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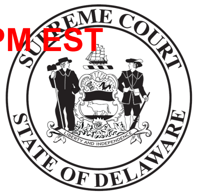

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERONTA FUNDING, Defendant/Counterclaim-Plaintiff Below, Appellant/Cross-Appellee	No. 374, 2023
v.	
BRIGHTHOUSE LIFE INSURANCE COMPANY,	Court Below: Superior Court of the State of Delaware
Plaintiff/Counterclaim-Defendant Below, Appellee/Cross-Appellant	C.A. No. N18C-04-028 PAW

CROSS-APPELLANT'S REPLY BRIEF ON CROSS APPEAL

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. THE LOWER COURT ERRED IN DECLINING TO CONSIDER WHETHER GERONTA PROVED THE ELEMENTS OF ITS VIABLE LEGAL THEORY. 2

II. GERONTA FAILED TO SATISFY A FAULT-BASED EXCEPTION. 15

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Emerald Partners v. Berlin,
726 A.2d 1215 (Del. 1999) 7

Geronta Funding v. Brighthouse Life Ins. Co.,
284 A.3d 47 (Del. 2022) ("*Seck*") .... *passim*

Holifield v. XRI Investment Holdings LLC,
304 A.3d 896 (Del. 2023) 11

State ex rel. Jennings v. Monsanto Co.,
299 A.3d 372 (Del. 2023) 9, 10, 11

Lavastone Capital LLC v. Estate of Berland,
266 A.3d 964 (Del. 2021) ("*Berland*") 10, 11, 19

Metcap Secs. LLC v. Pearl Senior Care, Inc.,
2007 WL 1498989 (Del. Ch. 2007 May 16, 2007) 12

PHL Variable Insurance Company v. Price Dawe 2006 Insurance Trust,
28 A.3d 1059 (Del. 2011) 10, 17, 19

Stryker Demolition v. Arcadis U.S., Inc.,
2020 WL 6588493 (Del. Super. Ct. Nov. 10, 2020) 12

Wells Fargo v. Estate of Malkin,
278 A.3d 53 (Del. 2022) ("*Estate of Malkin*") .... *passim*

Wilmington Trust v. Sun Life,
294 A.3d 1062 (Del. 2023) ("*Frankel & DeBourbon*") 7, 18

Statutes

18 *Del. C.* § 2704(b) 2, 9

Other Authorities

Restatement (Second) of Contracts §§ 197-99 5

INTRODUCTION

The lower court's decision that Geronta is entitled to restitution of all the premiums it paid was error. This is clear for two reasons.

First, Geronta's legal theory (unjust enrichment) is not viable because Geronta has contractual claims against EEA for misrepresenting the validity of the Policy. There is no dispute that Geronta has these claims and has tolled them under an agreement with EEA. Consequently, the presence of these other remedies defeats restitution. But on remand, the trial court declined to consider this, concluding that whether Geronta proved unjust enrichment was outside the scope of the mandate. This was error. This Court's mandate, to apply the newly-articulated test, necessarily encompassed this Court's requirement that an investor present a viable legal theory—especially considering that Geronta had argued (in the prior appeal) that it was never given the chance to prove its legal theory (unjust enrichment) at trial.

Second, even if Geronta's contractual remedies do not defeat restitution, the fact that Geronta is more at fault than Brighthouse does. Brighthouse conducted a robust investigation, issued the Policy in good faith, was the victim of the fraud, never knew the insured was fictitious, and always intended to pay the death benefit in good faith. Geronta conducted no investigation, strategically and willfully blinded itself in bad faith, and then stayed silent and continued to pay premium despite having "actual knowledge" that Seck was fictitious for nearly 15 months.

ARGUMENT

I. THE LOWER COURT ERRED IN DECLINING TO CONSIDER WHETHER GERONTA PROVED THE ELEMENTS OF ITS VIABLE LEGAL THEORY.

Geronta is not entitled to restitution of the premiums it paid because Geronta did not prove its "viable legal theory" of unjust enrichment. *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 50, 69-72 (Del. 2022) ("*Seck*"). Geronta has contractual remedies against the prior investor from whom it bought the Policy: EEA. And under this Court's clear holding in *Wells Fargo v. Estate of Malkin*, 278 A.3d 53, 70 (Del. 2022) ("*Estate of Malkin*"), the presence of Geronta's contractual remedies against EEA defeats the claim for restitution against Brighthouse.

As discussed in Brighthouse's Opening Brief (BH.OB. at 28-29),[1] in *Estate of Malkin*, this Court considered whether a downstream investor, sued under 18 *Del. C.* § 2704(b), could seek restitution of the premiums it paid into a policy declared void *ab initio* for lack of insurable interest. This Court held that the investor could try to seek restitution if it could prove a "viable legal theory," such as unjust enrichment, but that a claim for restitution would be defeated if the investor had contractual remedies against a prior owner—i.e., up the commercial chain. *Estate of Malkin*, 278 A.3d at 70. Here, it is undisputed that Geronta has contractual remedies

[1] "BH.OB." refers to Brighthouse's Answering Brief On Appeal/Opening Brief On Cross Appeal; "Ger.AB." refers to Geronta's Reply Brief On Appeal/Answering Brief On Cross Appeal.

against EEA; indeed, Geronta and EEA entered into a tolling agreement to allow Geronta to delay bringing those claims until the conclusion of this case (against Brighthouse). The presence of Geronta's contractual claims up its commercial chain is fatal to its claim against Brighthouse for restitution.

But when Brighthouse pressed this argument on remand (Dkt. 287 at 19-21; Dkt. 341 at 2-5), the lower court declined to consider it, concluding that whether Geronta was required to prove the elements of unjust enrichment was outside the scope of this Court's remand.[2] As previously explained (BH.OB. at 30-33), this was error. This Court, in articulating a new legal standard that expressly requires presenting a "viable legal theory," and then remanding to apply that new legal standard, was necessarily requiring the lower court to hold Geronta to its newly established burden on remand.

Geronta says (Ger.AB. at 34) the merits of its unjust enrichment claim were outside the remand because: "[T]his Court was silent on the issue rejecting by clear implication that Geronta's unjust enrichment claim was not viable." But that is purely conclusory and begs the question—assuming without analysis that the issue was previously decided (it was not), that it was disposed of on appeal (it was not), or that this Court was actually "silent" (it was not). Indeed, Geronta does not

[2] By the time this case was remanded, the original Judge who sat as fact-finder at trial (the "trial court"), had retired. A new judge (the "lower court") was assigned on remand.

meaningfully address any of Brighthouse's arguments. As discussed in Brighthouse's Answering Brief (BH.OB. at 32), the history makes clear that requiring Geronta to prove unjust enrichment was within the scope.

Prior to the last appeal, the trial court presided over a 7-day bench trial to determine whether Geronta could prove an entitlement to restitution. Although Geronta pled unjust enrichment, the trial court ruled that Geronta need not prove unjust enrichment. A1386/3:21-5:1; A1391:8:22-10:4. Instead, the trial court held that Geronta (at trial) could simply prove a Restatement exception to obtain restitution. A3338/78:19-22. After trial, the trial court found that Geronta failed to prove the exceptions in Restatement (Second) of Contracts § 198(a)-(b) (excusable ignorance or not more equally in the wrong), but did prove the exception in § 197 (disproportionate forfeiture) as to the premium Geronta paid after calling Brighthouse in April 2017. B059-73. Geronta appealed the legal standard, arguing Geronta should have been automatically awarded a full premium refund. This raised, as a matter of first impression in this Court, what the legal standard should be when an investor seeks restitution of premiums paid into a policy that has been declared void *ab initio* for lack of insurable interest. *Seck*, 284 A.3d at 50. This Court articulated a new test and then remanded so the trial court could apply it—since the trial court did not have the benefit of the proper test at (or after) trial. *See id.* at 75 ("[T]he Superior Court should be given the opportunity to review its factual findings

through the lens of our ***newly-articulated fault-based test***" (emphasis added)). This Court's new fault-based test requires investors to "present[]" (i.e., prove) a "viable legal theory" and to satisfy one of the exceptions in the Restatement (Second) of Contracts §§ 197-99. *Seck*, 284 A.3d at 50, 71-73. In other words, this Court's test *does* require Geronta to prove its viable legal theory of unjust enrichment; and, because Geronta had not done so at trial, and because this Court remanded to apply the new test (i.e., the whole test), the letter and spirit of this Court's opinion required the lower court to ensure Geronta presented a viable legal theory on remand. BH.OB. at 31-32.

Geronta also claims (Ger.AB at 32-33), Brighthouse has waived the right to challenge whether Geronta presented a viable legal theory because, in the prior appeal, Brighthouse did not cross appeal and did not brief the argument as appellee. The lower court correctly rejected Geronta's waiver argument (B1096), and indeed, it is clear there is no waiver for several reasons.

First, Brighthouse was not required to cross-appeal. Brighthouse was the prevailing party at trial as to most of the premium. BH.OB. at 22-23. The trial court found Geronta failed to prove it was excusably ignorant, or "not more equally in the wrong" with Brighthouse, and permitted Brighthouse to keep most of the premium, except for the $207,147.60 Geronta paid after April 2017. Moreover, Brighthouse did not need to cross appeal in order to challenge (or make argument on) the

appropriate legal standard for premium return, as that was the central issue Geronta had already raised as appellant.

Second, Brighthouse *did* raise its argument about unjust enrichment in the prior appeal—at oral argument—after this Court's intervening decision in *Estate of Malkin*. As previously discussed (BH.OB. at 24), this Court's decision in *Estate of Malkin* was issued after briefing closed (in this case) and two weeks before oral argument. In particular, as discussed, *supra* at 2, *Estate of Malkin* held that investors seeking restitution must, *inter alia*, prove the elements of a "viable legal theory, such as unjust enrichment," and that the presence of contractual remedies against up-chain commercial predecessors would defeat restitution. 278 A.3d at 70. At oral argument in this case (2 weeks later), both parties made arguments *based on that new decision*. Geronta argued, based on *Estate of Malkin*, that if this Court did not adopt the "automatic" premium refund rule, the trial court erred by not allowing Geronta to prove unjust enrichment. B1058/6:23-7:6 ("We know from the second certified question in *Malkin* that unjust enrichment is a legitimate recovery theory for past premium," but "[t]he Court below refused to countenance Delaware's normal unjust enrichment test"); *id.* at B1060/8:22-26 ("[W]e should have been allowed to present the unjust enrichment test . . . [a]nd I believe that that issue was actually cleared by the second certified question in *Malkin*. That's what we wanted to present, this Restatement 197, 198 thing came from the trial court effectively *sua sponte*" and

"we don't think that is the right Delaware unjust enrichment test"). And, of course, Brighthouse argued (as it did on remand and is doing now), that based on *Estate of Malkin*, Geronta's claim for unjust enrichment failed because Geronta has contractual remedies against EEA. B1070/18:18-19:1.

Geronta nevertheless says (Ger.AB. at 32-33), that raising this issue at oral argument was insufficient because it was not *briefed*, relying on *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999), where an *appellant* failed to raise an argument in its opening brief and then "tacitly conceded" the issue at argument. *Emerald Partners* is inapposite, including because Brighthouse was the appellee (and thus did not need to make all arguments in support of affirmance) and forcefully pressed (rather than conceded) the point at argument. Moreover, Geronta does not address the fact that this Court's general rule that arguments must be briefed would necessarily yield to this Court's intervening decision in *Estate of Malkin*. Indeed, this Court rejected a similar waiver argument from the insurer in *Wilmington Trust v. Sun Life*, 294 A.3d 1062 (Del. 2023) ("*Frankel & DeBourbon*"), allowing the investor to pursue a previously unpled claim for unjust enrichment based on this Court's intervening decision in *Seck*. *See id.* at 1075 ("Because the parties actually litigated the restitution issue, and because this Court clarified the applicable test for a restitutionary return of premiums after the Superior Court had issued its decision in this matter, Wilmington Trust should be permitted to proceed with its claim for

recovery of the premiums.”). Moreover, there is no dispute that Brighthouse repeatedly raised this issue in the trial court prior to the last appeal. Ger.AB. at 32.

Third, even if Geronta is correct that Brighthouse did not preserve the argument *in the prior appeal*, Brighthouse would still not have waived the argument *in this appeal*. The reason is simple: Brighthouse did not waive the right to seek application of the correct legal standard before this Court articulated what that standard was. Indeed, prior to this Court’s decision in *Seck*, it was not clear what the test should be, whether unjust enrichment was necessary, sufficient, or even cognizable in this *suis generis* context, or whether (as Geronta argued), investors could simply seek an automatic (i.e., proofless) rescission. *E.g.*, *Seck*, 284 A.3d at 61-62 (discussing cases granting automatic premium refunds). That is why this Court acknowledged that the prior appeal raised a question of “first impression,” and why this Court synthesized existing law, competing public policy concerns, and nationwide jurisprudence, before articulating an entirely new test. *Id.* at 60-73. Thus, as discussed, *supra* at 3-5, because this Court remanded to apply the new test, Brighthouse did not waive the right to insist that Geronta meet its burden under the new test on remand.[3] Whether Geronta proved unjust enrichment was properly before the lower court and is properly before this Court now.

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[3] Even if there was a waiver, any such waiver would be limited to arguments relating to premiums Geronta paid after April 2017—i.e., the premiums the trial court originally ordered Brighthouse to pay to Geronta.

Geronta also says (Ger.AB. at 34-35) its contractual remedies against EEA are irrelevant and do not bar its claim for restitution. Geronta says this is so because its claim for unjust enrichment is "legal," and, therefore, under *State ex rel. Jennings v. Monsanto Co.*, 299 A.3d 372 (Del. 2023), the "lack of an adequate remedy at law," is not an "element" of its unjust enrichment claim here. Geronta acknowledges the holding in *Estate of Malkin*, but casts the decision aside as inapposite because the investor there was sued under 18 *Del. C.* § 2704(b), and purportedly brought an "equitable" unjust enrichment claim—unlike Geronta's "legal" one.

But this Court's decision in *Estate of Malkin* was not a technical one based on jurisdictional distinctions of law and equity. To the contrary, *Estate of Malkin* was a broader certified question about seeking premiums, certified from a federal court that does not distinguish between law and equity (the U.S. Court of Appeals for the Eleventh Circuit). More importantly, whether the claim for restitution in *Estate of Malkin* is labeled as "legal" or "equitable," ***it is the same one Geronta has here***; and thus the holding in *Estate of Malkin* regarding the effect of contractual remedies on recovering restitution, applies with full force here. The investor in *Estate of Malkin* (Berkshire), like Geronta here, was a downstream investor that purchased a policy later declared void *ab initio* for lack of insurable interest; Berkshire, like Geronta, sought restitution of the insurance premiums it paid from the party that retained the death benefit; and, Berkshire, like Geronta, pursued restitution through a

counterclaim for unjust enrichment. 278 A.3d at 70. It's the same claim, on the same legal theory, seeking the same remedy (monetary restitution in the amount of premiums paid) from the entity that ultimately ended up with death benefits on a policy lacking insurable interest.

Moreover, this Court's holding was broader than the "element" of an adequate remedy at law. What this Court held is that if Berkshire had the contractual indemnification rights against Coventry that the estate alleged: "[T]hen ***Berkshire will not be able to demonstrate its entitlement to a restitutionary offset***." *Id.* at 70. (emphasis added). In other words, it defeats restitution. There is no dispute that Geronta has those precise contractual remedies against EEA and, therefore, Geronta cannot demonstrate its entitlement to restitution.

Geronta's reliance on *Monsanto* is misplaced. First and foremost, this Court, in *Monsanto*, did not reverse (or purport to reverse) *Estate of Malkin*. The most obvious reason is that *Monsanto* made no mention of *Estate of Malkin*; therefore, this Court did not overturn its unanimous *en banc* decision in *Estate of Malkin* without saying so. Indeed, this Court has been clear that there is an extremely high bar to overturning precedent. For example, in *Lavastone Capital LLC v. Estate of Berland*, 266 A.3d 964, 971 (Del. 2021), the Institutional Life Markets Association asked this Court to "re-examine" the unanimous *en banc* holding in *PHL Variable Insurance Company v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059 (Del. 2011),

that STOLI policies are not merely void*able*, but absolutely void *ab initio* against public policy. This Court, in *Berland*, chastised the investors for seeking a reversal of precedent when the decision could be harmonized with existing law: “Once a point of law has been settled by a decision of this Court, it forms precedent which is not afterwards to be departed from or lightly overruled or set aside and it should be followed except for urgent reasons and upon clear manifestation of error.” *Berland*, 266 A.3d at 970.

Likewise, this Court’s well-established adherence to *stare decisis* would have required an extensive analysis in *Monsanto* which, not surprisingly, was not present—because no reversal was even being considered. For example, in *Holifield v. XRI Investment Holdings LLC*, 304 A.3d 896, 927-932 (Del. 2023), this Court re-affirmed that “the development of and adherence to precedent is an essential feature of common law systems, and as such, precedent should not be lightly cast aside” and then engaged in an extensive analysis of practical, legal, and policy concerns, including the “nature of any reliance interests on the decision,” “the area of the law the precedent addresses,” “the clarify and administrability of the challenged precedent,” and “institutional considerations of the Court.” *Id.*

Moreover, *Monsanto* is not at odds with *Estate of Malkin*. The primary issue on appeal in *Monsanto* (relating to unjust enrichment) *was* (unlike in *Estate of Malkin*) jurisdictional. This court overturned the Superior Court’s decision to decline

jurisdiction over a legal claim for unjust enrichment—and then found unjust enrichment failed for other reasons. More importantly, this Court expressly limited its holding in *Estate of Malkin* to "unique" and "*sui generis*" nature of Delaware's insurable interest requirement. 278 A.3d at 56; *see id.* at 65 n.48.

Moreover, the remedy in *Estate of Malkin*—that this Court said would defeat restitution—was contractual. Delaware courts routinely prevent parties from using unjust enrichment to rectify harms that are governed by a contract. *See, e.g., Stryker Demolition v. Arcadis U.S., Inc.*, 2020 WL 6588493, at *2 (Del. Super. Ct. Nov. 10, 2020) ("Where a plaintiff's actions are governed by contract, the plaintiff cannot attempt to circumvent that contract by bringing an unjust enrichment claim against a third-party." (citing *Metcap Secs. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *6 (Del. Ch. 2007 May 16, 2007))). The reasoning is that holding parties to their bargained-for contractual rights *is* fair; but allowing parties to circumvent those rights is not.

These principles are exemplified by this case. Geronta is a sophisticated party and it bargained for contractual rights with EEA to protect Geronta from this exact situation and this exact harm—buying a life insurance policy Geronta cannot cash in because it was never validly issued. A3694-3702, A3706-07. This is not just some "remedy" that might be available to Geronta, it is the express contractual bargain

Geronta struck with EEA to account for the risk. It is neither fair nor just to allow Geronta to circumvent its contractual remedy with EEA.

It is especially unfair and unjust considering that Brighthouse did not cause Geronta harm. Brighthouse was the victim of Pape Seck's fraud and issued the Policy in good faith.[4] B1106. Moreover, the trial court expressly found that Brighthouse did not lie, defraud, or misrepresent any information to Geronta. B068-71. The same cannot be said of EEA. EEA affirmatively caused harm to Geronta by fraudulently selling the Policy to Geronta in violation of various contractual duties and promises. B672-77. And then EEA doubled down on its fraud with more fraud by affirmatively claiming—*for over a year*—that Seck was a real person. *Id.*; A2418/103:18-104:23 ("We were pretty sure that they [EEA] were lying to us"). It is neither fair nor just to allow Geronta to circumvent its contractual rights, let EEA

[4] Geronta tries to claim otherwise, disingenuously arguing that Brighthouse negligently underwrote the Policy. But Geronta's arguments (and misrepresentations of the record) are the same ones the trial court rejected following exhaustive live testimony at trial (B066) and then the lower court expressly rejected (again) on remand. B1106. For example, Brighthouse did not, as Geronta disingenuously suggests, substitute a one-page letter from a physician in place of a medical exam; an experienced underwriter, consistent with the underwriting guidelines, substituted a full medical exam with a full paramedical exam—which are identical in every respect except that one is conducted in-person by a doctor and one is conducted in-person at a nationally approved paramedical facility. B066.

off the hook, and then drag Brighthouse through 5 years of protracted litigation for harm Brighthouse never caused.[5]

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[5] Geronta tries to downplay EEA's conduct, claiming EEA never "knew" that Seck was fake. But Geronta admitted this in its legal demand letters, which Geronta's witnesses verified were truthful and accurate. B676; A2537/222:11-225:1. Geronta tries to suggest that all EEA did was stumble upon the fact that maybe Seck changed physicians since his application; but the doctors were just the tip of the iceberg. EEA spent years looking for Seck and quickly realized they could not find a single person connected to the Policy (in 2007) or the life settlement application (in 2009) that ever met Seck or could verify anything about his existence. All calls, letters, and emails bounced back, and even the two people that contractually agreed to keep tabs on Seck had no information. That is why, in 2009, EEA was asking whether Seck was actually alive; and why in 2011 and again in 2012, EEA was looking for—and found no—evidence of his existence.

II. GERONTA FAILED TO SATISFY A FAULT-BASED EXCEPTION.

On remand, the trial court awarded Geronta all of the premiums it paid, concluding that Geronta was less at fault than Brighthouse based on a single factor (timing of inquiry notice) and based on one side of the public policy coin (incentivizing insurers to speak up). This was error: Geronta was *far* more at fault. Brighthouse conducted a robust underwriting investigation; Geronta conducted no investigation. Brighthouse knew only from public sources that the Policy involved some sort of insurance fraud; Geronta had a private data room filled with evidence of the actual fraud *which was that Seck was fictitious*. Brighthouse did not speak up because it never knew Seck was fake and intended in good faith to pay the Policy's death benefit; Geronta willfully blinded itself in bad faith to capture "windfall profits" and has no explanation for staying silent. But the primary and indisputable reason that Geronta is more at fault is that Geronta—*and only Geronta*—***had actual knowledge that Seck was fake and intentionally stayed silent for nearly 15 months***. Geronta's witness admitted this live at trial. This is without question worse than anything Brighthouse ever did; and when coupled with Geronta's willful blindness and non-existent investigation, Geronta should not have gotten any restitution (certainly not of the premium it paid when it believed there was no insured).

In response, Geronta does not meaningfully dispute that the trial court did not apply the proper legal standard, but purports to go through a comparative fault

analysis to conclude that Geronta was less at fault. Geronta's central argument is that: "Brighthouse actually knew that the Policy was void no later than October of 2011"; and thus Geronta is necessarily less at fault because it simply failed to "discover[] in 2015 what Brighthouse *actually knew* in 2011." Ger.AB. at 41. But this argument is deeply flawed and counter-factual. This is clear for several reasons.

First, Geronta's assertion that Brighthouse had "***actual knowledge***" that the Policy was ***void*** in 2011 is an outright misrepresentation of the record and of the trial court's findings both after trial and on remand. Geronta has, for several years, been pushing this false and unfounded theory that Brighthouse had "actual knowledge" that Seck was fictitious. Geronta's theory is that Brighthouse figured out, in October 2011, that there was no underlying insured and (realizing there could never be a death claim) intentionally stayed silent to collect as much premium as possible. A3340/80:3-81:1. But the trial court ***rejected this theory before trial*** (Dkt. 161) (denying Geronta's motion to add a fraud claim because there was no evidence Brighthouse knew Seck was fictitious before April 2017), and ***rejected this theory after trial*** (B064-66, B071) (expressly finding Brighthouse did not know Seck was fictitious and crediting Brighthouse's live testimony that it always intended to pay the Policy's death benefit). And the lower court ***rejected this theory on remand*** (B1096-97) (re-affirming these prior findings). And yet, Geronta repeatedly claims in its Answering Brief that Brighthouse had "*actual knowledge* that the policy is void

ab initio because it is the product of a criminal fraud." Ger.AB. at 26; *see id.* at 41 ("Brighthouse actually knew that the Policy was void no later than October 2011").[6] And Geronta even claims that is what the lower court found on remand. *See id.* at 12. Needless to say, that is not correct.

The lower court was very clear on remand that Brighthouse never knew that Seck was fictitious. The trial court found that Brighthouse had ***inquiry notice*** of the Policy's invalidity in April 2010—when Brighthouse printed out a press release about the investigation into Pape Seck. B1100. That is, the lower court found that Brighthouse is constructively charged with knowledge of the Policy's invalidity because Brighthouse could have investigated the Policy at that time and could have learned that Seck was fictitious. The lower court also found that Brighthouse had actual knowledge that the Policy was "***procured fraudulently***" in October 2011—when Brighthouse learned that Pape Seck had been convicted of insurance fraud. B1097. But the lower court expressly re-affirmed the trial court's prior ruling that Brighthouse ***did not*** know that Seck was fictitious and did not know the Policy was void. B1096-7 ("This Court does not find its previous ruling to be clearly wrong," re-affirming that Brighthouse did "***not have actual knowledge that the Mansour Seck described in the Seck Policy was fictitious***" (emphasis added)). Indeed, as this Court recognized, most insurance fraud is not insurable interest fraud—the former

[6] *See also id.* at 2, 3, 7, 12, 19, 20, 22, 24.

renders a policy void*able* during contestability, the latter is void *ab initio*. *Price Dawe*, 28 A.3d at 1067-68. Thus, Geronta's repeated assertion that Brighthouse is more at fault because Brighthouse supposedly stayed silent in the face of "actual knowledge" that Seck was fictitious is false.

Second, Geronta's assertion that it never had "actual knowledge" and simply "failed to learn" the Policy was void is equally false—and misleading. Geronta *did* learn and *did* believe that Seck was fake. This is indisputable: Geronta's witness conceded this live on the stand at trial, conceding that by February 2016, Geronta specifically believed that Seck was fake and conceding Geronta chose to keep paying premiums and keep Brighthouse in the dark for nearly 15 months—all while Geronta believed there was no underlying insured. A2766/87:11-88:20; A2773/94:13-17. Geronta offered no explanation at trial for its decision to stay silent.

Moreover, Geronta tries to casually glaze over its non-existent investigation. Geronta did not simply "fail" to learn; Geronta chose not to see. B1102-03; B059-63. In other words, Geronta had actual knowledge that the Policy was void and stayed silent for 15 months—and the only reason Geronta was not able to stop itself from buying the Policy is that Geronta made a strategic decision not to conduct any investigation in the hopes of making extra money. Geronta does not address *any of this*—meaning its purported comparative fault analysis is not comparative at all. Indeed, Geronta tries to sweep its conduct under the rug—claiming it cannot

possibly be worse than Brighthouse's "actual knowledge." But Geronta has flipped the record upside down. It is Brighthouse that never knew and Geronta that actually knew and stayed silent.

Third, stripped of these falsehoods, Geronta's only meaningful argument is that Brighthouse was on inquiry notice first.[7] But although timing is, of course, relevant, this Court rejected the argument in *Frankel & DeBourbon* that it is dispositive. 294 A.3d at 1076. While it is theoretically true that Brighthouse could have investigated the Policy in 2010, it was outside of the contestability period, Brighthouse had already done a robust underwriting investigation "in good faith," and the trial court confirmed, that Brighthouse intended in good faith to pay out on the Policy. B064-67; B1106. Geronta does not address this. Brighthouse had no reason to investigate a policy it had no intention of challenging and always intended to pay when the insured passed away. Geronta does not dispute this either.

Thus, when comparing these two parties with inquiry notice, Geronta had access to more information and knew more than Brighthouse ever did. Brighthouse issued the Policy because it was victim of the fraud; Geronta could have easily stopped itself from buying the Policy if it was not willfully blinding itself to capture

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[7] Even here, Geronta again misrepresents the record by claiming it was first on inquiry notice in January 2016, when the trial court expressly rejected that and found, on remand, that Geronta was on inquiry notice in June 2015—when Geronta willfully ignored the red-flag documents in the data room.

windfall profits. And while Brighthouse *never knew* that Seck was fictitious; Geronta admits it specifically believed Seck was fictitious. Brighthouse did not speak up because it intended in good faith to pay; Geronta offered no explanation for why it paid premiums for 15 months when it believed the Policy had no underlying insured.

Geronta's other arguments fall flat as well. Geronta says (Ger.AB. at 42) that Brighthouse is more at fault because "it procured the illegal policy, albeit unwittingly." That is wrong. Brighthouse issued the Policy, but Brighthouse, as the insurer, obviously did not "procure" it. *See Price Dawe*, 28 A.3d at 1075 ("To determine who procured the policy, we look at who pays the premiums."); *Berland*, 266 A.3d at 972 ("*Price Dawe* directs courts to determine who procured a policy by examining 'who pays the premiums.'").

Geronta says (Ger.AB. at 42) "there is no evidence at all supporting the conclusion that Geronta knew or suspected that there was substantial risk that the Policy was void *when it was purchased*." This is disingenuous. The ***only*** reason Geronta did not actually know or actually suspect the Policy was void—at the moment of acquisition—is that it admittedly willfully blinded itself, which this Court says investors cannot do. *See Seck*, 284 A.3d at 70 ("a party is not excusably ignorant if it is willfully blind to the relevant facts"). Indeed, the lower court found Geronta was on inquiry notice in June 2015 (when Geronta chose to ignore the red flags in the data room *before* acquisition), rejecting Geronta's specious argument that it was

not on inquiry notice until removing the blindfold in January 2016. B1102-03. Moreover, this Court did not cabin the inquiry to a snapshot at acquisition. *See, e.g.*, *Seck*, 284 A.3d at 72-73 ("whether the party knew the policy was void at purchase ***or later learned the policy was void***" (emphasis added)). Geronta has obviously drawn the line this way so it need not discuss the elephant in the room: Its admission that it learned a few months later that Seck was not a real person and then stayed silent for nearly 15 months.

Geronta also tries to claim (Ger.AB. at 42-43) that the reason it did not investigate prior to acquisition was that it was just relying on the insurance company's underwriting and a purported verbal verification from Brighthouse that the Policy was "active" (i.e., that it was premium paying and had not lapsed). That is what Geronta's witnesses said at trial; but the trial court rejected it—finding that the real reason Geronta blinded itself was to capture windfall profits. B60-62. Moreover, this is the same argument Geronta made—*and this Court clearly rejected*—in the prior appeal, that investors should not have to be burdened with conducting investigations and should be able to keep buying potential STOLI policies indiscriminately. *See Seck*, 284 A.3d at 72 ("the automatic return of premiums encourages investors to continue purchasing life insurance policies

without investigation into whether those policies are unenforceable policies due to lack of insurable interest").[8]

Although the trial court did not make findings as to Section 197, Geronta claims (Ger.AB. at 39) that allowing Brighthouse to retain the premiums paid by Geronta would work a disproportionate forfeiture because Brighthouse "kept silent" and this Court's test is meant to incentivize insurers to speak up. But Geronta has the test backwards. As previously discussed (BH.OB.at 56), the disproportionate forfeiture analysis weighs the conduct of the *restitution claimant*, with the extent of the forfeiture to the restitution claimant and the "gravity of the public policy involved." *Seck*, 284 A.3d at 68-69. Thus, a proper inquiry examines Geronta's conduct, Geronta's forfeiture, and the public policy consequences. Geronta's analysis does not mention its own conduct or culpability. And, as discussed above, this is for good reason. Geronta's decision to stay silent when it had "actual knowledge" is indefensible, it epitomizes the conduct this Court expressly held should be disincentivized, it lacks good faith, and leaving Geronta to bear the

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[8] Geronta also says (Ger.AB. at 43) that it was reasonable not to investigate this Policy because, in retrospect, the Policy was the only one that turned out to be "void." That is not in the record—Geronta refused to produce discovery about the other policies and, at trial, simply testified this was the only one with a fictitious insured. In any event, whether Geronta's guess panned out (or not) is not a justification for blindly guessing.

consequences of its actions does not create a disproportionate forfeiture and would instead uphold public policy.

CONCLUSION

Respectfully, the lower court's decision to grant Geronta restitution of the premiums it paid should be reversed.

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