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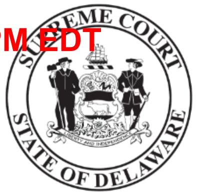

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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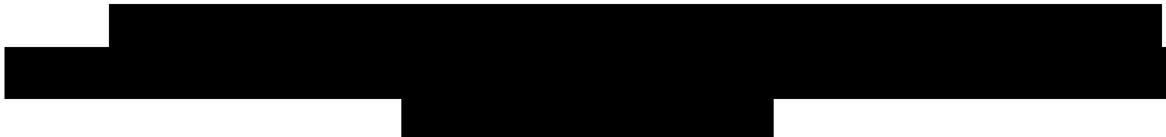
| WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary,<br><br>Defendant/Counterclaim-Plaintiff Below,<br><br>Appellant/Cross-Appellee<br><br>v.<br><br>SUN LIFE ASSURANCE COMPANY OF CANADA,<br><br>Plaintiff/Counterclaim-Defendant Below,<br><br>Appellee/Cross-Appellant | No. 126, 2022<br>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

**<u>CROSS-APPELLANT'S OPENING SUPPLEMENTAL BRIEF</u>**



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Dated: September 30, 2022

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Dated: September 30, 2022

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## INTRODUCTION

This Court's decision in *Geronta Funding v. Brighthouse Life Ins. Co.*, 2022 WL 3654872 (Del. 2022) ("*Seck*") governs the premium refund question here. In *Seck*, this Court adopted "restitution under a fault-based analysis as framed by the Restatement as the test to determine whether premiums should be returned when a party presents a viable legal theory, such as unjust enrichment, and seeks the return of paid premiums as a remedy." *Id.* "Thus, when analyzing a viable legal theory that seeks as a remedy the return of premiums paid on insurance policies declared void *ab initio* for lack of insurable interest, Delaware courts shall analyze the exceptions outlined in Sections 197, 198, and 199 of the Restatement." *Id.*

Wilmington Trust, on behalf of its client, Viva, seeks a premium refund on two STOLI Policies procured by an investor group called LPC in violation of *PHL Var. Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1068 (Del. 2011). As set forth in Sun Life's Opening Brief at pages 11-24, LPC procured the Policies by financially inducing Frankel and DeBourbon to allow policies on their lives to be taken out by and for the benefit of LPC. Before the Policies were effected, LPC arranged to buy the beneficial interests in the Trusts that would apply for them. LPC structured the transactions this way to trick Sun Life into issuing the Policies by concealing from Sun Life the fact that LPC (a stranger) had arranged before inception to take ownership of the Policies shortly after inception. After the Policies' two-year

contestable periods expired, LPC (by then the undisclosed owner of the Trusts) caused the Trusts to submit forms to Sun Life changing ownership to an LPC subsidiary called "Villa Capital." In 2011, LPC then reorganized its Portfolio by transferring ownership to a series of Irish special purpose vehicles called "ESF." Collectively, these entities are referred to as the "LPC Entities." The first arms' length sale of the Policies ([REDACTED]) occurred in 2014 when ESF sold the [REDACTED]

Thus, the Policies have, for all intents and purposes, only ever had two beneficial owners, the LPC Entities (2006-2014) and Viva (2014-present).

Wilmington Trust's premium refund claim has two parts. First, Wilmington Trust seeks a refund of the premium paid by its principal, Viva, the Policies' beneficial owner. Second, Wilmington Trust seeks a refund of the premium paid by the LPC Entities; that is, of the premium Viva did *not* pay. As an initial matter, Wilmington Trust has never pled a viable legal claim for a premium refund. Indeed, Wilmington Trust's complaint does not plead unjust enrichment nor did its (correctly-stricken) promissory estoppel claim seek a premium refund. Instead, for years, Wilmington Trust has insisted that, if the Policies were deemed void *ab initio*, it would be automatically entitled to a rescission that, so it said, would force Sun Life to automatically disgorge all premiums it received from any source to Wilmington Trust. In *Seck*, this Court rejected that theory. 2022 WL 3654872, at

*17. In so doing, this Court reaffirmed the fundamental principle that "when an agreement is void *ab initio* as against public policy, the courts typically will not enforce a remedy to any extent against either party. . . . [they] typically will leave the parties where they find them." *Id.* at *8.

Throughout the proceedings below, Sun Life, citing *Della v. Diamond*, 210 A.2d 847 (Del. 1965), was clear that Wilmington Trust was *not* entitled to an automatic remedy and that, to obtain some amount of premium refund, it would need to prove restitution under the Restatement. Wilmington Trust had every opportunity to do so. But hoping to limit discovery into Viva's knowledge, conduct, and culpability—and to somehow obtain a "refund" of premium Viva did *not* pay—Wilmington Trust doubled down and refused to plead a viable legal theory, even in the alternative. Having pursued this gambit unsuccessfully for almost five years, it should not now get a do-over. However, even if it were granted leave to re-plead its refund claim as a claim for unjust enrichment or promissory estoppel, no rational fact-finder could find for Wilmington Trust; thus, an order directing entry of summary judgment for Sun Life on the premium refund question is appropriate.

## ARGUMENT

### I. WILMINGTON TRUST CANNOT RECOVER RESTITUTION OF THE PREMIUM PAID BY THE LPC ENTITIES.

One of the reasons Wilmington Trust sought rescission—and refused to even plead in the alternative a potentially viable refund theory such as unjust enrichment—is that Wilmington Trust knew that if the remedy was restitution it would not be able to recover a so-called "refund" of the premium its principal did *not* pay. Although this Court did not expressly address this question in *Seck*, it recognized that "rescission would result in the return of *any* premiums paid," and then proceeded to *reject* rescission as a proper remedy, adopting instead a restitution-based theory under the Second Restatement §§ 197-199. *Id.* at *9 (emphasis added). Restatement sections 197-199 speak only to the possibility of restitution of performance the claimant "has rendered." And, as noted, nearly every court to assess the premium refund question in STOLI cases—including almost every opinion canvassed by this Court in *Seck*—has *refused* to refund to the current owner the premiums paid by its predecessors. *See* SL.Reply.Br. at 20-21.

Moreover, after the close of briefing here, a Seventh Circuit panel composed of Judges Wood, Easterbrook, and Hamilton held in an Illinois STOLI case that the securities intermediary could *not* recover for itself or for the policy's beneficial owner (Vida) the premium the securities intermediary paid on behalf of the investors who beneficially owned the policy *before* Vida. The Seventh Circuit noted that the

securities intermediary was merely a "conduit" that lacked standing to assert a claim for a premium refund and that "it is hard to see how Vida could ever have a claim to a refund of anything more than the $13,000 in premiums it paid itself through Wells Fargo." *Sun Life v. Wells Fargo*, 44 F.4th 1024, 1038 (7th Cir. 2022) ("*Corwell*").

Even assuming Wilmington Trust has standing to pursue an unjust enrichment claim, it will never be able to prove the factual elements of that or any other cause of action it might try to use to obtain a "refund" of the premium paid by the LPC Entities. But, for purposes of this appeal, Sun Life focuses on the undisputed fact that neither Wilmington Trust nor Viva paid those premiums. As a matter of law, this is fatal to any claim it might seek to bring to recover those premiums.

### A. Wilmington Trust Cannot Recover Through Unjust Enrichment.

This Court in *Seck* suggested unjust enrichment as a potentially viable legal theory under which a STOLI investor might obtain some amount of premium refund. The elements of an unjust enrichment claim are: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and the impoverishment, (4) absence of justification, and (5) the absence of a remedy provided by law." *Wells Fargo v. Estate of Malkin*, 278 A.3d 53, 69 (Del. 2022). "It is a prerequisite to an unjust enrichment claim that the plaintiff acted for the defendant's benefit." *Id.* Moreover, there must be "some direct relationship . . . between a defendant's enrichment and a plaintiff's impoverishment. In other words, there must be '[a]

showing that the defendant was enriched unjustly by the plaintiff who acted *for* the defendant's benefit.'" *Anguilla RE v. Lubert-Adler Real Estate Fund*, 2012 WL 5351229, at *6 (Del. Super. Ct. Oct. 16, 2012).

As a matter of law, Wilmington Trust cannot prove an entitlement to restitution of the premium paid by the LPC Entities because the *LPC Entities'* payment of premium to Sun Life from 2005 through 2014 did not impoverish *Viva*. Viva did not pay those premiums nor were those premiums paid by the LPC Entities on Viva's behalf or for Viva's intended benefit. Indeed, Viva did not even exist until it was formed in 2014 to [REDACTED], a competing STOLI investor. Thus, there is no connection between Sun Life's alleged enrichment and any impoverishment suffered by Viva, let alone a direct relationship between the two. *See id.*, at *6 (dismissing unjust enrichment claim because the claimant's predecessor-in-interest—not the claimant—was the entity that conferred the benefit, explaining that "SOF 82's predecessor in interest—Barnes Bay—is the proper party to pursue an unjust enrichment claim against Small"); *Corwell*, 44 F.4th at 1038 (rejecting STOLI investor's claim for restitution of the premium paid by prior owners because claimant did not pay those premiums); *Ohio Midland v. Proctor*, 480 F. Supp. 2d 1025, 1033 (E.D. Ohio 2007) ("Under the doctrine of unjust enrichment, if the plaintiff did not confer the asserted benefit upon the defendant, the plaintiff is not entitled to judgment for unjust enrichment."); *Rimini St. v. Oracle*

*Int'l Corp.*, 2017 WL 4227939, at *11 (D. Nev. Sept. 22, 2017) (dismissing unjust enrichment claim where defendant was enriched by third parties not by claimant); *Maxwell v. Adapt Appalachia*, 2015 WL 1444388, at *7 (W.D. Pa. Mar. 30, 2015) ("The 'benefit' must be conferred by the plaintiff directly—indirect benefits bestowed by third parties will not support a claim of unjust enrichment.").

### B. Wilmington Trust Cannot Recover Through Promissory Estoppel.

Although promissory estoppel is a fundamentally ill-fitting doctrine through which to seek a STOLI refund (since promissory estoppel is predicated on a promise and STOLI promises may never be enforced), and even though Wilmington Trust did not plead promissory estoppel as a means to try to obtain such a refund, Sun Life addresses it here because Wilmington Trust's briefing asks this Court to allow it to seek to obtain a premium refund through promissory estoppel. WT.Reply.Br. at 12.

"Under the doctrine of promissory estoppel, a plaintiff must demonstrate 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." *Chrysler v. Chaplake Holdings*, 822 A.2d 1024, 1032 (Del. 2003). Here, any promise by Sun Life to pay the death benefit can never be enforced, *Price Dawe*, 28 A.3d at 1067, and any attempt by Viva to use promissory

estoppel to obtain a "refund" of premiums paid by the LPC Entities necessarily fails. Indeed, Wilmington Trust does not allege (nor could it) that Viva, which did not exist prior to 2014, was the recipient of a Sun Life promise prior to 2014. Nor could Viva have possibly paid the premiums from 2005-2014 in detrimental reliance upon any Sun Life promise because Viva did not pay them at all. *See In re U.S. West Sec. Litig.*, 65 F. Appx. 856, 864 (3d Cir. 2003) (holding that plaintiff-shareholders failed to state promissory-estoppel claim under Delaware law because the promise was made, not to them, but to a third party, explaining: "Promissory estoppel is generally a 'consideration substitute for promises which are reasonably relied upon,' and does not abrogate the need to plead the basic contractual element of mutual assent" (quoting *Lord v. Souder*, 748 A.2d 393, 400 (Del. 2000))); *Crawford v. George & Lynch*, 2012 WL 2674546, at *6 (D. Del. July 5, 2012) (recommending dismissal of promissory estoppel claim brought by an LLC, because promise was made to owner of LLC, not the LLC itself), *adopted* 2012 WL 6087488 (D. Del. Dec. 6, 2012).

### C. Wilmington Trust's Assignment Theory Fails.

Wilmington Trust tries to avoid this fatal flaw by arguing that the LPC Entities assigned whatever unjust enrichment (or promissory estoppel) claims the LPC Entities may have had to Viva. They did not. But assuming solely for sake of argument that they did, Viva would then have to prove that *the LPC Entities* had a viable legal claim under *Seck* to a refund of the premiums the LPC Entities paid

because it is blackletter law that an assignee stands in the shoes of its assignor and can receive no greater rights than the assignor itself possessed. Here, no rational fact-finder could possibly conclude that the LPC Entities satisfy a *Seck* exception, and therefore, the LPC Entities' alleged assignment gets Viva nowhere.

**Excusable Ignorance**. The LPC Entities were not ignorant of the facts giving rise to the STOLI scheme because they created and ran that STOLI scheme. This is not a contested point, but for sake of clarity, Fleisher, an LPC principal involved in creating and running the LPC Entities, provided a detailed and uncontested affidavit and deposition testimony wherein he explained exactly how LPC financially induced seniors to take out hand-selected policies for the benefit of LPC.

**Less At Fault**. Sun Life was the victim of the LPC Entities' STOLI scheme, which tricked Sun Life into issuing policies that—unbeknownst to Sun Life—were being manufactured by LPC for LPC. This is not a remotely contested point either. The trial court has already found that the LPC Entities financially induced Frankel and DeBourbon into allowing LPC to procure the Policies and has already held that it would be "unfair" to return premium to the LPC Entities for that reason.[1] Moreover, Wilmington Trust does not allege that Sun Life knew or should have known the Policies were STOLI in 2005 when they were issued, and Fleisher's

[1] Opinion at 26-27, 34-35.

unrebutted testimony is that LPC intentionally designed the program to *conceal* the Policy's immediate transfer *from the issuing carriers*.[2] Thus, as between the original STOLI fraudster (the LPC Entities) and the actual and intended victim of that STOLI scheme (Sun Life), there can be no question that Sun Life is far less (if at all) at fault.

**Disproportionate Forfeiture**. The LPC Entities forfeiting the right to a premium refund is not disproportionate to their misconduct: By manufacturing STOLI policies, the LPC Entities violated Delaware's law, public policy, and Constitution. Refunding premium to the very group of fraudsters that manufactured the STOLI policies would incentivize other fraudsters to target Delaware with the next round of STOLI and make a mockery of Delaware's anti-STOLI rules.

**Withdrawal**. The LPC Entities did not withdraw before the illegality took effect; to the contrary, they intentionally procured the Policies in violation of Delaware law and then sold them downstream to a larger STOLI investor.

**Public Policy**. As noted, the LPC Entities engaged in serious misconduct by committing the original STOLI fraud in violation of Delaware's law, public policy, and Constitution. Delaware's public policy would be defeated, not furthered, by awarding the LPC Entities a premium refund.

[2] SL.Op.Br. at 22.

Because no rational fact-finder could conclude that the LPC Entities satisfy a *Seck* exception to the general rule that parties to STOLI policies are not entitled to a refund, Viva's status as alleged assignee of the LPC Entities is meaningless. Indeed, even if the LPC Entities had purported to assign their premium refund claim to Viva, that alleged bundle of rights is worthless and would have conveyed nothing.

## II. WILMINGTON TRUST CANNOT RECOVER A REFUND OF THE PREMIUM VIVA PAID.

Although the facts bearing on Viva's and Sun Life's knowledge (or lack thereof) of the Policies' illicit origination are numerous, the material facts are not genuinely disputed. From those facts, no rational fact-finder could conclude that Viva satisfies a *Seck* exception to the general rule that parties to STOLI policies are left where they are found.[3] As a consequence, this Court should remand with instructions to enter judgment for Sun Life on Wilmington Trust's refund claim.

**Excusable Ignorance.** "A party may obtain restitution if it is excusably ignorant of the facts leading to the unenforceability of the promise." *Seck*, 2022 WL 3654872, at *15. The following factors are relevant: "whether the facts surrounding the policy put or should have put the investor on notice that something was amiss; whether the party failed to notice red flags; and whether the investor's expertise in life insurance portfolio investments should have caused it to know or suspect that there was a substantial risk that the policy it purchased was void." *Id.*

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[3] Wilmington Trust also lacks standing to pursue a premium refund. Unlike Geronta in *Seck*, Wilmington Trust is merely a "conduit" and cannot assert that it personally is deserving of any refund. Viva itself is not a party here and should not be entitled to make a refund case through a proxy. *Corwell*, 44 F.4th at 1038. Regardless, to the extent this matter were to proceed to trial, and Wilmington Trust were permitted to indirectly pursue claims Viva has not itself made, Sun Life would also dispute Wilmington Trust's ability to meet the elements of whichever legal claim (e.g., unjust enrichment) Wilmington Trust might be allowed to proceed under.

Viva—a sophisticated investor that owns $2.5+ billion of life policies—was not ignorant (let alone excusably so) of the facts giving rise to the Policies' invalidity. [redacted] Moreover, before electing to buy the Policies, Viva had voluntary access to Fleisher, who told Viva precisely how LPC procured the policies, including that LPC financially induced seniors to cause the policies to be taken out through pre-arranged transactions—which is the very reason the trial court gave for finding the Policies to be human life wagers. [redacted]. No


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rational fact-finder could fail to conclude that Viva [redacted]

[redacted].[4]

**Not Equally At Fault.** A party may obtain restitution if it is less at fault. *Seck*, 2022 WL 3654872, at *15-18. In *Seck*, this Court focused on whether either party was on inquiry notice. Here, Sun Life denies that it was on inquiry notice. But even if one assumed solely for sake of argument that a rational fact-finder could conclude that Sun Life was, at some point, put on inquiry notice, no rational fact-finder could fail to conclude—for the reasons discussed *supra* at 12-14— that Viva, at the very least, has also been on inquiry notice since before it bought the Policies. Thus, the most any fact-finder could possibly find against Sun Life is that both parties were on inquiry notice. And, under *Seck*, where parties are in equipoise, they should be left where they are found. *See id.* at *14 ("[I]f the downstream investor was equally at fault with, or more at fault than, the insurer, [courts applying a fault-based approached have] left the parties where it found them, allowing the insurer to keep the premiums."). The comparative culpability analysis could end right there.[5]

But, to the extent one were to look even closer, no rational fact-finder could fail to conclude that the gap between Sun Life's and Viva's knowledge, conduct, and culpability is staggering and shows Sun Life to have been far less aware or at fault.

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[4] SL.Op.Br. at 10-24; SL.Reply.Br. at 2-6.

[5] SL.Reply.Br. at 11 (citing cases).



[redacted]

*Knowledge Disparity*. Viva knew substantially more about the Policies' origination than Sun Life, which was intentionally kept in the dark. As noted above, Viva had unfettered access to [redacted] (ii) Fleisher (who told Viva how LPC did it)[6]; and [redacted]. In contrast, Sun Life has only ever had a handful of suspected LPC policies on its books; was never given the key documents and data referenced above; and never had voluntary access to Fleisher or LPC's attorneys. In fact, Fleisher is (and has always been) openly adverse to Sun Life, an obvious fact Fleisher confirmed at deposition.[7]

*Diligence*. Sun Life conducted substantial diligence during underwriting, including various layers of investigation and verification with the Insureds and their advisors. [redacted] in violation of Viva's own trade organization's minimum diligence guidelines. Instead, [redacted], even though the guidelines expressly instruct investors *not* to buy policies procured through inducements.[8] *See*

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[6] SL.Reply.Br. at 3-4 & n.2-4.

[7] SL.Op.Br. at 18-19; SL.Reply.Br. at 3-4, 9-10; A2849/88:3-24.

[8] SL.Op.Br. at 20-22; SL.Reply.Br. at 5-6.

*id.* at *17 (premium refund analysis should incentivize investors to conduct "thorough investigation of insurance policies" before buying them).

*Timing*. Although Wilmington Trust alleges that Sun Life should be deemed to have been on inquiry notice some years after the Policies were issued, it does not allege that Sun Life was on inquiry notice of the Policies' invalidity before Sun Life issued them. Thus, even if Wilmington Trust's allegations are accepted as true, when Sun Life made the decision to enter into these insurance contracts, Sun Life did not know and had no reason to know that the Policies were invalid. In contrast, as explained above, Viva had

. This is important because it shows Viva intended to violate Delaware's insurable interest rules; whereas, Sun Life did not. It is also important because, even though a carrier can decline to issue a policy for most any reason, once it issues a policy, it incurs substantial legal obligations and is essentially stuck with that policy, unless and until it gathers evidence sufficient to prove invalidity. To be clear, the evidence a carrier must gather to prudently challenge a policy must be far more than mere suspicions because if it challenges policies incorrectly it runs the risk of substantial contractual and tort liability.[9] There is, unfortunately, no commensurate

[9] SL.Op.Br. at 49 n.24; SL.Reply.Br. at 10 n.6.

cause of action against investors for bad faith claim submission so investors are emboldened to deny STOLI accusations even where, as here, they bought the policies knowing they were illegal in the hopes of bullying the carrier into paying the bogus claim or, at worst, getting premium refunded if they lose.

*Action*. In 2009, when the Trusts sought to change the Policies' owner shortly after the expiration of the contestable periods, Sun Life, based on high-level STOLI indicia (i.e., far less information than Viva had and far less than would be required to bring a lawsuit) reserved its rights to later challenge the Policies. Sun Life reiterated that reservation of rights with every subsequent ownership change, including the change in 2014 to Wilmington Trust.[10] In contrast, Viva never shared the information it possessed with Sun Life and instead stayed completely silent hoping to lull Sun Life into simply paying the death claims. *See id.* at *16 (court should consider whether investor "concealed the void nature of the policy").

*Business Model*. Sun Life tried to avoid issuing STOLI and, despite being the victim of a massive STOLI fraud in the 2000s, has tried, in the years that followed, to rid itself of STOLI. In contrast, Viva's business model is buying STOLI at a discount and trying not to get caught.[11] *See Seck*, 2022 WL 3654872, at *16 (court should consider "whether a party engages in improper transactions as a business").

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[10] SL.Op.Br. at 48.

[11] SL.Op.Br. at 16-17 n.2.

No rational fact-finder could find Sun Life more at fault than Viva.

**Disproportionate Forfeiture**. A party may obtain restitution if "denial of restitution would cause disproportionate forfeiture." *Id.* at *15. Whether the forfeiture is disproportionate depends "on the extent of that denial of compensation as compared with the gravity of the public interest involved and the extent of the contravention." *Id.* Viva's misconduct was acquiring and perpetuating the Policies notwithstanding [redacted] or as this Court put it, "ignoring the fraud." *Id.* at *17. Also, by knowingly buying and maintaining these illegal human life wagers, Viva not only ignored the fraud, but also sought to bring about violations of Delaware's Constitution. *See Malkin*, 278 A.3d at 65 ("[B]ecause STOLI policies are void *ab initio*, when an investor receives their proceeds it . . . commit[s] . . . a violation of . . . Delaware['s] Constitution and of the State's public policy"). Refusing to refund premium to Viva now that it has been caught is not disproportionate. Instead, if Viva is given the refund it seeks, it will make a multi-million dollar profit from knowingly wagering on human life in Delaware.[12] Not only is this bad public policy, but it will make Delaware a hospitable forum for STOLI creation and investing going forward.

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[12] SL.Op.Br. at 47 n.22; SL.Reply.Br. at 13.

Moreover, Viva did not buy the Policies in a vacuum; [redacted]

[redacted]

[redacted]. The insureds for a number of those policies have already died, meaning Viva has [redacted]

[redacted] Not getting its premium back on a mere two of them now that it has been caught is not disproportionate or unfair.

**Withdrawal**. Viva did not withdraw before the illegality took effect. To the contrary, it knowingly bought the Policies, tried to cash in on them, and then after Sun Life brought its declaratory judgment suit, denied for years that there was anything wrong with them, alleged specious bad faith and unfair trade practices claims against Sun Life, and then dragged Sun Life through years of costly litigation.

**Public Policy**. As noted, Viva engaged in serious misconduct by ignoring and perpetuating a STOLI fraud, and Delaware's public policy would be defeated, not furthered, by awarding this deliberate STOLI buyer a premium refund.

Because no rational fact-finder could conclude that Viva satisfies a *Seck* exception, Viva's restitution claim cannot succeed.

## CONCLUSION

Respectfully, the trial court's premium refund decision should be reversed with instructions to deny Wilmington Trust's premium refund claim.

Dated: September 30, 2022

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