

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

Docket No. 19-0251

ALIERA HEALTHCARE INC.,

OIC’S RESPONSE TO ALIERA’S
MOTION FOR SUMMARY
JUDGMENT

Respondent.

I. RELIEF REQUESTED

The Washington State Office of the Insurance Commissioner (“OIC” or “Insurance Commissioner”) submits this Response in opposition to Alieria Healthcare Inc. (“Alieria”)’s motion for summary judgment. The undisputed facts do not support Alieria’s theory of the case and the applicable authorities demonstrate that Alieria is not entitled to judgment as a matter of law. The OIC respectfully requests that the Presiding Officer deny Alieria’s motion for summary judgment and uphold the OIC’s Cease and Desist Order (“Order”) in this matter.

This motion is based on all documents in the record in this case and, in particular, the Declaration of Tyler Robbins in Support of OIC’s Motion for Summary Judgment (“Robbins Declaration”) and exhibits thereto, as well as OIC’s Motion for Summary Judgment (“OIC Motion”), previously filed in this matter. Unless specifically identified otherwise, all references to Exhibits refer to Exhibits to the Robbins Declaration, previously filed in this matter.

II. FACTS

The undisputed material facts of this matter are set forth in full within OIC’s Motion, Robbins Declaration, and exhibits thereto, all of which are incorporated in this response by reference. They will not be further repeated here, except as useful to rebut Alieria’s motion for summary judgment.

Alieria is not licensed to sell, solicit, or negotiate insurance in the state of Washington. (Ex. 15.) However, Alieria is licensed as an insurance producer in approximately thirty other states. *Id.* Alieria is also not registered as a health care service contractor or licensed as a discount

1 plan organization in the state of Washington. *Id.* Trinity HealthShare, Inc. (“Trinity”) is a
2 nonresident corporation domiciled in Delaware. (Ex. 9, p. 421.) Trinity first incorporated in the
3 state of Delaware on June 27, 2018. *Id.* Trinity represents itself as a health care sharing ministry
4 (“HCSM”) as defined by 26 U.S.C. § 5000A and incorporated by reference under RCW
5 48.43.009. (*See, e.g.* Ex. 18 and Ex. 14). Trinity does not hold a certificate of authority in the state
6 of Washington. (Ex. 4, p. 1.)

7 Trinity’s HCSM products mirrored disability insurance products. (*See* Ex. 20.) The
8 AlierCare Individual brochure for consumers prominently promotes and promises Telemedicine,
9 Preventative & Primary Care, Labs & Diagnostics, and Urgent Care services under its plan. *Id.* at
10 p. 1. For example, the brochure states that “[s]ervices within the scope of the nearest Urgent Care
11 facility, including x-rays, are eligible for treatment.” *Id.* Also, it states that “[m]ost labs ordered
12 by Primary Care Physicians (PCP) or Urgent Care facilities **are included in the monthly
13 membership.**” *Id.* (emphasis added). Further, the literature promises that “[o]ur U.S. Board-
14 certified family practitioners, pediatricians, and internists diagnose, treat, and write prescriptions
15 when necessary and are available 24/7/365 from anywhere in the world.” *Id.* These statements
16 are indistinguishable from ordinary disability insurance. (Robbins Decl., p. 3.) The brochure
17 further provides a detailed explanation of plan benefits, divided into Bronze, Silver, and Gold
18 tiers, with network and non-network cost sharing amounts, which mirrors the form and function
19 of an ACA-compliant insurance product. (Ex. 20, p. 8-10.)

20 The Alier Member Guides, which explain plan benefits to members, contain similar
21 language that mirrors authorized insurance plans. (Ex. 21.) Under the heading, Plan Services and
22 Membership, Alier explained that “the plans cover medical services recommended by the
23 USPSTF and outlined in the ACA for preventive care.” *Id.* at 5. “There is zero out of pocket
24 expense and zero obligation to reach the Member Shared Responsibility Amount (MSRA) for any
25 scheduled preventive care service.” *Id.* Other promises included: “With an AlierCare Bronze,
26 Silver, or Gold plan, members are eligible to receive chronic care management from their primary
care physician for conditions such as diabetes, asthma, blood pressure, cardiac conditions, etc.”;
“Labs at in-network facilities are included”; “The AlierCare Bronze, Silver, or Gold prescription
savings program delivers significant discounts for a variety of drugs (depending on prescription),
saving members an average of 55% on prescription drug purchases” and “After \$1,500 of

1 prescription drug expenditures through Rx Valet, members are eligible for a percentage of
2 reimbursement for preferred and mail order drugs.” (Robbins Decl., p. 3-4; Ex. 21, p. 5).

3 Alieria’s contracts with other entities refer to the products it markets as health plans, which
4 are defined at RCW 48.43.005(29) and regulated by the OIC. *See, e.g.* Chapter 48.43 RCW,
5 Chapter 284-43 WAC. For example, under Alieria’s Provider Network Services Agreement,
6 “Covered Services means those medical, hospital and other health care services provided to
7 Members that are payable under the terms of a Plan.” (Ex. 38, p. 2.) Further, as defined therein,
8 “Plan means a fully-insured health benefits plan, self-insured health benefits plan, or other health
9 benefits plan.” *Id.* Additionally, “Member means a person eligible and entitled to received health
10 benefits under a Plan.” *Id.*

11 The memberships offered by Trinity and sold by Alieria operated as insurance products.
12 (Robbins Decl., p. 4.) In order to become a member, consumers completed an application that
13 detailed their medical history, and along with the application, submitted a payment. (Ex. 34.)
14 Members paid a monthly sharing amount to access plan benefits, signing an agreement to do so
15 and paying an initial fee. (Ex. 21, p. 16; *see also* Ex. 20 and 34). Upon purchase of a product,
16 members received an ID card that appears and functions identical to an insurance plan ID card.
17 (Ex. 34, p. 8; Ex. 21, p. 10-14). The plan benefits included payment, in whole or in part, for the
18 provision of health care services received by members. Members became eligible to receive said
19 benefits upon the occurrence of certain defined events, and would submit a claim to Alieria upon
20 occurrence of such events of bodily injury, sickness, or other health-related matters. (Ex. 21, p.
21 5, 10-14; Ex. 20, p. 1, 8-10).

22 In support of Alieria’s motion for summary judgment, it filed a Declaration of Shantanu
23 Paul, COO for the Alieria companies (“Paul Declaration”). Mr. Paul states:

24 “Share requests for member’s medical expenses are received from providers, and
25 Alieria, on behalf of Trinity, reviews these requests in accordance with the member
26 guidelines. Payments of any eligible share requests are made after approval by
Trinity, and eligible payments are made directly to the providers. Members always
remain responsible for their own medical payments as set forth in the applicable
member guidelines. Alieria also operates an online “Sharebox” solution for Trinity
members, which allows Trinity members to view their contributions and share
requests, share with other members, and review details of total share request
amounts paid.”

1 (Paul Declaration, p. 2, para. 4.) Mr. Paul explains that “Trinity also makes the final decision
2 regarding any dispute or appeal concerning member-sharing eligibility.” *Id.*, p. 2, para 5.

3 Alera solicits and sells plans to Washington consumers that are built on an extensive
4 network of preferred providers that further mislead consumers into thinking they are purchasing
5 regular health insurance. Alera maintains contracts with third-party providers in order to provide
6 its members with access to health care services. (*See* Ex. 35 (FirstCall); Ex. 37 (Rx Valet); Ex.
7 38 (First Health); Ex. 39 (Multiplan, Inc). Alera collected a portion of member payments for
8 these services. (*See* Ex. 32, p. 14-16). With Rx-Valet, Alera entered into a contract, so it could
9 offer its customers prescriptions at a discounted rate. (Ex. 21, p. 5). (The . . . prescription savings
10 program delivers significant discounts for a variety of drugs (depending on prescription), saving
11 members an average of 55% on prescription drug purchases.”). The RX Valet contract included
12 a price reduction in the aggregate. (Ex. 37, p. 6).

13 **III. LEGAL STANDARD**

14 In administrative adjudications, summary judgment procedure is governed by WAC 10-
15 08-135. The rule provides: “A motion for summary judgment may be granted and an order issued
16 if the written record shows that there is no genuine issue as to any material fact and that the moving
17 party is entitled to judgment as a matter of law.” WAC 10-08-135. Summary judgment is designed
18 to do away with unnecessary trials where there is no genuine issue of material fact. *LaPlante v.*
19 *State*, 85 Wn.2d 154, 158 (1975); *see also Jacobsen v. State*, 89 Wn.2d 104, 108 (1977) (“A
20 ‘material fact’ is one upon which the outcome of the litigation depends.”) (citations omitted).

21 The burden is on the moving party to demonstrate there is no genuine issue of material fact
22 and, as a matter of law, summary judgment is proper. *Jacobsen*, 89 Wn.2d at 108. A tribunal must
23 consider the material evidence and all reasonable inferences thereon most favorably for the
24 nonmoving party; if reasonable people might reach different conclusions, the motion should be
25 denied. *Id.* at 108-09.

26 **IV. ARGUMENT AND AUTHORITY**

The OIC has the authority to regulate the entire Insurance Code, which includes
prohibitions on the unauthorized business of insurance as well as a narrow exemption from
regulation for valid health care sharing ministries (“HCSMs”). The exemption for HCSMs does
incorporate language from a federal statute, but does not derive any effect or authority from
federal law. Thus, the OIC has the authority to determine whether a HCSM operating in

1 Washington is exempt from state insurance regulation under RCW 48.43.009, a provision in the
2 Insurance Code. *See also* RCW 48.02.060. As such, and under the state-based system established
3 for the regulation of insurance under the McCarran Ferguson Act, federal actions and litigations
4 concerning the ACA have no impact on the OIC’s authority to enforce RCW 48.43.009 or take
5 action against HCSMs that do not meet the defined elements. The undisputed evidence
6 demonstrates that Alera, with Trinity, has transacted unauthorized insurance and committed other
7 violations of the Insurance Code, and is not exempt from regulation by the OIC because Trinity
8 is not a valid HCSM. Accordingly, the OIC’s Order is amply justified and should be upheld.

9 **A. OIC has broad authority to regulate insurance.**

10 The Insurance Code, Title 48 RCW, vests the authority to regulate all insurance
11 transactions in this state in the Insurance Commissioner. This authority is broad. “All insurance
12 and insurance transactions in this state, or affecting subjects located wholly or in part or to be
13 performed within this state, and all persons having to do therewith, are governed by this code.”
14 RCW 48.01.020.

15 To protect the public in insurance matters, “the legislature created the office of Insurance
16 Commissioner and conferred upon that office the duty of enforcing the provisions of the code.”
17 *Ins. Co. of N Am. v. Kueckelhan*, 70 Wn.2d 822, 831, 425 (1967). To fulfill its mandate, the
18 Insurance Code vests the Insurance Commissioner with broad authority. *Nat’l Fed’n of Retired
19 Persons, Inc. v. Ins’r Comm’r*, 120 Wn.2d 101, 109 (1992). The Insurance Commissioner “has
20 the authority expressly conferred upon him by or reasonably implied from the provisions of the
21 [Insurance Code].” *See* RCW 48.02.060(1); *Nat’l Fed’n of Retired Persons*, 120 Wn.2d at 109.

22 The Insurance Commissioner acts to protect the public interest. RCW 48.01.030 provides:

23 The business of insurance is one affected by the public interest, requiring that all
24 persons be actuated by good faith, abstain from deception, and practice honesty and
25 equity in all insurance matters. Upon the insurer, the insured, their providers and
26 their representatives rests the duty of preserving inviolate the integrity of insurance.

The Insurance Commissioner must also execute his duties and enforce the provisions of the
Insurance Code. *See* RCW 48.02.060(2).

B. Alera transacted insurance and thus falls within the OIC’s jurisdiction.

The OIC has charged Alera with violations of several provisions of Title 48 RCW,

including, but not limited to RCW 48.17.060, RCW 48.15.020, and RCW 48.05.030. Since the evidence demonstrates that Alera transacted insurance, as well as other activity explicitly regulated by the Insurance Code, the OIC unquestionably had authority to act in this matter. Thus, Alera cannot be entitled to summary judgment and its motion should be denied, and the Order to Cease and Desist upheld, as a matter of law.

1. The applicable definition of insurance is found exclusively in Washington law.

The definition of insurance in Washington is a purely statutory question that is answered by the plain language of Title 48 RCW. “Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.” RCW 48.01.040. “Specified amount” and “determinable contingency” are not defined by statute. “In the absence of such a definition, statutory construction requires that we give undefined words their common and ordinary meaning. To ascertain this meaning, we may use a dictionary.” *Vance v. Dep't of Ret. Sys.*, 114 Wn. App. 572, 577 (2002) (citations omitted).

In pertinent part, Merriam-Webster defines “specify” as: “to name or state explicitly or in detail.”¹ Merriam-Webster defines “amount” (the noun) as:

1. a. The total number or quantity; aggregate;
- b. The quantity at hand or under consideration;
2. The whole effect, significance, or import;
3. Accounting: a principal sum and interest on it.²

Merriam-Webster defines “determinable” as “capable of being determined, definitely ascertained, or decided upon.”³ Merriam-Webster defines “contingency” in pertinent part:

1. A contingent event or condition: such as
 - a. An event (such as an emergency) that may but is not certain to occur;
 - b. Something liable to happen as an adjunct to or result of something else.⁴

¹ “Specify.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/specify>. Accessed 8 Oct. 2020.

² “Amount.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/amount>. Accessed 8 Oct. 2020.

³ “Determinable.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/determinable>. Accessed 8 Oct. 2020.

⁴ “Contingency.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/contingency>. Accessed 8 Oct. 2020.

1 These dictionary definitions, as applied to RCW 48.01.040, make it clear that Alieria has
2 transacted insurance and thus is subject to OIC's jurisdiction, as discussed more fully in OIC's
3 Motion. A brief summary follows.

4 Trinity, through Alieria, offered Washington consumers coverage for determinable events.
5 See RCW 48.01.040. Trinity's products mirrored disability insurance products (as defined by
6 RCW 48.11.030) because it undertook to indemnify a consumer or pay a specified amount upon
7 a determinable contingency of bodily injury, sickness or other health-related matters. (See Ex.
8 20). Further, Alieria's contracts with other entities refer to the products it markets as health plans,
9 which are defined at RCW 48.43.005 and regulated by the OIC. (Ex. 38, p. 2.) Therefore,
10 Trinity's products, as offered, marketed, solicited, and sold by Alieria, constitute insurance under
11 Washington's statutory scheme, giving rise to the violations laid out in OIC's Order.

12 The statutory language controls the determination of what is insurance. Cases discussing
13 risk-shifting and risk-distribution can be helpful in providing background and context to what is
14 insurance, but they do not purport to add words, terms, or elements to the Legislature's duly
15 enacted definition of insurance, which is found exclusively in statute. These cases do not provide
16 additional requirements for the definition of insurance that are not specifically listed in RCW
17 48.01.040. Finally, as to the existence of an insurance contract, it is irrelevant that a contract
18 asserts that it is not one of insurance. *McCarty v. King County Medical Serv. Corp.*, 26 Wn.2d
19 660, 684 (1946) (citations omitted).

20 2. Alieria's Trinity products were insurance.

21 Here, the undisputed evidence demonstrates that Alieria's HCSM products from Trinity
22 were insurance under the plain language of the insurance code. See also *Commonwealth v.*
23 *Reinhold*, 325 S.W.3d 272, 277-78 (Kentucky 2010) (holding that a HCSM's application created
24 an insurance contract despite disclaimers). In practice, the memberships offered by Trinity and
25 sold by Alieria operated as insurance products. In order to become a member, consumers
26 completed an application that detailed their medical history, and along with the application,
submitted a payment. (Ex. 34.) Members paid a monthly sharing amount to obtain access to plan
benefits, signing an agreement to do so, and paying an initial fee. (Ex. 21, p. 16; see Ex. 20 and
34). Upon purchase of a product, members received an ID card that appears and functions like
an insurance plan ID card. (Ex. 34, p. 8; Ex. 21, p. 10-13). The plan benefits included payment,
in whole or in part, for the provision of health care services received by members. Members

1 became eligible to receive said benefits upon the occurrence of certain defined events, and would
2 submit a claim to Alera upon occurrence of such events of bodily injury, sickness or other health-
3 related matters. (Ex. 21, p. 5, 10-14; Ex. 20, p. 1, 8-10). These elements for the consumer mirror
4 those taken with an insurance company.

5 Alera asserts that Trinity members choose whether to share funds with one another on a
6 case-by-case basis, and that due to the allegedly voluntary nature of the contribution program,
7 Trinity cannot be designated as an insurer. Here, Alera misrepresents its own evidence. Alera
8 misconstrues the Declaration of Mr. Paul's Declaration, which states plainly that

9 "Share requests for member's medical expenses are received from providers, and
10 **Alera, on behalf of Trinity, reviews these requests in accordance with the**
11 **member guidelines. Payments of any eligible share requests are made after**
12 **approval by Trinity,** and eligible payments are made directly to the providers."

13 (Paul Declaration, p. 2, para. 4) (emphasis added). Under this system, members are not the
14 ultimate decision makers about whether sharing happens on a given claim. The only thing
15 voluntary about the "contribution program" is participation, but in order for members to
16 participate, they must pay a monthly premium. (Ex. 21, p. 16; *see also* Ex. 20 and 34). This forms
17 a contractual relationship wherein members pay for the right to have their health care expenses
18 covered in the future upon the occurrence of some defined event. See RCW 48.01.040. Mr. Paul
19 further explains that "Trinity also makes the final decision regarding any dispute or appeal
20 concerning member-sharing eligibility." (Paul Declaration, p. 2, para. 5.) Thus, Alera has failed
21 to rebut OIC's evidence that its products functioned as insurance; in fact, Alera's own declaration
22 makes clear that the Trinity products were paid upon determinable contingencies according to the
23 member guidelines, and not on a purely voluntary basis by individual members. Accordingly,
24 Alera's motion should be denied and OIC's Order upheld.

25 **C. OIC has authority to enforce RCW 48.43.009.**

26 The Washington Legislature enacted RCW 48.43.009 to shield valid HCSMs from
insurance regulation. In doing so, RCW 48.43.009 incorporates by reference the statutory
language defining the elements of a HCSM found in 26 U.S.C. § 5000A, which itself was enacted
as part of the Affordable Care Act ("ACA"). This enactment was necessary for HCSMs to
become exempt from state insurance regulation, as nothing in 26 U.S.C. § 5000A or elsewhere

1 exempts HCSMs from state insurance regulation. As a result, the sole basis for Trinity and Alieria
2 to receive an exemption from OIC regulation in Washington is RCW 48.43.009.

3 As the actual exemption for HCSMs from insurance regulation is solely a creation of
4 Washington state law, federal litigation concerning the ACA has no effect on the effectiveness of
5 RCW 48.43.009, nor the authority of the OIC to act thereunder. No portion of 26 U.S.C. § 5000A
6 purports to have any effect on the scope of state insurance regulation, nor do any of the federal
7 cases being litigated around the constitutionality of the ACA purport to affect any aspect of state
8 insurance law.

9 Alieria’s discussion of whether the OIC can interpret and enforce federal tax law is
10 irrelevant to the matter at hand. This case solely concerns the scope of what constitutes insurance
11 and whether violations under the Insurance Code occurred. RCW 48.43.009 has nothing to do
12 with the federal income tax liability of individual taxpayers, and neither is the OIC. 26 U.S.C. §
13 5000A was only incorporated into the Insurance Code to help determine what is insurance, and
14 what should be exempt as a HCSM. Determining what is insurance, and how to apply the
15 Insurance Code, is assuredly within the OIC’s expertise and authority. Thus, as a matter of law
16 the OIC is entitled to deference in its interpretation of RCW 48.43.009 and its other
17 determinations in this matter.

18 This deference to state regulators on insurance matters is consistent with the statutory
19 scheme enacted by Congress. Under the McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015, state
20 insurance laws and regulations are shielded from preemption unless Congress explicitly enacts
21 federal legislation. As 26 U.S.C. § 5000A does not reference the definition of insurance, there is
22 no basis for federal law or actions to take precedence over state insurance regulation. Thus, as a
23 matter of law, Washington state insurance law governs this dispute.

24 Alieria incorrectly argues that the Washington Legislature inappropriately delegated its
25 authority to the federal government when it enacted RCW 48.43.009. The Washington
26 Legislature did not incorporate any powers or authority from the federal law, nor delegate any
powers to the federal government to regulate insurance under state law. Alieria’s argument seems
to confuse “meaning,” the actual term used by the Legislature, with “effect.” RCW 48.43.009
does not say it has the same effect as 26 U.S.C. § 5000A; instead, the statute uses the term
“meaning”. “Meaning” is undefined here, but Merriam Webster provides the following relevant
definitions:

1a: the thing one intends to convey especially by language;

b: the thing that is conveyed especially by language

(emphasis added).⁵ This term makes it clear how the Legislature wanted to incorporate 26 U.S.C. § 5000A: to incorporate the language of a useful definition. That purpose remains intact, regardless of any federal action concerning the effectiveness of the ACA. 26 U.S.C. § 5000A has not been repealed. The statutory language defining HCSMs remains present in the U.S Code for the Washington statute to incorporate by reference. As always, however, the source of authority remains entirely state law. Similarly, the sole interpretive and enforcement authority for RCW 48.43.009 remains with Washington State: the OIC. Thus, the OIC has the authority to determine whether a HCSM operating in Washington is exempt from state insurance regulation under RCW 48.43.009, a provision in the Insurance Code. *See also* RCW 48.02.060.

Aliera argues that, since certain federal courts have ruled that the ACA is unconstitutional, 26 U.S.C. § 5000A has no meaning and therefore OIC has no authority to enforce RCW 48.43.009. This approach to statutory construction of state insurance law is impermissible under the McCarran Ferguson act, which does not allow for implicit or tacit invalidation of state insurance laws by federal action. As discussed above, none of the federal cases or statutes that have since affected the ACA purport to alter, or even mention, the scope of state insurance law.

In fact, the ACA does not need to be in effect for RCW 48.43.009 to have meaning. The existence of the individual mandate (or even the ACA) is immaterial to the application of RCW 48.43.009, because the statutes address entirely different issues. The individual mandate (and the ACA as a whole) address an individual taxpayer's obligations under the Internal Revenue Code. *See Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 84 (4th Cir. 2013). RCW 48.43.009, in sharp contrast, determines whether an entity, otherwise subject to the OIC's jurisdiction, is nonetheless exempt from regulation if it meets the statutory criteria for a HCSM as incorporated by reference from the federal statute.

Further, no other state or federal law exempts HCSMs from state insurance regulation. Thus, it is strange that Aliera would argue that 26 U.S.C. § 5000A and RCW 48.43.009 are unenforceable. If so, there is no HCSM exemption from insurance regulation in Washington. If that were the case, Aliera would no longer be able to claim it is exempt from OIC authority on

⁵ "Meaning." *Merriam-Webster.com Dictionary*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/meaning>. Accessed 8 Oct. 2020.

1 the basis of the HCSM exemption. Of course, this question is entirely hypothetical, since RCW
2 48.43.009 remains in full effect.

3 OIC is not purporting to enforce federal law. Instead, OIC is enforcing a state law that is
4 found in Title 48 RCW, and thus clearly within the scope of OIC’s authority. The fact that the
5 state statute incorporates by reference definitions from elsewhere does not negate OIC’s authority
6 to enforce the state statute. OIC has appropriately applied the plain language HCSM criteria to
7 the activities of Alieria and Trinity, determined that the exemption is not applicable, and
8 appropriately issued the Order to Cease and Desist in light of the numerous Insurance Code
9 violations by Alieria. Accordingly, OIC’s Order should be upheld and Alieria’s motion denied.

10 **D. OIC’s Order complies with due process**

11 OIC’s Order fully complies with due process and applicable Constitutional requirements.
12 It is well established that a statute is presumed constitutional and the party challenging it has the
13 burden to prove it is unconstitutional beyond a reasonable doubt. *State v. Brayman*, 110 Wn.2d
14 183, 193 (1988). As addressed above, federal litigation regarding the ACA does not purport to
15 affect the constitutionality of RCW 48.43.009.

16 Alieria also asserts concerns under the U.S. Constitution about the application of the
17 HCSM criteria, but those arguments were already disposed of by *Liberty Univ., Inc. v. Lew*, 733
18 F.3d 72, 84 (4th Cir. 2013). That court, facing a challenge to the ACA, noted that “a court applies
19 strict scrutiny only to statutes that ‘make[] explicit and deliberate distinctions between different
20 religious organizations.’” *Lew*, 733 F.3d at 101 (citing *Larson v. Valente*, 456 U.S. 228, 246-47,
21 (1982). “A statute without such distinctions, even one that has a disparate impact on different
22 denominations, need only satisfy the less rigorous test set forth in *Lemon v. Kurtzman*, 403 U.S.
23 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).” *Lew*, 733 F.3d at 101.

24 In *Lew*, one of the provisions challenged was the “health care sharing ministry exemption”
25 arguing, as Alieria does now, that “it unconstitutionally selects an arbitrary formation date of
26 December 31, 1999 as the eligibility cutoff.” 733 F.3d at 102 (citing 26 U.S.C. § 5000A(d)(2)(B)).
However, the court held that “even if the exemption's cutoff date is arbitrary, it is not
unconstitutional. For neither the cutoff's text nor its history suggests any deliberate attempt to
distinguish between particular religious groups.” *Lew*, 733 F.3d at 102. The Court explained its
ruling:

1 “Applying Lemon, the date serves at least two "secular legislative purpose[s].” 403
2 U.S. at 612. First, the cutoff ensures that the ministries provide care that possesses
3 the reliability that comes with historical practice. Second, it accommodates
4 religious health care without opening the floodgates for any group to establish a
5 new ministry to circumvent the Act. The “primary effect” of the cutoff accordingly
6 “neither advances nor inhibits religion.” *Id.* Further, given that it applies only
7 secular criteria, the cutoff does not “foster an excessive government entanglement
8 with religion.”

9 *Lew*, 733 F.3d at 102. Further, the court rejected due process arguments:

10 “Here, the distinction made between sects that oppose insurance and provide for
11 themselves in their own welfare system and those that do not, and the distinction
12 made between ministries formed before 1999 and those formed after, are secular
13 and thus subject only to rational basis review. ... Both distinctions are rationally
14 related to the Government’s legitimate interest in accommodating religious practice
15 while limiting interference in the Act’s overriding purposes.”

16 *Lew*, 733 F.3d at 102. The court’s analysis effectively rejects Alier’s arguments here, particularly
17 in light of the fact that OIC is simply trying to enforce insurance regulations without regard to the
18 content of any religious belief.

19 Alier further argues that OIC was required to enact rules to enforce its interpretation of
20 RCW 48.43.009, claiming that Alier and Trinity could not have known that they would be
21 required to follow Washington insurance laws. However, “ignorance of the law is no excuse for
22 the violation of a law.” *Senn v. Northwest Underwriters*, 74 Wn. App. 408, 416 (1994). OIC is
23 not adding any requirements to the law other than the plain language of the statutes and regulations
24 cited in OIC’s Order. OIC is broadly authorized to interpret and enforce the Insurance Code, and
25 has done just that, as in any other enforcement case against an unauthorized entity.

26 Here, the undisputed evidence demonstrates that Alier and Trinity transacted insurance,
as discussed more fully in OIC’s Motion and elsewhere in this brief. OIC was specifically
authorized to issue the cease and desist order under statutes such as RCW 48.02.080, RCW
48.15.023, RCW 48.17.063, RCW 48.30.010, RCW 48.44.016, and RCW 48.155.130 for
violations of statutes including RCW 48.15.020, RCW 48.17.060, RCW 48.30.040, RCW
48.44.015(1), and RCW 48.155.020(1). OIC properly served Alier with the Order to Cease and
Desist, providing notice. Alier has availed itself of the hearing available under Chapter 48.04
RCW, demonstrating Alier’s opportunity to be heard regarding OIC’s Order. Due process
requires no more. *See Southwick, Inc. v. Wash. State Funeral & Cemetery Bd.*, 200 Wn. App.

890, 89 (2017) (due process requires only notice and opportunity to be heard that is meaningful in the context of the case). OIC's Order should be upheld and Alieria's motion denied.

E. OIC has authority over Alieria's solicitation of unauthorized insurance.

Alieria briefly argues that OIC does not have authority over Alieria because Alieria allegedly acts as a third-party administrator. However, Alieria cannot dispute its role as a marketer for Trinity and the marketing materials it used to promote Trinity. As discussed more fully in OIC's Motion, this activity constitutes solicitation within the meaning of the Insurance Code. RCW 48.17.010(14). Under RCW 48.17.060(1), Alieria's activities require a license in the state of Washington, which it does not possess, although Alieria does have an insurance producer license in nearly thirty other states. As a matter of law, Alieria's motion should be denied.

F. Trinity is not a valid health care sharing ministry.

As discussed in OIC's Motion for Summary Judgment, which is incorporated here by reference, Alieria transacted business on behalf an alleged HCSM that does not meet the basic requirements of a valid HCSM. As neither Trinity, nor any alleged predecessor organization existed continuously since December 31, 1999, and as Trinity's members do not share a common set of ethical or religious beliefs, Trinity is not a valid HCSM and therefore Alieria cannot take advantage of the protections of RCW 48.43.009. To avoid repetition, the OIC refers the Presiding Officer to OIC's Motion for further information, where these issues are addressed fully. Alieria's motion should be denied and the OIC's Order upheld on these grounds.

G. Alieria misrepresented the nature of its HCSM products.

As discussed in OIC's Motion for Summary Judgment, which is incorporated here by reference, Alieria misrepresented the nature of its HCSM products to consumers. Alieria communicated a statement of faith to consumers that was highly distinct from that found in Trinity's founding documents, and Alieria's marketing minimized the religious element of these allegedly religious products. Alieria's marketing further misled consumers into believing they were purchasing ACA-compliant insurance products, while at the same time attempting to take advantage of the ACA exemption of HCSMs from state insurance regulation. Consumers were deceived as to the nature of the products they had purchased, and were financially harmed as a result. To avoid repetition, the OIC refers the Presiding Officer to OIC's Motion for further

information, where these issues are addressed fully. Alera's motion should be denied on these grounds as well.

V. CONCLUSION

OIC has broad authority to regulate insurance in the state of Washington. The applicable statutory language and accompanying authority make clear that Alera transacted insurance when it marketed the Trinity HCSM products in Washington. As RCW 48.43.009 is a creation of state (not federal) law, federal actions regarding the ACA do not impact the OIC's authority to interpret and enforce RCW 48.43.009, as is also the case with any other provision of the Insurance Code. OIC is entitled to deference to its expertise and statutory authority in this matter involving the interpretation of state insurance law. As further discussed in OIC's Motion, the uncontroverted evidence shows that Alera and Trinity violated the Insurance Code. OIC acted within its authority and in accordance with due process in issuing its Order, which should be upheld. Accordingly, Alera's motion should be denied as a matter of law, and OIC's Motion granted.

DATED this 9th day of October, 2020.

/s/ Darryl E. Colman
Darryl E. Colman
Attorney Manager
Legal Affairs Division

CERTIFICATE OF MAILING

1 The undersigned certifies under the penalty of perjury under the laws of the State of
2 Washington that I am now and at all times herein mentioned, a citizen of the United States, a
3 resident of the State of Washington, over the age of eighteen years, not a party to or interested in
4 the above-entitled action, and competent to be a witness herein.

5 On the date given below I caused to be served the foregoing OIC’S RESPONSE TO
6 ALIERA’S MOTION FOR SUMMARY JUDGMENT on the following individuals in the
7 manner indicated:
8

9 Julia Eisentrout, Presiding Officer
10 Office of the Insurance Commissioner
11 5000 Capitol Boulevard SE
12 Tumwater, WA 98501
13 hearingsu@oic.wa.gov

14 *By email*

 Eric Neiman, Counsel for Alieria
 Lewis Brisbois Bisgaard & Smith
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By email per electronic service agreement.

16 **SIGNED** this 9th day of October, 2020 at Tumwater, Washington.

18 Christine M. Tribe
19 Christine M. Tribe
20 Paralegal