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Case Number 126,2022

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
v.	)	Court Below: Superior Court of the State of Delaware, C.A. Nos. N18C-07-289 MMJ CCLD, N17C-08-331 MMJ CCLD
SUN LIFE ASSURANCE COMPANY OF CANADA,	)	PUBLIC VERSION FILED NOVEMBER 3, 2022
Plaintiff/Counterclaim-Defendant Below, Appellee-Cross Appellant.	)	

APPELLANT AND CROSS-APPELLEE'S SUPPLEMENTAL ANSWERING BRIEF

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INTRODUCTION

Seck made clear that 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." *Geronta Funding v. Brighthouse Life Ins. Co.*, -- A.3d --, 2022 WL 3654872, at *17 (Del. 2022) ("*Seck*"). Sun cannot retain premiums in these cases under a straightforward application of *Seck.* In 2009, Sun was put on inquiry notice of the Policies' invalidity when Sun started analyzing the Policies [redacted] because of the Policies' connections to LPC, filing lawsuits regarding other LPC policies (including *Berck*), and flagging the Policies on its STOLI lists. In 2012, Sun made the "strategic decision" to stop filing STOLI lawsuits while insureds were alive, and then cynically waited until the insureds died in 2017 and 2018, respectively, to bring these cases. Sun's "strategic decision" enabled Sun to collect $6.9 million in premiums on the Policies—the majority of which were collected after Sun was on inquiry notice in 2009. No rational jury could let Sun keep those premiums under *Seck*.

First, Sun is more at fault than Viva. Viva bought the Policies in 2014 as part of the ESF QIF Portfolio. If Sun had sought to invalidate the Policies between 2009 and 2012—when Sun had inquiry notice of the Policies' illegality, and before Sun decided to stop filing STOLI lawsuits while insureds were alive—***the Policies would***

not have existed in 2014 when Viva bought the ESF QIF Portfolio. Sun also does not even cite, let alone analyze, the District of Delaware's premium-restitution decision in *Sol*—a conspicuous omission given *Seck*'s reliance on *Sol* when adopting the "fault-based" premium-return test.

Second, Sun's premium disgorgement obligations should not be limited to Viva's premiums. *Seck* implicitly rejected Sun's attempt to limit Viva's recovery to Viva's premiums when describing restitution as a "measure of recovery [that] is usu[ally] based ***not on the plaintiff's loss, but on the defendant's gain***." *Seck*, 2022 WL 3654872, at *11 (internal quotations & citation omitted; emphasis added). And in *Sol*, the court ordered Sun to return all the premiums it collected on the policy to the final policyholder in the chain-of-title as restitution damages—regardless of which investor in the chain-of-title had paid those premiums—because the final investor had bought the rights to those premiums. So too here.

Even if *Seck* did not implicitly reject Sun's argument, Sun's attempt to limit premium disgorgement to Viva's premiums is without merit. Requiring a policyholder to prove that *its predecessors* would be entitled to premiums under *Seck*'s fault-based analysis in order to recover those premiums—based on evidence that may no longer exist—would result in a windfall to insurers, and incentivize them to delay STOLI lawsuits as long as possible. Sun's proposed rule would also impose

significant burdens on the judiciary, as every case would involve a series of mini-cases on comparative fault. But even if the Court accepted Sun's proposed rule, Viva still is entitled to recover LPC's premiums because Sun is more at fault than LPC, notwithstanding that LPC would have been more at fault had Sun brought these cases promptly.

Third, Sun's attempts to keep premiums on procedural grounds—*i.e.*, (1) that Securities Intermediary[1] did not assert a claim seeking premiums as a remedy and (2) that Securities Intermediary purportedly lacks standing—fare no better. When Securities Intermediary filed its counterclaims, *every* court applying Delaware law had ordered insurers to return premiums automatically on void policies. That is why Securities Intermediary sought a return of all premiums in its Prayers for Relief, rather than as a remedy on a counterclaim. Sun also ignores the parties litigated this entire case on the assumption that the Restatement (Second) of Contracts may well be the premium-return test.

Securities Intermediary has standing to litigate in a representative capacity—indeed, that is why Sun itself sued Securities Intermediary seeking to keep all the

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

premiums. But if the Court were to disagree, the remedy under Rule 17 would be for Viva to join this litigation as a party.

ARGUMENT

I. SUN MUST RETURN ALL THE PREMIUMS TO SECURITIES INTERMEDIARY (ON BEHALF OF VIVA).

No rational jury could let Sun keep the $6.9 million in premiums at issue under *Seck*. (SI_Supp._Br. at 6–16.)[2] The *Seck* test is supposed to "incentivize[] each player along the chain of these insurance policies to behave in good faith." *Seck*, 2022 WL 3654872, at *17. If Sun had behaved in good faith when it was put on inquiry notice in 2009, Sun would have filed these lawsuits when it filed *Berck*. If Sun had filed these cases when it filed *Berck*, Sun would have been ordered to return the Policies' premiums to LPC in the same way Sun had to return premiums to LPC in *Berck*. *See Sun Life Assurance Co. of Can. v. Berck*, 719 F. Supp. 2d 410, 418–19 (D. Del. 2010). And if Sun had filed these lawsuits when it filed *Berck* and returned the premiums to LPC, Viva wouldn't have been able to buy the non-existent Policies in 2014.

That is the overarching problem with Sun's arguments. Sun wants the Court to hold that Sun is better off today under *Seck* than Sun was 12 years ago—an era when Sun filed certain STOLI lawsuits promptly, and was ordered to return premiums automatically under the District of Delaware's rule. *See id.* If this Court

[2] "SI_Supp._Br." refers to Appellant and Cross Appellee's Supplemental Opening Brief, Dkt. 43.

let Sun keep premiums, it would reward Sun for having made a "strategic decision" in 2012 to stop pursuing STOLI lawsuits while insureds were alive. And it would render meaningless *Seck*'s instruction that insurers "will not be able to retain premiums if they stay silent after being put on inquiry notice[.]" *Seck*, 2022 WL 3654872, at *17.

Unsurprisingly, each factor Sun proffers in an effort to keep the premiums—which Sun labels "knowledge disparity," "diligence," "timing," "action," and "business model" (Sun_Supp._Br. at 15–17)[3]—highlights why Sun cannot keep any of the Policies' premiums under *Seck*.

Knowledge Disparity / Diligence. Sun claims Viva bought the Policies in 2014 with information regarding the policies in the ESF QIF Portfolio, the ability to interview Martin Fleisher (one of LPC's principals), and legal representation from attorneys [redacted] (*Id.* at 15–16.) In doing so, Sun completely ignores its own knowledge and diligence regarding LPC—***over the five years prior to when Viva bought the Policies***.

Viva wasn't formed until 2014, and Sun had inquiry notice of the Policies' invalidity ***five years earlier***. In 2009, Sun filed three lawsuits regarding LPC

[3] "Sun_Supp._Br." refers to Cross-Appellant's Opening Supplemental Brief, dated Sept. 30, 2022, Dkt. 44.

policies, including *Berck*. (SI_OB at 8–9.)[4] In *Berck*, Sun sued Steven Lockwood—LPC's other principal—and subpoenaed LPC and Fleisher. *See Sun Life Assurance Co. of Can. v. Berck*, C.A. No. 09-498-SLR, Dkt. Nos. 28, 29, 31 (D. Del.). While litigating *Berck*, Sun's attorneys were representing other insurers in six additional LPC lawsuits, in which Sun's attorneys deposed Fleisher and Lockwood numerous times. (SI_OB at 11; SI_R/AB at 34.)[5] Sun monitored those lawsuits, and Sun's attorneys kept Sun fully informed on STOLI litigation. (SI_OB at 11–12.) All that happened in 2009–12, ***before*** Viva was formed and ***before*** Sun made the "strategic decision" to stop challenging policies while insureds were alive (and Sun was collecting premiums). (SI_OB at 16.)

Timing. Sun claims it issued the Policies in 2006 without having inquiry notice of their invalidity, and then points its finger at Viva for buying the Policies in 2014 with "actual knowledge (or, at the very least, inquiry notice) of the Policies' invalidity." (Sun_Supp._Br. at 16.) Once again, Sun ignores what happened between 2006 (when Sun issued the Policies) and 2014 (when Viva bought the Policies). In those eight years, Sun (1) analyzed the Policies [redacted]

[4] "SI_OB" refers to Appellant's Opening Brief, Dkt. 17.

[5] "SI_R/AB" refers to Appellant's Reply Brief and Cross-Appellee's Answering Brief, Dkt. 35.

because of their LPC connection, (2) filed lawsuits challenging three other LPC policies, (3) monitored LPC lawsuits filed by other carriers, (4) put the Policies on its STOLI lists, and (5) decided to forgo STOLI lawsuits while insureds were alive (and collect premiums). (SI_OB at 8–16.)

Action. Sun congratulates itself for burying reservation of rights language in ownership/beneficiary change confirmation letters on the Policies, and accuses Viva of "stay[ing] completely silent hoping to lull Sun Life into simply paying the death claims." (Sun_Supp._Br. at 17.) Sun testified it put reservation of rights language in *every* letter concerning ownership/beneficiary changes occurring within three years of a policy's issuance, if Sun had concluded that the policy lacked a "clear insurable interest." (SI_OB at 14.) Sun admitted it never informed the policyholder that it had concluded the policy lacked a "clear insurable interest." (*Id.*)

This is a bad fact for Sun. Sun's reservation of rights language is one of the reasons why the *Sol* court permitted the policyholder's unfair/deceptive trade practices claim to go to trial—the trial which resulted in the *Sol* court ordering Sun to disgorge all the premiums to the policyholder as restitution damages for promissory estoppel. *See Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 8353393, at *4 (D. Del. Dec. 30, 2019) ("*Sol*"); *Sun Life Assur. Co. of Can. v. U.S. Bank Nat'l Ass'n*, 2019 WL 2151695, at *3–4 (D. Del. May 17, 2019)

(highlighting Sun's reservation of rights language as a reason why a jury could find Sun liable for unfair/deceptive acts).

There is no evidence Viva stayed "silent hoping to lull Sun Life into simply paying the death claims." (Sun_Supp._Br. at 17.) Instead, the evidence is Viva did not believe the Policies had significant risk because Sun had accepted millions of dollars in premiums for ***eight years*** before Viva bought the Policies, and had been representing that the Policies were "in force," "active," and "in good standing." (SI_OB at 21.) In fact, before Viva bought the Policies, Sun provided a Verification of Coverage, in which Sun represented that the Policies were "in force" without disclosing that it had been treating the Policies internally as STOLI for several years. (*Id.* at 18.)

Business Model. Sun claims "Viva's business model is buying STOLI at a discount and trying not to get caught," and Sun "has tried, in the years that followed [the 2000s], to rid itself of STOLI." (Sun_Supp._Br. at 17.) Not true. Sun's "business model" isn't "rid[ding] itself of STOLI." Since 2012, Sun's "business model" has been keeping policies on its books that Sun is treating as STOLI, lining its pockets with premiums, representing that those policies are "in force," "active," and "premium paying," and only challenging policies after insureds die. (SI_OB at 14–15, 16–19.)

Now consider Viva's "business model." In 2014, Viva came into existence. (A2690 at 114:4–115:15.) This was ***two years after*** Sun made the "strategic decision" to stop filing lawsuits while insureds were alive (on policies Sun was treating as STOLI), and ***five years after*** Sun was on inquiry notice of the Policies' invalidity. Viva's business model is not "buying STOLI at a discount and trying not to get caught," as Sun claims hyperbolically. (Sun_Supp._Br. at 17.) Viva buys and sells policy portfolios on the tertiary market, which, as *Price Dawe* held, is "perfectly legal." *See PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1069–70 (Del. 2011).

And noticeably absent in Sun's presentation of these factors— "knowledge disparity," "diligence," "timing," "action," "business model"—is any mention of *Sol.* If Sun had to disgorge all premiums (regardless of who paid them) to the policyholder in *Sol*, then Sun should also have to disgorge all premiums (regardless of who paid them) to Viva. (SI_Supp._Br. at 7–10, 14 (citing *Sol*, 2019 WL 8353393, at *4 & n.6).) Sun has no answer to *Sol*, which is why Sun consistently ignores *Sol* and its implications here.

II. SUN'S PREMIUM DISGORGEMENT SHOULD NOT BE LIMITED TO ONLY THOSE PREMIUMS VIVA PAID.

As a fallback, Sun asks the Court to limit Securities Intermediary's recovery (on behalf of Viva) to only those premiums paid by Viva, rather than all the premiums Sun collected on the Policies. (Sun_Supp._Br. at 4–11.) The Court should reject Sun's request for an unwarranted windfall.

First, it's implicit in *Seck* that Sun must disgorge all the premiums it received on the Policies, not only those paid by Viva. *Seck* described restitution as a "measure of recovery [that] is usu[ally] based not on the plaintiff's loss, but on the defendant's gain." *Seck*, 2022 WL 3654872, at *11 (internal quotations & citation omitted). As this Court similarly explained in *Fleer Corp. v. Topps Chewing Gum, Inc.*, restitution "deprive[s] the defendant of benefits that in equity and good conscience he ought not to keep," and may be awarded "even though the plaintiff may have suffered no demonstrable losses." 539 A.2d 1060, 1063 (Del. 1988) (quoting *Mass Transit Admin. v. Granite Constr.*, 471 A.2d 1121, 1125 (Del. 1984)); *see also Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999) (restitution is appropriate "even though the plaintiff may have suffered no demonstrable losses") (quoting *Fleer*, 539 A.2d at 1063); 1 D. Dobbs, Law of Remedies § 4.1(1), at 374 (3d ed. 2018) ("Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain.").

The Court of Chancery's May 2022 decision in *Garfield v. Allen*, 277 A.3d 296 (Del. Ch. 2022), which canvassed the common-law history of unjust enrichment and restitution, is instructive. *Garfield* made clear that "[p]ermitting restitution even where the plaintiff has 'no measurable loss whatsoever' is consistent with the principles underlying the concept of unjust enrichment," and "restitutionary recovery is not, as in damages, the *harm* to the plaintiff, but rather the *benefit* received by the defendant." *Id.* at 344 (citations omitted). *Garfield* continued, "[a]lthough the standard Delaware formulation frames the doctrine of unjust enrichment as requiring an impoverishment, the Delaware Supreme Court has recognized that unjust enrichment is more flexible." *Id.* (citing *Fleer*, 539 A.2d 1060). The court explained "the emphasis on 'impoverishment' is not entirely warranted because restitution may be awarded based solely on the benefit conferred upon the defendant, even in the absence of an impoverishment suffered by the plaintiff." *Id.* at 345 (citations omitted).

As a result, *Garfield* pointed out "[o]ften, a plaintiff bringing an unjust enrichment claim will have suffered an impoverishment, *but the general framing need not imply that a plaintiff must plead and prove an impoverishment*." *Id.* at 345 (emphasis added). Instead, what's required is that "the defendant received a *benefit*, that the defendant's receipt of the benefit was unjustified, and that there is some

connection between the benefit unjustly received and an invasion of the plaintiff's legally protected rights. The claim is about unjust *enrichment*, not the plaintiff's impoverishment." *Id.* (emphasis in original). *Garfield* also explained that, while unjust enrichment is typically framed as though "there must be a relation between the impoverishment and enrichment," the better formulation is that there is a "relationship between the challenged enrichment and an invasion of the plaintiff's protected interests." *Id*. at 346. [6]

Seck not only confirmed that restitution is generally "based not on the plaintiff's loss, but on the defendant's gain," *Seck* also cited favorably the District of Delaware's decision in *Sol*. *See Seck*, 2022 WL 3654872, at *11. *Sol* held "[t]he 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]." *Sol*, 2019 WL 8353393, at *4–5. *Sol* also found

[6] Securities Intermediary respectfully submits that this Court should use the opportunity on this appeal to clarify the elements of unjust enrichment in light of *Garfield*'s "scholarly opinion." *Manti Hldgs., LLC v. Carlyle Grp. Inc.*, 2022 WL 1815759, at *12 (Del. Ch. June 3, 2022). Indeed, since *Garfield*, other Court of Chancery decisions have similarly opined that Delaware's traditional formulation of the elements of unjust enrichment—*see Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010)—is "unduly limited." *Manti Hldgs.*, 2022 WL 1815759, at *12; *see also Parseghian v. Frequency Therapeutics, Inc.*, 2022 WL 2208899, at *9 (Del. Ch. June 21, 2022) (citing *Garfield* for the proposition that "the absence of a remedy provided by law" is "not actually an element of the claim").

"[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.

For those reasons, Sun's argument that Viva cannot recover premiums it didn't pay as a remedy for unjust enrichment or promissory estoppel is inconsistent with *Seck*. (Sun_Supp._Br. at 5–8.) Sun's gain on the Policies was $6.9 million in premiums, it wasn't only the $2.3 million in premiums Viva paid. Restitution, as *Seck* correctly noted, is usually "based not on the plaintiff's loss, but on the defendant's gain," and nothing in *Seck* suggests Sun can pocket the $4.6 million difference between the total premiums Sun received and those premiums Viva paid. *Seck*, 2022 WL 3654872, at *11.[7]

And just like the *Sol* investor, Viva bought the rights to recover LPC's premiums when Viva purchased the Policies (SI_OB at 40–41), which means there

[7] In *Malkin*, this Court wrote—when explaining officiously conferred benefits— "it is a prerequisite to an unjust enrichment claim that the plaintiff acted for the defendant's benefit." *Wells Fargo Bank, N.A. v. Est. of Malkin*, 278 A.3d 53, 70 (Del. 2022). To the extent Sun cites *Malkin* to support its argument that Viva cannot recover LPC's premiums because Viva didn't pay those premiums (Sun_Supp._Br at 5), that is not an accurate statement of Delaware law on unjust enrichment/restitution. *See Garfield*, 277 A.3d at 343–46; *Fleer*, 539 A.2d at 1063; *Schock*, 732 A.2d at 232–33.

is a clear "relationship between the [Sun's] enrichment and an invasion of [Viva's] protected interests." *Garfield*, 277 A.3d at 346.[8] Viva can enforce its acquired premium rights in the same way the *Sol* investor enforced its rights against Sun in *Sol*. *See Sol*, 2019 WL 8353393, at *4–5 & n.6; *see also Urdan v. WR Cap. P'rs LLC*, 2019 WL 3891720, at *12 (Del. Ch. Aug. 19, 2019) (recognizing the "right to enforce a cause of action associated with ownership of property passing to the buyer is not something unique to shares"); *St. Search Partners, L.P. v. Ricon Int'l, L.L.C.*, 2006 WL 1313859, at *3 (Del. Super. Ct. May 12, 2006) (making clear that unjust enrichment claims are assignable).

Second*,** Sun's proposed rule—*i.e.*, that a policyholder can recover premiums paid by predecessors *only if* the policyholder can prove the prior owners would be entitled to a premium refund under the *Seck* test—would encourage insurers to delay STOLI lawsuits as long as possible, and it would overwhelm the judiciary as every case would involve a series of comparative-fault mini trials. (SI_R/AB at 39–41.) Regarding the burden on the judiciary, Delaware courts are already seeing evidence of this. There are two cases pending in the District of Delaware concerning policies that had ***10 owners over an 18-year period. The insurer, represented by Sun's

[8] Sun asserts LPC "did not" assign its rights to premiums to Viva (Sun_Supp._Br. at 8), but Sun fails to explain why the Purchase and Sale Agreement doesn't mean what it says. (SI_OB at 40.)

attorneys, is urging the court to hold that the policyholder cannot recover premiums paid by its predecessors, unless it can prove that ***its nine predecessors*** would be entitled to a premium refund under the Restatement.[9] And this situation is hardly atypical given the frequency in which policies trade in the tertiary market, and that insurers (when bringing STOLI lawsuits) generally challenge policies issued in 2004–07.

Third, if the Court agrees that fault-based analyses are necessary at every step in a policy's chain-of-title, Sun still must disgorge all $6.9 million in premiums to Securities Intermediary (on behalf of Viva). If this were 2009, Sun would be able to keep LPC's premiums under *Seck*. But at some point between 2009 (when Sun was put on inquiry notice) and 2017–18 (when Sun filed these lawsuits after waiting for the insureds to die), Sun became more at fault than LPC. Perhaps that occurred in 2012, when Sun made its "strategic decision" to stop filing STOLI lawsuits while insureds were still alive, and instead, to collect premiums on policies it was tracking internally as STOLI. (SI_OB at 16; *see also id.* 8–19, 21–22.)

Seck stated that insurers "will not be able to retain premiums if they stay silent after being put on inquiry notice[.]" *Seck*, 2022 WL 3654872, at *17. Sun cannot

[9] *Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, No. 20-cv-735-MN-JLH, Dkt. 177 at 17; *Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, No. 20-cv-736-MN-JLH, Dkt. 173 at 17.

be better off today under *Seck* than Sun was 12 years ago, when Sun brought STOLI lawsuits promptly upon being put on inquiry notice, and when the District of Delaware ordered Sun to return premiums automatically to LPC. *See Berck*, 719 F. Supp. 2d at 418–19. That is why, at the very least, legal doctrines such as waiver, laches, estoppel, and unclean hands have to preclude insurers from trying to keep premiums paid by prior owners in a policy's chain-of-title. (SI_Supp._Br. at 19; SI_R/AB at 38–41.)

III. SUN'S PROCEDURAL ARGUMENTS ARE MERITLESS

Sun also suggests the Court should let Sun keep all the premiums because (1) Securities Intermediary did not plead an actual claim (such as unjust enrichment or promissory estoppel) that specifically sought a return of premiums as a remedy, and (2) Securities Intermediary lacks standing to seek a premium recovery on behalf of Viva. (Sun_Supp._Br. at 2–3, 4–5.) Neither argument has any merit.

First, when Securities Intermediary filed its counterclaims in 2017 (for *De Bourbon*) and 2018 (for *Frankel*), courts applying Delaware law had been *unanimous* in their holdings that insurers had to automatically return premiums on void *ab initio* policies. (SI_OB at 39 (citing cases).) That is why Securities Intermediary did not assert a claim—such as unjust enrichment or promissory estoppel—that sought a return of premiums as a remedy, but instead, pleaded in its Prayers for Relief that the Superior Court should "enter judgment … awarding [Securities Intermediary] a return of all premiums paid to Sun Life over the life of the Polic[ies], plus interest[.]" (A437.69 ¶ (A); C.A. No. N17C-08-331, Dkt. 11 (Answer/Countercl.) at 70, ¶ (A).)

In March 2019, after the pleadings here were closed, Judge Streett issued her *Seck* decision. *See Brighthouse Life Ins. Co. v. Geronta Funding*, 2019 WL 8198323 (Del. Super. Ct. Mar. 4, 2019). Judge Streett rejected the automatic-return rule, and

adopted the Restatement (Second) of Contracts §§ 197–198 as the premium-return test. *See id.* at *4. Based on Judge Streett's decision, Sun conducted discovery into what Viva knew when it bought the Policies and the ESF QIF Portfolio—discovery which would have been irrelevant under the automatic-return rule. The parties then argued in their summary judgment motions why they were entitled to the premiums under Judge Streett's decision in *Seck* (in addition to briefing the automatic-return rule). (*See, e.g.*, A604–A607; A650–A677.)

As a result, Sun's argument that Securities Intermediary sought an automatic return of premiums because it "hop[ed] to limit discovery into Viva's knowledge, conduct, and culpability" (Sun_Supp._Br at 3) is preposterous. The fact that Sun obtained extensive discovery concerning Viva's "knowledge, conduct, and culpability" is the entire reason why Sun can argue to this Court that "Viva … was not ignorant (let alone excusably so) of the facts giving rise to the Policies' invalidity." (*Id.* at 13.)

But to the extent this Court believes Securities Intermediary's Prayer for Relief does not encompass a premium-return claim under *Seck*, the Court should permit Securities Intermediary to amend its counterclaims to seek a return of premiums under *Seck* as the remedy for unjust enrichment and promissory estoppel. *See Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)

(announcing a new standard for differentiating direct and derivative claims, and permitting the plaintiff to amend its complaint on remand). This would not be a "do over," as Sun disingenuously suggests. (Sun_Supp._Br. at 3.) If anything, it would conform the pleadings to the evidence already adduced and briefed.

Second, Sun's argument that Securities Intermediary lacks standing to litigate return of premiums is confounding. Sun filed these lawsuits alleging that Securities Intermediary "is named as a party to this action solely because … in its capacity as Securities Intermediary, it holds bare legal title as administer of the Policy[.]" (A247 ¶ 2; A415 (suing Securities Intermediary "in its capacity as Securities Intermediary").) Sun sought a judgment against Securities Intermediary "[d]eclaring that because the Policy is void *ab initio* the Court will leave the parties to this illegal contract as it finds them, thus permitting Sun Life to retain the premiums paid on the Policy[.]" (A272–73 ¶ G; A437 ¶ D.) Sun has known from the outset that Securities Intermediary is litigating in a representative capacity—as permitted under Superior Court Rule 17[10]—***because Sun sued Securities Intermediary in its representative***

[10] Del. Super. Ct. R. 17(a); *see also Advance Tr. & Life Escrow Servs., LTA v. ReliaStar Life Ins. Co.*, 2022 WL 911739, at *6 (D. Minn. Mar. 29, 2022) ("As the securities intermediary, ATLES has standing to assert claims on the policies on Life Partner's behalf.").

capacity, and then asked the Superior Court to enter a judgment permitting Sun to keep all the premiums.[11]

But if this Court believes Viva must pursue a premium-refund claim in its own name, the Court should permit Securities Intermediary to amend its counterclaims on remand to join Viva as a party under Rule 17(a). *See* Del. Super. Ct. R. 17(a); *see also Appriva S'holder Litig., LLC v. EV3, Inc.*, 937 A.2d 1275, 1293 (Del. 2007) (holding court erred in dismissing actions due to plaintiffs' lack of standing, and explaining "Rule 17 requires that the appellants should have been afforded an opportunity to amend their complaints to name the real parties in interest").

[11] Sun knows that securities intermediaries routinely litigate return of premiums on behalf of their investor customers. *See, e.g., Sol*, 2019 WL 8353393, at *4–5 (ordering Sun to return all premiums to "U.S. Bank and/or FCI").

CONCLUSION

Sun must disgorge all $6.9 million in premiums under *Seck*. The Court should permit policyholders to assert promissory estoppel claims, equitable 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 November 3, 2022, my firm served true and correct copies of the forgoing *Public Version of Appellant and Cross-Appellee's Supplemental Answering Brief* upon the following counsel of record by File & Serve*Xpress*:

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