

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

IN RE: ZELIS REPRICING ANTITRUST
LITIGATION

This Document Relates To:

All Actions

Lead Action Case No. 1:25-cv-10734-BEM

Consolidated with Case Nos.:

1:25-CV-11092-BEM

1:25-CV-11167-BEM

1:25-CV-11537-BEM

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT ELEVANCE HEALTH, INC.'S
MOTION TO COMPEL ARBITRATION OF PLAINTIFF
DANNY BACHOUA CHIROPRACTIC, APC'S CLAIMS AND STAY ACTION**

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I. INTRODUCTION

Contrary to Defendant Elevance Health, Inc.’s (“Elevance”) motion to compel arbitration, Plaintiff Danny Bachoua Chiropractic, APC (“DBC”) did not agree to arbitrate its antitrust claims against Elevance. Elevance seeks to enforce arbitration provisions in 2010 Chiropractic Provider Service Agreements (“PSAs”) that were entered into by **non-parties** “Bachoua Chiropractic,” American Specialty Health Plans of California, Inc. (“ASH Plans”), and American Specialty Health Networks, Inc. (“ASH Networks”) (collectively, “ASH”) and were terminated before the putative Class Period. *See* ECF No. 110 at 1; Decl. of Scott Hicks, Elevance, Exs. 1–3. On this basis alone, Elevance’s motion should be denied. But even if both DBC and Elevance were parties to the PSA and it somehow extended into the relevant period, its arbitration provisions bear the hallmarks of unenforceable “infinite arbitration” clauses, including (1) unreasonably broad scope, (2) that reach beyond the contracting parties, (3) an infinite temporal duration, and (4) Elevance’s request to import delegation clauses.

The Court should deny Elevance’s motion for multiple reasons. First, Elevance has not met its initial burden of demonstrating an agreement to arbitrate because it relies on 2010 ASH PSAs that were not even entered into by DBC, nor has it provided any DBC-Elevance contracts that allegedly applied during their business relationship. Instead, Elevance’s motion is based on 2010 agreements that expired in 2013 – years before the class period and the claims at issue here.

With respect to Elevance’s “delegation” argument regarding gateway issues, Elevance has not provided “clear and unmistakable” evidence that the parties intended to delegate arbitrability issues. Rather, Elevance cites 2019 Forum arbitration rules in its argument that in 2010, the parties intended a broad delegation of arbitrability. In addition,

The Court should additionally deny Elevance’s motion because (1) the conditions precedent to

arbitration under the agreement Elevance seeks to enforce, including other ADR measures, have not been satisfied; (2) the subject antitrust claims are outside the scope of the arbitration provisions; (3) the arbitration provisions, which are akin to infinite arbitration clauses, are unconscionable; (4) Elevance’s Legal Specialist, who offers a declaration to authenticate the 2010 ASH PSAs, does not have personal knowledge about ASH’s business practices, and (5) Elevance waived enforcement of any other arbitration agreement. If the Court was nevertheless somehow inclined to grant Elevance’s motion, it should stay only DBC’s claims against Elevance, and the remaining claims in this coordinated class action should continue.

II. RELEVANT BACKGROUND

A. Plaintiffs’ Out-of-Network Payment Antitrust Claims

DBC alleges that beginning in about June 2016, Elevance and other Commercial Payer Defendants¹ conspired with Zelis² and others to suppress out-of-network (“OON”) payments to healthcare service providers (“Providers”) in violation of Section 1 of the Sherman Act. Amended and Consolidated Class Action Complaint, ECF No. 39, (“CAC”), ¶¶ 1, 14, 29, 36, 301. The conspiracy does not arise from in-network claims, which—unlike OON claims—are governed by contract and heavily-discounted fee schedules that the Provider agrees to accept to gain access to a network’s members. *Id.* at ¶¶ 3–4. A driving force behind performing medical services on an OON basis is to be unbound by such network contracts. Indeed, for OON services, Elevance has admitted that it had no contractual relationship with DBC:

- “To the extent Plaintiffs have chosen to be OON, they have ***no contractual relationship with the MCOs***; rather, the patient contracts with the MCO, and the MCO’s obligation, if any, is

¹ The Commercial Payer Defendants include Aetna, Inc., the Cigna Group, The Elevance Health Companies, Inc., Humana, Inc., and UnitedHealth Group, Inc. CAC, ¶¶ 34–39. Defendants sometimes refer to themselves as “MCOs” or managed care organizations.

² “Zelis” or the “Zelis Defendants” refers to Zelis Healthcare, LLC, Zelis Claims Integrity, LLC, and Zelis Network Solutions, LLC. CAC, ¶¶ 30–33.

only to the patient.” ECF No. 97 at 3 (emphasis added).

- “[W]henver a patient receives care from an OON provider, that *provider does not have a contract or negotiated in-network rates with the MCO*, and thus has not agreed to abide by the health plan’s terms and conditions or quality guidelines.” *Id.* at 7 (emphasis added).

B. In 2010, Bachoua Chiropractic Entered Into ASH Contracts That Expired in June 2013

In mid-2010, non-party Bachoua Chiropractic, a clinic owned and operated by Dr. Danny Bachoua, entered into Chiropractic Provider Services Agreements (“PSAs”) with (1) American Specialty Health Plans of California, Inc. (“ASH Plans”) and (2) American Specialty Health Networks, Inc. (“ASH Networks”) (collectively, “ASH”). *See* Hicks Decl., Exs. 1–3 (respectively, “ASH Plans PSA” and “ASH Networks PSA”); Declaration of Danny Bachoua (“Bachoua Decl.”) ¶ 2. Bachoua Chiropractic had practically no ability to negotiate the provisions of the PSAs. Bachoua Decl. ¶ 5. In essence, it was a “take it or leave it” situation. *Id.* For the purposes of responding to Elevance’s motion, the ASH PSAs are largely the same.

The ASH PSAs pertain to claims submission and payment of in-network claims. The ASH Plans PSA explains that “[redacted]” licensed in California, that “[redacted]” for their members, and that “[redacted]” Hicks Decl., Ex. 1 at p.5. Likewise, the ASH Networks PSA provides that “[redacted]” for their members, that “[redacted]” and that “[redacted]” and that “[redacted]” Hicks Decl., Ex. 2 at p.5. Along these lines, practically all of Bachoua Chiropractic’s services through ASH were in-network.

Bachoua Decl. ¶ 4.

The ASH Plans PSA defines a “[REDACTED]” as a “[REDACTED]” that has been “[REDACTED]” and will be “[REDACTED]” Hicks Decl., Ex. 1 at § 1.12, p.7 (emphasis added). Along the same lines, the ASH Networks PSA defines a “[REDACTED]” as a “[REDACTED]” that has been “[REDACTED]” and will be “[REDACTED]” Hicks Decl., Ex. 2 at § 1.13, p.7.

Under Article 4, “Term,” the 2010 ASH PSAs set forth an automatic expiration date of “June 30, 2013, unless earlier terminated.” Hicks Decl., Ex. 1, at § 4, p.30; *id.*, Ex. 2, at § 4, p.30. Article 5.09 of the ASH PSAs set forth a survival provision for numerous provisions, including the ADR provisions in Articles 16, 17, and 18. Hicks Decl., Ex. 1, at § 5.09, p.33; *id.*, Ex. 2, at § 5.09, p.34. Under Article 26 of the PSAs, based on the respective ASH entity’s signature date, the effective date of each PSA was August 26, 2010. Hicks Decl., Ex. 1, at § 26, p.42; *id.*, Ex. 2, at § 26, p.43; *id.*, Ex. 3 (each signed by George DeVries). The 2010 ASH PSAs include choice of law provisions for California law. Hicks Decl., Ex. 1, at § 14, p.37; *id.*, Ex. 2, at § 14, p.38.

Each of the 2010 ASH PSAs includes three provisions for dispute resolution: (1) Article 16 for disputes between the Contracted Chiropractor and Members, (2) Article 17 for disputes between the Contracted Chiropractor and ASH Plans, and (3) Article 18 for disputes between the Contracted Chiropractor and the Payor.

Article 18 sets forth, in relevant part:

[REDACTED]

[REDACTED]

[REDACTED]

Hicks Decl., Ex. 1 at § 18.01.1–18.01.2, pp.38–39 (emphasis added); *id.*, Ex. 2 at § 18.01.1–18.01.2, p.39. Thus, to trigger the arbitration provisions, the 2010 ASH PSAs require [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*

C. In April 2013, Blue Cross and Two ASH Entities Entered Into a Vendor Agreement, Which Did Not Require Medical Providers like DBC to Arbitrate Disputes

Elevance, which is formerly Anthem, Inc., is a member of the Blue Cross and Blue Shield Association. CAC, ¶ 36. According to Elevance’s motion, in April 2013, Blue Cross of California, Inc. (“Blue Cross”), ASH Plans, and American Specialty Health Group, Inc. (“ASH Group”) entered into a vendor agreement (“2013 Blue Cross Agreement”). ECF No. 110 at 3; Hicks Decl. ¶¶ 3–5, 9–10, Ex. 4 at p.1. The 2013 Blue Cross Agreement [REDACTED]

[REDACTED]

[REDACTED] The 2013 Blue Cross Agreement [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *Id.* at p.9.

Section 11, [REDACTED]

[REDACTED]” [REDACTED]. Section 11 does not apply to any Provider like DBC. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. In 2025, Elevance Demands Arbitration, Even Though ASH Did Not Seek ADR

ASH has not requested that DBC engage in ASH’s grievance and dispute processes. Bachoua Decl. ¶ 6. Nevertheless, on August 7, 2025, Elevance demanded arbitration from DBC. *See* Motion at 3. Elevance’s arbitration demand is based on Section 18.01 of the 2010 ASH PSAs. *Id.*

III. LEGAL STANDARDS

Under the Federal Arbitration Act (“FAA”), arbitration can be compelled only where a valid agreement to arbitrate exists. “A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” 9 U.S.C. § 2. Federal courts generally “apply ordinary state-law principles that govern the formation of contracts.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also PaineWebber Inc. v. Elahi*, 87 F.3d 589, 600 (1st Cir. 1996) (explaining that courts apply “general state-law principles of contract interpretation” to arbitration agreements). The “courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” *Coinbase, Inc. v. Suski*, 602 U.S. 143, 149 (2024) (cleaned up) (quoting *First Options of Chicago, Inc.*, 514 U.S. at 944). “[D]istrict courts should apply the summary judgment standard to evaluate motions to compel arbitration under the FAA.” *Crean v. Morgan Stanley Smith Barney, LLC*, 652 F. Supp. 3d 171, 175 (D. Mass. 2023) (quoting *Air-Con, Inc. v. Daikin Applied Lat. Am., LLC*, 21 F.4th 168, 174–75 (1st Cir. 2021)).

A party seeking to compel arbitration under the FAA bears the initial burden to demonstrate that “a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause’s scope.” *Air-Con, Inc.*, 21 F.4th at 174. Therefore, “a court should not compel arbitration unless and until it determines that the parties entered into a validly formed and legally enforceable agreement covering the underlying claims(s).” *Nat’l Fed’n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 80 (1st Cir. 2018). Thus, “a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute.” *Granite Rock Co. v. Int’l Bhd. of Teamsters*,

561 U.S. 287, 297 (2010). “To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce.” *Id.*

Courts and legal scholarship alike have voiced concerns regarding “infinite arbitration” provisions—dubbed “infinite arbitration clauses” for their striking breadth. *See, e.g., McFarlane v. Altice USA, Inc.*, 524 F. Supp. 3d 264, 269 (S.D.N.Y. 2021); *Cook v. Univ. of S. California*, 102 Cal. App. 5th 312, 316 (2024), *reh’g denied* (June 13, 2024) (holding that broad arbitration agreement of “infinite duration” to be unconscionable); David Horton, *Infinite Arbitration Clauses*, 168 U. Pa. L. Rev. 633, 639-40 (2020). Infinite arbitration terms may include some or all of the following characteristics:

- “First, they are ‘not limited to disputes arising from or related to the transaction or contract at issue.’ ... Thus, infinite provisions attempt to govern conduct that has nothing to do with the original transaction, such as sexual harassment after the purchase of household goods or ‘a punch in the nose during a dispute over medical billing’”³;
- “Second, infinite clauses extend beyond the original contractual partners.” *Id.* at 640.
- “Third, infinite provisions have no sunset date. Although the common law condemns perpetual contracts, infinite clauses ‘survive the ... termination of any service.’” *Id.*
- “Finally, infinite clauses often appear alongside what the Supreme Court has dubbed ‘delegation clauses’: terms that give the arbitrator the exclusive right to decide gateway questions of ‘arbitrability’ (whether a claim must be submitted to arbitration).” *Id.*

As one court observed: “It effectively requires arbitration of *any* dispute between [plaintiff] and [defendant], as well [as defendant’s] parents, subsidiaries, affiliates ... and the like, whether arising now or in the future, and without regard for whether it arises from or relates to the [underlying agreement].” *McFarlane*, 524 F. Supp. 3d at 269. Infinite arbitration terms “are less a contractual provision and more a kind of arbitration servitude.” Horton, 168 U. Pa. L. Rev. at 639-40.

³ Horton, 168 U. Pa. L. Rev. at 639-40.

IV. ARGUMENT

A. The Court Should Deny Elevance’s Motion Because It Seeks to Enforce Arbitration Against a Non-Signatory Entity.

Elevance has not met its threshold burden for multiple reasons. First and foremost, Elevance seeks to enforce the arbitration provisions against an entity that *did not even exist in 2010*: In view of Elevance’s supporting evidence, it is undisputed that DBC, which was incorporated in early 2013, did not execute the 2010 ASH PSAs. Elevance has failed to show that DBC, as a non-signatory, is bound by the 2010 ASH PSAs’ arbitration provisions.⁴

Elevance must prove that the “*other party* is bound” by the arbitration provision. *Air-Con, Inc.*, 21 F.4th at 174 (emphasis added). It is axiomatic that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *InterGen N.V. v. Grina*, 344 F.3d 134, 142–43 (1st Cir. 2003) (quoting *AT&T Techs., Inc. v. Commcn’s Workers of Am.*, 475 U.S. 643, 648 (1986)). As the FAA is based on contract law principles, “its liberal policy favoring arbitration ‘is *only triggered when the parties actually agreed to arbitrate.*” *Air-Con, Inc.*, 21 F.4th at 174 (emphasis added). Elevance acknowledges that California law governs the 2010 PSAs. *See* Mot. at 6. Under California jurisprudence, “[b]ecause arbitration is a matter of contract, generally ‘one must be a party to an arbitration agreement to be bound by it or invoke it.’” *People v. Maplebear Inc.*, 81 Cal. App. 5th 923, 931 (2022). For distinct legal entities, “[c]orporate entities are presumed to have separate existences, and the corporate form will be disregarded only when the ends of justice require this result.” *Gopal v. Kaiser Found. Health Plan, Inc.*, 248 Cal. App. 4th 425, 431–32 (2016), *as*

⁴ In addition, Elevance argues that as a non-signatory, it has the right to enforce the 2010 ASH PSAs’ arbitration provisions under principles of equitable estoppel. *See* Motion at 7 n.8 (citing *Suh v. Superior Court*, 181 Cal. App. 4th 1504, 1513 (2010)). Plaintiffs acknowledge that equitable estoppel is one theory under which a nonsignatory *may* assert the right to enforce arbitration. *See* *Suh*, 181 Cal. App. 4th at 1513. But Elevance offers no substantive argument why equitable estoppel applies here. For this reason as well, Elevance has not met its burden as the moving party.

modified (June 23, 2016). Moreover, under California law, “[a]lter ego is an extreme remedy, sparingly used.” *Sonora Diamond Corp. v. Superior Ct.*, 83 Cal. App. 4th 523, 539 (2000).

Here, Elevance’s motion is grounded on the false assertions that in July 2010, Plaintiff “Danny Bachoua Chiropractic, APC” signed “two Chiropractic Provider Services Agreements.” Mot. at 1. Throughout the motion to compel arbitration, Elevance repeatedly argues that “DBC signed two Chiropractic Provider Services Agreements,” that “DBC expressly agreed to *arbitrate* its reimbursement disputes,” and that “[o]n July 14, 2010, DBC signed two provider services agreements with ASH.” *Id.* at 1, 2. When arguing that the FAA establishes a “strong policy” in favor of arbitration, Elevance again incorrectly asserts that “ASH and DBC entered into an agreement set out in the 2010 PSAs,” that “DBC and ASH, through their signatures, have agreed that the 2010 PSAs are the operative agreement,” and that “DBC is bound by the terms of the 2010 PSAs.” *Id.* at 6, 7. Elevance’s arguments do not withstand scrutiny.

In July 2010, DBC did not even exist. Bachoua Decl. ¶ 3, Ex. 1. Rather, DBC – Danny Bachoua Chiropractic, APC – was incorporated in March 2013. *Id.* Accordingly, DBC did not enter into the 2010 ASH PSAs. In July 2010, Dr. Danny Bachoua signed the 2010 ASH PSAs on behalf of a different clinic, Bachoua Chiropractic. Bachoua Decl. ¶ 2; Hicks Decl., Ex. 3.

As the moving party, Elevance has failed to meet its burden to prove that DBC *itself* entered into the 2010 ASH PSAs. Rather, Dr. Bachoua entered into the 2010 PSAs on behalf of non-party Bachoua Chiropractic. *Id.* As Elevance’s motion is based on the incorrect premise that DBC entered into the 2010 ASH PSAs, Elevance has failed to articulate any reason why DBC’s corporate form should be disregarded. *See Gopal*, 248 Cal. App. 4th at 431–32 (“[c]orporate entities are presumed to have separate existences, and the corporate form will be disregarded only when the ends of justice require this result.”); *Sonora Diamond Corp.* 83 Cal. App. 4th at 539 (“[a]lter ego is an extreme

remedy, sparingly used.”). Indeed, Elevance relies on the “signatures” and posits that “[o]ne who signs a contract” is “deemed to assent to all its terms.” Motion at 7 (citing *Martinez v. BaronHR, Inc.*, 51 Cal. App. 5th 962, 967 (2020)). But in *Martinez*, the dispute did not relate to a plaintiff’s corporate entity. *See Martinez*, 51 Cal. App. 5th at 967. Accordingly, *Martinez* is not instructive here.

For this reason alone, the Court should summarily deny Elevance’s motion.

B. Elevance Relies on 2010 ASH PSAs That Expired in 2013 and Pre-Date the Antitrust Claims at Issue in this Case.

DBC’s antitrust claims arise from facts and events that occurred after the 2010 ASH PSAs expired in June 2013. DBC’s claims, therefore, are not covered by the arbitration clauses in the agreements.

“A party who attempts to compel arbitration must show that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause’s scope.” *InterGen N.V.*, 344 F.3d at 142; *see also Air-Con, Inc.*, 21 F.4th at 173 (“our precedent makes clear that the party seeking to compel arbitration bears the burden of proving ‘that a valid agreement to arbitrate exists’”).

In *Bogen Communications, Inc. v. Tri-Signal Integration, Inc.*, 227 F. App’x 159 (3d Cir. 2007), the Third Circuit found that a dispute that occurred after the expiration of the parties’ contract was not subject to an arbitration clause in that agreement. *Id.* at 161. Bogen was a manufacturer and seller of sound systems, and it hired Tri-Signal to distribute its systems in California. *Id.* at 160. Bogen and Tri-Signal’s contract included an arbitration clause, and the contract “expressly stated” it would terminate on December 31, 2000. *Id.* After the contract expired, the companies continued doing business together, but on different terms. *Id.* In May 2003, more than two years after the written contract expired, Bogen terminated its business relationship with Tri-Signal. *Id.* at 160–61.

After Tri-Signal filed suit, Bogen moved to compel arbitration under the arbitration provision. *Id.* at 161. The district court denied the request, finding that Tri-Signal’s claims did not arise during the term of the written contract. *Id.*

On appeal, the court affirmed, reasoning that “[d]espite well-established policy considerations favoring the enforcement of arbitration agreements ... , a party can only be required to arbitrate if ‘that party has entered into a written agreement to arbitrate that covers the dispute.’” *Id.* This rationale is even more compelling here, where not only did the dispute arise long after the contract expired, it involved *different parties*.

Likewise, in *Vantage Technologies v. College Entrance Examination Bd.*, 591 F. Supp. 2d 768 (E.D. Pa. 2008), the district court denied a motion to stay pending arbitration because the contract dispute arose “after the expiration of their written contract containing an arbitration clause,” and before the commencement of the subsequent “written contract which did not include an arbitration provision.” *Id.* at 770. While the *Vantage Technologies* court acknowledged the policy in favor of arbitration, “this policy cannot be invoked to create an arbitration provision in a contractual relationship where no such provision exists.” *Id.* at 771. Thus, the *Vantage Technologies* court denied the motion.

Here, the 2010 ASH PSAs expired in June 2013. Even assuming DBC was a signatory, its antitrust claims arise from Zelis, Elevance, and other defendants’ collusive efforts to artificially suppress payments to healthcare providers performing OON Services, which began “as early as June 13, 2016.” CAC, ¶¶ 29, 301. Accordingly, the subject allegations arise *after* the expiration of the ASH PSAs. For this reason as well, Elevance has not satisfied its initial burden. *See Air-Con, Inc.*, 21 F.4th at 175–76 (reaffirming that “the substantive law on the enforceability of arbitration agreements puts the burden on the party moving to compel arbitration to show that it is entitled to

that outcome”).

C. The Court Should Reject Elevance’s Delegation Argument Because It is Not Clear and Unmistakable that the Parties Delegated Arbitrability Dispute.

As discussed *infra*, in Section IV.D, Elevance has not demonstrated that conditions precedent were satisfied sufficient for delegating arbitrability. In its motion, Elevance, argues that it is “clear and unmistakable” that the “parties agreed that an arbitrator would decide issues of arbitrability.” Mot. at 7-8. But even if the Court somehow determined the relevant parties were part of the agreement Elevance seeks to enforce, Elevance’s motion, which is based on fundamentally flawed evidence, falls far short.

In the First Circuit, the court “employ[s] a presumption that courts (not arbitrators) must ‘resolve gateway disputes about whether a particular arbitration clause binds parties in a particular case.’” *McKenzie v. Brannan*, 19 F.4th 8, 17 (1st Cir. 2021) (citations omitted). In order to “get around this presumption,” the moving party must supply “‘clear and unmistakable’ evidence” that the parties agreed to have the arbitrator decide the “‘gateway’ questions of ‘arbitrability.’” *Id.* Elevance acknowledges this burden. *See* Motion at 7 (discussing the Supreme Court’s requirement for “clear and unmistakable evidence”).

In its motion, Elevance argues that the “2010 PSAs incorporate the Commercial Arbitration Rules of the National Arbitration Forum ... into the arbitration provision,” and it cites “Forum,” “Code for Resolving Business-to-Business Disputes,” “v2.3,” which are available online. *See* Mot. at 7-8.⁵ As the moving party, Elevance has failed to proffer “clear and unmistakable evidence” that DBC agreed to the cited rules. First, as discussed in Section IV.A, DBC, which did not exist in July 2010, did not enter into the 2010 ASH PSAs, so it is not possible that it agreed to those rules. *See*

⁵ Citing www.adrforum.com/assets/resources/code/business/Forum.B2B_Rules.v.2.3.pdf (last visited September 21, 2025).

Morales-Posada v. Cultural Care, Inc., 141 F.4th 301, 310–11 (1st Cir. 2025) (analyzing non-signatory enforcement of delegation provision, observing that defendant had not made the “‘serious effort needed on [the] complex issue’ of nonsignatory enforcement of a delegation agreement,” and affirming the district court’s decision “declining to send the issue of arbitrability to the arbitrator to decide.”). Second, the 2010 ASH PSAs do not include the delegation language themselves.

Moreover, Elevance has not supplied “clear and unmistakable” evidence that in July 2010, Elevance’s cited rules were the applicable rules. First, the Forum’s “Code for Resolving Business-to-Business Disputes,” bears a different title than the “Commercial Arbitration Rules” identified in the 2010 PSAs. *See Hicks Decl.*, Ex. 1, § 18.01.3, p.39 (referring to the “Commercial Arbitration Rules of the National Arbitration Forum”); *id.*, Ex. 2, § 18.01.3, p.39 (same). Second, Elevance cites “v2.3” of the Forum “Business-to-Business” rules, which appear to substantially post-date July 2010. While the v2.3 Rules are undated, the Introduction states:

The rules in this Code of Procedure for resolving Business-to-Business Disputes ... govern all cases filed after ***April 1, 2019*** unless the Parties’ agreement specifies a different set of rules.

Forum, ADR, Code for Resolving Business-to-Business Disputes, , p.5 (emphasis added).

Thus, Elevance cites the Forum’s rules from approximately 2019. Because Elevance has not provided “clear and unmistakable evidence” that Plaintiff DBC delegated the gateway arbitrability disputes, the Court, rather than the arbitrator, should resolve arbitrability issues. *See Morales-Posada*, 141 F.4th at 310–11 (affirming district court’s “declining to send the issue of arbitrability to the arbitrator to decide,” where the moving party had not made the “type of serious effort needed on [the] complex issue of nonsignatory enforcement of delegation agreement,” and noting that the court “will not do [defendant’s] work for [it].”).

D. The 2010 PSAs' Arbitration Provisions Have Not Been Triggered Because Conditions Precedent Have Not Been Satisfied.

The Court should deny the motion to compel arbitration because under Article 18, the 2010 ASH PSAs require ASH to trigger the ADR provisions, prompting ASH's "grievance and appeals processes." Accordingly, under the terms of Article 18, Elevance has no right to request arbitration.

To establish there is a valid agreement to arbitrate, the moving party "bears the burden" of showing that it is "entitled to invoke the arbitration clause." *Air-Con, Inc.*, 21 F.4th at 174. Moreover, "[w]here contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA." *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003).

In *HIM Portland*, the First Circuit refused to compel arbitration where the requesting party had failed to comply with a precondition to arbitration. *Id.* at 42. HIM had contracted with DeVito, a building company, for the renovation of a motel. *Id.* HIM filed a breach of contract lawsuit against DeVito. *Id.* After DeVito filed its answer, HIM moved to compel arbitration and to stay the proceedings. *Id.* The subject contract contained, in relevant part, (1) a provision that the "parties shall endeavor to resolve their disputes by mediation ...," and (2) "[c]laims ... that are not resolved by mediation ... shall be decided by arbitration" *Id.* at 42–43. The district court denied the motion to compel arbitration, reasoning that "the plain language of the contract manifested the parties' clear intent to require mediation as a condition precedent to arbitration." *Id.* at 43.

The First Circuit affirmed, reasoning that a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* (quoting *AT&T Techs., Inc.*, 475 U.S. at 648). "[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Id.* Analyzing the contractual language – which included that the "parties shall endeavor to

resolve their disputes by mediation” – the First Circuit reasoned, “Under the plain language of the contract, the arbitration provision of the agreement is not triggered until one of the parties requests mediation.” *Id.* at 42, 44. “Where contracting parties condition an arbitration agreement on the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA.” *Id.* at 44. Because the parties had not “attempted to mediate this dispute, neither party can be compelled to submit to arbitration.” *Id.* The court concluded that there was “no doubt that the parties intended that the duty to arbitrate would not ripen until after the condition precedent of mediation had been satisfied.” *Id.* Thus, the court affirmed. *Id.*; see also *Synopsys, Inc. v. Siemens Indus. Software Inc.*, No. 20-cv-04151-WHO, 2021 WL 1238309, at *4 (N.D. Cal. Apr. 2, 2021) (concluding that “the parties have not triggered the PLSA’s arbitration provision and that a stay under the FAA is premature.”).

In this case, Elevance is not entitled to invoke the 2010 PSAs ADR provisions because under Article 18.01.1, ASH has not [REDACTED]

[REDACTED]

[REDACTED] Dr. Bachoua has explained that in the course of dealing with ASH, it had not requested ADR. Bachoua Decl., ¶6. Rather, Elevance merely asserts that on August 7, 2025, it “sent a demand for binding arbitration of DBC’s claims in the Amended Complaint.” Motion at 3. Thus, the “condition precedent” under Section 18 has not been satisfied. See *HIM Portland, LLC*. 317 F.3d at 44.

In addition, Elevance has not satisfied a second condition precedent: Section 18.01.2 of the 2010 ASH PSAs provide [REDACTED]

[REDACTED]

[REDACTED]

Indeed, Dr. Bachoua has explained that in the course of his dealings with ASH, practically none of the claims were OON. *Id.* DBC's antitrust claims arise from the Commercial Payers' and Zelis' manipulation of payment made to OON Providers. The scope of the arbitration provisions do not encompass DBC's antitrust claims.

F. The 2010 ASH PSA Arbitration Provisions Are Unconscionable

Elevance seeks to apply the 2010 ASH PSA arbitration provisions as practically "infinite" arbitration provisions. Under California law, the arbitration provisions are unconscionable. *See Cook*, 102 Cal. App. 5th at 316 (warning against arbitration agreement of "infinite duration"). Under California law, unconscionability has a "procedural" and "substantive" element, the former focusing on "oppression," based on "unequal bargaining power." *Id.* at 320. Here, Dr. Bachoua explains in his declaration that it was "basically a 'take it or leave it' deal," and that there was "practically no ability to negotiate the terms" with ASH. Bachoua Decl. ¶5. In view of the unequal "bargaining strength," the Court should find there was procedural unconscionability. *See id.* at 320-21.

In addition, the terms of the 2010 ASH PSAs' arbitration provisions are substantively unconscionable. In view of the survival provisions and Elevance's application of the 2010 ASH PSAs to conduct arising from approximately mid-2016 to 2022, Elevance seeks an "arbitration agreement of infinite duration." *Id.* at 316, 325. In its motion, Elevance posits that the "2010 PSAs," which include survival provisions for the ADR provisions, "govern the relationship between DBC, ASH, and ASH's payor customers." Motion at 10. The 2010 ASH PSAs do not include any limiting principle for the ADR provisions in Article 18. *See Hicks Decl.*, Ex. 1, at § 5.09, p.33; *id.* Ex. 2, at § 5.09, p.34.

Elevance also seeks a "broad scope" of arbitration, which would encompass antitrust claims, and were not contemplated in the scope of the clause itself. *See id.* at 320-22. In the motion, Elevance

asserts that the “2010 PSAs *govern the relationship* between DBC, ASH, and ASH payor customers, including Elevance Health.” Motion at 10 (emphasis added). *Compare id.* with Hicks Decl., Ex. 1, § 18.01.1, p.38 (encompassing “any dispute between Contracted Chiropractor and a Payor arising out of or relating to this Agreement”). According to Elevance, “any dispute” that arises or relates to the 2010 PSAs includes any dispute that relates to *any* business involving any Bachoua entity, any ASH entity, and any payor. This is plainly fails to comport with applicable law or common sense.

Moreover, Elevance seeks to import broad delegation provisions. *See Horton*, 168 U. Pa. L. Rev. at 639-40. As discussed *supra* in Section IV.C, Elevance apparently seeks to import 2019 Forum rules into the 2010 ASH PSAs. The 2010 arbitration terms are unconscionable.

G. The Elevance Legal Specialist Does Not Have Requisite Knowledge About ASH Business Practices.

The Court should also deny Elevance’s motion because its declarant, an Elevance legal specialist, does not have personal knowledge about ASH’s business practices. In *Crean v. Morgan Stanley Smith Barney, LLC*, 652 F. Supp. 3d 171 (D. Mass. 2023), the District of Massachusetts denied defendant’s motion to compel arbitration, where defendant relied on the declaration of a Morgan Stanley financial advisor. *Id.* at 176. The Morgan Stanley employee provided an affidavit regarding Legg Mason, Inc., which was a “Morgan Stanley predecessor.” *Id.* While defendant was “unable to locate a signed copy” of the applicable account agreement, the declarant “aver[red] that the Legg Mason client ‘account agreement would have contained an arbitration provision similar to those used by Morgan Stanley at account opening.’” *Id.* at 177.

The District of Massachusetts denied the motion to compel arbitration, reasoning that the Morgan Stanley financial advisor “did not work for Legg Mason at the time” the applicable agreement was executed. *Id.* at 181. Also, “Morgan Stanley did not acquire the account until seven

years later.” *Id.* “Given this context,” the court was not persuaded that the Morgan Stanley employee had “personal knowledge of the events at Legg Mason regarding the purported 2005 Legg Mason client agreement.” *Id.*

Here, Scott Hicks, Elevance Legal Specialist, asserts that he has “personal knowledge” based on his “access to certain Elevance Health’s business records.” Hicks Decl. ¶1 (ECF. No. 111). Mr. Hicks states that Elevance/Anthem Blue Cross “maintains a network of hospitals, doctors, and other health care providers.” *Id.* ¶ 5. He further provides a copy of the “Chiropractic Services Agreement (‘PSA’) with American Specialty Health Plans of California Inc. that Elevance Health received from ASH.” *Id.* ¶ 6. Mr. Hicks did not work for ASH, so he does not have personal knowledge about its business activities with DBC.

H. Elevance Waived Arguments Regarding Subsequent ASH Agreements, If Any

Elevance elected to move to compel arbitration based only on the 2010 ASH PSAs and the 2013 Blue Cross vendor agreement. *See Coinbase, Inc.*, 602 U.S. at 151 (discussing forfeiture of argument). Accordingly, Elevance has waived arbitration pursuant to any other contract.

I. Even if the Claim Were Arbitrable, Any Stay Should Be Limited

Should the Court find that the dispute is arbitrable, any stay should be limited to claims between Elevance and DBC. *See, e.g., Peterson v. Binnacle Cap. Servs. LLC*, 364 F. Supp. 3d 108, 118 (D. Mass. 2019) (staying only claims against only one defendant); *In re Amitiza Antitrust Litig.*, No. 21-cv-11057-MJJ, 2025 WL 671555, at *5 (D. Mass. Jan. 27, 2025) (staying claims of only one plaintiff). In its motion, Elevance seeks a “stay of DBC’s claims against Elevance Health.” Motion at 12. While Elevance does not appear to argue that any proceedings should be stayed as to Zelis and the remainder Commercial Payer Defendants, any such argument should be rejected as those

parties are not signatories to the agreement, and a stay would be futile.

V. CONCLUSION

For all of the reasons stated herein, the Court should deny Elevance's motion to compel arbitration of the claims asserted by DBC.

Dated: September 22, 2025

Respectfully submitted,

/s/ Richard M. Paul III

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CERTIFICATE OF SERVICE

I, Richard M. Paul III, attorney for the Plaintiffs, certify that, on September 22, 2025, I caused a copy of the foregoing to be served, via ECF, on all counsel of record.

/s/ Richard M. Paul III

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE: ZELIS REPRICING ANTITRUST LITIGATION This Document Relates To: All Actions	LEAD ACTION CASE NO. 1:25-CV-10734- BEM <i>Consolidated with Case Nos.:</i> 1:25-CV-11092-BEM 1:25-CV-11167-BEM 1:25-CV-11537-BEM
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DECLARATION OF DR. DANNY BACHOUA

I, Danny B. Bachoua, hereby state under penalty of perjury that the following statements are true and correct, that I have personal knowledge of the facts stated herein, and that I could testify to these matters if called to do so:

1. I am a licensed chiropractor. In 2001, I received my Bachelor 's Degree in Kinesiology from San Diego State University. In 2007, I received my Doctor of Chiropractic Degree at Southern California University. In December 2009, I was licensed by the Board of Chiropractic Examiners.

2. From approximately 2010 to 2013, I owned and operated Bachoua Chiropractic, a chiropractic clinic. In 2010, on behalf of Bachoua Chiropractic, I entered into agreements with American Specialty Health Plans of California, Inc. ("ASH Plans") and American Specialty Health Networks, Inc. ("ASH Networks ") (individually or collectively, "ASH").

3. In March 2013, I incorporated a different corporate entity, Danny Bachoua Chiropractic, APC ("DBC"), which is a California professional corporation. Attached as Exhibit 1 is a true and correct copy of the Articles of Incorporation for DBC. I am the owner and operator of DBC.

4. At a high level, ASH served as a middleman between health plans, such as Blue Cross Blue Shield and Bachoua Chiropractic. The principal purpose of the agreement with ASH was to enable

the provision of in-network services for health plans. For instance, as a licensed chiropractor, I Bachoua Chiropractic would be listed in HMO and PPO health plans as an in-network provider. With respect to ASH, practically none of the chiropractic services provided were out-of-network.

5. In the course of Bachoua Chiropractic's dealing with ASH, there was practically no ability to negotiate the terms of the agreements with ASH. On at least one occasion, I attempted to negotiate terms with ASH. The attempt was unsuccessful. With ASH, it was basically a "take it or leave it" deal. So Bachoua Chiropractic had no meaningful way to negotiate the provision of the ASH contracts.

6. One or more of the agreements with ASH included Alternative Dispute Resolution ("ADR") procedures, such as the use of ASH's grievance and appeals processes. To the best of my knowledge, ASH has not made any request for me or my business entities (including Bachoua Chiropractic or DBC) to engage in ADR, including for any dispute with a health plan. Over the years of dealing with ASH, I do not recall ASH making any request for ADR.

I declare under penalty of perjury that the contents here are true and correct.

Executed at La Mesa, California on September 22, 2025.

Dr. Danny B. Bachoua

3553083

FILED JKMA
Secretary of State
State of California

MAR 11 2013

1cc

ARTICLES OF INCORPORATION

The undersigned, for the purpose of forming a corporation under and pursuant to the laws of the State of California, does hereby declare.

I.

The name of this corporation is **DANNY BACHOUA CHIROPRACTIC, A PROFESSIONAL CORPORATION.**

II.

The purpose of the corporation is to engage in the **CHIROPRACTIC PROFESSION** and any other lawful activities (other than the banking or trust company business) not prohibited to a corporation engaging in such profession by applicable laws and regulations.

III.

The name and address in the State of California of this corporation's initial agent for service of process is:

Name: Danny Bachoua
Street Address: 3691 Via Mercado, Ste. 15
City, State, Zip: La Mesa, CA 91941

IV.


The initial street address of the corporation is: 3691 Via Mercado, Ste. 15, La Mesa, CA 91941. The initial mailing address of the corporation is the same as above.

V.

This corporation is authorized to issue only one class of shares of stock; and the total number of shares which this corporation is authorized to issue is TEN THOUSAND (10,000).

IN WITNESS WHEREOF, for the purpose of forming this Corporation under the laws of the State of California, the undersigned, constituting the Incorporator of this Corporation executed these Articles of Incorporation on 1/17/2013.

I hereby declare that I am the person who executed the foregoing articles of incorporation, which execution is my act and deed.



Danny Bachoua, Incorporator

3553083

FILED JKMA
Secretary of State
State of California

MAR 11 2013

1cc

ARTICLES OF INCORPORATION

The undersigned, for the purpose of forming a corporation under and pursuant to the laws of the State of California, does hereby declare.

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II.

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III.

The name and address in the State of California of this corporation's initial agent for service of process is:

Name: Danny Bachoua
Street Address: 3691 Via Mercado, Ste. 15
City, State, Zip: La Mesa, CA 91941

IV.

The initial street address of the corporation is: 3691 Via Mercado, Ste. 15, La Mesa, CA 91941. The initial mailing address of the corporation is the same as above.

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IN WITNESS WHEREOF, for the purpose of forming this Corporation under the laws of the State of California, the undersigned, constituting the Incorporator of this Corporation executed these Articles of Incorporation on 1/17/2013.

I hereby declare that I am the person who executed the foregoing articles of incorporation, which execution is my act and deed.



Danny Bachoua, Incorporator