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Case No. 2021-0396-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

K&P HOLDING II, LLC; AHMS HOLDINGS OF FLORIDA, LLC; and AMERICA'S 1ST CHOICE HOLDINGS OF FLORIDA, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. _____
ATH HOLDING COMPANY, LLC,	)	
Defendant.	)	

VERIFIED COMPLAINT FOR SPECIFIC PERFORMANCE

The plaintiffs (the "Sellers") bring this action against defendant ATH Holding Company, LLC (the "Buyer") to compel the release of escrowed purchase money.

NATURE OF THE ACTION

1. Anthem, Inc. is a serial litigant known for making baseless indemnity claims against its acquisition counterparties.

2. This action challenges yet another meritless claim by Anthem. This time, Anthem blocked a $50 million escrow release to the Sellers just because two strike suits had named their former businesses (the "Companies") as secondary defendants. In the underlying cases, private plaintiffs allege violations of the False Claims Act (the "FCA"), primarily against medical providers insured by Anthem. The United States has already investigated the claims and declined to intervene, dealing a major if not fatal blow to the plaintiffs' hopes of any recovery.

3. Although the underlying claims have nuisance value only, Anthem has made them its official basis for freezing 100% of the Sellers' escrow. The Court has seen Anthem's "freeze everything" playbook before. *E.g.*, *LPPAS Representative, LLC v. ATH Hldg. Co.* (*Anthem II*), 2020 WL 7706937 (Del. Ch. Dec. 29, 2020); *K&P Hldg. II, LLC v. ATH Hldg. Co.* (*Anthem I*), 2020 WL 7021505 (Del. Ch. Nov. 30, 2020). The Court should repudiate Anthem's recurring hold-up tactics, which meritorious litigation and adverse rulings have so far been unable to deter.

4. Under a master purchase agreement dated October 24, 2017 (the "MPA"), the Sellers sold the Companies to Anthem. The Companies include two health insurers, Freedom Health and Optimum Healthcare. The Companies operate Medicare Advantage plans, a type of health plan under which the government pays a private insurer to cover Medicare beneficiaries.

5. In February 2018, Anthem closed the acquisition and deposited $153,450,000 of the purchase price into escrow. The MPA required the escrow's release to the Sellers in two installments, less the amount of any properly submitted pending indemnity claims. The second installment, called the Special Escrow Amount, was initially $49.5 million. Today, the Special Escrow Amount exceeds $50 million including interest.

6. The MPA restricted Anthem's ability to make indemnity claims. The MPA required that Anthem make a "reasonable estimate" of its exposure in any

indemnifiable proceeding. The MPA also required that Anthem absorb a $14.85 million deductible (the "Deductible") before obtaining any indemnification.

7. FCA cases asserting overpayment claims against Medicare Advantage plans rarely yield any recovery. In the handful of cases in which plaintiffs recovered, most recoveries were for amounts less than the Deductible. In the select few cases that yielded a recovery exceeding the Deductible, the United States had intervened in the litigation.

8. By operation of the Deductible, for Anthem to make a "reasonable estimate" of its exposure in an FCA overpayment case sufficient to withhold the Special Escrow Amount, Anthem needed a reasonable basis to expect historically significant exposure in the underlying proceeding. When the United States declines intervention, there is no basis to expect historically significant exposure.

9. Freedom or Optimum have insured certain patients of medical providers called Physician Partners, LLC and Florida Medical Associates, LLC d/b/a VIPCare. In 2020, the United States District Court for the Middle District of Florida unsealed three *qui tam* complaints asserting Medicare overpayment claims against VIPCare or Physician Partners, with the Companies as secondary defendants in each case. On September 21, 2020, the United States filed a Notice of Election to Decline Intervention in all three cases.

10. After the United States declined intervention, one of the three plaintiffs dismissed his lawsuit. The second plaintiff was institutionalized after being deemed incompetent to stand trial on federal criminal charges of health care fraud and aggravated identity theft. That leaves the third plaintiff, who is treading water against motions to dismiss brought by all defendants. The United States investigated the third plaintiff's claims by forming an investigative team, interviewing the plaintiff and other potential witnesses, using "covert information gathering techniques," evaluating audio and video evidence, and analyzing medical and claims data. After taking these efforts, the United States let the third plaintiff fly solo.

11. Anthem has since asserted that a "conservative estimate" of its exposure to the third plaintiff is $110 million, which would be arguably the largest recovery ever in a case of this nature. Anthem withheld 100% of the Special Escrow Amount when it became due to the Sellers on February 15, 2021.

12. Anthem is running a scam. If Anthem were being candid, then it would have admitted that its exposure in the underlying proceedings was less than the Deductible. Anthem refused to admit what everyone knows because it has a bad-faith policy or custom of asserting blanket escrow holds. No reasonable person would expect Anthem's indemnifiable exposure to be anywhere near the $65 million required to hold back the full Special Escrow Amount, especially now that the United States has declined intervention.

13. Anthem's internal litigation analysis surely differs from its outward representations to courts and escrow counterparties. Outwardly, Anthem trumpets indemnifiable proceedings as threatening massive recoveries. But privately, Anthem knows that it rarely if ever has any basis to freeze ***100%*** of its counterparties' escrows. No holdback of any amount was appropriate here.

14. Now it is time to confront Anthem's scheming. The Sellers respectfully seek an order directing Anthem to surrender the Special Escrow Amount.

JURISDICTION AND VENUE

15. The Court has subject matter jurisdiction under 10 *Del. C.* § 341.

16. The defendant has consented to the Court's exclusive jurisdiction. *See* MPA § 11.6.

FACTUAL BACKGROUND

A. Dr. Patel

17. Non-party Dr. Kiran Patel is the Sellers' principal. He is a cardiologist and a philanthropist. Dr. Patel earned degrees from Cambridge University and the University of London before attending medical school at Gujarat University in India. In 1982, Dr. Patel completed a fellowship in the cardiology program affiliated with Columbia University. After completing his fellowship, Dr. Patel moved to Florida, where he developed a successful medical practice and has operated multiple healthcare businesses.

18. *Florida Trend* magazine named Dr. Patel "Floridian of the Year" in 2017 in recognition of his philanthropic efforts. Dr. Patel's initiatives include the Drs. Kiran & Pallavi Patel Family Foundation. The foundation has built hospitals and schools, funded the construction of affordable homes for low-income families, and offered scholarships to underprivileged youth.

B. The Companies

19. The Companies are Freedom Health, Inc. and Optimum Healthcare, Inc. The Companies operate Medicare Advantage ("MA") plans.[1] Under the Medicare Advantage program, the federal government pays a private company to insure Medicare beneficiaries.

20. The Centers for Medicare & Medicaid Services ("CMS") is a federal agency within the United States Department of Health and Human Services ("DHHS") that administers the Medicare program. CMS pays MA plans on a per-enrollee-per-month basis. CMS calculates the payments based on plan enrollees' health risks and demographics that serve as proxies for health risk, such as age. Medical providers insured by MA plans log "ICD-10-CM" codes reflecting patient diagnoses and encounters. Diagnosis codes drive the risk scores for an MA plan's

[1] The MPA defines the "Companies" to include a third entity, Global TPA, LLC, a staffing company that served Freedom and Optimum. This complaint mostly refers to the "Companies" as just Freedom and Optimum because Global TPA served an administrative function, was not an MA plan, and generally is not relevant to the complaint's allegations.

patient population, which in turn help calculate the risk-adjusted payments that CMS will make to a plan.

21. Freedom and Optimum offer HMO products, including Chronic Special Needs Plans (C-SNP) and Dual-Eligible Special Needs Plans. An "HMO" is a health maintenance organization. HMOs maintain networks of medical providers who have agreed to accept set payments for services. HMO-based health plans often charge lower premiums than alternative insurance plans.

22. Freedom and Optimum originated as separate businesses in 2004. They operated in overlapping service areas in Central Florida, making them a logical choice for consolidation by a third-party buyer.

23. In February 2008, Freedom made two important decisions. First, Freedom promoted its consultant Dr. Darren Sewell to be the Senior Vice President of Health Services. Second, Freedom applied to CMS to expand its service area to include more counties (the "2009 SAE"). Freedom was concurrently undertaking a sale process that resulted in its acquisition by the Sellers a few months later. CMS ultimately granted the 2009 SAE application.

24. In March 2008, the Sellers acquired Optimum. In May 2008, the Sellers acquired Freedom.[2]

[2] To be precise, plaintiff America's 1st Choice Holdings of Florida, LLC acquired Freedom and Optimum's equity. Before Anthem bought the Companies in 2018, plaintiffs K&P Holding II, LLC and AHMS Holdings of Florida, LLC owned

25. CMS uses a five-star rating system to determine quality ratings for MA plans, which can result in quality bonus payments. Medicare star ratings measure health-plan quality based on metrics such as health outcomes, access to care, and patient experience. After acquiring Freedom and Optimum, Dr. Patel grew their business and improved their Medicare star ratings. By 2017, Freedom had a 4.5-star overall rating, and Optimum had a 5-star overall rating.

26. In late 2016, Dr. Patel commenced efforts to sell the Companies. In March 2017, Anthem expressed interest.

C. The Companies Clear Sewell's Obstacle.

27. Before selling the Companies, the Sellers needed to resolve a problem that began before they bought Freedom in May 2008. In April 2008, shortly after promoting Sewell to an officer role, Freedom learned that he had surrendered his medical license in 2007. Freedom had to strip Sewell of certain responsibilities that required him to be a licensed doctor. Sewell otherwise stayed on with Freedom while planning revenge. In 2009, Sewell filed a sealed *qui tam* lawsuit throwing the kitchen sink at Freedom, its original owners, and the new owners.

28. Sewell alleged that Freedom had misstated the nature of its provider network to CMS, causing it to grant the 2009 SAE expanding Freedom's geographic

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Global TPA. For simplicity, this complaint groups the plaintiffs as the "Sellers" because they are under common control.

reach. Sewell also alleged that, by 2007, Freedom had commenced various efforts to obtain undeserved Medicare payments. Sewell alleged that those efforts continued under the Sellers' ownership. As required by the False Claims Act, Sewell served his sealed complaint on the United States for further investigation.

29. In 2012, the DOJ issued subpoenas to the Companies to investigate Sewell's allegations. By 2015, the DOJ had narrowed its focus to just two of Sewell's many theories: the 2009 SAE claim and a claim that the Companies had used unsupported patient data to obtain favorable Medicare risk-adjustment (MRA) payments. Resolving the MRA claim was important to a buyer like Anthem, which had its own MRA improprieties on a massive scale.

30. On May 12, 2017, the Companies settled with the government. The settlement agreement stated that the United States was intervening in the Sewell *qui tam* action to settle the 2009 SAE claim and the MRA claim. The United States otherwise declined to intervene. The Companies paid $11.6 million to settle the 2009 SAE claim and $4.17 million to settle the MRA claim. The Companies received a $16.7 million credit for conducting voluntary MRA reconciliation, which included applying CMS' 2015 revised MRA guidance retroactively to diagnosis codes submitted from 2008 onwards. After adding the MRA credit and deducting Freedom's former COO's settlement contribution, the total settlement value against the Companies was $31,695,593.

31. In the settlement, the United States released civil claims against the Companies concerning events occurring between January 2008 and December 2013.

32. As part of the settlement, the Companies entered concurrently into a corporate integrity agreement (the "CIA") with the Office of Inspector General of DHHS (the "OIG"). The Companies agreed to strengthen their compliance functions and make annual compliance reports to OIG for a five-year period. The CIA granted powerful information rights to OIG. In a section titled "OIG Inspection, Audit, and Review Rights," the CIA provided:

> In addition to any other rights OIG may have by statute, regulation, or contract, OIG or its duly authorized representative(s) may conduct interviews, examine and/or request copies of or copy Freedom's books, records, and other documents and supporting materials, and conduct on-site reviews of any of Freedom's locations, for the purpose of verifying and evaluating: (a) Freedom's compliance with the terms of this CIA and (b) Freedom's compliance with the requirements of the Federal health care programs. The documentation described above shall be made available by Freedom to OIG or its duly authorized representative(s) at all reasonable times for inspection, audit, and/or reproduction. Furthermore, for purposes of this provision, OIG or its duly authorized representative(s) may interview any of Freedom's owners, employees, contractors, and directors who consent to be interviewed at the individual's place of business during normal business hours or at such other place and time as may be mutually agreed upon between the individual and OIG. Freedom shall assist OIG or its duly authorized representative(s) in contacting and arranging interviews with such individuals upon OIG's request. Freedom's owners, employees, contractors, and directors may elect to be interviewed with or without a representative of Freedom present.[3]

[3] The CIA defined "Freedom" to mean both Freedom and Optimum.

In addition, the CIA provided: "Freedom shall maintain for inspection all documents and records relating to reimbursement from the Federal health care programs and to compliance with this CIA for six years (or longer if otherwise required by law) from the Effective Date."

33. The CIA required the Companies to disclose to OIG the occurrence of any "Reportable Event." The CIA provided: "If Freedom determines (after a reasonable opportunity to conduct an appropriate review or investigation of the allegations) through any means that there is a Reportable Event, Freedom shall notify OIG, in writing, within 30 days after making the determination that the Reportable Event exists." The definition of "Reportable Event" included any "substantial Overpayment" or any "matter that a reasonable person would consider a probable violation of criminal, civil, or administrative laws applicable to any Federal health care program for which penalties or exclusion may be authorized."

34. In sum, the CIA required the Companies to disclose to OIG any material non-compliance with law or regulation, and the CIA gave OIG strong tools to assess whether the Companies were honoring their disclosure obligations.

D. The Sellers Negotiate With Anthem.

35. On May 19, 2017, Anthem and the Sellers executed an NDA. Anthem received sophisticated advice throughout the ensuing negotiations and due diligence. Centerview Partners LLC served as Anthem's financial advisor. White & Case LLP

served as deal counsel. In addition, Anthem retained expert regulatory counsel from O'Melveny & Myers LLP. O'Melveny & Myers contemporaneously represented Anthem in defending a DOJ investigation of Anthem's major MRA improprieties.

36. "At the outset of diligence," the Sellers disclosed the Sewell litigation and settlement. Dkt. 30 Decl. of Alwyn van Heerden ¶¶ 7–8, *Anthem I*, 2019-0821-KSJM (Del. Ch. Jan. 27, 2020). Anthem's due diligence focused heavily on the Companies' compliance with healthcare laws, especially regarding their MRA practices. *E.g.*, *id.* ¶¶ 5–12. Anthem wanted to confirm that the Companies did not have the MRA problems for which the DOJ was investigating Anthem. O'Melveny & Myers was deeply involved, knew what to look for, and likely would have recommended against the deal had it identified any regulatory problems.

37. Effective October 24, 2017, the Sellers entered the MPA with Anthem's wholly owned subsidiary and acquisition vehicle, defendant ATH Holding Company LLC (the "Buyer," defined above). The MPA set aside two components of the purchase price—the "Indemnity Escrow Amount" ($99,000,000) and the "Special Escrow Amount" ($49,500,000)—to cover potential indemnification claims arising from any breach of the Sellers' representations and warranties.

38. Section 2.5(c) of the MPA required that Anthem make any claims against the Special Escrow Amount by the third anniversary of the closing, i.e., February 15, 2021. Anthem then had three business days to agree to release the

Special Escrow Amount to the Sellers, less the amount of any "properly submitted" pending indemnification claims. If Anthem "properly submitted" a claim, then an appropriate portion of the Special Escrow Amount would remain in escrow as a claim reserve.

39. The following reproduction of the pertinent aspects of Section 2.5(c) adds formatting for clarity:

> Within three (3) Business Days after the thirty-six (36) month anniversary of the Closing Date, the Sellers and Buyer shall execute and deliver to the Escrow Agent in accordance with the Escrow Agreement a joint written instruction instructing the Escrow Agent to release to
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> (i) the Sellers . . . the then remaining balance of the Special Escrow Amount
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> minus the aggregate amount of all pending indemnification claims for breaches of the Health Care Representations . . . ***properly submitted pursuant to*** Article 8 (such amount, the "Special Pending Claims Amount") by the Buyer Indemnified Parties . . . .

MPA § 2.5(c) (emphasis and formatting added).

40. Section 2.5(c) requires that an indemnification claim comply with Article 8 to be "properly submitted." Formatted for legibility, Section 8.5 states:

> Following the discovery of any facts or conditions that could be reasonably expected to give rise to a Loss or Losses for which indemnification under this Article 8 can be obtained, the Party seeking indemnification under this Article 8 (the "Indemnified Party") shall,
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> within thirty (30) days thereafter, provide written notice to the Party from whom indemnification is sought (the "Indemnifying Party"),

> 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 after giving effect to the limitations contained in this Article 8 (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 and formatting added).

41. Under Sections 2.5(c) and 8.5, if Anthem failed to make a "reasonable estimate" of its indemnifiable exposure by the closing's third anniversary, then the Sellers would receive the full Special Escrow Amount. If Anthem timely made a "reasonable estimate" of its indemnifiable exposure in an amount less than the Special Escrow Amount, then the Sellers would receive the difference between the Special Escrow Amount and the reasonable estimate, and the amount of the reasonable estimate would remain escrow as a claim reserve. As discussed below, to make a claim capable of withholding the entire Special Escrow Amount, Anthem would have to face an FCA overpayment claim reasonably estimated to be among the largest, if not the very largest, in all of history.

42. On February 15, 2018, the Buyer closed its acquisition of the Companies.[4] Anthem announced that "America's 1st Choice has generated significant membership growth by developing effective engagement programs and building strong provider relationships in the Florida market" and that it would "operate as a wholly-owned subsidiary of Anthem."

E. The Fernandez *Qui Tam* Complaint

43. Keith Fernandez is a regular *pro se* plaintiff known for pursuing meritless litigation.[5] Today, Fernandez faces federal criminal charges for health care fraud and aggravated identity theft. On April 6, 2021, the United States District Court for the Middle District of Florida found by a preponderance of the evidence that Fernandez "is currently not competent to proceed to trial."[6]

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[4] At closing, the Buyer deposited into escrow the "Indemnity Escrow Amount" ($99,000,000), the "Special Escrow Amount" ($49,500,000), and the "Adjustment Escrow Amount" ($4,950,000). This case concerns only the Special Escrow Amount.

[5] *E.g.*, *Fernandez v. City of New York*, Case No. 1:20-cv-02116 (E.D.N.Y. May 6, 2020); *Fernandez v. The Wharton Sch. of the Univ. of Penn.*, Case No. 2:19-cv-05574 (E.D. Pa. Nov. 26, 2019); *Fernandez v. Volusia Cnty. Sheriff's Office*, Case No. 6:19-cv-01627 (M.D. Fla. Aug. 26, 2019); *Fernandez v. Republican Nat'l Comm.*, Case No. 1:16-cv-02197 (D.D.C. Nov. 3, 2016); *Fernandez v. Republican Nat'l Comm.*, Case No. 1:16-cv-02309 (D.D.C. Nov. 16, 2016).

[6] The Court initiated competency proceedings after finding reasonable cause to believe that Fernandez "may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a).

44. On August 8, 2018, Fernandez filed a sealed *qui tam* complaint against Freedom, Optimum, and Physician Partners, LLC. The complaint alleged:

- In 2015, Fernandez served as the CEO of a now-dissolved radiology business called National Diagnostic Systems ("NDS").

- In September 2015, NDS contracted with Physician Partners, a management services organization, to provide ultrasound screening exams to MA patients within Physician Partners' network of medical providers.[7]

- Fernandez "soon observed that Physician Partners was routinely forging primary care physician prescriptions for leg and cardiac scans."

- "Defendants 'ordered' these tests only to increase the risk score for their Medicare Advantage members in order to receive enhanced payments from Medicare."

- Fernandez "also observed that Physician Partners demanded that NDS and its physicians use suggested diagnosis (ICD) codes that defendants referred to in phone calls to NDS as 'weighted codes.'" The "sole purpose of such a scheme was to increase risk score and reimbursement for defendants."

- Based on Fernandez's fall 2015 observations, "Defendants have received millions of dollars of improper risk adjustment payments from Medicare."

45. Fernandez allegedly learned on two occasions that Physician Partners had "planned on having its affiliate HMO's [sic] Freedom and Optimum submit NDS encounter data to the Medicare Part C Program for reimbursement." Physician Partners allegedly intended "to facilitate billing to the Medicare Part C program

[7] A management services organization, or MSO, helps a medical provider manage the non-medical aspects of its business, such as HR, IT, payroll, benefits, compliance, and administrative support.

through . . . Freedom and Optimum." In other words, Fernandez alleged that Freedom and Optimum were conduits in Physician Partners' supposed scheme. Fernandez asserted that Freedom and Optimum had breached the CIA as a result.

46. In a February 2021 motion to dismiss his criminal indictment, Fernandez asserted that his *qui tam* complaint "alleged Large-Scale Medicare Fraud (estimated proceeds over $100 million)," but that federal law enforcement had conducted a "Framed Arrest of Fernandez . . . to intentionally Obstruct Justice on his Qui-Tam Suit and dismiss his Suit." These assertions contributed to the recent judicial determination that Fernandez was mentally unfit for trial.

47. No reasonable person would expect that Fernandez's *qui tam* complaint threatened exposure to Anthem in an amount anywhere close to the Deductible ($14.85 million) or the Special Escrow Amount (over $50 million).[8]

[8] Evidence of Fernandez's broader litigation history points to the same conclusion. In connection with its pending motion to dismiss Fernandez's *qui tam* complaint, Anthem sought and obtained judicial notice of several complaints filed by Fernandez. In one example, *Fernandez v. Republican National Committee*, Fernandez alleged that his counsel had leaked "a confidential Memo outlining [Fernandez's] knowledge of Large Scale Medicare Fraud of over $25 million and Allegations of Police Misconduct." Fernandez alleged that the Republican Party had retaliated against his allegations of police misconduct by directing "hundreds of individuals" to harass him during bicycle rides. Fernandez moved to dismiss his complaint within two weeks of filing it. In another case, *Fernandez v. Volusia County Sheriff's Office*, Fernandez alleged that his ex-fiancée had sabotaged NDS after breaking up with Fernandez to date his attorney, who in turn had reported Fernandez to law enforcement for allegedly committing crimes at NDS. The Court dismissed the complaint.

F. The Zafirov *Qui Tam* Complaint

48. Dr. Clarissa Zafirov is a relatively inexperienced physician who earned her medical degree at the Medical University of Sofia in Sofia, Bulgaria in 2012. In October 2018, approximately two years after completing her residency, Zafirov began working as a family medicine physician at Florida Medical Associates, LLC d/b/a VIPCare. Freedom has insured certain patients of VIPCare.

49. In May 2019, Zafirov filed a sealed *qui tam* complaint alleging that VIPCare and affiliated medical providers had overbilled Medicare by submitting unsupported medical claims for insurance coverage. Zafirov alleged that secondary defendants Anthem, Freedom, and Optimum had aided the scheme by paying the unjustified claims.

50. Zafirov alleged that VIPCare had encouraged its physicians to over-diagnose patients by awarding bonuses pegged to increases in Medicare payments. The bonus structure allegedly encouraged willing physicians to see (and over-diagnose) patients insured by Freedom to take advantage of Freedom's access to Medicare.

51. But Zafirov did not join VIPCare until eight months after Anthem bought Freedom in February 2018. Zafirov never interacted with Freedom until at least eight months after Anthem's acquisition. Zafirov's alleged observations of

misconduct at VIPCare could not have supported any claim against Freedom's pre-Anthem business.[9]

52. In a hyperbolic style common to whistleblower complaints, Zafirov alleged that "Defendants violated" the False Claims Act, "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."

53. No reasonable person would expect that Zafirov's *qui tam* complaint threatened exposure to Anthem in an amount anywhere close to the Deductible ($14.85 million) or the Special Escrow Amount (over $50 million). In the unlikely event that Zafirov were to obtain any recovery, it would flow mostly or entirely against Freedom's Anthem-run business. To the extent any minor recovery flowed against Freedom's pre-Anthem business, the Deductible would prevent Anthem from recovering from the Special Escrow Amount.

[9] In an effort to escape this conclusion, Zafirov's complaint asserted in an introductory paragraph: "The violations of the FCA set forth herein have taken place for at least the preceding ten years from the date of the filing of this Complaint." Although parts of the complaint alleged that Zafirov had uncovered misconduct predating her arrival at VIPCare, the complaint mostly expressed Zafirov's medical disagreement with VIPCare's and other physicians' roughly contemporaneous evaluations of patients that she had treated in late 2018 or in 2019.

G. Anthem Notices the CIDs Claim.

54. Anthem "made a claim for indemnification on August 14, 2019 (one day before the first escrow release date) by faxing the Sellers a notice of a claim against the escrow (the 'Buyer Notice')." *Anthem I*, 2020 WL 7021505, at *1 (Del. Ch. Nov. 30, 2020). "The Buyer Notice provided an estimate of Loss greater than the $99 million in escrow thus reducing the Indemnity Escrow Release Amount to zero. The Buyer did not release any funds on August 15, 2019." *Id.*

> As "reasonable detail" of the specific facts and circumstances providing the bases for the claim of indemnification and the amount of Loss, the Buyer Notice identified Civil Investigation Demands (the "CIDs") from the United States Attorney's Office in connection with a Department of Justice ("DOJ") investigation into Anthem's alleged violations of the False Claims Act (the "DOJ Investigation"). The Buyer Notice stated that the "CIDs could reasonably be expected to give rise to an indemnified Loss because the CIDs' wording and time period (2010 to the present) encompass Sellers' pre-acquisition conduct." The Buyer Notice stated that the Losses "could well exhaust" the entirety of the funds in escrow.
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> The only support in the Buyer Notice for the assertion that an indemnifiable claim could "reasonably be expected" to result was the definition of "[t]he terms 'You,' 'Your,' 'Anthem' and 'Anthem's'" in the CID as inclusive of Anthem's subsidiaries, such as the Companies.

Id. at *1–2 (footnotes omitted).

55. "The only support in the Buyer Notice for the assertion that Losses 'could well exhaust' the $99 million Indemnity Escrow Release Amount was an October 1, 2018 DOJ Press Release announcing one $270 million settlement with an unaffiliated company for violations of the False Claims Act." *Id.* at *2.

56. In October 2019, the Sellers sued the Buyer to recover the Indemnity Escrow Amount. A few days before argument on the Sellers' motion for summary judgment in March 2020, "the DOJ filed a suit against Anthem in the United States District Court for the Southern District of New York. The suit did not name the Companies. In response, Anthem agreed to release the escrow funds to the Sellers." *Id.* at *3 (footnotes omitted).

57. Others were less fortunate. Anthem sent its "CIDs" claim notice, with the same $270 million loss estimate, to seemingly everyone sharing an escrow account with Anthem. Anthem sent the CIDs notice to the plaintiffs in *LPPAS Representative, LLC v. ATH Holding Company*, C.A. No. 2020-0241-KSJM (Del. Ch.) and *Shareholder Representative Services, LLC v. ATH Holding Company*, C.A. No. 2020-0443-KSJM (Del. Ch.). Anthem sent the CIDs notice to additional counterparties whose identities the Sellers either do not know or should not currently disclose.

58. In one example, Anthem used the CIDs notice to withhold escrow funds until the Court ordered specific performance against Anthem in December 2020. *See Anthem II*, 2020 WL 7706937, at *7–8 & n.52 (rejecting Anthem's argument that a new untimely claim "relate[d] back" to the defunct CIDs notice, which Anthem had refused to withdraw despite "acknowledging that it is groundless;" "Once the basis for withholding evaporated, the funds should have been released.").

59. Anthem makes routine efforts to assert blanket holdbacks against its counterparties. Anthem has a bad-faith custom or policy of asserting that its indemnity claims entitle it to withhold all amounts in escrow, rather than a realistic portion. Anthem intentionally makes unreasonably large holdbacks to create settlement leverage, making litigation the only recourse for its smaller counterparties.

H. Anthem Notices the Zafirov Claim.

60. In June 2020, the United States District Court for the Middle District of Florida unsealed the Zafirov complaint.

61. On July 13, 2020, Anthem sent to the Sellers' 2018 deal counsel a claim notice enclosing Zafirov's complaint. Anthem stated: "Although the Losses incurred from this Claim are not presently capable of calculation, the *Zafirov* Complaint alleges that the 'false claims inflated CMS's reimbursements by hundreds of millions of dollars.'" On this basis alone, Anthem concluded as follows:

> Thus, Anthem reasonably estimates that, between legal fees and potential damages (which could include treble damages and civil penalties), the Losses associated with this breach of the Health Care Representations may exhaust both the deductible ($14,850,000) and the Special Escrow Amount ($49,500,000). Anthem will provide the Sellers with an updated estimate of Losses as more information becomes available to it.

62. Anthem failed to send the claim notice to the Sellers' litigation counsel, who finally received a copy in late August.

63. By letter dated September 16, 2020, the Sellers objected to Anthem's claim notice and asked Anthem to answer several questions. The Sellers' objection letter stated:

> Anthem's loss estimate lacks analysis. When does Anthem expect to update its estimate? Would Anthem please propose a transparent methodology for estimating indemnifiable losses? Please confirm Anthem will make downward adjustments taking into account that (i) the Companies are secondary defendants and (ii) the complaint challenges conduct under Anthem's leadership.

64. Despite the Sellers' effort to engage with Anthem regarding its unreasonable loss estimate, Anthem declined to answer the Sellers' letter. Anthem ignored the Sellers' questions.

I. Zafirov Hits a Roadblock.

65. In a case management report dated September 14, 2020, the parties to the Zafirov litigation agreed that any settlement was "unlikely." This determination reflected Anthem's belief that Zafirov's claims were too meritless to warrant any discovery.

66. On September 21, 2020, the United States filed its Notice of Election to Decline Intervention. The notice contained customary language reserving the right to intervene later for good cause or, alternatively, to seek dismissal of Zafirov's claims. In declining to intervene, the United States relied on its investigation of Zafirov's claims, which had included at least the following:

- assembling an investigative team to examine the merit of the complaint's allegations;

- interviewing Zafirov and other potential witnesses;

- coordinating with potential *qui tam* relators other than Zafirov;

- opening a criminal investigation into the alleged misconduct, supported by OIG, and "using a variety of law enforcement tools, including covert information gathering techniques;"

- obtaining "numerous videos and recordings, some of considerable length;" and

- compiling and reviewing "data related to [Zafirov's] allegations, including data pertaining the [sic] utilization of certain diagnoses."

67. The United States' decision not to intervene was uniquely significant here because OIG has special access to the Companies' records under the CIA. The result of the United States' investigation, which OIG supported, indicates that Zafirov's claims lack meaningful upside.

68. MA-based *qui tam* lawsuits rarely generate any recovery without federal intervention. To the Sellers' knowledge, no MA case has ever gone to trial. The next page contains a chart of precedent settlements of MA-overpayment allegations.

Date	Key Parties	Settlement Value[10]	U.S. Intervention?
9/3/20	Independence Blue Cross	$2.25 million	Yes
5/12/17	Freedom & Optimum	$4.17 million	Yes
8/8/19	Beaver Medical Group	$5 million	Yes
11/16/20	Kaiser Permanente	$6.4 million	Yes
2/8/21	Humana & Roche	$8.9 million	No
4/12/19	Sutter Health	$30 million	Yes
10/1/18	DaVita Medical Holdings	$270 million[11]	Yes

69. On September 22, 2020, Anthem moved to dismiss all claims against Anthem and the Companies for at least four independent reasons.

[10] This column identifies settlement consideration paid to the United States. These figures exclude whistleblower awards, which would represent a fraction of the amounts paid to the government.

[11] The $270 million DaVita settlement is a non-precedential outlier for several reasons. By way of example, the case involved two types of claims. First, the United States alleged that a medical provider had caused an MA plan to submit incorrect diagnosis codes to CMS by instructing its physicians to use an improper code for a certain spinal condition, increasing Medicare reimbursements. Second, a whistleblower alleged that the same medical provider had conducted "one-way" chart reviews in which it scoured its patients' medical records for under-reported codes only (resulting in additional Medicare payments), without searching for over-reported codes that could have resulted in payment reductions. The whistleblower received a $10.2 million award. Working backward from a statute setting whistleblower awards at between 15% to 25% of the government's recovery, the second claim appeared to yield a recovery in the range of $40.8 million to $68 million. *See* 31 U.S.C. § 3730(d)(1). This exercise suggests that the relevant portion of the largest MA settlement in history probably yielded a recovery of less than the aggregate amount of the Deductible and the Special Escrow Amount.

J. Fernandez Hits a Roadblock.

70. On September 21, 2020, the United States filed its Notice of Election to Decline Intervention in the Fernandez litigation. The United States contemporaneously filed its Notice of Election to Decline Intervention in the Zafirov litigation, as discussed above, and in a third *qui tam* case brought by Dr. George Mansour, whose complaint largely mirrored Zafirov's allegations.

71. On September 22, 2020, the United States District Court for the Middle District of Florida unsealed Fernandez's complaint.

72. On November 3, 2020, Anthem sent a claim notice to the Sellers' 2018 deal counsel. As before, Anthem failed to copy the Sellers' litigation counsel. Anthem continued to ignore the Sellers' objection letter dated September 16, 2020.

73. Anthem's new claim notice stated: "Anthem has learned that two *qui tam* complaints against certain Companies were recently unsealed"—the Fernandez and Mansour complaints. Anthem failed to mention that the United States had declined intervention contemporaneously with the unsealing.

74. Rather than reduce its loss estimate to reflect the United States' refusal to intervene, Anthem doubled down by declaring that "Losses associated with" the Fernandez and Mansour cases "may exhaust both the deductible ($14,850,000) and the Special Escrow Amount ($49,500,000), particularly when considered with

Anthem's indemnification claim arising from the *Zafirov* Complaint, about which Anthem provided notice on July 13, 2020."

75. Anthem's internal litigation analysis surely differs from its outward representations to its escrow counterparties. When communicating with the Sellers, Anthem trumpets the *qui tam* lawsuits as threatening historically large recoveries. But privately, Anthem knows that these cases have only nuisance value.

76. On January 11, 2021, Mansour voluntarily dismissed his complaint and advised that the United States had consented to the dismissal.

77. On January 25, 2021, Anthem's counsel moved to dismiss the Companies from the Fernandez case for at least four independent reasons.

K. Anthem Stiffs the Sellers Again.

78. The MPA required that Anthem notice all claims against the Special Escrow Amount by Monday, February 15, 2021. On Thursday, February 11, Anthem sent an omnibus claim notice to the Sellers' 2018 deal counsel. The omnibus notice responded (finally) to litigation counsel's September 2020 objection letter, but Anthem avoided copying litigation counsel.

79. While purporting to answer litigation counsel's questions—asking Anthem to propose transparent methodology for estimating losses, to reduce its estimate to account for the Companies being secondary defendants in the underlying proceedings, and to reduce its estimate to account for the proceedings challenging

Anthem's own conduct—Anthem did none of the above. Anthem instead reverse-engineered its way to a "conservative estimate" of $110 million for Zafirov's claims alone. Anthem credited the strongest form of Zafirov's and Fernandez's allegations, taking their wildest claims at face value.

80. Anthem's "conservative estimate" was bogus. No reasonable person would expect the Zafirov or Fernandez cases to threaten a record-breaking recovery for FCA overpayment claims. Even if the United States had intervened, a recovery exceeding the Deductible would have been unlikely. *See supra* ¶ 68.

81. Anthem concluded that "taking into account the legal fees and costs, together with the potential damages, each of the *Zafirov* and *Fernandez* matters ***could be reasonably expected*** to give rise to Losses that exceed the deductible and Special Escrow Amount." But "[t]he 'reasonably be expected to' standard is an objective one." *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *65 (Del. Ch.), *aff'd*, 198 A.3d 724 (Del. 2018) (ORDER). "In other words, it means more likely than not." *Id.* at *65 n.646. Contrary to its representations to the Sellers, Anthem never believed that it was "more likely than not" that its exposure would exceed the Deductible and the Special Escrow Amount.

82. Anthem's method of estimating losses (if one can call it that) was improper; in other words, "garbage in, garbage out." The Sellers requested that Anthem propose a transparent methodology for estimating its litigation exposure.

The Sellers asked that the methodology address at least two variables: (i) whether the Companies were primary or secondary defendants and (ii) to what extent the underlying proceedings challenged post-closing rather than pre-closing conduct. Anthem refused to cooperate.

83. Anthem's loss "estimate" failed to consider that Zafirov's complaint named eight defendants, with the Companies being only two of them. In the unlikely event that Zafirov obtained any recovery, the Companies' minority share of the recovery would not meet the Deductible.

84. Anthem's decision to freeze the entire Special Escrow Amount thwarted the possibility of a partial release, which Section 2.5(c) of the MPA covered expressly. The MPA posited that even if Anthem discovered a basis to seek indemnification, the claim may be for less than the full Special Escrow Amount. If that were to happen, then the Sellers would receive a portion of the Special Escrow Amount by February 18, 2021, with the remaining distribution to be sorted out later. Anthem thwarted the parties' bargain by arbitrarily claiming losses exceeding the aggregate amount of the Deductible ($14.85 million) and the Special Escrow Amount (over $50 million).

85. If Anthem believed that the Zafirov litigation threatened meaningful exposure, then Anthem would have changed the Companies' business practices to moot related claims prospectively or to obtain settlement credit, as Freedom did

successfully in 2015. Anthem has not changed the Companies' business practices in response to Zafirov's or Fernandez's claims.

86. Anthem lacked any valid basis to withhold the Special Escrow Amount when it came due in February 2021. The Sellers respectfully request a decree of specific performance directing Anthem to surrender the Special Escrow Amount.

COUNT I
(Breach of Contract)

87. The Sellers repeat the above allegations.

88. The MPA is a binding agreement supported by consideration.

89. The defendant breached the MPA by refusing to consent to the release of the Special Escrow Amount to the Sellers once it became due.

90. The Sellers are entitled to a remedy for the defendant's breach of contract.

REQUESTS FOR RELIEF

The Sellers respectfully request that the Court:

a. order the defendant to specifically perform Section 2.5(c) of the MPA by participating in a joint written instruction directing the escrow agent to release the Special Escrow Amount to the Sellers;

b. enter a declaratory judgment that the Sellers are entitled to the Special Escrow Amount;

c. award damages, pre-judgment interest, and post-judgment interest to the Sellers;

d. award attorneys' fees, expenses, and costs to the Sellers; and

e. order such other relief as the Court deems just and proper.

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