

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

TECH DATA CORPORATION,)	
)	
Plaintiff,)	Civil Case No. 16-11197
v.)	
)	
TRAVELERS CASUALTY AND SURETY)	
COMPANY OF AMERICA and ZURICH)	
AMERICAN INSURANCE COMPANY,)	
)	
Defendants.)	

COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES

Plaintiff Tech Data Corporation (“Tech Data”), for its complaint against Travelers Casualty and Surety Company of America (“Travelers”) and Zurich American Insurance Company (“Zurich”), states and alleges, on personal knowledge with respect to its own actions, and on information and belief as to others, as follows:

PRELIMINARY STATEMENT

1. This lawsuit arises out of the continuing breach of insurance policies issued by Travelers and Zurich to Tech Data. Travelers issued to Tech Data its “Directors, Officers and Organization Liability” Policy No. 105556371, effective from February 1, 2013 to February 1, 2014, with a limit of liability of \$10 million (the “Travelers Primary Policy”). Zurich issued to Tech Data its “Zurich Excess Select” Insurance Policy No. DOC 5964720 05, effective from February 1, 2013 to February 1, 2014, with a limit of liability of \$10 million excess of the Travelers Policy (the “Zurich Excess Policy”). (The Travelers Primary Policy and Zurich Excess Policy are referred to herein as the “Policies,” and Travelers and Zurich are referred to as the

“Insurers.”) In breach of their contractual obligations, the Insurers refuse to reimburse Tech Data for attorneys’ fees Tech Data and its officers, directors and employees have incurred and are continuing to incur in connection with an investigation conducted by the U.S. Securities and Exchange Commission (“SEC”). The Insurers’ denials of coverage violate the express terms of the Policies. Tech Data therefore seeks a declaratory judgment concerning Tech Data’s rights and the Insurers’ obligations under the Policies, as well as money damages for the Insurers’ breaches of the Policies.

PARTIES

2. Plaintiff Tech Data is a corporation organized and existing under the laws of Florida and having its principal place of business in Florida.

3. Defendant Travelers is a corporation organized and existing under the laws of Connecticut and having its principal place of business in Connecticut.

4. Defendant Zurich is a corporation organized and existing under the laws of New York, with its principal place of business in Illinois.

JURISDICTION AND VENUE

5. The amount in controversy is in excess of \$75,000 exclusive of interest and costs.

6. By reason of the diversity of citizenship of the parties and the amount in controversy, this Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332. Tech Data further seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

7. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391 because Defendant Zurich is a resident of this Judicial District.

FACTUAL BACKGROUND

A. Tech Data's Insurance Policies

8. In consideration for a premium paid by Tech Data, Travelers issued and delivered the Travelers Primary Policy to Tech Data.

9. In consideration for a premium paid by Tech Data, Zurich issued and delivered the Zurich Excess Policy to Tech Data.

10. The Zurich Excess Policy follows form to the Travelers Primary Policy such that coverage under the Zurich Excess Policy shall "apply in conformance with and subject to the warranties, if permitted, limitations, conditions, provisions, and other terms of the [Travelers Primary Policy]"

11. The Policies cover insured entities and individuals for "Loss" that the insured entity and/or insured individual becomes legally obligated to pay as a result of any "Claim[s]" for a "Wrongful Act" occurring before or during the "Policy Period."

12. The "Policy Period" for the Policies is February 1, 2013 through February 1, 2014.

13. The Policies cover "Insured Persons" for, among other things, unindemnified "Loss" and/or "Interview Costs" that an "Insured Person" becomes legally obligated to pay as a result of a "Claim" for a "Wrongful Act" and/or an "Interview Request" by a regulatory enforcement agency. As modified by Endorsement PCDO-19018 Ed. 06-12 in the Travelers Policy, Insuring Agreement A provides:

DIRECTORS AND OFFICERS INDIVIDUAL LIABILITY COVERAGE: The Company will pay on behalf of any **Insured Person**, **Loss** that is not indemnified by the **Insured Organization** and that the **Insured Person** becomes legally obligated to pay for any **Claim** first made against the **Insured Person** during the **Policy Period**, or any

applicable **Extended Reporting Period**, for a **Wrongful Act** occurring before or during the **Policy Period**.

The **Company** will pay, on behalf of any **Insured Person**, **Interview Costs** that are not indemnified by the **Insured Organization** and that the **Insured Person** becomes legally obligated to pay for any **Interview Request** first made by an **Enforcement Body** and reported in writing to the **Company** during the **Policy Period**, or any applicable **Extended Reporting Period**.

14. The Policies also cover Tech Data for, among other things, such “Loss” or “Interview Costs” of an “Insured Person” whom Tech Data indemnifies. As modified by Endorsement PCDO-19018 Ed. 06-12 in the Travelers Policy, Insuring Agreement B provides:

ORGANIZATION INDEMNIFICATION LIABILITY COVERAGE:

The **Company** will pay on behalf of any **Insured Organization**, **Loss** of any **Insured Person** that the **Insured Organization** indemnifies, as permitted or required by law, and that the **Insured Person** becomes legally obligated to pay for any **Claim** first made against the **Insured Person** during the **Policy Period**, or any applicable **Extended Reporting Period**, for a **Wrongful Act** occurring before or during the **Policy Period**.

The **Company** will pay, on behalf of any **Insured Organization**, **Interview Costs** that the **Insured Organization** indemnifies, as permitted or required by law, and that the **Insured Person** becomes legally obligated to pay for any **Interview Request** first made by and **Enforcement Body** and reported in writing to the **Company** during the **Policy Period**, or any applicable **Extended Reporting Period**.

15. In addition, the Policies cover Tech Data for “Securities Claims” against the company itself. Insuring Agreement C provides:

ORGANIZATION SECURITIES CLAIM LIABILITY COVERAGE:

The **Company** will pay on behalf of any **Insured Organization**, **Loss** that such **Insured Organization** becomes legally obligated to pay for any **Securities Claim** first made against the **Insured Organization** during the **Policy Period**, or any applicable **Extended Reporting Period**, for a **Wrongful Act** occurring before or during the **Policy Period**.

16. The Policies define “Loss” to include, among other things, “damages, judgments, settlements, pre-judgment and post-judgment interest, and **Defense Expenses**.”

17. Attorneys' fees and expenses, including costs associated with the production of documents and the preparation of witnesses in response to a regulatory enforcement investigation, are "Defense Expenses." The relevant definition states that "Defense Expenses" include among other things:

the reasonable costs, charges, fees (including attorneys', experts', mediators', and arbitrators' fees), and expenses . . . incurred in defending a **Claim** covered under Insuring Agreement A, B, C

18. An SEC investigation can be a "Claim" triggering coverage under the Policies.

The Policies define "Claim" to include, among other things:

1. a written demand . . . against any **Insured** for monetary damages or non-monetary relief, including injunctive relief;
2. a civil proceeding against any **Insured**, commenced by service of a complaint, arbitration petition, or similar proceedings;
4. a formal civil administrative or formal civil regulatory proceeding or formal civil investigation against any **Insured Person**, commenced by the receipt of:
 - a. notice of filed charges, investigative order or similar document;
 - b. written notice identifying such **Insured Person** as a target of an investigatory authority; or
 - c. Wells Notice from the SEC that it may commence an enforcement action against such **Insured Person**;
5. service of a subpoena on an **Insured Person** identified by name if served upon such person to an SEC formal investigative order . . . ,
for a **Wrongful Act**, including any appeal therefrom.

19. If a "Claim" arises out of an investigation by the SEC of potential violations of securities laws, then the "Claim" constitutes a "Securities Claim" under the Policies. The Policies define "Securities Claim" to include, among other things:

any **Claim**, in whole or in part, that is . . . based upon or arising out of the purchase or sale of, or offer to purchase or sell, any equity or debt securities of, and issued by, the **Insured Organization**, whether such

purchase, sale, or offer involves a transaction with the **Insured Organization** or occurs in the open market, including any such **Claim** brought by the SEC or any other claimant.

20. The Policies define “Wrongful Act” to include, among other things:

any actual or alleged . . . error, misstatement, misleading statement, act, omission, neglect or breach of duty committed or attempted: a. by any **Insured Person** in their capacity as such . . .; or b. with respect to Insuring Agreement C, by the **Insured Organization**

21. The Policies define “Insured Person” to include, among other individuals, any:

1. natural person who was, is, or becomes a duly elected or appointed director, officer, **Manager**, or in house general counsel of the **Insured Organization**, or any functional equivalent position . . .

3. other natural person not described in [1] above who:

a. with respect to a **Securities Claim** . . . was, is, or becomes a full or part-time employee of any **Insured Organization**, but only if the **Securities Claim** . . . is made against such natural person; and

b. with respect to any other **Claim**, was, is, or becomes a full or part-time employee of any **Insured Organization**, but only if the **Claim** is initially made against both such natural person and any natural person described in [1] above.

22. Tech Data is an “Insured Organization” under the Policies because it is an “entity named in ITEM 1 of the Declarations.”

23. “Interview Costs” include attorneys’ fees and other expenses incurred when preparing and defending “Insured Persons” in response to SEC investigations. Pursuant to Endorsement PCDO-19018 Ed. 06-12, the Policies define “Interview Costs” as follows:

[T]he reasonable costs, charges, fees (including attorneys’ fees) and expenses . . . incurred by an **Insured Person** in responding to an **Interview Request**

24. Pursuant to Endorsement PCDO-19018 Ed. 06-12, the Policies define “Interview Request” as follows:

[A] written request by an **Enforcement Body** for an **Insured Person** to appear for an interview or meeting in connection with an investigation against any **Insured Person** or the **Insured Organization**; provided that **Interview Request** does not include any routine or regularly scheduled interview or audit conducted pursuant to the **Enforcement Body's** or **Insured Organization's** ordinary compliance procedures.

25. The Travelers Primary Policy is subject to a \$2 million retention “for all **Securities Claims**” and a \$1 million retention for “all other **Claims**”

B. The SEC Investigation

26. On or around March 21, 2013 Tech Data announced that it would restate some or all of its previously issued quarterly and audited financial statements for the fiscal years 2011 and 2012, and for some or all of the quarters of fiscal year 2013.

27. The purpose of the restatement was to correct inaccuracies primarily related to vendor accounting within a Tech Data subsidiary in the United Kingdom, Computer 2000 Distribution Ltd.

28. On March 22, 2013, the SEC's Division of Enforcement first contacted Tech Data regarding the financial restatement and indicated that the SEC planned to open an investigation into possible accounting irregularities at Tech Data. That same day, Tech Data received SEC Form 1662, “Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena.”

29. On April 5, 2013, Tech Data received, through its counsel Cleary Gottlieb Steen & Hamilton LLP (“Cleary Gottlieb”), an Order Directing Private Investigation and Designating Officers to Take Testimony, in the matter before the SEC styled *In the Matter of Tech Data Corp., File No. HO-12068*, dated March 28, 2013 (the “SEC Order”). The SEC Order alleged that Tech Data and its officers, directors, employees, partners, subsidiaries and/or affiliates may have violated statutes, rules and regulations under the Securities Act of 1933 and the Securities

Exchange Act of 1934. (The SEC Order, the SEC subpoenas issued pursuant to the SEC Order, and related SEC interviews of Tech Data's officers, directors and/or employees are collectively referred to herein as the "SEC Investigation.")

30. On or around April 10, 2013, Tech Data, through its insurance broker Willis Americas Administration, Inc. ("Willis"), provided notice of the SEC Order to the Insurers.

31. On April 10, 2013, the SEC's Division of Enforcement conducted an informal telephone interview of Tech Data's Vice President of Corporate Accounting. Cleary Gottlieb prepared the witness for and represented him in the interview.

32. Pursuant to the SEC Order, on May 16, 2013, the SEC Division of Enforcement served a document subpoena on Tech Data requiring, "as part of the investigation," the production of documents related to the accounting of Tech Data's U.K. subsidiary (the "May 16 Subpoena"). Tech Data, through its broker Willis, provided notice of the May 16 Subpoena to the Insurers on or around May 16, 2013. Tech Data, with the assistance of counsel, made numerous productions to the SEC of documents responsive to the May 16 Subpoena, including on May 30 and June 6, 2013.

33. Pursuant to the SEC Order, on June 14, 2013 the SEC's Division of Enforcement served a second document subpoena on Tech Data requiring, "as part of the investigation," the production of various budget and forecast reports, as well as two categories of documents related to communications of certain Tech Data officers (the "June 14 Subpoena"). Tech Data provided notice of the June 14 Subpoena to the Insurers on or around June 14, 2013. Tech Data, with the assistance of counsel, made numerous productions to the SEC of documents responsive to the June 14 Subpoena, including on July 3 and 18, and October 8, 2013.

34. On February 5, 2014, Tech Data filed its Annual Report on Form 10-K for the fiscal year ended January 31, 2013. This Annual Report restated certain consolidated financial statements and other financial information for fiscal years ending January 31, 2009, 2010, 2011 and 2012.

35. Pursuant to the SEC Order, on June 27, 2014 the SEC's Division of Enforcement served a third document subpoena on Tech Data, requesting documents on employee communications in both the U.S. and U.K. ("June 27 Subpoena"). Tech Data provided notice of the June 27 Subpoena to the Insurers on or around June 27, 2014. Tech Data, with the assistance of counsel, made a series of productions to the SEC of documents responsive to the June 27 Subpoena.

36. The SEC requested additional documents and information concerning Tech Data's U.K. personnel in 2014, 2015 and 2016. With the assistance of counsel, Tech Data provided additional documents and information. Counsel also prepared several witnesses for and represented them in additional interviews or testimony in connection with the SEC Investigation.

37. In connection with the SEC Investigation, Tech Data and certain past and present officers, directors and/or other "Insured Persons" incurred substantial legal fees. Tech Data paid legal fees on behalf of certain officers, directors and/or "Insured Persons."

C. The Insurance Coverage Dispute

38. The SEC Investigation constitutes or encompasses "written demands" for "non-monetary relief."

39. The SEC subpoenas served on Tech Data constitute "written demands" for "non-monetary relief."

40. The SEC Investigation is a “formal civil investigation” seeking information regarding possible securities law violations by “Tech Data, its officers, directors, employees, partners, subsidiaries, affiliates, and/or other persons or entities.” The SEC investigation was commenced by the receipt of an investigative order.

41. The SEC Investigation is a “Securities Claim” as defined in the Policies.

42. The SEC subpoenas served on Tech Data are “Securities Claims” as defined in the Policies.

43. The Insurers were timely notified of the SEC Investigation, including the SEC subpoenas, in compliance with the terms of the Policies.

44. On or around April 12, 2013, Travelers first acknowledged receipt of notice of the SEC Investigation.

45. In a letter dated May 28, 2013, Travelers declined coverage under the Travelers Primary Policy, stating the SEC Investigation “does not appear to satisfy the requirement of the Policy’s insuring agreement” and is not a “Claim” pursuant to the terms and conditions of the Travelers Primary Policy. Travelers also took the position that the SEC Investigation did not constitute an “Interview Request.”

46. In a letter to Travelers dated June 24, 2013, Tech Data disagreed with Travelers’ conclusions on coverage for the SEC Investigation, advised Travelers that the SEC Investigation is a covered “Securities Claim,” and requested that Travelers reconsider its coverage denial.

47. In a letter to Travelers dated August 26, 2013, Tech Data submitted to Travelers copies of paid invoices for legal fees and expenses related to the SEC Investigation and requested that Travelers apply the paid invoices against any applicable retention.

48. In a letter dated September 3, 2013, Tech Data provided Zurich with an update on the status of the SEC Investigation and the correspondence between Tech Data and Travelers.

49. In a letter dated September 20, 2013, Travelers reiterated its denial of coverage for the SEC Investigation, stating that the SEC Investigation is neither a "Claim" nor a "Securities Claim."

50. In a letter to Travelers dated October 18, 2013, Tech Data submitted to Travelers copies of additional paid invoices for legal fees and expenses related to the SEC Investigation and requested that Travelers apply the paid invoices against any applicable retention and reimburse amounts in excess of any applicable retention.

51. In a letter dated November 22, 2013, Travelers refused to reimburse Tech Data for any of the invoices submitted to date. Travelers stated that "the SEC Investigation does not at this point satisfy the requirement of the Policy's Insuring Agreements because it does not at this time constitute a **Claim** or involve an **Interview Request**."

52. In a letter dated April 4, 2014, Zurich informed Tech Data that Zurich adopts and incorporates the coverage positions and denial of coverage set forth in Travelers' correspondence.

53. Between November 2013 through April 2016, Tech Data continued to correspond with the Insurers to, among other things: (1) provide periodic updates regarding the status of the SEC Investigation and notify the Insurers of additional requests for documents and information by the SEC; (2) inform the Insurers that certain Tech Data executives had retained independent counsel for their personal defense of the SEC Investigation and notify the Insurers that Tech Data had indemnified the executives for their attorneys' fees and costs; (3) submit additional

invoices to the Insurers for reimbursement; and (4) request that the Insurers reconsider their coverage positions.

54. As of November 2016, Tech Data had submitted invoices to the Insurers documenting millions of dollars in legal fees and expenses related to the SEC Investigation. Tech Data has paid those invoices and has not been reimbursed by the Insurers. The amounts sought by Tech Data, if paid by the Insurers, would exhaust the Travelers Primary Policy and erode a portion of the limit of the Zurich Excess Policy.

55. The Insurers continue to deny coverage for the SEC Investigation.

COUNT I
(DECLARATORY JUDGMENT)

56. Tech Data adopts and incorporates by reference the allegations set forth in paragraphs 1 through 55 of the Complaint as if fully set forth herein.

57. Tech Data entered into contracts with the Insurers whereby Tech Data would pay insurance premiums in consideration for insurance coverage.

58. Each of the Policies is a valid and enforceable contract.

59. At all relevant times, Tech Data was covered by the Policies.

60. The Policies require the Insurers to, among other things, reimburse defense costs incurred as a result of the SEC Investigation.

61. Tech Data has fully complied with all terms and conditions of the Policies.

62. In breach of the Policies, the Insurers have refused to pay the defense costs incurred by Tech Data in connection with the SEC Investigation.

63. An actual controversy has arisen and now exists between Tech Data and the Insurers concerning the amount of coverage available to Tech Data under the Policies for the SEC Investigation.

64. Tech Data is entitled to a declaration that the SEC Investigation is a “Claim” under the Policies.

65. Tech Data is entitled to a declaration that the SEC subpoenas are “Claims” under the Policies.

66. Tech Data is entitled to a declaration that the SEC Investigation is a “Securities Claim” under the Policies.

67. Tech Data is entitled to a declaration that the SEC subpoenas are “Securities Claims” under the Policies.

68. Tech Data is entitled to a declaration that, subject to the Policies’ applicable retention provisions and limits, the Insurers are obligated to pay costs, including attorneys’ fees and other expenses, that Tech Data has incurred or incurs in the future relating to the SEC Investigation, including the SEC subpoenas.

69. Tech Data is entitled to a declaration that, subject to the Policies’ applicable retention provisions and limits, the Insurers are obligated to pay amounts that Tech Data becomes legally obligated to pay, through judgment, settlement or otherwise, with respect to the SEC Investigation, including the SEC subpoenas.

70. The issuance of the requested declaratory relief by this Court will terminate some or all of the existing controversies among the parties.

COUNT II
(BREACH OF CONTRACT)

71. Tech Data adopts and incorporates by reference the allegations set forth in paragraphs 1 through 70 of the Complaint as if fully set forth herein.

72. Tech Data entered into contracts with the Insurers whereby Tech Data would pay insurance premiums in consideration for insurance coverage.

73. Each of the Policies is a valid and enforceable contract.

74. Tech Data has fully complied with all terms and conditions of the Policies.

75. Tech Data has indemnified and continues to indemnify certain Tech Data directors, officers and/or other Insured Persons for losses incurred as a result of the SEC Investigation.

76. Tech Data has incurred and continues to incur substantial covered losses as a result of the SEC Investigation.

77. The Insurers have breached their respective contracts by denying coverage and/or failing to make required payments with respect to the SEC Investigation, including with respect to the SEC subpoenas.

78. As a direct and proximate result of the Insurers' actions, Tech Data has incurred damages (and will continue to incur damages) to the extent that the Insurers have failed to pay (and continue to fail to pay in the future) all or a portion of the defense costs and/or liability that the Insurers are obligated to pay to or on behalf of Tech Data or any other Insured Person under the Policies.

79. Tech Data's damages total millions of dollars. The full extent of Tech Data's damages will be determined according to proof at trial.

REQUEST FOR RELIEF

WHEREFORE, Tech Data respectfully requests that this Court:

- a) Enter a judgment declaring that the SEC Investigation, and any subpoenas served pursuant to them, are "Claims" and "Securities Claims" under the Policies;
- b) Enter a judgment declaring that Tech Data has satisfied the terms and conditions of the Policies;

c) Enter a judgment declaring Tech Data's rights to coverage under the Policies, including Tech Data's rights to reimbursement of defense costs, Tech Data's rights to reimbursement of indemnification payments made to or on behalf of Tech Data's directors, officers and/or any other Insured Person, and Tech Data's rights with respect to payments of judgments or settlements;

d) Enter a judgment awarding Tech Data damages for all amounts that the Insurers improperly have failed to pay or in the future may fail to pay under the Policies;

e) Enter a judgment awarding prejudgment interest; and

f) Award such other relief as the Court deems just and equitable.

JURY DEMAND

Plaintiff requests a trial by jury.

Respectfully submitted,

Dated: December 8, 2016

s/ Stephen A. Weisbrod

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