IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary,	)	
Defendant/Counterclaim-Plaintiff Below, Appellant,	)	No. 126, 2022
v.	)	Court Below: Superior Court of the State of Delaware, C.A. Nos. N18C-07-289 MMJ CCLD, N17C-08-331 MMJ CCLD
SUN LIFE ASSURANCE COMPANY OF CANADA,	)	
Plaintiff/Counterclaim-Defendant Below, Appellee.	)	**PUBLIC VERSION FILED JUNE 10, 2022**

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal is about how Appellee Sun Life Insurance Company of Canada ("Sun") adopted a "lay in the weeds" litigation strategy in an effort to obtain a windfall: Sun monitored suspected stranger-originated life insurance ("STOLI") policies [redacted], tracked policies on secret "STOLI lists," strategically delayed filing lawsuits (thereby maximizing premiums), and then claimed—only after the insureds died—that Sun should not have to pay death benefits *and* it should keep all the premiums paid in exchange for its promise to pay the death benefits. Appellant Wilmington Trust, N.A., as Securities Intermediary ("Securities Intermediary")[1] respectfully submits this Court could not have foreseen such sharp practices eleven years ago when it held that "an insurer can challenge the enforceability of a life insurance contract after the incontestability period where a lack of insurable interest voids the contract." *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1068 (Del. 2011) ("*Price Dawe*"). It should not countenance them now.

These consolidated cases concern two policies that Sun issued in 2006—a $10 million policy insuring Bernard de Bourbon's life (the "De Bourbon Policy") and a $9 million policy insuring Sam Frankel's life (the "Frankel Policy," together with

[1] Securities Intermediary has acted, and continues to act, solely in its capacity as a securities intermediary pursuant to the UCC. *See* U.C.C. § 8-102(a)(14).

the De Bourbon Policy, the "Policies"). The Superior Court ruled that both Policies were void, finding they were covers for wagering contracts by LPC Holdings I LP ("LPC"),[2] a non-party investment fund that acquired the Policies from the insureds in 2006.[3] The Court did, however, correctly hold that because Sun did not have to pay the death benefits, Sun had to disgorge all of the $6.9 million in premiums that it received on the Policies.

The Superior Court's ruling that the Policies were void was no surprise to Sun, which had been anticipating that outcome for nearly a decade before filing these cases. In 2009, Sun filed three lawsuits challenging the validity of other policies linked to LPC. [redacted] Sun was also communicating with LPC's principals about the Policies. During this same time period, Sun's attorneys litigated six other cases on behalf of different insurers concerning the validity of policies associated with LPC. Starting in [redacted] Sun placed the Policies on internal

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[2] Securities Intermediary will refer to LPC Holdings I LP and its affiliates throughout this brief as "LPC."

[3] Although Securities Intermediary believes the Superior Court erred in its policy validity ruling, Securities Intermediary is not appealing that ruling solely as a matter of judicial efficiency given the importance of the other issues presented by this appeal. To be clear, Securities Intermediary does not concede that the Policies (or other policies linked to LPC) are void.

lists that tracked potential STOLI, which Sun regularly updated in the ensuing years. In 2014, when Securities Intermediary acquired the Policies on behalf of its customer Viva Capital Trust ("Viva"), [redacted]

Although Sun [redacted], Sun never told Securities Intermediary—or any of the Policies' predecessor owners—that Sun believed the Policies were invalid while the insureds were alive. Instead, Sun approved three ownership and beneficiary changes on the Policies, repeatedly represented to Securities Intermediary and the Policies' predecessor owners that the Policies were "in force," and collected \$6.9 million in premiums from 2006–2018—premiums which Sun never would have received if Sun had sought to invalidate the Policies while the insureds were alive. In fact, in 2012, Sun made the "strategic decision" to stop challenging policies while insureds were alive (and while premiums were still flowing into the company).

In a situation like this, policy owners should be able to pursue promissory estoppel claims and equitable defenses to recover a policy's death benefit, even if the policy is void *ab initio*. Consequently, the Court should reverse those portions of the Superior Court's Rule 12 rulings that dismissed Securities Intermediary's promissory estoppel counterclaim and struck Securities Intermediary's waiver, estoppel, laches, and unclean hands defenses. The Court should remand the cases to the Superior Court for further briefing on whether Sun's duplicitous course of dealing from 2006 through 2018 requires Sun to pay the Policies' death benefits notwithstanding the Policies' invalidity.

Importantly, if this Court were to permit policy owners to assert equitable theories, this Court would not be enforcing a void contract. Instead, as the former Chief Judge of the U.S. District Court for the District of Delaware has explained, the Court would be requiring an insurer to honor promises that are independent of the void policy. Delaware law should not permit insurers to strategically delay lawsuits on policies they are treating as STOLI while collecting millions of dollars in premiums, simply because *Price Dawe* does not prohibit insurable interest challenges after the two-year contestability period. Indeed, there must come a time when insurers can no longer bring these claims—either because of the insurer's duplicitous course of dealing, extreme delay, or some combination.

Separately, the Superior Court was correct that, if Sun does not have to pay the $19 million in death benefits, Sun cannot obtain a windfall by keeping the $6.9 million in premiums that it collected on those very same Policies. But two aspects of the manner in which the Superior Court handled the premium-refund issue nevertheless should be reversed. The Superior Court erred when it held that Sun must return all of the premiums to each of the four parties in the chain-of-title who paid those premiums. Instead, the Court should hold that Sun must return all the premiums to Securities Intermediary (on behalf of Viva) because Viva bought the rights to all the premiums when it acquired the Policies in 2014. The Superior Court also erred when it ruled that Sun does not have to pay prejudgment interest on return-of-premium damages. The Court should require Sun to pay prejudgment interest from the date of each premium payment.

SUMMARY OF ARGUMENT

1. The Superior Court incorrectly held that Securities Intermediary could not assert a promissory estoppel counterclaim and waiver, estoppel, laches, and unclean hands defenses. The Superior Court's ruling was based on its belief that (a) a policy owner cannot use estoppel to recover the death benefit on a void policy, and (b) the Superior Court lacks subject matter jurisdiction to consider equitable defenses. Both of those rulings were erroneous, and should be reversed.

2. The Superior Court correctly held that, if Sun does not have to pay the Policies' death benefits, Sun cannot keep any of the $6.9 million in premiums that it collected over the life of the Policies. The Superior Court's premium refund decision was nevertheless incorrect in two respects:

(a) By ordering Sun to repay the premiums to the particular owners in the chain-of-title who paid the premiums, the Court overlooked a key undisputed fact. When Viva acquired the Policies in 2014, Viva purchased the rights to premiums paid by the Policies' prior owners. Therefore, if the Court holds that Sun need not pay the death benefits, it should require Sun to repay all the premiums to Securities Intermediary (on behalf of Viva).[4]

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[4] The issue whether a policy owner is entitled to recover premiums paid by predecessor owners is also currently before this Court in *Geronta Funding v. Brighthouse Life Ins. Co.*, No. 380, 2021 (Del.).

(b) The Superior Court erred when it held—without any briefing—that Sun was not required to pay prejudgment interest. If this Court holds that Sun need not pay the death benefits, the Court should reverse the Superior Court's ruling on prejudgment interest, and hold that Sun must pay prejudgment interest under well-settled Delaware law from the date of each premium payment.

STATEMENT OF FACTS

A. The Insureds Sell the Policies to LPC Through Beneficial Interest Transfers.

Sun issued the De Bourbon Policy on September 28, 2006, which named the Bernard Alexis De Bourbon Life Insurance Trust (the "De Bourbon Trust") as the policy's owner and beneficiary. (A1269; A1291.) Sun issued the Frankel Policy on December 4, 2006, which named the Sam Frankel Insurance Trust (the "Frankel Trust") as the policy's owner and beneficiary. (A935; A959.) Shortly thereafter, De Bourbon and Frankel both sold the Policies to LPC—an investment fund operated by Martin Fleisher and Steve Lockwood—through "beneficial interest transfers." (A930–A932; A974–A975; A1968, ¶¶4-5; A2099, ¶5.) This meant the insureds sold the beneficial interests the De Bourbon Trust and the Frankel Trust to LPC, rather than the Policies themselves.

B. Sun and Its Attorneys Begin Litigating Other LPC Cases and Discussing the Policies' Connection to LPC in 2009.

Sun learned about LPC in 2009, around the time Sun filed three lawsuits in 2009 challenging the validity of other policies associated with LPC. (A2120–A2121, Nos. 8-9; A2165–A2167 at 142:6–150:4; A2170 at 162:15–164:24.) One of those cases—*Sun Life Assurance Co. of Canada v. Berck*, C.A. No. 09-498-SLR (D. Del.) ("*Berck*")—is instructive concerning Sun's knowledge.

In *Berck*, Sun challenged the validity of a policy insuring Daniel Berman's life on the ground that Berman sold the beneficial interest in the trust that owned the Berman policy to investors shortly after the policy's issuance. (A1171–A1175, ¶¶37-48.) Sun claimed in *Berck* that it knew at least six other cases in which Jonathan Berck—the trustee of the Berman trust, and the defendant in *Berck*—was associated with policies sold to investors through beneficial interest transfers. (A1167–A1168, ¶¶21-22; A1174, ¶48.) Nearly a decade after filing *Berck*, Sun made nearly identical allegations regarding the De Bourbon and Frankel Policies in its complaints. (*Compare* A1171–A1175, ¶¶37-48 (*Berck*) *with* A255–A262, ¶¶32-51 (*De Bourbon*) *and* A422–A429, ¶¶31-50 (*Frankel*).)

Sun admitted that *Berck* involved the same type of prearranged beneficial interest transfer agreement with LPC that Sun believed rendered the Policies in these cases invalid, and that its allegations in *Berck* were substantially similar to its allegations here. (A2170–A2171 at 164:25–165:20; A2215 at 337:20-338:14). But Sun did not challenge the validity of the De Bourbon Policy or the Frankel Policy when it filed *Berck*. Instead, from July 8, 2009 (the date Sun filed *Berck*) through De Bourbon's death in 2017, Sun collected approximately $3.9 million in premiums on the De Bourbon Policy. (A1606–A1607; A2248 at 56:24–58:17.) And from the date Sun filed *Berck* through Frankel's death in 2018, Sun collected approximately $1.4 million in premiums on the Frankel Policy. (A1706; A2251 at 68:2-20.)

Significantly, at the same time it was litigating *Berck*, [redacted]–[redacted]. [redacted] it filed a lawsuit challenging the validity of the Frankel Policy. (A2479, row 7.) [redacted]–[redacted] it filed a lawsuit challenging the validity of the De Bourbon Policy. (A2482, row 19.)

Sun also communicated with LPC's representatives regarding both Policies while litigating *Berck* [redacted] Sun exchanged letters in 2009 and 2010 with Berck and Fleisher (one of LPC's principals) when confirming owner/beneficiary changes. (A1073–A1084; A1085–A1089; A1091; A1092; A1094–A1103; A1154–A1160; A1200; A1222–A1261; A1301–1318.) Sun obtained a copy of LPC-affiliate Villa Capital's operating agreement, which Fleisher signed on behalf of LPC, in the process of confirming those ownership/beneficiary changes. (A1073; A1081–A1082.)[5] Sun had extensive correspondence with Berck from 2008–2009 relating to the Policies. (A1005–A1045; A1047–A1055.) Sun communicated with Fleisher about the Policies from 2009–2010. (A1161; A1201;

[5] Villa Capital has no affiliation, and should not be confused, with Viva.

A1202–A1207; A1217–A1219.) Sun received wires from LPC for premium payments. (A1602–A1604; A2249–A2250 at 58:20-64:11.)

The law firm advising Sun during this time period was Drinker Biddle. Drinker represented Sun in *Berck*, and litigated nine cases concerning policies acquired by LPC between 2008 and 2009.[6] According to Lockwood (one of LPC's principals), Drinker held a conference in 2008 that included a panel discussion on LPC. (A2507–A2511 at 37:17–52:21.) This Drinker team is the same group of attorneys who moved to Cozen O'Connor in 2018 and represents Sun in these cases.[7] Sun admitted that it monitored LPC lawsuits—namely, *Kramer* and *Teren*[8]—in real

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[6] *Kramer v. Lockwood Pension Servs., Inc.*, No. 08-cv-2429-DA (S.D.N.Y.); *Lincoln Life & Annuity Co. of New York v. Gillman*, No. 502008 CA 01392 (Fla. Cir. Ct.); *Lincoln Life & Annuity Co. of New York v. Teren*, No. 37-2008-00083905 (Cal. Sup. Ct.); *Lincoln Life & Annuity Co. of New York v. Bernstein*, No. 2641/2008 (N.Y. Sup. Ct.); *Lincoln Life & Annuity Co. of New York v. Janis*, No. 17362/08 (N.Y. Sup. Ct.); *Bernstein v. Principal Life Ins. Co.*, No. 09-cv-4925 (S.D.N.Y.); *Sun Life Assurance Co. of Can. v. XLI Holdings, LLC*, No. 09-cv-407-GMS (D. Del.); *Sun Life Assurance Co. of Can. v. Laskaris*, No. 09-cv-413-GMS (D. Del.); *Sun Life Assurance Co. of Can. v. Berck*, No. 09-cv-498-SLR (D. Del.).

[7] *Cozen O'Connor Expands Commercial Litigation Practice in Philadelphia with Group from Drinker Biddle*, Cozen O'Connor (Apr. 26, 2018), https://www.cozen.com/news-resources/news/2018/cozen-o-connor-expands-commercial-litigation-practice-in-philadelphia-with-group-from-drinker-biddle (last visited May 26, 2022).

[8] In *Kramer*, the Court of Appeals of New York ultimately held that policies purchased by insureds and sold into the secondary market through beneficial interest transfers involving LPC are valid under New York law. *See Kramer v. Phoenix Life Ins. Co.*, 940 N.E.2d 535, 537, 550-53 (N.Y. 2010) ("*Kramer*"). In *Teren*, a California appellate court ultimately held that policies acquired by LPC through

time. (A2166 at 146:12–147:11; A2170 at 163:22–164:24.) [redacted] (A2412–A2413 at 301:11-305:3.)

C. <u>Sun's Business People Flag the Policies as STOLI as Part of Its STOLI Investigation.</u>

Sun's behind-the-scenes focus on the Policies based on their connection to LPC is only one part of this story. Beginning in 2005—a year before Sun issued the Policies—Sun launched an expansive STOLI investigation, through which its business people consistently flagged the Policies internally as STOLI for reasons other than their connection to LPC.

[redacted] (A893–A894; A2147 at 69:8–70:20; A2353–A2354 at 64:21–68:7.) [redacted] (A909; A910; A2188–A2190 at 234:13–243:12;

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beneficial interest transfers were valid under California law. *See Lincoln Life & Annuity Co. of N.Y. v. Berck*, 2011 WL 1878855, at *1-3, *6-7 (Cal. Ct. App. May 17, 2011) ("*Teren*").

A2348 at 43:10–13; A2349 at 48:19–50:4; A2354–A2355 at 68:8-73:17; A2360–A2362 at 92:15–99:1.)

Sun continued working on this project in 2007, when it first identified the De Bourbon Policy on a spreadsheet. (A976 at “2006 Data” tab, row 277; A977–A979; A2192 at 251:8–252:17; A2363 at 102:11–105:15.) [redacted] (the year Sun issued both Policies). (A977; A2190–A2192 at 243:13–252:17.) I[redacted]” (A993; A2386–A2387 at 195:5–199:12.) Sandy Schmidt was the broker on the Frankel Policy, and (11 years later) was named as a defendant in this case. (A415; A922; A924.)

[redacted] (A2149 at 78:16–79:10, 79:22–80:8.) S[redacted] (A2149 at 79:11–21.)

[redacted] (A2260–A2262 at 102:25–110:1; A2264 at 120:9–121:5.) Sun confirmed that both of the Policies at issue were flagged as part of this process. (A1091; A1093; A2263 at 116:10–117:6; A2267 at 130:9–131:10.) Despite treating both Policies as ones without "clear insurable interest[s]" when Sun approved the first ownership changes on the Policies (in 2010), Sun testified that it never informed the policy owner of Sun's internal conclusion. (A2261–A2262 at 109:16–110:7.)

[redacted] (A1150–A1151; A2192–A2194 at 252:21–258:1; A2348 at 43:14–45:19; A2391–A2392 at 214:20–221:4.) [redacted] (A1064; A2194 at 258:5–260:7; A2392 at 222:4-224:8.) The spreadsheet identified the De Bourbon Policy as one of those "likely STOLI cases." (A1068 at "All Data" tab, row 333; A2120, No. 6; A2194 at 259:7–260:24.) From October 29, 2009 through De Bourbon's death in

2017, Sun collected $3,761,389.90 in premiums on the De Bourbon Policy. (A1606–A1607.)

[redacted] (A1141–A1149.) The [redacted] spreadsheet identified both the De Bourbon Policy and the Frankel Policy. (A1149 at "Polno 2010" tab, rows 248 and 1411; A2195–A2197 at 264:24–269:17; A2399–A2400 at 248:1–252:19.) From May 4, 2010 through Frankel's death in 2018, Sun collected $1,436,008.96 in premiums on the Frankel Policy. (A1706.) Sun regularly updated its STOLI lists from [redacted] (and likely does so today), continuously flagging both Policies in the process. (A2194–A2195 at 258:5-263:7; A2195–A2196 at 264:24-269:17; A2197–A2198 at 270:8-276:14; A2199–A2201 at 277:17-288:18; A2393–A2395 at 222:4-230:23; A2399–A2400 at 248:1-252:19; A2401–A2403 at 256:7-262:22; A1549–A1551 & A1494 at rows 176, 224 (attachment to A1549–A1551).) S[redacted]. (A2157–A2158 at 109:3–113:5.)

Also in 2010, Sun circulated [redacted]" (A1104; A1112.) T[redacted]

[redacted] (A112; A2395–A2396 at 231:1–235:12.) Brown & Brown Metro Inc.—the agency associated with De Bourbon's broker—[redacted] (A1109.) [redacted] (A1112; A2396 at 235:13–17.) [redacted] (A1110.) [redacted] (A1129; A2397 at 239:12–241:13.)

D. Sun Makes the "Strategic Decision" in 2012 to Stop Challenging the Validity of Policies While Insureds are Alive.

Sun admitted, in 2012, it stopped filing STOLI lawsuits while insureds were still alive, and consequently, collected more money in premiums than it otherwise would have if Sun had challenged policies sooner. (A2161 at 127:5–128:10; A2163 at 136:5–15.)[9] Sun also admitted in the *Sol* case that it "made the strategic decision not to pursue investigating policies" that it had identified as STOLI, and confirmed that the company's testimony in *Sol* remained truthful and accurate here. (A1854 at 785:2–5; A2352 at 60:19–61:19.)

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[9] Sun claimed its decision to stop challenging policies while insureds were alive was because, during the 2008-2012 period, it was facing "countersuits" by policy owners, but undercut that testimony when it admitted Sun continues to face countersuits today (such as here). (A2162–A2163 at 129:15–133:1.)

E. <u>Sun Represents to the Policies' Owners that the Policies are "In Force," While Collecting Millions of Dollars in Premiums.</u>

Sun never informed the Policies' owners that the Policies [redacted] business people as STOLI. Nor did Sun ever challenge the validity of the Policies until the insureds died.

Instead, Sun did all of the following:

Owner/Beneficiary Changes. Sun confirmed three separate owner and beneficiary changes—first to LPC-affiliate Villa Capital in 2010, then to ESF QIF in 2011, and finally to Securities Intermediary in 2014. (A1090; A1092; A1133.1; A1200; A1262; A1319; A1320.1; A1351.1; A1465.1–A1465.2; A1465.3–A1465.4.) Sun admitted that, in confirming these changes, Sun never informed the Policies' owners that Sun suspected the Policies were STOLI or sought to invalidate the Policies; instead, Sun collected millions of dollars in premium payments for years. (A2263–A2269 at 116:10–138:6.)

Annual Reports and Illustrations. Sun issued Annual Reports for both of the Policies every year from their inception through the insureds' deaths. (A980–A983; A998–A1004; A1060–A1063; A1134–A1140; A1321–A1324; A1340–A1346; A1361–A1367; A1392–A1397; A1476–A1479; A1545–A1548; A1583–A1586; A994–A997; A1056–A1059; A1069–A1072; A1220–A1221; A1332–A1338; A1347–A1350; A1377–A1383; A1466–A1469; A1495–A1498; A1552–A1555;

A1690–A1693; A2272–A2273 at 151:22–155:4.) Sun testified that Sun only sends Annual Reports for in-force policies. (A2272–A2273 at 150:19–155:4.) Sun also regularly sent "In Force Life Insurance Illustrations" to the Policies' owners, which showed how the Policies' values may change over time. (A1208–A1216; A1325–A1331; A1352–A1360; A1368–A1376; A1384–A1391; A1470–A1475; A1480–A1487; A1488–A1493; A1499–A1508; A1509–A1514; A1515–A1524; A1525–A1534; A1535–A1544; A1556–A1569; A1570–A1576; A1577–A1582; A1694–A1700; A1701–A1705.) Sun testified that Sun only issues illustrations for in-force policies. (A2278 at 174:5–7.) Sun admitted that at no point during the 11 years it was sending out Annual Reports did it notify the Policies' owners that Sun suspected the Policies were STOLI. (A2273 at 155:13–18.)

Verifications of Coverage. In August 2014, before Viva bought the Policies, Sun provided verifications of coverage for both Policies, in which Sun represented on a recorded call that the Policies were in force. (A1398; A1399; A1400; A2270–A2272 at 142:25–150:17.) On that call, Sun confirmed it had received $3.2 million in premiums to date on the De Bourbon Policy and $1.3 million to date on the Frankel Policy. (A2272 at 150:3–12.) After Securities Intermediary acquired the Policies on behalf of Viva, Sun continued to represent that the Policies were "in good standing," "active," and "in force." (A1465.5–A1465.22; A1465.23–A1465.50; A2270 at 143:10-23.)

$6.9 million in Premiums. From Sun's issuance of the Policies in 2006 through De Bourbon's death in 2017 and Frankel's death in 2018, Sun collected $4,835,789.90 in total premiums on the De Bourbon Policy and $2,129,987.96 in total premiums on the Frankel Policy. (A2247 at 52:8–17; A2250–A2251 at 65:9–67:25; A1606–A1607; A1706.)

F. <u>Viva Acquires the Policies as Part of a Portfolio in the Tertiary Market.</u>

Viva had no involvement in De Bourbon or Frankel's procurement of the Policies in 2006. Instead, Viva acquired the Policies in August 2014 from the ESF QIF Trust as part of a portfolio (the "ESF QIF Portfolio"), a tertiary market transaction[10] that occurred eight years after Sun began accepting premiums and five years after Sun began flagging the Policies as STOLI. (A1401–A1465; A2986 at 51:3–6; A2693 at 126:3–127:5.) When Viva acquired the Policies, it also purchased the right to recover the premiums that Sun had collected from the Policies' prior owners. (A1402–A1403, § 2.01(a)–(d); A1448.)

The ESF QIF Portfolio included policies that insureds had sold into the secondary market through beneficial interest transfers, and Viva knew [redacted]

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[10] The tertiary market is "the market in which life insurance policies are traded among investors, but not between investors and original owners or insureds." *37 Besen Parkway, LLC v. John Hancock Life Ins. Co. (U.S.A.)*, 2017 WL 5126103, at *1 (S.D.N.Y. Oct. 5, 2017).

[redacted] (A2962 at No. 3; A2964–A2965 at No. 7; A3125 at 48:23–49:17; A3127 at 54:10–55:4; A3128 at 60:7–14.) But Viva and its investment advisor Preston Ventures LLC ("Preston") also knew [redacted] which are not susceptible to insurable interest challenges under New York and California law. (A3029 at 223:13–15; A3127 at 55:5–10; A3032 at 235:2–236:11.)[11]

Regarding the Delaware policies in particular (such as the Policies), Viva and Preston knew [redacted] (A3013 at 158:22–161:18; A3029 at 223:16–25; A3029–A3030 at 225:21–228:5; A3031 at 231:2–13; A3031–A3032 at 233:16–235:1; A3032 at 237:3–18; A3035–A3036 at 249:23–250:5; A3127 at 55:11–56:2.) [redacted] (A3031–A3032 at 233:24-234:19.)

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[11] *See Teren*, 2011 WL 1878855, at *1-3, *6-7; *Kramer*, 940 N.E.2d at 536-37.

Additionally, before acquiring the ESF QIF Portfolio, Viva—acting through Preston—[redacted] (A2967–2968, Nos. 8–9.) [redacted] (A2761 at 398:21–400:4; A3029 at 222:15–224:8; A3127 at 56:3–57:3; A3128 at 58:17–59:14.)

G. [redacted]

[redacted]

Sun did not bring these lawsuits at that point either. Instead, from October 13, 2014—[redacted]—through De Bourbon's death in 2017, Sun collected $1,560,131.53 in premiums on the De Bourbon Policy. (A1606–A1607.) And from October 13, 2014 through Frankel's death in 2018, Sun collected $793,900 on the Frankel Policy. (A1706.)

ARGUMENT

I. POLICY OWNERS CAN ASSERT PROMISSORY ESTOPPEL CLAIMS AND EQUITABLE DEFENSES IN CASES INVOLVING VOID *AB INITIO* POLICIES.

A. Questions Presented

1. If an insurance contract is declared void *ab initio*, can a policy owner assert a promissory estoppel claim and/or equitable defenses to recover the death benefit? (A308–A310; A328–A334; A470–A471.)

2. Does the Superior Court have jurisdiction to consider the affirmative defenses of waiver, estoppel, laches, and unclean hands? (A470-71.) This issue was not briefed below by the parties, but was raised by the Superior Court *sua sponte*. *See Gunn v. McKenna*, 116 A.3d 419, 420-21 (Del. 2015) (questions directed at subject matter jurisdiction can be raised for the first time on appeal).

B. Scope of Review

"The questions presented are issues of law which this Court decides *de novo*." *Price Dawe*, 28 A.3d at 1064; *Asbestos Workers Loc. Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007) ("Issues of subject matter jurisdiction involve questions of law that are [] reviewed *de novo*.").

C. Merits of Argument

The Superior Court dismissed Securities Intermediary's counterclaim for promissory estoppel and struck Securities Intermediary's defenses of laches, waiver, estoppel, and unclean hands. The Court should reverse those rulings, and hold (1) a policy owner can assert promissory estoppel claims and equitable defenses in cases involving void policies, and (2) the Superior Court has subject matter jurisdiction to consider defenses that were viewed traditionally as equitable.

The Court should remand these cases so the Superior Court can decide whether Sun must pay the $19 million in death benefits on either Securities Intermediary's promissory estoppel claim or its equitable defenses. In the alternative, if the Court determines that the Superior Court lacks subject matter jurisdiction to consider any of Securities Intermediary's defenses, the Court should designate Judge Johnston to sit as a Vice Chancellor so that she may properly consider those defenses on remand.

1. Policy Owners Should Be Permitted to Assert Promissory Estoppel Claims and Equitable Defenses to Recover Death Benefits on Void Policies.

In *De Bourbon*, the Superior Court dismissed Securities Intermediary's promissory estoppel counterclaim and struck its estoppel defense on the ground that "a contract that is void *ab initio* may not be enforced equitably through estoppel." (Ex. A at 7, 8 (quoting *Wilmington Sav. Fund Soc'y, FSB v. PHL Variable Ins. Co.*, 2014 WL 1389974, at *12 (D. Del. Apr. 9, 2014) ("*WSFS*").) The Superior Court issued the same ruling in *Frankel*. (Ex. B, ¶¶1–2.) This Court should reverse those decisions, and hold that policy owners can assert promissory estoppel claims and equitable defenses to recover death benefits on void policies.

(a) The Factual Record Demonstrates Clear-Cut Waiver, Estoppel, Laches, and Unclean Hands

"Waiver is the voluntary and intentional relinquishment of a known right … it implies knowledge of all material facts and intent to waive." *Realty Growth Invs. v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982); *see also Klein v. Am. Luggage Works*, 158 A.2d 814, 818 (Del. 1960) (describing waiver as "the voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect").

Relatedly, "[t]he doctrine of equitable estoppel may be invoked 'when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.'" *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990) (quoting *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903–04 (Del. 1965)). In order to recover for promissory estoppel:

> A plaintiff must show by clear and convincing evidence that: (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise.

Lord v. Souder, 748 A.2d 393, 399 (Del. 2000).

Laches "is generally defined as an unreasonable delay by the plaintiff in bringing suit after the plaintiff learned of an infringement of his rights, thereby resulting in material prejudice to the defendant." *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009); *see also Hudak v. Procek*, 806 A.2d 140, 155 (Del. 2002) ("The laches analysis necessarily depends upon the totality of the circumstances of each individual case. There is no rigid rule that can be applied to every case."). "'Laches generally requires the establishment of three things: first, knowledge by the claimant; second, unreasonable delay in bringing the claim, and third, resulting prejudice to the defendant." *Reid*, 970 A.2d at 182-183.

And finally, unclean hands is "[e]quity's maxim that a suitor who engaged in his own reprehensible conduct in the course of [a] transaction at issue must be denied equitable relief[.]" *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 876–77 (Del. 2015) (quoting *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995)); *see also SmithKline Beecham Pharms. Co. v. Merck & Co., Inc.*, 766 A.2d 448, 449 (Del. 2000) (describing unclean hands as "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief").

It would be hard to find a set of facts more deserving of application of these maxims. (*See* p. 8–22 *supra*.) Sun waited until after the insureds died to file lawsuits claiming that the Policies were void because they were covers for wagers by LPC.

But Sun knew the Policies were associated with LPC a decade earlier when it began receiving communications from LPC concerning the Policies in 2008. (*See* p. 10–11 *supra*.) Sun filed lawsuits seeking to invalidate three other LPC policies in 2009, [redacted]. (*See* p. 8–10 *supra*.) Sun's counsel litigated nine cases between 2008 and 2009 on behalf of Sun and other carriers concerning the validity of LPC policies. (*See* p. 11 *supra*.) [redacted] (*See* p. 22 *supra*.)

[redacted], [redacted] (*See* p. 12 *supra*.) [redacted] (*See* p. 13 *supra*.) [redacted]. (*See* p. 13–14 *supra*.) [redacted] (*See* p. 14 *supra*.) Both Policies were both flagged as part of that process. (*See* p. 14 *supra*.) [redacted]

[redacted]—a process that likely continues to this day. (*See* p. 14–15 *supra*.)

But Sun ***never*** gave Securities Intermediary or any of the Policies' prior owners reason to believe that Sun suspected the Policies were STOLI or that it would challenge their validity after the insureds died. Instead, Sun approved three separate ownership/beneficiary changes. (*See* p. 17–18 *supra*.) Sun repeatedly represented that the Policies were "in force" and "active." (*See* p. 19 *supra*.) Sun collected $6.9 million in premiums on the Policies. (*See* p. 19 *supra*.) Sun collected the majority of those premiums *after* Sun filed the *Berck* case. (*See* p. 9–10 *supra*.) But rather than challenge the Policies at any point during this time period, Sun made the "strategic decision" in 2012 to stop bringing STOLI cases while insureds were alive. (*See* p. 16–17 *supra*.)

Whether the applicable theory is a claim for promissory estoppel, a defense of laches, estoppel, waiver, or unclean hands, or some combination thereof, Delaware law must deter bad actors from behaving like Sun did here. Delaware law should not permit insurers to flag policies as STOLI, track those policies with their attorneys, collect millions of dollars in premiums for over a decade, make strategic decisions to not bring STOLI lawsuits until insureds die, and then be relieved of any obligation to pay the death benefits—simply because *Price Dawe* permits insurable interest challenges after the two-year contestability period. The alternative would reward the bad behavior of insurers like Sun, and allow them to purposefully delay lawsuits as long as possible in the hope of getting a windfall. This Court should not countenance such a result.

(b) The Court Should Endorse the Reasoning of Judge Stark's Rulings in *Griggs* and *Sol*

This Court should endorse Judge Stark's reasoning and hold that policy owners can assert promissory estoppel claims and equitable defenses against an insurer even if a policy is void *ab initio*. *See, e.g.*, *Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 2151695, at *5–6 (D. Del. May 17, 2019) ("*Sol II*"); *PHL Variable Ins. Co. v. ESF QIF Tr. ex rel. Deutsche Bank Tr. Co.*, 2013 WL 6869803, at *6, *8 (D. Del. Dec. 30, 2013) ("*Griggs*"); *cf.* 3 Couch on Ins. § 41:8 (3d ed.) ("In a number of states, it has been held that the insurer may validly waive the defense of lack of an insurable interest or be estopped from asserting it.").

In *Griggs*, Judge Stark denied an insurer's motion to dismiss the policy owner's waiver and estoppel defenses and promissory estoppel claim. *See Griggs*, 2013 WL 6869803, at *6, *8. Regarding waiver and estoppel, the *Griggs* court noted that it "[wa]s not determining at this time whether the policies are illegal. Even assuming that they are, the issue of whether enforcement of them would be against public policy is a factual question bound up, at least in part, with the equities, including a consideration as to whether [the carrier] has acted in bad faith." *Id.* at

*6 (citing 17A Am.Jur.2d *Contracts* § 309[12] and *Hammond v. Oregon & C.R. Co.*, 193 P. 457, 462–63 (Ore. 1920)).

Judge Stark acknowledged *Price Dawe*'s statement that "[a] court may never enforce agreements void *ab initio*, no matter what the intentions of the parties." *Id.* at *6 n.7. However, he emphasized that "the issue [of waiver and estoppel] was not squarely before [the Delaware Supreme Court in] *Dawe*" and "[u]nder the circumstances, the Court believes the Delaware courts, if faced with the issue now before this Court, would agree with the *Hammond* analysis." *Id.* (citing *Hammond*, 193 P. at 462–63). *Griggs* quoted *Hammond* for the proposition that "[u]nless the parties are *in pari delicto* as well as *particeps criminis*, the courts, although the contract is illegal, will afford relief where equity requires it, to the more innocent party, even after the contract has been executed." *Id.* at *6 (quoting *Hammond*, 193 P. at 462–63).

Judge Stark's ruling in *Griggs* is consistent with decisions from courts in other States which recognize that, although void contracts are generally unenforceable, the law is not so rigid. *See, e.g.*, *Reassure Am. Life Ins. Co. v. Midwest Res., Ltd.*, 2011 WL 672566, at *4 (E.D. Pa. Feb. 16, 2011) (recognizing, under Pennsylvania law, insurer may be estopped from claiming a policy lacks insurable interest when

[12] *Griggs* contains an apparent typo; the court actually quotes 17A Am. Jur. 2d *Contracts* § 304.

through its "acquiescence and acceptance of premiums from appellee over a number of years, appellant is now in no position to complain") (quoting *Kelly v. Prudential Ins. Co. of Am.*, 334 Pa. 143, 6 A.2d 55, 59 (Pa. 1939)); *Peyton v. Margiotti*, 156 A.2d 865, 868 (Pa. 1959) ("When the parties to a contract against public policy or otherwise illegal are not *in pari delicto*, or equally guilty, and when public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue, relief may be granted."); *Turner v. Davidson*, 188 S.E. 828, 830 (Ga. 1936) (finding that an insurer, through its conduct, "waiv[ed] any defense it may have on the ground of lack of insurable interest of the beneficiary or assignee in the life of the insured"); *Bay Parkway Nat'l Bank v. Shalom*, 200 N.E. 685, 687 (N.Y. 1936) ("The general rule also is that courts do not aid either party to an illegal contract. This rule, however, has its exceptions. When courts allow a defense, it is not as a protection to a defendant but as a disability to a plaintiff.").

Six years after *Griggs*, Judge Stark again addressed in *Sol II* whether a policy owner can assert equitable claims and defenses under Delaware law when a policy is void. After sustaining the policy owner's promissory estoppel counterclaim and waiver and estoppel defenses at the pleading stage,[13] the carrier moved for summary judgment on the policy owner's promissory estoppel claim. In denying the insurer's

[13] *See Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, No.1:17-cv-00075-LPS (D. Del.) ("*Sol*"), Dkt. 29 at 66:12-67:3, 76:3-6.

motion, Judge Stark held the carrier's "alleged promises—that it would pay a claim on the Policy, as long as premiums continued to be paid and the Policy remained in good standing—could constitute unjust, bad faith promises to which it should be held even though such promises were made in connection with a Policy that has now been determined to have been void *ab initio*." *Sol II*, 2019 WL 2151695, at *5. The court reasoned that "in this Court's view, the Court is ***not*** enforcing a void Policy but is, instead, estopping an allegedly bad faith actor who made promises in connection with the Policy from escaping the just consequences of such promises." *Id.* at *5 n.8; *see also Indemnity Ins. Co. of N.A. v. Talbot-BHJ Ins.*, 2005 WL 8155483, at *8 (D. Wy. Mar. 31, 2005) (explaining that promissory estoppel "operates to prevent an insurer from denying coverage *when a separate contract* has been created by the statements and promises of the insurer or its agent") (emphasis added).

Securities Intermediary recognizes that the majority of subsequent decisions have disagreed with Judge Stark, and held that promissory estoppel and equitable defenses are unavailable on void policies. *See Columbus Life Ins. Co. v. Wilmington Tr., Co.*, 2021 WL 3886370, at *6 (D. Del. Aug. 31, 2021) ("*Romano*"); *Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, 2021 WL 3886373, at *6 (D. Del. Aug. 31, 2021) ("*Cohen*"); *Columbus Life Ins. Co. v. Wilmington Tr. Co.*, 2021 WL 537117, at *8, *9 (Del. Super. Ct. Feb. 15, 2021) ("*Kluener*"); *Columbus Life Ins. Co. v.*

Wells Fargo Bank, 2021 WL 106919, at *5, *9 (D. Del. Jan. 12, 2021) ("*Snyder*"); *U.S. Bank Nat'l Ass'n v. Sun Life Assurance Co. of Can.*, 2016 WL 8116141, at *19 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*"); *Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2016 WL 161598, at *19 (S.D. Fla. Jan. 14, 2016) ("*Malkin I*"); *WSFS*, 2014 WL 1389974, at *12.[14]

But those decisions failed to appreciate the important distinction highlighted by Judge Stark between a policy owner whose conduct at the inception of the policy renders the policy void, and a policy owner who—like Viva—acquired the policy years after the policy's inception, and who did not cause the policy's invalidity. *See Sol II*, 2019 WL 2151695, at *5 n.8 (distinguishing *WSFS* because it "involved a claimant on the Policy who was *in pari delicto*, whereas here there is no evidence that [the policy owner] was involved in any of the fraud or misrepresentations relating to the Policy").

Separately, courts that disagree with Judge Stark assume that *Price Dawe*'s observation that "[a] court may never enforce agreements void *ab initio*, no matter what the intentions of the parties," *Price Dawe*, 28 A.3d at 1067, rules out a policy owner's use of equitable theories to recover a policy's death benefit. *See WSFS*,

[14] That said, *Van de Wetering* and *Malkin I* only dismissed waiver and laches because those courts believed the defenses were mooted by carrier's inability to keep premiums on a void policy. *See Van de Wetering*, 2016 WL 8116141, at *19; *Malkin I*, 2016 WL 161598, at *21.

2014 WL 1389974, at *12; *see also Malkin I*, 2016 WL161598, at *19 (citing *WSFS*). But as Judge Stark made clear, whether allowing a policy owner to assert a promissory estoppel claim or equitable defenses to recover the death benefit on a void policy is tantamount to enforcing that void policy was not before this Court in *Price Dawe*. *See Griggs*, 2013 WL 6869803, at *6 n.7.

Sun will likely respond by citing this Court's rulings in the corporate law context that a party can only invoke equitable defenses in cases involving voidable, not void, acts. *See Klassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1046 (Del. 2014); *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991); *Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990). The Court should not feel constrained by that general rule, and should instead allow policy owners to assert equitable theories on appropriate facts—such as those present here.

First, allowing a policy owner to assert equitable claims and defenses against an insurer to recover a death benefit is not the same as enforcing a void policy: "[I]n this Court's view, the Court is ***not*** enforcing a void Policy but is, instead, estopping an allegedly bad faith actor who made promises in connection with the Policy from escaping the just consequences of such promises." *See Sol II*, 2019 WL 2151695, at *5 n.8 (emphasis in original).

Second, "it is the duty of [courts] to review common law rules to ensure that the conditions and policy objectives that justify the rules remain relevant and valid."

Beattie v. Beattie, 630 A.2d 1096, 1098 (Del. 1993); *see also Sherman v. State Dep't of Pub. Safety*, 190 A.3d 148, 172 n.106 (Del. 2018) (explaining "the duty of the courts to ensure that the common law is as fair and efficient as humanly possible, taking into account evolving societal conditions and the problems created by past rulings"). Even though this Court has found elsewhere that equitable defenses are inapplicable to void acts, Sun's misconduct (*see* p. 8–22 *supra*) demonstrates why, on appropriate facts such as those present here, a policy owner must be able to assert equitable claims and defenses to recover a policy's death benefit—even if the policy is declared void *ab initio*.[15]

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[15] Sun may argue that policy owners cannot assert equitable defenses based on this Court's statement in *Lavastone Capital LLC v. Estate of Berland*, that:

> Lavastone's arguments that the estate's claim is barred by the doctrines of *in pari delicto* and unclean hands fail for similar reasons. To the extent that both Berland and Lavastone were engaged in a STOLI scheme, the General Assembly has prescribed that the estate should receive the proceeds of the policy as a matter of public policy. Thus, these equitable principles do not apply.

266 A.3d 964, 974 (Del. 2021). That argument would be meritless because, unlike in *Berland*, this Court is not addressing a situation where the General Assembly has enacted a statute providing that carriers can bring STOLI challenges indefinitely. This Court also made that observation when deciding whether an insured's fraud on an insurer prevents that insured's estate from asserting a claim to recover a policy's death benefit under 18 *Del. C.* § 2704(b).

2. The Superior Court Has Subject Matter Jurisdiction to Consider Equitable Affirmative Defenses.

In *De Bourbon*, the Superior Court struck "the equitable defenses of laches, waiver and estoppel, and unclean hands because this Court lacks jurisdiction." (Ex. A at 9.) In *Frankel*, the Superior Court adhered to that decision in *De Bourbon*. (Ex. B, ¶2.) These rulings should be reversed.

In *USH Ventures v. Global Telesystems Group, Inc.*, the Superior Court canvassed defenses that were historically seen as equitable, and explained why estoppel, waiver, laches, and unclean hands are available in the Superior Court. 796 A.2d 7, 18–20 (Del. Super. Ct. 2000). Delaware courts have repeatedly cited *USH Ventures* for the proposition that parties can assert equitable defenses in the Superior Court. *See, e.g.*, *Azadian Grp., LLC v. TenX Grp., LLC*, 2019 WL 6040299, at *2 (Del. Super. Ct. Nov. 13, 2019); *Avaya, Inc. v. Charter Commc'ns Holding Co., LLC*, 2015 WL 1975814, at *3 (Del. Super. Ct. May 1, 2015); *Manufacturers & Traders Tr. Co., Wilmington Savs. Fund Soc'y, FSB v. Washington House P'rs., LLC*, 2012 WL 1416003, at *4 (Del. Super. Ct. Mar. 22, 2012); *Reybold Venture Grp. XI-A, LLC v. Atlantic Meridian Crossing, LLC*, 2009 WL 143107, at *3 (Del. Super. Ct. Jan. 20, 2009).

To the extent this Court disagrees and finds that certain equitable defenses remain unavailable in the Superior Court,[16] this Court should not extend that holding to waiver and estoppel. Superior Court Civil Rule 8 *requires* parties to assert waiver and estoppel as defenses. *See* Del. Super. Ct. Civ. R. 8(c). The fact that Rule 8(c) requires defendants to plead waiver and estoppel means the Superior Court has jurisdiction to consider those defenses. Moreover, to the extent the Court holds that the Superior Court lacks jurisdiction to consider *any* of Securities Intermediary's defenses, the Court should designate Judge Johnston to sit as a Vice Chancellor on remand so she can properly consider all defenses.

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[16] Other Superior Court cases post-*USH Holdings* continue to find that laches and unclean hands, in particular, are not available in the Superior Court. *See, e.g.*, *Pike Creek Recreational Servs., LLC v. New Castle Cnty.*, 238 A.3d 208, 212 (Del. Super. Ct. 2020); *NASDI Holdings, LLC v. N. Am. Leasing, Inc.*, 2019 WL 1515153, at *6 (Del. Super. Ct. Apr. 8, 2019).

II. SUN SHOULD RETURN ALL THE PREMIUMS TO SECURITIES INTERMEDIARY (ON BEHALF OF VIVA) WITH PREJUDGMENT INTEREST

A. Questions Presented

The Superior Court correctly held that if Sun did not have to pay the death benefits on the Policies because they are invalid, Sun could not retain any of the $6.9 million in premiums that it collected on the Policies. This appeal raises two issues regarding the Superior Court's return-of-premiums decision, which require correction:

1. If an insurer must return all of the premiums on a policy declared void, does the insurer have to return those premiums to the final policy owner in the chain-of-title—if that policy owner purchased the right to recover premiums paid by prior owners? (A602; A745–A751.)

2. Does an insurer have to pay prejudgment interest from the date of each premium payment on return of premium damages? (A287, A292, A437.69, A455, A458, A508-09, A592, A702.)

B. Scope of Review

Questions of law are reviewed *de novo*. *See Price Dawe*, 28 A.3d at 1064; *Chrysler Corp. (Del.) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1037 (Del. 2003) (Court reviews "denial of [] motion for pre-judgment interest … *de novo*").

C. **Merits of Argument**

The Superior Court correctly held that "Sun Life cannot be absolved from any obligation to pay death benefits *and* yet retain premiums." (Ex. C at 34–35.) In so holding, the Superior Court endorsed the majority rule under Delaware law that insurers must automatically disgorge all premiums they received on a policy since its inception if that policy is declared void. (Ex. C at 33–34 (quoting *Sun Life Assurance Co. of Can. v. Berck*, 719 F. Supp. 2d 410, 418 – 19 (D. Del. 2010).)[17] That aspect of the Superior Court's decision should be affirmed.

That said, two aspects of the Superior Court's return-of-premiums ruling require correction. The Superior Court erred when it held that Sun had to repay the premiums to the particular parties that made the payments, instead of ordering Sun to repay those premiums to Viva as the current owner of the Policies and the party who bought the rights to those premiums. (Ex. C at 35; Ex. D, ¶5(a)–(h).) The

[17] *See also U.S. Bank Nat'l Ass'n v. Sun Life Assurance Co. of Can.*, 2016 WL 8116141, at *19 (E.D.N.Y. Aug. 30, 2016), *R&R adopted*, 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017); *Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2016 WL 161598, at *18, *21 (S.D. Fla. Jan. 14, 2016), *aff'd in relevant part*, 693 Fed. App'x 838 (11th Cir. 2017) ("*Malkin III*"); *PHL Variable Ins. Co. v. Chong Son Pak Life Ins. Tr.*, 2012 WL 13201401, at *1 (D. Del. July 25, 2012); *PHL Variable Ins. Co. v. Virginia L. Lankow Life Ins. Tr.*, 2012 WL 13201402, at *1 (D. Del. July 25, 2012); *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 774 F. Supp. 2d 674, 682 (D. Del. 2011); *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 564-65 (D. Del. 2010); *cf. Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 8353393, at *4 (D. Del. Dec. 30, 2019) ("*Sol III*").

Superior Court also erred when it ruled that Sun did not have to pay prejudgment interest. (Ex. C at 35.)

1. **Sun Should Return All of the Premiums to Securities <u>Intermediary (on Behalf of Viva)</u>**

When Viva acquired the Policies in 2014, Viva purchased the right to recover premiums that prior owners had paid to Sun:

[redacted]

(A1402–A1403 (emphasis added).) [redacted] (A1401; A1448.)

The Court should therefore hold that Sun must disgorge to Securities Intermediary (on behalf of Viva) all the premiums that it received on the Policies.

Judge Stark addressed this issue in *Sol III*, and ordered Sun to return all of the premiums to the policy owner who owned the policy when the insured passed away—regardless of whether that policy owner or a predecessor had paid the premiums. *Sol III*, 2019 WL 8353393, at *4 & n.6.

Ordering Sun to return all the premiums to Securities Intermediary (on behalf of Viva) is also consistent with basic concepts of New York and Delaware law.[18] *See, e.g.*, *Urdan v. WR Cap. P'rs, LLC*, 2019 WL 3891720, at *12 (Del. Ch. Aug. 19, 2019) (explaining "[t]he concept of a right to enforce a cause of action associated with the ownership of property passing to the buyer when the property is sold is not something unique to shares"); *In re Appraisal of Dell Inc.*, 2015 WL 4313206, at *23 (Del. Ch. July 13, 2015) (noting "the ability to sell a bundle of property rights that the buyer can enforce is unquestioned"); *State of Cal. Pub. Emps.' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 435–36 (2000) (holding where assignor had assigned "all" rights in certain loans, that assignment "transferred every right of action [the assignor] had … 'out of the receipt of the notes and the refusal to pay the share thereof'") (quoting *Allen v. Brown*, 44 N.Y. 228, 234 (1870)).

There is no reason why Viva's right to recover all the premiums paid on the Policies should be treated differently than any other property or contract right. In

[18] The PSA is governed by New York law. (A1430.)

fact, the Superior Court's decision requiring Sun to repay premiums to four entities—LPC, Villa Capital, ESF QIF Trust, and Securities Intermediary (Ex. D, ¶5(a)–(h))—will only promote inefficiencies. Once Sun repays premiums to LPC, Villa Capital, and ESF QIF Trust, those entities will have to transfer those premiums to Viva. If they refuse, Viva will have to commence litigation against the predecessor owners to recover the premiums. As a result, the practical effect of the Superior Court's decision is that it will potentially impose additional costs on Viva and the judicial system.

2. **<u>The Court Should Require Sun to Pay Prejudgment Interest from the Date of Each Premium Payment.</u>**

The Superior Court's ruling that Sun does not have to pay prejudgment interest on premium damages—issued without any briefing or argument—is at odds with Delaware law. This Court routinely has held that prejudgment interest is awarded "as a matter of right and not of judicial discretion." *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 485 (Del. 2011) (quoting *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978)).

In *Sun Life Assurance Company of Canada v. U.S. Bank National Association*, the Eleventh Circuit, applying Delaware law, explained "where, as here, the claimant seeks a refund of payments it never should have made, prejudgment interest accrues from the date of the claimant's payments." 693 F. App'x 838, 840–41 (11th Cir.

2017) ("*Malkin III*") (quoting *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) and citing *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 756 (Del. Ch. 2007) and *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *23 (Del. Super. Ct. May 30, 2008)). Based on those principles of Delaware law, the Eleventh Circuit in *Malkin III* reversed the trial court's decision on prejudgment interest, and ordered Sun to pay prejudgment interest from the date of each premium payment. *Id.* at 841.

Just as Sun was ordered to pay prejudgment interest on premium damages in *Malkin III* from the date of each payment, this Court should reverse the Superior Court's decision on prejudgment interest and require Sun to pay prejudgment interest from the date of each premium payment.

CONCLUSION

The Superior Court erred when it dismissed Securities Intermediary's promissory estoppel counterclaim and struck its defenses. This Court should reverse those rulings and remand the cases to the Superior Court for further briefing on whether Sun must pay the $19 million in death benefits because of promissory estoppel, waiver, equitable estoppel, laches, and/or unclean hands. To the extent this Court holds that the Superior Court lacks subject matter jurisdiction to consider any of Securities Intermediary's defenses, the Court should designate Judge Johnston to sit as a Vice Chancellor so she can properly consider those defenses.

Separately, although the Superior Court correctly held that Sun must return all premiums on the Policies if it does not have to pay the death benefits, the Superior Court erred when it (1) ordered Sun to repay those premiums to the party who actually made the payments rather than the current owner and beneficiary under the Policies (who bought all rights to those premiums) and (2) found that Sun did not have to pay prejudgment interest. The Court should reverse those decisions, and hold that if Sun need not pay the death benefits, Sun must return all the premiums, with prejudgment interest from the date of each payment.

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CERTIFICATE OF SERVICE

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