IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Complex Law and Motion/CMC Calendar
HONORABLE JEFFREY R. FINIGAN
Department 24

400 County Center, Redwood City
Courtroom 2F

Friday, May 17, 2024 at 2:00 PM

IF YOU *INTEND TO APPEAR* ON ANY CASE ON THIS CALENDAR, YOU MUST DO THE FOLLOWING:

1. **EMAIL Dept24@Sanmateocourt.org BEFORE 4:00 P.M. CONTEMPORANEOUSLY COPIED TO ALL PARTIES OR THEIR COUNSEL OF RECORD. IF BY EMAIL, IT MUST INCLUDE THE NAME OF THE CASE, THE CASE NUMBER, AND THE NAME OF THE PARTY CONTESTING THE TENTATIVE RULING OR;**

2. **CALL (650) 261-5124 BEFORE 4:00 P.M. WITH THE CASE NAME, NUMBER, AND THE NAME OF THE PARTY CONTESTING.**

3. **GIVE NOTICE BEFORE 4:00 P.M. TO ALL PARTIES OF YOUR INTENT TO APPEAR PURSUANT TO CALIFORNIA RULES OF COURT 3.1308(A)(1).**

Failure to comply with 1 or 2, and 3 will result in no oral presentation.

At this time, personal appearances are allowed but not required. Parties may appear via Zoom. Advance authorization is not required for remote appearances. Mute your line until your case is called. RECORDING OF A COURT PROCEEDING IS PROHIBITED.

Zoom Video Information:

https://sanmateocourt.zoomgov.com/

Meeting ID: 160 195 4264
Password: 738358

Please note: Zoom Meeting can be joined directly from Judge Finigan's page on the court's website.

TO ASSIST THE COURT REPORTER, the parties are ORDERED to: (1) state their name each time they speak and only speak when directed by the Court; (2) not to interrupt the Court or anyone else; (3) speak slowly and clearly; (4) use a dedicated land line if at all possible, rather than a cell phone; (5) if a cell phone is absolutely necessary, the parties must be stationary and not driving or moving; (6) no speaker phones under any circumstances; (7) provide the name and citation of any case cites; and (8) spell all names, even common names.

Case	Title / Nature of Case	
2:00 LINE 1 22-CIV-05190	CAREDX, INC. VS GREAT AMERICAN INSURANCE COMPANY	
CAREDX, INC. GREAT AMERICAN INSURANCE COMPANY		COLIN T KEMP TIFFANY S SALTZMAN-JONES

PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

TENTATIVE RULING:

The Parties' cross-motions for summary adjudication and summary judgment are addressed jointly in this single ruling, as the issues are identical to each motion and addressing them in separate rulings is cumbersome, inefficient, and unnecessary.

Plaintiff CareDx, Inc.'s ("Plaintiff" or "CareDx") Motion for Summary Adjudication of its First Cause of Action for Declaratory Judgment is **DENIED**. (CCP §437c.)

Defendants Great American Insurance Company ("Great American"), Berkley Insurance Company ("Berkley") and Argonaut Insurance Company ("Argonaut") (collectively the "Insurers" or "Defendants") Motion for Summary Judgment is **GRANTED**. (CCP §437c.)

Plaintiff's Request for Judicial Notice as to filings in other District Court cases is GRANTED, but not for the truth of the matters asserted therein. (RJN, Ex. A – D.)

Plaintiff's Objection to Defendants' Notice of Supplemental Authority is SUSTAINED and the Court does not consider the submission.

Certain defined terms within the insurance policies discussed herein are in **bold** and will appear in that manner. In order to distinguish when the Court wishes to emphasize a point, underline will be used.

The parties cite many non-California state court authorities that are unpublished, on appeal or not reported in official reporters. The Court understands the reasoning, i.e. all parties agree the main issue underlying the motions has not been addressed by California state courts yet. Nevertheless, the Court points this out to note such authorities are considered, if at all, for persuasive value only. (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 999 at fn. 4.)

I. Procedural Posture

This is a declaratory relief and breach of contract action where Plaintiff seeks insurance coverage under its directors' and officers' liability insurance policies ("D&O Policies";

Complaint ¶ 18) for its costs to investigate and defend against demands by the United States Securities and Exchange Commission ('SEC') for documents and information in connection with an investigation into alleged possible violations of securities laws." (Complaint, ¶ 1.)

CareDx is a transplant diagnostics company that purchased the D&O Policies for claims made during the policy period from January 17, 2021 to April 15, 2022 (Complaint, ¶¶ 15 – 17) from the following Defendants:

Defendant	Type	Complaint
Great American Insurance Co.	Primary	¶¶ 7, 16, Ex. A
Berkley Insurance Co.	Excess	¶¶ 8, 17(a), Ex. B
Argonaut Insurance Co.	Excess	¶¶ 9, 17(b), Ex. C

In 2021, CareDx was the subject of an investigation by the DOJ and SEC. Specifically,

> CareDx received a civil investigative demand ("CID") from the United States Department of Justice ("DOJ") requesting that the Company produce certain documents in connection with a False Claims Act investigation being conducted by the DOJ regarding certain business practices related to the Company's kidney testing and phlebotomy services, and a subpoena from the United States Securities and Exchange Commission ("SEC") in relation to an investigation by the SEC in respect of matters similar to those identified in the CID, as well as certain of the Company's accounting and public reporting practices.
>
> (Complaint, ¶ 21.)

Plaintiff moves for summary adjudication of the first cause of action for declaratory judgment on the following grounds (the fourth ground is irrelevant in light of the ruling herein): (1) The SEC investigation of CareDx constitutes a "Claim" under the D&O Policies because the SEC's subpoena served on CareDx is a "written demand" for "non-monetary relief;" (2) The SEC's investigation is a "Securities Claim" under the Policies; and (3) The SEC's investigation alleges certain violations that qualify as "Wrongful Act[s]" under the Policies.

Defendants move for summary judgment on the grounds that "there is no coverage under the liability insurance policies issued by the Insurers to Plaintiff because the SEC investigation of Plaintiff is not a Claim or Securities Claim under the relevant policy definitions."

II. Choice of Law

As a threshold matter, the Court finds California law applies and is not persuaded by Plaintiff's position otherwise. This is not to say non-California cases are irrelevant; they're simply not controlling. All parties agree Civ. C. §1646 applies: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Nevertheless, Plaintiff goes on to argue that Delaware law applies based on *RSUI Indemnity*

Company v. Murdock (2021) 248 A.3d 887. (Pl. Motion at p.9.) However, *RSUI* did not analyze the applicability of §1646. Further, the court also noted "we do not ignore the California contacts and acknowledge that they might be dispositive were we addressing an insurance policy covering a different subject matter and insureds with a more tenuous connection to Delaware" (*Id*., at p. 901.) That is significant because the *RSUI* case dealt with a shareholder suit filed in Delaware against specific directors and officers for specific stock transactions. (*Id*., at p. 892.) Those are distinguishable circumstances from the present case, which was at the investigative and information gathering stage to determine what, if any, violations occurred and who, if anyone, committed the violations. The Court is mindful that this can be viewed as a somewhat generalized and vague description of the underlying circumstances herein, but the Court is refraining from setting forth details in this tentative ruling that are covered by the parties' Motions to Seal. CareDx is located in Brisbane, CA, the D&O Policies, i.e. contracts, herein were negotiated by its San Francisco broker, and the relevant under-seal documents were served upon CareDx in South San Francisco or CareDx's counsel in New York, NY. The related shareholder suits against CareDx appear to have all been filed in California. (Bruno Decl. ¶¶ 10 and 11.) Accordingly, this Court finds the "to be performed" and "where it is made" phrases of §1646 to control and those places to be in California.

III. Law Related to Contract & Insurance Policy Interpretation

In their respective cross-motions, the parties move to establish whether there is coverage under the D&O Policies for the SEC investigation of Plaintiff. (Pl. Notice, filed Dec. 29, 2023, p. 2:8 – 3:2; Def. Notice, filed Dec. 29, 2023, p. 1:9-13.) The parties do not dispute any of the posited material facts and resolving this issue is a question of law.

> In determining whether a claim creates the potential for coverage under an insurance policy, we are guided by the principle that interpretation of an insurance policy is a question of law. Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. In determining this intent, the rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. We consider the clear and explicit meaning of these provisions, interpreted in their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage. We must also interpret the language in context, with regard to its intended function in the policy.

(*Hartford Casualty Insurance Company v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288; internal quotations and citations omitted.) "Courts will favor an interpretation that gives meaning to each word in a contract over an interpretation that makes part of the writing redundant." (*Yahoo Inc. v. National Union Fire Insurance Company of Pittsburgh, PA* (2022) 14 Cal.5th 58, 69; internal citation omitted.)

This tentative ruling focuses only on the Primary Policy and endorsements at Joint Stipulation, Exhibit A because the excess policies track the language and provisions of the

Primary Policy. (See Pl. MPA, filed p. 3:21-22 ("The definitions and other policy terms at issue in this motion are the same in all of the Policies"); Def. MPA, filed Jan. 2, 2024, p. 1:13-14 ("the excess insurers' policies follow form [of the Primary Policy] in relevant part").

The following rules establish the basic framework for interpretation of insurance policies:

> ***Rule #1—"Plain Meaning" Rule:*** First, an insurance policy is given its "plain meaning": i.e., the terms must be read in their "ordinary and popular sense" in the context of the policy as a whole and the circumstances of the case.
>
> ***Rule #2—"Objectively Reasonable Expectations of Insured" Rule:*** If the terms have no "plain meaning" and thus are ambiguous or uncertain, they must be interpreted in the sense the insurance company reasonably believed the insured understood them when the policy was issued; i.e., in accordance with the insured's "objectively reasonable expectations."

(California Practice Guide, Insurance Litigation, The Rutter Group, Wegner, at §4:5; quoting *AIU Insurance Company v. Superior Court (FMC Corporation)* (1990) 51 Cal.3d 807, 821-822.) There are two more rules listed in the treatise, but they are not relevant for this ruling.

Insurance policies are contracts and subject to the rules of construction governing contracts, where "[u]nder statutory rules of contract interpretation, the *mutual intention of the parties* at the time the contract is formed governs interpretation … Such intent is to be inferred, if possible, *solely from the written provisions* of the contract" (Wegner, *supra,* at §4:6, quoting *AIU*; emphasis in original.) The "plain meaning rule" derives from the following statutes:

> *Civ. C. § 1636*: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."
>
> *Civ. C. § 1638*: "The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."
>
> *Civ. C. § 1641*: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
>
> *Civ. C. § 1644*: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense or unless a special meaning is given to them by usage, in which case the latter must be followed."
>
> *Civ. C. § 1646*: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

(Wegner, *supra*, at §4:10.) Accordingly, "[c]lear and explicit" policy language governs. (*Id.*, at §4:11.)

> Policy provisions that are ambiguous may be interpreted according to the insured's "objectively reasonable expectations" … But where the policy is clear and unequivocal, the only thing the insured may "reasonably expect" is the coverage afforded by the plain language of the mutually agreed-upon terms.

(*Ibid*., internal citations omitted.)

The Rule #1 test for determining the plain meaning is based on common language a layperson would understand.

> Absent evidence indicating the parties intended a special usage, words used in an insurance policy should be interpreted in their "ordinary and popular sense." [*Id*., at §4:40; citing Civ. C. §1644 and *AIU, supra.*]
>
> **Test:** If the *meaning a layperson would ascribe to the language* of a contract of insurance is clear and unambiguous, a court will apply that meaning. This reliance on common understanding of language is bedrock.

(Wegner, *supra*, at §4:41; internal citations omitted.)

> Relevant here, specific provisions control over general provisions.
>
> A specific provision relating to a particular subject governs that subject despite a general provision that is broad enough to include the same subject. [Civ. C. §3534 – "Particular expressions qualify those which are general"]

(*Id*., at §4:113.5.) Similarly, the terms in an endorsement control over inconsistent provisions in the printed policy form. (*Id*., at §4:275.)

Notably, if the policy language is unambiguous, the insured's objectively reasonable expectations cannot create an ambiguity.

> The insured's "objectively reasonable expectations" may be considered *to resolve* an ambiguous policy provision but cannot be invoked to *create* an ambiguity where none exists … An insurance policy must be interpreted as a whole and in context … An insurance policy, like any other contract, must be construed as an entirety, with each clause lending meaning to the other.

(*Id*., §§ 4:210 – 4:212; internal citations omitted, emphasis in original.)

IV. The Primary Policy Endorsement Specifically Addresses SEC Investigations

Cutting to the chase to address the key issue – the Primary Policy Endorsement expressly amends the Primary Policy and addresses SEC investigations in both the definitions of **Inquiry** and **Claim** and coverage only applies in both situations where an SEC investigation targets an **Insured Person**, not the **Company**. The Court is aware Plaintiff is not seeking coverage for an **Inquiry**. Nevertheless, as explained below, evaluating that section of the Primary Policy as part of the analysis supports the ruling herein. Plaintiff's contention that the SEC Subpoena falls under the definition of **Securities Claim** and a general subsection of the definition of **Claim** disregards the plain language of the Primary Policy. Accordingly, Plaintiff's interpretation is not reasonable and afforded no deference because the exclusionary clause is "conspicuous, plain and clear." (*Palp, Inc. v. Williamsburg National Insurance Company* (2011) 200 Cal.App.4th 282, 290.)

V. The SEC Investigation of CareDx is not a "Claim" under the Primary Policy

The Court finds that the SEC Investigation is not a "Claim" under the plain and unambiguous language of the Primary Policy.

> **"Claim**" shall mean:
>
> > (1) a written demand for monetary or non-monetary relief, including any injunctive relief, made against any **Insured** and reported to the **Insurer** pursuant to Section VIII.A
> > . . .
> > (4) a civil, criminal, administrative or regulatory investigation (including a Securities and Exchange Commission, Equal Employment Opportunity Commission or grand jury investigation) of any **Insured Person** commencing:
> >
> > > (a) with the service of a subpoena upon such **Insured Person** in the case of an investigation by the Securities and Exchange Commission or a similar state or foreign government authority, receipt of a Wells Notice, receipt of a target letter or receipt of a formal order of investigation upon such Insured Person; or
> > >
> > > (b) on the date such **Insured Person** is identified in writing by the investigating authority, other than as stated in Section A.(4)(a) above, as a person against whom a proceeding described in Section A.(2) above may be commenced. However as respects this Section A.(4), a **Claim** shall not include a civil, criminal, administrative or regulatory investigation of the **Company.**

(Joint Stip., Ex. A, Primary Policy, Elite Coverage Endorsement, § 2. (replacing the term "Claim" at Primary Policy, § III.A.; emphasis added.)

It is undisputed that the SEC Order was issued to CareDx (the "**Company**" under the

Primary Policy) and not an "**Insured Person**." (Pl. UMF no. 21; Def. UMF no. 12.) Accordingly, the Court finds the plain language of the Primary Policy, III.A.(4)(b)), "a **Claim** shall not include a civil, criminal, administrative or regulatory investigation of the **Company,**" applies to the SEC investigation in this action, and it is not a **Claim** for the following reasons.

Plaintiff's contention that the SEC investigation is a "**Claim**" because it is a "demand for non-monetary" relief per III.A.(1), would require disregarding III.A.(4)(b) and result in verbal surplusage of III.A.(4)(b). "[I]nsurance contracts[] are to be construed to avoid rendering terms surplusage." (*Farmers Insurance Exchange v. Knopp* (1996) 50 Cal.App.4th 1415, 1421.)

Further, this Court finds the SEC documents in this case did not constitute demands for non-monetary relief. First, just a plain meaning analysis of the phrase "non-monetary relief" does not support Plaintiff's interpretation. "Relief" implies or connotes that the demanding entity has been aggrieved in some way by the other party and that the demand somehow corrects, alleviates or compensates the wrong. It also implies, as many cases note (e.g. *MusclePharm, infra*), something to be granted or awarded by a court. The SEC documents sought information, nothing more. Second, the authorities cited by Defendants support this interpretation. For example, a California federal court considered a very similar insurance policy and CID letter and found the CID neither sought non-monetary relief nor alleged any particular wrongdoing. (*NWHW Holdings, Inc. v. National Union Fire Insurance Company of Pittsburgh, P.A.* (CDCA 2023) 2023 WL 9375862 at *7; appeal filed January 23, 2024.) In *Center for Blood Research, Inc. v. Coregis Insurance Co.* (1st Cir. 2002) 305 F.3d 38, 40, the U.S. Attorney served a subpoena on the plaintiff to investigate Federal health care offenses. "There was no suggestion in the subpoena that the government was seeking anything other than information from the Center … and in fact, the Center acknowledges that the investigation did not result in the government bringing any charges against it." (*Id*., at p. 42.) The court viewed plaintiff as nothing more than a custodian of records and the subpoena did not qualify as a demand for non-monetary relief. (*Ibid*.) The language of the insurance policy and SEC letter in *MusclePharm Corporation v. Liberty Insurance Underwrites, Inc.* (10th Cir. 2017) Fed.Appx. 745, are remarkably similar. There, summary judgment in favor of the insurer was affirmed by the 10th Circuit because, in part, the insured had no claim against the insurer, as the SEC subpoena for documents did not constitute a demand for non-monetary relief. (*Id*., at pp. 753 – 754.) Third, the cases cited by Plaintiff that an SEC subpoena is a demand for nonmonetary relief per III.A.(1), appear distinguishable. Indeed, several are distinguished by the 10th Circuit within *MusclePharm, supra*. Plaintiff's authorities either conflict with a plain meaning analysis of the Primary Policy or do not address situations with policies containing language similar to III.A.(4)(b) within their definitions of "Claim."

Plaintiff's argument that the SEC investigation, by virtue of simply being opened and initiated, qualifies as a **Claim** under III.A.(1) is also not supported by a closer look at the terms and definitions in the Primary Policy and reading it as a whole. **Claim** must be read in conjunction with **Loss** in order to determine what is covered by the Primary Policy. "**Loss**" is defined in the Endorsement and the pertinent subsection is III.L.(5), which states that **Loss** shall not include: "any amount incurred by any **Insured** in a proceeding or investigation that is <u>not at that time a **Claim**</u>, even if such amount also benefits the defense of a **Claim** and even if such

proceeding or investigation subsequently gives rise to a **Claim**; provided, however, that this subsection shall not apply to otherwise covered costs, charges, fees and expenses incurred by an **Insured Person** as a result of an **Inquiry**." In order for underlined phrases to have meaning, this must contemplate situations where an investigation can begin/exist without automatically qualifying as a **Claim**. This reading of the Primary Policy as a whole further supports the finding herein that the SEC investigation of CareDx was not a **Claim**. The point here is that even if one disregards III.A.(4) as Plaintiff argues and looks at III.A.(1) alone to determine whether the SEC investigation is a **Claim**, it is not.

"**Inquiry**" is defined in the Endorsement as an added definition to the Policy. **Inquiry** shall mean: "(1) a request or demand for an **Insured Person** either to appear at a meeting, deposition or interview or to produce documents relating to the business of the **Company** or such **Insured Person's** capacity with the **Company**, where such request or demand is: (a) by any federal, state, local or foreign law enforcement authority or other governmental investigative authority (including but not limited to the U.S. Securities and Exchange Commission, U.S. Department of Justice or any attorney general)." The Amendment to Definitions then goes on to identify circumstances that **Inquiry** does not include, but then concludes this particular amendment by stating: "Coverage, subject to all other terms and conditions of the Policy, will be extended for an **Inquiry** whether or not a **Wrongful Act** is alleged."

A **Claim**, pursuant to III.A.(5), also includes an **Inquiry**. In order to give both III.A.(4) and (5) meaning, **Inquiry** must be read as a type of proceeding distinct from the investigation referenced in III.A.(4). Nevertheless, the **Inquiry** referred to in III.A.(5), just like the investigation referred to in III.A.(4), only provides coverage for an **Insured Person**. The **Company**, i.e. CareDx, is not covered for an **Inquiry**

Plaintiff's argument that III.A.(4) is solely a timing mechanism for triggering "when" an investigation of an **Insured Person** qualifies as a **Claim** is not persuasive. (Pl. Opposition at pp. 5 – 6.) If that were the case, the triggering event should logically apply to the **Company** as well. It makes no sense that a triggering event is only required for an **Insured Person** and not the **Company**. Indeed, the logic of including a triggering event seems plain – without a defined starting point demarcated by a dated writing from an enforcement entity, e.g. the SEC, there would undoubtedly be significant litigation over exactly when an insurer's obligation to being coverage starts. This interpretation is supported when **Claim** is compared to **Inquiry**. **Inquiry** applies only to **Insured Persons** and never mentions any coverage of the **Company**. Similar to the illogic of only applying triggering events to **Insured Persons**, it would make little sense to cover the Company for investigations and not **Inquires**.

Last, the grammatical structure of III.A. undermines Plaintiff's argument. The definition of **Claim** lists seven distinct types of claims in subparagraphs (1) through (7). Each should be treated in that manner. If, as Plaintiff argues, an SEC investigation is included within III.A.(1) and III.A.(4) is simply qualifying language for such an investigation as it pertains to **Insured Persons** versus the **Company**, then all of the language in III.A.(4) should be contained in subparagraphs to III.A.(1) and there should only be subparagraphs (1) through (6) in the definition.

VI. The SEC Investigation is not a "Securities Claim"

The SEC Investigation is not a "Securities Claim" under the Primary Policy.

> "**Securities Claim**" shall mean any **Claim** (including a civil lawsuit or criminal proceeding brought by the Securities and Exchange Commission) made against an **Insured** alleging a violation of any federal, state, local or foreign securities law, regulation, or rule, whether statutory or common law, which is: (1) brought by any person or entity arising out of, based upon or attributable to, in part or in whole, the: (a) purchase or sale of, or (b) offer or solicitation of an offer to purchase or sell, any securities of the **Company**, or (2). . .
>
> **Securities Claim** shall also include an administrative or regulatory proceeding alleging a violation of any federal, state, local or foreign securities law, regulation, or rule, whether statutory or common law against the **Company**, but only if and only during the time that such proceeding is also continuously maintained against an **Insured Person**.
>
> (Primary Policy, §III.P.)

The definition of "**Securities Claim**" incorporates the definition of "**Claim**" and, as such, the SEC investigation does not qualify for the same reasons above related to **Claim.** Further, even if the second clause above can be interpreted as including an SEC investigation, it does not apply because there is no evidence any such proceeding was also continuously maintained against an **Insured Person** simultaneously with the investigation at issue of CareDx as a company.

In this regard and although not on all fours, the Primary Policy has similar language to the policy in *Hertz Global Holdings, Inc. v. National Union Fire Insurance Company of Pittsburgh* (S.D.N.Y. 2021) 530 F.Supp.3d 447, 452, and the Court finds it to be persuasive where the District Court granted the defendants' motion to dismiss for failure to state a claim for breach of contract primarily because the SEC investigation was expressly excluded from coverage under the plain terms of the parties' insurance agreement and found, *inter alia:*

> With respect to Hertz, the policy covers any loss "arising from a Securities Claim made against such Organization." A "Securities Claim" is defined as "a Claim, ***other than an investigation of an Organization*** ... alleging" violation of securities laws or regulations. This language unambiguously excludes an SEC investigation against Hertz from coverage, as the phrase "other than an investigation of an Organization" is not susceptible to more than one meaning when viewed objectively." (*Hertz,* 530 F.Supp.3d at p. 454; citations omitted; emphasis in original.)

The definition of a "Securities Claim" under the policy includes "an administrative or

regulatory proceeding against an Organization." Policy ¶ 2(bb). Plaintiff argues that the SEC Formal Order of Investigation does not constitute an "investigation," which again is expressly excluded from coverage, but instead an "administrative or regulatory proceeding," which is expressly covered within the definition of a "Securities Claim." Undoubtedly, the SEC Formal Order of investigation initiates an investigation, not an administrative proceeding. First, it is clear from the face of the SEC Formal Order of Investigation that the SEC was only investigating potential wrongdoing as opposed to bringing any kind of action or proceeding against the company. (*Id*., at pp. 454 – 455.)

Therefore, to the extent a "Claim" is an investigation or does not allege violations of securities laws, Hertz is expressly barred from recovering under the policy. As explained above, the SEC Formal Order initiates an investigation. Hertz the organization therefore cannot recover for the costs of that investigation regardless of whether the SEC Formal Order fits into the definition of a "Claim." (*Id*., at p. 457.)

Plaintiff agreed to an insurance policy that would cover essentially any formal action against it, whether that be a private lawsuit (like *Ramirez*), an administrative proceeding, or criminal indictment, but expressly carved out that costs for 'investigations' into the organization would not be covered. (*Id*., at pp. 457 – 458.)

Thus, the policy in *Hertz* "carved out" investigations, the SEC investigation was not an administrative or regulatory proceeding, and the SEC was only investigating potential wrongdoing as opposed to bringing any kind of action. CareDx makes the same three arguments herein as the plaintiff in *Hertz* and applying a plain meaning analysis to the Primary Policy leads to the same result as *Hertz*.

The authorities cited in support of Plaintiff's argument for finding a **Securities Claim** (Pl. Motion at p. 15) are, as noted by Defendants, distinguishable on the basis that none appeared to deal with a disclaimer like the one at issue here in Defendant's UMF No. 14.

VII. The SEC Investigation Does not Allege a "Wrongful Act"

The Court finds that the disclaimer provided by the SEC in the documents sent to CareDx means the SEC was not alleging a **Wrongful Act**. The only potentially applicable definition of a **Wrongful Act** is:

(2) any actual or alleged act, omission, error, misstatement, misleading statement, neglect or breach of duty by the **Insured Entity**, but only with respect to Insuring Agreement I.C.;

(III.R.(2); See Pl. UMF no. 10 and Pl. Motion at p. 17.)

The **Insurer** shall pay on behalf of the **Insured Entity** all **Loss** which the **Insured Entity** shall be legally obligated to pay as a result of a **Securities Claim** first made against the **Insured Entity** during the **Policy Period** or the **Discovery Period** for a

Wrongful Act.

(I.C.)

This issue turns on the disclaimer in Defendants' UMF No. 14, which the Court finds establishes that no **Wrongful Act** was alleged under III.R.(2). The Court also considered Plaintiff's UMF Nos. 21 – 27 and Defendant's UMF No. 12. Again, omitting details in light of Motions to Seal. The Court finds the cases cited by Insurers, e.g. *NWHW* and *MusclePharm, supra,* are more persuasive than those cited by Plaintiff. (See also *Employers' Fire Insurance Company v. ProMedica Health Systems, Inc*. (6th Cir. 2013) 524 Fed.Appx. 241, 248; "FTC's use of the word [whether] in its communications to ProMedica, viewed in context, underscores the fact that the FTC did not affirmatively accuse ProMedica of antitrust violations. Rather, it simply discussed in hypothetical terms the possibility that an antitrust violation had or would occur. This is not enough to 'allege' wrongdoing."].)

The authorities relied upon by Plaintiff are distinguishable. For example, *Conduent, Agilis* and *Astellas* do not contemplate a similar disclaimer. (*Conduent State Healthcare, LLC v. AIG Specialty Insurance Company* (Del. Superior Court 2019) 2019 WL 2612829, *Agilis Benefit Services LLC v. Travelers Casualty and Surety Company of America* (E.D. Tex. 2010) 2010 WL 8573372, *Astellas US Holding, Inc. v. Starr Indemnity and Liability Company* (N.D. Ill. 2018) 2018 WL 2431969.) In *Cocrystal*, the Court made no finding as a matter of law because "there are factual disputes regarding whether the SEC was investigating Cocrystal's wrongful acts that preclude summary judgment for either party." (*Liberty Insurance Underwriters, Inc. v. Cocrystal Pharma, Inc.* (3rd. Cir. 2023) 2023 WL 3067498, at *4.) Further, the relevant subpoena in *Cocrystal* was issued to Cocrystal and its predecessor, it was uncertain who the target of the investigation was, and there was no mention of any disclaimer like the one in CareDx's SEC communications. (*Id*., at *2.) Although *180 Life Sciences* included a similar disclaimer as here (Pl. Reply RJN, Ex. D, page 9 of 113), it was not at issue in the opinion where it was noted that "the Insurers do not dispute that the SEC subpoenas constitute Claims under the policies." (*AmTrust International Underwriters DAC v. 180 Life Sciences Corp.* (NDCA 2024) 2024 WL 557724, at *5.) Here, there is no such stipulation by the Insurers and it's not clear from the opinion how the court would have ruled in the absence of such a concession, given its comment that "[o]n their face, the SEC subpoenas do not allege any Wrongful Acts at all; they merely request documents." (*Id*., at *6.)

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for Defendants shall prepare a written order consistent with the Court's ruling for the Court's signature, pursuant to CRC Rule 3.1312, and provide written notice of the ruling to all parties who have appeared in the action, as required by law and the CRC. The Court alerts the parties to revised Local Rule 3.403(b)(iv) (amended effective January 1, 2024) regarding the wording of proposed orders.

2:00
LINE 2

22-CIV-05190 CAREDX, INC. VS GREAT AMERICAN INSURANCE COMPANY

CAREDX, INC.	COLIN T KEMP
GREAT AMERICAN INSURANCE COMPANY	TIFFANY S SALTZMAN-JONES

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TENTATIVE RULING:

See Tentative Ruling for Line 1.

2:00
LINE 3
22-CIV-05190 CAREDX, INC. VS GREAT AMERICAN INSURANCE COMPANY

CAREDX, INC.	COLIN T KEMP
GREAT AMERICAN INSURANCE COMPANY	TIFFANY S SALTZMAN-JONES

PARTIES' MOTIONS TO SEAL

TENTATIVE RULING:

The parties have filed the following five (5) Motions to Seal various documents and pleadings, or portions thereof, as set forth in each of the Motions (listed in order of filing date):

1. 1.4.24: Joint Motion by all Parties
2. 2.2.24: Motion by Plaintiff
3. 2.2.24: Motion by Great American Insurance Company
4. 3.1.24: Motion by Great American Insurance Company
5. 3.1.24: Motion by Plaintiff

All five Motions are **GRANTED**.

The 1.4.24 Joint Motion to seal is based on the following grounds:

> First, the SEC explicitly designated its investigation "non-public" and the SEC Order as "confidential." Second, the Parties have an overriding interest in not disclosing the investigations' details because related underlying shareholder lawsuits against CareDx are still pending. California courts have for decades recognized the need to protect insureds from disclosures in coverage litigation where prejudice to their defense of underlying litigation would result. Further, the SEC's decision not to recommend an enforcement action cuts against any public interest in the substance of the government's unsubstantiated allegations.

(Joint Motion, at p. 7:13-20.) Specifically, the sealed portions pertain to:

> Allegations and statements contained in the Securities and Exchange Commission Order Directing Private Investigation and Designating Officers to Take Testimony (the "SEC Order"), Securities and Exchange Commission subpoena (the "SEC Subpoena"), and Civil Investigative Demand ("CID")

(Joint Motion, at p. 2:13-16.) In her declaration, CareDx's counsel states,

> I understand that the SEC Order, SEC Subpoena and CID were served on CareDx in or around the fall of 2021. My understanding is that they were not made public

> at any time before or after they were served on CareDx. The SEC Order and SEC Subpoena make clear they are "non-public" and thus, from what I understand, they were never made available to anyone other than the SEC and CareDx. The CID states that it was not served on any other persons besides CareDx, which I understand to mean that the only persons who received a copy of the CID were the Department of Justice, the SEC, and CareDx.

(Joint Motion, Bruno Dec., at ¶ 2.)

The circumstances and facts argued in support of the Joint Motion were also the bases for the subsequent four Motions. Based upon the Motions and the facts and arguments specified herein, the Court finds CRC Rule 2.550(d) has been satisfied and justifies granting the sealing requests. Specifically: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest. With respect to Rule 2.550(d)(4), the parties have been very diligent in only redacting as few documents as possible and then only certain references to and quotations from those documents in other materials/pleadings.

If the tentative ruling is uncontested, it shall become the order of the Court. Thereafter, counsel for the parties shall prepare a written order (or orders) consistent with the Court's ruling for the Court's signature. The parties shall prepare the order(s) in conformity with CRC Rules 2.550(d) & (e) and 2.551(e). The parties can prepare one global order addressing all of the sealed materials or separate orders for each Motion if the parties feel that makes a cleaner record. The Court believes either will suffice and has no preference.