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Case Number 401,2017

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,	)	
v.	)	On appeal from the Superior Court
	)	of the State of Delaware,
USI INSURANCE SERVICES NATIONAL, INC., f/k/a WELLS FARGO INSURANCE SERVICES USA, INC.	)	C.A. No. N14C-02-101 JRJ CCLD
Defendant below, Appellee.	)	

APPELLEE'S CORRECTED ANSWERING BRIEF

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Dated: January 22, 2018

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NATURE OF PROCEEDINGS

On February 12, 2012, an aircraft owned by Plaintiff/Appellant Lima Delta Company ("Lima Delta") crashed in the Democratic Republic of the Congo. Lima Delta, along with Plaintiffs/Appellants Trident Aviation Services, LLC ("Trident") and Societe Commerciale et Industrielle Katangaise ("Socikat"), had obtained an insurance policy on the aircraft issued by former-Defendant Global Aerospace, Inc. ("Global"), but neither of the two pilots flying the aircraft at the time of the accident were qualified to fly under the policy's clear and unambiguous pilot qualification requirements. As a result, the policy did not cover the accident.

Plaintiffs contend that their lack of coverage for the accident was caused by the insurance broker that arranged for Global to issue the policy, Defendant/Appellee USI Insurance Services National, Inc., formerly known as Wells Fargo Insurance Services USA, Inc. ("Wells Fargo").[1] Plaintiffs' attempt to avoid the consequences of their own failure to adhere to the policy's requirements by shifting the blame to their insurance broker fails as a matter of law.

As found by the Superior Court, Wells Fargo did not have any legal duty to advise Plaintiffs to obtain a different policy nor to procure policy terms that

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[1] On December 1, 2017, Defendant/Appellee Wells Fargo Insurance Services USA, Inc.'s name was changed to USI Insurance Services National, Inc. Because the parties and the Court referred to Defendant/Appellee as "Wells Fargo" throughout the proceedings below, and to avoid confusion, Defendant/Appellee will continue to be referred to herein as "Wells Fargo."

Plaintiffs never requested. Plaintiffs were well-aware of their policy's requirements, they accepted the benefits of the policy, and they were obligated to comply with its terms. It was Plaintiffs' own failure to adhere to the policy's pilot qualification requirements—regardless of what Wells Fargo allegedly did or did not do—that caused the lack of coverage. Because Plaintiffs cannot allege that the policy would have covered the accident *but for* any purported breach by Wells Fargo, Plaintiffs cannot state any legally cognizable claim as a matter of law.

After Plaintiffs affirmatively abandoned all but one claim against Wells Fargo in their Second Amended Complaint, the Superior Court correctly dismissed Plaintiff's sole remaining count for negligence. This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly found that Plaintiff's Second Amended Complaint failed to state a claim for negligence against Wells Fargo. Plaintiffs failed to allege, and cannot allege, two essential elements of a negligence claim: duty and proximate causation. Wells Fargo did not have a legal duty to advise Plaintiffs to obtain policy terms that Plaintiffs never requested. *See, e.g.*, *Sinex v. Wallis*, 611 A.2d 31, 33 (Del. Super. Ct. 1991); *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203, 204 (Ga. App. 2003). It was Plaintiffs' own failure to adhere to the unambiguous requirements of their insurance policy that caused the lack of coverage, and Plaintiffs cannot allege that the policy would have covered the accident *but for* any purported breach by Wells Fargo. Moreover, Plaintiffs have waived any basis for appellate relief, both by failing to present in their Opening Brief any substantive argument or authority in support of their assertion that the Superior Court erred in dismissing their claim, and by failing to preserve any affirmative request for leave to file a third amended pleading. *See* Supr. Ct. R. 8; Supr. Ct. R. 14.

STATEMENT OF FACTS[2]

In 2011, Plaintiff Lima Delta purchased a Gulfstream G-IV aircraft (the "Aircraft"). (A-050 at ¶¶ 4, 6.) After Lima Delta purchased the Aircraft, it entered into a trust agreement with Plaintiff Socikat that granted Socikat equitable ownership over the Aircraft and authorized Socikat to use the Aircraft in the course of its business operations. (*Id.*) Socikat is a business based and domiciled in the Democratic Republic of the Congo that provides mining support equipment to the mining industry in the DRC. (*Id.* at ¶ 5.) Plaintiff Trident managed the Aircraft for Socikat and provided contract flight crews, scheduling, maintenance, and other flight support services. (A-050–51 at ¶ 7.) Trident arranged for "contract flight crews" to fly the Aircraft for Socikat, and these flight crews were "periodically rotated." (A-057 at ¶ 38.)

As part of its management services, Trident contacted Wells Fargo and asked Wells Fargo to add the Aircraft to an already-existing insurance policy. (A-052 at ¶ 15.) After the Aircraft was added to the existing policy, Plaintiffs

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[2] Plaintiffs' Opening Brief references numerous "facts" that are not alleged in their Second Amended Complaint, and for which Plaintiffs merely cite to the same unsupported assertions in their briefs in the Superior Court below. (*See, e.g.,* Am. Op. Br. at 8 (citing A-218), 12 (citing A-123), 15 (citing A-126).) The Court must disregard new allegations found only in Plaintiffs' brief. *See Gerber v. EPE Holdings, LLC*, 2013 WL 209658, at *4 n. 38 (Del. Ch. Jan. 18, 2013); *Zucker v. Andreessen*, 2012 WL 2366448, at *2 (Del. Ch. June 21, 2012); *Orman v. Cullman*, 794 A.2d 5, 28 n. 59 (Del. Ch. 2002).

notified Wells Fargo that they would need coverage sufficient to travel to the European Union, requiring a minimum $250 million in liability insurance coverage for business aircraft visiting EU countries, which exceeded the existing policy's limits. (A-052–53 at ¶ 16.) At Plaintiffs' request, Wells Fargo arranged for Global to issue a new "Broad Horizon Aviation Insurance Policy," effective from June 22, 2011 through June 22, 2012, that would provide Plaintiffs with the mandated $250 million in liability coverage (the "Policy"). (A-052–53 at ¶¶ 16, 18.)

The Policy included an unambiguous Open Pilot Clause stating that "[t]he Policy shall not apply while a scheduled aircraft is in flight unless operated by any appropriately rated two pilot flight crew," including both a Pilot-in-Command and a Second-in-Command. (A-070 at ¶ 90; B-010–011.[3]) The Open Pilot Clause required both pilots to meet two mandatory qualification and training requirements: (1) completion of the aircraft manufacturer's recommended ground and flight training school within the 12 months preceding any flight; and (2) minimum flying experience consisting of at least 4,000 total flight hours logged by the Pilot-in-Command, and at least 2,000 total flight hours logged by the Second-

[3] The Court may consider the Policy in reviewing the Superior Court's dismissal because the Policy is integral to and incorporated into the Second Amended Complaint. *See Steinman v. Levine*, 2002 WL 31761252, at *8 (Del. Ch. Nov. 27, 2002), *aff'd*, 822 A.2d 397 (Del. 2003). (*See, e.g.*, A-053–56 at ¶¶ 18–32; A-059 at ¶¶ 46–48; A-070–74 at ¶¶ 90–102.)

in-Command. (*See* B-010–011.) Plaintiffs do not allege that they ever requested that Wells Fargo obtain policy terms different from the Open Pilot Clause.

On February 12, 2012, the Aircraft was involved in a tragic accident (the "Accident"), resulting in the deaths of five people—the two pilots, one passenger, and two local farmers on the ground—and the destruction of the Aircraft. (A-058–59 at ¶¶ 40-44.) At the time of the Accident, the contract pilots flying the Aircraft were Marcus Beresford and Geoffrey Weiner. (A-057–59 at ¶¶ 38, 40, 44.) Trident had assigned Beresford and Weiner to the Aircraft in the fall of 2011, after Global issued the Policy. (A-057 at ¶ 38.)

In May 2012, Global filed a declaratory judgment action against Plaintiffs in the Superior Court of Fulton County, Georgia seeking to disclaim coverage for the Accident under Plaintiff's Policy (the "Georgia Action"). Almost two years later, in February 2014, and while the Georgia Action was still pending, Plaintiffs filed this action in the Superior Court of Delaware against Global, the Policy's pool insurers, and Wells Fargo (the "Delaware Action"). Wells Fargo moved to dismiss Plaintiffs' claims in the Delaware Action, as did Global and the pool insurers. (*See* A-081–107; A-149–174.) In February 2016, the Superior Court below dismissed Plaintiffs' claims against Global and the pool insurers, and stayed the remaining claims against Wells Fargo in the Delaware Action until the final resolution of the Georgia Action. (B-049–67.)

On August 28, 2015, following extensive discovery, the Georgia trial court entered summary judgment in favor of Global and against Plaintiffs based on two independent theories. *See Global Aerospace, Inc. v. Lima Delta Co.*, 2015 WL 10384296 (Ga. Super. Ct. Aug. 28, 2015). First, the Georgia trial court found that Global was entitled to rescind the Policy because of certain misrepresentations and omissions during the insurance application process. *Id.* at *5. Second, the Georgia trial court found that Global was entitled to a declaration that the Policy did not cover the Accident, as a matter of law, because Plaintiffs failed to comply with the Policy terms. *Id.* at *9. Specifically, the Georgia trial court found that Plaintiffs failed to adhere to both the 12-month recurrent training and the total flight hours requirements in the Open Pilot Clause. *See id.* at *7–9.

On July 12, 2016, the Georgia Court of Appeals affirmed summary judgment in favor of Global and against Plaintiffs, based solely on Plaintiffs' failure to comply with the Policy's pilot training requirements. *See Lima Delta Co. v. Global RI-022 Aerospace, Inc.*, 789 S.E.2d 230, 233–34 (Ga. Ct. App. 2016).[4] The Court of Appeals found that "the terms of the [Open Pilot] policy provision at

[4] As Plaintiffs' counsel conceded below, the Superior Court was permitted to consider the Georgia decision for purposes of Wells Fargo's motion to dismiss. (*See* B-077 at 17–23.) *See also Lagrone v. Am. Mortell Corp.*, 2008 WL 4152677, at *4 (Del. Super. Ct. Sept. 4, 2008) (taking judicial notice of pleadings and official record of parallel litigation for purposes of motion to dismiss).

issue are clear and unambiguous." *Id.* at 233. The Georgia Court of Appeals also found that it was "undisputed that one of the pilots on the February 12, 2012 flight had not completed the required training within the 12 months preceding the date of the flight." *Id*. And the Court of Appeals found there was no written endorsement from Global waiving or extending the training requirement.[5] *Id.* Accordingly, the Court of Appeals held that "summary judgment was properly granted to Global because, at the time of the accident, one of the pilots had not completed the manufacturer's recommended ground and flight training school for the applicable make and model aircraft within the 12 months preceding the date of the flight, as required by the plain language of the Policy." *Id.* at 234. The Court of Appeals did not address whether Global was entitled to rescind the Policy based on misrepresentations or omissions in the application because the court's determination that Plaintiffs failed to comply with the Policy terms was dispositive.[6] *See id.* at 234 n. 6.

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[5] The Policy expressly provides that its "terms can be amended or waived only by endorsement issued on behalf of the Company by Global Aerospace, Inc. and made a part of this policy." (B-037; *see also* A-054 at ¶ 24.)

[6] Thus, the only issue finally adjudicated by the Georgia courts is that the Accident was not covered by the Policy because Plaintiffs failed to comply with the Policy terms. *See Humana, Inc. v. Davis*, 407 S.E.2d 725, 726 (Ga. 1991) ("[I]f a trial court bases its judgment on alternative grounds, and an appellate court affirms the judgment on only one of the grounds, the ground omitted from decision is not considered to have been finally adjudicated….").

Following the affirmance of summary judgment against Plaintiffs in the Georgia Action, the Superior Court below lifted the stay of the Delaware Action and permitted the parties to submit supplemental briefing on Wells Fargo's pending motion to dismiss Plaintiff's Second Amended Complaint. (*See* A-175–234; *see also* B-068–085.) After Wells Fargo submitted its opening supplemental brief, Plaintiffs abandoned five of their six Counts against Wells Fargo in their supplemental answering brief. (*See* A-200–219; A-241; A-285–286 at 6:22–7:3; A-288 at 9:15–20.)

Plaintiffs' sole remaining Count, for negligence, contended that Wells Fargo should have advised Plaintiffs to obtain a more narrow Named Pilot Clause—which would have permitted only pilots specifically identified by name in the Policy to fly the Aircraft—instead of their Policy's more flexible Open Pilot Clause, which allowed any person to pilot the Aircraft so long as he or she met the training requirements clearly stated in the Policy. (*See* A-070–74 at ¶¶ 88–102.) Plaintiffs also contended that Wells Fargo failed to obtain a written extension of the Open Pilot Clause's 12-month recurrent training requirement. (*See* A-073 at ¶ 99(iv).) As shown below, the Second Amended Complaint failed to state a claim for negligence against Wells Fargo because Plaintiffs' own actions (or inactions) are solely to blame for their alleged injury, and because Wells Fargo did not have any legal duty to advise Plaintiffs to seek and obtain a Named Pilot Clause.

Because Plaintiffs cannot allege that the Policy would have covered the Accident *but for* any alleged breach by Wells Fargo nor that Wells Fargo had any duty to advise, Plaintiffs failed to state any legally cognizable claim as a matter of law.

ARGUMENT

A. Question Presented

Whether the Superior Court erred in finding that the Second Amended Complaint failed to state a claim for negligence against Wells Fargo.

B. Scope of Review

This Court reviews *de novo* the grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001). The Court must "assume as true the well-pleaded allegations in the complaint." *Id.* The Court "is not, however, required to accept as true conclusory allegations 'without specific supporting factual allegations.'" *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d162, 168 (Del. 2006). The Court also "is not required to accept every strained interpretation of the allegations proposed by the plaintiff," and the plaintiff is entitled only to the "reasonable inferences that logically flow from the face of the complaint." *Malpiede*, 780 A.2d at 1083. "Moreover, a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Id.* Although Delaware courts employ a "notice pleading" standard, allegations of negligence in the Superior Court must "be stated with particularity." Super. Ct. R. Civ. P. 9(b).

C. Merits of Argument

As the Superior Court correctly noted, Plaintiffs' negligence claim against Wells Fargo was "something of a moving target throughout this litigation." (A-241.) Count VII for "Negligence With Regard to Absence of 'Named Pilot' Clause" theorizes that Wells Fargo should have advised Plaintiffs to seek and obtain a Named Pilot Clause—which Plaintiffs never requested—instead of the Open Pilot Clause that Plaintiffs accepted in their Policy. (*See* A-070–74.) Buried in a list of additional purportedly negligent acts by Wells Fargo, Plaintiffs also assert that Wells Fargo "fail[ed] to document and secure an endorsement memorializing the insurers' telephonic approval of a one-month postponement of one pilot's recurrent training . . . ." (A-073 at ¶ 99(iv).) Both of these negligence theories fail as a matter of law because (1) Wells Fargo did not have any duty to advise Plaintiffs to seek a Named Pilot Clause; and (2) it was Plaintiffs' own failure to comply with the Policy terms, not any conduct by Wells Fargo, that caused the lack of coverage.

1. Plaintiffs Waived Any Challenge to the Superior Court's Findings Not Addressed in Plaintiffs' Amended Opening Brief

Under this Court's Rules, "[t]he merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." Supr. Ct. R. 14(b)(vi)(A)(3). Further, "Appellant shall not

reserve material for reply brief which should have been included in a full and fair opening brief." Supr. Ct. R. 14(c)(i). "[T]he appealing party's opening brief must *fully* state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error." *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) (emphasis in original). "If a party only casually mentions an issue, that cursory treatment is insufficient to preserve the issue for appeal." *Ploof v. State,* 75 A.3d 811, 822 (Del. 2013). "If a party fails to cite any authority in support of a legal argument," this Court "will deem that argument waived." *Id.*

Plaintiffs' Amended Opening Brief fails to cite a single legal authority in support of its theory that Wells Fargo, as an insurance broker, had a duty to advise Plaintiffs to seek and obtain a Named Pilot Clause. (*See* Am. Op. Br. at 22–29.) Nor does Plaintiffs' Amended Opening Brief contain any substantive argument as to why the Superior Court purportedly erred in reaching the findings set out in the 17-page Order dismissing Plaintiffs' claims. (*See id.*) Instead, the "argument" in Plaintiffs' Amended Opening Brief consists of little more than long block quotations from the Second Amended Complaint. (*See id.* at 22–28.) Plaintiffs casually dismiss the Superior Court's findings as "irrelevant," but offer no argument or authority whatsoever to support that offhanded assertion. (*See id.* at 28–29.) By failing to include any substantive argument in their Amended Opening

Brief, Plaintiffs have waived any challenge to the Superior Court's findings. *See, e.g.*, *Roca*, 842 A.2d at 1242; *Ploof*, 75 A.3d at 822; Supr. Ct. R. 14. For this reason alone, the Court should affirm the Superior Court's Order dismissing Plaintiffs' claim.

2. The Second Amended Complaint Fails to State a Claim for Negligence Based on the Absence of a Named Pilot Clause

Plaintiff's negligence count theorizes that Wells Fargo was under a legal duty to convince Plaintiffs to seek out and bargain for a Named Pilot Clause, either in addition to or instead of the Open Pilot Clause for which Plaintiffs actually contracted. (*See* A-070–74 at ¶¶ 89–102.) Plaintiffs' negligence claim fails as a matter of law because Wells Fargo did not have any legal duty to advise Plaintiffs to obtain a Named Pilot Clause. Further, Plaintiffs cannot allege that any acts or omissions by Wells Fargo caused the lack of coverage for the Accident.

Wells Fargo's duty as an insurance broker was limited to procuring the coverage that Plaintiffs requested. *See, e.g.*, *Sinex*, 611 A.2d at 33; *Canales*, 583 S.E.2d at 204; *see also* 3 Couch on Ins. § 46:38 ("Insurance agents do not have an independent duty to identify their clients' needs and to advise them regarding whether they may be underinsured because it is the client's responsibility or duty, not the insurance agent's, to determine the amount of coverage needed and advise the agent of those needs."). Plaintiffs do not allege that Wells Fargo failed to

follow their instructions nor that the Policy did not provide the coverage that they requested. (*See, e.g.*, A-053–56 at ¶¶ 18–32; A-061–74 at ¶¶ 54–63, 69–85, 89–102.) As the Superior Court correctly found, Plaintiffs also do not allege that they ever requested a Named Pilot Clause. (*See* A-247.) Nor do Plaintiffs allege that Wells Fargo could have successfully obtained a Named Pilot Clause covering the pilots flying at the time of the Accident, even if Plaintiffs had requested one, particularly given that Plaintiffs had not even assigned Beresford and Weiner to fly the Aircraft until after Global issued the Policy. (*See* A-057 at ¶ 38.)

Wells Fargo maintains, as it argued below, that Georgia law governs Plaintiffs' negligence claim under Delaware's "most significant relationship" test. (*See* A-100; A-157–158; A-185; A-227–229.) Although the Superior Court did not resolve the choice-of-law issue, the court correctly found that Plaintiffs' negligence claim fails under both Delaware and Georgia law. (*See* A-244–246.)

A. Plaintiffs' Claim Fails Under Georgia Law

Georgia law imposed an affirmative legal duty on Plaintiffs "to examine [the] insurance policy and to reject it if it d[id] not furnish the desired coverage." *Canales v. Wilson Southland Ins. Agency*, 583 S.E.2d 203, 204 (Ga. Ct. App. 2003); *accord King v. Brasington*, 312 S.E.2d 111, 112 (Ga. 1984) ("[A]n insured has a duty to examine and reject a policy providing incorrect or insufficient coverage[.]"); *Greene v. Lilburn Ins. Agency, Inc.*, 383 S.E.2d 194, 195 (Ga. Ct.

App. 1989). The Policy was in effect for eight months prior to the Accident. (*See* A-053 at ¶¶ 18–20; A-058–59 at ¶¶ 40–44.) If Plaintiffs had any reason to believe that the coverage provided by the Open Pilot Clause was insufficient, it was their duty to reject the Policy and bargain for different terms. *Canales*, 583 S.E.2d at 204; *see also Parris & Son, Inc. v. Campbell*, 196 S.E.2d 334, 340 (Ga. Ct. App. 1973). Plaintiffs accepted the Policy, and as a matter of law, Wells Fargo cannot be liable for any alleged damages resulting from Plaintiffs' failure to abide by the Policy's terms. *See, e.g., Westchester Specialty Ins. Servs., Inc. v. U.S. Fire Ins. Co.*, 119 F.3d 1505, 1509 (11th Cir. 1997) ("[I]f the insured had a copy of the insurance policy in its possession and failed to read the policy so as to discover what risks are covered, the insurance agent is not liable because the insured is 'charged with the knowledge of the terms and conditions of the policy.'"); *England v. Georgia-Florida Co.*, 402 S.E.2d 783, 785 (Ga. Ct. App. 1991); *Turner, Wood & Smith, Inc. v. Reed*, 311 S.E.2d 859, 860 (Ga. Ct. App. 1983).

Georgia law will not impose additional duties on insurance brokers except in very limited circumstances not applicable here. *See, e.g., Canales,* 583 S.E.2d at 204; *Atlanta Women's Club, Inc. v. Washburne,* 427 S.E.2d 18, 20 (Ga. Ct. App. 1992); *Four Seasons Healthcare, Inc. v. Willis Ins. Services of Georgia, Inc.*, 299 Ga. App. 183, 182–187 (Ga. Ct. App. 2009). The Second Amended Complaint does not allege that Wells Fargo accepted any discretionary authority to make

insurance decisions for Plaintiffs about the appropriate type or amount of insurance coverage. *See, e.g.*, *J. Smith Lanier & Co. v. Acceptance Indem. Ins. Co.*, 612 S.E.2d 843, 849 (Ga. Ct. App. 2005), *rev'd on other grounds by J. Smith Lanier & Co. v. Se. Forge, Inc.*, 630 S.E.2d 404 (Ga. 2006); *England*, 402 S.E.2d at 785; *Greene*, 383 S.E.2d at 195. The Second Amended Complaint also does not allege that Wells Fargo held itself out as an expert. *See Canales*, 583 S.E. 2d at 204; *Washburne*, 427 S.E.2d at 20. (*See* A-248–249.) Further, the mere fact that Plaintiffs and Wells Fargo had dealt with each other in the past does not demonstrate the type of confidential relationship necessary to relieve Plaintiffs of their duty to read the Policy. *Canales*, 583 S.E.2d at 205.

Even in exceptional cases where Georgia law would impose additional duties on an insurance broker (unlike here), an insured still is not relieved entirely of its duty to read the policy and comply with its terms. *See, e.g.*, *Four Seasons*, 682 S.E.2d at 319; *Washburne*, 427 S.E.2d at 20. Even then, "[if] an examination of the policy would have made it 'readily apparent' that the requested coverage was not contained in the policy, then the exception does not apply, and the agent who acted in a fiduciary capacity and gave expert advice relied upon by the insured remains insulated from liability under the general rule.'" *Four Seasons*, 682 S.E.2d at 319. "A policy provision is 'readily apparent' upon examination if it is 'plain and unambiguous.'" *Id.*

The Open Pilot Warranty was plain and unambiguous. (*See* B-010–011) *See also Lima Delta Co.*, 789 S.E.2d at 233. Therefore, Plaintiffs were "charged with knowledge" of the Policy's pilot training and qualification requirements, which they failed to adhere to, and Plaintiffs cannot assert a negligence claim against Wells Fargo merely because they now wish that the Policy's coverage had been different than that for which they bargained. *See, e.g.*, *Four Seasons Healthcare*, 682 S.E.2d at 319; *Turner*, 311 S.E.2d at 861.

B. Plaintiffs' Claim Also Fails Under Delaware Law

Under Delaware law, an insurance broker "assumes no duty to advise the insured on specific insurance matters." *Sinex*, 611 A.2d at 33. Rather, "it is the duty of an insured to advise the [broker] of the insurance he or she wants, including the limits of the policy to be issued." *Id.* ("A [broker] may point out to [the insured] the advantages of additional coverage…*but he is under no obligation to do so*[.]") (emphasis added). "[I]n the normal insurer-insured relationship there is no general obligation for an insurance company or its agent to review the insured's risks and recommend coverages to adequately protect the changing needs of the insured." *Blanchfield v. State Farm Mut. Auto Ins. Co.*, 511 A.2d 1044, 1044 (Del. 1986). Plaintiffs do not allege that Wells Fargo failed to obtain the coverage that they requested, nor do Plaintiffs allege that they ever requested a Named Pilot policy. (*See, e.g.*, A-053–56 at ¶¶ 18–32; A-061–74 at ¶¶ 54–63, 69–85, 89–102.)

Further, "an expanded duty of care is not created by an insured who deals with a particular [broker] over a period of years." *Sinex*, 611 A.2d at 33–34. Nor does an expanded duty arise when an insured requests "sufficient coverage" or the "best policy," nor "when the [broker] says that coverage is adequate." *Id.* at 33. Rather, under Delaware law, a heightened duty arises when a broker "holds himself or herself out as an insurance counselor or specialist *and is receiving compensation apart from the premium(s) paid.*" *Id.* at 33. Plaintiffs do not allege that Wells Fargo received any compensation apart from the premiums paid for the Policy, nor that Wells Fargo held itself out as a specialist. (*See* A-248–249.) A heighted duty may also arise if a broker "voluntarily assume[s] the responsibility for selecting the appropriate policy," or if "[t]he insured makes an ambiguous request for coverage that requires clarification." *Montgomery v. William Moore Agency*, 2015 WL 1056326, at *2 (Del. Super. Ct. Feb. 27, 2015). But the Second Amended Complaint does not allege any facts that would impose heightened duties requiring a departure from the general rule that Wells Fargo had no duty to advise.

Moreover, "a party to a contract cannot silently accept its benefits and then object to its perceived disadvantages." *Moses v. State Farm Fire & Cas. Ins. Co.*, 1992 WL 179488, at *3 (Del. Super. Ct. June 25, 1992). Plaintiffs benefited from the flexibility of the Open Pilot Warranty, which allowed them to "periodically rotate" the contract pilots assigned to fly the Aircraft. (*See* A-057 at ¶ 38.)

Plaintiffs were well aware of their Policy's terms, including the pilot training and qualification requirements, and it was only after the Accident that Plaintiffs decided they were unhappy with those training requirements. It was Plaintiffs' failure to adhere to the Policy's unambiguous requirements that caused the lack of coverage for the Accident, and Plaintiffs cannot now turn back the clock in order to shift the blame to their insurance broker.

3. The Second Amended Complaint Fails to State a Claim for Negligence Based on the Lack of a Written Extension to the Policy's Unambiguous Pilot Training Requirement

Plaintiffs' contention that Wells Fargo "fail[ed] to document and secure an endorsement memorializing the insurers' telephonic approval of a one-month postponement of one pilot's recurrent training," is not well-pleaded. (A-073 at ¶ 99(iv).) No evidence of any such request was found after extensive discovery in the Georgia litigation. *See Global Aerospace*, 2015 WL 10384296, at *8. But even if it were true, this allegation cannot support a negligence claim.

As the Superior Court correctly found, the Second Amended Complaint does not allege that Beresford and Weiner would have met the requirements of the Open Pilot Clause even with a written extension of the 12-month recurrent training requirement. (A-250.) The recurrent training was only one of the requirements, and Plaintiffs do not allege that the pilots would have met the Open Pilot Clause's required minimum flight hours. (*Id.*; A-070 at ¶ 90; B-010–011.) *See also Global*

Aerospace, 2015 WL 10384296 at *7–*8 (finding no "admissible evidence that Weiner had completed the requisite flight hours").

Further, the Policy was a completely integrated contract and included an unambiguous requirement that its terms could only be modified in writing: "This policy's terms can be amended or waived only by endorsement issued on behalf of the Company by Global Aerospace, Inc. and made a part of this policy." (*See* B-037; *see also* A-054 at ¶ 24.) Thus, even if Plaintiffs asked Wells Fargo to request a one-month extension (which Wells Fargo denies), Plaintiffs remained contractually obligated to adhere to the Open Pilot Clause's requirements unless and until Global issued a written endorsement of the change. *See, e.g., Mariner Health Care Management Co. v. Sovereign Healthcare, LLC*, 703 S.E.2d 687, 691 (Ga. Ct. App. 2010); *see also Lima Delta*, 789 S.E.2d at 233–34. In other words, Plaintiffs could not reasonably have ignored the Policy's pilot training requirements in the absence of a written endorsement from Global. Here again, any purported damages were caused not by any alleged acts or omissions by Wells Fargo, but rather by Plaintiffs' own failure to adhere to the plain and unambiguous Policy terms. Thus, Plaintiffs cannot allege the essential element of causation, and their negligence claim fails as a matter of law.

4. Plaintiffs Failed to Preserve Any Request to File a Third Amended Complaint

Despite filing two amended complaints, Plaintiffs were unable to state a cognizable claim against Wells Fargo. Now on appeal, Plaintiffs complain that the Superior Court did not give them a third opportunity to amend their pleadings in lieu of dismissal. Contrary to Plaintiffs' assertion, however, they failed to preserve any request to file a third amended complaint in the Superior Court, and thus, have waived the issue for appeal. *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . . .").

After the final resolution of the Georgia Action, Wells Fargo asked the Superior Court below for a status conference to discuss whether Plaintiffs intended to proceed in the Delaware Action. During that status conference, Plaintiffs did not request the opportunity to amend their pleadings, but rather stated that they wished to move forward on their Second Amended Complaint. (*See* B-073 at 20–23.) Wells Fargo then filed its supplemental brief in support of its motion to dismiss, after which Plaintiffs abandoned all claims against Wells Fargo without seeking leave to amend and without any prior notice to either the Superior Court or to Wells Fargo. (A-241.) At no time did Plaintiffs present a motion to amend their Second Amended Complaint in the Superior Court.

Plaintiffs contend that they requested an opportunity to amend their pleadings during oral argument on Wells Fargo's motion to dismiss. (*See* Am. Op. Br. at 4 n. 1.) The motion hearing transcript tells a different story. At the hearing, Plaintiffs' counsel merely noted, "this may be one of those situations where you say to me, you know, Mr. Martin, based on my rulings, why don't you go ahead and file an amended complaint of some kind . . . ." (A-286.) Later in the hearing, Plaintiffs' counsel stated:

> I think the second amended complaint should be cleaned up. I don't know if that means by way of ruling or Your Honor saying clean it up and resubmit and we'll do that. We'd be happy to do that if Your Honor reaches that decision on a very, very tight schedule. We would just need a few days to do it.

(A-335.) Plaintiffs did not affirmatively request leave to amend the Second Amended Complaint, rather their counsel merely remarked that Plaintiffs would be willing to file an amended pleading if ordered by the Superior Court. That is not enough to preserve the issue for appeal. *Cf. Feralloy Indus. v. Wilson*, 1998 WL 442937, at *3 (Del. Super. Ct. June 23, 1998) ("A casual statement by counsel is not tantamount to a serious attempt to argue an issue . . . .").

Further, "the interests of justice" do not require this Court to make an exception to the rule that only issues presented in the Superior Court are preserved for appeal. *See* Supr. Ct. R. 8. Plaintiffs already had two opportunities to amend their pleadings. The Delaware Action had been pending for three years before the

Superior Court heard Wells Fargo's motion to dismiss. If Plaintiffs had wanted to amend their pleadings for a third time, they had ample opportunity to do so. This Court should not permit Plaintiffs to do what they never requested in the court below.

CONCLUSION

For the reasons set forth herein, the Superior Court's dismissal of the Second Amended Complaint should be affirmed.

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