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TRINITY HEALTHSHARE, INC.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CORLYN DUNCAN and BRUCE DUNCAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE ALIERA COMPANIES INC., formerly known as Aliera Healthcare, Inc., a Delaware corporation; and TRINITY HEALTHSHARE, INC., a Delaware corporation,

Defendants.

Case No.: 2:20-cv-867-TLN-KJN

[*Assigned to the Hon. Troy L. Nunley*]

DEFENDANT TRINITY HEALTHSHARE, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT, OR ALTERNATIVELY, COMPEL INDIVIDUAL ARBITRATION

Hearing
Date: August 20, 2020
Time: 2:00 p.m.
Ctrm: 2

Action Filed: April 28, 2020

TO THE HONORABLE COURT, TO ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 20, 2020 at 2:00 p.m. in Courtroom 2 of the above-referenced Court, located at 501 I Street, Sacramento, California 95814, Defendants Trinity Healthshare, Inc. ("Trinity") will, and hereby does, move to dismiss Plaintiffs Corlyn Duncan and Bruce Duncan (collectively, "Plaintiffs") Class Action Complaint, with prejudice, pursuant to Federal Rules of Civil Procedure 12(b)(1) for lack of standing.

In the alternative and to the extent that any claims remain, Trinity will, and hereby does, move this Court for an order compelling mediation and individual arbitration and dismissing all surviving claims asserted against Trinity in the Complaint pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and Federal Rule of Civil Procedure 12(b)(3) because Plaintiffs agreed to mediate and arbitrate all disputes with Trinity.

In the alternative, Trinity moves to dismiss Plaintiffs' claims against Trinity, in whole or in part, pursuant to Rule 12(b)(6) for failure to state a claim, and pursuant to Rule 9(b) for failure to plead fraud with particularity.

This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, all evidence submitted in support thereof and all evidence for which the Court may take judicial notice, any oral argument of counsel heard by the Court, and all other information as may be presented to the Court.

Dated: June 10, 2020

Respectfully Submitted,

BAKER & HOSTETLER LLP

By: */s/ Elizabeth M. Treckler*
Elizabeth M. Treckler

Attorneys for Defendant
TRINITY HEALTHSHARE, INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Trinity Healthshare, Inc. ("Trinity"), by and through its undersigned attorney, files this memorandum in support of its motion to dismiss all claims asserted against Trinity in Plaintiffs' Class Action Complaint, [Doc. 1], under Federal Rule of Civil Procedure 12(b)(1) for lack of standing. In the alternative and to the extent any claims remain, Trinity requests that the Court compel individual arbitration and dismiss all surviving claims asserted against Trinity in the Complaint pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and Federal Rule of Civil Procedure 12(b)(3) because Plaintiffs agreed to arbitrate all disputes with Trinity. In the alternative, Trinity moves to dismiss Plaintiffs' claims against Trinity, in whole or in part, pursuant to Rule 12(b)(6) for failure to state a claim, and pursuant to Rule 9(b) for failure to plead fraud with particularity.

II. STATEMENT OF FACTS

A. Trinity Is A Faith-Based Health Care Sharing Ministry That Does Not Sell Or Purport To Sell Insurance.

Trinity operates a not-for-profit faith-based organization that facilitates the voluntary sharing of medical needs among its members, referred to as Health Care Sharing Ministry ("HCSM"). *See* [Doc. 1] ¶ 3; *id.*, App. D [Doc. 1-5] at member guide pp. 2-3, 14-18; A. Joseph Guarino, III, Declaration ("Guarino Decl."), ¶¶ 3-4, Exh. 1. HCSMs, like Trinity, provide consumers that have committed to specific religious or ethical beliefs a faith-based alternative and/or supplement to health insurance. Trinity's "members agree to [a] Statement of Beliefs and voluntarily submit monthly contributions into a cost-sharing account [for the sharing of medical expenses] with Trinity HealthShare, acting as a neutral clearing house between members." [Doc. 1], App. D [Doc. 1-5] at 3.

As disclosed and detailed in its member guides, Trinity's health care sharing program is not insurance and Trinity does not offer or purport to offer the same member benefits as insurance products. *See id.*, App. D [Doc. 1-5] at 1, 2-3, 14-18, 26-30, 36-47. Trinity does not indemnify its members or contract to reimburse its members for medical expenses. *See id.* at 2-3,

5, 14-16, 40-41; *see also* Guarino Decl., ¶¶ 5-6. Trinity does not undertake to indemnify its members against loss, damage, or liability arising from a contingent or unknown event. *See* [Doc. 1], App. D [Doc. 1-5] at 2-3, 5, 14-16, 40-41; Guarino Decl. at ¶ 7. Trinity's members instead adhere to a common set of religious beliefs and share one another's medical costs in accordance with those beliefs. *See* Doc. 1], App. D [Doc. 1-5] at 2-3, 5, 14-16, 40-41. In addition to being a faith-based membership, Trinity clearly discloses to its members in its member guides (and on its public website) that it is not insurance and the limits on each of its sharing programs, such as lifetime and annual limits and waiting periods for certain pre-existing conditions. *See id.* at 1, 2-3, 14-18, 26-30, 36-47; *see also* https://www.trinityhealthshare.org/.

B. Plaintiffs' General Allegations.

Contrary to the clear disclosures provided to Trinity' members, the gravamen of Plaintiffs' Complaint is that "Defendants sold unfair and deceptive health care plans to California residents." *See, e.g.*, [Doc. 1] ¶ 8. These programs were allegedly "unfair and deceptive" because they: (a) "look" like insurance; (b) provide too-little coverage for members; and/or (c) inappropriately claimed to be part of a HCSM. *Id.*, ¶¶ 10-13, 15-16, 44-45, 49-54. Plaintiffs allege the programs "qualify as insurance" while failing to meet applicable insurance regulations. *See, e.g., id.*, ¶¶ 12, 15, 23, 58-63. But Trinity can discern no direct relationship between these general allegations in the Complaint and the individual claims of the named plaintiffs against Trinity. *See id.*, ¶¶ 66-77.

C. The Duncans Joined Unity's Sharing Ministry in November 2017 and Did Not Become Members of Trinity's Sharing Ministry until June 1, 2019.

As alleged in the Complaint, on November 28, 2017, Plaintiffs Corlyn Duncan and Bruce Duncan (the "Duncans") voluntarily enrolled in a catastrophic health care sharing program with Unity HeathShare, LLC, ("Unity"), an entity unaffiliated with Trinity, that was administered by defendant The Aliera Companies, Inc., f/k/a Aliera Healthcare, Inc. ("Aliera"). [Doc. 1] ¶ 66; *see also id.*, Apps. E [Doc. 1-6] and H [Doc. 1-9].

The Duncans allege that"[o]n March 16, 2018, Ms. Duncan required surgery." [Doc. 1] ¶ 74. As alleged in the Complaint, only part of the cost of the March 2018 surgery was shared by

Unity and the Duncans still owe more than $70,000 to the hospital. *Id.*, ¶ 75. The Duncans allege that, by telephone, they unsuccessfully attempted to appeal the decision by Unity not to share further in the expenses for the March 2018 surgery. *Id.*, ¶ 76. The last communications the Duncans allege they received regarding the dispute over the March 2018 medical expenses are an Explanation of Benefits dated April 26, 2019, *id.*; *id.*, App. L [Doc. 1-13] (only reflecting dates of service of "03/16-03/17/2018")), and a May 22, 2019 letter from Aliera, *id.*; *id.*, App. M [Doc. 1-14]. The March 2018 surgery is the only expense and physician service in the Complaint for which the Duncans allege they were improperly denied reimbursement. *See* [Doc. 1] ¶¶ 66-77.

In late 2018, litigation was filed in Georgia which sought and on December 28, 2018 obtained a temporary restraining order against Aliera to prohibit automatic account rollover from Unity to Trinity for all HCSM programs as of August 10, 2018 (which included the Duncans' program with Unity) and that also precluded the commingling of any assets relating to Unity program members with any other assets of Aliera or Trinity. *See* [Doc. 1] ¶ 38; *id.*, App. A [Doc. 1-2] at p. 16; *see also* Guarino Decl., ¶ 10. Ex. 1. On April 25, 2019, the same Georgia court entered an interlocutory injunction which prohibited Aliera from unilaterally transferring members, like the Duncans, from Unity to Trinity and also appointed a receiver to oversee the Unity legacy accounts. *See* [Doc. 1] ¶ 38; *id.*, App. A [Doc. 1-2] at pp. 28-30. The injunction was not directed at Trinity, and the Georgia court held that Aliera was free to solicit Unity members to sign up with or receive products/services from Trinity and Unity members were "free to make their own decision as to whether to terminate or change their plan and which HCSM they wish to associate with, if any." *See id.* at p. 28. Aliera was directed to segregate all Unity HCSM assets (defined as "the member funds that are properly allocated to the Unity HCSM component of member plans") to an account over which the receiver had access and oversight, enabling the receiver to oversee and ensure that the Unity HCSM member funds were being properly administered and used to share in member requests consistent with the Unity members' plan documents. *See id.* at pp. 27, 29-30.

The Duncans remained members of Unity's HCSM until mid-2019, when the Duncans voluntarily chose to switch from the Unity HCSM, and instead join Trinity's HCSM program. In

May 2019, Aliera, who administered Unity's HCSM, sent a notice to certain legacy Unity members, including the Duncans, informing them of an opportunity to transition to Aliera's new HCSM partner, Trinity. [Doc. 1] ¶ 69; *id.*, App. I [Doc. 1-10]. More than a year after Ms. Duncan's March 2018 surgery, on May 13, 2019. Mr. Duncan authorized Aliera to change the Duncans' Unity sharing program to a Trinity sharing program, with the switch effective the next billing cycle on June 1, 2019 (and a waiver of one-month's contribution included). [Doc. 1] ¶ 69; *id.,* App. I [Doc. 1-10]; Guarino Decl. at ¶¶ 15-16, Ex. 2 (Plan Update Authorization Form). Mr. Duncan agreed that, effective June 1, 2019, the Duncans' "coverage on the existing [Unity] plan will be terminated, and coverage on the new [Trinity] plan will initiate." *Id.* The Duncans terminated their membership in Trinity's HCSM effective December 31, 2019. [Doc. 1] ¶ 1; *see also* Guarino Decl. at ¶ 18.

Trinity has no record of ever denying a share request from the Duncans for eligible services performed between June 1, 2019 and December 31, 2019. Guarino Decl., ¶ 19.

D. The Duncans Agreed to Mediate and Then, If Necessary, Arbitrate Any Dispute They Had with Trinity.

The Duncans allege that they enrolled in Trinity's HCSM and had a contractual relationship with Trinity. [Doc. 1] ¶¶ 1, 58 69, 79-80 (seeking rescission or reformation of contract). When Mr. Duncan voluntarily switched the Duncans' program from Unity to Trinity in May 2019, he affirmed that he "understands and agrees to all fees, regulations, and limitations of the above said plan." Guarino Decl. at ¶ 15, Ex. 2. As evident from the Complaint, the Duncans remained on the Trinity sharing program and continued to make contributions for six months (one month waived) after being provided the membership guide. *See* [Doc. 1] ¶¶ 70, 72.

As a condition of becoming members of Trinity's HCSM, each of the Duncans agreed to the specific dispute resolution provisions of the Trinity member guide and agreed to resolve and "settle" "any dispute … with or against Trinity HealthShare, its associates, or employees" under those defined procedures. [Doc. 1], App. D [Doc. 1-5] at pp. 31-32. The process is multi-tiered providing for an appeal process for sharing request issues, then mediation, if necessary, then, if

necessary, a final dispute resolution procedure of arbitration. *Id*. The Trinity Member Guide provides (under the heading "DISPUTE RESOLUTION AND APPEAL"), in relevant part:

> **Mediation and Arbitration.** If the aggrieved sharing member disagrees with the conclusion of the Final Appeal Panel, then the matter shall be resolved by first submitting the disputed matter to mediation. ***If the dispute is not resolved the matter will be submitted to legally binding arbitration in accordance with the Rules and Procedure 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 decision. …
>
> 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. at p. 32 (emphasis added).[1] Plaintiffs failed to comply with this dispute resolution process by not exhausting the appeals process, engaging in mediation, or engaging in arbitration with Trinity. *See generally* [Doc. 1] ¶¶ 66-77.

III. LEGAL ARGUMENT

A. The Court Should Dismiss the Claims Against Trinity Pursuant to Rule 12(b)(1) For Lack of Standing.

1. Legal Standard.

Because standing pertains to a federal court's subject-matter jurisdiction, lack of standing is properly raised in a motion to dismiss under Rule 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "[J]urisdictional attacks can be either facial or factual." *Id.* A facial attack challenges only the complaint's allegations, and therefore, like with a Rule 12(b)(6) motion, the court is to presume the allegations are true. *See id.* However, where a defendant submits a factual attack, "a court may look beyond the complaint to matters of public record without having to

[1] As part of the arbitration agreement, Trinity also agrees to "pay the filing fees for the arbitration and arbitrator in full at the time of filing." [Doc. 1], App. D [Doc. 1-5] at 32.

convert the motion into one for summary judgment" and the Court is not required to "presume the truthfulness of the plaintiffs' allegations." *Id.*

Standing to sue is a doctrine rooted in the traditional understanding of a "case or controversy," and to establish it a plaintiff must demonstrate that she "(1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). To do so, Plaintiffs must show that they suffered "an invasion of a legally protected interest that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 36 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 36 S. Ct. at 1549. "[P]ossible future injury [is] not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal citations and quotations omitted). Where based on the possibility of future harm, that harm must be imminent such that it is "*certainly impending*." *Id.* (emphasis original). "[F]ears of hypothetical future harm that is not certainly impending" do not confer standing. *Id.*, at 416.

To meet the standing requirement for seeking relief under Plaintiffs' California's Unfair Competition Law ("Second Claim") or False Advertising Law ("Third Claim") counts, Plaintiffs must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1048 (9th Cir. 2017) (quoting *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 246 P.3d 877, 885 (2011) (emphasis in original)). Plaintiffs' Breach of Fiduciary Duty count ("Fourth Claim") requires "damage proximately caused by" the alleged breach of duty. *See Yamauchi v. Cotterman*, 84 F.Supp.3d 993, 1016 (N.D. Cal. 2015) (identifying elements of breach of fiduciary duty under California law). Similarly, for their Unjust Enrichment count ("Fifth Claim") to the extent such count is asserted

against Trinity,[2] Plaintiffs must establish "unjust retention" of a benefit by Trinity "at the expense of" the Duncans. *Peterson v. Cellco P'ship,* 164 Cal.App.4th 1583, 1593 (2008). Plaintiffs must also demonstrate an "injury in fact" or a "real and immediate threat" which the Court could redress with its equitable powers for their Illegal Contract count ("First Claim"), which seeks rescission or reformation. *See, e.g., Bhatia v. United States,* No. C 08-04208 SBA, 2008 WL 4830702, at *4 (N.D. Cal. Nov. 6, 2008), *aff'd,* 376 F. App'x 785 (9th Cir. 2010); *Stevens v. Harper,* 213 F.R.D. 358, 366 (E.D. Cal. 2002); *Langford v. Gates,* 610 F. Supp. 120, 122 (C.D. Cal. 1985).

2. The Duncans Lack Standing for Their Claims Against Trinity.

The Duncans lack standing to sue *Trinity* for any of their claims because the only "injury-in-fact" that the Duncans allege in the Complaint is for the failure of *Unity* to fully share in the medical expenses that Ms. Duncan incurred in March 2018, more than a year before the Duncans joined Trinity's HCSM. *See* [Doc.1] ¶¶ 74-77. The Duncans concede that they enrolled in Unity's HCSM in November 2017, *id.,* ¶ 66, and did not begin their relationship with Trinity until, at the earliest, May 2019, *id.,* ¶ 69. *See also* Guarino Decl. at ¶¶ 15-16, Ex. 2. Because the only specific injury that the Duncans allege they suffered is for expenses incurred in March 2018, none of that alleged injury is fairly traceable to the conduct of Trinity or establishes a "case or controversy" with Trinity.

The count allegations further demonstrate that the Duncans lack standing against Trinity for those claims as each is premised on an alleged injury from denial of a sharing request. First, the alleged violation of California's Unfair Competition Law ("Second Claim") alleges injury for denial of care and "excuses not to pay [] claims, or to unreasonably delay in the payment of the claims." *See* [Doc. 1] ¶ 86. The alleged violation of California's False Advertising Law ("Third Claim") likewise alleges injury for not providing the benefits offered or that should have been

[2] While the "Fifth Claim" for unjust enrichment refers to the plural "Defendants," the specific allegations of the count are directed only at Aliera, *see* [Doc. 1] ¶¶ 103-104 (alleging majority of payments going to "Aliera's fees, administrative expenses, and commissions), and the relief requested is limited to "disgorgement and restitution of all contributions ***Aliera*** unjustly retained," *see id.,* Prayer for Relief at (h) (emphasis added).

offered (i.e., sharing of medical expenses). *See id.*, ¶ 91. The alleged Breach of Fiduciary Duty count ("Fourth Claim") asserts that "Plaintiffs … have been arbitrarily denied claims for medical expenses" and Plaintiffs have been injured because "funds that should have been used to pay their claims" were not. *See id.*, ¶¶ 99, 101. The alleged Unjust Enrichment count ("Fifth Claim") similarly alleges Plaintiffs' contributions were "retained" while their medical claims were "arbitrarily den[ied.]" *See id.*, ¶ 105. But there are no factual allegations in the Complaint supporting that Trinity denied or delayed in sharing in any eligible expenses incurred while the Duncans were members of Trinity's HCSM or that Trinity improperly used funds that should have been paid to the Duncans or that Trinity improperly retained contributions made by the Duncans to Trinity while arbitrarily denying any of their sharing requests. As the Duncans' only denied (or limited) sharing requests alleged in the Complaint relate solely to the March 2018 surgery and the alleged failure by Unity (or Unity's administrator Aliera) to fully share in those expenses, the Duncans lack standing to sue *Trinity* for each of its claims.

The Duncans attempt to overcome their lack of standing by asserting in conclusory fashion that Trinity purportedly "assumed responsibility for claims made under the Unity brand." [Doc.1] ¶ 70. Not only does this unsupported statement defy common sense—that Trinity would simply agree to "assume" the alleged liabilities of a wholly separate and unaffiliated company and one that is effectively a competitor[3]—the naked conclusion is also belied by the facts. Trinity did not assume any responsibility or commitment for sharing medical expenses that were incurred by its members prior to them becoming members of Trinity's HCSM. Guarino Decl. at ¶ 13. Rather, what occurred is that the Duncans terminated their coverage under the Unity program as of May 31, 2019, and then started new coverage under the Trinity program, effective June 1, 2019. *Id.* at ¶¶ 15-16, Ex. 2; [Doc. 1] ¶ 69; *id.*, App. A at p. 28 (explaining that legacy Unity members could elect "whether to terminate or change their plan and which HCSM they wish to associate with, if any"). As established in the Georgia litigation, the Unity programs did not cease to exist; all the available Unity HCSM member funds contributed through Aliera

[3] *See* Guarino Decl. at ¶ 8.

(including contributions from the Duncans) were segregated and put under oversight of a receiver to ensure that the Unity HCSM member funds were being properly administered and used to share in member requests consistent with the Unity members' plan documents. [Doc. 1], App. A at pp. 27, 29-30; *see also* Guarino Decl. at ¶¶ 12-13, 17. Any contributions the Duncans made before June 1, 2019 thus went to and remained with Unity and the Duncans must look to Unity for reimbursement of any eligible sharing expenses that they incurred while members of Unity. *See id.* at ¶¶ 13, 17.

None of the other claim allegations support that the Duncans suffered any other injury-in-fact that is fairly traceable to the conduct of Trinity. For example, while Plaintiffs' Unfair Competition Law ("Second Claim") and False Advertising Law ("Third Claim") counts identify a litany of purported general misrepresentations by "Defendants," *see* [Doc. 1] ¶¶ 83, 88-89, there are no specific non-conclusory factual allegations supporting that any of these purported misrepresentations were *made to* the Duncans by Trinity or that the Duncans relied on any such representations, *see id.*, ¶¶ 69-72,[4] let alone that any such purported misrepresentations by Trinity *caused economic injury* to the Duncans. *Van Patten*, 847 F.3d at 1048. Similarly, contrary to the conclusory allegations in paragraphs 75 and 76 of the Complaint, Trinity did not pay anything toward (or have any obligation to pay) the cost of Ms. Duncans' March 2018 surgery and Trinity did not deny any "appeal" from the Duncans concerning payment of those services because the Duncans were not members of Trinity's HCSM at that time. The same applies to any other purported conduct that the Duncans allege occurred before June 1, 2019 or related to Ms. Duncan's March 2018 surgery—none of it involves or concerns Trinity's HCSM.

The Duncans thus lack standing to pursue any of their claims against Trinity and the claims should be dismissed.

[4] Both counts merely include the identical conclusory and generic allegation that "[m]embers of the public are likely to be, and have been, deceived by these unfair and unlawful practices." [Doc. 1] ¶¶ 84, 90. But absent from the complaint are any allegations concerning the Duncans.

B. In the Alternative, the Court Should Dismiss the Claims Against Trinity and Compel Mediation and Arbitration.

1. Legal Standard.

The FAA, enacted in 1925, manifests a long-standing "strong federal policy in favor of enforcing arbitration agreements."[5] *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985). Specifically, section 2 of the Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has further explained that the FAA is a congressional command instructing "federal courts to enforce arbitration agreements according to their terms . . . ." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). "The court's role under the [FAA] is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostics Sys.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citations omitted); *see Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir. 1999) ("the district court can determine only whether a written arbitration agreement exists, and if it does, enforce it in accordance with its terms") (citation omitted). Because arbitration is favored, the party challenging the enforceability of an arbitration agreement "bear(s) the burden of proving that the provision is unenforceable." *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

If the arbitration provision is valid, the validity of the remainder of the contract is for the arbitrator to decide. *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012). Where an arbitration agreement exists, any doubts concerning the arbitrability of a claim must be

[5] Because the sharing guidelines and transfer of contributions are between California residents, [Doc. 1] ¶ 1, and a Georgia entity, *id.*, ¶ 3, the relationship involves interstate commerce, and the FAA governs. *See* 9 U.S.C. § 2. The Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citation omitted). The Court has further explained the phrase "evidencing a transaction" means only that the transaction turns out to have involved interstate commerce, "even if the parties did not contemplate an interstate commerce connection." *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277–81 (1995).

resolved in favor of arbitration. *Moses H Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). And in circumstances like here, where the agreement incorporates "the Rules and Procedure of the American Arbitration Association," [Doc. 1], App. D [Doc. 1-5] at p. 32, the question of arbitrability of a claim is delegated to the arbitrator. *See Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1061 (9th Cir. 2018) (explaining "[i]n *Brennan* [*v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)], we decided that, at least in a contract between sophisticated parties, the 'incorporation of the AAA rules [into an arbitration agreement] constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.'").

2. <u>In the Alternative, the Court Should Compel Mediation and Arbitration and Dismiss the Duncans' Complaint or Stay the Litigation.</u>

As alleged in the Complaint, the only relationship between Trinity and the Duncans is through an alleged contractual relationship that began when the Duncans joined the Trinity HCSM as members and agreed to the program's sharing guidelines. The core allegation of every one of the Duncans' claims is that a request for reimbursement of a medical expense was denied or unreasonably delayed. *See* [Doc. 1] ¶¶ 8, 74-75, 79, 86, 91, 99, 101, 105. Thus, to the extent the claims concern the Duncan's membership in Trinity, every claim asserted in the Complaint involves a "controversy or claim arising out of the Sharing Guidelines." *See* [Doc. 1], App. D [Doc 1-5] at p. 31-32; *see Chiron Corp.*, 207 F.3d at 1131 (recognizing that "[a]ny dispute, controversy or claim arising out of or relating to" provision is "broad and far reaching" in scope). But for the program's sharing guidelines, the Duncans would not have made voluntary contributions as part of their membership, the Duncans would not be seeking rescission or reformation, and the Duncans would not be complaining about Trinity's allegedly wrongful actions in connection with its HCSM.

That the Duncans allege "illegal contract" and tort claims, including under California's Unfair Competition law and False Advertising law, does not alter the conclusion that the Duncans' claims all arise out of the sharing guidelines and their membership in Trinity's HCSM and fall within the arbitration agreement. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*,

546 U.S. 440, 449 (2006) (finding challenge to a contract as illegal is subject to arbitration under the FAA); *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 931, 938 (9th Cir. 2013) (finding claims under California's unfair competition law and false advertising law were subject to arbitration under the FAA and the FAA preempts California's *Broughton–Cruz* rule); *Boyko v. Benning Fin. Grp., LLC*, 737 F. Supp. 2d 1140, 1143-45 (E.D. Cal. 2010) (compelling arbitration of claims including breach of fiduciary duty).

Consequently, the mediation and arbitration agreement applies to all claims and disputes asserted in the Complaint against Trinity. And Plaintiffs cannot appropriately argue that they did not agree to the dispute resolution provision by merely claiming that they received the member guide after they enrolled. By making continued contributions for months under the member guide after they voluntarily switched to Trinity's HCSM and until they terminated their membership in December 2019, *see* [Doc. 1] ¶¶ 1, 70, 72; Guarino Decl. at ¶¶ 15-16, Ex. 2, Plaintiffs affirmed their assent to the agreement to mediate and arbitrate. *See, e.g., Mangahas v. Barclays Bank Del.*, No. SACV 16-00093 JVS, 2016 WL 11002179, at *2 (C.D. Cal. May 9, 2016) (citation omitted) (enforcing agreement to arbitrate and finding mutual assent manifested by objective acts, including assent to terms and conditions provided after initial credit card application); *Gonzales v. Credit One Bank, N.A.*, No. 19-CV-00733-DAD-BAM, 2020 WL 1274268, at *4 (E.D. Cal. Mar. 17, 2020) (compelling arbitration where plaintiff received arbitration agreement after signing up for credit card).

To the extent the Duncans have any legitimate surviving disputes with Trinity, the Court should dismiss the Complaint and require that the Duncans first, as a condition precedent to filing litigation, mediate those disputes with Trinity. *See, e.g., Delamater v. Anytime Fitness, Inc.*, 722 F. Supp. 2d 1168, 1180–81 (E.D. Cal. 2010); *Brosnan v. Dry Cleaning Station Inc.*, No. C-08-02028 EDL, 2008 WL 2388392, at *1 (N.D. Cal. June 6, 2008); *RLED, LLC v. Dan Good Distrib. Co.*, No. CIV. S-08-851 LKK/DAD, 2008 WL 11389039, at *6 (E.D. Cal. Aug. 29, 2008); *B & O Mfg., Inc. v. Home Depot U.S.A., Inc.*, No. C 07-02864 JSW, 2007 WL 3232276, at *8 (N.D. Cal. Nov. 1, 2007).

In the alternative, the Court should compel Plaintiffs to arbitrate any disputes remaining with Trinity pursuant to the binding arbitration provision. [Doc. 1], App. D [Doc. 1-5] at pp. 31-32. Any challenges by Plaintiffs to the arbitrability of those claims should also be determined by an arbitrator for several reasons.

First, Plaintiffs cannot properly challenge the validity of the arbitration provision by asserting that the Trinity sharing program itself, which includes the provision in its member guide, is "illegal." In *Buckeye Check Cashing, Inc. v. Cardegna*, where the borrowers sought to avoid arbitration by asserting that the loan agreements containing the arbitration provisions were illegal contracts because they violated Florida's usury laws, the Supreme Court rejected this argument, holding that where a party advances a challenge to "the validity of the contract as a whole, and not specifically to the arbitration clause," the challenge "must go to the arbitrator." *Id.*, 546 U.S. at 449; *see also Preston v. Ferrer*, 552 U.S. 346, 353-54 (2008) (holding that an arbitrator had to decide a contractual dispute even though one of the parties alleged that the contract containing the arbitration provision was illegal under California law); *Bridge Fund Capital, Corp. v. Fastbacks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010) (explaining that to escape an obligation to arbitrate, the plaintiff has to base the challenge on "reasons independent of any reasons the remainder of the contract might be invalid").

Second, all issues as to the validity or enforceability of the Trinity arbitration provision have been delegated to the arbitrator by incorporation of the rules of the American Arbitration Association. *See* [Doc. 1], App. D [Doc. 1-5] at p. 32. Both the Supreme Court and the Ninth Circuit have concluded that such incorporation delegates all gateway issues to the arbitrator, whether expressly stated in the agreement or incorporated by reference in arbitral body rules, and provides clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72-73 (2010); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (collecting cases).

Finally, Plaintiffs cannot properly challenge the arbitration provision if such challenge will require the Court to decide an ultimate merits issue in the case, such as whether Trinity's sharing program is "insurance," *see* [Doc. 1] ¶ 79. As the Supreme Court explained in *Henry*

Schein, Inc. v. Archer & White Sales, Inc., a court seeking to determine whether a claim should be arbitrated "may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator." *Id.*, 139 S.Ct. 524, 529 (2019) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649-50 (1986)); *see also S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 840 F.3d 138, 146 (3d Cir. 2016) (concluding it was for the arbitrator, not the court, to decide the "precise nature" of whether the transactions at issue constituted insurance); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769-70 (8th Cir. 2011) (concluding that an arbitrator, pursuant to a delegation clause incorporating AAA rules, had to decide whether claims were exempt from the FAA on the grounds that the plaintiffs were "transportation workers," the ultimate merits issue in the case).

Because all surviving claims asserted against Trinity are subject to arbitration pursuant to the dispute provision of the Trinity member guide (i.e., the "Sharing Guidelines"), any such disputes with Trinity should be mediated and then, if necessary, decided in arbitration. This Court has the authority to, and should, dismiss all surviving claims asserted against Trinity and compel the Duncans to mediation and arbitration. If the Court does not dismiss all of the claims asserted against Trinity, then, pursuant to § 3 of the FAA (9 U.S.C. § 3), the Court should also "stay the trial of the action until…arbitration has been had in accordance with the terms of the agreement…." *Id.*

C. In the Alternative, the Court Should Dismiss the Claims Against Trinity Pursuant to Rule 12(b)(6) For Failure to State a Claim.

1. Legal Standard.

To survive a Rule 12(b)(6) motion to dismiss, a "plaintiff must allege enough facts to state a claim for relief that is plausible on its face." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (internal quotation marks omitted). "[C]onclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal." *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009) (internal quotation marks omitted). A plaintiff's complaint must offer "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint's "basic deficiency . . . should be exposed at the point of minimum expenditure of

time and money by the parties and the court." *Id.* at 558 (citations omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

2. In the Alternative, the Duncans' Statutory Claims Should be Dismissed.

If not subject to dismissal for lack of standing or arbitration, the Duncans' fraud or misrepresentation-based claims under California's Unfair Competition Law ("Second Claim") and False Advertising Law ("Third Claim") should be dismissed pursuant to Rule 12(b)(6) and failure to meet the pleading requirements of Rule 9(b). Rule 9(b) requires a party to state with particularity the circumstances constituting fraud or mistake when alleging the same, Fed. R. Civ. P. 9(b), and requires a plaintiff to allege the "who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks and alterations omitted). The particularity requirement of Rule 9(b) applies to state-law causes of action and also extends to claims which sound in fraud and allege a unified course of fraudulent conduct. *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003). In particular, because Plaintiffs' Unfair Competition Law and False Advertising Law causes of action are grounded in fraud, the Complaint must satisfy 12(b)(6), as well as the heightened pleading requirements of Rule 9(b). *See Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018) (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)).

The Duncans' statutory claims fail to state a claim because, as alleged in the Complaint and demonstrated in the documents incorporated in the Complaint, none of the purported misrepresentations by Trinity *caused economic injury* to the Duncans. *See Van Patten*, 847 F.3d at 1048. The only damages and denied sharing request that the Duncans allege in the Complaint is the failure of *Unity* to fully share in the medical expenses that Ms. Duncan incurred in March 2018, more than a year before the Duncans joined Trinity's HCSM. *See* [Doc.1] ¶¶ 74-77.

The statutory claims also fail to state a claim because there are no allegations in the Complaint supporting that *Trinity* made any purported misrepresentations to the Duncans. Instead, Plaintiffs only list allegedly false statements of the "Defendants," and then assert without explanation that these statements caused them injury. *See* [Doc. 1] ¶¶ 83, 89. These are the very "threadbare" and "formulaic" recitals, especially as they relate to Trinity, that Rule 12(b)(6) prohibits. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. Plaintiffs do not allege what statements Trinity has ever made to anyone, including them.[6] Indeed, the only specific allegation of a representation made to the Duncans in the Complaint is a purported representation by Aliera in November 2017, "while Aliera was selling Unity-branded plans." [Doc. 1] ¶ 66. Moreover, for purposes of dismissal of these claims, the Complaint also specifically alleges that the Duncans *did not receive* "new insurance cards" until *after* they had made their decision to enroll with Trinity. [Doc. 1] ¶ 71. Thus, as the Complaint allegations establish, the Duncans could not have relied, and did not rely, on any statement concerning Trinity's "recognition" as a HCSM on the cards to *induce* them to switch their sharing program to Trinity in May 2019.

Plaintiffs' statutory claims also fail to satisfy Rule 9(b). Plaintiffs do not identify the party that made each of the alleged false or misleading statements. Instead, *every* allegation contained in Plaintiffs' statutory claims allege only that "Defendants" made false or misleading statements. *See* [Doc. 1] ¶¶ 82-83, 88-91. This is insufficiently particularized because Trinity and Aliera are separate corporate entities. *Id.*, ¶¶ 2-3. While Plaintiffs allude generally to the content of certain supposed fraudulent statements, *see id.*, ¶¶ 87-91, they also fail to provide any non-conclusory allegations describing what specific representations, if any, were made to them *by Trinity* or identify when or where any of these allegedly false or misleading statements were made. *See, e.g., Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117 (C.D. Cal. 2010) (holding consumer failed to plead with requisite particularity her claims against manufacturer, that its margarine packaging contained deceptive and false claims in violation of California's unfair

[6] The Duncans also affirmatively allege that Aliera is "*solely* responsible for the development of plan designs, pricing, *marketing materials*, vendor management, recruitment and maintenance of a sales force on behalf of Trinity." [Doc. 1] ¶ 4 (emphasis added).

competition law, false advertising law, and the Consumer Legal Remedies Act since she failed to allege when, where, and how alleged misrepresentations were communicated, whether she relied on packaging claims in choosing to purchase the margarine, and if so, which particular statements on which she relied).

Because the allegations in the Complaint pled to support the Duncans' statutory claims do not allege any misrepresentations *by Trinity* or reliance on any representations *by Trinity* or damages caused by *Trinity*, these claims all fail to state a claim against Trinity and should be dismissed pursuant to Rule 12(b)(6). Further, because these claims, which sound in fraud, fail to identify *any* representation by Trinity, these claims also fail to satisfy the particularity requirements of Rule 9(b) and should be dismissed on that independent basis as well.

3. <u>In the Alternative, the Duncans' Claim for Breach of Fiduciary Duty Should be Dismissed.</u>

The Duncans' Breach of Fiduciary Duty claim also fails to state a claim. First, Plaintiffs' fail to plead any "damage proximately caused by" an alleged breach of duty by Trinity. *See Yamauchi*, 84 F.Supp.3d at 1016. The only damages that the Duncans allege relates to reimbursement of Ms. Duncan's surgery in March 2018 when the Duncans were members of Unity's HCSM and more than a year before the Duncans joined Trinity's HCSM. *See* [Doc.1] ¶¶ 74-77. Second, the Duncans fail to plead any specific facts from which a factfinder could infer that Trinity breached its fiduciary duty. The Duncans' sole basis for alleging a breach of fiduciary duty is that "Defendants" "arbitrarily denied claims for medical expenses" and "funds that should have been used to pay their claims" were not. *See id.*, ¶¶ 99, 101. But the Duncans fail to allege a breach because they fail to allege *both* that they made any claims for reimbursement of eligible medical expenses *to Trinity* and they fail to allege any non-conclusory facts that *Trinity* denied any such claims. *See id.*, ¶¶ 66-77.

4. <u>In the Alternative, the Duncans' Claim for Unjust Enrichment Should be Dismissed.</u>

The Duncans' Unjust Enrichment claim should also be dismissed for failure to state a claim against Trinity. First, the specific allegations of the count are directed only at Aliera, *see*

[Doc. 1] ¶¶ 103-104 (alleging majority of payments going to "Aliera's fees, administrative expenses, and commissions), and the relief requested is limited to "disgorgement and restitution of all contributions ***Aliera*** unjustly retained," *see id.*, Prayer for Relief at (h) (emphasis added). As there are no specific allegations concerning Trinity and no relief sought from Trinity for "unjustly retained" contributions, this count fails to state a claim against Trinity.

Second, to the extent the unjust enrichment count is asserted against Trinity, Plaintiffs fail to plead "unjust retention" of a benefit *by Trinity* "at the expense of" the Duncans. *Peterson*, 164 Cal.App.4th at 1593. The Duncans allege, in general, that Plaintiffs' contributions were "retained" while their medical claims were "arbitrarily den[ied.]" *See* [Doc. 1] ¶ 105. But there are no factual allegations in the Complaint supporting that Trinity improperly retained contributions made by the Duncans to Trinity while arbitrarily denying any of their sharing requests. The only denied (or limited) sharing requests by the Duncans alleged in the Complaint relates solely to the March 2018 surgery and the alleged failure by Unity (or Unity's administrator Aliera) to fully share in those expenses. *See id.*, ¶¶ 74-77.

5. <u>In the Alternative, the Duncans' "Illegal Contract" Claim Should be Dismissed.</u>

The Duncans' "illegal contract" count ("First Claim"), which is essentially a claim for "rescission," should also be dismissed for failure to state a claim. Both of the equitable remedies sought fail based on the allegations of the Complaint.

First, the rescission remedy is premised on the contract being "illegal." [Doc. 1] ¶ 80(a). But California limits rescission in such circumstances to when "the contract is unlawful ***for causes which do not appear in its terms or conditions***, and the parties are not equally at fault." Cal. Civ. Code § 1689(b)(5) (emphasis added). Here, the terms (or absence of terms) that Plaintiffs allege make the sharing program "illegal health insurance plans," *see* [Doc. 1] ¶¶ 48-58, 60-62, 79, are all apparent from the face of the enrollment form and member guide, which Plaintiffs voluntarily elected to join in May 2019 after being a member of Unity's HCSM for a year and a half. *See id.*, App. D [Doc. 1-5] at pp. 3 ("This is not a legally binding agreement to reimburse any member for medical needs a member may incur…"), 14 ("[These guidelines] 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"), 26-27 (noting limits of sharing including lifetime limits and pre-existing conditions), 28-29 (providing list of services which are not eligible for sharing), 40-47 (providing various disclaimers that Trinity's program is not insurance); App. J [Doc. 1-11] at pp. 4-7 of 9 (similar disclaimers and explanations); Guarino Decl. at ¶¶ 15-16, Ex. 2. Because the Complaint fails to allege any non-conclusory facts supporting that Trinity's sharing programs were "unlawful for causes which do not appear in its terms or conditions" or that Plaintiffs were not "equally at fault," the "First Claim" based on rescission should be dismissed.

Second, and for similar reasons, the part of the claim based on reformation should be dismissed. Plaintiffs request that their sharing program be reformed "to comply with the mandatory minimum benefits and [insurance] coverage required under California and federal law." [Doc. 1] ¶ 80(b). But such terms and conditions were never intended by the parties to be part of the sharing program. And the Complaint lacks any factual allegations establishing that there was common intent for the sharing program to include such benefits and terms. Indeed, the enrollment form and member guide expressly disclaim such benefits and repeatedly state that Trinity's HCSM program is not insurance and that Trinity does not indemnify members or guarantee that members' medical expenses will be shared. *See id.*, App. D [Doc. 1-5] at front and back covers ("AlieraCare Plans are NOT Insurance"); *id.* at pp. 3 ("This publication or the membership does not guarantee or promise that your eligible medical needs will be shared by the membership"), 5 ("the AlieraCare membership is NOT health insurance"), 14 ("The Trinity Healthshare membership is not health insurance"), 26-27 (noting limits of sharing including lifetime limits and pre-existing conditions), 28-29 (providing list of services which are not eligible for sharing), 33-38 (describing limits and conditions of various plans, 40-47 (providing various disclaimers that Trinity's program is not insurance); App. J [Doc. 1-11] at pp. 4-7 of 9 (similar disclaimers and explanations). The equitable authority of the Court does not permit it to rewrite the terms of the parties' contract under principles of California law. *See Bailard v. Marden*, 36 Cal.2d 703, 708, 227 P.2d 10 (1951) ("Courts of equity have no power to make new contracts for the parties, ... [Nor] can they reform an instrument according to the terms in which

one of the parties understood it, unless it appears that the other party also had the same understanding.") (internal quotations omitted); *Spiegler v. Home Depot U.S.A., Inc.*, No. CV 07-4428 CAS AJW, 2008 WL 2699787, at *16 (C.D. Cal. June 30, 2008) (recognizing similar principle; concluding plaintiffs failed to state a claim for reformation). Plaintiffs "First Claim" based on reformation should also be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court grant its motion.

Dated: June 10, 2020

Respectfully Submitted,

BAKER & HOSTETLER LLP

By: */s/ Elizabeth M. Treckler*
Elizabeth M. Treckler

Attorneys for Defendant
TRINITY HEALTHSHARE, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CORLYN DUNCAN and BRUCE DUNCAN, individually and on behalf of all others similarly situated, Plaintiffs, v. THE ALIERA COMPANIES INC., formerly known as Aliera Healthcare, Inc., a Delaware corporation; and TRINITY HEALTHSHARE, INC., a Delaware corporation, Defendants.	CASE NO. 2:20-cv-867-TLN-KJN **DECLARATION OF A. JOSEPH GUARINO III** Hon. Troy L. Nunley

DECLARATION OF A. JOSEPH GUARINO III

I, A. Joseph Guarino III, under penalty of perjury, declare as follows pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am the President of Trinity Healthshare, Inc. ("Trinity"). I submit this declaration in support of Trinity's Motion to Dismiss or in the alternative Compel Arbitration filed in the above captioned matter.

2. I have personal knowledge of the matters set forth in this declaration, and I would be willing and able to testify to such matters.

3. Trinity is a tax exempt, non-profit organization as defined in Section 501(c)(3) of the Internal Revenue Code and is exempt from taxation under Section 501(a).

4. Trinity is a health care sharing ministry ("HCSM") that offers potential members options to participate in medical cost sharing programs. Trinity is not an insurance company and it does not provide health insurance to its members. Trinity facilitates the sharing of healthcare expenses by and among its members.

5. Trinity does not engage in the underwriting and spreading of risk for and among its members and does not indemnify members.

6. Trinity does not guarantee or promise that its members' medical expenses will be paid or contract to reimburse its members for medical expenses.

7. Trinity does not undertake to indemnify its members against loss, damage, or liability arising from a contingent or unknown event.

8. Trinity is not, and has never been, affiliated or a part of Unity Healthshare ("Unity"). Unity is also a HCSM and, effectively, Trinity and Unity are competitors. Aliera Healthcare, Inc. ("Aliera") was a previous service provider to Unity.

9. I have personal knowledge that on December 14, 2018, in relation to pending litigation between Aliera and Unity in Georgia, Unity sought a temporary restraining order against Aliera which formally sought to prohibit any automatic transfer of Unity members to Trinity.

10. I have personal knowledge that on December 28, 2018, the court overseeing that litigation formally entered an order, attached to this declaration as Exhibit 1, which prohibited Aliera from transferring legacy Unity members to Trinity.

11. I have personal knowledge that on April 25, 2019, the same court entered an additional order, attached to the complaint as Exhibit A [Doc. 1-2], which prohibited Aliera from unilaterally transferring legacy Unity accounts to Trinity. That order also expressly permitted Aliera and Unity to "solicit the Unity HCSM plan members under the traditional confines of fair competition." [Doc. 1] at 28. The Court stated that the "Unity HCSM plan members are free to make their own decision as to whether to terminate or change their plan and which HCSM they wish to associate with, if any." *Id.*

12. I have personal knowledge that, as a result of the April 25, 2019 order, Aliera was directed to segregate all of the Unity member funds that were properly allocated to the Unity HCSM component of member plans to an account over which a receiver had access and oversight, in order to enable the receiver to oversee and ensure that the Unity HCSM member funds were being properly administered and used to share in member requests consistent with the Unity members' plan documents.

13. In 2019, some legacy Unity members were provided the option to terminate their Unity HCSM program and voluntarily change to join Trinity's HCSM program. For those legacy Unity members that elected to switch to Trinity's HCSM program, Trinity did not assume any responsibility or commitment for sharing medical expenses that were incurred by those members prior to them becoming members of Trinity's HCSM. The legacy Unity members' contributions made before their enrollment with Trinity's HCSM program remained with Unity under the oversight of the appointed receiver in the Georgia litigation.

14. It is my understanding that Corlyn and Bruce Duncan ("Plaintiffs") have filed a complaint against Trinity.

15. I have reviewed the Duncan's "Plan Update Authorization Form," attached to this declaration as Exhibit 2, and confirm that the Duncans authorized transitioning their membership from Unity to Trinity on May 13, 2019.

16. I have reviewed the member report for the Duncans and I confirm that the Duncans became active Trinity members on June 1, 2019.

17. Any contributions the Duncans made before June 1, 2019, while Unity members, remained with Unity.

18. The Duncans terminated their membership with Trinity on December 31, 2019.

19. Based on a reasonable investigation, I confirm that Trinity has never denied a sharing request from the Duncans for eligible expenses incurred while they were members of Trinity's HCSM (between June 1, 2019 and December 31, 2019).

I hereby certify under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

Executed in Atlanta, Georgia this 10th day of June, 2020.

A. Joseph Guarino III
President
Trinity Healthshare, Inc.

Exhibit 1

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

ALIERA HEALTHCARE, INC.,	)	
	)	
Plaintiff/Counterclaim Defendant,	)	
v.	)	Civil Action File
	)	No. 2018CV308981
ANABAPTIST HEALTHSHARE; UNITY HEALTHSHARE, LLC,	)	
	)	
Defendants/Counterclaimants,	)	Bus. Case Div. 1
	)	
ALEXANDER CARDONA; and TYLER HOCHSTETLER,	)	
	)	
Defendants.	)	

ORDER ENTERING
TEMPORARY RESTRAINING ORDER

Upon due and careful consideration of Defendants-Counterclaimants Anabaptist Healthshare's and Unity Healthshare LLC's ("Unity") (collectively, "AHS/Unity") Motion for Temporary Restraining Order with its accompanying Memorandum of Law, exhibits attached thereto, Affidavit of Tyler Hochstetler, and reply brief submitted in support, as well as Aliera's responsive briefing, exhibits, and affidavits in opposition, and applicable law and authorities, the Court finds that a Temporary Restraining Order is appropriate under the circumstances and should be entered in this case to maintain the existing status quo concerning the Unity HCSM plans and avoid any irreparable harm until the Court can hold a full evidentiary hearing on AHS/Unity's Application for Interlocutory Injunction and for Appointment of a Receiver.

In entering this Temporary Restraining Order, the Court is not making any determination on the merits of the parties' claims and the contract dispute at issue, but only finds at this initial stage, for the reasons set forth in the briefing and submission of the parties, that AHS/Unity has made a sufficient showing of the necessary elements to warrant the entry of this Temporary Restraining Order to prevent Aliera from completing the January 1, 2019 transition of Unity HCSM plans and members to Trinity Healthshare, LLC, so that the Court can conduct a full evidentiary hearing to determine whether an interlocutory injunction should be entered and a receiver appointed over the Unity HCSM plans during the pendency of this litigation.

Accordingly, the Court **ORDERS** that:

(1) Aliera Healthcare Inc. ("Aliera") is hereby **ENJOINED** from transitioning any Unity HCSM members and plan assets to Trinity HealthShare LLC while this Temporary Restraining Order is in effect;[1]

(2) Aliera is **ORDERED** to maintain the status quo with respect to the Unity HCSM plans until further Order of this Court. As such, Aliera is **ORDERED** to maintain the Unity HCSM plan assets that are presently in its possession or that come into its possession while this Temporary Restraining Order is in effect in a separate account, and not commingle such plan assets with any other assets of Aliera or Trinity, and to administer claims under the Unity HCSM plans in accordance with the plan documents; and

[1] This includes all members of Unity HCSM plans as of the August 10, 2018 termination of the parties' Agreement who remain HCSM members as of the date of this Order.

(3) Aliera is **ORDERED** to use electronic means to notify as many Unity HCSM plan members as possible by January 1, 2019, that they will not automatically move to Trinity effective January 1, 2019, as previously stated in Aliera's November 15, 2018 electronic correspondence (and any other similar correspondence that Aliera has provided to members), but rather will remain on their current plans until further notice unless they choose to discontinue their participation in their current Unity HCSM plan. Specifically, in making these notifications by January 1, 2019, Aliera is **ORDERED** to use all of the same means of notification that it used for its November 15, 2018 email attached as Exhibit 10 to AHS/Unity's Motion for Temporary Restraining Order. Furthermore, Aliera is **ORDERED** to use the same membership roster as used in those communications, only excluding any members who have since terminated their HCSM plans. For any Unity HCSM plan members that are not notified through electronic or other means by January 1, 2019, Aliera is **ORDERED** to notify all such remaining members by First Class U.S. Mail or other means no later than five (5) business days from the date of issuance of this Order.

[*Order continues on the following page*]

(4) The notifications required by (3) above shall state as follows, in their entirety:

"Dear Member,

No Action Is Required

This is to notify you that, until further notice, your healthcare cost sharing ministry plan ("HCSM") is not being transitioned to Trinity Healthshare, LLC on January 1, 2019, as we had indicated in prior correspondence. This is only to notify you that your plan will remain a Unity HCSM plan at this time. All plan features will remain the same with no changes and you will retain the same Member ID number.

Sincerely, Aliera."

Aliera shall not modify or substantively add to this notification in any way. If Aliera receives any inquiries about the notification, Aliera shall inform the member, broker, agent, or other inquiring person that none of the terms and conditions of the Unity HCSM plan have changed, but the plan is currently the subject of a dispute between Aliera and AHS/Unity, and the Court that is handling the dispute has issued a Temporary Restraining Order requiring Aliera to maintain the plan as a Unity HCSM plan until further notice. Aliera is permitted to also provide the case caption, court, and case number to anyone who seeks further information, but Aliera shall not otherwise discuss the dispute and litigation with any members, brokers, or agents, or engage in any efforts to persuade any of the Unity HCSM plan members, or any of their brokers or agents, to move these members over to Trinity.

(5) Aliera is **ORDERED** to provide notice of this Order within three (3) business days of its issue to its officers, agents, servants, employees, attorneys, and anyone acting in concert or participation with them with respect to the Unity HCSM plans (including without limitation officers, agents, servants, employees, and attorneys of Trinity), and this Order shall also be binding on such persons with respect to the Unity HCSM plans.

This order shall remain in effect until further order of the Court but shall not exceed thirty (30) days from the entry of this order pursuant to O.C.G.A. § 9-11-65(b). The Court will hold a hearing on **January 22, 2019 beginning at 10:00 AM** on AHS/Unity's Application for an Interlocutory Injunction and for the Appointment of a Receiver as well as a hearing on the parties' claims seeking declaratory relief. *See* O.C.G.A. §§ 9-11-65(b), 9-4-3, 9-4-5.

The foregoing hearing will be held in Courtroom 9J of the Fulton County Courthouse, 136 Pryor Street, 9th Floor, Atlanta, Georgia 30303. A court reporter will not be provided. If the parties wish for the hearing or any other court proceeding to be taken down, counsel must confer and make appropriate arrangements to have a court reporter present.

IT IS SO ORDERED at 11:51 a.m. on this 28th day of December, 2018.

Alice D. Bonner

HONORABLE ALICE D. BONNER
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

Prepared and presented by[2]:

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[2] Edited by the Court.

Exhibit 2

Plan Update Authorization Form

Important Information About Your Plan Update:

Aliera is no longer selling your current healthcare plan with Unity HealthShare, LLC component. We do have a new plan available through our alliance with Trinity HealthShare that offers the same plan services and benefits.

Plus, the following track with each member:

- Medical history and historical claims
- Payments toward member shared responsibility amount (MSRA)
- Time spent on the plan

Member Information:

Last Name: Duncan	First Name: Corlyn	MI:	Date of Birth: 10-29-59
Member ID: 672555982			

Acknowledgement:

I hereby authorize Aliera Healthcare to change my current Aliera/Unity plan to an equivalent Aliera/Trinity plan and receive the first month's payment will be waived.

I, the Primary Account Holder, understands and agrees to all fees, regulations, and limitations of the above said plan. Effective the next billing cycle, I understand that my coverage on the existing plan will be terminated, and coverage on the new plan will initiate.

Signature: DocuSigned by: Bruce K Duncan 7A43A2E93BAE4EA...	Printed Name: Bruce K Duncan
Date: 5-13-19	

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CORLYN DUNCAN and BRUCE DUNCAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE ALIERA COMPANIES INC., formerly known as Aliera Healthcare, Inc., a Delaware corporation; and TRINITY HEALTHSHARE, INC., a Delaware corporation,

Defendants.

Case No.: 2:20-cv-867-TLN-KJN

[*Assigned to the Hon. Troy L. Nunley*]

[PROPOSED] ORDER GRANTING TRINITY HEALTHSHARE, INC.'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT, OR ALTERNATIVELY, COMPEL INDIVIDUAL ARBITRATION

Hearing
Date: August 20, 2020
Time: 2:00 p.m.
Ctrm: 2

Action Filed: April 28, 2020

ORDER

The Court, having considered Defendant TRINITY HEALTHSHARE, INC.'s Motion to Dismiss Plaintiffs' Complaint, or Alternatively Compel Individual Arbitration, and finding that good cause has been shown, hereby orders that the above-captioned action is:

Dismissed against Trinity, in its entirety, with prejudice and without leave to amend based on Plaintiffs' lack of standing.

[*alternatively*]

Compelled to individual arbitration of all claims against Trinity and stayed, in its entirety, until resolution of the arbitration.

[*alternatively*]

Dismissed against Trinity, in its entirety, for failure to state a claim against Trinity.

IT IS SO ORDERED.

Dated: _____

_____
HONORABLE TROY L. NUNLEY
UNITED STATES DISTRICT JUDGE