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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,	)	No. 126, 2022
	)	Court Below: Superior Court of the State of Delaware, C.A. Nos. N18C-07-289 MMJ CCLD, N17C-08-331 MMJ CCLD
v.	)	
SUN LIFE ASSURANCE COMPANY OF CANADA,	)	PUBLIC VERSION FILED OCTOBER 17, 2022
Plaintiff/Counterclaim-Defendant Below, Appellee-Cross Appellant.	)	

APPELLANT AND CROSS-APPELLEE'S
SUPPLEMENTAL OPENING BRIEF

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Dated: September 30, 2022

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. Nos. N18C-07-289 MMJ CCLD, N17C-08-331 MMJ CCLD

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SUPPLEMENTAL OPENING BRIEF

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INTRODUCTION

In response to the Court's letter dated September 13, 2022 (Dkt. 42), Appellant and Cross-Appellee Securities Intermediary[1] submits this Supplemental Opening Brief addressing the Court's decision in *Geronta Funding v. Brighthouse Life Insurance Co.*, where this Court "adopt[ed] a fault-based analysis, framed under the Restatement, that considers questions specific to insurance policies declared void *ab initio* as against public policy for lack of insurable interest as the correct test to determine whether premiums should be returned." -- A.3d --, 2022 WL 3654872, at *17 (Del. 2022) ("*Seck*"). Given that the Superior Court ordered Sun to return the premiums on the Policies automatically—and did not assess whether Sun would also have to return premiums under *Seck*'s comparative fault-based analysis—Securities Intermediary respectfully submits that the correct path forward is to remand to the Superior Court to decide the return-of-premiums issue under the *Seck* test, rather than have this Court make that fact-intensive determination in the first instance.

No matter which court adjudicates the premium-return issue, the result should be the same: no rational jury would let Sun keep one penny of the $6.9 million in premiums at stake under *Seck*. As *Seck* noted, "the majority of the courts surveyed

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

… determined that the premiums should be returned to the investor after undertaking a fault-based analysis." *Id.* at *17 n.217. And as *Seck* also explained, "[a] fault-based analysis … incentivizes insurers to speak up when the circumstances suggest that a policy is void for lack of insurable interest because they will not be able to retain premiums if they stay silent after being put on inquiry notice, and they might also be responsible for interest payments." *Id.* at *17.

Sun cannot keep the Policies' premiums under *Seck*. Sun purposefully waited until after the insureds had passed away to file De Bourbon in 2017 and Frankel in 2018, alleging that both Policies were void *ab initio* because they were purportedly illegal wagers by a non-party called LPC. But Sun had inquiry notice that the Policies were potentially illegal wagers by LPC ***nearly 10 years before*** it filed these cases and ***roughly five years before*** Viva bought these Policies on the tertiary market. Sun learned both Policies were connected to LPC in 2008. Sun filed three lawsuits challenging the validity of other LPC policies in 2009, including *Berck*—in which the District of Delaware ordered Sun to return premiums ***to LPC***. *See Sun Life Assurance Co. of Can. v. Berck*, 719 F. Supp. 2d 410, 418–19 (D. Del. 2010). [redacted]. Thus, Sun was on inquiry notice of everything it needed to know about policies connected to LPC—including these Policies—years before filing these lawsuits.

At the same time, Sun was busy conducting a broader investigation into all the possible STOLI policies Sun had issued in the early 2000s. As part of that effort, which started in 2005 [redacted] Sun eventually put the Policies on its internal STOLI-tracking spreadsheets in [redacted] (De Bourbon) and [redacted] (Frankel). Sun continuously updated those STOLI spreadsheets over the years, never disclosing to the Policies' owners that Sun was treating the Policies internally as STOLI. Instead, Sun continually represented that the Policies were "active," "in force," and "in good standing" through dozens of Annual Reports, In-Force Policy Illustrations, and Verifications of Coverage, while lining its pockets with $6.9 million in premiums (not accounting for interest).

Rather than attempt to rescind the Policies before De Bourbon and Frankel passed away in 2017 and 2018, Sun admittedly made a "***strategic decision***" to stop filing STOLI lawsuits in 2012 while insureds were still alive, which enabled Sun "to collect (often enormous) premiums"[2] on policies Sun had flagged on its secret STOLI spreadsheets. And to be clear, Sun did not forget about the Policies between

[2] *Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 8353393, at *4 (D. Del. Dec. 30, 2019) ("*Sol*").

2009 [redacted] and litigating other LPC policies) and 2017–18 (when Sun filed these lawsuits after the insureds passed away). In 2014, shortly after Viva bought the Policies, [redacted]

This case is not a close call, regardless of whether Viva bought the Policies knowing they had some insurable-interest risk. No rational jury could conclude that Viva—a tertiary-market investor that bought the Policies in 2014, ***five years after Sun was on inquiry notice of the Policies' potential illegality in 2009***—is more at fault than Sun. If Sun had "behave[d] in good faith," *Seck*, 2022 WL 3654872, at *17, when it was put on inquiry notice in 2009, ***the Policies would not have existed five years later when Viva began its diligence on the ESF QIF Portfolio***. That is because Sun would have rescinded the Policies and returned the premiums to LPC, at the same time Sun litigated other cases involving LPC policies—including *Berck*.

Seck's fault-based, return-of-premiums test has consequences for two other aspects of these appeals: (1) even if the Court holds that investors cannot assert promissory estoppel counterclaims and equitable defenses to recover death benefits on policies declared void *ab initio*—which it should not do—those claims and defenses must be available to force insurers to disgorge premiums; and (2) Sun must pay prejudgment interest on return-of-premium damages.

ARGUMENT

I. SUN MUST RETURN THE $6.9 MILLION IN PREMIUMS IT COLLECTED ON THE POLICIES TO THE CURRENT OWNER.

Seck "adopt[ed] a fault-based analysis, framed under the Restatement, that considers questions specific to insurance policies declared void *ab initio* as against public policy for lack of an insurable interest as the correct test to determine whether premiums should be returned." *Seck*, 2022 WL 3654872, at *17; *id.* at *18 ("[T]he fault of the parties and public policy considerations will determine which party is entitled to the premiums paid on an insurance policy that is void *ab initio* for lack of an insurable interest.").

The Court wrote "our test incentivizes each player along the chain of these insurance policies to behave in good faith." *Id.* at *17. Regarding the insurer's potential fault, the Court stressed that:

> A fault-based analysis … incentivizes insurers to speak up when the circumstances suggest that a policy is void for lack of insurable interest ***because they will not be able to retain premiums if they stay silent after being put on inquiry notice, and they might also be responsible for interest payments***.

Id. (emphasis added). Regarding the investor's potential fault, the Court explained "[a] fault-based analysis will encourage investors to actually investigate all policies to avoid the risk of losing their premiums—a thorough investigation of insurance policies will hopefully uncover those that are void *ab initio* as against public policy."

Id. In conducting this comparative fault-based analysis, the Court instructed courts to "analyze the exceptions outlined in Sections 197, 198, and 199 of the Restatement and determine whether any of those exceptions permit the return of premiums." *Id.*

After explaining its newly-adopted test, *Seck* reversed the lower court's decision on the ground that "Section 198 and the *in pari delicto* cases … focus on whether a party had actual knowledge or *inquiry notice* of the invalidity of the policy," "[t]he focus on inquiry notice is why those cases ask whether the party had knowledge of facts tending to suggest the void nature of the policy," and "the court should have also considered whether [the insurer] was on *inquiry notice* of the void nature of the Policy." *Id.* at *19 (emphasis in original). The Court therefore "specifically direct[ed] the court [on remand] to consider whether either party had inquiry notice of the void nature of the Policy." *Id.* at *20.

No rational jury could review the evidence and permit Sun to keep the $6.9 million in premiums because Sun is clearly more at fault than Viva—a tertiary market investor that did not buy the Policies until 2014, which was five years ***after*** Sun was put on inquiry notice in 2009.[3] To understand why, this Court need look

[3] If the Court remands these cases, Securities Intermediary will also argue that it is entitled to premium restitution under different exceptions of the Restatement as well, including Section 197's disproportionate-forfeiture prong for the reasons addressed in Securities Intermediary's earlier briefs. (*See* Appellant's Reply and

no further than *Sol*—an opinion this Court cited with approval in *Seck*. *See Sol*, 2019 WL 8353393, at *4. Indeed, the court undertook the same type of fault-based analysis in *Sol* that this Court adopted in *Seck*, and ordered Sun to disgorge every penny of premiums to the policyholder because Sun was more at fault than the investor. *See Sol*, 2019 WL 8353393, at *4.

As this Court noted in *Seck*, the *Sol* court "surveyed the actions of all parties, finding that everyone was at fault to some extent." *Seck*, 2022 WL 3654872, at *13. The *Sol* court began its analysis by noting the policyholder "is not an ignorant or duped party, but a highly-sophisticated secondary market investor with nearly $9 billion in life insurance portfolio investments." *Id.* The investor "knew the Sol Policy was premium financed, that Coventry was involved in policy origination, and that the policy portfolio it was acquiring was higher risk due to 'overzealous origination methods' that were subject to legal challenges." *Id.* The court continued that the investor's "due diligence into the Sol Policy also raised several red flags," and "[t]he Court is convinced that [the investor] knew or should have known at the time it purchased the Sol Policy there was a substantial risk the Policy was an illegal STOLI policy." *Id.*

Cross-Appellee's Answering Brief, dated July 27, 2022, Dkt. 35 ("R/AB") at 25–26.)

Even though the investor "knew or should have known" that the Sol policy was invalid before acquiring it, the *Sol* court ordered Sun to return all premiums to that investor because Sun was more at fault:

> Sun Life may have been unaware at origination that some of its policies constituted illegal human life wagers, but Sun Life admits (as the facts compel it to) that it subsequently developed a list of suspected STOLI policies. With the release of *Price Dawe*, Sun Life also knew (or should have known) that it could invalidate STOLI policies even after the two-year incontestability period. Yet, rather than notify policyholders that their policies were suspected STOLI, or that the validity of their policies may be challenged at any time, Sun Life "made the strategic decision not to pursue investigating [these] policies", and continued to collect (often enormous) premiums. Sun Life knowingly assumed the risk that someday a court would order it to repay some or all of the millions of dollars it collected in such premiums. If the Court were, instead, to leave the parties as it found them, Sun Life would be unjustly enriched.
>
> The only equitable remedy justified here is restitution damages, in which all premiums paid to Sun Life on the Sol Policy—an undisputed total of $1,923,068—are returned to [the policyholder].
>
> In the Court's view, no party here has shown itself to be an innocent victim, and none should leave the Court an undisputed victor.

Id. at *4–5 (citations omitted).

The *Sol* court then rejected the same argument Sun advances here, that Sun's premium disgorgement should be limited to premiums paid by the final policyholder in the chain-of-title because "[w]hile Sun Life argues that [the policyholder] is due only those premiums it directly paid ($702,168), it is undisputed that [the policyholder] purchased all interest in the Policy, including the right to pursue the return of any premiums that had already been paid on the Policy." *Id.* at *4 n.6.

If Sun had to return all the premiums it received under a fault-based analysis in *Sol*, Sun must also do so here. Sun published a memo in 2005, documenting its "aware[ness] of … 'stranger owned' or 'investor owned' life insurance." (OB at 12.)[4] In 2006, [redacted] (*Id.*) In 2007, [redacted] (*Id.* at 13.) In 2008, Sun began tracking policy ownership and beneficiary changes that it believed lacked a "clear insurable interest," and flagged both Policies in that process. (*Id.* at 14.) By [redacted] Sun was actively working on spreadsheets designed to target potential STOLI policies. (*Id.* at 14.) Sun flagged the De Bourbon Policy as part of that process in [redacted] and the Frankel Policy in [redacted]. (*Id.* at 14–15.) Sun continued those STOLI tracking efforts through 2017, and likely does so today. (*Id.*)

[4] "OB" refers to Appellant's Opening Brief, dated May 26, 2022, Dkt. 17.

Sun disclosed none of that to the Policies' owners, nor did Sun seek to rescind and/or invalidate the Policies during that period. Instead, in 2012, Sun made the "strategic decision" to stop filing STOLI lawsuits while insureds were still alive, which allowed Sun to collect millions of dollars in premiums on policies it had flagged internally as likely STOLI. (OB at 16.) And from the Policies' inception through the insureds' deaths, Sun continuously represented to the Policies' owners that the Policies were "in force," "active," and "in good standing," while approving three ownership/beneficiary changes and collecting $6.9 million in premiums. (*Id.* at 17–19.)

Those are precisely the same type of facts that caused the court to order Sun to return all the premiums to the investor in *Sol*. *See Sol*, 2019 WL 8353393, at *4.[5] But here, the facts are ***even worse*** for Sun than in *Sol* because these Policies were originally owned by LPC, and Sun knew all about LPC nearly a decade before the insureds here died and Sun belatedly filed these lawsuits.

When Sun filed these lawsuits in 2017 and 2018, it alleged the Policies were invalid because they were illegal wagers by LPC. (OB at 9.) But Sun learned about LPC in 2009 when it filed three lawsuits challenging the validity of other LPC

[5] *See also Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 2151695, at *3–4, *6 (D. Del. May 17, 2019) (summarizing additional facts regarding Sun's conduct over the life of the Sol policy).

policies. (OB at 8.) One of those was *Berck*—which, as this Court will recall, established the automatic premium-return rule that *Seck* rejected 12 years later. *See Seck*, 2022 WL 3654872, at *9–10 (citing *Berck*, 719 F. Supp. 2d at 418–19). Sun's allegations in its Complaints here are nearly identical to Sun's allegations in *Berck* (filed nearly a decade earlier). (*Compare* A1171–A1175, ¶¶ 37–48 (*Berck*) *with* A255–A262, ¶¶ 32–51 (*De Bourbon*); A422–A429, ¶¶ 31–50 (*Frankel*).)

While Sun was litigating *Berck*, [redacted] (OB at 10.) [redacted] (*Id.*) During this period, Sun was also communicating extensively with LPC's representatives—Martin Fleisher and Jon Berck (the *Berck* defendant himself)—about the Policies, and Sun even received premium payments directly from LPC. (OB at 10–11.) Sun collected $5.3 million in premiums on the Policies between filing *Berck* in 2009 through De Bourbon and Frankel's respective deaths in 2017 and 2018. (OB at 9.)

During this time, Sun's attorneys were also representing different insurers challenging other LPC policies. Sun's attorneys filed nine lawsuits in 2008 and 2009 regarding policies acquired by LPC through beneficial interest transfers, cases in which Sun's attorneys took multiple depositions of Fleisher and his LPC partner Steve Lockwood. (OB at 11 n.6 (citing cases); R/AB at 34.) Two of those cases were *Kramer v. Phoenix Life Ins. Co.*, 940 N.E.2d 535 (N.Y. 2010) ("*Kramer*") and *Lincoln Life & Annuity Co. of N.Y. v. Berck*, 2011 WL 1878855 (Cal. Ct. App. May, 17, 2011) ("*Teren*"). Sun testified that it monitored *Kramer* and *Teren* in real time, and that its attorneys always kept Sun up to speed about STOLI litigation. (OB at 11–12.)

But Sun did not seek to invalidate the Policies during the 2009–12 period while it was [redacted], litigating *Berck*, and collecting premiums directly from LPC. Instead, in 2012, Sun made the "strategic decision" to stop challenging policies while insureds were alive. (OB at 16.) But that did not stop Sun from tracking the Policies (and other LPC-linked policies) in the ensuing years. In October 2014, shortly after Viva acquired the Policies on the tertiary market as part of the "ESF QIF Portfolio," [redacted]

[redacted] (OB at 21.)

Securities Intermediary expects that Sun will argue that Viva is more at fault under *Seck* because it bought the Policies knowing they had some insurable interest risk. That argument is a sideshow. Even if everything Sun argues is factually correct (which it is not), Sun is still far more culpable than Viva. At most, Viva would be no different than the *Sol* policyholder— "a highly-sophisticated … investor" that "knew the [Policies] [were] [beneficial-interest transfer policies], that [LPC] was involved in the policy origination, and that the policy portfolio it was acquiring was higher risk due to 'overzealous origination methods' that were subject to legal challenges," and "knew or should have known at the time it purchased the [Policies] there was a substantial risk the [Policies] [were] … illegal STOLI polic[ies]." *Sol*, 2019 WL 8353393, at *4. If Sun had to return all the premiums it received to the *Sol* investor because Sun was more at fault, then Sun should have to return all the premiums it received to Viva for the same reason.

Sun also has an insurmountable timing problem under *Seck*—Sun had inquiry notice of the Policies' potential invalidity ***five years before*** Viva bought the Policies. The *Seck* test "incentivizes each player along the chain of these insurance policies to behave in good faith." *Seck*, 2022 WL 3654872, at *17. If Sun had acted "in good faith" in 2009 when Sun had inquiry notice of the Policies' potential illegality, Sun would have filed these lawsuits alongside *Berck* years before Viva bought the Policies. If Sun had filed these lawsuits 13 years ago alongside *Berck*, then Sun would have rescinded the Policies and returned the premiums to LPC in the early 2010s under *Berck*'s automatic-return rule. *See Berck*, 719 F. Supp. 2d at 418–19; *see also Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 774 F. Supp. 2d 674, 682–83 (D. Del. 2011); *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 565 (D. Del. 2010). If Sun had rescinded the Policies and returned the premiums to LPC in the early 2010s, then Viva wouldn't have had the opportunity to buy the non-existent Policies years later in 2014. And, of course, if Viva hadn't purchased the non-existent Policies in 2014, then the parties wouldn't be before this Court litigating Sun and Viva's comparative fault.

Under *Seck*, "the fault of the parties and public policy considerations will determine which party is entitled to the premiums paid on an insurance policy that is void *ab initio* for lack of an insurable interest." *Seck*, 2022 WL 3654872, at *18. If this Court (or the Superior Court) were to let Sun keep the $6.9 million in premiums at issue, the Court would turn public policy on its head. This would render Sun better off today after having purposefully delayed filing these lawsuits for nearly a decade after being put on inquiry notice of the Policies' possible illegality than Sun was 13 years ago when it filed *Berck*—the era in which Sun filed STOLI cases promptly upon discovering potential illegality, and when the *Berck* court ordered Sun to automatically return premiums to LPC.

II. THE COURT SHOULD PERMIT POLICYHOLDERS TO ASSERT PROMISSORY ESTOPPEL CLAIMS AND EQUITABLE DEFENSES.

As explained in Securities Intermediary's prior briefs, the Court should reverse the Superior Court's Rule 12 rulings and hold that Securities Intermediary can assert promissory estoppel claims and equitable defenses to recover the Policies' $19 million in death benefits. (OB at 23–35; R/AB at 5–16.) But to the extent the Court disagrees, *Seck* underscores why the Court should hold, at a minimum, that investors can assert promissory estoppel counterclaims and equitable defenses to force insurers to disgorge premiums on void *ab initio* policies.

Regarding promissory estoppel, *Seck* "adopt[ed] 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 theory, such as unjust enrichment*, and seeks the return of paid premiums as a remedy." *Seck*, 2022 WL 3654872, at *1 (emphasis added). *Seck* did not hold that unjust enrichment was the only viable claim a policyholder may use to force insurers to return premiums, only that unjust enrichment was *one viable theory*. The Court should hold that promissory estoppel is another "viable theory" pursuant to which policyholders can recover premiums, and permit Securities Intermediary to pursue its promissory estoppel counterclaim on remand. *See Sol*, 2019 WL 8353393, at *4 & n.6 (ordering Sun to disgorge all of the premiums to the policyholder as restitution damages on the policyholder's promissory estoppel counterclaim).

Separately, as a consequence of *Seck*, the Court should make clear that policyholders may assert any and all available affirmative defenses against insurers that, if successful, will require insurers to return premiums. The *Malkin* and *Van de Wetering* courts held that the investor's waiver and laches defenses were moot because Sun had to automatically return premiums under Delaware law. *See U.S. Bank Nat'l Ass'n v. Sun Life Assurance Co. of Can.*, 2016 WL 8116141, at *19 (E.D.N.Y. Aug. 30, 2016), *R&R adopted by* 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017) ("*Van de Wetering*"); *Sun Life Assurance Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2016 WL 161598, at *21 (S.D. Fla. Jan. 14, 2016), *aff'd in part, rev'd in part and remanded*, 693 F. App'x 838 (11th Cir. 2017) ("*Malkin*"). But now that *Seck* has rejected the automatic premium-refund rule that was applied by *Van de Wetering* and *Malkin*, defenses such as waiver and laches are no longer moot, and this Court should make clear that policyholders may assert those defenses.

This means that if an insurer files a lawsuit in the Superior Court seeking to invalidate a policy and keep the premiums—as Sun did here (*see* A1185–A1186, ¶G (*De Bourbon*); A437, ¶D (*Frankel*))—the policyholder should be able to assert all available defenses that bar the insurer from retaining premiums. At the very least, the Court should make clear that concepts such as waiver, laches, estoppel, ratification, and acquiescence are subsumed within the *Seck* test, even if the Court does not agree that policyholders can assert those types of equitable defenses separately as alternative ways for investors to force insurers to disgorge premiums.[6] In other words, if an insurer engages in conduct that constitutes waiver or laches, that should factor heavily into *Seck*'s fault-based analysis. And as Securities Intermediary explained previously, an insurer's waiver and/or laches should necessarily preclude the insurer from trying to limit its premium-return obligation to those paid by the final policyholder in the chain-of-title and attempting to keep premiums paid by the policy's predecessor owners. (*See* R/AB at 38–41.)

[6] Securities Intermediary recognizes laches is generally unavailable at law. That said, Sun should not be able to strip Securities Intermediary of affirmative defenses simply by filing in the Superior Court, rather than in the Court of Chancery or in federal court. To the extent this Court holds that certain equitable defenses, including laches, are unavailable because Sun filed in the Superior Court, the Court should designate Judge Johnston to sit as a Vice Chancellor on remand. (OB at 37.)

III. INSURERS MUST PAY PREJUDGMENT INTEREST ON RETURN-OF-PREMIUM DAMAGES.

Seck emphasized that its newly-adopted test "incentivizes each player along the chain of these insurance policies to behave in good faith," and insurers "will not be able to retain premiums if they stay silent after being put on inquiry notice, and they might also be responsible for interest payments." *Seck*, 2022 WL 3654872, at *17. *Seck* compels the conclusion that insurers must pay prejudgment interest on return-of-premium damages.

Putting aside that "prejudgment interest is awarded as a matter of right," *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992), prejudgment interest is the very tool that will motivate insurers to "behave in good faith," *Seck*, 2022 WL 3654872, at *17, once they are on inquiry notice that a policy is potentially void. If insurers do not have to pay prejudgment interest from the date of each payment, insurers will delay STOLI lawsuits as long as possible. Even if insurers are certain they will eventually be ordered to return all premiums received on policies later declared void, insurers will also know that, if they delay litigation as long as possible, they will generate significant investment income from those premiums over the insured's lifetime. Put differently, the only thing preventing insurers from viewing STOLI premiums as interest-free loans for the duration of an insured's life is the knowledge that a court will order the insurer to pay prejudgment interest measured from the date each of those premiums were paid.

CONCLUSION

Although Securities Intermediary no longer contends that the Superior Court correctly ordered Sun to automatically return the premiums on the Policies in light of *Seck*, Sun still must disgorge all $6.9 million in premiums under *Seck*'s fault-based analysis. Separately, as a result of *Seck*, the Court should permit policyholders to assert equitable claims and defenses, and require insurers to pay prejudgment interest on return-of-premium damages.

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2022, my firm served true and correct copies of the forgoing *Public Version of Appellant and Cross-Appellee's Supplemental Opening Brief* upon the following counsel of record by File & Serve*Xpress*:

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