**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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

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

**OPINION**

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

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**Jurden, J**

## I. Introduction

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

## II. Background

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

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

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

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

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

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

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

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

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

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

## III. Issues

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

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

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

## IV. Standard of Review

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

## V. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## VI. Conclusion

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

**IT IS SO ORDERED**.

/s/Jan R. Jurden
Jan R. Jurden, Judge

cc: Prothonotary

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