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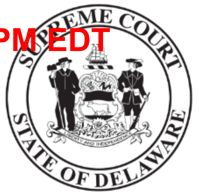

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WELLS FARGO BANK, N.A., as Securities Intermediary, and BERKSHIRE HATHAWAY LIFE INSURANCE COMPANY OF NEBRASKA, Defendants/Appellants/ Cross-Appellees, v. ESTATE OF PHYLLIS M. MALKIN, Plaintiff/Appellee/ Cross-Appellant.	No. 172,2021 Certification of Questions of Law from the United States Court of Appeals for the Eleventh Circuit No. 19-14689 D.C. No. 1:17-cv-23136-MGC

REPLY BRIEF OF APPELLANT WELLS FARGO BANK, N.A.

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INTRODUCTION

The Estate avoids virtually every point of law established by Wells Fargo in its opening brief. For this reason alone, the Court should find in the affirmative as to certified question number one. As to those established points of law that the Estate does not avoid wholesale, the Estate obfuscates, appeals to irrelevant facts from other litigations, or props up straw arguments not raised by Appellants.

The Estate widely mischaracterizes the application of the securities intermediary immunity defense set forth in Section 8-115 of the Delaware UCC. Contrary to the Estate's misquoting, Wells Fargo has explained—as it has throughout this lengthy litigation—both the scope of the well-established securities intermediary defense and the Estate's inability, on the facts of this case, to identify any evidence supporting an exception to that defense. Despite its hyperbole and rhetorical diversions, the Estate still cannot dispute that Wells Fargo meets every element of the applicable UCC defenses. To avoid this certainty, the Estate pretends that the certified questions concern agency law or tort law or contract law, rather than the specific UCC provisions enacted by the Delaware Legislature to establish and encourage the indirect holding system.

The reality remains that Wells Fargo's sole role in this matter is as a securities intermediary that received policy proceeds and promptly placed them into Berkshire's account. The Estate has challenged that transfer of a financial asset.

Despite repeated opportunities and exhaustive discovery, the Estate has never provided any evidence that one of the enumerated exceptions to the securities intermediary immunity defense could apply. Under the UCC, those facts should have ended the matter long ago. This Court should finally bring the issue to a close and answer the certified questions in the affirmative.

ARGUMENT

I. WELLS FARGO IS ENTITLED TO ASSERT SECURITIES INTERMEDIARY DEFENSES UNDER THE DELAWARE UCC

The Estate's wide-ranging opposition brief manages to be longer than Wells Fargo's opening brief while still failing to address the core points of Delaware law raised in that brief. Wells Fargo acted entirely within the scope of its role as a securities intermediary and is entitled to avail itself of the protections for securities intermediaries under the Delaware UCC.[1] The Estate's efforts to change the subject do not change the straightforward question of law before the Court.

A. The Estate fails to rebut Wells Fargo's right to rely upon the Delaware UCC protections for Securities Intermediaries.

Unrebutted is the explicit intent of the Delaware legislature to establish and encourage the indirect holding financial system, and in particular, the Delaware UCC's protections for securities intermediaries. WF Opening Br. at 5, 8-10. On its face, Section 8-115 of the Delaware UCC provides that "[a] securities intermediary that has transferred a financial asset pursuant to an effective entitlement order ... is not liable to a person having an adverse claim to the financial asset." 6 *Del. C.* § 8-115. *See also Myecheck, Inc v. Sweetsun Intertrade Inc.*, 2015 WL 6163456, at *3 (E.D. Cal. Oct. 19, 2015) (observing that the UCC "immunizes [securities

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[1] Wells Fargo joins in and adopts by reference the entirety of Section I of Berkshire's reply brief, which addresses Certified Question Number 1.

intermediaries] from liability in connection with their activities as conduits for the transfer of [financial assets] on behalf of their customers"). Wells Fargo has consistently established throughout this lengthy litigation that its actions are protected and that the UCC provides a defense to the Estate's suit. The Estate has failed, both here and in the federal courts, to provide any evidence disputing Wells Fargo's legal entitlement to the securities intermediary defense nor has it adduced any evidence that any of Section 8-115's carefully crafted exceptions apply here.

First, there is no credible claim that Wells Fargo was not acting as a securities intermediary in connection with the Policy. While the Estate may now tactically prefer to use the term "agent," it correctly chose to name Wells Fargo solely in its capacity as a securities intermediary. Opening Br. at 7. Moreover, Wells Fargo is properly characterized as a securities intermediary in this case because it is a bank that "in the ordinary course of its business maintains securities accounts for others and is acting in that capacity." 6 *Del. C.* § 8-102(14); *see also* Doc 77-1, at ¶ 3. Wells Fargo maintains numerous securities accounts and was acting in precisely that capacity here. *See* Doc 77-1, at ¶ 3.

Second, there is no credible dispute that a "transfer" within the meaning of UCC Section 8-115 took place and that on October 29, 2014, Wells Fargo transferred the entirety of the Policy's proceeds to Berkshire, pursuant to a signed entitlement order and in accordance with Wells Fargo's role as securities intermediary. Doc 132

at ¶ 76 (“On October 29, 2014, Wells Fargo credited the $4,013,976.47 to Berkshire’s securities account.”); Doc 88 at ¶ 5 (“Wells Fargo [upon receiving a check for the Policy proceeds] paid this amount to Berkshire Hathaway Life Insurance Company of Nebraska…”); Doc 132-29 at § 2(a); *see also* Doc 77 at No. 9; Doc 77-1 at ¶¶ 10-12; Doc 114-1 at ¶¶ 3-4. Indeed, the Eleventh Circuit specifically noted these facts in its opinion certifying questions to this Court. *See* Ex. A, at 8 (noting that Wells Fargo “credited [the] full amount” of the Policy’s proceeds to a securities account it held for Berkshire).

Third, there is no legally cognizable dispute that Wells Fargo had transferred a “financial asset” under Section 8-115. That term is defined by the Delaware UCC as “***any property*** that is held by a securities intermediary for another person ***in a securities account*** if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.” 6 Del. Code § 8–102(9) (emphases added). Wells Fargo and Berkshire agreed that the Policy and its proceeds would be “treated as a financial asset,” as required by Section 8-115, since the Control Agreement explicitly so provides. *See* Doc 77-3 at § 2(c) (confirming that the “Conveyed Life Policy ***and proceeds thereof*** credited to the Purchaser’s Securities Account, and any cash credited to the Cash Reserve Account, shall be treated as ‘financial assets’ within the meaning of Section 8–102(a)(9) of the UCC”)(emphasis added).

Wells Fargo's actions satisfied each element of a UCC Section 8-115 defense, and it should be found immune from the Estate's suit ***unless*** the Estate could establish one of the exceptions to Section 8-115 immunity.[2] It did not.

The UCC provisions at issue were drafted to address all types of known and unknown disputes that might arise under the indirect holding system of financial assets, including the types of disputes that might arise under section 1204(b) or any other Delaware statute. UCC section 8-115 itself sets forth three enumerated and exhaustive exceptions to securities intermediary immunity. Del. Code Ann. tit. 6, § 8-115. Two of those exceptions ***could*** have been implicated as to the type of financial asset at issue here; however, the record shows the impossibility of the Estate meeting its burden as to either potential exception.[3]

The first exception could not be satisfied here as there was no "injunction,

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[2] Contrary to the Estate's arguments, these exceptions evidence the Delaware Legislature's desire to harmonize UCC defenses with other statutes. Opening Brief at 12. Moreover, the presence of the exceptions expose the fallacy of the Estate's characterization of Wells Fargo seeking "absolute immunity." Opp. at 20.

[3] To avoid the securities intermediary immunity defense set forth in Section 8-115, the Estate would have had to prove either: (a) that Wells Fargo transferred the Policy proceeds "after it had been served with an injunction, restraining order, or other legal process enjoining it from doing so, issued by a court of competent jurisdiction, and had a reasonable opportunity to act on the injunction, restraining order, or other legal process;" or (b) that Wells Fargo "acted in collusion with the wrongdoer in violating the rights of the adverse claimant." Neither exception applies to the facts of this matter for the reasons set forth herein. The third exception to Section 8-115 is not applicable as it concerns only stolen security certificates.

restraining order, or other legal process" known to Wells Fargo that would bar the distribution of the Policy proceeds to Berkshire in 2013. Moreover, the insurance company chose to perform under the insurance contract and promptly paid the death benefit. Doc 132 at ¶ 76; Doc 88 at ¶ 5.

As to the second potential exception, the Estate was offered numerous opportunities in the federal courts to adduce ***any*** evidence supporting its claim of collusion under Section 8-115(2), which provides that the defense will not apply where a securities intermediary "acted in collusion with the wrongdoer in violating the rights of the adverse claimant." The exception requires affirmative evidence that the securities intermediary took an active role in the wrongdoing at the time it was conducted,[4] i.e. in 2006 when the Policy was allegedly issued without an insurable interest. Opening Br. at 6. In the federal courts, the Estate failed to meet its "heavy burden" of adducing evidence that that collusion exception (or any other exception

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[4] The burden of establishing the "collusion" exception is squarely on the party who seeks to invoke the exception, and that burden is an extraordinarily high one. *See Amegy Bank Nat'l Ass'n v. Deutsche Bank Alex.Brown*, 619 Fed. App'x 923 (11th Cir. 2015); *see id.* (recognizing that the burden to prove collusion under section 8-115 is a "heavy one" and, for the collusion exception to apply, the securities intermediary must have "engaged in such affirmative misconduct by knowingly and actively taking part in the scheme to convert [the financial asset], rather than acting as a mere conduit"); *see also Pine Belt Enters., Inc. v. SC & E Admin. Servcs., Inc.*, 2005 WL 2469672, at *7 (D. N.J. Oct. 6, 2005) (applying similarly worded New Jersey UCC provision in holding that collusion requires more than "mere awareness that the customer may be acting wrongfully").

in Section 8-115) applied to Wells Fargo and its actions with regard to the Policy. Opening Br. at 10-11. Indeed, that burden could never be met by the Estate because it concedes that, "Wells Fargo's first direct involvement with this specific Policy was in 2012," i.e. 6 years before the wrongdoing alleged by the Estate took place. Opp. Br. at 6. A securities intermediary should not have to litigate from Miami to Atlanta to the Delaware Supreme Court for performing its ministerial and legislatively immunized role of holding a financial asset where, as here, the facts show the ***impossibility*** of the Estate meeting its burden of establishing an exception to Section 8-115.[5]

B. Wells Fargo is entitled to rely upon the Delaware UCC's provisions protecting securities intermediaries as bona fide purchasers on the same terms as Berkshire.

In addition to joining Section I of Berkshire's reply brief regarding the application of UCC Section 8-502, Wells Fargo addresses the Estate's limited comments regarding a securities intermediary's ability to invoke the bona fide

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[5] The Estate fills the last several pages of its brief with purportedly public information that "policies procured through non-recourse premium financing programs like Coventry's were highly risky, particularly in states like Delaware with strong anti-STOLI laws, and that families could challenge these policies and recover the proceeds." Opp. at 22. These innuendos are insufficient to satisfy the Estate's legal burden. The Delaware legislature, again, addressed just this kind of argument when it made very particular and limited exceptions to the broad defense of securities intermediary immunity. Opening Br. at 12-16. And conspicuously absent from the Estate's arguments are citations to any caselaw regarding the high burden of proving an exception to the immunity defense set forth in Section 8-115.

purchaser defense on behalf of an entitlement holder pursuant to UCC Section 8-116. As set forth in its opening brief (at 9-10), Wells Fargo is independently entitled to assert a bona fide purchaser defense under § 8-502 because, as Delaware law expressly provides, "a securities intermediary that receives a financial asset in favor of an entitlement holder is a purchaser for value of the financial asset." 6 *Del. C.* § 8-116.

In response, the Estate makes a number of statements purporting to identify the burden upon Wells Fargo in establishing either of the UCC defenses that it has asserted. Estate Opp. at 15 (stating that "Wells Fargo would never be able to meet its burden" of proving lack of notice and good faith to establish the UCC defenses.). Such a standard does not apply to Wells Fargo's securities intermediary immunity defense for the reasons set forth above. To the extent that the Estate is making an argument about Wells Fargo's ability to prove a defense under UCC Sections 8-116 and 8-502, Wells disagrees with the Estate's characterization of the factual record and notes that it is well-settled that state courts do not engage in fact finding when resolving certified questions of law. *See, e.g.*, *E.I DuPont de Nemours and Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 458 (Del. 1999); 17A Federal Practice & Procedure § 4248, *Certification to State Court*. Indeed, this Court's governing rules provide that "certification will not be accepted if facts material to the issue certified are in dispute." Del. Sup. Ct. R. 41.

Here, the issues material to the certified questions are not in dispute.[6] As explained in Wells Fargo's Opening Brief (at 6-7), and admitted in the Estate's Opposition Brief (at 6), Wells Fargo did not become involved with the Policy until 2012. And the Eleventh Circuit expressly found that when Berkshire purchased the policies in 2013, "Coventry represented to Berkshire that to its knowledge none of the policies was originated in connection with a STOLI transaction." Ex. A, at 8. Based on these facts, Wells Fargo is equally able to utilize the defense contained in UCC Section 8-502.[7]

C. The Estate's *ad hominem* does not trump the UCC.

Rather than address its inability to satisfy any of the UCC exceptions to securities intermediary immunity, the Estate offers that the UCC provisions concerning securities intermediaries should not apply to Wells Fargo or other securities intermediaries, as represented by the Delaware Bankers Association, because they "aren't ***deserving*** of it in any event." Estate Amicus Opp. at 1

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[6] Moreover, the Estate cannot now claim that it will need additional discovery from Wells Fargo because the federal district court below specifically asked whether any additional discovery was needed and the Estate filed a response stating, "[t]he Estate believes that no further discovery is needed in order for the Court to deny Wells Fargo's (and Berkshire's) UCC Article 8 defenses as a matter of law." Doc 187 at 3, attached hereto as **Exhibit 1**.

[7] The Estate's citation of *SEC v. Credit Bancorp* (Opp. at 15) is inapposite because the securities intermediary's agent there was found to have actual notice of the specific adverse claims to the specific financial assets at issue in that litigation. *See* 386 F.3d 438, 451-52 (2d. Cir. 2004). No such allegation has been made here and the facts do not support such an extraordinary finding.

(emphasis added). Contrary to the Estate's *ad hominem*, the amicus brief of the Delaware Bankers Association well states the UCC's purpose and protections, not just to its members, but also to those members' clients, the financial system of Delaware itself, and all of its participants. *See* DBA Br. at 6-11. Wells Fargo respectfully suggests that the Delaware legislature intended the laws it passes to be applied to everyone equally and that it is not an issue before this Court whether a litigant is "deserving" of being equal before the law.

The Estate also argues that Wells Fargo is "unworthy" to assert UCC Section 8-115 immunity here because it does not assert that defense in every suit. Estate Opp. at 10-12. That argument misunderstands the statute. Indeed, the Estate's complaint about Wells Fargo not invoking a Section 8-115 defense where Wells Fargo is "*commencing*" a suit is, respectfully, absurd. The explicit language of Section 8-115 provides that securities intermediary immunity is a ***defense*** to specific types of claims and could not be the basis for a plaintiff's claim against an insurance company. Similarly, because Section 8-115 only applies to adverse claims regarding the ***transfer*** of a financial asset, a suit against a securities intermediary regarding a financial asset still held by the securities intermediary would not qualify—because no transfer had taken place.

The Estate also improperly attempts to inject misleading and irrelevant "fact" issues into this certification proceeding. Its brief repeatedly and misleadingly

proclaims that Wells Fargo "played an instrumental role in carrying out an unconstitutional wager on the life of Phyllis Malkin." Answering Br. at 1; *see also id.* at 5-7. The simple truth, however, is that the Policy was issued in 2006, and Wells Fargo did not become involved with the Policy, in any way whatsoever until six years later. Opening Br. at 6-7. But putting aside the misleading nature of the Estate's rhetoric, it is irrelevant to this certification proceeding. As this Court has expressly recognized, "only facts contained in the certification are actually part of the record." *Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, 28 A.3d 436, 440 (Del. 2011). In certifying questions to this Court, the Eleventh Circuit made no conclusions whatsoever regarding Wells Fargo's alleged role with respect to the Policy, other than noting that Wells Fargo served as a securities intermediary. Ex. A, at 2, 7. The simple legal question posed by the Eleventh Circuit is whether Delaware law allows a defendant to assert UCC-based defenses to a Section 2704(b) claim. *Id.* at 30-31. The Estate's accusations and rhetoric are not germane to the questions certified by the Eleventh Circuit.[8]

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[8] The Estate even goes so far as to chronicle Wells Fargo's supposed participation in "STOLI" litigation against companies that are not involved in the Malkin lawsuit. Opp. Br. at 10-12. The Estate focuses on these irrelevant allegations to paint the picture it asserts in opposition to the amici briefs—that Wells Fargo "does not deserve" to invoke a UCC defense. That, of course, is improper and has no bearing on the pure legal questions before the Court.

D. The Estate cannot unilaterally elevate agency law or contractual indemnification over the Delaware UCC.

Likely in response to the impossibility of meeting any of the limited exceptions to UCC Section 8-115 immunity, the Estate seeks to wish away the entirety of the UCC and assert that contractual indemnity or common law agency concepts should be substituted for the legislature's choice to implement the indirect holding financial system of the UCC. The legislature created that carefully crafted system to provide certainty to all participants. *See* 6 *Del. C.* § 8-115, at cmt. 3 ("It is essential to the securities settlement system that brokers and securities intermediaries be able to act promptly on the directions of their customers. Even though a firm has notice that someone asserts a claim to a customer's securities or security entitlements, the firm should not be placed in the position of having to make a legal judgment about the validity of the claim at the risk of liability either to its customer or to the third party for guessing wrong.").

Much like the Estate's assertion that securities intermediaries are "undeserving" of legal protection, its agency theory here turns the Delaware Legislature's intent on its head and amounts to an unacceptable rewriting of Section 8-115 of the Delaware UCC. "Where the legislature has preempted the field by enacting a provision in the UCC which establishes the rights of the parties, competing theories of liability are not permitted." *Mahaffy & Assoc., Inc. v. Long*, 2003 WL 22351271, at *6 (Del. Ch. 2003). Put another way, when the UCC grants

immunity from liability, courts cannot "rewrit[e] the UCC by holding otherwise." *U.S. Claims Inc. v. Flomenhaft*, 519 F. Supp. 2d 532, 539 (E.D. Pa. 2007). Notably, none of the agency cases cited by the Estate even mention the UCC. Opp. Br. at 18.

Similarly, the Estate's indemnification based theory ignores the fact that the contract between Berkshire and Wells Fargo is not a replacement of the indirect holding financial asset framework of the UCC, but rather the implementation of that system. The Securities Account Control Agreement between Wells Fargo and Berkshire, which defines the entire scope of Wells Fargo's role with regard to the Policy proceeds, is replete with citations to title 8 of the UCC and closely tracks the language of that title to make explicit that the securities intermediary and financial asset relationship is to be governed and guided by the UCC. *See, e.g.*, Doc 132-29 at § 2(a) ("…the Purchaser's Securities Account is (or with respect to any Purchaser's Securities Account subsequently established will be) a 'securities account' as such term is defined in Section 8-501(a) of the UCC"); § 2(c) (referencing Section 8-102(a)(9)); § 4(a) (referencing Section 8-102(a)(7)); § 5(a) (referencing Sections 8-102(a)(14) and 8-102(a)(5)). In other words, the contract does not replace the UCC, but rather explicitly expresses and implements the parties' desire to have the relationship governed by the UCC.

II. THE ESTATE CONTINUES TO ADVANCE MERITLESS STATUTORY CONSTRUCTION ARGUMENTS

In addition to joining Berkshire's reply brief explaining the legal infirmities of the Estate's statutory construction arguments, Wells Fargo writes separately to address the Estate's odd assertion that the Delaware insurable interest statute enacted ***in 1968*** (decades before the creation of the life settlement industry) should be deemed to have been enacted ***later*** than the ***1997*** amendments to the Delaware UCC containing Sections 8-115, 8-116, and 8-502. The Estate's theory, such as it is, is that because an older version of Article 8 made references to bona fide purchaser protections for "brokers and agents" in 1966, therefore all later amendments to the Delaware UCC are irrelevant for purposes of statutory construction. Estate Opp. At 14 n. 5.

The Estate offers no legal support for this breathtaking proposition because there is none. The Estate's time travel view of statutory interpretation cannot apply to either Section 8-115 or 8-116 regarding securities intermediaries, as both provisions appear for the first time in the 1997 Delaware UCC revision statute—nearly three decades after the enactment of Section 2704(b). *See* 1997 Del. Laws Ch. 75 (S.B. 139) ("Approved June 25, 1997"). Those two provisions, therefore, are indisputably later enacted statutes and controlling as to any conflict with earlier enacted Section 1204(b). Even if the 1997 enactment of Section 8-502 was a mere revision of earlier sections as claimed by the Estate, that 1997 revision would still

be the later enacted statute for these purposes under Delaware law. *See, e.g.*, *Bash v. Bd. of Med. Practice*, 579 A.2d 1145, 1151 (Del. Super. Ct. 1989) (holding that in a conflict between a statutory provision and an amendment, the later adopted amendment controls over the earlier conflicting provision).

All three UCC sections relied upon by Wells Fargo were part of the significant change to Article 8 of the Delaware UCC from a singular focus on "securities" to the broader concept of "financial assets" and the indirect holding system. *See* Section 8-103 (defining the distinctions between securities and financial assets). Further, the comments to Section 8-502 itself explain that the amendments were no mere reorganization, but rather greatly expanded the prior direct holding system of defined "securities" to a carefully crafted indirect financial asset holding system involving complex bundles of rights:

> The section provides investors in the indirect holding system with protection against adverse claims by specifying that no adverse claim can be asserted against a person who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim. It plays a role in the indirect holding system analogous to the rule of the direct holding system that protected purchasers take free from adverse claims (Section 8-303).

Section 8-502, at cmt. 1. The Delaware Legislature knew precisely what it was doing in 1997 when it created these protections for securities intermediaries and bona fide purchasers of financial assets. And because the relevant Delaware UCC provisions are indisputably the later enacted statute, Delaware law requires that, in the event of

any conflict, these UCC defenses prevail over the earlier enacted Section 2704(b). *See, e.g.*, *State v. Fletcher*, 974 A.2d 188, 193 (Del. 2009); *Dorsey v. United States*, 567 U.S. 260, 274 (2012).

III. PUBLIC POLICY CONTINUES TO FAVOR PROTECTING SECURITIES INTERMEDIARIES AND GIVING EFFECT TO THE UCC

Wells Fargo, and the amicus filers, cogently explain the public policy supporting the carefully crafted indirect holding financial asset system established by the 1997 amendments to the Delaware UCC. Opening Br. at 3-16; DBA Br. at 6-8; ILMA Br. at 7. Put simply, the financial innovation and efficiency for which Delaware has become known would fade without the provisions protecting securities intermediaries.

In response, the Estate argues that either: (a) the UCC should be ignored because financial system participants could just contract for an indemnification; (b) securities intermediaries like Wells Fargo, ***and every member of the Delaware Bankers Association***, should be ignored because they are "undeserving" of protection under the Delaware laws; or (c), it is on the correct side of an "absolute immunity" argument that Wells Fargo never made. Opp. at 1, 16-21. Legally and logically, all are wrong.

The Estate's arguments (a) and (b) above Estate have already been discussed *supra*. The Estate's third purported public policy argument, that Wells Fargo should be denied absolute immunity, is a mischaracterization of Wells Fargo's position and, ultimately, a red herring.

To advance this argument, the Estate misquotes Wells Fargo's opening brief

and transmogrifies a statement about how the public policies behind Sections 8-115 and 2704(b) are aligned, thereby allowing both to be enforced without conflict. According to the Estate:

> [W]hat is really going on here is plain from Wells Fargo's own brief: Wells Fargo is attempting to use the UCC to obtain (Wells Fargo Br. 12) absolute 'immun[ity]... from suit' in Section 2704(b) cases so that estates are precluded from even ***naming*** securities intermediaries...

Opp at 20. (emphasis and ellipsis in original). Quoted in full for context, Wells Fargo's actual statement on page 12 of its opening brief makes clear not only that there are exceptions to securities intermediary immunity, but also that those very exceptions show how the two statutes are easily read together:

> The UCC contains a carefully crafted set of asset transfer rules designed to ensure expeditious settlement of financial transactions. *See, e.g.*, Del. Code Ann. tit. 6, § 8-115, at cmt. 3. To achieve this goal, the legislature made the wise choice of immunizing securities intermediaries from suit, ***absent special circumstances***. Del. Code Ann. tit. 6, § 8-115. On the other hand, if the purpose of the insurable interest statute is to prevent collusively procured life insurance policies, then there can be no conflict between these two statutory purposes. Indeed, the statutes are entirely consistent in that ***UCC Section 8-115 expressly creates an exception that precludes a securities intermediary defense in instances where collusion has occurred***. *See* Del. Code Ann. tit. 6, § 8-115(2).

Opening Br. at 12. (emphasis added).

We can discern no fair explanation as to why the Estate has altered a quote from our opening brief to say the opposite of what was actually written, as the the very paragraph that the Estate altered for the purported proposition of "absolute

immunity" states that such immunity is not absolute and, indeed, serves the same public purpose as Section 2704(b).

Wells Fargo has been making the point (early and often) not only that it has a defense under the securities intermediary immunity provision of UCC Section 8-115, but also that the Estate did not, and cannot, meet its burden under any of the exceptions to that statute. *See, e.g.*, Doc. 77 Wells Fargo June 14, 2018 First Motion For Summary Judgment and Opening Brief at 2-3. This is how the statute is supposed to work, because Delaware has a strong interest in ensuring efficient, orderly financial transactions and protecting intermediaries from liability risk. *See* 6 *Del. C.* § 8-115, at cmt. 3.[9] Accordingly, the legislature provided a clear, statutory grant of immunity for securities intermediaries, which should not be ignored. 6 *Del. C.* § 8-115. That the Estate cannot meet any of the exceptions to the application of the UCC provisions at issue is not a reason to ignore this strong public policy.

[9] "It is essential to the securities settlement system that brokers and securities intermediaries be able to act promptly on the directions of their customers. Even though a firm has notice that someone asserts a claim to a customer's securities or security entitlements, the firm should not be placed in the position of having to make a legal judgment about the validity of the claim at the risk of liability either to its customer or to the third party for guessing wrong."

CONCLUSION

For the foregoing reasons, this Court should answer the certified questions in the affirmative and find that defenses arising under Delaware UCC Sections 8-502, 8-115, and 8-116 are available to defendants in a Section 2704(b) action.

Date: August 30, 2021

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