IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

INFINITY Q CAPITAL MANAGEMENT, LLC, LEONARD POTTER and SCOTT LINDELL,	)	
Plaintiffs,	)	C.A. No. N21C-07-158 EMD CCLD
v.	)	
TRAVELERS CASUALTY AND SURETY COMPANY, AXIS INSURANCE COMPANY, and ARCH INSURANCE COMPANY,	)	
Defendants.	)	

Submitted: May 5, 2022[1]
Decided: August 15, 2022

Upon Plaintiffs' Motion for Summary Judgment
DENIED
Upon Defendants' Motion for Summary Judgment
GRANTED

Jennifer C. Wasson, Esquire, Carla M. Jones, Esquire, Potter Anderson & Corroon LLP, Wilmington, Delaware, Kenneth H. Frenchman, Esquire, Andrew N. Bourne, Esquire, Cohen Ziffer Frenchman & McKenna LLP, New York, New York, *Attorneys for Plaintiffs Infinity Q Capital Management, LLC, Leonard Potter and Scott Lindell.*

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[1] D.I. No. 120.

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Curtis J. Crowther, Esquire, Robinson & Cole LLP, Wilmington, Delaware, Erica J. Kerstin, Robinson & Cole, LLP, New York, New York, *Attorneys for Defendant AXIS Insurance Company*.

DAVIS, J.

I. INTRODUCTION

This civil action is assigned to the Complex Commercial Litigation Division of this Court. Plaintiffs Infinity Q Capital Management LLC ("Infinity Q"), Leonard Potter, and Scott Lindell (collectively, the "Insureds") filed a Complaint on July 21, 2021. In the Complaint, the Insureds assert three claims against Defendants Travelers Casualty and Surety Company ("Travelers"), AXIS Insurance Company ("AXIS"), and Arch Insurance Company ("Arch") (collectively, the "Insurers"): (i) Count I- declaratory relief against the Insurers for defense obligations in connection with Noticed Matters; (ii) Count II- declaratory relief against the Insurers for indemnification obligations; and (iii) Count III- declaratory relief against Travelers for anticipatory breach of contract.[2]

Presently, the Court addresses cross motions for summary judgment.[3] The Insureds move for partial summary judgment on Count I of their Complaint (the "Insureds Motion") and request that the Court declare that the Insurers are obligated to advance the Insureds' defense costs incurred in connection with the Noticed Matters.[4] The Insurers move for summary judgment

[2] *See* Compl.
[3] The Court previously heard argument related to the Insureds Motion on November 23, 2021. The Court stayed Insureds Motion pending limited discovery. *See* D.I. No. 75.
[4] The Noticed Matters are explained in detail *infra* Section II.

(the "Insurers Motion") and argue that the Insureds' prior knowledge excludes them from coverage.

For the reasons stated below, the Insureds Motion is **DENIED,** and the Insurers Motion is **GRANTED**.

II. RELEVANT FACTS

A. PARTIES

Infinity Q is a registered investment advisor organized as a limited liability company under the laws of the state of Delaware.[5] Infinity Q's principal place of business is in New York.[6] Infinity Q was established in 2014 by James Velissaris, Infinity Q's Chief Investment Officer, to manage capital using various strategies including complex derivative strategies.[7]

Infinity Q is investment advisor for two funds: (i) Infinity Q Diversified Alpha Fund ("IQDAF"); and (ii) Infinity Q Volatility Alpha Fund ("IQDVF"). IQDAF is a mutual fund. While Infinity Q is the investment advisor, IQDAF is issued by non-party Trust for Advised Portfolios" ("TAP" or the "Trust").[8] Prior to February 2021, IQDAF's non-cash portfolio included a significant number of bilateral over the counter positions (the "Bilateral OTC Positions") that Infinity Q valued using Bloomberg's Evaluated Pricing tool ("BVAL").[9] According to the parties, Bilateral OTC Positions are sometimes referred to as "swaps."[10]

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[5] Compl. ¶ 12.
[6] *Id*.
[7] Insureds Mot. at 7 (citing Declaration of Leonard Potter, ¶ 2).
[8] *Id*. at 7-8. "TAP provides transfer agent services, fund administration services (including compliance financial reporting, board of directors, etc.), fund accounting services, and custody services." *Id.* at 8.
[9] *Id*. at 8. The Insureds contend that "in the context of valuing the Bilateral OTC Positions, Infinity Q was not only permitted to arrive at a valuation, but it was also required to do so, and it had significant discretion about how it did so. This overlooked fact is important because, as Infinity Q had discretion in how to value these securities used by the Fund, an SEC inquiry into how Infinity Q valued these securities does not in and of itself mean that Infinity Q had any reason to believe it would be subject to a claim later." Plaintiffs' Omnibus Brief in Opposition to Defendants' Motion for Summary Judgment and in Further Support of their Motion for Patrial Summary Judgment on Advancement of Defense Costs (hereinafter "Insureds Opp.") at 6-7.
[10] Insurance Companies Mot. at 4.

Leonard Potter is a director of Infinity Q.[11] Scott Lindell is the Chief Operating Officer, Chief Risk Officer, and Chief Compliance Officer of Infinity Q.[12]

Travelers is a corporation organized under the laws of Connecticut, with its principal place of business in Connecticut.[13] AXIS is a corporation organized under the laws of Illinois, with its principal place of business in Georgia.[14] Arch is a corporation organized under the laws of Missouri, with its principal place of business in New Jersey.[15] The Insurers are all licensed to do business in the state of Delaware.[16]

B. THE FEDERAL PRIMARY POLICY

In exchange for a premium, non-party Federal Insurance Co. ("Federal") issued a Chubb Asset Management Protector insurance policy, Policy No. 8251-9651, (the "Federal Primary Policy").[17] The Federal Primary Policy provides $5 million in coverage in excess of a $500,000 retention, for the policy period August 20, 2020 to August 20, 2021.[18] The Federal Primary Policy contains coverage parts potentially applicable to the facts of the Noticed Matters including: "(a) Directors & Officer Liability Coverage; (b) Professional Liability Coverage, Fund Adviser Liability Coverage; (c) Investment Company Coverage; and (d) Private Fund Coverage."[19] The Fund Advisor Liability Coverage provides:

> Fund Adviser Liability: The Company shall pay, on behalf of an Investment Adviser, Loss which such Investment Adviser becomes legally obligated to pay on account of any Claim first made against such Investment Adviser during the Policy Period or, if exercised, during the Extended Reporting Period, for a Wrongful Act by such Investment Adviser or by any entity or natural person for whose acts the

[11] Compl. ¶ 13.
[12] *Id.* ¶ 14.
[13] *Id.* ¶ 15.
[14] *Id.* ¶ 16.
[15] *Id.* ¶ 17.
[16] *Id.* ¶¶ 15, 16, 17.
[17] Plaintiffs' Motion for Partial Summary Judgment on Advancement of Defense Costs (hereinafter "Insureds Mot.") at 3 (citing Declaration of Andrew N. Bourne, dated Sept. 20, 2021 (hereinafter "Bourne Decl."), Ex. A).
[18] *Id.*
[19] *Id.* (citing Bourne Decl., Ex. A).

> Investment Adviser becomes legally liable, in the performance of or failure to perform Investment Adviser Services for or on behalf of an Investment Fund, before or during the Policy Period.[20]

The Federal Primary Policy defines Investment Adviser as "any Organization that is registered as an adviser under the Investment Advisers Act of 1940, solely in its capacity as such; and any Insured Person of any Organization identified in (I)(1) above, but solely in his or her capacity as an Executive or Employee of such Organization."[21] Further, the Federal Primary Policy states:

> Investment Adviser Services means:
>
> (1) financial, economic, or investment advice regarding investments in securities;
>
> (2) investment management, administrative services, portfolio management and asset allocation services performed;
>
> (3) the selection and oversight of investment advisers or outside service providers; and
>
> (4) any of the activities or services identified in (J)(1), or (J)(3) above, while performed in the capacity of a fiduciary pursuant to ERISA, for or on behalf of a client pursuant to a written contract between such client and an Investment Adviser for consideration; and
>
> (5) the publication of written material, whether in tangible or electronic format, in connection with any of the activities or services identified in (J)(1), (J)(2), (J)(3) or (J)(4) above.[22]

The Federal Primary Policy includes coverage for Investment Company Liability and provides the following:

> The Company shall pay, on behalf of an Investment Company, Loss which such Investment Company becomes legally obligated to pay on account of any Claim first made against the Investment Company during the Policy Period or, if exercised, during the Extended Reporting Period, for a Wrongful Act by such

[20] Bourne Decl., Ex. A at Asset Management Protector Part, § I(B).
[21] *Id.* § II(I).
[22] *Id.* § II(J).

> Investment Company or by any natural person or entity for whose acts the Investment Company becomes legally liable, before or during the Policy Period.[23]

The Federal Primary Policy defines Infinity Q Diversified Alpha Fund as an Investment Company.[24] Infinity Q, not Chubb, must defend any Claim.[25] Chubb is required to advance defense costs on a current basis.[26] The Federal Primary Policy provides the following about defense costs:

> Defense Costs shall be advanced on a current basis, but no later than ninety (90) days after receipt by the Company of invoices or bills detailing such Defense Costs and all other information requested by the Company with respect to such invoices or bills. The Company shall not seek repayment from an Insured Person of advanced Defense Costs unless there has been a final, non-appealable adjudication against such Insured Person of the conduct set forth in the applicable personal conduct exclusion.[27]

C. THE INSURANCE COMPANIES' EXCESS POLICIES

Beginning in 2014, Infinity Q had a $5 million policy from Chubb as its sole source of professional liability coverage.[28] Infinity Q inquired, in August 2019, from its broker in August 2019 about excess coverage because Infinity Q's assets had grown substantially since its inception.[29] However, Infinity Q did not purchase excess coverage at that time because Mr. Velissaris "forgot to follow up."[30]

In August 2020, each of the Insurers issued excess executive and organization liability insurance policies covering the Insureds.[31] On August 12, 2020, Gordon Gray of the AmWINS Brokerage of New York, Infinity Q's wholesale broker, sent Travelers, AXIS, and Arch separate

[23] Bourne Decl., Ex. A at Investment Company Coverage Part, § I.
[24] *Id.* at Endorsement 16.
[25] *Id.* at General Terms and Conditions, § VII(A).
[26] *Id.* at General Terms and Conditions, § VII(B).
[27] *Id.* at Endorsement 7.
[28] Insurance Companies Mot. at 10.
[29] *Id.*
[30] *Id.* (citing Supp. Ward Decl., Ex. Q).
[31] Insureds Mot. at 6.

emails with "a new business $5M xs $5M Financial D&O/E&O submission for the captioned account Infinity Q Capital Management."[32]

On August 13, 2020, Travelers sent Mr. Gray a "$5M xs $5M quote" and advised that Travelers "would need an excess warranty signed if this binds."[33] There are no discussions of the content of the "excess warranty" nor is there information as to whether it would contain a "Prior Knowledge Exclusion."[34] On August 19, 2020, AXIS "offer[ed] $5M xs $10M" with "a Fresh warranty," and Arch quoted the $5 million excess of $15 million layer, advising that "[w]e will need our warranty signed and dated."[35]

On August 20, 2020, Infinity Q's retail broker—Maria Hass of World Insurance Associates LLC—emailed the quotes from Travelers, Arch and AXIS to Mr. Lindell and Mr. Velissaris.[36] The email provides:

> To BIND:
>
> - Send a note in "writing that you would like to bind all 3 layers of EXCESS"
> - Complete the Warranty statements as they are required to BIND[37]

The email included two copies of the same draft Warranty Letter.[38] The Warranty Letter reads:

> [Date]
>
> Arch Insurance Group, Inc.
> One Liberty Plaza
> 53rd Floor
> New York, NY 10006
>
> Re: [Proposed Named Insured]
> [Name of Insurance Policy Applied for and/or Coverage Part if applicable]
> [Limit of Liability if split layer or increased Limit]

[32] *Id.* (citing Ward. Decl., Ex. A).
[33] Ward Decl., Ex. A.
[34] Compl. ¶ 30.
[35] Insurance Companies Mot. at 11 (citing Ward Decl., Ex. A).
[36] Insurance Companies Mot. at 11 (citing Supp. Ward Decl., Ex. S).
[37] Supp. Ward Decl., Ex. S.
[38] *Id.* The draft warranty letters were addressed to Arch.

> To whom it may concern:
>
> No person or entity for whom this insurance is intended has any knowledge or information of any act, error, omission, fact or circumstance that may give rise to a claim under the proposed insurance.
>
> It is agreed that any claim for, based upon, arising from, or in any way related to any act, error, omission, fact or circumstance of which any such person or entity has any knowledge or information shall be excluded from coverage under the proposed insurance.
>
> It is also agreed that Arch Insurance Group Inc. and its insurance company subsidiaries are relying upon the above representation and that this letter shall be deemed incorporated into any insurance policy issued for the proposed insurance.
>
> Sincerely,
> [Proposed Named Insured][39]

Mr. Lindell emailed Ms. Haas a response, stating that she "sent 2 warranty statements (they are the same). I assume I can send one?"[40] Ms. Haas replied that "[e]ach carrier sent one—since they do look the same we can just copy the one."[41] Mr. Lindell responded with an email stating:

> Maybe I do need multiple warranties? Otherwise how should I fill this out? Can you let me know what to put in these places?
>
> Re: [Proposed Named Insured]
> [Name of Insurance Policy Applied for and/or Coverage Part if applicable]
> [Limit of Liability if split layer or increased Limit][42]

Ms. Haas responded by email, advising Mr. Lindell:

> 1. INFINITY Q CAPITAL MANAGEMENT, LLC
> Excess limits 5x 5m
>
> 2. INFINITY Q CAPITAL MANAGEMENT, LLC
> Excess Limit 5mx 15M
>
> The other carrier didn't require one.[43]

[39] *Id.*
[40] Insurance Companies Mot. at 12 (citing Supp. Ward Decl., Ex. T).
[41] Supp. Ward Decl., Ex. T.
[42] *Id.*
[43] *Id.*

Mr. Lindell then sent a final email to Ms. Haas on August 20, 2020, which stated: "Thanks! We would like to bind all three layers of excess. Warranties attached. Please let us know if you need anything else."[44] Attached to the email were two copies of the draft Warranty Letter signed by Mr. Lindell on behalf of Infinity Q, one referred to the "Excess Limits 5mx 15m," the layer of coverage procured from Arch, and the other referred to "Excess Limits 5x 5m," the layer of coverage procured from Travelers.[45]

Mr. Gray, on the same day, sent Travelers, AXIS, and Arch separate emails stating he "'received instructions to bind' their respective quotes 'effective 8/20/2020.'"[46] Attached to the emails to Travelers and Arch were the August 20, 2020 Warranty Letters, signed by Mr. Lindell on behalf of Infinity Q.[47] "[T]he AXIS Binder conditioned coverage on receipt of a Warranty Letter, and in response Infinity Q provided AXIS with the Warranty Letters."[48]

Travelers then issued a SelectOne+ Excess Policy, Policy No. 107306224 (the "Travelers Policy") that provides the Insureds with $5 million in coverage in excess of the $5 million in coverage provided by the Federal Primary Policy.[49] The Travelers Policy follows form, in relevant part, to the Federal Primary Policy.[50] The policy period for the Travelers Policy was August 20, 2020 to August 20, 2021.[51]

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[44] *Id.*
[45] *Id.* Both letters attached were addressed to Arch.
[46] Insurance Companies Mot. at 13 (citing Declaration of Jeffrey J. Ward (hereinafter "Ward Decl."), Ex. A; Declaration of Curtis J. Crowther in Support of Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment (hereinafter "Crowther Decl."), Ex. A; Declaration of James M. Young (hereinafter "Young Decl."), Ex. A).
[47] *Id.* at 14 (citing Ward Decl., Ex. A; Young Decl., Ex. A). Both letters were addressed to Arch. Insureds Mot. at 6; Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment on Advancement of Defense Costs (hereinafter "Insurance Companies Opp.") at 8; Bourne Decl., Ex. C. There is some dispute as to who intentionally received the Warranty Letter because it was addressed to Arch and not each of the Excess Insurers.
[48] Insurance Companies Opp. at 40 (citing Crowther Decl., Ex. B).
[49] Insureds Mot. at 6 (citing Bourne Decl., Ex. B).
[50] *Id.*
[51] Bourne Decl., Ex. B.

On August 19, 2020, AXIS issued Excess Insurance to the Insureds for a policy period beginning August 20, 2020.[52] The Policy No. 1010302 0817 (the "AXIS Policy") provides $5 million in coverage in excess of the underlying $10 million in coverage and also follows form to the Federal Primary Policy.[53]

Arch issued an Arch Essential Excess Policy, Policy No. IAX1000020-00, (the "Arch Policy") (together with the Travelers Policy and the AXIS Policy, the "Excess Policies").[54] The Arch Policy provides $5 million in coverage in excess of the underlying $15 million and also follows form to the Federal Primary Policy.[55]

All three Excess Policies "follow form to the Primary Policy except as otherwise provided in the Excess Policies."[56]

In addition to the Warranty Letter, the Excess Policies each contain their own prior or pending litigation exclusions.[57] The Travelers Policy bars coverage for "any claim based upon or arising out of any prior or pending civil, criminal, administrative or regulatory proceeding against any Insured as of or prior to the Specified Prior or Pending Proceeding Date."[58] The AXIS Policy bars coverage for any claim "based upon, arising from, or in consequence of Pending or Prior Litigation, which is defined as "any demand, arbitration, suit, administrative, regulatory, criminal or other proceeding pending against . . . any Insured, on or prior to" August 20, 2020.[59] The Arch Policy bars coverage for loss "arising out of, based upon or attributable to" "any demand, suit or formal or informal investigation occurring prior to, or pending as of,

[52] Bourne Decl., Ex. D.
[53] *Id.*
[54] Insureds Mot. at 7; Bourne Decl., Ex. E.
[55] *Id.*
[56] Insurance Companies Mot. at 14.
[57] *See id*.
[58] Bourne Decl., Ex. B (Prior or Pending Litigation Exclusion Endorsement).
[59] Bourne Decl., Ex. D (Pending or Prior Litigation Exclusion Amended for Higher Limits Endorsement); Bourne Decl., Ex. A (Professional Liability Coverage Part, § III.(B), and General Terms and Conditions, § II.(S)).

8/20/2020" or "any Wrongful Act which gave rise to such prior or pending demand, suit or formal investigation or any Interrelated Wrongful Acts thereto."[60]

D. THE NOTICED MATTERS

The term "Noticed Matters" refers to: (a) an investigation by the Securities and Exchange Commission ("SEC"), styled *In the Matter of Infinity Q Capital Management, LLC,* No. NY-10234 (SEC Order of Sept. 15, 2020) (the "SEC Investigation"); (b) the actions styled *Yang v. Trust for Advised Portfolios, et al.*, No. 1:21-cv-01047 (E.D.N.Y) (the "Yang Action"); *Hunter v. Infinity Q Diversified Alpha Fund, et al.*, Index No. 651295/2021 (N.Y. Sup. Ct.) (the "Hunter Action"); *Rosenstein v. Trust for Advised Portfolios, et al.*, Index No. 651302/2021 (N.Y. Sup. Ct.) (the "Rosenstein Action"); *Sokolow v. Trust for Advised Portfolios, et al.*, No. 1:21-cv-2317 (E.D.N.Y.) (the "Sokolow Action"); *Oak Financial Group, Inc. v. Infinity Q Diversified Alpha Fund, et al.*, Civ. Action No. 1:21-cv-03249 (E.D.N.Y) (the "Oak Financial Action") (collectively, the "Underlying Actions"); and (c) an investigation by United States Attorney's Office for the Southern District of New York (the "SDNY Investigation").[61]

The Insurers submitted an addendum to the Insurers Motion which states that "[t]he parties agreed during discussions between counsel that these four actions are also Underlying[/Noticed] Matters."[62] The additional Noticed Matters include: (1) an indictment which was unsealed February 16, 2022, captioned *United States v. Velissaris*, No. 1:22-cr-00105-DLC (S.D.N.Y.) (the "Indictment");[63] (2) a civil enforcement action filed by the SEC on

[60] Bourne Decl., Ex. E (Prior or Pending Litigation Exclusion).
[61] Insureds Mot. at 1, n.1.
[62] D.I. No. 107.
[63] "The Indictment alleges Velissaris defrauded investors from at least 2018 through February 2021 by, for example, manipulating the computer code of a third-party asset pricing model and by inputting into that model false transaction terms to inflate the reported value of Infinity Q fund assets. The Indictment also alleges Velissaris (and 'CC-1,' Infinity Q's chief compliance and risk officer, plaintiff Scott Lindell in this coverage action) obstructed the SEC's inquiry in May and June 2020, by among other things, altering or forgoing documents produced to the SEC." *Id.* at 1 (citations omitted).

February 17, 2022, captioned *SEC v. Velissaris*, No. 1:22-cv-01346 (S.D.N.Y) (the "SEC Action"); (3) a civil enforcement action filed by the CFTC on February 17, 2022, captioned *CFTC v. Velissaris*, No. 1:22-cv-01347 (S.D.N.Y) (the "CFTC Action") (collectively with the SEC Action, the "Enforcement Actions");[64] and (4) a securities class action complaint filed by investors captioned *Schiavi + Co., et al. v. Trust for Advised Portfolios, et al.*, No. 1:22-cv-00896 (S.D.N.Y., Feb. 17, 2022) (the "Schiavi Class Action").[65]

E. THE SEC INQUIRY AND INFINITY Q'S INTERNAL AND EXTERNAL RESPONSES

On May 13, 2020, the SEC Division of Enforcement sent a letter (the "First Inquiry Letter") with the caption "In the Matter of Infinity Q Capital Management, LLC (MNY-10234)."[66] The SEC addressed the First Inquiry Letter to Mr. Lindell, advising that the SEC was "conducting an inquiry [of Infinity Q] to determine if violations of the federal securities laws have occurred."[67] This letter also included a request for documents including "all valuation policies," "[d]ocuments sufficient to identify the net asset value of the Infinity Q Funds," and documents regarding "concerns about the valuation of assets held by the Infinity Q Funds," "concerns about models for the valuation of assets held by the Infinity Q Funds" or "concerns about or by any broker, dealer, counterparty, or other third party [c]oncerning price quotes or 'marks' for any securities, derivatives, or other assets purchased, sold, or held by the Infinity Q Funds."[68]

The First Inquiry Letter contained the following language:

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[64] These actions "also allege Velissaris inflated asset valuations by manipulating the third-party pricing model's computer code and inputting false transaction terms continually from 2017 through 2021. Like the Indictment, the Enforcement Actions allege Velissaris attempted to conceal his fraud by forging documents provided to the SEC and Infinity Q's auditor." *Id.* at 2 (citations omitted).
[65] *Id.* at 1-2.
[66] Insurance Companies Opp. at 5 (quoting Ward Decl., Ex. K); Insurance Companies Mot. at 4.
[67] *Id.*
[68] *Id.*

> This inquiry is a non-public, fact-finding inquiry. The inquiry does not mean that we have concluded that you or anyone else has violated the law. Also, the inquiry does not mean that we have a negative opinion of any person, entity, or security. Enclosed is a copy of the Commission's Form 1661 entitled "Supplemental Information for Regulated Entities Directed to Supply Information Other Than Pursuant to a Commission Subpoena." Form 1661 explains how we may use the information you provide to the Commission and has other important information for you.[69]

The First Inquiry Letter also included "the SEC Form 1661, which advises that SEC document requests are mandatory for registered investment advisers, such as Infinity Q."[70]

David Tutor, Senior Counsel in the SEC's Division of Enforcement, signed the First Inquiry Letter.[71] Mr. Tutor called Infinity Q on May 13, 2020, and left a message asking to speak with someone at Infinity Q regarding the "open inquiry."[72] After receiving this message, Mr. Lindell messaged Mr. Velissaris writing: "WTF? Open inquiry."[73]

On May 13, 2020, Mr. Velissaris emailed Infinity Q's counsel at Dechert LLP writing: "[Infinity Q] received a request for information from the SEC, and would like to have a quick call tomorrow morning."[74] Infinity Q's counsel responded on May 14, 2020 and asked " . . . what part of the SEC? I can then find the right group here."[75] Dechert formed a team that included Anthony Kelly, former co-chief of the SEC Division of Enforcement's Asset Management Unit, whose practice focused on trial, investigations and securities litigation, to assist Infinity Q."[76]

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[69] Ward Decl., Exs. K, L.
[70] Insurance Companies Opp. at 6 (citing Ward Decl., Exs. K, L); Insurance Companies Mot. at 4.
[71] Insurance Companies Mot. at 5 (citing Supplemental Declaration of Jeffrey J. Ward dated January 31, 2022 (hereinafter "Supp. Ward Decl."), Ex. A).
[72] *Id.* (citing Supp. Ward Decl., Ex. A).
[73] *Id.* (citing Supp. Ward Decl., Ex. A).
[74] *Id.* (citing Supp. Ward Decl., Ex. B).
[75] *Id.* (citing Supp. Ward Decl., Ex. B).
[76] *Id.* (citing Supp. Ward Decl., Ex. C).

Also on May 13, 2020, Mr. Velissaris sent an email to Mr. Lindell with a link to an SEC press release announcing the SEC's April 21, 2020 proposal to "establish a framework for fund valuation practices" that would subject investment advisers determining fair value of fund investments to additional oversight requirements.[77]

On May 14, 2020, Mr. Lindell emailed Mr. Jensen, the Trust's Chief Compliance Officer, and Mr. Kashmerick, the Trust's Principal Executive Office, cc'ing Mr. Velissaris.[78] Mr. Lindell wrote:

> . . . We have received the attached inquiry from the SEC. The request centers on our valuation policies and procedures for all IQ funds. Please see schedule C in the Infinity Q Capital Management pdf included in the zip file attached here.
> There are 9 requests, most of which are easy to produce. We will coordinate the response to this request from our side, but will interact with fund accounting to fulfill requests 6-8.
> We have looped in Alaric and Dechert and are discussing. . . .[79]

Mr. Jensen replied that "it looks fairly routine."[80] Mr. Lindell then responded that "nothing is ever routine with [the SEC] but appreciate your feedback. Hopefully this is over quickly."[81] Mr. Lindell later sent a Document Preservation Notice for the SEC inquiry to Mr. Velissaris and Joe McDermott of Alaric Compliance."[82]

On May 20, 2020, Mr. Lindell and Mr. Velissaris exchanged a series of messages.[83] The following messages are of importance to the present dispute:

Mr. Velissaris:	I can join that Dechert call as well
Mr. Lindell:	cool. thx
Mr. Velissaris:	Should have Shaw increase the insurance

[77] *Id.* at 6-7 (citing Supp. Ward Decl., Ex. F).
[78] *Id.* at 6 (citing Supp. Ward Decl., Ex. D).
[79] *Id.* (citing Supp. Ward Decl., Ex. D).
[80] *Id.*
[81] *Id.*
[82] *Id.* (citing Supp. Ward Decl., Ex. E).
[83] Supp. Ward Decl., Ex. P.

We had talked about it last year
But I forgot to follow up
Should we*

Mr. Lindell: policy renews in July/August. We should definitely increase it this year. we held at 5mm last year
you good for the call at 3[84]

On May 27, 2020, Mr. Lindell and Mr. Velissaris exchanged another series of messages.[85] Mr. Lindell wrote to Mr. Velissaris "that the SEC had 'added another attorney' to the inquiry and provided a link to an SEC press release regarding an enforcement action prosecuted by that added attorney."[86]

On May 29, 2020, Infinity Q responded to the First Inquiry Letter.[87] After the response was submitted, Mr. Lindell emailed Dechert and stated that he would "let you know when we receive an official response (the attorney confirmed receipt) and can move forward from there."[88] Mr. Lindell and Dechert had a follow-up call on June 1, 2020, which included Anthony Kelly and Dennis Lawson.[89] Mr. Lawson is an attorney who represents investment advisers in "investigations and proceedings before the [SEC]."[90]

On June 23, 2020, the SEC sent an additional letter (the "Second Inquiry Letter") to Mr. Lindell requesting further documents regarding the Infinity Q valuation committee.[91] The Second Inquiry Letter contained some similar language to the First Inquiry Letter, including:

> This inquiry is a non-public, fact-finding inquiry. The inquiry does not mean that we have concluded that you or anyone else has violated the law. Also, the inquiry does not mean that we have a negative opinion of any person, entity, or security. Enclosed is a copy of the Commission's Form 1661 entitled "Supplemental Information for Regulated Entities Directed to Supply Information Other Than

[84] *Id.*
[85] Supp. Ward Decl., Ex. G.
[86] Insurance Companies Mot. at 7 (citing Supp. Ward Decl., Ex. G).
[87] *Id.* (citing Supp. Ward Decl., Ex. H).
[88] *Id.* (citing Supp. Ward Decl., Ex. I).
[89] *Id.* (citing Supp. Ward Decl., Ex. I).
[90] *Id.*
[91] *Id.* at 8 (citing Ward Decl., ¶ 33; Ex. L).

> Pursuant to a Commission Subpoena." Form 1661 explains how we may use the information you provide to the Commission and has other important information for you.[92]

The Second Inquiry Letter also provided that "the SEC Form 1661, which advises that SEC document requests are mandatory for registered investment advisers, such as Infinity Q."[93]

The same day, Mr. Lindell notified Dechert, Mr. Jensen at the Trust, and Mr. McDermott at Alaric.[94] Mr. Velissaris and Mr. Lindell exchanged a series of messages on July 7, 2020.[95] Mr. Lindell later wrote that the second submission to the SEC was complete and that "unlikely, but I hope we never hear from them again."[96]

On August 10, 2020, Mr. Jensen sent a Chief Compliance Officer Update to the Trust's Board of Trustees.[97] The update advised about the two document inquiries and that the SEC inquiry was "ongoing."[98] Mr. Jensen also wrote that "Infinity Q has resolved the firm's valuation issues and overall, decreased compliance risks, which were observed at the 2019 site visit. However, the complexity of Adviser's strategy employed to the Fund continues to warrant more enhanced oversight and the results of the SEC enforcement inquiry remain unknown."[99] At the August 13-14, 2020, quarterly meeting of the Board of the Trustee, the minutes recorded that the SEC "inquiry is ongoing."[100]

Mr. Lindell and Mr. Velissaris exchanged a series of messages on August 14, 2020 about a call involving the Trust's accounting firm, EisnerAmper.[101] Mr. Lindell wrote that he "hope[d]

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[92] Ward Decl., Exs. K, L.
[93] Insurance Companies Opp. at 6 (citing Ward Decl., Exs. K, L); Insurance Companies Mot. at 4.
[94] *Id.* (citing Supp. Ward Decl., Exs. J, K).
[95] Supp. Ward Decl., Ex. L.
[96] Insurance Companies Mot. at 8 (citing Supp. Ward Decl., Ex. L).
[97] *Id.* (citing Supp. Ward Decl., Ex. M).
[98] *Id.*
[99] Supp. Ward Decl., Ex. M.
[100] Supp. Ward Decl., Ex. N.
[101] Insurance Companies Mot. at 9 (citing Supp. Ward Decl., Ex. O).

they don't bring up SEC with EA [EisnerAmper] on the call," and expressed his belief that Ryan Tyas, EisnerAmper's representative at the Trust's Board meeting earlier that day, "hopped off before Steve [Jensen] asked the SEC question!"[102] Mr. Velissaris replied "Nice!"[103] In a chat between Mr. Velissaris and Mr. Lindell three days prior, Mr. Lindell wrote "im not providing EA our SEC interactions" and "just going to say there was no correspondence."[104]

Infinity Q learned in the fall of 2020 that the SEC would be commencing an investigation, which generally alleged that Infinity Q may have been employing schemes to defraud clients or prospective clients. In November 2020, the SEC issued a subpoena to Infinity Q as part of the SEC Investigation.[105]

On February 18, 2021, Infinity Q informed the IQDAF that Infinity Q's Chief Investment Officer had been adjusting certain parameters within BVAL that impacted the valuation of certain of the Bilateral OTC Positions.[106] Infinity Q made this disclosure from information shared with Infinity Q by the SEC's staff[107]

On February 19, 2021, Infinity Q informed IQDAF that Infinity Q was unable to conclude that the values it had previously determined for the Bilateral OTC Positions were reflective of their fair value.[108] Infinity Q then informed IQDAF that it would not be able to calculate a fair value for any of the Bilateral OTC Positions in sufficient time to calculate an accurate net asset value ("NAV") for at least several days.[109]

[102] *Id.* (citing Supp. Ward Decl., Ex. O).
[103] *Id.* (citing Supp. Ward Decl., Ex. O).
[104] *Id.* (citing Supp. Ward Decl., Ex. P).
[105] Insureds Mot. at 8.
[106] Insureds Mot. at 8.
[107] *Id.*
[108] *Id.*
[109] *Id.*

On February 19, 2021, Infinity Q also "informed the SEC that IQDAF was uncertain when it would be able to calculate a NAV that would enable it to satisfy requests for redemptions of IQDAF's shares and requested an order from the SEC to suspend redemptions and stop calculating the NAV."[110] The SEC issued an order permitting IQDAF to suspend redemptions and postpone the date of redemption payments beyond seven days on February 22, 2021.[111]

Following the disclosure, the Insureds were named as one of several defendants in multiple actions, including the Underlying Actions.[112] The Underlying Actions allege several violations of federal securities laws based on IQDAF's disclosures concerning the "adjustment of the parameters of the pricing models of complex derivatives in Infinity Q's portfolios."[113] Soon thereafter, Infinity Q also learned of the SDNY Investigation."[114]

F. ADVANCE OF DEFENSE COSTS

In February 2021, the Insureds alerted the Insurers of the Noticed Matters (the "Claim") by providing notice of the SEC Investigation.[115] Infinity Q also provided the Insurers notice of each of the Underlying Actions.[116]

On May 6, 2021, Federal wrote to Infinity Q and stated that the Noticed Matters constituted Claims under the Insuring Clause B of the Professional Liability Coverage and Investment Coverage Parts of the Federal Primary Policy.[117] Federal also concluded that the SEC Investigation, the Underlying Actions, and the SDNY Investigation arose from the same facts and treated them as a single Claim under the Federal Primary Policy.[118] As such, Federal

[110] *Id.* at 9.
[111] *Id.*
[112] *Id.* (citing Bourne Decl., Exs. F-I, P).
[113] *Id.*
[114] *Id.* at 10.
[115] *Id.* (citing Declaration of Leonard Potter, ¶ 15).
[116] *Id.* (citing Bourne Decl., Ex. J).
[117] *Id.* (citing Bourne Decl., Ex. Q).
[118] *Id.*

agreed to advance defense costs incurred by the Insureds in connection with the Noticed Matters.[119]

Travelers wrote to Infinity Q on May 4, 2021.[120] Travelers acknowledged notice of the Yang Action and the SEC Investigation and reserved its right to deny coverage, including "under the warranty letter it received from Infinity Q in connection with its procurement of the" Travelers Policy.[121] Travelers reserved "all of its rights under the Warranty Letter's prior knowledge exclusion" because Travelers believed that Infinity Q's Chief Investment Officer had knowledge "of an act, error, omission, fact or circumstance that may give rise to a claim under the proposed insurance."[122] Further, Travelers advised that if "Infinity Q disagrees with the foregoing, please let us know immediately and provide us with any additional information to support its conclusion that the Warranty Letter's prior knowledge exclusion does not apply."[123]

Infinity Q responded to Travelers on May 10, 2021.[124] Infinity Q stated that it "strongly disagree[d] the Warranty Letter's prior knowledge exclusion applies or even potentially applies for several reasons."[125] The reasons provided by Infinity Q included that:

> (a) the Warranty Letter is not part of the Travelers Policy; (b) the Warranty Letter is subject to the severability provision applicable in the Travelers Policy; (c) Travelers inappropriately mischaracterized the allegations in the Underlying Actions; (d) the fact that the parameters of the pricing model was adjusted does not suggest that that anyone had "knowledge or information of any act, error, omission, fact or circumstance that may give rise to a claim under the proposed insurance" particularly because the Chief Investment Officer had the ability to determine valuations based upon a somewhat subjective valuation process; (e) the fact that Infinity Q requested the suspension of the right of redemption does not create an implication that, at the time the Warranty Letter was signed, anyone had the requisite knowledge; and (f) the Warranty Letter's prior knowledge exclusion was

[119] *Id.*
[120] Bourne Decl., Ex. K.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] Bourne Decl., Ex. L.
[125] *Id.*

> inapplicable because it remained unproven that anyone at Infinity Q had any requisite knowledge.[126]

Travelers responded to Infinity on June 15, 2021.[127] Travelers maintained its position that the Warranty Letter is part of the Travelers Policy and applied to the Claim.[128] On July 21, 2021, Infinity Q responded to Travelers' June 15 letter and answered the questions posed by Travelers.[129]

AXIS and Arch have not acknowledged their obligations to Infinity Q for the Noticed Matters. Additionally, Infinity Q believes that Federal's obligations will be near exhaustion upon payment of already submitted invoices."[130]

G. THE PRESENT LITIGATION

The Insureds filed their Complaint on July 21, 2021.[131] The Insurers filed their Answers and Affirmative Defenses on September 15, 2021.[132] On September 21, 2021, the Insureds filed the Insureds Motion.[133] The Insurers responded and opposed the Insureds Motion on October 20, 2021.[134] The Insureds filed their Reply on November 8, 2021.[135] The Court heard oral argument on the Insureds Motion on November 23, 2021.[136] The Court stayed the Insureds Motion pending discovery limited to the SEC inquiry from May 2020 to the end of August 2020.[137] The Court heard arguments on the Defendants Motion to Compel on December 20, 2021.[138]

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[126] Insureds Mot. at 11-12 (citing Bourne Decl., Ex. L).
[127] Bourne Decl., Ex. M.
[128] *Id.*
[129] Bourne Decl., Ex. N.
[130] Insureds Mot. at 12.
[131] D.I. No. 1.
[132] D.I. Nos. 16, 17, 18.
[133] D.I. No. 24.
[134] D.I. No. 47.
[135] D.I. No. 62.
[136] D.I. No. 75.
[137] *Id.*
[138] D.I. No. 87. The Court clarified that all documents created due to the SEC investigation must be produced by January 10, 2022, and advised the parties to refer to the record from the November hearing. *Id.*

The Insurers filed the Insurers Motion on January 31, 2022.[139] The Insureds filed an Omnibus Brief in Opposition to the Insurance Companies Motion and in Further Support of the Insureds Motion on March 4, 2022.[140] The Insurers filed their Reply on March 18, 2022.[141] The Court held oral argument on April 11, 2022.[142] After the hearing, the Court took the matters under advisement.

III. PARTIES' CONTENTIONS

A. THE INSUREDS MOTION

The Insureds argue that the Court should grant partial summary judgment on Count I of their Complaint and declare that the Insurers are obligated to advance defense costs incurred in connection with the Noticed Matters. The Insureds contend that the Noticed Matters are covered, and the Insurers cannot demonstrate that no possibility of coverage exists for the Noticed Matters. As such, the Insureds argue that the Insurers' duty to advance defense costs is triggered upon the exhaustion of the applicable underlying limits of liability because the Noticed Matters are arguable covered claims under the applicable policies.

B. THE INSURERS MOTION

The Insurers argue that they are entitled to relief because the undisputed material facts establish that the Warranty Letters were breached and, as such, the Insureds are not entitled to coverage. Specifically, the Insurers argue that "the undisputed material facts establish that, as of August 20, 2020, one or more persons and entities seeking to procure excess coverage had knowledge or information of facts or circumstances that may give rise to a claim."[143]

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[139] D.I. No. 98.
[140] D.I. No. 109. Both the Trust Insured Plaintiff-Intervenors and Plaintiff-Intervenor James Velissaris joined the Plaintiffs' Omnibus Brief in Opposition to the Insurance Companies Motion. *See* D.I. Nos. 111, 112.
[141] D.I. No. 114.
[142] D.I. No. 118.
[143] Insurance Companies Mot. at 2-3.

Additionally, the Insurers contend that because Insureds "knew that Infinity Q was the subject of the SEC's ongoing inquiry, which quickly gave rise to the SEC formal order of investigation and all of the other [Noticed] Matters for which Plaintiffs seek coverage, those matters are barred from coverage, as a matter [of] law, by the prior knowledge exclusion provided with the Warranty Letter."[144] The Insurers also claim that the prior or pending litigation exclusions endorsed in each of the Excess Policies preclude coverage for the Noticed Matters as a matter of law.

In opposition, the Insureds contend that the Insurers cannot prove that the Warranty Letters preclude coverage. Accordingly, the Insureds claim that they are entitled to an advancement of defense costs. The Insureds alternatively argue that if the Court finds that the Warranty Letters were breached then the Court should find that the Warranty Letters are severable and order advancement to the innocent Insureds. Finally, the Insureds contend that the prior or pending litigation exclusions are inapplicable and thus do not preclude coverage.

IV. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[145] Summary judgment will be granted if, after viewing the record in a light most favorable to a nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[146] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the

[144] *Id.* at 3.
[145] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[146] *Id.*

law to the factual record, then summary judgment will not be granted.[147] The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[148] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[149]

"These well-established standards and rules equally apply [to the extent] the parties have filed cross-motions for summary judgment."[150] Where cross-motions for summary judgment are filed and neither party argues the existence of a genuine issue of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[151] But where cross-motions for summary judgment are filed and an issue of material fact exists, summary judgment is not appropriate.[152] To determine whether there is a genuine issue of material fact, the Court evaluates each motion independently.[153] Th Court will deny summary judgment where it seems prudent to make a more thorough inquiry into the facts.[154]

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[147] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[148] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[149] *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[150] *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *5 (Del. Super. Jan. 31, 2019) (citations omitted); *see Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super. May 31, 2013) (citing *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001)).
[151] Del. Super. Ct. Civ. R. 56(h).
[152] *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 WL 2495417, at *5 (Del. Super. June 19, 2017), *aff'd sub nom., Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018); *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. 2008); s*ee also Anolick v. Holy Trinity Greek Orthodox Church, Inc.*, 787 A.2d 732, 738 (Del. Ch. 2001) ("[T]he presence of cross-motions 'does not act per se as a concession that there is an absence of factual issues.'" (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997))).
[153] *Motors Liquidation*, 2017 WL 2495417, at *5; *see Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 167 (Del. Ch. 2003).
[154] *Ebersole*, 180 A.2d at 470-72; *Pathmark Stores, Inc. v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del. Ch. 1995).

V. DISCUSSION

The parties agree that the Court does not need to engage in a choice of law analysis. First, the Insureds argue that Delaware law should apply because no conflict of law exists between Delaware and New York on the issues raised.[155] The Insurers concede that "[n]o material conflict exists between Delaware and New York law for the purpose of this case, and thus the court need not resolve choice of law."[156] However, the Insurers do contend that if there were a conflict, New York law should apply.[157] Because both parties concede that there is no conflict of law, a choice of law analysis is unnecessary.

A. THE PRIOR KNOWLEDGE EXCLUSION IN THE WARRANTY LETTER BARS COVERAGE

The Court finds there is no genuine issue of fact as to whether the Warranty Letter bars coverage and that the Insurers are entitled to judgment as a matter of law. The language of the relevant policies is straightforward and unambiguous. In addition, the facts relating to the SEC Inquiry are stark and lead to the conclusion that Infinity Q (and its executives) had knowledge of any act, fact or circumstance that may give rise to a claim under the policies that would be issued by the Insurers.

The SEC Division of Enforcement sent multiple letters to Mr. Lindell in May and June of 2020. Mr. Lindell made other Infinity Q executives aware of the letters. Mr. Velissaris suggested that Infinity Q bring in outside legal counsel to assist and suggested an increase in insurance coverage. Infinity Q responded to the SEC letters and noted as late as August 14, 2021 that the SEC "inquiry is ongoing." Just days later, Infinity Q and the Insurers completed binding Infinity Q's insurance program; however, Infinity Q failed to disclose the SEC investigation.

[155] Insureds Opp. at 18.
[156] Insurance Companies Mot. at 26, n. 101.
[157] *Id.*

The Warranty language is clear and unambiguous—Infinity Q, and its executives, needed to disclose and failure to disclose means that claims arising out of the SEC investigation are excluded from coverage. For these reasons, discussed more fully below, the Court will **GRANT** the Insurers Motion.

1. Prior Knowledge

The Insurers assert that the Court should apply a mixed subjective/objective test to determine whether an insured had knowledge of facts or circumstances that may give rise to a claim.[158] The Insurers argue that the prior knowledge exclusion in the Warranty Letters bars coverage for the Underlying Matters.[159] The Insurers contend that the Warranty Letters and prior knowledge exclusions are unambiguous and exclude both defense and indemnity coverage.[160] As support, the Insurers rely on the following facts to demonstrate Infinity Q had prior knowledge of circumstances that may give rise to a claims under the policies:

- Mr. Lindell (who signed the Warranty Letter on behalf of Infinity Q), Mr. Velissaris, Mr. Jensen, and the Trust's board members knew, as of August 20, 2020, that the SEC's Division of Enforcement had an ongoing inquiry into Infinity Q's valuation policies and concerns about the valuation of assets held by Infinity Q's client funds.[161]

- Mr. Lindell messaged Mr. Velissaris saying "WTF? Open inquiry" upon learning of the inquiry by the SEC[162]

- Mr. Velissaris sent an email to Mr. Lindell with a link to an SEC press release announcing the SEC's April 21, 2020 proposal to "establish a framework for fund valuation practices" that would subject investment advisers determining fair value of fund investments to additional oversight requirements[163]

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[158] *Id.* at 30 (citing and quoting *B Five Studio v. Great Am. Ins. Co.*, 414 F.Supp. 3d 337, 340 (E.D.N.Y. 2019), *CPA Mutual Ins. Co of America Risk Retention Group v. Weiss & Co.*, 915 N.Y.2d 57, 58 (App. Div. 2011); *XL Specialty Ins. Co. v. Agoglia*, 2009 WL 1227485 (S.D.N.Y. Mar. 2, 2009).
[159] Insurance Companies Mot. at 25. The Court should clarify with the parties which matters are "Underlying Matters."
[160] *Id.*
[161] *Id.* at 26.
[162] *Id.* at 27 (citing Supp. Ward Decl., Ex. A).
[163] *Id.* (citing Supp. Ward Decl., Ex. F).

- Mr. Lindell sent Mr. Velissaris an SEC press release announcing that the SEC's Division of Enforcement—with a team of attorneys including at least one also involved in the Infinity Q inquiry—had successfully prosecuted an enforcement action against a portfolio manager who mispriced private fund investments by manipulating inputs used to value swaps[164]

- Mr. Velissaris and Mr. Lindell exchanged instant messages on May 20 (7 days after receiving the first inquiry letter) discussing increasing insurance[165]

- Mr. Velissaris and Mr. Lindell exchanged a series of messages on July 7, 2020.[166] Mr. Lindell wrote that the second submission to the SEC was complete and that "unlikely, but I hope we never hear from them again."[167]

- The Trust's board minutes from August 13-14, 2020 state that the SEC inquiry was "ongoing"[168]

- Mr. Lindell and Mr. Velissaris exchanged a series of messages on August 14, 2020 about a call involving the Trust's accounting firm, EisnerAmper.[169] Mr. Lindell wrote that he "hope[d] they don't bring up SEC with EA [EisnerAmper] on the call," and expressed his relief that Ryan Tyas, EisnerAmper's representative at the Trust's Board meeting earlier that day, "hopped off before steve [Jensen] asked the SEC question!"[170] Mr. Velissaris replied "Nice!"[171] In a chat between Mr. Velissaris and Mr. Lindell three days prior, Mr. Lindell wrote "im not providing EA our SEC interactions" and "just going to say there was no correspondence."[172]

The Insurers claim that these facts demonstrate that the "SEC's inquiry was a fact or circumstance that ***may*** give rise to a claim under the Excess Policies, and needed to be disclosed for the Warranty Letter to be truthful."[173]

The Insureds argue that the Warranty Letter does not support an objective analysis because the words "objective" and "reasonable person" do not appear in the Warranty Letter and

[164] *Id.* (citing Supp. Ward Decl., Ex. G).
[165] *Id.* (citing Supp. Ward Decl., Ex. P).
[166] Supp. Ward Decl., Ex. L.
[167] Insurance Companies Mot. at 8, 28 (citing Supp. Ward Decl., Ex. L).
[168] *Id.* (citing Supp. Ward Decl., Ex. M).
[169] *Id.* (citing Supp. Ward Decl., Ex. O).
[170] *Id.* (citing Supp. Ward Decl., Ex. O).
[171] *Id.* (citing Supp. Ward Decl., Ex. O).
[172] *Id.* (citing Supp. Ward Decl., Ex. P).
[173] *Id.* at 29.

in the cases relied upon by the Insurers the applicable provisions contain such specific language.[174] "Thus, the Insurance Companies must prove that someone at Infinity Q had knowledge of the fact that may give rise to a claim and those facts were known prior to August 20, 2020," a burden that the Insureds contend the Insurers cannot meet.[175] The Insureds also claim that there are no facts that any Insured was subjectively aware of facts that could be expected to give rise to a claim.[176] Further, the Insureds contend that even under a mixed subjective/objective analysis, there was no reasonable basis to expect a claim.[177]

While the parties cite to a series of cases about the "test" that should be applied, basic contract interpretation principles must guide the Court's analysis. Insurance policies are contracts.[178] The interpretation of contractual language, including in insurance policies, "is a question of law."[179] The principles governing the interpretation of an insurance contract are well-settled. In attempting to resolve a dispute over the proper interpretation of an insurance policy, "a court should first seek to determine the parties' intent from the language of the insurance contract itself."[180] In reviewing the terms of an insurance policy, the Court considers "the reasonable expectations of the insured at the time of entering into the contract to see if the policy terms are ambiguous or conflicting, contain a hidden trap or pitfall, or if the fine print

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[174] Insureds Opp. at 21-22.
[175] *Id.* at 23.
[176] *Id.* at 23-26.
[177] *Id.* at 26.
[178] *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *7 (Del. Super. Feb. 2, 2021) (citation omitted).
[179] *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001); *see Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1232 (Del. 2018) ("Whether [a] contract's material terms are sufficiently definite [is] mostly, if not entirely, a question of law." (citation omitted)); *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1232 (Del. 2017) (same).
[180] *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002); *see also Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997) ("The scope of an insurance policy's coverage . . . is prescribed by the language of the policy.") (citing *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1195–96 (Del. 1992); Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1076–77 (Del. Super. 1992) (citing *E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985)); *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996).

takes away that which has been provided by the large print."[181] Ambiguity exists when the disputed term "is fairly or reasonably susceptible to more than one meaning."[182] Absent any ambiguity, contract terms should be accorded their plain, ordinary meaning.[183] If an insurance policy contains an ambiguous term, then the policy is to be construed in favor of the insured to further the contract's purpose and against the insurer, as the insurer drafts the policy and controls coverage.[184]

The parties have not contended, or demonstrated, that the language of the Warranty Letter is ambiguous. As such, the plain meaning should be applied. The Warranty Letter requires that:

> No person or entity for whom this insurance is intended has any knowledge or information of any act, error, omission, fact or circumstance that may give rise to a claim under the proposed insurance.
>
> It is agreed that any claim for, based upon, arising from, or in any way related to any act, error, omission, fact or circumstance of which any such person or entity has any knowledge or information shall be excluded from coverage under the proposed insurance.[185]

"As contractual representations, these paragraphs must be read together according to their ordinary meaning. As contractual representations that form the basis of a coverage exclusion,

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[181] *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.,* 1996 WL 111205, at *2 (Del. Super. Jan. 30, 1996) (citation omitted); *see Steigler v. Ins. Co. of N. Am.,* 384 A.2d 398, 401 (Del. 1978) ("[A]n insurance contract should be read to accord with the reasonable expectations of the purchaser so far as the language will permit.") (quoting *State Farm Mut. Auto. Ins. Co. v. Johnson,* 320 A.2d 345, 345 (Del. 1974) (internal quotation marks omitted)).
[182] *Alta Berkeley VIC. V. v. Omneon, Inc.,* 41 A.3d 381, 385 (Del. 2012).
[183] *See id.*; *see also Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2018 WL 6266195, at *4 (Del. Super. Nov. 30, 2018); *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413694, at *7 (Del. Super. Jan. 31, 2019).
[184] *See Alstrin*, 179 F. Supp. 2d at 390 ("Generally speaking, however, Delaware . . . courts continue to strictly construe ambiguities within insurance contracts against the insurer and in favor of the insured in situations where the insurer drafted the language that is being interpreted regardless of whether the insured is a large sophisticated company.") (citations omitted); *Nat'l Union Fire Ins. Co. v. Rhone–Poulenc Basic Chems. Co*., 1992 WL 22690, at *8 (Del. Super. Jan. 16, 1992) ("Application of the [*contra proferentem*] doctrine turns not on the size or sophistication of the insured, but rather on the fact that the policy language at issue is drafted by the insurer and is not negotiated." (citation omitted)).
[185] Bourne Decl., Ex. C.

these paragraphs also must be construed strictly and narrowly."[186] As such "***any*** knowledge or information. . . of ***any*** act. . . that ***may*** give rise to a claim . . . ***shall*** be excluded from coverage."[187] Contrary to the Insureds contentions there is no reasonably expected qualifier. Instead, ***any*** knowledge or information that ***may*** give rise to a claim is sufficient to exclude the Insureds from coverage.

Although the Insureds are correct that the case law relied upon by the Insurers contained more facts than an SEC Inquiry,[188] the analysis undertaken by the courts in those cases is instructive. The Court is to look to the undisputed facts and determine whether the fact demonstrate the knowledge required by the policy that "may" lead to a claim. Here, the undisputed facts demonstrate that Mr. Lindell and Mr. Velissaris knew that there were two SEC Inquiries and that the SEC matter was ongoing as of the time the Excess Policies were purchased. Correspondence between Mr. Lindell, Mr. Velissaris, the Board of Directors, and Dechert further demonstrate knowledge of a circumstance which may give rise to a claim.

The Court does not find it issue determinative if Infinity Q purchased the policies because of the SEC Inquiries. The plain language of the Warranty Letters requires disclosure in the broadest sense. Further, disclosure of "any" knowledge which "may" result in a claim is consistent with the legitimate insurance objectives of a claims-made policy. "Like the exclusion of a known preexisting condition from a health insurance policy, the exclusion from a claims-only policy of claims based on conduct that occurred before the policy was issued and that was known to have claim potential uncontroversially proper."[189]

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[186] *Sycamore Partners Mgmt., L.P. v. Endurance Assurance Corp.*, 2021 WL 4130631, at *23 (Del. Super. Sept. 10, 2021).
[187] Bourne Decl., Ex. C (emphasis added).
[188] *See Patriarch Partners, LLC v. Axis Ins. Co.*, 758 F. App'x 14, 22 (2d Cir. 2018); *Rivelli v. Twin City Fire Ins. Co.*, 2008 WL 5054568, at *6-*8 (D. Colo. Nov. 21, 2008), *aff'd*, 359 F. App'x 1 (10th Cir. 2009).
[189] *Trucks Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787, 791 (7th Cir. 1992).

2. Applicability

The Insureds argue that there are issues of fact as to whether the Warranty Letters are part of the Excess Policies and thus, they do not exclude the Insureds from coverage.[190] The Insureds contend that the Travelers Policy and the quote for coverage do not mention a warranty letter and further that there is "no communicated intent that such an 'excess warranty' must include a prior knowledge exclusion."[191] Similarly, the Insureds note that "[n]one of the binder, Excess Policies, or the endorsements contain reference to the prior knowledge exclusion upon which the Insurance Companies rely."[192] The Insureds also claim that the Insurers cannot demonstrate that the error on the letter addressed to Arch but intended for Travelers is merely a scrivener's error.[193]

The Insurers counter, arguing that the Arch Policy and the AXIS Policy required an excess warranty before binding such coverage and that the Warranty Letters are applicable to all the Excess Policies.[194] The Insurers contend that the emails between Mr. Lindell, Infinity Q's brokers, and Travelers in August 2020, demonstrate that Mr. Lindell knew Travelers requires the Warranty Letter for its excess coverage, and Mr. Lindell provided the Warranty Letter with the intent that it apply to the Travelers Policy.[195]

The Court agrees with the Insurers' argument with respect to the Travelers Policy. Mr. Lindell knew the Warranty Letters were identical, emailed Ms. Haas about this fact and then despite not changing the recipient to Travelers, did alter the "Excess Limits 5x 5m" the layer of coverage procured from Travelers.[196] These facts demonstrate that Mr. Lindell understood the

[190] Insureds Opp. at 33.
[191] *Id.* at 33-34.
[192] *Id.* at 34.
[193] *Id.*
[194] Insurance Companies Mot. at 36-38.
[195] Insurance Companies Mot. at 36-38.
[196] Supp. Ward Decl., Ex. T; Ward Decl., Ex. A; Young Decl., Ex. A.

Warranty Letter was required and intended it apply to bind the Travelers Policy. Further, Travelers received the Warranty Letter, signed by Mr. Lindell on behalf of Infinity Q and issued the Travelers Policy in reliance on the Warranty Letter.

The AXIS binder mentions a Warranty Letter in connection with coverage.[197] The Insurers submit that the AXIS binder's language clearly conditions coverage on receipt of a Warranty Letter and, in response to that condition, Infinity Q provided AXIS with the Warranty Letters.[198] The only argument that the Warranty Letter does not apply to the AXIS Policy made by the Insureds is that the AXIS Policy and the AXIS binder does not specifically mention a prior knowledge exclusion.[199]

However, the Arch quote mentions a "Warranty Statement" and a "Known Wrongful Acts Exclusion."[200] Mr. Lindell provided the Warranty Letter addressed to Arch and there is no question of applicability other than the fact that the Arch Binder and Arch Policy do not mention the Warranty Letter or that coverage is subject to a prior knowledge exclusion.

The Insureds argue that the Warranty Letters are not applicable because the Excess Policies do not mention a prior knowledge exclusion. "[C]ourts give effect to exclusionary language where it is found to be 'specific,' 'clear,' 'plain,' 'conspicuous' and 'not contrary to public policy.'" Contrary to the Insureds insinuation, the fact that the Excess Policies do not specifically mention the words "Prior Knowledge Exclusion" does not negate the applicability of the Warranty Letters exclusionary language which is "specific," "clear," "plain," "conspicuous" and "not contrary to public policy."

[197] Crowther Decl., Ex. B; Bourne Supp. Decl., Ex. E.
[198] Insurance Companies Mot. at 38 (citing Crowther Decl., Ex. B).
[199] Insureds Opp. at 34.
[200] Ward Supp. Decl., Ex. S.

As discussed in the previous section, the language in the Warranty Letters is clear and unambiguous. "An insurance policy is ambiguous when the provisions at issue 'are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'"[201] "An insurance policy is not ambiguous merely because the parties do not agree on the proper construction."[202] The Court will not revise contract terms that the Insureds and the Insurers willingly accepted to find ambiguity. As such, the Court finds that the Warranty Letters are applicable to the Excess Policies.

3. Severability

The Insurers contend that the Warranty Letter's exclusion is non-severable.[203] The Insurers assert that the prior knowledge exclusion applies if "any" Insured had prior knowledge.[204] The Insurers make a comparison between *Rivelli v. Twin City Fire Insurance Company* to the case here because the language in the warranty letter in *Rivelli* is nearly identical to the Warranty Letter in dispute.[205] The basis for the Insurers' argument rests within the clear and unambiguous words of the warranty itself.[206] Additionally, the Insurers contend that the severability provision in Subsection XII.(C) of the Primary Policy is not applicable to the Warranty Letter because it only applies expressly to Subsection XII.(B).[207] The Insurers add that even if there was some discrepancy in the Primary Policy's severability provision and the

[201] *SS&C Techs. Holdings, Inc. v. Endurance Assurance Corp.*, 2020 WL 6335898, at *7 (Del. Super. Oct. 29, 2020) (citing *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 440 (Del. Super. 2002)).
[202] *Id*.
[203] Insurance Companies Mot. at 33
[204] *Id*.
[205] *Id*. at 31-32. While factually similar, *Rivelli* is not as insightful for this Court as Insurance Companies suggest because Delaware law applies, not Colorado; *see Rivelli v. Twin City Fire Ins. Co.*, 2008 WL 5054568 (D. Colo. Nov. 21, 2008), *aff'd*, 359 F. App'x 1 (10th Cir. 2009) (where the district court of Colorado found it "untenable" that the insureds "could have failed to appreciate the potential for liability from the actions they are alleged to have taken" before seeking excess policy coverage).
[206] *Id*. at 34.
[207] *Id*. at 35.

Warranty Letter's exclusion, the Warranty Letter language supersedes the terms set forth in the Primary Policy.[208]

The Insureds assert that severability need not be addressed because the Insurance Companies cannot prove that the Warranty Letters could be triggered by any violation of any warranty.[209] The basis for the Insureds' argument is that there are issues of material facts as to whether the Warranty Letter should apply.[210] The Insureds state, while the Insurers' binder requirement mentions a "Warranty Letter," the Excess Policies themselves do not mention the prior knowledge exclusion.[211] The Insureds contest the application of the severability clause in the Primary Policy because the provision under Subsection XII.(A) defines "Application" as including any "warranty."[212] Because of the language in Section XII, the Insureds belief is that the Claim is severable from innocent parties and therefore Mr. Potter and Mr. Lindell are not barred from coverage.[213]

Further, the Insureds suggest that because the Insurers did not specifically exclude innocent Insureds, the provision must be rejected because it does not conform with Delaware

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[208] *Id*. at 35-36. *See also supra* note 35.
[209] Insureds Opp. at 33
[210] *Id*. at 33-34.
[211] *Id*. at 34-35.
[212] *Id*. at 35-36; *see also* Bourne Decl., Ex. A, Endorsement 7 (Amended Definitions)

> Application means:
> (1) all signed applications and any attachments, information, warranty, or other materials submitted therewith or incorporated therein, submitted by the **Insured** to the Company for this Policy;
> (2) all public documents filed with any federal, state, local or regulatory agency by any **Insured Entity** during the twelve (12) months preceding this Policy's inception date whether or not submitted with or attached to the signed applications; and
> (3) if applicable, any warranty provided to the Company within the past three (3) years in connection with any policy, section or coverage part of a policy of which this Policy or any Coverage Part hereof is a direct or indirect renewal or replacement.

[213] *Id*. at 37-38.

law.[214] The Insureds essentially claim that the failure to expressly preclude the innocent insured from coverage in the provision makes it unclear, inconspicuous, and against public policy.[215]

Here, the Warranty Letters are not severable. The language of the Warranty Letter is clear and unambiguous. The Warranty Letter excludes "any claim for, based upon, arising from, or in any way related to any act, error, omission, fact or circumstance of which any such person or entity has any knowledge or information."

The Insureds argue that there are issues of material fact as to whether the Warranty Letter should apply; however, the Court does not agree. The Warranty Letter was a condition precedent for the Excess Policies to bind. The Insureds knew of this requirement and the prior knowledge warranty is incorporated in the Excess Policy. Further, the fact that the words "innocent insured" are not expressly provided in the Warranty Letters does not establish a basis for severability. As stated above, the Warranty Letter was a condition precedent for binding the policies. Moreover, the severability provision in the Primary Policy is expressly applicable to Subsection XII.(B).

Further, if the severability provision were to apply to the Warranty Letter, Subsection XII.(C) expressly imputes any knowledge by a "Chief Compliance Officer"—one of Mr. Lindell's titles—unto the "Insured Entity and any of its Subsidiaries."[216] Accordingly, the Court finds that the Warranty Letters exclusion is non-severable and grants the Insurers Motion.

B. PRIOR OR PENDING LITIGATION

The Insurers argue that each of the Excess Policies contained a prior or pending litigation exclusion which also bar coverage.[217] The Insureds argue that the prior and pending litigation

[214] *Id*.
[215] *Id*.
[216] *See supra* note 196.
[217] Insurance Companies Mot. at 39.

exclusions are inapplicable and thus coverage is not barred.[218] Because the Court will grant the Insurance Company Motion, there is no need for the Court to also address the parties arguments with respect to the prior or pending litigation exclusions.

C. THE COURT DENIES THE INSUREDS MOTION TO ADVANCE DEFENSE COSTS

As the Court has granted the Insurers Motion, the Court must deny the Insureds Motion because the Insureds are excluded from coverage under the Prior Knowledge Exclusion in the Warranty Letter.

VI. CONCLUSION

For the foregoing reasons, the Court will **DENY** the Insureds Motion and **GRANT** the Insurers Motion.

Dated: August 15, 2022
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress

[218] Insureds Opp. at 38.