UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

THE ALIERA COMPANIES, INC., formerly known as ALIERA HEALTHCARE, INC., a Delaware corporation;
TRINITY HEALTHSHARE, INC., a Delaware corporation; and
ONESHARE HEALTH, LLC, formerly known as UNITY HEALTHSHARE, LLC and as KINGDOM HEALTHSHARE MINISTRIES, LLC, a Virginia limited liability corporation.

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO AMEND OR ALTER ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

After a full briefing, this Court properly denied Defendants' motion to compel arbitration, holding that the Plaintiffs never agreed to arbitrate. ECF No. 67 ("Order"), at 22. Defendants now move the Court, under Federal Rule of Civil Procedure 59(e), to alter or amend its Order.[1] The Court did not err, and Defendants fail to show any basis for such alteration or amendment.

Rule 59(e) motions may be granted when "the court has misapprehended the facts, a party's position, or the controlling law." *Nelson v. City of Albuquerque,* 921 F.3d 925, 929 (10th Cir. 2019) (quoting *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000)). Such motions are "not appropriate to revisit issues already addressed or advance arguments that could

[1] Defendants have also appealed the Order. ECF Nos.72, 73, 74.

have been raised in prior briefing." *Servants of the Paraclete,* 204 F.3d at 1012. There are three grounds that justify reconsideration: (1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Id*. A motion to reconsider is not, however, at the disposal of parties who want to "rehash old arguments." *National Business Brokers, Ltd. v. Jim Williamson Prods., Inc.*, 115 F. Supp. 2d 1250, 1256 (D. Colo. 2000).

Defendants claim there was clear error in both the Court's understanding of the facts and its application of the law. They merely rehash the same arguments they have already made, and do not identify either facts or law that the Court got wrong. Nor do they identify relevant factual disputes that control the issue of whether an arbitration agreement was formed, and there is no basis for a trial on the issue. The motion should be denied.

II. THE COURT DID NOT MISUNDERSTAND THE FACTS

As this Court correctly held, Defendants had the burden of demonstrating that the Plaintiffs entered into a contract to arbitrate. *Smith v. Multi-Financial Sec. Corp.,* 171 P. 3d 1267, 1270 (Colo. App. 2007). They had the burden of demonstrating mutual assent and consideration. *Industrial Prods. Int'l v. Emo Trans, Inc.,* 962 P.2d 983, 988 (Colo. App. 1997) (an enforceable contract requires mutual assent to an exchange for legal consideration). This Court correctly held, based on Defendants' own evidence, that Plaintiffs did not agree to arbitrate. That evidence is undisputed.

First, the Plaintiffs signed an enrollment form in which they agreed to a "Statement of Beliefs." By signing, they agreed that Aliera could immediately, and then monthly, charge their bank account or credit card, and they agreed to certain "Terms and Conditions" set forth in that form. ECF Nos. 50-5, 55-2; 55-3. The "Terms and Conditions" did not mention arbitration. The enrollment form referenced "guidelines" that were not made available and were not linked to the enrollment form. The form stated that the guidelines were "not a contract." ECF No. 50-5, at 4 ("I

understand that the guidelines are not a contract….); 55-3, at 4 (same); 55-2, at 5 (the Guidelines "do not constitute an agreement, a promise to pay, or an obligation to share."). The forms did not advise that these "not a contract" guidelines would actually contain a binding agreement to arbitrate. Instead, the form advised the guidelines would tell them "what type of expenses are eligible for sharing requests," ECF No. 55-2, at 5, or advised that they "are for [Unity's] reference in following the Membership Escrow Instructions." ECF No. 55-3, at 4; 50-5, at 4.

Second, after entering into the agreement with Defendants and paying their application and first month's membership fee, each Plaintiff then received a "welcome email." ECF Nos. 50-2, 50-6, 50-8, 50-11. The email advised the new members to "become familiar with the benefits of your membership," and that guides, which Defendants claim were provided by a link from the email, would tell the new member "everything you need to know regarding your healthcare plan." *Id*. The email did not advise the members that the guide would contain a binding arbitration agreement or any other terms to which they would be deemed contractually committed. The email did not advise Plaintiffs to read the guide immediately and that if they did not agree with the arbitration clause, they should immediately cancel their membership, or that they would receive a full refund if they cancelled. It did not require Plaintiffs to express assent to new terms presented for the first time in the guide, to click a button that they "agree to" the new terms, or to otherwise indicate assent to the arbitration clause. Plaintiffs did not receive the actual physical copy of the guides in the mail until after their memberships went into effect. *Id*. (The guides "will arrive at your mailing address within 14 business days after your plan's effective date.").

Third, the member guides that Plaintiffs eventually received in the mail disclaimed any contractual commitment. As this Court noted, the guidelines stated they "do not create a legally enforceable right on the part of any contributor." Order, at 18, quoting ECF No. 50-3, at 12. The Court properly held that the member guides Plaintiffs received after they had entered into their membership agreements were not themselves contracts. It held that the defendants "cannot

disavow the contractual nature of the guides and then expect the Court to enforce the arbitration clauses in these supposed non-contracts." Order, at 18.

Defendants now claim the Court misunderstood the guides. They claim there was mutuality because, although these guides imposed no obligation on Defendants to pay healthcare costs, they were obliged to "consider" members' share requests. ECF No. 69, at 2. Defendants retained sole discretion, however, to decide whether such requests would be paid. ECF No. 50-5, at 15 ("Unity is the "final authority for the interpretation of these guidelines"), and at 22 ("Aliera reserves the right to interpret the terms of this membership to determine the level of medical services received hereunder."). Members who have very real healthcare needs receive no benefit when Defendants merely "consider" share requests, and the promise to "consider" those requests is illusory. In *Sentinel Acceptance Corp. v. Colgate*, 424 P. 2d 380, 382 (Colo. 1967), the seller promised to pay the buyer for "qualified" demonstrations to prospects referred by the buyer. The court held the promise was illusory because it left the seller with the sole discretion to determine whether a demonstration was "qualified" and would trigger payment. There was no mutuality, and the agreement was inoperative. Here, too, Defendants' obligation to unilaterally "consider" payment is an illusory promise and provides no consideration for an agreement to arbitrate.

Defendants cite no issue of material fact that would require a trial on contract formation. The Court based its decision on Defendants' own undisputed documents. Defendants claim, however, that the Court erred in deciding the agreement was limited to the enrollment forms and conversations with Aliera representatives, and that there should be a trial to determine the scope of the agreement. ECF No. 69, at 3. Defendants' claim is both wrong and irrelevant. It is clear that

the Court did not limit the scope of the agreement, at this point, to the enrollment forms.[2] It held 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 …)." Order, at 18. It then held, "[w]hatever 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***." Order, at 18 (emphasis added). The question before the Court on this motion is whether Plaintiffs agreed to arbitrate. The undisputed evidence shows that Plaintiffs accepted the offer to enroll in the healthcare plans before they were provided notice of arbitration, and that no arbitration agreement was formed.

III. THE COURT MADE NO LEGAL ERROR

Defendants claim the Court erred in applying the law of incorporation by reference. ECF No. 69, at 6. They fail, however, to explain how the Court erred. Under Colorado law, "for an incorporation by reference to be effective, 'it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'" *Taubman Cherry Creek Shopping Ctr., LLC, Neiman-Marcus Grp., Inc.*, 251 P.3d 1029, 1095 (Colo. App. 2010) (quoting 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 30.25, at 234 (4th ed. 1999)). The facts are undisputed that Plaintiffs were not advised of the existence of, much less provided with the terms of the arbitration clause when they entered into their healthcare plan agreements. Defendants did not incorporate by reference the arbitration terms merely by referencing "guidelines" that they described as "not a contract" and that were not provided to Plaintiffs before

[2] It is not true, as Defendants claim, that the enrollment forms do not outline medical expenses eligible for sharing. The beginning of the Unity enrollment forms state: "Hospitalization, Emergency Room, In-Patient, and Out-Patient procedures are covered, once the Member Shared Responsibility Amount has been met. The Per Incident limit is $500,00 sharing amount, capped at $1,000,000 lifetime sharing amount." ECF No. 50-5, at 2; 55-3, at 2. The Trinity form defined pre-existing conditions and provided that they were not covered for 24 months, and that certain other services required a 60-day wait period. ECF No. 55-2, at 2.

they entered into their agreement. As the Court noted in its Order, Plaintiffs had no way of knowing the arbitration clause existed, and the only reference to the member guide before enrollment stated that the guide was not binding. Order, at 21.

There was no manifest error in concluding as a matter of law that the arbitration provision was not incorporated by reference. Defendants cite no law that the Court misapplied. *Liquid Magnetix Corp. v. Therma-Stor, LLC,* NO. 13-cv-3151-WJM-KMT, 2014 WL 1389984 (D. Colo. Apr. 9, 2014), the only new authority Defendants cite for their incorporation argument, does not support them. In that case, the reference in the contract to the incorporated terms and conditions informed plaintiff where such terms and conditions could be located. This Court already distinguished *Vernon v. Qwest Comm'ns Int'l, Inc.,* 925 F. Supp. 12d 1185, 1191 (D. Colo. 2013), for the same reason—plaintiffs there had access to the Subscriber Agreement and received repeated instructions and warnings to access and review it. Order, at 20. In this case, however, the terms and conditions were not provided until after Plaintiffs entered into the agreements. "A party cannot agree to terms that are not included in or made available through the offer." *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.,* 872 F. Supp. 2d 1191, 1199 (D. Colo. 2012) (standard terms and conditions that were mentioned during negotiations but that were not made available by an internet link until after the parties' contract was formed did not become a part of the parties' contract*). See also, United States ex. Re. DDC Interiors v. Dawson Constr. Co.,* 895 F. Supp. 270, 273 (D. Colo. 1995) (subcontract did not incorporate by reference the dispute clause in the prime contract merely by incorporating by reference the "plans, specifications and amendments" to the prime contract).

Defendants also claim that the Court misapplied Colorado law regarding acceptance by performance, once again arguing that Plaintiffs could have stopped paying for their healthcare plans after they received their member guides. This is the same argument they already made and that the Court already rejected. Order, at 20-22. The only different authority they now cite is

Terlizzi v. Altitude Mktg., Inc., No. 16-cv-1712-WJM-STV, 2018 WL 2196090 (D. Colo. May 14, 2018). In that case, however, the plaintiffs signed a loan agreement that stated in all caps: "THIS AGREEMENT CONTAINS AN ARBITRATION PROVISION …" Plaintiffs there were also repeatedly informed that they had no obligation under the loan agreement until they drew on the loan by using a "shopping pass" they were sent, and that use of this pass would constitute acceptance of all the terms of the loan agreement. They received the full arbitration provision before they accepted the agreement by using the shopping pass. *Terlizzi* provides no support for the argument that Plaintiffs' payment of membership fees was acceptance of the arbitration provision when they had no notice of that provision before they joined and paid, and were never notified that continued payment of monthly fees would constitute agreement to a binding arbitration contract found in a "guide" that was described as "not a contract."

IV. CONCLUSION

Plaintiffs request that the Court deny the Motion to Alter or Amend the Order Denying Defendants' Motion to Compel Arbitration.

Respectfully Submitted: June 1, 2021.

s/ Eleanor Hamburger

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CERTIFICATE OF SERVICE

I certify that on June 1, 2021, I electronically filed the foregoing PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO AMEND OR ALTER ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

s/ Eleanor Hamburger
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