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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 REPLY BRIEF

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SUMMARY OF ARGUMENT

1. Plaintiff Below-Appellant, The Olga J. Nowak Irrevocable Trust's ("Trust" or "Plaintiff") Opening Brief ("OB") identified Policy language in the $4,000,000 life insurance policy ("Policy"), insuring the life of Olga Nowak ("Insured"); which (a) provided a minimum $4,000,000 death benefit regardless of the Insured's age; (b) was unaddressed by the Court-below and cannot be reconciled with its Judgment; or (c) was misread by the Court-below. Defendants Below-Appellees Security Life of Denver Life Insurance Company, and Voya Financial Inc. ("Voya"), its parent, ("collectively "Defendants") Answering Brief ("AB") does not discuss that language, and largely fails to address Plaintiff's arguments.

2. Defendants' never address the facts that concluding only Surrender Value was owed at death: (i) conflicts with the requirement that Face Amount be used to determine the Death Benefit (at least $4,000,000)[1]; (ii) "terminates" the insurance coverage in conflict with at least two other provisions; (iii) is premised upon a misreading of the Policy language; or (iv) makes the Policy a term policy when no term is stated. Under Defendants' interpretation, the Policy: (a) uses a hidden fine-print trap to terminate coverage by providing an illusory benefit (the Surrender Value was already owned), (b) settles the Policy at maturity for less than the Face Amount

[1] Defendants waffle between claiming Death Benefit means $4,000,000 and complaining that Plaintiff improperly makes that claim. AB-2, 7, 20.

violating Delaware public policy; and (c) creates conflicts in the Policy language. Defendants' denial fails because it relies on illogic and mischaracterizations, i.e. claiming "other Policy provisions" (never identified) support the result. AB-19.

3. Defendants acknowledge that to affirm, this Court must find the Policy language unambiguous. Nonetheless, the Answering Brief devotes itself largely to discussing disputed extrinsic statements about the Policy's meaning; "facts" admittedly irrelevant to a "four corners" analysis (AB-23). Defendants contractually waived any right to use such statements. Further, because their "facts" are disputed, if their consideration is needed, summary judgment was inappropriate.

4. Defendants ignore this Court's precedent, *Grand Ventures, Inc. v. Whaley*, 623 A.2d 63 (Del. 1993) ("Whaley"), expressly recognizing the Delaware Consumer Fraud Act ("DCFA") applies to sales of insurance policies.[2] Defendants never discuss the language in the illustrations showing the $4,000,000 death benefit was payable after age 100, relying instead on generic denials. Defendants do not dispute that: Plaintiff's initial premium purchased insurance for only one year; additional annual payments were required to purchase additional insurance; and the Policy did

[2] Defendants only include cite it as subsequent history to 622 A.2d 655 (Del. Super. 1992).

not require such. AB-35. Defendants' *ipse dixit* assertion that subsequent premiums were not in connection with the sale of insurance is unsupported.

5. Defendants do not deny the misrepresentations and omissions in the post-1998 illustrations. Instead, they argue such were innocent mistakes, not relied upon by the Plaintiff. Such evidence does not exist, but even if it did, it would be irrelevant as the DCFA requires neither an intent to deceive nor reliance. OB-39.

6. Defendants assert that the claims for unconscionability, unjust enrichment and bad faith breach "cannot survive the disposition of [plaintiff's] primary claims" but acknowledge that the proper standard to evaluate those claims is whether there are any factual disputes precluding their disposition on summary judgment. Defendants never address those facts.

7. Plaintiff denies Defendants' standing and limitations challenges. (Number 18). Defendants never presented standing below. That this Court could raise the issue *sua sponte*, does not permit to Defendants to raise it. The argument is meritless. Defendants cite no Delaware case where a trust was found to lack standing to sue for breach of a contract to which it was a party, to sue for consumer fraud in connection with a sale to it, nor to pursue unconscionability or unjust enrichment claims. There is none. Even were the Trust not a proper plaintiff, the trustee ratified this action and, if required, the remedy is to have him intervene. Defendants' claim

"many [unspecified] … claims" are barred the statute of limitations, is not properly presented nor did they appeal the failure to grant their limited motion-below on that ground. Plaintiff established below the argument is without merit. AR-0060.

8. Plaintiffs request that this Court vacate the Court-below's dismissal of Plaintiff's motion regarding Defendant's Affirmative Defenses on mootness grounds, if the Judgment is reversed. Defendants do not dispute that result. AB-42.

9. Defendants oppose Plaintiff's request to vacate a footnote in the Judgment commenting upon the merits of claims to which the Court-below determined it lacked jurisdiction. The footnote was not an alternative holding as Defendants claim nor could it be as, without jurisdiction, the Court could not rule substantively. OB-44-45.

REPLY STATEMENT OF FACTS

A. Introduction

Plaintiff relies without repetition on the facts and arguments in its Opening Brief. Supreme Court Rule 14(c)(i).

The Judgment on the Contract claims can be sustained only if the Policy unambiguously terminates the minimum $4,000,000 insurance coverage. Defendants, however, devote only little of their statement of facts to Policy language (and none to the language of any illustration).

Instead, Defendants set forth admittedly irrelevant facts seeking to establishing that prior to 2011 (12 years after Policy issuance) Plaintiff knew or should have known and understood Defendants' interpretation of the Policy: that the insurance terminated at age 100.[3] AB-5-6, 9-14, 23(admitting "a lay witness's (sic) contract interpretation … has no legal effect."). These facts are not pertinent to any contract or DCFA claim. Under a four corners analysis, extrinsic facts are irrelevant. OB-4. The DCFA requires neither reliance nor intent to deceive. OB-39 and authorities cited therein. Further, Defendants are contractually barred from using any statement outside the Policy against the insured. A-60. Another promise broken.

[3] Plaintiff uses "age 100" synonymously with "attained age 100."

To the extent this Court finds Plaintiff's knowledge or actions pertinent, the facts are disputed, and the Judgment should be reversed as disputed material facts preclude summary judgment. OB-4. Plaintiff provided evidence that: (1) before 2010, Plaintiff was never told and never understood the Policy *might not* provide insurance after 100, at which time Defendants' agent assured it the insurance would continue, (2) Plaintiff was never informed of Defendant's interpretation of the policy until 2011, when reducing Policy premiums was the only viable option, (3) Plaintiff was never shown any illustration for any other policy, (4) the texts of the illustrations always said $4,000,000 would be paid at death regardless of age, and (5) the tables in the illustrations did not change because of some unknown computer glitch. OB-15–16, 20–21, 22–28.

Indisputably: (1) Defendants' agent acknowledged the pre-issuance illustrations do not state the insurance ended at 100 and that the only document purportedly so informing Plaintiff was the Policy, OB-24, (2) Defendants' witness acknowledged that under their Policy interpretation, every illustration was misleading. OB-22.

This evidence precludes any award of summary judgment against Plaintiff based upon Defendants' contrary "facts."

B. Irrelevant Facts Which Defendants Mischaracterize

Although irrelevant, Plaintiff responds to Defendants' "facts" lest they claim such were undisputed. Not only are they disputed, but Defendants concede the Policy specifically waives Defendant's ability to use *any statement outside the application* against Plaintiff. OB-20–21, 31. The very purpose of this clause is to protect policy owners from the types of *ex post* attacks seen here.

Plaintiff's trustee testified only that he did not read the Policy "word for word from beginning to end." BA-271. Defendants claim that Plaintiff was interested "only" in price and the insurer's financial strength. AB-5. Plaintiff's trustee however testified "[m]y main focus was the death benefit." B263. He stated he did not ask for or receive multiple quotes on various policies. B264.

Plaintiff's trustee did not understand insurance ended at 100 nor did his understanding arise simply by reading the policy.

> Q.[McDowell]. Where did you gain your understanding that as reflected in paragraph three.
>
> A. Well, as I said earlier, when this illustration came in, and I had a discussion with my CPA, I became concerned and dug down into this policy and reread it, read it and reread it in detail. I had to read it several times and I still didn't fully understand the policy and this whole issue of living beyond 100.
>
> Q. … In this paragraph three reflects the understanding and came away with. Correct?
>
> A. I'm questioning it.

***

> Q. … based on your reading of the policy, your understanding of what the policy says is reflected in paragraph number three?
>
> ***
>
> THE WITNESS: Based on my reading of it and being confused about it, I wanted his opinion." B-344–345

Defendants mischaracterize a February 2011 customer service call. BA-687. In it, Plaintiff received *inaccurate* information. Defendants repeatedly distinguish between the "insurance" and the "Policy" with the Policy (but not the insurance) continuing after 100. AB-21. The representative, self-identified as an "ING" (Voya's predecessor) employee, advises that the ***Policy*** (not the insurance) was dead and ends at age 100. No party asserts that is correct. Whether any Nowak family member had lived past 86 was not discussed until after the possibility of the insurance terminating at 100 was raised, in 2011. B-265.

Defendants mischaracterize an August 2015 email to the beneficiaries. The Trustee wrote he was only "pretty sure" he understood and had asked an insurance expert to confirm. AB-13. That insurance expert did not. When asked whether his continuing communications with the trustee "were based on the assumption that the policy would no longer provide the $4 million benefit after attained age 100. …" the expert responded: "No, I would not say that." AR-0010.

The remainder of Defendant's "facts" seek to exploit an imagined bias in this Court. Whatever one might think of gallows humor, they were made when Plaintiff's trustee was under extreme duress and have no relevance.

To avoid the undisputed facts that Defendants' agent Wilcock: told the Plaintiff *in writing* $4,000,000 would be paid after at death after 100 (just like Defendants' illustrations); admitted he never provided Plaintiff any writing saying the $4,000,000 would end at 100; and *that in 2004* Wilcock confirmed with Defendants that illustrations showing $4,000,000 at age 110 were accurate (OB-24-26), Defendants seek to disown Wilcock; relying on an unauthenticated "screenshot," withheld from production until discovery was complete, to "establish" Wilcock was no longer their agent as of 2011. Not only is this "information" inadmissible (AR-0051), it is wrong. Defendants' illustrations list Wilcock as the servicing agent during 2012-2015. A-193-238. Defendants do not disown their agent, Wetherell.

Citing B-953, Defendants claim they disputed Plaintiff's damages calculations. AB-36. B-953 presents no alternate calculation of Plaintiff's damages.

ARGUMENT

I. Plaintiff Is Entitled to Summary Judgment for Breach of Contract.

A. QUESTION PRESENTED

Whether Plaintiff should be awarded summary judgment for breach of contract?[4] A-30.

B. SCOPE OF REVIEW

The standard and scope of review of a grant of summary judgment and interpretation of a contract is *de novo*. *Lank v. Moyed*, 909 A.2d 106 (Del. 2006) ("Lank").

C. MERITS OF ARGUMENT

1. Defendants' Concede Critical Flaws In The Judgment As To The Contract Counts.

Plaintiff cited authorities holding that insurance contracts are interpreted to accord with the reasonable expectations of a purchaser not versed in insurance law, that limitations on or exclusions from coverage must be crystal clear, and that confusing or ambiguous language is construed against the insurer. OB-29–31. This Court recently reaffirmed such principles stating:

> Insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectation. … Courts

[4] Awarding Plaintiff summary judgment on its claims automatically denies Defendants judgment on those claims.

> will interpret exclusionary clauses with a strict and narrow construction and give effect to such exclusionary language only where it is found to be specific, clear, plain, conspicuous and not contrary to public policy." *RSUI Indemnity Company v Murdock*, ___ A.3d ___, 2021 WL 803867 at *13 (Del. 2021) ("*RSUI*") (internal marks omitted).

Only when the absence of coverage is "clear and unambiguous" giving effect to all policy language while construing the language "most strongly against the insurance company" will coverage be denied. *Id*. Defendants assertion (AB-16) that insurance policies are interpreted no different than any other contracts is wrong. *Id*.

Defendants concede that the Judgment finds the insurance coverage, but not the Policy, terminated at age 100: excluding insurance coverage after age 100. E.g., AB-21. Defendants ignore many of Plaintiff's arguments, implicitly conceding the Judgment is inconsistent with the Policy language. A failure to address issues in an answering brief may be considered a waiver or concession of an issue. *Woods v. Woods*, 146 A.3d 357 at*2 (Del. 2016); *Hancock v. Citifinancial, Inc.*, 878 A. 2d 461 at *2 (Del. 2005). Irreconcilable provisions raised by Plaintiff but unaddressed by Defendants, include, the:

(a) section under the heading "**GENERAL PROVISIONS**" titled "**Termination**" stating "This *insurance* will terminate on the first to occur of one of these events …" none of which is attaining age 100. A-62 (emphasis added). No such event occurred.

(b) section under the heading "**PREMIUMS & REINSTATEMENT**" titled "**Continuation of Insurance**" stating "*Insurance* automatically continues in force … as long as the Surrender Value is sufficient to cover each Monthly Deduction …". A-54 (emphasis added). It was.

(c) definition of "Face Amount" stating in part "The Face Amount is used to determine the Death Benefit." The Face Amount is $4,000,000. Plaintiff does not claim, as Defendants assert, that the Death Benefit *always is* $4,000,000, only that $4,000,000 must be used *in determining* that benefit. Unable to explain how Face Amount is used to determine Surrender Value after 100, because they cannot, Defendants concede they claim Face Amount is not "available" after 100. AB-17, 20.

(d) provision which states "Insurance under this Policy takes effect at 12:01 a.m. on the Policy Date shown …" without providing any termination date. Nowhere else does the Policy provides any term or termination date for the insurance. A-52. Defendants claim the insurance had a term of 17 years.

(e) Statement of Policy Cost and Benefit Information, to which Defendants refer (AB-19), which states "PREMIUMS ARE PAYABLE UNTIL AGE 100. THE DEATH BENEFIT IS PAYABLE UPON THE INSURED'S DEATH WHILE YOUR POLICY IS IN FORCE…" and includes a chart listing "DEATH BENEFIT"

of "$4,000,000.00" after year 17 (age 100). A-98. There is no language even arguably redefining "Death Benefit" in this document.

Defendants never address the Court-below's misreading of "Death Benefit ***provision***" as "Death Benefit ***revision***." A-58, OB-7.

Defendants note "Death Benefit" is not synonymous with "Face Value" but fail to complete the analysis. "**Death Benefit**" (A-58) states "The Death Benefit *equals to the larger of*: 1. the Face Amount; or 2. a multiple of the Accumulation Value on the date of death." A-58 (emphasis added). No party contends alternate "2" applies here. So, on these facts, "Death Benefit" means $4,000,000.

2. When Addressed, Defendants Misconstrue the Policy.

While Defendants claim (AB-17) the "Policy clearly and consistently states that the $4 million face amount was available only until attained age 100.", they never identify anything stating: "Face Amount is available only until age 100," "$4,000,000 is available only until age 100," or "no insurance coverage is available after age 100." It does not exist. Defendants rely *on a single sentence* which says nothing about $4,000,000, Face Amount, insurance, or termination. If that sentence were removed from the Policy, no other language even arguably supports their interpretation.

Defendants' complaint that "Plaintiff points scattershot to other parts of the Policy" is hardly criticism. Contract interpretation requires reference to *all Policy language*. *RSUI.* The scope of the "scattershot" is a reflection of the Judgment's improperly narrow focus.

Defendants claim the "Termination" and "Continuation of Insurance" clauses do not refer to insurance but only define "when the Policy may terminate." AD-21. That is false. They specifically use the word "insurance" establishing the Insurance and Policy as coterminous. [5]

Defendants argue the Policy Proceeds section contains "two key provisions" AB-17. Elevating those two as "key clauses" requires that other stylistically and linguistically equal sections in the Policy Proceeds provision be subordinated, and manufactures a non-existent parallel between those two sections, such that one controls all payments before 100 and one controls all payments after. AB-17.

Defendants ignore four other stylistically equal sections in the Policy Proceeds provision. Why the section titled "Death Benefit" is of lesser dignity than another section, particularly regarding the meaning of death benefit, is never explained. Defendants assert "Death Benefit" is solely part of the "Before 100

[5] Defendants tax comment is unclear and was never raised before.

Section." It is not. The structure and language of the Death Benefit section, as well as the other definitions, dictate that it applies to all other sections.

Another section in Policy Proceeds (also not under the "prior to 100" heading), "Coverage Termination Prior to Attained Age 100," explains of how "coverage" can terminate; only due to events prior to age 100. There is no reference in that section, or the "Beyond 100 Section" to termination of coverage after age 100. This is consistent with the Termination and Continuation of Coverage sections, discussed above, which make clear termination of coverage after age 100 was not possible; a condition the Accelerated Benefits Rider calls "paid up insurance status." A-72.[6] According to Defendants, there is no such status. Defendants cannot explain why the Policy would clearly delineate when coverage could terminate before age 100, using the phrases "coverage will terminate" and "insurance … continues" but would not for a supposed termination at age 100.

Defendants are incorrect in claiming Surrender Value must be a fixed term in the "Beyond 100 Section." AB-18. The sentence "1" of that section changes the definition of Surrender Value at Age 100. Sentence "2" using that redefined amount (here $4,000,000) states Surrender Value is increased and decreased as before. A-

[6] That at 100 the death benefit was "guaranteed" is meaningless rhetoric. At 100, all payments had been made and Defendants had received $7,200,000 in value.

58. Were Surrender Value unchanged by sentence "1," there would be no need for sentence "2".

The "Proceeds" definition is entirely consistent. It states "proceeds are the sums we … pay while this Policy is in force. We will pay the following: 1. Death Benefits Proceeds upon the death of the Insured; or 2. Surrender Value upon the surrender of the policy." A-52. Were Surrender Value the only thing payable after age 100, "Proceeds" would have so stated.

Neither the titles nor the language of the supposedly "key sections" are parallel. The first is titled "Proceeds Payable at Death Prior to Attained Age 100" ("Before 100 Section") and the second is titled "Continuation Beyond Attained Age 100" ("After 100 Section"), referencing neither "Proceeds" nor "payable at death." The "Before 100 Section" states: "We will pay the Death Benefit Proceeds … on receipt of proof that the Insured died …" and specifies the manner of payment. The "After 100 Section" never mentions anything about payment, "Death Benefit Proceeds," "Policy Proceeds," or "Proceeds Payable."

The "Beyond 100 Section" discusses the "Policy," not the "insurance." Defendant's interpretation is that a section which does not discuss "insurance" (something distinct from the "Policy") and which says nothing about termination of anything, has the effect of terminating the insurance. This is a hidden trap.

Defendants claim the "After 100 Section" is "incorporated" in the definitions of "Death Benefit" on page 7 and 15 and of "Face Amount" on page 8. This also is incorrect. The reference in the "Death Benefit" definition is to the specific "Death Benefit" provision on Policy page 15. The "Face Amount" definition references the defined term "Death Benefit" (on the cited page 15 of the Policy Proceeds provision) which explains how Face Amount is "used to determine the Death Benefit" - minimally the Face Amount. Contrary to Defendants' claim, nothing states the Policy Proceeds Section exclusively defines what benefits are payable and when.

3. Defendants Non-Policy's Language Arguments Also Fail.

The "at-issuance" illustrations (AB-25) were pre-issuance. A-80. Were they part of the contract, which they are not, they say nothing about coverage ending at 100 or the death benefit converting to surrender value. They list the death benefit as "$4,000,000" and state it is "a level death benefit described as Option A in the policy. … The actual amount payable at death, or Net Death Benefit, may be decreased by policy withdraws or outstanding loans plus any unpaid loan interest (debt), or increased by additional insurance benefits purchased." A-101. There is no termination at age 100.

Defendants agree that the Policy "matured" at age 100, meaning no further premiums were due. Public policy (established by 18 Del.C. §2927(a)(2)) prohibits

settling life insurance at maturity for less than the amount insured. Plaintiff is not claiming "statutory liability" but instead asserts the settled principle that the contracts in violation of public policy as stated by the Legislature are unenforceable. OB-30-34 and authorities cited therein. Despite repeatedly stating the insurance coverage ended at age 100 (e.g., AB-3, 6, 9), Defendants attempt to finesse this argument by claiming it did not. "The dispute here is about what amount *was* insured after age 100." AB-25. As Defendants repeatedly acknowledge, Surrender Value is not insurance.

While Plaintiff believes the Policy language unambiguously provides $4,000,000 of insurance after age 100, if any language is found to be inconsistent, the Policy is ambiguous, and *contra proferentum* dictates that coverage be found. OB-34. Defendants' claim that this argument was not made in the Opening Brief, is simply wrong.

Without citing any authority, Defendants incorrectly assert that because the Policy form was submitted to the Department of Insurance, it must be interpreted as Defendants seek. There is no evidence of the Department of Insurance's interpretation. There is no basis, factually or legally, to conclude some regulatory process endorsed Defendants' interpretation nor that, even if such existed, it would be persuasive or binding in this Court.

Defendants presented neither an appropriate choice of law analysis, nor any Virginia authorities, Defendants' alternative. As they concede Virginia law is "identical to Delaware law on these issues," Defendant's footnote (AB-16) regarding Virginia law is neither a proper presentation of argument nor persuasive. *CALPERS v. Alvarez*, 179 A.3 824, 855 (Del 2018). Delaware law applies to life insurance applied for by and insuring the life of a Delawarean. Restatement (Second) Conflicts of Laws §191; *Clark Equip. Co. v. Liberty Mutual*, 1994 WL 466325 (Del. Super. Aug. 1, 1994).

II. Plaintiff Is Entitled to Summary Judgment on the DCFA Claims.

A. QUESTION PRESENTED

Whether Plaintiff should be awarded summary judgment on the DCFA claims? A-30.

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 Existence of Pre-issuance Illustrations and the Misrepresentations and Omissions Identified in Every Illustration (A80-97) Are Unchallenged.

The Defendants acknowledge pre-issuance illustrations, conceding the Court-below erred in finding no illustrations predated issuance. AB-34. Opinion-26. Defendants' claim that the pre-issuance illustrations are not actionable because they say nothing about a $4,000,000 Death Benefit after age 100 is legally and factually flawed. First, omissions are actionable under the DFCA. OB-35. Defendants' witness conceded omitting a change in the Death Benefit was misleading. OB-22 and record citations therein. Second, both illustrations say the Death Benefit as $4,000,000, payable at death (with no age limitation) and one charts a $4,000,000 benefit after year 17 (after age 100). Neither has a "Beyond 100 Section."

Defendants never disputed the identified misstatements and omissions in Plaintiff's Table 2, nor could they. E.g., "death benefit Type A [the type in the Policy] is available after age 100". A80-97.

2. Consumer Fraud in the Sale of Insurance is Actionable.

"[O]nce an issue of law has been settled by … this Court, it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside …". *Shuba v. United Servs. Automobile Association*, 77 A.3d 945, 949 (Del. 2013) (internal marks omitted). When "the Supreme Court has clearly spoken on a question of law necessary to deciding the case before it…" that ruling is precedent. *In re El Paso Pipeline Partners, LP. P. Derivative Litigation*, 2014 WL 2768782 at *21 (Del. Ch. June 12, 2014). "[J]udicial statements on issues that would have no effect on the outcome of the case … [are] dictum and without precedential effect." *Id.*

Grand Ventures, Inc. v. Whaley, 632 A.2d 63, 64 (Del. 1993) ("*Whaley*") "stem[ed] from an insurance policy that [plaintiff] purchased from defendant …". This Court held the plaintiff had a case for 'fraud remedied by an action … under the Consumer Fraud Act, … for damages." *Id*. at 70. *Whaley* has not been overruled. Although Plaintiff cited *Whaley*, Defendants ignore it, implicitly conceding they

cannot reconcile their argument with *Whaley*. Defendants' authorities, which do not discuss *Whaley*, are addressed in Plaintiff's Opening Brief.

3. The Illustrations Are Actionable "In Connection With" A Sale.

Mischaracterizing the contract, Defendants claim that illustrations after Policy issuance cannot be "in connection with" a sale as required by 18 Del.C. §2513. However, each annual premium purchased insurance for the next year with any excess funds credited to Surrender Value. E.g., A-50-51. There was no obligation to make any post-issuance premium payments or purchase any additional insurance. Plaintiff, consistent with the contract, could terminate the relationship and withdrawal all excess funds. A-44-72. *Each additional premium purchased additional insurance.* This is not, as Defendants posit, an installment sales contract where the totality of the goods are purchased at the outset with payment of the purchase price made over time. There was no set purchase price for a unitary "good." The years of insurance Plaintiff would purchase was not established. The "good" was the insurance, not the Policy, as Defendants' claim. Otherwise, subsequent payments were for nothing as the Policy had been issued.

Ridley v. Bayhealth Medical Center Inc., 2018 WL 1567609 (Del. Super. March 20, 2018), cited by Defendants, does not hold that misrepresentations regarding contracts are not actionable, a rule that would defeat the purpose of the

DCFA. It holds a DCFA claim must rest on something distinct from a breach. Id. at*5.[7] The misstatements and omissions in the illustrations are distinct, otherwise they would be a breach. Defendants claim the misuse of Voya's name in illustrations and by its customer service representatives are not actionable. Why is never explained. Their use was false and made with the intent that Plaintiff rely upon them. Indeed, Defendants identify a conversation with the "ING" employee as something upon which Plaintiff should have relied.

[7] *Bresler v. Wilmington Trust Co.,* 348 F.Supp.3d 473 (D.MD. 2018) simply states the same principle.

III. Defendants Were Not Entitled to Summary Judgment on the Unconscionability, Unjust Enrichment and Bad Faith Claims.

A. QUESTION PRESENTED

Whether Defendants should be denied summary judgment on Unconscionability, Unjust Enrichment and Bad Faith? A-37.

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

Defendants mischaracterize the unconscionability claim as based solely on not showing Plaintiff the Policy before purchase. This is a mischaracterization and does not addressing the argument in the Opening Brief.

Defendants mischaracterize the unjust enrichment argument. The Court-below found the damages sought to be no different than the breach of contract damages. The Opening Brief demonstrates this to be in error. Defendants' authority, *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872 (Del.Ch. 2009), is inapplicable because the inaccurate illustrations are not controlled by the contract. According to Defendants, regardless of what they said in the illustrations, there is no remedy.

Defendants' arguments regarding bad faith are addressed in the Opening Brief.

IV. The Remainder of the Judgment As 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? A-30.

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

As to Plaintiff's motion against the affirmative defenses, the question is not whether, if the Judgment is affirmed, was moot, but is whether, assuming this Court reverses, the mootness decision should be vacated. Defendants do not argue against this result.

Defendants claim that they would have succeeded on their defenses is not properly presented. Had it been, Plaintiff would have established the defenses are without merit. AR-0032-0035.

As to the Judgment's footnote 115, it is neither an alternative holding nor could it be. OB-44-45. It should be vacated regardless of the disposition of the rest of this appeal.

V. Plaintiff has Standing.

A. QUESTION PRESENTED

Assuming the Court considers the issue *sua sponte*, whether Plaintiff has standing? Not presented below or appealed by Defendant. AR-0039.

B. STANDARD OF REVIEW

A decision to consider an issue *sua sponte* is made by this Court. Decisions by the Trial Court on standing are reviewed de novo. *Morris v. Spectra Energy Partners (DE) GP, LP.*, ___A.3d ___, 2021 WL 221987 (Del. Jan. 22, 2021) ("*Spectra*").

C. MERITS OF ARGUMENT

1. Plaintiff Has Standing.

Standing is a threshold issue. *Spectra* at *4. By addressing the merits, the Court-below implicitly found standing. Defendants did not appeal. Ordinarily an issue not presented below and the subject of a notice of appeal will not be addressed by this Court. See, *Koutofaris v. Dick*, 604 A.2d 309, 401 (Del. 1992). Standing "*to present a constitutional question* is so fundamental as to permit examination thereof at any time …". *Mills v. Trans Caribbean Airways, Inc.*, 272 A.2d 702, 704 (Del. 1970) (emphasis added). Standing and subject matter jurisdiction are distinct. *Appriva Shareholder Litigation Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1285 (Del. 2007). In Delaware standing is not jurisdictional, it is "a matter of self-restraint to

avoid rendering advisory opinions at the behest of … 'mere intermeddlers.'" *Schoon v. Smith*, 935 A.2d 196, 200 (Del. 2008).

Standing requires that Plaintiff have an injury to a cognizable legal interest. *Dover Historical Soc, v. City of Dover Planning Com'n.*, 838 A. 2d 1103,1112 (Del. 2003). This case involves a breach of contract to which Plaintiff is a party, consumer fraud, and related legal claims which resulted in direct monetary injury to Plaintiff, not any constitutional issue. The Policy listed Plaintiff as the "owner" and Plaintiff made all payments to the Defendants. A-47, AR-0041. If the claims succeed, the payment will be owed to Plaintiff. Plaintiff is no "mere intermeddler."

2. Plaintiff Is The Proper Party And If Not, The Remedy Is Substitution of the Trustee.

Defendants' assert a trust may not be a party. However, Plaintiff's trust document expressly authorizes suits by the Trust. B-669 (Trust Art.XII.A.12. ("for the protection of the trust" the trustee may prosecute "any claims ***by or against the trust or [the]Trustee***…") (emphasis added)). Superior Court Rule 17(a) ("Rule") provides "every action shall be prosecuted in the name of the real party in interest." A party to a contract is a real party in interest. *Branch Banking and Trust v. EID,* 2013 WL 3353846 at *3-4 (Del. Super. June 13, 2013).

Rule 17(a) states trustees "may" be the plaintiff, not that they "must." E.g. *Hendry v. Hendry*, 2006 WL 1565254 at * 11 (Del.Ch. May 26, 2006). Further, "[n]o

action shall be dismissed … until a reasonable time has been allowed … *for ratification of commencement of the action by, or joinder or substitution of, the real party in interest* …". Rule 17. The Trustee ratified the commencement of the action (B-253, 259-260, 268). Even had he not, he must be provided an opportunity to be substituted. *Appriva* at 1293; *National Union Fire Ins. Co. v. Stauffer*, 1991 WL 138431 at *4 (Del. Super. Apr. 11, 1991).

Mennen v. Wilmington Trust Co., 2013 WL 4083852 (Del.Ch. July 25, 2013), Defendants' authority, *had a trust as a party*. It did not involve standing and notes only that under common law a trust and the trustee are not separate legal entities. *Id*. at *9. Defendants claim that because statutory trusts under 12 Del. C.§3800 et. seq. are expressly authorized to file lawsuits, no other trust is so authorized. No authority suggests this. Defendants inaccurately claim, *City Investing Co. v. Continental Casualty Co.*, 624 A.2d 1191 (Del. 1993) and *In re Dow Chemical International Inc.*, 2008 WL 4603580 (Del. Ch. October 14, 2008), involved "statutory trusts." They did not. 12 Del.C. §3801(i). The treatises Defendants cite follow Rule 17; noting local Rules control, that stating a trustee "may" being a party is permissive, not exclusive, language, and that when the trustee is required by local practice, substitution is the appropriate remedy. Restatement (Third) of Trusts §105, Reporter's Note.

CONCLUSION

This Court should reverse and remand.

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