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' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO STAY PENDING APPEAL [Doc. 63]

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I. INTRODUCTION

Aliera's Stay Motion [Doc. 63] falls far short of meeting its burden to establish that its appeal has merit. It has failed to do so for both the Selimo and non-Selimo claims. Indeed, Aliera completely mischaracterizes the analysis a court follows in deciding such a motion. The question before the Court now is whether—*based on the current record and the findings of the Court in its order* [Doc. 49]—Aliera has established a realistic basis for prevailing on appeal. Aliera conflates that question with the question of whether its defenses were entirely frivolous at the outset. The present question is a very different one, however, judged by a very different standard, than asking whether Aliera asserted some "colorable" ground in support of its position initially.

Aliera's Motion assumes Aliera has a right to re-raise on appeal, *de novo*, all of the factual contentions already decided by this Court against it, but that is not how appeals are decided. Aliera's burden *on appeal* is to show that material findings of the Court were *clearly erroneous*. Aliera does not even attempt to do that.

Furthermore, as to the legal question of the role of this Court versus that of an arbitrator in deciding the validity of Aliera's arbitration and delegation defense, the law in this circuit (as well as in the United States Supreme Court) is clear in cases like this one that the threshold question of whether there was an enforceable

arbitration agreement is a decision for the court. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). Before a court can compel arbitration, the movant must establish "that (a) the plaintiff entered into a written arbitration agreement that is enforceable 'under ordinary state-law' contract principles and (b) the claims before the court fall within the scope of that agreement." *Lambert v. Austin Indus.*, 544 F.3d 1192, 1195 (11th Cir. 2008) (citing 9 U.S.C. §§ 2–4 and *Paladino v. Avnet Computer Techs. Inc.*, 134 F.3d 1054, 1056 (11th Cir. 1998)).

A court must determine these basic prerequisites to arbitration, including the legality of an arbitration provision where one exists, before it can refer a matter to an arbitrator under the Federal Arbitration Act (FAA):

> An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract…."
>
> . . .
>
> If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.

Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70, 71 (2010). Even where arbitrability is delegated, "[t]o be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. *See* 9 U.S.C. § 2." *Henry Schein, Inc. v. Archer & White Sales, Inc*., ___ U.S. ___, 139 S. Ct. 524, 530 (2019).

Plaintiffs' earlier briefs cited authorities from the Eleventh and other circuits stating these principles. After the Court's June 22, 2021 order, the Eleventh Circuit again held that, where a contract contains a delegation provision, courts retain jurisdiction "to review a challenge to the delegation provision." *Tuckman v. JP Morgan Chase Bank, NA*, ___ F. App'x ___, 2021 WL 3357953, *4 n.5 (11th Cir. 2021). As the Court explained in *Tuckman*:

> [Appellants] make two kinds of arguments: threshold arguments about who should decide the question of arbitrability and merits arguments about why this dispute is arbitrable. As to the former, they cite a delegation provision in the [agreement]…. When a contract contains a delegation provision, we retain jurisdiction only to review a challenge to the delegation provision, if one is made. *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1148 (11th Cir. 2015). We may turn to the merits issue only if we conclude that the delegation provision is invalid or unenforceable. *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1334–35 (11th Cir. 2016).

Tuckman, 2021 WL 3357953 at *4 n.5.

Here, Plaintiffs promptly challenged the delegation provision as unenforceable based on Georgia's statutory prohibition against arbitration

requirements in insurance contracts, O.C.G.A. § 9-9-2(c)(3). The Eleventh Circuit has explicitly ruled that that arbitration prohibition controls in cases like this one by virtue of the McCarran-Ferguson Act, notwithstanding the FAA. *McKnight v. Chi. Title Ins. Co., Inc.*, 358 F.3d 854, 857 (11th Cir. 2004). This is yet another fatal impediment to Aliera's contention that it has a realistic chance of prevailing on appeal. And once again, Aliera does not even address this defect in its position; it simply ignores the problem.

In a futile effort to avoid the invalidity of the delegation provision, Aliera asserts a back-door argument that a plaintiff cannot "challenge a delegation clause on the same basis as their challenge to an arbitration agreement as a whole," [Doc. 63] at 5, as Plaintiffs do in relying on O.C.G.A. § 9-9-2(c)(3). But that argument is devoid of logic and legal support under any number of decisions from district and circuit courts, including the Eleventh Circuit, which hold that a delegation challenge is perfectly acceptable where based on the same legal issue as the challenge to the arbitration provision as a whole. As the Eleventh Circuit recently held:

> [Plaintiff] has challenged the delegation provision, and we agree with his contention that the provision is unenforceable here. Because the enforceability of the delegation provision turns on the same principles of law as the enforceability of the arbitration clause generally, we discuss the issues together. *Cf. Shockley v. PrimeLending*, 929 F.3d 1012, 1020 (8th Cir. 2019) ("The arbitration provision['s] ... validity requires the same proof of the elements of a valid contract as the delegation provision.").

Tuckman, 2021 WL 3357953 at *4 n.5.

Aliera complains about the thoroughness of the Court's order, insinuating that that alone—and the Court's citation of authorities from around the country—indicates that the issues are sufficiently unsettled that its appeal is necessarily not frivolous. [Doc. 63] at 21. Maybe Aliera would have preferred a ruling with little or no analysis, but if it were candid, Aliera would acknowledge that the thoroughness of the Court's order is one more factor that weighs *against* its chances on appeal. An objective assessment of the order comes from the District Court of Montana in another Aliera case with issues largely identical to those here. The Montana court, after chiding counsel there for their less than thorough treatment of the issues, stated the following:

> It is also worthy of note that, on June 22, 2021, Judge Amy Totenberg of the Northern District of Georgia, in a factual and legal issue setting remarkably similar to this case, issued a thoughtfully reasoned and exhaustive Opinion and Order holding, *inter alia*: (1) Trinity did not qualify as a HCSM under the ACA; (2) the contracts at issue in that case were contracts of insurance; and (3) the contracts at issue there were not subject to mandatory resolution of disputes by arbitration.

Moeller v. The Aliera Cos., Inc. et al., No. CV 20-22-H-SHE, 2021 WL 2680159, *3 (D. Mont. June 30, 2021). The Montana court then attached as an appendix to its own opinion the entirety of this Court's June 22, 2021 order.

When evaluated objectively under the proper standards that govern an appeal, Aliera's Motion fails to establish any ground of sufficient merit to warrant a stay.[1]

II. ALIERA'S POSITION ON THE SELIMO CLAIMS IS NOT ONLY FRIVOLOUS FOR APPEAL PURPOSES, IT WAS UTTERLY WITHOUT MERIT AT THE OUTSET.

A. There is no basis on which Defendant advances a colorable argument that the "Selimo claims" are subject to arbitration.

Based on the undisputed facts of record, the Court correctly ruled that claims of Plaintiff Selimo relating to the period from November 15, 2019 to May 14, 2020 are not covered by any arbitration provision:

> [T]he Court separately and specifically finds that Plaintiff Selimo is not required to arbitrate any of her claims based on Aliera's conduct while she was a Trinity member from November 15, 2019 to May 14, 2020 because Aliera has presented no evidence that the

[1] The question before the Court is whether Aliera's appeal has sufficient merit. Aliera also asserts that its appeal is not taken for a dilatory purpose [Doc. 63] at 3, however, and Plaintiffs therefore note there is ample evidence that Aliera has acted for delay. Notwithstanding the Court's explicit order that the parties cooperate in submitting a joint discovery plan, [Doc. 49] at 84, Aliera delayed, and a second order was required to make that happen. [Doc. 54]. Aliera remains in default *to this day* in its responsibility to file an answer, which was due July 6, 2021, 14 days after its motion was denied. *See* Fed. R. Civ. P 12(a)(4)(A). Aliera likewise has completely failed to respond to Plaintiffs' First Requests for Production of Documents (attached hereto as Exhibit 1), which were served on July 15, 2021, the same day that the Court entered its Scheduling Order [Doc. 56]. Aliera's Motion to Stay, of course, does not excuse its failure to respond to that discovery. *Callaway v. Exposaic Indus., Inc.*, No. C82-013N, 1982 WL 155095, at *1 (N.D. Ga. June 25, 1982); *United States Commodity Futures Trading Comm'n v. Brown*, No. 3:15-CV-354-J-39MCR, 2016 WL 3136847, at *2 (M.D. Fla. Jan. 28, 2016); *Omega Pats., LLC v. Fortin Auto Radio, Inc.*, No. 6:05CV1113 ORL 22DAB, 2006 WL 2038534, at *3 (M.D. Fla. July 19, 2006). Aliera waited until the very end of the 30-day deadline in which to file its notice of appeal, and it did not file the Motion to Stay until an additional 20 days had passed. The Motion could have been filed immediately after the Court's June 22, 2021 order denying Aliera's Motion to Compel. In sum, there is ample evidence upon which the Court could find dilatory behavior by Aliera, were that an issue. Beyond any doubt, Aliera has not been diligent.

> operative member guide contract for that timeframe incudes any alleged agreement to arbitrate at all. "In the absence of an agreement to arbitrate, a court cannot compel the parties to settle their dispute in an arbitral forum." *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004) (citing *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986)). Aliera's arguments that Selimo's contract with Unity extends to cover her time as a Trinity member, and while under a different member guide contract, stalls out. *Id.* at 1201 ("Because arbitration can only be compelled when the subject of the dispute has been agreed to be settled by arbitration, having one contract which contains a broad arbitration agreement does not necessarily mean that arbitration can be compelled when the subject of the dispute arises from a separate contract which does not have an arbitration clause.")
>
> Here, there is no question that the contract in effect for Plaintiff Selimo from November 15, 2019 to May 14, 2020 did not include an arbitration provision; thus, Plaintiff Selimo did not agree to arbitrate claims for conduct falling within that time period. *Id.* at 1203 (finding that district court properly refused to compel arbitration of claims from disputes which arose outside of the effective dates of arbitration agreements) ("Because arbitration is strictly a matter of contract, we cannot compel arbitration for disputes which arose during time periods in which no effective contract requiring arbitration was governing the parties.")[2]

[Doc. 49 at 82-83].

Aliera contends that its position regarding the Selimo claims "presented at least a colorable argument" for Defendant [Doc. 63] at 20, but Aliera's argument is

[2] [Following footnote in original]:

> Aliera argues that, if the Court concludes that there are legitimate fact issues about whether an arbitration agreement exists between Selimo and Aliera during the period she was a member of Trinity, then the solution is to conduct a summary trial on the issue. (Supplemental Reply, Doc. 45 at 3.) However, the Court finds that there is no fact issue to be tried. Aliera has not provided a contract containing an arbitration provision that governs Plaintiff Selimo's relationship with Trinity at all.

devoid of *any* factual support or *any* case law that would support such a nonsensical contention. Aliera's assertion is also completely untenable in light of its prior admissions *in judicio*. At the hearing on January 28, 2021, the Court asked counsel for Aliera about the Selimo question, and counsel admitted that:

> Selimo does not appear to have arbitration in the Trinity Member Guide ….
>
> Aliera has always been an administrator.…Aliera administered Unity's healthcare sharing program. ***And then that relationship ended in 2018, and Aliera began working as an administrator for Trinity's sharing program, which is a completely different entity.***
>
> … [T]he plaintiffs were members of Unity's health care sharing ministry, which plaintiffs call insurance. And Aliera was the administrator.
>
> And then they became members of Trinity's sharing program, which plaintiffs call insurance. And Aliera was the administrator….
>
> For the entire time Selimo was a member, Aliera was the administrator. Part of the time, it was Unity with arbitration. ***Part of the time, it was Trinity without arbitration.***

Tr. Jan. 28, 2021 [Doc. 41] at 12-15 (emphasis added).

Aliera's contention that Selimo's claims between November 15, 2019 and May 14, 2020 are subject to arbitration and delegation lacks a single word of support in any applicable document or member guide. Similarly, Aliera's contention that the undisputed *nonexistence* of an arbitration agreement should be "delegated" to an arbitrator to "decide"—even though there is nothing to decide, [Doc. 49] at 83

n.34—is utterly devoid of legal authority and logic. The sole "support" for Aliera's position is *its own assertion* that the Selimo issue should have been sent to arbitration, but counsel's unsupported assertion of what it wishes to be true does not create an issue, colorable or otherwise.

Aliera's contention regarding the Selimo claims is also foreclosed on the law based on Supreme Court precedents and abundant decisions of the circuit courts, including the Eleventh Circuit. As noted above, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc.*, 475 U.S. at 648. A court cannot compel arbitration unless the movant establishes that the plaintiff entered into a written arbitration agreement that is "enforceable" under governing state law principles. *Lambert*, 544 F.3d at 1195; *Paladino*, 134 F.3d at 1056. "In the absence of an agreement to arbitrate, a court cannot compel the parties to settle their dispute in an arbitral forum." *Klay v. All Defendants*, 389 F.3d 1191, 1200 (11th Cir. 2004); *see also Rent-A-Center, W., Inc.*, 561 U.S. at 70, 71. Obviously, a court cannot order arbitration under the FAA where there is no arbitration agreement in effect; Aliera's contention to the contrary is utterly frivolous.

B. The Selimo claims should not be stayed even if there were merit to Defendant's contention as to other claims.

In the next section of this brief, Plaintiffs will show that, when proper legal standards are applied, a stay is also inappropriate regarding the non-Selimo claims in this case. But even assuming *arguendo* that were not the case and Aliera had established a meritorious ground of appeal as to those other claims, a general stay that swept in the Selimo claims would be unjustified.

Where a stay is appropriate in a case because there are some admittedly arbitrable claims, all claims need not be stayed. *See Klay*, 389 F.3d at 1203. It is generally within a court's discretion to deny a stay under Section 3 of the FAA with respect to the non-arbitrable claims. *Id*. When "a court is presented with both arbitrable and non-arbitrable claims, . . . the decision to stay the non-arbitrable claims is within the court's discretion." *Variable Annuity Life Ins. Co. v. Laferrera*, 680 F. App'x 880, 884 (11th Cir. 2017). The district court has "a range of choice" that will be upheld so long as the court's choice "does not constitute a clear error of judgment." *Id*. The Eleventh Circuit has further noted that when faced with arbitrable and non-arbitrable claims, "courts generally refuse to stay proceedings of non-arbitrable claims when it is feasible to proceed with the litigation." *Klay*, 389 F.3d at 1204; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 225 (1985)

(White, J., concurring) ("[T]he heavy presumption should be that the arbitration and the lawsuit will each proceed in its normal course.") (cited with approval in *Klay*).

Many considerations can go into deciding whether to allow non-arbitrable claims to move forward in litigation. *Klay*, 389 F.3d at 1204. Here, there are very important, overriding reasons why the Selimo claims should not be stayed even if other claims were subjected to a stay. As a practical matter, if the Court of Appeals were to decide that the non-Selimo claims were arbitrable, which is effectively unimaginable on this record, it is likely that very few, if any, of the class members' claims would or could ever be addressed in individual arbitrations.[3] The cost of doing so would be prohibitive,[4] which, of course, is exactly why companies like Aliera try to force arbitration on their customers. Hence, there is no reason to be concerned about piecemeal, duplicative litigation, estoppel issues, inconsistent results, or the like.

In addition, it is difficult to imagine a case in which there is a greater need for a prompt resolution of the claims asserted, even if limited to Selimo claims. This is

[3] Class arbitration is not permitted here. *Lamps Plus, Inc. v. Varela*, 587 U.S. ___, 139 S.Ct. 1407 (2019); *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

[4] If Aliera had timely responded to Plaintiffs' First Request for Production of Documents, Ex. 1, the average size of class members' medical claims would be known. Based on what information counsel are aware of, together with their knowledge of arbitration costs, they know that nearly all, if not all, class members would be prevented from pursuing their claims because of economic considerations.

not a commercial matter where a delay in justice and a delay in payment is merely a cost-of-doing-business problem. The issues here involve whether class members will be able to avail themselves of needed medical treatment or, where they have gotten treatment, avoid collection actions or personal bankruptcy because of the cost of the procedures.

The need for a rapid resolution of as many claims as possible is also dramatically apparent because of the Trinity bankruptcy. If any recovery occurs for class members from the Trinity bankruptcy estate, it will be years off; that is the reality of bankruptcy proceedings.

While Aliera might complain about the potential for "piecemeal" litigation if everything were not stayed, that is not a real threat in this case.[5] Moreover, the

[5] In the *Laferrera* case, *supra*, the Eleventh Circuit held after the conclusion of the appeal that certain non-arbitrable claims should be stayed, and the differences between that case and the instant one further indicate why staying the Selimo claims would be inappropriate. The plaintiff-companies there sued Brett and Jessica Laferrera and the Laferreras' personal LLC for purloining trade secrets and other improprieties while the Laferreras were employed by plaintiffs. All parties agreed that the claims against the Laferreras were subject to arbitration (that arbitration was well underway at the time of the Eleventh Circuit's decision), but under controlling Alabama law plaintiffs' claims against the LLC were not arbitrable, even though the LLC had no existence independent of the Laferreras and the LLC's liability was vicarious and based on the "exact same" facts as the arbitration claims against the Laferreras themselves. Under those circumstances, a stay of the plaintiff-employers' non-arbitrable claims was called for. Here, the three named Plaintiffs have legally similar but completely independent claims against Aliera, and to the extent Selimo has claims against Aliera arising out of her membership with both Unity and Trinity, Aliera has represented that they are "completely different entities" and that Aliera was a mere administrator. *See supra* at 8.

Supreme Court has expressly recognized that "piecemeal" litigation is to be expected when courts "rigorously enforce agreements to arbitrate," but is no barrier to proceeding with non-arbitrable claims. *Dean Witter Reynolds, Inc.*, 470 U.S. at 221. Even if a stay pending appeal of the non-Selimo claims were proper—and it is not—the Selimo claims should go forward.

III. ALIERA ALSO FALLS FAR SHORT OF ESTABLISHING A BASIS FOR STAYING THE NON-SELIMO CLAIMS.

As noted above, Aliera seriously misstates the standard under which its appeal is to be judged. Asserting that it had some "colorable" claim to a defense before the Court's June 22nd ruling does not remotely meet the burden of establishing that it has a meritorious appeal, but that is all Aliera argues in its Motion and brief. For the most part, Aliera just lists factual contentions on which it did not prevail and asserts that they were not frivolous. Even if those contentions were "colorable" when first made (and they were not), that would not rise to the minimum threshold for a meritorious appeal.

While questions of law in a district court's denial of a motion to compel arbitration are reviewed *de novo*, the Eleventh Circuit must "accept the district court's findings of fact that are not clearly erroneous." *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1344 (11th Cir. 2021) (internal punctuation omitted); *see also Multi-Fin. Secs. Corp. v. King*, 386 F.3d 1364, 1366 (11th Cir. 2004) ("This Court reviews

de novo questions of law … but accepts the district court's findings of fact that are not clearly erroneous."). "Clear error is a highly deferential standard of review." *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1319 (11th Cir. 2007). A factual finding is clearly erroneous only when a court of appeals "is left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

Importantly, the deference to the district court's factual findings applies "even when the district court's findings do not rest on credibility determinations but are based instead on physical or documentary evidence or inferences from other facts." *Anderson*, 470 U.S. at 574. That is because

> [t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much….

Id. at 574–75 (internal punctuation and citation omitted).

Not only must Aliera overcome the heavy burden of the clearly erroneous standard, it must show there are errors in this Court's reasoning that are so fundamental to the decision that they would have required a different outcome. So long as the ultimate result would have been the same—even if there were error—a lower court's decision is affirmed. Indeed, the Eleventh Circuit will "affirm the district court's judgment on any ground that appears in the record," even if that ground was "not relied upon or even considered by the court below." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007); *see also Langston v. Lookout Mtn. Cmty. Servs.*, 775 F. App'x 991, 1001 n.13 (11th Cir. 2019) ("Under our right-for-any-reason rule, we may affirm based on any ground supported by the record."); *Young v. Comm'r of Internal Revenue*, 926 F.2d 1083, 1090 (11th Cir. 1991). Thus, so long as the *ultimate decision* of the Court finds support in the record, any error or mistake in the Court's reasoning (assuming some existed, which Aliera has not shown) would be irrelevant for appeal purposes. The error would have to be so grave that it was outcome determinative.

It is ludicrous to suggest that all of the Court's extensive, detailed factual findings are clearly erroneous. Aliera does not try to make such a showing, nor does it even assert that it would be possible to do so. In short, there is no basis for

concluding that the Court's ruling must be set aside by the Court of Appeals as clearly erroneous under the "highly differential" standard of review required. *Morrissette-Brown*, 506 F.3d at 1319.

A few examples of the challenges that Aliera does and does not attempt to raise illustrate its failure to satisfy the legal standards for an appeal. In addressing whether the AlieraCare plans are insurance under Georgia law, the Court exhaustively reviewed all of the evidence before it in nearly 20 pages of findings and analysis. [Doc. 49] at 48-66. Only then did it conclude that:

> After thorough review of the record and evidence presented by the Parties, the Court concludes that the language of the member guides, the findings of insurance commissioners and departments across the country that have been furnished as part of the record to the Court, and Aliera's own admissions demonstrate that Aliera's plans are insurance under Georgia law.
>
> First and primarily, the member guides (*i.e.*, the operative contracts) clearly outline a plan to indemnify members or pay certain amounts upon determinable contingencies and distribute losses among members, and therefore meet the definition of insurance under Georgia law.

Id. at 48 (footnote omitted). Dozens of provisions in Aliera's own member guides are cited in support of the Court's conclusion. *Id*. at 49-53. Aliera challenges one finding in that analysis by asserting that the monthly "contributions" its members pay are voluntary, not mandatory, citing a single phrase in a Unity member guide that *refers* to those payments as "voluntary contributions or gifts." [Doc. 63] at 16.

The nomenclature of the payments says nothing about their operation, however, and the very same page of the member guide that Aliera cites makes it clear that the contributions are mandatory. If one wants to remain a member of the program, they *must* pay the scheduled premium. "If the monthly contribution is not received by the end of the month, a membership *will become inactive* as of the last day of the month in which a monthly contribution *was* received." [Doc. 12-5] at 10 (emphasis added).

Nothing in Aliera's briefs (now or previously) comes close to establishing that this Court's finding that the contributions are mandatory was error, much less clear error. The Court's conclusion that the plans at issue are insurance is consistent with rulings elsewhere[6] based on the same plans, and it is a conclusion that is overwhelmingly compelled by the evidence in the record before this Court.

The Court's conclusion that "the AlieraCare plans are not valid HCSM plans," [Doc. 49] at 66, is similarly supported by a thorough discussion of the record evidence and findings that are compelled by that evidence. *Id*. at 66-81. To qualify as an HCSM under the Affordable Care Act, the statute requires that the organization or its predecessor have "been in existence at all times since December 31, 1999." 26

[6] State insurance laws share a high degree of similarity. A key purpose of the National Association of Insurance Commissioners (NAIC) has been to accomplish exactly that end during its 150-year existence. "Founded in 1871, the U.S. standard-setting organization [the NAIC] is governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U S territories to coordinate regulation of multistate insurers." https://content.naic.org/about

U.S.C. § 5000A(d)(2)(B)(ii)(IV). Based on clear evidence, the Court found that neither Unity nor Trinity satisfied this requirement. Aliera meekly suggests that this *statutory mandate* is "no longer relevant" because, Aliera posits, the original justification for that requirement has been rendered a nullity. *See* [Doc. 63] at 13. Aliera is not seriously challenging this Court's factual finding that it cannot satisfy the 1999 requirement; it is instead trying to rewrite the law to make that fact irrelevant. But that would take an act of Congress, not a mere assertion of counsel.

Both state and federal law require that health care sharing ministries limit membership to those of "a similar faith," O.C.G.A. § 33-1-20(a)(1), or those who "share a common set of ethical or religious beliefs," 26 U.S.C. § 5000A(d)(2)(B)(ii). Aliera's Motion suggests that the Court conducted no analysis of its own with respect to these requirements, but instead merely took the word of various state insurance commissioners. [Doc. 63] at 14. However, even if that were problematic (it is not)[7], it is plainly not what happened here. The Court conducted a rigorous and meticulous analysis of the evidence before it and properly concluded that neither

[7] Aliera did not object to the submission or consideration of any of the evidence or reports from other states' insurance regulators that it now complains of, nor could it have done so on a meritorious basis. *See, e.g.* Fed. R. Evid 803(8), which allows as an exception to hearsay "public records," including "factual findings from a legally authorized investigation." Further, all statements made by Aliera or its agents (or was acquiesced in by Aliera), whether during the course of an investigation or not, are admissible against it. *Id.* 801(2).

Trinity nor Unity met this requirement—indeed, it was "not a close call." [Doc. 49] at 77. A tremendous amount of evidence supports that finding, *id*. at 73-78, and Aliera does not even contend that it was clearly erroneous.

The requirement that members *must* pay a set monthly premium determined by a schedule applicable to the coverage chosen raises another flagrant failure to satisfy HCSM requirements. Georgia law requires that HCSM plan members share one another's burdens based on need and a member's present ability to help. A legal HCSM is "facilitator among participants" that "matches" "participants who have…medical needs" with "other participants with the present ability to assist those with…medical needs."[8] O.C.G.A. § 33-1-20(a)(2). The Aliera-Trinity-Unity plans do not operate at all like that. Mandatory monthly premiums are based on the member's plan coverage. The "present ability to assist those with needs" is no factor. If a member loses her/his job or is otherwise financially incapable of paying their premium, they are terminated. *See, e.g.*, [Doc. 12-5] at 10; [Doc. 12-6] at 20; [Doc. 12-8] at 13; [Doc.12] at 13; [Doc. 12-13.] at 20.

[8] Neither do Aliera or the other entities "facilitate" the transfer of any funds between members as required by law. Aliera receives monthly payments directly from members; Aliera determines what if anything to pay on claims; and on those occasions when Aliera approves some payment, payment goes from the entity, not from members based on their "present ability to assist."

Under both Georgia and federal laws, an organization must meet each and every one of the series of requirements to qualify as an HCSM. *See* 26 U.S.C. § 5000A(d)(B)(ii) and O.C.G.A. § 33-1-20. Those statutory prerequisites to qualify as an HCSM are conjunctive; they must *all* be satisfied. The failure to meet even one of the requirements is fatal to Aliera's claim that Trinity or Unity were bona fide HCSMs. This Court's conclusion that there was no legally constituted or operating HCSM does not rely on a single failure to comply with the law; it found a litany of such failures. To prevail on appeal on the HCSM question, Aliera would have to show that the Court clearly erred as to each and every finding of noncompliance. Again, it would be ludicrous to suggest that Aliera could possibly meet that burden, and Aliera makes no suggestion that it could in its Motion.

Aliera's arguments fail at multiple points and for multiple, independent reasons. It is impossible for Aliera to meet its ultimate burden of showing there is such extreme error in this Court's order as to be outcome-determinative. The Court's ruling was clearly right based on the record before it, and Aliera's appeal is frivolous. That is especially obvious when one considers the clearly erroneous rule and the deferential standard of review federal courts of appeal are required to follow, much less the right-for-any-reason rule of affirmance. *Langston*, 775 F. App'x at 1001 n.13; *Thomas*, 506 F.3d at 1364.

For the foregoing reasons and based on the entire record, Aliera's Motion to Stay should be denied.

Respectfully submitted,[9]

/s David F. Walbert
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Attorneys for Plaintiffs and the Proposed Class

[9] 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).

Exhibit 1

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' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT THE ALIERA COMPANIES, INC., formerly known as ALIERA HEALTHCARE, INC.

Please take notice you are hereby required, within the time allowed by law, to produce for inspection and copying the following requested documents or tangible items. These requests are continuing, and you are hereby requested and instructed to provide any and all supplemental information in response to any of these requests that may become available after service of your initial response. Production shall be made at the offices of the undersigned unless otherwise agreed to.

DEFINITIONS

A. "Documents" is an all-inclusive term referring to any written, recorded, graphic or pictorial matter, however produced or reproduced, including electronically stored information ("ESI"). The term "documents" includes, without limitation, correspondence, interoffice communications, minutes, reports, memoranda, notes, schedules, drawings, pictures, tables, graphs, charts, surveys, books of account, ledgers, invoices, receipts, purchase orders, contracts, bills, checks, drafts, recordings, agendas, emails, text messages, facsimile, and all other such documents, tangible or retrievable. "Documents" includes all version of any document and all changes, additions or deletions made to any documents, and all drafts or preliminary versions of documents.

B. The term "you" means the named Defendant in this lawsuit and all persons acting on your behalf, including employees, officers, agents, attorneys, investigators, contractors, experts, and any other person acting on your behalf, including members of the Moses family, even if they have no official role or position with Aliera. "You" also includes all subsidiaries, parents or affiliated companies of Defendant.

C. "Aliera" means the Aliera Companies, Inc., Aliera Healthcare, Inc., and any and all other predecessors, successors, or alter egos of The Aliera Companies, Inc., under whatever name they may have operated.

D. "Unity" refers to Unity Healthshare, LLC and any other entities that have operated as successors or predecessors to Unity Healthshare, LLC, under whatever name they may have operated.

E. "Trinity" refers to Trinity Healthshare, LLC, Sharity Ministries, Inc. and any other entities that have operated as successors or predecessors to Trinity Healthshare, LLC, under whatever name they may have operated

F. "Anabaptist" refers to Anabaptist Healthshare and any other related entity, acting under whatever name, that was involved in forming a relationship with Aliera.

G. "Fulton County litigation" refers to the case known as *Aliera Healthcare, Inc. v. Anabaptist Healthshare et al.*, Civ. No. 2018CV30898 I, *affirmed*, 355 Ga. App. 381, 844, 844 S.E.2d 268 (2020)

INSTRUCTIONS

A. *Privilege.* If an objection based on privilege is asserted, identify the document, tangible item, communication, or information as to which the privilege is

claimed in a fashion sufficient to allow a court to determine whether the asserted privilege properly lies as required by Fed. R. Civ. P. 26(b)(5).

B. *Objections.* If objections other than privilege are asserted, the statement of a general objection is insufficient. Set forth any objections in sufficient detail to allow the court to determine whether a motion to compel should be granted and the objection disallowed. *See, e.g., Powerlock Systems, Inc. v. Duo-Lok, Inc.*, 54 F.R.D. 578 (D. Wis. 1972).

C. *Separate Production.* The response to each request shall be made separately and identified so that each response is correlated to the appropriate request.

D. *Partial Responses.* If a partial or incomplete answer or production is provided, you must state the reason that the answer or production is partial or incomplete.

E. *Avoidance of disputes and delays.* If you believe that a request is confusing, vague, or ambiguous, please apply a reasonable construction to the request in light of the matters at issue in this action and respond accordingly. You may specify your construction of the request in the written portion of your response. Furthermore, you are encouraged to contact Plaintiffs' counsel for clarification prior to serving your response.

F. *Overly broad or burdensome objections*. If you believe that a particular request is overly broad or burdensome, respond by producing such documents as you believe are responsive to the request but are not overly broad or burdensome. Furthermore, you are encouraged to contact Plaintiff's counsel for clarification and possible revision of the request prior to serving your response.

G. *Form of production for documents that exist in electronic form*. Any documents that exist in electronic form are requested to be produced in native or near-native formats, pursuant to Rule 34(b)(1)(C) of the Federal Rules of Civil Procedure and should not be converted to an imaged format (e.g. .TIFF or .PDF) unless such document must be redacted to remove privileged content or the document does not exist within your care, custody or control in a native electronic format. Native format requires production in the same format in which the information was customarily created, used, and stored by you. The table below supplies examples of the native or near-native forms in which specific types of electronically stored information (ESI) should be produced:

SOURCE ESI	NATIVE (OR NEAR-NATIVE) FORM(S) SOUGHT
Microsoft Word documents	.DOC, .DOCX
Microsoft Excel Spreadsheets	.XLS, .XLSX

Microsoft PowerPoint Presentations	.PPT, .PPTX
Microsoft Access Databases	.MDB
WordPerfect documents	.WPD
Adobe Acrobat Documents	.PDF
Photographs	.JPG
E-mail	Messages should be produced to preserve and supply the source RFC 2822 content of the communication and attachments in a fielded, electronically searchable format. For Microsoft Exchange or Outlook messaging, .PST format will suffice. Single message production formats like .MSG or .EML may be furnished, if source folder data is preserved and produced. If your workflow requires that attachments be extracted and produced separately from transmitting messages, attachments should be produced in their native forms with parent/child relationships to the message and container(s) preserved and produced.

Databases (excluding e-mail systems)	Unless the entire contents of a database are responsive, extract responsive content to a fielded and electronically searchable format preserving metadata values, keys, and field relationships. If doing so is not feasible, please identify the database and supply information concerning the schemas and query language of the database, along with a detailed description of its export capabilities, to enable Plaintiffs to develop a query sufficient to identify, extract, and export responsive data.

H. *Form of production for documents that do not exist in electronic form*. Documents that do not exist in a native electronic format or which require redaction of privileged content are requested to be produced in searchable portable document format (.PDF) with logical unitization preserved.

I. *Medium of production.* Productions smaller than 32GB should be made using a flash/thumb drive. Productions larger than 32GB should be made using a portable external hard drive.

REQUESTS

1.

In connection with the Fulton County litigation:

i) All documents, including correspondence of counsel, sent by you to another party or to a non-party;

ii) All documents, including correspondence of counsel, received by you from another person, whether a party or non-party;

iii) All depositions taken by any party and accompanying exhibits;

iv) All court testimony and accompanying exhibits; and

v) All discovery responses made by any party.

2.

In any case where Aliera is or has been a party that involves allegations or claims similar to these made by plaintiffs here (including but not limited to: *Jackson v. The Aliera Companies, Inc.*, 462 F.Supp.3d 1129, 1131 (W.D. Wa. 2020); *Moeller v. Aliera Companies, Inc.*, 2020 WL 1434155 (D. Mn. 2020); *Smith v. Aliera Companies, Inc.*, 2021 WL 1990009 (D. Co. 2021); *Kelly v. The Aliera Companies, Inc.*, __ F.Supp.3d __, 2020 WL 6877574 (W.D. Mo. 2020)):

i) All documents produced by Aliera, Trinity or Unity to another party;

ii) All other discovery responses by Aliera, Trinity or Unity;

iii) All oral testimony, whether in court or by deposition and exhibits accompanying such testimony; and

iv) All affidavits filed in the case, including attachments thereto.

3.

In any investigation or proceeding by any state insurance commissioner, attorney general, or other governmental agency or officer involving Aliera, Trinity, or Unity:

i) All documents produced, submitted or delivered to such agency or officer by Aliera, Trinity or Unity; and

ii) All reports, findings, orders, directives, and pronouncements made by such agency or officer.

4.

All documents that provide support for any defense asserted by you in this action.

5.

All documents that constitute, reflect, or contain business plans and/or financial projections for your business.

6.

All contracts or agreements, and drafts thereof, between you and Anabaptist, Unity, or Trinity.

7.

All other documents that set forth, describe, evaluate or comment on the purpose, terms or performance of the relationships between you and (1) Anabaptist, (2) Unity, and/or (3) Trinity.

8.

For each named Plaintiff in this case:

i) All documents sent electronically or otherwise from Aliera, Unity or Trinity to them;

ii) All documents received electronically or otherwise by Aliera, Unity or Trinity from them; and

iii) All documents prepared by Aliera, Unity or Trinity regarding any claim for payment or reimbursement, including all internal documents pertaining to the review, consideration, or disposition of such claims.

In the event that information was displayed online to a Plaintiff, but such screen image(s) has/have not been maintained as a hard copy or otherwise, produce an exemplar all such screen images that were presented to Plaintiffs.

9.

All reports or other summary documents that indicate:

i) The number of members with Unity plans, broken down by state and month (or such other time period as is customarily reflected in such reports if there are no such monthly reports), and type of plan;

ii) The number of members with Trinity plans, broken down by state and month (or such other time period as is customarily reflected in such reports if there are no such monthly reports), and type of plan;

iii) The total amount of member contributions, premiums or other payments paid by members in connection with Unity plans broken down by state, type of payment and month (or such other time period as is customarily reflected in such reports if there are no such monthly reports), and type of plan;

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Respectfully submitted this 15th day of July 2021.

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Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I served a true and correct copy of **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS MOTION TO STAY PENDING APPEAL** [Doc. 63] by filing the same using the Court's CM/ECF system, which will automatically serve all counsel of record.

Dated this 20th day of August 2021.

/s David F. Walbert
David F. Walbert
Parks, Chesin & Walbert, P.C.
dwalbert@pcwlawfirm.com

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' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO STAY PENDING APPEAL [Doc. 63]

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v) The total of amounts paid out on claims of Unity members broken down by state and month (or such other time period as is customarily reflected in such reports if there are no such monthly reports), and type of plan; and

vi) The total of amounts paid out on claims of Trinity members broken down by state and month (or such other time period is customarily reflected in such reports if there are no such monthly reports), and type of plan.

Respectfully submitted this 15th day of July 2021.

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