IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NOELLE LECANN, KRISTIN SELIMO, and TANIA FUNDUK, on behalf of themselves and all 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

REPLY IN SUPPORT OF MOTION TO STAY

Defendant The Aliera Companies, Inc. files this reply in support of its motion to stay. (*See* ECF No. 63.) This Court should stay the case pending Aliera's appeal of the order denying Aliera's motion to compel arbitration. In further support, Aliera states the following:

I. ISSUE PRESENTED

The issue before this Court is whether Aliera's appeal is frivolous. If the appeal is not frivolous, the Court should stay the entire case during the appeal. *See Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (holding

that proceedings in the district court "should be stayed pending resolution of a non-frivolous appeal from the denial of a motion to compel arbitration").

Plaintiffs dispute Aliera's presentation of the issue, saying that Aliera has "completely mischaracterize[d] the analysis." (ECF No. 65 at 1.) They say (without citing any supporting caselaw) that the relevant issue is instead whether, "*based on the current record and the findings of the Court in its order*[,] Aliera has established a realistic basis for prevailing on appeal." (*Id.*) According to Plaintiffs, Aliera challenges a number of this Court's factual findings and thus the question is whether Aliera can show that the Court clearly erred when making those findings. (*See, e.g.*, *id.* at 15 (arguing that it is "ludicrous to suggest that all of the court's extensive, detailed factual findings are clearly erroneous").)

The problem for Plaintiffs, however, is that Aliera does *not* challenge the Court's factual findings. There is no challenge, for example, to this Court's finding that the Trinity membership guide for Selimo does not contain an arbitration provision. What Aliera does challenge are the Court's legal conclusions that it was appropriate for the Court (instead of the arbitrator) to decide whether the Unity arbitration clause covers Selimo's claims and that the clause did not cover her claims. S*ee U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th

Cir. 2014) (reviewing de novo whether a question about scope had been delegated to the arbitrator).

The same is true when it comes to the contents of the membership guides. The membership guides say what they say, and Aliera does not dispute the guides' contents. Instead, Aliera challenges the Court's legal conclusions about the meaning of the guides, such as its conclusions that the membership guides show that the Sharing Ministries are insurance under Georgia law and that the guides show that the Sharing Ministries are not valid HCSMs under Georgia law. *See Tobin v. Mich. Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005) ("Interpretation of a contract is a question of law that we review *de novo*."); *Healthcare Staffing, Inc. v. Edwards*, 860 S.E.2d 874, 879 (Ga. Ct. App. 2021) ("The interpretation of a contract is normally a question of law . . . .").

So, with that cleared up, the issue for the Court remains the same—whether Aliera's appeal (with its challenges to the Court's legal conclusions) is so "utterly devoid of merit" that it is frivolous, *see Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, 861 F.3d 1278, 1299 (11th Cir. 2017), even under the "exceedingly low" standard for non-frivolity, *see Pls.' S'holders' Corp. v. S. Farm Bureau Life Ins. Co.*, No. 606CV637ORL35KRS, 2011 WL 13142097, at *1 (M.D.

Fla. June 15, 2011). The answer is no, and the Court should stay the case as required by *Blinco*.

II. ARGUMENT

Plaintiffs call three of Aliera's arguments frivolous: (1) the argument that arbitrability issues were delegated to the arbitrator; (2) the argument that the Sharing Ministries are not insurance but instead are valid HCSMs under Georgia law; and (3) the argument that whether Selimo's claims must be arbitrated is a question for the arbitrator and, regardless, that her claims need to be arbitrated under the Unity member guide's arbitration clause.

As explained below, however, no binding authority forecloses Aliera's arguments, a number of which concern issues of first impression. Therefore, they are not frivolous. *See Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 556 (11th Cir. 2016) ("Where an appeal requires a court to decide an issue of first impression in a circuit court, it is not frivolous."); *Fritz v. Am. Home Shield Corp.*, 751 F.2d 1152, 1155 (11th Cir. 1985) (holding that an appeal was not frivolous where the defendants could "cite no court decision contrary to plaintiff's position").

A. The Delegation Issue

Aliera made a number of arguments in its motion to compel that the arbitrator (not the Court) should decide arbitrability issues, including that: (1) Plaintiffs failed

to challenge the delegation clause specifically and on a different basis than their challenge to the arbitration clause; and (2) Plaintiffs' challenge to the clause in any event went to a merits issue that was inappropriate for the Court to resolve. Although this Court rejected those arguments, they are not frivolous. Indeed, Plaintiffs do not even suggest that the second argument is frivolous (*see* ECF No. 65), meaning that there is at least one non-frivolous argument that, if successful, would require the entire matter to go to arbitration to determine the arbitrability issues. This alone is enough to satisfy *Blinco*'s non-frivolity requirement for staying the case.

Plaintiffs contend that Aliera's first argument is a "back-door argument" "devoid of logic and legal support," making Aliera's appeal on this issue frivolous. (*Id.* at 4.) They cite an unpublished Eleventh Circuit decision, *Tuckman v. JPMorgan Chase Bank, N.A.*, No. 20-11242, 2021 WL 3357953 (11th Cir. Aug. 3, 2021), as support. But Plaintiffs' reliance on *Tuckman* to prove frivolity is misplaced for at least four reasons.

First, unpublished decisions like *Tuckman* are not binding. *See S.-Owners Ins. Co. v. Easdon Rhodes & Assocs., LLC*, 872 F.3d 1161, 1165 n.4 (11th Cir. 2017); *see also* 11th Cir. R. 36-2. Second, *Tuckman* applied Florida law, and this case concerns Georgia law. 2021 WL 3357953, at *2. Third, *Tuckman* did not address the same challenge to a delegation clause and an arbitration clause based on a Georgia

anti-arbitration insurance law, and it is therefore distinguishable. *Id.* at **3–5 & n.5. Fourth, even if *Tuckman* were binding and applied the correct law, it is not frivolous for Aliera to make a good-faith argument to change the law. *See Dalberiste v. GLE Assocs., Inc.*, No. 18-CV-62276, 2021 WL 966009, at *4 (S.D. Fla. Mar. 5, 2021) ("[L]itigants are within their rights to attempt to advance the law or to overturn precedent.").

That other courts agree with Aliera's position also shows that Aliera's delegation argument is not utterly devoid of merit. *See Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010) (recognizing that a plaintiff cannot avoid a delegation clause by challenging it on the same grounds that the rest of the arbitration is unenforceable); *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, 909 N.W.2d 614, 630 (Neb. 2018) (noting that "the Third and Sixth Circuits concluded that when a challenge could apply equally to the arbitration agreement as a whole and the delegation provision, the challenge is not specific to the delegation provision and the delegation provision must be enforced" (citing *S. Jersey Sanitation v. Applied Underwriters*, 840 F.3d 138 (3d Cir. 2016) and *Milan Exp. Co. v. Applied Underwriters Captive Risk Assurance Co.*, 590 F. App'x 482 (6th Cir. 2014)); *see also* Fed. R. Civ. P. 11 cmt. (stating that it should "certainly be taken into account" in deciding whether an

argument is frivolous that a "litigant has researched the issues and found some support for its theories even in minority opinions").

B. The Insurance and HCSM Issues

Aliera argued that the Sharing Ministries are not insurance because the member guides are not indemnity contracts under Georgia law and that the Sharing Ministries are valid HCSMs under Georgia law. In thirty-six pages of analysis that cited non-binding authority as support, the Court disagreed with these arguments.[1] (ECF No. 49 at 45–81.) Yet no binding authority forecloses them. Thus, Aliera's appeal challenging the Court's conclusions is not frivolous. *See Suazo*, 822 F.3d at 556; *Fritz*, 751 F.2d at 1155.

Notwithstanding that no binding precedent governs the resolutions of these issues, Plaintiffs still argue that any appeal on these issues is not "meritorious" because Aliera allegedly cannot show that the Court "clearly erred" and that its "error would have to be so grave that it was outcome determinative." (ECF No. 65 at 13–15.) But, again, Plaintiffs misstate the standard of review. Because Aliera is

[1] Plaintiffs argue that "Aliera complains about the thoroughness of the Court's order." (ECF No. 65 at 5.) Not so. Aliera is grateful for the Court's hard work and attention to detail. But instead of proving that Aliera has no "realistic chance of prevailing on appeal," (*see* ECF No. 65 at 4), the Order shows that this Court grappled with complicated and difficult issues. And it acknowledged that other courts have reached differing conclusions on the issues. Far from proving frivolity, the Court's thorough Order shows that these issues are up for debate and that reasonable jurists can and, in fact, do disagree on them.

challenging the Court's legal conclusions, it need only show garden-variety error. Further, Plaintiffs ignore the "exceedingly low" standard for non-frivolity—an appellant need only present a "colorable" argument. *See Pls.' S'holders'*, 2011 WL 13142097, at *1.

Here, Aliera has colorable arguments that the Sharing Ministries are not insurance under Georgia law—the guides make clear that the Sharing Ministries do not undertake any obligation to indemnify their members and, in fact, expressly deny any such undertaking. There is no binding authority holding that arrangements like the Sharing Ministries are insurance. Plus, at least two courts have held that arrangements like the Sharing Ministries are *not* insurance. *See Altrua HealthShare, Inc. v. Deal*, 299 P.3d 197, 201 (Idaho 2013); *Barberton Rescue Mission, Inc. v. Ins. Div. of Iowa Dep't of Commerce*, 586 N.W.2d 352, 353 (Iowa 1998).

Aliera also has colorable arguments that the Sharing Ministries are valid HCSMs. First, Aliera argued that the "1999 requirement" does not apply and explained how the Sharing Ministries satisfied the requirement in any event. Plaintiffs challenge these arguments as "meek" and claim that Aliera is "trying to rewrite the law." (ECF No. 65 at 18.) But no binding authority rejects these arguments. And, at any rate, Aliera is allowed to make good-faith arguments for

changes in the law without rendering its appeal frivolous. *See Dalberiste*, 2021 WL 966009, at *4; *see also* Fed. R. Civ. P. 11.

Second, Aliera explained that the Sharing Ministries' members share faith-based beliefs sufficient to satisfy Georgia law. Plaintiffs argue that a "tremendous amount of evidence" (in the form of reports from various state insurance commissioners) supports the Court's conclusion that the Sharing Ministries enrolled members irrespective of their faith. (*Id.* at 18–19.) Aliera, however, has arguments to the contrary that are not "utterly devoid of merit"—the commission reports are not binding and should not be followed,[2] the Court improperly rejected the Sharing Ministries' faith expressions under Supreme Court Free Exercise jurisprudence, and no binding authority says that the members' shared beliefs are insufficient.

Third, Aliera argued that the membership guides do not mandate contributions, which are referred to as "voluntary contributions or gifts" throughout the guides. This Court disagreed with Aliera's interpretation of the guides. The Court, however, did not cite any binding authority as support for its interpretation

[2] Plaintiffs point out that Aliera failed to object to the admissibility of these reports and seem to imply that such failure somehow renders Aliera's arguments about the reports frivolous. (ECF No. 65 at 18 n.7.) Although Aliera did not object to the reports' admissibility, it certainly did object to the Court's reliance on them, arguing that the reports are not binding adjudications of contested fact, come from states where no Plaintiff resides, and do not analyze Georgia law. (*See, e.g.*, ECF No. 28 at 25–26 n.12.)

that forecloses Aliera's interpretation. Without any binding authority barring Aliera's arguments to the contrary, they are simply not frivolous.[3]

C. The Selimo Issue

Although Plaintiff Selimo's Trinity membership guide does not have an arbitration clause, Aliera argued that Selimo still has to arbitrate her claims under an arbitration clause in the Unity guide to which she was a party. This Court disagreed. But Aliera's arguments that the Court erred are not utterly devoid of merit.

Selimo does not dispute that she agreed to arbitration under the Unity guide. Whether the Unity arbitration clause covers all of Selimo's claims is a question for the arbitrator when the parties incorporate arbitration rules that give the arbitrator the power to decide such arbitrability issues. *See Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). When such arbitrability questions are delegated to an arbitrator, "a court possesses *no* power to decide the arbitrability issue" "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (emphasis added).

[3] In a footnote, Plaintiffs contend that the Sharing Ministries do not "facilitate" the transfer of funds between members as required by Georgia HCSM law. (ECF No. 65 at 19.) Though this Court agreed, it did not cite any binding Georgia authority that forecloses Aliera's argument that the Sharing Ministries meet the facilitation requirement.

The Unity guide requires "any dispute" to be arbitrated "in accordance with the Rules of Procedure for Christian Conciliation of the Institute of Christian Conciliation [ICC]." (*See* ECF No. 12-1 at ¶ 21.) Under the ICC Rules, the arbitrator has the power to rule on the enforceability or scope of the arbitration provision. *See* ICC Rule 34(B). Thus, as Aliera has argued throughout, *see, e.g.*, *supra* Part I.A., the issue of whether the Unity clause covers Selimo's claims needs to be decided by the arbitrator, and this is true even if the Court regards Aliera's arbitrability arguments themselves as frivolous. *See Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1271 (11th Cir. 2017).

To be sure, Selimo argues that the Unity guide does not cover all of her claims and therefore that the Unity guide's arbitration provision and its delegation clause do not apply. But, in order to deny a motion to compel arbitration, a court must be able to say "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers this dispute." *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014). If the facts alleged in a complaint could be read to implicate a contract with an arbitration clause, then the arbitration clause is "susceptible of an interpretation that covers the dispute." *Id.* at 1312 (holding that even though the complaint did not mention the contract with the arbitration and

delegation clauses, the facts alleged in the complaint implicated that contract and thus all arbitrability questions needed to be decided by the arbitrator).

There is a non-frivolous argument that the Court in this case erred because it cannot be said "with positive assurance that the [Unity] arbitration clause is not susceptible of an interpretation that covers [Selimo's] dispute." *See id.* at 1311. The Unity clause covers "*any dispute* [Selimo] ha[s] with or against Unity, its associates [like Aliera], or employees." (*See* ECF No. 12-1 at ¶ 21 (emphasis added).) It is not frivolous to argue that this broad clause is susceptible to an interpretation that it covers all of Selimo's disputes with Aliera, especially when the Eleventh Circuit has called "not wholly groundless" an argument that a clause requiring the arbitration of "all claims" arising out of the parties' agreement was "broad enough to encompass the claims of [the plaintiff] even when those claims predate[d] the agreement." *Jones*, 866 F.3d at 1271 n.1. Couple that with the fact that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," and it is apparent that Aliera's argument is not frivolous. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, 103 S. Ct. 927, 941 (1983).

Plaintiffs also argue that, even if the other Plaintiffs' claims should be stayed pending appeal, Selimo's claims (and the claims of the putative class members) should not because, they say, Selimo's claims are "not covered by any arbitration

provision." (ECF No. 65 at 6.) But it is not at all clear that Selimo's claims are "non-arbitrable" for the reasons explained above. *See supra* pp. 10–12.

In addition, proceeding with Selimo's claims conflicts with *Blinco*'s rationale.[4] As *Blinco* explained, a stay of the entire case pending appeal is important because "[b]y providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco*, 366 F.3d at 1251. Staying the entire case also promotes judicial economy and saves the parties' time and resources by preventing potentially unnecessary work and case-management problems. *See Seth v. Rajagopalan*, No. 12-61040-CIV, 2013 WL 11927709, at *1 (S.D. Fla. Mar. 5, 2013) (staying the case pending appeal because "[s]uch a stay will serve judicial economy by sparing this Court from passing on questions that may well be rendered moot by the decision of the Court of Appeals, while also serving the interest of fairness to parties who might otherwise be forced . . . to fight a two

[4] Plaintiffs cite *Klay v. All Defendants*, 389 F.3d 1191 (11th Cir. 2004), as support for their argument that a stay of all claims "would be unjustified." (ECF No. 65 at 10–13.) But *Klay* does not apply here. *Klay* addressed whether the district court erred in not staying the litigation pending the resolution of an arbitration of the arbitrable claims in the case. 389 F.3d at 1197. There was no argument made in *Klay* that the case should be stayed pending an appeal under *Blinco*. *Id.* And there was no question about the frivolity of any appeal. *Id.* So *Klay* certainly does not require this Court to allow Selimo's claims to proceed while Aliera's appeal is pending.

front war for no good reason"). If the Court proceeds with Selimo's claims, then one of the main benefits of arbitration "is lost." *Blinco*, 366 F.3d at 1251.

To illustrate, if Selimo's claims proceed and the Eleventh Circuit affirms the Court's denial of the motion to compel the other plaintiffs to arbitration, then the action concerning Selimo's claims would likely have proceeded to a stage where it would be impractical to reinsert the other Plaintiffs into the litigation. Aliera, moreover, would likely be subject to duplicative discovery. If there is no stay, Selimo would likely depose Aliera but then, after the appeal, the other Plaintiffs would get to depose Aliera again, giving Plaintiffs' counsel two bites at the appeal and an unfair litigation advantage. In addition, the Court may have to rule on duplicative issues or on questions that the appeal may ultimately render moot. It does not make sense, as a matter of judicial economy, to proceed with Selimo's claims while Aliera's appeal is pending.

* * *

In the end, although Aliera's arguments did not persuade this Court, that does not mean Aliera's arguments are "utterly devoid of merit" and frivolous.[5] The Court

[5] Although Plaintiffs acknowledge that delay is not an issue when this Court decides whether to stay the case under *Blinco*, Aliera would be remiss if it did not briefly address Plaintiffs' argument that Aliera has engaged in "dilatory behavior." (ECF No. 65 at 6 n.1.) Plaintiffs complain about Aliera's alleged failure to respond to discovery and its filing of a notice of appeal on the 30th day from the Court's order denying the motion to compel. (*Id.*) But Plaintiffs do not argue

did not call those arguments frivolous. And, most importantly, the Court did not cite any binding authority foreclosing those arguments. Aliera's appeal raises important issues about arbitration—issues with which courts around the country have grappled and issues that have not been definitely resolved in this Circuit. Aliera's appeal, therefore, is not frivolous. Under *Blinco*, then, this Court should stay the case.

III. CONCLUSION

For these reasons, and the reasons explained in its motion to stay (ECF No. 63), Aliera respectfully requests that the Court enter an order staying this litigation pending the result of Aliera's appeal.

Respectfully submitted,

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that the timing of Aliera's notice of appeal or its motion to stay violated any rules, and Plaintiffs have never requested a meet and confer to resolve any discovery disputes as the Court's standing order requires. (*See* ECF No. 5 at 20.) Aliera has acted in good faith and in a diligent manner throughout this case, and it vigorously disputes any suggestion otherwise by Plaintiffs.

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CERTIFICATE OF COMPLIANCE

Counsel certifies that this document has been prepared with Times New Roman 14 type, one of the font and point selections approved by the Court in LR 5.1.

/s/ Kevin R. Stone
Kevin R. Stone

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 3rd day of September 2021 via the Court's CM/ECF system, which will send notification of such filings to all parties of record via electronic mail.

/s/ Kevin R. Stone
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