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THE ALIERA COMPANIES INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CORLYN DUNCAN and BRUCE DUNCAN, individually and on behalf of all others similarly situated, Plaintiffs, v. THE ALIERA COMPANIES INC., formerly known as Aliera Healthcare, Inc., a Delaware corporation; and TRINITY HEALTHSHARE, INC., a Delaware corporation, Defendants.	CASE NO. 2:20-cv-867-TLN-KJN **MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION** Hearing Date: August 20, 2020 Time: 2:00 p.m. Ctrm: 2 Hon. Troy L. Nunley

DEFENDANT ALIERA'S MOTION TO DISMISS, OR ALTERNATIVELY, TO COMPEL ARBITRATION

Defendant The Aliera Companies Inc. ("Aliera") moves this Court to dismiss Plaintiffs' Complaint without prejudice, because it is evident from the Complaint that Plaintiffs Corlyn and Bruce Duncan ("the Duncans") have not complied with a condition precedent to bringing this suit -- a contractual obligation to mediate their claims with Defendants. Alternatively, if this Court decides not to dismiss this case, Aliera moves under 9 U.S.C. §§ 3-4 for the Court (i) to compel Plaintiffs to submit their claims to arbitration, and (ii) to stay all proceedings in this case during the pendency of the arbitration proceedings. In that situation, the arbitrator can decide whether arbitral

proceedings should be dismissed or stayed until mediation first occurs. And, the arbitrator can decide all other issues between the parties.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiffs filed suit alleging state law claims based on the false contention that Plaintiffs purchased health insurance from Aliera. (Doc. 1 at 2-3.) But Aliera does not offer health insurance. Plaintiffs in fact never purchased insurance from Aliera. Rather, Plaintiffs purchased a non-insurance product that included membership in the healthcare sharing ministry ("HCSM") first of Unity HealthShare ("Unity") and then of Trinity HealthShare, LLC ("Trinity"), both separate companies from Aliera. (K. Kromodimedjo Decl. ¶¶ 3-4, 8, 13, attached hereto as Ex. A.) Aliera was the administrator for the HCSMs. (*See id.* at ¶¶ 4, 8.)

Plaintiffs allege that they enrolled in AlieraCare Comprehensive Gold offered by Unity on November 28, 2017, with membership effective January 1, 2018. (Doc. 1, ¶ 66.) Upon joining, Plaintiffs received a Unity Membership Guide. (*Id.* ¶ 67; Doc. 1-6.) The Membership Guide contains a multi-tiered dispute resolution provision. (Doc. 1-6 at 12; Kromodimedjo Decl. ¶ 6.) The first tiers require internal appeals. (*Id.)* Should those fail, the dispute resolution provision calls for mediation and then, if necessary, "legally binding arbitration." (*Id.)* In 2019, the Duncans completed a new enrollment form to verify a change in enrollment from Unity to Trinity. (Doc. 1, ¶ 69.) The Duncans again received a Member Guide, this time for Trinity's HCSM, detailing virtually identical alternative dispute resolution procedures. (*Id.* ¶ 70; Doc. 1-5; Kromodimedjo Decl. ¶ 11.) The Duncans affirmed their membership and assent to the respective Member Guides by making monthly payments after receiving the Member Guides. (Doc. 1, ¶ 72.)

According to the Complaint, Ms. Duncan alleges that she needed surgery and that she obtained some form of advance approval from Aliera for the surgery. (Doc. 1, ¶ 74.) Aliera and/or Trinity have paid some costs of the surgery, but Ms. Duncan states that she has been left "with a hospital bill of over $70,000." (*Id.* ¶ 75.) The Duncans claim to have attempted to appeal the decision by phone. (*Id.* ¶ 76.) They further state that, after receiving correspondence from Aliera regarding the surgery and the bases for denying payment for it, they "submitted additional

information in support of their appeal," although it is unclear to whom or how. (*Id.)* The Duncans did not complete any appeal, or engage in mediation or arbitration before filing this lawsuit. (See Kromodimedjo Decl. ¶¶ 7, 12.)

Plaintiffs' transactions with Aliera, Unity, and Trinity involve interstate commerce. (Kromodimedjo Decl. ¶¶ 13-14.) Aliera receives membership contributions in Georgia from HCSM members across the country on behalf of Trinity (and previously Unity). (*Id.*) Aliera facilitates approved payments to healthcare providers across the country. (*See id.*) In this specific case, Aliera, a Georgia company, accepted contributions from the Duncans sent from California on behalf of Unity and Trinity, sent sharing payments from Georgia to Plaintiffs' healthcare providers in California, and exchanged information with Plaintiffs across state lines. (*See id.*)

II. ARGUMENT

A. This Case Should Be Dismissed Without Prejudice Because Plaintiffs Failed to Mediate Their Disputes.

The Duncans never attempted to mediate their disputes with either Defendant, Aliera or Trinity. Their Complaint never suggests otherwise. This means that their claims are due to be dismissed for failure to comply with a condition precedent in their agreements.

Failure to mediate a dispute pursuant to an agreement to mediate warrants dismissal of litigation. *Delamater v. Anytime Fitness, Inc.*, 722 F. Supp. 2d 1168, 1180–81 (E.D. Cal. 2010); *Brosnan v. Dry Cleaning Station Inc.*, No. C-08-02028 EDL, 2008 WL 2388392, at *1 (N.D. Cal. June 6, 2008). Stated otherwise, a claim that is filed before a mediation requirement is satisfied shall be dismissed. *B & O Mfg., Inc. v. Home Depot U.S.A., Inc.*, No. C 07-02864 JSW, 2007 WL 3232276, at *8 (N.D. Cal. Nov. 1, 2007). Where a contract requires mediation followed by arbitration, the strong federal principles favoring arbitration weigh in favor of dismissal. *RLED, LLC v. Dan Good Distrib. Co.*, No. CIV. S-08-851 LKK/DAD, 2008 WL 11389039, at *6 (E.D. Cal. Aug. 29, 2008) (dismissing claims subject to mediation and arbitration). This is a result "apparently uniformly reached by courts of this circuit." *Id.* at *6 n.6.

Courts throughout the country have followed these same California principles and enforced similar pre-suit dispute resolution procedures requiring mediation. *See, e.g., Primov v. Serco, Inc.*, 817 S.E.2d 811, 817 (Va. 2018) (dismissing a case where plaintiff failed to comply with provision in a contract requiring mediation to occur before either party could proceed to court); *see also DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987) (dealer's failure to follow contractual obligation to mediate before filing suit justified dismissal of his case); *Carter v. Firestone*, No. 4:05 cv-2042 ERW, 2006 WL 1153808, at *4 (E.D. Mo. 2006) (dismissal for failure to first mediate), *aff'd*, 242 F. App'x 375 (8th Cir. 2007); *MB Am., Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1288-91 (Nev. 2016) (prelitigation mediation provision in the parties' contract constituted an enforceable condition precedent to litigation and justified dismissal of the complaint); *Tombs v. Nw. Airlines, Inc.*, 516 P.2d 1028, 1031 (Wash. 1973) ("where the agreement provides for a method of resolving disputes … that method must be pursued before either party can resort to courts for relief") (emphasis added).

While Plaintiffs may attempt to avoid this precedent by claiming they did not receive the Member Guides until after they enrolled, this effort must fail. Plaintiffs affirmed their agreement to mediate by making continued voluntary sharing payments under the Member Guides. (Kromodimedjo Decl. ¶ 10; Docs 1-5 & 1-6, reflecting that monthly share payments are voluntary.) The "reasonable meaning of their words and acts, and not their unexpressed intentions or understandings," indicates that they assented to the terms of the Member Guides, including the alternative dispute resolution procedures. *See Mangahas v. Barclays Bank Del.*, No. SACV 16-00093 JVS, 2016 WL 11002179, at *2 (C.D. Cal. May 9, 2016) (citation omitted) (enforcing agreement to arbitrate based on California law and finding of mutual assent manifested by objective acts, including assent to terms and conditions provided after initial credit card application). *See also Gonzales v. Credit One Bank, N.A.*, No. 19-CV-00733-DAD-BAM, 2020 WL 1274268, at *4 (E.D. Cal. Mar. 17, 2020) (compelling arbitration where plaintiff received arbitration agreement after signing up for credit card). Here, if the Plaintiffs did not assent to the dispute resolution procedures in the Member Guides, then they could have terminated their

enrollment. Instead, by all objective measures, they manifested their assent to the alternative dispute resolution procedures by making monthly sharing contributions and by receiving the benefits of participating in the HCSM programs and having no medical expenses shred by other members.

Plaintiffs also cannot reasonably allege that the dispute resolution procedures set forth in the Member Guides will not resolve their claims. Certainly the assertion that Ms. Duncan was improperly denied sharing payments for the claims she filed is grist for the dispute resolution mill – there is a multi-step process (including mediation) designed to resolve precisely those claims. The alternative claims can also be resolved through mediation. Thus, Plaintiffs' claims should be dismissed without prejudice at the outset, because they failed to abide by the mediation requirement.

B. Alternatively, This Matter Should Be Sent To Arbitration.

This Court is not an appropriate forum for the Duncans to maintain their claims for another fundamental reason. Their agreements with Unity and Trinity contain a binding arbitration provision. (*See* Kromodimedjo Decl. ¶¶ 6, 11; Doc. 1-5 at 18-19; Doc 1-6 at 12-13.) So, if the Court does not dismiss due to the Duncans' failure to mediate, this Court should at least compel Plaintiffs to submit all their claims to arbitration. The arbitrator can then decide whether the Duncans' claims can proceed until a mediation occurs. *See BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 35 (2014) (arbitrators usually decide whether pre-arbitration procedural requirements have been followed).

Some background is needed to understand why arbitration should be compelled here. For centuries, there was a widespread judicial (and legislative) antipathy to arbitration agreements. *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). Indeed, the origins of courts' refusal to enforce arbitration agreements "lie in 'ancient times.'" *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (quoting *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 211 n.5 (1956)). A number of centuries ago, the English courts, because of their "jealousy … for their own jurisdiction, refused to enforce specific agreements to arbitrate upon the ground that the

courts were thereby ousted from their jurisdiction.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 n.6 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924)). "This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts." *Id.*

When Congress passed the Federal Arbitration Act ("FAA") in 1925, "it was 'motivated, first and foremost, by a desire' to change this anti-arbitration rule," *Allied Bruce*, 513 U.S. at 270-71 (quoting *Byrd*, 470 U.S. at 220), and "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Byrd*, 470 U.S. at 219-20. Congress therefore enacted the FAA in order to place arbitration agreements "'upon the same footing as other contracts, where [they] belong[].'" *Id*. at 219 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("The FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements'") (emphasis added) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

The FAA accomplishes these purposes by establishing that a written arbitration provision contained in a "contract evidencing a transaction involving commerce … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act mandates that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," upon application of one of the parties, if there has been a "failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." 9 U.S.C. § 4 (emphasis added). The Act also provides that a court "shall" stay its proceedings if it is satisfied that an issue before it is arbitrable under the parties' agreement "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added).

"[G]eneralized attacks on arbitration," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), based on the "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989), have been repudiated as "far out of

step with our current strong endorsement of the federal statutes enclosing this method of resolving disputes." *Id.* By its terms, "the Act leaves no place for the exercise of discretion by a [trial] court, but instead mandates that [trial] courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Byrd*, 470 U.S. at 218 (emphasis in original) (citing 9 U.S.C. §§ 3, 4). To abide by this Congressional mandate, courts must "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Byrd*, 470 U.S. at 221).

The FAA actually accomplishes much more than merely creating a mechanism to enforce an arbitration agreement. It establishes "a liberal federal policy favoring arbitration agreements" as a preferred method of dispute resolution. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This federal policy favoring arbitration is strong, so strong that it preempts any state law "to the extent that [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (citation omitted).

There are some limits to enforcement of an arbitration agreement. Section 2 of the FAA states that such an agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. But this "saving clause" does not allow for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). A state law or rule forbidding or limiting arbitration can find no help from the "saving clause" of section 2 of the FAA if it "prohibits outright the arbitration of a particular type of claim." *Id.* at 341. Nor does a state law or rule find refuge in the "saving clause" if it would "interfere[ ] with fundamental attributes of arbitration." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (citing *Concepcion*, 563 U.S. at 344).

Under the FAA, an arbitration agreement must be enforced where: (1) the parties entered a written agreement to arbitrate claims, (2) the transaction has a nexus to interstate commerce, and (3) the arbitration clause encompasses the claims. 9 U.S.C. § 2. Given the strong federal policy

favoring arbitration, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

1. The Agreement to Arbitrate Is Valid and in Writing.

Under Supreme Court precedent, state contract law controls the question of whether a valid agreement to arbitrate has been formed. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under California law, a written agreement to submit an existing controversy or a controversy arising thereafter to arbitration is valid and enforceable. Cal. Civ. Proc. § 1281. "Doubts about whether an agreement to arbitrate applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 1 Cal. Rptr. 3d 328, 333 (Cal. Ct. App. 2003) State policies that discriminate against arbitration provisions cannot be enforced. *Concepcion*, 563 U.S. at 343.

The Trinity Membership Guide contains a valid, written agreement to arbitrate "**any dispute**" that Plaintiff may have with Trinity **"or its associates."** (*See* Doc. 1-5 at 18 (emphasis added).) When they joined the Trinity HCSM, Plaintiffs affirmed that any expenses they submitted to Trinity were subject to the Trinity sharing guidelines contained in the Trinity Membership Guide. Plaintiffs further manifested their assent to the terms governing membership in the Trinity HCSM by making monthly membership contributions to Aliera for the benefit of Trinity. (*See* Kromodimedjo Decl. ¶ 10.) The Trinity Membership Guide, therefore, contains a valid, written agreement to arbitrate "any dispute" between Plaintiff and Trinity **"or its associates."** (*Id.*, ¶ 11.)[1]

2. The Agreement Involves Interstate Commerce.

The written agreements containing the arbitration provision in this case certainly involve or affect interstate commerce. Delivery, transfer, or movement of goods, services, or other articles of commerce "across state lines … has long been recognized as a form of 'commerce.'" *Camps*

[1] The same holds true for the Plaintiffs' agreement with Unity. It too contained a written arbitration agreement covering disputes with Unity and its "associates." (Doc. 1-6 at 12.)

Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997); *see also, Lewis v. BT Inv. Managers, Inc.,* 447 U.S. 27, 36 (1980); *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 194 (1824).

The term "involving commerce" in the FAA has been interpreted as the functional equivalent of the more familiar term "affecting commerce" and "encompasses a wider range of transactions than those actually 'in commerce' – that is, 'within the flow of interstate commerce.'" *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56 (2003) (quoting *Allied Bruce Terminix Co.*, 513 U.S. at 273). "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal court.'" *Citizens Bank,* 539 U.S. at 56-57 (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). The FAA extends to the full reach of the Commerce Clause. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 270. Because the Plaintiffs' transactions with Unity, Trinity, and Aliera involved interstate commerce, the second prerequisite under the FAA to enforcement of the parties' arbitration agreement is met.

3. The Arbitration Agreement Encompasses All of Plaintiffs' Claims.

The arbitration agreement here unquestionably encompasses each claim in this case. When determining the scope of an arbitration provision, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Info.*, 489 U.S. at 476. The presumption of arbitrability, created by the mere existence of an arbitration clause, may be rebutted only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). In construing arbitration clauses, courts have distinguished between "broad" clauses that purport to cover all disputes "arising out of" or "relating to" a contract, and "narrow" clauses that limit arbitration to specific types of disputes. *See McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). If a court concludes that the

arbitration provision before it is a "broad" one, then the presumption in favor of arbitrability applies with even greater force. *See AT&T Techs., Inc.*, 475 U.S. at 650.

The present dispute is clearly within the scope of the Unity and Trinity Membership Guides' broad arbitration provisions. Both of the Membership Guides refer to arbitration of "any dispute" between Plaintiff and either Unity or Trinity. (*See* Doc. 1-5 at 18-19.) The "disputes" contemplated by the Trinity Membership Guide specifically include any "determination" made by Trinity or its associates with which Plaintiff disagrees. (Doc. 1-5 at 18.) The Unity Membership Guide is equally broad. (*See* Doc. 1-6 at 12.) The Duncans allege that Aliera and Trinity improperly refused to pay her medical expenses. (Doc. 1. ¶¶ 66-76.) A determination as to covered medical expenses is exactly the sort of dispute contemplated in the alternative dispute resolution procedures of the Membership Guides. Plaintiff's disputes should be arbitrated in accordance with the express written agreement of the parties.

Each of the claims asserted by the Duncans, moreover, are the types that courts have already determined are arbitrable:

- Illegal Contracts: *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448-49 (2006).
- Violations of California's Unfair Competition Law: *See Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 938 (9th Cir. 2013).
- Violation of California's False Advertising Law: *See Concepcion*, 563 U.S. at 345.
- Breach of Fiduciary Duty: *See Boyko v. Benning Fin. Grp., LLC*, 737 F. Supp. 2d 1140, 1143-45 (E.D. Cal. 2010) (compelling arbitration of claims including breach of fiduciary duty); *see also Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 512-14 (9th Cir. 2019) (ERISA breach of fiduciary duty).
- Unjust Enrichment: *See GAR Energy & Assocs., Inc. v. Ivanhoe Energy Inc.*, No. 1:11-CV-00907 AWI, 2011 WL 6780927, at *10-12 (E.D. Cal. Dec. 27, 2011), *R. & R. adopted*, 2012 WL 174952 (E.D. Cal. Jan. 20, 2012); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1272-74 (C.D. Cal. 2008).

4. All Possible Challenges To The Enforceability Of The Arbitration Provision Must Also Be Resolved By The Arbitrator.

Not only are each of Plaintiffs' substantive claims subject to arbitration, but any potential defenses Plaintiffs may have to the arbitrability of their claims must also be submitted to arbitral resolution. Binding Supreme Court authorities have foreclosed any contrary arguments.

First, Plaintiffs certainly cannot challenge the validity of the arbitration provisions by asserting that the Unity and Trinity contracts containing them are illegal. The Supreme Court has directly foreclosed such an approach in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). In that case, the borrowers sought to avoid arbitration by asserting that the loan agreements containing them were illegal contracts because they violated Florida's usury laws. The Supreme Court flatly rejected this argument, holding that where a party advances a challenge to "the validity of the contract as a whole, and not specifically to the arbitration clause," the challenge "must go to the arbitrator." *Id.* at 449. *Accord Preston v. Ferrer*, 552 U.S. 346, 353-54 (2008) (holding that an arbitrator had to decide a contractual dispute even though one of the parties alleged that the contract containing the arbitration provision was illegal under California law).[2]

Second, the parties in this case have delegated all issues as to the validity or enforceability of the arbitration agreement to the arbitrator. They accomplished this in the Unity Member Guide by incorporating the rules of the Institute for Christian Conciliation, and in the Trinity Member Guide by incorporating the rules of the American Arbitration Association. (*See* Doc. Doc. 1-6 at 13; Doc. 1-5 at 19.) Under both sets of arbitration rules, the arbitrator is given the power to rule on his or her own jurisdiction, including any challenges to the existence, scope, or validity of the arbitration agreement. *See* ICC Rule 34(B); AAA Commercial Rule 7(a); AAA Consumer Rule 14(a).

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[2] Following these two Supreme Court decisions, the Ninth Circuit has concluded that in order to escape an obligation to arbitrate, the plaintiff has to base the challenge on "reasons independent of any reasons the remainder of the contract might be invalid." *Bridge Fund Capital, Corp. v. Fastbacks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010).

Both the Supreme Court and the Ninth Circuit have concluded that these types of clauses that delegate all gateway issues to the arbitrator, whether expressly stated in the agreement or incorporated by reference in arbitral body rules, are enforceable and provide clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72-73 (2010); *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (collecting cases). Thus, any challenge that Plaintiffs could possibly raise to defeat the arbitration provisions must be decided in the first instance by the arbitrator, not the Court.

Finally, the Plaintiffs cannot successfully mount a challenge to an arbitration provision that will require a court to decide the ultimate merits issue in the case (*e.g.*, whether what Unity or Trinity sold was actually "insurance"). As the Supreme Court recently made clear, a court seeking to determine whether a claim should be arbitrated "may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 529 (2019) (quoting *AT&T Techs.*, 475 U.S. at 649-50 (a court has "no business weighing the merits of the grievance" – that is for the arbitrator)); *South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 146 (3d Cir. 2016) (an arbitrator, not the court, had to decide the ultimate merits issue of whether the transactions at issue constituted insurance); *Green v. SuperShuttle Int'l, Inc.* 653 F.3d 766, 769-70 (8th Cir. 2011) (concluding that an arbitrator, pursuant to a delegation clause incorporating AAA arbitral rules, had to decide whether claims were exempt from the FAA under 9 U.S.C. § 1 on the grounds that the plaintiffs were "transportation workers," the ultimate merits issue in the case).

C. Aliera May Enforce the Alternative Dispute Resolution Procedures.

The agreement requiring mediation followed by arbitration covers not only the claims of the Duncans against Unity or Trinity, but also their claims against Aliera. Both Unity and Trinity's member benefit guides provide that all disputes that a member may have with an **"associate"** of Unity or Trinity must also be submitted to mediation in the first instance, followed by arbitration. (Doc. 1-5 at 19; Doc. 1-6 at 12.) Aliera was unquestionably an "associate" of Unity and Trinity and it was the entity responsible for administering their HCSMs during the time frames that the

Duncans were members. (*See* Kromodimedjo Decl. ¶ 4.) The Unity and Trinity member guides also refer to Aliera extensively throughout, providing contact information for Aliera and detailing the services it would provide to each HCSM's sharing members. (*See* Docs. 1-5, 1-6.)

The allegations of the Complaint indicate that the Duncans themselves perceive Aliera as an associate of Unity and Trinity. Merriam-Webster Dictionary defines the noun "associate" as "one associated with another," and lists "business associates" as an example. *Associate,* Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/associate. The Plaintiff repeatedly alleges associations between Aliera, on the one hand, and Trinity and Unity, on the other hand, including: that (i) Aliera alone designed, marketed, sold, and administered Unity's plan; (ii) that "Trinity was created by Aliera;" (iii) that Aliera entered into an Agreement with Trinity, which "allowed Aliera to use Trinity's non-profit status to sell health care plans;" (iv) that Aliera, using Trinity as a purported HCSM, then created, marketed, sold and administered unauthorized health insurance plans in California; and (v) that "Aliera markets, sells, and administers insurance plans for Trinity and is solely responsible for the development of HCSM plan designs, pricing, marketing materials, vendor management, recruitment and maintenance of a sales force on behalf of Trinity." (Doc. 1 at ¶¶ 4, 10-12, 46, 48.) Thus, as alleged in the complaint, Aliera unquestionably qualifies as an "associate" of Trinity.

There are at least three other, non-textual reasons why Aliera can enforce the arbitration agreements in the Unity and Trinity Member Guides. First, it is clear from Plaintiffs' complaint that they assert Aliera was acting as an agent for Unity and then Trinity in the offer, sale, and administration of those entities' HCSMs. (Doc. 1, ¶ 4.) Under California law, a nonsignatory *agent* of a signatory may enforce an arbitration agreement. *Dryer v. Los Angeles Rams*, 709 P.2d 826, 834 (Cal. 1985); *Rowe v. Exline*, 63 Cal. Rptr. 3d 787, 793 (Cal. Ct. App. 2007); *see also Garcia v. Pexco, LLC*, 217 Cal. Rptr. 3d 793, 797 (Cal. Ct. App. 2017) (permitting non-signatory to compel arbitration based on the fact that non-signatory acted as agent of signatory; *Keller Constr. Co. v. Kashani*, 20 Cal App. 3d 222, 229 (Cal. Ct. App. 1990) (holding that a non-

signatory general partner of a limited partnership is subject to arbitration when he was an agent and beneficiary of the partnership).

Second, Aliera is clearly an intended beneficiary of the agreements between Unity, Trinity, and the Duncans. Plaintiffs allege that Aliera benefitted by obtaining substantial revenues from its role in marketing, selling, and administering the Unity and Trinity HCSMs. (Doc. 1, ¶ 46.) "It is well established that a non-signatory beneficiary of an arbitration clause is entitled to require arbitration." *Harris v. Superior Court*, 233 Cal. Rptr. 186, 188 (Cal. Ct. App. 1986); s*ee also Cione v. Foresters Equity Servs., Inc.*, 58 Cal. App. 4th 625, 636 (Cal. Ct. App. 1997) (permitting express beneficiary of agreement containing an arbitration clause to compel arbitration).

Finally, the doctrine of equitable estoppel supports Aliera's position that it is covered by the arbitration agreements at issue. This doctrine applies when a signatory to a contract is attempting to enforce certain rights under the contract against a non-signatory while simultaneously claiming that the arbitration provision does not apply. *Bellingham Marine Indus., Inc. v. Del Rey Fuel, LLC*, No. CV 12-05164 MMM, 2012 WL 12941958, at *6 (C.D. Cal. Oct. 19, 2012). "The federal circuits that have considered the doctrine of equitable estoppel have uniformly accepted it, in appropriate factual circumstances, as a basis for compelling signatories to a contract containing an arbitration clause to arbitrate their claims against nonsignatories." *Metalclad Corp.*, 1 Cal. Rptr. 3d at 335. Under the doctrine of equitable estoppel, "if a plaintiff relies on the terms of an agreement to assert his or her claims against a nonsignatory defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause of that very agreement." *Molecular Analytical Sys. v. Ciphergen Biosystems, Inc.*, 111 Cal. Rptr. 3d 876, 893 (Cal. Ct. App. 2010) (citation omitted). Moreover, in a different vein, the courts of California have adopted the federal authority applying equitable estoppel principles to arbitration agreements. *Id.* Under the doctrine of equitable estoppel, a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims where, as here, the causes of action against the nonsignatory are "intimately founded in and intertwined" with the underlying agreement. *Victrola 89, LLC v. Jaman Props. 8 LLC*, 260 Cal. Rptr. 3d 1, 13 (Cal. Ct. App. 2020) (quoting *Molecular Analytical Sys.*, 111 Cal.

Rptr. 3d at 886); *Laswell v. AG Seal Beach, LLC*, 117 Cal. Rptr. 3d 310, 317-18 (Cal. Ct. App. 2010) (same).

In sum, the allegations of the Complaint document how Aliera operated as an "associate" or agent of Unity and then Trinity. Moreover, the Complaint further shows that Aliera is a beneficiary of the agreement, receiving payments arising therefrom. And all of plaintiffs' claims against Aliera arise from the Member relationship that Trinity and Aliera had with the Duncans. Consequently, under theories California courts consistently recognize, Aliera is entitled to enforce the dispute resolution procedures as a nonsignatory.

D. A Stay Pending Arbitration Is Proper.

Under 9 U.S.C. § 3, a court, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." (emphasis added). Consequently, if this Court does not dismiss this matter entirely for failure to comply with conditions precedent to suit, Aliera requests that this Court follow the mandate of Section 3 and stay the proceedings until arbitration is completed.

II. CONCLUSION

Plaintiff's membership in the Unity HCSM, and subsequently the Trinity HCSM, was subject to the specific alternative dispute resolution processes and arbitration provisions set forth in the respective Membership Guides. These provisions constitute valid, enforceable contractual obligations for Plaintiffs to follow prior to initiating litigation. Plaintiffs failed to do so. As a result, Aliera respectfully moves this Court to either (1) dismiss this case without prejudice for the Plaintiffs' failure to pursue mediation first, or in the alternative (2) compel Plaintiff to bring her claims in arbitration and stay all proceedings pending the conclusion of the arbitral process.

Dated: June 10, 2020

BURR & FORMAN LLP

By: */s/ Alan D. Leeth*
Alan D. Leeth

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CERTIFICATE OF SERVICE

A copy of the foregoing **DEFENDANT ALIERA'S MOTION TO DISMISS, OR ALTERNATIVELY, TO COMPEL ARBITRATION** has been filed this 10th day of June, 2020 through the Court's CM/ECF system, which will send notification of such filing to all parties of record. All parties may access the foregoing via the Court's CM/ECF system.

s/ Alan D. Leeth
Alan D. Leeth

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CORLYN DUNCAN and BRUCE DUNCAN, individually and on behalf of all others similarly situated, Plaintiffs, v. THE ALIERA COMPANIES INC., formerly known as Aliera Healthcare, Inc., a Delaware corporation; and TRINITY HEALTHSHARE, INC., a Delaware corporation, Defendants.	CASE NO. 2:20-cv-867-TLN-KJN **DECLARATION OF KATHLEEN KROMODIMEDJO** Hon. Troy L. Nunley

DECLARATION OF KATHLEEN KROMODIMEDJO

I, Kathleen Kromodimedjo, 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 and my review of relevant business records, true and correct copies of which are attached hereto.

2. I am the Director of Risk and Compliance for The Aliera Companies Inc. (formerly known as Aliera Healthcare, Inc.) (or "Aliera"). I am authorized by Aliera to execute documents on its behalf. I am familiar with the business and operations of Aliera.

3. Aliera is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the State of Georgia.

4. At the time frame set out in the plaintiffs' complaint, Aliera was an administrator for Unity HealthShare, LLC (or "Unity"), which is a health care sharing ministry ("HCSM"). As the administrator of Unity's HCSM, Aliera marketed for sale a product entitled "AlieraCare," which includes membership in Unity's HCSM. Aliera was an associate of Unity. It is Aliera's

understanding that Unity is organized under the laws of the State of Virginia, and its principal place of business is in Georgia.

5. Aliera's business records reflect that the plaintiffs, Corlyn and Bruce Duncan (or the Duncans"), enrolled in Unity's HCSM as of January 1, 2018.

6. The Duncans received the Unity Member Guide. (*See* Doc. 1-6 (Appendix E to Plaintiffs' Complaint.)) The Unity Member Guide provides for an alternative dispute resolution process, including mediation and arbitration:

DISPUTE RESOLUTION AND APPEAL

Unity HealthShare℠ is a voluntary association of like-minded people who come together to assist each other by sharing medical expenses. Such a sharing and caring association does not lend itself well to the mentality of legally enforceable rights. However, it is recognized that differences of opinion will occur, and that a methodology for resolving disputes must be available. Therefore, by becoming a Sharing Member of Unity HealthShare℠, you agree that any dispute you have with or against Unity HealthShare℠, its associates, or employees will be settled using the following steps of action, and only as a course of last resort.

If a determination is made with which the sharing member disagrees and believes there is a logically defensible reason why the initial determination is wrong, then the sharing member may file an appeal.

A. **1st Level Appeal.** Most differences of opinion can be resolved simply by calling Unity HealthShare℠ who will try to resolve the matter within ten (10) working days in writing.

B. **2nd Level Appeal.** If the sharing member is unsatisfied with the determination of the member services representative, then the sharing member may request a review by the Internal Resolution Committee, made up of three Unity HealthShare℠ officials: the needs processing manager, the assistant director, and the executive director. The appeal must be in writing, stating the elements of the dispute and the relevant facts. Importantly, the appeal should address all of the following:

1. What information does Unity HealthShare℠ have that is either incomplete or incorrect?
2. How do you believe Unity HealthShare℠ has misinterpreted the information already on hand?
3. Which provision in the Unity HealthShare℠ Guidelines do you believe Unity HealthShare℠ applied incorrectly?

Within thirty (30) days, the Internal Resolution Committee will render a written decision.

C. **3rd Level Appeal.** Should the matter remain unresolved, then the aggrieved party may ask that the dispute be submitted to three sharing members in good standing and randomly chosen by Unity HealthShare℠, who shall agree to review the matter and shall constitute an External Resolution Committee. Within thirty (30) days the External Resolution Committee shall render their opinion in writing.

D. **Final Appeal.** If the aggrieved sharing member disagrees with the conclusion of his/her fellow sharing members, then the aggrieved party may ask that the dispute be submitted to a medical expense auditor, who shall have the matter reviewed by a panel consisting of personnel who were not involved in the original determination and who shall render their opinion in writing within thirty (30) days.

E. **Mediation and Arbitration.** If the aggrieved sharing member disagrees with the conclusion of the Final Appeal Panel, then the matter shall be settled by mediation and, if necessary, legally binding arbitration in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries. Judgment upon an arbitration decision may be entered in any court otherwise having jurisdiction. Sharing members agree and

understand that these methods shall be the sole remedy for any controversy or claim arising out of the Sharing Guidelines and expressly waive their right to file a lawsuit in any civil court against one another for such disputes, except to enforce an arbitration decision. Any such arbitration shall be held in Fredericksburg, Virginia, subject to the laws of the Commonwealth of Virginia. Unity HealthShare℠ shall pay the fees of the arbitrator in full and all other expenses of the arbitration; provided, however, that each party shall pay for and bear the cost of its own transportation, accommodations, experts, evidence, and legal counsel, and provided further that the aggrieved sharing member shall reimburse the full cost of arbitration should the arbitrator determine in favor of Unity HealthShare℠ and not the aggrieved sharing member. The aggrieved sharing member agrees to be legally bound by the arbitrator's decision. The Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries, will be the sole and exclusive procedure for resolving any dispute between individual members and Unity HealthShare℠ when disputes cannot be otherwise settled.

(Doc. 1-6 at 19-20.)

7. The Duncans have not completed the dispute resolution process set forth in the Unity Member Guide. (*See* Doc. 1-6.) More specifically, they have not exhausted the various levels of appeal. They have not submitted a request for or participated in mediation. They have not requested or participated in arbitration.

8. In the late summer-fall of 2018, Aliera made business plans to change from offering products in conjunction with Unity's HCSM, to offering products in conjunction with Defendant Trinity Healthshare, Inc.'s ("Trinity") HCSM. Aliera's subsidiaries provide various services related to the operation and administration of Trinity's HCSM. Trinity and Aliera are separate companies, and they have various business contracts between them, negotiated at arms-length. Aliera is an associate of Trinity.

9. On November 15, 2018, Aliera sent members of the Unity HCSM a notice that Aliera would cease offering products involving Unity's HCSM as of December 31, 2018, and instead, it would start offering Trinity's HCSM as of January 1, 2019. The notice contained an option for the member to click on a link and/or to call a toll-free number to opt-out of participating in Trinity's HCSM.

10. The Duncans agreed to join Trinity's HCSM, and they maintained their Trinity membership (formerly a Unity HCSM membership) until December 31, 2019. The Duncans made monthly sharing contributions to Unity's HCSM from January 1, 2018 to May 31, 2019 and then to Trinity's HCSM from June 1, 2019 to December 31, 2019. The Duncans have not had a business relationship with Trinity or Aliera since that time.

11. The Duncans received the Trinity Member Guide. (*See* Doc. 1-5 (Appendix D to Plaintiffs' Complaint.)) The Trinity Member Guide provides for an alternative dispute resolution process, including mediation and arbitration:

DISPUTE RESOLUTION AND APPEAL

Trinity HealthShare is a voluntary association of like-minded people who come together to assist each other by sharing medical expenses. Such a sharing and caring association does not lend itself well to the mentality of legally enforceable rights. However, it is recognized that differences of opinion will occur, and that a methodology for resolving disputes must be available. Therefore, by becoming a Sharing Member of Trinity HealthShare, you agree that any dispute you have with or against Trinity HealthShare, its associates, or employees will be settled using the following steps of action, and only as a course of last resort.

If a determination is made with which the sharing member disagrees and believes there is a logically defensible reason why the initial determination is wrong, then the sharing member may file an appeal.

A. **1st Level Appeal.** Most differences of opinion can be resolved simply by calling Trinity HealthShare who will try to resolve the matter telephonically within a reasonable amount of time.

B. **2nd Level Appeal.** If the sharing member is unsatisfied with the determination of the member services representative, then the sharing member may request a review by the Internal Resolution Committee, made up of three Trinity HealthShare officials. The appeal must be in writing, stating the elements of the dispute and the relevant facts. Importantly, the appeal should address all of the following:

1. What information does Trinity HealthShare have that is either incomplete or incorrect?
2. How do you believe Trinity HealthShare has misinterpreted the information already on hand?
3. Which provision in the Trinity HealthShare Guidelines do you believe Trinity HealthShare applied incorrectly?

Within thirty (30) days, the Internal Resolution Committee will render a written decision, unless additional medical documentation is required to make an accurate decision.

C. **3rd Level Appeal.** Should the matter remain unresolved, then the aggrieved party may ask that the dispute be submitted to three sharing members in good standing and randomly chosen by Trinity HealthShare, who shall agree to review the matter and shall constitute an External Resolution Committee. Within thirty (30) days the External Resolution Committee shall render their opinion in writing, unless additional medical documentation is required to make an accurate decision.

D. **Final Appeal.** If the aggrieved sharing member disagrees with the conclusion of his/her fellow sharing members, then the aggrieved party may ask that the dispute be submitted to a medical expense auditor, who shall have the matter reviewed by a panel consisting of personnel who were not involved in the original determination and who shall render their opinion in writing within thirty (30) days, unless additional medical documentation is required to make an accurate decision.

> **E. Mediation and Arbitration.** If the aggrieved sharing member disagrees with the conclusion of the Final Appeal Panel, then the matter shall be resolved by first submitting the disputed matter to mediation. If the dispute is not resolved the matter will be submitted to legally binding arbitration in accordance with the Rules and Procedure of the American Arbitration Association. Sharing members agree and understand that these methods shall be the sole remedy to resolve any controversy or claim arising out of the Sharing Guidelines, and expressly waive their right to file a lawsuit in any civil court against one another for such disputes; except to enforce an arbitration decision. Any arbitration shall be held in Atlanta, Georgia, and conducted in the English language subject to the laws of the State of Georgia. Trinity HealthShare shall pay the filing fees for the arbitration and arbitrator in full at the time of filing. All other expenses of the arbitration shall be paid by each party including costs related to transportation, accommodations, experts, evidence gathering, and legal counsel. Further agreed that the aggrieved sharing member shall reimburse the full costs associated with the arbitration, should the arbitrator render a judgment in favor of Trinity HealthShare and not the aggrieved sharing member.

(Doc. 1-5 at 18-19.)

12. The Duncans have not completed the dispute resolution process set forth in the Trinity Member Guide. (*See* Doc. 1-5.) More specifically, they have not exhausted the various levels of appeal. They have not submitted a request for or participated in mediation. They have not requested or participated in arbitration.

13. Aliera's business model necessarily involves interstate commerce. For instance, the Duncans allege that they are residents of the State of California, and they were members of Unity's HCSM and then Trinity's HCSM, which were administered by Aliera in Georgia. Moreover, it is Aliera's understanding that Trinity is incorporated pursuant to the laws of the State of Delaware,

and its principal place of business is in Georgia. Based on Aliera's records, the Duncans received medical treatment in California. Sharing payments for medical expenses originated from Georgia and were sent interstate. The Duncans, as California residents, sent share payments to Aliera, in Georgia, on behalf of Unity and then Trinity.

14. These are but some examples of how Aliera's business necessarily involves interstate commerce and involved interstate commerce with regard to the Duncans. Indeed, Trinity has members throughout the United States, for which Aliera serves as an ASO (administrative services only) administrator. While Aliera was in a business relationship with Unity, Unity had members throughout the United States.

15. Aliera keeps true and correct records of applications to become members of Unity's and Trinity's HCSM, as well as true and accurate records of members' choices to opt-out of membership. Aliera also keeps true and correct records of requests for sharing, membership information (such as the products(s) that a member chooses to purchase, changes in selected products, and member guides), payments pursuant to members' products, information and documents that are sent to Unity and Trinity members, both electronically and in hard copy, members' signatures and agreements to join certain programs, and the like. These documents are prepared, signed (as applicable), and maintained in the regular course of the business of Aliera, and it is and was the regular practice of Aliera to prepare, have signed, and maintain such documents. Based on my role and responsibilities with Aliera, I have personal knowledge of the matters set out herein, as well as access and familiarity with the discussed documents and information.

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 10th day of June, 2020.


Kathleen Kromodimedjo