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., Defendants.	CIVIL ACTION FILE No. 1:20-cv-2429-AT **HEARING REQUESTED**

DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO OPEN CLERK'S ENTRY OF DEFAULT

I. INTRODUCTION

"Entry of judgment by default is a drastic remedy which should be used only in extreme situations." *Davila v. Marshall*, 649 F. App'x 977, 980 (11th Cir. 2016) (punctuation omitted). This is not such an extreme situation. In a hyperbolic attempt to transform it into one, Plaintiffs do nothing but disingenuously complain about other deadlines that either (a) Aliera timely met, and/or (b) should be stayed pursuant to Eleventh Circuit law. These arguments are irrelevant diversions. The standard of whether default should have been entered in the first place is whether Aliera had an

intent to defend. The standard for setting aside default is good cause, which requires an analysis of several factors, all of which weigh in favor of setting aside the default.

Ironically, while Plaintiffs complain generally about "delays," they waited until they were notified about the intended withdrawal of Aliera's counsel before moving for entry of default, which they contend they could have done 86 days before filing their motion. Why they chose to wait is clear. It is not because default is warranted. It is because Plaintiffs wanted to ambush Aliera as soon as they learned counsel intended to withdraw. Such gamesmanship is not a basis for default.[1]

To be sure, in the Joint Preliminary Report and Discovery Plan ("JPR") filed on July 13, 2021, Plaintiffs listed twelve "legal issues" to be tried – not one of them was the issue of default. (Doc. 55 ¶ 1(c).) This is because Plaintiffs knew that default was not warranted at that time (as it is not warranted today) because Aliera has been defending this case since day one. (*See* Docs. 12, 13, *see also* Doc. 55, p. 2.) Indeed, Plaintiffs were well aware at that time that Aliera had not yet filed an answer (*see* Doc. 55 ¶ 6(a)) and Plaintiffs did not consider it an issue of default because Plaintiffs knew of Aliera's defenses and intent to exercise its automatic right to interlocutory

[1] On September 29, 2021, Aliera's counsel filed a motion to withdraw in the Eleventh Circuit and served Plaintiffs with same. Upon receipt of that notice, Plaintiffs moved swiftly for entry of default in this Court a mere three business days later (the same day the Eleventh Circuit granted the withdrawal motion (Doc. 68)). The timing of Plaintiffs' motion is no coincidence.

appeal and that the action should be stayed pending the outcome of that appeal, which was timely filed. Consistent with this, Plaintiffs indicated that they anticipated Aliera would later file an answer and that this "forthcoming answer will include additional information." (Doc. 55, ¶ 5(a))

If Plaintiffs truly thought default was warranted then (which was after July 6), they would have and should have raised the issue in the Rule 26(f) Early Planning Conference and moved for entry of default at that time. Plaintiffs instead decided to sit on their hands for 86 days from July 7 (apparently so they could tout how long the "delay" has been). Only when they were informed that Aliera's counsel was about to withdraw did they choose to pounce with a motion for clerk's entry of default, which the clerk entered on the next business day.[2]

The Court should set aside the default because (1) it should not have been entered in the first place; and (2) good cause exists to set it aside.

[2] The motion for entry of default was not ripe when the clerk entered default. *See* L.R. 7.1(B) (allowing fourteen days to file a response in opposition to a motion). *See generally Pinnock v. Fin.*, 1:13-CV-501-AT, 2014 WL 11970539, at *2, n.2 (N.D. Ga. Feb. 10, 2014) (Totenberg, J.) (declining to rule on a motion until it was ripe); *see also Prop Sols., LLC v. GOPD, LLC*, 1:16-CV-1224-SCJ, 2016 WL 9454432, at *3 (N.D. Ga. Nov. 28, 2016) ("The Court will decide the motion after it becomes ripe."). Due process requires a defendant an opportunity to respond to any motion, especially a motion for entry of default. *See generally Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1151 (11th Cir. 2006) ("The broad discretion of the district court to manage its affairs is governed, of course, by the most fundamental safeguard of fairness: the Due Process Clause of the Fifth Amendment.").

II. FURTHER ARGUMENT AND CITATION OF AUTHORITY

A. Default Should Not Have Been Entered Because Defendant Consistently "Otherwise Defend[ed]" this Action.

The standard for entering default when an answer has not been timely filed is "whether Defendant showed an intent to defend." *Marques v. JP Morgan Chase N.A.*, 1:16-CV-1215-LMM-AJB, 2018 WL 11344738, at *3 (N.D. Ga. May 29, 2018); *see also* Fed. R. Civ. P. 55(a) and Advisory Committee's Note to 2007 Amendment. For some reason, Plaintiffs ignore this standard and try to create their own standard based on how much time passed before they decided to move for entry of default. (Doc. 74, p. 4.) As convenient as it would be for parties to manufacture their own standards, that is not how the law works.

They then argue that Rule 55's "otherwise defend" language is somehow limited to circumstances in which an answer was timely filed but the defendant otherwise failed to defend. (Doc. 74, p. 4.) Plaintiffs are mistaken. Although it may be true that default may be entered in certain extreme circumstances other than an untimely answer, this does not mean that the "otherwise defend" language in Rule 55 is limited to such circumstances.

Plaintiffs fail to cite any authority for that narrow and incorrect interpretation of the Rule. In fact, they ignore Eleventh Circuit law to the contrary – this Court has explicitly held that "default is not warranted under Fed. R. Civ. P. 55 solely because

Defendant failed to timely respond in accordance with Fed. R. Civ. P. 12(a)(4)(A)" and has refused to enter default where defendants defended claims against them even though they did not file timely answers. *See Clowers Commc'ns, LLC v. SkyCom USA, LLC*, 1:14-CV-0291-ODE, 2014 WL 12629947, at *3 (N.D. Ga. Oct. 7, 2014); *Marques*, 2018 WL 11344738, at *3. Ignoring the foregoing, Plaintiffs manufacture their own standard and argue in their Response that "Rule 55's reference to 'otherwise defend' does not mean that a Defendant who files a timely motion can thereafter ignore all other deadlines imposed by the Federal Rules." (Doc. 74, p. 4.) Setting aside the fact that Aliera has not "ignored all other deadlines" (addressed below), such a red herring has nothing to do with whether Aliera has shown an intent to defend here.

Indeed, Plaintiffs have conspicuously failed to address case law from this Court cited in Aliera's moving brief involving similar circumstances, most notably *Marques*, 2018 WL 11344738. There, as here, the defendant filed a pre-answer motion to dismiss and did not file an answer within fourteen days of the denial of that motion. The Court held that "Defendant's answer was not timely filed under Fed. R. Civ. P. 12(a)(4)(A)," but the Court went on to hold, in such a scenario, "[t]he question is whether Defendant showed an intent to defend." *Id.* at *3. The Court concluded that the defendant "unquestionably possessed such an intent by,

among other things, filing a timely motion to dismiss, an answer (albeit untimely), conducting discovery, engaging in a settlement conference, and filing a summary judgment." *Id.*

The facts here are similar and likewise show an intent to defend. Aliera filed a pre-answer motion to dismiss or, alternatively, to compel arbitration (Doc. 12)[3]; filed an answer (albeit untimely) denying the material allegations and raising thirty discrete defenses (Doc. 70-1); timely submitted a proposed preliminary report and discovery plan (Doc. 52); served initial disclosures; engaged in the Rule 26 conference (Doc. 55, p. 19); filed a JPR (raising several defenses) (Doc. 55); and timely filed a notice of interlocutory appeal (Doc. 58) and a motion to stay pending the outcome of the appeal (Doc. 63). At a bare minimum, as in *Marques*, those actions show an intent to defend, and so default should not have been entered. *See Marques*, 2018 WL 11344738, at *3; *see also Davila*, 649 F. App'x at 980 (punctuation omitted) ("Despite Marshall and Durden's late filing, this is not an extreme situation that warrants resorting to sanctions that deprive a litigant of his

[3] Despite Plaintiffs' misleading implication (Doc. 74, p. 4), the filing of the motion to dismiss is not the only act showing Aliera's intent to defend. There are many others, as addressed herein and in Aliera's moving brief.

day in court."); *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1317 (11th Cir. 2002); *Clowers*, 2014 WL 12629947, at *3.

Plaintiffs' last-ditch general argument is the truism that entry of default is a ministerial task for the clerk and that courts can *sua sponte* enter default, but this does not mean that such default should be entered where default is not supported by law. (Doc. 74, p. 5.) Where there is an intent to defend, default is not appropriate. *Marques*, 2018 WL 11344738. Just as a clerk cannot enter default when an answer has been timely filed simply because a plaintiff moves for entry of default, in the same way, a clerk cannot enter default when a defendant shows an intent to defend simply because a plaintiff files a motion for entry of default.

Indeed, in *Wilson v. Kelly*, 1:18-CV-5014-AT, 2019 WL 5485126, at *2 (N.D. Ga. Apr. 10, 2019), cited by Plaintiffs (Doc. 74, p. 5), the Court found, "while Plaintiff, in general terms, explains why a default should be entered against Defendant [], he fails to set forth the [details showing] that Defendant [] is in fact in default. As such, Plaintiff's motion seeking entry of default as against Defendant [] [Doc. 21] is **DENIED**." The same is true here. The legal standard does not change just because the task may be ministerial. "The Eleventh Circuit has held [] that default be used only sparingly and in extreme circumstances." *Manns v. City of Atlanta*, 1:06-CV-0609-TWT, 2006 WL 8433101, at *1 (N.D. Ga. Oct. 30, 2006).

This is not such an extreme circumstance. Aliera has actively participated in this litigation and shown an intent to defend from day one. As such, default should not have been entered, and the Court should set it aside.

B. Good Cause Exists for Setting Aside the Clerk's Entry of Default

Notwithstanding the fact that default should not have been entered in the first place, good cause exists to set aside such default. FED. R. CIV. P. 55(c). "Any doubt as to whether a default should be granted or vacated 'should be resolved in favor of a judicial decision on the merits of a case.'" *S. Timber Co. v. Ellis*, 4:07-CV-0215-HLM, 2008 WL 11470727, at *2 (N.D. Ga. Jan. 22, 2008). Each "good cause" factor is discussed below and each weighs in favor of setting aside default.

1. No Culpable or Willful Default

Again, as noted above, default should not have ever been entered because Aliera has always shown an intent to defend and was deprived of its due process right to show same before entry of default. Without any basis for default, by definition, there can be no finding of willful or culpable default. Notwithstanding the foregoing, the default that was prematurely entered was not willful or culpable.

Plaintiffs recklessly lodge baseless accusations that Aliera made a "strategic decision to ignore deadlines." (Doc. 74, p. 7.) This is false. Plaintiffs making it up and putting it in a brief does not make it true. The unfortunate (and vanilla) reality

is that, as in *S. Timber Co. v. Ellis*, 4:07-CV-0215-HLM, 2008 WL 11470727, at *2 (N.D. Ga. Jan. 22, 2008) (citations and punctuation omitted), the reason an answer was not filed within fourteen days of the order on the motion to dismiss was due to a simple calendaring oversight. (*See* Exhibit A attached hereto, the Declaration of Elizabeth B. Shirley ¶¶ 3-4.) This Court has made clear that such a calendaring issue does not rise to the high level of culpable or willful misconduct justifying the extreme sanction of default. *See Ellis*, 2008 WL 11470727, at *2.

Plaintiffs' reliance on *Weinstein Grp., Inc. v. O'Neill & Partners, LLC*, 1:19-CV-1533-SCJ, 2021 WL 2652331, at *4 (N.D. Ga. May 6, 2021) does not change this. (Doc. 74, pp. 9, 10.) In that case, after defense counsel withdrew, the Court ordered the defendant to notify the Court of the identity of its new counsel and explicitly warned that "[f]ailure to comply with this Order may result in an entry of default against Defendant." *Id.* at *1. Defendant failed to comply with the order. The plaintiff moved for default. Despite its warning that "[f]ailure to comply with this Order may result in an entry of default against Defendant," the Court denied that motion, refused to enter default, and gave the defendant a second chance. *Id.* After the defendant failed to comply with the second order to obtain counsel, the court held a hearing at which the defendant failed to appear. Only then, after "[n]oting that Defendant had failed to comply with two Court Orders directing it to retain

counsel, despite being given an **additional eight months** to do so, the Court granted Plaintiff's Motion for Clerk's Entry of Default and directed the Clerk to enter default against Defendant." *Id.* (emphasis in original).

Nothing like that has occurred here. The default here was entered solely because Plaintiffs complained that an answer was not filed within fourteen days after the Court's order on the motion to dismiss (Doc. 67), despite the fact that Aliera was "otherwise defending" under Rule 55(a) and that Aliera filed a notice of appeal and motion to stay all proceedings. The Court issued a show cause order (Doc. 69) that Aliera responded to on the same day (Doc. 70). And when the Court held a telephone conference four days later, Aliera's counsel attended and participated. (Doc. 75.)

Plaintiffs unsupported nonsense that "the default resulted from an intentional, strategic decision to delay proceedings as much as possible," is just plain false. (Doc. 74, p. 9.) There is no "pattern of reckless disregard for court rules, court orders, and deadlines." (Doc. 74, p. 8.) Plaintiffs' laundry list of grievances misses the mark. (Doc. 74, p. 7.) The Rule 26(f) planning conference was held and the JPR was filed. (Doc. 55.) Plaintiffs' complaint about this process was due to scheduling issues (counsel for both parties had overlapping vacations, amongst other things). (*See* Ex. A, ¶ 5.) Schedules were reconciled, and counsel participated in the conference and prepared and submitted a JPR. Although Plaintiffs think they have

the high ground regarding this minor scheduling kerfuffle, why they think this supports the extreme sanction of default is unclear and not supported by any law.

Next, the appeal was timely filed and Plaintiffs do not dispute that. Pausing everything in this Court pending the outcome of the appeal is supported not only by binding Eleventh Circuit authority but also makes common sense. (Docs. 63, 66.) The timing of the filing of the motion to stay and the amount of time it has been pending does not negate the law on that issue. Plaintiffs may disagree, but such a disagreement does not justify the severe punishment of default – and that is the only issue before the Court in this motion.

Plaintiffs' cited cases are all materially distinguishable. *Compania Interamericana Exp.-Imp., S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 949–50 (11th Cir. 1996) involved a complex procedural history with multiple violations of multiple orders and multiple second chances:

> The court directed [defendant] to secure new counsel on or before February 13, 1995, or risk sanctions. On February 14, 1995, Dominicana moved for an extension of time to retain counsel…. The court granted the extension, and denied a motion for default filed by [plaintiff]. Dominicana retained counsel by March 6, but on March 14, 1995, IAL again moved for default citing Dominicana's failure to respond to interrogatories. Dominicana responded…. The court then ordered the parties to participate in mediation… On May 22, Alvaraz Armas filed a motion to withdraw as counsel because Dominicana was unable to comply with its financial commitments. On May 23, the court granted the motion to withdraw, denied Dominicana's motion for an extension of time to retain new counsel, and ordered Dominicana to

> obtain counsel immediately. On May 24, 1995, the court ordered a default "because corporate Defendants are not represented by counsel…."

The multiple warnings and multiple second chances explicitly afforded by the Court in *Compania Interamericana* are nothing like what has happened here. Here, the motion for entry of default is based on Aliera not filing an answer within fourteen days of the order on the motion to dismiss due to a calendaring oversight despite the fact that Aliera has "otherwise defend[ed]" this action. (*See* Doc. 67); (Ex. A, ¶¶ 3-4.) This is a far cry from the circumstances in *Compania Interamericana.*

Grupo Rayco C.A. v. Delta Air Lines, Inc., 1:20-CV-01952-AT, 2021 WL 1351859, at *6 (N.D. Ga. Mar. 16, 2021) is also irrelevant:

> On June 10, 2020, the Court entered an Order extending the time for the parties to exchange their Initial Disclosures to June 29, 2020. Grupo Rayco ignored this deadline for **eight months**…. In addition, after its local counsel moved to withdraw, the Court ordered Grupo Rayco to obtain replacement counsel by October 29, 2020. Grupo Rayco failed to comply, and on November 4, 2020, the Court ordered Mr. Scordo to show cause by November 10th why the case should not be dismissed pursuant to Local Rule 41.3A(2) for failure to comply with the Court's order. Again, Grupo Rayco failed to comply and was ordered to have local counsel file a notice of appearance by November 24, 2020. The day after the Court's deadline, counsel filed his notice of appearance on November 25, 2020.… And most recently, Grupo Rayco failed to timely respond to Delta's Motion to Dismiss for failure to prosecute.

Again, as the procedural history in the instant case discussed above shows, nothing even remotely similar has occurred here.

In *Glock, Inc. v. Glob. Guns & Hunting, Inc.*, 1:12-CV-136-AT, 2017 WL 4334241, at *4 (N.D. Ga. June 30, 2017), the defendant "waited for over year—after default judgment was entered against him—to participate in the case…. He did not file a written response to the Clerk's entry of default or timely seek to set it aside, despite receiving notice of it, and he did not respond to Glock's motion for default judgment…." Again, as discussed above, that is nothing like the instant case. *Cf. Regent Ins. Co. v. Findlay Roofing & Constr., Inc.*, 1:16-CV-02602-RWS, 2017 WL 429415, at *3 (N.D. Ga. Jan. 31, 2017) (defendant disregarded two valid services of process on its registered agent).

In short, the basis for the alleged default here—not filing an answer within fourteen days of the order on the motion to dismiss—was due to an oversight in calendaring; it was not due to any willful or culpable misconduct no matter how many times Plaintiffs level that false accusation. *See Marquees*, *supra.*

2. No Prejudice

In a weak attempt to show prejudice, Plaintiffs vaguely complain about a discovery dispute that is not before the Court and time spent addressing unspecified "dilatory behavior." (Doc. 74, pp. 12-13.) But those issues do not meet the prejudice standard under Rule 55. *See Garneaux v. Kym Ventures LLC*, 1:16-CV-3012-AT, 2017 WL 11068768, at *2 (N.D. Ga. July 13, 2017) (Totenberg, J.) ("A mere delay

in the ultimate resolution of the issues on the merits does not constitute prejudice to a plaintiff."); *Glock, Inc. v. Glob. Guns & Hunting, Inc.*, 1:12-CV-136-AT, 2017 WL 4334241, at *5 (N.D. Ga. June 30, 2017) (emphasis added) ("[P]rejudice where there is a significant increase in trial length and excessive costs to litigants.").

If Plaintiffs truly thought they were prejudiced, they would have promptly sought entry of default. Instead, they waited almost three months before briefing the issue – they clearly did not deem it an urgent issue or one that would create prejudice. *See generally Carter v. Sec'y of Navy*, 492 F. App'x 50, 53 (11th Cir. 2012).

3. Meritorious Defense

Aliera denied each of the material allegations in the complaint (Doc. 70-1) and did not simply make "general denials" or "bare legal conclusions." (Doc. 74, p. 12.) Indeed, Aliera raised thirty discrete defenses. (Doc. 70-1, pp. 28-34.) Although the Court has rejected some in the limited context of an early motion—which had to accept all allegations in the complaint as true—this putative class action involving eight separate causes of action—if it survives appeal—will involve more issues and defenses than those raised in that early motion. Moreover, aside from denying the material allegations, Aliera raised numerous meritorious defenses that have nothing to do with the arbitration issue. (*See* Doc. 70-1, pp. 28-34; *see also* Doc. 55, pp. 5-6); *see Branch Banking & Tr. Co. v. Peretz*, 1:18-CV-760-AT, 2019 WL 3519012,

at *3 (Totenberg, J.) (N.D. Ga. Apr. 18, 2019) ("The movant must only make a bare minimum showing to support a claim for relief."); *United States v. Varmado*, 342 Fed. Appx. 437, 441 (11th Cir. 2009) ("[S]he advanced what could be liberally construed as a meritorious defense at this early stage of the proceedings.").

4. Promptness

Plaintiffs admit that "Aliera unquestionably acted promptly in moving to set aside the default." (Doc. 74, p. 13.) They then make the strange argument that this is a reason to not set aside default. (*Id.*). The law, however, is the opposite. *See S. Timber Co.*, 2008 WL 11470727, at *2; *Ochoa v. Principal Mut. Ins. Co.*, 144 F.R.D. 418, 420 (N.D. Ga. 1992).

5. Public Interest Not Implicated

Finally, Plaintiffs do not dispute that setting aside the default will not be adverse to the public interest. This factor undisputedly weighs in favor of setting aside the default. In sum, all factors weigh in favor of setting aside the default.

III. CONCLUSION

For the foregoing reasons, and those raised in Aliera's moving brief, the Court should "respect the usual preference that cases be heard on the merits rather than resorting to sanctions that deprive a litigant of his day in court" and set aside the clerk's entry of default. *See Mitchell*, 294 F.3d at 1317 (punctuation omitted).

Respectfully submitted,

/s/ Elizabeth B. Shirley
Elizabeth B. Shirley (pro hac vice)
Burr & Forman LLP
420 20th Street North, Suite 3400
Birmingham, Alabama 35203
Telephone: 205-251-3000
Email: bshirley@burr.com

Kevin R. Stone
Georgia Bar No. 830640
Burr & Forman LLP
171 17th Street NW, Suite 1100
Atlanta, Georgia 30363
Phone: (404) 815-3000
Email: kstone@burr.com

Counsel for Defendant The Aliera Companies Inc.

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/ Elizabeth B. Shirley
Elizabeth B. Shirley

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 18th day of October, 2021 via the Court's CM/ECF system, which will send notification of such filings to all parties of record via electronic mail.

/s/ Elizabeth B. Shirley
OF COUNSEL

EXHIBIT A

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., Defendants.	CIVIL ACTION FILE No. 1:20-cv-2429-AT

DECLARATION OF ELIZABETH B. SHIRLEY

I, Elizabeth B. Shirley, declare as follows:

1. I am over the age of twenty-one years, and I am competent to testify regarding the matters contained herein. I make this Declaration based on my personal knowledge.

2. I am one of the attorneys in this matter for Defendant The Aliera Companies Inc. ("Aliera"). I am appearing *pro hac vice* in this matter. I am a partner with Burr & Forman LLP (the "Firm").

3. After the Court entered its Order denying Aliera's Motion to Dismiss or Alternatively Motion to Compel Arbitration, (Dkt. 49), I assigned the task of calendaring deadlines based on the Court's Order to an employee of the Firm whose responsibilities and qualifications include calculating and calendaring deadlines. Due to internal issues involving the employee, the Answer deadline was not calendared.

4. The failure to serve an Answer by the deadline was not in any way intentional or willful. It was not for the purpose of delay. Instead, it was due to inadvertence, as explained above.

5. Plaintiffs filed their draft Joint Preliminary Report and Discovery Plan ("JPR") on July 6, 2021 at or around 3:15 PM and without notice to Aliera that they intended to file the JPR at that time. Counsel for Aliera responded at approximately 3:40 PM via email, stating that Aliera was working on the draft JPR and was planning to send it "as soon as possible today." (Exhibit 1, attached hereto, which is a true and correct copy of an email exchange between Plaintiffs' counsel and Defendant's counsel.) Because Plaintiffs already filed their version of the JPR, Defendant filed the finalized version on or around 6:27 PM on July 6. Counsel of record in this action had not connected and finalized the JPR prior to this time due to scheduling conflicts on both sides. (*See* Ex. 1.)

I declare pursuant to 28 U.S.C. § 1746, under penalty of perjury, that the foregoing is true and correct and based upon my personal knowledge.

Executed this 18th day of October, 2021.

/s/ Elizabeth B. Shirley
Elizabeth B. Shirley

EXHIBIT 1

From: Shirley, Elizabeth
Sent: Tuesday, July 6, 2021 5:08 PM
To: Jennifer K. Coalson; Rutherford, Robert; Stone, Kevin; Craig, Sadie
Cc: David Walbert; stephen@sfclasslaw.com; paul@sfclasslaw.com
Subject: RE: Aliera: Rule 26(f) conference

Jennifer,

I had an out-of-office email response activated all last week, and you can see on the Court's docket that Robert is not counsel of record in this case, as well as who is counsel of record for Defendant. A head's up as to your anticipated filing time today would have been helpful. At any rate, I'm not accusing you of improper conduct, and it is unfortunate that we were not able to work together on this document due to timing issues. We think it is best to cooperate on matters and believe that you will find this to be our approach in continued dealings with us.

Best regards,
Beth

From: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>
Sent: Tuesday, July 6, 2021 3:58 PM
To: Shirley, Elizabeth <bshirley@burr.com>; Rutherford, Robert <rrutherford@burr.com>; Stone, Kevin <kstone@burr.com>; Craig, Sadie <scraig@burr.com>
Cc: David Walbert <DWalbert@pcwlawfirm.com>; stephen@sfclasslaw.com; paul@sfclasslaw.com
Subject: RE: Aliera: Rule 26(f) conference

[EXTERNAL EMAIL]

Beth,

Just so we're clear, is your position really that WE didn't try hard enough to communicate with YOU all? You never had an out-of-office reply up; Robert never suggested he wasn't the appropriate person to contact; and the first we're hearing about how we should have reached out to someone else (at the same firm, I note) is at 4:45 Atlanta time on the date this document was due. We took the steps we felt was necessary to ensure that we complied with the Court's deadline because it didn't seem to us that any of you were concerned about it.

I do understand having personal and professional obligations to deal with; indeed, those same obligations on my end are why I can't sit around the office indefinitely tonight waiting on your revisions to a document we sent over a week ago. I think you'll find we are a pretty reasonable team to work with, but it does require some communication on your part.

Our initial disclosures are attached. Please advise if you need us to put these in the mail, and if so, to which office they should be sent.

Have a nice evening,
Jenn

JENN COALSON

PARKS | CHESIN | WALBERT

From: Shirley, Elizabeth <bshirley@burr.com>
Sent: Tuesday, July 6, 2021 4:43 PM
To: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>; Rutherford, Robert <rrutherford@burr.com>
Cc: Craig, Sadie <scraig@burr.com>
Subject: RE: Aliera: Rule 26(f) conference

As you know, I was out of town last week on a family vacation, with very limited access to phone and email. Yesterday was a holiday. Robert also has been unavailable, and he is not counsel of record in this case. Sadie Craig and Kevin Stone are counsel of record in this case, but your emails discussed below did not include them. It appears we will have to file a separate document with Defendant's positions.

From: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>
Sent: Tuesday, July 6, 2021 3:27 PM
To: Shirley, Elizabeth <bshirley@burr.com>; Rutherford, Robert <rrutherford@burr.com>
Cc: Craig, Sadie <scraig@burr.com>
Subject: RE: Aliera: Rule 26(f) conference

[EXTERNAL EMAIL]

We hadn't heard anything from you all despite reaching out multiple times last week, so early this afternoon we revised what we had sent you and finalized it for filing as Plaintiffs' unilateral proposal. I am just out of a meeting, and as you likely saw, that document got filed before I could respond to this message. Dave has already left the office and I have a hard stop at 5 to head to a meeting, so we would be hard pressed to be able to review any eleventh-hour revisions at this point anyway before the Court's deadline.

JENN COALSON
PARKS | CHESIN | WALBERT

From: Shirley, Elizabeth <bshirley@burr.com>
Sent: Tuesday, July 6, 2021 3:40 PM
To: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>; Rutherford, Robert <rrutherford@burr.com>
Cc: Craig, Sadie <scraig@burr.com>
Subject: RE: Aliera: Rule 26(f) conference

Hi Jennifer,

We are working on the draft Report you forwarded and plan to send that to you as soon as possible today. I am copying Sadie on this email, as she is licensed in GA and counsel of record in this matter, and also Kevin Stone, who is in our GA office and also licensed in GA.

Best regards,
Beth

Elizabeth Bosquet Shirley • *Partner*
Burr & Forman LLP

AL • DE • FL • GA
MS • NC • SC • TN

420 North 20th Street , Suite 3400, Birmingham, Alabama 35203
direct 205-458-5186 • fax 205-244-5705 • main 205-251-3000
bshirley@burr.com • www.burr.com

From: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>
Sent: Wednesday, June 30, 2021 12:54 PM
To: Rutherford, Robert <rrutherford@burr.com>
Cc: Shirley, Elizabeth <bshirley@burr.com>
Subject: RE: Aliera: Rule 26(f) conference

[EXTERNAL EMAIL]

That's fine; I expect to be reasonably available by e-mail between Thursday and Monday, but I'll be up in the mountains and am just not confident that I'll have good enough reception to do a call. But no need to rush your changes back to me today.

JENN COALSON
PARKS | CHESIN | WALBERT

From: Rutherford, Robert <rrutherford@burr.com>
Sent: Wednesday, June 30, 2021 1:40 PM
To: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>
Cc: Shirley, Elizabeth <bshirley@burr.com>
Subject: RE: Aliera: Rule 26(f) conference

I will ty to get to this once I finish up with the expert reports we have to file by tomorrow in my other case. I will be on conference calls with the experts starting in a few minutes.

From: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>
Sent: Wednesday, June 30, 2021 12:30 PM
To: Rutherford, Robert <rrutherford@burr.com>
Cc: Shirley, Elizabeth <bshirley@burr.com>
Subject: RE: Aliera: Rule 26(f) conference

[EXTERNAL EMAIL]

Attached is the draft that I e-mailed to you yesterday.

As to a stay, we very much disagree that one is automatic and we will oppose any such request. Regardless, we can address the issue of whether a stay is appropriate upon a motion to Judge Totenberg. I just want to make sure we have this document ready to be filed on Tuesday as previously ordered.

JENN COALSON

PARKS | CHESIN | WALBERT

From: Rutherford, Robert <rrutherford@burr.com>
Sent: Wednesday, June 30, 2021 1:02 PM
To: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>
Cc: Shirley, Elizabeth <bshirley@burr.com>
Subject: RE: Aliera: Rule 26(f) conference

Jennifer: Beth is on a much-needed vacation this week with her family, and I'm up against a hard deadline for expert reports due tomorrow in a trial I have coming up. I can't talk today. Let me suggest you send your plan to us, and hopefully we can come up with something together. You should know that, as of this moment, we plan to appeal the order, and I believe the law in the Eleventh Circuit is that there is an automatic stay pending appeal.

Robert H. Rutherford • *Partner*
Burr & Forman LLP

AL • DE • FL • GA
MS • NC • SC • TN

420 North 20th Street , Suite 3400, Birmingham, Alabama 35203
direct 205-458-5286 • fax 205-244-5704 • main 205-251-3000
rrutherford@burr.com • www.burr.com

From: Jennifer K. Coalson <Jcoalson@pcwlawfirm.com>
Sent: Wednesday, June 30, 2021 11:47 AM
To: Rutherford, Robert <rrutherford@burr.com>; Shirley, Elizabeth <bshirley@burr.com>
Cc: David Walbert <DWalbert@pcwlawfirm.com>; stephen@sfclasslaw.com; paul@sfclasslaw.com
Subject: RE: Aliera: Rule 26(f) conference

[EXTERNAL EMAIL]

Robert, Beth:

We haven't heard from either of you in response to the e-mails sent yesterday and the day before. The Court has ordered us to file this joint planning report on Tuesday, and today is my last day in the office before then. I will be in the mountains starting tonight and don't know what the internet or cell reception will be.

If Defendant does not intend to participate in the JPPR process, please let us know that today so we can seek direction from the Court today and if needed finalize our own proposed plan.

Otherwise, we can make ourselves available any time this afternoon for a call. We could even schedule a call for Tuesday morning if you all can circulate revisions to the draft joint planning report that I sent over yesterday.

Please update us at your earliest convenience (and in any event by close of business today) so we know how to proceed.

Thank you,
Jenn

JENN COALSON
PARKS | CHESIN | WALBERT

From: Jennifer K. Coalson
Sent: Tuesday, June 29, 2021 12:01 PM
To: rrutherford@burr.com; bshirley@burr.com
Cc: David Walbert <DWalbert@pcwlawfirm.com>; stephen@sfclasslaw.com; paul@sfclasslaw.com
Subject: RE: Aliera: Rule 26(f) conference

Robert and Beth,

Draft joint preliminary report and discovery plan is attached for your review. Let us know if or when you're available to speak tomorrow for the 26f conference.

Best,
Jenn

JENN COALSON
PARKS | CHESIN | WALBERT

From: Jennifer K. Coalson
Sent: Monday, June 28, 2021 5:14 PM
To: rrutherford@burr.com; bshirley@burr.com
Cc: David Walbert <DWalbert@pcwlawfirm.com>; stephen@sfclasslaw.com; paul@sfclasslaw.com
Subject: Aliera: Rule 26(f) conference

Hi Robert and Beth,

We're working on a preliminary draft of the joint preliminary planning report that we expect to have over to you all to review early tomorrow. Are you all available sometime Wednesday to conduct the Rule 26(f) conference? We aren't available Thursday or Friday because of 4th of July travel plans and uncertain internet/telephone access while gone.

Thanks,
Jenn

JENN COALSON
PARKS | CHESIN | WALBERT
75 14th Street NE, 26th Floor | Atlanta, Georgia 30309
Phone: 404-873-8000 | *Fax:* 404-873-8050
jcoalson@pcwlawfirm.com | bio | www.pcwlawfirm.com