**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**
**MILWAUKEE DIVISION**

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MARGARET HARRIS

Plaintiff,

vs.

File No.: 2:20-cv-00492

ALIERA HEALTHCARE, INC. n/k/a
THE ALIERA COMPANIES, INC.

Defendant.

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**PLAINTIFF'S BRIEF IN OPPOSITION OF MOTION TO DISMISS OR IN THE ALTERNATIVE TO COMPEL ARBITRATION**

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**NOW COMES** the Plaintiff, MARGARET HARRIS, by and through her attorneys, Guttormsen, Terry & Nudo, LLC, by Anthony Nudo, as and for her Brief in Opposition to the Defendant's Motion to Dismiss or in the Alternative to Compel Arbitration.

## INTRODUCTION

This action stems from the Defendant willfully, intentionally, and illegally ignoring state law as it relates to the providing of health insurance to Plaintiff. Specifically, the Defendant, a licensed insurer with the Wisconsin Office of the Commissioner of Insurance under license number 3000154007, unlawfully terminated the Plaintiff's insurance policy contrary to Wis. Stat. § 600.03(27).

The Plaintiff claims four causes of action under the Complaint: (1) declaratory judgment of enforceability of the contract pursuant to Wis. Stat. § 806.04; (2) common law breach of contract; (3) common law bad faith by an insurance company; and (4) statutory punitive damages

pursuant to Wis. Stat. § 895.043.

The Defendant asks the Court to dismiss the Plaintiff's Complaint pursuant to Rule 12(b)(3) because the parties must arbitrate the causes of action under the insurance contract; or, in the alternative, to stay this action under 9 U.S. Code § 3. The Defendant does not, however, request the Court to exercise its discretion to stay the proceedings until the Wisconsin Office of the Commissioner of Insurance, who has joined its cohorts, under OCI Complaint File #361590, of Texas, (https://www.tdi.texas.gov/news/2019/tdi05172019.html), Colorado (https://www.colorado.gov/pacific/dora/news/consumer-advisory-cease-and-desist-orders-trinity-healthshare-and-aliera-healthcare), Washington (https://www.insurance.wa.gov/news/kreidler-seeks-1-1-million-sham-health-care-sharing-ministry-ripping-consumers), and New Hampshire (https://www.nh.gov/insurance/documents/press-relase-aliera-cease-desist-10-30-19.pdf), in the investigation into the alleged illegal practices of the Defendant.

For the reasons hereinafter set forth, the Court should reject the Defendant's motion in its entirety.

## DISCUSSION

Whether venue is proper or improper is generally governed by 28 U.S.C. §1391. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 578 (2013). When venue is challenged, the court must determine whether the case falls within one of the three categories set forth in § 1391(b) or within some other specific venue grant. If the case is filed in an authorized venue, then venue is not wrong for purposes of Rule 12(b)(3). A motion for improper venue must be construed with all facts and drawing reasonable inferences in favor of the plaintiff. *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 806 (7th Cir. 2011). In considering a motion to dismiss, the court must accept as true all well-pleaded facts and must draw

all reasonable inferences from those allegations in plaintiff's favor. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); Swofford v. Mandrell, 969 F.2d 547, 549 (7th Cir.1992).

## I. The dispute at issue is not arbitrable.

### A. This Court is the proper authority to decide the threshold issue of Arbitrability.

The threshold issue of arbitrability must be decided by this Court. The Supreme Court has repeatedly ruled that parties to an arbitration clause may only delegate this threshold issue (to the arbitrator) by "clear and unmistakable evidence". *Henry Schein v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 528 (2019). Where the arbitration agreement does not explicitly delegate the power to determine arbitrability to the arbitrator, the court is vested with such power. *Id.* at 529.

The lack of explicit language delegating the decision on arbitrability to the arbitrator allows this court to decide that very issue. There can be no argument that an arbitrator should decide the issues raised here because the dispute resolution portions of the contracts make **no reference** to the arbitrator deciding the arbitrabililty issues. Without the "clear and unmistakable evidence" required by a litany of Supreme Court decisions, the issue is decided by this Court.

### B. Margaret Harris's claims are not subject to the arbitration clause of the Member Agreement.

A general arbitration clause will not include claims that were never contemplated by the language of the contract. *American United Logistics, Inc. v. Catellus Dev. Corp.*, 319 F.3d. 921, 929 (7th Cir. 2003). "A party cannot be forced to submit an issue to arbitration where that party never agreed to so submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347 (1960). Determining what parties have agreed to arbitrate is governed by state law principles regarding contract formation. *First Options of Chicago, Inc. v Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920 (1995); *Reliance Ins. Co. v. Raybestos Prods. Co.*, 382 F.3d 676,

678-79 (7th Cir. 2004). Wisconsin courts interpret contracts in order to determine and give effect to the intentions of the parties, presuming that those intentions are expressed in the language of the contract. *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 342 Wis.2d 29, 47-48, 816 N.W. 2d 853 (2012). The parties' intent is derived from the unambiguous contract language, not from how one party may interpret it. *Campion v. Montgomery Elevator Co*., 172 Wis.2d 405, 416, 493 N.W. 2d 244 (Ct. App. 1992). A contract is formed upon a mutual meeting of the minds as to terms, manifested by the expressed intent of the parties. *Household Utils., Inc. v. Andrews Co. Inc.*, 71 Wis. 2d 17, 28-29, 236 N.W.2d 663 (1976); *Bong v. Cerny*, 158 Wis. 2d 474, 481, 463 N.W.2d 359 (Ct. App. 1990). Where the terms of a contract are ambiguous, courts construe the ambiguous language in a contract against the drafter. *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, ¶21, 577 N.W.2d 617 (1998); *see also Dieter v. Chrysler Corp.*, 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2d 832; *Converting/Biophile Labs., Inc. v. Ludlow Composities Corp.*, 2006 WI App 187, ¶23, 296 Wis. 2d 273, 722 N.W. 2d 633. Additionally, "unambiguous contract language controls contract interpretation." *Kernz v. J.L. French Corp.*, 266 Wis.2d 124, 133-34, 667 N.W.2d 751 (Ct. App. 2003). Finally, where contract language is contradictory, the language raises a question of fact which a court cannot properly determine at on a motion to dismiss. *UIRC-GSA Holdings Inc., v. William Blair & Company, LLC*, 264 F.Supp. 3d 897, 906 (N.D. Ill 2017).

The Defendant claims that the "contract" between it and the Plaintiff is manifested in two documents: the "Unity Membership Guide" (Doc. 4-2) and the "Trinity Membership Guide" (Doc. 4-3). (Kromodimedgo Aff. ¶¶ 4, 8). The Unity Membership Guide requires arbitration under the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries held in Fredericksburg, Virginia, subject to the laws of the Commonwealth of Virginia. (*Id*. at ¶ 14). The Trinity Membership Guide requires arbitration

under the Rules and Procedures of the American Arbitration Association in Atlanta, Georgia, subject to the laws of the State of Georgia. (*Id*. at ¶ 16). These two provisions are in direct conflict and are ambiguous to state the least.

Here, the dispute at issue is not subject to arbitration. To begin with, despite the requirement that the plain language of the contract must make clear what is subject to arbitration – the contract does no such thing. Rather, the membership guides solely reference disputes related to medical care, treatment, or coverage. The membership guides provide for four (4) levels of appeal before a grievant can pursue arbitration. It is clear from the membership guides that the dispute resolution solely involves disputes related to medical treatment, care, or coverage – especially in light of its statement that "[s]uch a sharing and caring association does not lend itself well to the mentality of **legally enforceable rights**." (Doc. 4-3, p. 36; Doc. 4-2 p. 18) (emphasis added). It's apparent that any "sharing member" must enforce her legal rights in the court of law and not the outlined dispute resolution process.

The membership guides reference determinations that a "member disagrees" with and the same begins the dispute resolution process. (Doc. 4-3, p. 36-37; Doc. 4-2 p. 18). The second level of appeal provided for an Internal Resolution Committee made up of three Trinity Healthshare officials or Unity Healthshare officials. *Id*. At that second level appeal, the aggrieved must identify which provision of the guidelines were applied incorrectly. *Id.* Thereafter the aggrieved has the ability to submit **additional medical documentation to make an accurate decision.** (emphasis added). *Id.* The third and fourth levels of appeal additionally include "additional medical documentation to make an accurate decision". *Id.*

The plain and unambiguous language of the dispute resolution and appeal provisions make clear that the appeal process deals with a determination of medical treatment. The membership

guides reference "medical documentation" in three of the four appeal steps. Nowhere do the membership guides reference any dispute about the application of relevant law to the policy or subscription or whatever the Defendant is calling the scheme on any given day. The language of this purported contract is clear that a dispute on the necessity of medical treatment or cost of medical treatment **may** be subject to arbitration, but the very subject of this litigation – the statutory requirements for non-renewal – are in no way contemplated by this limited language. Margaret Harris could not have knowingly submitted the claims she asserts in her lawsuit to the arbitration clause in the document at issue.

The above contradictory contract provisions, as submitted by the Defendant in support of its motion, only seek to confirm that there could never been a meeting of the minds. The Trinity Membership Guide, providing for arbitration after exhausting the first four levels of appeal where an appellant can submit "additional medical documentation" after almost all appeals, requires arbitration before the American Arbitration Association. (Doc. 4-3, p. 37). That arbitration for "claims arising out the Sharing Guidelines" is to be held in Atlanta, Georgia and be subject to the laws of the State of Georgia. *Id.* Amazingly, those provisions differ substantially from the provisions of the Unity Membership Guide that apply the "widely accepted" Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation, a division of Peacemaker Ministries. (Doc. 4-2, p. 18). Evidently that arbitration is to be held in Fredericksburg, Virginia and subject to the laws of the Commonwealth of Virginia. (*Id.*). The contradiction is breathtaking, and to assert that Margaret Harris agreed to arbitrate her breach of Wisconsin Statute in Georgia or Virginia or pursuant to the Christian Conciliation rules is laughable.

Margaret Harris seeks to hold this insurance company responsible for its chicanery under Wisconsin law. This is not a medical treatment determination that, arguably and laughably may

be subject to the arbitration clause at issue. Rather, Margaret Harris, much like several other states have begun doing, seeks to hold this insurance company responsible for what it is.

## II. An arbitrator cannot fully apply state statute to the causes of action; therefore, the matter must be held in this Court.

An arbitration agreement that purports to forfeit an essential statutory right makes the arbitration agreement unenforceable. *McCaskill v. SCI Mgmt. Corp*., 298 F.3d 677, 684–85 (7th Cir. 2002). In *McCaskill*, the defendant attempted to force the plaintiff to arbitrate a Title VII matter under an arbitration clause in a contract. However, the arbitration clause did not provide for the recovery of attorney's fees should the plaintiff prevail on her claim. The Seventh Circuit Court held that the recovery of attorney's fees were integral to the Title VII statutory claim and further held the arbitration agreement unenforceable because statutory remedies were denied in arbitration.

In the instant matter, the Plaintiff alleged causes of action under Wis. Stat. §§ 806.04 (Declaratory Judgment) and 895.043 (Punitive Damages). Wisconsin's Declaratory Judgment statute permits a trial by jury and recovery of costs by the Plaintiff. Wisconsin's Punitive Damages statute permits the Plaintiff to recover exemplary fees if a standard of conduct is proved. The Defendant's arbitration clause does not permit a trial by a jury of the Plaintiff's peers nor does it permit an award for exemplary damages. (Kromodimedgo Aff. ¶¶ 14, 16). In fact, each arbitration clause, although contradictory on many terms, are consistent that the Plaintiff must reimburse the Defendant's costs should the Plaintiff's claims fail. (*Id*.). The same flies in the face of the Plaintiff's causes of action under Wisconsin statutes. The appropriate forum for this controversy is in this Court under the holding of *McCaskill*. Therefore, the Defendant's motion must be denied.

## CONCLUSION

For the reasons set forth above, venue is for this matter is proper and this Court should reject the Defendant's motion.

Dated: April 23, 2020.

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