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results matter

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July 26, 2021

The Honorable Michael E. Gans
Clerk of Court
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street
Room 24.329
St. Louis, Missouri 63102

Re: ***Kelly v. The Aliera Companies, Inc.*, No. 20-3702**
***Kelly v. Trinity Healthshare, Inc.*, No. 20-3709**

Dear Mr. Gans:

In its July 12, 2021 Order, the Court asked the parties to state their position on whether the Court should stay the above-referenced appeals or whether it should sever Appeal No. 20-3702 (in which The Aliera Companies, Inc. is the only appellant) and allow that appeal to proceed. Please accept this letter as Aliera's position that the Court should stay both appeals.

As background, these consolidated appeals concern a putative class-action lawsuit that the Appellees filed against both Trinity Healthshare, Inc. and Aliera. The complaint alleges that "Aliera markets, sells, and administers health insurance plans for Trinity" and claims that those plans violate Missouri law. In response to the complaint, Trinity and Aliera both moved to compel arbitration, relying on a binding arbitration clause in the member guide the Appellees received. The district court denied the motions to compel, holding that the member guides were not binding contracts. Trinity and Aliera separately appealed from the district court's order. Trinity's appeal is No. 20-3709, and Aliera's appeal is No. 20-3702. The Court consolidated the appeals. But after the parties fully briefed the appeals and the Court indicated it would hear oral argument, Trinity filed for bankruptcy.

In light of Trinity's bankruptcy filing, this Court should stay both appeals.

This case presents one of those "rare" circumstances in which the bankruptcy court's automatic stay under 11 U.S.C. § 362 should apply to Aliera's appeal as well as Trinity's because a judgment in Aliera's appeal will in effect be a judgment in Trinity's appeal. *See Ritchie Cap. Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 (8th Cir. 2011) (noting that a stay against a non-debtor can "arise where there is such identity between the debtor and the third-party defendant that the debtor may be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor"). If this Court proceeds with the Aliera appeal and issues a judgment based on Aliera's briefing and oral argument, that judgment would effectively bind Trinity because the issues in these consolidated appeals are functionally identical. (*See, e.g.*, Aliera Br. at 16 ("Here, the district court declined to enforce the written arbitration agreement in the Trinity Sharing Ministry Member Guide because it concluded there was no offer, acceptance, and consideration. Because that conclusion was error, the Court should vacate the district court's decision and remand for further proceedings."); Trinity Br. at 17 ("The district court erred when it denied enforcement of the mediation and arbitration clause in the Trinity Member Guides when it held that the 'dispute resolution agreement' lacks offer, acceptance, and bargained for consideration.").) Because any decision in Aliera's appeal would likely govern Trinity's appeal, the automatic stay requires that both appeals be stayed until Trinity can take part.

Even if the automatic stay under § 362 did not apply, however, this Court should nevertheless exercise its inherent power to stay both appeals for at least five reasons. *See Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (holding that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants").

First, as mentioned, staying both appeals avoids prejudicing Trinity because a judgment issued in the Aliera appeal would effectively bind Trinity.

Second, the Court has indicated it will hear oral argument. Unless the Court stays both appeals, the Court will hear only from Aliera at argument. Aliera cannot speak for Trinity—they are not the same company, and Aliera does not control Trinity. But the Court would likely benefit from Trinity's presentation at argument. To illustrate, the Appellees allege that Trinity (not Aliera) fails to meet the requirements for a Health Care Sharing Ministry and is therefore issuing illegal and unauthorized insurance products. (*See, e.g.*, Am. Compl. at ¶¶ 10, 12–13, ECF No. 30.) And in their brief, the Appellees argue that if the Court decides that the district court erred on the

contract-formation question, then the Court should remand the case for a determination of whether the Trinity Health Care Sharing Ministry is "insurance," which the Appellees argue would make the arbitration clause void. (Appellee Br. at 42–43.) If either this Court or the district court explores that issue, Trinity—not Aliera—is in the best position to speak on its status as a Health Care Sharing Ministry. As a result, the appeals (and the oral argument) should not proceed until Trinity is again able to participate.

Third, proceeding with Aliera's appeal but not Trinity's would likely prejudice Aliera. If the Court severs and proceeds with Aliera's appeal and issues a judgment (whether that judgment compels the case to arbitration or remands it for further litigation), then the Appellees' claims against Aliera will proceed without Trinity. Without Trinity in the case, Aliera would have to seek third-party discovery to gain access to Trinity's corporate records or witnesses—discovery that will run headlong into the automatic bankruptcy stay. Thus, Aliera will find it more difficult to defend against the Appellees' claims that Trinity is not a Health Care Sharing Ministry but instead provides insurance in violation of Missouri law.

Fourth, not staying both appeals will likely cause serious case-administration issues and a disjointed case schedule. If and when Trinity is finally able to participate and this Court decides Trinity's appeal, then Trinity would still have to rejoin the underlying arbitration or litigation. In the interim, the arbitration or litigation against Aliera would have continued. Aliera and the Appellees would have presumably engaged in at least some discovery—discovery that may need to be repeated once Trinity returns to the case. For instance, if Aliera deposes the Appellees before Trinity is able to participate in the case, once Trinity returns, it will be entitled to depose the Appellees again—duplicating the parties' time and resources. In addition, the district court or arbitrator may have to address discovery issues twice, once when the case is proceeding without Trinity and again when Trinity is involved.

Fifth and last, staying both appeals will not prejudice the Appellees. For one thing, the stay will likely be short lived in any event. Trinity filed for bankruptcy under newly-enacted subchapter V of Chapter 11 of the Bankruptcy Code. *See* Case No. 21-11001-JTD (Bankr. D. Del.). Subchapter V provides for an expedited bankruptcy process. Under Subchapter V, for instance, the bankruptcy court has to hold a status conference "to further the expeditious and economical resolution of [the] case" within 60 days after the entry of the order for relief. 11 U.S.C. § 1118(a). And the debtor has to file a plan "not later than 90 days after the order for relief." *Id.* § 1189(b). Thus, Trinity's bankruptcy should move quickly, and once the bankruptcy resolves or the

bankruptcy court lifts the stay, the Court can proceed with both appeals together. For another thing, the Appellees' case is in its infancy—no party or expert discovery has been done, no class-certification motions have been filed, and no trial date has been set. Moreover, the Appellees' claims against Trinity are already stayed and within the exclusive jurisdiction of the bankruptcy court. If the Appellees want to move forward with these appeals before the bankruptcy resolves, they can move the bankruptcy court to lift the stay.

For these reasons, the Court should stay both Appeal No. 20-3702 and Appeal No. 20-3709.

Respectfully yours,

E. Travis Ramey

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ E. Travis Ramey
OF COUNSEL