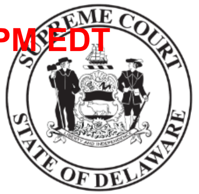
EFiled: Aug 11 2022 02:00PM EDT
Filing ID 67922933
Case Number 126,2022



IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary,	)	
Defendant/Counterclaim-Plaintiff Below, Appellant-Cross Appellee,	)	No. 126, 2022
	)	Court Below: Superior Court of the State of Delaware, C.A. Nos. N18C-07-289 MMJ CCLD, N17C-08-331 MMJ CCLD
v.	)	
SUN LIFE ASSURANCE COMPANY OF CANADA,	)	PUBLIC VERSION FILED AUGUST 11, 2022
Plaintiff/Counterclaim-Defendant Below, Appellee-Cross Appellant.	)	

APPELLANT'S REPLY BRIEF AND
CROSS APPELLEE'S ANSWERING BRIEF

OF COUNSEL:

Harry S. Davis
Robert E. Griffin
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000

Kevin G. Abrams (#2375)
John M. Seaman (#3868)
Samuel D. Cordle (#6717)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Wilmington Trust, National Association, as Securities Intermediary

Dated: July 27, 2022

{A&B-00816710}

TABLE OF CONTENTS

PAGE

INTRODUCTION 1

SUMMARY OF ARGUMENT ON CROSS APPEAL 4

ARGUMENT 5

I. THE COURT SHOULD PERMIT SECURITIES INTERMEDIARY'S PROMISSORY ESTOPPEL COUNTERCLAIMS AND EQUITABLE DEFENSES 5

1. Securities Intermediary Has Viable Equitable Defenses and Promissory Estoppel Counterclaims. 5

(a) *Price Dawe*, *Estate of Berland*, and *Estate of Malkin* Do Not Foreclose Securities Intermediary's Common-Law Defenses and Counterclaims. 6

(b) The Superior Court Did Not Reject Securities Intermediary's Promissory Estoppel Counterclaims and Equitable Defenses on the Merits. 12

2. Securities Intermediary's Promissory Estoppel Claim and Equitable Defenses Are Not Inconsistent with Delaware's Public Policy Against STOLI. 13

II. THE SUPERIOR COURT CORRECTLY APPLIED THE MAJORITY RULE THAT INSURERS MUST AUTOMATICALLY RETURN ALL PREMIUMS PAID ON VOID POLICIES 17

A. Questions Presented on Sun's Cross Appeal 17

B. Scope of Review 17

C. Merits of Argument 17

1. The Superior Court Correctly Applied the Majority Rule in Delaware on Return of Premiums. 17

(a) *Della* and *Estate of Malkin* Do Not Preclude a Rescission-Based Remedy in Insurer Cases. 18

(b) Sun's Public Policy Argument is Without Merit. 20

(c) *Price Dawe* Did Not Abrogate *Berck*, *Snyder*, and *Rucker*. 22

2. To the Extent the Superior Court Erred, the Court Should Remand the Cases to the Superior Court....23

3. Sun Must Return the Premiums Under the Restatement (Second) of Contracts §§ 197–198. 23

(a) Section 197: Disproportionate Forfeiture....25

(b) Section 198(b): Comparative Culpability....26

III. SECURITIES INTERMEDIARY IS ENTITLED TO A RETURN OF ALL PREMIUMS PAID TO SUN....37

IV. SUN MUST PAY PREJUDGMENT INTEREST 42

CONCLUSION....45

TABLE OF AUTHORITIES

Cases **Page(s)**

Becker v. Hamada, Inc.,
455 A.2d 353 (Del. 1982) 16

Estate of Beverly E. Berland v. Lavastone Cap. LLC,
No. 1:18-cv-02002-SB-SRF, ECF No. 157 (D. Del. Mar. 2, 2021)...................20

Boling v. Prospect Funding Holdings, LLC,
324 F. Supp. 3d 887 (W.D. Ky. 2018)...26

Brighthouse Life Ins. Co. v. Geronta Funding,
2019 WL 8198323 (Del. Super. Ct. Mar. 4, 2019)..24

Brighthouse Life Ins. Co. v. Geronta Funding,
2021 WL 4080672 (Del. Super. Ct. Aug. 20, 2021)..23

Cane v. State,
560 A.2d 1063 (Del. 1989) 14

Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.,
822 A.2d 1024 (Del. 2003) 44

Citadel Holding Corp. v. Roven,
603 A.2d 818 (Del. 1992) 42, 44

Clariant Corporation v. Hartford Mutual Insurance Company,
11 A.3d 220, 225 n.13 (Del. 2011) 44

Della v. Diamond,
210 A.2d 847 (Del. 1965) 18, 19

Kramer v. Phoenix Life Ins. Co.,
940 N.E.2d 535 (N.Y. 2010)...20, 28, 29, 30

Landgraf v. USI Film Products,
511 U.S. 244 (1994)..22

Lavastone Cap. LLC v. Estate of Berland,
266 A.3d 964 (Del. 2021) 6, 7, 8, 9

Lincoln Life & Annuity Co. of N.Y. v. Berck,
2011 WL 1878855 (Cal. Ct. App. May 17, 2011)....................30, 32

Lincoln Nat'l Life Ins. Co. v. Snyder,
722 F. Supp. 2d 546 (D. Del. 2010)....................18, 21, 22, 23

LTL Acres Ltd. P'ship v. Butler Mfg. Co.,
136 A.3d 682 (Del. 2016) 23

Estate of Malkin by Guarnero v. Wells Fargo Bank, NA,
2022 WL 2285884 (11th Cir. June 23, 2022)....................42

Moskowitz v. Mayor & Council of Wilmington,
391 A.2d 209 (Del. 1978) 42, 43

North American Leasing v. NASDI Holdings,
2022 WL 1073544, at *6 (Del. Apr. 11, 2022) 44

PHL Variable Ins. Co. v. ESF QIF Tr. ex rel. Deutsche Bank Tr. Co.,
2013 WL 6869803 (D. Del. Dec. 30, 2013) 9, 10

PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.,
28 A.3d 1059 (Del. 2011) ....*passim*

Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.,
774 F. Supp. 2d 674 (D. Del. 2011)....................18, 21, 22, 23

Reid v. Spazio,
970 A.2d 176 (Del. 2009) 41

Schueller v. Cordrey,
2017 WL 568344 (Del. Super. Ct. Feb. 13, 2017) 14

State v. Baker,
679 A.2d 1002 (Del. Super. Ct. 1996)....................14

State v. Fink,
820 A.2d 374 (Del. Super. Ct. 2002)....................14

Sun Life Assur. Co. of Can. v. Berck,
719 F. Supp. 2d 410 (D. Del. 2010)..*passim*

Sun Life Assur. Co. of Can. v. Conestoga Trust Services, LLC,
263 F. Supp. 3d 695 (E.D. Tenn. 2017), *aff'd*, 717 F. App'x 600
(6th Cir. Apr. 3, 2018) 26

Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n,
2016 WL 161598 (S.D. Fla. Jan. 14, 2016), *aff'd in part, vacated in part and remanded*, 693 F. App'x 838 (11th Cir. 2017).............11, 12, 26, 42

Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n,
2019 WL 2151695 (D. Del. May 17, 2019) 9, 27

Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n,
2019 WL 8353393 (D. Del. Dec. 30, 2019) ....*passim*

Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n,
839 F.3d 654 (7th Cir. 2016) 15, 26

Sun Life Assur. Co. of Can. v. Wells Fargo Bank, N.A.,
2020 WL 1503641 (N.D. Ill. Mar. 30, 2020) 35

Sun Life Assur. Co. of Can. v. Wells Fargo Bank, N.A.,
208 A.3d 839 (N.J. 2019) 35, 36

Sun Life Assur. Co. of Can. v. Wells Fargo Bank N.A.,
779 F. App'x 927 (3d Cir. Aug. 21, 2019) 26

Sun Life Assur. Co. of Can. v. Wilmington Tr. Co.,
2017 WL 978997 (D. Utah Mar. 13, 2017)...15

Telecomms. Law Pros. PLLC v. T-Mobile US, Inc.,
2015 WL 13159051 (D.D.C. Jan. 12, 2015)...26

U.S. Bank Nat'l Ass'n v. Sun Life Assur. Co. of Can.,
2016 WL 8116141 (E.D.N.Y. Aug. 30, 2016), *R&R adopted by*
2017 WL 347449 (E.D.N.Y. Jan. 24, 2017) 11

U.S. v. Kimbell Foods, Inc.,
440 U.S. 715 (1979)..21

Verrastro v. Bayhospitalists, LLC,
208 A.3d 720 (Del. 2019) 23

Wal-Mart Stores, Inc. v. AIG Life Ins. Co.,
860 A.2d 312 (Del. 2004) 16

Wells Fargo Bank, N.A. v. Estate of Malkin,
-- A.3d --, 2022 WL 1671966 (Del. May 26, 2022) .... *passim*

Wells Fargo Bank, N.A. v. Pruco Life Ins. Co.,
200 So. 3d 1202 (Fla. 2016) 20

Whitmore v. Robinson,
223 A.3d 417 (Del. 2019) 44

Statutes

11 *Del. C.* § 205(b)(1) 14

18 *Del. C.* § 2704(a) 5, 7

18 *Del. C.* § 2704(b) 5, 7, 8, 19

Fla. Stat. §§ 626.99289, 626.99291 20

Massachusetts General Laws Chapter 93A 12, 13, 29, 30

N.Y. Ins. Law § 7815(c) 20

Other Authorities

Del. Const. art. I, § 6 14

Restatement (Second) of Contracts .... *passim*

Restatement (Third) of Restitution and Unjust Enrichment 19, 24

Uniform Commercial Code 2, 8, 9

INTRODUCTION

Sun wants the Court to accept that insurers can learn the facts that render a policy invalid under *Price Dawe*, wait a decade to file a lawsuit seeking to invalidate that policy, and walk away from that lawsuit with a windfall—pocketing all the premiums, having no obligation to pay a policy's death benefit, and leaving the policyholder without equitable defenses. Businesses depend on Delaware law for its rationality and predictability, but accepting Sun's arguments would render Delaware law irrational and unpredictable. It will also inundate Delaware courts with insurer lawsuits concerning polices issued in the early 2000's, even when those insurers were on inquiry notice of the relevant facts concerning invalidity 10+ years earlier.

Sun concedes all of the following. After the insureds died in 2017 and 2018—and after Sun had collected \$6.9 million in premiums—Sun filed these lawsuits, claiming the Policies were wagers by LPC. But Sun learned LPC owned the Policies in 2008. [REDACTED]

Sun filed lawsuits challenging three other LPC policies in 2009, while Sun's attorneys were litigating six additional cases involving LPC policies. [REDACTED]

But Sun never told Securities Intermediary[1] or Viva that Sun had started waging a behind-the-scenes battle against LPC policies in 2009, which—because of Sun's "strategic decision" in 2012 to stop filing STOLI lawsuits while insureds were still alive—manifested itself after De Bourbon and Frankel passed away in 2017 and 2018, respectively. Instead, Sun laid in the weeds collecting $6.9 million in premiums—money paid for Sun's promise to provide insurance and pay death benefits—while consistently representing that the Policies were "in force," "in good standing," and "active."

If these cases involved *anything* other than life insurance, Sun would not be able to dispute that Securities Intermediary's promissory estoppel counterclaims and equitable defenses are viable. But Sun wants special treatment. Sun wants the Court to blind itself to how Sun exploited *Price Dawe*'s holding that policies can be challenged after the two-year contestability period by purposefully delaying STOLI lawsuits until insureds died while lining its pockets with premiums. Sun wants the Court to hold that insurers have immunity against promissory estoppel claims and all equitable defenses—regardless of their knowledge, conduct, and delay—even though no other litigant enjoys that luxury.

---

[1] Wilmington Trust, N.A., as Securities Intermediary ("Securities Intermediary") has acted, and continues to act, solely in its capacity as a securities intermediary pursuant to the UCC. *See* U.C.C. § 8-102(a)(14).

Sun's greed does not end there. Unsatisfied with not having to pay the death benefits, Sun wants a windfall. Sun asks the Court to reject the majority rule in Delaware requiring insurers to return premiums on STOLI policies. So after urging the Court to reject Securities Intermediary's promissory estoppel claims and equitable defenses because "courts 'may never enforce' STOLI policies," Sun asks the Court to enforce one side of the Policies by letting Sun keep $6.9 million in Policy premiums while relieving Sun of its obligation to pay the $19 million in death benefits. Sun wants the benefit of its bargain under the Policies without the burden.

And finally, Sun contends that if it must return some premiums, the Court should grant Sun a partial windfall by letting Sun retain the majority of premiums *and* not pay prejudgment interest. Not only are Sun's arguments flawed, but they underscore why the Court should sustain Securities Intermediary's counterclaims and defenses. If the Court accepts Sun's arguments that an insurer's premium-return obligations are capped at the premiums paid by the final owner in a policy's chain-of-title—or that an insurer only has to return all of the premiums *if* the policy owner can prove its predecessors would be entitled to premiums in a series of mini-trials—the only thing that will incentivize an insurer to act promptly upon discovering illegality will be the knowledge that, if the insurer waits too long, a court may dismiss the insurer's lawsuit based on equitable defenses.

SUMMARY OF ARGUMENT ON CROSS APPEAL

1. Denied. The Superior Court correctly held that Sun had to return premiums on the Policies after holding they were void *ab initio.* In doing so, the Superior Court relied on the well-established rule in Delaware that insurers must automatically return premiums on void policies—a rule grounded in rescission which courts have been reliably applying for 12 years.

If the Court disagrees and holds that a policyholder must satisfy the Restatement (Second) of Contracts §§ 197–198—or some other test—to recover premiums, the Court should remand the cases to the Superior Court for further proceedings, rather than engage in fact finding (as Sun invites the Court to do). If the Court decides to adjudicate factually whether Viva can recover premiums under the Restatement (Second) of Contracts §§ 197–198—the provisions Sun urges the Court to apply—the Court should order Sun to return all the premiums to Securities Intermediary (on behalf of Viva) under the Restatement (Second) of Contracts § 197 and/or § 198(b).

ARGUMENT

I. THE COURT SHOULD PERMIT SECURITIES INTERMEDIARY'S PROMISSORY ESTOPPEL COUNTERCLAIMS AND EQUITABLE DEFENSES

In *Estate of Malkin*,[2] the Court ruled that policy owners can assert common-law defenses and counterclaims against estates seeking to recover death benefits on void policies. *See Wells Fargo Bank, N.A. v. Estate of Malkin*, -- A.3d --, 2022 WL 1671966, at *5–6 (Del. May 26, 2022). The Court held "courts must look to the elements of the common-law defenses or counterclaims asserted—and, where appropriate, the public policy underlying the ban on human-life wagering—to decide the viability of such defenses or counterclaims to an estate's action under Section 2704(b)." *Id.* at *6.

Sun ignores this entirely. If policyholders can assert defenses and counterclaims against estates in Section 2704(b) actions, policyholders also can assert defenses and counterclaims against insurers in Section 2704(a) actions. In either case, the Court should (1) "look to the elements of the common-law defenses or counterclaims asserted," and (2) "where appropriate," consider "the public policy

[2] Because this Court decided *Estate of Malkin* on May 26, 2022—the deadline for Securities Intermediary's Opening Brief—Securities Intermediary could not incorporate *Estate of Malkin* into its Opening Brief.

underlying the ban on human-life wagering[.]" *Id.* at *6.[3] Applying *Estate of Malkin*, the Court should allow Securities Intermediary to assert its promissory estoppel counterclaims and equitable defenses on remand.

1. Securities Intermediary Has Viable Equitable Defenses and Promissory Estoppel Counterclaims.

Sun does dispute that based on "the elements of the common-law defenses or counterclaims asserted," *id.* at *6, Securities Intermediary has viable equitable defenses and promissory estoppel counterclaims. (OB 25–29.)[4] Sun nevertheless asks the Court to reject those defenses and counterclaims for two reasons. Both arguments lack merit.

(a) ***Price Dawe*, *Estate of Berland*, and *Estate of Malkin* Do Not Foreclose Securities Intermediary's Common-Law Defenses and Counterclaims.**

Sun claims "[t]his Court has thrice held *en banc* that courts may *never* enforce STOLI," "there is no meaningful difference between enforcing a STOLI policy and estopping an insurer from challenging one," and "[t]he common thread [in *Price Dawe*, *Estate of Berland*, and *Estate of Malkin*] is that investors cannot use defenses

---

[3] The cases where courts have interpreted *Price Dawe* to mean promissory estoppel claims and equitable defenses are automatically unavailable when a policy is void (AB at 30–31) do not survive *Estate of Malkin*.

[4] "OB __" refers to Appellant's Opening Brief (Dkt. 17).

or counterclaims to obtain/retain STOLI benefits[.]" (AB 29, 33, 34.)[5] Sun's argument that *Price Dawe*, *Estate of Berland*, and *Estate of Malkin* foreclose Securities Intermediary's promissory estoppel counterclaims and equitable defenses is misplaced.

First, *Estate of Berland* and *Estate of Malkin* do not help Sun. In *Estate of Berland*, the Court explained that "*something more*" than an insured's sale of a policy at a profit "must be required *to bar an estate's claim*" under Section 2704(b), and expressly left open the possibility of waiver. *See Lavastone Cap. LLC v. Estate of Berland*, 266 A.3d 964, 975 & n.44 (Del. 2021) (emphasis added). If an estate's Section 2704(b) claim is "barred"—whether because of waiver or something else—it means the investor will retain a STOLI policy's proceeds. And if there are circumstances in which an *insured's* course-of-dealing can bar an estate's STOLI claim under Section 2704(b), there must also be circumstances in which an *insurer's* course-of-dealing can bar an insurer's STOLI claim under Section 2704(a).

Estate of Malkin rejected a bona fide purchaser defense because "an action to recover death benefits under Section 2704(b) does not assert an 'adverse claim' as defined by UCC § 8-102(a)(1)." *Estate of Malkin*, 2022 WL 1671966, at *8; *see*

[5] "AB __" refers to Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal (Dkt. 32).

also id. at *11 (rejecting UCC § 8-115 defenses for the same reason). *Estate of Malkin* did *not* hold that UCC defenses are unavailable because, if permitted, a policyholder would retain the proceeds of a STOLI policy, and therefore, the Court would be "enforcing" (AB 33) a STOLI policy. If this Court had wanted to foreclose any defense or counterclaim that would result in a policy owner retaining (or receiving) the proceeds of a STOLI policy, the Court had the opportunity to do so in *Estate of Malkin*. It chose not to. Instead, *Estate of Malkin* instructed courts to consider the elements of a defense or counterclaim to determine its viability, rather than bar all defenses and counterclaims as a matter of law (as Sun suggests). *Estate of Malkin*, 2022 WL 1671966, at *6.

Second, the concerns that rendered certain defenses ineffectual in *Price Dawe*, *Estate of Malkin*, and *Estate of Berland* are absent here. *Price Dawe* held that policyholders cannot raise incontestability defenses because the contracts containing the incontestability clauses never came into existence. *See PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1067–68 (Del. 2011). Unlike *Price Dawe*, Securities Intermediary is not asserting claims or defenses that depend on the effectiveness of provisions contained in non-existent contracts.

Estate of Malkin held that policyholders cannot assert certain UCC defenses because a void policy does not fall within the statutory definition of an "adverse

claim." *See* 2022 WL 1671966, at *8–11. Unlike *Estate of Malkin*, Securities Intermediary is not asserting claims or defenses based on statutes with definitions that effectively carve out void *ab initio* policies.

And finally, *Estate of Berland* held that policyholders cannot raise *in pari delicto*/unclean hands against an estate based on an insured's fraud against an insurer because the Legislature provided that estate with a private right of action. *See* 266 A.3d at 974. The Court also reasoned that such a fraud harms the insurer rather than the investor asserting the fraud claim. *See id.* Unlike *Estate of Berland*, Securities Intermediary is not asserting claims or defenses that are inconsistent with a private right of action, nor is Securities Intermediary asserting a claim where it suffers no injury.

Third, Judge Stark got this right when holding that *Price Dawe* does not preclude policyholders from asserting equitable claims and defenses against insurers in STOLI cases. *See Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 2151695, at *5–6 & n.8 (D. Del. May 17, 2019) ("*Sol II*"); *PHL Variable Ins. Co. v. ESF QIF Tr. ex rel. Deutsche Bank Tr. Co.*, 2013 WL 6869803, at *6, *8 (D. Del. Dec. 30, 2013) ("*Griggs*").

Sun's attempts to downplay *Griggs* and *Sol* are unpersuasive. Sun relegates *Griggs* to a footnote without analysis. (AB 36 n.15.) In fact, Sun's argument that

there is no "special exception allowing a downstream buyer who was not involved in the illegality" to assert counterclaims and defenses (AB 34) ignores what the *Griggs* court said: "It seems to be well established that a party to an illegal agreement may, under some circumstances, be estopped to assert its illegality as against an innocent third person who has become interested in the agreement or whose rights are affected by the agreement[.]" *Griggs*, 2013 WL 6869803, at *6 (quoting 17A Am. Jur.2d *Contracts* § 304).

Regarding *Sol*, Sun misleadingly asserts "Judge Stark did not allow affirmative defenses or counterclaims to enforce a STOLI policy's death benefit either." (AB 37.) It's true *Sol III* ultimately held that the remedy for promissory estoppel was restitution damages (a return of all premiums) rather than expectation damages (the death benefit) or reliance damages (the purchase price plus the premiums paid by the policy owner). *See Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 8353393, at *3–4 (D. Del. Dec. 30, 2019) ("*Sol III*"). But the court also recognized that, on different facts, a policy owner *can* recover a policy's death benefit as expectation damages on a promissory estoppel claim. *See id.* at *3.

Sun's argument that the *Sol* court refused to instruct the jury on waiver and estoppel is also a half-truth. (AB 37.) The *Sol* court explained the policyholder's waiver and estoppel defenses to the jury in its preliminary instructions. (*Sol* Dkt.

283 at 218:10–11.) After the close of evidence, there was a dispute regarding whether those defenses had been preserved during trial, which the court took under advisement. (*Sol* Dkt. 287 at 1031:2–1040:4.) The court then issued jury instructions that did not include waiver and estoppel. (*Sol* Dkt. 267.)

Finally, Sun's claim that "there is no meaningful difference between enforcing a STOLI policy and estopping an insurer from challenging one" (AB 33) incorrectly conflates the counterclaim or defense's viability, on the one hand, with the appropriate remedy, on the other.

Sol, *Malkin*, and *Van de Wetering* are instructive. *Sol III* concluded that a return of all premiums rather than the death benefit was the appropriate remedy for promissory estoppel on *Sol*'s facts. *See Sol III*, 2019 WL 8353393, at *3–4. *Malkin I* and *Van de Wetering* held the policy owner's waiver and laches defenses were moot because Sun had to return premiums automatically on the policies. *See U.S. Bank Nat'l Ass'n v. Sun Life Assur. Co. of Can.*, 2016 WL 8116141, at *19 (E.D.N.Y. Aug. 30, 2016), *R&R adopted by* 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017) ("*Van de Wetering*"); *Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2016 WL 161598, at *21 (S.D. Fla. Jan. 14, 2016) ("*Malkin I*"), *aff'd in part, vacated in part and remanded*, 693 F. App'x 838 (11th Cir. 2017) ("*Malkin III*"). Put differently, *Van de Wetering* and *Malkin I* held that the remedy for Sun's waiver and/or laches

was duplicative of Sun's return-of-premium liability—as both courts required Sun to automatically return premiums once the policies were declared void.

Securities Intermediary believes the remedy for its promissory estoppel counterclaims and equitable defenses should be the Policies' death benefits. But the Superior Court could disagree (if the Court reverses), and find that another remedy is more appropriate. So even if the Court believes that policyholders cannot use promissory estoppel or equitable defenses to recover death benefits, the Court should at least hold that equitable theories are available to mandate an insurer to return premiums.

(b) The Superior Court Did Not Reject Securities Intermediary's Promissory Estoppel Counterclaims and Equitable Defenses on the Merits.

Sun also suggests the Superior Court's dismissal of Securities Intermediary's counterclaim under Chapter 93A of the Massachusetts General Laws means Securities Intermediary cannot prevail on its promissory estoppel counterclaims and equitable defenses. (AB 38.) Not true.

The Superior Court dismissed Securities Intermediary's Chapter 93A claim because it held Sun had no duty under Massachusetts law to disclose it was treating the Policies as STOLI or intending to challenge them. (Ex. C at 29.) Absent a duty, the Superior Court found no "causal connection" between Sun's unfair or deceptive

acts and Viva's damages. (*Id.*) But Securities Intermediary does not have to prove a disclosure duty to prevail on its promissory estoppel counterclaims and equitable defenses. (OB 25–26.) The Superior Court (or a jury) could find that Securities Intermediary has proved promissory estoppel and/or its equitable defenses under Delaware's common law, even though—in the Superior Court's view—Sun cannot be held liable under Chapter 93A. And even if Securities Intermediary has to establish a disclosure duty, the Superior Court could easily find that such a duty exists under Delaware's common law even if one does not exist under Massachusetts law.

2. Securities Intermediary's Promissory Estoppel Claim and Equitable Defenses Are Not Inconsistent with Delaware's Public Policy Against STOLI.

Securities Intermediary's counterclaims and defenses are not inconsistent with "the public policy underlying the ban on human-life wagering." *Estate of Malkin*, 2022 WL 1671966, at *6. Sun argues "[f]orcing an insurer to pay STOLI death benefits [pursuant to a counterclaim or defense] would allow an unlawful, unconstitutional human life wager that violates public policy to come to fruition." (AB 30; *see also id.* 33, 34, 36.) That is wrong.

Suffice it to say, STOLI policies are not the only things that offend Delaware's public policy or violate Delaware's Constitution. For example, crimes against

persons and property also offend Delaware's public policy, and yet courts have not condoned such crimes—or let them "come to fruition" (AB 30)—when holding that the State cannot bring criminal prosecutions outside the applicable statute of limitations. *See, e.g.*, *State v. Fink*, 820 A.2d 374, 375–76 (Del. Super. Ct. 2002); *State v. Baker*, 679 A.2d 1002, 1006–08 (Del. Super. Ct. 1996); *Cane v. State*, 560 A.2d 1063, 1066 (Del. 1989); *see also* 11 *Del. C.* § 205(b)(1) (statute concerning prosecutions that must be commenced within five years). The Delaware Constitution also prohibits unreasonable searches and seizures. Del. Const. art. I, § 6. But nobody could credibly claim that the Superior Court had condoned unconstitutional policing when it refused to create a damages action under Article 1, Section 6 for excessive force. *See Schueller v. Cordrey*, 2017 WL 568344, at *1–2 (Del. Super. Ct. Feb. 13, 2017).

The point is that courts do not let illegality "come to fruition" (AB 30) or condone such illegality when it runs into countervailing interests. In fact, courts outside Delaware have recognized they are not "allow[ing] human life wagers to come to fruition" (AB 34) by requiring *Sun itself* to pay death benefits on STOLI policies. *See Sun Life Assur. Co. of Can. v. Wilmington Tr. Co.*, 2017 WL 978997, at *8 (D. Utah Mar. 13, 2017); *Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n*, 839 F.3d 654, 657 (7th Cir. 2016) ("*Margolin*").

Securities Intermediary understands that STOLI is "void *ab initio*, anathema to hundreds of years of public policy, [and] violative of the Delaware Constitution[.]" *Estate of Malkin*, 2022 WL 1671966, at *9 n.48. But that does not mean Delaware's public policy is best served by letting insurers bring STOLI challenges 10+ years after they learn the facts regarding illegality, or that requiring insurers to face equitable defenses is inconsistent with "the public policy underlying the ban on human-life wagering." *Id.* at *6. Indeed, Sun's position—namely, that an insurer's conduct and/or delay will never, under any circumstances, obligate an insurer to pay a policy's death benefit—flouts basic principles of inquiry notice, which is meant to ensure plaintiffs act promptly upon discovering the existence of potential claims. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).[6]

In fact, if the Court accepts Sun's argument, the result will be remarkable. Although litigants are generally required to act promptly upon discovering illegality

---

[6] For that reason, Sun's unsupported argument that "[t]he time for an insurer to conduct its investigation is during underwriting" and "[o]nce an insurer issues policies … the burden falls on would-be investors … to do their part by conducting reasonable diligence" (AB 48–49) in an effort to wash its hands of any responsibility to commence litigation upon discovering facts suggesting policy invalidity is at odds with decades of Delaware jurisprudence which generally requires plaintiffs to bring claims promptly upon discovering an injury. *See, e.g.*, *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982).

(or risk forfeiting their claims), a ruling in Sun's favor will incentivize insurers to delay bringing STOLI challenges as long as possible. Insurers will know they can wait indefinitely to challenge a policy without any risk that a court will point to their strategic delay as a basis for dismissing the case. And while insurers wait, they will collect millions of dollars in premiums, which insurers will then attempt to keep even if the policy is declared void *ab initio*.

II. THE SUPERIOR COURT CORRECTLY APPLIED THE MAJORITY RULE THAT INSURERS MUST AUTOMATICALLY RETURN ALL PREMIUMS PAID ON VOID POLICIES

A. Questions Presented on Sun's Cross Appeal

1. Did the Superior Court correctly hold that Sun had to return the premiums on the Policies once the Superior Court declared that the Policies were void *ab initio*?

2. If the Court holds that Securities Intermediary must prove restitution under the Restatement (Second) of Contracts §§ 197–198—or some other test—should the Court remand the cases back to the Superior Court for further proceedings, rather than itself engage in a fact-intensive analysis under whatever test the Court adopts?

3. If the Court does not remand the issue to the Superior Court, does Sun have to return premiums on the Policies?

B. Scope of Review

Questions of law are reviewed *de novo*. *See Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

1. The Superior Court Correctly Applied the Majority Rule in Delaware on Return of Premiums.

The Superior Court correctly held that "[a]s a matter of public policy, it would not be fair for Sun Life to retain all premiums, while never having to pay death

benefits" and "Sun Life cannot be absolved from any obligation to pay death benefits *and* yet retain premiums." (Ex. C 34–35.) The Superior Court's ruling was a reaffirmation of the automatic premium-return rule that courts have been reliably applying as a matter of Delaware law since 2010. *See, e.g.*, *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 774 F. Supp. 2d 674, 682 (D. Del. 2011); *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 564–65 (D. Del. 2010); *Sun Life Assur. Co. of Can. v. Berck*, 719 F. Supp. 2d 410, 418–19 (D. Del. 2010); *cf. Sol III*, 2019 WL 8353393, at *4 (citing *Rucker*, *Snyder*, and *Berck*).

Sun urges this Court to reject the well-established automatic premium-return rule for three main reasons, none of which has any merit.

(a) *Della* and *Estate of Malkin* Do Not Preclude a Rescission-Based Remedy in Insurer Cases.

Sun claims the automatic-return rule is inconsistent with *Della v. Diamond*, 210 A.2d 847 (Del. 1965), and *Estate of Malkin*. (AB 40–41, 44.) Neither case supports Sun's argument that it may retain the benefit, without the burden, of a void *ab initio* policy. What Sun seeks to do—enforce only one side of a bilateral agreement—itself violates Delaware law.

Della—which involved an illegal bar—observed in passing "*[o]rdinarily*, we think … neither party has a remedy to any extent against the other." 210 A.2d at 849 (emphasis added). *Della* did not explain what "ordinarily" meant, what

circumstances would cause one party to have a remedy, or what that remedy would be. The automatic premium return rule is based on rescission, *see Berck*, 719 F. Supp. 2d at 418–19, and "[r]escission … may … be employed to reverse transfers made under unenforceable or illegal agreements[.]" Restatement (Third) of Restitution and Unjust Enrichment § 54, cmt. a. *Della* can be easily squared with the rule requiring insurers to return premiums on void policies—as courts have been doing for 12 years.

Estate of Malkin was a Section 2704(b) case brought by an estate where the investor specifically sought a premium offset as restitution damages for unjust enrichment. *See Estate of Malkin*, 2022 WL 1671966, at *12. The Court held "the party that is being sued under Section 2704(b) may recover the premiums it paid on the void contract if it can prove its entitlement to those premiums under a viable legal theory." *Id.* *Estate of Malkin* did not purport to list every "viable" premium-recovery theory—whether in an insurer case or an estate case. *Estate of Malkin* does not preclude a policyholder from recovering premiums under rescission principles in a carrier case.

If anyone is seeking a remedy that is inconsistent with the Court's precedent, it is Sun. *Price Dawe* explained "[a] court may never enforce agreements void *ab initio*, no matter what the intentions of the parties." 28 A.3d at 1067. By trying to

keep $6.9 million in premiums on the Policies, Sun is asking this Court to enforce one side of contracts that have been held void *ab initio*—in contravention of *Price Dawe*. *See Estate of Beverly E. Berland v. Lavastone Cap. LLC*, No. 1:18-cv-02002-SB-SRF, ECF No. 157, at 5 (D. Del. Mar. 2, 2021) ("If the agreement is void from the start, that suggests the correct outcome would be a remittance of the policy payment and premiums.").

(b) Sun's Public Policy Argument is Without Merit.

Sun's argument that ordering insurers to return premiums automatically will "send a loud message to upstream actors to create more STOLI in Delaware" (AB 42) is fearmongering.

As *Price Dawe* recognized, "[i]n approximately 2004 … STOLI promoters sought to solve the supply problem by generating new, high value policies." 28 A.3d at 1070. States responded to STOLI by passing legislation designed to curtail the issuance of future STOLI policies. *Compare Wells Fargo Bank, N.A. v. Pruco Life Ins. Co.*, 200 So. 3d 1202, 1205–06 (Fla. 2016) (holding that STOLI policies are incontestable after two years) *with* Fla. Stat. §§ 626.99289, 626.99291; *compare Kramer v. Phoenix Life Ins. Co.*, 940 N.E.2d 535, 536–37, 539 n.5 (N.Y. 2010) (holding that STOLI policies are valid) *with* N.Y. Ins. Law § 7815(c). In other states,

courts issued opinions that were favorable to insurers bringing STOLI lawsuits. *See Price Dawe*, 28 A.3d at 1067–76.

Today's laws are therefore different than they were in the early 2000s when "STOLI promoters sought to solve the supply problem by generating new, high value policies." *Price Dawe*, 28 A.3d at 1070. If ordering insurers to return premiums was going to facilitate new STOLI policies in Delaware, the market would have seen these policies by now. Indeed, courts applying Delaware law have been ordering insurers to automatically refund premiums since 2010, and Sun cites no data suggesting that *Berck*, *Snyder*, and *Rucker* have sent "a loud message upstream to upstream actors to create more STOLI in Delaware[.]" (AB 42.) If anything, rejecting the automatic-return rule and letting Sun keep the premiums on the Policies will send "a loud message" to *insurers* to write policies knowing there are insurable interest problems and delay STOLI lawsuits for years, because insurers will know that they will eventually be able to void those policies *and* keep the premiums.

Sun's public policy argument also ignores that "[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 739 (1979). The law's "predictability and stability are of prime

importance" when it comes to "contractual or property rights." *Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994).

Given that, Sun's argument that Viva bought the Policies believing that, if they were invalidated, "a court would make it whole—and then some—by automatically refunding to it, not just the premiums it paid, but also the premiums it did not pay" (AB 46) *is the very reason why* the Court should endorse the automatic-return rule. When Viva acquired the Policies in 2014 (OB 19), courts applying Delaware law had *unanimously* required insurers to return all premiums on void policies based on public policy considerations. *See, e.g.*, *Berck*, 719 F. Supp. 2d at 418–19. The law is supposed to be predictable. If this Court were to let Sun keep the premiums, the Court would be endorsing an outcome that would have upset the expectations of the life settlement industry in 2014—an industry which understood that, if a policy were declared void under *Price Dawe*, the insurer would have to return premiums under *Berck*, *Snyder*, and *Rucker*.

(c) ***Price Dawe* Did Not Abrogate *Berck*, *Snyder*, and *Rucker*.**

Sun asserts that *Berck*, *Snyder*, and *Rucker* "do[] not accurately reflect Delaware law" because they "treated STOLI as though it worked a private harm and was therefore merely void*able*, not void *ab initio*[.]" (AB 42.) Not true. *Berck*, *Snyder*, and *Rucker* ordered premium returns after holding (or expressly assuming)

that a policy was void *ab initio,* not that it was merely voidable. *See Rucker*, 774 F. Supp. 2d at 682; *Snyder*, 722 F. Supp. 2d at 558, 565; *Berck*, 719 F. Supp. 2d at 418.

2. To the Extent the Superior Court Erred, the Court Should Remand the Cases to the Superior Court.

If the Court rejects the automatic-return rule and adopts another test, it should decline Sun's invitation to "reverse with instructions to enter summary judgment for Sun[.]" (AB at 43.) When reversing summary judgment decisions, the Court typically remands cases to trial courts for further proceedings. *See, e.g.*, *Verrastro v. Bayhospitalists, LLC*, 208 A.3d 720, 731 (Del. 2019); *LTL Acres Ltd. P'ship v. Butler Mfg. Co.*, 136 A.3d 682, 688 (Del. 2016). And that is what the Court should do if it strikes down the automatic-return rule, particularly since Sun asks the Court to endorse the Restatement (Second) of Contracts §§ 197–198 as the applicable test (AB 44)—a fact-intensive test that could require a trial. *See Brighthouse Life Ins. Co. v. Geronta Funding*, 2021 WL 4080672, at *1 n.8, *12 (Del. Super. Ct. Aug. 20, 2021).

3. Sun Must Return the Premiums Under the Restatement (Second) of Contracts §§ 197–198.

Sun's argument "where a party to … a STOLI policy seeks a refund, it must prove an entitlement" (AB 41) relies on *Seck*—the only case where a court applying Delaware law has required a policy owner to prove restitution under the Restatement

(Second) of Contracts §§ 197–198 to recover premiums. *See Brighthouse Life Ins. Co. v. Geronta Funding*, 2019 WL 8198323, at *1, 4 (Del. Super. Ct. Mar. 4, 2019). But Sun does not actually want the Court to hold that a policy owner must satisfy the Restatement (Second) of Contracts §§ 197–98—as written—to recover premiums. Sun wants the Court to rewrite it, and then apply an insurer-friendly version of the Restatement instead.

There are three independent restitution grounds under the Restatement (Second) of Contracts §§ 197–98: (1) disproportionate forfeiture (§ 197); (2) excusable ignorance (§ 198(a)); and (3) comparative culpability (§ 198(b)). *See* Restatement (Second) of Contracts §§ 197–98 (1981). Sun rejiggers those prongs to (1) ignore disproportionate forfeiture and (2) reframe comparative culpability so it turns on whether a policyholder is "in a protected class" or was "oppressed or misrepresented into the illegal agreement." (AB 44.) Sun also does not acknowledge that the more recent Restatement (Third) of Restitution and Unjust Enrichment provides "contractual performance by a party who does not receive (and cannot compel) the promised counterperformance will frequently result in the unjust enrichment of the recipient and a prima facie entitlement to restitution." Restatement (Third) of Restitution and Unjust Enrichment § 32, cmt. b.

If the Court rejects the automatic-return rule, the Court should explain what a policy owner must prove and remand the cases to the Superior Court so Securities Intermediary can brief why it meets the Court's newly-adopted test. But if this Court accepts Sun's argument that a policyholder must prove restitution under the Restatement (Second) of Contracts §§ 197–98 and then undertakes its own factual analysis, the Court should order Sun to return the Policies' premiums under Section 197 and/or Section 198(b).[7]

(a) Section 197: Disproportionate Forfeiture

"Forfeiture" means "the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially, as by preparation or performance, on the expectation of that exchange." Restatement (Second) of Contracts § 197 cmt. b. Whether a forfeiture is disproportionate "depend[s] on the extent of that denial of compensation as compared with the gravity of the public interest involved and the extent of the contravention." *Id.*[8] Courts have

---

[7] Securities Intermediary does ***not*** concede that it cannot prove excusable ignorance under Section 198(a) on remand. But the Court need not reach Section 198(a)'s highly fact-intensive analysis relating to what precisely Viva knew (and when) because Securities Intermediary (on behalf of Viva) is so clearly entitled to recover premiums under Section 197 and Section 198(b).

[8] As discussed above, this Court would not contravene any public interest if it ordered Sun to return the $6.9 million in premiums. (*See* p. 21–24, *supra*.)

found disproportionate forfeitures where one party "receives an enormous windfall at no cost whatsoever." *Boling v. Prospect Funding Holdings, LLC,* 324 F. Supp. 3d 887, 895 (W.D. Ky. 2018); *see also Telecomms. Law Pros. PLLC v. T-Mobile US, Inc.*, 2015 WL 13159051, at *8 (D.D.C. Jan. 12, 2015).

That is what Sun wants—an enormous windfall at no cost whatsoever. Sun wants to avoid paying $19 million in death benefits under the Policies and keep the $6.9 million in premiums that it received under the same Policies, which is an outcome that the U.S. Courts of Appeals for the Third, Sixth, Seventh, and Eleventh Circuits all have rejected in previous cases where Sun sought this relief. *See Sun Life Assur. Co. of Can. v. Wells Fargo Bank N.A.*, 779 F. App'x 927, 929 (3d Cir. Aug. 21, 2019); *Sun Life Assur. Co. of Can. v. Conestoga Trust Services, LLC*, 263 F. Supp. 3d 695, 704 (E.D. Tenn. 2017), *aff'd*, 717 F. App'x 600 (6th Cir. Apr. 3, 2018); *Malkin I*, 2016 WL 161598, at *18, 21, *aff'd in relevant part Malkin III*, 693 F. App'x at 840; *cf. Margolin*, 839 F.3d at 657 (disapproving Sun's theory that it can "keep all the premiums and pay nothing to the policy holder").

(b) Section 198(b): Comparative Culpability

Section 198(b) permits restitution when the party seeking restitution was "not equally in the wrong with the promisor." Restatement (Second) of Contracts § 198(b). The *Sol* court undertook the equivalent of a Section 198(b) analysis by

comparing the policy owner's culpability to Sun's culpability, and held that Sun had to return *all* the premiums to the policy owner as restitution—regardless of who paid the premiums. *See Sol III*, 2019 WL 8353393, at *4 & n.6. *Sol III* is directly on point, and yet Sun treats *Sol*'s cogent analysis as if it's nonexistent. If Sun had to return all the premiums in *Sol III*, then Sun should clearly have to return all the premiums here.[9]

Sun. All the facts demonstrating Sun's culpability in *Sol* are present here—*e.g.*, Sun began investigating STOLI in 2005, Sun started tracking ownership/beneficiary changes without "clear insurable interests" in 2008, Sun put the Policies on its STOLI lists beginning in 2009, Sun made the "strategic decision" to stop litigating the validity of policies while insureds were alive in 2012, and Sun never disclosed it was treating the Policies as STOLI while it accepted millions of dollars in premiums and repeatedly represented that the Policies were "active," "in force," and "in good standing." (OB 12–19.)

---

[9] *Estate of Malkin* noted that, in the context of an estate case, the fact finder would have to decide "whether [the policyholder] was reasonably unaware that the Policy was a STOLI arrangement and, thus, whether an award of restitution would be consistent with 'the fundamental principles of justice or equity and good conscience.'" *Estate of Malkin*, 2022 WL 1671966, at *13. But in determining "whether an award of restitution would be consistent with 'the fundamental principles of justice or equity and good conscience,'" *id.*, in an *insurer* case, courts would also have to consider the *insurer's* knowledge. That is the point of *Sol III*—a premium restitution case that Sun does not address substantively.

But the facts here are much worse for Sun than they were in *Sol* because these cases involve LPC policies. Sun knew the Policies were LPC policies as early as 2008, Sun began filing lawsuits seeking to invalidate other LPC policies in 2009 (including *Berck*), [redacted] [redacted] (OB 8–12, 21–22.) And despite all that, Sun waited until the insureds died in 2017 and 2018 to file lawsuits seeking to invalidate the Policies—based on the argument that the Policies were wagers by LPC. To put this in monetary terms, from the date Sun filed *Berck* through De Bourbon's death in 2017 and Frankel's death in 2018, Sun collected $3.9 million in premiums on the De Bourbon Policy and $1.4 million in premiums on the Frankel Policy. (OB 9.)

Sun does not address those facts. Instead, Sun tries to focus the Court's attention on how Sun supposedly "has paid over 99% of the death claims made on policies appearing on the potential STOLI lists[.]" (AB 48.) But as the old adage goes, there are "lies, damn lies, and statistics."

Sun's assertion that it has paid 99% of the claims on its STOLI lists does not reflect (1) the policy's issue state—a critical omission since the success of an insurer's STOLI challenge depends significantly on the governing law (*compare Price Dawe*, 28 A.3d at 1067–76 *with Kramer*, 940 N.E.2d at 541–42)—or (2)

whether Sun associated the policy with LPC—a significant fact

(OB 8–12.) And here, the summary judgment record made clear that

rendering its "99%" claim misleading at best.[10] Regardless, Sun's STOLI lists and business practices were the very reasons why Sun had to return all the premiums in *Sol III*. *See Sol III*, 2019 WL 8353393, at *4.

Sun also claims the Superior Court's dismissal of Securities Intermediary's Chapter 93A counterclaim—a statutory claim for unfair or deceptive trade practices under Massachusetts law—means the Superior Court concluded that Sun committed no wrongdoing. (AB 47–48.) Not so. The Superior Court dismissed Securities Intermediary's Chapter 93A counterclaim after finding erroneously[11] that Sun had no duty under Massachusetts law to disclose that it was treating the Policies as

[10] Sun argued below that it has paid death benefits on (B0281.) hich cannot be challenged under *Kramer*). (A976 at "2006 Data," rows 3611, 3642, and 3685.)

[11] Securities Intermediary's decision to not appeal the lower court's Chapter 93A ruling or its policy invalidity ruling is not a concession that Securities Intermediary agrees with those aspects of the lower court's decision. (AB at 3, 48.) Securities Intermediary focused its appeal on issues of Delaware law that this Court has never considered and which arise frequently in lower courts.

STOLI or intending to challenge them. (Ex. C at 29.) The Superior Court did not adjudicate Sun and Viva's comparative culpability under Section 198(b). In fact, the Superior Court did not even rule on whether Sun acted unfairly or deceptively; it held that the absence of a duty under Massachusetts law broke the requisite causal connection (for a Chapter 93A claim) between Sun's misconduct and Viva's damages. (*Id.* at 29.)

Viva. When Viva bought the Policies in 2014, Viva and its investment advisor Preston Ventures LLC ("Preston") did not believe the ESF QIF Portfolio had significant litigation risk. The ESF QIF Portfolio was predominantly comprised of [redacted] (A2961.) In 2010, New York's highest court held that LPC's process of acquiring policies through beneficial interest transfers was legal under New York law. *See Kramer*, 940 N.E.2d at 537–38, 541–42. In 2011, a California appellate court ruled similarly as a matter of California law. *See Lincoln Life & Annuity Co. of N.Y. v. Berck*, 2011 WL 1878855, at *1, 6-7 (Cal. Ct. App. May 17, 2011). Viva [redacted] (A3127 at 55:5–10; OB 20.)

As for the portfolio's Delaware policies—such as the Policies—Viva and Preston knew [redacted] (OB 20.) Preston testified "we [redacted]

(A3031–A3032 at 233:24–234:19.)

Viva and Preston also did not think the Policies had significant risk because of Sun's eight years of representations that the Policies were "in force" and Sun's acceptance of millions of dollars in premiums. (OB 21.) Viva testified it [redacted] (A3127 at 56:3–21.)

Securities Intermediary could devote this entire brief to explaining why Sun's factual arguments concerning Viva's knowledge are materially misleading (at best). Most glaringly, Sun ignores what Viva actually knew about LPC's process for acquiring beneficial interests in 2006 when Viva acquired the Policies eight years

later. (A2958.) Viva understood that,

(*Id.*) But Viva did not know

(*Id.*) Instead, Viva understood that

(*Id.*)

But even if Viva had known that the insureds had pre-shopped their Policies to LPC, that would not mean Viva knew the Policies were invalid. *Price Dawe* held that "the insured's subjective intent … is not the relevant inquiry," and if an insured takes out a policy "in good faith—not as a cover for a wagering contact," the insured has a "right to take out a policy with the intent to *immediately transfer* the policy." *Price Dawe*, 28 A.3d at 1075–76 (emphasis added). In order for that right to have any meaning, there *must* be a species of good-faith, pre-issuance communications between brokers and investors concerning potential, post-issuance transactions that are not the types of "pre-negotiated agreements," "pre-negotiated arrangements," or "cover[s] for … wagering contract[s]" that *Price Dawe* prohibits. *Id.* at 1075–76, 1078.

There are many other problems with Sun's arguments concerning Viva's knowledge. For instance, Sun's suggestion that Viva's attorneys at Stroock represented LPC in 2006–07 is false. (AB 13, 18, 46.) LPC's partnership agreement makes clear LPC was advised by different law firms, and one of LPC's principals testified that Stroock did *not* represent LPC. (B0439; A2548–A2549 at 199:10–205:13.) Sun's claim that Viva's did not comply with ILMA's due diligence guidelines is misleading too. (AB 21.) ILMA testified that its guidelines are inapplicable to tertiary market investors like Viva, and instead apply to providers that buy policies directly from insureds. (B2190 at 48:21–50:2; B2216 at 150:19–152:15; B2217 at 154:6–156:18.) Sun's contention that

(AB 19.) Fleisher testified that he *never* provided any such litigation services to Viva. (A2905 at 311:13–312:6.)

That said, Securities Intermediary does not dispute Sun's general point that Viva knew the Policies had *some* insurable interest risk when Viva bought them. (AB 44–46.) But it does not follow that Viva is more culpable than Sun under a Section 198(b) analysis.

Consider just a few examples. Sun claims Viva cannot recover premiums because

(AB 19, 45.) But Sun does not acknowledge that its attorneys began deposing Fleisher and his partner Steve Lockwood in LPC litigations in 2008–09 while those attorneys were litigating nine different cases involving LPC policies, and Sun then collected premiums on the Policies for nearly another decade. (OB 11; A2500 at 7:20–8:19; A2830 at 12:21–14:7.) Nor does Sun inform the Court what Fleisher told Preston— (A3037 at 255:19–24.)

Sun claims Viva cannot recover premiums because Viva knew (AB 45.) Yet Sun does not acknowledge that Sun filed three lawsuits in 2009 regarding the alleged invalidity of LPC policies, including one case—*Berck*—where Sun pleaded it knew of six other beneficial interest transfer cases. (OB 9.)

Sun claims Viva cannot recover premiums because Viva knew (AB 45.) And yet Sun does not acknowledge that Berck and Lockwood were the defendants in *Berck*—one of the three LPC cases that Sun filed in 2009 (OB 8–9), and the very case in which Judge Robinson ordered Sun to automatically return premiums. *Berck*, 719 F. Supp. 2d at

418–19. Sun collected $5.4 million in premiums on the Policies between the date Sun filed *Berck* in 2009 and the dates De Bourbon and Frankel passed away in 2017 and 2018, respectively. (OB 9.)

* * *

Viva cannot possibly be "equally in the wrong" with Sun. At the absolute most, this case is no different than *Sol III*, where the court ordered Sun to return all the premiums to a sophisticated investor, despite finding that the investor "knew or should have known at the time it purchased the Sol Policy there was a substantial risk the Policy was an illegal STOLI policy." *Sol III*, 2019 WL 8353393, at *4; *see also Sun Life Assur. Co. of Can. v. Wells Fargo Bank, N.A.*, 2020 WL 1503641, at *14–15 (N.D. Ill. Mar. 30, 2020) (applying Illinois law and ordering Sun to return premiums to a sophisticated investor that bought a policy knowing "it might be purchasing a lawsuit").

Requiring Sun to refund premiums would also be consistent with the New Jersey Supreme Court's decision in *Bergman*. *See Sun Life Assur. Co. of Can. v. Wells Fargo Bank, N.A.*, 208 A.3d 839, 858–59 (N.J. 2019) ("*Bergman*"). Sun pretends *Bergman* stands for the proposition that, under New Jersey law, a policy owner's ability to recover premiums turns on "its 'knowledge of the illicit scheme' and 'its failure to notice red flags.'" (AB 41.) But *Bergman* endorses the same

comparative culpability analysis as *Sol III*. *See Bergman*, 208 A.3d at 858–59 (noting how "the less culpable party" can recover payments under an illegal contract and "a party may be entitled to a refund of premium payments it made on a void STOLI policy, particularly a later purchaser who was not involved in any illicit conduct").

III. SECURITIES INTERMEDIARY IS ENTITLED TO A RETURN OF ALL PREMIUMS PAID TO SUN

Sun does not dispute that when Viva bought the Policies, it also purchased (1) "all Premiums paid with respect to" the Policies and (2) "all other claims, rights, and causes of action, relating to or arising out of" the Policies and the Premiums. (OB 40.) Nevertheless, Sun asks the Court to hold that Securities Intermediary can only recover premiums that Viva paid—thereby letting Sun keep $4.5 million of the $6.9 million in premiums that Sun received in total. None of Sun's arguments has merit.

First, Sun's assertion that Securities Intermediary "does not cite to a single case holding that one can sell alleged rights to performance made under a void *ab initio* agreement" (AB 50) ignores *Sol III*. (OB 40–41.) Sun has no response to how Sun had to return all the premiums it had collected on the *Sol* policy to the final policyholder because that policyholder had bought the rights to previously paid premiums—the precise relief Securities Intermediary seeks against Sun here. *See Sol III*, 2019 WL 8353393, at *4 & n.6.

Second, Sun's claim that "there is no relationship between Sun Life's alleged enrichment [from premiums paid by the Policies' prior owners] and Wilmington Trust/Viva's alleged impoverishment" (AB 50) misses the point. Sun does not dispute that Viva bought the rights to recover premiums that the Policies' prior owners paid to Sun, and that the law permits sellers to convey property rights to

buyers which buyers can then enforce through litigation. (OB 40–41.) Sun was therefore enriched by those prior premium payments, Viva bought the rights to recover premiums that impoverished the Policies' predecessor owners, and Viva itself will be impoverished further if it cannot obtain property which it paid money to acquire.

Third, Sun's argument that Securities Intermediary cannot recover premiums paid by "the LPC Entities" because they would not be able to recover premiums ignores *Berck*. (AB 51.) *Berck* was one of three LPC cases that Sun filed in 2009 (OB 8–9), and the *Berck* court ordered Sun to return premiums to LPC. *See* 719 F. Supp. 2d at 418–19. If Sun had simply brought these cases in 2009 when it filed *Berck*, then Sun would have had to return premiums to LPC in these cases too. It makes no sense that LPC—the secondary market investor that the Superior Court held was responsible for the Policies' illegality—should be better off financially than Viva—a tertiary market investor that acquired the Policies eight years after Sun started collecting premiums and representing that the Policies were "in force." (OB 17–19.)

Sun's argument is also unworkable. If the Court finds that a policyholder can only recover premiums paid by predecessors if those predecessors would be able to recover premiums, every case will involve mini-trials as courts undertake multiple

comparative culpability analyses between the insurer and each of the policyholders in the chain-of-title.

This inefficiency, of course, inures to Sun's benefit. The longer Sun waits to challenge a policy, the harder it will be for the policyholder to meet its burden of proving that all its predecessors can recover premiums. Predecessors that owned policies 10 years earlier (or more) may be out-of-business. And even if they are active, those predecessors may no longer have relevant documents and their witnesses may no longer have any memory of events in the distant past.

Consider what this means. Sun will continue to strategically delay STOLI lawsuits until insureds die, while Sun lines its pockets with millions of dollars in premium payments. Then, once Sun files its belated STOLI lawsuits, Sun will argue that it can keep all the premiums paid by anyone other than the final policyholder in the chain-of-title unless that policyholder can prove all its predecessors—5, 10, or 20 years earlier—would be entitled to a premium refund. And according to Sun, the policyholder will have to meet that burden based on evidence that may no longer exist as a direct result of Sun's "strategic decision" (OB 16) to not challenge policies while insureds were still alive.

Fourth, Sun's assertion that Viva would obtain a $2 million windfall if the Court permitted Viva to recover premiums paid by the Policies' prior owners (AB

47 n.22, 52) is nothing short of the pot calling the kettle black. Sun knows once a policy is sold into the life settlements market, it will trade (sometimes frequently) in the tertiary market between institutional investors. As a result, the longer an insurer waits to challenge a policy, the more likely it is that a new investor will buy the policy. If an insurer could press "reset" on the premium-refund calculation every time a policy trades on the tertiary market, it would incentivize insurers to do exactly what *Berck* cautioned against 12 years ago, *i.e.*, "bring rescission suits as late as possible, as they continue to collect premiums at no actual risk." 719 F. Supp. 2d at 418–19.

Finally, Sun's efforts to minimize its premium-return obligations underscore why the Court should allow policy owners to assert promissory estoppel claims and equitable defenses. If an insurer's return-of-premiums obligation is capped at the premiums paid by the final policy owner, the only thing that will motivate insurers to bring lawsuits promptly is the knowledge that their delay may open the door for equitable defenses. Similarly, if the rule is that a policy owner must prove that all its predecessors in the chain-of-title would be entitled to premium refunds, then the only thing that will incentivize insurers to bring lawsuits promptly—rather than wait years hoping that evidence will be lost in the interim—is the potential that equitable defenses will bar the lawsuit entirely.

And even if the Court holds that policyholders cannot use promissory estoppel or equitable defenses to recover a STOLI policy's death benefit—which it should not do—these theories *must* be available to preclude insurers from delaying STOLI lawsuits indefinitely to maximize their premium retention. For example, laches is "generally defined as an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant." *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009). If an insurer could keep premiums paid by predecessors because the final policyholder in the chain-of-title could not uncover long-lost evidence needed to meet its burden of proving that those predecessors would be entitled to premium returns, the policyholder would be materially prejudiced as a direct result of the insurer's strategic delay.

IV. SUN MUST PAY PREJUDGMENT INTEREST

Under Delaware law, "where 'the claimant seeks a refund of payments it never should have made, prejudgment interest accrues from the date of the claimant's payments.'" *Estate of Malkin by Guarnero v. Wells Fargo Bank, NA*, 2022 WL 2285884, at *2 (11th Cir. June 23, 2022) ("*Estate of Malkin II*") (quoting *Malkin III*, 693 F. App'x at 841). None of Sun's efforts to avoid the effect of those cases—*i.e.*, that Sun must pay prejudgment interest from the date of each payment—has any merit.

First, Sun argues that "the trial court's decision not to award prejudgment interest was correct," essentially because Viva allegedly "knew the Policies had substantial insurable interest problems[.]" (AB 55.) That argument is a nonstarter (even if the premise wasn't false) because "[i]n Delaware, prejudgment interest is awarded as a matter of right." *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992).

Second, Sun contends *Malkin III* is flawed because it did not cite *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209 (Del. 1978). (AB 54, 56.) *Moskowitz* is inapposite. *Moskowitz* concerned whether municipalities are exempt from prejudgment interest on tax refunds. *See* 391 A.2d at 210. The Court rejected the taxpayer's argument that "interest should *invariably* be computed from the day

the improper tax assessment was paid," and instead held that "[t]he computation of interest *may vary from case to case*" depending on the circumstances. *Id.* at 211 (emphasis added). Sun's argument that *Moskowitz* is "this Court's seminal case on the question of when interest on a refunded payment accrues," and one in which "this Court explained that the rules it was applying were applicable generally" (AB 54 n.25, 56) is confounding. *Moskowitz* did not endorse a categorical rule applicable in all tax cases, let alone a rule applicable to all recessionary claims in a wide array of contexts.

But even if the Court accepts Sun's *Moskowitz* argument, it would mean the Superior Court should calculate prejudgment interest from the date that Securities Intermediary demanded prejudgment interest in its Counterclaim. Sun concedes as much by citing *Hercules v. AIU Ins. Co.*, 784 A.2d 481 (Del. 2001), for the point that prejudgment interest should "run[] … from [the] filing of [the] complaint because [the party's] demand was not sufficiently clear before then." (AB 56.)

Third, Sun's contention that Securities Intermediary waived prejudgment interest by not "address[ing] pre-judgment interest in its summary judgment papers" or "mov[ing] for re-argument or to alter the judgment" is no better. (AB 58.) While Securities Intermediary did not devote space in its briefs to the reasons why prejudgment interest is appropriate—including because prejudgment interest is

"awarded as a matter of right," *Citadel*, 603 A.2d at 826—Securities Intermediary made clear it was seeking prejudgment interest in its briefs and initial pleadings. (A437.69 at (A), (E); A592; A702.) Securities Intermediary did not have to file a motion for re-argument or motion to alter the judgment to prejudgment interest on appeal. *Whitmore v. Robinson*, 223 A.3d 417, 422 n.16 (Del. 2019).

Sun's waiver argument also ignores *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024 (Del. 2003), where the Court held that "[p]rejudgment interest is appropriate 'if a plaintiff requests such an award in its pleadings,'" and then rejected a waiver argument when the prevailing party had included a request for prejudgment interest in its amended pleadings. *Id.* at 1037–38. Sun concedes Securities Intermediary requested prejudgment interest in its pleadings, which means Sun's waiver argument is foreclosed by *Chrysler*. (AB at 57; *see also* 437.69 at ¶¶ (A), (E); C.A. No. N17C-08-331, Dkt. 11 (Answer/Countercl.) at 70, ¶¶ (A), (E).[12]

[12] Sun's cases—neither of which concern prejudgment interest—do not change the analysis. (AB 58.) In *North American Leasing v. NASDI Holdings*, the Court held that the defendants had waived a set-off/recoupment defense by not addressing it in their opposition to plaintiffs' summary judgment motion on a breach of contract claim, or raising it on re-argument. 2022 WL 1073544, at *6 (Del. Apr. 11, 2022). Here, Securities Intermediary did not have to raise prejudgment interest to rebut any arguments in Sun's summary judgment motion. In *Clariant Corporation v. Hartford Mutual Insurance Company*, the Court held that the plaintiff waived an argument by raising it at summary judgment and not seeking re-argument after the Superior Court failed to address that argument in its opinion. 11

CONCLUSION

The Court should reverse the Superior Court's Rule 12 decisions and permit Securities Intermediary to assert promissory estoppel counterclaims and equitable defenses on remand. The Court should also affirm the Superior Court's decision ordering Sun to return all the premiums on the Policies, but reverse those aspects of the premium-refund decision that ordered Sun to return premiums to the particular parties that paid the premiums and without prejudgment interest. Instead, the Court should hold that Sun must return all the premiums to Securities Intermediary (on behalf of Viva) with prejudgment interest.

/s/ John M. Seaman
Kevin G. Abrams (#2375)
John M. Seaman (#3868)
Samuel D. Cordle (#6717)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Wilmington Trust, National Association, as Securities Intermediary

OF COUNSEL:

Harry S. Davis
Robert E. Griffin
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10022
(212) 756-2000

Dated: July 27, 2022

A.3d 220, 225 n.13 (Del. 2011). Here, the Superior Court specifically rejected prejudgment interest in its decision.

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2022, my firm served true and correct copies of the forgoing *Public Version of Appellant's Reply Brief and Cross-Appellee's Answering Brief* upon the following counsel of record by File & Serve*Xpress*:

Thomas J. Francella, Jr., Esq.
Gregory F. Fischer, Esq.
Brian D. Burack, Esq.
COZEN O'CONNOR
1201 N. Market Street, Suite 1001
Wilmington, Delaware 19801

/s/ John M. Seaman
John M. Seaman (#3868)