Nos. 15-3504,

15-4189, 15-2665, and 15-3553

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Maria Del Carmen Robainas, Giovanni Valladares, Jose A. Capablanca, Modesto Martin, Jacqueline J. Russ, Allen Perez, Gregory Truitt, Eduardo J. Prieto, James T. Favre, International Association of Machinists and Aerospace Workers, District Lodge 15, *Plaintiffs-Appellants*,
Andrew Yale, on behalf of himself and all others similarly situated, *Plaintiff*,
v.
Metropolitan Life Insurance Company, *Defendant-Appellee*,
Metlife, Inc., *Defendant*.

(*For Continuation of Caption See Inside Cover*)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE
METROPOLITAN LIFE INSURANCE COMPANY

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Mark Andrew Intoccia, Sr., on behalf of himself and all others similarly situated, Ronald F. Weilert, individually and on behalf of all others similarly situated, Ann M. Weilert, individually and on behalf of all others similarly situated, *Plaintiffs-Appellants*,
v.
Metropolitan Life Insurance Company, *Defendant-Appellee*.

Jonathan Ross, David Levin, *Plaintiffs-Appellants*,
Andrew Yale, on behalf of himself and all others similarly situated, *Plaintiff*,
v.
AXA Equitable Life Insurance Company, *Defendant-Appellee*.

Calvin W. Yarbrough, on behalf of himself and all others similarly situated, *Plaintiff-Appellant*,
v.
AXA Equitable Life Insurance Company, *Defendant-Appellee*.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant Metropolitan Life Insurance Company ("MLIC") states that it is a non-governmental corporate party and is a wholly owned subsidiary of MetLife, Inc., a publicly held corporation. No publicly held corporation owns 10% or more of the stock of MetLife, Inc.

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I. Introduction

The District Court properly dismissed the Complaints in this case for a basic, fundamental reason: Plaintiffs lack standing to sue because they have not demonstrated any actual injury-in-fact and thus cannot satisfy the standing requirements of Article III of the U.S. Constitution.

Plaintiffs claim they are entitled to the return of more than *$40 billion* in premiums that they and the putative class purportedly paid for life insurance or annuities from Metropolitan Life Insurance Company ("MLIC") -- products that they undeniably received and that Plaintiffs do not, and cannot, assert are in jeopardy, let alone imminently so. Plaintiffs likewise do not and cannot allege that MLIC has breached any of its contractual obligations.

Plaintiffs nonetheless lay claim to this windfall by asserting that MLIC "misrepresented its financial strength" by omitting to disclose certain details of legally permissible and regulator-approved transactions engaged in by MLIC's parent and affiliates, but not MLIC itself. Not only were the purportedly omitted disclosures *not* required by statute or regulation under New York's "exacting" insurance disclosure regime in place at the time of Plaintiffs' purchases, but Plaintiffs concede that they *never saw*, *reviewed, or considered* any MLIC financial disclosures when making their respective purchases. In fact, MLIC's allegedly misleading statements were not even made to Plaintiffs at all.

That Plaintiffs were not aware of the so-called "misrepresentations" over which they sue -- and never have claimed that they would not have purchased MLIC policies had fuller regulatory disclosures been made -- is significant, since Plaintiffs' claimed injury stems *not* from captive reinsurance transactions themselves, but rather from what they allege to be misleading or inadequate disclosure by MLIC in its Statutory Annual Statements made to regulators.

Plaintiffs' claims fail every aspect of the Article III standing analysis. Three separate Southern District of New York judges have so held in the cases subject to this appeal, each invoking clear precedent from both this Court and the United States Supreme Court. SA52-56, *Intoccia v. Metro. Life Ins. Co.*, No. 15-cv-3061 (S.D.N.Y. Dec. 2, 2015) (Judge Cote); SA48-51, *Yarbrough v. AXA Equitable Life Ins. Co.*, 15CV2585 (S.D.N.Y. Oct. 22, 2015) (Judge Sullivan); SA25-47, *Robainas v. Metropolitan Life Ins. Co.*, No. 14-CV-9926 , 2015 WL 5918200 (S.D.N.Y. Oct. 9, 2015) (Judge Cote); SA1-24, *Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d 424 (S.D.N.Y. 2015) (Judge Furman).[1] Each of those District Court judges permitted Plaintiffs numerous attempts to state their claim and establish injury. There were no less than *twelve* separate Complaints in the cases

[1] Citations to the appendices on appeal are as follows: "JA" for the Joint Appendix filed on June 15, 2016, and "SA" for the Special Appendix filed on June 15, 2016.

before this Court, re-plead a total of six times. Yet Plaintiffs still could not establish any harm sufficient to satisfy Article III.

Plaintiffs eventually gave up trying to articulate any actual injury below, and instead retreated solely to the argument that merely *alleging* a statutory violation is itself a deprivation of a right that confers standing, whether or not it has a plausible basis in fact, whether or not Plaintiffs personally experienced any misrepresentation, and whether or not they suffered any non-conjectural or palpable harm, economic or otherwise. Only now that the United States Supreme Court's decision in *Spokeo v. Robins* has dealt a fatal blow to that claim do Plaintiffs fall back on their prior unsuccessful theories.

At the end of the day, none of Plaintiffs' theories of "injury" work. At best, Plaintiffs express a subjective and unsubstantiated concern that at some unknowable time in the future they ***might*** suffer harm only ***if*** Plaintiffs remain insured ***and*** the following additional, highly remote and speculative hypothetical chain of events were ***all*** to occur ***while*** the New York Department of Financial Services ("DFS") stood by, watched, and did nothing:

- MLIC's affiliated reinsurer would have to default on its reinsurance obligations at some future time, despite the reserves and surplus capital required by the governing jurisdiction's insurance regulator; and
- As a result, MLIC would then draw down the irrevocable Letter of Credit ("LOC") that secures the affiliated reinsurer's reinsurance obligation to MLIC and obtain the LOC funds; and

- The affiliated reinsurer would then have to default on its obligation to reimburse the bank for the payment on the LOC; and
- The bank issuing the LOC would then have to call the guarantee issued by MLIC's parent MetLife, Inc.; and
- *If,* a sufficiently large number of such parental guarantees are also coincidentally called such that these liabilities materially affect the overall financial profile of MLIC's parent, despite the fact that it has more than ***750 times*** more assets than all of its parental guarantees combined; and
- *If,* the effect on the financial profile of the parent company is so great that it is unable to honor its obligations; and
- *If* the parent's inability to fulfill its obligations as guarantor combines with other unknown and unknowable factors to create a liquidity crisis within the MetLife holding company system; and
- *If*, MLIC, despite having received the LOC funds and despite its own capital and reserves and surplus required by law, is affected by independent sources of financial stress such that it, too, suffers from a liquidity crisis; and
- *If*, MetLife, Inc. is unable to provide MLIC with a capital infusion; and
- *If*, a policyholder happens to have a claim at that same time all of these other remote and hypothetical events all occur; ***then***
- Some policyholder in the future ***might*** receive reduced benefits (without even considering the availability of state insurance guaranty funds).

See JA115-117.

Plaintiffs do not and cannot allege that *any* of these potential future actions by MLIC, its affiliated reinsurer, or its parent is looming or even probable. This is fatal to Plaintiffs' contention of "imminent and certainly impending harm" and

simply does not meet constitutional muster. It is also important to note that the draw down of the LOC proceeds would put MLIC in the same financial position as if it had to hold additional assets to support its reserves and had not ceded reinsurance to an affiliated reinsurer in the first instance. This not only further attenuates the possibility of Plaintiffs ever suffering the "harms" they allege, but also further attenuates Plaintiffs' ability to attribute such harm to the captive reinsurance arrangements about which they complain.

In the end, this case does not call upon the Court to decide any new questions of Article III standing, or to navigate the boundaries of "intangible harm," since Plaintiffs do not get past the very basic threshold of pleading that they have personally experienced a concrete and particularized injury-in-fact that they actually suffered or that is "certainly impending" -- nor anything remotely close to it. Judge Cote's rulings against Plaintiffs should be affirmed in their entirety, as should Judge Furman's and Judge Sullivan's rulings in the coordinated cases involving AXA Equitable Life Insurance Company.

II. Counter-Statement of the Issue Presented

Whether purchasers of life insurance and annuities with guaranteed benefit riders have met their burden to demonstrate that they suffered a concrete and particularized injury, fairly traceable to Defendants, that is not purely a remote and hypothetical "risk" but rather sufficient to confer standing under Article III of the

United States Constitution, on the basis of their allegations that the Defendant insurers omitted from their Statutory Annual Statements filed with the New York Department of Financial Services certain details of transactions that no statute or regulation required the insurers to disclose, and in the absence of any allegation that the purchasers were even aware of, or ever saw or heard, the alleged "misrepresentations" over which they sue, let alone relied on them.

III. Counter-Statement of the Case

Judge Denise Cote dismissed Plaintiffs' Complaints with prejudice, after permitting Plaintiffs several opportunities to re-plead. Judge Cote found that Plaintiffs failed to allege that they had suffered an injury in fact that was *concrete and particularized*, *actual or imminent*, and *fairly traceable* in any way to Defendants' conduct. SA45. Plaintiffs thus failed to meet the bedrock requirements for standing under Article III.

Although Judge Cote's decisions in *Robainas* (and later *Intoccia*) were subsequent in time to Judge Furman's ruling rejecting similar claims in the *Ross* matter -- and in fact cited that ruling approvingly -- Judge Cote separately analyzed Plaintiffs' claims.[2] SA38-45. Judge Cote provided detailed, independent

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[2] Plaintiffs reference only Judge Furman's decision, noting that the other Courts ruled the same way. It is true that all three judges reached the same ultimate conclusion, reasoning to their own conclusions.

reasoning to reach the same result as Judge Furman, and rejected each one of Plaintiffs' assertions of injury as a remote and entirely hypothetical "wrong." *Id.*

Judge Cote's opinion describes Plaintiffs' relevant allegations, which MLIC briefly summarizes here:[3] Plaintiffs take aim at MLIC's use of, and disclosures in Annual Statements to regulators regarding, captive reinsurance -- a long-established, perfectly legal, and highly regulated practice in the life insurance industry. JA108-111, 132-137. Misreading a June 2013 prospective policy report by DFS that -- contrary to Plaintiffs' insinuations -- identified *no* legal violations, Plaintiffs attempt to twist MLIC's entirely legal conduct into an actionable claim. To do so, Plaintiffs latch on to a seldom-referenced provision of New York insurance law, N.Y. Ins. L. § 4226 ("§ 4226"), a state consumer fraud statute, which in certain circumstances affords a private right of action to a person "aggrieved" by a "knowing" misrepresentation by a New York insurer of its financial condition or legal reserve system.

Plaintiffs did not assert any violation by MLIC of any specific requirement of what they describe as New York's "exacting" insurance disclosure regime. *See e.g.* JA101, 105, 140-141. Nor did they allege that there was anything misleading in any marketing materials they consulted upon purchasing their life or annuity

[3] The factual background underlying this dispute is set forth in greater length in the following section.

products. They do not even claim -- and cannot claim -- that MLIC failed to disclose its *use* of captive reinsurance transactions. MLIC and its affiliates not only disclosed their use of captive reinsurance transactions (all of which were expressly approved by DFS), but included more detail about those transactions than then-current regulations required. *See* JA266-268, 351- 361; N.Y. Ins. Law § 1505 (permitting "reinsurance treaties or agreements" within a holding company system subject to the superintendent's approval); N.Y. Comp. Codes R. & Regs. tit. 11, pt. 125 (allowing insurers to take reserve credit for reinsurance ceded to an affiliate). Plaintiffs likewise do not claim that MLIC's use of captive reinsurance transactions, which are widely used by life insurance companies (and other insurers) to manage capital and reserves, was not legal.

Plaintiffs instead claim that MLIC "knowingly misrepresented" its overall "financial condition" in its Statutory Annual Statements because MLIC allegedly failed to disclose certain *specific details* of these various transactions, which were not undertaken by MLIC itself but rather by its *affiliates*. JA132-137. Plaintiffs claim that aspects of these transactions that DFS labeled "parental guarantees," "hollow assets," and "two-step transactions" were both hidden from policyholders, and had the effect of "artificially inflating" MLIC's financial strength because these so-called "shadow insurance" transactions purportedly undermined the strength of the collateral backing MLIC's affiliated reinsurers. SA33; JA146-148.

Plaintiffs in turn contend that MLIC, in taking its entirely legal "reserve credit," took too large a credit because Plaintiffs disapprove of the regulator-approved security backing MLIC's affiliated reinsurers. JA132, 147-148.

Based on these claims, Plaintiffs assert that the nationwide class of policyholders whom they seek to represent are entitled to the drastic remedy of a penalty in the amount of *all* of the life insurance premiums and/or contributions toward the guaranteed annuity benefit rider that they had paid -- essentially free life insurance and guaranteed benefits. JA149-150.

A. Judge Cote Rejected Plaintiffs' "Riskier Products" Theory of Injury as Too Remote, Hypothetical and Speculative

Reviewing these allegations, Judge Cote first rejected Plaintiffs' notion that they were injured by having purchased policies that were "riskier" than MLIC represented them to be, and their related theory that "MLIC may be unable to pay their life insurance claims in the future," observing that "Plaintiffs' conclusory allegations of current risk do not suffice to confer Article III standing" in the absence of any real or impending injury. *See* SA39 (citing *Ross* at *10); SA40.

The District Court emphasized that Plaintiffs *do not allege* that they would not have purchased policies but for the alleged nondisclosures (which was not required by New York regulations in all events), and further explained that the claims of possible future injury fail to meet Article III's requirement that injury be

"certainly impending," and not too "hypothetical, speculative and uncertain" to satisfy the Constitutional minimum. SA39-40 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) and *Ross* at *10).

B. Judge Cote Also Rejected Plaintiffs' "Higher Premiums" Theory of Injury as Conclusory and Contradictory to Plaintiffs' Own Authorities

Judge Cote rejected Plaintiffs' next theory -- that they "paid higher premiums for insurance policies than they would have absent MLIC's failure to disclose its shadow insurance" -- noting that this allegation was both entirely conclusory and directly undermined by a study attached to Plaintiffs' Complaint that found that captive reinsurance practices: (i) actually ***reduce*** "the cost of life insurance policies," and (ii) if companies discontinued the practices criticized by Plaintiffs, "premiums might rise by as much as 10-21%." SA39 (citing JA182).

C. Judge Cote Likewise Rejected Plaintiffs' Bald "Statutory Violation" Theory of Injury, Finding Both that Article III and §4226 Require Actual Injury to Confer Standing

Judge Cote likewise disposed of Plaintiffs' claimed injury that §§ 4226(a)(4) and (d) together create a "statutory right to be free from misrepresentation by their insurer," and that an alleged violation of that right confers standing. SA40. The District Court correctly reasoned that "[a]lthough states may create a statutory cause of action where none exists in federal law, states may not bypass

constitutional or prudential standing requirements" and "still must demonstrate a concrete injury-in-fact." SA40-41 (footnotes omitted).

Judge Cote's ruling rested firmly on numerous precedents of this Court, all of which held that a statutory violation must still constitute a "palpable deprivation" to confer Article III standing. *See* SA41-43 (addressing *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170, 177-78 (2d Cir. 2012) ("the breach of a fiduciary duty and reputational harm associated with insider trading provided a concrete personal stake in the suit to satisfy Article III"), *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 456-57 (2d Cir. 2014) ("finding that a plaintiff had standing because her contractual obligation to pay private school tuition was a concrete injury, which was required even for statutorily created rights"), *Kendall v. Employees Ret. Plan of Avon Products*, 561 F.3d 112, 118 (2d Cir. 2009) ("holding that a 'plan participant suing under ERISA must establish both statutory standing and constitutional standing, meaning the plan participant must … assert a constitutionally sufficient injury arising from the breach of a statutorily imposed duty,' " and rejecting on standing grounds, among other claims, a claim that ERISA confers a right on every plan participant to sue the fiduciary for alleged breaches of duty without a showing that they were injured by the alleged breach)).

Finally, Judge Cote held that §4226 itself does not support standing in the absence of any concrete injury. The Court noted that even if a state could expand

standing beyond Article III (it cannot), New York did not do so with §4226(d) since it grants a cause of action only to policyholders who were "aggrieved" by "knowing misrepresentations," and "[i]mportantly, the named Plaintiffs do not contend that they specifically read, heard or relied on MLIC's alleged misstatements beyond a general allegation that MLIC misled the public, including policyholders." SA34, 43.

IV. Factual Background

The District Court's decisions are based on a robust factual record drawn from the pleadings and referenced documents. MLIC summarizes certain key aspects of that record below for the benefit of this Court.

MLIC is a New York licensed life insurance company that sells life insurance and annuities throughout the United States. JA98. MLIC is affiliated with reinsurers ultimately owned by the same parent, MetLife, Inc. JA208.

Plaintiffs in *Robainas* obtained individual life and group life insurance policies from MLIC between 2003 and 2010. JA96-97. Plaintiff Intoccia obtained a variable annuity with a Guaranteed Minimum Income Benefit rider in 2009. JA485. The *Weilert* Plaintiffs obtained variable annuity contracts with a Guaranteed Minimum Income Benefit rider in 2012 and 2013. JA485.[4]

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[4] Variable annuities sometimes offer optional features, including guaranteed benefit riders, which have extra charges. *See* SEC, *Variable Annuities: What You*

A. Captive Reinsurance and New York's Regulatory Regime

Like other insurance companies, MLIC purchases reinsurance to help manage its risk and capital. MLIC purchases a significant amount of reinsurance from third parties, and also purchases reinsurance from certain affiliated companies referred to as "captive" reinsurers, whose business is dedicated to reinsuring the business of MetLife, Inc.'s affiliates. *See* JA108-111.

Captive reinsurance is perfectly legal and is not unique to MLIC. Regulators in New York and elsewhere long have recognized captive reinsurance arrangements, which are expressly permitted by, and highly regulated under, the laws of most states. *See generally* N.Y. Comp. Codes R. & Regs. tit. 11, chap. 4, subchap. D "Reinsurance" (establishing regulatory regime allowing insurers to cede risk to affiliated insurers). Reinsurance is a critical tool for insurers who need to manage capital to ensure that they can pay claims. *See* N.Y. Comp. Codes R. & Regs. tit. 11, pt.125; N.Y. Ins. Law §§ 1301 *et seq*., 4202 *et seq*.

Since holding capital in liquid form is expensive, statutory reserve requirements tend to drive up policy prices for life insurance consumers unless the

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Should Know, http://www.sec.gov/investor/pubs/varannty.htm (April 18, 2011). A Guaranteed Minimum Income Benefit assures a particular minimum level of annuity payments even if the annuity account balance drops below the level necessary to support guaranteed benefit rider payments. *Id.*

insurer can obtain relief from a portion of its statutory reserve obligations.[5] In recognition of the excessive burden sometimes imposed by statutory reserves, New York regulations allow insurers to use capital management tools, including captive reinsurance, to lessen the cost associated with such reserve obligations while still meeting the reserve obligations imposed by statute. *See* N.Y. Ins. Law § 1505 (permitting "reinsurance treaties or agreements" within a holding company system subject to the superintendent's approval); N.Y. Comp. Codes R. & Regs. tit. 11, pt. 125 (allowing insurers to take reserve credit for reinsurance ceded to an affiliate).

As Plaintiffs recognize, captive reinsurance transactions are highly regulated in New York and subject to an extensive regulatory regime. *See generally id.; see also* JA94-95, 109-111. New York's regulations permit the cedant insurer to take a "reserve credit" for risks ceded to an affiliate captive reinsurer, if, among other things, the captive obtains an irrevocable LOC as collateral for its obligations. JA94-95, 110.

The LOC is from a third party, typically a bank, and extends on ordinary commercial terms. JA110. As Plaintiffs allege, a guarantee from the reinsurer's parent may be used to secure the third party LOC. JA114. However, well-

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[5] *See* JA180, 182, 199-202 (explaining that captive reinsurance lowers policy prices). Like the District Court, this Court is free to consider exhibits to the Complaint. *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995).

established corporate boundaries, and New York Insurance Law, assure that each company is responsible for the risk that it assumes. *See* JA109 (explaining that "cedant life insurers are ultimately responsible for paying even reinsured policyholder claims"); s*ee also generally* N.Y. Ins. Law § 7401 *et seq*.

Accordingly, in the event that the parent company comes under financial strain and cannot make good on its guarantee, the parent cannot unilaterally dip into the insurance company (in these cases MLIC) without DFS's approval. *See generally* N.Y. Ins. Law §§ 1501 *et seq.*, 7401 *et seq.* If DFS does not approve the parent dipping into the cedant insurer, ***the bank issuing the guarantee is stuck with the loss***. Thus, the transaction reflects a true transfer of risk. *See, e.g., Rent-A-Ctr., Inc. v. Comm'r of Internal Revenue*, 142 T.C. 1, *21-23 (2014) (parental guarantees did not negate the risk shift in the context of captive insurers).

New York's regulators have approved all of MLIC's captive reinsurance transactions with which Plaintiffs take issue. *See* JA178 (DFS prospectively recommending that state insurance commissioners consider whether to stop granting approval to captive reinsurance transactions). And, MLIC takes the reserve credit to which it is entitled under New York law. JA132. This is no surprise to regulators since the ability to take reserve credit is the very reason for the existence of the captive reinsurance regulatory framework.

B. The Debate Over Captive Reinsurance

Plaintiffs' lawsuits draw heavily from a DFS report issued in June 2013 entitled "Shining a Light on Shadow Insurance: A Little-Known Loophole That Puts Insurance Policyholders and Taxpayers at Greater Risk" (the "DFS Report"). *See generally* JA95. Critically, however, DFS did not conclude that any of the practices discussed or analyzed in that report are unlawful. Nor did it claim that MLIC or any carrier made "misrepresentations" or violated any disclosure laws. Instead, DFS recognized that insurance regulators regularly approve the very types of transactions at issue. JA178. DFS expressed the opinion that, at worst, insurers are taking advantage of a "loophole" in insurance regulations that allows the ultimate parent company to guarantee the obligations of the captive reinsurer without "good" disclosure to New York regulators. JA156, 174-177.

In addition, in the more than three years since issuing the DFS Report, DFS has not insisted that MLIC or any other insurer make any "corrective" disclosures -- and has not alleged that MLIC's policyholders (or any other company's policyholders) have been harmed in any way whatsoever. The DFS Report is prospective in nature -- a policy piece that includes recommendations to address potential risks and for additional future disclosure requirements relating to captive reinsurance.

Since the Report issued, New York has made some modest and conservative changes to its regulations. For example, New York adopted ***new*** rules that require the disclosure by licensed life insurers of parental guarantees and other information relating to captive transactions within the insurer's holding company system, which is a clear signal that such disclosures were not previously required. *See* JA268. Thus, New York's "exacting standards of . . . disclosure in connection with insurance and reserves" continue to evolve, and prior to 2013, New York did not require the disclosures Plaintiffs allege are "missing" in MLIC's Annual Statutory Statements. JA101; *see also* JA93, 96, 129-130, 132-134, 137.

DFS also recognized the redundancy and burden of the conservative statutory reserve requirements by *reducing* in 2014 and 2015 the amount of reserves for basic term-life insurance by 30 to 35 percent, and for universal life policies with secondary guarantees by as much as 15 percent.[6] The effect of such reductions -- which acknowledged that New York life insurers had reserve

[6] *See* JA269-272. The Court may consider these letters as well as MLIC's ratings and MLIC's and MetLife, Inc.'s public disclosures, because they are publicly available and are either referenced and integral to the Complaint and/or because there can be no reasonable doubt about their authenticity. *See* Fed. R. Evid. 201; *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

requirement *in excess of what prudence dictates* -- was to disincentivize the use of captive reinsurance, not prohibit it.[7]

Similarly, as MLIC reported to the District Court, none of the rating agencies that Plaintiffs suggest were duped by MLIC changed MLIC's financial ratings in the almost two years between the filing of Plaintiffs' complaints and the issuance of the DFS Report that purportedly "shone a light," JA95, on MLIC's allegedly clandestine practices:

MLIC Financial Strength Ratings, 2010-2015

	2015	2014	2013	2012	2011	2010
A.M. Best Company	A+	A+	A+	A+	A+	A+
Moody's Investors Service	Aa3	Aa3	Aa3	Aa3	Aa3	Aa3
Standard & Poor's	AA-	AA-	AA-	AA-	AA-	AA-
Fitch Ratings	AA-	AA-	AA-	AA-	AA-	AA-

Plaintiffs also tacitly admit -- though fail to highlight -- that MetLife, Inc. and MLIC made voluntary disclosures concerning their captive reinsurance arrangements and, in particular, the existence of parental guarantees and "hollow

[7] This decision by New York contrasts starkly with the DFS Report, and takes New York down an alternative policy path -- one advocated by other insurance regulators who have disagreed with the DFS Report's conclusions and support instead "Principle Based Reserving" which would update the excessive statutory reserve requirements for life insurance and lessen the need for capital management tools to meet them. JA 273-285; *see also* JA 286-294.

assets," *before* the DFS Report was issued and *before* DFS changed its regulations requiring such disclosures. *See, e.g.,* JA351-381.

V. Summary of Argument

Plaintiffs' claims of remote, hypothetical injury fail to meet the irreducible constitutional minimum of an injury in fact and are thus insufficient to confer standing under Article III. Three separate District Court judges so held, in each of the four cases, consolidating twelve separate Complaints, that are subject to these appeals. This Court should affirm the District Court rulings in full.

As to MLIC, Plaintiffs ask this Court to allow them to proceed on claims that they are entitled to the return of *all* premiums they paid for life insurance and annuity coverage from MLIC -- at least *$40 billion,* considering only the putative life insurance classes Plaintiffs seek to represent -- insurance that they undeniably have received, and as to which they assert no tenable claim that their contracts have been breached or are impaired. Plaintiffs' alleged justification for this bonanza rests solely on the conjectural assertions that MLIC misrepresented its financial strength by and through its use of captive reinsurance transactions -- transactions that *undeniably are permitted by law*, *specifically approved by New York regulators*, and that *met all disclosure requirements* of New York's "exacting" regime.

Simply put, Plaintiffs have not been wronged and their cases fail at the threshold. None of the ever-changing theories that Plaintiffs have put forward in support of Article III standing meet their burden to show a distinct and palpable injury that is "concrete and particularized," "actual or imminent, not conjectural or hypothetical," and both fairly traceable to Defendants' conduct, and subject to redress by a favorable decision. *See generally Spokeo, Inc. v. Robins,* 136 S. Ct. 1540 (2016)*, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). To the contrary, Plaintiffs lack any plausible assertion that have been harmed by any conduct attributable to MLIC.

In the District Court, Plaintiffs argued, in essence, that they did not need to show concrete injury, contending that a violation of New York Ins. L. § 4226 itself purportedly effects a deprivation of a statutorily-created right. Now, on appeal, after realizing that their initial plan to escape the requirement of injury cannot succeed under the law, they revert to two additional theories. None of them work.

The "Heightened Risk" Theory

Plaintiffs' lead argument on this appeal is that they have pled injury in fact, because they own contracts on which there is an "increased risk of nonpayment," which they attribute to MLIC having eluded the requirements for mandatory state reserves by taking advantage of loopholes, "without proper disclosure." Pl.Br. 25-27.

This theory amounts to nothing more than a subjective and remote suggestion that MLIC might be unable to pay their benefits at some unknowable time in the future, due to a hypothetical and extremely attenuated future perfect storm of events that could, in theory, effect some or all of them. The specter of "threats" or "increased risk" must be far more tangible and certain than what Plaintiffs allege in this case, for it to come anywhere close to the minimum required for Article III standing.

Moreover, even were this Court to credit the conjectural amplified risk than Plaintiffs claim, it is neither fairly traceable to the purported nondisclosures over which Plaintiff sue: it is the captive reinsurance transactions themselves and/or allegedly inadequate collateral behind them -- not the nondisclosure -- that creates the purported heightened risk. Nor could the relief that Plaintiffs are seeking, namely the return of all premiums paid, redress their claimed injury. Instead that drastic claimed remedy would *itself* create risk for policyholders of a far greater magnitude than any remote reinsurance transaction possibly could.

The "Less Valuable Policies" Theory

Plaintiffs next theory, new to this appeal, is that their policies are less secure than MLIC represented them to be, due to captive reinsurance practices. This is either (a) simply a different way to articulate their "heightened risk" theory, or (b)

a claim that Plaintiffs "overpaid" for their products, which purportedly are worth less than represented because of a "hidden defect."

This too fails as a basis for Article III standing. Nothing whatsoever about Plaintiffs' contracts has been compromised -- they offer no less protection, no different benefits, and no different pricing than at the time of purchase. Wholly unlike the product defect cases that Plaintiffs attempt to analogize, their insurance contracts are not dangerous and they are not worthless; they represent intact promises that are not at any real risk nor causing Plaintiffs any injury whatsoever. In short, they have received exactly what they paid for. To the extent that this theory is simply a revival of the previously abandoned claim that Plaintiffs overpaid premiums, their own Complaints plead them out of court by showing that captive reinsurances actually reduces premiums; it does not increase them.

The "Right to Truthful Information" Theory

Plaintiffs' last theory conflates a remote, alleged legal violation with "deprivation" or "injury-in-fact." The fact that a statutory violation can support a claim of injury that confers standing does not mean that it automatically gives rise to an actual concrete and particularized injury in each instance to satisfy Article III. Indeed, all of the Supreme Court and Second Circuit decisions that address this issue so recognize. And as the Supreme Court just reemphasized in *Spokeo*, that Congress *can* elevate previously unrecognized "concrete, de facto injuries" to

legally cognizable injuries *does not mean* that a plaintiff with non-concrete (not "actually existing") injuries has standing to sue under Article III.

The cases that Plaintiffs invoke do not recognize a blanket right to information, but rather found actual injury where plaintiffs sought out information to which they had a right, were denied that information, and *then* had concrete, non-remote, non-hypothetical and individual, particularized injuries to which they could point as a result. The factual allegations in this case are not remotely similar.

Moreover, Plaintiffs' general refrain that they have a right to full and accurate disclosures does not square with either the language or the case law under the specific statute upon which they base their claims, N.Y. Ins. L. § 4226, nor the facts they present. This law provides a cause of action only to a "person aggrieved," to obtain a remedy for one's "own use and benefit" in the context of a "knowing," i.e., purposefully deceptive, violation. As with other traditional misrepresentation laws, a claim is actionable only when the plaintiff is aware of a knowing misrepresentation made to them, causing injury as a result of the defendant's conduct. Here, Plaintiffs do not and cannot credibly claim to be personally harmed by an alleged nondisclosure of information that they did not seek out, in materials provided to regulators that they did not see or know about, on a topic that they do not allege that any of them individually cared about. In short, there is no actual injury here, just a bare plea of an alleged statutory violation.

For these reasons, as more fully set forth below, this Court should affirm the orders of the District Courts dismissing Plaintiffs' claims for lack of standing.

VI. Argument

A. Plaintiffs Bear the Burden of Showing Injury in Fact: A *Concrete and Particularized* Harm that is *Actual or Imminent*, *Fairly Traceable* to MLIC's Alleged Conduct and *Redressable* By Ruling

"Standing is the threshold question in every federal case, determining the power of the court to entertain the suit." *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008) (citations and quotations omitted). The " 'irreducible constitutional minimum' " of standing requires a plaintiff to establish an " 'injury in fact' "—the " 'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Lujan*, 504 U.S. at 560).

Standing also requires that each Plaintiff demonstrate that he/she suffered "a causal connection between the injury and the conduct complained of;" and that it "be likely, as opposed to mere speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotations and citations omitted); *see also* SA36 (quoting *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187 (2d Cir. 2013). " 'The requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.' " SA36 (quoting

Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009)). "Further, the ' "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.' " *Id.* (quoting *Lujan,* 504 U.S. at 563).[8]

As the United States Supreme Court repeatedly has held, " 'threatened injury must be *certainly impending* to constitute injury in fact,' and . . . '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147-48 (2013) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Likewise, speculative injuries based on "attenuated economic causality" do not suffice. *Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 14 (2d Cir. 1980).

As discussed in detail below, Plaintiffs' theories require an extremely attenuated and unlikely chain of highly speculative events before there is any possibility of harm -- a far cry from the requirement that injury be "certainly impending." *See Clapper*, 133 S. Ct. at 1147-48.

B. Plaintiffs' Claims of a "Concrete Injury" from the "Increased Risk of Nonpayment" Fail Article III

Plaintiffs' lead with the argument that "the complaints allege injury in fact" because they purportedly "face an increased risk of nonpayment." *See* Pl.Br. 25-

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[8] As Judge Cote noted, the fact that this is a proposed class action does not change standing requirements. SA36.

27. They claim that MLIC "circumvented state-mandated reserve requirements," "without proper disclosure," Pl.Br. 25, and that this is "concrete injury" because "[t]he NYSDFS found that the insurance companies' shadow insurance transactions had 'put[] insurance policyholders and taxpayers at greater risk.' " Pl.Br. 27 (quoting JA156).

1. The District Court Correctly Held that Plaintiffs' Asserted "Injury" Was Remote, Speculative and Hypothetical and Failed to Show an Injury-in-Fact

The District Court properly ruled that there is *no* " 'real or impending injury arising from [MLIC's] practices and nondisclosures,' " and thus " 'Plaintiffs' conclusory allegations of current risk' " from non-payment do not suffice. SA39 (quoting *Ross* at *10). The District Court first correctly observed that Plaintiffs are still policyholders, SA27, and Judge Furman found that "Plaintiffs received what they bargained for—life insurance." SA17. Plaintiffs do not contend that MLIC breached its contractual obligations to them and do not suggest or project an imminent future breach. Instead, their claim is merely a subjective concern that MLIC *may* be unable to pay their benefits at some unknowable time in the future.

While the law recognizes that "the risk of real harm" can satisfy the requirement of concreteness, the specter of threats or increased risk must be *far* more tangible and certain than alleged here. *See Spokeo*, 136 S. Ct. at 1549. As

the District Court's *Robainas* decision aptly put it, " '[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative … that the injury is certainly impending.' " SA40 (quoting *Clapper*, 133 S. Ct. at 1147). "Plaintiffs' claim that MLIC may in the future be unable to meet its obligations is too 'hypothetical, speculative and uncertain' to satisfy Article III." *Id.* (quoting *Ross* at *10).

2. Plaintiffs' Have Alleged Nothing More than Conjecture as to the Possibility of Future Harm

Although Plaintiffs vigorously protest the District Court's conclusion that their alleged risk rests on a "speculative chain of possibilities," Pl.Br. 29, they offer nothing that ties their assertions of "risk" to any imminent harm. Rather, their allegations rest entirely on what they claim is the "official statement of a government agency," Pl.Br. 30 (citing JA156). But that agency, DFS, simply issued a prospective policy report providing its perspective on certain captive reinsurance practices. *See supra* at 16-18. DFS took no action against MLIC and only later introduced new and modest *future* disclosure requirements. Thereafter, DFS tellingly *reduced* the "reserve buffer" that Plaintiffs claim was "insufficient." *See id*. This reduction acknowledges that DFS's prior reserve requirements were unnecessarily high. Nothing in the DFS Report or its subsequent actions evidences

a determination of harm that rises to the level of substantial, imminent risk, nor any "official statement of a government agency" supporting harm.

It is clear from the pleadings that the *possibility* of policyholders *ever* facing the injury speculated by Plaintiffs is remote and hypothetical. As Plaintiffs acknowledge, MLIC's affiliate reinsurers are backed by irrevocable third party LOCs that ensure payment to MLIC in the unlikely event such reinsurers are unable to do so. *See* JA110 (conceding the existence of third party LOCs). MLIC could draw upon the LOCs, regardless of its parent MetLife, Inc.'s ability to make good on its parental guaranty.

Injury becomes even more remote and speculative when one considers that MLIC's parent has assets that are ***750 times*** the total amount of the alleged exposure on its captive reinsurer guarantees, as the record before the District Court showed. MLIC's affiliated reinsurers allegedly had $1.18 billion in LOCs that were backed by "contractual parental guarantees" from their and MLIC's ultimate parent, MetLife, Inc. *See* JA165. Yet in its 2013 Annual Report, MetLife, Inc. reported assets of $885 billion,[9] certainly a significant cushion. Further undermining Plaintiffs' claims of injury from financial "risk," MLIC's ratings did

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[9] JA320-322. While certain of these assets relate to insurance operations of subsidiaries from which MetLife, Inc. could not unilaterally take funds to support its guarantee obligations, MetLife, Inc. clearly has ample available assets to cover its guarantee obligations.

not change after the DFS Report-- *i.e.*, the rating agencies attributed no financial concern to either the DFS Report or its purportedly "new" facts. *See supra* at 18.

Thus, as the District Court found, it would take an extremely attenuated causal chain -- dependent on a financial meltdown -- to raise the possibility of MLIC's policyholder claims going unpaid. As stated above, at least eight distinct remote, hypothetical, and future events would ***all*** have to occur, ***and*** one has to assume that DFS stands by and watches (and that Plaintiffs remain insured). *See supra* at 3-4; JA115-117. Plaintiffs do not and cannot allege that *any* of these potential future actions by MLIC, its affiliated reinsurer, its parent, or a third-party bank is imminent or even probable.

Even if the "threatened" injury that Plaintiffs hypothesize were possible, Plaintiffs offered no facts rendering this conjectural future injury "certainly impending." *See* JA106, 115. Instead, Plaintiffs allege suffering from an increased risk of an abstract injury, "at an unknown point in the future" -- fatally placing any claimed injury solely "in the realm of the hypothetical." *Hammond v. The Bank of New York Mellon Corp.*, No. 08 CIV. 6060 (RMB) (RLE), 2010 WL 2643307, at *6-7 (S.D.N.Y. June 25, 2010) (citations and quotations omitted).

Moreover, this hypothetical harm is in no way traceable to the conduct over which Plaintiffs have sued -- which is for lack of disclosure. The purported harm

they posit would be from the transactions themselves, which are indisputably legal and not what Plaintiffs challenge.[10]

This academic exercise in the conceivable is nothing more than the type of subjective, unfounded and remote fear that courts repeatedly have held fails Article III standing. *Clapper*, 133 S. Ct. at 1151 (plaintiffs "cannot manufacture standing" that is "based on their fears of hypothetical future harm that is not certainly impending"); *see also Wiggins v. Justices of Supreme Court of New York, App. Div., Second Judicial Dep't*, 434 F. App'x 2, 4 (2d Cir. 2011); *Green Island Power Auth. v. F.E.R.C.*, 577 F.3d 148, 160-61 (2d Cir. 2009); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, 175 F. Supp. 2d 593, 609-10 (S.D.N.Y. 2001); *see generally Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016) (rejecting on standing grounds a claim by a holder of federal public debt challenging the constitutionality of the Debt Limit Statute, commenting that certain

[10] As AXA Equitable sets forth in its brief in detail, injury must be "fairly traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560. Accordingly, "[i]f the injury is caused by matters other than the acts complained of, the injury does not support standing," 13A Charles Alan Wright, Arthur Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.5 (3d ed. 2016), because it is not "attributable to" misconduct by the defendant, *Garelick v. Sullivan*, 987 F.2d 913, 919 (2d Cir. 1993). Plaintiffs have advanced no theory as to how Defendants' allegedly reduced ability to fulfill their obligations to policyholders is traceable to any alleged nondisclosures. Judge Furman therefore correctly ruled that there is no "causal connection" between the challenged conduct and any economic harm suffered by virtue of Plaintiffs' purchasing decisions. SA18 n.2; *see also* AXA Br. Arguments I.C and II.B.

of plaintiff's theories of injury were "entirely conjectural" and predicated upon an "extended chain of contingencies").

3. Plaintiffs' Analogies to Cases Where Real Risks of Harm Could Support Standing Do Not Save Their Claims.

Plaintiffs' claim that "the financial risk at issue here is closely analogous to harms that this Court has recognized to be sufficient to confer standing" is just flat wrong. *See* Pl.Br. 30. In all of Plaintiffs' so-called analogous cases, a very real injury was foreseeable, supported by non-conclusory facts, and generally only one step away from being realized. Furthermore, there were additional aspects of injury such as: (1) the plaintiff had *already suffered* actual economic or emotional injury as a result of the risk, and/or (2) the plaintiff was at the time of suit deprived of a bargained-for contractual right. Plaintiffs' allegations in the instant cases lack *any* such facts, and certainly none that rise to the level of supporting constitutional standing.

Even a brief review of the allegations in the cases Plaintiffs cite illustrates the dramatic distinctions between this case and cases where standing was upheld. For example, in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), Alfalfa growers challenged the de-regulation of genetically engineered alfalfa. The Supreme Court found that the growers established a substantial risk that their alfalfa would be infected by the genetically engineered genes, and that risk actually

injured the growers *economically*, and *presently*, because they needed to both conduct testing in order to continue currently marketing their products as natural and to take prompt steps to prevent contamination. *Id*. at 153-55. The Supreme Court recognized a non-contingent economic injury caused by the risk of contamination (namely, actual financial investment to mitigate the risk). There was also a single-step causation to a materialized risk (*i.e.*, further injury if contamination occurs).

In *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003), this Court recognized a challenge to a USDA regulation which allowed downed livestock to be sold as human food. This Court did not blanket hold for all purposes, as Plaintiffs imply, that *any* level of "enhanced risk generally qualifies as sufficient injury to confer standing." *Id*. at 634, Pl.Br. 28 (citing *Baur*, 352 F.3d at 633).

Rather, the Court held on the factual record in that case that the risk rose to the level of actual harm, since a moderate risk of a deadly disease with no known cure or treatment, specifically recognized by government agencies, where the risk arose directly from the defendant's policy, was not remote and illusory but instead sufficient to confer standing. *Id*. at 637. Importantly, this Court demanded that plaintiffs establish "a direct risk of harm which rises above mere conjecture," and concluded that, while "by nature probabilistic," an "unreasonable exposure to risk

may itself cause cognizable injury." *Id*. at 634, 636 (citations and quotations omitted).

The present case is far afield from *Baur*, where the probability of injury was alleged to be supported by science, and directly traceable to the challenged policy -- human consumption of downed meat leading to illness. Similarly, in *Mountain States Legal Found. v. Glickman*, the D.C. Circuit, noting a factual affidavit and an environmental impact statement showing "an increased risk of catastrophic wildfire," concluded that the increased risk of fire -- which was one causal-step away via an errant lightning strike -- was a cognizable injury. 92 F.3d 1228, 1234-35 (D.C. Cir. 1996).

Plaintiffs' cases involving a threat of financial injury from lost collateral are equally unavailing because, unlike here, bargained for contractual rights were compromised and injury was then-present, not just certain and impending. In *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004), for example, a lender sued debtor companies for fraud and RICO violations after they diluted and eventually destroyed the lender's specific collateral backing the transactions. The lender suffered a present and non-contingent injury since the allegation was that the bargained for collateral was presently worthless. *Id*. at 55.

Here, the only claim is that back-up reinsurance is purportedly at risk, and only because of a speculative, attenuated hypothetical chain of events, not likely

ever to materialize. This is wholly unlike the situation here where plaintiffs have lost no contractual rights and will not suffer any loss absent utterly speculative failures of numerous buffers, reinsurance, and irrevocable third-party guarantees.

Plaintiffs' cases from other Circuits involving a loss of collateral likewise do not help them. *See Constellation Energy Commodities Grp., Inc. v. Fed. Energy Regulatory Comm'n*, 457 F.3d 14, 20 (D.C. Cir. 2006) (purchaser of energy suffered injury when it lost its right to collateral guaranteed by the relevant pricing document and would be less able to recover refunds without this means of seeking redress for unreasonable rates); *In re Paxton*, 440 F.3d 233, 236 (5th Cir. 2006) (mortgagee had standing to challenge sale that would have stripped it of its collateral).[11] Plaintiffs offer nothing like the allegations present in these cases.

Other decisions cited by Plaintiffs likewise demand palpable, non-theoretical and non-conjectural harm before recognizing standing. The courts permit cases to go forward only where based on a far stronger factual foundation, and where either living with a threat caused plaintiffs an *actual and present injury,* or actual contract

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[11] Plaintiffs also cite two cases that held that a defendant's intent to deprive a bank of accurate information was sufficient to sustain a fraud conviction. *See United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998); *United States v. Dinome*, 86 F.3d 277 (2d Cir. 1996). Neither case is a standing case -- both dealt with challenges to jury instructions regarding the *mens rea* of a fraud defendant. Nonetheless, each financial institution suffered an immediate harm from being presented with false financial information: an inability to allocate funds with full and accurate information knowledge.

rights were impaired. *See New York Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003) (uncertainty about the threat of health risks from increased pollutants caused plaintiff "personal and economic harm"); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,* 204 F.3d 149, 160 (4th Cir. 2000) (defendant's pollution of a water source endangered downstream uses and caused plaintiff a present injury); *Johnson v. Allsteel, Inc*., 259 F.3d 885, 890 (7th Cir. 2001) (plan participant suffered a present injury when his employer amended a benefit plan because he lost clear contractual rights, and would have to purchase additional insurance to regain those rights).

Plaintiffs here have no such facts. As illustrated above it would take an attenuated series of hypothetical and speculative events, many outside of MLIC's control, to create any *risk* whatsoever, let alone manifest injury.[12] *See supra* at B.2.

C. Plaintiffs' Claims of Concrete Injury Due to "Less Valuable Policies" Fail to Satisfy Article III

Plaintiffs make a new argument on appeal that their insurance/annuity products are "less valuable" because they are allegedly "less financially secure than [the companies] represented them to be." Pl.Br. 35. This argument was not offered in the District Court or in pleading. It is neither supported or supportable.

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[12] Plaintiffs have not alleged that living with the threat of that speculative injury is causing them any present injury.

First of all, Plaintiffs make no allegations in the Complaint that their policies from MLIC were "less valuable." The closest Plaintiffs come is their allegation that they had paid "inflated premiums" due to captive reinsurance. JA149. Judge Cote disposed of this allegation of overpayment, ruling that it was merely a conclusory assertion, with no plausible basis in fact. SA39. Instead, Plaintiffs' Complaint supported the *contrary* conclusion, since they attach and rely upon a study finding that captive reinsurance *lowers* premium prices.[13]

Plaintiffs now re-invent their argument to suggest that there is something defective about the in-force contracts that they purchased, attempting to analogize this case to cases involving products with latent defects. Pl.Br. 40-41. The analogy fails at the outset, most basically because it is not tied to the Complaints' allegations of wrongdoing. The Complaints in this case do not allege that the policies were defective -- and in fact, as Judge Cote observed, Plaintiffs are policyholders receiving exactly what they paid for. *See* SA27.

Nothing whatsoever about Plaintiffs' contracts is compromised -- they offer no less protection, no different benefits, no different pricing. Their Complaints simply allege that MLIC failed to include disclosures, in documents that Plaintiffs never read or knew about. Any loss in value, in addition to being entirely

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13 *See* JA180, 182, 199-202.

conjectural, hypothetical, and remote (as discussed above), is unrelated to this failure to disclose. Cases that do not even involve failures to disclose, but rather address allegedly defective products, are particularly inapt.[14] *See In re Aqua Dots Products Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011), *Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007); *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913 (N.D. Cal. 2012).

In any event, the products at issue are in no credible sense "less valuable." Plaintiffs bought insurance and annuity contracts, the value of which is derived from MLIC's contractual obligations and promises. All of the promises are intact and there is no plausible allegation in this case that the products Plaintiffs purchased are anything other than *exactly* what they were promised. There is no contractual breach alleged. Plaintiffs received and continue to receive all benefits of the products purchased. And even if an extremely speculative, hypothetical, and attenuated chain of events occurred, and MLIC and its affiliates collapsed financially, Plaintiffs would still receive their promised performance of claim

[14] Plaintiffs cite one case where the Ninth Circuit found plaintiffs had standing because they overpaid for houses as a result of a deceptive marketing strategy. *Maya v. Centex Corp.*, 658 F.3d 1060, 1065 (9th Cir. 2011). But in that case, the plaintiffs alleged both actual injury in overpayment, and detrimental reliance: "[i]f Defendants had made such disclosures, Plaintiffs would not have purchased the houses from Defendants and/or [sic] would not have paid an inflated price for the house." *Id.* Plaintiffs have alleged nothing of the sort, and cannot tie any injury to the alleged deception.

payment from the third party irrevocable LOC's backing the captive's obligations. The notion that the promise of future payment "is necessarily worth less when it is issued by a financially weak institution than when it is issued by a strong one," Pl.Br. 22, is not only circular but entirely inconsistent with Plaintiffs' allegations and the facts that they admit.

Later in their brief, Plaintiffs rephrase this "less valuable" theory of injury, claiming that "they paid more for the policies than the policies were worth." Pl.Br. 40. This argument offers no greater help. The Complaint offers no detail on what the policies were worth, how exactly they were overpriced, or even in general terms, how policies are valued.[15]

Without such allegations, Plaintiffs are asking this Court to engage "in hopeless speculation concerning the relative effect of" captive reinsurance on the market for life insurance and annuities when "countless other market variables could have intervened to affect those pricing decisions." *Reading Indus., Inc.*, 631 F.2d at 13–14. Such speculation is inappropriate here. And this Court does not

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[15] Plaintiffs point to numerous allegations in the brief that they do not tie to MLIC. *See, e.g.*, Pl.Br. 41-42. The allegations in Plaintiffs' Complaints could hardly be thinner or more conclusory. The entire allegation of the *Intoccia* Plaintiffs on this point is: "If Defendant's financial condition had been reported accurately, Defendant's Guaranteed Benefits Riders would have been priced lower. Plaintiffs and the Class have therefore paid inflated premiums for Guaranteed Benefit Riders as a direct result of Defendant's conduct described in this complaint." JA526, repeated at JA535. No factual support is offered.

need to speculate. The Koijen & Yogo study, which Plaintiffs adopt by attaching it to and incorporating it into their Complaints, found that captive reinsurance *lowers* premiums -- so their own pleading undermines the implausible notion that Plaintiffs paid more than the policies were worth.[16]

It is disingenuous for Plaintiffs to suggest that there is something akin to a drop in the price of a security at issue here. Securities cases, where products are priced on an open market, and suffer decreases in actual market value because of a public downgrade, have absolutely zero to do with the availability of ***contractual promises*** in a life insurance policy. *See CMFG Life Ins. Co. v. RBS Sec., Inc.*, 799 F.3d 729, 740 (7th Cir. 2015) (explaining the importance of the market for securities to the dispute). In *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, the plaintiffs suffered an injury in the form of a diminution in the price at which they could dispose of securities after revelations that the securities

[16] *See* JA180, 182, 199-202. That the Koijen and Yogo study on life insurance did not specifically address annuities is of no help to Plaintiffs in the annuities cases. The authors, on whom the annuities and life Plaintiffs all rely, concluded that captive reinsurance reduces premiums because it frees up capital -- and thus reduces the cost to the company of providing insurance. JA193, 202. The same reasoning (and the effect of freeing up of capital), would apply equally to the use of captive reinsurance in the context of variable annuity contracts with guaranteed benefit riders. That the *Intoccia* Plaintiffs cite the Koijen and Yogo study to support their Complaint implicitly concedes this analogy. JA481, 514.

had an increased risk profile caused ratings agency downgrades. 693 F.3d 145, 166 (2d Cir. 2012).

The drop in value was plausible because plaintiffs alleged that third parties were willing to pay less for the securities. *Id.* In this case, Plaintiffs have not even alleged the existence of a secondary market for their products, let alone an attempt to sell their products or a drop in price of their products. Even more generally, Plaintiffs have not alleged that there were any downgrades of these products or even of any of the Defendant companies. And it is clear that the markets did not react at all to the DFS Report since MLIC's ratings remained exactly the same before and after its issuance.

This last minute theory that the products are "less valuable" is nothing but a red herring -- a way of re-stating Plaintiffs' speculative argument that they face an increased risk of non-payment. Given the contractual nature of the products at issue, the only reason Plaintiffs' products could be "less valuable" is that they are now exposed to a greater risk of non-performance (*i.e.*, non-payment). Plaintiffs admit as much, since this is the only explanation they offer. Pl.Br. 36. Indeed, their Complaint has no allegations concerning the value of their insurance products, yet is full of allegations concerning the purported hypothetical "risk" of non-payment. *See, e.g.,* JA116, 120, 124. There are zero facts pled to suggest that MLIC will not honor their contractual promises.

In short, Plaintiffs' unsupported conclusions that their policies and annuities were "less valuable" are implausible. There is no "defect" in contracts with in-tact promises to pay, let alone any so-called latent defects that relate to the Ins. L. § 4226 cause of action here, i.e., that stem from MLIC's purported "failure to disclose" details of captive reinsurance transactions in their statutory annual statements supplied to regulators, not customers.

D. Plaintiffs' Argument that New York Insurance Law § 4226 "Confirms That the Policyholders Have Suffered Concrete Injuries" Mischaracterizes the Law and Fails to Meet Article III

Plaintiffs' last attempt at articulating injury is to assert that they do not need to do so. They claim that the deprivation of their alleged statutory right under Ins. L. § 4226 to "disclosure of all material facts" when purchasing an insurance policy suffices, without more, to create standing here. Pl.Br. 44. They claim, in essence, that § 4226 affords an "enforceable right to truthful information," the general violation of which, they assert, confers Article III standing in these specific Plaintiffs. Pl.Br. 46.

Plaintiffs' pronouncements ring hollow -- not only in light of bedrock Article III principles which demand actual injury that is both concrete and particularized -- but based on Plaintiffs' own admissions that they were not aware of the so-called "misrepresentations" over which they sue (which were not even

made to them, let alone relied upon by Plaintiffs or relevant to their purchase), and the requirements of the specific statute they invoke. That statute did not create a vaporous, abstract right to "truthful information," untethered to any actual aggrieved person (and a knowing violation by Defendant).

Plaintiffs' most fundamental mistake lies in conflating an alleged statutory violation with "injury-in-fact" under Article III. The fact that a statutory violation *can* confer standing in certain circumstances does not mean that it automatically gives rise to an actual injury-in-fact in each instance to satisfy Article III. Indeed, all of the Supreme Court and Second Circuit decisions that address this issue so recognize: Although Congress may recognize previously unaddressed wrongs and grant a statutory right of action, "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *accord Spokeo*, 136 S. Ct. at 1547-48.

The Supreme Court's recent decision in *Spokeo* further guides district courts on what constitutes "injury in fact" in the context of a purported statutory violation. The Court in *Spokeo* reversed the Ninth Circuit's conclusion that an alleged violation of the Fair Credit Reporting Act ("FCRA") was, without more, an Article III "injury in fact." The Court ruled that "[a] 'concrete' injury must be 'de facto'; that is, it must actually exist," as well as traceable to the defendant and plausible pled. *Spokeo*, 136 S. Ct. at 1548. The Court emphasized that the fact that Congress

can elevate previously unrecognized "concrete, de facto injuries" to legally cognizable injuries does not mean that a plaintiff with non-concrete (not actually existing) injuries has standing to sue under Article III. *Id*. at 1549. "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. *Article III standing requires a concrete injury even in the context of a statutory violation*." *Id.* (emphasis added). The Court thus remanded to the Ninth Circuit for a determination of actual injury--which would hardly have been necessary had Plaintiffs' view here been correct.

Plaintiffs attempt to avoid the fatal problem that they have not alleged any actual injury-in-fact by pointing to the statement in *Spokeo* stating that a "concrete" harm could be an "intangible" harm. Pl.Br. 44. This simply means that a harm need not be purely economic in nature to suffice for standing purposes. Of course here, Plaintiffs' purported harm plainly is economic in nature; characterizing it as "intangible" is just a rhetorical maneuver to attempt to get around having to establish injury-in-fact.

Nor can Plaintiffs find cover in the Supreme Court's statement that it is "instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in

English or American courts," *Spokeo*, 136 S. Ct. at 1549, Pl.Br. 44, to support their broad claim that courts have recognized an "enforceable right to truthful information," Pl.Br. 46. Even if there were any noneconomic "intangible" harm asserted here, "both history and the judgment of Congress play important roles" in assessing whether such a harm constitutes injury-in fact. *Spokeo*, 136 S. Ct. at 1549. Here, common law did not provide a basis for challenging purported untruths in the abstract without a tie to any personal harm, and certainly the New York legislature did not do so through this statute.

Plaintiffs' general refrain that they have a right to full and accurate disclosures does not square with either the language or the case law under the specific statute upon which they base their claims, N.Y. Ins. L. § 4226, nor their facts. As Plaintiffs themselves describe it, § 4226 is a consumer protection statute which guards the rights of trusting customers who wish to have accurate information when purchasing life insurance. *See* JA100-101, 104. The law provides a cause of action only to a "person aggrieved," to obtain a remedy for one's "own use and benefit" in the context of a "knowing," *i.e.*, purposefully deceptive, violation. Section 4226 -- like traditional misrepresentation laws - is

only actionable when the plaintiff is aware of a knowing misrepresentation made to them, causing injury as a result of the defendant's conduct.[17]

Courts generally have allowed § 4226 cases to proceed only when insurers, or their agents, made direct misrepresentations to plaintiffs (who then relied on these misrepresentations to their detriment). In *Finkelstein v. Lincoln Nat. Corp.*, for example, the plaintiffs purchased a policy from the defendant because its agents had allegedly concealed the existence of more favorable competing policies. 107 A.D.3d 759, 761 (2nd Dep't 2013). Similarly, in *Dornberger v. Metropolitan Life Ins. Co.*, the plaintiffs alleged that they bought policies on the basis of an insurer's allegedly extensive and fraudulent marketing scheme that misled the plaintiffs about a host of issues, from the quality of the policies to the insurer's compliance with local regulations. 961 F. Supp. 506, 514 (S.D.N.Y. 1997). In *Unibell Anesthesia, P.C. v. Guardian Life Ins. Co. of Am.*, the insurer justified a premium increase by allegedly withholding the Medicare status of one of the plaintiff's

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[17] That New York did not intend that this statute become a vehicle to vindicate public rights is also clear from the fact that suit under § 4226 cannot be brought as a class action in the courts of the State of New York. *Goshen v. Mut. Life Ins. Co. of New York*, No. 600466, 1997 WL 710669, at *12 (N.Y. Sup. Ct. Oct. 21, 1997), *aff'd*, 259 A.D.2d 360 (1999), *aff'd as modified sub nom. Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330 (1999), *In re Empire Blue Cross & Blue Shield Customer Litig.*, 622 N.Y.S.2d 843, 850 (Sup. Ct. 1994), *aff'd sub nom. Minihane v. Weissman*, 226 A.D.2d 152 (1996). MLIC is not arguing that this bars suit in this federal court case under Federal Rule of Civil Procedure 23 -- but rather that honoring legislative intent makes clear that individual harm is statutorily required.

employees, which was claimed to have misled the plaintiff into believing its claims would exceed its insurance premium. 239 A.D.2d 248, 248 (1st Dep't 1997). In each one of these cases (and others like them), the plaintiff saw or heard the claimed misrepresentation that contained important facts on which the plaintiff allegedly relied in making coverage and payment decisions.[18]

Likewise, § 4226 necessarily contains an element of *causation*. One who purports to sue under a consumer protection statute cannot just identify a generalized societal wrong -- they must be injured by result of defendant's conduct. *See Weiner v. Snapple Beverage Corp.*, No. 07 CIV. 8742 (DLC), 2010 WL 3119452, at *6 (S.D.N.Y. Aug. 5, 2010), *see generally Unibell Anesthesia, P.C. v. Guardian Life Ins. Co. of Am.*, 256 A.D.2d 252, 252-253 (1st Dep't 1998).

Viewed in the light of the harm this statute sought to address, Plaintiffs' argument that they suffered injury-in-fact based on the purported violation they allege does not withstand scrutiny. As an initial matter, Plaintiffs admittedly did not read, see, or even know about any statement at all in MLIC's Statutory Annual Statements to regulators, the alleged document that they claim omitted information -

[18] One case held that a § 4226 case survived a motion to dismiss where it was alleged than an insurer cooked its books and affirmatively misrepresented its financial condition to insurance regulators in order to obtain a rate increase. *In re Empire Blue Cross & Blue Shield Customer Litig.*, 622 N.Y.S.2d 843. Like the other § 4226 cases, this case is one of detrimental reliance, and also resulted in higher rates. The regulators approved the rate increases because of the insurer's allegedly altered financial figures. *See id.*

- and do not offer any allegation that a disclosure about the existence of parental guarantees backing a third-party LOC supporting a captive reinsurance arrangement would (plausibly) have influenced their insurance purchase, nor that the purported omission resulted in harm to them. Plaintiffs cannot credibly claim to be personally harmed by an alleged nondisclosure of information that they did not seek out, in materials provided to regulators that they did not see or know about, on a topic that they do not allege that any of them individually cared about. In short, there is no actual injury here, just an *ipse dixit* invocation of an alleged statutory violation.

Ignoring that the statute under which they claim to proceed does not purport to "elevate" a no-injury violation to a concrete harm (and *could not* do so under the Supreme Court's standing precedent), Plaintiffs resort to cases where "the denial of information required to be disclosed by statutes" supported standing. Pl.Br. 47. Those cases are far afield from the situation here.

Plaintiffs primarily rely on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), where the Supreme Court recognized the allegations of injury by a "tester" who suffered discrimination when trying to rent housing. While recognizing that the "actual or threatened injury required by Art. III" may exist by virtue of the invasion of a statutory right, the Court did not confer standing based on a violation of the statute alone as Plaintiffs suggest. *Id.* at 374 (quoting *Warth*, 422 U.S. at 500). Rather the Court recognized, under the facts of *Havens*, that the principal

plaintiff had been given inaccurate information on account of race *and was subjected to discrimination as a result* -- the exact injury that the statute at issue was intended to guard against. *Id.* at 373-74. *Havens* also recognized that a plaintiff could have standing if s/he could show that the defendants' steering based on race had deprived them of "the social and professional benefits of living in an integrated society"—benefits that the defendants did not dispute—and that the fair housing organization had standing because the defendants' practices "perceptibly impaired [its] ability to provide counseling and referral services for low- and moderate-income homeseekers," with a "consequent drain on the organization's resources." *Id.* at 376, 379 (citations and quotation omitted). Instead of writing injury-in-fact out of law, the *Havens* Court *embraced* the requirement that a plaintiff allege "distinct and palpable injuries that are 'fairly traceable' to" the defendant's conduct to meet the minimum Article III threshold. *Id*. at 376.

FEC v. Akins, 524 U.S. 11 (1988), addressed a situation where voters, who could not obtain information which they actively sought, and which they alleged was important to them for purposes of evaluating candidates for elected office, had standing. And in *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), the Court recognized standing where there was a failure to disclose information that had been specifically sought by plaintiffs in order to enable scrutiny of, and more effective participation in, aspects of the federal judicial selection process.

These cases did not simply recognize a "right to truthful information" -- or protect an interest -- but rather found *actual injury* where plaintiffs sought out information to which they had a right, were denied that information, and had concrete, non-remote, non-hypothetical, and individual, particularized injuries to which they could point as a result. The factual allegations in this case are nothing like these precedents.

Moreover, to suffice for Article III purposes, an injury must be "particularized" -- in other words, constitutional standing requires that the plaintiff "personally has suffered some actual or threatened injury." *See, e.g.*, *Spokeo* 136 S. Ct. at 1548 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). It does not suffice that injury be "undifferentiated" and that an alleged statutory violation simply exist in the world, without actually impacting the individual plaintiff. Critically, the Supreme Court's Article III precedents also recognize that the plaintiffs must actually and plausibly plead that they have *personally experienced* such a concrete and particularized injury-in-fact to have standing to sue, separate and apart from an alleged statutory allegation. *Id*.

Consistent with *Spokeo*, this Court's precedents recognize that only where a violation of a statute goes hand in hand with a distinct, palpable and non-theoretical injury-in-fact, can a statutory violation serve as a basis for Article III

standing. In *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170 (2d Cir. 2012), this Court considered a claim under Section 16(b) of the Securities Exchange Act, which provides a private right of action to issuers of securities to recover profits obtained from insider trading of those same securities on a *strict liability* basis. A Section 16(b) claim requires no knowingly culpable conduct by the defendant, has none of the elements of a consumer protection claim (*i.e.*, misrepresentation, materiality, causation, scienter), and allows only private enforcement -- no enforcement authority is conferred on the SEC. *Id.* at 174.

There was no dispute in *Donoghue* that a violation of that statute had occurred. Nonetheless, this Court did not find standing on the basis of a statutory violation alone: this Court recognized that the corporate issuer (and by extension, the derivative suit plaintiff) suffered distinct and very real injury in that case, since its reputation of integrity, as well as the acceptance and marketability of its stock, were damaged by insider trading, a serious breach of fiduciary duty. *Id*. at 177-78.

This Court in *Donoghue* further recognized that when "a plaintiff's claim of injury in fact depends on legal rights conferred by statute, *it is the particular statute and the rights it conveys that guide the standing determination*." *Id*. at 178 (emphasis added). Plaintiffs ignore that key part of *Donoghue's* analysis, pretending that (1) §4226 is a strict liability statute (rather than a consumer

protection statute, which they admit elsewhere, *see e.g.*, JA100-101, 104),[19] and (2) that they have Article III standing without being "aggrieved" or suffering harm from the alleged violation. Again, that is not what the statute purports to do, or what Article III jurisprudence allows.

VII. The District Court Had Numerous Alternative Grounds Upon Which to Dismiss the Complaints with Prejudice

The Orders of the District Court should be affirmed on the grounds detailed above. But in addition to the lack of Article III standing, there are numerous additional grounds for affirmance as follows:

A. Plaintiffs Fail to Allege Critical Elements of Their § 4226 Claim

Plaintiffs' sole claim against MLIC is that it violated § 4226, basing their Complaints on § 4226 (a)(4) and (d). But the facts alleged by Plaintiffs do not establish this claim as a matter of law. To state a claim, Plaintiffs must show:

- A ***material misrepresentation*** and/or ***misleading statement***, made *by MLIC*, to ***Plaintiffs***;
- That was ***known by MLIC*** to be false or misleading in violation of law;
- ***Concerning MLIC's financial condition*** or the ***legal reserve system*** upon which it operates;

[19] Section 4226 requires a "knowing" violation and therefore is not subject to strict liability construction for that reason alone. *Gordon v. Softech Int'l, Inc.*, 726 F.3d 42, 50 (2d Cir. 2013), as corrected (Aug. 1, 2013) (finding that statute is not subject to strict liability construction where, *inter alia*, it includes the term "knowingly").

- And that ***caused*** Plaintiffs to be ***aggrieved*** as a result.

See N.Y. Ins. Law § 4226(a)(4), (d). Plaintiffs' facts, even if true, fail to establish any of the core elements of this claim.

At the core of § 4226 is the requirement that Plaintiffs identify a specific material misrepresentation and/or a misleading statement made to them by MLIC about its financial condition or its legal reserve system -- in other words, an actual statement that they saw or heard. *See Phillips v. Am. Int'l Group, Inc.*, 498 F. Supp. 2d 690, 699 (S.D.N.Y. 2007) (dismissing § 4226 cause of action for plaintiff's failure to point to any specific statement made to them that was misleading).

Allegations of misrepresentation -- whether by affirmative misleading statements or by omission -- that are not tethered to any actual statement made by the defendant to a plaintiff do not suffice as a matter of law. *Cohen v. Hertz Corp.*, No. 13 CIV. 1205 (LTS) (AJP), 2013 WL 9450421, at *5 (S.D.N.Y. Nov. 26, 2013) (dismissing GBL §§ 349 and 350 claims because plaintiff failed to allege that he saw or heard any statement that " 'misled or deceived' him personally"). Plaintiffs do not allege having seen or heard ***any*** specific representations made by MLIC, impermissibly sidestepping the requirement that a plaintiff must, at

minimum, have been personally misled and be able to identify the statements that allegedly misled him/her.[20]

It is also dispositive that Plaintiffs do not allege that MLIC failed to disclose anything required by New York's extensive and "exacting" insurance disclosure regime, nor could they. Where, as here, (i) disclosures about captive reinsurance to DFS are governed by regulation and accompanying detailed instructions; (ii) there is no allegation that MLIC failed at any time to fully comply with New York's disclosure regime; and (iii) Plaintiffs complain about the lack of disclosure to DFS, but identify no misleading statements ever made directly to Plaintiffs themselves -- a § 4226(a)(4) claim cannot survive as a matter of law.

Moreover, Plaintiffs' complaints about purportedly missing disclosures in MLIC's Statutory Statements concern practices employed by its reinsurance and parent affiliates.[21] Plaintiffs do not point to any then existing source for an alleged duty to make such disclosures on behalf of an affiliate. Nor is there any reason why MLIC would think to make disclosures about the practices of its affiliates

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[20] MLIC does not concede materiality but accepts Plaintiffs' allegation for purposes of this appeal, as it did for the motion to dismiss below.

[21] Plaintiffs' principal complaint is that MLIC's Statutory Statements are misleading by omission. JA96. They charge that MLIC knowingly failed "adequately to disclose" parental guarantees, parental indemnification, two-step transactions, and hollow assets, and that the failures to disclose affiliates' practices caused it to misrepresent its financial condition and reserves. JA 140-141.

absent an express duty to do so. MLIC is a separate and distinct regulated entity, legally insulated from any impact of those practices.

Moreover, Plaintiffs acknowledge, but fundamentally ignore, that MLIC and MetLife, Inc. have made significant disclosures about captive reinsurance practices in their respective public filings. These disclosures not only contradict Plaintiffs' claims of "omission" but show that MLIC and MetLife, Inc. went above and beyond the then current legal disclosure requirements.

MLIC included numerous examples, which if nothing else, undermine the notion of "knowing" omission by MLIC with an intent to deceive policyholders about captive transactions. JA351-381; *Ross v. Lloyds Banking Group, PLC*, 546 F. App'x 5, 12 (2d Cir. 2013) ("Because Lloyds disclosed the critical fact that HBOS was dependent upon government assistance to meet its funding obligations, plaintiff cannot plausibly allege that defendants 'should have known that they were misrepresenting material facts' by not specifically identifying ELA as an HBOS funding source.").

Plaintiffs also cannot satisfy the requirement of § 4226 to show that MLIC knowingly misled them. The "knowing" requirement is built into the statute itself and is formidable. It distinguishes § 4226 from a strict liability statute and other statutory consumer protection claims where the defendant could potentially be liable irrespective of any fraudulent intent. *See Gaidon v. Guardian Life Ins. Co.*

of Am., 96 N.Y.2d 201, 209-10 (2001) (distinguishing GBL § 349 claims from common law fraudulent inducement, as, *inter alia*, GBL § 349 lacks statutory language requiring a "knowing" violation, outside of its treble damages provision which provision has been found available only for knowing, *i.e.*, purposeful wrongdoing).[22]

Yet, there are no facts pled supporting nefarious intent, only the *ipse dixit* statement that MLIC acted "knowingly." *See, e.g.,* JA138-142. Knowledge -- equivalent under § 4226 to the element of *scienter* in a fraud claim -- may not be pled by simply pointing to the obvious facts that MLIC knew that it was using captive reinsurance arrangements as a capital management tool or that it knew strong financial ratings could help sell policies to some people.

MLIC is a regulated entity, operating under a statutory regime governing captive reinsurance transactions, as well as an "exacting" statutory disclosure regime. There are no allegations that MLIC violated the specific DFS disclosure regulations nor that it did not receive regulatory approval. MLIC and MetLife, Inc. both made numerous disclosures over time, clearly not attempting to hide the details of the collateralization of captive transactions. The Complaints offer no

[22] Although MLIC has analogized § 4226 to GBL § 349 in certain respects, these statutory causes of action differ dramatically on this element of *scienter*, since § 4226 provides private relief only for a "knowing" violation, a significantly higher threshold than GBL § 349.

facts suggesting that MLIC "knowingly" could have misled Plaintiffs or had any wrongful purpose for omitting to disclose the reinsurance transactions of its affiliates, and for that reason fails to state a claim as a matter of law.

In addition, Plaintiffs cannot be aggrieved by a purported misrepresentation or misleading statement if not one of them was aware of the statements about which s/he complains. *See generally Weiner*, 2010 WL 3119452, at *6 (in the context of a GBL § 349 claim, "Only by showing that plaintiffs in fact paid more for Snapple beverages as a result of Snapple's 'All Natural' labeling can plaintiffs establish the requisite elements of causation and actual injury under § 349."). Plaintiffs assert only that an insurer's financial condition "is a material factor in the insurer's ability to market and sell their insurance products." JA134; *see also* JA121-122.

Not one Plaintiff alleges that s/he individually considered, reviewed, or saw any statements by MLIC concerning MLIC's financial strength or ratings or statements by any rating agencies. And for the same reasons that Plaintiffs cannot establish standing, they fail to state a claim that they have been "aggrieved" by MLIC's conduct. In addition, receiving a riskier policy than bargained for is not an injury cognizable under § 4226 -- undeniably a consumer protection statute -- because it is *not an injury distinct from the alleged deception*.

As with similar consumer protection statutes, the act of deception itself cannot serve as the injury. *See, e.g., Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56 (1999) (dismissing plaintiffs' § 349 claim which "sets forth deception as both act and injury."); *Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410, 415-16 (S.D.N.Y. 2004) (same). Plaintiffs here simply conflate "injury" with "deception," and again, Plaintiffs "overpayment" theory is hypothetical, remote, attenuated, and belied by the evidence embodied in their own Complaints.

B. The Complaints Fail Under the Primary Jurisdiction Doctrine

The issues Plaintiffs raise ultimately boil down to highly-technical and much-debated policy concerns, about which state insurance regulators have far greater expertise and which they are actively debating and addressing. The doctrine of primary jurisdiction promotes proper relationships between courts and regulatory agencies to ensure that these bodies do not work at cross-purposes. *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956); s*ee also Darbari v. Lenox Hill Hosp., Inc.*, No. 10 CIV. 5101 (DLC), 2011 WL 1226269, at *2-3 (S.D.N.Y. Mar. 24, 2011) (dismissing complaint on primary jurisdiction grounds). The doctrine is so important that the courts "must consider [it], even if it is not raised by the parties." *All Am. Tel. Co. v. AT & T, Inc.*, No. 07 CIV. 861 (WHP), 2009 WL 691325, at *3 (S.D.N.Y. Mar. 16, 2009).

This Circuit has identified two purposes of the primary jurisdiction doctrine: (1) to promote uniformity and consistency; and (2) to allow an agency to resolve issues in its specialized area of expertise. *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82 (2d Cir. 2006). To achieve these purposes, the Second Circuit has identified four factors to be analyzed:

> (1) whether the question is within the conventional experience of judges or involves technical or policy considerations within the agency's particular field of expertise;
>
> (2) whether the question at issue is particularly within the agency's discretion;
>
> (3) whether there exists a substantial danger of inconsistent rulings; and
>
> (4) whether a prior application to the agency has been made.

Id. at 82-83. Some courts also consider the risk of delay. *Id.* at 83, 90. All of these factors weigh in favor of this Court dismissing Plaintiffs' Complaints.[23]

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[23] MLIC also argued below in *Robainas* that, to the extent the district court were to find that Plaintiffs otherwise have stated a cognizable claim, their claims are time-barred. This would provide another independent ground supporting dismissal in that case. Actions brought pursuant to § 4226 are subject to a three year limitations period. *Dolce v. NW. Mut. Life Ins. Co.*, 272 A.D.2d 432 (2nd Dep't 2000); *Russo v. Massachusetts Mut. Life Ins. Co.*, 274 A.D.2d 878, 879-80, (3rd Dep't 2000), *rev'd on other grounds sub nom Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201 (2001). Though there is limited case law, the cases that have considered the issue have held that a § 4226 claim accrues, and the limitations period begins to run, when the policy was issued. *See Dolce*, 272 A.D.2d 432; *Russo*, 274 A.D.2d at 879. All of the *Robainas* Plaintiffs' claims are time barred because Plaintiffs' purchases occurred more than three years ago. The issue was not briefed in *Intoccia*, which was dismissed following an Order to Show Cause issued by Judge Cote subsequent to her *Robainas* decision. JA471-472, SA54.

VIII. Conclusion

For the foregoing reasons, as well as those set forth in AXA Equitable's brief, which MLIC adopts, MLIC respectfully requests that the Court affirm the Judgments below.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I, Sandra D. Hauser, counsel to Defendant-Appellee Metropolitan Life Insurance Company, hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,937 words, excluding the parts of the Brief exempted by Fed. R. app. P. 32(a)(7)(B)(iii). I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Time New Roman, 14-point font.

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