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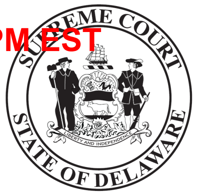

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERONTA FUNDING, Defendant/Counterclaim-Plaintiff Below, Appellant/Cross-Appellee	No. 374, 2023
v.	
BRIGHTHOUSE LIFE INSURANCE COMPANY,	Court Below: Superior Court of the State of Delaware
Plaintiff/Counterclaim-Defendant Below, Appellee/Cross-Appellant	C.A. No. N18C-04-028 PAW

APPELLEE/CROSS-APPELLANT'S CORRECTED ANSWERING/OPENING BRIEF

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NATURE OF PROCEEDINGS

This case is about whether a downstream buyer, which performed no due diligence as to the purchase of a life insurance policy that lacked insurable interest at inception, has proven an exception to the general rule that parties to illegal agreements are left where they are found, without restitution. The at-issue Policy was issued by what is now Brighthouse Life Insurance Company[1] in 2007; sold to an investor, EEA, in 2009; and sold to its current owner, Geronta Funding, in 2015. The parties agree the Policy is void *ab initio* because the underlying insured, Mansour Seck, was a fictitious person. In March 2021, a seven-day bench trial was held on the narrow question of whether Geronta could prove it was excusably ignorant of the Policy's invalidity or less at fault than Brighthouse. The Superior Court concluded that Geronta was not excusably ignorant, having willfully and strategically blinded itself to the Policy's invalidity; and, likewise, that Geronta was not less at fault, including because, after removing its blindfold and discovering that the insured was fictitious, it continued to pay premium and intentionally waited 15 months to tell Brighthouse, during which time Geronta paid most of the premium it is seeking as restitution in this litigation. The Superior Court awarded Geronta

[1] Brighthouse is the successor-in-interest to MetLife Investors USA Insurance Company ("MetLife"). Except where otherwise noted, Brighthouse and MetLife will be referred to collectively as "Brighthouse."

restitution of the premium it paid after it finally raised its concerns with Brighthouse in April 2017.

Geronta appealed, arguing that investors should "automatically" receive premium refunds on policies declared void *ab initio*. This raised, as a matter of first impression for this Court, what the proper test and legal standard should be. This Court, after surveying nationwide jurisprudence and competing public policy concerns, rejected the automatic premium refund concept and instead adopted a new, fault-based test: Investors must prove the elements of a viable legal theory (such as unjust enrichment) and then satisfy an exception set forth in the Restatement (Second) of Contracts §§ 197-99. This Court's new test was expressly designed to ensure that both investors and insurers would thoroughly investigate policies, raise their concerns, and act in good faith. This Court remanded to allow the Superior Court to examine its findings and apply the new test.

By the time the case was remanded, the judge who had presided over the bench trial had retired. The new judge, who had taken no part in the trial, asked the parties to submit post-trial briefing. The trial court reversed its decision regarding Geronta's premium, awarding Geronta all of the premium Geronta paid. This was error because it was undisputed on remand that Geronta failed to prove the elements of its viable legal theory—unjust enrichment. Indeed, Geronta did not dispute that unjust enrichment requires the absence of an adequate legal remedy, nor did it

dispute that it has an adequate legal remedy against it processor, EEA. But despite this's Court's holding that investors must prove a viable legal theory, the trial court incorrectly determined that this requirement was outside the scope of the remand. Because it is undisputed that Geronta has an adequate legal remedy, this Court can and should reverse the award of restitution to Geronta and enter judgment in Brighthouse's favor.

The decision to award premium to Geronta was also in error because the trial court did not apply the correct legal standard. On remand, Geronta urged the Superior Court to take an extremely narrow view of this Court's decision and of the new test this Court had articulated. Rather than the multi-factor comparative fault analysis this Court expressly envisioned, Geronta argued that the test should be reduced to a single question: Who had inquiry notice first? Even though this Court had, by that time, already rejected this very same argument in a case known as *Frankel & De Bourbon*, the Superior Court accepted it, found that Brighthouse was on inquiry notice first, and awarded Geronta restitution of the premium it paid. In so doing, the Superior Court did not appear to weigh any of the other factors this Court said must be considered, and appeared to reduce this Court's nuanced multi-factor test to a simple, single-factor test. If so, this was an error of law and, at minimum, remand would be needed to apply the correct legal standard. But remand is unnecessary because the only reasonable conclusion, based on the facts as the trial

court already found them, is that Geronta failed to carry its burden under this Court's new test.

As to whether Geronta could recover the premium paid by EEA, the Superior Court correctly concluded that Geronta could not prove that EEA was less at fault than Brighthouse and correctly held that Geronta was, therefore, not entitled to restitution of the premium it did not pay. To the extent Geronta is entitled to any restitution, the trial court also correctly held that Geronta cannot recover pre-judgment interest because Geronta stipulated to no pre-judgment interest and thus waived any right it might otherwise have had to recover it. Respectfully, this Court should: affirm the trial court's decision that Geronta is not entitled to the premium paid by EEA; reverse the trial court's decision that Geronta is entitled to the premium it paid and direct entry of an order denying Geronta's restitution claim in full—or alternatively remand with instructions to apply this Court's multi-factor test as to the premium Geronta paid.

SUMMARY OF ARGUMENT

I. GERONTA'S ARGUMENT

(1) Denied. The trial court correctly concluded that Geronta could not recover the premium paid by its predecessor (EEA) because Geronta could not prove that EEA was less at fault than Brighthouse. Geronta's contention that assessing EEA's comparative fault was outside the remand is meritless.

(2) Denied. The trial court correctly concluded that Geronta failed to prove that EEA was less at fault than Brighthouse. EEA conducted no pre-acquisition diligence and then, immediately after purchase, ignored red flag after red flag, including two reports showing that there was no public record of the insured's existence. EEA did not tell Brighthouse of its concerns, did not tell Geronta of its concerns and, instead, tried to fraudulently offload the Policy to Geronta—later covering its original fraud with more fraud by actively lying and claiming that Mansour Seck was not fictitious. Geronta's myopic focus on who was on inquiry notice first contradicts this Court's prior opinions, which make clear that the timing of the parties' inquiry notice is only one factor among many in the multi-factor comparative fault analysis.

(3) Denied. The trial's court's ruling that Geronta cannot recover EEA's premium was not only consistent with, but it was also required by the public policy behind Delaware's insurable interest rules. EEA did virtually all of the things this

Court says investors should not do: EEA did not investigate; EEA ignored red flags; EEA did not speak up; and EEA did not act in good faith. In fact, Geronta concedes that EEA engaged in actual fraud. Geronta's argument that allowing Brighthouse to keep EEA's premium will harm tertiary market buyers, who will now have to conduct bona fide diligence, is a thinly-veiled attempt to re-litigate and reverse this Court's original, unanimous, *en banc* decision, a major point of which was to incentivize downstream investors to conduct robust investigations instead of doing what they do now—buying policies blindly and indiscriminately.

(4) Denied. The trial court correctly denied pre-judgment interest because Geronta stipulated after trial that it was not entitled to pre-judgment interest, which it then obviously could not (and did not) raise on appeal.

II. BRIGHTHOUSE'S ARGUMENT

(1) The trial court's decision to award Geronta the premium Geronta paid was incorrect as a matter of law because it is undisputed that Geronta cannot satisfy all of the elements of its underlying legal theory, unjust enrichment. This Court has been clear that an unjust enrichment claimant must prove, among other things, the absence of a remedy at law. This Court also has been clear that an investor cannot satisfy this element if it has a legal remedy up its commercial chain. Here, Geronta does not deny that it has such a claim against the entity (EEA) that sold Geronta the Policy. In fact, Geronta formally accused EEA of breach of contract and fraud in connection with the Policy and then entered into an agreement with EEA tolling Geronta's claims against EEA until the conclusion of this lawsuit. Because Geronta has a legal remedy against EEA, Geronta's unjust enrichment claim against Brighthouse must fail. But the trial court declined to even consider this argument, committing an error of law by concluding that it was outside of the scope of the remand—even though this was clearly a part of the new test this Court directed the trial court to apply on remand.

(2) The trial court also erred in awarding Geronta the premium it paid because the trial court did not apply the proper legal standard in concluding Geronta was less at fault. On remand, the trial court was required to compare the parties by considering and weighing a wide range of factors, including, without limitation, the

quality of each parties' insurable interest investigation and the extent to which each party acted in good faith. However, the trial court's opinion on remand seems to have been based on just one factor (who was on inquiry notice first) and did not address the other factors that this Court said must be considered. If so, this was legal error. The test requires consideration of all the factors, so at a minimum (assuming this Court gets past Geronta's adequate remedy at law), this should be remanded with instruction to apply, compare, and analyze all of the factors. That said, remand is not needed because, based on the factual findings the trial court already made, the only reasonable conclusion is that Geronta did not carry its burden of proof. Brighthouse conducted a robust, "good faith" underwriting investigation; Geronta strategically did none, a "calculated" bad faith decision to capture "windfall profits." Brighthouse was aware of Pape Seck's criminal prosecution from publicly available information; Geronta had access to the same public information before it bought the Policy plus a giant pile of red flags Brighthouse never saw nor had access to. Brighthouse never knew Seck was fake; Geronta specifically believed Seck was fake and waited 15 months to tell Brighthouse. Brighthouse did not investigate the "criminal fraud" in 2010 because the Policy was outside contestability and Brighthouse intended in good faith to pay the death benefit; Geronta's decision to blind itself and stay silent was purely strategic.

COUNTERSTATEMENT OF FACTS

A. MetLife Issued The Policy After A Robust Underwriting Process.

On July 11, 2007, the Mansour Seck Irrevocable Life Insurance Trust ("Trust"), through its trustee Sandor Krauss, applied to MetLife for a $5 million life policy insuring a person identified as Mansour Seck with a birthday of January 1, 1933 and a social security number of 147-52-6352 ("Policy"). A696/¶¶ 2, 8. The application was completed on New Jersey forms, the proposed owner (the Trust) had its situs in New Jersey, and proposed insured (Seck) was identified as a resident of New Jersey. A3810-3824. The application was submitted by a national broker general agent, Algren, with whom MetLife had a longstanding relationship, and a licensed broker, Talma Nassim. 696/¶¶ 3, 31; A1831/111:5-12; A754/34:22-36:22. After hours of live testimony from Brighthouse's chief underwriter, Julienne Warr, the trial court found MetLife issued the Policy following a competent underwriting process, which included substantial verification of Seck's identity. B15-20, 63-64, 66.

As part of the underwriting process, MetLife received (i) an Agent Certification—in which Broker Nassim represented she had personally seen Mansour Seck on the date the application was signed; (ii) an application—in which Nassim represented that insurance was proper for Seck, that his data was accurate, and that she witnessed his signature; and (iii) other forms where Nassim represented

seeing Mansour Seck sign personally. A1764/44:6-51:23; A3784-85; A696/¶¶ 3-4. MetLife also received a Certification, where Trustee Krauss represented that Mansour Seck had granted the Trust, and a copy of Seck's notarized signature on the trust agreement. A207/51:16-57:23 A696/¶¶ 7-8; A3508-09.

Algren submitted a note from Seck's physician, confirming regular visits, A215/59:2-18; A267/111:5-12; A703/¶¶ 31-22, as well as the records from a recent full (in-person) paramedical exam from an approved third-party company, which contained Seck's medical history, vitals, EKG readings, and which was signed by the provider, representing that Seck's identification had been checked and serving as another witness to his signature. A215/59:19-61:7; A219/63:9-64:6; A703/¶¶ 35-38; B229-30. MetLife received results from blood and urine testing, and also completed a phone interview with a person purporting to be Mansour Seck. A220/64:13-65:23; A3510-12; A703/¶¶ 39-40, 45. Having no reason to know or suspect Seck was fake, on July 24, 2007, MetLife, issued the Policy to the Trust, which ultimately paid $248,711.14 in premium. A705/¶¶ 47, 50.

B. EEA Bought The Policy.

1. The Policy's Contestability Period Expired.

On July 24, 2009, the Policy's two-year contestability period expired; and on August 10, 2009, a sophisticated investor called "EEA" bought the Policy from the Trust. *Id.* ¶¶ 51-52, 55.

On December 17, 2009, David Bishop (MetLife compliance) emailed Jean Philipp (MetLife corporate ethics and compliance), asking Philipp whether she wanted to "run a book of business review" on the broker Nassim for having written a Policy where ownership changed "just after the contestability period expired" and the "wire transfers" "have strong IOLI flags." A3567-68. The review was not an investigation of the Policy itself, nor was it designed to evaluate whether to challenge the Policy; instead, it was a review of Nassim's *other* business, to decide whether to maintain her appointment. B134/90:10-93:23; A1257/82:18-83:21. Because Nassim had not written any other policies with such timing, her appointment was maintained. A3566.

2. **EEA Immediately Encountered Red Flags.**

EEA conducted no pre-acquisition diligence or investigation. *Before* buying the Policy, EEA ignored the first of many red flags. As part of the sale, EEA required the Trust to identity persons who were in *regular contact* with Seck. A712/¶ 89. Seck's first designated contact was Trustee Krauss. B2275-76. But, as Krauss testified, he has never had *any* contact with Seck. A2118/198:7-199:1. Krauss never told MetLife, but he warned EEA, amending the Terms and Conditions of his agreement to require EEA to acknowledge that Krauss—the Seck Trust's trustee and Seck's "Designated Contact"—"was not in contact with the Insured" and would have "no liability whatsoever for his failure to provide that information."

A2120/200:11-202:10(Krauss); B276. EEA ignored this, buying the Policy without any attempt to contact Seck or investigate his existence. A706/¶¶ 59-61.

Shortly *after* buying the Policy, EEA immediately encountered many more red flags. EEA hired ViaSource to obtain updated medical records for Seck, but quickly realized it had a problem because:

- Seck could not be reached or located, and ViaSource's letters to him were returned to sender. B279-81; B334-37; B431-32.
- Neither of Seck's designated contacts had any information about him. B334-37; B431.
- Many of Seck's doctors disavowed he was their patient. B279-81.
- In October 2011, ViaSource, ran a public record search for "fraud prevention or detection" purposes, which showed *there were no public records of the existence of Mansour Seck*. A719/¶¶ 124-26; B433-35.
- In December 2012, ViaSource ran another public record search, which again *showed no record of Seck's existence*. A721/¶¶ 135-37; B466-72.
- On December 17, 2012, ViaSource's counsel threatened legal action against a designated contact if he did not help locate Seck. B473-77.
- By 2012, all efforts to contact/get information about Seck (including from the broker, trustee, and designated contacts) had failed. B334-37; B432.

EEA did not share *any* of this information with MetLife, electing instead to *keep paying premiums*, totaling $706,478.29. A719/¶¶ 127, 138, 140.

C. The Criminal Prosecution Of Pape Seck.

On April 13, 2010, the New Jersey Attorney General's Office ("NJAG") issued a press release, titled "New York City Insurance Agent Pleads Guilty to Fraud

Involving Applications for Multi-Million Dollar Life Insurance Policies." A3577. The April 2010 Press Release explained that a broker named Pape Seck—who was not the Policy's broker—pled guilty to insurance fraud in connection with "false applications" to Prudential Life Insurance Company and Aviva Life Insurance Company on the life of a Mansour Seck. *Id.* On April 26, 2010, the NJAG issued a document subpoena to MetLife for records relating to Mansour Seck; MetLife complied by producing its underwriting file for the Policy. A3573-76. On April 28, 2010, someone at MetLife printed out a copy of the April 2010 Press Release. A3577. On October 26, 2011, Jim McCarthy (MetLife Claims Advisory) emailed Anthony DeCarlo (MetLife Ethics and Compliance), referring to Pape Seck's plea and pointing out that MetLife had been publicly thanked for its cooperation. A3579.

MetLife did not conduct an investigation into the Policy when it learned of Pape's investigation/conviction for insurance fraud because MetLife had absolutely no reason to believe Seck was not real, and the Policy was already past its statutorily-mandated, two-year contestable period, after which period insurers are barred from rescinding policies for insurance fraud. B134/72:16-73:23; A236/80:10-81:13. Instead, MetLife fully expected to pay the death benefit once Seck eventually passed away. A252/96:2-5; A320/164:14-16; B66. And consistent with that, Brighthouse paid for reinsurance on the Policy. A2682/3:16-4:14.

D. Geronta Bought The Policy Without Conducting Due Diligence.

1. Geronta Is A Sophisticated Investor.

Geronta is a trust created to buy portfolios of life insurance policies on strangers. A2266/101:5-18. Geronta's decisions were made by Leadenhall Capital, through Simon Mason and Dan Knipe, who both testified at trial. A722/¶¶ 144-45.

In 2015, Geronta negotiated an agreement ("PSA") to acquire a portfolio of life policies, including the Policy, from EEA for $132 million ("Portfolio"). *Id.* ¶ 146; A367-717; A2281/116:1-117:14; A2456/141:6-22. In so doing, Leadenhall told EEA that it was "positioned at the forefront of investment advisory within the field of insurance linked securities" with half of its then-$2 billion under management dedicated to "life related investments" and represented that Geronta had "expertise" "to enable it to identify, understand, and independently evaluate the merits and risks of the purchase of the Policies." A3678; A723/¶ 152; A3701.

Geronta understood that one of the well-known risks of buying life policies was widespread origination fraud. A2324/8:10-16; A2437/26:3-11, A2439/28:1-29:10; B282-333; B338-430; B457-65; B1012-1019. Geronta nonetheless agreed it bore sole responsibility for conducting an independent investigation and that it would rely solely on that investigation in determining whether to proceed. A3701-02; A2470/59:6-10; A724/¶¶ 153-54. Geronta concedes it applied a discount rate to the price it paid EEA for the Portfolio to account for legal risk, including the risk of

fraudulent policies. A725/¶ 160. EEA put its documents regarding the policies into a Data Room to which Geronta had access for about 3 months before it elected to buy the Portfolio. A724/¶ 155; A2872/57:4-7; A2186/21:10-22; A460/49:23-53:5; 3719.

Geronta's Data Room (A2777/98:4-116:10) included:

- Krauss's suspicious 2009 agreement with EEA saying he would serve as Seck's designated contact even though he was not in contact with Seck and would have no liability in the role of a contact. B624-27.
- ViaSource's December 17, 2009 letter to Seck, asking why his doctors disavowed he was their patient, marked "RETURNED TO SENDER." B878-80.
- ViaSource's January 25, 2010 note, describing its failure to get Seck's contact information from Krauss. B630.
- ViaSource's February 4, 2010 email to another designated contact, attempting to find Seck and determine if he was still alive. B629.
- ViaSource's October 19, 2010 email, showing another failed attempt to get information from Krauss. B632.
- ViaSource's October 20, 2010 failed email to Mansour Seck. B631.
- ViaSource's public records search from October 2011, showing no record of Mansour Seck's existence. B886-97.
- ViaSource's public records search from December 2012, showing no record of Mansour Seck's existence. B989-901.
- EEA's December 12, 2012 demand letter to Seck's designated contact, threatening suit if he did not provide contact information for Seck. B667-71.

2. Geronta Ignored The Red Flags In The Data Room.

Geronta concedes it basically did no pre-acquisition diligence as to the Policy and intentionally ignored the aforementioned red flags. B1092-73, 1102-04. Geronta

also concedes it bought the Policy without trying to verify its factual information, A724/¶¶ 157-59, and that it "intentionally" waited until after acquisition to call insureds or even to run public record or other internet searches. A2391/76:19-78:6. Indeed, the trial court confirmed on remand that Geronta made a "strategic" and "calculated" decision not to do any pre-acquisition due diligence. B1102-03.

Because Geronta elected to defer its diligence until *after* acquisition, Geronta did not see the overwhelming number of red flags in the Data Room. Indeed, Mason, admitted that: (i) each of EEA's Red Flag Documents (bulleted above) had been in the Data Room; (ii) Geronta could have seen each one of them before buying the Policy; but (iii) Geronta did not actually see any of them prior to acquisition because it chose not to look. A2391/98:4-116:10.

3. After Removing Its Blindfold, Geronta Immediately Discovered Seck's Non-Existence, But Concealed This From MetLife/Brighthouse For Nearly 15 Months.

Geronta, shortly after closing on the Portfolio, took off its blindfold. Geronta hired Life Equity to conduct *post*-acquisition diligence, and quickly discovered the problem. On January 11, 2016, Life Equity notified Geronta that: (i) the Data Room files (that Geronta ignored) reflected "several" unsuccessful attempts to contact Seck; (ii) public record searches revealed "no information on the name/SSN combination"; (iii) one of the third-party life expectancy reports for Seck (from EEA) had a "different SSN," which also did not match the application; and (iv) Life

Equity found publicly-available press releases discussing a 2010-11 criminal prosecution of Pape Seck for fraudulently applying to several insurers for policies insuring Mansour Seck. B482-83; A725/¶¶161-63. Mason testified this "raised red flags" of whether "he existed" and that Geronta "didn't tell MetLife or Brighthouse about these red flags at the time." A2760/81:5-7; A726/¶164; A2758/79:4-80:6.

At trial, Geronta conceded that, by February 2016, it believed Seck did not exist and that it chose not to tell MetLife. A2760/87:11-88:20; A2767/94:13-17. Instead, Geronta hired lawyers from Schulte Roth & Zabel ("SRZ"), who demanded EEA buy back the Policy, accusing EEA of knowing Seck did not exist and fraudulently concealing his non-existence from Geronta. B484; B672-74. But EEA dissembled claimed Seck was real. This back-and-forth is laid out in a September 2016 letter SRZ sent to EEA on Geronta's behalf:

- "*Shortly after the consummation of the [Policy sale] . . . [Geronta] became aware* that the Seck Policy was issued in connection with a fraudulent scheme initiated by Pape Seck, *and that the person purportedly insured under the Seck Policy does not exist.*"
- EEA "breached multiple representations" and "perpetrated fraud" by *not disclosing EEA's knowledge that Seck was fake*;
- EEA acted in bad faith because Geronta debunked its lame claim that Seck was real through "the most basic investigation"; and
- EEA needed to refund Geronta or prepare for litigation.

B672-74 (emphasis added). Despite confirming to EEA that it had *long* believed Seck was fake (since *at least* February 2016), Geronta continued to pay premium

and continued to conceal information it had as to Seck's non-existence from MetLife. A2762/89:9-90:12; A2769/96:20-97:23.

In November 2016, SRZ wrote another letter to EEA on Geronta's behalf, confirming Geronta's belief that "the person allegedly insured under the Seck Policy does not exi[s]t" and again stating that "*ViaSource and [EEA] were aware of this fact at the time the parties entered into the [PSA].*" B675-77 (emphasis added). Geronta also clarified that EEA engaged in a multi-layered fraud: not only selling the Policy to Geronta, but also trying to cover up that fraud after the fact. *Id.* Geronta and EEA ultimately entered into a tolling agreement to stay Geronta's claims against EEA until after this case. A2565/250:19-251:4; A728/¶ 175.

On April 21, 2017, Geronta called the customer service line for MetLife/Brighthouse, informing the representative that Geronta had reason to question whether Seck was real and asked if MetLife knew differently. A728/¶¶ 177-78. Geronta did not disclose it had come to the belief that Seck was fake 15 months prior, nor disclose its documentation to MetLife/Brighthouse until November 2017. A724/¶¶ 164-66.

4. **Geronta's Decision To Blind Itself Was A Tactical Decision.**

As the trial court found (B54, 61-62), based on Geronta's emails (B680-84), Geronta's decision to blind itself during the pre-acquisition diligence period was intentional and designed to capture "windfall" profits—because there was a

pecuniary benefit to not knowing, before acquisition, whether insureds were still alive. Under the PSA, EEA and Geronta agreed that, if an insured had already died, and Geronta discovered it during pre-acquisition diligence, Geronta was obligated to notify EEA, and EEA would then keep the policy; but if Geronta delayed discovering the death until after November 2015, Geronta would keep the policy. A2297/132:2-134:8.

Knipe and Luca Albertini (Leadenhall's CEO) discussed the strategy. B680-84. Knipe explained that, shortly *after* acquisition, Geronta learned that Seck was not a real person, but that it also learned a different insured had previously died in Mexico, allowing Geronta to immediately cash in on that policy. B683.

Albertini asked if there was a better system "to ensure going forward we are not buying policies without a life," and whether Leadenhall should, going forward, "do trades where the consideration is paid once we are happy of all bits being in place (*including the deeper due diligence which this case seems to point to as being necessary*." B682 (emphasis added). Knipe says no, advising Leadenhall to keep deferring diligence because: "*The standard in the tertiary market is not to check before closing because if the buyer finds a dead person they want to keep the windfall from the death benefits.*" B680-81.

Albertini responded, confirming his "takeaway": "these things happen," and it was "still possible to recover from the life insurer." Knipe responded, "Yes,

accurate summary." B680. That is, Geronta calculated that the benefits of blinding itself outweighed the costs of a Seck-like situation, concluding that Geronta would continue willfully blinding itself and conducting zero due diligence prior to purchasing policies because Geronta thinks Delaware courts will force insurers to subsidize its reckless gambling.

E. Procedural History

After Geronta told MetLife/Brighthouse Seck was fake, and the parties could not resolve the amount of premium, if any, to be refunded, Brighthouse filed this case, seeking a declaration that the Policy was void *ab initio*. A69-97. Geronta conceded Seck was fictitious and counterclaimed for "rescission," arguing it was entitled to a return of the premium it paid as well as the premium EEA paid—automatically. A121-24. Geronta also counterclaimed for unjust enrichment.

The parties cross-moved for judgment on the pleadings, each asking for the Policy to be declared void *ab initio*. The trial court dismissed Geronta's counterclaim for rescission, holding that Geronta could instead try to prove an entitlement to restitution under a theory of unjust enrichment. Dkt. 69 at 5-9. After the close of discovery, Geronta sought to assert a fraud claim against Brighthouse, alleging Brighthouse learned of Seck's non-existence years before and sat on its hands to collect premium. The trial court denied that motion, including because there was no evidence that Brighthouse knew of Seck's non-existence prior to Geronta telling it

in April 2017, and Geronta never asked MetLife/Brighthouse for any of the allegedly withheld information. Dkt. 161 at 12-20.

Brighthouse moved for summary judgment on Geronta's counterclaim for unjust enrichment, arguing, *inter alia*, that Geronta had an adequate remedy at law against EEA. Dkt. 112 at 15-17. Geronta did not file its own motion for summary judgment, but in opposing Brighthouse's motion, Geronta did not deny this fact. Dkt. 115; A1091/5:7-6:16, 1187/101:5-103:14. In supplemental briefing Brighthouse continued to argue that Geronta had an adequate legal remedy (Dkt. 141); and Geronta expressly admitted that it had tolled its claims against EEA. Dkt. 135 at 2-3. The trial court denied Brighthouse's motion for summary judgment, finding there were disputed issues of fact—without making a finding as to whether Geronta satisfied the elements of unjust enrichment. B1024/10:9-12:15-17.

At the pre-trial conference, the trial court made clear that it was not requiring (or permitting) Geronta to present a case for unjust enrichment—and was only requiring Geronta to prove a Restatement exception. Indeed, the trial court (referring to the pre-trial stipulation) asked Geronta why it had stated that it was going to prove a case through an "unjust enrichment framework," directing that, "if you start talking about unjust enrichment, that takes us off into a detour." A1386/3:21-5:1. Brighthouse then explained its understanding that Geronta "has to prove the elements of [its] unjust enrichment claim," [b]ut if Your Honor sees it different, I'm

sure we would both appreciate clarification of that." A1391/8:22-9:22. The Court responded: "Well, as to the unjust enrichment claim, the only way it can be advanced is under 198. So it's ***not unjust enrichment***. It is within the framework and the parameters of 198. It's ***not an overly broad unjust enrichment going on and on***." *Id.* A1392/9:23-10:4 (emphasis added); *see also* A1443/60:2-14. Brighthouse continued to maintain that Geronta was required to prove all the elements of unjust enrichment at trial. A735/¶ 227

In March of 2021, the trial court presided over a 7-day bench trial, including live testimony from Warr, an experienced underwriter, who walked the court through MetLife's underwriting process. B42-43. Geronta elected not to call an expert (or any other witness) to rebut her testimony. *Id.* at 58 n.206.

Geronta's witnesses (Mason and Knipe) also testified live and tried, unsuccessfully, to justify Geronta's diligence and deflect blame. *Id.* 44-49, 52-55. Knipe was not a credible witness: He was evasive and caught in lies, including without limitation, his false claim that the reason Geronta did not telephone insureds before the acquisition was because Geronta did not have their phone numbers—Geronta did. *Compare* A2386/71:20-74:3 (Knipe), *with* A2753/74:8-76:15 (Mason); A2259/94:10-96:19; A2403/88:9-89:5; A2427/112:4-113:8. At trial, Geronta did not prove (or attempt to prove) that it lacked an adequate remedy at law.

On August 20, 2021, the trial court issued a 66-page Opinion. The trial court credited Warr's testimony, found MetLife "did not commit wrong," that it had reasonably issued the Policy, that it never knew or believed Seck was fake, that it "always intended to pay the death benefit," and that "by the time MetLife learned that Pape Seck was a criminal, the . . . Policy was past its contestability period and MetLife was no longer able to protect the company from fraud." B64-66. By contrast, the trial court found Geronta had not acted reasonably. The trial court found that Geronta willfully blinded itself, "strategically" ignoring the information in the Data Room in the hopes of capturing "windfall" profits. B54, 60-61, 72-73.

The trial court concluded Geronta was not excusably ignorant and it was not less at fault. The trial court did not make any findings on the elements of unjust enrichment. Instead, the trial court ruled that Geronta was entitled only to a return of premium paid after it called MetLife in April 2017. B73-74.

On September 27, 2021, the parties stipulated that, based on the ruling, the amount of damages was $270,147.60, and on October 6, 2021 the trial court entered the proposed stipulation as an order. B75-80. The trial court then requested the parties provide a form of final judgment; the parties responded with a stipulated judgment for a "Principal Balance" of $207,147.60, and that "Pre-Judgment Interest:$0." B1049-52.

Geronta appealed from the trial court's pre-trial ruling that Geronta was not automatically entitled to a premium return on a theory of rescission. Geronta did not appeal the award of $0 in pre-judgment interest.

Two weeks before oral argument in this case, this Court issued its decision in *Estate of Malkin*. At oral argument, counsel for Geronta repeatedly asserted the trial court had incorrectly substituted Delaware's unjust enrichment elements for those in the Restatement. *See* B1053/3:14-19 (trial court used a "bastardized version of unjust enrichment that adopted a restatement test of restitution; it's not even Delaware's unjust enrichment test"); B1053/6:23-7:4 ("The Court below refused to countenance Delaware's normal unjust enrichment test, an enrichment, an impoverishment or relationship between the two and an injustice …. we were stuck unable to argue our normal unjust enrichment claim"); B1053/8:21-26 ("We believe that we should have been allowed to present the unjust enrichment test, enrichment, the power of enrichment relation injustice . . . we don't [think] that is the right Delaware unjust enrichment test."). Brighthouse likewise pressed the argument:

> MR. KELLEHER: They have fundamental problems under unjust enrichment. We know that it requires a connection between the impoverishment and the enrichment. How was Geronta impoverished because its predecessor paid premiums. It's competitor paid some money. How does that impoverish Geronta? It doesn't. They also have an adequate remedy at law and this court in the Malkin case, the Estate of Malkin case just came out was very clear. You can't have an unjust enrichment claim if you have adequate remedy at law. And here it's in the record, they can see, they have a private contract with the seller that provides representations and warranties to protect them,

> indemnification rights to protect them and they claim, in addition to that, they have a fraud claim against EEA. This isn't speculative. They entered a tolling agreement. It wouldn't produce the tolling agreement to us but as far as I know it's still in place. They have an adequate remedy at law and so an unjust enrichment claim would fail particularly for the premiums of other they didn't pay.

B1053/18:18-19:1.

This Court ruled as "a matter of first impression," that a party seeking a return of premiums paid into a policy that lacked insurable interest at inception must "present[]s a viable legal theory, such as unjust enrichment" and satisfy on of the fault-based exceptions in the Restatement (Second) Contracts § 197-99. *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 72 (Del. 2022) ("*Seck*"). This Court then remanded so the trial court could apply this "newly articulated fault-based test." *Id.* at 75.

On remand, the case was re-assigned to a new Judge, and the trial court ordered post-trial briefing. The trial court confirmed that Brighthouse's "underwriting process was reasonable and done in good faith." B1106. The trial court likewise confirmed Brighthouse did not believe or have actual knowledge (at any time prior to April of 2017) that Seck was "fictitious." B1097. The trial court found that Brighthouse did have actual knowledge, by October of 2011, that the Policy "was procured fraudulently." *Id.* The trial court found that Brighthouse's knowledge that the Policy was sold shortly after contestability was not enough to place Brighthouse on inquiry notice because lawful policies can be sold at any time.

However, the trial court found that after receiving a subpoena from the New Jersey Attorney General's Office and seeing the April 2010 Press Release, that Brighthouse was on inquiry notice of the void nature of the Policy in April of 2010.

The trial court confirmed that EEA conducted no pre-acquisition investigation and then, starting in 2010 and all the way through 2012, ran into and "disregarded multiple red flags"; namely the mound of red flags discussed *supra* at 12. B1110. "Rather than investigate whether Mansour Seck was real when faced with multiple red flags, EEA continued paying premiums, then sold the Policy" to Geronta. *Id.* The trial court found this meant EEA was "equally at fault" with Brighthouse. *Id.*

The trial court confirmed that Geronta did not act reasonably. The trial court confirmed that Geronta is a "sophisticated" investor with the knowledge and experience to assess the risk in purchasing the Policy and bargained for a pre-acquisition diligence period to assess that risk. B1092-93. The trial court confirmed that Geronta willfully blinded itself to the red flags in the data room and found Geronta was on inquiry notice *before* it bought the Policy. And, the trial court confirmed—*again*—that "Geronta made a deliberate, strategic decision not to examine the Seck Policy information contained in the data room[,] . . . a calculated choice made by a sophisticated investor, and Geronta will have to bear the consequences of that choice." B1102-03.

Brighthouse argued that Geronta failed to prove unjust enrichment because it had an adequate legal remedy against EEA. Geronta did not deny this fact, but claimed it was procedurally outside of the scope of the remand—the trial court agreed and refused to consider whether Geronta proved the elements of its viable legal theory. The trial court awarded Geronta all of the premium it paid, finding that, because Brighthouse was on inquiry notice earlier in time than Geronta, that Geronta was (for that reason) less at fault. By contrast, the trial court found that Geronta had not proven that EEA was less at fault than Brighthouse, denying Geronta's claim to receive the premium it did not pay.

Geronta appealed the decision to allow Brighthouse to retain EEA's premium; Brighthouse cross-appealed the decision to allow Geronta to keep its premium.

ARGUMENT

I. Geronta Is Not Entitled To The Premium It Paid Because It Failed To Satisfy The Elements Of A Viable Legal Theory.

A. Question Presented

Whether the trial court erred in ruling that Geronta's failure to satisfy the elements of unjust enrichment was outside the scope of the remand?

B. Scope of Review

This Court reviews questions of law *de novo*, *Backer v. Palisades Growth Capital II, L.P.*, 246 A.3d 81, 94 (Del. 2021), and questions of the scope on remand *de novo*. *Cede & Co. v. Technicolor*, 884 A.2d 26, 38-39 (Del. 2005).

C. Merits of Argument

1. Geronta Needed To Prove The Elements Of Unjust Enrichment.

To obtain restitution under an illegal contract, a claimant must prove "a viable legal theory, such as unjust enrichment" and satisfy one of the exceptions found in the Restatement (Second) Contracts §§ 197-99. *Seck*, 284 A.3d at 50, 72. The theory of restitution Geronta pled in its Counterclaims was unjust enrichment. To prove unjust enrichment, a claimant must prove "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy at law." *Wells Fargo v. Estate of Malkin*, 278 A.3d 53, 69 (Del. 2022). In *Estate of Malkin*, a STOLI case brought by an insured's family under 18 *Del. C.* § 2704(b), this Court made clear

that a STOLI investor seeking premium must, among other things, "establish the elements of a viable legal theory, such as unjust enrichment." *Id.* at 70. This Court further clarified that if the investor has a remedy at law against the entity it bought the policy from, it cannot satisfy this element. *Id.* Echoing *Estate of Malkin*, this Court required investors to likewise prove "a viable legal theory" in *Seck*. 284 A.3d at 72. Thus, under the test this Court newly-articulated on appeal, an investor like Geronta, that is relying on unjust enrichment as its viable legal theory, cannot recover premium if it has a legal remedy against its predecessors in interest (i.e., up its commercial chain).

2. Geronta Cannot Prove Unjust Enrichment.

Geronta cannot prove the elements of unjust enrichment here because it has an adequate legal remedy against EEA. This is not disputable.

- EEA represented and warranted to Geronta in the PSA that, to EEA's knowledge, the "Policy was solicited, issued and delivered . . . in compliance with all applicable law" and then indemnified Geronta for any losses it might incur if any of those representations and warranties proved untrue. A3694-3702, A3706-07.
- Shortly after Geronta bought the Policy, Geronta (through its lawyers) wrote a series of letters to EEA threatening a lawsuit against EEA and explaining that EEA had breached the PSA and defrauded Geronta by selling the Policy to Geronta with actual knowledge Seck was fake. B245-46.
- Indeed, Geronta forcefully asserted that EEA "had actual knowledge that the Seck Policy was fraudulently issued," "breached several representations and warranties in the [PSA], demanded that EEA "repurchase" the Policy from Geronta, and asserted that Geronta's continued attempts to claim Seck was real was a fraud to cover up EEA's original fraud.

- When EEA refused to voluntarily make Geronta whole, Geronta and EEA entered into an agreement to toll Geronta's claims against EEA until after Geronta tried to get the insurance company (Brighthouse) to foot the bill (i.e., until after the resolution of the instant lawsuit). A2565/250:19-251:4; A728/¶ 175.

On this record, Geronta—which, as claimant, had the burden of proof—simply cannot prove "the absence of a remedy at law." This is precisely the situation discussed in *Estate of Malkin*, where this Court made clear that if the investor, Berkshire, had a remedy based on contractual representations and indemnification promises, as Geronta does here, there is no restitution. 270 A.3d at 70.

3. The Trial Court Incorrectly Concluded That Geronta's Inability To Prove A Viable Legal Theory Was Outside The Scope Of The Remand.

On remand, Brighthouse argued (Dkt. 187 at 19-21) (as it has consistently throughout this litigation) that Geronta could not establish unjust enrichment because it had an adequate legal remedy against EEA. However, the trial court held that this question was outside the scope of the remand and thus, declined to consider it. The trial court reasoned that, at trial (i.e., through the prior trial judge), the court had somehow already found that Geronta satisfied the elements of unjust enrichment; and that, because Brighthouse raised this argument on appeal but this Court did not expressly address it, this purported "silence," amounted to an implicit rejection and disposal of the issue by this Court. This was error for a number of reasons.

First, as discussed, *supra* at 23-24, the original trial court did not make any findings that Geronta presented a "viable legal theory" or that it had, in fact, satisfied the elements of unjust enrichment. To the contrary, prior to trial, the trial court made clear that it was *not* going to apply Delaware's traditional test for unjust enrichment and was instead going to require *only* that Geronta prove an entitlement to restitution by satisfying an exception in the Restatement. That is why Geronta did not address the elements of unjust enrichment at trial, why the trial court made no such findings in its opinion after trial, and why counsel for Geronta conceded at oral argument to this Court that the trial court's test was "not even Delaware's unjust enrichment test." B1053/3:19. Simply put, there is no question that the original trial court neither found nor required Geronta to prove that it lacked an adequate remedy at law.

Second, this Court was not "silent" nor did it impliedly "dispose" of this question on appeal. It is well-established that when this Court remands for further proceedings, the *entire* opinion "becomes part of the mandate," and lower courts are required to implement its "letter and spirit," "taking into account [the] opinion and the circumstances it embraces." *Ins. Corp. of Am. v. Barker*, 628 A.2d 38, 40 (Del. 1993) (cleaned up). Where this Court "expressly or impliedly dispose[s]" of an issue, *id.,* it falls outside the scope on remand. *Chavin v. PNC Bank*, 830 A.2d 1220, 1222 (Del. Ch. 2003). But where, as here, this Court has not in fact disposed of an issue, and the question is "implicated in the procedure of reexamining the record [on

remand] in light of [a] newly articulated standard," *id.* at 1222 n.7, the issue falls within the scope on remand. *In re: Melson*, 1999 WL 160136 (Del. Ch. Mar. 10, 1999), *aff'd*, 741 A.2d 1027 (Del. 1999); *see PharmAthene, Inc. v. SIGA Technologies, Inc.*, 2014 WL 3974167, at *3-4 (Del. Ch. Aug. 8, 2014) (the Delaware Supreme Court's silence on argument does not mean it is outside scope on remand), *aff'd*, 132 A.3d 1108 (Del. 2015).

Here, the central question on appeal was whether the trial court applied the proper legal standard to the analysis of premium return. This Court, as a matter of first impression, adopted and articulated a *new* test, requiring investors to *both* prove a viable legal theory and to satisfy an exception set forth in Sections 197-99 of the Restatement. *Seck*, 284 A.3d at 50, 72-73. This Court then remanded "for consideration consistent with this Opinion" and for the trial court to review its factual findings through the lens of this Court's newly articulated test. *Id.* at 50, 75. When this Court remanded to apply the new test, it was clearly directing the trial court to apply the *entire* test. Indeed, this was, of course, a direct appeal—as opposed to guidance on a certified question. Thus, whether viewed as an express direction or simply an implied one, evaluating whether Geronta satisfied *all* aspects of this Court's new test was within the scope on remand—and nothing in this Court's opinion said or implied otherwise.

In sum, the trial court's decision to apply a procedural bar was wrong as a matter of law. The trial court was required to apply the proper legal standard (i.e., this Court's new test), but it declined to do so. This was reversible error because it is indisputable that Geronta has an adequate remedy at law. Consequently, this Court can and should reverse the trial court's decision to return premium to Geronta and remand with instructions to enter judgment in favor of Brighthouse.

II. Geronta Is Not Entitled To Its Premium Because It Cannot Satisfy A Fault-Based Exception.

A. Question Presented

Whether the trial court incorrectly narrowed this Court's premium return test, incorrectly focused on one factor as opposed to multiple factors, and incorrectly found that Geronta was less at fault than Brighthouse simply because it was purportedly on inquiry notice earlier in time.

B. Scope of Review.

This Court reviews questions of law *de novo*, and the application of facts to the correct legal standard for abuse of discretion. *Backer*, 246 A.3d at 94-95.

C. Merits of Argument

1. The Trial Court Incorrectly Turned This Court's Multiple Factor Test Into A Single Factor Test.

In *Seck*, this Court held that "the fault of the parties and public policy considerations will determine which party is entitled to the premiums paid on an insurance policy that is void *ab initio* for lack of an insurable interest." *Seck*, 294 A.3d at 74. To implement this holding, this Court requires trial courts to "consider a number of factors bearing on the fault of the parties" through a series of "nuanced" "inquiries" that are "manifestly fact intensive." *Id.* at 70, 72; *Wilmington Trust v. Sun Life*, 284 A.3d 1062, 1076 (Del. 2023) ("*Frankel & De Bourbon*"). Among other things, this requires a trial court to consider facts relating to: (i) the nature and quality of the parties' investigation; (ii) what the parties knew or should have known or

suspected about the policy's insurable interest problems; (iii) whether the parties "failed to notice red flags"; (iv) the extent to which the parties conducted themselves in "good faith" or whether they engaged in "misconduct" such as "fraud" or "ignoring the fraud"; (v) whether the nature of the parties' business is to engage in this sort of professional misconduct; and (vi) whether the parties communicated any concerns they may have had about the policy to their contractual counterparts. *Seck*, 284 A.3d at 70-73.

Once it has weighed the parties' comparative fault according to these factors, trial courts are supposed to take "public policy considerations" into account. This Court articulated several different public policy considerations to consider. This Court explained the test was designed to stop investors from "purchasing life insurance policies without investigation into whether those policies are unenforceable," from "ignoring the fraud," and from taking the "gamble" that they have nothing to lose if they get caught. *Id.* at 72. This Court hoped to "encourage investors to actually investigate all policies to avoid the risk of losing their premium," reasoning that "a thorough investigation of insurance policies will hopefully uncover those that are void *ab initio* as against public policy," and "should incentivize investors not to procure or purchase these unenforceable policies in the first instance." *Id.* This recognizes, of course, that the only reason upstream actors create policies like these is because they believe there is downstream money who

will buy it. *See PHL Var. Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011). This Court also wished to incentivize insurers not to "hid[e] the invalidity of a policy" and to "speak up when the circumstances suggest that a policy is void for lack of insurable interest." *Id.* at 72. "In other words, our new test incentivizes ***each player*** along the chain of these insurance policies ***to behave in good faith***." *Id.* (emphasis added).

On remand, the trial court did not apply this Court's multi-factor analysis. Instead, the trial court accepted Geronta's invitation (A947-52), to reduce the test to a single factor and a single question: Who was on inquiry notice first? In that regard, the trial court determined that Brighthouse was on inquiry notice three years or so after it issued the Policy when it saw the April 2010 Press Release, and it determined Geronta was on inquiry notice before it even bought the Policy when it gained access to the data room in or around June 2015. Without discussing or weighing the other considerations, the trial court simply held that, because it deemed Brighthouse to have been on inquiry notice 5 years before Geronta, Geronta was less at fault. B1106-07. Without discussing any of the other public policy considerations, the trial court reasoned that this would incentivize insurers to speak up. *Id.* It thus appears the trial court did not consider, weigh, and compare all of the factors this Court articulated, and instead predicated its decision on a single factor—the timing of inquiry notice. If so, this was legal error.

Indeed, Geronta's request to reduce the legal standard to single variable (inquiry notice timing) is the very same approach this Court rejected in *Frankel & DeBourbon*. There, the investor (Viva) likewise claimed that it was necessarily less at fault than the insurer, arguing the insurer had inquiry notice first. Viva's attorneys referred to this as "an insurmountable timing problem under *Seck*," reasoning that even if Viva did all of the bad things the insurer alleged (knowingly buying a massive portfolio of cookie-cutter human life wagers hoping to profit) that this did not matter because the insurer could have figured out the policy was STOLI sooner. WT.Supp.Br., Dkt. 50 at 14-15. If that were the test—if timing were dispositive—than this Court could have, and would have, said so. Instead, this Court re-affirmed the multi-factor nature of the test articulated in *Seck*: "The inquiries mandated by this analysis are manifestly fact-intensive" and will "require weighing of evidence" "regarding whether and when the parties had actual knowledge or inquiry notice of the policies' illegality, whether the parties were equally at fault, or ***any of the other considerations that this Court identified in Seck as relevant to the fault-based analysis***." *Frankel & Debourbon*, 294 A.3d at 1077 (emphasis added). That is, the timing of any inquiry notice is just one of the many factors trial courts must consider.

Consequently, the trial court's application of the incorrect legal standard requires, at minimum, remanding with instruction to consider and weigh all of the factors this Court articulated. However, remand is not necessary because, applying

the multi-factor test to the facts as the trial court already found them, shows that the only reasonable conclusion is that Geronta failed to carry its burden.

Investigation. The trial court did not compare Brigthouse's robust underwriting investigation with Geronta's non-existent investigation—the very thing this Court said investors cannot do because it will lead to the creation of more bogus policies. But the trial court found that before Brighthouse entered this transaction (i.e., before it issued the Policy) it conducted a thorough and reasonable investigation, including requiring and reviewing in-person medical testing, lab testing, and a phone interview with the insured. Moreover, on remand, the trial court found this underwriting process "was reasonable and done in good faith." B1106. By contrast, the trial court found that Geronta, at the time *it* entered the transaction (when it bought the Policy in 2015) did no investigation of the Policy of any kind. *Id.* at 17-18. Geronta bargained for and had access to a robust data room, where EEA had placed a veritable pile of red flags. *Id.* Geronta intentionally and willfully blinded itself (*id.*), epitomizing the precise conduct this Court wishes to disincentivize—buying without investigating and ignoring the fraud. And, of course, Geronta's *reason* for not investigating was "strategic," pecuniary, and not at all in good faith. There is simply no comparison as to the parties' investigations.

Knowledge. The trial did not compare the quantity and quality of the red flag documents in Geronta's possession (which Brighthouse neither saw nor had access

to) with the publicly available information in Brighthouse's possession. The trial court found that Brighthouse was aware that Pape Seck was prosecuted for insurance fraud based on publicly available information in press releases between 2010-2011. But the trial court already found this information was equally accessible to both Brighthouse and Geronta. Geronta had access to and ignored not only this publicly available information, but a giant pile of red flags in the data room—information Brighthouse never saw and never had access to until shortly before this litigation. B1102-03. The quantity and quality of the evidence in the data room is critical. If Geronta had not intentionally blinded itself, there is no possibility it would have bought the Policy; and, indeed, it would have figured out—as we know it did the second it actually looked in the data room *after* acquisition—that the insured was fictitious. Moreover, Geronta concedes that, in February of 2016, it believed Seck was fictitious. In sum, Geronta ignored far more than Brighthouse ever had and knew far more than Brighthouse ever did.

Good Faith. The trial court did not compare the fact that Brighthouse intended to pay the Policy's death benefit in good faith with Geronta's admission that the bad faith reason it failed to investigate the Policy was a "calculated" decision to capture "windfall" profits. Brighthouse did not raise its concerns because it did not have any. Brighthouse believed in good faith that it would be paying the death benefit on this Policy, and thus had nothing to disclose. Indeed, the trial court credited Ms. Warr's

testimony that Brighthouse intended to pay the death benefit and that its business practice was to pay (rather than investigate or challenge) problematic policies past contestability. Moreover, this was objectively reasonable considering that Brighthouse carried this as a New Jersey policy: The Policy was applied for on New Jersey forms, with New Jersey fraud warnings, by a New Jersey trust, insuring the life of a New Jersey resident, and was delivered to a New Jersey trust. It would not be until 2019 that the New Jersey Supreme Court (against significant resistance by investors) ruled that insurers could raise insurable interest after contestability.[2]

A comparison to Geronta leads to no comparison at all. Geronta's decision not to investigate was not in good faith. The trial court found, yet again, that Geronta made an "intentional" "strategic" and "calculated" decision to blind itself. B1102-03, 1106. Geronta hoped to gamble that, by blinding itself during pre-acquisition diligence, it could collect windfall profits. *Id.* This is not good faith and epitomizes the very behavior this Court's test is meant to discourage. When Geronta then opened its eyes and came to the specific and admitted belief that Seck was fake in

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[2] Brighthouse pled its claim under New Jersey law. Geronta argued in connection with its motion for judgment on the pleadings that "[b]ecause Delaware law on this topic is settled, but New Jersey law is silent, the Court should apply Delaware law. In response, Brighthouse explained the outcome would be the same either way, because both Delaware and New Jersey law would require Geronta to satisfy an exception in the Restatement to recover premium on a policy both sides agreed was void *ab initio*. The trial court, therefore, chose to apply forum law. This does not change the fact that Brigthouse was correct in treating the Policy as one that was governed by New Jersey law.

February of 2016, it intentionally chose to keep paying premium and waited 15 months to tell Brighthouse. Geronta, the party with the burden of proof, offered no evidence to try and justify its 15-month silence.

Public Policy. The trial court discussed incentivizing insurers to speak up, but did not discuss or appear to give any consideration to the competing public policy considerations, most notably the fact that rewarding downstream investors with restitution when they fail to conduct "thorough investigations" incentivizes the upstream creation of more bogus policies to satisfy that indiscriminate demand. It is difficult to fathom a downstream investor conducting a less thorough investigation than Geronta did here. And aside from investors who were actually involved in the creation of the bogus policy, it is hard to imagine an investor acting with more bad faith than Geronta did here. If investors like Geronta get rewarded with restitution, the investor market will recognize that this Court's *Seck* opinion is toothless, and they will continue doing precisely what Geronta admitted doing here: Willfully blinding themselves in the hopes that doing so will lead to windfall profits. Adequately balancing the competing public policy goals, should, at minimum, require re-affirming the trial court's original decision that Geronta was not entitled to the premium it paid prior to calling Brighthouse in April 2017.

* * *

In sum, the trial court was supposed to consider all of the *Seck* factors to determine in light of all the public policy considerations who was most at fault. The trial court did not appear to do that. Instead, the trial court appeared to look at a single factor (inquiry notice timing) in light of a single public policy (encouraging insurers to speak up). If so, this was reversible error because any fair look at the totality of the circumstances would lead to a finding that Brighthouse was less at fault than Geronta. Indeed, in the wake of *Seck* and *Frankel & De Bourbon*, the U.S. District Court for the District of Delaware has been presented with this very same argument—that the only thing that matters is who was on inquiry notice first—and has squarely rejected it as fundamentally inconsistent with this Court's opinions:

> I don't take the Supreme Court's statement to mean that a downstream investor who purchases a policy with inquiry notice always wins against an insurer who was already on inquiry notice. Indeed, such a conclusion would be inconsistent with the previous paragraph of the Court's opinion, which explained that its multi-factor analysis was intended to encourage downstream investors to investigate whether policies are STOLI 'to avoid the risk of losing their premium.' If Wilmington Trust is correct that the only thing that matters is who was on inquiry notice first, it would do nothing to deter downstream investors from purchasing policies with clear STOLI indicia where they can make the argument that the insurer was already aware of those indicia.

B1073/15:7-21.

III. The Trial Court Correctly Denied Geronta's Request For Restitution Of The Premium Geronta Did Not Pay.

A. Question Presented

Whether the trial court correctly concluded that Geronta did not prove an entitlement to restitution of the premium paid by EEA.

B. Scope of Review.

This Court reviews question of law *de novo* and the finding and application of facts for abuse of discretion. *Backer*, 246 A.3d at 94-95.

C. Merits of Argument.

The trial court's decision that Geronta is not entitled to restitution of the premium paid by EEA was correct and should be affirmed.

This Court has not yet squarely decided the purely legal question of whether a STOLI investor can ever recover restitution of premium it did not pay. *Columbus Life v. Wilmington Tr.*, (D. Del. Sept. 25, 2023) ("*Cohen & Romano*") B1073/19:2-6. ("[T]he Delaware Supreme Court has never definitely decided whether a securities intermediary can ever recover payments made by the current owner's predecessor-in-interest. I think that the Supreme Court will conclude that it cannot.").

In this case, Geronta's theory of restitution is unjust enrichment. To prove such a claim, a claimant must prove, among other things, an enrichment, an impoverishment, and a relationship between the two. *Estate of Malkin*, 278 A.3d at

69. "It is a prerequisite to an unjust enrichment claim that the plaintiff acted for the defendant's benefit." *Id.*

Here, Geronta was not impoverished by EEA's payment of premium to Brighthouse. EEA did not pay the premium on Geronta's behalf or for Geronta's intended benefit. In fact, Geronta, which is one of EEA's competitors, did not even exist while EEA was paying premium. Because *Geronta* was not impoverished by *EEA's* payment of premium, Geronta's unjust enrichment claim to recover restitution of EEA's premium fails. *See, e.g.*, *Anguilla v. Lubert-Adler Real Estate Fund*, 2012 WL 5351229, at *6 (Del. Super. Ct. Oct. 16, 2012) (dismissing unjust enrichment claim because claimant's predecessor-in-interest—not claimant—was entity that conferred benefit); *Sun Life v. Wells Fargo*, 44 F.4th 1024, 1038 (7th Cir. 2022) ("*Corwell*") (rejecting STOLI investor's claim for restitution of premiums paid by prior owners because it did not pay them); *Ohio Midland v. Proctor*, 480 F. Supp. 2d 1025, 1033 (E.D. Ohio 2007) ("Under the doctrine of unjust enrichment, if the plaintiff did not confer the asserted benefit upon the defendant, the plaintiff is not entitled to judgment for unjust enrichment."); *Rimini St. v. Oracle*, 2017 WL 4227939, at *11 (D. Nev. Sept. 22, 2017) (dismissing unjust enrichment claim where defendant was enriched by third parties, not by claimant); *Maxwell v. Adapt*, 2015 WL 1444388, at *7 (W.D. Pa. Mar. 30, 2015) ("The 'benefit' must be conferred by

the plaintiff directly—indirect benefits bestowed by third parties will not support a claim of unjust enrichment.").

Although this Court did not directly address this question in *Seck*, it recognized that "recission would result in the return of *any* premiums paid" and then rejected rescission as the proper remedy, adopting instead a restitution-based theory under Restatement §§ 197-99. 284 A.3d at 61 (emphasis added). By their own terms, §§ 197-199 speak only to the possibility of restitution of performance the claimant "has rendered." And nearly every single court to assess the premium refund issue in STOLI cases—including all but one of the opinions canvassed by this Court's opinion in *Seck*[3]—has refused to refund to the current owner the premium it did not pay. *See, e.g.*, *Sun Life v. U.S. Bank*, 2016 WL 3948059, at *2 (S.D. Fla. Jan. 14, 2016) ("*Malkin*"), *aff'd* 693 F. App'x 838 (11th Cir. 2017); *Sun Life v. Wells Fargo*, 2016 WL 6824367 (D.N.J. Nov. 17, 2016 ("*Bergman*"), *aff'd* 779 F. App'x 927, 929 (3d Cir. 2019); *Sun Life v. Conestoga Tr.*, 263 F. Supp. 3d 695, 704 (E.D. Tenn. 2017) ("*Collins*"), *aff'd* 717 F. App'x 600 (6th Cir. 2018); *Ohio Nat'l v. Davis*, 803 F.3d 904, 911 (7th Cir. 2015); *U.S. Bank v. Sun Life*, 2016 WL 8116141, at *6 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*"), *adopted*, 2017 WL 347449

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[3] In the *Sol* case, the court awarded the STOLI investor a refund of the premium paid by prior owners on a theory of promissory estoppel, which is not in play here. Moreover, the court's reasoning in *Sol* does not pass post-*Seck*, since the *Sol* court refunded premium because it believed the parties were equally at fault; whereas, under *Seck*, the claimant must prove it was *less* at fault to get restitution.

(E.D.N.Y. Jan. 24, 2017); B1073/19:1-22:8. In fact, the most recent time this has come up at the appellate level was when the Seventh Circuit refused to award a STOLI investor the premium paid by prior owners, stating: "[I]t is hard to see how Vida could ever have a claim to a refund of anything more than the $13,000 in premiums it paid itself through Wells Fargo." *Corwell*, 44 F.4th at 1038. Although the trial court below did not deny this aspect of Geronta's restitution claim for this particular reason, this Court can affirm a trial court's ruling for any reason.

The trial court's reason for denying this aspect of Geronta's claim relied upon this Court's decision in *Frankel & De Bourbon*. In that case, the investor argued that it could show an impoverishment because it supposedly bought its predecessor's rights to the premiums it had paid. This argument is tough to square because it does not change the fact that an investor is not impoverished when its competitor pays money. This argument is also tough to square with this Court's holding in *Estate of Malkin* that "[n]obody can have a 'property interest' in a STOLI policy or its proceeds," which calls into serious question whether an investor could ever effectively assign equitable rights to money paid into an illegal contract. 278 3d at 65. In any event, without tackling these broader legal issues, this Court in *Frankel & De Bourbon* held that, at the very least, a downstream buyer would bear the burden of proving that its predecessors were less at fault than the insurer. *See* 294 A.3d at 1077. This makes sense because it is black-letter law that an assignee stands in the

shoes of its assignor and can take no greater rights than the assignor had, so if the prior owner could not prove restitution, no assignee ever could either. *Madison Fund v. Midland Glass Co.*, 1980 WL 332958, at *2 (Del. Super. Ct. Aug. 11, 1980). In this case, the trial court denied Geronta's request for restitution of the premium paid by EEA because it correctly held that EEA was not less at fault than Brighthouse. B1108-13. This too is a sufficient basis for this Court to affirm.

Geronta claims (Ger.Op.Br. at 16) that the trial court was somehow required to ignore Delaware law as set forth in this Court's *Frankel & De Bourbon* decision because, according to Geronta, doing so would exceed the scope of the mandate. Not so. Geronta's argument is that because this Court did not *expressly* direct the trial court to weigh the comparative fault of EEA, that the "mandate" doctrine precluded doing so. But, as discussed, *supra* at 32, the mandate doctrine precludes taking action that contradicts an opinion or relitigates issues that have been decided. But as discussed, *supra* at 44, this Court did not expressly address EEA's premium nor did it expressly address, more generally, how to analyze whether to return premiums paid by a predecessor. The mandate doctrine, therefore, does not apply and the trial court was neither precluded from weighing EEA's fault, nor was it permitted to ignore a subsequent decision of Delaware law from this Court in *Frankel & DeBourbon*.

1. There Is No Question EEA Was More At Fault.

Geronta is also trying to relitigate the factfinder's conclusion that EEA was not less at fault than Brighthouse. But the trial court's conclusion in this regard was not an abuse of discretion—it was clearly correct.

Thoroughness Of Investigation. There is no real comparison between the robust investigation Brighthouse did prior to issuance and the non-existent investigation EEA did before buying.

EEA was a sophisticated life insurance investor, assisted by a specialist in the life insurance secondary market, ViaSource. Unlike Brighthouse, it is undisputed EEA made no attempt to speak to Seck prior to buying the Policy. Indeed, the record is devoid of *any* evidence that EEA did *any* pre-acquisition investigation at all.

ViaSource's designee gave self-serving testimony of what it supposedly "would have" done prior to acquisition, but had no evidence of any actual investigation. For example, ViaSource testified it "would have" collected medical records and life expectancy reports and "would have" reviewed them to "validate the person." A2194/29:6-13. But ViaSource was unable to identify which company supposedly did this analysis, and there is no evidence of any such analysis in the record. *Id.* This is important, because if EEA/ViaSource had *actually* tried to investigate Seck (as it claims it *would* have) or had *actually* asked a life expectancy company to "validate" Seck (*before* acquisition), it would have been told exactly

what it was told in 2011 and 2012 (when it *did* run public record searches) and what it was told in 2013 (when it *did* ask a life expectancy company): Seck's identity could not be validated. A719/¶¶ 124-25; A721/¶¶ 135-37; A1021.

In addition to its non-existent diligence, EEA also ignored the first of many red flags. *See Seck*, 284 A.3d at 72. Before buying the Policy, EEA asked for "Designated Contacts," defined as persons in "regular contact" with Seck, who would provide periodic reports to EEA about his whereabouts and health. A712/¶ 89. The Trust identified a CPA, Frohlic, and the Trust's trustee, Krauss. B275-78; B475-76. But because Krauss had *never* had contact with Seck, Krauss modified the contract's terms to warn EEA that "Krauss . . . is not in contact with the insured.". That is, Krauss said he would be a person in contact with Seck while at the same time confirming he was *not* a person in contact with Seck. Despite conceding this was "a cause for concern," EEA proceeded without any inquiry and never shared this with Brighthouse.

There is no meaningful comparison between EEA's virtually non-existent investigation and Brighthouse's thorough underwriting established through hours of live testimony the trial court credited. Dkt. 287 at 4-6. Indeed, Brighthouse interviewed a person purporting to be Seck, but EEA did not; Brighthouse did a thorough review of a complex application packet, but there is no evidence EEA even looked at it; Brighthouse ordered and analyzed medical tests, but there is no evidence

EEA looked at them. Krauss told EEA he was not in contact with Seck, but EEA asked no questions; by contrast, Krauss told Brighthouse Seck's data was accurate and he existed, representations Brighthouse was permitted to rely on. 18 Del. C. § 2704(d).

Quantity and Quality of Knowledge. Shortly after buying the Policy, EEA encountered a flood of red flags—but kept quiet. On December 17, 2009, ViaSource wrote Seck asking him why his physicians were disavowing he was their patient and requesting updated medical information—the letter was returned to sender. A711/¶ 86; B279-81. On January 25, 2010, a ViaSource nurse contacted Krauss asking for a way to contact Seck, for medical data about him, and whether he was alive. B344; A711/¶¶ 88, 90. Krauss gave no information. *Id.* ¶ 91; *see* B912/¶¶ 35-38. On February 4, 2010, ViaSource wrote Frohlic, asking for Seck's contact information, his physicians' names, and his mortality status—Frohlic gave no information. B336; A712/¶¶ 92-93. On October 19, 2010, ViaSource again called/emailed Krauss looking for information—Krauss was again unable to provide any. B432; A718/¶¶ 120-22. The next day, it again called and emailed Seck unsuccessfully. B432.

On October 11, 2011, ViaSource's General Counsel ran a public records search for Seck for "fraud prevention or detection" purposes. A719/¶¶ 124-25. *The resulting report showed that no public records for Seck existed. Id.* ¶ 127; B466-68. Indeed, at trial, Geronta's own witness acknowledged it would have been

immediately obvious to anyone looking at this report that it shows no evidence of Seck's existence.

On December 6, 2012, ViaSource's General Counsel ran another public records search for Seck, again for "fraud prevention or detection," *which again showed no public record of Seck's existence.* A721/¶¶ 135-37; B466-68. Indeed, live at trial, Geronta's Knipe conceded it took him "10 seconds" to conclude there was no record of Seck's existence in this report.

In May 2013, EEA asked a medical underwriting company to estimate Seck's mortality, but that company, after pointing out that the records were stale, listed Seck's SSN as "000-00-0000," warning EEA that "*the SSN stated on the ViaSource transmittal (147-52-3652) could not be verified as belonging to the insured*." B1021 (original emphasis).

EEA did not bring any of these red flags to Brighthouse's attention. A719/¶¶ 127, 138. At deposition, EEA tried claiming the inability to contact Seck was not irregular, but that misses the point: Seck was not simply dodging calls—his information was coming up false, everyone who purported to know anything about him was denying knowing anything, *and EEA had actual knowledge that there were no public records of his existence*.

But this Court need not take Brighthouse's word for it because Geronta's attorneys have already conceded EEA had *actual knowledge* Seck did not exist. As

Geronta's attorneys explained: "[EEA] sold the Seck Policy to [Geronta] through fraud by withholding key information regarding the Seck Policy" because "the person allegedly insured under the Seck Policy does not exi[s]t, and ViaSource and [EEA] were aware of this fact at the time" of the sale in 2015. B675-77. In contrast, the trial court has already correctly found Brighthouse did not have actual knowledge of Seck's non-existence until Geronta told Brighthouse in 2017.

Actual Fraud. EEA—knowing full well Seck was fake—tried to pass the Policy off to Geronta; and after Geronta confronted EEA, EEA continued acting in bad faith by falsely claiming for months Seck was real.

On September 13, 2016, Geronta's counsel wrote a letter to EEA and ViaSource entitled: "**Notice of Breach and Demand for Repurchase**." B672. Geronta's counsel stated: "[EEA] was aware of issues with the Seck Policy, yet failed to disclose this to [Geronta] . . . breach[ing] multiple representations and warranties set forth in the [PSA]." B245-46. Geronta's counsel explained that, despite Geronta having "addressed this issue directly with [EEA] at the time [it] learned of the fraud concerning the Seck Policy, [EEA] denied there were any issues." B675.

Geronta's counsel explained the chronology: "During the course of May and June 2016, [EEA] repeatedly promised to identify the alleged insured but never did so," and "after weeks of delay (accompanied by nothing but excuses)," Geronta

demanded EEA repurchase the Policy. B673. In August 2016, EEA "finally" "purported to identify the person insured under the Seck Policy as Mamadou Mansour Seck, a Senegalese general and former Ambassador to the United States." *Id.* But, as Geronta's counsel concedes, this was a fraud because "the most basic investigation proves that Ambassador Mamadou Mansour Seck is *not*," the Policy's Seck. *Id.* As Geronta's counsel explained, "[r]ather than admitting the issues with the Seck Policy," EEA made "assertions that are not believable and indeed are not true," and thus Geronta concluded: "it is inconceivable that [EEA's] and ViaSource's representations" about Seck "are anything other than a continuing attempt to conceal the facts about the fraudulent nature of the Seck Policy." *Id.*

On November 23, 2016, Geronta's counsel further explained that EEA "sold the Seck Policy to [Geronta] through fraud by withholding key information regarding the Seck Policy until after the transaction was consummated," given that "the person allegedly insured under the Seck Policy does not exi[s]t, and ViaSource and [EEA] were aware of this fact at the time" of the PSA." B676. Also, by claiming Seck was real, EEA "engaged in additional fraud to cover up the initial fraud." *Id.*

At trial, Geronta's witnesses admitted that what their attorneys said about EEA was true. Knipe admitted that, when EEA contended Seck was real, "[w]e were pretty sure that they were lying to us." A2419/104:11-20; *see* A2537/222:11-225:1 (Knipe admitting content of Geronta's counsel's letter to EEA was factually

accurate); A2723/44:13-17 (Mason admitting that what EEA told Geronta about Seck's existence was "factually wrong"); A2726/47:4-16 (Mason admitting that "a most basic investigation" would have shown EEA's statement that Seck was a Senegalese general was false); A2730/51:20-52:7 (Mason had no basis to dispute veracity of statements made by Geronta's counsel in letters to EEA).

In sum, Geronta did not carry its burden of proving EEA was less at fault. EEA did far less investigation than Brighthouse. EEA ignored all sorts of red flags Brighthouse never had access to. Unlike Brighthouse, EEA—by Geronta's own admission—had actual knowledge Seck was fake and used that knowledge to defraud Geronta into buying the Policy. Because EEA was far more at fault than Brighthouse, Geronta cannot recover EEA's premium.

2. Geronta's Argument that EEA Is Less At Fault Than Brighthouse Is Flawed.

Geronta's central argument for recovering EEA's premium is another attempt to reduce this Court's multivariate test to a single factor: timing. Indeed, Geronta repeatedly argues (Ger.Op.Br. at 21-23) that the "time line tells the tale," claiming that because Brighthouse was purportedly on inquiry notice before EEA, Brighthouse is more at fault. This is not the correct legal standard. As discussed, *supra* at 35-37, the *Seck* test is multivariate, "nuanced," and "manifestly fact-intensive." Geronta's attempt to reduce this Court's multivariate analysis to a single

factor (such as timing) is wrong as a matter of law. This Court rejected the same argument in *Frankel & DeBourbon*, and it should do so here. 294 A.3d at 1076.

Geronta also claims Brighthouse is more at fault than EEA because Brighthouse noted that the timing of the transfer *to EEA* bore “strong IOLI flags.” But as the trial court correctly found, based on the unrebutted testimony at trial, it is perfectly legal to sell a policy shortly after contestability, and, therefore, the timing of the sale to EEA did not even warrant further investigation. And, of course, EEA did not need to be told the timing when *it* bought the Policy. The trial court rejected this argument at trial, and it was correctly rejected (again) on remand.

Geronta claims Brighthouse is more at fault because of its investigation into Pape Seck in 2009. But this investigation is irrelevant to this case: It was not an investigation of the Policy; Pape Seck was not the writing broker for the Policy; and there was no indication that Pape Seck was using fictitious insureds (the modus operendi from this case). The original trial court, based on live testimony, found this investigation was “not germane.” On remand, the trial court’s affirmance of this prior ruling was not an abuse of discretion.

As discussed, *supra* at 39-43, applying this Court’s multivariate analysis leads to the conclusion that there is no meaningful comparison at all between the relative investigations, knowledge, good faith, and public policy implications. The trial

court's decision to deny Geronta's claim for EEA's premium because EEA was not less at fault than Brighthouse was not an abuse of discretion and should be affirmed.

3. Geronta's Public Policy Arguments For Obtaining EEA's Premium Are Flawed.

Geronta's final argument for obtaining EEA's premium is based on a series of attempts to effectively re-litigate and revise this Court's decision in *Seck*.

Geronta claims that allowing Brighthouse to retain EEA's premium would work a disproportionate forfeiture because, requiring investors like EEA to conduct pre-acquisition investigations will harm the secondary market, which Geronta says is against the "public policy" of encouraging the secondary market. This is wrong.

For one, this Court already made clear that the disproportionate forfeiture exception looks at the conduct of the restitution claimant (not the insurer). Here, it would require weighing the extent of the forfeiture to EEA (as restitution claimant) when weighed against EEA's conduct (i.e., in ignoring the fraud and hiding its concerns from both Brighthouse and Geronta) and the gravity of the "public policy *involved*." *Seck*, 284 A.3d at 68-69. But Geronta focusses on the conduct of Brighthouse (instead of EEA) and focuses on an amorphous public policy in favor of a secondary market, rather than the relevant public policy behind insurable interest—discouraging human-life wagering.

Moreover, Geronta's argument is a thinly-veiled request to revisit and reverse the merits of this Court's decision in *Seck*, which should be summarily rejected. *C.f.*

Lavastone Cap. LLC v. Est. of Berland, 266 A.3d 964, 971 (Del. 2021) (rejecting investor's request to "reexamine" *Price Dawe*"). Indeed, Geronta made—and this Court rejected—the same argument during the original appeal (Ger.Reply.Br. at 22), and the amici made—and this Court rejected—the same policy arguments in *Estate of Berland* and in *Estate of Malkin*. Geronta's request to conduct pretextual, non-existent investigations has been squarely rejected.

The fact that Geronta would even consider re-raising it underscores that it really wants this Court's permission to buy policies without conducting insurable interest investigations of any kind. As Geronta's executive put it: "*The standard in the tertiary market is not to check before closing . . . to keep the windfall from the death benefits.*" B680-81. Recently, multiple investors have been caught knowingly buying STOLI policies, taking what this Court called the "gamble" that they will not get caught. In the *Corwell* case, the Seventh Circuit found a large institutional investor (Vida) knowingly bought an illegal Illinois STOLI policy, "fully aware" it was originated through the same program as several policies that had been struck down for lack of insurable interest across the country, and simply took a "calculated risk to try and profit" and hoping it would not get caught. 44 F.4th at 1040-41. In the *Diamond* case, a Florida trial court, applying this Court's decision in *Estate of Malkin*, found that a different sophisticated investor (Viva Capital) was not entitled

to premium, given that it was “cognizant” of the “insurable interest risk.” *Estate of Diamond v. U.S. Bank*, 2023 WL 6392688, at *5 (Fla. Cir. Ct. Sept. 15, 2023).

Here, the public policy behind Delaware’s insurable interest laws would not be furthered in any way by allowing Geronta to recover EEA’s premium. EEA did no investigation; EEA did not raise its concerns with Brighthouse or Geronta; EEA did not act in good faith (at any time); and EEA compounded its prior attempt to hide its knowledge from Geronta by covering its original fraud with more fraud.

Finally, Geronta’s attempt to argue that EEA could satisfy § 199 fails for the same reasons. That is, doing so would clearly frustrate the relevant public policy; and, of course, EEA did not, as § 199 requires, “withdraw” from the transaction.

IV. The Trial Court Correctly Denied Geronta's Request For Pre-Judgment Interest.

A. Question Presented

Whether the trial court correctly found that Geronta waived pre-judgment interest.

B. Scope of Review

This Court reviews question of waiver for plain error. *North Am. Leasing*, 276 A.3d at 470.

C. Merits of Argument

After the trial in 2021, the trial court found that Geronta was entitled to a monetary judgment against Brighthouse for the premium Geronta paid after calling Brighthouse in April of 2017. The trial court requested a form of judgment, and the parties stipulated to a final judgment that did not include pre-judgment interest. When pressed further by this Court, the parties stipulated to a judgment that *expressly* included "$0" in pre-judgment interest. Thus, not only did Geronta not request pre-judgment interest, it stipulated that it was entitled to none—and Brighthoue stipulated it would not seek costs as the prevailing party. Geronta obviously did not appeal that aspect of the judgment—nor could it. On remand, Geronta was, therefore barred from raising the argument that it was entitled to pre-judgment interest, having already stipulated to the contrary—and, of course, by its own admission, having failed to raise the issue on appeal.

Geronta's attempt to rely on cases regarding new legal theories ignores the fact that Geronta did, in fact, receive a monetary award, and thus obviously did have the opportunity to raise this issue with the trial court.

CONCLUSION

The trial court's decision to deny restitution of the premium EEA paid should be affirmed. The trial court's decision to allow restitution of all the premium Geronta paid should be reversed. The trial court should be directed to enter final judgment denying Geronta's restitution claim in its entirety.

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