21-1830-cv

United States Court of Appeals

for the

Second Circuit

ANDREW NITKEWICZ, as Trustee of The Joan C. Lupe Family Trust and on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

– v. –

LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Defendant-Appellee Lincoln Life & Annuity Company of New York, a nongovernmental corporation, certifies that it is a wholly-owned subsidiary of The Lincoln National Life Insurance Company, which in turn is a wholly-owned subsidiary of Lincoln National Corporation. Lincoln National Corporation is a publicly held corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE ISSUE

Whether a New York Insurance Law statute concerning insurance "premiums" that are "actually paid" for "any period" of insurance applies to payments made into an interest-bearing account associated with a universal life policy, where:

- the policy explicitly provides that monthly deductions from the account are the only payments that purchase insurance and keep the policy in force one month at a time;
- in consideration of the payments into the interest-bearing account, the insurer undertook obligations that were separate from, and in addition to, insuring the risk of death;
- those payments into the interest-bearing account were made on an entirely voluntary basis;
- the policy owner's legal theory is unprecedented, inconsistent with the New York insurance regulator's published guidance, and would require courts to fashion rules regarding which portions of the payments apply to which periods of coverage; and
- the policyholder's demand would allow him to take benefits that he elected not to pay for,

simply because the universal life insurance policy uses the defined term "Planned Premium" to describe the voluntary payments at issue in the Complaint.

STATEMENT OF THE CASE

Plaintiff-Appellant Nitkewicz is trustee for a legal entity that owns a universal life insurance policy (the "Policy") issued by Defendant-Appellee Lincoln Life & Annuity Company of New York ("LLANY"). Universal life insurance combines life insurance coverage with an investment feature called a Policy Account. The Policy Account has a "Cash Value." JA326–27; *see also Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 342 (1999) ("Cash value life insurance combines 'pure' life insurance with an investment component that creates a potential accumulation of money in the policy."). LLANY credits interest to the Policy Account on a periodic basis, increasing the Cash Value. JA62, 65–66, 78.

On the first day of the Policy month, LLANY makes a monthly deduction from the Cash Value. JA78. Those deductions purchase insurance coverage for that month, and that month only. JA79 ("Monthly cost of insurance rates will be determined by [LLANY] based upon future expectations as to investment earnings, mortality experience, persistency, expenses, taxes, capital, and reserve requirements, and on rules and standards established by the Insurance Department of the state in which this policy is delivered or issued for delivery."); JA78 (computing the monthly deduction as "the cost of insurance and the cost of any additional benefits provided by Rider for the policy month," plus certain administrative charges); JA76 ("If on a Monthly

Anniversary Day the Cash Surrender Value is less than the monthly deduction due, Your policy will enter the grace period").

The deduction has two components, the "cost of insurance" ("COI") charge and "administrative charges." JA78. The COI charge is calculated as a function of the "net amount at risk" for the insurer—which "in simple terms, is based on the potential payout at the time of the insured's death." JA328. The COI charges generally correspond to the level of insurance coverage in terms of the amount of proceeds paid upon death; COI charges are higher when the Policy would have a higher total insurance payout upon death and lower when the Policy would have a lower insurance payout. *See* JA78–79.

If the Policy Account balance suffices to cover the coming month's charges, LLANY will make the deduction automatically, thereby extending insurance coverage for the coming month. JA78. Otherwise, the Policy will enter a grace period and ultimately lapse if the owner does not pay into the Policy Account "the minimum amount needed to continue th[e] policy"—namely, the amount of the monthly deduction. JA76; *see also* JA62 ("If the Policy Value, less surrender charge, less Debt (Cash Surrender Value) becomes so small that We cannot take an entire monthly deduction, Your policy may terminate; see, however, the Grace Period Provision.") JA75–76 ("The policy will terminate only if" certain conditions are met, one of which

is that the Policy Account value is "less than the monthly deduction due" and the ensuing "grace period ends.").

The Policy leaves payments into the Policy Account—whether, when, how, and how much—largely to the policyholder's discretion. JA62 (defining the term "Flexible Premium Adjustable Life Insurance," as the insurer's "generic name for universal life insurance"); JA62 ("'Flexible premium' means that You may pay premiums by any method agreeable with Us, at any time prior to the Insured's Attained Age 121 and in any amount subject to certain limitations."). Consistent with the goal of premium flexibility for the policyholder, the Policy also includes a "Planned Premium" feature. JA75. To use the feature, the owner simply makes a statement of when and how he intends to make deposits into the Policy Account. JA75 ("The Planned Premium is the amount of premium You intend to pay. The Premium Frequency is how often You intend to pay the Planned Premium." (emphasis added)). The Policy owner then receives billing reminders at the intervals selected. JA75 ("The Planned Premium and Premium Frequency . . . are selected by You."). The billing reminder may be disregarded, or the owner may pay less or more than the amount specified in the reminder. *See* JA75. "Planned Premiums" are defined as payments into the Policy Account at intervals of the owner's choice. JA75.

The Planned Premium provisions are a financial-planning tool, and the Policy expressly stresses that they are used at the owner's "option." JA75 ("Payment of the

Planned Premium is Your option."); *see also* JA75 ("Failure to pay a Planned Premium will not, in itself, cause this policy to terminate."). For example, the Planned Premium provisions may be used for estate planning purposes, including to schedule premium payments at levels designed to qualify as life insurance under the Internal Revenue Code. JA74–75. In this respect, the death benefit and Planned Premium provisions have been carefully constructed with the intent to meet certain Internal Revenue Code provisions, including a "Federal Income Tax exclusion." JA74 ("This policy is intended to qualify as life insurance under the Internal Revenue Code. The death benefit provided by this policy is intended to qualify for the Federal Income Tax exclusion.").

Nitkewicz requested and received Planned Premium reminders annually. Nitkewicz further chose to make Planned Premium payments, allegedly in amounts consistent with those reminders—amounts that Nitkewicz selected. JA8, 10–11, 63, 100. Nitkewicz's voluntary payments in response to those reminders increased the Cash Value. *See* JA11; Opening Br. at 5; *see also* JA78. As a general matter, the Policy provisions work together such that higher Cash Values lower the monthly deduction for the cost of insurance (JA78), earn more interest (JA62, 65–66, 78), and increase the amount available for use as collateral or returned to the Policy owner should the owner choose to surrender the Policy (JA79–81).

But the Policy owner's voluntary Planned Premium payments did not purchase any period of insurance coverage. Only the monthly deduction did that. JA76, 78–79.

The Policy's cost of insurance—part of the monthly deduction—turns in large part on the amount the insurer has at risk. The owner's funding choices—including the owner's Planned Premium choices—affect the net amount at risk and thus may raise or lower the cost of insurance.

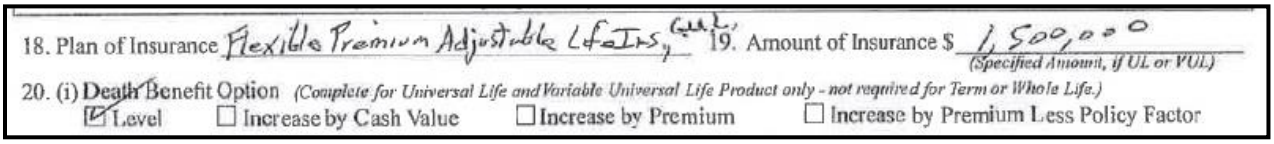
The Policy also offers a choice between two death benefit options, called "Option I" and "Option II." JA77. This choice is a core feature of the Policy. *See, e.g.*, JA62 (election between Option I and Option II is a key Policy feature, allowing owners to "change the death benefit to meet [their] changing needs"). The Option choice affects the net amount at risk, pricing, death benefits, and other critical assumptions underlying the insurance bargain. As a general matter, under Option I the insurer pays the face amount of the Policy upon the death of the insured, regardless of the amount of the Policy Account value. JA77. Under Option II, by contrast, the insurer pays the face amount of the Policy plus the Policy Account value. JA77. Thus, under Option II, the insurer generally receives a higher total death benefit in exchange for higher monthly COI charges. *See* JA78. Simply put, electing Option II lets the owner pay more to get more. The owner may seek to change Options "Any time after the first policy year and prior to the Insured's Attained Age 121." JA77.

The Option I-versus-Option II distinction operates in significant part by changing how the Policy Account value is used in calculating the COI charge and the proceeds of the Policy. Under Option I, the minimum death benefit is a "Specified Amount," similar to a face value or "Face Amount" (*see* JA101), that the owner has selected (less any debt from a Policy loan). JA77. Option I offers lower COI charges by using the Policy Account value to reduce the net amount at risk. JA77–78. That is, under Option I, the cost of insurance is calculated using the Policy's face value less the Policy Account value. JA78 ("The cost of insurance is determined on a monthly basis as the cost of insurance rate for the month multiplied by the net amount at risk for the month."); JA88 (same). Moreover, under Option I, if the Policy Account value is higher than the Specified Amount, the death benefit is not calculated using the Specified Amount but instead will be the Policy Account value, increased according to a schedule the Internal Revenue Code uses to define what qualifies as a "life insurance contract" for certain tax purposes. JA76 (providing that "[t]he death benefit of th[e] policy is the larger of" the death benefit option selected by the policyholder or the Policy Account value augmented by a coefficient provided by the Internal Revenue Code's life insurance requirements); *compare* JA67, *with* 26 U.S.C. § 7702(a).

On the other hand, Option II provides a minimum death benefit of the Specified Amount plus the Policy Account value (less any loan debt). JA77. Option

II leads to higher COI charges relative to Option I because the Policy's Cash Value does not offset any of the Specified Amount for purposes of calculating the net amount at risk. JA77. In other words, under Option II, the policyholder pays COI charges calculated using the entire face value. This also means that, under Option II, whatever value remains from the last Planned Premium deposit becomes part of the death benefit and thus is returned explicitly. JA77 ("The death benefit is the Specified Amount on the date of death plus the Policy Value at the beginning of the policy month of death.").

Nitkewicz selected Option I at the time the Policy issued. JA100 (selecting a "level" death benefit instead of one that would "Increase by Cash Value").


18. Plan of Insurance Flexible Premium Adjustable Life Ins, Guar. 19. Amount of Insurance $ 1,500,000
(Specified Amount, if UL or VUL)
20. (i) Death Benefit Option (Complete for Universal Life and Variable Universal Life Product only - not required for Term or Whole Life.)
☑ Level ☐ Increase by Cash Value ☐ Increase by Premium ☐ Increase by Premium Less Policy Factor

JA100; *see also* JA63. Nitkewicz could have changed Options prior to the insured's death, which would have resulted in a death benefit that consisted of the Specified Amount plus the Cash Value being returned. *See* JA77. Nitkewicz chose not to do so. He decided to pay less and get less.

After the insured died, LLANY paid Nitkewicz the Option I benefits he elected: the Policy's $1.5 million Specified Amount. Nitkewicz then demanded that he receive some of Option II's benefits without having paid for them; he claimed he was entitled to take at least some of the Cash Value on top of the Specified Amount that he

bargained for. JA11. Nitkewicz justified his demand by citing New York Insurance Law Section 3203(a)(2), which requires a refund of "any premium actually paid for any period beyond the end of the policy month in which such death occurred" if the insured's death "occurs during a period for which the premium has been paid."

LLANY refused. JA11. Nitkewicz then sued for breach of contract on the Policy. LLANY moved to dismiss, and the District Court granted dismissal as a matter of law because the plain language of Section 3203(a)(2) and the Policy both foreclose Nitkewicz's theory. JA325, 335–36, 341–42. The District Court correctly reasoned that the monthly deduction, not the Planned Premium, is what pays for the insurance (JA336), and concluded: "Having reviewed the plain text and the surrounding statutory provisions, the Court determines that the Planned Premium here was not a 'premium actually paid for any period beyond the end of the policy month' in which the insured died, such that it would be covered under the statute." JA342.

SUMMARY OF ARGUMENT

Nitkewicz asserts that LLANY breached the following term, the "substance" of which New York Insurance Law, Section 3203, deems incorporated into the Policy:

> if the death of the insured occurs during a period for which the premium has been paid, the insurer shall add to the policy proceeds a refund of any premium actually paid for any period beyond the end of the policy month in which such death occurred, provided such premium was not

> waived under any policy provision for waiver of premiums benefit. This paragraph shall not apply to single premium or paid-up policies[.]

Section 3203(a)(2).

Nitkewicz seeks a pro-rated refund of some portion of funds he attributes to a particular Planned Premium payment—a Planned Premium that LLANY applied to the Policy Account value. Nitkewicz does so even though he elected Option I rather than paying for Option II (which would have provided Nitkewicz the funds he now wants). Opening Br. at 33 ("Plaintiff instead chose the Option I benefit, which only paid out a specified death benefit."); *id*. at 3 ("Lincoln Life paid the Policy's death benefit.").

Nitkewicz makes these claims on the strength of his choice to make voluntary "annual" payments into the Policy using an optional financial-planning feature that the Policy calls "Planned Premiums."

The District Court correctly dismissed Nitkewicz's claim. The District Court issued a detailed opinion explaining that Nitkewicz's arguments are inconsistent with Section 3203(a)(2) and the Policy's text. JA335. First, the funds that Nitkewicz demands were not paid "for any period" of coverage. JA334–36. Instead, they increased the Policy Account's value, where they would remain and serve other purposes unless and until LLANY deducted those funds in a monthly deduction for insurance coverage. JA335. Second, those monthly deductions—not the Planned Premiums—are what "actually paid" for periodic (monthly) insurance coverage.

JA336, 341–42. The District Court's conclusion that the monthly deductions actually pay for the insurance was fundamental to its conclusion that the Planned Premium does not pay for a period of coverage. On appeal, Nitkewicz admits that the monthly deductions pay for the insurance (Opening Br. at 29 (citing "common sense"); the only error he assigns is that "*all* of the charges annually imposed by the insured [*sic*]" allegedly pay for the insurance (*id.*), even though the monthly deduction is what keeps the Policy in force from month-to-month and even though those deductions ceased following the month in which the insured died.

Nitkewicz pointed to various Policy mechanisms—such as "grace period" provisions (which can prevent a policy from lapsing under some circumstances), a Coverage Protection Guarantee Rider (an optional feature that provides additional grace period-related protection), and an adjustment factor applied for administrative purposes when a policyholder adds value to the Policy Account—arguing that such details muddy distinctions about which charges or funds pay for which Policy feature. JA 336–39, 341– 42; *see also* Opening Br. at 6–9. But none of those features negates the Policy's clear text and structure, under which only monthly deductions could be "actually paid" in exchange for "any period" of insurance coverage. As the District Court reasoned: "It is still the monthly deductions that actually pay for the insurance." JA336; *see also* JA335–37, 341–42.

Nitkewicz also resorted to the last-ditch doctrine of *contra proferentem*, under which Courts construe ambiguous contract terms against the drafter after all else fails. JA338–39. The District Court correctly declined to apply the doctrine because there was no contractual ambiguity. JA339. Moreover, the interpretive issues arise from the Legislature's language in Section 3203(a)(2), a context where *contra proferentem* and its policy justifications have no place, and where systematically favoring one side of the *v.* over the other would be arbitrary. *See infra* at 29–35; *see also* JA47–48.

The District Court also discussed some of the "myriad issues" and "irreconcilable tension" that Nitkewicz's unprecedented theory would create. JA336–38, 340. Nitkewicz misconstrues the District Court's analyses, suggesting that they imposed additional legal constraints or read words into the statute. *E.g.*, Opening Br. at 6–9, 24, 30. On the contrary, the District Court correctly observed that Nitkewicz's interpretation would permit insurance companies to demand payment of unpaid planned premiums in certain circumstances. JA337. Similarly, the District Court recognized that Nitkewicz's facile reading of a complex financial instrument threatens to upset important balances that LLANY, insurance regulators, and tax authorities rely upon. *See* JA330; JA340 (citing JA317); JA341 ("New York law does not prohibit this type of plan").

The District Court's reasoning is also consistent with the case law and secondary legal sources. Nitkewicz has not identified any opinion in the nearly 100-

year history of Section 3203(a)(2) that endorses his unprecedented theory. In contrast, LLANY submitted a request for judicial notice of published guidance from the New York insurance regulator—guidance that confirms LLANY's interpretation, and conflicts with Nitkewicz's. JA111–16. The district court held that this request for judicial notice was moot because the plain language of Section 3203 and the Policy compelled dismissal. JA343.

Furthermore, Nitkewicz attempts to create fact issues where there are none. Nitkewicz takes issue with the District Court's interpretation of Section 3203 with respect to the Policy's Coverage Protection Guarantee Rider ("CPGR"), which may extend the Policy in certain circumstances where the Policy would otherwise lapse. But the District Court was clear that the CPGR—just like the Policy's other provisions—does not make any of the Nitkewicz's Planned Premiums payments "actually paid" for "any period" within the meaning of the statute. JA337. Nitkewicz merely disputes the District Court's interpretation of Section 3203 as applied to the CPGR; characterizing that legal dispute as a factual one does not make it so.

LLANY also moved in the alternative to dismiss for lack of standing or, failing that, to eliminate the class allegations because Nitkewicz lacks class standing. JA50–55. The District Court did not reach these alternative arguments (JA343) and

Nitkewicz has neither identified them as issues presented on appeal nor addressed them in his opening brief.[1]

STANDARD OF REVIEW

"A district court's ruling under Rule 12(b)(6) that the complaint fails to state a claim on which relief can be granted against a given defendant is reviewed *de novo*." *Krys v. Pigott*, 749 F.3d 117, 128 (2d Cir. 2014). Likewise, "[b]ecause the issue on appeal involves the interpretation of a state statute and the definition of its terms presents a question of law, [the appellate panel] review[s] the trial court's ruling *de novo*." *KLC, Inc. v. Trayner*, 426 F.3d 172, 174 (2d Cir. 2005); *see also Wornick v. Gaffney*, 544 F.3d 486, 488–89 (2d Cir. 2008) (applying *de novo* review to a district court's interpretation of New York Insurance Law).

ARGUMENT

I. The District Court Properly Dismissed Nitkewicz's Complaint.

A. A "Planned Premium" Cannot Be A Statutory Premium Because It Is Not "Actually Paid" For A "Period" Of Insurance Coverage.

Section 3203(a)(2) does not apply to just any payment that might be characterized as a "premium." It applies only to premiums which are "actually paid for any period" of coverage and where the insured died "during a period for which

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[1] Accordingly, if the judgment is not affirmed in full, it would be appropriate to remand to the District Court for consideration of the standing and class standing issues in the first instance.

the premium has been paid." Planned Premiums are neither "actually paid" in exchange for insurance coverage, nor can they be attributed to any identifiable or particular "period" of such coverage.

"Premium" is a general term.[2] For example, in basic "term" life insurance the word premium refers only to a periodic payment which extends insurance coverage for a specific period. 31 N.Y. Prac., New York Insurance Law § 24:4 ("'Term life' insurance is defined as life insurance for a specified term only, the premium being calculated on a basis which provides coverage only for a death which occurs during the term"). The entirety of each term life insurance payment extends insurance coverage for a specific period (and only that period). 44 C.J.S. Insurance § 26 (defining term life insurance as "insurance for the term or period for which a premium has been paid, with the right to continue it from term to term on payment of the proper premium"). If there is no life to insure during that period, the insured has derived no coverage benefit, and the insurer has been paid for coverage of a risk it never assumed. *See* 5 Couch on Ins. § 69:1. In that situation, the insurance company has received an "unearned premium," which is one of the few circumstances where statutes may

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[2] Because the phrase "actually paid for any period" of coverage disposes of this case, it is not necessary to address whether, or for which purposes, "Planned Premiums" constitute "premiums" in one sense or another. JA33. Thus, as the District Court correctly observed, LLANY assumed, for purposes of its motion to dismiss, that Planned Premiums could be "premiums" under Section 3203. JA333.

require the return of a paid premium. *See* 5 Couch on Ins. § 79:7 ("As a general rule, in the absence of a statutory provision or an express or implied agreement to the contrary, an insured may not have any part of his or her premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned."); *see also* 5 Couch on Ins. § 69:1. Section 3203(a)(2) is such a statute, an exception to the general common-law rule. *See Fleetwood Acres v. Fed. Hous. Admin.*, 171 F.2d 440, 442 (2d Cir. 1948) (observing that New York's "ordinary rule is that an insured may not have any part of his premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned, unless there is an agreement to that effect"); *see also Oden v. Chemung Cty. Indus. Dev. Agency*, 87 N.Y.2d 81, 86 (1995) ("[A] statute enacted in derogation of the common law . . . is to be strictly construed. Further, it is to be construed in the narrowest sense that its words and underlying purposes permit, since the rules of the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires." (internal quotation marks and citations omitted)).

Certain types of life insurance, including universal life insurance are significantly more complex. They offer value and features independent of risk coverage. *See Gaidon*, 94 N.Y.2d at 342 ("'universal life' insurance [is] a form of 'cash value' life insurance. Cash value life insurance combines 'pure' life insurance with an investment component that creates a potential accumulation of money in the

policy."); *see also* 11 N.Y.C.C.R. § 53-2.7. The payment flows and benefits under such policies do not have a 1:1 relationship to insurance coverage. Some payment flows cover the risk of loss, while other payments relate to the savings and investment component. In short, universal life insurance policies such as the Policy are complex financial instruments, the terms of which have implications and carefully constructed relationships that go beyond basic risk coverage. *See Gaidon*, 94 N.Y.2d at 342.

The Policy's monthly deduction "actually" pays for each monthly "period" of coverage. JA341–42; JA76 (the "minimum amount needed to continue the policy" is the monthly deduction); *see also* JA75–76 ("The policy will terminate only if" certain conditions are met, one of which is that the Policy account value is "less than the monthly deduction due" and the ensuing "grace period ends."); JA75–76 (the Planned Premium is not "the minimum amount needed to continue the policy"). Policy Account value is the source of funds for the monthly deduction, but it is the monthly deduction that continues the Policy from month to month. JA76.

In addition, the statute's emphatic use of "actually" is significant. The term would be superfluous unless it distinguishes the actual transfer of funds in exchange for insurance coverage. As the District Court put it, "funds do not actually pay for any insurance until they are taken from the Policy Account via the monthly deduction." JA341–42. Planned Premiums are not "actually paid" to the carrier for insurance coverage for an identifiable period because they are statements of intent

that, once acted upon, increase the Policy Account value. Unless and until the monthly deduction is charged against the Policy Account, the Policy Account value is not "paid" but held in consideration of the non-insurance component of the Policy.

Nitkewicz's case turns on a blinkered literalism in two senses. First, Nitkewicz puts all the statute's weight on the word "premium." *Cf. Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003) ("The meaning of a writing may be distorted where undue force is given to single words or phrases." (internal quotation marks omitted)). Thus, Nitkewicz ignores the definition and contractual functions of "Planned Premium" (*see infra* at 20–25) and trivializes the "actually paid for any period" of coverage requirement, suggesting that requirement can be satisfied by provisions that have nothing to do with actually paying for any period of coverage (*i.e.*, grace periods, riders charges, and adjustment factors) (*see infra* at 25–29, 45–50). Second, Nitkewicz disregards the substance and context of both the statute and the Policy. *See* Section 3203(a) (cautioning that its provisions are implied "in substance"); *cf. Westmoreland Coal*, 100 N.Y.2d at 358 ("A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (internal quotation marks omitted)). This leads to nonsensical results that Nitkewicz attempts to downplay or re-frame as purported fact issues. *See infra* at 35–42.

Moreover, Section 3203(a)(2) has existed in some form for nearly 100 years. *See* Laws of the State of New York, 1923, c. 28, sec. 101. In that time, no opinion has expanded the scope of the statutory premium to include money paid in consideration for the non-risk features provided by universal policies.

In contrast, the State's insurance regulator, the New York Department of Financial Services ("NYDFS"), has published guidance that recognizes Section 3203(a)(2) has different implications for different policy types. The NYDFS Product Outline for individual universal life insurance policies recognizes that Section 3203(a)(2) focuses on "the amount needed to continue the policy" that "has been applied" to future months, and requires refunding only "such amount applied for any period beyond the policy month in which the death occurred." JA132 (emphasis added). By contrast, the Product Outline for individual term life insurance just quotes the statutory word "premium." JA175; *see also* JA46 (chart comparing language).

The Policy follows the NYDFS guidance verbatim: The Policy uses the same phrase as the Product Outline ("the amount needed to continue the policy") to describe the monthly "deduction." JA76 ("If on a Monthly Anniversary Day the Cash Surrender Value is less than the monthly deduction due, Your policy will enter the grace period. A grace period of sixty-one (61) days from the date that the policy enters the grace period will be allowed for the payment of the minimum amount needed to continue

this policy." (emphasis added)). On the previous page, the Policy explains that the Planned Premium is not the amount needed to continue the policy. JA75.

It is no coincidence that the District Court and NYDFS look beyond the word "premium" when applying Section 3203(a)(2) to universal life insurance. Both follow the plain language and meaning of the statute: A Section 3203(a)(2) premium must "actually" be paid for a "period" of coverage.[3]

B. Nitkewicz Mischaracterizes The District Court's Holdings And Reasoning.

Nitkewicz's case hinges on treating the Policy's defined term "Planned Premium" as synonymous with Section 3203(a)(2)'s "premium," with little or no further discussion. Opening Br. at 4–5, 11–12. This approach inverts basic interpretive rules by equating the generic word "premium" with its use in a defined term ("Planned Premium"), and by disregarding the critical context, namely the role Planned Premiums play in the Policy and its features. *HSBC Bank USA v. Nat'l Equity Corp.*, 279 A.D.2d 251, 253 (1st Dep't 2001) ("It is an elementary rule of contract construction that clauses of a contract should be read together contextually in order to

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[3] This Court has discretion to consider the Product Outlines. *See Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 60 (2d Cir. 2016) (taking judicial notice of materials on FDA website); *see also Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980) (explaining that the NYDFS's view may be relevant to insurance statute interpretation even if the Court views the issue as "one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent"); JA113–15; JA117–159; JA160–189.

give them meaning."). The District Court rightly rejected such a superficial approach. It proceeded by carefully analyzing the statute and Policy, then discussing and dismantling Nitkewicz's explicit arguments one-by-one.

Nitkewicz strips context from the District Court's detailed analysis to assert that the District Court labored under some "misunderstanding" (Opening Br. at 6; *see also id.* at 26); that the District Court "jumped through hoops to avoid . . . simple conclusions" (*id*. at 14); and that the District Court reached a "conclusion, as a matter of law, that the period of coverage is automatically and necessarily divorced from the timing of payments" (*id.* at 15).

In fact, the passages Nitkewicz now faults are the District Court's attempts to reason through Nitkewicz's scattershot arguments and *non sequitur*s. They are not holdings on the dispositive issues.

1. The Court Did Not "Misunderstand" Anything.

Nitkewicz needs to overcome the following Policy features:

- The Policy's "monthly deduction" of the "Monthly Cost of Insurance and Administrative Charges" are "applied to cover the company's cost of insurance and other expenses." JA62.
- That deduction is automatically deducted from the Policy Account at the beginning of each month. JA78. That deduction continues insurance coverage for that month. JA76. The Policy will not lapse so long as its Cash Value is

greater than or equal to the monthly deduction at the beginning of each month. JA76.

- The Planned Premium is not the amount needed to continue the policy. (The monthly deduction is.) JA75–76.
- Planned Premiums do not determine the duration of coverage. (The monthly deduction does that.) JA75–76.

And so Nitkewicz searches for a way to allocate Planned Premiums to insurance coverage. There is no principled way to do so because a Planned Premium is neither necessary nor sufficient to purchase coverage for any period, and there is no non-arbitrary way to assign any particular or identifiable portion of a Planned Premium to any period of coverage. As the Opening Brief puts it, Nitkewicz needs to identify "that portion of the $53,877.72 annual premium that was for the seven months after the insured died in October 2018." Opening Br. at 5. But he cannot. The $53,877.72 was "for" the Policy Account's Cash Value, where it provided Nitkewicz the benefit of his bargain immediately.

Any other characterization requires inventing rules that have no basis in the Policy or statute: For example, Nitkewicz assumes a last-in-first-out rule where the last payment in is deducted first. But there is no reason to favor that rule over a first-in-first-out rule, under which the Cash Value in existence before the alleged $53,877.72 payment would have paid (in whole or in part) for the next seven months.

See JA337 ("no logical clues" to determine which of successive payments are "for" any period); *infra* at 36–37. And if the rule is last-in-first-out, Nitkewicz needs to deal with whether accrued interest was deducted first. Moreover, Nitkewicz's theory is inconsistent with the statute's coverage-related purposes and the Policy's non-coverage bargain he struck because his $53,877.72 Planned Premium payment earned interest and contributed to eligibility for lower COI charges (among other things). Those are non-coverage benefits that Nitkewicz should (and could) have paid for by selecting Option II—but he would take those benefits for free by electing Option I and then demanding a refund inconsistent with the contract. By contrast, following the Policy's plain terms that the monthly deduction is the payment that continues insurance coverage from month to month avoids these problems and complications.

Then Nitkewicz tries to break the connection between the monthly deduction and a coverage period by identifying situations where the Policy could continue in force for a period of time even if, due to insufficient funding, the entire amount of the monthly deduction cannot be covered by the Policy Account value. *See* JA334–35. In other words, Nitkewicz looks for situations where money was not "actually paid" for coverage. That makes no sense, and in any event exceptions with respect to the monthly deduction (such as grace periods where LLANY will keep a policy in force notwithstanding the insufficiency of the Policy Account value) say nothing about what Planned Premium payments do.

Conversely, Nitkewicz tries to find correlations between monthly deductions and Planned Premium payments. *E.g.*, Opening Br. at 22 (assuming that each monthly deduction correlates to a specific Planned Premium); JA335–36 (addressing similar arguments). But a correlated payment is not an actual payment, and the correlations Nitkewicz identifies cannot overcome the clear Policy terms establishing that the monthly deduction purchases insurance for each month. JA75–76.

These arguments led the District Court to discuss various subsidiary points—such as the ways the Policy could terminate, the Policy's grace period for missed monthly deductions, a Policy rider (the CPGR), and the (non-)relation between Planned Premium payments and coverage for any particular period of coverage. JA334–37. Nitkewicz takes these discussions out of context, holding them up as "misunderstandings."

The District Court's holdings are simple and correct: The Policy means what it says when it explains that the monthly deduction pays for monthly periods of insurance coverage. JA334–36. Section 3203(a)(2)'s "actually paid" and "for any period" of coverage are substantive requirements; they require analyzing the Policy's structure and function. JA336, 341–42. The other payments and periods Nitkewicz discusses at length are just distractions. *See* Opening Br. at 13–16 (insisting an "annual" Planned Premium must be for an "annual" period of coverage; *id.* at 21–28 (insisting that the CPGR creates a distinct "period" of coverage); *id.* at 28–30

(insisting that a load charge assessed on a per-premium (not per-period) basis must nonetheless correlate to a specific period).

2. The Court Did Not Create Any Specificity Or Guarantee Requirement.

Nitkewicz argues that the District Court created a requirement that the period of coverage for purposes of Section 3203(a)(2) must be "specific" or that it "guarantee" coverage. Opening Br. at 6–7, 24, 30. The Court did no such thing. Relatedly, Nitkewicz argues at length that the Planned Premiums were "annual" payments, and were therefore "specifically" for a period. Opening Br. at 6–9, 14–17. Even if Nitkewicz's arguments were accurate, they are all beside the point: They do not identify any "premium" that was "actually paid" for any identifiable "period" of coverage.

There can be no dispute that the statute requires a relationship between a "premium" and a "period." The statute refers to "a period for which the premium has been paid" and a "refund of any premium actually paid for any period beyond the end of the policy month in which such death occurred." N.Y. Ins. Law § 3203(a)(2). The District Court correctly interpreted the statute to refer to a period of insurance coverage. The District Court did not create any specificity requirement. The District Court used the word "specific" in response to Nitkewicz's various attempts to establish some connection—any connection—between Planned Premiums and a coverage period, as discussed above. The District Court uses "specific period" in

contrast to the attenuated connections Nitkewicz made between various policy provisions and periods of coverage. *See* JA336–37, 339. "Specific period" in the Order is synonymous with "identifiable period" or "any particular period." JA336–37, 339. It is not a special legal requirement. Any argument to the contrary simply deletes the words "for a period" and "during a period" from the statute.

Nitkewicz follows the same approach when he mischaracterizes the Order as "inserting" the word "guarantee" into the statute (Opening Br. at 7, 9, 16), complaining that the District Court addressed "coverage guaranteed by the premium," (Nitkewicz's spin on the District Court's analysis; the District Court did not actually use those words) (*id.* at 16), and that the District Court observed how the Planned Premium "'may not necessarily prevent' the policy from lapsing" (*id.* (quoting JA335)). But the District Court was simply paraphrasing the Policy's Planned Premium provisions—which state that "Failure to pay a Planned Premium will not, in itself, cause this policy to terminate"—to explain the (non-)relationship between Planned Premiums and periods of insurance coverage. JA75. That analysis in no way involves adding words to a statute. Nitkewicz is attempting to rewrite the statute to relieve himself of the obligation to identify a premium that was actually paid for a period of coverage.

3. *Describing A Planned Premium As "Annual" Does Not Mean It Is "Actually Paid For Any Period" Of Coverage.*

Nitkewicz contends that the statutory requirements ("actually paid for any period" of coverage) are satisfied because certain Policy documents refer to "annual" Planned Premiums. Whether a Planned Premium can be described as "annual" or not has nothing to do with whether that Planned Premium was actually paid for a period of coverage. The Policy is clear that coverage is purchased monthly, not annually, via the monthly deduction, not a Planned Premium. *See supra* at 2–5. As a threshold matter, the Policy text precludes Nitkewicz's contention that "[a] reasonable insured would understand the Policy's specified 'ANNUAL' premium to be paid for an 'annual' period" (Opening Br. at 14)—in other words, that a policyholder was "supposed to pay" an annual premium because "each annual payment was designed to cover the next year's worth of insurance" (*id.* at 15). To be clear, the Policy language that Nitkewicz quotes uses the "Planned Premium" defined term. For instance, "ANNUAL" appears in the line "PLANNED PREMIUM: $53,877.72 ANNUAL," making clear that the Planned Premium definition and all the terms associated with the Planned Premium apply. JA65.

First, the Policy plainly states that Planned Premiums may not be sufficient to continue coverage. JA75 ("Payment of a Planned Premium may not prevent this policy from terminating."). Second, the notion that a policyholder is "supposed to" pay a specific premium for a specific period of coverage is antithetical to the concept

of universal life insurance, which provides flexibility to different policyholders with different financial circumstances and goals. *See supra* at 15–17 (contrasting structure and benefits of universal life insurance with term life insurance). Third, the "annual" description of Nitkewicz's Planned Premium is simply a reference to how often he intended to add his chosen amount to the Policy Account. JA75 ("The Premium Frequency is how often You intend to pay the Planned Premium.").

The District Court explained that the word "annual" merely "defines the anticipated recurrence of payment of the Planned Premium; it does not state the Planned Premium is *for* a specific period of coverage." JA339. More specifically, "annual" is a "Premium Frequency" that an owner can choose. JA339. As such, it referred to payment reminders, not a payment made for any identifiable period of coverage. *See* JA339.

The District Court was right. The frequency with which a Planned Premium reminder is sent does not correspond to any period of coverage. It corresponds only to "how often [the owner] intend[s] to pay the Planned Premium" into the Policy Account. JA75; *see also* JA339. It does not undermine the Policy provisions that provide for month-to-month insurance coverage. The District Court correctly stated: "Thus, the Premium Frequency—which in this case was annual—defines the anticipated recurrence of payment of the Planned Premium; it does not state the Planned Premium is *for* a specific period of coverage. Plaintiff cannot interpret the

word 'annual' in isolation to create ambiguity where there is none." JA339. Given that the monthly deductions continue the Policy month-to-month, there is a distinction—contrary to Nitkewicz's assertion—between (i) indicating an intent to make contributions to the Policy's Account value in the future and (ii) actually paying premiums for a period of coverage. *Cf.* Opening Br. at 14–15.

C. *Contra Proferentem*-Style Interpretation Has No Place In This Case.

Nitkewicz contends that Section 3203(a)(2) should be interpreted in favor of the insured. According to Nitkewicz, such an interpretive standard will void a Section 3203(a)(2) provision that expressly permits an insurer to recover unpaid statutory premiums and change substantive Policy provisions as diverse as the 85% adjustment factor, the Option choice, and grace period provisions. *Id.* at 29, 32–34. Nitkewicz's in-favor-of-the-insured arguments do not identify any ambiguous word or phrase in Section 3203(a)(2).

Nitkewicz's first step (that Section 3203(a)(2) should be interpreted in favor of the insured) violates black-letter law from New York's highest Court: "a policy provision mandated by statute must be interpreted in a neutral manner consistently with the intent of the legislative and administrative sources of the legislation." *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 N.Y.3d 799, 804 (2015).

The District Court correctly understood that Section 3203(a)(2)'s intent was not to systematically favor the policyholder over the insurer. *See* JA337. Section

3203(a)(2) is even-handed. It allows the insurer to recover a statutory premium that was due, but not actually paid, for insurance coverage. JA337 (citing and discussing Section 3203(a)(2), which permits insurers to "deduct from the policy proceeds the portion of any unpaid premium applicable to the period" under certain circumstances).

In response, Nitkewicz cites *Terry v. Unum Life Ins. Co. of Am.*, 394 F.3d 108, 110 (2d Cir. 2005), several times for the proposition that "where a policy provision is less favorable to the insured than the provision required by New York Insurance Law, the statutory provision controls." Opening Br. at 5, 11, 33; *see also id.* at 32. Nitkewicz is wrong for at least four reasons.

First, the *Terry* panel's "less favorable" language paraphrases a statute not at issue here. The statute at issue in *Terry*, New York Insurance Law Section 3216(d), is expressly limited to provisions in its own "subsection":

> Each policy of accident and health insurance . . . shall contain the provisions specified herein in the words in which the same appear in this subsection, except that the insurer may . . . substitute for one or more of such provisions corresponding provisions of different wording approved by the superintendent which are not less favorable in any respect to the insured or the beneficiary.

(emphases added). Yet Nitkewicz wrongly cites *Terry* as if it were an all-encompassing principle of law that applies to any bargained-for contractual language drafted by the parties that is less favorable than any provision of any statute. Opening Br. at 29, 32–34. But the "not less favorable" requirement discussed in *Terry* is self-

supplied by Section 3216(d). That requirement does not appear in Section 3203, and *Terry* did not implicitly write such requirement into every provision of the New York Insurance Law. Section 3216(d), and the *Terry* language Nitkewicz relies on, simply do not apply.

Second, even if *Terry* re-wrote all of New York Insurance Law to include the "not less favorable" requirement found in Section 3216(d) (which it did not), Section 3216(d) and *Terry* are about choosing between the actual words of a statute and a direct substitute for that language that appears in the policy. But Nitkewicz cites *Terry* for a very different proposition: voiding any Policy language that does not favor the insured. Opening Br. at 29, 32–33. Indeed, where a Policy term that is "less favorable" to the insured than the insurer is implied by statute, Nitkewicz reads *Terry* so far as to actually nullify the statute. *Id* at 33–34.

Section 3216(d) requires specific statutory language to actually appear in the contract. The *Terry* dispute concerned not that statutory language, but addressed language that New York's insurance regulator permitted the insurer to substitute for the statutory language. That is, the insurance regulator approved substitute language in the *Terry* contract as a replacement for the statutory words. 394 F.3d at 110. The *Terry* panel compared the substitute language with the statutory language and concluded that the substitute language was less favorable to the insured. *Id.* The remedy: The statutory language controlled. *Id.*

The Parties to this case do not dispute that the Section 3203(a)(2) language relevant to this case is implied by law (and neither appears nor needs to appear in the Policy itself). LLANY does not rely on alternative language approved by the regulator; rather LLANY and the District Court apply and follow the statutory language of Section 3203(a)(2) as written. Here, there is no need to consider whether any Policy language is "less favorable" than the statutory language because there is no departure from the statutory language. In contrast, Nitkewicz asks the Court to void substantive Policy provisions that Nitkewicz finds inconvenient, apparently because they are "less favorable" to him than he would like, even though they are exactly as favorable to him as the statute requires.

Third, Nitkewicz's view also negates statutory language, rendering at least one substantive Section 3203(a)(2) provision surplusage. *Cf. Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019) ("[S]tatutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous." (internal quotation marks omitted)). By applying *Terry* directly to the statute itself (instead of to contractual language seeking to comply with the statute), Nitkewicz makes it so the portion of Section 3203(a)(2) that allows insurers to recover unpaid premiums could never be invoked because it does not favor insureds. Opening Br. at 32–33 (contending that Section 3203(a)(2)'s unpaid-premium recovery provisions are not "incorporated into

the policy" because that provision is unfavorable to the insured). Obviously, *Terry* cannot stand for the proposition that the Legislature is functionally prohibited from writing statutory language that favors insurers over insureds.

Fourth, expanding *Terry* beyond the statute and facts at issue in that case would be inconsistent with the clear holding of New York's highest court that any "policy provision mandated by statute must be interpreted in a neutral manner." *State Farm*, 25 N.Y.3d at 804 (decided after *Terry*); *Glob. Reinsurance Corp. of Am. v. Century Indem. Co.*, 22 F.4th 83, 101 (2d Cir. 2021) ("When our circuit's precedent conflicts with a more recent decision of the New York Court of Appeals as to a matter of New York law, this court will follow the outcome it believes the New York Court of Appeals would reach, without giving binding authority to our precedent." (internal quotation marks omitted)).

Nitkewicz's *Terry* arguments are actually attempts to back-door the principle of *contra proferentem* into this case. Nitkewicz argued *contra proferentem* in the District Court below, and the District Court dispatched those arguments for the following reasons. *See* JA338–39.

As the District Court explained, *contra proferentem* ("against the offering party") is a last-ditch rule of contract interpretation. JA338. After every other attempt to resolve ambiguity has failed, *contra proferentem* is a tie-breaker that

resolves ambiguity against the contract offeror or drafter. *Schering Corporation v. Home Insurance Company* explains that

> *contra proferentem* is used only as a matter of last resort, after all aids to construction have been employed but have failed to resolve the ambiguities in the written instrument. This is clearly the law in New York. To conclude otherwise would require every ambiguously drafted policy to be automatically construed against the insurer.

712 F.2d 4, 10 n.2 (2d Cir. 1983) (citations omitted); *see also Int'l Multifoods Corp. v. Com. Union Ins. Co*., 309 F.3d 76, 88 at n.7 (2d Cir. 2002).

Contra proferentem has no place here. First, as the District Court correctly explained, there is no contractual ambiguity. The contract is explicit that the monthly deduction is the amount "actually paid" for a "period" of insurance coverage. Nitkewicz stretches and strains ancillary provisions—grace periods, riders, exceptions—to try to find circumstances where a monthly deduction might not "actually" be paid or where the Planned Premium might correlate with a monthly deduction—but there is no ambiguity on the point that matters: the Planned Premium payment was applied to the Cash Value but was not actually paid for any insurance coverage. *See supra* at 2–5, 27–29; *see also* JA34–35, 38–39, 42–44. The monthly deduction paid for each period of insurance coverage, and there is no dispute that LLANY stopped making monthly deductions after the month in which the insured died.

Second, if there were any relevant ambiguity (and there is not), *contra proferentem* is a rule of contract interpretation, not statutory interpretation. *See Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275–76 (2d Cir. 2000). Indeed, its justifications—creating an incentive for contract drafters to write clearly and preventing sophisticated drafters from adding artful ambiguities to benefit themselves—has no place in statutory interpretation. *U.S. Fire Ins. Co. v. Gen. Reinsurance Corp.*, 949 F.2d 569, 574 (2d Cir. 1991) ("[T]he touchstone for applying *contra proferentem* is the insured's lack of sophistication" relative to the insurer's "bargaining power.").

D. The District Court Was Right To Consider The "Myriad Issues" And "Irreconcilable Tension" Of Nitkewicz's Theory.

The District Court buttressed its statutory and contract interpretations by considering the ramifications of Nitkewicz's theory. JA336 ("Moreover, Lincoln NY compellingly demonstrates the myriad issues that would result from interpreting a Planned Premium as being 'for' a specific period."). The District Court first observed how Nitkewicz's theory cannot be squared with the Policy's "flexible" premium structure—the very purpose of which is to divorce premiums from defined periods of insurance coverage. JA336–37. Next, the District Court considered the context of the overall statutory scheme and determined that Nitkewicz's theory would produce "irreconcilable tension" if applied to the portion of Section 3203 that allows insurers to recover unpaid premiums, as described above. JA337–38. Nitkewicz dismisses

these analyses as a misguided "parade of horribles" and criticizes the District Court for employing hypotheticals to uncover flaws in Nitkewicz's reasoning. Opening Br. at 31–33. In truth, the District Court's careful analysis illustrates exactly why such attention to the whole text and its context is a critical part of interpreting both statutes and contracts. *Friedman v. Connecticut Gen. Life Ins. Co.*, 9 N.Y.3d 105, 115 (2007) ("A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent, and, where possible, should 'harmonize[ ] [all parts of a statute] with each other . . . and [give] effect and meaning . . . to the entire statute and every part and word thereof.'" (quoting McKinney's Cons. Laws of NY, Book 1, Statutes § 98) (citations omitted) (alterations original)); *HSBC*, 279 A.D.2d at 253.

The District Court further described how Nitkewicz's theory would upset the bargain struck in the specific Policy at issue. In particular, the District Court correctly observed that providing Nitkewicz the refund he requests would be giving him advantages of an Option II death benefit for free, when Nitkewicz specifically elected the lower-priced Option I death benefit.

1. *Nitkewicz's Theory Undermines Section 3203(a)(2)'s Language And Structure.*

The District Court considered how Section 3203(a)(2) might apply in light of the Policy's "flexible" premium structure, which permits owners to make both scheduled payments (*i.e.*, "Planned Premiums") and unscheduled payments into the

Policy Account. JA336–37. The only difference between a scheduled and an unscheduled payment is that the policy owner has made a prior optional statement of intent to pay the former; unscheduled payments affect the Policy Account and Cash Value exactly the same as Planned Premiums. The District Court recognized that Nitkewicz's theory would also require "that any unscheduled payments must also be interpreted to cover some period of time" despite "no logical clues as to how that might be done, or why it would be reasonable to interpret the statute to apply to these premiums given the flexible structure of the policy." JA337. Nitkewicz's theory makes no sense in the full context of the Policy.

Indeed, Nitkewicz's own analogy shows how his theory makes no sense in the context of the Policy's structure. Nitkewicz constructs a hypothetical situation involving a made-up term insurance policy whose policy mechanics and related terms are not before the Court. He then laments that the owner of such a one-year term policy and the owner of a flexible-premium universal life policy who each pay the same amount at the beginning of a policy year are not treated the same by Section 3203(a)(2)'s refund provision. Opening Br. at 20–23. Nitkewicz says that—if an insured dies mid-year—it is an "absurd result" for term policyholders to get refunds while universal life policyholders do not where "[t]he policies have the same face value" and "[t]he policies cost the same every year." *Id.* at 21–22. Nitkewicz suggests that "[i]t is a distinction without a difference that the annual premium was

first turned into a 'cash value' and then that latter item used to pay the cost of the insurance." *Id.* 22. Thus, according to Nitkewicz, term life insurance and universal life are the same thing purchased for the same price (of course they are not, as they plainly have different features, benefits, charges and structures) and the Legislature must have intended all term policies and universal life insurance policies to be treated the same way when controverting the common law prohibition on refunding premiums (there is zero evidence of such intent).

But, as a matter of law, universal life policies are not the same as term life policies. *Gaidon*, 94 N.Y.2d 330 at 342. By definition, universal policies include features and benefits that term polices do not. *Id.* Nitkewicz's argument does not identify any absurdity. It assumes its own conclusion: It takes as a false premise that term and universal life insurance are identical and concludes that they should be treated identically.

To put the same point in (hypothetical) factual terms, Nitkewicz mistakes apples for oranges by assuming as fact that an "annual" Planned Premium is equivalent to a term policy's yearly payment. Generally speaking, in a term policy, the premium is due on a specific date and its payment extends coverage for a length of time identified in the contract. By contrast, in a universal life insurance policy (as is the case here), premiums are never "due" and the payment of premiums does not extend the coverage (only the monthly deduction does that). Furthermore, the amount

at risk in a term policy is generally equal to its face amount, while the amount at risk in a universal life insurance policy is generally the difference between the cash value and the face amount (unless, the parties specifically bargain for the cash value to be included in the net amount at risk, as is available under Option II of the Policy at issue). Nitkewicz's hypothetical ignores the mechanics of the Policy he owns. Perhaps that is why Nitkewicz cannot find any judicial, legislative, or regulatory document adopting his view of the nearly 100-year-old statute.

Nitkewicz incorrectly asserts that the District Court was "led astray" by the fact that, even though the monthly deductions pay for the insurance coverage, the monthly deductions are in turn funded by the Policy Account value, which is in turn funded by Nitkewicz's Planned Premium. Opening Br. at 22–23. According to Nitkewicz, it is a "distinction without a difference that the annual premium was first turned into a 'cash value' and then that latter item used to pay the cost of the insurance," leading to a confused discussion about a hypothetical insurer investing in certificates of deposit or, according to Nitkewicz, "gold bars, or whatever." *Id.* at 23.

The District Court did not confuse anything. Timing distinctions matter because the timing of the payments that paid for the insurance is the lynchpin of Nitkewicz's refund demand. In the Policy before the Court, the payments that paid for the insurance were the monthly deductions and those payments were not paid

annually by the owner; rather they were deducted monthly by the insurer in accordance with the terms of the complex financial product that Nitkewicz purchased.

The District Court also considered the full context of the statute—Section 3203(a)(2)—which provides two inverse remedies. Namely, in addition to the refund provision Nitkewicz seeks to invoke, Section 3203(a)(2) also provides that, if the insured's death occurs within the grace period, then "the insurer may deduct from the policy proceeds the portion of any unpaid premium applicable to the period ending with the last day of the policy month in which such death occurred." N.Y. Ins. Law § 3203(a)(2). Observing that it "cannot ignore the implications of [Nitkewicz]'s proposed reading on other parts of the statute—particularly those within the same subsection," the District Court found that Nitkewicz's proposed reading would produce untenable results. JA338. In particular, if Planned Premiums are captured as a "premium actually paid for any period" under the refund provision, then they must also be captured by the parallel language in the deduction provision. JA337–38. But, as the District Court observed, "Planned Premiums are, by definition, optional statements of intent" and "Plaintiff's reading of the statute would thus transform a statement of intent into a binding promise upon the death of the insured." JA338. The absurdity of this approach is further amplified where, as here, "a prorated portion of that unpaid Planned Premium [i]s substantially greater than the relative cost of insurance for that month," meaning the insurer, under Nitkewicz's

hypothetical, could deduct much more than the monthly deduction that continued coverage during the month of the insured's death. *See* JA338.

Nitkewicz's response to both of these points is essentially the same, faulting the District Court for using hypotheticals as an interpretive tool. That is, because this case does not involve unplanned premium payments or an insured's death during the grace period, Nitkewicz contends that the District Court should have blinded itself to the contractual and statutory context that illuminates the meaning of the text at issue. *See* Opening Br. at 31–33. But that is simply not how statutory interpretation works. Indeed, the District Court was required to consider the full context of the statutory terms at issue. *See Friedman*, 9 N.Y.3d at 115; *Peyton v. New York City Bd. of Standards & Appeals*, 36 N.Y.3d 271, 280 (2020) ("A statute 'must be construed as a whole,' and 'its various sections must be considered together and with reference to each other.'"); *People v. Iverson*, 37 N.Y.3d 98, 103–04 (2021) ("Court[s] should give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions." (internal quotation marks omitted)); *Nadkos*, 34 N.Y.3d at 7. The District Court did not err in considering hypotheticals to illustrate the flaws in Nitkewicz's theory, including how that theory would create disharmony among

Section 3203(a)(2)'s various provisions. Nitkewicz does not—because he cannot—cite any case law to the contrary.[4]

2. Nitkewicz Misapprehends The Significance Of The Choice Between Option I And Option II.

Nitkewicz fares no better in his criticism of the District Court's analysis of his voluntary election of the Option I death benefit, which specifically provided that the Policy Account would not be paid out upon the death of the insured. JA340. Nitkewicz could have elected—but did not elect—the Option II death benefit, which would have provided that the Policy Account be paid out upon the death of the insured. JA340. Thus, the District Court reasoned that providing Nitkewicz with a refund of the Planned Premiums deposited into the Policy Account despite Nitkewicz's election of the Option I death benefit would essentially "invalidate" (that is, undermine) that contract's Option I-versus-Option II distinctions. JA340.

Again, Nitkewicz claims that the District Court's reasoning extrapolates too far. Nitkewicz insists that the District Court is wrong because "[t]he prorated refund

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[4] Nitkewicz cites only *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004), which is inapposite. There, this Circuit noted that whether a contract term was clear or ambiguous in stating the parties' intent with respect to a particular set of facts turns, of course, on indicia of the parties' intent with respect to those particular facts. Nothing in *Eternity Globe* disturbs the fundamental principle that a statutory term (or statutorily-imposed contractual term) is properly interpreted in the larger statutory context, including consideration of how the statutory scheme might apply to hypothetical facts.

that [Nitkewicz] seeks is not equivalent to the Option II death benefit," which is a larger amount. Opening Br. at 33 (emphasis added). Thus, says Nitkewicz, giving him the lesser refund would not "invalidate" his election because he would not actually receive the full Option II death benefit. *See id.* But the District Court never claimed that Nitkewicz sought the entirety of the proceeds he would have received had he elected Option II prior to the insured's death. Undeniably, awarding Nitkewicz any of the Option II proceeds that he elected to forego by choosing Option I negates and invalidates Nitkewicz's election.

Instead, the District Court correctly observed that reading Section 3203(a)(2) to provide Nitkewicz with a benefit that Nitkewicz specifically elected not to receive, and for which he did not pay (*see supra* at 6–9) would undermine the contractual election, even if not wholly "invalidating" that election down to the penny. That is essentially the argument LLANY made below—that giving Nitkewicz any portion of the Option II benefit for which he should have paid undermines the Policy's Option I-versus-Option II choice and the contractual provisions that rely on that choice, including the COI charge and death benefit calculations. JA47–48.[5]

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[5] Nitkewicz mischaracterizes the choice to elect Option I as resulting in a "forfeiture." That term has specific meanings in insurance law and under the Policy, none of which apply here. *See, e.g.*, JA78–80; N.Y. Ins. Law § 4221. Nitkewicz also fundamentally misconstrues how Option I and Option II work. Under Option I, the Cash Value was used to calculate the amount at risk (among other things) because

E. LLANY's Interpretation Does Not Require An Implicit Statutory "Exemption."

On the other hand, Nitkewicz contends that LLANY's statutory interpretation creates an implicit "exemption" for "all" universal life insurance. Opening Br. at 19–21. The District Court rightly dismissed this speculation, explaining that only the specific Policy and its terms were before it. JA339–40.

At any rate, Nitkewicz's assertion is inconsistent with the history of the industry and statute. As explained above, versions of Section 3203(a)(2) date back nearly 100 years. *See supra* at 19. That was decades before modern universal life insurance was created. D. Fischel and R. Stillman, *The Law and Economics of Vanishing Premium Life Insurance*, 22. Del. J. Corp. L. 1997, at 1, 5–6, (explaining that universal life insurance arose in the early 1980s), *cited and relied upon in Gaidon*, 94 N.Y.2d 330 at 342 (discussing the history of universal life insurance). As the lack of judicial interpretation regarding 3203(a)(2) demonstrates, it is a straightforward statute that has never created significant controversy. It makes perfect sense that the Legislature would not change language that already works. It

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the Death Benefit is equal to the Specified Amount (which is not inclusive of the Cash Value). Under Option II, a portion of the Cash Value is then added back to the Death Benefit. *See supra* at 6–9. The District Court briefing elaborates these mechanics and includes charts illustrating how these provisions work (JA34–38, 47–50), but the details of these Policy terms are not necessary to the outcome and the District Court did not discuss them.

also makes sense that the Policy—and perhaps other universal life insurance—is specifically designed so that a refund is never necessary: Month-to-month coverage ensures there never need be a Section 3203(a)(2) refund, which is administratively efficient and fully conforms to the statute.

On the other hand, Nitkewicz speculates that all universal life insurance contracts are written such that they could never trigger Section 3203(a)(2). Opening Br. at 20–21. Nitkewicz would also put the onus on the Legislature, demanding an explicit "exemption" where none is necessary: By definition, an "exemption" is necessary only when a statute would apply but for the exemption. No inference can be drawn from the lack of an explicit exemption. On the contrary, the Legislature is "presumed to be aware of the decisional and statute law in existence at the time of an enactment," *Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch.*, 65 N.Y.2d 161, 169 (1985), the background common law here is that premiums are generally nonrefundable (*see supra* at 15–16), and Nitkewicz cites no decisional law requiring refunds of universal life premiums under Section 3203 or any of its predecessor statutes.

II. Amendment Was Futile.

F. The Coverage Protection Guarantee Rider Cannot Change The Result.

Nitkewicz newly contends on appeal that the Coverage Protection Guarantee Rider creates a "fact" issue because it involves a "guarantee" of coverage. *Compare*

Opening. Br. at 13–14, *with* JA328–29; *see also* JA336. But nowhere did the District Court require a "guarantee" of coverage, and the Policy text establishes the CPGR's operations as a matter of law. Nitkewicz's CPGR argument is, at base, another mischaracterization of the Order. As the District Court recognized, the language of both the main Policy and its CPGR demonstrate that the CPGR is not a "premium paid 'for any period' of coverage." JA336 ("The CPGR speaks for itself and is simply not a premium paid 'for any period' of coverage.").

The CPGR is a rider, an optional Policy add-on. JA87. Nitkewicz's monthly deduction paid for the CPGR. JA62 ("We deduct the cost of providing the coverage (the cost of insurance) plus the cost of any additional benefits and/or riders and administrative charges from this value each month as a 'monthly deduction'." (emphasis added)). If the Policy's Cash Value cannot cover a full monthly deduction, the CPGR provides a second chance to avoid triggering the grace period provisions. JA87. The CPGR establishes a calculation (the "CPG Test") that leads to a notional "reference value" (the "Coverage Protection Value"). JA87. When the Coverage Protection Value is positive, "a negative Policy Value will not be in effect under the base policy." JA87. As a result, the base Policy will not enter a grace period if the Cash Value cannot cover the full monthly deduction. JA87.

The CPGR does not actually pay for any period of coverage. JA336. Triggering the CPGR does not increase the Policy Account value, and therefore the

CPGR cannot supply funds for any monthly deduction in any sense. *See* JA87 ("The Coverage Protection Value is not used in determining the actual Policy Value, it is simply a reference value used to determine whether the Coverage Protection Guarantee is in effect."); JA336. On the contrary, the monthly deduction pays for the CPGR benefit. JA62.

Moreover, after the CPGR benefit has been used, the owner must pay either an amount sufficient to create a "Cash Surrender Value on the date of reinstatement that is sufficient to keep the policy in force for at least 2 months" or an amount "sufficient to satisfy the CPG Test and to keep the Coverage Protection Guarantee in effect for at least 2 policy months." JA90. In other words, proceeding under the CPGR requires re-filling the Policy Account (from which monthly deductions are made)—once again confirming that the Policy's Cash Value, not the CPGR or its reference value, funds the monthly deduction.

The CPGR argument also fails to the extent it attempts to break the link between the monthly deduction and insurance coverage. Even if both (a) Nitkewicz's interpretation of the CPGR were correct (it is not) and (b) the CPGR saved the Policy from lapse at some point, it was still the monthly deduction that paid for the CPGR that, in turn, paid for coverage (according to Nitkewicz).

Let us be clear: The monthly deduction pays for the CPGR. JA87. Thus, even if the CPGR were construed to "pay" for coverage under some sets of conceivable

circumstances, the money for the CPGR still "actually" was paid by the monthly deduction.[6]

G. The So-Called "Load Charge" Does Not Alter The Analysis.

The insurance contract, and the statutes and regulations that govern it, control the treatment of Policy funds. Nitkewicz contends otherwise, appealing to "common sense" in an argument about a 15% "load charge" (a term that never appears in the Policy). Opening Br. at 29. This argument refers to an 85% adjustment factor that applies to funds added to the Policy Account. However denominated, that factor or charge does not purchase any period of coverage; it applies equally to "Planned Premiums" and unplanned, ad hoc payments that lack any conceivable linguistic relationship to any "period"; and it is fully consistent with the Policy structure, under which only Policy Account deductions pay for periods of insurance coverage.

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[6] At several points, Nitkewicz attempts to define the word "guarantee" in the abstract. Opening Br. at 24 (the CPGR "is what it sounds like: a *guarantee of* coverage"); *id.* at 25 ("on a 'Guaranteed' basis (i.e., no matter whether . . . "). These passages appear to assume that the CPGR is an "unconditional guarantee." *See* Black's Law Dictionary (11th ed. 2019) ("unconditional guarantee"). But "CPGR" is a defined term, and therefore "Guarantee" has its contractually defined meaning. *See Tanvir v. Tanzin*, 894 F.3d 449, 460 (2d Cir. 2018). ("When a statute includes an explicit definition, we must follow that definition. . . . In general, statutory definitions control the meaning of statutory words.") (internal quotation marks and citations omitted). In any event, the CPGR is a guarantee in the sense of "a collateral engagement" to prevent a "default" under the main Policy, provided that the CPGR's express terms are met. *See* Black's Law Dictionary (11th ed. 2019) ("guarantee"). At the end of the day, fixating on the word "guarantee" does nothing but illustrate how far afield Nitkewicz must search to find a purported fact issue.

JA319–20. The District Court explained and discussed the argument (JA327, 329, 334–35), but did not elaborate its reasoning with the length accorded arguments with superficial ("at first blush") appeal. JA335; *contra* Opening Br. at 29 (saying the Court "dismissed the relevance" of the argument).

The Policy provides that 85% of funds paid into it will be credited to the Policy Account value. JA62, 65, 78. The Policy states that this 85% factor is applied at the time premiums are received and corresponds only to the amount received (not any duration of coverage). JA62, 65, 78. Nitkewicz frames the 85% in terms of a resulting 15% "charge" that scales with the amounts Plaintiff uses to fund the Policy, regardless whether that amount was paid as a "Planned Premium" or not. The 15% charge does not purchase any period of insurance coverage, nor does it relate to any specific period. JA62, 65, 78. Nitkewicz argues the contrary, quoting a passage that says the charge covers "the company's cost of insurance and other expenses." Opening Br. at 29 (quoting JA62)). That passage says nothing about the timing or source of actual payment for any period of coverage. But an earlier paragraph on the same page does:

> We apply a charge to each premium You pay, and then add the balance to the Policy Value. We deduct the cost of providing the coverage (the cost of insurance) plus the cost of any additional benefits and/or riders and administrative charges from this value each month as a 'monthly deduction'.

JA62 (emphasis added). Once again, it is the monthly deduction, not an adjustment factor, that actually pays for coverage periods. *See* JA334–35.

Finally, it is inappropriate and speculative for Nitkewicz to denigrate the adjustment factor as "skim[ming] off the top," as well as to attempt to re-allocate payments in contravention of the Policy's express terms. *See* Opening Br. at 28. As the District Court recognized, the Policy's distinctions between one-time charges and the monthly deduction are carefully constructed to conform to the realities and regulations of insurance. *See* JA74, 330; *see also* 26 U.S.C. § 848. For example, certain tax liabilities may be incurred upon receipt of payments into universal life policies. Stringham, Daniel, Capitalization of Certain Policy Acquisition Expenses—Changes under the Tax Cuts and Jobs Act, Society of Actuaries, "Taxing Times," Vol. 14, Iss. 2, pp. 24– 25 (June 2018) (explaining that certain tax liabilities may be incurred upon receipt of payments into universal life policies); *Buck v. Am. Gen. Life Ins. Co.*, 2018 WL 5669173, at *1 (D.N.J. Oct. 31, 2018) (noting that different treatments of universal life policies may have "complicated" tax consequences). The Policy's treatment of funds matters, and Nitkewicz's cavalier (and irrelevant) attempts to re-frame them as somehow nefarious should be disregarded. *See also supra* at n.5 (discussing Nitkewicz's mistreatment of Option I and Option II).

H. Speculation About An Unrelated Company's Motives Cannot Create a Disputed Issue of Fact Regarding Industry Practice.

As Nitkewicz notes, the Complaint alleges that a different insurance company, operating under a different policy, acceded to what Nitkewicz vaguely characterizes as a demand "under parallel circumstances." Opening Br. at 3, 12, 30. Nitkewicz suggests that these vague allegations could generate a fact issue about "industry practice." *Id.* at 12. Nitkewicz is wrong.

First, Nitkewicz never raised this argument in the District Court, and thus the point should be deemed waived. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Nitkewicz did not raise this "industry practice" argument at all in its District Court briefing. Rather, Plaintiff referenced the other insurer's conduct only in a pre-motion letter in response to LLANY pointing out that Nitkewicz's theory is unprecedented in the case law. *See* JA40 (discussing Nitkewicz's pre-motion letter). At the motion hearing, Nitkewicz again mentioned the allegation only to show that "this isn't the first time that this has happened" in response to a "point that defendant made, that there is a lack of case law, that this is unprecedented." JA 364. Neither reference gives any hint that Nitkewicz sought (or would seek) leave to amend to elaborate the allegation of one other insurer's alleged

conduct with respect to a different policy into a full-blown industry-practice theory that could survive a motion to dismiss.[7]

Second, Nitkewicz has not identified a contractual ambiguity that could open the door to such extrinsic evidence. There is no reason to resort to extrinsic evidence about the conduct of a non-party when the legal and judicially noticeable materials are clear as a matter of law. *Greenfield v. Philles Recs., Inc.*, 98 N.Y.2d 562, 569 (2002) ("Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.").

Third, any inference from the decision of a different insurer to settle rather than litigate would be speculative. Nitkewicz's allegations about the other insurer's decision to settle does not actually include any allegations of industry "custom and usage" of "specialized" terms. *L. Debenture Tr. Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010) ("Evidence as to such custom and usage is to be considered by the court where necessary to understand the context in which the parties have used terms that are specialized."). There are myriad reasons why another insurer might have complied with Nitkewicz's refund request short of sharing Nitkewicz's understanding of the statutory terms at issue.

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[7] Nor has Nitkewicz ever explained why a single allegation of private-party conduct is "precedent" in the relevant, legal sense, or somehow stands in for a lack of case law in Nitkewicz's favor.

Even in the all-but impossible scenario where Nitkewicz's other alleged policy had identical language and the other insurer faced identical financial and business stakes, Nitkewicz has not—because he cannot—tie the other insurer's alleged conduct to an industry-practice theory. Nitkewicz never made, and has therefore waived, any such argument—and any industry practice is reflected in the New York insurance regulator's Product Outlines, not one private party's conduct.

CONCLUSION

For the foregoing reasons, LLANY respectfully requests this Court to affirm the District Court's judgment.

Dated: February 9, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because:

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/s/ *Alan B. Vickery*

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2022, a true and correct copy of the foregoing Final Form Brief of Appellee Lincoln Life & Annuity Company of New York was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) and (2).

/s/ *Alan B. Vickery*