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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CORLYN DUNCAN and BRUCE DUNCAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THE ALIERA COMPANIES, INC., f/k/a ALIERA HEALTHCARE, INC., a Delaware corporation; TRINITY HEALTHSHARE, INC., a Delaware corporation; and ONESHARE HEALTH, LLC, formerly known as UNITY HEALTHSHARE, LLC and as KINGDOM HEALTHSHARE MINISTRIES, LLC, a Virginia limited liability corporation,

Defendants.

Case No.: 2:20-cv-00867-TLN-KJN

[Assigned to the Hon. Troy L. Nunley]

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY IN OPPOSITION TO MOTIONS TO DISMISS

[Action Filed: April 28, 2020]

Plaintiffs Bruce and Corlyn Duncan submit as supplemental authority the November 13, 2020 Final Order on Summary Judgment of the Office of the Insurance Commissioner (OIC) of Washington State in the administrative hearing, *In the Matter of Aliera Healthcare, Inc.,* Docket No. 19-0251. A copy of that Final Order is attached as ***Exhibit A.***

In this recent Order, entered after Plaintiffs filed their Opposition (Dkt. 44) to Defendants' Motions to Compel or Dismiss (Dkts. 36, 37, 38), the OIC concluded as a matter of law that the

Trinity plans that defendant Aliera marketed and sold were "insurance." ***Exhibit A***, p. 17, ¶ 25. The Order is additional support for Plaintiffs' argument, at pages 14-17 of their Opposition, that the plan Aliera marketed and sold to them was also "insurance" that required disclosure of arbitration in clear and understandable language, prominently displayed on the enrollment form immediately before the signature line.

DATED: November 19, 2020.

/s/ Eleanor Hamburger

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Exhibit A

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of: ALIERA HEALTHCARE INC., Respondent	Docket No. 19-0251 **FINAL ORDER ON SUMMARY JUDGMENT**

I. ISSUES

1. Should the Office of the Insurance Commissioner's ("OIC") Motion for Summary Judgment be granted?

2. Should Aliera Healthcare Inc.'s ("Aliera") Motion for Summary Judgment be granted?

3. Should the Order to Cease and Desist No. 19-0251 *In the Matter of Aliera Healthcare, Inc.*, be upheld?

4. Did Aliera violate RCW 48.17.060 by selling, soliciting, or negotiating insurance in Washington without a license?

5. Did Aliera represent an unauthorized insurer in violation of RCW 48.15.020(2)(a)?

6. Did Aliera violate RCW 48.44.015(1) by acting as a healthcare service contractor without first being registered with the commissioner?

7. Did Aliera operate as a discount plan organization without first obtaining a license in violation of RCW 48.155.020(1)?

8. Did Aliera knowingly make, publish or disseminate any false, deceptive or misleading representation of advertising in the conduct of the business of insurance, or relative to the business of insurance, or relative to any person engaged therein, in violation of RCW 48.30.040?

9. Did Aliera violate Washington disability insurance advertising regulations in WAC 284-50-050 and WAC 284-50-060?

II. ORDER SUMMARY

1. Yes, the Office of the Insurance Commissioner's Motion for Summary Judgment is granted. All further proceedings are stricken.

2. Aliera's Motion for Summary Judgment is denied.

3. Yes, the Order to Cease and Desist No. 19-0251 *In the Matter of Aliera Healthcare, Inc*. should be upheld, for the reasons outlined below.

4. Because Trinity HealthShare Inc.'s ("Trinity") products qualify as "insurance" under the definition in RCW 48.01.040, and because Trinity Healthshare Inc. does not meet the criteria in RCW 48.43.009, and by incorporation, 26 U.S.C. § 5000A(d)(2)(B)(ii), Aliera violated RCW 48.17.060 by selling, soliciting, or negotiating insurance in Washington without a license.

5. Because Trinity's products fall under the definition of insurance under RCW 48.01.040, and because Trinity does not meet the criteria in RCW 48.43.009, and by incorporation, 26 U.S.C. § 5000A(d)(2)(B)(ii), Aliera violated RCW 48.15.020(2)(a) by representing an unauthorized insurer (Trinity).

6. As Aliera is "otherwise engaged in insurance business," it can only be found to have acted as an unlicensed healthcare service contractor if Trinity either qualifies as a healthcare sharing ministry or the plans do not meet the definition of insurance. In that case, Aliera violated RCW 48.44.015(1) by acting as a healthcare service contractor without first being registered with the commissioner.

7. Aliera operated as a discount plan organization without first obtaining a license in violation of RCW 48.155.020(1).

8. Because Aliera sold Trinity products that qualify as insurance, Aliera did not violate RCW 48.30.040 by advertising insurance like products.

9. Because Aliera sold Trinity products that qualify as insurance, Aliera did not violate WAC 284-50-050 and WAC 284-50-060.

III. BACKGROUND

1. On May 13, 2019, the OIC issued Order to Cease and Desist No. 19-0251, *In the Matter of Aliera Healthcare Inc*.

2. On August 7, 2019, Aliera filed a Demand for Hearing ("Demand") with the OIC's Hearings Unit to contest the Order to Cease and Desist No. 19-0251.

3. Both parties filed motions for summary judgment pursuant to the deadlines in the case schedule.[1]

4. The record in this matter has been reviewed and considered, including all evidence and attachments to the motions submitted, under the summary judgment standard articulated in WAC 10-08-135, applicable to adjudicative proceedings before the OIC per WAC 284-02-070(2)(a). All evidence offered by the parties has been considered.

IV. FACTS FOR PURPOSES OF SUMMARY JUDGMENT

1. Aliera is a nonresident corporation domiciled in Delaware and incorporated on December 18, 2015. *Declaration of Tyler Robbins*, Ex. 9, p. 130. Aliera is not licensed to sell, solicit, or negotiate insurance in the state of Washington. *Robbins Decl*., Ex. 15. Aliera is also not registered as a health care service contractor or licensed as a discount plan organization in the state of Washington. *Id*.

2. Trinity is a nonresident corporation domiciled in Delaware and established on June 27, 2018. *Robbins Decl.*, Ex. 31.

3. Trinity represents itself as a health care sharing ministry ("HCSM") as defined by 26 U.S.C. § 5000A(d)(2)(B)(ii), and incorporated by reference under RCW 48.43.009.

4. The OIC began to investigate Aliera and Trinity after receiving an email from a licensed insurer regarding Aliera's marketing practices. *Robbins Decl*., Ex. 2 p. 2.

5. Aliera entered into an agreement with Trinity that gave Aliera exclusive marketing rights. *Robbins Decl*. Ex. 32. As part of the agreement, Aliera would offer access to Trinity's Healthcare Sharing Ministry program alongside other healthcare products offered by Aliera. *Id*. The Management and Administration Agreement recognized that Trinity had no members. *Id*.

6. Aliera offers a number of plans that include Trinity healthcare sharing products. *Robbins Decl*., Ex. 20. Brochures explain the plans were created to "reduce out-of-pocket expenses and improve individuals' and families' healthcare experiences," and that they provide members "with one of the most flexible and cost-savings programs in the market today." *Id*. at p.1. The brochures explain that "AlieraCare includes a range of services such as telemedicine, Primary Care, pharmaceuticals, basic eye and hearing exams, both in and out-patient procedures, extended hospitalization, Urgent Care, and labs & diagnostic

[1] The case schedule was extended in this matter a few times, most recently September 11, 2020. The parties filed motions according to last extension of the schedule.

procedures. It's an all-inclusive, affordable health care option to traditional insurance." *Id*., at p. 2.

In describing the AlieraCare Bronze, Silver and Gold plans, the brochure explains these plans "offer a comprehensive range of care through enhanced Trinity Healthshare Inc., services, which include unlimited Primary Care, Urgent Care, Specialty Care, as well as sharing for certain pre-existing conditions and cancer." *Robbins Decl*., Ex. 20, p.7. It describes "CarePlus Advantage" as "a catastrophic health plan that offers assistance with the cost of major medical expenses." *Id*. at p.13. A description of "InterimCare," Aliera's short term plan states that "You'll have the care you need for unplanned or unexpected medical bills and other healthcare expenses, including: Doctor Visits and Preventive Care; Emergency Room and Ambulance Cost-Sharing; Urgent Care Cost Sharing; and more." *Id*. at p. 18. The brochure also contains graphics showing "Network" and "Non-Network" costs, whether the service is "eligible prior to meeting Member Shared Responsibility Amount" or "eligible after meeting Member Shared Responsibility Amount." *Robbins Decl*., Exhibit 20, pp. 4-6, 8-10, 20.

7. Member guides further explain how the plans function. *Robbins Decl*., Ex. 21. The 2018 AlieraCare Bronze, Silver and Gold Member Guide has a short overview at the beginning, then is divided into three parts: Part I: How to Use Your Membership; Part II: How Your Healthcare Cost-Sharing Ministry Works; and Part III: Your Summary of Cost-Sharing, Eligible Needs, and Limits. *Id*. at p. 1. The short overview at the beginning explains that Aliera and Trinity are "committed to providing you and your family with unparalleled service and care at an affordable cost…" *Id*. at p. 3. A disclaimer on the following page explains that the "offering by Trinity HealthShare, through Aliera Healthcare, Inc., is a faith-based medical needs sharing membership." *Id*. at p. 4. The disclaimer also explains that members "agree to the Statement of Beliefs" and "voluntarily submit monthly contributions." Trinity HealthShare acts as a "neutral clearing house between members." *Id*. In then states:

> We are including the following caveat for all to consider:
>
> This publication or membership is not issued by an insurance company, nor is it offered through an insurance company. This publication or the membership does not guarantee or promise that your eligible medical needs will be shared by the membership. This publication or the membership should never be considered as a substitute for an insurance policy. If the publication or the membership is unable to share in all or part of your eligible medical needs, or whether or not this membership continues to operate you will remain financially liable to any and all unpaid medical needs.
>
> This is not a legally binding agreement to reimburse any member for medical needs a member may incur, but is instead, an opportunity for members to care for one another in a time of need, to present their medical needs to other members as outlined in the membership guidelines. The financial assistance members receive will come from other members' monthly contributions that are placed in a sharing account, not from Trinity HealthShare.

8. After the disclaimer, the next portion of the member guide is "Plan Services & Membership." The section outlines "the full range of services and offerings" that Aliera Healthcare offers in conjunction with Trinity HealthShare, as noted below.

> Preventive Care
>
> As part of our solution, the plans cover medical services recommended by the USPSTF and outlined in the ACA for preventive care. There is zero out of pocket expense and zero obligation to reach the Member Shared Responsibility Amount (MSRA) for any scheduled preventive care service or routine in-network check-up, pap smear, flu shot and more. It's easier to stay healthy with regular preventive care.
>
> Episodic Primary Care
>
> Primary care is at the core of an Aliera Plan, and we consider it a key step in living a healthier lifestyle. Our model is based on an innovative approach to care that is truly patient-centered, combining excellent service with a modern approach. This includes medical care needs such as primary care, office visits, sick care, and the general care of a member's day to day medical needs.
>
> Chronic Maintenance
>
> With an AlieraCare Bronze, Silver, or Gold plan, members are eligible to receive chronic care management from their primary care physician for conditions such as diabetes, asthma, blood pressure, cardiac conditions, etc.
>
> Labs & Diagnostics
>
> Labs at in-network facilities are included.
>
> …
>
> Prescription Drug Program
>
> The AlieraCare Bronze, Silver, or Gold prescription savings program delivers significant discounts for a variety of drugs (depending on prescription), saving members an average of 55% on prescription drug purchases. After $1500 of prescription drug expenditrues through Rx Valet, members are eligible for a percentage of reimbursement for preferred and mail order drugs. Maximum reimbursement of $4000 per plan year. See Appendix for details.
>
> Urgent Care
>
> For those medical situations that can't wait or are more complex than primary care services, AlieraCare Bronze, Silver, and Gold plans offer access to Urgent Care facilities at hundreds of medical centers throughout the United States.

Robbins Decl., Ex. 21, 5.

9. In "Plan Services & Membership At a Glance," underneath "Membership," the guide states that:

> Trinity HealthShare is a health care sharing ministry (HCSM) which acts as an organizational clearing house to administer sharing

> contributions across qualifying members [sic] healthcare needs. The AlieraCare membership is NOT health insurance. The membership is based on religious tradition of mutual aid, neighborly assistance, and burden sharing. The membership does not subsidize self-destructive behaviors and lifestyles, but is specifically tailored for individuals who maintain a healthy lifestyle, make responsible choices in regards to health and care, and believe in helping others. Because Trinity HealthShare is a religious organization, members are required to agree with the organizations Statement of Beliefs; see Part II of this guide for the full description and membership details.

Robbins Decl., Ex. 21, p.6.

10. In the same section, the guide explains the AlieraCare Bronze, Silver and Gold plans "provide specialty care offerings at the cost of just a consult fee." *Robbins Decl., Ex. 21, p. 6.*

11. After some additional information mostly regarding setting up online accounts, the guide continues to Part I, "How to Use Your Membership," where each of the benefits included in the plan is explained in greater detail. *Robbins Decl.*, Ex. 21, pp. 10-14. Regarding Telemedicine, the AlieraCare Bronze, Silver and Gold plan member guide advises "Telemedicine consultations are free for you and dependents on your Plan." *Id.,* at p.10.

12. Regarding Preventive Care, the AlieraCare Bronze, Silver and Gold plan member guide advises that "[m]embers have no out-of-pocket expenses for preventive services, which include, but are not limited to, routine in-network checkups, pap smears, flu shots and more." *Robbins Decl., Ex. 21, p. 10.*

13. Regarding Urgent Care, the guide explains that "[y]our membership raises the standard of healthcare available to you by putting individuals first, treating them with clinical excellence, and focusing on their well-being." *Robbins Decl*., Ex. 21, p. 11. It goes onto state that AlieraCare Bronze, Silver, and Gold plans have "unlimited Urgent Care visits," and that "[x]-rays are included, and subject to $25 per read fee at Urgent Care." *Id.*

14. The next section, entitled "Primary Care," includes statements like "many of our plans offer Members under the age of 65 episodic primary care or sick care" and "AlieraCare Bronze, Silver, and Gold plans have unlimited Primary Care visits." *Robbins Decl*., Ex. 21, p. 13. To use "Primary Care Service for Sick Care," if a telemedicine consultation does not resolve the issue, members visit "the closest in-network Primary Care facility" and upon arrival, "present your Membership Card, or if Membership fees are not current, your Plan will not cover the costs of the provider." *Id.*

15. Part II, "How Your Healthcare Cost-Sharing Ministry (HCSM) Works," gives further explanation of the process through which medical expenses are paid, how to qualify for membership, and includes the Statement of Beliefs. *Robbins Decl*., Ex. 21, pp. 15-22. It

explains that plan guidelines "are not for the purpose of describing to potential contributors the amount that will be shared on their behalf and do not create a legally enforceable right on the part of any contributor." *Id*. at p. 15. Potential members "must have a belief of helping others and/or maintaining a healthy lifestyle as outlined in the Statement of Beliefs…" *Id*. at p. 16. Members with a limitation can apply to have it removed if they provide "medical evidence that they qualify for such removal." *Id*. Also, Monthly contributions not received by the end of the month result in the membership becoming inactive. *Id*. The section also explains what happens when share amounts "may or may not meet the eligible needs submitted for sharing;" needs will either be shared on a pro-rata basis or share amounts may be adjusted either temporarily or permanently. *Robbins Decl*., Ex. 21, p. 17. Under "Monthly Contributions," the guide explains that these are "voluntary contributions or gifts" that are "non-refundable," and that neither Trinity HealthShare nor the membership are liable for any part of a member's medical need, and "[a]ll contributors are responsible for their own medical needs." *Id*.

16. The Statement of Beliefs is found on p. 18 of the guide. *Robbins Decl*., Ex. 21, p.19. this section states:

> At the core of what we do, and how we relate to and engage with one another as a community of people, is a set of common beliefs. Our Statement of Share Beliefs is as follows:
>
> (1) We believe that our personal rights and liberties originate from God and are bestowed on us by God.
> (2) We believe every individual has a fundamental religious right to worship God in his or her own way.
> (3) We believe it is our moral and ethical obligation to assist our fellow man when they are in need per our available resources and opportunity.
> (4) We believe it is our spiritual duty to God and our ethical duty to others to maintain a healthy lifestyle and avoid foods, behaviors, or habits that produce sickness or disease to ourselves or others.
> (5) We believe it is our fundamental right of conscience to direct our own healthcare in consultation with physicians, family, and other valued advisors.

Id.

17. Part III, -"Your Summary of Cost-Sharing, Eligible Needs, & Limits," notes that medical expenses are "shared on a per person per incident basis" and includes a list of "medical expenses eligible for sharing." *Robbins Decl*., Ex. 21, pp. 23-26. The next section is entitled "Limits of Sharing (Maximum Payable)" and outlines limits on sharing including lifetime limits, per incident limits, cancer limits; explains that "eligible needs are limited to the amounts in excess of the MSRA;" and then discusses cost-sharing for pre-existing

conditions on each of Bronze, Silver and Gold plans. *Id.* at p. 28. This is then followed by a list of conditions and/or treatment services that are not eligible for any cost-sharing. *Id.* at p. 29.

18. Following is a section entitled "Dispute Resolution and Appeal." *Robbins Decl*., Ex. 21, p. 32. The section explains that although Trinity is a "voluntary association of like-minded people…differences of opinion will occur, and that a methodology for resolving disputes must be available." *Id.* The first level of appeal is calling Trinity to attempt to resolve the dispute on the phone; the second level is requesting review by the Internal Resolution Committee, made up of three Trinity officials; the third level is then a request to have the matter submitted to three sharing members chosen at random by Trinity, who then issue an opinion; the "final appeal" level is then submitting the matter 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 if that internal process does not resolve the matter, it is then submitted first to mediation, and then to arbitration. *Id.*

19. The guide has further plan details attached in the appendices. *Robbins Decl*., Ex. 21, pp. 34-39. The plans details in Appendix A separate the lists of costs between "network" and "non-network;" they are also divided into two sections, the first entitled "Eligible prior to meeting the Member Shared Responsibility Amount (MSRA)" and the second entitled "Eligible after meeting the Member Shared Responsibility Amount (MSRA)." *Id.* at pp. 34-36. Costs, percentages of coverage and similar metrics are listed in the graphic; for example, next to "Primary Care" in Appendix A for the Bronze Plan, it says "$50 Consult Fee" for "Network" Primary Care, and "50% after MSRA" for "Non-Network" primary care; in the same graphic, next to "Telemedicine" both "Network" and "Non-Network" are "Unlimited." *Id.* at p. 34. All three plan detail graphics for Bronze, Silver and Gold Wellness & Preventive Care as "100%" under "Network." *Robbins Decl*., Ex. 21, pp. 34-36.

20. The plan details also explain how cost-sharing for prescription drugs work. For example, Appendix A: Plan Details Bronze includes the following statements after the plan details graphic:

> All members seeking cost-sharing must use the prescription services Rx Valet included with your plan. Prescription drugs are elgible for cost-sharing by the percentage shown once a separate MSRA of $1,500 for all prescriptions is met. Members are required to pay prescription cost out-of-pocket before submitting recripts to Trinity HealthShare mailing address…. Maximum reimbursement of $4,000 per plan year.

Robbins Decl., Ex. 21, p. 37.

21. The appendices also include terms and conditions, and then disclosures; under the disclosures, number two explains again that "Aliera and Trinity programs are NOT

insurance." *Robbins Decl*., Ex. 21, p.41. Legal notices specific to certain states (although none for Washington) contain variations of the same advisement. *Id*. at 42-48.

22. The 2018 AlieraCare Value, Plus, and Premium Member Guide is also divided into three parts, with a welcome and overview at the beginning; it includes many of the same descriptions and advisements as outlined above. *Robbins Decl.,* Ex. 21, pp. 52 -95. The guide has numerous statements that the plan is not insurance, members are responsible for their own medical expenses, and that Trinity is not responsible for payment of any medical expenses. *See e.g*. *Robbins Decl*., Ex. 21, pp. 54, 56, 65, 67, 88, 89-95. The guide also explains that "[t]here is zero out of pocket expense and zero obligation to reach the Member Shared Responsibility Amount (MSRA) for any scheduled preventive care service or routine in-network check-up, pap smear, flu shot and more." *Id*. at p. 55. It states that "[p]rimary care is at the core of an AlieraCare plan;" Premium members "are eligible to receive chronic care management from their primary care physician;" "[l]abs at in-network facilities are included;" and regarding urgent care, "AlieraCare plans offer access to Urgent Care facilities at hundreds of medical centers throughout the United States." The *Statement of Beliefs* is on p. 10 of the guide, and is identical to the one above. *Id*. at p. 109. The rest of the guide is structured in the same way as the guide to the Bronze, Silver and Gold plans, with a section on dispute resolution and appendices that include plan details, terms and conditions and legal notices. *Robbins Decl*., Ex. 21, pp. 81-82; 83-95.

23. In order to become a member of Trinity through Aliera, a person must submit an application that includes medical history, along with a payment. *Robbins Decl*., Ex. 34. Members then make a monthly contribution in order to maintain access to plan benefits. *Id*. at p. 16; *see also* Ex. 20 and Ex. 34. After joining, members receive an ID card that is to be presented to providers upon receiving service. *Robbins Decl*., Ex. 34, p. 8; Ex. 21, p. 11.

24. Aliera has a "Provider Network Services Agreement" with First Health Group Corp. *Robbins Decl*., Ex. 38. This agreement refers to Aliera products as plans, defining "covered services" as "those medical, hospital, and other health care services provided to Members that are payable under the terms of a Plan." *Id*. at p. 2. "Member" is defined as "a person eligible and entitled to receive health benefits under a Plan." *Id*. "Plan" is defined as "a fully-insured health benefits plan, self-insured health benefits plan, or other health benefits plan, program or policy administered, offered, insured or sponsored by an employer, union or other organization for which Entity serves as a third party administrator and through which Members receive access to the Network and Covered Services under a Program." *Robbins Decl*, Ex. 38, p. 2.

    The agreement further specifies that First Health Group Corp., identified as "Company" in the agreement, "will provide [Aliera] and Customers with repricing services as set forth in Repricing Supplement, at no additional charge, provided that [Aliera] is not in arrears or past due in its obligation to pay any fees owed under this Agreement."

25. Aliera has contracts with third-party providers in order to provide members access to health care services; for example, Aliera contracts with: FirstCall for telemedicine services; First

Health and Multiplan for provider network services; and Rx Valet for discount prescription drugs. *Robbins Decl*., Ex 35, Ex. 38-39, and Ex. 37, respectively. Aliera collected a portion of member payments for these services. *Robbins Decl*., Ex. 32 p.14-16. The "Program Expenses Side by Side Products" breakdowns show that Aliera retained a portion of the member share contributions for services like "Provider Network (Multi Plan)," "Telemedicine," "TPA fees," and "Aliera [Management] Fee/General Overhead/Ops Labor/Internal Sales." *Id*.

26. Aliera contracted with Rx Valet to offer customers prescriptions at a discounted rate. *Robbins Decl*., Ex. 21, p. 5. The Rx Valet contract included a price reduction in the aggregate. *Robbins Decl*., Ex. 37, p. 6. Members were required to use Rx Valet in order to receive any reimbursement for prescriptions: "All members seeking cost-sharing must use the prescription services Rx Valet included with your plan." *See e.g. Robbins Decl.*, Ex. 21, p. 39.

27. In one communication to Washington brokers, Aliera stated "Aliera takes great pride in being one of the most broker-friendly health insurance providers in the industry." *Robbins Decl*., Ex. 16., p.2. Aliera comments that "the opportunities are significant for Aliera Healthcare in the Group Insurance market." *Id*. The same communication noted that "Aliera helps people, families and employers gain access to affordable, high-quality healthcare plans for a wide variety of needs and budgets form comprehensive to catastrophic, to short-term medical, vision dental and more." *Id*.

28. Marketing of the healthcare sharing ministry products called them "Healthcare Coverage You Deserve at an Affordable Cost." *Robbins Decl*., Ex. 33, p.2. The same marketing ad included the language "From everyday preventative care to catastrophic events, our healthcare coverage plans provide you and your family the peace of mind needed." *Id*.

29. A Facebook ad stated "Aliera Healthcare is your last chance. You can still sign up for healthcare coverage and meet the ACA requirements with Aliera. Enroll now for ACA-Exempt Healthcare." *Robbins Decl*., Ex 33, p. 3. Other banner ads included statements like "Your guide to better Healthcare," "Welcome to a new era of Healthcare choices" and "Sweet Savings on Healthcare." *Id*.

30. Aliera executive Chase Moses made an appearance on a television show to discuss Aliera's plans: he stated that the comprehensive plans "are meant to give the biggest bang for your buck, so they are the most expensive, but usually about 40% less than most traditional plans, so you are still saving a lot of money, and getting what you are used to." *Robbins Decl*., Exhibit 30. He also stated, "Lab work is obviously huge and in majority of Aliera plans it is 100% included." *Id*. The discussion Mr. Moses had with the host of the show he appeared on did not include any mention of charitable donations, any mention of statements of faith, nor any mention that ultimately, members are still responsible for their medical bills. *Id*.

V. CONCLUSIONS OF LAW

I adopt the following Conclusions of Law:

Jurisdiction

1. The OIC has jurisdiction over the person(s) and subject matter of this case pursuant to RCW 48.04.010, WAC 284-02-070 and RCW 34.05.

Summary Judgment

2. "A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WAC 10-08-135, WAC 284-02-070(2)(a). "But where material facts are disputed, a trial is needed to resolve the issue." *Camicia v. Howard S. Wright Constr. Co*., 179 Wn.2d 684, 693, 317 P.3d 987, 991 (2014). "A material fact is one upon which the outcome of the litigation depends." *Zimmerman v. W8Less Prods., LLC*, 160 Wn. App. 678, 693, 248 P.3d 601, 608 (2011). "If the moving party meets this initial burden, then '[t]he nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations.'" *Id*. (citation omitted).

3. The issues in this case are ripe for summary judgment, as there are no genuine issues as to any material facts. Based upon applicable law, and as outlined below, OIC is entitled to summary judgment and the Order to Cease and Desist No. 19.0251, *In the Matter of Aliera Healthcare, Inc*., is upheld. Accordingly, Aliera's motion for summary judgment is denied.

Whether Trinity's healthcare sharing ministry plans are insurance

4. RCW 48.01.040 defines "insurance" as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

5. "Specified amount" and "determinable contingency" are not defined by statute. "In the absence of such a definition, statutory construction requires that we give undefined words their common and ordinary meaning. To ascertain this meaning, we may use a dictionary." *Vance v. Dep't of Ret. Sys.*, 114 Wn. App. 572, 577 (2002) (citations omitted).

6. In pertinent part, Merriam-Webster defines "specify" as: "to name or state explicitly or in detail." "Specify." *Merriam-Webster.com Dictionary*, Merriam-Webster, http://www.merriam-webster.com/dictionary/specify. Accessed 16 Sep. 2020.

7. Merriam-Webster defines "amount" (the noun) as:

> (1) The total number or quantity; aggregate;
> (2) The quantity at hand or under consideration;
> (3) The whole effect, significance, or import;
> (4) Accounting: a principal sum and interest on it.

"Amount." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/amount. Accessed 16 Sep. 2020.

8. Merriam-Webster defines "determinable" as "capable of being determined, definitely ascertained, or decided upon." "Determinable." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/determinable. Accessed 16 Sep. 2020.

9. Merriam-Webster defines "contingency" in pertinent part:

> (1) A contingent event or condition: such as
> (a) An event (such as an emergency) that may but is not certain to occur;
> (b) Something liable to happen as an adjunct to or result of something else.

"Contingency." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/contingency. Accessed 16 Sep. 2020.

10. Thus, under the definition of insurance, there are two ways that a contract can be one of insurance: if one undertakes to indemnify another, or if one promises to pay another a specific amount upon the happening of a determined event that may or may not occur. The contract in question may qualify under both portions of the definition, or just one portion.

11. There is little common law guidance on the application of the current statutory definition of insurance in RCW 48.01.040. Prior to amendment, one Washington court held that "[a]n essential element of insurance is that there be a 'hazard or peril insured against.'" *State ex re. Fishback v. Universal Service Agency*, 87 Wash. 413, 424 (1915). But the prior definition was as follows: [i]nsurance is a contract whereby one party called the 'insurer,' for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the 'insured,' or his 'beneficiary,' *upon the happening of the hazard or peril insured against*, whereby the party insured or his beneficiary suffers loss or injury.' *State ex rel. Fishback*, 87 Wash. 413, 423 (emphasis added). The current definition no longer includes reference to any hazard or peril insured against. *See* RCW 48.01.040

12. A federal court noted that "the principal ingredients [of an insurance contract] are the consideration, the risk and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified." *Physicians*

Defense Co v. Cooper, 199 F. 576, 579 (9th Cir. 1912). In arriving at these principal ingredients, the court reviewed the definition of insurance in California, where this case arose, as well as the definition of insurance found in several dictionaries and texts on insurance. *Physicians' Defense Co*., 199 F. 576, 578-579.

13. In examining whether a contract is one of insurance, our Washington Supreme Court has noted that "[n]o one can change the nature of insurance business by declaring in the contract that it is not insurance." *McCarty v. King Cty. Med. Serv. Corp.*, 26 Wn.2d 660, 684 (1946). Specifically, the nature of the contract, and "the examination of its contents," aside from the terms used or omitted, determine whether a contract is one of insurance. *Id*.

14. Washington courts have not addressed whether plans offered by a healthcare sharing ministry fall within the statutory definition of insurance. There are limited cases in other jurisdictions that have addressed this issue, as discussed below.

15. The Idaho Supreme Court found that a health care sharing ministry's plans did not constitute insurance as there was not sufficient evidence that the entity assumed the risk of paying members' claims. *Altrua Healthshare, Inc. v. Deal*, 299 P.3d 197, 198 (2013). Altrua's membership contract included the Application for Membership, the Membership Eligibility Guidelines, and Altrua's Guidelines. *Id*. at 199. The application included a medical history questionnaire, an escrow instruction sheet, and a commitment agreement with standards the members must follow. *Id.* To determine the contribution amount, Altrua considered the applicant's desired level of participation, and the applicant's age and marital status; if the monthly contribution was not made, a member would not be able to receive any funds for medical expenses. *Id*. Altrua kept members' monthly contributions in the escrow account, and first paid the cost of operating the membership, then paid "eligible needs pursuant to the guidelines." *Id*. Altrua determined which members' "claims" were paid pursuant to the membership guidelines, not members. *Altrua Healthshare, Inc.*, 299 P.3d 197, 199. Disclaimers also appear in the contract materials, explaining that the membership is not insurance, Altrua is not liable for payment of medical expenses, and members are ultimately responsible for payment of medical bills. *Id.* at 199-200.

Altrua appealed the finding by the Hearing Officer at the Idaho Department of Insurance that Altrua's membership contract was a contract of insurance, which meant Altrua was operating as an unlicensed health insurance company in Idaho. *Altrua Healthshare, Inc.*, 299 P.3d 197, 198-99. In doing so, the court found that "[d]espite the high level of control Altrua exercises over the escrow account, simply operating the account does not mean that Altrua assumes the risk of paying members' claims." *Altrua Healthshare, Inc.*, 299 P.3d 197, 201. The court differentiated between the discretion to direct payment, and assumption of the risk of paying claims. *Id*. Because the court did not find any evidence that Altrua "guaranteed or assured payment of members' claims," they held the finding by the Hearing Officer at the Idaho Department of Insurance that Altrua was transacting insurance was erroneous. *Altrua Healthshare, Inc.*, 299 P.3d 197, 202. While Altrua's contract, despite the disclaimers, created a reliance interest in its members, the court did not believe that this meant Altrua assumed any of the risk of paying members claims, and operating the escrow account was

not enough to assume some of the risk either. *Id*. One member of the court noted that the state might have been successful had it proceeded under the other prong of insurance: "a contract to 'pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies.'" *Altrua Healthshare, Inc.*, 154 Idaho 390, 395. The same concurring opinion observed that Altrua had "designed its program to look like insurance and act like insurance but to exclude it from being insurance by virtue of its numerous disclaimers." *Id.*

16. Kentucky also examined this issue in *Commonwealth v. Reinhold*, 325 S.W.3d 272 (Ky. 2010). In that case, the court analyzed whether memberships offered by Medi-Share constituted insurance. *Reinhold*, 325 S.W.3d 272, 273. Prospective members submitted a fee with their application, which included disclaimers that the membership was not insurance, and that members were still responsible for payment of medical bills. *Id*. at 274. Medi-Share calculated member contributions by "applying underwriting standards and interpreting statistical data to fix the contribution based on anticipated future claims." *Id*. at 275. Member contributions went to a trust with sub-accounts for individual members, and the sub-accounts functioned as an escrow account; *Reinhold*, 325 S.W.3d 272, 275. Members pay applicable copayments to medical providers, then send the claim form to Medi-Share, and Medi-Share claims adjusters review whether the claim is covered. Once approved, payment for the bill is taken directly from another member's sub-account and made directly to the medical provider. Members do not control which claims their contributions pay for, only Medi-Share makes that determination. *Id*. at 282.

The Kentucky definition of insurance is "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils called 'risks,' or to pay or grant a specified amount or determinable benefit or annuity in connection with ascertainable risk contingencies, or to act as surety." *Reinhold*, 325 S.W.3d 272, 276 (citing KRS 304.1-030). The court noted that Medi-Share members were obligated to pay a monthly share and that for making that payment, members remained eligible to then have their own medical expenses paid. *Id.* at 277. "This process clearly shifts the risk of payment for medical expenses from the individual member to the pool of sub-accounts from which his expenses will be paid…thus there is a shifting of risk." *Id.* The court also found Medi-Share's use of actuarial tables to set contribution amounts operated like a traditional health insurance contract shift risk between policyholders. *Id*. at 278. Thus, the court held Medi-Share's commitment contract to be one of insurance, as Medi-Share "undertakes to actually pool the members' monthly shares together and pay the actual medical bills as claims for payment are submitted." *Reinhold*, 325 S.W.3d 272, 278. The disclaimers were not sufficient to overcome the nature of the contract-"one where individual members pool resources together to distribute the risk of major medical bills amongst each other." *Id*. The court also noted "[i]t is the actual nature and effect of the "commitment" contract that determines whether it is one for insurance." *Commonwealth v. Reinhold*, 325 S.W.3d 272, 277. In differentiating monthly contributions to the membership from charitable donations, the court discussed that the member donating to Medi-Share expects the benefit of a financial return for payment of their own medical bills. *Id*. Finally, Medi-Share advertisements also supported the conclusion that Medi-Share plans qualified as insurance: ads stated memberships was an "alternative to expensive health insurance" that could save members $2000-$4000 a year, or

more; noted that members "enjoy significant savings;" and included testimonials that "tout the monetary amount of their medical bills which were paid through Medi-Share, and make claims such as "the medical bills would have destroyed us financially, except for Medi-Share." *Reinhold,* 325 S.W.3d 272, 278.

17. An Iowa court also addressed this issue in *Barberton Rescue Mission v. Ins. Div.*, 586 N.W.2d 352 (Iowa 1998). There, the court reviewed whether "The Christian Brotherhood Newsletter" system qualified as insurance under Iowa law. Subscribers to the newsletter help each other with qualifying medical expenses up to $100,000 per person, per incident, with a separate program to help with bills over $100,000. *Barberton Rescue Mission*, 586 N.W.2d 352, 353. Under the basic program, subscribers are responsible for up to $200 before they can receive financial assistance for qualifying medical needs. *Id.* The program also excludes physical examination and other routine tests, and subscribers are to refrain from using alcohol, tobacco and illegal drugs, and have to provide a certificate from a minister stating the subscriber is in good standing in a Christian church. *Id*. The application includes an advisement that the newsletter is not an insurance company, that any payments come directly from other subscribers and not the newsletter itself, and that payment is not guaranteed. *Id.*, at 353-354. To receive money for a medical expense, a subscriber submits the bill to the newsletter; the newsletter staff review and determine whether the bill qualifies for payment, and if it does, the name and address of the subscriber that submitted the bill are published in the newsletter. *Barberton Rescue Mission,* 586 N.W.2d 352, 353. Newsletter staff assign subscribers to pay qualified bills, and the assigned subscribers mail a check directly to the person that submitted the bill, for amount they have agreed to pay each month: $50 for an individual subscriber, $100 for a couple, and $150 for a family. *Id.* Subscribers that do not mail a check as assigned are dropped after receiving three reminders, and if a subscriber is dropped, then a new subscriber is assigned to make a payment. *Id*. at 354. There is also a group designation optional, where needs may be met by other members "on a purely voluntary basis." *Id*.

Iowa insurance regulators charged the publishers of the newsletter for selling insurance without a license. *Barberton Rescue Mission,* 586 N.W.2d 352, 354. At the time, Iowa did not have a statutory definition of insurance, but Iowa courts had held that "[a] contract is one of insurance if it meets the following test: one party, for compensation, assumes the risk of another; the party who assumes the risk agrees to pay a certain sum of money on a specified contingency; and the payment is made to the other party or the party's nominee." *Barberton Rescue Mission,* 586 N.W.2d 352, 354. The court noted that the fact that a contract states it is not insurance is not determinative, but that the "contents and true character of the contract" must be examined to make that decision. *Id.* The insurance regulators argued that the title of the program, "A Biblical Alternative to High Cost Medical Coverage," implied that members of the newsletter would be "as served by the Newsletter as by purchasing health insurance." *Barberton Rescue Mission,* 586 N.W.2d 352, 355. The state insurance department pointed out that the newsletter memberships included what looked like deductibles, exclusions, coverage limitations, monthly fees, all of which "closely parallel provisions in traditional insurance policies," and argued that the average consumer would think the newsletter plans were insurance policies. *Id.*, 586 N.W.2d 352, 355. But the court noted that the main issue

was whether "the risk of payment for medical expense is assumed by the promoter," which has to be the "principal object and purpose of the program." *Id.* The court found that because the newsletter expressly disavows any assumption of risk, explains that members that don't pay are replaced by a new member, the newsletter did not assume any risk of payment and thus memberships were not a contract of insurance; even noting that all submissions have a 100% response is not an implied promise to pay. *Id.*

18. As noted in *McCarty (supra)*, these cases reinforce that a statement that a contract is not insurance is not enough to change the nature of the contract; and it is the nature of the contract that determines whether the contract is one of insurance.

19. Here, it is clear that the membership application with the fee accepted by Aliera, along with the most recent membership guide provided by Aliera to the new member, and the member ID card, constitute the contract for membership. These documents clearly lay out the terms and conditions of membership.

20. The member guides includes plan descriptions. The plans operate similarly to insurance: there are providers that are in-network, and use of an in-network provider is cheaper for members that out-of-network providers; there are lists of exclusions, or services that are not eligible for any funds under the plans; there are "member shared responsibility amounts" that operate as deductibles; and finally, the plans specifically describe health care services that are "covered," with "zero expense" to the member. It is this final statement-that plans "cover" certain services with "zero expense" to members, that is an explicit promise to pay a specified amount (the cost of the service) upon a determinable contingency (seeing a doctor for a preventive care visit, for example).

21. Again, the statements that a service is "covered" with "zero out-of-pocket expense" to the member" is an explicit promise to pay for a medical expense. Providing "unlimited" Telemedicine consultations is an explicit promise to pay for consulting with a healthcare provider. State that Labs and Diagnostics "are included" is a promise to pay fees for these services. These are not simply statements that the expense is "eligible for sharing;" they are statements that explicitly promise if a monthly contribution is received, these services will be provided to the member. This is a promise to pay a specified amount for a determinable contingency. Similarly, the statement regarding urgent care found in some materials, specifically stating that under some plans, members have "unlimited visits" with the cost of x-rays "included, subject to a $25 per read fee," acts as a promise the cost of the service. Disclaimers of responsibility elsewhere in the materials are outweighed by these statements offering to pay for these services, and the manner in which the plan are laid out in the guides.

22. Further, laying out the plans with specific percentages and dollar amounts that a member will be responsible for, with the remaining amount or percentage "eligible for sharing" or "covered" is at least an implicit promise to pay. The graphics that include "network" and "non-network" amounts, with percentages and dollar amounts for what is "eligible to be shared," are graphics that are identical to those found in insurance plans. Explaining elsewhere in the literature that the graphics are not intended as models of what will be paid

is not sufficient to overcome the nature of the graphic itself: it appears as if it is what is guaranteed by making a monthly contribution.

23. The advertising used is also consistent with this interpretation; the ads emphasize the Aliera products are low-cost alternatives to traditional insurance; that they offer "comprehensive coverage," that you don't have to worry about missing open enrollment, and that they comply with the ACA. The guides offer "ACA compliant healthcare." The ads are promising something in return for purchasing a product. This is distinctly different than a charitable donation, as the donor does not expect any return, in the form of a product or service, on that type of investment.

24. Further, offering limited memberships to those with certain health conditions, which can be upgraded to full membership upon a showing that the condition has abated, shows that Aliera and Trinity are engaging in some risk calculation even though they do not rely on actuarial tables in calculating contribution amounts.

25. To be clear: considering the contents of the application, member guides, and member ID, the plans in this case qualify as "insurance" as the materials contained explicit and implicit promises to pay for health care services, which meets the definition of insurance in RCW 48.01.040.

Whether Trinity qualifies as a healthcare sharing ministry under RCW 48.43.009

26. RCW 48.43.009 states "[h]ealth care sharing ministries are not health carriers as defined in RCW 48.43.005 or insurers as defined in RCW 48.01.050. For purposes of this section, "health care sharing ministry" has the same meaning as in 26 U.S.C. Sec. 5000A."

27. 26 U.S.C. § 5000A(d)(2)(B)(ii) provides:

> (ii) Health care sharing ministry. The term "health care sharing ministry" means an organization—
>
> (I) which is described in section 501(c)(3) [26 USCS § 501(c)(3)] and is exempt from taxation under section 501(a) [26 USCS § 501(a)],
>
> (II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,
>
> (III) members of which retain membership even after they develop a medical condition,
>
> (IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and
>
> (V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with

> generally accepted accounting principles and which is made available to the public upon request.

OIC use of the federal definition of healthcare sharing ministry

28. OIC argues that Trinity does not meet the criteria in sections II, IV, and V above, and thus does not qualify as a healthcare sharing ministry under the federal statute, incorporated by reference in RCW 48.43.009. Aliera argues that OIC does not have the authority to interpret federal law, such as 26 U.S.C. § 5000A(d)(2)(B)(ii); that OIC cannot make a determination that Trinity is not a healthcare sharing ministry because that involves core U.S. Constitutional rights, and OIC does not have the authority to make such a determination; and that OIC's application of the healthcare sharing ministry definition violates due process.

29. There is no language in RCW 48.43.009 that delegates the authority of the Insurance Commissioner to a federal agency; nor does the incorporation of the language of the federal law *require* an interpretation of a federal law. Instead, the reference adopts the federal standard as the state standard. By the language of RCW 48.43.009, it incorporates the language used to define a health care sharing ministry, in the state statute purporting to do the same, albeit for a different purpose. "Meaning" is not defined in the insurance code; as noted above, a dictionary can be consulted to interpret words not defined in a statute. "Meaning" has a definition of "the thing one intends to convey especially by language," or "the thing that is conveyed especially by language." "Meaning." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/meaning. Accessed 4 Nov. 2020. "For purposes of this section, "health care sharing ministry" has the same *meaning* as in 26 U.S.C. Sec. 5000A" simply adopts the criteria in the federal statute as the standard by which the state will determine if an entity is healthcare sharing ministry, and thus not an "insurer" or a "health carrier." It still leaves such a determination with the state.

30. Nor is there any basis to invalidate the statute definition of healthcare sharing ministry due to federal litigation regarding the individual mandate. Even if the definition in RCW 48.43.009 were void, as OIC points out, there would be no safe harbor from OIC oversight based on an entity's status as a health care sharing ministry. It is the state statute, and not the federal law, that exempts such groups from insurance regulation. The McCarran Ferguson Act, 15 U.S.C. §§1011-1015, prevents federal preemption of state insurance law unless Congress explicitly states the intent to regulate insurance. There is no mention of preempting any state insurance regulation in the federal definition of healthcare sharing ministry.

31. The OIC use of the definition of healthcare sharing ministry in 26 U.S.C. § 5000A(d)(2)(B)(ii), explicitly incorporated and adopted in RCW 48.43.009, does not violate Aliera's due process rights. There is no requirement that OIC adopt rules to further explain interpretation of the plain language of RCW 48.43.009 and 26 U.S.C. § 5000A(d)(2)(B)(ii). As OIC noted, "ignorance of the law is no excuse for the violation of a law." *Senn v. Northwest Underwriters*, 74 Wn. App. 408, 416 (1994). Further, at least one federal court

has upheld the time requirement in the definition of healthcare sharing ministry, as it serves to "ensure that the ministries provide care that possesses the reliability that comes with historical practice, and it accommodates religious health care without opening the floodgates for any group to establish a new ministry to circumvent [the Affordable Care Act]." *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 102 (4th Cir. 2013). The court further found that the distinguishing between ministries formed before 1999 and those formed after was rationally related to the Government's legitimate interest in accommodating religious practice while limiting interferences in the Act's overriding purposes." *Id.*

Similarly, there is nothing about OIC's interpretation of the time requirement that would require a different result. The Insurance Commissioner regulates the business of insurance to protect the public, and has an interest in ensuring that an entity seeking safe harbor from insurance regulations under the healthcare sharing ministry provision has "established reliability with historical practice." Entities should not escape insurance regulation by labeling themselves as healthcare sharing ministries, they must meet the criteria the legislature intended to set the standard for recognition as such.

Trinity existence prior to 1999

32. The main point of contention under the definition is the following section: "[t]he term "health care sharing ministry" means…(IV) an organization (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999…"

33. Trinity was formed in 2018. It clearly has not existed since prior to December 31, 1999. At the time Trinity was formed, it had no members. Thus, Trinity must meet this criteria by establishing that a predecessor of Trinity has been in existence at all times since December 31, 1999, with members sharing expenses continuously and without interruption since before that date as well.

34. The term "predecessor" is not defined in 26 U.S.C. § 5000A. "In the absence of [a definition], statutory construction requires that we give undefined words their common and ordinary meaning. To ascertain this meaning, we may use a dictionary. In determining the meaning of a term in a statute, we must also consider the intent of the legislature. If statutory language is susceptible to more than one definition, we will adopt the definition that promotes the purpose of the statute." *Vance v. Dep't of Ret. Sys.*, 114 Wn. App. 572, 577 (2002). Statutes should be interpreted to avoid absurd or strained results. *Homeowners' Ass'n v. Hal Real Estate Invs.*, 108 Wn. App. 330, 340 (2001).

35. Washington courts have used the term "predecessor" when describing the acquisition of the assets of a "predecessor" corporation by a "successor" corporation. *See Eagle Pac. Ins. Co. v. Christensen*, 135 Wn.2d 894 (1998); *Payne v. Saberhagen Holdings, Inc.*, 147 Wn. App. 17 (2008); *Leren v. Kaiser Gypsum Co.*, 9 Wn. App. 2d 55 (2019). They also point to the definition in the Federal Insurance Contributions Act, which uses the term "predecessor" for an employer whose property was substantially acquired. 26 U.S.C. § 3121(a)(1). The

Federal Insurance Contributions Act uses the term "predecessor" for an employer whose property was substantially acquired. See 26 U.S.C. § 3121(a)(1). And finally, Washington's Business and Occupation Tax statute defines "successor" in RCW 82.04.180(1) as

> (a) Any person to whom a taxpayer quitting, selling out, exchanging, or disposing of a business sells or otherwise conveys, directly or indirectly, in bulk and not in the ordinary course of the taxpayer's business, more than fifty percent of the fair market value of either the (i) tangible assets or (ii) intangible assets of the taxpayer; or
> (b) A surviving corporation of a statutory merger.

36. The apparent intent of the statute was to limit the application of the qualification for health care sharing ministries only to organizations that were in existence prior to 1999, or organizations that could show a predecessor organization existed prior to 1999. Thus, it seems likely that a predecessor organization would be some specific formal entity that transferred assets to the new organization, and then ceased to exist or was merged into the surviving corporation. Otherwise, the statute does not work in a limiting fashion.

37. Therefore, it is reasonable to conclude that the meaning of "predecessor" in the health care ministry statute thus refers to a health care sharing ministry organization that is acquired, or merged with, or otherwise replaced by another health care sharing ministry organization.

This interpretation is consistent with the holding in *Liberty Univ., Inc. v. Lew*, 733 F.3d 72 (4th Cir. 2013). In that case, the court analyzed a challenge to the health care sharing ministry exception in the statute, where the plaintiffs alleged that the exception was discriminatory and the cutoff date arbitrary. The court held:

> Applying *Lemon*, the date serves at least two "secular legislative purpose[s]." First, the cutoff ensures that the ministries provide care that possesses the reliability that comes with historical practice. Second, it accommodates religious health care without opening the floodgates for any group to establish a new ministry to circumvent the Act. The "primary effect" of the cutoff accordingly "neither advances nor inhibits religion." Further, given that it applies only secular criteria, the cutoff does not "foster an excessive government entanglement with religion.

Id. at 102.

38. The association of Baptist churches is not a formal organization or entity, and Trinity did not assume any assets of that association, or succeed it in any way. Trinity has since tried to meet the predecessor requirement by entering into an agreement with a specific church. Attached to Aliera's reply was an agreement executed between Trinity and Faith Driven Life Church, Inc., ("Faith Driven") a nonprofit corporation[2]. In the agreement, Faith Driven

[2] Faith Driven Life Church, Inc., is a Georgia nonprofit corporation d/b/a Faith Driven Life Church ("Faith Driven") in existence since 2013; New Horizons Church of God in Christ, Inc., is a Georgia nonprofit corporation d/b/a New Horizons, in existence from the 1980s to 2016. Faith Driven became a "successor in interest" to New Horizons in

transferred its sharing activities to Trinity, and Trinity and Faith Driven agree that Faith Driven is Trinity's "predecessor." However, the agreement explicitly permits Faith Driven to provide any future sharing of medical expenses amongst its members or any other individuals, whether or not such persons ever enroll in a Trinity Sharing Program or are ever members of Faith Driven. And the agreement simply allows Trinity to offer Faith Driven members the opportunity to apply and enroll as a member in a Trinity Sharing Program although the agreement anticipates Faith Driven members becoming Trinity Healthshare members. This agreement does not establish that Faith Driven is a "predecessor" to Trinity under the requirements of RCW 48.43.009 and 26 U.S.C. § 5000A(d)(2)(B)(ii). Trinity and Faith Driven agreeing to call Faith Driven "predecessor" is not sufficient to meet this requirement.

Continuous sharing of medical expenses among members

39. Trinity also cannot meet the criteria in section IV because Trinity members have not shared medical expenses continuously and without interruption since December 31, 1999. Trinity had no members at its inception, and thus cannot meet this requirement.

Common set of ethical beliefs

40. The OIC also alleges that Trinity does not meet the definition of healthcare sharing ministry under section II of 26 U.S.C. § 5000A(d)(2)(B)(ii), and thereby required by RCW 48.43.009, which provides that "members of [the organization] share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed."

    OIC argues that Trinity's Statement of Faith, as outlined in the corporate articles, is substantially different than the Faith Statements Aliera marketed to potential members and to which members actually agreed. They also argue that the nature of Trinity's ministry is significantly different than what was presented in its application to the IRS. However, Trinity has amended its Statement of Faith in its corporate articles such that currently, it is identical to the Faith Statements Aliera includes in the application and plan guidelines. Regardless, the requirement in the statute is that *members* share a common set of ethical or religious beliefs, and the only evidence in the record establishes that the Statement of Faith in all the Trinity and Aliera guides and application was the same.

41. Further, OIC does not have any expertise in defining the parameters of a religion. Although initially, the faith statements in the corporate articles were not identical to the faith statements in the member application and the member guidelines, they were not necessarily contradictory. Again, Aliera presented an identical Statement of Faith for the Trinity products in all its materials. Thus, section II of 26 U.S.C. § 5000A(d)(2)(B)(ii) is actually

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2016, when New Horizons and Faith Driven merged to become one single church. Thus, reference in this order to "Faith Driven" is also meant to include New Horizons Church of God in Christ. *Third Declaration of Ethan Smith*, Exhibit A, *Transfer and Assumption Agreement By and Among Trinity Healthshare, Inc., Faith Driven Life Church, Inc., and New Horizons Church of God in Christ, Inc.*

satisfied, as there is evidence that at least in form, the same Statement of Faith is presented in all of Aliera's printed materials.

Annual Audits

42. OIC argues that Trinity has not had any financial audits, and thus does not meet the requirement in (V) whereby an organization seeking health care sharing ministry designation must conduct an annual audit, performed by an independent certified public accounting firm in accord with generally accepted accounting principles, and is made available to the public on request. Trinity has conducted no audits as required by this section. There must be some demonstrable effort to meet this requirement. Thus, Trinity does not meet the definition of healthcare sharing ministry in RCW 48.43.009 and 26 U.S.C. § 5000A(d)(2)(B)(ii) because no annual audits have been performed.

Whether Aliera violated RCW 48.17.060 by selling, soliciting, or negotiating insurance in Washington without a license

43. RCW 48.01.020 provides that "[a]ll insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code."

44. RCW 48.17.060(1) provides that "[a] person shall not sell, solicit, or negotiate insurance in this state for any line or lines of insurance unless the person is licensed for that line of authority in accordance with this chapter."

45. RCW 48.17.010(14) defines "[s]olicit" as "attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular insurer."

46. Under RCW 48.02.060(1), the commissioner "has the authority expressly conferred upon him or her by or reasonably implied from the provisions of this code." Under RCW 48.02.060(2), "[t]he commissioner must execute his or her duties and must enforce the provisions of this code."

47. Because Trinity's healthshare plans fall within the definition of insurance, and because Trinity does not meet the definition of a healthcare sharing ministry in RCW 48.43.009, it is a violation of RCW 48.17.060 for Aliera to market and sell Trinity products in Washington without first obtaining a license from the OIC.

48. There is ample evidence of Aliera's "solicitation" in Washington regarding Trinity plans. First, Aliera's plan literature is accessible on their website to consumers in Washington, and encourages consumers to buy healthcare plans from Trinity. *Robbins Decl*., Ex. 2. P.16; Ex. 9, p 166-194. Second, Aliera's digital advertising campaign promoted Trinity plans with statements like "Aliera Healthcare is your last chance. You can still sign up for healthcare coverage and meet the ACA requirements with Aliera. Enroll now for ACA-Exempt Healthcare." *Robbins Decl*., Ex 33, p. 3. Other banner ads included that appeared

on digital services like Pandora include statements like "Your guide to better Healthcare," "Welcome to a new era of Healthcare choices" and "Sweet Savings on Healthcare." *Id.* Aliera's training materials, including the audio of training sessions for producers, educated producers on Trinity products so the producers could market them to consumers on behalf of Aliera. Robbins Decl., Ex. 9 p. 157, 23-27. Further, Aliera executive Chase Moses' appearance on a television program encouraging consumers to purchase Trinity products through Aliera, and demonstrated how to access the Aliera website to do so. *Robbins Decl*., Ex. 30.

Whether Aliera violated RCW 48.15.020(2)(a) by representing an unauthorized insurer

49. RCW 48.15.020(2)(a) provides that "[a] person may not, in this state, represent an unauthorized insurer except as provided in this chapter." Anyone found to have violated RCW 48.15.020(2) is subject to a fine up to $25,000, with each violation constituting a separate offense. RCW 48.15.020(3).

50. RCW 48.15.040 provides that "[i]f certain insurance coverages cannot be procured from authorized insurers, such coverages, hereinafter designated as "surplus lines," may be procured from unauthorized insurers subject to the following conditions: (1) The insurance must be procured through a licensed surplus line broker under this chapter."

51. Trinity is not authorized to sell insurance in the state of Washington. As such, Aliera must be a licensed surplus line broker in order to represent an unauthorized insurer in Washington. Aliera is not licensed as a surplus line broker. Aliera represented Trinity in the solicitation, sale, and administration of unauthorized insurance products, as outlined in the Management Agreement: "Aliera is a program manager for health care sharing ministry plans responsible for the development of plan designs, pricing, and marketing materials, vendor management, and recruitment and maintenance of a national sales force to market plans, including accounting and management of sales commissions to authorized marketing representatives on behalf of the ministry" *Smith Decl*., Ex. 5, p.1; *Robbins Decl*. Ex. 32, p.1.

52. As Trinity is not a licensed insurer, and does not meet the requirements of a healthcare sharing ministry, and Aliera has clearly represented Trinity in Washington, Aliera has violated RCW 48.15.020(2)(a).

Whether Trinity violated RCW 48.44.015(1) by acting as a healthcare service contractor without being registered with the Insurance Commissioner as required

53. Under RCW 48.44.010(9):

> 'Health care service contractor' means any corporation, cooperative group, or association, which is sponsored by or otherwise intimately connected with a provider or group of providers, who or which not otherwise being engaged in the insurance business, accepts prepayment for health care services from or for the benefit of persons or groups of persons as consideration for providing such persons with any health care services. 'Health care service contractor' does not

> include direct patient-provider primary care practices as defined in RCW 48.150.010."

54. Under RCW 48.44.015(1) "[a] person may not in this state, by mail or otherwise, act as or hold himself or herself out to be a health care service contractor, as defined in RCW 48.44.010 without first being registered with the commissioner."

55. Because Aliera has been found, as outlined above, to be "otherwise engaged in the insurance business," it cannot simultaneously violate the statutes above as well as be in considered an unlicensed health care service contractor.

56. However, if it is found that Trinity plans are not insurance contracts, or if Trinity meets the definition of a health care sharing ministry, there is sufficient evidence in the record to find that Aliera has acted as an unauthorized health care service contractor as defined above.

Aliera has contracted with provider networks to provide health care services for their members. By accepting monthly contributions from Trinity members for processing, and receiving a return of these portions in order to make and maintain such contracts with provider networks, Aliera has "accepted prepayment" for providing Trinity members with certain health care, like preventive well-care visits and flu shots, at "zero expense" to the members. The fact that no Washington consumers have accessed provider care through the network is inapposite; that is not a requirement of the statute.

Whether Aliera operated as a discount plan organization without first obtaining a license in violation of RCW 48.155.020(1)

57. RCW 48.155.010(5)(a) defines "discount plan organization" as

> a person that, in exchange for fees, dues, charges, or other consideration, provides or purports to provide access to discounts to its members on charges by providers for health care services. "Discount plan organization" also means a person or organization that contracts with providers, provider networks, or other discount plan organizations to offer discounts on health care services to its members. This term also includes all persons that determine the charge to or other consideration paid by members.

The same statute includes exceptions to the definition of discount plan organization:

> "Discount plan organization" does not mean:
> (i) Pharmacy benefit managers;
> (ii) Health care provider networks, when the network's only involvement in discount plans is contracting with the plan to provide discounts to the plan's members;
> (iii) Marketers who market the discount plans of discount plan organizations which are licensed under this chapter as long as all written communications of the marketer in connection with a

> discount plan clearly identify the licensed discount plan organization as the responsible entity; or
> (iv) Health carriers, if the discount on health care services is offered by a health carrier authorized under chapter 48.20, 48.21, 48.44, or 48.46 RCW.

58. RCW 48.155.020(1) provides that "[b]efore conducting discount plan business to which this chapter applies, a person must obtain a license from the commissioner to operate as a discount plan organization."

59. Aliera, through its sale of memberships to Trinity HealthShare plans, purported to provide access to discounts on prescription drugs through Rx Valet. Aliera collected monthly contribution amounts from Trinity members. *Robbins Decl.*, Ex. 32, p. 5. Trinity's membership roster is deemed the property of Aliera, through the agreement Trinity has with Aliera. *Id*., at p.1. Aliera's agreement with Rx Valet refers to Aliera "members or customers." *Robbins Decl*, Ex. 37, p.1, 3 The contract with Rx Valet included a price reduction in the aggregate. *Id*. at p. 6. The agreement with Rx Valet was not just for marketing, but specifically included price reductions for Aliera customers and members, and a promise to "use best efforts to cause Advanced Pharmacy, Advanced Diabetic Solutions and Phoenix PBM to fulfill and deliver the products and/or services ordered or requested from members and customers of Marketer…" *Robbins Decl*. Ex. 37 p.1, p.6. The goes beyond an agreement to market a product. Because the agreement covers more than marketing the products of Rx Valet, Aliera does not qualify for the marketer exemption under the RCW 48.155.010(6).

Thus, Aliera operated as an unlicensed discount plan organization.

Whether Aliera violated RCW 48.30.040, WAC 285-50-050, and WAC 285-50-060 by making deceptive and misleading representations and advertisements

60. RCW 48.30.040 provides that "[n]o person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein."

61. WAC 285-50-050 provides that:

> (1) The format and content of an advertisement to which these rules apply shall be sufficiently complete and clear to avoid deception or the capacity or tendency to mislead or deceive. Whether an advertisement has a capacity or tendency to mislead or deceive shall be determined by the insurance commissioner from the overall impression that the advertisement may be reasonably expected to create upon a person of average education or intelligence, within the segment of the public to which it is directed.

> (2) Advertisements shall be truthful and not misleading in fact or in implication. Words or phrases, the meaning of which is clear only by implication or by familiarity with insurance terminology, shall not be used.

62. WAC 284-50-060 provides in pertinent part:

> (1) No advertisement shall omit information or use words, phrases, statements, references, or illustrations if the omission of such information or use of such words, phrases, statements, references, or illustrations has the capacity, tendency, or effect of misleading or deceiving purchasers or prospective purchasers as to the nature or extent of any policy benefit payable, loss covered, or premium payable. The fact that the policy offered is made available to a prospective insured for inspection prior to consummation of the sale or an offer is made to refund the premium if the purchaser is not satisfied, does not remedy misleading statements.
> (2) No advertisement shall contain or use words or phrases such as, "all"; "full"; "complete"; "comprehensive"; "unlimited"; "up to"; "as high as"; "this policy will help pay your hospital and surgical bills"; "this policy will help fill some of the gaps that medicare and your present insurance leave out"; "this policy will help to replace your income" (when used to express loss of time benefits); or similar words and phrases, in a manner which exaggerates any benefits beyond the terms of the policy.

63. WAC 284-50-010(1) defines "advertisement" as including:

> (a) Printed and published material, audio visual material, and descriptive literature of an insurer used in direct mail, newspapers, magazines, radio scripts, television scripts, billboards, and similar displays; and
> (b) Descriptive literature and sales aids of all kinds issued by an insurer, or insurance producer for presentation to members of the insurance buying public, including but not limited to circulars, leaflets, booklets, depictions, illustrations, and form letters; and
> (c) Prepared sales talks, presentations, and material for use by insurance producers.

64. The crux of OIC's argument is that the Aliera ads, communications, program brochures and guides, training material, and even the appearance by Chase Moses on television, made it seem as if Trinity products offered through Aliera were insurance products. But OIC also argues that the Trinity products Aliera marketed and administered fall under the definition of insurance. If these products are in fact insurance, then statements that lead consumers to believe they are insurance are not misleading.

65. Simply put, unless the Trinity products offered by Aliera are in fact healthcare sharing ministry products, then Aliera cannot violate the statute or the WACs in

the manner OIC has alleged because advertising the products as insurance is consistent with offering a product that actually is insurance.

Authority for Order to Cease and Desist

66. RCW 48.01.030 provides that:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance

67. RCW 48.01.020 provides that "[a]ll insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith, are governed by this code."

68. The Insurance Commissioner "has the authority expressly conferred upon him by or reasonably implied from the provisions of this code." RCW 48.02.060(1). The Insurance Commissioner "must execute his or her duties and must enforce the provisions of this code." RCW 48.02.060(2).

69. RCW 48.02.080(3) provides that if the Insurance Commissioner "has cause to believe that any person is violating or is about to violate any provision of this code or any regulation or order of the commissioner, he or she may: (a) issue a cease and desist order[.]"

70. RCW 48.15.023(5)(a) states that "[i]f the commissioner has cause to believe that any person has violated the provisions of RCW 48.15.020(1), the commissioner may: (i) Issue and enforce a cease and desist order in accordance with the provisions of RCW 48.02.080…"

71. RCW 48.15.020(2)(a) provides in pertinent part that "[a] person may not, in this state, represent an unauthorized insurer except as provided in this chapter…"

72. RCW 48.17.063(4)(a) states that "[i]f the commissioner has cause to believe that any person has violated the provisions of RCW 48.17.060, the commissioner may: (i) Issue and enforce a cease and desist order in accordance with the provisions of RCW 48.02.080[.]"

73. RCW 48.17.060(1) provides that "[a] person shall not sell, solicit, or negotiate insurance in this state for any line or lines of insurance unless the person is licensed for that line of authority in accordance with this chapter."

74. Based on the violations Aliera has committed, as outlined above, the Insurance Commissioner has ample authority to issue Order to Cease and Desist No. 19-

0251 *In the Matter of Aliera Healthcare, Inc*. The Order to Cease and Desist should remain in effect.

VI. ORDER

Based on the foregoing Facts for Purposes of Summary Judgment and Conclusions of Law, there are no genuine issues of material fact, and the Office of the Insurance Commissioner is entitled to summary judgment as a matter of law. Aliera Healthcare, Inc.'s Motion for Summary Judgment is denied. It is ordered that the Order to Cease and Desist No. 19-0251, *In the Matter of Aliera Healthcare, Inc.*, remains in effect

All future dates, including the hearing, are stricken.

November 13, 2020

Julia Eisentrout
Presiding Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing *Final Order on Summary Judgment* on the following people at their addresses listed below:

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Dated this _13th_ day of November, 2020, in Olympia, Washington.

/s/ Rebekah Carter
Rebekah Carter
Paralegal, Hearings Unit