PREPARED BY THE COURT

BRAINBUILDERS, LLC, *Plaintiff*, vs. OSCAR GARDEN STATE INSURANCE CORPORATION, AND XZY CORPORATIONS 1-5, *Defendants*.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY DOCKET NO. OCN-L-1714-19 CIVIL ACTION **OPINION**

This matter comes before the Court on application of the Defendant's Motion for Summary Judgment and Plaintiff's Motion to Strike Defendant's Various Affirmative Defenses.

The underlying facts and procedural history are summarized here. The Defendant, Oscar Garden State Insurance Corporation, is a health insurer servicing families and individuals. Plaintiff BrainBuilders, LLC ("BrainBuilders"), is a healthcare provider that offers services to children with autism spectrum disorders. The services BrainBuilders provides include speech, occupational, and Applied Behavioral Analysis ("ABA") therapy. Between 2018 and 2021, BrainBuilders provided medical services to seven of Oscar's members enrolled in its Exclusive Provider Organization ("EPO") health plans. The EPO plans for these members are materially the same. Each one includes coverage for treatment of behavioral health services when provided in network, but there is no coverage for these services if obtained out-of-network ("OON"). The declaration of non-coverage is set forth in Oscar's Summary of Benefits and Coverage ("SBC") for the years 2018 through 2021.

The pertinent language from these Oscar agreements with its insureds is provided in a SBC explaining the protections and benefits provided under each plan. An eighth Oscar member, (#8),

was enrolled in an Oscar Preferred Provider Organization ("PPO") plan for the years 2019 to 2021 that contained OON benefits, with fifty percent co-insurance for behavioral health services. Insured #8's SBCs for the plan years 2020 and 2021 are materially the same. Oscar subcontracted with non-party Optum, Inc., and its affiliated companies ("Optum") to supply a network of behavioral health providers for its members and handle the administration and pricing of behavioral health services, e.g., Applied Behavioral Analysis services.

BrainBuilders does not participate in Oscar's (i.e., Optum's) provider network or any other insurer's network. Despite repeated attempts to negotiate an agreement to provide out-of-network services to Oscar, all negotiations ultimately failed. Between January 2018 and November 2021, BrainBuilders provided behavioral health services to the Oscar members identified above. BrainBuilders was aware before it treated the seven identified Oscar members that they had health plans which required them to obtain any autism-related services from identified providers that were recognized by Oscar as "in-network." Insurance coverage is not provided by Oscar under the terms of the policies agreed to by the seven patients' families unless a specific exception was granted by Oscar or Optum.

Oscar's EPO plans are network-only plans. Oscar subcontracted with non-party Optum, Inc., and its affiliated companies to supply a network of behavioral health providers for its members, to handle the specialized administration of behavioral health services, and to contract with providers regarding the pricing of behavioral health claims. The terms and conditions set forth in Oscar's EPO were communicated to both the Plaintiff and Oscar's insureds during the period between 2018 and 2021. Patients of BrainBuilders who were insured through Oscar's EPO did receive transitional medical services as recognized by a Single Case Agreement (SCA) executed

by Oscar. These SCAs allow patients to continue with a previous medical provider during the term when they were transitioning to a new "in-network" medical provider.

Patient E.G. was provided with insured benefits for Therapeutic Behavioral Services on a transitional basis between January 1, 2018, and April 1, 2018. (Binder #4, Tab B, 00062). On May 17, 2018, Optum notified BrainBuilders and the insureds that the request to extend insurance benefits beyond April 1, 2018, was denied. The insured and the provider were notified that the patient does not maintain Out-of-Network coverage and thus the patient would need to transition to an In-Network provider. A second review of E.G.'s eligibility for insured benefits from BrainBuilders was conducted by Optum on October 17, 2018, and benefit coverage was again denied. (Binder #4, Tab B, 000286).

Patient S.S. was notified on February 2, 2018, that BrainBuilders was a non-participating provider, and that the provider was considered out-of-network. Additionally, the patient was notified that an authorization of benefit coverage is "neither a statement of benefit coverage nor a guarantee of eligibility." BrainBuilders was notified by Optum that, payment for services is, "subject to the member's eligibility at the time services are provided…including benefit plan limitations… An eligibility disclaimer was given at the time of this benefit request." (Binder #4, Tab C, 00019). On March 1, 2019, S.S. was notified that the previous denial of services will be partially overturned. BrainBuilders was approved for a Single Case Agreement to accommodate its patient for lack of availability of in-network providers. The accommodation was for the period between October 10, 2018, and April 10, 2019. Supervision was approved limited to the general standard of care. (Binder #4, Tab C, 075888-89)

Patient R.G.: On March 18, 2019, BrainBuilders entered into a Single Case Agreement with Oscar for thirty-six occupational therapy visits between March 14, 2019, and June 14, 2019.

(Binder #4, Tab D, 013889). Other services provided by BrainBuilders were identified by Oscar, however, BrainBuilders was notified that payment for services are, "subject to the member's eligibility at the time services are provided…including benefit plan limitations… An eligibility disclaimer was given at the time of this benefit request." (Binder #4, Tab D, 085910).

Patient Y.S.: Oscar entered into a SCA with BrainBuilders on January 30, 2019, for the benefit of Y.S to receive forty-nine speech and occupational therapy visits. The SCA indicated that billed charges would be approved in the lesser amount of the billed charges or $160 per session. (Binder #4, Tab E, 038014).

Patient Y.T.: BrainBuilders was notified that benefit coverage was authorized for certain identified services, however, payment for services is, "subject to the member's eligibility at the time services are provided…including benefit plan limitations and availability of remaining coverage." (Binder #4, Tab F, 0116667).

Patient S.T.: On January 16, 2019, BrainBuilders was notified that a number of services were authorized for benefit coverage. BrainBuilders were also notified that payment for these services were subject to the member's eligibility at the time of service. On July 3, 2019, the parents of S.T. were notified by Oscar that certain Applied Behavior Analysis services were approved for benefit coverage from July 2, 2019, through January 2, 2020. While the insured was notified that they did not maintain out-of-network coverage, Oscar was approving a SCA "so long as the provider agrees to the rates for each billing code. (Binder #4, Tab G, 098560-62).

The Plaintiff is a medical provider specializing in the treatment of autistic patients. These treatments, therapies, and services were provided for years on a weekly basis pursuant to various specific regimens relating to each child. BrainBuilders has provided thousands of hours of treatments, therapies, and services to eight children insured through Oscar health insurance plans

on a weekly basis for years. BrainBuilders employs more than 200 healthcare providers that include, but are not limited to, Board Certified Behavior Analysts ("BCBA"), speech-language pathologists, occupational therapists, registered behavior technicians, and behavior technicians. Sorotzkin Cert., ¶6. BrainBuilders has four (4) facilities located in Ocean County, Middlesex County, and Burlington County. Id., ¶5. Billing requirements of insurance carriers were routinely observed by the Plaintiff. Accordingly, the concept of in-network and out-of-network medical providers was not a foreign concept to the Plaintiff.

Oscar's summary judgment motion argues that BrainBuilders and Oscar did not have an implied contract for any of the eight patients. This Court is mindful that resolving the issue of whether an implied contract exists is a factual question that generally precludes summary judgment. Gotham City Orthopedics, LLC v. United Healthcare Ins. Co., 2022 U.S. Dist. LEXIS 6382 *12 (D.N.J. Jan. 12, 2022) (citing Troy v. Rutgers, 168 N.J. 354 (2000)). Furthermore, the record before the Court includes testimony of Oscar's corporate representative who admitted that BrainBuilders and Oscar did indeed have an agreement relating to all eight patients and disclosed that the information he relied upon was his prior preparation for his deposition. However, Oscar points out that of the eight patients involved, the large majority of patients had SCAs covering a portion of the time in question. The executed SCAs were agreements between Oscar and BrainBuilders to provide compensation for authorized services provided to Oscar insureds. The Defendant argues that these agreements were not a result of an implied contract, rather the terms and conditions of the agreement were written clear and definite terms. SCAs were executed by the parties to authorize limited services from out-of-network providers. Those services provided to Oscar's insured which fell outside the scope of the SCA are now the subject of the Plaintiff's claim

that compensation is due on the basis of an implied contract. Each SCA executed by the Plaintiff indicates,

- "It is understood that this SCA is ONLY for the Member listed above and the Service(s) listed above. It is not a general participation agreement and Provider is not considered an in-network provider with Oscar." (emphasis supplied)

- "To the extent that additional services beyond those set forth above are needed, additional authorization must be sought by Provider prior to the services being provided or Provider will be responsible for the full cost of the additional services. A separate single case agreement may also be required." (emphasis supplied)

Between January 2018 and November 2021, BrainBuilders provided services to the Oscar insureds identified above. BrainBuilders has never contested that it was not a member of Optum's network of medical providers. Nor has the Plaintiff ever contested that the seven BrainBuilders patients insured through Oscar EPO health plans were required by the terms of the plan to obtain autism-related services from in-network providers. The Defendant indicates that BrainBuilders proceeded to treat these Oscar insured patients prior to entering into an agreement for insurance coverage with Oscar. BrainBuilders now claims through its Complaint that Oscar is required to pay for the treatment provided to its insureds.

Both parties recognize that although the Oscar EPO plans had no OON coverage for autism-related services, members have the opportunity to seek an exception to have particular services covered OON. Such exceptions must be reviewed and granted on a case-by-case basis. Oscar indicates that this typically arises when a member changes insurance during a course of treatment and needs time to transition to a new in-network provider, or when there is no such provider available. The Defendant asserts that because such exceptions fall outside the plan terms, they must be documented in a specific agreement that sets forth the authorized services and payment rates. These agreements are typically referred to as a "Single Case Agreement" or "SCA."

BrainBuilders' Director of Finances, Simon Nussbaum, attempted to negotiate an "overall" rate agreement to cover any OON ABA services provided to the Oscar members with Optum employee, Victor Law. Oscar claims that BrainBuilders continued to try to get Optum or Oscar to agree to BrainBuilders' proposed rates at various times in 2018 and 2019, but each of these efforts was unsuccessful.

In March 2018, Mr. Nussbaum e-mailed Oscar employee Yael Kino, seeking to enter into an agreement and attached a spreadsheet containing three different potential rate "options" for the ABA services. On numerous occasions in August 2018, Mr. Nussbaum e-mailed Oscar employees AJ Bayer and Antonio Crocco seeking a means to reach an agreement. In another e-mail chain spanning from late January to April 2019, Mr. Nussbaum attempted to convince Oscar to adopt rates from an old agreement that BrainBuilders had reached with a different health insurer. Mr. Nussbaum confirmed through his deposition testimony that the negotiations all failed, and he was unable to make a deal with Optum or Oscar.

BrainBuilders initially filed this action in Bergen County on June 18, 2019, and it was transferred on the Court's own motion to Ocean County, where BrainBuilders is headquartered. This Court heard oral argument on the present motions on November 3, 2023. During oral argument, this Court requested additional documentation to supplement the record. In response to this Court's request for BrainBuilders to provide documents from 2018 through to the middle of 2019 when this litigation commenced, the Plaintiff provided the Court with four separate binders containing communications between the parties. Binder #1 contains email communications from December 2017 through April 2019 relating to authorizations and BrainBuilders' rates. The emails provided are: (i) communications between BrainBuilders and Oscar, and between BrainBuilders and Optum; (ii) internal Oscar communications relating to BrainBuilders, its services, and

BrainBuilders' rates; and (iii) communications between Oscar and its agent, Optum, relating to (a) BrainBuilders, (b) BrainBuilders' services to the Oscar-insured patients, and (c) BrainBuilders' rates.

Plaintiff indicates in its January 15, 2024, supplemental memorandum that a portion of an April 5, 2018, email from Oscar to BrainBuilders reads, *"We want to make sure Brain Builders [sic] is getting reimbursed for services that are currently taking place."* The Plaintiff's copy of the email is circled with red ink and marked with "*" markings on each side. However, on further inspection it appears that the Plaintiff omitted the prior content of the email which appears immediately above the highlighted portion provided by the Plaintiff. The omitted portion of the April 5, 2018, email reads, *"I've forwarded your message to the relevant stakeholders for review in the meantime, can you confirm whether or not you have been able to finalize the contracts with Optum for the ABA therapy?"* Despite the later comment about wanting to make sure that the Plaintiff is getting reimbursed for ABA therapy, the initial inquiry by the Defendant appears to seek confirmation that contracts requiring the payment for ABA therapy were agreed upon by the parties. Oscar claims that no evidence of any agreement requiring the Defendant to pay for ABA therapy was ever produced by the Plaintiff.

The Defendant asserts that the communications between BrainBuilders and Oscar (as well as Optum) further show that BrainBuilders provided its bill rates to Oscar as early as December 2017, however, BrainBuilders' efforts to negotiate an agreement to provide services by offering to Oscar a discounted rate never came to fruition. The Plaintiff contends that in response to BrainBuilders' outreach and efforts, Optum was telling BrainBuilders that it was waiting for Oscar to approve the various discount options BrainBuilders was offering, but, when BrainBuilders confronted Oscar, the Defendant neither affirmed nor denied that any approval had been granted.

In a March 15, 2018, email, Victor Law, an Optum manager, informed Mr. Nussbaum of BrainBuilders as follows: "*Just sent another reminder to clinical about their decision; I think they are working with Oscar to seek their approval since it is their money that paying [sic] for all of this;"* The Defendant suggests that as of March 15, 2018, Oscar had not granted its approval according to the language of the email provided by the Plaintiff. On March 7, 2018, Victor Law informed the Plaintiff, *"Upper management has your information and are reviewing that information."* Oscar claims that no indication of an agreement between the parties was evident in March 2018.

The Plaintiff asserts that internal Oscar emails and emails between Oscar and Optum indicate that they were not clear whether it was Optum's responsibility to set discounted rates, or if it was Oscar's responsibility to dictate/authorize the discounted rates. In a series of emails between Oscar and Optum between September 25, 2018, and September 26, 2018, Oscar and Optum discuss whether they have an obligation of payment to BrainBuilders. While the Plaintiff argues that under Oscar's plan document terms, out-of-network providers—such as BrainBuilders—are entitled to receive at least eighty percent of UCR (Usual and Customary Rate) for the services they provide to Oscar-insured patients, the language of the email correspondence from Oscar leads the Court to a different conclusion.

> *"I have confirmed that Oscar similarly pays a % of UCR for providers working with members on a transition of care auth. Will look for confirmation from the Optum team on what you expect these codes to pay out at 80% UCR.*
>
> *Separate question: can you confirm 1) how may Oscar members currently have TOC auths with BrainBuilders (including G****), and 2) that Optum has INN providers within access standards for each of these members? I believe at least one of the TOC auths with BrainBuilders is expiring in early October so want to make sure we are ready to transition all of these members in-network."* (9/25/2018)

The concern expressed by the Oscar employee was whether the Oscar insureds had been provided with Transition of Care (TOC) authorizations to receive treatment from BrainBuilders before they could be placed with an in-network provider. Oscar claims that payment of a percentage of the UCR to out-of-network providers only occurs when TOC authorizations have been granted for the insured patient.

Similarly, on September 26, 2018, Oscar's internal email communications reveal:

> *"Our authorization lead would like to respond to the Provider (Brain Builder) today and provide them with an authorization number so that they know that their authorization is pending."*

The Plaintiff asserts that the September 26, 2018, email indicates that Oscar had determined to authorize the payments to BrainBuilders. The language of the email in question indicates that the request for payment from BrainBuilders is under review by Oscar. The direction provided in the email is to deliver an authorization number to the Plaintiff to memorialize for BrainBuilders that the authorization for payment of services is pending.

The Plaintiff identifies that Optum's databases—which Oscar had retained for these types of services and industry information—only had one UCR data for codes relating to ABA services. The Plaintiff claims that this database deficiency (i.e., lack of UCR rates in Optum's database) should have provided a motivating factor to negotiate with BrainBuilders on discounted rates. However, Oscar continued to remain silent in its communications with BrainBuilders about rates. Oscar argues that whether the Defendant failed to exercise an opportunity to negotiate payment rates with BrainBuilders, or whether the Defendant remained silent in its communications about payment rates to BrainBuilders, the final result was the same: no agreement was reached on the amount or method of compensation to be provided to BrainBuilders.

Ultimately, on October 5, 2018, another senior manager, Justin McGuire, wrote to Mr. Stine stating, *"[w]e haven't heard from you in about 3 weeks and this issue has been ongoing*

since May of this year …" The Plaintiff has consistently argued that requests for payment were regularly delivered to Oscar. However, the Defendant claims that no evidence exists that Oscar had ever confirmed that BrainBuilders was entitled to be paid for the services it rendered to its insureds in the absence of a Single Case Agreement (SCA). Oscar points out that the September 14, 2018, email from Chip Stine, the internal email chain of correspondence Oscar indicates, *"BB is refusing Optum's SCA rates; I've asked them for more detail on what the next steps are for negotiation."* Oscar claims that BrainBuilders' rejection of payment conditions established for OON providers does not entitle the Plaintiff to be treated in a manner contrary to the terms of the insurance agreement. The Defendant indicates that under circumstances where insured patients are unable to identify in-network providers, out-of-network providers may be authorized to provide treatment if a Single Case Agreement is executed between the provider and the insurance carrier to cover the necessary treatment until such time as the patient can be transitioned to an in-network provider.

The Plaintiff also provides a September 6, 2018, internal Oscar email from AJ Bayer that indicates,

> *"The provider received prior authorizations to render services to two Oscar members from Optum (attached). The provider billed all claims to Oscar and Oscar only paid out on services that were outlined in SCAs that were approved for these members."*

The Defendant maintains that Out-of-Network providers will be compensated only under those circumstances where patients are transitioning to In-Network providers and a Single Case Agreement has been agreed upon and executed by both the provider and Oscar. Notwithstanding that the services provided are recognized as "authorized" treatments, the Defendant indicates that the obligation of Oscar to its insureds is to provide coverage to those authorized treatments

provided by In-Network providers. In order for an Out of Network provider to receive payment from Oscar, two criteria must be satisfied: (1) the treatment must be authorized by Oscar or Optum and (2) the provider must execute and agree to the terms of a Single Case Agreement with Oscar. Should BrainBuilders fail to satisfy both of the aforementioned conditions, the obligation of Oscar to compensate the Plaintiff as an out-of-network provider is nonexistent.

Oscar alleges that BrainBuilders has failed to come forward with any document or other evidence to support its claims that Oscar agreed or promised to pay BrainBuilders for the services provided or establishing an agreement on rates for such services. BrainBuilders' Director of Finances and organizational representative, Simon Nussbaum, testified that he was never able to reach an agreement with Oscar and that the negotiation process ultimately failed.

However, Mr. Nussbaum indicated that he notified Oscar through its employees, Yael Kino, and Antonio Crocco, 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." While these declarations by Mr. Nussbaum were characterized as "an agreement," Oscar claims that no evidence has been presented that either Ms. Kino or Mr. Crocco ever confirmed or agreed with his position or accepted his "explanation." Additionally, Oscar asserts that Mr. Nussbaum failed to identify any e-mail or other document memorializing any such acceptance or "agreement." Id. (Nussbaum Tr.) at 86:25-88:12.

Oscar also points out that 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 entering into a rate agreement for a single Oscar member "in one specific case." Id. (Nussbaum Tr.) at 88:16-23. It is not contested by the parties that the member in question is not one of the eight members at issue here.

Oscar has repeatedly alleged that no evidence in this case suggests that BrainBuilders had arrived at an overall rate agreement with either Optum or Oscar. Moreover, Oscar claims that BrainBuilders failed to produce a specific rate agreement which had been executed by the parties for the services provided by the Plaintiff to any of the eight Oscar members at issue.

The standards applicable to a motion for summary judgment are set forth in Brill v. Guardian Life Insurance Company of Am., 142 N.J. 520 (1995). In Brill, the Supreme Court held that the trial court must decide whether there is a "genuine issue" of material fact that would preclude summary judgment. Id. at 540. The Court further stated that the purpose of its ruling was to afford "protection . . . against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention." Id. at 542 (citing Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)).

When defending against a summary judgment motion, the non-moving party cannot merely rely upon allegations or denials in a pleading. It must instead respond with evidence showing that there is a genuine issue to be resolved by the fact finder. R. 4:46-5. If the non-moving party fails to produce substantial facts establishing the existence of a genuine issue of material fact, summary judgment should be granted. Id.; Brill, 142 N.J. at 530.

Defendants assert that Plaintiffs cannot maintain a cause of action for breach of implied contract as set forth in their Complaint. New Jersey law states that the "basic elements of a contract [are] offer, acceptance, and consideration." Smith v. SBC Communs., Inc., 178 N.J. 265, 283 (2004); EnviroFinance Group, LLC v. Envtl. Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015) ("To prevail on a breach of contract claim, a party must prove a valid contract between the parties, the opposing party's failure to perform a defined obligation under the contract, and the

breach caused the claimant to sustain damages."). Defendants submit that a contract can only be enforced where the terms of the contract are specific enough to be understood and realistically enforced. Satellite Entm't Ctr., Inc. v. Keaton, 347 N.J. Super. 268, 277 (App. Div. 2002); Weichert Co, Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting West Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)) (internal quotations omitted) ("A contract arises from offer and acceptance and must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty.").

Defendants insist that Plaintiffs do not and cannot plead mutually flowing bargained for consideration to support the formation of contract. Defendants contend that the Complaint does not allege how Defendants, the insurers, benefitted and/or received consideration from Plaintiffs' performance of medical services on the Patients. Defendants maintain that there is nothing in the Complaint that alleges that Plaintiffs intended to be bound to Defendants to perform medical services on the Patients. Defendants insist that this does not show the requisite meeting of the minds. Finally, Defendants contend that Plaintiffs' implied contract claim fails to allege specific terms of the alleged contract, but rather offers conclusory allegations that a contract existed. Defendants assert that, because Plaintiffs have failed to properly plead a cause of action for a breach of an implied contract, the First Count of the Verified Complaint should be dismissed.

Plaintiffs argue that it has properly plead a prima facie claim of breach of implied contract. Plaintiffs submit that, in New Jersey, "there are only two essential elements of a implied contract in law: (1) that the defendant has received a benefit from the plaintiff, and (2) that the retention of the benefit by the defendant is inequitable." Wanaque Borough Sewerage Auth. v. Twp. of W. Milford, 144 N.J. 564, 575, 677 A.2d 747 (1996) (rejecting "rigidity of Anglo—American

pleadings [which] required some tangible basis for the enforcement of an implied-in-law contract.").

An implied contract is one in which the parties show their agreement by conduct. For example, if someone provides services to another under circumstances that do not support the idea that they were donated or free, the law implies an obligation to pay the reasonable value of services.

Thus, an implied contract is an agreement inferred from the parties' conduct or from the circumstances surrounding their relationship. In other words, a defendant may be obligated to pay for services rendered for defendant by plaintiff if the circumstances are such that plaintiff reasonably expected defendant to compensate plaintiff and if a reasonable person in defendant's position would know that plaintiff was performing the services expecting that defendant would pay for them.

Here, Plaintiff argues that Plaintiff reasonably expected Oscar to compensate Plaintiff at the out-of-network rate established in prior Single Case Agreements, which demonstrates the implied terms. Plaintiff argues, therefore, in looking to the totality of the circumstances, an implied contract was formed between the Parties, as is sufficiently established in the documents produced in discovery and therefore the allegation of implied contract must not be dismissed.

Defendants contend that in order to assert a viable breach of an implied -in-fact contract under New Jersey law, Plaintiffs must allege (1) a valid contract between the parties, (2) the opposing party's failure to perform a defined obligation under the contract, and (3) damages flowing from that breach. EnviroFinance Group, LLC v. Envtl. Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015). Defendants submit that Plaintiff's basis for the claim of a breach of contract arises from an alleged pattern of conduct from which contract terms can be inferred. Defendants maintain however, that the supposed pattern is too vague to amount to even an implied

contract. See Satellite Entm't 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"); 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). Defendants argue that a mere allegation that a reasonable person in Oscar's position would know that BrainBuilders was performing the medical services expecting that Oscar would pay Plaintiffs does not constitute a meeting of the minds; offer and acceptance; consideration; or reasonably definite terms. Defendants insist that Plaintiffs' allegations are conclusory and devoid of any allegations as to the alleged course of conduct, or that Plaintiffs entered into any type of agreement with or promise from Defendants, or the details of their agreement to be bound, or the terms of such purported agreement (including any payment/reimbursement term), or any specific provisions that were allegedly breached. As such, Defendants assert that the Implied Contract Count fails as a matter of law and should be dismissed.

The Court finds that Plaintiff has failed to present a question of fact regarding the existence of an implied contract with the Defendants as it relates to the claims of out-of-network patients. The relationship between an insurer and a health service provider is not direct, and thus Defendants are correct in arguing that there are no defined parameters of an express contract upon which to rely.

Significantly in this case, there is no relationship between the parties other than the relationship which was created out of the emails and written communications exchanged between the parties. The Plaintiff knew from the moment that it began treating the seven out-of-network patients that BrainBuilders had no contractual relationship with Oscar. More importantly,

BrainBuilders had never received any payment in any amount from Oscar for any services provided to its patients prior to January 2018.

Subsequent to January 1, 2018, payments to BrainBuilders for services provided to out-of-network patients were limited to those services which were identified in Single Case Agreements executed by Oscar. Each SCA contains language indicating that Oscar's obligation to compensate the provider is limited to the time period set forth in the agreement and those services recognized for payment as specifically identified in the agreement.

During the time period from January 1, 2018, through June 19, 2019, the Plaintiff only treated seven out-of-network patients insured by Oscar. Nothing in the record indicates that the relationship between the parties consisted of anything other than written communications. No promises were made to BrainBuilders, nor were any inducements provided for BrainBuilders to continue treating out-of-network patients beyond the written communications exchanged between the parties.

Oscar initially executed written Single Case Agreements with BrainBuilders to permit their insured patients an opportunity to transition to in-network providers. These SCAs limited the amount of time and the type of medical services which would be authorized for payment. Plaintiff has come forward with no evidence to suggest that any agreement for Oscar to pay for medical services was entered into by the parties that was beyond the language of those written documents.

The evidence here demonstrates that there was neither any agreement nor any promise by Oscar to pay BrainBuilders for the ABA services provided to Oscar's members. Even under circumstances where the Plaintiff fails to produce evidence of a breach of contract, BrainBuilders may be entitled to relief if it can produce evidence of a quasi-contract. To be enforceable, an implied-in-fact contract requires every element of a contract to be proven: mutual assent,

consideration, legality of object, and capacity of the parties, "plus the manifestation of these elements through conduct of the parties showing, in the light of surrounding circumstances, their tacit understanding." Fennimore v. Partylite Gifts, Inc., 2021 U.S. Dist. LEXIS 154137, at *21-*22 (D.N.J. Aug. 17, 2021). To satisfy the additional element unique to implied contracts, 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).

South Jersey Hosp., Inc. v. Correctional Med. Services, 2005 U.S. Dist. LEXIS 11693 (D.N.J. June 15, 2005), is instructive. There, a hospital routinely furnished services to inmates in a New Jersey prison. When the hospital unilaterally increased its prices from a *per diem* rate to a flat rate of eighty percent, the prison refused to pay the new rate and continued paying the *per diem* rate. The parties then negotiated, but no agreement could be reached on a new rate. Nonetheless, the hospital continued to treat the prison's patients. The court granted the prison's motion for summary judgment and dismissed the hospital's implied contract claim, finding that no agreement had been formed under the circumstances because the parties had failed to agree upon the price term. Id. at *12-*13. Thus, "no reasonable jury could conclude that [the prison] ever agreed to, or paid, the adjusted rates." Id. at *16.

BrainBuilders' implied contract claim suffers from a lack of evidence pointing to any agreement by Oscar to pay at billed charges or any other agreed rate for any services. The testimony of BrainBuilders employees, as well as the parties' ongoing e-mail exchanges, demonstrate the absence of an agreement between the parties at any time during the period of dispute. 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. In addition to this, Optum's clinical authorizations do not rise to the level of an implied contract. Mr. Nussbaum has conceded that such documents do not reflect the intentions of the parties concerning reimbursement commitments. Accordingly, the Defendant's motion to dismiss Count One of the Plaintiff's Complaint for Implied Contract is granted and dismissed with prejudice.

BrainBuilders asserts that it is entitled to damages from Oscar because Oscar made representations which created a condition of promissory estoppel. A promissory estoppel claim is justified under circumstances where the plaintiff satisfies four elements of proof: (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. Bd. of Chosen Freeholders of Cty. of Burlington, 194 N.J. 223, 253 (2008); Excelsior Lumber Co. v. Van Peenen Landscape Contractors, 2019 N.J. Super. Unpub. LEXIS 1569, at *14 (App. Div. July 9, 2019) (affirming dismissal of plaintiff's promissory estoppel claim where no evidence existed demonstrating promise to pay a third party's contractual obligation to plaintiff).

The first element, a "clear and definite promise," is an essential condition to recover under promissory estoppel. 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 the Plaintiff. East Orange Bd. of Educ. v. New Jersey Schs. Constr. Corp., 405 N.J. Super. 132, 147-48 (App. Div. 2009). Furthermore, the law does not permit 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.").

New Jersey courts have rejected promissory estoppel claims asserted by health care providers without specific evidence of a distinctly stated promise. For example, in Bergen Plastic Surgery v. Aetna Life Insurance Co., 2022 U.S. Dist. LEXIS 163205 (D.N.J. Sept. 9, 2022), the court granted the insurance carrier's motion to dismiss the plaintiff plastic surgery center's claim for promissory estoppel to recover OON payments for three surgeries that its employees had performed on one of the carrier's insureds, despite a finding of medical necessity.

The court concluded that, "[w]ithout more, claiming that the surgeries were 'pre-authorized' and medically necessary is insufficient to allege that" the carrier "had made a 'clear and definite' promise to pay." Id. at *6-*7. Other courts have rejected similarly generalized claims for promissory estoppel. See, e.g., Premier Orthopedic Assocs., 2021 U.S. Dist. LEXIS 121288, at *8 (holding that the same vagueness that required dismissal of the provider's implied contract claim also doomed its promissory estoppel claim, as the complaint's allegations were insufficient to identify the "precise promise Aetna made.")

Defendants assert that Plaintiff has failed to establish facts supporting a claim for promissory estoppel in the Second Count. Defendants submit that, to succeed upon a claim for promissory estoppel, a plaintiff must prove "(1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." Toll Bros., Inc. v. Bd. Of Chose Freeholders of Burlington, 194 N.J. 223, 253, 944 A.2d 1 (2008) (citations omitted); E. Orange Bd. Of Educ. v. N.J. Sch. Constr. Corp., 405 N.J. Super. 132, 148 (App. Div. 2009), certif. denied, 199 N.J. 540 (2009) (quoting Lobiondo v. O'Callaghan, 357 N.J. Super. 488, 499 (App. Div.), cert. denied, 177 N.J. 224 (2003)).

Defendants first argue that the issuance of benefit authorizations for identified and specific medical services does not constitute a promise for payment when the same document indicates:

> *"Payment for services described in this letter is subject to the member's eligibility at the time services are provided, including employment or Healthcare Exchange premium payment status, benefit plan limitations, and availability of remaining coverage. An eligibility disclaimer was given at the time of this benefit request. Please discuss this with the member*."

Promissory estoppel requires a sufficient and clear promise to pay for services rendered. E. Orange Bd. Of Educ. v. N.J. Sch. Constr. Corp., 405 N.J. Super. 132, 147 (App. Div. 2009) (dismissing claim where plaintiff articulated nothing more than general expectation of payment); see Malaker Corp. Stockholders Protective Comm. First Jersey Nat'l Bank, 163 N.J. Super. 463, 395 A.2d 222 (App. Div. 1978) (dismissing promissory estoppel claim because the alleged promise for a bank loan, where neither the amount of the loan nor the collateral was specified, was not sufficiently clear or definite).

Defendants argue that Plaintiffs have not established a promise or even a statement upon which Plaintiffs relied in coming to the conclusions that Defendants owed Plaintiffs any obligation. Finally, Defendants submit that Plaintiffs have not sufficiently established damages, because the patients, not Defendants, are obligated to pay outstanding balances to Plaintiffs. For all of these reasons, Defendants assert that the Second Count of the Complaint should be dismissed.

Because Plaintiff has not proffered any facts indicating that promises for payment were made by Oscar during contract negotiations upon which the Plaintiff relied, the tenets of promissory estoppel cannot be met. Defendants submit that Plaintiffs' argument falls short concerning the benefit coverage authorization letters as evidence of the type of conduct required to demonstrate a promise. The letters submitted state that payments from the Defendant are subject

to the terms of the respective health benefits plans and were not guarantees of payment. Moreover, the same letter indicates that an eligibility disclaimer was issued at the time of the benefit request.

The Court does not find that Plaintiffs have presented a prima facie case of promissory estoppel. The industry standard and course of conduct rely primarily on the benefit coverage authorization letters, which explicitly state that the receipt thereof does not guarantee payment at all. BrainBuilders' promissory estoppel claim is devoid of a material element: it cannot demonstrate the existence of any writing or conduct that rises to the level of a "clear and definite promise" to make payments for reimbursement. Moreover, the Plaintiff has failed to indicate the existence of a promise that BrainBuilders relied upon to its detriment. The lack of a promise for reimbursement was the primary factor which motivated BrainBuilders to continue the process of extended negotiations. Ultimately, the negotiations failed to produce an agreement on the payment for services and this litigation was commenced.

The lack of evidence demonstrating an agreement or understanding between the parties for an obligation on the part of Oscar to reimburse BrainBuilders for services defeats BrainBuilders' promissory estoppel claims. Accordingly, the Second Count of the Plaintiff's Complaint is dismissed with prejudice.

BrainBuilders' unjust enrichment / quantum meruit claims contend that Oscar received a benefit provided by BrainBuilders. An "unjust enrichment" requires that the benefit received by Oscar was an ill-gotten gain. A determination of unjust enrichment requires a finding of a benefit received by the Defendant which was conferred by the Plaintiff under circumstances where the Plaintiff expected remuneration from the Defendant at the time the benefit was conferred. Additionally, the Court must determine whether the failure of remuneration "enriched 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). Unjust enrichment requires proof of some direct relationship between the parties. Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109 (App. Div. 1966).

Defendants assert that Plaintiff has failed to produce facts supporting a claim for quantum meruit in the Third Count. Defendants submit that this claim fails because 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." EnviroFinance Group, LLC, 440 N.J. Super. at 349-50; Pollack v. Quick Quality Rests., Inc., 452 N.J. Super. 174, 194 (App. Div. 2017) (finding that "plaintiffs did not perform services for defendant's benefit" because the "benefit received by defendant . . . was obtained through defendant's own negotiations" and plaintiffs "had no involvement" in the agreement); see also Woodlands Cmty. Ass'n, Inc. v. Mitchell, 450 N.J. Super. 310, 318, 162 A.3d 306 (App. Div. 2017) ("[r]ecovery under the doctrine of quantum meruit requires a determination that defendant has benefited from plaintiff's performance.").

The Plaintiff's claims for quantum meruit are premised on Plaintiff's rendering of medical services to the Patients pursuant to the various contracts entered between Plaintiff and their Patients. Recognizing that all of the patients have contracts with Oscar, as enrolled members of health benefits plans, BrainBuilders, however, as an out-of-network provider, remains without the benefit of an ongoing contractual relationship with the Defendant. While Plaintiff's claim is premised on the allegation that the Defendants received and retained a benefit because the Plaintiff rendered medical services for which "Defendants failed to compensate Plaintiffs," the Defendants, as the insurers, cannot be said to derive a benefit from those services. Defendants submit that the

plaintiff has failed to produce any facts indicating that Defendants received a benefit sufficient to establish a cognizable quantum meruit claim.

The most common circumstance for application of unjust enrichment is when a party has not been paid despite having had a reasonable expectation of payment for services performed or a benefit conferred. Plaintiffs submit that a cause of action for quantum meruit requires, (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. Estate of Nicolaysen, 172 N.J. 60, 68, 796 A.2d 238 (2002). Here, Plaintiff maintains that there was a reasonable expectation of payment by Defendants for the services Plaintiff performed. Plaintiff contends that this is sufficient on a claim for quantum meruit.

However, Estate of Nicolaysen, 172 N.J. 60, 796 A.2d 238 (2002) states that "Courts generally allow recovery in quasi-contract when one party has conferred a benefit on another," which includes the provision and acceptance of services. Id. at 68; see also Plastic Surgery, 967 F.3d at 237 (listing causes of action in the complaint but declining to include quantum meruit). Here, Plaintiff cannot claim a benefit as Plaintiff merely rendered medical services to patients, and any expectation for compensation exceeding the amounts set forth in the Single Case Agreements executed by the parties is unreasonable.

The Court does not find that Plaintiffs sufficiently established a claim for *quantum meruit*. In a claim for quantum meruit the compensation or benefit conferred is sought from the person to whom the services were rendered. In looking for guidance as to how to evaluate the present matter, the Court turns to prior Court determinations on the issue of quantum meruit and unjust enrichment. The Court does not find that Defendant received any benefit in the Plaintiff

performing services to its insureds. See Plastic Surgery Ctr., LLC v. Oxford Health Ins., Inc., 2019 U.S. Dist. LEXIS 169146, 2019 WL 4750010, at *4 (D.N.J. Sep. 30, 2019) ("'[A]n insurance company derives no benefit from those services; indeed, what the insurer gets is a ripened obligation to pay money to the insured — which can hardly be called a benefit.'"). [sic]

The Court also considers Princeton Neurological Surgery, P.C., v. Horizon Blue Cross Blue Shield of New Jersey, Docket No. MER-L-796-19. While the Court acknowledges that unpublished opinions are not binding on this Court, the Court may look to those opinions to gain understanding as to how to evaluate similar matters. Here, medical and therapeutic services were similarly rendered to the patients, not to Defendants. Thus, the Court does not find that Defendants conferred a benefit from the medical services provided.

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. While not binding upon this Court, the Court recognizes that Robert Wilson, J.S.C., recently dismissed a similar unjust enrichment claim asserted by BrainBuilders against Optum finding it "well-settled that an insurer derives no benefit from the provision of services [to] an insured." BrainBuilders, LLC v. Optum, Inc., 2022 N.J. Super. Unpub. LEXIS 1628, at *21-*22 (Law Div. Sept. 12, 2022).

Numerous federal courts have reached similar holdings on both motions to dismiss and for summary judgment. See, e.g., Haghighi v. Horizon Blue Cross Blue Shield of N.J., 2020 U.S. Dist. LEXIS 157246, at *14 (D.N.J. Aug. 31, 2020) ("the insured individual, rather than the insurer, derives the benefit from a healthcare provider's provision of medical services"); Plastic Surgery Ctr., LLC v. Oxford Health Ins., Inc., 2019 U.S. Dist. LEXIS 169146, at *15 (D.N.J. Sept. 30, 2019) ("this Court consistently dismisses unjust enrichment claims when a healthcare provider

sues an insurer for the unreimbursed costs of a procedure performed on an insured") (internal quotations omitted); 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) ("district courts have consistently dismissed unjust enrichment claims under substantially similar circumstances, reasoning that, if anything, the benefit is derived solely by the insured party"); 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) ("the benefit conferred by Plaintiff was conferred upon [the patient], not [the insurer]"); Broad St. Surgical Ctr., LLC v. UnitedHealth Grp., Inc., 2012 U.S. Dist. LEXIS 30466, at *23 (D.N.J Mar. 6, 2012).

Here, BrainBuilders has provided a "benefit" to the patients it treated. Oscar did not obtain a benefit from BrainBuilders. 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 upon affirmative representations provided by Oscar.

After delivering hundreds of pages of documents to the Court in response to the Court's request for documents verifying the Defendant's alleged representations to guarantee reimbursement for services provided by BrainBuilders, the Plaintiff has failed to come forward with any evidence that the parties reached a rate agreement.

For the reasons set forth herein above, the Court has determined that the Plaintiff has failed to demonstrate the existence of any breach of either actual or implied contract. The Plaintiff has further failed to produce any credible evidence of a lack of good faith and fair dealing or in the

alternative, the creation of promissory estoppel or negligent misrepresentation on behalf of the Defendant. Lastly for the reasons set forth above, the Court has determined that there is no evidence of unjust enrichment under the facts of the Plaintiff's claim. Accordingly, the Third Count of the Plaintiff's Complaint for Unjust Enrichment / Quantum Meruit is dismissed with prejudice.

As set forth by the explanation above, the Court is compelled and constrained to grant the Defendant's motion for summary judgment and further dismisses the Plaintiff's Complaint with prejudice. For that reason, the pending motion and cross-motion to bar testimony are hereby denied as moot.

Date: May 6, 2024