Received electronically 10-16-20 RC

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of **ALIERA HEALTHCARE INC.,** Appellant.	Case No. 19-0251 **REPLY IN SUPPORT OF THE ALIERA COMPANIES, INC.'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The Office of the Insurance Commissioner ("OIC") has failed to produce any evidence that either Trinity Healthshare, Inc. ("Trinity") or The Aliera Companies, Inc. ("Aliera") had a contractual obligation to indemnify Trinity members for their medical costs. Rather, the undisputed evidence—upon which OIC explicitly relies—repeatedly and unequivocally states that there is no promise to pay or assumption of risk. Consequently, neither Aliera nor Trinity are insurers as defined in Washington's Insurance Code, and their products and services do not meet the statutory definition of insurance. Accordingly, OIC has no authority to regulate Aliera and specifically lacks the authority to issue the Cease and Desist Order that is the subject of these proceedings. Summary judgment must be granted on this basis.

Indeed, courts in other jurisdictions have concluded that health care sharing ministries ("HCSMs") are not insurance precisely because they do not indemnify their members. Applying the plain language of insurance definitions essentially identical to Washington's, these courts have focused on contractual language (rather than superficial similarities to insurance) and determined that eligibility for sharing is not equivalent to a promise to pay. This is true even where members have delegated their decision-making authority to the organization and thus are not involved in individual sharing determinations.

Finally, OIC has failed to provide any evidentiary or legal support for its arguments regarding the validity and enforceability of Washington's HCSM definition. That definition has

LEWIS BRISBOIS BISGAARD & SMITH LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

been rendered void and meaningless by the invalidation of the Affordable Care Act's individual mandate. Because OIC has failed to meaningfully oppose Aliera's arguments and evidence on this point, OIC's arguments should be stricken, and summary judgment should be granted.

II. FACTS

Aliera refers to its Motion for Summary Judgment for a complete recitation of the facts. In addition, Aliera refers to the Declaration of A. Joseph Guarino in Support of Defendant Trinity Healthshare, Inc.'s Opposition to Plaintiff's Motion for Partial Summary Judgment for a comprehensive explanation of Trinity's HCSM products. *See* Declaration of Ethan Smith in Support of The Aliera Companies, Inc.'s Reply Ex. A.

III. EVIDENCE RELIED UPON

This motion relies upon The Aliera Companies, Inc.'s Motion for Summary Judgment, the Declaration of Shantanu Paul in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment, the Declaration of Ethan A. Smith in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment and accompanying exhibits, The Aliera Companies, Inc.'s Response to OIC's Motion for Summary Judgment, the Declaration of Ethan A. Smith in Opposition to OIC's Motion for Summary Judgment and accompanying exhibits, the Declaration of Ethan A. Smith in Support of The Aliera Companies, Inc.'s Reply and accompanying exhibits, the Declaration of A. Joseph Guarino in Support of Defendant Trinity Healthshare, Inc.'s Opposition to Plaintiff's Motion for Partial Summary Judgment and accompanying exhibits and all other pleadings and evidence on file in this matter.

IV. ARGUMENT

A. Standard of Review

"The purpose of summary judgment is to avoid a useless trial" when there is no real factual dispute. *LaPlante v. State*, 85 Wn.2d 154, 158 (1975). If "there is no genuine issue as to any material fact," summary judgment will be granted. CR 56(c); *see also id.*; *Regan v. Seattle*, 76 Wn.2d 501 (1969); *Hughes v. Chehalis School Dist. 302*, 61 Wn.2d 222 (1963); *Jolly v. Fossum*, 59 Wn.2d 20 (1961); *Bates v. Bowles White & Co.*, 56 Wn.2d 374 (1960); *Preston v.*

LEWIS BRISBOIS BISGAARD & SMITH LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

1 *Duncan*, 55 Wn.2d 678 (1960).

2 The court will "construe all evidence and reasonable inferences in the light most favorable to the nonmoving party." *Keck v. Collins*, 181 Wn. App. 67, 78-79 (2014). However, the nonmoving party "may not rest on mere allegations in the pleadings but must set forth specific facts showing that there is a genuine issue for trial." *LaPlante*, 85 Wn.2d at 158; *see also* CR 56(e).

7 Questions of law are properly decided on summary judgment. "Interpretation of an unambiguous contract is a question of law, thus summary judgment is appropriate." *Dice v. City of Montesano*, 131 Wn. App. 675, 684 (2006); *see also Tanner Elec. v. Puget Sound*, 128 Wn.2d 656, 674 (1996). "The interpretation of insurance policies is a question of law" as well. *Pub. Util. Dist. No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 797 (1994). Likewise, "interpretation of a statute is a question of law." *Qualcomm, Inc. v. Dep't of Revenue*, 171 Wn.2d 125, 131 (2011).

13 **B. OIC Has Produced No Evidence that Aliera or Trinity Indemnified Trinity Members**

14 As OIC acknowledges, its authority is limited to "insurance and insurance transactions." RCW 48.01.020; *see also* OIC's Response to Aliera's Motion for Summary Judgment ("OIC Response") at 5. The Insurance Code defines "insurance" as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040.

19
20
21
> Insurance, in its general sense, may be defined as an agreement by which one person, for a consideration, *promises to pay* money or its equivalent, or to perform some act of value, to or for the benefit of another person, upon the destruction, death, loss, or injury of someone or something as the result of specified perils.

22 *In re Estate of Knight*, 31 Wn.2d 813, 816, 199 P.2d 89, 91 (1948) (emphasis added) (internal quotations omitted) (construing Washington statutory definition of insurance at issue here).

24 As the Insurance Code makes clear, in Washington, insurance is a matter of *contract*. *See* RCW 48.01.040 (insurance is "a contract . . ."); *see also* Ch. 48.18 RCW (titled "The Insurance Contract"); *McDermott v. Life Inv'rs Ins. Co. of Am.*, No. C06-5344RBL, 2007 U.S. Dist. LEXIS 84369, at *7 (W.D. Wash. Nov. 1, 2007) ("Insurance policies are construed as contracts in

LEWIS BRISBOIS BISGAARD & SMITH LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

Washington State."). "A contract requires an offer, acceptance, and consideration." *Fed. Deposit Ins. Corp. v. Uribe, Inc.*, 171 Wn. App. 683, 688 (2012) (internal citations omitted). Washington has imposed additional statutory requirements on insurance contracts, including that the entire insurance contract must be set forth in writing in the "policy." RCW 48.18.140(1); RCW 48.18.190.

Thus, in order to establish that Trinity products are insurance, OIC must prove the existence of a written contract between Trinity and its members containing a *promise to pay* upon the occurrence of specific events. *See* RCW 48.01.040; RCW 48.18.140(1); RCW 48.18.190; *In re Estate of Knight*, 31 Wn.2d at 816. OIC has utterly failed to carry this burden.

OIC makes sweeping, conclusory assertions that "Trinity's HCSM products mirrored disability insurance products" and "functioned as insurance." OIC Response at 2, 8. However, OIC bases these allegations upon: 1) the use of health care terminology that OIC has unilaterally deemed too similar to insurance terminology; 2) members' submission of applications; 3) members' receipt of ID cards; and 4) members' submission of sharing amounts. *See* OIC Response at 7. Yet these elements are neither necessary nor sufficient to satisfy the Insurance Code's definition of insurance. Many products involve applications, ID cards, and the exchange of funds but do not constitute insurance.

What OIC fails to provide is any evidence whatsoever of the fundamental hallmark of insurance: a *promise to pay*. *See generally*, OIC Response; Robbins Decl. and accompanying exhibits. Indeed, the very evidence upon which OIC relies repeatedly and unequivocally states that Trinity's products "are not a promise to pay" and Trinity "does not guarantee payment of medical costs." Robbins Decl. Ex. 20 at 8, 11, 16, 21, 28.

> [T]his program *does not guarantee or promise that your medical bills will be paid* or assigned to other for payment. *Whether anyone chooses to pay your medical bills will be totally voluntary*. As such, this program should never be considered a substitute for an insurance policy.

Id. at 11; *see also id*. at 16, 21, 28 (emphasis added). While cost-sharing is "available" for eligible costs, it is not "guarantee[d]," and payment is a "voluntary" decision made on a case-by-case basis. *Id*.

OIC fails to even articulate what it considers to be the "insurance contract" at issue in this matter. *See generally*, OIC Response. However, OIC repeatedly cites the terms and conditions that every Trinity member is required to review and sign prior to enrolling in the HCSM. *See* Robbins Decl. Ex. 34 at 4-8. In plain language, those terms and conditions state:

> THIS MINISTRY IS NOT AN INSURANCE COMPANY AND THE MINISTRY DOES NOT OFFER ANY INSURANCE PRODUCTS OR POLICIES. THE MINISTRY DOES NOT ASSUME ANY RISK FOR YOUR MEDICAL EXPENSES, AND THE MINISTRY MAKE NO PROMISE TO PAY.
>
> . . .
>
> The ministry does not make a promise to pay or any guarantee of payment of your medical expenses. You will be responsible for the payment of your medical bills. The ministry does not guarantee that your medical bills will be shared by the other member participating in the Aliera Plan that utilize health care sharing services.

Id. at 4-5. The terms and conditions further explain that Trinity's eligibility guidelines are not a promise to pay, and the fact that a medical expense is *eligible* for sharing under the guidelines does not mean a share request will be funded:

> The ministry manages its sharing contributions by establishing guidelines that define eligible sharing ("Guidelines"). *The Guidelines are not a contract of insurance. They do not constitute an agreement, a promise pay, or an obligation to share.* The guidelines are intended to ensure that every participant has paid their own medical expenses, as they are financially able, before requesting other to share with you to assist in paying remaining medical expenses.

Id. at 5 (emphasis added). Thus, to the extent OIC has produced any "contract" between Aliera or Trinity and the HCSM members, it contains no promise to pay whatsoever.

Rather than indemnifying members, "Trinity facilitates member-to-member sharing through technology called the ShareBox system," which allows "members the ability to consent to their dollars being shared on a real time, case-by-case basis with other members as needs arise." Declaration of Ethan Smith in Support of The Aliera Companies, Inc.'s Reply ("Smith Reply Decl.") Ex. A (Declaration of A. Joseph Guarino in Support of Defendant Trinity Healthshare, Inc.'s Opposition to Plaintiff's Motion for Partial Summary Judgment) ¶ 14. Members are notified of sharing requests via ShareBox, and provided an opportunity "to opt out of sharing their contributions in response to any specific sharing request." *Id*. ¶¶ 15. 20. Share

requests are funded solely with member funds; neither Trinity nor Aliera funds are ever comingled. *Id.* ¶ 17. As the evidence OIC has produced establishes, "Trinity does not contract with members of its program for indemnification or to guarantee the payment of a member's medical expenses or costs in exchange for the contributions provided by members." *Id.* at 24. Thus, Trinity's function is consistent with its terms of membership: Trinity bears no responsibility for members medical expenses, and the funding of each share request is a voluntary decision made by the members, rather than Trinity.

Indeed, the very authority upon which OIC relies does not support its position. *See* OIC Response at 7 (citing *McCarty v. King Cty. Med. Serv. Corp.*, 26 Wn.2d 660, 175 P.2d 653 (1946). In *McCarty v. King Cty. Med. Serv. Corp.*, the Washington Supreme Court determined that that a service corporation's product met the definition of insurance because its *contract* included an *obligation* to pay for medical services in exchange for monthly payment. 26 Wn.2d at 677-78. The court's analysis and holding were not based upon superficial similarities to insurance products—or even similarities of function—but rather, explicit contractual language. *See id*. OIC has identified no such contractual language between Trinity or Aliera and the HCSM members. In fact, the evidence upon which OIC relies contains entirely contrary language that explicitly and repeatedly states that there is no obligation to pay for members' medical expenses.

Thus, OIC has produced no evidence that Aliera or Trinity has undertaken to indemnify members for their medical expenses. In fact, all evidence produced by OIC clearly demonstrates that there is no such obligation. Because the undisputed evidence establishes that Trinity's products are not insurance, OIC lacks the authority to regulated either Aliera or Trinity, and summary judgment must be granted.

C. Other Courts Have Determined that HCSMs Are Not Insurance

Washington courts have not specifically addressed whether HCSM programs like Trinity meet the definition of insurance. However, courts in other jurisdictions have considered this issue and determined that plans like those offered by Trinity are not insurance because they lack the fundamental element: an obligation to indemnify.

LEWIS BRISBOIS BISGAARD & SMITH LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

In *Barberton Rescue Mission, Inc. v. The Insurance Division of the Iowa Department of Commerce*, the Iowa Insurance Division had charged the plaintiff non-profit Christian ministry with selling insurance without a license. 586 N.W.2d 352, 353 (Iowa 1998). Applying the "principal object and purpose" test, Iowa Supreme Court held that a Christian ministry through which members share health care costs—the precise arrangement offered by Trinity in Washington—was not insurance. *Id*. at 355. The court concluded that "even if a program looks like insurance, it is not necessarily so"; rather, "the principal inquiry" is "whether the risk of payment for medical expense is assumed by the promotor." *Id*. Because Barberton did not guarantee payment or assume risk, its product was not "insurance."

In *Altrua HealthShare, Inc. v. Deal*, the Idaho Supreme Court reached the same result. 154 Idaho 390, 299 P.3d 197 (2013). The Idaho Department of Insurance determined that Altrua, "a nationwide faith based membership of individuals who share in each other's medical needs by bearing the burden of others," was transacting insurance without a certificate of authority in violation of Idaho law. *Id.* at 198-99 (citation and quotations omitted). Altrua's program included eligibility rules for medical expenses, and monthly contribution amounts were determined by Altrua based on each member's "desired level of participation, which along with their age and marital status determines the amount Altrua requires them to pay each month." *Id.* at 199. Although payments were "voluntary," failure to pay the designated amount "renders one's membership inactive and no funds would be paid to the member." *Id.* Under the terms of the program, Altrua had "sole authority" to evaluate "eligible needs" against membership guidelines and direct payments to be made. *Id.* The Idaho Supreme Court held that Altrua's programs were not insurance because there was no "insurance contract" between Altrua and its members.[1] In particular, the court found that Altrua's program was not insurance because there was "no evidence in the record that Altrua has guaranteed or assured payment of members' claims." *Id.* at

[1] Idaho Code section 41-102, like RCW48.01.020, defines insurance as "a contract whereby one undertakes to indemnify another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies."

LEWIS BRISBOIS BISGAARD & SMITH LLP
888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

202 ("Altrua must assume some of the risk of paying its members' claims for its membership contract to be one undertaking to indemnify its members.").

As these decisions make clear, voluntary cost-sharing plans like those offered by Trinity are not insurance because they involve no promise to pay or indemnification. This is true even where eligibility and payment determinations have been delegated by members to the ministry. Accordingly, Trinity's products are not insurance and therefore outside the scope of OIC's authority. Therefore, summary judgment must be granted.

D. Because OIC's Argument Regarding Washington's Definition of HCSM is Unsupported by Any Authority, It Should Be Stricken

OIC's argument that it can enforce Washington's definition of HCSM cites to no supportive authority whatsoever. *See* OIC Response and 8-10. Rather, it consists of entirely conclusory assertions about the effect of legislative and judicial actions that have repealed the Affordable Care Act's individual mandate and rendered its definition of HCSM void and meaningless. Because OIC has failed to provide any relevant evidentiary or legal basis for its opposition to summary judgment on this issue, OIC's arguments should be stricken, and summary judgment should be granted.

V. CONCLUSION

For the reasons outlined above, Aliera respectfully requests that its Motion for Summary Judgment be granted in full along with whatever further relief the Hearing Officer deems just and equitable.

DATED this 16th day of October, 2020.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: *   /s/Eric J. Neiman*

Eric J. Neiman, WSBA #14473
888 SW Fifth Avenue, Suite 900
Portland, OR 97204
Phone: 971.712.2800
Fax: 971.712.2801
Eric.Neiman@lewisbrisbois.com

/s/ Ethan A. Smith,

Ethan A. Smith, WSBA #50706
1111 Third Avenue, Suite 2700
Seattle, WA 98101
Phone: 206.436.2020
Fax: 206.436.2030
Ethan.Smith@lewisbrisbois.com

Attorneys for The Aliera Companies, Inc.

CERTIFICATE OF SERVICE

I certify that I served the foregoing The Aliera Companies, Inc.'s Reply in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment on the following attorneys by the method indicated below on the 16th day of October, 2020:

Christine Tribe Darryl E. Colman Ellen Range Office of the Insurance Commissioner PO Box 40255 Olympia, WA 98504 E-Mail: ChrisT@oic.wa.gov DarrylC@oic.wa.gov EllenR@oic.wa.gov	______ Via First Class Mail ______ Via Federal Express ______ Via Facsimile ______ Via Hand-Delivery __✓__ Via E-Mail

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: *s/Christopher Moore*
Christopher Moore, Legal Secretary
Christopher.Moore@lewisbrisbois.com