

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 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.; COÖPERATIVE 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, :
v. :
:
MBIA INC., MBIA INSURANCE CORPORATION, :
and MBIA INSURANCE CORP. OF ILLINOIS, :
:
Defendants. :
-----X

Index No. 601475/09

**DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS**

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP
Marc E. Kasowitz
Daniel R. Benson
Aaron H. Marks
Albert S. Mishaan
1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Defendants

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Preliminary Statement.....	1
FACTS	4
A. The Parties	4
B. The Transformation	4
C. The Department of Insurance Approved the Transformation.....	6
1. The Superintendent and Department thoroughly investigated the Transformation before approving it.	6
2. The Superintendent’s approval of the Transactions comprising the Transformation.....	7
(a) The MBIA Insurance Dividend	7
(b) The MBIA Insurance Stock Redemption.....	8
(c) The Reinsurance Agreement.....	8
D. Plaintiffs’ Claims	9
E. Plaintiffs’ Document Request.....	10
ARGUMENT.....	11
I. THE COMPLAINT IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE DECISION OF THE SUPERINTENDENT OF INSURANCE	11
II. PLAINTIFFS’ CLAIMS OTHERWISE FAIL TO STATE A CAUSE OF ACTION	16
A. Plaintiffs Fail to State a Cause of Action for Fraudulent Conveyance.....	16
B. Plaintiffs Fail to State a Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing	18
C. Plaintiffs Fail to State a Cause of Action for a Declaratory Judgment of Joint and Several Liability	20
D. Plaintiffs Fail to State a Cause of Action for Unjust Enrichment.....	22
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Academic Health Prof'ls Ins. Ass'n. v. MQ of New York, Inc.</i> , No. 01 Civ. 605452, 2003 WL 25668211 (Sup. Ct., N.Y. County Apr. 14, 2003).....	12
<i>American Ins. Assoc. v. Chu</i> , 64 N.Y.2d 379, 476 N.Y.S.2d 311 (1985).....	20
<i>Ass'n for Cmty. Reform Now v. Bloomberg</i> , 13 Misc. 3d 1209A, 824 N.Y.S.2d 752, 2006 WL 2686520 (Sup. Ct., N.Y. County Sept. 19, 2006).....	13
<i>Aymes v. Gateway Demolition Inc.</i> , 30 A.D.3d 196, 817 N.Y.S.2d 233 (1st Dep't 2006).....	22
<i>Balestra 1882, S.p.A. v. Designs by Glory, Ltd.</i> , No. 06 Civ. 0603806, 2007 WL 4741116 (Sup. Ct., N.Y. County Dec. 21, 2007).....	16
<i>Brawer v. Johnson</i> , 231 A.D.2d 664, 647 N.Y.S.2d 553 (2d Dep't 1996).....	13
<i>Century-Maxim Constr. Corp. v. One Bryant Park, LLC</i> , No. 24683/08, 2009 WL 1218895 (Sup. Ct., Westchester County Apr. 7, 2009)	19
<i>Conklin v. Saratoga Springs</i> , 267 A.D.2d 841, 699 N.Y.S.2d 820 (3d Dep't 1999).....	23
<i>Consumers Union of U.S., Inc. v. New York</i> , 5 N.Y.3d 327, 806 N.Y.S.2d 99 (2005).....	16
<i>Cuomo v. Long Island Lighting Co.</i> , 71 N.Y.2d 349, 525 N.Y.S.2d 828 (1988)	20
<i>D & L Holdings, LLC v. RCG Goldman Co., LLC</i> , 287 A.D.2d 65, 734 N.Y.S.2d 25 (1st Dep't 2001)	19
<i>Employers' Fire Ins. Co. v. Klemons</i> , 229 A.D.2d 513, 645 N.Y.S.2d 849 (2d Dep't 1996).....	21
<i>Fiala v. Metro. Life Ins. Co.</i> , 6 A.D.3d 320, 776 N.Y.S.2d 29 (1st Dep't 2004)	3, 12
<i>Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v. Holiday Org., Inc.</i> , 12 Misc. 3d 1182A, 824 N.Y.S.2d 763, 2006 WL 1982603 (Sup. Ct., Nassau County July 7, 2006).....	22
<i>IDC (Queens) Corp. v. Illuminating Experiences</i> , 220 A.D.2d 337, 633 N.Y.S.2d 18 (1st Dep't 1995).....	16
<i>In re East New York Sav. Bank Depositors Litig.</i> , 145 Misc. 2d 620, 547 N.Y.S.2d 497 (Sup. Ct., N.Y. County 1989)	13
<i>In re Empire Blue Cross & Blue Shield Customer Litig.</i> , 164 Misc. 2d 350, 622 N.Y.S.2d 843 (Sup. Ct., N.Y. County 1994)	12

<i>In the Matter of City of New York [Third Water Tunnel Shaft 30B]</i> , 6 N.Y.3d 540, 814 N.Y.S.2d 592 (2006).....	12
<i>Lewis v. City of Gloversville</i> , 246 A.D.2d 804, 667 N.Y.S.2d 796 (3d Dep't 1998).....	21
<i>Mariacher Contracting Co. v. Kirst Constr., Inc.</i> , 187 A.D.2d 986, 590 N.Y.S.2d 613 (4th Dep't 1992).....	23
<i>Nat'l Union Fire Ins. Co. v. Xerox Corp.</i> , 6 Misc. 3d 763, 792 N.Y.S.2d 772 (Sup. Ct., N.Y. County 2004)	19
<i>Panish v. Rudolph</i> , 282 A.D.2d 233, 723 N.Y.S.2d 442 (1st Dep't 2001).....	22
<i>Prior v. Board of Trustees</i> , 6 Misc. 3d 1011A, 800 N.Y.S.2d 355, 2004 WL 3118689 (Sup. Ct., Kings County Nov. 23, 2004).....	16
<i>Riback v. Margulis</i> , 43 A.D.3d 1023, 842 N.Y.S.2d 54 (2d Dep't 2007)	16
<i>Rudin v. Talisman, Rudin & Delorenz, P.C.</i> , 14 Misc. 3d 1218A, 836 N.Y.S.2d 489, 2005 WL 5097015 (Sup. Ct., N.Y. County Dec. 23, 2005).....	20
<i>Salomon v. Hampton Athletic Club, Inc.</i> , 245 A.D.2d 282, 666 N.Y.S.2d 19 (2d Dep't 1997)...	23
<i>Shah v. Metro. Life Ins. Co.</i> , No. 00 Civ. 108887, 2003 WL 728869 (Sup. Ct., N.Y. County Feb. 21, 2003)	3, 12, 14, 15
<i>Sheridan Broad. Corp. v. Small</i> , 19 A.D.3d 331, 798 N.Y.S.2d 45 (1st Dep't 2005).....	21, 22
<i>State Farm Mut. Auto. Ins. Co. v. Levin</i> , 263 A.D.2d 233, 702 N.Y.S.2d 694 (3d Dep't 2000)	16
<i>State v. Khan</i> , 206 A.D.2d 732, 615 N.Y.S.2d 771 (3d Dep't 1994).....	13
<i>Steen v. Quaker State Corp.</i> , 12 A.D.3d 989, 785 N.Y.S.2d 551 (3d Dep't 2004)	13
<i>Sutton Assocs. v. LexisNexis</i> , 196 Misc. 2d 30, 761 N.Y.S.2d 800 (Sup. Ct., Nassau County 2003)	20
<i>TNS Holdings v. MKI Sec. Corp.</i> , 92 N.Y.2d 335, 680 N.Y.S.2d 891 (1998).....	21, 22
<i>Triton Partners LLC v. Prudential Sec. Inc.</i> , 301 A.D.2d 411, 752 N.Y.S.2d 870 (1st Dep't 2003).....	19
<i>U.S. Bank Nat'l Assoc. v. MOA Hospitality, Inc.</i> , No. 07 Civ. 0601686, 2007 WL 4639452 (Sup. Ct., N.Y. County Dec. 18, 2007).....	17
<i>Ward v. Cross County Multiplex Cinemas, Inc.</i> , 878 N.Y.S.2d 334 (1st Dep't May 7, 2009).....	22

Other Authorities

CPLR § 3001..... 20

CPLR 3016..... 16

CPLR 32111,11

CPLR § 7803 16

CPLR § 7804 16

New York Debtor and Creditor Law § 271 15

New York Debtor and Creditor Law § 276 16

New York Insurance Law § 201 6, 11

New York Insurance Law § 326 3, 12, 16

New York Insurance Law § 1308 8, 11

New York Insurance Law § 1309 15, 18

New York Insurance Law § 1411 8, 11

New York Insurance Law § 1505 8, 11

New York Insurance Law § 4105 7, 11

New York Insurance Law § 6906 8, 11

Defendants MBIA Inc. (“MBIA Inc.”), MBIA Insurance Corporation (“MBIA Insurance”), and MBIA Insurance Corporation of Illinois, now known as National Public Finance Guarantee Corporation (“MBIA Illinois”) (collectively, the “MBIA Group”) respectfully submit this memorandum of law in support of their motion, pursuant to CPLR 3211(a)(1), (2) and (7), to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a cause of action.¹

Preliminary Statement

Plaintiffs’ action is an improper and impermissible attempt to bypass the channels of review established by the New York State Legislature for challenging determinations made by the New York State Superintendent of Insurance (the “Superintendent”) pursuant to New York’s comprehensive insurance regulatory scheme.

Plaintiffs are twenty of the world’s largest banks and financial institutions, who allege that they hold structured finance products insured by MBIA Insurance, which, like MBIA Illinois, is an insurance company owned by MBIA Inc. Plaintiffs ask this Court to set aside and annul a series of transactions (the “Transactions”) that were expressly approved by the Superintendent after lengthy and thorough review by the New York State Insurance Department (the “Department”). Under New York law, therefore, plaintiffs’ claims -- no matter what labels they place on them -- may be brought only in an Article 78 special proceeding to which the Superintendent is a party.

The Transactions approved by the Superintendent enabled the MBIA Group -- whose MBIA Insurance subsidiary wrote financial guarantee insurance for both public finance bonds

¹ Submitted herewith in support of the motion is the affirmation of Marc E. Kasowitz, dated June 9, 2009 (“Kasowitz Aff.”). A copy of the complaint (“complaint” or Compl.) is annexed to the Kasowitz Aff. as Exhibit A.

and structured finance products -- to implement a transformation of their business (the "Transformation") to address the effects of the 2007-2009 financial markets crisis. In the wake of that crisis, certain members of the financial guarantee industry, including MBIA Insurance, were unable to write financial guarantee insurance, impeding the ability of municipalities and other government issuers to issue bonds. The Transformation was intended to allow MBIA Illinois to maintain and write financial guarantee insurance solely for domestic public finance bonds, and MBIA Insurance to maintain and resume writing financial guarantee insurance for structured finance and international products -- each with adequate capital and surplus to support the obligations insured.

The complaint manages only a fleeting reference to the Superintendent's approval of the Transactions, but fails to attach the Superintendent's letter setting forth that decision (the "Approval Letter").² Nor does the complaint refer to what the Approval Letter makes clear: that the Superintendent and the Department carefully analyzed each Transaction now challenged by plaintiffs under very specific, detailed and interrelated statutory provisions of New York Insurance Law. After completing that extensive and independent review -- which included the Department's examination of the books and records of MBIA Insurance and the Department's assessment of the pre- and post-Transformation financial condition of MBIA Insurance -- the Superintendent determined that the Transactions complied in all respects with New York law. He specifically found that each of the Transactions satisfied the applicable section of the Insurance Law -- namely, that as the case may be, it did not render MBIA Insurance insolvent,

² A copy of the Approval Letter, dated February 17, 2009, a public record available to plaintiffs since it was issued and posted on the MBIA Group's website on March 3, 2009, is annexed to the Kasowitz Aff. as Exhibit B. A copy of the Department's February 18, 2009 announcement of the approval of the Transactions is annexed to the Kasowitz Aff. as Exhibit C.

was “reasonable and equitable,” and did not “adversely affect the interests of policyholders.”
(*See Kasowitz Aff.*, Ex. B, at 6-9.)

Under New York law, the exclusive means for plaintiffs to challenge the Transactions approved by the Superintendent is through an Article 78 proceeding. *See* N.Y. Ins. Law (“Insurance Law”) § 326 (McKinney 2006) (“[A]ny order, regulation or decision of the superintendent is declared to be subject to judicial review in a proceeding under article seventy-eight of the civil practice law and rules.”). Plaintiffs may not bring a back door collateral attack on his determination by cloaking their claims as a private right of action against the MBIA Group in a plenary action such as this one. In asking this Court to “set aside” and “annul” the Transactions -- an unwinding that itself may very well require, at a minimum, the approval of the Superintendent -- plaintiffs necessarily challenge the very decision made by the Superintendent concerning their effect on the solvency of MBIA Insurance, the fairness of their terms, and the interests of policyholders. In seeking to set aside the Transactions, plaintiffs are asking this Court to overrule this decision of the Superintendent in a proceeding to which the Superintendent is not a party or to ignore that decision (as they do in their complaint) and make its own parallel determination. That would be flatly contrary to the law.

Courts thus have not hesitated to dismiss actions, such as this, which seek to “disregard and bypass the Superintendent’s decision, and bring an action directly against [an insurer] on the very issues necessarily encompassed in that decision.” *Shah v. Metro. Life Ins. Co.*, No. 00 Civ. 108887, 2003 WL 728869, at *12 (Sup. Ct., N.Y. County Feb. 21, 2003), *affirmed in part and rev’d in part on other grounds*, *Fiala v. Metro. Life Ins. Co.*, 6 A.D.3d 320, 776 N.Y.S.2d 29 (1st Dep’t 2004). To permit such actions would usurp the Superintendent’s authority and allow

plaintiffs to violate the statutory language of the Insurance Law and evade the overall legislative scheme established by the Legislature.

Accordingly, the complaint, and each of its purported causes of action, should be dismissed as an improper collateral attack on the decision of the Superintendent.³

FACTS⁴

A. The Parties

Plaintiffs, twenty of the largest financial institutions in the world, allege that they hold or are otherwise beneficiaries of financial guarantee insurance policies issued by MBIA Insurance.⁵ (Compl. ¶¶ 6, 15-33.)

MBIA Insurance is a New York-domiciled insurance corporation. MBIA Illinois is an Illinois-domiciled insurance company. MBIA Inc. is a publicly-traded Connecticut corporation, with its principal place of business in New York. MBIA Insurance and MBIA Illinois are, respectively, direct and indirect subsidiaries of MBIA Inc. (*Id.* ¶¶ 34-36.)

B. The Transformation

MBIA Insurance is a monoline insurer that issues only financial guarantee insurance, not other types of insurance such as property, casualty, life, health or disability insurance. Before the Transformation of the businesses of the MBIA Group, MBIA Insurance offered guarantees of payment for, among other things, principal and interest due on public finance bonds (such as

³ Moreover, all of plaintiffs' claims otherwise fail to state a cause of action under New York law. Among other things, as shown below, plaintiffs' purported fraudulent conveyance and declaratory judgment claims rest on entirely insufficient conclusory allegations, their claim for breach of the implied covenant of good faith would impermissibly require enforcing contractual terms for which the parties never bargained, and plaintiffs have no standing to assert their unjust enrichment claim.

⁴ In summarizing herein certain of the allegations of the complaint, the MBIA Group in no way concedes their truthfulness.

⁵ A copy of a standard Financial Guaranty Insurance Policy issued by MBIA Insurance is annexed to the Kasowitz Aff. as Exhibit D.

municipal and state bonds) and structured finance products (such as collateralized debt obligations and mortgage-backed securities). (*Id.* ¶¶ 5, 40-42.)

The crisis in the U.S. financial markets that began in 2007 adversely affected numerous financial institutions, including plaintiffs, some of whom have received government bailouts. Most companies in the financial guarantee industry, including MBIA Insurance, were downgraded by S&P and Moody's and suspended writing new structured finance business by mid-2008. (*See id.* ¶¶ 48, 51.)

The ratings downgrades also made it impossible for MBIA Insurance to write new insurance in the municipal and other U.S. public finance markets. This abrupt withdrawal of insurance capacity had the effect of freezing out many municipal and state issuers from the public finance market and caused the Superintendent and the Department to undertake actions they believed were necessary to stabilize and revitalize the financial guarantee industry. (*See Kasowitz Aff., Ex. C, at 1.*)

The purpose of the Transformation was, therefore, straightforward: establish MBIA Illinois as a separate insurance company that only insures domestic public finance obligations. (*See Compl.* ¶ 47.) As such, it could help provide lower-cost funds to public issuers and thus facilitate the unfreezing of the U.S. public finance and infrastructure markets. (*Kasowitz Aff., Ex. C, at 2.*) At the same time, the Transformation would preserve MBIA Insurance as a well-capitalized, solvent insurer. (*Id.* at 1-2.) Unlike the government bailouts received by some of the plaintiffs, the Transformation neither relied on nor required government funds. As the Superintendent stated:

“This is a private sector solution to a public sector concern It preserves MBIA's promises to policyholders, while reducing costs and increasing opportunities for taxpayers. It will aid the federal

stimulus efforts by providing access to the credit markets to fund shovel-ready infrastructure development, and it will help taxpayers by lowering the cost of that borrowing. At a time when the demands on the public purse have never been heavier, this plan accomplishes these goals solely with private capital.”

(Id. at 2.)

C. The Department of Insurance Approved the Transformation

1. The Superintendent and Department thoroughly investigated the Transformation before approving it

Under Section 201 of the Insurance Law, the Department is responsible for supervising and regulating all insurance business in New York State, and the Superintendent possesses “the rights, powers, and duties, in connection with the business of insurance in this state, expressed or reasonably implied by [the Insurance Law] or any other applicable law of this state.” As set forth further below, under the Insurance Law, the Transactions at issue here required the prior approval of the Department and the Superintendent before they could be implemented.

On December 5, 2008, after almost a year of consultations with the Superintendent and the Department, the MBIA Group submitted a detailed application to the Department seeking its approval of the Transactions necessary to implement the Transformation. Over the following two months, the Department continued to conduct an extensive and rigorous review of the proposed Transformation and the application, as well as an independent investigation of the MBIA Group companies, including an examination of each of their books and records, their financial condition both before and after the Transformation, and their reserving methodologies. Only after the Department’s review and investigation were completed did the Superintendent issue specific written findings and determinations, in the February 17, 2009 Approval Letter, approving the Transactions. (Kasowitz Aff., Ex. B, at 6-8; Kasowitz Aff., Ex. C, at 1-2.) And only thereafter were the Transactions undertaken, and the Transformation implemented,

according to the explicit authorization given to the MBIA Group by the Superintendent in the Approval Letter.

The Department, in announcing the approval of the Transactions, emphasized that: the Department had “facilitated and supervised” the Transformation; the Department “only approved [the Transactions] after deciding that both [MBIA Insurance and MBIA Illinois] would have sufficient statutory capital to meet the letter and spirit of the Insurance Law;” and both companies “will have sufficient resources to meet policyholder claims as they come due and would “continue to pay all valid claims in a timely fashion.” (Kasowitz Aff., Ex. C, at 1-2.) The Superintendent specifically noted that “[t]his deal is fair to all policyholders-[including] the bank counterparties.” (*Id.* at 1.)

2. The Superintendent’s approval of the Transactions comprising the Transformation.

With respect to the specific Transactions that the plaintiffs, four months later, ask this Court to unwind, the Superintendent’s Approval Letter contained the following findings -- findings which warrant dismissal of this action:

(a) The MBIA Insurance Dividend

The Superintendent approved the distribution of a dividend of approximately \$1.147 billion in cash and securities from MBIA Insurance to MBIA Inc. This Transaction is now challenged by plaintiffs. (*See* Compl. ¶¶ 54-62.) The Superintendent analyzed and approved this Transaction under the statutory requirements of Insurance Law § 4105(a), and issued his approval after finding (as required by the Insurance Law) that “MBIA [Insurance] will retain sufficient surplus to support its obligations and writings following the payment of the MBIA [Insurance] Dividend.” (Kasowitz Aff., Ex. B, at 6.) The Superintendent reached this

determination based upon the Department’s independent analysis of, among other things, “the MBIA Entities’ financial condition prior to the Transformation, and . . . after the effectuation of the Transformation.” (*Id.*)

(b) The MBIA Insurance Stock Redemption

The Superintendent approved the redemption by MBIA Insurance of 32,064 shares of its capital stock from MBIA Inc. in exchange for approximately \$938 million in cash and securities and the outstanding shares of MBIA Illinois owned by MBIA Insurance. These Transactions are also challenged in the complaint. (*See* Compl. ¶¶ 54-62.) The Superintendent analyzed these transactions under the statutory requirements of Insurance Law § 1411(d), and issued his approval after expressly finding (as required by the Insurance Law) that they were “reasonable and equitable.” The determination was based on, among other things, “the Department’s examination of the MBIA Entities’ financial condition prior to the Transformation, and . . . after the effectuation of the Transformation.” (*Kasowitz Aff., Ex. B, at 6.*)

(c) The Reinsurance Agreement

The Superintendent approved the terms of the reinsurance agreement (the “Reinsurance Agreement”) also now challenged by plaintiffs, pursuant to which MBIA Illinois assumed and reinsured \$537 billion in bonds previously insured by MBIA Insurance. (*See* Compl. ¶ 54-62.) The Superintendent analyzed this Transaction under the statutory requirements of Insurance Law §§ 1308, 1505(a) and (d), and 6906 and issued his approval based upon the following:

- The Department’s independent “examination of the MBIA Entities’ financial condition prior to . . . [and] after the consummation of the Reinsurance Transaction.”
- The Department’s “expertise and knowledge about insurance companies, the business of insurance and reinsurance, and the market for reinsurance.”

- The Department's determination that the terms of the Transaction are "fair and equitable," that the "[c]harges or fees for services performed [are] 'reasonable,'" that "[e]xpenses incurred and payment received [are] allocated to [MBIA Insurance] on an equitable basis," and that the Transaction would not "adversely affect the interests of policyholders," such as plaintiffs.

(Kasowitz Aff., Ex. B, at 7-8.)

The Department further found that "the Reinsurance Agreement incorporates by reference all New York statutes and Department regulations necessary for MBIA [Insurance] to realize full credit for the reinsurance being provided," and that MBIA Insurance "will receive full financial credit, including the ability to release all unearned premium, contingency and other reserves applicable to the policies ceded pursuant to the MBIA Reinsurance Agreement." (*Id.* at 8.) Thus, MBIA Insurance was effectively relieved of over \$537 billion of its liabilities, which were assumed and reinsured by MBIA Illinois. (Kasowitz Aff., Ex. C, at 1.)

D. Plaintiffs' Claims

Plaintiffs allege, in their purported First, Second and Third Causes of Action against all three defendants, that the Transactions approved by the Superintendent were either actual or constructive "fraudulent transfers" that violated the New York Debtor and Creditor Law. (Compl. ¶¶ 83-111.) With much hyperbole and no facts, plaintiffs claim that the Transactions were made while MBIA Insurance was insolvent or that they rendered MBIA Insurance insolvent, leaving MBIA Insurance unable to pay its obligations as they become due. In making these allegations, plaintiffs do not -- because they cannot -- cite to a single financial obligation that MBIA Insurance has failed to meet, either before or after the Transactions, much less a failure to pay principal or interest under any of its financial guarantee policies.

Plaintiffs allege in their purported Fourth Cause of Action against MBIA Insurance that MBIA Insurance breached the implied covenant of good faith in their insurance policies by participating in the Transformation approved by the Superintendent. (Compl. ¶¶ 112-121.)

Plaintiffs allege in their purported Fifth Cause of Action against MBIA Inc. and MBIA Insurance that plaintiffs are entitled to a declaratory judgment that those defendants are jointly and severally liable to plaintiffs under plaintiffs' insurance policies because of transfers of MBIA Insurance's assets to MBIA Inc. and MBIA Illinois pursuant to the Transformation approved by the Superintendent. (Compl. ¶¶ 122-130.)

Plaintiffs allege in their purported Sixth Cause of Action against MBIA Inc. and MBIA Illinois that, as a result of the Transformation approved by the Superintendent, those defendants were unjustly enriched and hold assets that should be returned to MBIA Insurance. (Compl. ¶¶ 131-136.)

Plaintiffs request that the Court reverse the Transactions approved by the Superintendent or, in the alternative, declare that all three defendants are jointly and severally liable under plaintiffs' insurance policies or award damages. (Compl. at pp. 31-32.)

E. Plaintiffs' Document Request

Plaintiffs served defendants with their First Notice To Produce Documents ("Document Request") along with the complaint.⁶ The Document Request seeks, in its very first request, all documents that defendants "submitted to or received from the [Department]" concerning the Transformation, "including but not limited to all Communications" between the MBIA Group and the Department concerning the Transformation. (Kasowitz Aff., Ex. E, at 2.)

⁶ A copy of the Document Request is annexed to the Kasowitz Aff. as Exhibit E.

Thus, plaintiffs themselves clearly recognize the indisputable fact that the issues central to their purported claims are precisely the ones examined and determined by the Superintendent. (See also Affirmation of Gandolfo V. DiBlasi in Support of Plaintiffs' Motion by Order to Show Cause, dated June 4, 2009, in support of motion to compel discovery, ¶ 4 (documents requested are "critically relevant").) The MBIA Group filed a motion to stay discovery pending a decision on this motion.⁷

ARGUMENT

As shown below, the complaint is an impermissible collateral attack on the Superintendent's Approval Letter, in which the Superintendent addressed and resolved every material issue raised by the complaint. Accordingly, this Court lacks subject matter jurisdiction over plaintiffs' claims and none of plaintiffs' claims state a cause of action. Pursuant to CPLR 3211(a)(1), (2) and (7), the complaint should be dismissed in its entirety.

I. THE COMPLAINT IS AN IMPERMISSIBLE COLLATERAL ATTACK ON THE DECISION OF THE SUPERINTENDENT OF INSURANCE

This action indisputably challenges a decision of the Superintendent on issues falling directly within his supervisory or regulatory authority pursuant to Sections 201, 1308, 1411(d), 1505(a) and (d), 4105(a) and 6906 of the Insurance Law. In their Prayer for Relief, plaintiffs specifically request that this Court overrule that decision of the Superintendent and "set aside" and "annul" the MBIA Insurance Dividend, the Stock Redemption, the transfer of MBIA Illinois stock to MBIA Inc., and the Reinsurance Agreement. (Compl. at p. 31.) Plaintiffs thus seek to "set aside" and "annul" the very Transactions that were approved by the Superintendent.

⁷ Plaintiffs, in their opposition to defendants' motion to stay discovery, misleadingly state that the MBIA Group filed their motion to stay after the June 2 deadline for producing documents had passed. The MBIA Group did so pursuant to the stipulation of the parties.

However, decisions of the Superintendent may be challenged only through an Article 78 proceeding. *See* Insurance Law § 326 (“Notwithstanding the specific enumerations of the right to judicial review in this chapter, any order, regulation or decision of the superintendent is declared to be subject to judicial review in a proceeding under article seventy-eight of the civil practice law and rules.”); *In the Matter of City of New York [Third Water Tunnel Shaft 30B]*, 6 N.Y.3d 540, 547, 814 N.Y.S.2d 592, 596 (2006) (“Generally, unless a statute specifies otherwise, a person aggrieved by an administrative agency’s determination *must* challenge that decision by initiating a timely Article 78 proceeding in Supreme Court.”) (emphasis added) (citation omitted). The complaint therefore is an impermissible collateral attack on the decision of the Superintendent here and must be dismissed. *Fiala*, 6 A.D.3d at 322, 776 N.Y.S.2d at 31 (upholding dismissal of claims against insurer for breach of contract, breach of fiduciary duty and fraud as “collateral attacks on the Superintendent’s approval” of the insurer’s demutualization plan); *Shah*, 2003 WL 728869, at *11 (a “claim . . . directed at the very issues . . . considered and addressed by the Superintendent in his review and approval of the Plan . . . constitutes a collateral attack on that decision”); *Academic Health Prof’ls Ins. Ass’n. v. MQ of New York, Inc.*, No. 01 Civ. 605452, 2003 WL 25668211 (Sup. Ct., N.Y. County Apr. 14, 2003) (declining to consider arguments “because they are an impermissible collateral attack on the Superintendent’s decision”); *In re Empire Blue Cross & Blue Shield Customer Litig.*, 164 Misc. 2d 350, 354-356, 622 N.Y.S.2d 843, 846-47 (Sup. Ct., N.Y. County 1994).

As the Court explained in *Shah*, there is no basis for a private right of action against an insurer on issues squarely within the Superintendent’s authority:

[P]laintiffs have indicated nothing in either the statute, or its legislative history, from which a private right of action, asserted directly against [the insurer], could be maintained on those very issues which fall directly within the supervisory or regulatory

authority of the Superintendent. To the extent that plaintiffs feel that the Superintendent's determination of these issues was improper, they are authorized to bring an Article 78 proceeding to challenge such determination. Permitting plaintiffs to simply disregard and bypass the Superintendent's decision, and bring an action directly against [the insurer] on the very issues necessarily encompassed in that decision, would not be consistent with the overall legislative scheme.

2003 WL 728869, at *12.

This legal principle, which mandates dismissal of claims that are collateral attacks on decisions of state regulators, is firmly established under New York law and is not limited in its application to the area of insurance law. *See, e.g., Brawer v. Johnson*, 231 A.D.2d 664, 664, 647 N.Y.S.2d 553, 554 (2d Dep't 1996) (claims of fraud, misrepresentation and breach of fiduciary duty "[i]n essence . . . constituted a collateral attack" on a bank conversion plan approved by New York State Superintendent of Banks and could only be raised in an Article 78 proceeding); *In re East New York Sav. Bank Depositors Litig.*, 145 Misc. 2d 620, 622-623, 547 N.Y.S.2d 497, 499 (Sup. Ct., N.Y. County 1989); *State v. Khan*, 206 A.D.2d 732, 733, 615 N.Y.S.2d 771, 772 (3d Dep't 1994); *Ass'n for Cmty. Reform Now v. Bloomberg*, 13 Misc. 3d 1209A, 824 N.Y.S.2d 752, 2006 WL 2686520, at *18 (Sup. Ct., N.Y. County Sept. 19, 2006); *Steen v. Quaker State Corp.*, 12 A.D.3d 989, 990, 785 N.Y.S.2d 551, 552 (3d Dep't 2004).

Plaintiffs try to avoid an Article 78 proceeding challenging the Superintendent's decision (where they clearly are concerned there would be a heightened standard of review) by disavowing any claim based on a violation of the Insurance Law. (Compl. ¶ 53.) Instead, they assert that their claims arise under the Debtor and Creditor Law and under the common law. (*Id.*) However, plaintiffs' characterization of their claims is legally irrelevant: "[e]ven though couched in terms of breach of fiduciary duty or fraud, a claim which seeks, indirectly, to

challenge the sufficiency of a Plan which was approved by the Superintendent, constitutes a collateral attack on that approval, and must be made in an Article 78 proceeding.” *Shah*, 2003 WL 728869, at *13.

Here, all of the relevant issues upon which all of plaintiffs’ claims rest -- *i.e.*, whether the Transactions rendered MBIA Insurance insolvent and whether they adversely affected the interests of policyholders -- were considered and squarely addressed by the Superintendent in his decision and approval. The Superintendent gave his approval only after the Department conducted an independent examination of the financial condition of MBIA Insurance, and only after concluding that MBIA Insurance would remain fully solvent and able to meet its obligations following the Transactions. Indeed, these were the key issues in the Superintendent’s consideration. As the Superintendent stated:

Both MBIA [Insurance] and [MBIA Illinois] will continue to pay all valid claims in a timely fashion, and *both entities will have sufficient resources to meet policyholder claims as they come due.* Consistent with New York State Insurance Law, the New York State Insurance Department only approved the transaction after deciding that *both companies would have sufficient statutory capital to meet the letter and spirit of the Insurance Law.* The review and study process lasted approximately one year.

(Kasowitz Aff. Ex. C, at 2 (emphasis added).)

It thus cannot be disputed that each of plaintiffs’ claims here necessarily depends on the claim that the Superintendent’s decision approving the Transactions was wrong. Plaintiffs’ purported fraudulent conveyance claims thus flatly contradict the Superintendent’s findings, among other things, that the Transactions were fair, equitable and preserved promises to policyholders and that MBIA Insurance -- post-Transformation -- will be solvent, will continue to have sufficient resources to pay policyholder claims and will have sufficient statutory capital

under the Insurance Law.⁸ *See, e.g.*, Compl. ¶ 88 (“MBIA Insurance was rendered insolvent”); *id.* ¶ 96 (“MBIA Insurance was left with unreasonably small capital”); *id.* ¶ 106 (MBIA Insurance’s “assets and claims-paying resources . . . likely would be inadequate to satisfy” policyholders’ future claims).⁹ The same is unquestionably true with respect to plaintiffs’ breach of contract claim (*see, e.g., id.* ¶ 118 (Transactions “sharply reduced the likelihood that MBIA Insurance” will meet policyholders’ claims); *id.* ¶¶ 117, 119 (MBIA Insurance breached the “implied covenant of good faith”)), their declaratory judgment claim (*see, e.g., id.* ¶ 129 (Transactions “deprive[d] MBIA Insurance of funds needed to meet its obligations” to policyholders)) and their unjust enrichment claim (*see, e.g., id.* ¶ 133 (in the Transformation, “MBIA Inc. inequitably sought to benefit itself and its management at the expense of [policyholders]”)).

Accordingly, it is inescapable that plaintiffs’ claims here collaterally attack the Superintendent’s approval, and those claims therefore may only be asserted in an Article 78

⁸ In particular, the Superintendent found that, following the MBIA Insurance Dividend, MBIA Insurance “will retain sufficient surplus to support its obligations and writings.” (Kasowitz Aff., Ex. B, at 6.) There can be no question that this necessarily constitutes a finding of solvency within the meaning of Insurance Law § 1309(a) (an insurer is “deemed insolvent” if the Superintendent finds that it 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”). Even assuming *arguendo*, that Debtor and Creditor Law § 271 was applicable here, the Superintendent’s finding also necessarily satisfies the definition of solvency under Section 271 (“A person is insolvent when 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 as they become absolute and matured.”). Moreover, *a fortiori*, the Superintendent could not have found that the MBIA Insurance Stock Redemption was “reasonable and equitable” (Kasowitz Aff., Ex. B, at 6), and that the Reinsurance Agreement was “fair and equitable” and did not “adversely affect the interests of policyholders” (*id.* at 7-8), unless the Superintendent also found that MBIA Insurance will be solvent after both of those Transactions as well. (*See also* Kasowitz Aff., Ex. C, at 1-2 (Superintendent noting that MBIA Insurance and MBIA Illinois will be able to pay their claims as they come due after the Transformation).)

⁹ Thus, for example, there could be no finding here that the MBIA Group acted with actual intent to defraud or that the Transactions left MBIA Insurance with “unreasonably small capital” (as plaintiffs allege) that could be conceivably consistent with the Superintendent’s findings -- including his findings that, among other things, the Transactions were “fair,” “reasonable” and “equitable” -- or for that matter, consistent with the indisputable fact that the MBIA Group submitted the Transactions to the Superintendent for his prior approval (and voluntarily underwent the Department’s extensive and thorough examination).

proceeding to which the Superintendent is a party.¹⁰ To hold otherwise and permit this action to proceed against an insurer who relied in good faith on the approvals of the Superintendent would undermine both the authority of the Superintendent and the legislative scheme for regulation of insurance companies.

II. PLAINTIFFS' CLAIMS OTHERWISE FAIL TO STATE A CAUSE OF ACTION

Plaintiffs' claims should be dismissed also because they otherwise fail to state a cause of action.

A. Plaintiffs Fail to State a Cause of Action for Fraudulent Conveyance

Plaintiffs' purported fraudulent conveyance claims (Compl. ¶¶ 83-111) should be dismissed because they rely only upon speculative and conclusory allegations. *See* CPLR 3016(b) ("circumstances constituting the [alleged fraud] shall be stated in detail"); *Riback v. Margulis*, 43 A.D.3d 1023, 1023, 842 N.Y.S.2d 54, 55 (2d Dep't 2007) (affirming dismissal of a fraudulent conveyance claim because "the speculative and conclusory allegations of the complaint failed to state a cause of action"); *IDC (Queens) Corp. v. Illuminating Experiences*, 220 A.D.2d 337, 337, 633 N.Y.S.2d 18, 19 (1st Dep't 1995) (affirming dismissal of Section 276 claim for "failure to plead the alleged fraudulent conveyance with the requisite particularity"); *Balestra 1882, S.p.A. v. Designs by Glory, Ltd.*, No. 06 Civ. 0603806, 2007 WL 4741116 (Sup.

¹⁰ Nor can it be argued that there is any relevant distinction between decisions that are issued by the Superintendent pursuant to provisions requiring notice and hearing (*see, e.g., Shah*, 2003 WL 728869, at *2; *Consumers Union of U.S., Inc. v. New York*, 5 N.Y.3d 327, 342, 806 N.Y.S.2d 99 (2005)), and those that are issued without notice and hearing (*see, e.g., Prior v. Board of Trustees*, 6 Misc. 3d 1011A, 800 N.Y.S.2d 355, 2004 WL 3118689, at *2-4 (Sup. Ct., Kings County 2004); *State Farm Mut. Auto. Ins. Co. v. Levin*, 263 A.D.2d 233, 237-38, 702 N.Y.S.2d 694, 697 (3d Dep't 2000)). Indeed, no such distinction is drawn by Section 326 of the Insurance Law (which provides for Article 78 review of "any order, regulation or decision" of the Superintendent) or by any of the cases that make clear that plaintiffs' exclusive remedy is through Article 78. Under New York's statutory scheme, the only relevance to whether a party had notice and an opportunity to be heard prior to the issuance of a decision by the Superintendent is whether the party's challenge will be decided under the legal standard set forth in CPLR § 7803(3) (when there has been no notice and hearing) or § 7803(4) (where there has), and whether the proceeding should be transferred to a term of the Appellate Division. *See* CPLR § 7804(g).

Ct., N.Y. County Dec. 21, 2007) (dismissing Section 276 claim because plaintiff “fail[ed] to state in detail the circumstances constituting the wrong”); *U.S. Bank Nat’l Assoc. v. MOA Hospitality, Inc.*, No. 07 Civ. 0601686, 2007 WL 4639452 (Sup. Ct., N.Y. County Dec. 18, 2007) (dismissing fraudulent conveyance claim because plaintiff failed to plead “badges of fraud” that demonstrated defendant’s “actual intent to hinder, delay or defraud” plaintiff).

Thus, plaintiffs conclusorily allege, “[o]n information and belief,” that the Transformation rendered MBIA Insurance insolvent (Compl. ¶88; *see also id.* ¶ 106), although they do not -- because they cannot -- allege that MBIA Insurance has defaulted on any of its payment obligations under any of the insurance policies it issued. Nor does the complaint contain sufficient factual allegations to support plaintiffs’ conclusions that the MBIA Group “knew and intended” that the Transformation “would hinder, delay and defraud plaintiffs and MBIA Insurance’s other structured-finance policyholders and creditors” (*id.* ¶ 107), that MBIA Insurance “did not receive fair consideration” (*id.* ¶¶ 86, 94, 102), that the Transactions “were not executed in good faith” (*id.* ¶¶ 87, 95, 103), that MBIA Insurance “was left with unreasonably small capital” (*id.* ¶ 96), or that its assets and claims-paying resources “likely would be inadequate to satisfy all future claims” of structured finance policyholders (*id.* ¶ 106).

Substituting pejorative rhetoric for plausible facts, the complaint is replete with conclusory accusations of “siphoning,” “stripp[ing],” “secret[s],” and “gamesmanship.” However, as set forth *supra*, the Superintendent and the Department found, based upon their own independent and extensive examination of the financial statements of MBIA Insurance, that the challenged Transactions were “reasonable and equitable” and that MBIA Insurance, both prior and subsequent to the Transactions, was solvent and able to pay all of its obligations as they

become due. (Kasowitz Aff., Ex. B, at 6-8.) *See* Insurance Law § 1309(a) (Superintendent determines solvency of insurers).

In short, plaintiffs' allegations are insufficient under New York law. Indeed, plaintiffs' claims that the MBIA Group knew or intended that the Transactions would render them insolvent or unable to pay policyholders are impossible to square with the fact that -- as plaintiffs themselves acknowledge, albeit fleetingly (Compl. ¶ 53) -- the MBIA Group responsibly presented the Transactions to the Superintendent and the Department for their thorough and complete independent review, and proceeded with the Transactions only after receiving written approval from the Superintendent -- all in accordance with New York law.

B. Plaintiffs Fail to State a Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiffs' purported cause of action against MBIA Insurance for breach of contract -- *i.e.*, the insurance policies -- must also be dismissed. (Compl. ¶¶ 112-121.) The insurance policies issued by MBIA Insurance -- of which plaintiffs allegedly are holders or otherwise beneficiaries -- provide only that MBIA Insurance guarantees the payment of principal and interest on the instruments they insure -- and nothing more. (*See* Kasowitz Aff., Ex. D.)

Plaintiffs do not -- and cannot -- allege that MBIA Insurance has failed to honor this guarantee, the sole guarantee in the policies, or any other express obligations. Instead, plaintiffs claim that MBIA Insurance breached the implied covenant of good faith. They allege that while “[o]ne of the purposes for obtaining insurance policies from MBIA Insurance was to obtain MBIA Insurance’s guarantee” (Compl. ¶ 115) -- *i.e.*, the guarantee that is in the policies and has not been breached -- “[a]nother of the purposes . . . was to enhance the value and credit rating” of the securities held by plaintiffs. (*Id.* ¶ 116.)

However, that second purported “purpose” is nowhere reflected in the policies, and it therefore cannot serve as the basis for a breach of contract claim. Under New York law, the implied covenant of good faith cannot operate to introduce new terms into a contract not bargained for by the parties.

Contrary to plaintiffs’ contentions, MBIA Insurance’s insurance policies do not guarantee the value or the credit ratings of insured securities or of anything else.¹¹ If plaintiffs had wanted a credit rating guarantee, they could have and should have negotiated for one. However, they failed to do so. Their failure to do so does not now allow them to add such new substantive terms to the policies based on an implied covenant of good faith and fair dealing. New York courts reject attempts to rewrite or interpret an agreement between sophisticated parties to impose an implied obligation that the parties did not include. *See D & L Holdings, LLC v. RCG Goldman Co., LLC*, 287 A.D.2d 65, 73, 734 N.Y.S.2d 25, 31 (1st Dep’t 2001) (“The covenant of good faith and fair dealing cannot be used to add a new term to a contract, especially to a commercial contract between two sophisticated commercial parties represented by counsel.”); *Nat’l Union Fire Ins. Co. v. Xerox Corp.*, 6 Misc. 3d 763, 773-74, 792 N.Y.S.2d 772, 781 (Sup.

¹¹ Plaintiffs claim that the Transactions “sharply reduced the likelihood that MBIA Insurance will be able to honor its unconditional and irrevocable guarantees in the future” (Compl. ¶ 118) and thus supposedly “frustrated” the purported purpose of the policies. (*Id.* ¶ 119.) However, there is, of course, no authority for the proposition that a party to a contract can sue another party for breach of contract because that other party “reduced the likelihood” of its performance rather than in fact breached an obligation. Under New York law, plaintiffs may not substitute such a flawed breach of contract claim with a breach of implied covenant of good faith claim. *See Triton Partners LLC v. Prudential Sec. Inc.*, 301 A.D.2d 411, 411, 752 N.Y.S.2d 870, 870-71 (1st Dep’t 2003) (“The breach of the covenant of good faith and fair dealing claim was properly dismissed since it was merely a substitute for a nonviable breach of contract claim.”); *Century-Maxim Constr. Corp. v. One Bryant Park, LLC*, No. 24683/08, 2009 WL 1218895, at *24 (Sup. Ct., Westchester County Apr. 7, 2009) (holding that a claim for breach of the implied covenant of good faith and fair dealing should be properly dismissed where it is “merely a substitute for a nonviable breach of contract claim”).

Ct., N.Y. County 2004) (new terms cannot be incorporated through the implied covenant of good faith and fair dealing).¹²

C. Plaintiffs Fail to State a Cause of Action for a Declaratory Judgment of Joint and Several Liability

Plaintiffs seek a declaratory judgment against MBIA Inc. and MBIA Insurance that the corporate veil between them be pierced and that they are jointly and severally liable to plaintiffs under MBIA Insurance's policies. (Compl. ¶¶ 122-130.) This claim is also fatally deficient.

Again, plaintiffs do not, and cannot, allege that MBIA Insurance has failed to pay any of its alleged obligations under plaintiffs' insurance policies. Accordingly, plaintiffs' request for a declaratory judgment impermissibly seeks no more than an advisory opinion based on future hypothetical events. Plaintiffs request that this Court hold now that, should the issuers of plaintiffs' insured securities default at some time in the future -- a hypothetical event which is completely out of the control of the parties and which may never occur -- then, at that point, plaintiffs may look to MBIA Inc. to satisfy their claims. Such an advisory opinion based on hypothetical events beyond the control of the parties is not the proper subject of a declaratory judgment claim. *See Cuomo v. Long Island Lighting Co.*, 71 N.Y.2d 349, 354, 525 N.Y.S.2d 828, 830 (1988) ("It is therefore settled law that an action 'may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur.'"); *American Ins. Assoc. v. Chu*, 64 N.Y.2d 379, 383, 476 N.Y.S.2d 311, 311 (1985) ("The 'justiciable controversy' upon which a declaratory judgment may be rendered [pursuant to CPLR § 3001] requires . . . that the controversy involve present, rather than hypothetical,

¹² *See also Rudin v. Talisman, Rudin & Delorenz, P.C.*, 14 Misc. 3d 1218A, 836 N.Y.S.2d 489, 2005 WL 5097015, at * 3 (Sup. Ct., N.Y. County Dec. 23, 2005) ("[T]he implied covenant does not create obligations . . . that lie outside the stated terms of the contract."); *Sutton Assocs. v. LexisNexis*, 196 Misc. 2d 30, 34, 761 N.Y.S.2d 800, 804 (Sup. Ct., Nassau County 2003) ("[T]he duty [of good faith and fair dealing] cannot be used to create independent obligations beyond those agreed upon and stated in the express language of the contract.")

contingent or remote, prejudice to plaintiffs.”); *Lewis v. City of Gloversville*, 246 A.D.2d 804, 805, 667 N.Y.S.2d 796, 797 (3d Dep’t 1998) (“As there exists a high degree of uncertainty as to whether these possible future events, which are not within the parties’ control, may ever come to pass, declaratory relief is premature and the complaint must be dismissed.”); *Employers’ Fire Ins. Co. v. Klemons*, 229 A.D.2d 513, 513-514, 645 N.Y.S.2d 849, 850-851 (2d Dep’t 1996) (holding that no justiciable controversy to justify declaratory judgment existed where an insurance claim was pending but had been neither allowed nor denied).

Moreover, plaintiffs fail to plead sufficiently that MBIA Inc. so dominated MBIA Insurance such that the corporate form was abused and should be ignored. Under New York law, “it is well settled that ‘[t]hose seeking to pierce a corporate veil . . . 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 [against plaintiff].’” *Sheridan Broad. Corp. v. Small*, 19 A.D.3d 331, 332, 798 N.Y.S.2d 45, 46 (1st Dep’t 2005) (quoting *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339, 680 N.Y.S.2d 891 (1998)). Accordingly, New York courts dismiss veil-pricing claims where, as here, plaintiffs do not allege “particularized statements detailing fraud or other corporate misconduct” or facts that would establish that the defendant “abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against [plaintiff] such that a court in equity will intervene.” *Id.* at 332, 798 N.Y.S.2d at 46 (citations and internal quotation marks omitted).

Plaintiffs do not come close to meeting their burden here. The only specific facts alleged concerning MBIA Inc.’s alleged domination of MBIA Insurance are that MBIA Inc. is the sole shareholder of MBIA Insurance and that the companies have the same senior management.

(Compl. ¶¶ 124-26.) This is insufficient on its own to allege the requisite complete domination of MBIA Insurance. *See Ward v. Cross County Multiplex Cinemas, Inc.*, 878 N.Y.S.2d 334, 335 (1st Dep’t May 7, 2009) (holding that allegations of domination by parent company were insufficient to pierce the corporate veil); *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v. Holiday Org., Inc.*, 2006 WL 1982603, at *15 (Sup. Ct., Nassau County July 7, 2006) (“The corporate veil will not be pierced simply because the same person or persons controlled multiple entities.”); *see also Sheridan Broadcasting*, 19 A.D.3d at 332, 798 N.Y.S.2d at 47 (“An inference of abuse does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business.”) (internal quotations and citations omitted); *accord TNS Holdings*, 92 N.Y.2d at 339-40, 680 N.Y.S.2d at 893-894.

D. Plaintiffs Fail to State a Cause of Action for Unjust Enrichment

Plaintiffs’ claim that MBIA Inc. and MBIA Illinois were unjustly enriched by the Transactions should likewise be dismissed. Plaintiffs allege only that MBIA Inc. and MBIA Illinois were unjustly enriched because they “now hold assets that, in equity and good conscience, should be returned to *MBIA Insurance*.” (Compl. ¶ 134 (emphasis added).) Nowhere do plaintiffs allege -- nor can they -- that MBIA Inc. or MBIA Illinois hold assets that should be returned to plaintiffs. Without such an allegation, plaintiffs lack standing to assert the unjust enrichment claim, and it must be dismissed. *See Aymes v. Gateway Demolition Inc.*, 30 A.D.3d 196, 197, 817 N.Y.S.2d 233, 234 (1st Dep’t 2006) (“To the extent plaintiff is asserting an unjust enrichment claim, he lacks standing because neither he nor the previous property owner bestowed a benefit on defendants.”); *Parish v. Rudolph*, 282 A.D.2d 233, 233, 723 N.Y.S.2d 442,443 (1st Dep’t 2001) (granting motion to dismiss unjust enrichment claim because plaintiff failed to allege that she conferred a benefit upon the defendant).

Moreover, New York courts have consistently held that a party to a contract may not maintain a claim for unjust enrichment against a third-party to that contract (who was allegedly unjustly enriched only by the counter-party to that contract) where the claim is based on the same subject matter as the contract. Thus, plaintiffs cannot assert a claim for unjust enrichment against MBIA Inc. based on precisely the same set of facts that purportedly instituted a breach of their contracts with MBIA Insurance. *See Conklin v. Saratoga Springs*, 267 A.D.2d 841, 842, 699 N.Y.S.2d 820, 821-822 (3d Dep't 1999) (unjust enrichment claim against town that was not a party to plaintiff's contract with developer should be dismissed because the claim was "based upon events arising out of the same subject matter encompassed by plaintiff's contract with [developer]"); *Salomon v. Hampton Athletic Club, Inc.*, 245 A.D.2d 282, 282, 666 N.Y.S.2d 19, 19 (2d Dep't 1997) (unjust enrichment claim against third-parties should be dismissed when it arose "out of the same subject matter governed by the written contract between the plaintiff" and another party); *Mariacher Contracting Co. v. Kirst Constr., Inc.*, 187 A.D.2d 986, 987-98, 590 N.Y.S.2d 613, 614 (4th Dep't 1992) (dismissing subcontractors' unjust enrichment claim against property owner because "there was a valid and enforceable written agreement between plaintiff and [the general contractor] governing this subject that bar[red] plaintiff's recovery").

CONCLUSION

For the foregoing reasons, the complaint, and each of the causes of action alleged therein, should be dismissed with prejudice.

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Respectfully submitted,

KASOWITZ, BENSON, TORRES
& FRIEDMAN LLP

By: 

Marc E. Kasowitz
Daniel R. Benson
Aaron H. Marks
Albert S. Mishaan

1633 Broadway
New York, New York 10019
(212) 506-1700
Attorneys for Defendants