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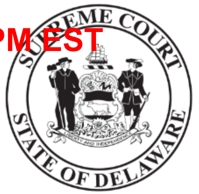

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERONTA FUNDING, Defendant/Counterclaim-Plaintiff Below, Appellant, v. BRIGHTHOUSE LIFE INSURANCE COMPANY, Plaintiff/Counterclaim-Defendant Below, Appellee.	NO. 380, 2021 Court Below: Superior Court of the State of Delaware C.A. No. N18C-04-028

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises from a thoughtful and well-reasoned final judgment issued by the Superior Court after a comprehensive, seven-day trial, granting in part and denying in part Appellant Geronta Funding's claim for restitution of the premium it paid under a life policy the parties agreed on the pleadings was void *ab initio* for lack of insurable interest because the insured, Mansour Seck, did not actually exist. The court correctly rejected Geronta's argument that it should be "automatically refunded"—not just the premium it paid, but also the premium it did *not* pay (i.e., the premium paid by the Policy's prior owners)—without Geronta having to prove anything. Indeed, as the trial court recognized, this Court's longstanding precedent holds that ordinarily parties to agreements violating public policy are left where they are found without any relief—*not* automatically afforded that relief.

Sitting as fact-finder, the court then held a trial to allow Geronta to try to prove an exception to this general rule. Through that trial, the court correctly found that MetLife[1] competently underwrote the Policy in 2007 and did not learn (or even suspect) that Mansour Seck was not real until April 2017 when Geronta brought this fact to MetLife's attention. The court also found that Geronta was not excusably ignorant of Mansour Seck's non-existence because Geronta's pre-acquisition

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[1] Appellee Brighthouse Life Insurance Company ("Brighthouse") is the successor in interest to MetLife Investors USA Insurance Company ("MetLife").

diligence was not reasonable; Geronta willfully blinded itself to his non-existence in the hopes of securing what Geronta itself described as a "windfall"; and Geronta elected to continue to pay premium even *after* it learned Mansour Seck did not exist and to withhold that information from MetLife for almost 15 months. After carefully considering the evidence, weighing private equities, and considering public policy, the court reasonably concluded that Geronta was only entitled to a refund of the premium it paid after bringing its concerns about the Policy to MetLife's attention.

On appeal, Geronta asks this Court to change the general rule that parties to agreements void *ab initio* as against public policy are usually left where they are found without relief and to replace it with a new, bright-line, automatic premium refund rule solely for insurable interest cases that would, if accepted, strip courts of their ability to assess the facts of individual cases and force courts to award remedies that frustrate the very public policy causing the agreement to be void *ab initio* in the first place. In so doing, Geronta asks this Court not only to ignore its own precedent, but also to ignore the record below and to re-write the trial court's well-reasoned opinion, fact findings, and credibility determinations.

The trial court's thorough and well-reasoned judgment should be affirmed.

SUMMARY OF ARGUMENT

(1) Denied. The court correctly rejected Geronta's request for an automatic return of premium. An automatic, proof-less return of performance made under a void *ab initio* agreement is *not* the law of Delaware—it is instead a misapplication of a trio of pre-*Price Dawe* decisions from the federal district court, which treated policies lacking insurable interest as merely void*able* instead of void *ab initio*. This Court has long held that parties to void (as opposed to void*able*) contracts are ordinarily left where they are found without any relief. The trial court therefore correctly ruled that the remedy for investors in such policies is restitution and provided Geronta a chance to prove it could satisfy an exception to the general no-restitution rule found at Section 198 of the Restatement (Second) of Contracts.

(2) Denied. The court did not *ignore* Geronta's argument that it was not equally in the wrong; rather, sitting as fact-finder, the court rejected it on the merits. The court found Geronta was not excusably ignorant that Mansour Seck was fake, because, although it could have discovered the truth before acquisition, it made the strategic decision to defer its diligence until *after* acquisition, willfully blinding itself to the information it had access to. Moreover, after removing its blindfold, and learning the truth, Geronta chose to withhold its knowledge from MetLife, continuing to pay premiums on a Policy it believed lacked a valid life for *fifteen months*—and then demanding a refund of those very premiums. By contrast, the

court found MetLife was excusably ignorant, having robustly underwritten the Policy in 2007, and that MetLife/Brighthouse justifiably did not know that Mansour Seck was fake until Geronta finally told MetLife in April 2017.

(3) Denied. The court properly ruled that Geronta's witnesses were precluded from claiming they acted in conformity with industry standards because Geronta proffered no expert and refused to answer questions on that topic at its deposition. Moreover, there was no prejudice, as Geronta's witnesses were given leeway to explain Geronta's reasoning for structuring its diligence as it did.

(4) Denied. The court did not err in rejecting Geronta's bona fide purchaser defense. Although such a defense is legally insufficient in connection with void *ab initio* instruments, the court did not reject the defense on the law, but rather rejected it on the facts, correctly finding that Geronta's diligence was unreasonable and that it willfully blinded itself. Such a purchaser is not bona fide.

COUNTERSTATEMENT OF FACTS

A. The Policy Was Originated Through A Short-Term, Nonrecourse Premium Finance Program

In the mid-2000s, the Himelsein-Mandel Fund ("HM Fund") was in the business of manufacturing multi-million-dollar life policies on senior citizens who did not want or need them for the benefit of the HM Fund and other investors. A1570/195:14-196:17. The HM Fund did this by creating trusts in the name of select seniors to apply for large life policies funded by the HM Fund and intended to be transferred to investors shortly after the expiration of the policies' two-year contestable periods. *Id.* The HM Fund selected Sandor Krauss, a New York real estate lawyer, to serve as trustee of many of these trusts. *Id.*

In 2007, the HM Fund directed Krauss to serve as trustee of the Mansour Seck Irrevocable Life Insurance Trust ("Seck Trust"). *Id.* Although the Seck Trust was purportedly created by "Mansour Seck," Krauss never actually met or communicated with a Mansour Seck. A1571/196:18-199:13. Rather, Krauss took all his instructions from the HM Fund and paid the premiums needed to effect the Policy with the HM Fund's money as the HM Fund instructed him to do. *Id.*; B695 ¶18.

B. MetLife Issued The Policy After A Robust Underwriting Process

On July 11, 2007, the Seck Trust applied to MetLife for a $5 million universal life policy insuring a person identified as Mansour Seck ("Policy"). A556 ¶2.

As the court found, MetLife issued the Policy following a thorough underwriting process, which included substantial verification of Mansour Seck's identity. Geronta.Ex.A, Decision After Trial ("Opinion") 7-12, 55-56, 58. The licensed broker, Talma Nassim, signed various forms as a witness to Mansour Seck's signature and expressly confirmed she met him in person. A556 ¶4. Krauss signed the Trust Certification confirming that Mansour Seck granted the Seck Trust, and a notary witnessed Mansour Seck's signature on the agreement. A1228/53:3-57:23.

The broker-general-agent with whom MetLife had a longstanding relationship, Algren, submitted a note from Mansour Seck's physician, confirming regular medical visits. A1234/59:2-18, A1286/111:5-12. Algren also provided a recent, full paramedical exam from an approved third-party, showing medical history, vitals, EKG reading, and another witnessed signature. A1234/59:19-61:7. MetLife received results from blood and urine testing and also completed a phone interview with a person purporting to be Mansour Seck. A1239/64:13-65:23, A2965-67. On July 24, 2007, MetLife, issued the Policy to the Seck Trust, which ultimately paid a total of $248,711.14 in premium. A565 ¶¶47, 50.

C. EEA Bought The Policy And Quickly Discovered Red Flags

On July 24, 2009, the Policy's two-year contestability period expired. *Id.* ¶51. On August 10, 2009, EEA bought the Policy from the Seck Trust. *Id.* ¶¶ 52-55.

As part of the sale, EEA required the Seck Trust to identify persons in contact with Mansour Seck so EEA could track his longevity. A572 ¶89. Mansour Seck's first designated contact was Krauss. B53-55. But because Krauss had never actually met him, Krauss informed EEA that he "was not in contact with the Insured" and would have "no liability whatsoever" for his failure to provide any information about him. A1575/200:11-202:10, B54. The other designated contact was a CPA from Florida, Marc Frohlic. B803/112:12-24 (Daly). EEA bought the Policy without any attempt to contact Mansour Seck or investigate his existence. A566 ¶¶ 59-61.

Shortly *after* buying the Policy, EEA, through an affiliated entity, ViaSource, tried to establish contact with Mansour Seck to obtain updated medical records. ViaSource quickly realized it had a problem because:

- All but one of Mansour Seck's doctors disavowed he was their patient. B57-59.
- Mansour Seck could not be reached or located, and ViaSource's letters to him were returned to sender. B57-65.
- In October of 2011, ViaSource, ran a public record search for "fraud prevention or detection" purposes, which showed that there were no public records of the existence of Mansour Seck. A579 ¶¶ 124-26; B66-68.
- On December 6, 2012, ViaSource ran another public records search, which again showed no record of Mansour Seck's existence. A581 ¶¶ 135-37; B90-96.
- On December 17, 2012, ViaSource's in-house counsel threatened legal action against Frohlic if he did not help locate Mansour Seck. B97-101.

- By 2012, all efforts to contact/get information about Seck (including from the broker, trustee, and designated contacts) had failed. B60-65.

But EEA did not share *any* of this information with MetLife, electing instead to *keep paying premiums*, totaling $706,478.29. A582 ¶ 140; A579 ¶¶ 127, 138.

D. Geronta Purchased The Policy Without Conducting Due Diligence

1. Geronta Is A Sophisticated Life Insurance Investor

Geronta is a Delaware Statutory Trust, created to purchase portfolios of life insurance policies on strangers as investments. A1721/101:5-18. Geronta is managed, and all of its decisions here were made, by a London-based management firm, Leadenhall Capital, through Simon Mason and Dan Knipe. A516 ¶ 144-45.

In 2015, Geronta negotiated an agreement (the "PSA") to acquire a portfolio of life policies, including the Policy, from EEA for $132 million (the "Portfolio"). *Id.* ¶ 146; A3129-3172; A1736/116:1-117:14; A1911/141:6-22. In so doing, Leadenhall told EEA that it was "positioned at the forefront of investment advisory within the field of insurance linked securities" with half of its then-$2 billion under management dedicated to "life related investments" and represented that Geronta had "expertise" "to enable it to identify, understand, and independently evaluate the merits and risks of the purchase of the Policies." A3133; A517 ¶ 152; A3156.

2. Geronta Had The Opportunity To Conduct Robust Diligence

Geronta understood that one of the risks of buying life policies on the investor market was widespread origination fraud. A1779/8:10-16, A1796/26:3-11,

A1798/28:1-29:10; B531-692. Through the PSA, Geronta nonetheless agreed that it bore sole responsibility for conducting an independent investigation of the Portfolio and that it would rely solely on its own investigation in determining whether to proceed. A3156-57; A1829/59:6-10; A518 ¶¶ 153-54. EEA put its documents regarding the policies in the Portfolio into a data room ("Data Room") to which Geronta had access for about three months prior to ultimately agreeing to buy the Portfolio. A584 ¶ 155; A2327/57:4-7; A1641/21:10-22; A1819/49:23-53:5. All of the "red-flag" documents referenced above at 7-8 were put in the Data Room. A2232/98:4-116:10 (Mason); B303-05, B110, B311-25, B417, B475-83, B518-22.

3. Geronta Chose To Defer Diligence Until After Acquisition

Geronta admits, however, that it chose *not* to look at the information in the Data Room regarding the Policy until *after* acquisition. *Id.* Had Geronta looked before buying, it would have seen that (i) Mansour Seck's designated contacts had no contact with him; (ii) his doctors disavowed him; (iii) EEA failed over-and-over again to locate him; (iv) there was no evidence of his existence in the public record; and (v) things had gotten so bad that EEA resorted to threatening legal action. *Id.*

Geronta also concedes that it bought the Policy without trying to verify its factual information, reviewing instead only the "biometric data" of a small sampling of policies (which did not include the Policy). A584 ¶¶ 157-59. Geronta also admits

it "intentionally" chose to wait until after acquisition to try to call the insureds and brokers or to run public record, or even simple internet, searches. A1846/76:19-78:6.

4. Geronta's Decision To Willfully Blind Itself Was A Strategic Decision In Pursuit Of A "Windfall"

As the trial court correctly found, based on a damaging internal email at Leadenhall, Geronta's decision to blind itself during the pre-acquisition diligence period was an intentional one designed to capture "windfall" profits—because there was a pecuniary benefit to not knowing, before acquisition, whether insureds were dead or alive. Opinion 46, 53-54. Specifically, under the PSA, Geronta was entitled to keep any policy where an insured had already died, so long as Geronta did not *learn* about that death until shortly *after* closing. A3143 (§2.07), A3175 (Matured Policy). By closing its eyes, Geronta hoped it could capture such policies and immediately cash in on their death benefits without paying any premium. The chronology is explained in an email on April 7, 2017 (the "April 2017 Email") between Knipe and Leadenhall's CEO, Luca Albertini. B1-5.

Through that email, Knipe confirmed that Geronta did not try to reach out to the insureds and verify their existence until ***after*** Geronta bought the Portfolio. B4-5. Knipe explained that all of the insureds were eventually found except for Mansour Seck and another person who, Geronta later learned, had died in Mexico in 2011. B4. Knipe explained that because Geronta paid for the Portfolio before inquiring

into the insureds' existences, Geronta received the policy proceeds resulting from the death in Mexico without having to pay any premiums. *Id.*

Albertini immediately wrote back, asking whether Leadenhall should try to mitigate the risk of another Seck-like situation going forward by confirming insureds' existences and conducting the "deeper due diligence this case seems to point to as being necessary" *prior* to buying policies. B3-4. Remarkably, Knipe responded in the negative—recommending Geronta continue to willfully blind itself in the future—because, if Geronta tried to confirm insureds' existence *before* buying, and it learned insureds had already died, sellers would claw back those policies, and Geronta would lose the opportunity to receive their death benefits without paying premium. B1. In Knipe's own words, ***"The standard in the tertiary market is not to check before closing because if the buyer finds a dead person they want to keep the windfall from the death benefits."*** *Id*. (emphasis added).

Albertini wrote back, confirming his "takeaway": "these things happen," and it was "still possible to recover from the life insurer." Knipe responded, "Yes, accurate summary." B1. That is, Geronta calculated that the "windfall" benefit of willfully blinding itself to try to capture policies (like the one involving the previously undiscovered death in Mexico) outweighs the risk of Seck-like situations, and that Geronta should continue to close its eyes and gamble like this in the future due to its belief that courts will order insurers to return premium if its gamble fails.

5. After Removing Its Blindfold, Geronta Immediately Discovered Mansour Seck's Non-Existence

Geronta hired Life Equity to conduct its diligence *post*-acquisition. Life Equity quickly discovered the problem and notified Geronta that: (i) the Data Room files (the ones Geronta previously ignored) reflected "several" unsuccessful attempts to contact Seck; (ii) public record searches revealed "no information on the name/SSN combination"; (iii) one of the third-party life expectancy reports for Mansour Seck (from EEA) had a different social security number, which also did not match; and (iv) Life Equity found publicly-available press releases discussing a 2010-11 criminal prosecution of a man named Pape Seck for fraudulently applying to several insurers (including MetLife) for policies insuring Mansour Seck. B106-07; A585 ¶¶161-63. Geronta did not alert MetLife when it discovered these facts.

E. Geronta Sought A Refund From EEA

Geronta concedes that, by February 2016, it believed Mansour Seck did not exist and that it chose *not* to tell MetLife. A2221/87:11-88:20. Instead, Geronta hired lawyers from Schulte Roth & Zabel ("SRZ"), who demanded EEA buy back the Policy. B109. But EEA dissembled and tried to contend Mansour Seck was real.

In September of 2016, SRZ sent a letter to EEA, on Geronta's behalf, confirming Geronta's belief that:

- "the person purportedly insured under the Seck Policy does not exist";

- EEA "breached multiple representations" and "perpetrated fraud" by not disclosing its knowledge that Mansour Seck did not exist;
- EEA had not acted in good faith because Geronta debunked its claim that Mansour Seck was real through "the most basic investigation"; and
- EEA needed to refund Geronta or prepare for litigation.

B523-25. Despite confirming to EEA that it had *long* believed Mansour Seck was fake, Geronta continued to pay premium and not alert MetLife. A2223/89:9-90:12.

In November 2016, SRZ again confirmed Geronta's belief that "the person allegedly insured under the Seck Policy does not exi[s]t[] and ViaSource and [EEA] were aware of this fact at the time the parties entered into the [PSA]." B526-27. Geronta also clarified that EEA engaged in a multi-layered fraud: not only in selling the Policy to Geronta, but also in trying to cover up that fraud after the fact. *Id.*

Geronta and EEA entered into a tolling agreement to stay Geronta's claims against EEA until after this case—the timing and details of which are not known as Geronta refused to produce the agreement. A2020/250:19-251:4, A588 ¶ 175.

F. Fifteen Months Later, Geronta Finally Informed MetLife

On April 21, 2017, Geronta finally brought its concerns to MetLife. Geronta did not disclose that it knew of Mansour Seck's non-existence 15 months prior or pass on any of its documentation until November 2017. A586 ¶¶ 164-66, 177-78. When negotiations broke down, Brighthouse commenced this suit. A590 ¶¶ 186-87.

G. MetLife/Brighthouse Intended To Pay The Policy's Death Benefit

As the court correctly found (both before and after trial), MetLife/Brighthouse did not know Mansour Seck did not exist until Geronta told it in April 2017 and, prior to that time, MetLife/Brighthouse always treated the Policy as one it intended to pay and incurred and paid commission, taxes, and reinsurance premiums. Opinion 55-56, 58; Geronta. Ex. D 16-17, n.38. Brighthouse's witnesses explained why MetLife/Brighthouse did not uncover Mansour Seck's non-existence. Although MetLife tried to avoid *issuing* STOLI, its general business practice was not to expend resources investigating or bringing costly STOLI litigation to challenge policies *once they were past the contestability period*. A1254/79:2-82:17. Instead, it was MetLife's policy to simply pay those policies' death benefits. *Id.*; Opinion 56.

That is why, even though MetLife noted that the timing of the transfer to EEA (immediately after contestability) was a potential STOLI marker, MetLife had no reason to investigate the Policy—because MetLife's practice was to simply pay. Indeed, as Jean Philippe, a former MetLife investigator explained, the transfer's timing, although suspicious, was patently insufficient to know whether the Policy lacked insurable interest and it was MetLife's practice not to investigate since this occurred *after* the Policy became incontestable. B917/86:17-89:17; Opinion 39-40. What MetLife would generally do (and did here) was to run a "book of business" review on the broker to see whether she had written other policies sold in a similar

manner. B921/90:10-93:23; A1257/82:18-83:21. The review did *not* involve investigating the Policy (nor was it related to any potential challenge of the Policy); it was focused on the broker's *other* business to see whether to maintain her appointment. *Id.* Because she had not written any other policies with suspicious timing, her appointment was maintained at that time. A3021.

MetLife's general business practice (to pay policies) is also why, when it learned in 2011 (2 years *past* contestability) that a broker named Pape Seck (who was *not* the Policy's broker) was prosecuted for insurance fraud, it saw no reason to investigate. B924/93:24-95:6; A1268/93:6-96:5, A1530/155:6-12, A1539/164:6-165:9 (Warr). Indeed, most insurance fraud concerns misrepresentations as to health and wealth, which are generally not challengeable post contestability.

H. MetLife's Unrelated Investigation of Pape Seck

At trial, Geronta argued that MetLife should have figured out that Mansour Seck was not a real person based on an unrelated investigation MetLife conducted of Pape Seck in 2010. In 2010, Pape Seck (who was not the Policy's broker) sought an appointment to place three policies (not on Mansour Seck), which was denied due to irregularities (including misrepresentations as to health and wealth as well as suspicious coordination—two of the seemingly unrelated insureds had the same phone number) in the application process. B913/82:14-86:16; A3024-26. As the

court correctly found, this was not "germane" to this case as it did not involve the Policy, its broker, or the use of fictitious insureds. Opinion 60; A1264/89:12-91:4.

I. Procedural History

Brighthouse sought a judicial declaration that the Policy was void *ab initio* for lack of insurable interest because Mansour Seck did not exist. A59-70. Geronta conceded as much but aggressively counterclaimed for "rescission," arguing it was entitled to all of the premiums Brighthouse ever received—regardless of whether Geronta itself even paid them—automatically, without proof of anything. A88-114.

The court dismissed Geronta's counterclaim for rescission, holding Geronta could instead try to prove an entitlement to restitution under a theory of unjust enrichment. Geronta. Ex. A 5-9. Geronta sought an interlocutory appeal, which the trial court declined to certify and this Court declined to hear. A257, A268.

Following discovery, Brighthouse moved for summary judgment. Dkt.112. On the eve of oral argument, Geronta sought to assert a fraud claim against Brighthouse—baldly alleging that Brighthouse had learned of Mansour Seck's non-existence years before and intentionally sat on its hands to collect premium. Dkt.125. The court denied that motion (and re-argument) for several reasons, including because there was no evidence that Brighthouse knew of Mansour Seck's non-existence prior to Geronta telling it, and Geronta never asked MetLife/Brighthouse for any of the allegedly withheld information. Geronta. Ex. D. 12-20.

The court denied Brighthouse's summary judgment motion, and at trial, heard from Julienne Warr, Brighthouse's chief underwriter, who walked the court step-by-step through MetLife's underwriting process for the Policy. Opinion 34-35. Geronta elected not to call any witnesses to rebut her testimony. *Id.* 58 n.206.

Geronta's witnesses (Mason and Knipe) also testified live and tried, unsuccessfully, to justify Geronta's diligence and to deflect blame. *Id.* 44-49, 52-55. Knipe was not a credible witness: he was evasive and caught in lies, including without limitation his false claim that the reason Geronta did not telephone insureds before the acquisition was because Geronta did not have their phone numbers—Geronta did. *Compare* A1841/71:20-74:3 (Knipe), *with* A2208/74:8-76:15 (Mason); A1714/94:10-96:19; A.1858/88:9-89:5; A1882/112:4-113:8.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT GERONTA WAS NOT AUTOMATICALLY ENTITLED TO A RETURN OF PREMIUMS

A. Question Presented

Whether the court correctly ruled that parties to an insurance policy lacking insurable interest are not automatically entitled to a return of premium, and, instead must prove an entitlement to restitution.

B. Scope of Review

This Court reviews questions of law *de novo*. *Desert Equities v. Morgan Stanley*, 624 A.2d 1199, 1204 (Del. 1993).

C. Merits of Argument

1. The Trial Court Correctly Denied Geronta's Motion For Judgment On The Pleadings Because Parties To Agreements Void *Ab Initio* As Against Public Policy Are Ordinarily Not Entitled To Any Relief To Any Extent

Delaware law treats agreements that are void *ab initio* because they violate public policy differently from those that are void*able* because they effect a mere private harm. This Court has held that "[a] court may never enforce agreements void *ab initio*, no matter what the intentions of the parties," *PHL Var. Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1067 (Del. 2011), and that where "it is against the public policy of this State to permit its courts to enforce an illegal contract prohibited by law . . . [o]rdinarily . . . neither party has a remedy *to any extent* against the other," *Della v. Diamond*, 210 A.2d 847, 849 (Del. 1965) (emphasis added).

The purpose of Delaware's general rule against relief under agreements violating public policy is to protect the public by discouraging the creation of such agreements. *Eisenman v. Seitz*, 25 A.2d 496, 498 (Del. Ch. 1942)[2] (refusing return of performance made into an illegal agreement for retail liquor business because "[t]he illegal terms are of such a character as would tend to promote evasion or frustration of restrictive and regulatory objects of the act," and rejecting argument that leaving plaintiff where it was found it was "unjust or inequitable" "'on account of public interest'" (quoting *McMullen v. Hoffman*, 174 U.S. 639, 669 (1899))).[3]

The common law recognizes certain discrete exceptions to this general rule. *Morford v. Bellanca Aircraft*, 67 A.2d 542, 547 (Del. Super. 1949) ("Certain exceptions exist" to general rule that "[m]oney paid upon an illegal agreement may not be recovered."). These exceptions are summarized at Restatement (Second) Contracts § 198. Section 198(a) provides that "a party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if he was excusably ignorant of the facts . . . in the absence of which the promise would be enforceable." The Section 198(a)

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[2] This Court cited *Eisenman* with approval by in *Della*. 210 A.2d at 469.

[3] *See also Cook v. Pierce*, 7 Del. 499 (Del. Super. 1862); *Model Heating Co. v. Magarity*, 81 A. 394 (Del. 1911); *Beeber v. Walton*, 32 A. 777 (Del. Super. 1887); *U.S. v. Owens*, 27 U.S. 527 (1829) (citing *Morck v. Abel*, 127 Eng. Rep. 20 (C.P. 1802) attached as Exhibit 1).

comments explain that "[w]hether ignorance is excusable is governed by the same considerations that apply under the rule stated in § 180," and the Section 180 comments explain that "good faith is expected on the part of the party who claims ignorance and he cannot blind his eyes because he does not wish to see." Also, "the matter of which he is ignorant must not be one as to which he is expected to have knowledge because of his expertise or relation to the transaction." *Id*.

Section 198(b) provides that "a party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if . . . he was not equally in the wrong with the promisor." The comments clarify that this exception is typically only applied "in two types of cases." *Id.* cmt. b. The first is where "the claimant is regarded as being less in the wrong because the public policy is intended to protect persons of the class in which he belongs and, as a member of that protected class, he is regarded as less culpable." *Id.* The second is where "the claimant is regarded as being less in the wrong because he has been the victim of misrepresentation or oppression practiced on him by the other party." *Id.*; *accord AIG Consol. Deriv. Litig. v. Smith*, 976 A.2d 872, 883 n.23 (Del. Ch. 2009) (a party is considered not *in pari delicto* "in certain discrete circumstances" such as where a party is induced to illegality through duress or where public policy protects him) (citing 1 J. Story, Commentaries on Equity Jurisprudence § 300 (identifying the same types of cases described in Section 198 Comment (b))).

The new automatic refund rule Geronta asks this Court to create solely for insurable interest cases contradicts this Court's holding in *Della* and is not based on any Delaware case. Rather, it is based on a trio of federal trial court decisions decided before this Court's opinion in *Price Dawe*. Although the policies at issue in that trio were alleged to be either void *ab initio* or merely void*able* due to lack of insurable interest, the courts' opinions focused on the latter, applying rescission principles to return the parties' to their original positions and relying on a case known as *Oglesby*, which likewise had applied rescission principles to a merely voidable contract procured through garden-variety medical misrepresentations (i.e., a private fraud). *See Sun Life v. Berck*, 719 F. Supp. 2d 410, 418 (D. Del. 2010) (citing *Oglesby v. Penn Mut. Life*, 877 F. Supp. 872 (D. Del. 1994)); *Lincoln Nat'l Life v. Snyder*, 722 F. Supp. 2d 546, 564 (D. Del. 2010) (citing *Oglesby*); *Principal Life v. Rucker 2007 Ins. Tr.*, 774 F. Supp. 2d 674, 681 n.68 (D. Del. 2011) (citing *Oglesby*).

But a year later, in *Price Dawe*, this Court held that policies lacking insurable interest "harm the public" and are thus void *ab initio*, devoting an entire section of the opinion to the difference between void policies (which harm the public) and voidable policies (which do not). 28 A.3d at 1067-68. In so doing, this Court distinguished *Oglesby*'s private lies as constituting "basic fraud," rendering that policy merely void*able*, and not providing the proper framework for analyzing policies lacking insurable interest, which are "egregiously flawed" because they

"harm the public" and are "a fraud on the court." *Id.* n.25 (citing *Oglesby*, 695 A.2d 1146, 1151 (Del. 1997)).

Geronta argues that Brighthouse "presented zero Delaware case law contradicting" the trio of federal cases. Not so. Brighthouse made the same argument it makes here, including by pointing to *Della*, which case Geronta's Brief omits altogether! Dkt.41 at 21-24. Geronta also claims that *Price Dawe* implicitly endorsed the federal courts' rescission analysis. But *Price Dawe* merely cited those cases for the proposition that a policy taken out as a cover for a wager lacks insurable interest; it did not credit—or even address—their remedies analysis. 28 A.3d at 1071 n.46.

Geronta also cites (Br. 19-21) dicta that rescission may be available to cure "illegality" or "lack of capacity." But lack of capacity renders a contract merely voidable, *Farone v. Kenyon*, 2004 WL 550745, at *10 (Del. Ch. Mar. 15, 2004), and "illegality" does not necessarily render a contract void. *Magarity*, 81 A. 394. Indeed, Geronta's cases miss the mark as none involved agreements violating public policy.[4] And, in any event, even if rescission were available, the remedy "is neither given nor withheld *automatically*, but is awarded as a matter of judgment." *Gotham Partners v. Hallwood Realty*, 817 A.2d 160, 174 (Del. 2002) (emphasis added).

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[4] *See, e.g.*, *United Engineers v. Babcock*, 1993 WL 50309 (Del. Ch. Feb. 11, 1993) (denying rescission with no mention of public policy violation); *Mkt. Am. v. Google*, 2010 WL 3156044, at *1 (D. Del. Aug. 9, 2010) (same); *Deutsche Bank v. Goldfeder*, 2014 WL 7692441 (Del. Super. Ct. Dec. 9, 2014) (rescission potentially available to cure lack of capacity).

Any attempt to change the law should obviously be left to the legislature. *Sternberg v. Nanticoke Mem. Hosp.*, 62 A.3d 1212, 1217 (Del. 2013). But the very change Geronta urges this Court to adopt has been repeatedly *rejected* by the General Assembly in the wake of *Price Dawe*. *See* Del. S.B. 220, 146th Gen. Assem. (2012) (proposing automatic premium return for insurable interest cases except to owners who violated Section 2704); Del. H.B. 87, 147th Gen. Assem. (2013) (same except without interest); Del. S.B. 71, Amendment 1, 148th Gen. Assem. (2015) (same, but only from insurers having filed five insurable interest suits in Delaware in a single year and no return to owner who engaged in fraud in the origination).[5]

Moreover, in 2016, Delaware's Senate directed Delaware's Department of Insurance ("DOI") to investigate, *inter alia*, the insurable interest challenges being brought by insurers to determine whether it recommended new legislation to "provide certainty to investors" or "what policies or rules should be established to avoid expensive and unnecessary litigation for owners." Del. S. Res. 19, 148th Gen. Assem. (2016). The DOI issued a report, which noted the repeated failure of (the aforementioned) bills that would "require[] life insurers to return premiums paid for policies rescinded or determined to be void because they were fraudulently obtained by a person without an insurable interest." DOI Rep. to Del. Sen., Secondary Mkt.

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[5] Any argument that these bills merely attempted to codify common law ignores *Della* and is belied by the lack of any Delaware cases awarding an automatic refund.

for Life Ins. Policies (2016) 24, attached as Ex. 2. Importantly, however, DOI did *not* recommend passing those bills; instead, it went the other way and recommended codifying legislation that "strongly discourages STOLI," which recommendation the General Assembly accepted. *Id.*; 81 Del. Laws 172 (2017).

Geronta nonetheless argues that this Court must create a new rule to reflect the public policy concern expressed in *Berck* that automatically allowing carriers to keep premiums paid on policies lacking insurable interest will incent them to sit on policies they know lack insurable interest. But that argument ignores the other side of the equation: A rule automatically granting investors a refund whenever a policy they own is deemed to lack insurable interest will incent them to keep doing exactly what Geronta did here and what Geronta says is the "standard in the tertiary market": Buy large blocks of policies without reasonable diligence and ignoring red flags in the hopes of "windfall" profits, secure in the belief that, if they get caught with a bogus policy, Delaware courts will automatically force insurers to foot the bill.

Indeed, because STOLI is a market-driven problem, *Price Dawe*, 28 A.3d at 1070, large downstream investors like Geronta willing to buy policies without reasonable diligence incents upstream actors to create more bogus policies. That is, automatically refunding premium paid under policies lacking insurable interest will defeat the very public policy Delaware's insurable interest rules were designed to promote. *See, e.g.*, *Eisenman*, 25 A.2d at 498 ("'To refuse to grant either party to an

illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum.'") (quoting *McMullen*, 174 U.S. at 669-70); *Stella v. W.S.F.S.*, 1993 WL 138697, at *9-10 (Del. Super. Ct. 1993) (explaining that refusing to provide restitution under illegal contract is particularly appropriate where it would disincent undesirable conduct); *see also, e.g.*, *Siner v. Am. Gen. Fin.*, 2004 WL 2441185, at *10-11 (E.D. Pa. Oct. 28, 2004) (refusing to provide restitution under illegal contract and explaining that "[t]his remedy will also force purchasers of bad debt to scrutinize the underlying transaction prior to making a decision to buy such debt, thereby placing additional pressure on the original creditor to follow both federal and state law during the formation and execution of the relevant contract").

The New Jersey Supreme Court was also recently asked to opine on whether the owner of a policy void *ab initio* for lack of insurable interest can obtain a refund of the premium the investor paid. In so doing, the court surveyed the applicable legal landscape across the nation and determined, as the court did here, that there is no automatic, bright-line rule. Rather, the court held that "[t]o decide the appropriate remedy, trial courts should develop a record and balance the relevant equitable factors," including "a party's level of culpability, its participation in or knowledge of the illicit scheme, and its failure to notice red flags." *Sun Life v. Wells Fargo*, 208

A.3d 839, 859 (N.J. 2019) ("*Bergman*"). The "fact sensitive" approach taken by New Jersey law is consistent with Delaware law and the trial court's decision.[6]

[6] *See* Op. Br. of Berkshire Hathaway 41, *Wells Fargo v. Est. of Malkin*, 172,2021 (Del. Jul. 7, 2021), Dkt.34 (crediting trial court's decision, here, that restitution is only available to an owner "reasonably unaware of the insurable interest problem").

II. The Trial Court, Sitting As Fact-Finder, Correctly Denied Geronta Restitution Of The Premium Geronta Paid Before Alerting MetLife/Brighthouse

A. Question Presented

Whether the court correctly limited Geronta's restitution to only those premiums paid *after* Geronta brought its insurable interest concern to MetLife's attention given that Geronta willfully blinded itself during its diligence and then continued to pay premiums even after discovering the truth.

B. Scope of Review

This Court reviews factual findings only for clear error, *Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010), and with "enhanced" deference "[w]hen [those] factual findings are based on determinations regarding the credibility of witnesses." *Cede & Co. v. Technicolor*, 758 A.2d 485, 491 (Del. 2000).

C. Merits of Argument

1. Geronta Cannot Satisfy Section 198(a)

Section 198(a) required Geronta to prove both that it was excusably ignorant of the facts in the absence of which the Policy would be enforceable and that Brighthouse was not. Restatement (Second) of Contracts § 198(a); *supra* at 20.

a. MetLife *Was* Excusably Ignorant

The court was well within its discretion to credit Warr's testimony that MetLife's 2007 underwriting was thorough, sound, and in-line with MetLife's internal guidelines, especially given Geronta's failure to call an expert to dispute her.

Opinion 55-56. Moreover, as the court correctly found (*id.*), Delaware's insurable interest statute expressly states that insurers can rely in good faith on statements made in applications to establish insurable interest. 18 *Del. C.* § 2704(d).

Geronta argues (Br. 8) that MetLife issued the Policy without following its own guidelines. Not so. Warr explained that the internal guidelines are "not a bible" and that certain requirements can be waived, *pursuant to the guidelines*, at the discretion of an experienced underwriter for reasonable substitutions. A1283/108:15-109:7, A1324/149:2-12. In this regard, Warr testified that a "full" paramedical exam was a reasonable substitute for a medical exam, given that it included all the necessary medical testing, and that accepting Algren's statements about Mansour Seck's finances was a reasonable substitute for a personal financial statement because of the longstanding relationship with Algren and also because the waived form was self-reporting. A1236/61:8-62:9, A1248/73:10-75:8. That is, none of the waived requirements would have made any difference in uncovering Mansour Seck's non-existence during underwriting or stopping the Policy's issuance.

(i) MetLife/Brighthouse Did Not Know About Mansour Seck's Non-Existence Until Geronta Told MetLife/Brighthouse In 2017

Geronta also argues (Br. 25, 31) that MetLife/Brighthouse had "actual knowledge" by 2011 that the Policy "was the product of criminal fraud, *and thus* void for lack of insurable interest." (emphasis added). This is false and misleading.

First, there has never been a shred of evidence that MetLife/Brighthouse "knew" (or even suspected) that Mansour Seck was fictitious at any time before Geronta told MetLife/Brighthouse in April 2017. That is what the court found before trial and what it found after trial. Geronta has no actual evidence, and the court was not required to take the gargantuan leap Geronta urged to *infer* a baseless conspiracy.

Geronta points (Br. 12) to the internal MetLife email from October 26, 2011, suggesting that MetLife was generally aware of Pape Seck's conviction for insurance fraud. A3034. But nowhere in that email does it say (or even suggest) that anyone thought Mansour Seck was not a real person or suspected the Policy lacked insurable interest. Geronta also points (Br.11) to MetLife's printout of a press release from April 2010, coinciding with MetLife's receipt of a grand jury subpoena, and several similar press releases from 2010-11, available to both Geronta and MetLife in the public domain, which describe Pape Seck's prosecution for insurance fraud. A3028-33, A3240-43. But none of the press releases say Mansour Seck was not a real person, in fact, most of them imply he was real. *See* A3242 (describing him as Pape Seck's father); *id.* (describing the use of information of "other real people" implying that Mansour Seck was real as well). Indeed, as the court pointed out, a real person using someone else's social security number does not necessarily mean an insured has been invented from whole cloth. A757/87:9-90:15.

Second, Geronta's entire argument is premised on conflating "criminal fraud" with insurable interest—Geronta argues (Br. 31) that because MetLife knew, *post-contestability*, there had been "criminal fraud," it must *ipso facto* be true that Brighthouse had "actual knowledge" that Mansour Seck *did not exist* and that the Policy therefore lacked insurable interest. Not so. Most insurance fraud has nothing to do with insurable interest, nothing to do with fictitious insureds, and does not form a basis to challenge a policy past its contestability period. Thus, MetLife's knowledge, *post-contestability*, that there had been fraud in the Policy's issuance does not show MetLife had "actual knowledge" the Policy lacked insurable interest.

Geronta's argument that MetLife/Brighthouse *should* have known the Policy lacked insurable interest fares no better. Geronta argues that when MetLife "flagged" the Policy as potential "IOLI" (investor-owned life insurance) in 2009, or, at the latest, when it learned, in 2010/11 that there had been fraud, it should have dug deeper. But the court heard, and justifiably credited, substantial, undisputed testimony as to why MetLife had no reason to investigate the Policy for insurable interest issues and, instead, always treated the Policy as one whose death benefit would be paid upon due proof of death. And, of course, Delaware law does not impose an affirmative duty on insurers to investigate policies for defects after they are issued, to alert subsequent policyholders that policies may contain certain STOLI

indicia, or to cease accepting premium on policies. *Sun Life v. Wilmington Tr.*, 2022 WL 179008, at *12 (Del. Super. Ct. Jan. 12, 2022) ("*Frankel/Debourbon*").

b. Geronta Was Not Excusably Ignorant

There is no dispute that Geronta could have discovered Mansour Seck's non-existence by the time Geronta should have been doing its pre-acquisition diligence *in 2015* had it so much as looked at the information in its Data Room or conducted even the most basic investigation *before* acquisition. This is most obviously reflected in how quickly Geronta did discover the truth as soon as it removed its blindfold. But, as the April 2017 Email makes clear, Geronta intentionally bought the Policy without investigating in the hopes of securing a "windfall." This places Geronta squarely within the common law's prohibition on willful blindness.

Moreover, "Delaware courts do not rescue disappointed buyers from circumstances that would have been guarded against through normal due diligence and negotiated contractual protections." *Interim Healthcare v. Spherion*, 884 A.2d 513, 551 n.305 (Del. Super. 2005), *aff'd*, 886 A.2d 1278 (Del. 2005) (Table); *see VGS v. Castiel*, 2004 WL 876032, at *6 (Del. Ch. Apr. 22, 2004) (sophisticated investor's failure to recognize importance of contract made available during due diligence diminished plaintiff's fraud and breach of contract claim); *Debakey v. Raytheon Serv.*, 2000 WL 1273317, at *26-28 (Del. Ch. Aug. 25, 2000) (finding

party's "cost-benefit analysis" that "less-than-careful job of diligence would suffice" was a decision it was "free to make," but that it must "live with its consequences").

Geronta does not meaningfully dispute its failure to prove excusable ignorance; indeed, Geronta's counsel abandoned its excusable ignorance argument altogether in closing. A2793/78:7-123:9; A2839/124:15-126:15. Likewise, Geronta's Opening Brief here gives the issue only cursory treatment (in a heading) without disputing the trial court's factual findings, and without meaningfully addressing the record. Br.43. So although, at trial, Knipe tried to re-write the April 2017 Email to argue that Geronta had *not* willfully blinded itself, that testimony was correctly rejected, and the issue has not been raised on appeal.

And, regardless of motives, there is no dispute that Geronta is sophisticated, and easily could have (and would have) discovered the truth if it had simply looked at the documents it had. Indeed, it took Knipe ten seconds on the witness stand to conclude that Mansour Seck was not in EEA's 2012 public records search. A2057/287:1-288:15. Geronta also could easily have seen the very articles and press releases it now claims show that Mansour Seck was fictitious.[7] Geronta's failure to establish that its ignorance of Mansour Seck's non-existence was excusable is fatal

[7] The articles do not say he is fictitious, but they were publicly available by 2015 (including from a simple Google search) and they would have given pause to any reasonable investor to at least dig deeper *before* buying—precisely what happened *after* acquisition when Geronta opened its eyes.

to its claim. Indeed, the court's restitution analysis could have stopped right there: There is no basis in law, equity, or policy, to award restitution on a contract violating public policy to a party who cannot even establish its own excusable ignorance.

2. Geronta Failed to Satisfy Section 198(b)

Under Section 198(b), Geronta had to prove it was "not more equally in the wrong" than Brighthouse. As the comments make clear, consistent with Delaware law, this exception has traditionally only been applied where a claimant is deemed not *in pari delicto* because it is in the class of persons the law is designed to protect, or because it has been the victim of oppression or misrepresentation at the hands of the other party. Section 198(b), *cmt.* b; *AIG Consol. Deriv. Litig.*, 976 A.2d at 883 n.23; *see supra* at 20. Geronta does not dispute that (as a sophisticated policy investor) it is not in the class of persons Delaware's insurable interest laws are designed to protect (it is in the class of persons *from whom* insureds need protection), *Price Dawe*, 28 A.3d at 1070-71, 1074, nor does it argue on appeal that it was the victim of misrepresentation or oppression at the hands of MetLife/Brighthouse.

Instead, Geronta argues (Br. 37-38) that Brighthouse has "ignored" the full text of the comments and overlooked that the "limitation" on Section 198(b) does not apply unless a claimant has engaged in misconduct. But Geronta has flipped the comment on its head, misreading the very portion it quotes—which actually provides an exception to the exception. Read properly, even if a claimant meets "the exception

in paragraph (b)" (i.e., is not more equally in the wrong), the exception is not available to a *claimant* whose misconduct is serious. This does not help Geronta.

Geronta also spills ink (Br. 27-31) claiming the court was not permitted to rely on the comments to Section 198(b), having purportedly bound itself to Geronta's amorphous "comparative fault" standard under the law of the case doctrine. But it is a fundamental tenet of that doctrine that the issue in question must be "actually decided." *Washington v. Del. Transit Corp.*, 226 A.3d 202, 212 (Del. 2020). Here, the trial court ordered briefing on the proper interpretation of Section 198(b), following the second pretrial conference, but never made a ruling. A890/52:10-55:4. Moreover, Geronta's argument (Br. 28-29) that the court should be deemed to have "decided" the issue by purportedly failing to correct Geronta's self-serving statements at a pre-trial conference hardly warrants a response.

3. Geronta Failed A Comparative Fault Test

Even if one were to ignore the fact that the exceptions to Delaware's general no restitution under agreements violating public policy rule are narrow, and instead assume that the proper test is the free-wheeling comparative fault analysis Geronta urges, Geronta unquestionably failed to prove that as well. This is clear, mostly for the reasons already discussed above—and it is not a close call.

First, there is no comparison between the robust underwriting MetLife conducted and the intentionally blind diligence Geronta conducted. Nor is there any

comparison between the access to information MetLife had in 2007 (before any fraud was uncovered) and the information Geronta had access to in 2015 (including the Data Room it ignored and the public articles it could easily have seen).

Second, setting aside the question of *justifiable* ignorance, most of the premiums the court refused to refund were paid while Geronta was no longer ignorant at all. Indeed, Geronta discovered the problem in January 2016 (B106-07) and Mason concedes that by February 2016 he believed Mansour Seck was fake. A2221/87:11-88:20. But Geronta nonetheless elected to pay premiums and wait 15 months to tell MetLife/Brighthouse.

Finally, Geronta's entire argument here is that MetLife/Brighthouse must be more to blame than Geronta because MetLife/Brighthouse supposedly knew no later than 2010/11 that Mansour Seck did not exist. (Br. at 31-42). But this argument is built on a false premise—repeatedly rejected by the court as fact-finder—that MetLife/Brighthouse knew of Mansour Seck's non-existence before Geronta informed MetLife/Brighthouse of this in 2017.

The court's conclusion that Geronta was more to blame was not error.

4. There Was No Disproportionate Forfeiture

Section 197 provides an exception for restitution where its absence would cause a "disproportionate forfeiture." Restatement (Second) § 197. The comments make clear that "[w]hether the forfeiture is 'disproportionate' . . . will depend on the

extent of that denial of compensation as compared with the gravity of the public interest involved and the extent of the contravention." *Id.* cmt. b.

The court was well within its discretion to find that the proper balancing of policy and equity warranted awarding Geronta only the premiums it paid *after* informing MetLife. This incents investors to avoid perpetuating the market for illegal policies and rewards those who raise (rather than withhold) their concerns. Any other outcome would encourage investors *not* to look carefully and *not* to share their concerns—which Geronta did here and admits is the current market standard—which would frustrate the public policy interests animating the insurable interest laws. After all, and as this Court recognized in *Price Dawe*, bogus life insurance policies are ginned up by unscrupulous actors to meet the demand of downstream investors like Geronta. If upstream actors know that downstream money will buy without reasonable diligence, they will be incented to continue manufacturing bogus policies without insurable interest to the detriment of the public.

III. Geronta Is Wrong That It Can Obtain A Refund of Premiums It Did Not Pay

A. Question Presented

Whether the court correctly ruled that Geronta was not entitled to restitution of the premiums paid by its predecessors.

B. Scope of Review

This Court reviews questions of law *de novo* and of fact for clear error.

C. Merits of Argument

Geronta's contention that it should get a refund, not just of the premium it paid, but also of the premium it did *not* pay (i.e., the premium paid by prior owners) merely because Geronta says it bought the "rights" to those past paid premiums in connection with buying the Policy is not supported by Delaware law.[8]

First, Geronta does not cite any Delaware case for the proposition that a party can sell rights to performance made under agreements that violate public policy.

Second, as Geronta's Opening Brief makes clear, its restitution claim is predicated on a theory of unjust enrichment, that it would be unjust to allow Brighthouse to keep all of the premiums it received because it supposedly incurred "no risk."[9] In so doing, Geronta ignores the principle that to recover under unjust

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[8] Geronta's argument (Br. 23) that its "purchase" of those rights is not disputed is false. EEA testified it never intended to sell Geronta those rights. B842/236:1-238:2.

[9] The contention that Brighthouse incurred no risk is false. Brighthouse was the victim of a fraud and has at all times been subject to the risk that the fraud would be culminated through a fraudulent claim for death benefits. Brighthouse has also been forced to incur substantial costs to litigate this case and incurred substantial costs

enrichment "there must be some direct relationship . . . between a defendant's enrichment and a plaintiff's impoverishment." *Anguilla Re v. Lubert-Adler Real Estate Fund*, 2012 WL 5351229, at *1 (Del. Super. Ct. Oct. 16, 2012); *Windsor I, LLC v. CWCapital Asset Mgmt.*, 238 A.3d 863, 875-76 (Del. 2020). Here, the payment of premium by Geronta's *predecessors* did not impoverish *Geronta*.

Third, courts applying Delaware law have, upon finding a policy lacking insurable interest, refused investors' windfall request for a "refund" of premiums that investor did not actually pay. *See, e.g.*, *Sun Life v. U.S. Bank*, 2016 WL 3948059, at *1 (S.D. Fla. June 9, 2016) ("*Malkin*") (reasoning that investor could not "cite to any Delaware authority mandating a return of premium payments made by a third party"), *aff'd* 693 F. App'x 838 (11th Cir. 2017); *U.S. Bank v. Sun Life*, 2016 WL 8116141 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*") (same outcome), *adopted* 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017).[10]

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over the life of the policy, including the cost to reinsure the risk, which the trial court, incorrectly in Brighthouse's view, did not allow Brighthouse to take as an offset.

[10] To counsel's knowledge, there are only two insurable interest decisions returning premiums paid by prior owners, *Sun Life v. U.S. Bank,* 2019 WL 8353393 (D. Del. Dec. 30, 2019) ("*Sol*"), and *DeBourbon/Frankel*, 2022 WL 179008. In *Sol*, the remedy was for promissory estoppel, a claim not alleged here. (Nor could it have been since this Court has held that "a court may never enforce agreements void *ab initio*." *Price Dawe*, 28 A.3d at 1067). And in *DeBourbon/Frankel*, the court ruled that the insurer must return all premiums to all prior owners, even though (i) the court found that the insurer did not act deceptively and did not violate any duty to the policy's owner; (ii) the court found that refunding those premiums would be "unfair" because those prior owners induced the illegality in the first place; (iii) those prior owners were not before the court; and (iv) those prior owners no longer exist.

Fourth, courts applying insurable interest law similar to Delaware's also routinely decline to award investors the windfall of premiums they did not pay. *See, e.g.*, *Bergman*, 2016 WL 6824367, at *2 (D.N.J. Nov. 17, 2016) (granting STOLI investor premiums paid by it and with its money but refusing to award it premiums paid by and with others' money), *questions certified to* 208 A.3d at 859 (explaining that STOLI investor "may be entitled to a refund of premium payments ***it*** made on the policy, depending on the circumstances") (emphasis added), *aff'd* 779 F. Appx. 927, 929 (3d Cir. Aug. 21, 2019); *Sun Life v. Wells Fargo*, 2018 WL 2100740, at *5 (N.D. Ill. May 7, 2018) ("*Corwell*") ("Any recovery by the Bank of premiums paid is limited to payments innocently made by it. The Bank would not be entitled to restitution of all premiums *received* by plaintiff from any source."), *clarified by* 2020 WL 1503641, at *15 (N.D. Ill. Mar. 30, 2020).

Fifth, Geronta ignores the legal principle than an assignee can take no greater right than held by the assignor. *Burton v. Willin*, 11 Del. 522, 539 (1883). This is relevant here because Geronta's predecessors obviously could not qualify for restitution themselves. The Seck Trust was involved in the original misconduct, and Geronta concedes that EEA *knew* Mansour Seck did not exist but *defrauded* Geronta by hiding this and selling the Policy to Geronta anyway. B523-28.

That at least one court incorrectly believed that Delaware law tied its hands and required an "unfair" premium refund to actual wrongdoing entities that no longer exist speaks to the need for clarity on this issue.

Finally, if an insurer were required to "refund" to a policyholder the premiums that policyholder did *not* pay, it would be receiving the very "unfair windfall" Geronta incorrectly argues the court gave Brighthouse. Indeed, Geronta fails to mention that it has indemnification rights against EEA; that Geronta threatened to sue EEA for indemnification; and that Geronta then entered into a tolling agreement with EEA so that Geronta could first try to get Brighthouse to foot the bill. To the extent Geronta has additional losses, it can attempt to be made whole by holding its predecessor—an entity Geronta has repeatedly accused of defrauding it—to account.

IV. THE TRIAL COURT DID NOT ERR BY EXCLUDING TESTIMONY

A. Question Presented

Whether the Trial Court erred by ruling that Geronta needed an expert witness to establish that its diligence confirmed to industry standards.

B. Scope of Review

This Court reviews admissibility of evidence and discovery sanctions for abuse of discretion. *Wong v. Broughton*, 204 A.3d 105, 108 (Del. 2019).

C. Merits of Argument

Geronta argues it was prejudiced at trial because it was purportedly not able to offer testimony explaining its rationale for conducting no pre-acquisition diligence due to the court's ruling that an expert was required. This argument is false and misleading on several levels.

First, the court correctly ruled that Geronta could not argue that its diligence was reasonable because it supposedly conformed to industry standards without an expert to establish that standard under Rule of Evidence 702. This is unquestionably a type of specialized knowledge outside the scope of lay testimony. Geronta does not cite a single Delaware case, instead relying upon a Third Circuit decision, which *excluded* technical testimony dressed up as lay opinion, precisely what Geronta tried to do here. Br.44 (citing *Donlin v. Philips Lighting*, 581 F.3d 73, 81 (3d Cir. 2009)).

Second, Geronta conveniently omits that the court also precluded Geronta from explaining how its diligence was informed by prior experience *because*

Geronta refused to answer questions on that topic at deposition. A919/81:14-90:20, B[__]. Delaware courts have long had discretion to preclude testimony withheld in discovery "to enforce standards of fairness and the Rules of Court," *Concord Towers v. Long*, 348 A.2d 325, 326 (Del. 1975), and to avoid litigants using discovery as a "sword and a shield." *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 (Del. Ch. 2000). At Geronta's deposition, its designee, Mason was asked several questions about his experience conducting diligence and whether, *inter alia*, there was any "standard policy that you use with respect to life settlement policies when you are evaluating risk." Counsel for Geronta instructed Mason to answer only as to policies purchased *for* Geronta, and because the Portfolio was Geronta's first purchase, Mason had no prior Geronta-related experience to speak of and thus refused to answer questions about his own experience and what he knew from other portfolios that might have informed his decisions in advising Geronta. B942-46. Because Brighthouse was prevented from exploring this topic at deposition, the Court properly refused to let Geronta's witnesses testify to it at trial.

Third, even if this ruling was erroneous (it was not) it had no material effect because Geronta was permitted to expound at length about its diligence and the reasoning behind it, including Knipe's lengthy efforts to try to distance himself from his own words in the April 2017 Email. *E.g.*, A2325/55:3-60:21, A2314/44:11-15; A2456/7:2-18:5. To be clear, Geronta never objected to the admissibility of the April

2017 Email or claimed its use opened a door; because, the reality is, Geronta's witnesses said everything they wanted to say on this topic.

V. The Trial Court Did Not Reject Geronta's Bona Fide Purchaser Defense As Legally Insufficient—It Found Factually That Geronta Lacked Bona Fides

A. Question Presented

Whether a sophisticated investor that willfully blinds itself in due diligence can claim to be a bona fide purchaser.

B. Scope of Review

This Court reviews questions of law *de novo* and of fact for clear error.

C. Merits of Argument

Geronta's cursory claim that the court erred by failing to apply a purported bona fide purchaser defense fails on several levels.

First, as discussed above, the court correctly found, as matter of fact, that Geronta conducted limited diligence, willfully blinding itself for pecuniary gain—that is, Geronta did not buy in good faith.

Second, as a matter of law, a bona fide purchaser defense also does not apply to rights purportedly purchased in connection with void *ab initio* agreements. *See, e.g.*, *Faraone v. Kenyon*, 2004 WL 550745 (Del. Ch. Mar. 15, 2004); *Pruco Life Ins. Co. v. Wells Fargo*, 846 F.3d 1188 (11th Cir. 2017), *rev'd on other grounds* 200 So.3d 1202, 1206 (Fla. 2016); *Kinwood Capital Group v. BankPlus*, 614 F.3d 140, 144 (5th Cir. 2010); *Faison v. Lewis*, 32 N.E.3d 400, 403-05 (N.Y. Ct. App. 2015)

Third, Geronta should not be heard to complain that the court failed to expressly acknowledge its purported bona fide purchase defense, considering

Geronta never once mentioned it during the trial—including failing to argue or even address it in its opening and closing remarks.

For all these reasons, the court correctly limited Geronta's relief to the premiums it paid after April 2017.

CONCLUSION

The trial court's thoughtful and well-reasoned judgment should be affirmed.

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