IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

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

Defendants The Aliera Companies Inc. ("Aliera"), Trinity Healthshare, Inc. ("Trinity"), and OneShare Health, LLC (f/k/a Unity HealthShare, LLC and referred to herein as "Unity") respectfully move pursuant to Fed. R. Civ. P. 59(e) to alter or amend the Court's April 16, 2021 Order ("Order," ECF No. 67), which denied Defendants' Combined Motion to Compel Arbitration ("Arbitration Motion") (ECF No. 50). Pursuant to D.C.COLO.LCivR 7.1(a), the parties have conferred regarding this Motion, which Plaintiffs oppose.

Defendants respectfully submit that the Court misapprehended controlling facts and law, which resulted in manifest errors of fact and law. *See Fisher v. Am. Family Mut. Ins. Co.*, No. 17-cv-01949-MEH, 2018 WL 4491423, at *1 (D. Colo. Sept. 19, 2018) (stating that granting a

Rule 59(e) motion is appropriate "where the court has misapprehended the facts, a party's position, or the controlling law") (citing *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)); *see generally Kirzhner v. Silverstein*, No. 09-cv-2858-RBJ, 2012 WL 1222368, at *2 (D. Colo. Apr. 10, 2012) (granting motion for partial reconsideration of order, citing Rule 59(e)). Accordingly, Defendants request that the Court alter or amend the Order by granting the Arbitration Motion. Defendants further state as follows in support of this Motion.

I. THE ORDER ERRED ON THE FACTS

With regard to errors of fact, respectfully, the Court erred in several respects. First, the Court misinterpreted ECF No. 50-3, a Unity Member Guide discussed in the Court's Order. (Order at 18.) The quoted language from the Unity Member Guide recited in the Court's Order (and similar language in the Trinity Member Guide) does not mean that the member guides are not enforceable contracts. Instead, it means that the member guides contain "an outline for eligible needs," and these outlined needs do not create a legal obligation in favor of a contributor – members, such as Plaintiffs – to enforce the outlined eligible needs as a binding contract. Fairly construed in context of the Member Guide and HCSM membership, the language relied upon by the Court does not negate the existence of any enforceable rights created by the membership, but rather recognizes that because Unity is a health care sharing ministry and not an insurance company, the guidelines do not constitute an insurance contract and thus do not give the member a right of indemnity. Even though members such as Plaintiffs do not have a contractual right to payment or indemnification of medical expenses as they would under an insurance contract, there are numerous binding aspects of the member guides. For example, ECF No. 50-3 binds Unity to (i) consider members' submitted share requests for consideration pursuant to the outline

of eligible needs, (ii) act as a clearing house that administers sharing of outlined eligible needs in accordance with the HCSM membership's established sharing guidelines; and (iii) participate in the appeals process, including arbitration. (ECF No. 50-3, at ECF 4, 12, 18.)

While the member guides are enforceable agreements, the agreement is for the HCSM to act as a facilitator of medical expense sharing among its members pursuant to member guidelines. In doing so, no indemnity obligation is assumed by the HCSM and thus there is no contractual right for members to have their medical expenses paid or indemnified that exists under an insurance contract.

If, however, the Court is not convinced of the above interpretation, then it should order a trial on the issue of what is the parties' contract and whether it contains an arbitration provision to resolve what the Court views as a dispute of fact. *See* 9 U.S.C. § 4 (Section 4 of the Federal Arbitration Act) (explaining that the court shall proceed to a summary trial "if the making of the arbitration agreement . . . be in issue"). *See also, e.g., Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977-78 (10th Cir. 2014) (Gorsuch, J.) (reversing denial of motion to compel arbitration for failure to conduct trial under FAA Section 4 where there was a disputed fact issue on contract formation).

The Court also erred when it found as a matter of law that the parties' contract consists only of the application emails signed by each Plaintiff, and unidentified conversations with various Aliera representatives about the sharing programs prior to signing the application emails. (*See, e.g.*, Order at 15, 17, 18.) Respectfully, the finding does not accord with the record.

The application emails clearly contemplate the member guides as controlling the parties' agreement and do not evidence that the application emails are the only applicable documents

governing the parties' relationship. For example, Plaintiff Larson's Unity application email refers to the document as an "application [f]or membership." (ECF No. 50-5, at ECF 4.) Further, the application email does not contain an outline of medical needs that are eligible for sharing – instead, those are found in Larson's Unity Member Guide (and the other Plaintiffs' applicable member guides).

Further, Plaintiffs could not claim here that the application emails are the entirety of the parties' agreement because Plaintiffs' Amended Complaint is based significantly on the member guides. For example, Plaintiffs' Claim for Illegal Contract is based on the member guides as allegedly illegal because the member guides supposedly contain inconsistent and contradictory coverage terms. This claim alleges that the member guide constitutes an insurance plan that is illegal under the Colorado insurance code, and Plaintiffs use these allegations to invoke C.R.S. § 10-3-1116 to argue that the arbitration provision is invalid. (*See* Am. Compl., ECF No. 38-1, ¶¶ 125-128.) Plaintiffs quote the member guides in their Amended Complaint as support for their allegation that the "products" are "insurance," "equivalent to insurance" and "look, feel, and convey the impression that they are equivalent to insurance." (*Id.* ¶¶ 126, 63-64, including all subparagraphs thereto.) Plaintiffs' breach of fiduciary duty counts also quote the member guides and claim that they imposed fiduciary duties on Defendants that were breached. (*Id.* ¶¶ 129-150.) Plaintiffs' Appendix 28 is an EOB for Plaintiff Larson, evidencing that she made requests for sharing in certain medical expenses. As noted earlier, the application emails do not include an outline of eligible medical expenses – but the member guides do. Plaintiffs' claimed relief includes a request that the Court find that "Defendants' unauthorized health insurance plans were and are illegal contracts" and should be either rescinded or reformed to comply with

applicable insurance codes. (*Id.* at Prayer for Relief, pp. 34-35.) Yet, Plaintiffs attacked the enforceability of the arbitration clause by relying in part on (and misapplying) language in the member guide that disclaims any insurance contract and is directly at odds with their substantive claim that this was an illegal insurance contract subject to Colorado insurance law. (*Id.* ¶ 126). The Court should have rejected, not accepted, Plaintiffs' arbitration arguments that contradict their substantive claims.

Moreover, should Plaintiffs' Prayer for Relief be construed as applying to the various application emails, no reasonable person could believe that the six-page application emails were what they purchased as insurance plans. Indeed, the application emails consist mostly of general health questions, an affirmation of statement of beliefs, and disclaimers of what is not included in the program. They do not include an outline of medical expenses that are eligible for sharing. They do not include language that Plaintiffs contend has the "look and feel like health insurance." (Am. Compl. ¶ 13; *see also, e.g.,* Larson's Unity application email, ECF No. 50-5.)

Again, however, if the Court is not persuaded that the applicable member guides are the parties' contract, it should order a trial on the issue of what is the parties' contract and whether it contains an arbitration provision to resolve what the Court views as a dispute of fact. *See* 9 U.S.C. § 4.

II. THE ORDER ERRED ON THE LAW

With regard to errors of law, respectfully, the Court misapplied Colorado law that provides acceptance may be created by performance of terms. *See Terlizzi v. Altitude Mktg., Inc.*, No. 16-cv-1712-WJM-STV, 2018 WL 2196090, at *7 (D. Colo. May 14, 2018) ("Acceptance may be shown 'by act or conduct.'" (quoting *Linder v. Midland Oil Ref. Co.*, 40 P.2d 253, 254

(Colo. 1935)). Plaintiffs signed the application emails, which indicated their agreement to join the sharing ministry and recognized that the member guides outline the types of medical expenses eligible for sharing (as well as otherwise detailing the parties' rights and obligations). Each Plaintiff received the applicable Unity and/or Trinity Member Guides prior to the effective date of their membership. Plaintiffs could have stopped making voluntary monthly contributions at any time. By choosing to continue to submit monthly sharing contributions many times over after receiving their member guides, Plaintiffs accepted the terms of the member guides as governing the parties' relationship. *Id.*

Additionally, respectfully, the Court did not properly apply Colorado law regarding incorporation of documents by reference. There is no requirement that Plaintiffs had to sign a specific document reciting the appeals language and including arbitration provisions. *See E-21 Eng'g, Inc. v. Steve Stock & Assocs., Inc.*, 252 P.3d 36, 39 (Colo. App. 2010). Instead, pursuant to the FAA, the parties' agreement has to be in writing. The member guides are in writing. They are part of the parties' agreements, and they were effectively incorporated by reference. *See Liquid Magnetix Corp. v. Therma-Stor, LLC*, No. 13-cv-3151-WJM-KMT, 2014 WL 1389984, at *2 (D. Colo. Apr. 9, 2014).

Not only were the applicable member guides incorporated by reference, but also the application emails put Plaintiffs on inquiry notice as to the guidelines – the member guides. The application emails are replete with references to the guidelines, and it is inconsistent with Colorado law to find that these numerous references were for naught and did not put Plaintiffs on inquiry notice of the terms and conditions contained in the applicable member guides. *See Terlizzi*, 2018 WL 2196090, at *8 (citing *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d

Cir. 2012) (an offeree is bound by a contractual term, even absent actual notice, "if he or she is on *inquiry* notice of the term and assents to it through conduct that a reasonable person would understand to constitute assent" (emphasis in original).[1]

III. CONCLUSION

For the above reasons, Defendants respectfully request that the Court alter or amend its Order on the Defendants' Combined Motion to Compel Arbitration, and grant that Motion.

Respectfully submitted, this 11th day of May, 2021.

s/ Sarah R. Craig
Sarah R. Craig
BURR & FORMAN, LLP
One Tampa City Center
201 North Franklin Street, Suite 3200
Tampa, FL 33602
Telephone: (813) 367-5766
scraig@burr.com

Robert H. Rutherford
Elizabeth B. Shirley
BURR & FORMAN, LLP
420 North 20th Street, Suite 3400
Birmingham, AL 35203
Telephone: (205) 251-3000
rrutherford@burr.com

[1] The Order (pp. 20-22) distinguishes *Vernon v. Qwest Communications International, Inc.*, 857 F. Supp. 2d 1135 (D. Colo. 2012), *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013); *Wagner v. Discover Bank,* No. 12-cv-2786-MSK-BNB, 2014 WL 128372 (D. Colo. Jan. 13, 2014); and *Martinez v. TCF National Bank*, No. 13-cv-3504-PAB-MJW, 2015 WL 854442 (D. Colo. Feb. 25, 2012). While *Wagner* and *Martinez* are distinguished by reference to the Court's conclusion about the disavowal of the member guide being part of the agreement, if the Court were to reconsider that finding for the reasons discussed in Section I above, then Defendants respectfully contend that the Court's analysis in *Wagner* and *Martinez* should control. As for *Vernon*, Defendants respectfully submit that the references to the guidelines in the application in this case, the ability of the Plaintiffs to review the member guide before the effective dates (and cancel and request refunds), and Plaintiffs' decision to continue participation for many months thereafter, aligns this case with *Vernon*, as well as with *Wagner* and *Martinez*. Accordingly, as in those cases, the arbitration agreements here should be enforced.

bshirley@burr.com

Attorneys for Defendant The Aliera Companies, Inc.

s/ Laurin D. Quiat
Laurin D. Quiat
Matthew C. Baisley
BAKER & HOSTETLER LLP
1801 California Street, Suite 4400
Denver, CO 80202-2662
Telephone: (303) 861-0600
Fax: (303) 861-7805
lquiat@bakerlaw.com
mbaisley@bakerlaw.com

Attorneys for Defendant Trinity Healthshare, Inc.

s/ Jon F. Sands
Jon F. Sands
Marilyn S. Chappell
Sweetbaum Sands Ramming PC
1125 Seventeenth Street, Suite 2100
Denver, Colorado 80202
Telephone: (303) 296-3377
jsands@sweetbaumsands.com
mchappell@sweetbaumsands.com

Kyle G.A. Wallace
SHIVER HAMILTON LLC
3490 Piedmont Road, Suite 640
Atlanta, Georgia 30305
Telephone: (404) 593-0020
Fax: (888) 501-9536
kwallace@shiverhamilton.com

Attorneys for Defendant OneShare Health, LLC (f/k/a Kingdom and Unity)

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2021, I electronically filed the foregoing **DEFENDANTS' MOTION TO ALTER OR AMEND ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION** with the Clerk of the Court using the CM/ECF system which will email the foregoing to the following:

Laurin D. Quiat
Matthew C. Baisley
Baker & Hostetler LLP
1801 California Street, Suite 4400
Denver, CO 80202
lquiat@bakerlaw.com
mbaisley@bakerlaw.com

Sarah R. Craig
Burr & Forman LLP
One Tampa City Center
201 North Franklin Street, Suite 3200
Tampa, FL 33602
scraig@burr.com

Robert H. Rutherford
Elizabeth B. Shirley
BURR & FORMAN, LLP
420 North 20th Street, Suite 3400
Birmingham, AL 35203
rrutherford@burr.com
bshirley@burr.com

Victoria E. Lovato, Esq.
Michael Best & Friedrich LLP
1776 Lincoln Street, Suite 1100
Denver, CO 80203
velovato@michaelbest.com

Patrick Bernal, Esq,
Michael Best & Friedrich LLP
8300 Arista Place, Suite 300
Broomfield, CO 80021
pjbernal@michaelbest.com

Eleanor Hamburger
Richard E. Spoonemore

SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC
3101 Western Avenue, Suite 350
Seattle, WA 98121
ele@sylaw.com
rick@sylaw.com

Michael David Myers
MYERS & COMPANY PLLC
1530 Eastlake Avenue East
Seattle, WA 98102
mmyers@myers-company.com

s/ Megan MacLennan