UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: ZELIS REPRICING ANTITRUST LITIGATION This Document Relates To: All Associated Cases	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*

PLAINTIFF DENNIS C. AYER, DDS, LLC'S SUR-REPLY IN FURTHER OPPOSITION TO DEFENDANT AETNA, INC.'S MOTION TO COMPEL ARBITRATION WITH RESPECT TO PLAINTIFF DENNIS C. AYER, DDS, LLC

INTRODUCTION

Aetna's reply, which violates the Court's Order (ECF No. 143) by largely rehashing its prior arguments, mischaracterizes both the nature of Ayer's allegations and the terms of the network agreement. Attempting to shoehorn Ayer's claims into its arbitration clause, Aetna reframes Ayer's antitrust claims as a dispute about seeking additional payment from his patients after Aetna underpays for OON services in the first place. It does so by repeatedly citing Section 4.3.1 of the agreement, which governs bills from Ayer to his patients, not Aetna's payments to Ayer for OON services. Equally misplaced is Aetna's suggestion that Ayer merely failed to "read or understand" the agreement. The issue is not ambiguity, but an absence of mutual assent to arbitrate OON antitrust claims that are wholly outside the network agreement. Aetna's motion should be denied.

ARGUMENT

I. The Parties Did Not Agree to Arbitrate Ayer's OON Antitrust Claims.

Aetna asserts that Ayer ignores "multiple portions of the agreement that govern Aetna's and Dr. Ayer's responsibilities as to out-of-network services[,]" yet notably fails to identify a single such provision. Aetna cites to Section 4.3.1, which Ayer addressed at length in his opposition (Opp. at 5), explaining it has nothing to do with Aetna's payments to Ayer for OON services.[1] Section 4.3.1 concerns balance billing—a practice whereby Ayer may charge his patients for services after receiving Aetna's artificially suppressed payment amounts.[2] Ayer's antitrust claims challenge the suppressed amounts Aetna (and its co-defendants) pay him for OON services—not

[1] Aetna notes (Reply at 1 n.1), that Section 2 of the Primary Dentist Compensation Schedule attached to the agreement and the fee schedule attached to Ayer's opposition contain "similar language" but offers no analysis. Ayer's arguments about Section 4.3.1 apply equally here.

[2] Aetna explicitly interprets this Section as "the process by which Dr. Ayer can seek additional payment for OON services if he was not satisfied with the amount Aetna paid." Reply at 3.

payments he may seek from patients after Aetna has underpaid.[3]

Aetna's only new argument is its attempt to distinguish *Davitashvili v. Grubhub Inc.*, 131 F.4th 109, 119 (2d Cir. 2025), which rests entirely on a mischaracterization of Ayer's allegations. Aetna argues *Davitashvili* is inapposite because it found that the arbitration clause did not encompass plaintiffs' claims as they were based on the use of other platforms rather than Grubhub's own. Reply at 5. On that basis, Aetna asserts that Ayer's claims are within the scope of the agreement because they are about "Aetna's reimbursements for OON claims ***and his alleged unwillingness to charge customers when he was not satisfied with that reimbursement.***" *Id*. (emphasis added). Ignoring for the moment that no OON payments by Aetna were "reimbursements", Ayer's claims against Aetna do not concern balance billing his patients as contemplated in Section 4.3.1; they challenge Aetna's suppressed OON payments to Ayer. Aetna cannot salvage its arbitration clause by rewriting Ayer's complaint.

II. The Parties Did Not Agree to Arbitrate Ayer's OON Antitrust Claims.

Aetna similarly addresses Ayer's arguments about a lack of mutual assent as if he were claiming that the contract is ambiguous. Ayer is not; rather he asserts the contract is clear on its face and does not encompass OON antitrust claims. Aetna equates Ayer's argument that he never agreed to arbitrate his antitrust claims with the fiction he did not read or understand the terms of the agreement.[4] This misstates the facts and law. Mutual assent requires evidence showing that the

[3] Aetna digresses into an irrelevant and incorrect discussion that there can be no injury if Ayer did not attempt to "recoup any alleged underpayment[,]" from patients. Reply at 3-4. This standing argument is refuted in Plaintiffs' briefing on Defendants' joint motion to dismiss.

[4] Aetna's citations to *Albers v. Nelson*, 248 Kan. 575, 579 (1991) and *Andra v. Lean P. Peebler Revocable Tr.*, 2012 WL 4937465, *3 (Kan. App. 2012) are misplaced. *Albers* concerns a party that did not read the contract before signing, which is not at issue here. Similarly, in *Andra*, defendants asserted that the contract was void due to a unilateral mistake about the meaning of a substantive term of the contract for the sale of land.

parties agreed on the same terms and is determined by what a reasonable person would have understood the contract to mean under the circumstances. *Duling v. Mid Am. Credit Union*, 530 P.3d 737, 745 (Kan. App. 2022); *First Nat. Bank of Lawrence v. Methodist Home for the Aged*, 309 P.2d 389, 392 (Kan. 1957). Although Aetna claims that the reasonable person standard does not apply, its own authority confirms that it does. Reply at 5-6 (citing *Jones v. Reliable Sec. Incorporation, Inc*., 29 Kan. App. 2d 617, 627 (2001) ("…to determine whether an insurance contract is ambiguous we must consider, not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean.")).

Aetna further insists that a reasonable person would view Ayer's claims "that he was underpaid by Aetna for OON services ***and was unwilling to recuperate that underpayment by billing members***" (Reply at 6 (emphasis added)), as connected to his network agreement with Aetna. But this argument fails twice over. First, it mistakes the factual basis of Ayer's claims by manufacturing that they concern balance billing practices. Second, Aetna points to no evidence that a reasonable person would understand the IN-network agreement to compel arbitration of OON antitrust disputes. Thus, should the Court reach this issue,[5] it should find that the arbitration clause is unenforceable as a matter of contract formation.

CONCLUSION

Aetna has not met its burden to show that Ayer's claims are within the scope of the agreement. The Court should deny Aetna's motion to compel arbitration.[6]

[5] Aetna has only moved to compel under the FAA, and seeks to compel a dispute that is outside the FAA's scope. That alone is a sufficient basis to deny Aetna's motion.

[6] In its reply, Aetna does not contest that should the Court find that the dispute is arbitrable, any stay should be limited to claims between Ayer and Aetna, excluding any claims for temporary, preliminary, permanent injunctive relief, and equitable relief per the terms of the arbitration clause.

Dated: October 27, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard M. Paul III, attorney for the Plaintiffs, certify that, on October 27, 2025, I caused a copy of the foregoing to be served, via ECF, on all counsel of record.

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