IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NOELLE LeCANN, KRISTIN SELIMO, and TANIA FUNDUK, on behalf of themselves and others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO. 1:20-CV-02429-AT**
vs.	)	
THE ALIERA COMPANIES, INC., formerly known as ALIERA HEALTHCARE, INC.,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS, OR ALTERNATIVELY, TO COMPEL ARBITRATION

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I. INTRODUCTION

This is an unusual case. Plaintiffs allege that they joined two separate healthcare sharing ministries ("HCSMs"), Unity Healthshare ("Unity") and Trinity Healthshare ("Trinity"). They sent sharing contributions to both HCSMs and sought sharing payments from them. Aliera, they claim, was involved in marketing, selling, and administering both HCSMs.

Plaintiffs launch a broad-scale attack on both Unity and Trinity's HCSMs. (*See* Doc. 1 at ¶¶ 77-83, 99, 164, 209, 240.) They assert that neither qualifies as a valid HCSM because neither complied with federal or Georgia law governing such programs. (*Id*. at ¶ 33.) As a result, applying some form of default rule, Plaintiffs allege that this qualification failure makes these two HCSMs illegal health insurance plans. (*Id*. at ¶ 33-34.)[1] They ask this Court to enjoin Aliera "and all others acting with it [presumably Unity and Trinity] from marketing, selling, and continuing to

[1] Both Trinity and Unity (n/k/a OneShare Health, Inc.) have consistently maintained in other proceedings that their programs are not insurance and that they are instead valid HCSMs. (*See e.g. George T. Kelly, III v. The Aliera Companies Inc., et al.*, No. 3:20-cv-05038 (W.D. Mo.), Doc. 40-1). The Court may take judicial notice of pleadings filed in these other proceedings. *See* Fed. R. Evid. 201; *Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 651 (11th Cir. 2020) ("Federal Rule of Evidence 201 permits a court to 'judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" (quoting Fed. R. Evid. 201(b)(2)); *Middlebrooks v. Experian Info. Sols., Inc.*, No. 1:18-cv-2720-SCJ, 2020 WL 1809566, at *5 (N.D. Ga. Mar. 3, 2020).

charge Plaintiffs and the Class for the pseudo-HCSM plans." (Doc. 1, Prayer for Relief.) Yet, they have chosen not to sue either entity that operated the healthcare sharing ministries they joined – Unity and Trinity.

Perhaps Plaintiffs believe their path to success will be easier if neither Unity nor Trinity appear in this case to defend the legal status of their HCSMs. But, more likely, the most reasonable explanation for this curious course of conduct is that Plaintiffs hope to avoid the alternative dispute resolution procedures contained in the Member Guides they received when they joined the Unity and Trinity HCSMs. But this strategy won't work because they expressly agreed to mediate and arbitrate all their "disputes" with Aliera as well. And, even if such an express agreement did not exist, Aliera could still invoke the mediation and arbitration procedures under well-settled principles of Georgia law.

The bottom line is that this case does not belong here. If Plaintiffs were serious about their claims against Aliera, they should have followed the alternative dispute resolution procedures they agreed to when they became Unity or Trinity members (mediation and then, if necessary, arbitration). Because they failed to do so, this case should either be dismissed outright or stayed while arbitration proceeds.

II. FACTUAL & PROCEDURAL BACKGROUND

A. The Nature of Unity and Trinity's HCSM and Aliera's Role In Administering Them.

Unity and Trinity are non-profit healthcare sharing ministries ("HCSM") comprised of members who adhere to a faith-based statement of beliefs. (Mot., Ex. A, Ex. 1, p. 2; Ex. 5, p. 20.) Historically, HCSMs are not considered insurance, and instead function as faith-based alternatives to traditional insurance. They offer a framework for individuals to freely associate with others who share a set of faith principles and to direct their contributions to a pool, in which members may share in the payment of other members' medical expenses. (*Id.*; *see also* Doc. 1 at ¶ 54.) In a certain sense, the HCSM structure is a formalized, special-purpose version of "passing the plate," which many churches have long endorsed as a way to help others with medical needs.

The HCSM structure differs from traditional insurance in several respects. The chief difference, as both Unity and Trinity explained to their members in the Member Guides, is that neither Unity nor Trinity ever assumes any contractual obligation (and takes no responsibility) to pay for any member's medical expenses from its own funds. (Mot., Ex. A at ¶¶ 8, 9, 13, 14, 19, 20, 26, 27.)[2] Nor is there

[2] *See Altura Healthshare, Inc. v. Deal*, 299 P.3d 197, 201 (Idaho 2013); *Barberton Rescue Missions, Inc. v. Ins. Div. of the Iowa Dep't of Commerce*, 586 N.W. 2d 352, 356 (Iowa 1998) (both cases holding that "insurance" was not involved because the entity involved assumed no risk of paying members' claims).

any guarantee that any specific member's requests for sharing will be paid out of other members' healthsharing contributions. (*Id.*) Trinity and Unity, in essence, act merely as clearinghouses for their members to share each other's medical expenses. (*Id.*)

Aliera is not an HCSM and does not purport to be one. (Mot., Ex. A at ¶ 4.) It is a for-profit entity that contracted with Unity and then Trinity (through its subsidiaries) to market memberships in their HCSMs and to create processes to facilitate member-to-member sharing of medical expenses. (*Id.* at ¶¶ 4-5; Doc. 1 at ¶¶ 61, 73.) Aliera has created a system that is designed to afford members the ability to consent to their contributions being shared on a real-time, case-by-case basis with other members as their needs arise. But, as previously noted, all members are informed that their requests for sharing payments may not be met – there are no guarantees.

B. Plaintiffs' Experiences With The Unity and Trinity HCSMs.

Each of the Plaintiffs originally enrolled in Unity's HCSM in 2018. (Mot., Ex. A at ¶¶ 6, 17, 24.) Each received the Unity Member Guides, and each made sharing contributions to Aliera for the benefit of Unity's HCSM. (*Id.* at ¶¶ 7, 18, 25.)

Each Plaintiff eventually ended their memberships with Unity and enrolled in Trinity's HCSM in 2019. Each made monthly sharing contributions to Aliera for the benefit of Trinity's HCSM, and each received Trinity Member Guides. (Doc 1 at

¶¶ 12, 23, 25.) While a member of either Unity or Trinity's HCSMs, each Plaintiff submitted sharing requests to cover medical expenses, and each claims those requests were denied. Each disputes those denials. (Doc. 1 at ¶¶ 8-31.) None of the Plaintiffs are current members of either Unity or Trinity's HCSMs. (Mot., Ex. A at ¶¶ 20, 23, 24.)

C. The Unity And Trinity Healthcare Membership Guides.

As previously mentioned, Plaintiffs allege that they were at one time Unity or Trinity members. As members, Plaintiffs concede that they received Member Guides for plans offered by Unity and Trinity and sold by Aliera. (Doc. 1 at ¶¶ 93, 106.)[3] These Membership Guides imposed several obligations on the members' part, the most pertinent of which at this juncture is complying with the dispute resolution procedures found in those Guides. (Mot., Ex. A at ¶¶ 10, 15, 21, 28, 31.) Trinity Members, for example, agreed that "**any dispute** [they] have with or against Trinity Healthshare, **its associates**, or employees will be settled using the following steps of action, and only as a course of last resort." (*Id.*) (emphasis added); *see also* Doc. 1 at ¶ 107 -- recognizing existence of Member Guide's mediation and arbitration requirements.) These include, in basic terms:

- 1st Level Appeal (telephone call with Trinity representative)

[3] Plaintiffs refer to these Member Guides (either directly or indirectly) throughout the Complaint. (*See* Doc. 1 at ¶¶ 35, 80, 85, 93, 106-113, 224.)

- 2nd Level Appeal (review by Internal Resolution Committee)
- 3rd Level Appeal (review by three sharing members in good standing)
- Final Appeal (review by medical expense auditor and other personnel)
- Mediation
- Arbitration

(*See* Mot., Ex. A, Exs. 4, 5, 7, 11 & 12 for a full explanation of the specific requirements for each step in this dispute resolution process.)[4] None of the Plaintiffs allege that they followed each of these steps in the dispute resolution process. In fact, they did not. (*See* Mot., Ex. A at ¶¶ 11, 16, 22, 29, 34.)

III. ARGUMENT

A. This Case Should Be Dismissed Without Prejudice Because Plaintiffs Failed To Abide By Their Obligations To Mediate Their Disputes.

Plaintiffs never attempted to mediate their disputes with Aliera. Their Complaint fails to allege otherwise. This means that Plaintiffs' claims are due to be dismissed without prejudice for failure to comply with a condition precedent contained in their Unity and Trinity Member Guides.

It is a nearly universal rule that failure to mediate a dispute pursuant to an antecedent agreement to mediate warrants dismissal of litigation. *See World of Beer*

[4] The Unity Member Guides contained virtually identical dispute resolution procedures. (*See, e.g.*, Mot., Ex. A at ¶¶ 10, 21 & 28.)

Franchising, Inc. v. MWB Dev. I, LLC, 711 F. App'x 561, 570 (11th Cir. 2017) (affirming denial of preliminary injunction where movant failed to first submit claims to mediation); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979) (affirming district court's dismissal of complaint where medical malpractice plaintiff failed to participate in mediation before filing complaint)*; Houseboat Store, LLC v. Chris-Craft Corp.*, 692 S.E.2d 61, 65 (Ga. Ct. App. 2010) ("[T]he mediation provision is a condition precedent to either party's right to file a lawsuit arising out of the disputes between them."). Stated otherwise, courts will strictly adhere to the parties' agreed dispute resolution procedures, including when mediation is set forth as a condition precedent. *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002).[5]

Plaintiffs cannot reasonably allege that the mediation procedures set forth in the Member Guides have no possibility to resolve their claims. Certainly the

[5] Courts throughout the country have enforced similar pre-suit dispute resolution procedures requiring mediation. *See, e.g., Primov v. Serco, Inc.*, 817 S.E.2d 811, 817 (Va. 2018) (dismissing a case where plaintiff failed to comply with provision in a contract requiring mediation to occur before either party could proceed to court); *see also DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987) (dealer's failure to follow contractual obligation to mediate before filing suit justified dismissal of his case); *Carter v. Firestone*, No. 4:05 cv-2042 ERW, 2006 WL 1153808, at *4 (E.D. Mo. 2006) (dismissal for failure to first mediate), *aff'd*, 242 F. App'x 375 (8th Cir. 2007); *MB Am., Inc. v. Alaska Pac. Leasing*, 367 P.3d 1286, 1288-91 (Nev. 2016) (prelitigation mediation provision in the parties' contract constituted an enforceable condition precedent to litigation and justified dismissal of the complaint.

Plaintiffs' assertions that they were improperly denied payment for their sharing contribution requests are grist for the dispute resolution mill – there is a multi-step process (including mediation) designed to resolve precisely those claims. The alternative claims can also be resolved through a consensual arrangement forged in mediation. Thus, Plaintiffs' claims should be dismissed without prejudice at the outset because they failed to abide by the mediation requirement.

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

This Court is not an appropriate forum for the Plaintiffs to maintain their claims for another fundamental reason. Their agreements with Unity and Trinity contain a binding arbitration clauses. So, if the Court does not dismiss the Complaint due to the Plaintiffs' failure to mediate, it should compel Plaintiffs to submit all their claims to arbitration. The arbitrator can then decide whether the Plaintiffs' claims can proceed before a mediation occurs. *See BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 35 (2014) (arbitrators usually decide whether pre-arbitration procedural requirements have been followed).

Some background is needed to understand why arbitration should be compelled here. For centuries, there was a widespread judicial (and legislative) antipathy to arbitration agreements. *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). A number of centuries ago, the English courts, because of their "jealousy … for their own jurisdiction, refused to enforce specific agreements

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

When Congress passed the Federal Arbitration Act ("FAA") in 1925, "it was 'motivated, first and foremost, by a desire' to change this anti-arbitration rule," *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995) (quoting *Byrd*, 470 U.S. at 220), and "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Byrd*, 470 U.S. at 219-20. Congress therefore enacted the FAA in order to place arbitration agreements '"upon the same footing as other contracts, where [they] belong[].'" *Id.* at 219 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

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

of another to arbitrate under a written agreement for arbitration." 9 U.S.C. § 4 (emphasis added). The Act also provides that a court "shall" stay its proceedings if it is satisfied that an issue before it is arbitrable under the parties' agreement "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). To abide by these Congressional mandates, courts must "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Byrd*, 470 U.S. at 221).

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

There are some limits to enforcement of an arbitration agreement. Section 2 of the FAA states that such an agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. But this "saving clause" does not allow for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T*

Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011). A state law or rule forbidding or limiting arbitration can find no help from the "saving clause" of section 2 of the FAA if it "prohibits outright the arbitration of a particular type of claim." *Id.* at 341. Nor does a state law or rule find refuge in the "saving clause" if it would "interfere[ ] with fundamental attributes of arbitration." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (citing *Concepcion*, 563 U.S. at 344).

Under the FAA, an arbitration agreement must be enforced where: (1) there is a written agreement to arbitrate claims, (2) the transaction has a nexus to interstate commerce, and (3) the arbitration clause encompasses the claims. 9 U.S.C. § 2. Once again, each of these inquiries must be undertaken against the background of a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp,* 460 U.S. at 24; *see also Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532-33 (2012). Given the strong federal policy favoring arbitration, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

1. The Agreements to Arbitrate Are Valid and in Writing.

State contract law controls the question of whether a valid agreement to arbitrate has been formed. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under Georgia law, a written agreement to submit an existing controversy or a controversy arising thereafter to arbitration is valid and enforceable.

Galindo v. Lanier Worldwide, 526 S.E.2d 141, 145-46 (Ga. Ct. App. 1999). And, taking it one step further, under Georgia law, any doubts about whether an agreement to arbitrate applies to a particular dispute are to be resolved in favor of sending the parties to arbitration. *SunTrust Bank v. Lilliston*, 809 S.E.2d 819, 821 (Ga. 2018).

Both the Unity and Trinity Membership Guides state, in writing, that "**any dispute**" that each Plaintiff may have with Unity or Trinity **"or its associates"** shall be submitted to arbitration conducted in accordance with certain arbitration association rules. (*See* Mot., Ex. A at ¶¶ 10, 15, 21, 28, 33.) When they joined their respective HCSMs, Plaintiffs affirmed that any expenses they submitted for sharing would be subject to the Unity or Trinity sharing guidelines contained in the Membership Guides. (*See, e.g.*, Mot, Ex. A, Ex. 4, p. 5; Ex. 5, p. 3.) Plaintiffs further manifested their assent to the terms governing membership in the Unity and Trinity HCSMs by sending monthly membership contributions to Aliera for the benefit of Unity first, and then Trinity. (Mot., Ex. A at ¶¶ 7, 12, 18, 23, 25.) Both Membership Guides, therefore, contain a valid, written agreement by Plaintiffs to arbitrate "any dispute" between them, and either Unity or Trinity **"or its associates**."

2. Interstate Commerce Is Present.

Section 2 of the FAA requires that the parties' transaction involved "commerce." 9 U.S.C. § 2. The term "involving commerce" has been interpreted as the functional equivalent of the more familiar term "affecting commerce" and

"encompasses a wider range of transactions than those actually 'in commerce' – that is, 'within the flow of interstate commerce.'" *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Allied-Bruce Terminix*, 513 U.S. at 273)). What that means is that "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal court.'" *Citizens Bank*, 539 U.S. at 56-57 (citing *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). The FAA extends to the full reach of the Commerce Clause. *See Allied-Bruce Terminix*, 513 U.S. at 270; *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

The "commerce" requirement is easily met here. Plaintiffs LeCann and Selimo live in New York and New Jersey, respectively. (Doc. 1 at ¶¶ 8, 18.) They sent monthly sharing payments from their home states to Aliera in Georgia for the benefit of the Unity and Trinity HCSMs. (*Id*. at ¶¶ 10, 13, 20, 22; Mot., Ex. A at ¶¶ 35-36.) And, while Plaintiff Funduk is a Georgia resident, her sharing contributions were part of a larger group of contributions made by other members in the Unity and Trinity HCSMs. (Mot., Ex. A at ¶¶ 35-36.) On behalf of Unity and Trinity, Aliera received sharing contributions from members across the country, interacted with members and their local medical care providers, and processed payments to providers from the members' contributions throughout the country. (*Id*.)

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

The arbitration agreement here unquestionably encompasses each claim in this case. When determining the scope of an arbitration provision, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt Info.*, 489 U.S. at 476. The presumption of arbitrability, created by the mere existence of an arbitration clause, may be rebutted only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (citation omitted). Where, as here, the arbitration clause is a broad one (covering "all disputes"), the presumption in favor of arbitrability applies with even greater force. *Id.*

The present dispute between Plaintiffs and Aliera is clearly within the scope of the Unity and Trinity Membership Guides' broad arbitration provisions. Both of the Membership Guides refer to arbitration of "**any dispute.**" (Mot., Ex. A at ¶¶ 10, 15, 21, 28 & 33.) The "disputes" contemplated by the Unity and Trinity Membership Guides specifically include, by example, any "determination" made by Unity, Trinity, or their "associates" with which Plaintiffs disagree. (*Id.*) The Plaintiffs allege that Unity, Trinity, and Aliera improperly refused to pay their medical expenses. (*See generally* Doc. 1.) A determination as to covered medical expenses

is exactly the sort of dispute contemplated in the alternative dispute resolution procedures contained in the Membership Guides. Plaintiffs' disputes should be arbitrated in accordance with the express written agreement of the parties.

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

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

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

even though one of the parties alleged that the contract containing the arbitration provision was illegal under California law); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-82 (11th Cir. 2005); *John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1095 (11th Cir. 2003); *Schklar v. Evans*, No. 1:15-cv-2265-AT, 2015 WL 9913859, at *3-4 (N.D. Ga. Dec. 29, 2015).

Second, the parties in this case have delegated all issues as to the validity or enforceability of the arbitration agreement to the arbitrator. They accomplished this in the Unity Member Guide by incorporating the rules of the Institute for Christian Conciliation, and in the Trinity Member Guide by incorporating the rules of the American Arbitration Association. (Mot., Ex. A at ¶¶ 10, 15, 21, 28 & 33.) Under each set of arbitration rules (ICC Rule 34(B); AAA Commercial Rule 7(a); AAA Consumer Rule 14(a), the arbitrator is given the power to rule on his or her own jurisdiction, including any challenges to the existence, scope, or validity of the arbitration agreement. (*See adr.org/commercial; adr.org/consumer; https://peacemaker.training/guidelinesforchristianconciliation/.*)

Both the Supreme Court and the Eleventh Circuit have concluded that these types of clauses delegating all gateway issues to the arbitrator, whether expressly stated in the agreement or incorporated by reference in arbitral body rules, are enforceable and provide clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72-73

(2010); *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005).[6] Most courts, moreover, have concluded that these "rule-incorporation" delegations of arbitrability also assign to the arbitrator the question of whether a non-signatory can invoke an arbitration provision in a suit brought by a signatory. *See Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020) (collecting cases). Thus, any challenge that Plaintiffs could possibly raise to defeat or avoid the arbitration provisions must be decided in the first instance by the arbitrator, not the Court.

Finally, the Plaintiffs cannot successfully mount a challenge to an arbitration provision that will require a court to decide the ultimate merits issues in the case (*e.g.*, whether Unity or Trinity's plans were actually "insurance"). As a general rule, the arbitrator decides all merits-related disputes, *First Options*, 514 U.S. at 944, unless such a dispute is specifically excluded in the arbitration agreement itself. *See Jpay, Inc. v. Kobel*, 904 F.3d 923, 929 (11th Cir. 2018). And, the Supreme Court

[6] This Court has reached the same conclusion. *See Nat'l Freight, Inc. v. Consol. Containers Co.*, 166 F. Supp. 3d 1320, 1324 (N.D. Ga. 2015). This Court has also concluded that where there is a delegation clause -- either an express clause or one found in an incorporated rule -- it stands apart from the rest of the arbitration agreement and has to be challenged directly to avoid the result that an arbitrator decides all arbitrability issues. *See Githieya v. Global Tel Link Corp.*, No. 1:15-cv-0986-AT, 2016 WL 304534, at *4 (N.D. Ga. Jan. 25, 2016).

recently made clear that even if the Court believes that a claim of arbitrability is wholly groundless, "a court may not 'rule on the potential merits of the underlying' claim that is assigned by contract to an arbitrator." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (quoting *AT&T Techs.*, 475 U.S. at 649-50 (a court has "no business weighing the merits of the grievance" – that is for the arbitrator)); *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 146 (3d Cir. 2016) (an arbitrator, not the court, had to decide the ultimate merits issue of whether the transactions at issue constituted insurance). A court, moreover, should also not prejudge how an arbitrator might resolve uncertainties around key merits issues in order to wrest that decision from the arbitrator. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003).

C. Aliera May Enforce the Alternative Dispute Resolution Provisions.

1. Those Provisions Expressly Encompass Claims Against Aliera.

The alternative dispute resolution provisions, requiring mediation followed by arbitration, cover not only any disputes the Plaintiffs may have against Unity or Trinity, but also any disputes they have with Aliera.[7] As previously noted, both Unity and Trinity's member benefit guides provide that all disputes that a member

[7] Moreover, any issue whether the arbitration agreement expressly incorporates Aliera is a question the parties have likewise delegated to the arbitrator.

may have with an **"associate"** of Unity or Trinity must also be submitted to mediation in the first instance, followed by arbitration.

The plain meaning of the term "associate" encompasses Aliera under the circumstances of this case. One commonly-used dictionary defines the noun "associate" as "one associated with another," and lists "business associates" as an example. *See* Associate, *Merriam-Webster Dictionary*, available at https://www.merriam-wbster.com/dictionary/associate. *See also Webster's Third New International Dictionary* 132 (1992) ("associate" means a person "closely connected, joined, or united with another"); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (terms should be given their "ordinary, everyday meanings – unless the context indicates that they bear a technical sense").

Clearly, Plaintiffs perceive Aliera as an "associate" of both Unity and Trinity. The entire thrust of the Complaint is that Aliera (i) either created or worked to form both Unity and Trinity's HCSMs; (ii) marketed, sold, and administered both of the HCSMs involved here; and (iii) worked hand-in-hand with Unity and Trinity to accomplish what Plaintiffs allege is a wide-ranging course of illegal conduct. (*See* Doc. 1 at ¶¶ 1-3, 33, 35, 58-61, 65-67.) Thus, there can be no legitimate dispute that Aliera, under Plaintiffs' own allegations, qualifies as an "associate" of both Unity and Trinity.

2. Aliera Can Invoke The Arbitration Provision Under Generally-Applicable Principles Of Equitable Estoppel And Agency.

Even assuming that Plaintiffs' agreements to arbitrate their disputes with "associates" of Unity and Trinity do not expressly incorporate Aliera, Georgia principles of equitable estoppel permit Aliera to invoke the arbitration provisions. As this Court explained in *National Freight*, Georgia courts apply equitable estoppel in two situations:

> First, cases in which the "signatory to a written agreement … must rely on the terms of the written agreement in asserting its claims against the nonsignatory." Second, … "when the signatory to the contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one of more signatories to the contract."

166 F. Supp. 3d at 1328 (citations omitted). *Accord Order Homes, LLC v. Iverson*, 685 S.E.2d 304, 310 (Ga. Ct. App. 2009); *Price v. Ernst & Young, LLP*, 617 S.E.2d 156, 159-60 (Ga. Ct. App. 2005); *LaSonde v. CitiFinancial Mortg. Co.*, 614 S.E.2d 224, 226 (Ga. Ct. App. 2005); *Lankford v. Orkin Exterminating Co.*, 597 S.E.2d 470, 474 (Ga. Ct. App. 2005); *AutoNation Fin. Servs. Corp. v. Arain*, 592 S.E.2d 96, 100-01 (Ga. Ct. App. 2003) (all five cases applying equitable estoppel principles to allow non-signatory to arbitrate).

Both situations are present here. First, a portion of Plaintiffs' claims rest upon (or at least are related to) the written terms of the Unity and Trinity Member Guides. For example, the Member Guides detail the guidelines for sending sharing

contributions, the types of medical expenses that may qualify for sharing payments, how to submit sharing requests, and what to do if a member disputes a decision about sharing. (Mot., Ex. A, Exs. 4, 5, 7, 11 & 12.) Plaintiffs assert that they submitted sharing requests for medical expenses that were "covered expenses" under the Member guidelines, that Aliera should be required to honor those sharing requests, and that Aliera is legally responsible under breach of contract theories to pay the Plaintiffs' medical expenses. (Doc. 1 at ¶¶ 7-31, 112-113, 172-75.) Because these allegations and theories are dependent upon, or at least arise in part from, the contents of the Unity and Trinity Member Guides, Plaintiffs cannot seek to use those Guides as bases for their claims and then disavow the dispute resolution procedures contained therein. *See Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005); *A.L. Williams & Assocs., Inc. v. McMahon*, 697 F. Supp. 488, 494 (N.D. Ga. 1988); *LaSonde*, 614 S.E.2d at 226 (all three cases allowing a nonsignatory to invoke an arbitration clause by applying equitable estoppel where similar allegations were made).

Likewise, if anything can be said about Plaintiffs' complaint, it is that there are numerous allegations of interdependent and concerted misconduct by Unity, Trinity, and Aliera. For example, Plaintiffs assert that Aliera "acted in concert with third parties, including Unity … and Trinity … to issue its putative HCSM plans in an attempt to give those plans an appearance of legality," even though those two

companies, "as operated and created by Aliera, did not (and do not) meet the qualifications of an HCSM under federal or Georgia law." (Doc. 1 at ¶ 33.) Plaintiffs further allege that Aliera, Unity, and Trinity "have combined their respective property, experience, labor, and know-how to form a joint undertaking" and have "portrayed themselves and operated as a single enterprise, such that a reasonable consumer would not appreciate any meaningful difference between Aliera and these companies (such as Trinity)." (*Id.* at ¶ 35.) Plaintiffs go so far as to allege that Trinity is "a mere shell entity operated, administered, and directed by Aliera solely to serve Aliera's purposes," (*id.* at ¶ 67), and that Aliera "squandered, stole, and diverted" money to "Trinity" and others, (*id.* at ¶ 197). Indeed, the Complaint is replete with allegations that Aliera, Unity, and Trinity all engaged in joint actions that supposedly injured the Plaintiffs. (*See generally* Doc. 1); *see Becker v. Davis*, 491 F.3d 1292, 1304 (11th Cir. 2007) (recognizing that allegations of collusive or conspiratorial conduct between signatory and nonsignatory defendants were sufficient to warrant application of equitable estoppel principles and allow the nonsignatory to compel arbitration); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) (equitable estoppel doctrine applied to allow nonsignatory defendant to arbitrate under an arbitration clause covering "all disputes … between the parties hereto").

Plaintiffs can't avoid these principles and their contractual agreements to arbitrate by exploiting their decision not to sue Unity or Trinity. Aliera can invoke the arbitration clause even if the two signatory parties (Unity and Trinity) are not present. *See AutoNation Fin. Servs.*, 592 S.E.2d at 101-02 (nonsignatory could still enforce arbitration provision even after the signatory defendant had been dismissed from the case). *Accord MS Dealer Serv. Corp.*, 177 F.3d at 946-47 (a nonsignatory could enforce an arbitration provision even though its alleged conspirator, who was a signatory to the arbitration agreement, was not a party to the action); *see also Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000); *Roberson v. Money Tree of Ala., Inc.*, 954 F. Supp. 1519, 1529 (M.D. Ala. 1997) (both cases allowing nonsignatories to enforce an arbitration agreement even though the signatory entity was never (or no longer) a party to the lawsuit).

In sum, as this Court concluded in *National Freight*, "'the ends of justice are more nearly met' by estopping [Plaintiffs] from avoiding arbitration of [their] claims against [Aliera]." 166 F. Supp. 3d at 1329 (citation omitted). Their claims, all of them, belong in arbitration.[8]

[8] Additionally, Plaintiffs clearly assert Aliera was acting as an agent for Unity and then Trinity in the offer, sale, and administration of those entities' HCSMs. (Doc. 1 at ¶¶ 33, 61, 69, 73-76.) Under Georgia law, a nonsignatory *agent* of a signatory may enforce an arbitration agreement. *Comvest, L.L.C. v. Corp. Secs. Grp., Inc.*, 507 S.E.2d 21, 25 (Ga. Ct. App. 1998) ("[A]gents, employees, and representatives [of signatory] are also covered under the terms of [arbitration]

IV. CONCLUSION

Plaintiffs' memberships in the Unity HCSM, and subsequently the Trinity HCSM, were subject to alternative dispute resolution processes set forth in the respective Membership Guides. Aliera is covered by, or can legally invoke, those provisions. These provisions constitute valid, enforceable obligations for Plaintiffs to follow prior to initiating litigation. Plaintiffs failed to do so. As a result, Aliera respectfully moves this Court to either (1) dismiss this case without prejudice for the Plaintiffs' failure to pursue mediation first, or in the alternative (2) compel Plaintiffs to bring their claims in arbitration and stay all proceedings pending the conclusion of the arbitral process pursuant to 9 U.S.C. § 3.

Respectfully submitted on July 16, 2020.

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agreements." (citation omitted)); *see also MS Dealer Serv. Corp.*, 177 F.3d at 947 (same).

CERTIFICATE OF COMPLIANCE

Counsel certifies that brief has been prepared with Times New Roman 14 type, one of the font and point selections approved by the Court in LR 5.1.

CERTIFICATE OF SERVICE

A copy of the foregoing **DEFENDANT ALIERA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS, OR ALTERNATIVELY, TO COMPEL ARBITRATION AND TO STAY PROCEEDINGS** has been filed this 16th day of July, 2020 via the Court's CM/ECF system, which will send notification of such filing to all parties of record as noted below.

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