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Case No. 2020-0443-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SHAREHOLDER REPRESENTATIVE SERVICES LLC, solely in its capacity as HealthSun Sellers' Representative,	)	
Plaintiff,	)	
v.	)	C.A. No. 2020-0443-KSJM
ATH HOLDING COMPANY, LLC and HIGHLAND ACQUISITION HOLDINGS, LLC,	)	PUBLIC VERSION FILED MAY 7, 2021
Defendants.	)	

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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The Court previously granted partial judgment directing Anthem to release most of the Disputed Funds. The Court held that "Anthem was required to meet the materiality standard" of Section 10.2(a) of the EIPA to withhold the remaining $5.8 million in dispute. The Sellers contended that Section 10.2(a) (titled "Limitations") limits indemnification by excluding claims that seek under $14.675 million collectively. By contrast, Anthem asserted that Section 10.2(a) deems aggregate claims for $14.675 million to be material **and** lets Anthem withhold smaller amounts that are somehow "material" anyway. Anthem argued that the "Limitations" provision limits nothing and is instead a "purely buyer-friendly construct."

The Court held that Section 10.2(a) is ambiguous and requested extrinsic evidence of its meaning. The HealthSun Sellers' deal counsel has now produced Section 10.2(a)'s negotiating history and an affidavit stating its purpose. The evidence confirms that the $14.675 million materiality standard is a tipping basket that excludes Anthem's $5.8 million claims. No one never agreed to a "Limitations" term granting special privileges to the Buyer.

When negotiations over the EIPA began, the Buyer proposed that "the Deductible shall be the materiality standard for all purposes hereunder." Under the Buyer's proposal, the EIPA would scrape the materiality qualifiers from the Health Care Representations and Warranties, apply a materiality threshold in an amount equal to the Deductible to determine whether any misstated representation

constituted breach, and apply the same number to calculate the aggregate loss required to obtain indemnification for any breach.

If the Sellers had accepted the Buyer's opening ask, then they would have obtained a [redacted] tipping basket that excluded Anthem's $5.8 million claims. But the Sellers bargained for even more protection. The Sellers at first resisted scraping materiality from Health Care Representations and Warranties, which the Buyer's representations and warranties insurance did not cover. The Buyer then narrowed its request by proposing a [redacted] tipping basket for certain Health Care Representations and Warranties involving claims of specific concern to the Buyer. The Sellers requested a higher number, and the parties settled on $14.675 million.

The HealthSun Sellers' deal counsel introduced the $14.675 million materiality threshold to Section 10.2(a). Anthem's assertion that sell-side counsel introduced a "purely buyer-friendly construct" is insupportable. The author has sworn that he introduced a tipping basket, and the contemporaneous record proves the same point. Even Anthem conceded in its demand letters that Section 10.2(a) excludes claims totaling under $14.675 million. Only after this case began did Anthem "talk[] to transaction lawyers" and repudiate its concession for litigation convenience. Anthem's pre-litigation course of dealing is an independent basis for the Sellers' contract interpretation.

The Court indicated previously and without the benefit of evidence that the Sellers' interpretation of Section 10.2(a) is "more compelling." Indisputable facts now confirm that the Sellers have interpreted Section 10.2(a) correctly. The HealthSun Plaintiff respectfully seeks summary judgment directing Anthem to release the remaining Disputed Funds and granting contractual fee-shifting.

FACTUAL BACKGROUND

A. The Companies and Their Business

The HealthSun Entities and the Pasteur Entities (the "Companies") "operate as an integrated health plan, medical center network, and pharmacy."[1] The HealthSun Plan is a "Medicare Advantage" (MA) plan, a type of private health insurer covering Medicare-eligible beneficiaries.[2] The Pasteur Entities run medical clinics that served 30.2% of the HealthSun Plan's members as of August 2015.[3]

The Centers for Medicare & Medicaid Services ("CMS") is a federal agency that administers the Medicare program.[4] CMS pays MA plans on a per-enrollee-per-month basis.[5] CMS calculates the payments based on plan enrollees' health risks and demographics.[6] Medical providers log "ICD-10-CM" codes reflecting patient

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[1] *LPPAS Representative, LLC v. ATH Hldg. Co.* (*Pleadings Decision*), 2020 WL 7706937, at *2 (Del. Ch. Dec. 29, 2020). This brief adopts defined terms from the EIPA and the Pleadings Decision.

[2] Answer ¶¶ 25–26.

[3] PX 43 at '976, '978.

[4] *See, e.g.*, *Medicare and Medicaid Programs; Policy and Technical Changes to the Medicare Advantage, Medicare Prescription Drug Benefit, Program of All-Inclusive Care for the Elderly (PACE), Medicaid Fee-for-Service, and Medicaid Managed Care Programs for Years 2020 and 2021*, 83 Fed. Reg. 54982, 54982–94 (Nov. 1, 2018) [hereinafter *Medicare*].

[5] Answer ¶¶ 29, 33.

[6] *See Medicare*, *supra* note 4, at 55037 (stating that CMS "risk adjust[s]" to "ensur[e] that accurate payments are made to MA organizations based on the health

diagnoses and encounters.[7] "Diagnosis codes determine the risk scores, which in turn determine the risk-adjusted payments" made by CMS to MA plans.[8]

"The current risk adjustment model employed in adjusting MA plan payments is known as the CMS Hierarchical Condition Category (CMS-HCC) model."[9] The CMS-HCC model "functions by categorizing ICD-10-CM codes into disease groups called Hierarchical Condition Categories, or HCCs."[10] "Each HCC includes diagnosis codes that are related clinically and have similar cost implications."[11]

CMS conducts "risk adjustment data validation (RADV) audits" of MA plans to confirm whether enrollees' medical records support the codes submitted to CMS.[12] "Risk adjustment discrepancies are identified when the enrollee's HCCs used for payment (based upon MA organization-submitted data) differ from the HCCs assigned based on the medical record, pursuant to the RADV audit process."[13]

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status . . . that is, less for healthier enrollees expected to incur lower health care costs and more for less healthy enrollees expected to incur higher health care costs").

[7] *Id.*; *see* Answer ¶ 49 ("[H]ealthcare providers submit diagnosis codes to Medicare Advantage organizations.").

[8] *Medicare*, *supra* note 4, at 55037.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 55037–38.

B. The Companies Conduct a Sale Process

In 2015, the HealthSun Sellers and the Pasteur Sellers sought to consolidate and sell the Companies.[14] Oppenheimer & Co. Inc. served as the Sellers' financial advisor.[15] McDermott Will & Emery LLP and Akerman LLP served as counsel to the HealthSun Sellers and the Pasteur Sellers, respectively.[16]

Oppenheimer pitched the Companies to potential buyers.[17] Nine parties made preliminary acquisition proposals.[18] On December 31, 2015, the private equity firm Summit Partners, L.P. ("Summit") entered a letter of intent to buy the Companies for [redacted][19] Kirkland & Ellis LLP served as counsel to Summit.[20]

C. The Sellers Negotiate With Summit

Frederic Levenson, the co-chair of McDermott's Private Equity Practice Group, led the Sellers' efforts to negotiate the EIPA with Kirkland.[21] The Pasteur Sellers' counsel played a supporting role.[22]

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[14] Compl. ¶ 32.

[15] PX 43 at '973.

[16] Levenson Decl. ¶¶ 3–4.

[17] PX 53 at '431.

[18] *Id.*

[19] *Id.*; PX 45 at '994.

[20] Levenson Decl. ¶ 3.

[21] *Id.* ¶¶ 3–5.

[22] *See id.* ¶ 4 ("The HealthSun Sellers had the larger economic stake of the two seller groups. The parties allocated a majority of the sale proceeds to the

On January 4, 2016, McDermott circulated an initial draft EIPA.[23] Article 10 addressed indemnification.[24] Section 10.2, titled "Limitations," cabined the Buyer's indemnification right.[25] Section 10.2(a)'s first sentence contained a deductible (the "Deductible") in an amount to be determined (the "First Sentence").[26] When used in the First Sentence, the Deductible functioned as a deductible basket permitting "recovery of losses *only* in excess of the stated threshold."[27] The First Sentence applied to all the Sellers' representations except for a subset called the "Limitation Carve-Outs."[28] The parties exchanged iterations of Section 10.2(a) over the next seven months.

HealthSun Sellers. MWE led the negotiation of the EIPA's terms with K&E. The Pasteur Sellers' counsel from Akerman LLP largely followed MWE's lead and worked with MWE.").

[23] *See* PX 47.

[24] PX 46 Art. 10.

[25] *See id.* § 10.2.

[26] *Id.* § 10.2(a) ("[T]he Sellers . . . shall only be required to indemnify the Buyer Indenified Parties to the extent that the indemnifiable Losses, in the aggregate, exceed $[_____] (the 'Deductible'), and, in such event, the indemnifying party (or parties) shall collectively only be required to provide indemnification for the amount of any Losses in excess of the Deductible." (footnote omitted)).

[27] *Pleadings Decision*, 2020 WL 7706937, at *12 (emphasis added) (internal quotation marks omitted).

[28] PX 46 § 10.2(a).

On March 19, 2016, Kirkland provided its first markup of the EIPA.[29] Kirkland proposed line-item indemnities for "Specified Matters," "if any," to be determined after due diligence.[30] Kirkland's new Section 10.3(e) stated:

> The Sellers . . . agree to . . . indemnify and defend Buyer and its Affiliates . . . against, and agree to hold each of them harmless from, and shall pay the amount of, any and all Losses sustained, incurred or suffered by any of them incident to, resulting from or in any way arising out of or in connection with any of the following:
>
> (e) Any Liability with respect to the matters set forth on Schedule 10.3(e) (the "Specified Matters").
>
> Note to Draft: Contents, if any, subject to finalization of due diligence.[31]

Kirkland added the "Specified Matters" and the "Health Care Representations and Warranties" to the Limitation Carve-Outs, exempting those items from the Deductible-as-deductible-basket of the First Sentence.[32]

Kirkland inserted a new sentence scraping the materiality qualifiers from the Sellers' representations and replacing them with a global materiality threshold in an amount equal to the Deductible (the "Second Sentence").[33] Unlike the final version

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[29] *See* PX 50.

[30] PX 52 Pt. 6 § 10.3(e) (redline).

[31] PX 51 (footnote consolidated with above-line text).

[32] PX 52 Pt. 6 § 10.2(a) (redline).

[33] *See id.* § 10.2(a) ("the Deductible shall be the materiality standard for all purposes hereunder"). At the time, the Second Sentence technically was a fourth sentence, but this brief sticks to the terminology of the Pleadings Decision for clarity.

of the Second Sentence, Kirkland's original Second Sentence applied the Deductible-derived materiality threshold to *all* the Sellers' representations, even the Limitation Carve-Outs. As a result, the original Second Sentence applied a tipping basket in an amount equal to the Deductible to the Health Care Representations and Warranties. The chart below illustrates this point.

Kirkland's Original Second Sentence (March 2016)	Final Version of Second Sentence (August 17, 2016)
"The Parties agree that for purposes of (A) determining whether there has been a breach, inaccuracy or failure of any representation, warranty, covenant or agreement subject to indemnification pursuant to this Article 10, and (B) calculating the amount of Losses with respect thereto, ***the Deductible shall be the materiality standard for all purposes hereunder*** and, therefore, such representations . . . alleged to have been breached . . . shall be construed as if any qualification or limitation with respect to materiality . . . were omitted from the text of such representations . . . ." PX 51 § 10.2(a) (emphasis added).	"The Parties agree that for purposes of (A) determining whether there has been a breach or inaccuracy of any representation, warranty, covenant or agreement subject to indemnification pursuant to this Article 10 (***other than***, under this clause (A) only, for purposes of determining whether there has been a breach or inaccuracy of any of . . . ***the Health Care Representations and Warranties*** . . .), and (B) calculating the amount of Losses with respect thereto, the Per-Claim Basket and ***the Deductible shall be the materiality standards for all purposes hereunder*** and, therefore, such representations . . . alleged to have been breached shall be construed as if any qualification or limitation with respect to materiality . . . were omitted from the text of such representations . . . ." PX 1 ("EIPA") § 10.2(a) (emphasis added).

D. Summit Takes Due Diligence

Summit achieved significant due diligence by late March 2016.[34] Summit used a second law firm, Epstein Becker & Green, P.C., and two consultants for Medicare diligence.[35] Their responsibilities were as follows:

Due Diligence Advisor	General Focus	Scope of Review
Epstein Becker	Regulatory Due Diligence	• Compliance policy review • Review of affiliated contracts • HCC and coding risk • Program audit risk
Advance Health	Coding / HCC Consultant	• Coding audit • HCC accuracy / risk factors
Avalere	Reimbursement Consultant	• Review of reimbursement environment • MA member / rate projections • HCC methodology projections[36]

On March 29, 2016, Summit reduced its proposed purchase price from [redacted] to [redacted].[37] Around this time, Summit's Medicare specialists gave feedback on the Companies:

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[34] *See* PX 53 at '436 ("Summit Partners has largely completed a thorough due diligence review of the Company.").

[35] *Id.* at '437.

[36] PX 55 at '395–96.

[37] PX 53 at '441; *see id.* at '431.

- "The Company has done a very good job on stars and HCC coding over the last few years."

- "It was a smooth process throughout the entire audit [by Summit's consultant Advance Health] with the Company responding promptly and providing data in a format that was easy to digest. This speaks well to how the Company can perform in a CMS request scenario."[38]

Despite these favorable reviews, Summit was "cautious" of Medicare's "regulatory spotlight" on South Florida, where the Companies operated.[39] The Pasteur Entities' clinics had historically served the patients of a Humana MA plan,[40] and Summit took seriously "the rumors [redacted]."[41] Summit identified possible indemnity claims of specific concern: "RADV, Program Audit, ODAG and CDAG risks are real and require protection for periods prior to Summit's ownership. We look forward to reviewing the mock Program Audit currently underway."[42]

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[38] PX 55 at '412.

[39] *Id.* at '411.

[40] *See id.* at '408 (citing Pasteur Entities' "Legacy reputational issues in the market related to the previous relationship with Humana and previous sales & marketing tactics"). *See generally U.S. ex rel. Osheroff v. Humana, Inc.*, 2012 WL 4479072, at *1–2 (S.D. Fla. Sept. 28, 2012) (describing relationship between Humana and Pasteur Entities).

[41] PX 55 at '421; *accord id.* at '411 ("We still remain very cautious of the South Florida regulatory environment, given all of the recent activity and investigations with Humana's provider groups in Florida . . . .").

[42] *Id.* at '411.

Summit's concern about regulatory action caused it to take an initially aggressive negotiating position on indemnification.[43] Summit requested an escrow amount equal to [redacted] of the purchase price and a lengthy survival period for representations concerning "Healthcare / Regulatory Matters."[44]

In a slide deck sent to the Sellers, Summit contended that its indemnity position was "market."[45] While Summit may have been a tough negotiator, it never made patently unfair non-market demands. For example, Summit never proposed a rigged materiality standard permitting it to obtain indemnification by meeting a presumptive threshold while reserving the right to claim materiality below that threshold. That argument, which is Anthem's litigation argument, is unsupported by any evidence.

In summer 2016, the Sellers chipped away at Summit's requested healthcare coverage. Summit ultimately accepted less protection than it had initially requested, as discussed below.

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[43] *See id.* at '421 ("Escrows/Indemnification in Medicare Advantage transactions that provide significant risk allocation for healthcare regulatory / compliance issues to selling shareholders are market for transactions of this type."); *id.* ("While we have completed significant regulatory and coding due diligence, there are still unknown risks related to the Company's previous compliance, regulatory and coding policies.").

[44] *Id.* at '422.

[45] *See id.* at '421–22; PX 54 (cover email).

E. The Sellers Answer Summit's Coverage Demands

In May 2016, the Sellers responded to Summit's indemnity position. Recall that Kirkland's proposed Second Sentence applied a tipping basket to the Health Care Representations and Warranties, which would have granted Summit recovery from dollar one if its losses reached a threshold amount. Oppenheimer proposed that the Sellers give "'line-item' dollar one indemnities" for just a subset of healthcare claims: "pre-closing liabilities related to the pre-closing Risk Adjustment Data Validation (RADV) audits."[46] McDermott suggested that the EIPA "limit[] the dollar-one health care indemnity to known items that are designed as line-item indemnities."[47] On May 22, McDermott sent to Kirkland an issues list summarizing the parties' main discussion points.[48] The chart on the next page contains excerpts from the list.

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[46] PX 56.

[47] PX 58 at '575. As discussed above, CMS conducts "RADV audits" on MA plans. *See supra* at 4–5. "RADV audits occur after the final risk adjustment data submission deadline for the MA contract year." *Medicare*, *supra* note 4, at 55037. CMS "annually select[s] MA organizations" for RADV audits and thus does not audit every plan every year. *Id.*

[48] PX 57; PX 58 at '567 (addressing "key issues and discussion points").

Section	Buyer's Proposal	Sellers' Response
§1.3(c) – Payments at Closing	"[B]uyer has required a [redacted] Indemnity Escrow Fund . . . ."	"To be discussed, including an Indemnity Escrow Fund equal to a mutually agreed upon percentage of the Purchase Price . . . ."
§10.1 – Survival	"Include Health Care Representations and Warranties . . . survive for a to-be-determined amount of time post-Closing."	"To be discussed as Buyer has requested [redacted] and the Sellers desire a shorter survival period."
§10.2 – Limitations	"Include added carve-outs to the deductible for (and thus Buyer will have dollar-one indemnity coverage for) (i) indemnification obligations with respect to any line-item indemnities that are to be determined (if any), and (ii) any breaches of the Health Care Representations and Warranties."	"To be discussed, including limiting the dollar-one health care indemnity to known items that are designed as line-item indemnities."
§10.2 – Limitations	"Include a Deductible equal to [redacted] of the Purchase Price."	"Acceptable; provided, that the parties mutually agree upon the carve-outs to the Deductible."
§10.2 – Limitations	"Include a double 'materiality scrape'."	"Include a single 'materiality scrape' solely with respect to determining the amount of Losses, but not in determining whether a breach has occurred."[49]

[49] PX 58 at '569, '575–76.

Negotiations continued in June 2016. On June 7, McDermott circulated a revised issues list.[50] The "Current Status/Proposals" column addressed the items from the chart above as follows:

1) The Escrow Amount: "Buyer continues to request a [redacted] Indemnity Escrow Fund and a 4 year escrow period; however the Sellers and their respective advisors to discuss a counter proposal."

2) The Survival Period: "To be discussed – Survival period for Health Care Representations and Warranties . . . [redacted]

3) Whether to Apply the First Sentence to Healthcare Claims: "To be discussed – Which Health Care Representations and Warranties are carve-outs to the deductible."

4) The Amount of the Deductible: "Agreed to [redacted] To be discussed – Carve-outs to the Deductible."

5) "Single" Versus "Double" Materiality Scrape: "To be discussed – Based upon the requirements of the Representations and Warranties Insurance Policy with respect to included and excluded indemnity claims thereunder."[51]

The Sellers opposed Summit's request to escrow [redacted] of the purchase price. McDermott advocated to Kirkland that the "Sellers already took a large purchase price adjustment related to the same issues that are being subjected to the escrow."[52] The Sellers were "uncomfortable with the requested escrow amount" because "the

[50] PX 59.

[51] PX 60 at '598, '608–09; PX 61 at '621–22, '630–31 (redline).

[52] PX 59 (period added).

claims history of the Selling Entities and Buyer's due diligence" had "not revealed any governmental investigations or systemic issues."[53]

On June 7, 2016, Summit made a "non-negotiable" "best and final offer" for the indemnity package.[54] Summit lowered its requested escrow amount from [redacted] to [redacted] of the purchase price.[55] Summit stood by its demand for a [redacted] survival period for the Health Care Representations and Warranties, rejecting the Sellers' request for a shorter period.[56] The Sellers accepted Summit's offer on both items but continued negotiating others.

F. McDermott Proposes a "Single" Scrape in the Second Sentence

On June 18, 2016, McDermott provided edits to Kirkland's March 2016 markup of the EIPA.[57] McDermott replaced the Second Sentence's "double" materiality scrape with a "single" scrape. As modified, the scrape applied "solely with respect to determining the amount of Losses, but not in determining whether a breach has occurred."[58] McDermott struck the [redacted] materiality standard that Kirkland had used as the breach threshold, consistent with removing the scrape

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[53] *Id.* (period added).

[54] PX 63 (internal quotation marks omitted); *accord* PX 62.

[55] *See* PX 63.

[56] *Id.*

[57] PX 64.

[58] PX 60 at '609 (June 7 issues list foreshadowing McDermott's edit).

that had applied for breach purposes.[59] McDermott's revised Second Sentence stated:

> The Parties agree that solely for purposes of calculating the amount of Losses with respect to a breach of any representation . . . subject to indemnification pursuant to this Article 10 (***and not for determining whether there has been a breach*** of any representation . . . subject to indemnification pursuant to this Article 10) such representations . . . shall be construed as if any qualification or limitation with respect to materiality, whether by reference to the terms "material," "in all material respects," . . . or similar words, were omitted from the text of such representations . . . .[60]

McDermott's edits created two risks from a buyer's perspective: (i) a court could hold that a breach was immaterial even if the resulting losses exceeded [redacted] and (ii) the buyer could not establish materiality by aggregating the effect of small breaches, even if those breaches caused significant collective costs.[61]

G. Kirkland Conforms the Second Sentence to Summit's R&WI Coverage

By this point, the draft EIPA required Summit to draw indemnification from the following sources in the following order: (1) the "Indemnity Escrow Fund up to an amount equal to the Initial Cap" of [redacted], (2) Summit's representations

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[59] *See* PX 66 Pt. 5 § 10.2(a) (redline).

[60] PX 65 Pt. 2 § 10.2(a) (emphasis added).

[61] *See* Dkt. 48 HealthSun Pl.'s Reply Br. at 11–12 (discussing Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 15.03[1] n.1 (2019 ed.) (presenting possibility of a court holding that a material breach required losses "of at least" 2% of purchase price)).

and warranties insurance ("R&WI") policy "(to the extent coverage is available)," and (3) the Indemnity Escrow Fund.[62] Subject to exceptions not relevant here, Summit had to exhaust its R&WI coverage before recovering from escrow because the Initial Cap equaled the Deductible.[63] The final EIPA imposed the same rules.[64]

Summit's R&WI policy did not cover the Health Care Representations and Warranties, line-item indemnities, or certain tax liabilities,[65] thus making the escrow more accessible for those matters. The Sellers understandably wanted a pro-seller "single" materiality scrape for uninsured representations to reduce Summit's recourse to the escrow. Summit understandably wanted a double scrape for insured representations to make tapping the R&WI policy easier.

On June 28, 2016, Kirkland proposed a double scrape for most of the Sellers' representations.[66] Kirkland modified the Second Sentence to apply "the [redacted] thousand Per-Claim Basket to determine whether any misstated garden-variety

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[62] PX 65 Pt. 2 § 10.7(a).

[63] *See id.*; *id.* at '395 ("'Initial Cap' means $9,750,000.").

[64] *See* EIPA § 10.7(a).

[65] *See* PX 68 Pt. 3 § 10.7(a) (identifying "claims that are excluded under the Representations and Warranties Insurance Policy (including the Specified Matters, breach or inaccuracy of the Health Care Representations and Warranties and certain Tax matters)").

[66] *See id.* § 10.2(a) (redline).

representations constitute a breach and the [redacted] Deductible to calculate the aggregate loss required to obtain indemnification for those breaches."[67]

Kirkland's edits respected the Sellers' choice of a single scrape for the Health Care Representations and Warranties, meaning those representations retained their materiality qualifiers for breach purposes. As modified, the Second Sentence carved out the Health Care Representations and Warranties "under this clause (A) only." Clause (B), which applied to all representations, made the [redacted] Deductible the measuring stick for the degree of loss required for Summit to obtain indemnification for a healthcare claim. Put differently, Kirkland renewed the aspect of its March 2016 proposal under which a tipping basket pegged to the Deductible would calculate indemnification for any healthcare claim.[68] Kirkland's June 28 version of the Second Sentence provided:

> The Parties agree that for purposes of (A) determining whether there has been a breach, inaccuracy or failure of any representation . . . subject to indemnification pursuant to this Article 10 (***other than, under this clause (A) only***, for purposes of determining whether there has been a breach, inaccuracy or failure of any of . . . ***the Health Care Representations and Warranties*** . . .), and (B) calculating the amount of Losses with respect thereto, the Per-Claim Basket and the Deductible shall be the materiality standards for all purposes hereunder and, therefore, such representations . . . alleged to have been breached shall be construed as if any qualification or limitation with respect to materiality, whether by reference to the terms "material," "in all

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[67] *Pleadings Decision*, 2020 WL 7706937, at *13; *see* PX 69 Pt. 2 § 10.2(a).

[68] *See supra* at 8–9.

material respects," . . . or similar words, were omitted from the text of such representations . . . .[69]

H. The Parties Bifurcate the Materiality Scrape

On July 6, 2016, McDermott restored the Second Sentence from its June draft, adopting a "single" scrape for all the Sellers' representations.[70] By making this change, McDermott reintroduced the risks to Summit identified above: uncertainty regarding how a court would define materiality, Summit being unable to aggregate small claims, and a tougher path to R&WI coverage. In an issues list dated July 15, 2016, Kirkland objected that the "Sellers reverted to a single materiality scrape for all matters rather than only those not covered by the R&WI policy."[71]

On July 17, 2016, Kirkland stated: "We think our prior draft will work with the insurer and is a reasonable outcome and is what we have in mind for bifurcating the scrape."[72] Kirkland restored the Second Sentence from its June 28 draft.[73]

On July 21, 2016, the Sellers agreed to a double scrape for representations covered by RW&I policy.[74] Revisiting the long-outstanding placeholder for line-

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[69] PX 69 Pt. 2 § 10.2(a) (emphasis added).

[70] *See* PX 72 Pt. 6 § 10.2(a) (redline).

[71] PX 74 at '374.

[72] PX 75.

[73] *See* PX 77 Pt. 3 § 10.2(a) (redline).

[74] *See* PX 80 at '242 (proposing "'Double Scrape' for general representations and warranties with respect to the R&WI policy and 'single scrape' for all other representations and warranties; provided that the representations and warranties

item indemnities,[75] McDermott proposed: "Limits on 10.3(e) to be discussed once such 'line item' indemnities are provided by Buyer (which have to be provided by end of business on July 22, 2016)."[76]

I. The Parties Address Specific Healthcare Claims

On July 28, 2016, Kirkland proposed two line-item indemnities.[77] Each was a mini-basket for a group of related healthcare claims. Kirkland used a tipping-basket structure, consistent with the EIPA's overall treatment of healthcare claims: "If and only if the cumulative amount of Losses" for each claim type exceeded a specified amount, then the Sellers would indemnify Summit "for all such Losses."[78]

First, Kirkland proposed a [redacted] for [redacted]" concerning specified plan years, [redacted]"[79]

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contained in Sections 2.13(e) through 2.13(m) shall be the sole and exclusive representations and warranties of the Sellers concerning healthcare matters").

[75] *See supra* at 8 (discussing Kirkland's March 2016 proposal for line-item indemnities for "Specified Matters" in Section 10.3(e)).

[76] PX 80 at '242.

[77] PX 81 ("As requested, attached please find a draft Schedule 10.3(e) with the two proposed specific indemnity matters, covering RADV and CMS Program audits.").

[78] PX 82.

[79] *Id.*

Second, Kirkland proposed a [redacted] basket for "any CMS Program Audit . . . with respect to data or operations of the Companies occurring before or within one year after the Closing Date, including any cost . . . imposed upon the Companies in connection therewith."[80] RADV Claims and CMS Program Audit Claims include efforts by the government to remediate overpayments to MA plans.[81]

The parties quickly moved off the healthcare mini-baskets. After a call with Kirkland on July 30, 2016, Levenson reported internally: "They want materiality defined in the healthcare reps."[82] The final EIPA would define the affected representations as the "Specified Health Care Representations and Warranties" (under the Pleadings Decision, the "Specified Representations").

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[80] *Id.*

[81] *See* EIPA at A-5 ("'CMS Program Audit Claim' means any civil money penalty or sanction including the suspension of marketing, enrollment, or payment arising out of or in connection with any CMS program audit to which any of the Companies is or becomes subject to with respect to data or operations of the Companies occurring before or within one year after the Closing Date."); *id.* at A-18 ("'RADV Claim' means any: (a) determination by the Department of Health and Human Services [i.e., CMS], based on a Risk Adjustment Data Validation Audit, that any of the Companies were overpaid for payment years 2013, 2014, 2015, and/or the period from January 1, 2016 through the Closing Date based on identified errors in Hierarchical Condition Coding or encounter data; or (b) *qui tam* claim to which any of the Companies is or becomes subject to that alleges errors in Hierarchical Condition Coding or encounter data with respect to payment years 2013, 2014, 2015, and/or the period from January 1, 2016 through the Closing Date.").

[82] PX 83 at '202 (period added).

J. Summit Proposes a [redacted] Tipping Basket

On August 3, 2016, Levenson informed his colleagues that "K&E came back with the following:"

> Materiality for RAD-V matters means [redacted] basis (I.e., on a tipping basket basis).
>
> Materiality for CMS audit matters means [redacted] in the aggregate for claims on a cumulative basis and not on a per claims basis (I.e, on a tipping baker [sic] basis).[83]

Kirkland's idea resembled its March 2016 proposal for a tipping basket pegged to the Deductible to apply to the Health Care Representations and Warranties, but with one difference: The [redacted] basket would apply to healthcare claims of specific concern to Summit, but the Health Care Representations and Warranties would otherwise retain their materiality qualifiers.

McDermott insisted that any basket for healthcare claims be larger than [redacted].[84] On August 5, 2016, Levenson reported internally and to the Pasteur Sellers' counsel: "K&E agreed to $14,625,000 as the cumulative definition of materiality for the RAD-V, HCC and CMS related healthcare reps."[85] In other words, Kirkland agreed to a basket in an amount equal to [redacted] of the Deductible.

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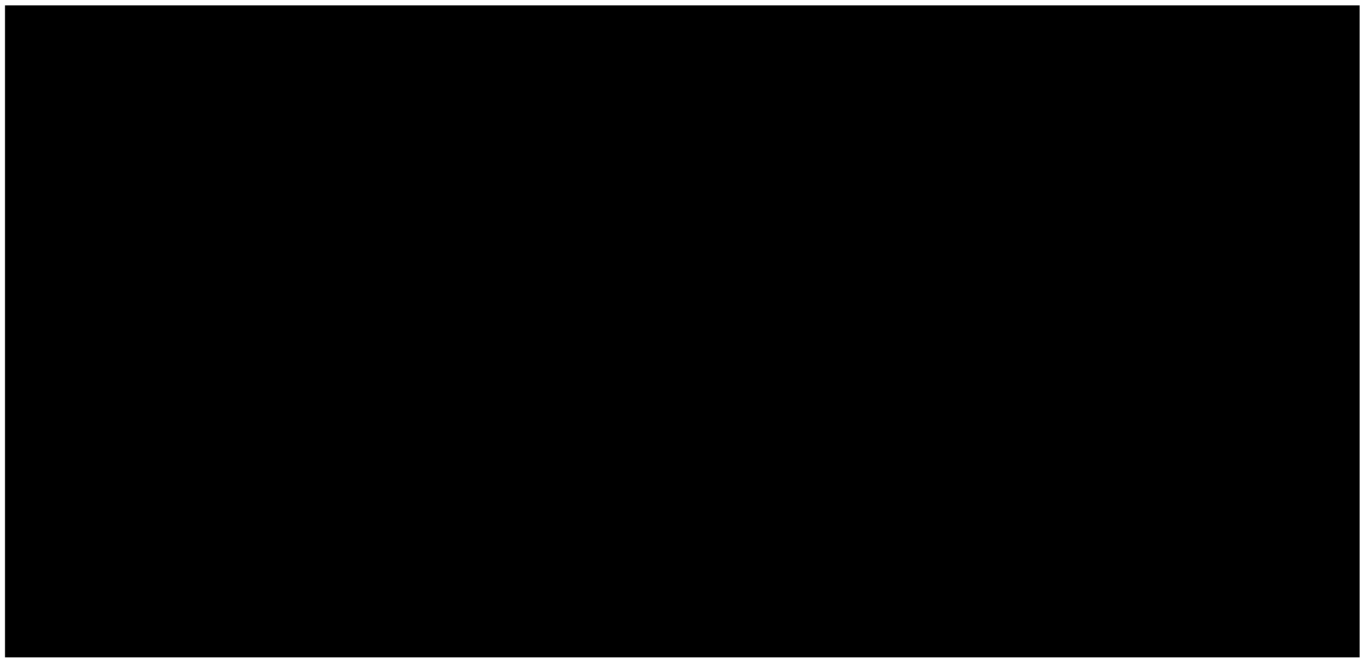
[83] PX 84.

[84] Levenson Decl. ¶ 7.

[85] PX 85.

K. The Parties Implement a $14.675 Million Tipping Basket

On August 5, 2016, McDermott circulated a revised EIPA adding a $14.675 million materiality threshold to Section 10.2(a) (to the Second Sentence), and striking the provision for line-item indemnities.[86] The following reproduction of McDermott's markup to the Second Sentence adds ellipses for clarity:

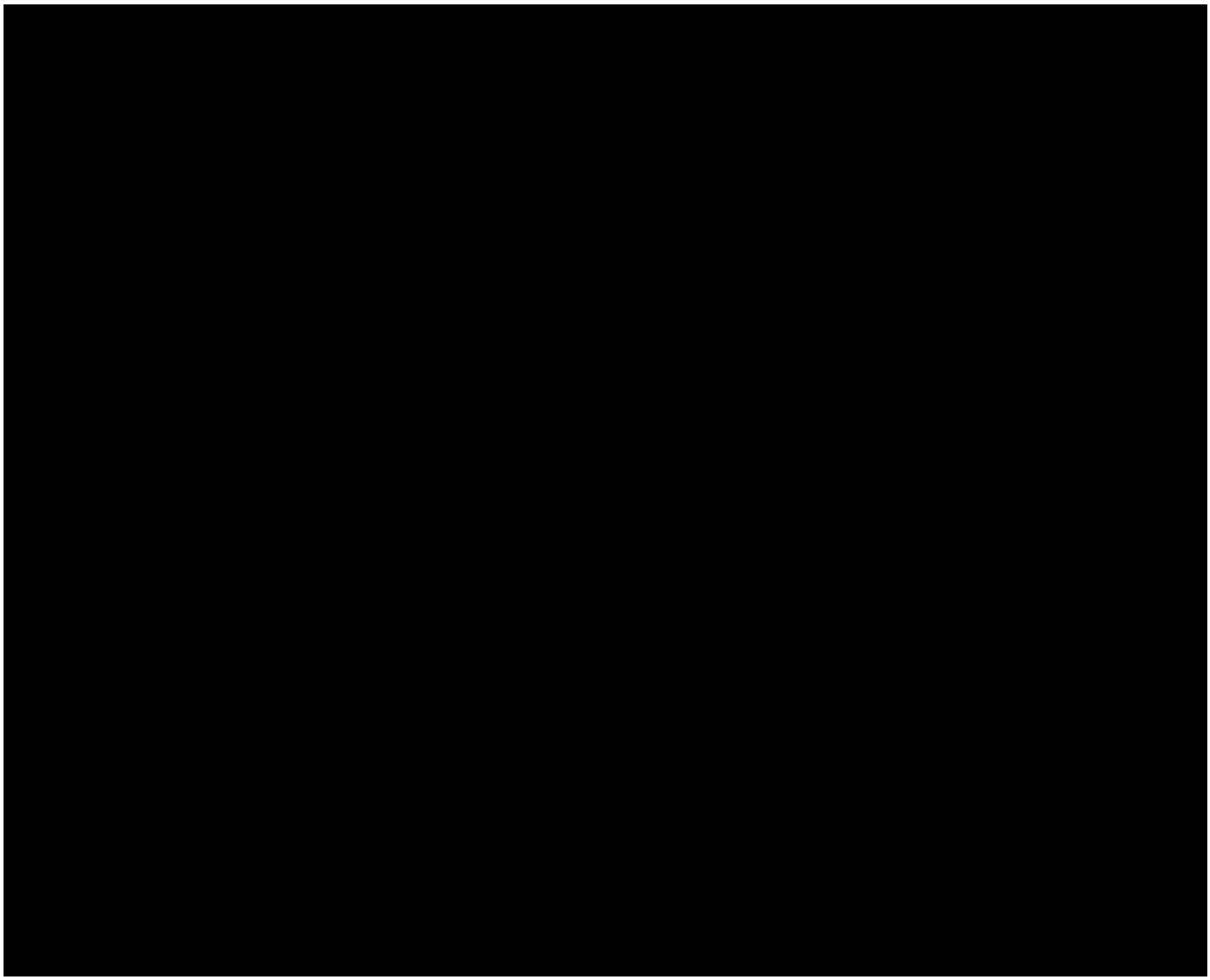


On August 9, 2016, Kirkland relocated the $14.675 million materiality threshold to a new third sentence of Section 10.2(a) (the "Third Sentence").[87] The Third Sentence did not make any substantive changes, but it arguably clarified that the materiality threshold applied (i) on a cumulative (not a per-claim) basis, (ii) as a

[86] PX 86 (cover email); PX 88 Pt. 6 §§ 10.2(a), 10.3(e) (redline).

[87] PX 90 Pt. 2 § 10.2(a) (redline).

tipping (not a deductible) basket, and (iii) to the Specified Representations only. Each clarifying edit was consistent with the parties' agreement discussed above. The following reproduction of Kirkland's markup of the Second and Third Sentences adds ellipses for clarity:



Over the next few days, the parties exchanged further edits (i) identifying the Specified Representations, (ii) clarifying that the Third Sentence applied "solely with respect to RADV Claims and CMS Program Audit Claims," and (iii) defining

the terms "RADV Claim" and "CMS Program Audit Claim."[88] The following illustration compares Kirkland's August 9 draft to the execution version of the Third Sentence and adds ellipses for clarity:

L. The Parties Execute the EIPA and Close the Acquisition

On August 17, 2016, Summit and the Sellers executed the EIPA.[89] On November 30, 2016, Summit closed its acquisition of the Companies and paid [redacted] million of the transaction consideration into the Indemnity Escrow Fund.[90] Summit's acquisition vehicle was Highland Acquisition Holdings, LLC.

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[88] *See* Levenson Decl. ¶¶ 10–12 & Exs. D–F; PX 93; PX 98 Pt. 5 § 10.2(a); *id.* Pt. 7 at '141, '154 (claim definitions); PX 100 Pt. 3 at '966 (RADV Claim).

[89] PX 104.

[90] Answer ¶ 42.

M. Anthem Acquires the Companies

On September 19, 2017, Anthem entered an agreement to buy Highland from Summit.[91] On December 21, 2017, Anthem closed its acquisition of Highland and became the Companies' indirect owner.[92] Anthem paid [redacted] for the Companies,[93] more than [redacted] what Summit had paid the year before.

On November 30, 2018, CMS sent to all MA plans a memorandum regarding their December 2018 payments.[94] CMS stated that the payments would factor in "risk adjustment reconciliation adjustments" for 2016.[95] The leaders of Anthem's Medicare division discussed internally: [redacted]

[redacted]

[redacted]

[redacted]"[96]

[91] *See* PX 105.

[92] Answer ¶ 67.

[93] *See* PX 37 at 7.

[94] PX 106 at 2.

[95] *Id.*

[96] *Id.* at 1.

N. Anthem Demands Indemnification

On June 28, 2019, Anthem demanded indemnification from the Sellers.[97] Anthem claimed that it had "recently become aware that in December 2016," the HealthSun Plan "commenced an audit of various entities [sic] Medicare Risk Adjustment (MRA) scoring."[98] Anthem's claim notice stated:

> During the audit, Anthem understands that HealthSun's coding team found codes/scores that were not supported by the medical charts (the "Scoring Issues"). The majority of the Scoring Issues occurred prior to August 2016. Because of the Scoring Issues, Anthem had to submit certain code deletions to CMS. Anthem currently estimates a Loss of approximately $5,000,000. The enclosed chart shows this loss by entity.[99]

Contrary to Anthem's representation that it had "recently become aware" of the alleged 2016 audit, the loss chart was from "11/28/2018."[100] Anthem stated that the "Scoring Issues" "indicate a breach of" the Specified Representations.[101] Anthem failed to disclose that it viewed the matter as [redacted] and [redacted] about it.

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[97] Answer ¶ 104.

[98] PX 21 at 1.

[99] *Id.*

[100] *Id.* at 1, 5.

[101] *Id.* at 1.

O. McDermott Reminds Anthem of the Third Sentence

On August 7, 2019, Levenson objected on the HealthSun Sellers' behalf to Anthem's first indemnity claim.[102] Levenson explained: "[A]lleged breaches of the Specified Health Care Representations and Warranties are not material unless such breaches equal or exceed $14,675,000 in the aggregate."[103] Over the next year, Anthem never disagreed, not even once.

P. Anthem Admits the Third Sentence Is a Tipping Basket

On November 1, 2019, Anthem demanded indemnification a second time.[104] Anthem announced that a medical provider called HealthMax had threatened to sue the HealthSun Plan for $800,000.[105] Anthem agreed with Levenson's articulation of the materiality threshold: "HealthMax's 2016 audit claim *is included within* the $14,675,000 *aggregate materiality standard*. *Once this standard is met*, all Losses arising out of the claims submitted for breaches of the HealthCare Representations (*e.g.*, the Risk Scoring and related claims thereto) must be indemnified."[106] To reiterate, Anthem agreed that the $14.675 million materiality threshold was a tipping

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[102] PX 22.

[103] *Id.* at 2.

[104] PX 24.

[105] *Id.*

[106] *Id.* at 2 (emphasis added).

basket. Anthem's two claims sought just $5.8 million, so Anthem searched for more claims.

Q. Anthem Admits the Third Sentence Is a Tipping Basket (Again)

On November 1, 2019, Anthem demanded indemnification again.[107] Anthem recognized that if it failed to meet the $14.675 million materiality threshold by November 30, then it would owe the full 2019 Release to the Sellers. Anthem turned to lies. Anthem declared that "CIDs" from the Department of Justice were targeting all Anthem subsidiaries, including the Companies, and that the expected losses "could well exceed *the materiality standard ($14,675,000)*."[108] The purpose of the CIDs claim was to meet the materiality threshold, which Anthem otherwise could not achieve.[109]

"Anthem noticed a claim against the escrow funds in connection with these three indemnification claims on November 25, 2019, instructing that the Escrow Agent not release any amount of the Disputed Funds."[110] "The Sellers sent letters disputing the escrow claim, and the Escrow Agent withheld the Disputed Funds."[111]

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[107] PX 25.

[108] *Id.* at 1 (emphasis added).

[109] *See, e.g.*, Answer ¶ 119 (admitting that Anthem's first two claims "together asserted losses of only $5.8 million").

[110] *Pleadings Decision*, 2020 WL 7706937, at *4.

[111] *Id.*

R. Anthem Admits the Third Sentence Is a Tipping Basket (a Third Time)

On March 26, 2020, the DOJ filed a complaint against Anthem exposing its third indemnity claim for the mockery that it was. The CIDs were unrelated to the Companies, as Anthem always knew. "This development eliminated the basis for Anthem's third indemnification claim."[112] Still, Anthem "refused to instruct the escrow agent to release any of the funds that were earmarked for the 2019 release."[113] On March 31, the Pasteur Plaintiff sued Anthem to recover the Disputed Funds.[114]

On April 16, 2020, Anthem demanded indemnification a fourth time and "estimated a jaw-dropping $173.645 million in losses."[115] Conceding yet again that the Third Sentence contained a $14.675 million tipping basket, Anthem stated that its new claim "*exceeds* the $14,675,000 aggregate materiality standard. *Once this standard is met*, all Losses arising out of the claims submitted for breaches of the HealthCare Representations (*e.g.*, the Risk Scoring and related claims thereto) must be indemnified."[116]

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[112] *Id.*

[113] *Id.* at *1.

[114] *Id.* at *5.

[115] *Id.* at *9.

[116] PX 37 at 6 (emphasis added).

S. Anthem Admits the Third Sentence Is a Tipping Basket (a Fourth Time)

On June 5, 2020, the HealthSun Plaintiff sued Anthem to recover the Disputed Funds.[117] When the Pasteur Plaintiff moved for summary judgment on its complaint, Anthem admitted in its answering brief that "the EIPA includes a materiality threshold" but argued that the Escrow Agreement did not incorporate the EIPA's requirements.[118] Anthem conceded: "Anthem's losses will be determined in this case, ***and assuming*** they, along with all other indemnity amounts, exceed $14,675,000, ***then*** the losses must be paid from the escrow."[119]

T. Anthem Changes Its Contract Interpretation During the Litigation

During argument on the Pasteur Plaintiff's motion for summary judgment, Anthem asserted for the first time that "there is no materiality threshold" in the EIPA.[120] Anthem's position at argument was therefore the opposite of what it said in its supporting brief. Two months later, during argument on the HealthSun Plaintiff's motion for judgment on the pleadings, Anthem explained its about-face:

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[117] *Pleadings Decision*, 2020 WL 7706937, at *5.

[118] Pasteur Defs.' Ans. Br. at 30.

[119] *Id.* at 31.

[120] HealthSun Defs.' Ans. Br. at 23; *accord LPPAS Representative, LLC v. ATH Hldg. Co.*, C.A. No. 2020-0241-KSJM, at 41 (Del. Ch. Sept. 16, 2020) (TRANSCRIPT) (Anthem arguing for the first time that "the one challenge is that the amount of those claims failed to exceed an alleged 14.675 materiality threshold, often called a deductible. And Mr. Denn suggested that we kind of have an agreement on this, on how this works. And we really don't at all.").

> Frankly, [Section 10.2(a)] wasn't addressed, it wasn't read with enough care, and it wasn't understood. And only when on [the Pasteur Plaintiff's] reply paper they came up with this materiality scrape argument is when we really drilled down, talked to transaction lawyers, and, at least as far as I'm concerned, became aware that there is a material provision in this world, which we then researched and looked at, and it's a materiality scrape. And it works in an interesting way.[121]

Although Anthem candidly admitted to changing its position, its representation about when it did so was inaccurate. The Pasteur Plaintiff did not "c[o]me up with" the "materiality scrape argument" in its "reply paper." The Pasteur Plaintiff raised that point in its opening brief,[122] which in turn was the same position that Levenson took in his August 2019 letter to Anthem, which Anthem then conceded in three letters and an answering brief. Anthem repudiated its true contract interpretation for expedience.

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[121] *S'holder Representative Servs. LLC v. ATH Hldg. Co.*, C.A. No. 2020-0443-KSJM, at 43 (Del. Ch. Nov. 10, 2020) (TRANSCRIPT).

[122] *See* Pasteur Defs.' Ans. Br. at 6 (Anthem *admitting* that the Pasteur Plaintiff had challenged its claims as "less than an 'aggregate materiality standard' of $14,675,000 in the EIPA"); Pasteur Pl.'s Opening Br. at 8 (arguing correctly that "Anthem has already conceded that the Purchase Agreement bars it from seeking indemnification or any escrow funds for its claims against the Sellers unless those claims amount to $14,675,000 or more in the aggregate"); *id.* at 22 ("Under Anthem's own interpretation of the Purchase Agreement, the claims asserted in Anthem's other two purported notices fall far short of the $14,675,000 threshold that Anthem must meet if it is to be indemnified for any alleged violations of the representations and warranties it cites or permitted to demand the withholding of any Escrow Funds.").

U. The Pleadings Decision

On December 29, 2020, the Court granted judgment for the Sellers on two of three issues. First, the Court directed Anthem to release the Disputed Funds less $5.8 million, resulting in a $7.6 million distribution to the Sellers. Second, the Court held that "Anthem was required to meet the materiality standard" of Section 10.2(a) "in order to block the release of the Disputed Funds."[123]

The second holding required that all escrow claims comply with Section 10.2(a). As a general rule, Anthem must assert claims totaling $9.75 million before making any escrow hold because the Second Sentence applies the Deductible to most of the EIPA's representations. Anthem disputed this premise previously, but the Pleadings Decision settled the matter.

Departing from the general rule, Anthem asserts that the Third Sentence creates a special "buyer-friendly construct" for healthcare claims.[124] Under Anthem's special rule, it can make an escrow hold for *any* claim, no matter how small, that it can claim is "material." Anthem contends that it always wins under this standard because "integrity issues are always material."[125] Anthem therefore

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[123] *Pleadings Decision*, 2020 WL 7706937, at *11.

[124] *Id.* at *14.

[125] *S'holder Representative Servs. LLC v. ATH Hldg. Co.*, C.A. No. 2020-0443-KSJM, at 45 (Del. Ch. Nov. 10, 2020) (TRANSCRIPT).

argues that the Third Sentence imposes no limits at all.

Anthem is mistaken. The Third Sentence does not create a special pro-buyer rule that defies the broader escrow framework. The Third Sentence instead applies a variant of the general framework: Anthem must notice claims in an amount equal to approximately 150% of the Deductible before making any escrow hold for the Specified Representations. "[A]s to Specified Representations, Anthem must hit a higher materiality threshold but can be indemnified for a greater amount (back to the first dollar of losses) if it does."[126]

The Court found "Plaintiffs' interpretation of the Third Sentence more compelling,"[127] but, the tortured wording of the provision had allowed Anthem to assert an incorrect interpretation adequate to survive a pleading-stage challenge. The Court held that "[f]urther fact-finding as to Section 10.2(a)'s meaning and effect is appropriate and necessary to determine what the parties intended when drafting this provision."[128] The evidence submitted with this brief confirms that the Sellers have interpreted Section 10.2(a) correctly.

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[126] *Pleadings Decision*, 2020 WL 7706937, at *15 (framing the Sellers' argument).

[127] *Id.*

[128] *Id.*

ARGUMENT

Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). "[A]mbiguity may be resolved on a summary judgment motion based on extrinsic evidence 'when the moving party's record is not . . . rebutted so as to create issues of material fact.'" *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012) (ellipses in original) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997)). "[W]here the moving party supports its motion with admissible evidence and points to the absence of proof bolstering the non-moving party's claims, the non-moving party must come forward with admissible evidence creating a triable issue of material fact or suffer an adverse judgment."[129]

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[129] *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 473 (Del. Ch. 2000); *accord* Ct. Ch. R. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, . . . the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."); *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) ("The opponent to a motion for summary judgment 'must do more than simply show that there is some metaphysical doubt as to material facts.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986))); *Union Oil Co. of Cal. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *9 (Del. Ch. Dec. 15, 2006) ("[O]nce the moving party puts facts into the record, which, if undenied, entitle it to summary judgment, the burden shifts to the opposing party to present some evidence to show the existence of a material factual dispute.").

I. ANTHEM MUST RELEASE THE DISPUTED FUNDS

The Court should grant summary judgment directing Anthem to release the remaining Disputed Funds for two reasons. First, the original parties to the EIPA intended for Section 10.2(a) to contain a $14.675 million tipping basket for the types of claims that Anthem now asserts. Second, Anthem's pre- and early-litigation course of dealing confirms the same point.

A. The Negotiating History Confirms That the Third Sentence Is a Tipping Basket

"[T]he drafting history of particular disputed provision(s) is often especially revealing of the process by which the parties reached a meeting of the minds and the ground on which that meeting occurred." *Zayo Gp., LLC v. Latisys Hldgs., LLC*, 2018 WL 6177174, at *12 (Del. Ch. Nov. 26, 2018). Vast evidence confirms the Sellers' contract interpretation. The Court can and should grant summary judgment on any one of the three grounds stated below.

1. The Negotiating History as a Whole Warrants Summary Judgment

Anthem argues that the Third Sentence "creates a presumption in its favor that claims for losses in the aggregate amount of $14.675 million are material; it does not foreclose Anthem from pursuing claims for indemnification below that amount if it can prove materiality." *Pleadings Decision*, 2020 WL 7706937, at *14.

The evidence shows that Summit never even asked for the one-way street that Anthem advocates. If Summit had requested a one-sided materiality presumption, that would have been an aggressive position warranting discussion. The parties exchanged at least ten markups of Section 10.2(a)[130] and at least four issues lists summarizing their main deal points.[131] The issues lists, emails between deal counsel, and notes to draft to the EIPA covered healthcare matters extensively, but they never mentioned any one-way materiality presumption.[132]

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[130] *See* PX 52 (Mar. 18, 2016); PX 66 (June 17, 2016); PX 68 (June 28, 2016); PX 72 (July 6, 2016); PX 77 (July 17, 2016); PX 88 (Aug. 5, 2016); PX 90 (Aug. 9, 2016); PX 93 (Aug. 10, 2016); PX 98 (Aug. 12, 2016); PX 100 (Aug. 16, 2016).

[131] *See* PX 58 (May 22, 2016); PX 60 (June 7, 2016); PX 74 (July 15, 2016); PX 80 (July 21, 2016).

[132] *E.g.*, PX 55 at ’421–22 (Summit’s slide deck dated March 29, 2016; discussing survival period for healthcare claims, escrow as percentage of purchase price, escrow release schedule, indemnification cap, and R&WI coverage); PX 58 at ’575–76 (issues list dated May 22, 2016; discussing survival period, whether to carve out Health Care Representations and Warranties from Deductible, and whether to use single or double materiality scrape); PX 60 at ’608–09 (issues list dated June 7, 2016; continuing discussion from May 22 issues list and adding that R&WI policy should drive when to use double as opposed to single scrape); PX 62 (email dated June 8, 2016; discussing size of escrow, escrow release schedule, indemnification cap, and survival period); PX 74 at ’374 (issues list dated July 15, 2016; discussing interplay between materiality scrapes and R&WI policy; discussing possibility that “mini-basket should function as an additional pre-claim deductible (i.e., Sellers will indemnify only for those Losses in excess of the mini-basket)”); PX 80 at ’240, ’242 (issues list dated July 21, 2016; “Changes to 2.13(c) and 2.13(d) are not acceptable. HealthCare representations and warranties from the MWE 7/6/15 draft are acceptable (as per our discussion with Epstein);” Sellers agreeing to double materiality scrape for insured representations).

The parties' contemporaneous communications about materiality refute Anthem's arguments. Under Kirkland's first markup to the EIPA, the Second Sentence scraped materiality qualifiers from the Health Care Representations and Warranties and replaced them with a tipping basket in an amount equal to the Deductible. *See supra* at 8–9. Summit's *opening* ask was therefore less aggressive than Anthem's interpretation of the final EIPA. If the parties had stopped there, then they would have settled on a $9.75 million tipping basket, excluding Anthem's $5.8 million claims.[133]

The Sellers initially resisted scraping materiality from the Health Care Representations and Warranties, which Summit's R&WI policy did not cover. Kirkland recognized that was a reasonable position for the Sellers to take. In August 2016, Summit tried again. This time, Summit requested a materiality scrape and a [redacted] tipping basket for healthcare claims of specific concern, namely RADV Claims and CMS Program Audit Claims. Summit otherwise granted the Sellers' request for the Health Care Representations and Warranties to retain their materiality qualifiers. *See supra* at 16–23. Summit thus offered an *even more* seller-

[133] To be precise, when Kirkland first proposed that the Second Sentence contain a tipping basket pegged to the Deductible, the parties had not yet determined the Deductible's amount. Kirkland's draft proposed that the Deductible equal [redacted] of the purchase price, which initially was [redacted] before dropping to [redacted]. *See* PX 51 § 10.2(a) n.21 ("Note to Draft: Means an amount equal to [redacted] of the Purchase Price."); PX 45 at '994 (identifying initial purchase price).

favorable version of the March 2016 opening ask that would have defeated Anthem's claims if accepted.

Anthem apparently contends that the Sellers gave up the farm in response, resulting in a "materiality scrape without the deductible and . . . thus a purely buyer-friendly construct." *Pleadings Decision*, 2020 WL 7706937, at *14. The evidence refutes Anthem's assertion. The Sellers never granted concessions that Summit never requested. Instead of concessions, the Sellers demanded that any dollar-based materiality threshold be at a number higher than [redacted]. *See* Levenson Decl. ¶ 7. Summit then "agreed to $14,625,000 as the cumulative definition of materiality for the RAD-V, HCC and CMS related healthcare reps." PX 85. Summit therefore agreed that an amount greater than the Deductible would be the appropriate measure of materiality for the healthcare claims that Anthem now asserts. Section 10.2(a)'s negotiating history warrants summary judgment for the Sellers.

2. Levenson's Testimony Regarding the Negotiations Warrants Summary Judgment

"[W]here a moving party's affidavits in support of a Rule 56 motion negate the opposing party's pleadings, the opposing party must submit countervailing evidence or affidavits or judgment may be granted." *Feinberg v. Makhson*, 407 A.2d 201, 203 (Del. 1979). "Any facts set forth under oath by the movant which remain uncontroverted by the opponent will be assumed to be true." *Womach v. Thomas*,

486 A.2d 15, 17 (Del. Ch. 1984); *accord Gilliland v. Motorola, Inc.*, 859 A.2d 80, 85–86 (Del. Ch. 2004); *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 386 (Del. Ch. 1979).

Levenson led the Sellers' efforts to negotiate the EIPA's terms. *See* Levenson Decl. ¶¶ 3–5. His declaration confirms that Anthem's contract interpretation is wrong. In August 2016, Levenson inserted a $14.675 million materiality threshold into the Second Sentence and circulated a markup to Kirkland. *Id.* ¶ 8; PX 86; PX 88 Pt. 6 § 10.2(a). Levenson's markup barred recovery for claims of less than the threshold amount, as the parties had agreed. Levenson Decl. ¶¶ 14–15.

Kirkland followed up with clarifying edits. McDermott responded with only minor changes, confirming that Kirkland had not overhauled the provision. *See id.* ¶¶ 11–12; *id.* Ex. E (adding claim definitions); PX 95 at '514 (preparing edits to representations "subject to the special definition of materiality ($14,675,000)"). Levenson "understood K&E's edits as implementing the parties' agreement, namely that a $14,675,000 tipping basket would apply to RADV and CMS Program Audit Claims on a cumulative basis." Levenson Decl. ¶ 16. "If the Buyer's Losses reached $14,675,000, then it could recover back to the first dollar. Otherwise, the Buyer could not recover." *Id.* ¶ 15.

Contrary to Levenson's testimony, Anthem apparently argues that Kirkland made radical changes. To credit Anthem's argument, the Court would have to find

that Kirkland performed eleventh-hour trickery to morph the tipping basket into a rigged pro-buyer presumption, somehow without triggering any negative reaction from McDermott.

Anthem's arguments are baseless. Summit and Kirkland were above board about their intentions. All parties made efforts to document their negotiating positions in issues lists, emails, or slide decks. There is no evidence of Summit even wanting the unusual contract term that Anthem began advocating in fall 2020 after this litigation began.[134] Levenson's sworn testimony is an independent basis for summary judgment.

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[134] *See supra* note 132 and accompanying text; Levenson Decl. ¶ 17 ("In my experience, it would be highly unusual, if not unheard of, to insert a pro-buyer presumption—i.e., the opposite of a limitation—into a limitations provision."). Even assuming for argument's sake that Summit had pulled a fast one, the Sellers' contract interpretation would prevail under the forthright negotiator principle. *See U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *11 (Del. Ch. June 6, 1996) ("[W]hile the subjective understanding of a contracting party is not ordinarily a relevant datum in determining the existence and scope of contractual obligation (such obligations being determined under an 'objective' standard), where ambiguity in contract language is not easily resolvable by extrinsic evidence, it may be necessary for the court, in considering alternative reasonable interpretations of contract language, to resort to evidence of what one side in fact believed the obligation to be, coupled with evidence showing that the other party knew or should have known of such belief. This last principle of contract construction might be called the forthright negotiator principle.").

3. The Connection Between the Second and Third Sentences Warrants Summary Judgment

The HealthSun Plaintiff argued when seeking judgment on the pleadings that the Third Sentence functions like the Second Sentence, but with two modifications. The Pleadings Decision summarized the argument as follows:

> [The Sellers] view the Third Sentence as adopting, with respect to the Specified Representations, the basket and materiality scrape structure of the first two sentences, but with two modifications. The first modification is that subsection (i) of the Third Sentence swaps out the language of subsection (A) of the Second Sentence, thereby replacing the Deductible ($9.75 million) level with a higher ($14.675 million) level. The second modification is that subsection (ii), which refers to "all such Losses," renders the basket a tipping basket as opposed to the deductible basket. In other words, as to Specified Representations, Anthem must hit a higher materiality threshold but can be indemnified for a greater amount (back to the first dollar of losses) if it does.

Pleadings Decision, 2020 WL 7706937, at *15. Under the slightly modified reasoning discussed below, the Court should grant summary judgment because the documentary record has confirmed that the Third Sentence originated within and tracks the mechanics of the Second Sentence.

McDermott originally drafted the $14.675 million materiality threshold as a final clause to the Second Sentence. Kirkland moved the $14.675 million materiality threshold to a new third sentence, so that the Second Sentence addressed representations subject to the First Sentence and the Third Sentence addressed the Specified Representations. *See* PX 90 Pt. 2 § 10.2(a).

Kirkland's edits clarified that if Summit's losses reached $14.675 million, then, "for the avoidance of doubt, all such Losses shall be calculated and indemnifiable in accordance with clause (B) of the" Second Sentence. *Id.* By making this edit for the "avoidance of doubt," Kirkland recognized that the Second Sentence implemented a tipping basket as the baseline for most of the Sellers' representations. The Second Sentence provided that if Summit's losses reached a threshold amount, then Summit could recover from dollar one. The First Sentence kicked in at the same number, requiring Summit to absorb the first $9.75 million if those losses resulted from the breach of garden-variety representations.

Put another way, McDermott's first cut of the $14.675 million materiality threshold had caused the Second Sentence to apply to representations subject to the First Sentence *and* to representations not subject to the First Sentence. Kirkland created a clean divide by relocating the $14.675 million materiality threshold to the Third Sentence. The Third Sentence tracked the two-pronged approach of the Second Sentence from which it originated: Part (A) applied a monetary threshold "to determine whether any misstated . . . representations constitute a breach," and part (B) applied a monetary threshold "to calculate the aggregate loss required to obtain indemnification for those breaches." *Pleadings Decision*, 2020 WL 7706937, at *13.

Only two meaningful differences between the Second and Third Sentences resulted. *First*, the Second Sentence applied a [redacted] thousand threshold to part (A) and a $9.75 million threshold to part (B). The Third Sentence applied a unified $14.675 million threshold to each part.

Second, the Third Sentence operated as a $14.675 million tipping basket for all claims to which it applied. The Second Sentence had made a $9.75 million tipping basket the baseline for most representations, but it had little practical effect. As soon as the Buyer became entitled to recover under the Second Sentence, the First Sentence would kick in and require the Buyer to absorb the Deductible, which was also $9.75 million. The First Sentence did not apply to the Third Sentence, allowing the Buyer dollar-one recovery for RADV or CMS Program Audit Claims under the Specified Representations as soon as it hit the $14.675 million baseline.

The chart below depicts the Third Sentence accurately. The Court should grant summary judgment on this basis.

Text	**Function**
"Notwithstanding anything contained herein to the contrary, for purposes of determining whether there has been a breach or inaccuracy of any of the representations or warranties set forth in [the Specified Representations] solely with respect to RADV Claims and CMS Program Audit Claims . . . ,	The Third Sentence governs whether any misstatement in the Specified Representations resulting in a RADV Claim or CMS Program Audit Claim constitutes a "breach or inaccuracy."

if and after the cumulative amount of all Losses . . . suffered by any of the Buyer Indemnified Parties . . . in connection with any and all breaches or inaccuracies of the [Specified Representations] that would be incurred if clause (A) of the immediately preceding sentence applied notwithstanding the parenthetical therein that excludes breaches or inaccuracies of the Health Care Representations and Warranties equals or exceeds $14,675,000 in the aggregate, then	The Buyer may aggregate losses across misstatements that *would* constitute a "breach or inaccuracy" *if* the Per Claim Basket of $50 thousand (from "clause (A) of the immediately preceding sentence") had applied to the Specified Representations. If the cumulative losses from those occurrences reach $14,675,000, then two results follow (see below).
(i) clause (A) of the preceding sentence shall apply to breaches and inaccuracies of the [Specified Representations] notwithstanding the parenthetical therein that excludes breaches or inaccuracies of the Health Care Representations and Warranties and all such Losses shall be deemed to have satisfied any and all instances of the terms 'material,' 'in all material respects,' . . . or similar words set forth in any such [Specified Representations]	Result (A): The Buyer may aggregate those occurrences to prove a "breach or inaccuracy." Otherwise, the Buyer cannot recover.
and (ii) for the avoidance of doubt, all such Losses shall be calculated and indemnifiable in accordance with clause (B) of the immediately preceding sentence." EIPA § 10.2(a) (emphasis added) (formatting altered).	Result (B): *For the avoidance of doubt*, Losses resulting from those occurrences are compensable from dollar one.

B. Anthem's Course of Dealing Confirms That the Third Sentence Is a Tipping Basket

"In construing an ambiguous contractual provision, a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing." *Eagle Indus.*, 702 A.2d at 1233. "[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts." *Dweck v. Nasser*, 2012 WL 161590, at *16 (Del. Ch. Jan. 18, 2012) (quoting *Radio Corp. of Am. v. Phila. Storage Battery Co.*, 6 A.2d 329, 340 (Del. 1939)). "That proposition rings particularly true here, where the party whose conduct is at issue acts in a manner directly contrary to their personal financial interests." *S'holder Representative Servs. LLC v. Gilead Sci., Inc.*, 2017 WL 1015621, at *24 (Del. Ch. Mar. 15, 2017).

Anthem interpreted the Third Sentence correctly throughout the relevant period and until September 2020. Anthem's pre-litigation view adopted the Sellers' interpretation of the Third Sentence, "directly contrary to [Anthem's] personal financial interests." *Id.* In short:

- In August 2019, Levenson sent a formal objection to Anthem's first indemnity claim. Levenson reasoned that "alleged breaches of the Specified Health Care Representations and Warranties are not material unless such breaches equal or exceed $14,675,000 in the aggregate." PX 22 at 2. If Anthem wanted to dispute this premise, then it should have done it.

- In November 2019, Anthem began a long period of agreeing with Levenson. Anthem stated that the HealthMax claim was "included within the $14,675,000 aggregate materiality standard." PX 24 at 2. Anthem continued: "*Once this standard is met*, all Losses . . . must be indemnified." *Id.* at 2.

- In November 2019, Anthem made the Third Demand in an effort to meet the materiality threshold. It asserted that losses from "CIDs" "could well exceed *the materiality standard ($14,675,000)*." PX 25 at 1 (emphasis added).

- In April 2020, Anthem asserted that the Fourth Demand "*exceeds* the $14,675,000 aggregate materiality standard." PX 37 at 6 (emphasis added). Anthem conceded again: "*Once this standard is met*, all Losses . . . must be indemnified." *Id.* (emphasis added).

- In July 2020, Anthem admitted when opposing summary judgment that "the EIPA includes a materiality threshold" but argued that the Escrow Agreement did not incorporate the EIPA's requirements. Pasteur Defs.' Ans. Br. at 30. Anthem conceded on its strongest terms yet: "Anthem's losses will be determined in this case, ***and assuming*** they, along with all other indemnity amounts, exceed $14,675,000, ***then*** the losses must be paid from the escrow." *Id.* at 31 (emphasis added).

After filing its answering brief against the Pasteur Plaintiff, Anthem "talked to transaction lawyers" and began claiming that the Third Sentence was actually a purely buyer-friendly construct.[135] Before this point, Anthem had defended itself

[135] *S'holder Representative Servs. LLC v. ATH Hldg. Co.*, C.A. No. 2020-0443-KSJM, at 43 (Del. Ch. Nov. 10, 2020) (TRANSCRIPT).

using the CIDs claim, relation-back arguments, and an assertion that the Escrow Agreement did not incorporate the EIPA's requirements. Those arguments facially lacked merit, so Anthem searched for more.

Anthem argued when opposing judgment on the pleadings that evidence of its subjective contract interpretation was inadmissible. The Court has since held that the Third Sentence is ambiguous. Now is the appropriate time to bar Anthem from changing its position. Anthem's course of dealing confirms that the Sellers have interpreted the Third Sentence correctly. The Court should grant summary judgment directing Anthem to release the Disputed Funds.

II. ANTHEM'S POTENTIAL RULE 56(f) AFFIDAVIT MUST FAIL

Between February 10 and March 5, 2021, the HealthSun Plaintiff produced over 45,000 pages of documents from Levenson and two more McDermott partners. The production included every email between Kirkland and McDermott hitting on the search terms "Summit," "HealthSun," "Pasteur," and "Highland."

Meanwhile, Anthem has produced only one document, its stock purchase agreement with Summit (the "SPA"). Section 10.4(b) of the SPA contains a materiality threshold nearly identical to the Third Sentence of the EIPA (Summit's tipping basket is larger—[redacted]. *See* PX 105 § 10.4(b). White & Case negotiated the SPA with Kirkland. Anthem therefore possesses discovery about materiality thresholds that it has not provided.

Before moving for summary judgment, the HealthSun Plaintiff requested the evidentiary basis for Anthem's interpretation of the Third Sentence. Anthem responded that it was "not productive or appropriate" to discuss such matters. PX 109 at 3. In its verified interrogatory responses dated March 31, 2021, Anthem failed to identify *any* evidence supporting its contract interpretation. *See* PX 108 at 9–11. Anthem's failure occurred four days after the HealthSun Plaintiff had given detailed evidence-based responses to mirror-image interrogatories. *See* PX 107.

"In answering interrogatories, a party is charged with knowledge of what its agents know, or what is in records available to it, or even, for purposes of Rule 33,

information others have given it on which it intends to rely in its suit." Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2177 (3d ed.). "If a party is unable to give a complete answer to an interrogatory, it should furnish any relevant information that is available." *Id.* By failing to identify any evidence for its position, Anthem has admitted that nothing in the document trove supports its arguments. If Anthem's deal counsel had believed that the materiality threshold in the EIPA or the SPA represented a purely buyer-friendly construct, then Rule 33 would have required Anthem to disclose that information. *See id.*

It follows that when Anthem negotiated its assumption of the EIPA from Summit, Anthem's deal counsel never believed the arguments that litigation counsel from the same firm now asserts. The same reasoning applies to White & Case's efforts to negotiate the parallel materiality threshold in the SPA. Anthem's admission that it changed its contract interpretation during this litigation leads to the same conclusion. And by failing to answer interrogatories seeking to discover any disputed fact issue, Anthem must concede that there is not one.

"Although this Court has broad discretion in permitting additional discovery under Rule 56(f), the onus is on the non-moving party to state with some degree of specificity, the additional facts sought by the requested discovery." *Bay Cap. Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 2020 WL 1527784, at *10 (Del. Ch. Mar. 30, 2020) (internal quotation marks omitted), *aff'd*, 2021 WL 1233380 (Del. Mar. 30,

2021) (ORDER). "After a reasonable opportunity for discovery has been afforded," Rule 56(f) "provides the court with a method of checking on the bona fides of the party opposing summary judgment and also might give some indication whether a genuine fact issue is likely ever to be developed." Wright & Miller, *supra*, § 2741. "The courts will not delay a case to allow discovery when the discovery sought could have been instituted earlier, especially when there is no reason to believe that it will lead to a denial of the motion." *Id.*

Unable to find any support in the 45,000-page record or in its private records, Anthem's final gambit is to claim that more discovery would somehow change things. It would not. The record already contains Section 10.2(a)'s negotiating history. Yet Anthem still has not identified any basis to oppose this motion. The Court should reject Anthem's effort to delay an adverse judgment. *See* Ct. Ch. R. 56(g). There is no evidence of Summit obtaining, or even asking for, the one-sided materiality presumption that Anthem began advocating last year.

III. ANTHEM MUST PAY THE SELLERS' ATTORNEYS' FEES

"Although Section 10.4 does not impose a prevailing-party requirement and thus permits the Sellers to recover fees on a claim-by-claim basis, aspects of Plaintiffs' claim for specific performance are unresolved. It thus seems more efficient to leave Plaintiffs' claims for contractual fee-shifting for the conclusion of this litigation." *Pleadings Decision*, 2020 WL 7706937, at *15. The HealthSun Plaintiff seeks to conclude this litigation by recovering the remaining Disputed Funds, ripening its fee-shifting claim. Anthem can no longer dispute liability. The parties briefed contractual fee-shifting last time, with Anthem coming up short.[136] The HealthSun Plaintiff is entitled to summary judgment granting fees under Section 10.4 of the EIPA.[137]

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[136] *See* HealthSun Pl.'s Opening Br. at 41–46; HealthSun Defs.' Ans. Br. at 55–57; HealthSun Pl.'s Reply Br. at 32; Pasteur Pl.'s Opening Br. at 40–42; Pasteur Defs.' Ans. Br. at 55–56; Pasteur Pl.'s Reply Br. at 34.

[137] The HealthSun Plaintiff is also entitled to fee-shifting under the bad-faith exception to the American Rule, but this motion has not sought that relief. Anthem is once again withholding the discovery subject to its failed motion for a protective order in a related case. The HealthSun Plaintiff is weighing its options.

CONCLUSION

The HealthSun Plaintiff respectfully requests that the Court enter the enclosed form of order granting summary judgment and establishing a procedure for fee-shifting.

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2021, my firm served true and correct copies of the *Public Version of Plaintiff's Opening Brief in Support of its Motion for Summary Judgment* on the counsel listed below via File & Serve*Xpress*.

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