UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

GEORGE T. KELLY, III, and THOMAS BOOGHER, individually and on behalf of all others similarly situated, Plaintiffs, v. THE ALIERA COMPANIES, INC., formerly known as Aliera Healthcare, Inc., a Delaware corporation; and TRINITY HEALTHSHARE, INC., a Delaware corporation, Defendants.	Civil Action No. 3:20-CV-05038-MDH

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO STAY

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I. INTRODUCTION

Defendants' motion is yet another attempt to stay the proceedings. In November 2020, the Court mooted Defendants' prior requests for a stay when it determined that the Defendants' dispute resolution "agreement" is unenforceable based on undisputed facts. Dkt. 62. The Court relied on law, evidence, and facts that have not changed. Since then, the only developments that have occurred are the Defendants' filing of a motion challenging the Court's ruling as a manifest error, an appeal, and a motion for a stay pending resolutions of the motion to alter or amend and the appeal. Defendants fail to meet their burden necessary to justify the "extraordinary remedy" of a stay, in part because they rely on arguments the Court already rejected.

II. LEGAL STANDARD

A stay of proceedings is an "extraordinary remedy." *Blackorby v. BNSF Ry. Co.*, 2018 U.S. Dist. LEXIS 114138, *2 (W.D. Mo 2018). The party seeking a stay bears the burden of establishing the need for it. *Nken v. Holder*, 556 U.S. 418, 433-434 (2009). The Court considers four factors when deciding whether to grant a stay:

> (1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id., at 434; *Indep. Sch. Dist. No. 720 v. C.L.*, 2018 U.S. Dist. LEXIS 76617, *9 ("The Eighth Circuit applies this same standard.") (citing *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1076-77 (8th Cir. 1974)).

The most critical factor in the stay analysis is "the appellant's likelihood of success on the merits." *Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011); *Orbital Atk v. Heckler*

& Koch Gmbh, 2017 U.S. Dist. LEXIS 232050, at *1 (D. Minn. Oct. 6, 2017) (finding that the defendant had not shown there was a likelihood it would succeed on the merits of its appeal or that it would suffer irreparable harm if the case were not stayed, therefore denying the motion to stay pending appeal). However, the formula cannot be reduced to a set of rigid rules. *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987).

Moreover, evidence of the four factors does not automatically entitle the party seeking a stay to that relief. Instead, the elements establish the bare minimum showing necessary for a stay. *E.g., id.* (as "an intrusion into the ordinary processes of administration and judicial review" a stay pending appeal "is not a matter of right, even if irreparable injury might otherwise result to the appellant"). Indeed, "[b]ecause the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be denied." *Indep. Sch. Dist. No. 720*, 2018 U.S. Dist. LEXIS 76617 at *10.

III. ARGUMENT

A. The Court Should Not Stay Proceedings Pending A Decision on its Motion to Alter or Amend.

Defendants ask the Court to order a discretionary staying of the proceedings until it decides the motion to alter or amend. Defendants claim that they have a substantial case for relief on the merits of their motion to alter or amend and "will suffer irreparable harm absent a stay through the loss of the speed and economy of arbitration." Dkt. 76, pg. 2. They also suggest that a stay will not substantially harm the Plaintiffs and would promote judicial economy and foster the federal policy favoring arbitration. *Id*. Defendants misconstrue the facts and fail to meet their burden on each factor.

i. Defendants Do Not Have a Substantial Case for Relief on the Merits.

As an initial matter, Defendants' burden to show a strong likelihood of success on the merits is "very steep" because the underlying merits issue here refers to Defendants' Rule 59(e) motion. Dkt. 76, p. 5 ("[The Rule 59(e)] motion has merit"). *See Indep. Sch. Dist. No. 720 v. C.L.*, 2018 U.S. Dist. LEXIS 76617 at *10 ("[D]efendant faces a very steep burden of proof here . . . and fails to show that it has a strong likelihood of success on the merits, in part because the merits are governed by a deferential abuse of discretion standard."). And Rule 59(e) motions are "not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances." *Dale and Selby Superette & Deli v. U.S. Dept. of Agriculture*, 838 F. Supp. 1346, 1348 (D. Minn. 1993); *Ryan v. Ryan*, 889 F.3d 499 (8th Cir. 2018), 507 (motions to alter or amend serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence); *Neb. Mach. Co. v. Cargotec Solutions, LLC*, 762 F.3d 737, 741 (8th Cir. 2014) (in deciding a Rule 59(e) motion, courts should give the non-moving party the benefit of all reasonable doubts and inferences).

The Court found Defendants' arbitration "agreement" unenforceable based on a series of undisputed facts described in its opinion dismissing Defendants' motions to dismiss. Dkt. 62, pg. 9-10. Despite the Court's well-considered rejection of their assertions, Defendants repeat their failed arguments. They claim to somehow have a strong likelihood of showing that the Court made a manifest error because (i) Plaintiffs received the Member Guides before their respective enrollments' effective dates, (ii) Plaintiffs made monthly premium payments, (iii) "while the Member Guides clearly disclose that Aliera and Trinity make no guarantee or contract to pay or indemnify Plaintiffs' medical expenses, they do contain various binding provisions," and (iv) factual disputes, if any, should be resolved by trial.

As detailed in the Plaintiffs' simultaneously filed Suggestion in Opposition to Defendants' Motion to Alter or Amend, Defendants do not dispute a single fact relied on by the Court. Nor do they raise new or disputed facts that could have been offered or raised by Defendants before the

Court denied their motions to dismiss. Far from a strong likelihood of success, Defendants' prospects on its motion for reconsideration are grim.

First, as noted by the Court, it is undisputed that members do not sign or even receive anything suggesting an agreement to arbitrate until ***after*** they have enrolled and made their first payment. Nor did the enrollment forms signed by Plaintiffs indicate that Plaintiffs agreed to arbitrate disputes. Dkt. Nos. 38-2, 38-4, 38-6.

Second, Defendants provided access to the Member Guide through inconspicuous hyperlinks buried in the "welcome emails" sent to each Plaintiff only ***after*** they paid and enrolled. Dkt. 38-2, p.12; 38-4, p. 7. Moreover, to the extent the emails reference the Member Guides, they are grossly inadequate disclosures of any arbitration provision as they do not provide any indication that the linked Member Guide would contain an arbitration agreement.

Third, "voluntary" payments of monthly premiums cannot cure the lack of assent at contract formation. As explained in Plaintiffs Suggestion in Opposition to the Motion to Alter or Amend, members cannot terminate health plans without risking severe repercussions. For example, individuals who terminate after the open enrollment period become effectively uninsured and may be ineligible to purchase other coverage because of pre-existing conditions. A policyholder may have also already paid out-of-pocket towards the deductible and would lose the benefit of the accumulated expenses. More importantly, the Plaintiffs had no notice of the arbitration provision when they agreed to become members. They were also not allowed to opt-out of the arbitration clause, nor were they given a meaningful opportunity to be refunded fees. Under those circumstances, continued payment is far from the required positive and unambiguous manifestation of assent. *See, e.g., Katz v. Anheuser-Busch, Inc., 347 S.W.3d 533 (Mo. Ct. App. 2011)* at 545 (an acceptance is present when the offeree signifies agreement to the terms of the offer in a "positive and unambiguous" manner).

Fourth, in addition to the lack of assent, the arbitration clause fails because its provisions are not mutual and do not constitute consideration.

Fifth, the Court based its decision on undisputed facts. It did not make a credibility determination. Defendants fail to identify a single fact – let alone a dispositive fact – left to try. Defendants do not come close to satisfying their uniquely steep burden of showing a strong likelihood of success on the merits of a discretionary motion for reconsideration. This Court should reject Defendants' latest attempt to stall the proceedings

ii. Plaintiffs, Not Defendants, Will Suffer "Substantial Injury" Without a Stay.

Defendants claim they will lose the "advantages of arbitration" and endure extensive, prejudicial class discovery and motions practice absent a stay pending the decision on its motion to alter. Dkt. No. 76, p. 6. Defendants are exaggerating. The harm of losing arbitration's advantages is insufficient to justify a stay. Concerning discovery and motions practice, the pending written discovery focuses on numerosity and other readily available information that Defendants can address with minimal effort. Plaintiffs have yet to seek depositions or take third-party discovery and have yet to file for class certification.

By contrast, Plaintiffs will suffer ***actual*** and substantial injury – in addition to the harm Defendants already inflicted on them – if this case is stayed. This dispute is over unpaid health benefits. Any loss of health care coverage or delay of health care constitutes irreparable harm. *See Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003) (danger to plaintiffs' health gives them a strong argument of irreparable injury).

For each plaintiff, the longer this case proceeds, the greater their hardship. Additionally, a delay only increases the risk that Defendants may be emptied of corporate assets with which to pay any judgment. Defendants' motion runs counter to Fed. R. Civ. P. 1 requiring "the court and the parties to secure a just, speedy and inexpensive determination."

iii. The Public Interest Lies with Plaintiffs.

Particularly as the pandemic rages, it is axiomatic that the public health concerns implicated by the expeditious litigation of Defendants' misconduct are an overwhelming public

interest.[1] In addition to the public health concerns implicated by this case, if Defendants are ultimately determined to be in the insurance business, then the public interest concerning the sale of unregulated insurance further increases the weight that should be given to Plaintiffs' and the putative class members' rights. *See, e.g., Alleghany Corp. v. Pomeroy*, 898 F.2d 1314, 1318 (8th Cir. 1990) ("The McCarran-Ferguson Act, which states that the 'regulation and taxation by the several States of the business of insurance is in the public interest,' 15 U.S.C. § 1011, is indicative of [a state's] interest in regulating the insurance provided to its residents.").

The public interest implicated by the healthcare plans at issue, their unenforceable and illegal arbitration "agreements," and the definition of "insurance" outweighs Defendants' overblown concerns about resources and abstract references to federal policy favoring arbitration. Dkt. No. 76, p. 8. Moreover, to the extent there is any merit to Defendants' concerns, the Court should give that factor less weight because the magnitude of harm is relatively low, *e.g., Indep. Sch. Dist. No. 720*, 2018 U.S. Dist. LEXIS 76617 at *10, while the harm to the plaintiffs and putative class being without health coverage during a pandemic are extraordinarily high.

B. The Court Should Not Stay Proceedings Pending Appeal

i. A Stay is Not Mandatory

Generally, the filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over ***only*** those aspects of the case involved in the appeal. *Liddell by Liddell v. Bd. of Educ.*, 73 F.3d 819, 822 (8th Cir. 1996) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)).[2] Regarding a pending appeal on the district

[1] *See, e.g., New York Times, Christian Health Sharing Group Is Target of Customer Lawsuits* (Apr. 21, 2020) https://www.nytimes.com/2020/04/21/health/christian-ministries-insurance-lawsuits.html.

[2] In *Griggs*, the issue was whether the Third Circuit had jurisdiction to hear an appeal when the appellant filed its notice of appeal too early, before litigation had ended in the district court. *Griggs*, 459 U.S. at 58 (reversing the Third Circuit for exercising jurisdiction). *Griggs* did not discuss a district court's jurisdiction over a case pending interlocutory review. *See also Orbital*

court's decision to deny a motion to compel arbitration, this Circuit has yet to decide whether such an appeal divests the district court of jurisdiction. *See James Shackelford Heating & Cooling, LC, v. AT&T Corp.*, 2017 U.S. Dist. LEXIS 210000, at *2 (W.D. Mo. Dec. 21, 2017).

At least three circuits have found that an appeal from a district court's denial of a motion to compel arbitration does ***not*** divest the district court of jurisdiction. *See Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 909-10 (5th Cir. 2011) (holding that a stay is not automatic "because arbitrability is an issue easily separable from the merits of the underlying dispute"); *Motorola Credit Crop. v. Uzan*, 38 F.3d 39, 54 (2d Cir. 2004) ("[F]urther district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration, and [] a district court therefore has jurisdiction to proceed with a case absent a stay…"); *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990) (reasoning that because arbitrability was the only substantive issue on appeal, the district court was not divested of jurisdiction since the claims before the district court were not the subject of the appeal). Five circuit courts have taken the opposite view.[3]

The minority view recognizes that arbitrability is distinct from the merits of the litigation. Thus, an appeal of a denial to compel arbitration does not prevent the district court from moving forward "with the case on the merits." *Britton*, 916 F.2d at 1412. These courts also emphasized that an automatic stay encourages defendants to delay litigation by bringing a frivolous motion to compel arbitration and subsequently appealing the denial of such motion. *See id*. Here, the Court should conclude that the sole issue of arbitrability is distinctive and separate from the merits of the

Atk v. Heckler & Koch Gmbh, 2017 U.S. Dist. LEXIS 232050, at *2 (D. Minn. Oct. 6, 2017) (emphasizing that *Griggs* does not stand for the proposition that a nonfrivolous appeal of a denial of a motion to compel arbitration *automatically* divests this Court of jurisdiction over the case).

[3] *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265-66 (4th Cir. 2011); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 214-15 (3d Cir. 2007); *Hardin v. First Cash Fin. Servs. Inc.*, 465 F.3d 470, 474 (10th Cir. 2006); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1253 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).

case and allow the parties to proceed to class certification and engage in discovery.

Defendants urge this Court to adopt the majority view and stay district court proceedings pending the appeal. But, notably, each of those circuits has created a frivolousness exception to the divesture of jurisdiction. *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011). For example, the Seventh Circuit found that either the court of appeals or the district court may declare that an appeal is frivolous, and if it is, the district court will maintain jurisdiction. *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).

In this instance, Defendants' basis for appeal is hollow. The entirety of the facts is undisputed and the legal issue of arbitrability is unquestionable. An agreement to arbitrate must be the product of a conscious decision where both parties to a contract agree to use a specific set of rules to resolve disputes to be valid. It also must be fair to both parties and not otherwise be prohibited by law. Defendants seek to enforce arbitration clauses that do not meet any of these legal requirements.

ii. A Discretionary Stay is Not Justified

As noted above, the court balances four factors when determining whether to exercise its discretion in issuing a stay – the first factor being the most critical. ***First***, in addition to the discussion above regarding Defendants' steep burden to succeed on the merits of their Rule 59(e) motion, Defendants' appeal is also likely to fail. Defendants were unsuccessful in seeking dismissal and, unsurprisingly, argue not a single fact or issue as to why or how they will succeed on the merits of their appeal.

On the contrary, Plaintiffs adequately demonstrated, and the district court affirmed the following: (i) the documents signed by Plaintiffs did not reference arbitration nor did they contain an arbitration provision; (ii) only after completing and signing the online forms, making payments,

and that "as part of the membership" did Plaintiffs receive a copy of the Member Guide, which contained the 'arbitration' provision, however Plaintiffs were never asked to review or specifically acknowledge specific terms of the Member Guide; and (iii) Defendants failed to establish a mutually accepted contract formed between Plaintiffs and Defendants regarding the agreement to arbitrate. The appellate court is likely to agree.

Additionally, Plaintiffs have more than adequately demonstrated that Defendants' health plans are insurance. Therefore, the Court of Appeals could deny Defendants' appeal on the additional ground that arbitration provisions in insurance contracts are void under Missouri law. Mo. Rev. Stat. § 435.350 ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract"). Not only is Defendants' "dispute resolution 'agreement'" unenforceable because it lacks the basic elements of a binding contract, Dkt. 62, it is also void because it involves insurance.[4] The Court of Appeals has more than a sufficient basis to and will likely deny the appeal.

Notably, the FAA's preemption of state laws prohibiting arbitration does not apply to the business of insurance. 15 U.S.C. § 1012(b). Pursuant to the McCarran-Ferguson Act, state insurance law preempts the FAA. The arbitration provision here, which Defendants claim is authorized by the FAA, would impermissibly "impair" state law within the meaning of the

[4] Plaintiffs noted in their Opposition to Defendants' motions to dismiss that numerous state insurance departments and state attorneys-general have found that Aliera and Trinity's health plans constitute insurance. Other states have followed suit since then. In November 2020, the Washington Office of Insurance Commissioner concluded that the plans are insurance and fined Aliera $1.1 million. *See* https://fortress.wa.gov/oic/consumertoolkit/Orders/OrderProfile.aspx?OrderNumber=sqXJNg034qylgHjtT4ndpQ%253D%253D. In November, the New Mexico Office of the Superintendent also upheld its order concluding the same and imposing a $2.68 million fine. *See* https://www.osi.state.nm.us/wp-content/uploads/2020/11/Recommended-Decision-20-00020.pdf.

McCarran-Ferguson Act, because an arbitrator has no authority to determine whether an agreement is an insurance contract. *See, e.g.*, Mo. Rev. Stat. §§ 374.005.1, 374.010, 374.040.1-2, 374.046. Authorizing an arbitrator to decide whether this dispute is arbitrable necessarily authorizes the arbitrator to determine whether the Defendants' product is insurance, thereby giving the arbitrator the power to override state law, regardless of whether the dispute is ultimately arbitrated.

In a case involving a Virginia statute functionally identical to Missouri's, *Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co*, the Fourth Circuit explained:

> [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. Indeed, were an arbitrator to incorrectly determine that a contract was not an "insurance contract" for purposes of Virginia law and move forward with arbitration of the underlying dispute—or to correctly conclude that a contract was an insurance contract and then incorrectly move forward with arbitration of the underlying dispute—a Virginia insured would be deprived of recourse to the judiciary to resolve a dispute over the interpretation of an insurance contract governed by Virginia law, the precise outcome Virginia sought to prevent in enacting Section 38.2-312.

Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co, 867 F.3d 449, 457 (4th Cir. 2017) (affirming denial of motion to compel arbitration and remanding to district court to determine whether the instrument was "insurance" under state law). Depriving an insured of recourse to the courts to resolve an insurance dispute is precisely the outcome Missouri sought to prevent with § 435.350, just as Virginia did with Va. Code Ann. § 38.2-312 applied in *Minnieland*.

In addition, the argument that the McCarran-Ferguson Act bars Defendants' challenge is particularly strong here because the arbitration provision necessarily, and directly, affects what both the Supreme Court and the Eighth Circuit deem the "core components" of the insurance

business: the insurer-insured relationship and the interpretation and enforcement of the insurance policy. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993); *Std. Sec. Life Ins. Co. v. West*, 267 F.3d 821, 823 (8th Cir. 2001). If Defendants' plans are characterized as insurance, the Member Guide's arbitration provision is void, even if it were based on a valid offer, open and unambiguous acceptance, and cognizable consideration. This Court should find that it is unlikely Defendants will succeed on the merits of their appeal.

Second, the only harm that Defendants suggest they will face is further litigation, "but further litigation always results from an adverse ruling and a resulting reliance on an appeal for vindication." *McLeod v. Gen. Mills, Inc.*, 2015 LEXIS 157574, at *7 (D. Minn. Nov. 20, 2015) (emphasizing that more harm is done to Plaintiffs by delaying proceedings because of stay in a similar case).

Third, and more significantly, the core issue here is Defendants' creation and marketing of fraudulent health insurance plans and refusal to pay Plaintiffs' medical claims. A stay pending Defendants' appeal will cause undue delay in the Plaintiffs' ability to achieve a remedy. Plaintiffs, not Defendants, face irreparable harm. As noted above, as a matter of law, any loss of health care coverage or delay of health care constitutes "irreparable harm." *See Kai*, 336 F.3d at 656 (danger to plaintiffs' health gives them a strong argument of irreparable injury); *Prof'l Firefighters Ass'n,* 2010 U.S. Dist. LEXIS 57409, at *4-5 (finding there was a threat of irreparable harm due to jeopardizing health insurance benefits during the pendency of lawsuits); *Yockey v. Ilenda, No. 04-3958 (JRT/RLE), 2004 U.S. Dist. LEXIS 24717 (D. Minn. Nov. 23, 2004),* at *5 ("The loss of health insurance, even temporarily is a significant harm.").

Fourth, the public interest in protecting consumers like Plaintiffs in insurance contracts generally, and from illegal arbitration clauses in particular, far outweighs Defendants overstated

litigation concerns and any abstract federal public interest in "encouraging arbitration." Dkt. No. 76, p. 12. Any consideration of the public interest decidedly favors Plaintiffs. For all of the reasons stated above, this Court should deny Defendants' Motion to Stay Pending Appeal.

IV. CONCLUSION

Plaintiffs request that this Court deny Defendants' Motion to Stay in its entirety for the reasons stated above.

DATED: January 8, 2020.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 8, 2021, the undersigned filed the foregoing with the Court's CM/ECF system, which will cause a true and correct copy of the same to be served electronically on all registered counsel of record.

/s/Jay Angoff
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