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IN THE SUPREME COURT OF THE STATE OF DELAWARE

VIDA LONGEVITY FUND, LP, Defendant/Counterclaim-Plaintiff Below, Appellant v. ESTATE OF MARTHA BAROTZ, Plaintiff/Counterclaim-Defendant Below, Appellee	No. 366, 2023 Court Below: Superior Court of the State of Delaware C.A. No. N20C-05-144-EMD-CCLD

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Although the law prohibits investors from procuring policies on the lives of strangers, in the mid-2000s, a number of stranger-originated life insurance ("STOLI") promoters developed complex schemes to do just that. One such STOLI promoter was a family of companies called Coventry, and its scheme not only targeted Delaware, but used Delaware trusts to make its transactions look legitimate.

This Court, however, has always held that STOLI schemes are illegal, and through a series of unanimous, *en banc* opinions, has worked hard to ensure STOLI promoters cannot abuse Delaware trust structures to manufacture policies through schemes designed to feign technical compliance with the insurable interest rules.

Through these opinions, this Court provided lower courts with unambiguous guidance on how to identify STOLI policies and what the proper remedial response should be. Here, the Superior Court faithfully applied that guidance to the undisputed facts and correctly concluded the Policy at issue lacked insurable interest and that the Estate was entitled to the proceeds under 18 *Del. C.* § 2704(b).

The Superior Court's decision is consistent with every single other court that has evaluated policies manufactured through Coventry's scheme under Delaware law. To date, fifteen judges at both the trial and appellate levels have done so, all on cross-motions for summary judgment. Because Coventry's program was cookie-cutter, the factual records examined by each of these judges has been substantially

the same. And every single one has agreed—on summary judgment—that the policies manufactured through Coventry's program are void.

On appeal, Vida does not genuinely dispute the material facts. Instead, it argues this Court's STOLI opinions somehow don't mean what they say and otherwise offers arguments this Court (and others) have already soundly rejected. Vida also tries to create disputed fact issues that are neither material nor genuine. The Superior Court's thorough and well-reasoned Orders should be affirmed.

SUMMARY OF ARGUMENT

(1) Denied. The Superior Court properly applied *Lavastone Capital v. Estate of Berland*, 266 A.3d 964 (Del. 2021) and held the Policy was void for lack of insurable interest under 18 *Del. C.* § 2704(a) because the insured did not actually pay, or have a genuine obligation to pay, the premium. The Policy was instead procured by Coventry. And when a third party procures, the insured's subjective intent is irrelevant, and the only question is whether that third party had insurable interest, which Coventry obviously did not. *PHL Var. Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1076 (Del. 2011). The Policy was also void under § 2704(c)(5) because the beneficiary at inception was a nominally-funded trust created for Coventry. *Id*. at 1078. And although the Superior Court did not need to look beyond the fact that a third party lacking insurable interest procured the Policy, *Berland*, 266 A.3d at 972, it nevertheless correctly rejected Vida's argument that the Policy was not "an illegal human life wager" because Coventry indisputably used Mrs. Barotz as an instrumentality to create a policy for investors. Finally, Vida's argument that STOLI only exists where there is a "pre-arranged transfer" is wrong and has been soundly rejected, including because it defies this Court's instruction that courts scrutinize STOLI transactions and reject feigned compliance arguments.

(2) Denied. Vida's defenses and counterclaims were not legally viable because they sought permission to retain the death benefit. This Court has been

"crystal clear" that investors are not allowed to keep STOLI proceeds. *Wilmington Trust v. Sun Life*, 294 A.3d 1062 (Del. 2023) ("*Frankel & De Bourbon*"); *Wells Fargo v. Estate of Malkin*, 278 A.3d 53 (Del. 2022) ("*Estate of Malkin*").

(3) Denied. Prejudgment interest is a matter of right and runs from the date Vida received the death benefit. Allowing Vida to keep the interest it earned on its wager defies § 2704(b)'s plain language, which entitles an estate to "any benefits" paid on a STOLI policy, which includes the time-value of those "benefits."

COUNTERSTATEMENT OF FACTS

A. Coventry Originated Policies For Investors.

"Since the initial creation of life insurance during the sixteenth century, speculators have sought to use insurance to wager on the lives of strangers." *Price Dawe*, 28 A.3d at 1069. In the 2000s, investors began buying up existing, legitimate policies on seniors' lives, which "substantially increased the demand for life settlements, but did not affect the supply side, which remained constrained by a limited number of seniors who had unwanted policies of sufficiently high value." *Id*. at 1070. "STOLI promoters sought to solve the supply side problem by generating new, high value policies." *Id*. Coventry, a family of Delaware entities, led the charge to manufacture policies to fill this void. B305-08; B505; B299/390:9-394:7.

Starting in 2001, Coventry and AIG entered into a series of "Origination Agreements" requiring Coventry, as "Originator," to create as many multi-million-dollar policies as possible. B110/Art. II, § 2.01; B153 ("Eligibility Criteria"); B159 ("Origination Fee"); B162 ("Probabilistic Yield"); B169 ("Success Fee"); B283-97. Those agreements were requirements contracts and memorialized the fact that AIG "desire[d] to purchase" large numbers of policies from Coventry, even though no such policies yet existed, and made Coventry the exclusive provider of policies to AIG, so long as Coventry met its "Production Commitment." B6-8. The new policies Coventry was creating were designed to meet "eligibility requirements," including

that the insured be a senior citizen expected to live at least 25 months (so the contestability period would expire) but not more than 180 months (so the wager wouldn't become unprofitable). B153-54.

To capitalize on its exclusive arrangement with AIG, Coventry and AIG created the Premium Finance Plus ("PFP") Program, a short-term, non-recourse "loan" program whose purpose, as captured by AIG's internal documentation, was for Coventry to manufacture policies in the hope of selling them to AIG. A1531-35.[1]

Coventry engaged a network of insurance producers to find seniors meeting its requirements; one such producer was Lindsay Spalding and her agency, Spalding Financial ("SFG"), who put 20 seniors through Coventry's program. A1532; A932/26:3-23; A997/91:2-14; A998/92:8-23; A999/93:16-97:17; A1003/97:2-12. Coventry and SFG worked together to find 70-year-old Martha Barotz and financially induced her to consent to a transaction that, in the words of Spalding, was promoted as "free insurance." A995/89:16-25. Unbeknownst to Mrs. Barotz, Spalding was required to split her insurance commissions with Coventry. A940/34:13-35:2; A1016/110:16-112:7.

[1] *Estate of Berland v. Lavastone Capital*, No. 18-cv-02002, D.I. 92-7, p.8 (D. Del. 2022) (internal AIG memo conceding that Coventry's loan program "creates new policies that may become available in the life settlement market that we could purchase under our life settlements program."). Vida concedes (Br. at 2) this case involves "the same loan program" as in *Berland*.

As Spalding described it, Coventry dictated everything, from the boilerplate forms Mrs. Barotz was required to sign, to the insurer's identity, to the Policy's face amount. A945/39:3-9; A956/50:20-51:24; A1006/100:21-101:18; A1030/124:7-13; B272-76. Before the Policy was applied for, Coventry analyzed Mrs. Barotz's medicals and ordered life expectancy reports to see if a policy on her life would be a good investment. B257/Row 4; B259-60; A1003/97:2-98:11.

Coventry then required Mrs. Barotz to sign non-negotiable trust agreements for the "Martha Barotz 2006 Family Trust" (the "Trust") and a "Sub-Trust." Those documents provided that the Trust would be nominally funded with "the sum of $1" and prohibited Mrs. Barotz from placing any property into the Trust or from referring to the Policy as her own. A1557/Art. II, §§ 6, 7(b); Ex. 1 at 4-5. Coventry also obtained broad powers of attorney over Mrs. Barotz and her son Nathan to "originate[]" and "liquidat[e]" policies on her life. B262-70.

Coventry mandated that the Trust's and Sub-Trust's trustee be Wilmington Trust Company, which took its direction from Coventry, not Mrs. Barotz. Ex. 1 at 4-5; A537-43; A560-61; A545-55; A1547-65; A1032/126:4-15; A1025/119:17-122:6. The Sub-Trust, acting through Wilmington Trust, then entered into a 26-month, non-recourse loan, through which Coventry paid the Policy's initial premiums. A1515-23. Although the loan was nominally funded by LaSalle Bank, the funding's true source was a wholly-owned Coventry subsidiary called "PFP

Funding," which, at the moment of funding, bought 100% of the loan and the collateral (i.e., the Policy) for the precise amount to be loaned. A653 §§ 3.01-02; A830 ("Amount Financed"); A838 ("Funding Date" & "Insurance Premium Loan"); A843 ("Purchase Price"); A845 ("Transfer Effective Date"); A1535; A672-74; B306; *see also Sun Life v. Wells Fargo*, 2020 WL 1503641, at *3, 13 (N.D. Ill. Mar. 30, 2020) ("*Corwell*") (explaining same), *aff'd* 44 F.4th 1024 (7th Cir. 2022).

Mrs. Barotz was not the borrower—the Sub-Trust was—and the loan was structured so neither the Sub-Trust nor Mrs. Barotz were required to pay anything—toward premium, principal, or interest—and the Sub-Trust could satisfy all its obligations by relinquishing the Policy to Coventry. A1516; A931/25:17-21; A941/45:15-46:25; A995/89:16-90:11; A1060/154:5-155:17.

The Trust and Sub-Trust were revocable, not irrevocable, as would be used for estate planning. A1551/§ 14; A1562/Art. V, § 1; 26 I.R.C. § 2042(2). Coventry's paperwork confirmed that the Trust (and a supplement creating the Sub-Trust) "***are not intended to satisfy Settlor [Mrs. Barotz's] estate planning needs and have not been designed as an estate planning tool***." A201-02/¶ 6 (emphasis added). Spalding testified that she did not "perform an insurance needs analysis," as would be done for a client seeking life insurance for estate planning purposes. A997/91:2-20; A1007/101:22-102:2. And she testified that this was not "traditional life insurance,"

but rather "free insurance" paid for by Coventry. A995/89:16-90:11; *see* A1018/112:5-23 (Policy would not exist without Coventry paying premium).

On April 20, 2006, the Policy was issued to the Trust, and six days later, Coventry paid the initial premium by wiring $257,678.00 to Pacific Life. B279; B281. Neither Mrs. Barotz, nor anyone in her family, ever paid a single dollar toward the premium. A1049/143:9-15; A1266 at 7-11.

B. The Policy Is Acquired By Investors And Then Sold To Vida.

In May 2008, as the loan came due, Coventry was outbid for the Policy by a different investor, Midas, which bought the Policy for $390,400. A863; A880; A889; A900-01. Of that, Midas paid $62,842 to Mrs. Barotz and $322,557 directly to PFP Funding, which, as noted, was the same Coventry entity that owned all of LaSalle's interest in the loan and the Policy before the Policy was incepted. A879; A882.

The Policy was ultimately bought by Vida Longevity Fund ("Vida") for $80,000 as part of a larger portfolio of policies in December 2018. A205-62; B311-494; B517/40:12-19, B520/51:24-52:9. Vida knew there were insurable interest risks, but bought the Policy anyway. B518/44:19-46:10; B523/63:14-65:24; B524/67:3-69:3; B528/82:24-85:16; B532/100:16-106:1; B547/160:1-170:8; B550/170:6-8; *c.f., Sun Life v. Wells Fargo*, 44 F.4th 1024, 1039-41 (7th Cir. 2022) (holding, in another Coventry STOLI case, that "Vida walked into the transaction as a highly sophisticated buyer fully aware of all the material facts and significant risk

that Corwell's policy would be found unlawful and void"). Ten days later, Mrs. Barotz died, and Vida received the Policy's benefits, realizing a $7,925,698.63 profit. B496; B500.

C. Procedural History

In 2020, the Estate filed suit in Superior Court pursuant to 18 *Del. C.* § 2704(b). In late 2021, the Estate and Vida cross-moved for summary judgment.

The Estate's motion set forth the undisputed material facts about Coventry's Origination Program with AIG; how Coventry and SFG split the Policy's insurance commissions and induced Mrs. Barotz with the promise of a potential back-end payment; how the Coventry program was no-risk to Mrs. Barotz and she paid no premium; how Coventry directed the transaction, including by mandating the use of its boilerplate documents, taking power of attorney over Mrs. Barotz, and deciding on the amount and terms of the Policy; and how Coventry used its non-recourse loan to pay for, and thus procure, the Policy. A170-79.

In its opposition, Vida purported to "dispute" some of these facts, but not genuinely because Vida's cross-motion was based on the same authentic documents and testimony. The Superior Court held oral argument, during which the parties were questioned about whether there was any genuine fact issue. A1569/10-23; A1570/1-9; A1573/7. Vida's counsel failed to raise any such issue. A1566-1636; A1611/10-11 (Vida counsel: "Again, I don't think there's a factual dispute.").

The Superior Court issued a thorough and well-reasoned Order on November 9, 2022, granting the Estate's motion and denying Vida's. The Superior Court held that Mrs. Barotz did not procure the Policy because she did not pay "the premiums either individually or through a trust," and that Coventry procured the Policy—a conclusion Vida does not contest on appeal—because "Coventry Capital paid the premium." Ex. 1 at 15-16. The Superior Court further rejected Vida's efforts to raise fact issues. The Superior Court also rejected Vida's defenses and counterclaims, including because they improperly sought to allow it to retain illegal wagering proceeds. Through a separate Order, the court awarded prejudgment interest.

ARGUMENT

I. The Policy Lacked Insurable Interest.

A. Question Presented

Did the lower court correctly hold that the requirements of 18 *Del. C.* §§ 2704(a) and (c)(5) were not met where it was undisputed Mrs. Barotz did not actually pay the premium, and therefore, did not procure the Policy?

B. Scope of Review

This Court reviews the Superior Court's grant of summary judgment *de novo*. *Frankel & De Bourbon*, 294 A.3d at 1071.

C. Merits of Argument

1. Delaware Law Prohibits Third-Parties Like Coventry From Procuring Policies On Strangers.

Delaware law has always required an insurable interest to distinguish between legitimate insurance and unlawful wagering. *Balt. Life. Ins. Co. v. Floyd*, 91 A. 653, 656 (Del. 1914). In 1968, the General Assembly enacted the Insurable Interest Statute to codify these long-standing principles. 18 *Del. C.* § 2704. In 2011, this Court held that "[t]he plain language of 18 *Del. C.* § 2704(a) is ambiguous because a literal reading of the statute would permit wagering contracts, which are prohibited by the Delaware Constitution," and thus harmonized § 2704's statutory language with Delaware's longstanding common law, public policy, and constitutional prohibition against human life wagering. *Price Dawe*, 28 A.3d at 1070.

Recognizing that "STOLI schemes are created to feign technical compliance with insurable interest statutes," this Court held that "[S]ection 2704(a) requires more than just technical compliance at the time of issuance" because it "serves the substantive goal of preventing speculation on human life." *Id.* at 1074. This Court thus cautioned courts to reject "form over substance" transactions whose validation "would completely undermine the policy goals behind the insurable interest requirement." *Id.* at 1071, 1078. In so doing, this Court confirmed that third-parties cannot use seniors as "instrumentalities" to "create[]" or "generat[e]" policies for "investors." *Id.* at 1070, 1074. Consequently, this Court held that policies "procured or effected" by "STOLI promoters" for investors "lack an insurable interest," constitute "an illegal wager on human life," are a "fraud on the court" and "void *ab initio*," and courts may "never enforce" them. *Id.* at 1067-68, n.25.

To determine if a policy lacks insurable interest, this Court explained that courts must "scrutinize the circumstances under which the policy was issued and determine who in fact procured or effected the policy." *Id.* at 1074-76. "To determine who procured the policy, we look at who pays the premiums" because "insurance policies … do not come into effect without premiums, so an insured cannot 'procure or effect' a policy without actually paying the premiums." *Id.* at 1075-76.

This Court concluded that if an insured, or a trust the insured actually created and funded, paid the premium and thus procured the policy, the policy would be

valid, so long as the policy was procured "in good faith," "for lawful insurance purposes, and not as a cover for a waging contract." *Id.* at 1075-76, 1078.

In contrast, this Court held that if a third party paid the premium, and thus procured the policy, the policy is invalid unless that third party had an insurable interest in the insured's life. *Id.* at 1071, n.47, 1074, 1075 n.76, 1076, 1078.

> In summary, the insured's subjective intent for procuring a life insurance policy is not the relevant inquiry. ***The relevant inquiry is who procured the policy and whether or not that person meets the insurable interest requirements.***

Id. at 1076 (emphasis added).

In 2021, this Court provided guidance, in *Berland*, on how to apply *Price Dawe* to policies funded with nonrecourse loans. This Court forcefully re-affirmed *Price Dawe*, including its holding that the critical question is who procured, and that "to determine who procured a policy [courts must] examin[e] 'who pays the premiums.'" *Berland*, 266 A.3d at 972. This Court then explained that a policy taken out through certain kinds of nonrecourse loans could be valid, "[b]ut the use of such financing might also be evidence of an impermissible STOLI scheme, especially where the use of a nonrecourse loan means that a third party, and not the insured, bears the entire financial liability for obtaining the policy." *Id.* at 972.

This Court concluded that when a policy is paid for with a nonrecourse loan, the policy is valid "***so long as*** the use of nonrecourse funding did not allow the insured or his or her trust to obtain the policy 'without actually paying the premiums'

and the insured or his or her trust procured or effected the policy in good faith, for a lawful insurance purpose, and not as a cover for a wagering contract." *Id.* at 973 (emphasis added). In so doing, this Court was very clear that, in this context, when the insured pays no premium, the policy is void:

> If the use of nonrecourse funding allows the insured—either as settlor or grantor of a trust—to obtain the policy ***'without actually paying the premiums,' then the requirements of §§ 2704(a) and (c)(5) are not met.***"

Id. at 972 (quoting *Price Dawe*, 28 A.3d at 1076) (emphasis added).

2. The Superior Court Faithfully Applied This Court's Precedent By Holding The Policy Lacked Insurable Interest Because Mrs. Barotz Did Not Actually Pay The Premium.

The Superior Court scrutinized the record to determine who procured or effected the Policy and correctly determined that Coventry paid the premium and thus procured the Policy. Vida does not challenge this conclusion on appeal because it is undisputed that Mrs. Barotz did not pay, and was not required to pay, the premium or to make payments on the loan.

Indeed, the premiums were paid by Coventry through a nonrecourse loan to a nominally-funded Sub-Trust of the Trust that could be satisfied by simply relinquishing the Policy to Coventry. Because Coventry procured the Policy, Mrs. Barotz's subjective intent was irrelevant; the only relevant question was whether Coventry had an insurable interest in her life. *Price Dawe*, 28 A.3d at 1076. Vida did not argue below (nor does it here) that Coventry had a valid insurable interest,

and obviously it did not. Coventry was a stranger to Mrs. Barotz and was running a STOLI ring to manufacture policies for AIG, itself, and other investors.

Unable to escape the dispositive fact that a third-party stranger procured the Policy, Vida tries to reargue *Price Dawe* and *Berland* and to rewrite this Court's opinions. According to Vida (Br. at 11), "the validity of a policy does not rise and fall on whether the insured, a lender, or some other third party, 'actually pays the premiums.' Instead, a policy's validity rises or falls on whether the policy is a cover for a wager." In support of this, Vida quotes the following passage from *Berland*:

> The use of a nonrecourse loan to fund the premium therefore is not dispositive, but should be viewed in the context of the entire transaction and in conjunction with consideration of whether the insured intended, when obtaining the policy, 'to purchase the policy for lawful insurance purposes, and not as a cover for a [wagering] contract.'

(Br. at 11-12). But Vida's attempt to base its argument on this quote fails.

First, Vida conveniently omits the sentence that immediately follows: "If the use of nonrecourse funding allows the insured—individually or as settlor or grantor of a trust—to obtain the policy 'without actually paying the premiums,' then the requirements of §§ 2704(a) and (c)(5) are not met." *Berland*, 266 A.3d at 972. This clear and unambiguous language alone is fatal to Vida's entire argument.

Second, the language Vida does quote addresses a situation where a policy is taken out through a nonrecourse loan where the insured actually pays the premium and thus a situation where *the insured procured the policy*. The Estate does not

dispute that *if* the loan here had involved Mrs. Barotz actually paying the premium, the relevant inquiry would become whether "the insured t[ook] out the policy in good faith—not as a cover for a wagering contract," which would involve questions about whether the insured procured the policy "for a legitimate insurance purpose, such as estate planning," and whether "the insured had some *bona fide*, short-term need for insurance." *Price Dawe*, 28 A.3d at 1075; *Berland*, 266 A.3d at 972-73. But this is not that case. ***Here, it is undisputed that a third party procured the Policy.*** Where a third party procures a policy, "the insured's subjective intent for procuring a life insurance policy is not the relevant inquiry. ***The relevant inquiry is who procured the policy and whether or not that person meets the insurable interest requirements.***" *Price Dawe*, 28 A.3d at 1076 (emphasis added).

Third, Vida's argument employs sleight of hand to rewrite *Berland* in a way that would, if adopted, overrule *Berland* and *Price Dawe*. To be clear, what *Berland* says is "not dispositive" is "the use of a nonrecourse loan." In contrast, what *Vida* says (Br. at 11) is "not dispositive" is "whether the insured or someone else pays the premiums." But this Court never said that; in fact, this Court said the complete opposite when it held that "[i]f the use of nonrecourse funding allows the insured … to obtain the policy 'without actually paying the premiums,' then the requirements of §§ 2704(a) and (c)(5) are not met." *Berland*, 266 A.3d at 972.

What Vida is really saying is that it disagrees with this holding, which Vida calls "nonsensical" (Br. at 12) because, according to Vida, "the entire point of a nonrecourse loan is that a lender (and not the insured) is 'actually paying the premiums' and the insured's assets are not at risk." Thus, Vida says, this Court could not possibly have meant what it wrote because this would mean "every single nonrecourse premium-financed policy is now invalid under Delaware law." But Vida's attorneys[2] made—and lost—this same argument in *Berland:*

> Lavastone's argument that 'Delaware law permits an insured to use premium financing to pay policy premium,' ***glosses over the fact that the use of premium financing does not always result in the insured incurring no expense.*** *See* Blaze & Movsesian, *supra*, note 25, at 30 (explaining ***a typical use of a premium financing structure***, through which an insured can achieve gift tax savings by 'having an irrevocable trust purchase life insurance with borrowed funds and ***making gifts to the trust that cover only the loan payments, rather than the full premiums on the insurance coverage***").

266 A.3d at 972 n.27 (emphasis added).

Stated differently, real loans aren't free, and legitimate premium finance transactions involve insureds who *do pay* premium, at least by making payments on the loan from their own pockets.[3] Far from being nonsensical, *Berland*'s statement

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[2] The lawyers representing Vida here represented Lavastone in *Berland*.

[3] In the article *Berland* cited, the example of a "typical" premium finance loan involved insureds (i) gifting $1 million *from their own pockets* to seed an irrevocable trust; (ii) gifting another $60,000 year-over-year *from their own pockets* to further fund the trust; (iii) having the trust borrow an amount sufficient to pay premium; and then (iv) having the trust *pay the annual interest charge* on that loan *from the cash*

that the insurable interest requirements are not met where insureds do not actually pay the premiums is entirely consistent with *Price Dawe*: If the premiums are not actually being paid by the insureds, then they are being paid by third-party STOLI promoters like Coventry, who lack an insurable interest in seniors like Mrs. Barotz.

Unable to deny that Mrs. Barotz did not procure the Policy, and unable to re-write *Berland* to suit its purposes, Vida argues that "if taken to the logical conclusion that an insured must pay premium in order for her policy to satisfy Delaware's insurable statute, then every policy purchased by a third party on the life of an insured would be void," including "all policies funded by companies on the lives of their employees and key executives, irrespective of whether those employees' families are the beneficiaries or not." This fear mongering is misplaced for the same reason: As *Price Dawe* teaches, a third party *may* pay premium *so long as* that third party *has an insurable interest*. 28 A.3d at 1076 ("The relevant inquiry is who procured the policy and whether or not that person meets the insurable interest requirements."). Section 2704(c)(3) gives employers an insurable interest in their workers' lives so employers can procure policies on them without violating the statute. But STOLI promoters like Coventry do not have an insurable interest in the lives of the nation's senior citizens, so they cannot.

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the insureds provided. Andre S. Blaze & Julian Movsesian, *Consider Premium Financing*, 38 Est. Plan. 30 (2011)).

All courts applying this Court's precedent to Coventry policies, both pre- and post-*Berland*, have held they lack insurable interest because the insureds did not actually pay the premium—Coventry did. *See Estate of Malkin v. Wells Fargo*, 998 F.3d 1186, 1195-97 (11th Cir. 2021) ("Mrs. Malkin did not procure the AIG Policy" because "Coventry paid the initial premium to AIG on the Policy"; thus, "Mrs. Malkin's intent is irrelevant"); *Sun Life v. U.S. Bank*, 369 F. Supp. 3d 601, 611 (D. Del. 2019) ("*Sol*") ("In sum, by not paying the premium herself and by not undertaking a personal obligation to repay the premiums, Sol did not procure the Policy and did not provide the Policy's insurable interest at inception."); *Estate of Berland v. Lavastone Capital*, 2022 WL 15023450, at *4 (D. Del. Sept. 28, 2022) ("*Berland II*") (voiding policy because "not a penny of the premiums came out of Berland's pocket"); *Sun Life v. U.S. Bank*, 2016 WL 161598, at *17 (S.D. Fla. Jan. 14, 2016) ("*Malkin*") (voiding policy because "Coventry's payment under the Loan Agreement" was "simply smoke and mirrors meant to obscure the identity of the party responsible for procuring the Policy," which was Coventry), *aff'd on this* 693 F. App'x 838 (11th Cir. 2017); *U.S. Bank v. Sun Life*, 2016 WL 8116141, at *17 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*") (same), *adopted* 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017); *Estate of Diamond v. U.S. Bank*, 2023 WL 6392688, at *5 (Fla. 15th Cir. Ct. Sept. 15, 2023) (voiding policy because "Mr. Diamond made zero premium payments to fund the Policy and "it is abundantly clear that the instant

Policy was effectuated by numerous third parties"); *U.S. Bank v. Estate of Albart*, 2023 WL 7491131, at *13 (Fla. 5th Cir. Ct. Oct. 23, 2023) (voiding policy because Mr. Albart did not actually pay the premium …. Coventry paid the premium.").

3. The Policy Also Flunks The "Cover For A Wager" Test.

Vida now concedes that Mrs. Barotz did *not* procure the Policy, but contends the Policy might somehow still be valid because there was supposedly conflicting evidence on whether it was a cover for a wager. This argument misses the mark because, having correctly held that Mrs. Barotz did not actually pay the premium, the Superior Court was not required to separately assess a "wagering" question. As noted, where, as here, a third party procures, the only question is whether that third-party had insurable interest. *Price Dawe*, 28 A.3d at 1070. Coventry had no insurable interest in Mrs. Barotz, so the analysis ends there.

Regardless, the Superior Court correctly rejected Vida's contention that the Policy was not "an illegal human life wager." Ex. 1 at 19-20. Indeed, the summary judgment record detailed Coventry's procurement of the Policy; the history of Coventry's Origination Agreements with AIG; the fact that AIG wrote Coventry a blank check to "originate" as many large policies as possible; and that to capitalize on this opportunity, Coventry and AIG created the PFP loan program, whose purpose was to manufacture policies on seniors meeting their requirements.

The record also showed that Coventry engaged a network of insurance agencies like SFG to find those seniors; that Coventry and SFG worked together to find an insured, insurer, and face amount acceptable to Coventry; and that Coventry, through SFG, then induced Mrs. Barotz to consent to the transaction by marketing it as "free insurance" that would cost her nothing and further inducing her with the chance that there might be some money for her if the Policy could be sold to Coventry, or to some other investor if Coventry got outbid, when the loan matured.

It was also undisputed that Coventry dictated the transaction's terms, including by creating the Trust and Sub-Trust to which the Policy would be issued and by selecting, directing, and paying the trustee. Coventry's documentation also required the nominally-funded Trust and Sub-Trust to hold the Policy—not for the benefit of Mrs. Barotz—but for the benefit of Coventry and prohibited Mrs. Barotz from referring to the Policy as her own or adding any of her own funds to the Trust. Coventry also acquired broad and irrevocable power of attorney over the Barotzes, granting Coventry the power to "originate" and "liquidate" the Policy. Many of these facts were recited by the Superior Court's opinion. Ex. 1 at 2-7.

The Superior Court also held that "[t]he material facts" here "are substantially identical to the policy at issue in" Judge Stark's summary judgment decision in the *Sol* case, down to the fact that the trust agreements and "loans" were identical, and

the insured in *Sol* was solicited by the same agency, SFG. In *Sol*, Judge Stark explained the undisputed facts about Coventry:

> Coventry, with the help of U.S. Bank, established and directed a program to increase the number of high-value life insurance policies available on the secondary market. Coventry arranged financing for numerous individuals—at least some of whom appear to have been financially strained—to procure high-value life insurance policies with little to no risk to the individuals.

369 F. Supp. 3d at 616. Judge Stark thus concluded that the same Coventry STOLI scheme at issue here was a "wager" and that "the third parties—Coventry, LaSalle, and/or SFG—did not act in good faith." *Id*. at 613-17.

These are the same indisputable facts that have been considered by courts in many other Coventry cases, and all reached the same conclusion on cross-motions for summary judgment: Coventry was using seniors to create wagering contracts for itself and other investors. *See, e.g.*, *Malkin*, 2016 WL 161598, at *17, *aff'd on this* 693 F. App'x at 840; *Van de Wetering*, 2016 WL 8116141, at *18 , *adopted* 2017 WL 347449; *Estate of Malkin v. Wells Fargo*, 379 F. Supp. 3d 1263, 1274-76 (S.D. Fla. 2019), *aff'd on this* 998 F.3d 1186; *Berland II*, 2022 WL 15023450, at *5-6; *Albart*, 2023 WL 7491131, at *14-17.

Remarkably, Vida's brief fails to mention Coventry until page 28 where Vida begrudgingly concedes the Policy was "connected to the Coventry PFP Program." Vida does not, however, claim the Superior Court erred in its findings about Coventry, including that Coventry paid the premium or that the facts of this case are

"substantially identical" to *Sol*, or in relying on *Sol* as "additional support" for the Superior Court's conclusion that there were no genuine issues of fact about who procured the Policy or whether it was an illegal human life wager.

a) Vida's "Pre-Existing Agreement" Argument Fails.

Unable to genuinely dispute the facts showing that Coventry *both* procured the Policy *and* used Mrs. Barotz as an instrumentality to create a wager, Vida tries to reduce this Court's broad anti-STOLI opinions to a restrictive formula pursuant to which a policy is a wagering contract *only if* there was, at inception, "a pre-negotiated agreement between the insured and a specific third-party buyer."

Nowhere in *Price Dawe* or *Berland* did this Court say a transaction is a cover for a wager *only if* there was a pre-existing agreement. Indeed, in both cases, the sales agreement was not entered until months or years *after* the policy was incepted. In *Price Dawe*, any reference to a pre-existing agreement was as an example only, and in *Berland*, this Court declined to narrow *Price Dawe* to pre-existing agreements—even though Lavastone repeatedly asked this Court to do just that.[4]

Investors create wagering contracts when they use seniors as instrumentalities to generate policies for investors. *Price Dawe*, 28 A.3d at 1070. To narrow this rule

[4] *Berland*, 2021 WL 1605037, at *17-18, 20-31 (Del. Apr. 16, 2021). Lavastone also argued that *Sol*, *Malkin*, *Van de Wetering*, and *Estate of Malkin* "misappl[ied] *Price Dawe*." *Id.* at *28. But *Berland* adopted the same analysis those courts employed.

as Vida proposes would invite the very feigned compliance this Court has already prohibited. *Id.* at 1074; *see Estate of Malkin*, 998 F.3d at 1196 ("We do not read *Price Dawe* to say that a policy lacks an insurable interest only when there is a pre-negotiated agreement to immediately transfer ownership. Rather, *Price Dawe* takes a broader view."); *Sol*, 369 F. Supp. 3d at 615 ("Defendants' efforts to point to any place in *Dawe* in which the Delaware Supreme Court establishes this [pre-existing agreement] as a prerequisite for a policy to be a STOLI are unavailing. All of the statements on which Defendants rely are non-exhaustive, non-limiting descriptions of facts the Court was considering in *Dawe*."); *Sun Life v. Wilmington Trust*, 2022 WL 179008, at *9 (Del. Super. Ct. Jan. 12, 2022) (similar).[5]

Nor is Vida correct (Br. at 25-26) that, because Coventry ultimately got outbid for the Policy at the loan's maturity by a different investor, there must be a fact question about whether Coventry was using Mrs. Barotz to create a wagering contract. Delaware law prohibits "STOLI promoters" from "generat[ing]" policies for "investors" and analyzes insurable interest at the time a "contract was made," so

[5] Vida also contends (Br. at 24) that *Price Dawe*'s citation to *Chamberlain* and *Clement* corroborates its theory that *Price Dawe* meant, without saying so, that a pre-negotiated agreement is needed to prove STOLI. But that's not what this Court cited those cases for. And, in any event, to the extent those particular cases involved factual scenarios where there *were* pre-existing agreements, *Price Dawe* only cited them as "non-exhaustive, non-limiting descriptions" of what can constitute STOLI. *Sol*, 369 F. Supp. 3d at 615. The existence of a pre-existing agreement is certainly *sufficient* to prove STOLI, but it is not *necessary*.

what ended up happening afterwards is not material. *Price Dawe*, 28 A.3d at 1070. Indeed, Judge Stark rejected this exact argument in *Sol* where, as here, Coventry got outbid by a different investor on a substantively-identical policy:

> Nor has Defendant identified a persuasive reason as to why, under Delaware law, the legality of the Policy should turn on whether the third party procuring the policy is also the same third party that will acquire the policy on the secondary market. Instead, the Court agrees with Sun Life that ***Dawe precludes strangers from procuring policies for strangers. It would turn Dawe on its head to take U.S. Bank's invitation to create a loophole where a stranger cannot create a policy for itself, but can do so for a different stranger***.

369 F. Supp. 3d at 616 (emphasis added); *see Corwell*, 2020 WL 1503641, at *14 ("This upside opportunity for Corwell added a new variable to the common STOLI transaction but did not change the nature of the transaction. ***The process was constructed to stack the odds in favor of Coventry First ending up with the Policy and selling it to AIG.*** While the typical STOLI wager caries the risk the insured dies before the contestability period expires and the investor gains the policy, ***the Coventry Entities' program simply added an additional risk—that they might get outbid by another prospective investor.***"), *aff'd* 44 F.4th 1024 (emphasis added).

b) Vida's Trust Beneficiary Argument Fails.

Vida is also wrong that a fact-finder needs to decide whether the Policy was supported by insurable interest because "the initial beneficiary of the Policy had an insurable interest in the life of the insured." For starters, Vida is playing fast and loose with the facts. At inception, it is undisputed that the Policy was payable to the

Trust, not family members. What Vida is arguing is that because the Trust's beneficiary was a different trust whose beneficiary was a family member, this Court should look to the beneficiary of that other trust and ask whether that so-called "ultimate beneficiary" had insurable interest in the insured.

But that argument trips right out of the gate because trust beneficiaries are irrelevant for purposes of Section 2704, which confers an insurable interest on "the trustee of a trust created and initially funded by an individual … *without regard to: the identity of the trust beneficiaries*." 18 *Del. C.* § 2704(c)(5) (emphasis added). Indeed, the same trust structure existed in *Price Dawe*, where the insured himself was the beneficiary of a trust that was the beneficiary of another trust that was the beneficiary of the policy. This Court held this was irrelevant to the insurable interest analysis. 28 A.3d at 1076-78. Rather, what this Court held is dispositive under Section 2704(c)(5) is whether the insured actually established the trust by both creating and initially funding it. *Id*. at 1078. As this Court explained: "***This requirement is not satisfied if the trust is created through nominal funding as a mere formality.***" *Id.* (emphasis added).

This is fatal to Vida's argument (and an independent basis to affirm the Superior Court) because Vida does not challenge the Superior Court's findings that: (i) the Trust was created on boilerplate Coventry forms, the substantive terms of which were chosen, not by Mrs. Barotz, but by Coventry; (ii) Coventry selected

Wilmington Trust as trustee, which "took all direction from Coventry"; (iii) the Trust was "nominally funded with 'the sum of $1'"; (iv) Wilmington Trust held the Policy "solely for the benefit of Coventry/LaSalle"; and (v) Mrs. Barotz was prohibited from adding any of her own funds to the Trust or Sub-Trust or from referring to the Policy as her own. Ex. 1 at 4-5. These undisputed facts prove that the Trust did not have a valid insurable interest. *Price Dawe*, 28 A.3d at 1076-78.

Vida's argument also ignores *Price Dawe*'s holding that "section 2704(a) requires more than just technical compliance at the time of issuance," and that "[p]arties cannot use section 2704(c)(5) to do indirectly what 2704(a) clearly prohibits parties from doing directly." *Id.* at 1075, 1078. Many STOLI schemes try to feign technical compliance through trust structures whose ultimate beneficiary is a family member. The STOLI schemes in *Price Dawe* and *Berland* were structured that way. But the theoretical possibility that some of the death benefit might have ultimately flowed through a series of trusts to a family member, and not to investors, had Mrs. Barotz unexpectedly died before the contestability period expired, was simply part and parcel of Coventry's gamble.

Judge Stark addressed these exact issues in *Sol* and held that the "trustee did not have insurable interest" because an identical trust was nominally-funded. 369 F. Supp.3d at 612. And in response to the argument that naming a family member as the so-called ultimate beneficiary somehow changed this result, Judge Stark held:

> ***That within this contestable period the third parties allowed Sol to say who she would and would not want to obtain the Policy proceeds is simply part of the gamble the third parties were taking*** …. After all, ***somebody*** had to be named as beneficiary during the contestable period.

Id. at 615 (some emphasis added); *see Malkin*, 2016 WL 161598, at *18 ("U.S. Bank attempts to obscure this unavoidable conclusion with the fact that Malkin received coverage for two years and was not bound to sell the Policy to Coventry at the end of the Loan. These inquiries are irrelevant. ***The question must always be who procured the policy at issue and not what the formal consequences are of obtaining a life insurance policy. Indeed, this is part and parcel of the gamble. If the insured succumbs to the inevitable at a time prior to the expiration of the contestability period, the funding entity loses the wager."***) (emphasis added), *aff'd* 693 F. App'x 838; *Van de Wetering*, 2016 WL 8116141, at *18 (same), *adopted* 2017 WL 347449; *see also Corwell*, 2020 WL 1503641, at *14 ("[T]he typical STOLI wager carries the risk the insured dies before the contestability period expires and the investor gains the policy."), *aff'd* 44 F.4th 1024.

Accordingly, Vida is wrong when it argues that there was insurable interest through the Trust and that this somehow creates a fact issue. On the contrary, the trustee of the Trust had no insurable interest, and this is a stand-alone, dispositive reason for affirming the Superior Court's holding that the Policy is void *ab initio*.

4. Mrs. Barotz's Subjective Intent Was Irrelevant.

Vida further contends that a fact-finder must decide Mrs. Barotz's "purpose and intent for buying the Policy," which Vida baldly contends was for "estate planning purposes." This argument immediately falls apart, however, because *Price Dawe* is clear that when a third party procures, "the insured's subjective intent … is not the relevant inquiry." 28 A.3d at 1070. Indeed, as discussed at length, the Superior Court correctly held—based on facts Vida does not dispute—that Mrs. Barotz did *not* procure the Policy because she did *not* pay the premium. Thus, her intent was irrelevant and the court correctly held that "V[ida] cannot reasonably argue that the nonrecourse loan here was used to facilitate procurement of a policy for a legitimate insurance purpose, such as estate planning." Ex. 1 at 20.

Even assuming Mrs. Barotz's intent were relevant, Vida's efforts to create a fact issue about whether she had a valid estate planning purpose fail.

First, Vida contends (Br. 17) that the Estate's evidence about the PFP Program was inadmissible because the Estate did not depose anyone about certain documents. This argument is hard to take seriously because the parties submitted essentially the same evidence on their cross-motions; this included documents produced in response to document requests and subpoenas that are unquestionably authentic; and Vida's counsel admitted during oral argument that there were no issues of fact.

Second, Vida argues that the "structure of the trusts" shows "the Policy was procured for a legitimate purpose." But the undisputed evidence from Coventry's own documents (whose authenticity Vida does not contest) shows the Trust was *revocable*, which eliminated the tax advantages of using life insurance as part of an estate plan. Blaze & Movsesian, 38 Est. Plan. at *31; 26 I.R.C. § 2042(2). Coventry's documents also concede: "***The Trust and Supplement to the Trust Agreement are not intended to satisfy [Mrs. Barotz's] estate planning needs and have not been designed as an estate planning tool***." A201-02 (emphasis added).

Third, Vida contends that there is no one alive to testify about Mrs. Barotz's intent. But Spalding is alive. She signed the application and her agency put the Barotzes through this and three other STOLI transactions. A415; A932/26:14-29:13. As the Superior Court correctly observed, Spalding testified that the Barotzes were induced with the promise of "free insurance" and the possibility of money when the Policy was sold, which is why Mrs. Barotz consented to the transaction to begin with. A948/42:15-22; A995/89:20-90:11; A1065/159:25-160:9; A1067/161:5-10; A1068/162:8-20. Spalding also testified that she did not "perform an insurance needs analysis" that would be done for clients seeking life insurance for estate planning purposes, A997/91:2-20; A1007/101:22-102:2, and admitted this was not a "traditional life insurance" transaction. A995/89:16-90:11.

Spalding's testimony is unrefuted and entirely consistent with Coventry's own document, which says the transaction was "not intended to satisfy [Mrs. Barotz's] estate planning needs." Accordingly, it is clear that no disputed evidence would have been put forth at any trial. Indeed, not a single witness testified that the Barotzes had any *bona fide*, short-term need for $8 million of insurance, let alone the combined $27 million of STOLI SFG put on their lives. Thus, there is no genuine issue of fact about whether the Policy was procured for a valid estate planning purpose.

Fourth, Vida's brief dedicates pages (Br. at 13-19) to a thinly-cited and inaccurately-paraphrased recitation of the "representations" Mrs. Barotz supposedly made in connection with the Policy's sale, which Vida then argues "clearly support the inference (indeed, say) that the Policy had a lawful insurance purpose." Nothing could be further from the truth. None of these alleged representations say the Policy was taken out for a legitimate insurance purpose or to address any actual short-term need, let alone identify what that *bona fide* purpose/need might have been.

Most of the alleged representations Vida points to relate to Mrs. Barotz's consent to the Policy's sale in a form created by Midas, two years after Coventry procured the Policy. This does not show that she had a legitimate purpose/need for the Policy at inception. Indeed, insureds almost always consent to STOLI transactions and then sell the policies. *Id*. *at* 1076; *Berland*, 266 A.3d at 975; And,

of course, the Estate is not seeking to enforce any contractual rights so whether Mrs. Barotz gave up contract rights is irrelevant.

Vida also points to representations related to the identity of the Policy's beneficiary at inception, which Vida says was ultimately Mrs. Barotz's husband. But this doesn't show a *bona fide* need for insurance either; after all, as Judge Stark observed, "***somebody*** had to be named as beneficiary during the contestable period." *Sol*, 369 F. Supp. 3d at 615; *see, supra*, at 27-30 (discussing this in detail).

Vida also points to representations that there was no pre-existing agreement to sell, but that doesn't show there was a *bona fide* insurance need; as noted, STOLI schemes typically, as here, proceed through less formal means. *See, supra*, at 24-27.

Finally, Vida points to the Trust's (not Mrs. Barotz's) boilerplate representation in the Policy's application that "I believe that the policy(ies) applied for will meet my insurance needs and financial objectives." But statements like these are contained in every insurance application, and the whole point of STOLI transactions is to feign technical compliance. *See Berland II*, 2022 WL 15023450, at *5 ("Lavastone asserts that Berland had a valid insurance purpose. First, it notes that Berland signed a form saying she was buying the policy 'to meet a need for life insurance.' But technical compliance is insufficient. The very purpose of a STOLI scheme is to 'feign technical compliance.' So even though Coventry made sure to have Berland dot her I's and cross her t's, Lavastone must point to something

more."). Indeed, STOLI transactions almost always involve documentation stating that the policy is valid and/or waiving/releasing/indemnifying investors. But none of this is relevant. *See, e.g.*, *Warnock v. Davis*, 104 U.S. 775, 781-83 (U.S. 1881) (awarding STOLI proceeds to an insured's estate notwithstanding the fact that the insured signed broad releases and waivers of claims to the policy's death benefit both before and after the policy was issued); *Berland II*, 2022 WL 15023450, at *6 ("Lavastone asserts various defenses based on the contract that Berland and her trust signed when selling the policy to Coventry. But that contract was used to effect a STOLI scheme. So it is void for the same reason the insurance policy is: it 'violates Delaware's clear public policy against wagering."); *Estate of Malkin*, 379 F. Supp. 3d at 1276-77 ("To hold that Mrs. Malkin gave up her rights under Delaware's insurable interest statute by signing a 'boilerplate, non-negotiable form,' would only allow entities like Coventry to defeat the statute's intent with the same type of 'feigned technical compliance' that characterizes STOLI schemes in general.").

The Superior Court was correct to conclude that Vida failed to present any evidence from which a rational juror could conclude that the Policy was taken out for a legitimate insurance purpose to cover any actual, short-term risk.

Out of arguments, Vida makes a last-ditch contention (Br. at 26) that "the lender had an insurable interest in [Mrs. Barotz] up to the amount of its debt." This argument fails because Vida has never contended that Coventry had insurable

interest. Moreover, while a legitimate lender can have "a lawful and substantial economic interest" in a debtor and thus take out an appropriately-sized policy on the debtor's life, 18 *Del. C.* § 2704(c)(1), the Policy here was not taken out to protect a valid debt; rather, the loan was taken out to create a policy. And the loan did not create any debt obligation for Mrs. Barotz (she was not even party to the loan), so her death posed zero economic risk to Coventry. Regardless, as Vida tacitly concedes, not even a legitimate lender has an $8 million interest in a $267,497 debt.

In short, the loan created no genuine debt and was "simply smoke and mirrors meant to obscure the identity of the party responsible for procuring the Policy," *Malkin*, 2016 WL 161598, at *17, and existed to allow Coventry to procure hundreds of policies for itself, AIG, and other investors. Because Vida concedes that a third party procured the Policy, Mrs. Barotz's subjective intent was irrelevant and no fact-finding was needed. But even if her intent were deemed relevant, the Superior Court did not err by concluding that no reasonable fact-finder could conclude that the Policy was taken out to serve a legitimate insurance purpose such as estate planning.[6]

[6] Vida argues (Br. at 27-28) that summary judgment was improper because of a case decided under North Carolina law. Not so. North Carolina has no constitutional prohibition on wagering, no insurable interest statute, and no modern STOLI opinion from its highest court. Without clear guidance on North Carolina law, that court held a trial about the insured's subjective intent, *Estate of Rink v. VICOF II Tr.*, 2021 WL 6064890, at *5 (W.D.N.C. Dec. 20, 2021), and then gave jury instructions that no Delaware court could ever give, including that North Carolina law allows an insured "to bet on her own life for whatever reason or purpose she chose." A1969/489:9-13.

II. The Superior Court Correctly Denied Vida's Affirmative Defenses And Counterclaims.

A. Question Presented

Did the Superior Court correctly deny affirmative defenses and counterclaims that exclusively sought to allow an illegal human life wager to pay off?

B. Scope of Review

This Court reviews the Superior Court's grant of summary judgment *de novo*. *Frankel & De Bourbon*, 294 A.3d at 1071.

C. Merits of Argument

Vida's defenses and counterclaims each arose from what the Superior Court correctly concluded was "a boilerplate release form" signed when the Policy was sold to Midas as the loan matured. As the court recognized, each of Vida's defenses and counterclaims proceeded on the same release/waiver/indemnity theory, and each sought the same relief: To prevent the Estate from obtaining the death benefit, or if the Estate was awarded the death benefit, to require the Estate to pay it right back to Vida.[7] The Superior Court correctly found these defenses/counterclaims were not legally viable because "they would allow a downstream purchaser to retain the death benefit paid under a void policy." Ex. 1 at 23.

Vida argues (Br. at 30, 33) that the Superior Court's reasoning was inconsistent with this Court's decision in *Estate of Malkin*. Not so.

[7] Vida Op. Br. at 28-32.

In *Estate of Malkin*, this Court considered the legal viability of two different defenses/counterclaims. The first was a *bona fide* purchaser/UCC defense through which the investor sought to keep the death benefit. The second was an unjust enrichment claim through which the investor sought an off-set for premium it paid. This Court held: "Section 2704(b) is not inconsistent with all common-law defenses or counterclaims," and "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)." 278 A.3d at 62-63.

This Court held that the UCC defense was not legally viable, including because "nobody can have a 'property interest' in a STOLI policy or its proceeds," so actions brought under Section 2704 do not constitute "adverse claims." *Id.* at 65. This Court also reasoned that "when an investor receives [STOLI] proceeds," the investor's receipt of those proceeds constitutes "a violation of Article II, Section 17 of Delaware Constitution and of the State's public policy." *Id.*

In contrast, this Court held that the premium set-off claim was legally viable, reasoning that "[a] claim for unjust enrichment … does not on its face violate the Delaware Constitution's general prohibition of wagering ***or the State's longstanding policy of preventing STOLI policies from paying out to investors***." *Id.* at 69 (emphasis added). Accordingly, this Court was clear that claims/defenses

that would result in downstream investors retaining STOLI benefits are not legally viable because they would, in effect, allow the illegal wager to pay off; whereas, claims seeking other independent damages may be viable.

This Court was later presented with similar issues in a STOLI case called *Frankel & De Bourbon*. There, a downstream investor argued it could force the insurer to pay STOLI death benefits through defenses and counterclaims, including waiver and estoppel. This Court disagreed, explaining it had already been "crystal clear" that courts can "never enforce" STOLI or allow "illegal human life wagers to pay off" and that "[s]uch a remedy would fly in the face of our repeated avowals that enforcement of a STOLI policy is not an option." As this Court put it:

> [T]o award the death benefit to Wilmington Trust would be to, in effect, enforce the STOLI policies, ***causing the illegal human-life wagers to pay off***. The Superior Court correctly averted that result by dismissing Wilmington Trust's promissory-estoppel counterclaim and striking its affirmative defenses, ***the ultimate objective of which was the recovery of the death benefits under the policies***.

Frankel & De Bourbon, 294 A.3d at 1072-74. (emphasis added).

Here, the "ultimate objective" of each of Vida's claims/defenses was to award Vida the death benefit, rather than a premium set-off or some other measure of damages. *Id.* at 1074. Had the Superior Court allowed that to happen, it would have, "in effect," been "enforc[ing] the illegal STOLI polic[y]" and violating "the State's longstanding policy of preventing STOLI policies from paying out to investors." *Estate of Malkin*, 278 A.3d at 65, 69; *Frankel & De Bourbon*, 294 A.3d at 1072-74.

Vida ignores Delaware's public policy and instead argues (Br. at 31-32) that the alleged waivers, releases, and indemnifications contained in the sales documentation should be enforced because they were supposedly "new agreements" involving "new consideration." But this argument was not raised below so it was waived. Regardless, Vida's main source of support, 8 Richard A. Lord, *Willison on Contracts* § 19:17 (4th ed.), is *consistent* with the Superior Court's holding because it plainly states that "a subsequent contract may not be enforceable *if it violates public policy*." *Id.* (emphasis added). Enforcing the agreement by allowing Vida to keep the death benefit would not only breathe life into the Policy and effectively create a property interest in STOLI proceeds—contrary to *Estate of Malkin*'s holding that "nobody can have a 'property interest' in a STOLI policy or its proceeds," 278 A.3d at 65—but it would violate Delaware's public policy and Constitution by allowing the illegal wager to come to fruition and the bet to pay off, which, this Court has said, "is not an option." *Frankel & De Bourbon*, 294 A.3d at 1072.[8]

[8] Vida claims, for the first time on appeal, that the sale to Midas was distinct from the STOLI scheme. This makes no sense because a sale was contemplated from the beginning, and it was the prospect of such a sale that Coventry, through SFG, "financially induced" Mrs. Barotz with. *See Price Dawe*, 28 A.3d at 1075. Vida also points, for the first time, to *Armstrong v. Toler*, 24 U.S. 258 (1826), which is inapposite for a number of reasons, including because it merely dealt with a private agreement to share a tax obligation which, of course, did not violate public policy.

III. The Superior Court Properly Awarded Prejudgment Interest.

A. Question Presented

Was the Superior Court correct in awarding prejudgment interest from the date of Mrs. Barotz's death, compounded quarterly?

B. Scope of Review

A trial court's prejudgment interest ruling is reviewed *de novo*. *Chrysler v. Chaplake Holdings*, 822 A.2d 1024, 1037 (Del. 2003.)

C. Merits of Argument

Section 2704(b)'s plain language entitles an estate to recover "any benefits" received by an investor under a STOLI policy, which includes the proceeds' time value. *Estate of Berland v. Lavastone Capital*, 2022 WL 17084121, at *1 (D. Del. Nov. 18, 2022) ("*Berland III*"). Section 2704(b) "codifies the longstanding common-law rule that, if the insurer pays the death benefit on a policy that lacks an insurable interest, the estate may sue to receive that benefit," *Estate of Malkin*, 278 A.3d at 61 (citing *Warnock*), and the common-law rule was that estates recovered "the amount collected from the insurance company, with interest," *Warnock*, 104 U.S. at 782–83. Moreover, where, as here "the damages are of a pecuniary nature and are capable of calculation prior to judgment," interest "is available as a matter of right." *Janas v. Biedrzycki*, 2000 WL 33114354, at *5-6 (Del. Super. Ct. Oct. 26, 2000), *rationale approved Brandywine Smyrna v. Millennium Builders*, 34 A.3d 482, 487 (Del. 2011). Finally, awarding interest is consistent with public policy;

otherwise, investors would profit from STOLI by keeping the interest they made. *Berland III*, 2022 WL 17084121, at *1.

There is no merit to Vida's argument that prejudgment interest is limited to tort and contract actions, or to actions in which the defendant has engaged in illegal conduct that has harmed the plaintiff. None of the cases cited by Vida actually impose such a rule. Nor is it true that Vida did not engage in illegal conduct: It wagered on Mrs. Barotz's life and received the wager's proceeds in violation of Delaware's Constitution. *Estate of Malkin*, 278 A.3d at 65. And the Estate obviously suffered an injury because, among many other things, the Estate's loved one was wagered on, which is an injury the common-law has long recognized. *Estate of Boggess v. U.S. Bank*, 2024 WL 100839, at *5 (D. Minn. Jan. 9, 2024).

Nor are any of Vida's "demand"/"unjustifiable refusal" cases applicable. When someone makes a payment later determined to be excessive, interest does not accrue until the payor demands a refund. That rule makes sense because a refund does not become due until the payor demands it. But, as Judge Bibas recognized in *Estate of Berland III*, the "demand"/"unjustifiable refusal" rule has no relevance in Section 2704(b) actions because the estate is not seeking a *refund* of moneys it paid, but rather is seeking to obtain illegal STOLI proceeds that the investor received from the insurer. 2022 WL 17084121, at *1.

Finally, Vida's argument that only the Chancery Court is allowed to compound interest was not raised below and was thus waived. Regardless, it does not comport with economic reality. *Gotham Partners v. Halwood Reality Partners*, 817 A.2d 160, 173 (Del. 2002) ("[T]he rule or practice of awarding simple interest, in this day and age, has nothing to commend it….").

CONCLUSION

The Superior Court's thorough and well-reasoned Orders should be affirmed.

Dated: February 7, 2024

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