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ALLSTATE INSURANCE ET ALS. (PLAINTIFF/RESPONDENT) V. [redacted], Et al. (DEFENDANT/APPELLANT/MOVANT)	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION **DOCKET No. AM** Sat Below: Judge Mark P. Ciarocca, JSC, Superior Court of New Jersey, Law Division, Union County Docket No: [redacted] MAY 19th, 2020 ORDER DENYING DISMISSAL OF SECOND AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM AND DENYING OTHER RELIEF SOUGHT

DEFENDANT/APPELLANT'S BRIEF IN SUPPORT OF MOTION FOR INTERLOCUTORY APPEAL AND FOR A STAY OF ALL DISCOVERY PURSUANT TO R. 2:5-6

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Preliminary Statement

Plaintiff/respondent Allstate on January 18, 2018, filed a complaint against various defendants alleging fraud in the context of a purported referral fee scheme involving a network of attorneys, health care providers, and diagnostic facilities. The complaint was amended as a matter of course on June 11, 2018, and on February 3, 2020, plaintiff/respondent was granted leave to file a Second Amended Complaint ("SAC") which added fifteen new "groups" of defendants. Six of these groups, including defendant/appellants, were identified *solely* as a result of an uncorroborated anonymous tip received by current Allstate counsel as they litigated this case in June of 2019. The uncorroborated anonymous tip referenced no wrongdoing by the defendants, and did not identify any of them by name, but instead *vaguely* by address only.

In the SAC, plaintiff/respondent bolstered the "anonymous tip" by using detailed "expert testimony" to assert that defendants herein *may* have acted wrongfully based on plaintiff/respondent's own interpretation of the contents of the uncorroborated anonymous tip. In fact, however, it is unknown why defendant/appellant's address appears in said anonymous tip.

The Judge below impermissibly relied on a multitude of conclusory allegations, on numerous *specific* allegations relevant to *other* defendants (i.e. that John Doe testified that defendant

Mary Smith received a referral fee in the amount of X dollars), and on "fraud expert" allegations regarding the contents of the anonymous tip, to "cull" out a *specific* cause of action against defendant/appellants. The Judge also formally ruled that time-honored rules requiring specificity in *all* fraud pleadings do not apply to this *fraud* case.

At oral argument, plaintiff did not deny that none of the witnesses upon which the original complaint was based *specifically* inculpated defendant/appellants herein. Neither did they deny that if the case against defendant/appellants were tried with no further discovery, the only witness for their case-in-chief would be counsel for Allstate, the recipient of the anonymous tip. Plaintiff, therefore, seeks to manufacture the *entirety* of the case using scorched-earth discovery tactics.

PROCEDURAL HISTORY[1]

Plaintiff/respondent Allstate on January 18, 2018, filed an eight Count complaint alleging common law fraud and Insurance Fraud Prevention Act ("IFPA") violations against numerous attorneys, health care providers, and diagnostic facilities. Having previously filed an amended complaint, on February 3, 2020, plaintiff was granted leave to file a 16-count Second Amended

[1] References to the transcripts are as follows:

1T May 15, 2020 Telephonic Motion Hearing
2T May 19, 2020 Placement of Reasons for Denial on the Record

Complaint ("SAC") which added fifteen new "groups" of defendants [**A1 to A401**]. Numerous stays of testimonial discovery were issued relative to the "[redacted]" defendants in 2019 and, prior to the filing of the SAC, the state attorney general on May 8, 2019 filed a motion to intervene, which motion was granted on July 12, 2019. A discovery master was appointed on September 27, 2019, without the consent of any of the SAC defendants.

Plaintiff/respondent served defendant/appellants herein with the SAC, contemporaneously with *comprehensive* interrogatories, in February of 2020, [**A411-A467**],[**A487**], and on April 10, 2020, defendant/appellants filed an omnibus motion to dismiss returnable May 8, 2020. [**A404-A467**]. The omnibus motion also sought an extension of discovery and additional time to answer plaintiff/respondent's *comprehensive* interrogatories. [**A411-A467**]. Plaintiff/respondent filed an opposition letter brief on May 7, 2020. Defendants filed a reply brief on May 11, 2020, and telephonic oral argument then took place on May 15, 2020. [**1T:1-9**]. On May 19, 2020, the Court placed its findings on the record, [**2T:1-10**], and issued an order denying *all* relief requested by defendant/appellants. [**A469-A470**].

This timely interlocutory appeal motion then followed.

STATEMENT OF FACTS

(with references to appendix)

Plaintiff/respondent's Second Amended Complaint ("SAC") consists of IFPA, N.J.S.A. 17:33A-1 *et seq.*, allegations at Counts 5,9, 8, and 12, [**A1-A401**], common law fraud allegations at Counts 7 & 11,[**A1-A401**], and unjust enrichment/equitable fraud allegations at Counts 6 and 10. [**A1-A401**].

Complaint, Count 5, ¶395 to ¶400, [**A141-A142**], sets forth the core "referral fee scheme" fraud allegations against defendant/appellants. These paragraphs consist primarily of a conclusory allegation at Complaint, ¶395[2], as well as vague reference, at Count 5, ¶397-399[3], to the *sole* "fact" which purports

[2] To wit, Count 5, ¶395: *"The [redacted] Defendants have caused Allstate Claimants and other patients of Defendant [redacted] to be referred to the [redacted] MRI Facility Defendants* ***in exchange for kickbacks in furtherance of the [redacted] MRI Kickback Scheme from [redacted] and until [redacted]."*** [**A141**]. This conclusory allegation was repeated in elsewhere, e.g., Complaint ¶251. [**A102**]

[3] Count 5, ¶397: *The main business address for the [redacted] Defendants is [redacted].* [**A141**]
Count 5, ¶398: *This address is listed on the [redacted] Solicitation Letter, as that term is herein described, as one of the law offices for the [redacted] Defendants, when it is not.* [**A141**]
Count 5,¶399: *This address is identified as the chiropractic office of the [redacted] Defendants from which patients are referred to the [redacted] MRI Defendants, by an anonymous individual in a letter submitted to the Office of Attorney Advertising and Plaintiffs' counsel.* [**A141**] Count 5, ¶399, is misleading. In that allegation plaintiff sets forth that the anonymous tip *itself* identified defendant/appellant's address as constituting an address "from which patients are referred." This is completely false. The anonymous tipster, as per Count 5, ¶580 to ¶632, [**A217**], did not

to support plaintiff/respondent's contention that defendant/appellants *may* have been participants in a fraud scheme. This "fact", the "[redacted] Solicitation Letter", is essentially an *uncorroborated* anonymous tip received by counsel for plaintiff as they litigated this case in June of 2019. In the absence of plaintiff's "expert opinion"[4] at Complaint,¶580 to ¶632[5], this anonymous tip is meaningless. Indeed, this anonymous "[redacted] Solicitation Letter" on its face references absolutely no wrong-doing by defendant/appellants (or any of the other defendants for that matter), and only vaguely refers to them by address only, in lieu of their names or likeness. *It is in fact unknown why*

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make such a statement. In fact, it **remains unknown why defendant's address appears in this anonymous letter**.

[4] I.e., not based on witness testimony or documentary evidence. Those allegations consist primarily of conjecture, i.e. that it *may* be true that defendants herein are participants because their address appears in the anonymous "[redacted] Solicitation Letter".

[5] The only relevant facts alleged in those paragraphs consist of the following two paragraphs:
Complaint, ¶580: which reads "*On or about June 7, 2019, the law firm of Pringle Quinn Anzano... Plaintiffs' counsel in this litigation, received ...two envelopes from an anonymous sender. One of the envelopes was addressed in type to H. Steven Berkowitz, Esquire, and the other to Thomas Mulvihill, Esquire. ...The contents of the envelopes were identical.*" [**A0217**]
Complaint, ¶601: "*The six addresses listed on the* [redacted] *Solicitation Letter and/or Enclosure as "Our NJ Offices" that are in fact the offices of chiropractors [include] the following: ....* [redacted] *is the office address of Defendant* [redacted]*, which is owned by Defendants* [redacted]*"* [**A0224**]

defendant's addresses were included in the "[redacted] Letter", and plaintiff's "expert opinion" that the letter depicts wrongdoing constitutes impermissible, and inadmissible, conjecture.

In order to "bolster" the Count 5 conclusory allegations, plaintiff/respondent alleged one additional misleading "fact" in the form of two exhibits, Exhibits Q and II, [**A402-A403**], which contain claim numbers and patient names for thirty-two Allstate patients that defendant/appellants referred to MRI facilities owned by the "[redacted]" defendants for *bona fide* MRI studies. Plaintiff/respondent, however, did not allege, and pointed to no testimony or document, which set forth that defendant/appellants *specifically* received a referral fee for *each or any* of these thirty-two Allstate patient/claimants. **Plaintiff at oral argument indeed did not refute the compelling assertion that there is no allegation or fact, e.g. witness testimony, specifically connecting *any* of these thirty-two Allstate patients to the "scheme"[6]. [1T:1-9].** Moreover, plaintiff did not deny at oral argument that they failed to *specifically* allege that defendants herein acquired *any* of these thirty-two patients with the

[6] There are 32 patients. The proper format for the 32 allegations for *each* of the patients should take the form: "*Witness Michael Smith testified that on xx/xx/20cc, defendant* [redacted] *received a referral fee or kickback, in the amount of X dollars, for having referred patient F.G. to the* [redacted] *Defendants on or about x/xx/20xx.*"

uncorroborated "[redacted] Solicitation Letter", or that the "[redacted] Solicitation" letter was used to acquire any *other* patients, including patients insured by other carriers. [**1T:1-9**]. Said evidence does not exist, as plaintiff/respondent clearly purports to manufacture the *entirety* of their case-in-chief against defendant/appellants by employing abusive and intrusive discovery tactics. **The patient exhibits notwithstanding, the only factual allegation against defendants herein continues to be the anonymous tip, which absent impermissible expert testimony says nothing regarding defendant/appellant's participation in the schemes alleged.**

Count 5, ¶256 to ¶394, [**A104-A140**], references *specific* and detailed allegations against *the (original)* defendants, e.g. that *other* defendants purportedly received or paid referral fees as per credible or non-credible witness testimony. **Not one of the witnesses cited in those allegations inculpated defendant/appellants herein - and plaintiff did not deny same at oral argument, although that point had been prominently raised in defendant/appellant's briefs.**[7] [**1T:1-9**].

[7] Plaintiff did not dispute at oral argument that not one of the following witnesses cited in connection with the original complaint implicated defendant/appellants: (1) [redacted] (plea hearing), referenced at Complaint ¶342,(2) [redacted] (deposition) at ¶343, (3) [redacted], D.C , referenced at Complaint ¶31, (4) Defendant A[redacted], D.C., referenced at Complaint ¶38, (5) Defendant [redacted], D.C., referenced at Complaint ¶271, (6) [redacted], M.D., referenced [**next page**]

Count 5, ¶251 to ¶255, [**A102-A104**], in turn contains conclusory IFPA allegations as to all defendants, e.g., that they were *all* members of the "[redacted] Enterprise" and engage in the referral fee "scheme", and includes only one paragraph which specifically references defendants herein in a conclusory allegation.[8]

Counts 6 through 12 incorporated the "allegations" of Count 5, and added little further. As stated, the Count 5 allegations are specific as to the *other* defendants, and the sole allegation against defendants herein is therefore the uncorroborated "anonymous tip", e.g., the "[redacted] Solicitation Letter", Count 5, ¶398 and ¶580 to ¶632, [**A141**], [**A217-A233**], which when stripped of

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at Complaint ¶669, (7) [redacted], D.C., referenced at Complaint ¶346, (8) [redacted], D.C., referenced at Complaint ¶454, (9) [redacted], Esq., aka "[redacted]", referenced at Complaint ¶681, (10) Chiropractors [redacted], D.C. and/or [redacted], DC, referenced at Complaint ¶256, (11) [redacted] and/or [redacted], referenced at Complaint ¶336, (12) Defendant [redacted], D.C., referenced at Complaint ¶477, (13) defendant [redacted], referenced at Complaint ¶495, (14) L.G., referenced at Complaint ¶355, (15) F.V., referenced at Complaint ¶355, (16) Claimant J.R, referenced at Complaint ¶305, (17) Defendant [redacted], D.C., referenced at Complaint ¶281, (18) [redacted], referenced at Complaint ¶337, (19) [redacted], referenced at Complaint ¶338, (20) [redacted], D.C., referenced at Complaint ¶297. [**A1-401**]

[8] *To wit*, Complaint, ¶251: *"At all times relevant to this litigation the [redacted] Enterprise Defendants, acting in concert or otherwise with the assistance of the Patient Broker/Runner Defendants and/or the Attorney/Provider Network Defendants,* ***have given kickbacks directly or indirectly*** *to the Referring Provider Defendants, including..* ***the [redacted] defendants...*** *"* [**A102**]

counsel's "expert testimony" says nothing more than that counsel received an anonymous tip with vague references to defendant's addresses. Even more damaging is that plaintiff's entire case, based solely on the anonymous tip and impermissible expert opinion, seems to disintegrate completely in the face of Complaint, Count 5, ¶600[9], which is essentially a hypothesis that defendant/appellants defendants herein may not have been aware of the "[redacted] Solicitation Letter" and did not approve of the use of their addresses. **Since plaintiffs have alleged no other facts connecting defendants herein to the "schemes", their entire case collapses.**

[9] "*[a]lternatively, or in addition, these Referring Provider Defendants are so sufficiently active and reliable participants in the [redacted] Referral Network and Schemes that the [redacted] Defendants and [redacted] Defendants simply assumed they would be amenable to having their addresses used on the [redacted] Solicitation Letter..*", Complaint, Count 5, ¶600 [**A223**].

POINT I

Interlocutory Appeal Is Proper As This Case Involves a Substantial Claim or Defense, and Two Novel Issues Not Previously Raised, *To Wit*, Whether IFPA Pleadings Are Exempt From R. 4:5-8 and, Second, Whether Providers Are Required To Disclose Regulatory Referral Fee Violations to Insurance Carriers, and/or Whether They are Required to Disclose Purported Kickbacks That Are The Purview of General and Broad Anti-Kickback Statutes Which Have Not Been Found To Affect the Quality of Services Rendered. [2T-12:12 to 13:17]

Interlocutory review in the case *sub judice* is in the interests of justice, and would advance the within litigation since, (**i**) it depicts a substantial claim, (**ii**) the issue of whether IFPA fraud pleadings are exempt from R. 4:5-8, which requires specificity in *all* fraud pleadings, is a novel issue not previously raised, and (**iii**) the issue of the IFPA applicability in the context of referral fee or kickback lawsuits, e.g. defendant's duty to disclose a referral fee "scheme", represents a novel question of law not previously entertained by our Courts.

Interlocutory appeals generally are governed by R. 2:2-4, which states in relevant part that the appellate division, "*may grant leave to appeal, in the interest of justice, from an interlocutory order of a court*" Id. Further, leave to appeal shall be granted if a substantial claim or defense is dismissed or denied See, e.g., Fid. Union Bank v. Hyman, 214 N.J.Super. 177, 179, (App.Div.1986). Novel questions of law also warrant interlocutory review. See, e.g., Arena v. Saphier, 201 N.J.Super.

79, 81 (App.Div.1985).

Leave may also be granted "where the appeal, if sustained, will terminate the litigation and thus very substantially conserve the time and expense of the litigants and the courts...." Romano v. Maglio, 41 N.J.Super. 561 (1956). Thus, leave may be appropriate if it will resolve a fundamental procedural issue and thereby prevent the court and the parties from embarking on an improper or unnecessary course of litigation. See Dinizo v. Butler, 315 N.J.Super. 317, 319, 718 A.2d 251 (App.Div.1998).

In the case *sub judice*, interlocutory review is proper primarily because: (**i**) it depicts a substantial claim, (**ii**) the issue of whether IFPA fraud pleadings are exempt from R. 4:5-8, which requires specificity in *all* fraud pleadings, is a novel issue not previously raised, (**iii**) the issue of the IFPA inapplicability in the context of referral fee or kickback suits, e.g. defendant's duty to disclose a referral fee "scheme", represents a novel question of law not previously entertained by our Courts, and (**iv**) resolution of applicability of R. 4:5-8 to IFPA pleadings will "*resolve a fundamental procedural issue and thereby prevent the court and the parties from embarking on an improper or unnecessary course of litigation*".

POINT II

The Trial Judge Committed Reversible Error In Finding, as a Matter of Law, That IFPA Pleadings Are Exempt From The Court Rule On Specificity in Fraud Pleadings, R. 4:5-8, And He Further Erred In Ruling That The Second Amended Complaint Was Pled With the Required Specificity. [2T-12:12 to 13:17]

On May 19, 2020, the trial Judge ruled:

> *With respect to specificity in pleadings, the Court finds that the heightened standard of Rule 4:5 --* ***4:5-8 does not apply to an Insurance Fraud Prevention Act allegation****. In order to accomplish its purpose of deterring insurance fraud, the Insurance Fraud Prevention Act requires insurers who allege violation to prove* ***fewer elements*** *than those of common law fraud, citing to Building Materials of America versus Allstate, 424 N.J. Super. 448. In Liberty Mutual versus Land, 186 N.J. 163 (2006) the Court held that the proper standard for proof under Insurance Fraud Prevention Act is a preponderance of the evidence, stating that having the Insurance Fraud Prevention claims held to a higher standard would defeat the* ***legislative intent*** *of -- of -- of enacting the Insurance Fraud Prevention Act.* ***That is, to liberally combat and deter insurance fraud.***

[**2T:11:20 to 12:11**].

In so ruling, the trial Court misconstrued the Liberty Mutual v. Land holding in that Liberty did not reference pleading requirements, but instead only the burden of proof standard (cf. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). Further, the trial court misconstrued Liberty in finding that its holding regarding the burden of proof was based on legislative intent *only*. Lastly, the court below erred since R. 4:5-8 is not ambiguous, it is clear, in that all fraud actions require particularity in

pleadings.

This Court's review of the trial Court's decision must of necessity therefore begin the subject rule itself, R. 4:5-8(a), which conspicuously reads, "*[i]n **all** allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, **particulars** of the wrong, with dates and items if necessary, shall be stated ...*". Id. (emphasis supplied). The plain language of the rule, it is respectfully submitted, is dispositive, as the rule applies to "**all** allegations...of fraud" and does not exempt IFPA fraud actions. The plaintiff/respondents during the motion hearings were indeed unable to cite to any cases which found otherwise.

Moreover, as stated *supra*, the Liberty Court did not base its holding solely on "legislative intent" regarding IFPA "aggression"[10] in the context of combating the 37-year old insurance fraud "pandemic".[11] Instead, the Liberty court relied on

[10] The IFPA was enacted to "confront aggressively the problem of insurance fraud." N.J.S.A. 17:33A-2. This 37-year old provision is often used by the Courts to provide IFPA plaintiffs with expansive near-limitless powers, such as in the case at bar.

[11] It is respectfully submitted that the limits of IFPA "aggression" in the context of insurance fraud *have been reached*. There is no need to give IFPA plaintiffs more expansive, near limitless "super-prosecutor" powers, particularly in this case, as the attorney general is a party herein. Thus, IFPA actions are subject to the preponderance of the evidence burden of proof standard, Liberty v. Land, IFPA allows treble damages and attorneys fees, NJSA §17:33A-7, IFPA requires no proof of reliance or resultant damages, Liberty v. Land, and IFPA requires no proof of intent to deceive.

a smorgasbord of legal and factual premises, some of which are not applicable in the context of *pleadings*, to arrive at its decision that the proper burden of proof for IFPA actions was preponderance of the evidence.

Specifically, the Liberty Court relied upon the following five premises to support its holding: (**1**) it compared IFPA with **the Consumer Fraud Act**, ("*[CFA] is the closest statutory analogue to IFPA…[S]ince [the CFA] is a civil action, preponderance of the evidence, the usual civil standard of proof, should be the applicable standard.*") Liberty, 186 NJ at 170, (**2**) the Court compared IFPA with the **federal False Claims Act**, ("*The federal statutory counterpart to IFPA, the False Claims Act (FCA)... similarly requires proof by a preponderance of the evidence.*") Liberty, 186 NJ at 172, (**3**) the Court also compared IFPA with **non-fraud statutes** ("*[w]e routinely require a preponderance of the evidence in civil proceedings in which the Attorney General seeks to enforce the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42, which prescribes penalties..*") Liberty, 186 NJ at 172, (**4**) the Court analogized IFPA with case law on the use **fraud as an affirmative defense**, ("*when an insurance company is defending against payment of an insurance claim that it deems to be fraudulent, the company need only prove the affirmative defenses*

Open MRI of Morris v. Frieri, 405 N.J. Super. 576, 583 (A. D. 2009). The foregoing "aggression" need not be expanded further.

of ...fraud .. by a preponderance of the evidence") Liberty, 186 NJ at 172, and (**5**) the Court alluded to the specific **absence of a provision within the IFPA statute** which called for the clear and convincing burden of proof standard ("*[f]inally, we note that the Legislature is well aware of its ability to impose a higher standard of proof when it so desires…...We therefore decline to interpret the Legislature's silence as an indication that it intended to depart from the customary standard of proof in civil cases. Rather, the more reasonable conclusion is that* ***absence of an evidentiary standard indicates that a preponderance of the evidence — the traditional, default standard — applies.***"). Liberty, 186 N.J. at 173.

The foregoing five Liberty premises supporting the holding that IFPA is subject to the "preponderance" burden of proof, support the proposition that IFPA actions *are* subject to R. 4:5-8, *to wit*, (**1**) as to CFA, this Court has specifically held that **IFPA's "statutory analogue", CFA, is not exempt from R. 4:5-8,** Miller v. Bank of America Home Loan Servicing, 439 N.J. Super. 540 (App Div 2015), (**2**) the federal **False Claims Act, the "federal equivalent to IFPA", is likewise not exempt from the federal counterpart to R. 4:5-8, *to wit*, F.R.C.P. 9(b),** United States ex rel. Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770, 776 (7th Cir. 2016), ("*The district court granted the defendants' motion to dismiss the [False Claims Act] complaint for failure to*

state a claim of fraud with particularity as required by Federal Rule of Civil Procedure 9(b). We affirm that judgment.."), (**3**) the proposition that **non-fraud statutes, e.g. Law Against Discrimination, are subject to preponderance** of the evidence standard, does not compel the conclusion that IFPA is exempt from R. 4:5-8's *pleading* requirements, (**4**) the proposition that **fraud as an affirmative defense must be proven by preponderance of the evidence** does not compel the conclusion that IFPA fraud actions are exempt from *pleading* requirements in R. 4:5-8, and (**5**) since the legislature was **silent on the issue of R. 4:5-8's applicability in IFPA fraud actions**, the "default" legal tenet must be implemented, e.g., that R. 4:5-8 applies to all fraud actions, including IFPA.

Nonetheless, the Judge below erroneously cited to allegations which are specific to *other* defendants, to "cull out" a cause of action which has not been *specifically* alleged as to defendants herein, to wit:

> *The Court -- the -- the -- the Court in this case finds, nevertheless, that the -- the complaint has sufficiently set forth the cause of action for fraud and -- and violations of the Insurance Fraud Prevention Act. The complaint has sufficiently pled, as the complaint* ***identifies the payer*** *of the alleged kickbacks, the* [redacted] *enterprise defendants, which include* [redacted]*, and the recipients of the kickbacks.* ***The patients*** *referred by the movants in exchange for payments of kickbacks,*

> ***the methods used*** *to obtain such prospective referrals,* ***the amounts*** *of kickbacks, and* ***the facts that these kickbacks were paid in cash.*** *Moreover, the complaint identifies* ***the bills,*** *precertification requests, medical report, medical records, reports, and assignment of benefits form which were* ***submitted to Allstate*** *in support of the movants' claims for payments as the statements which contained movants' implicit misrepresentations that the subject MRI testing was rendered in compliance with all applicable policies and laws.*

[2T-12:12 to 13:17].

The trial Judge thus erroneously found that the following facts were sufficiently pled: (**i**) the payer of the alleged kickbacks, (**ii**) the patients and bills submitted i.e. the claims, (**iii**) the methods used, and (**iv**) the fact that the kickbacks were in cash.

In fact, these allegations were specifically made as to *other* defendants in the original complaint, using *specific* witness statements, ***Statement of Facts*****, Footnote 7**, implicating them, but similar specific allegations were not set forth in connection with defendant/appellants herein. **The only factual allegation against defendants herein continues to be the vague anonymous tip which references no wrongdoing, and identifies defendants not by name, but by a vague reference to their address, which was buttressed by impermissible, and inadmissible, expert testimony by counsel or some unknown third person. Absent this impermissible expert testimony, the anonymous tip proves nothing.** [**A141**], [**A217-A233**]. See State v. Rodriguez, 172 N.J. 117 (2002) "*An anonymous tip,*

standing alone, is rarely sufficient to establish a reasonable articulable suspicion of criminal activity."

Further, the twenty witnesses/statements set forth at ***Statement of Facts*, Footnote 7**, are the *only* witnesses/statements which plaintiff relied upon to specifically identify *all* of the defendants in the original complaint. **Not one of these witnesses/statements identified, inculpated, or even remotely suggested that defendant/appellants are participants, there is simply no factual allegation connecting defendants herein to the schemes alleged.** Plaintiffs did not refute this compelling proposition at oral argument, and neither did they dispute that the *only* item of evidence alleged against defendants herein is the anonymous tip, the ambiguous "[redacted] Solicitation Letter". [**1T: 1-9**].

Taking the Judges findings of "specificity" individually, it is clear that plaintiff's complaint is impermissibly based solely on the anonymous tip aided by impermissible expert testimony:

(**i**) **The payer of the alleged kickbacks** - there is no *specific* allegation which states that the [redacted] defendants paid defendant/appellants herein a referral fee, instead, plaintiff incorporated by reference allegations that witness "John Doe said that he received a referral fee from the [redacted] Defendants". [**A106**] Then, based on the "anonymous tip", plaintiff in a conclusory fashion alleged that defendant/appellants may have also received

such a referral fee. [**A251**] Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1988) ("*A plaintiff can ..bolster a ..cause of action through discovery, but not [] file a* ***conclusory complaint*** *to find out if one exists.")*. It is axiomatic that an allegation that "John Doe" received a referral fee cannot be used as a premise for the allegation that "Maria Smith" *also* received a referral fee.

(**ii**) **The patients and bills submitted to Allstate i.e. the claims for which defendants purportedly received a referral fee.** Plaintiff did not refute that they have no evidence and have made no allegation which even remotely suggests that defendant/appellants specifically received a referral for each of the 32 "Exhibit Q and II" patient/claims submitted to Allstate by defendant/appellants, in connection with bona fide MRI studies [**A402**]. In fact, plaintiff did not allege *specifically* because such evidence does not exist. Plaintiff purports to obtain the evidence during an aggressive discovery process, in order to manufacture the entirety of the case against defendant/appellants. This "super prosecutor" tactic, which severely curtails defendant's Constitutional rights, cannot be countenanced by this Honorable Court, particularly as the attorney general is a party in this matter.

(**iii**) **The methods used** – The complaint is laden with *specific* allegations that *other* defendants engaged in some methods/schemes

as part of the "[redacted] Enterprise", as per the testimony of credible or non-credible witnesses. [**A106**]. Yet, there is no specific allegation, directed at defendant/appellants, that they too employed such schemes. Instead, plaintiff extrapolated all but the moon from the indistinct anonymous tip to argue or *vaguely* set forth that defendants herein *must* have also engaged in that scheme as per their expertise in fraud litigation. Plaintiff did not refute this at oral argument. [**1T: 1-10**]

(**iv**) **The fact that the kickbacks were in cash.** The complaint is laden with specific allegations, based on credible or non-credible witness testimony, that the alleged kickbacks were in cash, and also in kind, in the form of the reciprocal referral of patients by alleged members of the "enterprise." However, there is not one specific allegation which implicitly or explicitly sets forth that defendant/appellants herein made/received such cash or "in-kind" payments for their referrals. Instead, once again, plaintiff purports to argue that an undecipherable anonymous tip, which identifies no one, and which sets forth no wrongdoing, can be used to conclude that defendants herein *must* have made/received such referrals. Plaintiff did refute this during oral argument.

As such, the trial Judge erred finding that R. 4:5-8 did not apply to IFPA actions, and in not dismissing pursuant to R. 4:6-2(e).

POINT III

The Trial Judge Committed Reversible Error in Not Dismissing Counts 7 and 11, the Common Law Fraud Claims, Since Defendant/Appellants Owed Plaintiff/Respondent No Common Law Duty to Disclose. [2T-12:12 to 13:17]

In C.U.R.E. v. Meer, 321 F. Supp. 3d 479 (DNJ 2018), the Court dismissed common law fraud claims against a provider, in a referral fee or "kickback" matter similar to the case *sub judice*, and rightfully found that in New Jersey, providers owe the carriers no duty to disclose:

> *CURE's two other theories of common law fraud, the noncompliance and kickback theories, involve a failure to disclose — i.e., that defendants were not eligible to receive PIP reimbursements because [defendants] ...were engaged in a prohibited kickback scheme with chiropractors.* ***These theories are not actionable as common law fraud because, in New Jersey, "fraudulent omission claims require that the defendant have had duty to disclose the omitted information."*** *... see Stockroom, 941 F.Supp.2d at 546 (citing New Jersey cases for the proposition that "a fraudulent omission under common law requires a duty to disclose"); Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68, 74-75 (1974); United Jersey Bank v. Kensey, 306 N.J.Super. 540, 704 A.2d 38, 43-44 (N.J. Super. Ct. App. Div. 1997).*

Id. at 491. (emphasis supplied).

In United Jersey Bank v. Kensey, 306 N.J.Super. 540 (App.Div. 1997), certif. denied, 153 N.J. 402 (1998), cited by the CURE v. Meer court, the Court set forth the guiding tenets to determine if a duty to disclose exists:

> *Silence in the face of a duty to disclose may constitute a fraudulent concealment. See Strawn v. Canuso, 140 N.J. 43 (1995) (quoting Weintraub v. Krobatsch, 64 N.J. 445, 449, 317 A.2d 68 (1974)). The question of whether a duty exists is a*

matter of law. Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc., 135 N.J. 182, 194 (1994) (quoting Wang v. Allstate Ins. Co., 125 N.J. 2, 15, (1991)). The question is one of fairness and policy that "involves identifying, weighing, and balancing several factors — the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439, (1993) (citing Goldberg v. Housing Auth., 38 N.J. 578, 583, (1962)).

There are three general classes of transactions in which a duty to disclose arises. Berman v. Gurwicz, 189 N.J. Super. 89, 93 (Ch.Div. 1981), aff'd, 189 N.J. Super. 49 (App.Div.), certif. denied, 94 N.J. 549, (1983). The first involves fiduciary relationships such as principal and agent or attorney and client. Ibid. The second embraces situations in which "`either one or each of the parties, in entering ... [the] transaction, expressly reposes ... a trust and confidence in the other ... or [because of the] circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence ... is necessarily implied.'" Id. at 93-94 (quoting 3 J. Pomeroy, A Treatise on Equity Jurisprudence at 552-54). The third includes contracts or transactions which in their essential nature, are "intrinsically fiduciary," and "necessarily call[] for perfect good faith and full disclosure, without regard to any particular intention of the parties." Id. at 94, (quoting 3 J. Pomeroy, A Treatise on Equity Jurisprudence at 552-54).

Id.

The three instances wherein a duty to disclose arises are therefore, (**i**) fiduciary relationships, (**ii**) "implied" fiduciary relationships wherein the parties, in entering into a *specific* transaction, expressly repose trust and confidence in one another, or, given the "circumstances" of the specific transaction, trust and confidence is implied, and (**iii**) specific transactions which are "intrinsically fiduciary". United Jersey Bank v. Kensey, 306 N.J.Super. 540 (N.J.Super.Ct.App.Div.1997). It is clear that

plaintiff and defendants are not in a fiduciary relationship, as plaintiff insurer and defendants herein are competitors - plaintiff seeks to deny as many claims as possible, and defendants seek to have their claims honored. It is also clear that (ii) and (iii), the "implied" fiduciary and the "intrinsically fiduciary" test for a duty to disclose, must be **applied on a case-by-case**, or **transaction-by-transaction** basis. Thus, absent detailed allegations about a specific claim, which are clearly absent here, providers do not have a general duty to disclose, since they generally do not "expressly repose trust and confidence in one another", and the "circumstances" of most if not all claims do not suggest trust and confidence. In fact, the converse is true, since a large percentage of these claims are subject to resolution by a third party, e.g., PIP arbitration, in the vast majority of cases the claims are submitted with no expectation that the claim will be honored. Therefore, the relationship between insurers and providers is not "intrinsically fiduciary", and neither must such a fiduciary relationship be *implied* in most cases.[12]

As such, the common law fraud claim should have been dismissed as a matter of law. R. 4:6-2(e), R. 4:5-8.

[12] Plaintiff/respondent will nonetheless posit, as it did below, that IFPA's *statutory* duty to disclose implies that providers have a *common law* duty to disclose. However, that theory finds scant support in Kensey and progeny. See, e.g., C.U.R.E. v. Meer, 321 F. Supp. 3d 479 (DNJ 2018) (dismissing common law fraud claim).

POINT IV

The Judge Committed Error In Not Dismissing Counts 5,8, 9, & 12, The **IFPA Counts**, Since as Our Courts Have Not Found that Regulatory or Statutory **Referral Fee Violations** Render PIP Claims Non-Payable, and Therefore Material, Under IFPA. [2T-12:12 to 13:17]

The Insurance Fraud Prevention Act ("IFPA") provides, in relevant part, that a "person or practitioner" violates the Act when she:

> *(1) [p]resents ..any written or oral statement ..... knowing that the statement contains any false or misleading information concerning any fact or thing* ***material to the claim;*** *or*
>
> *(2) [p]repares or makes any written or oral statement … in connection with..any claim for payment ..pursuant to an insurance policy ... knowing that the statement contains any false or misleading information concerning any fact or thing* ***material to the claim;*** *or*
>
> *(3) [c]onceals or knowingly fails to disclose the occurrence of an event* ***which affects any person's initial or continued right or entitlemen****t to (a) any insurance benefit or payment …]*

N.J.S.A. 17:33A-4(a)(1), (2), (3). (emphasis supplied).

Subsections (1) and (2) are clear, in that the misrepresentation must be "material". Subsection (3) imposes a duty to disclose which is limited to those facts which "affect[s] any persons...right...to any insurance benefit." It is axiomatic that such information which must be disclosed include whether the treatment was actually rendered, whether the accident was staged, etc. However, a long line of cases state that a provider must also disclose regulatory anomalies regarding the proper *business structure* of the provider, since such regulatory oversights have

been found to affect a person's entitlement to PIP benefits. See, e.g., Allstate Ins. Co. v. Northfield Med. Ctr., P.C., 228 N.J. 596 (2017)("*… a practice entity must comply with all statutes and regulations governing the permissible structures for control, ownership, and direction of a medical practice..*"). The law division has also set forth a generalized rule which has not been interpreted in the context of referral fees, *to wit*, that "*[t]he failure of a provider ..to adhere to .. any other* ***significant*** *state statute or agency regulation, renders that provider or service ineligible for reimbursement*". Prudential Prop. & Cas. Ins. Co. v. Midlantic Motion X-Ray, Inc., 325 N.J.Super. 54, 60, (Law Div. 1999). (emphasis supplied). **Plaintiff was unable to cite to *any* cases which found that violations of referral fee regulations, or violations of the broader more generalized kickback statutes, constitute a "significant" statute or regulation which affect the "quality of services rendered" [13], nullifies PIP benefits, and must therefore be disclosed.**

As such, the trial Court erred in not dismissing *all* IFPA counts, pursuant to R. 4:6-2(e) and R.4:5-8.

Respectfully submitted.

DATED: June 6, 2020 *Santos A. Perez, Esq.*

[13] "Significant" statutes are those which have a nexus with the quality of services provided. See, e.g, Northfield, 228 NJ at 611, ("[providers] .. must also comply with any other significant qualifying requirements of law **that bear upon rendition of the service**"). Ibid. (emphasis supplied)