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Case #22CV398878  
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ORDER ON SUBMITTED MATTER

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA

ZOOM VIDEO COMMUNICATIONS, INC.,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD’S, LONDON;  
EVANSTON INSURANCE CO.;  
CONTINENTAL CASUALTY CO.; ALLIED  
WORLD INSURANCE CO.; and ENDURANCE  
RISK SOLUTIONS ASSURANCE CO.,

Defendants.

Case No. 22CV398878

**ORDER RE: MOTIONS FOR  
SUMMARY JUDGMENT AND/OR  
SUMMARY ADJUDICATION**

The above-entitled matter came on for hearing on May 1, 2024, at 1:30 p.m. in Department 19, the Honorable Theodore C. Zayner presiding. Having reviewed and considered the written submissions filed by the parties, and having listened carefully to arguments of counsel, the court rules as follows:

**I. INTRODUCTION**

This action arises out of defendants Certain Underwriters at Lloyd’s London’s (erroneously sued as Underwriters at Lloyd’s, London) (“Underwriters”), Evanston Insurance Company’s (“Evanston”) (collectively with Underwriters, the “18/19 Tower Insurers”), Continental Casualty Company’s (“Continental”), Allied World Specialty Insurance Company’s

1 (“Allied World”), and Endurance Risk Solutions Assurance Company’s (“Endurance”)  
2 (collectively with Continental and Allied World, the “19/20 Tower Insurers”) alleged refusal to  
3 pay plaintiff Zoom Video Communications, Inc. (“Zoom”) money that is due and owing under  
4 its insurance policies.

5 On May 25, 2022, Zoom filed a Complaint against the 18/19 Tower Insurers and 19/20  
6 Insurers, alleging causes of action for: (1) Breach of Contract (against the 18/19 Tower Insurers);  
7 (2) Breach of Contract (against the 19/20 Tower Insurers); (3) Breach of Implied Covenant of  
8 Good Faith and Fair Dealing (against the 18/19 Tower Insurers); and (4) Breach of Implied  
9 Covenant of Good Faith and Fair Dealing (against the 19/20 Tower Insurers).

10 As is relevant here, on July 7, 2022, Underwriters filed an Answer, generally denying the  
11 allegations of the Complaint and asserting various affirmative defenses.

12 On April 10, 2024, Underwriters filed a Notice of Partial Settlement. Shortly thereafter,  
13 on April 17, 2024, Zoom, Evanston, and the 19/20 Tower Insurers filed a Joint Notice of  
14 Conditional Settlement. The notices advise that, following a private mediation, (1) Zoom and  
15 Evanston reached a settlement of all claims in this action against Evanston and (2) Zoom and the  
16 19/20 Tower Insurers reached a settlement of all claims in this action against the 19/20 Tower  
17 Insurers.

18 Now before the court are: (1) the motion by Zoom for summary adjudication of the FTC  
19 Claim Issue, Underwriters’ fifth affirmative defense (Definition of Claim), the Interrelatedness  
20 Issue, and Underwriters’ third affirmative defense (Relatedness); (2) the motion by Underwriters  
21 for summary judgment of the Complaint and summary adjudication of Underwriters’ third and  
22 fifth affirmative defenses or, alternatively, summary adjudication of Zoom’s first cause of action,  
23 Zoom’s third cause of action, Underwriters’ third affirmative defense, and Underwriters’ fifth  
24 affirmative defense; and (3) the motion by Underwriters for summary judgment of the Complaint  
25 and summary adjudication of Underwriters’ third, fifth, and twenty-third affirmative defenses or,  
26 alternatively, summary adjudication of Zoom’s first cause of action, Zoom’s third cause of  
27  
28

1 action, Underwriters’ third affirmative defense, Underwriters’ fifth affirmative defense, and  
2 Underwriters’ twenty-third affirmative defense.<sup>1</sup> All three motions are opposed.

3 **II. LEGAL STANDARD**

4 The pleadings limit the issues presented for summary judgment or adjudication and such  
5 a motion may not be granted or denied based on issues not raised by the pleadings. (See  
6 *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City*  
7 *of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health*  
8 *Ins.* (2010) 181 Cal.App.4th 60, 73.)

9 A motion for summary judgment must dispose of the entire action. (Code Civ. Proc.,  
10 § 437c, subd. (a); *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 954  
11 (*All Towing*) [“Summary judgment is proper only if it disposes of the entire lawsuit.”].)  
12 “Summary judgment is properly granted when no triable issue of material fact exists and the  
13 moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for  
14 summary judgment bears the initial burden of showing that a cause of action has no merit by  
15 showing that one or more of its elements cannot be established or that there is a complete  
16 defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff ‘to  
17 show that a triable issue of one or more material facts exists as to that cause of action or a  
18 defense thereto.’ [Citation.] ‘There is a triable issue of material fact if, and only if, the evidence  
19 would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing  
20 the motion in accordance with the applicable standard of proof.’ [Citation.]” (*Madden v.*  
21 *Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272 (*Madden*).)

22 “Summary adjudication works the same way, except it acts on specific causes of action or  
23 affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.], § 437c, subd. (f).)  
24 ... Motions for summary adjudication proceed in all procedural respects as a motion for  
25 summary judgment.’ ” (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458,  
26 464.)

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27  
28 <sup>1</sup> In connection with the notices of settlement, the court vacated the hearing on the pending motions between Zoom and Evanston as well as Zoom and the 19/20 Defendants.

1           “A party may move for summary adjudication as to one or more causes of action within  
2 an action, one or more affirmative defenses, one or more claims for damages, or one or more  
3 issues of duty, if the party contends that the cause of action has no merit, that there is no  
4 affirmative defense to the cause of action, that there is no merit to an affirmative defense as to  
5 any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of  
6 the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff  
7 or plaintiffs.” (Code Civ. Proc., § 437c, subd. (f)(1).) “A motion for summary adjudication shall  
8 be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for  
9 damages, or an issue of duty.” (Code Civ. Proc., § 437c, subd. (f)(1).)

10           A plaintiff seeking summary adjudication on a cause of action “must present evidence  
11 sufficient to establish every element of that cause of action. A plaintiff’s initial burden ... does  
12 not include disproving any affirmative defenses the defendant asserts. ‘Once the plaintiff ... has  
13 met [its] burden, the burden shifts to the defendant ... to show that a triable issue of one or more  
14 material facts exists as to that cause of action or a defense thereto.’ ” (*California Bank & Trust v.*  
15 *Lawlor* (2013) 222 Cal.App.4th 625, 630–631.)

16           A defendant seeking summary adjudication “must show that at least one element of the  
17 plaintiff’s cause of action cannot be established, or that there is a complete defense to the cause  
18 of action. ... The burden then shifts to the plaintiff to show there is a triable issue of material fact  
19 on that issue.” (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98  
20 Cal.App.4th 66, 72; see Code Civ. Proc., § 437c, subd. (p)(2).)

21           For purposes of establishing their respective burdens, the parties involved in a motion for  
22 summary judgment or adjudication must present admissible evidence. (*Saporta v. Barbagelata*  
23 (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh  
24 said evidence or deny the motion on the ground that any particular evidence lacks credibility.  
25 (See *Melovich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v.*  
26 *Superior Court* (1977) 70 Cal.App.3d 656, 660.) As summary judgment or adjudication “is a  
27 drastic remedy eliminating trial,” the court must liberally construe evidence in support of the  
28 party opposing the motion and resolve all doubts concerning the evidence in favor of that party.

1 (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389; see also *Hepp v. Lockheed-*  
2 *California Co.* (1978) 86 Cal.App.3d 714, 717-718.)

3 **III. ZOOM’S MOTION FOR SUMMARY ADJUDICATION AND UNDERWRITERS’**  
4 **MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE,**  
5 **SUMMARY ADJUDICATION REGARDING THE DEFINITION OF A CLAIM**  
6 **AND RELATEDNESS**

7 Zoom’s motion for summary adjudication and Underwriters’ motion for summary  
8 judgment or, alternatively, summary adjudication ask the court to resolve the same issues. Both  
9 motions ask the court to address:

- 10 (1) whether the only matter noticed to Underwriters during the policy period  
11 effective October 31, 2018 to October 31, 2019 (the “18/19 Policy Period”)—the  
12 Federal Trade Commission (“FTC”) Civil Investigative Demand (“CID”) issued  
13 to Zoom on September 16, 2019—constitutes a “Claim” as defined by the Chubb  
14 Digitech Enterprise Risk Management Policy No. F14515343 issued by  
15 Westchester Insurance Company (the “18/19 Primary Policy”); and  
16 (2) whether the FTC Draft Administrative Complaint, the FTC Draft Federal  
17 Complaint, the FTC Administrative Complaint, the action titled *Consumer*  
18 *Watchdog v. Zoom Video Communications, Inc.* (United States District Court for  
19 the District of Columbia, Case No. 1:20-cv-02526) (“Consumer Watchdog  
20 Action”), and the lawsuits alleging security and technological vulnerabilities in  
21 Zoom’s products that were eventually consolidated into *In re Zoom Video*  
22 *Communications, Inc. Privacy Litigation* (United States District Court for the  
23 Northern District of California, Case No. 5:20-cv-02155) (“Privacy Action”) relate  
24 back to the FTC CID because they arise out of the same “Incident” or  
25 “Interrelated Incidents” as defined by the 18/19 Primary Policy.

26 **1. Undisputed Material Facts**

27 The parties generally agree that the following material facts are undisputed:  
28

1 In 2018, Zoom purchased three errors and omissions policies totaling \$25 million in  
2 coverage. (Separate Statement of Undisputed Material Facts in Support of Plaintiff Zoom Video  
3 Communications, Inc.’s Motion for Summary Adjudication, UMF Nos. 1-3.) Zoom purchased  
4 18/19 Primary Policy, and two excess policies, one issued by Underwriters and one issued by  
5 Evanston. (*Ibid.*) The 18/19 Primary Policy provided a coverage limit of \$10 million. (UMF  
6 No. 1.) Underwriters’ excess policy provided a coverage limit of \$10 million. (UMF No. 2.).  
7 Evanston’s excess policy provided a coverage limit of \$5 million. (UMF No. 3.) Those policies  
8 provided coverage for “Claims” made during the 18/19 Policy Period. (UMF Nos. 4, 16.) The  
9 excess policies provided coverage “in accordance with” the terms and conditions of the 18/19  
10 Primary Policy, with limited modifications not at issue here. (UMF Nos. 5-6.)

11 The policies provide coverage for “Claims” relating to “technology errors and  
12 omissions,” “cyber, privacy, and network security,” and media. (UMF No. 15.) A “Claim” is  
13 defined to include any:

- 14 1. written demand against [Zoom] for monetary damages or non-monetary or  
15 injunctive relief;
- 16 . . .
- 17 6. Regulatory Proceeding.

18 (UMF No. 17.) The policies define “Regulatory Proceeding” as any “suit, civil investigation or  
19 civil proceeding by or on behalf of a government agency . . . or regulatory authority, commenced  
20 by the service of a complaint, notice, or similar pleading based on an alleged or potential  
21 violation of Privacy or Cyber Laws as a result of a Cyber Incident, and which may reasonably be  
22 expected to give rise to a Claim under Insuring Agreement E.” (UMF No. 18.) The policies  
23 define “Privacy or Cyber Laws” to include “any local, state, federal, and foreign . . . privacy  
24 protection laws, legislation, statutes, or regulations, that require commercial entities that collect  
25 Protected Information to . . . adopt specific privacy or security controls.” (UMF No. 20.) The  
26 policies define “Protected Information” to include “non-public personal information” and “third  
27 party confidential or proprietary information.” (UMF No. 21.)  
28

1 The Policies contained certain exclusions and exclusionary language. As is relevant here,  
2 the policies combine similar “Claims,” even if made in different policy periods, into one “Claim”  
3 under the earliest relevant policy period. (UMF No. 56.) Specifically, the policies state that:

4 D. MAXIMUM LIMIT OF INSURANCE FOR ALL INTERRELATED  
INCIDENTS AND CLAIMS

5 Claims arising out of the same Incident and all Interrelated Incidents shall be  
6 deemed to be one Claim, and such Claim shall be deemed to be first made on the  
date the earliest of such Claims is first made . . . .

7 All Interrelated Incidents shall be deemed to be one Incident, and such Incident  
8 shall be deemed to be first discovered, on the date the earliest of such Incidents is  
first discovered . . . .

9 (UMF Nos. 56-57.)

10 The Policies also contain a “Pending or Prior Proceedings” exclusion that provides:

11 A. EXCLUSIONS APPLICABLE TO ALL INSURING AGREEMENTS

12 The Insurer shall not be liable for Costs, Damages, or Claims Expenses on  
account of any Incident or any Claim:

13 . . .

14 3. Pending or Prior Proceedings

15 alleging, based upon, arising out of, or attributable to:

16 . . .

17 b. any other Incident whenever occurring which, together with an Incident  
18 underlying or alleged in any pending or prior litigation, Claim, demand,  
arbitration, administrative or regulatory proceeding or administrative or  
regulatory investigation . . . would constitute Interrelated Incidents.

19 (UMF Nos. 56-58.) “Interrelated Incidents” includes “all Incidents that have as a common nexus  
20 any act, fact, circumstance, situation, event, transaction, cause or series of related acts, facts,  
21 circumstances, situations, events, transactions or causes.” (UMF No. 59.)

22 On September 16, 2019, the FTC issued a CID against Zoom “pursuant to Section 20 of  
23 the [FTC Act], in the course of an investigation to determine whether there is, has been, or may  
24 be a violation of any laws administered by the [FTC].” (UMF Nos. 23-24.) The subject of the  
25 investigation was “[w]hether [Zoom] has engaged in unfair or deceptive practices in connection  
26 with its use of the Web Server (as defined herein), its treatment of Vulnerabilities (as defined  
27 herein), its Video Settings (as defined herein), or its representations of compliance with the  
28 Privacy Shield (as defined herein), in violation of the FTC Act, 15 U.S.C. § 45, and whether

1 [FTC] action to obtain monetary relief would be in the public interest.” (UMF No. 23-25; see  
2 also UMF No. 26 [directing use of “compulsory process in nonpublic investigation of acts and  
3 practices related to consumer privacy and/or data security”].) The FTC CID “required” Zoom to  
4 produce documents in response to 9 document requests and to answer 24 interrogatories. (UMF  
5 No. 27.) The FTC CID further instructed that the “production of documents or the submission of  
6 answers . . . must be made under a sworn certificate,” and “may subject [Zoom] to a penalty  
7 imposed by law for failure to comply.” (UMF No. 28.)

8 As it proceeded, the FTC expanded its investigation into additional alleged security and  
9 technological vulnerabilities in Zoom’s platform (but not Zoom sharing users’ information).  
10 (UMF Nos. 39-40.) For example, the FTC investigated Zoom’s representations regarding end-  
11 to-end encryption, including the level of encryption that was provided to secure users’ meetings.  
12 (UMF No. 40.) The FTC also issued additional document requests and interrogatories to Zoom  
13 as part of its ongoing investigation. (UMF No. 39.)

14 The FTC ultimately issued several draft complaints and a final complaint against Zoom,  
15 including a FTC Draft Administrative Complaint dated June 25, 2020, a FTC Draft Federal  
16 Complaint dated August 13, 2020, and a FTC Administrative Complaint dated January 19, 2021.  
17 (UMF Nos. 41-43.) The complaints alleged that Zoom made various misrepresentations  
18 regarding the “privacy and security measures it employ[ed] to protect users’ personal  
19 information”—including that it provided end-to-end encryption for its meetings, that it encrypted  
20 meetings with an AES 256-bit encryption key when it used AES 128-bit encryption, and that its  
21 security exceeded industry standards. (UMF Nos. 44-47.)

22 The complaints also alleged that Zoom misrepresented that its security exceeded industry  
23 standards when it did not. (UMF No. 47.) Specifically, the complaints alleged that, in addition  
24 to not providing a higher level of encryption, Zoom failed to implement robust security  
25 measures, such as multi-factor authentication or similar technology to secure remote access to its  
26 networks and systems, and robust security training, testing, monitoring, patching, and reporting  
27 to ensure its platform was free from attacks. (UMF No. 48.) The complaints alleged that these  
28 “vulnerabilities in Zoom’s infrastructure could be exploited to put users’ communications at risk,



1 as well as lead to a significant breach of users’ personal information.” (UMF No. 49.) Like the  
2 FTC CID, the complaints did not allege that Zoom shared users’ information with third parties  
3 without consent. (UMF No. 62.)

4 On October 19, 2020, Zoom and the FTC entered into an Agreement Containing Consent  
5 Order to resolve the FTC Investigation, subject to final FTC approval. (UMF No. 52.) On  
6 January 19, 2021, the FTC issued a Decision and Order, finally resolving the FTC Investigation.  
7 (UMF No. 53.) This settlement imposed injunctive orders on Zoom, such as requiring Zoom to  
8 refrain from making misrepresentations, establish and monitor a comprehensive information  
9 security program, provide reports, notices, and certifications to the FTC, and create and maintain  
10 certain records. (UMF No. 54.) Zoom allegedly incurred over \$6.6 million in fees and costs in  
11 connection with the FTC action before reaching the settlement. (Joint Appendix (“JA”)-  
12 006738.)

13 Beginning on March 30, 2020, certain Zoom users commenced the Privacy Action, filing  
14 several lawsuits against Zoom that were ultimately consolidated as a class action. (UMF No.  
15 68.) A Second Amended Consolidated Class Action Complaint was eventually filed and  
16 remained the operative complaint when the Privacy Action was later settled. (UMF Nos. 69, 78.)

17 The Privacy Action contained two distinct categories of allegations: (1) claims that  
18 Zoom’s platform had inadequate security and technological standards; and (2) privacy claims  
19 that Zoom shared users’ information with third parties like Facebook and Google without  
20 consent. Specifically, the Privacy Action alleged that Zoom claimed it was “utilizing ‘end-to-  
21 end encryption for desktop and mobile devices,’” when its video conferences, and other audio  
22 and video functionality did not support end-to-end encryption. (UMF No. 70.) The Privacy  
23 Action alleged that Zoom’s use of “transport encryption,” as opposed to “end-to-end  
24 encryption,” could result in user data being intercepted by “a hacker who can infiltrate the  
25 company’s systems.” (UMF No. 71.)

26 The Privacy Action also alleged “security breaches by unauthorized bad actors who  
27 hijack[ed] Zoom videoconferences.” (UMF No. 72.) The plaintiffs claimed that Zoom “could  
28 have, but did not provide adequate meeting security to limit or prevent altogether such

1 Zoombombing instances or unauthorized meeting access and intrusions.” (UMF No. 73.) For  
2 example, Zoom allegedly “could have implemented various other relatively simply technical  
3 solutions to limit or prevent altogether such Zoombombing attacks, for instance making it easier  
4 to allow hosts to cancel a meeting and/or eject a Zoombomber with a push of a single button,  
5 screen sharing control defaults, or implementing stronger meeting security (attendee admission)  
6 protocols such as identity verification or unique meeting passcodes.” (UMF No. 74.)

7 On August 10, 2020, Consumer Watchdog filed a one-count complaint against Zoom in  
8 the Superior Court of the District of Columbia for allegedly “making false and deceptive  
9 representations to consumers about its data security practices,” specifically relating to Zoom’s  
10 encryption levels. (UMF No. 63.) The Consumer Watchdog Action alleged that Zoom  
11 misrepresented the security of its services by stating that it provided end-to-end encryption.  
12 (UMF No. 64.) For example, the complaint alleges that, instead of using end-to-end encryption  
13 as represented, Zoom used what is known as “transport encryption” or “Transport Layer  
14 Security” and that Zoom misrepresented “end-to-end encryption as a standard security feature for  
15 its video conferencing service.” (UMF No. 65.) The Consumer Watchdog Action did not allege  
16 that Zoom shared users’ information with third parties like Facebook and Google without  
17 consent. (UMF No. 67.)

## 18 **2. Parties’ Arguments**

19 Based on the foregoing undisputed material facts, Zoom argues that the FTC CID is a  
20 “Claim” under the policies that was made on September 16, 2019, within the 18/19 Policy  
21 Period. Specifically, Zoom asserts that the FTC CID is a “Claim” because it is a “written  
22 demand” for nonmonetary relief. Zoom points out that the CID required it to respond to  
23 interrogatories and requests for production of documents under penalty of law. Zoom highlights  
24 case law (see e.g., *Minuteman Int’l, Inc. v. Great Am. Ins. Co.* (N.D.Ill. Mar. 18, 2004, No. 03 C  
25 6067) 2004 U.S.Dist.LEXIS 4660 (*Minuteman*)) providing that governmental subpoenas  
26 constitute demands for non-monetary relief, and contends that the FTC CID is analogous to such  
27 subpoenas. Zoom also asserts that the FTC CID is a “Claim” because it is a “Regulatory  
28 Proceeding.” Zoom contends that the FTC CID is a “Regulatory Proceeding” because FTC is a

1 government agency and regulatory authority, the FTC’s investigation was commenced by service  
2 of the CID, the FTC CID was based on alleged or potential violations of Privacy or Cyber Laws  
3 (as the investigation was concerned with whether Zoom violated the FTC Act), the alleged or  
4 potential violations were the result of a Cyber Incident, and Zoom reasonably expected the  
5 investigation to give rise to a “Claim.” Finally, Zoom further argues that the allegations in the  
6 underlying actions that its platform had security and technological vulnerabilities (i.e., the FTC  
7 Draft Administrative Complaint, the FTC Draft Federal Complaint, the FTC Administrative  
8 Complaint, the Consumer Watchdog Action, and portions of the Privacy Action) arise out of  
9 “Interrelated Incidents.”

10         Conversely, Underwriters argues that the FTC CID is not a “Claim” because it is neither  
11 a “written demand” for nonmonetary relief nor a “Regulatory Proceeding.” Underwriters  
12 maintains that the FTC CID does not demand injunctive or other nonmonetary relief, and is most  
13 properly characterized as a request for information. Underwriters highlights case law (see e.g.,  
14 *NWHW Holdings, Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, P.A.* (C.D.Cal. Dec. 22, 2023,  
15 No. SACV 22-01030-CJC (KESx)) 2023 U.S. Dist. LEXIS 228688 (*NWHW*)) providing that CIDs  
16 and investigative subpoenas, requesting documents and testimony, do not constitute demands for  
17 non-monetary relief. Underwriters also contends the FTC CID is not a Regulatory Proceeding  
18 because it is not based on an actual or potential violation of a Privacy or Cyber Law.  
19 Underwriters highlights Zoom’s position that the FTC Act is a Privacy or Cyber Law, as defined  
20 in the policies, because it requires companies to adopt specific privacy or security controls.  
21 Underwriters points out that Zoom does not identify any provision of the FTC Act that requires it  
22 to adopt specific privacy or security controls, and the FTC Act merely prohibits trade practices  
23 that are unfair or deceptive. Underwriters also maintains that the FTC CID is not a “complaint,  
24 notice or similar pleading” and, therefore, is not a “Regulatory Proceeding.” Lastly,  
25 Underwriters asserts that even if the FTC CID were a claim, the Privacy Action does not arise  
26 out of any Interrelated Incidents as it arose out of end-to-end encryption misrepresentations,  
27 Zoombombing, and third-party data sharing allegations.

### 28         **3. Rules of Contract Interpretation**

1 Absent a factual dispute, the interpretation of an insurance contract and its application to  
2 undisputed facts are questions of law. (*Westrec Marina Management, Inc. v. Arrowood*  
3 *Indemnity Co.* (2008) 163 Cal.App.4th 1387, 1391 (*Westrec*); *Abifadel v. Cigna Ins. Co.* (1992) 8  
4 Cal.App.4th 145, 159 (*Abifadel*) [“The interpretation of a contract is a question of law when the  
5 contract terms are unambiguous.”].) Courts interpret an insurance policy using the same rules of  
6 interpretation applicable to other contracts. (*Westrec, supra*, 163 Cal.App.4th at p. 1391.) The  
7 mutual intention of the contracting parties at the time the contract was formed governs. (Civ.  
8 Code, § 1636; *Westrec, supra*, 163 Cal.App.4th at p. 1392.) Courts ascertain that intention solely  
9 from the written contract, if possible, but also consider the circumstances under which the  
10 contract was made and the matter to which it relates. (Civ. Code, §§ 1639, 1647; *Westrec, supra*,  
11 163 Cal.App.4th at p. 1392.) Courts consider the contract as a whole and construe the language  
12 in context, rather than interpret a provision in isolation. (Civ. Code, § 1641.) Courts interpret  
13 words in a contract in accordance with their ordinary and popular sense, unless the words are  
14 used in a technical sense or a special meaning is given to them by usage. (Civ. Code, § 1644;  
15 *Abifadel, supra*, 8 Cal.App.4th at p. 159 [“A basic canon of insurance policy construction is that  
16 the words used in it are to be interpreted according to the plain meaning that a layperson would  
17 ordinarily attach to them.”].) If contractual language is clear and explicit and does not involve an  
18 absurdity, the plain meaning governs. (Civ. Code, § 1638.)

19 “Coverage clauses are interpreted broadly to afford the insured the greatest possible  
20 protection[;] [c]lauses limiting coverage are construed narrowly.” (*Abifadel, supra*, 8  
21 Cal.App.4th at p. 160.)

22 In defining “claims,” the law focuses on the claimant’s formal demands for service or  
23 payment—it requires more than an inquiry requesting for information or an explanation, the  
24 expression of dissatisfaction, mere complaining, or the lodging of a grievance as a claim.  
25 (*Abifadel, supra*, 8 Cal.App.4th at p. 160; *Hill v. Physicians & Surgeons Exch.* (1990) 225  
26 Cal.App.3d 1, 5 (*Hill*); *Hoyt v. St. Paul Fire & Marine Ins. Co.* (9th Cir. 1979) 607 F.2d 864,  
27 865-866.) A claim is the assertion of a liability of the party, demanding that the party perform  
28

1 some service or pay some money. (*Abifadel, supra*, 8 Cal.App.4th at p. 160; *Hill, supra*, 225  
2 Cal.App.3d at pp. 5-7.)

3 **4. Whether the FTC CID is a “Claim” Under 18/19 Primary Policy**

4 The court agrees with Underwriters that the FTC CID does not constitute a “Claim”  
5 under the 18/19 Primary Policy because it is not a written demand for nonmonetary relief or a  
6 Regulatory Proceeding under the terms of the policies.

7 First, the FTC CID did not demand nonmonetary relief (e.g., injunctive relief). Instead, it  
8 is merely mechanism for requesting various forms of information. The FTC CID sought the  
9 production of documents and responses to interrogatories in connection with the FTC’s  
10 investigation of potential wrongdoing. The FTC CID did not allege against Plaintiff any  
11 particular wrongdoing; it merely requested discovery to aid the FTC’s determination of whether  
12 Zoom had violated the FTC Act. (See *FTC v. Invention Submission Corp.* (1992) 296  
13 U.S.App.D.C. 124 [“At the investigatory stage, the Commission does not seek information  
14 necessary to prove specific charges; it merely has a suspicion that the law is being violated in  
15 some way and wants to determine whether or not to file a complaint”]; see also *NWHW, supra*,  
16 (C.D.Cal. Dec. 22, 2023, No. SACV 22-01030-CJC (KESx)) 2023 U.S.Dist.LEXIS 228688, at  
17 \*21 [stating that the mere possibility that an investigation may lead to a formal allegation of  
18 wrongdoing is not sufficient to constitute a claim]; *First Horizon Nat’l Corp. v. Hous. Cas. Co.*  
19 (W.D.Tenn. June 23, 2017, No. 15-cv-2235-SHL-dkv) 2017 U.S.Dist.LEXIS 109935, at \*33  
20 [same].)

21 The court is persuaded by the cases cited by Underwriters providing that a CID  
22 essentially an administrative subpoena (*FTC v. Invention Submission Corp.* (1992) 965 F.2d  
23 1086, 1087-1089 [CID issued by FTC in connection with investigation of possible violations of  
24 section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) is an administrative  
25 subpoena]; *NWHW, supra*, (C.D.Cal. Dec. 22, 2023, No. SACV 22-01030-CJC (KESx)) 2023  
26 U.S.Dist.LEXIS 228688, at \*19; *United States v. Markwood* (6th Cir. 1995) 48 F.3d 969, 975-  
27 976) and such investigative subpoenas are not demands for nonmonetary relief (see e.g., *NWHW,*  
28 *supra*, (C.D.Cal. Dec. 22, 2023, No. SACV 22-01030-CJC (KESx)) 2023 U.S.Dist.LEXIS

1 228688, at \*18-22 [holding that a CID requesting documents and testimony issued by the United  
2 States Attorney’s Office related to a False Claims Act investigation was not a demand for  
3 nonmonetary relief]; *Diamond Glass Cos. v. Twin City Fire Ins. Co.* (S.D.N.Y. Aug. 18, 2008,  
4 No. 06-CV-13105 (BSJ) (AJP)) 2008 U.S.Dist.LEXIS 86752, at \*9-13 [holding that grand jury  
5 subpoenas and a search warrant were not a demand for nonmonetary relief]; *BioChemics, Inc. v.*  
6 *AXIS Reinsurance Co.* (1st Cir. 2019) 924 F.3d 633, 640 [holding that subpoenas demanding the  
7 production of documents issued by the Securities and Exchange Commission in connection with  
8 its investigation against the company and its officers were requests made of a party for  
9 information, and were not requests made for equitable redress or benefit (such as specific  
10 performance)].)

11 This court does not agree with the conclusion reached in the cases cited by Zoom (e.g.,  
12 *Minuteman Int’l, Inc. v. Great Am. Ins. Co.* (N.D.Ill. Mar. 18, 2004, No. 03 C 6067) 2004  
13 U.S.Dist.LEXIS 4660). For example, the court in *Minuteman* held that “[a] demand for ‘relief’ ”  
14 is a broad enough term to include a demand for something due, including a demand to produce  
15 documents or appear to testify. (*Minuteman, supra*, (N.D.Ill. Mar. 18, 2004, No. 03 C 6067)  
16 2004 U.S.Dist.LEXIS 4660, at \*7.) But the ordinary and accepted meaning of the word “relief”  
17 and the context in which is it used in the policies make it clear that investigative subpoenas, like  
18 the FTC CID, are not demands for nonmonetary relief. (See *Diamond, supra*, (S.D.N.Y. Aug.  
19 18, 2008, No. 06-CV-13105 (BSJ) (AJP)) 2008 U.S.Dist.LEXIS 86752, at \*11-12 [“Black’s Law  
20 Dictionary defines ‘relief’ as ‘[t]he redress or benefit, esp. equitable in nature (such as injunction  
21 or specific performance), that a party asks of a court. Also termed remedy.’ Black’s Law  
22 Dictionary at 1317 (8th ed. 2004); see also *Foster v. Summit Medical Systems, Inc.*, 610 N.W.2d  
23 350, 354 (Minn. Ct. App. 2000)(quoting Black’s Law Dictionary at 1293 (7th ed.1999) (‘In a  
24 legal context, the term “relief” refers to redress or benefit, especially equitable redress such as an  
25 injunction or specific performance.’). Similarly, ‘remedy’ means ‘[t]he means of enforcing a  
26 right or preventing or redressing a wrong; legal or equitable relief.’ *Id.* at 1320. Grand jury  
27 subpoenas and search warrants do not fit within this meaning of the term ‘relief.’”].)

1           Second, the FTC CID is not a “Regulatory Proceeding” as defined in the policies because  
2 the investigation was not based on an alleged or potential violation of “Privacy or Cyber Law.”  
3 The parties agree that the policies define a “Privacy or Cyber Law” as “any local, state, federal,  
4 and foreign ... privacy protection laws, legislation, statutes, or regulations that require  
5 commercial entities that collect Protected Information to post privacy policies, adopt specific  
6 privacy or security controls, or notify individuals in the event that Protected Information has  
7 potentially been compromised.” The FTC’s investigation of Zoom was based on potential  
8 violations of Section 5 of the FTC Act. Zoom contends that the FTC Act falls within the  
9 definition of “Privacy or Cyber Law” because it requires entities to adopt specific privacy or  
10 security controls. However, Zoom does not identify any provision in the FTC Act that requires it  
11 to adopt specific privacy or security controls. Rather, as Underwriters persuasively argues,  
12 Section 5 of the FTC generally prohibits entities from engaging in “unfair or deceptive” acts of  
13 practices. (15 U.S.C. § 45 [the FTC is empowered to prevent entities “from using unfair  
14 methods of competition in or affecting commerce and unfair or deceptive acts or practices in or  
15 affecting commerce.”].)

16           For the foregoing reasons, the FTC CID is not a “Claim” under the policies.

17           Because the FTC CID—the only matter noticed to Underwriters during the 18/19 Policy  
18 Period—is not a “Claim,” Zoom cannot prevail on its first cause of action for Breach of Contract.  
19 (Complaint, ¶¶ 68, 70, 71 [claim for breach of contract is predicated on Underwriters’ denial of  
20 coverage for the FTC CID and the other purportedly Interrelated Incidents].) Under the policies,  
21 claims made after the expiration of the 18/19 Policy Period (e.g., the FTC complaints, the  
22 Consumer Watchdog Action, and the Privacy) are not covered. An exception applies where a  
23 “Claim” made after the 18/19 Policy Period and a “Claim” made during the 18/19 Policy Period  
24 arise out of Interrelated Incidents. In that circumstance, the “Claim” made after the 18/19 Policy  
25 Period will relate back to the “Claim” made during the 18/19 Policy Period. As the FTC CID  
26 was not a “Claim” made during the 18/19 Policy Period, the other underlying actions do not  
27 relate back to the FTC CID. Thus, Underwriters alleged denial of coverage for those actions was  
28 not a breach of the policies.

1 Furthermore, Zoom cannot prevail on its third cause of action for breach of the implied  
2 covenant of good faith and fair dealing. Where, as here, there is no coverage, there can be no  
3 claim for breach of the duty of good faith and fair dealing. (Complaint, ¶ 84 [claim for breach of  
4 the implied covenant of good faith and fair dealing is predicated on Underwriters’ alleged failure  
5 to investigate the facts giving rise to a right to coverage and its unreasonable interpretation of the  
6 policy and the facts]; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35-36 [because a  
7 contractual obligation is the underpinning of a bad faith claim, such a claim cannot be  
8 maintained unless policy benefits are due under the contract; “when benefits are due an insured,  
9 ‘delayed payment based on inadequate or tardy investigations, oppressive conduct by claims  
10 adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may  
11 breach the implied covenant because’ they frustrate the insured’s right to receive the benefits of  
12 the contract in ‘prompt compensation for losses.’”; “[a]bsent that contractual right, however, the  
13 implied covenant has nothing upon which to act as a supplement, and ‘should not be endowed  
14 with an existence independent of its contractual underpinnings.’ ”].)

15 Consequently, Underwriters is entitled to summary judgment of the Complaint as alleged  
16 against it.

17 Accordingly, Underwriter’s motion for summary judgment of the Complaint is  
18 GRANTED. Underwriters’ alternative motion for summary adjudication is deemed MOOT.  
19 Zoom’s motion for summary adjudication is DENIED.

20 **IV. UNDERWRITERS’ MOTION FOR SUMMARY JUDGMENT OR, IN THE**  
21 **ALTERNATIVE, SUMMARY ADJUDICATION REGARDING**  
22 **RETROACTIVITY**

23 Underwriters’ second motion seeks summary judgment of the Complaint and,  
24 alternatively, summary adjudication of Underwriters’ third, fifth, and twenty-third affirmative  
25 defenses or, alternatively, summary adjudication of Zoom’s first cause of action, Zoom’s third  
26 cause of action, Underwriters’ third affirmative defense, Underwriters’ fifth affirmative defense,  
27 and Underwriters’ twenty-third affirmative defense on the ground that the alleged “Claim”  
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1 arising out of the alleged “Interrelated Incidents” first occurred prior to the January 17, 2018  
2 Retroactive Date in the policies.

3 Because Underwriters’ first motion completely disposes of the Complaint, the instant  
4 motion is deemed MOOT.

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Dated: May 9, 2024



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Hon. Theodore C. Zayner  
Judge of the Superior Court