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Case No. 2021-0396-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

K&P HOLDING II, LLC; AHMS HOLDING OF FLORIDA, LLC; and AMERICA'S 1ST CHOICE HOLDINGS OF FLORIDA, LLC,	)	
Plaintiffs,	)	C.A. No. 2021-0396-KSJM
v.	)	**PUBLIC VERSION**
ATH HOLDING COMPANY, LLC,	)	**EFILED ON JULY 2, 2021**
Defendant.	)	

MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT FOR SPECIFIC PERFORMANCE

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June 25, 2021

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MISCELLANEOUS

Defendant ATH Holding Company, LLC ("Anthem") respectfully submits this Motion to Dismiss Plaintiffs K&P Holding II, LLC, AHMS Holding of Florida, LLC, and America's 1st Choice Holdings of Florida, LLC's (collectively, "Plaintiffs" or "Sellers") Verified Complaint for Specific Performance ("Complaint" or "Compl.").

PRELIMINARY STATEMENT

In 2018, Anthem purchased from Plaintiffs three companies, Freedom Health, Inc. ("Freedom"), Optimum Healthcare, Inc. ("Optimum") and Global TPA, LLC (collectively, the "Companies"). Plaintiffs agreed to indemnify Anthem for certain losses, including for third party claims, based on any violation of the Health Care Laws, as they were defined in the Master Purchase Agreement ("MPA" or the "Agreement").[1] The parties placed roughly [redacted] of the purchase price, $153,450,000, in escrow[2] to fund Plaintiffs' indemnity obligations, which otherwise are non-recourse.

Two *qui tam* lawsuits have been filed in the Middle District of Florida against, among others, Freedom and Optimum, alleging violations of the Health Care Laws. The first lawsuit, *United States of America ex. rel. Dr. Clarissa Zafirov v. Florida*

[1] The MPA is attached hereto as Exhibit 1.

[2] The escrow was set up for potential release on two different dates. The first escrow amount was released to Plaintiffs on March 31, 2020. Plaintiffs' Complaint focuses on the Special Escrow Amount, which totals $49.5 million, plus interest.

Medical Associates, LLC, et al., No. 8:19-cv-01236-SDM-SPF (M.D. Fla.) (the "*Zafirov* Action"), alleges that Freedom and Optimum "brazenly and knowingly" violated the False Claims Act (the "FCA") by "knowingly" submitting to CMS "hundreds of thousands of false and unsubstantiated diagnosis codes, in order to fraudulently obtain higher capitation rates than they were entitled to receive." The second lawsuit, *United States of America ex rel. Keith Fernandez v. Freedom Health, Inc., et al.*, No. 8:18-cv-01959-MSS-JSS (M.D. Fla.) (the "*Fernandez* Action" and together with the *Zafirov* Action, the "*Qui Tam* Actions"), alleges that Freedom and Optimum made "millions of dollars of improper risk adjustment payments from Medicare" and received "risk adjustment payments for thousands of patients by submitting false diagnoses to Medicare."[3] The Complaint here does not dispute that the *Qui Tam* Actions are covered by Plaintiffs' indemnification obligations in the Agreement.

The Agreement allows Anthem to estimate the amount of third party claims. Here, the *Qui Tam* Actions each allege several hundreds of millions of dollars in damages, and together allege up to more than $1 billion in damages. Anthem relied on those third party demands in reasonably estimating that they were for amounts in

[3] As discussed *infra* at n.15, the *Fernandez* Action was dismissed without prejudice on May 26, 2021 and the plaintiff relator was given until July 14, 2021 to re-file an amended complaint. This brief will refer to both *Qui Tam* Actions given Fernandez's apparent intent to replead.

excess of the $14.85 million self-retention and the $49.5 million escrow. Anthem is unable to further assess the amount of the third party demands for damages because the third parties have not yet identified the specific claims on which they sue. Because Anthem accurately described the third party demands and the damages sought by the relators in those actions, Plaintiffs cannot state a claim for breach of the Agreement.

Plaintiffs do not dispute that the amount of damages claimed by the *qui tam* plaintiffs greatly exceed the escrow amount here at issue. And Plaintiffs have no information to dispute the third party demands. Instead, Plaintiffs offer rank speculation that the *Qui Tam* Actions will settle for less than the deductible, which is 1-2% of the demands. The Agreement provides for Anthem to reasonably estimate the third party demands, not for Plaintiffs to speculate about non-existent settlements. Moreover, Plaintiffs concede that the parties in one of the *Qui Tam* Actions have advised the court that settlement is "unlikely."

Additionally, Plaintiffs do not allege any facts to support their speculation of a settlement at 1-2% of the high-end of the demands. Plaintiff simply alleges that five of seven totally unrelated cases were settled for less than the deductible here—but that two were settled for amounts that greatly exceeded it. Under the unambiguous terms of the Agreement, Anthem is to estimate the third party "demand," here the *Qui Tam* Actions, not the settlements of unrelated cases against

different parties for different claims with different losses. Indeed, the cases that Plaintiffs cite which were settled for less than the deductible here alleged damages that were a small fraction of those alleged in the *Qui Tam* Actions, and settled for up to 53% of the demands made in those actions.

The relief that Plaintiffs seek here violates the bargain the parties' struck in the Agreement. The parties used a commonplace deal structure to allocate the risk of third-party loss arising from pre-closing conduct to the Plaintiffs, capped by the amount in the escrow. Specifically, Anthem received the security of readily available funds to satisfy Plaintiffs' indemnity obligations, which are to be held upon a notice of loss until the actual loss, if any, is determined. Plaintiffs received the benefit of an otherwise non-recourse obligation, and cannot now obtain a release of the very monies set aside to fund Plaintiffs' indemnity obligations before the third party losses, if any, are determined, so that Plaintiffs can then rely on the non-recourse feature of the arrangement to completely evade their obligations.

Lastly, Plaintiffs characterize Anthem as a wrongdoer for seeking indemnification (for claims covered by Plaintiffs' indemnification obligations), claiming that "Anthem intentionally makes unreasonably large holdbacks to create settlement leverage" (Compl. ¶ 59), but it is third parties that have determined their loss demand, not Anthem. And, contrary to Plaintiffs' allegation about "settlement leverage," Plaintiffs do not, and cannot, allege that Anthem has ever proposed to

keep any of the escrow for any purpose other than indemnity for Losses arising from these third party demands. Indeed, Anthem does not stand to gain a single dollar in connection with this indemnity claim. The escrow will be used to satisfy Losses from the *Qui Tam* Actions, if any, or will be released to Plaintiffs with interest. In the interim, it will remain in an interest-bearing account for the benefit of whichever of those parties have received all or a portion of the escrow. This case should be dismissed for failure to state a claim.

Alternatively, this case should be stayed pending resolution of the *Qui Tam* Actions. The amount of the third party loss can be determined only through a resolution of the *Qui Tam* Actions in Florida. Plaintiffs can neither defend liability nor impact the amount of the losses in the *Qui Tam* Actions, so litigating this case would be pure waste. Courts routinely stay indemnity claims pending resolution of the underlying lawsuits.

STATEMENT OF FACTS

A. Anthem Acquires The Companies, Which Had Recently Settled A *Qui Tam* Action

In 2017, Anthem sought to acquire the Companies as part of its initiative to expand its Medicare Advantage portfolio. While Plaintiffs' complaint represents the Companies' operations as unassailable (Compl. ¶ 25), in truth, when Anthem entered into discussions with the Sellers to explore an acquisition of Companies, the

Companies had, only weeks earlier, resolved a *qui tam* action that was brought in 2009 (the "*Sewell* Action"). Ex. 4.[4]

At the center of the allegations in the *Sewell* complaint was Dr. Kiran Patel, the majority interest owner and a Seller of the Companies. The *Sewell* complaint alleged that, after acquiring the Companies in 2007, Dr. Patel aggressively expanded the Companies' membership and revenue in order to "flip" the Companies for a profit; however, that aggressive expansion to "extract[] as much revenue as they could from Freedom and Optimum" created a focus on "short-term profitability instead of improving long-term health outcomes for their members." Ex. 4, ¶¶ 100, 102-06.

The *Sewell* complaint alleged fraudulent conduct and violations of the False Claims Act by both Freedom and Optimum. Ex. 4, ¶¶ 1, 383-89.[5] In particular, the

[4] While Plaintiffs attached no documents in support of their Complaint, the exhibits attached to this brief were incorporated by reference in Plaintiffs' Complaint. With respect to exhibits 7, 10, 11, 12, the Court may take judicial notice of what was said in these exhibits, even if the court may not take judicial notice to establish the truth of those contents. *See Indem. Ins. Corp. v. Cohen*, 2018 WL 487246, at *1 (Del. Ch. Jan. 18, 2018) ("[T]he Court may take judicial notice to discern when a document was created, what was said therein, or what notice was provided thereby").

[5] While Plaintiffs' complaint represents that the Relator in the *Sewell* Action was "planning revenge" and "throwing the kitchen sink" at Freedom, they also admit that the *Sewell* Actions resulted in $31,695,593 in total settlement value against the Companies. (Compl. ¶¶ 27, 30)

Sewell complaint targeted Freedom and Optimum's alleged fraudulent over-reporting practices:

> Freedom and Optimum ***knowingly submit incorrect and unsubstantiated risk adjustment data to CMS in order to fraudulently increase their capitation payments***. Freedom's and Optimum's fraudulent practices include, without limitation: (a) using internal coding auditors to submit false risk adjustment data to CMS; (b) submitting risk adjustment data to CMS without checking their validity and by ***knowingly using an automated submission processing system that is incapable of filtering out invalid data*** . . .; (c) conducting an internal audit that identified a significant percentage of risk adjustment data that did not qualify for CMS payment, without refunding the overpayments or alerting CMS to the audit results; (d) ***in the ordinary course of business, failing to correct or notify CMS about risk adjustment data they determine to have been incorrect and improperly submitted***; and (e) causing physicians to perform medically unnecessary and unreasonable procedures in order to increase risk scores.

Ex. 4, ¶ 9 (emphasis added). As Plaintiffs correctly note, after years of investigation, the DOJ was continuing to pursue two claims against the Companies, one being that "the Companies had used unsupported patient data to obtain favorable Medicare risk-adjustment (MRA) payments." (Compl. ¶ 29)

On May 12, 2017, mere days before Anthem and the Sellers started discussions regarding an acquisition, the Companies and other defendants settled the *Sewell* Action, the total value of which was $31,695,593 to the United States, plus an additional $78,414 to the State of Florida. Ex. 5, p. 4 (the "Settlement Agreement"); Compl. ¶ 30; *see also* MPA § 4.1. The Settlement Agreement resolved

the government's claims that the Companies "submitted unsupported diagnostic data and diagnosis codes to CMS in connection with Medicare Advantage contracts . . . which resulted in inflated payments from CMS during the relevant time period [January 2008 through December 2013], as alleged in the risk adjustment allegations contained in paragraphs 108 through 185 of the Second Amended Complaint." Ex. 5, ¶ D(1) (the "Covered Conduct").

The release covered only the time period from January 2008 through December 2013. *Id.* A number of other claims also were carved out from the Settlement Agreement:

> Notwithstanding the releases given in paragraphs 3 and 7 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:
>
> a. Any liability arising under Title 26 U.S. Code (Internal Revenue Code);
>
> b. Any criminal liability;
>
> c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion from Federal health care programs;
>
> d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
>
> e. Any liability based upon obligations created by this Agreement; [and]
>
> f. Except as explicitly stated in this Agreement, any liability of individuals.

Ex. 5, ¶ 8(a)-(f); *see also id.*, ¶ 3.

The Companies also entered into a five-year Corporate Integrity Agreement that the Companies needed to comply with until May 2022. Ex. 6, Corporate Integrity Agreement.

B. The Indemnity Agreement

1. The Parties Agreed To A Non-Recourse Escrow Structure

Anthem negotiated for an escrow amounting to approximately [redacted] of the purchase price to fund the Sellers' indemnity obligations, including for claims arising out of conduct that would breach the Sellers' representations. The Agreement provided that the Escrow Amount would be the "sole source" of indemnification against the Sellers:

> (i) the Buyer Indemnified Parties' sole source of indemnification payments under this Agreement shall be claims made against the then current balance of the Escrow Amount in accordance with the terms of this Agreement and the Escrow Agreement and (ii) all of the indemnification obligations of the Sellers under this Agreement shall cease, without any further action, when the balance of the Escrow Amount is zero or the Escrow Agreement otherwise terminates.

MPA § 8.7(a).

Upon closing, on February 15, 2018, Anthem deposited $153,450,000 of the purchase price into an escrow account (the "Escrow Amount"). MPA § 2.2(c). The Escrow Amount was made up of three components—the "Adjustment Escrow Amount" ($4,950,000), the "Indemnity Escrow Amount" ($99,000,000) and the "Special Escrow Amount" ($49,500,000). The Special Escrow Amount is the

escrow at issue here, and it was available for claims noticed within thirty-six months from the closing date. MPA §§ 2.5(c), 8.1.

2. The Parties Agreed To Indemnification For Alleged Breaches Of Health Care Representations And Warranties

Plaintiffs agreed to industry-standard representations and warranties that pertained to various health care matters, which were contained in Section 3.1(l) of the MPA. MPA § 3.1(l). As relevant here, the Sellers represented to Buyer that:

- "Each Company (a) is in compliance in all material respects with all such Contracts [with CMS, AHCA or any other Governmental Entity] to which it is a party and (b) is not in material breach or in material default of any such Contracts to which it is a party. Each applicable Company (x) is in compliance in all material respects with the Subscriber Agreements and (y) is not in breach or in default in any material respect of any of the Subscriber Agreements[.]" MPA § 3.1(l)(ii).
- "Other than as set forth in the Audit Reports or in Section 3.1(l) of the Disclosure Schedule, during the three (3) year period preceding the date of this Agreement, (a) no material deficiencies have been asserted in writing against any Company by any such Governmental Entity with respect to the Regulatory Filings or Audit Reports***, (b) the Regulatory filings were in compliance in all material respects with applicable Law when filed*** . . . ." MPA § 3.1(l)(v) (emphasis added).
- "Each of the Companies is in material compliance with all applicable Health Care Laws." MPA § 3.1(l)(vi).
- "None of the Companies and, to the knowledge of the Sellers, no director or officer of any of the Companies, has engaged in any activities that are prohibited under . . . the Federal False Claims Act . . . ." MPA § 3.1(l)(vii).
- "***All bids, premium rates, rating plans, policy terms, Contracts, and other documents established and used by the Companies that are required to be filed with and/or approved by Governmental Entities have been in all material respects so filed and/or approved***, ***the***

> ***premiums or rates . . . charged conform in all material respects to the premiums so filed and/or approved and comply in all material respects with the Laws applicable thereto,*** and to the knowledge of the Sellers, no such premiums or other payments are the subject of any pending investigation by any Governmental Entity." MPA § 3.1(l)(ix) (emphasis added).

The Sellers agreed that they would jointly and severally indemnify Buyer from and against "all Losses suffered, incurred or paid, directly or indirectly, by any Buyer Indemnified Party as a result of or arising out of (i) any breach of any of the representations and warranties of the Sellers set forth in Section 3.1 . . . and (ii) any breach of any covenant or agreement of the Sellers set forth in [the MPA]." MPA § 8.2(a). Anthem is entitled to make such a claim within thirty-six months of the closing date. MPA § 8.1 ("Buyer shall continue to have a right to pursue a claim under Section 8.2 [Indemnification by the Sellers] if Buyer, prior to the expiration of the applicable Survival Period, delivers a notice that constitutes an Indemnification Notice[.]"). Anthem's losses are subject to a $14,850,000 deductible.[6] MPA §8.4(b) ("the Sellers shall not have any liability for Losses under…Section 8.2(a)…unless and until the aggregate of all such Losses for which

[6] Plaintiffs spend a portion of their Complaint discussing other indemnification claims that Anthem has made previously against these Sellers, and others, of which the Court is already aware. (Compl. ¶¶ 54-59) The escrow amounts relating to Anthem's CID claim have been released and are not relevant here, where Anthem has an extant claim against the Sellers arising from the *Qui Tam* Action in which Freedom and Optimum are named defendants.

the Sellers would otherwise be required to provide indemnification exceeds on a cumulative basis an amount equal to $14,850,000 (the "Deductible")").

3. The Notice Provision

The MPA outlines the procedure for bringing a third party or direct indemnification claim. *See* MPA §§ 8.5, 8.6. If a party discovers facts that could give rise to a "Loss" within the meaning of the MPA, then that party shall provide a written Indemnification Notice to the indemnifying party:

> Following the discovery of any facts or conditions that could be reasonably expected to give rise to [an indemnifiable loss], the Party seeking indemnification . . . shall, within thirty (30) days thereafter, provide written notice . . . setting forth the specific facts and circumstances, in *reasonable* detail, for the bases of the claim of indemnification, the amount of the Loss or Losses to which the Indemnified Party is entitled to indemnification . . . (or a non-binding, ***reasonable estimate thereof if the actual amount is not capable of reasonable calculation***) and the specific Section(s) of this Agreement upon which the Indemnified Party is relying in seeking such indemnification (an "Indemnification Notice") . . .

MPA § 8.5 (emphasis added). Section 8.6 adopts the same notice procedures when the loss is based on third party claims. S*ee* MPA § 8.6(a).

"Loss" is broadly defined in the MPA and includes lawsuits:

> "Loss" shall mean (a) all debts, liabilities Taxes and obligations owed to or at the behest of any other Person, (b) all losses, damages, judgments, awards, penalties, fines and settlements, (c) ***all demands, claims, suits, actions, causes of action, proceedings*** and assessments and (d) all reasonable out-of-pocket costs and expenses (including interest, court costs and reasonable fees and expenses of attorneys and expert witnesses) incurred in connection with investigating, defending or asserting any of the foregoing.

MPA § 11.15 (emphasis added).

C. The *Zafirov* Complaint Is Unsealed, Alleges Violations Of The False Claims Act, And Names Freedom And Optimum As Defendants

On June 25, 2020 the complaint in the *Zafirov* Action was unsealed. Zafirov sued Freedom and Optimum as part of the "MA Defendants."[7] The *Zafirov* complaint alleges violations of the False Claims Act that took place "for at least the preceding ten years from the date of the filing of this Complaint," *i.e.*, May 20, 2019. Ex. 2, ¶ 2.[8]

- "Defendants violated the FCA as described herein, resulting in the submission of ***thousands of erroneous, invalid, phony, unsupported or otherwise false*** risk-adjusting diagnosis codes to CMS for ***tens of thousands*** of Medicare Advantage beneficiaries. These false claims inflated CMS's reimbursements by ***hundreds of millions of dollars***." Ex. 2, ¶ 45 (emphasis added)
- "Despite Freedom/Optimum['s]…previous lawsuit and settlement, the Defendants violated the FCA *again* – brazenly and knowingly – resulting in the submission of false and unsubstantiated risk adjustment data to CMS in

[7] Zafirov also named Anthem, Inc., as the other MA Defendant, but later stated in her opposition to the MA Defendants' motion to dismiss that she did not intend to pursue allegations against Anthem, Inc. Ex. 13, at p.45 n.1. The opposition to the MA Defendants' motion to dismiss was attached to Anthem's February 11, 2021 letter which was referred to in the Complaint at ¶ 78.

[8] Anthem, Freedom, and Optimum argued in their motion to dismiss the *Zafirov* Action that Zafirov's allegations partially overlap with the time period that the Settlement Agreement in the *Sewell* Action was intended to cover (January 2008-December 2013). Relator acknowledged in its opposition to Freedom and Optimum's motion to dismiss that it will not pursue pre-2014 claims against Freedom and Optimum, even though Relator maintained they were not time-barred. Ex. 13, at 65.

order to ***unlawfully increase*** their capitation payments. Defendants' unlawful practices include, without limitation:

- "(a) using coders to submit and cause physicians to submit false diagnoses, ultimately resulting in the submission of ***false risk adjustment data to CMS***;
- "(b) ***misleading and inducing physicians to code improperly, resulting in phony diagnoses*** assigned and recorded in the medical records of ***thousands of patients***;
- "(c) incentivizing physicians to ***report and record phony diagnosis codes***;
- "(d) knowingly using an automated submission processing system that was incapable of filtering out invalid data;
- "(e) knowingly causing physicians to perform ***medically unnecessary and unreasonable procedures*** in order to increase risk scores; and
- "(f) knowingly failing to have any meaningful compliance program and failing to abide by its commitments pursuant to the Corporate Integrity Agreement entered into…in or about May, 2017." Ex. 2, ¶ 47) (emphases added)

- "Through each of these fraudulent schemes, practices and machinations, the MA Defendants [*i.e.*, Freedom and Optimum] have ***knowingly submitted to CMS hundreds of thousands of false and unsubstantiated diagnosis codes, in order to fraudulently obtain higher capitation rates than they were entitled to receive***." Ex. 2, ¶ 48 (emphasis added)

The *Zafirov* complaint detailed certain alleged examples of fraudulent coding: (1) an 83 year-old patient who participated in Freedom's Part C program since 2009 was diagnosed in 2017 with Anencephaly, "a serious birth defect in which a baby is born without parts of the brain and skull"; (2) a Freedom patient was diagnosed from 2015-2017 as having Chronic Lymphocytic Leukemia, a type of bone marrow cancer, despite never being referred to a hematologist or oncologist; and (3) Freedom

submitted claims and other documentation to CMS for certain diagnoses that were unsupported by the patient's medical records, such as a diagnosis of opioid dependence when the patient had only used opioids post-operatively as prescribed. Ex. 2, ¶¶ 72-74. The Zafirov complaint also alleged that these phony patient diagnoses caused substantial patient harm, including in having difficulty procuring new health insurance or making health decisions following false diagnoses. Ex. 2, ¶¶ 94-96.

The *Zafirov* complaint alleged that the "false claims inflated CMS's reimbursements by hundreds of millions of dollars." Ex. 2, ¶ 45. Moreover, the Zafirov complaint alleged additional damages "of treble damages plus a civil penalty for each false claim in an amount…not less than $5,500 and not more than $11,000 for claims submitted prior to August 1, 2016; not less than $10,781 and not more than $21,563 for claims submitted between August 1, 2016 and February 3, 2017, and as appropriately statutorily adjusted for inflation each successive year under the Bipartisan Budget Act of 2015." Ex. 2, ¶ 26.

Additionally, the Relator in the *Zafirov* Action filed a Rule 26 initial disclosure stating: "Relator is not able to accurately compute damages at this time because Relator does not yet have access to all of the data relating to the false claims that Defendants caused to be submitted to federal healthcare programs, but estimates the damages to the United States exceeds hundreds of millions of dollars related to

tens of thousands of false claims. Relator will seek treble the value and civil penalties for each false claims submitted." Ex. 7, at 6.

D. Anthem Asserts An Indemnity Claim Arising From the *Zafirov* Action

On July 13, 2020, Anthem sent a notice of an indemnity claim regarding the *Zafirov* Action (the "July Notice"). Ex. 8. The July Notice contained five pages of detail outlining the allegations against Freedom and Optimum, and attached the complaint, which contained all the details of the Third Party Claim. Ex. 8, at p. 1; Ex. 2 The July Notice also explained how "[i]f substantiated the allegations in the *Zafirov* Complaint could be reasonably expected to give rise to Losses for which indemnification can be obtained" and that the allegations "constitute breaches of the Health Care Representations by the Sellers under Section 3.1(l) of the purchase Agreement." Ex. 8, at p. 3-4 (citing MPA §§ 3.1(l)(ii), (v)-(vii), (ix), 8.2, 8.5))

Anthem further explained that because the *Zafirov* Action is a Third Party Claim, the amount of Losses is "currently unknown, and will not be known until the Claim is resolved"; however, the July Notice cited the *Zafirov* complaint's own allegations that the "false claims inflated CMS's reimbursements by hundreds of millions of dollars" plus treble damages, civil penalties and legal fees. Ex. 8, at p. 4. Given the "hundreds of millions of dollars" of damages alleged in the complaint—plus alleged statutorily set treble damages and civil penalties under the

False Claims Act and legal fees—Anthem estimated that Losses associated with this claim "may exhaust both the deductible ($14,850,000) and the Special Escrow Amount ($49,500,000)." *Id.* Anthem informed the Sellers that it would provide them with an updated estimate of Losses as more information became available. *Id.* Anthem sent its July Notice to the distribution list for notices under Section 11.9 of the MPA.[9]

E. Two More *Qui Tam* Complaints Are Unsealed,[10] And Freedom And Optimum Are Again Named Defendants

On September 22, 2020, the complaint in the *Fernandez* Action was unsealed. The *Fernandez* Action is brought under the False Claims Act and alleges that

[9] Plaintiffs' allegation that the United States has not intervened in the Qui Tam Actions is irrelevant. (Compl. ¶¶ 2, 8) There is no requirement for the United States to intervene in the cases, which are being prosecuted by the Relators' chosen counsel. Indeed, most qui tam cases are prosecuted without the government intervening. *See* "False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits," U.S. DOJ (June 13, 2012), https://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf ("Fewer than 25% of filed qui tam actions result in an intervention on any count by the Department of Justice.").

[10] A third *qui tam* complaint was unsealed on September 29, 2020, *United States of America ex rel. George Mansour, M.D. v. Freedom Health, Inc. et al.*, No. 8:19-cv-02977-CEH-JSS (the "*Mansour* Action"). Anthem initially asserted an indemnity claim arising from the *Mansour* Action in November 2020 at the same time as it asserted a claim arising from the *Fernandez* Action. On January 11, 2021, Relator Mansour filed a notice of voluntary dismissal without prejudice and the United States consented to that dismissal. Anthem informed the Sellers that, as a result of that dismissal, it was not pursuing an indemnity claim related to the *Mansour* Action in its February 11, 2021 letter to the Sellers. Ex. 13, at p. 12 *See infra* at p. 21.

Freedom and Optimum "have violated the FCA by systematically submitting false risk adjustment data to Medicare in order to receive enhanced payment[s] from the government" and "have defrauded CMS by knowingly submitting incorrect and/or unsubstantiated risk adjustment data to CMS." Ex. 3, ¶¶ 3, 17. The allegations are, once again, serious and substantial:

- "Defendants received ***millions of dollars of improper risk adjustment payments from Medicare***. Medicare pays an increased capitation payment each month for patients with certain diagnoses. Defendants have received risk adjustment payments for ***thousands of patients***, by submitting false diagnoses to Medicare." Ex. 3, ¶ 33 (emphasis added).

- "Freedom and Optimum made reverse false claims in violation of § 3729(a)(1)(G) by ***falsely certifying compliance*** with its [Corporate Integrity Agreement's] reporting requirements in order to avoid their obligation to pay stipulated penalties under the [Corporate Integrity Agreement]." Ex. 3, ¶ 42 (emphasis added)

- The Defendant Optimum ***knowingly made, used or caused to be made or used false records or false statements*** – i.e., the false certifications made or caused to be made by it – ***material to an obligation to pay or transmit money to the Government*** or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government." Ex. 3, ¶ 44 (emphasis added).

The *Fernandez* complaint did not allege a specific damages number, but alleged "millions of dollars of improper risk adjustment payments" from CMS. Ex. 3, ¶ 33. The complaint also requested that "the Court enter judgment against the Defendants in an amount equal to three times the amount of damages the United States Government has sustained because of Defendants' actions, plus a civil penalty

of $11,000 for each action in violation of 31 U.S.C. § 3729, and the costs of this action[.]" Ex. 3, Prayer for Relief ¶ A.

On March 18, 2021, Relator in the *Fernandez* Action filed a Rule 26 disclosure. Relator noted that "[d]iscovery has not yet begun so this computation of damages is preliminary and at this point based upon estimates," but the disclosure estimated Relator's total fraud proceeds as [redacted] That estimate did not account for potential trebling or statutory penalties. Ex. 10, at p.4.

F. Anthem Asserts An Indemnity Claim Arising From *Fernandez* Action

On November 3, 2020, Anthem sent the Sellers a notice of an indemnity claim with respect to the *Fernandez* Action (the "November Notice"). Ex. 9. The seven-page November Notice described the allegations in the complaint, and explained how the allegations "could be reasonably expected to give rise to Losses for which indemnification can be obtained" and constitute breaches of the Health Care Representations under Section 3.1(l)(ii), (v)-(vii), (ix). Ex. 9, at p. 2-3, 5). Anthem also attached the complaint, which contains all of the details of that third party claim. Ex. 9, at p. 1; Ex. 3.

The *Fernandez* complaint did not identify a specific damages number, but as Anthem explained, the complaint alleged that "Defendants received millions of dollars of improper risk adjustment payments from Medicare" and that "Defendants

have received risk adjustment payments for thousands of patients, but submitting false diagnoses to Medicare." Ex. 9, at p. 6. Moreover, Fernandez's prayer for relief sought "judgment against Defendants in an amount equal to three times the amount of damages…plus a civil penalty of $11,000 for each action in violation of" the False Claims Act and "the costs of this action." Anthem went on to explain in its November Notice that "multiplying the civil penalty Relator alleges ($11,000) by 2,000, a conservative estimate of the 'thousands of patients' for whom Freedom had [allegedly] submitted false diagnoses to Medicare, would be well over $20,000,000. And that just accounts for the civil penalty, it does not factor in the treble damages that could be owed to the United States Government." *Id.* at p. 6. Therefore, coupled with the indemnity claim relating to the *Zafirov* Action, Anthem informed the Sellers that it "reasonably estimates that, between legal fees and potential damages (which could include treble damages and civil penalties), the Losses associated with these breaches of the Health Care Representations may exhaust" the deductible and the Special Escrow Amount. *Id.*

As with the July Notice, Anthem informed the Sellers that it would provide them with an updated estimate of Losses as more information became available. Anthem sent its notice to the distribution list outlined for notices in Section 11.9 of the MPA.

G. Anthem Informs The Sellers In February 2021 That It Will Not Be Releasing The Special Escrow Amount, Given The Extant Indemnity Claims

Counsel for Freedom and Optimum has vigorously defended the Companies in the *Qui Tam* Actions. Freedom and Optimum filed motions to dismiss in both matters, and motions to stay discovery while the motions were pending. *See generally* Ex. 13, at p. 15-41, 80-92, 93-119; Ex. 12.[11] The *qui tam* Relators in both actions opposed those motions. *See generally* Ex. 13, at p. 42-67, Ex. 11. None of the motions were to be resolved by February 15, 2021, the thirty-sixth month anniversary of the Closing Date.

Anthem wrote to the Sellers on February 11, 2021 (the "February Letter") (1) informing the Sellers that Anthem was no longer pursuing an indemnity claim arising out of the *Mansour* Action because it had been dismissed in January 2021; (2) informing the Sellers that Anthem still had extant indemnity claims in the *Qui Tam* Actions in which damages were asserted well into the hundreds of millions of dollars and, therefore, Anthem would not release any of the Special Escrow Amount—its only recourse for breaches of the Health Care Representations and

[11] In the *Zafirov* Action, Anthem, Inc. also joined in the motion to dismiss as it was a named defendant in that action, *see* Ex. 2, ¶ 8, but for the sake of simplicity, this Brief refers only to Freedom and Optimum, particularly given that the Relator in the *Zafirov* Action has informed the court that it is no longer pursuing claims against Anthem, Inc. Ex. 13, at p. 45 n.1.

Warranties; and (3) responding to a letter the Sellers' counsel had sent in September 2020 requesting further information about the *Zafirov* Action. Ex. 13, at p. 1-10.

The February Letter contained nine pages of detailed information about the *Qui Tam* Actions, as well as 118 pages of attachments which contained: (1) the Notice of Voluntary Dismissal in the *Mansour* Action; (2) Freedom and Optimum's Motion to Dismiss filed in the *Zafirov* Action; (3) the Relator's opposition to the motion to dismiss in the *Zafirov* Action; (4) Freedom and Optimum's reply in further support of their motion to dismiss in the *Zafirov* Action; (5) Freedom and Optimum's motion to stay discovery in the *Zafirov* Action; (6) Freedom and Optimum's motion to dismiss in the *Fernandez* Action; and (7) a draft joint defense agreement, which Anthem was willing to enter into to if the Sellers wanted to consult with respect to the third party actions.[12] *See generally* Ex. 13, at p. 11-129.

In the February Letter, Anthem again explained the rationale for its loss estimate using the allegations in the *Zafirov* and *Fernandez* complaints as benchmarks for the demands:

> The *Zafirov* complaint alleges that the "false claims inflated CMS's reimbursements by *hundreds of millions of dollars*." *Zafirov* Complaint ¶ 45 (emphasis added). Moreover, Relator in the *Zafirov* action filed a Rule 26 initial disclosure stating that "Relator is not able to accurately compute damages at this time because Relator does not yet have access to all of the data relating to the false claims that Defendants caused to be submitted to federal healthcare programs, *but estimates the damages to the United*

[12] The Sellers have not executed the joint defense agreement.

States exceeds hundreds of millions of dollars related to tens of thousands of false claims. Relator will seek treble the value and civil penalties for each false claim submitted." (emphasis added).

Additionally, through December 2020, defense counsel has incurred approximately [redacted] in fees and costs for the *Zafirov* litigation, excluding certain third-party vendor costs for purposes of the estimation. These amounts do not include fees or costs for discovery (which would likely include a privileged data consultant and eDiscovery counsel) or trial. If this matter is not dismissed, Anthem expects significant additional legal fees and costs.

The *Fernandez* complaint alleges, "Defendants have received millions of dollars of improper risk adjustment payments from Medicare." *Fernandez* Compl. ¶ 33. It further alleges, "Defendants have received risk adjustment payments for thousands of patients, by submitting false diagnoses to Medicare." *Id.* The *Fernandez* complaint also alleges that the False Claims Act provides for $5,500 to $11,000 per false claim as well as "3 times the amount of damages which the Government sustains." Although the *Fernandez* Relator has not yet filed a Rule 26 initial disclosure, it is likely to provide for similar damages as in *Zafirov*.

Additionally, through December 2020, defense counsel has incurred approximately [redacted] in fees and costs for the *Fernandez* litigation. Anthem expects this amount to increase in the future, and if the case moves into discovery or goes to trial these legal fees and costs are likely to be significant.

Ex. 13, p. 2-3.

Additionally, in response to some of the questions asked by Plaintiffs in their September 2020 letter, Anthem further outlined its methodology underlying its estimate of losses in the *Zafirov* Action, as it had done in its November Notice regarding the *Fernandez* Action:

> The *Zafirov* complaint also states how the FCA "imposes liability of treble damages plus a civil penalty for each false claim in an amount (as pertinent here) not less than $5,500 and not more than $11,000 for claims submitted prior to August 1, 2016; not less than $10,781 and not more than $21,563 for claims submitted between August 1, 2016 and February 3, 2017, and as appropriately statutorily adjusted for inflation each successive year…" [*Zafirov* Complaint] ¶ 26. Taking a conservative example of multiplying Relator's lowest civil penalties amount ($5,500) by 20,000, a conservative estimate of the "thousands" of erroneous, phony and unsupported codes for "tens of thousands" of Medicare Advantage beneficiaries, the civil penalties are $110 million. That does not even account for the trebled damages.

Ex. *Id.* at p. 6.[13] Again, Anthem sent this letter to the distribution list pursuant to Section 11.9 of the MPA.

H. The Sellers File This Lawsuit For Immediate Release Of The Escrow, While Anthem Has Properly-Noticed, Extant Indemnity Claims

Although Plaintiffs concede that Anthem's indemnification claims are covered under the MPA (*see* Compl. ¶ 37), on May 7, 2021 the Sellers filed a complaint for specific performance in which they requested that this Court order Anthem to enter into a joint instruction directing the escrow agent to release the

[13] In their Complaint, Plaintiffs mischaracterize Anthem's loss estimate in the February Letter, claiming that Anthem has since asserted that a "conservative estimate of exposure [in the *Zafirov* Action] is $110 million." (Compl. ¶ 11) The use of that number in the February Letter, as shown above, was to simply show that, based on the allegations in the *Zafirov* Action in which Relator asserted "thousands" of false codes for "tens of thousands of Medicare Advantage beneficiaries" then accounting for trebling of damages and civil penalties, the Losses alleged by Zafirov were well in excess of the deductible and escrow amounts.

Special Escrow Amount to the Sellers and to enter a declaratory judgment that the Sellers are entitled to the Special Escrow Amount. Plaintiffs did so despite the fact that (1) Anthem has two extant indemnity claims arising out of *Qui Tam* Actions in which Freedom and Optimum are named defendants in which the Relators are each alleging hundreds of millions of dollars in damages, and (2) the Special Escrow Amount, Anthem's only recourse for any breaches resulting from the *Qui Tam* Actions, remains in an interest bearing account.[14]

ARGUMENT

The standard for a motion to dismiss under Rule 12(b)(6) is well settled: "the court must assume the truthfulness of all well-pled allegations in the complaint and view those facts, and all reasonable inferences drawn from them, in a light most

[14] On May 26, 2021, the Court granted defendants' motions to dismiss Relator's complaint in the *Fernandez* Action without prejudice. The court in the *Fernandez* Action granted Relator leave to amend his complaint, finding that "there is no indication that amendment would be futile" and allowed Relator to try to remedy his "fail[ure] to provide particularized allegations demonstrating the [d]efendants submitted false claims to the government." *United States of America ex. rel. Keith Fernandez v. Freedom Health, Inc. et al.*, No. 8:18-cv-01959-MSS-JSS (M.D. Fla. May 26, 2021) [Dkt. 89] The court gave Relator twenty-one days to file an amended complaint. Anthem informed the Plaintiffs of this on May 28, 2021, attaching the Court's order.

On June 17, 2021, Relator requested, and the court granted, an extension to file an amended complaint. Relator must now file an amended complaint by July 14, 2021. *United States of America ex. rel. Keith Fernandez v. Freedom Health, Inc. et al.*, No. 8:18-cv-01959-MSS-JSS (M.D. Fla. May 26, 2021) [Dkt. 91]. Anthem informed Plaintiffs of this extension on June 18, 2021. Plaintiffs have not responded to either of these notifications.

favorable to the plaintiff." *Preston Hollow Capital LLC v. Nuveen LLC*, 216 A.3d 1, 9 (Del. Ch. 2019). While "[a]ll facts alleged in the pleadings and inferences that can reasonably be drawn from them are accepted as true," the court "need not accept…inferences or conclusions of fact unsupported by allegations of specific facts." *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *4 (Del. Ch. Nov. 30, 2007). The Court is not required to accept conclusory allegations as true, nor must it "accept every strained interpretation of the allegations proposed by the plaintiff." *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 2006 WL 2588971, at *7 (Del. Ch. Sept. 1, 2006).

I.

THE COMPLAINT SHOULD BE DISMISSED FOR FAILING TO STATE A CLAIM

A. The *Qui Tam* Actions Allege Claims That Are Covered By Plaintiffs' Indemnity Obligations

The Agreement is unambiguous that the Sellers "shall jointly and severally indemnify and hold harmless Buyer and its Affiliates (including the Companies)…from and against all Losses suffered, incurred or paid, directly or indirectly, by any Buyer Indemnified Party as a result of (i) any breach of any of the representations and warranties of the Sellers set for in Section 3.1." MPA § 8.2(a).

The allegations made by the *qui tam* Relators in the *Zafirov* Action and the *Fernandez* Action state breaches of the Health Care Representations and Warranties

in the MPA. *See, e.g.*, MPA § 3.1(l)(vi)-(vii) (representing and warranting that "[e]ach of the Companies is in material compliance with all applicable Health Care Laws" and "[n]one of the Companies…has engaged in any activities that are prohibited under…the Federal False Claims Act"). The Complaint does not dispute this fact. The Complaint also does not dispute that Anthem's notices adequately described the third party claims.

B. Plaintiffs Cannot State A Claim Based On Anthem's Estimation Of The Third Party Demands Because Anthem Has Described The Third Party Demands In Detail, And Has No Other Information About The Alleged Losses

Anthem's notices also identified the potential amount of the "Loss." "Losses include "damages, judgments, awards… settlements … ***demands***, claims, ***suits***, actions, causes of action, [and] proceedings." MPA § 11.19 (emphasis added); *see ESG Holdings, LLC v. Lear Corp.*, 2017 WL 3485816, at *3 (D. Del. Aug. 14, 2017) ("A 'demand,' as sophisticated parties to these agreements would well understand, is made well before any finding of liability."). If the actual amount is not capable of reasonable calculation," as here, an indemnification notice will contain a "non-binding, reasonable estimate" of the amount of Losses for which Anthem is entitled to indemnification. MPA §§ 8.5, 8.6(a).

Anthem's non-binding, reasonable estimate of the third party demands here is based on the only source available for determining the third party demand for losses:

the third party demand for losses. The complaint in the *Zafirov* Action alleges that "false claims inflated CMS's reimbursements by hundreds of millions of dollars," plus treble damages and statutory penalties from those false claims. Ex. 2, ¶ 45. The complaint in the *Fernandez* Action alleges that defendants have received "millions of dollars of improper risk adjustment payments from Medicare," plus treble damages and statutory penalties arising from those false claims. Ex. 3, ¶ 33

Additionally, the plaintiffs in those *Qui Tam* Actions filed Rule 26 disclosures. Rule 26 requires a plaintiff to "provide to the other parties…a computation of each category of damages claimed by the disclosing party." Fed. R. Civ. P. 26(a)(1)(iii); *Cates v. Trs. of Columbia Univ. in N.Y.*, 330 F.R.D. 369, 372 (S.D.N.Y. 2019) ("Pursuant to Rule 26(a)(1)(A)(iii), a party seeking damages must automatically 'provide to the other parties…a computation of each category of damages claims by the disclosing party' and must 'make available for inspection and copying as under Rule 34 the documents or other evidentiary material…on which each computation is based.'"). A Rule 26 disclosure "contemplates some analysis beyond merely setting forth a lump sum amount for a claimed element of damages." *Grouse River Outfitters Ltd v. Oracle Corp.*, 2019 WL 2929867, at *1-3 (N.D. Cal. July 8, 2019); *Silver State Broad., LLC v. Beasley FM Acquisition*, 2016 WL 320110, at *2 (D. Nev. Jan. 25, 2016). The Rule 26 disclosure in the *Fernandez* Action states the losses at [redacted] without accounting for treble damages and

statutory penalties. Ex. 10, at p. 4. The Rule 26 disclosure in the *Zafirov* Action states that the losses "exceed hundreds of millions of dollars related to tens of thousands of false claims" plus treble damages and statutory penalties. Ex. 7, at p. 6. Thus, together, the *Qui Tam* Actions allege as much as more than $1 billion in damages.

Anthem's estimate of the third party demands of over $1 billion as being in excess of the $14.85 million deductible and the $50 million escrow is plainly reasonable. Indeed, the deductible is 1-2% of the high end of the third party demands. Moreover, the use of the third party demands to estimate the third party demand is necessarily reasonable. *See ESG Holdings, LLC v. Lear Corp.*, 2017 WL 3485816, at *3 n.2 (D. Del. Aug. 14, 2017) (dismissing challenge to indemnification claim where notice passed along EPA's demand of $1.38 billion cleanup even though buyer acknowledged that it was "highly unlikely that [the company] will ultimately be held responsible for anything approaching the $1.38 billion figure"); *Dominion Retail, Inc. v. Rogers*, 2013 WL 1149911, at *10 (W.D. Pa. Jan. 30, 2013) (buyer provided appropriate notice of third party claim where they alerted the sellers that they learned the company "would be the subject of a Sales and Use Tax Audit" by the state of Texas, even though the buyer informed seller that it "cannot estimate the amount at issue" at the time of the indemnity notice); *Bradley v. MDC Credit Corp.*, 2011 WL 835822, at *10 (D.S.D. Mar. 4, 2011) (provision of a Notice of

Liability regarding tax liability of the IRS is "undisputably" a "claim or demand" made against plaintiffs with respect to 2004 federal income tax liability and "also constitutes a 'loss,' a 'penalty' and 'damages'" and "does not need to be 'postponed until such time as liability may be imposed upon [sellers] by rendition of a judgment against [them] in favor of the [IRS]."); *Thomson U.S., Inc. v. Gosnell*, 151 Misc. 2d 249, 255-56 (N.Y. Sup. Ct. N.Y. Cnty. 1991) (noting that third party claim on which the indemnity claim is based "need not have yet resulted in concrete, ascertainable damages").

In addition to the fact that it is necessarily reasonable to rely on the third party demand in estimating the third party demand, Anthem has no other basis for an estimation (and neither do Plaintiffs). The *qui tam* plaintiffs have not yet specified the claims on which they sue, nor has there been any discovery yet, so Anthem is unable to reduce its estimate of the losses demanded by the *qui tam* plaintiffs.

Notably, the Special Escrow Amount is being held in an interest bearing account. *See* MPA § 2.5(c). Anthem itself will never receive any of the money in escrow.[15] If the third party claims result in a payment obligation, then any amounts

[15] Under the Agreement, "Losses" are defined to include "all reasonable out-of-pocket costs and expenses…incurred in connection with investigating, defending or asserting any of the foregoing." Consequently, a portion of the Losses could include costs and expenses Anthem incurred in investigating, defending the *Qui Tam* Actions.

covered by the escrow will be used to fund those Losses. To the extent that Anthem succeeds in defeating any or all of the third party claims, then the appropriate amount of the escrow will be released to Plaintiffs, along with the allocable interest.

C. Plaintiffs Do Not State A Claim By Offering Baseless Speculation That The *Qui Tam* Actions Will Settle Below The Deductible

Plaintiffs do not dispute that Anthem has described the third party demands in more than sufficient detail, including the amount of the alleged Losses. Instead, Plaintiffs allege that Anthem breached the Agreement by relying on the third party demands in estimating them, rather than accepting Plaintiffs' assertion that the cases will settle at a small percentage of the demands. Plaintiffs fail to state a claim.

1. There Is No Allegation That Anthem Did Not Reasonably Describe The Third Party Demands, Including The Amount Of The Alleged Losses

In most cases, estimation is an imprecise art because it typically takes a substantial period of time, sometimes years, to resolve a third party claim. Consequently, estimators, like Anthem, enjoy wide discretion in estimating losses. *BSL Invs. II, LLC v. Fresh Frozen Foods Inc.*, 2016 WL 9008197, at *6 (N.D. Ga. June 16, 2016) (it was "reasonable for [buyer] to provide its best estimate of the losses by requesting the Escrow Agent freeze all funds remaining in the account, and then provide an update to [seller] once [buyer] gathered more information about the exact nature of damages it had suffered"); *Bradley v. MDC Credit Corp.*, 2011 WL

835822, at *10 (D.S.D. Mar. 4, 2011) (provision of a Notice of Liability regarding tax liability of the IRS is "undisputably" a "claim or demand" made against plaintiffs with respect to 2004 federal income tax liability and "also constitutes a 'loss,' a 'penalty' and 'damages'" and "does not need to be 'postponed until such time as liability may be imposed upon [sellers] by rendition of a judgment against [them] in favor of the [IRS].'"); *Thomson U.S., Inc. v. Gosnell*, 151 Misc. 2d 249, 255-56 (Sup. Ct. N.Y. Cnty. 1991) (noting that third party claim on which the indemnity claim is based "need to have yet resulted in concrete, ascertainable damages"); *see also Nationwide Mut. Fire Ins. Co. v. D.R. Horton, Inc.*, 2016 WL 5867044, at *9 n.12, 29 (S.D. Ala. Oct. 6, 2016) (holding that a final calculation of damages "will be impossible to determine until the underlying matter is completely resolved."); *Orange & Blue Const., Inc. v. Evanston Ins. Co.*, 2020 WL 6323904, at *9 (S.D. Fla. May 29, 2020) ("the amount of damages [that a party] is entitled to is not capable of being calculated . . . until the [u]nderlying [l]awsuit is resolved" and ordering a stay on the issue of damages "pending the resolution of the underlying action.").

The broad discretion to estimate is particularly applicable here because "[t]he calculation of loss in health care cases…may be difficult to quantify/estimate in many cases and is often subject to challenge. This difficulty may be primarily attributed to the numerous and different government health care programs, their different reimbursement methodologies, and the potentially vast numbers of (past

and pending) claims involved, among other things." *See* 2 Federal Sentencing for Business Crimes § 19.02 (2021).

As addressed above, Anthem relied on the third party complaints and Rule 26 disclosures, and has no other information at this time that would allow it to reduce the estimation of the third party demands. *See supra at p.* 27-29. Consequently, Anthem's estimate of losses is not only reasonable, it is the only estimate that reasonably could be made. The Complaint contains no factual allegations to challenge the third party demands for losses.

The Complaint does not state a claim for breach by making a conclusory allegation that Anthem's estimate is unreasonable in concluding that the demands in the *Qui Tam* Actions for as much as over $1 billion in damages is more than the $14.85 million self-retention plus the $50 million escrow. *See Eisberner v. Discover Prods.*, 921 F. Supp. 2d 946, 949 (E.D. Wisc. 2013) (finding "bare legal conclusion" that defendants "failed to conduct a reasonable investigation" insufficient); *Wiessmann v. Northwestern Mut. Life Ins. Co.*, 2018 WL 2331994, at *7 (E.D. Pa. May 22, 2018) (noting it granted defendant's prior motion to dismiss in the case where the "[c]omplaint's allegations regarding the supposedly unreasonable investigation are largely conclusory and not entitled to a presumption of truth" because allegations of an unreasonable investigation were "allege[d] without any factual support"); *Antonoff v. Bushell*, 1991 WL 95433, at *5 (S.D.N.Y. May 28,

1991) (allegation that defendant "knew that the projections were unreasonable because of 'his own prior experience'" "is patently insufficient" and "fails to breathe life into plaintiffs' claim"); *see also Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) (in considering a motion to dismiss, "[c]onclusory allegations unsupported by facts contained in a complaint…will not be accepted as true"); *Nebenzahl v. Miller*, 1996 WL 494913, at *3 (Del. Ch. Aug. 26, 1996) (conclusory allegations "cannot be considered in the context of a motion to dismiss"; "[c]onclusory allegations alone cannot be the platform for launching an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them").

ESG v. Lear Corp. is instructive. There, Lear, the buyer in the transaction, received a third party claim from the EPA in which the EPA informed the company Lear had purchased that it would be remedying a Superfund Site, estimated the cost of which of the cleanup to be $1.38 billion, and stated that the company may be jointly and severally liable for the cost. *ESG v. Lear Corp.*, 2017 WL 3485816, at *1 (D. Del. Aug. 14, 2017). Lear notified ESG, the seller, of the $1.38 billion claim and demanded that the escrow agent refrain from releasing any portion of the escrow. ESG sued Lear seeking a declaratory judgment to "break the escrow." *Id.* Lear filed a motion to dismiss, arguing that passing on the EPA's demand satisfied the contractual requirement that an indemnification notice either provide a "dollar amount" of the claim or a 'good faith reasonable estimate'" of losses of the claim.

Id. at *2 n.1.

The court agreed that Lear properly noticed the claim, even though it noted that Lear had acknowledged that it was "highly unlikely that [the company] will ultimately be held responsible for anything approaching the $1.38 billion figure." *Id.* at *3 n.2. According to the court, by allowing for an estimate, "the parties contemplated that an indemnification Notice might be served on ESG before the amount of the claim was fully crystallized" and that the purchase agreement's definition of a "Third Party Claim" as "any 'claim ***or demand*** made by any third party'" meant that the parties understood a demand "is made well before any finding of liability." *Id.* at *3. (emphasis in original).

This Court's ruling on Plaintiff Shareholder Representative Services LLC's motion to dismiss Defendants' Counterclaims in *Shareholder Representative Services LLC v. ATH Holding Company, LLC et al.*, C.A. No. 2020-0443-KSJM (the "SRS Matter") is also instructive. In the SRS Matter, Anthem filed counterclaims for indemnification. Plaintiff Shareholder Representative Services, represented by the same firm and one of the same counsel here, moved to dismiss, arguing that the claim for indemnification was premature pending resolution of the underlying third party claim. This Court agreed, dismissing the counterclaim. The Court stated that the "gist of Plaintiff's argument is that the counterclaims are unripe because they arise from proceedings that have not yet started or are not yet over, and generally

indemnification claims do not ripen while an underlying claim is pending or the key facts are unsettled." Tr. 6:14-21. Therefore, the Court noted that the counterclaims "for indemnification raise the classic collection of unsettled issues that this Court typically dismisses as unripe." Tr. 8:8-11. Here too, the claims are premature because the underlying case has not yet been resolved.

2. Plaintiffs Do Not State A Claim By Speculating That The *Qui Tam* Actions Will Be Settled For Less Than The Escrow Amount, Notwithstanding The Actual Demands

Plaintiffs do not state a claim by speculating that the *Qui Tam* Actions will be settled for an amount that is both less than the escrow and the deductible, indeed less than 1-2% of the total alleged damages sought in the demands. Plaintiffs' allegations are deficient for a number of reasons. *One*, the Agreement provides for Anthem to make the estimate of Losses, not Plaintiffs. *See* MPA §8.5. Plaintiffs have no right to participate in, much less override, Anthem's estimation.

Two, the Agreement provides for Anthem to estimate the third party "demand," not to speculate without basis that the case can be settled for some unknown amount at a small fraction of the demands. *See supra at p.* 27-29. It is impossible to know whether the *Qui Tam* Actions will settle at all or the amount of any settlement. In fact, as Plaintiffs concede in their Complaint, "[i]n a case management report dated September 14, 2020, the parties to the *Zafirov* litigation agreed that any settlement was 'unlikely.'" (Compl. ¶ 65)

Three, Plaintiffs offer no support rooted in the actual *Qui Tam* Actions for their estimate, much less for challenging Anthem's estimate as unreasonable. Calling Anthem's use of a third party demand to estimate the Losses unreasonable, while failing to "allege any particulars as to what method the Defendants used to make the estimate and why that was unreasonable," is "insufficient"; "[c]onclusory allegations disguised as facts will not suffice to survive a motion to dismiss." *In re Alamosa Holdings, Inc. v. Sec. Litig.*, 382 F. Supp. 2d 832, 850 (N.D. Tex. 2005); *see also Taylor v. Commonwealth of PA*, 2018 WL 5574187, at *17 (E.D. Pa. Dec. 12, 2018) ("Without more, merely claiming that something is unreasonable does not make it so."); *Orman v. Cullman*, 794 A.2d 5, 15 (Del. Ch. 2002) (stating that, in considering a motion to dismiss "[c]onclusory allegations unsupported by facts contained in a complaint…will not be accepted as true"); *Nebenzahl v. Miller*, 1996 WL 494913, at *3 (stating that conclusory allegations "cannot be considered in the context of a motion to dismiss" and that "[c]onclusory allegations alone cannot be the platform for launching an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them").

Plaintiffs do not, and cannot, offer any allegation that they are competent to predict that the *Qui Tam* Actions will settle, the amount at which they would settle, or the amount of any potential verdict by a jury in Middle District of Florida, other than to concede that the parties in the *Zafirov* Action believe that settlement is

"unlikely." (Compl. ¶ 65) The Complaint also includes nothing beyond conclusory allegations about the merits of the claims, the amount of the alleged "overpayments" by the government or the potential statutory damage amounts, the information that would be necessary to assess the amount of a potential settlement or judgment. Indeed, Plaintiffs do not, and cannot, allege that they have any information about the specific claims at issue or the amount of alleged "overpayments" by the government that would even allow them to contest the amount of the third party demands or Anthem's reliance on the third party demands. Consequently, the Complaint alleges no basis, much less a requirement, for Anthem to make a loss estimate as anything other than the amount identified by the third party itself, much less to require Anthem to estimate the third party demand at 1-2% of the actual amounts stated in filed pleadings and disclosures.

Plaintiffs' citation to settlements of seven totally unrelated cases does not state a breach by Anthem. Initially, two of the cases settled at $270 million and $30 million, so Plaintiffs' allegations show that even irrelevant cases settled for substantially more than the deductible here. In any case, Plaintiffs do not state a claim by asserting that some completely different claims against different parties with different exposures were settled at amounts that were less than the deductible here at issue—and some were not. The Agreement requires Anthem to estimate the third party demands against it, not unrelated demands made against other parties.

In addition to the fact that the Agreement provides for an estimation of the *Qui Tam* Actions, not unrelated cases, there is nothing reasonable about speculating that there will be a settlement at all, much less for 1-2% of the high-end of the third party demands. Not every case settles, and the cases that do settle do not settle at the same amounts, as even Plaintiffs' allegations show (with settlements ranging from $2.5 to $270 million). Rather, it is axiomatic that every estimation depends on the specific facts and circumstances of the cases that form the basis for the indemnity claim, including, among other things, the specific claims at issue, the strength of the claims and defenses, the exposure, the venue, the risk profiles of the plaintiffs and the defendants, and the identity of the plaintiffs' lawyers. *See* Black's Law Dictionary (11th Ed. 2019) (defining "reasonable" as "[f]air, proper, or moderate *under the circumstances*; sensible") (emphasis added); Black's Law Dictionary (6th Ed. 1990) (defining "estimate" as "[a] valuing or rating by the mind, without actual measuring, weighing or the like"); *Zepeda v. Mastec Network Sols, LLC*, 2018 WL 32227491, at *4 (C.D. Cal. June 29, 2018) (finding defendants' "estimate is reasonable in light of [p]laintiffs' *specific factual allegations*" regarding amount of time class members worked) (emphasis added); *see also* 42 C.J.S. Indemnity § 2 ("As an equitable remedy, indemnity does not lend itself to hard and fast rules, and, its *application must turn on the facts of each case*.") (emphasis added). A well-recognized treatise states: "What is a 'reasonable estimate' and what is 'reasonable

certainty'? No answer that is even 'reasonably' definite can be made to such questions in the abstract and unrelated to a specific set of facts." 11 Corbin on Contracts § 56.16 (2021).

Consequently, settlements of other cases are irrelevant. *O'Hearn v. Hillcrest Gym & Fitness Ctr., Inc.*, 115 Cal. App. 4th 491, 501 (2d Dist. Ct. App. 2004) (settlements obtained in other cases were irrelevant for purposes of calculating damages in the present action because of differences in "substantive law in those jurisdictions" and "the particular facts of the lawsuits and even the personalities of the individuals involved in those negotiations"); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 44 (Tex. 1998) (in determining whether to award punitive damages, "[a]ctual damage settlements or awards and litigation expenses in other cases are not relevant" and that "evidence of actual damages and expenses in other cases is inappropriate because each case is fact specific and unrelated to the particular plaintiffs here"); *SSL Servs., LLC v. Citrix Sys.*, 2010 WL 547478, at *3 (E.D. Tex. Feb. 10, 2010) (finding expert reports on damages from unrelated lawsuits irrelevant because "the analyses will be of little value because they come from different experts, relate to different patents, different financial data, and different plaintiffs"); *see also Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv.*, 1996 WL 506906, , at *20 (Del. Ch. Sept. 3, 1996) (rejecting damages claims that were "based on assumptions about industry averages and are not linked

specifically to the alleged acts" because they "do not appear based on a reasonable estimate"); *Carlson v. Hallinan*, 925 A.2d 506, 539 (Del. Ch. 2006) (finding plaintiffs "did not prove resultant damages" when it attempted to quantify damages by examining growth of similar companies because, "[e]ven though they were in the same line of business, the four companies were different businesses with different advertising emphases and different capital structures").

And without even taking into account the fact that the unrelated cases involved different parties, different evidence, different practices and different claims, Plaintiffs' cases are plainly inapposite because the complaints in those actions alleged much smaller losses. *See, e.g.*, *United States of America ex rel. David Nutter, M.D. v. Beaver Medical Grp., L.P., et al.*, No. 5:17-cv-02035 (C.D. Cal.) [Dkt. 1] (alleged "several millions of dollars in increased…capitation payments that should not have been paid"); *Sewell* Action (complaint alleged "millions of dollars in damages"); *United States ex rel. Teresa Ross v. Group Health Cooperative et al.*, No. 1:12-cv-00299-WMS (W.D.N.Y.) [Dkt. 1] (Kaiser complaint alleged that "Defendants have fraudulently caused CMS to pay thousands of false claims for risk adjustment payments worth millions of dollars" and estimated damages around $12 million); *United States of America ex rel. Eric Johnson v. Independence Blue Cross*, No. 2:10-cv-01520-BMS (E.D. Pa.) [Dkt. 1] (alleged "$20 million in inflated premiums" for a two-year contract period); *United States of America ex rel. Crystal*

Derrick v. Hoffman-La Roche Ltd. et al., No. 1:14-cv-04601 (N.D. Ill.) [Dkt. 1] (alleged that the "amount of the overpayment was $45 million based upon [Roche's] calculation of a discounted percentage of the rebates Roche had paid to Humana"). Here, the *Qui Tam* Actions together allege over $1 billion dollars of damages, many multiples more than Plaintiffs' cases. The cases Plaintiffs cite that alleged substantial damages—the Sutter and DaVita actions—settled at amounts greatly in excess of the deductible here. Additionally, Plaintiffs' unrelated cases settled for between 11% and 53% of the demands made in those actions, further demonstrating that Plaintiffs' speculation about a settlement at 1-2% of the demands in the *Qui Tam* Actions does not state any basis for a breach claim.

3. The Complaint Fails To State A Claim By Alleging That Plaintiffs Are Only Severally Liable Under The False Claims Act, An Allegation That Is Incorrect As A Matter Of Law

Plaintiffs also alleged that Anthem's estimate is unreasonable because Anthem "failed to consider that Zafirov's complaint named eight defendants, with the Companies being only two of them" and that "the Companies' minority share of the recovery would not meet the Deductible." (Compl. ¶ 83) Although Plaintiffs do not reference the *Fernandez* Action in their complaint with respect to their allegations about several liability, there are three defendants in that action, two of which are Freedom and Optimum. Even if Plaintiffs were correct about several liability, and they are not, the judgment allocation principle would be irrelevant here

because no damages have been assessed, so there is no number to divide.

In any case, the *Qui Tam* Actions are brought under the False Claims Act, which provides for joint and several liability. *See, e.g.*, *United States ex rel. McNeil v. Jolly*, 451 F. Supp. 3d 657, 685 (E.D. La. Apr. 3, 2020) (finding that "joint and several liability is appropriate" for *qui tam* suit brought under the FCA); *United States ex rel. Abbott-Burdick v. Univ. Med. Assocs.*, 2002 WL 34236885, at *5 (D.S.C. May 23, 2002) (explaining that the FCA's "other provisions dictate a joint and several relationship among culpable parties" and evince "unequivocal congressional intent of encouraging *qui tam* suits and the unique pro-plaintiff structure of litigation under the [FCA]"); *United States ex rel. Wiser v. Geriatric Psychological Servs.*, 2001 WL 286838, at *3 (D. Md. Mar. 22, 2001) (explaining that there is "joint and several liability . . . [for claims brought] under the False Claims Act"). Consequently, Plaintiffs' contention that Freedom and Optimum would be liable for only a fraction of a judgment is wrong.

4. Plaintiffs Seek To Evade Their Indemnification Obligations By Shifting The Risk On Their Non-Recourse Obligation To Anthem

The parties here adopted a commonplace and important transactional structure for indemnification, where Plaintiffs are relieved of all recourse for indemnity obligations, allowing Plaintiffs to protect their net worth, in exchange for a limited amount of money held in escrow to fund their obligations. This structure allocated

the risk of third party loss to the escrow. *See* Darian M. Ibrahim, *The Unique Benefits of Treating Personal Goodwill as Property in Corporate Acquisitions*, 30 Del. J. Corp. L. 1, 40–41 (2005) ("Buyers know that indemnities are only as good as the collateral backing them. Without security, a selling shareholder can take all proceeds from the sale and squander them. If the shareholder later owes under an indemnity, there would be no assets from which buyer could collect. . . . A common way for buyers to ensure adequate security is to hold back or escrow part of the purchase price. A hold back is when buyer withholds part of the purchase price at the closing but pays it at a later date provided that buyer has not suffered an indemnifiable loss. If buyer suffers a loss, it is entitled to retain a portion of the hold back equal to its loss (rather than pay it to seller)"); 3 Corbin on Contracts § 10.10 (2021) ("The ordinary function of an escrow or of a conditional delivery of a document is to give security to both parties to an existing transaction."); (Compl. ¶ 37) (the escrow funds were set aside to cover "potential indemnification claims arising from any breach of the Sellers' representations and warranties.").

In some cases, the third party claim is successfully defended, and all the money is released to the seller (here with interest). In other cases, the third party claim is successful, and the escrow is used to fund the indemnified party's losses. Sometimes the claim is resolved at the demand amount, and sometimes it is resolved for more or less than the demand. But the Losses resulting from a third party claim

cannot be ascertained until the claim is ultimately resolved, typically long after the notice of a third party claim, and sometimes not for years until the litigation is completed.

Because losses cannot be ascertained until the third party claim is ultimately resolved, the parties here agreed to a customary provision allowing Anthem to preserve the escrow as soon as the third party claim is made. *See* MPA §§ 8.5, 8.6(a); *see also ESG Holdings, LLC v. Lear Corp.*, 2017 WL 3485816, at *3 (D. Del. Aug. 14, 2017) (noting that the purchase agreement defines "Third Party Claim" as "any claim or demand made by any third party, including any Governmental Entity" and finding that "a 'demand,' as sophisticated parties to these agreements would well understand, is made well before any finding of liability"). The amount of the demand then must be held in escrow pending resolution of the third party claim to ensure payment. MPA § 2.5(c). Thus, the estimation provision is to ensure that the monies are preserved in escrow to fund any loss ultimately assessed.

There can be no dispute that the Agreement requires that all Losses assessed in the *Qui Tam* Actions in excess of $14.85 million be indemnified from the escrow. There also can be no dispute that the amount of any Losses resulting from the *Qui Tam* Actions can be determined only in the *Qui Tam* Actions in Florida, and that an adjudication here will have no effect on the *Qui Tam* Actions. Consequently, Plaintiffs are asking this Court, in effect, to make a non-binding prediction of the

Losses in the *Qui Tam* Actions, and then to direct Anthem to release all of the escrow amounts in excess of that prediction. But then the monies set aside—and the only monies available—to discharge Plaintiffs' obligations would be released before the third party claims are resolved. A release of the escrow would vitiate Plaintiffs' indemnity obligations for any Losses that result from the *Qui Tam* Actions because Plaintiffs would then rely on the non-recourse feature of the Agreement to completely evade their indisputable indemnification obligations. *See Jefferson Chem. Co. v. Mobay Chem. Co.*, 267 A.2d 635, 637 (Del. Ch. 1970) ("Equity, of course, abhors a forfeiture. And it is not obliged to permit a party to get the advantages which a forfeiture would give him."); *Milford Power Co., LLC v. PDC Milford Power*, LLC, 866 A.2d 738, 762 (Del. Ch. 2004) ("[O]ur courts have often noted that Delaware law does not favor interpretations that result in forfeitures.").

II.

IN THE ALTERNATIVE, THIS CASE SHOULD BE STAYED PENDING RESOLUTION OF THE *QUI TAM* ACTIONS

Alternatively, Anthem respectfully submits that the Court should stay this action pending resolution of the *Qui Tam* Actions. This Court has broad discretion to grant a stay pending the outcome of another action. *See Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket

with economy of time and effort for itself, for counsel, and for litigations. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."); *In re TGM Enters., L.L.C.*, 2008 WL 4261035, at *1 (Del. Ch. Sept. 12, 2008); *accord Salzman v. Canaan Capital Partners, L.P.*, 1996 WL 422341, at *5 (Del. Ch. July 23, 1996). ("The Court's right to grant a stay is within the exclusive discretion of the Court.").

In determining whether to grant a stay, "[t]he court should inform its analysis with considerations of comity and the necessities of an orderly and efficient administration of justice." *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 4516645, at *2 (Del. Ch. Oct. 8, 2008). To that end, a court may "hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Bechtel Corp. v. Laborers' Int'l Union*, 544 F.2d 1207, 1215 (3d Cir. 1976); *see also Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 397 (Del. Ch. Dec. 8, 2009) ("This Court possesses the inherent power to manage its own docket, including the power to stay litigation on the basis of comity, efficiency, or simple common sense.").

Here, Plaintiffs are seeking specific performance and a declaratory judgment that the "Sellers are entitled to the Special Escrow Amount" (Compl. at 30) by asking this Court to determine that the Relators in the *Qui Tam* Actions will never win their claims or recover alleged damages. But only the Florida court and a Florida jury can

resolve the issue of whether there has been a breach of a healthcare law, and any damages caused by any such breach. *Nationwide Mut. Fire Ins. Co. v. D.R. Horton, Inc.*, 2016 WL 5867044, at *9 (S.D. Ala. Oct. 6, 2016) (holding that a final calculation of damages "will be impossible to determine until the underlying matter is completely resolved."); *Orange & Blue Const., Inc. v. Evanston Ins. Co.*, 2020 WL 6323904, at *9 (S.D. Fla. May 29, 2020) (finding that "the amount of damages [that a party] is entitled to is not capable of being calculated . . . until the [u]nderlying [l]awsuit is resolved" and ordering a stay on the issue of damages "pending the resolution of the underlying action."). Consequently, it would be pure waste to have a duplicative litigation here, where the result would have no impact on the determination of any Losses assessed in Florida, which, as addressed above, are subject to indemnification by Plaintiffs through the escrow. Unless the Court were to relieve the Plaintiffs of the their unambiguous obligation to indemnify for any Losses, this case would involve an academic exercise of predicting the litigation result in Florida, which would be meaningless to the actual result that ultimately will issue in the *Qui Tam* Actions.

Given that indemnity claims and defenses are based on the resolution of the underlying third party claims, courts routinely stay them until the underlying actions are resolved. *See LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009) ("As a general rule, 'decisions about indemnity should be postponed until the

underlying liability has been established' because a declaration as to the duty to indemnify 'may have no real-world impact if no liability arises in the underlying action.'" (quoting *Molex Inc. v. Wyler*, 334 F. Supp. 2d 1083, 1087 (N.D. Ill. 2004))); *Huff v. Longview Energy Co.*, 2013 WL 4084077, at *2 (Del. Ch. Aug. 12, 2013) (noting that ruling on indemnification "in advance of a final determination of the underlying action would also risk the need to reopen this action to revise the court's decision because the decision was wrong, precisely because it was based on a hazardous and unwarranted guess as to how the underlying action would come out"); *Yellow Pages Group, LLC v. Ziplocal, LP*, 2015 WL 358279, at *4 (Del. Super. Ct. Jan. 27, 2015) (granting stay and noting that "[i]ndemnification claims do not typically ripen until *after* the merits of an action have been decided, and all appeals have been resolved"); *Hampshire Grp., Ltd. v. Kuttner*, 2010 WL 2739995, at *53 (Del. Ch. July 12, 2010) (noting that indemnification claims do not ripen until after the merits have been decided and that "it would be inefficient for [the court] to predict the final outcome of this litigation"). Anthem respectfully submits that, in the alternative to dismissal, this case be stayed pending resolution of the underlying *Qui Tam* Actions.

CONCLUSION

ATH Holding Company, LLC respectfully requests that the Court dismiss this action or, in the alternative, stay it pending resolution of the underlying *Qui Tam* Actions.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, the ***Public Version of Opening Brief in Support of Defendant's Motion to Dismiss Plaintiffs' Verified Complaint for Specific Performance*** was caused to be served upon the following counsel of record via File & ServeXpress:

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