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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DR. HENRY T. NICHOLAS, III, WILLIAM J. RUEHLE, and DR. HENRY SAMUELI,	)	
Plaintiffs Below/Appellants,	)	No. 209, 2013
v.	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, TWIN CITY FIRE INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, ARCH INSURANCE COMPANY, and FEDERAL INSURANCE COMPANY,	)	Court Below – Superior Court of the State of Delaware, in and for New Castle County C.A. No. N12C-07-311 JRJ CCLD
Defendants Below/Appellees.	)	

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is an appeal from a March 19, 2013 Superior Court Order dismissing the action of Plaintiffs-Appellants Dr. Henry T. Nicholas, III, William J. Ruehle, and Dr. Henry Samueli ("Plaintiffs") against Defendants-Appellees National Union Fire Insurance Company of Pittsburgh, PA, Twin City Fire Insurance Company, XL Specialty Insurance Company, Arch Insurance Company, and Federal Insurance Company (collectively, the "Insurers").

Plaintiffs, as directors and officers of Broadcom Corporation ("Broadcom"), were protected by directors and officers liability insurance policies issued to Broadcom by the Insurers (the "D&O Policies").[1] In 2006, Broadcom's shareholders (the "Derivative Plaintiffs") asserted shareholder derivative claims against Plaintiffs and other executives. In 2009, the Derivative Plaintiffs entered into a settlement agreement with all defendants in the derivative action except Plaintiffs (the "Partial Settlement"). The Insurers and Broadcom entered into a separate agreement that resolved a number of coverage disputes between them, including the Insurers agreeing to fund the Partial Settlement (the "Insurance Agreement"). As part of that Insurance Agreement, the Insurers required Broadcom to indemnify them for any future coverage claims that might be brought

[1] Six other insurers that are not defendants in this action issued coverage to Broadcom during the relevant time period. Three of those insurers were dismissed without prejudice in the action below. Plaintiffs settled with the other three insurers prior to this action.

by Plaintiffs (the "Indemnity Provision"), and delegated to Broadcom and the Derivative Plaintiffs (parties adverse to Plaintiffs) the right to approve any payments by the Insurers that would trigger the Indemnity Provision. In other words, the Insurers effectively precluded Plaintiffs from using their insurance coverage to reach a settlement with the Derivative Plaintiffs by guaranteeing that Broadcom could receive no benefit from such a settlement. Notably, the Insurance Agreement did not require that Broadcom indemnify the Insurers for tort claims that might be brought against the Insurers.

The California District Court approved the Partial Settlement at a fairness hearing in 2010, the purpose of which was to determine if the settlement was fair to Broadcom and its shareholders. The Insurers did not attend the hearing, and the court did not decide whether the Partial Settlement or the Insurance Agreement were fair to Plaintiffs.

Because the Insurance Agreement impaired Plaintiffs' ability to use their insurance coverage to settle the derivative action, Plaintiffs were left to fund multi-million dollar settlements of the derivative action on their own. The California District Court approved those settlements in an Order dated May 23, 2011 (the "2011 Settlement Agreement"). As part of the 2011 Settlement Agreement, Derivative Plaintiffs required Plaintiffs to agree that they would not bring claims that would trigger the Indemnity Provision of the Insurance Agreement or void that

Agreement. Like the Insurance Agreement, however, the 2011 Settlement Agreement did not restrict Plaintiffs' right to bring tort claims.

On July 25, 2012, Plaintiffs asserted claims for tortious bad faith and tortious interference with contractual relations against the Insurers for carrying out their scheme to deprive Plaintiffs of $92 million in coverage. The Insurers moved to dismiss, arguing that Plaintiffs' tort claims were actually coverage claims (despite Plaintiffs' specific allegations to the contrary). As such, the Insurers argued that Plaintiffs' claims constituted a collateral attack on the Insurance Agreement and violated the 2011 Settlement Agreement – an agreement to which the Insurers were not parties. The Insurers further argued that Plaintiffs could not allege bad faith or tortious interference with Plaintiffs' rights to coverage because Plaintiffs no longer had access to coverage. The Insurers also asserted that they were immune from liability for tortious interference because they were not "strangers" to each other's policies.

The Superior Court dismissed the action solely on its factual determination that the 2011 Settlement Agreement barred Plaintiffs' claims, and thus that the claims were a collateral attack on that Agreement. The Superior Court did not address the sufficiency of Plaintiffs' allegations supporting their claims. Plaintiffs filed a Notice of Appeal on April 18, 2013 in the Superior Court. The Notice was transferred to the Supreme Court on May 22, 2013.

SUMMARY OF ARGUMENT

1. The Superior Court erred by dismissing the Complaint as a collateral attack on the 2011 Settlement Agreement.

   a. The Superior Court misinterpreted the plain language of the 2011 Settlement Agreement in finding that it barred Plaintiffs' tort claims. To the contrary, the 2011 Settlement Agreement permits the tort claims, which therefore do not constitute a collateral attack on that Agreement.

   b. Even if the 2011 Settlement Agreement did not unambiguously permit Plaintiffs' tort claims, the Superior Court should not have dismissed those claims under Rule 12(b)(6). Because the 2011 Settlement Agreement is reasonably susceptible to Plaintiffs' interpretation under California law, extrinsic evidence of the parties' intent is necessary to resolve any dispute over the Agreement's terms. The intent of Plaintiffs and the Derivative Plaintiffs in negotiating the 2011 Settlement Agreement is a factual question inappropriate for resolution on a motion to dismiss. Thus, contrary to well-established principles of California contract law, the Superior Court erred by making an unwarranted factual finding about the parties' intent.

2. No alternative grounds exist for dismissing Plaintiffs' action. The Superior Court's improper dismissal of Plaintiffs' claims based solely on its interpretation of the 2011 Settlement Agreement prevented the Court from reaching Plaintiffs' arguments that they are not collaterally attacking the Partial Settlement and that they have alleged cognizable claims for tortious bad faith and tortious interference with contractual relations. Because Plaintiffs' claims fulfill the pleading standards of Rule 12(b)(6), the Superior Court's ruling should be reversed, and the Insurers' Motion to Dismiss should be denied.

STATEMENT OF FACTS

I. THE DERIVATIVE ACTION AND THE EXONERATION OF THE CRIMINAL CHARGES AGAINST PLAINTIFFS

In 2006, a shareholder derivative suit (the "Derivative Action") was filed on behalf of Broadcom against Plaintiffs, Broadcom, and other individual defendants. Complaint ¶¶ 43-44 (A316-17). The complaint alleged violations of securities laws and breaches of the defendants' fiduciary duties in the granting of stock options to Broadcom employees. *Id.* In 2008, criminal actions were brought against Plaintiffs in connection with the stock option grants. *Id.* ¶ 69 (A324). Plaintiffs were exonerated when, in 2009, the criminal court dismissed the criminal actions against each Plaintiff. *Id.* ¶¶ 70-74 (A324-26). Shortly thereafter, pending SEC actions were also dismissed. *Id.*

When the Derivative Action was filed, Plaintiffs were insured for a total of $210 million under the D&O Policies, which Broadcom had obtained in separate contracts from separate insurers. *Id.* ¶¶ 24-36 (A311-14). The D&O Policies covered Plaintiffs for the defense and settlement of the Derivative Action. *Id.*

II. THE INSURERS CONSPIRED TO DENY PLAINTIFFS ACCESS TO COVERAGE

In August 2009, the Insurers executed the Insurance Agreement to resolve coverage disputes between Broadcom, the Insurers, and certain individual defendants (the "Settling Defendants") relating to the defense of not just the

Derivative Action, but also various other securities class action lawsuits, investigations by the DOJ and SEC, and internal investigations. *See* Appendix to Opening Br. Supp. Defs.' Joint Mot. Dismiss ("App.") at 327-29 (A52-54); Twin City Mot. Dismiss at 11 (A394). The Insurers also agreed, through the Insurance Agreement, to fund a settlement (the "Partial Settlement") to resolve the Derivative Action as to Broadcom and the Settling Defendants (excluding the Plaintiffs) for $118 million and other consideration. *Id.* ¶¶ 46-53 (A317-19). As part of the Insurance Agreement, the Insurers required that Broadcom indemnify them against any coverage claims that might be brought by Plaintiffs (the "Indemnity Provision"). *Id.* ¶¶ 56-61 (A320-22). The Insurance Agreement also gave Derivative Plaintiffs and Broadcom the right to approve any payments by the Insurers that would trigger the Indemnity Provision. *Id.* ¶¶ 62-64 (A322-23).

In other words, the Insurers ceded their duty to approve and fund reasonable settlements on behalf of Plaintiffs to the very third parties who were adverse to Plaintiffs. *Id.* ¶ 64 (A323). The Insurers also transferred the burden of paying Plaintiffs' coverage claims to Broadcom, the entity on whose behalf the Derivative Action was brought. *Id.* ¶ 58 (A321). This ensured that the Insurers would never make any coverage payments to Plaintiffs, because the Derivative Plaintiffs and Broadcom would not consent to payments that would trigger the Indemnity Provision. *Id.* ¶¶ 58-59 (A321-22). Thus, the Insurers intentionally structured the

Insurance Agreement to avoid paying under their respective contracts for Plaintiffs' losses. *Id.* ¶ 56 (A320).

Broadcom did not agree, however, to indemnify the Insurers for other claims that Plaintiffs might bring against the Insurers, such as claims for bad faith or other tortious conduct. *Id.* ¶¶ 54-58 (A320-21). Broadcom agreed to indemnify only for claims:

> (a) seeking insurance coverage as to any of the Released Matters, or (b) including both a bad faith claim and any other claim that would otherwise fall within the indemnification obligations of Broadcom hereunder (i.e. declaratory relief as to respective coverage rights and obligations under the Policies or breach of contract regarding failure to honor obligations or duties under the Policies) (a "mixed claim") . . . .

App. at 333 (A58). Broadcom's indemnity obligation did not extend to "any obligation (i) to indemnify, or cover indemnity for, any judgment for (or portion of a judgment for) or settlement amount (or portion of a settlement amount) clearly or expressly allocable to a bad faith claim or (ii) to the payment of any defense costs for a bad faith claim that is not part of a mixed claim." App. at 334 (A59).

III. THE FAIRNESS HEARING DID NOT CONSIDER OR DECIDE PLAINTIFFS' RIGHTS AGAINST THE INSURERS

On December 14, 2009, the California District Court approved the Partial Settlement at the conclusion of a fairness hearing as to that Settlement. Because neither Plaintiffs nor the Insurers were parties to the Partial Settlement, Plaintiffs' rights (including any tort claims) vis-à-vis the Insurers were never considered or

decided at the fairness hearing, and the Insurers were not even present. *See* App. at 504-07 (A154-57). Rather, that hearing's purpose was to determine the fairness of the Partial Settlement to Broadcom and its shareholders. *See id.* at 386 (A111). As discussed below, the reviewing court and the parties to that proceeding (Broadcom, the Settling Defendants, and the Derivative Plaintiffs) repeatedly asserted this narrow purpose.

A. The Proponents of the Partial Settlement Focused Only on Its Fairness to Broadcom and the Shareholders

The motions of Broadcom and Derivative Plaintiffs (the "Proponents") to approve the Partial Settlement demonstrate the limited purpose of the fairness hearing. Proponents assured the California District Court that it "need not consider more than whether the Settlement presents any reason to doubt its fairness to Broadcom and its shareholders." App. at 385 (A110). To ensure that the District Court focused on that issue, the Proponents asserted that the Partial Settlement did not adversely affect Plaintiffs, stating that "[t]he Settlement is also fair to [Plaintiffs], who will not be prejudiced by, and indeed will enjoy some benefits from, the Settlement." *Id.* at 390 (A115).

Similarly, Proponents stated that "[t]he issue presented by [this motion] is whether the terms of the Settlement amount to fair, adequate and reasonable consideration to Broadcom for its release of the derivative claims against ten Settling Defendants and the Released Persons." *Id.* at 421 (A128). They stated

that the fairness to Plaintiffs was not relevant because "[the Plaintiffs] are left in the same position they would have been in absent the [Partial] Settlement." *Id.* at 440 (A147).

Proponents sought to confine the focus of the fairness hearing in order to "foreclose any objection [Plaintiffs] might have made that the [Partial] Settlement [was] somehow affirmatively unfair to them." *Id.* Thus, the Proponents specifically argued that Plaintiffs were "left in the same position they would have been in absent the Settlement." *Id.* And yet, the Insurers now contend that the fairness hearing left Plaintiffs in a markedly different position than the one they occupied before the settlement: by resolving and barring Plaintiffs' current claims.

B. The California District Court Only Considered the Fairness of the Settlement to Broadcom and Its Shareholders

The Proponents were so successful in confining the focus of the fairness hearing that the California District Court would not entertain even narrow objections. After the Government abruptly dropped all criminal charges against Dr. Samueli days before the fairness hearing, Dr. Samueli asked the court at the hearing for more time so that a broader settlement could be reached. App. at 509-20 (A159-70). The court declined to do so, stating that it only was deciding if the Partial Settlement was fair to Broadcom and its shareholders. The court stated:

> So where are we, Counsel? What you're asking me to do is rule against the settling defendants for the benefit of Mr. Ruehle, Dr. Nicholas, and Mr. Samueli. . . . That's what you're

> asking. You're asking me to rule against the settling defendants, and it isn't fair to them. . . . That's all I've – that's the only ruling I've made thus far . . . is that the settling – it is fair to the corporation so far as those persons are concerned and so far as those defendants are concerned. . . . That's the only ruling I've made thus far. . . . It's fair to them, and this is a fairness hearing . . . on the settlement with those people."

Id. at 521:19-522:16 (A171-72). Derivative Plaintiffs echoed that "the only issue before Your Honor, as you have quite correctly pointed out, is whether or not the settlement that is before you is fair, reasonable, and adequate in terms of the amounts to be paid for the release of the settling defendants. It has nothing to do with the impact on or involvement of [Plaintiffs]." *Id.* at 527:18-23 (A177). On this basis, the court concluded that the Partial Settlement was "fair, adequate, and reasonable," noting that Broadcom received substantial benefit due to the "value of the settlement." *Id.* at 529:17-531:07 (A179-81). At no point did the court address Plaintiffs' rights vis-à-vis the Insurers, who did not even attend the hearing. Likewise, the court never addressed the Insurance Agreement, which was merely appended to the Partial Settlement.

IV. THE INSURERS' CONTINUING TORTIOUS CONDUCT CAUSED PLAINTIFFS TO SUSTAIN EXTRA-CONTRACTUAL DAMAGES

A. The Insurers Refused to Fund Reasonable Settlement Offers After the Fairness Hearing

Following the fairness hearing, the Derivative Action continued against Plaintiffs. Compl. ¶ 75 (A326). Between April 2010 and February 2011, Plaintiffs

engaged in numerous settlement negotiations with Derivative Plaintiffs. Plaintiffs were thwarted from settling the Derivative Action with insurance proceeds, however, because: (1) the Insurers had expressly delegated to parties adverse to Plaintiffs the approval of any settlement, and (2) the Indemnity Provision effectively precluded settlement of coverage claims. *Id.* ¶ 76 (A326-27). Consequently, the Insurers, citing the Insurance Agreement's requirement that the Insurers seek approval from the Derivative Plaintiffs, refused to attend settlement negotiations and rejected requests to fund reasonable settlement offers. *Id.* ¶¶ 77-79 (A327). The Insurers indicated that they would not expect Derivative Plaintiffs to accept a settlement that would trigger the Indemnity Provision. *Id.*

In September 2010, the California District Court directed Plaintiffs and the Derivative Plaintiffs to appear for trial in February 2011. Pet'n for Writ of Mandamus at 11 (A202). This order contradicted the court's order of April 2010, which had stayed discovery and effectively provided that trial would not occur until July 2011. *Id.* The September 2010 order accelerated trial by six months, leaving the parties three months to take forty depositions, designate expert witnesses, complete fact and expert discovery, and file motions. *Id.* at 11-13 (A202-04). The court denied a joint request to set a later trial date consistent with its prior order. *Id.* at 12 (A203)

In January 2011, Plaintiffs received another within-limits settlement demand. Predictably, Derivative Plaintiffs insisted that any settlement could not be funded with money that ultimately would be paid by Broadcom under the Indemnity Provision, as it would provide no benefit to the company. *Id.* ¶ 81 (A328). Again, Plaintiffs requested that the Insurers cover the settlement without reimbursement from Broadcom, but the Insurers refused. *Id.* ¶ 82 (A328).

B. The Insurers' Conduct Forced Plaintiffs to Enter Into and Fund the 2011 Settlement

Deprived of the ability to use insurance proceeds to settle the Derivative Action, finding themselves at a severe disadvantage due to the newly-accelerated trial schedule, and facing the prospect of a jury award in excess of the settlement offers (as is almost always the case in any negotiated resolution of a complex securities matter), Plaintiffs had no practical choice but to settle the Derivative Action on their own. As a condition of the 2011 Settlement Agreement, Plaintiffs were forced to waive the right to assert coverage claims against the Insurers (namely, declaratory judgment and breach of contract claims) that would trigger the Indemnity Provision. *Id.* ¶ 90 (A330). Plaintiffs were also forced to withdraw their appeal of the order approving the Partial Settlement. App. at 564 (A230). Thus, with regard to coverage, the Insurers achieved precisely the unfair outcome and windfall they had intended when they entered into the Insurance Agreement.

However, Plaintiffs did not waive their right to assert tort claims against the Insurers under the 2011 Settlement Agreement. Compl. ¶ 90 (A330).

In May 2011, the California District Court approved the 2011 Settlement Agreement. *Id.* ¶ 89 (A330). In approving that Agreement, the court did not address the Insurance Agreement, the Partial Settlement, or any of Plaintiffs' rights at all, including the scope of claims that would constitute "coverage" claims sufficient to trigger the Indemnity Provision of the Insurance Agreement. *See* App. at 631-37 (A293-99).

V. PLAINTIFFS SUED TO REDRESS THE INSURERS' TORTIOUS CONDUCT

As a result of the Insurers' conduct, Plaintiffs filed this tort action. Plaintiffs' action did not seek insurance coverage or allege that the 2011 Settlement Agreement or Insurance Agreement were invalid. Rather, Plaintiffs alleged that the Insurers acted in tortious bad faith by engineering and executing a scheme to make it impossible for Plaintiffs to access insurance coverage that should have been available to them. Compl. ¶¶ 92-106 (A331-35). Plaintiffs further alleged that, by doing so, each Insurer tortiously interfered with Plaintiffs' contractual relationship with each of the other Insurers. *Id.* ¶¶ 107-17 (A335-38). Plaintiffs asserted that the Insurers are jointly and severally liable for Plaintiffs' damages in tort, which means that the Insurers' policies do not limit their liability here. *Id.* at 39. Further, Plaintiffs seek punitive damages. *Id.*

ARGUMENT

I. THE SUPERIOR COURT ERRED BY RULING THAT PLAINTIFFS' CLAIMS ARE A COLLATERAL ATTACK ON THE 2011 SETTLEMENT AGREEMENT

A. Question Presented

Do Plaintiffs' claims constitute a collateral attack on the 2011 Settlement Agreement? *See* Pls.' Opp'n Defs.' Joint Mot. Dismiss at 20-21 (A422-23).

B. Standard and Scope of Review

The Court reviews trial court rulings granting motions to dismiss *de novo*. *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002)). The Court also reviews *de novo* the trial court's interpretation of written agreements. *Id.* (citing *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002)). When reviewing a ruling on a motion to dismiss, the Court "(1) accept[s] all well pleaded factual allegations as true, (2) accept[s] even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw[s] all reasonable inferences in favor of the non-moving party, and (4) do[es] not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances." *Id.* (citing *Savor*, 812 A.2d at 896-97). Any further determination as to the substantive adequacy of a plaintiff's claims is inappropriate on a motion to dismiss. *See id.* at 538.

C. Merits of the Argument

1. Plaintiffs' Claims Do Not Constitute a Collateral Attack on the 2011 Settlement Agreement

A collateral attack is an "attempt in a separate and independent proceeding to question the integrity and validity of any adjudication in another proceeding." *Martin v. Gen. Fin. Co.*, 48 Cal. Rptr. 773, 777 (Cal. Ct. App. 1966).[2] Here, Plaintiffs' claims question neither the integrity nor the validity of the 2011 Settlement Agreement, which only prohibits Plaintiffs from asserting coverage claims. To the contrary, Plaintiffs are asserting tort claims in compliance with the plain language of that Agreement. Even if the 2011 Agreement does not unambiguously permit Plaintiffs' claims, Plaintiffs have, at minimum, proffered an interpretation to which the Agreement is reasonably susceptible. In such a case, extrinsic evidence is necessary to resolve any dispute over the Agreement's terms. Plaintiffs have pled, and discovery will show, that the negotiating parties intended the 2011 Settlement Agreement to allow Plaintiffs to assert tort claims against the Insurers. Accordingly, the Superior Court erred in dismissing those claims on a 12(b)(6) motion, before the parties conduct discovery. *See Central Mortg. Co.*, 27 A.3d at 538 (finding that lower court's substantive determinations "inappropriately

[2] The law of the state where the judgment was rendered determines the effect of a judgment in subsequent litigation. *Playtex FP, Inc. v. Columbia Cas. Co.*, 1990 WL 91097, at *1 (Del. Super. June 14, 1990). Thus, California law governs whether Plaintiffs' claims constitute a collateral attack on the 2011 Settlement Agreement.

shifted the burden" to Plaintiffs and held them "to a higher standard than required" on a motion to dismiss).

a. California Standards of Contract Interpretation

A settlement agreement is interpreted by reference to the same principles applied to any other contract. *General Motors Corp. v. Superior Court*, 15 Cal. Rptr. 2d 622, 625 (Cal. Ct. App. 1993).[3] Under California law, the mutual intent of the parties at the time the contract is formed governs its interpretation. Cal. Civ. Code § 1636; *Santisas v. Goodin*, 951 P.2d 399, 405 (1998). Courts interpret the "intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." *Mieuli v. DeBartolo*, 2001 WL 777447, at *5 (N.D. Cal. Jan. 16, 2001) (citing *Powers v. Dickson, Carlson & Campillo*, 63 Cal. Rptr. 2d 261, 266 (Cal. Ct. App. 1997)).

California courts have rejected the traditional rule that extrinsic evidence is only admissible when a writing is ambiguous on its face. *Id.* Instead, a court must consider extrinsic evidence in determining whether a contract is ambiguous when the contract is "reasonably susceptible" to a meaning urged by a party. *Id.* Such intent is a factual question inappropriate for resolution on a motion to dismiss. *Id.*

[3] "Delaware courts use the 'most significant relationship test' when conducting a contract choice of law analysis." *Deuley v. Dyncorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010). Under this analysis, California has the most significant relationship to the settlement agreement, as it was negotiated and approved there.

"[I]t is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face." *Wolf v. Superior Court,* 8 Cal. Rptr. 3d 649, 655 (Cal. Ct. App. 2004).

b. The 2011 Settlement Agreement Permits Plaintiffs' Claims

The plain language of the 2011 Settlement Agreement permits Plaintiffs' claims. As previously noted, the Derivative Plaintiffs insisted on safeguards to ensure that Broadcom would not be required to indemnify the Insurers for a settlement that would provide no monetary benefit to the company or to otherwise refund the Partial Settlement amount. Accordingly, Provision F.15 of the Settlement Agreement states that:

> [Plaintiffs] agree and covenant not to make any claims that would obligate Broadcom to indemnify or to hold harmless any of the Insurers pursuant to the terms of Paragraph 4 of the Insurance Agreement. While [Plaintiffs] maintain that the Insurance Agreement is invalid and void, [Plaintiffs] agree and covenant not to make any claims seeking to invalidate or void the Insurance Agreement or any provision therein.

App. at 574 (A240).

The limited nature of Paragraph 4 of the Insurance Agreement (i.e., the Indemnity Provision) is underscored by its express exclusions. That provision states that Broadcom's indemnity obligation applies specifically to "declaratory relief as to respective coverage rights and obligations under the Policies or breach

of contract regarding failure to honor obligations or duties under the Policies ('a mixed claim')," but does not extend to "any obligation (i) to indemnify, or cover indemnity for, any judgment for (or portion of a judgment for) or settlement amount (or portion of a settlement amount) clearly or expressly allocable to a bad faith claim or (ii) to the payment of any defense costs for a bad faith claim that is not part of a mixed claim." App. at 333-34 (A58-59). In other words, Plaintiffs' claims for bad faith and tortious interference, which are not part of a "mixed claim," do not require Broadcom to "indemnify or to hold harmless any of the Insurers." Therefore, they are permissible under the first sentence of Provision F.15 of the 2011 Settlement Agreement. Compl. ¶ 91 (A331).

Although the Superior Court agreed that, under the express terms of the Insurance Agreement, Plaintiffs "could have brought their current claims without forcing Broadcom to indemnify the Insurance Companies," the Court found that Provision F.15 of the 2011 Settlement precluded bad faith claims. The Court stated that:

> the only reason for bringing such claims would have been to try to undermine and/or invalidate the Insurance Agreement and the provisions therein. Thus, the second sentence [of Provision F.15 in the 2011 Settlement Agreement] merely closes the door on claims that would jeopardize the existence of the Insurance Agreement and/or any provision therein – a door likely left open because Plaintiffs were not part of the original negotiations. Plaintiffs' current collateral attack is exactly what the second sentence was designed to combat.

Del. Super. Ct. Op. at 10 (attached as Ex. A).

This reading is overly broad. Under the Superior Court's reading of the second sentence of Provision F.15, any claim against the Insurers – even those claims that are consistent with the first sentence of Provision F.15 because they do not require Broadcom to indemnify the Insurers – would invalidate or void that Agreement. The Superior Court's interpretation of the second sentence renders the first sentence moot, which runs counter to basic rules of contract interpretation. *Titan Corp. v. Aetna Cas. & Sur. Co.*, 27 Cal. Rptr. 2d 476, 485-86 (Cal. Ct. App. 1994) ("Importantly, we should interpret contractual language in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory.") (citing *New York Life Ins. Co. v. Hollender*, 237 P.2d 510 (Cal. 1951) (rejecting insured's interpretation of an "incontestability" clause because it would effectively nullify other clauses unambiguously permitting age adjustment)).

In contrast, a reasonable interpretation of the two sentences together permits Plaintiffs to bring bad faith or other tort claims that would not trigger the Indemnity Provision of the Insurance Agreement, but prevents Plaintiffs from actually invalidating or voiding the Insurance Agreement on the grounds, for example, that it violates California public policy by forcing a corporation to indemnify its directors and officers for derivative claims.

The express terms of Provision F.15, read in harmony, permit Plaintiffs' claims. Thus, the Superior Court's dismissal of those claims as a collateral attack on the 2011 Settlement Agreement was in error.[4]

c. The Superior Court's Findings Regarding the Negotiating Parties' Intent as to the 2011 Settlement Agreement Were Improper on a Motion to Dismiss

Even if the 2011 Settlement Agreement does not unambiguously permit Plaintiffs' claims, Plaintiffs have, at minimum, set forth an interpretation of the Agreement to which its terms are "reasonably susceptible." Accordingly, the meaning of the disputed provision is a factual question of the intent of the negotiating parties (including the Derivative Plaintiffs, who are not even parties to this action). *Mieuli*, 2001 WL 777447, at *5. The Superior Court erred by dismissing the action based on its own unwarranted factual determinations regarding that intent.

As Plaintiffs argued, the dispute regarding Plaintiffs' intent in agreeing to Provision F.15 "is the epitome of a factual dispute that cannot be resolved on a motion to dismiss." Pls.' Opp'n Defs.' Joint Mot. Dismiss at 21 (A423). Those factual questions include whether Plaintiffs and the Derivative Plaintiffs intended Provision F.15 to "close the door" on claims that are otherwise permitted by the

[4] Similarly, because Plaintiffs' claims comply with the 2011 Agreement, the Superior Court's characterization of Plaintiffs' position as arguing that they "should not be required to adhere to their own 2011 Settlement Agreement" is inaccurate. Del. Super. Ct. Op. at 10 n.56.

Insurance Agreement, and what types of claims Plaintiffs and Derivative Plaintiffs intended Provision F.15 to allow. Plaintiffs have alleged that they did not intend the 2011 Settlement Agreement to waive their rights to recover from the Insurers for tortious bad faith or tortious interference with contractual relations. Compl. ¶ 91 (A331). Plaintiffs further contend that discovery regarding the negotiating parties' intent in drafting both agreements will support this assertion. Pls.' Opp'n Defs.' Joint Mot. Dismiss at 21 (A423). The Superior Court erred by summarily deciding these factual issues before the parties conduct discovery.

California courts have declined to dismiss claims under similar circumstances. In *in re Yahoo! Litigation*, 251 F.R.D. 459 (C.D. Cal. 2008), defendants moved to dismiss a breach of contract claim on the basis that the express terms of the agreement at issue did not guarantee that plaintiffs would receive targeted advertisement placement. *Id.* at 470-71. Plaintiffs did not dispute that certain express terms of the agreement indicated that defendants had not promised such services, but asserted that defendants made such representations in their marketing materials. *Id.* The court denied the motion to dismiss, finding that "[a]t this stage of the proceedings . . . the Court is unable to dismiss, out of hand, plaintiffs' contention that extrinsic evidence will show that they bargained for targeted advertising services, even if the Agreement appears on its face to state otherwise." *Id.* at 471. The court based its ruling on the principle that, under

California law, "[i]f one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity." *Id.* (citing *Trident Ctr. v. Connecticut Gen. Life. Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988)). Accordingly, the court held that plaintiffs were entitled to conduct discovery to obtain evidence bearing on a reasonable alternative interpretation of the agreement. *Id.* at 472.

Similarly, in *Stonebrae, L.P. v. Toll Brothers., Inc.*, 2009 WL 248097 (N.D. Cal. Jan. 30, 2009), the court declined to dismiss claims for breach of contract on a motion to dismiss, even though it found one party's interpretation of a disputed contract provision more reasonable. *Id.* at *4. Applying California law, the court held that dismissal was inappropriate because the plaintiff was entitled to present evidence as to the parties' intent in drafting the contract. *Id.*; *see also A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493, 496 n.2 (9th Cir. 1988) ("[C]ourts may not dismiss on the pleadings when one party claims that extrinsic evidence renders the contract ambiguous."). Similarly, here, it was reversible error for the Superior Court to dismiss Plaintiffs' claims before the parties presented extrinsic evidence as to the intent of the parties to the 2011 Settlement Agreement.

II. PLAINTIFFS' CLAIMS ARE NOT AN ATTACK ON THE PARTIAL SETTLEMENT, AND PLAINTIFFS STATE COGNIZABLE CLAIMS FOR BAD FAITH AND TORTIOUS INTERFERENCE

A. Question Presented

Are there any alternative grounds for affirming the Superior Court's ruling? *See* Pls.' Opp'n Defs.' Joint Mot. Dismiss at 13-19, 21-35 (A416-21, A423-37).

B. Standard and Scope of Review

See Argument Section I(B), above.

C. Merits of the Argument

In improperly dismissing Plaintiffs' action based on the 2011 Settlement Agreement, the Superior Court did not reach the parties' additional arguments. Had it done so, the Court would have concluded that Plaintiffs' claims do not collaterally attack the Partial Settlement, and that Plaintiffs have stated cognizable claims for bad faith and tortious interference.

1. Plaintiffs' Action is Not a Collateral Attack on the Partial Settlement

The Insurers argue that Plaintiffs' claims are an impermissible collateral attack on the Partial Settlement. Defs.' Joint Mot. Dismiss at 21-25 (A367-71). This argument rests on the premise that the hearing held by the California District Court to review the Partial Settlement addressed Plaintiffs' rights or the Insurance Agreement. That premise is both factually and legally incorrect.

"The principal factor to be considered in determining the fairness of a settlement concluding a shareholders' derivative action is the extent of the benefit to be derived from the proposed settlement by the corporation, the real party in interest." *Shlensky v. Dorsey*, 574 F.2d 131, 147 (3d Cir. 1978). Consistent with this principle, the California District Court did not consider Plaintiffs' rights under the Insurance Agreement when evaluating the overall fairness of the Partial Settlement. When Plaintiffs attempted even to postpone approval of the Partial Settlement, especially in light of the developments in the criminal proceedings, the court stated that such developments were irrelevant because it only was considering the fairness to Broadcom and its shareholders:

> [I]t is fair to the corporation so far as those persons are concerned and so far as those defendants are concerned. . . . That's the only ruling I've made thus far. . . . It's fair to them, and this is a fairness hearing . . . on the settlement with those people.

App. at 522:05-522:16 (A172). Accordingly, the District Court did not assess Plaintiffs' rights against the Insurers in finding that the Partial Settlement was fair.

Courts have refused to bar claims by third parties under the collateral attack doctrine where, as here, the prior proceeding did not address the impact of the settlement on those third parties. The United States Supreme Court, for example, has held that

> a voluntary settlement in the form of a consent decree between one group of employees and their employer cannot possibly

> "settle," voluntarily or otherwise, the conflicting claims of another group of employees who do not join in the agreement. This is true even if the second group of employees is a party to the litigation.

Martin v. Wilks, 490 U.S. 755, 762, 768 (1989).

California courts have limited the collateral attack doctrine in circumstances similar to those present here. In *Helfand v. National Union Fire Insurance Co.*, National Union (a defendant here) cancelled a three-year D&O policy issued to Technical Equities, which was then in bankruptcy. 13 Cal. Rptr. 2d 295, 308 (Cal. Ct. App. 1992), *review denied* (Cal. Feb. 11, 1993), *cert. denied*, 510 U.S. 824 (1993). Although Technical Equities disputed the cancellation, it ultimately agreed that National Union would cancel the policy's third year and issue a new policy covering post-bankruptcy acts, and the parties obtained the bankruptcy court's approval of their settlement. *Id.* At the hearing, the parties described the deal but did not explain that individual directors and officers of Technical Equities would not be able to access the limits of the subject policy's third year. *Id.*

After the approval of the settlement, National Union – as it does here – attempted to bar the directors' and officers' bad faith cancellation claims, arguing that they were an "impermissible collateral attack on the bankruptcy court order approving the compromise." *Id.* The court rejected this argument, holding that the bankruptcy court's order "did not purport to determine the rights of the insured directors and officers under the policy." *Id.* at 310. The court stated:

> [T]he order did not cut off or determine the preexisting rights of the former directors and officers to the policy proceeds, or alter the preexisting duties of National Union to its insureds. These rights and duties have nothing to do with the debtor's property. The insureds had a preexisting right to third year coverage absent a good faith cancellation. If, as the trial court found, National Union did not act in good faith in seeking cancellation, it follows that the directors and officers remain entitled to the benefits of third year coverage.

Id. at 310. *See also Rein v. Providian Fin. Corp.*, 270 F.3d 895, 902 (9th Cir. 2001) ("[T]he collateral attack doctrine does not apply to [the plaintiff] because his claims were never addressed by a prior order or judgment.")

Here, too, the fairness hearing did not address Plaintiffs' rights against the Insurers under the Insurance Agreement (which resolved a number of disputes between Broadcom and its Insurers – not just the conditions of funding the Partial Settlement), or any of Plaintiffs' rights under that Agreement. Rather, the hearing was limited to the fairness of the Partial Settlement to Broadcom and its shareholders. Neither Plaintiffs nor the Insurers were parties to the Partial Settlement that the court was evaluating, and the Insurers did not even attend the hearing. Thus, the Insurers have no basis to assert that Plaintiffs should have raised their claims at the fairness hearing. As in *Helfand*, Plaintiffs' claims are not an "impermissible collateral attack" on the Partial Settlement. *Id.* [5]

[5] Notably, an Insurer in the instant action has successfully argued for a result similar to that in *Helfand*. In another California Court of Appeal case, numerous excess insurance companies, including Twin City, persuaded the court to allow them to challenge the reasonableness, for coverage purposes, of a global settlement of underlying liabilities that a bankrupt insured

2. The Insurers' Circular Argument that Their Bad Faith Acts Prevent Plaintiffs from Suing for Bad Faith Fails

The Insurers argue that Plaintiffs cannot assert a claim for bad faith because Plaintiffs are not asserting a claim for coverage. This argument is incorrect as a matter of law. Plaintiffs would have a claim for coverage but for the Insurers' bad faith conduct. It is that conduct that is actionable.

The Insurers acted in bad faith by engineering the Indemnity Provision in the Insurance Agreement to effectively eliminate Plaintiffs' access to coverage. With that Indemnity Provision in place, the Derivative Plaintiffs predictably required Plaintiffs to relinquish any coverage claims because such claims would be indemnified by Broadcom, thus providing no benefit to the company. Now, the Insurers contend that Plaintiffs cannot state a claim for tortious bad faith because Plaintiffs cannot show "that benefits were due under the policy," since Plaintiffs "relinquished their contractual right to coverage as part of the Plaintiffs' Settlement." Defs.' Joint Mot. Dismiss at 29-30 (A375-76). In other words, the Insurers attempt to use the very result intended by their bad faith conduct – Plaintiffs' inability to access coverage – as a shield to liability for that conduct.

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negotiated as part of its Chapter 11 proceedings, even though a bankruptcy court already had approved that settlement, including the insurance funding aspects of it. *See Fuller-Austin Insulation Co. v. Highlands Ins. Co.*, 38 Cal. Rptr. 3d 716, 741 (Cal. Ct. App. 2006).

"[T]he legal principle that a breach of the implied covenant cannot occur 'unless policy benefits are due' refers to whether the policy will eventually cover the claim, and does not depend on when such coverage finally attaches." *Schwartz v. State Farm Fire & Cas. Co.,* 106 Cal. Rptr. 2d 532, 528 (Cal. Ct. App. 2001) (finding that excess insurer owed insured who had not yet exhausted primary coverage a duty not to favor the interests of one insured over another). The duty arises "so long as a potential for coverage under the insurance contract exists." *Id.* Here, consistent with *Schwartz*, Plaintiffs alleged potential entitlement to coverage at the time the Insurers refused to cover the 2011 Settlement. Compl. ¶¶ 29, 33 (A312-13). The fact that Plaintiffs do not assert coverage claims does not prevent them from establishing potential entitlement to coverage as a predicate to their bad faith claim.

Applying this principle, the California Supreme Court and other courts have rejected similar attempts by an insurer to use as a defense to bad faith the insured's inability to access coverage resulting from the insurer's own bad faith conduct. In *Gruenberg v. Aetna Insurance Company*, 510 P.2d 1032 (Cal. 1973), the insurers falsely implied that a policyholder whose restaurant had been damaged by fire had a motive to commit arson, knowing that the policyholder would not appear for a policy-mandated examination concerning the loss while criminal charges were pending against him. *Id.* at 1038. The insurers then denied coverage based on the

policyholder's failure to appear, and argued that he could not assert bad faith claims where he was no longer eligible for coverage. *Id.* at 1039. The court rejected that argument, finding that the policyholder's breach was excused because it was induced by the insurers' bad faith conduct. *Id.* at 1040 n.9.

Other courts likewise have found insurers liable for bad faith where, as here, the insurer's bad faith conduct was the very reason the insured could no longer show entitlement to coverage. *See Lockwood Int'l, B.V. v. Volm Bag Co., Inc.*, 273 F.3d 741, 742-46 (7th Cir. 2001), *reh'g denied* (Jan. 11, 2002) (holding that an insurer acted in bad faith when it bribed the underlying claimant to amend its complaint so that the claims would no longer be covered under the policy). Here, too, the Insurers cannot credibly argue that Plaintiffs' inability to access coverage precludes Plaintiffs from asserting bad faith claims when it was the Insurers' own bad faith conduct that has eliminated such access.

3. Plaintiffs Have Pled a Cognizable Tortious Interference Claim

a. The Insurers Cannot Use the Result of Their Tortious Interference as a Defense to Liability

The Insurers argue that Plaintiffs cannot prove the requisite "disruption of the contractual relationship" for a tortious interference claim because they "disavowed any claim that the insurers breached their contracts or owed coverage." Defs.' Joint Mot. Dismiss at 35 (A381). By doing so, the Insurers again attempt to

use their own bad faith conduct as a shield to liability for that conduct. Plaintiffs' inability to bring a coverage claim against the Insurers is the very "disruption" the Insurers sought to cause when they wrongfully negotiated and executed the Insurance Agreement in a manner to induce the other Insurers to deprive Plaintiffs of access to their coverage. Compl. ¶ 109 (A336). Far from "disavowing" any claim to coverage, Plaintiffs have alleged that they were entitled to coverage when the Insurers refused to cover the 2011 Settlement. *Id.* ¶¶ 29, 33 (A312-13). Thus, Plaintiffs have properly pled allegations of "disruption" of their economic relationship with the Insurers.

b. The Insurers Are Not Parties to Each Other's Contracts and Are Liable for Tortious Interference

Under California law, only a non-party or "stranger" to a contract may be liable in tort for interfering with the performance of the contract. *Reeves v. Hanlon*, 95 P.3d 513, 517 (Cal. 2004). This is because a claim of interference by one party to a contract against another (non-stranger) is, "in essence, [a] breach of contract; and, in such case, plaintiff is entitled to recover all damages flowing from the breach." *Kasparian v. County of Los Angeles*, 45 Cal. Rptr. 2d 90, 100 (Cal. Ct. App. 1995) (citations and quotations omitted).

The Insurers argue that they are immune from liability for Plaintiffs' tortious interference claim because they have a "direct interest or involvement" in each

other's policies. Defs.' Joint Mot. Dismiss at 32-33 (A378-79). This argument is inappropriate in a motion to dismiss. Plaintiffs' allegations make clear that each Insurer had its own policy with Broadcom, each with its own limit and attachment point. Compl. ¶¶ 12-20 (A305-09). Whether any Insurer has an interest in another's contract rising to the level of "non-stranger" to that contract is a question of fact that should not be addressed at this stage of the proceedings.

In any event, the Insurers' argument fails. The Insurers are not parties to each other's contracts and never would agree that they could be liable for the breach of another Insurer's contract. Indeed, insurers themselves often argue, and courts have held, that excess policies "are separate and distinct contracts from the primary policy." *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 871 N.E.2d 418, 426 (Mass. 2007).[6] As a result, "[t]he individual insurers do not (absent a specific provision) act as coinsurers of the entirety of the risk. Rather, each insurer contracts with the insured individually to cover a particular portion of the risk." *Allmerica Fin.*, 871 N.E.2d at 426. Thus, the Insurers' contention here that they are not liable in tort because they are not "strangers" to the contracts should be rejected.

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[6] *See also* 39A Cal. Jur. 3d *Insurance Contracts* § 607 (citing *Kaiser Found. Hosps. v. North Star Reins. Corp.*, 153 Cal. Rptr. 678 (Cal. Ct. App. 1979)) ("[A]n excess insurer is not necessarily required to accept certain facts or conditions requisite to its coverage, even where that fact or condition is stated or accepted by the primary insurer.").

The fact that the D&O Policies contain some of "the same terms and conditions" and offer "successive layers of coverage" does not render them dependent upon one another. Insurers use follow-form language because it

> allows an insured to have coverage for the same set of potential losses (and with the same set of exceptions) in each layer of the insurance program. The language does not, however, bind the various insurers to a form of joint liability should coverage at a prior layer fail. The layer of risk each insurer covers is defined and distinct.

Id. (citing 23 E.M. Holmes, *Appleman on Insurance* 145 (2d ed. 2004); and 2 J.W. Stempel, *Insurance Contract Disputes* 16 (2d ed. Supp. 2005)).

Moreover, numerous California courts have confirmed that entities with "no more than an economic interest or connection to the plaintiff's contract with some other entity" are not immune from tortious interference claims. *See, e.g., Woods v. Fox Broadcasting Sub., Inc.*, 28 Cal. Rptr. 3d 463, 472 (Cal. Ct. App. 2005); *G&C Auto Body Inc. v. Geico Gen. Ins. Co.*, 552 F. Supp. 2d 1015, 1020 (N.D. Cal. 2008). For example, in *Woods*, the court found that a major shareholder of a corporation had only a general economic interest in the corporation, and thus could be liable for tortious interference with a corporate officer's stock options. *Id.*

Here, the Insurers do not even have a stake in each other's contracts rising to the level of "general economic interest." Yet, the Insurers seek to escape all liability for interfering with the others' policies merely because they use similar

language and wrote individual policies in a coverage tower. Such arguments are meritless and do not warrant dismissal of Plaintiffs' claims.

CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that this Court reverse the Order below and deny the Insurers' Motion to Dismiss.

Respectfully submitted,

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EXHIBIT A

EFiled: Mar 19 2013 12:20PM EDT
Transaction ID 51207563
Case No. N12C-07-311 JRJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DR. HENRY T. NICHOLAS, III, WILLIAM J. RUEHLE, and DR. HENRY SAMUELI,	)	
Plaintiffs,	)	
v.	)	C.A. No. N12C-07-311 JRJ CCLD
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, et al.,	)	
Defendants.	)	

Date Submitted: February 7, 2013
Date Decided: March 19, 2013

OPINION

Upon Consideration of Defendants' Joint Motion to Dismiss: **GRANTED**

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Jurden, J

I. Introduction

Plaintiffs Dr. Henry Samueli, Dr. Henry T. Nicholas, III, and William J. Ruehle (together, "Plaintiffs") are suing certain of their directors and officers liability insurers, including Defendants National Union Fire Insurance Company of Pittsburgh, PA, Twin City Fire Insurance Company, XL Specialty Insurance Company, XL Insurance (Bermuda) Ltd., Arch Insurance Company, Federal Insurance Company, Allied World Assurance Company, Ltd., and Chartis Excess Limited (together, "Defendants") for alleged bad faith and tortious actions that took place during protracted settlement negotiations in a stockholder derivative action. Defendants ask this Court to dismiss Plaintiffs' lawsuit for impermissible collateral attack and failure to state a claim. Defendants' Joint Motion to Dismiss is **GRANTED** for the reasons stated below.

II. Background

Broadcom is "a multi-billion dollar public company and a worldwide leader in broadband communications and semi-conductors."[1] Plaintiffs have each served as "high-level former and[/or] current directors and officers" of Broadcom.[2] Broadcom purchased $210 million in insurance coverage under eighteen separate policies by eleven insurance companies.[3] The polices were arranged in a tower, with each policy triggered when the policy below was exhausted by payment of indemnity and/or defense costs.[4] Under the terms of the primary policy (the bottom policy), the insurer shall pay: "[T]he Loss of any Insured Person arising from a Claim first made against such an Insured Person for any Wrongful Act of such Insured person, except when and to the extent that an Organization has indemnified such Insured Person."[5]

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[1] Complaint ¶ 22, *Nicholas v. Nat'l Union Fire Ins. Co.*, No. N12C-07-311 (Del. Super. Jul. 25, 2012) (Trans. ID 45554170) [hereinafter Complaint].
[2] *Id.* ¶ 2.
[3] *See id.* ¶¶ 2 and 12.
[4] *Id.* ¶ 12.
[5] *Id.* ¶ 31.

On May 25, 2006, a shareholder derivative action was brought on behalf of Broadcom in the United States District Court for the Central District of California (the "District Court").[6] This action alleged that Plaintiffs, along with fifteen others, "violated securities laws and breached their fiduciary duties in connection with the granting of stock options to Broadcom employees."[7] Protracted settlement discussions between the insurance companies, Broadcom, the derivative plaintiffs, and others eventually resulted in a $118 million settlement (the "Partial Settlement") in which the derivative plaintiffs "released all of their claims against the settling officers and directors, with the exception of the claims against" the Plaintiffs.[8] Plaintiffs had been "excluded from the majority of the negotiations" [9] because of pending criminal charges and refused to consent to any settlement that did not include all insureds.[10]

On August 20, 2009, Broadcom and its insurance companies entered into a new insurance agreement (the "Insurance Agreement") to fund the Partial Settlement.[11] According to the terms of the Insurance Agreement, Plaintiffs would "retain all rights" under the original insurance polices "in all respects."[12] However, upon payment by the insurance companies of the $118 million, Broadcom would indemnify the insurance companies in the event of a claim by Plaintiffs that either: (a) seeks coverage as to the released derivative action claims, or (b) includes *both* a bad faith claim and any other claim that would otherwise be indemnified by Broadcom (a "mixed claim").[13]

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[6] *Id.* ¶ 44.
[7] *Id.*
[8] *Id.* ¶ 53.
[9] *Id.* ¶ 47.
[10] *See id.* ¶ 45.
[11] *Id.* ¶ 54.
[12] Appendix to Opening Brief in Support of Defendants' Joint Motion to Dismiss Complaint at 331-32 (Insurance Agreement, Terms of Agreement ¶ 3.A. ("Mutual Releases")), *Nicholas v. Nat'l Union Fire Ins. Co.*, No. N12C-07-311 JRJ CCLD (Del. Super. Oct. 12, 2012) (Trans. ID 46927803) [hereinafter Appendix].
[13] *Id.* at 333 (Insurance Agreement, Terms of Agreement ¶ 4 ("Indemnification")).

The Partial Settlement was filed with in the District Court on August 28, 2009.[14] The language of the Partial Settlement closely mirrored, explicitly adopted, and/or conditioned its own terms on the terms of the Insurance Agreement.[15] Dissatisfied with the terms of, and for having been excluded from, the Partial Settlement, Dr. Nicholas submitted pre-hearing papers objecting to its approval by the District Court.[16] Mr. Ruehle joined Dr. Nicholas' objection to final approval of the Partial Settlement.[17] Dr. Samueli withdrew his non-opposition to final approval of the Partial Settlement after his criminal charges were dropped – four days before the District Court conducted the hearing in which it approved the Partial Settlement and issued its final judgment.[18] Counsel for Dr. Samueli argued before the District Court in opposition of final approval.[19] Nevertheless, the District Court approved the Partial Settlement, finding that the Partial Settlement was "fair, adequate, and reasonable" and that "there [was] no evidence that the settlement was the product of fraud, overreaching, or collusion . . . ."[20]

Plaintiffs appealed the ruling of the District Court.[21] Dr. Samueli submitted his brief separately from Dr. Nicholas and Mr. Ruehle, who submitted together.[22] But Plaintiffs would later drop their appeals as part of their own settlement agreement in the derivative action (the

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[14] *See id.* at 292 (Stipulation and Agreement of Partial Settlement).
[15] *See id.* at 303 (Stipulation and Agreement of Partial Settlement § V.B.(1) ("Settlement Terms: Payment to Broadcom")) and 304 (Stipulation and Agreement of Partial Settlement § V.B.(2) ("Settlement Terms: Compromise of Insurance Disputes")).
[16] *See id.* at 398 (Opposition of Defendant Henry T. Nicholas, III to Joint Motion for Preliminary Approval of Partial Settlement) and 446 (Objections of Henry T. Nicholas, III to Proposed Partial Settlement; Memorandum of Points and Authorities).
[17] *See id.* at 496 (Defendant William J. Ruehle's Notice of Joinder in Objections of Henry T. Nicholas, III to Proposed Partial Settlement).
[18] *See id.* at 498 (Notice of Dr. Henry Samueli's Position Regarding the Joint Motion for Final Approval of Partial Settlement), 500 (Notice of Dr. Henry Samueli's Withdrawal of His Non-Opposition to the Joint Motion for Final Approval of Partial Settlement), and 503-32 (Transcript of Proceedings of December 14, 2009, Motion Hearing).
[19] *See id.* at 503-32 (Transcript of Proceedings of December 14, 2009, Motion Hearing).
[20] *Id.* at 529-30 (Transcript of Proceedings of December 14, 2009, Motion Hearing).
[21] *See id.* at 539 (Notice of Appeal (Dr. Nicholas)), 547 (Notice of Appeal (Mr. Ruehle)), and 549 (Notice of Appeal (of Samueli)).
[22] *See* Letter to Chambers at Tabs 1 and 2 (Brief of Appellant Dr. Henry Samueli and Brief of Defendants-Appellants Henry T. Nicholas, III and William J. Ruehle, respectively), *Nicholas v. Nat'l Union Fire Ins. Co.*, No. N12C-07-311 JRJ CCLD (Del. Super. Feb. 7, 2013) (Trans. ID 49349821).

"2011 Settlement").[23] Under the terms of the 2011 Settlement, Plaintiffs agreed not to make any claims that would obligate Broadcom to indemnify or to hold harmless any of the insurance companies pursuant to the Indemnification terms of the Insurance Agreement.[24] In addition, while the terms allowed Plaintiffs to continue to maintain that the Insurance Agreement is "invalid and void," Plaintiffs nevertheless agreed and covenanted not to make any claims "seeking to invalidate or void the Insurance Agreement or any provision therein."[25]

On July 25, 2012, Plaintiffs filed a Complaint in Delaware alleging: (1) Tortious Bad Faith against all defendants except Chartis Excess Limited, XL Insurance (Bermuda) Ltd., and Allied World Assurance Company, Ltd., and (2) Tortious Interference with Contract and/or Prospective Economic Advantage against all defendants. On October 12, 2012, Defendants filed the Joint Motion to Dismiss pursuant to Superior Court Civil Rule 12(b)(6).[26] Defendant Twin City Fire Insurance Company joins in the Joint Motion to Dismiss and has filed an additional and separate Motion to Dismiss.[27]

III. Issues

In their Joint Motion to Dismiss, Defendants argue that Plaintiffs' lawsuit is an impermissible collateral attack on the Partial Settlement and on the 2011 Settlement.[28] Even if Plaintiffs' lawsuit is not an impermissible collateral attack, according to Defendants, Plaintiffs

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[23] *See* Appendix at 638 (Appellants Nicholas and Ruehle's Unopposed Motion for Voluntary Dismissal), 657 (Dr. Samueli's Motion for Voluntary Dismissal of Appeal), 564 (Stipulation and Agreement of Settlement § V.C.(1) ("Pending Appeals, Preliminary Approval, Notice Order and Settlement Hearing")), and 631 (Final Judgment and Order of Dismissal).
[24] *Id.* at 574 (Stipulation and Agreement of Settlement § V.F.(15) ("Miscellaneous Provisions")).
[25] *Id.*
[26] Opening Brief in Support of Defendants' Joint Motion to Dismiss Complaint, *Nicholas v. Nat'l Union Fire Ins. Co.*, No. N12C-07-311 JRJ CCLD (Del. Super. Oct. 12, 2012) (Trans. ID 46927803) [hereinafter Opening Brief].
[27] Defendant Twin City Fire Insurance Company's Brief in Support of Its Motion to Dismiss Plaintiffs' First Cause of Action, *Nicholas v. Nat'l Union Fire Ins. Co.*, No. N12C-07-311 JRJ CCLD (Del. Super. Oct. 12, 2012) (Trans. ID 46956124) [hereinafter Twin City Brief].
[28] Opening Brief at 18.

nevertheless fail to state a claim under California law for the torts they assert.[29] Defendant Twin City Fire Insurance Company argues that Plaintiffs fail to "sufficiently plead allegations of a prima facie claim for tortious bad faith with respect to Twin City."[30]

IV. Standard of Review

When considering a motion to dismiss, the Court must assume that all well-plead facts in the complaint are true.[31] The Court may also consider any document that "is integral to a plaintiff's claim and incorporated into the complaint."[32] And the Court may take judicial notice of publicly available facts that are not subject to reasonable dispute,[33] such as the fact that statements were made in filings in other courts.[34] Thus, in addition to the facts alleged in the Complaint, this Court may consider the settlement agreements that Plaintiffs' claims reference and rely upon,[35] the insurance contracts that the Complaint discusses at length,[36] and the publicly-available filings in the federal court action that was the subject of those settlements. Nevertheless, "a complaint may not be dismissed unless it is clearly not viable, which may be determined as a matter of law or fact."[37]

V. Discussion

"A collateral attack is an attempt to avoid, defeat, evade, or deny the force and effect of a final order or judgment in an incidental proceeding other than by appeal, writ of error, certiorari,

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[29] *Id.*
[30] Twin City Brief at 2.
[31] *See Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 3157124, at *3 (Del. Super. Aug. 1, 2012) and *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).
[32] *Vanderbilt Income and Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996); *see also In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).
[33] *In re GM (Hughes) S'holder Litig.*, 897 A.2d 162, 169-71 (Del. 2006).
[34] *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 n.28 (Del. 2004).
[35] Complaint ¶¶ 4, 7, 53.
[36] *Id.* ¶¶ 12, 25-36.
[37] *Cornell Glasgow, LLC v. LaGrange Props., LLC*, 2012 WL 3157124, at *3 (Del. Super. Aug. 1, 2012), citing *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

or motion for new trial."[38] "The collateral attack doctrine precludes litigants from collaterally attacking the judgments of other courts."[39] This is because "[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected."[40] In the case *sub judice*, Plaintiffs' lawsuit is an impermissible collateral attack on their own 2011 Settlement.

"A judicially approved settlement agreement is considered a final judgment on the merits."[41] In the 2011 Settlement, Plaintiffs agreed and covenanted "not to make any claims seeking to invalidate or void the Insurance Agreement or any provision therein."[42] In their Complaint, however, Plaintiffs allege that Defendants "engaged in a bad faith scheme to withhold from Plaintiffs the benefits of their insurance coverage"[43] by "intentionally and knowingly structuring the Insurance Agreement in a manner that made it impossible for Plaintiffs to use their insurance coverage to settle the derivative action."[44] Plaintiffs further allege that Defendants "intentionally and wrongfully negotiated and executed the Insurance Agreement in a manner to induce the other Insurance Companies to deprive Plaintiffs of the benefits available to them under the other insurance contracts . . . ."[45] Moreover, in addition to *entering* into the Insurance Agreement, Plaintiffs argue that Defendants "committed further wrongful overt acts in *operating* the conspiracy" *according to the terms of the Insurance*

[38] *Fransen v. Conoco, Inc.*, 64 F.3d 1481, 1847 (10th Cir. 1995) (internal citation omitted).
[39] *Rein v. Providian Fin. Corp.*, 270 F.3d 895, 902 (9th Cir. 2001) (internal citation omitted).
[40] *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995).
[41] *Rein*, 270 F.3d at 903 (internal citation omitted).
[42] Appendix at 574 (Stipulation and Agreement of Settlement § V.F.(15) ("Miscellaneous Provisions")).
[43] Complaint ¶ 94.
[44] *Id.* ¶ 95.
[45] *Id.* ¶ 109.

Agreement by "refus[ing] to fund reasonable settlement offers, and condition[ing] their coverage on Broadcom's consent to such settlement offers."[46]

Plaintiffs assert that they "do not seek to *set aside*" the Insurance Agreement.[47] Instead, argue Plaintiffs, their claims are based upon the underlying "wrongful overt acts" that *led* to the Insurance Agreement's creation and implementation.[48] Thus, conclude Plaintiffs, because they are not "pursuing any coverage claims," their lawsuit is not an impermissible collateral attack on their 2011 Settlement.[49] But this is a distinction without a difference. Plaintiffs' current claims clearly jeopardize the validity and efficacy of the Insurance Agreement. Yet Plaintiffs agreed and covenanted "not to make any claims seeking to invalidate or void the Insurance Agreement or any provision therein."[50] Thus, their current claims are "an attempt to avoid, defeat, evade, or deny the force and effect" of that agreement and covenant, making them an impermissible collateral attack on the 2011 Settlement.[51]

Plaintiffs argue that their agreement and covenant "not to make any claims that would obligate Broadcom to indemnify or to hold harmless any of the Insurers pursuant to the terms of Paragraph 4 of the Insurance Agreement" nullifies their agreement and covenant "not to make any claims seeking to invalidate or void the Insurance Agreement or any provision therein."[52] Plaintiffs assert that, "[u]nder Paragraph 4 of the Insurance Agreement, Broadcom does not have to indemnify Defendants for non-coverage claims and, specifically, for bad faith claims."[53] Thus, concludes Plaintiffs, "the first sentence of the provision expressly permits this action" and

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[46] *Id.* ¶ 104 (emphasis added). *See also id.* ¶ 116.
[47] Plaintiffs' Consolidated Answering Brief in Opposition to the Defendants' Joint Motion to Dismiss and Twin City's Separate Motion to Dismiss at 18, *Nicholas v. Nat'l Union Fire Ins. Co.*, No. N12C-07-311 (Del. Super. Dec. 7, 2012) (Trans. ID 48260042) [hereinafter Answering Brief] (emphasis added).
[48] *See id.*
[49] *Id.*
[50] Appendix at 574 (Stipulation and Agreement of Settlement § V.F.(15) ("Miscellaneous Provisions")).
[51] *Fransen v. Conoco Inc.*, 64 F.3d 1481, 1847 (10th Cir. 1995) (internal citation omitted).
[52] Answering Brief at 20.

"Defendants' reading of the second sentence . . . renders the first sentence null, an outcome that violates basic rules of contract interpretation."[54]

Plaintiffs' interpretation in incorrect. The provision in question reads in its entirety:

> [Plaintiffs] agree and covenant not to make any claims that would obligate Broadcom to indemnify or to hold harmless any of the Insurers pursuant to the terms of Paragraph 4 of the Insurance Agreement. While [Plaintiffs] maintain that the Insurance Agreement is invalid and void, [Plaintiffs] agree and covenant not to make any claims seeking to invalidate or void the Insurance Agreement or any provision therein.[55]

The first sentence does not nullify the second sentence, nor does it "permit" Plaintiffs' current action. It merely protects Broadcom from having to indemnify the insurance companies against claims made by Plaintiffs by prohibiting Plaintiffs from bringing such claims at all. Plaintiffs are correct that the terms of the Insurance Agreement (by themselves) do not require Broadcom to indemnify Defendants for bad faith claims that are not part of a mixed claim. Under the terms of the Insurance Agreement *alone – ceteris paribus* – Plaintiffs could have brought their current bad faith claims against Defendants without forcing Broadcom to indemnify the insurance companies. But the only reason for bringing such claims would have been to try to undermine and/or invalidate the Insurance Agreement and the provisions therein. Thus, the second sentence merely closes the door on claims that would jeopardize the existence of the Insurance Agreement and/or any provision therein – a door likely left open because Plaintiffs were not part of the original negotiations. Plaintiffs' current collateral attack is exactly what the second sentence was designed to combat.[56]

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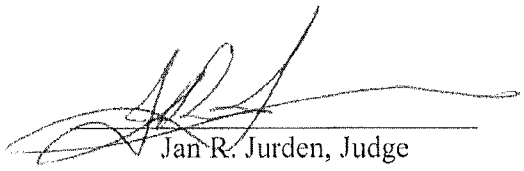
[53] *Id.* (emphasis in original).
[54] *Id.* (internal citations omitted).
[55] Appendix at 574 (Stipulation and Agreement of Settlement § V.F.(15) ("Miscellaneous Provisions")).
[56] Plaintiffs' argument that they should not be required to adhere to their own 2011 Settlement because they were in an "untenable position" when they agreed to it is unpersuasive. Any complaints and/or allegations regarding the process or result of the 2011 Settlement most certainly belong in the District Court or the Ninth Circuit Court of Appeals. Any attack here would be impermissibly collateral. Therefore, Plaintiffs must comply with the terms of their 2011 Settlement, whether their position was "untenable" or not.

For the reasons stated above, Defendants' Joint Motion to Dismiss is **GRANTED** and all claims against Defendants are dismissed.[57]

VI. Conclusion

Plaintiffs' lawsuit is an impermissible collateral attack on the 2011 Settlement. Therefore, Defendants' Joint Motion to Dismiss is **GRANTED** and all claims against Defendants are dismissed.

IT IS SO ORDERED.



Jan R. Jurden, Judge

cc: Prothonotary

[57] In light of the Court's decision granting dismissal, the Court need not consider whether Plaintiffs' lawsuit is an impermissible collateral attack on the Partial Settlement or whether Plaintiffs sufficiently stated a claim against Defendants or Twin City.

CERTIFICATE OF SERVICE

Jennifer C. Wasson hereby certifies that on the 16th day of July, 2013, she caused to be filed, via File & Serve*Xpress*, an electronic version of the foregoing document, and to be served, via File & Serve*Xpress*, upon the Delaware counsel of record identified below:

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