UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NOELLE LeCANN, KRISTIN SELIMO, and TANIA FUNDUK, on behalf of themselves and others similarly situated, Plaintiffs, v. THE ALIERA COMPANIES, INC., formerly known as ALIERA HEALTHCARE, INC., Defendant.	Civil Action File No. 1:20-cv-2429-AT

PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR COMPEL ARBITRATION

INTRODUCTION

Aliera's Reply Brief [Doc. 28] in support of its motion to compel [Doc. 12] recites new authorities, including (1) an order in *Jackson v. The Aliera Companies,* No. 2:19-cv-1281-BJR, 2020 WL 4787990 (W.D. Wash. Aug. 18, 2020) ("*Jackson* Order") that post-dates Plaintiffs' brief and (2) 37 cases Aliera did not mention in its initial brief. Aliera also tenders five new declarations taken from other cases. This Supplemental Brief addresses the *Jackson* Order and three other points in Aliera's Reply Brief, and objects to certain new testimony Aliera has tendered.

ARGUMENT

The Jackson Order is wrong. As the Supreme Court has held: "If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70, 71 (2010). Delegation provisions do not empower arbitrators to determine "whether the district court has the authority to act under the FAA—specifically, the authority under § 4 to compel the parties to engage in arbitration." *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 14 (1st Cir. 2017). But *Jackson* did just that, allow an arbitrator to "determine whether the district court has the authority to act."

The correct interpretation and application of §§ 2 and 4 of the FAA is addressed in detail in *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc.,* 867 F.3d 449, 455–56 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 926 (2018). *Minnieland* is identical to the instant case in all material respects. As here, Minnieland claimed that the product it bought from Applied Underwriters, a Reinsurance Participation Agreement ("RPA"), was actually an "insurance contract" under Virginia law; that it had been marketed and sold, illegally, as not being insurance; that the defendant had done so to circumvent insurance laws and rate restrictions; and that the defendant had manipulated claims

in violation of insurance laws for its financial benefit. An arbitration provision in the contract between the parties explicitly delegated to the arbitrator "[a]ll disputes… relating in any way to…enforceability of this Agreement." 867 F.3d at 452. As here, Virginia law prohibits arbitration provisions in "insurance contracts," and, as here, the defendant denied that the RPA was an "insurance contract" under Virginia law.

Like Aliera, Applied Underwriters argued that the court had no authority to determine (1) whether the arbitration provision was valid or (2) whether it sold "insurance" so as to trigger the Virginia prohibition on arbitration. On appeal,

> Applied Underwriters argues that the district court improperly determined that [Va.] section 38.2–312 reverse preempts the arbitration provisions in the RPA because the RPA included a so-called "delegation provision," which expressly delegated the authority to resolve questions of arbitrability to the arbitrator. In particular, Applied Underwriters asserts that the district court improperly concluded that the RPA constituted an "insurance contract" for purposes of Section 38.2–312, when the RPA left that question of arbitrability to the arbitrator.

Id. at 454. The Fourth Circuit rejected that argument. Based on what the FAA says and Supreme Court decisions, the Court held that the district court must determine the enforceability of an arbitration provision, or a delegation provision therein, when a statutory prohibition on arbitration is present. "[B]ecause [Virginia's insurance code] renders void delegation provisions in putative insurance contracts—at least to the extent such provisions authorize an arbitrator to resolve whether the contract at

issue constitutes an 'insurance contract'—we conclude that the district court did not reversibly err in denying Applied Underwriters' motion to compel arbitration." *Id.* at 457. Specifically, the Court held that "the delegation provision is unenforceable" on "grounds [that] exist at law or in equity," FAA § 2, the "ground" being the Virginia arbitration prohibition:

> [W]e conclude that [the Virginia Insurance Code] renders invalid delegation provisions in putative insurance contracts governed by Virginia law, at least to the extent such delegation provisions endow an arbitrator, as opposed to a court, with exclusive authority to determine whether the contract at issue constitutes an "insurance contract" for purposes of Virginia law.
> .....
> If an agreement including a delegation provision constitutes an "insurance contract," the delegation provision…is "unenforceable from its inception." Thus, Virginia's decision to treat delegation provisions in insurance contracts as void constitutes "grounds as exist at law…for the revocation of any contract." [FAA] § 2.

867 F.3d at 456-57 (footnote omitted).

Aliera cites *South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assur. Co., Inc.*, 840 F.3d 138 (3d Cir. 2016), and *Milan Express Co., Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc.,* 590 F. App'x 482 (6th Cir. 2014) in an effort to avoid *Minnieland*, [Doc. 28] at 17-18, but as *Minnieland* explained, neither of those cases "considered—much less decided—whether the relevant state insurance laws rendered unenforceable the *delegation provision* in the RPA—the question we resolve here." 867 F.3d at 457. *South Jersey* just held that the plaintiff

failed to "demonstrate that the RPA is an 'agreement concerning or relating to an insurance policy' within the meaning of the Nebraska statute." 840 F.3d at 146. That is not only *not* the case here, the *South Jersey* decision has been superseded entirely by the Nebraska Supreme Court's decision in *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assur. Co., Inc.,* 909 N.W.2d 614 (Neb. 2018). *Citizens of Humanity* addressed the exact same claims and issues as *South Jersey* – including the proper interpretation and application of the Nebraska statute that renders illegal arbitration provisions in insurance contracts – and reversed a trial court order compelling arbitration. While Applied Underwriters denied that its product was "insurance" – as does Aliera – the Supreme Court held that it was for the court, not an arbitrator, to determine whether the product was insurance such that the arbitration and delegation provisions would be unenforceable. *Id*. at 632-33.

The *Jackson* Order is also inconsistent with the recent decision *Gibbs v. Haynes Investments, LLC,* 967 F.3d 332 (4th Cir. 2020), where an arbitration provision was challenged as an illegal prospective waiver of federal claims. Notwithstanding a delegation clause providing for arbitration of any issue "concerning the validity" of the arbitration agreement, the court of appeals held that a court must "decide whether the delegation provision is unenforceable upon such grounds as exist at law or in equity." *Id*. at 338. "Therefore, the district court had the

authority to decide whether the arbitration agreements were valid, correctly decided they were not, and did not err in denying the motion to compel arbitration." *Id.* at 345. Under Aliera's approach and the *Jackson* Order, those issues would have been sent, wrongly, to an arbitrator. The Third Circuit has similarly held that courts retain the authority to determine whether there is an agreement in effect that permits compelled arbitration, even if the delegation provision goes so far as to "empower an arbitrator to decide whether an agreement exists." *MZM Construction Co., Inc., v. New Jersey Building Laborers Benefit Funds*, 2020 WL 5509703 (3rd Cir. Sept. 14, 2020).

In re Van Dusen, 654 F.3d 838, 843–45 (9th Cir. 2011) also conflicts with the *Jackson* Order. *Van Dusen* held that a district court must itself determine the enforceability of an arbitration provision if a statute may exclude arbitration from FAA enforcement. The plaintiffs in *Van Dusen* were interstate truck drivers who worked under contracts that characterized the drivers as independent contractors. They claimed that they were actually "employees" and, as such, the arbitration provisions were unenforceable by virtue of §§ 1 and 2 of the FAA, which exclude "contracts of employment" of interstate transportation workers from compelled arbitration. *Id.* at 840. Thus, as here and as in *Jackson*, (1) the plaintiffs relied on a statute that, if applicable, would render the arbitration provision unenforceable; (2)

there was a dispute as to whether the statute applied under the *facts* of the case; and (3) plaintiffs' substantive claims were based on the *same facts* (there, employee versus independent contractor; here, insurance versus non-insurance).

The district court in *Van Dusen* had ruled that, given the delegation provision, *id*. at 841-42, it was required to send the case to arbitration to determine whether it had "authority to compel arbitration…under Section 4 of the FAA," *id*. at 843, just as Aliera argues should occur here. In reversing, the court of appeals held:

> In essence, Defendants and the District Court have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of *whether the parties can invoke the authority of the FAA.* This position puts the cart before the horse… [P]rivate contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.

Id. at 843-44 (italics in original). As the Ninth Circuit further explained:

> [W]hatever the contracting parties may or may not have agreed upon is a distinct inquiry from whether the FAA confers authority on the district court to compel arbitration. The [Supreme] Court has never indicated that parties may delegate this determination to an arbitrator in the first instance; on the contrary, it has affirmed that, when confronted with an arbitration clause, the district court must first consider whether the agreement at issue is of the kind covered by the FAA. This is equally true where the arbitration clause at issue delegates an arbitrability question….

Id. at 844-45 (authorities omitted).[1]

[1] *Van Dusen* was subsequently reaffirmed after remand and a later appeal. *See* 544 F. App'x 724 (9th Cir. 2013), *cert. denied*, 573 U.S. 916 (2014).

The First Circuit likewise rejected Aliera's position in *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), another decision at odds with the *Jackson* Order. *Oliveira* involved claims similar to the *Van Dusen* plaintiffs', and the First Circuit held the district court was required to determine both (1) the enforceability of the arbitration agreement and (2) the fact of whether the plaintiffs were "employees" so as to be excluded from the reach of FAA arbitration by virtue of their contract status. To hold otherwise would improperly allow the district court's authority to be determined by an arbitrator, contrary to the FAA.[2]

Oliveira was unanimously affirmed by the Supreme Court, 139 S. Ct. 532 (2019), confirming the district court's responsibility to determine whether the agreement was excluded from FAA coverage such that a court, by statute, could not compel arbitration. District courts cannot send to an arbitrator for determination the question of whether an arbitration agreement falls within or without the coverage of §§ 1 and 2 of the FAA.

> While a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional. If two parties agree to arbitrate future disputes between them and one side later seeks to evade the deal, §§ 3 and 4 of the Act often require a court to stay

[2] Aliera recognizes that Eleventh Circuit precedents allow courts to invalidate insurance arbitration clauses where there is "no meaningful dispute that insurance or reinsurance was involved." [Doc. 26] at 17 n.6. But the power of a court to compel arbitration under the FAA depends on whether the contract is or is not insurance, not how "clear" the case is. Aliera's acknowledgment of these authorities is inconsistent with its denial of a court's power to make that inquiry.

> litigation and compel arbitration "accord[ing to] the terms" of the parties' agreement. ***But this authority doesn't extend to all private contracts, no matter how emphatically they may express a preference for arbitration.***
>
> ***Instead, antecedent statutory provisions limit the scope of the court's powers under §§ 3 and 4.***

Id. at 537 (emphasis added). Those "antecedent statutory provisions" that "limit the scope of the court's powers under §§ 3 and 4" are, of course, the limitations expressed in §§ 1 and 2 of the Act:

> [T]o invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2. The parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum…. Sections 1 and 2 define the field in which Congress was legislating, and ***§§ 3 and 4 apply only to contracts covered by those provisions.***

Id. at 537-38 (emphasis added). In applying that analysis, the plaintiffs in *Oliveira* were never subject to the possibility of compelled arbitration under §§ 3 and 4 because the arbitration provisions were not "valid and enforceable" under § 2. While the unenforceability of the arbitration provisions there arose from plaintiffs' alleged status under "contracts of employment," the Plaintiffs' claims here stand on the same legal footing for the purpose of arbitration. The arbitration and delegation provisions – not the contract as a whole – are illegal and unenforceable by virtue of O.C.G.A.

§ 9-9-2(c)(3), which "reverse preempts" the FAA from application. *McKnight v. Chi. Title Ins. Co.*, 358 F.3d 854, 857-59 (11th Cir. 2004). As such, by operation of statutory law, the FAA does not allow compelled arbitration.

Oliveira also confirmed that this Court must "treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears." 139 S. Ct. at 538. That is exactly what Plaintiffs seek, an analysis of the arbitration and delegation provisions. Just as in this case, the facts supporting the *Oliveira* plaintiffs' merits claims overlapped with the facts that determined whether they were "employees" for whom arbitration could not be compelled, but the arbitration challenge was still a matter for judicial resolution, not arbitration.

The *Jackson* Order rests on a misapplication of two Ninth Circuit cases, *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006), and *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.,* 622 F.3d 996 (9th Cir. 2010). *Jackson* reasoned that, because the "crux of the complaint challenges the validity or enforceability of the agreement containing the arbitration provision," the court cannot consider the arbitration challenge. 2020 WL 4787990, *4. But the "crux of the complaint" idea *Jackson* takes from *Nagrampa* and *Bridge Fund* comes from the Supreme Court's *Buckeye Check Cashing* decision, where it was used to describe a

situation where there is ***no*** separate challenge to the arbitration provision. The plaintiff's only challenge in *Buckeye* was that arbitration should fail because the overall contract was illegal. "The crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge." *Buckeye Check Cashing*, 546 U.S. at 444.

That has nothing to do with the present situation, nor does it have anything to do with the Ninth Circuit cases *Jackson* relies on. *Bridge Fund* allowed an arbitration challenge based on unconscionability to go forward in court, stating that "[t]he crux of the complaint matters when the complaint itself makes clear that the challenge to the arbitration clause is the ***same challenge*** that is being made to the entire contract." 622 F.3d at 1001 (emphasis added). The court also explained that the "crux of the complaint" rule was simply a shorthand way of referring to the *Buckeye Check Cashing* rule – that an arbitration challenge is not viable where it is ***no more*** than the argument that arbitration fails because the contract fails. *Id*. at 1000-01.

According to *Jackson, Nagrampa* held that "the issue of arbitrability was for the arbitrator to decide," 2020 WL 4787990, *3, but *Nagrampa* actually held the opposite. 469 F.3d at 1277 (the arbitration challenge fell "squarely within the category of claims that must be decided by a federal court"). Regardless, in *Nagrampa,* like *Bridge Fund*, the "crux of the complaint" phrase is nothing but a

shorthand way of referring to the rule in *Buckeye Check Cashing* that a challenge to the overall contract, ***by itself***, is not sufficient to challenge an arbitration provision therein.[3] By comparison, here and in *Jackson* the merits and the arbitration challenge do involve overlapping facts, but the challenge to the arbitration and delegation provisions rests on a distinct ***legal*** footing. The challenge here rests on O.C.G.A. § 9-9-2(c)(3), but the merits claims would be *exactly the same* if that statute did not exist. That key fact makes the arbitration and delegation challenge here completely different than what is not permitted by the "crux of the complaint" rule in *Buckeye*.

In reading the "crux of the complaint" language in *Nagrampa* and *Bridge Fund* more broadly than it was intended in *Buckeye, Jackson* runs into a host of contrary Supreme Court decisions, not the least of which is last year's *Oliveira* decision. There, the underlying merits facts were identical to those that governed the arbitration challenge, but the arbitration challenge was based on the additional statutory contention that the FAA did not apply to those facts. If *Jackson* were right, *Oliveira* would have sent the whole matter to arbitration. The Supreme Court not only held that a court must determine whether the claims were subject to arbitration,

[3] *Nagrampa* uses the phrase "crux of the complaint" 10 times, and each time, it is tied specifically to *Buckeye Check Cashing*. There is no hint that it is trying to expand on the meaning of the term as the Supreme Court used it in *Buckeye Check Cashing*.

it went on to determine, again unanimously, the underlying factual issue necessary to resolve the arbitration question. 139 S. Ct. at 538-44. To comply with the procedures set forth in *Oliveira, Buckeye Check Cashing*, and similar cases, this Court must itself determine whether arbitration is required, not seek an opinion from an arbitrator on that issue. In so doing, that some facts germane to the Court's arbitration decision overlap with Plaintiffs' merits claims is irrelevant.[4]

Plaintiffs challenge the delegation provision specifically. Aliera contends that "Plaintiffs do not challenge the delegation provision specifically," [Doc. 28] at 13, but Plaintiffs did exactly that as soon as Aliera first raised arbitration. *See* [Doc. 26] at 25ff.[5] In addition to challenging whether there even is a delegation or arbitration

[4] In the circuit decisions Plaintiffs rely on, the merits claims also overlap at least as much if not more than they overlap here, but the arbitration challenges went forward in court because of the additional, separate statutory basis for that challenge. In *Minnieland*, for example, the complaint goes on at great length to allege that the contract at issue constituted illegal insurance under Virginia law. *See* Complaint, Case 1:15-cv-01695-AJT-IDD (E.D. Va. Dec. 24, 2015). Like the claims here, those allegations are part of the contention that the arbitration provision is illegal because the contracts at issue are "insurance contracts." Similarly, *In re Van Dusen* the plaintiffs' substantive claims overlapped completely with the arbitration challenge, but the arbitration challenge, like here, had the additional element that it was statutorily prohibited ***if*** the plaintiffs' factual allegations were correct. The "crux" of the arbitration challenge was thus different, even though the facts of that challenge overlapped with the merits facts.

[5] Plaintiffs are also moving to amend their complaint to more explicitly detail their challenges to the arbitration provisions, including delegation, which will comport with the challenges raised in their brief. While Plaintiffs challenged the arbitration provision in the complaint, [Doc. 1] pp. 30-32, even had they not done so, raising their challenges in response to Aliera's motion to compel arbitration would be sufficiently timely. *Bridge Fund,* 622 F.3d at 998, 1002.

provision covering the claims at issue, Plaintiffs explicitly challenge the delegation provision as illegal by command of statute. *Id*. While that challenge to delegation is the same as the challenge to the arbitration provision as a whole, that is a perfectly acceptable "separate" challenge to delegation. *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226–27 (3d Cir. 2018) ("In specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions."); *Gibbs v. Haynes Investments, LLC,* 967 F. 3d 332, 338 (4th Cir. 2020); *Minnieland,* 867 F.3d at 455-56.

Delegation is not available to Aliera even if it were otherwise applicable.[6] Aliera marketed and sold what Plaintiffs allege to be insurance contracts between Plaintiffs and Trinity or Unity. Whether they be deemed insurance or not, since Aliera was not a party to the arbitration agreements, it cannot rely on any delegation provision in those agreements. *See, e.g.*, *In re Toyota Motor Corp. Unintended Acceleration Litig.,* 838 F. Supp. 2d 967, 983-87 (C.D. Cal. 2012) ("The fact that the Toyota Defendants are not parties to the arbitration provisions or the delegation provisions at issue fundamentally alters the relevant analysis." *Id*. at 984. As a

[6] Aliera contends that the arbitration rules of the Institute for Christian Conciliation require delegation of arbitrability decisions, but the cited rule reflects no such agreement by the parties. [Doc. 28] at 11 n.1, 28. While it *authorizes* arbitrability decisions to be made by the arbitrator, the actual scope of the arbitration is determined by Rule 25, which contains no "clear and unmistakable" agreement to delegate arbitrability.

nonparty, delegation was not available to Toyota, and the court, not an arbitrator, therefore decided whether equitable estoppel applied in that case. *Id*. at 983-87.

No arbitration provision applies to at least some of Plaintiffs' claims. Plaintiffs assert claims based on the wrongful taking of premiums. That wrongful act occurred every month while Plaintiffs were active members of the Trinity or Unity plans, and a new claim arose each and every month that a payment was made. As Plaintiffs have shown, there are times when the member guide included no arbitration provision at all. [Doc. 26 at 29-30]. Plaintiff Selimo was a Unity or Trinity member from February 15, 2018 to May 14, 2020, but Aliera's evidence reflects no arbitration provision in effect regarding her claims for wrongful taking of premiums from November 15, 2019 to May 14, 2020. *Id*. at 30 and [Doc. 12-1] at 16 ¶ 23.

Aliera's latest exhibits include objectionable testimony. Plaintiffs do not object to Defendant's exhibits [Doc. 28-1 to -5] because they lack authenticity, but do object to the following opinions, conclusions, and characterizations that are inadmissible: Paragraph 5 of the Paul Declaration [Doc. 28-1] uses the vague and conclusory term "facilitator" to describe Unity and Trinity. Paragraphs 12 and 13 of the Hochstetler California Declaration [Doc. 28-2] contain legal conclusions and

unsupported opinions and characterizations about Unity's business.[7] Paragraphs 4-7 and 13 of the Guarini California Declaration [Doc. 28-3] contain legal conclusions and unsupported opinions about Trinity's business.[8] Paragraphs 5-6, 8, and 11 of the Guarini New Mexico Declaration [Doc. 28-4] contain legal conclusions and unsupported opinions and characterizations about Trinity's business.[9] Paragraphs 3-4 of the Hochstetler Washington Declaration [Doc. 28-5] contain legal conclusions and unsupported opinions and characterizations concerning Unity's business.[10]

CONCLUSION

For the reasons set forth herein and in Plaintiffs' earlier Brief in Opposition [Doc. 26], and based on the entire record, Plaintiffs respectively request that Defendant's Motion [Doc. 12] be denied.

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[7] *E.g.*, "Health care sharing is not health insurance. Unlike insurance, OneShare does not assume the risks of its members medical expenses, it does not guarantee coverage, and does not undertake any obligation to indemnify the members or pay anything on their behalf in exchange for a premium. Rather health care sharing ministries like OneShare merely facilitate the sharing of medical expenses among their members in accordance with member guidelines."

[8] *E.g.*, "Trinity does not engage in the underwriting and spreading of risk for and among the HCSM's members and does not indemnify the HCSM members."

[9] *E.g.*, "Trinity does not contract with its members to guarantee payment of a member's medical expenses or costs in exchange for the contributions provided by members."

[10] *E.g.*, "OneShare's sharing model is distinct from insurance: there is no assumption of risk, no promise to pay, and no guarantee of coverage. OneShare merely facilitates the sharing of medical expenses between those who share Biblical beliefs and who choose to participate as members of the program."

Respectfully submitted this 15th day of September 2020.[11]

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[11] Pursuant to Local Rule 7.1(D), undersigned counsel certifies that this filing has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C).

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2020, I electronically filed the foregoing PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR COMPEL ARBITRATION with the Clerk of Court using the CM/ECF system which will automatically serve all counsel of record.

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