IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

CLOVER HEALTH INVESTMENTS, CORP. f/k/a SOCIAL CAPITAL HEDOSOPHIA HOLDINGS CORP. III,	)	C.A. No. N22C-06-004 MMJ (CCLD)
	)	**TRIAL BY JURY OF TWELVE DEMANDED**
Plaintiff,	)	
v.	)	
BERKLEY INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, ALLIED WORLD SPECIALTY INSURANCE COMPANY, ENDURANCE RISK SOLUTIONS ASSURANCE CO., CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. B0146ERUSA2001262, and HUDSON INSURANCE COMPANY,	)	
Defendants.	)	

EXHIBIT A

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CLOVER HEALTH INVESTMENTS, CORP. f/k/a SOCIAL CAPITAL HEDOSOPHIA HOLDINGS CORP. III,	)	
Plaintiff,	)	
v.	)	
BERKLEY INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, ALLIED WORLD SPECIALTY INSURANCE COMPANY, ENDURANCE RISK SOLUTIONS ASSURANCE CO., and HUDSON INSURANCE COMPANY,	)	C.A. No. N22C-06-004 MMJ CCLD [redacted]
Defendants.	)	

Submitted: November 9, 2022
Decided: February 6, 2023

On Plaintiff's Motion for Partial Summary Judgment on the Duty to Pay Defense Costs Against the Tail Insurers
GRANTED

On Defendants' Motion to Dismiss Plaintiff's Amended Complaint
GRANTED IN PART AND DENIED IN PART

OPINION

Jennifer C. Wasson, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Wilmington, DE, Robin L. Cohen, Esq. (*pro hac vice*) (Argued), Kenneth H. Frenchman, Esq. (*pro hac vice*), Cynthia M. Jordano, Esq. (*pro hac vice*), Cohen Ziffer Frenchman & McKenna LLP, New York, NY, *Attorneys for Plaintiff*

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Marc S. Casarino, Esq., Kennedys CMK LLP, Wilmington, DE, *Attorneys for Defendant Allied World Specialty Insurance Company*

David F. Cutter, Esq. (*pro hac vice*) (Argued), Jonathan R. Walton, Esq. (*pro hac vice*), BatesCarey LLP, Chicago, IL, *Attorneys for Defendant Endurance Risk Solutions Assurance Co.*

Courtney E. Scott, Esq. (*pro hac vice*), Tressler LLP, New York, NY, *Attorneys for Defendant Hudson Insurance Company*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This is a coverage action regarding directors and officers ("D&O") liability coverage. Social Capital Hedosophia Holdings Corp. III ("Social Capital") was a publicly traded special purpose acquisition company ("SPAC"). Clover Health Investments, Corp. ("Legacy Clover") was a private health insurance company. Social Capital and Legacy Clover merged on January 7, 2021 (the "Merger"). The company resulting from the Merger is referred to as "Clover Health."

Before the Merger, Social Capital purchased D&O insurance coverage from Endurance Risk Solutions Assurance Co. ("Endurance"), Certain Underwriters at

Lloyd's ("Underwriters"), and Hudson Insurance Company ("Hudson") (together, the "Tail Insurers"). The insurance policies from the Tail Insurers (the "Tail Policies") provide up to [redacted] in coverage, with a [redacted] self-insured retention. Endurance issued the Primary Tail Policy. The Underwriters and Hudson policies followed form to the Primary Tail Policy. The Tail Policies went into run-off on January 7, 2021, in conjunction with the Merger. The run-off endorsement adjusted the Policy Period to reflect a date range of April 22, 2020 to January 7, 2027, with a Run-Off Coverage Period from January 7, 2021 to January 7, 2027. Underwriters has settled with Clover Health.

Through Social Capital's Securities and Exchange ("SEC") Form S-4 filing on October 20, 2020, Clover Health announced that Vivek Garipalli ("Garipalli"), Andrew Toy ("Toy"), Joseph Wagner ("Wagner"), Nathaniel Turner ("Turner"), Lee Shapiro ("Shapiro"), and Chelsea Clinton ("Clinton") would serve as directors and/or officers of the merged company, Clover Health. In connection with the Merger, shareholders elected Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton to serve as directors or officers of Clover Health.

Clover Health obtained insurance coverage under a set of D&O liability insurance policies (effective January 7, 2021). These policies were issued by Berkley Insurance Company ("Berkley"), XL Specialty Insurance Company ("XL"), and Allied World Specialty Insurance Company ("Allied") (collectively,

the "Go-Forward Insurers"). The policies issued by the Go-Forward Insurers are referred to as the "Go-Forward Policies." Berkley issued the Primary Go-Forward Policy. The XL and Allied policies follow form to the Primary Go-Forward Policy. The Go-Forward Policies have a self-insured retention of [redacted] and provide up to [redacted] in subsequent coverage.

The underlying suits for which Clover Health is seeking coverage are: (1) a securities class action suit (the "Securities Action"); (2) various shareholder derivative suits (the "Derivative Actions"); (3) demands and a complaint filed under 8 *Del. C.* § 220 ("Shareholder Demands"); and (4) an investigation by the Securities and Exchange Commission ("SEC") ("SEC Investigation").

Clover Health notified the Tail Insurers of the actions against it. With respect to the Securities Action, coverage for Garipalli, Toy, and Wagner is in dispute after Endurance denied coverage. With respect to the Derivative Actions, coverage for Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton is in dispute after Endurance denied coverage. Endurance acknowledged that Social Capital and individual defendants Chamath Palihapitiya, Steven Trieu, Ian Osborne, Jacqueline Reses, and James Ryans are insured under the Tail Policies. Endurance denied coverage for the SEC Investigation because it did not meet the definition of a Claim.

Clover Health also notified the Go-Forward Insurers of its claims. Regarding the Securities Action and Derivative Actions, Berkley denied coverage for certain former directors and officers of Social Capital named among the individual defendants. Berkley claimed the individual defendants were denied coverage because they did not qualify as Insureds under the Go-Forward Policies. Berkley has not issued a coverage position with respect to the SEC Investigation.

On June 7, 2022, Clover Health filed the instant action seeking: (1) declaratory judgment that the Go-Forward Insurers are obligated to pay Clover Health for the losses it incurred in connection with the Securities Action, the Derivative Actions, the Section 220 Demands and Action, and the SEC Investigation; (2) declaratory judgment that the Tail Insurers are obligated to pay Clover Health for the losses it incurred in connection with the Securities Action, the Derivative Actions, the Section 220 Demands and Action, and the SEC Investigation; and (3) a finding that Tail Insurers breached the implied covenant of good faith and fair dealing.

The Tail Insurers filed a Motion to Dismiss under Superior Court Civil Rule 12(b)(6) on August 25, 2022, seeking: (1) dismissal of the second cause of action against the Tail Insurers for declaratory judgment; and (2) dismissal of the third cause of action against the Tail Insurers for breach of the implied covenant of good faith and fair dealing. On the same day, Clover Health filed its Motion for Partial

Summary Judgment against the Tail Insurers. The Court heard oral argument on November 9, 2022.

STANDARDS OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[1] All facts are viewed in a light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[3] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[4] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[5]

In a Rule 12(b)(6) Motion to Dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[6] The Court must accept as true all well-pled allegations.[7]

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[1] Super. Ct. Civ. R. 56(c).
[2] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[3] Super. Ct. Civ. R. 56(c).
[4] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[6] *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978).
[7] *Id.*

Every reasonable factual inference will be drawn in the non-moving party's favor.[8] If the claimant may recover under that standard of review, the Court must deny the Motion to Dismiss.[9]

ANALYSIS

Insurance Policy Interpretation

In *Ferrellgas Partners L.P. v. Zurich American Insurance Company*,[10] this Court outlined interpretation of insurance policies:

> Insurance policies are contracts. Interpretation of contracts is a question of law. The Court must give effect to the parties' mutual intent at the time of contracting. The Court should interpret contract language as it "would be understood by any objective, reasonable third party." Absent ambiguity, contract terms should be accorded their plain, ordinary meaning. Ambiguity exists when the disputed term "is fairly or reasonably susceptible to more than one meaning."
>
> Insurance policies are also adhesion contracts, not generally the result of arms-length negotiation. Thus, the rules of construction "differ from those applied to most other contracts." Where policy language is ambiguous, the doctrine of *contra proferentem* requires the Court to interpret the policy in favor of the insured because the insurer drafted the policy. The Court, pursuant to this doctrine, looks to "the reasonable expectations of the insured at the time when he entered the contract[.]" The Court will only apply this doctrine where the policy is ambiguous. When the policy language is "clear and

[8] *Wilmington Sav. Fund. Soc'v, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del.2005)).
[9] *Spence*, 396 A.2d at 968.
[10] 2020 WL 363677 (Del. Super.), *appeal denied*, 2020 WL 764155 (Del. Super.).

> unambiguous[,] a Delaware court will not destroy or twist the words under the guise of construing them" and each party "will be bound by its plain meaning."[11]

Relevant Policy Provisions

Section II.B(1) of the Primary Tail Policy defines "Insured Persons" as: "[A]ny one or more natural persons who were, now are or shall become duly elected or appointed directors, trustees, governors, **Managers**, officers, in-house general counsel, controller, risk manager, advisory director or member of a duly constituted committee or board of the **Company** or their functional equivalent[.]"

Section II.A of the Primary Tail Policy, as modified by Endorsement Number 3, defines a "Claim" as:

> 1. a written demand for monetary damages or other relief, including, but not limited to, a demand for injunctive relief, against any **Insured** for a **Wrongful Act**, commenced by the **Insured's** receipt of such demand,
>
> 2. a civil proceeding against any **Insured** for a **Wrongful Act**, commenced by the service of a complaint or similar pleading,
>
> 3. an arbitration, mediation, or other alternative dispute resolution proceeding against any **Insured** for a **Wrongful Act**, commenced by the **Insured's** receipt of a written demand or similar document,
>
> 4. a criminal proceeding against any **Insured** for a **Wrongful Act**, commenced by a return of an indictment, information or similar document, or the arrest of an **Insured Person**,

[11] *Id.* at *4 (internal citations omitted).

> 5. any official request for the **Extradition** of any **Insured Person** or the execution of a warrant for the arrest of any **Insured Person** where such execution is an element of **Extradition**,
>
> 6. a formal administrative or regulatory proceeding, other than an investigatory proceeding, against any **Insured** for a **Wrongful Act**, commenced by the filing of a notice of charge or similar document,
>
> 7. a **Formal Investigation** of an **Insured Person**, and
>
> 8. a written request that the **Insured** toll or waive a statute of limitations with respect to a potential or threatened claim against any **Insured** for a **Wrongful Act**, including any appeal therefrom.

Section II.K of the Primary Tail Policy, as amended by Endorsement Number 1, defines a "Wrongful Act" as:

> 1. any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by any of the **Insured Persons** in their capacity as such, or in an **Outside Position**, or with respect to Insuring Agreement C, by the **Company**, or
>
> 2. any matter claimed against the **Insured Persons** solely by reason of their serving in such capacity or in an **Outside Position**; provided that this Item 2 shall not apply to an **Insured Person** in his or her capacity as a partner in a **Company** or an **Outside Entity** that is a partnership.

Endorsement Number 13 to the Primary Tail Policy provides:

> The **Run-Off Coverage Period** set forth in Item 6 of the Declarations [January 7, 2021 to January 7, 2027] is the period during which any **Claim** [is] first made against the **Insured** and reported to the Insurer in accordance with

> Section VIII. REPORTING AND NOTICE of the General Terms and Conditions shall be deemed first made during the **Policy Period** [April 22, 2020 to January 7, 2027], but only for **Wrongful Acts** that take place prior to the termination of the **Policy Period**. The Insurer shall not be liable for Loss on account of any **Claim** for a **Wrongful Act** that takes place on or after the inception of the **Run-Off Coverage Period**.

Endorsement Number 13 to the Primary Tail Policy effectively bars coverage for Wrongful Acts taking place on or after the January 7, 2021 Merger.

The Go-Forward Policies provide some retroactive coverage for certain losses. The Go-Forward Policies contain a Past Acts Exclusion, which provides:

> In consideration of the premium paid, it is understood and agreed that the **Insurer** shall not be liable for **Loss** in connection with any **Claim or Preliminary Inquiry** or **Related Claim or Related Preliminary Inquiry** made against any **Insured** based upon, arising out of, or attributable to any actual or alleged **Wrongful Act** first committed or allegedly first committed before January 7, 2021; except that this exclusion shall not apply to:
>
> 1. **Loss** in connection with a **Securities Claim**, **an Insured Person Investigation, or a Merger or Acquisition Claim** made against any **Insured** arising out of, based upon, or attributable to the Form S-4 filed with the Securities and Exchange Commission, and deemed effective December 11, 2020, by Social Capital Hedosophia Holdings Corp. III in connection with the acquisition of Clover Health Investments, Corp by Asclepius Merger Sub Inc.
>
> 2. **Loss** in connection with a **Securities Claim**, **Insured Person Investigation or Merger or Acquisition Claim** made against any Insured based upon, arising out of, or attributable to any actual or alleged **Wrongful Act**

> committed or allegedly committed by Clover Health Investments, Corp. or any **Subsidiary** or **Insured Person** thereof.

Wrongful Act

The Tail Policies provide coverage for a Claim against an Insured Person for a Wrongful Act. Under the definition for Wrongful Act in the Primary Tail Policy, the Insured Persons must be acting "in their capacity" as Insured Persons, or "in their capacity" in an Outside Position.

The Tail Insurers argue that maintaining control of the organization does not equal acting in the capacity of an Insured Person if the alleged Insured Person is only a future director. Clover Health counters that the underlying complaints allege the individuals were acting from positions of control and authority.[12] Clover Health contends that individuals acting in a position of control and authority qualifies as acting in their capacity as Insured Persons. The complaints contained no allegations against Legacy Clover.[13] The underlying allegations control the coverage for defense costs.[14]

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[12] *See* Securities Action Compl. ¶¶ 36, 41, 373, 380 (referring to Individual Defendants exercising and possessing power, control, and authority).

[13] Legacy Clover is no longer an existing entity, which is likely why there is a lack of allegations against it.

[14] *Legion Partners Asset Mgmt., LLC v. Underwriters at Lloyds London*, 2020 WL 5757341, at *7 (Del. Super.), *reargument denied*, 2020 WL 6338359 (Del. Super.), and *cert. denied*, 2020 WL 6875211 (Del. Super.), and *appeal refused*, 242 A.3d 601 (Del. 2020) ("Where defense costs are concerned, the Court must look to the underlying complaint's allegations in order to determine whether the action states a claim covered by the policy." (citing *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974))).

Coverage for Securities Action

The Securities Action was filed against Clover Health, Garipalli, Toy, Wagner, and Palihapitiya. The dispute for coverage of the Securities Action is whether coverage extends to Garipalli, Toy, and Wagner. The Securities Action alleges that Garipalli, Toy, and Wagner were "liable for: (i) making false statements; (ii) failing to disclose adverse facts known to them about Clover [Health]; and (iii) engaging in a scheme to defraud."[15] The Securities Action alleges that Garipalli, Toy, and Wagner "reviewed, contributed to, authored, approved, and disseminated [various documents in connection with the Merger, including] [Social Capital's] S-4, [Social Capital's] First Amended S-4, [Social Capital's] Second Amended S-4, [Social Capital's] Third Amended S-4, the December 14 Prospectus, the Proxy Statement, and the Shelf Registration."[16] They each also signed the Shelf Registration."[17] The question for the Court is whether these allegations against Garipalli, Toy, and Wagner amount to a Wrongful Act by an Insured Person under the Tail Policies.

Coverage for Derivative Actions

The dispute for coverage of the Derivative Actions is whether coverage extends to Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton. The Derivative

[15] Securities Action Compl. ¶ 43.
[16] *Id.* ¶¶ 36–38.
[17] *Id.*

Actions contain similar allegations to those from the Securities Action, but in the context of shareholder derivative suits.[18] The coverage issues for the Derivative Actions and the Securities Action are the same, but the Derivative Actions include allegations for three additional individuals: Turner, Shapiro, and Clinton.

Who are Insured Persons

Section II.B(1) of the Primary Tail Policy defines "Insured Persons" as: "[A]ny one or more natural persons who were, now are or shall become duly elected or appointed directors . . . ." The question of who qualifies as Insured Persons under this type of insurance policy language is an issue of first impression for this Court.

The Tail Insurers argue the "shall become" language was necessary because this is a claims made policy covering director's and officer's alleged Wrongful Acts occurring in any period leading up to the Policy Period for claims made during the Policy Period. If the Tail Policies were not claims made policies, and were instead occurrence policies, then the Tail Policies would be more like general liability policies. If these were occurrence policies, then the "shall become" language would not be necessary because it would be clear that Wrongful Acts must have occurred during the Policy Period. "Shall become" refers to the dates

[18] *See* Consolidated Deriv. Compl. ¶¶ 3, 67–70; Sun Deriv. Compl. ¶¶ 11–12; Weigand Deriv. Compl. ¶ 23; Luthra Deriv. Compl. ¶¶ 11–12; Davies Deriv. Compl. ¶ 49; Uvaydov Deriv. Compl. ¶¶ 24–25.

after the policy inception. It confirms that directors and officers elected or appointed during the Policy Period, but after policy inception, are covered.

Clover Health argues the "shall become" language is not typically in claims made policies. Clover Health argues the language was included specifically to protect future directors of Social Capital who were not yet directors as of the policy inception date, but the alleged Wrongful Acts took place while the individuals were acting "in their capacity" as "Insured Persons."

It would have been more clear if the language had said that an Insured Person must have been a director or officer at time the Wrongful Act was committed. It also would have been more clear if the language had said that "Insured Persons" includes individuals who were not yet directors or officers as of the policy date, but the individuals' alleged Wrongful Acts took place while they were "in their capacity" as "Insured Persons."

Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton were not elected or appointed by Social Capital. They were directors and officers of Legacy Clover prior to the consummation of the Merger. They were not directors and officers of Social Capital on the inception date of the Tail Policies.

In *Liberty Insurance Underwriters, Inc. v. Cocrystal Pharma, Inc.*,[19] Biozone and Cocrystal Discovery combined to form Cocrystal.[20] Cocrystal was the Insured.[21] The parties disputed coverage of an SEC Investigation regarding a pump-and-dump scheme to inflate the value of Biozone shares.[22] The pump-and-dump scheme allegedly involved three directors and/or officers of Biozone, who became directors or officers of Cocrystal after the business combination.[23] The three directors or officers allegedly carried out the scheme before the business combination.[24]

The insurance policy in *Cocrystal* defined a Wrongful Act as: "[A]ny actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty, actually or alleged committed or attempted by the Insured Persons in their capacities as such . . . ."[25] The insurance policy in *Cocrystal* defined "Insured Persons" as: "[O]ne or more natural persons who were, now are, or shall hereafter be duly elected or appointed directors or officers of the Insured Organization."[26] The Court concluded that none of the three directors or officers could have acted in their capacity as directors or officers of Cocrystal because the

[19] 2022 WL 1624363 (D. Del.).
[20] *Id.* at *5.
[21] *Id.*
[22] *Id.*
[23] *Id.* at *2.
[24] *Id.* at *5.
[25] *Id.* (emphasis removed).
[26] *Id.*

alleged acts occurred before Cocrystal (the Insured Organization) existed as an entity.[27] Instead, the Court concluded the alleged directors or officers had acted in their capacity as directors and officers of Biozone.[28]

The instant case is distinguishable from *Cocrystal*. *Cocrystal* dealt with an insurance policy that listed the new combined company as the insured, while the instant case lists the former company, Social Capital, as the insured. The directors or officers in *Cocrystal* did not commit acts while Cocrystal "existed," while the directors and officers in the instant case acted while the Insured (Social Capital) did exist. The definition of Insured Persons in *Cocrystal* did not include language permitting those acting as "functional equivalents" to be included in the definition, while the definition of Insured Persons in the instant case has language including those acting as "functional equivalents." Because of these differences, *Cocrystal* does not control the Court's analysis.

Clover Health argues that a future director or officer of Clover Health is the functional equivalent of a Social Capital officer or director. Clover Health contends that as future directors or officers, they only lacked a title with the new organization, Clover Health. Therefore, Clover Health argues the directors and officers at issue qualify as Insured Persons under the Tail Policy. The Tail Insurers

[27] *Id.*
[28] *Id.*

contend that the directors and officers at issue cannot be Insured Persons because they are not "of the Company" (*i.e.*, past, current, or future directors and officers of Social Capital).

The directors and officers at issue are all former directors and officers of Legacy Clover, not Social Capital. Therefore, they cannot be "of the Company." However, the question then becomes whether they are the functional equivalent to directors and officers of Social Capital. In the Primary Tail Policy's definition of Insured Persons, "functional equivalent" comes after "of the Company." Therefore, the Court finds that "functional equivalent" is not modified by "of the Company." Thus, an Insured Person could be someone associated with another entity that is not Social Capital if that person operated in a functionally equivalent role to a director or officer of Social Capital.

The alleged Wrongful Acts (misstatements through document filings explained above) took place before the Merger, while Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton were future directors and officers of Clover Health, but current directors and officers of Legacy Clover.[29] These individuals allegedly had positions of power, authority, and control, over Clover Health, which enabled

[29] Securities Action Compl. ¶¶ 36–38, 41, 373, 380; Consolidated Deriv. Compl. ¶¶ 3, 67–70; Sun Deriv. Compl. ¶¶ 11–12; Weigand Deriv. Compl. ¶ 23; Luthra Deriv. Compl. ¶¶ 11–12; Davies Deriv. Compl. ¶ 49; Uvaydov Deriv. Compl. ¶¶ 24–25.

them to control the contents of Clover Health's filings and statements.[30] The individuals allegedly assisted with Social Capital's Form S-4 while they were still directors and officers of Legacy Clover. Because Social Capital was set to become Clover Health at the time of the alleged wrongdoing—and Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton allegedly committed the wrongdoing concerning Social Capital's SEC filings while in positions of control as future directors and officers of Clover Health—these individuals were acting in functionally equivalent roles to Social Capital's directors and officers when they committed the alleged wrongdoing.

The definition of Insured Persons includes individuals that "shall become duly elected . . . directors . . . [or] officers . . . of the **Company** or their functional equivalent." The Court finds that the plain language of the Insured Persons definition includes Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton.

SEC Subpoena

As part of the SEC Investigation, the SEC sent Clover Health subpoenas dated February 26, 2021 and September 15, 2021. Clover Health sought coverage for its alleged expenses incurred in connection with responding to the subpoenas. The Tail Insurers denied coverage on the basis that the SEC Investigation does not

[30] Securities Action Compl. ¶¶ 36–38, 41, 373, 380.

qualify as a Claim. The Court must determine whether the SEC Investigation qualifies as a Claim for a Wrongful Act under the Tail Policies.

Tail Insurers argue the SEC Investigation subpoenas do not qualify under Subparts 6 and 7 of the definition of a Claim. Subpart 6 includes in the definition of a Claim "a formal administrative or regulatory proceeding, other than an investigatory proceeding, against any **Insured** for a **Wrongful Act**, commenced by the filing of a notice of charge or similar document." Subpart 7 includes in the definition of a Claim "a **Formal Investigation** of an **Insured Person**." Endorsement Number 3 to the Primary Tail Policy defines a "Formal Investigation" as:

> a civil, criminal, administrative or regulatory investigation against an **Insured Person** for a **Wrongful Act**, commenced by the service upon or other receipt by the **Insured Person** of a formal investigative order, written notice, including a Wells Notice, target letter, subpoena, search warrant, or a similar document from the investigating authority identifying the **Insured Person** as an individual against whom a formal proceeding may be commenced.

Tail Insurers contend Social Capital is not an Insured Person and the subpoenas do not identify any Insured Persons. Because of this, Tail Insurers argue the SEC Investigation does not qualify as a Claim under the Tail Policies. Tail Insurers also contend that no Wrongful Act is identified in the SEC

subpoenas. Rather, Tail Insurers claim the subpoenas are merely a "non-public, fact-finding inquiry."

"Terms in an insurance contract generally are given their plain and ordinary meaning. Any ambiguity in the contract is construed against the insurer and in favor of coverage."[31] Clover Health argues that Subpart 6 and 7 of the definition of a Claim are inconsistent, and thus ambiguous. Subpart 6 removes investigatory proceedings from the definition of a Claim, while Subpart 7 includes Formal Investigations as defined above. Clover Health also contends that the subpoenas do identify Insured Persons because both "Clover Health" and "Social Capital" are defined in the subpoenas as including their respective directors and officers.

The Court finds the Claim definition to be ambiguous because of directly contradictory language in Subparts 6 and 7.[32] The Court hereby denies the Motion to Dismiss with respect to the SEC Investigation subpoenas. The Court will permit discovery regarding the ambiguity.

Implied Covenant of Good Faith and Fair Dealing

"'To sufficiently plead [a] breach of the implied covenant of good faith and fair dealing, a complaint must allege a specific implied contractual obligation, a

[31] *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co*., 2019 WL 2612829, at *5 (Del. Super.).
[32] Because the Court finds Subparts 6 and 7 of the Claim definition are ambiguous, the Court need not address the Tail Insurers' other arguments concerning Wrongful Acts and Insured Persons.

breach of that obligation by the defendant, and resulting damage to the plaintiff.'"[33] "To maintain an implied covenant claim, the factual allegations underlying the implied covenant claim must differ from those underlying an accompanying breach-of-contract claim."[34]

The implied covenant of good faith and fair dealing claim and the breach of contract claim against the Tail Insurers are the same. Both claims allege that the Tail Insurers should have provided coverage for the Securities Action, the Derivative Actions, the Section 220 Demands and Action, and the SEC Investigation.[35]

The Court finds the alleged conduct for the implied covenant of good faith and fair dealing claim is not different from the alleged conduct for Clover Health's breach of contract claim. The Court hereby dismisses the claim for breach of the implied covenant of good faith and fair dealing.

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[33] *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1117–18 (Del. 2022) (quoting *Sheehan v. AssuredPartners, Inc.*, 2020 WL 2838575, at *11 (Del. Ch.) (internal quotations omitted)).
[34] *GWO Litig. Tr. v. Sprint Sols., Inc.*, 2018 WL 5309477, at *6 (Del. Super.) (citing *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 539 (Del. 2011)); *see also AQSR India Priv., Ltd. v. Bureau Veritas Holdings, Inc.*, 2009 WL 1707910, at *11 (Del. Ch.) (dismissing the claim for breach of the implied covenant of good faith and fair dealing because "the breach of the implied covenant of good faith and fair dealing claim and the breach of contract claim [were] essentially the same").
[35] *Compare* Clover Health's Am. Compl. ¶¶ 104–11 (explaining the second cause of action seeking declaratory judgment against Tail Insurers for breach of contract), *with* Clover Health's Am. Compl. ¶¶ 112–19 (explaining the third cause of action for breach of the implied covenant of good faith and fair dealing).

Allocation[36]

Section VII. DEFENSE AND SETTLEMENT of the Primary Tail Policy, as amended by Endorsement Number 1, Section J, states in part:

> [I]t shall be the duty of the **Insureds** and not the duty of the Insurer to defend any **Claim**.
>
> . . .
>
> The **Insureds** agree to provide the Insurer with all information, assistance and cooperation which the Insurer reasonably requests and agree that in the event of a **Claim** the **Insureds** will do nothing that shall prejudice the Insurer's position or its potential or actual rights of recovery. However, the failure of one **Insured** to provide such information, assistance, or cooperation shall not prejudice the rights of any other **Insured Person** under this **Policy**. The Insurer may make any investigation it deems necessary.
>
> The Insurer shall advance on a current basis, but in no event later than sixty (60) days following the receipt of defense bills that are reasonably acceptable to the Insurer, **Defense Costs** which the Insurer believes to be covered under this **Policy**. Any advancement of **Defense Costs** shall be repaid to the Insurer by the **Insureds** severally according to their respective interests if and to the extent the **Insureds** shall not be entitled under the terms and conditions of this **Policy** to coverage for such **Defense Costs**.

[36] The analysis in this section is included for context and completeness. However, this issue might properly be considered moot. All directors and officers have been determined to be Insured Persons. The allocation between the Go-Forward and Tail Policies is not a dispute about whether coverage exists. Rather, both policies may have overlapping coverage and determining allocation between the two may be worked out at a future time.

Section V. ALLOCATION of the Primary Tail Policy, as amended by Endorsement Number 2, states in part: "[T]he **Insureds** and the Insurer shall use their best efforts to allocate such amount between covered **Loss** and uncovered loss based upon the relative legal and financial exposures of the parties to covered and uncovered matters." The Court first must determine if the issue of allocation is ripe, and if so, the Court must determine whether the Larger Settlement Rule applies.

Ripeness

Tail Insurers argue Endorsement Number 2 means the Insured must negotiate with the Insurer before the issue of allocation is ripe for determination. Clover Health argues the parties have already attempted to resolve the allocation issue. The question for the Court is whether the allocation issue is ripe for determination.

Before mediation, Endurance informed Clover Health that it was only responsible for 10% of any loss. Clover Health argues that Endurance's position that it is only responsible for 10% of any loss does not have a good faith basis. Clover Health contends the issue of allocation would be moot if the Court found all six directors and officers qualify as Insured Persons. However, the Tail Insurers based their 10% allocation on more than whether individuals qualify as Insured Persons. The Tail Insurers contend that the 10% is based on an analysis involving

partial coverage for different people and under different insurance policies (*i.e.*, allocation between the Tail Policies and the Go-Forward Policies).[37] Because there were multiple factors in the analysis, not just whether certain parties qualify as Insured Persons, this matter is not moot.

In *Arch Insurance Company v. Murdock*[38] this Court dealt with "best efforts" language in an allocation provision.[39] However, the Court did not need to contemplate whether the parties satisfied the "best efforts" requirement prior to allocation becoming ripe for judicial determination because no facts suggested an opposing party failed to use "best efforts."[40] Instead, the court focused on the application of the Larger Settlement Rule to a settlement amount.[41] Tail Insurers argue that Clover Health failed to negotiate the allocation, and instead filed suit.

The Court finds that Endorsement Number 2's language saying, "shall use best efforts to allocate" does not mandate the parties enter into actual negotiations before the allocation dispute is ripe for judicial determination. Thus, the issue of allocation is ripe for judicial determination. However, determining the allocation involves facts not yet on the record, unless the Larger Settlement Rule applies.

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[37] Tail Insurers posited that other factors may have been part of the analysis, though did not explicitly state them.
[38] 2020 WL 1865752 (Del. Super.).
[39] *Id.* at *3.
[40] *Id.* at *7 ("Moreover, the record provides no facts that support that either party requested an allocation or, if an allocation was requested, one party failed to use best efforts to try and determine a fair and proper allocation.").
[41] *Id.* at *7–9.

Larger Settlement Rule

Applying the Larger Settlement Rule in this instance would require that the Tail Insurers be responsible for the entirety of the defense costs related to the Securities Action and Derivative Actions.

The purpose of the Larger Settlement Rule is to "protect the economic expectations of the insured" by preventing "the deprivation of insurance coverage that was sought and bought."[42] The Larger Settlement Rule requires that the insurer pay all costs associated with a settlement or defense, without allocating any costs to the uninsured parties or matters if: "(i) the settlement [or defense] resolves, at least in part, insured claims; (ii) the parties cannot agree as to the allocation of covered and uncovered claims; [] (iii) the allocation provision does not provide for a specific allocation method (*e.g.*, *pro rata* or alike);"[43] and (iv) "the defense or settlement costs of the litigation were" not higher "than they would have been had" only the insured claims "been defended or settled."[44]

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[42] *Id.* at *7.
[43] *Id.*
[44] *See id.* ("The Larger Settlement Rule provides that 'allocation is appropriate only if . . . the defense or settlement costs of the litigation were, by virtue of the wrongful acts of the uninsured parties, higher than they would have been had only the insured parties been defended or settled.'" (quoting *Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*., 64 F.3d 1282, 1287 (9th Cir. 1995))); *see also Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1432 (9th Cir. 1995), *as amended on denial of reh'g* (Aug. 1, 1995) ("[R]esponsibility for any portion of the settlement should be allocated away from the insured party only if the acts of the uninsured party are determined to have increased the settlement."). In other words, if the insurers are entitled to allocation, and not responsible for the entirety of the settlement or defense costs, then it is because the allegedly uninsured claims made the settlement or defense costs more

Clover Health argues that the Tail Insurers are not entitled to allocation, and that even if the allocation provision were triggered, the Larger Settlement Rule should apply because all defendants in the Securities Litigation shared the same counsel and benefited from the same defense work. Clover Health contends that because all defendants in the Securities Litigation shared the same counsel and benefited from the same defense work, there would be no basis for the defense costs to have increased. Because the Court finds all disputed directors and officers are Insured Persons, the only bases for allocation are the other factors. The principal of these factors is the allocation of defense costs between the Tail Policies and the Go-Forward Policies.

Tail Insurers argue they do not have a duty to defend because the Primary Tail Policy states: "[I]t shall be the duty of the **Insureds** and not the duty of the Insurer to defend any **Claim**." Tail Insurers also argue that under Section 7 of the Primary Tail Policy, the Tail Insurers are only responsible to advance defense costs which they "believe[] to be covered under [the] Policy."

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expensive. Conversely, if there was not an increase in the settlement or defense costs, then the insurers are not entitled to allocation and the Larger Settlement Rule would apply.

This Court analyzed whether to apply the Larger Settlement Rule in *Arch Insurance Company v. Murdock*.[45] The language in the allocation provision in *Murdock* stated:

> [T]he Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of covered Loss. . . . In making such determination, the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim.[46]

[45] 2020 WL 1865752 (Del. Super.).

[46] *Id.* at *8. The full allocation provision from the primary insurance policy, Section VIII.A, at issue in *Murdock* states:

> If in any Claim, the Insureds who are afforded coverage for such Claim incur Loss jointly with others (including other Insureds) who are not afforded coverage for such Claim, or incur an amount consisting of both Loss covered by this Policy and loss not covered by this Policy because such Claim includes both covered and uncovered matters, then the Insureds and the Insurer agree to use their best efforts to determine a fair and proper allocation of covered Loss. The Insurer's obligation shall relate only to those sums allocated to matters and Insureds which are afforded coverage. In making such determination, the parties shall take into account the relative legal and financial exposures of the Insureds in connection with the defense and/or settlement of the Claim.
>
> If the Insureds and the Insurer agree on an allocation of Defense Costs, the Insurer shall advance Defense Costs allocated to the covered Loss. If the Insureds and the Insurer cannot agree on an allocation of Defense Costs, the Insurer shall advance on a current basis Defense Costs which the Insurer believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined.
>
> Any negotiated, arbitrated or judicially determined allocation of Defense Costs on account of a Claim shall be applied retroactively to all Defense Costs on account of such Claim, notwithstanding any different allocation made in connection with any prior advancement of Defense Costs. Any allocation or advancement of Defense Costs on account of a Claim shall not apply to or create any presumption with respect to the allocation of other Loss arising from such Claim or any other Claim.
>
> (emphasis removed).

The Court determined this language did not provide for a specific allocation method if the parties could not agree on an allocation of the settlement amount.[47]

After determining the Allocation Provision did not provide a specific allocation method, the Court in *Murdock* looked to whether a settlement had been increased due to uninsured claims.[48] With respect to whether defense costs were affected, one of the insurance claims at issue was an action for all joint and several liability.[49] Because the liability was all joint and several liability, there was no issue whether uninsured parties caused an increase to the settlement, and the Court applied the Larger Settlement Rule.[50] The second claim at issue required additional facts to determine if all liability was joint and several.[51] In its review of the Superior Court ruling in *Murdock*, the Delaware Supreme Court determined the *Murdock* Court properly applied the Larger Settlement Rule.[52]

In the instant case, the advancement of defense costs would resolve, at least in part, Clover Health's claims. The parties have not come to an agreement as to the allocation of covered and uncovered claims between the Tail and Go-Forward Policies. Therefore, the first two requirements for the Larger Settlement Rule are

[47] *Id.*
[48] *Id.* at *8–9.
[49] *Id.* at *9.
[50] *Id.*
[51] *Id.*
[52] *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 909 (Del. 2021) (affirming the Superior Court opinion).

satisfied. The two remaining factors are whether the allocation provision provides for a specific allocation method, and whether the defense costs were increased due to uninsured parties or matters.

The Court in *Murdock* did not address allocation of defense costs. It addressed allocation of a settlement.[53] However, the Larger Settlement Rule applies to both allocation of defense costs and allocation of a settlement.[54]

When considering the allocation method, the Court looks to the Allocation Provision. However, because this case involves the advancement of defense costs, the Court also looks to the Primary Tail Policy's advancement provision. Section VII. DEFENSE AND SETTLEMENT, states:

> [I]t shall be the duty of the Insureds and not the duty of the Insurer to defend any Claim.
>
> . . .
>
> The Insurer shall advance on a current basis, but in no event later than sixty (60) days following the receipt of defense bills that are reasonably acceptable to the Insurer, **Defense Costs** which the Insurer believes to be covered under this **Policy**."[55]

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[53] *Murdock*, 2020 WL 1865752, at *1 ("The insurance carriers seek a declaratory judgment concerning indemnification relating to two settlements due to Defendants' alleged breaches of the applicable insurance policies . . . .").

[54] *Id.* at *7 ("The Larger Settlement Rule provides that 'allocation is appropriate only if, and only to the extent that, the *defense or settlement costs* of the litigation were, by virtue of the wrongful acts of the uninsured parties, higher than they would have been had only the insured parties been defended or settled.'" (emphasis added)).

[55] The insurance policy at issue in *Murdock* contained similar language. Section V.D from the insurance policy in *Murdock* stated: "It shall be the Insureds' duty and not the Insurer's duty to defend Claims, including the investigation and evaluation of any Shareholder Derivative

This provision gives the Tail Insurers the authority to determine the reasonable defense costs that are covered under the Tail Policies. However, if the Tail Insurers are accorded unfettered authority to determine what constitutes a covered defense cost, such unilateral discretion would contradict the Allocation Provision's "best efforts" instruction. There would be no point in requiring Clover Health and the Tail Insurers to use "best efforts" to allocate defense costs if the Tail Insurers can ultimately make a unilateral decision. The Allocation Provision includes Clover Health in the determination of the allocation of defense costs. The DEFENSE AND SETTLEMENT Provision dictates that the Tail Insurers have sole discretion to determine defense costs. Therefore, the Court finds this policy language potentially contradictory and ambiguous. Construction must be in favor of Clover Health, as the insured.[56] Because these provisions are ambiguous with respect to allocation, the Primary Tail Policy does not provide a specific allocation method. Thus, the third requirement for the Larger Settlement Rule is satisfied.

Demand." (emphasis removed). Section VIII.A of the insurance policy, in *Murdock* stated: "the Insurer shall advance on a current basis Defense Costs which the Insurer believes to be covered under this Policy until a different allocation is negotiated, arbitrated or judicially determined." (emphasis removed). However, because the *Murdock* case involved settlement costs, not defense costs, this language was immaterial to the Court in its analysis.

[56] *Murdock*, 2020 WL 1865752, at *6 ("Ambiguous insurance policy language is construed in the insured's favor--i.e., under the doctrine of contra proferentem, the language of an insurance policy must be construed most strongly against the insurance company that drafted the policy.").

With respect to the last requirement—whether the defense costs were increased due to uninsured parties or matters—the Court finds defense costs were not increased. Defense costs were not impacted by whether multiple insurance policies may or may not provide coverage. Thus, all requirements for the Larger Settlement Rule to apply are satisfied. The Court finds the Larger Settlement Rule applies. The Tail Insurers are required to advance all defense costs for the Securities Action and Derivative Actions, subject to their respective retentions and limits.

CONCLUSION

The Court finds that the plain language of the Insured Persons definition includes Garipalli, Toy, Wagner, Turner, Shapiro, and Clinton.

The Court finds the Claim definition to be ambiguous because of directly contradictory language in Subparts 6 and 7. The Court hereby **DENIES** Defendants' Motion to Dismiss with respect to the SEC Investigation subpoenas. The Court will permit discovery regarding the ambiguity.

The Court finds the alleged conduct for the implied covenant of good faith and fair dealing claim is not different from the alleged conduct for the breach of contract claim. The Court hereby **GRANTS** Defendants' Motion to Dismiss the claim for breach of the implied covenant of good faith and fair dealing.

The Court finds that Endorsement Number 2's language saying, "shall use best efforts to allocate" does not mandate the parties enter into actual negotiations before the allocation dispute is ripe for judicial determination.

The Court finds that the Larger Settlement Rule applies. The Tail Insurers are required to advance all defense costs for the Securities Action and the Derivative Actions, subject to their respective retentions and limits.

Tail Insurers' Motion to Dismiss is hereby **GRANTED IN PART AND DENIED IN PART**.

Clover Health's Partial Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston