

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' REPLY IN SUPPORT OF SUPPLEMENTAL AUTHORITY
IN OPPOSITION TO DEFENDANTS' COMBINED MOTION TO COMPEL**

After briefing concluded on Defendants' Motion to Compel Arbitration, Plaintiffs submitted as supplemental authority the decision of the Federal District Court for the Western District of Missouri in *Kelly, et al, v. The Alieria Companies, Inc., et al.*, Case No. 6:20-cv-05038-MDH (“*Kelly* Order”). Dkt. 58. In their response (Dkt. 59), Defendants argue that this Court should not consider the *Kelly* Order, even though they argue it should consider a decision from the Western District of Washington that considered the “same member guides and arbitration provisions at issue here.” Dkt. 50, at 7, Dkt. 55, at 2. The *Kelly* court also considered the same member guides and arbitration provisions, as well as the very formation issue before this Court now. The *Kelly* Order is relevant and consistent with Colorado law.

In denying Alera's and Trinity's motions to compel arbitration, the *Kelly* Order cited, at page 9 (Dkt. 58-1), the identical facts present here in concluding there was no agreement to arbitrate: (1) The online enrollment forms that are signed do not contain an arbitration provision – or even mention arbitration – nor do they provide a link to any document that contains an arbitration provision. Dkts. 50-5 (Larson); 55-2 (Lund); 55-3 (Beard). (2) There was no evidence that plaintiffs received, reviewed, or acknowledged the terms of the Member Guide when they electronically signed the online forms to become a member. (3) The enrollment forms state that the document “is not a contract.” Dkts. 50-5, p. 6 of 6, and 55-3, p. 6 of 7 (“I understand that the guidelines are not a contract ... but instead are for [Unity's] reference ...”); 55-2, p. 5 of 8 (“This is not a contract.”). (4) A link to the Member Guide that does contain the arbitration provision is not provided until after the member has enrolled and paid. Dkts. 50-2, 50-6, 50-8, 50-11. The court held there was no mutually accepted contract formed regarding arbitration. *Kelly* Order, p. 10.

The *Kelly* Order is consistent with Colorado law. Under Colorado law, where a party seeks to enforce terms or conditions incorporated by reference in a contract, “it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms,” and that assent be gleaned from the totality of the circumstances. *Vernon v. Qwest Communs. Int'l, Inc.*, 857 F. Supp. 2d 1135, 1150 (D. Colo. 2012), quoting, *Taubman Cherry Creek Shopping Center, LLC v. Neiman-Marcus Group, Inc.*, 251 P.3d 1091, 1095 (Colo. App. 2010). The *Kelly* court considered not just the lack of signature on the arbitration clause, but the lack of any notice of, much less assent to, an agreement to arbitrate. The *Kelly* Order is not at all contrary to this Court's decision in *Vernon*. In *Vernon*, plaintiffs who enrolled online were given a link to the terms and conditions that contained the arbitration clause, were specifically advised that those terms included an arbitration agreement, and were required to click that they agreed to the terms. A welcome email that they received after subscribing not only provided a link to the subscriber agreement, but also

specifically advised that the agreement included arbitration, and advised that if they did not agree, they could cancel within 30 days. *Vernon*, 925 F. Supp. 2d at 1188. This Court concluded that the plaintiffs there were “sufficiently warned that there was an arbitration clause.” *Id.*, at 1191.

The facts in this case are the opposite. The Alieria enrollment form that states it is “not a contract” provided no link to the Member Guide or any other “guidelines,” did not advise that any terms included arbitration, and did not require them to agree to the terms of the Member Guide. The welcome email Plaintiffs received did not inform them that the Member Guide contained an arbitration clause and did not advise them how to cancel and get their money back if they did not agree.

The *Kelly* Order is consistent with Colorado law and is on point factually, and Plaintiffs request that this Court consider it in deciding the pending motion to compel.

Respectfully Submitted: January 11, 2020.

 s/ Eleanor Hamburger

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