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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary, Defendant/Counterclaim-Plaintiff Below, Appellant/Cross-Appellee v. SUN LIFE ASSURANCE COMPANY OF CANADA, Plaintiff/Counterclaim-Defendant Below, Appellee/Cross-Appellant	No. 126, 2022 Court Below: Superior Court of the State of Delaware C.A. No. N18C-07-289; N17C-08-331 [redacted]

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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[redacted]

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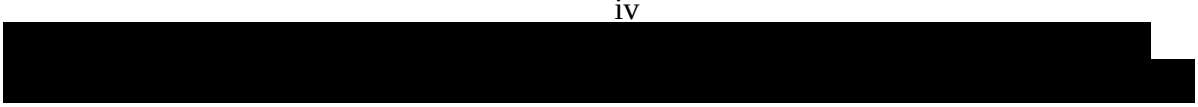

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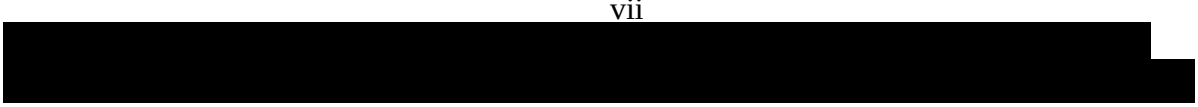

NATURE OF PROCEEDINGS

This case has always been about whether a $10 million life insurance policy insuring the life of Bernard DeBourbon and a $9 million life insurance policy insuring the life of Samuel Frankel (the "Policies") are void *ab initio* for lack of insurable interest, and if so, whether Wilmington Trust could prove an entitlement to a refund of the premium it paid for the Policies on behalf of its principal, Viva Capital Trust ("Viva"), which beneficially owns the Policies. But that posed a problem for Wilmington Trust because the Policies were generated by investors for investors through a STOLI program—and making matters worse—Viva *knew that* before it bought the Policies and before it paid a single penny in premium.

For this reason, Wilmington Trust asserted a series of affirmative defenses and counterclaims designed to try to force Sun Life to pay the Policies' illegal death benefit to Viva—even if the Court determined that the Policies were void *ab initio*. These affirmative defenses and counterclaims were predicated on a baseless conspiracy theory—that investors invariably trot out in STOLI cases regardless of which carrier is making the challenge or what the actual facts of record might be—that the carrier, here Sun Life, knew the policies were STOLI and hatched a secret plan long ago to induce premium to be paid year over year until Sun Life sprung the alleged trap and challenged the policies upon the death of the insureds.

[redacted]

The problem with Wilmington Trust's strategy—aside from the fact that its secret plan theory is untethered to reality—is that this Court has been crystal clear that courts "may never enforce" STOLI policies as doing so would allow illegal human life wagers to come to fruition in violation of Delaware's law, public policy, and Constitution. And yet that is precisely what Wilmington Trust's affirmative defenses of waiver and estoppel, unclean hands, and laches and its counterclaims for promissory estoppel sought to do: Force Sun Life to pay the death benefit on void *ab initio* human life wagers. Because this Court's precedent holds that a court may never enforce STOLI death benefits, Sun Life moved to strike and dismiss these affirmative defenses and counterclaims, and the trial court correctly granted them.

After extensive discovery, the parties cross-moved for summary judgment. Wilmington Trust argued vigorously that the Policies were not STOLI; that Sun Life's failure to pay the death claims therefore amounted to bad faith; and that Sun Life acted unfairly and deceptively in supposedly tricking Wilmington Trust into buying the Policies and paying premium for them. For its part, Sun Life argued that the Policies were STOLI; that Wilmington Trust could not prove an entitlement to any amount of premium refund because Viva, through Wilmington Trust, paid premiums knowing the unlawful way in which the Policies were originated in the hopes that doing so would lull an unwitting carrier into paying human life wagers;

[redacted]

and that the unfair and deceptive practices claim failed because Sun Life did not trick Viva into buying or paying premium for the Policies and never had any secret plan.

On a robust and genuinely indisputable record, the trial court correctly ruled that the Policies were STOLI and thus void *ab initio*; Sun Life did not engage in unfair or deceptive conduct; and Sun Life did not trick anyone into buying the Policies or paying premium. The court then incorrectly held that it was compelled by a trio of pre-*Price Dawe* federal district court decisions to order Sun Life to automatically disgorge the premium it received to whichever entity paid them. In so doing, the court engaged in no fact finding and ordered Sun Life to refund the premium to the very LPC entities (LPC Holdings I LP, Villa Capital LLC, and ESF QIF Trust (collectively, the "LPC Entities" or "Wilmington Trust's Predecessors")) that generated the STOLI to begin with, a result the court itself recognized was "unfair." Finally, the court correctly held that no pre-judgment interest was proper.

In sum, the trial court got almost everything right. The court was correct to find that the Policies were STOLI and thus void *ab initio*. Wilmington Trust apparently agrees since it has declined to appeal from that ruling. The court was also correct to dismiss Wilmington Trust's unfair and deceptive trade practices claim. Wilmington Trust apparently agrees with that too since it has likewise failed to appeal from that ruling. The trial court was also correct to decline to award pre-

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judgment interest because this Court has held that interest on refund claims does not accrue until the claimant demands the refund, which Wilmington Trust never did.

The only thing the trial court got wrong was its conclusion that it was compelled to order an automatic, proof-less premium refund once the Policies were declared void *ab initio*. This Court has been clear that where, as here, it is against the public policy of this state to permit its courts to enforce a contract prohibited by law, ordinarily neither party has a remedy to any extent. Rather, to obtain a premium refund on a void *ab initio* STOLI policy, an investor must prove its entitlement under a viable legal theory such as unjust enrichment and that awarding a refund will not frustrate the public policy underlying the ban on human life wagering.

Ordinarily, the proper result in an appeal like this would be for this Court to reverse the trial court's order with respect to the premiums and remand for further proceedings on the question of whether Wilmington Trust can prove an entitlement to a refund of the premiums it paid on the Policies. But where, as here, the factual record is fully developed and the material facts are not genuinely disputable, this Court can (and, Sun Life believes, should) reverse with instructions to enter judgment for Sun Life on Wilmington Trust's premium refund claim.

The reason for this is simple: An investor cannot prove an entitlement to a premium refund unless it paid the premium reasonably unaware of the policy's

insurable interest problems. [redacted]

[redacted] Awarding restitution to a claimant who knowingly buys a STOLI policy would frustrate Delaware's public policy and Constitution. Not only would it allow Viva to profit from knowingly investing in human life wagers and encourage Viva to continue knowingly buying STOLI policies, it would send a loud message upstream to would-be STOLI creators to churn out more STOLI in Delaware because there are deep-pocketed investors downstream who will buy it.

[redacted]

SUMMARY OF ARGUMENT

I. WILMINGTON TRUST'S ARGUMENT

1. Denied. The trial court, faithfully following this Court's precedent regarding STOLI in particular and void *ab initio* instruments more generally, correctly held that the equitable doctrine of estoppel (whether employed offensively or defensively) is not available to enforce a human life wager. Wilmington Trust's other equitable defenses were legally ineffective for the same reason: A court may never enforce agreements void *ab initio*. Because courts can never enforce STOLI agreements, this Court need not address the question of whether the Superior Court might otherwise have had jurisdiction over these kinds of equitable defenses.

2. Denied. The trial court's award of an automatic premium refund was incorrect. An automatic (i.e., proof-less) premium refund is not grounded in Delaware law and is instead a creation of a trio of pre-*Price Dawe* federal district court decisions that applied a body of Delaware remedies law pertaining to merely void*able* agreements to STOLI policies, which this Court would later explain in *Price Dawe* are so egregiously flawed as to be void *ab initio*. This Court's applicable precedent, which the trial court set aside without explanation, provides that ordinarily parties to a void *ab initio* agreement are left where they were found. The trial court should have required Wilmington Trust to prove its alleged entitlement to a premium refund through a viable legal theory.

(a) Denied. Sun Life agrees that the Policies' premiums should not have been refunded to Wilmington Trust's Predecessors, but denies the rest. Wilmington Trust is not entitled to the premium paid by its predecessors because (i) Wilmington Trust cannot even prove that it is entitled to a refund of *its* premiums; (ii) there is no authority for the proposition that alleged rights under STOLI policies can be assigned; (iii) Wilmington Trust was not impoverished when *its predecessors* paid premium; (iv) Wilmington Trust's alleged assignors, the LPC Entities, had no premium refund rights to assign in the first place because they were the original wrongdoers; (v) Viva negotiated representations, warranties, and indemnification rights related to insurable interest from the LPC Entities; and (vi) awarding Wilmington Trust this windfall "refund" would reward Viva for knowingly investing in STOLI—resulting in a return on investment of over $2 million.

(b) Denied. The trial court correctly denied prejudgment interest as Wilmington Trust never made a demand for any refund and has, at all times prior to this appeal, insisted that the Policies were legitimate and that no refund was due.

II. SUN LIFE'S ARGUMENT

1. The trial court applied the wrong legal standard to the question of premium return. Rather than determining whether Wilmington Trust could prove an exception to the rule that ordinarily parties to void *ab initio* contracts are left where they are found, the trial court incorrectly held that premiums must be refunded automatically, incorrectly relying upon pre-*Price Dawe* cases from the federal courts that had, themselves, treated STOLI policies as void*able*, rather than void *ab initio*.

To obtain a premium refund in connection with a void *ab initio* STOLI policy, an investor must prove its entitlement under a viable legal theory such as unjust enrichment and that awarding restitution will not frustrate the public policy underlying the ban on human life wagering. A STOLI investor cannot prove such an entitlement unless it paid the premium reasonably unaware of the insurable interest problems. [redacted]

[redacted] Awarding restitution to a claimant that knowingly bought STOLI would frustrate Delaware's immense public policy and constitutional interest against human life wagering. Not only would it allow Viva to profit from a knowing STOLI investment and encourage it to continue buying STOLI in violation of Delaware's public policy and Constitution, but it would send a loud message upstream to the

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would-be STOLI creators of the world to churn out more STOLI in Delaware as there are deep-pocketed investors downstream who will buy it indiscriminately.

[redacted]

COUNTERSTATEMENT OF FACTS

A. The Emergence of Modern STOLI Schemes

Human life wagering has been around for hundreds of years. *Lavastone Capital v. Estate of Berland*, 266 A.3d 964, 967-68 (Del. 2021) ("*Berland*"). In the early 2000s, a modern version of human life wagering emerged where the resulting wagering policies were referred to as stranger-originated life insurance ("STOLI"). *PHL Var. Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011). The STOLI phenomena was rife with fraud and bad practices and resulted in thousands of improper policies. *Id.*; *see* Susan Lord Martin, *Betting on the Lives of Strangers: Life Settlements, STOLI, and Securitization*, 13 U. Pa. J. Bus. L. 173, 175 (2010).

As this Court has recognized, the volume of STOLI surged as large financial institutions bought large blocks of high-face-value life insurance policies on the lives of senior citizens, and indeed, the nearly limitless demand from investors quickly outstripped the natural supply—that is, of seniors who had the kinds of policies the investors wanted and were willing to sell into the market. *Price Dawe*, 28 A.3d at 1070. Unscrupulous brokers and funders rose up to fill this void by manufacturing the policies investors wanted through clever schemes designed to slip STOLI applications past insurers by feigning compliance with insurable interest laws. *Id.*

[redacted]

B. The LPC STOLI Scheme

In 2005, two attorneys, Martin Fleisher and Steven Lockwood, learned that large firms on Wall Street wanted to buy blocks of life insurance policies on seniors. A2099 ¶¶ 4-5; A2504/25:22-26:13. Looking to profit, Fleisher and Lockwood developed a series of entities, known generally as "LPC," whose purpose was to create and obtain a large number of multi-million dollar policies on the lives of hand-picked seniors across the country so that LPC could later sell those policies to larger firms. Opinion 5; A2858/125:23-127:8; A2548/198:12-199:4; A1968 ¶¶ 3-4.

To do so, LPC developed a network of brokers who shepherded seniors to its door drawn—not by any need for insurance—but by the prospect of "easy money." A1968 ¶ 8; A2099 ¶¶ 8, 15, 20; B1621 ¶ 4. Before LPC would approve a senior to participate, LPC required an illustration showing the minimum amount of premium needed to initiate and maintain a policy on that senior's life and a life expectancy report estimating how much longer that senior was likely to live. Opinion 5-6; A1968 ¶ 9; A2099 ¶ 13. LPC used that data to decide whether such a policy—*if later issued and put in force*—would present a favorable return on investment to LPC. A1969 ¶ 10; A2868/165:1-9. Once LPC determined such a policy would be profitable to LPC, LPC financially induced the seniors to apply for it by offering to buy the policy, once issued and put in force, for 2%-3% of its face value, plus a dollar-for-dollar

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reimbursement of any premium paid to effect the policy. Opinion 6-7; A1969 ¶¶ 10-14; A2856/116:6-117:4; A2519/82:15-83:18; A2520/87:18-23; B357.10. These pre-issuance inducements and arrangements existed in every or nearly every policy that LPC procured. A1968 ¶¶ 7-21; A2099 ¶ 7.

LPC also made sure that participating seniors knew that the policies being applied for needed to be issued to trusts whose beneficial interests could be sold to LPC. A1969 ¶ 15; A2875/193:22-197:15; Opinion 6. To aid in this process, LPC made available its form trust agreement and told brokers that LPC's preferred trustee was Fleisher's childhood friend, Jonathan Berck, Esq. A1970 ¶ 17; A2039 ¶ C; A2860/130:16-131:12, 133:2-19. As trustee of these sham trusts, Berck never met the insureds and was not paid by them; instead, Berck was paid and instructed by LPC. B1819/168:7-169:11. The reason LPC required the policies to be issued to trusts was so—shortly after the policies were issued and put in force—LPC could buy the beneficial interest in the trusts holding the policies, without ever having to record an ownership change with the issuing insurer during the two-year contestable period. A2885/231:21-233:14. In this way, LPC took formal ownership of almost all

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of the policies it procured very shortly after they were issued and put in force.[1] Opinion 6-7; A1969-70 ¶¶ 16, 19; A2856/115:19-116:5; A2960-61; B1048.

LPC and/or LPC's investors were advised on insurable interest issues going all the way back to the LPC Program's inception by attorneys then at the firm of Stroock & Stroock & Levan, Boris Ziser and Thomas Weinberger. A2888/245:17-246:9; A2898/285:20-286:9; A656. These attorneys remained involved as LPC manufactured the policies; [redacted] B519. Apparently, the lawyers were comfortable with these pre-arranged transactions so long as certain perceived formalisms were observed: namely, that LPC wait at least one day after a policy was placed in force to formally effectuate the sale. Opinion 7; A2558/238:6-240:15; A2548/198:24-199:4; A2555/226:4-227:9; B1873/222:8-12.

C. LPC Manufactured $19 Million Of STOLI On The Lives Of Bernard DeBourbon And Samuel Frankel.

With slight variations, the two policies at issue here: a $9 million policy on a senior from Illinois, Samuel Frankel, and a $10 million policy on a senior from New York, Bernard DeBourbon, were created as human life wagers through the LPC

[1] These sorts of wet-paper, beneficial interest transfer transactions through which LPC (and other STOLI promoters at the time) procured policies are referred to in the industry as "BI Deals." A2996/92:5-22; A3122/36:6-19.

[redacted]

Program. Opinion 8-15. Neither insured wanted or needed insurance and neither paid the premium. Opinion 25; B1618 ¶¶ 3, 9; B1621 ¶¶ 5, 7-8; B1945 ¶ 22. Frankel (who was wealthy) fronted the initial premium in reliance upon LPC's promise that he would be reimbursed and paid 3% of the face value shortly after issuance. Opinion 25; A911; A914; A2101 ¶¶ 27-28; B1621 ¶ 5. DeBourbon (who, as it turns out, was not wealthy) did not even front the initial funds—instead an attorney with no relationship to him, whom LPC also reimbursed, fronted the initial premium from his IOLTA account that he was apparently using as a slush fund. A1972 ¶¶ 34-35; B1943 ¶¶ 13-15, 29; B478; B483-84. Both Policies were shopped to LPC *before* they were put in force; LPC arranged to buy both for 3% of their face plus a return of premium *before* either was put in force; and both were sold to LPC through sales of the trusts' beneficial interests shortly after they were effected, as intended and arranged all along. Opinion 26; A1975 ¶ 34; A2884-85/229:22-231:3; B447-48.

D. LPC Consolidated Its Portfolio Into A Single Entity.

After the policies were past their two-year contestable periods, LPC caused the trusts to submit paperwork to the insurers to formally change the policies' owner and beneficiary to Villa Capital, LLC ("Villa Capital"), an LPC subsidiary controlled by Fleisher designed to hold LPC's policies after contestability. A2885/231:12-232:25. By December of 2010, LPC had amassed a portfolio of [redacted]

[redacted]

[redacted] (the "Portfolio"), which included the Policies, held by Villa Capital. B1156-62. LPC then reorganized the Portfolio through a transaction whereby ownership was transferred to a series of Irish special purpose entities and the policies were held by a Delaware trust, ESF QIF Trust ("ESF"). B1019. As part of that re-organization, Ziser and Weinberger helped draft an Offering Memorandum, warning prospective investors that the transactions through which LPC procured the policies were a "type of *stranger originated life insurance* arrangement that are now *prohibited* by life settlement laws adopted in many states." B678, B701 (emphasis added). The Offering Memorandum further warned that *if* a court were to later determine that policies "must be acquired with the *good faith* intent to provide protection for family members or business partners, then some or all of the [policies in the Portfolio] *may be subject to attack by the issuing insurance companies*." B701 (emphasis added).

After this draft of the Offering Memorandum was circulated, the New York Court of Appeals issued its decision in *Kramer v. Phoenix Life Ins. Co,* 940 N.E.2d 535 (N.Y. 2010), which held that New York's insurable interest statute in effect at the time did not require policies to be taken out in good faith. *Id.* [redacted]

[redacted]

[redacted] B1048 B1195 (emphasis added); *see also* B1050-51 [redacted]

Later that year, Ziser's and Weinberger's warnings proved prescient as this Court issued its decision in *Price Dawe*, distinguishing *Kramer* and declining to follow its holding and expressly confirming that Delaware policies must be taken out "in good faith"—the very test they had just warned that policies procured through LPC would fail. *See Price Dawe*, 28 A.3d at 1075 ("An insured's right to take out a policy with the intent to immediately transfer the policy is not unqualified. That right is limited to bona fide sales of that policy taken out in good faith.").

E. Blackstone Bought the LPC Portfolio With Eyes Wide Open To The Insurable Interest Problems.

Blackstone, Inc. is a large investment firm with over $915 billion in assets under management that invests in high-face value life insurance policies on the lives of seniors through a constellation of special purpose vehicles collectively referred to as "Viva." A2668-70/27:5-30:8, A2670/34:8-14, A2684/92:6-10. Viva's business model involves buying portfolios of STOLI policies that were manufactured by and

[redacted]

for investors—policies many other investors won't touch—at a discount.[2] Viva owns roughly 1,950 policies with a market valuation of over $2.5 billion. B187.

[redacted] A1401-64; A2693/127:10-14; A2959. [redacted] A1417 at xii. [redacted] A1413/§ 4.01(a)(xi)(B), (J); A1421/Art. VI.

[2] In 2014, Viva bought the Monarch portfolio, containing assets originated through Daniel Carpenter's criminal STOLI scheme, previously held by Caldwell Life. *See* A2689/112:12-113:20; B1593; *U.S. v. Carpenter*, 190 F. Supp. 3d 260, 263-64, 275, 278-80 (D. Conn. Jun. 6, 2016), *aff'd* 801 F. App'x 1 (2d Cir. 2020). In 2016-17, Viva bought two large tranches of policies from AIG, containing policies originated through Coventry's non-recourse premium finance program. B1497; *U.S. Bank v. Sun Life*, 2016 WL 8116141 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*") (declaring policy originated through Coventry's short-term, non-recourse premium finance scheme void *ab initio* under Delaware law), *adopted* 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017); *Sun Life v. U.S. Bank*, 2016 WL 161598 (S.D. Fla. Jan. 14, 2016) ("*Sun Life/Malkin*") (same); *Sun Life v U.S. Bank*, 369 F. Supp. 3d 601 (D. Del. 2019) ("*Sol*") (same); *Sun Life v. Wells Fargo*, 2020 WL 1503641 (N.D. Ill. Mar. 30, 2020) ("*Corwell II*") (same under Illinois law); B1617.1-1617.3 (discussing negative impact of *Van de Wetering* decision on Blackstone's portfolio).

[redacted]

[redacted] A2983/40:24-41:9; A2964/No. 5. As explained above, Viva's Attorneys already knew how the LPC Program worked, having long advised it regarding insurable interest issues going back to the program's inception. *See* A2888/245:19-246:9; A2898/285:12-286:9; B519.

As part of that diligence, LPC gave Viva access to a data room that housed its policy files. A2704/170:24-171:21. [redacted][4]; [redacted]

[3] [redacted] Wilmington Trust, and its principal, Viva, are represented in this lawsuit by Ziser's and Weinberger's litigation colleagues at Schulte Roth & Zabel.

[4] Viva did not produce statistics showing how shortly after the policies were *effected* the beneficial interest transfers happened. Since the premium needed to effect these sorts of policies is not typically paid until *after* the policies are *issued*, the time between the policies being effected and sold to LPC was likely even shorter.

[redacted]

A2959-61 (Viva's Interrogatory Responses). A2959-61; A3030/228:18-229:6. A2892/259:1-260:22, 261:11-262:13, A2893/263:7-264:5; A2896:274:17-275:4, A2897/278:4-279:22, 280:13-282:14; A1967 ¶¶ 7-21. A2904/309:18-310:10; B1233-48. A2966-67. (*id.*) we know what Viva's Attorneys said about the policies back in 2010, which is that, if a court were to require policies to be taken out "in good faith," LPC's

policies would likely be deemed void. B678-779, B701. And, of course, we know that this Court subsequently held in *Price Dawe*—over the strenuous objection of Viva's Attorneys[5]—that Delaware law requires policies to be taken out in good faith.

[redacted] A2964-67; A3033/240:16-241:15. [redacted] A2994/83:7-84:3, A3029/223:13-18, A3031/233:16-234:7, A3032/236:6-11, A3033/239:4-240:7, A3034/243:5-247:7; B147.

[5] Ziser and Weinberger filed an *amicus* brief in *Price Dawe* on behalf of the Institutional Life Markets Association (ILMA), arguing that good faith should *not* be required and that, even if it was required, STOLI policies should be considered merely void*able*, not void *ab initio*. 2011 WL 2613974, at *5-12 (Del. Jun. 23, 2011).

[redacted]

Thus, as explained above, before buying the Policies—and before paying a single penny in premium for them—[redacted] A2963-64 (No. 5); A3040/267:19-273:11. This violated the "minimum" diligence principles set forth by Viva's own trade organization (ILMA), which instruct investors to, *inter alia*, interview insureds and brokers prior to a sale to "confirm that the policy was not taken out with the intent to resell" and "whether anyone offered or provided any type of incentives" to take out the policy.[6] B2269-79. Those guidelines proceed to explain that if the policy

[6] Ziser and Weinberger have long served as ILMA's outside general counsel. B2187 at 34:20-35:22.

[redacted]

was taken out to be sold or if the insured was offered incentives to take out the policy "*the Provider should not acquire the policy*."[7] B2276 (original emphasis).

F. Sun Life Was The Victim Of The LPC STOLI Scheme.

Sun Life was tricked into issuing the Policies; indeed, concealing investor involvement is precisely what LPC's use of beneficial interest transfers was designed to accomplish. A2885/231:21-232:7; B2259-B2260 ¶ 4; Opinion 10-11; B1618-20; B1621; B1622 ¶¶ 1-4; B1943 ¶¶ 1-8, 22. Sun Life competently underwrote the policies and, in issuing them, relied in good faith on the representations in the applications, including that legitimate policies were being taken out by legitimate trusts for legitimate purposes. A2373/145:9-14, A2374/148:1-25. Sun Life is expressly entitled to do so by statute, 18 Del. C. § 2704(d), and no rule requires insurers to conduct investigations post-issuance to determine if they were tricked into issuing STOLI in the first place. Opinion 29.

But because Sun Life takes insurable interest seriously, Sun Life tried to understand STOLI (which was inherently hard to do because it was designed to keep insurers in the dark) and developed a set of high-level criteria consistent with STOLI policies (e.g., high face amount insuring lives of seniors issued to trusts, and/or

[7] As noted above, the insureds here were offered such financial incentives, [redacted] *Supra* at 12-13, 15-21.

[redacted]

transferred within three years) and began flagging policies meeting such high-level criteria as *potential* STOLI. *See* B0362; B2260 ¶ 5; *see also* A2354-A2355 at 69:8-70:8; B0377; B0363; A2407 at 278:17-280:18. The purpose of these lists was not litigation; among other things, Sun Life's actuarial department created a potential STOLI list to track STOLI's financial impact to ensure Sun Life would have adequate cash reserves—believing (correctly) that STOLI polices would be funded differently and would lapse (or not lapse) differently than otherwise expected. A2157 at 109:3-112:23. Sun Life recognized, however, that these high-level criteria were also consistent with a great many perfectly legitimate policies on its books. A1141-46; A2198/273:22-274:4. Thus, although the Policies here appeared on certain lists of policies having indicia of potential STOLI, Sun Life never had sufficient information to determine that they would, if challenged, be deemed to lack insurable interest under the law of the applicable jurisdiction and did not decide to bring the instant challenges until a full investigation was conducted (including by outside counsel) following the submission of death claims. *Id.*; A2144/58:9-59:1; A2145/61:6-62:12; A2174/180:3-7; A2200/281:11-15; A2202/290:2-304:17.

In the trial court, Wilmington Trust alleged a conspiracy theory that Sun Life had a "deceptive and unconscionable practice of 'laying in the weeds'—secretly harboring an intention" to collect premiums on policies it had already determined

[redacted]

were STOLI—because the Policies had been placed on suspected STOLI lists among 10,307 other policies also meeting indicia of potential STOLI. A286; 437.35; *see* A504/7-12 (alleging Sun Life delayed filing so evidence would be lost). But that conspiracy theory was baseless and fell flat on its face, including because discovery revealed that Sun Life has paid ***over 99%*** of the death claims for policies on those lists. A2124; N17C-08-331-MMJ-CCLD D.I. 280 (Ex. QQQ) (native excel sheet of list). The reality is that Sun Life considers every death claim on its own merits when received and only challenges those that lack insurable interest under the applicable body of law and that Sun Life is confident it can prove in court. A2145/64:8-65:11.

G. Procedural History

On August 28, 2017 and July 31, 2018, respectively, Sun Life commenced these cases in the Superior Court by seeking declarations that the Policies lacked insurable interest. A246, A415. Wilmington Trust answered with nearly identical defenses and counterclaims in both cases, and the cases were consolidated. A437.1.

Through its pleadings, Wilmington Trust maintained that the Policies were valid, but raised a battery of equitable defenses through which it sought to enforce the Policies and compel Sun Life to pay their death benefits even if they were deemed to be void *ab initio*—namely, laches, waiver/estoppel, and unclean hands. A437.31. Wilmington Trust then alleged counterclaims for (i) breach of contract;

[redacted]

(ii) bad faith; (iii) unfair and deceptive trade practices in violation of Mass. Gen. Laws Ch. 93A; and (iv) to the extent the Policies were deemed void *ab initio*, promissory estoppel. A437.59-437.69.

Wilmington Trust's breach of contract and bad faith counterclaims were predicated on the theory that the Policies were valid and that Sun Life lacked "any reasonable basis or justification" to challenge them. A437.61. The unfair and deceptive trade practices counterclaim proceeded on the baseless conspiracy theory that Sun Life had, "since December 2009 . . . a secret, undisclosed intention to challenge the Polic[ies] upon Mr. Frankel's[/DeBourbon's] death[s] for almost a decade," but that Sun Life concealed this plan "to induce" Wilmington Trust (and its predecessors) to pay premium. A437.46 ¶ 28. Wilmington Trust's main allegation in support of this theory was that Sun Life's placement of the Policies on potential STOLI lists somehow meant Sun Life knew they lacked insurable interest and intended long ago to challenge them. The promissory estoppel counterclaim was alleged in the alternative and, like the affirmative defenses, sought to compel Sun Life to pay the "face amount of the Polic[ies] plus interest," if the Policies were deemed void, because Sun Life allegedly promised to pay them. A437.69 ¶ 81. Wilmington Trust did not plead a cause of action for a premium refund and merely requested this in passing in its relief prayer. *Id.* at ¶ (A).

[redacted]

Sun Life filed motions to strike the affirmative defenses of laches, wavier/estoppel, and unclean hands because it is settled law that STOLI policies in particular (and void *ab initio* agreements generally) may "never" be enforced—including by equitable defenses. B0001. Sun Life moved to dismiss the promissory estoppel counterclaim for the same reason. B0019. The trial court, relying on *Price Dawe* struck/dismissed the estoppel-based defenses and counterclaims and then struck the remaining equitable defenses for lack of jurisdiction.[8] WT Ex. A.

After the close of extensive discovery, the parties cross-moved for summary judgment on all claims. Wilmington Trust continued to argue that the Policies possessed insurable interest and were valid. A537-66, A622-48, A706-16. On a robust and genuinely indisputable record, however, the trial court correctly declared the Policies void *ab initio* for lack of insurable interest. Opinion 5-27. In fact, the court determined that the evidence that the Policies were STOLI was overwhelming. *Id.* In that regard, the court found LPC financially induced DeBourbon and Frankel to take out policies for LPC through pre-arranged transactions pursuant to which

[8] Wilmington Trust also alleged defenses based on the Policies' contestable periods and Sun Life's alleged lack of standing to challenge the Policies for lack of insurable interest. The trial court denied Sun Life's motion to strike these affirmative defenses because, on the pleadings, Wilmington Trust denied that Delaware law applied. Ex.A to Op. Br. at 8. After discovery closed, Wilmington Trust conceded that Delaware law governed the Policies, and thus it did not pursue these defenses further.

[redacted]

LPC agreed to indirectly pay the premiums needed to put the Policies in force and to pay the insureds 3% of the Policies' face value for participating. *Id.* Wilmington Trust does not appeal that ruling.[9] *Id.* at 26-27.

The trial court also rejected Wilmington Trust's baseless conspiracy theory, finding "Sun Life's actions are not deceptive trade practices." Opinion 30. In this regard, the court found that Sun Life had no "duty" to investigate polices sooner, inform Wilmington Trust that the Policies had certain high-level indicia of STOLI, or to "bring litigation sooner." Opinion 29. The court further found "no evidence of any actions by Sun Life inconsistent with insurance industry practices," that "[t]he life insurance industry is highly regulated," and that there "is no evidence Sun Life is in violation of any statute or regulations." *Id.* at 30. The court also found that Wilmington Trust could not prove "a causal connection between Sun Life's conduct and any losses allegedly suffered by . . . Viva." *Id.* at 29. Wilmington Trust's conspiracy theory having crumbled, the court correctly dismissed its unfair and deceptive trade practices claims. *Id.* at 36. Wilmington Trust does not appeal from this ruling—though it continues to push the same debunked conspiracy theory here,

[9] Wilmington Trust's contention (Op. Br. 2 n.2) that it elected not to appeal the case's central issue (the Policies' validity) out of "judicial efficiency" rings hollow.

[redacted]

albeit now in support of its argument that it is entitled to a premium refund. *Compare* Op. Br. 8-18, *with* A569-587 (opening brief in support of summary judgment).

Having found the Policies void *ab initio* for lack of insurable interest, the trial court, incorrectly in Sun Life's view, ordered Sun Life to disgorge all premiums to whichever entities paid them. Opinion 36. The trial court was clear that it was providing this relief automatically, without considering any of the facts, and without requiring Wilmington Trust (or any other entity) to prove any entitlement to a refund because, in the court's view, a trio of pre-*Price Dawe* opinions from the federal district court (*Berck*, *Snyder*, *Rucker*) mandated that result as a matter of law. Opinion 33-34, *id.* n.54; SL.Ex. C at 11:18-12:4 (trial court "not comfortable" with premium return ruling, but "I did not feel that I could deviate from precedent and make a ruling in any other manner"). The court ordered this result even though it believed that refunding premiums to Wilmington Trust's predecessors would be "unfair" because they were the entities that manufactured the STOLI in the first place; even though none of those predecessor entities were before the Court; and even though most, if not all of them, no longer even exist. *Id.* at 26, 35-36; B0357.5

The trial court ordered Sun Life to refund $4,550,112.37 to the LPC Entities and $2,325,356.07 to Wilmington Trust (on behalf of Viva). SL.Ex. D at 3-4.

[redacted]

ARGUMENT

III. INVESTORS CANNOT FORCE INSURERS TO PAY STOLI DEATH BENEFITS THROUGH ANY MEANS, INCLUDING THROUGH PROMISSORY ESTOPPEL CLAIMS AND EQUITABLE DEFENSES.

A. Question Presented

Whether the court correctly struck/dismissed Wilmington Trust's affirmative defenses of waiver and estoppel, unclean hands, and laches and its promissory estoppel counterclaims, which sought to force Sun Life to pay void *ab initio* STOLI death benefits in violation of Delaware's law, public policy, and Constitution.

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

This Court has thrice held *en banc* that courts may *never* enforce STOLI.[10] *Price Dawe*, 28 A.3d at 1067 ("A court may never enforce agreements void *ab initio*, no matter what the intention of the parties."); *Berland*, 266 A.3d at 969 (quoting *Price Dawe*, 28 A.3d at 1067) ("[A] 'court may never enforce [such an] agreement[].") (alterations in the original); *Wells Fargo v. Est. of Malkin*, 2022 WL

[10] STOLI is "void *ab initio*, anathema to hundreds of years of public policy, [and] violative of the Delaware Constitution." *Malkin*, 2022 WL 1671966, at *9 n. 48.

[redacted]

1671966, at *4 (Del. 2022) ("*Malkin*") (quoting *Price Dawe*, 28 A.3d at 1067 & 1068 n.25) ("STOLI policies are void *ab initio* and a 'fraud on the court,' meaning that they never legally come into existence and cannot be enforced by any court.").

The reason for this unequivocal rule is simple: Forcing an insurer to pay STOLI death benefits would allow an unlawful, unconstitutional human life wager that violates public policy to come to fruition. *See Malkin*, 2022 WL 1671966, at *9 ("[W]hen an investor receives their [STOLI] proceeds it . . . commit[s] . . . 'a violation of Article II, Section 17 of Delaware Constitution and of the State's public policy"); *id.* at *7 (agreeing with trial court that bona fide purchaser defense cannot be asserted to allow investor to retain STOLI death benefits due to Delaware's public policy of "ensuring that 'such bets never pay off'") (internal citations omitted).

As a consequence, courts applying Delaware law have unanimously refused to allow investors to force insurers to pay STOLI death benefits through affirmative defenses and counterclaims such as waiver and estoppel, unclean hands, and laches. *See, e.g.*, *Columbus Life v. Wilmington Trust*, 2021 WL 1820573, at *5-6 (D. Del. May 6, 2021) ("*Romano*") (striking affirmative defenses of laches, waiver and estoppel, and unclean hands and dismissing promissory estoppel claim because permitting them is "essentially the same thing as enforcing the policy, which the Delaware Supreme Court says courts cannot do"), *adopted* 2021 WL 3886370, at *7

[redacted]

(D. Del. Aug. 31, 2021) ("[U]nder the reasoning of *Price Dawe*, [the investor's] challenged affirmative defenses, which seek to enforce the [p]olicy should it be deemed void *ab initio*, are impermissible as they seek relief that the Delaware Supreme Court says courts cannot give."); *Columbus Life v. Wells Fargo*, 2021 WL 106919, at *4-5 (D. Del. Jan. 12, 2021) ("*Snyder*") (same); *Columbus Life v. Wilmington Trust*, 2021 WL 537117, at *6 (Del. Super. Ct. Feb. 15, 2021) ("*Kluener*") (striking waiver and estoppel claim because "if the [p]olicy is determined void *ab initio*, it is clear that Delaware law does not allow for waiver and estoppel to revive it"); *WSFS v. PHL Var. Ins. Co.*, 2014 WL 1389974, at *12 (D. Del. Apr. 9, 2014) ("[A] contract that is void *ab initio* may not be enforced equitably through estoppel."); *Sun Life/Malkin*, 2016 WL 161598, at *19-20 (rejecting laches, waiver, estoppel, and unclean hands because these doctrines have "no application to an agreement which is illegal because it violate an express mandate of law or the dictates of public policy" and "the immense public policy against wagering contracts clearly trumps any possible application of that [unclean hands] doctrine"); *Van de Wetering*, 2016 WL 8116141, at *19 (rejecting estoppel, unclean hands, laches, and waiver as "inapplicable to a STOLI policy which has been declared void *ab initio*").

Courts applying the law of other jurisdictions are in accord. *See, e.g.*, *Columbus Life v. Wilmington Trust*, 2021 WL 1712528, at *4-5 (D.N.J. Apr. 30,

[redacted]

2021) ("*Goldman*") (granting motion to strike because, under New Jersey law, "if the [p]olicy is ultimately determined to be a STOLI arrangement, the equitable defenses of laches, waiver and estoppel, and unclean hands cannot be asserted to sustain the [p]olicy"); *Corwell I*, 2018 WL 2100740, at *2-3 (N.D. Ill. May 7, 2018) (granting motion to strike estoppel, laches, unclean hands, ratification, and waiver because, under Illinois law, a plaintiff's allegedly "wrongful conduct does not make a contract that was void at inception enforceable").[11]

Wilmington Trust concedes (Op. Br. at 23) that the purpose of its affirmative defenses and promissory estoppel counterclaims is "to recover the death benefit[s],"

[11] Wilmington Trust argues that the law of some other states "is not so rigid" as to always refuse to enforce void *ab initio* contracts (Op. Br. at 30-31). But this case involves questions of Delaware law, and this Court has been clear that, under Delaware law, "a court may never enforce agreements void *ab initio*." *Price Dawe*, 28 A.3 at 1067. In any event, the cases Wilmington Trust cites are not on-point; in some cases do not even involve enforcing illegal promises; and the language Wilmington Trust cherry picks is often equivocal and/or dicta. *See, e.g.*, *Peyton v. Margiotti*, 156 A.2d 865 (Pa. 1959) (requiring attorney to refund money paid by client into unethical contingent fee arrangement because of unequal power dynamic between attorney and client); *Bay Parkway v. Shalom*, 200 N.E. 685 (N.Y. 1936) (refusing to allow party that knowingly entered into a sham note with bank to defraud regulators and depositors to plead lack of consideration); *Turner v. Davidson*, 188 S.E. 828 (Ga. 1936) (stating, in dicta, that insurer's act of *paying* a benefit may have waived its right to claim lack of insurable interest, where insurer was not even trying to recover or stop paying benefits); *Reassure Am. Life Ins. Co. v. Midwest Res.*, 2011 WL 672566 (E.D. Pa. Feb. 16, 2011), *quoting Kelly v. Prud. Ins. Co.*, 6 A.2d 55 (Pa. 1939) (stating, in dicta, that by accepting premium on a *legitimate* policy, appellant was "in no position to complain" about insurable interest).

[redacted]

but then argues that it is somehow not trying to *enforce* the Policies' death benefits, but is merely trying to *estop* Sun Life from not paying them. Respectfully, there is no meaningful difference between enforcing a STOLI policy and estopping an insurer from challenging one: A court doing either is allowing a human life wager to come to fruition in violation of longstanding Delaware law, public policy, and its constitution. *See, e.g.*, *Romano*, 2021 WL 1820573, at *5-6 (permitting equitable defenses and promissory estoppel counterclaims is "essentially the same thing as enforcing the policy, which the Delaware Supreme Court says courts cannot do").[12]

Nor is it true, as Wilmington Trust contends (Op. Br. at 30), that this Court has yet to address whether an investor can estop an insurer from paying STOLI death benefits. In *Price Dawe*, this Court held that an otherwise *effective* affirmative defense to a policy challenge—the policy's statutorily-mandated, two-year contestable clause—could *not* be asserted to force an insurer to pay STOLI proceeds

[12] Wilmington Trust makes the equally tenuous argument (Op. Br. at 31-32) that a court forcing an insurer to pay a STOLI death benefit through doctrines like estoppel is not enforcing the illegal promise, but rather is enforcing a separate promise to honor its illegal promise. This too is a distinction without a difference and would, if accepted, result in Delaware courts enforcing STOLI and allowing human life wagers to come to fruition. *See Snyder*, 2021 WL 106919, at *9 ("[T]he most glaring problem with Wells Fargo's position is that any subsequent promise to pay a death benefit in return for premium payments would itself constitute an unenforceable, illegal wager on the life of Ms. Snyder.").

[redacted]

because "[a] court may never enforce an agreement void *ab initio*." 28 A.3d at 1067. Since then, this Court has likewise held that an investor cannot retain STOLI proceeds through unclean hands and *in pari delicto* defenses, *Berland*, 266 A.3d at 974, or through bona fide purchaser defenses, *Malkin*, 2022 WL 1671966, at *8-10. The common thread is that investors cannot use defenses or counterclaims to obtain/retain STOLI benefits because this would allow human life wagers to come to fruition, which Delaware's Constitution and public policy forbid.

Wilmington Trust also argues that there is a special exception allowing a downstream buyer who was not involved in the illegality to enforce promises that violate public policy (and, in this case, Delaware's Constitution). But this confuses the exception allowing *restitution* of performance made under an illegal contract to a buyer who is excusably ignorant of the illegality with *enforcement* of the illegal promise itself, which this Court has held over-and-over again—both within the STOLI context and without—a court may *never* do. *See, e.g.*, *Klaassen v. Allegro Dev.*, 106 A.3d 1035, 1046 (Del. 2014) ("[O]nly voidable acts are susceptible to . . . equitable defenses."); *Waggoner v. Laster*, 581 A.2d 1127, 1136-37 (Del. 1990) ("*Waggoner I*") (estoppel and other equitable defenses, which might otherwise bar claims involving merely voidable contracts, have "no application to an agreement or instrument which is illegal because it violates an express mandate of law or the

dictates of public policy" (internal citations and quotations omitted)); *STARR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991) ("*Waggoner II*") (rejecting estoppel because "[n]either logic nor equity compel the validation of a legally void act"); *see also Fleming v. Perdue Farms*, 2002 WL 31667335, at *3 n.3 (Del. Super. Ct. Oct. 30, 2002) ("While a person may waive an advantage of law intended for his or her benefit, the doctrine of waiver does not apply to transactions that are forbidden by statute, violate the public's interests, are contrary to public policy, or that infringe upon the rights of others[.]"); *In re HealthSouth S'holders Litig.*, 845 A.2d 1096, 1108 (Del. Ch. 2003) ("[T]he unclean hands doctrine . . . will not be applied when its acceptance would contravene an important public policy."), *aff'd* 847 A.2d 1121 (Del. 2004); *c.f. supra* at 28-29 (citing *Price Dawe*, *Berland*, and *Malkin*).[13]

Wilmington Trust likewise argues, citing to the Oregon Supreme Court's decision in *Hammond v. Oregon & C.R. Co.*, that this Court should carve out a special exception for cases where the private equities support enforcing an illegal

[13] The investors in *Berland* and *Malkin* both purported to be downstream buyers who contended that they should be able to retain STOLI proceeds because they alleged that they were either less to blame or reasonably unaware. This Court did not carve out a special exception for downstream STOLI buyers in those cases; to the contrary, it held that *none* of those defenses were viable because doing so would enforce an illegal promise in contravention of Delaware law, public policy, and its Constitution.

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promise. 193 P. 457 (Ore. 1920). But *Hammond* did not enforce an illegal promise; it simply allowed a buyer to sue a seller for *restitution* of some of the money it paid in connection with an agreement the buyer did not know or have reason to know was illegal when made. *Id.* at 462-63. And, more importantly, as this Court's precedents make clear: Human life wagers are not unenforceable to remedy private harm; they are unenforceable because allowing them to come to fruition harms the public and violates the Constitution. *See, e.g.*, *Malkin*, 2022 WL 1671966, at *9 ("Similarly, because STOLI policies are void *ab initio*, when an investor receives their proceeds it does not commit 'a violation of the rights of the claimant' but rather a violation of Article II, Section 17 of Delaware Constitution and of the State's public policy."); *Berland*, 266 A.3d at 975 ("Thus, these equitable principles do not apply.").[14] STOLI policies are never enforceable; arguments about private equities do not change that.

The only Delaware case Wilmington Trust cites in support of its argument that human life wagers can sometimes be enforced is *Sol*.[15] But, read together, the

[14] Wilmington Trust's argument (Op. Br. 35 n.15) that this holding does not apply because "this Court is not addressing a situation where the General Assembly has enacted a statute providing that carriers can bring STOLI challenges indefinitely" ignores the fact that Delaware's Constitution (and public policy) are violated "when an investor receives [STOLI] proceeds." *Id.*, at *9.

[15] Judge Stark's decision in *Sol* was derivative of his decision in an earlier case known as *Griggs*, which Wilmington Trust also cites.

[redacted]

opinions in *Sol* do not support this argument. In *Sol*, Judge Stark denied an insurer's motion on the pleadings to strike an investor's affirmative defenses and counterclaims seeking to enforce an alleged STOLI policy's death benefit if that policy was deemed to be void *ab initio*. Respectfully, this was error for the reasons discussed above. But after making that ruling, Judge Stark declared the policy void *ab initio* for lack of insurable interest on summary judgment without discussing the investor's waiver and estoppel affirmative defenses, *Sun Life v U.S. Bank*, 369 F. Supp. 3d 601 (D. Del. 2019) ("*Sol*"), refused to instruct the jury as to those affirmative defenses, *compare* Proposed Jury Instr., 2019 WL 8353393, ECF 241, *with* Final Jury Instr., 2019 WL 8353393, ECF 267, and refused to award expectation damages (i.e., the death benefit) on the promissory estoppel claim, *Sun Life v. U.S. Bank*, 2019 WL 8353393 (D. Del. 2019) ("*Sol III*"). Thus, although he came about it differently, Judge Stark did not allow affirmative defenses or counterclaims to enforce a STOLI policy's death benefit either.[16] *See Snyder*, 2021 WL 106919, at *6

[16] As explained more fully below, an investor who paid premiums on a STOLI policy reasonably unaware of the insurable interest problems has a remedy for restitution of premiums it so paid. But a promissory estoppel claim is not the proper vehicle to seek such relief in a STOLI case because the whole point of promissory estoppel is to enforce a promise, which in the STOLI context, courts may never do. *See Snyder*, 2021 WL 106919, at *10 ("My narrow disagreement with *Sol* and *Griggs* relates to the theory under which restitution is available. As explained above, I do not think that restitution is available under a promissory estoppel theory, because, in my view,

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("Read together, the Court's rulings in *Sol* are not inconsistent with my conclusion that the defenses of waiver, estoppel, and unclean hands are not applicable against an insurer's claim that a life insurance contract is" STOLI.).

At the end of the day, Wilmington Trust seems to recognize that the relief it seeks would require this Court to overturn a long line of its own cases, both within the STOLI context and without. Indeed, Wilmington Trust actually argues (Op. Br. at 34) that this Court "need not feel constrained" by this Court's prior precedent because, according to Wilmington Trust, Sun Life supposedly engaged in outrageous conduct that requires this Court to carve out some unique exception to rescue Wilmington Trust from fundamental unfairness. This desperate argument ignores at least two things. First, the rule that courts will never enforce agreements void *ab initio* is designed to protect the public, not private litigants, and, second, Wilmington Trust's conspiracy theory that Sun Life duped it into paying premium through some secret plan was soundly rejected by the trial court on the merits in connection with the deceptive trade practices claim, which Wilmington Trust elected not to appeal.

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a court may never enforce a promise to pay on a STOLI policy, or even a promise to perform on a promise to pay on a STOLI policy.").

Respectfully, this Court should affirm the trial court's decision to strike/dismiss Wilmington Trust's affirmative defenses of waiver and estoppel, unclean hands, and laches and its promissory estoppel counterclaims.[17]

[17] Because the equitable defenses are not legally viable, this Court need not consider whether the Superior Court would have subject matter jurisdiction to hear them.

[redacted]

IV. THE TRIAL COURT ERRED BY ORDERING SUN LIFE TO REFUND PREMIUM.

A. Questions Presented

Whether the trial court erred by ordering Sun Life to refund all premiums paid to whoever paid them, automatically without requiring proof of entitlement. B0186-B0192, B0206-219; B0295-304; B0336-349

B. Scope of Review

This Court reviews questions of law *de novo*. *Kahn v. Roberts*, 679 A.2d 460 (Del. 1996).

C. Merits of Argument

1. The Trial Court Erred By Awarding An Automatic, Proof-less Premium Refund Under Void *Ab Initio* Agreements.

The trial court was clear that it ordered Sun Life to disgorge all premiums automatically without considering any of the relevant facts and without requiring anyone to prove an entitlement to restitution because it believed it was compelled to do so by supposed federal court "precedent." [18] Respectfully, this was error.

This Court has been clear that where, as here, "it is against the public policy of this state to permit its courts to enforce an illegal contract prohibited by law . . .

[18] The court acknowledged *Della*'s general rule (Opinion 33), but then abruptly, without explanation, cast it aside in favor of a rule that stripped the court of its discretion and led to a result that even the court acknowledged was "unfair" and with which the court was "not comfortable," i.e., return of premium to LPC. *Id.* at 32-34.

[redacted]

[o]rdinarily . . . neither party has a remedy to any extent against the other." *Della Corp. v. Diamond*, 210 A.2d 847, 849 (Del. 1965). If it is true that *ordinarily* there is no remedy *to any extent* in connection with void *ab initio* agreements, it cannot also be true that parties to void *ab initio* STOLI policies are *automatically* awarded a refund. To the contrary, where a party to such a STOLI policy seeks a refund, it must prove an entitlement. *Brighthouse Life Ins. Co. v. Geronta Funding*, 2019 WL 8198323 (Del. Super. Ct. Mar 4, 2019) ("*Seck*"), *interlocutory certif. denied*, 2019 WL 8198324 (Del. Super. Ct. Mar. 14, 2019), *interlocutory appeal denied*, 207 A.3d 579 (Mar. 28, 2019)[19]; *see Sun Life v. Wells Fargo*, 208 A.3d 839, 859 (N.J. 2019) ("*Bergman*") (declining to adopt automatic premium refund rule under New Jersey law, instead requiring investor to prove entitlement by way of reference to factors like its "knowledge of the illicit scheme" and "its failure to notice red flags").

The purpose of this general rule is to protect the public by discouraging the creation of these sorts of agreements in the future. *Eisenman v. Seitz*, 25 A.2d 496, 498 (Del. Ch. 1942). If a STOLI investor like Viva—[redacted]—is refunded premium, Delaware's constitutional and public policy against human life wagers

[19] The *Seck* court's holding that STOLI investors are not entitled to an automatic, proof-less premium refund is currently on appeal to this Court. 380, 2021.

[redacted]

will be frustrated. STOLI is a market-driven phenomenon: Upstream actors, like LPC, create STOLI policies so that they can sell them to downstream investors like Viva. *Price Dawe*, 28 A.3d at 1070. If downstream investors know that, when they get caught trying to cash in on STOLI, Delaware law will automatically refund them—not just the premium they paid, but also the premium they did not pay (i.e., the premiums paid by prior owners)—they will continue doing precisely what Viva did here: [redacted] This, in turn, will send a loud message to upstream actors to create more STOLI in Delaware to satisfy that indiscriminate demand. *See, e.g.*, *Siner v. Am. Gen. Fin.*, 2004 WL 2441186, 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 pre-*Price Dawe* trio of federal district court cases that the trial court felt compelled to follow is not mandatory authority and does not accurately reflect Delaware law. For purposes of their remedy analysis, those courts treated STOLI as though it worked a mere private harm and was therefore merely void*able*, not void *ab initio*, by relying on cases like *Oglesby*, which itself dealt with a merely voidable

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policy procured through a private fraud.[20] Shortly thereafter, this Court clarified that STOLI does not work a mere private harm, but rather harms the public, is a fraud on the court, and violates the Constitution, rendering it void *ab initio*. *Price Dawe*, 28 A.3d at 1068 n.25. In so doing, this Court specifically distinguished *Oglesby* as the wrong way to look at policies void *ab initio*. *Id.* The trio of federal opinions erred by fashioning a remedy based on cases like *Oglesby*, instead of *Della* and *Eisenman*.

2. The Trial Court Should Have Evaluated The Factual Record And Then Held, On Summary Judgment, That Wilmington Trust Did Not Prove A Premium Refund Entitlement.

Because the trial court incorrectly believed that precedent required it to order Sun Life to disgorge the premiums to whomever paid them, the trial court did not have occasion to consider whether a rational factfinder could ever find that Viva satisfied an exception to the general rule that parties to agreements void *ab initio* are ordinarily left where they are found without restitution. Ordinarily, the appropriate remedy would be for this Court to remand for further proceedings. But because the material facts are not genuinely disputed, this Court may, in its discretion, reverse with instructions to enter summary judgment for Sun Life, which Sun Life

[20] *See, e.g.*, *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. 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*).

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respectfully suggests is the most appropriate and efficient way forward here. *Kahn*, 679 A.2d at 464; *State v. 14.69 Acres of Land*, 245 A.2d 788, 790-91 (Del. 1968).

To obtain a premium refund in connection with a void *ab initio* STOLI policy, an investor must "prove its entitlement under a viable legal theory such as unjust enrichment" and show that awarding restitution will not frustrate "the public policy underlying the ban on human life wagering." *Malkin*, 2022 WL 1671966, at *6, *14; *see Della*, 210 A.2d at 849; *Eisenman*, 25 A.2d at 498; *see also* Restatement (Second) of Contracts §§ 197, 198. The sorts of cases where courts have held that refunds will not frustrate public policy are summarized by the Restatement (Second) of Contracts § 198, namely where the claimant was (i) excusably ignorant; (ii) in a protected class; or (iii) oppressed or misrepresented into the illegal agreement.

a) No Rational Factfinder Could Find That Wilmington Trust Is Entitled To A Refund Of Premium It Paid.

Wilmington Trust's principal, Viva, bought the Policies in 2014, and since then, Wilmington Trust has paid $2,326,356 in premium on Viva's behalf. No rational factfinder could conclude that Viva is entitled to a refund of that premium because Viva (i) was not excusably ignorant of the Policies' insurable interest problems; (ii) was not oppressed or misrepresented into paying premiums; and (iii) is not in the class of persons the insurable interest laws are designed to protect.

[redacted]

[redacted] This alone should be enough to eviscerate any claim or argument of Viva's excusable ignorance. But there is more.

[redacted]

[redacted]

[redacted] This too should be enough to eviscerate any claim or argument of Viva's excusable ignorance. But there is more [redacted] Ziser and Weinberger, who have been working with LPC since the very beginning and who, back in 2010, warned potential investors that the LPC policies would probably be deemed void *ab initio* for lack of insurable interest under state law requiring policies be taken out in good faith, which includes Delaware. Likewise, the diligence standards promulgated by Viva's own trade organization directed investors not to buy policies such as these. And, of course, [redacted]

Viva made this decision because it believed the worst thing that could happen to it if it got caught was that a court would make it whole—and then some—by automatically refunding to it, not just the premiums it paid, but also the premiums it did not pay, with interest. This is precisely the sort of situation where awarding a premium refund would frustrate Delaware's prohibition against human life

[redacted]

wagering.[21] If upstream actors know investors like Viva will buy policies even where they know they will be deemed void if challenged, those upstream actors will create more STOLI in Delaware to feed that demand. Indeed, if Viva were awarded all $6.9 million in premium, it will not only have avoided losing money, it will make over $2 million as a reward for getting caught with two STOLI policies.[22]

The record also indisputably establishes that Sun Life did not oppress or misrepresent Wilmington Trust (or Viva) into paying premium. Wilmington Trust's fact section (Op. Br. at 8-22) makes wide-ranging allegations that Sun Life duped Viva into paying premium by developing, and then withholding, a secret plan to challenge known STOLI policies only after substantial premiums had been collected. But this was the same factual theory Wilmington Trust presented to the trial court in support of its unfair and deceptive trade practices claim, which the trial

[21] *C.f. Landi v. Arkules*, 835 P.2d 458, 468 (Ariz. Ct. App. 1992) ("If restitution were granted, this may in some situations, prove tantamount to enforcement. At the very least, it would provide a floor or cushion on which an illegal actor might fall back, sure that if his illegal conduct were not challenged, he could profit by it, and that if it were challenged, he could at least get his money back. This would no[] doubt encourage such illegal contracts.'" (quoting *Dobbs on Remedies* § 13.5, at 994-47)).

[22] Viva supposedly paid about $4.8 million to acquire and maintain the Policies (being, about $2.5 million to ESF to acquire the Policies and about $2.3 million to Sun Life in premium). Thus, if Viva gets the roughly $6.9 million award it is seeking, it will have made about $2.1 million from its knowing investment in human life wagers. That number would, of course, balloon further if Viva were to get interest.

[redacted]

court rejected on the merits, finding that Sun Life did not engage in deceptive trade practices and that no action or inaction of Sun Life caused Viva to buy the Policies or pay premium. Opinion 29-30. Wilmington Trust did not appeal that ruling and does not lodge error with the underlying factual findings.

Indeed, no rational factfinder could credit the notion that Wilmington Trust was tricked into paying premium. [redacted] Sun Life expressly reserved its rights to challenge the Policies for lack of insurable interest through written correspondence to Wilmington Trust (and to its predecessors) before it ever paid any premium. A2762/402:7-13; A2969 (No. 10); A1090-93; A1262; A1319; A1465.1; A1465.4 And Wilmington Trust has no evidence to rebut the fact that Sun Life has paid over 99% of the death claims made on policies appearing on the potential STOLI lists that Wilmington Trust says prove its conspiracy theory.

Wilmington Trust also alleges (without authority) that Sun Life has a duty to investigate policies and bring challenges on potential STOLI policies while they are still in force. But the trial court correctly rejected this argument. Opinion 29-30. Every market participant has a role to play in ensuring a legitimate market. The time for an insurer to conduct its investigation is during underwriting.[23] The time for

[23] *See* 18 *Del. C.* § 2704(d) ("An insurer shall be entitled to rely upon all statements, declarations, and representations made by an applicant for insurance relative to the insurable interest of the applicant in the insured, and no insurer shall incur legal

[redacted]

investors to conduct their investigation is during diligence. Wilmington Trust's argument that Sun Life should have done more to determine that the Policies were STOLI *after* they were underwritten and issued ignores the reality that insurers are not the policemen of the life settlement market. Once an insurer issues policies after a good faith investigation, the burden falls on would-be investors who want to acquire those policies to do their part by conducting reasonable diligence and refusing to buy policies they have reason to believe are illegal human life wagers under applicable law.[24] A rule that awards investors, like Viva, who deliberately do not do this with a premium refund will incentivize the creation of more STOLI.

This Court should reverse the trial court's decision awarding Wilmington Trust a refund of the premium it paid for Viva with instructions to enter judgment for Sun Life on Wilmington Trust's request for a premium refund. Alternatively, to

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liability except as set forth in the policy by virtue of any untrue statements, declarations, or representations so relied upon in good faith by the insurer."); *Seck*, 2019 WL 8198324, at *3 ("[B]y protecting insurers from legal liability when relying in good faith on representations made by applicants, § 2704(d) suggests that Delaware public policy does not require insurers to spend resources on investigating potential fraud in policy applications.").

[24] There was a time when Sun Life was more inclined to challenge potential in-force STOLI. But the investor community rewarded Sun Life for this with aggressive lawsuits alleging that Sun Life's mere act of questioning the policies' legitimacy put a cloud over them, rendered them less valuable, and constituted various forms of contractual breaches, tortious interference, and fraud. A2161/128:11-131:17.

the extent this Court believes additional analysis of the factual record is needed, this Court should remand for further proceedings.

b) Wilmington Trust Is Not Entitled To A Refund Of Premium Paid By Its Predecessors.

Wilmington Trust argues it should be awarded the $4,550,112.37 in premium paid by its predecessors, the LPC Entities, because Viva supposedly bought "the right to recover premiums that prior owners had paid to Sun [Life]." Not so.

First, Wilmington Trust cannot obtain a refund of the premiums Viva's predecessors paid when it cannot even prove that Viva is entitled to its own premium.

Second, Wilmington Trust does not cite to a single case holding that one can sell alleged rights to performance made under a void *ab* initio agreement.

Third, there is no relationship between Sun Life's alleged enrichment and Wilmington Trust/Viva's alleged impoverishment. Wilmington Trust's *Predecessors'* payment of premium to Sun Life did not impoverish *Wilmington Trust (or Viva)*. What Wilmington Trust really seems to be complaining about is the price Viva paid ESF to buy the Policies. But that payment did not enrich Sun Life, and Viva negotiated private contractual remedies to recover against ESF in situations like this. There is simply no relationship between any impoverishment and enrichment. *See Malkin*, 2022 WL 1671966, at *10, 13 (explaining that "private

ordering in this area is feasible" and that an investor cannot obtain a premium refund if it has an adequate remedy at law against the seller for selling it STOLI).

Fourth, assuming *arguendo* that Viva did buy a bundle of rights that included whatever rights, if any, its predecessors (the LPC Entities) had to the premiums they paid, Wilmington Trust cannot prove that the LPC Entities possessed premium refund rights to begin with. An original wrongdoer (like the LPC Entities) obviously has no right to recover its own premium. *See, e.g.*, *Cook v. Pierce*, 7 Del. 499 (Del. Super. Ct. 1862) (refusing to allow usurious lender to recover loaned funds); *see also* Opinion 34 ("It also appears unfair for investors to be reimbursed for premiums if they knew that they were inducing STOLI policies."). And it is blackletter law that an alleged assignee stands in the shoes of its alleged assignors, and can take no greater right than possessed by them. *Burton v. Willin*, 11 Del. 522, 539 (1883); *see Resort Point Custom Homes v. Tait*, 2010 WL 1443274, at *2 (Del. Super. Ct. Apr. 7, 2010) ("It is a rudimentary principle of contract law that the assignee takes the assigned claim subject to all defenses of the obligor against the assignor. That is to say that the assignee stands in the shoes of the assignor. He acquires no greater right than that which was possessed by his assignor. Moreover, defenses may be interposed against the assignee if they were available against the assignor."); *see also Del. Tr. Co. v. Everitt*, 140 A.2d 778, 782 (Del. Ct. Ch. 1958) (the assignee has

[redacted]

the burden of proving the assignment); *Klinedinst v. CACH*, 2014 WL 606629, at *1 (Del. Super. Ct. Jan. 10, 2014) (same).

This is fatal to Viva's claims here because the trial court already correctly found that "Wilmington Trust's [P]redecessors" (i.e., the LPC Entities) effectuated the original wrongdoing, by "inducing insureds to procure STOLI policies." Opinion 27, 35. Because Wilmington Trust's Predecessors have no right to a refund of the premium they paid, Viva could not have taken any such rights from them.

Finally, awarding Viva a refund of all premium, including the premium Viva did *not* pay, would be a windfall to Viva, [redacted] As noted, it would cause Viva to gain more than $2 million from its STOLI investment. *See, supra*, at n.22 Allowing investors to make millions of dollars investing in STOLI in Delaware would not only frustrate Delaware's public policy and constitutional prohibition against human life wagering, it would defeat it.

Respectfully, this Court should reverse the trial court's order requiring Sun Life to refund the premiums paid by Wilmington Trust's Predecessors with instructions to enter judgment for Sun Life.

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V. THE TRIAL COURT CORRECTLY DECLINED TO AWARD PRE-JUDGMENT INTEREST.

A. Question Presented

Whether Wilmington Trust is entitled to pre-judgment interest on any premium refund where it never demanded that Sun Life refund premium, has always insisted that the Policies are valid, and did not preserve its argument below.

B. Scope of Review

The question of when interest should begin to run is "ordinarily a question of law subject to plenary review by this Court." *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992). A trial court's retained discretion to modify the award of judgment is reviewed for abuse of discretion. *Id.*; *see Swier v. McLeod*, 2016 WL 2934614, at *1 (Del. 2016) ("The Superior Court's action on the pending motion for costs will require an exercise of judicial discretion in deciding whether, and in what amount, to award pre-judgment interest to [defendant].").

C. Merits of Argument

For the reasons already given, the trial court erred in directing Sun Life to refund the premiums. But if this Court affirms that aspect of the judgment, it should also affirm the trial court's decision not to award prejudgment interest.

"The general rule is that interest starts on the date when payments should have been made," *Metro. Mut. Fire Ins. Co. v. Carmen Holding*, 220 A.2d 778, 782 (Del.

[redacted]

1966), or "from the date payment is due." *Hercules v. AIU Ins. Co.*, 784 A.2d 481, 508 (Del. 2001). Accordingly, pre-judgement interest on a refund claim cannot begin to accrue unless and until the claimant makes a demand for that refund. *Moskowitz v. Mayor and Council of Wilmington* 391 A.2d 209, 211 (Del. 1978) (refusing to run pre-judgment interest on a refund until the time "the taxpayer gave notice to the governmental entity that the taxpayer considered the tax payment unlawful and improper").[25] As this Court explained in *Moskowitz*: "[I]nterest is awarded from the date the taxpayer gave notice to the governmental entity that the taxpayer considered the tax payment unlawful or improper . . . Thus, a taxpayer may recover interest from the date the tax payment was made if the payment was accompanied by adequate notice that the payment is considered to be excessive, improper, or unlawful; but if such notice did not accompany the tax payment then interest will not begin to

[25] Although the plaintiff in *Moskowitz* was a taxpayer who made excessive tax payments to the City of Wilmington, this Court explained that the rules it was applying were applicable generally and not limited to tax contexts. 391 A.2d at 211. Accordingly, Delaware courts have applied *Moskowitz*'s demand requirement in a variety of contexts outside the tax area. *See, e.g.*, *Aveta Inc. v. Bengoa*, 2010 WL 3221823, at *2 (Del. Ch. Aug. 13, 2010) ("When a party has a right, contractual or otherwise, to a monetary amount, the party is entitled to prejudgment interest running from the date the [p]ayment is due. Payment becomes due when a particular amount is demanded."); *Pontone v. Milso Indus.*, 100 A.3d 1023, 1058 (Del. Ch. 2014) ("A party from whom advancement is improperly withheld is entitled to interest computed from the date of demand.").

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accumulate until there has been a later act constituting notice to the taxing authority that, in the opinion of the taxpayer, the tax is excessive, improper, or illegal." *Id.*

The "rationale underlying this rule is that money is not due and payable, and thus not in default, until there has been a demand therefor." *Id.* Another rationale is fairness: A party "should only pay interest from the time it fairly had the opportunity to satisfy the plaintiff's demand for reimbursement." *Meyers v. Quiz–DIA*, 2018 WL 1363307, at *12 (Del. Ch. Ct. Mar. 16, 2018).

The trial court's decision not to award prejudgment interest was correct. For the reasons explained above, [redacted] They were also put on notice over the years that Sun Life reserved its rights to challenge the Policies as STOLI. And yet, none of these entities ever asked Sun Life to cancel the Policies and issue a refund. Instead, they continued voluntarily and knowingly paying premium in the hopes that, when the insureds died, death claims on human life wagers could be slipped past an unwitting carrier. Having made this strategic choice and thus having failed to make a demand for a refund at any point prior to this litigation, no pre-judgment interest on any such refunds began to accrue. And, of course, no premium refund was ever "due"; indeed, Wilmington Trust's purported right to a reimbursement was triggered, if at all, by

[redacted]

the declaration that the Policies were void *ab initio*—not before.[26] Wilmington Trust's argument that is should get pre-judgment interest running from the date each premium was paid is squarely foreclosed by *Moskowitz* and *Hercules* as it is undisputed that Wilmington Trust never made a demand for those premiums. *See Hercules*, 784 A.2d at 508-98 (running prejudgment interest from filing of complaint because demand was not sufficiently clear before then).

In arguing that this Court should reverse the trial court and require Sun Life to pay prejudgment interest from the date of each payment, Wilmington Trust relies entirely on an Eleventh Circuit *per curiam* opinion in *Sun Life/Malkin II*, 693 Fed. App'x 838 (11th Cir. 2017), and on the cases cited therein. That reliance is misplaced. *Sun Life/Malkin II* never so much as mentions *Moskowitz*, even though *Moskowitz* is this Court's seminal case on the question of when interest on a refunded payment accrues. Instead of following *Moskowitz*, *Sun Life/Malkin* relied on *Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 756 (Del. Ch. 2007) and *Segovia v. Equities First Holdings*, 2008 WL 2251218 (Del. Super. Ct. May 30, 2008). But those cases are inapposite because (i) they too make no mention of *Moskowitz*; (ii) neither

[26] In *Seck*, the trial court also correctly declined to award pre-judgment interest. *See* Direction for Entry of Judgment, *Seck*, N18C-04-028-DCS, D.I. 269.

[redacted]

actually discusses the question of accrual dates; indeed, there is no indication the parties even contested the date of accrual; and (iii) they are otherwise off-point. *See Valeant*, 921 A.2d at 755–56 (corporate director that improperly awarded himself a self-interested bonus owed pre-judgment interest on the disgorgement from date of improper receipt); *Segovia*, 2008 WL 2251218, at *23 (lender that breached loan agreement by selling (and tortuously converting the) collateral owed pre-judgment interest on origination fees and on the loan interest from the dates it received each).

Likewise, Wilmington Trust is not entitled to have pre-judgment interest run during the pendency of these cases. Although Wilmington Trust pled an entitlement to a premium refund in passing as part of its prayer for relief, (A437.69), it did so in the alternative and then took the unflinching position throughout the litigation that the Policies were valid; that their death benefits should be paid; and that no premium refund was due. In sum, at no point before entry of judgment did Wilmington Trust demand a refund or even tell Sun Life or the court that it considered the premium payments excessive, improper, or unlawful. Thus, the trial court's decision not to award prejudgment was in keeping with *Moskowitz* and should be affirmed.[27]

[27] Relatedly, pursuant to *Moskowitz*, a trial court retains discretion to modify an otherwise appropriate award of interest where a party delays in prosecuting their claim. Thus, even if Wilmington Trust is deemed to have made a "demand" through

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In any event, the argument is waived as it was not "fairly presented to the trial court." Rule 8. Wilmington Trust failed to request or even address pre-judgment interest in its summary judgment papers and never presented the trial court with the arguments it makes here. Indeed, Wilmington Trust concedes (Op. Br. 42) the court's decision was issued "without briefing." If Wilmington Trust felt it had not yet presented its position, it had both the opportunity and the obligation to raise those arguments with the trial court. *See N. Am. Leasing v. NASDI Holdings*, 2022 WL 1073544, at *6 (Del. 2022) (request for set-off not raised in summary judgment papers or re-argument was waived); *Clariant Corp. v. Harford Mut. Ins. Co.*, 11 A.3d 220, 225 n.13 (Del. 2011) (failure to seek re-argument on issue not adequately addressed effects waiver). But Wilmington Trust chose not to move for re-argument or to alter the judgment. Del. Super. Ct. Rule 59(d)-(e). This claim is waived

In sum, this Court does not need to reach the pre-judgment interest question, both because the trial court's order requiring Sun Life to disgorge premium was error and also because Wilmington Trust failed to preserve its arguments on pre-judgment

its counterclaim (it did not), this Court can and should affirm for the reason discussed above: Wilmington Trust always maintained it was entitled to the death benefits.

[redacted]

interest below. But to the extent this Court determines otherwise, this Court should affirm the trial court's decision not to award pre-judgment interest.[28]

[28] If the Court does not affirm, it should remand to the trial court for further proceedings including the proper accrual date, the appropriate rate and mechanism of interest, and whether any periods of time should be excluded due to delay, including litigation delay, attributable to Wilmington Trust. *See Moskowitz*, 391 A.2d at 211; *Summa Corp. v. Trans World Airlines*, 540 A.2d 403, 409 (Del. 1988); *Optical Air Data Sys. v. L-3 Commc'ns*, 2021 WL 423461, at *3 (Del. Super. Ct. Feb. 8, 2021).

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CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order striking Wilmington Trust's affirmative defenses of waiver and estoppel, unclean hands, and laches and dismissing its promissory estoppel counterclaims. This Court should reverse the trial court's order requiring Sun Life to refund premiums. Finally, to the extent this Court believes some amount of refund was proper, this Court should affirm the trial court's decision not to award pre-judgment interest.

Dated: July 8, 2022

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