

**Academy Orthotic & Prosthetic Assoc. IPA, Inc. v
Healthfirst PHSP, Inc.**

2016 NY Slip Op 31410(U)

July 21, 2016

Supreme Court, New York County

Docket Number: 654316/2015

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ACADEMY ORTHOTIC AND PROSTHETIC
ASSOCIATES IPA, INC.,

Index No.: 654316/2015

DECISION & ORDER

Plaintiff,

-against-

HEALTHFIRST PHSP, INC., MANAGED HEALTH,
INC., and HEALFIRST INSURANCE COMPANY, INC.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Healthfirst PHSP, Inc., Managed Health, Inc., and Healthfirst Insurance Company, Inc. (collectively, Healthfirst) move, pursuant to CPLR 3211, to dismiss the amended complaint (the AC). Plaintiff Academy Orthotic and Prosthetic Associates IPA, Inc. (Academy) opposes the motion. Healthfirst’s motion is granted in part and denied in part for the reasons that follow.

I. Background

As this is a motion to dismiss, the facts recited are taken from the AC (Dkt. 33)¹ and the documentary evidence submitted by the parties.

A. The Parties’ Relationship as IPA & MCO

Academy claims to be an “independent practice association” (IPA), which is a “network comprised of many small businesses that provide durable medical equipment (such as braces, wheelchairs) and prosthetics, orthotics and medical supplies (collectively, “DMEPOS”) [in this decision, such businesses are referred to as “Providers”] to insured patients.” See AC ¶ 2.

Academy explains that “[s]mall [Providers] do not have the resources to do the necessary billing

¹ References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

and collection themselves and so they contract with IPAs to perform these services for a small fee.” *See id.* IPAs, in turn, contract with managed care organizations (MCOs) to remit Providers’ health insurance claims. In this case, “[Academy] billed Healthfirst, an [MCO] that receive[s] Medicare and Medicaid subsidized health services, for the [Providers] supplied by [Academy’s] network members to Healthfirst enrollees.” *See* AC ¶ 3.²

Academy and Healthfirst have done business since 1997. Academy explains that, prior to registering as an IPA, it was a “network” with the corporate name “Academy Orthotic & Prosthetic Associates, Inc.” Nonetheless, at no time did it “ever manufacture, distribute or sell

² The following definitions of MCO, IPA, and Provider are set forth in an exhibit to the parties’ contract:

“Managed Care Organization” or “MCO” shall mean the person, natural or corporate, or any groups of such persons, certified under Public Health Law Article 44, who enter into an arrangement, agreement or plan or any combination of arrangements or plans which provide or offer, or which do provide or offer, a comprehensive health services plan.

“Independent Practice Association” or “IPA” shall mean **an entity formed for the limited purpose** of arranging by contract for the delivery or provision of health services by individuals, entities and facilities licensed or certified to practice medicine and other health professions, and, as appropriate, ancillary medical services and equipment, by which arrangements such health care providers and suppliers will provide their services in accordance with and for such compensation as may be established by a contract between such entity and one or more MCOs. “IPA” may also include, for purposes of this Agreement, a pharmacy or laboratory with the legal authority to contract with other pharmacies or laboratories to arrange for or provide services to enrollees of a New York State MCO.

“Provider” shall mean physicians, dentists, nurses, pharmacists and other health care professionals, pharmacies, hospitals and other **entities engaged in the delivery of health care services** which are licensed, registered and/or certified as required by applicable federal and state law.

See Dkt. 48 at 15 (emphasis added). It should be noted that both IPAs and Providers are contractually permitted to subcontract out their services, for instance, to Affiliated Providers. That said, the definitions of IPA and Provider make clear that the latter actually provides medical services while the former does not.

medical supplies or provide any medical supplies or services directly to Healthfirst (or other insurers') enrollees." See AC ¶ 19.

Academy and Healthfirst first contracted in June 1997 (the 1997 Agreement). See AC ¶ 21.³ Academy claims that the 1997 Agreement "was amended by operation of law in 2008 to conform it to the 'New York State Standard Clauses For Managed Care/Independent Practice Association Contracts' and 'Provider Contract Guidelines for Managed Care Organizations and IPAs.'" See *id.* Academy further alleges that "by operation of law, the 2008 amendments to the parties' contract required that the relationship between Healthfirst and [Academy] be one as between MCO and IPA and not as between MCO and Provider." See AC ¶ 22.

In September 2011, non-parties Isaac Stein and Henry Daskal acquired a majority stake in Academy. They immediately "made the appropriate filings with the New York State Department of Health for formal recognition of the corporation as an IPA." See AC ¶ 23. In conjunction with these filings, Academy changed its name from "Academy, Academy Orthotic & Prosthetic Associates, Inc." to "Academy Orthotic and Prosthetic Associates **IPA**, Inc." (emphasis added). Academy claims to have changed its website to reflect its new name in late 2011, and notified Healthfirst of the name change on multiple occasions in 2012 and 2013.⁴ Academy specifically alleges that it discussed the name change and IPA regulatory filings with an employee of Healthfirst named Consuela Taveras. Critically, however, both before and after registering to become an IPA, Academy never actually provided any medical supplies or services, and only served as an administrative middleman between the Providers and the MCOs, such as Healthfirst. Academy claims that Healthfirst always knew this to be the case.

³ The 1997 Agreement and additional amended agreements are not in the record.

⁴ See, e.g., Dkt. 67-71 (letters sent by Academy to Healthfirst between November 6, 2012 and January 23, 2013 indicating that Academy's new name had "IPA" in it).

B. The 2014 Agreement

In the spring of 2014, Academy and Healthfirst entered into their most recent version of their agreement, which became effective on June 1, 2014. *See* Dkt. 48 (the 2014 Agreement).⁵ The 2014 Agreement is governed by New York law. *See id.* at 9. Despite its new corporate name and its allegation that Healthfirst always knew that it was an IPA, and not a Provider, the 2014 Agreement was drafted in a manner that makes it appear, on its face, that it is a contract between an MCO (Healthfirst) and a Provider (Academy). The contract is titled “HEALTHFIRST PARTICIPATING **PROVIDER** AGREEMENT”. *See id.* at 1 (unless otherwise indicated, all quoted capitalization is in the original, and all bolded text is added for emphasis). It defines Healthfirst to include the same three corporate defendant entities that Healthfirst is defined to refer to in this decision. *See id.* Provider is defined as “ACADEMY ORTHOTIC and PROSTHETIC”. *See id.* The term “IPA” and the full corporate name of Academy are not used.⁶ *See id.* The parties do not dispute that the 2014 Agreement takes the form of a typical Provider agreement and that a typical IPA agreement looks different and has different terms.⁷

The 2014 Agreement’s second whereas clause states: “WHEREAS, Healthfirst and Provider [defined, as noted, to mean Academy] desire to enter into an agreement by which Provider shall provide certain Health Care Services to Enrollees.” *See id.* Health Care Services is defined to mean “the professional, medical and other health care services that Provider and

⁵ Healthfirst executed the 2014 Agreement on April 3, 2014, and Academy executed it on May 8, 2014. *See* Dkt. 48 at 11.

⁶ The full corporate names of each of the three Healthfirst entities are listed on the signature lines; Academy is referred to as “ACADEMY ORTHOTIC and PROSTHETIC”. *See* Dkt. 48 at 11.

⁷ This was confirmed at the recent discovery conference.

Affiliated Providers are licensed to provide under New York State law and are covered under the applicable Plan Contract(s).” *See id.* Affiliated Providers are defined as:

Provider’s employee(s), independent contractor(s), member(s), or partner(s) who (a) are licensed and/or certified under applicable state and/or federal law to practice as health care providers and (b) shall be obligated to provide Health Care Services to Enrollees under the terms of this Agreement. Provider shall ensure that each Affiliated Provider shall be bound by this Agreement.

See id.

Enrollee “means a person enrolled in Healthfirst under a Plan Contract.” *See id.* Plan Contracts are “the contracts under which Healthfirst provides services to Enrollees that are entered into between Healthfirst and (i) a federal, state or local government agency, (ii) an Enrollee or his or her spouse, parent or guardian on the Enrollee’s behalf, (iii) an employer or (iv) another group.” *See id.* at 2. Provider Manual⁸ (the importance of which is discussed below), is defined as “the manual prepared by Healthfirst setting forth certain requirements, policies and procedures applicable to Provider and Affiliated Providers, as amended from time to time by Healthfirst.” *See id.*⁹

Section 2 of the 2014 Agreement sets forth the “Responsibilities of Provider.” *See id.* at 2-4. Section 2.1 states: “Provider and Affiliated Providers shall provide Health Care Services to Enrollees pursuant to the terms of this Agreement, the Provider Manual, and the applicable Plan

⁸ The excerpted copy of the Provider Manual submitted by Healthfirst indicates that it was revised on September 26, 2014, almost 2 months after Academy was terminated. *See* Dkt. 49. Absent from the record is a complete copy of this version of the Provider Manual or any portion of the Manual in effect prior to Academy’s termination. Nor is it clear which version was in effect prior to the execution of the 2014 Agreement or if the Provider Manual is at all mentioned in prior versions of the contracts. Academy’s counsel indicated that it was not. In light of Healthfirst’s incomplete and irrelevant submissions, the record is devoid of documentary evidence that could justify dismissal of the contract claim based on Healthfirst’s contention that Academy failed to comply with the Provider Manual.

⁹ Other important defined terms, which are not reproduced here, are set forth in section 1 of the 2014 Agreement. *See* Dkt. 48 at 1-2.

Contract(s) for those Plan(s) identified in Exhibit 2.1.” *See id.* at 2. Section 2.4 requires Academy and its Affiliate Providers, *inter alia*, to “(i) hold current and unrestricted licenses or certification issued or recognized by New York State to render Health Care Services under this Agreement as are appropriate to each (“Required Licenses”) and (ii) meet such other credentialing requirements as Healthfirst from time to time establishes.” *See id.* Section 2.10 requires Academy and its Affiliate Providers to “comply with all applicable provisions of the Provider Manual.”¹⁰ *See id.* at 4.

Section 3 sets forth the “Responsibilities of Healthfirst”, and includes the obligation to “monitor the performance of Provider and Affiliated Providers.” *See id.* at 4. Section 4 addresses “Provider Compensation”. *See id.* at 4-6. It begins with section 4.1, which states, in pertinent part:

Healthfirst shall reimburse Provider for the provision of Health Care Services as set forth in Exhibit 4.1. **Provider must submit claims for payment of Health Care Services rendered to Enrollees by Provider or by Affiliated Providers within one hundred and eighty (180) days of rendering the Health Care Service. Claims shall include the information set forth in the Provider Manual applicable to Provider.** Healthfirst shall not pay any claim for Health Care Services submitted for the first time more than one hundred and eighty (180) days after services were rendered. Healthfirst shall pay or deny claims within the timeframes set forth in Exhibits 2.2.1 and 2.2.2 for each Plan.

See id. at 4.

¹⁰ Section 2.10 further provides:

Healthfirst shall give Provider at least thirty (30) days written notice of any change to the Provider Manual that affects Provider’s rights or responsibilities under this Agreement, except where adoption of such a change must be made on shorter notice to comply with applicable laws, regulations, or requirements under the Plan Contracts. No provision of the Provider Manual may be inconsistent with the terms of this Agreement.

See Dkt. 48 at 4.

Section 8 addresses the terms of the 2014 Agreement and termination. *See id.* at 7-9.

Section 8.1 provides:

This Agreement shall be effective until the renewal date which shall be January 1st of every year and shall continue in effect from year to year unless terminated earlier pursuant to this Section 8. **After this Agreement has been in effect for at least twelve months, either party may exercise a right of non-renewal at the expiration date of this Agreement upon no less than sixty (60) days' notice to the other party.**

See id. at 7.

Section 8.2.1 states that “[s]ubject to Section 8.4 of this Agreement, Healthfirst may terminate this Agreement without cause on ninety (90) days’ notice to Provider.” *See id.*

Section 8.2.2 states that the 2014 Agreement “may be terminated for cause only on” the grounds set forth in subsections of section 8.2.2. *See id.* One such ground, set forth in section 8.2.2.1, is the “Provider’s or Affiliated Provider’s material breach of this Agreement”, which is defined to include “failure to (i) comply with the provisions of Healthfirst’s quality improvement and utilization review programs referred to in Section 2.5 herein, (ii) Provider or Affiliated Provider’s failure to comply with the terms of any Plan Contract applicable to Provider or (iii) Provider’s failure to provide any notice required pursuant to Section 9.12.” *See id.* at 8. Section 8.2.2.2 then specifies:

Healthfirst may terminate this Agreement **immediately** on notice to Provider in the event that (i) Provider or Affiliated Provider fails at any time to meet Healthfirst’s credentialing standards; (ii) Provider or Affiliated Provider fails to maintain insurance pursuant to Section 7 of this Agreement; (iii) Provider or Affiliated Provider **loses certification** under the Medicare or Medicaid Act, or loses or has restricted a Provider professional license in New York or any other jurisdiction; or (iv) Provider’s or Affiliated Provider’s loss or restriction of medical staff privileges at a hospital or other licensed medical care facility.

See id. Section 8.2.2.3 also permits Healthfirst to “immediately terminate this Agreement for cause in cases involving (a) **imminent** harm to patient care, (b) a **determination** of fraud, or (c)

a **final disciplinary action** by a state licensing board or other governmental agency that impairs Provider's or an Affiliated Provider's ability to practice." *See id.*

Section 8.3 explains that "Healthfirst may, in its sole discretion, require Provider to exclude any Affiliated Provider from participation under this Agreement on the grounds set forth in Section 8.2 in lieu of termination of this Agreement." *See id.* Section 8.4 then specifies: "If **required** under New York State law or a Plan Contract, Provider and/or Affiliated Providers **shall be afforded a hearing** regarding any termination under this Agreement." *See id.* Section 8.5, titled "Effect of Termination", states that "[a]s of the effective termination date of this Agreement pursuant to Section 8 this Agreement shall be of no further force or effect and the parties shall be relieved from their respective rights and obligations except [for certain exceptions set forth in section 8.5.1]." *See id.* Section 8.5.2 requires Academy and Affiliated Providers to "cooperate in notification of Enrollees as to the termination." *See id.*

Section 9.4 declares:

No assent or waiver, express or implied, of any breach of any one or more of the covenants, conditions or provisions hereof shall be deemed or taken to be a waiver of any other covenant, condition or provision hereof or a waiver of any subsequent breach of the same covenant, condition or provision hereof.

See id. at 9.

Section 9.8 addresses the parties' legal compliance obligations:

Healthfirst shall comply with all applicable federal and state laws and regulations, and Provider and Affiliated Providers shall assist Healthfirst in such compliance. During the term of this Agreement Provider and Affiliated Providers shall comply with all applicable federal and state laws and regulations relating to the provision of Health Care Services, **Provider and Affiliated Providers shall also remain licensed and/or certified under applicable state law**; and shall comply with all rules, regulations, policies and procedures of Healthfirst necessary to implement Healthfirst's administrative responsibilities hereunder, and any amendments thereto, Healthfirst shall provide Provider with a copy of all such rules, regulations, policies and procedures, and with any amendments thereto.

See id. at 10. Section 9.9.1 then sets forth the procedure for amending the contract. *See id.* Section 9.10 is a merger and integration clause that disclaims any prior or collateral agreements and understandings. *See id.*

There are multiple exhibits attached to and referenced by the 2014 Agreement. Exhibit 2.1 lays out the Healthfirst Plans. *See id.* at 12. Exhibit 2.2.1(A) addresses various New York State health and financial services regulatory requirements, which include the requirement that Healthfirst “pay or deny claims as required by Section 3224-a of the New York State Insurance Law.” *See id.* at 13. This exhibit concludes by providing:

Notwithstanding any other provision of this Agreement, Healthfirst, Provider and Affiliated Providers shall comply with the **New York State Department of Health Standard Clauses for Managed Care Provider/IPA Contracts** (“SDOH¹¹ Standard Clauses”), a copy of which is attached as Exhibit A as applicable to each Plan. **If applicable to a Plan any term in this Agreement which is inconsistent with the SDOH Standard Clauses, the SDOH Standard Clauses shall control.** Notwithstanding any provision to the contrary in Section 9.9 of this Agreement, Healthfirst and Provider agree that this Agreement shall be automatically amended to incorporate any revisions to the SDOH Standard Clauses promulgated by SDOH.

See id. at 14.

The SDOH Standard Clauses are set forth in Exhibit 2.2.1(B), prefaced by:

Notwithstanding any other provision of this [A]greement, ... the parties agree to be bound by the following clauses which are hereby made a part of the Agreement. Further, **if this Agreement is between [an MCO] and an IPA**, or between an IPA and an IPA, such clauses must be included in IPA contracts with providers, and providers must agree to such clauses.

See id. at 15. Section B of the SDOH Standard Clauses requires the contract and any material amendment to be approved by SDOH. Section E contains termination and transition requirements applicable to IPAs. *See id.* at 20-21.

¹¹ SDOH is defined in the 2014 Agreement to mean the New York State Department of Health. *See Dkt. 48* at 2.

Exhibit 2.2.2 sets forth requirements applicable to Medicare Plans, including the requirement that Healthfirst must pay or deny claims in accordance with the Provider Manual's timeframes. *See id.* at 23. Finally, Exhibit 4.1 addresses compensation rules. *See id.* at 24-26.

C. Healthfirst's Termination of Academy

Academy alleges that in late 2013, Stein,¹² the President of Academy, "noticed that certain [Providers] in its network appeared to be miscoding a mechanized seat lift." *See* AC ¶ 38. Academy explains that some Providers were erroneously using a code for a mechanized chair, instead of a mechanized seat lift, in order to claim a ten-times-higher reimbursement rate applicable to mechanized chairs. Academy claims that "Stein learned from some of [Academy's Providers] that they had raised the potential miscoding issue with Healthfirst and had been specifically told to use the higher priced code for this equipment." *See* AC ¶ 40. Academy further claims that Stein learned from one of its Providers that its "chief competitor", non-party Integra Partners LLC (Integra), allowed its Providers to overcharge insurers using the wrong seat lift code. *See* AC ¶ 41. Stein contends he raised these issues with an employee of Healthfirst, Natalia Zhdanova, on November 11, 2013. Stein further claims that, on April 28, 2014, he again raised the issue with Zhdanova and another Healthfirst employee, Carole Griseta. Academy alleges that it wanted "[t]o assure Healthfirst that [Academy] itself was not intentionally miscoding these items," and Stein "asked that Healthfirst conduct an audit of [Academy] with regard to these codes." *See* AC ¶ 43. Academy claims that "Healthfirst did not conduct that audit of [Academy] and did not respond directly to [Stein] about his concerns of upcoding over seat lifts." *See* AC ¶ 44. Additionally, it argues that Healthfirst had a federal legal requirement to "self-report" these alleged violations and that Healthfirst later became "embroiled in an

¹² Stein is referred to as a defendant [*see* AC ¶ 38], even though he is not a party in this action. Stein was named as a defendant in the Federal Action, discussed herein.

investigation by the United States Attorneys' Office for the Eastern District of New York related to the concerns over upcoding that [Stein and Academy] had first tried to raise with Healthfirst."¹³

Academy's fundamental allegation in this case is that Healthfirst was furious with Academy for "blowing the whistle" on the seat lift coding issue and retaliated by terminating Academy on pretextual grounds. By letter dated August 6, 2014 (sent approximately 2 months after the 2014 Agreement became effective), Healthfirst notified Academy that it was terminating the 2014 Agreement "effective immediately." *See* Dkt. 56 (the Termination Letter). The Termination Letter states:

It has come to our attention that Academy Prosthetics and Orthotics is organized as an independent practice association ("IPA") under New York law. New York State Department of Health regulations require that all contracts between health maintenance organizations and IPAs be approved by, and filed with, the New York State Department of Health prior to execution. As the current agreements have not been subject to that process we are not able to continue to include Academy's IPA providers in the Healthfirst network as participating providers. Please be advised therefore that effective today, Academy and all providers which are part of the Academy IPA are not part of the Healthfirst participating provider network.

See Dkt. 56 at 1. Academy alleges that "[t]his was pure pretext because Healthfirst had always known back to 1997 that even Academy Inc. was a network for [Providers]." *See* AC ¶ 48.

Academy claims that this alleged "pretext is further illustrated by the fact that Healthfirst's only expressed reason in the letter for terminating its 2014 Agreement with [Academy] was Healthfirst's own failure to file the agreement [with SDOH] prior to execution." *See* AC ¶ 49.

Academy explains what, allegedly, happened next:

¹³ It should be noted that Healthfirst represented to the court at the recent discovery conference that it was not involved in such investigation until late 2014, *after* it had terminated Academy, that such investigation had nothing to do with the seat lift coding issue, and that Healthfirst was considered a victim and received restitution.

By letter dated October 24,¹⁴ 2014, [Academy IPA] replied to Healthfirst that Healthfirst's own failure to submit the [2014 Agreement to SDOH] was not a basis for immediate termination of the [2014 Agreement] and that, in any event, since the [2014 Agreement] already contained the [SDOH] "Standard Clauses" for MCO-IPA agreements, it would be a purely ministerial act to obtain the requisite approvals. By this time, [Academy] had been served with the first of three grand jury subpoenas in connection with the U.S. Attorneys' Office's investigation of the potential upcoding that [Stein] had first raised with Healthfirst almost a year earlier. [Academy's letter] questioned whether the real reason for Healthfirst's reaction was retaliation for "prior communications between Academy and Healthfirst regarding certain [seat lift] reimbursement practices that we urged be examined from a compliance perspective and modified going forward." **[Academy's letter] also reminded Healthfirst that [Healthfirst] then owed [Academy] \$2.6 million for [equipment] that had been provided to Healthfirst's insureds (with Healthfirst's prior authorization) by [Academy's] network members both before and after the purported termination.** Healthfirst has refused to pay all or part of many of those claims over 1 year later. **As of the date of [the AC], Healthfirst has failed to pay or underpaid \$742,376.12 in valid claims** submitted by [Academy] on behalf of its network members from 2011 to 2014 plus approximately \$250,000 in interest thereon for a total of approximately \$1,000,000. There is no good faith dispute that Healthfirst's enrollee-patients received from [Academy's] members the [equipment] they were prescribed.

See AC ¶¶ 52-55 (citations, paragraph breaks, and numbering omitted).

As noted earlier, Healthfirst had the absolute right to terminate Academy without cause, the only significant difference being the amount of advance notice that was required to be given. Academy, however, alleges: "**Upon information and belief**, Healthfirst entered into a scheme with Integra, the purpose of which was to retaliate against [Academy] for embroiling Healthfirst in what became a federal investigation over seat lift coding and eliminate [Academy] as a competitor of Integra." See AC ¶ 60 (emphasis added). Despite the serious nature of this accusation, the AC contains sparse detail to support it. Academy's explanation is as follows:

Healthfirst further [k]new that Integra was [Academy's] chief competitor in New York for (a) contracts with health insurers to process claims of DMEPOS

¹⁴ While the AC states that the letter was dated October 24, the actual letter, attached to the AC as Exhibit E, is dated October 28, 2014. See Dkt. 38 at 2.

providers servicing the insurers' enrollees and (b) contracts with the DMEPOS providers to become part of [Academy's] (or Integra's) networks.

...

Healthfirst knew and intended that their wrongful termination of the [2014 Agreement] with [Academy] would make it impossible for [Academy] to perform its contractual obligations for network members interested in servicing Healthfirst enrollees and Healthfirst further intended to injure [Academy] by driving its network members to contract instead with Integra. As a result of Healthfirst spiteful, malicious and wrongful termination of [Academy], numerous members of [Academy's] network members stopped submitting claims to insurers through [Academy] and switched to Integra – not merely for claims involving Healthfirst enrollees, but for claims involving all insurers – in order to obtain “one-stop-shopping” from Integra.

See AC ¶¶ 59, 61-62 (paragraph breaks and numbering omitted). Paragraph 63 of the AC lists the Providers that ceased working with Academy after Healthfirst's termination.

D. The Federal Action

On June 5, 2015, another MCO, New York Catholic Health Plan (Fidelis), commenced an action against Academy, Stein, Daskel, and other individuals in the United States District Court for the Eastern District of New York, styled *N.Y. State Catholic Health Plan, Inc. v Academy O & P Assocs.*, No. 15-CV-3298 (the Federal Action). Fidelis, like Healthfirst has in this action, alleged that Academy lied about being a Provider instead of an IPA. Fidelis asserted more than mere contract claims, contending, among other things, that Academy committed common law fraud and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). The RICO claims were the sole proffered basis for federal jurisdiction. By order dated December 18, 2015, the federal court (Weinstein, J.) dismissed the RICO claims and, consequently, dismissed the Federal Action for lack of subject matter jurisdiction. See *N.Y. State Catholic Health Plan, Inc. v Academy O & P Assocs.*, 312 FRD 278, 282-83 (EDNY 2015) (“[Fidelis] relies upon the weak crutch of [RICO] to support a federal civil claim. The RICO

statute does not encourage use of the criminal law with treble damages to decide contractual disputes among lawful businesses. There is no support for federal subject matter jurisdiction or a reason to retain state contract claims in this court.”).

Judge Weinstein summarized Fidelis’ allegations:

Fidelis alleges that [Academy] submitted false claims indicating that Academy was the actual provider of durable medical equipment to Fidelis’ clients when, unbeknownst to plaintiff, Academy was acting as an [IPA]: It was utilizing third-parties within its own network to directly provide the equipment to plaintiff’s enrollees. The claim is that [Fidelis] was injured as a result of the alleged fraudulent scheme; the third-party suppliers were providers that [Fidelis] would either not have contracted with, or would have contracted with at a lower rate than it did with Academy. **There is no dispute between the parties that Fidelis’ enrollees actually needed and received the proper medical equipment.**

See id. at 283 (emphasis added).

The claims asserted by Academy in this action were originally asserted by it in the Federal Action on July 20, 2015. Judge Weinstein explained:

Together with their answer, [Academy] asserted counterclaims against Fidelis, as well as third-party claims against [Healthfirst]—another [MCO] with which Academy contracted for the provision of durable medical equipment. **Academy allege[s] that both Fidelis and Healthfirst knew that Academy was acting as an IPA when the two entities unlawfully terminated their separate contracts with Academy.** [Academy] argue[s] that the termination was in retaliation for Academy’s “whistleblowing,” which triggered investigations by the United States Attorney’s Office for the Eastern District of New York.

See id. (emphasis added).¹⁵

While Judge Weinstein did not reach the merits of the New York state law claims (including the claims between Academy and Healthfirst), the court would be remiss if it did not

¹⁵ It should be noted that Judge Weinstein’s decision cited communications between Fidelis and Academy that clearly demonstrate that Fidelis knew Academy was an IPA and that they agreed there was no need to convert their Provider agreement to an IPA agreement. *See* 312 FRD at 286 (quoting 12/12/14 email from Academy to Fidelis).

mention some of the pertinent observations made in his thorough decision. For instance, in assessing the merits of the RICO claim, Judge Weinstein wrote:

No one alleges that the claims submitted by Academy were not medically based, that the equipment in question was not delivered to the patients in need, or that the equipment's cost was different from what was claimed. [Academy's] acting as an IPA cannot be deemed to be inherently fraudulent—managed care organizations regularly contract with either providers or IPAs to supply healthcare products to their enrollees, and such arrangements are permitted by New York State law.

See id. at 300 (emphasis added).

Judge Weinstein also explained the cynicism in claiming that Academy's role as an IPA was not known by its MCOs:

Academy's behavior was fraudulent, [Fidelis] contends, because it intentionally withheld its identity as an IPA and used "Academy O & P" as a "front" to conceal the fact that the supplies were being provided by "uncredentialed" third parties. [Fidelis] argues that the claims listed in [the claim form submitted by Academy to Fidelis] substantiate its allegations of fraud as Academy only listed its own NPI number on the forms, and not that of the third-party providers.

See id. at 301. However, as Judge Weinstein demonstrated by including a copy of a claim form in his decision, *the claim forms actually identify the Providers.* *See id.* Judge Weinstein rejected Fidelis' "fraud allegations [] centered on the claim that Fidelis did not know that Academy was acting as an IPA, due to Academy's allegedly purposeful concealment," finding that such "claim is not supported by documentary or any other available evidence" since "Academy's communications with Fidelis, including the claim forms themselves, **show that Academy was not fraudulently concealing its use of third-party suppliers.**" *See id.* at 303 (emphasis added).

E. This Action

Two days after Judge Weinstein dismissed the Federal Action, on December 20, 2015, Academy commended the instant case. *See* Dkt. 1. The original complaint here asserted claims against both Fidelis and Healthfirst. Healthfirst moved to dismiss the original complaint on January 11, 2015. *See* Dkt. 7. Academy then settled with Fidelis, and Healthfirst consented to Academy filing an amended complaint and withdrew its original motion. *See* Dkt. 30.

Academy filed the AC on March 1, 2016. *See* Dkt. 33. The AC, which only asserts claims against Heathfirst, contains six causes of action: (1) breach of the 2014 Agreement for failure to timely pay more than \$700,000 in claims; (2) “specific performance or lost profit damages for improper termination of [the] 2014 Agreement”; (3) violation of New York Insurance Law (Insurance Law) § 3224-a; (4) quantum meruit; (5) tortious interference with contract “and/or” prospective business relations; and (6) prima facie tort.

Heathfirst filed the instant motion to dismiss on March 18, 2016. Its arguments are set forth below. In opposition to the motion, Academy submitted an affidavit from Stein (Dkt. 65) in which he addresses, among other things, Heathfirst’s contention that Academy is not entitled to recover claims under its first cause of action because Academy was listed in Box 32 of the claim forms (Form-1500) as the Provider, instead of the actual Provider. In paragraph 8 of his affidavit, Stein alleges:

On or about November of 2012, some of Academy’s claims began being denied as “out of network”. When John Tiernan, Academy’s contract manager, and Darlene King Academy’s Claim Specialist for the Healthfirst contract, called Healthfirst to understand why this was happening, we were told this was happening because the providers and locations listed in Box 32 were not included in the Healthfirst contract as Academy’s providers. They were told to submit an updated list of providers. **Academy had already done this many times and did so again several times after the issue arose.** (*See* [Dkt. 67-71]). It was to no avail. Thus, after weeks passed and the situation was not fixed, I called and spoke to Consuelo Taveras, Healthfirst’s account manager for Academy. **She advised**

that Academy should enter its own location in Box 32. Academy complied with that directive beginning in approximately mid February 2013. **In at least two subsequent meetings that I had with Natalia Zhdanova at Healthfirst, I was told to continue submitting forms in this manner until further notice.** Nobody at Healthfirst ever asked why Academy changed its practice with respect to Box 32 or stated that this was improper, presumably because Healthfirst knew it had directed Academy to do so.

See id. at 2-3 (paragraph numbering and breaks omitted; bold added).

Stein then addressed Healthfirst's attempt to impugn Academy's reputation based on fraud committed by two of its Providers:

Healthfirst makes a big deal that Chikwere Onyekwere and Humphrey Ude pled guilty or were convicted of fraud in connection with fraudulent insurance claims and implies that Academy filled out Box 32 in the Form-1500 using Academy's name to conceal fraud by Messrs. Onyekwere and Ude and their companies. This is absurd. **First, as noted above, Academy began putting its own name in Box 32 at Healthfirst's request.** Second, with respect to Mr. Onyekwere and his company Excellent Care Medical Supply, **neither showed up on any Medicaid or Medicare exclusion list until December 8, 2014, well after Healthfirst's improper termination.** What is more, **Academy stopped billing for Mr. Onyekwere and Excellent Care on May 7, 2014, after Mr. Onyekwere could not provide delivery tickets for claims in an audit performed by Academy.** Third, with respect to Mr. Ude and his company, Kings County Medical Supply, although Mr. Ude informed Academy that he was under investigation on or about April of 2013, he asserted that he had not committed any fraud. Further, as a result of his disclosure, Academy double and triple checked his claims to ensure, as best it could, that all claims were legitimate. **Academy only found out that Mr. Ude had been convicted when it appeared in the news on or about July 15, 2015, nearly a year after Healthfirst improperly terminated Academy.** **Upon learning this, Academy ceased submitting claims for Mr. Ude and his company and did not write any checks to Mr. Ude after June 5, 2015.** To date, neither Mr. Ude nor Kings County Medical Supply appears on any Medicare or Medicaid exclusion list. Fourth, once Mr. Ude and Mr. Onyekwere were convicted, Academy cancelled out all their claims, such that such claims would not appear on those that remain unpaid, underpaid, or were paid late by Healthfirst. Fifth, Messrs. Onyekwere and Ude, and their companies, represent only a small fraction of the claims submitted by Academy on behalf of its providers. Sixth, and finally, Healthfirst's implication that Academy was trying to conceal fraud strains credulity when it is apparent that Academy reported potential "upcoding" by some DMEPOS providers to Healthfirst enrollees to Healthfirst who, instead of auditing Academy as requested, retaliated against Academy for whistleblowing and tried to sweep the issue under the rug.

See id. at 3-4 (paragraph numbering and breaks omitted; bold added; citations omitted). These allegations are not refuted in Healthfirst's reply papers and, thus, are assumed to be true for the purpose of this motion.

The court reserved on the motion after oral argument. *See* Dkt. 80 (5/24/16 Tr.).

II. *Legal Standard*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

Healthfirst seeks dismissal of Academy's first cause of action for breach of contract based on Academy identifying itself in Box 32 of the Form-1500s as the Provider. Academy does not dispute that it was not the Provider, nor does Academy dispute its contractual obligation to identify the Provider. However, as Stein explains in his affidavit,¹⁶ Academy listed itself as the Provider at the specific direction of Healthfirst. Academy contends that, if it proves this to be true, it is entitled to be paid for these claims based on estoppel and ratification defenses. In reply, Healthfirst relies on the 2014 Agreement's merger and no-oral modification clauses, but does not directly address Academy's ability to maintain an estoppel or ratification defense.

Accepting Stein's averment that Healthfirst orally instructed Academy to perform in contravention of the contract, the relevant inquiry is whether Academy has pleaded "partial performance or estoppel 'unequivocally referable' to the alleged oral modification." *See AJ Holdings Group, LLC v IP Holdings, LLC*, 129 AD3d 504, 505 (1st Dept 2015), quoting *Greenberg v Frey*, 190 AD2d 546, 546-47 (1st Dept 1993) ("While General Obligations Law § 15-301 generally bars oral modification of an agreement which contains a merger clause, application of this section may be avoided by an executed oral modification, partial performance, or estoppel, if unequivocally referable to the modification"), citing *Rose v Spa Realty Assocs.*, 42 NY2d 338, 343-44 (1977); *see also Eujoy Realty Corp. v Van Wagner Commc'ns, LLC*, 22 NY3d 413, 425 (2013). The allegations in the AC and Stein's affidavit suffice to plead conduct unequivocally referable to Healthfirst's instruction to Academy to list itself as the Provider in Box 32. Moreover, the claim form cited by Judge Weinstein demonstrates that Academy was

¹⁶ *See Cron*, 91 NY2d at 366 ("In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims) (citations and quotation marks omitted).

not trying to deceive its MCOs about the identity of the Providers. Academy, both in this action and in the prior Federal Action, vehemently maintained that its MCOs always knew Academy was an IPA, and not a Provider. Academy claims it never attempted to, nor did, deceive its MCOs about its status as an IPA and the identity of its Providers. Academy asserts that Healthfirst's claim to the contrary is frivolous and intends to prove this in discovery. These allegations raise a reasonable and plausible inference that the only explanation for Academy listing itself as the Provider was the express direction of Healthfirst and, thus, meet the unequivocally referable standard, warranting equitable estoppel.¹⁷

Next, Healthfirst seeks dismissal of Academy's claim under Insurance Law § 3224-a, which creates statutory duties to promptly pay health care claims. To the extent Healthfirst seeks dismissal of this cause of action due to § 3224-a's exception for claims "submitted fraudulently" based on Academy listing itself as the Provider, the court rejects that contention on this motion. As discussed with respect to Academy's estoppel defense, it was Healthfirst that allegedly told Academy to do so. Accepting this allegation as true on this motion to dismiss, the fraud exception does not apply because, if Academy is telling the truth, it did not act with fraudulent intent. Nonetheless, as Healthfirst correctly contends, and as Academy now concedes, a claim under § 3224-a for unpaid Medicare claims is federally preempted. *See* Dkt. 41 at 19-21 (explaining why the Medicare claims are preempted); *see also* Dkt. 61 at 18 ("To the extent Academy's Prompt Payment claim [under § 3224-a] is premised upon Medicare, Academy does

¹⁷ *See Shondel J. v Mark D.*, 7 NY3d 320, 326 (2006) ("The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position"). It should be noted that the claims are not otherwise alleged to be invalid. The only issue is the identity of the Provider.

not contest that it is pre-empted”). The parties further agree that the portions of this claim relating to Medicaid or other forms of insurance are not preempted.

Healthfirst also seeks dismissal of Academy’s quantum meruit claim. Quantum meruit is a quasi-contract claim that cannot be maintained when a written agreement expressly governs the parties’ rights. *See MG W. 100 LLC v St. Michael’s Protestant Episcopal Church*, 127 AD3d 624, 626 (1st Dept 2015) (“the existence of ... a valid and enforceable written agreement governing the parties dispute [] precludes recovery in quasi contract for events arising out of the same subject matter”), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). While Academy suggests that questions about the validity of the 2014 Agreement permit the maintenance of a quantum meruit claim, the cases it cites for this proposition are inapposite. Healthfirst is not challenging the validity of the 2014 Agreement. Healthfirst is claiming that Academy breached it and is using such breach to justify non-payment and for-cause termination. If Healthfirst prevails on these issues, quantum meruit recovery for the same, non-viable contract claim would not be permitted. *See TADCO Constr. Corp. v Dormitory Auth.*, 93 AD3d 619, 620 (1st Dept 2012); *Am. Curtainwall, Inc. v NTD Const. Corp.*, 83 AD3d 597, 598 (1st Dept 2011). If Academy prevails, any relief sought under a quantum meruit claim would be duplicative and, in any event, expressly barred by *Clark-Fitzpatrick* and its progeny. Hence, there is no circumstance where Academy’s quantum meruit claim could be viable. It is dismissed with prejudice.

Academy’s remaining causes of action do not concern the unpaid claims, but rather damages allegedly resulting from the manner in which it was terminated by Healthfirst. Academy claims contract damages based on Healthfirst’s failure to provide the requisite 90-days’ notice for what Academy contends was a without-cause termination. Academy also seeks

damages for the loss of its Providers to a competing IPA, Integra, due to conduct on the part of Healthfirst that Academy claims amounts to tortious interference with contract, tortious interference with business relations, and prima facie tort. Healthfirst disputes the factual allegations underlying these claims but, even assuming them to be true for the purpose of this motion, contends that the way in which these causes of action are pleaded in the AC fails to state a claim upon which relief may be granted.

“Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the **third-party’s breach of the contract** without justification, **actual breach of the contract**, and damages resulting therefrom.” *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996) (emphasis added). The Court of Appeals consistently includes “actual breach of the contract” in its recitation of the essential elements of this tort. *See Oddo Asset Mgmt. v Barclays Bank PLC*, 19 NY3d 584, 594 (2012). While the AC identifies the Providers that allegedly breached their contracts and references “a sample Academy IPA network agreement with” its Providers [*see* AC ¶ 88], the AC does not actually allege what provisions of the contract the Providers allegedly breached. The breach allegations are conclusory. *See* AC ¶ 89.¹⁸ And while Academy suggests, with citation to non-binding federal and state trial court cases, that its own breach of its agreement with its Providers may be pleaded instead of the

¹⁸ Academy’s only breach discussion is its cursory suggestion in its opposition brief that Healthfirst’s termination of Academy caused Academy and its Providers to breach their contracts. Academy further states, without explanation, that “the Providers also breached at least Sections 3.2, 4.1, 5.1, and 5.2 of the provider agreement.” *See* Dkt. 61 at 31. For Academy to properly plead this claim, it must make its allegations in its pleading, not in its attorney’s unsworn brief, and must provide more than conclusory allegations.

Providers' breach, the court need not opine on the soundness of this theory¹⁹ since Academy also does not plead what contractual provisions it breached. This cause of action, therefore, is dismissed without prejudice and with leave to replead.

Academy also pleads tortious interference with *business relations*, albeit in the same cause of action (the fifth) as its claim for tortious interference *with contract*.²⁰ The elements of the two causes of action are different. *See Carvel Corp. v Noonan*, 3 NY3d 182, 189 (2004) (“We have recognized that inducing breach of a binding agreement and interfering with a nonbinding ‘economic relation’ can both be torts, but that the elements of the two torts are not the same.”). The law deliberately makes tortious interference with business relations more difficult to plead and prove²¹ by virtue of the requirement that plaintiff establish sufficiently “culpable conduct” in the form of malice or an independent tort. *See id.* at 189-90. To state a claim for tortious interference with business relations, the plaintiff must plead “1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) **that the defendant acted solely out of malice or used**

¹⁹ The court sees no reason to address the parties' dispute over possible conflict between the federal cases cited by Academy and Court of Appeals precedent since any such discussion would be dicta. The tortious interference claim is pleaded insufficiently in the AC, and, according to Academy's opposition brief, appears to be capable of being repleaded based on alleged breaches by the Providers, mooted the need to rely on Academy's own breach. The court will only address this issue if Academy's claims turn exclusively on its own breach.

²⁰ If repleaded, these claims should be set forth in separate causes of action.

²¹ The Court of Appeals has explained that tortious interference with business relations is more difficult to satisfy because “greater protection is accorded an interest in an existing contract (as to which respect for individual contract rights outweighs the public benefit to be derived from unfettered competition) than to the less substantive, more speculative interest in a prospective relationship (as to which liability will be imposed only on proof of more culpable conduct on the part of the interferer)”. *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 622 (1996) (citation omitted).

improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009) (emphasis added). Malice in this context means "that the conduct by defendant that allegedly interfered with plaintiff's prospects [] was undertaken for the **sole purpose** of harming plaintiff." *Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 (1st Dept 2004) (emphasis added), citing *Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 969 (1986).

Academy does not plead malice since the AC alleges that Healthfirst acted to further its economic relationship with Academy's competitor, Integra. Academy, however, claims to have pleaded "wrongful means", which "include[s] physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *Arnon Ltd v Beierwaltes*, 125 AD3d 453 (1st Dept 2015). It is well settled that "wrongful means" cannot be conclusorily pleaded. See *Kickertz v N.Y. Univ.*, 110 AD3d 268, 275 (1st Dept 2013); see also *Lincoln Place LLC v RVP Consulting, Inc.*, 16 AD3d 123, 124 (1st Dept 2005). At a minimum, the complaint must "plead in nonconclusory language facts" that may give rise to a reasonable inference of the alleged wrongful means. See *Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585 (1st Dept 1987).

Academy contends that Healthfirst and Integra engaged in anti-competitive behavior and that such conduct constitutes wrongful means. As a conceptual matter, this court agrees with the latter contention. Courts have held that allegations of illegal anti-competitive behavior may be used as a predicate for a tortious interference with business relations claim. See *Reading Int'l, Inc. v Oaktree Capital Mgmt. LLC*, 317 FSupp2d 301, 334 (SDNY 2003) ("It seems obvious that alleging violations of federal antitrust law and state statutory law should satisfy the pleading

requirements for wrongful conduct. Indeed, the New York Court of Appeals has recognized that a competitor can be held liable for tortious interference with prospective contractual relations where ‘unlawful restraint of trade is effected.’), quoting *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190-91 (1980) (“Although his status as a competitor does not protect the interferer from the consequences of his interference with an existing contract, it may excuse him from the consequences of interference with prospective contractual relationships, where the interference is intended at least in part to advance the competing interest of the interferer, **no unlawful restraint of trade is effected**, and the means employed are not wrongful.”) (emphasis added).

That being said, the AC’s allegations of anti-competitive behavior are sparse and largely conclusory. Academy alleges that, after it was terminated by Healthfirst, Healthfirst continued to service Academy’s Providers through Integra. Leaving aside the conclusory manner in which this allegation is pleaded [*see* AC ¶¶ 59-62], Academy does not explain why the alleged scheme with Integra is actually an *illegal* restraint of trade, as opposed to legal competitive activity. The court will not divine the line between seemingly untoward, but legal competition, and illegal, anti-competitive conduct. If the alleged scheme here is indeed an illegal restraint of trade, Academy must explain why it is illegal with citation to supporting case law.²²

If the reason Academy’s Providers moved their business to Intergra was to continue to do business with Healthfirst, the Providers would have had equal reason to switch to Intergra had Academy been terminated without cause. That said, there may be merit to this claim. Assuming

²² To the extent Academy seeks to claim that legal, but nonetheless wrongful “economic pressure” [*see Reading*, 317 FSupp2d at 334-35] is the basis for its claim, such claim must be fleshed out with more detail than provided thus far. *See generally Carvel Corp.*, 3 NY3d at 190-93 (discussing *Guard-Life*’s holding with respect to competition). As noted, Healthfirst had the contractual right to terminate Academy for *any* reason.

Healthfirst is a rational economic actor, it obviously believed it had something to gain from terminating Academy for cause. And if it is true, as the court assumes on this motion, that Healthfirst always knew that Academy was an IPA, then there was no apparent benefit to terminating for-cause without 90-days' notice, rather than without-cause with notice. If Healthfirst is correct that Academy's status as an IPA is grounds for termination, then such grounds existed during the entirety of the parties' relationship since 1997. Academy suggests something cynical and malicious is afoot. It claims the without-cause termination only served to impugn Academy's integrity, implying to the Providers that they ought not do business with a supposedly shady IPA. That is, the for-cause termination was meant to nudge the Providers to Integra, even though many of them may have moved their business anyway.

With these concerns in mind, the court dismisses Academy's claim for tortious interference with business relations without prejudice, with leave to replead, and without staying or altering the scope of discovery.²³ For Academy to ultimately prevail on this claim, it must plead additional, non-conclusory factual allegations that address the issues set forth herein.²⁴

Finally, the court dismisses Academy's prima facie tort claim with prejudice. "The elements of such a cause of action ... are (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful." *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 (1983). The Court of Appeals has long cautioned that "prima facie tort is [not] a 'catch-all'

²³ That said, the parties have agreed to stay discovery until October 6, 2016, and this decision does not alter that agreement, which was so-ordered by the court. *See* Dkt. 82. It also should be noted that the parties have not asked the court to hold this motion in abeyance. *See id.*

²⁴ The court declines to address the proper scope of damages since the issue was not raised in the parties' briefs, although the court's view on the damages recoverable on each cause of action will be a guiding factor in making ESI proportionality determinations in discovery.

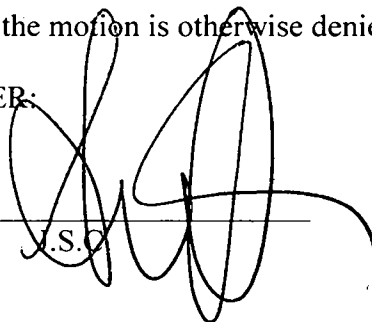
alternative for every cause of action which cannot stand on its legs.” *See id.* at 333 (citation omitted). The Court, thus, held that there cannot be “recovery in prima facie tort unless **malevolence is the sole motive** for defendant’s otherwise lawful act”, that is, “unless defendant acts from ‘disinterested malevolence.’” *See id.* (emphasis added; citations omitted). This means “that the genesis which will make a lawful act unlawful **must be a malicious one unmixed with any other and exclusively directed to injury and damage of another.**” *See id.* (emphasis added; citations omitted).

It is well established that this standard prohibits the maintenance of a prima facie tort claim where the defendant has an economic motive for the alleged tortious conduct. *See AREP Fifty-Seventh, LLC v PMGP Assocs., L.P.*, 115 AD3d 402, 403 (1st Dept 2014); *Princes Point, LLC v AKRF Eng’g, PC*, 94 AD3d 588, 589 (1st Dept 2012). As Healthfirst correctly contends, Academy’s allegations make clear that Healthfirst acted to further its own economic ends. This is fatal to a prima facie tort claim. Regardless of the legality of Healthfirst’s actions, its profit motive is undeniable. This claim is dismissed with prejudice. Accordingly, it is

ORDERED that Healthfirst’s motion to dismiss Academy’s AC is granted to the extent of dismissing: (1) the portion of the third cause of action under Insurance Law § 3224-a relating to Medicare claims with prejudice; (2) the fourth cause of action for quantum meruit with prejudice; (3) the fifth cause of action for tortious interference with contract and tortious interference business relations without prejudice and with leave to replead; and (4) the sixth cause of action for prima facie tort with prejudice; the motion is otherwise denied.

Dated: July 21, 2016

ENTER:



J.S.C.