



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DR. HENRY T. NICHOLAS, III, *et al.*,)
) No. 209, 2013
Plaintiffs Below/Appellants,)
v.) Court Below – Superior Court of the
) State of Delaware, in and for
NATIONAL UNION FIRE) New Castle County
INSURANCE COMPANY OF) Case No. N12C-07-311 JRJ CCLD
PITTSBURGH, PA, *et al.*,)
)
Defendants Below/Appellees.)

APPELLEES' ANSWERING BRIEF

OF COUNSEL:

Wallace A. Christensen, Esq.
Merril Hirsh, Esq.
TROUTMAN SANDERS LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2950

ROSENTHAL, MONHAIT & GODDESS, P.A.

Carmella P. Keener, Esq. (#2810)

919 N. Market Street, Suite 1401

Wilmington, DE 19801

P.O. Box 1070

Wilmington, DE 19899

(302) 656-4433

ckeener@rmgglaw.com

Attorneys for Defendant Below/Appellee Federal Insurance Company

Dated: August 29, 2013

OF COUNSEL:

John R. Gerstein, Esq.
Jonathan A. Constine, Esq.
TROUTMAN SANDERS LLP
401 9th Street, N.W., Suite 1000
Washington, D.C. 20004-2134
(202) 274-2950

ROSENTHAL, MONHAIT & GODDESS, P.A.

Carmella P. Keener, Esq. (#2810)
919 N. Market Street, Suite 1401
Wilmington, DE 19801
P.O. Box 1070
Wilmington, DE 19899
(302) 656-4433
ckeener@rmgglaw.com

Attorneys for Defendant Below/Appellee XL Specialty Insurance Company

OF COUNSEL:

Robert Novack, Esq.
Angela M. Scafuri, Esq.
Charles W. Stotter, Esq.
Nicholas I. Bamman, Esq.
BRESSLER, AMERY & ROSS,
P.C.
325 Columbia Turnpike
Florham Park, NJ 07932
Morristown, NJ 07962
(973) 514-1200

MORRIS JAMES LLP

Edward M. McNally (#614)
Patricia A. Winston (#5248)
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899
(302) 888-6800
emcnally@morrisjames.com
pwinston@morrisjames.com

*Attorneys for Defendant Below/Appellee National
Union Fire Insurance Company of Pittsburgh, Pa.*

OF COUNSEL:

Jay Shapiro, Esq.

WHITE AND WILLIAMS LLP

One Penn Plaza

250 W. 34th Street

41st Floor, Suite 4110

New York, NY 10119-4115

(212) 244-9500

Attorneys for Defendant Below/Appellee Twin City Fire Insurance Company

WHITE AND WILLIAMS LLP

John D. Balaguer, Esq. (#2537)

824 N. Market Street, Suite 902

P.O. Box 709

Wilmington, DE 19899-0709

(302) 654-0424

balaguerj@whiteandwilliams.com

OF COUNSEL:

Michael R. Goodstein, Esq.

BAILEY CAVALIERI LLC

10 W. Broad Street, Ste. 2100

Columbus, Ohio 43215-3422

(614) 221-3155

FOX ROTHSCHILD, LLP

Neal J. Levitsky, Esq. (#2092)

Seth A. Niederman, Esq. (#4588)

Citizens Bank Center

919 North Market Street

Suite 1300

P.O. Box 2323

Wilmington, DE 19899-2323

(302) 654-7444

nlevitsky@foxrothschild.com

sniederman@foxrothschild.com

Attorneys for Defendant Below/Appellee Arch Insurance Company

TABLE OF CONTENTS

Table of Authorities	iii
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT	3
STATEMENT OF FACTS	4
I. THE INSURANCE.....	4
II. THE DERIVATIVE LITIGATION	4
III. THE PARTIAL SETTLEMENT STIPULATION.....	6
A. The Settlement Terms.....	6
B. The Insurance Agreement.....	8
C. Preliminary and Final Approval	10
1. The Settling Parties’ Arguments	10
2. The Non-Settling Defendants’ Objections	11
3. The Non-Settling Defendants’ Appeal	13
IV. THE PLAINTIFFS’ SETTLEMENT AND DISMISSAL OF APPEALS.....	14
V. THIS LAWSUIT	15
ARGUMENT	17
I. THE SUPERIOR COURT PROPERLY CONCLUDED THAT PLAINTIFFS’ COURT-APPROVED AGREEMENT NOT TO CHALLENGE THE VALIDITY OF THE INSURANCE AGREEMENT BARRED THEIR CLAIMS	17
A. Question Presented	17
B. Scope of Review.....	17

C.	Merits of Argument	17
1.	The Court-Approved Agreement Not to Make Any Claims Seeking to Invalidate “the Insurance Agreement or Any Provision Therein” Was Entitled to Full Faith and Credit	17
2.	The Plaintiffs’ Complaint Sought to Invalidate the Insurance Agreement or a “Provision Therein”	18
3.	The Superior Court’s Interpretation Does Not Render the First Sentence of Provision F.15 Null or Moot	20
4.	The Superior Court Did Not Improperly Make “Findings” Regarding the Parties’ “Intent”	22
II.	PLAINTIFFS’ COMPLAINT ALSO SOUGHT COLLATERALLY TO ATTACK THE COURT ORDER APPROVING THE INSURANCE AGREEMENT, AND STATED NO CLAIM FOR RELIEF	25
A.	Question Presented	25
B.	Standard of Review.....	25
C.	Merits of Argument	25
1.	Plaintiffs’ Claims Are an Impermissible Collateral Attack on the Order Approving the Partial Settlement	25
a.	Plaintiffs’ Complaint Attacks the District Court’s Order Approving the Insurance Agreement.....	25
b.	Plaintiffs Cannot Collaterally Attack the Order by Arguing It Did Not Address their Rights	28
2.	Plaintiffs Cannot State a Claim for “Tortious Bad Faith”	30
3.	Plaintiffs Cannot State a Claim for Tortious Interference with Contract or Interference with a Business Relationship	33
	CONCLUSION	35

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Am. Funding Servs. v. State,</u> 41 A.3d 711 (Del. 2012)	17
<u>Behnke v. State Farm General Ins. Co.,</u> 127 Cal. Rptr. 3d 372 (Cal. Ct. App. 2011)	31
<u>Benavides v. State Farm General Ins. Co.,</u> 39 Cal. Rptr. 3d 650 (Cal. Ct. App. 2006)	31
<u>Brizuela v. CalFarm Ins. Co.,</u> 10 Cal. Rptr. 3d 661 (Cal. Ct. App. 2004)	31
<u>Celotex Corp. v. Edwards,</u> 514 U.S. 300 (1995)	25
<u>Cent. Laborers Pension Fund v. News Corp.,</u> 45 A.3d 139 (Del. 2012)	25
<u>Daewoo Motor Co. v. General Motors Corp.,</u> 459 F.3d 1249 (11th Cir. 2006), <u>cert. denied</u> , 549 U.S. 1362 (2007)	27, 28
<u>In re Daewoo Motor Co., Ltd. Dealership Litig.,</u> No. 1510, 2005 U.S. Dist. LEXIS 43197 (M.D. Fla. Jan. 6, 2005)	26, 27
<u>Exxon Corp. v. Superior Court,</u> 60 Cal. Rptr. 2d 195 (Cal. Ct. App. 1997)	34
<u>Fransen v. Conoco, Inc.,</u> 64 F.3d 1481 (10th Cir. 1995)	26
<u>Fresno Motors, LLC v. Mercedes-Benz USA, LLC,</u> No. 11-2000, 2012 U.S. Dist. LEXIS 42161 (E.D. Cal. Mar. 27, 2012)	33, 34
<u>Garza v. TV Answer, Inc.,</u> 1997 Del. LEXIS 452 (Del. Dec. 8, 1997)	18

<u>George v. Auto. Club of Southern California,</u> 135 Cal. Rptr. 3d 480 (Cal. App. 2011).....	23, 24
<u>Gruenberg v. Aetna Ins. Co.,</u> 108 Cal. Rptr. 480 (Cal. 1973)	32
<u>Helfand v. National Union Fire Ins. Co.,</u> 13 Cal. Rptr. 2d 295 (Cal. Ct. App. 1992).....	29, 30
<u>Houck Constr., Inc. v. Zurich Specialties London Ltd,</u> No. 06-3832, 2007 U.S. Dist. LEXIS 46363 (C.D. Cal. June 4, 2007).....	31
<u>Humana Inc. v. Forsyth,</u> 525 U.S. 299 (1999).....	18
<u>Kasparian v. County of Los Angeles,</u> 45 Cal. Rptr. 2d 90 (Cal. Ct. App. 1995).....	33
<u>Love v. Fire Ins. Exchange,</u> 271 Cal. Rptr. 246 (Cal. Ct. App. 1990).....	31, 32
<u>Marder v. Lopez,</u> 450 F.3d 445 (9th Cir. 2006)	24
<u>Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.,</u> 271 F.3d 825 (9th Cir. 2001)	33, 34
<u>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,</u> 319 F. Supp. 2d 1059 (C.D. Cal. 2003).....	33, 34
<u>Norman v. McKee,</u> 431 F.2d 769 (9th Cir. 1970)	28-29
<u>PM Group, Inc. v. Stewart,</u> 64 Cal. Rptr. 3d 227 (Cal. Ct. App. 2007).....	34, 35
<u>Reeves v. Hanlon,</u> 95 P.3d 513 (Cal. 2004)	33
<u>Rein v. Providian Fin. Corp.,</u> 270 F.3d 895 (9th Cir. 2001)	25

<u>Russell v. State,</u> 5 A.3d 622 (Del. 2010)	22, 23
<u>Sabo v. Metropolitan Life Ins. Co.,</u> 137 F.3d 185 (3d Cir. 1998)	18
<u>Schwartz v. State Farm Fire and Cas. Co.,</u> 106 Cal. Rptr. 2d 523 (Cal. Ct. App. 2001).....	32, 33
<u>Skilstaf, Inc. v. CVS Caremark Corp.,</u> 669 F.3d 1005 (9th Cir. 2012)	24
<u>Stewart v. First Cal. Bank,</u> No. B236286, 2013 Cal. App. Unpub. LEXIS 3829 (Cal. Ct. App. May 30, 2013)	23
<u>Tomaselli v. Transamerica Ins. Co.,</u> 31 Cal. Rptr. 2d 224 (Cal. Ct. App. 1994).....	31
<u>United States v. Stewart,</u> 955 F. Supp. 385 (E.D. Pa. 1997).....	18
<u>United States v. Summerville,</u> No. 04-cv-462, 2006 U.S. Dist. LEXIS 7168 (E.D. Va. Feb. 14, 2006).....	18
<u>Waller v. Truck Ins. Exchange, Inc.,</u> 900 P.2d 619 (Cal. 1995).....	31
<u>Woods v. Google, Inc.,</u> 889 F. Supp. 2d 1182 (N.D. Cal. 2012).....	24

OTHER AUTHORITIES

Oxford English Dictionary (1989)	18
Webster’s Third New Int’l Dictionary (1986)	18

NATURE OF PROCEEDINGS

Plaintiff-Appellants Dr. Henry T. Nicholas, III, William J. Ruehle, and Dr. Henry Samueli (collectively, “Plaintiffs”), three of Broadcom Corporation’s (“Broadcom’s”) current or former top executives, were among the defendants in a federal lawsuit filed in California that alleged they had unlawfully “backdated” stock options. In that California lawsuit, the other defendants and derivative plaintiffs entered into a Stipulation and Agreement of Partial Settlement (the “Stipulation” or “Partial Settlement”), that “fully incorporated” an “Insurance Agreement” that provided almost all of its funding. As non-settling defendants there, the Plaintiffs objected to the Partial Settlement. And when the United States District Court for the Central District of California approved the Partial Settlement over their objection, Plaintiffs appealed. Subsequently, however, Plaintiffs entered into their own settlement with the derivative plaintiffs in which they not only dismissed that appeal, but agreed in a second, court-approved “Plaintiffs’ Settlement” not to pursue coverage under the insurers’ policies and “not to make any claims seeking to invalidate or void the Insurance Agreement or any provision therein.”

More than a year later, Plaintiffs brought this action in Superior Court in and for New Castle County alleging that insurance companies who were parties to the Insurance Agreement engaged in “tortious bad faith” and “tortious interference with contract” by entering into and complying with the Insurance Agreement.

The five Insurer Defendants in this action moved to dismiss the Complaint on several grounds. The Insurer Defendants argued that the Complaint, which was

premised on the alleged illegality of the insurers' entry into and performance of the Insurance Agreement, violated Plaintiffs' court-approved covenant not to "make any claims seeking to invalidate or void the Insurance Agreement or any provision therein." These insurers also argued, among other things, that (1) the Complaint was an improper collateral attack on the California federal court's 2010 order approving the Partial Settlement Stipulation, which "fully incorporated" the Insurance Agreement; (2) Plaintiffs' disavowal of any claim to coverage precluded Plaintiffs from stating a cause of action for bad faith; and (3) Plaintiffs did not state a claim for "tortious interference" because insurers on a common insurance tower are not (as the applicable law requires) "strangers" to the insurance contracts with which they allegedly interfered.

By Order dated March 19, 2013, Judge Jan R. Jurden granted the insurers' motion to dismiss. Judge Jurden ruled that, because Plaintiffs' claims were based on the premise that the Insurance Agreement was unlawful (and could not lawfully be performed by the insurers), Plaintiffs had violated their court-sanctioned agreement not to "make any claims seeking to invalidate or void the Insurance Agreement or any provision therein." Judge Jurden did not address the other grounds supporting the motion to dismiss.

Plaintiffs filed a Notice of Appeal on April 18, 2013 in the Superior Court. The Superior Court transferred the Notice to this Court on May 22, 2013.

SUMMARY OF ARGUMENT

1. a. Denied. The Superior Court properly held that the Plaintiffs' explicit, court-approved agreement not to "make any claims seeking to invalidate . . . the Insurance Agreement or any provision therein" required dismissal of Plaintiffs' Complaint. Plaintiffs premised their Complaint on asserting that it was a tort for the Insurers to enter into or perform the Insurance Agreement and to comply with the Indemnity Provision in that agreement. This assertion – that it is unlawful for a party to make or comply with the terms of an agreement – is a claim "seeking to invalidate" that agreement.

b. Denied. The Superior Court did not make any "unwarranted factual finding about the parties' intent." Plaintiffs never argued or alleged that there was a factual question regarding intent, and therefore waived this issue. In any case, the language of the court-approved agreement was clear, and Plaintiffs did not identify any extrinsic evidence supporting a contrary interpretation.

2. Denied. There are multiple alternative grounds for upholding the Superior Court's dismissal. First, the Complaint, which was premised on the unlawfulness of the Insurance Agreement, constituted an impermissible collateral attack on the California federal court judgment that approved the Insurance Agreement and the broader settlement of which it was a part. Second, the Plaintiffs' claims fail on their merits as a matter of law. Plaintiffs failed to state a cause of action for "bad faith" because Plaintiffs disclaimed any intention of establishing coverage.

Plaintiffs' claim for tortious interference could not survive because the Insurer Defendants were not "strangers" to the contracts at issue, as the law requires.

STATEMENT OF FACTS

I. THE INSURANCE

The five defendants that remain in this case are insurers participating in a Directors and Officers Liability (“D&O”) insurance tower consisting of one primary and 17 excess policies, issued to Broadcom by 11 different “Insurers.” A305-07, 311. (The Plaintiffs settled with three Insurers prior to this action, A301, and subsequently dismissed their case without prejudice against three others).

The Primary Policy, issued by defendant National Union Fire Insurance Company, had a Limit of Liability of \$10,000,000. A305-07. The 17 excess insurance policies had Limits of Liability of between \$5,000,000 and \$15,000,000, for a combined tower of \$210,000,000. *Id.* Each excess policy specified that it would not afford coverage until “the Policy below it in the tower is exhausted by payment of indemnity and defense costs.” *Id.* The excess policies were generally “follow form” policies, meaning that, subject to specific exceptions, they incorporated and followed the terms and conditions of the Primary Policy and other policies below them. A314; B9, B24. However, some policies contained relevant policy-specific provisions. A314; B52.

II. THE DERIVATIVE LITIGATION

Plaintiffs Samueli and Nicholas co-founded Broadcom. A301, 305. During all relevant times, Dr. Samueli has been Broadcom’s Chief Technology Officer and the Chairman of its Board of Directors. *Id.* Dr. Nicholas was Broadcom’s Chief Executive Officer and the Co-Chairman of its Board of Directors until January

2003. A305. Mr. Ruehle was Broadcom's Chief Financial Officer until September 2006. Id.

In 2006, Nicholas, Ruehle and Samueli were named as defendants in shareholder derivative suits, private securities class actions, Securities and Exchange Commission ("SEC") investigations and lawsuits, and Department of Justice investigations and criminal proceedings. A301, 305. Various federal derivative actions were consolidated in the Central District of California as In re Broadcom Corporation Derivative Litigation, Master File CV-06-3252-R (CWx) (C.D. Cal.) (the "Derivative Action").

These 2006 actions alleged that Nicholas, Ruehle and Samueli (and 15 other Broadcom directors and officers) violated securities laws and breached their fiduciary duties by permitting (and in some instances engineering) a plan whereby Broadcom would grant stock options that were "backdated" to a day on which the market price was lower than the date on which the option was granted. See, e.g., B56, 64-84, 91. The Derivative Action Complaint alleged that, following an "internal investigation into its stock option granting practices," Broadcom admitted in a July 14, 2006 SEC filing that it had "engaged in improper backdating of stock options, stating: 'the accounting measurement dates for certain stock option grants awarded during the years 2000-2002 differ from measurement dates previously used for such awards.'" B73. According to the Derivative Action Complaint, correcting the effects of improper backdating had resulted in restatements of *seven years* of Broadcom's financial statements and caused the company to incur "more than \$1.5 billion in additional compensation expenses." B74.

Nicholas and Ruehle were also criminally charged in federal court with violating the securities laws in connection with the stock option grants, and Samueli was criminally charged with, and initially pled guilty to, making a false statement. A324. In December 2009, the United States District Court for the Central District of California set the plea aside and dismissed the charges against all three Plaintiffs; however, many of the events in the litigation took place with these charges pending. A325-26.

III. THE PARTIAL SETTLEMENT STIPULATION

Through 2008 and 2009, the Derivative Action Plaintiffs, Broadcom, 15 of the defendants, and the 11 Insurers engaged in protracted settlement discussions requiring multiple mediation sessions. A318. On August 28, 2009, the Derivative Action Plaintiffs, Broadcom, Broadcom's Special Litigation Committee ("SLC") and all of the Derivative Action Defendants except Nicholas, Ruehle and Samueli (the "Settling Defendants") (collectively, the "Settling Parties") jointly moved for preliminary approval of a Stipulation and Agreement of Partial Settlement (the "Stipulation" or the "Partial Settlement"). A324; A97-122.

A. The Settlement Terms

The Stipulation provided that the Derivative Plaintiffs would dismiss and release the claims against the Settling Defendants in exchange for payments and other benefits to Broadcom. A25-26, 32. Section V(B) of the Stipulation, titled "Settlement Terms," identified six components to the settlement relief. Id.

The first component, titled "Payment to Broadcom," provided that "Broadcom will receive payments totaling \$118,000,000" to be made "from the

Insurers *pursuant to the Insurance Agreement.*” A28 (emphasis added). “As part of the consideration for the Settlement, and *as set forth more fully in the Insurance Agreement*, the Released Persons relinquish their rights under the policies and agree that Broadcom will receive from the Insurers reimbursements ultimately totaling \$118,000,000 *pursuant to the terms of the Insurance Agreement.*” *Id.* (emphasis added).

The second component of the Settlement Terms, titled “Compromise of Insurance Disputes,” provided:

As set forth more fully in the Insurance Agreement and subject to its terms, (a) the Released Persons and the Insurers will exchange releases relating to various claims and Broadcom’s directors and officers liability insurance policies; (b) the Non-Settling Defendants shall retain all rights as against the Insurers under Broadcom’s directors and officers liability insurance policies, and the Insurers reserve all of their rights as against the Non-Settling Defendants; and (c) Broadcom shall indemnify the Insurers for claims brought against them by the Non-Settling Defendants.

A29 (emphasis added).

A third settlement component, titled “Other Consideration,” included repricing and cancelling certain stock options with a total value of \$875,000. A29-30. The fourth component was a contribution bar and judgment reduction. The Derivative Plaintiffs agreed that “any subsequent judgment against any of the Non-Settling Defendants” (the Plaintiffs here) “*shall be reduced* by the greater of the Settlement Amount or an amount that corresponds to total percentage of responsibility” of various settling defendants. A30 (emphasis added).

The fifth component specified that Broadcom's benefit from the Settlement would *not* include judgment reductions it needed to take, or indemnity it needed to pay the Insurers. Id. It also required Broadcom to take a judgment reduction if otherwise it would owe an indemnity Broadcom was unable to pay. Id. The sixth component stayed the shareholder litigation pending the outcome of criminal cases pending against Nicholas and Ruehle. A31.

B. The Insurance Agreement

The "Insurance Agreement" (A49-96) was attached to, made a "material and integral part[]" of, and "fully incorporated" in the Stipulation. A24, 39. The Insurance Agreement, in turn, was contingent on approval of the Partial Settlement and otherwise would be "void ab initio." A55.

The Insurance Agreement recited that "the Insurers [had] raised numerous defenses to coverage of" the Broadcom matters (including rescission), "and dispute whether their respective Policies, or any of them, cover or are otherwise responsible for any and all claims for payment and/or reimbursement of such claimed loss in connection with" those matters. A53. It also stated that "the Insurers had paid to Broadcom, under a reservation of rights, approximately \$43.3 million as reimbursement for legal fees and expenses" in connection with those matters, and that Broadcom had advised that \$85 million of "Unreimbursed Defense Fees and Expenses" remained outstanding. Id.

In the Insurance Agreement, the Insurers agreed to pay Broadcom an additional \$74.7 million, and to release any claim for recoupment of the \$43.3 million they previously paid Broadcom for defense costs. A54-55. These figures

totaled the \$118 million in the Stipulation. The Insurance Agreement also contained mutual releases among the Settling Parties. A56-58.

As Nicholas, Ruehle and Samueli were not parties to the Partial Settlement, they neither gave nor received an insurance release. However, as “Non-Settling Defendants,” these individuals not only received a “credit” against any judgment for \$118 million that the Insurers paid, they retained their rights to make demands for the remaining \$92 million in coverage and their right to continued indemnity from Broadcom for their defense. A59-60.

In consideration for the Insurers’ agreement to pay \$118 million in settlement of a case in which the Insurers might be found to owe no coverage, Broadcom agreed to “indemnify and hold harmless each of the Insurers” against any claim by Nicholas, Ruehle or Samueli “(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’).” A58-59. The indemnity provision also proscribed that “[n]o insurer shall admit any liability, enter into any settlement, stipulate to any judgment, or incur any costs in defending any such claim . . . without the prior written consent of Broadcom and the [Derivative Plaintiffs].” Id.

C. Preliminary and Final Approval

1. The Settling Parties' Arguments

In seeking court approval for the Partial Settlement, the Settling Parties detailed the background and operation of *both* the Partial Settlement *and* the incorporated Insurance Agreement. They represented that “[t]he Insurance Agreement resulted from protracted and complex arm’s-length negotiations, that included a mediator’s proposal, and represented the Company’s reasoned judgment in the context of significant risks.” A145. They explained that “[f]or over sixteen months, the parties engaged in extensive negotiations regarding a potential settlement of this case . . . presided over by Judge [Daniel] Weinstein, a highly skilled and experienced mediator, and by Special Master [Francis] Carroll.” A133.

Much of the briefing focused on the insurance aspects of the settlement. The Settling Parties noted that Broadcom received “substantial benefit” from the \$118 million insurance payment. A142. They explained that the payment resolved “a number of complicated coverage issues,” including “a significant issue” of rescission; arguments that coverage was barred by “Prior and Pending Litigation Exclusions” (by virtue of stock-option related litigation “threatened in late 2000”); and “significant disputes” concerning what damages were recoverable under the policies.” A143-44. The Settling Parties also stated that the case could not be settled by one or a few of the Insurers. This is because these coverage issues were:

further complicated by the multi-layer tower, in which many of the policies had provisions requiring “exhaustion” of all layers below. Those exhaustion provisions generally provide that any particular Insurer is not obligated to make any payments on its policy until all

policies below it have paid out in full. As a result, compromise of the insurance disputes *required unanimous agreement among representatives for all eighteen policies . . .* [A143] (emphasis added).

The Settling Parties explained that the settlement did not include the Non-Settling Defendants because they were “alleged to be the most responsible for the problems with the Company’s historic options granting practices and the damages suffered by the Company as a result,” and that “the Non-Settling Defendants, two of whom are billionaires, *can and should make significant personal contributions to Broadcom for the alleged damage to the Company.*” A142-43 (emphasis added).

The Settling Parties’ motion included an entire section arguing that “**THE SETTLEMENT IS FAIR TO THE NON-SETTLING DEFENDANTS.**”

A149. Among the terms that “ensur[ed]” this fairness was that “any subsequent judgment against the Non-Settling Defendants will be reduced by the Settlement Amount (approximately \$118,000,000), thus ensuring that they will not be responsible for the consideration already paid to Broadcom in compromise of the claims against the other defendants” and that “the Non-Settling Defendants retain all their rights against the Insurers to the extent they are entitled to coverage.”

A147. Elsewhere, the Settling Parties noted that the settlement was especially reasonable because the Non-Settling Parties “themselves . . . account for over \$70 million of the submitted expenses” that the parties were settling. A145.

2. The Non-Settling Defendants’ Objections

Nicholas (joined by Ruehle) opposed both the preliminary and final approval of the Partial Settlement. B185-198, 199-200, 201-227, 228-29. Samueli

originally did not object either to preliminary or final approval (B230-31, 232-33), but on December 10, 2009 (the day after his criminal charges were dismissed, A325), Samueli withdrew his “non-opposition.” B236. According to a brief he later filed on appeal, “[o]ne of Dr. Samueli’s *primary objections* to the Partial Settlement was that it was fundamentally unfair to the Non-Settling Defendants,” B264 because the “indemnification obligation” in the Partial and Insurance Settlements had “*eliminated the Non-Settling Defendants’ ability to use their insurance coverage to settle this case* because such a settlement is unlikely to benefit the corporation[.]” B265 (emphasis added).

In opposing preliminary approval, Nicholas and Ruehle also argued that the proposed settlement notice was “highly misleading” because it failed to disclose that the \$118 million insurer payment resulted in Broadcom’s abandonment of “*over \$90 million of insurance coverage*,” while requiring Broadcom “to indemnify its insurers for any future claims they may have to pay the non-settling defendants.” B188, 191, 193 (emphasis in original). In opposing final approval, Nicholas and Ruehle argued that “the Insurance Settlement, Not the Proposed Settlement Provides the \$118,000,000 of Consideration” to Broadcom (B211), and that its value cannot be “tested” without an evaluation of “the validity of” the Insurers’ “defenses to coverage.” B216. Nicholas and Ruehle also maintained that they should be allowed to take discovery regarding insurance, as well as the independence of Broadcom’s SLC that negotiated the settlement. B222-25.

Contrary to the suggestion in Plaintiffs’ Opening Brief, the District Court did not ignore these issues. At the conclusion of the hearing on December 14,

2009, the District Court approved the Partial Settlement, finding it to be “fair, adequate, and reasonable.” A179. Referring to the payment made by the Insurers, the court stated that “[b]y any measure, the value of the settlement is exceptional.” A180. The court found “no evidence that the settlement was the product of fraud, overreaching, or collusion.” *Id.* By written Final Judgment and Order of Dismissal, the court declared that “the Settlement embodied in the Stipulation is hereby approved in all respects and shall be consummated in accordance with its terms and provisions.” A184.

3. The Non-Settling Defendants’ Appeal

Unsatisfied with the ruling, Nicholas, Ruehle and Samueli appealed the order approving the Partial Settlement to the United States Court of Appeals for the Ninth Circuit. B279-290. Dr. Samueli argued that the District Court “abused its discretion by approving the Partial Settlement” because “the Partial Settlement was both unfair to the Non-Settling Defendants and provided no real benefit for the very party it was supposed to protect—Broadcom’s shareholders.” B263 (emphasis added). Arguing that “[n]on-settling defendants are permitted to protest settlements that prejudice their rights, and settlement agreements that fail to respect the interests of non-settling defendants must be rejected,” Samueli contended his concerns about the indemnity, and inability to take insurance discovery “lie at the heart of [Fed. R. Civ. P.] 23.1’s requirement that all proposed settlements receive judicial approval, so that cooperating parties *cannot settle a case without ‘giving due regard’ to the interest of parties not involved in the settlement.*” B266 (emphasis added; citation omitted).

Nicholas and Ruehle jointly filed their appellate brief on January 10, 2011. B291. They argued the Partial Settlement was “manifestly unfair” due to the “flawed and prejudicial manner in which the district court handled the process of reviewing and approving the Partial Settlement.” B318-19.

IV. THE PLAINTIFFS’ SETTLEMENT AND DISMISSAL OF APPEALS

After the District Court approved the Partial Settlement, Nicholas, Ruehle and Samueli “commenced further negotiations with counsel for the derivative plaintiffs,” A328, and demanded that the Insurers pay these remaining defendants’ settlements. Id. However, “the Derivative Plaintiffs insisted that the settlement could not be funded with money to be reimbursed by Broadcom as such a settlement would provide no benefit to the company,” id., and accordingly would not consent to the Insurers’ payment. Id.

On March 18, 2011, Nicholas, Ruehle and Samueli entered into a Stipulation and Agreement of Settlement (“Plaintiffs’ Settlement”) resolving the Derivative Action on terms the Derivative Plaintiffs were willing to accept. A329. In Plaintiffs’ Settlement: (1) Nicholas agreed to pay Broadcom \$26,580,085; (2) Samueli agreed to cancel unexercised Broadcom stock-options Broadcom valued at \$24,265,375 and to pay Broadcom \$2,314,710 in cash; and (3) Ruehle agreed to dismiss his action filed against Broadcom. A329-330; A228-29.

Plaintiffs’ Settlement also provided that Nicholas, Ruehle and Samueli “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.” A240. Nicholas, Ruehle and Samueli

also covenanted: “While [they] maintain that the Insurance Agreement is invalid and void, [they] agree and covenant not to make any claims seeking to invalidate or void the Insurance Agreement or any provision therein.” Id.

On May 23, 2011, the District Court entered a Final Judgment and Order of Dismissal approving Plaintiffs’ Settlement “in all respects,” and “direct[ing]” the parties “to perform the terms of [Plaintiffs’ Settlement].” A294. Nicholas, Ruehle and Samueli dismissed their appeals of the District Court’s earlier approval of the Partial Settlement. B355-373, 374-75, 376-77, 378-79.

V. THIS LAWSUIT

On July 25, 2012, Nicholas, Ruehle and Samueli filed this lawsuit in the Superior Court in and for New Castle County against five of the Insurers who were parties to the Insurance Agreement. Admitting they agreed “that they would not bring insurance coverage claims against any of the Insurance Companies,” A304, Plaintiffs stated that they “bring this action *not* for coverage under the Policies, but rather for damages arising out of the Insurance Companies’ tortious conduct.” Id. (emphasis added).

Plaintiffs asserted two causes of action. The first, for bad faith, alleged that these Insurers committed “tortious bad faith” when “[e]ach Domestic Insurance Company agreed with each other Insurance Company to enter into the Insurance Agreement.” A334. Plaintiffs claimed that this was “bad faith” because (just as Dr. Samueli had previously argued in the Ninth Circuit appeal he had withdrawn) the Insurance Agreement terms were “favorable to the Insurance Companies and illegal and unfair to Plaintiffs,” in that they (1) required Broadcom to indemnify

the Insurers for future coverage claims, (2) gave Broadcom the right to consent to future payments, and (3) allowed excess carriers to pay before the underlying carriers had exhausted their policies. A302-03. According to Plaintiffs, the Insurer Defendants (acting in accordance with the court-approved Insurance Agreement) “refused to pay for any portion of a within-policy-limits settlement on behalf of Plaintiffs unless it was approved by Broadcom.” A303.

Plaintiffs’ second claim, for tortious interference with contract, alleged that “[b]y negotiating and executing the Insurance Agreement, each Insurance Company interfered with Plaintiffs’ contractual relationship with all of the other Insurance Companies under the Policies.” A336. Plaintiffs also averred that the Insurer Defendants engaged in a “civil conspiracy to commit this tort,” because “each Insurance Company agreed with each other Insurance Company to enter into the Insurance Agreement, which each Insurance Company did.” A337.

On October 12, 2012, the Insurer Defendants jointly moved to dismiss the Complaint. Following briefing and oral argument, Judge Jurden granted the motion to dismiss by Order dated March 19, 2013. This appeal followed.¹

¹ Defendant Twin City joined in the Defendants’ motion to dismiss but also filed a separate motion arguing that Plaintiffs could not prove bad faith under California law because Twin City did not proximately cause them any harm. Before Plaintiffs’ Settlement, the Partial Settlement and Insurance Agreement, Twin City had exhausted its entire \$10 million limit of liability under the Twin City Policy. Twin City also argued that it had no obligation to preserve its limits of liability for the Plaintiffs’ Settlement, and was in fact required to pay the defense costs when they became due. Judge Jurden did not reach the issues raised in Twin City’s motion.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY CONCLUDED THAT PLAINTIFFS' COURT-APPROVED AGREEMENT NOT TO CHALLENGE THE VALIDITY OF THE INSURANCE AGREEMENT BARRED THEIR CLAIMS

A. Question Presented

Did the Superior Court properly conclude that the Plaintiffs' court-approved agreement not to "make any claims seeking to invalidate or void the Insurance Agreement or any provision therein" required dismissal of Plaintiffs' Complaint? Plaintiffs preserved a portion of the issue, A363-74, but not their argument that there was a factual question regarding the parties' intent. *See* I.C.4, below.

B. Scope of Review

Review is *de novo* on appeal from a grant of a motion to dismiss. Am. Funding Servs. v. State, 41 A.3d 711, 713 (Del. 2012).

C. Merits of Argument

1. The Court-Approved Agreement Not to Make any Claims Seeking to Invalidate "the Insurance Agreement or Any Provision Therein" Was Entitled to Full Faith and Credit

In provision F.15 of the Plaintiffs' Settlement, Plaintiffs "agree[d] and covenant[ed] . . . not to make any claims seeking to invalidate or void the Insurance Agreement *or any provision therein*." A240 (emphasis added). The California District Court's May 23, 2011 Final Judgment and Order of Dismissal "direct[ed]" Plaintiffs to comply with this agreement. A294. Such an Order "must be given full faith and credit by the courts of Delaware and cannot be collaterally

challenged in the Delaware litigation.” Garza v. TV Answer, Inc., 1997 Del. LEXIS 452, *4 (Del. Dec. 8, 1997).

2. The Plaintiffs’ Complaint Sought to Invalidate the Insurance Agreement or a “Provision Therein”

The Superior Court correctly found that Plaintiffs’ lawsuit was a claim “seeking to invalidate” the Insurance Agreement in violation of the Plaintiffs’ court-approved agreement and the court order enforcing it. “The term ‘invalidate’ ordinarily means ‘to render ineffective’” Humana Inc. v. Forsyth, 525 U.S. 299, 307 (1999). “Invalidate” has also been defined as “‘to weaken or make valueless,’” Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185, 194 (3d Cir. 1998) (citing Webster’s Third New Int’l Dictionary (1986)), or “to deprive of legal efficacy.” United States v. Summerville, No. 04-cv-462, 2006 U.S. Dist. LEXIS 7168, at *5-6 (E.D. Va. Feb. 14, 2006) (citing Oxford English Dictionary (1989)); United States v. Stewart, 955 F. Supp. 385, 389 (E.D. Pa. 1997).

As the Superior Court held, Plaintiffs’ Complaint necessarily “render[ed] ineffective,” “weaken[ed] or ma[d]e valueless” the Insurance Agreement, because Plaintiffs’ causes of action hinged on the contention that it was unlawful for the Insurers to enter into and comply with the Insurance Agreement. Plaintiffs’ “tortious bad faith” claim, for example, asserted that the Insurer Defendants “acted in bad faith 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” (A332-33), by “conditioning [their] ability to fund a . . . settlement on the approval” of Broadcom and the Derivative Plaintiffs (as

provided in the Insurance Agreement) (A333), and by “structuring the Insurance Agreement so that excess policies were improperly eroded.” *Id.* Similarly, the purported “interference” upon which Plaintiffs based their “tortious interference” cause of action was that each Insurer “negotiated and executed the Insurance Agreement.” A336. Plaintiffs claimed to “have been damaged as a result of each Insurance Company’s negotiation and execution of the Insurance Agreement, as well as the subsequent actions taken pursuant to the Insurance Agreement.” A337.

A claim that asserts a party acted unlawfully and committed a tort by “negotiat[ing],” “structuring,” “execut[ing]” and taking actions “pursuant to” an agreement clearly seeks to weaken and deprive of legal efficacy – and thus “invalidate” – that agreement. Plaintiffs’ Complaint violated their agreed (and court-ordered) obligation not to bring such claims.

Indeed, Plaintiffs’ Opening Brief focuses on invalidating a “provision” of the Insurance Agreement – the Indemnity Provision: “As part of that Insurance Agreement, the Insurers required Broadcom to indemnify them for any future coverage claims that might be brought by Plaintiffs (the ‘Indemnity Provision’), and delegated to Broadcom and the Derivative Plaintiffs . . . the right to approve any payments by the Insurers that would trigger the Indemnity Provision.” *Op. Br.* at 1-2. Plaintiffs’ claims in this lawsuit rely on asserting that this indemnity, “effectively precluded Plaintiffs from using their insurance coverage to reach a settlement with the Derivative Plaintiffs.” *Id.* at 2.

Thus, Plaintiffs’ claims sought to “invalidate” a “provision” of the Insurance Agreement so central that it makes the entire agreement valueless to the Insurers.

In the Insurance Agreement, the Insurers agreed to pay \$118,000,000 to Broadcom – thereby resolving a dispute as to whether the Insurers owed anything at all – on the condition that Broadcom would indemnify the Insurers for any further payments under the policies. Broadcom and the Derivative Plaintiffs imposed a requirement that the Insurers not make such payments “without the consent of Broadcom and the Derivative Plaintiffs.” A59.

Plaintiffs seek a ruling that the Insurers could not lawfully comply with the Indemnity Provision’s requirement that they obtain that consent. Plaintiffs’ lawsuit effectively says “the Insurers were free to refrain from pursuing coverage defenses and to pay out \$118,000,000 they might not owe, so long as they did not insist on receiving anything in return.” This makes not only the “provision” but the whole Agreement “ineffective” and “valueless.”

Indeed, Plaintiffs did not dispute any of this below. Instead, Plaintiffs urged (as they do here) that enforcing their agreement not to bring such a suit would “render ... null” or “moot” the preceding sentence of Plaintiffs’ Settlement barring Plaintiffs from making claims that obligate Broadcom to indemnify the Insurers. A422. The Superior Court correctly rejected that argument.

3. The Superior Court’s Interpretation Does Not Render the First Sentence of Provision F.15 Null or Moot

Plaintiffs contend that the Plaintiffs’ Settlement cannot bar the present action because to do so would “render[] moot” the first sentence of provision F.15 of the Plaintiffs’ Settlement. A421-22. That makes no sense.

Provision F.15 of the Plaintiffs’ Settlement states:

[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.

The first sentence bars Plaintiffs from bringing claims that trigger indemnity under the Insurance Agreement. The second sentence bars Plaintiffs from bringing an action to invalidate the Insurance Agreement in part or in whole. Plaintiffs do not explain how enforcing the second sentence – barring claims “seeking to invalidate or void the Insurance Agreement or any provision therein” – renders “null” or “moot” the first prohibition – barring 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.” They are two separate prohibitions.

Perhaps Plaintiffs mean to say that because a claim that “do[es] not require Broadcom to indemnify the Insurers” is “permissible” under the first sentence, the second sentence cannot be read to bar such a claim. A421-22. But such an interpretation cannot stand. The first sentence does not “permit” any claims; it simply identifies a category of claims that *cannot* be brought. The second sentence identifies a second category of prohibited claims. That a claim may be precluded by one sentence but not the other does not render either sentence “moot.”

Nor is there any basis for Plaintiffs’ entirely unsupported contention that the relevant provision should be read only to “prevent[] 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.” Op. Br. at 20. Plaintiffs never challenged below, and do not challenge now, that the Complaint *does* seek to “actually invalidat[e]” the Insurance Agreement, within the settled meaning of the word “invalidate,” by seeking a ruling that the Insurers could not lawfully enter into and perform that agreement. In addition, the provision is not limited to claims seeking to invalidate the Insurance Agreement on “public policy” grounds.

4. The Superior Court Did Not Improperly Make “Findings” Regarding the Parties’ “Intent”

Plaintiffs last argue that the second sentence of provision F.15 is “reasonably susceptible” of Plaintiffs’ interpretation, and therefore under California law the Superior Court erred in deciding the “factual question of intent of the negotiating parties” on a motion to dismiss. Op. Br. at 21. The argument fails for two reasons.

First, Plaintiffs’ attempt to raise a factual dispute violates Delaware Supreme Court Rule 8. Under that Rule “and general appellate practice, this Court may not consider questions on appeal unless they were first fairly presented to the trial court for consideration.” Russell v. State, 5 A.3d 622, 627 (Del. 2010).

Plaintiffs state they argued below that their “intent in agreeing to Provision F.15” was a “factual dispute.” Op. Br. at 21. But that is not the case. Rather, Plaintiffs argued that there was a “factual dispute” as to whether the Plaintiffs “had no choice” but to agree to the Plaintiffs’ Settlement, and were therefore excused from abiding by it (an argument they no longer make on appeal). Op. Br. at 21. They never argued that there was a “factual dispute” as to the intent of the parties to Plaintiffs’ Settlement. They cannot do so now.

There is a limited exception to this rule for “plain error,” that applies when the error was “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.” Russell, 5 A.3d at 627. That standard is not met here. Far from “jeopardiz[ing] the fairness and integrity” of the judicial process, the Superior Court protected that process by requiring Plaintiffs to abide by their court-approved agreement and court-ordered directive to comply with it.

Second, in any case, Plaintiffs’ California law argument is mistaken. Under California law, “in ruling on a demurrer the plain meaning of an attached contract controls unless (1) the plaintiff alleges the existence of ‘specified parol evidence’ contrary to that meaning; and (2) the contract is reasonably susceptible of the plaintiff’s claimed interpretation.” Stewart v. First Cal. Bank, No. B236286, 2013 Cal. App. Unpub. LEXIS 3829, *27-28 (Cal. Ct. App. May 30, 2013) (quoting George v. Auto. Club of Southern California, 135 Cal. Rptr. 3d 480, 490 (Cal. Ct. App. 2011)). Here, the circumstances met neither of these requirements.

First, Plaintiffs never alleged the “existence of ‘specified parol evidence’” contrary to provision F.15’s plain meaning. The only “evidence” that Plaintiffs point to is the allegation in their Complaint that “the 2011 Settlement Agreement allowed Plaintiffs to recover from the Insurance Companies for bad faith or tortious interference with contract and/or prospective economic advantage.” A331 (cited in Op. Br. at 22). But that is just an assertion, not evidence of intent. Nor is it contrary to the meaning of Provision F.15.

Second, Provision F.15 was not “reasonably susceptible of [Plaintiffs’] claimed interpretation.” Plaintiffs’ sole interpretive argument below was that the

second sentence of Provision F.15 cannot be interpreted to preclude any claim that the first sentence “permits.” Op. Br. at 20. The Superior Court considered that argument and concluded that “[t]he first sentence does not nullify the second sentence, nor does it ‘permit’ Plaintiffs’ current action.” Opinion at 10. Rather, the first sentence and the second sentence, on their face, *preclude* Plaintiffs from bringing any action that falls within the scope of either sentence.

Under California law, courts grant motions to dismiss (or “demurrers”) based on clear contract language unless the plaintiff alleges or proffers extrinsic evidence showing the contract is “reasonably susceptible” to a contrary meaning. E.g., Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1017 (9th Cir. 2012); Marder v. Lopez, 450 F.3d 445, 449-53 (9th Cir. 2006) (affirming dismissal based on Release referenced in complaint because plaintiff’s extrinsic evidence did not support contrary interpretation); Woods v. Google, Inc., 889 F. Supp. 2d 1182, 1194 (N.D. Cal. 2012); George, 135 Cal. Rptr. 3d at 490.

Similarly here, Plaintiffs neither pointed to nor alleged extrinsic evidence supporting a contrary interpretation. Judge Jurden considered Plaintiffs’ arguments and allegations and properly concluded that the only reasonable construction of Provision F.15 was that it barred Plaintiffs’ claims, which sought to “invalidate” the Insurance Agreement and its key provision. The Superior Court did not make any “factual determinations” regarding intent. Op. Br. at 21. Nothing in California (or any) law makes this erroneous.

II. PLAINTIFFS' COMPLAINT ALSO SOUGHT COLLATERALLY TO ATTACK THE COURT ORDER APPROVING THE INSURANCE AGREEMENT, AND STATED NO CLAIM FOR RELIEF

A. Question Presented

Should the Superior Court's dismissal be affirmed on the alternate grounds that Plaintiffs' claims are an impermissible collateral attack on the federal court's approval of the Insurance Agreement, or that Plaintiffs fail to state a claim for bad faith or tortious interference? Issue preserved. A363-381.

B. Standard of Review

This Court may affirm the Superior Court on any rationale that was fairly presented to the Superior Court, even if that issue was not addressed by that court. Cent. Laborers Pension Fund v. News Corp., 45 A.3d 139, 141 (Del. 2012).

C. Merits of Argument

1. Plaintiffs' Claims Are an Impermissible Collateral Attack on the Order Approving the Partial Settlement

"The collateral attack doctrine precludes litigants from collaterally attacking the judgments of other courts." Rein v. Providian Fin. Corp., 270 F.3d 895, 902 (9th Cir. 2001) (citing Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995)). "A judicially approved settlement agreement is considered a final judgment on the merits." Id. at 903. Here, the District Court's Order approving the Partial Settlement, including the Insurance Agreement, was a final judgment. Plaintiffs cannot collaterally attack the agreement or its performance as tortious.

a. Plaintiffs' Complaint Attacks the District Court's Order Approving the Insurance Agreement

The District Court's order approving the Partial Settlement also approved

the Insurance Agreement that was attached to and incorporated into it. The order provided that “the Settlement embodied in the Stipulation is hereby approved in all respects.” A184. The Stipulation “fully incorporated” the Insurance Agreement, identifying it as a “material and integral part[] hereof.” A39.

The order directed that the Stipulation “shall be consummated in accordance with its terms and conditions.” A184. By its terms, the Stipulation had to be performed “pursuant to the terms of the Insurance Agreement,” A28; it prescribed that “Broadcom shall indemnify the Insurers. . . [a]s set forth more fully in the Insurance Agreement and subject to its terms,” A29, including that “[n]o Insurer shall admit any liability [or] enter into any settlement . . . without the consent of Broadcom and the Derivative Plaintiffs.” A59. The District Court not only approved this indemnity; it *ordered* compliance with its terms.

The sole premise of Plaintiffs’ Complaint is that the Insurers and Broadcom could not lawfully enter into or perform the terms of the Insurance Agreement, particularly those terms regarding indemnification. As that is the very same agreement the District Court approved and ordered compliance with, Plaintiffs’ claim is a collateral attack on the District Court’s order. Fransen v. Conoco, Inc., 64 F.3d 1481, 1487 (10th Cir. 1995) (““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””) (citation omitted).

It does not matter that Plaintiffs mount their attack by suing in tort for entering into and complying with a court-approved agreement. In In re Daewoo Motor Co., Ltd. Dealership Litig., No. 1510, 2005 U.S. Dist. LEXIS 43197 (M.D.

Fla. Jan. 6, 2005), for example, various American automobile companies (“acquirers”) acquired certain assets of the bankrupt Korean company, Daewoo, pursuant to a Master Transaction Agreement (“MTA”) approved by a Korean court. *Id.* at *13. The American dealers sued the acquirers for, among other things, tortious interference with their contract. They alleged the acquirers “were aware of the American Daewoo dealer network and yet deliberately set out upon a course of action designed to put those dealers out of business, . . . using, *inter alia*, the MTA, to terminate Plaintiffs’ franchise agreements thereby driving Plaintiffs out of business.” *Id.* at *22.

The Daewoo court noted that the plaintiffs did “not seek . . . to directly challenge or undo the Korean court’s orders approving the MTA. Instead, *Plaintiffs seek damages for conduct permitted by, and directly resulting from, the court-approved MTA.*” *Id.* at *34-35 (emphasis added). But as the Daewoo court explained, “*this is the very essence of an impermissible collateral attack.*” *Id.* at *35 (emphasis added). And it dismissed their lawsuit.

When a related proceeding then went up on appeal, the appeals court agreed:

The complaint of Daewoo America regarding the effect of the MTA *should have been raised* before the Korean court. Daewoo America *cannot now collaterally attack that order by bringing claims against the recipients of the property transferred based on the approval by the Korean court.*

Daewoo Motor Co. v. General Motors Corp., 459 F.3d 1249, 1259 (11th Cir. 2006) (emphasis added), cert. denied, 549 U.S. 1362 (2007).

These arguments apply with even greater force here than they did in Daewoo. The court in Daewoo found the collateral attack improper on the theory that the problem with the relevant contract merely “should have been raised” in the Korean court. 459 F.3d at 1259. Here, the fairness of the settlement to the Non-Settling Parties (the Plaintiffs here) was raised in the motion seeking to approve the settlement – the motion to which these Plaintiffs unsuccessfully objected – and by Dr. Samueli in the appeal he dismissed. Plaintiffs cannot demand that a Delaware court rescind the approval of that settlement by making compliance with it a tort.

b. Plaintiffs Cannot Collaterally Attack the Order by Arguing It Did Not Address their Rights

Plaintiffs’ sole argument against application of the collateral attack doctrine is that the District Court “did not consider Plaintiffs’ rights under the Insurance Agreement when evaluating the overall fairness of the Partial Settlement.” Op. Br. at 25. This argument is both misleading and irrelevant.

Plaintiffs cannot reasonably maintain that the fairness of the Insurance Settlement to them was **not** at issue in the settlement approval. Dr. Samueli told the Ninth Circuit that one of his “*primary objections* to the Partial Settlement was that it was fundamentally unfair to the Non-Settling Defendants,” B264, specifically because the “indemnification obligation” in the Partial and Insurance Settlements has “*eliminated* the Non-Settling Defendants’ *ability to use their insurance coverage to settle the case.*” B265 (emphasis added).

In approving the Partial Settlement, the question for the district judge was “whether the proposed settlement is fair and adequate to all concerned,” Norman v.

McKee, 431 F.2d 769, 774 (9th Cir. 1970). Thus, in the District Court, the Settling Parties *conceded* that the settlement’s fairness to the “Non-Settling Defendants” (Plaintiffs here) was relevant to approval of the settlement, and argued that “**THE SETTLEMENT IS FAIR TO THE NON-SETTLING DEFENDANTS.**”

A115, 147. The approval motion stated that the settlement was designed to protect Plaintiffs, in order to “foreclose any objection they might have made that the Settlement is somehow affirmatively unfair to them,” since “[s]uch objections would have potentially disrupted . . . approval of the Settlement.” A148. The Settling Parties also explained that the settlement contained massive benefits for these Plaintiffs – including a \$118 million credit against any judgment that might be returned and the ability to continue to have 100% of their defense fees paid.

In any event, given that Mr. Samueli *did* argue to the Ninth Circuit that “[t]he Partial Settlement has deprived Dr. Samueli, Dr. Nicholas, and Mr. Ruehle of their right to use their insurance coverage to resolve the claims against them,” B264, these Plaintiffs obviously had an opportunity to raise this objection. Plaintiffs cannot withdraw their appeal, let the settlement go through, benefit from a \$118 million credit against their liability (from insurance that might have been found not to provide coverage), and come to Delaware now to attack the District Court’s decision on the theory that the settlement was so “illegal and unfair to Plaintiffs,” A302, as to constitute a *tort* against them.

Helfand v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d 295 (Cal. Ct. App. 1992), the case on which Plaintiffs principally rely, does not support Plaintiffs’ position. That case did not address an attack on a court order at all. Rather, it

involved an insurers' May 1986 notice that it was cancelling a D&O liability policy issued to a company in bankruptcy. Id. at 308. The debtor company negotiated a compromise, resulting in a deal approved by the bankruptcy court whereby the insurer issued a new policy to the company. Id.

Later, some directors and officers, not parties to the original compromise, brought state court claims against the insurer based upon the original May 1986 cancellation. Id. The California court held the collateral attack doctrine did not apply because "while the results of the order were to approve a cancellation agreed upon between [the insurer and the debtor], . . . the 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 [the insurer] to its insureds." Id. at 310.

Thus, Helfand does not raise the issue involved here. The Helfand insureds did not claim that the insurer committed a tort by negotiating a court-approved agreement to provide a new policy. They disputed the insurer's assertion that it had previously cancelled the old policy. Indeed, the Helfand insureds insisted (and the state court agreed) that the court-approved agreement "did not impact ... rights as between the insurer and its insureds." Id. Plaintiffs here, in contrast, ask the Court to find that the court-approved Insurance Agreement tortiously eliminated Plaintiffs' access to coverage.

2. Plaintiffs Cannot State a Claim for "Tortious Bad Faith"

Under California law, a cause of action for bad faith cannot exist unless the insured shows that it is entitled to insurance coverage for the loss at issue. The California Supreme Court has ruled that "a bad faith claim cannot be maintained

unless policy benefits are due.” Waller v. Truck Ins. Exchange, Inc., 900 P.2d 619, 639 (Cal. 1995) (quoting Love v. Fire Ins. Exchange, 271 Cal. Rptr. 246, 256 (Cal. Ct. App. 1990)). This requirement that the insured establish a contractual right to coverage as a prerequisite to a bad faith claim naturally flows from the fact that “[t]he gravamen of a claim for breach of the covenant of good faith and fair dealing, which sounds in both contract and tort, is the insurer’s refusal, without proper cause, to compensate the insured for *a loss covered by the policy*.” Brizuela v. CalFarm Ins. Co., 10 Cal. Rptr. 3d 661, 672 (Cal. Ct. App. 2004) (emphasis added). Therefore, “to establish an implied covenant tortious breach, an insured must show first, that benefits were due under the policy.” Benavides v. State Farm General Ins. Co., 39 Cal. Rptr. 3d 650, 655 (Cal. Ct. App. 2006).²

Here, Plaintiffs not only fail to meet this burden, they have disclaimed it because they relinquished their contractual right to coverage as part of the Plaintiffs’ Settlement. Plaintiffs acknowledge they agreed “that they would not bring insurance coverage claims against any of the Insurance Companies,” A304, and declare that they are not seeking this coverage. Id.

In Love, the appellate decision upon which the California Supreme Court relied heavily in Waller, the court affirmed a summary judgment ruling against insureds based on the same fundamental defect that applies here. The Love court

² See also Behnke v. State Farm General Ins. Co., 127 Cal. Rptr. 3d 372, 393 (Cal. Ct. App. 2011) (in absence of underlying contractual right or breach of contract claim, there is no claim for bad faith denial of benefits as a matter of law); Tomaselli v. Transamerica Ins. Co., 31 Cal. Rptr. 2d 224, 228 (Cal. Ct. App. 1994) (without a breach of contract, there can be no breach of the implied covenant of good faith); Houck Constr., Inc. v. Zurich Specialties London Ltd, No. 06-3832, 2007 U.S. Dist. LEXIS 46363, at *10-13 (C.D. Cal. June 4, 2007) (actionable breach of contract claim is a necessary element to a claim for bad faith claim).

first concluded that the plaintiffs were barred from asserting a claim for coverage because the contractual statute of limitations had run on that claim. 271 Cal. Rptr. at 248-49. The court then ruled that, because the insureds were procedurally barred from asserting a claim for coverage, they were also precluded as a matter of law from asserting a claim for bad faith. *Id.* at 254-55. *This was true even though the alleged bad faith occurred within the statute of limitations. Id.* As in Love, Plaintiffs cannot assert a claim for coverage; therefore, they cannot assert that coverage was denied in bad faith as a matter of law.

The cases Plaintiffs cite do not change this result. In Gruenberg v. Aetna Ins. Co., 108 Cal. Rptr. 480 (Cal. 1973), the court merely reached the unremarkable (and inapplicable) conclusion that an insurer who “encouraged criminal charges by falsely implying that [the insured] had a motive to commit arson,” and then “knowing plaintiff would not appear for an examination during the pendency of criminal charges against him . . . used his failure to appear as a pretense for denying liability under the policies,” can be liable for bad faith. *Id.* at 486. The court did not conclude that an insured who expressly disclaims any right to coverage under the policy can then sue the insurer for bad faith. To the contrary, in Gruenberg, the claimant had actually sought coverage and asserted bad faith for the insurer’s withholding of payment. *Id.* at 485.

Similarly, Schwartz v. State Farm Fire and Cas. Co., 106 Cal. Rptr. 2d 523 (Cal. Ct. App. 2001), concerned whether the excess insurer could defend against a bad faith claim by asserting that the condition precedent of payment of the underlying policy limits had not yet occurred. In fact, the court reiterated the

principle that “breach of that covenant [of good faith] cannot occur if no benefits are due under the policy.” *Id.* at 527. It found simply that the duty of good faith was not dependent on the occurrence of the condition precedent, payment of the underlying policy limits. Indeed, unlike here, the insureds in Schwartz brought claims for breach of contract as well as claims for bad faith.

3. Plaintiffs Cannot State a Claim for Tortious Interference with Contract or Interference with a Business Relationship

The tort of intentional interference with contractual relations or prospective economic advantage “*can only be asserted against a stranger to the relationship.*” Kasparian v. County of Los Angeles, 45 Cal. Rptr. 2d 90, 100 (Cal. Ct. App. 1995) (emphasis added). This rule exists “so that an entity with a direct interest or involvement in that relationship is not usually liable for harm caused by the pursuit of its interests.” Fresno Motors, LLC v. Mercedes-Benz USA, LLC, No. 11-2000, 2012 U.S. Dist. LEXIS 42161, at *35 (E.D. Cal. Mar. 27, 2012) (quoting Marin Tug & Barge, Inc. v. Westport Petroleum, Inc., 271 F.3d 825, 832 (9th Cir. 2001)). Accord Reeves v. Hanlon, 95 P.3d 513, 517 (Cal. 2004).

Plaintiffs contend that the Insurers were “strangers” to each other’s contracts because they “are not parties to each other’s contracts.” Op. Br. at 32. But to show that a defendant is a “stranger” to a contractual relationship, it is not enough that the defendant be a non-party to a contract. “[T]he threshold test for determining whether a defendant is not a stranger to an economic relationship and thus cannot be liable for tortious interference, is whether such defendant has a direct interest or involvement in that relationship.” Nat’l Rural Telecomms. Coop.

v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1070 (C.D. Cal. 2003). This interest can be practical rather than legal. For example, a defendant has a “direct interest” in a business relationship when the underlying contract cannot exist without the defendant’s participation or cooperation, Marin Tug, 271 F.3d at 834, or when the defendant stands to benefit from the contract’s performance, DIRECTV, 319 F. Supp. 2d at 1070; see also Fresno Motors, 2012 U.S. Dist. LEXIS 42161, at *36-37; Exxon Corp. v. Superior Court, 60 Cal. Rptr. 2d 195 (Cal. Ct. App. 1997); PM Group, Inc. v. Stewart, 64 Cal. Rptr. 3d 227 (Cal. Ct. App. 2007).

Far from alleging that the Insurers were “strangers,” Plaintiffs allege that the Insurers were all part of a single insurance “tower, with the primary policy at the bottom, and every other Policy stacked above it in successive layers of coverage.” A305-06. “Each Policy, with the exception of the primary policy, is triggered when the Policy below it in the tower is exhausted by payment of indemnity and defense costs.” Id. Indeed, under each of the policies above the Primary Policy, “coverage applies in conformance with the terms of the Primary Policy, subject to certain endorsements particular to each Excess Policy,” and “contains the same terms and conditions of the Primary Policy unless otherwise specified.” A314.

Nor can Plaintiffs seriously maintain their extraordinary theory that the various follow form insurers on a tower of insurance are “strangers” to each others’ contracts, who cannot mediate a large dispute requiring more than one policy layer without risking liability for tortiously interfering with every other insurer’s policy. In PM Group, for example, a group of “subpromoters” of a Rod Stewart concert tour – who had contracts with the main promoter but *not* with Rod Stewart –

received a jury award against Stewart’s agents for tortious interference with contract when Stewart cancelled the tour. 64 Cal. Rptr. 3d at 231-33. Reversing the verdict, the California Court of Appeal held that Stewart was not a “stranger” to these subpromotor contracts, potentially liable for tortious interference, because “each of these subcontracts contemplated a concert performance by Stewart at one or more of the venues on the proposed tour.” *Id.* at 235.

Here, the contracts do not just “contemplate” performance under their policies by the other carriers, the policies “incorporate” those policies’ provisions, and “require” performance by the other carriers in order to be triggered. The Insurers here cannot be “strangers” to the very insurance contracts that make up their own insurance tower. The policies are intertwined, with each Insurer having a direct interest in the totality of the insurance tower.

CONCLUSION

The judgment of the Superior Court should be affirmed.

August 29, 2013

Respectfully submitted,

/s/ Carmella P. Keener

Carmella P. Keener, Esq. (#2810)

ROSENTHAL, MONHAIT & GODDESS, P.A.

919 N. Market Street, Suite 1401

Wilmington, DE 19801

P.O. Box 1070

Wilmington, DE 19899

(302) 656-4433

ckeener@rmgglaw.com

Attorneys for Appellees Federal Insurance Company and XL Specialty Insurance Company (and, as to this Brief, on behalf of all Appellees as listed on cover page)