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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE LIMA DELTA COMPANY, TRIDENT AVIATION SERVICES, LLC, And SOCIETE COMMERCIALE ET INDUSTRIELLE KATANGAISE,	)
	) No. 401, 2017
Plaintiffs below, Appellants,	)
	) On appeal from the Superior Court
v.	) of the State of Delaware,
	) C.A. No. N14C-02-101 JRJ CCLD
WELLS FARGO INSURANCE SERVICES USA, INC.	)
Defendant below, Appellee.	)

APPELLANTS' AMENDED OPENING BRIEF

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Dated: January 2, 2018

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NATURE OF PROCEEDINGS

This case comes before this Honorable Court on appeal by the Lima Delta Company, Trident Aviation Services, LLC, and Société Commerciale et Industrielle Katangaise ("Plaintiffs"), from the Opinion and Order dated August 30, 2017, granting the Motion to Dismiss Plaintiffs' Second Amended Complaint filed by Wells Fargo Insurance Services USA, Inc. ("Wells Fargo"), of the Superior Court of Delaware, New Castle County, by the Honorable Jan R. Jurden, President Judge, in Case No. N14C-02-101 JRJ CCLD in that court.

This matter arises from an aviation insurance policy (the "Policy") that Wells Fargo procured for Plaintiffs, on Plaintiffs' Gulfstream IV aircraft (the "Aircraft"), which crashed in the Democratic Republic of the Congo (the "DRC") on February 12, 2012, resulting in multiple deaths and the loss of an $8 million aircraft (the "Accident"). Plaintiffs contend, and alleged in their Second Amended Complaint, that Wells Fargo was negligent in connection with obtaining the Policy and in servicing it thereafter, which resulted in Plaintiffs being denied the benefits of insurance coverage.

The Policy, known as a "Broad Horizon Aviation Insurance Policy," was issued by Global Aerospace, Inc., along with National Indemnity Company, American Alternative Insurance Corporation, Tokio Marine & Nichido Fire Insurance Company, Ltd. (USB), Mitsui Sumitomo Insurance Company of

America, and American Commerce Insurance Company (the "Pool Insurers"). After the Accident, the Pool Insurers refused to extend insurance coverage in connection with the Accident, instead choosing to file suit, in Georgia state court, seeking, among other things, rescission of the Policy and a declaration that the Accident was not covered by the Policy because the pilots operating the Aircraft at the time of the Accident did not meet the requirements of the "Open Pilot Warranty" provision of the Policy, which is a term that establishes certain requirements for the pilots authorized to operate the Aircraft, including training requirements. The Pool Insurers were successful in Georgia when the trial court granted the Pool Insurers' motion for summary judgment.

While the Georgia lawsuit was pending, Plaintiffs filed a Complaint in the Superior Court of Delaware on February 11, 2014, as Delaware was the appropriate forum for adjudication of the parties' claims – indeed, the Plaintiffs had moved to dismiss the Georgia action for lack of jurisdiction and forum *non conveniens* – and the Pool Insurers had not named Wells Fargo as a party in the Georgia action. Having been given leave of Court in the Delaware lawsuit, the Plaintiffs filed a Second Amended Complaint on May 14, 2014. On June 13, 2014, Wells Fargo moved to dismiss the Second Amended Complaint. That motion was fully briefed, after which the Superior Court stayed the lawsuit pending the resolution of the Georgia action, which at that point was on appeal.

The Georgia Court of Appeals issued its decision on August 24, 2016. The Court affirmed the trial court's Order granting summary judgment on the basis that the pilots of the Aircraft failed to meet the "Open Pilot Warranty" provision of the Policy (insofar as the court determined that one of the pilots did not satisfy the training requirements of that provision) and therefore the Policy did not provide coverage for the Accident.

Plaintiffs contend in this action, and allege in their Second Amended Complaint, that, before the accident, they requested from Wells Fargo an extension of time to meet the training requirements of the Open Pilot Warranty provision, and that Wells Fargo had advised Plaintiffs that such extension had been "taken care of." It turned out that it had not, as Wells Fargo had failed to request or obtain from the Pool Insurers an endorsement confirming the extension, leaving Plaintiffs exposed and without insurance coverage for the Accident.

Plaintiffs also contend in this action, in their Second Amended Complaint, that Wells Fargo failed to advise Plaintiffs regarding the Open Pilot Warranty provision and that Wells Fargo failed to advise Plaintiffs regarding a "Named Pilot Warranty" provision, which provision would have been appropriate under the circumstances and would have met Plaintiffs' needs and would not have resulted in the Plaintiffs being without coverage for the Accident.

After the Georgia Court of Appeals issued its decision, Wells Fargo requested, in this case, that the Superior Court accept supplemental briefing on Wells Fargo's Motion to Dismiss to address the effect, if any, of the Georgia decision on the pending Motion. Such briefing was completed on October 17, 2016 and the Court heard oral argument on the Motion on April 12, 2017.

By Opinion and Order dated August 30, 2017, the Superior Court granted Wells Fargo's Motion and dismissed the Second Amended Complaint, finding that Plaintiffs had not adequately alleged a negligence claim against Wells Fargo. The Court did not provide the opportunity for Plaintiffs to amend their Second Amended Complaint to address the pleading deficiencies identified by the Court.[1]

For the reasons detailed below, and in the documents submitted herewith, the trial court erred in finding that Plaintiffs had failed to state a claim for negligence against Wells Fargo, and the trial court should have provided Plaintiffs with the opportunity to amend their Second Amended Complaint.

[1] Despite Plaintiffs' request at oral argument on the Motion for the opportunity to amend the Complaint, the trial court failed to address this request in its August 30 Order and provide Plaintiffs with the opportunity to amend. A-287 and A-335.

SUMMARY OF ARGUMENT

The trial court erred in finding that the Second Amended Complaint failed to adequately allege a claim for negligence against Wells Fargo. Plaintiffs specifically alleged each element of a negligence claim – duty, breach of duty, damages and causation – and alleged the factual bases supporting each of these elements. To be sure, the Second Amended Complaint sufficiently placed Wells Fargo on notice of the claim, the allegations against it, and the bases for those allegations.

For these reasons, as more fully detailed below, Plaintiffs respectfully submit that the Court should reverse the trial court's decision and remand this matter either to proceed in the usual course or to permit Plaintiffs the opportunity to amend their Second Amended Complaint.

STATEMENT OF FACTS

A. The Parties.

1. The Plaintiffs.

Plaintiff The Lima Delta Company is a Delaware Corporation which, at all relevant times, maintained offices at 112 Deer Valley Lane, Wilmington, Delaware. A-055 at ¶ 4. Lima Delta served as the registered owner of the Aircraft. *Id.* Though the Aircraft's registered owner, Lima Delta is solely an "owner trustee" of the Aircraft under a trust agreement. *Id.* This type of trust ownership is a common arrangement permitted under applicable U.S. law; it allows non-U.S. citizens to register aircraft with the Federal Aviation Administration, permitting them to operate under the flag of the United States. *Id.*

Plaintiff Société Commerciale et Industrielle Katangaise ("Socikat") is a business entity based and domiciled in the DRC. Socikat, which provides mining support equipment to the mining industry in the DRC, is the beneficiary of the trust under which Lima Delta acts as owner trustee of the Aircraft and is therefore the Aircraft's equitable (or beneficial) owner. *Id.* at ¶¶ 5 and 6.

The Aircraft was purchased by Lima Delta (as owner trustee for the benefit of Socikat) on or about May 4, 2011, and based in Wilmington, Delaware. *Id.* at ¶ 6. In an arrangement common to such trusts, Socikat used the Aircraft in the course of its business operations pursuant to a lease from Lima Delta (as trustee). *Id.*

Plaintiff Trident Aviation Services LLC ("Trident"), a Delaware limited liability company, provided various forms of administrative services and assistance to Socikat, including hiring contract flight crews for the Aircraft, scheduling and overseeing maintenance, arranging for flight support services, arranging and paying for navigational database subscriptions, and administering maintenance tracking programs, warranty programs, and related aviation services. *Id.* at ¶ 7.

2. The Defendants.

Defendant Global Aerospace, Inc. ("Global") is a Delaware corporation. A-051 at ¶ 8. Global describes itself as "a major provider of insurance for all types of aerospace risks, from major flag carriers and regional airlines to corporate jet operators and private aircraft as well as airports, manufacturers and aviation service providers." *Id*. According to the company's website, Global "ha[s] handled claims in every country in the world." *Id*. In all matters relevant to this action, Global has acted in a representative capacity on behalf of the other Pool Insurers. *Id*.

Defendant American Alternative Insurance Corporation is a Delaware corporation headquartered in Princeton, New Jersey. A-052 at ¶ 10. The remaining Pool Insurers are citizens of Nebraska, New York and Ohio. A-051-052 at ¶¶ 9, 11-13.

Wells Fargo Insurance Services, USA is a citizen of North Carolina. A-052 at ¶ 14. According to its website, the company is an industry leader in aviation insurance services:

> There's no room for unprotected risk in your flight path. The industry professionals who make up the Wells Fargo aviation insurance practice group understand this, and help you navigate the risks of the aviation industry to find exposures and solutions others might miss.
>
> Since no one knows this industry better than those who have worked within it, our practice group includes former pilots and aviation safety professionals who give you an informed and trusted perspective on risk exposure, along with strong strategies to fit every aviation segment. The result is a policy designed for your industry, by your industry that better protects your business.

A-218.

B. The Insurance Policy and its Underwriting History

As part of the services it provided to Socikat, Trident arranged for Wells Fargo to add the Aircraft to an insurance policy (the "Hawker Policy") that had earlier been purchased for another business aircraft that Lima Delta owned in trust for Socikat. The Hawker Policy had been underwritten by XL Aerospace, an insurer that specializes in aviation risks. A-052 at ¶ 15. As plans were made to use the Aircraft for Socikat's international travel needs, Trident, Lima Delta and Wells Fargo were advised that the European Union required a minimum of $250 million in liability insurance coverage for business aircraft visiting EU countries. *Id.* at ¶

16. Because XL Aerospace was unable to provide more than $150 million in liability coverage, Wells Fargo arranged for the issuance of a new policy underwritten by Global. *Id.*

Global sold to the plaintiffs a "Broad Horizon Aviation Insurance Policy," policy number 15001184, covering the period of June 22, 2011 through June 22, 2012. A-053 at ¶ 18. The Policy's Declarations state that with respect to the Aircraft's use, the coverage afforded under the Policy extends to "[a]ll operations of the Named Insured." A-054 at ¶ 23. The Policy also sets forth a condition, under the heading "Policy Conditions - General," stating in pertinent part that the Policy "contains all the agreements between the Named Insured and [Global] concerning the insurance afforded." The Policy sets forth an additional condition stating that the Policy applies to bodily injury or property damage which occurs and to physical damage sustained:

> (a) anywhere in the world; and
>
> (b) during the policy period.

Id. at ¶ 24.

1. The Policy's Liability Coverage

Under the Policy's liability coverage part (Part I, Coverage A), Global promised to pay on the Plaintiffs' behalf all sums "which the insured shall become legally obligated to pay as damages because of bodily injury or property damage,

caused by an occurrence and arising out of the ownership, maintenance or use of the scheduled aircraft[.]" A-055 at ¶ 26. The Policy defines "occurrence" to mean, in pertinent part, "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured[.]" *Id.* at ¶ 27. The declarations set forth limits of liability for the Policy's liability coverage part in the amount of $250 million for each occurrence. *Id.* at ¶ 28.

2. The Policy's Physical Damage Coverage

Pursuant to Part III, Coverage L of the Policy, the Policy provides physical damage coverage for the Aircraft. A-056 at ¶ 29. Under the Policy's physical damage coverage part, Global promised to pay "for physical damage to the scheduled aircraft including disappearance of the scheduled aircraft." *Id.* at ¶ 30. The declarations set forth limits of liability for the Policy's physical damage coverage part in the amount of $8 million. *Id.* at ¶ 32.

3. Wells Fargo's Services

The Policy contains a provision that is commonly referred to, in the jargon of aviation insurance, as an "Open Pilot Warranty" clause. A-070 at ¶ 90. As one commentator has explained,

> We often get questions from our [insureds] regarding the Open Pilot Clause (sometimes referred to as Open Pilot Warranty) on their quote or policy. The Open Pilot Clause (OPC) in your aircraft policy lets you know who

> is allowed to fly your aircraft in addition to the named pilots. The hours and ratings listed under the OPC do not reflect any of the named pilots. [The clause] simply states that if any pilot who meets or exceeds the following requirements is flying the aircraft with your (the named insured's) permission, and within the scope of the policy, then you have coverage.[2]

An Open Pilot clause is to be distinguished from a "Named Pilot" clause. As another commentator has explained:

> One of the most important sections of your aircraft insurance policy is the pilot warranty.
>
> ***
>
> Warranties can be for Named Pilots only, Open Pilot warranties, or a combination of both. A Named Pilot only warranty is just that. The only persons approved to fly the aircraft are the pilots listed on the policy. An Open Pilot Warranty is one that spells out the pilot experience requirements for there to be coverage.[3]

A-122.

The Policy here contained an Open Pilot clause; it did not contain a Named Pilot clause. A-071 at ¶ 91. The absence of a Named Pilot clause was (and remains) contrary to Plaintiffs' purpose in securing aviation insurance for the

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[2] *See* A-122 (citing http://pimi.com/2011/10/02/aircraft-insurance-who-can-pilot-my-aircraft-pilot-requirements-and-the-open-pilot-clause/ (visited on April 21, 2014)). Though the Open Pilot clause is sometimes referred to as an "Open Pilot Warranty," such clauses do not constitute or create contractual warranties in the traditional sense. *Id*.

[3] *See* A-122 (citing http://www.rebaaviationinsurance.com/OPW.pdf (visited April 21, 2014)).

Aircraft. *Id.* at ¶ 92. More specifically (and, arguably, depending on the substantive law to be applied), the absence of such a clause allows the insurers a purported, technical basis on which to deny coverage for even the slightest deviation from the Policy's Open Pilot clause, even where, as here, that (slight) deviation bears no causal relationship to the insured's loss. *Id.*

Because Named Pilot clauses are readily available in the aviation insurance marketplace, and because the inclusion of a Named Pilot clause avoids the potential harm described above, professional insurance intermediaries recognize that reasonable care and diligence requires them to advise prospective insureds of the desirability and/or necessity of securing a Named Pilot clause as part of the aviation insurance bargain: "[Y]ou usually want to name the pilots who will be flying your aircraft on a regular basis."[4] Though Wells Fargo held itself out to Plaintiffs as a professional aviation insurance broker – and therefore knew or should have known that the Plaintiffs needed to seek and secure the inclusion of a Named Pilot clause within the Policy – it failed to so advise Plaintiffs. A-071 at ¶ 93. Moreover, at no time prior to the Accident did either Global or Wells Fargo make any effort to confirm the identity and/or qualifications of the Aircraft's flight crew. A-123.

[4] *See* A-123 (citing http://pimi.com/2011/10/02/aircraft-insurance-who-can-pilot-my-aircraft-pilot-requirements-and-the-open-pilot-clause/ (visited April 21, 2014)).

In any event, Wells Fargo's services were substandard in several respects, and Wells Fargo deviated from the duties it owed to Plaintiffs. First, as specifically alleged in the Second Amended Complaint, Wells Fargo was negligent in that it failed to advise Plaintiffs regarding the desirability of a Named Pilot clause. A-072 at ¶ 99. Second, also as specifically alleged in the Second Amended Complaint, Wells Fargo was negligent in (a) failing to request or secure a written application for the Broad Horizon Aviation Insurance Policy at issue (A-073 at ¶ 99(i)), which application would have confirmed Plaintiffs' needs; (b) failing to advise Plaintiffs that aviation underwriters typically approve pilots with less overall experience and fewer currency requirements than are contained in an Open Pilot Endorsement, so long as the underwriter is presented with specific history forms and other specific evidence of experience and currency for insured pilots (*id.* at ¶ 99(ii)); (c) failing to advise Plaintiffs to provide pilot history forms to the insurers, and to obtain from the insurers an endorsement naming specific pilots as approved and covered under the Policy, as pilots were rotated to and from Africa (*id.* at ¶ 99(iii)); (d) failing to document and secure an endorsement memorializing the insurers' telephonic approval of a postponement of one pilot's recurrent training, for the purpose of allowing both pilots to attend recurrent training together as a crew (*id.* at ¶ 99(iv)); (e) failing to document communications with both the Plaintiffs and Global, relying instead on oral

communications, in relation to the foregoing (*id.* at ¶ 99(v-vi)); (f) failing to follow industry custom and practice in its role as insurance broker in the underwriting process and in the retention of documents and information related thereto (*id.* at ¶ 99(vii)); and (g) failing to follow its own internal policies and procedures in the underwriting process. *Id.* at ¶ 99(viii).

C. The Accident

The Aircraft departed Wilmington, Delaware on June 29, 2011. A-057 at ¶ 37. Socikat used the Aircraft for travel throughout the EU (including Belgium, the U.K., Spain and Greece), Africa (including South Africa, the DRC and Algeria), and in Israel. The Aircraft spent most of December 2011 in Lanseria, South Africa undergoing routine inspections and maintenance. *Id.*

Trident arranged for qualified contract flight crew to operate the Aircraft for Socikat. *Id.* at ¶ 38. In the Fall of 2011 and early 2012, the crew assigned to the Aircraft consisted of pilots Marcus Beresford and Geoffrey Weiner, both experienced and type-rated Gulfstream G-IV captains.[5] *Id.* Because they would be flying the Aircraft to the DRC, both Beresford and Weiner were required to present their pilot logbooks and licenses to the DRC Civil Aviation Authority in person in

[5] A "type rating" certifies that a pilot is specifically trained and qualified, not only to fly a particular type of aircraft, but also to act as pilot in command. It requires training additional to that required for the licensing of pilots. In this way, type rating for pilots is roughly akin to board certification for medical doctors. *See* A-126.

order to "prove up" their qualifications to operate a civil aircraft in DRC airspace. *Id.* at ¶ 39. Those confirmations proved that both pilots met the Open Pilot Warranty on the date of the Accident, with Beresford's requested training interval having been extended and approved by Wells Fargo. A-126.

On the morning of Sunday, February 12, 2012, Captains Beresford and Weiner filed flight plans to fly the Aircraft from Lubumbashi, DRC to Kinshasa, DRC; from Kinshasa to Goma, DRC; and then from Goma to the Bukavu Kavumu Airport near Kamakombe, DRC. The Aircraft departed Goma shortly after noon with nine persons aboard, in addition to Beresford and Weiner. A-058 at ¶ 40. It arrived at Bukavu after the short flight from Goma and was cleared to land. Based on the information available at that time, it appeared the Aircraft made a stabilized approach in visual conditions and touched down normally, and the crew deployed the thrust reversers (which are clam shell doors at the rear of each engine that deflect engine exhaust to slow the aircraft) and spoilers (which are devices that rise from each wing to diminish lift and increase drag after touchdown) and attempted to engage the brakes. *Id.* at ¶ 41. The brakes failed.

The Aircraft continued off the far end of the runway, traversed a soft, unpaved runway overrun area, and hurtled off a cliff. The Aircraft crashed near the bottom of a deep ravine. *Id.* at ¶ 43. Both Captain Beresford and Captain Weiner died in the Accident, as did one passenger, Augustin Katumba Mwanke, an advisor

to the DRC president. Two local farmers were also said to have died in the Accident, though Plaintiffs have been unable to confirm their deaths. A-059 at ¶ 44.

D. Global's and Wells Fargo's Wrongful Claims-Handling

Word of the Accident, which occurred on a Sunday, spread quickly. Within hours, Global and Wells Fargo commenced an urgent exchange of secret communications aimed at denying coverage for the Accident under the Policy. A-059-060 at ¶ 49. As part of this exchange, Wells Fargo provided Global with a broad array of information about Plaintiffs and the Policy, including personal information and insurance policies unrelated to the Accident. These disclosures were made without Plaintiffs' knowledge or consent, and for the purpose of advancing Global's strategic litigation interests to the detriment of Plaintiffs' interests. *Id.*

Over the succeeding days and weeks (long before any meaningful amount of substantive information concerning the Accident was known), Global and Wells Fargo had multiple phone conferences regarding Plaintiffs and the Accident. In the course of these discussions, which (again) were kept secret from Plaintiffs, Global specifically assured Wells Fargo that it would not be sued by Global. *Id.* ¶ 49. At the same time, Global and Wells Fargo repeatedly assured Plaintiffs that Global's investigation of the Accident was proceeding normally and would be concluded in

short order. Wells Fargo went so far as to discourage Plaintiffs from retaining legal counsel in connection with the Accident, while (unbeknownst to Plaintiffs) helping Global prepare to file a lawsuit against Plaintiffs in the state of Georgia. *Id.*

E. The Delaware Trial Court's Decision Granting Motion to Dismiss

By Opinion and Order dated August 30, 2017, the Superior Court granted Wells Fargo's Motion to Dismiss, finding, initially, that the Second Amended Complaint "contains two theories of negligence: (1) Wells Fargo negligently failed to advise Lima Delta to seek and secure a Named Pilot clause; and (2) Wells Fargo negligently failed to secure a written endorsement to the Policy approving a one-month postponement of the pilot's recurrent training…." A-243-244.

The trial court then found, with the respect to the failure-to-advise claim, that Plaintiffs had not "sufficiently alleged a claim for negligent failure to procure in Count VII" of the Second Amended Complaint. A-247. The Court explained as follows:

> The Court makes this finding, first and foremost, because Lima Delta does not allege that Wells Fargo could have secured a Named Pilot clause if Lima Delta had requested one, that Lima Delta would have submitted the names of the pilots who were flying the Aircraft the day of the crash to the insurers for Named Pilot status, or that the insurers would have approved those pilots for Named Pilot status. Moreover, contrary to Lima Delta's suggestion in its briefing that a Named Pilot clause is always desirable and would have insulated Lima Delta

> from a denial of coverage, Lima Delta alleges in its Second Amended Complaint that its flight crews were periodically rotated and were not hired directly by either the owner or the "equitable owner" of the Aircraft, but rather, "contract flight crews" were provided by the third Plaintiff, Trident Aviation Services, LLC. In fact, the flight crew at the time of the February 2012 crash was only assigned to the Aircraft beginning in fall 2011. Thus, Lima Delta's negligent failure to procure theory fails both because Lima Delta does not allege that Wells Fargo has a duty to procure a Named Pilot clause and because neither the allegations nor the reasonable inferences therefrom sufficiently support the conclusion that – but for Wells Fargo's failure to procure – Lima Delta would have had insurance coverage. The fatal insufficiency of the pleadings with regard to causation applies equally to Lima Delta's negligent failure to procure argument and to the negligent "failure to advise" claim actually alleged in the Second Amended Complaint.
>
> As to Lima Delta's second argument, that Wells Fargo held itself out to the public as an expert in aviation insurance (and therefore assumed a duty to advise), the Court likewise finds that this argument is not well-pleaded in the Second Amended Complaint. Regardless of whether the legal theory could survive under Delaware or Georgia law, Lima Delta does not allege that Wells Fargo held itself out to be an expert, nor does Lima Delta allege any facts from which it could be reasonably inferred that Wells Fargo held itself out as an expert.

A-247-248 (internal citations omitted).

With respect to the Plaintiffs' claim that Wells Fargo negligently failed to secure a written endorsement to the Policy approving a one-month postponement of the pilot's recurrent training, the trial court found as follows:

> Nowhere in the Second Amended Complaint does Lima Delta allege that its pilots would have met the requirements of the Open Pilot Clause but for Wells Fargo's failure to secure a written endorsement for recurrent training. The Open Pilot Clause requires the flight crew to meet minimum flight hour requirements and to have 'successfully completed the manufacturer's recommended ground and flight training school…within the preceding twelve (12) months of any date that he or she acts [as a pilot in command or as a second in command.' Lima Delta's allegation that Wells Fargo failed to document a postponement only concerns the second requirement, and for this reason, the Court finds that Lima Delta has not sufficiently pled causation to support a claim of negligence based on this allegation.

A-250.

ARGUMENT

A. Questions Presented.

Whether the trial court erred in finding that Second Amended Complaint failed to state a claim for negligence against Wells Fargo. This issue was preserved in the trial court via Plaintiffs' Answering Brief in Opposition to Wells Fargo's Motion to Dismiss (A-108-A148), Plaintiffs' Answering Brief in Opposition to Wells Fargo's Supplemental Brief in Support of Motion to Dismiss (A-200-A219), and at the oral argument on the motion to dismiss (A-280-A-344).

B. Scope of Review.

This Court reviews a trial court decision to grant a motion to dismiss under Rule 12(b)(6) de novo, *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998), recognizing that a plaintiff's burden on a motion to dismiss is low. As this Court explained in *John Doe No. 1 v. Cahill*, 884 A.2d 451, 458 (Del. 2005), under "[l]ong-settled doctrine govern[ing] this Court's review of dismissals under Rule 12(b)(6)," "the threshold for the showing a plaintiff must make to survive a motion to dismiss is low." Indeed, "Delaware is a notice pleading jurisdiction. Thus, for a complaint to survive a motion to dismiss, it need only give 'general notice of the claim asserted.'" *Id*. (internal citations omitted). *See also Ramunno*, 705 A.2d at 1034 ("To survive a motion to dismiss, the complaint need only give general notice of the claim asserted."). That is, "[a] court can dismiss for failure to state a claim

on which relief can be granted only if 'it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief.'" *Cahill*, 884 A.2d at 458 (internal citations omitted); *Ramunno*, 705 A.2d at 1034 (dismissal is appropriate only if it appears "with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."). "Only if a court can say that the plaintiff could prevail on no set of facts inferable from the pleadings may it dismiss the complaint under Rule 12(b)(6)." *Ramunno*, 705 A.2d at 1034.

While it well-settled that, "[o]n a motion to dismiss, a court's review is limited to the well pleaded allegations in the complaint," [a]n allegation, 'though vague or lacking in detail' can still be well pleaded so long as it puts the opposing party on notice of the claim brought against it." *Cahill*, 884 A.2d at 458 (internal citations omitted). To be sure, "in ruling on a motion to dismiss under Rule 12(b)(6), a trial court must draw all reasonable factual inferences in favor of the party opposing the motion." *Id*.; *Clinton v. Enterprise Rent-A-Car Co*., 977 A.2d 892, 895 (Del. 2009), *citing Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008) ("In reviewing the grant or denial of a motion to dismiss, we view the complaint in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations."); *White v. Panic*, 783 A.2d 543, 549 (Del. 2001) (on a motion to

dismiss, plaintiffs are entitled to all reasonable inferences that logically flow from the well pled allegations of the complaint).

C. Merits of Argument.

The Trial Court Erred in Finding that the Second Amended Complaint Failed to State a Claim for Negligence Against Wells Fargo.

To state a claim for negligence, a plaintiff must allege "1) duty; 2) breach of duty; 3) who breached the duty; 4) what act or failure to act caused the breach; and 5) the purportedly offending party." *Wood v. Rodeway Inn*, 2015 Del. Super. LEXIS 109, *6 (March 4, 2015). While negligence claims must be pled with particularity, "'[p]articularity' in pleading negligence is satisfied by 'specify[ing] a duty, a breach of duty, who breached the duty, what act or failure to act caused the breach, and the party who acted." *Id*. at *4. These elements "must be accompanied by some factual allegations to support them;" that is, the allegations must "put[] the opposing party on notice of the claim being brought against it…." *Id*.

Here, the Second Amended Complaint alleged each of the above elements of a negligence claim and the facts supporting each such element.

First, Plaintiffs alleged that Wells Fargo owed a duty to Plaintiffs, including the nature of such duty. Specifically, Plaintiffs alleged as follows:

> 92. The absence from the Policy of any Named Pilot clause was (and remains) contrary to and in derogation of

the plaintiffs' purpose in securing aviation insurance for the Aircraft. More specifically, and depending on the substantive law to be applied, the absence of such a clause allows the insurers a purported, technical basis on which to deny coverage for even the slightest deviation from the Policy's Open Pilot clause — even where that (slight) deviation there is no causal relationship whatever to the insureds' loss.

93. Because Named Pilot clauses are readily available in the aviation insurance marketplace, and because the inclusion of a Named Pilot clause avoids the potential harm described in the preceding paragraph, professional insurance intermediaries recognize that reasonable care and diligence requires them to advise prospective insureds of the desirability and/or necessity of securing a Named Pilot clause as part of the aviation insurance bargain: "[Y]ou usually want to name the pilots who will be flying your aircraft on a regular basis."

94. In connection with the purchase and placement of the Policy, Wells Fargo was required to exercise the skill and knowledge normally held by brokers of aviation insurance. Wells Fargo owed this duty to the plaintiffs.

95. In connection with the purchase and placement of the Policy, Wells Fargo was required to exercise reasonable care, skill and diligence. Wells Fargo owed this duty to the plaintiffs.

96. In connection with the purchase and placement of the Policy, the plaintiffs reasonably relied on Wells Fargo's skill, knowledge and experience as brokers of aviation insurance.

97. Wells Fargo knew or should have known that the exercise of reasonable care, skill and diligence required it to advise the plaintiffs, in connection with the purchase and placement of the Policy, to seek and secure the inclusion of a Named Pilot clause.

> 98. Wells Fargo owed the plaintiffs a duty, in the exercise of reasonable care, skill and diligence, to advise the plaintiffs to seek and secure the inclusion of a Named Pilot clause within the Policy.

A-071-072 at ¶¶ 92-98. Plaintiffs' further alleged that Wells Fargo "acted negligently, and failed to act as would an aviation insurance broker of ordinary prudence…." A-049 at ¶ 3.

Second, Plaintiffs alleged, with considerable (and sufficient) specificity, that Wells Fargo breached such duties and the methods and manners by which the duties were breached. Plaintiffs specifically alleged as follows:

> 3. This action further alleges that:
>
> b. Regardless of whether defendant Wells Fargo Insurance Services, USA, Inc. acted, in connection with the matters and transactions alleged below, as the plaintiffs' agent, the agent of its co-defendants, or the agent of neither, such defendant acted negligently, and failed to act as would an aviation insurance broker of ordinary prudence, by (without limitation):
>
> i. Failing to request or secure a written application for the Broad Horizon Aviation Insurance Policy at issue;
>
> ii. Failing to advise plaintiffs that reliance on the Broad Horizon Aviation Insurance Policy's "Open Pilot Endorsement," which set minimum experience and currency requirements for pilots not specifically named in such policy, posed an inherent risk and danger that coverage might be denied for even a minor, technical deviation from the Open Pilot Endorsement's terms;

iii. Failing to advise plaintiffs that aviation underwriters typically approve pilots with less overall experience and fewer currency requirements than are contained in an Open Pilot Endorsement, so long as the underwriter is presented with specific history forms and other specific evidence of experience and currency for insured pilots;

iv. Failing to advise plaintiffs to provide pilot history forms to the insurers, and to obtain from the insurers an endorsement naming specific pilots as approved and covered under the Broad Horizon Aviation Insurance Policy, as pilots were rotated to and from Africa;

v. Failing to document and secure an endorsement memorializing the insurers' telephonic approval of a one-month postponement of one pilot's recurrent training, for the purpose of allowing both pilots to attend recurrent training together as a crew;

vi. Failing to document communications with the plaintiffs, relying instead on oral communications;

vii. Failing to document communications with the insurers, relying instead on oral communications;

viii. Failing to follow industry custom and practice in its role as insurance broker in the underwriting process; and

ix. Failing to follow its own internal policies and procedures in carrying out its role as insurance broker in the underwriting process.

As alleged below, such acts and omissions by defendant Wells Fargo Insurance Services, USA, Inc. were proximate causes of the insurers' failure to acknowledge

> and extend insurance coverage for the Accident under the Broad Horizon Aviation Insurance Policy.

A-049-049 at ¶ 3(b).

Plaintiffs further alleged as follows:

> 99. Wells Fargo acted negligently in connection with the purchase and placement of the Policy by failing to advise the plaintiffs to seek and secure the inclusion of a Named Pilot clause within the Policy. Wells Fargo was further negligent in its role as insurance broker by:
>
> i. Failing to request or secure a written application for the Broad Horizon Aviation Insurance Policy at issue;
>
> ii. Failing to advise plaintiffs that aviation underwriters typically approve pilots with less overall experience and fewer currency requirements than are contained in an Open Pilot Endorsement, so long as the underwriter is presented with specific history forms and other specific evidence of experience and currency for insured pilots;
>
> iii. Failing to advise plaintiffs to provide pilot history forms to the insurers, and to obtain from the insurers an endorsement naming specific pilots as approved and covered under the Broad Horizon Aviation Insurance Policy, as pilots were rotated to and from Africa;
>
> iv. Failing to document and secure an endorsement memorializing the insurers' telephonic approval of a one-month postponement of one pilot's recurrent training, for the purpose of allowing both pilots to attend recurrent training together as a crew;

v. Failing to document communications with the plaintiffs, relying instead on oral communications;

vi. Failing to document communications with the insurers, relying instead on oral communications;

vii. Failing to follow industry custom and practice in its role as insurance broker in the underwriting process; and

viii. Failing to follow its own internal policies and procedures in carrying out its role as insurance broker in the underwriting process.

A-072-073 at ¶ 99.

Third, Plaintiffs alleged that they suffered damages as a result of such breaches, namely by providing the insurers with a purported basis on which to deny coverage for the Accident and depriving Plaintiffs of the benefits of appropriate insurance coverage. A-074 at ¶¶ 101-102. The Plaintiffs specifically alleged as follows:

> 100. Had Wells Fargo advised the plaintiffs to seek and secure the inclusion of a Named Pilot clause within the Policy, and informed the plaintiffs of the heightened risk of relying solely on an Open Pilot clause (that is, the risk of a denial and/or forfeiture of coverage on purely technical grounds), the plaintiffs would have followed that advice and avoided such risk.
>
> 101. Wells Fargo's negligence has harmed the plaintiffs by providing the insurers with a purported, technical basis on which to deny coverage for the Accident.
>
> 102. In the event that the insurers succeed in avoiding coverage for the Accident based on an alleged breach of

> the Policy's Open Pilot clause (or otherwise), Wells Fargo's negligence will have further harmed the plaintiffs by depriving them of the benefits of the insurance coverage for which premiums were paid under the Global Broad Horizon Aviation Insurance Policy; and by subjecting them to harm as heretofore alleged.

Id. at ¶¶ 100-102.

Fourth, Plaintiffs specifically alleged that such damages were proximately caused by Wells Fargo's negligence:

> As alleged below, such acts and omissions by defendant Wells Fargo Insurance Services, USA, Inc. were proximate causes of the insurers' failure to acknowledge and extend insurance coverage for the Accident under the Broad Horizon Aviation Insurance Policy.

A-049 at ¶ 3(b). In further support of their negligence claim, Plaintiffs alleged, as cited at length above, that they suffered damages as a result of Wells Fargo's actions. A-073-074 at ¶¶ 100-102.

The foregoing allegations make clear that Plaintiffs adequately stated a claim for negligence against Wells Fargo in the Second Amended Complaint such that the trial court should have denied Wells Fargo's motion and allowed the case to proceed so that a factual record could be developed, including the facts the trial court felt should have been alleged. To be sure, the trial court erred by finding otherwise and by specifically finding that Plaintiffs were required to allege that (i) Plaintiffs had actually requested a Named Pilot clause (which of course is irrelevant to Plaintiff's claim); (ii) Wells Fargo could have secured a Named Pilot

clause if Plaintiff had requested one (which of course is irrelevant to Plaintiff's claim); (iii) Wells Fargo had a duty to procure a Named Pilot Clause (which of course is irrelevant to Plaintiff's claim); (iv) Plaintiff would have submitted the names of the pilots who were flying the Aircraft the day of the crash to the insurers for Named Pilot status; (v) the insurers would have approved those pilots for Named Pilot status; (vi) Wells Fargo held itself out to be an expert; and (vii) the flight crew would have met the minimum flight hour requirements under an Open Pilot Clause (which was alleged). A-247-250.

Of course, such matters are for discovery. Indeed, in effect, the trial court raised facts it would have liked to have seen in the Second Amended Complaint, and then found that the absence of such factual allegations were fatal. Such an approach of raising "straw men" facts - - many of which are irrelevant to Plaintiff's claims - - and then knocking them down is not appropriate on a motion to dismiss. Delaware law does not require such a level of factual specificity to state a negligence claim. *Ramunno,* 705 A.2d at 1034.

Plaintiffs expressly alleged the four elements of a negligence claim against Wells Fargo and identified the facts supporting each such element. Nothing more was required of Plaintiffs for the trial court to deny Wells Fargo's motion.

CONCLUSION

For the foregoing reasons, and based on the authorities cited herein, Plaintiffs respectfully request that the Court *reverse* the Opinion and Order of the trial court granting Wells Fargo's Motion to Dismiss the Second Amended Complaint and *remand* this matter to the trial court either (1) to proceed in the usual course or (2) to permit Plaintiffs the opportunity to amend their Second Amended Complaint to address any deficiencies found therein.

Date: January 2, 2018

/s/ *Jennifer L. Dering*

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Counsel for The Lima Delta Company, Trident Aviation Services, LLC and Société Commerciale et Industrielle Katangaise, Plaintiffs Below-Appellants

4822-8085-5641, v. 2

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LIMA DELTA COMPANY, TRIDENT AVIATION SERVICES, LLC, and SOCIÉTÉ COMMERCIALE ET INDUSTRIELLE KATANGAISE,	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-02-101 JRJ CCLD
WELLS FARGO INSURANCE SERVICES USA, INC.,	)	
Defendant.	)	

OPINION

Date Submitted: May 26, 2017
Date Decided: August 30, 2017

Upon Wells Fargo Insurance Services USA, Inc.'s Motion to Dismiss the Second Amended Complaint: **GRANTED.**

John S. Spadaro, Esquire, John Sheehan Spadaro, LLC, 54 Liborio Lane, Smyrna DE, Gary L. Evans, Esquire (*pro hac vice*), George Andrew Coats, Esquire (*pro hac vice*), Coats & Evans, P.C., P.O. Box 130246, The Woodlands, TX, William R. Firth, III, Esquire, Martin Law Firm LLC, 1521 Concord Pike, Suite 301, Wilmington, DE, Joseph A. Martin, Esquire (*pro hac vice*) (argued), Martin Law Firm LLC, 6000 Sagemore Drive, Suite 6202, Marlton, NJ, Attorneys for Plaintiffs.

Erika R. Caesar, Esquire, David J. Margules, Esquire, Elizabeth A. Sloan, Esquire, Ballard Spahr LLP, 919 North Market Street, 11th Floor, Wilmington, DE, Nancy H. Baughan, Esquire (*pro hac vice*) (argued), Parker, Hudson, Rainer & Dobbs LLP, 303 Peachtree Street, N.E., Suite 3600, Atlanta, GA, Attorneys for Defendant Wells Fargo Insurance Services USA, Inc.

Jurden, P.J.

I. INTRODUCTION

Before the Court is Defendant Wells Fargo Insurance Services USA, Inc.'s ("Wells Fargo") Motion to Dismiss Plaintiffs' Second Amended Complaint.[1] In the Second Amended Complaint, Plaintiffs allege a number of causes of action against Wells Fargo, including declaratory judgment (Count II), breach of fiduciary duty (Count VI), negligence with regard to the "Named Pilot" clause (Count VII), negligence through failure to disclose (Count VIII), consumer fraud (Count IX), and civil conspiracy (Count X).[2] In their Answering Brief, Plaintiffs contest Wells Fargo's Motion to Dismiss only as to Count VII,[3] and at oral argument, Plaintiffs confirmed that they were abandoning all claims against Wells Fargo except Count VII.[4] Accordingly, the Court dismissed Counts II, VI, VIII, IX, and X at oral argument.[5] Consequently, this Opinion addresses the sole remaining claim—Count VII. For the following reasons, Wells Fargo's Motion is **GRANTED**.

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[1] Wells Fargo Insurance Services USA, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (Trans. ID. 5590516); Wells Fargo Insurance Services USA, Inc.'s Supplemental Brief in Support of Its Motion to Dismiss Plaintiffs' Second Amended Complaint ("Wells Fargo Suppl. Mot. Dismiss") (Trans. ID. 59707208); Wells Fargo Insurance Services USA, Inc.'s Supplemental Reply Brief in Support of Its Motion to Dismiss Plaintiffs' Second Amended Complaint (Trans. ID. 59850020).

[2] Second Amended Complaint ("SAC") (Trans. ID. 55449371).

[3] Plaintiffs' Answering Brief in Opposition to Wells Fargo's Supplemental Brief in Support of Motion to Dismiss ("Lima Delta Answering Br.") (Trans. ID. 59804486).

[4] April 12, 2017 Oral Argument Transcript ("Oral Arg. Tr.") at 6:9–7:13 (Trans. ID. 60670000).

[5] *Id.* at 9:15–20; April 12, 2017 Superior Court Proceeding Worksheet (Trans. ID. 60464704).

II. BACKGROUND

In 2011, Plaintiffs Lima Delta Company, Trident Aviation Services, LLC, and Société Commerciale et Industrielle Katangaise (collectively, "Lima Delta") asked Wells Fargo to act as an insurance broker and procure insurance for a Gulfstream G-IV aircraft owned and operated by Lima Delta (the "Aircraft").[6] Wells Fargo approached Global Aerospace, Inc. ("Global") to secure the requested policy, and Global issued a Broad Horizon Aviation Insurance Policy (the "Policy") to Lima Delta on behalf of a number of other insurers (the "Pool Insurers").[7]

Relevant here, the Policy contains a provision providing that the coverage "shall not apply while a scheduled aircraft is in flight unless operated by any appropriately rated two pilot flight crew . . . " (the "Open Pilot Clause").[8] Among other things, the Open Pilot Clause requires the flight crew to meet minimum flight hour requirements and to have "successfully completed the manufacturer's recommended ground and flight training school . . . within the preceding twelve (12) months of any date that he or she acts [as a pilot in command or as a second in command]."[9]

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[6] SAC ¶¶ 15–16. The relationship of each Plaintiff to the Aircraft is more fully laid out in Lima Delta's Second Amended Complaint. *Id.* ¶¶ 4–7.
[7] *Id.* ¶¶ 15–16, 22.
[8] Wells Fargo Suppl. Mot. Dismiss, Ex. A, Broad Horizon Aviation Insurance Policy ("Policy") at v (emphasis omitted).
[9] *Id.* at v–vi.

On February 12, 2012, the Aircraft crashed into a ravine when landing at an airport in the Democratic Republic of the Congo.[10] Lima Delta provided timely notice of the crash to Global and the Pool Insurers,[11] and in May 2012, approximately three months after the crash, Global filed a lawsuit (the "Georgia Action") against Lima Delta in the Superior Court of Fulton County, Georgia ("Georgia Superior Court").[12] In the Georgia Action, Global sought rescission of the Policy or, in the alternative, a declaration of no coverage under the Policy based on Lima Delta's failure to operate the Aircraft at the time of the crash with pilots who met the requirements of the Open Pilot Clause.[13]

In February 2014, almost two years after Global filed the Georgia Action, Lima Delta filed suit against Global, the Pool Insurers, and Wells Fargo in this Court (the "Delaware Action"). Ultimately, the Court dismissed Lima Delta's claims against Global and the Pool Insurers for the reasons stated in the Court's February 19, 2016 Opinion.[14] In that Opinion, the Court stayed the remaining claims in the Delaware Action (the claims against Wells Fargo) until the Georgia Action came to a final non-appealable resolution, because the resolution of the Georgia Action was

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[10] SAC ¶¶ 40–43.
[11] *Id.* ¶ 45.
[12] *Id.* ¶ 50.
[13] *Lima Delta Co. v. Glob. Aerospace, Inc.*, 2016 WL 691965, at *1 (Del. Super. Feb. 19, 2016), *appeal refused*, 135 A.3d 311 (Del. 2016).
[14] *Id.* at *3–6.

likely to streamline the controversy (if any controversy remained following the resolution of the Georgia Action) between Lima Delta and Wells Fargo.[15]

In August 2015, the Georgia Superior Court entered summary judgment for Global, finding: (1) the Policy was subject to rescission due to misrepresentations and omissions made to Global; and (2) even if the Policy was valid, it did not cover the crash that occurred in the Democratic Republic of the Congo because Lima Delta's pilots did not meet the requirements of the Open Pilot Clause.[16] Lima Delta appealed the decision to the Georgia Court of Appeals.

On July 12, 2016, the Georgia Court of Appeals affirmed the judgment of the Georgia Superior Court.[17] The Georgia Court of Appeals based its affirmance on Lima Delta's failure to meet the requirements of the Open Pilot Clause. In support of its decision, the Georgia Court of Appeals found that it was undisputed that one of the pilots on the February 12, 2012 flight had not completed the manufacturer's recommended ground and flight training within the twelve months preceding the date of the flight.[18]

Following the Georgia Court of Appeals' affirmance of the Georgia Superior

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[15] *Id.* at *6–8.
[16] *Id.* at *2.
[17] Wells Fargo's Aug. 24, 2016 Letter, Ex. Georgia Court of Appeals Opinion ("Georgia Opinion") (Trans. ID. 59464923).
[18] Georgia Op. at 6.

Court's grant of summary judgment to Global, this Court lifted the stay imposed in the Delaware Action.[19] Prior to the Court's imposition of a stay in the Delaware Action, Wells Fargo filed a Motion to Dismiss the Second Amended Complaint. Once the Court lifted the stay, the parties supplemented their briefing on Wells Fargo's original Motion to reflect the developments in the case.

III. STANDARD OF REVIEW

On a motion to dismiss under Superior Court Civil Rule 12(b)(6), the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in the plaintiff's favor.[20] The Court will grant a motion to dismiss pursuant to Rule 12(b)(6) if the plaintiff "would not be entitled to recover under any reasonably conceivable set of circumstances."[21] An allegation, though vague or lacking in detail, is nevertheless "well-pleaded" if it puts the opposing party on notice of the claim being brought against it.[22] That said, plaintiffs are bound by the allegations made in the complaint and cannot supplement a complaint through additional allegations made in an opposition brief.[23]

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[19] September 26, 2016 Superior Court Proceeding Worksheet (Trans. ID. 59611651).
[20] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[21] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002)).
[22] *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).
[23] *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010) (citing *Orman v. Cullman*, 794 A.2d 5, 28 (Del. Ch. 2002)).

IV. DISCUSSION

The precise basis for Lima Delta's negligence claim against Wells Fargo has been something of a moving target throughout this litigation. In part, this difficulty stems from the fact that, prior to the resolution of the Georgia Action, Lima Delta did not know for certain whether it would ultimately be denied coverage and, if coverage did not exist, for what reason. However, the larger part of the difficulty at this stage of the litigation stems from Lima Delta's decision to abandon all but one of its claims against Wells Fargo without seeking leave to amend its Second Amended Complaint and without notifying Wells Fargo or the Court. This decision has needlessly complicated the Court's consideration of Wells Fargo's Motion to Dismiss and needlessly burdened Wells Fargo with responding to multiple theories of liability that Lima Delta summarily abandoned. Therefore, it is necessary to untangle what Count VII of the Second Amended Complaint actually alleges.

In Count VII, titled "Negligence With Regard to Absence of 'Named Pilot' Clause," Lima Delta alleges that "Open Pilot" clauses, like the Open Pilot Clause of the Policy, are common in aviation insurance and distinguishable from "Named Pilot" clauses.[24] According to Lima Delta, a Named Pilot clause permits any approved person listed in the insurance policy to fly the insured aircraft, whereas an

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[24] SAC ¶ 90.

Open Pilot clause "is one that spells out the pilot experience requirements for there to be coverage."[25] Lima Delta alleges that the absence of a Named Pilot clause in the Policy is "contrary to and in derogation of the plaintiffs' purpose in securing aviation insurance for the Aircraft."[26] However, Lima Delta does not allege that it ever requested that Wells Fargo procure aviation insurance with a Named Pilot clause. Rather, Lima Delta alleges that—in the exercise of reasonable care, skill, and diligence as an insurance broker—Wells Fargo was required to "advise prospective insureds of the desirability and/or necessity of securing a Named Pilot clause as part of the aviation insurance bargain."[27] Because Wells Fargo did not advise Lima Delta to seek and secure a Named Pilot clause, Lima Delta concludes that Wells Fargo acted negligently in the purchase and placement of the Policy.[28]

Lima Delta's allegation that Wells Fargo negligently failed to advise Lima Delta regarding Named Pilot clauses is straightforward. However, Count VII continues by alleging that Wells Fargo was additionally negligent for:

> (1) failing to request or secure a written application for the Policy;
>
> (2) failing to advise Lima Delta that "aviation underwriters typically approve pilots with less overall experience and fewer currency requirements than are contained in the Open Pilot Endorsement;"

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[25] *Id.* (quoting Gregory Reba, *Understanding Pilot Warranties*, Reba Aviation Insurance, LLC, http://www.rebaaviationinsurance.com/OPW.pdf).
[26] *Id.* ¶ 92.
[27] *Id.* ¶ 93.
[28] *Id.* ¶ 99.

(3) failing to advise Lima Delta to obtain a Named Pilot clause covering its pilots;

(4) failing to "document and secure an endorsement memorializing the insurers' telephonic approval of a one-month postponement of one pilot's recurrent training;"

(5) failing to document communications with Lima Delta;

(6) failing to document communications with Global;

(7) failing to follow industry custom and practice in its role as insurance broker; and

(8) failing to follow its own internal policies and procedures in its role as insurance broker.[29]

Of these additional purportedly negligent acts, the most significant is Lima Delta's allegation that Wells Fargo failed to secure an endorsement memorializing the insurers' telephonic approval of a one-month postponement of the pilot's recurrent training. It is reasonable to infer from this allegation that Lima Delta requested that Wells Fargo secure the postponement, and as explained below, under Delaware law, specific requests from an insured to a broker have legal significance.

In light of the foregoing, Count VII contains two theories of negligence: (1) Wells Fargo negligently failed to advise Lima Delta to seek and secure a Named Pilot clause; and (2) Wells Fargo negligently failed to secure a written endorsement

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[29] *Id.*

to the Policy approving a one-month postponement of the pilot's recurrent training, i.e. the manufacturer's recommended ground and flight training. Whether the allegations in the Second Amended Complaint are sufficient to survive Wells Fargo's Motion to Dismiss is potentially dependent upon what law applies. On this point, the Court finds that the record before it is insufficient to determine choice of law. However, for the reasons explained below, the outcome under Delaware or Georgia law is the same, and therefore, it is not necessary to defer decision on the Motion to Dismiss in favor of choice of law discovery.

A. Comparison of Delaware and Georgia Law

Under Delaware law, an insurance agent has a duty to "exercise reasonable care, skill and diligence [in] discharging his responsibilities."[30] Specifically, an insurance agent should use reasonable care and judgment in "procuring the insurance *requested* by the insured."[31] But, "generally, an insurance agent has no duty to advise a client."[32] The general rule, however, "turns largely on the relationship between the agent and the client."[33] For example, a heighted duty of care may arise if an insurance the broker voluntarily assumes the responsibility to select an

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[30] *Ins. Co. of N. Am. v. Waterhouse*, 424 A.2d 675, 677 (Del. Super. 1980).
[31] *Sinex v. Wallis*, 611 A.2d 31, 33 (Del. Super. 1991) (internal citations omitted) (emphasis added).
[32] *Montgomery v. William Moore Agency*, 2015 WL 1056326, at *2 (Del. Super. Feb. 27, 2015) (citing *Sinex*, 611 A.2d at 33).
[33] *Id.*

appropriate insurance policy absent the insured's request[34] or the insured's request for an insurance policy is ambiguous such that it requires clarification.[35]

Georgia law employs a different framework to evaluate the insured-broker relationship. Under Georgia law, an insured "is obligated to examine an insurance policy and to reject it if it does not furnish the desired coverage."[36] Under this general rule, an insured with possession of an insurance policy is "charged with the knowledge of the terms and conditions of the policy,"[37] and where the insured fails to read the policy, the insurance agent is insulated from liability on negligence claims.[38]

Similar to Delaware law, the general rule has exceptions. One exception lies where the agent "acting in a fiduciary relationship with the insured, holds himself out as an expert in the field of insurance and performs expert services on behalf of the insured under circumstances in which the insured 'must rely [up]on the expertise

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[34] *Id.* (citing *Blanchfield v. State Farm Mut. Auto. Ins. Co.*, 1985 WL 189320, at *2 (Del. Super. Nov. 27, 1985) ("[N]egligence is generally found . . . upon evidence of the previous conduct of the agent acting to procure insurance without specific instructions of the applicant to do so.")).
[35] *Id.* (citing *Harts v. Farmers Ins. Exch.*, 597 N.W.2d 47, 53 n.11 (Mich. 1999)).
[36] *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203, 204 (Ga. Ct. App. 2003) (citing *McCoury v. Allstate Ins. Co.*, 561 S.E.2d 169 (Ga. Ct. App. 2002)); *Traina Enters., Inc. v. Cord & Wilburn, Inc. Ins. Agency*, 658 S.E.2d 460, 464 (Ga. Ct. App. 2008) ("As a general rule, an insured has a duty to read and examine an insurance policy to determine whether the coverage requested was procured.").
[37] *Four Seasons Healthcare, Inc. v. Willis Ins. Servs. of Ga., Inc.*, 682 S.E.2d 316, 318 (Ga. Ct. App. 2009) (quoting *England v. Georgia-Florida Co.*, 402 S.E.2d 783 (Ga. Ct. App. 1991)).
[38] *Id.*

of the agent to identify and procure the correct amount or type of insurance.'"[39] Other exceptions to the general rule include where "an agent intentionally misrepresents the existence or extent of coverage," or where "special relationship of trust or other unusual circumstances" between the insured and the agent prevent or excuse the insured from reading and examining the policy to determine whether the coverage requested was procured.[40]

B. Wells Fargo's Alleged Failure to Advise Lima Delta Regarding the Inclusion of a "Named Pilot" Clause in the Policy

With regard to Lima Delta's duty to advise allegations, Wells Fargo argues that it did not (and does not) have any legal duty to advise Lima Delta to seek and secure a Named Pilot clause.[41] In response, Lima Delta first argues that a reasonable jury could find that, by failing to procure a Named Pilot clause, Wells Fargo breached a "baseline standard of care."[42] Second, Lima Delta argues that this case falls into an exception to the general "no duty to advise" rule because Wells Fargo held itself out as having special expertise in aviation insurance.[43]

Lima Delta's first argument misrepresents the allegations in the Second

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[39] *Atlanta Women's Club, Inc. v. Washburne*, 427 S.E.2d 18, 20 (Ga. Ct. App. 1992) (quoting *Epps v. Nicholson*, 370 S.E.2d 13, 14 (Ga. Ct. App. 1988)).
[40] *Traina Enters., Inc.*, 658 S.E.2d at 464 (first quoting *Rogers & Sons, Inc. v. Santee Risk Managers*, 631 S.E.2d 821, 825 (Ga. Ct. App. 2006); and then quoting *Heard v. Sexton*, 532 S.E.2d 156, 158 (Ga. Ct. App. 2000)).
[41] Wells Fargo Suppl. Mot. Dismiss at 15.
[42] Lima Delta Answering Br. 7–10.
[43] *Id.* at 11–15.

Amended Complaint. Count VII plainly and repeatedly cites a "duty to advise" as the basis for the alleged negligence. While the Court must draw all reasonable inferences in Lima Delta's favor at this stage of the proceedings, the Court does not find that Lima Delta has sufficiently alleged a claim for negligent failure to procure in Count VII. The Court makes this finding, first and foremost, because Lima Delta does not allege that it requested a Named Pilot clause. Beyond that, Lima Delta does not allege that Wells Fargo could have secured a Named Pilot clause if Lima Delta had requested one, that Lima Delta would have submitted the names of the pilots who were flying the Aircraft the day of the crash to the insurers for Named Pilot status, or that the insurers would have approved those pilots for Named Pilot status. Moreover, contrary to Lima Delta's suggestion in its briefing that a Named Pilot clause is always desirable and would have insulated Lima Delta from a denial of coverage, Lima Delta alleges in its Second Amended Complaint that its flight crews were periodically rotated and were not hired directly by either the owner or the "equitable owner" of the Aircraft,[44] but rather, "contract flight crews" were provided by the third Plaintiff, Trident Aviation Services, LLC.[45] In fact, the flight crew at the time of the February 2012 crash was only assigned to the Aircraft beginning in fall 2011. Thus, Lima Delta's negligent failure to procure theory fails both because

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[44] Respectively, Lima Delta Company and Société Commerciale et Industrielle Katangaise.
[45] SAC ¶¶ 4–7, 38.

Lima Delta does not allege that Wells Fargo had a duty to procure a Named Pilot clause and because neither the allegations nor the reasonable inferences therefrom sufficiently support the conclusion that—but for Wells Fargo's failure to procure—Lima Delta would have had insurance coverage.[46] The fatal insufficiency of the pleadings with regard to causation applies equally to Lima Delta's negligent failure to procure argument and to the negligent "failure to advise" claim actually alleged in the Second Amended Complaint.

As to Lima Delta's second argument, that Wells Fargo held itself out to the public as an expert in aviation insurance (and therefore assumed a duty to advise), the Court likewise finds that this argument is not well-pleaded in the Second Amended Complaint. Regardless of whether the legal theory could survive under Delaware or Georgia law, Lima Delta does not allege that Wells Fargo held itself out to be an expert, nor does Lima Delta allege any facts from which it could be reasonably inferred that Wells Fargo held itself out as an expert.

At oral argument, Lima Delta argued that the statement "the plaintiffs reasonably *relied on* Wells Fargo's skill, knowledge and experience as brokers of

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[46] *See Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 829 (Del. 1995) ("[O]ur time-honored definition of proximate cause . . . is that direct cause without which [an] accident would not have occurred." (quoting *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del 1965)); *Four Seasons*, 682 S.E.2d at 319 ("An insured cannot recover on a negligence cause of action against an insurer without evidence sufficient to support an essential element of the action-that the insurer's negligence was the proximate cause of the loss for which the insured seeks recovery.").

aviation insurance," constitutes an allegation that Wells Fargo held itself out as an expert.[47] This argument not only attempts to confuse an insured's reliance with a broker's decision to hold themselves out as an expert, but also attempts to conflate Wells Fargo holding itself out as a broker capable of procuring a particular type of insurance with Wells Fargo holding itself out an expert in that type of insurance such that it potentially took on additional legal obligations. If any authority exists to suggest that by merely offering to procure a particular, even specialized, type of insurance, a broker necessarily holds themselves out as an expert—as that term is used in case law discussing heightened duties—the Court is not aware of it, and Lima Delta has not cited it.

C. Wells Fargo's Alleged Failure to Document a Training Extension

As previously discussed, Lima Delta does not sufficiently allege a claim of negligent failure to procure a Named Pilot clause. However, Lima Delta does allege that Wells Fargo failed "to document and secure an endorsement memorializing the insurers' telephonic approval of a one-month postponement of the pilot's recurrent training."[48] At least under Delaware law, specific requests from an insured to a broker potentially trigger additional obligations as part of the broker's ordinary duty

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[47] SAC ¶ 96 (emphasis added); Oral Arg. Tr. at 52:52:3–12.
[48] SAC ¶ 99.

of care.[49] Consequently, at first glance, it is surprising that this allegation is buried in a laundry list of secondary allegations included in a count principally concerned with a failure to advise. However, upon closer examination, at least one reason why this allegation is not pled as a separate and independent count of negligence becomes clear: Nowhere in the Second Amended Complaint does Lima Delta allege that its pilots would have met the requirements of the Open Pilot Clause but for Wells Fargo's failure to secure a written endorsement for recurrent training. The Open Pilot Clause requires the flight crew to meet minimum flight hour requirements *and* to have "successfully completed the manufacturer's recommended ground and flight training school . . . within the preceding twelve (12) months of any date that he or she acts [as a pilot in command or as a second in command."[50] Lima Delta's allegation that Wells Fargo failed to document a postponement only concerns the second requirement, and for this reason, the Court finds that Lima Delta has not sufficiently pled causation to support a claim of negligence based on this allegation.

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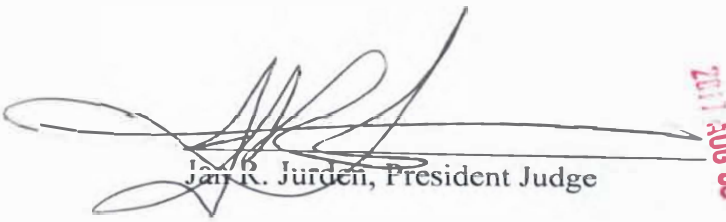
[49] *See Sinex*, 611 A.2d at 33 (explaining that a broker's duty of care "includes the obligation to use reasonable care, diligence and judgment in procuring the insurance *requested* by the insured" (emphasis added) (citations omitted)).
[50] Policy at v–vi.

V. CONCLUSION

For the foregoing reasons, Wells Fargo's Motion to Dismiss Plaintiffs' Second Amended Complaint is **GRANTED.**

IT IS SO ORDERED.



Jan R. Jurden, President Judge