NO. 20-3702

IN THE

United States Court of Appeals For The Eighth Circuit

GEORGE KELLY, III, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; THOMAS BOOGHER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

VS.

THE ALIERA COMPANIES, INC., FORMERLY KNOWN AS ALIERA HEALTHCARE, INC., A DELAWARE CORPORATION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
NO. 3:20-CV-0583-MDH

BRIEF OF APPELLANT THE ALIERA COMPANIES INC.

Joshua B. Christensen
KUTAK ROCK LLP
300 S. John Q. Hammons Pkwy.
Suite 800
Springfield, Missouri 65806
(417) 755-7221
joshua.christensen@kutakrock.com

E. Travis Ramey
BURR & FORMAN LLP
420 North 20th Street
Suite 3400
Birmingham, Alabama 35203
(205) 251-3000
tramey@burr.com

Attorneys for Appellant The Aliera Companies Inc.

SUMMARY OF THE CASE

George Kelly, III and Thomas Boogher filed this action, alleging the Trinity Healthshare, Inc., health care sharing ministry that Aliera Companies Inc. administers is an illegal insurance contract that violates the Missouri Merchandising Practices Act; that Aliera and Trinity breached fiduciary duties; and that Aliera has been unjustly enriched.

Aliera and Trinity moved to dismiss or to compel arbitration based on the dispute-resolution provision of the sharing ministry's Member Guide. Although Kelly and Boogher undisputedly received the Member Guides and voluntarily remained members of the sharing ministry, the district court held the parties never agreed to mandatory mediation followed by binding arbitration of disputes. This is Aliera's appeal from the denial of its motion to dismiss or compel arbitration and its motion to alter or amend.

This appeal is not frivolous, involves important arbitration issues, and arises from complex litigation. Thus, the Court's decisional process will be significantly aided by oral argument. *See* Fed. R. App. P. 34(a)(2). Aliera, therefore, requests oral argument with fifteen minutes for each side.

CORPORATE DISCLOSURE STATEMENT

The Aliera Companies Inc., formerly known as Aliera Healthcare, Inc., does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

s/ E. Travis Ramey

E. Travis Ramey
BURR & FORMAN LLP
420 North 20th Street
Suite 3400
Birmingham, Alabama 35203

Attorney for Appellant
The Aliera Companies Inc.

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JURISDICTIONAL STATEMENT

Appellee George T. Kelly, III brought this suit against Appellant The Aliera Companies Inc. (Aliera) and Trinity Healthshare, Inc. (Trinity). (JA 11–41.) As amended, the plaintiffs in the suit are Kelly and Appellee Thomas Boogher, both of whom are Missouri citizens. (JA 77.) The defendants are Aliera and Trinity, both of whom are citizens of Delaware and Georgia. (JA 77–78.) Kelly and Boogher allege that the amount in controversy exceeds $5 million. (JA 78.)

Because there is complete diversity and the amount in controversy exceeds $75,000, the district court had subject-matter jurisdiction under 28 U.S.C. § 1332(a)(1). In the alternative, because there is at least minimal diversity and the amount in controversy exceeds $5 million, the district court had subject-matter jurisdiction under 28 U.S.C. § 1332(d)(2)(A).

On November 23, 2020, the district court denied Aliera's motion seeking to dismiss or compel arbitration. (JA 880–91.) On December 21, 2020, Aliera moved under Federal Rule of Civil Procedure 59(e) to alter or amend that order. (JA 1004–22.) On December 23, 2020, Aliera timely filed a notice of appeal. (JA 1039–41.) On January 28, 2021, the district

court denied Aliera's motion to alter or amend. (JA 1112–13.) On February 10, 2021, Aliera timely filed an amended notice of appeal. (JA 1114–15.)

This Court has appellate jurisdiction over the arbitration issue under 9 U.S.C. § 16. Because the arbitration issue is inextricably intertwined with the question of whether the district court should have dismissed based on the mediation requirement in the same dispute-resolution clause, the Court has pendent appellate jurisdiction over the mediation issue. *See Lockridge v. Bd. of Trs. of Univ. of Ark.*, 315 F.3d 1005, 1012 (8th Cir. 2003) (en banc); *see also Freeman v. Complex Computing, Co.*, 119 F.3d 1044, 1049–50 (2d Cir. 1997).

STATEMENT OF THE ISSUES

1. Did Aliera demonstrate the existence of the elements of contract at the time Kelly and Boogher enrolled in the Sharing Ministry?

- *Dickson v. Gospel for Asia, Inc.*, 902 F.3d 831 (8th Cir. 2018); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. 2012) (en banc); *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. 2003) (en banc); *TD Auto Fin., LLC v. Bedrosian*, 609 S.W.3d 763 (Mo. Ct. App. 2020).

2. Did Aliera demonstrate the existence of the elements of contract based on Kelly's and Boogher's voluntarily remaining members and contributing to the Sharing Ministry after receiving the Member Guides?

- *Holm v. Menard, Inc.*, — S.W.3d —, No. WD 83862, 2021 WL 560289 (Mo. Ct. App. Feb. 16, 2021); *Health Related Servs, Inc. v. Golden Plains Convalescent Ctr., Inc.*, 705 S.W.2d 499 (Mo. Ct. App. 1985).

3. Kelly and Boogher have asserted a cause of action and a defense to arbitration that are predicated on the Member Guide being a

contract. Are they estopped from denying that the Member Guide, including the dispute-resolution provision, is a contract?

- *Netco, Inc. v. Dunn*, 194 S.W.3d 353 (Mo. 2006) (en banc); *Dubail v. Med W. Bldg. Corp.*, 372 S.W.2d 128 (Mo. 1963).

4. Are there at least genuine factual disputes regarding contract formation that necessitate a summary trial under 9 U.S.C. § 4?

- 9 U.S.C. § 4; *Jin v. Parsons Corp.*, 966 F.3d 821 (D.C. Cir. 2020); *Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737 (8th Cir. 2014).

5. The Member Guide's dispute-resolution clause also contains a mediation requirement—a contractual condition precedent to suit. The district court declined to dismiss the case based on the condition precedent for the same reasons it declined to compel arbitration. Are the mediation and arbitration questions inextricably intertwined, giving this Court jurisdiction to vacate the entire district court order?

- *Lockridge v. Bd. of Trs. of Univ. of Ark.*, 315 F.3d 1005 (8th Cir. 2003) (en banc); *Freeman v. Complex Computing, Co.*, 119 F.3d 1044 (2d Cir. 1997).

STATEMENT OF THE CASE

A. Health Care Sharing Ministries and the Trinity Sharing Ministry

Health care sharing ministries offer a framework for individuals to freely associate with others with common ethical or religious beliefs to share medical expenses. These types of ministries have not historically been considered insurance, as the ministries are not obligated to indemnify their members. Instead, sharing ministries are a faith-based alternative to traditional insurance,[1] allowing members to contribute to a funding pool and share in the payment of other members' medical expenses. In a sense, sharing ministries are little more than a formalized version of "passing the plate," which many churches have long used as a way to help others pay medical expenses.

The fundamental premise of a sharing ministry is that it operates as an alternative to traditional health insurance because of the lifestyle and beliefs of its members. Members contribute a fixed amount each month to the ministry. When another member of the ministry needs help paying medical expenses, the individual submits a request for the

[1] *See* Benjamin Boyd, *Health Care Sharing Ministries: Scam or Solution?*, 26 J.L. & Health 219, 277 (2013).

amount needed to pay the bill. If approved for sharing, the request is paid directly to the health care provider using funds from all the members' contributions. By 2018, more than 1,000,000 people belonged to a sharing ministry.[2]

Trinity is a sharing ministry (the Sharing Ministry) composed of members who adhere to a faith-based statement of beliefs. (JA 150, 157.) As Trinity explains in its Member Guide and in other forms, the Sharing Ministry is not contractually obligated (and is not responsible) to pay members' medical expenses. (JA 150, 545, 547.) In short, there is never any guarantee that the Sharing Ministry will pay any members' medical expenses from the various members' contributions. (JA 150, 545, 547.) Instead, the Sharing Ministry takes on an obligation to function as a clearinghouse for its members to share each other's medical expenses. (JA 153.)

Aliera is not a sharing ministry; it is an associate of Trinity's Sharing Ministry. Aliera is a for-profit entity whose subsidiaries have contracted with Trinity to (1) market memberships in the Sharing

[2] *See* Laura Santhanam, *1 million Americans pool money in religious ministries to pay for health care*, PBS NewsHour (Jan. 16, 2018).

Ministry, and (2) facilitate member-to-member sharing of medical expenses. (JA 77 at ¶ 3; JA 431, 545.) In that role, Aliera has created a system to allow Sharing Ministry members to consent to the sharing of their contributions (in real time, and on a case-by-case basis) when other members' needs arise. (JA 153.) But, again, all members are informed that sharing requests may not be met—there are no guarantees. (JA 153.)

B. Kelly's membership in the Sharing Ministry.

Kelly began the process of enrolling in the Trinity Sharing Ministry around October 16, 2018. (JA 549–50.) The document Kelly signed on October 16, 2018 noted that the Sharing Ministry maintained guidelines that governed sharing. (JA 545.) It made clear that the guidelines were not an insurance contract and did not obligate the Sharing Ministry to share (pay) medical expenses. (JA 545.) The Sharing Ministry reserved the right to change the guidelines. (JA 546.)

The document Kelly signed also made clear (in two separate places) that the guidelines would govern. It informed Kelly (twice) that it was his responsibility to review the guidelines and abide by them. (JA 546, 549.) Kelly received a copy of the Member Guide before his membership became effective on November 1, 2018. (JA 526, 551.)

The document Kelly signed on October 16, 2018 also reserved some rights to Kelly. Until his enrollment became effective on November 1, 2018, Kelly could have withdrawn his membership and received a refund of his enrollment fee. (JA 546, 551.) The document also provided for refunds of contributions if requested within the first thirty days after the member's active date. (JA 547.)

The document Kelly signed also made clear that enrollment in the Sharing Ministry, participation in cost sharing, and remaining a member of the Sharing Ministry were all voluntary. (JA 548.) In other words, Kelly could opt out at any time.

Kelly's monthly contribution to the Sharing Ministry was $344.44, which he made every month until November 2019. (JA 99 at ¶¶ 68–69; JA 543.) He continued—voluntarily—to remain a member of the Sharing Ministry and to make his monthly contribution long after he received the Member Guide containing the dispute-resolution provision as one of its guidelines—guidelines by which he had agreed to abide.

In 2019, Kelly apparently became dissatisfied with his membership in the Sharing Ministry. He alleges that he incurred medical costs in February and March 2019 that were not shared—paid—by the Sharing

Ministry. (JA 99–100 at ¶¶ 71–72.) He also alleges that the Sharing Ministry denied him preauthorization for a surgery at a particular hospital. (JA 100 at ¶¶ 73–74.) So, Kelly cancelled his membership in the Sharing Ministry effective December 30, 2019. (JA 100 at ¶ 75.)

C. Boogher's membership in the Sharing Ministry

Boogher initially enrolled in a sharing ministry that Aliera administered for Unity Healthshare, LLC (Unity). (JA 100 at ¶ 76; JA 425–28, 564.) He acknowledged that the Unity guidelines were "part of and incorporated into" his application. (JA 563.) He acknowledged that the guidelines superseded anything he had been told verbally and that the guidelines could change. (JA 563.) He received a link to the Unity member guide in his welcome email. (JA 566; *see also* JA 430–43.)

In November 2018, Aliera sent Boogher an email informing him that it would now be partnering with Trinity's Sharing Ministry instead of Unity. (JA 101 at ¶ 78.) It informed him that his membership would remain largely unchanged. (JA 101 at ¶ 78.) As part of that planned transition, Boogher received a copy of the Trinity Sharing Ministry's Member Guide in December 2018. (JA 101 at ¶ 78.)

Aliera's plans to transition members from the Unity sharing ministry to the Trinity Sharing Ministry later changed. (JA 101 at ¶ 79.) And Boogher remained a member of the Unity sharing plan until mid-2019. (JA 483–85.) Aliera later requested that Boogher authorize a change from the Unity sharing ministry to the Trinity Sharing Ministry. (JA 102 at ¶ 80.) On May 6, 2019, Boogher granted that authorization. (JA 596.) His enrollment in the Sharing Ministry became effective on June 1, 2019. (JA 484–85.)

Boogher alleges he has paid over $19,000 in contributions since enrolling in the Unity and Trinity sharing ministries. (JA 102–03 at ¶ 84.) As of the filing of the complaint, he remained a member of the Trinity Sharing Ministry. (JA 102 at ¶¶ 81, 84.) He has not, however, received healthcare services exceeding $1,000 or sought preauthorization for medical care from Aliera or Trinity. (JA 102 at ¶ 84.) Instead, Boogher alleges that he fears that Aliera and Trinity will refuse to pay for a hip replacement he has been told he needs. (JA 102–03 at ¶ 84.)

D. The Sharing Ministry Member Guide

Both Kelly and Boogher concede they received a Member Guide for their membership in the Trinity Sharing Ministry that Aliera

administers. (JA 99 at ¶ 69; JA 101 at ¶ 78.) Boogher also received a copy of a member guide for the Unity sharing ministry that Aliera administered. (JA 570–94.)

The Trinity Member Guide includes a detailed dispute-resolution provision. (JA 159.) That clause requires resolution of disputes through a four-step internal appeal process, followed by mandatory mediation, and then (if necessary) binding arbitration under the rules and procedures of the American Arbitration Association. (JA 159.)

> Therefore, by becoming a Sharing Member of Trinity HealthShare you agree that any dispute you have with or against Trinity HealthShare, its associates, or employees will be settled using the following steps of action, and only as a course of last resort.
>
> A. 1st Level Appeal. ...
>
> B. 2nd Level Appeal. ...
>
> C. 3rd Level Appeal. ...
>
> D. Final Appeal. ...
>
> E. 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. Any arbitration shall be held in Atlanta, Georgia, and conducted in the English language subject to the laws of the State of Georgia. Trinity HealthShare shall pay the filing fees for the arbitration and arbitrator in full at the time of filing. All other expenses of the arbitration shall be paid by each party including costs related to transportation, accommodations, experts, evidence gathering, and legal counsel. Further agreed that the aggrieved sharing member shall reimburse the full costs associated with the arbitration, should the arbitrator render a judgment in favor of Trinity HealthShare and not the aggrieved sharing member.
>
> 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.

(JA 159.) The Trinity Member Guide also makes clear that membership in the sharing ministry does not include a guarantee or promise to pay medical bills. (JA 150, 161, 163 at ¶¶ 4, 15, 17.)

The Unity member guide Boogher received contains a functionally identical dispute-resolution provision calling for resolution of disputes through a four-level appeal process, then mediation, then binding arbitration under the AAA's rules and procedures. (JA 586–87.) The Unity member guide similarly makes clear that membership in the sharing ministry does not include a guarantee or promise to pay medical bills. (JA 573, 591–94.)

E. Procedural History

On April 15, 2020, Kelly filed this putative class action naming Aliera and Trinity (but not Unity) as defendants. (JA 11–41.) After an amended complaint and second amended complaint, Kelly and Boogher were both named plaintiffs. (*See* JA 42–76, 77–113.) In their second amended complaint, Kelly and Boogher alleged (on their own behalf and on behalf of a putative class) claims: (1) seeking rescission or reformation of the Member Guides; (2) for violation of the Missouri Merchandising Practices Act; (3) for breach of fiduciary duty; and (4) for unjust enrichment. (JA 103–09.)

Aliera moved to dismiss the case for failure to comply with a condition precedent—a mediation requirement in the Member Guide's dispute-resolution clause. (JA 508–10.) Alternatively, Aliera moved to compel arbitration under the Member Guide's dispute-resolution clause. (JA 510–22.) Among other things, Aliera explained that the arbitration provision in the Member Guide satisfied the requisite elements of contract—offer, acceptance, and consideration. (JA 818–821.) Trinity filed a similar motion. (JA 597–600.)

After full briefing on the issue, (JA 497–524; 601–34; 667–99; 812–54), the district court denied Aliera and Trinity's motions, (JA 880–91). The court declined to dismiss or compel arbitration based on the dispute-resolution clause because it held that Boogher and Kelly never entered into an enforceable agreement. (JA 888.) It reasoned that Kelly and Boogher did not "sign[] an agreement to arbitrate" and did not receive the Member Guide, which contains the dispute-resolution clause, until after they had enrolled in the Sharing Ministry. (JA 888.) Thus, it held there was no offer, acceptance, and bargained for consideration to support the dispute-resolution clause. (JA 889.)

Aliera and Trinity timely filed a joint motion under Rule 59(e) to alter or amend the order denying their requests to compel arbitration. (JA 1004–22.) Aliera and Trinity explained: (1) both Kelly and Boogher had received the Member Guide before their membership in the Sharing Ministry began; (2) both Kelly's and Boogher's signature emails incorporated the terms of the Member Guide; and (3) both Kelly and Boogher voluntarily remained members and made contributions to the Sharing Ministry after receiving the Member Guides. (JA 1011–15.) As a

result, Aliera and Trinity explained that the dispute-resolution clause in the Member Guide was binding. (JA 1015–18.)

Two days later, Aliera and Trinity each filed a notice of appeal from the order denying their motions to dismiss or to compel arbitration. (JA 1039–43.)[3]

The district court denied Aliera and Trinity's Rule 59(e) motion. (JA 1112–13.) And both Aliera and Trinity filed amended notices of appeal to include appeals from the order denying their Rule 59(e) motion. (JA 1114–17.)

[3] Aliera and Trinity filed these notices out of caution. Although the First Circuit has held that a Rule 59(e) motion tolls the running of the time to appeal an order denying a motion to compel arbitration, this Court has not. *See Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7 (1st Cir. 2005).

SUMMARY OF THE ARGUMENT

Under the FAA, courts enforce written agreements to arbitrate. Here, the district court declined to enforce the written arbitration agreement in the Trinity Sharing Ministry Member Guide because it concluded there was no offer, acceptance, and consideration. Because that conclusion was error, the Court should vacate the district court's decision and remand for further proceedings.

1. The FAA mandates that courts enforce written agreements to arbitrate so long as there is a nexus to interstate commerce and the dispute falls within the scope of the arbitration agreement. Here, the dispute-resolution provision in the Member Guide is in writing, there is undisputedly a nexus to interstate commerce, and Kelly and Boogher's dispute with Aliera falls within the scope of the dispute-resolution provision. Therefore, the FAA mandates enforcement of the dispute-resolution provision's arbitration requirement.

2. Contrary to the district court's conclusion, all of the elements of contract were present when Kelly and Boogher enrolled in the Sharing Ministry. The district court apparently concluded there was no consideration because the Sharing Ministry has no indemnity obligation.

The Sharing Ministry did, however, make other promises to Kelly and Boogher that are legally enforceable. Thus, because the parties exchanged promises, there was mutuality of obligation—consideration on both sides.

3. There was also mutual assent—offer and acceptance—at the time Kelly and Boogher enrolled. The documents Kelly and Boogher signed incorporated the Member Guide by reference, making it as much a part of any agreement as if it had been explicitly set out in the contract. Further, both Kelly and Boogher undisputedly received the Member Guide before their enrollment became effective. Although the district court focused on the lack of evidence that Kelly and Boogher reviewed the Member Guide, their failure to familiarize themselves with its terms is irrelevant to whether they accepted them.

4. Further, Kelly and Boogher's decision to remain members of the Sharing Ministry also shows their assent to the Member Guide, including the dispute-resolution provision. Under Missouri law, a party can manifest assent to a contract through conduct. After receiving their Member Guides (including the dispute-resolution provision), Kelly and Boogher remained members of the Sharing Ministry, made monthly

contributions, and Kelly made a claim for benefits. That conduct is sufficient to demonstrate their assent.

5. The Court should also estop Kelly and Boogher from denying that the Member Guide is a contract. Missouri law does not allow a person to accept the benefits of a contract while, at the same time, questioning its existence. Because Kelly and Boogher base one of their claims and one of their defenses to arbitration on the Member Guide being an insurance contract, the Court should estop them from denying the contract exists.

6. At minimum, a factfinder could infer assent to the Member Guide from all of Kelly and Boogher's conduct. As a result, there is at least a genuine issue of material fact as to assent. Under 9 U.S.C. § 4, the district court should have resolved that factual dispute through a summary trial.

7. Aliera also moved to dismiss the case based on Kelly and Boogher's failure to comply with a contractual condition precedent to suit—mediation. The mediation requirement and arbitration requirement come from the same dispute-resolution provision, and the district court denied Aliera's motion to dismiss for the same contract-

formation reasons it denied arbitration. Thus, the issues are inextricably intertwined, giving the Court pendent appellate jurisdiction over the mediation question. Because Kelly and Boogher did assent to the Member Guide's terms, the Court should vacate the district court's order denying the motion to dismiss as well.

ARGUMENT

A. Standard of Review

The Court reviews *de novo* a denial of a motion to compel arbitration. *See Neal v. Navient Sols., LLC*, 978 F.3d 572, 575 (8th Cir. 2020). This includes a district court decision regarding the formation of an agreement to arbitrate. *See Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 740 (8th Cir. 2014).

B. The Member Guide contains a written agreement to arbitrate, and Kelly and Boogher's claims fall within its scope.

The Federal Arbitration Act establishes the enforceability of, and a federal policy favoring, arbitration agreements. Under the FAA, arbitration provisions in contracts involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. When a party presents the court with a written agreement to arbitrate, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* § 4. Further, federal policy favors arbitration as a method of dispute resolution. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). So, courts enforce arbitration agreements when: (1) there is a written

arbitration agreement; (2) a nexus to interstate commerce; and (3) the dispute falls within the scope of the arbitration agreement. *See* 9 U.S.C. § 2.

Here, the Member Guide indisputably contains a written agreement to arbitrate all disputes with Trinity, its associates, or its employees. Specifically, it provides: "Therefore, by becoming a Sharing Member of Trinity HealthShare you agree that **any dispute** you have with or against Trinity HealthShare its associates, or employees will be settled using the following steps of action, and only as a course of last resort." (JA 159 (emphasis added).) The process that follows is a four-step in-house appellate procedure, followed by mandatory mediation, and then AAA arbitration. (JA 159.)

As a result, the Member Guide contains an agreement to arbitrate "any dispute" between a Sharing Member (such as Kelly and Boogher) and Trinity or its associate, Aliera. (JA 159.) This transaction, involving individual citizens of Missouri (Kelly and Boogher) and corporations located in Delaware and Georgia has a nexus to interstate commerce because it is interstate commerce. Kelly and Boogher did not contend otherwise in the district court. (JA 667–99, 1044–59.) Further, the claims

Kelly and Boogher raise fall within the requirement to arbitrate "any dispute" with Trinity and Aliera. Thus, there is a written agreement to arbitrate Kelly and Boogher's claims.

C. The elements of contract—offer, acceptance, and consideration—were present at enrollment.

The issue in this appeal is whether the dispute-resolution provision is a contract. Arbitration is a matter of contract. *See Parm v. Bluestem Brands, Inc.*, 898 F.3d 869, 873 (8th Cir. 2018). And state law—here Missouri law—governs whether an enforceable contract to arbitrate exists. *See id.*

Like most states, Missouri requires mutual assent (offer and acceptance) and mutual obligation (consideration) to form a contract. *See Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988) (en banc). The district court denied enforcement of the arbitration clause in the Member Guide because it held that the "dispute resolution 'agreement' lacks offer, acceptance, and bargained for consideration." (JA 889.) That decision was error.[4]

[4] The district court also emphasized that "there is no evidence [Kelly and Boogher] signed an agreement to arbitrate. (JA 888.) But the FAA does not require arbitration agreements to be signed, only that they be in writing. *See* 9 U.S.C. § 3; *Seawright v. Am. Gen. Fin. Servs., Inc.*,

1. There was mutuality of obligation—consideration.

The district court denied enforcement of the arbitration agreement in the dispute-resolution clause of the Member Guide in part because it held there was no "bargained for consideration." (JA 889.) Although the district court did not fully explain that conclusion, parts of its order focused on statements that there is no indemnity contract between the sharing members and the Sharing Ministry. (JA 887, 889.)

Under Missouri law a contract that imposes obligations on both parties is supported by consideration. An exchange of mutual promises—imposing mutual obligations—is consideration. *See, e.g.*, *TD Auto Fin., LLC v. Bedrosian*, 609 S.W.3d 763, 769–70 (Mo. Ct. App. 2020); *Brown v. Smith*, 601 S.W.3d 554, 559 (Mo. Ct. App. 2020); *Caldwell v. UniFirst Corp.*, 583 S.W.3d 84, 91–92 (Mo. Ct. App. 2019). Further, an arbitration provision in a larger agreement need not have independent

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507 F.3d 967, 978 (6th Cir. 2007); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002); *Karzon v. AT&T, Inc.*, No. 4:13-cv-2202, 2014 WL 51331, at *2 (E.D. Mo. Jan. 7, 2014); *Filson v. Radio Advert. Mktg. Plan*, 553 F. Supp. 2d 1074, 1086 (D. Minn. 2008). And a party can show acceptance of an arbitration agreement in ways other than a signature. *See Rivera-Colon v. AT&T Mobility P.R., Inc.*, 913 F.3d 200, 210–14 (1st Cir. 2019); *Legair v. Circuit City Stores, Inc.*, 213 F. App'x 436, 439 (6th Cir. 2007); *Tinder*, 305 F.3d at 736.

consideration. Instead, "[m]utuality … is satisfied if there is consideration as to the whole agreement." *TD Auto Fin.*, 609 S.W.3d at 769.

Here, although the Sharing Ministry may have had no indemnity obligation, it nonetheless exchanged promises with its members.

- It promised to establish guidelines to determine what type of medical expenses are eligible for sharing. (JA 152.)
- It promised to assign recommended cost-sharing amounts to each member each month. (JA 546.)
- It promised to administer the Sharing Ministry and assign members' contributions as the Guidelines prescribe. (JA 152, 545–46.)
- It promised to collect the members' monthly share amounts. (JA 546.)
- It promised to consider share requests. (JA 545.)
- It promised to operate the four-level internal appeal system. (JA 159.)
- It promised to mediate disputes between it and the members of the Sharing Ministry. (JA 159.)

- It promised, as a last resort, to arbitrate disputes between it and the members of the Sharing Ministry. (JA 159.)
- It promised to pay in full the filing fees for the arbitration and the arbitrator. (JA 159.)

Indeed, the promise to be bound to mediate and arbitrate disputes with the members of the Sharing Ministry is independent consideration supporting the dispute-resolution provision. *See Dickson v. Gospel for ASIA, Inc.*, 902 F.3d 831, 835 (8th Cir. 2018) ("[W]e think that GFA's promise to be bound by the result of an arbitration proceedings that the Dicksons initiate is sufficient consideration to render the agreement enforceable.").

These mutual promises also demonstrate that the district court wrongly interpreted any language in the Member Guide or the signature emails that might have suggested there was no contract. (*See* JA 887 ("Further, the online forms they signed repeatedly state the documents they were signing was not a contract."); JA 889 ("Defendants argue that Plaintiffs signed a document (that repeatedly states is not a contract) ....").) Taken in their proper context, any such statements instead "repeatedly" warned potential members that the signature form and the

Member Guide were not an **indemnity** contract. Had the district court correctly interpreted the Member Guide and signature emails, it would have concluded there was a contract, just not an indemnity contract.

In sum, because there is mutuality of obligation between the Sharing Ministry and its members, there is consideration to support the dispute-resolution provision. The district court erred by concluding otherwise.

2. There was mutual assent—offer and acceptance—at the time of enrollment.

The district court's conclusion that there was no mutual assent—no offer and acceptance—to the dispute-resolution provision in the Member Guide is based on two premises. (JA 888–89.) First, the forms Kelly and Boogher signed to become members in the Sharing Ministry do not (at least not on their face) contain the dispute-resolution provision. (JA 888.) Second, it is uncertain whether Kelly and Boogher, individually, had "received, reviewed, or specifically acknowledged the terms of the Member Guide when they electronically signed the online forms to become a member." (JA 888.) There are at least three problems with the district court's reasoning.

First, the documents bearing Kelly's and Boogher's signatures may not themselves include the dispute-resolution provision, but they incorporate it by reference. (JA 546, 563.) Specifically, Kelly's signature email contains the following disclosure:

> 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.

(JA 546.) Boogher's signature email is even more explicit. "I also understand that the guidelines are part of and incorporated into the UHS Application as if appended to it." (JA 563.) "In Missouri, matters incorporated into a contract by reference are as much a part of the contracts as if they had been set out in the contract in haec verba." *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. 2003) (en banc). And the incorporation of the Member Guide into the signature emails put Kelly and Boogher—who both acknowledged that the guidelines would govern—on at least constructive notice of the Member Guide's terms. *See Masters v. Boston Sci. Corp.*, 404 F. App'x 127, 129 (9th Cir. 2010) (concluding an employee who signed "the 2000 Agreements, which incorporated the 2000 Plan by reference" was charged

with constructive knowledge of 2000 Plan's definition of retirement); *Glenn Hunter & Assocs. v. Union Pac. R.R. Co.*, 135 F. App'x 849, 855 (6th Cir. 2005); *cf. also D.C. Transit Sys., Inc. v. United States*, 717 F.2d 1438, 1443 (D.C. Cir. 1983) (reasoning that incorporation by reference of documents into a public notice may impart constructive knowledge of their contents).

Second, both Kelly and Boogher undisputedly received the Member Guide before their enrollment became effective. Kelly received his copy of the Member Guide before his enrollment became effective on November 1, 2018—when he could still have withdrawn his membership and gotten a refund. (JA 526, 546–47, 551.) Boogher had long ago received the Unity guidelines containing a basically identical dispute-resolution provision. (JA 566.) Further, he received the Trinity Member Guide months before authorizing Aliera to switch his membership from the Unity sharing ministry to the Trinity Sharing Ministry. (JA 101 at ¶ 78; JA 596.) And he received the Trinity Member Guide again as a link in his welcome email, weeks before his enrollment in the Trinity Sharing Ministry became effective. (JA 484, 565–66.)

Third, it is irrelevant if Kelly and Boogher never reviewed the Member Guide, the dispute-resolution provision, or both. Under Missouri law, failure to read or understand the terms of a contract is no defense to enforcement of the contract's terms. *See Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 509 n.4 (Mo. 2012) (en banc) ("The law is clear that a signer's failure to read or understand a contract is not, standing alone, a defense to the contract."). Given that both Kelly and Boogher received the Member Guide before their enrollment in the Sharing Ministry took effect, they had ample opportunity to review the Member Guide's terms before their enrollment became effective. If Kelly and Boogher failed to do so, their negligence in failing to inform themselves of the Member Guide's terms cannot relieve them of the obligations it imposed on them. *See id.*

In sum, on the evidence in the record and under Missouri law, Kelly and Boogher assented to be bound by the terms of the Member Guide, which includes the dispute-resolution provision. As result, there was mutual assent to—offer and acceptance of—the Member Guide, including the dispute-resolution provision.

3. Kelly and Boogher voluntarily remaining members of the Sharing Ministry also demonstrates their assent to the dispute-resolution provision.

Not only did Kelly and Boogher assent in writing to the Member Guide imposing binding obligations on them, they also assented through their conduct. That is, Kelly and Boogher's decision voluntarily to remain members of the Sharing Ministry after having received the Member Guide containing the dispute-resolution provision manifested their assent to the Member Guide's terms for at least two reasons.

First, Kelly and Boogher's conduct after receiving the Member Guide manifested their assent to its terms. Under Missouri law, a party can manifest assent to—can accept—a contract through their conduct even though they never signed a document assenting to it. *See Holm v. Menard, Inc.*, — S.W.3d —, No. WD 83862, 2021 WL 560289, at *4 (Mo. Ct. App. Feb. 16, 2021) (holding that a signature is not required to accept an arbitration agreement); *Baker Team Props., LLC v. Wenta*, 611 S.W.3d 348, 355 (Mo. Ct. App. 2020) (finding assent to a lease agreement through conduct); *Heritage Roofing, LLC v. Fischer*, 164 S.W.3d 128, 134–35 (Mo. Ct. App. 2005) (finding assent based on conduct).

Kelly and Boogher's conduct after receiving the Member Guides demonstrates their assent to the Member Guide's terms. They remained members of the Sharing Ministry despite the voluntary nature of their membership and despite having an opportunity to withdraw their membership before the enrollment date and receive a refund of fees. (JA 99–102 at ¶¶ 68–69, 75, 78, 81, 84; JA 483–85, 546, 548–51.) They made monthly member contributions. (JA 99 at ¶ 68; JA 102 at ¶ 84.) And Kelly made sharing requests, attempting to receive funds from the Sharing Ministry to pay his medical bills. (JA 99–100 at ¶¶ 71–73.) And they did all of that after having acknowledged in their signature emails that the guidelines—the Member Guide—would govern their membership in the Sharing Ministry. (JA 546, 549, 563.)

In at least one analogous situation, courts routinely enforce arbitration agreements that plaintiffs receive only after they have "enrolled" in a program—arbitration clauses in credit-card agreements. Quite often, consumers apply online or through the mail but do not receive the full credit-card agreement (with the accompanying arbitration provision) until the credit-card company has approved their application and sent them a credit card. Yet, courts enforce those

arbitration agreements. *See, e.g.*, *Mason v. Midland Funding LLC*, 815 F. App'x 320, 329 (11th Cir. 2020); *Fahey v. U.S. Bank Nat'l Ass'n*, No. 4:05cv1453, 2006 WL 2850529, at *1–2 (E.D. Mo. Sept. 29, 2006); *cf. also Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009).

Second, even if the Court were to construe the Member Guide (including the dispute-resolution provision) as imposing new guidelines on Kelly and Boogher, they both agreed that the Sharing Ministry could do so. Specifically, Kelly's signature email provides, in two separate locations: "The ministry reserves the right to make updates to the Guidelines at any time." (JA 546; *see also* JA 549.) Boogher's signature email similarly provides for guidelines changes: "I also understand that with notice to the general membership the guidelines may change at any time …." (JA 563.) In short, if the Sharing Ministry imposed a new guideline—a new obligation—on Kelly and Boogher when it provided them with the Member Guide containing the dispute-resolution provision, Kelly and Boogher had both explicitly authorized the Sharing Ministry to do so. By continuing their membership in the Sharing Ministry after receiving that "new" guideline, they assented to being bound by its terms. *See Health Related Servs., Inc. v. Golden Plains*

Convalescent Ctr., Inc., 705 S.W.2d 499, 510 (Mo. Ct. App. 1985) (holding that conduct of the parties can show assent to a novation).

D. Kelly and Boogher's claims are predicated on the Member Guide being a contract.

"As a general rule, by accepting benefits a person may be estopped from questioning the existence, validity, and effect of a contract." *Dubail v. Med. W. Bldg. Corp.*, 372 S.W.2d 128, 132 (Mo. 1963) (citation omitted). Put another way: "[a] party will not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens." *Id.* (citation omitted); *accord Netco, Inc. v. Dunn*, 194 S.W.3d 353, 360 (Mo. 2006) (en banc) (same); *cf. also Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 631 (Mo. Ct. App. 1994) (reasoning that if a party "seeks to enforce the contract, [that party] will be bound by the contract's limitations" (citation omitted)).

Here, Kelly and Boogher are trying to do just that—trying to have their cake and eat it too. In their complaint, Kelly and Boogher rely on the Member Guide being a contract as a basis for their claims. For example, the entire first count of their complaint is a claim that the Member Guides are contracts, albeit illegal insurance contracts, that

need to be reformed to comply with Missouri insurance law. (JA 103–04 at ¶¶ 85–87.) Indeed, in their complaint, Kelly and Boogher refer to the Sharing Ministry as an "illegal contract" at least seven times. (*See* JA 80–81, 94, 96, 104 at ¶¶ 13, 15, 59, 62, 87.) Further, because Missouri state law forbids arbitration clauses in insurance contracts, Kelly and Boogher have argued the Member Guide is an insurance contract to try to avoid arbitration. (JA 96 at ¶ 62; JA 680–84); *see also* Mo. Rev. Stat. §§ 435.350, 376.1378.

Missouri law forbids parties from doing what Kelly and Boogher seek to do here—claim the benefits of a contract while seeking to disclaim a provision deemed unfavorable. Because Kelly and Boogher have causes of action and defenses to arbitration that depend on the Member Guide being a contract, the Court should estop them from denying that that the Member Guide, which includes the dispute-resolution provision, is a contract.

E. At minimum, there are factual issues regarding the elements of contract that should have gone to trial under 9 U.S.C. § 4.

Courts analyze motions to compel arbitration much like motions for summary judgment. *See Neb. Mach.*, 762 F.3d at 741–42. For the movant

to prevail it must show that there are no genuine factual disputes about arbitration. *See id.* If, however, there are genuine issues about "the making of the arbitration agreement" then the FAA commands courts to try those factual issues—"the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4; *accord Neb. Mach.*, 762 F.3d at 743. In such an instance, the district court should "hold the motion to compel arbitration in abeyance pending a trial on the issue of arbitrability." *Jin v. Parsons Corp.*, 966 F.3d 821, 828 (D.C. Cir. 2020).

The D.C. Circuit's decision in *Jin* is instructive. In that case, an employer put in place in 1998 an employee dispute-resolution program that included an arbitration agreement. *See id.* at 823. It updated that program in 2012 and, although asking employees to affirmatively certify their receipt of the agreement, the 2012 company email distributing the updated program indicated that continued employment would constitute acceptance. *See id.* at 823–24. The plaintiff testified he had no recollection of the 1998 program and never received any emails about the 2012 update. *See id.* at 824. He did, however, continue his employment. *See id.* The appellate court held that the district court should have held

a section 4 trial to resolve the dispute of fact over whether the employee had assented to the arbitration agreement. *See id.* at 826–28.

This Court's decision in *Nebraska Machinery* is also helpful. In that case, the defendant contended it had sent the plaintiff purchase orders that included a form containing an arbitration provision. *See Neb. Mach.*, 762 F.3d at 738–39. The plaintiff contended it had sent the defendant purchase orders that contained no arbitration provision. *See id.* at 739. Both parties insisted they never received the others' forms. *See id.* Because there remained factual issues regarding the making of the contract, the Court remanded to the district court to hold a section 4 trial. *See id.* at 742–44.

Here, if Kelly's actions were not sufficient as a matter of law to show his assent to the terms of the Member Guide, which included the dispute-resolution provision, they were at least sufficient to create a genuine issue of fact as to Kelly's assent. After all, Kelly agreed the guidelines would govern, that he would abide by the guidelines, that it was his responsibility to review the guidelines, and that Aliera and Trinity could change the guidelines. (JA 545–46, 548.) He received a copy of those guidelines—the Member Guide—before his membership became

effective. (JA 526 at ¶ 6; JA 156.) And although Kelly could have withdrawn his membership at any time, and even received a refund if he did so within a certain time frame, he voluntarily chose to remain a member long after receiving the Member Guide containing the dispute-resolution provision. (JA 546–48; JA 99–100 at ¶¶ 68–69, 75.) At minimum, a reasonable factfinder could infer assent from all of Kelly's actions. *See Holm*, 2021 WL 560289, at *4; *Baker Team Props.*, 611 S.W.3d at 355; *Heritage Roofing*, 164 S.W.3d at 134–35.

The same is equally true for Boogher; there is at least a genuine issue of fact as to his assent. Boogher's Aliera-administered Unity sharing ministry used a basically identical dispute-resolution provision, and he acknowledged that provision, which he received as part of his welcome email, was incorporated into his application for membership. (JA 563, 566, 586–87.) Boogher received a copy of the Trinity Member Guide roughly six months before he authorized Aliera to transition him to the Trinity Sharing Ministry. (JA 101 at ¶ 78; JA 596.) And Boogher has remained a member of the Trinity Sharing Ministry long after having received the Member Guide. (*See* JA 102–03 at ¶¶ 81–84.) At minimum, a reasonable factfinder could infer assent from all of Boogher's actions.

See Holm, 2021 WL 560289, at *4; *Baker Team Props.*, 611 S.W.3d at 355; *Heritage Roofing*, 164 S.W.3d at 134–35.

Because a reasonable factfinder could at least infer that Kelly and Boogher assented to the terms of the Member Guide, including the dispute-resolution provision, there is at least a genuine factual issue as to whether the parties agreed to arbitrate. So, at minimum, the district court should have held Aliera's motion in abeyance and proceeded to resolve the factual dispute through a section 4 trial. *See* 9 U.S.C. § 4; *Neb. Mach.*, 762 F.3d at 741–42; *see also Jin*, 966 F.3d at 828. Instead, it erred by denying Aliera's motions to compel arbitration and to alter or amend. As a result, the Court should vacate the district court's orders and remand.

F. Because the questions of whether to dismiss based on the mediation requirement and whether to compel arbitration are inextricably intertwined, the Court should vacate the entire order.

Under the final judgment rule, this Court generally has jurisdiction to review only final orders. *See* 28 U.S.C. § 1291. There are, however, a number of narrow exceptions to the general rule that allow the Court to hear interlocutory appeals. One of them is the statutory exception that

grants the Court jurisdiction to hear appeals from orders denying motions to compel arbitration. *See* 9 U.S.C. § 16.

When any of those interlocutory-appeal exceptions applies—including the exception for orders denying motions to compel arbitration—the Court may exercise pendent appellate jurisdiction over issues that are inextricably intertwined with the issue over which it has interlocutory jurisdiction. *See Lockridge*, 315 F.3d at 1012; *see also Freeman*, 119 F.3d at 1049–50 (exercising pendent appellate jurisdiction in case where appellate jurisdiction was based on 9 U.S.C. § 16). Issues are inextricably intertwined when resolution of the issue over which the Court has interlocutory jurisdiction necessarily also resolves the pendent issue as well. *See Lockridge*, 315 F.3d at 1012.

Here, the Court has pendent appellate jurisdiction over the question of whether Kelly and Boogher contracted with Aliera to mediate their disputes. The district court resolved the issue of whether Kelly and Boogher are contractually bound to mediate their disputes with Aliera and the issue of whether Kelly and Boogher are contractually bound to arbitrate instead of litigate those disputes on the same basis. That is, it held that "the dispute resolution 'agreement' lacks offer, acceptance, and

bargained for consideration." (JA 889.) Thus, the Court's resolution of the contract-formation issues as to compelling arbitration necessarily also resolves the pendent contract-formation issues as to mediation as well. And, as a result, the two issues are inextricably intertwined, giving the Court pendent appellate jurisdiction. *See Lockridge*, 315 F.3d at 1012.

For the same reasons the district court erred when it concluded Kelly and Boogher never contracted to arbitrate their disputes with Aliera, the district court erred when it concluded Kelly and Boogher never contracted to mediate their disputes with Aliera. For those reasons, the Court should vacate the district court's order denying Aliera's motion to dismiss based on Kelly's and Boogher's failure to mediate before resorting to an adversarial dispute-resolution procedure.

CONCLUSION

For these reasons, Aliera requests that the Court vacate the district court's orders denying Aliera's motion to dismiss or to compel arbitration and Aliera's motion to alter or amend. The Court should remand for further proceedings regarding Aliera's motion to dismiss or compel arbitration.

Respectfully submitted,

s/ E. Travis Ramey
E. Travis Ramey

One of the Attorneys for
Appellant The Aliera Companies Inc.

OF COUNSEL:
BURR & FORMAN LLP
420 North 20th Street
Suite 3400
Birmingham, Alabama 35203
Tel: (205) 251-3000
Email: tramey@burr.com

Joshua B. Christensen
KUTAK ROCK LLP
300 S. John Q. Hammons Pkwy.
Suite 800
Springfield, Missouri 65806
Tel: (417) 755-7221
Email: joshua.christensen@kutakrock.com

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in 14-point Century Schoolbook, which is a proportionally spaced font that includes serifs.

This brief complies with the type volume limitations in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 7,658 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

The brief complies with the electronic filing requirements of Eighth Circuit Rule 28A(h). The brief and addendum have been scanned for viruses and are virus-free.

s/ E. Travis Ramey
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2021, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system.

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Jay Angoff
Mehri & Skalet, PLLC
1250 Connecticut Avenue, N.W.
Suite 300
Washington, DC 20036

Ginger K. Gooch
HUSCH BLACKWELL LLP
901 St. Louis Street, Suite 1800
Springfield, Missouri 65806

s/ E. Travis Ramey
OF COUNSEL