No. 20-3702
No. 20-3709

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,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Missouri
No. 3:20-Cv-0583-MDH

BRIEF OF APPELLEES GEORGE KELLY, III AND THOMAS BOOGHER

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INTRODUCTION

Appellants, the Aliera Companies and Trinity Healthshare, market and sell sham health insurance plans through what they claim is a "recognized" health care sharing ministry ("HCSM"). While neither meets the requirements for HCSM exemptions, Appellants sell this sham coverage to circumvent Missouri insurance law and federal requirements under the Affordable Care Act ("ACA") in order to funnel millions of dollars from consumers into the pockets of Aliera's owners.

Kelly and Boogher, on behalf of a proposed class, sued Aliera and Trinity alleging that Appellants sold them illegal health insurance plans. Put simply, Appellees allege that Aliera and Trinity violated federal and state laws by retaining members' premium payments while refusing to pay medical claims.

Appellants moved to dismiss the complaint or compel arbitration. The District Court correctly determined that no agreement to arbitrate was formed. The arbitration provision was buried in a Member Guide that: (1) Appellants described as not legally binding; (2) Appellees received ***after*** enrolling in Appellants' health plans; and (3) Appellees did not learn about until ***after*** making initial payments to Appellants. For these and other reasons, the District Court rejected the Appellants' motion to compel arbitration. The Court of Appeals should uphold the District Court's well-reasoned decision. Oral argument is not necessary because the facts and legal argument are adequately presented in the briefs and record.

RESTATEMENT OF THE ISSUES

1. Did the District Court correctly determine that there was no mutual assent to an agreement to arbitrate, when:

   (a) The documents the parties signed disclaimed the formation of any "contract;"

   (b) There was no arbitration provision in any document that the Appellees signed and no mention of arbitration in any document provided to Appellees before they signed the agreement; and

   (c) By reserving the right to alter any term of their arrangements with the Appellees at any time, Appellants provided only illusory consideration?

Shockley v. PrimeLending, 929 F.3d 1012 (8th Cir. 2019); *Jackson v. Higher Educ. Loan Auth.*, 497 S.W.3d 283 (Mo. Ct. App. 2016); *Baker v. Bristol Care, Inc.*, 450 S.3d 770 (Mo. banc. 2014).

2. Did the District Court correctly conclude that there are no issues of material fact regarding contract formation, such that there is no need for trial under 9 U.S.C. § 4? *Shockley v. PrimeLending*, 929 F.3d 1012 (8th Cir. 2019).

3. Should this Court reject the Appellants' pendent jurisdiction argument to consider whether the Member Guide's Dispute Resolution procedure, which also includes a binding mediation provision, is enforceable because the same formation

questions apply to the mediation clause that apply to the arbitration clause? *Lockridge v. Bd. of Trs.*, 315 F.3d 1005 (8th Cir. 2003).

STATEMENT OF THE CASE

A. Aliera Executives Created Trinity to Sell Sham HCSM Coverage.

In December 2015, after his release from a six-year prison sentence for white-collar fraud and perjury, Timothy Moses, together with his wife and son, established Aliera, a for-profit corporation. App. 22 ¶4; App. 29-30 ¶31. Initially, Aliera contracted with an existing HCSM, Anabaptist Healthshare, to create a new subsidiary, Unity Healthshare ("Unity"). Aliera and Unity planned to take advantage of the HCSM exemption in the ACA, that might allow the entities to market Aliera's products as legal alternatives to ACA-compliant comprehensive health coverage. *See* App. 31 ¶¶36-38.

HCSMs are a form of health coverage in which members who share religious beliefs make monthly payments to cover other members' medical expenses. To qualify as an HCSM exempt from ACA requirements, an entity must, among other things: (1) be recognized as a 501(c)(3) tax-exempt organization; (2) have members who "share a common set of ethical or religious beliefs and share medical expenses among members according to those beliefs;" and (3) have "been in existence at all times since December 31, 1999," with "medical expenses of its members . . . shared continuously and without interruption since at least December 31, 1999." 26 U.S.C. § 5000A(d)(2)(B)(ii). Missouri also exempts legitimate HCSMs from state regulation under § 376.1750 R.S. Mo. Under the statute, an HCSM must also provide

for financial or medical needs through direct gifts from one member to another or through a trust established solely for the benefit of members, among other requirements.

In 2018, Anabaptist and Unity terminated its contract with Aliera after learning that Timothy Moses had written himself about $150,000 in unauthorized checks and failed to properly maintain assets reserved for payment of benefits. App. 31-32, ¶¶39-40. Anticipating the termination, on June 27, 2018, Aliera and its owners created Trinity, which they claimed was also an HCSM. App. 32 ¶41. In August 2018, Aliera signed an agreement with Trinity to provide the marketing, sale, and administration of the purported HCSM plans they created (the "Agreement"). App. 34-35 ¶47. Under the Agreement all monthly member payments are made directly to Aliera, which then allocates 30-40% of every payment to commissions. It also provides that Trinity will pay Aliera substantial additional administrative fees. *Id*. Under the Agreement, a small fraction of members' contributions—as little as 8.3% in some cases—were placed in a Trinity "Sharebox" account for payment of medical claims. *Id*. This structure violates the ACA requirement that health insurers maintain an 80% medical loss ratio—in other words, that healthcare plans spend at least 80% of each premium payment on actual medical claims. *See* 42 U.S.C. § 300gg-18.

Appellants misrepresent that Trinity is a "recognized HCSM," and they misinform members who purchase Trinity plans that they are members of an HCSM. App. 94; App. 112; App. 126-149; App. 156-158. As alleged by Kelly and Boogher, Trinity does not meet HCSM requirements. Instead, Appellants' health plans have typical insurance attributes and fit squarely within the definition of "health insurance." App. 35-38.

- The health plans charge "members" a "monthly contribution" referred to as "premiums," and the amount of the premium depends on the program selected, which include "interim medical," "comprehensive," "standard," "basic care," and "catastrophic." App. 35-36 ¶49.
- Appellants' plans are marketed as providing payment benefits in the event of specified health-related contingencies in exchange for a monthly payment, and the benefit amounts are tied to the amount of the monthly premium and cost incurred. *Id*.
- The plans require a member to pay a deductible, called a "Member Shared Responsibility Amount" ("MSRA") amount.
- After the MSRA is paid, medical bills are paid in accordance with a benefits booklet or member guide for the selected program. *Id*.
- These plans require preauthorization of certain non-emergency surgeries, procedures, or tests, as well as for some cancer treatments. *Id*.
- The plans purport to provide coverage for medical expenses, including for primary care visits, specialty care visits, hospitalization, emergency room, prescription drugs, labs, preventive care, and urgent care. App. 36-37 ¶50.
- Appellants' plans have established preferred provider networks through which members can seek care. Critically, providers bill Appellants directly, and payments are made by Appellants directly

to providers—not to other members or subscribers. App. 33 ¶43; App. 35-36 ¶49; App. 37 ¶54.

- Insurance agents sell the plans. App. 37 ¶56.

Given all the above, when Appellee Boogher first enrolled, Aliera's agent informed him that its health plans would work "just like a Blue Cross" plan and that his coverage would "smell, taste, and act like health insurance." App. 44-45 ¶76. Many insurance regulators have concluded that the Appellants' plans are unauthorized insurance and not legitimate HCSMs, operating illegally to avoid state consumer protection and solvency regulation and ACA requirements. *See* App. 183-362. Indeed, regulators from Texas, Washington, Colorado, New Hampshire, Connecticut, Maryland, and California have all issued orders finding Appellants were marketing, issuing, and administering unauthorized health insurance. *Id*; App. 41-42 ¶ 65.[1]

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[1] Since the Complaint was filed, regulators in Iowa, New Jersey, New Mexico, and Oregon have also charged Aliera and/or Trinity with selling illegal insurance. *See* Order, New Mexico Off. Of Superintendent of Ins., No. 20-00020-COMP-CL (Nov. 17, 2020), https://www.osi.state.nm.us/wp-content/uploads/2020/11/Recommended-Decision-20-00020.pdf; Order, Iowa Ins. Comm'r, No. 105205 (March 17, 2021), https://iid.iowa.gov/documents/enforcement-orders-and-actions/in-the-matter-of-trinity-healthshare-inc?utm_medium=email&utm_source=govdelivery; New Jersey Dept. of Banking and Ins., No. E20-32 (Dec. 23, 2020), https://www.nj.gov/dobi/division_insurance/enforcement/E20_32.pdf; Order, Oregon Dept. of Consumer and Business Services, No. INS-19-0109 (Oct. 9, 2019), https://dfr.oregon.gov/AdminOrders/enf-orders-2021/ins-19-0109-trinityhealthshare20210316.pdf.

B. Kelly and Boogher Purchased Aliera/Trinity Sham Health Insurance.

Appellee Kelly enrolled in Appellants' health plans effective November 1, 2018. Before purchasing, he was assured that the only hospital in his community was "in network" under the plans he was purchasing, and that care he received there would be covered. App. 43 ¶67. Weeks after enrolling and paying his initial payment, he received two Member Guides and insurance cards. App. 94; App. 112; App. 156-157. In February and March 2019, after making regular monthly payments or premiums to Appellants, Mr. Kelly incurred $1,723 of medical costs identified as covered in his Member Guide, all of which Appellants refused to pay. App. 173-178. In November 2019, Mr. Kelly sought pre-authorization from Appellants to have surgery performed at the same hospital and with the same providers whom Appellants had represented as in-network.[2] Appellants denied the pre-authorization, claiming these providers were not in-network. App. 180. Unable to find an in-network provider, Mr. Kelly was forced to pay out-of-pocket for his surgery.

Appellee Boogher bought an Aliera Unity health plan effective June 1, 2018. App. 44-45 ¶76. In November 2018, Aliera announced its separation from Unity and its new partnership with Trinity, which Aliera falsely represented was an HCSM.

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[2] The Complaint (App. 44 ¶73) includes a typographical error, identifying the year as 2018 instead of 2019.

App. 45 ¶78. Aliera sent him a new membership card and Member Guide, which were virtually identical to those he had received before, except that Trinity's name had replaced Unity's name. App. 392-491. Mr. Boogher agreed to move his plan from Unity to Trinity in May 2019. App. 46 ¶80; App. 428.

In 2019 and much of 2020, Mr. Boogher paid $936.52 per month for his Aliera health plan. App. 46 ¶81. To date, he has paid over $19,000 in health care premiums to Aliera. *Id*. His physicians have also advised that Mr. Boogher will need hip replacement surgery. App. 46-47 ¶84. He feared Appellants would refuse to pay for such procedure. *Id*.

C. The Online Enrollment Form Signed by Kelly and Boogher Does Not Mention Arbitration.

Members who enroll in Appellants' health plans sign nothing suggesting an agreement to arbitrate—this is undisputed. The Member Guide is the only document Appellants provide to their members that contains the dispute resolution provision at issue. It is sprung on consumers after enrollment and after they have made initial payments to Appellants. Nothing in Appellants' advertising materials, enrollment forms, or any documentation provided to prospective members before or during their decision to enroll, mentions an arbitration provision. App. 123-154; App. 160-171; App. 487-500; App. 540-544.

The enrollment forms contain "guidelines" and "terms and conditions," neither of which mention arbitration. App. 487-500; App. 506-507. The enrollment

forms also do not provide a link to the "Member Guide" which contains the arbitration clause. Furthermore, the enrollment forms state that the "guidelines" they contend Kelly and Boogher agreed to "are not a contract." App. 489; App. 507 ("I understand that the guidelines are not a contract … but instead are for [the HCSM's] reference …").

D. The Arbitration Provision Is Buried in the Member Guide, That Aliera and Trinity Provided Only After Appellees Had Completed Enrollment and Made Payments.

After signing their enrollment agreements, paying their enrollment fees and making their first month payments, Kelly and Boogher received a "welcome email." App. 495-500; App. 509-513. That email includes no information about arbitration. But it includes a link that the Appellants claim would have taken Kelly and Boogher to a member guide which, in turn, contained an arbitration provision.

No copy of the member guide was provided with the welcome email. Instead, the welcome email alludes to a future mailing, stating that a hard copy of the member guide will be forthcoming—but will not arrive until after the health plans become effective. Kelly and Boogher were never asked to acknowledge receipt of the member guide, much less to sign and acknowledge their agreement to terms mentioned only in the member guide, such as an arbitration provision.

E. Procedural History.

Kelly and Boogher's Second Amended Class Action Complaint alleges that Aliera and Trinity sell illegal and deceptive health care plans to Missouri residents and fail to provide coverage for medical care for which members pay monthly premiums. App. 21-57. Kelly and Boogher alleged the plans marketed and sold by Appellants qualify as insurance under both federal and state law. Kelly and Boogher have sued Appellants for illegal contract, violation of the Missouri Merchandising Practices Act, breach of fiduciary duty, and unjust enrichment. Kelly and Boogher seek rescission or reformation of their health care plans.

Appellants moved to dismiss the case, or in the alternative, to compel arbitration—relying on the dispute-resolution clause belatedly disclosed in the Member Guide. App. 448; App. 541-542. Appellants contended the Member Guide satisfied the requisite elements of a contract–offer, acceptance, and consideration. App. 556-557. They also moved to stay all discovery pending a decision on their motion to compel. App. 591-600.

Kelly and Boogher opposed the motions to compel arbitration on three bases. First, the provision lacked offer, acceptance, and consideration. Second, it was unconscionable. Third, it is also unenforceable under § 435.350 R.S. Mo., which voids arbitration clauses in insurance agreements. After full briefing, App. 591-600; App. 611-747; App. 756-798, the District Court agreed that Kelly and Boogher had

never entered into an enforceable agreement to arbitrate and denied Appellants' motions. App. 824-835. The court held there was no offer, acceptance, and bargained-for consideration to support the dispute-resolution provision. App. 833. It did not reach the questions of whether the arbitration clauses were unconscionable or void under Missouri law.

Appellants then jointly moved to alter or amend the order denying their motions to dismiss and compel arbitration, pursuant to Rule 59(e). App. 954-972. The District Court denied their Rule 59(e) motion. App. 1068-1069. This appeal ensued. App. 1070-1071; App. 1072-1073.

SUMMARY OF THE ARGUMENT

1. The arbitration provision in the Member Guide lacked an objective offer and acceptance required for mutual assent. Appellants never made an offer to arbitrate. They did not mention arbitration in any of the advertising materials or in the online enrollment application form but referenced guidelines that they claimed were not "not a contract." Appellants never objectively manifested their intention that the arbitration clause included in the Member Guide, received only after members enrolled and paid a substantial membership fee, was an "offer." Instead, they explicitly stated the guidelines were not a contract. They referred to the Member Guide as a "guide" or "booklet" rather than clearly manifesting an offer for an "agreement" or "contract" to arbitrate.

Nor did Kelly and Boogher ever assent to arbitration. Acceptance is present only when an offeree signifies assent to the offer's terms positively and unequivocally. Kelly and Boogher never signified acceptance of the terms of the arbitration agreement, and silence does not constitute acceptance. Additionally, Appellants provided no notice that continued membership in the health care plans constitutes acceptance of terms in a Member Guide that they described as not legally binding.

No bargained-for consideration was present for the arbitration provision. For consideration to exist, the parties must make mutual promises to do or refrain from

doing something that provides a benefit or that they would not otherwise have to perform. The Appellants claim, however, that the Member Guide does not bind them to anything that provides a benefit to Kelly and Boogher. Moreover, the arbitration provision itself is one-sided. Appellants reserve the unilateral right to amend the arbitration provision.

2. There are no issues of material fact related to whether the Parties formed a valid agreement to arbitrate. Even on appeal, Appellants identify no genuine factual dispute. The District Court's findings are straightforward legal determinations based on undisputed facts. No trial is warranted.

3. Similarly, there was no offer, acceptance, and consideration related to the binding mediation clause, which appears in the same provision as the disputed arbitration clause. Pendent jurisdiction should not be assumed. If, however, the Court asserts pendent jurisdiction over whether the parties agreed to mediate, the result must be the same as with arbitration.

4. Appellees argued below that the arbitration clause is unenforceable because it is unconscionable, but the District Court did not reach that issue. The arbitration provision is grossly unequal, defies common sense, is one-sided, oppressive, and unfair. If this Court does not affirm because no agreement to arbitrate was formed, Appellees request that the issue of unconscionability be remanded for consideration by the District Court.

5. Appellees also argued below that the arbitration provision is unenforceable because Appellants' health plans are insurance. Under Mo. Rev. Stat. § 435.350, arbitration provisions in insurance agreements are void. If the Court does not affirm the District Court's decision that no contract was formed, Appellants request that the matter be remanded to the District Court for consideration of the validity of the arbitration clause under Mo. Rev. Stat. § 435.350.

ARGUMENT

A. Standard of Review.

The District Court denied Appellants' motion to compel arbitration and rejected their argument that the arbitration clause in the Member Guide is enforceable. This Court reviews *de novo* the denial of a motion to compel arbitration as an interlocutory appeal within the scope of 28 U.S.C. § 1292(a)(1) when the decision turns on contract interpretation. *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 344 (8th Cir. 1990).

B. There Was No Agreement to Arbitrate.

1. Appellants Failed to Meet their Burden of Demonstrating an Agreement to Arbitrate.

Appellants bear the burden of proving a valid and enforceable arbitration agreement under state law. *Shockley v. PrimeLending*, 929 F.3d 1012, 1017 (8th Cir. 2019); *see also Jackson v. Higher Educ. Loan Auth.*, 497 S.W.3d 283, 288 (Mo. Ct. App. 2016) (whether two parties agreed to arbitrate disputes is determined by whether a valid agreement to arbitrate exists). An arbitration agreement, like any contract, is unenforceable if it lacks offer, acceptance, and bargained-for consideration. *Shockley*, 929 F.3d at 1017; *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 436 (Mo. App. 2010) ("Though [parties] are free to enter into an agreement to arbitrate disputes, the agreement is not valid unless it reflects the essential contract elements required under Missouri law.").

Appellants failed to demonstrate the existence of each of the elements—offer, acceptance, and consideration. These facts are undisputed. Kelly and Boogher each signed an online application form and agreed to allow Aliera to charge their respective credit card or bank account. The form said nothing about arbitration and provided no link to any arbitration agreement but informed them that it was "not a contract." App. 487-494; App. 505-508. After they enrolled, committed to the healthcare plan, and paid both an enrollment and the first month's fee, they received a "welcome email" that told them how to "take advantage of their healthcare benefits" as outlined in a member guide. However, that welcome email said nothing about arbitration or other previously undisclosed terms or conditions and provided no instructions on how to opt out or terminate their membership. App. 495-500; App. 509-513. ***After*** their membership became effective, they received a "Member Guide" or "Quick Guide" in the mail that itself also disclaimed being a "legally binding agreement," but which included, buried towards the end, a Dispute Resolution procedure consisting of a four-step internal process, followed by mediation and then arbitration. App. 94-109.

Appellants never informed Kelly and Boogher, before they enrolled and paid substantial fees, that should any dispute arise between the parties, they would have to arbitrate such disputes. App. 43 ¶¶67, 69 App. 44-45 ¶76; App. 45 ¶77. Appellants had ample opportunity to do so. App. 124-154; App. 160-171; App. 373-387. In

document after document provided to Kelly and Boogher before they purchased Appellants' health coverage, Appellants did not disclose the existence of an arbitration clause—not in any advertising materials, enrollment forms, or any other correspondence. *Id*; App. 91-109. Under these undisputed facts, and as described below, no contract to arbitrate was formed. *See Smith v. The Aliera Companies, Inc.,* No. 1:20-cv-02130-RBJ, 2021 U.S. Dist. LEXIS _____ (D. Colo. April 16, 2021) (a federal district court in Colorado concluded similarly that there was no contract to arbitrate between Aliera/Trinity and its enrollees).

2. There is No Valid Offer or a Valid Acceptance of an Agreement to Arbitrate.

An offer is made when the person receiving the offer would "reasonably believe that an offer has been made." *Jackson*, 497 S.W.3d at 288. A valid offer includes the ability to accept through some affirmative words or action. *Id*. at 290. Acceptance occurs when the person receiving the offer assents to the terms of the offer in a "positive and unambiguous" manner. *Katz v. Anheuser-Busch, Inc.*, 347 S.W.3d 533, 545 (Mo. Ct. App. 2011) (quoting *Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W.3d 476, 484 (Mo. Ct. App. 2010)). Together, offer and acceptance constitute mutual assent. *See Guidry v. Charter Commc'ns, Inc.*, 269 S.W.3d 520, 528 (Mo. Ct. App. 2008). "A mutual agreement is reached when the minds of the contracting parties meet upon and assent to the same thing in the same sense at the same time." *Baier v. Darden Rests.*, 420 S.W.3d 733, 738 (Mo. Ct. App. 2014).

a. The enrollment form is not an offer or acceptance of an agreement to arbitrate.

The only "agreement" that Appellants point to that Kelly and Boogher signed before becoming members of Appellants' plans was the online enrollment form. App. 91-109; App. 124-154. These signed online forms, however, do not mention arbitration. Nor do they "incorporate by reference" any arbitration agreement, as Appellants claim.

The form Mr. Kelly signed acknowledges, immediately above his signature, that "I have read and agree to the terms and conditions set forth in ***this*** agreement," and by signing, he authorized Aliera to charge his bank account monthly. App. 493. (emphasis added). At the very beginning of the "Terms and Conditions" section of the form is this disclaimer: "***This is not a contract***." App. 488 (emphasis added).[3] On the next page, under the heading "Voluntary," the enrollment form again states, "[e]nrollment in the ministry sharing plan ***is not a contract***." App. 489. (emphasis added). The "Terms and Conditions" section does not mention either arbitration or a "Member Guide" in which Mr. Kelly might find an arbitration clause. Under the subsection headed "Guidelines," the form again states that the Guidelines "do not constitute an agreement, a promise to pay, or an obligation to share," but specify the

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[3] There are two separate "Terms and Conditions" sections in the enrollment form Mr. Kelly signed, one for each of the two healthcare plans he enrolled in. The "Terms and Conditions" are identical for both plans.

types of expenses that are and are not eligible for coverage. App. 492. It explains that the Guidelines "define eligible sharing," without mentioning that they might also include terms unrelated to "sharing," such as an arbitration clause. *Id*. The form provides no link to any "Guidelines," and there is no evidence that any "Guidelines" were made available for review before Kelly enrolled.

Similarly, the form Mr. Boogher signed acknowledged that he had "read and agree[d] to the terms and conditions set forth in ***this*** agreement," and authorized Aliera to charge his credit card. App. 506 (emphasis added). There is no acknowledgment in that application of terms that might be found in some other writing. The "Terms and Conditions" section above the signature line does not mention either arbitration or a "Guide." *Id*. Under that heading, the application provides that "sharing" would be "per the guidelines and membership Escrow Instructions" and the "Membership Eligibility Manual." *Id*. There is no link provided to either of these documents from the online application, and no evidence that they were made available for review at the time of enrollment. The application agreement then provides: "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." *Id*. (emphasis added).

These documents do not evidence an offer to arbitrate or assent. To demonstrate the existence of a contract to arbitrate, Appellants would have needed

to show an offer that would lead the offeree to reasonably believe that an offer to arbitrate had been made. *Jackson*, 497 S.W.3d at 288. A vague reference to undisclosed "guidelines," described as "not a contract" and as merely a "reference" for Appellants' use, was insufficient to establish an "offer to arbitrate." Nor did Appellees manifest assent by signing enrollment forms that never mentioned arbitration. *Id.* at 289. *See Guidry v. Charter Communs., Inc.*, 269 S.W.3d 520, 528 (Mo. Ct. App. 2008) ("A meeting of minds occurs when there is a definite offer and an unequivocal acceptance.").

Aliera and Trinity suggest that, even though the enrollment documents did not refer to an arbitration clause or explicitly incorporate the Member Guide, the arbitration clause in the Member Guide is somehow still "incorporated." For this argument, they rely on a footnote in *Dunn Indus. Grp. Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n. 5 (Mo. 2003). But *Dunn* stands for the unremarkable holding that "matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract *in haec verba*." *Id.* Here, of course, there is no incorporation because (a) Appellants claimed that there was no contract; (b) the enrollment materials did not incorporate by reference either the arbitration provision or even the Member Guide in which it appears; and (c) Appellants asserted that the Member Guide itself was not a contract. Aliera and Trinity fail to mention that in *Dunn,* the Missouri Supreme Court held that an arbitration provision was not

incorporated by reference into a guaranty contract, rejecting a similar motion to compel. *Id*. at 436.

b. The welcome email is not an offer or acceptance of an agreement to arbitrate.

Appellants claim that their failure to provide any information about the arbitration provision to Kelly and Boogher when they enrolled was somehow cured with a later-sent "welcome email" containing a hyperlink. App. 497; App. 510. But "under Missouri law, merely saying a contract is 'attached' is insufficient to incorporate an arbitration clause in the contract by reference." *United States ex rel. Lighting & Power Servs. V. Interface Constr. Corp.*, 553 F.3d 1150, 1155 (8th Cir. 2009) (citing *Dunn Indus. Group, Inc.*, 112 S.W.3d at 436). Additionally, an incorporation clause is valid only when the referenced provision has a "reasonably clear and ascertainable meaning." *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co*, 242 F.3d 777, 781 (8th Cir. 2001).

Appellants' incorporation argument fails. ***First,*** by the time they received that email, Kelly and Boogher had paid a substantial enrollment fee and the first month's premium, App. 495 (showing Mr. Kelly had paid $179); App. 509 (showing Mr. Boogher had paid $928.89). They had accepted the enrollment offer and provided valuable consideration. Aliera and Trinity could not unilaterally change the terms of the agreement.

Second, the welcome emails do not mention arbitration. They merely informed Kelly and Boogher that they would receive a copy of their Member Guide in the mail "within 14 business days ***after your plan's effective date***." App. 497; App. 510 (emphasis in original). Although Appellants point to this email as evidence that Kelly and Boogher received the Member Guide before their plans went into effect,[4] there is nothing in the record identifying what was linked to the welcome emails. *See, e.g.*, App. 469-485.

Third, even if Appellants could show that the Member Guides were linked to the welcome emails, nothing in the emails suggests that the Member Guide would contain an arbitration agreement, or any other previously undisclosed terms to which members would be deemed to have agreed. Instead, the link appears beneath the caption, "become familiar ***with your benefits***." App. 497 (emphasis added). After instructing each member to consult the Member Guide for "everything you need to know regarding your healthcare plan," the email provides instructions on how to use the plans, including registering for telemedicine, activating the insurance card, and accessing the member portal. *Id*. The email refers to the Guide as a "booklet," and not a "contract" or "agreement." Against that backdrop, a member would reasonably

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[4] Mr. Kelly filled out his enrollment form on October 16, 2018. App. 494. He did not receive the "welcome email" until 11:57 pm on October 30, 2018, just hours before his plan went into effect on November 1. App. 495.

conclude that the Member Guide would provide details about the plan's ***benefits***, and not a one-sided waiver of legal rights. The email does not inform members that the Guide contains new and binding terms, and that if members do not agree with them, they should immediately terminate their healthcare plan for a full refund.

Mere receipt of a link to an arbitration clause does not manifest mutual assent. In *Shockley*, for example, the defendant employer maintained various company documents, including an Employee Handbook, on its network. 929 F.3d at 1016. Clicking on the Handbook automatically generated an acknowledgment pop-up window, along with a hyperlink to the full Handbook. *Id*. The Handbook contained a dispute resolution/arbitration clause. *Id*. The court held that the plaintiff did not agree to arbitrate merely by clicking on the hyperlink or even by opening the online employment handbook that contained the arbitration provision. *Id*. at 1019. As the court emphasized, an employee's general knowledge or awareness of a contract does not equate to positively and unambiguously accepting it. *Id*. (*citing Katz*, 347 S.W.3d at 545); *see also Nguyen v. Barnes & Noble Inc.,* 763 F.3d 1171, 1179 (9th Cir. 2014) (even if conspicuous, a hyperlink that "provides no notice to users nor prompts them to take any affirmative action to demonstrate assent" is insufficient to give constructive notice of or bind consumers to arbitration clause).

Similarly, in *Jackson*, an emailed link could not prove a valid offer or acceptance of an arbitration provision. 497 S.W.3d 283, 289. The *Jackson* court

emphasized that by using the word "policy" throughout, the employer tried to camouflage "an alleged offer that requires Employee's acceptance." *Id*. It also highlighted that the employer's "linguistic smokescreen" prevented the employee from understanding the "objective intent" of the employer to execute an agreement. *Id*. Here, besides Appellants claiming the Member Guide is not a contract, and instead using terms like "booklet" and "guidelines," the emailed link to the Member Guide Kelly and Boogher received was inconspicuous and appeared below a "linguistic smokescreen" caption: "become familiar with the benefits of your membership." App. 497; App. 510.

Simply put, the welcome emails do not evidence the "meeting of the minds" required for Kelly and Boogher's mutual assent to arbitration. *See, e.g.*, *Katz*, 347 S.W.3d at 545 (acceptance of offer to arbitrate is present when offeree signifies assent to terms of offer in a "positive and unambiguous" manner; silence is not acceptance); *Holley v. Bitesquad LLC*, 416 F. Supp. 3d 809, 812 (E.D. Ark. 2019) (requiring arbitration only where potential employee specifically signed and agreed to "Arbitration Agreement"). The Member Guide, which is referenced in ambiguous terms such as "guide" and "booklet" rather than "contract" or "agreement," does not objectively make clear that it includes terms that a member will be deemed to have accepted. App. 92-109.

When terms that include arbitration are not provided until after a product is purchased, there is no mutual assent to arbitration. *See Norcia v. Samsung Telcoms. Am., LLC,* 845 F.3d 1279, 1287 (9th Cir. 2017) (no arbitration agreement formed when purchaser was given no notice of a freestanding obligation to arbitrate in a brochure provided after purchase); *Plummer v. Nicor Energy Servs. Co.*, No. 1:17-cv-2177-WTL-MPB, 2018 U.S. Dist. LEXIS 35186, at *21 (S.D. Ind. Mar. 5, 2018) (nothing in the insurance plan welcome email indicated that failure to act within a certain period following receipt of the plan would be deemed acceptance of the arbitration clause); *Kauders v. Uber Technologies, Inc.*, 159 N.E.3d 1033, 1052 (Mass. 2021) (arbitration agreement was unenforceable because it did not require users to click on terms and conditions, and defendant did not obtain a clear manifestation of assent).

c. Continued membership is not evidence of acceptance of an offer to arbitrate.

Appellants claim that Kelly and Boogher accepted the arbitration provision because they "voluntarily" remained members and continued to pay their monthly premiums after they received their Member Guide. Acceptance is present ***only*** when an offeree signifies assent to the terms of the offer in a positive and unequivocal manner. *Katz*, 347 S.W.3d at 545 (mere continuation of employment does not manifest an employee's intent to be bound by proposed arbitration agreement). Appellees' mere continued membership, without more, does not qualify as

unequivocal assent. Appellants identify no other actions by Kelly and Boogher to manifest an agreement to the arbitration procedure.

Appellants' claim that Kelly and Boogher' payments were "voluntary" is misleading. The Member Guides provide: "If the monthly contribution is not received by the end of the month, a membership will become inactive as of the last day of the month in which a monthly contribution was received." App.115. One who is not a member cannot receive any benefits and is not eligible for coverage for medical expenses: "[o]nly needs incurred on or after the membership effective date are eligible for sharing under the membership instructions." App. 117; App. 120. Appellees' participation in Aliera/Trinity was only "voluntary" to the extent any commercial transaction is. Aliera and Trinity made clear that if monthly premiums were not paid, Kelly and Boogher would be ineligible for benefits.

Moreover, members cannot simply "terminate" a health plan at any time without serious repercussions. If members "voluntarily" fail to make monthly payments, they become effectively uninsured and ineligible for coverage if they incur health care expenses. If the member is terminated outside the ACA open enrollment period for health insurance, he or she may be unable to purchase other coverage. *See* App. 620. (Mr. Boogher was ineligible for any special enrollment period with the HealthCare Exchange in Missouri and unable to purchase alternate health insurance before January 1, 2021). Besides, members may have already paid

out-of-pocket towards their deductible—their MRSA—and would lose the benefit of the accumulated out-of-pocket expenses. App. 173-178.

And, throughout Kelly and Boogher's membership, Aliera and Trinity continued to obscure what they now claim is a binding arbitration clause. For example, when members submitted medical claims for payment, Aliera and Trinity sent them an "Explanation of Benefits," or "EOB." App.173-178. The EOBs include a section with the heading "Important Information About Your Appeals Rights." Under that heading, the member is advised to contact the Missouri Department of Insurance if they suspect fraud. It says nothing about a four-step appeals process or binding arbitration.

The cases Appellants rely on to demonstrate assent by conduct are inapposite. The offerees in each case unmistakably and clearly approved the terms of an agreement offered to them. In *Holm v. Menard, Inc.*, 2021 Mo. App. LEXIS 166, at *7 (Ct. App. Feb. 16, 2021), there was a clear offer when defendant presented plaintiff with a writing that advised him to "read this contract carefully," and that his purchase of the product "on this contract constitutes your agreement to all the terms and conditions . . ." He read the entire contract and then accepted the offer by purchasing the product. In *Baker Team Props., LLC v. Wenta*, 611 S.W.3d 348, 354-55 (Mo. Ct. App. 2020), the tenant agreed to the terms of a lease renewal by signing it. In *Heritage Roofing, LLC v. Fischer*,164 S.W.3d 128, 135 (Mo. Ct. App. 2005),

the defendant orally agreed to the terms of a roofing contract after he had received it. Offer and acceptance were clear in each of those cases.

Appellants' credit card cases are also unavailing because there was no question that the arbitration terms were included in an "agreement" and that the card users were advised that by using the card they agreed to its terms. *See, e.g.*, *Cicle v. Chase Bank USA,* 583 F.3d 549, 554-55 (8th Cir. 2009) (no question that plaintiff had agreed to terms of Cardmember Agreement, and Agreement was "not foisted upon an unwary customer after she began using the card"). Here, the Member Guide contains no language outlining what would constitute members' assent to its terms and conditions. Instead, it is prefaced with the words, "This is not a legally binding agreement to reimburse … but is an opportunity for members to care for one another in their time of need …" App. 94.

The present case is more like *Masteller v. Champion Home Builders Co.*, 723 N.W.2d 561 (S.D. 2006). In that case, the plaintiff bought a home from the defendant and the purchase agreement did not reference an arbitration clause. *Id*. at 561. After the home was built, the plaintiff received the defendant's homeowner's guide and warranty, which contained an arbitration provision. *Id*. The plaintiff later sued under the warranty, after having additional work completed by the defendant. *Id*. The court held that "there was no unambiguous conduct evincing acceptance of the benefits of

the [h]omeowner's [g]uide with its mandatory arbitration clause… the only contract the [plaintiff] signed and now seeks to enforce was the [purchase order]." *Id*. at 566.

Like *Masteller*, Kelly and Boogher purchased and enrolled in Appellants' health care plans. Nothing they signed referenced an arbitration agreement. Kelly and Boogher later received the Member Guide, which Appellants disclaimed was a contract and which also contained an arbitration provision. Kelly and Boogher remained members and later sued Appellants for selling insurance illegally in the State of Missouri. There was no clear and unambiguous conduct on behalf of Kelly and Boogher exhibiting acceptance of the arbitration provision.

Similarly, in *Smith*, 2021 US Dist. LEXIS _____, *__, as here, the trial court rejected Appellants' argument that continued membership in the healthcare plans evidenced assent to the arbitration clause in the member guides. It distinguished credit card and other cases, because *inter alia,* the Appellants' "disavowal of the binding nature of the guides" rendered any notice of the provision "ambiguous."

3. Appellants Failed to Show Consideration for an Agreement to Arbitrate.

The District Court correctly determined that the arbitration provision lacked "bargained for consideration." App. 833. Under Missouri law, a contract contains valid consideration where a "benefit [is] conferred upon the promisor or [there is] a legal detriment to the promisee." *State ex. rel. Kansas City v. State Highway Comm'n,* 163 S.W.2d 948, 953 (Mo. 1942); *see also*, *Baker v. Bristol Care, Inc.*,

450 S.W.3d 770, 774 (Mo. banc 2014) ("Consideration consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party."). Appellants disclaim any obligation at all in the Member Guide, claiming it is not a contract requiring them to pay anything. App. 95; App. 394. ("This is not a legally binding agreement to reimburse any member for medical needs …"); App. 449 (Dkt. No. 38, p. 9 (Aliera: "there is no quid pro quo").

Furthermore, the arbitration provision was offered after contract formation occurred, so it cannot be enforced. *See Dakota Foundry, Inc. v. Tromley Indus. Holdings,* 891 F. Supp. 2d 1088, 1097 (D.S.D. 2012) (finding the arbitration clause unenforceable because the initial contract between the parties formed without mutual consent to any arbitration clause). That did not happen. Without consideration, there can be no agreement.

The arbitration clause itself is not an agreement because the Member Guides purport to require only members to arbitrate claims, not the Appellants. App. 99; App. 411; *see also* App. 474 ("***Sharing members*** … expressly waive their right to file a lawsuit …") (emphasis added). Further, members are required to reimburse Appellants for the full costs associated with the arbitration if the member loses, but Appellants do not have to repay the policyholder for such costs if they lose. *Id*. *See Greene v. Alliance Auto, Inc.,* 435 S.W.3d 646, 654 (Mo. App. 2014) (no mutual consideration when defendant could waive arbitration, but plaintiff could not).

Appellants claim that their "promise" to pay in full the filing fees for the arbitration and the arbitrator is consideration. Under the AAA consumer rules, however, the business must pay those fees whether it "promises" to do so.[5] Agreeing to do what one is already obligated to do is not consideration. *State Highway Comm'n.,* 163 S.W.3d at 953 (mere promise to do what is already required does not constitute consideration).

The "obligations" that Appellants claim provide mutual consideration are illusory. *See* Aliera Br., at 24; Trinity Br. at 25. Their promise to "collect" the members' monthly payments is no obligation by Appellants but is merely another way of saying the ***members must pay*** Appellants by allowing them to monthly bill their credit card or bank account. The promise to "***consider*** share requests" with no further obligation to pay any benefit is illusory—it provides no benefit to the members and is no promise. *Magruder v. Quarry & Co, LLC v. Briscoe,* 83 S.W.3d 647, 650 (Mo. Ct. App. 2002) ("an illusory promise is not a promise at all and cannot act as consideration, therefor no contract is formed"). Similarly, a "promise" to

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[5] "***All expenses of the arbitrator***, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, ***shall be borne by the business***." American Arbitration Association, Consumer Arbitration Rules (September 1, 2018), https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_0.pdf (emphasis added).

"establish guidelines" and "assign" contributions provides no benefit to the members and is not consideration for their payment.

In addition, an arbitration agreement is also unenforceable for lack of consideration if one side retains the power to unilaterally modify it. *Esser v. Anheuser-Busch, LLC*, 567 S.W.3d 644, 652 (Mo. Ct. App. 2018) (reservations to unilaterally amend or modify arbitration agreements cause those promises to arbitrate to be illusory and fail for lack of consideration under Missouri law). *Campbell v. Adecco USA, Inc.*, No. 2:16-cv-04059, 2016 U.S. Dist. LEXIS 76234 at *7 (W.D. Mo. June 13, 2016) (where employer retained unilateral right to modify, the arbitration agreement failed for lack of consideration). The promises imposed on both sides must be binding and not illusory. *Baker*, 450 S.W.3d. at 777. "A promise is illusory when one party retains the unilateral right to amend the agreement and avoid its obligation." *Id.* Appellants here unilaterally retain the right to change the Member Guide's terms, including the arbitration clause. *See* App. 493 ("The ministry reserves the right to make updates to its Guidelines at any time.") In fact, Appellants unilaterally removed and then reinstated the arbitration requirement with more onerous provisions in Mr. Boogher's Member Guide. App. 657.

Considering the totality of the circumstances and the totality of the disclaimers and explanations present in the Member Guide, there is no bargained-for consideration. Appellants do not require of themselves the same promises and

waivers they require of members. Neither mutual assent nor consideration was present at enrollment.

C. Kelly and Boogher are Not Estopped From Denying the Existence of an "Agreement" to Arbitrate by Seeking Damages to Compensate for Lost Benefits that Legitimate Insurance Would Provide.

Appellants erroneously claim that Kelly and Boogher "rely on the Member Guide being a contract as a basis for their claims," and are therefore estopped from arguing its arbitration provision is unenforceable. Aliera Br. at 33, Trinity Br. at 34. Appellants cannot raise a new issue for the first time on appeal. Because Appellants did not raise this issue in the District Court, they waived it. *See United States v. Hirani*, 824 F.3d 741, 751 (8th Cir. 2016).

Should this Court consider the issue, it should reject Appellants' argument. Appellants significantly misconstrue Appellees' claims. Kelly and Boogher do not allege that the ***Member Guide*** is a written insurance contract that they seek to enforce. Instead, Kelly and Boogher claim the Appellants' health care ***plans*** are insurance that were never authorized by the Missouri Department of Insurance and were sold illegally in the state. They seek damages in the form of either (a) a refund of the premiums paid to Aliera and Trinity for the unauthorized, illegal insurance or (b) coverage of the medical expenses incurred to the extent the expenses would have been covered, had the health care plans complied with the minimum requirements of Missouri law and the ACA. *See* App. 47.

The contract that Kelly and Boogher seek to enforce is the enrollment agreement that Aliera and Trinity represented as providing certain levels of coverage for health care costs. *See, e.g.*, App. 95-100 (outlining the covered benefits under different plans); App. 487 (Kelly's enrollment form showing that after an MSRA (deductible) is met, the plan would pay 100% for most services). By enrolling, Kelly and Boogher agreed to allow Aliera to automatically collect their monthly payments for the premium amount, and they agreed to the Statement of Beliefs. App. 487-494; App. 505-508. That is the operative contract. The Member Guide is not a contract that Appellants seek to enforce; it is documentary evidence of the deceptive scheme through which Appellants on the one hand, cloak their healthcare plans in terminology that looks and feels like health insurance, while on the other hand, disclaim any obligations. *See* App. 35-37.

In *Netco, Inc. v. Dunn,* 194 S.W.3d 353 (Mo. 2006), a case on which Appellants rely, one of the plaintiffs contested the validity of the arbitration agreement after suing the defendant for conspiracy. The defendant in *Netco* argued that because the plaintiff asserted rights under the parties' business contract, they therefore could not reject the obligations of the agreement, including the obligation to arbitrate. *Id*. At 358. However, the court found that because the plaintiff was not seeking to enforce any provision of the contract, equitable estoppel was unwarranted. *Id*.

Like the plaintiffs in *Netco*, Appellees' positions are consistent. Aliera and Trinity sold them health care plans that qualify as insurance, with the enrollment agreement reflecting that insurance contract. They allege that after they enrolled, Appellants sent them a Member Guide (described as "not a contract") that included an arbitration provision to which they never agreed. Appellees have never claimed that the arbitration provision or the Member Guide constitute a contract.

There is a glaring distinction between this case and the cases Appellants rely on for their estoppel argument. None of Appellants' cases have an arbitration clause that appears only in a document that the drafting party asserted was "not a contract." In each of Appellants' cases, a contract existed. The legal question was which parties were bound by it. *See Dubail v. Med. W. Bldg. Corp.*, 372 S.W.2d 128, 128-32 (Mo. 1963) (arbitration clause extended to non-signatory entity that accepted benefits of its signatory principals); *Tractor-Trailer Supply Co. v. NCR Corp.*, 873 S.W.2d 627, 631 (Mo. Ct. App. 1994) (arbitration clause extended to non-signatory entities whose principal signed); *see also Netco*, 194 S.W.3d at 360 (plaintiff signed membership application agreeing to terms including arbitration and accepted benefits of membership; whether unrelated changes to agreement had been accepted was irrelevant).

It is Appellants, not Kelly and Boogher, who "cannot have their cake and eat it too." *See* Aliera Br. at 33. Appellants insist the plans are "not insurance" and that

there is "no contract" to avoid Missouri insurance law, including R.S. Mo. § 435.350 that voids arbitration in insurance contracts. But then they claim that Kelly and Boogher are bound by an arbitration "contract." They cannot have it both ways. As the court in *Smith v. The Aliera Companies,* supra, at __ held, "Defendants cannot disavow the contractual nature of the member guides and then expect the Court to enforce the arbitration clauses in these supposed non-contracts."

D. No Fact Issues Require A Trial Under 9 U.S.C. § 4.

Appellants bore the burden of proving the lack of material issues of fact. *Shockley*, 929 F.3d at 1017. They filed declarations with numerous exhibits, claiming they demonstrated that Kelly and Boogher had agreed to arbitrate. App. 469-485; App. 540; App. 579-590. They identified no factual issues in dispute. They also moved to stay all discovery while their motion was pending, insisting any discovery would prejudice them. App. 974-987. Only after the District Court decided the motion based on Appellants' presented evidence did they claim there were fact issues in dispute. App. 996-1012.

When, as here, no genuine issues of material fact exist, courts generally decide arbitrability as a matter of law through motions practice. *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 978 (10th Cir. 2014). Thus, Appellants' motion to compel arbitration mirrors a motion for summary judgment. *Id*; *see also Camara v. Mastro's Rests. LLC*, 952 F.3d 372, 373 (D.C. Cir. 2020) (district court correctly

treated motion to compel arbitration as if movant "sought summary judgment…with respect to the question" whether parties agreed to arbitrate).

That is precisely what the District Court did here. There are no genuine issues of material fact about whether the parties formed a valid agreement to arbitrate, and thus a trial on arbitrability is unwarranted. Whether the necessary mutual assent exists to form a contract depends on the ***objective*** intentions of the parties. *Jackson*, 497 S.W.3d at 289. There are no material issues of fact regarding what Kelly and Boogher signed or received or what those documents objectively imparted. Appellants do not dispute the basis for the District Court's order that "the documents signed by [Kelly and Boogher] … do not reference arbitration or contain an arbitration provision"; that "[t]here is no evidence [Kelly and Boogher] received, reviewed, or specifically acknowledged the specific terms of the Member Guide when they electronically signed the online forms to become a member"; or that the only documents signed by Kelly and Boogher repeatedly state they are not contracts. App. 832-833. *Compare*, *Nebraska Mach. Co. v. Cargotec Solutions, LLC*, 762 F.3d 737, 739 (8th Cir. 2014) (where there was an issue of fact regarding which forms were sent and received, a trial was necessary); *Jin v. Parsons Corp.*, 966 F.3d 821, 826-28 (D.C. Cir. 2020) (whether there was a genuine dispute on whether plaintiff had received and agreed to arbitration clause, a trial was warranted).

The only disputed "fact" issue Appellants point to is "as to [Appellees'] assent," which they claim is evidenced by continued membership in the health care plans. Aliera Br. at 38. But it is undisputed that they remained members. There is no factual dispute to warrant remand for trial.

E. There was No Agreement to Mediate, Just as There was No Agreement to Arbitrate.

Pendent jurisdiction should be assumed sparingly, and only "when appellate resolution of the collateral appeal necessarily resolves the pendent claim as well." *Lockridge v. Bd. of Trs.*, 315 F.3d 1005, 1012 (8th Cir. 2003). While the formation issues related to mediation and arbitration are the same here, Appellees have additional arguments as to why the binding mediation provision in the Member Guide is unenforceable. As Kelly and Boogher argued below, the multi-level appeal process, including the mediation provision, cannot be enforced under federal or Missouri law since any more than one level of internal appeal is illegal. App. 631; 42 U.S.C. § 300gg-19(a)(1); 45 C.F.R. § 147.136(b)(3)(ii)(G) (under the ACA, health insurers selling individual coverage may not impose more than one level of internal appeals). *See Jackson v. Aliera Cos.,* 462 F. Supp. 3d 1129 (W.D. Wash. 2020) (denying motion to dismiss for failure to mediate because plaintiffs sufficiently alleged that multi-layered dispute resolution procedures in Trinity plans were illegal rules preventing multiple levels of appeal). The District Court did not decide these issues, and there is no jurisdiction for this Court to do so here.

If the Court considers Appellants' arguments about mediation, it should find no agreement to mediate, just as there is no agreement to arbitrate. If the dispute-resolution procedure, which included both the arbitration and mediation provisions, lacked the requisite elements of contract formation, then there is no basis for enforcing the mandatory mediation clause contained within the same provision. App 833. This Court should affirm the District Court's decision that the dispute resolution provision is unenforceable as to both mediation and arbitration provisions.

F. If the Court Concludes that the District Court Erred, It Should Remand for a Determination on Unconscionability.

The District Court did not reach a determination of whether the arbitration clause is unconscionable because it concluded that no arbitration agreement was ever formed. This Court should do the same and affirm on that basis. Should it conclude, however, that the arbitration clause reflects an enforceable agreement, it should remand this case to the trial court to determine whether the arbitration agreement is unconscionable.

Kelly and Boogher demonstrated to the trial court that the Dispute Resolution procedure, of which the arbitration clause was the ultimate step, was grossly unequal, and was designed to force members into a maze of phone calls, letters, and three separate appeals to different committees that serve to avoid any timely or fair resolution of members' medical claims. App. 631-633. This process provides no relief for members like Mr. Kelly, who could not wait indefinitely for needed

surgery. *Id*. If members could wade through the four-step internal appeals process, they would then need to submit the disputed matter first to mediation and then to "legally binding arbitration" to be held in Atlanta, Georgia. Members must pay their own travel and accommodation expenses and must pay the full costs of arbitration if they lose.

If the trial court's decision is not affirmed, it should consider these factors, along with the facts that the arbitration agreement was nonnegotiable, is non-binding on Appellants (in fact, Aliera is not even mentioned in the Procedure), and was not provided to members until after they had enrolled and paid, along with the unlikely possibility that any member has ever made it through all levels to arbitration. *See Brewer v. Mo Title Loans*, 364 S.W.3d 486, 495 (Mo. Banc 2012) (factors considered in concluding arbitration agreement was unconscionable included requirement that consumers pay fees and costs even if they win, the agreement was not bilateral, and no consumer had ever filed a claim under the arbitration agreement which was itself "an obstacle to the accomplishment of the [FAA's] objectives").

G. Should the Court Decide the District Court Erred, It Should Remand for a Determination on Whether the Arbitration Provision Is Void Under Missouri Insurance Law

Missouri prohibits arbitration agreements in insurance contracts. Mo. Rev. Stat. § 435.350. *See Sturgeon v. Allied Prof'ls Ins. Co.,* 344 S.W. 3d 205, 214 (Mo. App. 2011) (under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), state insurance

law preempts the FAA, and the FAA's preemption of state laws prohibiting arbitration does not apply to the business of insurance in Missouri). *See also Simon v. Liberty Mut. Fire Ins. Co.,* Case No. 4:17-cv-0152-DGK, 2017 U.S. Dist. LEXIS 202315, *5 (W.D. Mo. Dec. 8, 2017) (Missouri law deems arbitration in insurance contracts to be invalid and contrary to public policy). Because the court below decided that the parties never entered into an arbitration agreement, it declined to decide on the motion to compel whether the health care plans qualified as insurance, rendering the arbitration clause void. App. 833. Should this Court determine that the requisite elements of contract formation are present, the matter should be returned to the District Court for a decision on whether the arbitration clause is void because it is part of an insurance agreement.

Appellants argued below that the District Court could not decide the fundamental question of whether the health care plan was insurance, rendering the arbitration clause void, claiming the parties had delegated that issue to the arbitrator. Authorizing an arbitrator to decide whether this dispute is arbitrable, however, necessarily authorizes the arbitrator to determine whether the Appellants' product is insurance, thereby giving the arbitrator the power to override state law and undermine the very purpose of the law. In *Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co.*, 867 F.3d 449, 457 (4th Cir. 2017), *cert. denied,* 138 S. Ct. 925 (2018), a case involving a Virginia statute functionally

identical to Mo. Rev. Stat. § 435.350, the court held that it is for the court, not an arbitrator, to decide whether a statute invalidating arbitration in insurance is arbitrable. It reasoned:

> [The statute] reflects a state policy choice that insureds should have the option to seek enforcement of Virginia's insurance laws and regulations in court rather than through arbitration. Enforcing contractual provisions that provide arbitrators with exclusive authority to determine whether a contract amounts to a "contract of insurance"—a term defined by Virginia law—would undermine that purpose by giving the arbitrators exclusive authority over a core question of Virginia insurance law.

Id. at 457. The court there remanded the matter to the district court to determine whether the instrument was "insurance" under state law. *Id*. at 459.

Appellants alleged sufficient facts to state a claim that the health care plans they purchased qualified as "insurance" under Missouri law. App. 35-42. Should this Court decide the District Court erred in finding there was no agreement to arbitrate, it, too, should remand for a determination of whether the arbitration clause was void because it was included in insurance plans.

CONCLUSION

For these reasons, Appellees request that the Court affirm the District Court's orders denying Appellants' motion to dismiss or to compel arbitration and Appellants' motion to alter or amend, in their entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Kelly and Boogher George Kelly, III, and Thomas Boogher certifies that:

1. This Brief of Kelly and Boogher complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 11,025 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point type.

3. This brief complies with the requirements of 8th Cir. R. 28(A)(h) because this brief has been generated as a PDF from the original word processing file, so that the text of the electronic version of the brief may be searched and copied, and because this brief and addendum have been scanned for viruses that confirmed the brief is virus-free.

DATED: April 23, 2021.

/s/ Jay Angoff
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record.

/s/ Jay Angoff
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