IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION

In its Order denying Defendants' Motion to Compel Arbitration, the Court accepted an argument by Plaintiffs that is directly at odds with Plaintiffs' Complaint and merits theories: the arbitration clause was not enforceable based on purported "no contract" language in the Member Guide. There is no mistaking that Plaintiffs' substantive claims are grounded in large part on a theory that the HCSM programs and their Member Guides constituted illegal insurance contracts under Colorado law, rather than valid health care sharing ministry (HCSM) memberships.[1] That is truly the crux of Plaintiffs' case. Given that, Plaintiffs cannot escape the arbitration provision

[1] *See, e.g.*, Am. Compl., ECF No. 39, ¶¶ 125-128, 63-67, 13, 129-150; *see also* Appendix 2 & 3 (attaching Member Guides as exhibits and citing to and quoting from them throughout the Complaint).

in the Member Guide by misinterpreting the Member Guide's insurance disclaimer language for a sweeping proposition – that the Member Guide was not part of the contract at all, only to later – once we reach the merits – argue to the Court that they believed that they were purchasing an insurance contract and point to the Member Guide as support – as they have done throughout their Complaint. Plaintiffs' Response makes no effort to directly address this fundamental problem with their argument and the Court's Order. The Court should grant this Motion and enter an order compelling arbitration.[2]

Departing from how their Complaint is cast, Plaintiffs heavily rely on application emails as constituting the parties' contract. (*See* Response, p. 3.) However, no reasonable person could believe that the barebones application forms (containing little or no explanation of covered medical expenses, how the sharing system worked, or other expected terms and conditions) was an insurance policy. In fact, as a matter of black-letter insurance law, those applications cannot be an insurance policy. *See* 1A Steven Plitt et al., *Couch on Insurance* § 11.1 (3d ed.) (stating that an application is merely an offer for an insurance contract); 3 Eric M. Holmes, *Appleman on Insurance Law & Practice* § 11.1 at 93-94 (2d ed. 1998) ("A mere proposal or application for insurance standing alone does not constitute a contract upon which judgment can be recovered."); *see also Mitchell v. AARP Life Ins. Program, NY Life Ins. Co.*, 779 A.2d 1061, 1069–70 (Md. Ct. App. 2001). Regardless, to the extent there is a dispute on the parties'

[2] The Order in effect disfavored the parties' arbitration provisions. Such an approach contravenes the FAA's equal treatment principle, as recognized by the Supreme Court in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1424-25 (2017) (in reversing holding that state law defeated arbitration provisions, noting: "A court may invalidate an arbitration agreement on 'generally applicable contract defenses' … but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an arbitration agreement is at issue.'" *Id.* at 1426 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

contracting intent, an FAA Section 4 trial is in order. *See* FAA Section 4; *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975, 977-78 (10th Cir. 2014).

Nor do the authorities cited in the Response (pp. 5-7) contradict the Motion's argument regarding legal error in the Order. Notably, as to *Liquid Magnetix Corp. v. Therma-Stor LLC,* No. 13-cv-3151-WJM-KMT, 2014 WL 1389984, at *3 (D. Colo. Apr. 9, 2014), there, as here, the contractual clause at issue did not appear in the offer or acceptance, but was incorporated by reference – just as the terms of the Member Guides were incorporated by reference in the application – and the clause was available through the defendant's website, just as the Member Guides were here. The court rejected any requirement that the parties use certain "magic words" to achieve incorporation by reference. *Id.* "In fact, so long as the offer plainly states which document is incorporated and the parties intended for such incorporation, no particular language is required." *Id.* Plaintiffs' attempt to distinguish the case is unavailing.

Likewise, in *Terlizzi v. Altitude Mktg., Inc.*, No. 16-cv-1712-WJM-STV, 2018 WL 2196090, at *7 (D. Colo. May 14, 2018), the defendant sought to enforce an arbitration provision that was incorporated by reference. As here, the plaintiffs in *Terlizzi* attempted to avoid the arbitration provision by arguing that "later-transmitted terms" could not be enforced against them. The court rejected that attempt, stating that: "acceptance through conduct will create a binding agreement so long as the contract-forming effect of that conduct is known to the party engaging in it." *Id.* Again, Plaintiffs' reliance on limited facts of that case do not detract from its overall context. Here, Plaintiffs not only had awareness of and access to the Member Guide before their memberships were effective, but Plaintiffs participated in the Unity and Trinity HCSMs for many months under Member Guides that indisputably contained arbitration clauses.

Other cases cited in the Response involve incorporation principles under dissimilar fact situations. *See Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Group, Inc.,* 251 P.3d 1091, 1095, 1096 (Colo. App. 2010) (involving incorporation by reference in the context of arbitrability determination by court or arbitrator, requiring a "heightened standard" in such context, and noting arbitration as favored means of dispute resolution**);** *Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, 872 F. Supp. 2d 1191, 1200 (D. Colo. 2012) (discussing ability of merchant parties to incorporate terms under Colorado Uniform Commercial Code); *U.S. for Use of DDC Interiors, Inc. v. Dawson Const. Co., Inc.*, 895 F. Supp. 270, 273, 274 (D. Colo. 1995), *aff'd,* 82 F.3d 427 (10th Cir. 1996) (concerning waiver of federal Miller Act rights, requiring to be effective "mention of the Miller Act and unambiguously express[ed] intention to waive the rights provided by it").

Here, the arbitration provision in the Member Guides was part of the parties' contract. From their conduct, Plaintiffs manifested their agreement to the terms of the Member Guides. Moreover, "[f]ailure to read the Terms and Conditions [in this action, the Member Guides] is not an excuse under Colorado law." *Terlizzi,* 2018 WL 2196090, at *7. Also, Plaintiffs were on inquiry notice of the Member Guides; the application emails are replete with references to the guidelines, which numerous references are not for naught under Colorado law. *See Terlizzi*, 2018 WL 2196090, at *8 (citing *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012) (an offeree is bound by a contractual term, even absent actual notice, "if he or she is on *inquiry* notice of the term and assents to it through conduct that a reasonable person would understand to constitute assent") (emphasis in original). Plaintiffs' arguments against error in the Order should not prevail.

Defendants respectfully request that the Court grant their Motion to alter or amend its Order on the Defendants' Combined Motion to Compel Arbitration, and grant that Motion.

Respectfully submitted this 15th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2021, I electronically filed the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION** with the Clerk of the Court using the CM/ECF system which will email the foregoing to all counsel of record.

s/ Megan MacLennan