

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

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**PLAINTIFFS' PROPOSED SURREPLY REGARDING  
DEFENDANT'S MOTION TO OPEN DEFAULT**

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Plaintiffs respectfully seek leave of this Court to file a short surreply regarding the issue of Aliera's default in order to respond to new issues Aliera raises in its reply brief [Doc. 77], filed on October 18, 2021.

In its reply brief, Aliera finally proffers an explanation for why it never filed an answer: an alleged calendaring oversight. [Doc. 77] at p.9; [Doc. 77-1] at p. 3 ¶¶ 3-4. The facts here suggest otherwise. It is not as though Aliera filed its answer a day, a week, or even a month out of time. Until this Court entered a show-cause order in response to the Clerk's entry of default, Aliera never filed an answer at all, despite being reminded on multiple occasions of its continuing obligation to

do so, including in Plaintiffs' response to Alieria's motion for a stay ([Doc. 65] at p.7 n.1) and, as Alieria itself notes, in the joint preliminary planning report, which referred to a forthcoming answer from Alieria. [Doc. 55] at p.8, ¶ 5(a). No mere calendaring error explains the egregious circumstances that led to the entry of default in this case.

Alieria's assertion of "innocence" is also belied by its very similar and contemporaneous ignoring of its obligation to respond to Plaintiffs' discovery requests. As noted by Plaintiffs on August 20, 2021 ([Doc. 65] at p.6 n.4), Alieria has flagrantly ignored its discovery obligations, and the pendency of its Motion to Stay Pending Appeal [Doc. 63] does not relieve it of those discovery obligations under long-established case law in this district and elsewhere. *See* [Doc. 65] at p.6 n.4. While Alieria has thus long known of the clear illegality of its refusal to respond in any way to Plaintiffs' succinct First Request for Production of Documents, attached as Ex. 1 to Doc. 65, Alieria has still to this day made no response to those requests, not even to file perfunctory boilerplate objections (which counsel could not have done consistent with their ethical and Rule 11 constraints). In short, Alieria's failure to answer does not reflect a singular instance of stonewalling. To the contrary, it is part of an unbroken pattern since this Court's order of June 22, 2021, denying arbitration. [Doc. 49]. In other words, the most that Alieria has exhibited in this case

is an intent to defend against being in federal court; it has not in any way evidenced an intent to substantively defend against Plaintiffs' claims or participate in ongoing litigation following the denial of its motion.

More importantly, however, at this juncture Plaintiffs suggest that the Court should refrain, temporarily, from deciding the merits of Alieria's motion to open default. Four days after Plaintiffs filed their response brief [Doc. 74] opposing the motion to open default, Alieria's counsel filed a motion to withdraw [Doc. 76]. That motion is unopposed, and if it is granted, Alieria will have to secure replacement counsel, because it is a well-established rule in this Circuit that "a corporation is an artificial entity that can act only through agents, cannot appear *pro se*, and must be represented by counsel." *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985).

While Plaintiffs believe that the initial entry of default was appropriate and good cause has not been shown to lift default, subsequent developments could make that even more abundantly clear. If Alieria were to fail to secure replacement counsel following withdrawal of its initial counsel, that would be a separate and independent basis for entering default against Alieria, without regard to the untimely filing of its answer. "Default is appropriate under the 'otherwise defend' provision of Rule 55(a) where a corporation, following withdrawal of its former

counsel, fails to retain new counsel and thereby indicates an intent not to defend itself.” *Continental Cas. Co. v. Nat’l Employer Solutions, Inc.*, No. 1:08-cv-974-WSD, 2010 WL 11506863, at \*2 (N.D. Ga. Feb. 3, 2010); *see also PBS&J Constructors, Inc. v. I.L. Fleming, Inc.*, No. 1:11-cv-1785-WSD, 2015 WL 7779214, at \*2 (N.D. Ga. Dec. 2, 2015).

Plaintiffs respectfully suggest that the Court should first rule on the motion to withdraw that is presently pending. Assuming that motion is granted, the Court should give Alera a specific deadline by which replacement counsel must appear.<sup>1</sup> If Alera fails to comply with that Order, then that would render the motion to open default moot. If the Court were to open default now, and then Alera were to dismiss its counsel and not hire new counsel, Plaintiffs would have to file a new motion just to return to the present status quo. If, on the other hand, Alera does comply with any Order to secure new counsel, then neither side will have suffered any prejudice by virtue of the slight delay in deciding the merits of the motion to open default. In light of the strong evidence that Alera has abandoned any intent it ever had to defend against Plaintiffs’ substantive allegations, there is no reason to prematurely open default now.

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<sup>1</sup> The Eleventh Circuit has given Alera until November 3 to secure new counsel in connection with its appeal of this Court’s June 22 Order.

Respectfully submitted this 20th day of October, 2021.

/s Jennifer K. Coalson

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**CERTIFICATE OF SERVICE**

I certify that on the date below, I served a true and correct copy of **PLAINTIFFS' PROPOSED SURREPLY REGARDING DEFENDANT'S MOTION TO OPEN DEFAULT** on Defendant by filing it using the Court's Case Management and Electronic Case Filing (CM/ECF) system, which will automatically serve all counsel of record.

This 20th day of October, 2021.

/s/ Jennifer K. Coalson

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