BEFORE THE NEW MEXICO OFFICE OF SUPERINTENDENT OF INSURANCE

IN THE MATTER OF GOSPEL LIGHT MENNONITE CHURCH MEDICAL AID PLAN, DBA LIBERTY HEALTHSHARE,	)	**Docket No. 2021-0085**
Respondent.	)	

OFFICE OF SUPERINTENDENT OF INSURANCE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Office of Superintendent of Insurance ("OSI") through its attorney, Stephen Thies submits these Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On November 23, 2021, the New Mexico Superintendent of Insurance ("Superintendent") issued an Order to Cease and Desist and Order to Show Cause, Docket No. 2021-0085, *In the Matter of Gospel Light Mennonite Church Medical Aid Plan, dba Liberty Healthshare* ("Liberty").

2. On December 10, 2021, Liberty filed a Request for Hearing to contest the Order to Cease and Desist and Order to Show Cause ("Request for Hearing").

3. The Gospel Light Mennonite Church Medical Aid Plan is a Virginia corporation having been incorporated on or about June 24, 2014. (OSI-3)

4. Liberty does not hold a Certificate of Authority to transact insurance business in the State of New Mexico. (OSI-18: *Christy Written Testimony*) The State of New Mexico requires any person transacting insurance business in New Mexico to hold a valid certificate of authority. NMSA 1978, § 59A-5-10. The offering, marketing, sale, and all activities relating to health benefits coverage constitute transacting insurance business.

5. Liberty represents itself as a health care sharing ministry as defined by 26 U.S.C. §

5000A(d)(2)(B)(ii).

6. Liberty operates a program known as Liberty HealthShare ("Liberty Plan"). Liberty HealthShare is a registered trade name in Ohio with an effective date of November 15, 2014. (OSI-2) Liberty maintains that its Liberty Plan is a health care sharing ministry exempt from insurance regulation.

7. The U.S. Department of Health and Human Services ("HHS") is the federal agency responsible for certifying that a health care sharing ministry meets the criteria set forth in 26 U.S.C. § 5000A(d)(2)(B)(ii). If such an entity satisfies the criteria, its members are granted an exemption from the individual mandate and the penalty for noncompliance required by the Patient Protection and Affordable Care Act of 2010. Liberty obtained such a letter from HHS. (Exhibit F)

8. New Mexico has not adopted a "safe harbor law" applicable to health care sharing ministries that explicitly exempts ministries from the New Mexico Insurance Code, Chapter 59A NMSA 1978.

9. Section 59A-16-21.2(A), NMSA 1978 provides that no "entity shall sell or issue, or cause to be sold or issued, a health benefits plan that is unlicensed or unapproved for sale or delivery in the state."

10. Section 59A-16-21.2(B), NMSA 1978 provides that no "entity shall sell or issue, or cause to be sold or issued, health insurance coverage that is not permitted health insurance coverage."

11. NMSA 1978, § 59A-16-21.2(C)(1) defines a "health benefits plan" as "a policy or agreement entered into, offered or issued by a health insurance carrier to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services."

12. NMSA 1978, § 59A-16-21.2(C)(2) defines a "health insurance carrier" as "an entity subject to the insurance laws and regulations of this state, including a health insurance company, a health maintenance organization, a hospital and health services corporation, a provider service network, a nonprofit health care plan or any other entity that contracts or offers to contract, or enters into agreements to provide, deliver, arrange for, pay for or reimburse any costs of health care services, or that provides, offers or administers health benefits plans or managed health care plans in this state."

13. The Office of Superintendent of Insurance ("OSI") began an investigation of Liberty after receiving two consumer complaints. First, in July of 2020, the New Mexico Attorney General's Office referred a consumer complaint to the OSI that the Attorney General's Office had received from Mr. Robert Joaquin Glassman. (OSI-1) Mr. Glassman's complaint centered around the failure of Liberty HealthShare to pay certain medical expenses incurred by Mr. Glassman.

14. Mr. Glassman's complaint was assigned to Ms. Phyllis Christy, an investigator with the OSI's Civil Investigations Bureau ("CIB"). (OSI-18: *Christy Written Testimony*) Ms. Christy and two other OSI employees conducted an interview of Mr. Glassman on August 12, 2020, using the Zoom video conferencing program. The interview was later transcribed. (OSI-8)

15. As part of her investigation, Ms. Christy obtained copies of documents including a document described by the Liberty Plan as its "Sharing Guidelines" ("Guidelines") (OSI-4 & OSI-5), and a copy of a "Sharing Member Enrollment Application" ("Application") (OSI-6).

16. Ms. Christy determined that Liberty is not authorized by the OSI to provide a health care benefits plan to the residents of the State of New Mexico. (OSI-18: *Christy Written Testimony*)

17. On or about May 11, 2021, the OSI's Managed Health Care Bureau ("MHCB") received a consumer complaint from Ms. Ginger Knollenberg. (OSI-10) The complaint was

referred to Ms. Jessica Baker, the then MHCB Supervisor, who conducted an investigation of the complaint. (OSI-19: *Baker Written Testimony*) On May 18, 2021, Ms. Baker emailed Liberty requesting that Liberty respond to eight questions. (OSI-11) After a couple of follow-up emails, Liberty responded to each of the eight inquiries in addition to providing some additional information on May 25, 2021. (OSI-12)

18. By agreement of the parties, the evidentiary hearing on this matter commenced on March 8, 2022. Both Ms. Christy and Ms. Baker submitted written testimony and sponsored several exhibits that were offered into evidence. The hearing was then recessed.

19. On July 27, 2022, a status conference was conducted after which the recommencement of the evidentiary hearing was scheduled for September 14, 2022, at 9:00 A.M.

20. On September 14, 2022, the evidentiary hearing was reconvened before Hearing Officer R. Alfred Walker.

21. Ms. Knollenberg, one of the two parties who filed complaints against Liberty submitted written testimony and offered several exhibits into evidence. (OSI-17: *Knollenberg Written Testimony*) Ms. Knollenberg identified herself as a resident of New Mexico having enrolled in the Liberty Plan in 2017. Ms. Knollenberg described that she filed her complaint when the Liberty Plan failed to timely pay a medical bill on her behalf in 2020. She testified that she submitted an application online and was required to provide past medical history as part of the application process. (OSI-17: *Knollenberg Written Testimony*)

20. Ms. Julie Weinberg, the OSI's Director of the Life and Health Division testified on behalf of the OSI. Ms. Weinberg testified that a health benefits plan must be approved by the OSI, specifically the Life & Health Division, a division within the OSI that she supervises, before the plan can be issued to consumers in the State of New Mexico. (OSI21: *Weinberg Written*

Testimony).

21. Ms. Weinberg testified that based on her review of the Application and Guidelines, the Liberty Plan substantially mirrors health benefits plans that are authorized by the OSI and shared numerous characteristics found in a major medical health benefits plan. (OSI-21: *Weinberg Written Testimony*)

22. Ms. Viara Ianakieva, the Bureau Chief for OSI's Life and Health Division testified on behalf of the OSI. Ms. Ianakieva's duties include overseeing the life and health product filing bureau the OSI bureau that is responsible for the intake and the review of life and health insurance products to ensure that the product meets federal and state laws. Ms. Ianakieva testified that during her tenure with the Life and Health Division the Liberty Plan was never submitted for review. Tr. 88:11-20 (Ianakieva).

23. Liberty offered the testimony of five current members of the Liberty Plan.

24. Dr. Phyllis Panzeter, a resident of New Mexico, testified that she has been a member since 2017. Dr. Panzeter testified that due to her dissatisfaction with her existing health care insurer, she was looking for options when she learned of the Liberty Plan. Dr. Panzeter described the document she signed when joining the Liberty Plan as a contract, Tr. 127:16-19 (Panzeter), that the Liberty Plan has paid medical expenses on her behalf, Tr. 177:20-25; Tr. 128:1-25; Tr. 129:1-4 (Panzeter), that she understood the failure to pay her monthly share amount would render her medical expenses ineligible for sharing, Tr. 140: 6-12 (Panzeter), and acknowledged that a reason for enrolling in the Liberty Plan was to provide her a level of protection against sizable medical expenses. Tr. 140:21-25; 141:1. (Panzeter).

25. Ms. Laura Smith, a resident of New Mexico and member since 2017, testified that she and her spouse enrolled in the Liberty Plan because it provided a cheaper option than their

existing health care plan. Ms. Smith testified that the Liberty Plan had paid certain past medical expenses on her behalf, Tr. 150:3-7 (Smith), and agreed that the purpose of the plan is to provide for the payment of medical expenses. Tr. 151:16-25; Tr. 152:1 (Smith).

26. Ms. Breanna Renteria, a New Mexico resident and to the best of her recollection a member since 2019, acknowledged that the Liberty Plan had paid past medical expenses related to a childbirth, Tr. 162:10-25; Tr. 163:1-4 (Renteria), and testified that she enrolled in the Liberty Plan as a means to obtain coverage of medical expenses associated with maternity and childbirth. Tr. 169:10-25; Tr. 170:1 (Renteria).

27. Ms. Tammy Waters, a resident of New Mexico and a member several years, acknowledged that the program has paid past medical expenses Tr. 180:9-24 (Waters), and acknowledged that she and her spouse enrolled in the program to protect against large medical bills. Tr. 184:16-20 (Waters).

28. Mr. Kevin McCarty, a former Florida Insurance Commissioner testified regarding his involvement with the National Association of Insurance Commissioners during the time when the Patient Protection and Affordable Care Act was enacted. Mr. McCarty testified that nothing in that act exempts a health care sharing ministry from regulation by a state insurance department, a fact specifically acknowledged by the Department of Health and Human Services in the letter Liberty received from the Department Tr. 222:9-113 (McCarty); (Exhibit F)

29. The Liberty Plan offers a number of program options. *Sharing Member Enrollment Application*, (OSI-6). A member may sign up for a "Liberty Unite, Liberty Connect, or Liberty Essential" option, each of which provides a different level of coverage. (OSI-6)

30. To become a member of the program, a person must submit a Member Enrollment Application and pay enrollment dues. (OSI-5) After joining, a member receives an ID card that is

to be presented to providers upon receiving service. (OSI-17: *Knollenberg Written Testimony*); (OSI-15)

31. To remain an active member, an individual must pay annual membership dues and pay a monthly payment in an amount determined by the Board of Directors and is based upon the amount of bills submitted by members for sharing, the amount needed to administer the Program, and the number of participating Members. (OSI-5)

32. Members are required to pay a "Monthly Share Amount". If payment is made by the end of the month, the membership is inactivated retroactively as of the first day of the month, for which a suggested monthly share amount is not paid. (OSI-4 & OSI-5)

33. If an individual fails to pay their Monthly Share Amount for two months, the individual's membership is effectively terminated. Rejoining the program under these circumstances requires to person to reapply with no guarantee that the person will be accepted into the program. (OSI-4 & OSI-5)

34. The *Sharing Member Enrollment Application* requires an applicant to provide complete and accurate medical information. (OSI-6) If an applicant does not submit a complete or accurate medical history, membership can be denied or can be retroactively rescinded. (OSI-4; OSI-5 & OSI-6)

35. The *Sharing Member Enrollment Application* requires an applicant to agree to the terms and conditions contained in the Sharing Guidelines. (OSI-6)

36. The *Sharing Member Enrollment Application* describes that an applicant can enroll at three different levels. An individual can enroll in the Liberty Unite, Liberty Connect or Liberty Essential plan. (OSI-6) Within those three options, the applicant can select coverage at the single, couple, or family level. (OSI-6)

37. The *Sharing Member Enrollment Application* details the coverage for the three different program options. (OSI-6) An individual who enrolls at the Liberty Unite can receive up to 100% of their eligible medical expenses paid or reimbursed, while an individual who enrolls at the Liberty Connect can receive up to 85% of their eligible medical expenses paid or reimbursed, and enrollment at the Liberty Essential results in the individual receiving 75% of their eligible medical expenses paid or reimbursed. (OSI-6) All three levels provide payment or reimbursements of a member's medical expenses up to $1,000,000 per incident after the member's medical expenses exceed the Annual Unshared Amount. (OSI-6)

38. The *Sharing Member Enrollment Application* specifies that within each plan level there exists a different monthly share amount based on the applicant's age. (OSI-6)

39. Payment or reimbursement of an individual's medical expenses is subject to certain contingencies. The medical expenses must be the result of an illness or injury. The expenses must be medically necessary and provided by or under the direction of licensed physicians, urgent care facilities, clinics, emergency rooms, or hospitals (inpatient and outpatient), or other approved providers of conventional or naturopathic care. (OSI-5)

40. Payment or reimbursement is contingent upon the total bills incurred by the member exceeding an "Annual Unshared Amount", which operates like a typical health insurance deductible. (OSI-4 & OSI-5) The *Sharing Member Enrollment Application* specifies the annual accumulate amount of eligible medical expenses, which is the Annual Unshared Amount, assigned to each single, couple or family membership. (OSI-6)

41. Medical expenses eligible for sharing include, but are not limited to, home health care, physician and hospital services, emergency medical care, medical testing, x-rays, emergency ambulance transportation and prescriptions, unless otherwise limited or excluded by

these Guidelines. (OSI-4 & OSI-5)

42. The Sharing Guidelines specifies certain services, procedures, and diagnosis that prenotification is required in order to be eligible for reimbursement or payment. (OSI-4 & OSI-5)

43. Provided the contingencies are satisfied, and exchange for the promises made by an individual, Liberty agrees to submit a member's eligible medical expenses for sharing which results in the expenses being paid or reimbursed. (OSI-4 & OSI-5)

44. The Sharing Guidelines explain how the program works. Part I provides a short overview of the program; Part II describes the types of memberships; Part III describes the criteria and requirements an individual must meet and satisfy to become and remain a member; Part IV describes the eligible, ineligible and limitations on medical expenses; Part V describes additional programs offered to members; Part VI describes the dispute resolution procedures; Part VII reserves Liberty's right amend the Sharing Guidelines; Part VIII lists the members' rights and responsibilities; and Part IX includes a definition of terms. The Sharing Guidelines concludes with several pages of legal notices. (OSI-4 & OSI-5)

45. Subject to certain limitations, including that the expense is medically necessary, the eligible medical expenses listed in Part IV.B consist of twenty-two categories of expenses. (OSI-4 & OSI-5)

46. Part IV.C lists forty categories of expenses that are not eligible. (OSI-4 & OSI-5)

47. Liberty sold its Liberty Plan in New Mexico without a certificate of authority to sell insurance. The earliest date on which a resident of New Mexico became a member was April 1, 2014. Since that date, Liberty has sold a total of 502 memberships to residents of New Mexico consisting of single, couple and family memberships. (OSI-22)

II. CONCLUSIONS OF LAW

1. The New Mexico Superintendent of Insurance has Jurisdiction over Liberty and the subject matter of this proceeding.

In its responsive pleading, Liberty alleged that the OSI lacks jurisdiction over it because Liberty is not "doing business" in New Mexico. In support of this claim, Liberty stated: 1) it is not incorporated; or domiciled in the State;2) has no officer or other physical presence in the State; 3) has no employees or agents in the State; and 4) does not engage in marketing in the State.

a. Long-arm Jurisdiction.

State insurance regulators have the authority to utilize a state's long-arm statute in order to pursue regulatory enforcement action against a party engaging in the unauthorized business of insurance in the state. See e.g., *Commissioner of Insurance v. Albino*, 572 N.W.2d 21, 225 Mich. App. 547 (1997); *Cogswell v. American Transit Insurance Company,* 282 Conn. 505, 923 A.2d 638 (2007).

New Mexico's long-arm statute is found in NMSA 1978, Section 38-1-16(A). The statute provides in pertinent part:

> A. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
> …
> (4) the contracting to insure any person, property or risk located within this state at the time of contracting; . . ..

New Mexico state courts have not interpreted Section 38-1-16(A)(4). However, the Supreme Court of New Mexico has deemed Illinois cases on long-arm jurisdiction as persuasive authority because the New Mexico long-arm statute was adopted directly from Illinois. *See Customwood Mfg., Inc. v. Downey Constr. Co., Inc.*, 1984-NMSC-56, ¶ 6, 102 N.M. 56, 691 P.2d

57; *Blount v. T D Publishing Corp.,* 1966-NMSC-262, ¶ 13, 77 N.M. 384, 423 P.2d 421.

In the case of *Kerr v. Conrail*, 103 Ill.App.3D 61, 64-65, 430 N.E.2d 627, 630 (Ill. App. 1981), the Illinois Appellate Court determined that the relevant subsection of the Illinois long-arm statute, Section 17(1)(d) of the Civil Practice Act, which authorized the exercise of jurisdiction over a party contracting to insure any person, property or risk located within the state at the time of contracting, was intended to facilitate the state's interest in regulating the insurance industry. NMSA 1978, Section 38-1-16(A)(4) contains the exact same wording as Section 17(1)(d) of the Illinois Civil Practice Act. As for the extent of the contact with a particular forum, the United States Supreme Court has held that a single insurance policy sold to a resident of California was sufficient to establish jurisdiction. See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957).

As part of Respondent's Objections and Submission of Information in Response to Order Granting OSI's Motion to Compel, Liberty attached a lengthy list of members of its program who reside in New Mexico. That list disclosed that Liberty has had members in New Mexico dating back to 2014. The OSI provided testimony evidencing that two individuals who were members reside in New Mexico. Liberty itself offered the testimony of five existing members who reside in New Mexico. Liberty has more than adequate contact with the State of New Mexico to establish jurisdiction pursuant to the New Mexico long-arm statute.

b. <u>Presumed Jurisdiction</u>.

Section 59A-15-16, NMSA 1978 also provides a basis for obtaining jurisdiction over Liberty. Section 59A-15-16 provides in part:

> [A]ny person who provides coverage in this state for health benefits, … shall be presumed to be subject to the provisions of the Insurance Code and the jurisdiction of the superintendent unless the person provides evidence satisfactory to the superintendent that

he is subject exclusively to the jurisdiction of another agency of this state or the federal government.

In order to be subject to the Superintendent's jurisdiction under this statute, it must be shown that Liberty provides coverage for the services listed in Section 59A-15-16. Merriam-Webster provides the following definitions of term coverage:

> 1: something that covers: such as
> a: inclusion within the scope of an insurance policy or protective plan
> b: the amount available to meet liabilities
> c: inclusion within the scope of discussion or reporting the news coverage of the trial
> 2: the total group covered: SCOPE: such as
> a: all the risks covered by the terms of an insurance contract
> b: the number or percentage of persons reached by a communications medium
> 3: the act or fact of covering

"Coverage." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/coverage. Accessed 11 Oct. 2022.

The Sharing Guidelines contains four pages of medical expenses that are eligible for sharing. The Sharing Guidelines provides that an individual who participates in the Liberty Plan is eligible to receive payment or reimbursement for these enumerated medical expenses. An individual's eligible medical expenses are included within the scope of the Liberty Plan. Therefore, Section 59A-15-16 provides jurisdiction over Liberty.

c. Liberty has failed to show that it is subject exclusively to the jurisdiction of another state agency or the federal government.

The U.S. Department of Health and Human Services ("HHS") is the federal agency responsible for certifying that health care sharing ministry meets the criteria set forth in 26 U.S.C. § 5000A(d)(2)(B)(ii). If such an entity satisfies the criteria, its members are granted an exemption from the individual mandate and the penalty for noncompliance. However, nothing in the Patient

Protection and Affordable Care Act of 2010 exempts a health care sharing ministry from regulation by a state insurance department, a fact specifically acknowledged by the HHS in the letter it sent to Liberty.

New Mexico has not enacted a "safe harbor" statute which would exempt a health care sharing ministry from regulation by the Superintendent. *See e.g., Jackson v. Aliera Companies, Inc.,* 462 F. Supp. 3d 1129, 1134 (W.D. Wash. 2020); *see also,* Ariz. Rev. Stat. Ann. § 20-122; Fla. Stat. Ann. § 624.1265; Ga. Code Ann. § 33-1-20; Iowa Code Ann. § 505-22; Ky. Rev. Stat. § 304.1-120 (7); Md. Code. Ann., Ins. §1-202 (4); Utah Code Ann. § 31a-1-103(3)(c); Va. Code. ann. § 38.2-6300, 6301; Wash. Rev. Code Ann. § 48.43.009.

The burden to persuade the factfinder is on the party who seeks to show the existence of an exemption. *Bills v. All-W. Bowling Corp*., 1964-NMSC-176, ¶ 8, 74 N.M. 430, 394 P.2d 274. Liberty failed to satisfy its burden of persuasion.

2. <u>Liberty's health care sharing ministry program is insurance subject to regulation under the Insurance Code</u>.

The current statutory definition of insurance is found Section 59A-1-5 of the Insurance Code. It defines "insurance" as "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies, or to act as surety." The New Mexico Supreme Court wrote "the current definition, adopted by the Legislature as part of the Insurance Code in 1984, articulates a functional approach, looking to the substance of the contract rather than to its label." *Guest v. Allstate Ins. Co*., 2010-NMSC-047, ¶ 62, 149 N.M. 74, 244 P.3d 342.

As the *Guest* Court noted, this statutory definition emphasizes indemnity. *Guest*, 2010-NMSC-047, ¶ 67. Such a determination requires an examination of the prevalent purpose and nature of the agreement. The need to focus on whether there has been a transfer or assumption of risk is not a controlling aspect. See *Guest v. Allstate Ins. Co*., 2010-NMSC-047, 149 N.M. 74, 244 P.3d 342.

The "principal object and purpose" test provides a limiting principle to a potentially overly expansive definition of insurance. "The [principal object and purpose] test directs a court to consider 'not . . . whether risk is involved or assumed," but instead look to the principal object of the contract. *Guest*, 2010-NMSC-047, ¶ 66. "If the principal object of the contract is indemnity, the contract constitutes 'insurance' and is therefore within the scope of state regulation." *Guest*, 2010-NMSC-047, ¶ 67.

The New Mexico Supreme Court has approved the following definition of "indemnify": "1. To save harmless, to secure against loss, damage or penalty. 2. To make good to; to reimburse; to compensate". *Hasbrouck v. Carr*, 1914-NMSC-091, ¶ 20, 19 N.M. 586, 145 P. 133.

As evidenced by the Decision Guide, the Application, the Guidelines, and witness testimony, the principal object and purpose of the Liberty Plan is to provide a means by which its members are reimbursed or compensated for their eligible medical expenses. The Liberty Plan is therefore insurance subject to regulation by the Superintendent.

The argument that products similar to the Liberty Plan do not involve a transfer or assumption of risk has been expressly rejected by Kentucky Supreme Court in *Commonwealth v. Reinhold*, 325 S.W.3d 272 (2010). In that decision, the Kentucky Supreme Court stated:

> In return for paying their monthly "share," Medi-Share members remain eligible to receive payment for their medical needs through the program. This

> process clearly shifts the risk of payment for medical expenses from the individual member to the pool of sub-accounts from which his expenses will be paid. Thus, regardless of how Medi-Share defines itself or what disclaimers it includes in its literature, in the final analysis, there is a shifting of risk.

Reinhold, 325 S.W.3d at 277.

The United States District Court for the Northern District of Georgia has similarly rejected that argument. It held:

> To summarize, the Court concludes that Aliera's plans are insurance as defined by Georgia law, O.C.G.A. § 33-1-2 (defining 'insurance' as "a contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specific amount or benefits upon determinable contingencies."). The language of the member guides clearly establishes that the plans operate to distribute individual losses whereby Aliera undertakes to indemnify members and pay specific amounts and benefits upon determinable contingencies.

LeCann v. The Aliera Campanies, Inc, Case No. 1:20-cv- 02429 (N.D. GA. slip op at 65, June 22, 2021, appeal dismissed, llCir., Dece. 15, 2021).

The Insurance Commissioner for the State of Maryland has rejected that argument finding that the structure of these sharing arrangements spreads the individual risk of medical expenses among its members. See Memorandum Opinion dated August 18, 2022, *Maryland Insurance Administration v. Medi Share, Inc., DBA Christian Care Ministry, et al*, Case Nos. MIA-2020-06-019; MIA-2020-06-022; MIA-2020-06-023; MIA-2020-06-023; MIA-2020-07-001; MIA-2020-02-005; and MIA-2020-07-010.

The *Reinhold* Court and others have rejected the argument that disclaimers included in a health care sharing ministry's documentation results in the product not being a contract of insurance. The *Reinhold* Court wrote that "one cannot change the nature of an insurance business by simply declaring in the contract that it is not insurance." *Reinhold,* 325 S.W.3d

at 278.

A Hearing Officer for the Office of Insurance Commissioner for the State of Washington rejected such an argument. Citing *McCarty v. King Cty. Med. Serv. Corp.,* 26 Wn2d 660, 685 (1946), the Hearing Officer wrote, '[n]o one can change the nature of insurance business by declaring in the contract that it is not insurance." Instead, "the nature of the contract, and 'the examination of its contents,' aside from the terms used or omitted, determine whether a contract is one of insurance." Final Order on Summary Judgment, In the Matter of Aliera Healthcare Inc., dated November 13, 2020, Docket No. 19-0251.

The principal object and purpose of the Liberty Plan is to provide a means for individuals to obtain payment or reimbursement of medical expenses. The program, therefore, constitutes insurance.

Section 59A-5-10, NMSA 1978 requires a person to obtain a certificate of authority in order to "act as an insurer" or "transact insurance" in New Mexico. Testimony offered by the OSI established that Liberty does not possess a certificate of insurance.

Section 59A-1-13, NMSA 1978 describes the activities that constitute transacting insurance. Witness testimony establishes that Liberty was transacting insurance in this State.

3. <u>Liberty is an unlicensed entity that contracts with its members pursuant to an unapproved health benefits plan to pay for or reimburse its members' costs of health care services</u>.

Section 59A-16-21.2(A) of the New Mexico Insurance Code prohibits any entity from selling or issuing, or causing to be sold or issued, "a health benefits plan that is unlicensed or unapproved for sale or delivery in the [State of New Mexico]." A "health benefits plan" is defined in Section 59A-16-21.2(C)(1) as "a policy or agreement entered into, offered or issued by a health

insurance carrier to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services".

The relationship between Liberty and its members results in the parties "entering into" an "agreement". Black's Law Dictionary (11th ed.2019) defines the term "agreement" as follows:

> 1. A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons.
> 2. The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.

The contents of the Decision Guide, the Application, and the Sharing Guidelines detail the respective parties' rights and duties which results in a mutual understanding between the parties regarding the future payment of the costs of a member's health care services. Witness testimony corroborates this conclusion.

The contents of the Decision Guide, the Application, the Sharing Guidelines, and witness testimony establish a course of performance evidencing the existence of an agreement. Witness testimony showed that the member understood that if they complied with the terms and conditions of Liberty Plan, Liberty would arrange for the member's medical expenses to be shared which results in those expenses being paid.

The documents and witness testimony establish the existence of an explicit and implicit agreement evidencing the existence of agreement by which Liberty will arrange for, pay for or reimburse a member's costs of health care services. Whether one terms the process as the expenses being shared or paid, the end result is the same, the members have their costs of health care services covered by the program.

A four-part test adopted by the Eleventh Circuit Court of Appeals is useful in analyzing this issue. That test provides that a "plan, fund, or program" ... "is established if from the

surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982). In the present matter, the intended benefits are the eligible medical expenses as described in the Sharing Guidelines. (See Ex. OSI-5, Page 18) The class of beneficiaries are the members of the Liberty Program. The source of financing is the monthly share each member was obligated to pay. (See Ex. OSI-5, Page 18) Witness testimony and the Guidelines describe the procedure for receiving benefits. (See Ex. OSI-5, Page 18, Sections III(F) and IV) Any reasonable person would conclude that the Liberty Program constitutes a health benefits plan.

Liberty clearly meets the definition of a "health insurance carrier" as that term is defined in Section 59A-16-21.2(C)(2). The definition of health insurance carrier includes the phrase "any other entity". The Gospel Light Mennonite Church Medical Aid Plan is a Virginia corporation having been incorporated effective June 24, 2014. "[T]he common and ordinary meaning of 'entity' is "an organization (such as a business or governmental unit) that has a legal identity apart from its members or owners.'" *Williams v. Big Picture Loans, LLC*, No. 3:17-CV-461, 2021 WL 2930976 (E.D. Va. July 12, 2021). "The fundamental concept of a corporation is that it is a separate entity created under the law". *Beale v. Kappa Alpha Ord.*, 192 Va. 382, 395, 64 S.E.2d 789, 796 (1951). Liberty is an entity.

Liberty "contracts or offers to contract, or enters into agreements to provide, deliver, arrange for, pay for or reimburse any costs of health care services". A legally enforceable contract requires a showing of an offer, acceptance, consideration, and mutual assent. *Hartbarger v. Frank Paxton Co.*, 115 N.M. 665, ¶ 9, 857 P.2d 776, cert. denied, 510 U.S. 1118, 127 L. Ed. 2d 387, 114 S. Ct. 1068 (1994). "The manifestation of mutual assent to an exchange ordinarily takes the form

of an offer by one party followed by an acceptance by the other party." *Orcutt v. S & L Paint Contractors, Ltd.,* 1990-NMCA-036, ¶ 11, 109 N.M. 796, 791 P.2d 71. "Consideration consists of a promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do." *Heye v. Am. Golf Corp.*, 2003-NMCA-138, ¶ 12, 134 N.M. 558, 80 P.3d 495.

Liberty's Decision Guide constitutes an offer. The Decision Guide's ask "What to Do Next" followed by a description of the steps needed to join the Liberty Plan.

Witness testimony established that Liberty confirms acceptance of the offer by the issuance of a membership card.

Witness testimony established the existence of consideration. The witnesses testified they paid a monthly fee known as a "monthly share amount" which varied on the program option selected by the individual. These individuals had no obligation to pay this monthly share amount unless they expected something in return. That something was payment of their medical expenses.

Witness testimony and documents offered into evidence establish that Liberty arranged for, paid for or reimbursed the individuals' costs of health care services. The Liberty Plan meets the definition of a health benefits plan.

A violation of Section 59A-16-21.2 occurs if the health benefits plan is unlicensed or unapproved for sale or delivery in New Mexico. As Ms. Viara Ianakieva testified, Liberty has never submitted or obtained approval of the Liberty Plan by the OSI.

As the foregoing establishes, Liberty meets the definition of a health insurance carrier. Liberty should therefore be subject to the penalties specified in Section 59A-16-27(C).

Similarly, the above discussion establishes that Liberty is violating Section 59A-16-21.2(B). That section prohibits an entity from selling or issuing, or causing to be sold or issued,

health insurance coverage that is not permitted health insurance coverage. Liberty is a Virginia corporation, an organization that has a legal identity apart from its members, in other words, an entity. The contents of the Decision Guide, the Application, the Sharing Guidelines and the witness testimony not only show that Liberty offers to sell but has actually sold its Liberty Plan to residents of New Mexico. As discussed above, the Liberty Plan provides its members with coverage under a plan that is not permitted by the OSI.

In conclusion, pursuant to Section 59A-16-27(A) the Order directed Liberty to cease and desist from selling an unlicensed health benefits plan. The Order to Cease and Desist and Order to Show Cause should be upheld, and pursuant to Section 59A-16-27(C), Liberty should be subject to the penalty referred to in Section 59A-16-27(C) together with payment of the costs of the hearing as determined by the superintendent.

4. Liberty's violations of the Insurance Code warrants the imposition of an administrative penalty.

Section 59A-16-27(C) provides that if the violation is confirmed by final order of the Superintendent, the violator shall be subject to the penalty referred to in Subsection A, together with payment of the costs of the hearing as determined by the Superintendent. As for monetary penalties, Subsection A provides that the violator shall be subject to the penalties referred to in Section 59A-16-29 NMSA 1978 for each violation.

In addition to any applicable suspension, revocation or refusal to continue any certificate of authority or license under the Insurance Code, a penalty for violation of any provision of the Insurance Code may be imposed by the Superintendent in accordance with Section 59A-1-18 NMSA 1978. Section 59A-1-18(B) provides that the administrative penalty shall be not over

$5,000 for each violation, except that if the violation is to be found willful and intentional, a $10,000 penalty may be imposed for each violation.

The Insurance Code does not provide any guidance for determining when a violation is willful and intentional. For purposes of the Unfair Practices Act (UPA), NMSA 1978, §§ 57–12–1 to –26 (1967, as amended through 2009), the New Mexico Court of Appeals looked to the definition of willful found in UJI 13-1827 since the UPA similarly lacks a definition of willfulness. *Atherton v. Gopin*, 2015-NMCA-003, ¶ 53, 340 P.3d 630. The *Gopin* Court concluded that a party acts willfully if the "conduct is the intentional doing of an act with knowledge that harm may result." Proof of a culpable mental state, therefore, requires a showing of two elements: "deliberation and a disregard for foreseeable risk." *Gopin*, 2015-NMCA-003, ¶ 54.

Liberty has been enrolling residents of New Mexico in its Liberty Plan since 2014. Four years earlier, the Kentucky Supreme Court issued its *Reinhold*, decision which created significant doubt that a religious-based system for sharing medical costs would be exempt from state insurance regulation. The letter Liberty received from the Department of Health and Human Services is dated March 31, 2014, four years after the *Reinhold* decision. By this letter, Liberty was put on notice that qualification as a health care sharing ministry pursuant to the Patient Protection and Affordable Care Act did "not supersede other relevant state or federal laws that govern the conduct of Gospel Light Mennonite Church Medical Aid Plan." Nevertheless, Liberty deliberately continued to enroll residents of New Mexico in the Liberty Plan in disregard of the foreseeable action that the Superintendent could seek to stop its unlawful activity leaving its members without coverage for their medical expenses. Liberty's actions should, therefore, be found to be willful and intentional subjecting Liberty to the $10,000 penalty for each member enrolled in the program.

Based on its own disclosures, Liberty sold 502 plans since entering the New Mexico market in 2014. These plans included 228 single plans, 139 single-parent and couple plans, and 135 family plans. Using a conservative estimate, each family plan consists of at least three members. Couple and single-parent plans consist of at least two members. Single plans account for one member each. Using these numbers, Liberty is subject to a fine of $9,110,000 (total members by plan-type X $10,000). In lieu of the fine, Respondent, must cancel the membership of all existing members' plans sold in New Mexico, refund all contributions received by the members of those plans, and inform each plan member of all possible options for obtaining major medical coverage.

5. The Hearing Officer lacks the authority to determine constitutional issues.

Liberty raised several constitutional issues in its Request for Hearing. However, the Hearing Officer's lacks subject matter jurisdiction to consider matters beyond the scope of the Insurance Code, and therefore cannot rule on constitutional challenges. *Citizens for Fair Rates & the Env't v. New Mexico Pub. Regul. Comm'n*, 2022-NMSC-010, ¶ 21, 503 P.3d 1138; *Maso v. State of New Mexico Taxation and Revenue Department, Motor Vehicle Division*, 2004-NMCA-025, ¶ 12, 135 N.M. 152, 85 P.3d 276.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21st day of October 2022, I filed *OSI's Proposed Findings of Fact and Conclusion of Law* through OSI's eDocket filing system, which caused all parties entitled to notice in this case to be served electronically, as more fully reflected on the notice of electronic filing.

BY: _____
Freya Joshi, OSI Law Clerk