

Peter Slocum, Esq. (I.D. No. 037762010)  
Anish Patel, Esq. (I.D. No. 382142021)  
**LOWENSTEIN SANDLER**  
One Lowenstein Drive  
Roseland, New Jersey 07068  
973-597-2500  
*Counsel for Plaintiff-Appellant BrainBuilders, LLC*

<p>BRAINBUILDERS, LLC,</p> <p style="text-align: center;">Plaintiff-Appellant,</p> <p style="text-align: center;">-against-</p> <p>OSCAR GARDEN STATE INSURANCE CORPORATION, AND XZY CORPORATIONS 1-5,</p> <p style="text-align: center;">Defendants- Respondents.</p>	<p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003514-23</p> <p>CIVIL ACTION</p> <p>ON APPEAL FROM ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY</p> <p>DOCKET NO. OCN-L-1714-19</p> <p>SAT BELOW: HON. CRAIG L. WELLERSON, J.S.C.</p>
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**BRIEF FOR PLAINTIFF-APPELLANT BRAINBUILDERS, LLC**

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Peter M. Slocum (I.D. No. 021222012)  
Anish Patel (I.D. No. 382142021)  
*Of Counsel & On the Brief*  
LOWENSTEIN SANDLER, LLP  
One Lowenstein Drive  
Roseland, New Jersey 07068  
973-597-2500  
pslocum@lowenstein.com  
apatel@lowenstein.com

Vafa Sarmasti (I.D. No. 008942004)  
*Of Counsel & On the Brief*  
SARMASTI PLLC  
271 Route 46 West  
Suite A205  
Fairfield, New Jersey 07004  
973-882-6666  
vafa@sarmastipllc.com

*Counsel for Plaintiff-Appellant  
BrainBuilders, LLC*

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED .....iii**

**TABLE OF AUTHORITIES ..... iv**

**PRELIMINARY STATEMENT ..... 1**

**PROCEDURAL HISTORY ..... 3**

**STATEMENT OF FACTS..... 5**

    A. BrainBuilders Provides Necessary Medical Services to Children with Autism ..... 5

        1. The Insured Children ..... 7

    B. Oscar Enters the New Jersey Market Without In-Network Providers To Treat Children with Autism ..... 10

        1. The New Jersey Autism Mandate Requires Insurers to Cover ABA, Speech Therapy, and Occupational Therapy for Children with Autism..... 11

        2. The New Jersey Healthcare Quality Act Requires Insurers to Maintain Adequate Networks of Providers Who Treat Autism Spectrum Disorder ..... 12

    C. Oscar Outsources Its Statutory Obligation to Cover Behavioral Health Services to Optum, a Third-Party Administrator ..... 13

        1. To Address Gaps in Its Network of Behavioral Healthcare Providers, Optum Authorized Out-of-Network Providers’ Services ..... 14

        2. Optum Authorized BrainBuilders to Treat the Insured Children Through Its Engagement with BrainBuilders..... 17

    D. BrainBuilders Negotiates with Oscar for Payment of Services Rendered to the Insured Children..... 18

        1. Oscar’s Lack of In-Network Providers for the Insured Children Prompts Oscar to Authorize BrainBuilders’ Services for Continuity of Care..... 18

        2. BrainBuilders Receives Authorizations from Optum to Render ABA Treatment to the Insured Children, Without an Agreement on the Billing Rates..... 20

E.	BrainBuilders Gets the Run-Around from Oscar and Optum on Setting Rates and Securing Authorizations to Treat the Insured Children ....	21
F.	Optum and Oscar Point Fingers at Each Other About the Responsible Party for Authorizing BrainBuilders’ Services .....	25
G.	Oscar Continues to Issue Authorizations and Pay Claims.....	27
H.	After the Department of Banking and Insurance Audits Oscar, Oscar Investigates Optum’s Mishandling of BrainBuilders’ Claims .....	29
	<b>STANDARD OF REVIEW .....</b>	<b>30</b>
	<b>LEGAL ARGUMENT .....</b>	<b>31</b>
	<b>I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BRAINBUILDERS’ IMPLIED CONTRACT CLAIM (Pa35-36; Pa20-26).....</b>	<b>32</b>
A.	The Facts in the Record Are Sufficient to Show that an Implied Contract Exists Between Oscar and BrainBuilders .....	34
	<b>II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BRAINBUILDERS’ PROMISSORY ESTOPPEL CLAIM (Pa35-36; Pa26-29).....</b>	<b>39</b>
A.	Oscar’s Promises of Compensation Are Sufficient for BrainBuilders’ Promissory Estoppel Claim.....	40
B.	BrainBuilders Reasonably Relied on Oscar’s Promises to Its Detriment .....	42
	<b>III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BRAINBUILDERS’ UNJUST ENRICHMENT AND QUANTUM MERUIT CLAIMS (Pa35-36; Pa29-34) .....</b>	<b>44</b>

**TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING  
APPEALED**

	<b><u>Page</u></b>
Opinion regarding Defendant’s (“Oscar”) Motion for Summary Judgment and Plaintiff’s (“BrainBuilders”) Motion to Strike Defendant’s Various Affirmative Defenses, filed May 6, 2024 .....	Pa8
Order granting Oscar’s Motion for Summary Judgment and dismissing Complaint with prejudice, filed May 6, 2024.....	Pa35
Order denying BrainBuilders’ Motion to Strike and Dismiss, filed May 6, 2024.....	Pa37
Order denying BrainBuilders’ Motion for Reconsideration, filed June 20, 2024.....	Pa39

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<u>Brill v. Guardian Life Ins. Co. of America,</u> 142 N.J. 520 (1995) .....	4
<u>C.V. by &amp; through C.V. v. Waterford Twp. Bd. of Educ.,</u> 255 N.J. 289 (2023) .....	29
<u>Comprehensive Neurosurgical, P.C. v. Valley Hosp.,</u> 257 N.J. 33 (2024) .....	passim
<u>Goldfarb v. Solimine,</u> 245 N.J. 326 (2021) .....	33, 38
<u>Iliadis v. Wal-Mart Stores, Inc.,</u> 191 N.J. 88 (2007) .....	43
<u>Lobiondo v. O’Callaghan,</u> 357 N.J. Super. 488 (App. Div. 2003) .....	40
<u>Lynch v. New Deal Delivery Serv. Inc.,</u> 974 F. Supp. 441 (D.N.J. 1997) .....	37
<u>Malaker Corp. S’holders Protective Comm. v. First Jersey Nat. Bank,</u> 163 N.J. Super. 463 (App. Div. 1978) .....	39, 40
<u>Martindale v. Sandvik, Inc.,</u> 173 N.J. 76 (2002) .....	35
<u>Moorestown Mgmt., Inc. v. Moorestown Bookshop, Inc.,</u> 104 N.J. Super. 250 (Ch. Div. 1969) .....	36
<u>Murray v. Plainfield Rescue Squad,</u> 210 N.J. 581 (2012) .....	30
<u>Plastic Surgery Center, P.A. v. Aetna Life Insurance Co.,</u> 967 F.3d 218 (3d Cir. 2020) .....	44, 45,46
<u>Pop’s Cones, Inc. v. Resorts Int’l Hotel, Inc.,</u> 307 N.J. Super. 461 (App. Div. 1998) .....	39, 40

<u>Rabinowitz v. Massachusetts Bonding &amp; Ins. Co.,</u> 119 N.J.L. 552 (1938).....	44, 45
<u>Royal Assocs. v. Concannon,</u> 200 N.J. Super. 84 (App. Div. 1985).....	39
<u>Starkey, Kelly, Blaney &amp; White v. Est. of Nicolaysen,</u> 172 N.J. 60 (2002) .....	43, 45
<u>Thieme v. Aucoin-Thieme,</u> 227 N.J. 269 (2016) .....	43
<u>Toll Bros. v. Bd. of Chosen Freeholders of Cnty. of Burlington,</u> 194 N.J. 223 (2008) .....	38
<u>Troy v. Rutgers,</u> 168 N.J. 354 (2001) .....	31, 32
<u>Wanaque Borough Sewerage Auth. v. Township of West Milford,</u> 144 N.J. 564 (1996) .....	32
<u>Weichert Co. Realtors v. Ryan,</u> 128 N.J. 427 (1992) .....	35, 43, 44
<b>STATUTES</b>	
N.J.S.A. 17B:27A-7.16 .....	passim
N.J.S.A. 17:48-6ii .....	23
<b>RULES</b>	
<u>Rule 1:6-2</u> .....	4
<u>Rule 1:38-3(a)</u> .....	4
<u>Rule 2:6-1(a)</u> .....	4
<u>Rule 4:46-2</u> .....	5
<b>REGULATIONS</b>	
N.J.A.C. 6A:14-3.5 .....	5

N.J.A.C. 11:4-57.2 .....5  
N.J.A.C. 11:24A-1.1 .....10  
N.J.A.C. 11:24A-4.10 .....passim

**OTHER AUTHORITIES**

Corbin on Contracts § 4.1 (1993) .....36  
Corbin on Contracts § 4.4 (1993) .....36  
Restatement (Second) of Contracts § 19 (1981).....35

## PRELIMINARY STATEMENT

Appellant/Plaintiff BrainBuilders LLC (“BrainBuilders”) is a provider of comprehensive therapeutic services to children with autism. This case is about eight of those children (the “Insured Children”), who received life-changing treatment from BrainBuilders, while their insurance carrier, Respondent/Defendant Oscar Garden State Insurance Corporation (“Oscar”), reneged on paying for those services, despite its legal and contractual obligation to do so. Although BrainBuilders has brought the lawsuit and appeal that is now before this Court, the families and Insured Children, who struggle daily with autism spectrum disorders, are very much at the center of this legal battle over Oscar’s failure to pay for their services.

Before 2018, BrainBuilders was already successfully treating seven of the eight Insured Children and measurably improving their lives. Between 2018 and 2019, the families of those children switched their insurance coverage to Oscar.

State law required Oscar to provide the Insured Children with coverage for medically necessary behavioral interventions at the same level as would be required for children afflicted with any other medical condition. Oscar turned to United Behavioral Health (“Optum”), as a third-party administrator, to put together an adequate network of providers to place Oscar in compliance with the law. Neither Oscar nor Optum offered the Insured Children the services of a

provider – either in-network or out-of-network – that could meet their unique therapeutic and cultural needs within the legally mandated geographic distance, as BrainBuilders was already doing.

Without any adequate alternatives, Oscar and Optum authorized BrainBuilders to continue servicing the Insured Children as an out-of-network provider. Doing so ensured continuity of care for the Insured Children, who, if services were discontinued for even short periods, would have suffered serious regression, markedly setting back their progress. BrainBuilders offered Oscar several industry-standard discounted rates and made clear that unless rates were negotiated at one of those standards, it expected to be paid at its full billed rates.

Oscar assured BrainBuilders that it would be reimbursed for its services. Oscar made payments to BrainBuilders in varied amounts, some at or very close to BrainBuilders' billed rates and others at a fraction of the billed rates, but did so sporadically and inconsistently. Oscar indicated to BrainBuilders that it or Optum would negotiate rates in good faith for outstanding bills. Instead of doing so, Oscar and Optum each pointed the finger of blame at the other for not setting rates. While BrainBuilders continued to provide essential therapeutic services that the Insured Children needed to progress in school and in life, Oscar and Optum engaged in diversions and evasions on the issues of setting rates and paying invoices.

In the end, with unpaid invoices for thousands of hours of life-changing treatment, BrainBuilders brought suit against Oscar on four legal grounds: breach of an implied contract, promissory estoppel, unjust enrichment, and quantum meruit. After discovery, Oscar moved for summary judgment. Astonishingly, despite the plethora of evidence supporting the claims, the trial court granted the motion, dismissing BrainBuilders' Complaint. The trial court did not abide by the summary judgment standard that required it to give BrainBuilders, the nonmoving party, the benefit of all favorable evidence and inferences supporting its causes of actions. The trial court approached the analysis as though it were the decisive trier of fact, weighing evidence and selecting facts that supported Oscar. That was the wrong analysis in a summary judgment setting.

BrainBuilders concedes that material issues of fact are in dispute. The resolution of those factual disputes, however, is for a jury. For that reason, BrainBuilders urges this Court to reverse and remand for a trial.

### **PROCEDURAL HISTORY**

On June 18, 2019, BrainBuilders filed a Complaint alleging that Oscar failed to pay for services rendered by BrainBuilders and therefore is liable based on four separate legal doctrines: breach of an implied contract, promissory estoppel, unjust enrichment, and quantum meruit. Pa46-49. Oscar moved for

summary judgment against BrainBuilders on all causes of action. Pa122-23; see also 1T 1:1 to 87:12; 2T 1:1 to 22:7.<sup>1</sup> BrainBuilders moved to strike certain affirmative defenses raised in Oscar’s Answer. Pa68-69; see also 1T 4:22 to 5:6.

On May 6, 2024, the trial court granted Oscar’s summary judgment motion and dismissed BrainBuilders’ Complaint with prejudice. Pa35-36. The trial court also denied BrainBuilders’ motion to strike.<sup>2</sup> Pa37-38. On May 28, 2024, BrainBuilders moved for reconsideration of the trial court’s decisions on both motions. Pa587-88; see also 3T 1:1 to 15:19. On June 20, 2024, the trial court denied BrainBuilders’ reconsideration motion. Pa39-40. BrainBuilders timely appealed the trial court’s Orders. Pa1.

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<sup>1</sup> Citations to the record are to BrainBuilders’ Appendix (“Pa”). “1T” refers to the November 3, 2023 transcript of the oral argument on Oscar’s summary judgment motion and BrainBuilders’ motion to strike. See 1T. “2T” refers to the March 22, 2024 transcript of the oral argument on the same motions. See 2T. “3T” refers to the June 20, 2024 transcript of the oral argument on BrainBuilders’ motion for reconsideration. See 3T.

<sup>2</sup> In denying BrainBuilders’ motion to strike, the trial court relied on the reasons it stated in its May 6, 2024 Opinion. Pa37-38. That Opinion, however, does not give any reasons to support the trial court’s decision. See Pa8-34. That decision should be reversed because the trial court failed to provide a statement of reasons as required by the Court Rules. R. 1:6-2.

### **STATEMENT OF FACTS**<sup>3</sup>

When reviewing a grant of summary judgment, a court must consider the evidence in the light most favorable to the nonmoving party and give the nonmoving party the benefit of all reasonable inferences drawn from that evidence. R. 4:46-2; Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-30 (1995); Pa20. Through the lens of that standard, BrainBuilders presents the facts and inferences drawn from those facts that should have led to the denial of Oscar’s summary judgment motion. R. 4:46-2; Pa20.

#### **A. BrainBuilders Provides Necessary Medical Services to Children with Autism**

BrainBuilders is a healthcare provider that treats children diagnosed with autism by means of Applied Behavioral Analysis (“ABA”)<sup>4</sup> therapy, speech therapy, and occupational therapy. Pa235 ¶ 7; Pa236 ¶ 18. BrainBuilders employs over 200 therapists who work in four facilities in New Jersey, including

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<sup>3</sup> The trial court issued a Protective Order governing the submission of documents that contain “Protected Health Information” protected by federal law. Pa591-95. BrainBuilders’ therefore submits those portions of the record on both its motion to strike and Oscar’s motion for summary judgment in a Confidential Appendix under Rules 1:38-3(a)(1), 1:38-3(a)(2) and 2:6-1(a)(3). See Pa591-3642.

<sup>4</sup> ABA is “the practice of designing, implementing, and evaluating instructional and environmental modifications to produce socially significant improvements in human behavior, including the empirical identification of functional relations between behavior and environmental factors, known as functional assessment and analysis.” N.J.AC. 13:42B-1.2; Pa236 ¶¶ 14-15.

one in Lakewood, New Jersey. Pa235 ¶¶ 6-7.

Autism is “a pervasive developmental disability that significantly impacts verbal and nonverbal communication and social interaction that adversely affects a student’s educational performance.” N.J.A.C. 6A:14-3.5; see also Pa235-36 ¶ 12; N.J.A.C. 11:4-57.2 (defining “autism” as “a mental or nervous condition that is caused by a biological disorder of the brain and results in a clinically significant or psychological syndrome or pattern that substantially limits the functioning of the person with the illness”). Some characteristics “associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routine, unusual responses to sensory experiences, and lack of responsiveness to others.” N.J.A.C. 6A:14-3.5; see Pa235-36 ¶ 12. The failure to treat autism can have significant negative impacts on a child’s development and life outcome. Pa235-36 ¶¶ 8-14.

ABA, as well as speech and occupational therapy, can substantially improve both the long-term development as well as the educational and life outcomes of a child diagnosed with autism. Pa236 ¶ 15. A child treated for autism undergoes intensive and long-term therapy that can range from 25 to 40 hours per week for several years. Pa236 ¶¶ 15-16. Improvement often takes time as a child with autism must become familiar with both his or her

surroundings and therapists. Pa237 ¶¶ 17-18. Treatment must be consistent and persistent. Pa237 ¶18. Abrupt changes in surroundings or the treatment provider can easily undo weeks or months of progress. Pa237 ¶¶ 17-18. Group therapy with other children of similar ages and backgrounds is also necessary to improve a child’s communication and socialization skills. See Pa237 ¶ 20. For many children, the goal is to transition to a mainstream education and enjoy childhood with as little struggle as possible. See Pa239 ¶ 40; Pa242 ¶ 72; Pa245 ¶ 94; Pa251 ¶ 159; Pa254 ¶ 197.

*1. The Insured Children*

Using the above principles and methods, BrainBuilders treated the Insured Children.<sup>5</sup> Pa237 ¶¶ 21-22. In 2015, at age three, L.K. began treatment for autism at BrainBuilders. Pa238 ¶¶ 25-28. He exhibited many symptoms of autism that significantly impacted his ability to function, such as impulsive behavior, fear of change, delayed language and speech skills, and emotional outbursts. Pa238 ¶¶ 25-35. Through three years of treatment, which included hundreds of hours of ABA and speech and occupational therapy while insured by Oscar, L.K.’s condition improved, allowing him to reduce the frequency of treatment and transition to mainstream kindergarten at the age of six. Pa239 ¶¶

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<sup>5</sup> All of BrainBuilders’ ABA treatments were medically necessary for each of the Insured Children. See Pa3098-99 (explaining that none of BrainBuilders’ claims were “denied for medical necessity”).

36-44.

In 2016, at age five, E.G. began treatment for autism with BrainBuilders. Pa240-41 ¶¶ 45-57. She had severe deficits in communication, impaired social interaction skills, and engaged in overly repetitive behaviors; she also had problems with fine motor skills that required substantial therapeutic support. Pa240-41 ¶¶ 45-66. E.G. experienced some success over four years of treatment, which included approximately 1,000 hours of treatment while insured by Oscar. Pa243 ¶ 75.

In 2014, at age four, S.S. began treatment for autism with BrainBuilders. Pa243 ¶¶ 76-78. S.S. experienced substantial issues in communicating and socially interacting with other children. Pa243-44 ¶¶ 77-89. S.S. suffered a major regression when he switched to a different provider in 2017. Pa244 ¶¶ 90-91. But after resuming treatment with BrainBuilders in 2018, S.S. made significant progress through years of treatment, which included 1,700 hours of treatment while insured by Oscar. Pa245 ¶¶ 94-97.

In October 2018, at age seven, R.G. began treatment for autism with BrainBuilders. Pa247 ¶¶ 117-20. R.G. had substantial difficulty socially interacting and communicating with others, often exhibiting aggressive and impulsive behavior. Pa247-78 ¶¶ 121-28. Through about a year of treatment, which included approximately 1,000 hours of treatment while insured by Oscar,

R.G. made sufficient progress to mainstream to a school setting. Pa248 ¶¶ 129-41.

In May 2016, at age three, Y.S. began treatment for autism with BrainBuilders. Pa249 ¶¶ 142-46. Y.S. experienced delays in communication and had trouble socially interacting, focusing, and adjusting to changes; Y.S. also often engaged in ritualized patterns of behavior. Pa250 ¶¶ 148-56. Through three years of treatment, which included hundreds of hours of treatment while insured by Oscar, Y.S. was able to mainstream to a school setting. Pa251 ¶¶ 157-62.

In 2015, at age five, S.T. began treatment for autism with BrainBuilders. Pa251 ¶¶ 163-65. He had difficulty focusing, communicating, and socially interacting with others; in addition, he had poor motor skills. Pa252 ¶¶ 166-74. Through seven years of treatment, including 2,000 hours of treatment while insured by Oscar, S.T. made moderate progress. Pa252-53 ¶¶ 175-81.

In 2015, at age ten, Y.T. began treatment for autism with BrainBuilders. Pa253 ¶¶ 182-84. Y.T. had difficulty with simple daily tasks and socially interacting with others and could only attend school 50% of the time because of severe anxiety. Pa253-54 ¶¶ 185-92. Over five years of treatment, which included 1,500 hours of treatment while insured by Oscar, Y.T. achieved steady progress. Pa254 ¶¶ 193-98.

In February 2019, at age seven, Y.F. began treatment for autism with BrainBuilders. Pa245 ¶¶ 98-99. Y.F. experienced significant issues in socially interacting and communicating with others and exhibited overly repetitive and aggressive behaviors. Pa245-46 ¶¶ 100-07. Y.F. made substantial progress through approximately 1,500 hours of treatment over two years while insured by Oscar. Pa246-47 ¶¶ 108-16.

Seven of the Insured Children switched from their insurance providers to Oscar between January 2018 and February 2019. Pa237 ¶ 24; Pa240 ¶¶ 47-48; Pa243 ¶ 79; Pa247 ¶ 120; Pa249 ¶ 144; Pa253 ¶ 184. An eighth Insured Child, Y.F., began treatment while insured by Oscar in February 2019. Pa245 ¶ 100. Seven of the Insured Children had Oscar in-network insurance plans. Pa260 ¶ 23. The eighth Insured Child, Y.F., had an insurance plan that included out-of-network coverage. Pa260 ¶ 24.

**B. Oscar Enters the New Jersey Market Without In-Network Providers To Treat Children with Autism**

Oscar entered the New Jersey insurance market in January 2018, primarily selling insurance policies to individuals and families through exchanges set up under the Affordable Care Act. Pa3494-95 at 18:4-19:24; Pa3125 at 11:9-24. As Oscar's corporate representative explained, Oscar primarily sold insurance policies that provided in-network coverage to its insureds. Pa3497-98 at 21:4-22:19. Because Oscar did not have an adequate network of providers, it

contracted with third-party administrators to furnish an adequate network. See Pa3497-98 at 21:10-22:19. Oscar was mandated by law to provide out-of-network coverage under various circumstances. See Pa3530-32 at 292:14-294:20. Oscar was required to provide coverage for autism services under the New Jersey Autism Mandate, N.J.S.A. 17B:27A-7.16, and an adequate network of providers for the Insured Children under the New Jersey Healthcare Quality Act, N.J.S.A. 26:2S-1 to -40, and its implementing regulations, N.J.A.C. 11:24A-1.1 to -5.3. See Pa3503-05 at 59:21-61:2; Pa3513 at 69:1-7; Pa1875 at 54:21-55:10.

*1. The New Jersey Autism Mandate Requires Insurers to Cover ABA, Speech Therapy, and Occupational Therapy for Children with Autism*

The New Jersey Autism Mandate requires insurance carriers operating in New Jersey, such as Oscar, to provide their insureds coverage for autism and other developmental disabilities. See N.J.S.A. 17B:27A-7.16(a); Pa3503-05 at 59:21-61:2; Pa3513 at 69:1-7; Pa1875 at 54:21-55:10. The Autism Mandate specifically requires insurers to cover “expenses incurred for medically necessary behavioral interventions” such as ABA, as well as speech and occupational therapy. N.J.S.A. 17B:27A-7.16(a); see Pa3503-05 at 59:21-61:2; Pa3513 at 69:1-7; Pa1875 at 54:21-55:10. Insurers must provide these benefits at the same level they would provide for “any other medical condition,” except

that there can be no “limit[] on the number of [patient] visits” to “provider[s] of behavioral interventions.” N.J.S.A. 17B:27A-7.16(c); see also Pa3503-05 at 59:21-61:2; Pa3513 at 69:1-7; Pa1875 at 54:21-55:10. Moreover, an insurance carrier “may only request an updated treatment plan [for autism] once every six months from the [child’s] treating physician to review medical necessity,” unless the physician and carrier agree otherwise. N.J.S.A. 17B:27A-7.16(d); see; Pa696-98 (citing N.J.S.A. 17:48-6ii(d)).

*2. The New Jersey Healthcare Quality Act Requires Insurers to Maintain Adequate Networks of Providers Who Treat Autism Spectrum Disorder*

Regulations implementing the Healthcare Quality Act require insurers that offer in-network plans, like Oscar, to maintain an “adequate network” of providers so that insureds can “access services in-network and take full advantage of the in-network benefits levels when [an insurance plan] specifies that there is a differential between the in-network and out-of-network benefits levels.” N.J.A.C. 11:24A-4.10(a); see Pa3503-05 at 59:21-61:2. Oscar is generally required to offer in-network providers to its insureds “within 20 miles or 30 minutes average driving time, whichever is less.” N.J.A.C. 11:24A-4.10(b)(3)(v)(6); Pa3504-09 at 60:15-65:8. Oscar knew that it “had an obligation” to meet these requirements but had no in-network providers to do so. Pa3512 at 68:22-25; see Pa3503-05 at 59:21-61:2; Pa3507-10 at 63:20-

66:11; Pa3516 at 176:15-20; Pa3520 180:24-17. Oscar therefore contracted with third-party administrators to furnish its insureds (including the Insured Children) with an adequate system of in-network providers. Pa3497 at 21:4-22:19.

**C. Oscar Outsources Its Statutory Obligation to Cover Behavioral Health Services to Optum, a Third-Party Administrator**

Because Oscar did not have the statutorily required network of participating providers to treat the Insured Children, it contracted with Optum, a third-party administrator, to offer a network of “behavioral health” service providers to the Insured Children.<sup>6</sup> Pa3497-3501 at 21:10-18, 22:7-24, 24:22-25:7; Pa3513 at 69:5-20; Pa3134-36 at 20:7-22:18; see generally Pa2775-2932. Oscar had a “Network Partnerships” team to manage its relationship with Optum. Pa3131 at 17:4-14.

Behavioral health services included ABA therapy Oscar was required to cover under the Autism Mandate. Pa3513 at 69:1-7; Pa1875 at 54:21-55:10; N.J.S.A. 17B:27A-7.16. As Oscar’s third-party administrator and agent, Optum was responsible not only for furnishing a network of suitable providers to deliver behavioral health services, such as ABA therapy, but also for processing and

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<sup>6</sup> Oscar contracted with a different third-party administrator, Qualcare, to offer a network of providers to furnish non-behavioral health services, including speech therapy and occupational therapy, for the Insured Children. See Pa3497 at 21:12-18; Pa3513 at 69:5-20.

paying claims from those providers when they treated Oscar's insureds. See Pa3134-36 at 20:7-22:18; Pa3154-58 at 40:14-44:18; Pa3498 at 22:7-19. As Oscar's agent, Optum was responsible (1) for determining whether a particular behavioral health service was "medically necessary," (2) for processing "[a]ny behavioral health claim," and (3) for paying the out-of-network provider who submitted the claim. Pa3137-38 at 23:17-24:24; Pa3157-58 at 43:19-44:18.

*1. To Address Gaps in Its Network of Behavioral Healthcare Providers, Optum Authorized Out-of-Network Providers' Services*

Oscar relied on Optum to fulfill its statutory responsibilities under the Healthcare Quality Act, see Pa3137-38 at 23:17-24:24; Pa3497-98 at 21:10-18, 22:7-24; Pa3513 at 69:5-20, and particularly to furnish an adequate network of behavioral health providers for the Insured Children under N.J.A.C. 11:24A-4.10(a), Pa3503-05 at 59:7-61:2; see Pa3510 at 66:7-11. Optum was required "to contract with behavioral health providers, [like BrainBuilders,] directly" so that it "provide[d] a regulatorily adequate network" for the Insured Children. Pa3503-04 at 59:18-60:1; see Pa2783 § 4.2. That network was required to meet the time and distance requirements mandated by N.J.A.C. 11:24A-4.10(a). See Pa3504-09 at 60:15-61:2, 63:23-65:8. Optum, however, did not have an adequate network of providers for the Insured Children, and therefore Oscar was not in compliance with N.J.A.C. 11:24A-4.10(a). See Pa3503-04 at 59:18-60:1.

Oscar delegated to Optum the power to “negotiate rates” and authorize services with out-of-network providers when Optum did not have suitable in-network providers available for Oscar’s insureds.<sup>7</sup> Pa3135-39 at 23:17-25:9. Having no suitable in-network providers, Optum authorized BrainBuilders to furnish services to the Insured Children. Pa3137-39 at 23:12-25:9; Pa3155-56 at 41:9-42:24; Pa3167 at 53:21-54:3; Pa181-82; N.J.A.C. 11:24A-4.10(a); N.J.S.A. 17B:27A-7.16. Optum executed its power to authorize BrainBuilders’ services in several ways. See Pa3253-54 at 139:22-140:24; Pa3391-3410.

First, Optum issued authorizations for out-of-network providers’ services for continuity-of-care purposes after an insured switched from its previous carrier to Oscar. Pa3254-55 at 140:25-141:17. Through an authorization, Optum covered the insureds’ treatment by an out-of-network provider during the period of transition until an Oscar provider was available. Pa3254-55 at 140:25-141:17.

Second, Optum authorized out-of-network services when it did not have an in-network provider to comply with the Healthcare Quality Act. Pa3253-54 at 139:22-140:24; Pa3503-04 at 59:18-60:1. The out-of-network provider’s services could continue indefinitely if Optum offered no suitable in-network

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<sup>7</sup> Optum also was delegated the power to contract with a provider and bring the provider in-network. Pa3156 at 42:10-24.

provider for the insured.<sup>8</sup> Pa3253-54 at 139:22-140:24.

Third, when Optum denied authorization of an out-of-network provider's services to an insured, such as the Insured Children, a provider had the right to appeal the denial and Optum was required to address the appeal within a specific "turnaround time." See Pa3070-81; Pa3256-57 at 142:7-143:11; Pa3442; Pa1160-61; N.J.A.C. 11:24A-3.5(j). If Optum did not meet the turnaround time requirement, Oscar was mandated to approve out-of-network services. See Pa3253-57 at 139:22-143:11; Pa1160-61; N.J.A.C. 11:24A-3.5(j).

In many instances, Optum entered into agreements known as "Single Case Agreements" ("SCAs") with BrainBuilders to authorize out-of-network services.<sup>9</sup> See Pa3253-57 at 139:22-143:11; Pa1160-61; Pa3391-3410; Pa260-61 ¶¶ 22, 25-28; Pa1886-87 at 65:15-66:3. An SCA authorizing ABA therapy is an agreement between an insurance company and a healthcare provider to cover services for an insured diagnosed with autism, which may not be available within the insurer's network of providers. See Pa3167-54 at 53:24-54:3. However, there was no requirement that Optum issue a written document to

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<sup>8</sup> As noted above, however, when autism is at issue, a child's treatment plan cannot be changed more frequently than once every six months. See N.J.S.A. 17B:27A-7.16.

<sup>9</sup> An example of a written Oscar SCA appears at Pa1391-93. An example of a written Optum SCA appears at Pa3391-3410. See Pa3203-08 at 89:5-94:6.

enter into an SCA. See Pa3253-57 at 139:22-143:11.

An SCA authorized the provider to treat the Oscar insured and submit its bills for payment. Pa3198-3201 at 84:21-87:25; Pa3253-57 at 139:22-143:11. Oscar understood that Optum's authorizations and SCAs obligated it to pay the out-of-network provider for services rendered to Oscar's insureds. Pa3198-3201 at 84:21-87:25; Pa3253-57 at 139:22-143:11.

*2. Optum Authorized BrainBuilders to Treat the Insured Children Through Its Engagement with BrainBuilders*

Because it did not have in-network providers to treat the Insured Children in compliance with the time and distance requirements of N.J.A.C. 11:24A-4.10(b)(3)(v)(6), Optum issued many written SCAs authorizing BrainBuilders to do so. Pa1370-1620; Pa3039-50.

BrainBuilders submitted claims to Optum for out-of-network services it provided to the Insured Children even when no written agreement was in place and Optum paid for those services because it had no in-network provider to treat the Insured Children. Pa3557-72 at rows 1-958 (indicating payments for BrainBuilders' services rendered to Y.F. with no written SCA in place); see Pa1370-602 (comprising all written authorizations Optum issued, which does not include any related to Y.F.).

Given its lack of in-network options, Optum authorized BrainBuilders to treat the Insured Children and agreed to compensate BrainBuilders for the

services it provided to the Insured Children. See Pa3157-58 at 43:2-44:18; Pa3203-08 at 89:7-94:3; Pa3391-3410; Pa3225-3226 at 111:22-112:7; Pa3419. This course of conduct by Optum was consistent with the parties' understanding that BrainBuilders was fulfilling Oscar's legal obligation to provide ABA services to the Insured Children. See Pa3503-05 at 59:7-61:2; Pa181-82; Pa260 ¶¶ 22, 25. On Oscar's behalf, Optum customarily negotiated rates with out-of-network providers for services to be included in SCAs. Pa3198-3201 at 84:21-87:25. However, Optum declined to discuss with BrainBuilders the discounted rates BrainBuilders placed on the table for negotiation. See Pa263 ¶¶ 41-43.

**D. BrainBuilders Negotiates with Oscar for Payment of Services Rendered to the Insured Children.<sup>10</sup>**

*1. Oscar's Lack of In-Network Providers for the Insured Children Prompts Oscar to Authorize BrainBuilders' Services for Continuity of Care.*

In December 2017, Simon Nussbaum, BrainBuilders' Director of Finance,

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<sup>10</sup> The following individuals are affiliated with Oscar and appear in the communications cited in the statement of facts: (1) Yael Kino, Oscar SCA Specialist; (2) Antonio Crocco, Oscar Clinical Review Processor Lead; (3) Abigail "AJ" Johnson, member of Oscar's Provider Relations Team; (4) Chip Stine, member and later senior manager of Oscar's Network Partnerships Team; (5) Molly Stein, member and later manager of Oscar's Network Partnerships Team; as each was Oscar's agent in its dealings with BrainBuilders, this brief will refer to those individuals as "Oscar" unless otherwise identified. Pa636; Pa3124-25 at 10:12-11:8; Pa3233-35 at 119:4-121:15; Pa2496-97 at 33:24-34:1; Pa2508 at 45:21-23; Pa1834 at 13:2-16; Pa1886-87 at 65:16-66:21.

communicated with Oscar regarding BrainBuilders' existing patients L.K., E.G., and S.S., whose families switched to Oscar as their insurance carrier. Pa257 ¶¶ 6-7; Pa613-26; Pa609-11. BrainBuilders was not an Optum in-network provider, and therefore it sought to arrange for continuity of care coverage for each of the three Insured Children. Pa257 ¶¶ 6-7.

BrainBuilders also informed Oscar that it had independently confirmed that there were no other suitable providers within the mandated geographical range that offered the same types of services to meet the Insured Children's unique cultural needs.<sup>11</sup> Pa181-82; Pa1772-75 at 72:12-75:11.

In response, Oscar told BrainBuilders to contact Optum for the issuance of SCAs for ABA services. Pa608-11. Optum later contacted BrainBuilders and explained how to request an SCA for "continuity of care." Pa601-06; see also Pa3080-81.

Although Oscar's plans for the Insured Children did not cover out-of-network services, those plans were required by law to ensure that those Insured Children received the treatment they needed. See N.J.S.A. 17B:27A-7.16.

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<sup>11</sup> BrainBuilders serves many patients in the Orthodox Jewish community, including the Insured Children. See Pa181-82. The Insured Children accordingly have unique cultural needs and background. See Pa181-82. But even beyond those needs, there were no other providers in Ocean County who offered the same type of service BrainBuilders provided. See Pa181-82; Pa3039-50.

Therefore, Oscar was obligated to pay for out-of-network services when it could not provide suitable in-network options. See Pa3215-18 at 101:23-104:7; Pa3416; N.J.A.C. 11:24A-4.10(a). When the law mandated Oscar to pay for out-of-network services, Oscar calculated a price for those services known as the “[out-of-network] allowable.” Pa3416; see Pa3215-18 at 101:23-104:7. The “[out-of-network] allowable” was “80%” of the “UCR” (usual and customary rate)<sup>12</sup> for a particular treatment. Pa3416; see Pa3215-18 at 101:23-104:7. Oscar never communicated the out-of-network allowable to BrainBuilders. See Pa1611 ¶¶ 41, 43.

*2. BrainBuilders Receives Authorizations from Optum to Render ABA Treatment to the Insured Children, Without an Agreement on the Billing Rates*

In January 2018, after seeking authorization from Oscar, BrainBuilders received SCAs from Optum authorizing ABA services for L.K. and E.G. for periods ranging from four to six months. See Pa3070-81; Pa809-25; Pa3391-3410.<sup>13</sup> According to Chip Stine of Oscar’s Network Partnerships Team, in issuing these SCAs, “Optum [was] authorizing the services and saying [to

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<sup>12</sup> A UCR is a term of art in the health insurance industry. See Pa3210 at 96:8-21.

<sup>13</sup> Although the documents themselves are not entitled “Single Case Agreement,” Oscar recognized them as “Optum SCAs.” Pa3391-3410; see Pa3203-08 at 89:7-94:6.

BrainBuilders]; Here’s what you need to do to receive payment for claims.” Pa3391-3410; Pa3203-08 at 89:7-94:6.

In Oscar’s view, these SCAs represented Oscar’s “obligation to pay” BrainBuilders. Pa3203-08 at 89:7-94:6. Although BrainBuilders found it unusual to receive SCAs before Oscar or Optum agreed on a rate for services, it relied on the SCAs as pledges of future payment and continued to treat the three Insured Children referenced in the SCAs. Pa1776-77 at 76:19-77:20. Oscar admitted that such “agreements . . . directly with Optum for behavioral health services” were in place for all eight of the Insured Children. Pa3531 at 293:9-20; Pa3539-41 at 321:22-323:2. After Optum issued these SCAs authorizing treatment, Oscar paid BrainBuilders’ invoices sporadically and at inconsistent rates. See Pa333 ¶¶ 21-22; Pa350-459.

**E. BrainBuilders Gets the Run-Around from Oscar and Optum on Setting Rates and Securing Authorizations to Treat the Insured Children**

Throughout 2018 and part of 2019, BrainBuilders repeatedly attempted to reach an agreement on rates with Optum for the services it provided to the Insured Children. See Pa614-36.

BrainBuilders believed it was authorized to treat the Children based on the issuance of authorizations by Optum, the lack of in-network options for the Insured Children, and those payments of BrainBuilders’ bills by Optum. Pa601-

06; Pa257 ¶ 4; Pa260 ¶ 22; Pa691-92; Pa1011-13. BrainBuilders presented Optum with four different sets of rates for its services, all of which significantly discounted BrainBuilders’ normal “billed” rates. Pa613-29. BrainBuilders made clear to Oscar that if Oscar did not agree to the discounted rates, that Oscar would have to pay BrainBuilders’ billed rates. See Pa1778-79 at 86:25-18; Pa1018; Pa687-88; Pa691-92.

Optum communicated to BrainBuilders that Oscar was responsible for setting rates, and at one point sought “[Oscar’s] approval since it is [Oscar’s] money that [is] paying for all of this.” Pa623; see Pa3391-3410.<sup>14</sup> BrainBuilders explained to Oscar that it was interested in arranging an “umbrella agreement” – SCAs for all the Insured Children receiving BrainBuilders’ services. Pa613. Importantly, Oscar expressed that it “want[ed] to make sure BrainBuilders is getting reimbursed for services that [were then] taking place.” Pa627.

Throughout 2018 and part of 2019, BrainBuilders corresponded with both Oscar and Optum representatives, seeking resolution of the nonpayment of its claims. See, e.g., Pa627; Pa632-35; Pa640; Pa648-51; Pa672; Pa684-85; Pa694. But Oscar and Optum engaged in a finger-pointing game: Oscar would ask BrainBuilders whether it had been able to set rates with Optum, and, in turn,

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<sup>14</sup> Optum later falsely told Oscar and the Insured Children’s parents that BrainBuilders was refusing to negotiate on rates; BrainBuilders had never received a proposal from Optum on rates. See Pa3079-81; Pa3423.

BrainBuilders would respond that Optum refused to negotiate discounted rates. See Pa627; Pa632-35; Pa640-41; Pa636; Pa648-51; Pa679-82, Pa691; Pa694-68; Pa699-700; Pa1020-24, Pa994-95; Pa997-98; Pa1083. Optum, however, responded that Oscar needed to set the rates, and this merry-go-round cycle repeated itself over and over again. See Pa3414-31.

For the Insured Children treated by BrainBuilders, neither Oscar nor Optum offered a suitable in-network provider to which the Insured Children could transition. See Pa181-82; Pa3221-26 at 107:10-112:7; Pa3419; Pa3040-3050; Pa3070-81. BrainBuilders continued to provide services to those Children, who otherwise would have suffered severe regression due to interruption of service and/or lack of treatment. See Pa644-45; Pa652-54; Pa237 ¶¶ 17-18; Pa257 ¶ 4; Pa260 ¶¶ 22-25. Throughout 2018 and 2019 (and beyond), BrainBuilders received authorizations and/or payments from Optum to provide services to each of the eight Insured Children, and, therefore, BrainBuilders continued to treat them. See Pa1370-602; Pa3391-410; Pa3557-635. Indeed, Oscar's corporate representative confirmed that "agreement[s]" were in place "directly with Optum for behavioral health services" for each of the Insured Children. Pa3531 at 293:9-20; Pa3539 at 321:22-323:2.

Notably, when an authorization to treat a patient expired, BrainBuilders requested an additional authorization, and appealed if its request was denied.

See Pa261-62 ¶¶ 29-35, 38; Pa1685-90. BrainBuilders could not get a straight answer on the proper procedure for appealing the denial of authorization requests. See Pa3070-81; Pa672; Pa632-35; Pa1083-85; Pa652-53; Pa696-98 (citing N.J.S.A. 17:48-6ii(d)); Pa644-46; Pa640-42; Pa994-95; Pa1685-90. In some instances when BrainBuilders appealed a denial, a non-qualified clinician undertook the review for Oscar, violating Optum’s internal policies and state regulations. See Pa3070-81; Pa3017-18; N.J.A.C. 11:24A-3.5(j).

And even when Optum authorized treatment, it did not process BrainBuilders’ claims for payment, missed deadlines, or falsely asserted that there were no claims – all the while failing *ever* to issue a proposal for rates or respond to BrainBuilders’ proposal. See Pa2677 at 214:10-17; Pa3414-31. But at no point did Oscar advise BrainBuilders to discontinue treating the Insured Children, and at no point did Oscar provide the Insured Children suitable in-network or out-of-network options. Pa3039-50.

For instance, on August 6, 2018, BrainBuilders received “Explanation of Benefits” forms wrongly indicating that Optum denied most of BrainBuilders’ claims for certain Insured Children because it was an out-of-network provider. Pa664. In fact, BrainBuilders had received SCAs for those Children. Pa691-92. Optum also paid a number of BrainBuilders’ bills on Oscar’s behalf, although at rates lower than BrainBuilders’ billed rates or Oscar’s own in-

network rates. Pa691-92. Optum, however, had never negotiated these rates with BrainBuilders, and BrainBuilders had never agreed to those lower rates. See Pa263 ¶¶ 41-43; Pa265-66 ¶¶ 54-57.

**F. Optum and Oscar Point Fingers at Each Other About the Responsible Party for Authorizing BrainBuilders’ Services**

On August 21, 2018, Chip Stine, a Senior Manager on Oscar’s Network Partnerships team, was made aware of the dysfunctional process that left BrainBuilders unable to get straight answers from Oscar and Optum. Pa3390. For example, Mr. Stine expressed surprise that Optum authorized BrainBuilders’ services without negotiating rates – rates BrainBuilders had offered to discount. See Pa3390. An Oscar representative also explained to Mr. Stine that BrainBuilders had received authorization from Optum to provide ABA treatment for the Insured Children, but Optum had informed BrainBuilders that Optum was “waiting for Oscar to approve rates for [ABA services<sup>15</sup>].” Pa786.

On September 11, 2018, Mr. Stine conveyed to Optum that Oscar “continue[d] to get questions from BrainBuilders about payment for claims that are covered under . . . two Optum SCAs.” Pa3391-3410. Later that month, Optum erroneously told Oscar that it had tried to negotiate rates with

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<sup>15</sup> The reference to “CPT codes” in Pa786 refers to codes that were assigned to ABA services. See Pa257 ¶ 8.

BrainBuilders through an “accommodation rate request,” but that BrainBuilders denied Optum’s request. Pa3414. A week later, Optum informed Oscar that it had actually *never* sent BrainBuilders an “accommodation request.” Pa3423. Additionally, Optum for the first time provided Oscar with the rates BrainBuilders had proposed in *January* of that same year. Pa3422; Pa613-26.

In communicating with Optum, Mr. Stine confirmed that, under Oscar’s protocols for approved out-of-network services (such as the services provided by BrainBuilders), Oscar would pay BrainBuilders 80% of the usual and customary rates.<sup>16</sup> Pa3422. Optum responded that, with the exception of one particular treatment, Optum did not have UCRs in its database for the services rendered by BrainBuilders. Pa3422. As noted earlier, Oscar and Optum never advised BrainBuilders that Oscar’s out-of-network allowable rate was 80% of the UCR. See Pa997-1017.

On September 26, 2018, after BrainBuilders had treated seven of the Insured Children for nine months under Oscar’s insurance plans, Optum informed Oscar that it still needed to “confirm” the rate at which it would pay BrainBuilders’ claims. Pa3426.

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<sup>16</sup> Optum also confirmed that Oscar insureds were receiving out-of-network services under continuity of care (referred to as “Transition of Care” or “TOC” by Optum), and the rate paid for those services would be “80% of the [usual and customary rates.” Pa883.

While Oscar and Optum haplessly attempted to figure out their respective responsibilities, BrainBuilders continued to treat the Insured Children based on Optum's SCAs and the intermittent payments of BrainBuilders' claims for out-of-network services. See Pa997-1017.

### **G. Oscar Continues to Issue Authorizations and Pay Claims**

Although Oscar had authorized BrainBuilders to render services to the Insured Children, Oscar randomly paid BrainBuilders' bills. See Pa333 ¶¶ 21-22; Pa350-459; Pa3557-635<sup>17</sup>. BrainBuilders reasonably believed that Oscar would pay for the services rendered to the Insured Children, Pa1782-83 at 90:7-91:16; Pa903-06, because, among other reasons, Oscar had no in-network providers available to provide the same treatment. Pa3039-50; Pa3416; Pa257 ¶ 4; Pa260 ¶¶ 22, 25; Pa3155-58 at 41:9-44:18, Pa3225-3226 at 111:22-112:7; Pa3250-56 at 136:19-142:6; Pa3439.

During the course of its engagement with BrainBuilders, Oscar

1. Paid for an Insured Child's treatment at BrainBuilders' *billed* rates when there was a written SCA. See, e.g., Pa3557-635 at rows 1693-1706, 3285-3307, 3366-82; accord Pa333 ¶¶ 21-22; Pa350-459.

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<sup>17</sup> The chart presented at Pa3557-635 was prepared for the purposes of this appeal and contains data on all BrainBuilders' outstanding bills and all Optum's payments and nonpayments for out-of-network services, using data from the expert report of Hubert Klein and Optum's written SCAs for ABA services, both of which were in the summary judgment record before the trial court. Pa323-459; Pa323-459; see also Pa330 ¶ 16 (identifying the treatment "codes" used on the chart and in Mr. Klein's expert report).

2. Paid for an Insured Child's treatment at varying rates below BrainBuilders' billed rates when there was a written SCA. See, e.g., Pa3557-635 at rows 1253-79, 1686-92, 2972-3063, 3856-4153; accord Pa333 ¶¶ 21-22; Pa350-459.
3. Paid for an Insured Child's treatment at BrainBuilders' *billed* rates when there was *no* written SCA. See, e.g., Pa3557-635 at rows 583-84, 627-28, 688-702, 838-849, 1113-18, 1146-51, 1213-33, 1324-44, 1565-67, 1835-49; accord Pa333 ¶¶ 21-22; Pa350-459.
4. Paid for an Insured Child's treatment at varying rates below BrainBuilders' billed rates when there was *no* written SCA. See, e.g., Pa3557-635 at rows 585-616, 629-33, 635-52, 1568-96; accord Pa333 ¶¶ 21-22; Pa350-459.

Optum would pay some claims but not others, even when all claims were covered by the same Optum SCA. See, e.g., Pa1581; Pa3557-635 at rows 3653-738, rows 4206-74; accord Pa333 ¶¶ 21-22; Pa350-459. Some payments made by Oscar were at or very close to BrainBuilders' normal rates and other payments varied in amount. See, e.g., Pa3557-635 at rows 2921-62 (payments of 4%, 5%, and 6% for the same treatment over a four-month period); rows 2854-913 (payments of 0%, 5, 6%, 10%, 11%, 13%, and 100% for the same treatment over a four-month period); accord Pa333 ¶¶ 21-22; Pa350-459.

In some instances, Optum would not pay for authorized services or pay at extremely low rates and then randomly pay a few claims at 100% of BrainBuilders billed rates. See, e.g., Pa3557-635 at rows 3495-521, 3021-3108, 2854-2913; Pa1528; Pa1531; accord Pa333 ¶¶ 21-22; Pa350-459. The same was true for periods when there was no written SCA in place. See, e.g., Pa3557-635

at rows 3109-3181; accord Pa333 ¶¶ 21-22; Pa350-459. This pattern continued for *nearly four years*. See Pa3557-635; accord Pa333 ¶¶ 21-22; Pa350-459. In all, Optum paid some amount on 58% of BrainBuilders' bills for ABA services provided to the Insured Children. See Pa3557-635. In total, Optum paid BrainBuilders \$842,964, \$654,170 of which was paid at BrainBuilders full billed rates. Pa264 ¶¶ 46-49; see Pa3557-635; accord Pa333 ¶¶ 21-22; Pa350-459.

#### **H. After the Department of Banking and Insurance Audits Oscar, Oscar Investigates Optum's Mishandling of BrainBuilders' Claims**

In August 2018, after the New Jersey Department of Banking and Insurance audited Oscar, Oscar recognized that Optum was failing to perform its contractual obligations to Oscar and comply with relevant regulations. See Pa2934; Pa2953-54; Pa3017-18. Oscar concluded that

1. Optum falsely claimed that it had not received any claims from BrainBuilders, see Pa3108-13;
2. Optum was violating its own internal policies in its dealings with BrainBuilders and failed to timely respond to appeals on multiple occasions, see Pa3017-18; Pa2631-33 at 168:6-170:1; Pa2644-48 at 181:18-185:11; Pa3032-37;
3. Optum was denying coverage for BrainBuilders' services under the false premise that in-network providers were available when, in fact, no such providers were available within a geographically acceptable distance, see Pa2571-73 at 108:3-110:2; Pa2934; Pa3040-50;
4. Optum was denying BrainBuilders' requests for written SCAs by having them reviewed by unqualified persons (i.e., an M.D. was required and Optum used a Psy.D. or an individual without a license), see Pa3017-18; Pa3070-81; Pa2662-64 199:11-201:6; and

5. Optum had denied BrainBuilders’ requests with a denial form designed for providers in California – a form that provided incorrect instructions, see Pa1328-29.

Oscar’s investigation continued into 2020, after BrainBuilders filed its Complaint. See Pa3113. The investigation uncovered that Optum had improperly denied numerous claims that Optum “expected . . . to be paid.” Pa3101; Pa2675-76 at 212:17-213:25. Optum did not deny any of BrainBuilders’ bills because the services were not medically necessary. See Pa3098-99. Despite Oscar finding Optum derelict and Oscar possessing records of BrainBuilders’ treatment of all eight Insured Children, BrainBuilders has been paid a pittance for the life-changing services it rendered. See Pa3557-635; Pa264 ¶¶ 47-49. And despite the results of its investigation, Oscar still did not comply with its agreement to pay BrainBuilders for services rendered to the Insured Children. See Pa264 ¶¶ 47-49.

### **STANDARD OF REVIEW**

This Court “review[s] decisions granting summary judgment de novo.” C.V. by & through C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 305 (2023) (citation omitted). A court reviewing a grant of summary judgment “must ‘consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the

non-moving party.” Ibid. (citation omitted). In ruling on a summary judgment motion, a court does not “weigh the evidence and determine the truth of the matter”; it only “determine[s] whether there is a genuine issue for trial.” Id. at 305-06 (citation omitted). “Because the trial court entered summary judgment against plaintiffs, who are the non-moving parties, [the Appellate Division] must give plaintiffs the benefit of all favorable evidence and inferences presented in the record.” Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584-85 (2012).

### **LEGAL ARGUMENT**

The trial court did not apply the basic principles governing summary judgment and therefore erred in dismissing BrainBuilders’ Complaint. The court did not once reference in its Opinion that, at the summary judgment stage, it was required to give BrainBuilders “the benefit of all favorable evidence and inferences presented in the record.” Ibid. Throughout its Opinion, the court selectively accepted evidence favoring Oscar and ignored its obligation to give BrainBuilders the benefit of its best case. Instead of viewing the record in the light most favorable to BrainBuilders, the court acted as though it were the ultimate trier of fact, picking evidence from among disputed facts that supported the arguments advanced by Oscar. At the summary judgment stage, the trial court mistakenly put the burden on BrainBuilders, the nonmovant, to “demonstrate” or “establish” the elements of its claims, Pa24-25; Pa29-31, when

the court was required to determine whether the evidence favoring BrainBuilders supported its claims.

Had the trial court viewed the evidence through the appropriate lens, giving BrainBuilders the benefit of all favorable evidence and all favorable inferences, BrainBuilders would have been permitted to proceed on all four of its claims: breach of an implied contract, promissory estoppel, unjust enrichment, and quantum meruit.

Therefore, the court's order granting summary judgment should be reversed and BrainBuilders should be permitted to present its claims to a jury.

**I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BRAINBUILDERS' IMPLIED CONTRACT CLAIM (Pa35-36; Pa20-26)**

BrainBuilders presented sufficient evidence – based on communications and course of conduct – to establish that Oscar breached an implied contract to compensate BrainBuilders for the services it rendered to the Insured Children.

“Implied contract terms generally are considered as binding as express contract terms.” Troy v. Rutgers, 168 N.J. 354, 365 (2001) (citing Wanaque Borough Sewerage Auth. v. Township of West Milford, 144 N.J. 564, 574 (1996)). “[A]n implied-in-fact contract may form based on the parties’ actions, course of conduct, oral expressions, or a combination of the three.” Comprehensive Neurosurgical, P.C. v. Valley Hosp., 257 N.J. 33, 71 (2024).

“Courts often find and enforce implied promises by interpretation of a promisor’s word and conduct in light of the surrounding circumstances.” Id. at 70 (quoting Wanaque Borough, 144 N.J. at 574). Surrounding circumstances include “actions and representations [that] were [not] communicated to the [counterparty]” that demonstrate a party’s intention to be bound. Troy, 168 N.J. at 370.

Additionally, “there is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others.” Comprehensive Neurosurgical, 257 N.J. at 71-72 (quoting Troy, 168 N.J. at 365). The elements of an implied contract are no different than the elements of an express contract. See id. at 72-73. “Whether the parties acted in a manner sufficient to create implied contractual terms is a question of fact generally precluding summary judgment.” Troy, 168 N.J. at 366; see also Comprehensive Neurosurgical, 257 N.J. at 72 (“[W]hether parties’ interactions rise to the level of creating an implied contract is generally a question of fact best resolved by the jury.”).

The trial court recognized that “the issue of whether an implied contract exists is a factual question that generally precludes summary judgment.” Pa12. The court, however, then proceeded to weigh the evidence and draw inferences

in favor of the moving party, Oscar – the precise opposite of the role a court is supposed to play in deciding a summary judgment motion.

**A. The Facts in the Record Are Sufficient to Show that an Implied Contract Exists Between Oscar and BrainBuilders**

The elements of a contract – express or implied – are “offer, acceptance, consideration, and performance by both parties.” Goldfarb v. Solimine, 245 N.J. 326, 339 (2021). The record contains evidence supporting each element of the implied contract between BrainBuilders and Oscar.

The Healthcare Quality Act and Autism Mandate obligated Oscar to cover ABA services. N.J.S.A. 17B:27A-7.16; N.J.A.C. 11:24A-4.10. To do so, Oscar had to have in place a suitable in-network ABA provider for the Insured Children. That is a legal duty Oscar owed to the Insured Children. Yet Oscar had no provider (in-network or out-of-network) to furnish the treatment the Insured Children required. Any disruption in the Insured Children’s treatment threatened to cause serious regression in their progress. Pa237 ¶¶ 17-18.

Oscar had no alternative to BrainBuilders, which was already providing services to meet the unique needs of the Insured Children. Pa181-82. Optum’s network did not have any other available adequate provider within the time and distance requirements under N.J.A.C. 11:24A-4.10(b)(3)(v)(6). Pa181-82; Pa3039-50. Through multiple communications, both written and oral, and through their course of conduct, Oscar and its agent Optum offered to

compensate BrainBuilders for its services. See, e.g., Pa3157-58 at 43:2-44:18; Pa3203-08 at 89:7-94:6; Pa3391-3410; Pa3225-3226 at 111:22-112:7; Pa3419; Pa3503-05 at 59:7-61:2; Pa627; Pa632-35; Pa640; Pa648-51; Pa672; Pa684-85; Pa694. The offer was conveyed through Optum’s continual issuance of written SCAs authorizing BrainBuilders to provide ABA services to the Insured Children and its overall promise to reimburse BrainBuilders for the services it was providing to the Insured Children. See Pa1370-1620.

Over the course of 2018 to 2019, Oscar’s agent Optum issued over one hundred written SCAs covering ABA treatments for different time periods and made payments pursuant to some, but not all. Pa3557-635; Pa1370-Pa602. Optum, however, also paid hundreds of other claims outside of the written authorizations, some at full billed rates and others at varying rates, thereby recognizing Oscar’s duty to pay for services rendered. See Pa333 ¶¶ 21-22; Pa350-459; accord Pa3557-635. Oscar knew that BrainBuilders was the only provider that could treat the Insured Children during the relevant time period. See Pa181-82; Pa601-06; Pa3253-54 at 139:22-140:24; Pa3443; Pa3039-50]. Oscar admitted that, by issuing the written SCAs, “Optum [was] authorizing the services and saying [to BrainBuilders]: Here’s what you need to do to receive payment for claims.” Pa3391-3410; Pa3201-05 at 89:7-91:14. Oscar and Optum signaled their assent to BrainBuilders’ continued treatment of the Insured

Children, who did not have in-network options, by paying BrainBuilders' claims. Pa3557-635. By paying those claims, Oscar and Optum followed their normal practice of ensuring continuity-of-care treatment of their insureds when no suitable in-network provider was available. See Pa3250-56 at 136:19-142:6; Pa3439-44.<sup>18</sup>

BrainBuilders accepted Oscar and Optum's offer to continue providing services to the Insured Children in exchange for payment of its claims. See Weichert Co. Realtors v. Ryan, 128 N.J. 427, 436 (1992) ("An offeree may manifest assent to the terms of an offer . . . by conduct, creating a contract implied-in-fact." (citing Restatement (Second) of Contracts § 19 (1981))). As a matter of common sense, BrainBuilders would have had no reason to treat the Insured Children without the promise of payment for its services. Mutual consideration undergirded this implied contract: Oscar would pay for the treatment provided by BrainBuilders to the Insured Children – treatment that Oscar was mandated by law to cover. See Martindale v. Sandvik, Inc., 173 N.J.

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<sup>18</sup> The trial court explained that "Optum's clinical authorizations do not rise to the level of an implied contract" and that "Mr. Nussbaum has conceded that such documents do not reflect the intentions of the parties concerning reimbursement commitments." Pa26. It is unclear to what "clinical authorizations" the court is referring. To the extent that the court conflated the Optum SCAs with unidentified "clinical authorizations," respectfully, it is mistaken. See Pa3391-3410 (identifying the documents as written SCAs authorizing BrainBuilders to treat the Insured Children).

76, 87 (2002) (“The essential requirement of consideration is a bargained-for exchange of promises or performance . . .”).

And, importantly, Oscar, in part, performed. Oscar paid for some services at or near the full billing rate, however inconsistent or intermittent those payments might have been. See Pa333 ¶¶ 21-22; Pa350-459; accord Pa3557-635. At times, Oscar paid at rates ranging from 1% to 99% of BrainBuilders’ billed rates. Pa333 ¶¶ 21-22; Pa350-459; Pa659; accord Pa3557-635; see Moorestown Mgmt., Inc. v. Moorestown Bookshop, Inc., 104 N.J. Super. 250, 259 (Ch. Div. 1969) (“[I]t is settled that an agreement is not unenforceable for lack of definiteness of price . . . if the parties specify a practicable method by which the amount can be determined.” (citing Corbin on Contracts § 4.4 (1993))).

Optum and Oscar’s internal communications reveal that they normally paid out-of-network providers 80% of the UCR for a particular service. Pa3416. That price is known as the “[out of network] allowable.” Pa3416. Therefore, Oscar and Optum had the ability to determine the rate for services rendered pursuant to the implied contract.<sup>19</sup> In fact, they did so. In the case of L.K.,

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<sup>19</sup> As noted above, UCRs are a term of art in the health insurance industry. There are different sets of rates calculated by a variety of institutions. Even if Oscar or Optum did not have UCRs for particular services in their databases, there are other databases to which they, and the court, can refer, such as FAIR Health. See, e.g., Frequently Asked Questions, FairHealth, <https://www.fairhealth.org/faqs> (“How is FAIR Health data used? FAIR Health’s data

Optum sent BrainBuilders a schedule of rates for its out-of-network services from October 3, 2018 to November 30, 2018. Pa1431-33. That schedule referred back to several written SCAs issued by Optum *and included the same rates BrainBuilders offered in January 2018*. Compare Pa1431-33, with Pa618-19. Optum refused to pay the rest of BrainBuilders' bills related to the other Insured Children at those rates even though BrainBuilders provided the same services to the Insured Children, seven of whom had the exact same Oscar insurance plan.<sup>20</sup>

Despite Optum issuing dozens of nearly identical written SCAs, Oscar refuses to pay for the treatments it authorized through Optum's written SCAs or fully pay balances due on claims for out-of-network services that Optum partially paid. Oscar continued to make payments both before *and after* BrainBuilders initiated litigation. Pa3557-635. Those payments for services that occurred are part of the course of conduct that a jury could consider when

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are relied upon by various stakeholders from all parts of the healthcare ecosystem as a neutral data source. Our data support licensees in developing out-of-network . . . UCR fee schedules.”); Lynch v. New Deal Delivery Serv. Inc., 974 F. Supp. 441, 458 (D.N.J. 1997) (“Courts may resort to commercial practice or other usage or custom to fill in the gaps.” (citing Corbin on Contracts § 4.1)) (applying New Jersey law).

<sup>20</sup> Even though Y.T. has an Oscar insurance plan requiring Oscar to pay for 50% of out-of-network services, Oscar has paid some of BrainBuilders' bills related to Y.T. at varying rates and refused to pay others at all. See Pa3609-17 at rows 3280-789.

deciding the merits of BrainBuilders’ implied contract claim. See Comprehensive Neurosurgical, 257 N.J. at 70-72.

Therefore, Oscar breached the implied contract by not fully performing and paying for the necessary services it authorized. In short, giving BrainBuilders the benefit of all favorable evidence and inferences in the record, (1) “[BrainBuilders and Oscar] entered into a contract containing certain terms”; (2) BrainBuilders performed its obligation under the contract; (3) Oscar did not carry out its corresponding obligation; and (4) “[Oscar’s] breach, or failure to do what the contract required, caused a loss to [BrainBuilders].” See Goldfarb, 245 N.J. at 338.

Accordingly, the trial court improvidently granted summary judgment in favor of Oscar when disputed issues of fact persisted on each element of the implied contract claim. It follows that the trial court’s Order should be reversed, and this issue should be remanded for trial.

**II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BRAINBUILDERS’ PROMISSORY ESTOPPEL CLAIM (Pa35-36; Pa26-29)**

The trial court erroneously granted summary judgment in favor of Oscar on BrainBuilders’ claim of promissory estoppel.

To establish a claim of promissory estoppel against Oscar, BrainBuilders must satisfy four elements: it must show that (1) Oscar made “a clear and

definite promise,” (2) “with the expectation that [BrainBuilders would] rely on it; (3) “reasonable reliance” on the promise by BrainBuilders; and (4) “definite and substantial detriment” suffered by BrainBuilders. Toll Bros. v. Bd. of Chosen Freeholders of Cnty. of Burlington, 194 N.J. 223, 253 (2008). “The essential justification for the [promissory estoppel] doctrine is avoidance of substantial hardship or injustice were the promise not to be enforced.” Royal Assocs. v. Concannon, 200 N.J. Super. 84, 92 (App. Div. 1985) (citing Malaker Corp. S’holders Protective Comm. v. First Jersey Nat’l Bank, 163 N.J. Super. 463, 484 (App. Div. 1978)). Viewing the evidence in the light most favorable to BrainBuilders, a reasonable jury could conclude that BrainBuilders met each of those elements.

**A. Oscar’s Promises of Compensation Are Sufficient for BrainBuilders’ Promissory Estoppel Claim**

BrainBuilders has demonstrated that Oscar made “a clear and definite promise” to pay BrainBuilders for the ABA services rendered to the Insured Children. That promise came through the issuance of written SCAs, Oscar’s constant directing BrainBuilders to negotiate rates with Optum, and the partial or full payment of BrainBuilders’ claims for out-of-network treatment provided to the Insured Children even without SCAs. See Pa1370-602; Pa3557-635; Pa333 ¶¶ 21-22; Pa350-459; see, e.g., Pa627; Pa632-35; Pa640; Pa648-51; Pa672; Pa684-85; Pa694. Oscar, moreover, communicated to BrainBuilders by

email that it “want[ed] to make sure BrainBuilders is getting reimbursed for services that [were then] taking place.” Pa627.

To be sure, a “clear and definite promise” need not be express to support a promissory estoppel claim. See Pop’s Cones, Inc. v. Resorts Int’l Hotel, Inc., 307 N.J. Super. 461, 469-70 (App. Div. 1998). In Pop’s Cones, this Court noted that “earlier New Jersey decisions discussing promissory estoppel [(such as Malaker Corp.)] seem to greatly scrutinize a party’s proofs regarding an alleged ‘clear and definite promise by the promisor’ as a prelude to considering the remaining three elements of a promissory estoppel claim,” but “more recent decisions have tended to relax the strict adherence to [that] formula for determining whether a prima facie case of promissory estoppel exists.” Id. at 469 (citing Malaker Corp., 163 N.J. Super. at 484).<sup>21</sup>

The Pop’s Cones court noted that this “relax[ation]” is “particularly” applicable where “a plaintiff does not seek to enforce a contract not fully negotiated, but instead seeks damages resulting from its detrimental reliance upon promises made during contract negotiations despite the ultimate failure of

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<sup>21</sup> In addressing BrainBuilders’ promissory estoppel claim, the trial court noted that “the law does not permit a ‘clear and definite promise’ by implication . . . . because an implication, by definition, cannot be clear and unambiguous,” citing to Malaker. Pa26-27 (citing 163 N.J. Super. at 480). The court failed to note – and perhaps did not understand – that in cases such as this one, where BrainBuilders and Oscar were negotiating an agreement, the heightened Malaker standard does not apply.

those negotiations.” Id. at 469-70; accord Lobiondo v. O’Callaghan, 357 N.J. Super. 488, 499-500 (App. Div. 2003).

This Court’s observation in Pop’s Cones fits the facts of this case precisely. If BrainBuilders and Oscar did not enter into an implied contract, it is clear that they were negotiating one. Therefore, all of Oscar and Optum’s conduct during negotiations with BrainBuilders is relevant to whether Oscar promised to reimburse BrainBuilders for treating the Insured Children. That includes Optum’s continual issuance of written SCAs, Oscar’s statements that it would reimburse BrainBuilders, and Oscar’s intermittent payments of BrainBuilders’ bills for out-of-network services provided to the Insured Children.

For purposes of the summary judgment standard, BrainBuilders has shown that Oscar made a “clear and definite” promise sufficient to sustain a promissory estoppel claim.

**B. BrainBuilders Reasonably Relied on Oscar’s Promises to Its Detriment**

Oscar’s promise to compensate BrainBuilders, in turn, induced BrainBuilders’ reasonable reliance on that promise. BrainBuilders relied on Oscar to keep its word. Oscar repeatedly told BrainBuilders to work with Optum to set rates. In its previous dealings with Optum (outside of this case), BrainBuilders had come to terms with Optum on rates for services. See Pa617-

19 (“SCA Option B: BrainBuilder[s]’ ‘in-network’ rate in 2013 . . . managed by Optum”). In working with insurers in the past, BrainBuilders had reached agreement on the terms of compensation for its out-of-network services. See Pa1772-75 at 72:12-75:11. BrainBuilders had no reason to believe that Oscar would not stay true to its promise and come to reasonable terms of compensation.

BrainBuilders’ reasonable reliance was also based on Optum’s continued issuance of written SCAs and Oscar’s continued intermittent payment of BrainBuilders’ bills. At no point did Oscar affirmatively advise BrainBuilders that its rates were unreasonable or that it would not keep its promise or that BrainBuilders risked nonpayment despite its continued delivery of services to the Insured Children.

BrainBuilders stayed true to its course, dutifully treating the Insured Children, mindful that any disruption in treatment could cause a regression in their progress. In fulfilling its commitment to treat the Insured Children, BrainBuilders billed thousands of hours for its services, and in return Oscar paid just a fraction of the overall billed rates. BrainBuilders reasonably relied on Oscar and Optum’s promise of compensation to its detriment.

In its Opinion, the trial court indicated that BrainBuilders had not sufficiently established damages because the Insured Children’s families, not

Oscar, were obligated to pay the outstanding balances. See Pa28. The doctrine of promissory estoppel vitiates the substantial injustice that would occur if the families of the Insured Children were required to pay for the essential services that Oscar was obligated to provide by law and in accordance with the insurance policies it sold those families.

Viewing the evidence in the light most favorable to BrainBuilders, the trial court's dismissal of the promissory estoppel claim should be reversed.

### **III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BRAINBUILDERS' UNJUST ENRICHMENT AND QUANTUM MERUIT CLAIMS (Pa35-36; Pa29-34)**

The trial court erroneously granted summary judgment in favor of Oscar on BrainBuilders' unjust enrichment and quantum meruit claims.

To establish an unjust enrichment claim, a plaintiff "must demonstrate that the opposing party 'received a benefit and that retention of that benefit without payment would be unjust.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 288 (2016) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 110 (2007)). "That quasi-contract doctrine also 'requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched [the] defendant beyond its contractual rights.'" Ibid. (quoting Iliadis, 191 N.J. at 110). "[U]njust enrichment is an equitable remedy resorted to only when there [is] no express

contract providing for remuneration.” Caputo v. Nice-Pak Prod., Inc., 300 N.J. Super. 498, 507 (App. Div. 1997).

“To recover under a theory of quantum meruit, a plaintiff must establish: “(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.” Starkey, Kelly, Blaney & White v. Est. of Nicolaysen, 172 N.J. 60, 67 (2002).

Although the elements of quantum meruit are slightly different from those of unjust enrichment, the underlying principle is the same: “[c]ourts generally allow recovery in quasi-contract when one party has conferred a benefit on another, and the circumstances are such that to deny recovery would be unjust.” Ibid. (quoting Weichert Co. Realtors, 128 N.J. at 437).

The trial court wrongly concluded that BrainBuilders – by treating the Insured Children – did not confer a benefit on Oscar as an insurer for purposes of the quantum meruit and unjust enrichment claims. See Pa31-32.

New Jersey jurisprudence has long recognized that when an insurer “is under a legal duty to provide [an insured] with medical or surgical attendance” and a healthcare provider “dutifully intervenes in the company’s affairs and performs [the insurer’s] obligation,” the “law will raise a quasi contractual obligation to support a recovery for the value of such benefits conferred.”

Rabinowitz v. Ma. Bonding & Ins. Co., 119 N.J.L. 552, 556-57 (1938). This long-held principle was recently discussed by the Third Circuit in Plastic Surgery Center, P.A. v. Aetna Life Insurance Co., 967 F.3d 218, 223 (3d Cir. 2020), in which the court applied New Jersey law. There, an out-of-network provider brought both promissory estoppel and unjust enrichment claims, among others, against an insurance carrier arising from an “ad hoc arrangement[.]” between the provider and the insurer “in which the provider agree[d] to render services (which are *not* covered by the terms of the [insurance] plan) in exchange for a promise of payment by the insurer.” Id. at 229.

In discussing the out-of-network provider’s unjust enrichment claims, the Third Circuit noted that “benefit conferred, if any, is not the provision of the healthcare services per se, but rather the discharge of the obligation the insurer owes to its insured.” Id. at 240. The Third Circuit based its identification of the benefit conferred by the out-of-network provider on Rabinowitz. See id. at 240-41 (“As New Jersey’s highest court observed long before the advent of ERISA, the essence of an unjust enrichment cause of action against an insurer is that ‘the [insurer] is under a legal duty to provide the person injured with medical or surgical attendance,’ and ‘the physician . . . dutifully intervene[d] in the [insurer’s] affairs and perform[ed] its obligation.’” (quoting 119 N.J.L. at 556-

57) (alterations in original)).<sup>22</sup>

As noted, Oscar had legal obligations to cover ABA therapy for the Insured Children but did not have the in-network providers to do so. By providing ABA services to the Insured Children, BrainBuilders discharged Oscar's legal obligation, and therefore conferred a benefit upon Oscar sufficient to sustain its unjust enrichment and quantum meruit claims. Plastic Surgery Ctr., 967 F.3d at 240-41.

It stands to reason that if Oscar had a legal duty to provide coverage for ABA therapy to the Insured Children by having an available in-network or out-of-network provider, it was required to pay for those services. If Oscar does not have to cover the ABA services provided by BrainBuilders, then Oscar is receiving an unjustified windfall – padding its pockets with the monies it would

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<sup>22</sup> The Third Circuit noted “that district judges in New Jersey have disagreed over whether a healthcare provider’s provision of services to an insured may ever constitute a ‘benefit’ to an insurer for purposes of an unjust enrichment claim.” Plastic Surgery Ctr., 967 F.3d at 240 n.26. The Third Circuit particularly cited Plastic Surgery Center, LLC v. Oxford Health Insurance, Inc. as an example of a case holding that “a healthcare provider may not bring an unjust enrichment claim against an insurer because the ‘benefit is derived solely by the insured party.’” Ibid. (quoting Plastic Surgery Ctr., LLC v. Oxford Health Ins., Inc., No. 18-cv-2608, 2019 WL 4750010, at \*5-6 (D.N.J. Sept. 30, 2019)). The Third Circuit concluded that such reasoning is “at odds with the decisions of the New Jersey state courts that have allowed these types of unjust enrichment claims to proceed.” Ibid. (citing Rabinowitz, 119 N.J.L. at 556-57). The trial court relied on Plastic Surgery Center, LLC v. Oxford Health Insurance, Inc., and decisions citing Oxford Health Insurance, Inc. in holding that BrainBuilders did not confer a benefit to Oscar. See Pa31-32.

have had to pay some other provider. Moreover, Oscar wants to retain the premiums paid by the families of the Insured Children while now attempting to foist the shortfalls in its payment to BrainBuilders on those families. This windfall the very essence of unjust enrichment – permitting Oscar to improperly benefit by financially abandoning the Insured Children while BrainBuilders furnished those Children with desperately needed life-changing treatment.

Accordingly, the trial court’s grant of summary judgment dismissing BrainBuilders’ quantum meruit and unjust enrichment claims should be reversed.

### **CONCLUSION**

For the reasons expressed, the trial court erred in granting summary judgment in favor of Oscar on each of BrainBuilders’ claims. The judgment of the trial court should therefore be reversed, BrainBuilders’ Complaint reinstated, and the matter remanded for trial.

Dated: October 21, 2024

By: s/ Peter Slocum  
Peter Slocum, Esq.  
Anish Patel, Esq.  
LOWENSTEIN SANDLER LLP  
One Lowenstein Drive  
Roseland, New Jersey 07068  
973-597-2500  
*Counsel for Plaintiff-Appellant  
BrainBuilders, LLC*

BRAINBUILDERS, LLC,

*Plaintiff-Appellant,*

vs.

OSCAR GARDEN STATE  
INSURANCE CORPORATION,  
AND XZY CORPORATIONS 1-5,

*Defendants-Respondents.*

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-003514-23T4

On appeal from a Judgment and Orders  
in the Law Division in the Superior  
Court of New Jersey; Ocean County;  
Docket No.: OCN-L-1714-19; Orders  
dated: May 6, 2024 and June 20, 2024

Sat Below:

Hon. Craig L. Wellerson, J.S.C.

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**DEFENDANT-RESPONDENT  
OSCAR GARDEN STATE INSURANCE CORPORATION'S  
BRIEF IN OPPOSITION**

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**GREENBERG TRAURIG, LLP**

David Jay, Esq. (019651995)

Todd L. Schleifstein, Esq. (14201990)

Samantha Varsalona, Esq. (280662018)

500 Campus Drive, Suite 400

Florham Park, New Jersey 07932

(973) 360-7900

[jayd@gtlaw.com](mailto:jayd@gtlaw.com)

[SchleifsteinT@gtlaw.com](mailto:SchleifsteinT@gtlaw.com)

[varsalonas@gtlaw.com](mailto:varsalonas@gtlaw.com)

*Attorneys for Defendant-Respondent*

*Oscar Garden State Insurance Corporation*

**TABLE OF CONTENTS**

	<b><u>Page(s)</u></b>
PRELIMINARY STATEMENT.....	iii
STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	4
1.    The Parties and the Insurance Coverage .....	4
2.    The Evidence Showing There was No Agreement .....	10
A.    Mr. Nussbaum Admits There Was No Agreement.....	10
B.    BrainBuilders’ Ongoing Unsuccessful Rate Negotiations Confirm That No Agreement Was Reached. ....	11
C.    BrainBuilders’ Counsel Confirms in November 2018 That the Parties Had No Agreement. ....	13
D.    BrainBuilders’ Allegation that Oscar Agreed to Pay All Claims at Billed Charges Unless The Parties Agreed to a Discount is Contradicted by Mr. Nussbaum’s Testimony. ....	14
E.    BrainBuilders Knew How to Enter Into a Rate Agreement and That It Did Not Have One for the Members at Issue. ....	17
3.    Procedural History .....	19
A.    Oscar’s Motion and the Parties’ Post-Hearing Submissions .....	19
B.    The Trial Court’s Summary Judgment Decision and Order.....	21
C.    BrainBuilders’ Motion for Reconsideration .....	22
LEGAL ARGUMENT .....	23
A.    The Summary Judgment Standard.....	24
B.    The Trial Court Did Not Make Factual Determinations or Fail to Grant Inferences in BrainBuilders’ Favor. ....	25
POINT I SUMMARY JUDGMENT ON THE IMPLIED CONTRACT CAUSE OF ACTION WAS PROPER BECAUSE THERE IS NO EVIDENCE THAT THE PARTIES REACHED ANY AGREEMENT .....	27

POINT II OSCAR MADE NO CLEAR AND DEFINITE PROMISE OF  
PAYMENT TO BRAINBUILDERS..... 34

    A.    There Is No Evidence That Oscar Made a Clear and  
          Definite Promise of Payment to BrainBuilders..... 35

    B.    BrainBuilders Did Not and Could Not Have  
          Reasonably Relied on Anything That Oscar Said or  
          Did..... 40

POINT III SUMMARY JUDGMENT ON THE THIRD CAUSE OF  
ACTION WAS PROPER BECAUSE BRAINBUILDERS DID  
NOT CONFER ANY BENEFIT ON OSCAR..... 43

CONCLUSION..... 49

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

Advanced Orthopedics & Sports Med. Inst. v. Anthem Blue Cross Life & Health Ins. Co.,  
2018 U.S. Dist. LEXIS 212024 .....45

Bhagat v. Bhagat,  
217 N.J. 22 (2014) .....24

BrainBuilders, LLC v. Optum, Inc.,  
2024 N.J. Super. Unpub. LEXIS 671 (App. Div. Apr. 19, 2024).....45

Brill v. Guardian Life Ins. Co. of Am.,  
142 N.J. 520 (1995) .....24, 26

Broad St. Surgical Ctr., LLC v. UnitedHealth Grp., Inc.,  
2012 U.S. Dist. LEXIS 30466 (D.N.J Mar. 6, 2012) .....45

Burt v. West Jersey Health Sys.,  
339 N.J. Super. 296 (App. Div. 2001) .....37

Callano v. Oakwood Park Homes Corp.,  
91 N.J. Super. 105 (App. Div. 1966).....44

Carlini v. Curtiss-Wright Corp.,  
71 N.J. Super. 101 (App. Div. 1961)..... 3

Celotex Corp. v. Catrett,  
477 U.S. 317 (1986).....24

Cortez v. Gindhart,  
435 N.J. Super. 589 (App. Div. 2014).....25

East Orange Bd. of Educ. v. New Jersey Schs. Constr. Corp.,  
405 N.J. Super. 132 (App. Div. 2009) .....35

Friedman v. Martinez,  
242 N.J. 449 (2020) .....24

Globe Motor Co. v. Igdalev,  
225 N.J. 469 (2016) .....26

Haghighi v. Horizon Blue Cross Blue Shield of N.J.,  
2020 U.S. Dist. LEXIS 157246 (D.N.J. Aug. 31, 2020) .....45

Horizon Blue Cross Blue Shield of N.J. v. State,  
 425 N.J. Super. 1 (App. Div. 2012).....25

Investors Bank v. Torres,  
 457 N.J. Super. 53 (App. Div. 2018).....25, 26

Kress v. La Villa,  
 335 N.J. Super. 400 (App. Div. 2000).....41

Malaker Corp. Stockholders Protective Comm. v. First Jersey  
 Nat’l Bank,  
 163 N.J. Super. 463 (App. Div. 1978).....35, 40

Miller v. Bank of Am. Home Loan Servicing, L.P.,  
 439 N.J. Super. 540 (App. Div. 2015).....26

Plastic Surgery Ctr., P.A. v. Cigna Health & Life Ins. Co.,  
 2019 U.S. Dist. LEXIS 72174 (D.N.J. Apr. 30, 2019).....45

Plastic Surgery Center, P.A. v. Aetna Life Insurance Company,  
 967 F.3d 218 (3d Cir. 2020).....47

Plastic Surgery Ctr., LLC v. Oxford Health Ins., Inc.,  
 2019 U.S. Dist. LEXIS 169146 (D.N.J. Sept. 30, 2019).....45

Pop’s Cones, Inc. v. Resorts International Hotel, Inc.,  
 307 N.J. Super. 461 (App. Div. 1998).....38, 39, 40

Premier Physician Network, LLC v. Maro,  
 468 N.J. Super. 182 (App. Div. 2021).....24

Rabinowitz v. Massachusetts Bonding and Insurance Company,  
 119 N.J.L. 552 (1938).....47, 48, 49

Read v. Profeta,  
 397 F. Supp. 3d 597 (D.N.J. 2019).....39

Robbins v. Jersey City,  
 23 N.J. 229 (1957) .....24

Saint Barnabas Med. Ctr. v. County of Essex,  
 111 N.J. 67 (1988) .....28

Satellite Ent’mt Ctr., Inc. v. Keaton,  
 347 N.J. Super. 268 (App. Div. 2002).....27

Shelcusky v. Garjulio,  
 172 N.J. 185 (2002) .....30

<u>Smith v. SBC Commc’ns, Inc.,</u> 178 N.J. 265 (2004) .....	27
<u>Starkey, Kelly, Blaney &amp; White v. Estate of Nicolaysen,</u> 172 N.J. 60 (2002) .....	44
<u>State v. Jasuilewicz,</u> 205 N.J. Super. 558 (App. Div. 1985).....	21
<u>Swider v. Ha-Lo Indus., Inc.,</u> 134 F. Supp. 2d 607 (D.N.J. 2001).....	43
<u>Templo Fuente De Vida Corp. v. National Union Fire Ins. Co.,</u> 224 N.J. 189 (2016) .....	24
<u>Toll Bros. v. Board of Chosen Freeholders of Cty. of Burlington,</u> 194 N.J. 223 (2008) .....	34, 41
<u>VRG Corp. v. GKN Realty Corp.,</u> 135 N.J. 539 (1994) .....	44
<u>Wanaque Borough Sewage Auth. v. Township of W. Milford,</u> 144 N.J. 564 (1996) .....	27
<u>Weichert Co. Realtors v. Ryan,</u> 128 N.J. 427 (1992) .....	27
<u>Woodlands Cmty. Ass’n v. Mitchell,</u> 450 N.J. Super. 310 (App. Div. 2017).....	44
<u>Zaman v. Felton,</u> 219 N.J. 199 (2014) .....	47
<b>Other Authorities</b>	
N.J.A.C. 11:4-37.1 <u>et seq.</u> .....	6
N.J.A.C. 11:24B-3.5 .....	6
<u>Rule 1:6-2</u> .....	21
<u>Rule 1:36-3</u> .....	45
<u>Rule 4:14-2(c)</u> .....	15

**PRELIMINARY STATEMENT**

This case is not about children with autism spectrum disorders, who are not the plaintiffs, have not complained to anyone, and have not paid a single dollar out of their own pockets. Rather, it is about a provider of autism-related medical and behavioral health services which sought to make itself wealthy by continuing to render out-of-network (“OON”) services to such children, rather than helping them obtain the benefits under their health plans by transitioning them to in-network providers who accepted their insurance coverage.

Plaintiff-Appellant BrainBuilders, LLC, an OON provider, filed suit against Defendant-Respondent Oscar Garden State Insurance Corp. (“Oscar”), a health insurer, seeking payment for autism-related services that it provided primarily to Oscar members who had no OON coverage for them under their health plans. BrainBuilders opted to treat the Oscar members knowing that they did not have OON coverage and that BrainBuilders needed “OON exceptions” and specific agreements from Oscar to get paid for treating them (which it began requesting in January 2018 but did not get).

BrainBuilders nevertheless turned around and sued Oscar, fabricating that Oscar had made specific promises to BrainBuilders to pay for all the services. BrainBuilders asserted only quasi-contractual causes of action for breach of

implied contract, promissory estoppel and unjust enrichment/quantum meruit (because it has no rights under the Oscar plans), and incredibly sought \$9.8 million for treating the Oscar members – well over \$1 million per patient.

Despite years of discovery, BrainBuilders came forward with no evidence that there was any implied contract or promise by Oscar to pay for OON services rendered to Oscar members. Oscar, however, came forward with clear undisputed evidence as to the absence of any agreement or promise, showing that the negotiation process failed to result in an agreement. Most notably, Oscar offered deposition testimony and correspondence from BrainBuilders' Director of Finances, Simon Nussbaum, admitting that BrainBuilders' efforts to negotiate with Oscar and its contractually appointed administrator, Optum, Inc., never culminated in any agreement and eventually "fell by the wayside."

Thus, the trial court correctly granted summary judgment to Oscar, dismissing the implied contract and promissory estoppel causes of action. The trial court similarly disposed of BrainBuilders' unjust enrichment/quantum meruit cause of action because, in the absence of any contrary obligation, Oscar did not receive any benefit from BrainBuilders; rather, the actual patients were the only ones who received a benefit. Nor was Oscar enriched unjustly, because BrainBuilders treated the patients knowing that they had no OON coverage, and then sued Oscar for the coverage BrainBuilders knew did not exist.

Instead of pointing to any agreement or promise by Oscar, BrainBuilders asked the trial court to infer one from the sheer volume of material that it had dumped into the record. The trial judge carefully waded through BrainBuilders' document dump, however, and recognized that its fabricated contentions rested on selective, out-of-context citations to deposition testimony and documents, none of which showed any promise or agreement by Oscar. Rather, BrainBuilders mischaracterized the parties' emails regarding negotiations over a rate structure, tried to fool the trial court into believing that Optum's medical authorizations were agreements to pay, and pretended that it had relied on certain payments issued by Optum when they had not even been made until well over a year later. At bottom, BrainBuilders provides no evidence to support its causes of action. If any agreement or promise existed, it would have been clear to the trial court and would be equally apparent to this Court.

Realizing that it cannot satisfy the elements of the causes of action that it *actually* pleaded, BrainBuilders devotes much of its brief to a host of later-manufactured theories that it *wished* it had pleaded instead.<sup>1</sup> None of this

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<sup>1</sup> See Carlini v. Curtiss-Wright Corp., 71 N.J. Super. 101, 108 (App. Div. 1961) (affirming summary judgment where allegedly disputed facts were “outside the scope of the complaint[,] . . . bear no true relationship to the issue framed by the pleadings” and presented “completely new alleged cause of action”).

material – regarding health care statutes and regulations<sup>2</sup>, the adequacy of the Optum network, Optum’s delays and errors in claims processing, and an investigation of Optum’s claims-handling practices by the New Jersey Department of Banking and Insurance (“DOBI”) – should be considered by this Court because it has nothing to do with whether there was an agreement between the parties or a payment promise by Oscar. When focused on the issues relevant to BrainBuilders’ quasi-contractual causes of action, it is readily apparent that summary judgment was indeed appropriate.

## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### **1. The Parties and the Insurance Coverage**

Oscar is a health insurer focused on making quality healthcare affordable for families and individuals. Pa45; Pa287. Between 2018 and 2021, Oscar enrolled seven New Jersey residents (LK, YF, RG, EG, SS, YS, and ST) in its Exclusive Provider Organization (“EPO”) health plan, whose individual periods of enrollment varied over this time frame. Pa145-55. Oscar’s EPO plans are network-only plans. Id. They cover treatment of autism spectrum disorders,

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<sup>2</sup> None of these contains a private right of action, which explains the absence of this material from BrainBuilders’ Complaint.

including Applied Behavioral Analysis (“ABA”) therapy, as long as the members obtain such services from in-network providers. Id.<sup>3</sup>

Oscar contracted with Optum to supply a fulsome network of behavioral health providers for its members, to handle the specialized administration of behavioral health services (e.g., ABA services), and to contract with providers regarding the pricing of behavioral health claims. Pa139-40 at 69:1-72:10; Pa2775-2932. BrainBuilders now makes un-pleaded allegations that Oscar, through Optum, lacked an “adequate” or “suitable” network of behavioral health services providers to comply with the regulations promulgated under New Jersey’s Autism Mandate and Health Care Quality Act requirements (none of which compels an insurer to pay all claims for autism-related services, with no questions asked, at the provider’s full billed charges), Pb1-2; Pb10-14, and that Oscar thus asked BrainBuilders to fill this void by serving in that capacity, Pb34 (falsely alleging that “Oscar had no alternative to BrainBuilders”). None of the materials cited by BrainBuilders provides any factual basis for either of those contentions (as opposed to pure argument and conjecture), nor is there any written communication BrainBuilders can identify that embodies such a request.

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<sup>3</sup> An eighth member, YT, was enrolled from 2019 to 2021 in an Oscar Preferred Provider Organization (“PPO”) plan that contained OON benefits. Pa157-60.

Rather, Oscar contracted with Optum to ensure its members had ready access to a fulsome behavioral health network. Pa3152-54 at 37:20-40:18. Indeed, it is undisputed that DOBI reviewed and approved the sufficiency of Optum's network, which was a condition precedent to certification of Oscar to offer qualified health plans on the federal-facilitated exchange and to maintain the good standing of its licensure as a stock health insurer.<sup>4</sup> Moreover, none of Oscar's witnesses admitted anywhere that Optum lacked an adequate network of behavioral health care providers, either as a factual matter or under the relevant regulations. See Pa289-90 at 59:18-63:6.

BrainBuilders offers services to children with autism spectrum disorders. It is a highly sophisticated healthcare provider with over 200 caregivers operating out of multiple locations, the largest of which is a facility in Lakewood. Da56. BrainBuilders chooses not to participate in Optum's (or any other insurer's) provider network. Pa42. Between 2018 and 2022, BrainBuilders provided services to the Oscar members identified above. Pa45. At the time, BrainBuilders was fully aware that it was not in Optum's network and that seven of the Oscar members had EPO health plans that required them to obtain any autism-related services from in-network providers, as Optum had

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<sup>4</sup> In satisfaction of its obligation to provide an adequate behavioral health services network, Oscar was entitled to rely on its contract with Optum. See N.J.A.C. 11:24B-3.5; N.J.A.C. 11:4-37.1 et seq.

directed. See Pa163-64 at 40:24-42:8; Pa181-82; Pa3639-40. There is no evidence in the record that BrainBuilders collected anything from these patients (or billed them) for the services it provided; it likely promised them that it would accept whatever it could wrest from their insurer.

BrainBuilders now claims that Oscar should pay it an astounding \$9.8 million for treating the eight Oscar members when it was aware at all times that the services it was providing to them were not covered if provided OON. Pa220.

Although the Oscar EPO plans had no OON coverage for autism-related services, members could seek an exception to have particular services covered OON. Such exceptions are granted on a case-by-case basis in limited situations, such as a “continuity of care” (“CoC”), when a member changes insurance during a course of treatment and needs time to transition to a new in-network provider,<sup>5</sup> or when no such provider is available. Pa181-82; Pa1385-86; Pa1388-90. Indeed, BrainBuilders was fully aware at all relevant times that it needed OON exceptions to get paid by Oscar, as is readily apparent from its requests for such exceptions beginning in January 2018. Pa1629-33; Pa613-14.

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<sup>5</sup> In a few instances, Oscar agreed to allow BrainBuilders to continue to provide ABA services to patients who were receiving them under earlier insurance plans but made clear that this was a stopgap and temporary determination until the patient could transfer to an Optum in-network provider. Da74 at 3, 7; Pa1453-461; Pa1440-141; Pa1385-86; Pa1388-90.

Because such exceptions fall outside the plan terms, they must be documented in a specific agreement that sets forth the services authorized and the payment rates – i.e., a “Single Case Agreement” or “SCA.” Pa167-68 at 73:10-75:11; Pa293 at 178:9-179:23. BrainBuilders failed to reach any such SCAs with Oscar (or Optum) for ABA services provided in treating the Oscar members. Pa165-66 at 65:6-68:7; Pa225-28; Pa169-70 at 86:1-93:12.<sup>6</sup>

The absence of any SCAs for ABA services is confirmed by Optum’s contemporaneous clinical notes from 2018 and early 2019. The notes reflect that Optum repeatedly communicated to both BrainBuilders and the patients’ families that it would continue to deny payment because it had been unable to reach an agreement with BrainBuilders, and the patients must transfer to in-network providers. For example, Optum’s clinical notes regarding SS show:

- On January 25, 2018, Optum advised BrainBuilders’ that “we are not currently doing SCAs w/Brainbuilders due to issues with provider not accepting or agreeing to rate.”
- Optum attempted to reach SS’s mother and left a note indicating “[i]f mother calls into queue, please inform her that we are not granting SCA to Brainbuilders because they do not accept or agree to rates. Let her know . . . SCAs are never promised, even when approved. Providers must meet benefit guidelines and reach a financial pay agreement with Optum.”

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<sup>6</sup> The Complaint itself is further evidence of this, as BrainBuilders asserted only quasi-contractual causes of action. Pa46-48. Had there been any SCAs or other written agreements between the parties for these services, BrainBuilders would have been able to assert a cause of action for breach of express contract.

- When the mother called back 15 minutes later, the “CA explained to mother that SCA with BrainBuilders is not possible at this time due to administrative reasons and they had been told this today.”
- On September 4, 2018, SS’s mother was told that, because BrainBuilders “is not willing to work with accommodations we will not be able to offer a SCA for them” and given the contact information for two other providers.
- On October 11, 2018, Shaine Birnbaum of BrainBuilders was told by Optum that because BrainBuilders was “not willing to work with accommodation team . . . SCA will not be offered” for SS.

Pa3639-642. Consistent with these references, Optum repeatedly either furnished the eight patients with lists of in-network behavioral health specialists offering the same services as BrainBuilders or advised them to call the phone number on the back of their insurance card to obtain network referrals for ABA services. Pa530-31; Pa544-45; Pa1440-41; Pa1453-54; Pa1474-75; Pa1388-90.

Notwithstanding all of this, however, BrainBuilders opted to treat the Oscar members anyway without any regard for their actual insurance coverage. BrainBuilders then repeatedly and unsuccessfully (1) sought OON exceptions; (2) submitted and resubmitted claims; and (3) called, faxed and emailed both Oscar and Optum, over and over again – even after Oscar advised BrainBuilders that these practices were themselves causing claim denials and needless delays. Pa163-64, Pa181-82, Pa1955-59, Pa2048-52, Pa2068, Pa2677-78, Pa2681-83. BrainBuilders thus knew exactly what it was doing and made a conscious,

intentional and informed decision to keep treating these patients for thousands of hours over multiple years, knowing there was no promise of payment or implied agreement with Oscar and assuming the risk of non-payment.

## **2. The Undisputed Evidence Showing There was No Agreement**

### **A. Mr. Nussbaum Admits There Was No Agreement.**

The record is devoid of any evidence to support BrainBuilders' allegations that Oscar agreed or promised to pay BrainBuilders for the services provided or establishing an agreement on rates for services. Mr. Nussbaum testified that he attempted to negotiate an "overall" rate agreement for ABA services for Oscar members with Victor Law of Optum, but ultimately did not reach one. Pa169 at 86:17-24; Pa615-16. Mr. Nussbaum explained that "[m]e and Mr. Law never came to a one size fits all rate agreement" and that the negotiation "sort of slipped by the wayside . . . ." Pa169 at 86:17-24; Pa175 at 143:24-145:10. Indeed, Mr. Nussbaum confirmed that he was never able to make a deal and that the negotiation process ultimately failed. Pa175 at 143:24-145:10.

Mr. Nussbaum instead argued that he "explained" his position to Oscar employee Yael Kino in a conversation, and to Oscar employee Antonio Crocco in emails, that "when you have the need for . . . [OON] exceptions, it reverts to" a structure in which "rates unless they were negotiated otherwise would be at billed rates." Pa169 at 87:8-18. But, while Mr. Nussbaum characterized his

alleged statements as “an agreement,” *id.* at 86:25-87:18, he offered no evidence that either Ms. Kino or Mr. Crocco ever agreed with his position or accepted his “explanation” – which is unsurprising, because, as BrainBuilders concedes, Oscar looked exclusively to Optum to handle such rate agreement negotiations with a behavioral health services provider. Pb15. Nor could Mr. Nussbaum identify any email or other document memorializing any such acceptance or “agreement.” Pa169 at 88:5-89:12.

Next, when asked whether Optum and BrainBuilders had ever entered into a specific rate agreement for an Oscar member to receive ABA services, Mr. Nussbaum testified that he could only recall doing so for a single Oscar member “in one specific case.” Pa169 at 88:20-21. That member, however, is not one of the eight members at issue here. Pa169 at 89:13-19. Thus, Mr. Nussbaum’s unequivocal sworn testimony is that BrainBuilders had neither an overall rate agreement with Optum or Oscar, nor specific rate agreements for the ABA services provided to any of the eight Oscar members.

**B. BrainBuilders’ Ongoing Unsuccessful Rate Negotiations Confirm That No Agreement Was Reached.**

The undisputed evidence in the record reflects that Mr. Nussbaum continued to try to get Optum or Oscar to accept his (very high) proposed rates over and over throughout the relevant period, but that those efforts were unsuccessful. When Mr. Nussbaum did not like an Optum proposal or did not

receive a fast enough response, he would turn to Oscar, and then back to Optum again, but no one was willing to accept the inflated rates he proposed.<sup>7</sup> Evidence of the unsuccessful negotiations spans throughout 2018 and 2019. For example:

- In March 2018, Mr. Nussbaum emailed Ms. Kino seeking to enter into an agreement, stating “[w]e would like to request an ... [i]n-network exception ... for patient RG” (Pa182), and attaching a spreadsheet containing three different potential rate “options” for certain ABA services. Pa184-86.
- In an April 2018 email exchange, Ms. Kino asked Mr. Nussbaum whether he was able to finalize ABA rates with Optum, and Mr. Nussbaum responded that “Optum has yet to work out the final details in regard to the SCA for ABA therapy and they are giving us a very hard time.” Pa627-29.
- In August 2018, still having no agreement with or promise of payment from Oscar, Mr. Nussbaum repeatedly emailed Oscar employees AJ Bayer and Mr. Crocco, stating, “we tried multiple times to resolve it but [Optum] never got back to us” and “I just want to make sure that the point is clear that the issue with these claims is that we are waiting for a rate agreement.” Pa188-96.
- In one email, Mr. Nussbaum re-confirmed, on August 13, 2018, that Optum had never approved rates for any ABA codes. Pa188.
- In an internal email later in August 2018, AJ Bayer clearly confirmed that “there are not any pre or post service SCAs on file for the mentioned CPT codes that [Optum] are denying.” Pa672.
- In yet another email chain spanning from late January to April 2019, Mr. Nussbaum again unsuccessfully attempted to convince Oscar to adopt rates from an old agreement that BrainBuilders had reached with a different health insurer. Pa211-16. In the April 2019

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<sup>7</sup> Although Mr. Nussbaum was repeatedly advised by Oscar that any agreement on rates for ABA services had to be reached directly with Optum, he refused to follow that protocol, and repeatedly sought to have Oscar intervene. Pa1933.

communications, Mr. Nussbaum sent yet another proposed rate agreement to Oscar's Raleigh Ross, demonstrating that there was still no promise or agreement. Pa211.

In short, the record contains no evidence that the parties ever reached a rate agreement and undisputed evidence to the contrary.

**C. BrainBuilders' Counsel Confirms in November 2018 That the Parties Had No Agreement.**

On November 14, 2018, after nearly a year of being told "no" by both Optum and Oscar, BrainBuilders' counsel wrote to Oscar's in-house counsel and proved with 100% certainty that there was no agreement and that BrainBuilders had no expectation of payment from Oscar. Pa581-84. Embedded among various complaints about Optum and a threat to sue, BrainBuilders' counsel stated that Optum refused to enter into an agreement with BrainBuilders. In his own words:

- "Optum employees claim that the children will not receive authorizations or an SCA, and those that are receiving services must discontinue services at BrainBuilders and move to an in-network facility that is part of Optum's network of providers."
- "Optum employees are alleging authorization requests, claims, appeals and SCA requests will not be entertained, or in other instances . . . claim they are denied or rejected because the children are continuing services at BrainBuilders instead of at an Optum network provider."
- "Further, the Optum employees demand that these children must switch to providers within Optum's provider network."

BrainBuilders' own counsel thus confirmed that Optum had clearly informed BrainBuilders that it would not pay for treatment for the eight Oscar members and that those patients needed to move to an in-network provider.

**D. BrainBuilders' Allegation that Oscar Agreed to Pay All Claims at Billed Charges Unless The Parties Agreed to a Discount is Contradicted by Mr. Nussbaum's Testimony and Does Not Show an Agreement.**

Mr. Nussbaum could not identify any specific documents supporting BrainBuilders' position that Oscar agreed to pay for all ABA services provided to the Oscar members at BrainBuilders' full billed charges unless the parties specifically agreed to discounted rates. Pa169 at 87:8-18; Pa174 at 139:19-140:17; Pa176-77 at 146:13-157:1. Unable to identify any specifics, Mr. Nussbaum instead claimed that the "agreement" consisted of (1) the universe of all Explanations of Benefits ("EOBs"); (2) "all the authorizations and all the correspondence"; and (3) unspecified verbal approvals. Pa173 at 132:7-16; Pa177-78 at 157:22-158:13. Unable to do anything but point to a massive record, Mr. Nussbaum testified only that the agreement "spoke for itself." Pa173 at 139:2-6.

Mr. Nussbaum next claimed that the fact that a handful of claims were paid at billed charges (years later) "solidifies to an extent" an agreement that Oscar agreed to pay all claims at billed charges. Pa169 at 88:1-3. Not only is this contention expressly contradicted by the ongoing failed rate negotiations

discussed above, but no payments on claims for ABA services were even made to BrainBuilders until 17 months after it started the patients with Oscar EPO plans. Pa3550-56. Oscar's corporate representative, Auroop Roy (a Director of Market Profit and Loss), explained that individual claim payments made years later could have been made for a "multitude of reasons" (e.g., a specific appeal was granted) and do not reflect any global agreement. Pa569 at 373:18-374:14. Nor does BrainBuilders point to any evidence that any particular payment was tendered pursuant to an agreement or promise by Oscar (which it cannot do because its attempts to obtain such an agreement were all flatly rejected). Mr. Nussbaum likewise admitted that Oscar agreeing to pay all of BrainBuilders' claims at full billed charges, essentially with no questions asked, would have been contrary to industry practice because health insurers typically do not pay OON providers their full billed charges. Pa 171-72 at 96:11-98:4.

BrainBuilders' only supposed "evidence" of Oscar's alleged agreement to pay pursuant to SCAs for ABA services consists of a distortion of deposition testimony of two Oscar witnesses, Mr. Roy and Chip Stine (an Oscar employee who managed its relationship with Optum). Mr. Roy's full testimony makes clear that he did not know exactly what SCAs existed for the eight members (as this topic was beyond the scope of his designation pursuant to Rule 4:14-2(c)), and he did not draw a distinction between SCAs for medical services (which the

parties agree Oscar had issued on a small number of occasions for some of the eight patients) and those for ABA and other behavioral health services at issue here. Likewise, nothing in Mr. Roy's testimony actually shows that there were any agreements between the parties with respect to those members. Pa565 at 285:3-20; Pa568 at 288:7-11. Again, as the trial court recognized after its thorough review of the record, if there were SCAs for the specific ABA services performed for the eight individuals, then BrainBuilders would have produced them. Pa15, Pa24-25. They do not exist.

Mr. Stine, a senior manager on Oscar's Network Partnerships Team, stated only that *if* an SCA was in place (not the case here for ABA services), then Oscar would need to honor its terms. Pa3203-05 at 89:14-91:14; Pa3207-08 at 93:20-94:3. Mr. Stine further testified that he had consistently understood throughout his tenure at Oscar that BrainBuilders had failed to reach any overall rate agreement with Oscar, despite negotiations and efforts to do so. Pa3315-16 at 201:4-202:7; Pa3336 at 222:6-12.<sup>8</sup> Mr. Stine also distinguished between authorizations and SCAs and made clear that he was not involved with payments

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<sup>8</sup> Mr. Stine likewise did not admit, in either his deposition testimony or in any emails, that Optum issued authorizations for OON ABA services because it had "no suitable in-network providers," and that it would thus follow its "normal practice" of approving CoC requests in those circumstances. Pb15; Pb36.

pursuant to the latter. As discussed immediately below, BrainBuilders is attempting to mislead the Court by conflating SCAs and authorizations.

**E. BrainBuilders Knew How to Enter Into a Rate Agreement and Did Not Have One for the Members at Issue.**

Both parties knew how to – and did – enter into agreements for the payment of certain OON services for some Oscar members for medical services (such as speech therapy), but never for the ABA or other behavioral health services at issue. In the instances involving medical claims, the parties signed SCAs containing detailed and exact terms identifying the member, the specific authorized services, their duration, and the number of service units approved. Pa165-66 at 65:6-68:7; Pa170 at 92:16-93:12; Pa226-29.<sup>9</sup> For instance, an SCA between the parties for LK for speech and occupational therapy (which are medical services) shows that BrainBuilders knew exactly what an agreement for payment of OON services looked like, demonstrating that it appreciated that it needed such an agreement and would know that it did not have one for ABA services. Pa226-29.

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<sup>9</sup> These SCAs for non-ABA services make clear that (a) they only apply with respect to the specific member and specific services set forth therein; (b) they are not a general network participation agreement between the parties; and (c) to the extent that additional services might prove to be necessary, additional authorization for those services would be required. Pa226-29.

While BrainBuilders cites throughout its brief to certain clinical authorizations it obtained from Optum – mischaracterizing them as SCAs and falsely claiming that they reflect an agreement to pay – those authorizations merely confirm medical necessity (which Oscar does not dispute), thus allowing BrainBuilders to get paid for the referenced services upon reaching a rate agreement (which it never did). The authorizations state on their face that they are not agreements to pay, making clear that “[p]ayment for services described in this letter is subject to the member’s eligibility at the time services are provided . . . [a]n eligibility disclaimer was given at the time of this benefit request.” See, e.g., Pa1436-38; Pa1469-73; Pa1494-98; Pa1499-1502. Indeed, the first authorization provided to BrainBuilders, in December 2017, states on the cover page that “Contracting will reach out for an SCA.” Pa2211-12.

Moreover, as the trial court recognized, Pa19, this is a two-step process. As Mr. Nussbaum himself explained in a prior case, a “medical authorization is merely a statement of a treatment's medical appropriateness and is not a promise to pay.” Pa232 ¶ 5. According to Mr. Nussbaum, “[a]s is common knowledge in the industry . . . medical authorizations (as opposed to commitments to reimburse) concern medical necessity and . . . do not reflect the intentions of the parties concerning reimbursement commitments or SCAs.” Pa233 ¶ 14.

Mr. Nussbaum similarly confirmed in an August 20, 2018 email to AJ Bayer that, with regard to a number of claims for LK, EG and SS, “*we have received authorizations, but not SCAs.*” Pa673. BrainBuilders’ counsel agreed in his November 14, 2018 letter, stating that Optum had refused to enter into agreements to pay BrainBuilders. Pa581-84. There was therefore nothing “unusual” about these authorizations pre-dating the parties’ agreement on a “rate for services.” Pb21. BrainBuilders cannot point to any document in the record indicating on its face that it is an SCA for ABA services.<sup>10</sup>

### **3. Procedural History**

#### **A. Oscar’s Motion and the Parties’ Post-Hearing Submissions**

On October 6, 2023, Oscar moved for summary judgment dismissing all three causes of action in BrainBuilders’ Complaint. Pa122-23. The trial court heard oral argument on the motion on November 3, 2023, and despite the above evidence, generously allowed BrainBuilders another chance to supplement the record and provide evidence of any conduct that would have resulted in it having a reasonable expectation of payment. 1T at 74:19-21, 74:23-75:3, 83:6-8.

Later characterized by the trial court as an un-indexed “mountain of documents,” 2T at 4:24-5:8, 13:24-25, BrainBuilders’ December 22, 2023

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<sup>10</sup> The examples of fully executed documents that are clearly labelled as SCAs – Pa1391-93; Pa1399-1402; Pa1408-09 – are all for medical (e.g., speech and occupational therapy) and not behavioral health services (e.g., ABA).

supplemental submission (to which Oscar responded on January 26, 2024) consisted of five binders containing over 1,000 pages of random documents with no explanation whatsoever as to how any of the contents showed an implied agreement, promise or expectation of payment. See Pa596-600. The trial court held a March 22, 2024 conference with the parties, stating that it was “frustrated beyond words” with BrainBuilders, 2T at 16:5-14, because it did not understand the nature of BrainBuilders’ causes of action as to what claims had been denied or underpaid and why, “what provisions were made” or “which payments . . . were made” or still outstanding.<sup>11</sup> 2T at 6:17, 7:1-5, 9:1-7.

The trial court then gave BrainBuilders a third bite at the apple, offering it the chance to make another supplemental submission in which it could provide a “road map” to the record demonstrating “what’s outstanding, when it was submitted, [and] why it was wrongfully denied.” 2T at 14-15, 18-20. BrainBuilders attempted to do so on April 5, 2024, Da56, and Oscar responded on April 19, 2024. Da74.

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<sup>11</sup> Mr. Nussbaum was posed the same questions but was unable to answer them with any degree of particularity. Pa169 at 86:25-88:12; Pa173-74 at 130:2-6, 132-7:16, 139:6-140:12; Pa176-78 at 147:14-21, 155:25-157:1, 157:22-158:13.

## **B. The Trial Court's Summary Judgment Decision and Order**

In a May 6, 2024 Decision and Order, the trial court granted Oscar's motion for summary judgment.<sup>12</sup> The trial court found that BrainBuilders had failed to present a question of fact regarding the existence of an implied contract, holding that the parties had not reached any meeting of the minds regarding the payment of OON ABA services for the patients. Pa23-26. With respect to BrainBuilders' promissory estoppel cause of action, the trial court found no writing or conduct evidencing a "clear and definite" promise of payment by Oscar to BrainBuilders, nor of any inducement provided for BrainBuilders to continue treating the patients, which is what motivated BrainBuilders to continue pursuing its ultimately fruitless negotiations with Optum and Oscar over a rate agreement. Pa24-29. The trial court similarly rejected the hybrid unjust enrichment/quantum meruit cause of action, finding that while the patients had received benefits from BrainBuilders, Oscar, as their insurer, had not, rendering any expectation by BrainBuilders for compensation beyond

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<sup>12</sup> The Court simultaneously denied BrainBuilders' motion to strike certain affirmative defenses from the Answer. While BrainBuilders makes much of the trial court's failure to address its motion to strike with a separate "statement of reasons" pursuant to Rule 1:6-2, Pb4 Pbn.2, the granting of Oscar's summary judgment motion mooted that motion, rendering this effort unnecessary. See State v. Jasulewicz, 205 N.J. Super. 558, 576 (App. Div. 1985) (finding no error in trial court's failure to separately address argument as to excessiveness of sentence where issue had been mooted by need for retrial).

already agreed-upon amounts in the few SCAs for medical services unreasonable. Pa30-32.

The trial court concluded (Pa33) that:

BrainBuilders was on notice at the time it provided services to Oscar's insureds that the patients it was treating maintained insurance plans with no OON coverage and that BrainBuilders was an OON provider. BrainBuilders continued to provide services to Oscar's insureds with full recognition that there was no insurance coverage available for these patients. Any expectation of payment by BrainBuilders under these circumstances was unique to BrainBuilders and not [premised] upon affirmative representations provided by Oscar.

### **C. BrainBuilders' Motion for Reconsideration**

On May 28, 2024, BrainBuilders moved for reconsideration of the trial court's May 6, 2024 Decision and Order. The trial court denied the motion in a June 20, 2024 Order (Pa39-40) after hearing argument that day, making clear that it had "spent a significant amount of time reviewing the disputes between the parties," including "countless hours going through five or six different looseleaf binders with emails and records of patients." 3T at 12:1-17, 13:2-4. After re-examining BrainBuilders' arguments on reconsideration, the trial court remained "unpersuaded" that it had "made any error in law, or any error in the factual presentation presented by the parties." 3T at 14:23-15:2.

The trial court further confirmed that BrainBuilders had not met its burden of proof under the summary judgment standard because there was "nothing in

writing that has been produced before the Court” evidencing that “there was an obligation to provide compensation for services rendered through some sort of conduct or oral agreement” among the “thousands of pages of documents, emails, conversations, [and] deposition transcripts” in the record. 3T at 13:9-13, 14:14-22. Rather, the record “unmistakably indicated that there was never any acceptance by [Oscar] to entertain to pay for services unless they were identified specifically for specific purposes, for specific patients, [and] on specific instances . . . .” 3T at 14:14-22. The trial court further articulated that BrainBuilders’ efforts to construe the parties’ 2018-19 discussions as evidence of an agreement was a “radical departure from what people would consider to be reasonable under the circumstances.” 3T at 14:10-13.

### **LEGAL ARGUMENT**

BrainBuilders’ appeal is premised on a misreading of the summary judgment standard, as it suggests courts may use any disputed fact – whether or not relevant to the elements of the causes of action asserted or material to the core issues – to justify a full-blown trial on the merits of the entire case. As the trial court recognized, Pa20, this flies in the face of the entire purpose of summary judgment, which is to afford “protection . . . against groundless claims . . . not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command

attention.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 542 (1995) (citing Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)).

### **A. The Summary Judgment Standard**

This Court reviews a grant of summary judgment de novo under the same standard used by the trial court. Templo Fuente De Vida Corp. v. National Union Fire Ins. Co., 224 N.J. 189, 199 (2016). As the trial court recognized, Pa20, “[u]nder that standard, summary judgment will be granted when ‘the competent evidential materials submitted by the parties,’ viewed in the light most favorable to the non-moving party, show there are no ‘genuine issues of material fact’ and that ‘the moving party is entitled to summary judgment as a matter of law.’” Premier Physician Network, LLC v. Maro, 468 N.J. Super. 182, 192 (App. Div. 2021) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

“Summary judgment should be granted . . . ‘after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.’” Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986)). “Neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing” it. Bhagat, 217 N.J. at 38.

Where “the moving party satisfies its burden of proof” through the presentation of sufficient evidence, “the burden shifts to the non-moving party to present evidence that there is a genuine issue for trial” on each element of a cause of action. Investors Bank v. Torres, 457 N.J. Super. 53, 64 (App. Div. 2018). The non-movant “must do more than simply show that there is some ‘metaphysical doubt’ as to the material facts” or rely upon “[b]are conclusory assertions” lacking factual support. Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012). “[S]peculation” and “fanciful arguments” are not “[c]ompetent opposition” to the motion. Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (internal quotations and citation omitted). A “[l]ack of clarity on a particular point is not equivalent to a dispute over an issue of material fact.” Horizon, 425 N.J. Super. at 32.

**B. The Trial Court Did Not Make Factual Determinations or Fail to Grant Inferences in BrainBuilders’ Favor.**

BrainBuilders argues that the trial court applied the incorrect summary judgment standard, falsely accusing it of placing the burden of proof on BrainBuilders from the outset, deciding disputed issues of material fact, or at a minimum, failing to grant all favorable inferences to BrainBuilders. Pb3; Pb31-32. In doing so, BrainBuilders contends that it was improperly directed to prove its case instead of being allowed to point to disputed facts. Pb31-32.

BrainBuilders ignores that, once the movant presents sufficient supporting evidence, the burden of proof shifts to the non-movant to demonstrate, through competent evidence, that a genuine issue of material fact exists. Globe Motor Co. v. Igdaley, 225 N.J. 469, 479-80 (2016); Torres, 457 N.J. Super. at 64. “Factual disputes that are merely ‘immaterial or of an insubstantial nature’ . . . do not preclude the entry of summary judgment.” Miller v. Bank of Am. Home Loan Servicing, L.P., 439 N.J. Super. 540, 547 (App. Div. 2015) (quoting Brill, 142 N.J. at 523). Here, the material concerning whether Oscar had reached an agreement with, or made a clear promise of payment to, BrainBuilders regarding payment for OON ABA services are undisputed, and other facts having nothing to do with these core questions are immaterial.

As discussed below, BrainBuilders did not meet its burden of proof by coming forward with competent evidence demonstrating a material factual dispute as to the elements of any of the three causes of action actually pleaded in its Complaint. That is because the record contains no evidence of either an implied agreement between the parties or a discrete promise of payment by Oscar. Without such evidence to support the elements of the prima facie causes of action asserted, BrainBuilders has nothing to put in front of a jury at trial. It was not the trial court’s obligation – and is certainly not this Court’s obligation

– to scour the thousands of pages in the multi-volume Appendix to find some way of salvaging those deficient causes of action.

**POINT I**

**SUMMARY JUDGMENT ON THE IMPLIED CONTRACT CAUSE OF ACTION WAS PROPER BECAUSE THERE IS NO EVIDENCE THAT THE PARTIES REACHED ANY AGREEMENT**

To be enforceable, an implied-in-fact contract requires every element of an express contract to be proven: offer, acceptance and consideration, Smith v. SBC Commc’ns, Inc., 178 N.J. 265, 283 (2004), and terms that are sufficiently definite and specific to be understood and realistically enforced by allowing a court to ascertain the performance to be rendered with reasonable certainty. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (holding that an absence of a meeting of the minds and failure to include essential terms prevents recognition of parties’ obligations); Satellite Ent’mt Ctr., Inc. v. Keaton, 347 N.J. Super. 268, 277 (App. Div. 2002) (“the [alleged] contract [is] so vague [and] indefinite that it [can]not realistically be enforced”). In addition, the plaintiff must establish the manifestation of each of the above elements through an interpretation of the conduct of the parties in light of surrounding circumstances, in place of written statements. Wanaque Borough Sewage Auth. v. Township of W. Milford, 144 N.J. 564, 574 (1996).

To satisfy this additional element, the plaintiff must demonstrate that the conduct of the defendant, as viewed by a reasonable person in the relevant custom or trade, revealed a promise to pay for goods or services provided by the plaintiff. Saint Barnabas Med. Ctr. v. County of Essex, 111 N.J. 67, 77 (1988) (reversing judgment in favor of hospital on implied contract claim where it had failed to come forward with any “objective proofs” of conduct by defendant or its agents manifesting either that the parties had reached any mutual agreement or that defendant had made any promise of payment). Although BrainBuilders cites numerous authorities for the abstract propositions that conduct can give rise to an implied contract, Pb32-33; Pb39, or that courts can sometimes fill in indefinite price terms in commercial contracts, Pb37, none of these authorities alters the fundamental proposition that, in the specific context of dealings between healthcare providers and payors, the defendant’s objectively viewed conduct must reveal a clear and definite assent to pay for the services provided by the plaintiff at an amount certain. Saint Barnabas, 111 N.J. at 77.

BrainBuilders can point to no evidence in the record of an agreement by Oscar to pay at billed charges or any other agreed-upon rate for any services. For example, while BrainBuilders argues in conclusory fashion that Oscar “offered to compensate BrainBuilders for its services,” did so “through multiple communications, both written and oral,” Pb34-35, and made an “offer to

continue providing services to the Insured Children in exchange for payment of its claims,” Pb36, BrainBuilders fails to identify even a single such specific communication, nor the specific writings or conversations in which the supposed “offer” was purportedly made or accepted. To the contrary, Mr. Nussbaum admitted that he was never able to make a deal and that the negotiation process just “slipped by the wayside.” Pa169 at 86:17-24; Pa175 at 143:24-145:10. The parties’ ongoing email exchanges, as well as the November 14, 2018 letter from BrainBuilders’ counsel, likewise demonstrate the absence of an agreement between the parties over their entire course of dealing. Pa183-86; Pa187-209; Pa210-16; Pa581-84. In fact, there would have been no reason for BrainBuilders and Oscar/Optum to continue negotiating as late as April 2019 if a global agreement had already been reached. See Pa183-86; Pa187-209; Pa210-16.

In light of this undisputed evidence, the trial court correctly found that BrainBuilders had “failed to present a question of fact regarding the existence of an implied contract with [Oscar] as it relates to the claims of [OON] patients,” which BrainBuilders had known did not exist “from the moment that it began treating” them. Pa23. The trial court agreed with Oscar that the only agreements evidenced by the parties’ communications were the limited number of SCAs for medical services only, and that BrainBuilders had “come forward with no evidence to suggest that” the parties had reached any agreement “that was

beyond the language of those written documents.” Pa24. In particular, the trial court found that “there was neither any agreement nor any promise by Oscar to pay BrainBuilders for the ABA services provided to Oscar’s members,” either “at billed charges or any other agreed rate for any services,” and that the “well-documented period of protracted negotiations confirms that BrainBuilders and Oscar/Optum needed to continue negotiating because of the absence of an agreement on the issue of reimbursement for services.” Pa24-26.

BrainBuilders attempts to manufacture a factual dispute as to whether the parties had reached an agreement by arguing that (1) any negotiations were actually for “discounts” off of its already agreed-to full billed rates per its supposed arrangement allowing it to treat additional Oscar members; and (2) BrainBuilders had entered into SCAs for all eight patients at full billed rates. Pb2; Pb16-17; Pb20-25; Pb35; Pb38; Pb40; Pb43. With respect to the first contention, BrainBuilders’ citation to the record is to a sham certification from Mr. Nussbaum submitted in opposition to Oscar’s summary judgment motion, Pa256-66, which was properly disregarded by the trial court because it contradicted his own sworn deposition testimony and his numerous emails with Oscar/Optum employees in 2018 and 2019.<sup>13</sup> See Pb16-24; Pb27; Pb35.

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<sup>13</sup> See Shelcusky v. Garjulio, 172 N.J. 185, 194 (2002) (affidavit submitted in opposition to summary judgment motion should be disregarded under sham

BrainBuilders’ contention that the full billed rates are essentially default rates unless negotiated otherwise also defies common sense. BrainBuilders cannot point to any evidence (other than Mr. Nussbaum’s certification) that Oscar ever agreed to pay BrainBuilders’ full billed rates. To the contrary, every shred of evidence in the record demonstrates that there was no such agreement, and there could be no “default rate” when there was no agreement in the first place. Of course, if there was an agreement, then there would have been no reason why BrainBuilders continuously tried to negotiate rates.<sup>14</sup>

The trial court also expressly rejected BrainBuilders’ second contention, recognizing that there were no SCAs for ABA services and that Optum’s authorizations – which BrainBuilders mischaracterizes as SCAs – were not implied contracts. Pa24-25. Critically, Mr. Nussbaum conceded that such documents do not “reflect the intentions of the parties concerning reimbursement commitments . . . .” Pa233 at ¶ 14. But BrainBuilders also knew

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affidavit doctrine when it “contradicts the affiant’s prior deposition testimony” and that “contradiction is unexplained and unqualified by the affiant”).

<sup>14</sup> BrainBuilders also cites to a December 18, 2017 email from Oscar (Pa601-06), falsely asserting that it shows that Oscar agreed to “accept” a CoC exception for an unidentified patient because “Oscar knew that BrainBuilders was the only provider that could treat the Insured Children during the relevant time period.” Pb18-19; Pb35. All that the email actually says is that BrainBuilders could apply for coverage on a CoC basis (which it did, and that request was rejected). The email contains no admission that there were no other adequate providers.

exactly what an SCA looked like and entered into them at times for specific medical services, see Pa226-29, yet it cannot point to any such agreement for ABA services. Thus, while BrainBuilders argues that Optum “continual[ly] iss[ued]” over 100 “written SCAs . . . for ABA services” to the Oscar members, Pb35, it cannot identify even one, and instead cites only to authorizations that failed to ripen into SCAs because the parties never reached a rate agreement. To the contrary, Optum repeatedly told BrainBuilders “no” and advised the patients that they needed to transition to in-network providers if they wished to have their claims for ABA services covered under their Oscar plans. Pa581-84; Da74; Pa1453-61; Pa1440-41; Pa1385-86; Pa1388-90.

BrainBuilders also argues, independently of the improper Nussbaum certification, that an agreement to pay all OON ABA claims at its full billed charges arose when Oscar and Optum “in part, performed” and “signaled their assent to BrainBuilders’ continued treatment of the Insured Children, who did not have in-network options, by paying [some of] BrainBuilders’ claims.” Pb37. Such payments, however, could not possibly be evidence of an agreement because they were not made until a full 17 months *after* BrainBuilders started treating the Oscar members in early 2018 without an agreement, following month after month of flat denials and demands that the Oscar members switch to in-network providers. Pa3550-56. And even BrainBuilders admits that the

payments were never made in consistent amounts or that they corresponded to any particular authorizations at any point in time.<sup>15</sup> Pb27-28; Pb37. In the end, BrainBuilders points to no evidence in the record that any remittance was tendered pursuant to a payment or rate agreement, as both Oscar and Optum had consistently rejected efforts by BrainBuilders to obtain one.

BrainBuilders alternatively argues that an implied contract between the parties came into existence merely by virtue of the fact that it provided Oscar with its standard schedule of billed charges/rates for ABA services, so Oscar knew at all times what those rates were but never specifically objected to them as unreasonable. Pb2; Pb22; Pb38; Pb43. However, a contract cannot spring up from a party's unilateral decision to perform services followed by sending the other party its rates. Contract formation requires mutual assent, and the record is replete with evidence that both Oscar and Optum repeatedly refused to accept BrainBuilders' proposed rates or to enter into SCAs for ABA services.

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<sup>15</sup> It is hard to see the relevance of BrainBuilders' repeated citation to "Optum and Oscar's internal communications . . . that they normally paid [OON] providers 80% of the UCR for a particular service." Pb37. Since BrainBuilders admits that Oscar did not share this alleged information, Pb26, it could not possibly be the basis of any implied agreement between the parties. Equally irrelevant are proposed rate schedules that Optum provided to BrainBuilders for LK in October and November 2018, Pb37-38, in light of Mr. Nussbaum's deposition testimony and 2018-19 email exchanges with Oscar and Optum, in which it is clear that BrainBuilders and Optum had rejected one another's proposed rates at various points in time. Pa169 at 86:17-24, 88:20-21, 89:13-19; Pa175 at 143:24-145:10; Pa183-86; Pa187-209.

Accordingly, because BrainBuilders cannot identify any evidence demonstrating an implied contract with specific terms or rates, this Court should affirm the trial court's dismissal of its implied contract cause of action.<sup>16</sup>

**POINT II**

**SUMMARY JUDGMENT ON PROMISSORY ESTOPPEL WAS PROPER BECAUSE THERE IS NO EVIDENCE THAT OSCAR MADE A CLEAR AND DEFINITE PROMISE OF PAYMENT TO BRAINBUILDERS**

BrainBuilders' theory of promissory estoppel is as flawed as its efforts to identify an implied payment agreement between the parties. A plaintiff can only make out a promissory estoppel cause of action if it satisfies its burden of proving the existence of four elements: (1) a clear and definite promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) reasonable reliance on the promise, and (4) detriment of a definite and substantial nature resulting from the reliance. Toll Bros. v. Board of Chosen Freeholders of Cty. of Burlington, 194 N.J. 223, 253 (2008). There is no support in the record for any of these elements, as Oscar made no promises to

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<sup>16</sup> BrainBuilders was likewise unable to meet the elements of its cause of action for breach of implied contract (or promissory estoppel) with respect to YT, the one Oscar member who subscribed to a plan that included OON coverage. In that regard, BrainBuilders can point to no evidence of any specific agreement with or promise by Oscar to reimburse BrainBuilders at rates any different from those expressly set forth in YT's PPO plan. Indeed, the Complaint is silent as to YT and fails to distinguish between her and the seven other members.

BrainBuilders to pay OON ABA claims. Nor can BrainBuilders demonstrate that it reasonably relied to its detriment on anything that Oscar wrote or said.

**A. There Is No Evidence That Oscar Made a Clear and Definite Promise of Payment to BrainBuilders.**

The first element of a promissory estoppel cause of action, a “clear and definite promise,” is an essential condition of recovery. Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat’l Bank, 163 N.J. Super. 463, 479 (App. Div. 1978). To meet the promise element, the plaintiff must show that it had more than a general expectation of a certain outcome and must instead prove that the defendant made a specific representation to it. East Orange Bd. of Educ. v. New Jersey Schs. Constr. Corp., 405 N.J. Super. 132, 147-48 (App. Div. 2009). There cannot be a “clear and definite promise” by implication. That is because an implication, by definition, cannot be clear and unambiguous. Malaker, 163 N.J. Super. at 480 (“We do not regard this kind of implied undertaking . . . as the ‘clear and definite promise’ that is required”).

The promissory estoppel cause of action suffers from the same deficiencies as the implied contract cause of action, as BrainBuilders cannot point to any writing or conduct that rises to the level of a “clear and definite promise” to make payments at any set of rates. To the contrary, BrainBuilders knew, based on the lengthy ongoing negotiations, that there was no specific promise, as further evidenced by Mr. Nussbaum’s admission that the parties

were never able to come to terms (and that the negotiation “fell by the wayside”), as well as his concession that any such promise would have been inconsistent with industry practice. See Pa169 at 86:17-24, 88:20-21, 89:13-19, Pa171-72 at 96:11-98:4, Pa175 at 143:24-145:10, Pa183-86, Pa 187-209.

Not surprisingly then, Mr. Nussbaum failed to point to any specific promise made by Oscar, instead vaguely referencing entire collections of email exchanges, EOBs, authorizations, and assorted unspecified correspondence and conversations. Pa169 at 87:8-18, 88:5-89:12; Pa173 at 132:7-16; Pa174 at 139:18-140:17; Pa176 at 146:13-23; Pa177-78 at 157:22-158:13. None of these materials contains any express promise that could make out a viable cause of action for promissory estoppel. The record instead shows the exact opposite – an ongoing series of disagreements between Oscar and BrainBuilders about the fact BrainBuilders was continuing to provide services and the rates for those services. Pa169 at 86:17-24, 88:20-21, 89:13-19, Pa171-72 at 96:11-98:4, Pa175 at 143:24-145:10; Pa183-86; Pa187-209; Pa210-16, Pa3638-2; Pa3639-642; Pa3414. The authorizations that Optum provided to BrainBuilders similarly do not constitute a promise of payment, as even Mr. Nussbaum admitted that a “medical authorization is merely a statement of a treatment's medical appropriateness and is not a promise to pay,” Pa232-33 ¶¶ 5, 14, and

that the authorizations received in August, March, and July 2018 for LK, EG and SS were not SCAs. Pa1660-664; Pa16410-644; Pa1442-448.

Nor does the fact that Optum paid certain ABA claims years later constitute a “promise” by Oscar to do anything, let alone to pay all claims at any particular rate. See Pa569. To the contrary, the payments highlighted by BrainBuilders at Pb27-28 and Pb37 do nothing to suggest that there was an understanding of any sort between the parties at the time that the services were rendered and do not support promissory estoppel.<sup>17</sup>

In light of this record, the trial court found that “[n]o promises were made to BrainBuilders,” Pa24, and that BrainBuilders had not “presented a prima facie case of promissory estoppel” because it could not “demonstrate the existence of any writing or conduct that rises to the level of a ‘clear and definite promise’ to make payments for reimbursement.” Pa29. The trial court elaborated that the “lack of a promise for reimbursement was the primary factor which motivated

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<sup>17</sup> The citation to the “payment chart” which supports these contentions “was prepared for the purposes of this appeal.” Pb27, Pbn.16. This practice is impermissible. See Burt v. West Jersey Health Sys., 339 N.J. Super. 296, 311 n.3 (App. Div. 2001) (striking medical records and deposition testimony not presented to trial court, but that “substantiated” other record evidence, and holding that this Court will not consider evidentiary material which was not part of the record below). Regardless, the chart omits critical data from the actual record, most importantly, the dates that those payments were made, which are more accurately reflected at Pa3550-56. Oscar thus respectfully requests that this Court disregard this misleading document and strike it from the record.

BrainBuilders to continue the process of extended negotiations.” Pa29. Those negotiations, however, “failed to produce an agreement on the payment for services,” which led directly to BrainBuilders filing suit. Pa29.

Nor do any of the statements and communications cited by BrainBuilders, Pb40, rise to the level of a clear and definite promise by Oscar to pay OON ABA claims at any particular payment structure. Specifically:

- As discussed at length above, there were no “written SCAs” for ABA services provided to any of the eight patients.
- Oscar’s “direction” of BrainBuilders to negotiate rates with Optum cannot reasonably be construed as a promise to pay any or all OON ABA claims but was merely an invitation to negotiate a rate agreement that never materialized (as well as a reminder that Oscar had specifically delegated that function to Optum).
- The email from Ms. Kino in which she stated to Mr. Nussbaum that Oscar “want[ed] to make sure BrainBuilders is getting reimbursed for services that [were then] taking place” was immediately followed by an acknowledgement from Mr. Nussbaum that “Optum has yet to work out the final details in regard to the SCA for ABA therapy and they are giving us a very hard time.” See Pa184-86.

Because these items do not come within shouting distance of a clear and definite promise, BrainBuilders argues that this Court recognized an exception to the Malaker requirement in Pop’s Cones, Inc. v. Resorts International Hotel, Inc., 307 N.J. Super. 461 (App. Div. 1998). BrainBuilders suggests that New Jersey courts will “relax the strict adherence to” the Malaker formula “for determining whether a *prima facie* case of promissory estoppel exists,” Pb41;

Pbn.21 (quoting Pop's Cones, 307 N.J. Super. at 484), in circumstances where the parties had started contract negotiations that ultimately stalled. Pb41-42. But that is not what this Court held in Pop's Cones.

Pop's Cones did not abrogate the “clear and definite promise” requirement the very minute that parties start negotiating contract terms, but rather, found evidence of the promise in that specific case (conveyed through the contract negotiation process there) in the form of a specific lease offer by the defendant boardwalk casino owner to the plaintiff TCBY Yogurt retail franchisee to relocate its operation to the premises by operating a vending cart, so that it could earn profits during the summer (when the demand for its product was naturally at its highest). Pop's Cones, 307 N.J. Super. at 472. Courts have thus limited Pop's Cones to its specific facts and declined to recognize broad exceptions to the Malaker “clear and definite promise” requirement. See, e.g., Read v. Profeta, 397 F. Supp. 3d 597, 631-32 (D.N.J. 2019) (granting summary judgment on promissory estoppel cause of action and distinguishing Pop's Cones where the “claimed promises” in connection with efforts to launch new magazine were “too uncertain and contingent to be enforced via promissory estoppel”). Unlike in Pop's Cones, there is no evidence in the record here of anything specific or definite showing a promise by Oscar of payment of OON ABA claims to

BrainBuilders – whether made while the parties were negotiating rates between March 2018 and April 2019, or at any other time.

Moreover, this Court also carefully noted that it was only willing to consider such softer evidence of a promise in Pop’s Cones because the plaintiff was not claiming the benefit of a contractual bargain and seeking damages on a going-forward basis. Instead, the plaintiff was only seeking to recover money that it had already spent out-of-pocket as a result of surrendering its prior location. Pop’s Cones, 307 N.J. Super. at 469. The trial court recognized this as well in its May 6, 2024 Decision and Order, noting that BrainBuilders has no damages in the form of out-of-pocket losses because the Oscar members themselves – not Oscar – were ultimately obligated to pay BrainBuilders. Pa28. What BrainBuilders is seeking here are expectation-based contract damages in the form of payment of claims for ABA services provided OON to Oscar members from 2018 to 2022. Pop’s Cones is thus of no help to BrainBuilders.

**B. BrainBuilders Did Not and Could Not Have Reasonably Relied on Anything That Oscar Said or Did.**

BrainBuilders also cannot recover on a promissory estoppel claim without a showing that it reasonably relied on a promise to its detriment. To meet the reliance element, a plaintiff must show that it would have proceeded differently “in the absence of the alleged promise.” Malaker, 163 N.J. Super. at 482 (no evidence that funds from allegedly promised bank loan were forthcoming or

borrower could not have raised and did not secure needed money from other sources). A plaintiff likewise cannot reasonably rely on a defendant's statements as "an immutable source of obligation" where it knew or should have known of contrary facts rendering its reliance inherently unreasonable. Toll Bros., 194 N.J. at 253 (in refusing to approve and pay for road improvements, County could not reasonably have relied on statements by real estate developer to proceed with development exactly as described in light of its experience with land use law allowing developer to seek modifications based on changed circumstances); see also Kress v. La Villa, 335 N.J. Super. 400, 413 (App. Div. 2000) (law firm could not have reasonably relied on municipality's promise to pay legal fees where firm should have known that town had not followed proper procedures to enter into professional services contract).

The record here could not possibly make clearer that BrainBuilders' wounds are entirely self-inflicted, as it chose to treat the patients from 2018 to 2022 knowing full well that it was not in Oscar's network and that (with one exception) the patients had no OON coverage. Pa163-64; Pa181-82; Pa3639-3642. Moreover, BrainBuilders was clearly and repeatedly told that (1) the patients had no coverage; (2) no exception would be granted; and (3) the patients needed to transfer to in-network providers. Pa165-70; Pa293; Pa181-82; Pa581-84; Pa529-43; Pa544-46; Pa1440-41; Pa1474-75; Pa1385-86.

Perhaps most importantly, both Oscar and Optum consistently denied and rejected efforts by BrainBuilders to obtain a payment agreement. Pa169 at 86:17-24, 88:20-21, 89:13-19; Pa171-72 at 96:11-98:4; Pa183-86, Pa187-209, Pa210-16. BrainBuilders, however, ignored this and opted to just keep treating the patients without helping them to transfer or even sending any of them a single bill. It knew exactly what it was doing and made a conscious, intentional and informed decision to assume the risk of non-payment. It thus cannot show any reasonable reliance to its detriment on any statement or act by Oscar.

BrainBuilders misses the mark with its argument that the resulting “substantial injustice” from actually looking to the members’ families to make payment is the very reason why the doctrine of promissory estoppel exists. Pb44. Oscar’s only obligation was to provide a health plan that covered such behavioral health services, which it did. Pa145-55; Pa157-60. But, according to those health plans, the services had to be performed by an in-network provider (or subject to a specific OON exception). Pa163-64 at 40:24-42:8; Pa181-82; Pa529-43; Pa544-46; Pa1440-41; Pa1453-61; Pa1474-75; Pa1388-90. It was not reasonable for BrainBuilders to keep treating the patients and then demand an insurance recovery when it knew that none was available.

Likewise, the facts that (1) Oscar invited BrainBuilders to discuss a rate agreement with Optum; or (2) Optum continued issuing medical necessity

authorizations for OON ABA services for some of the eight patients when sought (which, as discussed above, are not SCAs), Pb42-43, do not give rise to a showing of reasonable reliance on BrainBuilders' part. Under these circumstances, BrainBuilders cannot demonstrate that it reasonably relied to its detriment on any promise of payment allegedly made by Oscar. See Swider v. Ha-Lo Indus., Inc., 134 F. Supp. 2d 607, 620 (D.N.J. 2001) (distinguishing Pop's Cones and granting summary judgment on promissory estoppel claim based on plaintiff's demotion and later termination after alleged promise of being hired as sales manager; detrimental reliance element was not satisfied based on alleged rejection of competing job offer because defendant was unaware of offer and made no representations to plaintiff suggesting he should reject it).

### **POINT III**

#### **SUMMARY JUDGMENT ON THE THIRD CAUSE OF ACTION WAS PROPER BECAUSE BRAINBUILDERS DID NOT CONFER ANY BENEFIT ON OSCAR**

BrainBuilders' third cause of action asserts two related, quasi-contractual theories: unjust enrichment and quantum meruit. Neither is legally viable within the context of BrainBuilders' dispute with Oscar.

There are two elements of an unjust enrichment cause of action: (1) either (a) the defendant received a benefit conferred by the plaintiff; or (b) the plaintiff expected remuneration from the defendant at the time that it conferred a benefit;

and (2) the retention of the benefit without payment would be unjust because the failure to pay remuneration enriched the defendant beyond its contractual rights. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994); Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 317 (App. Div. 2017). Thus, to meet these elements, there must either be “some direct relationship between the parties or a mistake on the part of the person conferring the benefit.” Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109 (App. Div. 1966).

There are four elements of a cause of action for quantum meruit: (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation for the services; and (4) the reasonable value of the services. Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 172 N.J. 60, 68 (2002). Thus, BrainBuilders must have provided specific services to Oscar that Oscar accepted.

Courts have consistently held that, under New Jersey law, an insurance carrier cannot be deemed to have received a “benefit” when a healthcare provider treats the carrier’s members, as the benefit from the services provided accrues only to the patient. Most recently, this Court affirmed the Law Division’s grant of summary judgment dismissing identical unjust enrichment and quantum meruit causes of action asserted by BrainBuilders against Optum and two health insurers, holding that “BrainBuilders was required to

demonstrate it performed or conferred a benefit upon defendants and expected remuneration.” BrainBuilders, LLC v. Optum, Inc., 2024 N.J. Super. Unpub. LEXIS 671 at \*21 (App. Div. Apr. 19, 2024) (unpub.); Da74.<sup>18</sup> This Court found BrainBuilders had not met its burden because it (1) “failed to explain why it continued to expect compensation or identify services provided to specific patients for which it expected to be paid”; and (2) “conferred only benefits to the insured members and not defendants.” Id.

BrainBuilders’ unjust enrichment/quantum meruit cause of action is no different from those dismissed as a matter of law by this Court (and the federal courts). BrainBuilders’ autism-related behavioral health services were provided to the eight individuals – not to Oscar itself – and it is those members who accepted those services from BrainBuilders. Oscar received and accepted nothing from BrainBuilders. Thus, like in the above-cited cases, the only benefit provided was to the patients, not to Oscar. Nor could BrainBuilders have

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<sup>18</sup> Haghighi v. Horizon Blue Cross Blue Shield of N.J., 2020 U.S. Dist. LEXIS 157246, at \*14 (D.N.J. Aug. 31, 2020) (unpub.); Plastic Surgery Ctr., LLC v. Oxford Health Ins., Inc., 2019 U.S. Dist. LEXIS 169146, at \*15 (D.N.J. Sept. 30, 2019) (unpub.); Plastic Surgery Ctr., P.A. v. Cigna Health & Life Ins. Co., 2019 U.S. Dist. LEXIS 72174, at \*23 (D.N.J. Apr. 30, 2019) (unpub.); Advanced Orthopedics & Sports Med. Inst. v. Anthem Blue Cross Life & Health Ins. Co., 2018 U.S. Dist. LEXIS 212024, at \*11 (D.N.J. Dec. 14, 2018) (unpub.); Broad St. Surgical Ctr., LLC v. UnitedHealth Grp., Inc., 2012 U.S. Dist. LEXIS 30466, at \*23 (D.N.J. Mar. 6, 2012) (unpub.). (Da5, Da16, Da24, Da33, Da40). Pursuant to Rule 1:36-3, Oscar certified to the trial court that it was unaware of any unpublished authority reaching a different conclusion. (Da3 ¶ 14, Da74.)

reasonably expected remuneration from Oscar at the time that it provided the services because (1) it knew that the Oscar members had insurance plans with no OON coverage; and (2) as evidenced by the Optum clinical notes and the letter from BrainBuilders’ own counsel, BrainBuilders had been told specifically that it would not be paid for the ABA services rendered to the patients. Pa163-64 at 40:24-42:8; Pa181-82; Pa3636-42; Pa581-84.

The trial court agreed, holding that there was no unjust enrichment because Oscar, “as the insurer[], cannot be said to derive a benefit from” the services provided to the eight patients. Pa30. Rather, BrainBuilders had “merely rendered medical services to patients, and any expectation for compensation exceeding the amounts set forth in the” parties’ few SCAs for the discrete medical services provided to those patients “is unreasonable.” Pa31. The trial court likewise rejected the quantum meruit theory, holding that Oscar, as an insurer, similarly had not “received any benefit in the Plaintiff performing services to its insureds” because “Courts have consistently held that under New Jersey law, an insurance carrier cannot be deemed to have received a ‘benefit’ when a healthcare provider treats the carrier’s members, as the benefit from the services provided accrues only to the patient.” Pa31-32.

Ignoring the undisputed facts about both the nature of the relationship among BrainBuilders, the patients and Oscar, and Oscar’s longstanding

insistence that the patients transfer to in-network providers, BrainBuilders relies on dicta in Plastic Surgery Center, P.A. v. Aetna Life Insurance Company, 967 F.3d 218 (3d Cir. 2020), and its cited holding in Rabinowitz v. Massachusetts Bonding and Insurance Company, 119 N.J.L. 552 (1938), to suggest that New Jersey law is somehow unsettled as to whether BrainBuilders can satisfy the elements of the third cause of action. Pb45-47. Initially, these arguments were not advanced in the trial court, and they have thus been waived. Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (holding that appellate court will decline to consider argument not raised in trial court when party making it had opportunity to do so, unless argument involves jurisdictional or public interest concerns). Regardless, neither case is helpful to BrainBuilders.

BrainBuilders notes that, in affirming the dismissal of an unjust enrichment cause of action on unrelated ERISA pre-emption grounds in Plastic Surgery Ctr., the Third Circuit commented that the “benefit conferred, if any, is not the provision of the healthcare services per se, but rather the discharge of the obligation the insurer owes to its insured.” Pb46 (quoting Plastic Surgery Ctr., 967 F.3d at 240). The obligation at issue there was contractual, as the Third Circuit found that an oral agreement to pay claims had arisen between the parties in light of the evidence in the record. Plastic Surgery Ctr., 967 F.3d at 224.

Here, however, Oscar’s only obligation under the specific health plans that its members had purchased was to pay for services rendered by an in-network provider. Oscar and Optum were upfront with both BrainBuilders and the members about the need for the members to transfer to an in-network provider and repeatedly stated that OON services would not be covered as a matter of course. Pa163-64 at 40:24-42:8; Pa181-82; Pa3636-42; Pa581-84. BrainBuilders then took it upon itself to provide ABA services to the patients anyway in an attempt to keep their business, and then tried to squeeze Oscar for payments to which BrainBuilders was not entitled.<sup>19</sup>

BrainBuilders then cites to Rabinowitz for the proposition that an insurer owes “a legal duty to provide the person injured with medical or surgical attendance” under circumstances in which “the physician . . . dutifully intervene[d] in the [insurer’s] affairs and perform[ed] its obligation.” Pb46 (quoting Rabinowitz, 119 N.J.L. at 556-57). In Rabinowitz, the defendant insurer had written two letters to a hospital, expressly promising payment for the subject emergency services to treat the seriously injured insured patient. Rabinowitz, 119 N.J.L. at 553-54. But, again, that was not the case here.

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<sup>19</sup> The members were not harmed by this practice, as none of them has ever seen a bill from BrainBuilders, which apparently told them that they would not be charged beyond any recovery received from Oscar.

While Oscar agrees that it “had legal obligations to cover ABA therapy for the Insured Children,” Pb47, BrainBuilders’ contention that it “did not have the in-network providers to do so,” *id.*, is contradicted by the record, which shows that Optum had a DOBI-approved provider network, whose names were repeatedly furnished to BrainBuilders and the patients or were available to them by phone. Pa529-43; Pa544-46; Pa1440-41; Pa1453-61; Pa1474-75; Pa1388-90. BrainBuilders thus interfered with, and did not discharge, Oscar’s legal obligation by continuing to treat the patients, and there is no “unjustified windfall” to Oscar from not paying the at-issue claims for ABA services that BrainBuilders was asked not to perform. Pb18; Pb47-48. To hold otherwise would allow BrainBuilders (or any other OON health care provider) to perform services that it is expressly told not to perform and then claim unjust enrichment when the insurer refuses to pay for the services. If that were the law, the terms of the patients’ actual health plans would become entirely irrelevant.

### **CONCLUSION**

For the above reasons, Oscar respectfully submits that this Court affirm the trial court’s Opinion and Order granting summary judgment to Oscar on all of the causes of action asserted in BrainBuilders’ Complaint.

Dated: November 25, 2024

Respectfully submitted,

**GREENBERG TRAUIG, LLP**  
Attorneys for Defendant-Respondent  
Oscar Garden State Insurance Corporation

By: /s/ David Jay  
David Jay

Peter Slocum, Esq. (I.D. No. 037762010)  
Anish Patel, Esq. (I.D. No. 382142021)  
**LOWENSTEIN SANDLER**  
One Lowenstein Drive  
Roseland, New Jersey 07068  
973-597-2500  
*Counsel for Plaintiff-Appellant BrainBuilders, LLC*

BRAINBUILDERS, LLC,  Plaintiff-Appellant,  -against-  OSCAR GARDEN STATE INSURANCE CORPORATION, AND XZY CORPORATIONS 1-5,  Defendants- Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003514-23  CIVIL ACTION  ON APPEAL FROM ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, OCEAN COUNTY  DOCKET NO. OCN-L-1714-19  SAT BELOW: HON. CRAIG L. WELLERSON, J.S.C.
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**REPLY FOR PLAINTIFF-APPELLANT BRAINBUILDERS, LLC**

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Peter M. Slocum (I.D. No. 021222012)  
Anish Patel (I.D. No. 382142021)  
*Of Counsel & On the Brief*  
LOWENSTEIN SANDLER, LLP  
One Lowenstein Drive  
Roseland, New Jersey 07068  
973-597-2500  
pslocum@lowenstein.com  
apatel@lowenstein.com

Vafa Sarmasti (I.D. No. 008942004)  
*Of Counsel & On the Brief*  
SARMASTI PLLC  
271 Route 46 West  
Suite A205  
Fairfield, New Jersey 07004  
973-882-6666  
vafa@sarmastipllc.com

*Counsel for Plaintiff-Appellant  
BrainBuilders, LLC*

Date Submitted: December 9, 2024

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**  
**TABLE OF AUTHORITIES ..... ii**  
**PRELIMINARY STATEMENT ..... 1**  
**ARGUMENT ..... 1**  
**I. EVIDENCE IN THE RECORD SUPPORTS BRAINBUILDERS’  
IMPLIED CONTRACT CLAIM..... 1**  
    A. Oscar’s Payments and Authorizations Evidence Its Assent To  
    Reimburse BrainBuilders..... 8  
    B. Oscar Did Not Have An Adequate Network For The Insured Children  
    ..... 9  
    C. Mr. Nussbaum Affirmed That The Parties Had An Implied Agreement  
    ..... 9  
    D. A Judge Or Jury Can Set A Reasonable Reimbursement Rate For  
    Services Rendered Pursuant To An Implied Contract..... 10  
**II. EVIDENCE IN THE RECORD SUPPORTS BRAINBUILDERS’  
PROMISSORY ESTOPPEL CLAIM..... 11**  
**III. EVIDENCE IN THE RECORD SUPPORTS BRAINBUILDERS’  
QUASI CONTRACT CLAIMS ..... 13**  
**CONCLUSION ..... 15**

**TABLE OF AUTHORITIES**

**Cases**

**Page(s)**

Brill v. Guardian Life Ins. Co. of America,  
142 N.J. 520 (1995) ..... 2

Comprehensive Neurosurgical, P.C. v. Valley Hosp.,  
257 N.J. 33 (2024) ..... 1-2

Moorestown Mgmt., Inc. v. Moorestown Bookshop, Inc.,  
104 N.J. Super. 250 (Ch. Div. 1969) ..... 10-11

Plastic Surgery Ctr., P.A. v. Aetna Life Ins. Co.,  
967 F.3d 218 (3d Cir. 2020) ..... 7, 14

Pop’s Cones v. Resorts International Hotel  
307 N.J. Super. 461 (App. Div. 1998) ..... 12

Rabinowitz v. Massachusetts Bonding & Insurance Co.  
119 N.J.L. 552 (1938) ..... 13, 14

Saint Barnabas Medical Center. v. County of Essex,  
111 N.J. 67 (1988) ..... 7

Troy v. Rutgers,  
168 N.J. 354 (2001) ..... 2

Weichert Co. Realtors v. Ryan,  
128 N.J. 427 (1992) ..... 6

**Regulations**

N.J.A.C. 11:24A-4.10 ..... 2, 3, 14

## **PRELIMINARY STATEMENT**

Oscar’s drumbeat repetition that the evidence favoring its case is “undisputed” blissfully disregards the fact that BrainBuilders disputes the evidence. Oscar’s “undisputed” version of the facts is a one-sided affair, trumpeting its best evidence and drawing inferences to its benefit while eliding contested facts – the exact opposite of what the summary judgment standard requires. Thus, Oscar turns the summary judgment standard on its head and asks this Court to repeat the mistake made by the trial court. At the summary judgment stage, the evidence (and all reasonable inferences) must be viewed in the light most favorable to BrainBuilders, the non-moving party. Through that lens, BrainBuilders has pointed to numerous material facts in the record that support the finding of an implied contract and cognizable quasi-contracts between BrainBuilders and Oscar. For that reason, the trial court’s grant of summary judgment must be reversed and the case submitted to a jury.

## **ARGUMENT**

### **I. EVIDENCE IN THE RECORD SUPPORTS BRAINBUILDERS’ IMPLIED CONTRACT CLAIM**

An implied contract claim may be based on the whole of the “parties’ actions, course of conduct, oral expressions, or a combination of the three” and must be viewed “in light of the surrounding circumstances.” Comprehensive Neurosurgical, P.C. v. Valley Hosp., 257 N.J. 33, 70-71 (2024). “[W]hether

[the] parties’ interactions rise to the level of creating an implied contract is generally a question of fact best resolved by the jury.” Id. at 72. On that basis, an implied contract claim is generally not resolved at the summary judgment stage. Troy v. Rutgers, 168 N.J. 354, 366 (2001). Oscar’s arguments ignore the fact-sensitive nature of an implied contract claim, focus on aspects of the record in isolation, and disregard the facts that do not fit its preferred design.

Here are the facts concerning the parties’ relationship and course of conduct that must be viewed in BrainBuilders’ favor. See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 539-40 (1995) (stating that the evidence – and all reasonable inferences – must be viewed in the light most favorable to the nonmoving party on a motion for summary judgment).

*First*, Oscar failed to meet its legal obligation to furnish suitable healthcare providers to the Insured Children. Oscar paid lip service to the requirement that it furnish the Insured Children with access to a provider within the lesser of “twenty miles or thirty minutes driving time,” Pa3504 at 60:15-24; N.J.A.C. 11:24A-4.10, and then did not supply the Insured Children healthcare providers within that parameter, see Pa3049-50; Pa3641; Pa1261; Pa1426.<sup>1</sup>

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<sup>1</sup> For seven of the Insured Children, BrainBuilders does not dispute that Oscar was entitled to rely on Optum’s network – if the network had been adequate for the Insured Children. See Pa3502-06 at 58:7-62:23. It was not. See Pa3049-50; Pa3641; Pa1261; Pa1426; Pa181-82. Y.T.’s plan, however, allowed Y.T. to

Oscar delegated to Optum the task of furnishing an adequate network of behavioral health providers for the Insured Children under N.J.A.C. 11:24A-4.10(a). Pa3503-05 at 59:7-61:2; see Pa3510 at 66:7-11. Optum admitted that there were no “in-network providers within the metro area [(the lesser of twenty miles or thirty minutes driving distance)] that were center based and had availability” for the Insured Children. Pa3049-50. That there were no in-network providers in the metro area to furnish the requisite treatment services for the Insured Children is documented in Optum’s clinical notes, Pa3641, its emails, Pa1261, and its letters to the Insured Children, Pa1426. BrainBuilders’ investigation confirmed that no provider, within the lesser of “twenty miles or thirty minutes driving time,” was available to supply the services needed by the Insured Children. Pa181-82; N.J.A.C. 11:24A-4.10; see Pa257-60 ¶¶ 4, 22, 25.<sup>2</sup>

*Second*, Oscar knew that “there was a shortage of behavioral health providers who accepted insurance” and that it had an obligation to furnish needed services, such as applied behavior analysis (“ABA”), to its insureds. Pa3154-55 at 40:19-41:8. Oscar acknowledged that when it did not have an in-

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access out-of-network healthcare providers like BrainBuilders. Even so, Oscar failed to reimburse BrainBuilders for its treatment of Y.T.

<sup>2</sup> Oscar’s contention that Simon Nussbaum’s certification, Pa256-66, is a sham affidavit, Db30, should be disregarded by this Court. The trial court never made such a finding. Mr. Nussbaum’s certification is entirely consistent with his deposition testimony.

network provider available for an insured, as was the case with the Insured Children, the “ultimate requirement” is “to find a provider for the patient.” Pa3155 at 41:9-16. That is why “Optum had the authority from Oscar to enter into [SCAs] with an out-of-network provider” like BrainBuilders and issued over a hundred SCAs authorizing BrainBuilders to treat the Insured Children. Pa3156-57 at 42:10-43:24; Pa1370-1602.

Had Oscar an adequate network of providers, it would not have had to issue over a hundred SCAs to BrainBuilders. Pa1370-602. Oscar did not have in its network behavior-health providers for the Insured Children. Oscar needed BrainBuilders to fill that void. Without BrainBuilders, the Insured Children would have gone without critically needed treatment services for autism and suffered dramatic regression of the progress they had achieved. Pa235-37 ¶¶ 11-18; Pa244 ¶¶ 90-91. Oscar expected that Optum would “sign a single case agreement [(‘SCA’)] with a provider,” such as BrainBuilders. Pa3156 at 42:10-18. Oscar admitted that its overall obligation was to “mak[e] sure [that] the patient gets care somehow” and “mak[e] sure the provider gets paid, too.” Pa3157 at 43:2-18.

*Third*, Optum, on Oscar’s behalf, issued over a hundred SCAs to BrainBuilders to treat the Insured Children. Pa1370-1602. Oscar understood the “Optum SCAs” – the single case agreements – to represent “obligation[s] to

pay” the provider. Pa3207-08 at 93:20-94:6. A former Oscar senior manager, Chip Stine, stated that, by issuing the SCAs, “Optum authoriz[ed] the services and sa[id] [to BrainBuilders]: Here’s what you need to do to receive payment for claims.” Pa3201-05 at 89:7-91:14; Pa3391-3410. Another representative promised BrainBuilders that Oscar “want[ed] to make sure BrainBuilders is getting reimbursed for services that [were then] taking place.” Pa627.

*Fourth*, Oscar’s corporate representative, Mr. Roy, testified that Oscar reimbursed an out-of-network provider only if it had authorized a provider to treat its insured. Pa3531 at 293:15-20. Oscar’s hundreds of payments to BrainBuilders and the numerous Optum SCAs are proof of that authorization. Pa1370-1602; Pa363-459; Pa3557-3635<sup>3</sup>. Of the hundreds of bills BrainBuilders submitted to Oscar for ABA services, Oscar paid some amount on 58% of the bills for a total of \$899,311, evidencing an implied agreement to reimburse BrainBuilders.<sup>4</sup> Pa363-459; Pa3557-3635. Nevertheless, the amount Oscar paid is still a fraction of what Oscar owes BrainBuilders. In its responsive

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<sup>3</sup> BrainBuilders urges this Court to consider the chart at Pa3557-3635. However, if this Court were not to do so, acceding to Oscar’s request, it is welcome to review the same information at Pa363-459, which contain the same data showing that Oscar paid hundreds of bills at BrainBuilders’ billed rates and hundreds more at varying rates.

<sup>4</sup> Oscar paid an additional \$17,808 for other services BrainBuilders provided to five of the Insured Children. Pa363-459; Pa3557-635.

brief, Oscar could not explain why it made those payments. Db15. Clearly, Oscar was not making charitable payments to BrainBuilders.

Those payments are admissions of Oscar's underlying contractual obligation to reimburse BrainBuilders for the services it rendered to the Insured Children. See Weichert Co. Realtors v. Ryan, 128 N.J. 427, 436 (1992). Many of the bills paid by Oscar lined up with the SCAs Optum issued to BrainBuilders. However, Oscar also reimbursed BrainBuilders for services rendered, even when no SCA lined up with the payment of a bill. Pb27-28 (citing Pa3557-3635; Pa333 ¶¶ 21-22; Pa350-459). But, significantly, Oscar failed to pay a host of bills, breaching the terms of the implied agreement. Ibid. Although Oscars' obligation to reimburse BrainBuilders is clear, there is no logic in the manner in which Oscar made payments – and failed to make payments. Ibid.

Oscar's representative, Mr. Roy, testified that single case agreements existed “for all of the [eight Insured Children],” which includes three children who received solely ABA services from BrainBuilders. Pa3525 at 287:11-16; Pa332 (indicating that Patients 3, 5, and 7 received only ABA services). One reasonable conclusion to be drawn from Mr. Roy's statement and Oscar's payments is that Oscar authorized BrainBuilders to provide ABA treatment to

the Insured Children. Indeed, in its remittances, Oscar explained that the amount paid *for ABA services* was a “contracted/legislated fee arrangement.” Pa279.

At this stage, the evidence and all reasonable inferences must be viewed in the light most favorable to BrainBuilders. From that objective perspective, a factfinder could conclude, from the totality of the circumstances, including the parties’ conduct, that Oscar and BrainBuilders entered into an implied agreement – an agreement in which Oscar promised to reimburse BrainBuilders for its treatment of the Insured Children.<sup>5</sup> Oscar may dispute the facts presented by BrainBuilders. But Oscar is not entitled to have disputed facts decided in its favor on a motion for summary judgment, as occurred here. Those disputed factual issues must be decided by a jury. The trial court usurped the jury’s role, not once acknowledging that it had the duty to view the evidence in BrainBuilders’ best light. For that reason, the trial court’s order of summary judgment must be reversed.

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<sup>5</sup> BrainBuilders disagrees with Oscar’s suggestion that an implied contract is somehow higher under Saint Barnabas Medical Center. v. County of Essex, 111 N.J. 67, 77 (1988). See Db28. But even if Oscar were right, BrainBuilders has met that standard and demonstrated that customs in the healthcare industry support its interpretation of the facts. An insurer’s agreement to authorize and reimburse out-of-network services when no in-network services are available is not a new phenomenon. See Plastic Surgery Ctr., P.A. v. Aetna Life Ins. Co., 967 F.3d 218, 224, 228-29 (3d Cir. 2020). Whether Oscar entered into an implied agreement to reimburse BrainBuilders is a matter of applying settled law to facts – not a matter of healthcare industry custom.

### **A. Oscar's Payments and Authorizations Evidence Its Assent To Reimburse BrainBuilders**

Optum issued over a hundred SCAs to BrainBuilders that bound Oscar to pay for BrainBuilders' services, according to Oscar's former senior manager, Mr. Stine. Pa3203-08 at 89:7-94:6; Pa3391-410. In an effort to persuade this Court to sustain the grant of summary judgment, Oscar now desperately attempts to discredit Mr. Stine, suggesting that he incorrectly identified "Optum SCAs." Db16-17. Oscar further deflects by referring to BrainBuilders' Mr. Nussbaum's testimony in a different case regarding authorizations. Db18; Db31 (citing Pa233 at ¶ 14). What weight to give Mr. Stine's and Mr. Nussbaum's testimony is a matter for a jury. The record before this Court establishes that Oscar *did pay* BrainBuilders after sending out authorizations. Pa3557-3635; Pa333 ¶¶ 21-22; Pa350-459. Those payments are admissions by Oscar of its implied contract with BrainBuilders.

Oscar makes much of its delayed payments to BrainBuilders. It cites evidence that *nine* payments for *one* patient were delayed by up to seventeen months. See Db14-15 (citing Pa3550-56). But whether those payments were made in 2018 or 2021, they still evidence Oscar's acknowledgment of its obligation to reimburse BrainBuilders under an implied contract. Any doubt or disputed fact about the import of those payments is a matter that ultimately a

jury must resolve. For now, those hundreds of payments must be viewed in the light most favorable to BrainBuilders.

**B. Oscar Did Not Have An Adequate Network For The Insured Children**

Oscar claims that it is “undisputed that DOBI [(Department of Banking and Insurance)] reviewed and approved the sufficiency of Optum’s network.” Db6. Yet it provides no citations to support that assertion. And BrainBuilders does not concede the point. The real question is whether Oscar had in-network ABA healthcare providers for the Insured Children within twenty miles or thirty minutes driving time. Oscar points to its own self-serving letters to the Insured Children as evidence that it had in-network providers for the Insured Children, Db49, but ignores other parts of the record that say otherwise, see Pa3049-50; Pa3641; Pa1261; Pa1426; Pa181-82. Additionally, an Oscar representative could not confirm whether the in-network providers Oscar offered the Insured Children actually had the “availability and capability to provide the services” necessary for the Insured Children. Pa3514-16 at 174:20-176:22.

**C. Mr. Nussbaum Affirmed That The Parties Had An Implied Agreement**

The implied agreement at issue in this case is one in which Oscar, through its conduct, agreed to reimburse BrainBuilders for treatment provided to the Insured Children. That Mr. Nussbaum was attempting to reach a more expansive

express agreement for Oscar to authorize BrainBuilders to treat up to ten Oscar insureds, “a one size fits all rate agreement that would apply across the board,” Pa1778 at 86:17-24, does not contradict Oscar’s implied agreement to pay for the services of the Insured Children. BrainBuilders does not dispute that a global agreement for up to ten patients never came to fruition. Pa1612-13 ¶¶ 55-57.

Mr. Nussbaum explained that his discussions with Oscar “sort of slipped by the wayside” *once Oscar started paying BrainBuilders’ bills “in full,”* indicating Oscar’s assent to reimburse BrainBuilders. Pa1808-09 at 144:17-145:4. (emphasis added). Mr. Nussbaum never suggested that BrainBuilders and Oscar did not have an implied agreement. Why would BrainBuilders have continued to treat the eight Oscar Insured Children but for the promise of payment? That BrainBuilders was waiting for Oscar to inform BrainBuilders what its usual and customary rates (“UCR”) for its services were does not undermine the fact that they were parties to an implied agreement.

**D. A Judge Or Jury Can Set A Reasonable Reimbursement Rate For Services Rendered Pursuant To An Implied Contract**

When parties enter into an implied agreement but cannot come to terms on the reasonable price for services rendered, a court or jury can do so. Moorestown Mgmt., Inc. v. Moorestown Bookshop, Inc., 104 N.J. Super. 250, 259 (Ch. Div. 1969) (“[I]t is settled that an agreement is not unenforceable for

lack of definiteness of price . . . if the parties specify a practicable method by which the amount can be determined.” (citing Corbin on Contracts § 4.4 (1993)).

According to Oscar’s own internal emails, Oscar’s “practicable method” for calculating the rates paid to out-of-network providers such as BrainBuilders, was to pay 80% of the UCR. Pa3419-20. BrainBuilders was familiar with Oscar’s 80% UCR methodology. Pa170 at 90:7-91:4. Additionally, BrainBuilders offered heavily discounted rates that were similar to the UCR rates. See Pa613-626; Pa643; Pa912-913. That the parties were negotiating a rate does not vitiate the preexisting implied agreement.<sup>6</sup>

## **II. EVIDENCE IN THE RECORD SUPPORTS BRAINBUILDERS’ PROMISSORY ESTOPPEL CLAIM**

BrainBuilders has pointed to evidence in the record that Oscar promised to reimburse BrainBuilders and that BrainBuilders’ relied on that promise. Pa627; Pa1370-1602; Pa3557-3635; Pa333 ¶¶ 21-22; Pa350-459. BrainBuilders does not deny that Oscar disputes the facts and inferences on which BrainBuilders relies, including the meaning to be ascribed to Oscar’s communications, Optum’s communications, and Oscar/Optum’s continued

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<sup>6</sup> Oscar conveniently ignores that BrainBuilders offered to substantially discount its rates and seeks reimbursement for thousands of hours of intensive treatment over the course of years for the eight Insured Children, who faced profound challenges from their autism diagnoses and substantially improved as a result of BrainBuilders’ efforts. Pa234-54.

payment of BrainBuilders' claims. But those factual disputes cannot be resolved by a court on summary judgment.

A promissory estoppel claim requires a plaintiff to demonstrate a clear and definite promise, but it does not require proof of an express promise. Pop's Cones v. Resorts Int'l Hotel, 307 N.J. Super. 461, 469-72 (App. Div. 1998) (“[T]he strict adherence to proof of a ‘clear and definite promise’ as discussed in [Malaker Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bank, 163 N.J. Super. 463 (App. Div. 1978)] is being eroded by a more equitable analysis designed to avoid injustice.”). In Pop's Cones, this Court relied heavily on Section 90 of the Restatement (Second) of Contracts, which provides that “[a] promise which the promisor should reasonably expect to induce action . . . on the part of the promisee . . . is binding if injustice can be avoided only by enforcement of the promise.” Id. at 471. So long as the promise is clear and definite, even if the promise is implied, it will give rise to a promissory estoppel claim. Id. at 469-72. That is so even if negotiations over the express terms for calculating the rate for services rendered do not succeed, as occurred here. Ibid. (stating that promissory estoppel applies when a plaintiff “seeks damages resulting from its detrimental reliance upon promises made during contract negotiations”).

Oscar’s representative expressly promised that Oscar “want[ed] to make sure BrainBuilders is getting reimbursed for services that [were then] taking place.” Pa627. Oscar’s defense – and a poor one at that – is that Mr. Nussbaum did not agree to the arbitrary rates proposed by Oscar. Oscar was content to have BrainBuilders provide services to its Insured Children and then to manufacture excuses to withhold payment for those services – a seemingly profit winning strategy.

Mr. Nussbaum testified that Oscar never told BrainBuilders “to stop treating [the Insured Children].” Pa174-75 at 141:2-142:6. Instead, Oscar took steps that led BrainBuilders to believe that it would be reimbursed for its services. Optum, on Oscar’s behalf, issued SCAs to BrainBuilders and paid many of BrainBuilders’ bills (for sure, at inconsistent rates but sometimes in full), thus lulling BrainBuilders to rely on the promise of future payment. Pa3557-3635; Pa333 ¶¶ 21-22; Pa350-459; Pa1370-1602. Again, that Oscar disputes the facts on which BrainBuilders relies to support its promissory estoppel claim does not entitle Oscar to summary judgment.

### **III. EVIDENCE IN THE RECORD SUPPORTS BRAINBUILDERS’ QUASI CONTRACT CLAIMS**

Evidence in the record clearly supports BrainBuilders’ claims that it conferred a direct benefit on Oscar by treating the Insured Children. After all, had BrainBuilders not provided services to those Children, Oscar would have

had a contractual duty to pay an “approved” provider to furnish the same services. In Rabinowitz v. Massachusetts Bonding & Insurance Co., the Court of Errors and Appeals held that medical providers who treat an insured fulfill an obligation owed by the insurer, thereby conferring a benefit on the insurer; and when the insurer reneges on payment, that is a sufficient basis for an unjust enrichment or quantum meruit claim. 119 N.J.L. 552, 556-57 (1938); see Plastic Surgery Ctr., P.A. v. Aetna Life Ins. Co., 967 F.3d 218, 223 (3d Cir. 2020).

BrainBuilders did exactly what the provider in Rabinowitz did – it provided services to the Insured Children that Oscar was legally bound to cover through its insurance agreements with the Insured Children and under state law. Oscar was legally obligated to supply the Insured Children with a suitable provider to furnish treatment for autism. Pa3502-06 at 58:7-62:23; N.J.A.C. 11:24A-4.10(a), (b).

Oscar’s attempt to distinguish Rabinowitz and Plastic Surgery falls way short of the mark. As in those cases, there is sufficient evidence from which a trier of fact could conclude that Oscar agreed to pay for BrainBuilders’ services. BrainBuilders filled the gap in Oscar’s deficient network of providers. Those circumstances suffice to show that BrainBuilders conferred a benefit on Oscar.

In response, Oscar cites to federal district court cases that the Third Circuit has concluded were wrongly decided and are inconsistent with New Jersey law.

The Third Circuit specifically rejected the reasoning of Plastic Surgery Center, LLC v. Oxford Health Insurance, Inc., No. 18-cv-2608, 2019 WL 4750010 (D.N.J. Sept. 30, 2019), cited by Oscar, see Db45 n.18; Da16-22, as “at odds” with Rabinowitz. Plastic Surgery Ctr., 967 F.3d at 240 n.26. Oscar relies on other unpublished district court cases that applied the same flawed reasoning rejected by the Third Circuit. See Da12; Da30-31; Da36; Da49.

Here, BrainBuilders filled a gap in Oscar’s network, conferring a distinct benefit on Oscar. Accordingly, the dismissal of BrainBuilders’ unjust enrichment claim on summary judgment must be reversed.

### **CONCLUSION**

For the reasons expressed, the trial court erred in granting summary judgment in favor of Oscar on each of BrainBuilders’ claims. Accordingly, the trial court’ judgment must be reversed, BrainBuilders’ Complaint reinstated, and the matter remanded for trial.

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By: s/ Peter Slocum  
Peter Slocum, Esq.  
Anish Patel, Esq.  
LOWENSTEIN SANDLER LLP  
One Lowenstein Drive  
Roseland, New Jersey 07068  
973-597-2500  
*Counsel for Plaintiff-Appellant  
BrainBuilders, LLC*