IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	CHAPTER 11
	)	
THE ALIERA COMPANIES INC.	)	CASE NO. 21-11548-JTD
d/b/a Aliera Healthcare, Inc.,	)	
	)	**Obj. Deadline: January 6, 2022, at 4:00 P.M. (EST)**
	)	**H'rg Date: January 13, 2022, at 11:00 A.M. (EST)**
Alleged Debtor.	)	
	)	

MOTION TO DISMISS INVOLUNTARY PETITION

COMES NOW The Aliera Companies Inc. d/b/a Aliera Healthcare, Inc. (the "**Alleged Debtor**" or "**Aliera**"), pursuant to Fed. R. Bank. P. 1011, Fed. R. Bank. P. 1013, and Fed. R. Civ. P. 12, and hereby respectfully requests that the Court enter an order dismissing the involuntary petition pending in the above-captioned case. In support of this motion (the "**Motion**"), the Alleged Debtor states as follows:

PRELIMINARY STATEMENT

Aliera is a limited liability company organized in Delaware whose principal place of business and executive offices have been located since its formation continuously in the Atlanta, Georgia area. Aliera ceased active operations in September 2021. In an effort to wind down and liquidate its assets for the benefit of its creditors in an expeditious and cost-effective manner, Aliera elected to file in Georgia a statutory Assignment of Benefit of Creditors (the "**ABC**"). That proceeding was filed on or about October 11, 2021. As part of that process, assets of Aliera and four of its wholly owned subsidiaries were assigned to Asset Recovery Associates Aliera, LLC ("**ARAA**") as the "Assignee." ARAA is controlled and directed by Katie S. Goodman, an experienced fiduciary who has serve in such role numerous times throughout her career. Approximately two months thereafter, an involuntary Chapter 11 petition (the "**Involuntary**

Petition") was filed against Aliera in this Court on December 3, 2021 (the "**Involuntary Petition Date**") and remains pending. The petitioning creditors (collectively, the "**Petitioning Creditors**") are all class action tort claimants with default judgments entered against Aliera in November, 2021, less than a month prior to the filing of the Involuntary Petition. Those judgments are all still subject to reconsideration or appeal under applicable rules, and the claims are therefore subject to bona fide dispute. In the Involuntary Petition the Petitioning Creditors contended that Aliera is an "affiliate" of Sharity under 11 U.S.C. § 101(2)(D). Aliera disputes that it is an affiliate of Sharity and is not aware of any finding to the contrary. Tellingly, not a single trade creditor of Aliera joined in the Involuntary Petition.

On December 22, 2021, a voluntary Chapter 11 petition was filed in the United States Bankruptcy Court for the Northern District of Georgia (the "**Georgia Court**") by Aliera, as well as by each of its affiliates that were parties to the Georgia ABC proceeding, none of whom were parties to the Involuntary Petition. On December 28, 2021, the Alleged Debtor filed with this Court a Motion to Transfer Venue [Dkt. No. 17] (the "**Aliera Venue Motion**") of the above-captioned case to the Georgia Court.[1] Later that same day, the Petitioning Creditors filed their Petitioning Creditors' Motion to Transfer Venue of the Later-Filed Voluntary Bankruptcy Cases of the Aliera Companies Inc. and its Four Affiliates [Dkt. No. 18] (the "**PC Venue Motion**"). If the Court declines to grant the Aliera Venue Motion and transfer venue of the case to Georgia, independent grounds exist which require dismissal of the Involuntary Petition.

[1] Aliera incorporates by reference as if fully stated herein the Aliera Venue Motion, including all exhibits attached thereto.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a), and the standing order of reference entered by the United States District Court for the District of Delaware on February 29, 2012.

2. This matter is a core proceeding under 28 U.S.C. § 157(b)(2), and this Court has Constitutional authority to enter a final order on this Motion.

3. Venue is proper both in this Court and in the Georgia Court pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTUAL BACKGROUND

4. On or about October 11, 2021, the Alleged Debtor and various of its affiliates: Advevo, LLC, a Delaware limited liability company; Ensurian Agency LLC, a Delaware limited liability company; Tactic Edge Solutions LLC, a Delaware limited liability company; and USA Benefits & Administrators, LLC, a New Mexico limited liability company (collectively, the "**Assignors**"), filed a Deed of Assignment with the Clerk of the Superior Court in Fulton County, Georgia in accordance with O.C.G.A. § 18-2-41, initiating a statutory Assignment for Benefit of Creditors process. *See Declaration of Katie Goodman in Support of Motion to Transfer Venue*, ¶ 2, attached to the Venue Motion as Exhibit A (hereinafter, the "**Goodman Declaration**"). A copy of the ABC Deed is attached to the Venue Motion as Exhibit B.

5. Pursuant to the ABC Deed, ARAA, a Georgia limited liability company, became the assignee of all assets of the Assignors for the benefit of the Assignors' creditors. *See* Goodman Declaration, ¶ 3. Those assets consisted primarily of receivables, a D&O insurance policy and other intangible items, including potential causes of action against former insiders and other parties, but very little cash. The ABC Deed reflects that as of August 31, 2021, the Assignors

collectively had cash on deposit in a total amount of approximately $32,863, and Aliera itself had no cash. *See* ABC Deed Exhibits B-1, B-2, B-3, B-4 and B-5. At the time of the assignment approximately one month later the Assignors had little or no cash. *See* Goodman Declaration, ¶ 3.

6. Katie S. Goodman is the managing member of ARAA. She has served as an assignee, trustee, receiver and chief restructuring officer in numerous insolvency proceedings both in and out of bankruptcy court. *See* Goodman Declaration, ¶ 1.

7. On December 3, 2021, the Involuntary Petition for relief under Chapter 11 of Title 11, United States Code (the "**Bankruptcy Code**") was filed against the Alleged Debtor in this Court. Dkt. No. 1. The Petitioning Creditors are all class action tort plaintiffs who were former members of Trinity Healthshare Inc. n/k/a Sharity Ministries, Inc. ("**Sharity**"). Sharity purported to operate a non-profit healthcare sharing ministry ("**HCSM**") comprised of members adhering to a faith-based statement of beliefs. Aliera is a for-profit entity that contracted with other parties, such as Sharity, to provide certain administrative and other services, including, *inter alia*, marketing memberships in the sharing programs and create processes to facilitate and process member-to-member sharing of medical expenses.

8. ARAA and the Alleged Debtor subsequently authorized the filing of voluntary petitions for relief for each of the Assignors in the Georgia Court (collectively, the "**Georgia Debtors**"). *See* Goodman Declaration, ¶ 6. Such cases were filed on December 21, 2021. *Id.* ARAA and the Alleged Debtor also authorized the filing of a motion to dismiss or transfer venue of the Alleged Debtor's bankruptcy case from this Court to the Georgia Court. *Id.*

9. The Petitioning Creditors are all class action tort claimants with default judgments (collectively, the "**Default Judgments**") entered in November, 2021, in one of two separate lawsuits brought in federal district court against Aliera and other defendants in the states of

Kentucky and Washington, respectively. Other than local counsel, the plaintiffs in both lawsuits were represented by the same set of attorneys. The Kentucky lawsuit is styled as *Hanna Albina and Austin Willard, individually and on behalf of others similarly situated v. The Aliera Companies, Inc., Trinity Healthshare, Inc. and OneShare Health, LLC d/b/a Unity Healthshare, LLC*, Case No. 5:20-cv-00496-JMH (U.S.D.C. E.D. Ky.) (the "**Kentucky Suit**"). A copy of the docket showing activity in the Kentucky Suit as of December 27, 2021, is attached to the Venue Motion as Exhibit C (the "**Kentucky Docket**"). The Washington lawsuit is styled *as Gerald Jackson, Roslyn Jackson, Dean Mellom, Jon Perrin, and Julie Perrin, individually and on behalf of others similarly situated v. The Aliera Companies, Inc., Aliera Healthcare, Inc. and Trinity Healthshare, Inc.*, 2:19-CV-01281-BJR (U.S.D.C. E.D. Wash.) (the "**Washington Suit**"; together, with the Kentucky Suit, the "**Class Action Suits**"). A copy of the docket showing activity in the Washington Suit as of December 27, 2021, is attached to the Venue Motion as Exhibit D (the "**Washington Docket**").

10. The Default Judgments were entered at a time when the Alleged Debtor was unrepresented by counsel and had no practical ability to retain counsel to defend against the Class Action Suits. Further, the Default Judgments were entered on an extremely expedited basis at the request of the Petitioning Creditors, which they claimed was necessary due to the pendency of the ABC. Hence, the claims asserted in the Class Action Suits have not been tested on the merits. And the damages awarded by default, with no live testimony, include rescission damages, reformation damages, and treble damages for each class claimant, and an award of attorneys fees. *See* Involuntary Petition; PC Venue Motion Exhibits B, C and D.

11. Further, the Default Judgments are not final, and are therefore subject to appeal and/or a motion to reopen the asserted defaults, which may be subject to both underlying defenses

and rights to limit damage claims. In addition, there may be claimants who may have elected or will elect to opt out of the class, but the process was never completed and class certification took place only after Aliera had run out of funds to defend itself and its Answers were stricken by the Courts. *See* F. R. Civ. P. 23(c). The Default Judgment in the Kentucky Suit was entered on November 17, 2021, and the Default Judgment in the Washington Suit was entered on November 11, 2021. *See* Involuntary Petition, Exhibits 1 and 2. As noted above, the Involuntary Petition was filed on December 3, 2021, and therefore the Default Judgments did not become final and are now stayed by operation of the automatic stay.

12. A review of the dockets in the Class Action Suits shows that Aliera had retained attorneys to represent it and was vigorously defending both actions. However, at or about the time Aliera ceased its business operations and filed the ABC, Aliera's counsel withdrew from representing Aliera in each of the Class Action Suits because Aliera owed substantial amounts to its attorneys and lacked the resources to continue to pay legal fees to defend itself in those proceedings. *See* Goodman Declaration, ¶ 5; Kentucky Docket Nos. 62 and 63; Washington Docket Nos. 146 and 150. Shortly thereafter, in each case the plaintiffs filed motions seeking entry of a default judgment against Aliera. *See* Kentucky Docket No. 64; Washington Docket No. 153. The plaintiffs also filed in each case motions to certify the proposed class, as well as motions to shorten notice and expedite consideration of the motions seeking entry of default judgments. *See* Kentucky Docket Nos. 65 and 66; Washington Docket Nos. 152 and 154. Shortly thereafter, in each case the motions were granted and default judgments entered. *See* Kentucky Docket Nos. 68, 69, 70 and 72; Washington Docket Nos. 169, 170 and 171.

13. In each of the Class Action Suits the petitioning creditors were able to convince the judge overseeing the case to expedite consideration of their motion for entry of default judgment

by indicating that they intended to participate as creditors in the ABC proceedings and needed to have their claims liquidated as soon as possible in order to do so. For example, in the *Plaintiffs' Motion to Strike Aliera's Answer and Enter Default Judgment after Class Certification or, in the Alternative, Motion For Summary Judgment* (the "**Motion to Strike**") filed in the Washington Suit on October 26, 2021 (a copy of which is attached to the Venue Motion as Exhibit E), the plaintiffs made the following argument:

> *Plaintiffs seek an immediate adjudication of their claims and class certification so that the Washington class may be considered creditors in the Aliera ABC process. Accordingly, they move to expedite their motion and request a telephonic hearing, and seek an immediate summary judgment for both rescission and reformation damages, Consumer Protection Act ("CPA") treble damages, attorney fees and litigation costs, so that they may protect their interests and that of other Washington state Trinity/Sharity members in the Aliera ABC and pursue those ultimately responsible for this fraud.*

Motion to Strike, p. 4.

Likewise, in the *Motion to Expedite Rulings on Plaintiffs' Pending Motions* (the "**Motion to Expedite**") (a copy of which is attached to the Venue Motion as Exhibit F) filed in the Kentucky Suit on November 4, 2021, the plaintiffs represented to the Kentucky District Judge as follows:

> *Plaintiffs must proceed expeditiously against The Aliera Companies, Inc. ("Aliera"), in order to avoid specific prejudice to them. Aliera has already begun an expedited process of liquidating itself under Georgia law, and Plaintiffs (and the class members) have barely two months remaining to present claims under that process or forever be barred from doing so. As explained in more thorough detail in its other pending motions, Aliera has begun winding up its business operations and has recorded a deed of Assignment for the Benefit of Creditors ("Aliera ABC"), a state-law alternative to bankruptcy recognized under Georgia law. See Ga. Code. Ann. §§ 18-2-40 to -59. The Aliera ABC is a method by which Aliera can liquidate its assets in a way which undermines the fairness afforded by the United States Bankruptcy Code. Without the protections provided by the Bankruptcy Code, Aliera's insiders, through the Aliera ABC, will have more control over the liquidation of its assets than they would in bankruptcy proceedings. Id. §§ 18-2-40, -42. Aliera has already transferred its assets to the assignee—Asset Recovery Associates Aliera, LLC—and the assignee has already notified creditors of the claims bar date of January 11, 2022. [Exh. A]. If Plaintiffs are going to have any viable claim against the remaining assets of Aliera, they must proceed with a claim as a creditor in the Aliera ABC process before the claims bar date of January 11,*

> *2022. In order to proceed credibly, Plaintiffs must have a liquidated judgment before that date, which will require this Court to expedite its consideration of Plaintiffs' various motions."*

Motion to Expedite, p. 2. These representations were misleading at best. There is no reason why the plaintiffs had to have their claims liquidated on an expedited basis (with due process shortcuts) in order to participate as creditors in the ABC. There can be no doubt that the real reason for pushing for expedited resolution was to try to obtain liquidated claims with which to file the instant involuntary case.

RELIEF REQUESTED

14. The filing of the Involuntary Petition automatically stayed further proceedings against Aliera in both the Washington Suit and the Kentucky Suit under 11 U.S.C. § 362(a). *See Ass'n of St. Croix Condominium Owners v. St. Croix Hotel Corp*., 682 F.2d 446 (3d Cir. 1982) (automatic stay applies to any case in which the debtor originally was the defendant). Those default judgments were automatically stayed for 30 days under Fed. R. Civ. P. 62(a). Because the 30-day appeal period under Rule 4 of the Federal Rules of Appellate Procedure had not expired at the time of the filing of the Involuntary Petition, each of the default judgments held by the petitioning creditors is still subject to appeal. They also are potentially subject to being set aside (under Fed. R. Civ. P. 55(c)), reconsidered or amended (Fed. R. Civ. P. 59). Under the circumstances as set forth herein, the petitioning creditors' claims clearly remain subject to bona fide dispute.

BASIS FOR RELIEF

A. The Involuntary Petition must be Dismissed Because the Petitioning Creditors' Claims are All Subject to Bona Fide Dispute

15. Because the claims asserted by the Petitioning Creditors remain subject to bona fide dispute as to both liability and amount, the Alleged Debtor requests that, in the event the Court

declines to transfer venue of the above-captioned case, that this Court enter an order dismissing the case at bar, due to the Involuntary Petition not satisfying the requirements of Section 303(b)(1) of the Bankruptcy Code.

16. Section 303(b)(1) of the Bankruptcy Code provides, in relevant part, that an involuntary case may only be commenced "by three or more entities, each of which is either a holder of a claim . . . this is not . . . the subject of a bona fide dispute as to liability or amount."

17. Because the term "bona fide dispute" in Section 303(b)(1) is not defined in the Bankruptcy Code, courts have adopted certain standards to evaluate make such determination. In the decision of *In re AMC Investors, LLC*, 406 B.R. 478 (Bankr. D. Del. 2009), this Court outlined the standards which are to be applied in the Third Circuit as follows:

> The Third Circuit has held that a bona fide dispute exists "[i]f there is a genuine issue of a material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts. . . . Under this standard, the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt." ***However, the court's objective is to ascertain the existence of a dispute, not to actually resolve the dispute***.

AMC Investors, 406 B.R. at 483-484 (citations omitted) (emphasis added). "[T]he court need only engage in a limited analysis of the claims at issue. The court *must not*, when determining whether there is a bona fide dispute, *resolve any genuine issues of fact or law*." *In Prisuta*, 121 B.R. 474, 476 (Bankr. W.D. Pa. 1990) (citations omitted) (emphasis added). A petitioning creditor is ineligible to join an involuntary petition if its claim is in bona fide dispute as to either liability or amount. *In re Euro-American Lodging Corp.*, 357 B.R. 700, 712 n. 8 (Bankr. S.D.N.Y. 2007) ("any dispute regarding the amount that arises from the same transaction and is directly related to the underlying claim should render the claim subject to a bona fide dispute.") (citing 2 Alan N. Resnick & Henry J. Sommer, *Collier On Bankruptcy* P 303.03[2][b], at 303-30 (15th rev. ed. 2006)). *See also Farmers & Merchants State Bank v. Turner*, 518 B.R. 642, 651-54 (N.D. Fla.

2014) (subsequent to the amendment of Section 303 of the Bankruptcy Code in 2005 to add the phrase "as to liability or amount," the "majority of courts have concluded that the 2005 amendment changed the analysis such that now any dispute as to amount (whether implicating the statutory threshold or not) renders a creditor ineligible.").

18. In *AMC Investors* this Court described the applicable burdens of proof thusly:

> The burden is on the petitioning creditor to first establish a prima facie case that no bona fide dispute exists. Once a prima facie case has been established, the burden shifts to the alleged debtor to demonstrate the existence of a bona fide dispute.

AMC Investors, 406 B.R. at 484 (citations omitted). *See also In re Metrogate, LLC*, 2016 Bankr. LEXIS 2242, Case No. 15-12593 (Bankr. D. Del. May 26, 2016) ("'Substantial' factual and legal questions preclude a finding of involuntary bankruptcy).

19. In the instant case, the Petitioning Creditors cannot carry even their initial burden of showing that their claims are not subject to a bona fide dispute both as to liability and amount. As an initial matter, all of the Petitioning Creditors' claims are based on the Default Judgments, which Default Judgments were entered in the Class Action Suits less than thirty days prior to the filing of the Involuntary Petition. As such, by operation of Fed. R. App. P. 4(a)(1)(A), the Default Judgments were still subject to appeal as of the Involuntary Petition Date, and further, any proceedings to enforce such Default Judgments were similarly stayed by operation of the 30-day supersedeas provided by Fed. R. Civ. P. 62(a). As such, the Default Judgments never became final, and remain stayed pursuant to Section 362 of the Bankruptcy Code and thus remain nonfinal.

20. While courts have held that claims arising from an ***unstayed*** final judgment on the merits which is subject to appeal are not considered subject to "bona fide dispute" for purposes of Section 303(b)(1), such is not the case for default judgments. *See AMC Investors, LLC*, 406 B.R. 478. In *AMC Investors* this Court adopted the majority position espoused in *In re Drexler*, 56 B.R. 960 (Bankr. S.D.N.Y. 1986), and held in that case that a claim arising under an unstayed,

immediately enforceable state court judgment was not subject to bona fide dispute for purposes of Section 303(b)(1). However, this Court distinguished such a claim from one arising under a default judgment which was stayed and could not be immediately enforced.

> The Court holds that the existence of a judgment by a court (***other than a default judgment***) that has ***not been stayed*** is, in and of itself, sufficient to establish that the claim underlying the judgment is not in bona fide dispute for purposes of determining whether a petitioning creditor is eligible to commence an involuntary case.

AMC Investors, 406 B.R. at 487 (emphasis added).

21. There are a number of reasons why courts distinguish between unstayed judgments on the merits and default judgments which are stayed. With a judgment on the merits, the defendant has had its day in court. And even if the defendant has appealed the adverse judgment, if the judgment is unstayed and immediately enforceable under relevant state law, bankruptcy courts are loathe to look behind the underlying judgment and will deem it to be final and not subject to challenge under Section 303(b)(1). As stated by the bankruptcy court in the *Drexler* decision out of the Southern District of New York:

> Once entered, an unstayed final judgment may be enforced in accordance with its terms and with applicable law or rules, even though an appeal is pending. . . . It would be contrary to the basic principles respecting, and would effect a radical alteration of, the long-standing enforceability of unstayed final judgments to hold that the pendency of the debtor's appeal created a "bona fide dispute" within the meaning of Code § 303.

Drexler, 56 B.R. at 967 (citations omitted). *See Fustolo v. 50 Thomas Patton Drive, LLC*, 816 F.3d 1, 8 (1st Cir. 2016) (*Drexler* rule does not apply where execution on the judgment is stayed, even if only by automatic operation of law). In the instant case, the Default Judgments held by the

Petitioning Creditors were all automatically stayed under Fed. R. Civ. P. 62 and remained stayed at the time the Involuntary Petitions were filed; therefore, they could not be enforced.[2]

22. Additionally, there is the obvious distinction that where, as here, a default judgment has been entered because the defendant lacked the resources to defend the action, the defendant has not had the opportunity to have its "day in court." *See, e.g. Medunic v. Lederer,* 533 F.2d 891, 893-894 (3d Cir. 1976) ("a standard of 'liberality,' rather than 'strictness' should be applied in acting on a motion to set aside a default judgment, and . . . 'any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits.'") (citation omitted). And because the claims asserted in the Washington Suit and the Kentucky Suit were based in large part on allegations of fraud and deceit, it makes the subsequent default judgment even more suspect since those are the types of issues which have historically been deemed not appropriate for summary disposition. *See Riehl v. Travelers Ins. Co.,* 772 F.2d 19, 24 (3d Cir. 1985) ("issues of knowledge and intent are particularly inappropriate for resolution by summary judgment, since such issues must often be resolved on the basis of inferences drawn from the conduct of the parties."); *see also Coolspring Stone Supply v. American States Life Ins. Co*., 10 F.3d 144 (3d Cir. 1993) (same).

23. Further, even if the Petitioning Creditors were able to establish liability, the manner in which damages were determined and the nature and type of damages awarded in the Default Judgments in the Class Action Suits cast substantial doubt on whether these were accurately determined. For example, in the Kentucky Suit the District Judge awarded to the putative class

[2] In fact, the Alleged Debtor questions whether the Petitioning Creditors' act in filing the Involuntary Petition violated the stay under Rule 62. Rule 62 provides for an automatic stay of the enforcement of judgments for 30 days after entry. This Court has noted that "[t]he filing of an involuntary petition is but one of many means by which a judgment creditor may seek to attempt collection of something upon its judgment." *AMC Investors*, 406 B.R. at 484.

$4,679,868.46. This was calculated in summary fashion based solely on affidavits of Mr. Neil Luria, Sharity's CRO, submitted by the plaintiffs. Likewise, in the Washington Suit the District Judge awarded to the putative class a total of $21,352,827.08, based solely on affidavits submitted by the plaintiffs. On information and belief, no live testimony was permitted or received, and Aliera was unable to participate in such process because it had not retained counsel. As a result, the total amount of claims asserted under the Default Judgments exceed $26 million. This amount is well in excess of the total amount of claims held by Aliera's trade creditors. The total amount of trade claims listed for Aliera in the ABC Deed was approximately $15,380,000, and that included an approximate $6 million PPP loan which is expected to be largely forgiven. *See* Aliera Venue Motion (ABC Deed, Ex. B), so the actual number is likely to be closer to $9 million. Therefore, even assuming arguendo that Aliera has liability to the Petitioning Creditors the determination of the proper amount of damages will be critical to a fair distribution of Aliera's assets.

24. As noted above, when asked to decide whether claims of petitioning creditors are subject to bona fide dispute for purposes of Section 303(b)(1), a bankruptcy court is not called upon to undertake the laborious task of combing through the underlying in an effort to resolve factual disputes. Rather, the bankruptcy court should merely satisfy itself that issues bearing upon the determination of liability and damages are contested. *See AMC Investors*, 406 B.R. at 487 ("the court's objective is to ascertain the existence of a dispute, not to actually resolve the dispute"). In looking at the record below in each of the Class Action Suits, it is undeniable that the allegations raised in the Complaints were hotly contested by Aliera before its cash flow issues, which became acute in the late summer of 2021 and caused it to lose legal representation with which to press its case. *See* Kentucky Docket (Aliera Venue Motion Exhibit C) and Washington

Docket (Aliera Venue Motion Exhibit D). The Petitioning Creditors seized upon that opportunity, and under the guise of needing immediate relief to participate in the ABC, they were able to convince two federal District Courts to enter very large Default Judgments on an extremely expedited basis, effectively denying Aliera and ARAA adequate time to see if sufficient funds could be collected or otherwise generated to obtain substitute counsel. Under all of the foregoing circumstances this Court should find that the Petitioning Creditors' claims remain subject to bona fide dispute both as to liability and amount.

B. <u>The Petitioning Creditors Cannot Satisfy their Burden of Showing that the Involuntary Petition was filed in Good Faith</u>

25. In *In re Forever Green Ath. Fields, Inc.*, 804 F.3d 328 (3d Cir. 2015), the Third Circuit held that "bad faith provides an independent basis for dismissing an involuntary petition." Creditors who file petitions "as a litigation tactic in pending proceedings" act in bad faith. *Id.* at 334. Creditors are presumed to have acted in good faith; to dismiss the petition, the alleged debtor must show by a preponderance of the evidence that the creditors acted in bad faith. *Id.* at 335. The standard for bad faith under 11 U.S.C. § 303 is the "totality of the circumstances," looking to "both subjective and objective evidence of bad faith."

26. The Third Circuit provided a non-exhaustive list of factors courts may consider whether:

> [1] the creditors satisfied the statutory criteria for filing the petition; [2] the involuntary petition was meritorious; [3] the creditors made a reasonable inquiry into the relevant facts and pertinent law before filing; [4] there was evidence of preferential payments to certain creditors or of dissipation of the debtor's assets; [5] the filing was motivated by ill will or a desire to harass; [6] the petitioning creditors used the filing to obtain a disproportionate advantage for themselves rather than to protect against other creditors doing the same; [7] the filing was used as a tactical advantage in pending actions; [8] the filing was used as a substitute for customary debt-collection procedures; and [9] the filing had suspicious timing.

Id. at 336.

27. Substantial case law prior to *Forever Green* focused on the nexus between the seventh (litigation tactic) and ninth (timing) factors, inquiring into whether the action was brought with a "valid bankruptcy purpose" such as "preserving a going concern or maximizing the values of the Debtors' estate." *In re 15375 Mem'l Corp.*, 589 F.3d 605, 619 (3d Cir. 2009).

28. The following factors are relevant here:

The Petitioning Creditors Have Not Satisfied the Statutory Criteria for Filing the Involuntary Petition

As shown above, because the Petitioning Creditors alleged claims remain subject to bona fide dispute given that such alleged claims arising from stayed Default Judgments not decided on the merits, they have not satisfied the requirements of Section 303 of the Bankruptcy Code.

The Petitioning Creditors Did Not Make a Reasonable Inquiry into the Relevant Facts and Pertinent Law Before Filing

Had the Petitioning Creditors bothered to review Fed. R. Civ. P. 62 prior to filing the Involuntary Petition, as well as the relevant case law in this District, they would have realized that their alleged claims remained subject to bona fide dispute and thus their claims did not satisfy the requirements of Section 303 of the Bankruptcy Code.

Numerosity

Although numerosity is a statutory requirement, it has an equitable component as well. The numerosity requirement is based "on strong policy considerations, which include the fear that one or two recalcitrant creditors might file an involuntary case to harass a debtor." 2 *Collier On Bankruptcy* ¶ 303.14[2]. As noted above, the Petitioning Creditors are all represented by the same law firm, whose alleged claims arise out of the same lawsuits filed by the same law firm as class action cases in the Class Action Suits, and all of the Petitioning Creditors list that law firm as their mailing address. In essence, the Petitioning Creditors are acting as one creditor, managed by a law firm that has a direct financial interest in the outcome of the underlying lawsuits. As such, this

Court's decision in *In re Metrogate, LLC*, 2016 Bankr. LEXIS 2242 is instructive. In *Metrogate*, the Court found that while the petitioning creditors in that case technically met the numerosity requirement of Section 303 of the Bankruptcy Code, the fact that the petitioning creditors in that case were all managed by the same entity led the Court to conclude that this was essentially a two-party dispute. *Id.* at *41-43. That is essentially what is happening in the case at bar. Further, it is quite telling that the only petitioning creditors in this case are the class action plaintiffs, and that no other non-litigation creditors appeared willing to join the Involuntary Petition.

No Evidence of Preferential Payments to Certain Creditors or of Dissipation of the Alleged Debtor's Assets

The Petitioning Creditors point to no evidence that the Alleged Debtor was making preferential payments to certain creditors, or that the Alleged Debtor's assets were being dissipated. Indeed, the evidence is overwhelmingly to the contrary. The Alleged Debtor had responsibly sought to liquidate its remaining assets and distribute same to creditors by transferring all such assets to ARAA and commencing the ABC process.

The Involuntary Petition is Being Used as a Tactical Advantage in Pending Actions

As noted above, the Petitioning Creditors appear to have misled the District Courts in the Class Action Suits by implying in their filings in those courts that the reason they needed to liquidate their claims on an expedited and extraordinary basis was to be able to participate in the ABC process. However, once they obtained those judgments, they then proceeded to file the Involuntary Petition without ever seeking to participate in the ABC process. It appears, therefore, that the Petitioning Creditors have invoked this Court's jurisdiction for an improper purpose: to obtain a tactical advantage in an ongoing dispute already properly pending in other forums through forum shopping.

Timing of the Involuntary Filing

The timing of the filing of the Involuntary Petition is similarly suspicious. Upon the commencement of the ABC, the Petitioning Creditors immediately sought to expedite judgment in the Class Action Suits, and then less than 3 weeks after obtaining such Default Judgments, filed the Involuntary Petition. It would appear that timing appears to be directly in response to the pending ABC.

29. Given the above factors, it appears that the Involuntary Petition was not filed in good faith, which is additional ground to dismiss same

WHEREFORE, the Alleged Debtor respectfully requests that the Court enter an order (1) granting the Motion, (2) dismissing the Involuntary Petition, and (3) granting the Alleged Debtor such other and further relief as may be just and proper.

This 29th day of December, 2021.

MONZACK MERSKY AND BROWDER, P.A.

By: */s/ Rachel B. Mersky*
RACHEL B. MERSKY
Del. Bar No. 2049

1201 Orange Street, Suite 400
Wilmington, DE 19801
P: (302) 656-8162
F: (302) 656-2769
E: rmersky@monlaw.com

and

SCROGGINS & WILLIAMSON, P.C.

By: */s/ J. Robert Williamson*
J. ROBERT WILLIAMSON
Georgia Bar No. 765214
Admitted Pro Hac Vice
MATTHEW W. LEVIN
Georgia Bar No. 448270
Admitted Pro Hac Vice

4401 Northside Parkway
Suite 450
Atlanta, Georgia 30327
T: (404) 893-3880
F: (404) 893-3886
E: rwilliamson@swlawfirm.com
mlevin@swlawfirm.com

Counsel for the Alleged Debtor, by and through ARA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	CHAPTER 11
	)	
THE ALIERA COMPANIES INC.	)	CASE NO. 21-11548-JTD
d/b/a Aliera Healthcare, Inc.,	)	
	)	**Obj. Deadline: January 6, 2022, at 4:00 P.M. (EST)**
	)	**H'rg Date: January 13, 2022, at 11:00 A.M. (EST)**
Alleged Debtor.	)	
	)	

NOTICE OF MOTION TO DISMISS

PLEASE TAKE NOTICE that:

1. On December 29, 2021, The Aliera Companies Inc. ("**Aliera**") filed a *Motion To Dismiss* ("**Motion**") with the United States Bankruptcy Court for the District of Delaware ("**Court**").

2. Any responses or objections to the Motion must be filed in writing with the Court, through its CM/ECF electronic filing system or with the Clerk of the U.S. Bankruptcy Court for the District of Delaware, 824 N. Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon and received by the undersigned counsel on or before **January 6, 2022, at 4:00 p.m. (ET)**.

3. The Court will not consider any objection or other response to the Motion that is not filed with the Court by the Objection Deadline.

4. A hearing to consider approval of the Motion will be held on **January 13, 2022 at 11:00 a.m. (ET)** before the Honorable John T. Dorsey, in the U.S. Bankruptcy Court for the District of Delaware, 824 North Market Street, 5th Floor, Wilmington, Delaware 19801, via Zoom, in accordance with his Chambers Procedures, which are available on the Court's website at https://www.deb.uscourts.gov/content/judge-john-t-dorsey.

5. If you fail to respond to the Motion in accordance with this notice, the Court may grant the relief requested in the Motion without further notice or a hearing.

Dated: December 29, 2021
Wilmington, Delaware

MONZACK MERSKY & BROWDER, P.A.

/s/ Rachel B. Mersky

Rachel Mersky (DE No. 2049)
1201 N. Orange Street, Suite 400
Wilmington, Delaware 19801
Telephone: (302) 656-8162
Facsimile: (302) 656-2769
E-mail: rmersky@monlaw.com

AND

J. Robert Williamson
Matthew W. Levin
Scroggins & Williamson, P.C.
4401 Northside Parkway
Suite 450
Atlanta, GA 30327
(404) 893-3880
rwilliamson@swlawfirm.com
mlevin@swlawfirm.com

Attorneys for The Aliera Companies. Inc.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	CHAPTER 11
	)	
THE ALIERA COMPANIES INC. d/b/a Aliera Healthcare, Inc.,	)	CASE NO. 21-11548-JTD
	)	
	)	Related to ECF No.
Alleged Debtor.	)	
	)	

ORDER DISMISSING INVOLUNTARY PETITION

On the motion of The Aliera Companies Inc. d/b/a Aliera Healthcare, Inc. (the "**Alleged Debtor**" or "**Aliera**") for an order dismissing the involuntary petition (the "**Involuntary Petition**") filed to commence the above-captioned case (the "**Motion**");[1] and it appearing that (a) this Court has jurisdiction of both this case and this proceeding, (b) this proceeding is a core proceeding arising in a case under the Bankruptcy Code, (c) this Court has statutory authority to hear and determine this proceeding, (c) this Court has constitutional authority to enter a final order or judgment in this proceeding, (d) venue of both this case and this proceeding in this district is proper, (e) there has been "notice and a hearing" with respect to the Motion, and (f) there is sufficient cause for the Court to dismiss the Involuntary Petition because the preponderance of the evidence shows that the claims held by the petitioning creditors that filed the Involuntary Petition are subject to bona fide dispute;

IT IS HEREBY ORDERED THAT:

1. The relief requested in the Motion is GRANTED as set forth in this Order.

2. The Involuntary Petition be and hereby is DISMISSED.

[1] Capitalized terms that are not defined in this Order have the meanings that were given to those terms in the Motion.

3. Notwithstanding any provision of the Bankruptcy Code or the Bankruptcy Rules to the contrary, this Order will become effective immediately on its entry.

4. The Court retains jurisdiction of, and may hear and determine, any matter arising from or relating to the interpretation, implementation, or enforcement of this Order.

_____, 2022
Wilmington, Delaware

_____
The Honorable John T. Dorsey
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	CHAPTER 11
	)	
THE ALIERA COMPANIES INC.	)	CASE NO. 21-11548-JTD
d/b/a Aliera Healthcare, Inc.,	)	
	)	**Obj. Deadline: January 6, 2022, at 4:00 P.M. (EST)**
	)	**H'rg Date: January 13, 2022, at 11:00 A.M. (EST)**
Alleged Debtor.	)	
	)	

CERTIFICATE OF SERVICE

I Rachel B. Mersky, hereby certify that on December 29, 2021, I served or caused to be served a correct copy of the foregoing *Motion to Dismiss* by the Court's CM/ECF system on all counsel of record registered in this case through CM/ECF and by separate e-mail upon the following:

Joseph H. Huston, Jr. jhh@stevenslee.com
Counsel for Petitioning Creditors
Eleanor Hamburger ehamburger@sylaw.com
Counsel for Petitioning Creditors
Rosa Sierra rosa.sierra@usdoj.gov
Office of the U.S. Trustee

December 29, 2021

MONZACK MERSKY AND BROWDER, P.A.

/s/ Rachel B. Mersky
Rachel B. Mersky (DE No. 2049)
Del. Bar No. 2049
1201 Orange Street, Suite 400
Wilmington, DE 19801
P: (302) 656-8162
F: (302) 656-2769
E: rmersky@monlaw.com

AND

J. Robert Williamson
Matthew W. Levin
Scroggins & Williamson, P.C.

4401 Northside Parkway
Suite 450
Atlanta, GA 30327
(404) 893-3880
rwilliamson@swlawfirm.com
mlevin@swlawfirm.com

Attorneys for The Aliera Companies, Inc.