EFiled: Jun 10 2020 04:58PM EDT
Transaction ID 65690252
Case No. 2020-0443-PAF

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-PAF
	)	PUBLIC VERSION FILED
ATH HOLDING COMPANY, LLC and HIGHLAND ACQUISITION HOLDINGS, LLC,	)	JUNE 10, 2020
Defendants.	)	

VERIFIED COMPLAINT FOR SPECIFIC PERFORMANCE

Plaintiff Shareholder Representative Services LLC ("SRS"), solely as the authorized agent of the HealthSun Sellers, brings this action to compel the release of escrowed funds that were required to be distributed on December 2, 2019.

NATURE OF THE ACTION

1. Anthem, Inc. has decided to raise cash by making fake indemnification claims to freeze acquisition funds held in escrow, thereby pressuring its counterparties to pay for the release of their own money. *See generally LPPAS Representative, LLC v. ATH Hldg. Co.*, C.A. No. 2020-0241-PAF (early-stage lawsuit addressing same claims under same contract); *K&P Hldg. II, LLC v. ATH Hldg. Co.*, C.A. No. 2019-0821-KSJM (late-stage lawsuit addressing same primary claim under different contract).

2. The story begins in 2016, when the United States Department of Justice began a massive and expensive investigation into whether Anthem had violated the False Claims Act by concealing illegal profits from Medicare (the "Anthem FCA Investigation").

3. In 2019, Anthem began sending demand letters to its acquisition counterparties asserting that the Anthem FCA Investigation might "encompass" businesses that Anthem bought in 2017–18, even though the Anthem FCA Investigation began in 2016 and targeted systemic fraud at Anthem. As Anthem knows, the Anthem FCA Investigation did not target Anthem's newly acquired businesses as they existed under pre-Anthem management. Anthem sent its demand letters for holdup value.

4. Anthem's playbook contained the following steps:

- First, state that the Anthem FCA Investigation investigates Anthem.
- Second, assert that the Anthem FCA Investigation "could be reasonably expected to encompass" Anthem's recently acquired businesses because those businesses joined Anthem when Anthem bought them.
- Third, reserve the right to seek future indemnification from the sellers of the acquired businesses for an amount exceeding all available escrow funds.

5. Anthem's demand letters did not contain any evidence that the Anthem FCA Investigation targeted Anthem's acquisition counterparties, presumably because none existed. The demand letters therefore failed to meet the common

contractual requirement that a claims notice assert liability. Instead, the demand letters functioned as reservation-of-rights letters that, if permitted, would allow Anthem to seek indemnification from escrow funds for as long as Anthem wanted and long after their contractual release dates.

6. Anthem's placeholder claims fail as a matter of law. *See Winshall v. Viacom Int'l Inc.*, 2012 WL 6200271, at *8 (Del. Ch. Dec. 12, 2012) (rejecting "placeholder" indemnification notice that "reserved its rights … to ignore the 18-month time limit and sue at any point in the future"), *aff'd*, 76 A.3d 808 (Del. 2013).

7. Plaintiff SRS represents the "HealthSun Sellers." The HealthSun Sellers owned a Florida-based health insurer and other medical businesses called the "HealthSun Entities."

8. LPPAS Representative, LLC represents the "Pasteur Sellers." The Pasteur Sellers owned Florida-based healthcare providers called the "Pasteur Entities." Together, the HealthSun Sellers and the Pasteur Sellers are the "Sellers." Together, the HealthSun Entities and the Pasteur Entities are the "Companies."

9. Under an equity interests purchase agreement dated August 17, 2016 (the "EIPA"), defendant Highland Acquisition Holdings, LLC bought the Companies from the Sellers. Highland was an acquisition vehicle for the private equity firm Summit Partners.

10. On November 30, 2016, Highland closed its acquisition of the Companies and deposited [redacted] of the purchase price into escrow (the "Indemnity Escrow Fund"). Under an escrow agreement dated November 30, 2016 (the "Escrow Agreement" or "EA"), Highland agreed to the release of the Indemnity Escrow Fund to the Sellers in four stages. Each release was due one business day after each of the following dates:

- November 30, 2017: The balance of the Indemnity Escrow Fund above [redacted], minus the aggregate amount of valid buyer indemnification claims pending as of that date. EA § 6(a).

- November 30, 2018: The balance of the Indemnity Escrow Fund above [redacted], minus the aggregate amount of valid buyer indemnification claims pending as of that date. *Id.* § 6(b).

- November 30, 2019: The balance of the Indemnity Escrow Fund above [redacted], minus the aggregate amount of valid buyer indemnification claims pending as of that date. *Id.* § 6(c).

- November 30, 2020: The balance of the Indemnity Escrow Fund, minus the aggregate amount of valid buyer indemnification claims pending as of that date. *Id.* § 6(d).

The Escrow Agreement incorporates the EIPA's requirements for indemnification.

11. The Sellers represented in the EIPA that the Companies had complied in all material respects with certain healthcare laws (the "Specified Health Care Representations and Warranties"). For all relevant purposes, the EIPA defines material compliance based on a dollar amount: Highland could seek indemnification

over a breach of the Specified Health Care Representations and Warranties only if the aggregate resulting losses reached at least [redacted]. EIPA § 10.2(a).

12. On December 21, 2017, defendant ATH Holding Company, LLC acquired Highland from Summit Partners. ATH is an acquisition vehicle for Anthem, the second-largest health insurer in the United States.[1] Anthem bought Highland during an effort to expand Anthem's business in Florida. On February 15, 2018, Anthem acquired additional Florida-based health insurers (the "AFC Entities") from an unrelated group of sellers (the "AFC Sellers").

13. By letter dated June 28, 2019, Anthem asserted a claim against the Indemnity Escrow Fund (the "First Demand"). The First Demand announced that Anthem was Highland's successor under the EIPA. Anthem claimed that it had "recently become aware" of an [redacted] that one of the HealthSun Entities had conducted in December 2016. Anthem claimed that the [redacted] showed that the Sellers had breached the Specified Health Care Representations and Warranties. Anthem asserted "approximately [redacted]" in resulting losses.

14. By letter dated August 7, 2019, the HealthSun Sellers explained that because the First Demand asserted losses of less than [redacted], Anthem could not recover from the Indemnity Escrow Fund.

[1] For purposes of this litigation, the distinction between Anthem and ATH is largely unimportant. For simplicity, this complaint refers mostly just to "Anthem."

15. On August 14, 2019, Anthem sent to the AFC Sellers a document titled "Notice of Potential Indemnity Claim." Anthem reserved the right to seek indemnification of nine-figure losses arising from the Anthem FCA Investigation. But Anthem knew the investigation did not target the AFC Entities. Anthem made the claim in order to block an eight-figure escrow release that the AFC Sellers were supposed to receive one day later. In the ensuing litigation, Anthem capitulated one business day before Vice Chancellor McCormick had scheduled to hear the AFC Sellers' motion for summary judgment. *See* Order Dismissing Complaint as Moot and Retaining Jurisdiction for Fee Application, *K&P Hldg. II, LLC v. ATH Hldg. Co.*, C.A. No. 2019-0821-KSJM (Del. Ch. Apr. 27, 2020).

16. By letter dated November 1, 2019, Anthem asserted a second claim against the Indemnity Escrow Fund (the "Second Demand"). Anthem announced that a healthcare provider called [redacted] had threatened to sue one of the HealthSun Entities. According to Anthem, the [redacted] claim indicated that the Sellers had breached the Specified Health Care Representations and Warranties. Anthem asserted [redacted] in resulting losses.

17. The Second Demand admitted that Anthem's asserted losses were too small to recover from the Indemnity Escrow Fund. Anthem's claimed aggregate loss from the first two demands [redacted] was less than [redacted]

Accordingly, the Escrow Agreement required the Escrow Agent to release the Indemnity Escrow Fund's entire third tranche to the Sellers on December 2, 2019.

18. At this point, Anthem made up a third claim to manufacture losses exceeding the [redacted] materiality threshold. In a second letter dated November 1, 2019, Anthem asserted a claim against the Indemnity Escrow Fund for an undefined amount "well into the hundreds of millions of dollars" (the "Third Demand").

19. The Third Demand sought indemnification of losses arising from the Anthem FCA Investigation, even though Anthem knew the investigation did not target the HealthSun Entities. The Third Demand was almost an exact copy of the meritless "Notice of Potential Indemnity Claim" that Anthem sent to the AFC Sellers in August 2019 (and later refused to defend in a matter before this Court).

20. By letter dated November 25, 2019, Anthem unilaterally instructed the Escrow Agent to freeze the entire Indemnity Escrow Fund going forward.

21. This action seeks an order invalidating the Third Demand and directing the defendants to instruct the Escrow Agent to release the balance of the Indemnity Escrow Fund exceeding [redacted] to the Sellers.

JURISDICTION AND VENUE

22. This Court has subject matter jurisdiction under 10 *Del. C.* § 341.

23. The parties to the EIPA consented to the exclusive jurisdiction of this Court and waived any defense to venue. EIPA § 11.21.

24. The parties to the Escrow Agreement consented to the exclusive jurisdiction of this Court and waived any defense to venue. EA § 13(c).

FACTUAL BACKGROUND

A. The HealthSun Entities

25. In 2004, the HealthSun Sellers formed HealthSun Health Plans, Inc. (the "HealthSun Plan"). The HealthSun Plan is a for-profit health insurer serving Medicare-eligible beneficiaries in South Florida. The HealthSun Entities comprise the HealthSun Plan and independent businesses with common ownership, including a healthcare provider network called WellMax and a pharmacy business called EasyScripts.

26. The HealthSun Plan is a Medicare Advantage plan. Under the Medicare Advantage program, the federal government pays a private company to insure Medicare beneficiaries. Many consumers prefer private Medicare plans over direct government Medicare. By September 2015, the HealthSun Plan had 29,969 members.

27. The HealthSun Plan operates as a health maintenance organization (HMO). HMOs maintain networks of doctors, hospitals, and other healthcare

providers who have agreed to accept set payments for services. Health insurance with an HMO structure often has lower premiums than alternative plans.

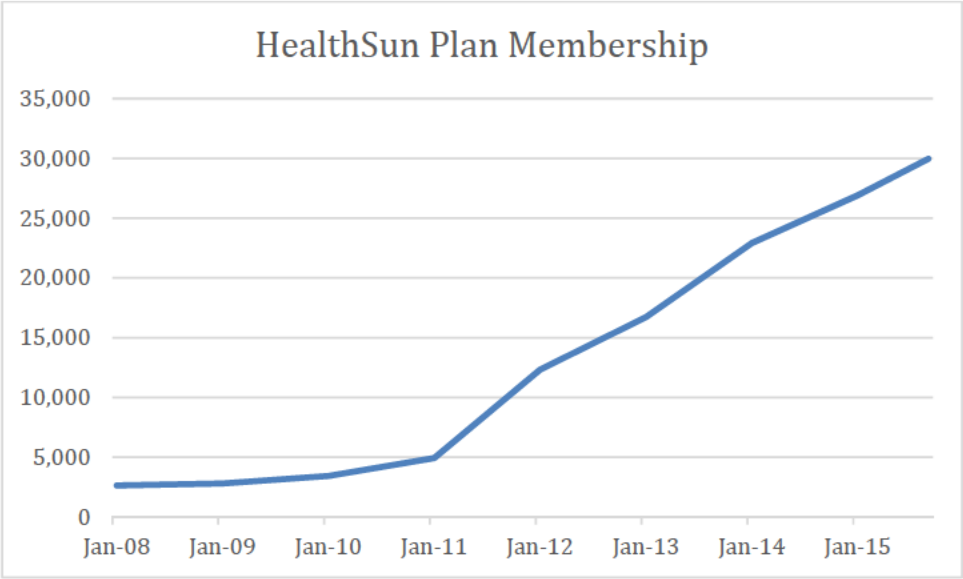
28. As of August 2015, the HealthSun Entities' WellMax network provided healthcare to 18.9% of HealthSun Plan members. The other 81.1% of HealthSun Plan members received healthcare from independently owned providers. For example, the Pasteur Entities (owned by the Pasteur Sellers) provided healthcare to 30.2% of HealthSun Plan members. The Pasteur Entities and WellMax operated seventeen primary care clinics serving HealthSun Plan members exclusively.

29. Like all Medicare Advantage plans, the HealthSun Plan profits by retaining a portion of the government's funding for its members' health benefits. Under Medicare Advantage, the Centers for Medicare & Medicaid Services ("CMS") pays fixed monthly amounts to each qualifying plan for each member insured. The payment amount depends heavily on the underlying members' health risks; plans with higher-risk members are supposed to receive more funding.

30. The HealthSun Plan's profit as an intermediary depends in part on its contracts with healthcare providers. For example, as of 2015, the HealthSun Plan retained 15% of each CMS payment for members served by WellMax. By contrast, the HealthSun Plan retained only 13% of the CMS payments for members served by the Pasteur Entities.

B. The HealthSun Sellers and Pasteur Sellers Work to Sell the Companies.

31. Between 2008 and 2015, the HealthSun Sellers grew the HealthSun Plan's membership at a compound annual rate of 37.3%. Membership expanded rapidly during the growth period's second half, as the graph below depicts.



32. In summer 2015, the HealthSun Sellers hired Ernst & Young LLP to conduct financial due diligence for a possible combination and sale of the HealthSun Entities and the Pasteur Entities. Ernst & Young helped the HealthSun Sellers understand the Pasteur Entities' quality of earnings, an important consideration for combining the businesses. The HealthSun Sellers hired Oppenheimer & Co. Inc. as their financial advisor.

33. The HealthSun Plan was an attractive acquisition target for reasons that include the following:

- Membership Growth: Because CMS pays Medicare Advantage plans on a per-member, per-month basis, the HealthSun Plan's substantial membership growth signaled strong future profits.

- Quality Incentive Payments: CMS pays bonuses to Medicare Advantage plans with a "star rating" of four or greater.[2] A star rating is a one-to-five score that measures health-plan quality based on metrics like health outcomes, access to care, and patient experience. CMS made incentive payments (bonuses) to the HealthSun Plan because it had a four-star (and later a five-star) overall rating.

- Medicare Growth: Between 2015 and 2020, the number of Medicare-eligible individuals nationally was expected to increase by over eight million to approximately sixty-four million total.

- Favorable Market Presence: South Florida was expected to play a large role in the anticipated Medicare growth. Its large senior population was expected to grow significantly. The two counties in which the HealthSun Plan operated—Miami-Dade County and Broward County—were the seventh- and sixteenth-largest Medicare Advantage markets in the United States.

34. In September 2015, the HealthSun Entities acquired Liberty Health Management, LLC. Liberty Health was a management services organization (MSO) that had operated contracts with third-party providers serving 31% of the HealthSun Plan's 29,969 members. Around this time, Oppenheimer pitched an acquisition of the Companies to Summit Partners, a Boston-based private equity firm.

35. Over the next year, the Sellers worked with Summit Partners to structure an investment. Summit Partners agreed to buy the Companies' equity

[2] *See* 42 C.F.R. § 422.258(d)(7).

through an acquisition vehicle. Effective August 2, 2016, Summit Partners formed Highland as that acquisition vehicle.

C. The EIPA

36. Effective August 17, 2016, the Sellers entered into the EIPA with Highland. Ex. 1 (EIPA). Highland agreed to buy the Companies' equity for an amount equaling [redacted], minus indebtedness and subject to a working-capital adjustment and certain other adjustments. EIPA §§ 1.2, 1.3(a). The EIPA allocated approximately [redacted]% of the pre-debt unadjusted purchase price to the HealthSun Sellers and approximately [redacted]% to the Pasteur Sellers. *Id.* §§ 1.2(a), 1.3(a). The EIPA required that Highland pay [redacted] of the unadjusted purchase price into escrow to fund the Indemnity Escrow Amount. *Id.* § 1.3(a).

37. The EIPA required that the Sellers indemnify the "Buyer Indemnified Parties," *i.e.*, Highland or its affiliates or heirs, for any "Losses" arising from any breach of the Sellers' representations and warranties. EIPA § 10.3, 10.3(a); *see id.* at A-13 to -14 (defining "Losses"). The Sellers' representations and warranties included the "Specified Health Care Representations and Warranties." *Id.* § 10.2(a).

38. The EIPA provides that if any Buyer Indemnified Party seeks indemnification of Losses arising from any breach of the Specified Health Care

Representations and Warranties, then the recovery is capped at "the amounts remaining in" the Indemnity Escrow Fund.[3]

39. In short, the Specified Health Care Representations and Warranties constitute a representation that the Companies had complied in all material respects with certain healthcare laws. The Specified Health Care Representations and Warranties include the following:

- The Sellers made a knowledge-qualified representation that the each of the Companies had "been in compliance in all material respects" with all healthcare laws applicable to such Company.[4]

- The Sellers made a schedule-qualified representation that (i) none of the Companies had received written notice from a governmental entity alleging "material noncompliance" with any healthcare law applicable to such Company, (ii) none of the Companies had settled a proceeding asserting such material noncompliance by it, and (iii) the Companies lacked knowledge of any event giving rise to such material noncompliance.[5]

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[3] EIPA § 10.2(c)(ii)(B)(1); *see id.* (providing that "the Cap with respect to any indemnification obligations in respect of … any breaches or inaccuracies of the Health Care Representations and Warranties shall be the amounts remaining in the Indemnity Escrow Fund"); *id.* at A-8 (defining "Health Care Representations and Warranties"); *id.* § 10.2(a) (defining Specified Health Care Representations and Warranties as subset of Health Care Representations and Warranties).

[4] *Id.* § 2.13(e) ("Each of the Companies, and to the Knowledge of the Companies, each of their respective directors, officers, members partners or managers, is and has since January 1, 2013 been in compliance in all material respects with all Health Care Laws applicable to such Company, or by which any property, business product or other asset that is material to the operations of any of the Companies is bound or affected.").

[5] *Id.* § 2.13(g) ("Except as set forth in Schedule 2.13(g) attached hereto (i) none of the Companies is currently party to or the subject of any Proceeding or has

- The Sellers represented that (i) the Companies had been in "compliance in all material respects with each of their respective" contracts with their third-party payors, *i.e.*, CMS, (ii) each Company had, to the Companies' knowledge, "paid, or caused to be paid, in all material respects all undisputed" specified amounts owed to their third-party payors, (iii) none of the Companies had "claimed or retained" reimbursements from their third-party payors exceeding the amounts permitted by contract or law, and (iv) none of the Companies was subject to any non-ordinary-course pending unfavorable adjustments for amounts owed to any third-party payor "except with respect to such items that would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect."[6]

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received written notice from any Governmental Authority that alleges any material noncompliance (or that the Company is under investigation or the subject of an inquiry by any such Governmental Authority for such alleged material noncompliance) with respect to any applicable Health Care Law with respect to the applicable Company, (ii) none of the Companies has since January 1, 2013 entered into any written agreement or settlement with any Governmental Authority with respect to any Proceeding or its material non-compliance with, or material violation of, any applicable Health Care Law with respect to the applicable Company nor do any of the Companies have on-going obligations from any such written agreement or settlement with any Governmental Authority since January 1, 2013, and (iii) the Companies have no Knowledge of any event(s) since January 1, 2013 that would give rise to such material noncompliance by any of the Companies (or that would subject any Company to such a Proceeding, investigation or inquiry by any such Governmental Authority for such alleged material noncompliance).").

[6] *Id.* § 2.13(*l*) ("The Companies have been since January 1, 2013 and are in compliance in all material respects with each of their respective Third Party Payors Contracts (whether Governmental Health Care Program agreements or commercial agreements), and those Companies which are service providers have charged and billed in accordance with the terms of its respective Third Party Payors Contracts, including any such agreements with HealthSun. For each third-party payment program, to the Knowledge of the Companies, each Company has paid, or caused to be paid, in all material respects all undisputed (i) refunds, (ii) overpayments, (iii) discounts or (iv) adjustments which have become due outside the Ordinary Course of Business pursuant to such reports, capitation reports, cost reports, billings or other information or filings provided to Governmental Authorities or Governmental

- The Sellers represented that the Companies had been "in compliance in all material respects with the requirements imposed on Medicare Advantage Organizations" by federal regulation or CMS guidance.[7]

40. The EIPA identifies two consequences of breaching the Specified Health Care Representations and Warranties: "RADV Claims" and "CMS Program Audit Claims." EIPA § 10.2(a). The EIPA defines those terms as follows:

> "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-5.

Health Care Programs. None of the Companies have claimed or retained reimbursements from Third Party Payors in excess of amounts permitted by applicable Contract and Law. For each third-party payment program, with respect to each Company, there are no outside the Ordinary Course of Business, pending adjustments, audits, litigation or notices of intent to audit, reopening of cost reports, notices of program reimbursement reflecting overpayments, penalties, interest or fines with respect to any such reports, capitation reports, cost reports, billings or other filings except with respect to such items that would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.").

[7] *Id.* § 2.13(m) ("To the extent such requirements are applicable to a Company, since January 1, 2013, the Companies have been and are in compliance in all material respects with the requirements imposed on Medicare Advantage Organizations and Part D Plan Sponsors that contract with CMS to administer benefits under the Medicare Advantage and Part D Programs, under applicable regulation and the Medicare Managed Care Manual and the Medicare Prescription Drug Benefit Manual and maintain appropriate policies and procedures, work plans and reporting methodologies to fulfill such requirements, and collect and maintain data so as to be able to timely produce data universes as required by CMS audit protocols.").

> "RADV Claim" means any: (a) determination by the Department of Health and Human Services, 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.

Id. at A-18.

41. Section 10.2(a) of the EIPA states that "solely with respect to RADV Claims and CMS Program Audit Claims," inaccuracies in the Specified Health Care Representations and Warranties may constitute breach only if the aggregate resulting Losses reach [redacted] or more. EIPA § 10.2(a). By applying a dollar-based materiality threshold, Section 10.2(a) scrapes materiality qualifiers appearing on the face of the Specified Health Care Representations and Warranties. *See id.* (scraping "any qualification or limitation with respect to materiality").

D. Highland Executes the Escrow Agreement and Closes the Acquisition.

42. On November 30, 2016, Summit Partners closed its acquisition of the Companies. Highland deposited [redacted] of the purchase price into the

Indemnity Escrow Fund. Effective the same day, Highland entered into the Escrow Agreement with SRS, LPPAS, and Wells Fargo Bank, National Association.[8]

43. The Escrow Agreement required that the Escrow Agent release the Indemnity Escrow Fund to the Sellers in four stages. Each release was due one business day after each of the following dates:

- November 30, 2017: The balance of the Indemnity Escrow Fund above [redacted], minus the aggregate "Claim Amounts" pending as of that date. EA § 6(a).

- November 30, 2018: The balance of the Indemnity Escrow Fund above [redacted], minus the aggregate "Claim Amounts" pending as of that date. *Id.* § 6(b).

- November 30, 2019: The balance of the Indemnity Escrow Fund above [redacted], minus the aggregate "Claim Amounts" pending as of that date. *Id.* § 6(c).

- November 30, 2020: The balance of the Indemnity Escrow Fund, minus the aggregate "Claim Amounts" pending as of that date. *Id.* § 6(d).

44. Each of the four escrow-release provisions operates identically. As one example, the provision governing the November 2019 release states as follows:

[8] Ex. 2 (EA). The Escrow Agreement defines its parties as follows: Highland is the "Buyer," SRS is the "HealthSun Sellers' Representative," LPPAS is the "Pasteur Sellers' Representative," and Wells Fargo is the "Escrow Agent."

> On the Business Day following the third (3rd) anniversary of the date hereof [*i.e.*, the third anniversary of November 30, 2016], an amount equal to the amount (if any) by which (i) the Indemnity Escrow Deposit Amount in the Indemnity Escrow Fund *less the aggregate Claim Amounts which are pending as of the third (3rd) anniversary of the date hereof* exceeds (ii) [redacted] shall be automatically released and distributed by the Escrow Agent (without a Joint Instruction) to [the Sellers in accordance with the Escrow Agreement's requirements for allocation between the Sellers].

EA § 6(c) (emphasis added).

45. Section 4 of the Escrow Agreement defines a "Claim Amount" and incorporates the EIPA's requirements for indemnification claims. The below reproduction of Section 4 adds numbering and formatting to enhance legibility.

> In the event Buyer has made a timely claim for indemnification under Section 10.3 of the Purchase Agreement prior to expiration of the applicable survival period set forth in Section 10.1 of the Purchase Agreement with respect to such claim for indemnification under Section 10.3 of the Purchase Agreement,
>
> Buyer may deliver one or more written notices at any time and from time to time prior to the distribution of all of the Escrow Funds (a "Claim Notice") to the Escrow Agent and the Sellers' Representatives
>
> > [1] stating that it has made a claim for indemnification pursuant to, and in accordance with, Section 10.3 of the Purchase Agreement (a "Claim") and
> >
> > [2] specifying the amount of the Loss if known, and, if not known, Buyer's reasonable good faith estimate of the amount of the Loss thereunder (the specified amount of such Loss being referred to as the "Claim Amount"), and
> >
> > [3] stating in reasonable detail the nature of, and basis for, any such Claim.

> The date of delivery of such Claim Notice to the Escrow Agent and the Sellers' Representatives is hereinafter referred to as the "Notice Date" with respect to such Claim Notice. The Escrow Agent shall have no responsibility or liability to monitor the expiration of the applicable survival period set forth in Section 10.1 of the Purchase Agreement.

46. At the time of Summit Partners' acquisition, the HealthSun Plan was a major Medicare Advantage plan in the South Florida market, but it was not the only one. National health insurers—such as Anthem, UnitedHealth, Aetna, and Humana—operated competing plans regionally. Summit Partners bought the Companies in order to flip them to a national player.

E. The Anthem FCA Investigation

47. By 2016, the United States federal government had begun investigating whether Anthem had violated the False Claims Act in a manner proscribed by *United States ex rel. Swoben v. United Healthcare Insurance Co.*, 848 F.3d 1161 (9th Cir. 2016). The Anthem FCA Investigation addressed whether Anthem-sponsored Medicare plans had concealed illegal profits from the federal government.

48. The Medicare Advantage program assumes that higher-risk insureds need more government funding than lower-risk insureds. CMS funds Medicare Advantage plans in a manner proportionate to the health risks of their members.[9]

[9] *See* 42 C.F.R. § 422.308 (regulating risk-adjustment payments); *Medicare Program; Establishment of Medicare Advantage Program*, 70 Fed. Reg. 4588, 4567 (Jan. 28, 2005) (explaining that federal law requires CMS to "adjust the payment

The funding calculation uses medical diagnosis codes to help assess health risk. Diagnosis codes originate with healthcare providers, such as doctors. Providers evaluate patients to determine the appropriate codes.

49. Healthcare providers submit diagnosis codes to Medicare Advantage organizations, which in turn submit the codes to CMS. Accurate code submissions help CMS set its monthly per-member payments at the appropriate level.

50. Medicare Advantage organizations sometimes report diagnosis codes to CMS in a manner that overstates or understates enrollees' actual health risks. These outcomes are sometimes called "over-reporting" and "under-reporting." An organization that over-reports receives more money from CMS than it deserves. If an organization under-reports, then it is underpaid.

51. CMS has urged Medicare Advantage organizations to ensure the accuracy of their code submissions. Federal law permits Medicare Advantage organizations to conduct "retrospective reviews" to check their past submissions to CMS. When an organization discloses the results of a retrospective review to CMS, CMS may increase or decrease payments to the organization.

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amount for an MA plan to take into account the health status of the plan's enrollees" in order to "ensure that MA organizations are paid appropriately for their plan enrollees (that is, less for healthier enrollees and more for less healthy enrollees)").

52. A retrospective review might identify under-reporting. For example, the review might show that an enrollee's medical records justify diagnosis codes that were not reported to CMS. A Medicare Advantage organization may submit those previously unreported codes to become eligible for upward adjustments to future payments from CMS.

53. A retrospective review might also identify over-reporting. For example, the review might show that a Medicare Advantage organization had reported medically unjustified diagnosis codes to CMS. An organization that over-reports should delete its unjustified code submissions. Code deletion may cause a downward adjustment to future CMS payments.

54. The *Swoben* decision holds that if a company conducts retrospective reviews, then it may not rig the outcome in its favor. In *Swoben*, a *qui tam* relator alleged that United Healthcare, WellPoint (n/k/a Anthem), and others had falsely certified the accuracy of data submitted to CMS. The relator alleged that the defendants knew their certifications were false, because the defendants had designed their retrospective reviews so they would not detect over-reporting. The defendants purportedly benefited from disclosing under-reporting while failing to confess to over-reporting.

F. The DOJ Investigates Anthem's Retrospective Reviews.

55. Since 2010, Anthem has contracted with a third-party vendor to conduct retrospective reviews to identify under-reporting.

56. On December 15, 2016, the DOJ sent a civil investigative demand (a "CID") to Anthem. Ex. 3. The December 2016 CID sought discovery of Anthem's retrospective-review and risk-adjustment practices over a ten-year period.[10] The December 2016 CID contained nine document requests and thirty-two interrogatories (including subparts). The December 2016 CID followed up on a DOJ subpoena to Anthem dated March 21, 2016. *See* Ex. 26.

57. The DOJ has explained in public documents that the "focus" of the Anthem FCA Investigation

> is about whether Anthem, as the plan sponsor of dozens of Medicare Part C [*i.e.*, Medicare Advantage] insurance plans, has violated the FCA by improperly obtaining and retaining risk-adjustment payments while knowingly disregarding its duty to ensure the validity of diagnosis data it submitted to Medicare for purposes of calculating these payments.

Ex. 8 ¶ 2.

58. Consistent with the DOJ's public account, the December 2016 CID stated that the Anthem FCA Investigation "concerns Anthem, Inc.'s submission of

[10] *See id.* at 7 (defining "Relevant Time Period" as January 1, 2007, through "date of service" of December 2016 CID).

risk adjustment claims to the Centers for Medicare and Medicaid Services (CMS) under Parts C and D of the Medicare Program." Ex. 3 at 1.

59. The December 2016 CID stated that its "general purpose" was "to discover information about Anthem's Chart Reviews and its risk adjustment compliance programs and activities relating to the accuracy and truthfulness of data, including diagnosis codes, submitted by it to CMS for risk adjustment payments under Parts C and D of the Medicare Program." Ex. 3 at 2.

60. On January 31, 2017, Anthem began producing documents to federal authorities in response to the Anthem FCA Investigation. Anthem produced additional documents on (a) February 28, 2017, (b) March 31, 2017, (c) May 22, 2017, (d) June 30, 2017, (e) July 31, 2017, (f) August 31, 2017, (g) November 22, 2017, (h) January 11, 2018, and (i) April 2, 2018.

61. Anthem provided extensive discovery regarding the retrospective "chart reviews" that Anthem conducted through its third-party vendors, Verscend Technologies, Inc. and MediConnect Global, Inc. For simplicity, this complaint refers to Verscend and MediConnect interchangeably.[11]

62. In response to the Anthem FCA Investigation, Anthem "has admitted that it implemented a 'retrospective chart review' program, which involved using a

[11] In 2012, Verisk Analytics, Inc. acquired MediConnect. In 2016, Verisk rebranded itself as Verscend Technologies, Inc.

vendor called Verscend to identify diagnosis codes through a review of medical records for beneficiaries selected by Anthem." Ex. 8 ¶ 6.

63. Anthem has also admitted that it failed to "implement any procedure to identify which of the provider-submitted diagnosis codes were *not* found by Verscend's medical records review." *Id.* Anthem structured the reviews to detect under-reporting only.

64. Anthem apparently designed its third-party chart-review process to obtain improper risk-adjustment payments. Verscend's process achieved Anthem's "financial incentive to exaggerate an enrollee's health risks by reporting diagnosis codes that may not be supported by the enrollee's medical records . . . ." *Swoben*, 848 F.3d at 1166. This longstanding Anthem-only problem has nothing to do with the Sellers, because the Companies did not use Verscend for chart reviews.

G. While Under Investigation, Anthem Buys Highland.

65. In 2017, as the Anthem FCA Investigation accelerated, Summit Partners grew the Companies. The HealthSun Plan's achievements during this time included the following:

- "Delivered the highest level of care and clinical outcomes to a medically complex, dual-eligible patient population throughout a phase of meaningful growth."
- "Expanded membership to more than 40,000 members while growing revenue and EBITDA at a CAGR of 22% and 31%, respectively."

- "Received a 5 STAR rating from the Center for Medicare and Medicaid Services (CMS), ranking in the 97th percentile for clinical quality and member satisfaction."[12]

66. On September 20, 2017, Anthem announced that it had entered into an agreement to buy Highland (and indirectly the Companies) from Summit Partners. Anthem described the acquisition as follows:

> The acquisition of HealthSun, which offers a unique integrated care delivery model serving mainly dual-eligible (Medicare and Medicaid) members, fits well with our plans for continued growth in the Medicare Advantage and dual-eligible populations. In addition, the HealthSun acquisition will further the industry leading commitment of Anthem's affiliated health plans in offering a wide variety of value based care models that benefit our members through high quality care and improved outcomes. . . .
>
> We are excited about the addition of HealthSun as we believe their unique integrated delivery system will be an important asset that drives our continued success in Florida. In addition, this acquisition is consistent with our goal to build industry leading capabilities to serve this country's most vulnerable citizens. With the addition of HealthSun, Anthem's affiliated Medicare and Medicaid plans will now serve more than 650,000 members in Florida.[13]

67. On December 21, 2017, Anthem closed its acquisition of Highland and became the indirect owner of the Companies.

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[12] *HealthSun*, SummitPartners.com, https://www.summitpartners.com/companies/healthsun (last visited June 3, 2020).

[13] Press Release, Anthem, Inc., Anthem, Inc. Completes Acquisition of HealthSun (Dec. 21, 2017), https://www.businesswire.com/news/home/20171221005587/en/Anthem-Completes-Acquisition-HealthSun.

H. While Under Investigation, Anthem Continues Expanding in Florida.

68. In January 2018, Anthem continued to produce documents in response to the Anthem FCA Investigation.

69. On February 5, 2018, the DOJ asked Anthem to agree to extend the tolling period to sue Anthem under the False Claims Act (Anthem ultimately refused). Around this time, the DOJ informed Anthem that the United States Attorney's Office for the Southern District of New York would be taking the lead on the Anthem FCA Investigation.[14]

70. On February 15, 2018, Anthem acquired the AFC Entities, a group of Florida-based health insurers unaffiliated with the Companies. The acquisition expanded Anthem's Medicare and Medicaid reach in Florida to approximately 780,000 members.[15]

I. The March 2018 CID

71. In "February and March of 2018, and in response to questions from Anthem," the DOJ stated that if the Anthem FCA Investigation "uncovers conduct

[14] Multiple government actors have pursued the Anthem FCA Investigation. For simplicity, this complaint generally describes the government authorities as the "DOJ," which oversees the offices of the United States Attorneys.

[15] Press Release, Anthem, Inc., Anthem Completes Acquisition of America's 1st Choice (Feb. 15, 2018), https://www.businesswire.com/news/home/20180215005806/en/Anthem-Completes-Acquisition-America%E2%80%99s-1st-Choice.

and *scienter*" like that in *Swoben*, then the United States would seek relief under the False Claims Act. Ex. 8 ¶ 5.

72. On March 22, 2018, the DOJ sent another CID to Anthem. Ex. 4. The March 2018 CID sought a deposition of Anthem's corporate representative. The deposition topics covered Anthem's company-wide compliance efforts, retrospective-review practices, and Verscend (Anthem's chart-review vendor).

J. The April 2018 CID

73. On April 2, 2018, Anthem produced additional documents in response to the Anthem FCA Investigation.

74. On April 23, 2018, the DOJ sent another CID to Anthem. Ex. 5. The April 2018 CID continued the Anthem-wide investigation that began in 2016.

75. The April 2018 CID sought documents and interrogatory responses regarding (1) the "Chart Review Results Productions" that Anthem made in response to the December 2016 CID, and (2) an August 2017 cover letter to an Anthem document production. The April 2018 CID did not address later events.

76. Anthem asserted for the first time in November 2019 that the April 2018 CID supported an indemnification claim against the Sellers. But in April 2018, Anthem did not perceive the CIDs as supporting an indemnification claim against the Sellers. Anthem did not mention the April 2018 CID to the Sellers until November 2019—over one year after Anthem received it.

K. The June 2018 CID

77. On June 12, 2018, the DOJ sent another CID to Anthem. Ex. 6. The June 2018 CID continued the Anthem-wide investigation that began in 2016.

78. The June 2018 CID sought documents and interrogatory responses regarding Anthem's retrospective-review and risk-adjustment practices—just as the December 2016 CID and April 2018 CID had done.

79. The June 2018 CID investigated "Anthem's purported *scienter*." Ex. 11 ¶ 30. Scienter is an element of liability under the False Claims Act. *See Swoben*, 848 F.3d at 1173 ("The essential elements of a false certification claim are: '(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.'" (quoting *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1174 (9th Cir. 2006))).

80. By addressing Anthem's scienter, the June 2018 CID represented a progression to an advanced stage of the Anthem FCA Investigation. Nothing about the June 2018 CID signaled a reboot to address Anthem's recently acquired businesses, such as the Companies.

81. The June 2018 CID sought discovery regarding medical diagnosis codes processed by four of Anthem's Medicare Advantage plans. The June 2018 CID's first interrogatory stated as follows: "Identify all Dx Deletions You submitted

to CMS for the Sample Plans for encounters with dates of services in January or July of 2010, 2012, 2014, and 2016." Ex. 6 at 4. The June 2018 CID defined the "Sample Plans" as "the Medicare Part C plans operated by Anthem with the following plan numbers: H0564, H1517, H3342, and H3370." *Id.* at 2.

82. The "H0564" plan operated in California. The "H1517" plan operated in Missouri. The "H3342" and "H3370" plans operated in New York. None of the Sample Plans operated in Florida.

83. Anthem asserted for the first time in November 2019 that the June 2018 CID supported an indemnification claim against the Sellers. But in June 2018, Anthem did not perceive the CIDs as supporting an indemnification claim against the Sellers. Anthem did not mention the June 2018 CID to the Sellers until November 2019—over one year after Anthem received it.

84. On June 28, 2018, Anthem served responses and objections to the March 2018 CID. The responses and objections acknowledged that the Anthem FCA Investigation did not target Anthem's recently acquired businesses. Anthem qualified its response to the March 2018 CID as follows:

> ***Anthem's responses do not address . . . any retrospective chart reviews conducted by*** (1) Anthem subsidiary Simply Healthcare Holdings, Inc. ("Simply"), (2) Anthem subsidiary CareMore Health Group, Inc. ("CareMore"), (3) Amerigroup before approximately June 2014, (4) ***HealthSun Health Plans, Inc. and its direct and indirect subsidiaries and affiliates***, and (5) Freedom Health, Inc. and its direct and indirect subsidiaries and affiliates.

Ex. 11 Ex. J at 3 (emphasis added).

85. Anthem acquired Simply Healthcare in 2015. Anthem acquired CareMore Health in 2011. Anthem acquired Amerigroup in 2012. Anthem acquired the HealthSun Plan in 2017. Anthem acquired Freedom Health in 2018.[16]

86. As Anthem's formal discovery responses demonstrate, Anthem understood that the Anthem FCA Investigation did not cover the individual practices of Anthem's acquired businesses as they existed before Anthem bought them. Anthem knew that the Anthem FCA Investigation sought to uncover systemic long-term fraud at Anthem.

L. The August 2018 CID

87. In a letter to Anthem's counsel dated August 9, 2018, the DOJ reiterated that the Anthem FCA Investigation's objective was "to determine whether Anthem knowingly and improperly obtained and/or retained Part C risk-adjustment payments by using its retrospective chart review program to *only* identify and submit additional diagnosis codes, without *also* correcting and withdrawing 'the previously submitted diagnosis codes that were unsupported by the retrospective [chart] reviews.'" Ex. 11 Ex. R at 1 (alteration in original) (quoting *Swoben*, 848 F.3d at 1173–74). In other words, the investigation continued to concern whether Anthem was submitting

[16] Until December 2014, Anthem was known as WellPoint.

codes to rectify under-reporting, without making similar efforts to address over-reporting.

88. In its letter dated August 9, 2018, the DOJ confirmed that it viewed Anthem's problem as systemic. The DOJ requested the following information:

- "the names of individuals who recommended, reviewed, or approved Anthem's decision to initiate or to continue its retrospective chart review program";
- "the list of Anthem's risk adjustment policies" with specified initials;
- "whether Anthem has ever had any policy, procedure, or training material regarding its obligation relating to invalid or inaccurate diagnosis codes submitted to the Government"; and
- "the names of individuals who requested or received any return on investment ('ROI') analysis of Anthem's retrospective chart review program."

Ex. 11 Ex. R at 3. The DOJ did not seek discovery of idiosyncratic practices at individual branches of Anthem's business, such as the HealthSun Plan.

89. On August 9, 2018, the DOJ sent more CIDs to Anthem. Ex. 7. The August 2018 CIDs demanded interviews of seven Anthem employees. The interviewees included Scott Anglin, Anthem's Chief Investment Officer, and Sarah Lorance, who then served as Vice President of Compliance for Anthem's Medicare division and now serves as Anthem's Chief Compliance Officer.

90. All seven interviewees subject to the August 2018 CIDs worked for Anthem before Anthem bought the Companies.

91. None of the interviewees subject to the August 2018 CIDs ever worked for the Companies.

92. Anthem asserted for the first time in November 2019 that the August 2018 CIDs supported an indemnification claim against the Sellers. But in August 2018, Anthem did not perceive the CIDs as supporting an indemnification claim against the Sellers. Anthem did not mention the August 2018 CIDs to the Sellers until November 2019—over one year after Anthem received them.

M. The United States Sues Anthem to Enforce the March 2018 CID.

93. On August 21, 2018, the DOJ filed a discovery petition against Anthem in the United States District Court for the Southern District of New York. *See United States v. Anthem, Inc.*, No. 18-mc-00379 (S.D.N.Y. 2018). Anthem had objected to the March 2018 CID's effort to depose a corporate representative regarding Anthem's methods for verifying submissions to CMS. The DOJ sought an order overruling the objection. *See* Ex. 8; *see also* Exs. 9–13.

94. On November 13, 2018, the magistrate judge issued a report and recommendation that the United States' discovery petition against Anthem be granted. Ex. 14. Anthem objected to the report and recommendation before ultimately settling the discovery petition. *See* Exs. 15–16, 18.

95. On January 7, 2019, the DOJ sent more CIDs to Anthem. Ex. 17. The January 2019 CID demanded interviews of two current or former Anthem employees.

96. Both interviewees subject to the January 2019 CIDs worked for Anthem before Anthem bought the Companies.

97. None of the interviewees subject to the January 2019 CIDs ever worked for the Companies.

98. Anthem asserted for the first time in November 2019 that the January 2019 CIDs supported an indemnification claim against the Sellers. But in January 2019, Anthem did not perceive the CIDs as supporting an indemnification claim against the Sellers. Anthem did not mention the January 2019 CIDs to the Sellers until November 2019—approximately ten months after Anthem received them.

99. On January 31, 2019, Anthem stipulated to dismissal of the DOJ's discovery petition. Ex. 18. The stipulated dismissal order granted the DOJ substantially all of the relief it had sought. *Compare id.*, *with* Ex. 9.

N. The February and April 2019 CIDs

100. On February 13, 2019, the DOJ sent another CID to Anthem. Ex. 19. The February 2019 CID demanded the interview of Kristina Cournoyer, Vice President of Finance for Anthem's Medicare division. Ms. Cournoyer worked for Anthem before Anthem bought the Companies. Ms. Cournoyer never worked for the Companies.

101. Anthem asserted for the first time in November 2019 that the February 2019 CID supported an indemnification claim against the Sellers. But in February

2019, Anthem did not perceive the CIDs as supporting an indemnification claim against the Sellers. Anthem did not mention the February 2019 to the Sellers until November 2019—approximately nine months after Anthem received it.

102. On April 15, 2019, the DOJ sent another CID to Anthem. Ex. 20. The April 2019 CID demanded the interview of Marc Russo, President of Anthem's Medicare division. Mr. Russo worked for Anthem before Anthem bought the Companies. Mr. Russo never worked for the Companies.

103. Anthem asserted for the first time in November 2019 that the April 2019 CID supported an indemnification claim against the Sellers. But in April 2019, Anthem did not perceive the CIDs as supporting an indemnification claim against the Sellers. Anthem did not mention the April 2019 CID to the Sellers until November 2019—approximately seven months after Anthem received it.

O. The First Demand

104. By letter dated June 28, 2019, Anthem asserted the First Demand against the Sellers. Ex. 21. Anthem claimed that it had "recently become aware" of an [redacted] that the HealthSun Plan had conducted in December 2016. Anthem claimed that the [redacted] showed that the Sellers had breached the Specified Health Care Representations and Warranties. Anthem asserted "approximately [redacted] in resulting losses.

105. The First Demand stated as follows:

> Anthem has recently become aware that in December 2016, [the HealthSun Plan] commenced an [redacted]. During the [redacted] Anthem understands that HealthSun's [redacted]. The majority of the [redacted] occurred prior to August 2016. Because of the [redacted], Anthem had to [redacted]. Anthem currently estimates a Loss of approximately [redacted]. The enclosed chart shows this loss by entity.

Ex. 21 at 1.

106. Anthem asserted that the unspecified [redacted] indicate a breach of" certain Specified Health Care Representations and Warranties. Anthem did not explain why.

107. Contrary to Anthem's assertion that it had "recently become aware" of the apparent December 2016 [redacted] the First Demand enclosed a chart of "loss by entity" dated November 28, 2018.

108. Assuming for the sake of argument that there were merit to Anthem's asserted losses, Anthem's chart excluded the HealthSun Sellers from most of them. The chart attributed [redacted] of the losses to [redacted]. *See* EIPA at 1. The chart also claimed [redacted] in losses from December 2016, after Summit Partners bought the Companies. Deducting those two categories alone yields a loss of only [redacted], as shown below.

Anthem's Total	[redacted]
[redacted]	[redacted]
Dec-16 (non-[redacted])	[redacted]
Revised (Generous) Total	[redacted]

109. By letter dated August 7, 2019, the HealthSun Sellers objected formally to the First Demand. Ex. 22. The HealthSun Sellers explained that because the First Demand asserted losses of less than [redacted], Anthem could not recover from the Indemnity Escrow Fund. The HealthSun Sellers requested "back-up for Anthem's estimated 'Loss of approximately [redacted]' referenced in the [First Demand], so that we can thoroughly investigate." *Id.* at 3. Anthem did not respond.

P. Anthem's "Notice of Potential Indemnity Claim" to the AFC Sellers

110. Meanwhile, Anthem's purchase contract with the AFC Sellers had required the release of an eight-figure escrow amount to the AFC Sellers on August 15, 2019. On August 14, 2019, Anthem sent to the AFC Sellers a document titled "Notice of Potential Indemnity Claim." Ex. 23. Anthem reserved the right to seek indemnification of nine-figure losses arising from the Anthem FCA Investigation. Anthem sent the Notice of Potential Indemnity Claim to take hostage the escrow amount that was supposed to be paid to the AFC Sellers one day later.

111. Anthem asserted that because Anthem had bought the AFC Entities, the Anthem FCA Investigation "could be reasonably expected to encompass the [AFC] Sellers' conduct, giving rise to Loss." There was no "factual basis from which

anyone could reach that conclusion." *Bay Capital Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 2020 WL 1527784, at *11 (Del. Ch. Mar. 30, 2020). Anthem knew that the Anthem FCA Investigation that began in 2016 did not target the AFC Entities that Anthem bought in 2018.

112. On October 15, 2019, the AFC Sellers sued Anthem to invalidate the Notice of Potential Indemnity Claim. *See* Complaint, *K&P Hldg. II, LLC v. ATH Hldg. Co.*, C.A. No. 2019-0821-KSJM (Del. Ch. Oct. 15, 2019).

Q. The Second Demand

113. By letter dated November 1, 2019, Anthem asserted the Second Demand against the Sellers. Ex. 24. Anthem announced that a healthcare provider called [redacted] had threatened to sue the HealthSun Plan to recover [redacted]

114. The Second Demand attached a letter to Anthem from [redacted] dated November 8, 2018, and [redacted] follow-up letter dated July 1, 2019. Ex. 24 at 5–11. Thus, after receiving the [redacted] demand, Anthem took over eleven months to inform the Sellers.

115. Anthem asserted that [redacted]s demand indicates a breach of" certain Specified Health Care Representations and Warranties. Anthem did not explain why.

116. In fact, [redacted]x contended that the HealthSun Plan had *under-reported* for [redacted] provider services. In its demand letter dated November 8, 2018, [redacted] stated as follows:

> [redacted] determined that they have viable claims against HealthSun for approximately [redacted]. This was done by [redacted], and this information was previously produced to HealthSun. The [redacted]. HealthSun had verified knowledge of the validity of the claims and [redacted] steadfast intent of pursuing these credits.

Ex. 24 at 9.

117. Anthem is not entitled to indemnification for the [redacted] demand because, if [redacted] were correct, then Anthem could cure the shortfall by [redacted] There would be nothing to indemnify.

118. Finally, the Second Demand conceded that Anthem's first two demands had asserted immaterial losses, *i.e.*, less than [redacted] in the aggregate. In other words, assuming the First Demand and the Second Demand were the only claims in controversy, then Anthem agreed that the HealthSun Sellers are entitled to the principal relief they seek in this action: the release of the balance of the Indemnity Escrow Fund exceeding [redacted] The Second Demand conceded as follows:

> As a breach of the HealthCare Representations, [redacted] 2016 audit claim is included within the [redacted] 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 [redacted] and related claims thereto) must be indemnified.

Ex. 24 at 2 (emphasis added).

119. The First Demand and the Second Demand together asserted losses of only [redacted] (and as to the HealthSun Sellers, a six-figure maximum). These losses were too small to prevent the release of the Indemnity Escrow Fund's third tranche when it became due on December 2, 2019. *See* EIPA § 10.2(a) (setting materiality threshold of [redacted] in losses).

R. The Third Demand

120. At this point, Anthem manufactured a third indemnification demand in order to cross the materiality threshold. In a second letter dated November 1, 2020, Anthem asserted the Third Demand against the Sellers. Ex. 25. The Third Demand was almost an exact copy of the meritless "Notice of Potential Indemnity Claim" that Anthem sent to the AFC Sellers in August 2019.

121. The Third Demand's asserted purpose was "to provide notice of a claim under the [EIPA] that is related to the prior notice regarding the [redacted] [*i.e.*, the First Demand]." The Third Demand stated as follows:

> Anthem has received a number of Civil Investigation [*sic*] Demands (CIDs) from the United States Attorney's Office for the Southern District of New York ("SDNY US Attorney's Office") (they are voluminous so copies will be provided to counsel or whoever you designate electronically next week). The SDNY US Attorney's Office issued the CIDs "in the course of a False Claims Act investigation" concerning "Anthem, Inc.'s submission of risk adjustment claims to the Centers for Medicare and Medicaid Services ('CMS') under Parts C and D of the Medicare Program."

Ex. 25 at 1.

122. The Third Demand repeated nearly verbatim the key text from the "Notice of Potential Indemnity Claim." The Third Demand asserted that the

> CIDs constitute a claim and also could reasonably be expected to give rise to an indemnified Loss because the CIDs' wording and time period (2010 to the present) encompass conduct that occurred prior to the 2016 [EIPA]. The CIDs' definition of "Anthem" includes all subsidiaries and affiliates with no limitation for pre-acquisition acts:
>
> > The terms "You," "Your," "Anthem" and "Anthem's" refer to Anthem, Inc., any corporate parent, subsidiary, or affiliate of Anthem, Inc., and any officer, employee, agent, representative, or person acting or purporting to act on behalf of Anthem, Inc. or any of its corporate parents, subsidiaries, or affiliates.
>
> Thus, the investigation, and related government investigations, proceedings or actions *could be reasonably expected to encompass the Companies* (as defined in the [EIPA]).

Ex. 25 at 1 (emphasis added).

123. This was not a truthful position. "The '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 (ORDER) (Del. 2018). "In other words, it

means more likely than not." *Id.* at *65 n.646. Anthem knew that the Anthem FCA Investigation addressed Anthem-wide fraud going back as far as 2007. Anthem knew that the Anthem FCA Investigation that began in 2016 did not target the pre-Anthem practices of businesses that Anthem bought in 2017. Anthem never believed its alternative facts were "more likely than not" to be true.

124. Anthem contended that "given the [redacted] issues that Anthem has previously uncovered, it is likely that [the Anthem FCA Investigation] *will encompass* [the HealthSun Plan's] actions, including [redacted], prior to August 2016." Ex. 25 at 1 (emphasis added). This text confirmed that the Third Demand was not a real claims notice. A claim requires an assertion of liability, which the Third Demand did not make. The Third Demand purported to reserve Anthem's right to seek indemnification from the Indemnity Escrow Fund's third tranche after the release date of December 2, 2019, and for as long as Anthem wanted. The Third Demand was invalid for this reason alone. *See Winshall*, 2012 WL 6200271, at *8 (rejecting reservation of rights styled as claims notice).

125. Anthem asserted that the "CIDs indicate a breach of" certain Specified Health Care Representations and Warranties. Anthem did not explain why.

126. The Third Demand asserted undefined losses that "could well exceed the materiality threshold." This assertion relied entirely on a press release about an unrelated company paying $270 million to settle False Claims Act liabilities. This

too was a sham. Anthem cannot claim indemnifiable losses by analogy to a press release about an unrelated company. The Third Demand stated as follows:

> Although the amount of Loss is currently unknown, False Claims Act investigations against health care providers may include triple damages and have resulted in settlements and claims well into the hundreds of millions of dollars (*see, e.g.*, News Release re Medicare provider - $270,000,000, attached). Thus, Loss associated with such a matter could well exceed the materiality standard ([redacted]).

Ex. 25 at 1.

127. The press release attached to the Third Demand is the same press release attached to the "Notice of Potential Indemnity Claim." The bottom right-hand corner of the press release states "8/12/2019." Anthem printed the press release on August 12, 2019, before sending it to the AFC Sellers on August 14, 2019. Anthem used the same press release to make the same loss estimate in a different demand against different sellers. It was a copy-and-paste job lacking any process or analysis.

128. On November 4, 2019, Anthem produced to the HealthSun Sellers the CIDs that the Third Demand referenced: the April 2018 CID, the June 2018 CID, the August 2018 CIDs, the January 2019 CIDs, the February 2019 CID, and the April 2019 CID. Ex. 26.

129. The CIDs had nothing to do with the Companies. *See supra* ¶¶ 56–103. Each CID reinforced that the Anthem FCA Investigation addressed Anthem's systemic Medicare fraud.

S. The HealthSun Sellers Respond to the Second and Third Demands.

130. By letter dated November 21, 2019, the HealthSun Sellers objected formally to the Second Demand and Third Demands. Ex. 27.

131. If it were true that Anthem had asserted indemnifiable losses, then the EIPA required that Anthem be completely transparent with the Sellers regarding its claims and any evidence that might support them.

132. Section 10.6(a) of the EIPA states as follows:

> If any third party shall notify any Indemnified Person with respect to any matter (a "Third Party Claim") *which may give rise to a claim for indemnification* against an Indemnifying Person under this Article 10, then the Indemnified Person shall promptly notify the Indemnifying Person thereof in writing . . . .

EIPA § 10.6(a) (emphasis added). If the Anthem FCA Investigation targeted the Companies, then each CID would constitute a "Regulatory Claim." *Id.* 10.6(b). The EIPA provides that where Anthem seeks indemnification arising from a Regulatory Claim, Anthem

> shall (and shall cause its counsel to) consult regularly (and not less than once per week) with the designated representatives of the Indemnifying Person [*i.e.*, the Sellers] regarding the status of such matter, including making the Indemnified Person's [*i.e.*, Anthem's] legal counsel available for such consultation, and otherwise to reasonably cooperate with and inform the designated representatives of the Indemnifying Person with respect to the conduct of the defense of such Regulatory Claim, including with respect to all significant decisions to be made with respect to such Regulatory Claim . . . .

Id. § 10.6(c).

133. In response to the Third Demand, the HealthSun Sellers requested as follows: "If . . . the CIDs directly address the Companies' conduct that pre-date the [EIPA] or Anthem has provided information to the [DOJ] which suggests there is an actual indemnifiable Loss, please provide the relevant information as soon as possible so that we can respond accordingly." Ex. 27 at 3. Anthem never provided the requested information.

134. Anthem's failure to provide back-up for the Third Demand presents two possibilities. The most likely possibility is that the back-up does not exist because the Third Demand was fake. A second possibility is that Anthem breached its obligation to be fully transparent with the Sellers regarding any Regulatory Claim. *See* EIPA § 10.6(c). The result is the same either way: Anthem has surrendered any claim to amounts in the Indemnity Escrow Fund exceeding [redacted]

T. Anthem Blocks the Escrow Release.

135. By letter dated November 25, 2019, Anthem instructed the Escrow Agent unilaterally to freeze the entire Indemnity Escrow Fund going forward. Ex. 28. Anthem purported to enclose the First, Second, and Third Demands. Anthem asserted that it "reasonably estimates that these Claim Amounts will exceed the current Escrow Funds" and "requests that the Escrow Agent not release [redacted] from the Escrow Funds on November 30, 2019." *Id.* at 2.

136. Anthem's instruction to the Escrow Agent was invalid because it failed to constitute a "Claim Notice" under Section 4 of the Escrow Agreement. The Escrow Agreement defines a "Claim Notice" as a written notice with three specified components: (i) a claim meeting the requirements of Section 10.3 of the EIPA (a "Claim"); (ii) a "reasonable good faith estimate of the amount of Loss" arising from the Claim; and (iii) content "stating in reasonable detail the nature of, and basis for, any such Claim." EA § 4. Anthem's instruction failed all three requirements.

137. Further, Anthem's escrow instruction was ineffective because it failed to request what Anthem wanted. Anthem requested "that the Escrow Agent not release [redacted] from the Escrow Funds on November 30, 2019." That is effectively what the Escrow Agent was supposed to do anyway. The release of the final [redacted] is not due until December 1, 2020. EA § 6(d). The release of all amounts *exceeding* [redacted] was due on December 2, 2019. *Id.* § 6(c).

138. By letter dated November 27, 2019, SRS objected formally to Anthem's instruction to the Escrow Agent. Ex. 29.

139. By letter dated December 9, 2019, LPPAS objected formally to Anthem's instruction to the Escrow Agent. Ex. 30.

U. Anthem Lies About Supposedly Imminent DOJ Litigation.

140. By letter dated December 12, 2019, the HealthSun Sellers tried once again to engage with Anthem regarding the First, Second, and Third Demands. Ex. 31. The HealthSun Sellers noted that despite their multiple requests, Anthem still had not provided back-up for these demands.

141. Anthem continued to fail to provide any back-up.

142. On December 20, 2019, Anthem represented to the HealthSun Sellers that "within the next thirty days" the DOJ would file a complaint "that specifically targets HealthSun and that the complaint will be informative concerning the parties' escrow dispute." Ex. 32. This assertion was false. Anthem claimed that the DOJ would sue the HealthSun Plan in order to pressure the HealthSun Sellers to settle on terms that Anthem did not deserve.

143. On February 3, 2020, Anthem claimed that it was "working on determining what additional information Anthem can provide regarding the HealthSun Sellers" and that it "should have an answer by this Friday (2-7-2020)." Ex. 32. Anthem did not provide any further update in February or in March.

V. The DOJ Sues Anthem.

144. On March 26, 2020, the DOJ sued Anthem for violating the False Claims Act. *See* Complaint, *United States v. Anthem, Inc.*, No. 1:20-cv-02593-ALC (S.D.N.Y. Mar. 26, 2020) (Ex. 33). The case has been assigned to the Honorable Andrew L. Carter Jr., United States District Judge of the United States District Court for the Southern District of New York. Contrary to what Anthem had represented to the HealthSun Sellers, the DOJ complaint named Anthem as the sole defendant.

145. The DOJ complaint did not "specifically target" the HealthSun Sellers (as Anthem had claimed it would). The complaint did not reference the HealthSun Entities in any way. The complaint attached a "table of the plans operated by Anthem that are relevant to this action, the contract numbers for those plans, and the Anthem subsidiaries involved with those plans …." Ex. 33 ¶ 11 n.2. The table listed thirty-five Anthem plans, but it did not list the HealthSun Plan. Ex. 33 Ex.1.

146. The DOJ complaint mirrors this complaint's account of the Anthem FCA Investigation. The DOJ complaint focuses heavily on Anthem-wide chart reviews conducted by Medi-Connect, *i.e.*, Verscend. The DOJ complaint does not address any conduct specific to Anthem's acquired businesses, because that was never the point. *See* Ex. 33 ¶ 129 ("Anthem intentionally chose to structure chart review … to prioritize profits over its compliance obligations. Anthem saw its chart review program not as an 'oversight activity' — as it had told providers — but rather

as 'a cash cow' for Anthem itself."); *id.* ¶ 114 ("[A]nthem used this program *solely* to find additional diagnosis codes to submit to CMS and thereby obtaining higher risk adjustment payments, and not – as it had told providers – to determine whether previously-submitted diagnosis codes had been reported accurately or inaccurately."); *id.* ¶¶ 108–13, 115–26, 131, 147 (describing Medi-Connect's role).

147. By letter dated March 27, 2020, the HealthSun Sellers asked Anthem to withdraw the Third Demand. Ex. 34. The HealthSun Sellers asked Anthem to instruct the Escrow Agent to release to the Sellers the balance of the Indemnity Escrow Fund exceeding [redacted]

148. Anthem never responded to the HealthSun Sellers' letter dated March 27, 2020. Anthem has not withdrawn the Third Demand.

W. The AFC Sellers' Litigation Concludes.

149. Meanwhile, the Court of Chancery had scheduled a hearing for Monday, March 30, 2020, on the AFC Sellers' motion for summary judgment against Anthem. The AFC Sellers' motion sought to invalidate the "Notice of Potential Indemnity Claim" that was nearly identical to the Third Demand.

150. On Friday, March 27, 2020, Anthem contacted the AFC Sellers in a hurried effort to moot the case. Ex. 35. Anthem surrendered 100% of the escrow funds that the AFC Sellers had demanded. The Court retained jurisdiction to hear the AFC Sellers' motion for fee-shifting under the bad-faith exception to the

American Rule. *See* Order Dismissing Complaint as Moot and Retaining Jurisdiction for Fee Application, *K&P Hldg. II, LLC v. ATH Hldg. Co.*, C.A. No. 2019-0821-KSJM (Del. Ch. Apr. 27, 2020).

151. The DOJ complaint exposed publicly that Anthem had been misrepresenting the Anthem FCA Investigation to its acquisition counterparties. Recognizing this, Anthem capitulated in the AFC Sellers' litigation. The only difference between this case and that one is that here, there is no imminent court hearing in which Anthem would have to answer for its dishonest conduct.

X. The Fourth Demand

152. By letters dated April 16, 2020, Anthem asserted a claim against the Indemnity Escrow Fund (the "Fourth Demand"). Exs. 37–38.

153. The Fourth Demand asserted that in February 2019, a departing employee of the HealthSun Plan had filed an "Ethics and Compliance Exit Report" with Anthem. Anthem claimed that the exit report had caused it to uncover a variety of misconduct spanning between 2014 and December 2017 (*i.e.*, a period including a year in which the Sellers no longer owned the Companies).

154. Although meritless, the Fourth Demand does not matter at this time. Anthem has not sent the Fourth Demand to the Escrow Agent. The Fourth Demand, dated April 16, 2020, has no effect on the escrow release that was supposed to have happened on December 2, 2019.

155. By letter dated May 13, 2020, the HealthSun Sellers responded formally to the Fourth Demand. Ex. 39.

Y. Anthem's Positions in the DOJ Litigation Contradict the Third Demand.

156. Meanwhile, in the DOJ litigation, Anthem has asserted a wall of arguments contradicting the Third Demand.

157. For example, on April 14, 2020, Anthem informed Judge Carter that it would seek to transfer venue to the United States District Court for the Southern District of Ohio. Ex. 36. Anthem contended that "most material witnesses are located" in Ohio. Anthem asserted that its "retrospective chart review program originated out of Anthem's offices in Columbus, Ohio, was designed by Anthem personnel in those offices, and was operated out of that location for nearly the entire time period at issue in the Complaint."

158. The Companies are in Florida, not Ohio. Anthem's effort to transfer venue to Ohio discredits the Third Demand.

159. As a second example, on May 29, 2020, Anthem informed Judge Carter that it would move to strike from the DOJ's complaint a paragraph describing the DOJ's success obtaining a $270 million settlement from an unrelated company. Ex. 40. Anthem derided the allegation as irrelevant, prejudicial, and only "'based in part' on a challenge to the provider's coding guidance and chart review" program. *Id.* at 2.

160. The $270 million settlement is the same settlement that the Third Demand enclosed as the exclusive basis for its asserted losses. Having represented in federal court that the settlement is irrelevant, Anthem cannot claim before this Court that the settlement constitutes a reasonable loss estimate under Section 4 of the Escrow Agreement.

161. As a third example, on May 29, 2020, Anthem informed Judge Carter that it would move to dismiss the DOJ's complaint on the basis that the challenged conduct was permitted by law. Ex. 41. Having represented in federal court that the challenged conduct was proper, Anthem cannot claim before this Court that the Sellers did anything wrong.

Z. The HealthSun Sellers Demand Indemnification.

162. On June 5, 2020, the HealthSun Sellers demanded that Anthem indemnify them for the attorneys' fees and expenses they have incurred and are incurring in connection with Anthem's meritless indemnification demands. Ex. 42.

163. The HealthSun Sellers are entitled to indemnification of "any and all Losses" arising from "any breach of any covenant or agreement applicable to Buyer" contained in the EIPA or Escrow Agreement. EIPA § 10.4. "Losses" include "reasonable attorneys' fees, costs, and expenses . . . with respect to asserting or enforcing" the Sellers' rights under the EIPA. *Id.* at A-13.

164. Anthem refuses to indemnify the HealthSun Sellers.

COUNT I:
BREACH OF CONTRACT FOR FAILURE TO RELEASE ESCROW

165. The plaintiff repeats the above allegations.

166. The EIPA is a binding contract supported by consideration.

167. The Escrow Agreement is a binding contract supported by consideration.

168. The plaintiff and the HealthSun Sellers have performed their contractual obligations.

169. The defendants have breached the EIPA and the Escrow Agreement by failing to consent to the release of the disputed portion of the Indemnity Escrow Fund when it came due on December 2, 2019.

170. The plaintiff is entitled to a remedy for the defendants' breaches of contract.

COUNT II:
BREACH OF CONTRACT FOR FAILURE TO PAY FEE-SHIFTING

171. The plaintiff repeats the above allegations.

172. The EIPA is a binding contract supported by consideration.

173. The plaintiff and the HealthSun Sellers have performed their contractual obligations.

174. The defendants have breached the EIPA by refusing to indemnify the HealthSun Sellers for the fees and expenses they have incurred in connection with Count I of this Verified Complaint for Specific Performance.

175. The plaintiff is entitled to a remedy for the defendants' breach of contract.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully requests that this Court award the following relief:

(a) An order of specific performance directing the defendants to participate in a Joint Instruction to the Escrow Agent to release to the Sellers the balance of the Indemnity Escrow Fund exceeding [redacted]

(b) An order awarding the plaintiff and the HealthSun Sellers their attorneys' fees and expenses incurred in connection with this litigation;

(c) An order awarding pre-judgment and post-judgment interest; and

(d) An order for such other and further relief as the Court may deem equitable.

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Dated: June 5, 2020

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