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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERONTA FUNDING, a Delaware Statutory Trust,	))	No. 374, 2023
	)	
Appellant/Cross-Appellee,	))	Court Below: Superior Court of the State of Delaware
v.	))	
BRIGHTHOUSE LIFE INSURANCE COMPANY,	))	C.A. No. N18C-04-028 DCS
	)	
Appellee/Cross-Appellant.	)	

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

Dated: January 22, 2024

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[1] The argument section of Brighthouse's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal commingles its answering and cross-appeal arguments and does not clearly identify them. Geronta's brief is organized so as to separate Brighthouse's arguments by their procedural posture.

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INTRODUCTION[2]

In its opinion in *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 75 (Del. 2022) ("*Seck I*") remanding this case to the trial court for further proceedings, this Court directed the trial court to reconsider its factual findings in light of the Court's newly-articulated five-part tests to be applied when a party, like Geronta here, seeks the return of premium payments paid on an insurance policy declared void *ab initio* for lack of an insurable interest, and it "specifically direct[ed] the trial court to consider whether either party had inquiry notice of the void nature of the Policy. *Id.* at 75. This Court made it clear that the fault-based test announced in *Seck I* was intended, in part, to "incentivize insurers to speak up" when they were aware that one of their polices might be void for lack of an insurable interest "because they will not be able to retain the premiums if they stay silent after being put on inquiry notice." *Id.* at 72.

In its answering brief, Brighthouse repeatedly ignores the teachings of this Court in *Seck I*. Like the trial court, Brighthouse ignores the limited scope of this Court's remand ,and it tries to argue that the comparative fault analysis announced in *Seck I* permits it to retain all of the premiums it collected on the Policy. Brighthouse's argument is wrong on the law: it completely ignores the five-part

[2] Capitalized terms utilized but not defined herein shall have the meanings ascribed in Geronta's Opening Brief. Geronta's Opening Brief is cited herein as "OB __." Brighthouse's Answering Brief is cited herein as "AB __."

tests announced in *Seck I,* and indeed it attempts to rewrite them using a favorable formulation of its own design. And Brighthouse completely ignores the outcome-determinative significance of the trial court's findings that Brighthouse was on inquiry notice that the Policy was void *ab initio* by April, 2010 and had *actual knowledge* of the same thing by October of 2011 by virtue of its cooperation with, and knowledge of, the criminal conviction for insurance fraud of Pape Seck for placing the Policy. Instead, and like the trial court, Brighthouse overlooks the unacceptable public policy consequences of a holding which would permit an insurance company to retain the premiums it collects on a policy after it has inquiry notice and actual knowledge that the policy is void *ab initio* as the result of criminal fraud. The facts, when properly considered in light of the five-part tests from *Seck I,* strongly favor a return of the premium payments made by EEA, and later purchased by Geronta, as well as an award of prejudgment interest to Geronta.

In its cross-appeal, Brighthouse argues on appeal for the first time that it should retain the premium payments made by Geronta itself because Geronta failed to prove unjust enrichment. But this argument was waived long ago, as Brighthouse did not raise it with this Court in *Seck I* after losing the argument before the trial court. Brighthouse's attempt to reargue the point on remand also exceeded the narrow scope of this Court's remand. And Brighthouse is wrong on the law as well, as it ignores well-settled Delaware law pertaining to the elements of an unjust enrichment claim at law.

Brighthouse's cross-appeal also argues that Geronta was not entitled to a refund of the premiums it paid on the Policy because it was more in the wrong than Brighthouse. As it did when arguing the point about its wrongfulness as compared with EEA, Brighthouse completely ignores the five-part *Seck I* tests, and it takes the trial court to task for focusing on whether and when Brighthouse and Geronta were first on inquiry notice—despite the fact that this Court ordered the trial court to do *precisely* that. Worse yet, Brighthouse makes no attempt at all to explain how Geronta was more in the wrong even though Geronta's failure to uncover the fact that the Policy was a fraud in 2015 was nothing more than a failure to discover what Brighthouse should have known in April 2010, and had *actual knowledge* of no later than October 2011. Brighthouse's argument flies in the fact of this Court's policy preference that an insurance company should not be permitted to keep the premiums on a policy that is knows is void *ab initio* when it keeps silent about what it knows.

This Court should reverse the trial court's determination that Geronta is not entitled to the premium payments made by EEA, the rights to which were purchased by Geronta. This Court should also reverse the trial court's denial of an award of pre-judgment interest to Geronta. Conversely, this Court should affirm the trial court's decision to refund to Geronta the premium payments that it paid itself. The law and sound public policy require no less.

ARGUMENT IN REPLY

I. THE SCOPE OF REMAND DIRECTED AN INQUIRY ONLY INTO THE RELATIVE FAULT OF BRIGHTHOUSE AND GERONTA

The scope of the Court's remand in *Seck I* was narrow: the trial court was directed "to reconsider its factual findings in light of this Court's articulated [fault-based] test and specifically direct[ed] … to consider whether ***either party*** had inquiry notice of the void nature of the Policy." *Seck I* at 75. (emphasis added). Referring only to Geronta and Brighthouse as the parties to this dispute, it was envisioned that the trial court's inquiry into the relative fault of Brighthouse and Geronta would resolve the entire dispute around premiums, i.e., a zero-sum game.

Brighthouse concedes that the trial court was not "expressly" directed to consider or weigh EEA's relative fault, but it nevertheless argues the mandate rule did not preclude the trial court from doing so because EEA's premium payments were not expressly addressed by the Court in *Seck I*. *See* AB 47. Not so. It was understood on appeal in *Seck I* that Geronta sought a return of all premiums paid on the Policy by EEA and Geronta. *See Seck I*, 284 A.3d at 57 ("Geronta filed … a counterclaim, alleging that it was entitled to reimbursement of all premiums paid, with the exception of the premiums paid by the original owner of the Policy."); *id.* at 59 ("In the alternative, Geronta next argues that if restitution is the correct remedy, the court still erred in not returning the premiums."). And Brighthouse specifically argued to this Court that Geronta could not recover the premiums paid by EEA. A933-934. Yet, the Court never distinguished between premiums paid by EEA and Geronta; the Court referred to *the* premiums, i.e., all premiums paid by EEA and Geronta. This was an acknowledgement that Geronta would be entitled to all premiums paid by it and EEA if it could satisfy the newly articulated test, and directly informed the scope of remand, which did not reference EEA.

At minimum, the *Seck I* decision impliedly decided that Geronta should be awarded its and EEA's premiums on remand upon satisfying Delaware's new fault-based test. Brighthouse admits the mandate rule encompasses issues that are "impliedly" disposed of on appeal. *See* AB 31 (citing *Chavin v. PNC Bank*, 830 A.2d 1220, 1222 (Del. Ch. 2003).

II. EVEN IF GERONTA WAS REQUIRED TO SHOW THAT EEA WAS NOT MORE AT FAULT THAN BRIGHTHOUSE, THE TRIAL COURT ERRED BY FINDING THAT BRIGHTHOUSE WAS NOT MORE AT FAULT THAN EEA

The trial court on remand found that by April of 2010 Brighthouse was on inquiry notice of the void nature of the Policy. OB Ex A. at 15. The trial court also found that Brighthouse had *actual knowledge* that the Policy was the product of a criminal fraud by October of 2011. *Id.* at 21-22. The trial court further found that Brighthouse "could have informed the policy holder of the void nature of the policy and stopped collecting premiums" but that it instead kept silence and did *nothing* except collect premiums. *Id.* Yet, in the face of these facts—none of which are mentioned at all in Brighthouse's argument (AB 43-58)—Brighthouse urges this Court to affirm the trial court's holding that it is entitled to retain the premiums paid by EEA—the rights to which were later purchased by Geronta—during EEA's ownership of the Policy. This Court must not countenance a holding that would permit an insurance company with both inquiry notice and *actual knowledge* that one of its policies is void due to criminal fraud to retain premium payments made on the policy by downstream purchasers after the date of the insurance company's inquiry notice where, as here, those downstream purchasers neither played a role in the fraudulent scheme that led to placing of the policy nor had actual knowledge that the policy was void, and the insurance company kept silent about what it knew.

A. Brighthouse's Argument That It Was Not Unjustly Enriched By The Premiums Paid On The Policy By EEA Misstates The Law.

Brighthouse argues that Geronta is not entitled to the premiums EEA paid because Geronta "was not impoverished" by EEA's payment of premium to Brighthouse. AB 43-45. This argument is wrong on the facts and the law. Brighthouse stipulated to the fact that when Geronta purchased the Policy from EEA it also purchased the rights to the premiums paid on it by EEA, as well as the rights to any claims or actions arising from the Policy. (A723, ¶ 151; A3677-3680; A3685-86, § 2.01.) Indeed, Brighthouse concedes elsewhere that Geronta is EEA's assignee. AB 46-47.

The two STOLI cases cited by Brighthouse—*Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, C.A. No. 20-00735 (D. Del. Sept. 25, 2023) ("*Cohen & Romano*") and *Sun Life Assurance Co. of Canada v. Wells Fargo Bank, N.A.*, 44 F.4th 1024 (7th Cir.) ("*Corwell*")—support Geronta's position. In each of *Cohen & Romano* and *Corwell*, the crux of the analysis focused on the fact that each defendant seeking to recover premium payments was acting in a securities intermediary capacity, i.e., neither was the beneficial owner of the policies at issue. *See Cohen & Romano*, AB, Ex. B at 12, 19 (stating that "whether, under Delaware law, a securities intermediary can recover premiums paid by prior owners is still up in the air" and predicting this Court would conclude they are not); *Corwell*, 44 F.4th at 1038 ("Wells Fargo has never had a beneficial interest in the Corwell policy and never used its own money to pay premiums. It was always only a 'securities intermediary,' i.e., a conduit for the (hidden and complicit) beneficial owners."). Each reviewing court nevertheless appeared to endorse the view that a beneficial owner can assert claims for premiums paid by prior owners. *Cohen & Romano*, AB Ex. B at 19 ("The payments made by Viva's predecessors-in-interest were not payments made by Viva in return for a promise that is unenforceable, and Wilmington Trust is not arguing that it or Viva is the assignee of any prior owner's claims for restitution."); *Corwell*, 44 F.4th at 1038 ("Wells Fargo also did not offer evidence or argument in the district court that would let Vida assert claims for itself to the premiums that AIG and Blackstone paid through Wells Fargo.").

Finally, Brighthouse's "emphasis on 'impoverishment" runs contrary to Delaware law. Restitution may be awarded "solely on the benefit conferred upon the defendant, even in the absence of an impoverishment suffered by the plaintiff." *Metcap Secs. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *5 n.26 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009). *See also Garfield v. Allen*, 277 A.3d 296, 345 (Del. Ch. 2022) (citing 2 Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 16.01[b], at 16-19 n.85 (2d. ed. 2021)) ("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."); *Nemec v. Shrader*, 991 A.2d 1120, 1130, n.37 (Del. 2010) ("Impoverishment does not require that the plaintiff seeking a restitutionary remedy suffer an actual financial loss, as distinguished from being deprived of the benefit unjustifiably conferred upon the defendant.").

B. Brighthouse's Argument That The Law Does Not Permit A Refund To Geronta Of Premiums Paid By EEA Is Wrong.

Brighthouse seems to suggest that that law forbids downstream purchasers of STOLI policies from seeking a refund of policy premiums paid by others. AB 45. But Brighthouse's argument ignores the fact, as noted *infra*, that Geronta purchased all rights to the premiums paid by EEA on the Policy. That fact is critical because it distinguishes this case from the list of irrelevant cases Brighthouse cites (at AB 45-46) as support that courts in other jurisdictions refuse to "refund to the current owner the premium it did not pay." *None* of the cases cited by Brighthouse involve a party seeking return of premium payments paid by predecessors where the party seeking return had purchased the rights to those premiums.

For instance, in *Sun Life v. U.S. Bank*, 2016 WL 3948059, at *2 (S.D. Fla. Jan. 14, 2016) ("*Malkin*"), *aff'd*, 693 F. App'x 838 (11th Cir. 2017), the court specifically noted that "whether Coventry and U.S. Bank intended the purchase price paid for the Malkin Policy to encompass previously-paid premium payments was not properly brought before this Court on summary judgment." In *Sun Life*

Assurance Co. of Canada v. Wells Fargo Bank, NA, 2016 WL 6824367, at *1 (D.N.J. Nov. 17, 2016), *aff'd*, 779 Fed. Appx. 927 (3d Cir. 2019), the court found there was no "factual nexus" connecting the third party payments to the defendant who was seeking their return. And in none of the other opinions is mention made of an assignment of the right to the premiums paid by the predecessor(s) to the party who was seeking their refund. The cases are, in a word, irrelevant to the facts at issue here.

Moreover, this Court has at least impliedly held that in certain circumstances a downstream purchaser of a life insurance policy that is later found to be void *ab initio* may recover the premiums paid by the former owners of the policies. The question was explicitly at issue in *Wilmington Trust v. Sun Life*, 294 A.3d 1062, 1078 (Del. 2023) ("*De Bourbon & Frankel*"). In that case the current holder of the policies at issue, Wilmington Trust, was seeking to recover the premiums paid by the former owners of the policies. This Court directed the Superior Court on remand to resolve that question pursuant to the fault-based analysis announced in *Seck I*. *Id.* at 1076-1077. In other words, and at the very least, this Court has already held that where, as here, a downstream purchaser of a policy void *ab initio* can demonstrate that its predecessors were less at fault than the insurance company who issued the policy it may recover the premiums paid by those prior owners. Brighthouse's implication that the law is otherwise is wrong.

C. Brighthouse Is More At Fault Than EEA Because It Was On Inquiry Notice That The Policy Was Void, And Because It Also Had Actual Knowledge That The Policy Was Void.

1. Brighthouse ignores the facts that prove that it was more in the wrong than EEA.

The trial court on remand held that Geronta was not entitled to the premiums paid to Brighthouse by EEA because "Geronta has failed to prove EEA was less at fault than Brighthouse." OB Ex. A. at 24. The trial court's conclusion in that regard was error because in reaching that conclusion it gave no weight at all to its own finding that, although EEA and Brighthouse were on inquiry notice as to the void nature of the policy at roughly the same time, Brighthouse—and *only Brighthouse*—had actual knowledge that the Policy was a criminal fraud and did nothing in response to that knowledge. Brighthouse ignores these same facts in its argument here. And even though the trial court held that EEA was on inquiry notice as to the fact that the Mansour Seck insured by the Policy did not exist, its failure to investigate in response would have only led it to discover *what Brighthouse already and actually knew*. Similarly, although the trial court found that when Brighthouse learned some time between April of 2010 and October of 2011 that the Policy was void as the product of a criminal fraud it remained silent and continued to collect premiums from EEA (and later Geronta) (OB Ex. A. at 21-22), it gave no weight to that fact at all when it compared EEA's wrongfulness to Brighthouse's. Respectfully, the trial court's failure to hold that Brighthouse's *actual knowledge* and silence does not make it more in the wrong than EEA's failure to investigate is contrary to common sense.

Brighthouse's self-serving attempt to engage in the comparative fault analysis suggested by *Seck I* should be rejected by this Court out of hand because Brighthouse's argument does not acknowledge its own wrongful conduct *at all*. Brighthouse makes no attempt to compare its wrongful conduct with the facts supporting EEA's inquiry notice as found by the trial court. After all, a comparative fault analysis perforce assumes that the ledger has two sides—Brighthouse wholly ignores their side of the equation. Brighthouse's argument makes no mention *at all* of the following facts:

- In November and December of 2009 two of Brighthouse's investigators were investigating Pape Seck (the fraudster) for attempting to place possible STOLI policies with Brighthouse (A3562-3565; A708-710, ¶¶71-75.) while at the same time they were alerted to "strong IOLI flags" that had been associated with the Policy (A707, ¶ 62; A3550-3551; A3552-3561.)

- On April 26, 2010 Brighthouse received a subpoenaed from the New Jersey Office of Insurance Fraud Prosecutor of the NJAG for all documents pertaining to the Policy. (A715, ¶103' A.3576).

- On April 27, 2010, even though the subpoena did not mention Pape Seck, Brighthouse added him to its Do Not Appoint List. (A1973-1974; A3732-3734.)

- On April 28, 2010, someone at Brighthouse printed out the April, 2010 press release that announced that Pape Seck had pleaded guilty to insurance fraud for placing multiple policies in the name of a fictious Pape Seck who never applied for the policies. and placed it in Brighthouse's files. (A715, ¶105; A3577-3578; A1978.)

- On October 17, 2011 the NJAG issued a second press release (the "October 2011 Press Release") which announced that Pape Seck had pleaded guilty to insurance fraud by making fraudulent statements to insurance companies, including Brighthouse, in policy applications. The October 2011 Press Release thanked Brighthouse for its cooperation with the investigation, which strongly implies that Brighthouse was aware that the Policy was likely a criminal fraud long before the conviction was announced. (A720, ¶¶128–131; A3786-3787.) Seck pleaded guilty to fraud involving the Policy in October 2011.

- On October 26, 2011 an investigator in Brighthouse's claims investigation unit ("McCarthy"), sent an email discussing Pape Seck's conviction that included the name "Mansour Seck," the Policy number, and Pape Seck's name and Brighthouse broker number in its subject line. (A3579.)

- Brighthouse never shared any of those facts with EEA. A711, ¶¶83,85, A715 ¶ 108, A720 ¶132,

Similarly, the trial court made no mention of any of these facts in the section of its Remand Decision that compared the relative fault of Brighthouse and EEA, despite the fact that the trial court found all of them to be proved. OB Ex. A. at 6-7; 23-25.

Brighthouse's attempt to avoid the above facts, and the trial court's failure to account for them in its analysis when comparing the fault of EEA against that of Brighthouse, is in derogation of this Court's clear command in *Seck I:*

> A court analyzing the exceptions outlined in Section 198 should consider the following questions: **whether the party knew the policy was void at purchase or later learned the policy was void**; whether the party had knowledge of facts tending to suggest that the policy is void; whether the party procured the illegal policy; whether the party failed to notice red flags; and whether the investor's expertise in the industry should have caused him to know or suspect that there was a substantial risk that the policy it purchased was void.

Seck I at 72-73 (emphasis added). The very first inquiry that this Court directed the trial court to undertake was a determination as to whether either (or both) of the parties knew or later learned that the Policy was void. Brighthouse—and *only* Brighthouse—knew that the Policy was void. Neither Brighthouse nor the trial court make any mention of that fact *at all* in their respective analyses of the Section 198(b). OB Ex. A. at 24-25.

Although the trial court found that both EEA and Brighthouse were each on inquiry notice as to the void nature of the Policy at approximately the same time in 2010, the trial court went on to criticize EEA's failure to investigate further, and its continued premium payments, while ignoring that all of that happened only because Brighthouse, who had *actual knowledge* that the Policy was void by no later than October 2011, remained silent and kept cashing those premium payment checks. *Id.* The trial court's error flies in the face of this Court's admonition that the fault-abased analysis in *Seck I* "incentivizes insurers to speak up when the circumstances suggest that a policy is void for lack of an insurable interest because they will not be able to retain the premiums if the stay silent…" 284 A.3d at 72.

What purports to be Brighthouse's analysis comparing its relative fault with that of EEA's makes no mention *at all* of any of the facts listed above. Though Brighthouse may wish it were otherwise, the timeline here indeed tells the tale. The single set of facts identified by Brighthouse to argue that EEA was on inquiry notice before April of 2010 (the date ascribed by the trial court of Brighthouse's inquiry notice) relate to representations to EEA by Mansour Seck's purported doctors that he was no longer a patient. AB 50. Brighthouse's brief puts a litigation spin on the fact that was actually proved at trial. In reality, the evidence was only that several doctors listed as being Mansour's Seck's physicians at the time of his original Policy application in 2007 said that he was not a current patient of theirs in 2010. A712; *Seck I* at 53.

There is irony in Brighthouse's reliance upon that fact in support of its claim. During its underwriting process for the Policy, Brighthouse waived its own underwriting requirement to have Mansour Seck sit for a "full exam performed by a medical doctor" to include a full health history." A704, ¶ 41. Brighthouse instead wrote a $5 million dollar life insurance policy on the life of a 75 year-old man on the strength of a one page handwritten medical history that was supposedly written by a doctor in France. Brighthouse did *nothing* to verify whether the doctor actually existed. A702, ¶ 33, 1826–1828. And if those doctors who refused to confirm to EEA that Mansour Seck was a patient of theirs in 2010 were contacted by Brighthouse itself in 2007 presumably they would have said the same thing—But Brighthouse never bothered to ask.

Brighthouse castigates EEA for running a public records database search that showed no records for a Mansour Seck that matched the pedigree information provided in the Policy application. AB 50. But Brighthouse ignores the hypocrisy inherent in its argument: Brighthouse *never* ran a public records database search to identify records pertaining to Mansour Seck. EEA did so in October of 2011—16 months *after* the events of April 2010 that placed Brighthouse on inquiry notice that the Policy was void, and at least a year after Brighthouse began its cooperation with prosecutors that eventually led to Pape Seck's conviction for insurance fraud involving the Policy in October 2011. A719, ¶ 124.

Worse yet, Brighthouse's investigators *did* run a public database search during the course of their investigation of Pape Seck in December of 2009 which identified Mansour Seck as his possible relative, and which revealed that the address given by Mansour Seck in the Policy application was in a neighborhood with a median *annual* income of $32,625. A708, ¶¶ 67-69. This was inconsistent with Mansour Seck's claimed net worth of $18 to $20 *million* dollars and an *annual* income of $2 million. A699, ¶¶ 19, 22. And Brighthouse *never* mentions that it did absolutely *nothing* during its underwriting process to independently verify Mansour Seck's claimed net worth and income. A699, ¶ 21. At the time the Policy was written, Brighthouse's general underwriting guideline required the presentation of a personal financial statement for any policies with a value in excess of $1 million. A.1853-1855. But, as with its requirement of obtaining a full medical history from a licensed physician, Brighthouse waived the requirement.

Brighthouse attempts to deny the importance of its investigation of Pape Seck in 2009 because "he was not the writing broker for the Policy and there was no indication that [he] was using fictitious insureds…" AB 55. But Brighthouse again ignores the fact that it was investigating Pape Seck in December of 2009 for attempting to place IOLI policies, and during that investigation the assigned investigators ran the public records database printout that linked Pape Seck and Mansour Seck together as possible relatives. A707-709. ¶¶ 64-67. They were the same two investigators who were alerted during the same time to the "strong IOLI flags" connected with the sale of the Policy. A709, ¶ 74; A711, ¶ 84. And, by April of 2010 Brighthouse had *actual knowledge* that its broker, Pape Seck, was creating a fictitious Mansour Seck and placing insurance policies in his name. After all, Brighthouse printed out the April 2010 Press Release announcing Pape Seck's criminal conviction for insurance fraud by creating a fictitious Mansour Seck and placed it in the files for this Policy. Brighthouse was therefore aware of the relationship between Pape Seck and the Policy. To argue that this sequence of events is "irrelevant," as Brighthouse does (AB 55) strains credulity well past the breaking point.

Brighthouse further protests that EEA did not bring any of the alleged "red flags" that it uncovered during its unsuccessful attempts to contact Mansour Seck to its attention. AB 51. But Brighthouse ignores the fact that it never told EEA (or

Geronta) *anything* about its suspicions that Pape Seck was attempting to place void IOLI polices, the April 26, 2010 subpoena from the NJ Office of Insurance Fraud Prosecutor for information about the Policy, the fact that Brighthouse suspected a connection between the Policy and Pape Seck (the convicted insurance fraudster), or its cooperation with the criminal prosecution of Pape Seck for insurance fraud pertaining to the Policy. And, of course, Brighthouse never told EEA (or Geronta) that it had *actual knowledge* that the Policy was void because of criminal fraud. Instead, Brighthouse remained silent and cashed premium checks paid by EEA (and Geronta) on a policy that it knew would never pay a death benefit.

For the first time in the course of this litigation in this Court, Brighthouse is now advancing the claim that EEA had actual knowledge that Mansour Seck was "fake." AB 52. Respectfully, Brighthouse's claim is nonsense. Neither the trial court in its post-trial findings, nor on remand, ever found such to be true. The only documents cited by Brighthouse in support of its argument are pre-litigation demand letters written by Geronta's counsel in 2016 to EEA, several years before this litigation began and years before discovery was taken from either Brighthouse or EEA. AB 52-53. The trial court has twice now declined Brighthouse's claim that EEA had actual knowledge of the fraud. This Court should do the same.

2. **Application of the five-part test announced in *Seck I* for use when conducting the comparative fault analysis outlined in Section 198 clearly shows that Brighthouse is more in the wrong than EEA.**

Like the trial court on remand, Brighthouse *completely ignores* the five-part inquiry that this Court directed the trial court to apply when analyzing the exception set forth in Section 198(b). Incredibly, Brighthouse does not discuss, quote, or cite to the five-part test *at all*. One can easily see why: an application of that test to Brighthouse *vis-a-vis* EEA clearly demonstrates that Brighthouse is more clearly in the wrong. First, as discussed in Section II.C.1 *infra*, Brighthouse—and only Brighthouse— ever actually knew that the Policy was void (by no later than October of 2011). Second, Brighthouse had knowledge of facts tending to suggest that the Policy was void by April of 2010 by virtue of its receipt of the subpoena from NJAG and its association of the April 2010 Press Release with the Policy. Third, although neither party knowingly procured an illegal policy it was Brighthouse who wrote the Policy after waiving many of its own underwriting guidelines. Brighthouse was obviously in a better position than EEA to prevent the sale of an illegal policy in the first instance. Fourth, both EEA and Brighthouse ignored "red flags" in 2010, though Brighthouse refuses to concede that point. Fifth, although EEA may have had reason to suspect that the Policy was void sometime after it purchased the Policy there was no reason for EEA to think so at the time of the purchase.

The facts—including the timeline on which they occurred—when analyzed pursuant to the Section 198 framework announced by this Court in *Seck I* clearly establishes that Brighthouse was more in the wrong than EEA.

III. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT SOUND PUBLIC POLICY STRONGLY FAVORS BRIGHTHOUSE KEEPING ALL PREMIUMS PAID TO IT BY EEA

To be plain: Brighthouse is arguing for a holding that will reward an insurance company with actual knowledge that one of its policies was void *ab initio* for criminal fraud, and which thereafter keeps that knowledge to itself, by allowing it to keep the premiums it collects after it was first on inquiry notice as to that fact. Such a holding is unjust and untenable, and contrary to this Court's expressed preference for a regime that incentivizes insurers to speak up in such circumstances. Public policy would be far better served by a rule that says if an insurance company has actual notice that a policy is void it must the refund the policy payments it collects once it is on inquiry notice unless a subsequent purchaser played a role in procuring the fraudulent policy.

A. To Permit Brighthouse To Retain the Premium Payments Made By EEA Would Constitute A Disproportionate Forfeiture Within the Meaning of Section 197 Of The Restatement.

This Court has held that when considering whether to return the premiums paid on insurance policies declared void *ab initio* for lack of an insurable interest, one factor that a reviewing court must consider is "whether there would be a disproportionate forfeiture if premiums are not returned." *Seck I*, 284 A.3d at 72. This Court has further explained that:

> [w]hether the forfeiture is 'disproportionate' for the purposes of Seaction 197 will depend on the extent of that denial of compensation

> as compared with the gravity of the public interest involved and the extent of the contravention. Specifically, the court should consider "the party's deliberate involvement in any misconduct, the gravity of that misconduct, and the strength of the public policy.

Id. at 69. The trial court on remand reasoned that Section 197 did not justify an award of restitution to Geronta because "EEA suffered no forfeiture." OB Ex. A at 26. Brighthouse makes the same argument. AB 56. The trial court's reasoning is flawed because when Geronta purchased the Policy from EEA it also purchased the rights to the premiums paid by EEA, as well as all claims and causes of actions flowing from the Policy. Obviously, those rights were baked into the purchase price Geronta paid for the Policy, which would have been less if those rights were stripped out of the deal.

Neither the trial court nor Brighthouse cite to any authorities that stand for the proposition that a subsequent purchaser cannot stand in the shoes of a predecessor for the purposed of Section 197 analysis. In fact, and to the contrary, Brighthouse argues elsewhere that "it is black letter law that an assignee stands in the shoes of its assignor." AB 46. Brighthouse does not explain how if that is so the principle does not extend to Section 197. Brighthouse also fails to explain the logic or public policy rationale that would support its construction of Section 197, which is that an otherwise disproportionate forfeiture vanishes, thereby enriching the other party, if the original claimant sells the rights to the claim to a successor.

Both the comments to Section 197 and, most importantly, this Court's interpretation of its applicability make it clear that "the strength of the public policy" at issue are critical to Section 197 analysis. *Seck I* at 69. This Court emphasized that "[w]hether the forfeiture is 'disproportionate' for the purposes of this Section will depend 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.,* quoting Restatement (Second) of Contracts § 197 cmt b. The trial court erroneously cabined the requisite public policy considerations by finding that Section 197 is "most appropriate in the case of technical rules or regulations…" OB Ex. A. at 26. But the trial court misunderstood the import of comment b. to Section 197. Comment b. actually reads: [t]he exception is *especially appropriat*e in the case of technical rules or regulations that are drawn so that their strict application would result in such forfeiture if restitution were not allowed." Restatement (Second) of Contracts § 197 (emphasis added). The trial court erred by reading the phrase "especially appropriate" as "only appropriate." For its part, Brighthouse makes no effort at all to explain how public policy is not contravened by allowing an insurance company to retain the proceeds it collected on a void *ab initio* insurance policy after it is on inquiry notice that the policy is void, and then on *actual notice* that the policy is void, and thereafter does nothing except remain silent and collect premiums. Brighthouse ignores the elephant in the room.

The trial court similarly erred when it found, with little analysis, that permitting Brighthouse to retain the premiums paid by EEA would not be contrary to the public interest. OB Ex. A. at 26. This Court explicitly said, in *Seck I,* that public policy should incentivize insurers to "speak up" when they become aware of circumstances that suggest one of their policies is void for lack of an insurable interest. *Seck I*, 284 A.3d at 72. Here, Brighthouse was not merely aware of circumstances suggesting that the Policy was the product of a criminal fraud committed by one of its agents, *it had actual knowledge of the fact.* Yet, the trial court rewarded Brighthouse for its choice to keep silent by allowing it to retain $706,478.29 in premium payments made by EEA. That is precisely the opposite of the intent of this Court's comparative-fault analysis. The unavoidable fact is that had Brighthouse cancelled the Policy when it learned the Policy was the product of a criminal fraud this litigation would have never happened. This Court must not allow Brighthouse to profit from its silence and inaction.

By filing suit against Geronta, Brighthouse defined the contest over the rights to the premium payments made by EEA as a zero sum game. Either Geronta, who purchased the rights to those premiums, will be allowed to recover them in restitution or Brighthouse will be allowed to keep them. Public policy cannot permit an insurance company to retain the premiums it collects on a policy when it has *actual knowledge* that the policy is void *ab initio* because it is the product of criminal fraud.

IV. GERONTA DID NOT WAIVE PREJUDGMENT INTEREST

In *Seck I*, Geronta appealed the entirety of the trial court's post-trial judgment and sought clarification on the correct legal remedy available to claimants seeking premium payments on a life insurance policy declared void *ab initio* for lack of insurable interest. Thus, whether prejudgment interest was available, in particular as it relates to premiums paid by EEA, was not ripe until this Court ruled in *Seck I*. Indeed, depending on the legal remedy, it was possible that the Court could have determined prejudgment interest would be unavailable. But notably, the Court did not do so. Instead, as a matter of first impression, the Court "recognized the role prejudgment interest plays in incentivizing the parties to potentially illegal agreements to behave in good faith." *De Bourbon & Frankel*, 294 A.3d 1062, 1078 (Del. 2023) (citing *Seck I*, 284 A.3d at 72). The Court's remand to the trial court therefore carried with it an implicit understanding that Geronta would be awarded prejudgment interest if entitled to restitution under the newly articulated fault-based test. Geronta proved precisely that.[3]

Brighthouse does not tackle any of the aforementioned circumstances or aspects of Geronta's argument. AB 59-60. Nor does Brighthouse address (let

[3] For the avoidance of doubt, Geronta seeks prejudgment interest on any and all of its ultimate restitution award, including the premiums paid by EEA.

alone attempt to distinguish) the cases that Geronta cited in support of its waiver argument. In fact, Brighthouse's argument is devoid of any legal citations. *Id.*

What Brighthouse offers instead is a contrived interpretation of events following the trial court's initial post-trial decision. AB 59. For instance, Brighthouse contends that Geronta was barred from raising prejudgment interest on remand because it had "stipulated to the contrary" earlier in the case. *Id.* But what Brighthouse ignores is that any stipulated judgment was required to reflect the scope of the trial court's actual award, which did not include prejudgment interest. OB. Ex. A at 65. It is disingenuous for Brighthouse to intimate that Geronta should have (or could have) preserved its rights by exceeding the trial court's award and including prejudgment interest in any proposed stipulated judgment. Nor would Brighthouse have agreed to such a stipulation.

Even if trial court's finding of a waiver is subject to a plain error standard of review, as Brighthouse contends (AB 59), the trial court's prejudgment interest decision on remand should be reversed. Indeed, it was plain error for the trial court to award Geronta its premiums payments based, in part, on public policy considerations to incentivize insurers to speak up, yet ignore the critical role that prejudgment interest plays in enforcing that public policy. *See N. Am. Leasing, Inc. v. NASDI Holdings, LLC*, 276 A.3d 463, 470 (Del. 2022) ("In order for this Court to find plain error, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”). Brighthouse again does not address Geronta’s argument on the issue.

<u>SUMMARY OF ARGUMENT ON CROSS APPEAL</u>

1) Denied. The trial court correctly concluded that Brighthouse was procedurally barred from arguing that Geronta failed to prove the lack of an adequate remedy at law and thus did not satisfy the elements of an unjust enrichment claim. Brighthouse waived that argument by failing to brief it on appeal in *Seck I* and such argument was beyond the scope of the mandate on remand. Even if Brighthouse's argument is considered, it fails as a matter of law. In *State ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372, 390-91 (Del. 2023), the Court was unequivocal that proof of the "absence of an adequate remedy at law is required only if an unjust enrichment claim is brought in the Court of Chancery and there is no other independent basis for equitable jurisdiction." Here, Geronta sought a legal remedy for its counterclaim, and not equitable relief, which was heard in Superior Court, and not the Court of Chancery. Thus, Geronta was not (nor ever) required to prove the absence of an adequate remedy at law.

2) Denied. The trial court on remand properly applied the fault-based test announced by this Court in *Seck I* and correctly determined that Brighthouse was more at fault that Geronta in accordance with Restatement Section 198(b) because Brighthouse had inquiry notice that the Policy was void for lack of an insurable interest several years before Geronta. Moreover, Brighthouse had actual notice that the Policy was the product of a criminal fraud. Yet, Brighthouse sat silent and

collected premiums from EEA and Geronta so that it could capture a windfall on a policy where Brighthouse knew the risk of paying out a death benefit was zero.

ARGUMENT ON CROSS APPEAL

I. THE TRIAL COURT WAS CORRECT TO PROCEDURALLY BAR BRIGHTHOUSE'S ATTEMPT TO RELITIGATE WHETHER GERONTA HAD PROVEN UNJUST ENRICHMENT.

A. Question Presented.

Whether Brighthouse waived its ability to argue on remand that Geronta had not proven its unjust enrichment claim, or, alternatively, whether Brighthouse's argument fell outside the scope of this Court's mandate on remand.

B. Scope of Review.

Questions of law are reviewed *de novo*. *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1064 (Del. 2011).

C. Merits of Argument.

Geronta agrees with Brighthouse that, prior to *Seck I*, Brighthouse made repeated, unsuccessful attempts to convince the trial court that Geronta could not prove its unjust enrichment counterclaim, in particular the element regarding the absence of an adequate remedy at law. *See* AB 30. The trial court on remand agreed, and it held that "[t]his Court previously rejected Brighthouse's argument that Geronta must first prove…unjust enrichment." OB. Ex. A at 10. Despite its lack of success, Brighthouse did not appeal on that issue or argue it in its appellate brief in *Seck I*. *See Geronta Funding v. Brighthouse Life Ins. Co.*, No. 380, 2021, Dkt. 33. Established Delaware law confirms that Brighthouse waived its right to make its unjust enrichment argument on remand. S*ee Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.") (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)). To emphasize the point, the phrase "unjust enrichment" appears just three times in Brighthouse's Answering Brief in *Seck I*: twice to cite to the Restatement (Third) of Restitution and Unjust Enrichment (one of which was in the table of authorities) and once to support that the Superior Court can award restitution in the form of a money judgment as a remedy to unjust enrichment. Moreover, the phrase "adequate remedy at law" appears precisely zero times in Brighthouse's Answering Brief in *Seck I.*

The only way in which Brighthouse did not waive its unjust enrichment argument is if the Court credits statements made by Brighthouse's counsel during the *Seck I* oral argument. It was only those statements that Brighthouse could point to on remand support that it raised its unjust enrichment argument on appeal. The Court should not do so and adhere to Delaware precedent like *Emerald Partners*. Indeed, Brighthouse presents no authority to support that statements by counsel at argument can ameliorate a waiver worked by the failure to brief an issue.

Even if Brighthouse is not deemed to have waived its unjust enrichment argument, the trial court was correct to bar it on grounds that it fell outside the scope of this Court's mandate on remand. The Court remanded so that the trial court could have an opportunity to "reconsider its factual findings" and specifically determine "whether either party had inquiry notice of the void nature of the Policy." *Seck I*, 284 A.3d at 75. The remand *did not* direct the trial court to re-examine, as a threshold matter, whether Geronta had a viable unjust enrichment claim. *See id.* As the trial court pointed out, had this Court wished the trial court to "revisit its finding regarding the issue of whether Geronta must prove the elements of unjust enrichment *plus* a Restatement exception, it would have said so." *See* OB, Ex. A at 10-11. Instead, the Court was silent on the issue rejecting by clear implication that Geronta's unjust enrichment claim was not viable. *See Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 860 (Del. 2008) ("The trial court is required to implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.").

Irrespective of any waiver or mandate argument, Brighthouse is wrong as a matter of Delaware law that Geronta is (or ever was) required to prove "the absence of a remedy at law" to state an unjust enrichment claim. The Court has explained that "unjust enrichment is historically a legal, not an equitable claim." *Monsanto*, 299 A.3d at 391 (citing *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 496-97 (Del. 2003)). Lest there be any doubt regarding the elements of unjust enrichment, the Court clarified unequivocally in *Monsanto* that "[t]he absence of an adequate remedy at law is required only if an unjust enrichment claim is brought in the Court of Chancery and there is no other independent basis for equitable jurisdiction." *Id.* Thus, "[o]utside of a dispute over jurisdiction, [] it is not necessary for a plaintiff to plead or later prove the absence of an adequate remedy at law." *Garfield on behalf of ODP Corp. v. Allen*, 277 A.3d 296, 351 (Del. Ch. 2022) (cited with approval in *Monsanto*, 299 A.3d at 391 n.115).

In accord with *Monsanto*, Geronta was never required to prove "the absence of an adequate remedy at law" to succeed on its unjust enrichment claim because Geronta asserted its unjust enrichment counterclaim in Superior Court and sought a legal restitution remedy. This dispute was never litigated in the Court of Chancery and never involved a dispute over subject-matter or equitable jurisdiction. Notably, Brighthouse does not challenge any other element of unjust enrichment.

Brighthouse's assertion that "an investor like Geronta, that is relying on unjust enrichment as its viable legal theory, cannot recover premium [*sic*] if it has a legal remedy against its predecessors in interest (i.e., up its commercial chain)" (AB at 29) stems from an incomplete assessment of the Court's *Wells Fargo v. Estate of Malkin*, 278 A.3d 53, 69 (Del. 2022) decision.[4] In *Estate of Malkin*, an estate sued the final owner of a STOLI policy and its securities intermediary to recover a paid-out death benefit under 18 *Del. C.* § 2704(b). *See* 278 A.3d at 59. In response, the policy owner asserted an equitable unjust enrichment counterclaim

[4] Counsel for Brighthouse in this appeal was counsel for the estate in the *Estate of Malkin* appeal.

to recover the premiums it paid "as a restitutionary offset" to the estate's recovery. *Id.* at 69. Accordingly, the Court set forth the elements under Delaware law for "an ***equitable claim*** of unjust enrichment" and included "the absence of a remedy provided by law" as the fifth element. *Id.* (emphasis added). And it was within the equitable unjust enrichment context that the Court noted the policy owner may be unable to demonstrate an entitlement to a restitutionary offset in the face of a potential claim against a predecessor owner for violating a contractual promise. *See id.* at 70.[5] The circumstances in the *Estate of Malkin* are further distinguishable because, here, there was no death benefit paid-out by Brighthouse on the Policy and this is not a statutory proceeding under 18 *Del. C.* § 2704(b).

[5] The *Estate of Malkin* appeal was presented to the Court by certified question from the Eleventh Circuit. Accordingly, the Court did not definitively rule on whether the policy owner could prove its unjust enrichment theory. *See id.* at 69 ("Whether or not this claim will ultimately be a winner for Berkshire depends on determinations still to be made by the factfinder. Below, we briefly address some of the legal issues presented by the certified question.").

II. THE TRIAL COURT CORRECTLY AWARDED GERONTA THE PREMIUMS IT PAID ON THE POLICY BECAUSE BRIGHTHOUSE WAS MORE AT FAULT THAN GERONTA

A. Question Presented.

Whether the trial court correctly determined that Geronta is entitled to the premiums it paid on the Policy in restitution because, under Section 198(b), Brighthouse was more in the wrong than Geronta.

B. Scope of Review.

Questions of law are reviewed *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument.

In *Seck I,* this Court carefully laid out the five factors that Delaware courts should address when determining whether and when to order the return in restitution of premiums paid on insurance policies later declared to be void *ab initio* for lack of an insurable interest. The Court further made it manifestly obvious that the inquiry was to be a comparative fault analysis, as described by Restatement Section 198, and it directed reviewing courts to apply a five-part test to determine whether the exceptions set forth in Section 198 are applicable. *Seck I*, 284 A.3d at 72-73. Lastly, the Court ordered the trial court on remand to "specifically consider whether either party had inquiry notice of the void nature of the Policy." *Id.* at 78.

Despite the clear command of this Court, with considerable hubris Brighthouse completely ignores both of the tests prescribed in *Seck I,* attempts to rewrite the tests to suit its own purposes and avoid the import of fatal factual weaknesses, and criticizes the trial court for focusing on the question of inquiry notice as the Court directed. But when the law as applied as directed by this Court to the facts as found by the trial Court is abundantly clear that the trial court's decision that Brighthouse was more in the wrong than Geronta, and was therefore entitled to the return of the premiums it paid for the Policy, was correct.

With unmistakable clarity, this Court held in *Seck I* that, on remand, the trial Court was to determine whether Geronta was entitled to recover the premiums it paid on the Policy by and inquiry in "the fault of the parties and public policy considerations." *Seck I*, 284 A.3d at 73. The Court further explained that the trial court's inquiry was to be grounded in the exceptions outlined in Sections 197 and 198 of the Restatement, and that in so doing the trial court

> would need to determine whether: (1) there would be a disproportionate forfeiture if the premiums are not returned; (2) the claimant is excusably ignorant; (3) the parties are not equally at fault; (4) the party seeking restitution did not engage in serious misconduct and withdrew before the invalid nature of the policy becomes effective; or (5) the party seeking restitution did not engage in serious misconduct, and restitution would put an end to the situation that is contrary to the public interest.

Id. at 72. This test is neither mentioned nor quoted anywhere in Brighthouse's Opening Brief on Cross-Appeal. An application of the facts at hand to the relevant factors identified by this Court lays bare the reasons for Brighthouse's calculated omission: the factors announced as important by this Court compel the conclusion that Geronta was less in the wrong than Brighthouse.

First, it is clear that a disproportionate forfeiture would occur if Brighthouse was to be permitted to retain the premiums payments made by Geronta. As discussed *supra* at pp. 18-19, an essential element of the inquiry mandated by Sections 197 of the Restatement is “the nature of the public policy involved. *Seck I* at 69. Here, the trial court correctly found that Brighthouse was on inquiry notice that the Policy was *void ab initio* because it was the product of a criminal fraud by no later than April of 2010—*five years* before Geronta itself was on inquiry notice. OB. Ex. A. at 13-17. The trial court also found that Brighthouse had *actual knowledge* that the Policy was procured fraudulently by one of its agents no later than October of 2011. OB. Ex. A. at 11-12. And, the trial court found that Brighthouse failed to do anything in response to (first) its inquiry notice and (second) its actual knowledge, and instead it kept silent.

The trial court correctly recognized the public policy implications of this sequence of events. It held that:

> one of the policy rationales underlying the fault-based approach is to incentivize insurers to speak up when they are on notice that a policy may lack an insurable interest. If this Court were to conclude the parties here are at equal fault, then an insurer would not be incentivized to speak up when it suspects a policy lacks an insurable interest, but only to wait and see if the policy is sold on the secondary market to an investor who does not conduct any pre-acquisition diligence.

OB Ex. A. at 22.

Brighthouse makes no effort at all to explain how sound public policy could conceivably be furthered by rewarding Brighthouse for its inaction and silence. And make no mistake: Brighthouse's inaction was calculated. Brighthouse's Vice President in charge of sales investigations testified that once a policy had passed its two year contestability period its investigators would not "expend any time" on such policies, even if the fact of a criminal insurance fraud conviction. A3430-3440. And, of course, once Brighthouse had actual knowledge that the Policy was a criminal fraud it also knew that that it would never pay a death benefit on the Policy. The trial court correctly held that public policy would be ill-served by allowing Brighthouse to keep the fruits of its inaction.

The second part of the *Seck I* test was resolved against Geronta; the trial court held that Geronta was not excusably ignorant. OB Ex. A. at 21. That inquiry is set forth by Restatement Section 198(a), but trial court easily found that Restatement Section 198(b), which compels an inquiry into the comparative fault of the parties, required a finding that Geronta was less in the wrong than Brighthouse. The trial court was guided by the second of the two five-part tests announced in *Seck I*, which is specific to the comparative fault analysis of Section 198(b):

> A court analyzing the exceptions outlined in Section 198 should consider the following questions: whether the party knew the policy was void at purchase or later learned the policy was void; whether the party had knowledge of facts tending to suggest that the policy is void; whether the party procured the illegal policy; whether the party failed to notice red flags; and whether the investor's expertise in the industry should have caused him to know or suspect that there was a substantial risk that the policy it purchased was void.

Seck I, 284 A.3d at 72-73. Brighthouse completely ignores this test as well, and it is easy to see why: a faithful application of these factors leads to the inexorable conclusion that Geronta is entitled to the return of the premiums it paid because it was less in the wrong than EEA.

First, and most importantly, Brighthouse actually knew that the Policy was void no later than October of 2011. When Geronta finally came to that realization for itself more than five years had passed. Brighthouse illogically faults Geronta for discovering in 2015 what Brighthouse *actually knew* in 2011, and what it should have known by April of 2010. And notably, when Geronta informed Brighthouse of its suspicions that the Policy was a fraud (in 2017) Brighthouse *never* admitted that it was until Brighthouse filed this lawsuit in 2018. A729-730. This factor weighs decisively against Brighthouse.

Second, and similarly, Brighthouse had knowledge of facts “tending to suggest that the policy was void” no later than April of 2010. Geronta was first on inquiry notice in January of 2016—*five years later*. OB Ex. A. at 17. Brighthouse criticizes Geronta for not discovering the fact that the Policy was a fraud, but it never admits that what it criticizes Geronta for failing to discover was something Brighthouse itself had actual knowledge of since no later than October of 2011. Critically, had Brighthouse done *anything* in the five years following April 2010 in response to the fraudulent and void nature of the Policy, Geronta would never have been able to purchase it.

The third factor in the *Seck I* 198(b) analysis also weights against Brighthouse—it procured the illegal policy, albeit unwittingly. There is no claim that Geronta had any role at all in the writing and original sale of the Policy.

The fourth factor was correctly resolved by the trial court as weighing against Brighthouse, because although both parties were, or should have been, aware of "red flags," had Brighthouse investigated the red flags related to the Policy as early as April of 2009 "it would have discovered Mansour Seck was fictitious and could have informed the policy holder of the void nature of the Policy and stopped colleting premiums." OB Ex. A at 21. There is no reasonable rebuttal to the trial court's obvious conclusion.

Lastly, and unlike some of the other cases recently considered by this Court involving STOLI policies,[6] there is no evidence at all supporting the conclusion that Geronta knew or suspected that there was a substantial risk that the Policy was

[6] *See Wilmington Tr., Nat'l Ass'n v. Sun Life Assurance Co. of Canada,* 294 A.3d 1062, 1077 (Del. 2023), as revised (Mar. 21, 2023)

void when it was purchased. After all, Brighthouse itself responded to Geronta's pre-purchase inquiry about the policy by informing Geronta that it was "active." Moreover, Geronta's representatives testified at trial that although it was aware of the possibility of fraud in the life settlement market it viewed the risk of purchasing a void policy as "very low" A2323-2324. Geronta presumed that if a life insurance policy was underwritten by a reputable insurance company and was current for premium payments the risk of the policy lacking an insurable interest was small. A2324. The reasonableness of Geronta's assessment was borne out of the fact that out of the 188 policies in the tranche of polices purchased by Geronta that included the Policy, only the Policy was void. A2876-2877.

An application of the five-part tests that this Court carefully crafted to resolve the question of whether the premiums paid on an insurance policy declared to be void *ab initio* clearly and easily suggests that the trial court was correct: the premiums paid on the Policy by Geronta must be returned to it in restitution. This Court should not countenance Brighthouse's transparent attempt to re-write the *Seck I* tests to avoid their conclusive effect, much as it must reject Brighthouse's strategy of ignoring the consequences of its actual knowledge of the Policy's illegality through fraud. The public policy of this State must not be such that an insurance company with actual knowledge that one of its policies is void *ab initio* because of criminal insurance fraud can do nothing in response to that knowledge, remain silent about what it knows, and thereafter keep the premiums it collects.

CONCLUSION

This Court should reverse the trial court's determination that Geronta is not entitled to the premium payments made by EEA, the rights to which were purchased by Geronta. This Court should also reverse the trial court's denial of an award of pre-judgment interest to Geronta. Conversely, this Court should affirm the trial court's decision to refund to Geronta the premium payments that it paid itself. The law and sound public policy require no less.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2024, a true and correct copy of the **Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal** was served via File & ServeXpress on the following counsel of record:

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