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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., f/k/a Aliera Healthcare, Inc., and TRINITY HEALTHSHARE, INC., ONESHARE HEALTH, LLC, f/k/a UNITY HEALTH SHARE, LLC and as KINGDOM HEALTHSHARE MINISTRIES, LLC,

Defendants.

CASE NO. 2:20-CV-867-TLN-KJN

DEFENDANTS' RESPONSE TO NOTICES OF SUPPLEMENTAL AUTHORITY

HON. TROY L. NUNLEY

Complaint Filed: April 28, 2020
Amended Complaint Filed: June 26, 2020

Defendants The Aliera Companies Inc. ("Aliera"), Trinity Healthshare, Inc. ("Trinity"), and OneShare Health, LLC ("OneShare") file this response to Plaintiffs' Notices of Supplemental Authority, which introduce irrelevant decisions from other jurisdictions. (Docs. 54, 54-1, 57, & 57-1). The First Notice attaches an interlocutory order from a Washington state administrative agency. (Doc. 54-1). That order, analyzing Washington law and involving only Aliera, is subject to multiple levels of appeal before it becomes final in Washington. Because the First Notice presents a decision that has no bearing on the dispute before this Court, Defendants move to strike the First Notice.

The Second Notice attaches a decision of a federal court in Missouri not involving OneShare. (Doc. 57-1). Aliera and Trinity have moved to alter or amend that decision and appealed it to the Eighth Circuit Court of Appeals. The Missouri court further applied Missouri law to the particular facts presented in that case – facts and law that are distinct from those presented here. Defendants therefore move to strike the Second Notice as well.

I. BACKGROUND

Pending before this Court are Defendant The Aliera Companies Inc.'s Motion to Dismiss or in the Alternative, to Compel Arbitration (Doc. 36), OneShare Health, LLC's Motion to Compel Arbitration, or in the Alternative Motion to Dismiss (Doc. 37), and Trinity Healthshare, Inc.'s Motion to Dismiss, or Alternatively, Motion to Compel Individual Arbitration (Doc. 38). These motions have been fully briefed and submitted to the Court without oral argument. (Doc. 49).

After the motions were submitted to the Court, Plaintiffs filed a motion to file a sur-reply to Aliera and OneShare's motions, which Defendants opposed. (Docs. 50 &51). Plaintiffs then filed their two Notices of Supplemental Authority. Defendants' position is that the Duncans' dispute should be heard in arbitration. In an apparent attempt to distract this Court from the arbitration agreement and law that controls the issues before this Court in this case, the Duncans submitted as supplemental authority two unrelated decisions with no bearing on the factual and legal questions of whether they agreed to arbitrate disputes with Defendants.

II. ARGUMENT

A. Legal Standard.

The local rules do not state that parties are entitled to provide notice of supplemental authority regarding motions that have been taken under submission, without first obtaining leave from the court. *Larson v. Harman-Mgmt. Corp.*, No. 116CV00219DADSKO, 2018 WL 3326696, at *1 (E.D. Cal. June 29, 2018). Plaintiffs did not obtain prior leave in this matter.

B. The Washington Insurance Commissioner Decision Has No Bearing Here.

The First Notice, attaching a decision by the Washington Office of the Insurance Commissioner decision ("OIC"), has no application here. The proceeding involved only Aliera as a party, but the OIC made factual findings at the summary judgment stage regarding Trinity. (The Washington OIC decision in no way applies to OneShare). The factual findings and legal conclusions involved the OIC's interpretation of Washington's insurance statutes. The issue discussed in the First Notice – whether a Washington agency interpreting Washington law believes products sold by Aliera to be health insurance – is not the question before this Court. Thus, the Notice serves only to confuse and distort the matters ripe for resolution. That decision has no bearing on the question of whether the Duncans agreed to arbitrate their disputes with Defendants. Whether products marketed and sold by Aliera in the state of California are health insurance under California law is a merits question expressly reserved to the arbitrator for resolution.

Moreover, the order is subject to multiple levels of appeal, which Aliera is presently pursuing, and did not involve the same parties, law, issues or facts involved here. Accordingly, it has no preclusive effect in the matter before this Court.

There can be no indiscriminate presumption of judicial adequacy of state administrative proceedings. *Plaine v. McCabe*, 797 F.2d 713, 718–19 (9th Cir. 1986). Rather, "[t]he federal court must carefully review the state administrative proceeding to ensure that, at a minimum, it meets the state's own criteria necessary to require a court of that state to give preclusive effect to the state agency's decisions." *Id.* Here, there is no question that California courts applying California law are not bound by a Washington state administrative agency applying Washington law. Moreover,

neither Trinity nor OneShare was involved in the Washington decision, and therefore, they have not had the opportunity to litigate the matter, a predicate for any issue preclusion. Simply put, the OIC decision has no application to matters of California law involving different parties, different law, and different legal burdens, particularly on the question of whether the parties formed a valid agreement to arbitrate under California law.

C. The Missouri Decision Has No Bearing Here.

In the Second Notice, Plaintiffs introduce a decision from the Western District of Missouri denying motions to dismiss or compel arbitration in a case involving Aliera and Trinity, but not OneShare. Aliera and Trinity filed a motion to alter or amend the decision of that court's order, which is currently subject to briefing. They also filed a Notices of Appeal to the Eighth Circuit Court of Appeals and a Motion to Stay proceedings and discovery pending resolution of the Motion to Alter or Amend and the appeal. *See* Exhibit A attached hereto (Motion to Alter or Amend); Exhibit B attached hereto (Notices of Appeal). Moreover, application of Missouri law to differing facts presented by different plaintiffs is not relevant or persuasive in the instant matter. Thus, Plaintiffs' Second Notice should carry no weight.

"Under California law, a valid contract requires: (1) parties capable of contracting; (2) mutual consent; (3) a lawful object; and (4) sufficient cause or consideration." *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1077 (E.D. Cal. 2014) (citing Cal. Civ. Code § 1550). The Missouri court concluded, without analysis of each element, that "the dispute resolution 'agreement' lacks offer, acceptance, and bargained for consideration." *Kelly v. Aliera Companies, Inc.*, 6:20-CV-05038-MDH, 2020 WL 6877574, at *5 (W.D. Mo. Nov. 23, 2020). The court focused primarily on the timing of when the Missouri plaintiffs received their Member Guides, finding that the plaintiffs could not be bound by the terms of Member Guides provided to them after they signed agreements to enroll with their respective HCSMs programs.

However, courts in California applying California law have reached the opposite conclusion under virtually identical facts. For example, in *Mangahas v. Barclays Bank Del.*, No. SACV 16-00093 JVS, 2016 WL 11002179, at *2 (C.D. Cal. May 9, 2016), the plaintiff signed a

credit card application agreeing to be bound by terms and conditions that "will be sent to you." By using her credit card after Barclays sent the full terms and conditions, including an arbitration provision, she manifested her intent to be bound and her agreement to arbitrate. *Id.* Under California law, conduct implying ratification or acceptance of an arbitration agreement constitutes evidence of a valid agreement to arbitrate, "despite an unsigned agreement." *Serafin v. Balco Properties Ltd., LLC*, 185 Cal. Rptr. 3d 151, 159 (Ct. App. 2015). This is precisely such a case. The Duncans enrolled on November 28, 2017, with an effective date of January 1, 2018 (Compl. ¶¶ 69-73), and thus had the opportunity to review the terms and conditions including the arbitration provision before the enrollment was effective. The Duncans could have cancelled and received a refund, but instead, they proceeded to make monthly payments over-and-over again for well over a year – repeatedly ratifying the terms and conditions including the arbitration provision. (*Id.*). California law is inconsistent with the Missouri District Court's findings in its order that Plaintiffs submitted as supplemental authority in this matter – particularly with respect to the facts presented in this case involving the Duncans and their enrollment.

Additionally, the Missouri court's reliance on the fact that the arbitration agreement itself was not separately signed is not persuasive in this case. "California courts have observed that 'in the arbitration context, a party who has not signed a contract containing an arbitration clause may nonetheless be compelled to arbitrate when he seeks enforcement of other provisions of the same contract that benefit him." *Montoya v. Comcast Corp.*, 2:15-CV-02573-TLN-DB, 2016 WL 5340651, at *5 (E.D. Cal. Sept. 23, 2016) (quoting *Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1713 (2003)). Thus, because the Missouri court primarily relied on its factual finding that the arbitration agreement itself was not signed, it has no relevance to this Court's application of California law.

CONCLUSION

The Notices of Supplemental Authority are not authorized by the Local Rules and provide no binding or persuasive authority for the question before the Court. Defendants thus move to strike the Notices.

DATED: December 31, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL AUTHORITY** has been filed this 31st day of December, 2020 through the Court's CM/ECF system, which will send notification of such filing to all parties of record. All parties may access the foregoing via the Court's CM/ECF system.

Dated: December 31, 2020

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ATTESTATION

I hereby attest that I have obtained concurrence of the above noted signatories as indicated by a "conformed" signature (/s/) within this e-filed document.

Dated: December 31, 2020

/s/ *Alan D. Leeth*

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

GEORGE T. KELLY, III, and THOMAS BOOGHER, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO. 3:20-CV-05083-MDH**
v.	)	
THE ALIERA COMPANIES, INC.; formally known as Aliera Healthcare, Inc., a Delaware corporation, and TRINITY HEALTHSHARE, a Delaware Corporation,	)	
Defendants.	)	

DEFENDANTS' MOTION TO ALTER OR AMEND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS OR STAY PENDING ARBITRATION AND REQUEST TO STAY PROCEEDINGS PENDING RESOLUTION WITH SUGGESTIONS IN SUPPORT

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I. MOTION TO ALTER OR AMEND

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Defendants The Aliera Companies Inc. ("Aliera") and Trinity Healthshare, Inc. ("Trinity") move to alter or amend this Court's November 23, 2020 Order (the "Order") denying their motions to dismiss or stay pending arbitration. (Doc. 62.) Defendants request a brief stay of pre-trial proceedings and discovery pending resolution of this Motion.

Defendants submit that there is no genuine dispute of material fact that the Parties formed an agreement to arbitrate Plaintiffs' claims. However, to the extent this Court finds that there is a genuine dispute of fact, such dispute is to be resolved by a trial pursuant to Section 4 of the FAA – not by denial of Defendants' motions to compel arbitration. Because the Court "erred in failing to order a trial to resolve material factual disputes concerning whether the parties agreed to arbitration," Defendants respectfully request this Court alter or amend its order to compel arbitration or set a trial on any disputed facts. *Nebraska Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 (8th Cir. 2014) (reversing district court order affirming magistrate judge's denial of motion to compel arbitration and remanding for bench trial where parties presented disputed facts as to formation of agreement to arbitrate).

II. SUGGESTIONS IN SUPPORT OF MOTION

A. Procedural Background.

Plaintiffs George Kelly and Thomas Boogher filed their Second Amended Complaint on June 15, 2020 alleging four counts: illegal contract, violation of the Missouri Merchandising Practices Act, breach of fiduciary duty, and unjust enrichment. (Doc. 30.) Defendants moved to dismiss or compel arbitration, citing the arbitration provisions set forth in the respective Member Guides applicable to Kelly and Boogher. (Docs. 38 & 39.) On November 23, 2020, this Court denied the motions, holding that "there is no evidence Plaintiffs signed an agreement to

arbitrate." (Doc. 62.) The Court further stated that no record evidence indicated that Kelly or Boogher were provided the Member Guides until after they signed a form acknowledging their agreement to the HCSM membership guidelines. (*Id*.) The Court concluded Kelly and Boogher needed to manifest their assent to the terms of their respective Member Guides by either receiving them prior to signing an email indicating their consent to join the healthcare sharing ministry, or by signing a document expressly containing arbitration.

The record evidence shows the Parties indeed formed written agreements to arbitrate: Plaintiffs signed enrollment documents acknowledging their consent to join the healthcare sharing program, including being bound by the applicable guidelines. They, in fact, received the guidelines – the Member Guides, which contain the arbitration provisions at issue – prior to the effective dates of their respective sharing programs. Moreover, Plaintiffs made voluntary choices, every month, to participate in the sharing programs long after receiving their Member Guides. This intentional, voluntary continuation of their membership indicates Plaintiffs' assent to the terms in the Member Guides, including the dispute resolution provisions. Moreover, while the Member Guides clearly disclose that Aliera and Trinity make no guarantee or contract to pay or indemnify Plaintiffs' medical expenses, they do contain various binding provisions. Per the Member Guides, Aliera and Trinity promise that Plaintiffs' share requests based on the outlined qualified medical services will be submitted for consideration for sharing, and the Parties agree to follow the dispute resolution procedures, including arbitration. The Court should find that the Parties formed agreements to arbitrate, or in the alternative, proceed to trial under Section 4 of the FAA on whether the Parties formed agreements to arbitrate.

B. Applicable Law Regarding Motion to Alter or Amend.

The court has broad discretion to grant a Rule 59(e) motion, which serves to correct manifest errors of law or fact or to present newly discovered evidence. *Bayer Cropscience LP v.*

Texana Rice Mill Ltd., No. 4:13CV2375 CDP, 2015 WL 3843804, at *3 (E.D. Mo. June 22, 2015). "Federal Rule of Civil Procedure 59(e) was adopted to make clear that a district court has the power to rectify its own mistakes in the period immediately following the entry of judgment. Thus, this type of motion is appropriate in cases where the court has based an order on a factual error." *Terminix Int'l.. Co., L.P. v. Crisel*, No. 05-1065, 2008 WL 4831755, at *1 (W.D. Ark. Nov. 3, 2008) (citation omitted).

C. Missouri Contract Law.

Under Supreme Court precedent, state contract law controls the question of whether a valid agreement to arbitrate has been formed. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). To form a contract under Missouri law requires offer, acceptance, and consideration. *Strain v. Murphy Oil USA, Inc.,* No. 6:15-CV-3246-MDH, 2016 WL 540810, at *3 (W.D. Mo. Feb. 9, 2016) (compelling arbitration). Missouri law provides that assent to (*i.e.*, "acceptance" of) terms of an agreement can be shown through the parties' conduct, even without signatures. In *McKeage v. Bass Pro Outdoor World*, the United States District Court for the Western District of Missouri set out Missouri law concerning formation of an agreement through conduct:

> Although a written document is not signed, when one party accepts the other party's performance, it gives validity to the instrument and imposes on the accepting party the obligations provided by the agreement. [citations omitted.] "[A] signature is not required in order to show mutuality or assent to the terms of a writing. Assent can be shown in other ways, such as by the parties' conduct."

McKeage v. Bass Pro Outdoor World, Case No. 12-03157-CV-S-GAF, 2014 WL 12921607, at *10 (W.D. Mo. July 30, 2014) (quoting *Heritage Roofing, LLC v. Fischer*, 164 S.W.3d 128, 134 (Mo. App. E.D. 2005)). The court found that, even though the plaintiffs did not sign the order form containing the choice-of-law provisions at issue, the order forms did not need to be signed because the contract's validity was established by performance – similar to enforcement of arbitration provisions where the contract was established by performance. *McKeage*, 2014 WL

12921607, at *10. The court stated: "It is uncontested that Plaintiffs and all class members made payment and received a boat, boating accessory, boat trailer or recreational vehicle, demonstrating performance of the terms of a sales contract, and thereby imposing upon the parties all the terms of the written document. Thus, signatures are not required on any order form between Plaintiffs or the class members and Defendants for there to be an enforceable contract." *Id.; see also Heritage Roofing*, 164 S.W.3d at 134. ("A signature is not required in order to show mutuality or assent to the terms of a writing. . . . Assent can be shown in other ways, such as by the parties' conduct." (citation omitted.))

D. The Parties Formed An Agreement to Arbitrate Plaintiffs' Disputes in this Action.

The evidence in this action shows that the Parties formed an agreement, which is reflected through Plaintiffs' signature emails and their respective Member Guides. And, those Member Guides contain dispute resolution provisions, including the arbitration agreements at issue in this action.

1. Plaintiffs Received Member Guides Containing Arbitration Provisions Prior to the Effective Dates of Their Sharing Programs.

Both Plaintiffs Kelly and Boogher acknowledge in the Second Amended Complaint that they received the Member Guides containing arbitration provisions. Kelly acknowledges that he received the Member Guide after paying enrollment fees, but that he chose to continue making voluntary monthly membership contributions from October 30, 2018 through November 30, 2019. (Doc. 30 (Plaintiffs' Second Am. Compl.) ¶¶ 68-69.) Kelly indicated his consent to join Trinity's sharing program on October 16, 2018, with membership effective on November 1, 2018 – approximately 2 weeks later. (Doc. 38-1, ¶ 5.) Defendants presented evidence that Kelly received the Trinity Member Guide containing arbitration provisions prior to the effective date of his program membership. (Doc. 38-1, ¶¶ 5-6.) Thus, Kelly had time to review the Member Guide

prior to the effective date of his membership, as well as during the during the year and two months after he joined the sharing program and continued to make voluntary contributions and otherwise participate in the sharing program.

Boogher acknowledges receiving a Unity HealthShare, LLC ("Unity") Member Guide containing arbitration provisions after he enrolled in Unity's sharing program.[1] (Doc. 30 ¶ 77; Doc. 30-11, which is Appendix K to Plaintiffs' Second Am. Compl. and includes a link to Unity's Member Guide.) Boogher received his Member Guide containing arbitration provisions approximately three weeks before the effective date of his membership. Boogher consented to join Unity's program on May 10, 2018; he received a copy of the Member Guide containing arbitration the same day, in a link on his welcome email; and his program membership became effective as of June 1, 2018. (Doc. 38-4; Doc. 38-5; Doc. 30-11; Doc. 38-1, ¶ 13.) Boogher also acknowledges that he received a Trinity Member Guide in December of 2018, and that after he received that Member Guide, he affirmatively agreed to transfer to Trinity's sharing program in June 2019 – approximately six (6) months later. (Doc. 30, ¶ 80; Doc. 30-18.) So Boogher had plenty of time to review both the Unity Member Guide and the Trinity Member Guide containing arbitration provisions before his memberships' effective dates.

2. Plaintiffs' Signature Emails Indicating Their Consent to Join The Healthcare Sharing Programs Put Them on Notice of the Guidelines.

While the text of Plaintiffs' individual signature emails do not specifically recite all of the terms of their Member Guides, including the dispute resolution provision containing arbitration, the signature emails do contain disclosures that Plaintiffs are responsible for reviewing the "Guidelines" and to "abide by the terms of the Guidelines," as well as that the "the guidelines in effect on the date of medical services supersede any spoken or verbal communication and all

[1] Plaintiffs chose not to sue Unity in this action.

previous versions of the guidelines." The signature emails further disclose that the member "understand[s] that the guidelines are part of and incorporated into this UHS Application as if appended to it." (Doc. 38-2, at p. 5; Doc. 38-4, at p. 4.) In particular, Kelly's signature email contains the following disclosure, among others:

Membership Guidelines Details

Each Aliera member is responsible for reviewing the HCSM Guidelines provided at the time of enrollment, and to abide by the terms of the Guidelines. It is your responsibility to understand which of your medical expenses are eligible for cost sharing, and which medical expenses are NOT eligible for cost sharing. Members are also provided with a toll-free number to contact Member Services with any questions they have. It is recommended that members call Member Services with any questions regarding eligibility prior to seeking medical services.

(Doc. 38-2, at p. 5.)

Boogher's signature email contains the following disclosure, among others:

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

(Doc. 38-4, at p. 4.)

The signature emails and information contained therein are not the entire agreement between the Parties. Instead, the agreement among the Parties also is set out in the Member Guides, and the signature emails specifically give notice of these terms. Members indicate their intention to join the healthcare sharing program by signing their names on the signature email. (Doc. 38-2, at p. 5; Doc. 38-4, at p. 4.) As set out above, the signature email put them on notice that the applicable guidelines constitute the complete terms of the Parties' agreement. New members receive the Member Guides shortly after they indicate their consent to join the sharing program and prior to the effective date of the membership.

Accordingly, Plaintiffs had notice prior to the effective dates of their respective memberships that their applicable Member Guides contained dispute resolution provisions, including arbitration.

3. Plaintiffs Voluntarily Chose to Remain Members of the Sharing Program on a Monthly Basis, Thus Evidencing Consent to the Terms of the Member Guides, Including Arbitration, Through Performance.

Each month after receiving their Member Guides, which included the arbitration provisions at issue, Plaintiffs made voluntary member contributions on a monthly basis. (Doc. 38-1, ¶¶ 6, 19; *see also* Doc. 30-2, at p. 13 (Kelly Member Guide containing arbitration provision at issue); Doc. 38-5, at p. 17-18 (Boogher Member Guide containing arbitration provision at issue.)) The effect of these voluntary contributions was to affirm the terms of the Parties' agreement through performance, which included the arbitration provisions set out in the applicable Member Guides.

Plaintiffs' respective signature emails state that membership is entirely voluntary and, thus, may be cancelled at any time. For example, Kelly's signature email dated October 16, 2018 (prior to the November 1, 2018 effective date) states:

DISCLAIMER

THE MINISTRY IS NOT AN INSURANCE COMPANY AND THE MINISTRY DOES NOT OFFER ANY INSURANCE PRODUCTS OR POLICIES. THE MINISTRY DOES NOT ASSUME ANY RISK FOR YOUR MEDICAL EXPENSES, AND THE MINISTRY MAKES NO PROMISE TO PAY. HEALTH CARE SHARING MINISTRIES ARE NOT GOVERNED BY INSURANCE LAWS.

THE HEALTH CARE SHARING MINISTRY OFFERS VOLUNTARY PARTICIPATION IN ITS HEALTH CARE SHARING MINISTRY. MINISTRY SERVICES ARE ADMINISTERED BY ALIERA HEALTHCARE, INC.

(Doc. 38-2, at p. 6.)

Kelly's signature email also states:

Voluntary

Participation in the ministry HCSM is voluntary. Enrollment as an Aliera member and participant of the ministry HCSM is voluntary and the sharing of monetary contributions are also voluntary. Enrollment in the ministry sharing plan is not a contract. You are free to cancel your participation at any time. The ministry requests a Monthly Share Amount, to be collected each month you are enrolled, to facilitate the payment of sharing requests published on behalf of other participants.

(Doc. 38-2, at p. 7.) And, Boogher's signature email dated May 10, 2018 (prior to the June 1, 2018 effective date) states:

- I understand that monthly contribution amounts are based on operating and medical needs and the total number of members and that monthly contributions are figured on a periodic basis as needed and are subject to change at any time. I also understand that the submission of my monthly contributions is voluntary and that I am not obligated in any way to send any money.

(Doc. 38-4, at p. 4.) Thus, Plaintiffs were on written notice at the time they indicated their intention to join the sharing programs through execution of the signature emails that membership was entirely voluntary. They made the choice to continue their memberships every month, and their memberships undisputedly continued well after they received their respective Member Guides.

The key elements of offer, acceptance, and consideration are not restricted to the initial enrollment form – particularly because the Parties had ongoing relationships wherein the Plaintiffs voluntarily affirmed, on a monthly basis, their intention to be bound by their Member Guides. Plaintiffs also chose on a monthly basis to participate in their sharing programs, which are governed by the terms and procedures set out in the Member Guides – for example, the Member Guides identify the medical expenses that are eligible for requests for sharing from other members. And, Missouri law provides that an individual's signature is not required to form a written agreement to arbitrate; the agreement may be formed by electronic acceptance or by conduct. *Taylor v. Dolgencorp, LLC.,* No. 1:19-CV-00132-SNLJ, 2019 WL 6135440, at *3 (E.D. Mo. Nov. 19, 2019). Here, Plaintiffs accepted the terms of the Member Guides, including the arbitration provisions, through performance of the agreements.

4. The Member Guides Constitute the Parties' Agreement, Including Arbitration, and Include Binding Provisions.

As to the Court construing certain disclosures in Plaintiffs' signature emails and Member Guides to mean that there is no contract among the Parties, the Court has misread those

documents. Instead, the signature emails and Member Guides contain various mandatory provisions; however, they do not contain a mandatory provision that medical expenses will be paid or indemnified. The Member Guides make clear that by participating as members in the sharing programs in which they enrolled, Kelly and Boogher agree to mandatory dispute resolution procedures, including the arbitration provisions at issue. In turn, Kelly and Boogher's Member Guides explain that their medical expenses will be submitted for sharing according to the membership guidelines, which set out the various qualifying medical expenses, procedures, and prescriptions that are eligible for sharing. The Member Guides include a promise that such medical expenses will be submitted for consideration for sharing:

Disclaimer

Trinity HealthShare is a faith-based medical need sharing membership. Medical needs are only shared by the members according to the membership guidelines. Our members agree to the Statement of Beliefs and voluntarily submit monthly contributions into a cost-sharing account with Trinity HealthShare, acting as a neutral clearing house between members. Organizations like ours have been operating successfully for years. We are including the following caveat for all to consider:

> This publication or membership is not issued by an insurance company, nor is it offered through an insurance company. This publication or the membership does not guarantee or promise that your eligible medical needs will be shared by the membership. This publication or the membership should never be considered as a substitute for an insurance policy. If the publication or the membership is unable to share in all or part of your eligible medical needs, or whether or not this membership continues to operate, you will remain financially liable for any and all unpaid medical needs.

> This is not a legally binding agreement to reimburse any member for medical needs a member may incur, but is instead, an opportunity for members to care for one another in a time of need, to present their medical needs to other members as outlined in the membership guidelines. The financial assistance members receive will come from other members' monthly contributions that are placed in a sharing account, not from Trinity HealthShare.

(Doc. 30-2, at p. 4 (Kelly's Member Guide); Doc. 38-5, at p. 4 (Boogher's Unity Member Guide, containing substantially the same language; Doc. 30-15, at p. 18-19 (Boogher's Trinity Member Guide.)) Accordingly Aliera, as a third-party administrator for Trinity, promises to facilitate sharing requests for medical expenses submitted on behalf of members to Trinity's (and previously Unity's) healthcare sharing program. These medical expenses will be considered for sharing based on the qualifying medical expenses specifically outlined in the applicable Member Guides.

While the Court noted in its Order that certain language in the signature emails and Member Guides indicates there is not a contract among the Parties, such language is in the context of the disclosures that there is no contract or promise to pay or indemnify members for medical expenses. Indeed, this is a hallmark difference between healthcare sharing ministries and insurance companies. Moreover, that there is no promise to reimburse for medical expenses does not mean that other portions of the Member Guides – which contain affirmative promises and agreements, including the arbitration provision with its mandatory language – are unenforceable. Accordingly, the Parties formed an agreement, as evidenced by the signature emails and Member Guides, which contains binding dispute resolution provisions, including arbitration.

To find that the signature email alone is the Parties' agreement and that it does not specifically recite an arbitration agreement does not consider the factual evidence that there is

also a Member Guide, which members receive via an email link prior to the effective dates of their memberships and in hard copy form around the effective dates of their membership. It does not consider that Plaintiffs Kelly and Boogher, after receiving the Member Guides containing arbitration provisions, specifically chose to continue their memberships every month for years – until Kelly voluntarily terminated his membership effective December 31, 2019, and Boogher chose to remain a member. Additionally, to find otherwise would be inconsistent with Missouri contract law, which provides that agreements may be formed through conduct and performance – even if there is no signed document. *See McKeage*, 2014 WL 12921607, at *10.

Thus, the Parties formed an agreement to arbitrate, and this Court should so find based on the undisputed facts.

E. Disputed Facts Regarding Formation of Arbitration Agreement Should Be Tried.

To the extent there are genuine disputes of material fact regarding whether the Parties formed agreements to arbitrate, these disputes are to be decided by trial. *See* 9 U.S.C. § 4 ("If the making of the arbitration agreement … be in issue, the court shall proceed summarily to the trial thereof." Akin to the summary judgment standard, when there are genuine disputes of material fact raised by a motion to compel arbitration, the court must "move summarily to trial." *Nebraska Mach. Co. v. Cargotec Solutions*, LLC, 762 F.3d 737, 743-44 (8th Cir. 2014) ("[B]ecause issues of fact remained on the formation of the arbitration agreement, the district court erred in failing to summarily proceed to trial on those issues as the FAA instructs.")

In *Nebraska Machinery*, the parties presented conflicting accounts as to the terms governing a transaction. *Nebraska Machinery*, 762 F.3d at 741. Defendant Cargotec claimed to have sent Nebraska Machinery terms and conditions including an agreement to arbitrate; Nebraska Machinery denied ever receiving those terms. *Id*. Because the district court failed to resolve these factual issues, the Eighth Circuit remanded the case for trial regarding formation of

the agreement to arbitrate. *Id.* at 744. "In the end, the district court never resolved the factual issues concerning the making of the contract but merely recognized their existence. Therefore, because issues of fact remained on the formation of the arbitration agreement, the district court erred in failing to summarily proceed to trial on those issues as the FAA instructs." *Id*. (citing *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 980 (10th Cir. 2014) for the proposition that if a court finds disputed issues of fact after evaluating a motion to compel arbitration in the light most favorable to the non-movant, "the court must lift that thumb from the scales, evaluate the conflicting evidence even-handedly, and decide which side's account is more likely true" through a Section 4 trial). The same principle applies here. The Court, having construed Defendants' motions in favor of the Plaintiffs, has not resolved the issues of fact remaining on formation of the arbitration agreement.[2]

The case of *Margulis v. HomeAdvisor, Inc*. is instructive here. In January of 2020, the district court denied without prejudice HomeAdvisor's motion to compel arbitration, ruling that "[b]ecause the Court has found at least one genuine issue of fact regarding the making of a valid arbitration agreement between the Parties, this matter must proceed summarily to trial on the issue of contract formation." *Margulis v. HomeAdvisor, Inc.*, No. 4:19-CV-00226-SRC, 2020 WL 512402, at *3 (E.D. Mo. Jan. 31, 2020). Subsequently, in August of 2020, after limited discovery on the narrow question of formation, HomeAdvisor again moved to compel arbitration – this time, with the court concluding the parties had indeed agreed to arbitrate. *Margulis v.*

[2] Courts within the Western District of Missouri have likewise held that factual disputes over the formation of an agreement to arbitrate should be resolved through Section 4 trial. *See, e.g., Welk Resort Sales, Inc. v. Bryant*, 17-03197-CV-S-SWH, 2018 WL 1309738, at *3 (W.D. Mo. Mar. 13, 2018) (ordering trial as to what role a signed memorandum played in formation of agreement to arbitrate under Missouri contract law, and stating that where the making of the arbitration agreement is at issue, the FAA directs courts to summarily proceed to trial on the issue); *Ramsey v. H&R Block Inc.,* No. 18-00933-CV-W-ODS, 2019 WL 2090691, at *6 (W.D.

HomeAdvisor, Inc., No. 4:19-CV-00226-SRC, 2020 WL 4673783, at *4 (E.D. Mo. Aug. 12, 2020). While the plaintiff in *Margulis*, as here, denied receiving or reviewing the terms and conditions containing the arbitration provision, the Court found that HomeAdvisor provided sufficient evidence the plaintiff received constructive notice of those terms. Even though the transaction was structured so that he would have to *separately* review the terms and conditions, it was binding because he was put on notice of those separate terms.

So too here. Plaintiffs received written notice of the member guidelines in their respective signature emails; they acknowledged that the guidelines were incorporated into and part of the membership agreement; and they agreed to be bound by the guidelines. Plaintiffs actually received the Member Guides – of which they were put on notice in the signature emails – prior to the effective dates of their sharing programs. In this action, Plaintiffs now seek to disclaim parts of those Member Guides – the arbitration provisions. However, they simultaneously seek to reform these "illegal contracts" to conform with the applicable state insurance regulations and, thus, to transform the terms of the Member Guides into compliant insurance policies under Missouri insurance regulations. (*See, e.g.,* Doc. 30, at p. 27-28 (Count I) and p. 34, ¶ (g).) Plaintiffs should not be allowed to take the inconsistent positions that (a) they did not agree to the Member Guides including arbitration provisions, and (b) at the same time, the Member Guides constitute illegal contracts and should be reformed to be consistent with required benefits under Missouri insurance policies. Plaintiffs cannot have it both ways simply to avoid arbitration. Accordingly, to the extent Plaintiffs claim that they did not agree to arbitration based

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Mo. May 13, 2019) (where a court finds questions of fact as to whether Plaintiff accepted the terms of an arbitration agreement, a Section 4 trial is proper).

on the method of receipt or notice of the Member Guides, there are genuine issues of material fact that should proceed to a summary trial, while preserving arbitration rights.[3]

III. CONCLUSION

Defendants respectfully submit that the Court erred by finding that Plaintiffs and Defendants did not form an enforceable agreement to arbitrate because there is no dispute that Plaintiffs received their respective Member Guides that include arbitration agreements and that Plaintiffs voluntarily chose every month to remain members of the healthcare sharing program by paying voluntary monthly contributions towards sharing of members' qualified medical expenses. Defendants respectfully request this Court alter or amend its Order and either (1) find that the Parties formed agreements to arbitrate compel arbitration, or (2) order summary trial under Section 4 of the FAA as to factual issues regarding formation of an agreement to arbitrate. Additionally, Defendants respectfully request a limited stay of pre-trial proceedings and discovery pending resolution of this Motion.

Respectfully submitted,

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[3] It is unclear whether the Motion to Alter or Amend is a tolling motion for purposes of Federal Rule of Appellate Procedure 4(a)(4)(A). *Compare Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7 (1st Cir. 2005), *with Ramsey v. H&R Block, Inc.*, No. 18-cv-00933, 2019 WL 5685686, at *2 (W.D. Mo. July 11, 2019) (declining to reach an earlier filed motion to reconsider because of a stay pending appeal). So, out of abundance of caution, Aliera and Trinity are also contemporaneously filing notices of appeal. Aliera and Trinity therefore request that this Court either conclude it retains jurisdiction to rule on this Motion, or issue an indicative ruling otherwise.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I electronically filed the foregoing with the Court's CM/ECF system, which will cause a true and correct copy of the same to served electronically on all registered counsel of record.

/s/ Joshua B. Christensen
Attorney for Defendant
The Aliera Companies Inc.

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

GEORGE T. KELLY, III, and THOMAS BOOGHER, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO. 3:20-CV-05083-MDH**
v.	)	
THE ALIERA COMPANIES, INC.; formally known as Aliera Healthcare, Inc., a Delaware corporation, and TRINITY HEALTHSHARE, a Delaware Corporation,	)	
Defendants.	)	

NOTICE OF APPEAL

Defendant The Aliera Companies Inc. gives notice, under Federal Rules of Appellate Procedure 3 and 4 and 9 U.S.C. § 16(a)(1)(B), that it appeals to the United States Court of Appeals for the Eighth Circuit from the November 23, 2020 Order (ECF No. 62), denying its Motion to Dismiss, or Alternatively, to Compel Arbitration (ECF No. 38), and its Motion to Stay (ECF No. 43), together with all interlocutory orders and rulings that produced that Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020, I electronically filed the foregoing with the Court's CM/ECF system, which will cause a true and correct copy of the same to served electronically on all registered counsel of record.

/s/ Joshua B. Christensen
Attorney for Defendant
The Aliera Companies Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

GEORGE T. KELLY, III, and THOMAS BOOGHER, 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.	Civil Action No. 3:20-cv-05038-MDH

TRINITY HEALTHSHARE, INC.'S NOTICE OF APPEAL

Pursuant to 9 U.S.C. § 16(a)(1)(B) and Federal Rules of Appellate Procedure 3 and 4, Defendant Trinity Healthshare, Inc. ("Trinity) gives notice that it appeals to the United States Court of Appeals for the Eighth Circuit from the November 23, 2020 Order, (ECF No. 62), denying its Motion to Dismiss, or Alternatively, to Compel Arbitration (ECF No. 39), and its Motion to Stay, (ECF No. 43), together with all interlocutory orders and rulings that produced that Order.

Respectfully submitted on December 23, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2020, I filed the foregoing document via the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

Date: December 23, 2020

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