SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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ABDUL Q. MALIK M.D. and
ABDUL MALIK, PHYSICIAN P.C.,

Plaintiffs,

Index No. 651250/2017
Motion Seq. Nos. 001, 003, 004, 005, 006, 007, 008

- against -

ULTRALINE MEDICAL TESTING P.C., ULTRALINE MANAGEMENT, INC., BMZ, INC., CHARLES MASTER, M.D., HUSAIN MOTAVALLI-HAGHI, WENDY MOTAVALLI-HAGHI, MARINA TABAKMAN, ALBINA ZAVADSKY, ALEX ZAVADSKY, YULY ZAVADSKY, HEALTHFIRST, INC., HEALTH FIRST HEALTH PLAN, INC., HEALTHFIRST PHSP, INC., METROPLUS HEALTH PLAN, INC., NEW YORK STATE CATHOLIC HEALTH PLAN, INC. d/b/a FIDELIS HEALTH CARE NEW YORK, UNITEDHEALTHCARE OF NEW YORK, INC., AMERICHOICE CORPORATION and AMERICHOICE HEALTH SERVICES, INC.,

Defendants.

DECISION AND ORDER

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HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for, among other things, conspiracy to defraud, aiding and abetting fraud, and breach of contract. This Decision and Order resolves eight motions by various defendants and groups of defendants seeking, inter alia, to dismiss the complaint insofar as asserted against them.[1]

[1] This is one of several related actions brought by plaintiffs in connection with Dr. Malik's indictment and exclusion from the Medicaid program. This Court heard oral argument on the motions made by defendants in the instant case, in combination with oral argument in two of the related actions in which defendants moved pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against them. The motions in those related actions are decided in separate decisions and orders herewith

BACKGROUND

On March 25, 2015, a Kings County grand jury voted to indict plaintiff Abdul Q. Malik., M.D.("Dr. Malik" or plaintiff"), a cardiologist and internist, on three counts of petit larceny, eight counts of falsifying business records in the first degree, and one count of health care fraud in the fifth degree, in connection with his alleged participation in a massive fraud scheme that involved, among other things, billing Medicaid and Medicaid managed care providers (i.e., health maintenance organizations that provide services to Medicaid recipients), for unnecessary medically services or for services that were never rendered to patients. The indictment alleged that Dr. Malik co-conspired to defraud Medicaid managed care provider Amerigroup New York, LLC d/b/a Amerigroup Community Care d/b/a Health Plus ("Amerigroup"), by seeing inflated numbers of patients at a Brooklyn clinic and falsifying their medical records in order to fraudulently bill and receive payment from Amerigroup for unnecessary medically services, frequently costly treatments, and by billing for patients that he never saw.

As a result of the indictment, the New York State Office of Medicaid Inspector General ("OMIG") excluded Dr. Malik and his physician group, plaintiff Abdul Malik Physician, P.C. (the

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(*see* Decision & Order dated July 13, 2018, *Malik v Heritage New York IPA, Inc.*, Index No. 652583/2017[decided herewith]; Decision & Order dated July 13, 2018, *Malik v Excelsior Medical IPA, LLC*, Index No. 652581/2017[decided herewith]).

"P.C."), from participating in the Medicaid program effective May 7, 2015. On November 30, 2016, the Kings County District Attorney dismissed the indictment against Dr. Malik. On December 7, 2016, OMIG reinstated Dr. Malik and the P.C., retroactive to the date the Medicaid exclusion went into effect.

THE INSTANT ACTION

On or about March 9, 2017, Dr. Malik and the P.C. commenced this action against defendants seeking to recover the losses they allegedly sustained as a result of Dr. Malik's erroneous indictment, and by the decisions of various health plans to immediately suspend Dr. Malik from their network of providers upon learning of his indictment and exclusion from the Medicaid program. The complaint alleges the following.

In June 2013, defendant Ultraline Medical Testing P.C. ("Ultraline Testing") contacted Dr. Malik, asking him to provide remote readings of films for its patients. Dr. Malik agreed to provide remote reading services for $25 per study. He thereafter billed Ultraline Testing on a monthly basis for the number of studies he completed during the prior month.

Dr. Malik never entered into an agreement with Ultraline Testing, or any other entity or individual associated with it, to allow Ultraline Testing to bill health insurance carriers using his name or credentials. However, unbeknownst to Dr. Malik, Ultraline Testing submitted claims to various payors, including

Medicaid and Medicare, listing him as the "servicing provider" for services he never performed. Payments for these claims were then sent to Ultraline Testing and deposited into its bank account via wire transfer or checks that were fraudulently endorsed with Dr. Malik's forged signature.

During the relevant time periods, the signors for Ultraline Testing's bank account included defendants Wendy Motavalli-Haghi, Albina Zavadsky, and Charles Master, M.D. Dr. Malik did not have any knowledge of Ultraline Testing's fraudulent scheme until he was arrested for fraud.

The complaint further alleges that Ultraline Testing funneled funds to defendant Ultraline Management, Inc. ("Ultraline Management"), whose sole source of income was Ultraline Testing. Ultraline Management then made monthly payments to defendants Albina Zavadsky, Wendy Motavalli-Haghi, Husain Motavalli-Haghi and BMZ, Inc. ("BMZ"). BMZ's primary source of income was Ultraline Management. Between April 2012 and December 2015, Ultraline Management transferred more than $5.1 million into BMZ's bank account. BMZ then made monthly payments to defendants Alex and Yuly Zavadsky. Defendant Albina Zavadsky was the signor for Ultraline Management's and BMZ's bank accounts.

As a result of this fraudulent activity performed without Dr. Malik's knowledge, he was indicted with 22 other individuals for allegedly participating in the scheme. On November 30, 2016, the

Kings County District Attorney dismissed the indictment against Dr. Malik, stating that it appeared that Dr. Malik's credentials were stolen, and that he was an innocent victim who was made to appear as if he was participating in an overreaching fraud, when in fact he had no idea what was going on.

According to the complaint, Ultraline Testing, Ultraline Management, Albina Zavadsky, Wendy Motavalli-Haghi, Husain Motavalli-Haghi, BMZ, Charles Master, M.D., Alex Zavadsky and Yuly Zavadsky (collectively Ultraline) submitted the fraudulent claims to various payors, including defendants Healthfirst, Inc., Health First Health Plan, Inc., Healthfirst PHSP, Inc., (collectively "Healthfirst"), Metroplus Health Plan, Inc. ("Metro"), New York State Catholic Health Plan, Inc. d/b/a Fidelis Health Care New York ("Fidelis"), Unitedhealthcare of New York, Inc., Americhoice Corporation and Americhoice Health Services, Inc. (collectively "United"). It is alleged that these defendants negligently, and in violation of New York regulations, allowed Ultraline to fraudulently misuse Dr. Malik's name and billing credentials, which resulted in his erroneous indictment and exclusion from the Medicaid program. After his indictment, these defendants also allegedly ignored their statutory and contractual duties to provide Dr. Malik with notice and a hearing prior to excluding him from their provider networks.

DISCUSSION

Motion to Dismiss Standard

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal is warranted pursuant to CPLR 3211 (a) (1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "Put differently, the documentary evidence must 'resolv[e] all factual issues as a matter of law and conclusively dispose[] of the plaintiff's claim'" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011], quoting *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2d Dept 2010]; *see Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

"In assessing a motion under CPLR 3211 (a) (7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d at 88 [internal

quotations marks and citations omitted]). "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it , . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "It is true that in considering a motion to dismiss brought pursuant to CPLR 3211 (a) (7), the court must presume the facts pleaded to be true and must accord them every favorable inference . . . . However, factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016][internal quotations marks and citation omitted]).

United's Motion (MOTION SEQ. NO. 001)

Under Motion Sequence No. 001, United moves to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211(a)(1) and 3211(a)(2). The complaint sets forth nine causes of action against United: aiding and abetting fraud; violation of Insurance Law 4803(b); violation of Public Health Law 4406-d; violation of Public Health Law 4403(6)(e)(1) and 4408(4); violation of Insurance Law 4804(e)(1); breach of contract; negligence; failure to comply with 11 NYCRR 86.6 and 10 NYCRR 98-1.21; and violation of General Business Law §§ 349 and 350.

United contends that an arbitration provision in the physician contracts between Dr. Malik and United mandates arbitration of these claims and, therefore, the action must be dismissed insofar as asserted against it on the ground that the physician contracts establish that the court lacks subject matter jurisdiction over these causes of action. In the alternative, United moves to compel arbitration of these causes of action pursuant to CPLR 7503(a).

As relevant here, the physician contracts provide:

> "We will resolve *all disputes between us* by following the dispute procedures set out in our Provider Manual. If either of us wishes to pursue the dispute beyond those procedures, *they will submit the dispute to binding arbitration* in accordance with the Commercial Dispute Procedures of the American Arbitration Association . . . within one year.
>
> We both expressly intend that any dispute between us be resolved on an individual basis so that no other dispute with any third party(ies) may be consolidated or joined with our dispute. . . . The arbitrator will not vary the terms of this agreement and will be bound by governing law. We both acknowledge that this agreement involves interstate commerce, and is governed by the Federal Arbitration Act, 9 USC § 1, et seq. The arbitrator will not have the authority to award punitive or exemplary damages against either of us, except in connection with any statutory claim that explicitly provides for such relief. Arbitration will be conducted in New York County, NY, New York.
>
> . . . This section of the agreement governs *any dispute between us arising before or after execution of this agreement* and this section shall survive and govern any termination of this agreement"

(Physician Contracts [Exhibit "A" to Affidavit of Amy S. Rodwell], at 5 [emphasis added]). Located immediately above the signature

line of both contracts is the following language in bold type: "THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION THAT MAY BE ENFORCED BY THE PARTIES" (*id.* at 7).

"New York public policy favors arbitration. However, an agreement to arbitrate must be clear and unambiguous, and not dependent upon subtleties in the agreement" (*Aerotech World Trade v Excalibur Sys.*, 236 AD2d 609, 611 [2d Dept 1997]; *see Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *Matter of Waldron [Goddess]*, 61 NY2d 181 [1984]). Here, all of plaintiffs' claims against United are subject to arbitration pursuant to the above broad and unambiguous arbitration provision which covers "any dispute between us arising before or after execution of this agreement."

That said, the existence of "[a]n agreement to arbitrate is not a defense to an action" and therefore "may not be the basis for a motion to dismiss" (*Allied Bldg. Inspectors Intl. Union of Operating Engrs., AFL-CIO v Office of Labor Relations of The City of N.Y.*, 45 NY2d 735, 738 [1978]; *see also Thomas v Mathieu*, 17 Misc 3d 93, 94 [App Term, 2d Dept 2007]["the mere existence of an arbitration agreement effective between the parties does not deprive the court of subject matter jurisdiction"]). "In the absence of arbitration and an award, CPLR 3211 furnishes no basis for a dismissal because of the presence in the contract of an arbitration provision" (*Prince of Peace Lutheran Church v Hibner*,

44 AD2d 830, 830 [1974]; *see* CPLR 3211[a][5]; *Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 NY2d at 738; *Blatt v Sochet*, 199 AD2d 451, 453 [2d Dept 1993]; *Ogoe v New York Hosp.*, 99 AD2d 968, 969 [1st Dept 1984]). Accordingly, United's motion which is to dismiss the complaint insofar as asserted against it is denied. Its alternative request which is pursuant to CPLR 7503, to stay the action and compel arbitration is granted.

Healthfirst's, Fidelis's, and Metro's Motions to Dismiss (MOTION SEQ. NOS. 003, 004, 007)

Under Motion Sequence Nos. 003, 004, and 007, respectively, Healthfirst, Fidelis, and Metro (collectively, "the HFM defendants)" separately move, pursuant to CPLR 3211(a)(1) and/or (a)(7), to dismiss the complaint insofar as asserted against them. The complaint sets forth the same nine causes of action against the HFM defendants as it sets forth against United. For the reasons that follow, their motions to dismiss are granted.

Aiding and Abetting Fraud

In the seventh cause of action, plaintiffs allege that Ultraline defrauded them by using Dr. Malik's name and billing credentials to submit false claims to healthcare providers and receiving payments for those claims based upon documents containing Dr. Malik's forged signature. The complaint states that the HFM defendants knowingly induced and participated in this

fraud by "(a) failing to use reasonable care to safeguard Plaintiffs credentialing information and to confirm that any changes submitted under Plaintiffs' name were valid; (b) failing to cross-reference fraudulent documents submitted by Plaintiffs; [and] (c) failing to contact Plaintiffs' office to inquire whether the Ultraline Defendants' documents were valid" (Complaint at 34-35, ¶ 186). Due to these failures, Ultraline was able to submit fraudulent bills and to receive payment for them under Dr. Malik's account, without Dr. Malik's knowledge or authorization, resulting in Dr. Malik's erroneous indictment and exclusion from the Medicaid program. These allegations are inadequate to support a claim for aiding and abetting fraud.

"A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, *actual knowledge* and substantial assistance" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010][emphasis added]; *see Goel v Ramachandran*, 111 AD3d 783, 792 [2d Dept 2013]). "Aiding and abetting fraud 'is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud' combined with conclusory allegations that the aider and abettor had actual knowledge of such fraud" (*Goel v Ramachandran*, 111 AD3d at 792, quoting *National Westminster Bank USA v Weksel*, 124 AD2d 144, 149 [1st Dept 1987]). "The nexus between the aider and abettor and the primary fraud is made out by allegations as to the proposed aider's knowledge of the fraud, and what he, therefore, can be

said to have done with the intention of advancing the fraud's commission" (*National Westminster Bank USA v Weksel*, 124 AD2d at 149).

"Aiding and abetting fraud must be pleaded with the specificity sufficient to satisfy CPLR 3016 (b)" (*High Tides, LLC v DeMichele*, 88 AD3d 954, 960 [2d Dept 2011]). The heightened pleading requirement "may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, 'are sufficient to permit a reasonable inference of the alleged conduct' including the adverse party's knowledge of, or participation in, the fraudulent scheme" (*Goel v Ramachandran*, 111 AD3d at 792-793, quoting *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]).

Here, the allegations in the complaint are insufficient to permit a reasonable inference as to the HFM defendants' knowledge of the fraud. In this regard, the complaint does not allege that these defendants actually knew Ultraline was submitting fraudulent claims to them. Rather, the complaint alleges that these defendants failed to use reasonable care in safeguarding Dr. Malik's credentials, failed to cross-reference fraudulent documents and failed to contact plaintiffs' office to inquire whether the documents were valid. In other words, if the HFM defendants used reasonable case, cross-referenced documents, and contacted plaintiffs to inquire about whether Ultraline's documents were valid, they would have known that Ultraline was

submitting fraudulent documents, thereby thwarting Ultraline's fraudulent scheme. It cannot be inferred from these allegations that the HFM defendants had knowledge of Ultraline's fraudulent scheme. At best, the allegations imply that the HFM defendants should have known of the fraud, which "is insufficient to support an aiding and abetting fraud claim" (*Lumen at White Plains, LLC v Stern*, 135 AD3d 600, 600 [1st Dept 2016]; *see Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014][the allegation that a defendant "'knew or should have known' of the fraud is conclusory and alleges mere constructive knowledge"]; *Oikonomos, Inc. v Bahrenberg*, 48 Misc 3d 1228[A], 2015 NY Slip Op 51300[U][Sup Ct, Suffolk County 2015]["The knowledge element requires a showing of *actual* knowledge of the fraud, as discerned from the surrounding circumstances"][emphasis added]; *cf. Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 101-102 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]["To state a claim for aiding and abetting a breach of fiduciary duty . . . [a]ctual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty"]).

In addition, the complaint includes allegations implying that the HFM defendants were, in fact, victims of Ultraline's fraud. These allegations contradict any assertion that they had actual knowledge of such fraud.

Since plaintiffs failed to adequately allege that these defendants had actual knowledge of the underlying fraud, it is not necessary to reach the issue of whether the complaint fails to plead substantial assistance. Accordingly, the cause of action alleging aiding and abetting fraud insofar as asserted against the HFM defendants is dismissed pursuant to CPLR 3211(a)(7).

Violation of the Notification standards set forth in Insurance Law § 4803(b) and Public Health Law § 4406-d(2)

In the ninth and tenth causes of action, plaintiffs allege that the HFM defendants violated the notification standards set forth in Insurance Law § 4803(b) and Public Health Law § 4406-d(2). Both of these statutes provide that, prior to terminating a health care contract, a health care plan must provide a written explanation of the reasons for the proposed contract termination, and an opportunity for a review or hearing. The complaint alleges that the HFM defendants violated these statutes by terminating their agreements with Dr. Malik without giving him a written explanation or the opportunity for a review or hearing.

The HFM defendants assert that they did not violate the foregoing statutes, because they did not "terminate" Dr. Malik from their networks. Rather, Dr. Malik was suspended. Furthermore, even assuming they terminated Dr. Malik, both statutes explicitly state that the notification standards "shall not apply in cases involving . . . a determination of fraud, or a final disciplinary action by a state licensing board or other governmental agency

that impairs the health care professional's ability to practice" (Insurance Law § 4803[b][1]; Public Health Law § 4406-d[2][a][emphasis added]).

Plaintiffs contend that Dr. Malik was *de facto* terminated, not suspended, in that there were no provision made for his reinstatement. Furthermore, OMIG's decision to exclude plaintiffs from the Medicaid program was not a "*final* disciplinary action," inasmuch as plaintiffs had the right to appeal the exclusion under 18 NYCRR 515.7(g). In addition, there was never a "determination of fraud," inasmuch as Dr. Malik was merely arrested, not convicted of fraud, and he denied ever committing fraud.

Plaintiffs are correct that, pursuant to 18 NYCRR 515.7(g), they were entitled to appeal OMIG's exclusion, in writing, within 30 days. Within 45 days of receiving written arguments, OMIG must review the sanction and notify the person sanctioned of whether the sanction will be "affirmed, reversed or modified" (18 NYCRR 515.7[g][2]). Therefore, it is possible that the sanction imposed by OMIG was not a "*final* disciplinary action" at the time Dr. Malik was suspended or terminated from these networks.

Notwithstanding the above, Dr. Malik's indictment constituted a "determination of fraud" under Insurance Law § 4803(b) and Public Health Law § 4406-d(2). The statutes do not supply a definition of the term, and the parties do not direct this Court to any case law interpreting the specific term. It is first noted that although a grand jury does not determine whether a person is

guilty or innocent, a grand jury is authorized to indict a person for an offense when "(a) the evidence before it is legally sufficient to establish that such person committed such offense, . . . and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense" (CPL 190.65[1]). As such, the grand jury did make a determination that the evidence before it was legally sufficient to establish that Dr. Malik committed fraud. The fact that Insurance Law § 4803(b)(1) and Public Health Law § 4406-d(2)(a) do not use the words "final" or "judicial" to qualify the term "determination of fraud" also supports the interpretation that a grand jury's indictment on fraud charges constitutes a "determination of fraud" under those statutes.

The "determination of fraud" in this case (i.e., the indictment) also impaired Dr. Malik's ability to practice, in that it resulted in OMIG sanctioning him by excluding him from participating in the Medicaid program. Given that the complaint includes allegations establishing that this case "involv[ed] . . . a determination of fraud . . . that impair[ed] the health care professional's ability to practice," plaintiffs cannot establish that the notification and review standards set forth in Insurance Law § 4803(b) and Public Health Law § 4406-d(2) applied. Therefore, the ninth and tenth causes of action are dismissed, pursuant to CPLR 3211(a)(7), insofar as asserted against the HFM defendants.

Violation of Public Health Law §§ 4403(6)(e)(1) and 4408(4) and Insurance Law § 4804(e)(1)

In the eleventh cause of action, plaintiffs allege that the HFM defendants violated Public Health Law § 4403(6)(e)(1) by not permitting Dr. Malik's patients to continue an ongoing course of treatment with him for 90 days after his disaffiliation with the network. The eleventh cause of action also alleges that the HFM defendants violated Public Health Law § 4408(4), by not providing notice to Dr. Malik's patients undergoing an ongoing course of treatment within 15 days of his termination, informing them of the procedures for continuing care. In the twelfth cause of action, the complaint alleges that the HFM defendants violated the patient rights embodied in Insurance Law § 4804(e)(1).

Public Health Law § 4403(6)(e)(1) and Public Health Law § 4408(4) clearly express that they are intended to benefit/protect "enrollees," and Insurance Law § 4804(e)(1) clearly states that it is intended to benefit/protect "the insured." As such, these provisions do not give rise to a private right of action in favor of health care providers such as plaintiffs in this case (*see generally Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 325 [1983] ["Whether a private cause of action was intended will turn in the first instance on whether the plaintiff is 'one of the class for whose especial benefit the statute was enacted'"], quoting *Motyka v City of Amsterdam*, 15 NY2d 134, 139 [1965]).

Breach of Contract

The thirteenth cause of action alleges that plaintiffs "entered into agreements with" the HFM defendants, and that "upon information and belief, the Provider Manuals provided by [the HFM defendants] contain provisions requiring [the HFM defendants] to provide a pre-termination notice [and the right to] appeal a termination" (Complaint at 41, ¶¶ 224-226). The complaint alleges that the HFM defendants "breached the terms of the Provider Manuals by not providing the required notice prior to termination and not providing an opportunity for a hearing or review prior to termination" (Complaint at 41, ¶ 227).

To plead a cause of action for breach of contract, the complaint must allege "in nonconclusory language . . . the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated" (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see Woodhill Elec. v Jeffrey Beamish, Inc.*, 73 AD3d 1421 [3d Dept 2010]; *Kraus v Visa Intl. Serv. Assn.*, 304 AD2d 408, 408 [1st Dept 2003]; *Lebow v Kakalios*, 156 AD2d 301, 302 [1st Dept 1989]; *Rattenni v Cerreta*, 285 AD2d 636, 637 [2d Dept 2001]; *Caniglia v Chicago Tribune-NY News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994]; *Shields v School of Law of Hofstra Univ.*, 77 AD2d 867, 868 [2d Dept 1980]). Here, the complaint is less than clear in articulating the essential terms of the purported contracts or

the specific provisions upon which liability is based. The complaint alleges that the HFM defendants breached a provision in their "provider manuals," but does not allege that the "provider manuals" were incorporated into the contracts that purportedly exist between plaintiffs and the HFM defendants. Even assuming the provider manuals were incorporated in such contracts, the complaint does not set forth the specific requirements from the provider manual that these defendants failed to satisfy.

In support of its motion, Fidelis submits a copy of the agreement it entered into with Dr. Malik, which states that Fidelis "shall immediately terminate any Personnel due to . . . a determination of fraud" (Exh B, at 14). In response, plaintiffs do not dispute that this agreement governs Dr. Malik's relationship with Fidelis. However, plaintiffs argue that Dr. Malik was terminated based upon his arrest, and that an arrest does not constitute a "determination of fraud." For the reasons discussed above, Dr. Malik's March 25, 2015 indictment on fraud charges constitutes a "determination" of fraud. In support of its motion, Fidelis supplies a letter dated April 8, 2015, after the indictment, suspending Dr. Malik from its network until the charges against him were resolved, indicating that he was suspended based upon the indictment, not his arrest. Therefore, the breach of contract cause of action insofar as asserted against Fidelis, is dismissed pursuant to CPLR 3211(a)(1) and (a)(7).

With respect to Healthfirst and Metro, as best can be

discerned from plaintiffs' opposition papers (which are also less than clear with respect to the cause of action for breach of contract), they assert that, pursuant to a "Physician Participation Agreement" that Dr. Malik entered into with Excelsior Medical IPA, LLC ("Excelsior"), Excelsior, acting as Healthfirst's and Metro's agent, had the authority to terminate providers from their networks. Plaintiffs assert that Excelsior, acting as Dr. Malik's agent, entered into agreements with Healthfirst and Metro, to permit him to provide services to their enrollees, and, therefore, Dr. Malik had contracts with Healthfirst and Metro through Excelsior. Plaintiffs contend that Healthfirst and Metro breached these contracts when Excelsior, acting as their agent, terminated him from participating in their networks. Plaintiffs attach a copy of the "Physician Participation Agreement" to their opposition papers (Exhibit "D" to Affirmation of Linda J. Clark in Opposition to Healthfirst and Fidelis' Motions to Dismiss). The "Physician Participation Agreement" between Dr. Malik and Excelsior states: "Termination of the participation of a Physician for cause involving . . . a determination of fraud . . . shall be effective immediately on written notice to the Physician" (*id.* at 11). Since in this case, Dr. Malik was indicted on fraud charges, Excelsior, which plaintiffs assert acted as Healthfirst's agent in terminating Dr. Malik, was permitted to immediately render Dr. Malik inactive from its network.

Further, the agreement states: "Notwithstanding any other provision of this Agreement the parties agree to be bound by the New York State Department of Health Standard Clauses ('Standard Clauses') which are hereby made part of this Agreement and attached as Appendix A" (Physician Participation Agreement, at 17). Section E(5) of the Standard Clauses provides: "Notwithstanding any other provision herein, to the extent that the provider is providing health care services to enrollees under the Medicaid Program and/or Family Health Plus, the . . . IPA retains the option to immediately terminate the Agreement when the provider has been terminated or suspended from the Medicaid Program" (Physician Participation Agreement, Appendix A, at 26). Since Dr. Malik was suspended from the Medicaid program, Excelsior had the option to immediately terminate the agreement with Dr. Malik pursuant to this section of the agreement.

In sum, the Physician Participation Agreement, which plaintiffs contend Healthfirst and Metro breached, conclusively establishes that plaintiffs have no cause of action sounding in breach of contract against Healthfirst or Metro. Therefore, this cause of action is dismissed, pursuant to CPLR 3211(a)(1) and (a)(7), insofar as asserted against them.

Negligence

In the fourteenth cause of action, plaintiffs allege that the HFM defendants had a duty to them to use reasonable care to safeguard their credentialing information and to confirm that any

changes submitted under Dr. Malik's name were valid. They breached that duty by failing to cross-reference fraudulent documents submitted by Ultraline against valid documentation submitted by plaintiffs and by failing to contact plaintiffs' office to inquire whether the documents submitted by Ultraline were valid. As a result of their failure to cross-reference the documents and contact plaintiffs' office to confirm their validity, Ultraline was able to submit fraudulent bills to them and to receive payment for these bills under Dr. Malik's account without his knowledge. Plaintiffs allege that this fraud resulted in Dr. Malik's erroneous indictment, which damaged his reputation, career, professional relationships, and income.

As an initial matter, contrary to the HFM defendants' contention, the negligence claim against them is not duplicative of the breach of contract claim. The breach of contract claim alleges that these defendants violated their contracts with Dr. Malik by terminating him from their networks without proper notice or the opportunity for a hearing/review. The negligence cause of action is not based upon a contractual obligation. Rather, plaintiffs are asking this Court to impose a legal duty on the HFM defendants independent of their contractual obligations (*see generally Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). Nevertheless, plaintiffs fail to state a cause of action for negligence against these defendants.

"To establish a cause of action sounding in negligence, a

plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty, and damages" (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]; *see Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). "In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]). "The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court" (*Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). "The nature of the inquiry depends, of course, on the particular facts and circumstances in which the duty question arises. The analysis is also driven by considerations of public policy. . . . 'The common law of torts is, at its foundation, a means of apportioning risks and allocating the burden of loss'" (*id.*, quoting *Waters v New York City Hous. Auth.*, 69 NY2d 225, 229 [1987]). "While a court might impose a legal duty where none existed before . . . , such an imposition must be exercised with extreme care, for legal duty imposes legal liability" (*Pulka v Edelman*, 40 NY2d at 786).

Here, plaintiffs assert that the HFM defendants paid claims to Ultraline Testing under Dr. Malik's billing credentials without cross-referencing the information on the documents submitted to them by Ultraline Testing with the information provided by Dr. Malik. Had they done so, they would have ascertained that the documents submitted by Ultraline Testing contained fictitious

addresses and payment information that did not comport with the authentic information provided to them by Dr. Malik. This, they assert, "opened the gates to the massive and devastating fraud perpetrated by Ultraline Testing and its co-conspirators, as described in the Indictment, allowing the [HFM defendants'] . . . credentialing management department to become instruments of fraud that was detectable to them, but invisible to Dr. Malik" (Affirmation of Linda Clark in Opposition to Healthfirst and Fidelis, at 7).

However, the HFM defendants did not owe Dr. Malik a duty to cross-reference every document submitted to them using Dr. Malik's name and credentialing information before paying a claim. Plaintiffs cite no case law or statute creating such a duty and this Court declines to impose such a duty. In the absence of such a duty, the complaint does not state a cause of action to recover damages for negligence against the HFM defendants.

The cases cited by plaintiffs, related to the duty to safeguard the confidentiality of a party's personal data, are inapplicable. As asserted in the complaint, the negligence cause of action does not allege that Ultraline Testing obtained Dr. Malik's credentialing information from the HFM defendants. The allegations assert that the HFM defendants paid claims to Ultraline Testing under Dr. Malik's billing credentials without first cross-referencing the documents in order to ascertain their authenticity.

Violation of 11 NYCRR 86.6 and 10 NYCRR 98-1.21

In the fifteenth cause of action, plaintiffs assert that the HFM defendants violated 11 NYCRR 86.6 and 10 NYCRR 98-1.21 by not having an "effective" fraud and abuse prevention plan. 11 NYCRR 86.6 requires certain insurers to "develop and file with the superintendent a plan for the detection, investigation and prevention of fraudulent insurance activities in this State and those fraudulent insurance activities affecting policies issued or issued for delivery in this State" (11 NYCRR 86.6 [a]). Similarly, 10 NYCRR 98-1.21 requires certain managed care organizations to "develop and file with the commissioner . . . a plan for the detection, investigation and prevention of fraudulent activities in this state and those fraudulent and abusive activities affecting policies or state or local department of social services contracts issued or issued for delivery in this state" (10 NYCRR 98-1.21 [a]). Both regulations also set forth items that must be included in such plans.

A violation of these regulations does not give rise to a private right of action. Where as here, a statute does not expressly provide for a private right of action, recovery under the statute may be had only if a private right of action may fairly be implied (*see Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]). The essential factors to be considered in this regard are: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether

recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*id.*). Even assuming the first two factors are met, "the most critical inquiry in determining whether to recognize a private cause of action where one is not expressly provided is whether such action would be consistent with the over-all legislative scheme" (*Brian Hoxie's Painting Co. v Cato-Meridian Cent. School Dist.*, 76 NY2d 207, 212 [1990]). "[R]egardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature" (*Sheehy v Big Flats Community Day*, 73 NY2d at 634-635).

Here, 11 NYCRR 86.6, promulgated by the New York State Insurance Department, implements the requirements set forth in Insurance Law § 409. That provision states that "[i]f an insurer fails to . . . comply with the provisions of this section, the superintendent may (i) impose a fine . . . ; or (ii) impose upon the insurer a fraud detection and prevention plan deemed to be appropriate by the superintendent . . . ; or (iii) . . . both" (Insurance Law § 409 [d][3]). It further provides that,

> "[e]very insurer required to file a fraud prevention plan shall report to the superintendent on an annual basis . . . describing the insurer's experience, performance and cost effectiveness in implementing the plan . . . Upon consideration of such reports, the superintendent may require amendments to the insurer's fraud prevention plan"

(Insurance Law § 409 [g]). Thus, the language of Insurance Law § 409 demonstrates the legislative intent to have the Superintendent of Insurance enforce the fraud prevention plan requirements. Therefore, recognizing a private right of action would be incompatible with the enforcement mechanism chosen by the Legislature (*see Dwyer v First Unum Life Ins. Co.*, 14 Misc 3d 1202[A], 2006 NY Slip Op 52380[U] [Sup Ct, NY County 2006]["Insurance Law § 409, which requires insurers to establish a plan for fraud prevention, is only enforceable by the Superintendent of Insurance, and does not create a private right of action. The Superintendent may impose a fine, and/or a plan for fraud prevention if an insurance company fails to satisfy the statutory requirements for such a plan"]; *see generally Hudes v Vytra Health Plans Long Is.*, 295 AD2d 788, 789 [3d Dept 2002]["where a regulatory agency has either been selected or, in fact, serves to administratively enforce the duties created by a statute, 'a private right of action should (ordinarily) not be judicially sanctioned'"][internal citation omitted]).

10 NYCRR 98-1.21, promulgated by the New York State Department of Health pursuant to Public Health Law § 4414, also indicates that the Commissioner of Health and Superintendent of Insurance are responsible for enforcing the regulation. Therefore, recognition of a private right of action in favor of plaintiffs under either regulation would be inconsistent with the legislative scheme.

In addition, even assuming a private right of action in favor of plaintiffs exists under these regulations, the complaint does not allege that the HFM defendants failed to develop or file a fraud prevention plan with the appropriate authority, or that their plans did not include the content prescribed by the regulations. Rather, the complaint merely alleges that their failure to detect the fraud perpetrated by Ultraline Testing establishes that their plans were ineffective. Having an ineffective plan would not constitute a violation of these regulations. Therefore, the fifteenth cause of action, insofar as asserted against the HFM defendants, is dismissed pursuant to CPLR 3211(a)(7).

Violation of General Business Law §§ 349 and 350

In the sixteenth cause of action, plaintiffs assert that the HFM defendants violated General Business Law §§ 349 and 350, by engaging in deceptive practices and false advertising. General Business Law § 349 (h) provides that "any person who has been injured [by deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state] may bring an action in his [or her] own name to enjoin such unlawful act or practice." Pursuant General Business Law § 350, "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is [also] unlawful."

"A plaintiff under section 349 must prove three elements:

first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; see *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). Therefore, "[a]s a threshold matter, in order to satisfy General Business Law § 349 plaintiffs' claims must be predicated on a deceptive act or practice that is 'consumer oriented'" (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 24-25). "The conduct need not be repetitive or recurring but *defendant's acts or practices must have a broad impact on consumers at large*" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995][emphasis added], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25). Similarly, to state a cause of action under General Business Law § 350, a plaintiff must allege that the defendant "engaged in 'consumer-oriented conduct'" (*BitSight Tech., Inc. v SecurityScorecard, Inc.*, 143 AD3d 619, 621 [1st Dept 2016], quoting *Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]). "Private contract disputes unique to the parties" do "not fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25).

Here, the complaint alleges that the HFM defendants failed to

safeguard and cross-check Dr. Malik's credentialing information despite luring Dr. Malik into joining their networks, by representing and warranting competence in fraud detection in their advertising. Plaintiffs also allege that, in an effort to sell and market memberships in their networks, the defendants deliberately declined and failed to advise Dr. Malik of the risks of membership in their networks.

Even assuming plaintiffs have properly alleged a deceptive practice, the actions complained of are not directed at "consumers" but rather at health care practitioners providing services to consumers. Therefore, the complaint fails to sufficiently allege that the HFM defendants engaged in deceptive acts or practices that had a broad impact on consumers at large *(see Medical Socy. of State of N.Y. v Oxford Health Plans, Inc.*, 15 AD3d 206, 207 [1st Dept 2005] [the acts and practices of defendant (a network/association of medical providers) "are directed at physicians, not consumers"]). Their conclusory allegations as to the effect of the conduct on physicians at large are "insufficient to transform a private dispute into conduct with further-reaching impact" (*Scarola v Verizon Communications, Inc.*, 146 AD3d 692, 693 [1st Dept 2017]).

Motions by Defendants Ultraline Management, BMZ, Husain Motavalli-Haghis, Wendy Motavalli-Haghis, and Albina Zavadsy, Alex Zavadsky and Yuly Zavadsky, and Marina Tabakman's Motions (MOTION SEQS. NO. 005, 006, 008)

In Motion Sequence No. 005, Ultraline Management, BMZ, Husain

Motavalli-Haghis, Wendy Motavalli-Haghis, and Albina Zavadsy (collectively the UBMA defendants) move to dismiss the complaint, pursuant to CPLR 3211(a)(7), insofar as asserted against them. In Motion Sequence No. 006, Alex and Yuly Zavadsky move, pursuant to CPLR 5015, to vacate an order entered upon their default in answering the complaint or appearing in the action, and, pursuant to CPLR 3211 (a)(7), to dismiss the complaint. In Motion Sequence No. 008, Marina Tabakman moves to dismiss the complaint, pursuant to CPLR 3211 (a)(7), insofar as asserted against her.[2] The complaint asserts six causes of action against these defendants: fraudulent misrepresentation; civil conspiracy to defraud; unjust enrichment; aiding and abetting fraud; breach of contract, and RICO violations.

Alex and Yuly Zavadsky's Default

By order dated July 14, 2017, this Court granted a default judgment in plaintiffs' favor against defendants Alex and Yuly Zavadsky. Alex and Yuly seek to vacate the default pursuant to CPLR 5015. "A defendant seeking to vacate a default under [CPLR 5015 (a) (1)] must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense

[2] A default judgment was entered against Marina Tabakman on July 14, 2017. On December 6, 2017, Tabakman and plaintiffs stipulated to vacating the default and deeming the summons and complaint properly served on Tabakman. Pursuant to the stipulation, Tabakman also waived all defenses related to personal jurisdiction and withdrew her instant motion, except to the extent that it seeks dismissal of the complaint, pursuant to CPLR 3211(a)(7), insofar as asserted against her. Tabakman is represented by Christopher Cardillo, the same counsel representing the UBMA defendants and Alex and Yuly Zavadsky.

to the action" (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). "A determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court" (*38 Holding Corp. v City New York*, 179 AD2d 486, 487 [1st Dept 1992]). Public policy favors disposing of cases on their merits (*see Johnson-Roberts v Ira Judelson Bail Bonds*, 140 AD3d 509, 509 [1st Dept 2016]). "'[F]or that purpose a liberal policy is adopted with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues'" (*38 Holding Corp. v New York*, 179 AD2d at 487, quoting *Matter of Raichle, Moore, Banning & Weiss v Commonwealth Fin. Corp.*, 14 AD2d 830, 831 [4th Dept 1961]).

Here, Alex and Yuly proffer the following excuse for their default. They assert that they did not initially retain Christopher Cardillo, the attorney representing them on the instant motion, because of a conflict of interest in that Cardillo had already been retained by defendants Albina Zavadsky and her company BMZ, Inc. In addition, Yuly (Alex's father), has been ill since the service of the complaint, and is now residing in a nursing home. Alex attempted to retain separate counsel within the confines of taking care of his ailing father, and while he came close to hiring an attorney, he could not find an attorney that he was comfortable working with. Alex asserts that English is not his first language, and that at one point, he mistakenly

believed that he retained an attorney. Alex and Yuly then contacted Cardillo and asked him to represent them. Cardillo explained the meaning of "conflict of interest" to them, as well as the potential impact on their case. Alex and Yuly then decided they were comfortable with Cardillo representing them. In sum, the delay in appearing was a result of Yuly's illness, a language barrier, and a misunderstanding. Given the strong public policy in favor of disposing of cases on their merits, this court finds that Alex and Yuly have proffered a reasonable excuse for their delay. For the reasons discussed below, they set forth a colorable meritorious defense to the action.

Fraudulent Misrepresentation

"Generally, in a claim for fraudulent misrepresentation, a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). In addition, where a cause of action is based upon misrepresentation or fraud, the circumstances constituting the wrong must be stated in detail (*see* CPLR 3016 [b]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 178; *Lanzi v Brooks*, 43 NY2d 778, 780 [1977] ["(CPLR 3016 [b])

requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of"]; *Lynch v Upper Crust, Inc.*, 294 AD2d 237, 238 [1st Dept 2002][cause of action for fraud properly dismissed on ground that "allegations pertinent thereto being too vague and conclusory to give proper notice of the transactions and occurrences intended to be proved"]).

Here, the allegations pertinent to the fraudulent misrepresentation claim insofar as asserted against these defendants are not set forth in sufficient detail so as to inform these defendants with respect to the incidents complained of[3]. The only specific allegations related to this claim are directed at the defendant Ultraline Testing. The same holds true for aiding and abetting fraud. Therefore, the first cause of action for fraudulent misrepresentation is dismissed, pursuant to CPLR 3211(a)(7), insofar as asserted against these defendants, unless plaintiffs re-plead specific allegations against these individual defendants and Ultraline within thirty (30) days of notice of entry of this Decision and Order.

Civil Conspiracy to Defraud

The second cause of action which is for conspiracy to defraud

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[3] The forty-eight page Complaint (comprised of two hundred fifty-eight paragraphs), makes many allegations against "Ultraline" or the "Ultraline Defendants" and as such, in those instances fails to differentiate between them and individual defendants (Complaint at 5, ¶ 28).

is also dismissed, pursuant to CPLR 3211(a)(7), insofar as asserted against these defendants. "New York does not recognize an independent cause of action for civil conspiracy" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 110 [1st Dept 2009]; *see Zachariou v Manios*, 50 AD3d 257 [1st Dept 2008]).

Unjust Enrichment

"The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered . . . . A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182 [internal quotation marks and citations omitted]).

Here, the gravamen of the unjust enrichment claim, insofar as asserted against these defendants, is that they were unjustly enriched by receiving money for claims submitted in Dr. Malik's name for services that were never actually rendered by Dr. Malik, except for "payment for approximately $8,355 in remote reading services [plaintiffs] provided to Ultraline Testing." (Complaint at 25, ¶ 156). Therefore, the enrichment was at the expense of the HMOs paying the claims, not Dr. Malik, inasmuch as Dr. Malik was not entitled to receive money for services he never rendered. Accordingly, the cause of action for unjust enrichment is dismissed, insofar as asserted against these defendants (*see Giant*

Supply Corp. v City of N.Y., 248 AD2d 231, 235 [1st Dept 1998][dismissing unjust enrichment claim where enrichment was not at plaintiff's expense]). Since it is uncontroverted that Ultraline and plaintiffs had an agreement for plaintiffs to provide remote reading services, there is also no necessity for an unjust enrichment claim when there is a viable claim for breach of contract as will be discussed below.

Aiding and Abetting Fraud

The complaint alleges that these defendants participated in Ultraline Testing's fraudulent use of his name and billing credentials by:

> "(a) communicating misrepresentations to Dr. Malik concerning the use of his credentials; (b) submitting fraudulent claims, including claims containing forged signatures of Dr. Malik . . . . (c) receiving and processing payments from payors resulting from the submission of fraudulent claims; and (d) signing, transferring and receiving payments to and from Ultraline bank accounts, including payments made from Ultraline bank accounts"

(Complaint at 28, ¶ 164). The complaint further alleges that the funds fraudulently obtained by Ultraline Testing were funneled to these defendants, inasmuch as Ultraline Management's sole source of income was Ultraline Testing. Ultraline Management, in turn, made monthly payments to BMZ, Husain Motavalli-Haghis, Wendy Motavalli-Haghis, and Albina Zavadsy. In addition, BMZ made monthly payments to Alex and Yuly Zavadsky. Further, Albina Zavadsky was a signatory on Ultraline Management's and BMZ's bank account. Wendy Motavalli-Haghis and Albina Zavadsky were

signatories on Ultraline Testing's bank accounts. Albina Zavadsky and Marina Tabakman were employees of Ultraline Testing. Wendy Motavalli-Haghis, Albina Zavadsky and Hasain Motavalli-Haghi owned, operated and/or controlled Ultraline Management and Albina Zavadsky and Alex Zavadsky owned, operated and/or controlled BMZ.

These allegations are insufficient to permit a reasonable inference that Ultraline Management, BMZ, Husain Motavalli-Haghis, Wendy Motavalli-Haghis, Albina Zavadsky, Alex Zavadksy, or Yuly Zavadsky had knowledge of the fraudulent scheme. The fraudulent claims were submitted by Ultraline Testing, which then received and processed the payments from the claims.

Simply receiving funds that originated from Ultraline Testing, relaying information on behalf of Ultraline Testing, and/or acting as a signatory on the bank account of a company that received funds from Ultraline Testing does not evince actual knowledge of the fraud. Although the complaint establishes a connection between Ultraline Testing, Ultraline Management, and BMZ by alleging that defendant Albina Zavadsky was involved in all three entities, this does not evince that she, or any of these defendants, had actual knowledge of the fraud. Furthermore, the complaint supplies no supporting details as to these defendants' specific involvement in the fraud. Since the allegations do not meet the specificity requirements of CPLR 3016 (b) to sufficiently plead knowledge of the underlying fraud on the part of these defendants, or their substantial assistance in the achievement of

the fraud, this cause of action is dismissed insofar as asserted against them (*see Matter of Woodson*, 136 AD3d 691, 692 [2d Dept 2016]; *generally Goel v Ramachandran*, 111 AD3d at 792), unless plaintiffs re-plead specific allegations against these individual defendants and Ultraline within thirty (30) days of notice of entry of this Decision and Order.

Breach of Contract

To the extent that plaintiffs seek "payment for approximately $8,355 in remote reading services [plaintiffs] provided to Ultraline Testing" (Complaint at 228-29, ¶ 167-168), there is a viable breach of contract claim. In other respects, the fifth cause of action fails to state a cause of action.

RICO Claims

In the sixth cause of action, plaintiffs allege violations of the Federal Racketeer Influenced and Corrupt Organizations Act (18 USC § 1961 et seq.) ("RICO"). 18 USC § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." To establish the foregoing, the complaint alleges that, by submitting fraudulent claims to insurers using Dr. Malik's forged signature and credentialing information, defendants committed mail fraud in violation of 18 USC § 1341 and wire fraud in violation of

18 USC § 1343.

Although the complaint describes in general terms certain aspects of the fraudulent scheme, it does not set forth the specific fraudulent acts, statements, or omissions made by these particular defendants. Therefore, the complaint fails to sufficiently plead RICO offenses against them (*see Ritchie v Carvel Corp.*, 180 AD2d 786, 787 [2d Dept 1992] ["allegations of fraud that refer only to the 'defendants,' without connecting particular misrepresentations to the particular defendants are insufficient"]; *see also United States v Persico*, 832 F2d 705, 714 [2d Cir 1987], *cert denied* 486 US 1022 [1988] ["The focus of section 1962 (c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962 (d)"]; *see also Wasserman v Maimonides Med. Ctr.*, 970 F Supp 183, 189 [EDNY 1997]). As such, this cause of action is dismissed, pursuant to CPLR 3211(a)(7), insofar as asserted against the Utltraline defendants, Alex and Yuly Zavadsky, and Marina Tabakman, unless plaintiffs re-plead specific allegations against these individual defendants and Ultraline within thirty (30) days of notice of entry of this Decision and Order.

Plaintiffs' Request for Leave to Replead

Plaintiffs' request for leave to re-plead is granted. Given the allegations and the circumstances surrounding this case, it would be manifestly unfair and unjust not to permit the plaintiffs

to better particularize the claims against Ultraline and the individual defendants.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants Unitedhealthcare of New York, Inc., Americhoice Corporation and Americhoice Health Services, Inc. to dismiss the complaint insofar as asserted against them, or in the alternative, to compel arbitration of the action insofar as asserted against them, is granted to the extent that plaintiffs' claims insofar as asserted against these defendants shall be submitted for arbitration and the action is stayed insofar as asserted against them pending the completion of such arbitration (Motion Sequence 001); and it is further

ORDERED that the motion of defendants Healthfirst, Inc., Health First Health Plan, Inc., and Healthfirst PHSP, Inc. to dismiss the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against them (Motion Sequence No. 003); and it is further

ORDERED that the motion of defendant New York State Catholic Health Plan, Inc. d/b/a Fidelis Health Care New York to dismiss the complaint insofar as asserted against it is

granted, and the complaint is dismissed insofar as asserted against it (Motion Sequence No. 004); and it is further

ORDERED that the motion of defendants Ultraline Management, BMZ, Husain Motavalli-Haghis, Wendy Motavalli-Haghis, and Albina Zavadsy to dismiss the complaint insofar as asserted against them is granted (except for the portion of the fifth cause of action for breach of contract seeking payment in the sum of $8,355), unless plaintiffs re-plead specific allegations against these individual defendants and the Ultraline defendants within thirty (30) days of notice of entry of this Decision and Order (Motion Sequence No. 005); and it is further

ORDERED that the motion of defendants Alex Zavadsky and Yuly Zavadsky to vacate the default against them and to dismiss the complaint insofar as asserted against them is granted, the order dated order dated July 14, 2017 is vacated only insofar as against defendants Alex Zavadsky and Yuly Zavadsky, and the complaint insofar as asserted against them is dismissed unless plaintiffs re-plead specific allegations against these individual defendants and the Ultraline defendants within thirty (30) days of notice of entry of this Decision and Order (Motion Sequence 006); and it is further

ORDERED that the motion of defendant Metroplus Health Plan, Inc. to dismiss the complaint insofar as asserted against it is granted, and the complaint is dismissed insofar as asserted against it (Motion Sequence No. 007); and it is further

ORDERED that the motion of defendant Marina Tabakman to dismiss the complaint insofar as asserted against her is granted, and the complaint is dismissed insofar as asserted against her, unless plaintiffs re-plead specific allegations against these individual defendants and the Ultraline defendants within thirty (30) days of notice of entry of this Decision and Order (Motion Sequence No. 008); and it is further

ORDERED that plaintiffs' request for leave to re-plead is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Dated: July 13, 2018

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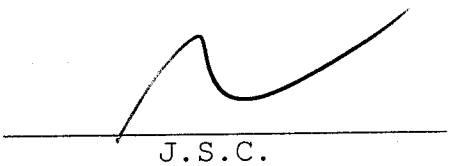

J.S.C.

SHLOMO HAGLER
J.S.C.