EFiled: Sep 13 2013 04:40PM EDT
Filing ID 54160586
Case Number 209,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DR. HENRY T. NICHOLAS, III, WILLIAM J. RUEHLE, and DR. HENRY SAMUELI, Plaintiffs Below/Appellants, 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, Defendants Below/Appellees.	No. 209, 2013 Court Below – Superior Court of the State of Delaware, in and for New Castle County C.A. No. N12C-07-311 JRJ CCLD

APPELLANTS' REPLY BRIEF

Of Counsel:

Scott D. Gilbert
Miriam M. Smolen
Ivan J. Snyder
Emily P. Grim
GILBERT LLP
1100 New York Avenue, NW
Suite 700
Washington, DC 20005
Telephone: (202) 772-2200

Jennifer C. Wasson (No. 4933)
Michael B. Rush (No. 5061)
POTTER ANDERSON & CORROON LLP
Hercules Plaza – Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000

Attorneys for
Plaintiffs Below/Appellants

Dated: September 13, 2013
1122508/39304

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Pages

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs' claims for bad faith and other tortious behavior are permitted under the plain language of the 2011 Settlement Agreement, which preserved the status quo of the Insurance Agreement's Indemnity Provision. Since it was the Insurers who drafted the Indemnity Provision to allow for these tort claims, they cannot claim now that the tort action voids or invalidates the Insurance Agreement. The tort claims are not, therefore, a "collateral attack" on the 2011 Settlement Agreement. At minimum, Plaintiffs have demonstrated that the 2011 Settlement Agreement is ambiguous, and dismissal of their claims at this early stage was improper.

The Insurers' remaining arguments are similarly meritless, and Twin City's supplemental answering brief offers no alternative grounds for affirming the Superior Court's ruling. Twin City's assertion that it cannot be held liable for bad faith because it preliminarily paid its limits (despite later obtaining a refund under the Insurance Agreement) is irrelevant to Plaintiffs' claims for tort damages. Such conditional payment of limits did not extinguish Twin City's duty of good faith to Plaintiffs. Far from causing Plaintiffs "no actual harm" (as Twin City contends), Twin City obtained a $2.265 million payout by participating in the Insurers' scheme to bar Plaintiffs from accessing their insurance coverage.

ARGUMENT

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

A court may resolve a dispute over contractual language on a motion to dismiss only if the language is unambiguous. *State v. Cont'l Ins. Co.*, 281 P.3d 1000, 1004 (Cal. 2012). If, however, a contractual provision is reasonably susceptible to more than one meaning, the court must turn to extrinsic evidence to determine the drafting parties' intent. *Mieuli v. DeBartolo*, 2001 WL 777447, at *5 (N.D. Cal. Jan. 16, 2001). What the parties intended by an ambiguous contract is a factual determination. *Id.* Thus, "[w]here the language leaves doubt as to the parties' intent, the motion to dismiss must be denied." *Monaco v. Bear Stearns Residential Mortg. Corp.*, 554 F. Supp. 2d 1034, 1040 (C.D. Cal. 2008).

Even apparently clear language may prove to be ambiguous. Under California law, a court must provisionally receive any evidence demonstrating that a latent ambiguity may underlie contract language that appears clear. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968). "[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).

The Insurers contend that the Superior Court properly ruled that the 2011 Settlement Agreement, on its face, bars Plaintiffs' claims. This argument fails. First, the plain language of the Agreement permits Plaintiffs' claims. Second, even if the Agreement does not unambiguously permit Plaintiffs' claims, the Court erred by making premature findings regarding the parties' intent on a motion to dismiss. Finally, even if the Insurers are correct in arguing that the Court ruled only on the plain language of the Agreement without making factual findings, the Court erred by not considering extrinsic evidence supporting Plaintiffs' interpretation.

A. Plaintiffs' Claims Are Permissible Under The Plain Language Of The 2011 Settlement Agreement

Plaintiffs' claims are consistent with the plain language of the 2011 Settlement Agreement. Under Provision F.15 of that Agreement, Plaintiffs may bring claims that do not "obligate Broadcom to indemnify or to hold harmless any of the Insurers pursuant to the terms of Paragraph 4 of the Insurance Agreement," but may not bring claims that seek to "invalidate or void" the Insurance Agreement. Appendix to Opening Br. Supp. Defs.' Joint Mot. Dismiss ("App.") at 574 (A240). As explained in Plaintiffs' Opening Brief, Paragraph 4 of the Insurance Agreement (the "Indemnity Provision") specifically states that bad faith claims (and any other claims not for declaratory relief or breach of contract) do not trigger Broadcom's indemnity obligation. Appellants' Opening Brief ("Opening

Brief") at 18-19. Therefore, Plaintiffs' tort claims are permissible under the first sentence of Provision F.15. *Id.*

The Superior Court agreed that Plaintiffs' tort claims did not trigger the Indemnity Provision. Super. Ct. Op. at 10. The Court concluded, however, that such claims seek to "undermine and/or invalidate" the Insurance Agreement, and that Plaintiffs and the Derivative Plaintiffs intended the second sentence of Provision F.15 to "close the door" on such claims. *Id.* The Court determined that the "door" to such claims was "likely left open because Plaintiffs were not part of the original negotiations." *Id.*

This reading is overly broad and incorrect. 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 bars Plaintiffs from actually invalidating or voiding the Insurance Agreement. Such prohibited claims would include, for example, those which require Broadcom to refund the insurance proceeds that Defendants paid under the Insurance Agreement, or those seeking to void the Insurance Agreement on the grounds that it violates California public policy by forcing a corporation to indemnify its executives for derivative claims. Opening Brief at 18, 20. Far from "conceding" that their claims invalidate the Insurance Agreement, Plaintiffs have

explained repeatedly that the Insurance Agreement expressly *permits* Plaintiffs to bring bad faith or other tort claims against the Insurers. *Id.* at 18-19.

The Insurers argue in response that "Plaintiffs' claims sought to 'invalidate' a 'provision' of the Insurance Agreement so central it makes the entire agreement valueless to the Insurers." Appellees' Answering Brief ("Answering Brief") at 19. This is simply not the case. The Insurers are receiving precisely the benefit for which they bargained under the Insurance Agreement, subject to the limitations they negotiated themselves. First of all, the Insurers entered into the Insurance Agreement to resolve coverage disputes between Broadcom, the Insurers, and the Settling Defendants relating to the defense of the Derivative Action and various other securities class action lawsuits, investigations by the DOJ and SEC, and internal investigations. App. at 327-29 (A52-54); Twin City Mot. Dismiss at 11 (A394). This they accomplished, and Plaintiffs' tort claims do not impact the Agreement's resolution of any of those disputes.

Second, the Insurers negotiated the very Indemnity Provision in the Insurance Agreement that expressly allows Plaintiffs' tort claims. At the time the parties negotiated the Insurance Agreement, it was (and remains) well-established California law that an insured can bring tortious bad faith claims separate and apart from coverage claims. *See, e.g., Schwartz v. State Farm Fire & Cas. Co.*, 106 Cal. Rptr. 2d 523, 528 (Cal. Ct. App. 2001). Thus, had there been no 2011 Settlement

Agreement, and had Plaintiffs been found liable for damages at a trial with the Derivative Plaintiffs, Plaintiffs could have pursued these same tort claims against the Insurers without triggering the Indemnity Provision. In such a case, the Insurers hardly could have argued that claims preserved under the Insurance Agreement invalidated that Agreement. Since the 2011 Settlement Agreement specifically left the status quo of the Indemnity Provision intact, and Plaintiffs' claims are allowed under the Indemnity Provision, the Insurers' arguments that those same claims now invalidate the Insurance Agreement is without merit.

B. The Superior Court Made Premature Factual Findings As To The Negotiating Parties' Intent

Even if the 2011 Settlement Agreement did not unambiguously permit Plaintiffs' claims, Plaintiffs proffered an interpretation to which the 2011 Agreement is reasonably susceptible. Thus, the Superior Court erred by making premature factual determinations regarding the parties' intent and motivations. *Mieuli*, 2001 WL 777447, at *5. Such determinations include whether the Plaintiffs and Derivative Plaintiffs intended the second sentence of Provision F.15 to "close the door" on claims otherwise permitted under the Insurance Agreement, and whether the parties to the Insurance Agreement "left the door open" for such claims only because "Plaintiffs were not part of the original negotiations."

The Insurers' assertion that Plaintiffs cannot appeal the Superior Court's premature factual findings is incorrect. Under Delaware Supreme Court Rule 8, a

party may raise any question on appeal that was "fairly presented to the trial court for consideration," or, if a question was not so presented, "when the interests of justice so require." Supr. Ct. R. 8. It is well-established that when a court resolves a question, including *sua sponte*, that question is deemed "fairly presented to the Superior Court and is thus properly before this Court on appeal." *Lawson v. Preston L. McIlvaine Const. Co., Inc.*, 552 A.2d 858 (Del. 1988); *see also Reddy v. MBKS Co., Ltd.*, 945 A.2d 1080, 1086 (Del. 2008) (where court ruled on issue *sua sponte*, "interests of justice" required appeal to be heard, as parties had not been heard on the issue in the underlying proceedings). Accordingly, Plaintiffs are entitled to appeal the Superior Court's interpretation of Provision F.15, and specifically, the propriety of the Court's factual findings.

C. Plaintiffs Alleged Extrinsic Evidence Demonstrating, At A Minimum, A Latent Ambiguity In The 2011 Settlement Agreement

Contrary to the Insurers' arguments, the Superior Court went beyond the face of the 2011 Settlement Agreement to dismiss Plaintiffs' claims. However, even if the Court had dismissed Plaintiffs' claims based solely on the plain language of that Agreement, such a dismissal still would have been improper, as Plaintiffs alleged evidence sufficient to demonstrate, at minimum, a latent ambiguity in Provision F.15. *See Wolf*, 8 Cal. Rptr. 3d at 655 ("[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.").

Plaintiffs asserted, based on their participation in the negotiation of the 2011 Settlement Agreement, that the Derivative Plaintiffs included Provision F.15 merely as a safeguard 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 otherwise to refund the Partial Settlement. Pls.' Opp'n Defs.' Mot. Dismiss at 11-12, 20 (A394-95, 103); Compl. ¶¶ 6, 90 (A303, 330). Plaintiffs further asserted, again based on their personal knowledge, that they drafted the 2011 Settlement Agreement to preserve their rights to recover from the Insurers in tort. *Id.*; Compl. ¶ 91 (A331). Such evidentiary allegations at the pleading stage, before the parties have taken discovery, are sufficient to overcome a motion to dismiss. *See, e.g., In re Yahoo! Litig.*, 251 F.R.D. 459, 471 (C.D. Cal. 2008) (denying motion to dismiss where plaintiffs contended that extrinsic evidence would show they bargained for certain services, even if contract stated otherwise).[1] In contrast, the Insurers, who were not parties to the 2011 Settlement Agreement and did not participate in negotiations, have identified no extrinsic evidence to support their position.

[1] Defendants' cases do not suggest otherwise. The courts in *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005 (9th Cir. 2012) and *Stewart v. First Cal. Bank*, 2013 Cal. App. Unpub. LEXIS 3829 (Cal. Ct. App. May 30, 2013), found that the extrinsic evidence the parties alleged did not support an interpretation to which the contract was even reasonably susceptible.

II. THE INSURERS FAIL TO OFFER ANY ALTERNATIVE GROUNDS FOR DISMISSAL

A. Plaintiffs' Claims Are Not A Collateral Attack On The Partial Settlement

1. The District Court Did Not Address Plaintiffs' Rights Under The Insurance Agreement

Plaintiffs' claims cannot constitute a collateral attack on the District Court's approval of the Partial Settlement when the District Court did not even address Plaintiffs' rights under the Insurance Agreement. *See* Opening Brief at 24-27. The Insurers attempt to argue that the District Court did consider Plaintiffs' rights under the Insurance Agreement, because (1) the settling parties stated in their motion for approval that the Partial Settlement was fair to Plaintiffs, and (2) Dr. Samueli argued to the Ninth Circuit that the Partial Settlement was unfair. Answering Brief at 11, 29. These arguments are without merit.

Regardless of the settling parties' self-serving statements in a motion seeking approval for the Partial Settlement, the District Court stated on the record that it was *not* deciding Plaintiffs' rights under the Insurance Agreement. App. at 521:19-522:16 (A171-72). This is consistent with the well-established principle that "[t]he 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

the District Court's statement, the settling parties repeatedly stated that the only issue before the District Court was whether the Partial Settlement was "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]." App. at 527:18-23 (A177).

Dr. Samueli's arguments to the Ninth Circuit are similarly irrelevant to a determination of what the District Court considered in approving the Partial Settlement. Moreover, contrary to the Insurers' arguments, the fact that Plaintiffs were later forced to withdraw their Ninth Circuit appeal as a precondition to the 2011 Settlement in no way precludes Plaintiffs from holding the Insurers liable for their tortious conduct in placing Plaintiffs in the very untenable position that required them to enter the 2011 Settlement Agreement. *See* Opening Brief at 13-14. To the contrary, as noted above, Plaintiffs preserved their rights to pursue these very tort claims in the 2011 Settlement Agreement.

2. Defendants' Sole Case Supporting Their Collateral Attack Argument Is Inapposite

Daewoo Motor America, Inc. v. General Motors Corp., 459 F.3d 1249 (11th Cir. 2006), does not support Defendants' position that Plaintiffs' tort action can constitute a collateral attack on an order that did not adjudicate Plaintiffs' rights. *Daewoo* concerned an actual attempt to set aside a Korean bankruptcy court's

disposition of unencumbered estate assets.[2] Specifically, Daewoo Motor Co. ("Daewoo Korea") agreed to transfer its assets to a General Motors ("GM") subsidiary as part of Daewoo Korea's bankruptcy proceedings in Korea. *Id.* at 1253. At the same time, Daewoo Korea sought to terminate its distribution agreement with Daewoo Motor America ("Daewoo America"). *Id.* Despite the potential termination, Daewoo America neither made any claims in the Korean proceeding, nor voted against the bankruptcy plan, which finalized the transfer and which was approved by the Korean court. *Id.* at 1254.

Daewoo America sued GM for tortious interference and other claims, and GM successfully moved to dismiss on the grounds of comity. *See Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 315 B.R. 148 (M.D. Fla. 2004) ("*Daewoo II*").[3] The Eleventh Circuit affirmed, finding that the validity of the asset transfer was at issue in the Korean proceeding, and that Daewoo America should have made its claims there. *Daewoo*, 459 F.3d at 1259.

---

[2] Likewise, *Garza v. TV Answer, Inc.*, 1997 Del. LEXIS 452, at *4 (Del. Dec. 8, 1997), which Defendants cite for the collateral attack standard, provides no support for their argument. Unlike this case, where Plaintiffs do not seek to overturn the Partial Settlement to which they were not parties, Garza sought to directly challenge the Order of the Bankruptcy Court concerning a bankruptcy settlement agreement of his own bankruptcy.

[3] Dealers that sold Daewoo cars under an agreement with Daewoo America also sued GM. After the dismissal of Daewoo America's claims, the court also dismissed the dealers' claims on the basis of comity. *See In re Daewoo Motor Co, Ltd. Dealership Litig.*, 2005 U.S. Dist. LEXIS 43197 (M.D. Fla. Jan. 6, 2005) ("*Daewoo III*").

It bears emphasis that resolution of all claims in the bankruptcy proceeding – unlike in a fairness hearing – was important because the assets were to be transferred "free and clear," and the plaintiff's claims amounted to an encumbrance. *Daewoo III*, 2005 U.S. Dist. LEXIS 43197, at *26. The Eleventh Circuit found that the plaintiff's claim was a direct attack on the Korean court's order because, unlike here, Daewoo America sought an injunction and a declaration that the "transfer be set aside." *Daewoo*, 459 F.3d at 1259 (citation omitted). As the claims would "require the court to set aside the asset transfer to the defendants, which was approved by the Korean court," they were "a collateral attack on the order of the Korean court." *Id.*

By contrast, Plaintiffs do not seek to set aside the Partial Settlement or the Insurance Agreement, nor do Plaintiffs assert coverage claims. Plaintiffs are in no way precluded, however, from proving that they would have been entitled to coverage as a predicate to the Insurers' tort liability for eliminating that coverage.

B. The Insurers' Circular Argument That Their Bad Faith Acts Prevent Plaintiffs From Suing For Bad Faith Fails

The Insurers contend that Plaintiffs cannot state a claim for tortious bad faith because Plaintiffs "relinquished their contractual right to coverage as part of the Plaintiffs' Settlement." Answering Brief at 31. The Insurers fail to present any authority justifying their 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. Instead, Defendants' own cases reaffirm that the duty of good faith arises "so long as a potential for coverage under the insurance contract exists." *Schwartz v. State Farm Fire & Cas. Co.*, 106 Cal. Rptr. 2d 532, 528 (Cal. Ct. App. 2001) (emphasis added); *Waller v. Truck Ins. Exch., Inc.*, 900 P.2d 619, 639 (Cal. 1995) (finding that there can be no action for bad faith "if there is no *potential* for coverage") (emphasis in original); *Brizuela v. Calfarm Ins. Co.*, 10 Cal. Rptr. 3d 661, 673-74 (Cal. Ct. App. 2004) (finding that a bad faith claim typically cannot exist "absent any potential for coverage," unless, for example, an insurer "embarked on [a] campaign to intimidate insured into settling" instead of investigating a claim). Here, consistent with *Schwartz*, Plaintiffs alleged that they were potentially entitled to coverage at the time the Insurers refused to cover the 2011 Settlement. Compl. ¶¶ 29, 33 (A312-13).

Defendants' remaining cases merely reiterate that an insurer has no duty to act in good faith when there is no potential for coverage. In *Love v. Fire Insurance Exchange*, 271 Cal. Rptr. 246, 254-55 (Cal. Ct. App. 1990), the court found that, because the plaintiffs' claim for benefits was time-barred, the insurer's denial of that claim was not in bad faith. In contrast, here, Plaintiffs would be well within their rights to seek coverage but for the Insurers' bad faith conduct. *Id.; see also Benavides v. State Farm Gen. Ins. Co.*, 39 Cal. Rptr. 3d 650, 656 (Cal. Ct. App. 2006) (no bad faith claim where jury had previously determined that no coverage

existed).[4] Thus, Plaintiffs' scenario is more akin to *Lockwood International, B.V. v. Volm Bag Co., Inc.*, in which the court found an insurer liable for bad faith where the insurer's bad faith conduct was the very reason the insured could no longer show entitlement to coverage. 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). Notably, Defendants did not address *Lockwood.*

C. Twin City's Supplemental Brief Offers No Additional Grounds For Dismissal

Twin City filed a separate answering brief to Plaintiffs' appeal, arguing that this Court should dismiss Plaintiffs' bad faith claim as to Twin City on the grounds that Twin City did not cause "actual harm" to Plaintiffs. Twin City argues that it caused no harm to Plaintiffs because (1) Twin City promptly paid its full limits before executing the Insurance Agreement, and thus extinguished its good faith duties to Plaintiffs, and (2) Plaintiffs have no rights or interests in the $2.265

[4] Moreover, any suggestion by Defendants that no breach of the implied covenant of good faith can exist absent a breach of the contract is incorrect. California courts have long held that "the obligations of insurers go beyond meeting reasonable expectations of coverage." *Foley v. Interactive Data Corp.*, 765 P.2d 373, 390 (Cal. 1988). "The duty violated – that of dealing fairly and in good faith with the other party to a contract of insurance – is a duty imposed by law, not one arising from the terms of the contract itself." *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973). As a result, "breach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing." *Schwartz*, 106 Cal. Rptr. 2d at 531; *see also Lehman Commercial Paper Inc. v. Fidelity Nat'l Title Ins. Co.*, 2013 WL 26741, at *4 (C.D. Cal. Jan. 2, 2013).

million refund Twin City received pursuant to the Insurance Agreement's payment scheme (under which each Insurer contributed a pre-determined percentage of its limits, regardless of whether their insurance or applicable underlying insurance would be exhausted properly), because the $2.265 million was paid "as consideration for agreeing to resolve coverage issues." Appellee Twin City Fire Ins. Co.'s Supp. Answering Brief ("Twin City Brief") at 14-16.

Twin City's arguments regarding its limits are irrelevant, as Plaintiffs are not asserting a coverage claim. Rather, Plaintiffs seek tort damages for Twin City's joint and several liability for tortious interference and for violating its fundamental duty to "act fairly and in good faith in discharging its contractual responsibilities." *Gruenberg*, 510 P.2d at 1037. These good faith obligations "go beyond meeting reasonable expectations of coverage," and "encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary." *Foley*, 765 P.2d at 390 (quoting *Egan v. Mut. of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979)).

Twin City's participation in the Insurance Agreement to resolve various coverage disputes between Broadcom and the Derivative Plaintiffs was not, as Twin City argues, "an agreement separate and apart from Twin City's contract to provide insurance." Twin City Brief at 16. Twin City's duty to settle coverage disputes is one of its fundamental obligations as an insurer, and Twin City violated its duty to carry out that obligation in good faith by agreeing with the other

Insurers to deprive Plaintiffs of access to their insurance to fund the 2011 Settlement Agreement. Far from causing Plaintiffs no harm, Twin City's breach of the duty of good faith was the most egregious of all: in executing the scheme to bar Plaintiffs from accessing their coverage, Twin City received a $2.265 million refund, which was funded with money from the other Insurers that should have been available to Plaintiffs.

Twin City cannot credibly argue that, because Twin City preliminarily paid out its limits, Twin City extinguished its good faith duties to Plaintiffs and was then free to engage in bad faith conduct, through which it recouped $2.265 million. Even if Twin City's limits were somehow relevant to Plaintiffs' ability to allege the requisite elements of bad faith, Twin City's argument that Plaintiffs would not have been entitled to Twin City's $2.265 million refund is incorrect.

An insurer's recoveries – whether by contribution, subrogation, or refund – replenish the insurer's limits of liability. *See, e.g., Flintkote Co. v. Gen. Accident Assurance Co. of Canada*, 2008 WL 2477420, at *6 (N.D. Cal. June 18, 2008) ("[A]ny recovery by insurer B against insurer A replenishes B's aggregate limits, so that additional funds are available to pay subsequent claims."); *Reliance Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 691 N.Y.S. 2d 458, 460 (N.Y. App. Div. 1999) ("Payment to National Union, as opposed to [the policyholder], is appropriate in order to replenish the policy limits of the National Union policy for

the benefit of other potential claimants."). Because the $2.265 million refund should have been available as insurance coverage to Plaintiffs, Plaintiffs have not, as Twin City claims, received the full benefit of Twin City's $10 million policy (and have never conceded as much).

In light of the foregoing, Twin City's argument that it caused no "actual harm" to Plaintiffs because they "would be in the same position as they are today" had Twin City not participated in the Insurance Agreement is unavailing. Twin City Brief at 15. Had Twin City complied with its duty of good faith by (1) funding a settlement of the Derivative Action covering all insureds, and (2) not engineering the circular payment scheme that prevented Plaintiffs from using their insurance coverage to settle the Derivative Action (including the $2.265 million that Twin City received for executing the tortious scheme), Plaintiffs could have avoided protracted litigation with the Derivative Plaintiffs, would not have been forced to fund a settlement with their own money, and would not now be embroiled in costly litigation over the instant dispute.

D. The Insurers Are Not Parties To Each Other's Contracts And Are Liable For Tortious Interference

Finally, Defendants' argument that they are immune from liability for tortious interference because they have a "direct interest or involvement" in each other's policies is legally and factually flawed.

Defendants rely on a line of cases stemming from *Marin Tug & Barge Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825 (9th Cir. 2001). In *Marin Tug*, the court found that Shell Oil could not be liable for tortious interference with an oil shipper's contracts with Shell customers by refusing to allow the shipper to carry Shell on its barges. Citing Shell's "direct, active involvement" in the contracts and the contracts' "depend[ence] on Shell's cooperation," the court found that Shell's behavior did not rise to the requisite level of independent wrongfulness needed for a claim for tortious interference with prospective economic advantage. *Id.* at 834.

California state and federal courts have rejected *Marin Tug* as an accurate statement of California law on the scope of tortious interference liability. *See, e.g., Woods v. Fox Broadcasting Sub., Inc.*, 28 Cal. Rptr. 3d 463, 471 (Cal. Ct. App. 2005) (finding that *Marin Tug* did no more than evaluate Shell's conduct in the context of its relationships with the plaintiff and its customers under the "independent wrongfulness" element of a tortious interference claim); *G&C Auto Body Inc. v. Geico Gen. Ins. Co.*, 552 F. Supp. 2d 1015, 1021 (N.D. Cal. 2008) (concluding that the *Marin Tug* opinion "[r]egarding the scope of the California intentional interference tort would not be adopted by California's highest court").

Even accepting *Marin Tug*'s "direct, active involvement" standard, the Insurers have no such active involvement in each other's policies. No policy relies on the cooperation of another Insurer, and each Insurer can and must carry out its

obligations under its respective policy regardless of whether the other Insurers fulfill their own contractual obligations. Thus, the D&O Policies are highly distinguishable from the cases the Insurers cite, in which the defendant plays, at minimum, an active and essential role in the contracts.[5] Instead, this case is more akin to *Woods* or *G&C*, in which the courts determined that parties with no more than a general economic interest in a contract could not be immune to liability for tortious interference. *See Woods*, 28 Cal. Rptr. 3d 463 at 472; *G&C Auto Body*, 552 F. Supp. 2d at 1020; *see also Ford Motor Credit Co. v. Daugherty*, 2005 WL 1366455, at *3 (E.D. Cal. May 27, 2005) (holding that where two parties held separate contracts with the plaintiff to facilitate a single business endeavor, one party could be liable for tortious interference with the other's contract).

CONCLUSION

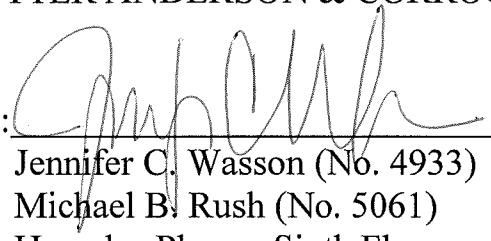
In light of the foregoing, Plaintiffs respectfully request that this Court reverse the Order below and deny the Insurers' Motion to Dismiss.

---

[5] *See Fresno Motors, LLC v. Mercedes-Benz USA, LLC*, 852 F. Supp. 2d 1280, 1293, 1301 (E.D. Cal. 2012) (defendant was not a stranger because of his ongoing "direct, active role" and "necessary involvement" in an asset purchase agreement, including a statutory and contractual first right of refusal over the sale); *P.M. Group, Inc. v. Stewart*, 64 Cal. Rptr. 3d 227 (Cal. Ct. App. 2007) (party to contract or related subcontracts cannot be held liable for tortious interference where the contract is wholly dependent on a party's active and direct performance); *National Rural Telecommc'n Coop. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1070 (C.D. Cal. 2003) (third-party beneficiary was not a stranger to the contract, as it had a "direct, continuing, and substantial interest" in the delivery of satellite services); *Exxon Corp. v. Superior Court*, 60 Cal. Rptr. 2d 195 (Cal. Ct. App. 1997) (Exxon franchisee could not claim tortious interference against Exxon for contractually forbidding franchisee from purchasing Exxon gas from independent operators, because the relationship could not exist without Exxon's active participation and involvement as the provider of gas).

Respectfully submitted,

POTTER ANDERSON & CORROON LLP

By: 

Jennifer C. Wasson (No. 4933)
Michael B. Rush (No. 5061)
Hercules Plaza – Sixth Floor
1313 North Market Street
Wilmington, DE 19801
Telephone: (302) 984-6000

Attorneys for
Plaintiffs Below/Appellants

Of Counsel:

Scott D. Gilbert
Miriam M. Smolen
Ivan J. Snyder
Emily P. Grim
GILBERT LLP
1100 New York Avenue, NW
Suite 700
Washington, DC 20005
Telephone: (202) 772-2200

Dated: September 13, 2013
1122508/39304

CERTIFICATE OF SERVICE

Jennifer C. Wasson hereby certifies that on the 13th day of September, 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:

Carmella P. Keener, Esq. (No. 2810)
ROSENTHAL, MONHAIT & GODDESS, P.A.
919 N. Market Street - Suite 1401
Wilmington, DE 19801

Attorney for Defendants Below/Appellees Federal Insurance Company and XL Specialty Insurance Company

Edward M. McNally, Esq. (No. 614)
Patricia A. Winston, Esq. (No. 5248)
MORRIS JAMES LLP
500 Delaware Avenue - Suite 1500
Wilmington, DE 19801

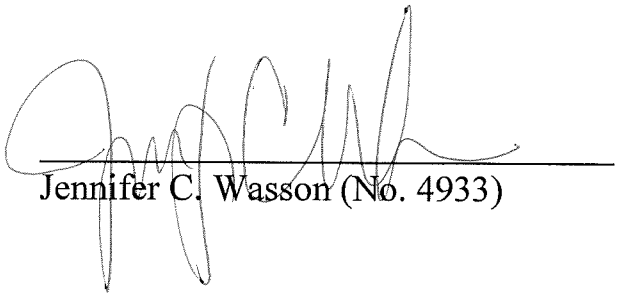
Attorneys for Defendant Below/Appellee National Union Fire Insurance Company of Pittsburgh, PA

John D. Balaguer, Esq. (No. 2537)
WHITE AND WILLIAMS LLP
824 N. Market Street – Suite 902
Wilmington, DE 19801

Attorney for Defendant Below/Appellee Twin City Fire Insurance Company

Neal J. Levitsky, Esq. (No. 2092)
Seth A. Niederman, Esq. (No. 4588)
FOX ROTHSCHILD LLP
919 N. Market Street - Suite 1300
Wilmington, DE 19801

Attorneys for Defendant Below/Appellee Arch Insurance Company



Jennifer C. Wasson (No. 4933)