18-2490

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

STEVEN PLAVIN,

Plaintiff-Appellant,

—v.—

GROUP HEALTH INCORPORATED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR PLAINTIFF-APPELLANT

WILLIAM CHRISTOPHER CARMODY
ARUN SUBRAMANIAN
HALLEY W. JOSEPHS
NICHOLAS C. CARULLO
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas,
32nd Floor
New York, New York 10019
(212) 336-8330

MICHAEL F. COSGROVE
J. TIMOTHY HINTON, JR.
HAGGERTY HINTON & COSGROVE LLP
203 Franklin Avenue
Scranton, Pennsylvania 18503
(570) 344-9845

Attorneys for Plaintiff-Appellant

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I. Introduction

GHI, in arguing that its conduct is not "consumer-oriented" within the remedial scope of the New York General Business Law ("GBL"), is asking this Court to hold what no other court has ever held: that where a commercial contract lurks in the background of a consumer transaction, injured consumers are without recourse. Put simply, GHI's opposition depends on writing the transaction between GHI and Plavin out of the Complaint.

This case is not about any contract between GHI and New York City (the "City"). Nor does it concern any of the circumstances surrounding the negotiation of that contract. It is about GHI's transactions with individual consumers. Specifically, it is about GHI's use of deceptive marketing to get hundreds of thousands of consumers to select GHI's health insurance plan and purchase worthless riders.

In its brief, GHI goes all-in on its reliance on *New York Univ. v. Continental Ins. Co.*, 662 N.E.2d 763 (N.Y. 1995) ("*NYU*"). But in that case the plaintiff ***was*** New York University, a sophisticated commercial entity. It was suing over a heavily-negotiated, custom crime insurance contract to which it was a party (the sole policyholder). Plavin, by contrast, is not a sophisticated commercial entity; he is not suing over the contract between GHI and the City; he does not have any

express contract at all with GHI; and he is challenging conduct that was directed to hundreds of thousands of current and former City employees.

Nothing in the *NYU* case, or any other case, stands for the proposition that a consumer is barred from asserting a claim under the GBL if such claim indirectly arises from a contract. Contrary to GHI's assertion, courts have sustained GBL claims arising from group health contracts. For example, GHI's brief simply ignores *Am. Med. Assoc. v. United Healthcare Corp.*, which involved GBL claims brought on behalf of two million New York state and municipal employees insured through the state's contract with United Healthcare, related to United's out-of-network charge determinations. No. 00-2800, 2003 WL 22004877, at *1, *4, *6 (S.D.N.Y. Aug. 22, 2003) (cited in Plavin Br. at 30). United settled the case, including those claims, for $350 million.[1]

GHI's other arguments fare no better. To avoid defending the District Court's conclusion that GHI's advertisements were not misleading as a matter of law based on the presence of disclaimers, which under black letter law a court may not consider on a motion to dismiss, GHI reframes its position to be that its marketing materials "fully disclosed" all of the unfavorable information about its health insurance plan. *See* GHI Br. at 24–28. GHI's position is the opposite of what

[1] *See Am. Med. Ass'n*, 2009 WL 1437819, at *2 (May 19, 2009) (noting settlement amount); *id.* 2009 WL 4403185, at *6 (Dec. 1, 2009) (granting preliminary approval of settlement); *id.* 2011 WL 5386347, at *1 (Nov. 7, 2011) (noting case was finally settled in October 2010).

the New York Attorney General's investigation showed, as detailed in its Assurance of Discontinuance ("AOD"), and relies on post-hoc rewriting of its marketing materials to say and imply things that are disclosed nowhere therein. To give just one example, while in GHI's brief it argues that it "simply publish[ed] truthful information and allow[ed] consumers to make their own assumptions about the nature of the information," *id.* at 32 (internal quotation marks omitted), the New York Attorney General instead recognized that "GHI does not sufficiently describe the limitations of GHI Plan's reimbursement of out-of-network providers and the resulting financial consequences to member and prospective members" and "GHI misrepresents the frequency with which the Schedule is updated." A168; *see* A66 (Compl. ¶ 39).

Plavin does not use the AOD as a substitute for proof; it is relevant because it confirms that reasonable people (including the New York Attorney General personnel themselves) read GHI's marketing materials in the same way that Plavin does and that his claims are, at the very least, plausible. *Cf. Rodriguez v. It's Just Lunch, Int'l*, No. 07-9227, 2010 WL 685009, at *7 (S.D.N.Y. Feb. 23, 2010), *report & recommendation adopted*, Dkt. 90 (Mar. 30, 2010) ("[W]ith respect to the overcharging allegation, the New York [A]ttorney [G]eneral's determination to conduct his own investigation into this charge, itself, signals the conduct was consumer-oriented.").

As for the rulings specific to the Insurance Law § 4226 claim, GHI adopts the District Court's conclusion that a heightened "scienter" standard akin to "fraudulent" intent applies. *See* GHI Br. at 36–37. But by its plain terms the statute solely requires "knowingly" misrepresenting the terms of insurance, which Plavin alleges both generally and specifically. Additionally, GHI does not even try to defend the District Court's imposition of a "reliance" requirement on this claim.

As for GHI's limitations argument, which the District Court *rejected* at the pleadings stage, GHI argues based on an affidavit from a GHI executive that Plavin's claims may have accrued in 2004 when he first incurred any out-of-network charge (regardless of what procedure the charge was for, or what the rate of reimbursement was for that charge at the time). GHI Br. at 45–47. The District Court correctly declined to consider the affidavit, and rejected GHI's statute of limitations argument. *See* A9–17.

There is nothing erroneous about that determination. The law is clear that Plavin suffered a separate, compensable GBL and Insurance Law injury each time GHI told him it would pay just a fraction of a given out-of-network claim, and GHI was unjustly enriched each time the City paid premiums on Plavin's behalf and each time Plavin directly paid for the Enhanced OON Rider. *See Gristede's Foods, Inc. v. Unkechauge Nation*, 532 F. Supp. 2d 439, 453 (E.D.N.Y. 2007) (GBL);

Cohen v. S.A.C. Trading Corp., 711 F.3d 353, 364 (2d Cir. 2013) (unjust enrichment).

For these reasons, and those set forth further below, the judgment of the District Court respectfully should be reversed.

II. Argument

A. Plaintiff States Valid Claims Under the New York General Business Law

1. GHI's Conduct, Directed Toward Plaintiff and Other New York City Employees and Retirees, Is Consumer-Oriented

The District Court held that Plavin could not, as a matter of law, plead a GBL claim because GHI's conduct toward him was not "consumer-oriented." A18–23. GHI's arguments track the District Court's analysis.

Like the District Court, GHI struggles in its analogy to the *NYU* case. GHI Br. at 17–23 (citing *NYU*). As outlined in Plavin's opening brief (at 26–29), *NYU* is the quintessential private contract dispute between two commercial entities. Indeed, GHI's own block-quote from *NYU* only serves to highlight the factual distinctions between *NYU* and this case. *See* GHI Br. at 18 (block-quote from *NYU* noting that the case involved "parties" to a contract who included a major university; a policy that was not "standard" but rather was "tailored to meet the purchaser's wishes and requirements"; and that the sale to the plaintiff was "handled through one of the largest brokerages in the Nation," who managed, "through negotiation," to "obtain several enhancements to the policy for plaintiff's

benefit"). *None* of these facts are presented here: the City is not the insured or the party claiming that it was deceived; Plavin had nothing to do with the negotiation of the insurance policy or contract and its terms were not "tailored" to him; and the terms of GHI's contract with the City are irrelevant to the marketing GHI directed at consumers like Plavin.

Apparently recognizing that Plavin's claims do not have anything to do with the terms or circumstances of the City's negotiations with GHI, GHI advances a novel argument that "the GBL provisions at issue do not extend to claims that *arise from* privately negotiated contracts." *Id.* at 19 (emphasis added). This illogical proposition is not the law of New York; and GHI's cited cases say nothing of the sort. No case says that. As the case law makes clear, the distinction between private contract disputes and consumer-oriented conduct is whether the plaintiff's claim arises from a single-shot transaction and bears solely on the specific terms of his insurance policy or interaction with the insurer; or (as here) whether the deceptive business practice was directed at or could affect similarly situated consumers. *See* Plavin Br. at 26–30 (citing cases); *see generally Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 604 (N.Y. 1999) (stating that GBL claims "are based on deceptive business *practices*, not on deceptive contracts").

Indeed, despite GHI's claim to the contrary, courts have sustained GBL claims arising specifically from group health contracts. For example, in *American*

Medical Association, the district court permitted New York public employees' unions to intervene in a lawsuit against United Healthcare to assert GBL claims on behalf of their United-insured members—approximately two million New York state and municipal employees—for deceptive conduct related to the insurer's out-of-network charge determinations. 2003 WL 22004877, at *1, *6. United Healthcare "administer[ed] the Empire Plan pursuant to a contract with the State of New York," *id.* at *4, but that had no bearing on the unions' ability to assert GBL claims on behalf of their members for deceptive *practices*.[2] Additionally, individual members of the Empire Plan brought (and settled) GBL claims as part of the same action. *See Am. Med. Ass'n*, 2007 WL 7330395 (4th Am. Compl. ¶¶ 19, 324–33) (July 10, 2007). GHI fails to address, let alone distinguish this case.[3]

[2] Similarly, GHI fails to address *Accredited Aides*, in which the court permitted the employer members of a group self-insured trust to proceed with GBL §§ 349 and 350 claims against the trust's plan and claims administrators (who contracted with the trust to administer the plan). *Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 46 N.Y.S.3d 246, 257 (N.Y. App. Div. 2017) (cited in Plavin Br. at 22–23). The background existence of a contract did not limit the members' ability to bring GBL claims.

[3] GHI also inaccurately describes the disposition of *Millennium Health, LLC v. EmblemHealth, Inc.*, 240 F. Supp. 3d 276 (S.D.N.Y. 2017), a case against GHI's parent company, EmblemHealth. GHI Br. at 21–22 (discussing case). In *Millenium Health*, the plaintiff alleged "that the representations made by Emblem to its members that it 'will cover the costs of their health care services' constitute unlawful deceptive acts and practices in violation of [GBL] § 349.'" 240 F. Supp. 3d. at 281. The court dismissed the GBL claim, with leave to amend, because the plaintiff failed to identify the *specific* document or statement it claimed was misleading. *Id.* at 286; Plavin Br. at 49 (noting case history). After the plaintiff

Next, GHI attempts to shift the focus of this case to the aggregate premiums it collected from the City and insureds, arguing that the total amount involved makes this a sophisticated rather than consumer-oriented transaction. But, again, Plavin's GBL claims are based on GHI's transactions with him, not on GHI's contract with the City. A60 (Compl. ¶ 19) (alleging that premiums are based on the number of enrollees that GHI convinces to sign up, with the City contributing $5,312 annually for an individual policy and $13,791 annually for a family policy). There is nothing "sophisticated" or "custom" about those transactions. The fact that, by virtue of directing its conduct towards hundreds of thousands of City employees and retirees, GHI cumulatively collected hundreds of millions of dollars in ill-gotten premiums is irrelevant to the GBL analysis. *See, e.g.*, *Am. Med. Ass'n*, 2003 WL 22004877, at *1, *6; & *supra* note 1.

Like *NYU*, the cases that GHI cites to support its argument are inapposite. In *Interested Underwriters at Lloyd's of London v. Church Loans & Invs. Trust*, 432 F. Supp. 2d 330 (S.D.N.Y. 2006), the court ***denied*** the property insurer's motion to dismiss on the ground that its conduct was not "consumer-oriented" where "[t]he insurance policy at issue here was purchased at a premium of $11,000 and involves

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amended, Emblem again moved to dismiss for failure to allege materially misleading statements. *Millennium Health*, No. 16-748, Dkt. 75–77 (Aug. 4, 2017). The Court denied the motion, *id.* Dkt. 99 (Oct. 4, 2017) and the case settled less than a year later, *id.* Dkt. 114 (Aug. 31, 2018). As noted in Plavin's opening brief, and not disputed by GHI, the *Millennium Health* court found that the complaint adequately alleged consumer-oriented conduct.

a potential payout of $750,000." *Id.* at 333. As the court explained, "absent a fuller evidentiary record to provide better context, the transaction cannot readily be characterized either as a 'modest' transaction that § 349 was indisputably intended to reach or a more substantial transaction that falls outside its ambit." *Id.* If anything, this case confirms that it is *improper* to dismiss on the pleadings a GBL claim merely because the amount in controversy is high. Moreover, a commercial property insurance transaction is hardly analogous to the selection of a personal health insurer—something hundreds of millions of people do each year.

In *Teller v. Bill Hayes, Ltd.*, 213 A.D.2d 141, 143, 148–49 (N.Y. App. Div. 1995), also relied upon by GHI, the court held, on *summary judgment*, that a dispute over a $350,000 East Hampton home renovation contract did not implicate "consumer-oriented conduct" because the contract was subject to extensive negotiations and the homeowner adduced no evidence that the contractor made misleading representations to other consumers. Here, there was no private negotiation between Plavin and GHI, and the same misleading marketing materials were distributed to hundreds of thousands of other City employees and retirees.

In any event, GHI's suggestion that the determination of whether conduct is consumer-oriented turns on the amount at issue is erroneous. Whether the amount at issue is "modest" is just one factor that courts look to in determining whether conduct is consumer-oriented, and it merely reflects an assumption that the more

substantial a transaction, the more likely it is that it involved sophisticated parties and individual negotiations. The overarching and fundamental question is whether the conduct "potentially affect[s] similarly situated consumers." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 647 N.E.2d 741, 745 (N.Y. 1995). For the reasons stated above and in Plavin's opening brief, GHI's conduct—directed at hundreds of thousands of City employees and retirees—plainly satisfies that standard.

2. The Complaint Alleges Materially Misleading Statements

The District Court ruled that the statements in GHI's marketing materials are not materially misleading as a matter of law because of the presence of disclaimers. *See* Plavin Br. at 33–42. This is reversible error because New York's highest court has held that it is improper for a court to dismiss a GBL claim based on disclaimers. *Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675, 676 (N.Y. 2012).

GHI's primary response is that the statements in its marketing materials are not disclaimers, but rather further explanations of the coverage under the policy. GHI Br. at 25–29. The problem for GHI is that its statements are substantially similar to the disclaimers at issue in *Gaidon*, 725 N.E.2d at 600–02:

***Gaidon* (emphases added)**	***Plavin* (italics added)**
• "These values are not guaranteed."	• "This is **not** a cost estimator."
• "Dividends shown and amounts dependent on them are based on the current illustrative formula. *They are neither guarantees nor estimates of future results*."	• "Coverage examples are not cost estimators. *You can't use the examples to estimate costs for an actual condition*."
• "Actual future dividends *may be higher or lower* than those illustrated depending on the company's actual future experience."	• "The reimbursement levels, as provided by the Schedule, *may be less than* the fee charged by the non-participating provider."

If GHI is right about disclaimers—that they are always just further explanations of a policy or an offer—then New York courts were wrong in finding that disclaimers could not cure (on a motion to dismiss) otherwise material misrepresentations in *Koch* and *Gaidon*. *See* Plavin Br. at 33–34 (citing cases). That is not the law.[4]

GHI's other arguments are similarly misguided. First, GHI argues that its representations about the outdated fee schedule were not materially misleading because it disclosed that the rates were based on 1983 procedures allowances. But GHI's argument de-emphasizes—both in substance and the quoted text of its

[4] GHI's citation to a Lanham Act case purportedly defining "disclaimer" does not address Plavin's argument that New York law precludes consideration of disclaimers on a motion to dismiss. *See* GHI Br. at 27 (citing *SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 906 F. Supp. 178, 182 (S.D.N.Y. 1995)). That case, which does not concern a GBL claim, describes several things a disclaimer may do; it does not define the only characteristics of a disclaimer. Even if it did, Plavin's claims about GHI's misleading statements conform to those characteristics that "contradict, clarify or change the meaning of the claim." *Id.*

brief—that (i) the marketing materials say that the "reimbursement rates were **originally** based on 1983 procedures allowances" and (ii) "some have been increased periodically." In fact, virtually all the reimbursement rates in effect from 2011 to 2015 were **currently** based on 1983 allowances, and only a tiny fraction had ever been updated. *See* A55–64 (Compl. ¶¶ 5, 7–8, 27–29, 31–32). The District Court erred in holding, as a matter of law, that it is implausible that any reasonable consumer would have read these marketing materials to mean that GHI had made some good faith effort to keep its rates up-to-date. *See Gaidon*, 725 N.E.2d at 604–05 ("Consumers vary in their level of sophistication and their ability to perceive the connection" between various statements in insurance marketing materials).

Second, GHI suggests that there is no meaningful difference between saying that reimbursements "***may*** be less than" out-of-network charges and saying that they "***will*** be far less than" out-of-network charges. But this argument ignores both (a) the well-established differences in meaning between the words "will" and "may" and (b) the compounding effect of GHI's false coverage example. Specifically, Plavin alleges that GHI deceptively included a single coverage example with a 66% percent rate of reimbursement when the actual average reimbursement rate was 23% and sometimes far, far less. *See* A63–64 (Compl.

¶¶ 31–32).[5] GHI's marketing materials cannot plausibly be read to indicate that reimbursement rates would be that low.

Third, GHI argues that "there is nothing misleading about the statement" that the Enhanced OON Rider covers "*certain* services increas[ing] the reimbursement of the basic program's non-participating fee schedule, on average, by 75%." GHI Br. at 30-31. But this argument ignores that omissions are independently actionable under the GBL. Indeed, New York's highest court has held that "fail[ing] to reveal" that a coverage illustration or other information about coverage is "wholly unrealistic" or subject to large-scale exceptions is grounds for a GBL claim. *Gaidon*, 725 N.E.2d at 608.

Here, the fact that ***all*** out-patient, out-of-network services were categorically excluded from the scope of the "out-of-network Rider" was highly material to consumers, particularly in light of the fact that those excluded services accounted for 65% of members' out-of-network costs. Plavin Br. at 39–40 (citing A65–66 (Compl. ¶¶ 36–38)). Further, that exclusion could have easily been disclosed by GHI. Instead of doing so, GHI chose to conceal that information in order to sell an out-of-network rider that provided no benefit to the vast majority of policyholders. That type of conduct falls squarely within the scope of the GBL.

[5] For example, the Complaint alleges that GHI reimbursed less than 15% of a $20,000 hip replacement procedure. A56–57 (Compl. ¶ 8). Nothing in the marketing materials would give a reasonable consumer notice of such low rates of reimbursement for standard medical procedures.

Lastly, GHI's defense of its promise of "Catastrophic Coverage" fails for similar reasons. GHI advertised this as an "additional" benefit, and the plain and ordinary meaning of "catastrophic coverage" is that there will be a cap on out-of-pocket medical expenses in the event of a major medical emergency.[6] In reality, this "additional benefit" merely represented the normal reimbursement allowance and did not provide any cap on an insured's out-of-pocket liability. This type of false advertising is precisely what the GBL was enacted to combat. *See Oswego*, 647 N.E.2d at 744 (emphasizing that under "consumer-protective purpose" of GBL, "consumers have the right to an honest market place where trust prevails between buyer and seller").

3. GHI Waived Any Claim of Error About the District Court's Consideration of the New York Attorney General's Assurance of Discontinuance

The District Court erred in its treatment of the New York Attorney General's 2014 AOD with GHI. As explained in Plavin's opening brief, the District Court erroneously concluded that the AOD covered only GHI's violations of Executive Law § 63(12), and that a lower standard applied to the New York Attorney General's findings than to Plavin's GBL claims. *See* Plavin Br. at 40–42.

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[6] *See, e.g.*, https://www.emblemhealth.com/~/media/Files/PDF/Federal/2018/2018_GHI_RI_Brochure.pdf at 13 (benefits plan brochure for another GHI plan describing "catastrophic protection" as "protect[ing] you against catastrophic out-of-pocket expenses for covered services" and stating that "[y]our annual out-of-pocket expenses for covered services obtained from non-participating providers, including deductibles and copayments, cannot exceed $15,000 per person").

GHI repeats the District Court's erroneous analysis but its independent error lies in asking this Court in the first instance to *strike* the AOD references from the Complaint and broader record.[7] *See* GHI Br. at 33–35. GHI did not move for such relief in the District Court and has therefore waived this issue. *See Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). In any event, GHI's argument is meritless. *See, e.g.*, *Rodriguez*, 2010 WL 685009, at *7 (making inferences based on an investigation by the New York Attorney General).

B. The District Court Correctly Held That Plaintiff's Claims Are Not Time-Barred.

The District Court properly limited its statute of limitations analysis to the allegations in the Complaint, as required on a motion to dismiss. A9–17. Under the Federal Rules, "a defendant [is required] to plead an affirmative defense, like a statute of limitations defense, in the answer, not in a motion to dismiss." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014). The Third Circuit "permit[s] a limitations defense to be raised by a motion under Rule 12(b)(6) 'only if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'" *Id.* (quoting *Robinson v. Johnson*, 313

[7] Notably, GHI attached the AOD to its own motion to dismiss. *See* A163 (attaching AOD). *Cf. In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 437 n.12 (3d Cir. 1996) (concluding that party who "placed the [other side's expert] report in the record" and "did not move to strike nor did it otherwise object to [the] report in the district court" waived any claim of Rule 56 defect on appeal).

F.3d 128, 134–35 (3d Cir. 2002)); *see Hanna v. U.S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975) (dismissal on limitations grounds improper where "there is a question of fact as to the existence of the defense").

On appeal, GHI has abandoned the position it took below that the claims accrued when Plavin first enrolled in the GHI Plan in 1984. GHI Br. at 44–45 (abandoning argument). Instead, GHI now argues that Plavin's claims may have accrued in 2004. This argument is based solely on conjecture from a vague, untested affidavit submitted by GHI itself (and rejected by the District Court) purporting to show that Plavin and his family submitted out-of-network claims before 2014.

GHI's revised argument fails as a matter of both procedure and substance. First, under Third Circuit law, extraneous evidence cannot be considered on a motion to dismiss. *See Schmidt*, 770 F.3d at 249. Only if a limitations defect is apparent on the face of the Complaint would dismissal on that ground be appropriate. *Id.* The District Court correctly declined to consider the affidavit and expressly concluded that it is "exactly the type of subject matter that should properly be explored during discovery." A9–10 (declining to consider affidavit). GHI's assertion that the information in the affidavit is somehow "integral" to Plavin's claims is meritless. *Id*. (noting that the claims mentioned in the affidavit

are not mentioned anywhere in the Complaint and are not "integral" to Plavin's claims).[8]

Not only is the use of the affidavit improper, but it is substantively irrelevant. Plavin is not seeking damages for injuries outside of the class period. *See* A445–54. And New York law is clear that (i) Plavin suffered a separate, compensable GBL and Insurance Law injury each time GHI told him it would pay just a fraction of a given out-of-network claim, and (ii) GHI was unjustly enriched each time the City paid premiums on Plavin's behalf and each time Plavin directly paid for the Enhanced OON Rider. *See Gristede's Foods*, 532 F. Supp. 2d at 453 (dismissal on limitations grounds unwarranted where plaintiff alleged more than one deceptive act and/or false advertisement under GBL §§ 349, 350, because each misleading act or advertisement may "inflict new injuries" on plaintiff within the three-year period, though plaintiff could not assert claims outside that period); *Cohen*, 711 F.3d at 364 (reciting black-letter New York law that "the six-year limitations period for unjust enrichment accrues upon the occurrence of the wrongful act giving rise to a duty of restitution" and measuring timeliness from "[t]he latest-in-time wrongful act pleaded in the complaint") (internal quotation

[8] GHI does not argue that the District Court erred in excluding the affidavit or explain why this Court should nonetheless consider it. In fact, GHI does not even mention that the District Court held it could not consider the affidavit. Further, GHI does not make any attempt to show that Plavin's claims are barred by the allegations within the four corners of the Complaint.

marks omitted); *Kermanshah v. Kermanshah*, 580 F. Supp. 2d 247, 263–64 (S.D.N.Y. 2008) (acknowledging that *multiple* "wrongful acts [ ] could serve as the basis for unjust enrichment").

Just as in *Gristede's Foods* and *Cohen*, Plavin is solely seeking to proceed with his GBL, Insurance Law, and unjust enrichment claims that accrued within the respective three- and six-year limitations periods. *Gristede's Foods*, 532 F. Supp. 2d at 453 (rejecting defendants' argument that a GBL claim "accrues only once (as of the date of the initial injury) and does not continue to accrue upon each subsequent violation") (internal quotation marks omitted); *see Koenig v. Boulder Brands, Inc.*, 995 F. Supp. 2d 274, 276, 291 (S.D.N.Y. 2014) (allowing plaintiffs who bought milk deceptively labeled fat-free to proceed with GBL claims within the limitations period even though they began purchasing the product more than three years before they filed the complaint); A67 (Compl. ¶ 41) (alleging one of Plavin's injuries occurred when GHI told Plavin in February 2015 that he was responsible for a significant portion of an out-of-network claim); A56–70 (*id.* ¶¶ 6, 11–13, 19, 21, 24–25, 36–38, 50–51) (alleging City employees and retirees directed the City to make premium payments to GHI on their behalf and directly paid for the Rider).

As the District Court recognized, for the February 2015 claim, "it is plausible that Plavin could not have known that his expectations about out-of-

network reimbursements were unrealistic until Group Health reimbursed his claim. Following *Gaidon*, courts have held that plaintiffs' injuries occur when defendants' representations 'proved false,'" and their expectations were not met. A15–16; *see Gaidon v. Guardian Life Ins. Co. of Am. (Gaidon II)*, 750 N.E.2d 1078, 1083–84 (N.Y. 2001).

Third Circuit precedent and the case law cited above foreclose GHI's argument that Plavin's claims are time-barred. The District Court's limitations ruling was correct.

C. The Insurance Law Claim Is Adequately Pled

With respect to Plavin's Insurance Law § 4226 claim, GHI collapses the distinction between what is sufficient to *plead* a claim and what is necessary to *prove* a claim. Knowledge may be alleged generally under Rule 9(b).[9] GHI asks the Court to set aside this fundamental rule and hold Plavin to an evidentiary standard at the pleadings stage. *See* GHI Br. at 36 (arguing that "proof of scienter is required"). True to form, the only case GHI cites to support its argument that Plavin failed to plead "scienter" is a case holding, on a motion for summary judgment, that (in GHI's words) the "claim failed as a matter of law *given the lack of evidence*" of knowledge. *Id.* (emphasis added).

[9] As detailed in Plavin's opening brief, the Complaint pleads knowledge generally—as permitted under Rule 9(b)—and specifically. Plavin Br. at 43–45.

GHI makes similar missteps in its analysis of case law purportedly supporting the District Court's imposition of a "nefarious intent" scienter requirement. *See* Plavin Br. at 43. All that § 4226 requires is a showing that an insurer "knowingly" misrepresented the terms, benefits, or advantages of the policy. There is no "fraudulent intent" requirement, *see id.* (citing case law), and the District Court erred in imposing such a requirement.

Finally, by failing to address the issue, GHI concedes that the District Court erred in grafting a "reliance" requirement onto Plavin's § 4226 claim. GHI does not even try to defend that aspect of the District Court's ruling. *Compare* Plavin Br. at 45–46, *with* GHI Br. at 35–37.

D. The Unjust Enrichment Claim Should Proceed

1. Plaintiff Disputes the Existence and Scope of the Alleged Contracts on Which the District Court and GHI Rely

The District Court dismissed Plavin's unjust enrichment claim on the grounds that Plavin must be the third-party beneficiary of the contract between the City and GHI and the contract must cover the dispute between the parties regarding GHI's deceptive marketing practices. This was error because the District Court relied on a contract it has never seen to conclude that the contract somehow covers the subject matter of this dispute. *See* Plavin Br. at 46–48.

On appeal, GHI does not defend the majority of the District Court's analysis, but nonetheless argues that the "GHI Plan" precludes a claim of unjust enrichment.

GHI Br. at 37. But GHI never identifies what constitutes the "GHI Plan." This is not a standard case where an insurer sends an insurance policy to insureds, which insureds then assent to, thus creating a contract between the insurer and the insured. *See* A61 (Compl. ¶ 24) (alleging that GHI never sent a certificate of insurance to or executed any contract with Plavin). Even GHI's (inadmissible) affidavit does not claim that any such policy was ever sent to Plavin. GHI did attach a Certificate of Insurance to the affidavit, but there is no evidence it was sent to Plavin or other policyholders, and it expressly states that "i[t] is *not a contract between you and GHI*." [10] A196 (emphasis added).

Because GHI has not identified any valid contract, let alone one that is both integral to the complaint and covers the subject matter of this dispute, Plavin's unjust enrichment claim should not have been dismissed.

2. GHI's Alternative Arguments About the Unjust Enrichment Claim Fail

GHI also asserts two additional grounds for affirming the dismissal of Plavin's unjust enrichment claim, neither of which was addressed or adopted by the district court. Both arguments fail.

First, Plavin's equitable and statutory claims are not duplicative. Under New York law, an unjust enrichment claim is not duplicative where a "reasonable trier

[10] Because the COI is not a contract (and no other purported contract is in the record), it is irrelevant whether or not a third-party beneficiary to a contract can bring an unjust enrichment claim. *See* GHI Br. at 39.

of fact could find unjust enrichment . . . without establishing all the elements for one of [Plaintiffs'] claims sounding in law" (and vice versa). *Nuss v. Sabad*, No. 10-279, 2016 WL 4098606, at *11 (N.D.N.Y. July 28, 2016) (denying motion for summary judgment to dismiss unjust enrichment claim as duplicative of tort claims).[11] Further, "claims are not duplicative" where "a claimant is entitled to a particular category of damages on one claim but not the other." *Myers Indus., Inc. v. Schoeller Arca Sys., Inc.*, 171 F. Supp. 3d 107, 122–23 (S.D.N.Y. 2016) ("In New York, duplicative claims arise from the same facts *and* allege the same damages.") (emphasis added) (quoting *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 175 (2d Cir. 2008)).[12] In addition, a plaintiff is permitted to plead alternative claims. *See* Fed. R. Civ. P. 8(d)(2); *In re Processed Egg Prod. Antitrust Litig.*, 851 F. Supp. 2d 867, 915 (E.D. Pa. 2012) ("Rule 8 allows plaintiffs to plead claims in the alternative despite inconsistencies 'in both legal and factual

[11] *See Nuss*, 2016 WL 4098606, at *11 (concluding that even if jury decided plaintiff did not rely on defendants' fraudulent statements, "the loss of any one element [of fraud]" would not, as a matter of law, "preclude equitable recovery under a theory of unjust enrichment"); *McCracken v. Verisma Sys. Inc.*, No. 14-6248, 2017 WL 2080279, at *7 (W.D.N.Y. May 15, 2017) (denying motion to dismiss unjust enrichment claim as duplicative of GBL claim in putative class action because "a reasonable trier of fact could find the elements [of] unjust enrichment without establishing all the elements for Plaintiffs' NYGBL § 349 claim," such as "consumer-oriented" conduct).

[12] GHI's citation to *Nelson v. MillerCoors, LLC*, 246 F. Supp. 3d 666, 679 (E.D.N.Y. 2017), GHI Br. at 41, contradicts the Second Circuit's *NetJets Aviation* decision, which permits unjust enrichment and other claims to proceed where the damages for each claim differ.

allegations.'") (quoting *Indep. Enters. Inc. v. Pittsburgh Water & Sewer,* 103 F.3d 1165, 1175 (3d Cir. 1997)).

Here, neither the elements of the unjust enrichment claim nor the damages sought "duplicate" the statutory claims. Among other things: (1) unjust enrichment requires that GHI benefitted at Plavin's expense, whereas the GBL claims require that Plavin was injured by GHI's conduct; (2) an unjust enrichment claim can be based on the mere fact that GHI failed to communicate the policy terms and the reimbursement schedule and obtain mutual assent to both, without regard to whether its marketing materials were deceptive; (3) unjust enrichment occurred each time Plavin selected the GHI Plan and paid for the Rider, while the GBL and § 4226 injuries did not occur until Plavin's reasonable expectations were not met; (4) under the unjust enrichment cause of action, Plavin is entitled only to restitution of the benefit conferred (less amounts paid out), whereas his GBL claims entitle him to actual and statutory damages; (5) the GBL claims require that GHI engaged in consumer-oriented conduct, while unjust enrichment contains no such element; and (6) § 4226 requires a "knowing" misrepresentation, while unjust enrichment has no "knowledge" element.

Accordingly, it was error for the District Court to conclude that Plavin's unjust enrichment claim is duplicative of his statutory claims.

Second, GHI disputes the sufficiency of Plavin's allegation that GHI benefited at Plavin's expense. GHI Br. at 42–44. This position is meritless. Under New York law, there is no privity requirement for an unjust enrichment claim, *Georgia Malone & Co. v. Rieder*, 973 N.E.2d 743, 746–47 (N.Y. 2012), and a benefit may be conferred on the defendant "directly or indirectly." *Mfrs. Hanover Trust Co. v. Chem. Bank*, 559 N.Y.S.2d 704, 708 (N.Y. App. Div. 1990). Here, Plavin conferred a benefit upon GHI both when he (a) directly paid for the optional (and illusory) Enhanced OON Rider[13] and (b) when he selected the GHI Plan, which had the effect of both directing the City to pay premiums to GHI and depriving Plavin of the right to select another plan.

GHI concedes that the first type of benefit is sufficient to state a claim for unjust enrichment. *See* A138 n.6. This should end this Court's inquiry because GHI filed a motion to dismiss, not a motion to strike. In any event, however, GHI's argument that Plavin's selection of the GHI Plan did not directly or indirectly benefit GHI at Plavin's expense fails. Plavin was statutorily entitled to have the payments made on his behalf as part of his employment and retirement package, *see* N.Y.C. Admin. Code § 12-126, his selection had the direct effect of putting money into GHI's pockets; and, having selected the GHI Plan based on misleading and incomplete information, he was deprived of both the promised benefits and the

[13] *See* A58, A65–70 (Compl. ¶¶ 13, 36–38, 41, 51).

opportunity to select a different plan. Under New York law, which requires neither privity nor a direct payment by the plaintiff, these allegations are more than sufficient.[14]

E. If the Court Announces a New Rule Requiring a Heightened Pleading Requirement, Plavin Should Be Granted Leave to Amend

In the event this Court agrees with Plavin's position but nonetheless believes there are additional facts that should have been alleged in support of any claim (if, for example, the Court announces a new rule that reliance or heightened knowledge or "fraudulent intent" scienter is an element of a § 4226 claim), in fairness Plavin should be permitted leave to amend in the first instance to address those new pleading requirements. *Cf. In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434–35 (3d Cir. 1997) (noting that "[o]rdinarily, complaints dismissed under Rule 9(b) are dismissed with leave to amend" and, where plaintiff requested leave to amend in opposition to motion to dismiss, reversing dismissal with prejudice of claims under Rule 9(b) notwithstanding absence of a proposed

[14] GHI cites two cases for the proposition that Plavin lacks a "property interest" in the premiums the City paid to GHI at his direction and on his behalf. GHI Br. at 42–44. Whether Plavin has a "property interest" is irrelevant; the question is simply whether GHI benefited at Plavin's expense. *See Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000). And neither case involved even remotely analogous facts. GHI Br. at 42–44 (citing *N.Y. v. Barclays Bank*, 563 N.E.2d 11, 14–15 (N.Y. 1990) (applying U.C.C. rule regarding actual or constructive delivery of checks); and *Navana Logistics Ltd. v. TW Logistics, LLC*, No. 15-856, 2016 WL 796855, at *1– 2, 7–8 (S.D.N.Y. Feb. 23, 2016) (rejecting freight shipper's unjust enrichment claim where only the seller, not the shipper, suffered loss)).

amended complaint). Both GHI's arguments and the District Court's decision were based on categorical positions concerning whether retirees like Plavin could assert claims like those in the Complaint, not the specificity of the facts alleged or some omission of a required factual allegation.

III. Conclusion

For the foregoing reasons and those stated in his opening brief, Plavin respectfully submits that the opinion and order of the District Court should be reversed.

Dated: New York, New York
December 14, 2018

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: *s/ William Christopher Carmody*

William Christopher Carmody
Arun Subramanian
Halley W. Josephs
Nicholas C. Carullo
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019-6023
Tel.: 212-336-8330
Fax: 212-336-8340
bcarmody@susmangodfrey.com
asubramanian@susmangodfrey.com
hjosephs@susmangodfrey.com
ncarullo@susmangodfrey.com

J. Timothy Hinton, Jr., Esq. (PA ID 61981)
Michael F. Cosgrove, Esq. (PA ID 47349)
HAGGERTY HINTON & COSGROVE LLP
203 Franklin Avenue
Scranton, PA 18503
Tel: (570) 344-9845
timhinton@haggertylaw.net
mikecosgrove@haggertylaw.net

Attorneys for Plaintiff-Appellant and the Class

CERTIFICATION OF COUNSEL

I, William Christopher Carmody, hereby certify that:

1. I am a member of the bar of this court;

2. This brief complies with the type-volume limitation of Fed. R App. P. 32(a)(7)(B) because this brief contains 6,474 words, including parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman (14 point font);

4. The electronic version of this brief is identical to the text version in the paper copies filed with the court. This document was scanned using Bit Defender Version 6.2.23.932 (with updated definition file as of December 14, 2018) and that no viruses were detected.

5. On this date, Seven hard copies of the foregoing Reply Brief for Plaintiff-Appellant were sent to the Clerk's Office. Pursuant to Local Appellate Rules 31.1(d) and 113.4(a), I caused the foregoing to be served on counsel for Defendant-Appellee via the Notice of Docket Activity generated by the Court's electronic filing system (i.e., CM/ECF) and via electronic mail.

Dated: New York, New York
December 14, 2018

Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: *s/ William Christopher Carmody*

William Christopher Carmody
Arun Subramanian
Halley W. Josephs
Nicholas C. Carullo
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019-6023
Tel.: 212-336-8330
Fax: 212-336-8340
bcarmody@susmangodfrey.com
asubramanian@susmangodfrey.com
hjosephs@susmangodfrey.com
ncarullo@susmangodfrey.com

J. Timothy Hinton, Jr., Esq. (PA ID 61981)
Michael F. Cosgrove, Esq. (PA ID 47349)
HAGGERTY HINTON & COSGROVE LLP
203 Franklin Avenue
Scranton, PA 18503
Tel: (570) 344-9845
timhinton@haggertylaw.net
mikecosgrove@haggertylaw.net

Attorneys for Plaintiff-Appellant and the Class