

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X
ABN AMRO BANK N.V.; BARCLAYS :
BANK PLC; BNP PARIBAS; CALYON; :
CANADIAN IMPERIAL BANK OF : Index No.: 601475/09
COMMERCE; CITIBANK, N.A.; HSBC :
BANK USA, N.A.; JPMORGAN CHASE :
BANK, N.A.; KBC INVESTMENTS :
CAYMAN ISLANDS V LTD.; MERRILL :
LYNCH INTERNATIONAL; BANK OF :
AMERICA, N.A.; MORGAN STANLEY :
CAPITAL SERVICES INC.; NATIXIS; :
NATIXIS FINANCIAL PRODUCTS INC.; :
COÖPERATIEVE CENTRALE :
RAIFFEISEN-BOERENLEENBANK B.A., :
NEW YORK BRANCH; ROYAL BANK OF :
CANADA; THE ROYAL BANK OF :
SCOTLAND PLC; SMBC CAPITAL :
MARKETS LIMITED; SOCIÉTÉ :
GÉNÉRALE; UBS AG, LONDON :
BRANCH; and WACHOVIA BANK, N.A., :
:
Plaintiffs, :
:
- against - :
:
MBIA INC., MBIA INSURANCE :
CORPORATION, and MBIA INSURANCE :
CORP. OF ILLINOIS, :
:
Defendants. :
----- X

**PLAINTIFFS' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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July 13, 2009

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Plaintiffs respectfully submit this memorandum of law in opposition to the motion to dismiss the Complaint filed on June 9, 2009 by Defendants MBIA Inc., MBIA Insurance Corporation (“MBIA Insurance”) and MBIA Insurance Corp. of Illinois (“MBIA Illinois”) (collectively, “MBIA” or “Defendants”) (hereinafter “Motion to Dismiss”).

PRELIMINARY STATEMENT

Plaintiffs in this action are aggrieved creditors of MBIA Insurance asserting their rights under the New York Debtor & Creditor Law (“DCL”) and common law to set aside fraudulent conveyances that unlawfully diverted assets from MBIA Insurance in connection with a “restructuring” that Defendants secretly consummated on February 17, 2009 (the “Fraudulent Restructuring”). Plaintiffs’ claims do not arise under the New York Insurance Law. (Compl. ¶¶ 83-136.) Nevertheless, Defendants assert that they are immunized from civil liability for their violations of the DCL and common law unless a court first overturns, in an Article 78 proceeding, approvals privately issued by the New York State Insurance Department (“NYID”) under the Insurance Law in connection with certain transactions underlying the Fraudulent Restructuring. (See Defendants’ Memorandum in Support of the Motion to Dismiss (hereinafter “MBIA Br.”) at 11-15.)¹ In short, Defendants claim that, because MBIA Insurance is a regulated insurer, it is free to violate the DCL and common law, so long as its actions were approved by the NYID under the Insurance Law. That argument is plainly erroneous.

Defendants have not cited a *single* case holding that the Insurance Law—or any approval issued by the NYID thereunder—preempts plenary claims brought under the DCL or common law. Plaintiffs are not aware of any such authority. In fact, it is well settled that when a statute (here, the DCL) expressly provides a remedy, the NYID may *not* take actions inconsistent

¹ The letter issued by the NYID (the “NYID Letter”) is Exhibit (“Ex.”) A to the Affirmation of Marc E. Kasowitz, dated June 9, 2009, and submitted in support of Defendants’ Motion to Dismiss.

with that statute. *See, e.g., McNulty v. N.Y. State Tax Comm'n*, 70 N.Y.2d 788, 791 (1987); *Cady v. Aetna Life & Cas. Co.*, 113 Misc. 2d 1080, 1086 (Sup. Ct. Broome Co. 1982), *aff'd*, 61 N.Y.2d 594 (1984). It is also well settled that the Insurance Law does not repeal common law remedies unless it does so expressly. *See Belco Petroleum Corp. v. AIG Oil Rig, Inc.*, 164 A.D.2d 583, 589 & n.4 (1st Dep't 1991). Here, Defendants do not and cannot claim that any Insurance Law provision expressly immunizes them from liability. Moreover, the Court of Appeals has expressly held that a regulator's approval of a transaction under one statute does *not* immunize a defendant from plenary claims relating to the legality of that transaction under other laws. *See Richards v. Kaskel*, 32 N.Y.2d 524, 535 & n.5 (1973).

Ignoring this well-settled law, Defendants primarily rely on, and mischaracterize, *Fiala v. Metropolitan Life Insurance Co.*, 6 A.D.3d 320 (1st Dep't 2004). Defendants conveniently overlook that the common law claims that were dismissed in that action—*unlike* each of the claims asserted by Plaintiffs here—were based on the theory that the defendants had violated Insurance Law provisions that the Superintendent had *expressly* found were *not* violated. (*See* Section I.C. *infra.*) Plaintiffs' claims here do not rest on whether Defendants violated the Insurance Law. Defendants also ignore that the *Fiala* court specifically found that plaintiffs *could bring* plenary claims that—like Plaintiffs' claims here—had *not* been addressed by the Superintendent. *Fiala*, 6 A.D.3d at 321.

In apparent recognition of the limited applicability of *Fiala*, Defendants resort to grossly overstating the scope of the NYID Letter in their Motion to Dismiss, making the blatantly erroneous claim that the NYID Letter “determined that the [Fraudulent Restructuring] complied in all respects with New York law.” (MBIA Br. at 2.) By its express terms, however, nothing in the NYID Letter made determinations under the DCL or common law, or otherwise purported to immunize Defendants from the claims asserted by Plaintiffs here. Nor could it

properly do so, particularly where, as here, the approvals were issued without any notice or hearing to affected creditors such as Plaintiffs.

Finally, Defendants' perfunctory challenges to the sufficiency of the Complaint's allegations are utterly without merit. Indeed, many of these challenges are based on plainly erroneous statements of the law. The Complaint more than adequately pleads each claim.

STATEMENT OF FACTS

Plaintiffs hold financial guarantee insurance policies issued by MBIA Insurance that cover a variety of "structured-finance" products (such as mortgage-backed securities). (*See* Compl. ¶¶ 6, 15-33.) Under those policies, MBIA Insurance unconditionally and irrevocably promised to make payments if the obligors on the insured products default on their payment obligations. (*See id.* ¶¶ 5, 41.) The current economic crisis has made it increasingly likely that these insured obligations will default, and that MBIA Insurance will be required to pay out billions to policyholders. (*See id.* ¶¶ 46, 51, 69.)

A. Defendants' Fraudulent Restructuring

To avoid MBIA Insurance's payment obligations, MBIA consummated the Fraudulent Restructuring and stripped nearly \$5 billion out of MBIA Insurance, while leaving behind billions in liabilities to its structured-finance policyholders. (*See id.* ¶¶ 1, 8-11, 54.)² The Fraudulent Restructuring involved an integrated series of related-party transfers, including:

- MBIA Insurance's payment of a \$1.147 billion dividend to MBIA Inc. for no consideration whatsoever (the "\$1.147 Billion Dividend") (*id.* ¶¶ 55-56);

² Unbeknownst to Plaintiffs, in December 2008, Defendants privately submitted an application to the NYID in connection with certain transactions underlying the Fraudulent Restructuring. (*See* Compl. ¶ 53.) On February 17, 2009, the NYID issued the NYID Letter "in reliance on the truth of" the information provided by MBIA (*see* NYID Letter at 6-10), without issuing any public notice or offering policyholders any opportunity to be heard; MBIA carried out the Fraudulent Restructuring the same day and back-dated its effectiveness to January 1, 2009. (*See* Compl. ¶¶ 53-54, 60.) The NYID Letter was limited to addressing only the specific requests set forth by MBIA in its application. (*See* NYID Letter at 1-2, 6.)

- MBIA Insurance’s transfer of \$938 million of cash and securities, as well as 100% ownership of MBIA Illinois, to MBIA Inc. for no value (the “Stock Redemption”) (*id.* ¶¶ 55, 57);
- MBIA Inc.’s transfer of the cash and securities received from MBIA Insurance to MBIA Illinois (*id.*);
- MBIA Insurance’s payment of \$2.89 billion and agreement to pay 78% (net) of future municipal-bond premiums to MBIA Illinois for inadequate consideration (the “Reinsurance Agreement”) (*id.* ¶¶ 55, 58); and
- MBIA Insurance’s transfer of all of its future U.S. public bond business to MBIA Illinois for no consideration (*id.* ¶¶ 12, 46-53).

B. The Fraudulent Restructuring Left MBIA Insurance Undercapitalized and Apparently Insolvent.

Upon announcement of the Fraudulent Restructuring, Moody’s immediately downgraded MBIA Insurance’s credit rating to “junk” status, and another commentator noted that Defendants had left MBIA Insurance to “wither and die.” (*See id.* ¶¶ 4, 54, 63-66.) MBIA Inc.’s own public statements support that observation: MBIA Insurance’s loss estimates are continually increasing, it is rapidly depleting its cash and claims-paying resources, and the reported “fair value” of its liabilities (but-for a shocking \$17.1 billion accounting adjustment) is more than double the “fair value” of its assets. (*See id.* ¶¶ 60-69.)

C. Plaintiffs’ Claims under the DCL and Common Law

The Complaint in this action asserts fraudulent conveyance claims under the DCL to set aside Defendants’ unlawful asset transfers on the grounds that the Fraudulent Restructuring (1) left MBIA Insurance insolvent, (2) left MBIA Insurance with unreasonably small capital, and (3) was intended to hinder, delay or defraud creditors. (*See id.* ¶¶ 83-111; DCL §§ 273, 274, 276.) The Complaint also alleges three common law claims: breach of the implied contractual covenant of good faith and fair dealing, abuse of the corporate form, and unjust enrichment. (*See Compl.* ¶¶ 112-36.) Plaintiffs’ claims in this action do not arise under the Insurance Law, and do not depend upon Defendants’ having violated the Insurance Law.

STANDARDS APPLICABLE TO DEFENDANTS' MOTION

On a motion to dismiss under CPLR 3211, “the pleadings are necessarily afforded a liberal construction.” *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). As a result, this Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOT A COLLATERAL ATTACK ON THE NYID LETTER.

A. Plaintiffs' Claims Do Not Challenge Any Legal Findings in the NYID Letter.

Plaintiffs have brought claims under the DCL and the common law to set aside a series of transfers that had the purpose and effect of defrauding Plaintiffs and other creditors in violation of those laws. (*See* Compl. ¶¶ 83-136.) Notwithstanding Defendants' assertion that these claims are somehow “collateral attacks” on findings reached by the NYID in the NYID Letter (MBIA Br. at 11-15), the NYID Letter did not even reference, let alone resolve, any of the legal obligations on which Plaintiffs' claims here are based. (*See generally* NYID Letter.) Rather, pursuant to the express language of the NYID Letter, the NYID's approvals, as Defendants concede, came *only* under “very specific, detailed and interrelated statutory provisions of New York Insurance Law.” (*See* MBIA Br. at 2.)

Accordingly, Defendants' reliance on Insurance Law Section 326—which merely provides that “any order, regulation or decision of the superintendent is declared to be subject to judicial review” in an Article 78 proceeding—is entirely misplaced. (MBIA Br. at 11-12.) Plaintiffs are not seeking any such review in this action. Indeed, Article 78 specifically provides, in relevant part, that the “*only* questions that may be raised in [such] a proceeding” are “whether a *determination* [of an agency] was made in violation of lawful procedure” or was “arbitrary and

capricious or an abuse of discretion.” CPLR § 7803 (emphasis added). Plaintiffs’ claims in this action do not challenge any determination of the Superintendent.³

B. Plaintiffs’ Claims Similarly Do Not Challenge Any Factual Finding in the NYID Letter.

None of Plaintiffs’ individual claims challenges any determinations made by the NYID under the specific criteria set forth under the Insurance Law. As a threshold matter, Plaintiffs here challenge the effects of the Fraudulent Restructuring as a whole. (See Compl. ¶¶ 1, 8.) The NYID Letter did *not* approve the Fraudulent Restructuring as a whole under the Insurance Law (see NYID Letter at 10), despite Defendants’ suggestions to the contrary. (MBIA Br. at 6.) Rather, the NYID Letter only approved certain aspects of the Fraudulent Restructuring under certain specified provisions of the Insurance Law. (See NYID Letter at 6-10.)

1. Plaintiffs’ DCL Claims Do Not Challenge Any Finding in the NYID Letter.

Defendants erroneously assert that the NYID determined that MBIA Insurance would be solvent following the Fraudulent Restructuring, and therefore any fraudulent conveyance claims “necessarily” constitute a “collateral attack” on the NYID Letter. (MBIA Br. at 14-16.) As demonstrated *infra*, the NYID did not make any such finding, but even if it had, two of Plaintiffs’ fraudulent conveyance claims do not even require a showing of “insolvency.”

DCL § 273 (First Cause of Action). Plaintiffs’ DCL Section 273 claim requires Plaintiffs to show that (1) transfers were made by MBIA Insurance, (2) while “insolvent” under DCL Section 271 (*i.e.*, where “the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts when they become

³ On June 15, 2009, Plaintiffs commenced an Article 78 proceeding against the NYID and Defendants. See *ABN AMRO Bank N.V. v. Dinallo*, No. 601846/09 (Verified Petition filed June 15, 2009). Plaintiffs did so in order to preserve their rights under the four-month statute of limitations applicable to

absolute and matured”), and (3) without “fair consideration.” (Compl. ¶¶ 69, 83-90.) Here, there is no dispute that the transfers were made by MBIA Insurance to related parties. Therefore, as a matter of law, the transfers were not made for “fair consideration” under the DCL. (*See* Compl. ¶¶ 55, 57.)⁴ The only remaining element of the claim is MBIA Insurance’s “insolvency” under DCL Section 271, which is the governing standard here.

The NYID Letter did not make any finding that MBIA Insurance would be “solvent” under the DCL following any aspect of the Fraudulent Restructuring. Rather, as Defendants concede, the NYID Letter only found that (1) MBIA Insurance would retain “sufficient surplus to support its obligations and writings,” as required by Insurance Law Section 4105, following the \$1.147 Billion Dividend; (2) the Stock Redemption was “reasonable and equitable” under Insurance Law Section 1411; and (3) the Reinsurance Agreement was “fair and equitable” under Insurance Law Section 1505. (NYID Letter at 6; MBIA Br. at 15 n.8.) Even if any of these discrete statutory findings somehow meant that the NYID found that MBIA Insurance would be “solvent” under Insurance Law Section 1309, any such finding would be irrelevant to Plaintiffs’ DCL Section 273 claim for at least three independent reasons.

First, Insurance Law Section 1309 does not even address conveyances. Rather, it is the threshold for the determination of regulatory insolvency that the Superintendent must make before proceeding against an insurer pursuant to Article 74 of the Insurance Law, which

(Footnote continued)

Article 78 proceedings, because MBIA has erroneously argued that such a proceeding is Plaintiffs’ exclusive remedy.

⁴ *See Klein v. CAVI Acquisition, Inc.*, 57 A.D.3d 376, 378 (1st Dep’t 2008) (grant of security interest to shareholders rather than outside creditors “cannot be found, as a matter of law, to have been made for fair consideration”); *Farm Stores, Inc. v. School Feeding Corp.*, 102 A.D.2d 249, 253-54 (2d Dep’t 1984) (preferential transfers to insiders of insolvent corporations are not made in “good faith,” even if consideration’s amount would be fair), *aff’d*, 64 N.Y.2d 1065 (1985).

addresses rehabilitation, liquidation, conservation, and dissolution of insurance companies. New York Ins. Law § 1309 & Article 74.

Second, a finding of “insolvency” under the DCL is materially different from a finding of insolvency under the Insurance Law. DCL Section 271 defines a debtor to be “insolvent” using a *fair-value* test looking to “the present fair salable value” of assets and “probable liability on his existing debts” as they mature. By contrast, Insurance Law Section 1309(a) defines an “insolvent” insurer as one that is “unable to pay its outstanding lawful obligations as they mature in the regular course of business, as shown by an excess of required reserves and other liabilities over admitted assets.” Defendants cite no authority for the proposition that these two distinct standards, which serve entirely different legal purposes, can be used interchangeably. Indeed, the Superintendent has expressly acknowledged that (1) the *DCL*’s definition of insolvency governs fraudulent conveyance claims seeking to recover transfers made by an insurer; and (2) a finding of solvency under the Insurance Law as of particular date has “no determinative impact” on solvency under the DCL as of that date.⁵

Third, under DCL Section 273, the solvency analysis begins after the challenged transfers were “actually completed.” *In re Granwell*, 20 N.Y.2d 91, 97 (1967); *see also In re Best Prods. Co.*, 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994) (“Under traditional fraudulent conveyance rules, the solvency test is to be conducted at the time of the conveyance”) (applying DCL). The NYID Letter did not make any finding that MBIA Insurance remained

⁵ Pl. Superintendent’s Mem. in Opp. to Defs. Mot. to Dismiss, *Mills v. Everest Reinsurance Co.*, dated Nov. 28, 2005, Dkt No. 20, Slip Op. at 22, No. 05-CV-8928 (S.D.N.Y. filed Dec. 8, 2005) (quoting DCL § 271) (attached as Ex. 1 to the accompanying Affirmation of Michael T. Tomaino, Jr. (“Tomaino Aff.”), dated July 13, 2009), at 22; *id.* at 3 (“The Rehabilitator alleges pursuant to section 273 that Frontier was insolvent or caused to be insolvent by the transfers . . . using the definition of insolvency provided by Debtor and Creditor Law section 271.” (emphasis added).) The Superintendent also expressly recognized that creditors such as Plaintiffs can bring fraudulent conveyance claims against insolvent insurers. *See id.* at 14-15.

solvent following the draining of roughly \$5 billion in assets *as of February 17, 2009*.⁶

Moreover, any analyses conducted by the NYID with respect to any aspect of the Fraudulent Restructuring apparently were based on MBIA's financial condition as of September 30, 2008 or December 31, 2008 at the latest (*see* Compl. ¶ 60)—well before the conveyances and a rapid and substantial deterioration in MBIA's financial condition. (*See id.* ¶¶ 51, 52, 60.)

DCL § 274 (Second Cause of Action). Plaintiffs' DCL Section 274 claim requires Plaintiffs to show that MBIA Insurance made a transfer, without "fair consideration," when the company had "unreasonably small capital." (*See* Compl. ¶¶ 91-98.) Unreasonably small capital is "a financial condition short of equitable insolvency," where "the transferor is technically solvent but doomed to fail." *Manshul Constr. Corp. v. Schulman*, Nos. 97 Civ. 8851 (JGK), 99 Civ. 2825 (JGK), 2000 WL 1228866, at *54 (S.D.N.Y. Aug. 30, 2000) (internal citations omitted). Nothing in the NYID Letter sets forth any findings concerning whether MBIA Insurance had unreasonably small capital after the completion of the Fraudulent Restructuring as a whole. Indeed, the NYID Letter does not discuss a variety of factors courts consider in assessing DCL Section 274 claims, such as debt-to-equity ratio, access to cash and future cash flows, and whether the company's financial projections leave a reasonable margin for error. *See, e.g., id.; Brandt v. Hicks (In re Healthco Int'l, Inc.)*, 208 B.R. 288, 302 (Bankr. D. Mass. 1997); *Best Prods. Co.*, 168 B.R. at 54-55. Moreover, the NYID expressly stated that it relied on information provided by MBIA (*see* NYID Letter at 6-10), whose financial projections

⁶ Plaintiffs' claims challenge the Fraudulent Restructuring as an integrated \$5 billion fraudulent conveyance. (*See* Compl. ¶¶ 1, 8, 55; *Gruenebaum v. Lissauer*, 185 Misc. 718, 728 (Sup. Ct. N.Y. Co. 1945) ("Each transfer does not constitute a separate cause of action . . . ; it is the whole series of transfers which is actionable" under the DCL); *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35-36 (2d Cir. 1993) (series of transfers deemed a "single, integrated transaction" under the DCL).)

consistently have been overly optimistic and whose financial condition continues to worsen. (See Compl. ¶¶ 67-68.)

DCL § 276 (Third Cause of Action). Plaintiffs' DCL Section 276 claim requires Plaintiffs to show that Defendants executed the Fraudulent Restructuring with the "actual intent to hinder, delay or defraud creditors." (Compl. ¶¶ 99-111.) Nothing in the NYID Letter addresses whether the Defendants had any such intent. Defendants suggest that MBIA's mere submission of certain aspects of the Fraudulent Restructuring to the NYID for limited regulatory approvals somehow precludes a finding of an intent to defraud creditors. (MBIA Br. at 18.) There is no basis for any such suggestion. First, the NYID Letter was issued "in reliance on the truth of th[e] representations and submissions" of MBIA. (NYID Letter at 6-10.) Yet MBIA's public disclosures following the Fraudulent Restructuring suggest that MBIA may have provided the NYID with outdated, incomplete and/or inaccurate financial information. (See Compl. ¶ 60.) Second, MBIA's public disclosures make clear that it executed the Fraudulent Restructuring with the specific intent of shielding the \$5 billion in assets from the claims of policyholders such as Plaintiffs (*see id.* ¶ 72)—the very definition of an intent to hinder, delay or defraud creditors.

Moreover, Defendants ignore that they can be liable under DCL Section 276 even if MBIA Insurance was solvent or if they believed that the Fraudulent Restructuring would somehow help to rehabilitate their business. *See, e.g., Pattison v. Pattison*, 301 N.Y. 65, 73-74 (1950) ("A conveyance is fraudulent when the grantor, even though solvent, is motivated by an intent to hinder, delay or defraud his creditors."); *Flushing Sav. Bank v. Parr*, 81 A.D.2d 655, 656 (2d Dep't 1981) (debtors may not seek to "stave off creditors . . . to obtain enough time to restore the debtor's affairs").

2. The NYID Letter Similarly Does Not Address Any of Plaintiffs’ Common Law Claims.

The NYID Letter is similarly silent as to the elements of Plaintiffs’ common law claims for breach of the implied covenant of good faith and fair dealing, veil-piercing, and unjust enrichment. The NYID Letter did not address, for example, whether the Fraudulent Restructuring had frustrated the purposes of Plaintiffs’ insurance policies, whether MBIA Inc. had unduly “dominated” the corporate affairs of MBIA Insurance with respect to the Fraudulent Restructuring, or whether Plaintiffs’ injuries made it inequitable for MBIA Illinois to retain all the transferred assets. (See Sections III.D, E & F, *infra*.)

C. The Authority Cited by Defendants Confirms That Plaintiffs’ Claims Here May Proceed in a Plenary Action.

In *Fiala v. Metropolitan Life Insurance Co.*—the primary case relied on by Defendants—the First Department *reversed* the trial court’s dismissal of certain plenary claims brought by policyholders against an insurer in connection with a transaction approved by the Superintendent. 6 A.D.3d at 321. The First Department did so even though (unlike here) the transaction at issue was specifically approved *in its entirety* by the Superintendent after a *public hearing* on the grounds that it was (in the trial court’s words) “in the best interests of [the insurer] and its policyholders,” “did not violate applicable law,” and “was fair and equitable from a financial point of view” to policyholders. *Shah v. Metro. Life Ins. Co.*, Nos. 108887/00, 601181/00, 2003 WL 728869, at *5 (Sup. Ct. N.Y. Co. Feb. 21, 2003). In fact, the *Fiala* plenary action is still pending.

The *Fiala* court specifically found that, even where the Superintendent approves a transaction as complying with a specific provision of the Insurance Law, a policyholder may still proceed with a plenary claim against the insurer based on an alleged violation of that *same Insurance Law statute* if “there was no indication that the Superintendent was aware of the

[theory underlying that alleged violation] at the time he passed upon [the transaction].” *Fiala*, 6 A.D.3d at 321.⁷ Here, Plaintiffs’ plenary claims do not even allege any violations of the Insurance Law, let alone ones that were expressly addressed in the NYID Letter.

Moreover, although overlooked by Defendants here, the claims that were dismissed in *Fiala* were based on legal theories that directly contradicted *express* findings of the Superintendent that were issued pursuant to his specific statutory authority. *Id.* at 322. Specifically, the *Fiala* plaintiffs claimed that defendants violated the Insurance Law demutualization statute (and thereby breached their insurance policies)—even though the Superintendent had expressly found that defendants had complied with that statute. *See Shah*, 2003 WL 728869, at *10. Likewise, the “primary allegations underlying the breach of fiduciary duty and fraud claims are that the *consideration* provided to policyholders, as reflected by the IPO price, was *unfair and inequitable*,” even though the “issue of whether the *consideration* paid to policyholders was *fair and equitable* was *expressly* determined by the Superintendent in his decision.” *Id.* at *13-14 (emphasis added). Plaintiffs’ claims here, by contrast, do not contradict any express findings of the NYID Letter.⁸

⁷ The First Department also allowed plaintiffs to re-plead their common law fraud claim to the extent it was premised on that same theory. *Fiala*, 6 A.D.3d at 321.

⁸ The other authorities relied on by Defendants are similarly distinguishable and otherwise unavailing. (*See* MBIA Br. at 12-13.) For example, in *State v. Kahn*, the court only found that a single affirmative defense against a *state agency* in a plenary action should have been brought in an Article 78 proceeding, because that defense challenged the “particular calculations or formulae employed by” that agency. 206 A.D.2d 732, 734 (3d Dep’t 1994). Similarly, in *In re Empire Blue Cross and Blue Shield Customer Litigation*, the court found that plaintiffs’ claims “essentially challeng[ed] . . . as excessive” rates set by the Superintendent pursuant to his statutory authority. 164 Misc. 2d 350, 355 (Sup. Ct. N.Y. Co. 1994). Likewise, in *Academic Health Professionals Insurance Assoc. v. MQ of New York, Inc.*, No. 605452/01, 2003 WL 25668211 (Sup. Ct. N.Y. Co. Apr. 14, 2003), plaintiff challenged a subscriber-policyholder vote procedure specifically authorized by the Insurance Law, *after* he had previously brought an unsuccessful Article 78 proceeding challenging that same procedure. *See also Steen v. Quaker State Corp.*, 12 A.D.3d 989, 989 (3d Dep’t 2004) (plaintiffs challenged a state agency’s order as not accurately reflecting certain boundaries, after failing to seek a modification of that order as permitted by its express terms); *Brawer v. Johnson*, 231 A.D.2d 664, 664 (2d Dep’t 1996) (shareholders challenged

II. AS A MATTER OF SETTLED LAW, THE NYID CANNOT EXTINGUISH PLAINTIFFS' CLAIMS.

A. NYID Does Not Have Any Preemption Authority.

Defendants do not and cannot cite any statute or case to support their theory that the Insurance Law preempts Plaintiffs from seeking to set aside unlawful asset transfers. To the contrary, Insurance Law Section 7425(c) acknowledges the existence of such claims by empowering the Superintendent (when acting as “liquidator, rehabilitator or conservator”) to “avoid any transfer of, or lien upon, the property of an insurer *which any creditor . . . of such insurer* might have avoided” (emphasis added). As a matter of settled law, the Insurance Law and the NYID Letter thereunder do not extinguish Plaintiffs’ claims.

In *Richards*, the Court of Appeals expressly found that regulatory approval of a transaction under one statute did not immunize a defendant from plenary claims challenging the legality of that transaction under other laws. 32 N.Y.2d at 535 & n.5. Specifically, the Court of Appeals found that plaintiffs’ plenary claims relating to a cooperative plan that had been approved by the Attorney General under the General Business Law could proceed, even though the Attorney General had “exclusive primary jurisdiction” to review the plan under the General Business Law, because that statute did not deprive the court of its “traditional equitable jurisdiction to consider claims of illegality . . . apart from noncompliance with that provision.”

*Id.*⁹

(Footnote continued)

a bank conversion approved by shareholders and Banking Superintendent in its entirety following a public hearing); *ACORN v. Bloomberg*, No. 114729/05, 2006 WL 2686520, at *18 (Sup. Ct. N.Y. Co. Sept. 19, 2006) (claims against *government agencies* challenged the same express findings that Court had already found to be rational in an Article 78 proceeding); *In re E. N.Y. Sav. Bank Depositors Litig.*, 145 Misc. 2d 620, 622-24 (Sup. Ct. N.Y. Co. 1989) (same).

⁹ Courts of other states have reached the same conclusion. *See, e.g., Drain v. Covenant Life Ins. Co.*, 712 A.2d 273, 277-78 (Pa. 1998) (plaintiffs’ tort claims were not a collateral attack on “the Insurance Commissioner’s approval of the merger based upon insurance laws”); *Doyle v. Union Ins. Co.*, 277

Here, by its express terms, the NYID Letter did not purport to immunize Defendants from any liability under the DCL or common law. And, despite the fact that there are now at least three pending litigations against MBIA in which MBIA is claiming that plaintiffs' claims are preempted by the NYID Letter, the NYID has not sought to intervene or otherwise advise *any* of those three courts that it agrees with Defendants' position that the NYID Letter provides such immunity to MBIA. The NYID's silence speaks volumes.

In any event, even if the NYID had purported to extinguish Plaintiffs' DCL claims, it could not properly do so. Administrative agencies such as the NYID lack the power to "vary or amend statutory provisions" unless "explicitly conferred by the Legislature." *Durant v. Motor Vehicle Accident Indem. Corp.*, 20 A.D.2d 242, 247 (2d Dep't 1964) (internal citations omitted), *modified on other grounds*, 15 N.Y.2d 408 (1965); *see also Nw. Nat'l Ins. Co. v. Pink*, 288 N.Y. 359, 362 (1942). The legislature knows how to exempt insurance-related transfers from the DCL: Insurance Law Section 3212(e) provides that changes in a beneficiary can only be challenged as "actual" fraudulent conveyances under DCL Section 276. *See Hubbard v. Millard*, 156 A.D.2d 233, 235 (1st Dep't 1989) (Insurance Law Section 3212(e) exempts changes in a beneficiary from "constructive" fraudulent conveyance claims under DCL). Here, no provision of the Insurance Law precludes policyholders from suing insurers under the DCL, whose terms expressly apply to "[e]very conveyance." DCL §§ 273, 274, 276 (emphasis added).

The NYID also does not have the statutory authority to extinguish common law claims. "[I]t is a general rule of statutory construction that a clear and specific legislative intent

(Footnote continued)

N.W.2d 36, 39-41 (Neb. 1979) (insurance regulator's review of transaction did not "abridge or limit the common law rights of policyholders"); *Rowen v. LeMars Mut. Ins. Co.*, 230 N.W.2d 905, 911-12 (Iowa 1975) (insurance regulator's power to disapprove transactions did not deny "aggrieved persons their common-law and other statutory remedies," and plaintiffs need not exhaust administrative remedies before "invok[ing] judicial machinery to seek a judicial remedy").

is required to override the common law.” *Hechter v. N.Y. Life Ins. Co.*, 46 N.Y.2d 34, 39 (1978). Thus, “when the common law gives a remedy, and another remedy is given by statute, the latter is cumulative, unless made exclusive by the statute.” *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 324 (1983) (internal citation omitted). Here, Defendants do not and cannot cite any Insurance Law provision that expressly overrides the common law.

Indeed, in the context of contract law, courts have specifically held that approvals by the Superintendent do not render contracts “invulnerable” from challenge on the grounds that they “violate[] existing law.” *Durant*, 20 A.D.2d at 248 (NYID approval did not defeat policyholder’s claim that insurance policy endorsement was unenforceable); *see also Kocak v. Metro. Life Ins. Co.*, 237 A.D. 780, 782 (3d Dep’t 1933) (“The fact that the Superintendent of Insurance . . . approved the form of the policy in question . . . cannot be regarded as affecting the contractual rights of the insured.”).

Finally, Insurance Law Section 109(b) *expressly* provides that “[e]very penalty imposed by this section shall be in addition to any penalty or forfeiture otherwise imposed by law,” which has been read broadly to cover “every violation of any provision of the Insurance Law.” *Belco Petroleum*, 164 A.D.2d at 589. As a result, the Insurance Law has been found not to preempt policyholders’ “common-law right to sue an insurer for punitive damages.” *Rocanova v. Equitable Life Assur. Soc’y of U.S.*, 83 N.Y.2d 603, 615 (1994) (citing *Belco Petroleum*).

B. Construing the NYID Letter as Barring Plaintiffs’ Claims Would Be Unconstitutional.

Accepting Defendants’ argument that Plaintiffs’ claims are somehow barred by the NYID Letter would result in multiple constitutional violations. The NYID Letter was issued

without any public hearing, notice, or opportunity to be heard.¹⁰ Under Article I, Section 6 of the New York Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution, the State of New York may not deprive a person of “property” without “due process of law.” Insurance policies constitute “property,” and an interference with an essential attribute of a contract constitutes a deprivation of property.¹¹ Here, Plaintiffs would be deprived of “property” to the extent that the NYID Letter is determined to have extinguished Plaintiffs’ claims, which arise from contracts with MBIA Insurance.

“The bedrock of due process is notice and opportunity to be heard.” *People v. David W.*, 95 N.Y.2d 130, 138 (2000). Article 78 review of an administrative decision is not adequate to remedy a due process violation unless the prior decision was made pursuant to “administrative procedures that conform with due process requirements.” *Id.* at 139-40 (“unilateral” agency action taken without “a hearing or [providing] any opportunity to present evidence” violated due process).¹²

Here, Plaintiffs had no notice or opportunity to address MBIA’s secret application, the accuracy of which was relied on by the NYID. (*See* NYID Letter at 6-10.) Defendants have failed to cite a *single* case in which plenary claims against a private litigant were dismissed based on regulatory approval that was issued without any notice or opportunity to be heard. For

¹⁰ Notably, just last year, the NYID published a public notice with respect to a proposed MBIA reinsurance transaction. (*See* Press Release, N.Y. State Ins. Dep’t, MBIA-FGIC Deal Resulted from Auction Process Directed by N.Y. Insurance Dep’t, dated Aug. 27, 2008 (attached as Ex. 2 to Tomaino Aff.) (announcing a 10 business day public comment period following the companies’ submission of an application).

¹¹ *See, e.g., Lynch v. United States*, 292 U.S. 571, 577-80 (1934) (insurance policies, “being contracts, are property and create vested rights”); *Patterson v. Carey*, 41 N.Y.2d 714, 720 (1977) (“[T]he State may not deprive a party to a contract of an essential contractual attribute without due process”).

¹² *See also Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Serv.*, 77 N.Y.2d 753, 757-58 (1991) (construing CPLR Section 7803(3)’s deferential standard of review to presuppose that the petitioner had *some* opportunity to be heard).

example, in *Shah*, 93% of the policyholders voted in favor of the transaction at issue following a public hearing. 2003 WL 728869, at *2, *4-*5.¹³ Similarly, in other cases relied on by Defendants (MBIA Br. at 12-13), such as *Brawer v. Johnson*, 231 A.D.2d at 664, 667, and *E. N.Y. Savings Bank Depositors Litigation*, 145 Misc. 2d at 622-23, plaintiffs were provided with public notice, a public hearing, and a vote.

In *Marine Midland Bank v. Home Insurance Co.*, the First Department specifically found that an order of the New Hampshire Insurance Department (“NHID”) was not binding on bondholder plaintiffs in their fraudulent conveyance action against an insurer because, among other reasons, the NHID did not provide adequate notice to plaintiffs of the public hearing that had addressed the transaction at issue. 263 A.D.2d 374, 374 (1st Dep’t 1999).¹⁴ Given that the NYID provided *no* notice here, the NYID Letter similarly cannot bind Plaintiffs.

Because “[c]ontracts between . . . corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened,” *Lynch*, 292 U.S. at 580, a state action that prevented Plaintiffs from asserting claims for breach of contract or from asserting their rights as contract creditors under the DCL would also violate the Contracts Clause of the U.S. Constitution, Art. I, Section 10. *See, e.g., U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977); *Sliosberg v. N.Y. Life Ins. Co.*, 244 N.Y. 482, 495

¹³ Although the *Shah* plaintiffs also brought a claim relating to the Superintendent’s amendment to the demutualization plan following the public hearing, that claim alleged that the Superintendent *violated the Insurance Law* by failing to approve the amendment without a new hearing and vote in accordance with the demutualization statute—precisely the type of claim that should be raised in an Article 78 proceeding. *Shah*, 2003 WL 728869, at *6.

¹⁴ Notably, the First Department also found that “the issues in the [fraudulent conveyance] action” were not “the same as those that were before the [NHID]”—even though creditors had made a submission that specifically argued that the transaction “may ultimately fail as a fraudulent conveyance.” *Marine Midland*, 263 A.D.2d at 274-75.

(1927). Moreover, construing the NYID Letter to extinguish Plaintiffs' rights would be an unconstitutional "taking." U.S. Const. Am. V; N.Y. Const. Art. I, §7(a).¹⁵

III. THE COMPLAINT MORE THAN ADEQUATELY PLEADS EACH OF PLAINTIFFS' WELL-RECOGNIZED CLAIMS.

A. Plaintiffs Have Standing to Assert Each Claim.

As an initial matter, Defendants' perfunctory argument that the Complaint fails to state any claim because MBIA Insurance has not yet "defaulted on any of its payment obligations" (MBIA Br. at 17, 20) is wrong as a matter of law. Presumably, that is why Defendants have not argued in their Motion to Dismiss that Plaintiffs lack standing. DCL Sections 273, 274 and 276 each expressly permits a "creditor" to bring a claim thereunder, and DCL Section 270 defines a "creditor" to include any person with "matured *or unmatured*, liquidated *or unliquidated*, absolute, fixed *or contingent*" claims. DCL § 270 (emphasis added). Moreover, Plaintiffs do not assert that MBIA Insurance has breached its *express* covenant to pay claims, but rather that the Fraudulent Restructuring already breached the implied covenant of good faith and fair dealing by frustrating the purpose of Plaintiffs' insurance policies. Further, Plaintiffs' equitable claims of veil-piercing and unjust enrichment are based on transactions that have occurred and harmed Plaintiffs.

B. The Complaint Properly Alleges Constructive Fraudulent Conveyance Claims.

Defendants' contention that Plaintiffs must plead claims arising under DCL Sections 273 and 274 with particularity is incorrect as a matter of law. (*See* MBIA Br. at 16-

¹⁵ *See, e.g., E. Enters. v. Apfel*, 524 U.S. 498, 522-37 (1998) (statute was unlawful taking due to its economic impact, interference with investment-backed expectations, and nature); *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (court's decision to alter property law constituted a taking) (Stewart, J., concurring).

17.)¹⁶ It is well settled that CPLR Rule 3016(b)'s heightened pleading standard does *not* apply to such claims. *Menaker v. Alstaedter*, 134 A.D.2d 412, 413 (2d Dep't 1987) (“[V]iolations of [DCL] §§ 273, . . . 274 . . . do not require proof of an actual intent to defraud. Therefore, it is unnecessary to plead such paragraphs with the particularity required by CPLR 3016(b).”). Rather, Plaintiffs need only provide Defendants with “notice of the event out of which the grievance arises.” *Holme v. Global Minerals and Metals Corp.*, No. 600232/08, 2009 WL 387034, at *3 (Sup. Ct. N.Y. Co. Jan. 12, 2009) (internal citations omitted). Plaintiffs have more than adequately done so here.

Claims under DCL Sections 273 and 274 require that the transferor not receive “fair consideration” for the challenged transfers. As discussed in Section I.B.1 & n.4 *supra*, MBIA Insurance could not have received “fair consideration” for the conveyances *as a matter of law*, because the assets were transferred to related parties. In any event, the Complaint specifically alleges that MBIA Insurance transferred \$5 billion for essentially no consideration whatsoever. (*See* Compl. ¶¶ 55-59.)

Claims under DCL Sections 273 and 274 also require allegations that the transferor was “insolvent” (as defined by the DCL) or left with “unreasonably small capital.” The Complaint far surpasses the requirements of notice pleading by setting forth each of these allegations in great detail, citing *inter alia* commentary from market commentators, the reactions of market prices to the Fraudulent Restructuring, and Defendants’ own financial statements and public comments. (*See* Compl. ¶¶ 1, 3-4, 8-10, 12, 50-54, 61, 63-70, 83-111.)

¹⁶ None of the cases cited by Defendants even addresses whether claims under DCL Sections 273 and 274 should be pled with particularity under CPLR Rule 3016(b).

C. The Complaint Alleges An Actual Fraudulent Conveyance Claim with Sufficient Particularity.

The Complaint alleges in great detail that Defendants engaged in the Fraudulent Restructuring with actual intent to hinder, delay or defraud creditors, as required by DCL Section 276. Because such intent is rarely susceptible to direct proof, courts often rely on so-called “badges of fraud” to infer such intent. *Dempster v. Overview Equities, Inc.*, 4 A.D.3d 495, 498 (2d Dep’t 2004). Each of these badges is specifically alleged in the Complaint:

- A close relationship between the parties to the challenged transaction (*see* Compl. ¶¶ 1, 34-6, 81 (Defendants are a corporation and two of its wholly owned subsidiaries));
- A questionable transfer not in the usual course of business (*see, e.g., id.* ¶ 57 (MBIA’s admission that the Fraudulent Restructuring’s dividend was “extraordinary”));
- The transferor’s knowledge of creditors’ claims and the inability to pay such claims (*see, e.g., id.* ¶¶ 1, 4, 9-10, 53, 72, 74-75 (MBIA’s awareness of policyholders’ potential claims and the restructuring’s effect on those claims));
- Inadequacy of the consideration (*see, e.g., id.* ¶¶ 55-59 (MBIA Insurance transferred away \$5 billion for almost no consideration)); and
- Retention of control of the property by the transferor after the conveyance (*see, e.g., id.* ¶¶ 1, 8, 11, 34-36, 50, 54-55, 57-59, 62, 76-82 (MBIA Inc.’s retention of control of assets transferred to MBIA Illinois, its wholly owned subsidiary)).

See Dempster, 4 A.D.3d at 498; *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dep’t 1999).

Here, Plaintiffs have also alleged direct evidence of Defendants’ intent to hinder, delay or defraud creditors:

- MBIA’s admission that the Fraudulent Restructuring would weaken MBIA Insurance so much that policyholders would be pressured to “cut a settlement today” and surrender their policies at a steep discount (*see* Compl. ¶ 3, 74);
- MBIA’s admission that a restructuring would “not [be] good” for policyholders like Plaintiffs (*see id.* ¶ 75); and

- MBIA’s admissions that the Fraudulent Restructuring was designed to shield assets from structured-finance policyholders by leaving those assets “totally isolated, separate, [and] . . . not going to pay structured claims” (*see id.* ¶¶ 72-73).

Plaintiffs plainly have sufficiently alleged the requisite intent. *See, e.g., Chandre Corp. v. Indotronix Int’l Corp. (In re Chandre Corp.)*, Adv. No. 05-9009, 2005 WL 3789129, at *9 (Bankr. S.D.N.Y. Oct. 28, 2005) (complaint alleging three of five so-called “badges of fraud” adequately alleged intent under DCL Section 276).

D. The Complaint States a Valid Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.

“Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance,” which “embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (internal citations omitted). As detailed in the Complaint, MBIA Insurance violated this covenant by (1) substantially reducing the likelihood that MBIA Insurance will be able to pay policyholders’ claims; and (2) eliminating the policies’ ability to “enhance” the credit rating of the underlying securities. (*See Compl.* ¶¶ 6, 13, 44-45, 62, 115-16, 118-20.) As Justice Bransten recognized just last week in a case brought by MBIA, allegations that a contracting party “unfairly shifted the risks of default and delinquencies” to its counterparty adequately state this claim.¹⁷

Nevertheless, MBIA Insurance argues that this claim should be dismissed because (1) it has not yet breached its express obligations to honor its payment guarantees to Plaintiffs;

¹⁷ *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/08, slip op. at 18 (Sup. Ct. N.Y. Co. filed July 8, 2009) (attached as Ex. 3 to Tomaino Aff.) (quoting MBIA’s opposition to defendants’ motion to dismiss). Plainly, Plaintiffs—who bought insurance from MBIA to *reduce* their own risk exposure—had a reasonable expectation that MBIA would not impair its own ability to pay claims. *See Dalton*, 87 N.Y.2d at 389 (implied covenant embraces “any promises which a reasonable person in the position of the promisee would be justified in understanding were included” (internal citations omitted));

and (2) the policies at issue do not expressly guarantee an enhancement of the value and credit rating of the securities held by Plaintiffs. (*See* MBIA Br. at 18-19.) But the “New York courts have repeatedly affirmed that a party may be in breach of an implied duty of good faith and fair dealing, even if it is not in breach of its express contractual obligations.” *Gross v. Empire Healthchoice Assurance, Inc.*, No. 602848-2005, 2007 WL 2066390, at *4 (Sup. Ct. N.Y. Co. July 18, 2007).¹⁸

E. The Complaint Adequately States a Claim for Abuse of Corporate Form.

As the sole stockholder of MBIA Insurance, MBIA Inc. cannot “legally have caused its property to be transferred . . . in derogation of the rights of creditors” while “utiliz[ing] the corporate entity to prevent payment of [a creditor’s] claim.” *Grad v. Roberts*, 14 N.Y.2d 70, 76 (1964). A claim to pierce the corporate veil is established where, as here: “(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) . . . such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.” *Morris v. State Dep’t of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). Because “piercing the corporate veil involves a fact laden inquiry,” it is generally “unsuited for resolution on a pre-answer, pre-discovery motion to dismiss.” *Holme*, 2009 WL 387034, at *7.

Here, MBIA Inc. caused MBIA Insurance to engage in the Fraudulent Restructuring for the admitted purpose of shielding assets from the claims of policyholders like Plaintiffs. (*See* Compl. ¶¶ 1, 3, 8, 73-82, 118, 128.) Moreover, there can be no dispute that

(Footnote continued)

N.Y. Univ. v. Cont’l Ins. Co., 87 N.Y.2d 308, 318 (1995) (“Certainly, a reasonable insured would understand that the insurer promises . . . to pay covered claims.”).

¹⁸ Unlike each of the cases cited by MBIA (MBIA Br. at 19-20 & n.11), such as *Triton Partners LLC v. Prudential Securities Inc.*, 301 A.D.2d 411, 411 (1st Dep’t 2003) and *D&L Holdings, LLC v. RCG Goldman Co.*, 287 A.D.2d 65, 73 (1st Dep’t 2001), Plaintiffs here do not seek to rewrite the express terms of their contracts.

MBIA Inc. dominated MBIA Insurance. MBIA Inc. was the sole owner of MBIA Insurance, and its senior management constituted a majority of MBIA Insurance's Board and its entire senior management (including but not limited to its CEO, CFO, Chairman, and General Counsel). (*See* Compl. ¶¶ 1, 3, 8, 74-82, 118, 124-26.) Such allegations plainly state a veil-piercing claim.¹⁹

Defendants erroneously claim that Plaintiffs may not seek declaratory relief until MBIA Insurance has failed to make payments to Plaintiffs. In all of the cases cited by Defendants, however, the events giving rise to the cause of action (unlike here) had not yet occurred. (MBIA Br. at 20-21.) *See Am. Ins. Ass'n v. Chu*, 64 N.Y.2d 379, 386 (1985) (plaintiffs' alleged injury was dependent upon the "possibility" that the Legislature in the future could take certain actions).²⁰ As stated by the *American Insurance Association* Court, a plaintiff

¹⁹ *See Serio v. Ardra Ins. Co.*, 304 A.D.2d 362, 362-63 (1st Dep't 2003) (corporate veil of reinsurer pierced after its shareholder diverted assets to another entity owned by shareholder, thus "depriv[ing the reinsurer] of the funds needed to meet its reinsurance obligations"); *Rehb v. Rotterdam Ventures, Inc.*, 252 A.D.2d 609, 610-11 (3d Dep't 1998) (denying defendant's motion for summary judgment as to fraudulent conveyance and abuse of corporate form claims where parent and subsidiary shared common officers, directors, names and office space, extended intracompany loans and parent moved assets out of undercapitalized subsidiary into "another wholly owned subsidiary"); *9 E. 38th Street Assocs. v. George Feher Assocs.*, 226 A.D.2d 167, 168 (1st Dep't 1996) (reinstating veil-piercing claim where "[d]efendant, as sole shareholder, is alleged to have exercised complete dominion and control over the corporation and to have fraudulently conveyed corporate assets to avoid the corporation's obligations").

Defendants erroneously rely on *Sheridan Broadcasting Corp. v. Small*, 19 A.D.3d 331, 332 (1st Dep't 2005) (quoting *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998)), for the assertion that Plaintiffs "bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." (MBIA Br. at 21.) *TNS Holdings* requires no such rigid pleading requirement. Rather, *TNS Holdings*' "two-prong test" is "an aid rather than [a] requirement[]" for alleging a corporate veil claim, and such a claim is sufficiently alleged "[e]ven if the complaint d[oes] not contain allegations sufficient to satisfy both prongs of the test." *AY Bank Ltd. v. JPMorgan Chase & Co.*, No. 604190/04, 2006 N.Y. Misc. LEXIS 3785, at *10 (Sup. Ct. N.Y. Co. Nov. 29, 2006). In any event, the Complaint here more than adequately alleges both prongs of this test.

²⁰ *See also Cuomo v. Long Island Lighting Co.*, 71 N.Y.2d 349, 354-55 (1988) (seeking advisory opinion on legality of plan that had not yet been finalized or approved by administrative agency); *Lewis v. City of Gloversville*, 246 A.D.2d 804, 804 (3d Dep't 1998) (firefighter sought declaratory judgment that he was entitled to disability benefits when he was not presently disabled); *Employers' Fire Ins. Co. v. Klemmons*, 229 A.D.2d 513, 513 (2d Dep't 1996) (property insurer sought declaratory judgment that insured's claim was time-barred prior to the insured filing suit).

may maintain a declaratory judgment action where, as here, the “controversy involve[s] a present . . . prejudice to plaintiffs.” *Id.* at 386.

F. The Complaint States a Valid Claim for Unjust Enrichment.

“The essential inquiry in any action for unjust enrichment . . . is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *Paramount Film Distrib. Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). As detailed in the Complaint, Plaintiffs paid premiums to MBIA Insurance in exchange for contractual payment guarantees. (*See* Compl. ¶¶ 5-6, 44, 55, 113-16.) In the Fraudulent Restructuring, MBIA Inc. and MBIA Illinois reaped the benefits of those payments by draining \$5 billion from MBIA Insurance—leaving MBIA Insurance with a “junk” credit rating and unable to honor forthcoming claims from policyholders. (*See id.* ¶¶ 4, 8, 10, 54-59, 76-82, 118.)

Defendants nonetheless claim that Plaintiffs’ unjust enrichment claim is invalid on the technical ground that Plaintiffs seek the return of the wrongfully transferred assets to MBIA Insurance (rather than directly to Plaintiffs). (*See* MBIA Br. at 22.) The cases cited by Defendants, however, do not in any way support that argument. *See Panish v. Rudolph*, 282 A.D.2d 233, 233 (1st Dep’t 2001) (plaintiff suffered no injury because “she paid nothing” with respect to the debt at issue and had not been assigned contribution rights by party that had fully paid that debt); *Aymes v. Gateway Demolition, Inc.*, No. 603730-04, 2005 WL 5749432 (Sup. Ct. N.Y. Co. May 2, 2005) (plaintiff suffered no injury because the alleged damages were

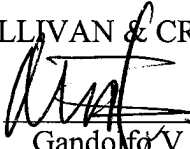
incurred by a local government). Nor are Plaintiffs aware of any authority supporting Defendants' position.²¹

Defendants MBIA Inc. and MBIA Illinois also argue that the unjust enrichment claim should be dismissed because Plaintiffs had contracts with MBIA Insurance. (MBIA Br. at 23.) However, the rule invoked by Defendants applies only where an express contractual provision addresses the "events arising out of the" "particular subject matter" of the unjust enrichment claim. *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987).²² Here, the contracts in question do not expressly address the fraudulent transfer of assets.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

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²¹ Notably, the First Department has expressly determined that it is irrelevant whether the benefit conferred by plaintiffs to defendants is directly or indirectly conveyed. *Cox v. Microsoft Corp.*, 8 A.D.3d 39, 41 (1st Dep't 2004).

²² The cases cited by Defendants confirm the limited applicability of this rule. *See Conklin v. City of Saratoga Springs*, 267 A.D.2d 841, 842 (3d Dep't 1999) (dismissing unjust enrichment claim because it was "based upon events arising out of the same subject matter encompassed by plaintiff's contract."); *Salomon v. Hampton Athletic Club, Inc.*, 245 A.D. 2d 282, 282 (2d Dep't 1997) (dismissing unjust enrichment claim because it "arises out of the same subject matter governed by the written contract"); *Mariacher Contracting Co., Inc. v. Kirst Constr., Inc.*, 187 A.D.2d 986, 987 (4th Dep't 1992) ("[C]ontract exist[ed] governing [the] particular subject matter" of dismissed unjust enrichment claim).

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