

1 Richard E. Spoonemore, *Pro Hac Vice*
2 Eleanor Hamburger, *Pro Hac Vice*
3 SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC
4 3101 Western Avenue, Suite 350
5 Seattle, WA 98121
6 Tel. (206) 223-0303
7 Email: r Spoonemore@sylaw.com
8 Email: ehamburger@sylaw.com
9 *Attorneys for Plaintiffs*

10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12 CORLYN DUNCAN and BRUCE DUNCAN,
13 individually and on behalf of all others similarly
14 situated,

15 Plaintiffs,

16 v.

17 THE ALIERA COMPANIES, INC., f/k/a
18 ALIERA HEALTHCARE, INC., a Delaware
19 corporation; TRINITY HEALTHSHARE, INC.,
20 a Delaware corporation; and ONESHARE
21 HEALTH, LLC, formerly known as UNITY
22 HEALTHSHARE, LLC and as KINGDOM
23 HEALTHSHARE MINISTRIES, LLC, a
24 Virginia limited liability corporation,

25 Defendants.

Case No.: 2:20-cv-00867-TLN-KJN

[Assigned to the Hon. Troy L. Nunley]

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
STRIKE**

[Action Filed: April 28, 2020]

26 Plaintiffs filed Notices of Supplemental Authority bringing to the attention of this Court two relevant decisions that were issued after the Motion to Dismiss in this case was fully briefed. Those decisions are: (1) the Final Order on Summary Judgment entered by the Office of the Insurance Commissioner of Washington State ("OIC Order"), concluding that Trinity plans Alieria sold were insurance (Dkt. 54); and (2) the Order denying Defendant Alieria's and Trinity's Motions to Compel or Dismiss entered by Federal District Court for the Western District of

1 Missouri (“Arbitration Denial Order”), holding the Trinity arbitration “agreement” lacked mutual
2 assent (Dkt. 57).

3 Defendants have moved to strike the supplemental authority. Dkt. 58.¹ They argue that
4 supplemental authority should be stricken because Plaintiffs did not first seek leave of court.
5 Supplemental authority is, however, considered in this district, without seeking leave to file. *Polk*
6 *v. Yee*, No. 2:18-cv-2900-KJM-KJN, 2020 U.S. Dist. LEXIS 153420, *4 (E.D. Cal. Aug. 24,
7 2020) (considering supplemental authority filed after briefing concluded); *H.W.J. Designs for*
8 *Agribusiness, Inc. v. Rethceif Enters., LLC*, No. 1:17-cv-027-AWI-SKO, 2018 U.S. Dist. LEXIS
9 22838, *3, n. 1 (E.D. Cal. Feb. 12, 2018) (supplemental authority pointing to new decisions
10 dealing with the legal issue at hand was considered, and motion to strike the supplemental filings
11 was denied). The Court can consider the supplemental authority without requiring Plaintiffs to
12 first file a motion for leave.

13 Defendants also seek to strike the two Orders as irrelevant. Defendants’ first objection to
14 the OIC Order is that it goes to an issue – whether the health care plans are insurance – that they
15 claim should be decided by an arbitrator. As Plaintiffs argue in their opposition to the Motion to
16 Dismiss, that is an issue that this Court should decide. Dkt. 44, at 18-20. The Trinity plans the
17 Washington OIC considered include the same health care plan Plaintiffs enrolled in, and its well-
18 reasoned decision that the plans are insurance under Washington law is additional authority for
19 the argument that Plaintiffs’ plan equally qualifies as insurance under California law.

20 Defendants’ argument that the OIC Order has “no preclusive effect” here is misplaced.
21 Plaintiffs provided the OIC Order as supplemental authority, not that *res judicata* or collateral
22 estoppel applies to prevent this court from considering whether the health care plans are insurance.

23 The Arbitration Denial Order is likewise relevant supplemental authority. The court there
24 cited, at page 9 of its Order, the identical facts present here in concluding there was no agreement
25

26 _____
¹ Although their motion is styled as a “Response,” the relief they seek is that the Court strike both Notices.

1 to arbitrate: (1) The enrollment forms that are signed do not reference arbitration or contain an
2 arbitration provision — or even mention arbitration — nor do they provide a link to any document
3 that contains an arbitration provision. Dkt. 46-1, pp. 6-9 of 9; 50-1, p. 3 of 6. (2) The enrollment
4 forms state that the document “is not a contract.” Dkt. 46-1, p. 8 of 9; 50-1, p. 3 of 6. (3) There is
5 no evidence that plaintiffs received, reviewed, or acknowledged the terms of the Member Guide
6 when they electronically signed the online forms to become a member. (4) The link to the
7 Member Guide that does contain the arbitration provision is not provided until after the member
8 has enrolled and paid. Dkt. 36-2, p. 5 of 6; 44, p. 13 of 39. The Arbitration Denial Order is
9 consistent with California law. In *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 805
10 (2012), the court rejected the argument that by signing an employment agreement, plaintiff agreed
11 to be governed by “policies then in effect,” including an arbitration agreement. The agreement
12 she signed did not mention arbitration at all, and she never signed or agreed to the actual
13 arbitration clause in the employee handbook. *Serafin v. Balco Properties Ltd., LLC*, 185 Cal.
14 Rptr. 3d 151 (2015), does not support Defendants’ claim that under California law, Plaintiffs
15 agreed to arbitrate because they received the arbitration clause hidden in the back of the Member
16 Guide after they had enrolled and paid. In *Serafin*, the employee received the arbitration policy
17 set out in an easy-to-read document headed “MANDATORY ARBITRATION POLICY,” and
18 signed it.

19 The estoppel cases Defendants cite – *Montoya v. Comcast Corp.*, 2:15-cv-02573-TLN-
20 DB, 2016 U.S. Dist. LEXIS 130806 (E.D. Cal. Sep. 23, 2016), and *Metalclad Corp. v. Ventana*
21 *Env'tl. Organizational P'ship*, 109 Cal. App. 4th 1705 (2003) – are inapposite. The issue in those
22 cases was whether a third-party stranger to the contract could be compelled to arbitrate. The
23 Plaintiffs here were not third-party strangers. See, *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171,
24 1179-80 (9th Cir. 2014) (benefits estoppel is intended to apply to third-parties, not to the primary
25 party to the Terms of Use at issue).

1 Defendants' motion to strike should be denied, and the supplemental authority should be
2 considered.

3 DATED: January 11, 2021.

4 s/ Eleanor Hamburger

5 Richard E. Spoonemore, *Pro Hac Vice*
6 Eleanor Hamburger, *Pro Hac Vice*
7 SIRIANNI YOUTZ SPOONEMORE HAMBURGER PLLC
8 3101 Western Avenue, Suite 350
9 Seattle, WA 98121
10 Tel. (206) 223-0303
11 Email: rspoonemore@sylaw.com
12 Email: ehamburger@sylaw.com

13 Nina Wasow, California Bar #242047
14 Catha Worthman, California Bar #230399
15 FEINBERG, JACKSON, WORTHMAN & WASOW LLP
16 2030 Addison Street, Suite 500
17 Berkeley, CA 94704-2658
18 Tel. (510) 269-7998
19 Email: nina@feinbergjackson.com
20 Email: catha@feinbergjackson.com

21 Michael David Myers, *Pro Hac Vice*
22 MYERS & COMPANY PLLC
23 1530 Eastlake Avenue East
24 Seattle, WA 98102
25 Tel. (206) 398-1188
26 Email: mmyers@myers-company.com

Attorneys for Plaintiffs