

# FRIER LEVITT

A T T O R N E Y S A T L A W  
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OSLER HEALTH IPA, LLC.,  
  
Plaintiff,  
  
v.  
  
HORIZON HEALTHCARE SERVICES,  
INC. d/b/a HORIZON BLUE CROSS BLUE  
SHIELD OF NEW JERSEY,  
  
Defendant.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION – BERGEN COUNTY

DOCKET NO.: BER-L- \_\_\_\_\_

Civil Action

**VERIFIED COMPLAINT, JURY  
DEMAND, AND DESIGNATION OF  
TRIAL COUNSEL**

Plaintiff, OSLER HEALTH IPA, LLC (“Plaintiff” or “Osler”), by way of verified complaint, through the undersigned counsel, alleges and says:

### NATURE OF THE ACTION

1. This matter, at bottom, is a “shared savings” dispute between Osler, an Independent Physician Association (“IPA”),<sup>1</sup> and Horizon, an insurance carrier. As such, it bears briefly explaining the basics of the shared savings payment model. Broadly, a shared savings arrangement is a risk-based agreement between a provider entity, such as a medical practice, and an insurance carrier, through which a prospective healthcare cost benchmark for a given time interval (often one-year) and a given patient pool is fixed, and, where, if the provider entity succeeds in reducing expenses so that its total

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<sup>1</sup> An IPA or Independent Physician Association, similar to an Accountable Care Organization, is a “business entity organized and owned by a network of independent physician practices for the purpose of reducing overhead of pursuing ventures such as contracts with . . . managed care organizations (MCOs)[.]” such as shared savings agreements. See <https://www.aafp.org/about/policies/all/independent-physician-associations.html> (last accessed 11/9/21).

healthcare cost at the end of the time interval is less than the benchmark, the carrier will pay the provider a bonus as a percentage of the total savings earned. It is an archetypal value-based care model, which encourages the reduction of healthcare costs, on a systemic level, while improving quality of care, standing in stark contrast to the more traditional fee-for-service model, one which, arguably, incentivizes volume over quality. The importance of the shared savings concept is understood by the federal government, which has invested substantial tax dollars in encouraging its growth. See <https://www.cms.gov/newsroom/press-releases/affordable-care-acts-shared-savings-program-continues-improve-quality-care-while-saving-medicare> (last accessed 11/9/21). Healthcare advocacy groups, such as the American Medical Association, have likewise lauded its potential to affect positive systemic change. See [https://www.acponline.org/acp\\_policy/statements/leading\\_health\\_groups\\_praise\\_introduction\\_of\\_value\\_in\\_health\\_care\\_act\\_july\\_2020.pdf](https://www.acponline.org/acp_policy/statements/leading_health_groups_praise_introduction_of_value_in_health_care_act_july_2020.pdf) (last accessed 11/10/21).

2. This case more specifically concerns abusive practices by Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey (“Horizon”) against Osler through Horizon’s failure to fairly or competently administer its own commercial Value-Based Program, the stated purpose of which was to “transform the delivery of medical care to the Horizon Commercial and Medicare members . . . by working collaboratively as partners [with Osler] to innovate and develop new and more efficient ways to improve the health of Horizon’s members who are Osler patients to the mutual financial benefit of both Horizon and Osler . . .” (“VBP Program”). Unfortunately, Horizon has proven itself to be neither a partner nor a particularly “efficient” carrier in regards to the administration of its VBP Program, failing or refusing, as it did, to secure Osler’s consent for the Total Medical Expense benchmarking used for calculating shared savings; failing or refusing to produce the healthcare and cost utilization data required by contract; and failing or refusing to produce monthly and complete cost of care reports, hampering Osler’s ability to take the steps necessary to maximize

potential shared savings. And this is not the first time that Osler has had a shared savings dispute with Horizon. Under a VBP Program Agreement predating the Agreement at issue here, Osler alleged, as they do again here, that Horizon failed to properly administer its VBP Program, resulting in multiple years in which Horizon erroneously claimed Osler had earned zero dollars in shared savings. In 2019, the Parties reached a settlement on the matter (in which neither Party admitted to wrongdoing), through which Horizon was to pay Osler, among other things, compensation in the form of temporarily enhanced commercial rates (“Temporarily Enhanced Rates”) for Osler’s constituent practices. Osler has discovered, however, that Horizon has not made full payment of these funds and, therefore, also seeks compensation for the carrier’s material breach of the Settlement Agreement through this action. Osler additionally discovered that Horizon has resorted to gameplaying to sidestep its settlement obligations by reducing, on an effectively dollar-for-dollar basis, all of Osler’s potential shared savings under the current VBP Agreement by the value of what it has (albeit only partially) paid to date in Temporarily Enhanced Rates.

3. Finally, in the weeks leading up to the filing of this action, the Parties met in a last ditch effort to avoid litigation. During these discussions, Horizon threatened that, should Osler proceed to sue rather than settle, Horizon would likely proceed to redesignate Osler’s constituent practices, currently designated as “Tier 1” under Horizon’s OMNIA insurance plans, as “Tier 2” beginning January 1, 2022. Per the OMNIA plans’ own terms, this redesignation will result in an increase in the deductible, copayments and/or coinsurance that OMNIA insured patients will have to pay if they wish to continue to be treated by an Osler physician. What’s more, OMNIA tiering is public information, and, through public statements and publications, Horizon has misleadingly indicated that higher OMNIA tiering status is associated with higher quality providers and medical services. The redesignation thus imminently threatens to destroy the hard-earned patient and healthcare marketplace goodwill cultivated by Osler and its constituent practices over the course of years.

### **THE PARTIES**

4. Osler is an IPA located in Hasbrouck Heights, New Jersey.
5. Horizon is an insurance carrier headquartered in Newark, New Jersey.

### **VENUE**

6. Venue is proper under R. 4:3-2(a) because Plaintiff is located in Bergen County.

### **FACTS COMMON TO ALL COUNTS**

#### ***I. Osler***

7. Osler is an Independent Physician Association, consisting of 23 independent primary care medical practices, all of whom have agreed to work together with the shared goal of reducing healthcare costs while improving quality of care for their patients. Osler currently services approximately 16,224 lives, approximately 12,192 of which are Horizon members (i.e., Horizon insureds).

8. Osler and its constituent practices have worked for many years to cultivate valuable goodwill with their attributed patients, who have remained loyal and regularly return for evaluation and treatment. Osler has similarly fostered goodwill and valuable relationship with other members of the healthcare marketplace, including other practices, providers, and facilities. The goodwill cultivated in both cases is based, in large part, on Osler's constituent practices' reputation for providing the highest quality of care and patient experience.

9. As the largest insurer in the State of New Jersey, Osler's Value Based Care agreements with Horizon are Osler's largest single source of revenue. Because fees for independent physician practices have stagnated over the years – in contrast to those fee arrangements negotiated between carriers and large healthcare and hospital conglomerates, often private equity-backed, which have negotiated increased fee schedules – value-based care agreements have become integral to maintaining the financial viability of practicing medicine as a primary care provider who is not under the control

of larger corporate interests. This case is thus a matter of public concern, as it speaks to the question of whether independent physicians may continue to work for themselves and their patients only, or whether they will be forced to work for a handful of profit-driven corporate monoliths, which are swallowing independent medical practices whole at an ever-increasing pace.

10. Horizon has stated in no uncertain terms that because Osler has complained of Horizon's mismanagement of its VBP Program, it will not offer to reengage Osler as a VBP Partner. Without the prospect of a renewed value-based contract with Horizon or the ability to be made whole for the damages described at length in this Complaint, Osler will collapse as a going concern.

## ***II. The 2019 Settlement Agreement.***

11. In or around October 1, 2014, Osler and Horizon entered into a shared savings agreement titled: "Accountable Care Organization Program Agreement[.]" (the "2014 VBP Agreement").

12. In or around 2017, Horizon claimed Osler had earned zero dollars in shared savings for performance year 2016 under the 2014 VBP Agreement.

13. Osler studied Horizon's claim in this regard and determined it was erroneous.

14. In late 2017, Osler advised Horizon of this, demanding a recalculation of year 2016's shared savings.

15. Thereafter, extensive discussions between the Parties ultimately resulted in a Settlement Agreement, executed in or around February of 2019 (the "Settlement Agreement").

16. Within its recitals, the Settlement Agreement provided, among other things, that "Osler has alleged that Osler earned and was entitled to substantial shared savings under the ACO Agreement in and for year 2016, which Horizon has failed to pay, and Horizon denies this allegation, (the 'Dispute')[.]" It further noted that the Parties had "reached a mutually agreeable settlement to resolve the Dispute, the terms and nature of which is memorialized herein[.]" Id.

17. Thus, the purpose of the Settlement Agreement was to make Osler whole for alleged non-payment of shared savings.

18. The Settlement Agreement provided that part of the settlement amount was to be paid over time through the Temporarily Enhanced Rates. Specifically, that provision, ¶2(iv), provides:

**Retroactive Payments.** It is understood and agreed by the Parties that the Commercial Rates shall be effective retroactive to September 15, 2018 for those Participating Practices listed in Exhibit 1 (the "Enhanced Practices"). In furtherance of the foregoing, Horizon covenants that it shall "true up" all Commercial Rates for the Enhanced Practices in the amount of \$1,838,697.08 (the "True Up Amount"). Payment of the True Up Amount shall be effectuated by a temporary increase in the Commercial Rates (i.e., applying commercial rates that are over and above the Commercial Rates) for Enhanced Practices commencing on March 1, 2019 and continuing for a period not to exceed nine (9) months from the Implementation Date ("Temporarily Enhanced Commercial Rates"). To the extent practicable, the True Up Amount shall be allocated to the Enhanced Practices on a pro-rata basis, with each Enhanced Practice receiving a share of the True Up Amount that, as reasonably determined by Horizon, is proportionate to the allowed amounts generated by each Enhanced Practice in 2018. For the avoidance of doubt, after the value of the True Up Amount has been paid via Temporarily Enhanced Commercial Rates, the Commercial Rates shall continue to apply to Enhanced Practices in accordance herewith. Notwithstanding anything herein to the contrary, to the extent the providers associated an Enhanced Practices become providers of OMG and cease providing services through the Enhanced Practice, then the Temporarily Enhanced Commercial Rates applicable to such Enhanced Practice will apply to OMG pursuant to the terms set forth herein.

[Id.]

19. The Settlement Agreement also increased the value of the Care Coordination Transformation fees ("CCT fees"), a fixed per member per month ("PMPM") fee paid to Osler for each of Osler's attributed<sup>2</sup> members ("Enhanced CCT Fees"). See, e.g., id. at Exhibit A at B(2)(i).

20. Additionally, the Settlement Agreement designated Osler's constituent practices as having "Tier 1 status" under Horizon's OMNIA health plans, and provided that this designation would remain fixed through December 31, 2021. Id. at Exhibit A at A(2)(ii).

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<sup>2</sup> Generally, patient "attribution" for shared savings purposes is the "assignment of a patient to a specific physician or clinician for a period of time based on the patient's claim history [among other things]." <https://www.aafp.org/family-physician/practice-and-career/delivery-payment-models/acos.html#attribution> (last accessed 11/10/21). For this reason, attributed patient pools are used to monitor performance under a shared savings agreement.

21. Finally, the Settlement Agreement extended the term of the 2017 VBP Agreement through December 31, 2021. See, e.g., id. at Exhibit A at B(2)(iv).

***III. The 2017 VBP Agreement.***

22. In or around January 1, 2017, Osler and Horizon entered into a new shared savings agreement (“2017 VBP Agreement”), which incorporates by reference additional terms set forth in Horizon’s “Value-Based Program Manual” (the “VBP Manual”).

23. The 2017 VBP Agreement employed a Total Medical Expense (“TME”) model, the benchmarking (and associated methodology) for which required Osler’s approval or consent before Horizon was permitted to fix and apply it to Osler’s data to determine the value of Osler’s shared savings in a given year. Id. at Appendix A at § 3.

24. Under the arrangement, a risk score is applied to each attributed member’s projected per member per month cost, the purpose of which is to use a patient’s overall health status/risk to project their estimated cost of care for the following year, enhancing the accuracy of TME benchmarking.

25. Next, the value of the CCT fees paid is deducted from the potential shared savings pool, calculated per the above.

26. Finally, a multiplier is applied to the resulting pool of potential shared savings, which corresponds to one of three quality metrics levels – the higher the quality metric “Level[.]” the higher the percentage of the savings provided to Osler. See id. at § 2, 4.

27. Osler was hopeful there would be no further shared savings disputes with Horizon under this new Agreement, particularly in light of its inclusion of provisions protective of Osler’s interests, which, among other things, require that Horizon secure approval or consent from Osler before fixing or applying any proposed TME benchmarking in a given contract year, in addition to creating clear data transparency/sharing obligations on Horizon’s part.

28. Further, to meet its data and data analytics transparency obligations under the 2017 VBP Agreement and VBP Manual, Horizon created what it purported to be a fixed reporting schedule, designed to apprise Osler of proposed TME benchmarking, and at fixed intervals, to provide Osler with reasonably contemporaneous cost and utilization data, along with quality metrics. There are four such reports.

29. First, in early spring of each contract year, Horizon was to issue a Total Medical Expense Target report, which, in effect, provided Osler with proposed TME benchmarking for that year (“TME Target Report”). TME Target Reports include, among other things, cost trends and risk scores for particular segments of the attributed patient population, which is reflective of a percentage increase, year-over-year, for servicing those segments. Cost trends nearly always increase year-over-year.

30. Second, on a monthly basis, Horizon was to provide Osler with Cost of Care Reports, containing claims-level data, including billed/paid claims from the month prior. As such reports are necessarily extremely data-rich, Horizon would instruct Osler to download them from a dedicated Horizon MFT site (“Monthly Cost of Care Reports”). The Monthly Cost of Care Reports’ analytics of the raw claims data was key to determining the significance of this raw claims data within the confines of the 2017 VBP Agreement’s shared savings methodology, in addition to being critical for Osler’s ongoing efforts to reduce cost and utilization.

31. Third, on a roughly quarterly basis, Horizon was to issue aggregated Cost of Care Reports that included all claims data, including claims runout data,<sup>3</sup> from the previous quarter (“Aggregated Cost of Care Reports”).

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<sup>3</sup> The nature of medical billing is such that there is almost always a significant, often two-to-three month, lag between submission of a claim and payment. Thus, even though a billing period may end at the end of March, claims may not be fully adjudicated and paid until May or June. Aggregated Cost of Care Reports included, but was not limited, to this data, thus providing a complete picture of the cost of care for a given billing period.

32. Finally, Horizon was to issue quarterly Total Medical Expense Target Reports, which highlighted the variance between the target TME and the actual TME for each quarter. This is a critical piece of intelligence for an IPA seeking to appropriately address its practices' cost and utilization numbers to maximize shared savings ("TME Variance Reports").

***IV. Commencement of the Present Dispute.***

33. Early in the life of the 2017 VBP Agreement, it became evident that Osler's hopes that relations with Horizon had turned a corner were misplaced, as Horizon would not, as required, cooperate in crafting reasonable TME benchmarks. Specifically, throughout the course of the 2017 VBP Agreement, Osler repeatedly objected to Horizon's inclusion of the cost of physical therapy, chiropractic services, specialty medications, and hospital observation as part of its TME benchmarking, as these are services/items over which Osler and its primary care physicians have no cost savings/utilization-based control (collectively, the services and items, "Uncontrolled Costs"). Horizon ignored these objections despite the 2017 VBP Agreement's call for "collabor[ation]", Id. at 1, and despite Horizon's duty to ensure Osler is agreeable to its TME benchmarking methodology. Id. at Appx. A.

34. Osler additionally objected to what appeared to be the obviously incorrect or outright false cost trends used by Horizon for benchmarking purposes in its TME Target Reports. In particular, cost trends for certain (presumably high value) Horizon clients, such as Administrative Services Organizations ("ASOs"), were inexplicably low, year-over-year, notwithstanding obvious and significant increases in the cost of care throughout various other healthcare sectors, including other segments of Osler's own attributed population. In addition to being a breach by virtue of its falsity, inclusion of artificially deflated cost trends has the inevitable result of making an IPA's task of keeping costs below the TME benchmark significantly more complicated, as these cost trends are the building blocks of the benchmarking itself, i.e., skewing cost trends downward works to skew downward TME

shared savings thresholds. Meanwhile, naturally, the “actual” TME, calculated by adding together paid claims, remains comparatively much higher.

35. Notwithstanding Horizon’s failures in this regard, Osler continued to take steps, to the greatest extent practicable, to reduce cost and utilization while maintaining the highest levels of patient care for performance year 2017 and 2018.

36. Horizon, however, advised Osler that it had determined that Osler had earned no shared savings for year 2018.

37. Upon information and belief, Osler did, in fact, generate substantial shared savings for performance year 2018. Further, but for Horizon’s failure to meet its obligations under the 2017 VBP Agreement, Osler would have generated considerably more in shared savings for performance year 2018.

38. Despite the above issues, Osler nevertheless remained optimistic that Horizon would, eventually, abide by its obligations and substantively address the objections Osler had raised, particularly after having executed the 2019 Settlement Agreement.

39. As Year 2019 metrics and reporting began rolling in, however, it became immediately obvious that Horizon had, once again, failed to honor its obligations as Osler’s “partner[]” and instead, had ignored Osler’s benchmarking objections, including Uncontrolled Costs in its TME benchmarking (and in its calculation of the “actual” TME) for purposes of calculating Osler’s earned shared savings. Likewise, ASO cost trends, among others, remained suspiciously low.

40. Inclusion of the Uncontrolled Costs and deflated cost trends over and above Osler’s objections is a material breach, which works at cross-purposes with the 2017 VBP Agreement’s express “goal [of] . . . transforming the delivery of medical care . . . to the *mutual financial benefit of both Horizon and Osler.*” Id. at 1 (emphasis supplied).

41. Unsurprisingly, not long thereafter, Horizon informed Osler that it had determined that Osler had failed to generate shared savings for performance year 2019.

42. Upon information and belief, Osler did, in fact, generate substantial shared savings in performance year 2019. Further, but for Horizon's failure to meet its obligations under the 2017 VBP Agreement, Osler would have generated considerably more in shared savings for performance year 2019.

43. To better understand Horizon's purported findings, on or about April 20, 2020, Osler requested by email data validating the carrier's determination that no shared savings were earned for year 2019.

***V. The Initial Demand Letter.***

44. Paragraph 7.10 of the 2017 VBP Agreement contains an "Internal Dispute Resolution" provision, which provides that disputes that "arise between the parties regarding the performance or interpretation of th[e] Agreement must be first attempted to be resolve by good faith negotiations between designated representatives of the parties . . . If the matter is not resolved within 60 days of such a request, either party may pursue its legal remedies outside of this Agreement." (the "Dispute Resolution Clause").

45. Paragraph 7.9, "Data Requests[.]" provides that, "[u]pon reasonable request, Horizon will provide Osler and/or its independent auditor with the data that was in and that validates the calculations set forth in the Appendix A . . ." *Id.*; *see also* ¶1.6.

46. Seeking to communicate its concerns with Horizon's conduct while complying with the Dispute Resolution Clause, Osler outlined the above-described issues through counsel in a letter to Horizon in November 2020 ("2020 Dispute Notice"). The 2020 Dispute Notice underscored, among other things, the issue of Uncontrolled Costs and that of apparently artificially deflated cost

trends for certain Horizon clients. Additionally, the Letter included record and data demands pursuant to Paragraph 1.6 and 7.9 of the Agreement, including requests for:

- “Hospital observation to Inpatient by revenue code. Hospitals are over utilizing observation vs. discharging patients to have additional testing/evaluations. Physicians have no input or influence on decisions to move patients to observation. Osler is not able to impact care and therefore cost.
- Cost of Care Report Practice Detail IP, OP and Professional in excel format - In many instances Osler is seeing a decrease or stable utilization but a drastic increase in PMPM. Need the cost details in areas so Osler can impact where care is directed.
- Inpatient Cost breakdown by Complexity of DRG - Need to understand if the fewer admissions have more complex DRGs or it is driven by unit cost increases at the facilities where attributed patients are receiving care.
- Outpatient Health System vs Freestanding Unit Cost breakdown - To affect behavior change, Osler needs to know the unit cost for services at facilities (health systems vs. freestanding) that their physicians refer to so they can direct patients to the most cost effective facilities.
- Hospital admission breakdown across all categories tying back to practice - This view of the data will help to understand if patient geography is driving the admissions or if patients are seeking services at a specific hospital regardless of their location.
- Chiropractor, PT continues to be an issue for not only because of out of network utilization, but cost/unit cost- Osler has had conversation with various leaders within Horizon to get high quality chiros and PTs **in** network. The Horizon fee schedule for these providers is so low they cannot afford to be **in** network. Again, Osler would like to understand cost differences by POS (Health System vs Freestanding).
- Cost of care reporting - This included raw dollars and not adjusted for risk, catastrophic or completed (all this is done on the financials). It would be helpful to see these adjustments on the total cost of care as well as on the financials.”

[Collectively, the “Data and Document Demands”.]

47. To Horizon’s credit, not long after receiving the 2020 Dispute Notice, it invited Osler for a sit-down to work through the grievances outlined therein, in an (apparent) effort to negotiate a resolution to the matter.

48. The Parties met for this purpose on or about November 23, 2020 and, again, on January 13, 2021. At the second meeting, Horizon representatives Lisa White, Robert Jones, and Lisa Lacarruba conceded that Horizon had erroneously included the Uncontrolled Costs in tabulating Osler's shared savings, as these were services/items over which neither Osler nor Horizon had any control, and represented that Horizon would take steps to correct these errors on a prospective basis. Disappointingly (but unsurprisingly), those same Horizon representatives later declined to memorialize these statements in writing when asked. Notwithstanding, following the meeting, Osler remained optimistic that Horizon would make good on these representations by promptly revising its 2018 and 2019 (and any as then-yet undisclosed 2020) shared savings calculations accordingly. To date, however, Horizon has not done so.

49. Soon thereafter, as Osler dug deeper into the metrics provided, additional serious issues became evident. First, it appeared that the analytics from those Monthly Cost of Care Reports provided to Osler were inconsistent with underlying claims-level data accessible via Horizon's MFT site, which indicated that Horizon's analytics were substantially inaccurate or, alternatively, that Horizon had failed to produce all relevant claims-level data sets. Second, Osler discovered that Horizon had, in essence, gamed the Settlement Agreement by reducing, on an effectively dollar-for-dollar basis, all of Osler's potential shared savings by tabulating paid claims using the Temporarily Enhanced Rates to determine actual TME, in addition to deducting from the shared savings pool the Enhanced CCT fees, rather than the pre-Settlement CCT fees. Thus, for every settlement dollar Horizon paid Osler to make up for failing to pay Osler shared savings under the 2014 VBP Agreement, Horizon snatched back a dollar under the 2017 VBP Agreement, by not adjusting TME benchmarking to account for the uptick in value.

50. The purpose of the Settlement Agreement was to make Osler whole for Horizon's alleged failure to pay earned shared savings. Therefore, Osler had a reasonable expectation that the

settlement funds paid would not be used to reduce future shared savings. Instead, Horizon's underhanded workaround effectively recouped the value or at least a substantial percentage of the value of the Settlement Agreement.

51. This surreptitious effort to circumvent the spirit and purpose of the Settlement Agreement left Osler concerned that Horizon had also failed to meet its "Retroactive Payment[]" obligation under the Settlement Agreement, in which, through Temporarily Enhanced Rates, Horizon was to pay Osler a total of \$1,838,697.08 over a period beginning March 1, 2019 and ending on December 1, 2019. An audit was therefore duly performed, through which Osler determined that, in fact, Horizon had paid Osler, minimally, forty percent (40%) less in settlement funds through the Temporarily Enhanced Rates than it should have paid during the relevant time period, in clear (further) breach of the Settlement Agreement.

52. Despite Horizon's continued failures to meet its obligations under the 2017 VBP Agreement, Osler continued to take steps, to the greatest extent practicable, to reduce cost and utilization while maintaining the highest levels of patient care for performance year 2020. Upon information and belief, Osler did, in fact, generate substantial shared savings for performance year 2020. Further, but for Horizon's failure to meet its obligations under the 2017 VBP Agreement, Osler would have generated considerably more in shared savings for performance year 2020.

***VI. Horizon's Continued Failure to Perform in 2021.***

53. Beginning in January of 2021, Horizon ceased producing Monthly Cost of Care Reports for Osler. Purportedly, the reason for this was that Horizon was transitioning to a new online platform where the key analytics normally contained in those reports would be more easily accessible by its VBP partners. The new platform, however, was not functional or accessible to Osler and, indeed, it remains as such through the date of this writing.

54. It was not until some *eight (8) months later in September 2021 that Osler received its first Monthly Cost of Care Report*. The Report was not sent through or accessible via the new platform since, per Horizon, the new platform was still not operational. Nor did it contain the detailed Horizon-produced data analytics normally included in Monthly Cost of Care Reports; instead, it contained nothing more than a high level and largely superficial summary of analytical conclusions without any underlying detail, in contrast to what was previously provided. Horizon sent its second, and to date, only other Monthly Cost of Care Report in October of this year, containing all of the failings of its September counterpart.

55. Without the comparatively detailed and timely-issued data analytics provided in Monthly Cost of Care Reports of years past, Osler cannot optimize its ability to earn shared savings. Moreover, to date, Osler has not yet been given meaningful or usable access to Horizon's new online platform.

56. Despite Horizon's continued failures to meet its obligations under the 2017 VBP Agreement, Osler continued to take steps, to the greatest extent practicable, to reduce cost and utilization while maintaining the highest levels of patient care. Upon information and belief, Osler has, to date, generated substantial shared savings for performance year 2021, and would have generated even greater shared savings were it not for Horizon's continued failures to meet its obligations under the 2017 VBP Agreement.

57. On or about May 25, 2021, Osler sent a follow-up dispute notice to Horizon (the "2021 Dispute Notice"), expressing all of the above concerns, including the issue of Uncontrolled Costs, artificially deflated cost trends, and the improper use of settlement funds to reduce future shared savings, in addition to reiterating the Data and Document Demands made in the 2020 Dispute Notice (and in Osler's April 20, 2020 email), as Horizon had not (and largely still has not) produced any of the requested data or records.

58. Horizon rejected the 2021 Dispute Notice's demands in full, and, to date, the records and data requested therein have not, in large part, been produced.

59. On or about June 28, 2021, Horizon paid Osler 1.3 million dollars for shared savings earned in performance year 2020.

60. Upon information and belief, Osler had, in fact, generated substantially more than 1.3 million dollars in shared savings for performance year 2020. Upon further information and belief, Osler would have generated even greater shared savings but for Horizon's failure to meet its obligations under the 2017 VBP Agreement.

61. By letter sent in or around August 2021, Horizon advised Osler that Horizon intended to change the risk adjustment methodology to be used in calculating shared savings under the 2017 VBP Agreement.

62. Shortly thereafter, Horizon scheduled a "standard performance meeting" with Osler to discuss "Key Performance Indicators," and at which, per counsel for Horizon, Horizon would address "issues Osler may have regarding the timeliness of Horizon's reporting in 2021."

63. The (virtual) meeting took place on September 8, 2021 (the "September Performance Meeting"), at which representatives from Osler and Horizon were present, including Lisa White, Robert Jones, Ravi Patel, and Isabella Micciche. Counsel for Horizon and the undersigned were also present.

64. During the September Performance Meeting, Osler pressed Horizon on a number of the above-described issues, including Horizon's tardiness in issuing Monthly Cost of Care Reports, and Horizon's continued failure to provide it with usable data analytics. The issue of seemingly artificially deflated cost trends was also raised. Strikingly, Horizon representatives, including Ms. White, *conceded* that Horizon had, in fact, been delinquent in timely issuing Monthly Cost of Care Reports. Ms. White reiterated that cost and utilization data normally accessible by Osler had been

rendered inaccessible due to Horizon's efforts to transition to its new online portal. Further, the September Report provided did not contain risk adjusted PMPM values, according to Horizon, because of Horizon's recent decision to change course regarding the type of risk adjustment methodology it would be utilizing to determine shared savings in year 2021. Further, neither Ms. White nor anyone else on the call could explain why Horizon had not simply continued issuing Monthly Cost of Care Report in the previous format while working to transition to the new online platform, but they did express an understanding that the situation had effectively left Osler (and, presumably, other VBP Program participants) in the dark. Perhaps most strikingly, Ms. White admitted and agreed that the cost trends reflected in the TME Target Reports for ASOs were inexplicably low and indicated an intention to determine the cause of the abnormality. Neither Ms. White nor anyone else at Horizon has done so to date, however.

65. Finally, during the September Performance Meeting, Osler asked Horizon whether, in light of the COVID-19 pandemic, benchmarking for 2021 would be based on 2019, rather than 2020 data, given the highly aberrant nature of 2020, during which time, comparatively fewer patients sought medical treatment for fear of contracting the virus. Horizon did not provide a definitive answer. Osler stated plainly that it would not consent to 2021 benchmarking based on 2020 data since, not only would the aberrant data hold little predictive validity vis-à-vis cost and quality metrics, but it would make efforts to reduce cost and utilization below such benchmarking unreasonably difficult.

66. On or about November 10, 2021, Horizon invited Osler for another performance meeting (the "November Performance Meeting"). During the November Performance Meeting, Osler reiterated many of the questions previously posed to Horizon, which Horizon had still not answered, including, among others, whether TME benchmarking for year 2021 would be based upon 2020 or 2019 data, and why ASO cost trends appeared to remain artificially low. Incredibly, even though 2021 was nearly over, Horizon admitted that it did not know whether it would use 2020 data for TME

benchmarking. As for the perennial ASO cost trend issue, Horizon stated, effectively, that it would “look into it.” Among other things, Osler made clear that Horizon’s benchmarking failures negatively impacted the IPA’s ability to perform under the Agreement and, further, that Osler had not and would not agree to use pandemic-affected healthcare data as a benchmark for year 2021.

67. During the November Performance Meeting, Osler noted that recently provided data and reporting from Horizon, in the form of flawed Cost of Care reporting, indicates that Horizon is preparing once again to award Osler zero dollars in shared savings for performance year 2021. Horizon had no substantive response.

68. To date, Horizon still has not provided the records sought through the Data and Document Demands (or Osler’s April 20, 2020 email), nor has Horizon indicated that it would be doing so in the future.

69. Recently, Osler performed an exhaustive data analysis and found that the claims-level data provided by Horizon for years 2018, 2020 and (likely) 2021 through its MFT site are incomplete.

70. Osler generated millions in shared savings under the 2017 VBP Agreement in years 2019 and 2021, despite Horizon’s determinations to the contrary, and would have generated even greater shared savings had Horizon met its obligations under the 2017 VBP Agreement and Settlement Agreement. Likewise, Osler earned significantly more shared savings in year 2020 than Horizon’s 1.3 million dollar payment would indicate.

71. Horizon’s failure to competently administer its VBP Program, as required by the 2017 VBP Agreement, doesn’t just harm Osler – it harms all other VBP Program-participating IPAs, Accountable Care Organizations, and other independent provider groups who have heeded the call to transform their practices from volume-based to value-based care-centric healthcare entities, and did so in an effort to innovate, reduce healthcare costs and positively transform the healthcare system at large.

72. As described at length above, Osler has justifiably complained to Horizon on multiple occasions about its mismanagement of its VBP Program. Upon information and belief, as a result, Horizon has determined not to address the issues raised but, rather, to retaliate against and punish Osler by refusing to offer it a new contract within Horizon's VBP Program, a decision which will almost certainly lead to Osler's financial collapse.

***VII. Horizon's Misuse of OMNIA Tier Status as Leverage.***

73. OMNIA health plans are administered by Horizon.

74. Upon information and belief, OMNIA health plans insure millions of New Jersey residents.

75. Osler's constituent practices treat thousands of OMNIA insureds.

76. OMNIA uses a tier system, which designates providers as either "Tier 1" or "Tier 2."

77. According to Horizon, insureds "will pay less out of their pocket for care when they use OMNIA Tier 1 physicians, other health care professionals, hospitals and ancillary providers." <https://www.horizonblue.com/providers/products-programs/products/omnia-health-plans> (last accessed 12/21/21). Thus, redesignation of a provider from Tier 1 to Tier 2 status will cause that provider's OMNIA patients to pay higher out-of-pocket costs than they would if they were to see a provider designated as OMNIA Tier 1.

78. Through marketing and promotional materials, including press releases, Horizon has misleadingly represented that OMNIA tiering is correlated with the quality of the provider and/or the medical services he or she provides. In other words, Horizon has created the false impression that providers designated as Tier 2 are less qualified and/or offer medical services that are inferior to those offered by providers designated as Tier 1.

79. By way of example but not limitation, in 2015, in or around the time the OMNIA health plans were launched, Horizon stated: "As New Jersey's largest and most experienced health

insurer, Horizon . . . listened carefully to the concerns of our customers: you wanted high-quality healthcare at low costs. That is why this Fall we introduced OMNIA . . . [, which] offers a choice of lower premiums compared to other plans and are based on a tiered network . . .”

<https://www.nj.com/horizon-blue-cross-blue-shield/2015/12/horizon-committed-to-high-quality.html> (last accessed 12/21/21). Horizon would go on to further state in a press release that “OMNIA Health Alliance is committed to radically altering how health care is financed and delivered in New Jersey *to reward value, which it defines as high quality care . . . [and] enhanced patient experience[.]*” <https://www.bcbs.com/news/press-releases/major-new-alliance-formed-transform-how-health-care-delivered-and-financed-new> (emphasis supplied) (last accessed 12/21/21).

80. Later, in 2019, Christopher M. Lepre, Horizon’s Executive Vice President for Commercial business, wrote: “By far our biggest value-based program is our OMNIA Health Alliance, a first-of-its-kind partnership with leading health systems and physician groups across the state . . . [It] rewards doctors and hospitals for providing *better care.*” <https://www.horizonhealthnews.com/partnering-on-value-based-care-is-key-to-reining-in-health-care-costs/> (emphasis supplied) (last accessed 12/21/21).

81. Further, in a Horizon “Health News” bulletin entitled “6 Questions Your Employees Are Asking About OMNIA[.]” Horizon stated that OMNIA Tier 1 “doctors and hospitals [unlike Tier 2 doctors and hospitals] . . . have joined Horizon in committing to reduce the cost of health care by improving quality and coordination to give our members a better overall experience.” <https://www.horizonhealthnews.com/6-questions-your-employees-are-asking-about-omnia/> (last accessed 12/21/21).

82. Taken in their totality, these and other representations made by Horizon, creates the false impression that providers designated Tier 2 are inferior to providers designated Tier 1 in terms of “quality” and “overall” patient experience.

83. Osler's constituent practices consist of the highest quality physicians providing the highest quality of care, matching and exceeding those practices and providers designated OMNIA Tier 1 status. And, indeed, currently, all of Osler's constituent practices are, in fact, designated OMNIA Tier 1. Thus, any representation that Osler's constituent practices, once redesignated OMNIA Tier 2 on or about January 1, 2022, are inferior to practices and providers then-designated OMNIA Tier 1 is false, defamatory, and injurious. By labeling Osler's constituent practices as OMNIA Tier 2, which Horizon has threatened to do imminently, Horizon will be making false, defamatory and injurious misrepresentations, actionable at law.

84. Redesignation of Osler's constituent practices and physicians to OMNIA Tier 2 status will increase the out-of-pocket costs of the patients they treat, leading, inevitably, to their exodus from Osler practices due to economic necessity and, by extension, to a disruption in their continuity of care. Such harm cannot be compensated by money damages alone. Moreover, given the structure of the OMNIA program, those patients who are forced to leave the care of Osler's constituent practices will foreseeably flow to Tier 1 practices with whom Horizon has in-force value-based care contracts, to Horizon's financial benefit.

85. Redesignation of Osler's constituent practices and physicians to OMNIA Tier 2 status, which redesignation will be published publicly,<sup>4</sup> will create the false impression that the practices and their physicians provide care inferior to that offered by practices and physicians designated OMNIA Tier 1, thereby destroying invaluable and hard-fought patient goodwill cultivated over many years. Likewise, redesignation will irreparably harm the hard-fought and valuable goodwill Osler and its constituent practices have fostered over the years with other healthcare professionals, including other

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<sup>4</sup> A provider or practice's OMNIA tier status is publicly available through, among other places, Horizon's website. See [https://doctorfinder.horizonblue.com/dhf\\_search/doctors/plan-omnia/distance-50/state-nj/specialty-all+pcps/page-1/sub-category-all/criteria-all+primary+care+physicians+\(pcps\)?application=dhf](https://doctorfinder.horizonblue.com/dhf_search/doctors/plan-omnia/distance-50/state-nj/specialty-all+pcps/page-1/sub-category-all/criteria-all+primary+care+physicians+(pcps)?application=dhf) (Last accessed 12/21/21)

practices, providers and facilities. Such intangible harms cannot be compensated by money damages alone.

86. In the weeks preceding the filing of this Complaint, discussions were held by the Parties in an effort to avoid litigation. In one such discussion, on or about December 8, 2021, Horizon executives, in a thinly veiled threat, advised that the carrier would be forced to “reevaluate” Osler’s constituent practices’ OMNIA tier status beginning on January 1, 2022 if Osler refused to waive its rights to file the instant action. This veiled threat was reiterated by Horizon’s counsel to the undersigned approximately one week later.

87. The threat of redesignation fits a wider pattern of retaliatory conduct on Horizon’s part, designed to silence and intimidate Osler from raising the issues set forth in this Complaint and, more broadly, to expand its dominion and control over independent medical practices in this State.

88. Upon information and belief, Horizon will undertake additional retaliatory and injurious actions against Osler and its constituent practices following the filing of this lawsuit.

**COUNT ONE**  
**(Breach of 2017 VBP Agreement)**  
**(Failure to Pay Shared Savings Earned In Years 2018 and 2019)**

89. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

90. To demonstrate a breach of contract a plaintiff must show a valid contract, defective performance by the defendant under that contract, and resulting damages.

91. The 2017 VBP Agreement, including the VBP Manual, is a binding contract. This contract was extended to December 31, 2021 by the Settlement Agreement.

92. The 2017 VBP Agreement requires Horizon to pay Osler a percentage of savings Osler earned through a reduction in cost and utilization by its constituent practices while maintaining specific quality metrics. See, e.g., 2017 VBP Agreement at Appendix A at § 2-4.

93. In performance years 2018 and 2019, Osler succeeded in reducing cost and utilization while maintaining quality metrics, earning substantial shared savings.

94. Horizon failed or refused to properly apply the shared savings methodology set forth in the 2017 VBP Agreement, thereby erroneously determining that Osler failed to earn shared savings in performance years 2018 and 2019 when, in fact, Osler had succeeded in earning substantial sums per that same methodology.

95. Horizon's failure to pay Osler for the shared savings earned in performance years 2018 and 2019 cause Osler financial damages, as Osler earned those shared savings and went to considerable effort and expense to do so.

96. Horizon's failure to pay Osler for shared savings earned in performance years 2018 and 2019 is a material breach of the 2017 VBP Agreement (and VBP Manual, incorporated therein by reference).

**WHEREFORE**, Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the 2017 VBP Agreement (and VBP Manual as incorporated by reference therein) as set forth above; and
- (b) Compensatory damages in an amount equal to the value of the shared savings earned by Osler but not paid by Horizon in performance years 2018 and 2019; and
- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

**COUNT TWO**

**(Breach of 2017 VBP Agreement)**

**(Anticipatory Repudiation as to Payment of Shared Savings for Year 2021)**

97. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

98. To demonstrate a breach of contract a plaintiff must show a valid contract, defective performance by the defendant under that contract, and resulting damages. Where a Plaintiff has

reasonable grounds to support its belief that the Defendant will breach the contract even though the Plaintiff may not have yet done so or done so fully, the contract is still breached by way of anticipatory repudiation.

99. The 2017 VBP Agreement, including the VBP Manual, is a binding contract. This contract was extended to December 31, 2021 by the Settlement Agreement.

100. The 2017 VBP Agreement requires Horizon to pay Osler a percentage of savings Osler earned through a reduction in cost and utilization by its constituent practices while maintaining specific quality metrics. See, e.g., 2017 VBP Agreement at Appendix A at § 2-4.

101. Upon information and belief, in performance year 2021, which has not yet ended, Osler succeeded in reducing cost and utilization while maintaining quality metrics, earning substantial shared savings to date.

102. Upon information and belief, per the reporting provided to Osler thus far in 2021, including TME Variance Reports, among others, Horizon has failed or refused to properly apply the shared savings methodology set forth in the 2017 VBP Agreement, thereby erroneously determining that Osler failed to earn any shared savings in performance year 2021 when, upon information and belief, Osler has succeeded in earning substantial sums per that same methodology and will continue to do so through the end of 2021. More to the point, this same reporting indicates that it is Horizon's clear and unambiguous intention not to pay Osler for any shared savings earned in 2021.

103. Horizon's telegraphing of its intention not to pay Osler for the shared savings earned (and as yet to be earned) in 2021 is a material breach, by way of anticipatory repudiation and otherwise, of the 2017 VBP Agreement (and VBP Manual, incorporated therein by reference).

**WHEREFORE**, Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the 2017 VBP Agreement (and VBP Manual as incorporated by reference therein) as set forth above; and

- (b) Compensatory damages in an amount equal to the value of the shared savings earned by Osler (and to be earned by Osler through the end of 2021) for performance year 2021, which Horizon has represented it will not pay; and
- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

**COUNT THREE**  
**(Breach of 2017 VBP Agreement)**  
**(Failure to Secure Osler's Approval or Consent for TME Benchmarks for Years 2018-2021)**

104. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

105. To demonstrate a breach of contract a plaintiff must show a valid contract, defective performance by the defendant under that contract, and resulting damages.

106. Under contract law, a party who breaches a contract is liable for all of the natural and probable consequences of the breach of contract.

107. The 2017 VBP Agreement, including the VBP Manual, is a binding contract. This contract was extended to December 31, 2021 by the Settlement Agreement.

108. Under the 2017 VBP Agreement and VBP Manual (incorporated therein by reference), Horizon is required to secure approval or consent from Osler before fixing or applying a TME benchmark in connection with calculating Osler's shared savings for a given performance year. See, e.g., 2017 VBP Agreement at Second WHEREAS clause; Appendix A (including without limitation at ¶3.(a)).

109. As described above, throughout the life of the 2017 VBP Agreement, Osler objected to Horizon's attempts to set unfair TME benchmarks on various grounds, including but not limited to Horizon's TME benchmarking that calculated TME using, among other things, Uncontrolled Costs; Horizon's TME benchmarking using apparently artificially deflated cost trends; and Horizon's

stated intention of using (and apparent current use of) 2020 data to benchmark Osler's 2021 performance.

110. Osler did not consent to or approve the use of such flawed TME benchmarking.

111. Horizon did not seriously consider Osler's above (and other) objections and used flawed and inequitable TME benchmarking notwithstanding having failed to secure Osler's approval or consent to do so.

112. Horizon's use of flawed and unapproved TME benchmarking in calculating Osler's shared savings for performance years 2018-2021 resulted in a reduction of shared savings that Osler would have otherwise earned, had an approved and consented to method of TME benchmarking been fixed and applied. By way of illustration but not limitation, had Horizon not included Uncontrolled Costs and artificially deflated cost trends for attributed patient segments such as those serviced by ASOs, Osler would have earned substantially more shared savings than it ultimately did.

113. The reduction in shared savings resulting from Horizon's failure to secure consent or approval from Osler in regards to TME benchmarking was a material breach of contract. This breach of contract naturally and foreseeably resulted in lost potential shared savings that would have otherwise been earned in performance years 2018-2021. These potential shared savings may be determined with a reasonable degree of accuracy and certainty. Osler is not a new business.

**WHEREFORE,** Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the 2017 VBP Agreement (and VBP Manual as incorporated by reference therein) as set forth above; and
- (b) Compensatory damages in an amount equal to the value of the shared savings that, but for Horizon's above-described failures, would have been earned by Osler for performance years 2018-2021; and
- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

**COUNT FOUR**  
**(Breach of 2017 VBP Agreement)**  
**(Failure to Produce or Provide Relevant Data and Records for Years 2018-2021)**

114. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

115. To demonstrate a breach of contract a plaintiff must show a valid contract, defective performance by the defendant under that contract, and resulting damages.

116. Under contract law, a party who breaches a contract is liable for all of the natural and probable consequences of the breach of contract.

117. The 2017 VBP Agreement, including the VBP Manual, is a binding contract. This contract was extended to December 31, 2021 by the Settlement Agreement.

118. The 2017 VBP Agreement and VBP Manual (incorporated therein by reference) created a duty of data and data analytics transparency on Horizon's part, in addition to requiring that Horizon accommodate Osler's data and record requests relevant to determining its shared savings under the 2017 VBP Agreement. See, e.g., 2017 VBP Agreement at ¶1.6; ¶7.9; Appendix A at ¶3.(a); see also VBP Manual at 4.

119. Further, as above-described, to meet its data and data analytics transparency obligations under the 2017 VBP Agreement, Horizon created what it purported to be a fixed reporting schedule, designed to apprise Osler of proposed TME benchmarking, and at fixed intervals, to provide Osler with reasonably contemporaneous cost and utilization data and data analytics, along with quality metrics. Among such reports provided were Monthly Cost of Care Reports, which, until January 2021, contained detailed analytics of raw claims-level data.

120. By email on or about April 20, 2020, Osler requested data validating Horizon's determination that no shared savings were earned for year 2019.

121. Through the 2020 Dispute Notice, and pursuant to Paragraphs 1.6 and 7.9 of the 2017 VBP Agreement, Osler demanded records, data and analytics relevant to calculating Osler's shared savings under that Agreement. See supra at ¶46.

122. In January of 2021, Horizon ceased producing Monthly Cost of Care Reports. Horizon stated that these reports would be replaced by access to a new online platform; however, at that time, and as of the writing of this Complaint, meaningful or usable access to that platform has not been granted to Osler.

123. Horizon produced only two Cost of Care Reports in 2021 and those reports did not contain the key analytics that reports in previous years had. Such analytics are key because it is, ultimately, Horizon's analytics that are employed by Horizon in calculating shared savings.

124. On or about May 25, 2021, Osler sent the 2021 Dispute Notice, which reiterated the Data and Document Demands made in the 2020 Dispute Notice. Horizon has not, to date, produced these data or records.

125. Osler performed a careful analysis of the claims-level data provided by Horizon through its MFT site and determined that those data for years 2018, 2020 and (likely) 2021 were incomplete.

126. Horizon's failure and/or refusal to produce the foregoing data, records and analytics for performance years 2018-2021 is a material breach of the 2017 VBP Agreement (and the VBP Manual incorporated therein).

127. Further, this material breach has caused Osler damages. By way of illustration but not limitation, had Horizon provided Osler with complete and timely Monthly Cost of Care Reports, Osler could have taken steps, together with its constituent practices, to reduce cost and utilization, thereby earning increased shared savings in performance years 2018-2021.

128. The reduction in shared savings resulting from Horizon's failure and/or refusal to produce the foregoing data, records and analytics for performance years 2018-2021 thus naturally and foreseeably resulted in lost potential shared savings that would have otherwise been earned. These potential shared savings may be determined with a reasonable degree of accuracy and certainty. Osler is not a new business.

**WHEREFORE**, Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the 2017 VBP Agreement (and VBP Manual as incorporated by reference therein) as set forth above; and
- (b) Compensatory damages in an amount equal to the value of the shared savings that, but for Horizon's above-described failures, would have been earned by Osler for performance years 2018-2021; and
- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

**COUNT FIVE**

**(Breach of the 2017 VBP Agreement's Implied Covenant of Good Faith and Fair Dealing)  
(Failure to Secure Osler's Approval or Consent for TME Benchmarks for Years 2018-2021)**

129. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

130. In New Jersey, every contract has implied in it a covenant of good faith and fair dealing. A covenant of good faith and fair dealing is breached where one party to a contract has acted to frustrate the reasonable expectations of the other, or where one party has worked to frustrate the fundamental purpose of the contract at issue. This is true even where the breaching party's conduct (which results in the breach) constituted an exercise of that party's discretion under the relevant contract.

131. To the extent the 2017 VBP Agreement granted Horizon some latitude or discretion in pursuing TME benchmarking over and above Osler's objections and/or without Osler's express

consent or approval, Horizon's above-described conduct nevertheless violated the covenant of good faith and fair dealing implicit in that Agreement.

132. Osler had a reasonable expectation, based on the wording of the 2017 VBP Agreement, that Horizon would be required to seek Osler's approval before proceeding to fix and apply TME benchmarks for a given performance year. Moreover, Horizon's failure to secure agreement on something as foundational to a shared savings arrangement as benchmarking frustrated the fundamental purpose of the Agreement.

133. Horizon's frustration of Osler's reasonable expectations and/or the fundamental purpose of the 2017 VBP Agreement with regard to performance years 2018-2021 constituted a breach of the covenant of good faith and fair dealing implicit in that Agreement.

**WHEREFORE**, Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the covenant of good faith and fair dealing implied in the 2017 VBP Agreement (and VBP Manual as incorporated by reference therein) as set forth above; and
- (b) Compensatory damages in an amount equal to the value of the shared savings that, but for Horizon's above-described failures, would have been earned by Osler for performance years 2018-2021; and
- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

#### **COUNT SIX**

#### **(Breach of the 2017 VBP Agreement's Implied Covenant of Good Faith and Fair Dealing) (Horizon's Failure to Provide Reporting and Data During Performance Years 2018-2021)**

134. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

135. In New Jersey, every contract has implied in it a covenant of good faith and fair dealing. A covenant of good faith and fair dealing is breached where one party to a contract has acted to frustrate the reasonable expectations of the other or where the first party has worked to frustrate

the fundamental purpose of the contract at issue. This is true even where the breaching party's conduct (which results in the breach) constituted an exercise of that party's discretion under the relevant contract.

136. To the extent the 2017 VBP Agreement granted Horizon some latitude or discretion in determining what data, records and/or analytics to provide to Osler, (1) failing or refusing to provide those data, records and analytics on a regular basis and in a reasonably usable/accessible form and/or (2) failing to provide those data, records and/or analytics requested by Osler nevertheless violated the covenant of good faith and fair dealing implicit in that Agreement.

137. Osler had a reasonable expectation, based on the wording of the 2017 VBP Agreement, that Horizon would be required to regularly provide data, records and/or analytics in a reasonably usable form. Osler likewise had a reasonable expectation, based on the wording of the 2017 VBP Agreement, that Horizon would provide those data, records and/or analytics requested by Osler. Moreover, data, record and methodological transparency is foundational to the 2017 VBP Agreement (and the VBP Manual incorporated therein by reference) and Horizon's failure to adhere to it frustrated the fundamental purpose of that Agreement.

138. Horizon's frustration of Osler's reasonable expectations and/or the fundamental purpose of the 2017 VBP Agreement with regard to data, records and methodological transparency for performance years 2018-2021 constituted a breach of the covenant of good faith and fair dealing implicit in that Agreement.

**WHEREFORE,** Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the covenant of good faith and fair dealing implied in the 2017 VBP Agreement (and VBP Manual as incorporated by reference therein) as set forth above; and
- (b) Compensatory damages in an amount equal to the value of the shared savings that, but for Horizon's above-described failures, would have been earned by Osler for performance years 2018-2021; and

- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

**COUNT SEVEN**

**(Unjust Enrichment As to Savings Accrued to Horizon's Benefit In Years 2018-2019)**

139. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

140. To demonstrate unjust enrichment, a plaintiff must show that the plaintiff conferred a benefit on the defendant; that the plaintiff expected remuneration for this benefit at the time it was conferred; and that retention of that benefit by defendant without payment to plaintiff would be unjust.

141. The shared savings earned by Osler but left unpaid by Horizon, as referenced in Count One, supra, for performance years 2018-2019, accrued to Horizon's benefit in that it reduced the costs that Horizon would otherwise have been required to pay to cover the healthcare services furnished to those Horizon members (i.e., insureds) who were Osler attributed patients during those years.

142. Thus, the shared savings earned by Osler but left unpaid by Horizon for performance years 2018-2019 conferred a benefit on Horizon.

143. At the time the benefit was conferred, Osler expected that it would be remunerated for the time, effort and expense it went to in order to earn those savings.

144. It would be inequitable for Horizon to retain the benefit of the shared savings accrued to it by virtue of Osler's time, effort and expense without compensating Osler.

**WHEREFORE**, Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon was unjustly enriched at the expense of Osler, as set forth above; and
- (b) Disgorgement from Horizon of the value of the shared savings earned by Osler but not paid by and unjustly retained by Horizon in performance years 2018-2019; and
- (c) Costs and reasonable attorney's fees as permitted by law; and

(d) For such other relief as the Court may deem reasonable and just.

**COUNT EIGHT**  
**(Breach of Settlement Agreement)**  
**(Failure to Pay Settlement Amount)**

145. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

146. To demonstrate a breach of contract a plaintiff must show a valid contract, defective performance by the defendant under that contract, and resulting damages.

147. The Settlement Agreement is a valid and binding contract.

148. The Settlement Agreement provided that part of the settlement amount was to be paid over time through the Temporarily Enhanced Rates. Specifically, that provision, ¶2(iv), provided that \$1,838,697.08 was to be paid via Temporarily Enhanced Rates during the March 1, 2019 through December 1, 2019 period.

149. Osler conducted a review of the value received through the Temporarily Enhanced Rates during that period and determined that Horizon had paid, minimally, forty percent (40%) less than it should have paid.

150. As such, Horizon failed to pay the full amount of settlement funds owed, constituting a material breach of the Settlement Agreement.

**WHEREFORE,** Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the Settlement Agreement as set forth above; and
- (b) Compensatory damages in an amount equal to the value of the settlement funds left unpaid by Horizon as set forth above; and
- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

**COUNT NINE**

**(Breach of Settlement Agreement's Implied Covenant of Good Faith and Fair Dealing)**

151. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

152. In New Jersey, every contract has implied in it a covenant of good faith and fair dealing. A covenant of good faith and fair dealing is breached where one party to a contract has acted to frustrate the reasonable expectations of the other or where the first party has worked to frustrate the fundamental purpose of the contract at issue. This is true even where the breaching party's conduct (which results in the breach) constituted an exercise of that party's discretion under the relevant contract.

153. The Settlement Agreement, as with any New Jersey contract, has implied in it a covenant of good faith and fair dealing.

154. Within its recitals, the Settlement Agreement provided, among other things, that "Osler has alleged that Osler earned and was entitled to substantial shared savings under the ACO Agreement in and for year 2016, which Horizon has failed to pay, and Horizon denies this allegation[.]" It further noted that the Parties had "reached a mutually agreeable settlement to resolve the Dispute, the terms and nature of which is memorialized herein[.]" Id.

155. Thus, the foundational or fundamental purpose of the Settlement Agreement was to make Osler whole for alleged non-payment of shared savings under the 2014 VBP Agreement.

156. One of the ways in which the Settlement Agreement seeks to achieve this goal is through payment of Temporarily Enhanced Rates and Enhanced CCT Fees.

157. In executing the Settlement Agreement, it was Osler's reasonable expectation that Horizon would be conducting itself in accordance with the Agreement so as to make Osler whole for the alleged losses it had suffered.

158. Osler conducted due diligence into Horizon's compliance with the Settlement Agreement.

159. Through this due diligence, Osler has discovered that Horizon had, in essence, gamed the Settlement Agreement by reducing, on an effectively dollar-for-dollar basis, all of Osler's potential shared savings by tabulating paid claims using the Temporarily Enhanced Rates to determine actual TME, in addition to deducting from the shared savings pool the Enhanced CCT fees, rather than the pre-Settlement CCT fees. Thus, for every settlement dollar Horizon paid Osler to make up for failing to pay Osler shared savings under the 2014 VBP Agreement, Horizon snatched back a dollar under the 2017 VBP Agreement, by not adjusting TME benchmarking to account for the uptick in value.

160. Through this gamesmanship, Horizon has frustrated Osler's reasonable expectation that it would be made whole through the Settlement Agreement, in addition to frustrating the fundamental purpose of that Agreement.

**WHEREFORE**, Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon breached the covenant of good faith and fair dealing implied in Settlement Agreement; and
- (b) Compensatory damages in an amount equal to the value of the reduction in shared savings or potential shared savings caused by Horizon as set forth above; and
- (c) Costs and reasonable attorney's fees as permitted by law; and
- (d) For such other relief as the Court may deem reasonable and just.

#### **COUNT TEN**

#### **(Tortious Interference with Prospective Business Relation and Economic Advantage)**

161. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

162. To assert a claim for tortious interference with prospective business relation or economic advantage, a showing must be made that plaintiff had a reasonable expectation of economic advantage arising from a relationship with a third party; that the defendant intentionally interfered

with this relationship; and that the foregoing caused or will imminently cause the loss of prospective business or economic advantage.

163. A provider or practice's relationship with his or her patients implies a reasonable expectation of economic advantage or business in that future business is reasonably anticipated.

164. Osler and Osler's constituent practices have cultivated valuable relationships and goodwill with its attributed patient population over the course of years on the basis of, among other things, the high quality of the medical services provided. Likewise, and for the same reasons, Osler and its constituent practices have fostered valuable relationships and goodwill with other healthcare professionals, including other practices, providers and facilities. As such, Osler and its constituent practices have a reasonable expectation of prospective business or economic advantage through a continued and unimpeded relationship with those attributed patients and healthcare colleagues.

165. As reflected in the 2017 VBP Agreement's shared savings methodology, among other places, Horizon recognizes the relationship between Osler and Osler's constituent practices, on the one hand, and Osler's attributed patients, on the other.

166. Approximately one third of Osler's attributed patient population is enrolled in an OMNIA health plan, which plan maintains the above-described status tiering system.

167. Horizon has threatened, without just cause, to imminently redesignate Osler's constituent practices as OMNIA Tier 2 beginning January 1, 2022.

168. Due to Horizon's public representations, OMNIA Tier 2 Status is strongly correlated with the false proposition that providers bearing this (public) label are inferior to providers designated as OMNIA Tier 1 status.

169. Redesignation of Osler's constituent practices to OMNIA Tier 2 Status will result, by operation of contract, in substantially increased out-of-pocket costs for those attributed Osler patients who are enrolled in the OMNIA program, which, in turn, will cause a significant percentage of these

patients to leave the care of Osler's constituent practices, interrupting the continuity of care. Moreover, given the structure of the OMNIA program, those patients who are forced to leave the care of Osler's constituent practices will foreseeably flow to Tier 1 practices with whom Horizon has in-force value-based care contracts, to Horizon's financial benefit.

170. Redesignation of Osler's constituent practices as OMNIA Tier 2 will also create the false impression that Osler's constituent practices and their physicians are inferior to those practices and physicians designated as OMNIA Tier 1, destroying patient goodwill cultivated by Osler and its constituent practices over many years. For the same reasons, such redesignation will harm the hard-fought and valuable goodwill Osler and its constituent practices have fostered over years with other healthcare professionals, including other practices, providers and facilities. Osler and its constituent practices will, as a result, lose patients and colleagues who may have otherwise referred to or recommended Osler and its practices, destroying these valuable relationships and the potential for similar prospective or future relationships.

171. The loss of patients and the substantial damage to Osler and its constituent practices' reputation and goodwill are intangible harms, individually or together, that cannot be adequately remedied at law. Per Horizon's threats, this harm is imminent and will occur on or about January 1, 2022.

172. For these reasons, Horizon has tortiously interfered and/or will imminently tortiously interfere with Osler's constituent practices' valuable prospective business and economic relationships with its patients and healthcare colleagues – current and future – in violation of law.

**WHEREFORE,** Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon has tortiously interfered or imminently will tortiously interfere with Osler's constituent practices' valuable prospective business and economic relationships with its patients and healthcare colleagues; and

- (b) Temporary emergent restraints, a preliminary injunction, and/or a permanent injunction prohibiting Horizon from redesignating Osler's constituent practices as OMNIA Tier 2; and
- (c) Compensatory damages in an amount to be determined at trial; and
- (d) Costs and reasonable attorney's fees as permitted by law; and
- (e) For such other relief as the Court may deem reasonable and just.

### **COUNT ELEVEN**

#### **(Defamation of Osler, Osler's Constituent Practices and the Services Offered by the Constituent Practices)**

173. Plaintiff repeats and realleges each and every previous allegation as if set forth at length herein.

174. To plead defamation, a plaintiff must show that the defendant made a defamatory statement of fact concerning the plaintiff, which was false and communicated to a person or persons other than the plaintiff, in addition to damages. A false statement is defamatory if it exposes the plaintiff to, among other harms, loss of goodwill and confidence of others or so harms his reputation as to deter others from associating with him. Such statements may be made in the context of and pertaining to a person's trade, profession or business where the matter is of significance and importance relating to the manner in which the subject of the statement carries out his trade, profession or business.

175. Osler and Osler's constituent practices have cultivated valuable relationships and goodwill with its attributed patient population over the course of years on the basis of, among other things, the high quality of the medical services provided. Likewise, and for the same reasons, Osler and its constituent practices have fostered valuable relationships and goodwill with other healthcare professionals, including other practices, providers and facilities.

176. Osler's constituent practices have provided and continue to provide the highest quality of medical care and services. Currently, they are designated as OMNIA Tier 1.

177. Approximately one third of Osler's attributed patient population is enrolled in an OMNIA health plan, which maintains the above-described status tiering system.

178. Horizon has threatened, without just cause, to imminently redesignate Osler's constituent practices as OMNIA Tier 2 beginning January 1, 2022.

179. Due to Horizon's public representations, OMNIA Tier 2 Status is strongly correlated with the false proposition that providers bearing this (public) label are inferior to providers designated as OMNIA Tier 1 status.

180. OMNIA tier status for a provider or practice is published publicly, among other places, on Horizon's website.

181. Redesignation of Osler's constituent practices as OMNIA Tier 2 will create the false impression that Osler's constituent practices and their physicians are inferior to those practices and physicians designated as OMNIA Tier 1, destroying patient goodwill cultivated by Osler and its constituent practices over many years.

182. For the same reasons, such redesignation will harm the hard-fought and valuable goodwill Osler and its constituent practices have fostered over the years with other healthcare professionals, including other practices, providers and facilities.

183. For the same reasons, such redesignation will harm the reputation of the medical services provided by Osler's constituent practices by implying that such services are inferior to those services provided by practices bearing the OMNIA Tier 1 designation.

184. Osler's constituent practices, even if redesignated as OMNIA Tier 2 by Horizon on January 1, 2022, will remain objectively as high quality, in terms of the medical services and patient experience provided, as any other provider in Horizon's network bearing the designation of OMNIA Tier 1.

185. The loss of patients and harm to Osler and its constituent practices' reputation and goodwill are intangible harms, individually or together, that cannot be adequately remedied at law. Per Horizon's threats, this harm is imminent and will occur on or about January 1, 2022.

186. For these reasons, Horizon has defamed or imminently will defame Osler, Osler's constituent practices, and the services provided by those constituent practices, in violation of law.

**WHEREFORE**, Osler demands judgment against Horizon, and seeks the following relief:

- (a) A finding and declaration by the Court that Horizon has defamed or imminently will defame Osler, Osler's constituent practices, and the services provided by those constituent practices by virtue of the impending OMNIA tier status redesignation to be carried out by Horizon on January 1, 2022; and
- (b) Temporary emergent restraints, a preliminary injunction, and/or a permanent injunction prohibiting Horizon from redesignating Osler's constituent practices as OMNIA Tier 2; and
- (c) Compensatory damages in an amount to be determined at trial; and
- (d) Costs and reasonable attorney's fees as permitted by law; and
- (e) For such other relief as the Court may deem reasonable and just.

**JURY DEMAND**

Please take notice that Plaintiff hereby demands a trial by jury on all issues so triable.

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to Rule 4:25-4, Jason N. Silberberg, Esq. is hereby designated trial counsel in the within matter.

**FRIER LEVITT, LLC**

/s/ Jason N. Silberberg

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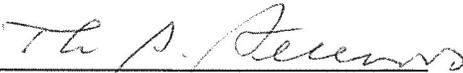
Dated: December 23, 2021

VERIFICATION

I, Thomas Bellavia, M.D., being duly sworn according to law, upon my oath, depose and say:

1. I am an authorized agent of the Plaintiff in the foregoing Verified Complaint.
2. I have read the foregoing Verified Complaint.
3. Based on my personal knowledge, the statements in the foregoing Verified Complaint are true to my knowledge and belief, except as to matters stated on information and belief which are true to the best of my knowledge and belief.

The foregoing statements made by me are true and I am aware that if any of the foregoing statement made by me are willfully false, I am subject to punishment.

By:   
Thomas Bellavia, M.D., Officer  
On behalf of:  
OSLER HEALTH IPA, LLC

Dated: December 23, 2021