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 all others similarly situated,

Plaintiffs,

v.

THE ALIERA COMPANIES, INC., formerly known as ALIERA HEALTHCARE, INC.,

Defendants.

CIVIL ACTION FILE

No. 1:20-cv-2429-AT

MOTION TO STAY PENDING APPEAL AND MEMORANDUM OF LAW IN SUPPORT

Defendant The Aliera Companies, Inc. moves for an order staying all proceedings in this case pending Aliera's appeal to the United States Court of Appeals for the Eleventh Circuit from the Court's Opinion and Order, (ECF No. 49), denying the Defendant's Motion to Dismiss or Alternatively Motion to Compel Arbitration, (ECF No. 12). In support of this motion, Aliera states the following.

PROCEDURAL HISTORY

1. On June 5, 2020, the Plaintiffs filed this putative class-action lawsuit regarding the Unity and Trinity Health Care Sharing Ministries (the Sharing Ministries) that Aliera administers. (ECF No. 1.) The Plaintiffs later amended their complaint. (ECF No. 32.)

2. On July 16, 2020, Aliera moved to dismiss or, alternatively, to compel arbitration and stay these proceedings. (ECF No. 12.) The parties fully briefed the motion. (*See* ECF Nos. 13, 26, 28, 30, 36, 43, 44 & 45.)

3. On June 22, 2021, the Court denied Aliera's Motion to Dismiss or Alternatively Motion to Compel Arbitration. (ECF No. 49.)

4. On July 20, 2021, Aliera filed a notice of appeal. (ECF No. 58.)

ARGUMENT

A. Under *Blinco*, courts should stay litigation based on a non-frivolous appeal from a denial of a motion to compel arbitration.

"When a litigant files a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel arbitration, the district court should stay the litigation so long as the appeal is non-frivolous." *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1253 (11th Cir. 2004); *see also id.* at 1251 ("Upon motion, proceedings in the district court, therefore, should be stayed pending resolution of a non-frivolous appeal from the denial of a motion to compel

arbitration."); *accord Parnell v. CashCall, Inc.*, No. 4:14-cv-0024, 2016 WL 7395311, at *1 (N.D. Ga. Mar. 28, 2016) (staying litigation pending a non-frivolous appeal of the denial of a motion to compel arbitration).

It is a high bar for a court to classify an appeal as frivolous. To be frivolous, an appeal must be "utterly devoid of merit." *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1371 (11th Cir. 2016) (quoting *Bonfiglio v. Nugent*, 986 F.2d 1391, 1393 (11th Cir. 1993)); *accord Flagg v. Premier Bank*, No. 1:15-cv-324, 2015 WL 13649829, at *1 (N.D. Ga. Oct. 23, 2015) ("[A]n appeal is frivolous if it is obviously without merit and is prosecuted for delay, harassment, or other improper purposes."). Put another way, "[a]n appeal is frivolous if the arguments are wholly without merit, such as where the appeal is brought in the face of controlling precedent," or "is so lacking in arguable merit as to be groundless or without foundation." *Connors & Co. v. McKinley Capital Mgmt., Inc.*, No. 1:08-cv-2744, 2009 WL 10671567, at *1 (N.D. Ga. Aug. 28, 2009). Thus, an appeal is not frivolous simply because it is unpersuasive—"it must be 'without even arguable merit.'" *Id.* (quoting *United States v. Roberts*, 858 F.2d 698, 702 (11th Cir. 1988). And an appeal is not frivolous so long as it raises "at least a colorable argument." *Parker*, 835 F.3d at 1371.

B. Aliera's appeal of the Court's Order denying its motion to compel arbitration is not frivolous because it has at least arguable merit.

Here, Aliera's appeal of the court's order is not frivolous. Aliera has raised at least colorable arguments that: (1) the issues on which the Court decided the motion to compel arbitration were delegated to an arbitrator; (2) the Sharing Ministries is not insurance; (3) the Sharing Ministries are Health Care Sharing Ministries (HCSMs) under Georgia law; and (4) there exists an arbitration agreement that binds Selimo to arbitrate her dispute with Aliera.

1. Aliera has raised at least colorable arguments that an arbitrator should decide the Plaintiffs' challenges to arbitration.

In its Order denying the motion to compel arbitration, the Court concluded that the Plaintiffs had directly challenged the delegation provision in the arbitration provision. (ECF No. 49 at 35–37.) The Court concluded that it had to decide the Plaintiffs' challenge to the delegation clause. (*Id.* at 37–45.) And in doing so, it relied extensively on non-binding, out-of-circuit authority. (*See id.*)[1]

[1] *See id.* (citing *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 338 (4th Cir. 2020); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 126 (2d Cir. 2019); *MacDonald v. Cashcall, Inc.*, 883 F.3d 220, 226–27 (3d Cir. 2018); *Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 452, 455–56 (4th Cir. 2017); *In re Van Dusen*, 654 F.3d 929, 844 (9th Cir. 2011); *Citizens of Humanity, LLC v. Applied Underwriters Captive Risk Assurance Co.*, 909 N.W.2d 614, 633 (Neb. 2018).

Although, the Court was unpersuaded by them, Aliera presented at least colorable arguments that the Plaintiffs' arbitrability challenge—whether Georgia law invalidates the arbitration clause because the Sharing Ministries are insurance and not HCSMs—should go to an arbitrator for decision.

First, Aliera explained that to avoid the delegation provision: (1) the Plaintiffs had to challenge it specifically; (2) the Plaintiffs' challenges regarding insurance and Georgia law were challenges to the arbitration agreement as a whole, not to the delegation clause specifically; and (3) courts had refused to allow plaintiffs to challenge a delegation clause on the same basis as their challenge to an arbitration agreement as a whole. (*See* ECF No. 28 at 12–15 & n.3.) Aliera provided authority from the U.S. Supreme Court, from the Eleventh Circuit, from other courts of appeals, from another district court analyzing the issue for these same arbitration agreements, and from this Court to support that explanation.[2]

[2] *See* ECF No. 28 at 12–15 & n.3 (citing *Rent-A-Center, W. v. Jackson*, 561 U.S. 63, 70, 72 (2010); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017); *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1148–49 (11th Cir. 2015); *Bridge Fun. Cap. Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010); *John B. Goodman Ltd. P'ship v. THF Constr., Inc.*, 321 F.3d 1094, 1095 (11th Cir. 2003); *Jackson v. Aliera Cos.*, No. 19-cv-1281, 2020 WL 4787990, at *4 (W.D. Wash. Aug. 18, 2020); *Shklar v. Evans*, No. 1:15-cv-2265, 2015 WL 9913859, at *3–4 (N.D. Ga. Dec. 29, 2015); *Githieya v. Global Tek*Link Corp.*, No. 1:15-cv-0986, 2015 WL 304534, at *4 (N.D. Ga. Jan. 25, 2015)).

Second, Aliera explained that this Court is not the appropriate forum to resolve the Plaintiffs' challenge for at least two reasons. One, doing so required the Court to resolve underlying merits issues, something the Supreme Court has ruled out-of-bounds. (ECF No. 28 at 16.) Two, other courts, including at least two other courts of appeals, have disagreed with the Fourth Circuit's decision in *Minnieland* and held that an arbitrator must decide the applicability of a state law ban on arbitration clauses in insurance contracts and whether the McCarran–Ferguson Act reverse preempts the Federal Arbitration Act. (ECF No. 28 at 16–19.) Aliera provided authority from the U.S. Supreme Court, from the Eleventh Circuit, from other courts of appeals, from another district court analyzing the issue for these same arbitration agreements, and other district courts to support that explanation.[3]

[3] *See* ECF No. 28 at 16–19 (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530–31 (2019); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448–49 (2006); *AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649–50 (1986); *JPay, Inc. v. Kobel*, 904 F.3d 923, 930 (11th Cir. 2018); *S. Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138, 146 (3d Cir. 2016); *Milan Express Co. v. Applied Underwriters Captive Risk Assurance Co.*, 590 F. App'x 482, 486 (6th Cir. 2014); *Peabody Holding Co. v. UMWA Int'l Union of Am.*, 665 F.3d 96, 104 (4th Cir. 2012); *Jackson*, 2020 WL 4787990, at *4; *Nandorf v. Applied Underwriters Captive Risk Assurance Co.*, 410 F. Supp. 3d 882, 890 (N.D. Ill. 2019); *Hillyard, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, No. 16-6062, 2017 WL 5957816, at *2–3 (W.D. Mo. Feb. 28, 2017); *Mountain Valley Prop., Inc. v. Applies Risk Servs., Inc.*, No. 1:15-cv-187, 2016 WL 755614, at *2 (D. Me. Feb. 25, 2016).

In sum, Aliera's delegation arguments are well-grounded in the facts of the case and well-supported by legal authority. Although the Court was unpersuaded by Aliera's arguments, no binding authority forecloses Aliera's arguments such that they are utterly devoid of merit, groundless, and without foundation. Further, nothing suggests Aliera has appealed for some improper purpose. As a result, Aliera's appeal is not frivolous, and under *Blinco*, the Court should stay these proceedings pending Aliera's appeal.

2. Aliera has raised at least colorable arguments that the Sharing Ministries are valid HCSMs and not insurance.

In its Order denying the motion to compel arbitration, the Court concluded that the Sharing Ministries were insurance and subject to insurance regulation under Georgia law. (ECF No. 49 at 45–81.) Performing a bifurcated analysis, the Court first concluded that the Sharing Ministries were insurance under Georgia law. (ECF No. 49 at 48–66.) The Court then concluded the Sharing Ministries are not valid HCSMs. (ECF No. 49 at 66–81.) As a result of its conclusion that the Sharing Ministries are insurance, the Court held that Georgia statutory law, which bars arbitration provision in insurance contracts, renders the arbitration clauses in the member guides illegal and void. (ECF No. 49 at 81.) Aliera's appeal will raise at least colorable arguments that the Court erred.

a. Aliera has raised at least colorable arguments that the Sharing Ministries are not insurance in Georgia.

In its Order denying the motion to compel arbitration, the Court concluded that the Sharing Ministries are insurance for two reasons. Aliera has raised at least colorable arguments that the Court reached the wrong conclusion on both.

First, the Court concluded that the member guides were contracts "to indemnify members or pay certain amounts upon determinable contingencies and distribute losses among members." (ECF No. 49 at 48.) The Court reasoned: (1) the member guides detail the coverage available for various types of care; (2) the members make monthly payments that are required to maintain membership; (3) prospective members submit an application that is similar to those submitted in the insurance underwriting process; (4) language in the member guide discusses the sharing of funds the members have contributed; and (5) language in the member guide suggests that the Sharing Ministries have promised to pay medical expenses when determinable contingencies occur. (*Id.* at 48–54.) And to support its conclusion, the Court relied heavily on a non-binding decision from the Kentucky Supreme Court interpreting Kentucky law. (*Id.* at 54–58 (relying on *Commonwealth v. Reinhold*, 325 S.W.3d 272 (Ky. 2010).)

Second, the Court relied on a series of reports and investigations by insurance commissioners and departments from states other than Georgia. (ECF

No. 49 at 58.) The Court acknowledged that those reports were assessing Aliera-administered sharing ministries under other states' laws—not Georgia law. (*Id.*) Nevertheless, the Court reasoned that the commissioner or department reports from Colorado, Connecticut, New Hampshire, Washington, and Maryland "bolstered" its conclusion that the Sharing Ministries are insurance. (*Id.* at 65.) The Court also relied on the Fourth Circuit's decision in *Minnieland* to rely on similar reports. (ECF No. 49 at 59.)

Although the Court did not embrace them, Aliera presented at least colorable arguments that the Sharing Ministry's member guides are not indemnity contracts and, therefore, not contracts for insurance under Georgia law. *See* O.C.G.A. § 33-1-2(4) (defining "insurance" as requiring the insurer to "undertake[] to indemnify another or to pay a specified amount … upon determinable contingencies"). As Aliera explained, the Sharing Ministries never undertook any obligation to indemnify their members who presented sharing requests or promised to pay a "specified amount upon determinable contingencies." (ECF No. 28 at 26–28.) Instead, the member guides explicitly disclaimed any such obligation or promise. (*See* ECF No. 12-5 at 4, 23; ECF No. 12-6 at 5, 48; ECF No. 12-8 at 4, 24; ECF No. 12-12 at 4, 24; ECF No. 12-13 at 5, 48.)

Further, Aliera cited authority from two states holding that HCSMs with similar arrangements *are not insurance*.[4] Thus, not only is the Kentucky Supreme Court decision on which the Court relied not binding authority that forecloses Aliera's contentions, other states' courts have reached different conclusions. Given the division of authority and the lack of any binding precedent, Aliera's argument that the Sharing Ministries are not insurance is not frivolous.

Finally, as to the Court's reliance on reports, investigations, and the like from insurance commissioners and departments in states other than Georgia, Aliera provided a non-frivolous explanation of why the Court should not rely on them. (ECF No. 28 at 25–26 n.12.) As Aliera explained, none of them are binding adjudications of contested facts. (*Id.*) None of the plaintiffs reside in any of those states. (*Id.*) And, most importantly, none of those reports analyze whether the Sharing Ministries satisfy the elements of a healthcare sharing ministry, or are insurance, under Georgia law. (*Id.*)

In sum, Aliera has at least non-frivolous arguments—well-grounded in the facts of the case and well-supported by legal authority—that the Sharing Ministries are not insurance under Georgia law. Although Aliera's arguments did not

[4] *See* ECF No. 28 at 27–28 (citing *Altrua HealthShare, Inc. v. Deal*, 299 P.3d 197, 201 (Idaho 2013); *Barberton Rescue Mission, Inc. v. Ins. Div. of Iowa Dep't of Commerce*, 586 N.W.2d 352, 353 (Iowa 1998)).

persuade the Court, no binding authority forecloses those arguments such that they are utterly devoid of merit, groundless, and without foundation. Further, nothing suggests Aliera has appealed for some improper purpose. As a result, Aliera's appeal is not frivolous, and under *Blinco*, the Court should stay these proceedings pending Aliera's appeal.

b. Aliera has raised at least colorable arguments that the Sharing Ministries qualify as HCSMs.

In its Order denying the motion to compel arbitration, the Court also concluded that the Sharing Ministries are not HCSMs. (ECF No. 49 at 70.) Aliera has raised at least colorable arguments that the Sharing Ministries are HCSMs.

First, the Court held the Sharing Ministries are not HCSMs under the Affordable Care Act. (ECF No. 49 at 67.) It reached that conclusion because it found that the Sharing Ministries have not existed, and their members have not shared medical expenses, continuously since December 31, 1999. (ECF No. 49 at 67–68). The Court also concluded the Unity sharing ministry's members did not share a "common set of ethical or religious beliefs and share medical expenses among members in accordance with those belief." (*Id.* at 68–69.)

Second, the Court held that the Sharing Ministries are not HCSMs under Georgia law. (ECF No. 49 at 70.) The Court questioned whether Trinity and Unity were "bona fide 'faith based' organizations." (ECF No. 49 at 71.) Next, the Court

found that the Sharing Ministries did not meet the Georgia requirements to be HCSMs because they:

> (1) do not limit participants to those of similar faith; (2) do not act as a facilitator matching participants with needs with those who have the present ability to pay; (3) do not provide amounts that participants may contribute with no assumption of risk or promise to pay among participants or by Unity/Trinity; and (4) do not provide monthly statements to participants listing the dollar amount of qualified need.

(ECF No. 49 at 71 (citing O.C.G.A. § 33-1-20).) The Court reasoned there was no evidence that the Sharing Ministries limited their members to a particular faith. (ECF No. 49 at 78.) The Court concluded the Sharing Ministries did not act as a facilitator because it outsourced that function to Aliera and did not match participants with needs to other members with the present ability pay. (ECF No. 49 at 78–79.) The Court concluded that contributions were mandatory, and the Sharing Ministries assumed a risk in taking on members. (*Id.* at 79–80.) Lastly, the Court concluded that declarations stating that Aliera provided monthly statements to Sharing Ministry members listing the amounts of needs submitted and paid was insufficient. (*Id.* at 80–81.)

Although the Court did not embrace them, Aliera presented at least colorable arguments that the Sharing Ministries qualify as HCSMs under the ACA and Georgia law. Because Aliera has presented colorable arguments supporting its position, its appeal is not frivolous.

First, as to the ACA, Aliera explained that the "1999" requirement was not a relevant consideration and, in any event, the Sharing Ministries could satisfy it. Aliera explained that the requirement was never relevant because Georgia law does not require an HCSM to have existed since 1999. (ECF No. 28 at 25 (citing O.C.G.A. § 33-1-20(a).) Aliera further explained that the "1999" requirement was no longer relevant even as a question of federal law because the requirement was imposed merely as a qualification for a safe-harbor exemption from the individual mandate and that requirement became a nullity when Congress rescinded the individual-mandate penalty in 2017. (ECF No. 28 at 25 (citing 26 U.S.C. § 5000A(d)92)(B)(ii)(IV)). The Court rejected this second argument as unsupported and belied by the post-2017 "findings of various insurance commissioners." (ECF No. 49 at 69 n.31.) But the Court cited, and Aliera has located, no binding authority foreclosing Aliera's position.

Second, as to Georgia's state-law requirements to qualify as an HCSM, Aliera provided an ample basis, moored in the law and the facts of this case, from which a court could conclude that the Sharing Ministries meet the five requirements the Court identified as problematic.

i. Faith-based non-profit and limiting participation to those of similar faith

Aliera provided evidence that the Sharing Ministries are faith-based nonprofits who limit member participation to those who acknowledge a similar set of faith beliefs. (ECF No. 12-2 at 2–3; ECF No. 12-5 at 10–11; ECF No. 12-6 at 7, 21, 22; ECF No. 12-7 at 5; ECF No. 12-8 at 5, 12, 14; ECF No. 12-11 at 2, 5; ECF No. 12-12 at 12, 14; ECF No. 28-1 at 2; ECF No. 28-2 at 3–4; ECF No. 28-3 at 2; ECF No. 28-4 at 2–3; ECF No. 28-5 at 2–4.)

The Court took issue with that evidence because various state insurance commissioners had concluded that the Sharing Ministries had enrolled members irrespective of their faith. (ECF No. 49 at 73–77.) The Court that enrolling in each of the Sharing Ministries required acceptance of a Statement of Beliefs—including statements of belief in moral obligations to assist those in need and belief in a "spiritual duty to God … to maintain a healthy lifestyle"—that clearly implies a requirement of belief in God. (ECF No. 49 at 73–75.) The Court, however, repeated language from insurance commissioners denigrating those belief statements as "generic." (*Id.* at 73.) Ultimately, the Court held that there was no evidence that the Sharing Ministries' members shared ethical or religious beliefs.

But, as Aliera explained, the Court treads on dangerous ground when trying to determine whether the Sharing Ministries are "faith based," whether their

statements of belief are a legitimate "faith" expression, and whether their members actually share religious or ethical beliefs. (ECF No. 28 at 23–24.) In doing so, Aliera relied on precedent from the U.S. Supreme Court cautioning courts against attempting to decide the legitimacy of religious belief.[5] Further, Aliera pointed to Free Exercise jurisprudence rejecting any contention that people must share all doctrinal beliefs to share a set of ethical or religious beliefs.[6]

As Aliera explained, the Sharing Ministries' members represent that they share beliefs rooted in religious motivation. (ECF No. 12-5 at 5, 10; ECF No. 12-6 at 5, 19, 22; ECF No. 28-4 at 2–3.) That is enough to satisfy Georgia law. At minimum, neither the Court nor the Plaintiffs have pointed to any binding authority stating that representation is insufficient. Thus, Aliera's contention that the Sharing Ministries complied with the requirements of Georgia law are, at minimum, not frivolous. Under *Blinco*, that is sufficient to require a stay of these proceedings pending appeal.

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[5] *See* ECF No. 28 at 23–24 & n.10 (citing *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981)).

[6] *See* ECF No. 28 at 24 (citing *Peterson v. Minidoka Cty. Sch. Dist. No. 331*, 118 F.3d 1351, 1356–57 (9th Cir. 1997)).

ii. Providing amounts members may contribute with no assumption of risk or promise to pay

Aliera provided evidence that each participating member is informed when they join the Sharing Ministry and in the member guides that, despite their contributions, no one assumes the risk or promises to pay any sharing requests. (ECF No. 12-1 at 4, 10–11, 14–15, 17–18, 21–22; ECF No. 28-1 at 3; ECF No. 28-4 at 3–4.

The Court rejected Aliera's explanation, concluding that the monthly membership payments were mandatory and that members promised to pay those amounts. (ECF No. 49 at 79.) The Court also concluded that the Sharing Ministries had promised to pay for certain medical coverage and had assumed a risk in taking on members. (*Id.* at 79–80.)

Aliera has an at least colorable argument that the Court erred when reaching those conclusions. Put simply, the language of the member guide supports an at least colorable reading that the Sharing Ministries' members' contributions are voluntary, in that they are not contractually bound to make those contributions each month and may seek making them at any point. (*See, e.g.*, ECF No. 12-5 at 10 (calling monthly contributions "voluntary contributions or gifts"); *see also generally* ECF Nos. 12-5, 12-6, 12-8, 12-12 & 12-13.) Further, the language of the member guide supports an at least colorable reading that the Sharing Ministries did

not promise to pay for any particular medical coverage or assume any risk of being required to pay for members' medical treatments. (ECF No. 28 at 26–28; *see also* ECF No. 12-5 at 4, 22–25; ECF No. 12-6 at 5, 47–53; ECF No. 28-1 at 3; ECF No. 28-2 at 4; ECF No. 28-3 at 3.)

Under that reading, the relevant "agreement" was that if a member chose to make a monthly contribution, the Sharing Ministry would submit any sharing requests from that member for potential sharing of medical expenses. Such a reading would satisfy Georgia requirements for an HCSM. *See* O.C.G.A. § 33-1-20(4). At minimum, no binding authority has held that it does not.

In sum, Aliera has a non-frivolous argument that it meets this requirement. Therefore, under *Blinco*, the Court should grant a stay pending appeal.

iii. Facilitating matching members with needs with those who have the present ability to pay

Aliera provided evidence that, through Aliera's administration, both of the Sharing Ministries acted as a facilitator (or clearinghouse) for members with medical needs—matching them with other members who had the present ability to assist with those needs in accordance with the Sharing Ministries' eligibility criteria. (ECF No. 12-5 at 4–9; ECF No. 12-6 at 18; ECF No. 28-1 at 3; ECF No. 28-2 at 4; ECF No. 28-4 at 2–4; ECF No. 28-5 at 2.)

The Court took two issues with this evidence. First, it noted that Aliera—not the Sharing Ministries themselves—had done the facilitating and questioned whether HCSMs could lawfully "outsource" that authority. (ECF No. 49 at 78.) The Court, however, pointed to no binding authority foreclosing the argument that the Sharing Ministries could perform its duty to facilitate matching members with needs with those who can pay through an agent or agents. (*See id.*) Thus. Aliera's contention that its role facilitating that matching on the Sharing Ministries' behalf satisfies Georgia law is not frivolous.

Second, the Court concluded that the Sharing Ministries does not match participants with needs with those with the present ability to pay. (ECF No. 49 at 78–79.) The Court reached that conclusion based on its incorrect conclusion that payments are mandatory and conflating the present ability to assist with the need for sharing of medical benefits. (*See id.*) As discussed above, Aliera has an at least colorable argument that contributions to the Sharing Ministries, and sharing of costs by the members of the Sharing Ministry, are voluntary.

In sum, Aliera has a non-frivolous argument that it also meets this requirement. Therefore, under *Blinco*, the Court should grant a stay pending appeal.

iv. Providing monthly statements of the amounts of needs submitted and paid.

Aliera provided evidence that it (or its affiliates), acting on the Sharing Ministries' behalf, provided monthly statements to all members listing the total amount of qualified needs submitted to each Sharing Ministry and the amounts actually assigned to participants for their contributions. (ECF No. 28-1 at 3; ECF No. 28-4 at 3.) The Court rejected that evidence on two bases: (1) as before, it reasoned that it was not apparent that the Sharing Ministries could outsource this requirement to agents; and (2) it apparently discredited declarations stating that monthly statements are provided to members. (ECF No. 49 at 80–81.)

But Aliera's evidence provides at least a non-frivolous basis from which a court could conclude that Aliera meets this Georgia law requirement. As before, the Court points to no binding precedent foreclosing Aliera's contention that the Sharing Ministries' use of agents to provide monthly statements satisfies the Georgia-law requirement. Therefore, Aliera's contention is non-frivolous. Further, declarations are evidence. *See, e.g.*, *Mason v. Midland Funding LLC*, 815 F. App'x 320, 328–29 (11th Cir. 2020) (reversing a district court's order denying a motion to compel arbitration based solely on a declaration stating that the plaintiff was mailed a credit card agreement containing an arbitration clause). Thus, at minimum, the relevant declarations were some evidence the required statements

were sent to members. And if the Court believed that evidence to be insufficient for Aliera to win the point as a matter of law, a summary trial would be needed to resolve the factual dispute. *See* 9 U.S.C. § 4.

In sum, Aliera has a non-frivolous argument that it meets this fourth requirement. Therefore, under *Blinco*, the Court should grant a stay pending appeal.

3. Aliera has raised at least colorable arguments that Selimo is subject to an agreement to arbitrate her disputes with Aliera or, at minimum, that an arbitrator should decide Selimo's status.

In its Order denying the motion to compel arbitration, the Court found that there was no contract in effect between November 15, 2019 and May 14, 2020 for Plaintiff Kristin Selimo that included an arbitration provision. (ECF No. 49 at 82.) Thus, it held that Selimo had not agreed to arbitrate any claims based on conduct that occurred within that time period. (*See id.*)

Aliera has, however, presented at least colorable arguments that Selimo is bound to arbitrate her claims against Aliera or, at minimum, that an arbitrator should decide any Selimo-related arbitrability questions. As Aliera has explained, Selimo was a party to the Unity member guide, which undisputedly contained a dispute-resolution clause calling for arbitration under arbitral rules that incorporated a delegation clause. (ECF No. 12-1 at 15–17, ECF No. 12-8, ECF No.

43 at 4.) And as Aliera explained, the question of whether Selimo's current claims fall within the scope of that agreement is a question regarding the scope of the arbitration agreement—a question of arbitrability for the arbitrator.[7] (ECF No. 43 at 4–6.; ECF No. 45 at 1–3) And Aliera cited binding authority from the U.S. Supreme Court and the Eleventh Circuit to support its position.[8]

* * *

Of note, although the Court rejected Aliera's arguments and denied its motion to compel arbitration, its Order doing so was eighty-four pages long and included more than sixty pages of analysis. At no point in that Order did the Court state or even suggest that Aliera's arguments were frivolous, without any arguable merit, or were brought in bad faith or for some improper purpose. Instead, the Court referred to the motion to compel as presenting a "thicket of disputes." (ECF No. 49 at 26.) Although the Court ultimately found Aliera's arguments

[7] This would be true even if the Court regarded Aliera's argument as frivolous. *See Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1270 (11th Cir. 2017).

[8] *See* ECF No. 43 at 4–6 (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019); *JPay, Inc. v. Kobel*, 904 F.3d 923, 943 (11th Cir. 2018); *Jones*, 866 F.3d at 1270; *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014); *In re Checking Account Overdraft Litig.*, 674 F.3d 1252, 1256–57 (11th Cir. 2012)); ECF No. 45 at 1–3 (citing *Henry Schein*, 139 S. Ct. at 529; *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *U.S. Nutraceuticals*, 769 F.3d at 1311–12; *Lambert v. Austen, Ind.*, 544 F.3d 1192, 1197 (11th Cir. 2008)).

unpersuasive, the bar for frivolity is much higher. *See Connors & Co.*, 2009 WL 10671567, at *1. It is enough that Aliera's appeal has at least arguable merit.

CONCLUSION

Under *Blinco*, district courts should stay litigation pending an appeal from a denial of a motion to compel arbitration so long as the appeal is not frivolous. *See* 366 F.3d at 1253. Here, Aliera's appeal has at least arguable merit and will raise at least colorable arguments. Thus, it is not frivolous. As a result, the Court should grant Aliera's motion and stay this case pending the result of Aliera's appeal to the Eleventh Circuit.

THEREFORE, Aliera respectfully requests that the Court enter an order staying this litigation pending the result of Aliera's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

/s/ Elizabeth B. Shirley
Elizabeth B. Shirley

CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 9th day of August, 2021 via the Court's CM/ECF system, which will send notification of such filings to all parties of record via electronic mail.

/s/ Elizabeth B. Shirley
OF COUNSEL