

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

NOELLE LeCANN, KRISTIN SELIMO, and
TANIA FUNDUK, on behalf of themselves
and others similarly situated,

Plaintiffs,

v.

THE ALIERA COMPANIES, INC., formerly
known as ALIERA HEALTHCARE, INC.,

Defendant.

Civil Action File

No. 1:20-cv-2429-AT

**PLAINTIFFS' REPLY IN SUPPORT OF (1) MOTION FOR LEAVE TO
FILE SUPPLEMENTAL BRIEF [Doc. 29] AND (2) MOTION FOR
LEAVE TO FILE FIRST AMENDED COMPLAINT [Doc. 32]**

Before the Court are Plaintiffs' Motions for Leave to File a First Amended Complaint [Doc.32] and a Supplemental Brief in Opposition to Defendant's Motion to Dismiss or Compel Arbitration. [Doc. 29]. Defendant's opposition to these motions is unpersuasive and self-contradictory, to say the least. On the one hand, Alieria says repeatedly that Plaintiffs' First Amended Complaint and their Supplemental Brief add nothing at all to this case or to the issues before the Court. But at the same time, Alieria has filed 25 pages of additional briefing in an effort to show that there is nothing worth talking about in Plaintiffs' filings. In taking the position it has, Alieria ignores the overall purpose of the procedural rules that govern

this Court, which are supposed to be “construed, administered, and employed ... to secure the just, speedy, and inexpensive determination of every action...” Fed. R. Civ. P. 1.

Rather than proceeding with the ultimate goal of assisting the Court in resolving the issues before it, Alieria advances contrived arguments in an effort to unnecessarily – and very *inefficiently* – constrain what is available to the Court as it decides the ultimate question before it, whether to compel arbitration. [Doc.12] While Alieria would hope to minimize the issues and arguments before the Court, courts have universally recognized the complexity of arbitration and delegation issues. As the Third Circuit stated just two weeks ago, the question before this Court – who decides, a court or an arbitrator, whether an enforceable agreement exists – is a “mind-bending question that has been dubbed ‘the queen of all thresholds’ in arbitration law.” *MZM Constr. Co., Inc. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 2020 WL 5509703 (3rd Cir. Sept. 14, 2020) (quoting Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370, 422 (2018) (also characterizing the issue before the Court in the present case as “one of the most important and unsettled areas on the docket.”). When Plaintiffs’ proposed filings are looked at objectively, there can be no serious question that they serve the purpose of the Court’s procedural rules – assisting the Court “to secure the just, speedy, and inexpensive determination” of the issues before it. While Alieria would prefer that the Court not

have the benefit of Plaintiffs' elaboration of the issues before the Court, that is no basis for denying the motions. It is a mere attempt at procedural maneuvering by Alieria, which is entitled to no weight.

Plaintiffs' First Amended Complaint. Alieria's opposition to Plaintiffs' Amended Complaint assert several points, all of which contradict one another. First, Alieria claims that the "proposed amendment is superfluous" and that it "adds nothing to the dispute." [Doc. 33] at 3-5. Alieria then says that new, revised briefings and motions would be required to respond to the proposed Amended Complaint, *id.* at 6, without pointing to a single fact, allegation, or factor in the First Amended Complaint that would require new briefing. *Id.* at 6. If Alieria actually thought that its Motion to Dismiss or Compel needed to be redone and restarted, it was bound to withdraw its current motion as moot. *See* Standing Order of Judge Totenberg, November 26, 2018, ¶ III (j). Alieria makes no such suggestion, nor could it because there is no reason whatsoever why Alieria's pending motion cannot go forward as is.

Alieria also complains that the two additional counts added by the First Amended Complaint "do not constitute legal causes of action," [Doc. 33] at 4, but then again takes the opposite position, asserting that the new counts would require substantial new (but completely unspecified) briefing by Alieria to respond to these counts. *Id.* at 7. That the two new counts state "legal" claims for relief cannot be seriously disputed, notwithstanding Alieria's unsupported assertions to the contrary.

Both counts set forth claims for declaratory relief concerning the applicability and enforceability of Alieria's asserted arbitration provision (Count IX) and Alieria's asserted delegation provision (Count X). *See* [Doc. 32], ¶¶ 244-68 and accompanying prayers for relief.

As stated in Plaintiffs' Motion for Leave to File First Amended Complaint [Doc. 32]:

The new counts in the Amended Complaint set forth in more detail the grounds for Plaintiffs' challenge to the Defendant's contentions that Plaintiff's claims are subject to arbitration and delegation of arbitrability decisions.

Plaintiffs asserted detailed grounds why the arbitration and delegation provisions are not enforceable under the FAA ... when Plaintiffs filed their Brief in Opposition to Defendant's motion to compel. *See* [Doc 26]. As such, they timely raise[d] those claims. *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 998, 1002 (9th Cir. 2010).

Nevertheless, it is desirable that Plaintiffs set forth their claims regarding the inapplicability and unenforceability of the arbitration and delegation provision in their complaint as well.

[Doc. 31] at 2-3. The additional factual allegations that comprise Plaintiffs' new counts add more *factual* detail to the arbitration delegation issues, which is entirely appropriate. By incorrectly characterizing those allegations as "argument," [Doc.33] at 6, Alieria provides nothing to supports its opposition to the amendment.

Plaintiffs' Supplemental Brief. Alieria's opposition to filing Plaintiffs' Supplemental Brief is, again, divorced from the overriding objective of the Federal

Rules of Civil Procedure. Alieria not only seeks to avoid *appropriate* briefing of the issues before the Court, its tactics are directly contrary to achieving a “speedy and inexpensive determination” of this action. Alieria claims that the proposed Supplemental Brief adds nothing, but finds it necessary to file a seventeen page brief to argue that contention.

Alieria does not dispute the potential significance of the *Jackson* court’s decision, or that the order was issued after Plaintiffs’ filed their principal brief in opposition to Defendant’s motion to compel arbitration. Given the factual similarities in that case and the present one, there could be no doubt that a supplemental brief is warranted. Even Alieria appears to begrudgingly acknowledge that.

Given the importance of the *Jackson* to this case, Plaintiffs’ detailed analysis of the opinion in their Supplemental Brief and their demonstration that the *Jackson* Order is wrong is entirely justified in this case. Among other things, Plaintiffs’ Supplemental Brief shows that *Jackson’s* analysis of the precedents it relies on is wrong and not even consistent with the Ninth Circuit decisions. The relevance of that showing is clear, in spite of Alieria’s bizarre assertion that: “Whether *Jackson* properly construed Ninth Circuit law is not in issue here.” [Doc. 34] at 12. But the persuasiveness of *Jackson* is certainly germane in this Court, and the inconsistency

of the *Jackson* ruling with Ninth Circuit precedent is unquestionably germane as well. Alier's contrary assertion is frivolous.

Alier also complains that the Supplemental Brief discusses in more detail cases that were available at the time of Plaintiffs' principal brief. While that is obviously true, that does not make the Supplemental Brief improper. The question is, what level of analysis and what depth of treatment of the issues before the Court – particularly after the *Jackson* ruling – is appropriate. In that regard, Alier can point to no part of the Plaintiffs' Supplemental Brief that is not directly relevant to the issues before the Court. While Alier may argue for different interpretations or applications of the precedents Plaintiffs' address, that is no reason to avoid Plaintiffs' Supplemental Brief. To the contrary, the intensity of the debate shows the opposite, the need for a thorough discussion of the nuances of the cases cited.

This Court has broad discretion in deciding whether to permit the filing of a supplemental or surreply brief. *Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005). Additional briefing is appropriate where “a movant raises new arguments or facts in a reply brief, or where a party wishes to inform the Court of a new decision or rule implicating the motion under review.” *Coker v. Enhanced Senior Living, Inc.*, 897 F. Supp. 2d 1366, 1373 (N.D. Ga. 2012). Courts in this District regularly grant leave to file surreply briefs that address new precedent. *See, e.g., Honig v. Comcast of Georgia I, LLC*, 537 F. Supp. 2d 1277, 1286 n.5 (N.D.

Ga. 2008) (“receiving fully briefed arguments and responses interpreting a new and relevant case ... is a valid reason for granting leave to file a surreply”); *Melder v. State Farm Mut. Auto Ins. Co.*, No. 1:08-cv-1274-RWS-JFK, 2008 WL 1899569, at *3 (N.D. Ga. April 25, 2008) (granting leave to file surreply that “not only addresse[d] facts and arguments brought by Defendants in their reply brief” but “also br[ought] the court up to date on the forum court’s recent ruling in a related ... dispute involving the parties”); *Dynamic Depth, Inc. v. Captaris, Inc.*, No. 1:07-cv-1488-CAP, 2009 WL 10671407, at *1 (N.D. Ga. June 9, 2009) (granting leave to file surreply that addressed new decision).

The ultimate question is whether the further discussion of the issues, and the *Jackson* order in particular, will assist this Court in its analysis and decision-making of a complicated issue. The purpose of the procedural rules is to advance *justice*, not to artificially limit relevant argument or to advantage any party. Alera ignores that overriding purpose in its opposition.

Finally, it should again be noted that Plaintiffs’ Supplemental Brief will not cause any delays. Indeed, more delay has surely been caused by Defendant’s opposition to the filing than by the filing itself. In its opposition brief, Alera has already responded at length to the issues addressed in Plaintiffs’ Supplemental Brief, *see* [Doc. 34], so Alera would not need to file anything more in further response to the points Plaintiffs address.

Conclusion

For the reasons set forth in Plaintiffs' pending motions [Docs. 29 & 31] and based on the substance of Plaintiffs' Supplemental Brief and their First Amended Complaint as well as on the entire record, Plaintiffs request that the Court grant their motions.

Respectfully submitted this 5th day of October 2020.¹

/s David F. Walbert

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¹ Pursuant to Local Rule 7.1(D), undersigned counsel certifies that this filing has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C).

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I served a true and correct copy of PLAINTIFFS' REPLY IN SUPPORT OF (1) MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF [Doc. 29] AND (2) MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT [Doc. 32] by filing the same using the Court's CM/ECF system, which will automatically serve all counsel of record.

Dated this 5th day of October 2020.

/s David F. Walbert _____

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