IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

TECH DATA CORPORATION, Plaintiff, v. TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, et al., Defendants.	)	Case No. 1:16-cv-11197 Judge Elaine E. Bucklo

DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, Zurich American Insurance Company ("Zurich") submits the following Memorandum of Law in Support of its Motion for Summary's Judgment:

INTRODUCTION

Tech Data Corporation is the subject of an investigation by the SEC into possible accounting irregularities. Complaint, ¶¶ 28-29. The SEC issued an Order Directing Private Investigation and Designating Officers to Take Testimony ("SEC Investigative Order") on April 5, 2013, followed by several subpoenas, but neither the Order nor the subpoenas specify that any particular individual is the target of the investigation. Complaint, ¶ 29; Exs. A-1, A-2, A-3, A-4. The SEC also made no written requests to any individuals employed by Tech Data for interviews or meetings. Ex. B, Answer to Interrogatory No. 8; Ex. A, ¶ 10.

Zurich issued a Zurich Excess Select Insurance Policy to Tech Data Corporation (Ex. C) (the "Zurich Policy"), which applies in conformance with and subject to the warranties, limitations, conditions, provisions, and other terms of the Directors, Officers, and Organization Liability Policy issued by Travelers Casualty and Surety Company of America ("Travelers") to Tech Data (Ex. A-5) (the "Travelers Policy").

None of the insuring agreements in the Travelers Policy provides coverage to Tech Data. The SEC Investigation and the subpoenas do not "allege" any "Wrongful Act," as required by the Travelers Policy. The SEC Investigation and the subpoenas also do not constitute "Claims." Specifically, the SEC Investigation and subpoenas are not written demands for "relief," are not "against any Insured Person," and do not identify any Insured Person "by name."

ARGUMENT

I. This Dispute is Governed by Florida Law.

For this Court's analysis, the threshold question that must be determined is which state's law governs the questions of policy interpretation presented by this matter. Specifically, courts in Florida and Illinois have interpreted the "Claim" and "Wrongful Act" definitions in different ways. To the extent a conflict of laws exists, and to the extent the insurance policies do not contain express choice-of-law provisions (as is the case here), the Court must apply the general choice-of-law rules of the forum state, Illinois, to determine which state's law should apply. *Coltec Indus. v. Zurich Ins. Co.*, 2004 U.S. Dist. LEXIS 1207, *10 (N.D.Ill. Jan. 29, 2004).

When addressing choice-of-law issues, Illinois generally applies the "most significant contacts" analysis embodied in Restatement (Second) of Conflict of Laws (1971). *Id.* at *11. Under this analysis, insurance policy provisions are generally "governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act giving rise to the contract, the place of performance, or other place bearing a rational relationship to the general contract." *Lapham-Hickey Steel Corp. v. Protection Mutual Ins. Co.*, 166 Ill.2d 520, 526-27 (1995). These factors do not have equal significance and are to be weighed according to the issue involved. *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, 319 Ill. App. 3d 218, 232 (2001). At least some of the factors in a choice-of-

law analysis "will point in different directions in all but the simplest case." Restatement (Second) of Conflict of Laws § 6, Comment c, at 12 (1971). "Hence, any rule of choice of law, like any other common law rule, represents an accommodation of conflicting values." Restatement (Second) of Conflict of Laws § 6, Comment c, at 12 (1971). A choice-of-law analysis should consider the contracting parties' justified expectations, yield certain, predictable, and uniform results, and avoid inconsistent interpretations of the same insurance contract. *Emerson Electric*, 319 Ill. App. 3d at 232.

Florida is favored by the majority of factors, including the place of the delivery of the contract and the domicile of the insured. Florida is in fact the place of Tech Data's incorporation and its principal place of business, and is the place of delivery as shown by the face of Traveler's policy. Indeed, the Travelers Policy contains two Florida-specific endorsements, as well as a Florida-based Notice page, while containing no endorsements referencing any other state. *See Cont'l Cas. Co. v. Duckson*, 826 F.Supp.2d 1086, 1094 (N.D.Ill. 2011) (finding significant the fact that the policy in that case "contains three Illinois-specific endorsements on the headings of three amendments and are the only references to a specific state in the Policy"); *Gann v. Oltesvig*, 508 F.Supp.2d 654, 657 (N.D.Ill. 2007) (finding significant the fact that "[t]he policy contained state-specific Wisconsin endorsements, including Wisconsin Uninsured Motorists endorsements", but "contained no Illinois endorsements, nor any state-specific endorsements from any state other than Wisconsin").

Nor do the other factors weigh in Illinois' favor. The location of the insured loss is of little significance where the risks are spread nationwide. *Liberty Mut. Fire Ins. Co. v. Woodfield Mall, L.L.C.*, 407 Ill.App.3d 372 (2010). Here, the risks are spread not only nationwide, but worldwide. Tech Data's website states: "IT Resellers around the world - our customers - depend

on us to support the technology needs of end users of all sizes, including small- and medium-sized businesses (SMB), large enterprises, educational institutions, government agencies, and consumers." The website further states that Tech Data has 14,000+ employees worldwide. Moreover, the Tech Data subsidiary whose activities sparked the SEC Investigation is located in the United Kingdom. Under these circumstances, the location of the insured risk/loss is of little significance. Further, and even more fundamentally, nothing about the loss at issue particularly implicates Illinois over any other state.

The domicile of the insurers appears to favor Connecticut law. Travelers is incorporated in Connecticut and has its principal place of business in Connecticut. Zurich is incorporated in New York with its principal place of business in Illinois; however, a corporation's state of incorporation – not its principal office – constitutes the corporation's domicile. *Coltec* at *12-13. Accordingly, Travelers's domicile is Connecticut, and Zurich's domicile is New York. Given that Zurich Policy generally follows form to the provisions and warranties contained in the Travelers Policy, however, Travelers' domicile should outweigh Zurich's. As a result, this factor somewhat favors Connecticut (but again, not Illinois).

The place of negotiation is not significant in this case. The persons involved in the negotiations for the policies were located in Colorado (Tech Data's broker), Florida (Tech Data's Director Risk/Insurance and Corporate Real Estate Executive) and New York (Travelers' and Zurich's underwriters). Normally, the place of a contract's negotiation is a "significant contact." Restatement (Second) of Conflicts § 188 cmt. e. The state where contract negotiations occur has an interest in the legality of the negotiations themselves, as well as the ultimate agreement. *See id.* However, "[t]his contact is of less importance when there is no one single place of negotiation and agreement, as for example, when the parties do not meet but rather conduct their

negotiations from separate states by mail or telephone." *Id.; Nautilus Ins. Co. v. Reuter*, 537 F.3d 733 (7th Cir. 2008). Here, the negotiations were conducted from different states, rendering this factor insignificant.

In sum, none of the relevant factors favors Illinois. The overwhelming majority of significant factors favor Florida. The insured's domicile, the place where the policy was delivered, and the fact that the policy contains state-specific endorsements for only one state are the most significant factors in a case like this. In *Coltec*, the court applied Illinois law based on the domicile of the insured, particularly because that was the location of the office where the Insurance Manager for the insured worked. *Coltec* at *16 (domicile of the insured the controlling factor); *Gann*, 508 F.Supp.2d at 656-57 (place where policy delivered and fact that policy contained state-specific endorsements for only one state the controlling factors); *Duckson*, 826 F.Supp.2d at 1094 (domicile of the insured the controlling factor). All of these factors – place where the insured's insurance manager works, the place where the policy was delivered, the state identified in the state-specific endorsements to the policy, and the insured's domicile – favor the application of Florida law in this case.

II. No "Wrongful Act" has been Alleged Against Tech Data or any Tech Data Employees.

Each of the insuring agreements in the Travelers Policy applies to "Claims" or "Securities Claims" only if they are "for a Wrongful Act." The definition of "Claim" also requires that any demand or proceeding be "for a Wrongful Act."

In this matter, there is no affirmative allegation of a "Wrongful Act" and this important part of the definition of "Claim" or "Securities Claim" is simply not met. The SEC Investigative Order merely states that Tech Data and various individuals "may have been or may be" committing various wrongful acts – it does not affirmatively accuse them of having committed

those acts. The subpoenas issued by the SEC to Tech Data are even less accusatory, failing to even reference a possibility that Tech Data or various individuals may have committed wrongful acts. An investigation to determine "whether a wrongful act has occurred" is not a demand in response to (or as requital of) a "wrongful act." *RSUI Indem. Co. v. Desai*, 2014 U.S. Dist. LEXIS 122068 (M.D.Fla. Sep. 2, 2014). Instead, an investigation seeking the production of documents and things simply enables the SEC to determine "whether a wrongful act had occurred." *Id.* at *13.

The definition of "Wrongful Act" requires that the enumerated conduct be "actual or alleged." The policies at issue do not define "alleged." When a term in an insurance policy is undefined, it should be given its plain and ordinary meaning, and courts may look to legal and non-legal dictionary definitions to determine such a meaning. *Barcelona Hotel, LLC v. Nova Cas. Co.*, 57 So. 3d 228, 230-31 (Fla. 3d DCA 2011); *Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, 1001 (Fla. 4th DCA 2010); *State Farm Fla. Ins. Co. v. Campbell*, 998 So. 2d 1151, 1153 (Fla. 5th DCA 2008); *Martinez v. Iturbe*, 823 So. 2d 266, 267 (Fla. 3d DCA 2002). However, the lack of an operative term's definition does not, by itself, create an ambiguity. *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072 (Fla. 1998); *Kepler v. Ga. Int'l Life Ins. Co.*, 538 So. 2d 940 (Fla. 2d DCA 1989). Neither is a provision considered ambiguous simply because it is complex and requires analysis to interpret it. *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007); *Swire Pac. Holdings Inc. v. Zurich Ins. Co.*, 845 So. 2d 161 (Fla. 2003); *Koenigsberg v. Intercontinental Ins. Co.*, 571 So. 2d 578 (Fla. 4th DCA 1990).

Consistent with the direction to courts applying Florida law to consider legal and non-legal dictionary definitions, the term "allegation" has been defined as "a declaration that something is true; esp., a statement, not yet proved, that someone has done something wrong or

illegal" and/or "[s]omething declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved; averment." Black's Law Dictionary (10th ed. 2014). As used as an adjective, "alleged" means "asserted to be true as described" or "accused but not yet tried." *Id.*; *see also* American Heritage Dictionary 94 (2d ed. 1976) (defining "alleged" as "representing as existing or as being as described but not so proved; supposed").

Courts in multiple jurisdictions – including the *Desai* court in Florida, as discussed above - have concluded that an investigation conducted to determine "whether" there is, has been, or may be violations of laws does not amount to "allegations" of wrongdoing – at least where the investigating body does not "affirmatively accuse" the insured of wrongdoing. See *MusclePharm Corp. v. Liberty Ins. Underwriters, Inc.*, 2017 U.S. App.. LEXIS 20233, *19 (10th Cir. Oct. 17, 2017) (defining "alleged" as "[a]sserted to be true as described," or "[a]ccused but not yet tried," and holding that a SEC order of investigation "was not asserting that MusclePharm had broken any laws; rather, the SEC was investigating to determine whether it had"); *Emplr's. Fire Ins. Co. v. Promedica Health Sys.*, 524 Fed.Appx. 241, 248 (6th Cir. Apr. 30, 2013). Discussion in hypothetical terms the possibility that a violation had or would occur is not enough to "allege" wrongdoing. *Promedica*, 524 Fed.Appx. at 248.

Tech Data seeks to rely on *Nat'l Stock Exch. v. Fed. Ins. Co.*, 2007 U.S. Dist. LEXIS 23876 (N.D.Ill. Mar. 30, 2007) as support for the conclusion that a "Wrongful Act" has been alleged in this case. First, *Nat'l Stock Exchange* is based on Illinois law, which does not govern this dispute, and which should be rejected in favor of Florida decisions such as *Desai*. Second, the court in *Nat'l Stock Exchange* did not analyze the plain meaning of the term "alleged," as the courts in *Promedica* and *MusclePharm* did. For a court to find that any investigation regarding

"an inquiry," "possible" violations, or "acts that may have been committed" is sufficient to allege a "Wrongful Act" would be to "transform *any* notice of any investigation that identifies the investigation's purpose into an 'allegation.'" *Promedica*, 524 Fed.Appx. at 250; *see also MusclePharm* at *12 ("The court's [in *Nat'l Stock Exch.*] completely unexamined conclusion is hardly self-evident and does not withstand scrutiny given this court's analysis of the plain meaning of the relevant term 'alleged'").

In this case, neither the SEC Investigative Order nor the SEC subpoenas contained any positive assertion that the implicated errors or omissions by Tech Data or any individuals are believed to have actually occurred. The SEC Investigative Order only asserts that wrongful acts "may have or may be" occurring, and the subpoenas contain no reference to any errors or omissions whatsoever. Acknowledging that it had not reached any conclusions about whether anyone committed any wrongful acts, the SEC Investigative Order states: "The Commission, deeming such acts and practices, ***if true***, to be possible violations of Section 17(a) of the Securities Act [*et al.*]...." The SEC Investigative Order does not contain any allegations of "Wrongful Acts." Nor do any of the subpoenas at issue. As a result, the "Wrongful Act" element required by the definition of "Claim" and by each of the insuring agreements in the Travelers Policy is absent in this case. Zurich therefore has no obligation to cover any loss or expense incurred in connection with the SEC Investigation.

III. The SEC Investigation does not Constitute a "Securities Claim" or "Claim."

Each of the insuring agreements in the Travelers Policy is triggered only upon the making of a "Claim. Although Insuring Agreement C covers "Securities Claims," the definition of "Securities Claim" requires a "Claim." None of the categories in the Claim" definition applies in this case, even irrespective of the "Wrongful Act" limitation noted above.

A. Category (1) – "written demand...against any Insured for monetary damages or non-monetary relief, including injunctive relief" – does not Apply.

This category of "Claim" requires a written demand for "relief" that is "for a Wrongful Act." Under Florida law, the term "relief" has been construed as "redress in response to, or as requital of, a wrongful act." *Desai* at *12. In the absence of an alleged wrongful act, an investigation or subpoena cannot qualify as a demand for "relief." *Id.* As discussed in section II, above, the SEC Investigation and subpoenas do not allege any "Wrongful Act" by Tech Data or any individuals. As a result, the SEC Investigation and subpoenas are not demands for "relief."

In addition, category (1) cannot be interpreted as applying to SEC investigations or subpoenas. Category (4) is the category covering formal civil investigations, and any such investigation must be "against any Insured Person" to qualify. Category (5) is the category covering subpoenas, and any such subpoenas must be served "on an Insured Person identified by name" to qualify. Specific provisions of a contract control over general conditions. *Underwriters of Lloyds of London v. Cape Publ'ns, Inc.*, 63 So. 3d 892, 896 (Fla. 5th DCA 2011) (*citing Colonial Bank, N.A. v. Taylor Morrison Servs., Inc.*, 10 So. 3d 653, 655 (Fla. 5th DCA 2009)). This is equally true with regard to insurance contracts. *See Herring v. Horace Mann Ins. Co.*, 795 So. 2d 209, 212 (Fla. 4th DCA 2001) (holding, when provisions of insurance policy conflict, "[w]e recognize the clear rule of construction that a specific provision in a policy governs over a general provision"). Categories (4) and (5) are quite specific about when SEC investigations and subpoenas qualify as "Claims" and must be the operative categories when determining whether a SEC investigation and/or subpoena is a "Claim." Further, categories (4) and (5) limit coverage to investigations against "Insured Persons" and subpoenas identifying an "Insured Person" by name and do not cover investigations against Tech Data only or subpoenas identifying only Tech Data by name. The limited coverage under categories (4) and (5) would be

meaningless if category (1) were read to cover all SEC investigations and/or subpoenas, regardless of whether directed against any "Insured Person." Florida law prohibits a court from interpreting insurance provisions as meaningless or as surplusage where it is possible to give such provisions meaning. *Auto-Owners Ins. Co. v. Anderson*, 756 So.2d 29, 34 (Fla. 2000) ("in construing insurance policies, courts should read each policy as a whole, endeavoring to give each provision its full meaning and operative effect"); *see also Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 941 (Fla. 1979) (noting that every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible). A finding that the SEC investigation and the subpoenas fall within category (1) of the definition of "Claim" would read categories (4) and (5) out of the policy entirely, which this Court cannot do.

Tech Data asserts that the SEC Investigation and subpoenas fall within category (1), relying on *Minuteman Int'l, Inc. v. Great Am. Ins. Co.*, 2004 U.S. Dist. LEXIS 4660 (N.D.Ill. Mar. 18, 2004). First, the decision in *Minuteman* applied Illinois and, therefore, does not govern this dispute in light of the contrary Florida law as set forth in *Desai*. *See Desai* at *12-13 (holding that "relief" is not sought in the absence of any allegation of a "wrongful act").

Second, *Minuteman* is distinguishable and contained a <u>different</u> definition of "Claim" than exists here. In *Minuteman*, the SEC had issued an investigative order and issued subpoenas to Minuteman and certain of its officers and employers, before issuing a cease-and-desist order 18 months later as part of a settlement. The policy at issue in *Minuteman* defined "Claim," in relevant part, as a "written demand for monetary or non-monetary relief made against any Insured..." The definition of "Claim" in *Minuteman*, however, did not contain any language similar to categories (4) and (5) in the definition of "Claim" in the Travelers Policy and did not contain the requirement in the Travelers Policy that relief be "for a Wrongful Act." The court in

Minuteman held that the subpoena issued by the SEC was a written demand for non-monetary relief, because the production of documents or testimony in response to the subpoena could have been ordered by a court if Minuteman refused to comply with the subpoena. *Id.* at *21-22. The holding in *Minuteman*, however, did not render meaningless any provision that set forth more limited coverage for SEC subpoenas as a result of its expansive interpretation of the term "relief," because the policy at issue in *Minuteman* did not contain any such provisions (like those set forth in categories (4) and (5) of the "Claim" definition at issue here). Likewise, the policy at issue in *Minuteman* did not include a "for a Wrongful Act" requirement in its definition of "Claim" – a significant difference leading the court in *Desai* to find *Minuteman* distinguishable. *See Desai* at *13, n. 5 ("the majority of these cases [including *Minuteman*] are readily distinguishable on their facts, including significant differences in the policy language at issue," noting that in *Minuteman*, the "policy did not require 'relief' to be 'for' any wrongful act").

Even if Illinois law governed this dispute – which it does not – *Desai* is the only decision which addresses policy language similar to that in the Travelers Policy. Faced with this language, a court applying Illinois law must construe the policy to give effect to all of its provisions and not render any portion to be meaningless or mere surplusage. *Horwitz v. Bankers Life & Cas. Co.*, 319 Ill.App.3d 390 (2001), *quoting White v. White*, 62 Ill.App.3d 375, 378 (1978) ("Indeed, 'in construing a contract, meaning and effect must be given to every part, and no part should be rejected as surplusage unless absolutely necessary since it is presumed that each provision was inserted deliberately and for a purpose"). As a result, the reasoning of the *Desai* holding leads to only one conclusion under either Florida or Illinois law – the SEC Investigation and subpoenas in this case are not written demands for non-monetary relief and are not "Claims."

B. Category 4 – "formal civil investigation against any Insured Person, commenced by the receipt of a…investigative order" – does not Apply.

The SEC Investigation is a formal investigation, commenced by the receipt of an investigative order. Category 4, however, applies only to investigations "against any Insured Person." Although the SEC Investigation includes a general inquiry as to the conduct of unspecified individuals associated with Tech Data, it is not "against" such individuals.

Although Tech Data mistakenly relies on decision applying Illinois law, the operative law in this case is that of Florida, and a decision applying Florida law indicates that the phrase "against any Insured Person" should be interpreted as being limited to proceedings against specific individuals. In *Office Depot v. Nat'l Union Fire Ins. Co.*, 734 F.Supp.2d 1304 (S.D.Fla. 2010), *aff'd* 453 Fed.Appx. 871 (11th Cir. Oct. 13, 2011), the insured sought coverage under an organization and executive liability insurance policy for costs incurred in voluntarily responding to a SEC investigation. The policy in *Office Depot* defined "Securities Claims" as excluding administrative or regulatory proceedings against, or investigations of, an "Organization"; however, a carve-back provision restored coverage for administrative or regulatory proceedings against an "Organization" if "such proceeding is also commenced and continuously maintained against an Insured Person." 734 F.Supp.2d at 1309. The court held that the carve-back provision did not provide coverage because, in part: (1) the informal notice of inquiry and formal "order during private investigation" issued by the SEC were both captioned to name only Office Depot; (2) neither document identified any particular officers or directors as respondents or potential targets of a civil, criminal, administrative or regulatory proceeding; and (3) the general statements making reference to the conduct of Office Depot's officers, directors and employees as participants in "possible violations" of the securities laws do not "identify any specific officer or director as a wrongdoer by name and do[] not affirmatively allege an actual violation of the securities laws." *Id.* at 1319-20. The court concluded: "This SEC activity cannot, under the plain

meaning of the word, be viewed as a 'commencement' of a 'proceeding against' any Insured Person within the meaning of the" carve-back clause. *Id.* at 1320; *see also Medical Mut. Ins. Co. v. Indian Harbor Ins. Co.*, 583 F.3d 57, 63 (1st Cir. 2009) (where a claim must be "made against" an insured person, "free-standing allegations of wrongful conduct by an insured corporation's directors and officers cannot be the equivalent of a claim made against those directors and officers"). There must be a specific reference to an insured person for a proceeding or investigation to be deemed "against" an insured person.

An analysis of the word "against" further supports the conclusion of the court in *Office Depot.* As noted in section II, above, policy terms should be given their plain and ordinary meaning, and courts may look to legal and non-legal dictionary definitions to determine such a meaning. *Barcelona Hotel, LLC, supra*, 57 So. 3d at 230-31; *Harrington, supra*, 54 So. 3d at 1001. (Fla. 4th DCA 2010). The term "against" means "in opposition or hostility to"; "contrary to"; "directly opposite"; "in the direction of and into contact with"; or "in a direction opposite to the motion or course of." Merriam-Webster's Collegiate Dictionary 21 (10th ed. 1996). Without naming any specific individuals, an investigation cannot be said to be "in opposition or hostility to," "contrary to," "directly opposite," "in the direction of and into contact with," or "in a direction opposite to the motion or course of" such individuals.

In this case, the SEC Investigative Order and subpoenas do not identify any "Insured Persons" in the caption; do not identify any particular individuals as respondents or potential targets; and do not identify any specific individual as a wrongdoer by name and do not affirmative allege an actual violation of any securities laws by specific individuals. Significantly, in the more than four years since the SEC Investigation began, the SEC has not served subpoenas on any "Insured Person." Instead, the SEC has served subpoenas only on Tech Data itself,

reinforcing the conclusion that the SEC Investigation is "against" Tech Data only. The SEC Investigation and subpoenas are not in opposition or hostility to, contrary to, directly opposite, in the direction of and into contact with, or in a direction opposition to the motion or course of, any "Insured Person." As a result, the SEC Investigation is not "against any Insured Person."

Tech Data will likely rely on the holding in *Nat'l Stock Exchange* finding that language similar to category (4) does not require the SEC to name specific individuals as the target of its proceedings. *Nat'l Stock Exchange* at *14-15. *Nat'l Stock Exchange*, however, is based on Illinois law. Because this dispute is governed by Florida law, and not Illinois law, the holding in *Office Depot* should be the guidepost for interpreting category (4).

Moreover, *Nat'l Stock Exchange* is distinguishable. First, the SEC had sent a letter defining Cincinnati Stock Exchange (later, National Stock Exchange) as including "present and former officers and directors." Here, the SEC Investigative Order does not define "Tech Data" as including officers and directors, and there is no other document doing so. *See Hansen Natural Corp. v. St. Paul Mercury Ins. Co.*, 2009 U.S. Dist. LEXIS 134032 (C.D.Cal. Mar. 26, 2009) (distinguishing *Nat'l Stock Exchange* on the grounds that the SEC letter in that case "did not state that the term 'Hansen' included present and former officers and directors" and holding that the proceeding initiated by that letter was not "against any Insured Person"). In addition, the SEC's formal investigative order in *Nat'l Stock Exchange* was quickly followed by Wells Notices advising that the SEC staff was recommending that the SEC institute further proceedings against three current or former officers of the insured entity. *Id.* at *3-4. The targeting of "Insured Persons" in *Nat'l Stock Exchange* was clear and direct, unlike this case where the SEC has never indicated that its investigation might lead to some direct action against any "Insured Person." As

a result, the SEC Investigation is against Tech Data only, and not any **"Insured Person,"** and the SEC Investigation does not fall within the scope of category (4).

C. Category (5) – "service of a subpoena on an Insured Person identified by name if served upon such person pursuant to an SEC formal investigative order."

None of the subpoenas issued by the SEC in this case have been served on an "Insured Person" identified by name. The subpoenas were served on Tech Data only. As a result, neither the SEC Investigation nor the resulting subpoenas fall within the scope of category (5).

IV. Coverage for "Interview Costs" does not Apply Because no Interview Request has Occurred.

Insuring Agreements A and B in the Travelers Policy provide coverage for "Interview Costs" accrued by an "Insured Person" resulting from an "Interview Request." "Interview Request" is defined in the Travelers Policy as a "written request…to appear for an interview or meeting…." It is undisputed that no "Insured Person" has ever received a written request from the SEC for an interview or meeting. As a result, coverage for "Interview Costs" does not apply.

CONCLUSION

Wherefore, Defendant, ZURICH AMERICAN INSURANCE COMPANY, respectfully requests that this Honorable Court grant it summary judgment as to all claims and defenses, finding that:

(1) The Zurich Policy does not provide coverage in connection with the SEC Investigation and any subpoenas served pursuant to that investigation, including any fees or costs incurred by Tech Data in response to the SEC Investigation, as well as any indemnification payments made to or on behalf of Tech Data's directors, officers and/or any other Insured Person;

(2) Zurich is entitled to any other relief as the Court deems just and equitable.

Respectfully submitted,

ZURICH AMERICAN INSURANCE COMPANY

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