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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE OLGA J. NOWAK IRREVOCABLE TRUST, Plaintiff below- Appellant, v. VOYA FINANCIAL, INC.; SECURITY LIFE OF DENVER INSURANCE COMPANY; Defendants below- Appellees.	No. 435,2020 Court below: Superior Court of State of Delaware, New Castle County C.A. No. N17C-05-254 FWW

CORRECTED APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal involves claims arising out of a $4,000,000 life insurance policy ("Policy"), insuring the life of Olga Nowak ("Insured"), issued as of[1] February 21, 1999 by and serviced by Defendants Below-Appellees Security Life of Denver Life Insurance Company ("SLD"), and Voya Financial Inc. ("Voya"), its parent, ("collectively "Defendants") using various subsidiaries. The Policy owner/beneficiary was Plaintiff Below-Appellant, The Olga J. Nowak Irrevocable Trust ("Trust" or "Plaintiff").

The Plaintiff maintained the Policy in force until the Insured's death on June 29, 2016, making premium payments for almost 17 years totaling over $3,200,000. Despite Policy language stating the Death Benefit would be based upon the $4,000,000 Face Amount and the insurance did not terminate if the Policy was kept in force, as well as Defendants' repeated written illustrations stating they would pay $4,000,000 whenever the Insured died, Defendants refused. Defendants claimed that *even though the Policy did not end* before the Insured's death, *the insurance coverage did*, and had a term of 17 years from the retroactive issuance date.

[1] SLD required that the Policy be "issued" retroactively nine months to provide it an additional $187,500 in premiums, risk free. (A-47, 103).

Because Olga Nowak lived 4 months past that, Defendants claimed the Trust was not entitled to the $4,000,000 insurance, but instead was only entitled to a non-insurance benefit, the return of the excess of premiums paid over the Policy charges, a "Surrender Value" of about $330,000. The Second Amended Complaint alleges one count of breach of contract, one count of bad faith breach of contract, three counts of consumer fraud, three counts of contract reformation, and one count each of unconscionability and unjust enrichment.

The Trust appeals from the Memorandum Opinion and Order dated November 30, 2020 (the "Opinion" or "Judgment") (D.I.196) which, on cross motions for summary judgment, found for the Defendants on the contract, consumer fraud, unconscionability and unjust enrichment claims, and dismissed the reformation claims for lack of jurisdiction.[2] Plaintiff seeks reversal of the Judgment, a remand with directions to enter judgment for Plaintiff on the breach of contract claim and the consumer fraud claims in the unopposed amounts of Plaintiff's damages, and for further proceedings on Plaintiff's other claims.

[2] The reformation claims properly were before the Superior Court. E.g., *Parke Bancorp, Inc. v. 659 Chestnut LLC*, 217 A.3d 701 (Del. 2021). Nonetheless, Plaintiff filed an election of transfer under 10 Del.C. § 1902.

SUMMARY OF ARGUMENT

1. **Plaintiff Was Entitled To Summary Judgment For Breach Of Contract.** Whether construed as ambiguous or unambiguous, the Policy required the payment of $4,000,000 upon the death of the Insured, regardless of her age. The Court-below erred in concluding that at age[3] 100 the Policy unambiguously terminated the insurance and only the Trust's pre-existing right to the Surrender Value continued. The Superior Court's interpretation of a life insurance contract and its grant and denial of summary judgment are reviewed by this Court *de novo*. E.g., *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006) ("*Lank*").

2. The Policy is a variable premium universal life policy; not a term policy. No term is ever stated. The Policy language ***never states*** "the Insurance terminates at Age 100" specifically or in words to that effect. It says *premiums* end at age 100. It says the death benefit *is payable at death*. (A-39).[4] Under the contract, the Trust could pay any size annual premium or none at all. Amounts exceeding those needed to keep the Policy in force became Surrender Value, payable to the Plaintiff on

[3] Plaintiff uses "age" herein to refer to the term "attained age" whose awkward definition confused even USDC Judge Andrews in his remand opinion. *Nowak Trust v. Voya Financial*, 2018 WL 3717015 at *2n.2 (D.Del. Aug. 3, 2018).
[4] References "(A-_)" are to Plaintiff's appendix in this Court. References to filings below are to the exhibits or pages of those filings constituting the evidence or setting out the evidentiary record before the Court-below, including appendices to the pretrial motions on which the Judgment is premised.

demand. (A-47). If insufficient payments were made, the Policy would lapse and the contract would terminate. (A-54). Plaintiff was under no obligation to make sufficient payments or to keep the Policy in force. *Id.* Sufficient payments were made to keep the Policy in force until the Insured's death. (A-296-7).

3. The Judgment found the contract unambiguous and therefore relies exclusively on the four corners of the Policy. *Eagle Industries, Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("*DeVilbiss*"). The Court-below concluded that one sentence in the Policy made the Policy a term policy, and, at age 100 terminated the insurance (which provided for the $4,000,000 death benefit), not by stating the insurance ended, but instead by *redefining* the term "Death Benefit" (already defined elsewhere) to mean the Surrender Value to which the Insured already was entitled. The Judgment, disregards precedent by failing to construe the Policy as a whole and give meaning to all its provisions, and by rendering multiple provisions meaningless or illusory. *In re Shorenstein Hays-Nederlander Theatres LLC*, 213 A.3d 39, 57 (Del. 2019) ("*Shorenstein*"). The Court-below interpreted the Policy as containing a provision prohibited by 18 Del.C. §2927 (settling a life insurance contract at maturity[5] for less than the face amount), yet without

[5] The policy matured at 100 when no additional premiums were due, i.e. "paid up insurance status" (A-44, 72) Plaintiffs' Motion for Summary Judgment ("PMSJ") Table 1 (D.I.146).

explanation failed to follow precedent requiring the term be rejected as against public policy. *Frank v. Horizon Assurance Co.*, 553 A.2d 1199, 1205 (Del. 1989 (*en banc*) ("*Horizon*"); *O'Brien v Progressive*, 785 A.2d 281, 286 (Del. 2001) ("*O'Brien*").

4. The Court-below also fails to discuss and apply other settled Delaware principles regarding insurance contract interpretation, each of which supports the existence of insurance coverage in this case. "[A]n insurance contract should be read to accord with the reasonable expectations of the purchaser …" (*State Farm Mut. Auto Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974) ("*Johnson*")), that is an "ordinary person …, not versed in the nice distinctions of insurance law …". *Steigler v. Insurance Company of North America*, 384 A.2d 398, 400-401(Del. 1978) ("*Steigler*"). A life insurance policy being worth less after decades of paying premia "seems to defy" common sense. *Mentis v. Del. Am. Life Ins.*, 1999 WL 1240818 at *1 (Del. Super. Nov 5, 1999) ("*Mentis II*"). Defined terms are given their defined meanings and undefined terms are given their plain and ordinary meaning. *ConAgra Foods, Inc. V. Lexington Ins. Co.*, 21 A.3d 62 (Del. 2011) ("*Conagra*"): *Pacific Insurance Co. v. Liberty Mutual Ins. Co.*, 956 A.2d 1246, 1251 (Del. 2008) ("*Pacific*"). "[C]onvoluted or confusing terms are the problem of the insurer …". *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997) ("*Oglesby*"). Insurers may not deny coverage where a policy is "ambiguous *or conflicting*, or *if*

the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print." *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 927 (Del. 1982) ("*Hallowell*") (emphasis added). When an insurer knows the insured's particular purpose the insured can rely on the insurer to provide an appropriate policy. 6 Del.C. § 2-315; *Fritz v. Nationwide*, 1991 WL 23585 at *1 (Feb 19, 1991).

5. As delineated herein, the Policy contains at least seven provisions which *specifically state either the Death Benefit will be based upon the $4,000,000 Face Amount or that the insurance will continue without any age limitation* (collectively the "Non-Termination Clauses") and the Policy's other language is consistent. *Without considering these*, the Judgment concludes the Policy unambiguously terminates the insurance coverage at age 100 based upon a single sentence which states that after 100: "The Death Benefit at any time will be the Surrender Value." (the "Beyond 100 Sentence").[6] Opinion 16.

6. The Judgment: (1) ignores the Non-Termination Clauses described herein which state that the $4,000,000 insurance remains payable regardless of age; (2) misreads the Beyond 100 Sentence as ending the insurance, when it never states

[6] Defendant's agent, reaching the exact opposite conclusion, stated this clause meant that, after age 100, $4,000,000 is the Surrender Value and that Defendants confirmed to him the $4,000,000 applied after age 100. Plaintiffs' Motion for Summary Judgment ("PMSJ") Appendix PMSJAppx A273, 1196-1294 (D.I.151).

anything ends: (3) misreads the definition of "Death Benefit" as referring to a "Death Benefit *revision*" (Opinion 16, emphasis in original) when the actual language is "Death Benefit provision," the very clause the Opinion disregards, and (4) subordinates the separate paragraph defining "Death Benefit" to the paragraph containing the Beyond 100 Sentence, contrary to the Policy language and format. The Judgment ignores that the defined terms "Face Amount" and "Death Benefit" never state they are eliminated or redefined elsewhere. The Policy has an explicit "insurance" commencement date and time, but never states any term or ending date and time for the insurance. (A-47). The definition of "Surrender Value" does not state it becomes the Death Benefit or is the only benefit available after age 100. *Id*. Lastly, even if the Beyond 100 Sentence could be read in isolation as terminating the insurance, it is in conflict with the Non-Termination Clauses and other language. Under *contra proferentum*, that conflict is resolved against the insurer. *Rhone-Poulenc Basic Chemicals Company v. American Motorists Insurance Company*, 616 A.2d 1192, 1196 (Del. 1992) ("*Rhone-Poulenc*").

7. The Court-below misreads a Policy Schedule, which delineates the costs of selected benefits, as support finding it delineates the number of years Policy benefits are available. Not only does the Schedule not list all Policy benefits, one benefit listed has a different duration than the number on the schedule. PMSJAppx A578, 596-7(Fick140:18-23,213:20-214:7) (D.I.151). See, page 20-21, infra.

8. **Plaintiff is entitled to summary judgment on its Delaware Consumer Fraud Act ("DCFA") (6 Del.C. §2513) claims**. Commencing before the Policy was issued and until the Insured's death, Defendants issued illustrations which state they will pay $4,000,000 at the Insured's death. (A-80-257). During the 17 years of receiving these, Plaintiff made premium payments exceeding $3,200,000. The statements were: false; deceptive; concealed, suppressed and omitted material facts; and were made with the intent Plaintiff rely upon them in determining whether and the extent to which it would make premium payments to purchase the insurance. *Id*.; (A-62). As Defendants never intend to pay $4,000,000 after age 100, the statements were false and deceptive whether the Policy provides for such or not. The Court-below's denial to Plaintiff and award to Defendants of judgment on these claims is subject to *de novo* review because it interprets a statute and awards summary judgment. *Lank*, supra; *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 284 (Del. 2016) ("*Hazout*").

9. In erroneously concluding that DCFA is inapplicable to the sale of an insurance policy, the Court-below failed to follow (or cite) this Court's precedent in *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 70 (Del. 1993) ("*Whaley*"). *Whaley*, was an "action stem[ing] from an insurance policy" in which this Court concluded the plaintiff had a viable claim "remedied by an action … under the Consumer Fraud Act …". *Id.* at 64, 70.

10. The Judgment's alternate conclusion that the claims for damages arising from the premium payments in the face of the admittedly deceptive illustrations could not be actionable because they occurred after the Policy was issued, ignores both the deceptive pre-issuance illustrations, and that the post-issuance illustrations were intended to cause consumer reliance and affect the amounts paid to purchase the insurance. The Court-below illogically concluded the DCFA claims were not about the premiums paid, but instead, were seeking a "benefit" under the Policy, and, as a result, it misapplied federal authorities which address using the DCFA to obtain insurance benefits. Even those authorities, however, recognize that post-sale matters can relate to the sale. "Post-sale representations *not connected with the sale* … of merchandise do not fall within the purview of the DCFA." *Christiana Care Health Services, Inc. v. PMSLIC Insurance Company*, 2015 WL 667553 at *7 (D.Del. November 2, 2015) ("*Christiana*") (emphasis added). *Benson v. Amguard Ins. Co.,* 2017 WL 2672078 at *4 (D.Del. June 21, 2017) ("*Amguard*").

11. Defendants' own Rule 30(b)(6) designee admitted *every* illustration for 11 years (during which Plaintiff paid about $3,000,000 in premiums) was deceptive. PMSJAppx A567-589 (Fick) (D.I.151). Both before and after the Policy was issued the Defendants provided illustrations the text of which, *inter alia,* consistently represented a $4,000,000 benefit at death regardless of age. (A-79-97). The Court-below never addressed the evidence summarized on this chart: evidence the

Defendants never undisputed. Because the Policy permitted Plaintiff to vary the amount of paid, or to pay none all, these illustrations were intended to induce reliance by guiding premium payment decisions. In 2011, after about $3,000,000 in premiums, although the text of the illustrations continued to state $4,000,000 would be paid after age 100, Defendants modified *a chart* which was a part of the illustrations to replace the $4,000,000 after age 100 with Surrender Value. Plaintiff immediately reduced the premiums to the minimum reasonably necessary to maintain the Policy in force.[7]

12. The Court-below apparently also concluded that the DCFA could not apply because one aspect of the sale, the issuance of the Policy, occurred outside Delaware. Opinion 27. This was never argued below, however, the DCFA applies when *any part* of the sale involved Delaware. 6 Del.C. §2512. Here the Policy was sold to a Delaware Insured; the owner/beneficiary was a Delaware entity, and the illustrations were issued to the Insured, a Delawarean.[8] Similarly, The Court-below dismissed without discussion the undisputed evidence of Voya's actions holding itself out as an insurer, using its name, and unregistered trade names which included its name, in the communications servicing the Policy. PMSJ Table 3 (D.I.146),

[7] Defendants admitted this is precisely what Plaintiff should have done to mitigate its damages. Defendants' Opposition to Plaintiff's MDJ Affirmative Defenses at 3 (D.I.166).

[8] Indeed, the Court interpreted the Policy under Delaware law.

PMSJAppx A894-1149 (D.I.151). Without discussing the evidence, the Opinion erroneously concludes Count IX (based upon 18 Del.C. §2304(9) and Voya's involvement in the illustrations and Policy administration (e.g., as "ING Security Life") raises no facts to support the claim Voya held itself out as an insurer.

13. **The Superior Court's grant of summary judgment to Defendants on the unconscionability, unjust enrichment and bad faith breach of contract claims on the grounds that there was no dispute of material fact, was in error and is subject to de novo review.** *Lank*, supra. The Judgment is in error as it ignores material evidence supporting these claims. The Judgment also erroneously applied Superior Court Rule 56(h) (Opinion 8) when Plaintiff specifically disputed Defendants' facts. E.g., Plaintiff's Opposition SLD MSJ ("POSLDMSJ") 6-8, Nowak Affidavit (D.I.169), Plaintiff's Opposition Defendants' MSJ Defenses ("PODMSJ") 2, 6-7, Table 5 (D.I.167).

14. The evidence of unconscionability was not, as the Opinion concludes, "simply because the Death Benefit changed … at age 100." Opinion 30. The result here, Defendants received over $7,200,00 in value (from the $3,200,000 in premiums over 17 years) yet provided Plaintiff only $330,000 in return, coupled with the manner in which the Policy lays out these provisions (even assuming the Court-below is correct as to their meaning) and the admittedly misleading illustrations, is unconscionable. The Policy language is not that it "terminates" the

$4,000,000 Death Benefit, but the Court found it "redefines" the insurance out of existence; a sleight-of-hand as the Trust already had a right to the Surrender Value. Calling a preexisting non-insurance benefit a "death benefit" is inherently deceptive. To quote Defendant's own witness, Fick: "so when you think about that [the Surrender Value already existing independently], what are you gaining from death? You're not". (A-597).

15. The Court-below, having dismissed all other avenues for recovery for Defendants' admitted multiple misrepresentations in illustrations that $4,000,000 would be paid at death regardless of age, simply dismisses these misrepresentations as "regrettable." (Opinion 21). The Court-below absolves the Defendants of any responsibility for them. However, innocent or otherwise, Defendants' erroneous illustrations were used to induce Plaintiff to pay over $3,200,000 in premiums, presently worth over $7,200,000. A jury could easily find this result unconscionable.

16. Similarly, the Judgment is in error is concluding the unjust enrichment claim arises only from the contract. The unjust enrichment arises from the admittedly deceptive illustrations, which explicitly stated the $4,000,000 would be paid after age 100 and under which Plaintiff continued to pay premiums of $250,000 per year, *for benefits which Defendants admit they never intended to provide*. Defendants never disavowed these illustrations and, before litigation, never claimed there was any error. A jury properly could find unjust enrichment from inducing the payment

of millions of dollars in premiums while touting benefits which Defendants never intended to pay.

17. The Judgment's conclusion that there was no breach of contract to support a claim of bad faith breach is in error for the reasons stated herein. The Opinion further concludes that even if the Court is in error about the meaning of the Policy, because the Court-below accepted Defendants' contract interpretation, no jury could find bad faith. This substitutes a judge's personal conclusion for that of a trier of fact, invading the province of the jury. *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979) ("*Storey*"): *Ellingsworth v. Hudson*, 622 A.2d 1095 (Del. 1993) ("*Ellingsworth*"). The facts above raise questions of bad faith for a jury to decide. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264-5 (Del. Supr. 1995) ("*Tackett*"), *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445-447 (Del. 1996) ("*Pressman*").

18. The Superior Court's determination that Plaintiff's motion for summary judgment as to the Defendant's affirmative defenses was moot is subject to de novo review and should be vacated. *Lank*, supra. Because the Superior Court's determination of mootness rests entirely on its erroneous determinations discussed above, that decision should be vacated and the matter remanded.

STATEMENT OF FACTS

A. Introduction

While each party contended there was no dispute of material fact *as to its motions* for summary judgment, the Court-below erred in stating Plaintiff submitted Defendants' motions on stipulated facts under Superior Court Rule 56(h). Plaintiff opposed Defendants motions detailing disputed material facts in the record. E.g., POSLDMSJ 4, 6, 8, 11 (D.I.169)[9]; Plaintiff's Opposition to Voya's MSJ Motion 1-8 ("POVMSJ") (D.I.168): PODMSJ 2-3, 6-7, Table 5 (D.I.167). For brevity and to avoid repetition, Plaintiff incorporates herein the facts and record citations set out already in its summary of argument.

The Opinion does tie many of the "facts" in its brief statement of facts to any ruling. Many are not relevant. The Court-below found the contract unambiguous, and on that interpretation denied Plaintiff and awarded Defendants judgment on the contract. Similarly, the Court found the DCFA legally inapplicable. Those rulings rely on the Policy language only. Defendants conceded that if the Policy is ambiguous, judgment should be entered for Plaintiff. E.g., Defendants' Motion in Limine at 2 (D.I.145).

[9] Due to the overlapping briefing of the pretrial motions, Plaintiff relied upon all its pretrial submissions to oppose Defendants' motions. Plaintiff's Summary Judgment Reply at 1 (D.I.184). The Court-below did as well. Opinion 10.

The Opinion reaches its alternate ground as to the DCFA erroneously ignoring the pre-issuance illustrations and misconstruing the purpose and content of post-issuance illustrations. The Policy illustrations are documents, undisputed as to their identity or content. (A-79-257). Each was prepared by Defendants for the Insured, Olga Nowak, a Delaware resident. Id.;(A-73). The Policy Owner and Beneficiary is Plaintiff, a Delaware entity. (A-103). Every illustration indisputably was inaccurate, representing Defendants would pay $4,000,000 upon death even after age 100, as set out in a chart Defendants never disputed.[10] (A79-97).

Even though not identified as the basis of any ruling, the Opinion recites Defendants' version of the reason certain tables in illustrations from 2004-2010 were inaccurate. The Opinion simply ignores Plaintiff's evidence showing Defendants' version is contrary to all evidence. POSLDMSJ 6-7 (D.I.169); Plaintiff's Motion in Limine under DRE 403 4-7 ("PMDRE") (D.I.149); Plaintiffs' Motion under Rule 37 at 2, 4-7 ("PMR37") (D.I.150). The eight deposition pages which the Opinion cites, contradict, not support, Defendants' version. Similarly, the manner in which Voya directly participated in these events was set out by Plaintiff in a chart, Defendants never undisputed. PMR37 (D.I.150); PMSJ Tables 3-4 (D.I.146).

The Opinion recites certain matters about purported statements of Plaintiff's trustee, testimony about information purportedly provided to him, and his purported

[10] Arguing the consequences of the facts is different from disputing the facts.

knowledge before and after the Policy was issued. The Opinion does not ground any ruling on these and they appear to be irrelevant. Plaintiff disputed these facts below. (e.g., PODMSJ Table 5 (listing 27 separate items of evidence) (D.I.167)). Further, under the Policy language, *no statement* which does not appear in the application for insurance, whether by Plaintiff, its representatives, the Insured, or Defendants agents, may be used to challenge a claim. (A-60)

B. The Policy Language

The Policy is a variable premium universal life policy *with premiums payable only until Age 100*. (A-44). The ending of premium payments is identified as the Policy reaching maturity. (A-74); PMSJ Table 1 (D.I.146).

In contrast, the Policy directly and by necessary implication, repeatedly provides a minimum $4,000,000 is payable at death regardless of age, as follows:

(1) "Death Benefit Proceeds Payable at Insured's Death. Flexible Premiums Payable until Attained age 100." (A-44).

(2) "Face Amount [is] $4,000,000." (A-46).

(3) "All capitalized terms have specific definitions for the purposes of this Policy." (A-50). The definitions include:[11]

(a) "*Death Benefit" … [is] the amount applicable in the determination of Death Benefit Proceeds* payable … [at] death. *See the Death Benefit provision on*

[11] Full definitions are not included and emphasis is added through this section.

page 15." (A-50). (This is the language the Court-below misread as a "revision." The Beyond 100 Sentence and the paragraph in which it appears on page 16 are not referenced.)

(b) the referenced "Death Benefit" provision on page 15 states the *minimum* amount is the Face Amount. (A-58).

(c) "Face Amount … is [the $4,000,000] shown on the Schedule. The *Face Amount is used to determine the Death Benefit.*" (A-51). (In summary: Face Amount determines Death Benefit; and Death Benefit determines Death Benefit Proceeds. Death Benefit is defined in the Death Benefit Section on page 15 as at least the Face Amount. The Beyond 100 Sentence and its paragraph on page 16 are not referenced in this consistent chain of definitions.)

(d) "Policy Date" states "*Insurance* under this Policy takes effect at 12:01 a.m. on the Policy Date shown on the schedule." (A-52). There is no termination date.

(e) "Proceeds" means "Death Benefit Proceeds upon death … Surrender Value upon the surrender of the Policy." (A-52).

(4) The section titled "Termination" states the "insurance" terminates only at death, surrender, or insufficient payments. (A-62). Age is not mentioned.

(5) The section titled "Continuation of Insurance" states "Insurance automatically continues in force … as long as the Surrender Value is sufficient to cover" the charges due. (A-54). Indisputably, it was sufficient. Age is not mentioned.

The Court-below ignored these sections entirely and focused only the Beyond 100 Sentence in the section titled "Continuation Beyond Attained Age 100." (A-59). That section is one of six stylistically equal sections within the broader Policy Proceeds section. (A58-59). The Beyond 100 Sentence does not mention "insurance," "Death Benefit Proceeds," or "Face Amount" and is not referenced in the Face Amount, Death Benefit, Termination or Continuation of Insurance definitions or sections. The Beyond 100 Sentence states after 100, "The Death Benefit at any time will be the Surrender Value." (A-59). Defendants' agent told the Plaintiff this meant "$4M is the surrender value." PMSJAppx A1196, 294 (Wilcock138:16-139:15) (D.I.151) Others concurred. PMSJSuppAppx A1850-51, 1854 (Fulkerson) (D.I.174).

The Court-below found this one sentence had a cascading consequence: changing the definition of "Death Benefit" from the right to insurance to the already existing right to Surrender Value (which has nothing to do with death); thereby changing the definition of "Death Benefit Proceeds" (A51) (a definition not referenced in the Beyond 100 Sentence or paragraph); thereby *sub silentio* terminating the Insurance and the $4,000,000 benefit thereunder. As Defendants'

witness Fisk put "You're not [getting anything from death]" because this "redefines" the Death Benefit into something having nothing to do with death: that is, *the insured gets nothing* as a result of the Insured's death, despite it being called a "Death Benefit." PMSJAppx A597. (D.I.151).

The Court-below never explained how all other sections referenced above could be reconciled with its conclusions, or why the Beyond 100 paragraph would override all the other sections in the Policy Proceeds section as to the meaning of Death Benefit, i*ncluding the section specifically titled "Death Benefit."*[12] The Court-below also never addressed the next sentence in the Beyond 100 paragraph, which redefines Surrender Value as that value at age 100. The Surrender Value definition was reset at age 100 because it, not the Death Benefit, is the one being changed by the Beyond 100 Sentence. Under the Court-below's interpretation, this sentence is mere surplusage.

The Court-below concluded its interpretation was supported by number "17" appearing on the third page of the Schedule under "Summary of Benefits" because it concluded the purpose of the chart was to set out all Policy benefits and their duration. It concluded the listed number capped the number of years the benefit in

[12] Inexplicably, the Court-below finds that the sections in first half of the Policy Proceeds section must be "read in conjunction" with each other, but that the sections in the latter half, containing the Beyond 100 Sentence, should not be so read. Opinion 17.

each row was available and was not the number of years the listed premiums were to be paid for each benefit listed. (A-49). The Court-below does not reconcile this interpretation with the facts that the Schedule does not, in fact, list all Policy benefits, some of which exist longer than 17 years (i.e., Surrender Value); and lists "17" for the Hardship Rider even though that benefit indisputable terminated after 14 years. (A-49, 69).; The Policy itself refers to the Schedule as showing "the minimum monthly premium." (A16).

If matters outside the Policy are relevant, the Opinion does not reconcile its result with Defendants' own agent's explanation that "The Death Benefit at any time will be the Surrender Value" means "$4 million is the surrender value" PSMFAppx A1196, 294(Wilcock138:16-139:15) (D.I.151); an explanation entirely consistent with the rest of the Policy. That is, after age 100, when no further premia are due, the Policy is paid up and you can surrender it for the $4,000,000 Death Benefit.

The Policy prohibits using any statement not in the application against Plaintiff; specifically, Defendants "will not use any statement … deny a claim unless it is contained in [the] application …". (A-60). Therefore, even if the characterizations of Plaintiff's trustee's statements and knowledge were accurate and had relevance, which they are not and do not,[13] Defendants contractually waived

[13] E.g., POSLDMSJ 4, 6, 8, 11 (D.I.169); Plaintiff's Opposition to Voya's MSJ Motion 1-8 ("POVMSJ") (D.I.168): PODMSJ 2-3, 6-7, Table 5 (D.I.167).SLDMSJAppxApp.340-346 (D.I.154).

any ability to use them against Plaintiff. Although it is not clear what significance the Court-below placed on its conclusion that Plaintiff's trustee applied for the insurance, the application was made by the Insured, Olga Nowak. (A-75).

C. The Illustrations

In 1999, prior to delivery of the Policy, Plaintiff's trustee received and signed for illustrations demonstrating the operation of the Policy. (A98). As was shown on undisputed table 2 to Plaintiff's Motion for Summary Judgment from the outset in the Policy Benefit Statement dated February 21, 1999 a $4,000,000 death benefit was shown after age 100. (A79-97).

The Opinion at 18, ignores all text in all illustrations, focusses solely on tables and charts, and inaccurately states no chart before 2004 lists a $4,000,000 benefit after year 17. The Illustration dated February 21, 1999 states: the "Death Benefit" is "$4,000,000"; "PREMIUMS ARE PAYABLE UNTIL AGE 100. THE DEATH BENEFIT IS PAYABLE UPON THE INSURED'S DEATH WHILE YOUR POLICY IS IN FORCE."; it says nothing about any age limitation and lists a $4,000,000 Death Benefit **in the row after year 17**. (A-98-99).

The illustration dated August 9, 1999 (A-100-105) lists reasons the Death Benefit might decrease. (A-101). Age is not one of them. It notes that the Policy riders end after 17 years but does not say the insurance or death benefit end ever. *Id*.

It lists the Death Benefit as "Option A" which the subsequent illustrations state exists past age 100 and is the Face Amount. Table 2 (A79-97).

From the pre-issuance illustrations, until 2011, not one single illustration charted or stated the Death Benefit after age 100 was less than $4,000,000. (A-79). The texts of the illustrations contain numerous representations explicitly providing that the Face Amount was payable after age 100. *Id.* Those from 2004 to 2009 *specifically chart* a $4,000,000 death benefit after age 100. *Id.* SLD's own witness admitted that every illustration before 2011 was misleading on this point and all were misleading as to some issue related to paying the death benefit after 100. PMSJAppx A567-589(Fick97:17-182:24) (D.I.151). Defendants presented no contrary evidence.

The Court-below noted the Defendants explained the charts from 2004-2010 were a mistake, Opinion 7 but failed to note Defendants presented no evidence to support this explanation. POSLDMSJ at 6-7 (D.I.169). This testimony of Defendants' witness, Mr. Schaley, and that which the Court-below cites is that: Defendants do not know why *the charts* started showing benefits post age 100 in 2004; do not know why in 2010 they changed to eliminate post age 100 data; and that, for reasons Defendants do not know, the charts were deliberately changed in 2011, without proper approvals, to chart post age 100 as Surrender Value by contract computer programmers assigned to work on a different policy form. PMILR37 at 4-

6. (D.I.150); PMSJAppx A559 (Fick63:2-64:6,188-195); A657-9 (Schaley38:3-11-47:4). Defendants have never claimed any "error" resulted *in the texts of the illustrations stating throughout that $4,000,000 was payable after age 100*.

Defendants concealed direct evidence about the 2011 change, which reinstated the table to 110 and changed the post-100 death benefit to surrender value, improperly withheld the names of these programmers and the supervisor who gave them this assignment, and deliberately provided no discovery about the textual changes in any illustration precluding discovery about this. PMILR37 (D.I.150). The Court-below did not address Plaintiff's request for adverse findings of fact based on this conduct. Reading the evidence favorably to Plaintiff, such findings preclude any summary judgment for Defendants if it relies on facts outside the Policy language.

D. The Other Facts Before the Court-Below

Plaintiff presented evidence showing its damages for breach of contract were $4,000,000 plus legal interest from June 29, 2016 and damages for breach of the DCFA as of October 15, 2019 were $7,230,253. PMSJ 1, 12 (D.I.146). Defendants presented no evidence opposing these damages.

Plaintiff addresses other evidence before the Court-below because the Opinion refers to it, without conceding its relevance or Defendants ability to use it in the face of the Policy providing that no statement outside the application will be used to oppose a claim. Defendants claim no misstatement in the application.

The agent who sold the Policy, Wilcock, and his partner and Wetherell, were agents of SLD under contract to it. PMSJAD 8-9 (D.I.147). They were agents, not insurance *brokers,* compensated by SLD, not Plaintiff. *Id*.[14] Although Wilcock claimed Plaintiff's trustee understood and asked for a policy where the life insurance ended at age 100, his file contained no documentation to support this recollection and he was unable to explain where Plaintiff's trustee, a lay person, could have acquired this knowledge. PMSJAppx A274, 281-282, 377-78, 291-2, 297-99 (D.I.151). Wilcock admitted nothing was provided to Plaintiff's trustee (not even the Policy) which would have informed a person not versed in insurance jargon, notice that the $4,000,000 insurance ended at age 100. *Id.*; PMILDRE at 5. (D.I.149). Although Wilcock claimed he advised Plaintiff's trustee against buying a policy with the insurance ended at age 100, he acknowledged there is not one single document reflecting that advice. *Id*. Wilcock, however, also acknowledged he believed the $4,000,000 was available after age 100 when he wrote that to Plaintiff.[15] *Id*.

Wilcock assumed that because information about other policies was in his file, which he reorganized for his lawyer, that he had shown them to Plaintiff's trustee.

[14] These two factors make them Defendants' agents. *Allstate Auto Leasing Co. V. Caldwell*, 394 A.2d 748, 750 (Del.Super. 1978); *Sinex v. Wallis*, 611 A.2d 31, 33 (Del.Super, 1991).

[15] Wilcock claimed this believe was on again/off again.

Id. He acknowledged, however, he had no specific recollection and that it was unlikely all of the illustrations had been shown. *Id*.

Plaintiff's trustee denies ever having seen any pre-issuance illustrations other than the one's he signed for which relate to the Policy. E.g., POSLDMSJ 8, 11, Nowak Aff. para 4-7. (D.I.169); PODMSJ 2-3, 6-7, Table 5 (D.I.167). He denies understanding that the insurance in the Policy could terminate at age 100 and denies that anyone ever suggested that to him before 2011. *Id.* Not one document from either Plaintiff's, Defendants' or any third party's files indicates that anyone ever told Plaintiff, prior to 2010, that life insurance could end at age 100 as to any life insurance policy. Indisputably, the first document which ever states in plain language that the Policy's life insurance could end at age 100 was the chart in the January 2011 illustration. (A-88) The Opinion 5-6 in concluding Mr. Nowak reviewed multiple policies from various companies and shopped for a policy ending at 100 ignores this evidence Opinion and cites evidence that simply does not support the conclusion.

The Opinion notes Plaintiff consulted advisors, but ignores that every advisor who said anything on the topic agreed the insurance did not end. DMIL ex 2,5. (D.I.145). Defendants own agent, Wilcock, who sold the Policy, wrote Plaintiff that the insurance did not end and after 100 "$4M is the Surrender value." *Id*. Legacy Analytics, to whom Wilcock referred Plaintiff, provided a report to Defendant SLD

specifically advising it the insurance was needed for Mrs. Nowak's estate planning purposes, that is for when she died. (A-258-9). It says nothing about acquiring insurance only until age 100.

The communications with the Defendants' were through Defendants' customer service representatives, who identified themselves as "Voya" customer service representatives. PMSJ, Table 3 (D.I.146); PMSJAppx A894-1149 (D.I.151). Wilcock testified that he contacted Defendants in 2004 and was assured that the illustrations showing the payment of the $4,000,000 death benefit after age 100 were accurate. PMSJAppx A273(Wilcock56:13-57:17) (D.I.151). When, in 2010, Plaintiff's trustee came across the Beyond 100 language in the Policy and was concerned that it might mean what Defendants now claim, he contacted Wilcox who assured him that the $4,000,000 benefit did not end at age 100. DMIL Ex 2 (D.I.145). Another insurance expert Plaintiff contacted also reached the same conclusion. PMSJSuppAppx A1850 (D.I.174).

The opinion states "although Wilcock thought differently, SLD confirmed Mr. Nowak's understanding that the Trust would receive… [only] the surrender value if she died and attained age 100 …". Opinion 7. The Court does not cite evidence but presumably relied on a transcript of a phone call with a Voya customer service representative purportedly in January 2011. PMSJAppx A949-956 (D.I.151). However, it does not support the Court-below's conclusion. The representative

stated *at age 100 "the policy's done"* with an immediate payment of the Surrender Value *and with "no way"* to continue *the Policy.* (DMSJAppx803-806) (emphasis added). That advice unquestionably was wrong: even under the Court-below's interpretation the Policy did not end and Surrender Value was not paid immediately. Demonstrating the unreliability of this representative, he also stated the life insurance was $8,000,000. *Id*.

Plaintiff's trustee testified that he understood the Policy would pay $4,000,000 regardless of age, pre-issuance he never discussed with anyone an age limitation, he never asked for an age limitation, and had he known there was one, he never would he purchased the Policy. POSLDMSJ, Nowak Aff. (D.I. 169). The multiple evidence on this topic is that the post-2010 conflicting information basically left him confused and without any understanding of the policy. E.g., Id. para 5-7; PODMSJ, Table 5 (D.I.169); POSLDMSJAppx A1853. (D.I.174) The Court's citation (Opinion 5-7) to Mr. Nowak's deposition testimony shows exactly this: when asked if an email said he knew the $4,000,000 ended, he stated "I'm questioning it." (DMSJAppx App.345) (D.I.154). To the extent what Plaintiff's trustee was told, when, and what he understood and when had any bearing on the decision below, it should be reversed and remanded because the evidence, even if admissible, read most favorably towards Plaintiff, is disputed and cannot be resolved through summary judgment. *GMG Capital Invest., LLC v. Athenian Vent. Part. I,*

L.P. 36 A.3d 776, 783-4 (Del. 2012) ("GMG), infra. E.g., SLDMSJAppxApp.340 (D.I.154). See also, Objection to Def Evid POSMDJ, Table 6. (D.I.169).

ARGUMENT

I. The Court-below Erred In Denying Plaintiff and in Awarding Defendants Summary Judgement on the Breach of Contract Claim.

A. QUESTION PRESENTED

Whether Plaintiff should be awarded, and the Defendants denied, summary judgment for breach of contract? (Preserved at D.I. 146 at 1-8 (A30), D.I. 169 at 1-3, 8-10 (A37)).

B. SCOPE OF REVIEW

The standard and scope of review as to a Court's grant of summary judgment and interpretation of a contract is *de novo*. *Lank*, supra.

C. MERITS OF ARGUMENT

1. The Policy Provided A $4,000,000 Death Benefit at the Insured's Death.

(a) Legal Principles

The Opinion takes a single sentence out of the context and construes it to conflict with other Policy provisions (including clear Policy definitions), to render the Death Benefit illusory, to render other provisions meaningless, to reach a result no reasonable lay person would understand, and to create a hidden trap in small print. A contract is interpreted by the Court, absent an ambiguity requiring resolution of a disputed material fact. *GMG* at, 783-4. The "'objective' theory of contracts, … [gives] each provision and term effect, so as not to render any part … mere

surplusage [or] … a provision or term meaningless or illusory. … An unreasonable interpretation produces an absurd result … . If a contract is ambiguous, … the doctrine of contra proferentem [applies] against the [insurer] …". *Osborn v. Kemp* 9911 A.2d 1153, 1159-60 (Del. 2010). "[A]n insurance contract should be read to accord with the reasonable expectations of the purchaser …" (*Johnson*, supra.), an "ordinary person …, not versed in the nice distinctions of insurance law …". *Steigler* at 400-401. (Del. 1978). A life insurance policy being worth less after decades of paying premiums "seems to defy" common sense. *Mentis II at *1*.

Defined terms are given their defined meanings and undefined terms are given their plain and ordinary meaning. *Conagra*, supra. "[C]onvoluted or confusing terms are the problem of the insurer …". *Oglesby* at 1150. Payment may not be denied if a policy is "ambiguous or *conflicting*, or if the policy *contains a hidden trap or pitfall*, or if the fine print takes away that which has been given by the large print." *Hallowell* at 927 (emphasis added). The Court-below's interpretation, that the insurance settled at maturity for less than the face amount, is prohibited by public policy and would be unenforcable. 18 Del.C. §2927. *O'Brien* at 286; *Horizon*, supra.

In life insurance contracts, critical limitations must be made "crystal clear" and not buried. *Mentis* at *5 (buried language "falls painfully short"). "[C]ontra proferentem requires that the language … be construed most strongly against the

insurance company …". *O'Brien* at 288; *Steigler* at 400. "Specific language in a contract controls over general language …." *Shorenstein* at 62.

Insurance clauses waiving the ability to use an insured's statement against it are enforced. *Oglesby* at 1150. Where a contract is ambiguous, its meaning can be explained by the course of dealings, here illustrations showing $4,000,000 payable at death. 6 Del.C. § 2-202. A breach of contract is proven upon showing a contract, a breach, and damages. *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003).

(b) The Policy Unambiguously Provides $4,000,000 Upon Death at Any Age.

The flow of definitions is clear: The $4,000,000 Face Amount is "used to determine the Death Benefit" and is the minimum Death Benefit which is "the amount applicable in determining" the Death Benefit Proceeds, which under "Proceeds" is the amount payable at death. "Surrender Value" states it applies upon surrender (death after age 100 is not mentioned). The Death Benefit definition refers to a specific Death Benefit Section on page 15, which state the minimum is $4,000,000 without any age limitation.

The Continuation of Insurance and Termination of Insurance sections list the things that can end the insurance. Age is not one of them.

While the Death Benefit Proceeds does refers to the Policy Proceeds section generally, it does not refer to the Beyond 100 Sentence or paragraph specifically,

and gives them no priority over the other sections or language, including the stand-alone definition of Death Benefit. In contrast to "Death Benefit," the Policy Proceeds section does not have a stand-alone definition of Surrender Value, reinforcing that it is Surrender Value and not Death Benefit that is altered by the Beyond 100 Sentence.

The Death Benefit section is a stand-alone part of the Policy Proceeds section. Neither the language nor the structure of the Policy indicates that the general reference to Policy Proceeds (in the Death Benefit Proceeds defination) was in any manner intended to change the definition of Death Benefit, nor to have a clause headed "Continuation" act to terminate the insurance, the *raison d'etre* for the Policy, by "converting" the Death Benefit into something of no additional value and having nothing to do with the death of the Insured, the already owned Surrender Value.[16] Reading the Beyond 100 Sentence as did every expert: after age 100, $4,000,000 is the Surrender Value, is consistent with all the Policy language, gives meaning to all Policy language, is consistent with the reasonable expectations of a lay reader, is devoid of hidden "gotcha's," and is consistent with Delaware public policy.

In contrast, the Court-below's reading relies on a misreading of the definitions as referring to a "Death Benefit *revision*" (which they do not), creates irreconcilable

[16] The Surrender Value was owned by and available to Plaintiff at any time. PMSJAppx A578, 596-7(D.I.151).

conflicts with the Non-Termination Clauses of the Policy, finds the Policy to be a term policy despite it containing no term language, is in irreconcilable conflict with other definitions (i.e. Face Amount "is used to determine Death Benefit"), enforces a contract which violates Delaware public policy, an*d finds the an insurance policy can terminate the insurance without ever once stating directly that the insurance terminates on occurrence of the event.* The Court-below also renders the sentence after the Beyond 100 Sentence meaningless. That clause resets "Surrender Value" as the Surrender Value at 100. If, as the Court-below concluded, Surrender Value continued as before (in contrast to being redefined by the preceding sentence), the next sentence would be unnecessary.

The Court's interpretation is a poster child for a fine print pitfall, terminating insurance by the artifice of redefining the insurance benefit into something *of no additional value, which is not insurance, and which the consumer already owns*. Indeed, why would the Policy tout that *the premiums end at age 100*, except to highlight that the insurance did not? No reasonable person would expect and no reasonable insurer would suggest that premiums would be due for insurance that had terminated.

(c) Even If The Beyond 100 Sentence Terminates the Insurance, Plaintiff is Entitled to Judgment on the Contract claim.

Even if the Court-below is correct in its interpretation of the Beyond 100 Sentence, that language is hopelessly in conflict with the definitions (i.e. under the Court-below's interpretation Face Amount not used to determine Death Benefit) and the Non-Termination Clauses, and *contra proferentum* dictates the conflict be resolved in favor of the Plaintiff. *Steigler* at 400. The Court-below improperly restricted its consideration of *contra proferentum* to whether there was an ambiguity within the Beyond 100 Sentence only and did not consider conflicts with other Policy language. *ConAgra* at 69; *Pacific at 1256, fn.37*. Further, even assuming the Court-below's interpretation of the sentence is correct, public policy, 18 Del.C. §2927, prohibiting settling life insurance contracts at maturity for less than Face Amount, requires that the sentence not be enforced. E.g., *O'Brien*, supra.; *Horizon*, supra.

II. The Court-below Erred In Denying Plaintiff and in Awarding Defendants Summary Judgement on Counts III, VIII and IX under the DCFA.

A. QUESTION PRESENTED

Whether Plaintiff should be awarded, and the Defendants denied, summary judgment on the DCFA claims? (Preserved at D.I. 146 at 8-12 (A30), D.I. 169 at 5-8, 10-11 (A37)).

B. SCOPE OF REVIEW

The standard and scope of review as to a Court's grant of summary judgment and interpretation of a law is de novo. *Lank*, supra.

C. MERITS OF ARGUMENT

1. The DCFA Applies to the Sale of a Consumer Insurance Policy.

Delaware Consumer Fraud is the act, use, or employment of deception, … misrepresentation, or the concealment, suppression, or omission of material facts in connection with the sale of merchandize with an intent that the consumer rely upon such and damages. 6 Del.C. § 2513 ("DCFA"). In *Whaley* at 70, this Court expressly held that a claim involving the sale of an insurance policy was actionable under the DCFA. The Court-below does not discuss *Whaley*.

The Court-below held Plaintiff had no remedy under the DCFA because of 6 Del.C. §2513(b)(3) which states "[t]his section shall not apply: … [t]o matters subject to the jurisdiction of the Public Service Commission, or of the Insurance

Commissioner …". However, as noted in *DiSimplico v. Equitable Variable Life Ins.* Co., 1988 WL 15394 at * 4 (Del.Super. Jan. 29, 1988) and *Mentis* at *6, the jurisdiction of the Insurance Commissioner "does not relieve or absolve any person … from any other liability … [and] shall not be deemed to affect or prevent … any penalty provided … by other law …". 18 Del.C. § 2308(f)-(h). The legislature did not exempt "insurance" from the broad definition of merchandise (6 Del.C. §2511(6)) which is what the Court-below concluded and obtaining damages for an individual injured by fraud in the sale of insurance is consistent with the broadly remedial purpose of the DFCA, something not shown to be withing the jurisdiction of the Insurance Commissioner.

The Court-below concluded this Court's one sentence summary affirmance in *Price v State Farm Mutual Auto. Inc. Co.*, 77 A.3d 272 (Del. 2013) exempted all insurance from the DCFA because the decision-below summarily affirmed had as an alternate ground for one holding that the DFCA did not apply to insurance. Opinion 24. Respectfully, Plaintiff is unaware of any decision of this Court overruling its prior precedent by means of a one sentence summary affirmance of a trial court decision that did not cite the precedent purportedly overruled and which stated multiple grounds for the ruling below. The federal cases also cited in the Opinion on this point, *Christiana*, supra. and *Amguard*, supra, do not cite or discuss *Whaley*, involved challenges *to the benefits paid* (not the means used to obtain premiums),

relied on alternative holdings, and, even then, noted the trial court decision affirmed in *Price* was against the weight of Superior Court authority as to the DCFA. *Christiana* at *7.

The Court-below's alternate conclusion that the sale of merchandise to a Delaware resident based upon representation sent to the Delaware resident might somehow be exempt from the DCFA if the merchandise is issued outside Delaware,[17] was not argued below and is not supported by any legal analysis. The DCFA applies to any commerce conducted "in part or in whole" in Delaware. 6 Del.C. §2512; *Nieves v. All Star Title, Inc.*, 2010 WL 2977966 at *4 (Del.Super. July 27, 2010).

As to Count IX the Opinion does not discuss the undisputed evidence that Voya used its name or combined unregistered trade names, i.e. "ING Southland" or "ING Security Life," to handle Customer Service, illustrations, and payments under the Policy. PMSJAppxA249-257, 894-1149) (D.I. 151); (A106-257). PMSJ Table 3 (D.I.146). This was undisputed and implied Voya (formerly ING) was an insurer, a deceptive practice under 18 Del.C. §2304(9). Even Defendants' agent thought so. PMSJAppx A282 (D.I.151). At a minimum, it created a material dispute of fact precluding judgment for Defendants.

[17] The Opinion properly interpreted the Policy under Delaware law. Opinion 14-15. PMSJ 4 n.9 (D.I.146); PMSJreply 2 n.3. (D.I.184).

2. The Pre-issuance and Post-issuance Illustrations Were Made With the Intent to Have a Consumer Rely Upon Them in Making a Purchase Decision.

The Court-below erred legally and factually in concluding the illustrations could not be actionable on the ground that they were made post-issuance of the Policy and therefore could not have be in connection with the sale or advertisement of merchandise. Factually, two illustrations were pre-issuance. Legally, matters post-issuance were on connection with the sale and advertisement of the insurance. 6 Del.C. §2513(a) states the DCFA applies to wrongful acts "in connection with the sale… or advertisement of any merchandise." Indisputably the illustrations were intended to inform Plaintiff's decisions about the operation of the Policy and future premium payments *which were not contractually fixed or required*. E.g., A-62; POSLDMSJAppx A1846 (D.I.174). This Court in *LCT Capital, LLC v. NGL Energy Partners, LP*, ___ A.3d. ___, 2021 WL 282645 at *12 (Del. Jan. 28, 2021) cited with approval the decision in *Lewis v. Citizens Agency of Madelia, Inc.*, 235 N.W.2d 831 (Minn. 1975) which recognized an action lies for "statements that the [insurance] policy would provide [a beneficiary] with that sum on her husband's death and [resulted in] … continue[d] premium payments …". *Id*. at 834.

Under the DCFA, Plaintiff is not required to show actual reliance.[18] *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Nor is there an "innocent mistake" exception to the DCFA, even had one been shown. The only intent required is the intent that the consumer rely upon the statement, something not disputed below. *Id*. Damages are undisputed. The Court-below improperly gave the Defendants a free pass to have made any misrepresentation whatsoever in the illustrations without any legal consequence.

3. All Pre-issuance and Post-issuance Illustrations Indisputably Were Deceptive, Misrepresentative and Omitted Material Facts.

As noted in Table 2 (A-79-94) every illustration contains a material misrepresentation and/or omission. Defendants never identified any error in this chart and never explained how the identified items were not misrepresentations or omissions. Contrary to Defendants' claim, ending a chart at a particular year does not suggest future values are $0 thereafter. *Mentis* at *5 (instead such future information has been "omitted"). Defendants own witness admitted it was misleading to end a chart before showing all changes in the Death Benefit. (E.g., PMSJAppx A571-2, 574.)

[18] Nonetheless, the evidence is that Plaintiff's trustee reduced premiums to the minimum needed to keep the Policy in force after the chart was issued suggesting Defendants would not pay the $4,000,000 after age 100.

III. Material Disputes of Fact Exist as to the Unconscionability, Unjust Enrichment, and the Bad Faith Breach of Contract Claims.

A. QUESTION PRESENTED

Whether Defendants were entitled to summary judgment on Plaintiff's unconscionability, unjust enrichment and bad faith breach of contract claims? (Preserved at D.I. 169 at 4, 8-12 (A37)).

B. SCOPE OF REVIEW

The standard and scope of review as to a Court's grant of summary judgment and interpretation of a law is de novo. *Lank*, supra.

C. MERITS OF ARGUMENT

1. A Dispute of Material Fact Exists as to The Unconscionability Claim.

This claim is in the alternative to the breach of contract and reformation claims. The Opinion at 30 mischaracterizes this claim as premised "simply [upon] the death benefit chang[ing] from the face amount to the surrender value at age 100, a term explicit in the policy that the Trust shopped for and chose in a free market." This conclusion was an error.

To conclude that finding that the policy *explicitly* changes "the face amount to the surrender value" is wrong, one need look no further than the actual Policy language which makes no such explicit statement. Indeed, "Face Amount" explicitly

states it will be used to determine the Death Benefit. The Opinion should be reversed on these grounds alone.

The Court-below also mischaracterized the unconscionability claim. Unconscionability is both procedural and substantive, involving disparate bargaining power and whether the actual terms "shocks the conscience". *Chemours Co. v. DowDuPont Inc.*, 2020 WL 1527783 at *12 (Del.Ch. March 30, 2020). An insurance contract is a contract of adhesion, where taking unfair advantage is evidence of unconscionability. *Graham v. State Farm*, 565 A.2d 908, 912 (Del. 1989) Unconscionability rests on the totality of the circumstances, not just the four corners of a contract. *James v. National Financial, LLC,* 132 A.3d 799, 814 (Del.Ch. 2016). Here, Plaintiff was not shown the Policy until it was purchased, was told a retroactive payment of $187,500 was required, was shown and signed for illustrations stating the Death Benefit was $4,000,000 and would be paid at death and was never told there was any age limitation. Settling a life insurance contract at maturity for less than the face amount is against public policy.

Further, the supposedly operative sentence is deceptive, designed to make a termination look like something else. What honest person would call something a "Death Benefit" when they designed the redefinition language to eliminate every benefit arising from the death of the insured? A jury easily could find a buried confusing sentence, further hidden by misleading illustrations until almost $3

million in premia had been paid leaving the insured no alternatives is an unconscionable result. *Id*.; *Tulowitzki v Atl. Richfield Co*., 396 A.2d 956, 960 (Del. 1978).

2. The Unjust Enrichment Claim Is Not Premised Upon the Policy Contract.

The Opinion at 32 mischaracterizes this claim as controlled by and based upon the Policy contract. This conclusion was an error. "[U]njust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Reserves Development LLC v. Severn Sav. Bank, FSB*, 2007 WL 4054231 at *10 (Del.Ch. Nov. 9, 2007), aff'd 961 S.2d 521 (Del. 2008). Here the measure of the injury is not Plaintiff's alleged contract rights, but instead is the amounts Plaintiff paid to Defendants and unjust enrichment is available. *Id*.; *Biomedical Corp. v. TM Tech., Inc*., 1995 WL 130743 at *15 (Del.Ch. Mar 16, 1995).

The claim of unjust enrichment arises from the misrepresentations in the illustrations, which are not part of the contract, as the Opinion recognizes in analyzing the contract claims. The Court-below's decision is that an Insurer can make misrepresentations effecting premium payments with impunity. The unjust enrichment arises because, assuming the contract did not provide for a $4,000,000 death benefit at any age, the Defendants provided illustrations to the Plaintiff which stated that the $4,000,000 death benefit would be paid at any age, including after age

100. The Policy was sold on this basis and Defendants collected in excess of $3,000,000 in premiums before they ever suggested that the $4,000,000 might not be available after age 100. By that time Plaintiff had no choice but to continue with the Policy as no alternatives were available.

3. A Dispute of Material Fact Exists As to The Bad Faith Breach of Contract Claim.

The Judgment's conclusion that there was no breach of contract to support a claim of bad faith breach is in error for the reasons stated herein. The Opinion further concludes that even if the Court is in error about the meaning of the Policy, because the Court-below accepted Defendants' contract interpretation, no jury could find bad faith. This ignores that Defendants admittedly conducted no investigation and obtained no legal advice to support their refusal to pay, based their refusal on a clause barred by public policy and erroneously substitutes a judge's personal conclusion for that of a trier of fact, invading the province of the jury. *Storey* at 465: *Ellingsworth* at 1095. Defendants were unable even to identify any individual who participated in the denial decision and waited over a decade (and $3,000,000 in premiums), before even revealing their position. These facts support the conclusion that Defendants acted to frustrate implementation of the Policy's terms. See authorities cited Opinion 21. These facts raise questions of bad faith for a jury to decide. *Tackett* at 265; *Pressman*, at 445-447.

IV. The Remainder of the Judgment As It Relates to Plaintiff's Claims Should be Vacated.

A. QUESTION PRESENTED

Whether the remainder of the Judgment finding Plaintiffs' Motion for Summary Judgment as to Defendants' Affirmative Defenses was moot and issuing dicta on claims as to which it concluded it had no jurisdiction should be vacated? (Preserved at D.I. 147 at 1-11 (A30)).

B. SCOPE OF REVIEW

The standard and scope of review as to a Court's grant of summary judgment and interpretation of a law is de novo. *Lank*, supra.

C. MERITS OF ARGUMENT

1. Plaintiff's Motion as to Defendants Affirmative Defenses is Not Moot.

The Court-below's mootness decision rests upon the viability of its decisions on the merits. As noted above, these should be reversed. As a result, the mootness decision is without basis and should be vacated.

2. Dicta as to Claims Over Which A Court Has No Jurisdiction Are Void and Should Be Vacated.

While the Court-below declined to rule on the reformation counts for lack of jurisdiction, Opinion 28-29, it dropped footnote 115 commenting on the merits of the claims. This Court should vacate that dicta. E.g., *State v. Kamalski*, 429 A.2d

1315, 1320 (Del.Super. 1981) (judgment of a court without jurisdiction is void.). Further, that footnote is premised upon a disregard of the facts noted above which show, Defendants writings show they were "mistaken:" specifically, issuing "mistaken" illustrations before the Policy was issued; issuing "mistaken" illustrations after the Policy was issued (which reveal their beliefs at the time of issuance); or, alternatively, knew of (and indeed caused) Plaintiff's misunderstanding based upon the illustrations and acted inequitable by providing them.

CONCLUSION

For the foregoing reasons, the Judgment should be reversed and the matter remanded with instruction to enter judgment for Plaintiff for: (a) on the breach of contract Count I in the amount of $4,000,000 plus interest at the Delaware legal rate from the date of the Insured's death, and (b) on the DCFA counts III, VIII, and IX in the amount of $7,230,253 plus interest at the Delaware legal rate from October 15, 2019; and for further proceedings on Plaintiff's other claims in the Second Amended Complaint. Dicta as to claims over which no jurisdiction was exercised, should be vacated.

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