



Summary for Legacy Unity HCSM Members: April 27, 2019

You enrolled in a Unity health care sharing ministry (“HCSM”) plan through Alera Healthcare, Inc. (“Alera”). We at Unity have terminated our relationship with Alera Healthcare, Inc., and have rebranded to OneShare Health, LLC. There is pending legal action in the Superior Court of Fulton County, Georgia between Alera and Unity Healthshare, LLC (“Unity”), concerning the Unity HCSM plans and the central issue is whether Unity or Alera has the legal right to the Unity HCSM plans. On December 28, 2019, the Court enjoined Alera’s plan to transition the plans over to Trinity Healthshare on January 1, 2019. The Court required Alera to inform Unity HCSM members that the plans were not being transitioned to Trinity at that time, and you may recall receiving that notification.

On April 25, 2019, the Court entered an order granting Unity’s motion for an interlocutory injunction and appointing a receiver to oversee Alera’s administration of the Unity HCSM plans and plan assets. You can read the Court’s entire written decision and specific findings below.

The Court is allowing us to reach out to the Unity HCSM members about their options to choose to move to another plan and we are reaching out to you to offer you the opportunity to enroll in one of our OneShare HCSM plans. The OneShare HCSM plans are not affiliated with Alera or Trinity in any way. You may be separately contacted by Alera asking you to enroll in Trinity or another plan as the Court is permitting both parties to contact you in this regard.

If you choose to take no action, you will remain in your current Unity HCSM plan, which will be overseen by the court-appointed receiver and will continue to be administered by Alera while the litigation is pending.

It is for you to decide if you prefer to remain in the legacy Unity HCSM plan during the litigation or to change your plan now. We invite you to take a look at OneShare’s offerings, which are offered by leaders with extensive experience in the HCSM space.

If you choose to take no action, you will remain in your current Unity HCSM plan, which will be overseen by the court-appointed receiver and will continue to be administered by Alera while the litigation is pending.

We invite you to take a look at OneShare’s offerings, which are offered by leaders with extensive experience in the HCSM space.

A few of the benefits of joining OneShare Health are:

- No Application Fee, a savings of \$125
- Your first month is FREE
- Member Shared Responsibility Amount (MSRA/ISA) accrued for current program year is honored

It is for you to decide if you prefer to remain in the legacy Unity HCSM plan during the litigation or to change to OneShare Health.

**IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA**

ALIERA HEALTHCARE, INC.,

Plaintiff/Counterclaim Defendant,

v.

ANABAPTIST HEALTHSHARE; and
UNITY HEALTHSHARE, LLC,

Defendants/Counterclaimants,

ALEXANDER CARDONA, and
TYLER HOCHSTETLER,

Defendants.

CIVIL ACTION FILE NO.
2018CV308981

Business Case Div. 1

**ORDER ENTERING INTERLOCUTORY INJUNCTION
AND APPOINTING RECEIVER**

The Court has carefully considered the Application for an Interlocutory Injunction and for the Appointment of a Receiver submitted by Defendants-Counterclaimants Anabaptist Healthshare (“Anabaptist”) and Unity Healthshare LLC (“Unity”) (collectively, “AHS/Unity”), the exhibits and briefs submitted in support, the responses and exhibits submitted by Plaintiff-Counterclaim Defendant Alieria Healthcare, Inc. (“Alieria”), and the evidence and arguments presented at the evidentiary hearing held on January 22, 2019 and January 24, 2019. This Order reduces to writing the oral order and interlocutory injunction of the Court issued at the conclusion of the hearing on January 24, 2019.

Having allowed the parties several opportunities to confer on a proposed order following the January hearing and having considered the parties’ respective submissions and the record, the Court finds and orders as follows:

I. FINDINGS OF FACT¹

Background

1. Defendant/Counterclaimant AHS is a non-profit Section 501(c)(3) tax exempt organization. Affidavit of T. Hochstetler (Hochstetler Aff.) at ¶ 2; Transcript of Hearing on AHS/Unity's Application for Interlocutory Injunction and for Appointment of a Receiver ("Hr'g Tr.") 42:14-18.²

2. AHS has, for some years, managed a Health Care Sharing Ministry ("HCSM") for members of the Anabaptist communities in Virginia. Hochstetler Aff. ¶ 2; Hr'g Tr. 94:18-95:19.

3. Health care sharing ministries ("HCSM") facilitate the sharing of certain medical expenses among their members. Hochstetler Aff. at ¶ 3; Hr'g Tr. 43:16-44:13.

4. The Affordable Care Act (the "ACA") exempts members of a qualifying HCSM from the tax penalty levied on those who fail to purchase health insurance, commonly referred to as "the individual mandate." Hochstetler Aff. ¶ 3; Hr'g Tr. 43:16-24.

5. AHS received a letter from the Centers for Medicare and Medicaid Services ("CMS") stating that it met the ACA's requirements for its members to claim the tax exemption, which included the requirement that AHS has been "in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since December 31, 1999." Hochstetler Aff. ¶ 3; Hr'g Tr. 43:25-44:3.

6. The United States Department of Health and Human Services certified that AHS is an HCSM whose members qualified for the exemption from the individual mandate. Hochstetler Aff. ¶ 6; Hr'g Tr. 45:1-12; Joint Ex. 2.

7. AHS's wholly-owned subsidiary, Unity, is also an HCSM whose members qualified for the exemption from the individual mandate to the same extent as AHS. Hr'g Tr. 49:18-50:6.

¹ As demonstrated by the parties' respective proposed findings of fact and other submissions, the evidence adduced to date in this matter is too vast to adequately summarize here. Included herein are the Court's preliminary findings that are most relevant to the Court's rulings and analysis.

² The exhibits cited herein were either received in evidence at the evidentiary hearing on AHS/Unity's motion for interlocutory injunction or are attached to the parties' pleadings and filings in connection with AHS/Unity's motion for a TRO/interlocutory injunction.

8. AHS was formed in 2015, and Unity was formed in late 2016. Hr’g Tr. 96:7-8; 300:3-5.

9. Congress eliminated the individual mandate’s tax penalty beginning January 1, 2019. *See* Pub. L. No. 115-97, § 11081 (2017); Hr’g Tr. 98:23-99:9.

10. Georgia’s Insurance Code defines a “health care sharing ministry” as “a faith-based, nonprofit organization that is tax exempt under the Internal Revenue Code” and that meets the six specific requirements set forth in the statute. O.C.G.A. § 33-1-20 (providing that HCSMs meeting such requirements are neither insurance nor subject to the jurisdiction of the Commissioner of Insurance).

11. Other states have similar statutes defining HCSMs. *See, e.g.*, Fla. Stat. § 624.1265(1) (defining a healthcare sharing ministry as “[a] nonprofit religious organization” that satisfies certain requirements); Tex. Ins. Code § 1681.001 (“A faith-based, nonprofit organization that is tax-exempt under the Internal Revenue Code of 1986 qualifies for treatment as a health care sharing ministry...”); Va. Code Ann. § 38.2-6300 (“As used in this chapter, ‘health care sharing ministry’ means a health care cost sharing arrangement...administered by a non-profit organization that has been granted an exemption from federal income taxation pursuant to § 501(c)(3) of the Internal Revenue Code of 1986...”).

12. Additionally, the federal ACA provision that allowed HCSM members to claim an exemption from the tax penalty of the individual mandate makes clear that an HCSM must be a non-profit federally tax-exempt organization. *See* 26 U.S.C. § 5000A(d)(2)(B) (defining a “health care sharing ministry” as a non-profit tax exempt 501(c)(3) organization that meets certain criteria including having members who share a common set of ethical or religious beliefs and who share medical expenses, and that the HCSM must have been in existence and sharing continuously and without interruption since at least December 31, 1999).

13. Alieria is an Atlanta-based for-profit company that sells healthcare products. Hochstetler Aff. at ¶ 10; *see also* Hr’g Tr. 48:12-20; 89:1-2. Alieria offers alternative healthcare that is not insurance. Hr’g Tr. 251:1-23; Steele Aff. at ¶ 2.

14. As a for-profit company, Alieria does not qualify as an HCSM under state or federal law. *See* Hr’g Tr. 48:12-20; 50:10-17; 52:1-8; 55:17-23; 89:1-2.

15. Alieria began selling its healthcare products in 2015. Hr’g Tr. at 185:5-17. At that time, Alieria’s products included services such a direct primary care medical home (DPCMH) service but did not include coverage for emergency room visits and hospitalization. Hr’g Tr. at 50:7-17, 185:5-17; Steele Aff. at ¶ 4.

16. Before Alieria established a relationship with an HCSM to offer an HCSM product, members who purchased Alieria’s products did not qualify for exemption from the individual mandate’s tax penalty. In other words, individuals who purchased Alieria’s products did not satisfy the ACA’s individual mandate unless they also purchased additional healthcare products from another source that satisfied the individual mandate. Hr’g Tr. 186:9-11.

17. At some point after it began selling its products, Alieria determined that if it could sell its plans side-by-side with an ACA-exempt HCSM plan, it would make the Alieria plan much more attractive to consumers and increase sales of Alieria’s own products. Hr’g Tr. 186:12-189:4. Such concurrent offering of non-ACA exempt Alieria products with ACA-exempt AHS/Unity products would not, however, make Alieria’s own products satisfy the individual mandate.

Alieria Approaches AHS and the Parties Negotiate and Execute an Amended MOU and a Written Agreement

18. To this end, in 2016, Alieria approached AHS to pitch a relationship between Alieria and AHS. Hochstetler Aff. at ¶ 7; Hr’g Tr. 46:4-9.

19. Timothy Moses, Alexander Cardona, and G. Michael Smith pitched the relationship and negotiated with AHS on behalf of Alieria. Hochstetler Aff. at ¶¶ 7-14; Hr’g Tr. 46:4-47:25; Smith Aff. at ¶¶3-5. Tyler Hochstetler led the negotiations for AHS. Hr’g Tr. 46:4-65:4.

20. Tyler Hochstetler testified that Alieria representatives proposed an arrangement under which Alieria would work with AHS to build AHS’s HCSM network. Hochstetler Aff. at ¶ 8; Hr’g Tr. 46:10-50:3.

21. Timothy Moses explained to Tyler Hochstetler that Alieria sought to enter into a business relationship with AHS because Alieria could not offer hospitalization coverage through its direct primary

care medical home (DPCMH) products, nor could Alieria – as a for-profit company – offer HCSM products by itself. Hr’g Tr. 50:10-17.

22. Alieria valued AHS’s exemption from the individual mandate, and entering into a relationship with AHS would allow Alieria to bundle HCSM plans with its products to offer participants the ability to qualify for the tax exemption from the ACA’s individual mandate. Hochstetler Aff. at ¶¶ 11-13; Hr’g Tr. 48:12-20.

23. Timothy Moses stated that, if the parties were to enter into a business relationship, Alieria would market and administer AHS’s HCSM plans. Hr’g Tr. 46:10-18; 49:21-24.

24. Timothy Moses proposed that AHS/Unity compensate Alieria \$25 per member per month as Alieria’s fee for the administrative services Alieria performed as part of its business relationship with AHS. Hr’g Tr. 51:14-25. Timothy Moses suggested that this fee was reasonable because it was similar to the fee other HCSMs paid for administrative services. Hr’g Tr. 51:11-25.

25. AHS asserts it was interested in partnering with Alieria because it desired to expand its ministry, and Alieria presented itself as an experienced and reputable company that could help AHS expand its HCSM nationwide. Hochstetler Aff. at ¶¶ 13-14; Hr’g Tr. at 50:21-50:1.

26. For example, Alieria represented to AHS that it had a strong compliance strategy and maintained strong relationships with insurance commissioners in every state. According to Tyler Hochstetler, this was extremely important to AHS. Hochstetler Aff. at ¶ 14; Hr’g Tr. 51:2-10.

27. Following their negotiations, Alieria and AHS executed a Memorandum of Understanding on October 31, 2016. Hochstetler Aff. at ¶ 15.

28. On November 10, 2016, AHS and Alieria executed an Amended Memorandum of Understanding. Hochstetler Aff. at ¶¶ 16; Hr’g Tr. 55:7-9.

29. Alieria primarily drafted the Amended Memorandum of Understanding with participation from AHS representatives. Hr’g Tr. 55:15-16; 164:7-20; Smith Aff. at ¶5.

30. The Amended Memorandum of Understanding contemplated that AHS would create a new nonprofit subsidiary, Unity, to offer HCSM plans. Hochstetler Aff. at ¶ 16.

31. The Amended Memorandum of Understanding further contemplated that Alieria and AHS, through its new subsidiary Unity, would partner to sell two-part healthcare products. It provided that “AHS and [Alieria] wish to cooperate as set forth in this MOU so that the [Alieria] products along with the AHS products are sold side by side and marketed to the public members who are or agree to become members of the faith-based ministry membership and health plan.” Joint Ex. 3 at p. 1 (Amended Memorandum of Understanding); Hochstetler Aff. at ¶ 16; Hr’g Tr. 57:5-11.

32. The Amended Memorandum of Understanding described Alieria’s role in Section 2.5(j) as follows: “AHS will contract with [Alieria] to market Unity Healthshare, service memberships, cover claims, handle bill reductions, and generally operate Unity Healthshare, subject to the direction of the board of AHS. [Alieria] will charge an anticipated \$25 per member, per month for this service.” Joint Ex. 3 at p.3.

33. The Amended Memorandum of Understanding at Section 1.2 provided in part: “[Alieria] is and shall remain the sole and exclusive owner or authorized licensee of and will retain all right, title, and interest, including all intellectual property rights, in and to the [Alieria] Products, and AHS is and shall remain the sole and exclusive owner or authorized licensor of and will retain all right, title, and interest, including all intellectual property rights, in and to the AHS product offerings, except for the specific licenses granted to [Alieria] or specific grants by [Alieria] to AHS...” Joint Ex. 3 at p.2.

34. The Amended Memorandum of Understanding also contemplated that the parties would “enter into a more formal understanding and written agreement as quickly as possible . . . to formalize their understanding and agreement.” Joint Ex. 3 at p. 1.

35. On February 1, 2017, Alieria and AHS entered into a written contract (“the Agreement”). Hochstetler Aff. at ¶ 17; Hr’g Tr. 59:4-7; Joint Ex. 4 (Agreement).

36. Alieria drafted the Agreement although the parties negotiated the terms. Hr’g Tr. 58:23-24, 59:12-14; Smith Aff. at ¶5.

37. The fourth “Whereas” clause on the first page of the Agreement provides, in relevant part, that AHS and Alieria “have agreed to cooperate and partner together in accordance with the

Amended Memorandum of Understanding, whereby the two parties agree to enable ALIERA to market and sell the two part non-insurance products to AHS and ALIERA and/or [Unity] members.” Joint Ex. 4 at p. 1.

38. The fifth “Whereas” clause goes on to state that “AHS and its subsidiary, UHS, wish to market products through ALIERA’s DPCMH model of care, network, administration, call center, marketing, plan design, website administration, enrollment portal, concierge services, telemedicine, and other related services, and whereas, AHS and [Unity] do hereby contract with ALIERA to provide said services, in accordance with the terms and conditions contained herein.” Joint Ex. 4 at p. 1.

39. The ninth “Whereas” clause provides: “AHS is granting ALIERA an exclusive **license to sell and distribute [Unity] products** to the public markets (*pubic markets means persons who will acknowledge the standard of beliefs and other requirements as deemed necessary by AHS*) via all distribution channels...” Joint Ex. 4 at p. 2 (capitalized and italicized emphasis in original; bold emphasis added). Section 1.2 further provides that AHS, on Unity’s behalf, granted AlierA a “U.S. wide, royalty-free, non-transferable, exclusive[] **license.**” Joint Ex. 4 at p. 2 (bold emphasis added).

40. Section 1.3 provides: “**During the term of this agreement** ALIERA shall remain the sole and exclusive authorized non-insurance health care company allowed to market and sell health care products to ALIERA and Unity HealthShare members. AlierA will retain all right, title, and interest including all intellectual property rights, in and **to the ALIERA products**, and AHS is and shall remain the sole and exclusive owner or authorized licensor of and will retain all right, title, and interest, including all intellectual property rights, in and to the membership roster, except for the specific licenses granted in Sections 1.2.” Joint Ex. 4 at p. 2 (bold emphasis added).

41. Section 1.4 provides that the “HealthShare offerings [are] to be marketed and sold by Unity HealthShare, LLC.” Joint Ex. 4 at p.2.

42. Section 7(g) states that “AlierA will design and implement all cost sharing plans, marketing materials, operational controls and general business banking for [Unity] subject to access and approval by the AHS Board of Directors.” Joint Ex. 4 at p. 5.

43. Under Section 7(d), Unity was to escrow \$2.00 per member per month from each new membership application into a “ministry fund” to be administered directly by AHS. Joint Ex. 4 at p. 5. Unity also agreed to deposit \$25.00 from each one-time application fee per membership to be used by AHS as it deemed most appropriate to further the intent of the ministry and cover administration and related costs. *Id.*

44. Section 7(f) sets forth a “profit-sharing arrangement” whereby Eldon and Tyler Hochstetler each received \$2.50 per enrolled member in Unity per month. Joint Ex. 4 at p. 5.

45. Section 4 of the Agreement is entitled “Administrative Fees” and states, in relevant part: “It is agreed that ALIERA shall be entitled to retain the initial enrollment fee, and the first monthly membership fee payment. The second monthly membership fee payment shall also be retained by ALIERA, to be used if necessary for ALIERA or [Unity] expenses. Thereafter, any succeeding month(s) which the membership is continued, ALIERA shall be entitled to retain \$25.00 PMPM [*i.e.*, “per member per month”] as payment for its services.” Joint Ex. 4 at pp. 3-4. Thus, the parties’ Agreement provides Alieria with more compensation than what was contemplated in the Amended Memorandum of Understanding.

46. The Administrative Fees paid to Alieria under Section 4 of the parties’ Agreement amounted to millions of dollars. Hr’g Tr. 307:17-308:5.

47. Section 7(l) of the Agreement states that the parties’ contract is integrated: “This Agreement contains the entire understanding between the Parties with respect to the subject matter hereof and supersedes all and any prior understandings, undertakings and promises between AHS, [Unity], and ALIERA, whether oral or in writing.” Joint Ex. 4 at p. 6.

48. Tyler Hochstetler testified that, during the parties’ negotiations concerning the Agreement, Timothy Moses told Tyler that he had retired after building a billion-dollar company. Hr’g Tr. 54:8-55:1.

49. In 2005, a federal jury found Timothy Moses guilty of securities fraud and perjury. *See United States v. Moses*, No. 1:04-cr-508-CAP (N.D. Ga.), at ECF 86. Mr. Moses was sentenced on

February 17, 2006 to 78 months' imprisonment followed by a term of five years' supervised release. *Id.* at ECF 96. Soon after his release, Judge Pannell revoked Mr. Moses's supervised release because he had misled his supervising probation officer about his financial affairs and failed to disclose bank account information and new lines of credit. *Id.* at ECF 145 & 150. Mr. Moses's supervised release was terminated in April 2015 (*see id.* at ECF 167), approximately six months prior to Alieria's creation and approximately one and a half years prior to Alieria and Mr. Moses approaching AHS and Mr. Hochstetler about forming a relationship.

50. Tyler Hochstetler testified that he learned about Tim Moses' criminal conviction in the "first half" of 2017. Hr'g Tr. 151:21-24.

The Parties' Business Relationship

51. Alieria offered its products to the public in conjunction with the Unity HCSM plans. Hochstetler Aff. at ¶ 19; Hr'g Tr. 107:8-20.

52. Individuals and families who purchased a Unity HCSM plan could claim an exemption from the tax penalty of the ACA individual mandate. Hochstetler Aff. at ¶¶ 12, 19; Hr'g Tr. 50:4-6

53. The marketing materials for the side-by-side plan offerings emphasized the Unity HCSM exemption from the tax penalty of the ACA's individual mandate. Hr'g Tr. 188:22-189:18.

54. Members interfaced with Alieria with respect to both plans because Alieria served as the program administrator for the Unity HCSM plans under the Agreement. Hochstetler Aff. at ¶ 20.

55. Unity entrusted Alieria with Unity HCSM member information and the Unity HCSM plan assets. Hochstetler Aff. at ¶ 20; Hr'g Tr. 80:21-81:4.

56. Some individuals purchased plans that contained only an Alieria product and some individuals purchased plans that contained only a Unity HCSM product. The vast majority of individuals, however, purchased plans that contained two separate products: an Alieria DPCMH product and a Unity HCSM product. Hr'g Tr. 188:13-189:18. Though those plans were offered side by side, Alieria represented to third parties during the course of its relationship with AHS/Unity, consistently with the fact that only the Unity HCSM was ACA exempt, that the plans were legally separate and distinct. *See*

Corresp. to Fla. Office of Ins. Reg., Joint Ex. 6 at pp. 1-2; Corresp. to Maryland Ins. Comm'r, Joint Ex. 1 at p. 2.

57. The separate and distinct nature of the Unity HCSM plans is also reflected in the Member Guide admitted into evidence, which was drafted by Alera. Joint Ex. 5; Hr'g Tr. 65:25-66:12.

58. The Member Guide delineates between the Alera component and the Unity HCSM component of the combined plans. For example, the Member Guide distinguishes between "Alera Healthcare services and Unity HealthShare cost sharing," which "combine to create a full range of services and benefits." Joint Ex. 5 at p. 4. Part I of the Member Guide relates to information about Alera's products. Part II of the Member Guide relates to the Unity HCSM. *See generally* Joint Ex. 5.

59. Part II of the Member Guide makes clear that the HCSM is a Unity HealthShare plan and that the members of such plan are Unity HealthShare members. For example, Part II begins by describing Unity HealthShare as "a health care sharing ministry (HCSM) which acts as an organizational clearing house to administer sharing of health care needs for qualifying members." *Id.* It also outlines certain criteria that individuals must meet in order to "become and remain a member of Unity HealthShare." *Id.* at p. 11. The Member Guide also states that "[m]embers wishing to change to a membership type other than that in which they are currently participating may, at the discretion of Unity HealthShare, be required to submit a new signed and dated membership application for review." *Id.* at p. 12. And page 13 of the Member Guide defines the term "Membership" as "[a]ll members of Unity HealthShare." *Id.* at p. 13. Monthly contributions are defined as monetary contributions "voluntarily given to Unity HealthShare to hold as an escrow agent and to disburse according to the membership escrow instructions." *Id.* at p. 14. These are just a few examples of how Part II of Member Guide defines the HCSM plan as a Unity product, separate and distinct from the Alera product.

60. Moreover, the Member Guide requires members to seek resolution of any disputes concerning their HCSM plan with Unity, *not* Alera. *See id.* at p. 17. The Dispute Resolution and Appeal section of the Member Guide outlines the various steps that a member must take to challenge determinations made by the HCSM. The first level of appeal asks the member to "call[] Unity

Healthshare,” which “will try to resolve the matter within ten (10) working days in writing.” *Id.* The second level of appeal is to an “Internal Resolution Committee, made up of three Unity HealthShare officials.” *Id.* The third level of appeal is to submit the dispute to “three sharing members in good standing and randomly chosen by Unity HealthShare.” *Id.*

61. If the various levels of appeal do not result in a resolution that is satisfactory to the member, then the member must pursue the claims through a mediation and arbitration with Unity HealthShare. The Member Guide states that “Unity HealthShare shall pay the fees of the arbitrator in full and all other expenses of the arbitration.” *Id.*

62. Alieria is not referenced in the dispute resolution provision in Part II for the HCSM plan.

63. The Member Guide also expressly accords Unity, not Alieria, with exclusive subrogation rights for amounts paid or found to be payable by an institutional source or a liable third party, which further evidences that the HCSM plans belonged to Unity, not Alieria. *Id.* at p. 19.

64. Consistent with the Member Guide, during the course of the parties’ relationship, Alieria described itself to regulators as a third-party administrator of the Unity HCSM plans. For example, Alieria explained to the Maryland Insurance Commissioner that “as a program administrator for Unity plans, Alieria is exempt from Maryland licensing laws because Alieria does not market insurance in Maryland.” Corresp. to Maryland Ins. Comm’r, Joint Ex. 1 at p. 2.

65. Tyler Hochstetler testified that AHS/Unity understood that, under the parties’ Agreement, member funds collected for Unity products were to be segregated in a separate account that belonged to Unity. Hr’g Tr. at 70:14-17.

66. Tyler Hochstetler also testified that AHS/Unity trusted that Alieria would properly account for Unity HCSM plan assets and that Alieria would keep the Unity HCSM plan assets separate from Alieria’s funds. Hr’g Tr. 80:21-81:4.

67. Alieria represented to third parties, such as the Florida Office of Insurance Regulation, that it was in fact segregating the Unity HCSM plan assets from other funds. Specifically, a law firm retained by Alieria to represent it in proceedings before the Florida Office of Insurance Regulation stated

in September 2017 that “Alieria provides and maintains the portal used by members to purchase products. Funds collected through the portal for Unity products are disbursed directly to Unity Healthshare. Likewise, funds collected through the portal for Alieria products are disbursed directly to Alieria.” Corresp. to Fla. Ins. Comm’r, Joint Ex. 6 at 1. Alieria also stated in its Motion to Reconsider that “[a]ll of the [Unity HCSM plan members’] money – in the form of payments to Alieria, to Trinity, to Unity, and payments from those entities to providers – can be traced.” Alieria’s Motion to Reconsider at 8 (Jan. 2, 2019).

68. Tyler Hochstetler testified that in January 2018, he learned for the first time that Alieria was not properly segregating the Unity HCSM plan assets. According to Tyler Hochstetler, Timothy Moses stated at a January 2018 meeting of the AHS Board that Alieria had not segregated the Unity HCSM plan assets, but instead unilaterally allocated revenues in the manner in which Alieria saw fit, keeping as much of the incoming member funds for Alieria’s own benefit as it desired. Hr’g Tr. 71:10-16; 79:20-80:10.

69. Tyler Hochstetler testified that Alieria did not have AHS/Unity’s permission or authorization to treat member funds in this way, and that AHS/Unity never authorized Alieria to place Unity funds into Alieria accounts or to use Unity funds for Alieria’s own purposes. Hr’g Tr. 70:21-24 & 80:14-20.

70. The evidence shows that, per Timothy Moses’ admissions to AHS/Unity, the representations that Alieria made to the Florida Office of Insurance Regulation about the way it treated Unity HCSM plan funds were incorrect. Indeed, Alieria’s Comptroller, James F. Butler, III, acknowledged at the interlocutory injunction hearing in this case that member contributions associated with the Unity HCSM plans were not sent directly to Unity Healthshare. Hr’g Tr. at 334:6-335:4. Rather, Mr. Butler testified that: payments were received by Alieria and deposited into an account; when transactions occurred Alieria transferred money to pay for the claims; and later there would be a monthly reconciliation whereby contribution payments were segregated into Alieria and Unity accounts. Hr’g Tr. 331:21-333:13.

71. On May 4, 2018, Unity also learned that Timothy Moses had written approximately \$150,000 dollars in checks to himself out of the Unity operating account without AHS/Unity's knowledge or authorization. Hochstetler Aff. at ¶ 28; Hr'g Tr. 83:5-86:3.

72. Tyler Hochstetler testified that after learning that the Unity HCSM plan assets were not being properly segregated, AHS/Unity took immediate steps to secure the integrity of its funds. Hr'g Tr. 81:5-12.

73. AHS/Unity first demanded an accounting of Unity funds so that AHS/Unity could assess whether Alera was handling Unity HCSM plan assets appropriately. Hr'g Tr. 81:5-12. Alera did not provide Unity with an accounting. Hochstetler Aff. at ¶¶ 24-25.

74. On July 25, 2018, AHS/Unity instructed Alera to turn over control of Unity funds to Unity immediately and directed Unity HCSM plan members to make future payments to Unity. Hr'g Tr. at 81:13-22. Alera did not comply with either of these demands, and continued to collect funds associated with the Unity HCSM component of member plans. Hr'g Tr. at 83:2-4; 195:2-23.

75. AHS/Unity has presented evidence that it became increasingly concerned about Alera's administration of its plans during the summer of 2018. It was particularly troubled by Alera's repeated refusals to disclose information about the Unity HCSM plans that Alera had assumed complete control over. Hochstetler Aff. at ¶¶ 24-26; Hr'g Tr. 79:20-86:17.

76. Tyler Hochstetler testified that given Timothy Moses's criminal history, Mr. Moses's taking funds from the Unity operating account, and Alera's refusal to disclose complete financial information, he and other AHS Board members became seriously concerned that the Unity HCSM plan assets were at risk of misappropriation. Hochstetler Aff. at ¶ 24-29; Hr'g Tr. 79:20-86:17.

77. Tyler Hochstetler testified that AHS/Unity removed Timothy Moses and Shelley Steele from certain Unity bank accounts as signers and ultimately froze two accounts containing approximately \$5 million in funds used to pay claims. Hr'g Tr. 82:21-83:4, 147:8-149:24.

AHS/Unity Terminates the Agreement

78. With respect to termination, Section 3 of the Agreement provides:

This Agreement will commence on the Effective Date and will remain in effect perpetually after the execution date of this [A]greement, unless terminated or modified earlier by mutual agreement or substantial, material breach of this contract. However, upon termination, any existing member plans will remain active until the member's next renewal date.

Upon termination of this Agreement, all licenses granted hereunder shall immediately terminate, and the Parties will promptly destroy or return all materials in its possession which belong to the other Party, including any and all confidential information which may have come into its possession. In the event of any termination of this Agreement, Sections 2, 3.2 and 4., 5. and 6. will survive in accordance with their terms.

Joint Ex. 4 at p. 3 (bold emphasis added).

79. On August 10, 2018, following a failed mediation with Alera, AHS terminated the Agreement. Hochstetler Aff. at ¶ 30; Hr'g Tr. 86:18-19, 146:14-20.

80. AHS/Unity's termination included an express revocation of Alera's right to hold the Unity HCSM plan funds and demanded that Alera return control over those funds to AHS/Unity. Hr'g Tr. 89:12-21; 179:17-23. Alera disagreed and did not turn over the Unity HCSM plan funds. Hr'g Tr. 89:19-21.

81. AHS/Unity sought to have Alera provide it with the Unity HCSM membership roster. Hr'g Tr. 88:16-22. Alera disagreed and did not provide the Unity HCSM membership roster to AHS/Unity. Hr'g Tr. 88:16-22.

82. Alera retained possession of the Unity membership roster, all of the Unity HCSM plans, all of the Unity HCSM plan assets, Unity's intellectual property, including the Unity website, and Unity's employees. Hr'g Tr. 88:11-22.

83. Tyler Hochstetler testified that Alera's retention of the financial information concerning the Unity HCSM plans has prevented AHS/Unity from completing its 2017 and 2018 audits, which are necessary to retain Unity's status as a HCSM. Hr'g Tr. 91:13-92:5; 92:12-19.

84. AHS/Unity's inability to complete its audit jeopardizes its status as a tax exempt and ACA-approved HCSM. Hr'g Tr. 91:13-92:16.

85. Tyler Hochstetler testified that if AHS/Unity's HCSM status as an ACA-approved HCSM is lost, it may become very difficult to recover, as HCSMs must share healthcare expenses of its members continuously and without interruption from 1999 to the present. Hr'g Tr. 92:6-11.

86. Tyler Hochstetler testified that Alera has prevented AHS/Unity from doing business with a key vendor. Hr'g Tr. 90:6-20.

87. After termination of the Agreement, Alera retained the entirety of the Unity HCSM plans' member base for itself. Hr'g Tr. 90:6-12.

88. After termination of the Agreement, Alera continued to maintain control over Unity's website and refused Unity's claims to it. Hr'g Tr. 91:2-12.

89. The testimony at the hearing demonstrates that Alera continues to controls the Unity website, www.unityhealthshare.org and www.unityhealthshare.com. Alera has configured those website so that when a member visits them, the member is automatically redirected to the website of Trinity Healthshare ("Trinity"). Hr'g Tr. 91:2-12.

90. In 2018, Unity changed its name to Kingdom Healthshare. Mr. Cardona testified that Unity decided to change its name to Kingdom Healthshare in part because Alera maintained control of the Unity HCSM plans and Unity's website. Hr'g Tr. 170:22-25; 195:24-198:6.

Change from Unity HSCM to Trinity HSCM

91. On November 15, 2018, Alera sent a notice to all Unity HCSM members. Joint Ex. 9.

92. Alera's November 15, 2018 notice stated "*No Action is Needed*" in bold italics font, near the top of the notice. Joint Ex. 9.

93. Alera's November 15, 2018 notice announced that it would transition all Unity HCSM members to Trinity on January 1, 2019. Joint Ex. 9.

94. Trinity was created in 2018 by Alera and its principals. Its Chief Executive Officer is William H. ("Rip") Thead, III, a former Alera employee. Hr'g Tr. 300:8-16. Mr. Thead is a Moses

family friend who officiated Chase Moses's wedding. Hr'g Tr. 300:19-23. Chase Moses testified that Trinity is a 501(3)(c) and that it is "based on the Baptist faith." Hr'g Tr. 301:2-302:20.

95. The November 15, 2018 notice stated in part: "Beginning January 1st, 2019 Alera is excited to announce Trinity HealthShare as its new Healthcare Sharing Ministry (HCSM) partner...All plan features, including eligible medical services, Member Shared Responsibility Amount ("MSRA"), and monthly member contribution amounts (how much you are billed each month) will remain the same. You also retain access to the same network providers and facilities with the same discounts. *Nothing changes on your plan except for the HCSM name. You don't have to do anything to maintain your current plan.* You will retain your Member ID number and continue to contact Alera Member Services for any assistance you may need regarding your membership. You will receive an updated plan membership card. All contact and processing information remains the same. If for any reason, you wish not *to continue* with your AleraCare 5000 – Premium Plan Plan, [sic] you may opt-out by clicking here to complete a member cancellation form. An Alera representative will follow up with you promptly to process your request." Joint Ex. 9 (emphasis added).

96. Unity HCSM members had to take affirmative action to opt out of the transition of their plans from Unity plans to Trinity plans.

97. Trinity is a separate and distinct entity from Unity Healthshare. Trinity is in no way affiliated with Unity. Hochstetler Aff. at ¶ 34; Hr'g Tr. 91:10-12.

98. Trinity was created in Delaware on June 26, 2018, and authorized to conduct business in Georgia on October 26, 2018. Joint Ex. 10.

99. The November 15, 2018 notice made no mention of Unity, or the fact that Unity had terminated its Agreement with Alera. Joint Ex. 9.

The Court's TRO

100. On December 28, 2018, the Court entered a Temporary Restraining Order, which – in part – enjoined Alera from "transitioning any Unity HCSM members and plan assets to Trinity HealthShare LLC while this Temporary Restraining Order is in effect."

101. The Temporary Restraining Order also required Alieria to “use electronic means to notify as many Unity HSCM plan members as possible by January 1, 2019, that they will not automatically move to Trinity effective January 1, 2019, as previously stated in Alieria’s November 15, 2018 electronic correspondence”

102. Alieria, however, did not send this notice out to Unity HSCM members until two days after denial of its motion to reconsider the Court’s TRO, on January 10, 2019. Hr’g Tr. 312:1-8.

II. CONCLUSIONS OF LAW

Under Georgia law, a court may enter an interlocutory injunction “to maintain the status quo, if, after balancing the relative equities of the parties, it appears the equities favor the party seeking an injunction.” *Bernocchi v. Forcucci*, 279 Ga. 460, 461, 614 S.E.2d 775, 777 (2005).

In weighing the relevant equities, the Court considers the following factors:

- (1) whether there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted;
- (2) whether the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined;
- (3) whether there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial;
- (4) whether granting the interlocutory injunction will not disserve the public interest.

Bishop v. Patton, 288 Ga. 600, 604, 706 S.E.2d 634, 638 (2011). These factors guide the Court’s weighing of the equities, but “a party seeking interlocutory injunctive relief need not always ‘prove all four of these factors.’” *SRB Inv. Servs., LLLP v. Branch Banking & Tr. Co.*, 289 Ga. 1, 5 n. 7, 709 S.E.2d 267, 271 (2011).

As an initial matter, in weighing the relevant equities on the facts presented here, the Court finds instructive the Georgia Supreme Court’s decision in *Grossi Consulting, LLC v. Sterling Currency Grp., LLC*, 290 Ga. 386, 722 S.E.2d 44 (2012). In that case, the Supreme Court affirmed an interlocutory injunction where the moving party’s former contractor – initially hired to create a website and technology infrastructure to aid the movant’s business – held the movant’s assets after termination of the parties’

business relationship. *Id.* The Supreme Court found that because the former contractor had gained control of the movant’s assets by virtue of the parties’ business relationship, the Court did not abuse its discretion in ordering the contractor to relinquish control of those assets. *Id.* The contractor’s continued possession of the movant’s assets threatened dissipation of the assets during litigation. *Id.*

In this case, and as more fully set forth below, the evidence shows that AHS/Unity is substantially likely to succeed on its claim that it held all rights to the Unity HCSM plans and that Alera serviced those plans solely as a third-party administrator under the parties’ Agreement. *See* Findings of Fact (“FOF”) at ¶¶ 23-24, 54-56, 64. The evidence further shows that, as in *Grossi*, Alera had substantial control over the Unity HCSM plan assets by virtue of the parties’ Agreement and Alera’s role as an administrator of the Unity HCSM plans. FOF at ¶¶ 55, 65-66, 87-90. And, most importantly, the evidence shows that Alera has taken actions to misappropriate those assets; namely, by unilaterally attempting to transition the Unity HCSM plans to Trinity. FOF at ¶¶ 91-99.

An interlocutory injunction is legally appropriate to prevent Alera from transitioning all Unity plan members and plan funds to a new HCSM, and to protect those funds from misappropriation and waste pending a final resolution on the merits. Moreover, the terms of the interlocutory injunction – enjoining the transition of Unity HCSM members to Trinity coupled with a receivership – are less intrusive than in *Grossi* where the court ordered a transfer of all disputed assets to the movant. Accordingly, the Court finds that the Georgia Supreme Court’s decision in *Grossi* governs the propriety of granting an interlocutory injunction under the circumstances presented here.

Moreover, upon consideration of the parties’ briefing, the exhibits attached thereto, and the evidence adduced at the hearing, the Court finds that each equitable factor weighs in favor of an interlocutory injunction in this case.³

³ To the extent Defendants argue Section 2.4 of the Agreement forecloses injunctive relief, the Court disagrees. That section provides:

EXCEPT FOR (i) A PARTY’S BREACH OF ITS CONFIDENTIALITY OBLIGATIONS SET FORTH IN SECTION 6. AND (ii) A PARTY’S INDEMNITY OBLIGATIONS SET FORTH IN SECTION 5. **NEITHER PARTY WILL BE**

Likelihood of Success on the Merits

The Court finds that AHS/Unity is likely to succeed on its claim for breach of the parties' Agreement. While the Court is not making a final determination regarding contract interpretation at this time nor deciding the parties' claims seeking declaratory relief, the Court preliminarily concludes for purposes of deciding this interlocutory injunction that a fair reading of the Agreement is that the Unity HCSM plans belonged to AHS/Unity with Alera administering the Unity HCSM plans as consideration for the administrative fees provided for under the Agreement. FOF at ¶¶ 45-46. This interpretation is consistent with the statutory requirements for HCSMs like Unity. The Court finds that there is a substantial likelihood that AHS/Unity will succeed on the merits of its declaratory judgment claim and its claim that Alera's treatment of the Unity HCSM plans and its retention of the Unity HCSM plans and plan assets after termination of the parties' contract was a material breach of the parties' Agreement. Unity is also likely to succeed on the merits of its breach of fiduciary duty claim.

First, AHS/Unity is likely to succeed on its declaratory judgment claim that the Agreement

LIABLE TO THE OTHER PARTY FOR ANY INCIDENTAL, CONSEQUENTLY, SPECIAL, OR PUNITIVE DAMAGES ARISING OUT OF THIS AGREEMENT, WHETHER LIABILITY IS ASSERTED IN CONTRACT OR TORT, AND REGARDLESS OF WHETHER EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF ANY SUCH LOSS OR DAMAGE THIS SECTION DOES NOT LIMIT EITHER PARTY'S LIABILITY FOR BODILY INJURY (INCLUDING DEATH), OR PHYSICAL DAMAGE TO TANGIBLE PROPERTY. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, EXCEPT AS PROVIDED FOR A BREACH OF SECTION 4.1 (CONFIDENTIALITY OBLIGATIONS) OR EXCEPT AS PROVIDED UNDER SECTION 2.5 (INDEMNITY OBLIGATIONS), IN NO EVENT SHALL EITHER PARTY'S TOTAL LIABILITY TO THE OTHER PARTY IN CONNECTION WITH, ARISING OUT OF OR RELATING TO THIS AGREEMENT EXCEED \$5,000 (USD). THE PARTIES AGREE THAT THE LIMITATION SPECIFIED IN THIS SECTION WILL APPLY EVEN IF ANY LIMITED REMEDY PROVIDED IN THIS AGREEMENT IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

Joint Ex. 4 at p. 3 (capitalized emphasis in original; bold emphasis added). The foregoing section plainly describes "liability" in terms of damages and limits the parties' entitlement to monetary relief. However, it does not address injunctive or other equitable relief, much less do so explicitly, prominently clearly and unambiguously. *See Imaging Sys. Int'l, Inc. v. Magnetic Resonance Plus, Inc.*, 227 Ga. App. 641, 644-45, 490 S.E.2d 124, 128 (1997) ("Provisions severely restricting remedies act as exculpatory clauses and therefore should be explicit, prominent, clear and unambiguous") (citation and punctuation omitted); *2010-1 SFG Venture LLC v. Lee Bank & Tr. Co.*, 332 Ga. App. 894, 898, 775 S.E.2d 243, 248 (2015) ("[B]ecause exculpatory clauses may amount to an accord and satisfaction of future claims and waive substantial rights, they require a meeting of the minds on the subject matter and must be explicit, prominent, clear and unambiguous") (citation and punctuation omitted).

provides that AHS/Unity holds the rights to the Unity HCSM plans, and that Alieria has breached the Agreement in how it has treated the Unity HCSM plans and plan assets as its own. As summarized in *Scrocca v. Ashwood Condo. Ass'n, Inc.*, 326 Ga. App. 226, 756 S.E.2d 308 (2014):

[C]ontract construction proceeds in a series of steps, moving from one to the next only if necessary. The construction of contracts involves three steps. At least initially, construction is a matter of law for the court. First, the trial court must decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury....

When courts construe contracts, the primary purpose is ascertaining the parties' intent: [C]ourts should ascertain the parties' intent after considering the whole agreement and interpret each of the provisions so as to harmonize with the others. That is, in construing contracts, it is important to look to the substantial purpose which must be supposed to have influenced the minds of the parties, rather than at the details of making such purpose effectual.

Id. at 228-29 (citations omitted).

Here, Section 1.3 of the Agreement states, in part, that “AHS is and shall remain the sole and exclusive owner or authorized licensor of and will retain all right, title, and interest, including all intellectual property rights, in and to the membership roster, except for the specific licenses granted in Sections 1.2.” Agreement, Joint Ex. 4 at p. 2. Upon consideration of two days of testimony from six witnesses and the voluminous evidence and briefing submitted by the parties, the Court finds that AHS/Unity is likely to succeed on its claim that the parties’ Agreement provides that Unity, and not Alieria, is the owner of the Unity HCSM plans and plan assets.⁴ A fair reading of the Agreement is that

⁴ The Court rejects Alieria’s argument that such a construction of the Agreement violates federal antitrust laws. Accepting AHS/Unity’s construction of the Agreement does not allocate customers between horizontal competitors as Alieria suggests. Indeed, Alieria and Unity are not horizontal competitors because only Unity is a non-profit organization and therefore only Unity can qualify as an HCSM under Georgia law, federal law, and the laws of numerous other states. Because Alieria cannot compete with Unity for HCSM members, there is no basis for a claim of an antitrust violation. *See Ad-Vantage Tel. Directory Consultants v. GET Directories Corp.*, 849 F.2d 1336, 1346 (11th Cir. 1987) (“[T]here can be no antitrust violation without a competitor, and agents do not compete with those whom they represent”). Even if Alieria and AHS/Unity, through their affiliates, currently “compete” in the HCSM market, such does not change the Court’s analysis. As noted above, a fair reading of the Agreement is that AHS/Unity granted Alieria a license to market and sell the Unity HCSM plans, not that AHS/Unity was “allocating” customers to a competitor.

AHS/Unity granted Alera a license to market and sell the Unity HCSM plans. As the party with authority to grant a license to market and sell the plans, AHS/Unity is substantially likely to be able to demonstrate that it is the plan owner. Moreover, Section 1.4 of the Agreement confirms that the “Healthshare offerings” are “to be marketed and sold by Unity HealthShare, LLC.” Alera’s role in the parties’ relationship is delineated in Section 7(g) of the Agreement, which provides that “ALIERA will design and implement all cost sharing plans, marketing materials, operational controls and general business banking for [Unity] for its operation of Unity HealthShare, subject to access and approval by the AHS Board of Directors.”

Alera’s compensation structure under the Agreement is further evidence that AHS/Unity’s reading of the contract is substantially likely to be correct. Section 4 of the Agreement entitles Alera to “Administrative Fees” on a per member per month basis. FOF at ¶45. Alera has received millions of dollars in administrative fees. FOF at ¶ 46. Through Section 4, AHS/Unity and Alera agreed that Alera would be paid substantial administrative fees for administering the Unity HCSM plans. Such a provision is wholly consistent with administration, not ownership.

Moreover, AHS/Unity’s reading of the contract is consistent with the nature of the parties’ business relationship. The testimony reveals that only AHS/Unity, not Alera, is a recognized HCSM. Indeed, Alera, as a for-profit company, cannot qualify as an HCSM. *See, e.g.*, O.C.G.A. § 33-1-20 (defining an HCSM as “a faith-based, nonprofit organization that is tax exempt under the Internal Revenue Code” which meets the six specific requirements set forth in the statute).⁵ FOF at ¶¶ 10-14. Thus, it makes sense that AHS/Unity, and not Alera, would retain the right to the Unity HCSM plans and plan assets after termination of the Agreement. Further, Alera represented to, *e.g.*, the Maryland Insurance Commissioner that it acted as an administrator for the Unity HCSM plans, nothing more. FOF

⁵ *See also* Fla. Stat. § 624.1265(1) (defining a healthcare sharing ministry as “[a] nonprofit religious organization” that satisfies certain requirements); Tex. Ins. Code § 1681.001 (“A faith-based, nonprofit organization that is tax-exempt under the Internal Revenue Code of 1986 qualifies for treatment as a health care sharing ministry...”); Va. Code Ann. § 38.2-6300 (“As used in this chapter, ‘health care sharing ministry’ means a health care cost sharing arrangement...administered by a non-profit organization that has been granted an exemption from federal income taxation pursuant to § 501(c)(3) of the Internal Revenue Code of 1986...”).

at ¶¶ 56, 64. In light of these facts, AHS/Unity is substantially likely to succeed on the merits of its claim that under a fair reading of the Agreement AHS/Unity holds the rights to the Unity HCSM plans.

Even if the Court were to ultimately conclude that the Agreement is ambiguous and consider parol evidence to determine which entity owns the Unity HCSM plans, the Court still finds that AHS/Unity is substantially likely to succeed on the merits. Tyler Hochstetler provided credible testimony that the parties intended that AHS/Unity, and not Alieria, would retain all rights to the Unity HCSM plans and plan assets. Furthermore, the law governing HCSMs, referenced above, strongly supports a conclusion that AHS/Unity's reading of the Agreement is not only correct, but the only reading permitted by law. Again, while the Court does not make that final determination at this point, there is a likelihood of success in favor of AHS/Unity on its claim that the Unity HCSM plans belong to it, not Alieria.

Finally, the Court finds that AHS/Unity is likely to succeed on the merits of its breach of fiduciary duty claim. “[A] claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach.” *Engelman v. Kessler*, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017) (quoting *Nash v. Studdard*, 294 Ga. App. 845, 849-850 (2), 670 S.E.2d 508 (2008)). Under Georgia law, “[a] fiduciary duty arises where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another.” *Curry v. TD Ameritrade, Inc.*, No. 1:14-cv-1361, 2015 WL 11251449, at *10 (N.D. Ga. June 30, 2015) (quoting O.C.G.A. § 23-2-58). “The showing of a relationship in fact which justifies the reposing of confidence by one party in another is all the law requires.” *Cochran v. Murrah*, 235 Ga. 304, 307, 219 S.E.2d 421, 424 (1975).

Here, the Court finds, for purposes of this interlocutory injunction, that AHS/Unity is likely to succeed in establishing that Alieria owed it a fiduciary duty given the testimony set forth above demonstrating that AHS/Unity delegated the administration of virtually all aspects of the Unity HCSM plans and plan assets to Alieria. See *Tom Brown Contracting, Inc. v. Fishman*, 289 Ga. App. 601, 603, 658 S.E.2d 140, 142 (2008) (finding fiduciary duties created under Georgia law when one party holds funds in escrow for another). AHS/Unity is also likely to succeed in establishing that Alieria breached this

fiduciary duty by refusing to provide AHS/Unity with complete information about the Unity HCSM plans and plan assets and in light of Tyler Hochstetler's testimony that Timothy Moses informed the AHS Board of Directors that Alieria was using funds that were supposed to be allocated to Unity for whatever purpose Alieria wished. *See Wright v. Apartment Inv. & Mgmt. Co.*, 315 Ga. App. 587, 594, 726 S.E.2d 779, 787 (2012) ("When a fiduciary relationship exists, the agent may not make a profit for himself out of the relationship to the injury of the principal.").

Irreparable Harm

The Court also finds that Alieria's actions, if not enjoined, will result in irreparable harm to AHS/Unity. The threat of irreparable harm "is the most important [factor], given that the main purpose of an interlocutory injunction is to preserve the status quo temporarily to allow the court and the parties time to try the case in an orderly manner." *Bishop*, 288 Ga. at 605. That said, "a demonstration of irreparable injury is not an absolute prerequisite to interlocutory relief." *Parker v. Clary Lakes Recreation Ass'n, Inc.*, 272 Ga. 44, 44, 526 S.E.2d 838, 839 (2000).

Alieria's plan to transition all Unity HCSM Members to Trinity threatens Unity with irreparable harm. The evidence shows that Trinity is not affiliated with Unity. FOF at ¶ 97. The evidence further shows that Alieria intended to unilaterally transition all Unity HCSM members to Trinity effective January 1, 2019. FOF at ¶¶ 91-99. Alieria made this intention clear in its November 15, 2018 notice to Unity HCSM members (*id.*) which, notably, was sent after this litigation was initiated and when the parties' rights with respect to the Unity HCSM plans were plainly in dispute.

The Court finds that Alieria's intent to transition all of Unity's members and plan assets to an entirely different entity – unaffiliated with Unity – amounts to irreparable harm. *See TMX Fin. Holdings, Inc. v. Drummond Fin. Servs., LLC*, 300 Ga. 835, 839 n. 9, 797 S.E.2d 842, 846 (2017) (affirming interlocutory injunction where trial court balanced the equities and found "there was 'a substantial threat' that [the movant] would 'suffer irreparable injury in the form of lost customers'"). The Court finds that the irreparable harm here – caused not by any external factors but by the very conduct that breached the parties' Agreement – weighs heavily in favor of equitable relief.

Further, the Court finds that Alieria's conduct during the parties' relationship and in light of AHS's termination of the Agreement threatens Unity's status as an HCSM. FOF at ¶¶ 83-85. Alieria's failure to provide AHS/Unity with important information about the Unity plan assets or to return control of the Unity plan assets to AHS/Unity upon termination threatens AHS/Unity's status as a 501(c)(3) non-profit organization and therefore its ability to function as an HCSM. Moreover, Alieria's refusal to provide AHS/Unity with information about its funds has impaired AHS/Unity's ability to complete its 2017 and 2018 annual audits, which are required to maintain its status as a 501(c)(3) organization. *Id.* AHS/Unity's 501(c)(3) status is integral to its status as an ACA-approved HCSM and its ability to operate as an HCSM under numerous state laws. *Id.* And once lost, an ACA-exemption cannot be recovered because the ACA requires continuous operation as an HCSM from December 1999 to the present. 26 U.S.C. § 5000A(d)(2)(B). As such, loss of AHS/Unity's status as a 501(c)(3) would amount to irreparable harm, and Alieria's conduct – unless enjoined – threatens such harm.

Finally, the Court finds that Alieria's conduct has harmed AHS/Unity's goodwill. *See Dunkin Donuts, Inc. v. Kashi Enters., Inc.*, 119 F. Supp. 2d 1363, 1364 (N.D. Ga. 2000) (harm to goodwill "constitutes an irreparable injury"). Alieria's unilateral decision to transition all of the Unity HCSM members to Trinity harms Unity's goodwill because the members have not been provided with any information about the reason that Alieria is attempting to transition the plans to Trinity and therefore conveys the impression that Unity was somehow unable to maintain their plans. This irreparable harm is especially acute given the unique nature of HCSMs, which require members to put a great deal of trust in the organizations that hold their member contributions, and the relatively small market of HCSMs. Moreover, Alieria's retaining the Unity website – and redirecting visitors to that website automatically to Trinity – also harms Unity's goodwill by suggesting that Unity has some sort of relationship with Trinity, which is not the case.

Public Interest

The Court is most concerned with the plan members' rights and welfare. The Court finds that an interlocutory injunction is in the members' interest, and thus the public interest.

Aliera has demonstrated a lack of transparency with respect to the Unity HCSM plans and funds. Aliera did not provide Unity with information about the Unity HCSM funds Aliera held and controlled — funds that members contributed with the understanding that they would be used to share in other members' healthcare expenses. After termination of the parties' Agreement, Aliera did not return control of the Unity funds to Unity as requested. Further, Aliera represented to state insurance regulators that it kept Unity funds separate from Aliera funds, but Aliera's Controller has now stated under oath that Aliera's prior representations to state regulators were not accurate. In light of the foregoing, and in consideration of all of the testimony, documentary evidence, and briefing in this case, the Court finds that Aliera's course of conduct evinces a threat of misappropriation of the plan assets. An interlocutory injunction — and appointment of a receiver, discussed more fully below — is necessary to protect the members' interests, and the public interests, during this litigation.

Moreover, the evidence shows that Timothy Moses, who exercises substantial control over Aliera, was convicted of felony securities fraud and perjury in federal court. Following his custodial sentence, the court revoked Moses's supervised release after finding that he lied to his probation officer about his financial situation. Moses did not inform AHS/Unity of any of this when proposing a relationship to AHS. Moreover, during the parties' relationship Moses wrote checks to himself out of the AHS/Unity operating account, without AHS/Unity's knowledge or authorization.

Balance of Harms

The Court finds that the threatened irreparable harm to AHS/Unity outweighs any harm to Aliera. As discussed more fully above, Aliera's conduct threatens irreparable harm to AHS/Unity. Importantly, the harm claimed by Aliera from the interlocutory injunction is largely self-inflicted. Had Aliera given control of the Unity HCSM plans back to Unity upon termination of the parties' Agreement — as requested by AHS/Unity — it would not have had to incur costs associated with maintaining those plans following termination. And if Aliera had not taken steps to unilaterally transition those Unity HCSM plans to Trinity — a separate and distinct entity from Unity — Aliera would not have had to incur costs of stopping that transition — a transition the Court has found is likely unlawful. Moreover, the interlocutory

injunction impacts only the Unity HCSM plans. It does not impact any of Alier's other products, including the DPCMH products that Alier sold. The interlocutory injunction also does not impact Alier's ability to market and sell the Trinity HCSM. In consideration of all of the evidence and argument presented, the Court finds the balance of the harms favors AHS/Unity.

Appointment of Receiver

Under Georgia law, "[w]hen any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected or when there is a fund or property having no one to manage it, a receiver of the same may be appointed by the judge of the superior court having jurisdiction thereof." O.C.G.A. § 9-8-1. The Georgia Supreme Court has recognized that Superior Courts have broad power to appoint a receiver to administer disputed assets. *Georgia Rehab. Ctr., Inc. v. Newnan Hosp.*, 283 Ga. 335, 336, 658 S.E.2d 737, 738 (2008). Appointment of a receiver is appropriate under the circumstances presented here.

The Unity HCSM and plan assets are disputed. As discussed more fully above, AHS/Unity is likely to succeed on its claim that it holds the rights to the Unity HCSM plans and the right to possess the Unity HCSM plan assets under the parties' Agreement. However, Alier disputes AHS/Unity's right to the plans and plan assets; and instead argues that Alier should have control over those Unity HCSM plans and be allowed to transition or otherwise transfer those plans to Trinity. The parties' diametrically opposed positions with respect to the ownership of and rights to the Unity HCSM plans is a dispute over assets during litigation for which appointment of a receiver is appropriate. *See Ga. Rehab Ctr. Inc.*, 283 Ga. at 336 (appointment of receiver appropriate where dissolution of joint venture leaves disputed assets).

The Court finds a receivership all the more appropriate here because the evidence shows that Alier did not provide a full accounting of Unity funds when AHS/Unity made a demand for such an accounting prior to the termination of the parties' Agreement. The Georgia Supreme Court has recognized that appointment of a receiver is appropriate where the parties cannot meaningfully account for the disputed assets during litigation. *Id.* (receivership appropriate where "no meaningful accounting could be done" because of "conflicting, incomplete, and inconsistent information"). Alier's lack of

transparency with respect to the Unity HCSM funds has prevented any accounting of those same disputed funds. Appointment of a receiver is appropriate to account for, administer, and oversee those Unity HCSM plan funds during the pendency of this litigation.

Finally, the evidence shows a risk of Alieria misappropriating those disputed assets in absence of a receiver. *Mirko Di Giacomantonio v. Romagnoli*, No. 2007CV133477, 2007 WL 7330441 (Ga. Super. Oct. 4, 2007) (receivership appropriate under circumstances showing “waste . . . mismanagement, or misappropriation of assets”). As set forth above, AHS/Unity is likely to succeed on its claim that it holds the rights to the Unity HCSM plans. Alieria has attempted, however, during the pendency of this litigation to move those same assets to an entirely different entity that is unaffiliated with Unity. FOF at ¶91-99. Alieria’s attempt to move what are likely Unity assets to a different entity after the Agreement was terminated and while litigation with respect to those assets was ongoing amounts to an attempt to misappropriate those assets. Accordingly, appointment of a receiver is necessary to protect the integrity of the plan funds during the pendency of the litigation.

The Court has considered – and rejects – Alieria’s argument that the appointment of a receiver is inappropriate because it allegedly permits the receiver to take over Alieria’s business. The Court’s Order merely permits the receiver to have oversight of the Unity HCSM plans and assets (i.e., the member funds that are properly allocated to the Unity HCSM component of member plans) in order to monitor their proper allocation, preserve them and to ensure that member claims are paid consistently with the plan documents. The Georgia Supreme Court has consistently held that the appointment of a receiver is warranted in circumstances akin to these. *See, e.g., Richardson v. Roland*, 267 Ga. 34, 35, 472 S.E.2d 301, 302 (1996) (receiver appropriate where evidence presented to court showed that “the assets belonging to [movant] were in [non-movant’s] control and were likely to be impaired or depleted should they remain under that control”); *Alstep, Inc. v. State Bank & Tr. Co.*, 293 Ga. 311, 745 S.E.2d 613 (2013) (same); *Ebon Found. v. Oatman*, 269 Ga. 340, 344, 498 S.E.2d 728, 732 (1998) (evidence of commingling of disputed assets with non-disputed assets necessitated interlocutory injunction and appointment of receiver); *Warner v. Warner*, 237 Ga. 462, 462, 228 S.E.2d 848, 849 (1976) (“A receiver

is also appropriate...where the person who is managing the property seems inimical to its best interests”). Thus, for all of the reasons set forth above, the Court finds that the appointment of a receiver is appropriate here.

CONCLUSION

After full and careful consideration of the parties’ briefing, exhibits attached thereto, and evidence presented at the hearing on AHS/Unity’s Application for Interlocutory Injunction and for Appointment of Receiver, the Court finds that an Interlocutory Injunction and appointment of a receiver are appropriate under the facts presented here and under Georgia law.

The Court finds that there is a likelihood of success on the merits for AHS/Unity in this case, that the actions of Alieria are causing irreparable harm to Anabaptist and Unity, and that this harm outweighs any harm that may occur to Alieria as a result of this Order. The Court concludes that converting the Temporary Restraining Order that is currently in place, with some modification, to an Interlocutory Injunction is proper. Accordingly, the Court **ORDERS** that:

Alieria Healthcare Inc. (“Alieria”) remains **ENJOINED** from moving, converting, or in any way unilaterally transitioning Unity Healthcare Sharing Ministry (“HCSM”) members and Unity HCSM plan assets relating to all Unity HCSM members whose Unity HCSM plans existed as of August 10, 2018 and prior to that time to Trinity HealthShare, LLC.

However, insofar as Alieria asserts that, through its affiliate Trinity, it is offering an HCSM product to members/prospective members similar to AHS/Unity (now known as Kingdom Healthshare) and the Agreement does not include a non-compete or non-solicitation provision post-termination, the Court finds it would be improper to prohibit Alieria from soliciting the “legacy” Unity HCSM plan members after the termination as that would grant greater rights to AHS/Unity than contemplated under the Agreement. Thus, the Court finds either side may solicit the Unity HCSM plan members under the traditional confines of fair competition and Unity HCSM plan members are free to make their own decision as to whether to terminate or change their plan and which HCSM they wish to associate with, if any. Indeed, such is most consistent with the fundamental premise of a “health care sharing ministry” as a

faith-based, nonprofit organization with participants who are of a similar faith and who voluntarily agree to share in each other's medical expenses. In line with the Court's findings and rulings above, Alera is **ORDERED** to provide AHS/Unity with the names and all contact information available for all Unity HCSM members whose Unity HCSM plans existed as of August 10, 2018 and prior to that time **within twenty-four (24) hours of the entry of this order**. Alera may not begin to market/solicit the Unity HCSM members until members' contact information has been provided to AHS/Unity. Additionally, particularly given the history of this case and the ongoing litigation, the Court **strongly cautions** the parties not to disparage each other in any such marketing/solicitation efforts or to engage in other improper conduct which may result in the Court ordering additional injunctive relief. The Court **DENIES** Alera's request to stay the injunction ordered herein pending an appeal.

The Court **ORDERS** appointment of a receiver pursuant to O.C.G.A § 9-8-1 to oversee the legacy Unity HCSM plans and to oversee all Unity HCSM plan assets during the pendency of this litigation in accordance with the instructions set forth below. The receiver shall have complete access to the books and records of Alera and Unity that the receiver determines, subject to the direction of the Court, are necessary to fulfill the duties set forth in this Order. The receiver's access to any confidential information shall be subject to an appropriate Protective Order that restricts the receiver's use or disclosure of the information to the receiver's duties in this action.

The receiver shall examine Alera's and Unity's books and records as necessary to determine the total amount of funds in Alera's possession, custody, or control corresponding to the Unity HCSM component of member plans. Alera shall segregate those funds – *i.e.*, the Unity HCSM plan assets – to an account over which the receiver shall have access and oversight. The receiver shall have all financial access and audit rights necessary to confirm the proper allocation, as well as payment of claims and expenses.

Alera shall continue to administer the Unity HCSM member plans as it has in accordance with the Temporary Restraining Order. While the Unity HCSM claims administration and payment of member claims shall continue through Alera and its third-party administrator HealthScope Benefits, Inc. (or such

other qualified third-party administrator approved by the receiver and the Court), the receiver will have access to and oversight of the use of Unity HCSM member funds to pay for the claims administration services provided by Alieria, HealthScope, and any other entities providing approved administration or other necessary services for the Unity HCSM plans. The receiver also has review and audit rights with respect to Alieria's administration of Unity HCSM claims to ensure that Alieria is administering the members' plans and paying member claims consistently with the plan documents. If any issue arises with the manner in which Alieria is allocating funds or administering the Unity HCSM plans and claims, the receiver may bring the issue to the Court's attention as he deems appropriate. Alieria shall not make changes to its plan administration practices without prior written approval of the receiver and the Court.

The parties have each submitted the name of their preferred candidates to serve as the receiver. Alieria has proposed Marshall Glade of GlassRatner. AHS/Unity has proposed Tim Renjilian of FTI Consulting, Inc. After careful consideration, the Court hereby **ORDERS** that **Marshall Glade of GlassRatner** is appointed as the receiver in this action.

The Court will hold a status conference on **May 17, 2019 beginning at 10:00 AM** to further address the role and compensation of the receiver. The receiver shall be present along with counsel for the parties. The status conference will be held in Courtroom 9J of the Fulton County Courthouse, 136 Pryor Street, 9th Floor, Atlanta, Georgia 30303. A court reporter will not be provided. If the parties wish for the conference or any other court proceeding to be taken down, counsel must confer and make appropriate arrangements to have a court reporter present.

Until the receiver assumes its role, Alieria is required to maintain the status quo. The Court declines to order bond. The Court declines to enter a declaratory judgment at this point. The Court is most concerned with the plan members. The Court strongly cautions the parties that the members' rights need to be taken care of and handled, and this case needs to proceed in an expedited manner.

The parties are **ORDERED** to submit a Joint Case Management Order to the Court no later than ten (10) days from this Order. In doing so, the parties shall also prioritize the pending motions. The Court does not believe that a long discovery period will be necessary, as much of the work in this case has been

done.

Aliera is **ORDERED** to provide notice of this Order to its officers, agents, servants, employees, attorneys, and anyone acting in concert or participation with them with respect to the Unity HCSM plans, and this Order shall also be binding on such persons with respect to the Unity HCSM plans.

IT IS SO ORDERED, this 25th day of April, 2019.

Alice D. Bonner

JUDGE ALICE D. BONNER
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

Served upon registered service contacts through eFileGA

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