STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of **ALIERA HEALTHCARE INC.,** Appellant.	Case No. 19-0251 **THE ALIERA COMPANIES, INC.'S RESPONSE TO OIC'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The core issue before the tribunal is the scope of the Office of the Insurance Commissioner's ("OIC") authority. OIC's authority is statutorily limited to "insurance and insurance transactions." An essential and well-established element of insurance under Washington law is assumption of risk and guarantee of payment. But nowhere in the record has OIC presented any evidence that Aliera or Trinity HealthShare, Inc. ("Trinity") ever assumed risk or promised to pay anyone's health care costs. Consequently, neither Aliera nor Trinity are insurers as defined in Washington's Insurance Code. Their products and services likewise do not meet the statutory definition of insurance, and neither has engaged in insurance transactions or otherwise conducted the business of insurance in Washington. 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.

Fundamental to OIC's charges against Aliera is its contention that Trinity is not a valid health care sharing ministry ("HCSM"). Yet even if this were true (Aliera and Trinity maintain that Trinity is a valid HCSM), that would not automatically transform Trinity's products into "insurance" and thereby subject Trinity and Aliera to OIC's authority. Yet throughout its motion, OIC conflates these two distinct issues: 1) whether Trinity meets OIC's definition of a health care sharing ministry ("HCSM"); and 2) whether Trinity's products are insurance. For purposes of the instant motion only, Aliera sets aside the dispute regarding Trinity's status as an HCSM—

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

because regardless, OIC's motion fails.

Indeed, the very evidence that OIC relies upon repeatedly and unequivocally states that Trinity's products are not insurance but rather cost-sharing plans that involve no promise to pay or assumption of risk. As a condition of membership (set forth in terms conditions cited by OIC), every Trinity member acknowledges in writing that Trinity is not insurance and does not guarantee payment for medical expenses. Likewise, in practice, whether to fund a Trinity member's share request is determined on a voluntary, case-by-case basis with no obligation to pay. Because Trinity is not an insurer, Aliera's administrative services for Trinity are not insurance transactions or otherwise part of the business of insurance. Therefore, OIC lacks the authority *as a matter of law* to regulate Aliera. On this basis alone, OIC's motion for summary judgment should be denied, and OIC's Cease and Desist Order should be vacated.

Moreover, even if OIC had the authority to regulate Aliera, it has failed to provide a sufficient evidentiary or legal basis to support its individual charges. As OIC acknowledges, Aliera's functions were limited to providing administrative services in support of Trinity products. In the context of the insurance industry, these functions are most similar to those of third-party administrator—an entity that OIC lacks the authority to regulate, despite seeking this authority from the Washington legislature on multiple occasions.

Nor does Aliera meet the statutory definitions of health care service contractor or discount plan organization. The evidence relied upon by OIC does not correspond to the plain language of the Insurance Code definitions, and thus OIC's charges fail as a matter of law. To the extent there is any dispute, OIC has merely highlighted genuine issues of material fact, subject to contradictory interpretation and evidence, that cannot be decided on summary judgment.

Likewise, OIC is not entitled to summary judgment on its charge of misleading and deceptive advertising. OIC points to broker training materials that were not directed to the public as violations of Insurance Code provisions that apply only to materials *directed to the insurance buying public*. OIC then speciously alleges that membership materials are deceptive merely

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

because they employ terminology that OIC has unilaterally deemed too similar to insurance terminology. This argument is inherently factual and subjective and thus cannot be decided on summary judgment. Moreover, OIC's position is grossly unreasonable; OIC does not contend that these materials are demonstrably false, but rather objects to the use of common health care industry terminology to describe a *health care* sharing ministry.

In short, OIC's Cease and Desist Order and Motion for Summary Judgment reach beyond the bounds of OIC's statutorily defined authority and conflict with the plain language of the Insurance Code. OIC's own evidence repeatedly contradicts its arguments. OIC lacks the legal and factual basis to issue the Cease and Desist Order to Aliera, let alone to meet the high burden on summary judgment. Accordingly, summary judgment should be denied and the Cease and Desist Order should be vacated.

II. FACTS

Aliera refers to its Motion for Summary Judgment for a complete recitation of the facts.

IV. 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 Smith in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment and accompanying exhibits, the Declaration of Ethan Smith in Opposition to OIC's Motion for Summary Judgment and accompanying exhibits, and all other pleadings and evidence on file in this matter.

V. ARGUMENT

A. Standard of Review

WAC 10.08.135 governs motions for summary judgment in administrative proceedings:

> A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In ruling on a motion for summary judgment, all evidence and reasonable inferences must be considered in the light most favorable to the nonmoving party. *Jacobsen v. State*, 89 Wn.2d

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Portland, Oregon 97204-2025
971.712.2800

104, 108-109, 569 P.2d 1152 (1977).

B. Because Aliera Was Not Engaged in the Business of Insurance, OIC Lacks Authority to Issue the Cease and Desist Order

OIC's Cease and Desist Order to Aliera is based upon the premise that Aliera was "[e]ngaging in or transacting the unauthorized business of insurance." Declaration of Ethan Smith in Support of The Aliera Companies, Inc.'s Motion for Summary Judgment ("Smith Decl.") Ex. 1, at 1. However, neither Trinity's HCSM program nor Aliera's administration of that program constitute the business of insurance as defined in the Washington Insurance Code. Accordingly, OIC has no authority to order Aliera to cease and desist its administrative business activity for Trinity.

1. OIC's Authority Is Limited to Insurance

The Insurance Code limits OIC's authority to "insurance and insurance transactions." RCW 48.01.020. In Washington, "insurance" is defined as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. As the term implies, "insurance transactions" are transactions related to insurance contracts; if no insurance is involved, then no insurance transaction has occurred. RCW 48.01.060.

2. Trinity's Products Are Not Insurance

OIC alleges that Trinity's products meet the Insurance Code's definition of insurance because:

> The plan benefits included payment, in whole or in part, for the provision of health care services received by members. Members became eligible to receive said benefits upon the occurrence of certain defined events, and would submit a claim to Aliera upon occurrence of such events of bodily injury, sickness or other health-related matters.

OIC's Motion for Summary Judgment ("OIC MSJ") at 12. As an initial matter, OIC both inaccurately describes Trinity's HCSM products and fundamentally misstates the elements of "insurance" in Washington, leaving out the essential promise to pay. Moreover, in support of this contention, OIC relies *solely* upon Trinity membership materials that *contain no promise or guarantee of payment*, but rather merely describe costs that are *eligible for sharing*. *See id.*

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

(citing Declaration of Tyler Robbins in Support of OIC's Motion for Summary Judgment ("Robbins Decl.") Ex. 20, p. 1, 8-10; Robbins Decl. Ex. 21, p. 5, 10-14;). Indeed, the materials cited by OIC explicitly state that "Trinity HealthShare, Inc. plans follow medical eligibility review protocols described in the plan *but are not a promise to pay*." Robbins Decl. Ex. 20 at 8.

Nowhere in these materials does Trinity or Aliera "undertake to indemnify" anyone. *See generally*, Exs. 20, 21. Rather, the membership materials repeatedly make clear that Trinity's products are "cost-sharing plans," not insurance. *See e.g.*, Robbins Decl. Ex. 20 at 13, 14, 15, 18, 19. Trinity definitively and repeatedly states that it "is not an insurance company" and "*does not guarantee payment of medical costs*. Our role is to *enable self-pay* patients to help fellow Americans through *voluntary financial gifts*." *Id*. at 11, 16, 21, 28 (emphasis added)

> Sharing is available for all eligible claims; however, *this 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). Sharing is "available" for eligible costs but not "guarantee[d]," and payment is a "voluntary" decision made on a case-by-case basis. *Id*.

OIC's supporting exhibits also include a copy of the terms and conditions that each Trinity member was required to review and acknowledge in writing. *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 once again emphasize that whether to fund a share request is voluntary and thus not guaranteed:

> Participation in the ministry HCSM is voluntary. Enrollment as an Aliera member and participate of the ministry HCSM is voluntary and the sharing of monetary

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

> contributions are also voluntary. Enrollment in the ministry sharing plan is not a contract.

Id. at 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).

It is difficult to conceive how Aliera could make more plain that neither it nor Trinity "undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. As OIC asserts, when determining whether a product constitutes insurance, "courts must examine '[t]he real character of this promise, or of the act to be performed[.]'" OIC MSJ at 9 (quoting *McCarty v. King County Medical Serv. Corp.*, 26 Wn.2d 660, 684 (1946)). Here, the character of the promise—or lack thereof—is clear: Trinity's products are "voluntary" "cost-sharing plans" that provide no "*g*uarantee or promise that [members'] medical bills will be paid." Through the Sharebox system, Trinity members choose whether to share funds with one another on a case-by-case basis. Paul Decl. ¶ 4. This *voluntary* contribution program involves no assumption of risk or guarantee of payment. Thus, the essential elements of an insurance agreement as set forth in in the Insurance Code—assumption of risk, indemnification, and guaranteed payment—are all missing. *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979); *see als*o RCW 48.01.040.

Accordingly, Trinity's products clearly do not meet the statutory definition of "insurance," and therefore Aliera's administration of these products does not involve the insurance or insurance transaction *as a matter of law*. Thus, OIC's motion for summary judgment should be denied, and summary judgment should be granted in Aliera's favor vacating the Cease and Desist Order.

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

To the extent OIC has presented any evidence suggesting Trinity's products should be considered insurance, there are ample examples of contrary evidence, included in the very exhibits upon which OIC relies. Thus, at most, OIC has raised a legitimate factual dispute on this issue rendering summary judgment unavailable.

C. At Most, Aliera Acted as Trinity's Third-Party Administrator, an Entity Not Subject to OIC's Regulatory Authority

OIC alleges that Aliera acted as various types of entities regulated under Washington's Insurance. *See* OIC MSJ at 9-14, 17-19. Yet OIC conveniently ignores the insurance industry entity that Aliera most closely resembles: a third-party administrator ("TPA").[1] Although OIC's Cease and Desist Order notably omits reference to TPAs, it nonetheless acknowledges that "Aliera is the *administrator*. . . for Trinity." Smith Decl. Ex. 6 (emphasis added). Likewise, OIC acknowledges in the instant motion that Aliera *administered* [Trinity's HCSM] program." OIC MSJ at 2 (emphasis added). OIC's logical dissonance may be explained by the fact that OIC has no authority to regulate TPAs.

In fact, OIC has unsuccessfully sought this authority from the Washington legislature on multiple occasions. During the 2015-16 legislative session, OIC proposed legislation, HB 2445, that would have allowed it to regulate TPAs. *See* HB-2445.[2] However, HB 2445 was not enacted. *See* HB 2445 - Bill Information.[3]

Again in the 2019-20 legislative session, OIC unsuccessfully attempted to obtain legislative authority to regulate TPAs with the introduction of HB 2959, which was also not enacted. *See* HB 2959.[4]; HB 2959 - Bill Information.[5]

While neither bill passed, their proposed definitions of TPA delineate the limits of OIC's

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[1] As set forth above, Aliera disputes that it has ever engaged in the business of insurance in Washington. Aliera does not concede that it is a TPA in Washington or elsewhere. However, to the extent Aliera resembles any insurance industry entity, it is TPA, which is not subject to OIC authority.

[2] http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/2445.pdf?q=20201001111115.

[3] https://app.leg.wa.gov/billsummary?BillNumber=2445&Initiative=false&Year=2015.

[4] http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/House%20Bills/2959.pdf.

[5] https://app.leg.wa.gov/billsummary?BillNumber=2959&Initiative=false&Year=2019#billhistorytitle.

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

current regulatory authority and establish that it does not reach Aliera's TPA-like activities on behalf of Trinity. In 2015's HB 2445, "Third-party administrator" is defined as:

> a person who performs one or more of the following functions on behalf of a carrier, either directly or indirectly, in connection with disability, health, or stop-loss coverage: Underwriting business; collecting charges or premiums; adjusting or settling claims; performing utilization reviews, credentialing providers, prior authorization of treatments or quality audits; acting as a benefit manager such as pharmacy benefit manager or radiology benefit manager. . ." (15 exceptions omitted as not relevant to this discussion).

Id. § 1(7). "Underwriting" is defined as "the acceptance of employer or individual applications for coverage of individuals and the overall planning and coordination of a benefits program." *Id*. § 1(8). "Benefit manager" means

> a person who performs one or more of the following functions on behalf of a carrier, third-party administrator, or self-insured company:
> (a) Claims processing for services and procedures;
> (b) Utilization review;
> (c) Outcomes management;
> (d) Disease management; and
> (e) Payment or authorization of payment to providers or facilities for services or procedures.

Id. § 1(2).

In 2019's HB 2959, TPA was defined as "any person or entity who, on behalf of a health carrier or health care purchaser . . . receives or collects charges or contributions for providers and facilities." *Id.* § 1(4)(e) (irrelevant exceptions omitted).

Notably, both definitions apply only to entities that perform functions on behalf of a carrier or health care purchaser. As set forth above, Trinity is neither. However, even accepting arguendo OIC's position that Trinity is a carrier, Aliera's activities on behalf of Trinity are captured by the proposed definitions of TPA in HB 2445 and HB 2959. OIC unsuccessfully sought authority to regulate entities that perform these functions, and thus OIC clearly lacks the authority to regulate Aliera.

Specifically, Aliera performed (and since January 1, 2020, Aliera's subsidiary has performed) the following functions for Trinity: 1) accepting signature emails from members joining the HCSM (which OIC equates with "accept[ing] . . . individual applications for coverage"); 2) "collecting" Trinity member contributions (which OIC equates with "charges or

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

premiums"); 3) overseeing the administration of share requests (which OIC equates with "adjusting or settling claims" and "claims processing for services and procedures"); 4) facilitating "payment or authorization of payment to providers or facilities for services or procedures" that meet the Trinity's eligibility requirements and are approved by the HCSM; and 5) "overall planning of" the administration of Trinity's HCSM program (which OIC equates with "a benefits program"). HB 2445 § 1(2), (7), (8). Thus, Aliera's functions directly align with those of a TPA, as defined in HB 2445.

Likewise, Aliera meets the definition of TPA set forth in BP 2959 because "on behalf of" Trinity, Aliera "receives or collects charges or contributions for providers and facilities." HB 2959 § 1(4)(e).

Thus, even if Trinity is an insurer as OIC contends, Aliera's functions were that of a TPA and therefore not subject to OIC regulation or authority. At a minimum, there are obvious disputed issues of material fact as to whether Aliera should be considered a TPA and therefore whether OIC had authority to issue its Cease and Desist Order. Accordingly, summary judgment must be denied.

D. The Record Fails to Establish that Aliera Acted as a Health Care Service Contractor

The Washington Insurance Code defines "health care service contractor as

> any corporation, cooperative group, or association, which is sponsored by or otherwise intimately connected with a provider or group of providers, who or which not otherwise being engaged in the insurance business, accepts prepayment for health care services from or for the benefit of persons or groups of persons as consideration for providing such persons with any health care services.

RCW 48.44.010(9). This definition has three essential elements: An entity must 1) be "sponsored by or intimately connected with a provider or group of providers"; 2) accept "prepayment for health care services"; and 3) provide health care services. *Id.*

OIC alleges that Aliera operated as an unregistered health care service contractor, yet fails establish any of these three elements. *See* OIC MSJ at 17-18. First, Aliera does not provide health care services to anyone. Rather, as OIC acknowledges, Aliera marketed and administered *Trinity's* health care programs. *See* Robbins Decl. Ex. 32; OIC MSJ at 4 ("memberships [were]

offered by Trinity and sold by Aliera"), 10 ("Trinity, through Aliera, offered Washington consumers coverage"), 12 ("Aliera solicited Trinity's unauthorized insurance products"), at 13, ("Aliera represented Trinity in its solicitation, sale, and administration of" Trinity's products). Thus, Trinity, not Aliera, provided Trinity members with health care services.

Second, neither Aliera nor Trinity accepted "prepayment" for health care services. Because Aliera did not provide health care services, Aliera could not accept prepayment for services that it did not provide. Any payments collected by Aliera were strictly for its administrative and marketing functions. Moreover, as set forth above, Trinity's HCSM products involved no indemnification or promise to pay. Inherent in *pre*payment is an obligation to subsequently provide the services that were paid for. Because neither Trinity nor its members had any obligation to pay medical costs, Trinity could not accept prepayment. Therefore, Trinity (and Aliera by association) cannot be a health care service contractor.

Third, Aliera was neither "sponsored by" nor "intimately connected with" any provider network. OIC relies upon Aliera's Provider Network Services Agreement with First Health Group Corp. *See* OIC MSJ at 18 (citing Robbins Decl. Ex. 38). However, the mere fact that Aliera had a limited, arm's-length contract with First Health does not render Aliera "intimately connected with" a provider network. Moreover, as set forth in Aliera's discovery responses to OIC, no health care services have ever been provided to Trinity's Washington members pursuant to any contract between Aliera and a provider network:

> No services have been provided to Washington enrollees pursuant to any contract between Aliera and a preferred provider network. The provider networks utilized by Washington enrollees were accessed through Healthscope Benefits, which contracted with Multiplan (PHCS) and First Health. Aliera contracted with Healthscope Benefits. *While Aliera does have agreements with Multiplan (PHCS) and First Health, no services have ever been provided to Washington enrollees pursuant to those contracts.*

Declaration of Ethan A. Smith in Opposition to OIC's Motion for Summary Judgment Ex. A at 5.

Thus, the evidence proffered by OIC fails to establish any element of Insurance Code's definition of health care service contract, and therefore, summary judgment must be denied.

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

E. The Record Fails to Establish that Aliera Acted as a Discount Plan Organization

The Washington Insurance Code defines "discount plan organization" as

> a person that, in exchange for fees, dues, charges, or other consideration, provides or purports to provide access to discounts to its members on charges by providers for health care services. "Discount plan organization" also means a person or organization that contracts with providers, provider networks, or other discount plan organizations to offer discounts on health care services to its members.

RCW 48.155.010(5)(a). Explicitly excluded from this definition are "marketers" of discount plans so long as the marketer's written communications clearly identify the underlying discount plan organization. RCW 48.155.010(5)(b)(iii).

OIC alleges that Aliera acted as a discount plan organization in Washington based solely on the fact that Rx-Valet prescription drug discounts were offered to Trinity members. *See* OIC MSJ at 18-19. However, in order to qualify as a discount plan organization under either prong of the Insurance Code's definition, an entity must have "members." RCW 48.155.010(5)(a). Aliera has no "members." Rather, as OIC acknowledges, "memberships [were] *offered by Trinity* and sold by Aliera." OIC MSJ at 4; *see also* OIC MSJ at 10 ("Trinity, through Aliera, offered Washington consumers coverage"), 12 ("Aliera solicited *Trinity's* unauthorized insurance products"), at 13, ("Aliera represented Trinity in its solicitation, sale, and administration of" Trinity's products). Trinity had members; Aliera merely marketed and administered Trinity's products. *See* Robbins Decl. Ex. 32. Because Aliera had no members to whom it could offer discounts, Aliera does not meet the definition of a discount plan organization. *See* RCW 48.155.010(5)(a).

Nor can OIC establish that Aliera collected "fees, dues, charges, or other consideration" for access to Rx-Valet discounts. RCW 48.155.010(5)(a). OIC alleges that "members paid Aliera for access to these discounts." OIC MSJ at 19 (citing Robbins Decl. Ex. 34 at 6-8). Yet in support of that contention, OIC cites terms and conditions that make no reference to any payment for Rx-Valet or any other discount plan. *See generally*, Robbins Decl. Ex. 34. Rather, the only fees referenced are for administration. *Id.* at 6. Moreover, the terms and conditions explicitly state that Aliera will collect "the monthly share amount" "on behalf of the ministry [Trinity]." *Id.*

To the extent any fees were paid for Rx-Valet discounts, those fees went to Trinity, not Aliera. Accordingly, OIC has produced no evidence whatsoever that Aliera provided access to Rx-Valet products "in exchange for fees, dues, charges, or other consideration."

Finally, OIC alleges that Aliera qualifies as a discount plan organization because "Aliera entered into a contract with Rx-Valet to offer its customers prescriptions at a discounted rate." OIC MSJ at 19. However, the contract upon which OIC relies is a "*Marketer* Agreement" in which Aliera agrees to market Rx-Valet's preexisting products subject to strict oversight by Rx-Valet. *See* Robbins Decl. Ex. 37. The definition of "discount plan organization" specifically excludes "marketers" whose written communications identify the underlying discount plan organization. RCW 48.155.010(5)(b)(iii). The member guide cited by OIC clearly identifies "Rx-Valet" as the entity offering prescription drug discounts. Robbins Decl. Ex. 21 at 5. Thus, Aliera fits into this exclusion and is therefore not a discount plan organization.

As illustrated by the very exhibits upon which OIC relies, there is insufficient evidence in the record to determine that *as a matter of law* Aliera acted as discount plan organization. Accordingly, summary judgment must be denied.

F. Aliera's Alleged Misrepresentations Do Not Violate the Statutes or Regulations upon Which OIC Relies

OIC alleges that "Aliera made deceptive and misleading representations and advertisements in violation of RCW 48.30.040." OIC MSJ at 19. The premise of this allegation is that Aliera deceived consumers into thinking Trinity's products were insurance. *See id.* at 19-20.

RCW 48.30.040 provides:

> No person shall knowingly make, publish, or disseminate any false, deceptive or misleading representation or advertising in the conduct of the business of insurance, or relative to the business of insurance or relative to any person engaged therein.

As OIC notes, this provision of the Insurance Code and its implementing regulations only apply to advertising for "disability insurance products." OIC MSJ at 20; *see also id.* As explained above, neither Aliera nor Trinity provided insurance or engaged in insurance

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888 SW Fifth Avenue, Suite 900
Portland, Oregon 97204-2025
971.712.2800

transactions, so these provisions do not apply to Aliera's advertising materials.

Moreover, even if OIC did have authority to regulate Aliera's advertising, the relevant regulations do not apply to the majority of allegedly deceptive materials cited by OIC. RCW 48.30.040 "establish[es] only general standards"; its implementing regulation—promulgated by OIC—"establishes specific standards for advertisements." WAC 284-50-010 (specifically referring to RCW 48.30.040). That regulation defines "advertisement" as:

> (a) Printed and published material, audio visual material, and descriptive literature of an insurer *used in direct mail, newspapers, magazines, radio scripts, television scripts, billboards, and similar displays*; and
>
> (b) Descriptive literature and sales aids of all kinds issued by an insurer, or insurance producer *for presentation to members of the insurance buying public*, including but not limited to circulars, leaflets, booklets, depictions, illustrations, and form letters; and
>
> (c) Prepared sales talks, presentations, and material *for use by insurance producers*.

WAC 284-50-030(1) (emphasis added). As this definition makes clear, the Insurance Code's advertising provisions apply only to advertisements *directed to prospective buyers*. "[D]irect mail, newspapers, magazines, radio scripts, television scripts, billboards, and similar displays" are clearly media directed to individual consumers. Subpart (b) is even more explicit, covering only materials "for presentation to members of the insurance buying public." And "sales talks, presentations, and materials for use by insurance producer" are likewise directed at insurance consumers. By contrast, the Insurance Code's definition of "advertisement" clearly does not include training materials *directed to brokers or producers.*

Yet most of the allegedly misleading materials were directed to brokers rather than the insurance buying public. *See* Robbins Decl. Ex. 16 ("a communication to Washington brokers"); Robbins Decl. Exs. 23, 24, 25, 27 (videos from Aliera's broker training site). These materials were not presented in "direct mail, newspapers, magazines, radio scripts, television scripts, billboards, and similar displays." Nor were they "for presentation to members of the insurance buying public." And while they were training materials, they were not intended to be presented by brokers directly to consumers. Thus, these materials do not meet the Insurance Code's

definition of advertising, and therefore cannot, as a matter of law, be the basis for a violation.

Much of the remaining "deceptive" content consists of terminology that OIC has unilaterally deemed too similar to insurance terminology. OIC does not contend that this content is demonstrably false—merely that it is so similar to insurance terminology that consumers could believe Trinity's products were insurance. This characterization of consumers' likely perceptions is an inherently factual and subjective issue that cannot be decided on summary judgment. Indeed, the premise of OIC's position strains credibility. According to OIC, Aliera's use of terminology similar to that used to describe health insurance is inherently deceptive. Yet HCSMs are specifically intended to 1) facilitate the provision of health care (health care is part of the name); 2) serve as an alternative to traditional insurance; and 3) provide an exemption to the ACA's individual mandate. Rather than misleading, it is entirely natural and unavoidable that a program intertwined with the same health care system as insurance would have some overlapping terminology.

Likewise, the declarations of a handful of disgruntled former Trinity members are wholly anecdotal and subjective. Moreover, witness credibility inherently raises issues of fact that render summary judgment improper. *Morinaga v. Vue*, 85 Wn. App. 822, 828, 935 P.2d 637, 641 (1997). At most, the declarations produced by OIC constitute *some* evidence that communications could have been misleading in some circumstances; the weight, credibility, and interpretation of that evidence are issues of fact.

At best, OIC has a raised a genuine issue of material fact as to whether Aliera's marketing materials were misleading. Thus, summary judgment must be denied.

VI. CONCLUSION

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

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

DATED this 9th day of October, 2020.

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 Response to OIC's Motion for Summary Judgment on the following attorneys by the method indicated below on the 9th 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

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