oral insurance contract in Missouri. *See Wright v. Blevins*, 380 S.W.3d 8, 12 n.2 (Mo. Ct. App. 2012). Further, oral contracts would be terminal to Kelly and Boogher's efforts to certify a class action, as the

class members would necessarily have individualized contracts depending on what oral representations were made to each of them.

In addition, Aliera has explained that, based on Kelly and Boogher's reliance on the Member Guide as a basis for its claims, the Court should estop them from denying the Member Guide is a contract.[4] (Appellant's Br. 33–34.) Kelly and Boogher now disclaim any attempt to enforce the Member Guide. So either this Court or the district court on remand should preclude them from shifting positions. If Kelly and Boogher successfully argue that the only contract is their application forms, the courts should require them to live with the consequences of their argument when determining whether to certify a class or whether their claims fail on the merits.

[4] Kelly and Boogher contend Aliera waived that argument by failing to present it to the district court. (*See* Appellees' Br. 34.) That is inaccurate. Although not using the word "estoppel," Aliera argued to the district court "Plaintiffs should not be allowed to take the inconsistent positions that (a) they did not agree to the Member Guides including arbitration provisions, and (b) at the same time, the Member Guides constitute illegal contracts and should be reformed to be consistent with required benefits under Missouri insurance policies. Plaintiffs cannot have it both ways simply to avoid arbitration." (JA 1020.) That is, fundamentally, the same estoppel argument Aliera makes in its principal brief. (*See* Appellant's Br. 33–34.)

For now, the Court should recognize what is apparent from the difficulty Kelly and Boogher's disclaimer of the Member Guide causes their claims. That is, their argument the Member Guide is not a contract is nothing more than an after-the-fact contrivance designed to avoid arbitration at all costs—even if it undermines the merits of their claims and their ability to achieve class certification.

B. The elements of offer and acceptance were present at the time of enrollment.

The district court declined to compel arbitration because it concluded there was no mutual assent to—no offer and no acceptance of—the Member Guide's terms. Aliera explained in its principal brief that Kelly and Boogher's enrollment forms, which they signed, showed offer and acceptance because they incorporate the Member Guide by reference. (Appellant's Br. 27–28.) Aliera also explained that both Kelly and Boogher received their Member Guides before their enrollment became effective, and it was irrelevant that Kelly and Boogher may not have read their Member Guides. (*See id.* at 28–29.)

Kelly and Boogher argue the online application form is not good enough, even though both of their application forms included a promise to abide by the Sharing Ministry's guidelines and Boogher's expressly

affirmed that the guidelines were "part of and incorporated into" it. (*See* Appellees' Br. 19–22; *see also* JA 546, 563.) Their argument is three-fold. One, the application forms both include a phrase saying they are not a contract. Two, the application forms do not expressly mention arbitration. And three, neither enrollment form incorporates the Member Guide.

First, as Aliera explained in its principal brief, given the mutual promises between the Sharing Ministry[5] and Kelly and Boogher respectively, the proper interpretation of the "not a contract" language in the application form is that it was a repeated warning to potential members that the signature form and Member Guide were not an indemnity contract. (*See* Appellant's Br. 25–26.) Kelly and Boogher themselves obviously understand the documents they signed are contracts. In fact, they argue themselves in their brief that the documents they signed are the only thing that is a contract. (*See* Appellees' Br. 35 ("The contract that [Kelly and Boogher] seek to enforce

[5] No one has challenged Aliera's right to invoke the arbitration provisions in the agreements between Kelly and Boogher and the Sharing Ministry.

is the enrollment agreement that Aliera and Trinity represented as providing certain levels of coverage for health care costs.... That is the operative agreement.").)

Second, Kelly and Boogher cite no authority that an agreement must expressly mention or refer to arbitration or it cannot incorporate another document containing an arbitration clause. Such a rule would make no sense. Missouri law is clear that when a contract incorporates another document by reference, the two documents are treated as a single instrument and the contents of the incorporated document are treated as if they were set out in full. *See, e.g.*, *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. 2003) (en banc); *Shawnee Bend Dev. Co. v. Lake Region Water & Sewer Co.*, 419 S.W.3d 817, 824 (Mo. Ct. App. 2013). Because Kelly and Boogher's application forms incorporate the Member Guide by reference, the two documents become a single, unitary instrument. And that instrument does expressly set out an obligation to arbitrate.[6] (JA 159, 586–87.)

[6] The unspoken premise of this argument is that it seeks to forge a special rule for arbitration agreements. Kelly and Boogher do not suggest that other features of the Member Guides must meet this standard. But the creation of special contract rules that apply only to arbitration provisions runs counter to the Supreme Court's decisions under the FAA.

Third, Kelly and Boogher contend the forms they signed do not incorporate by reference the Member Guide. They base that argument largely on the language in the two documents saying that it is not an indemnity contract, but the Court can discard that argument for the reasons already discussed. They also argue that the forms do not incorporate the Member Guide, but they fail to explain why that is so. After all, "[p]arties may incorporate terms from another document, even one that is separate and unsigned, if the contract makes clear reference to the document and describes it so that it can be recognized beyond a doubt." *Hughes v. Ancestry.com*, 580 S.W.3d 42, 48 n.7 (Mo. Ct. App. 2019) (citation omitted). Both Kelly's and Boogher's forms make clear reference to the guidelines being binding, and there is no doubt that Member Guide is the guidelines those documents reference. (JA 546, 563.) Further, because "[t]here is no requirement that an incorporated document be attached to the contract or provided to the parties prior to the execution of the contract," *see Hughes*, 580 S.W.3d at 48 n.7 (citation

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See Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423 (2017) (holding that a contract formation rule that applies only to arbitration provisions cannot survive under the FAA); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

omitted), it is irrelevant whether Kelly or Boogher received and reviewed their Member Guide before they signed the forms. Moreover, they received the Member Guides before the effective dates of their memberships in the Sharing Ministry. (JA 101, 526, 551–53.)

Here, in their application forms, Kelly and Boogher agreed to be bound by the Sharing Ministry guidelines. Those guidelines, which are found in the Member Guide and are incorporated into the forms Kelly and Boogher signed, include the dispute-resolution provision. So, there was offer and acceptance of the dispute-resolution provision, and Kelly and Boogher are bound by it.

C. Kelly and Boogher accepted the terms of the Member Guide by remaining a member of the Sharing Ministry after receiving it.

In its principal brief, Aliera explained that Kelly and Boogher's conduct after they received their Member Guides showed their assent to the Member Guide's terms. (*See* Appellant's Br. 30–32.) Having agreed to be bound by the Sharing Ministry guidelines, having received the Member Guides, they remained members even though they could

withdraw,[7] they continued to make monthly member contributions, and Kelly even made sharing requests. (JA 99–102, 483–85, 546, 548–51, 563.) Aliera also explained that, even if the Court construed the Member Guide as imposing new guidelines, Kelly and Boogher both agreed in their application forms—the documents they agree are contracts—that the Sharing Ministry could do that. (*See* Appellant's Br. 32–33; *see also* JA 546, 549, 563.)

Kelly and Boogher offer no real response to their agreement to give the Sharing Ministry authority to impose to impose new guidelines, except to argue that it makes any obligations the Member Guide imposes on the Sharing Ministry illusory, undermining the exchange of consideration. (*See* Appellees' Br. 33–34.) For the reasons explained below, the Court should reject that argument. Moreover, the Court should view Kelly and Boogher's failure to respond as a tacit admission

[7] Kelly and Boogher take some umbrage with the idea that remaining a member and making member contributions was "voluntary." (*See* Appellees' Br. 27–28.) Market pressures aside, the point remains: Kelly and Boogher were under no contractual obligation to remain members of the Sharing Ministry for any specific period of time and were free to withdraw their membership if they chose. They did not choose to do so.

they agreed to give the Sharing Ministry authority to add an arbitration requirement as a Sharing Ministry guideline.

As for their after-the-fact conduct, Kelly and Boogher don't seem to dispute that their conduct is capable of manifesting assent. Instead, they just argue that their conduct does not.

In doing so, they rely on *Masteller v. Champion Home Builders Co.*, 723 N.W.2d 561 (S.D. 2006), as factually analogous, but *Masteller* is meaningfully different from this case. In *Masteller*, the plaintiffs bought a manufactured home. *See id.* at 562. The purchase agreement contained an express warranty and no arbitration provision, but after installing the home, the seller sent a limited warranty that contained an arbitration agreement. *See id.* The Court held that later requests for service on their home did not bind the plaintiffs to arbitrate because, given the two agreements, it was ambiguous as to under which agreement service had been provided. *See id.* at 565–66. Here, there are not two agreements with conflicting terms. Moreover, a manufactured home is not like an insurance policy. The purchasers of the home were not free to withdraw their ownership and move on to a different manufactured home, but Kelly

and Boogher were free to move on to an insurance company or to another sharing ministry at any time.

Kelly and Boogher also rely on Missouri employment cases, such as *Katz v. Anheuser-Busch, Inc.*, 347 S.W.3d 533 (Mo. Ct. App. 2011). In that case, the court held that merely remaining an employee after the employer presented the employee with an arbitration agreement was insufficient to show the "employee's unequivocal intention to be bound." *Id.* at 545 (citation omitted). The court's reasoning was that "silence generally cannot be translated into acceptance." *Id.* (citing *Kunzie v. Jack-in-the-Box, Inc.*, 330 S.W.3d 476, 484 (Mo. Ct. App. 2010). This Court's decision in *Shockley v. PrimeLending*, 929 F.3d 1012, 1019 (8th Cir. 2019), shares that reasoning.

The general rule on which *Katz* and *Shockley* rely—silence is generally not acceptance—is subject to two exceptions that apply here. First, silence can be acceptance if the offeree has a duty to speak but remains silent. *See Bestor v. Am. Nat'l Stores, Inc.*, 691 S.W.2d 384, 388 (Mo. Ct. App. 1985); *see also Restatement (Second) of Contracts* § 69. Second, silence can be acceptance if the silence would mislead a reasonable person into believing the silent offeree had assented. *See* 2

Williston on Contracts § 6:53 (4th ed. updated May 2021) ("If the situation for any reason is such that a reasonable person would construe silence as necessarily indicating assent, the offeree who keeps silent, knowing that its silence will be misinterpreted, should not be allowed to deny the natural interpretation of its conduct."); *see also Revere Copper & Brass, Inc v. Mfrs.' Metals & Chems., Inc.*, 662 S.W.2d 866, 870 (Mo. Ct. App. 1983).

Under the facts here, silence can be, and should be, construed as assent. Again, Kelly and Boogher agreed to be bound by the Sharing Ministry guidelines, agreed the Sharing Ministry could make changes the guidelines, remained members after receiving the Member Guides containing the guidelines (including the dispute-resolution provision), continued to make monthly member contributions after receiving the Member Guides, and Kelly even made sharing requests after receiving the Member Guide.[8] (*See* JA 99–102, 483–85, 546, 548–51, 563.) Given

[8] As a result, this case, in which there is no dispute that Kelly and Boogher received the Member Guides, is meaningfully distinct from the other decisions on which Kelly and Boogher rely. In none of those other cases did the party seeking to avoid arbitration expressly agree to be bound by a policy or guidelines containing the arbitration clause, undisputedly receive the document containing the arbitration clause, and

that, the Court should conclude that Kelly and Boogher were under a duty to speak and reject any guideline to which they did not assent and that a reasonable person, in the place of the Sharing Ministry, would interpret Kelly and Boogher's silence as assent.

D. At minimum, there are factual issues about assent to the Member Guide for trial under 9 U.S.C. § 4.

In its principal brief, Aliera explained that, at minimum, the district court should have referred the questions of whether Kelly and Boogher assented to the terms of the Member Guide to a summary trial under 9 U.S.C. § 4 instead of outright denying the motion to compel arbitration. (*See* Appellant's Br. 34–38.) Courts assess motions to compel arbitration under a summary-judgment-like standard. *See Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F. 3d 737, 741–42 (8th Cir. 2014). And, as Aliera explained, Kelly and Boogher's actions were at least sufficient to create a genuine issue of material fact as to whether they assented to the terms of the Member Guide. (*See* Appellant's Br. 36–38.)

Although Kelly and Boogher agree about the standard, they contend a § 4 trial is unnecessary. (*See* Appellees' Br. 37–39.) They argue

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then voluntarily remain a member, customer, or employee of the party with whom it had agreed to arbitrate.

that whether Kelly and Boogher assented is an objective analysis. (*See id.* at 38.) They also agree there is no dispute about what Kelly and Boogher signed or received and no dispute that they remained members of the Sharing Ministry after receiving the Member Guide. (*See id.* at 38–39.)

There are at least two problems with Kelly and Boogher's analysis. The first is that, although "[w]hether there exists mutual assent sufficient to form a contract is dependent upon the *objective* intentions of the parties," *Jackson v. Higher Educ. Loan Auth. of Mo.*, 497 S.W.3d 283, 289 (Mo. Ct. App. 2016), "[w]hether a party has accepted the terms of a contract in the absence of a signature is … a question of fact." *Baker Team Props., LLC v. Wenta*, 611 S.W.3d 348, 355 (Mo. Ct. App. 2020) (citation omitted); *accord Doss v. EPIC Healthcare Mgmt. Co.*, 901 S.W.2d 216, 220 (Mo. Ct. App. 1995) (citing 2 *Williston on Contracts* § 6:4 (4th ed. 1991)).

If the Member Guide is not incorporated into their application forms, then neither Kelly nor Boogher signed the Member Guide. In that instance, it would be a question of fact whether they agreed to its terms. Kelly: (1) agreed the guidelines would govern, that he would abide by

them, that it was his responsibility to review them, and that Aliera and Trinity could change them; (2) received the Member Guide before his membership became effective; and (3) remained a member long after receiving the Member Guide. (JA 99–100, 156, 526, 545–48.) Boogher: (1) was a part of the Aliera-administered Unity sharing ministry, which used a virtually identical Member Guide and dispute-resolution provision, putting him on notice that the Aliera-administered Trinity Sharing Ministry's Member Guide would likely contain a dispute-resolution provision as well; (2) received a copy of the Trinity Member Guide about six months *before* transitioning from Unity to the Trinity Sharing Ministry; and (3) made sharing requests and remained a member of the Sharing Ministry long after receiving the Member Guide. (JA 101–03, 563, 566, 586–87, 596.) A reasonable factfinder could conclude that this conduct constitutes assent to the Member Guide's terms.

The second problem with Kelly and Boogher's analysis is that its emphasis on the lack of any dispute as to what happened misapplies the summary-judgment-like standard that governs motions to compel arbitration. Under that standard, a court considering a motion to compel arbitration can grant the motion without a § 4 trial only if there are no

genuine issues of material fact when giving the non-movant the benefit of all reasonable inferences. *See SS White Burs, Inc. v. Guidance Endodontics, LLC*, 789 F. App'x 714, 718 (10th Cir. 2019); *Dicent v. Kaplan Univ.*, 758 F. App'x 311, 312 (3d Cir. 2019). Even if the Court concludes, after giving Kelly and Boogher the benefit of all reasonable inferences, that Aliera has not shown assent to the Member Guide as a matter of law, it should at least recognize that Kelly and Boogher's conduct can support a reasonable inference of assent to the Member Guide. Thus, formation of the arbitration agreement remains at issue, and the district court should have held the motion in abeyance and sent the matter to a § 4 trial, where the factfinder can draw whatever inferences the evidence supports (including inferences in Aliera's favor). *See* 9 U.S.C. § 4; *Jin v. Parsons Corp.*, 966 F.3d 821, 828 (D.C. Cir. 2020); *Neb. Mach.*, 762 F.3d at 743.

E. There is mutuality of obligation—consideration.

In its principal brief, Aliera explained that there was consideration to support the Member Guide as a whole and the dispute-resolution provision individually. (Appellants' Br. 23–26.) It explained that an exchange of mutual promises is consideration under Missouri law. (*See*

id. at 23 (gathering authority).) And it explained that, although it had no indemnity obligation, it had nonetheless made promises. It was obligated to:

- establish guidelines to determine what type of medical expenses are eligible for sharing;
- assign recommended cost-sharing amounts to each member each month;
- administer the Sharing Ministry and assign members' contributions as the Guidelines prescribe;
- collect the members' monthly share amounts;
- consider share requests;
- operate the four-level internal appeal system;
- mediate disputes between it and the members of the Sharing Ministry;
- arbitrate disputes between it and the members of the Sharing Ministry; and
- pay in full the filing fees for the arbitration and the arbitrator.

(JA 152, 159, 545–46.) Thus, Aliera showed that there is bargained for consideration.

Kelly and Boogher incorrectly contend that all of those obligations are illusory. (Appellees' Br. 30–34.) Taken together, Aliera's obligations to establish sharing guidelines, recommend sharing amounts to members, collect those amounts, consider share requests, and assign contributions in accordance with the guidelines sum up to an obligation to handle the Sharing Ministry's operations. (JA 152, 159, 545–46.) There can be no serious argument that Aliera could collect member sharing amounts from Kelly and Boogher and then refuse to do those things. Therefore, they are obligations. And they are obligations that Aliera would not have to Kelly and Boogher but for the contract between them and the Sharing Ministry.

Kelly and Boogher also incorrectly contend there is no independent consideration for the arbitration agreement. (*See* Appellees' Br. 31–32.) There is, however, no obligation that an arbitration agreement have independent consideration. The consideration for the larger agreement suffices. *See T.D. Auto Fin., LLC v. Bedrosian*, 609 S.W.3d 763, 769 (Mo. Ct. App. 2020). But even if there were such a requirement, independent consideration supports the arbitration clause.

Kelly and Boogher argue the arbitration clause is not mutual because only the Sharing Ministry members' claims are subject to mandatory arbitration. (JA 468.) But, for their part, the Sharing Ministry and Aliera (its affiliate) are also obligated to mediate and then arbitrate the members' disputes without any recourse to litigation, and they would be bound by those results—obligations they would not otherwise have. That is mutual obligation—consideration. *See, e.g.*, *Dickson v. Gospel for Asia, Inc.*, 902 F.3d 831, 835 (8th Cir. 2018) ("[W]e think that GFA's promise to be bound by the result of an arbitration proceeding that the Dicksons initiate is sufficient consideration to render the agreements enforceable. In other words, a reciprocal promise to arbitrate is not required."); *Johnson v. Circuit City Stores*, 148 F.3d 373, 378–79 (4th Cir. 1998) (finding consideration where employer was bound by results of arbitration even though employer was not itself required to submit claims to arbitration); *Cervantes v. Bridgestone Retail Operations, LLC*, No. 20-cv-2164, 2020 WL 7480700, at *1 (N.D. Ill. Dec. 18, 2020) (concluding that there was consideration where employer was bound by results of arbitration of employee's claims). Further, that the relevant clause requires that "the matter shall be resolved" by mediation and, if

unsuccessful, "the matter will be submitted" to arbitration shows the arbitration obligation is mutual, even if the clause is perhaps inartfully drafted. *See Dickson*, 902 F.3d at 834–35.

Kelly and Boogher also argue that, even though the Sharing Ministry agrees to pay the arbitration filing fees and the arbitrator costs, there is no consideration because AAA rules require the Sharing Ministry to do so and because the Sharing Ministry—but not its members—can recoup costs from the other side if it prevails. (*See* Appellees' Br. 31–32.) The AAA Consumer rules may require the business to pay many of the fees, but it does not require the business to pay the filing fee; the consumer pays that under the AAA rules. *See* AAA Consumer Rule 2(a)(2); *see also id.* at pp. 33–34 (stating that the consumer pays a nonrefundable filing fee). In the dispute-resolution provision, however, the Sharing Ministry also agrees to pay the filing fee—an obligation it does not have under the AAA rules. (JA 468.) And of course the reimbursement of costs provision is one-sided. The Sharing Ministry has agreed to bear all of the costs. (JA 468.)

Finally, Kelly and Boogher argue that any promise from the Sharing Ministry is illusory because the Sharing Ministry has reserved

the unilateral right to modify its obligations—to "make updates to its Guidelines at any time." (JA 546.) The Court should reject that argument.

Many courts hold that the unilateral power to modify an agreement does not render obligations illusory so long as there are meaningful restrictions on the power to modify, such as providing notice before the changes are made and the ability to avoid being bound by the changed terms. *See Patrick v. Altria Grp. Distrib. Co.*, 570 S.W.3d 138, 144 (Mo. Ct. App. 2019); *see also Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002); *Pre-Paid Legal Servs., Inc. v. Moore*, No 13-cv-215, 2015 WL 13158317, at *2 (E.D. Okla. Mar. 27, 2015). Others have held that the unilateral power to modify does not make an agreement illusory so long as there is a mutual agreement to be bound by the arbitration process. *See Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 91 n.5 (4th Cir. 2005). In any event, any changes to the Member Guide—to the contract—would be subject to the duty of good faith and fair dealing, which prevents the Sharing Ministry's authority to make changes from rendering its obligations illusory. *See In re Checking Account Overdraft Litig.*, No. 19-14097, 2021 WL 1292305, at *5 (11th Cir. Apr. 7, 2021) (citing *Larsen v. Citibank, FSB*, 871 F.3d 1295, 1321 (11th Cir. 2017)).

Here, the Sharing Ministry's ability to modify the guidelines does not render its obligations illusory. The Sharing Ministry makes clear that the guidelines in effect on the date of the medical service governs, which means there is no retroactive application of changes. (JA 459, 549.) The Sharing Ministry gives notice to members before making changes to the Guidelines (*Id.*) Because membership is voluntary, members always have the ability to avoid being bound if they disapprove of changes to the guidelines. Thus, there are meaningful restrictions on the Sharing Ministry's ability to modify the guidelines. *See Patrick*, 570 S.W.3d at 144; *see also Blair*, 283 F.3d at 604; *Pre-Paid Legal Servs.*, 2015 WL 13158317, at *2. Further, the Sharing Ministry is bound by the outcome of the arbitration process. (JA 459.) So there is necessarily consideration for a promise to arbitrate. *See Wood*, 429 F.3d at 91 n.5.

In sum, there is consideration to support an agreement, including an agreement to arbitrate.

F. The Court should remand the validity issues, but an arbitrator should decide them.

In their brief, Kelly and Boogher contend that, if the Court concludes the district court erred when it found there was no arbitration agreement, it should remand to allow the district court to decide whether

the arbitration agreement is unenforceable under Missouri law because it is unconscionable or is part of an insurance policy. (*See* Appellees' Br. 40–43.) They argue that the district court never decided those issues. (*See id.*)

Kelly and Boogher are correct that the district court never decided those issues. (*See* JA 887.) But the district court also never decided whether the parties delegated the power to decide those issues to the arbitrator. (*See id.*) Thus, if this Court does not reverse and order arbitration, it should simply remand for further proceedings and allow the district court to decide in the first instance whether those questions are delegated to an arbitrator. *See, e.g. Garnac Grain Co. v. Blackley*, 932 F.2d 1563, 1571 (8th Cir. 1991) ("Questions of law, like other questions, should normally be decided by the District Court in the first instance."). This is particularly true here, where the questions of validity under Missouri law have not been fully briefed. *See, e.g.*, *United Fire & Cas. Ins. Co. v. Garvey*, 19 F. App'x 478, 479 (8th Cir. 2001) (remanding an agency question because the district court had not addressed it and the parties had not fully briefed it).

If the Court decides to reach the delegation question, it should hold that the parties have delegated arbitrability questions to the arbitrator. Both the Unity and Trinity Member Guides incorporate the AAA rules, (JA 159, 468), and the AAA rules give the arbitrator the power to decide any challenges to the existence, scope, or validity of the arbitration agreement. *See* AAA Commercial Rule 7(a); AAA Consumer Rule 14(a).

Delegation clauses like the one here are generally enforceable. *See Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72–73 (2010); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009). Under the FAA and Missouri law, any attacks on their enforceability must be specific to the delegation clause; attacks on the arbitration agreement as a whole are insufficient. *See, e.g.*, *Rent-A-Center*, 561 U.S. at 72–73; *Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 115–17 (Mo. 2018) (en banc), *abrogated on other grounds by Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432 (Mo. 2020) (en banc); *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 51 (Mo. 2017), *abrogated on other grounds by Theroff*, 591 S.W.3d 432 (Mo. 2020); *see also, e.g.*, *Arment v. Dolgencorp., LLC*, No. 2:18-cv-26, 2018 WL 5921369, at *2 (E.D. Mo. Nov. 13, 2018); *Astarita v. Menard,*

Inc., No. 5:17-cv-6151, 2018 WL 5928061, at *4–5 (E.D. Mo. Nov. 13, 2018); *TD Auto Fin.*, 609 S.W.3d at 770–71.

Kelly and Boogher's first validity challenge—unconscionability, (*see* Appellees' Br. 40–41)—is just the sort of arbitrability issue that delegation clauses typically cover. *See, e.g.*, *Rent-A-Center*, 561 U.S. at 73–74; *Pinkerton*, 531 S.W.3d at 49. It is an attack on the arbitration agreement as a whole, not an attack on the delegation clause itself. Therefore, under the delegation clause, it is for an arbitrator to decide whether the arbitration agreement in unconscionable.

Kelly and Boogher's second validity challenge fares no better. Their argument that Missouri law prohibits arbitration agreements in insurance contracts targets the arbitration agreement as a whole, and not the delegation clause specifically. (*See* Appellees' Br. 41–43.) Thus, their basis for challenging arbitrability is founded on their overall challenge to the Member Guide as an illegal insurance policy. So the question of whether the arbitration agreement is valid is for the arbitrator under the delegation clause. *See Soars*, 563 S.W.3d at 115–17; *Pinkerton*, 531 S.W.3d at 51; *see also Arment*, 2018 WL 5921369, at *2;

Astarita, 2018 WL 5928061, at *4–5; *TD Auto Fin.*, 609 S.W.3d at 770–71.

Kelly and Boogher rely on the Fourth Circuit's decision in *Minnieland Private Day School, Inc. v. Applies Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 457 (4th Cir. 2017), to support their argument that the district court—not the arbitrator—should decide whether the Sharing Ministry is insurance before sending the case to arbitration. (*See* Appellees' Br. 42–43.) But other courts have rejected the Fourth Circuit's reasoning.[9]

For example, in *Jackson v. Aliera Companies., Inc.*, No. 19-cv-1281, 2020 WL 4787990, at *2–4 (W.D. Wash. Aug. 18, 2020), a federal district court rejected much the same arguments Kelly and Boogher make here. It held that, under a delegation clause, it was for an arbitrator to decide whether a similar Washington statute precluding arbitration agreements in insurance invalidated the arbitration agreement in that case. *See id.*

[9] The validity of the *Minnieland* decision is particularly questionable given the Supreme Court's intervening decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). That decision makes clear that decisions about the merits of the claims in the case are strictly off limits when addressing arbitrability. *See generally id.*

The Third and Sixth Circuits have also reached a different conclusion. They have held that when it is unclear whether insurance was involved, it is "for the arbitrator to determine what the precise nature of the [instrument] is and whether it falls within [the statutory ban]." *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 146 (3d Cir. 2016); *accord Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, 590 F. App'x 482, 484–85 (6th Cir. 2014); *see also Nandorf v. Applied Underwriters Captive Risk Assurance Co.*, 410 F. Supp. 3d 882, 890 (N.D. Ill. 2019).

In sum, the Court's remand should be for further proceedings consistent with its decision. The district court should decide in the first instance the delegation question. But the correct answer to the delegation question is that an arbitrator should decide Kelly and Boogher's arbitrability challenges.

CONCLUSION

For these reasons, and those stated in Aliera's principal brief, the Court should vacate the district court's orders denying Aliera's motion to dismiss or to compel arbitration and Aliera's motion to alter or amend and remand for further proceedings regarding Aliera's motion to dismiss or compel arbitration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in 14-point Century Schoolbook, which is a proportionally spaced font that includes serifs.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system.

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