IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

GEORGE T. KELLY, III, and THOMAS BOOGHER, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO. 3:20-CV-05083-MDH**
v.	)	
THE ALIERA COMPANIES, INC.; formally known as Aliera Healthcare, Inc., a Delaware corporation, and TRINITY HEALTHSHARE, a Delaware Corporation,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY

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Defendants Aliera and Trinity moved to stay proceedings in this matter pending resolution of their Motion to Alter or Amend and pending resolution of their appeals to the United States Court of Appeals to the Eighth Circuit. (*See* ECF No. 76.). Notwithstanding Plaintiffs Kelly and Boogher's arguments to the contrary (ECF No. 88), this Court should grant Defendants' motion and stay proceedings because: (1) Plaintiffs overstate the burden to obtain a temporary stay of proceedings due to a pending dispositive motion; (2) the Motion to Alter or Amend is meritorious and potentially dispositive; and (3) Aliera and Trinity will suffer irreparable harm absent a stay, but Plaintiffs fail to show that they will suffer any prejudice if a stay issues. Thus, Aliera and Trinity have satisfied the requirements for a discretionary stay. The Court should further stay all proceedings pending appeal because such a stay is mandatory.

In further support of their motion, Defendants state the following.

I. ARGUMENT

A. The Court should stay proceedings pending resolution of the Motion to Alter or Amend.

1. Kelly and Boogher overstate the burden to obtain a temporary stay of proceedings due to a pending dispositive motion.

District courts have inherent power to stay portions of a lawsuit while a dispositive motion is pending. *See Blacktop, Inc. v. Edible Arrangements Int'l, LLC*, No. 4:14-cv-00005, 2014 WL 12695690, at *1 (W.D. Mo. Apr. 30, 2014) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Contracting Nw., Inc. v. City of Fredericksburg*, 713 F.2d 382, 387 (8th Cir. 1983)). Such a stay is appropriate when the plaintiff will suffer no discernable prejudice and the stay will preserve judicial resources and prevent duplicative or unnecessary discovery. *See Allen v. Agreliant Genetics, LLC*, No. 15-CV-3172-LTS, 2016 WL 5416418, at *3 (N.D. Iowa Sept. 26, 2016). When the stay is short, the potential prejudice is minimal, but the potential for duplicative motion practice

and discovery proceedings weighs heavily in favor of a stay. *Emerson v. Lincoln Elec. Holdings, Inc.*, No. 09-6004-CV-SJ-GAF, 2009 WL 690181, at *1 (W.D. Mo. Mar. 12, 2009).

Contrary to the above, Plaintiffs argue that a different, more burdensome standard should be imposed on the Court's inherent power to control its litigation schedule. To do that, Plaintiffs incorrectly rely on decisions concerning stays in different and inapplicable contexts, not stays of proceedings to allow a court to decide a dispositive motion. *See Nken v. Holder*, 556 U.S. 418 (2009) (stay pending appeal of a removal order); *Hilton v. Braunskill*¸ 481 U.S. 770 (1987) (stay of issuance of writ of habeas corpus); *Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011) (stay pending appeal); *Blackorby v. BNSF Rwy. Co.*, No. 4:13-cv-0908, 2018 WL 3370574 (W.D. Mo. July 10, 2018) (stay pending appeal granted with supersedeas bond); *Indep. Sch. Dist. No. 720 v. C.L. ex rel. B.L.*, No. 18-cv-0936, 2018 WL 2108205 (D. Minn. May 7, 2018) (stay enforcement of ALJ order pending appeal before district court); *Orbital ATK, Inc. v. Heckler & Koch GMBH*, No. 17-cv-0250, 2017 WL 10220900 (D. Minn. Oct. 6, 2017) (stay pending appeal).

The Court should decline to cabin its discretion to control the progress of this litigation by importing alien and overly burdensome tests for obtaining stays in different procedural postures. Instead, it should simply exercise its own discretion as to the best way for this case to proceed. And it should exercise that discretion in favor of halting other proceedings until the Court decides the pending dispositive Motion to Alter or Amend, something courts do regularly. *See*, *e.g., In re CenturyLink Sales Practices & Sec. Litig.*, MDL No. 17-2795, 2018 WL 2122869, at *2 (D. Minn. May 8, 2018) (granting motion to stay discovery pending decision on motion to compel arbitration); *see also, e.g.*, *Perkins v. Missouri*, No. 4:18-cv-0835, 2019 WL 332811, at *2 (W.D. Mo. Jan. 25, 2019) (granting a stay to prevent "the cost of proceeding with discovery on seemingly meritless claims"); *In re Pre-Filled Propane Tank Antitrust Litig.*, MDL No. 14-02567, 2015 WL

11022887, at *5 (W.D. Mo. Feb. 24, 2015) (granting stay where defendants would suffer hardship if forced to engage in discovery while court considered dispositive motion to dismiss); *Johnson Cty. Park & Recreation Dist. v. Lexington Ins. Co.*, No. 08-cv-0502, 2008 WL 11337949, at *4 (W.D. Mo. Sept. 3, 2008) (staying federal litigation pending dispositive ruling in state court).

2. The Motion to Alter or Amend is meritorious and potentially dispositive.

Kelly and Boogher contend the Court should deny Defendants' motion for a short stay while Defendants' Motion to Alter or Amend is pending because Defendants have not shown the Court will grant relief. (ECF No. 88 at 8–10.) As established above, however, Plaintiffs misstate the standard for this sort of stay. Likelihood of success is only one factor the Court may consider.

In any event, Aliera and Trinity are sufficiently likely to prevail on their motion to warrant a stay. As Defendants have explained, both Kelly and Boogher received their Member Guides before their membership became active—whether they reviewed them is irrelevant—and continued to assent to the program terms by making voluntary member contributions for months after having received the Member Guides (as well as seeking benefits under the program), affirming their intention that the Member Guides bind them on a monthly basis. (ECF No. 74 at 4–8; ECF No. 90, § A.) Further, the Member Guides contain mutual obligations. (ECF No. 74 at 8–10, ECF No. 90, § A.2.) This evidence is sufficient to raise a triable issue of fact as to whether Kelly and Boogher assented to the terms of the Member Guides. ECF No. 74 at 8–10, ECF No. 90, § C.) Thus, at minimum, the Court should hold a trial of this issue under 9 U.S.C. § 4.

Defendants' motion is potentially dispositive of the whole case. If they prevail on the motion and the Court orders arbitration, the entire case will go to arbitration. If the Court orders a § 4 trial and Defendants prevail at the trial, the entire case will go to arbitration. So, staying proceedings pending resolution of the Motion to Alter or Amend promotes judicial economy by minimizing proceedings in this Court until the Court determines whether litigation will continue

in this forum. *See PCH Mut. Ins. Co., Inc. v. Cas. & Sur., Inc.,* 569 F. Supp. 2d 67, 78 (D.D.C. 2008) ("[T]he Federal Arbitration Act requires … the court [to] resolve the threshold issue of whether the parties agreed to mandatory arbitration before the litigation of [a] matter can continue").

3. Defendants will suffer irreparable harm absent a stay, but Plaintiffs have not shown they will suffer any prejudice if a stay issues.

Kelly and Boogher wrongly contend in their briefing that the balance of harms favors a decision to decline a stay. Defendants will suffer irreparable harm absent a stay. The harm is more than just continued litigation; it is the loss of the benefit of the arbitration agreement—the speed and economic benefits of arbitration. *See Nordin v. Nutri/Sys., Inc.*, 897 F.2d 339, 342 (8th Cir. 1990); *Sample v. Brookdale Senior Living Communities, Inc.*, No. 11-cv-5844, 2012 WL 195175, at *2 (W.D. Wash. Jan. 23, 2012). Though Kelly and Boogher attempt to downplay the importance of those harms, they are particularly real given that Plaintiffs are currently using this forum to pursue class discovery when such discovery would be unavailable in arbitration because the agreement precludes class arbitration. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019); *In re CenturyLink* 2018 WL 2122869, at *2.

On the other hand, Kelly and Boogher claim they will purportedly suffer actual and substantial injury in the form of loss of health care coverage or delay of health care. But there is no evidence of this.[1] An unsupported "suggestion" in a brief that someone might be left without insurance coverage does not warrant depriving Aliera and Trinity of the benefit of the arbitration agreement. That is especially true given the small amount of delay warranted while the Motion to

[1] Indeed, this argument is counterintuitive. If the concern is that named plaintiffs Kelly and Boogher may lose health care coverage or have a delay in health care, resolution of that concern would certainly be faster in individual arbitration as opposed to the current attempt by Plaintiffs' counsel to certify a state-wide class.

Alter or Amend is pending and the mandatory nature of a stay pending an appeal (an appeal that has already been filed) of any denial of the motion to compel arbitration.

For these reasons, continuing proceedings while the Court considers the Motion to Alter or Amend will prejudice Defendants, and a stay of proceedings will avoid that prejudice. Thus, the balancing of harms weighs heavily in favor of the short-term stay that Defendants have requested.

B. The Court should stay all proceedings pending appeal.

1. The stay pending appeal is mandatory.

Kelly and Boogher concede, as they must, that a district court lacks jurisdiction over all aspects of a case that is involved in an appeal, and that the majority of courts to consider the issue have concluded that this rule requires district courts to stay proceedings pending an appeal from an order denying a motion to compel arbitration. (*See* ECF No. 88 at 11–13.) Plaintiffs urge the Court to instead accept the minority position, but offer no argument that should persuade the Court to reject the conclusion that a majority of courts, including this Court, have embraced. *See Ramsey v. H&R Block, Inc.*, No. 18-cv-0933, 2019 WL 5685686, at *2 (W.D. Mo. July 11, 2019) (noting that the Third, Fourth, Seventh, Tenth, and Eleventh Circuits all hold that the district court loses jurisdiction); *see also Morgan v. Ferrellgas, Inc.*, No. 4:19-cv-0910, 2020 WL 591510, at *1–2 (W.D. Mo. Feb. 6, 2020); *James Shackelford Heating & Cooling, LC*, No. 17-cv-0663, 2017 WL 6540039, at *1 (W.D. Mo. Dec. 21, 2017); (ECF No. 76 at 9 (citing additional cases)).

First, as a majority of courts have recognized, an arbitration appeal is insufficiently distinct from the question of whether the merits of the litigation may move forward in the district court to allow the district court to retain jurisdiction. As those courts have explained, litigating the underlying claims while there is an ongoing appeal from the denial of a motion to compel arbitration is improper because the question of whether the case may move forward in the district court is not collateral to the question the appeal presents. Allowing litigation to move forward in

the district court largely defeats the purpose of allowing an interlocutory appeal in the first place. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 263–65 (4th Cir. 2011); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 505–06 (7th Cir. 1997).

Second, the majority rule that only non-frivolous appeals divest the district court of jurisdiction mitigates the risk of frivolous motions to compel or appeals causing undue delay. *See Levin*, 634 F.3d at 265; *McCauley v. Halliburton Energy Servs.*, 413 F.3d 1158, 1162 (10th Cir. 2005); *Blinco*, 366 F.3d at 1252; *Bradford-Scott*, 128 F.3d at 506. "Under Rule 38, an appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit." *U.S. Water Servs., Inc. v. Chem Treat, Inc.*, 794 F.3d 966, 977 (8th Cir. 2015) (quoting *Misischia v. St. John's Mercy Health Sys.*, 457 F.3d 800, 806 (8th Cir. 2006)).

Here, Defendants' appeals are far from frivolous. To begin, even Plaintiffs stop short of calling them frivolous, being willing only to refer to the appeals as "hollow." (ECF No. 88 at 13.) And, further and tellingly, Plaintiffs also have not asked this Court to certify the appeals as frivolous. *See Levin*, 634 F.3d at 265; *McCauley*, 413 F.3d at 1162. Even if the Court ultimately does not embrace Defendants' arguments, those arguments have at least some merit andare not frivolous.

2. Aliera and Trinity also satisfy the requirements for a discretionary stay.

Although the Court should not adopt the minority rule that stays pending appeal are discretionary, jurisdictions that do apply the minority rule assess whether to grant stays under the traditional framework: (1) likelihood of success on appeal; (2) irreparable harm to the movant; (3) the stay causing substantial injury to the non-movant; and (4) the public interest. *See Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 423 (8th Cir. 2003). Kelly and Boogher do not

dispute that would be the test, but they are mistaken about the correct outcome of the test. Those factors instead favor a discretionary stay.

As to the first factor, Kelly and Boogher disparage Defendants' chances on appeal, arguing that Trinity and Aliera have not shown "why or how they will succeed." (ECF No. 88 at 13.) But Defendants do not bear the burden of showing that they *will* succeed, only that there is a substantial chance—perhaps better put, more than an insubstantial chance—they may prevail on appeal. *See Leiva-Perez v. Holder*, 640 F.3d 962, 967–68 (9th Cir. 2011); *Iowa Utils.*, 109 F.3d at 423; *cf. Planned Parenthood Minn., N.D. S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008); *Packard Elev. v. Interstate Commerce Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986). For the reasons stated in their motion to stay, their briefing on the motion to alter or amend, and in their briefing on the motions to compel, Aliera and Trinity have a more than insubstantial chance—a fair chance, reasonable probability, a fair prospect—of prevailing in their appeals.

Kelly and Boogher further argue that Defendants' chances of prevailing are insubstantial because the Eighth Circuit could affirm on the basis that Missouri law bars enforcement of arbitration agreement in insurance contracts and, under the McCarran-Ferguson Act, that Missouri statute would reverse preempt the Federal Arbitration Act. (ECF No. 88 at 14–16.) Putting aside Plaintiffs' unsupported conclusory statement that they "have more than adequately demonstrated that Defendants' health plans are insurance," (*id.* at 14), their argument makes at least two additional unfounded assumptions.

One, it assumes the Eighth Circuit would be willing to affirm on an alternative basis. Although that court certainly has the power to affirm on an alternative basis, it is under no obligation to do so. *See Shelby Cty. Health Care Corp. v. S. Farm Bureau Cas. Ins. Co.*, 798 F.3d 686, 690 (8th Cir. 2015) (citing *Loftness Specialized Farm Equip., Inc. v. Twiestmeyer*, 742 F.3d

845, 851 (8th Cir. 2014); *Murphy v. Aurora Loan Servs., LLC*, 699 F.3d 1027, 1033–34 (8th Cir. 2012)). Thus, the Eighth Circuit may decline even to reach Kelly and Boogher's alternative argument for affirmance (especially considering the lack of any evidence supporting Plaintiffs' legal theory).

Two, it assumes the Eighth Circuit would agree that the issue of whether the arbitration agreement is enforceable is a question for the courts instead of for the arbitrator. But courts disagree on that question. Indeed, whileKelly and Boogher point to a Fourth Circuit decision applying Virginia law to argue the decision is one for the courts, there are contrary decisions, including one relating **to the same arbitration provision at issue in this case**. *See, e.g.*, *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assur. Co.*, 840 F.3d 138, 146 (3d Cir. 2016); *Milan Express Co. v. Applied Underwriters Captive Risk Assur. Co.*, 590 F. App'x 482, 486 (6th Cir. 2014); *Jackson v. Aliera Co.*, No. 19-cv-1281, 2020 WL 4787990, at *3–4 (W.D. Wash. Aug. 18, 2020) (holding that it was for the arbitrator to decide a challenge to the enforceability of an arbitration clause based on Washington's law prohibiting binding arbitration agreements in insurance contracts); *see also Jackson v. Aliera Co.*, No. 19-cv-1281, 2020 WL 5909959, at *7 (W.D. Wash. Oct. 6, 2020). And as explained in briefing on the motions to compel, the issue is one for the arbitrator, not the courts. (*See* ECF No. 58 at 17–21.) Thus, there is a substantial likelihood the Eighth Circuit would conclude that Boogher and Kelly's alternative argument for affirmance is a question the parties delegated to the arbitrator.

As to the second factor, Kelly and Boogher incorrectly contend that Defendants will suffer no irreparable harm. That argument is based on the false premise that "further litigation" is the sole nature of the harm Aliera and Trinity will suffer. As discussed above, the harm here is the loss of the benefit of the arbitration agreement—the speed and economic benefits of arbitration. *See*

Nordin, 897 F.2d at 342; *Sample*, No. 11-cv-5844, 2012 WL 195175, at *2 (W.D. Wash. Jan. 23, 2012). This is particularly true given that Plaintiffs are currently attempting to take advantage of this forum to obtainclass discovery, knowing that class arbitration is unavailable under the dispute resolution provisions that Kelly and Boogher agreed to. *See Lamps Plus*, 139 S. Ct. at 1417; *In re CenturyLink* 2018 WL 2122869, at *2.

As to the third factor, and as discussed above, Kelly and Boogher have failed to show they will be substantially harmed by a stay. Their only argument seems to be that a stay pending appeal will cause them to lose healthcare coverage, but they have never shown any admissible evidence of this.[2] A mere suggestion that it is *possible* that one of the named plaintiffs or members of class might be left without insurance coverage (especially considering Plaintiffs sought out and voluntarily joined the sharing program and could have terminated at any time but chose not to) is not enough to warrant the tangible irreparable harm that Aliera and Trinity would suffer from the lack of a stay.

Fourth, stays pending non-frivolous appeal of denials of motions to compel arbitration are in the public interest. There is a strong federal policy favoring arbitration, *see Houlihan v. Offerman & Co.*, 31 F.3d 692, 695 (8th Cir. 1994), and a strong corollary policy encouraging the preservation of judicial resources, *see Union Elec. Co. v. Aegis Energy Syndicate 1225*, No. 4:12-cv-877, 2012 WL 4936572, at *2 (E.D. Mo. Oct. 17, 2012). Although Kelly and Boogher argue that the public interest in protecting consumers outweighs the strong federal policy favoring arbitration, they cite no authority supporting that position. Moreover, Plaintiffs' argument of a public interest in protecting plaintiffs in insurance contracts is based on the faulty, unproven and disputed assumption that the healthcare sharing products are insurance.

[2] *See* footnote 1, *supra*.

Thus, even if the Court were to conclude that a stay pending appeal is not mandatory due to a transfer of jurisdiction to the Eighth Circuit, it should nonetheless conclude that a discretionary stay is proper.

II. CONCLUSION

To promote efficiency and judicial economy, Aliera and Trinity request that the Court stay all proceedings in this action, including discovery, until after it issues its rulings on the Motion to Alter or Amend and, if necessary, until resolution of their appeals to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted on January 22, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I electronically filed the foregoing document with the Court's CM/ECF system, which will cause a true and correct copy of the same to served electronically on all registered counsel of record.

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