

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

AMTRUST INTERNATIONAL
UNDERWRITERS DAC,

Plaintiff,

v.

180 LIFE SCIENCES CORP.,

Defendant.

Case No. 22-cv-03844-BLF

**ORDER GRANTING 180 LIFE
SCIENCES CORPORATION'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

[Re: ECF 62]

180 LIFE SCIENCES CORP.,

Counterclaimant,

v.

AMTRUST INTERNATIONAL
UNDERWRITERS DAC,

Counterdefendant.

180 LIFE SCIENCES CORP.,

Third-Party Plaintiff,

v.

FREEDOM SPECIALTY INSURANCE
COMPANY,

Third-Party Defendant.

This order addresses a motion for partial summary judgment filed by 180 Life Sciences Corp. (“180 Life”) in this insurance coverage action relating to the directors and officers (“D&O”) liability provisions of policies issued by AmTrust International Underwriters DAC (“AmTrust”) and Freedom Specialty Insurance Company (“Freedom”) (collectively, “the Insurers”). *See* Mot., ECF 62. As relevant here, the parties dispute whether the policies provide coverage for 180 Life’s payment of expenses incurred by two of its former directors and officers, Dr. Marlene Krauss

1 (“Krauss”) and George Hornig (“Hornig”), in connection with subpoenas issued to them by the
2 Securities and Exchange Commission (“SEC”). 180 Life seeks partial summary judgment that an
3 “Advancement” clause in the policies requires the Insurers to advance the subpoena-related
4 expenses to 180 Life pending a final coverage determination. The Insurers oppose the motion.

5 180 Life’s motion is GRANTED as discussed below.

6 **I. BACKGROUND**

7 *KBL’s Purchase of Policies, Merger, and Name Change to 180 Life*

8 The facts giving rise to this litigation are set forth in the Court’s order addressing 180
9 Life’s prior motion for partial summary judgment, and need not be repeated in full here. *See* Prior
10 Order, ECF 59. In brief, 180 Life previously was known as KBL Merger Corp. IV (“KBL”). *See*
11 *id.* at 14. KBL purchased a claims-made Directors and Officers and Public Company Liability
12 Policy from AmTrust with a policy limit of \$3 million. *See id.* at 3. KBL also purchased an
13 Excess Insurance Policy from Freedom that follows form to the AmTrust policy and provides \$2
14 million of coverage excess of the AmTrust policy. *See id.* KBL thereafter changed its name to 180
15 Life in conjunction with a November 6, 2020 merger (“the Merger”) that involved the resignation
16 of its chief executive officer, Krauss, and all directors, including Hornig. *See id.* at 4.

17 *180 Life’s Advancement of Subpoena-Related Expenses to Krauss and Hornig*

18 The SEC opened an investigation into the Merger and issued subpoenas to Krauss and
19 Hornig. *See* McGovern Decl. ¶ 8, ECF 62-1. Another court has ordered 180 Life to advance to
20 Krauss the expenses she incurs in connection with the SEC subpoenas. *See id.* ¶ 9. To date, 180
21 Life has advanced millions of dollars in subpoena-related expenses to Krauss. *See id.* ¶ 10. 180
22 Life also has advanced more than \$100,000 in subpoena-related expenses to Hornig. *See id.*

23 *Present Action*

24 180 Life demanded coverage under the AmTrust and Freedom policies for the subpoena-
25 related expenses advanced to Krauss and Hornig. AmTrust then filed the present declaratory relief
26 action, asserting that 180 Life is not an insured under the AmTrust policy issued to the pre-Merger
27 entity KBL, and that in any event the subpoena-related expenses are subject to policy exclusions.
28 In response, 180 Life filed a counterclaim against AmTrust and a third-party complaint against

1 Freedom, seeking (as relevant here) coverage for the subpoena-related expenses. Freedom
2 answered, asserting that no coverage is available under the Freedom policy.

3 *180 Life's Prior Motion for Partial Summary Judgment*

4 180 Life filed a prior motion for partial summary judgment, seeking determinations that it
5 is the named insured under the policies and that the policies provide coverage for the subpoena-
6 related expenses. *See* Prior Mot., ECF 41. Any potential coverage falls under Coverage B of the
7 policies, set forth below (bold in original). The Court's citations are to the AmTrust policy; as
8 noted, the Freedom policy follows form to the AmTrust policy.

9 **Coverage B: Company Reimbursement Coverage**

10 The **Insurer** shall pay **Loss** of a **Company** arising from a **Claim** first made against
11 an **Individual Insured** during the **Policy Period** or the Extended Reporting Period,
12 if applicable, for any actual or alleged **Wrongful Act** of such **Individual Insured**,
13 but only when and to the extent that such **Company** has indemnified such
14 **Individual Insured** for such **Loss**.

15 McGovern Decl. Ex. 1 (AmTrust Policy) at 13, ECF 62-2. The term "Loss" is defined to include
16 "**Defense Costs** which the insured is legally obligated to pay[.]" *Id.* at 36.

17 The Court granted 180 Life's motion in part, concluding that 180 Life is the named insured
18 under the policies, the SEC subpoenas are Claims under the policies,¹ and the subpoena-related
19 expenses are Defense Costs constituting Loss within the basic scope of coverage. *See* Prior Order
20 at 15-17. However, the Court denied 180 Life's request for a determination that the policies
21 provide coverage for those Defense Costs, finding that 180 Life failed to show that the Insurers
22 cannot rely on the policies' Change in Control Exclusion to defeat coverage. *See id.* at 17-19.

23 *180 Life's Current Motion for Partial Summary Judgment*

24 180 Life now seeks partial summary judgment that an "Advancement" clause in the
25 policies obligates the Insurers to advance the subpoena-related Defense Costs to 180 Life pending
26 a final coverage determination regarding the SEC subpoenas. The Insurers oppose the motion.

27 ¹ More precisely, the SEC *investigation* is a "Claim" under the policies. The policies define
28 "Claim" to include "a civil, criminal, administrative or regulatory *investigation*" of an Individual
Insured; where the investigation is conducted by the SEC, the investigation becomes a "Claim"
after service of a subpoena on the Individual Insured. AmTrust Policy at 34 (italics added). The
Court has followed the parties' lead in referring to the SEC subpoenas themselves as the "Claims,"
as the lack of precision in terminology does not affect the Court's analysis.

1 **II. LEGAL STANDARD**

2 A party may obtain summary judgment by showing that “there is no genuine dispute as to
3 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
4 “The moving party initially bears the burden of proving the absence of a genuine issue of material
5 fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). “Where the moving party
6 meets that burden, the burden then shifts to the non-moving party to designate specific facts
7 demonstrating the existence of genuine issues for trial.” *Id.* “The court must view the evidence in
8 the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant’s
9 favor.” *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014).
10 “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving
11 party, there is no genuine issue for trial.” *Id.* (quotation marks and citation omitted).

12 **III. DISCUSSION**

13 180 Life seeks partial summary judgment that the policies’ “Advancement” clause requires
14 the Insurers to advance the subpoena-related Defense Costs to 180 Life immediately, pending a
15 final coverage determination regarding the SEC subpoenas. The Advancement clause reads as
16 follows:

17 B. Advancement

18 Regardless of whether the defense is so tendered, the **Insurer** shall advance
19 **Defense Costs** in excess of the applicable Retention on behalf of the Insured
20 not less often than every 90 days and prior to final disposition of the **Claim**.
21 Such advanced payments by the **Insurer** shall be repaid to the **Insurer** by each
22 and every **Insured**, severally according to their respective interests, in the
23 event and to the extent that any such **Insured** shall not be entitled under the
24 Terms and Conditions of this **Coverage Element** to payment of such **Loss**.

25 AmTrust Policy at 38.

26 It is 180 Life’s position that the Advancement clause is triggered when there are
27 “potentially covered” Claims, and that the SEC subpoenas are at least potentially covered Claims
28 under the policies. In opposition, the Insurers argue that the Advancement clause is triggered only
by “actually covered” Claims. The Insurers also argue that the motion must be denied under either
standard, asserting that the SEC subpoenas are not even potentially covered Claims because they
fall within the Change in Control Exclusion.

1 The Court first addresses whether the Advancement clause is governed by the “potentially
2 covered” or “actually covered” standard. Next, the Court addresses whether the Advancement
3 clause requires the Insurers to advance to 180 Life the subpoena-related Defense Costs that 180
4 Life has advanced to Krauss and Hornig.

5 **A. Whether the Standard is Potentially Covered or Actually Covered**

6 California law governs the interpretation of the insurance policies in this diversity case.
7 *See Encompass Ins. Co. v. Coast Nat’l Ins. Co.*, 764 F.3d 981, 984 (9th Cir. 2014) (“California’s
8 substantive insurance law governs in this diversity case.” (quotation marks and citation omitted)).
9 Under California law, “[i]nterpretation of an insurance policy is a question of law and follows the
10 general rules of contract interpretation.” *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 647
11 (2003) (quoting *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995)). Policies are interpreted
12 broadly to afford the greatest possible protection to the insured. *Id.* at 648.

13 D&O policies may impose a duty to reimburse defense costs, but the duty to reimburse
14 generally “is limited to defense costs related to *actually covered* claims, as opposed to defense
15 costs related to *potentially covered* claims.” *Health Net, Inc. v. RLI Ins. Co.*, 206 Cal. App. 4th
16 232, 259 (2012) (emphasis in original). That is because D&O policies typically provide for the
17 recovery of defense costs only as covered loss for which indemnification is to be paid. *See id.* A
18 D&O policy may fall outside this general rule, however, where it contains language extending the
19 insurer’s duty to reimburse defense costs to potentially covered claims. *See id.* In *Health Net*, the
20 California appellate court determined that policy language requiring the insurer to reimburse the
21 insured for “defense costs incurred in defense of any Claim or Law Suit brought against the
22 Insured *alleging a Wrongful Act*” was sufficient to obligate the insurer to reimburse defense costs
23 “for potentially covered claims, not merely actually covered claims.” *Id.* (italics in original).

24 In *Gon v. First State Ins. Co.*, 871 F.2d 863, 868 (9th Cir. 1989), the Ninth Circuit applied
25 California law in finding that the potentially covered standard applied to a D&O policy requiring
26 the insurer to pay potentially covered legal expenses as they were incurred by the directors. The
27 Ninth Circuit acknowledged that the insurer “may be advancing legal fees that it will have great
28 difficulty in recovering should the court subsequently decide that a claim or individual was not

1 covered by the policy.” *Id.* at 869. However, the *Gon* court found that it would be impractical to
2 apportion legal fees between covered and uncovered claims based solely on the face of the
3 complaint, “where coverage is not yet clear, because the facts are not fully developed,” and that
4 attempting to do so “may deny the insureds the benefits of the protection they purchased.” *Id.*
5 The Ninth Circuit concluded that, although the insurer “is entitled to apportion the expenses
6 between covered and uncovered claims and persons, it cannot do so at the expense of the insured.”
7 *Id.* at 868. Accordingly, the *Gon* court held that the insurer “must pay all legal expenses as
8 incurred, subject to apportionment and reimbursement for defense of uncovered claims or persons
9 after settlement or judgment in the underlying [] action.” *Id.* at 869.

10 Applying these principles in the present case, the Court finds that the policies require the
11 Insurers to advance defense costs for potentially covered claims as they are incurred. As noted
12 above, the Advancement clause provides that “the **Insurer** shall advance **Defense Costs** . . . not
13 less often than every 90 days and prior to final disposition of the **Claim**.” AmTrust Policy at 38.
14 The Advancement clause provides further that “[s]uch advanced payments by the **Insurer** shall be
15 repaid to the **Insurer**” in the event the “**Insured** shall not be entitled . . . payment of such **Loss**.”
16 *Id.* This language clearly contemplates advancement of Defense Costs for potentially covered
17 Claims, subject to recoupment by the Insurer if it ultimately turns out that the Claims are not
18 actually covered. The Court finds that the inclusion of this language in a separate Advancement
19 clause distinguishes the policies in this case from typical D&O policies that require payment of
20 defense costs only after they have been shown to be a component of indemnified loss. Even if the
21 Court were to find other constructions of the policy to be plausible (and it does not), the policies
22 must be interpreted broadly to afford the greatest protection to 180 Life.

23 The Court’s reading of the Advancement clause is consistent with the decision of another
24 court in this district, *Braden Partners, LP v. Twin City Fire Ins. Co.*, No. 14-CV-01689-JST, 2017
25 WL 63019 (N.D. Cal. Jan. 5, 2017). In *Braden*, the policy required that the insurer advance to the
26 insured expenses incurred in connection with claims made against the insured “*prior to disposition*
27 *of such claims*.” *Id.* at *10 (italics in original). The *Braden* court reasoned that, “Because [n]o
28 one can determine whether the third party suit does or does not fall within the indemnification

1 coverage of the policy until that suit is resolved, this language necessarily contemplates potential,
2 rather than actual, coverage.” *Id.* (quotation marks and citation omitted). The *Braden* court also
3 found it significant that the policy defined “Claim” as a judicial or other proceeding for a
4 “Wrongful Act,” and defined “Wrongful Act” as “any actual or *alleged* error, misstatement,
5 misleading statement, act. . . .” *Id.* (italics in original). Finally, the policy in *Braden* gave the
6 insurer the right to repayment of the defense costs in the event it turned out there was no coverage.
7 *Id.* The *Braden* court concluded that, “This right to repayment after a final determination of
8 coverage only makes sense if the duty to advance defense costs is triggered by potential
9 coverage.” *Id.* Like the policy at issue in *Braden*, the policies in the present case require
10 advancement of Defense Costs prior to disposition of the Claim; provide coverage for a Claim
11 asserting any actual or alleged Wrongful Act; and grant the insurers a right to repayment of the
12 Defense Costs in the event of a final determination of no coverage. This Court finds no reason to
13 deviate from the persuasive reasoning of *Braden*, and likewise concludes that the potential for
14 coverage standard applies to the Insurers’ duty to advance defense costs.

15 The *Braden* court acknowledged that the Ninth Circuit has not offered clear guidance on
16 the standard applicable to an insurer’s duty to advance defense costs, and that some district courts
17 within the Ninth Circuit have found that duty to be limited to actually covered claims. *See*
18 *Braden*, 2017 WL 63019, at *9 (N.D. Cal. Jan. 5, 2017) (collecting cases). The Insurers rely on a
19 number of district court cases applying the actually covered standard in opposing 180 Life’s
20 motion. The Court finds that reliance to be misplaced, as the cases cited by the Insurers are
21 factually distinguishable. In *Jeff Tracy, Inc. v. U.S. Specialty Ins. Co.*, 636 F. Supp. 2d 995 (C.D.
22 Cal. 2009), the policy did not contain a separate advancement clause requiring advancement of
23 defense costs subject to reimbursement in the event of a later determination that they are not
24 covered loss. In *U.S. TelePacific Corp. v. U.S. Specialty Ins. Co.*, No. CV 18-5083-DMG
25 (AGR_x), 2019 WL 2590171, *4 (C.D. Cal. June 18, 2019), *aff’d*, 815 F. App’x 155 (9th Cir.
26 2020), the policy did contain an advancement clause but it was expressly limited to “Defense
27 Costs for which this Policy provides coverage.” To the extent any of the district court cases cited
28 by the Insurers may be viewed as factually analogous to the present case, this Court finds the

1 reasoning of *Braden* to be far more persuasive. Finally, the Insurers’ citation to the Ninth
2 Circuit’s decision in *Millennium Lab ’ys, Inc. v. Allied World Assurance Co. (U.S.), Inc.*, 726 F.
3 App’x 571, 574 (9th Cir. 2018), does not support their position, as the policy in *Millennium* did
4 not require the contemporaneous advancement of the insured’s defense costs and instead provided
5 for coverage of defense costs only as an ingredient of covered losses.

6 After careful consideration of the policy language and the relevant case law, the Court
7 concludes that the Advancement clause requires the Insurers to advance Defense Costs for
8 potentially covered Claims.

9 **B. Whether Advancement of Subpoena-Related Defense Costs is Required**

10 Having concluded that the policies’ Advancement clause is governed by the potentially
11 covered standard, the Court applies that standard in evaluating 180 Life’s request for an
12 adjudication that the Insurers must advance the subpoena-related Defense Costs to 180 Life
13 pending a final coverage determination. At the hearing, the Court stated its tentative view that 180
14 Life easily will prevail on its motion if the potentially covered standard applies. After revisiting
15 the policy language in light of the oral argument made by AmTrust’s counsel, however, the Court
16 finds that 180 Life’s motion presents a close question even under the potentially covered standard.

17 As the party moving for summary judgment, 180 Life has the initial burden to show that
18 the SEC subpoenas and related Defense Costs are potentially covered in order to trigger the
19 Advancement clause. “Under California law, the burden is on the insured to establish that a
20 claimed loss is within the basic scope of insurance coverage.” *Mudpie, Inc. v. Travelers Cas. Ins.*
21 *Co. of Am.*, 15 F.4th 885, 890 (9th Cir. 2021) (quotation marks and citation omitted). “[O]nce an
22 insured has made this showing, the burden is on the insurer to prove the claim is specifically
23 excluded.” *Id.* (quotation marks and citation omitted). As discussed herein, the Court previously
24 found that the SEC subpoenas are Claims under the policies, and the subpoena-related expenses
25 are Defense Costs constituting Loss within the basic scope of coverage. *See* Prior Order at 15-17.
26 The Court noted in its prior order that, apart from arguing that 180 Life is not the named insured,
27 the Insurers do not dispute that the SEC subpoenas constitute Claims under the policies. *See id.* at
28 17. 180 Life points to the Court’s prior ruling to show that the SEC subpoenas and related

1 Defense Costs are within the basic scope of coverage. That is sufficient to shift the burden to the
2 Insurers to show that the SEC subpoenas and related Defense Costs are specifically excluded
3 under the policies, and thus not even potentially covered.

4 The Insurers contend that the SEC subpoenas are specifically excluded under the Change
5 in Control Exclusion. “[A]n insurer that wishes to rely on an exclusion has the burden of proving,
6 through conclusive evidence, that the exclusion applies in all possible worlds.” *Atl. Mut. Ins. Co.*
7 *v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1039 (2002).

8 The Change in Control Exclusion relied on by the Insurers provides as follows:

9 If during the Policy Period:

- 10 1. the **Named Insured** shall consolidate with or merge into any other entity or
11 group of persons or entities acting in concert, or
12 2. any person or entity or group of persons or entities acting in concert shall
13 acquire **Management Control** of the **Named Insured**,

14 (1 and/or 2 herein referred to as a Change In Control), then this policy may not be
15 cancelled thereafter and it shall not, in any event, apply to any **Claim** alleging in
16 whole or in part any **Wrongful Acts** committed, attempted or allegedly committed
17 or attempted by any **Insured** subsequent the date of such Change In Control.

18 AmTrust Policy at 33.

19 It is undisputed that there was a change in control on November 6, 2020, the date the
20 Merger closed. Thus, coverage for the Claims at issue – the SEC subpoenas – is barred if they
21 “alleg[e] in whole or in part any Wrongful Acts committed, attempted or allegedly committed or
22 attempted by” Krauss and/or Hornig during the post-Merger period. The Insurers point out that
23 the SEC subpoenas necessarily must be construed to allege Wrongful Acts by Krauss and/or
24 Hornig to be covered Claims. As discussed above, any potential coverage for the SEC subpoenas
25 and related Defense Costs falls under Coverage B of the policies, which provides in relevant part
26 that “[t]he **Insurer** shall pay the **Loss** of a **Company** arising from a *Claim first made against an*
27 *Individual Insured . . . for any actual or alleged Wrongful Act of such Individual Insured*” that
28 has been indemnified by the Company. AmTrust Policy at 38 (bold in original, italics added).
Because the SEC subpoenas must be construed to allege Wrongful Acts in order for coverage to
exist at all, application of the Change in Control Exclusion turns on *when* the alleged Wrongful
Acts are alleged to have been committed or attempted. If the SEC subpoenas are construed to

1 allege “in whole or in part” any Wrongful Acts committed or attempted by Krauss and/or Hornig
2 after the Merger, the exclusion would apply.

3 180 Life appears to argue that the Insurers can defeat coverage only by providing
4 conclusive evidence of *actual* Wrongful Acts by Krauss and/or Hornig after the Merger. For the
5 reasons discussed above, the Court finds this argument to be inconsistent with the relevant policy
6 language. To establish application of the Change in Control Exclusion, the Insurers must show
7 that the SEC subpoenas are Claims “*alleging* in whole or in part any Wrongful Acts” committed
8 or attempted after the Merger. AmTrust Policy at 33.

9 This showing is difficult to make in the context of a subpoena rather than a civil complaint
10 containing specific factual allegations of wrongdoing. The parties have not cited any case law
11 providing guidance on how the Court is to determine whether the SEC subpoenas allege any
12 Wrongful Acts committed or attempted post-Merger. On their face, the SEC subpoenas do not
13 allege any Wrongful Acts at all; they merely request documents. *See* McGovern Decl. Ex. 3 (SEC
14 Subpoenas), ECF 62-4. “When the claim is a subpoena or other investigative demand (rather than
15 a complaint in a civil litigation), we consider whether the government is investigating the insured
16 for a legal violation that falls within the policy’s coverage instead of whether the complaint states
17 a claim that does the same.” *Liberty Ins. Underwriters, Inc. v. Cocystal Pharma, Inc.*, No. 22-
18 2242, 2023 WL 3067498, at *4 (3d Cir. Apr. 25, 2023). The SEC subpoenas fairly may be
19 characterized as investigating Krauss and Hornig for a legal violation falling within the policies’
20 definition of Wrongful Act, which includes “any actual or alleged breach of duty, neglect, error,
21 misstatement, misleading statement, omission or act by an **Individual Insured** in their respective
22 capacities as such, or in their capacity as a controlling person within the meaning of Section 15 of
23 the Securities Act of 1933, as amended or Section 20(a) of the Securities Exchange Act 1934, as
24 amended; or for any matter claimed against such **Individual Insured** by reason of his or her status
25 as an **Executive, Employee, or Outside Entity Executive**[.]” AmTrust Policy at 37. However,
26 characterizing the SEC subpoenas as Claims for actual or alleged Wrongful Acts of Krauss and
27 Hornig does not shed light on *when* the alleged Wrongful Acts were committed or attempted for
28 purposes of the Change in Control Exclusion.

1 The Insurers emphasize that the SEC subpoenas request documents from Krauss and
2 Hornig relating to both pre-Merger and post-Merger time periods, and urge the Court to infer from
3 those requests that the SEC subpoenas allege both pre-Merger and post-Merger Wrongful Acts.
4 The Court cannot make that logical leap, especially in the absence of any case authority supporting
5 it. Given that Krauss and Hornig resigned their positions as CEO and director, respectively, as of
6 the date of the Merger, it is entirely possible that the SEC is investigating them for alleged
7 Wrongful Acts *only* in the pre-Merger time period. In that scenario, the Change in Control
8 Exclusion would not apply.

9 It certainly is *possible* that the SEC also is investigating Krauss and Hornig for alleged
10 Wrongful Acts in the post-Merger time period. That possibility was the basis for the Court’s
11 partial denial of 180 Life’s prior motion. As stated in the Court’s prior order: “That Krauss and
12 Hornig resigned from KBL in conjunction with the Merger does not mean that they cut off all
13 involvement with KBL/180 Life as of that date. It also does not mean that they could not have
14 committed a wrongful act after that date.” Prior Order at 18. Because of the possibility that
15 Krauss and Hornig might be under investigation for conduct extending into the post-Merger time
16 period, the Court declined 180 Life’s request for an adjudication that the Change in Control
17 Exclusion cannot apply. *See id.* at 18-19. However, the possibility that the SEC may be
18 investigating Krauss and Hornig for post-Merger misconduct does not conclusively establish that
19 the Change in Control Exclusion applies.

20 The Insurers assert in their opposition that it appears from the SEC subpoenas’ request for
21 both pre-Merger and post-Merger documents that the SEC is investigating “both pre-Merger and
22 post-Merger conduct *that could possibly violate* numerous federal statutes[.]” Opp. at 5, ECF 65.
23 However, the Insurers have not presented any evidence that Krauss and/or Hornig are suspected
24 of, or being investigated for, post-Merger misconduct. The Insurers’ speculation as to what the
25 SEC may be investigating, and whether federal statutes have been violated, is insufficient to show
26 that the Change in Control Exclusion applies to bar coverage here.

27 180 Life argues that coverage for pre-Merger Wrongful Acts would not necessarily be
28 excluded even if the SEC subpoenas were construed to allege post-Merger Wrongful Acts, citing

1 *Opus Bank v. Liberty Ins. Underwriters, Inc.*, 621 F. App'x 405 (9th Cir. 2015). In *Opus Bank*,
2 the Ninth Circuit discussed the effect of a policy exclusion for Wrongful Acts allegedly committed
3 or attempted prior to the policy period. The insured requested that the insurer provide a defense
4 for a civil action alleging both fraudulent misrepresentations made prior to the policy period and
5 retaliatory misconduct made during the policy period. *See id.* at 405. The *Opus Bank* court held
6 that the policy plainly covered the acts of retaliation occurring within the policy period, and that it
7 was not clear from the policy that such coverage would be lost by the inclusion in the complaint of
8 other acts occurring prior to the policy period. *See id.* at 406. Under those circumstances, the
9 Ninth Circuit determined that any doubt regarding insurer's duty to defend the complaint should
10 be resolved in favor of the insured. *See id.* In this Court's view, *Opus Bank* has little application
11 in the present case. Unlike the complaint at issue in *Opus Bank*, which alleged separate wrongful
12 acts occurring in separate time periods, the SEC subpoenas at issue here are something of a black
13 box. However, as discussed above, the Court finds unpersuasive the Insurers' arguments that the
14 SEC subpoenas must be construed to allege Wrongful Acts committed or attempted during the
15 post-Merger period based solely on the subpoenas' request for documents relating to that period.

16 It is the Insurer's burden to show conclusively that the Change in Control Exclusion
17 applies to bar coverage for the SEC subpoenas and related Defense Costs. They have not done so.
18 The Insurers may be able to make this showing at a later date, upon a more factually developed
19 record regarding the SEC investigation. If so, they will be able to recoup any Defense Costs
20 advanced to 180 Life for Claims that turn out not to be covered. On the limited record before it,
21 however, the Court finds that there is a potential for coverage for the SEC subpoenas and related
22 Defense Costs, and thus that 180 Life is entitled to advancement of the subpoena-related Defense
23 Costs consistent with the policies' Advancement clause.

24 Accordingly, 180 Life's motion for partial summary judgment is GRANTED.

25 //
26 //
27 //
28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. ORDER

- (1) 180 Life’s motion for partial summary judgment is GRANTED.
- (2) AmTrust is obligated under its policy to advance to 180 Life all Defense Costs in excess of the retention threshold that 180 Life has advanced, and will advance, to Krauss and Hornig in connection with the SEC subpoenas;
- (3) Upon exhaustion of the AmTrust policy, Freedom is obligated under its policy to advance to 180 Life all Defense Costs that 180 Life has advanced, and will advance, to Krauss and Hornig in connection with the SEC subpoenas.
- (4) This order terminates ECF 62.

Dated: February 12, 2024



BETH LABSON FREEMAN
United States District Judge