S253593

General Docket

United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 17-16452 **Docketed:** 07/19/2017
Nature of Suit: 4110 Insurance **Termed:** 01/16/2019
Yahoo! Inc. v. National Union Fire Insurance
Appeal From: U.S. District Court for Northern California, San Jose
Fee Status: Paid

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0971-5 : 5:17-cv-00447-NC
Trial Judge: Nathanael M. Cousins, Magistrate Judge
Date Filed: 01/27/2017

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
06/29/2017	06/29/2017	07/18/2017	07/18/2017

Prior Cases:
None

Current Cases:
None

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Clerk of Court
by: M. Manzo
Deputy Clerk

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YAHOO! INC., A Delaware corporation Plaintiff – Appellant,	Heather W. Habes, Attorney Direct: 310-248-3830 [COR NTC Retained] Kilpatrick Townsend & Stockton, LLP 9720 Wilshire Boulevard Penthouse Suite Beverly Hills, CA 90212 William T. Um Direct: 310-870-7048 [COR NTC Retained] Jassy Vick Carolan LLP 800 Wilshire Boulevard Suite 800 Los Angeles, CA 90017
v.	
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, a Pennsylvania corporation Defendant – Appellee,	Daniel I. Graham, Jr., Esquire Direct: 312-585-1400 [COR NTC Retained] Nicolaides Fink Thorpe Michaelides Sullivan LLP 10 South Wacker Drive Suite 2100 Chicago, IL 60606 Jodi S. Green, Attorney Direct: 312-585-1436 [COR NTC Retained] Nicolaides Fink Thorpe Michaelides Sullivan LLP 10 South Wacker Drive Suite 2100 Chicago, IL 60606 Matthew C. Lovell, Counsel Direct: 415-745-3779 [COR NTC Retained] Nicolaides Fink Thorpe, LLP 101 Montgomery Street Suite 2300 San Francisco, CA 94104 Richard H. Nicolaides, Jr. Direct: 312-762-3100 [COR NTC Retained] Bates Carey Nicolaides LLP Suite 2400 191 North Wacker Drive Chicago, IL 60606

YAHOO! INC., A Delaware corporation,

Plaintiff – Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, a Pennsylvania corporation,

Defendant – Appellee.

07/19/2017	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 07/26/2017. Appellant Yahoo! Inc. opening brief due 10/26/2017. Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania answering brief due 11/27/2017. Appellant's optional reply brief is due 21 days after service of the answering brief. [10513859] (JBS) [Entered: 07/19/2017 09:23 AM]
07/19/2017	2	Filed (ECF) notice of appearance of Jodi S. Green for Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania. Date of service: 07/19/2017. [10514817] [17-16452] (Green, Jodi) [Entered: 07/19/2017 03:21 PM]
07/19/2017	3	Added attorney Jodi S. Green for National Union Fire Insurance Company of Pittsburgh, Pennsylvania, in case 17-16452. [10514894] (JFF) [Entered: 07/19/2017 03:44 PM]
07/19/2017	4	Filed (ECF) notice of appearance of William T. Um for Appellant Yahoo! Inc.. Date of service: 07/19/2017. [10514961] [17-16452] (Um, William) [Entered: 07/19/2017 04:06 PM]
07/19/2017	5	Added attorney William Um for Yahoo! Inc., in case 17-16452. [10514973] (JFF) [Entered: 07/19/2017 04:11 PM]
07/25/2017	6	Filed (ECF) Appellant Yahoo! Inc. Mediation Questionnaire. Date of service: 07/25/2017. [10520752] [17-16452] (Habes, Heather) [Entered: 07/25/2017 12:48 PM]
08/17/2017	7	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Assessment Conference, 09/13/2017, 10:00 a.m. PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [10549124] (CL) [Entered: 08/17/2017 02:46 PM]
09/13/2017	8	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Conference, 10/11/2017, 4:00 p.m. Pacific Time, w/ appellant's counsel only. See order for details. [10580046] (CL) [Entered: 09/13/2017 03:31 PM]
10/17/2017	9	Filed order MEDIATION (KS): This case is RELEASED from the Mediation Program. The briefing schedule previously set by the court is amended as follows: appellant shall file an opening brief on or before December 15, 2017; appellee shall file an answering brief on or before February 5, 2018; appellant may file an optional reply brief within twenty one (21) days from the service date of the answering brief. All further inquiries regarding this appeal, including requests for extensions of time, should be directed to the Clerk's office. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant further settlement discussions. [10620030] (GWL) [Entered: 10/17/2017 08:51 AM]
12/13/2017	10	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellant Yahoo! Inc.. New requested due date is 01/12/2018. [10689354] [17-16452] (Habes, Heather) [Entered: 12/13/2017 01:28 PM]
12/13/2017	11	**Streamlined request [10] by Appellant Yahoo! Inc. to extend time to file the brief is approved. Amended briefing schedule: Appellant Yahoo! Inc. opening brief due 01/12/2018. Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania answering brief due 03/13/2018. The optional reply brief is due 21 days from the date of service of the answering brief.** [10689360] (DJW) [Entered: 12/13/2017 01:31 PM]
01/11/2018	12	Submitted (ECF) Opening Brief for review. Submitted by Appellant Yahoo! Inc.. Date of service: 01/11/2018. [10722475] [17-16452] (Um, William) [Entered: 01/11/2018 05:49 PM]
01/11/2018	13	Submitted (ECF) excerpts of record. Submitted by Appellant Yahoo! Inc.. Date of service: 01/11/2018. [10722477] [17-16452] (Um, William) [Entered: 01/11/2018 05:52 PM]

01/12/2018	14	Filed clerk order: The opening brief [12] submitted by Yahoo! Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the excerpts of record [13] submitted by Yahoo! Inc.. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10722841] (SML) [Entered: 01/12/2018 09:47 AM]
01/17/2018	15	Received 7 paper copies of Opening Brief [12] filed by Yahoo! Inc.. [10727372] (RG) [Entered: 01/17/2018 01:00 PM]
01/17/2018	16	Filed 4 paper copies of excerpts of record [13] in 2 volume(s) filed by Appellant Yahoo! Inc.. [10728000] (KWG) [Entered: 01/17/2018 04:28 PM]
02/08/2018	17	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania. New requested due date is 04/12/2018. [10757250] [17-16452] (Green, Jodi) [Entered: 02/08/2018 06:04 PM]
02/09/2018	18	**Streamlined request [17] by Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania to extend time to file the brief is approved. Amended briefing schedule: Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania answering brief due 04/12/2018. The optional reply brief is due 21 days from the date of service of the answering brief.** [10757425] (JN) [Entered: 02/09/2018 08:51 AM]
03/15/2018	19	Filed (ECF) Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania Motion to extend time to file Answering brief until 05/14/2018. Date of service: 03/15/2018. [10800051] [17-16452] (Green, Jodi) [Entered: 03/15/2018 02:32 PM]
03/15/2018	20	Filed (ECF) notice of appearance of William T. Um for Appellant Yahoo! Inc.. Date of service: 03/15/2018. [10800290] [17-16452] (Um, William) [Entered: 03/15/2018 03:35 PM]
03/19/2018	21	Filed clerk order (Deputy Clerk: AMT): Appellee's unopposed motion (Docket Entry No. [19]) for an extension of time to file the answering brief is granted. The answering brief is due May 14, 2018. The optional reply brief is due within 21 days after service of the answering brief. [10803287] (OC) [Entered: 03/19/2018 11:28 AM]
05/14/2018	22	Submitted (ECF) Answering Brief for review. Submitted by Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania. Date of service: 05/14/2018. [10871821] [17-16452] (Green, Jodi) [Entered: 05/14/2018 03:17 PM]
05/14/2018	23	Filed clerk order: The answering brief [22] submitted by National Union Fire Insurance Company of Pittsburgh, Pennsylvania is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10871875] (SML) [Entered: 05/14/2018 03:39 PM]
05/15/2018	24	Received 7 paper copies of Answering Brief [22] filed by National Union Fire Insurance Company of Pittsburgh, Pennsylvania. [10872981] (DB) [Entered: 05/15/2018 12:14 PM]
05/24/2018	25	Filed (ECF) Appellant Yahoo! Inc. Motion to extend time to file Reply brief until 07/27/2018. Date of service: 05/24/2018. [10884345] [17-16452] (Um, William) [Entered: 05/24/2018 09:50 AM]
05/24/2018	26	Filed clerk order (Deputy Clerk: amt): Granting unopposed (ECF Filing) motion [25] to extend time to file the reply brief. The optional reply brief is due July 27, 2018. [10884876] (AT) [Entered: 05/24/2018 01:35 PM]

07/26/2018	27	This case is being considered for an upcoming oral argument calendar in San Francisco Please review the San Francisco sitting dates for November 2018 and the two subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please inform the court *within 3 days of this notice*, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: regarding availability for oral argument). When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter *within 3 days of this notice*, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: request for mediation).[10956843] (AW) [Entered: 07/26/2018 04:02 PM]
07/27/2018	28	Filed (ECF) Appellant Yahoo! Inc. Correspondence: Availability for Oral Argument. Date of service: 07/27/2018 [10957731] [17-16452] (Um, William) [Entered: 07/27/2018 12:39 PM]
07/27/2018	29	Submitted (ECF) Reply Brief for review. Submitted by Appellant Yahoo! Inc.. Date of service: 07/27/2018. [10957925] [17-16452] (Um, William) [Entered: 07/27/2018 02:05 PM]
07/27/2018	30	Filed clerk order: The reply brief [29] submitted by Yahoo! Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10958078] (SML) [Entered: 07/27/2018 02:57 PM]
07/30/2018	31	Filed (ECF) Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania Correspondence: Regarding availability for oral argument. Date of service: 07/30/2018 [10959291] [17-16452] (Graham, Daniel) [Entered: 07/30/2018 01:32 PM]
08/01/2018	32	Received 7 paper copies of Reply Brief [29] filed by Yahoo! Inc.. [10962381] (RG) [Entered: 08/01/2018 10:51 AM]
08/27/2018	33	This case is being considered for an upcoming oral argument calendar in San Francisco Please review the San Francisco sitting dates for December 2018 and the two subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please inform the court *within 3 days of this notice*, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: regarding availability for oral argument). When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter *within 3 days of this notice*, using CM/ECF (**Type of Document**: File Correspondence to Court; **Subject**: request for mediation).[10991430] (AW) [Entered: 08/27/2018 03:51 PM]
08/28/2018	34	Filed (ECF) Appellant Yahoo! Inc. Correspondence: Dates re Availability for Oral Argument. Date of service: 08/28/2018 [10992289] [17-16452] (Um, William) [Entered: 08/28/2018 09:49 AM]
08/29/2018	35	

		Filed (ECF) Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania Correspondence: Availability for Oral Argument. Date of service: 08/29/2018 [10993842] [17-16452] (Graham, Daniel) [Entered: 08/29/2018 08:57 AM]
10/07/2018	36	Notice of Oral Argument on Monday, December 17, 2018 - 9:00 am - Courtroom 4 - San Francisco CA. View the Oral Argument Calendar for your case **here**. Be sure to review the GUIDELINES for important information about your hearing, including when to arrive (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form and within 21 days of Monday, December 17, 2018, file the completed form via Appellate CM/ECF. [11037923] (AW) [Entered: 10/07/2018 06:10 AM]
10/09/2018	37	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney William Um for Appellant Yahoo! Inc.. [11038935] [17-16452] (Um, William) [Entered: 10/09/2018 11:34 AM]
10/11/2018	38	Filed (ECF) Acknowledgment of hearing notice. Location: San Francisco. Filed by Attorney Daniel I Graham, Jr., Esquire for Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania. [11043207] [17-16452] (Graham, Daniel) [Entered: 10/11/2018 12:02 PM]
10/16/2018	39	Filed clerk order (Deputy Clerk: WL): The parties are ordered to submit supplemental briefs addressing the impact on this case of Los Angeles Lakers, Inc. v. Federal Insurance Co., 869 F.3d 795 (9th Cir. 2017). These supplemental briefs may be in the form of letters to the Clerk of the Court and shall be no longer than 10 pages or 2,800 words, and shall be submitted no later than 21 days after the entry of this order. Parties who are registered for Appellate ECF must file the supplemental brief electronically. Parties who are not registered Appellate ECF filers must file the original supplemental brief plus seven paper copies. [11048251] (WL) [Entered: 10/16/2018 10:14 AM]
10/22/2018	40	Filed clerk order (Deputy Clerk: WL): In their supplemental briefs to be submitted no later than November 6, 2018, the parties shall also address whether the policy exclusion found at page 98 of the excerpts of record provides an alternate basis for affirming the district court. [11054698] (WL) [Entered: 10/22/2018 09:28 AM]
11/06/2018	41	COURT DELETED INCORRECT ENTRY. Notice about deletion sent to case participants registered for electronic filing. Correct Entry: [44]. Original Text: Filed (ECF) Appellant Yahoo! Inc. response to Court order dated 10/16/2018. Date of service: 11/06/2018. [11073824] [17-16452] (Um, William) [Entered: 11/06/2018 02:04 PM]
11/06/2018	42	Submitted (ECF) Letter Brief for review. Submitted by Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania. Date of service: 11/06/2018. [11074096] [17-16452] (Graham, Daniel) [Entered: 11/06/2018 03:33 PM]
11/06/2018	43	Filed clerk order: The letter brief [42] submitted by National Union Fire Insurance Company of Pittsburgh, Pennsylvania is filed. No paper copies are required at this time. [11074156] (SML) [Entered: 11/06/2018 03:56 PM]
11/06/2018	44	Submitted (ECF) Letter Brief for review. Submitted by Appellant Yahoo! Inc.. Date of service: 11/06/2018. [11074255] [17-16452] ---[COURT UPDATE: Attached corrected brief. 11/7/2018 by TYL] (Um, William) [Entered: 11/06/2018 04:37 PM]

11/07/2018	45	Filed clerk order: The letter brief [44] submitted by Yahoo! Inc. is filed. No paper copies are required at this time. [11074478] (SML) [Entered: 11/07/2018 08:58 AM]
12/17/2018	46	ARGUED AND SUBMITTED TO MILAN D. SMITH, JR., JACQUELINE H. NGUYEN and JANE A. RESTANI. [11122466] (AKM) [Entered: 12/17/2018 12:05 PM]
12/17/2018	47	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [11123351] (TG) [Entered: 12/17/2018 05:03 PM]
01/16/2019	48	Order filed for PUBLICATION: ORDER CERTIFYING QUESTION TO THE CALIFORNIA SUPREME COURT (MILAN D. SMITH, JR., JACQUELINE H. NGUYEN and JANE A. RESTANI) We ask the California Supreme Court to resolve an important and unresolved question of state law. (SEE ORDER FOR FULL TEXT) We direct the Clerk of Court to transmit immediately to the California Supreme Court, under official seal of the United States Court of Appeals for the Ninth Circuit, copies of all relevant briefs and excerpts of record, as well as an original and 10 copies of this order, with a certificate of service on the parties. See Cal. R. Ct. 8.548(c)–(d). This case is withdrawn from submission and will be resubmitted following receipt of the California Supreme Court's opinion on the certified question or notification that it declines to answer the certified question. The Clerk of Court shall administratively close this docket pending a ruling by the California Supreme Court. The panel shall retain jurisdiction over further proceedings in this court. The parties shall notify the Clerk of Court within one week after the California Supreme Court accepts or rejects certification. In the event that the California Supreme Court grants certification, the parties shall notify the Clerk of Court within one week after the California Supreme Court renders its opinion. IT IS SO ORDERED. [11154647] (RMM) [Entered: 01/16/2019 08:03 AM]

17-16452 Yahoo! Inc. v. National Union Fire Insurance

Panel Members: M. SMITH, NGUYEN, Restani
Date of Hearing: Monday, 12/17/2018
Hearing Location: Courtroom 4, San Francisco CA

Date Filed		Description
01/11/2018	[12]	Opening Brief. Submitted by Appellant Yahoo! Inc..
01/11/2018	[13]	Excerpts of record. Submitted by Appellant Yahoo! Inc.. Two (2) volumes.
05/14/2018	[22]	Answering Brief. Submitted by Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania.
07/27/2018	[29]	Reply Brief. Submitted by Appellant Yahoo! Inc..
11/06/2018	[42]	Letter Brief. Submitted by Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania.
11/06/2018	[44]	Letter Brief. Submitted by Appellant Yahoo! Inc..

Notes: **Certified docket sheet**
Certified order
Copies of order

S253593

Appeal No. 17-16452

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Yahoo! Inc.,
Plaintiff-Appellant,

v.

National Union Fire Insurance Company of Pittsburgh, PA
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 5:17-cv-00447-NC
Hon. Nathanael M. Cousins

APPELLANT'S OPENING BRIEF

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Attorneys for Plaintiff-Appellant Yahoo! Inc.

Appeal No. 17-16452

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Yahoo! Inc.,
Plaintiff-Appellant,

v.

National Union Fire Insurance Company of Pittsburgh, PA
Defendant-Appellee.

On Appeal from the United States District Court
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff Yahoo! Inc., by and through its undersigned counsel, states as follows:

Effective June 13, 2017, Plaintiff Yahoo! Inc. transferred to Yahoo Holdings, Inc. all potential recoveries relevant to this case. Yahoo Holdings, Inc., a Delaware corporation with an office located at 701 First Avenue, Sunnyvale, California, 94089, is a wholly owned subsidiary of Verizon Communications, Inc. Plaintiff Yahoo! Inc. no longer owns any interest in the past, present, or future recoveries relevant to this lawsuit. Effective January 1, 2018, Yahoo Holdings, Inc. changed its name to Oath Holdings, Inc.

Date: January 11, 2018

KILPATRICK TOWNSEND &
STOCKTON LLP

/s/ William T. Um
William T. Um
Attorneys for Plaintiff-Appellant Yahoo! Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Standard form "personal and advertising injury" coverage under commercial general liability polices includes numerous exclusions, including an exclusion for violations of the Telephone Consumer Protection Act ("TCPA"). Yahoo expanded the coverage under its policies with National Union, deleting the TCPA exclusion and negotiating an endorsement providing Yahoo with broader "personal injury" coverage, separate and apart from the provision for "advertising injury." Among other things, the personal injury coverage endorsement insured Yahoo for claims based on "oral or written publication, in any manner, of material that violates a person's right of privacy." Notably, there is no requirement that the "material" appear "in your advertisement."

Despite the specifically-negotiated endorsement, National Union refused to provide a defense to Yahoo for TCPA class actions challenging Yahoo's transmission of allegedly unsolicited text messages. This appeal asks this Court to decide whether the district court erred when it dismissed Yahoo's complaint seeking coverage for the TCPA claims.

In dismissing Yahoo's complaint, the district court interpreted the policy's coverage for invasions of a "person's right of privacy" to include only intrusions on a person's right to secrecy, and not to include invasions of the right to seclusion (the privacy right allegedly violated by Yahoo's text transmissions). It based its

decision on two intermediate California appellate decisions that interpret similar language in typical (non-negotiated) "advertising injury" provisions as encompassing only violations of the right of secrecy, ignoring that Yahoo negotiated "personal injury" coverage to more broadly reach publication "in any manner" of material alleged to violate a person's "right of privacy."

Yahoo respectfully submits the district court's ruling does not comport with the California Supreme Court's mandate that all terms of an insurance policy be interpreted according to their plain and ordinary meaning. Had the district court followed the California Supreme Court's directives, it would have agreed with the rulings of numerous other courts that interpret language such as contained in Yahoo's negotiated "personal injury" endorsement as encompassing TCPA claims.

This Court should reverse the district court's dismissal of Yahoo's claims against National Union. Alternatively, this Court should certify the coverage issue to the California Supreme Court. Several state supreme courts, including the Florida Supreme Court in response to a certified question from the Eleventh Circuit, recently have interpreted language materially identical to Yahoo's personal injury endorsement as providing coverage for TCPA claims. Given that TCPA litigation continues to proliferate in California and elsewhere, the Court should secure a definitive statement of California law on this issue, particularly given the cost to, and potential exposure of, insureds facing TCPA class actions.

JURISDICTIONAL STATEMENT

This is an appeal from the final Judgment of the United States District Court for the Northern District of California, dated June 29, 2017, entering judgment in favor of National Union and against Yahoo, and dismissing Yahoo's lawsuit against National Union with prejudice. (ER001.) The basis for jurisdiction in the district court was diversity of citizenship with an amount in controversy exceeding $75,000, pursuant to 28 U.S.C. § 1332. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The notice of appeal was filed on July 18, 2017, nineteen days after entry of the Judgment, and thus was timely under Federal Rule of Civil Procedure 4(a)(1)(A). (ER013-15.)

ISSUES PRESENTED

1. The Yahoo policies provide expanded, manuscript coverage for "personal injury," defined to include "oral or written publication, in any manner, of material that violates a person's right of privacy," without a TCPA exclusion. Did the district court err in holding that Yahoo failed to plausibly allege any potential for coverage of claims that Yahoo allegedly violated the TCPA by sending unsolicited text messages?

2. Numerous recent decisions, including a decision of the Florida Supreme Court in response to a certified question from the Eleventh Circuit, have held that provisions similar to Yahoo's negotiated endorsement provide coverage

for TPCA claims. Should this Court certify the coverage issue to the California Supreme Court, given the critical importance of insurance coverage to California insureds facing TCPA claims?

STATEMENT OF THE CASE

I. THE YAHOO POLICIES PROVIDE BROAD COVERAGE FOR "PERSONAL INJURY."

National Union sold Yahoo a series of five consecutive, one-year "Commercial General Liability" insurance policies covering the period from May 31, 2008 to May 31, 2013. (ER023, ¶ 22.)

Normally, National Union's policies include standard form coverage for "personal and advertising injury" under "COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY." (ER023, ¶ 23.) In the standard form, this coverage remains subject to several exclusions, including Exclusion 2(p) for "Distribution of Material in Violation of Statutes" that specifically excludes coverage for TCPA claims. (ER023, ¶ 23; ER045.) The standard form also has exclusions for "Insureds In Media And Internet Type Businesses" (Exclusion 2(j)) and "Infringement of Copyright, Patent, Trademark or Trade Secret" (Exclusion 2(i)). (ER023, ¶ 23; ER045.)

Rather than agree to the standard form language, Yahoo negotiated an endorsement entitled "Endorsement No. 1." (ER023-24, ¶ 24.) Endorsement No. 1 replaced the standard form "personal and advertising injury" coverage with

broader "personal injury" coverage. (ER024, ¶ 24.) Endorsement No. 1 also deleted Exclusion 2(p), which excluded coverage for claims alleging violation of the TCPA, as well as the exclusions for "Insureds In Media And Internet Type Businesses" and "Infringement of Copyright, Patent, Trademark or Trade Secret." (ER024, ¶ 24; ER101-02.) By replacing the standard form language through Endorsement No. 1, Yahoo intentionally moved toward a coverage provision that was more suited to its specialized risks.

Endorsement No. 1 defines covered "personal injury" as follows:

> "Personal injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> a. False arrest, detention, or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy.

(ER024, ¶ 26; ER102-03, § III(a).)

Separate and apart from the express coverage for "personal injury," Endorsement No. 1 defined "advertising injury" as follows:

> "Advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> a. Oral or written publication, in any manner, of ***material in your "advertisement"*** that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication, in any manner, of ***material in your "advertisement"*** that violates a person's right of privacy;
>
> c. The use of another's advertising idea ***in your "advertisement"***; or
>
> d. Infringing upon another's copyright, trade dress or slogan ***in your "advertisement"***.

(ER103, § III(b) (emphasis added).)

Under Endorsement No. 1, National Union agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' to which this insurance applies." (ER024, ¶ 25.) Moreover, National Union has "the right and duty to defend the insured against any 'suit' seeking those damages." (ER024, ¶ 25.)

II. CLASS ACTION CLAIMS AGAINST YAHOO TRIGGERED NATIONAL UNION'S DUTY TO DEFEND.

Beginning in January 2013, several class action lawsuits were filed against Yahoo alleging that it had violated the TCPA through the transmission of unauthorized text messages (the "Text Message Actions"). (ER019-23, ¶¶ 6-21.) Yahoo sought insurance coverage under its policies on the basis that the Text Message Actions alleged "publication" (through widespread transmission to the underlying plaintiffs) by Yahoo of "material" (in the form of unwelcome text messages) that allegedly violated underlying plaintiffs' rights of privacy. (ER025, ¶ 30). Yahoo alleged that none of the exclusions, conditions, or limitations contained in its policies preclude coverage. (*Id.*)

Yahoo took the position that, at the very least, the Text Message Actions contained claims and allegations that gave rise to the potential for coverage, thus triggering National Union's duty to defend Yahoo. (*Id.*) National Union, however, denied coverage. (ER024, ¶ 28.)

III. THIS INSURANCE DISPUTE

Yahoo filed a complaint against National Union that contained a single cause of action: Breach of Contract – Duty to Defend. (ER025-26.) On April 10, 2017, National Union filed a motion to dismiss Yahoo's complaint, arguing that it failed to state a claim for which relief could be granted under Federal Rule of Civil Procedure 12(b)(6).

By Order dated June 2, 2017, the district court granted National Union's motion to dismiss Yahoo's complaint for failure to state a claim. (ER002-12.) The district court concluded that Yahoo did not plausibly allege that the policies' coverage for "oral or written publication, in any manner, of material that violates a person's right of privacy" extended to the Text Message Actions. (*Id.*)

On June 23, 2017, Yahoo filed notice of its election to stand on its complaint (rather than amend) and asked the district court to enter judgment. (ER016-17.) On June 29, 2017, the district court entered judgment in favor of National Union with respect to all claims in the complaint. (ER001.)

Yahoo filed its Notice of Appeal on July 18, 2017. (ER013-14.)

SUMMARY OF THE ARGUMENT

Yahoo seeks reversal of the district court's June 2, 2017 Order on National Union's motion to dismiss. National Union did not sustain its burden to show that Yahoo could not "plausibly allege" that the Text Message Actions were potentially covered by its policies. The district court's ruling conflicts with the negotiated policy language and California law governing the interpretation of insurance policies. This Court should reverse or certify the coverage issues to the California Supreme Court.

The district court's ruling hinged on its determination that coverage under the "personal injury" endorsement did not extend to claims alleging violations of

the right of seclusion. (ER007.) In so ruling, the district court narrowly and technically interpreted the terms "publication," "material," and "right of privacy," rather than giving these terms their plain and ordinary meaning as a layperson would understand them. Numerous other courts, applying similar rules of interpretation to materially identical policy language, have reached a contrary conclusion.

The district court relied on *ACS Systems, Inc. v. St. Paul Fire and Marine Ins. Co.*, 147 Cal. App. 4th 137 (2007), and *State Farm General Insurance Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429 (2010), in holding that for information to be "published" and covered by the policies, it had to be disclosed to a third party. (ER007-8). But nowhere do the policies define "publication" to require disclosure to a third party, as opposed to being published to the allegedly injured party. Courts in other jurisdictions have reached a contrary conclusion and held that TCPA-violating communications have been "published" when construing similar language. The district court's analysis, moreover, effectively concluded that adding "in any manner" to qualify the term "publication" did not broaden the meaning of "publication" at all. (ER010-11.)

The district court also relied on *ACS Systems* and *JT's Frames* to hold that published "material" can only violate a person's right of privacy if it contains "confidential information" that violates "the victim's right to secrecy." (ER008

quoting JT's Frames, 181 Cal. App. 4th at 446). This interpretation of "material" does not afford the term its ordinary and plain meaning when used in the clause "material that violates a person's right of privacy." California courts hold that a "right of privacy" includes both the right to be left alone (the right of seclusion) as well as the right to preserve confidential information (the right to secrecy). Because the text messages transmitted by Yahoo, the "material" here, allegedly violated the underlying plaintiffs' right to seclusion protected by the TCPA, Yahoo plausibly alleged potential coverage for these claims, as numerous courts outside of California have held.

Moreover, the interpretation of the terms "publication" and "material" in *ACS Systems* and *JT's Frames* is grounded in the context in which these provisions appear. In both cases, the terms appeared in "advertising injury" clauses that limited coverage to content-based offenses. The broad "personal injury" coverage Yahoo negotiated here, in contrast, protects against both content-based and conduct-based offenses. The district court incorrectly examined only the listed offense that immediately preceded the offense at issue, rather than construing the coverage provided in the context of the entire policy. (ER009-10.)

There is another significant difference between the policies here and the policies at issue in *ACS Systems* and *JT's Frames*. In Yahoo's policies, the "personal injury" coverage was deliberately expanded by manuscript endorsement

to cover specialized risks beyond what was covered by the standard form language. And Yahoo and National Union also agreed to remove the TCPA exclusion. But the district court failed to consider the significance of the removal of the TCPA exclusion, or to construe broadly the coverage for "personal injury" given the parties' intentional revision of the policy terms through manuscript endorsement.

Yahoo believes *ACS Systems* and *JT's Frames* should be distinguished from the policy language at issue. But even if not distinguishable, contrary rulings of state and federal courts across the country cast serious doubt as to whether the California Supreme Court would embrace these intermediate appellate court decisions. These recent decisions have held that alleged TCPA violations constitute covered "publication" of "material" that "violates a person's right of privacy" based on the plain meaning of these terms. Because the California Supreme Court similarly requires insurance coverage terms be interpreted in accordance with their plain meaning, Yahoo respectfully submits *ACS Systems* and *JT's Frames* are not a reliable indicator of the Supreme Court's likely resolution of the matter. At a minimum, the coverage issue should be certified to the California Supreme Court, so that it can definitely resolve the issue for the numerous California insureds seeking defense costs for TCPA actions.

The district court's Order granting National Union's motion to dismiss should be reversed, and this case should be remanded for further proceedings.

ARGUMENT

I. YAHOO'S COMPLAINT PLAUSIBLY ALLEGED CLAIMS POTENTIALLY COVERED BY ITS INSURANCE POLICIES.

A. The District Court's Order Is Reviewed *De Novo*.

This Court reviews *de novo* a district court's dismissal of a complaint under Rule 12(b)(6). *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011); *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002). "When ruling on a motion to dismiss, we may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030–31 (9th Cir. 2008). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998).

To defeat National Union's motion to dismiss, all Yahoo needed to do was show that its complaint "plausibly allege[s] a potential for coverage." *Arrowood Indemnity Co. v. Ins. Co. Penn.*, 102 F. Supp. 3d 1141, 1145 (C.D. Cal. 2012) (denying motion to dismiss claim that insurer breached its duty to defend). Under California law, an insurer must defend any suit that "*potentially* seeks damages within the coverage of the policy" and the insurer "bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77 (1966)

(emphasis in original). A defense is excused only when the underlying complaint "*can by no conceivable theory raise a single issue which could bring it within the policy coverage.*" *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287, 295 (1993) (emphasis in original). Yahoo plausibly alleged a potential for coverage under the policies here.

B. Rules Of Policy Construction Under California Law.

"The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). "The policy should be read as a layman would read it and not as it might be analyzed by an attorney or insurance expert." *Crane v. State Farm Fire & Cas. Co.*, 5 Cal. 3d 112, 115 (1971); *see also E.M.M.I. Inc. v. Zurich American Ins. Co.*, 32 Cal. 4th 465, 471 & n.2 (2004). "If the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning." *Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 666-667 (1995); *see also State v. Allstate Ins. Co.*, 45 Cal. 4th 1008, 1018 (2009). On the other hand, ambiguous terms will be interpreted broadly "to protect the objectively reasonable expectations of the insured." *State v. Allstate Ins. Co.*, 45 Cal. 4th at 1018.

These rules of interpretation apply to standard form policy provisions as well as manuscript provisions resulting from a negotiated agreement between the insured and the insurer. *Powerine Oil Co., Inc. v. Sup.Ct.* ("*Powerine II*"), 37 Cal. 4th 377, 391 (2005). Manuscript provisions are "entirely nonstandard and drafted for the particular risk undertaken." *Dart Industries, Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 1073-74 (2002) (internal quotations omitted). These provisions reflect the parties' "intention" to address a specialized risk not covered by the insurer's standard forms, and control over any standard language. *See* Cal. Civ. Code § 1651; *see also Venoco, Inc. v. Gulf Underwriters Ins. Co.*, 175 Cal. App. 4th 750, 766 (2009). When added by an endorsement attached to the insurance policy, the manuscript provisions "form a part of the insurance contract, and the policy of insurance with the endorsements and riders thereon must be construed together as a whole." *Adams v. Explorer Ins. Co.*, 107 Cal. App. 4th 438, 451 (2003) (internal citations omitted).

C. The "Plain Meaning" Of The Policy Terms Potentially Cover The Claims Against Yahoo For Alleged Violations Of The TCPA.

1. "Oral or written publication, in any manner" includes the transmission of text messages.

"Publication" is not defined by the Yahoo policies and therefore must be interpreted in accordance with the "plain meaning or the meaning a layperson would ordinarily attach to it." *Waller*, 11 Cal. 4th at 18. Courts often consult

dictionaries to derive the ordinary and popular meaning of terms in insurance contracts. *See, e.g., Scott v. Continental Ins. Co.*, 44 Cal. App. 4th 24, 29-30 (1996).

As defined by the Black's Law Dictionary, "publication" means "[g]enerally, the act of declaring or announcing to the public." *Publication*, Black's Law Dictionary (10th ed. 2014). The transmission of an allegedly unsolicited text message to a putative class of recipients constitutes the act of declaring or announcing the content of the messages to the public. And because the term "publication" must be read in context, the phrase "in any manner" further confirms that publication should be interpreted to include the transmission of allegedly unsolicited text messages. *See* Cal. Civ. Code § 1641.

The district court narrowly interpreted "publication" to require the disclosure of one party's secret information to a different party, relying on *ACS Systems* and *JT's Frames*. But *ACS Systems* construed different policy language that limited coverage to "making known to any person or organization," holding that such language implied "'telling, sharing or otherwise divulging such that the injured party is the one whose private material is *made known*, not the one *to whom* the material is made known.'" 147 Cal. App. 4th at 143 (citation omitted) (emphasis in original).

The *ACS Systems* court limited its decision to that exact policy language before it. Indeed, *ACS Systems* specifically found such language to be substantially different and therefore distinguishable from numerous cases holding that "oral or written publication" policy language covered violations of the TCPA. 147 Cal. App. 4th at 153.[1] Here, Yahoo's policies used the broader phrase "oral or written publication."

Despite the difference between "making known" and "oral or written publication" as recognized by *ACS Systems*, the district court relied on *JT's Frames* to conclude that the two terms actually were synonymous. The *JT's Frames* court in turn cited only *Reimel v. Alcoholic Bev. Appeals Bd.*, 256 Cal. App. 2d 158, 166-67 (1967), in support of its holding "publication" and "making known to any person or organization" were "without a difference." *JT's Frames*, 181 Cal. App. 4th at 447.

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[1] The *ACS Systems* court distinguished all of the following cases because they involved "publication" language: *Park University Enterprises Inc. v. American Casualty Company of Reading, P.A.*, 442 F.3d 1239, 1248-51 (10th Cir. 2006), *aff'g* 314 F. Supp. 3d 1094 (D. Kan, 2004); *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 272 F. Supp. 2d 1365, 1371-74 (S.D. Ga. 2003); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 845-47 (N.D. Tex. 2003), *aff'd*, 96 Fed. Appx. 960 (5th Cir. 2004); *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744, 748, 752-53 (M.D.N.C. 2002); and *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 237-39 (Tex. App. – Dallas 2004), *abrogated on other grounds by Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).

But *Reimel* analyzed the meaning of "publication" in a statute related to minimum retail price schedules for branded distilled spirits that required "every change of price or new price ... *to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof.*" *Reimel*, 256 Cal. App. 2d at 164. While *Reimel* recognized that the dictionary broadly defined "publication" to mean: "To make public; to make known to people in general; ... The act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny[,]" it held that the language regarding the method of publication in the statute ("in a trade journal of general circulation") demonstrated an intent to give the word "publishing" a more specific meaning. *Id.* at 168. Consequently, *JT's Frames*, and the district court's Order relying on it, mischaracterize *Reimel*, which did not hold that "making known" and "publication" were equivalent when used in the context of construing insurance policies according to their plain language.

The district court's narrow reading of "publication" ignores the seclusion privacy right protected by the TCPA. "The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of [automatic telephone dialing systems] to communicate with others by telephone in a manner that would be an invasion of privacy." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946,

954 (9th Cir. 2009).[2] Under the TCPA, it is the publication itself of the allegedly unsolicited message that violates the recipient's right of privacy. This act falls squarely within the coverage here for injuries arising out of "oral or written publication, in any manner, of material that violates a person's right of privacy." In TCPA terms, this clause covers the "publication" (via blast-fax, mass text messaging, etc.) of "material" (the unsolicited message) that "violates a person's right of privacy" (by infringing on the recipient's right to be left alone).[3]

In reaching a contrary result and limiting "publication" to violations of the victim's right to secrecy (as opposed to seclusion), *JT's Frames* also relied on *American States Insurance Company v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 942 (7th Cir. 2004), where the Seventh Circuit sought to predict Illinois law. *JT's Frames*, 181 Cal. App. 4th at 447. But the Illinois Supreme Court rejected the Seventh Circuit's prediction in *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307, 320 (Ill. 2006), instead holding that TCPA claims were covered under policy language – identical to that here – for "oral or written publication, in any manner, of material that violates a person's right of privacy." The *Valley Forge* court reasoned that relying "on the proposition

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[2] A voice message or a text message are not distinguishable in terms of being an invasion of privacy under the TCPA. *Id.*

[3] As discussed *infra*, this exact reasoning was applied by the Wisconsin Court of Appeals to find coverage for claims alleging violations of the TCPA. *See Sawyer v. West Bend Mut. Ins. Co.*, 821 N.W.2d 250, 257 (Wis. Ct. App. 2012).

that 'publication' matters in a 'secrecy situation,' but not in a 'seclusion situation' ... as a basis for interpreting the insurance policy language" would be inconsistent with the court's approach of construing undefined policy terms by using their plain and ordinary meaning. 860 N.E.2d at 323.

While no California court has determined whether a policy that covers "publication, in any manner" potentially covers claims that the insured transmitted unsolicited communications in violation of the TCPA,[4] other state and federal courts have agreed with the Illinois Supreme Court that such policies do provide coverage for TCPA claims. *See, e.g., Collective Brands,* No. 11-4097-JTM, 2013 WL 66071, at *13 (D. Kan. Jan. 4, 2013); *Sawyer v. West Bend Mut. Ins. Co.*, 821 N.W.2d 250 (Wis. Ct. App. 2012). These courts apply the same plain meaning requirement the California Supreme Court mandates for the construction of insurance policies under California law. *See also infra* Argument § II.A.

Yahoo's Complaint alleged that the underlying plaintiffs sought to recover against it for purported violations of privacy that resulted from Yahoo's alleged unsolicited transmission of text messages to plaintiffs' cellular phones. (ER019.) These transmissions constituted "publication, in any manner" because Yahoo was declaring or announcing information to these plaintiffs through its text message

[4] The clause at issue in *JT's Frames* did not include the "in any manner" language included in Yahoo's policy. 181 Cal. App. 4th at 445.

transmissions. These transmissions were allegedly made generally to members of the public, who have filed class action claims against Yahoo. Yahoo thus plausibly alleged that the transmission of allegedly unsolicited text messages constituted a potentially covered "publication."

2. "Material that violates a person's right of privacy" includes text messages allegedly sent without consent.

As with "publication," the Yahoo policies do not define the term "material." And as with publication, the court properly may look to the dictionary to the plain and ordinary meaning of material. *See Waller*, 11 Cal. 4th at 18; *Scott,* 44 Cal. App. 4th 24, 29-30 (1996).

Black's Law Dictionary defines "material" to mean, among other things: "Information, ideas, data, documents, or other things that are used in reports, books, films, studies, etc." *Material*, Black's Law Dictionary (10th ed. 2014). This definition easily encompasses allegedly unsolicited or unauthorized text messages, an interpretation strengthened by viewing "material" in the full context of the phrase "material that violates a person's right of privacy."

The phrase "right of privacy" also is not defined in the Yahoo policies. Black's Law Dictionary defines "right of privacy" as "[t]he right to personal autonomy," or alternatively as "[t]he right of a person and the person's property to be free from unwarranted public scrutiny or exposure." *Right of Privacy*, Black's Law Dictionary (10th ed. 2014). This definition in turn refers the reader to the

definition for "invasion of privacy," which is defined as "[a]n unjustified exploitation of one's personality or intrusion into one's personal activities, actionable under tort law and sometimes under constitutional law." *Invasion of Privacy*, Black's Law Dictionary (10th ed. 2014).

These definitions confirm that the "right of privacy" connotes both an interest in seclusion and an interest in the secrecy of personal information. *See JT's Frames*, 181 Cal. App. 4th at 445 (explaining that "right of privacy" may refer to either the "right to keep personal information confidential or secret" or "the right to seclusion or to be free from unwanted intrusions"). A seclusion-based privacy interest means "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short it is the right to be let alone." *Miller v. Nat'l Broad. Co.*, 187 Cal. App. 3d 1463, 1481 (1986) (internal quotations omitted). Accordingly, given that the TCPA is designed to protect against unwanted intrusions on the right of seclusion, the policy language "material that violates a person's right of privacy" reasonably can be understood to refer to material that violates a person's right of seclusion. Unsolicited text messages, the subject of the underlying claims against Yahoo, thus potentially fall within coverage.[5]

[5] As discussed *infra*, the Illinois Supreme Court followed this same analysis to conclude that alleged violations of the TCPA were covered by a provision that

In construing "material" to be limited to the dissemination of content violating a party's right to secrecy (as opposed to seclusion), the district court misapplied the "last antecedent rule." (ER008.) This rule of construction provides that the qualifying language in a contract or statute modifies the last antecedent before that language, that is, the word or phrase that immediately precedes the qualifying language. (*Id.*) Using this rule, the district court deduced that the phrase "violates a person's right of privacy" qualifies the word "material" and not the word "publication." And because the content of the "material" at issue (the unsolicited text messages) did not disclose secret information of the alleged victims, there was no violation of the plaintiffs' secrecy right of privacy. (*Id.*)

The district court's application of the last antecedent rule again reflects its failure to recognize that unsolicited messages themselves can constitute the "material" that violates the recipient's right to seclusion. Indeed, other courts have reached precisely the opposite conclusion, applying the last antecedent rule to find coverage for TCPA claims. *See, e.g., Indiana Ins. Co. v. CE Design Ltd.*, 6 F. Supp. 3d 858 (N.D. Ill. 2013) (discussed more fully *infra* § II.A).

As these courts recognize, one of the stated purposes of the TCPA is to protect individuals from receiving unsolicited communications: "The Act presumes

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covered "oral or written publication, in any manner, of material that violates a person's right of privacy." *See Valley Forge*, 860 N.E.2d at 318.

that all advertising, so long as it is unsolicited, is an offensive intrusion into the recipient's solitude." *See* 47 U.S.C. § 227(b)(2)(B)-(C). Before passing the Act, the United States Congress specifically found that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy . . . ." H.R.Rep. No. 102–317 at 2 (1991). Congress thus recognized that advertising is a form of written communication that can have a uniquely intrusive quality when sent to persons who have not requested it, and this intrusion was sufficiently offensive and unreasonable that it required regulation. *See id.*[6] Under the TCPA, it is the allegedly unsolicited content of the text messages that the underlying plaintiffs received from Yahoo that constitutes the "material" violating their right of privacy.

The district court's determination that "material" can only plausibly violate a person's "right of privacy" if it discloses confidential "content" to third parties grafts onto the Yahoo policies a requirement beyond the plain and ordinary meaning of the terms. (ER008.) In fact, it would improperly require the rewriting of the policy to read "material *the content of which* violates a person *other than the recipient's* right of privacy." Such strained interpretations should be rejected under well-established California law. *See Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d

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[6] As discussed *infra*, this same analysis was relied on by the Court of Appeals of Texas to conclude that alleged TCPA violations potentially fell within coverage. *See TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238 (Tex. App. -- Dallas 2004), *abrogated on other grounds by Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007).

800, 807 (1982) ("Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists."). *See also Kwok v. Transnation Title Ins. Co.*, 170 Cal. App. 4th 1562, 1571 (2009) ("We do not rewrite any provision of any contract, including an insurance policy, for any purpose.") (internal quotes and brackets omitted). Accordingly, the district court's conclusion that "material" of a publication would violate a right of privacy only if it disclosed confidential information to a third party conflicts with California law.

The plaintiffs in the Text Message Actions allege that Yahoo invaded their privacy rights by allegedly sending unsolicited text messages. (ER019, ¶ 7) (*Sherman* Complaint accuses Yahoo of "negligently and/or intentionally contacting Plaintiffs on Plaintiffs' cellular telephones, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., ("TCPA"), thereby invading Plaintiffs' privacy."); (ER020, ¶ 10) (*Reza* Complaint, same); (ER021, ¶ 13) (*Johnson* Complaint alleges that "[i]n an effort to enforce this fundamental federal right to privacy, Plaintiff files the instant class action complaint alleging violations of the TCPA."). Reading the terms of the Yahoo policies according to their plain and ordinary meaning, the Text Message Actions sufficiently allege potentially covered violation of privacy rights. *Montrose*, 10 Cal. 4th at 666–67.

The "right of privacy" included within the coverage for "personal injury" is not limited to rights based on interests of secrecy, but encompasses violations of

privacy that intrude on a person's right of seclusion. It was the content of the alleged unsolicited text messages sent by Yahoo that purportedly disrupted the underlying plaintiffs' right to be left alone. Accordingly, these claims are *potentially* covered claims for injury arising from "oral or written publication, in any manner, of material that violates a person's right of privacy." National Union's duty to defend was triggered by the alleged TCPA violations in the Text Message Actions. *See Gray*, 65 Cal. 2d at 276-77 (1966) (holding an insurer must defend a suit that "*potentially* seeks damages within the coverage of the policy").

D. The Context Of The Insurance Clause Supports Coverage.

1. Yahoo and National Union agreed to delete the "personal injury" TCPA exclusion.

As Yahoo alleged in its Complaint, it "specifically sought to expand the 'personal injury' coverage provided by its insurance policies through a separately drafted manuscript endorsement." (ER023-24, ¶ 24.) This manuscript endorsement reflects Yahoo's and National Union's specific intent to provide coverage for specialized risks. *See* Cal. Civ. Code § 1651; *see also Venoco*, 175 Cal. App. 4th at 766. Among other things, the "personal injury" coverage replaced the standard form coverage for "personal and advertising injury" with a unique, stand-alone coverage for "personal injury." (*Id.*) And Yahoo and National Union removed several exclusions from the standard form "personal and advertising injury" coverage, including the TCPA exclusion. (ER100-02.)

While the district court acknowledged that the Endorsement No. 1 "alters coverage as to personal injury" and "provide[s] extended coverage for personal and advertising injury," its Order did not ascribe any broader coverage to this clause. (ER002-3). To the contrary, the district court relied on *ACS Systems* and *JT's Frames*, both of which construe standard-form "advertising injury" clauses. Particularly given that Yahoo secured a ***separate*** definition for "advertising injury" as "[o]ral or written publication, in any manner, of material in your 'advertisement' that violates a person's right of privacy" (ER103 § III(b)), the district court essentially rendered the separate "personal injury" coverage provision of Endorsement No. 1 meaningless. *See Mirpad, LLC v. California Ins. Guarantee Assn.*, 132 Cal. App. 4th 1058, 1073 (2005) ("An interpretation of the policy that creates an ambiguity where none existed by rendering words redundant or superfluous violates all rules of construction.").

The district court also did not consider the fact that Endorsement No. 1 eliminated the TCPA exclusion from the Yahoo policies. Such deletion is critical to interpretation of the "personal injury" coverage under the Yahoo policies. As originally drafted, the "personal and advertising injury" was subject to Exclusion 2(p) for "Distribution of Material in Violation of Statutes," which excluded "personal and advertising injury" arising out of "any action or omission that violates or is alleged to violate: (1) The Telephone Consumer Protection Act

(TCPA). . . ." (ER023-24, ¶ 24, ER045.) Because this exclusion was removed through the addition of the manuscript endorsement for "personal injury" coverage, there is at least the potential that Yahoo and National Union intended to provide coverage for claims alleging violation of the TCPA. *See Regence Group v. TIG Specialty Ins. Co.*, 903 F. Supp. 2d 1152, 1166 (D. Or. 2012) (holding that insurer's deletion of the RICO exclusion demonstrated the parties' intent to provide coverage for RICO claims).

The district court's ruling essentially renders the deletion of the TCPA exclusion a meaningless act. The fact that National Union's standard policy included a TCPA exclusion suggests that the language of its standard form – which covered for "oral or written publication, in any manner, of material that violates a person's right of privacy" (ER103) – otherwise provided coverage. Here, Yahoo not only negotiated out the TCPA exclusion, it incorporated the critical operative language of National Union's standard policy into the "personal injury" coverage.

Because Yahoo plausibly alleged that it negotiated manuscript Endorsement No. 1 to expand available coverage for "personal injury" and the district court did not consider the parties' specialized intent in interpreting available coverage, the district court's order should be reversed. At a minimum, Yahoo's allegations regarding the parties' intentions to expand the standard-form "personal and

advertising injury" through endorsement warrants permitting the parties to conduct discovery as to the meaning of the "personal injury" coverage.

2. The "personal injury" coverage protects against both *content*-based and *conduct*-based intrusions of privacy.

The "personal injury" coverage in the Yahoo policies' Endorsement No. 1 includes several conduct-based offenses to the right of seclusion that infringe on the victim's rights to be free from physical intrusion:

> a. False ***arrest***, ***detention***, or ***imprisonment***;
>
> b. Malicious prosecution;
>
> c. The ***wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room***, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication, in any manner, of material that violates a person's ***right of privacy***.

(ER024, ¶ 26; ER102-03 § III(a) (emphasis added).)

Offenses such as false imprisonment, wrongful entry, or invasion of the right of private occupancy have nothing to do with the ***content*** of any material that might violate a person's right of privacy or violate a person's right to secrecy. Instead, these personal injury offenses are focused on actions and conduct that are

done to others, or intrusions on the alleged victim's personal space. When the term "right of privacy" is interpreted in the context of these other "personal injury" offenses, it is more than reasonable to conclude that an "oral or written publication, in any manner, of material that violates a person's right of privacy" includes communications that violate a person's privacy right to seclusion. Thus, the Text Message Actions, which allege "publication" by Yahoo of text messages that allegedly violated the underlying plaintiffs' right to seclusion, are precisely the type of lawsuits that trigger National Union's duty to defend.

In contrast, the separate "advertising injury" provision in Yahoo's policies applies solely to *content*-based injuries, given the explicit wording of those provisions. The "advertising injury" provision includes a clause defining advertising injury to include "oral or written publication, in any manner, of material ***in your 'advertisement'*** that violates a person's right of privacy." (ER103 § III(b) (emphasis added)). This clause more reasonably can be interpreted to apply only to secrecy-based privacy violations, because the "material" violating an individual's right of privacy must be in the content of the insured's advertisement. No similar limitation is included in the "personal injury" coverage, which applies broadly to any "material" that violates a privacy right, regardless of the nature of such "material."

The district court failed to acknowledge that the "advertising injury" context of the provisions analyzed in *ACS Systems* and *JT's Frames* substantively differed from the "personal injury" context of the critical language found in Endorsement No. 1. In *ACS Systems* and *JT's Frames*, the critical provision appeared within four different "advertising injury" offenses, each of which involved injury caused by the *content* of an advertisement. *See JT's Frames*, 181 Cal. App. at 448 (in all four "advertising injury" offenses, "the victim is injured by the content of the advertisement"); *ACS Systems,* 147 Cal. App. 4th at 151-52 (same).

Relying on the context in which the "right of privacy" language appears as part of the other "advertising injury" offenses, the *ACS Systems* and *JT's Frames* courts concluded that the "right of privacy" "may most reasonably be interpreted as referring to advertising material whose *content* violates a person's right of privacy." *JT's Frames*, 181 Cal. App. 4th at 448 (emphasis in original). The three other advertising injury offenses, which do not contain the "right of privacy" language, provide coverage for liability arising from injury to the secrecy privacy right caused by the publication or taking or use of content. Given this context, "it would be unreasonable to give a different interpretation to the advertising injury offense at issue." *ACS Systems*, 147 Cal. App. 4th at 152.

Here, Yahoo negotiated for two separate definitions for "personal injury" and "advertising injury" – each of which contained a provision addressing the

publication of material that violates a person's right of privacy. The "advertising injury" provision (which includes "[o]ral or written publication, in any manner, of material in your 'advertisement' that violates a person's right of privacy") arguably would be subject to a similar context argument, given that all of the other provisions in this clause focus on injury arising from the publication of materials injurious to the reputation, or in violation of the intellectual property rights, of the victim. (*See* ER102.) But the separate "personal injury" provision (which covered "[o]ral or written publication, in any manner, of material that violates a person's right of privacy" without the limitation that the "material" appear "in your advertisement") would not be subject to a similar context argument, because it occurred in a group of provisions that included violations of personal freedom and privacy rights highly analogous to the "seclusion" right of privacy protected by the TCPA. (*See, e.g.*, ER102-03 (providing coverage for "[f]alse arrest, detention, or imprisonment" and "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies . . . .")).

Rather than interpreting the "right of privacy" provision in the context of the other offenses that are part of the "personal injury" coverage, the district court instead examined *only* the offense that immediately preceded the one at issue, citing *ACS Systems*. (*See* ER009 (stating "[i]t is important to analyze the provision

directly before the disputed one in order to use the context of that provision to help determine the disputed provision's meaning"). But *ACS Systems* did not suggest such a limited analysis. On the contrary, *ACS Systems* recognized that a court must interpret the policy terms "in context, and give effect to every part of the policy with each clause helping to interpret the other." *ACS Systems*, 147 Cal. App. 4th at 146. There was no reason for the district court to place additional, and indeed sole, emphasis on the offense immediately preceding the provision at issue, rather than considering all five of the offenses covered in the "personal injury" section.

II. THE COURT SHOULD CONCLUDE THE CALIFORNIA SUPREME COURT WOULD FOLLOW THE MAJORITY OF RECENT CASES FINDING SIMILAR LANGUAGE PROVIDES COVERAGE FOR TCPA CLAIMS; OR, ALTERNATIVELY, CERTIFY THE COVERAGE ISSUE TO THE CALIFORNIA SUPREME COURT.

For all the reasons discussed above, Yahoo respectfully submits the district court improperly applied the intermediate appellate decisions in *ACS Systems* and *JT's Frames* in dismissing Yahoo's claims. Among other things, the *ACS Systems* decision actually supports Yahoo's position, by distinguishing the language of the policy before it from authorities construing "oral or written publication of material that violates a person's right of privacy" policy provisions (language much closer to Yahoo's policy language). *See* 147 Cal. App. 4th at 153. And the *JT's Frames* court placed great emphasis on the "advertising injury" context of its ruling. *See*

181 Cal. App. 4th at 446-49. Here, Yahoo negotiated Endorsement No. 1, replacing the standard form with different coverage for "personal injury" claims.

But even if the Court does not find these decisions distinguishable, it still must perform its own assessment of whether these lower court decisions accurately predict how the California Supreme Court would rule. *Thompson v. Cantwell*, 223 Fed. Appx. 545, 547-48 (9th Cir. 2007) (explaining that where forum state's highest court has not ruled on a particular issue, this Court "must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance"). Thus, this Court "applies California law as it believes the California Supreme Court would apply it." *Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 432 (9th Cir. 1994). While state appellate court decisions are persuasive authority, this Court is not bound if it believes that the California Supreme Court would decide otherwise. *In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 924 (9th Cir. 2000); *see also Miller v. County of Santa Cruz*, 39 F.3d 1030, 1036 n.5 (9th Cir. 1994).

Yahoo respectfully submits that, to the extent *JT's Frames* and *ACS Systems* can be interpreted to preclude coverage here, those rulings do not reflect how the California Supreme Court would decide this case. Among other things, the decisions (particularly *JT's Frames*) fail to apply the California Supreme Court's

well-established mandate that the terms of an insurance policy must be given their ordinary and plain meaning as a layperson would understand them. *See e.g., E.M.M.I. Inc. v. Zurich American Ins. Co.*, 32 Cal. 4th 465, 471 (2004); *Powerine II,* 37 Cal. 4th 377, 391 (2005); *State v. Allstate Ins. Co.*, 45 Cal. 4th 1008, 1018, (2009). Instead, the intermediate decisions adopted improperly narrow and technical definitions of the terms "publication," "material," and "right of privacy."

The California Supreme Court repeatedly has emphasized the importance of giving terms in an insurance contract their plain meaning. In *E.M.M.I.*, for example, the Supreme Court rejected the insurer's argument that an ordinary person would understand the phrase "actually in or upon" only in a legal sense, "because it runs afoul of elementary rules of contract interpretation that policy language is interpreted in its ordinary and popular sense[.]" 32 Cal. 4th at 472. The court looked instead to dictionary definitions to determine how a layman would read the provision and found that "upon" was ambiguous as used in the policy and therefore had to be construed in favor of coverage. *Id.*

Similarly, in *Powerine II*, the Supreme Court concluded, "under a literal reading" of the policies at issue, that the insurer's indemnification obligation extended beyond court-ordered money "damages" because the policy included the additional term of "expenses," which in its plain and ordinary sense included government-imposed environmental clean-up costs. 37 Cal. 4th 377, 398. And the

Supreme Court relied on the "broad literal meaning" of the terms "discharge, dispersal, release or escape" to hold that the pollution exclusion was ambiguous as to its exact application and therefore had to be interpreted in favor of coverage and the reasonable expectations of the insured. *State v. Allstate Ins. Co.*, 45 Cal. 4th 1020-21 (2009).

Because *ACS Systems* and *JT's Frames* fail to interpret the undefined policy terms of "publication," "material," and "right of privacy" according to their plain meaning, the district court should have looked to the decisions of other jurisdictions. *See Thompson*, 223 Fed. Appx. at 547–48 (recognizing that federal court may rely on the decisions of other jurisdictions to determine how the highest court would rule). These decisions overwhelmingly support interpreting the policy language at issue here to provide coverage for the TCPA claims.

A. This Court Should Predict The California Supreme Court Would Follow The Numerous Recent Decisions Of Other Courts That Have Interpreted Similar Policy Language To Provide Coverage For TCPA Claims.

Interpreting provisions substantially similar to terms at issue according to their plain and ordinary meaning, the majority of decisions in other jurisdictions have found coverage for TCPA claims. *See, e.g., W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 Fed. Appx. 960 (5th Cir. 2004) (unpublished), *aff'g* 269 F. Supp. 2d 836 (N.D. Tex. 2003) (holding insurer had duty to defend TCPA claim as potentially within "advertising injury" coverage); *Hooters of Augusta, Inc. v.*

American Global Ins. Co., 157 Fed. Appx. 201 (11th Cir. 2005) (concluding insured's fax advertising was "publication" under ordinary meaning of term); *Park University Enters., Inc. v. Am. Cas. Co. of Reading, PA*, 442 F.3d 1239 (10th Cir. 2006) (finding coverage applying a plain meaning analysis); *Valley Forge Ins. Co. v. Swiderski Elec., Inc.*, 860 N.E.2d 307, 316 (Ill. 2006) (holding insurer had duty to defend claims based on the "plain, ordinary, and popular" meaning of the clause "oral or written publication, in any manner, of material that violates a person's right of privacy"); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 572 (Mass. 2007) (finding "plain and ordinary meaning" of "personal and advertising injury" coverage extended to claims for mass facsimile transmission in violation of the TCPA); *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 912 N.E.2d 659 (Ohio Ct. App. 2009) (applying dictionary definition of "publication" to find coverage for claims under the TCPA); *Penzer v. Transportation Ins. Co.*, 29 So. 3d 1000 (Fla. 2010) (finding "advertising injury" clause covered TCPA claims when "plain meaning" of terms was adopted); *Sawyer v. West Bend Mut. Ins. Co.*, 821 N.W.2d 250, 258 (Wis. Ct. App. 2012) (holding insurer had duty to defend claims against insured for violations of the TCPA under "personal and advertising injury" coverage based on the "plain, ordinary, and popular" meaning of policy terms); *Owners Ins. Co. v. European Auto Works, Inc.,* 695 F.3d 814, 819 (8th Cir. 2012) (applying "ordinary meaning" of policy terms to encompass violations of the

TCPA); *Indiana Ins. Co. v. CE Design Ltd.*, 6 F. Supp. 3d 858 (S.D. Ill. 2013) (finding duty to defend based on "commonly used meaning" of "advertising injury" terms); *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258, 270 (Mo. 2013) (holding "advertising injury" clause covered TCPA claims); *Collective Brands, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 11–4097–JTM, 2013 WL 66071, *13 (D. Kan. Jan. 4, 2013) (holding "oral or written publication, in any manner, of material that violates a person's right of privacy" covered alleged violations of TCPA, but exclusion for TCPA claims ultimately barred coverage); *National Union Fire Ins. Co. of Pitts., P.A. v. Papa John's Intl., Inc.*, 29 F. Supp. 3d 961 (W.D. Ky. 2014) (holding "plain and ordinary meaning" of terms in "personal and advertising injury" sufficiently broad to include violations of a person's right of seclusion as protected under the TCPA). Because the California Supreme Court similarly emphasizes the importance of applying a policy's plain meaning to an insured, these cases provide an accurate barometer to predict how the California Supreme Court would rule in this case.

In *Terra Nova Insurance*, Massachusetts' highest court held that disseminating facsimile advertisements in violation of the TCPA amounted to "oral or written publication of material" according to the "plain and ordinary meaning" of the phrase. 869 N.E.2d at 572. The court found that the dictionary definitions of "publication" encompassed at least two definitions: "communication (as of news

or information) to the public" or a "public announcement." *Id.* And the "mass transmission of 60,000 facsimile advertisements" constituted an "announcement to the public" covered by the meaning of "publication." *Id.*

Numerous other courts similarly have held that transmission of allegedly unsolicited fax messages to the injured parties constitutes "publication" within its plain meaning. *See, e.g., Hooters of Augusta, Inc.*, 157 Fed. Appx. at 208 (holding alleged faxing of unsolicited advertisements "squarely fits" within the "ordinary sense" of "publication"); *Penzer*, 29 So. 3d at 1005 (holding sending of unsolicited fax blast advertisements was within "plain meaning" of "publication" "because it constitutes a communication of information disseminated to the public and it is 'the act of process of issuing copies for general distribution to the public.'"); *Dandy-Jim, Inc.*, 912 N.E.2d at 666 (holding "ordinary sense" of "publication" included "communicating information to the public and distributing copies of the advertisements to the public").

In *Penzer*, the court recognized that the plain meaning of "material" encompasses fax advertisements sent in violation of the TCPA. 29 So. 3d at 1006. The court examined two dictionary definitions of "material": (1) "of, relating to, or consisting of matter" and (2) "something (as data, observations, perceptions, ideas) that may through the intellectual operation be synthesized or further elaborated or otherwise reworked into a more finished form or new form or that may serve as the

basis for arriving at fresh interpretations or judgments or conclusions." *Id.* Based on these definitions, the court determined that the alleged fax advertisements transmitted to plaintiffs in violation of the TCPA met the definition of "material" because the fax advertisement at issue "consists of matter" and "something that may be synthesized or further elaborated or may serve as the basis for arriving at fresh interpretations or judgments or conclusions." *Id.* (internal quotations omitted). Other courts have similarly concluded that the plain meaning of "material" includes advertisements transmitted in violation of the TCPA. *See, e.g., Valley Forge*, 860 N.E.2d at 317 (finding dictionary definition of "material" was "quite broad and clearly encompasses advertisements").

These non-California decisions have also rejected the technical argument (accepted by the district court here) that the word "publication" narrows the scope of "right of privacy" to only those rights related to secrecy. *See, e.g., Valley Forge*, 860 N.E.2d at 323; *Sawyer*, 821 N.W.2d at 258. In *Sawyer*, the court looked to the plain meaning of the "right of privacy," which included both seclusion and secrecy interests, and found that the policy language could therefore "reasonably be understood to refer to violations of a person's right to seclusion." 821 N.W.2d at 258. The faxed advertisements "violated this right because the advertisements were sent without permission." *Id.* Because of the "prohibited nature" of this material, "the unsolicited advertisement *was* highly offensive ... as

evinced by the fact that it is expressly prohibited by the TCPA." *Id.* To the extent that an insurer sought to limit coverage to violations of secrecy privacy rights and not seclusion privacy rights, it had an obligation to choose more precise language. *See also HIAR Holding*, 411 S.W.3d at 270. National Union could have, but did not, specifically limit coverage for the "right of privacy" to only secrecy-based offenses.

Moreover, these courts have rejected "context" arguments similar to those driving the intermediate California court decisions. For example, in *European Auto Works*, the Eighth Circuit rejected the insurer's argument that the provision's placement next to other types of advertising injuries that required an evaluation of content meant that the "publication of material" had to be content-based to trigger coverage. 695 F.3d at 821. Because the "advertising injury portion of the policies covers a wide range of injuries, including copyright infringement and libel, and it does not necessarily follow that the right of privacy provision must involve the content of the advertisements." *Id.*

The offense for "publication of material" in *Sawyer* appeared in "personal and advertising injury" coverage that included offenses related to conduct (such as false arrest), similar to the "personal injury" coverage at issue here. The Wisconsin court rejected the insurer's argument that the other offenses were based on the "*content* of an advertisement rather than the harm arising from the mere

receipt of an advertisement." 821 N.W.2d at 257-58 (emphasis in original). Even if one of these offenses solely implicated a secrecy interest, "it would defy the principles of contract construction to require that they *all* did so." *Id.* (emphasis in original).

Neither *ACS* nor *JT's Frames* meaningfully addressed the out-of-jurisdiction decisions finding coverage (many of which post-date the intermediate courts' rulings).[7] Rather, they both favorably cite *American States*, an early Seventh Circuit decision whose prediction of Illinois law subsequently has been rejected by the Illinois Supreme Court in *Valley Forge*. This Court should predict the California Supreme Court will follow the majority of other jurisdictions in holding language such as in Yahoo's policies provides coverage for TCPA claims.

B. Alternatively, The Court Should Certify The Coverage Issue To The California Supreme Court.

If the Court has any doubt about whether *JT's Frames* and *ACS Systems* constitute binding precedent here, Yahoo requests that the Court certify the following question to the California Supreme Court:

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[7] As noted above, the *ACS Systems* court distinguished the out-of-jurisdiction decisions because they construed provisions covering "oral or written publication of material that violates a person's right of privacy" – language substantially similar to Yahoo's policies here. 147 Cal. App. 4th 137, 153. The *JT's Frames* court merely noted the contrary decisions in a footnote and made no effort to address them. 181 Cal. App. 4th at 447 & n.16.

> Does a policy that covers "injury" arising out of "oral or written publication, in any manner, of material that violates a person's right of privacy" cover claims that the insured violated the TCPA by sending unsolicited text messages?

The California Supreme Court has authority to decide a question of California law certified to it by this Court if "[t]here is no controlling precedent" on the question and the Supreme Court's answer "could determine the outcome of a matter pending in the requesting court." Cal. R. Ct. 8.548(a).

Here, the California Supreme Court has never decided this coverage question. If the California Supreme Court answers the certified question in the affirmative, then the dismissal of Yahoo's claims against National Union should be reversed. This case thus presents an appropriate question for the California Supreme Court to address. *See* Cal. R. Ct. 8.548(a)(1).

Decisions of other jurisdictions have also acknowledged that the question of coverage for TCPA claims under an "advertising injury" clause is often properly resolved by the state courts. *See Penzer*, 29 So. 3d 1000 (decided through certification by the United States Court of Appeals for the Eleventh Circuit); *Valley Forge*, 860 N.E.2d 307 (declining to follow the Seventh Circuit's analysis in *American States* as an accurate prediction of Illinois law); *Indiana Ins. Co. v. CE Design Ltd.*, 6 F. Supp. 3d 858 (S.D. Ill. 2013) (declining to follow the Seventh Circuit's analysis in *American States* as to Illinois law or *Auto-Owners Ins. Co. v. Websolv Computing Inc.*, 580 F.3d 543 (7th Cir. 2009) as to Iowa law). As a

leading authority in the area of insurance coverage law, California has an interest in appropriate resolution of the certified question. Resolution of this issue will have significant impact on policyholders and insurers alike.

This Court has broad authority to certify questions of law. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Factors guiding the exercise of that discretion include the significance of the issue, the possibility of delay, the likelihood the issue will recur, and the ability to frame a precise legal question that will produce a helpful response from the California Supreme Court. *See Kleffman v. Vonage Holdings Corp.*, 551 F.3d 847, 849 (9th Cir. 2008). Here, the issue would be of determinative significance to all California insureds seeking coverage of TCPA claims under policies containing similar language. Any prejudice from delay likely would be inconsequential. The sheer number of recent decisions in other courts addressing coverage for TCPA claims (and the related tidal wave of TCPA actions) ensures this issue likely will recur. Finally, the response to the legal question proposed by Yahoo should provide definitive guidance in this and numerous other insurance coverage matters.

Accordingly, if the Court does not predict the California Supreme Court would follow the majority of courts that find similar language provides coverage for TCPA claims, it should certify the issue to the California Supreme Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for further proceedings and trial. In the alternative, the Court should certify the coverage issue to the California Supreme Court.

Date: January 11, 2018 KILPATRICK TOWNSEND & STOCKTON LLP

By: */s/William T. Um*
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STATEMENT OF RELATED CASES

Yahoo is not aware of any related cases.

Date: January 11, 2018 KILPATRICK TOWNSEND & STOCKTON LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,002 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 11, 2018 KILPATRICK TOWNSEND & STOCKTON LLP

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 17-16452

I, William T. Um , certify that this brief is identical to the version submitted electronically on [date] January 11, 2018 .

Date January 16, 2018

Signature /s/William T. Um

(either manual signature or "s/" plus typed name is acceptable)

Docket No. 17-16452

In the

United States Court of Appeals

For the

Ninth Circuit

YAHOO! INC., A Delaware Corporation,

Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, a Pennsylvania Corporation,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 5:17-cv-00447-NC · Honorable Nathanael M. Cousins

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DISCLOSURE STATEMENT

Defendant-Appellee National Union Fire Insurance Company of Pittsburgh, Pa. is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of AIUH LLC, which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly-held entity owns 10% or more of the stock of American International Group, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellee, National Union Fire Insurance Company of Pittsburgh, Pa., adopts the jurisdictional statement of Appellant Yahoo!, Inc.

STATEMENT OF APPELLATE ISSUES

This appeal presents the following issues:

I. Did the district court correctly find that under California law, allegations that Yahoo violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited text messages do not trigger a duty to defend under the personal injury offense of injury arising out of the publication of material that violates a person's right of privacy in a commercial general liability insurance policy where:

- It is undisputed that California law governs the interpretation of the insurance policies at issue;
- Two intermediate California state court decisions (*State Farm General Ins. Co. v. JT's Frames, Inc.*, 104 Cal. Rptr. 3d 573 (Ct. App. 2010), *rev. denied* (Apr. 28, 2010); *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 3d 786 (Ct. App. 2007), *rev. denied* (Apr. 25, 2007)) hold that violations of the TCPA do not trigger coverage under the same or substantially similar policy language; and

- Other courts following a similar contextual policy analysis as that employed by the California Supreme Court have reached the same conclusion.

II. Alternatively, if this Court is unable to determine that *ACS* and *JT*'s *Frames* are binding authority requiring affirmance, should this Court certify the following question to the California Supreme Court:

- Does a duty to defend exist under California law under the personal injury offense of injury arising out of the publication of material that violates a person's right of privacy in a commercial general liability coverage grant for violations of the TCPA, where the TCPA actions at issue involve the injured parties' "seclusion" right to be left alone from unwanted text messages, and where the coverage grant responds only to invasions of privacy that involve the disclosure of the injured party's personal information to a third party?

STATEMENT OF THE CASE

Prefatory Note: Setting the Record Straight.

Yahoo's brief is replete with bald assertions that its personal injury endorsement "expanded" coverage beyond what the policies would otherwise afford. As discussed below, the face of the policies themselves belie Yahoo's unsupported allegations. Because Yahoo's assertions are not well-plead facts, the Court need not consider them. For these reasons, National Union submits its own statement of the case based on proper record support.

I. The Parties to this Coverage Dispute.

Yahoo is a global internet services provider located in Sunnyvale, California. (Excerpts of Record ("ER") ER019, ¶2; ER030.) National Union is Yahoo's commercial general liability ("CGL") insurer for five successive annual policy periods from May 31, 2008 to May 31, 2013. (ER023, ¶22.) Yahoo seeks a declaration that National Union owes it a defense under the policies for five underlying Telephone Consumer Protection Act ("TCPA") class action lawsuits. (ER018, ¶1.)

II. The National Union Policies.

A. National Union Agreed to Cover Personal Injury as Defined.

National Union issued five CGL policies to Yahoo for the relevant period, which Yahoo asserts are "substantially similar." (ER023, ¶22.) Yahoo attached the 2008-2009 National Union policy (No. 721-90-84) as an exemplar policy to its complaint in this case. *See* ER028–ER103. Except as otherwise noted, all citations to insurance policy language in National Union's appellee brief are to the 2008-2009 policy exemplar located at Yahoo's Excerpts of Record. (ER028–ER103.)

National Union issued the policies on a standard CGL form approved and issued by the Insurance Services Office ("ISO"), modified by various endorsements.[1] (*Id.*) In relevant part, the policies include a "personal injury" endorsement, which provides that National Union has the right and duty to defend any "suit" seeking damages that the insured becomes legally obligated to pay because of "personal injury," as defined. (ER100.) The personal injury endorsement defines

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[1] The ISO "develops standard forms for the insurance industry and collects statistical data and estimates risks relevant to the form." *Bank of the West v. Superior Court*, 833 P.2d 545 (Cal. 1992).

personal injury as injury arising from five specified tort offenses. (ER102–103.) This endorsement supersedes the ISO coverage form applicable to Coverage B, which ordinarily offers more expansive personal and advertising injury liability coverage for seven specified offenses. (ER052.) By operation of the personal injury endorsement, this combined coverage line was deleted and Yahoo's coverage was limited to five personal injury offenses. (ER102–103.)

Of those five offenses, the so-called "privacy offense" is the only offense under which Yahoo seeks a duty to defend. The policies define this offense (in both the personal injury endorsement and the superseded personal and advertising injury form) as: "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." (ER052, ER103.)

The personal injury endorsement expressly excludes coverage for damages arising out of various "advertising injury" offenses, including the "[o]ral or written publication, in any manner, of material in your 'advertisement' that violates a person's right of privacy." (ER102-103) The policies define "advertisement" as:

> A notice that is broadcast or published to the general public or specific market segments about your goods, products or services

for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

(ER050.)

III. The TCPA Actions Against Yahoo Do Not Allege a Publication of Material that Violates a Right to Secrecy, Which California Law Requires to Implicate Coverage.

The TCPA actions for which Yahoo seeks a defense are class action lawsuits, which each allege that Yahoo violated the TCPA by sending unsolicited text messages to the plaintiffs' cellular phones. (ER019–022; ECF 14, Exs. 1–5.) According to Yahoo, the *Sherman* and *Reza* lawsuits were dismissed with prejudice, while the *Calderin*, *Johnson*, and *Dominguez* lawsuits remain pending. (ER021–022, ¶¶12, 17, 20.)

A. *Calderin v. Yahoo! Inc.*

The *Calderin* lawsuit (No. 1:14-cv-2753 (N.D. Ill)) asserts a single count against Yahoo for violation of the TCPA. (ER022, ¶15; ECF 14, Ex. 4.) The named plaintiff in *Calderin* alleges that Yahoo sent her and

other similarly-situated persons unsolicited "marketing" texts with the "single purpose of promoting Yahoo's services." (ECF 14, Ex. 4, ¶12.) The lawsuit further alleges that the named plaintiff "received Yahoo's unsolicited marketing text because she was sent a message from a Yahoo user via Yahoo's Messenger service." (*Id.*) According to the lawsuit, the text notified Calderin that she had received a text from a Yahoo user and contained an "advertising link to Yahoo's website." (*Id.*) The *Calderin* lawsuit alleges that federal law requires entities to obtain consent before sending unsolicited texts advertising the commercial availability of services. (ECF 14, Ex. 4, ¶17.)

B. *Johnson v. Yahoo! Inc.*

The *Johnson* lawsuit (No. 1:14-cv-2028 (N.D. Ill.)), also asserts a single count for violation of the TCPA. (ER021, ¶13; ECF 14, Ex. 3.) Like *Calderin*, *Johnson* alleges that Yahoo sent him and the class unsolicited SPAM text messages that included a link "advertising Yahoo's website." (ECF 14, Ex. 3, ¶¶19-20.) The lawsuit further alleges the text messages included an "advertisement for services offered through Yahoo! Messenger." (ECF 14, Ex. 3, ¶20.) The court deemed the *Johnson* lawsuit

substantially similar to the *Calderin* lawsuit and consolidated it with that case. (ER022, ¶17.)

C. *Sherman v. Yahoo! Inc.*

The *Sherman* lawsuit (No. 3:13-cv-41 (S.D. Cal.)) asserts two causes of action against Yahoo for negligent and willful violations of the TPCA. (ER019-20, ¶¶7-9; ECF 14, Ex. 1.) Specifically, *Sherman* alleges that Yahoo sent the plaintiff class unsolicited SPAM text messages. (ECF 14, Ex. 1, ¶¶14–15.) As with *Calderin* and *Johnson*, the text messages allegedly notified the recipients that a Yahoo user had sent them a message and contained a link to Yahoo's website. (*Id.*)

D. *Reza v. Yahoo! Inc.*

Reza (No. 3:13-cv-71 (S.D. Cal.)) also asserts two causes of action for negligent and willful violations of the TCPA. (ER020, ¶10; ECF 14, Ex. 2.) Like the prior cases, *Reza* alleges that Yahoo sent the plaintiff class unsolicited SPAM text messages that included a link to Yahoo's website, which notified the recipients of a message from a Yahoo user. (ECF 14, Ex. 2, ¶11.)

E. *Dominguez v. Yahoo! Inc.*

The *Dominguez* lawsuit (No. 2:13-cv-1887 (E.D. Pa.))[2] asserts a single count against Yahoo for violation of the TCPA. (ER022, ¶18; ECF 14, Ex. 5.) The lawsuit alleges that Yahoo sent the plaintiffs "unsolicited commercial text messages" that "generally advertised certain products." (ECF 14, Ex. 5, ¶¶20, 26, 50.)

IV. The District Court Found the TCPA Actions Do Not Involve a Publication of Material that Violates a Right to Secrecy.

Yahoo contends in this declaratory judgment action that National Union breached its duty to defend the TCPA actions. (ER018.) According to Yahoo, the TCPA actions trigger coverage under the policies' right of privacy offense because the alleged transmission of text messages to the TCPA plaintiffs is a publication of material that violates the plaintiffs' right of privacy. (ER025, ¶30.) Yahoo admits no other policy provision potentially applies. (*See* ER005, ER030; App. Br. 3.) National Union moved to dismiss Yahoo's action, asserting the TCPA actions do not trigger a duty to defend under the policies as a matter of California law. (ECF 15.)

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[2] National Union maintains that Yahoo never tendered *Dominguez* to it for either a defense or indemnity but does agree that the *Dominguez* lawsuit is an action against Yahoo that alleges a violation of the TCPA.

The district court agreed and granted National Union's motion to dismiss. (ER002, ER004.) In so ruling, the court first acknowledged that California recognizes two spheres of privacy rights: (1) the right to secrecy, which involves the right to prevent disclosure of a person's personal information and is inherently "content-based"; and (2) the right to seclusion, which involves the right to be left alone and can be disrupted regardless of content. (ER005.)

After identifying these common law privacy rights, the district court analyzed the plain text of the policies' right of privacy provision, which responds only when a claimant asserts publication, or making known, of material that offends a right of privacy. (ER007.) Based on the word "publication," the district court found that the policies do not encompass violations of the right of seclusion because publication (or making known) is not an element of the common law right of seclusion. (ER008.) The district court cited two California cases mandating that conclusion. *See State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 104 Cal. Rptr. 3d 573 (Ct. App. 2010), *rev. denied* (Apr. 28, 2010); *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 3d 786 (Ct. App. 2007), *rev. denied* (Apr. 25, 2007).

The district court next applied the last antecedent rule to the policy language, finding that the phrase "that violates a person's right of privacy" modifies the word "material." (ER008.) That sentence structure reinforced the district court's conclusion that the *content* of material – not the mere transmission of communications – must violate a right of privacy to invoke coverage under the policies. (ER008.) In sum, the court found no coverage for violations of the right of seclusion, because seclusion claims do not require publication and are unconcerned with content, and thus, do not satisfy the plain meaning of the policy language when construed as a whole. (ER009.)

Last, the district court considered the disputed privacy offense in the context of the policies' five other personal injury offense coverage grants. (ER009.) The court noted that the privacy provision appears directly after the defamation offense provision, which is defined as "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." (ER009.) Relying on California common law relative to libel and slander, the court determined that the word publication in the defamation provision

means the sharing of offensive content about the claimant to a third party. The court reasoned that the word publication should be construed in a like manner, whether found in the privacy provision or the defamation provision, to require the sharing of offensive content with third parties. (ER009–010.)

The court considered Yahoo's arguments in favor of coverage and citations to out-of-state authority but found them unpersuasive and inapplicable in light of the California authority directly on point. (ER010–012.) In particular, the district court rejected Yahoo's broad definition of the policies' right of privacy as inconsistent with California law, which requires consideration of the disputed policy provision as a whole rather than in the abstract.

Although the court issued its decision without prejudice, allowing Yahoo the opportunity to amend its complaint, Yahoo declined to do so. (ECF 38.) On June 29, 2017, the district court entered final judgment. (ER001.)

SUMMARY OF THE ARGUMENT

The question Yahoo poses in this case is not new. Yahoo asks the Court to reject a decade of California precedent finding that no coverage

is owed for unsolicited communications that violate the TCPA under a CGL policy's coverage for the publication or making known of material that violates a person's right of privacy." *See JT's Frames*, 104 Cal. Rptr. 3d 573; *ACS*, 53 Cal. Rptr. 3d 786. This question is familiar for a reason: offense-based coverage has been a staple of CGL insurance policies for decades. As such, California law is well-developed in this area and resolves this issue against Yahoo.

Under precise guidelines for interpreting the offense-based coverage at issue here, California courts apply the plain meaning of the policy language as a whole in light of the common law offenses the provisions cover. The district court, *JT's Frames*, and *ACS* applied these rules to hold that CGL policies providing coverage for the publication, or making known, of material that violates a right of privacy cover privacy violations involving the sharing of private content with another. The TCPA, which statutorily condemns the mere transmission of annoying text messages, has nothing to do with content or secrecy. While undesired texts may impinge on a person's seclusion – like a bothersome late-night knock on the door – that does not

automatically make the intrusion a covered privacy offense. The policy language, taken as whole, commands otherwise.

Nothing has changed since these cases were decided, and this Court should decline Yahoo's invitation to reject them. Yahoo misunderstands California law in contending these courts failed to consider the plain meaning of the word "privacy." In advocating a broad definition of "privacy," Yahoo oversimplifies the plain meaning analysis undertaken by California courts by invoking an abstract definition of privacy that would encompass the seclusion concerns at issue in the TCPA. But not just any theoretical meaning of privacy will do. The meaning of privacy in the policies, taken as a whole, controls. In context, the words "publication," "material," and "privacy" taken together can mean just one thing: that the sharing of private content must violate a right of secrecy. Under the TCPA, by contrast, "publication" is not an element, and content is irrelevant. In other words, the mere transmission of bothersome texts – while barred by the TCPA – does not state a plausible claim for coverage under the policies.

Unable to escape the weight of controlling California law, Yahoo attempts to distinguish *ACS* and *JT's Frames*. Yahoo's argument is

constructed on the unsupported premise that the privacy coverage in the personal injury section of its policies is broader than others that provide privacy coverage in an advertising injury coverage form. But the critical language of the privacy provision itself is substantively identical, and should be construed in a like manner, regardless of the policy form in which it is found. Yahoo also maintains that the absence of a TCPA exclusion means the policies were intended to cover the TCPA. Not so. The policies never needed an exclusion. Under California law, the absence of an exclusion cannot expand or create coverage where none ever existed.

Finding no support in California, Yahoo also ventures out-of-state to discredit *ACS* and *JT's Frames*. In so doing, Yahoo selectively ignores persuasive cases supporting the district court's decision that employ a California-style contextual analysis that goes beyond the isolated word "privacy" to afford meaning to the surrounding words. And the cases Yahoo cites for the opposite conclusion commit what California's high court deems a "defective" analysis – finding coverage based on isolated dictionary definitions of privacy alone.

In sum, because Yahoo provides no meaningful basis to depart from controlling California law, the district court's ruling should be affirmed. If this Court has any hesitation regarding the precedential value of *ACS* and *JT's Frames*, however, National Union agrees with Yahoo that the case should be certified to offer the California Supreme Court the chance to confront this issue of significance to the insurance industry.

ARGUMENT

I. Standard of Review: *De Novo.*

Appellate courts review a lower court's interpretation of an insurance policy *de novo*. *Allstate Ins. Co. v. Gilbert*, 852 F.2d 449, 454 (9th Cir. 1988). This Court may affirm the district court's dismissal for failure to state a claim on any basis fairly supported by the record. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). In reaching its conclusion, this Court is not required to accept as true: conclusory allegations, unwarranted deductions of fact, unreasonable inferences, or allegations that contradict exhibits to the complaint and matters properly subject to judicial notice. *Id.*

II. Burden of Proof and Rules of Construction.

A. Yahoo Cannot Meet Its Burden of Showing the TCPA Actions are Even Potentially Covered as Required to Establish a Duty to Defend.

The insured bears the initial burden of proving that a claim is within an insurance policy's insuring agreement. *Waller v. Truck Ins. Exch. Inc.*, 900 P.2d 619 (Cal. 1995). The insurer's duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy. *Id.* at 626. Consequently, if the claim is not potentially covered, the insurer does not have a duty to defend. *Buss v. Superior Court*, 939 P.2d 766, 774 (Cal. 1997).

Yahoo cannot meet its initial burden of proving the TCPA actions are even potentially covered under the policies' insuring agreements. Because the policies do not encompass the risk associated with the TCPA, National Union does not have a duty to defend Yahoo.

B. California Courts Employ a Contextual Approach to Interpret Insurance Policies.

California courts apply a contextual approach to interpret insurance policies. This approach requires consideration of the plain meaning of an insurance policy provision, but not in the abstract. *Bank of the West. v. Superior Court*, 833 P.2d 545, 552 (Cal. 1992). As such,

the court's function is not to "import all possible definitions or even the broadest definition" to a word, nor to select a definition of a singular word in the abstract, but instead to glean meaning from the context. *Mirpad, LLC v. Cal. Ins. Guar. Ass'n*, 34 Cal. Rptr. 3d 136, 144 (Ct. App. 2005).

Courts must also consider policy language in light of its intended function in the policy, as well as the nature and type of risk at issue. *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 884 P.2d 1048, 1054 (Cal. 1994). In evaluating the unique risks associated with offense-based coverage, the California Supreme Court's interpretative analysis is guided by the common law torts on which the offense-based coverage grants are based. *See Bank of the West*, 833 P.2d at 550-52 (evaluating coverage for unfair competition claims by reference to the common law); *Hartford Cas. Ins. Co. v. Swift Dist., Inc.*, 326 P.3d 253, 259-61 (Cal. 2014) (evaluating coverage for disparagement in the CGL context by reference to the common law).

Bank of the West illustrates California's contextual approach to determine the plain language of offense-based coverage provisions. There, the California Supreme Court found that a CGL policy provision,

which provided coverage for "damages ... arising out of ... libel, slander, defamation, violation of right of privacy, *unfair competition*, or infringement of copyright, title or slogan" did not encompass statutory claims arising under California's Unfair Business Practices Act. *Bank of the West*, 833 P.2d at 550 (emphasis in original). Relying on the rule that policy language should be given its plain meaning, the insured invoked a broad dictionary definition of unfair competition to urge that any conceivable type of unfair business practices should be covered, including statutory claims. *Id.*

The California Supreme Court rejected that argument. *Id.* In support, the Court reasoned that the term unfair competition – as used in the policy – referred only to the common law tort of unfair competition, rather than general unfair practices, which the Court found "substantially limits the scope of coverage." *Id.* at 551. The Court next inspected the policy language as a whole, which provided coverage not for unfair competition in the abstract, but for "unfair competition" seeking "damages." *Id.* at 552. Unlike that requirement, the Court determined that damages were not a remedy under the Unfair Business Practices Act, which provides for disgorgement. *Id.* at

557. Because of those limitations, the Court characterized the insured's attempt to broadly define unfair competition in the abstract as a "defective" and improper application of the plain meaning rule, because it disregarded the surrounding language and context in which the disputed phrase was found. *Id.* at 552.

As with *Bank of the West*, the words "privacy," "publication," and "material" in the policies derive meaning from the surrounding sentence structure and context, as well as the common law, and cannot be interpreted in isolation. In *Bank of the West*, the court rejected an abstract and broad understanding of unfair competition because the common law and policy's requirement of damages narrowed the scope of its definition. So too here, privacy in its most generic sense may have many permutations, but not all privacy concerns involve the *publication* of *material* that violates a *right of privacy*, as required by the policies and understood under tort law.

To begin, however, it is true that California recognizes four common-law privacy torts, all of which prohibit conduct that is "highly offensive to a reasonable person": (1) public disclosure of private facts; (2) commercial appropriation of a name or likeness; (3) publicity which

places the plaintiff in a false light; and (4) intrusion into private matters (seclusion). *Hill v. Nat'l Collegiate Athletic Ass'n.*, 865 P.2d 633, 647 (Cal. 1994). The first three are content-based and involve sharing of the claimant's information. *See id.* Intrusion into seclusion is unconcerned with content and does not require publication. *Hernandez v. Hillsides, Inc.*, 48 Cal. Rptr. 3d 780 (Ct. App. 2006), *rev'd in part on other grounds*, 211 P.3d 1063 (Cal. 2009). Like the common law seclusion tort, a violation of the TCPA is actionable regardless of content. 47 U.S.C. § 227. The TCPA prohibits the mere sending of unsolicited transmissions. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 373 (2012) (citing 47 U.S.C. § 227(b)(1)(C)).

Yahoo's reliance on a right of privacy that includes claims of seclusion, in the abstract, contravenes *Bank of the West*'s most fundamental rule of contextual analysis. 833 P.2d at 552 (holding that policy terms cannot be considered in the abstract). Under *Bank of the West*, the phrase "right of privacy" in the policies cannot be replaced with each and every conceivable definition of privacy. *See id.* The sentence syntax requires more: the privacy offense encompasses claims

involving a *publication* of *material* that violates a right of privacy. As discussed below, the TCPA actions do not satisfy those requirements.

III. The District Court Properly Applied California Law to Find No Coverage for the TCPA Actions.

In finding the disputed privacy offense inapplicable to the TCPA actions against Yahoo, the district court correctly relied on two California Court of Appeal decisions, which found no coverage for TCPA violations based on substantially similar policy language: *ACS*, 53 Cal. Rptr. 3d 786, and *JT's Frames*, 104 Cal. Rptr. 3d 573. Because both cases correctly apply California Supreme Court law, this Court should find *ACS* and *JT's Frames* controlling.

A. The Word "Material" Limits the Covered "Right of Privacy" to Secrecy Rights.

In *ACS*, recipients of unsolicited fax advertisements sued an insured software company under the TCPA, resulting in coverage litigation. 53 Cal. Rptr. 3d 786. The insured asserted that its TCPA liability to the underlying claimants was covered under the policy's provision covering the "making known to any person or organization written or spoken material that violates an individual's right of

privacy." *Id.* at 794. The trial court disagreed and sustained the insurer's demurrer. *Id.* at 792.

The reviewing court affirmed, finding the policy did not potentially cover the TCPA lawsuit under settled principles of insurance policy interpretation. *ACS*, 53 Cal. Rptr. 3d 786. The court first discussed the distinct rights of secrecy and seclusion under California law. *Id.* at 794-95. While it was undisputed that unsolicited advertisements can invade the recipient's seclusion, the *ACS* court rejected the insured's assertion that it should define privacy as broadly as possible simply because the phrase "right of privacy" was undefined in the policy. *Id.* Relying on California Supreme Court law, the *ACS* Court recognized that, despite the abstract breadth of "privacy," potential coverage depends on what the word "privacy" means in the context of the policies as a whole. *See id.* at 792–93 (citing *Waller*, 900 P.2d 619 and *Bank of the West*, 833 P.2d 545).

In so ruling, *ACS* found *American States Ins. Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004), instructive. *ACS*, 53 Cal. Rptr. 3d at 797-98. Evaluating the same coverage provision at issue here, the Seventh Circuit held that the

structure of the provision indicated that its scope was limited to publications of material violating secrecy interests. *American States*, 392 F.3d at 943. The reasoning in *American States* and its successor *Websolv* continues to be cited favorably by states employing a contextual approach, like California. *See, e.g.*, *Auto–Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 550 (7th Cir. 2009) (reaffirming the reasoning in *American States* to find no coverage for the same offense); *Auto–Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388 (3d Cir. 2016) (applying Pennsylvania law) (considering the full text of the privacy offense, as well as its broader context); *Ace Mortg. Funding, Inc. v. Travelers Indem. Co. of Am.*, No. 1:05-cv-1631-DFH-TAB, 2008 WL 686953 (S.D. Ind. Mar. 10, 2008) (applying Indiana law) (finding *American States* persuasive); *Erie Ins. Exch. v. Kevin T. Watts, Inc.*, No. 1:05-CV-867-JDT-TAB, 2006 WL 1547109 (S.D. Ind. May 30, 2006) (applying Indiana law) (finding *American States'* "general analytical guidance" in interpreting the privacy provision helpful).

ACS applied California's requirement to consider the whole privacy provision, which required "making known" "material that violates a person's right of privacy." 53 Cal. Rptr. 3d at 795. While

acknowledging that sending fax advertisements can be described as "making known" in the abstract, the *ACS* Court found that coverage hinged on the further requirement that the "material"—*i.e.* the content—that is made known must also violate a "person's right of privacy." *Id.* at 795-96.

California Supreme Court authority applying the "last antecedent rule" reinforced *ACS*'s conclusion that coverage applied only to injury caused by the disclosure of material (*i.e.*, private content) to a third party. *Id.* at 796 (citing *Renee J. v. Superior Court*, 28 P.3d 876 (Cal. 2001)). This rule provides that qualifying words, phrases, and clauses are to be applied to the immediately preceding words or phrases rather than others more remote. *ACS*, 53 Cal. Rptr. 3d at 796. *ACS* explained that the word "that" in the phrase "material *that* violates an individual's right of privacy" signaled an intent for "material" to modify "right of privacy." *See id.* (emphasis added). According to the *ACS* Court, the word "material" was not just the last antecedent of "that" – it was the "*only* antecedent." *Id.* (emphasis in original). To give effect to the word "material," *ACS* concluded that the offense did not provide

coverage for the mere transmission of a communication disturbing the recipient's seclusion. *Id.* at 796-97.

Three years later, *JT's Frames* re-affirmed *ACS* by holding that TCPA claims do not involve an "oral or written publication of material that violates a person's right of privacy." *JT's Frames*, 104 Cal. Rptr. 3d 573. As in *ACS*, *JT's Frames* involved unsolicited fax transmissions under the TCPA, and the policy at issue differed from *ACS* only in one minor respect: the substitution of "publication" for "making known." *Id.* Citing *Bank of the West* to denounce the insured's attempt to pigeonhole coverage based on a broad definition of privacy, the court reasoned that a "semantically permissible interpretation of a word or phrase cannot create coverage where none would otherwise exist." *Id.* at 585. The court explained that the privacy offense coverage would encompass TCPA claims only if the right of privacy in the policy encompassed the right of seclusion. *Id.* at 586.

Like *ACS*, *JT's Frames* applied the last antecedent rule to find that the word "material" could violate a person's right of privacy only if its content included "confidential information and violated the victim's right to secrecy." *Id.* The court also rejected the insured's assertion

that the transmitted content did violate a right of privacy because the TCPA targets commercial advertisements, reasoning that "any privacy interest in being free from an unwelcomed fax is unaffected by the content of the material." *Id.* at n.15. *See also Integral Res., Inc. v. Hartford Fire Ins. Co.*, No. 2:14-CV-02308-R AGRX, 2014 WL 2761170, at *7 (C.D. Cal. June 13, 2014) (reaching the same conclusion based on *ACS* and *JT's Frames* and finding the privacy provision "affords coverage for disclosure of private facts under California law," rather than TCPA violations).

In other words, the disputed privacy provision can only encompass the right to secrecy, not the right to seclusion. Because Yahoo concedes the TCPA claims do not involve the right to secrecy, the TCPA claims cannot satisfy this requirement of the policies' privacy offense.

B. "Publication" Requires Communication of the Claimant's Personal Information, Which Is Not an Element of a TCPA Claim.

The common law (and common sense) understanding of the term publication in the policies supports the district court's finding that coverage hinges on making known the claimant's personal information to a third party. *See JT's Frames*, 104 Cal. Rptr. 3d at 587 (citing

Black's Law Dictionary (4th ed. 1954) to define publication as "making known"). In *JT's Frames*, the insured argued that the word "publication" in the policy was broader than the phrase "making known" in the *ACS* policy such that it encompassed the transmission of faxes. *Id.* at 584-87. The court disagreed, finding the terms interchangeable and thus refusing to find coverage based on a "marginal semantic difference." *Id.*

California's contextual approach to policy interpretation further supports this result in *JT's Frames*, in that "publication" should be limited to the disclosure of the plaintiff's information, which is offensive or harmful to the plaintiff, based on the understanding of publication in the common law. *See La Jolla*, 884 P.2d at 1054 (holding that the duty to defend is limited by "the nature and kind of risk covered by the policy"); *Bank of the West*, 833 P.2d 545 (holding that policy offenses are interpreted based on the applicable common law tort); *Hartford*, 326 P.3d 253 (holding that a disparagement offense did not cover underlying claims where the claims failed to satisfy the common law elements of disparagement, including "publication," which is understood to involve disclosure of information harmful to the plaintiff). *Cf.*

Ananda Church of Self Realization v. Everest Nat. Ins. Co., No. C038570, 2003 WL 205144 (Cal. Ct. App. Jan. 31, 2003) (holding that publication under the policies is considered in light of common law privacy torts, and as such, requires disclosure of the plaintiff's information to a third party).[3]

This analysis is sound because publication of the plaintiff's information is a requirement of the privacy tort of disclosure of private facts, but it is not an element of intrusion upon seclusion under California law. *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469 (Cal.1998). *See also Hernandez*, 48 Cal. Rptr. 3d 780 (holding that the tort of intrusion does not require proof of publication, *i.e.*, that private information was disclosed to a third-party); Restatement (Second) of Torts § 652B (1977) (holding that in the tort of intrusion, the "intrusion itself" makes the defendant subject to liability, even without publication). In the same manner that the *Bank of the West* Court

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[3]This Court may rely on unpublished California state court decisions as persuasive authority illustrating how California courts interpret insurance policies. *See CPR for Skid Row v. City of Los Angeles*, 779 F.3d 1098, 1117 (9th Cir. 2015) (citing *Empl'rs Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 (9th Cir. 2003)).

found the common law and policy requirement of damages illuminated the meaning of unfair competition, the common law and policy language demonstrate that the privacy provision's scope is limited to privacy violations involving secrecy.

Other courts agree. In *Websolv*, the Seventh Circuit Court of Appeals held that the term "publication," when used with the term "privacy," refers to the communication of the claimant's information to a third party and limits privacy coverage to claims involving a violation of the right of secrecy. 580 F.3d 543. *Websolv* found that interpreting the policy term publication to include TCPA claims stretched the policy language "too far." *Id.* at 551. Likewise, in *Springdale Donuts, Inc. v. Aetna Casualty & Surety Co. of Illinois,* the Connecticut Supreme Court held that the privacy offense found in a "personal injury" coverage part was not implicated in a suit alleging the insured made lewd remarks to the plaintiff. 724 A.2d 1117 (Conn. 1999). The court held that "common sense" dictates that "publication" means communication of the plaintiffs' information to a third party, and not just communications by the insured to the plaintiffs. *Id.* at 1122. *See also Integral*, 2014 WL 2761170, at *7 (holding that TCPA claims did not involve publication

under identical provision in a "personal and advertising injury" coverage part).

Based on these authorities, the policies' publication element requires a disclosure of informational content to someone other than the complaining party, implicating the secrecy right of privacy. The TCPA, by contrast, does not require a "publication." The TCPA actions merely allege a transmission of information to *the complaining parties themselves,* disturbing the right to seclusion. As such, the district court correctly found that the use of the word "publication" coupled with the phrase "right of privacy" signals that the disputed privacy offense does not encompass violations of the right of seclusion, including TCPA claims.

C. *ACS* and *JT's Frames* Are Binding Because They Correctly State California Law.

When the applicable state's highest court has not decided an issue, this Court must predict how the highest court would rule. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266-67 (9th Cir. 2017). Where state intermediate appellate decisions exist, however, those decisions are binding, absent "convincing evidence" that the state supreme court would decide differently. *See id.* This Court properly

defers to intermediate decisions, particularly when the Supreme Court has refused review of the lower court's decisions. *Id.* (finding that the California Supreme Court's denial of review suggested the Court would uphold an intermediate court's ruling). *See also State Farm Fire & Cas. Co. v. Abraio*, 874 F.2d 619, 621 (9th Cir. 1989) (same); *Tenneco W., Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir. 1985) (same).

Poublon exemplifies why *ACS* and *JT's Frames* are binding here. There, the plaintiff relied on a case from this Court to argue that a contractual confidentiality provision was substantively unconscionable. *Poublon*, 846 F.3d at 1265. This Court disagreed because a California court of appeal issued a later decision that was on point and contradicted this Court's earlier decision. *Id.* at 1266. In the absence of California Supreme Court authority, this Court found itself bound by the intermediate state court decision, even despite its own prior contrary holding. *Id.* at 1267.

Thus, this Court held that a "state appellate court's announcement of a rule of law" should not be disregarded unless "other persuasive data" shows that the "highest court of the state would decide otherwise." *Id.* at 1266. Finding no data to combat the state court

decision, the *Poublon* Court expressly noted that the plaintiff had not cited any California precedent reaching a different conclusion and reiterated that the California Supreme Court's declination of review of the court of appeals' decision heightened the importance of relying on the intermediate case. *Id.* at 1267.

Here, the only California cases addressing insurance coverage for privacy claims stemming from the insured's transmittal of unsolicited communications to third parties found no coverage under CGL policies containing functionally identical language as Yahoo's coverage with National Union: *ACS*, 53 Cal. Rptr. 3d 786 and *JT's Frames,* 104 Cal. Rptr. 3d 573.

Importantly, the California Supreme Court denied review in both *ACS* and *JT's Frames*. These decisions have, thus, stated California law on this issue for over ten years without challenge or criticism by California courts. As *Poublon* instructs, leaving precedent intact for over ten years is significant evidence that the California Supreme Court would not rule differently on the issue. Indeed, that is precisely what the Third Circuit recently held in *Stevens*, when it applied an intermediate Pennsylvania court decision—finding no coverage under a

CGL policy for TCPA claims—because it found the intermediate court's decision to be "presumptive evidence" of state law. 835 F.3d at 409.

Unable to dispute the strength of *ACS* and *JT's Frames*, Yahoo asks this Court to instead apply the law of other jurisdictions. Yahoo cites a dissenting opinion in *Thompson v. Cantwell*, 223 Fed. App'x 545, 547-48 (9th Cir. 2007) for the proposition that the Ninth Circuit can look to other jurisdictions to determine an issue that the highest court has not considered. *Thompson*'s dissent is not controlling, and the case did not rely on out-of-state law, and thus does not stand for the proposition that Yahoo affords it. Equally unhelpful is Yahoo's citation of *Miller v. County of Santa Cruz*, 39 F.3d 1030, 1036 n.5 (9th Cir. 1994), where this Court found the California Supreme Court's de-publication of a related case was not persuasive data to undermine a court of appeal's ruling. Finally, in *In re KF*, this Court deemed intermediate cases not controlling, but only after concluding they directly conflicted with California Supreme Court law. *KF Dairies, Inc. & Affiliates v. Fireman's Fund Ins. Co.*, 224 F.3d 922, 924 (9th Cir. 2000). Neither *Miller* nor *In re KF* relied on out-of-state precedent to

support their holdings. *See Miller*, 39 F.3d 1030; *In re KF*, 224 F.3d 922.

Yahoo does not – because it cannot – cite a single case where this Court applied foreign authority to a case controlled by California law, and where California intermediate courts resolved the issue years before—without conflict—and where the California Supreme Court twice denied review. Because *ACS* and *JT's Frames* followed California's established rules of insurance policy interpretation, there is no "convincing" reason to believe the Supreme Court would overrule either decision. Under *Poublon*, *Abraio*, and *Tenneco West*, *ACS* and *JT's Frames* are binding, and this Court should affirm the judgment for National Union on Yahoo's claim.

IV. Yahoo's Challenges to the District Court's Opinion Are Unpersuasive.

D. Yahoo's Reliance on Isolated Definitions of "Publication," "Material," and "Privacy" Contravenes California Supreme Court Law.

Yahoo disregards context and misapplies the "plain meaning rule" to argue that policy terms should be construed by their most expansive dictionary definitions, citing *E.M.M.I. Inc. v. Zurich American Ins. Co.*, 84 P.3d 385 (Cal. 2004), *Powerine Oil Co., v. Superior Court*, 118 P.3d

589 (Cal. 2005) ("*Powerine II*"), and *State of California v. Allstate Ins. Co.*, 201 P.3d 1147 (Cal. 2009). (App. Br. 24, 27.) Neither *Powerine II* nor *Allstate* hold that the terms "publication," "material," and "privacy" should be interpreted without reference to the language that surrounds them. *Powerine II* and *Allstate* advocate plain meaning, but not at the expense of context.

Further, in *E.M.M.I.*, the questionable phrase at issue ("actually in or upon") was contained in a vehicle theft exclusion in a first-party jeweler's property policy, and the Court found nothing in the policy suggesting that the language should be construed in a specialized manner. 84 P.3d at 390. By contrast, offense-based CGL coverage provisions must be construed based on the elements of the common law tort for which coverage is provided because that tort frames the nature of the covered risk. *See Bank of the West*, 833 P.2d 545. Within the proper framework, the covered risk here involves liability for violating a claimant's secrecy interest, not a claimant's right to be left alone, the right at issue in the TCPA.

Further, while California courts consult dictionaries to derive the meaning of terms, they do not rely on dictionary definitions alone. *See*

id. The definition of "publication" Yahoo urges here – "the act of declaring or announcing to the public" – does not withstand scrutiny once the common law tort context is considered. Publication in the right of privacy context involves divulging the injured party's private facts, and thus, is focused on the content of the communications. *See id.* Yahoo's overly broad definition renders the content meaningless, which then renders the word "material" superfluous, all in contravention of California law. *See Mirpad*, 34 Cal. Rptr. 3d at 147.

Yahoo also tries to distinguish *JT's Frames* by highlighting an immaterial linguistic distinction: the policies in *JT's Frames* and here use the phrase "publication" in place of "making known," which was at issue in *ACS*. (App. Br. 41.) But the terms are synonymous, as *JT's Frames* found. 104 Cal. Rptr. 3d at 587. The policies include identical words surrounding the term "publication" ("material that violates a right of privacy") that narrow the meaning of the offense to secrecy violations. (ER103) These surrounding words import meaning that undermines Yahoo's argument that *JT's Frames* interpreted "publication" too narrowly.

Yahoo further complains that *JT's Frames* adopted the definition of "publication" from a distinguishable case. (App. Br. 17, citing *Reimel v. Alcoholic Beverage Control Appeals Board*, 65 Cal. Rptr. 251 (Ct. App. 1967)). But by focusing on an abstract definition alone, Yahoo again misses the point: context matters. *JT's Frames* correctly looked beyond the definition of publication as "making known," which it obtained from *Reimel* and Black's Law Dictionary. *JT's Frames* drew on context to support its conclusion that the word publication means "making known" and limits the phrase "right to privacy" to violations of secrecy. 104 Cal. Rptr. 3d 573.

JT's Frames' consideration of syntax, in fact, highlights the flaws in Yahoo's next argument: that *JT's Frames* "ignored" "the seclusion right protected by the TCPA." *JT's Frames* did not ignore the right of seclusion – Yahoo just has it backwards. As *American States* explained in the context of the TCPA, and *Bank of the West* held in the context of unfair competition, the language in the policies is the starting point of the analysis, not the statute for which coverage is sought. *Am. States*, 392 F.3d 939; *Bank of the West*, 833 P.2d 545 (finding that, while the term "unfair competition" in the abstract might encompass statutory

claims, the context of "unfair competition" offense in the insurance policy had a narrower scope).

By starting with the language of the policies, rather than the TCPA itself,[4] *JT's Frames* emphasized that "in a secrecy situation, publication matters; ... [i]n a seclusion situation, publication is irrelevant. A late-night knock on the door or other interruption can impinge on seclusion without any need for publication." 104 Cal. Rptr. 3d at 587 (citing *American States*, 392 F.3d at 942). When construed under the lens of the common law secrecy tort, as the California Supreme Court has done with other offenses, publication can imply only transmissions of an injured party's personal information to a third party.

Yahoo fares no better in attempting to discredit *JT's Frames* for relying on *American States*. Yahoo unfairly demonizes *American States* as no longer authoritative in the wake of *Valley Forge Insurance Co. v. Swiderski Electrics, Inc.*, 860 N.E.2d 307 (Ill. 2006), which disagreed

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[4] Yahoo asserts that the "publication" of text messages violates the right to privacy in the TCPA, but it bears mentioning that the word "publication" is absent from the TCPA and is not an element of an intrusion upon seclusion tort.

with *American States'* interpretation of Illinois law. (App. Br. 27.) But *Valley Forge* held that limiting "publication" to secrecy situations conflicted with Illinois' "plain meaning" approach. 860 N.E.2d at 314-17. As the Seventh Circuit held in *Websolv*, however, *American States'* reasoning is not contrary to the contextual approach applied by other courts, including California. *Websolv*, 580 F.3d at 550.

Websolv distinguished and rejected *Valley Forge*'s reliance on expansive definitions of publication and privacy for the same reason the California Supreme Court shunned a broad dictionary definition of unfair competition in *Bank of the West*. *Id.* Applying Iowa 's contextual approach to coverage, the Seventh Circuit maintained its reasoning from *American States* that the word "publication" narrows the privacy offense to the right of secrecy. *Id.* For that reason, Yahoo's reliance on dictionary definitions and the reasoning in *Valley Forge* to advocate that "publication" should encompass any garden variety of privacy violation may be superficially attractive, but it is ultimately lacking in substance.

The "same meaning" rule of construction, which holds that the same term used in a policy should be afforded a consistent meaning

throughout, also undermines Yahoo's argument that publication includes any transmission regardless of content. *See Mirpad*, 34 Cal. Rptr. 3d 136 (holding that the term "person" must be construed consistently throughout a policy to mean a natural person and not an organization). The word "publication" must be afforded the same meaning throughout the policies. Ascribing a broader meaning to "publication" in the privacy provision would contradict the understanding of the term as limited to third-party communications in the defamation provision directly preceding the privacy provision. (ER102-103); *JT's Frames*, 104 Cal. Rptr. 3d 573 (reasoning that publication in the defamation offense requires the sharing of injurious content with a third person).

Yahoo also offers no support for its final perfunctory argument that the phrase "in any manner" broadens the term "publication" to include transmissions to the claimants themselves. (App. Br. 19.) The phrase "in any manner" by its plain language refers to the "means" of the publication. As authorities recognize, ISO added this limitation to the 2001 ISO form to clarify that "publication" can include electronic communications. *See* J. H. Walter Croskey, *et al.*, *California Practice*

Guide: Insurance Litigation ¶7:1070.2 (The Rutter Group 2014) ("The addition of the phrase, "in any manner" was intended to clarify that coverage extends to publications in the form of e-mail or other electronic transmissions").[5] This minor tweak in the policy language is irrelevant to the issue at hand.

B. Yahoo Provides No Support for Its Assertion that "Material" Means a Transmission Itself, Regardless of Content.

Yahoo's effort to construe the word "material" to mean the text messages themselves, regardless of content, is unavailing. To the contrary, the dictionary definition Yahoo cites to support its broad reading of the term "material" suggests that content *does* matter. According to Yahoo, material means "[i]nformation, ideas, data, documents, or other things *that are used in* reports, books, films, studies, etc." (App. Br. 20) (emphasis added). Even adopting Yahoo's definition, not just any text blast will suffice. The information *that is*

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[5] The non-precedential cases Yahoo cites that found coverage for TCPA claims also focused on the word "publication" rather than the "in any manner" language, and thus, have no bearing on this issue. *Collective Brands, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, No. 11-4097-JTM, 2013 WL 66071, at *13 (D. Kan. Jan. 4, 2013); *Sawyer v. W. Bend Mut. Ins. Co.*, 2012 WI App 92, 821 N.W.2d 250 (Wis. Ct. App. 2012).

used in the texts must violate the right to privacy, not the mere existence of the texts themselves.

Yahoo also assails the district court's application of the last antecedent rule but offers no meaningful explanation why the word "material" is not the last, and only, antecedent of "that violates a person's right of privacy." (App. Br. 31.) The one case that Yahoo relies on for the opposite conclusion was issued by an Illinois district court predicting Michigan law and offers no value here. *See Ind. Ins. Co. v. CE Design Ltd.*, 6 F. Supp. 3d 858, 868 (N.D. Ill. 2013). Not only is the case devoid of analysis on the last antecedent issue, but it relies on abstract dictionary definitions taken out of context in a manner contrary to California law. *Id.* at 867.

Ultimately, accepting Yahoo's premise as true – that "material" means no more than the transmission of messages regardless of their content – would strip the word "material" of any meaning. *See Mirpad*, 34 Cal. Rptr. 3d 136. Yahoo wants the policies to cover a "transmission that violates a person's right of privacy," but California law does not permit revision of the policies in hindsight.

C. Yahoo Relies on Inapposite Authority to Manufacture Coverage.

Yahoo cannot actuate coverage by citing non-controlling precedent supporting its position. While affirmance should never hinge on a theoretical "scorecard" of authority, Yahoo cites inapposite cases to support its conclusion that "the majority of decisions in other jurisdictions have found coverage for TCPA claims." (App. Br. 35.) A review of the law of other jurisdictions reveals that a number of cases follow California's lead of finding no coverage under the same or similar facts. *See* Addendum A to this brief for a compendium of these authorities. Reference to foreign authorities establishes only that each state resolves this issue of its own accord. More importantly, the California intermediate courts have conclusively decided the issue against Yahoo.

The cases Yahoo string-cites to support its argument that coverage is owed for TCPA liability do not apply the contextual analysis mandated by the California Supreme Court. (App. Br. 37.) While these cases advocate plain meaning, and thus, appear to mirror California law on a superficial level, in reality they stop well short of what California law requires. Instead, these authorities prematurely end the

analysis by defining policy terms in the abstract, rather than undertaking a holistic review of the language and context, including the unique nature of offense-based coverage. As *Bank of the West* directs, finding the "plain meaning" of a policy term by its dictionary definition is not the so-called "barometer" for coverage analysis, it is just the beginning of the interpretive process.

Penzer, for that very reason, diverged from California interpretation rules by relying on broad dictionary definitions of "publication" and "material." *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1006 (Fla. 2010). Likewise, *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565 (Mass. 2007) and *Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 822 (8th Cir. 2012) conducted a cursory analysis, using dictionary definitions to conclude that "publication of material" includes transmission of fax advertisements. In *Hooters*, the court employed Georgia's rule of adopting the definition that favors greater coverage to broadly interpret "publication" and "privacy," without considering the surrounding language. *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 157 F. App'x 201, 207 (11th Cir. 2005).

Unlike these cases, the California Supreme Court does not sanction a result that distorts language by taking it out of context. In fact, the *Bank of the West* Court found that an analysis mirroring that in *Penzer, Terra Nova, European Auto*, and *Hooters* was "defective" as a matter of contract interpretation because the insured sought coverage based on an abstract dictionary definition without considering the adjacent terms. *Bank of the West*, 833 P.2d 545.

Terra Nova and *Penzer* also fail to consider the context of the common law tort when evaluating the offense, a feature of California law that narrows the vast dictionary definitions of words at issue to those that fit the common law tort applicable to the policy offense. This particular nuance has ramifications central to the resolution of this case. The jurisdictions finding coverage for TCPA claims invariably do so by adopting broad dictionary definitions of "publication," rather than refined by the common law tort understanding. Publication in the invasion of privacy tort context narrows its scope to communications of plaintiff's personal information to someone other than the plaintiff.

Yahoo's next assertion—that an insurer wishing to limit the scope of coverage for privacy offenses must use more precise definitions—

relies on inapposite out-of-state authority: *Columbia Casualty Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258, 270 (Mo. 2013).[6] *HIAR* involved broad and vague policy language that covered an "injury," which was defined as "private nuisance [and] invasion of rights of privacy," without further clarification. *Id.* The policies here significantly curtail privacy coverage by covering only publications of material that violate a right of privacy.

Moreover, *HIAR*'s rationale—that an insurer seeking to limit coverage for invasion of privacy should use more precise language—is at odds with California law. California courts look to syntax and context to inform the meaning of undefined terms, rather than prematurely adopt a finding of ambiguity. Finding a similar argument illogical and unworkable, the California Supreme Court in *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Insurance Co.*, 855 P.2d 766 1263 (Cal. 1993) held that in adopting more precise definitions:

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[6] Yahoo cites *Sawyer* for the proposition that an insurer should use more precise definitions, but *Sawyer* did not so hold. *Sawyer v. W. Bend Mut. Ins. Co.*, 821 N.W.2d 250 (Wis. Ct. App. 2012) (holding dictionary definitions alone provide plain meaning). Further, *Sawyer* follows the principles of law invoked by *Valley Forge*, which as described above are not consistent with those outlined by California law.

> an insurer would have to define every word in its policy, the defining words would themselves then have to be defined, their defining words would have to be defined, and the process would continue to replicate itself until the result became so cumbersome as to create impenetrable ambiguity.

In sum, Yahoo's assertions are illogical because, if multiple definitions alone created ambiguity, insurance policies would either lose all meaning or would devolve into epic tomes. In the words of the California Supreme Court, this type of analysis is "defective" and should not be employed to grant Yahoo more coverage than the policies afford. *See Bank of the West*, 833 P.2d 1263.

D. Removing the Advertising Injury Coverage Line Did Not Expand Yahoo's Personal Injury Coverage.

Yahoo next asserts the disputed privacy provision here should be interpreted more expansively than the identical offense in other coverage forms. (App. Br. 25-27.) Yahoo is wrong for several reasons. To begin, Yahoo relies on unsupported and conclusory assertions that the parties intended to broaden the scope of coverage under the policies, contrary to California law dictating that policy language supersedes unsupported and conclusory allegations. *Daniels-Hall*, 629 F.3d at 998 (holding that courts must reject conclusory allegations, unwarranted deductions of fact, or unreasonable inferences that contradict exhibits to

the complaint). Here, Yahoo's assertions are belied by the exemplar policy Yahoo itself attached to its complaint. That policy confirms that the "personal injury" endorsement Yahoo contends offers "broader" coverage in reality eliminated the advertising injury coverage that the ISO form would otherwise provide. (App. Br. 10, 13–14, 19–20, 34–41.) Yahoo's bald assertions that it negotiated expanded coverage must yield to the record.

The historical evaluation of the privacy offense exposes further flaws in Yahoo's argument that the personal injury endorsement in Yahoo's policies offers broader privacy coverage than other policies. Yahoo's argument overlooks the fact that "offense-based" personal and/or advertising injury coverage has been an essential component of the standard form CGL policy for decades. Croskey, *supra,* at ¶7:1001.[7]

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[7] California courts, including the California Supreme Court, cite the Rutter Group's California Insurance Litigation Practice Guide as a persuasive resource for interpreting policy forms. *See, e.g., Dart Indus., Inc. v. Commercial Union Ins. Co.*, 52 P.3d 79 (Cal. 2002) (discussing standard versus manuscript policy forms); *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265 (Cal. 1998) (discussing distinction between "claim" and "suit"); *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, 948 P.2d 909 (Cal. 1997) (discussing history of Coverage A).

Before ISO created a combined "personal and advertising injury" form, the separate "personal injury" and "advertising injury" coverages ISO offered had virtually identical privacy offenses. *Id.* at ¶7:1070.1. Historically, the only distinction in the definition of the privacy offense in the two forms was that the "advertising injury" definition required the offense to be "committed in the course of advertising," while the "personal injury" definition excluded offenses committed in the course of advertising. *See Bank of the West*, 833 P.2d 545. *See also* Croskey, *supra,* at ¶¶7:1050.5; 7:1069.

As the historical backdrop reveals, whether found in the "personal injury," "advertising injury," or "personal and advertising injury" section of a policy, the disputed privacy offense has always been substantively identical. Because of the similarity in language, courts interpreting the same provision in a personal injury or personal and advertising injury form have found no coverage for alleged TCPA violations for the same general reasons as courts interpreting an advertising injury form. *See, e.g., Integral*, 2014 WL 2761170, at *7 (finding no coverage for TCPA claims under an identical provision in a "personal and advertising injury" coverage part). *See also Hartford Fire*

Ins. Co. v. Flagstaff Indus. Corp., No. 1:11 CV 1137, 2012 WL 1669845, at *7 (N.D. Ohio May 10, 2012) (same); *Maryland Cas. Co. v. Express Products, Inc.*, No. 09-857, 2011 WL 4402275, at *16-17 (E.D. Pa. Sept. 22, 2011); *Erie*, 2006 WL 1547109, at *4-6 (same); *St. Paul Fire & Marine Ins. Co. v. Brunswick Corp.*, 405 F. Supp. 2d 890, 895 (N.D. Ill. 2005) (finding no coverage for TCPA claims under a "personal injury" coverage part). This consistent application makes good sense. To construe the identical language differently would invite uncertainty into the marketplace, to the detriment of insureds, including Yahoo itself.

In attempting to manufacture a distinction in coverage offered by the identical privacy provision in different policy forms, Yahoo maintains that *JT's Frames* placed "great emphasis" on surrounding advertising injury offenses, which the court found content-based. (App. Br. 41–42.) Yahoo urges that the five offenses covered by its personal injury endorsement (false arrest; malicious prosecution; wrongful eviction; publication of material that slanders or libels; and publication of material that violates a right of privacy) focus on the conduct of the insured, rather than the content of offending material. To the contrary,

Yahoo's assertion ignores the defamation offense immediately preceding the disputed privacy provision, which is also content-based.

But more importantly, rather than placing "great emphasis" on surrounding advertising injury provisions, *JT's Frames* states that it was *already persuaded by* the last antecedent rule and the decision in *ACS*, which construed the requirements that "material" be "made known," before considering surrounding advertising injury offenses. *JT's Frames*, 104 Cal. Rptr. 3d at 587 (emphasis added). Further undermining Yahoo's assertion, the cases that *JT*'s *Frames* cited for that proposition – *American States* and *Websolv* – relied on the context of other advertising injury offenses *only after* deciding that the disputed privacy provision afforded just one reasonable interpretation against coverage. The language of the privacy offense itself is a far more valuable contextual clue than the offenses that surround it. And the language, as discussed above, implicates a secrecy tort, not the TCPA. *See, e.g.*, *Integral*, 2014 WL 2761170, at *7 (finding no coverage for TCPA violations irrespective of other offenses listed in CGL policy's definition of "personal and advertising injury"); *Hartford*, 2012 WL

1669845, at *7 (same); *Maryland*, 2011 WL 4402275, at *16-17; *Erie*, 2006 WL 1547109, at *4-6 (same).

Reaching for support of broader coverage, Yahoo asserts that the policies' separate definition for advertising injury means that the district court's finding of no coverage rendered the "personal injury" coverage meaningless, stating: "particularly given that Yahoo secured a separate definition for 'advertising injury' ... the district court essentially rendered the separate 'personal injury' coverage provision of Endorsement No. 1 meaningless." (App. Br. 26.) This makes little sense.

The separate definitions of advertising injury and personal injury simply establish that coverage is afforded for publications of material that violate a right to privacy, so long as the publication is not made in an advertisement. If, for example, a Yahoo employee texted another person's highly offensive private information to a third-party or posted it on a website, that action could potentially involve a covered "publication" of "material" that violates a "right of privacy" as those terms are understood.

In fact, the personal injury form's separate definition of the privacy offense for advertising injury reinforces the meaning of "material" as private content. (ER103.) The definition of advertising injury includes the offense of "[o]ral or written publication, in any manner, of material *in your 'advertisement'* that violates a person's right of privacy." (ER103.) If, as Yahoo argues, the mere transmission of an advertisement (regardless of content) qualifies as a "publication" of "material," then the word material would be superfluous. "Material" – *i.e.*, some content in addition to the advertisement itself — must offend the right of privacy to give any meaning to the word material. Whether used in the advertising injury definition or the personal injury definition, the word "material" should be afforded the same meaning throughout the policy. *See Mirpad*, 34 Cal. Rptr. 3d 136 (applying the same meaning rule).

In sum, what Yahoo trumpets as evidence of intent to expand coverage proves the opposite point. The truth derived from the plain language of the policies is that the "personal injury" endorsement curtails coverage that the typical policy would otherwise afford.

E. The Absence of a TCPA Exclusion Does Not Expand Coverage Where None Previously Existed.

Yahoo next asserts the policies should cover TCPA claims because the personal injury coverage form does not include a TCPA exclusion. (App. Br. 26.) To bolster this argument, Yahoo mischaracterizes the issue by pointing to its unsupported allegations that the parties "negotiated out" the exclusion from the policies. (App. Br. 27.)

The policies themselves establish that rather than "negotiate out" that specific exclusion, the personal injury endorsement completely replaced the personal and advertising injury coverage and all corresponding advertising injury exclusions. If, as Yahoo appears to concede, the TCPA is an advertising injury statute, then a TCPA exclusion would be unnecessary because the policies did not cover advertising injury in the first instance. (App. Br. 22–23, 39–40.)

Yahoo also asserts that the TCPA "presumes that all advertising, so long as it is unsolicited, is an offensive intrusion...." (App. Br. 22–23.)[8] Yahoo cites Congressional reports for the proposition that "advertising is a form of written communication that can have a

[8] Yahoo cites 47 U.S.C. § 227(b)(2)(B)–(C) for this proposition but the quoted material is not present there.

uniquely intrusive quality." (App. Br. 22–23.) In addition, Yahoo cites various out-of-state cases in which courts found coverage for TCPA claims under advertising injury insuring agreements. (App. Br. 35–37.) Yahoo thus tacitly concedes that the TCPA exclusion was considered part of advertising injury coverage, making it no longer relevant to the coverage at hand.

Either way, Yahoo's premise is a red herring. California courts affirmatively hold that the absence of an exclusion does not create coverage. *See Glavinich v. Commonwealth Land Title Ins. Co.*, 209 Cal. Rptr. 266 (Ct. App. 1984). Courts further recognize that an insurer need not include an exclusion for every type of risk because "when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded." *Id. See also Upasani v. State Farm Gen. Ins. Co.*, 173 Cal. Rptr. 3d 784 (Ct. App. 2014) (holding that an insurer did not concede coverage in earlier policies by adding an exclusion to a later policy when the damages were not covered). In more colloquial terms, exclusions are often used as part of a "belt and suspenders" drafting philosophy, to reinforce a policy's already limited coverage grant. Where coverage is already unavailable

for a certain risk, as here, the removal of an exclusion does not correlate with an intent to provide coverage.

California law forecloses Yahoo's argument, so Yahoo ineffectively tries to bolster its point with an inapposite Oregon case, *Regence Group v. TIG Specialty Ins. Co.*, 903 F. Supp. 2d 1152 (D. Or. 2012). (App. Br. 27.) There, the court relied on extrinsic facts, including testimony, to conclude that the parties intended to provide coverage for RICO claims. *Regence*, 903 F. Supp. 2d at 1157–58. The extrinsic evidence confirmed that the parties deleted a "RICO exclusion" in exchange for an additional premium, and revised certain other exclusions to specifically cover claims relating to RICO. *Id.* at 1166. The one California court to evaluate *Regence*'s holding on this issue rejected it on the basis that California does not recognize coverage by estoppel. *Styles for Less, Inc. v. RSC Ins. Brokerage, Inc.*, No. SACV161324JVSJCGX, 2016 WL 7826518 (C.D. Cal. Dec. 15, 2016).

Regence has no application here, either factually or legally. Coverage does not otherwise exist for TCPA claims, so the absence of an exclusion cannot create coverage. These distinctions raise another distinguishing point: discovery is inadmissible under California law to

contradict the plain language of the policies.[9] *Hervey v. Mercury Cas. Co.*, 110 Cal. Rptr. 3d 890 (Ct. App. 2010). The plain language of the policies unambiguously precludes coverage for TCPA claims, and Yahoo's conclusory assertions that it sought expanded coverage are belied by the policies themselves.

V. This Court Should Certify the Issue Rather Than Reject *ACS* and *JT's Frames*.

Certification to the California Supreme Court is warranted if (1) the decision could determine the outcome of a matter pending in the requesting court; and (2) there is no controlling precedent. *Hayes v. County of San Diego*, 658 F.3d 867, 868 (9th Cir. 2011), *certified question answered*, 305 P.3d 252 (Cal. 2013). In the absence of controlling authority, the interpretation of common insurance policy terms has weighty public policy importance warranting certification. *See, e.g., Century Sur. Co. v. Casino W., Inc.*, 677 F.3d 903 (9th Cir. 2012), *certified question answered*, 329 P.3d 614 (Nev. 2014) (recognizing certified question concerning interpretation of common

[9] For this reason, Yahoo's argument that the case should be remanded to allow Yahoo to take discovery concerning the parties' intent in issuing the personal injury endorsement is also unsupportable.

pollution exclusion was of "exceptional importance" to insureds and insurers); *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, 834 F.3d 998, 1001–02 (9th Cir. 2016), *certified question accepted* (Oct. 19, 2016) (certifying a question regarding the scope of an "occurrence" under a CGL policy as one of "significant precedential and public policy importance," "given the ubiquity of insurance policies that cover 'occurrences'").

As Yahoo notes, the Eleventh Circuit certified this issue to the Florida Supreme Court because it found the interpretation of the same "widely used language" at issue sufficiently important to warrant certification. *Penzer*, 545 F.3d 1303 , *certified question answered*, 29 So. 3d 1000 (Fla. 2010). As *Penzer* recognized, and as the vast number of decisions on the TCPA issue confirms, the question at hand is not merely academic. It is critical for insurers and insureds alike to understand the scope of coverage afforded under standard insurance policy provisions to enable proper negotiations and premium calculations, and to injured parties who seek to recover insurance proceeds. *Id.*

To be sure, the question is even more compelling here, where the insurance marketplace has relied on *ACS* and *JT's Frames* as undisturbed intermediate authority for a decade to guide the crafting of insurance policy provisions and corresponding exclusions like those at issue in this case.

While recognizing first that intermediate court of appeal authority is typically authoritative, this Court has found an absence of controlling precedent sufficient to warrant certification only when it is "unclear whether the California Supreme Court would follow the decisions of the California Courts of Appeal." *Hayes*, 658 F.3d at 868. In *Hayes*, intermediate decisions appeared to potentially conflict with the California Supreme Court's subsequent ruling on a related issue. *Id.* at 872–73. The lack of clarity regarding the impact of the later California Supreme Court ruling prompted the Ninth Circuit to certify the question. *Id.*

No such doubt exists here. *ACS* and *JT's Frames* offer a decade of unwavering guidance in accord with California Supreme Court law and should be deemed controlling. If this Court has any hesitation on how to rule, however, National Union agrees with Yahoo that the California

Supreme Court should be afforded the opportunity to resolve the issue. National Union submits that this Court should certify the following question if it believes certification is warranted:

- Does a duty to defend exist under California law under the personal injury offense of injury arising out of the publication of material that violates a person's right of privacy in a commercial general liability coverage grant for violations of the TCPA, where the TCPA claims at issue involve the injured parties' "seclusion" right to be left alone from unwanted text messages, and where the coverage grant responds only to invasions of privacy that involve the disclosure of the injured party's personal information to a third party?

For those reasons, if the Court is unconvinced that *ACS* and *JT's Frames* are controlling, National Union respectfully requests that the Court certify the question to the California Supreme Court.

VI. Conclusion

For the foregoing reasons and upon the authorities cited, National Union respectfully requests this Court affirm the district court's judgment in its favor on any other grounds apparent in the record, and

grant such further relief as it deems just and proper under the circumstances.

Respectfully submitted,

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

s/ Daniel I. Graham, Jr.

Dated: May 14, 2018

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing appellee brief complies with the type-volume limitation of Ninth Circuit R. 32-1(a) because it contains a total of 11,927 words, including Addendum A containing 281 words, and excluding the parts of the brief exempted by Fed. R. App. P 32(f). The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 10 in 14-point Century Schoolbook.

s/ Daniel I. Graham, Jr.
NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA

Dated: May 14, 2018

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF SERVICE

The undersigned, counsel for appellee certifies that on May 14, 2018, this appellee brief was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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ADDENDUM A

National Union's Authority Finding No Coverage
Ace Mortg. Funding, Inc. v. Travelers Indem. Co. of Am., No. 105-CV-1631-DFH-TAB, 2008 WL 686953 (S.D. Ind. Mar. 10, 2008).
Ace Rent-A-Car, Inc. v. Empire Fire & Marine Ins. Co., 580 F. Supp. 2d 678 (N.D. Ill. 2008).
ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co., 53 Cal. Rptr. 3d 786 (Ct. App. 2007).
Am. States Ins. Co. v. Capital Assocs. of Jackson Cty., Inc., 392 F.3d 939 (7th Cir. 2004).
Auto–Owners Ins. Co. v. Stevens & Ricci Inc., 835 F.3d 388 (3d Cir. 2016).
Auto-Owners Ins. Co. v. Websolv Computing, Inc., 580 F.3d 543 (7th Cir. 2009).
Erie Ins. Exch. v. Kevin T. Watts, Inc., No. 1:05-CV-867-JDT-TAB, 2006 WL 1547109 (S.D. Ind. May 30, 2006).
Hartford Fire Ins. Co. v. Flagstaff Indus. Corp., No. 1:11 CV 1137, 2012 WL 1669845 (N.D. Ohio May 10, 2012).
Integral Res., Inc. v. Hartford Fire Ins. Co., No. 2:14-CV-02308-R AGRX, 2014 WL 2761170 (C.D. Cal. June 13, 2014).
Maryland Cas. Co. v. Express Products, Inc., No. 09-857, 2011 WL 4402275 (E.D. Pa. Sept. 22, 2011).
New Century Mortg. Corp. v. Great N. Ins. Co., No. 05 C 2370, 2006 WL 2088198 (N.D. Ill. July 25, 2006).
Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631 (4th Cir. 2005).
St. Paul Fire & Marine Ins. Co. v. Brunswick Corp., 405 F. Supp. 2d 890 (N.D. Ill. 2005).

St. Paul Fire and Marine Ins. Co. v. Onvia, Inc., No. C06-156RSL, 2007 WL 564075 (W.D. Wash. Feb. 16, 2007), *aff'd* 301 F. App'x 707 (9th Cir. 2008).
State Farm General Ins. Co. v. JT's Frames, Inc., 104 Cal. Rptr. 3d 573 (Ct. App. 2010).

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 17-16452

I, Daniel I. Graham, Jr. , certify that this brief is identical to the version submitted electronically on [date] May 14, 2018 .

Date May 14, 2018

Signature s/ Daniel I. Graham, Jr.

(either manual signature or "s/" plus typed name is acceptable)

S253593

Appeal No. 17-16452

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YAHOO! INC.,
Plaintiff-Appellant,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 5:17-cv-00447-NC
Hon. Nathanael M. Cousins

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules & Regulations

APPELLANT'S REPLY BRIEF

This case presents the question of whether insurance coverage for "oral or written publication, in any manner, of material that violates a person's right of privacy" potentially covers claims for the alleged transmission of unsolicited text messages in violation of the Telephone Consumer Protection Act ("TCPA").

Yahoo contends the TCPA claims allege "publication" (through widespread transmission to the underlying plaintiffs) of "material" (in the form of unwelcome text messages) that allegedly violated the TCPA claimants' rights of privacy (the "seclusion" right to be left alone). (ER025, ¶ 30.) Yahoo's reading finds support in the majority of recent decisions to address the issue, including decisions of the highest courts of Florida, Illinois, Massachusetts, and Missouri. *See Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000 (Fla. 2010); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 860 N.E.2d 307 (Ill. 2006); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565 (Mass. 2007); *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, 411 S.W.3d 258 (Mo. 2013). No state supreme court has held to the contrary.

National Union responds that this Court should follow *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Co.*, 147 Cal. App. 4th 137 (2007), and *State Farm General Insurance Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429 (2010), both of which it characterizes as involving "the same or substantially similar policy language." Appellee's Br., at 2. But *ACS Systems* involved fundamentally

different language, restricting coverage to "'making known to any person or organization written or spoken material that violates an individual's right of privacy.'" Appellee's Br., at 23-24 (quoting 147 Cal. App. 4th at 147-49). The *ACS Systems* court not only relied on this "making known" language in rejecting coverage, it distinguished authorities construing policies that more broadly covered any "publication" of material that violated a right of privacy. 147 Cal. App. 4th at 153. Thus, *ACS Systems* supports Yahoo's, rather than National Union's, position.

Although National Union claims *JT's Frames* followed *ACS Systems*, that decision actually rejected the core reasoning of *ACS Systems*, ruling that the critical policy language differences on which *ACS Systems* relied constituted a distinction "without a difference." *JT's Frames*, 181 Cal. App. 4th at 447. To support this interpretative leap, the *JT's Frames* court relied on *Reimel v. Alcoholic Beverage Appeals Board*, 256 Cal. App. 2d 158, 166-67 (1967), a non-insurance decision addressing the meaning of "publication" in an entirely different statutory context. And *JT's Frames* buttressed its conclusion by reference to the "advertising injury" context of the "publication" provision in the policy before it, where all of the coverage grants focused on the "content" of the publication. 181 Cal. Rptr. 4th at 447-49. Here, in contrast, Yahoo relies on negotiated "personal injury" coverage that includes multiple "conduct-based" (rather than "content-based") provisions.

In an effort to finesse *JT's Frames* interpretative leap, National Union's brief repeatedly and incorrectly equates "making known to any person or organization . . . material that violates an individual's right of privacy" (language that contemplates disclosure of an individual's secret information to a third party) with the much broader coverage of "publication, in any manner, of material that violates a person's right of privacy" (language that reasonably could be and has been read to reach the transmission of unwanted advertising that violates a person's seclusion interest). *See, e.g.*, Appellee's Br., at 11, 14 (repeating phrase "publication, or making known" four different times). The Court should reject National Union's efforts to conflate critically different coverage grants.

And while National Union agrees that certification of the coverage issue to the California Supreme Court may be appropriate, its proposed question incorrectly assumes a key merits issue by defining the coverage grant as addressing only "the disclosure of the injured party's personal information to a third party." Appellee's Br., at 3, 62. The Court should use Yahoo's neutrally-worded question instead.

For the reasons set forth in Yahoo's opening brief and below, the Court should either distinguish *ACS Systems* and *JT's Frames* or find them non-persuasive indicators of how the California Supreme Court would rule. Alternatively, the Court should certify the coverage issue to the California Supreme Court.

I. The *ACS Systems* case supports Yahoo's position, and *JT's Frames* inexplicably rejected *ACS Systems'* reasoning before relying on a "context" analysis that supports finding coverage for Yahoo here.

National Union repeatedly describes *ACS Systems* and *JT's Frames* as "controlling." Appellee's Br., at 15, 17, 23, 61, 62. But *ACS Systems* supports Yahoo's position, while *JT's Frames* (a) dismissed the key language on which *ACS Systems* turned as a distinction "without a difference"; and (b) relied upon the "advertising injury" context of the policy, where all of the other coverage grants involved only "content-based" offenses. *JT's Frames*, 181 Cal. App. 4th at 447-49. Here, Yahoo's "personal injury" coverage includes multiple "conduct-based" offenses, rather than only "content-based" claims.

A. The *ACS Systems* decision turned on "making known" language, specifically distinguishing authorities involving "publication."

The policy language in *ACS Systems* restricted coverage to "making known to any person or organization written or spoken material that violates an individual's right of privacy." 147 Cal. App. 4th at 147-49. The court interpreted the "making known" language in the "'plainest and most common reading of the phrase,'" which involved "'telling, sharing, or otherwise divulging'" in such a way that the "'injured party is the one whose private material is *made known*, not the one *to whom* the material is made known.'" *Id.* at 149-151 (emphasis in original) (citations omitted). Based on this interpretation of "making known," the *ACS Systems* court concluded coverage should be limited to "injury caused by the

disclosure of private *content* to a third party – to the invasion of 'secrecy privacy' caused by 'making known' to a third party 'material that violates an individual's right of privacy.'" *Id.* at 149 (emphasis in original).

The insured in *ACS Systems* had relied on courts interpreting "publication" policies similar to the one at issue here, such as "oral or written publication of material that violates a person's right of privacy." 147 Cal. App. 4th at 153 (citations omitted). But *ACS Systems* distinguished these cases because their "publication" policy language "differs from the advertising injury offense of 'making known to any person or organization written or spoken material that violates an individual's right of privacy'. . . . " *Id.*

Other courts likewise have distinguished between "publication" and "making known" in determining TCPA coverage. In *Terra Nova*, Massachusetts' highest court held that a policy covering the "publication of material that violates a person's right of privacy" encompasses TCPA violations. 869 N.E.2d at 572. Four years later, retired Justice Souter (sitting by designation) addressed coverage under a "making known" provision. *Cynosure, Inc. v. St. Paul Fire & Marine Ins. Co.*, 645 F.3d 1, 2 (1st Cir. 2011). Recognizing the fundamental differences between the two phrases, Justice Souter ruled "Massachusetts law is a clean slate on" the issue of "making known" policies. *Id.* at 3. Among other things, Justice

Souter noted the "relative specificity of 'making known' ... distinguishes it from the more general verb 'publishing.'" *Id.* at 4.[1]

Here, Yahoo's policies broadly cover claims arising out of the "publication, in any manner, of material that violates a person's right of privacy." (ER024, ¶ 26.) This language reasonably can be understood to include a publication (text) of material (unwanted communication) that invades the claimant's right of privacy (seclusion). Policies covering "making known to any person or organization material that violates a person's right of privacy," in contrast, only reach disclosures to third parties of material violating the claimant's right to secrecy privacy. Thus, courts consistently interpret "publication" to include publication to the claimant. *See, e.g., W. Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 846-47 (N.D. Tex. 2003) (holding "there is nothing in the CGL policy indicating that the word 'publication' necessarily means communicating the offending material to a third-party"), *aff'd*, 96 F. App'x 960 (5th Cir. 2004);

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[1] *See also, e.g., Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 820 (8th Cir. 2012) ("We agree with Justice Souter's explanation that 'publication' is more general than 'making known.'"); *Park Univ. Enter., Inc. v. Am. Cas. Co. of Reading, Pa.*, 442 F.3d 1239, 1248 n.5 (10th Cir. 2006) (noting distinction in refusing to follow "making known" ruling cited by insurer); *Hooters of Augusta, Inc. v. Am. Glob. Ins. Co.*, 157 F. App'x 201, 208 (11th Cir. 2005) (recognizing "making known" creates a "focus on secrecy" and constitutes a "significant factor" in interpreting policy); *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 912 N.E.2d 659, 665 (Ohio Ct. App. 2009) (agreeing with *Hooters of Augusta*).

Hooters of Augusta, 157 F. App'x at 207-08 (holding that sending unsolicited faxes "amounted to an act of 'publication' in the ordinary sense of the word"); *Valley Forge*, 860 N.E.2d at 317-18 (explaining that adopting insurer's contrary interpretation "would essentially require us to rewrite the phrase 'material that violates a person's right of privacy' to read 'material *the content of which* violates a person *other than the recipient's* right of privacy'") (emphasis in original).

National Union ends its analysis of *ACS Systems* by discussing the "last antecedent rule," under which "qualifying words, phrases, and clauses are to be applied to the immediately preceding words or phrases rather than others more remote." Appellee's Br., at 26-27. According to National Union, *ACS Systems* applied this rule to require the published "material" to violate the person's right of privacy. *Id.* But *ACS Systems* applied this rule in the context of a policy covering only the "making known" of the material to third parties. *Id.* Where policies cover "publication" of material violating a person's right of privacy, courts have applied the last antecedent rule to find coverage for claims that unwanted advertising (the "material") violated the TCPA claimant's right of seclusion. *See, e.g.*, *Penzer*, 29 So. 3d at 1007 ("[E]ven if the phrase 'that violates a person's right of privacy' only modifies the term 'material,' it does not follow that only the secrecy right to privacy is implicated because 'material' could also invade one's seclusion."); *Dandy-Jim*, 912 N.E.2d at 666 ("In other words, the unsolicited faxed

advertisement itself is the 'material' that is offensive and violative of the individual's right of privacy."); *Ind. Ins. Co. v. CE Design Ltd.*, 6 F. Supp. 3d 858, 867-68 (N.D. Ill. 2013) ("The last antecedent rule could be employed equally effectively to refer to material that violates a person's seclusion, such as unsolicited faxes."). Thus, this rule supports Yahoo's position here.

B. The *JT's Frames* decision rejected the reasoning of *ACS Systems* based on the inapposite *Reimel* decision, further relying on the "advertising injury" context of the policy to deny coverage.

National Union characterizes *JT's Frames* as merely "re-affirm[ing] *ACS*." Appellee's Br., at 27. But in direct contrast to the reasoning of *ACS Systems*, the *JT's Frames* court found "making known" and "publication" to be "synonymous phrase[s]" with a "marginal semantic difference." 181 Cal. App. 4th at 447. This conflicts with *ACS Systems*, which distinguished "publication" cases from the "making known" language of the policy before it. *See esp. ACS Systems*, 147 Cal. App. 4th at 153. And it conflicts with numerous other cases likewise turning on the substantive difference between "publication" and "making known" policies.

In equating "publication" with "making known," *JT's Frames* relied on *Reimel v. Alcoholic Beverage Appeals Board*, 256 Cal. App. 2d 158, 166-67 (1967). But *Reimel*, a non-insurance case, addressed the meaning of "publication" in an entirely different statutory context. *See id.* at 166-71 (interpreting the manner in which price schedules for branded distilled spirits must be "published" under the

Alcoholic Beverage Control Act). In this context, *Reimel* held that the language regarding the method of publication in the statute at issue ("in a trade journal of general circulation") demonstrated an intent to give the word "publishing" a more specific meaning. 256 Cal. App. 2d at 168.

National Union fails to address *JT's Frames* uncritical adoption of *Reimel*, arguing instead that Yahoo, "by focusing on an abstract definition alone ... misses the point: context matters." Appellee's Br., at 39. But Yahoo agrees that *JT's Frames* emphasized the "context" of the policy before it to find that "advertising injury coverage applies only to content-based claims." 181 Cal. App. 4th at 447-48. The "advertising injury" context of *JT's Frames* differs materially from the "personal injury" context of Yahoo's policies.

In *JT's Frames*, the "advertising injury" policy encompassed four offenses: (1) "oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services"; (2) "oral or written publication of material that violates a person's right of privacy"; (3) "misappropriation of advertising ideas or style of doing business"; or (4) "infringement of copyright, title or slogan." 181 Cal. App. 4th at 448. Emphasizing that the other three covered offenses (1, 3, and 4) "all involve injury caused by the information contained in the advertisement" (such that "the victim is injured by the content of the advertisement, not its mere sending and receipt"), the

JT's Frames court held the second offense ("publication of material that violates a person's right of privacy") likewise "may most reasonably be interpreted as referring to advertising material whose *content* violates a person's right of privacy." *Id.* (emphasis in original).

Yahoo's policies cover "personal injury" rather than "advertising injury." The coverage includes both content-based and conduct-based offenses:

> a. False arrest, detention, or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy.

(ER024, ¶ 26; ER102-03, § III(a).)

Unlike the "advertising injury" coverage in *JT's Frames*, the offenses of false imprisonment, wrongful entry, or invasion of the right of private occupancy have nothing to do with the content of any communications by the insured. Instead, these "personal injury" offenses address the insured's conduct, including specifically intrusions on the alleged victim's personal space. In this context, the

publication of "material that violates a person's right to privacy" should be interpreted to include the conduct-based offense of violating a person's right to seclusion through the transmission of unwanted text advertising.

Although National Union concedes that most of the "personal injury" coverage grants reach conduct-based offenses, it (like the district court) focuses on the "content-based" defamation offense immediately preceding the "right to privacy" provision. Appellee's Br., at 52-53. But in *JT's Frames*, *all* of the surrounding definitions of advertising injury involved injury caused by content. "Viewed in this context," the *JT's Frames* court held the right of privacy clause "most reasonably" encompassed only "advertising material whose *content* violates a person's right of privacy." 181 Cal. App. 4th at 448 (emphasis in original). The same reasoning supports the opposite result here: because the majority of the "personal injury" coverage grants to Yahoo reach conduct-based offenses, the right to privacy provision should be interpreted to reach the conduct-based offense of violating a person's seclusion right through the transmission of an unwanted text.

II. The overwhelming majority of courts have held that policies granting coverage for the "publication" of "material" that violates a person's "right of privacy" encompass TCPA claims.

The Yahoo policies do not define the terms "publication," "material," or "right of privacy." Under California law, these terms must be interpreted in accordance with the "plain meaning or the meaning a layperson would ordinarily

attach to it," *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995), and the policy must not be read "as it might be analyzed by an attorney or insurance expert." *Crane v. State Farm Fire & Cas. Co.*, 5 Cal. 3d 112, 115 (1971).

The plain reading of these terms at least potentially encompasses TCPA actions. Appellant's Br., at 14-25. First, the transmission of allegedly unsolicited text messages to a putative class of recipients constitutes the act of declaring or announcing the content of the messages to the public – *i.e.*, "publication." Second, the policy language "material that violates a person's right of privacy" reasonably can be understood to refer to material such as unsolicited text messages that violates a person's right of seclusion (the privacy interest protected by the TCPA).

The majority of state and federal courts to consider the issue have held that TCPA claims qualify for coverage under substantially similar policies.[2] Appellant's Br., 35-41. These courts have concluded the plain meaning of

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[2] *See, e.g.*, *Penzer*, 29 So. 3d 1000 (Florida law); *Valley Forge*, 860 N.E.2d at 318 (Illinois law); *Terra Nova*, 869 N.E.2d 565, 571-74 (Massachusetts law); *HIAR Holding*, 411 S.W.3d 258, 270 (Missouri law); *Sawyer v. W. Bend Mut. Ins. Co.*, 821 N.W.2d 250, 258 (Wis. Ct. App. 2012) (Wisconsin law); *Dandy-Jim*, 912 N.E.2d at 663-66 (Ohio Ct. App. 2009) (Ohio law); *European Auto Work*, 695 F.3d at 818 (Minnesota law); *Hooters of Augusta*, 157 F. App'x at 204-05 (Georgia law); *W. Rim Inv. Advisors*, 269 F. Supp. 2d at 846-47 (Texas law); *Nat'l Union Fire Ins. Co. of Pitts., P.A. v. Papa John's Intl., Inc.*, 29 F. Supp. 3d 961 (W.D. Ky. 2014) (Kentucky law); *CE Design*, 6 F. Supp. 3d at 867-68 (Michigan law); *Collective Brands, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 11-4097-JTM, 2013 WL 66071, *13 (D. Kan. Jan. 4, 2013) (Kansas law).

"publication" and "material" encompasses the transmission of allegedly unsolicited fax messages. *See, e.g.*, *Hooters of Augusta*, 157 F. App'x at 208 (faxing unsolicited advertisements "squarely fits" within the "ordinary sense" of "publication"); *Valley Forge*, 860 N.E.2d at 317 (finding dictionary definition of "material" was "quite broad and clearly encompasses advertisements"). They likewise have read "right of privacy" to encompass both the right of secrecy and seclusion. *See, e.g.*, *European Auto Works*, 695 F.3d at 818 ("The majority of circuits which have considered the question have held that the phrase is not limited to secrecy based privacy violations and that the phrase covers TCPA violations."); *Collective Brands*, 29 F. Supp. 3d at 967-68 (predicting that Kentucky courts would follow the "majority of other circuits by holding that the plain and ordinary meaning of the personal and advertising injury provision is sufficiently broad to include violations of a person's right to seclusion"). Although National Union claims these decisions conflict with unique attributes of California law, the California authorities on which it relies accord with the basic principles of insurance policy construction applied by these courts.[3]

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[3] National Union correctly notes that, in discussing federal courts' reliance on other state's decisions to predict how the California Supreme Court would rule, Yahoo cited Judge Ferguson's dissent in *Thompson v. Cantwell*, 223 F. App'x 545 (9th Cir. 2007). Appellee's Br., at 35. But this Court repeatedly has endorsed using "'intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance'" when predicting how the California Supreme Court would resolve an issue. *Crockett & Myers, Ltd. v.*

A. The *Bank of the West* case, which rejected an attempt by an insured to read the word "damages" out of a coverage grant, re-affirmed settled California authority interpreting undefined policy terms according to their "ordinary and popular sense."

National Union heavily relies on *Bank of the West v. Superior Court*, 2 Cal. 4th 1254 (1992), as announcing unique rules of insurance policy interpretation that render all of Yahoo's cited authorities inapposite. Appellee's Br., at 18-32. But *Bank of the West* affirmed the same basic principles Yahoo articulated in its opening brief: (1) "[i]f contractual language is clear and explicit, it governs"; and (2) "policy terms must be read in their 'ordinary and popular sense.'" 2 Cal. 4th at 1264-65 (quoting Cal. Civ. Code § 1644); *accord* Appellant's Br., at 13-14.

In *Bank of the West*, the policy covered "damages" for "advertising injury" caused by "unfair competition." 2 Cal. 4th at 1265. The insured claimed the term "unfair competition" theoretically could include claims under California's Unfair Business Practices Act, as opposed to the common law tort of unfair competition. *Id.* at 1260. But because "damages" cannot be recovered under the Unfair Business Practices Act (only restitution), the California Supreme Court rejected the insured's interpretation, because it would have read the "damages" limitation out of the coverage grant entirely. *Id.* at 1265-66.

Napier, Fitzgerald & Kirby, LLP, 583 F.3d 1232, 1237 (9th Cir. 2009) (quoting *Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 865 (9th Cir. 1996)).

Relying on *Bank of the West*, National Union argues "the phrase 'right of privacy' in the policies cannot be replaced with each and every conceivable definition of privacy" and that the "sentence syntax requires more: the privacy offense encompasses claims involving a *publication* of *material* that violates a right of privacy." Appellee's Br., at 22-23 (emphasis in original). But the policy here provides coverage for "oral or written publication, in any manner, of material that violates a person's right of privacy." (ER024 ¶ 26.) In sharp contrast to the insured's attempt in *Bank of the West* to read the critical word "damages" out of the coverage grant, the state and federal courts finding coverage have relied on the ordinary meaning of the policy's terms to find coverage for TCPA claims (interpreting "publication" to include mass dissemination, "material" to include unwanted advertisements, and "right of privacy" to include violations of the right to seclusion). *See infra* n.2. These cases apply the same policy interpretation rules recognized by *Bank of the West* and other California insurance law decisions.

B. Consistent with California law, courts have relied on dictionary definitions and lay understanding to find coverage for TCPA claims under policies such as Yahoo's.

National Union attacks the reasoning of the Florida Supreme Court, Illinois Supreme Court, and Eleventh Circuit on the grounds that they "diverged from California interpretation rules" by broadly defining the policy's terms, including by "relying on broad dictionary definitions." Appellee's Br., at 41, 46. But under

California law, "[i]n seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries" and "[i]t is thus safe to say that the 'ordinary' sense of a word is to be found in its dictionary definition." *Scott v. Cont'l Ins. Co.*, 44 Cal. App. 4th 24, 29-30 (1996) (citing numerous California authorities using dictionary definitions to determine the ordinary meaning of undefined terms in both insurance and non-insurance contracts).

Consistent with these California authorities, Florida courts confronting undefined policy terms must discern their "plain meaning" by consulting "'references [that are] commonly relied upon to supply the accepted meaning of [the] words.'" *Penzer*, 29 So. 3d at 1005 (citation omitted). Illinois courts likewise accord undefined policy terms "their plain, ordinary, and popular meanings," looking to their "dictionary definitions." *Valley Forge*, 860 N.E.2d at 316 (citations omitted). And under Georgia law, "[a] reviewing court must consider the ordinary and legal meaning of the words employed in the insurance contract" and read the policy "'as a layman would read it and not as it might be analyzed by an insurance expert or an attorney.'" *Hooters of Augusta*, 157 F. App'x at 205 (citations omitted). All of these authorities fully accord with settled rules of insurance policy interpretation, in California and elsewhere.

C. As National Union admits, California's common-law "right of privacy" encompasses both secrecy and seclusion.

National Union next argues that the *Penzer* and *Terra Nova* courts failed to "consider the context of the common law tort when evaluating the offense." Appellee's Br., at 47. According to National Union, under this "particular nuance" of California law, "[p]ublication in the invasion of privacy tort context narrows its scope to communications of plaintiff's personal information to someone other than the plaintiff." *Id.*

National Union fails to explain what about the common-law right of privacy "narrows" the term "publication" to mean only communications of a plaintiff's personal information to a third party. To the contrary, National Union admits California's right of privacy encompasses a common law privacy tort based on "intrusion into private matters (seclusion)." Appellee's Br., at 21-22. National Union argues that an intrusion into seclusion does not require publication, *id.* at 22, but this does not mean a publication cannot violate someone's seclusion right. Indeed, the TCPA itself recognizes just such a violation from the receipt of unwanted advertising. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009).

National Union also argues the Court should limit the term "publication" to disclosure of the plaintiff's information "based on the understanding of publication in the common law." Appellee's Br., at 29. This would violate California's well-

established principle that the policy must not be read "as it might be analyzed by an attorney or insurance expert." *Crane*, 5 Cal. 3d at 115. In addition, both of the cases cited by National Union analyzed whether the underlying action alleged the common law tort covered by the policy. *See Bank of the West*, 2 Cal. 4th at 1263 (unfair competition); *Hartford Cas. Ins. Co. v. Swift Distrib., Inc.*, 59 Cal. 4th 277, 288 (2014) (disparagement).[4] Applying that same analysis here, the common law privacy tort encompasses the "seclusion" right to be left alone.

D. National Union neither defined the key provisions of the coverage narrowly nor secured Yahoo's agreement to a TCPA exclusion.

National Union argues the terms "publication," "material," and "right to privacy," which appear in the coverage grant of the policy, should be interpreted narrowly. But if National Union intended such narrow definitions, it should have insisted on a policy that so defined these terms. As Massachusetts' highest court held in similar circumstances, "had [the insurers] wished their policies to pertain only to violations of privacy created by the content of material, it was incumbent

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[4] National Union also cites *Ananda Church of Self Realization v. Everest Nat. Ins. Co.*, No. C038570, 2003 WL 205144 (Cal. Ct. App. Jan. 31, 2003). Appellee's Br., at 30. Leaving aside that California Rule of Court 8.1115 prohibits parties from citing unpublished opinions, the underlying claims in *Ananda Church* involved trespassing onto property and stealing private documents, not TCPA claims. 2003 WL 205144, at *5. In this very different context, the *Ananda Church* focused on whether claims based on the "publication" of these stolen documents satisfied the elements of a claim for publication of secret information (finding they did not because the documents did not reveal sensitive private facts). *Id.* at *6.

on them to draft explicit policies to that effect." *Terra Nova*, 869 N.E.2d at 574; *cf. E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 473 (2004) (holding insurer should have articulated its claimed narrow definitions in the policy itself).

Here, Yahoo alleges it specifically sought to expand its "personal injury" coverage through a separately drafted manuscript endorsement. (ER023-24, ¶ 24.) Through this process, the parties agreed to delete certain exclusions, including an exclusion for "Insureds In Media and Internet Type Businesses" – an exclusion that would have rendered the insurance essentially valueless to a company such as Yahoo. (ER023-24, ¶¶ 23, 24; ER045, 101-02.) More importantly for the case at issue here, the parties also agreed to delete the TCPA exclusion, which would have narrowed the "personal injury" coverage in precisely the way National Union now seeks. Appellant's Br., at 25-28. Although National Union disputes semantics – arguing that Yahoo did not "negotiate out" the exclusion but rather "replaced" it with the personal injury endorsement (Appellee's Br., at 56) – it cannot dispute that the parties negotiated and removed the TCPA exclusion that normally would have been applicable to personal injury coverage.

National Union argues that "California courts affirmatively hold that the absence of an exclusion does not create coverage." Appellee's Br., at 57 (citing *Glavinch v. Commonwealth Land Title Ins. Co.*, 163 Cal. App. 3d 263 (1984), and *Upasani v. State Farm Gen. Ins. Co.*, 227 Cal. App. 4th 509 (2014)). But the

Glavinch case involved inapposite facts, where an insured who had standard insurance for a *third* deed of trust sought coverage for a claim arising under the *second* deed of trust. 163 Cal. App. 3d at 270. The Court held the incident "[m]anifestly" not covered and rejected the insured's argument that the insurance policy needed an exclusion for the particular type of claim at issue. *Id.* at 269.

In *Upasani*, the insured argued that the addition of an emotional distress exclusion to later policies established that emotional distress had been covered by earlier "bodily injury" policies. Rejecting this argument, *Upasani* noted that, "long before" the insurer added the exclusion, "California law made clear that bodily injury did not include emotional distress damages." 227 Cal. App. 4th at 522.

Unlike these cases, here Yahoo and National Union negotiated a "personal injury" coverage endorsement that specifically jettisoned the TCPA exclusion. This fact pattern tracks *Regence Group v. TIG Specialty Ins. Co.*, 903 F. Supp. 2d 1152 (D. Or. 2012), where, as National Union concedes, the "extrinsic facts" showed that the parties negotiated the deletion of a RICO exclusion and intended to cover claims relating to RICO. Appellee's Br., at 58.[5] Yahoo's well-pleaded

[5] National Union argues the "one California court to evaluate *Regence's* holding on this issue" rejected it. Appellee's Br., at 58 (citing *Styles for Less, Inc. v. RSC Ins. Brokerage, Inc.*, No. CV 16-1324-JVS (JCGx), 2016 WL 7826518 (C.D. Cal. Dec. 15, 2016)). But *Styles for Less* has nothing to do with the issues in this case. Instead, it addressed the separate analysis in *Regence Group* that judicial estoppel precluded the insurer from denying coverage because of positions it had taken in

allegations in the Complaint – which must be taken as true at this stage of the proceedings – establish that Yahoo, like the insured in *Regence Group*, "specifically sought to expand" the personal injury coverage and specifically negotiated the deletion of the TCPA exclusion. (ER023-24, ¶ 24.)

E. At a minimum, the policy provisions present an ambiguity warranting discovery as to the parties' intent in entering the endorsement.

According to National Union, the district court properly precluded Yahoo from taking discovery on the parties' intent in negotiating the endorsement, because "discovery is inadmissible under California law to contradict the plain language of the policies." Appellee's Br., at 59. Yahoo agrees that the "clear and explicit meaning" of the policy provisions, "interpreted in their 'ordinary and popular sense,'" control judicial interpretation. *Hervey v. Mercury Cas. Co.*, 185 Cal. App. 4th 954, 961 (2010). But "if the meaning a layperson would ascribe to contract language" is ambiguous, then parole evidence "is admissible to interpret an insurance policy if 'relevant to prove a meaning to which the language of the instrument is reasonably susceptible.'" *Id.* (citations omitted). And "[i]n the insurance context," California courts "generally resolve ambiguities in favor of coverage" and "generally interpret the coverage clauses of insurance policies

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prior proceedings. *Compare Regence Grp.*, 903 F. Supp. 2d at 1168-69, *with Styles for Less*, 2016 WL 7826518 at *5.

broadly, protecting the objectively reasonable expectations of the insured." *Id.*; *see also La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 9 Cal. 4th 27, 38 (1994) (holding insurer has duty to defend where policy ambiguous). These rules track Oregon law as applied by *Regence Group* (*see* 903 F. Supp. 2d at 1164-65) and support resolving the ambiguities in Yahoo's favor[6] or, at a minimum, allowing Yahoo discovery.

III. The California Supreme Court likely would not follow the minority position advocated by National Union.

National Union discusses the minority rule decisions cited by *JT's Frames* in holding TCPA claims did not constitute covered right of privacy violations. Appellee's Br., at 53-54. These decisions largely follow the Seventh Circuit's decision in *American States Insurance Company v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004), a distinguishable case that has been rejected as an inaccurate prediction of Illinois law by the Illinois Supreme Court.

A. The *American States* decision construed an "advertising injury" policy and has been rejected by the Illinois Supreme Court.

The decision in *American States* constituted the "first federal appellate decision on the subject" of TCPA coverage, issued without the benefit of a single

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[6] *See, e.g.*, *Hooters of Augusta*, 157 F. App'x at 206 (finding insurer's interpretation of similar policy not "the only reasonable one" and resolving ambiguity in favor of coverage); *Terra Nova*, 869 N.E.2d at 573-74 (finding "right of privacy" ambiguous and resolving the ambiguity in favor of coverage).

decision by "the highest court of any state." 392 F.3d at 943. Unlike the policies at issue here, *American States* involved an "advertising injury" policy. *Id.* at 940. Emphasizing that "advertising-injury coverage deals with informational content," the court held the "structure of the policy strongly implies that coverage is limited to secrecy interests." *Id.* at 942-43.

In *Valley Forge*, the Illinois Supreme Court rejected the Seventh Circuit's reasoning. 860 N.E.2d at 320-23. The *Valley Forge* court held that interpreting the policy language narrowly would be "inconsistent" with Illinois' approach to affording undefined policy terms their plain, ordinary, and popularly understood meaning. *Id.* at 323.

National Union responds that Yahoo "unfairly demonizes *American States* as no longer authoritative in the wake of" *Valley Forge*. Appellee's Br., at 40-42. But the Illinois Supreme Court unambiguously rejected the Seventh Circuit's prediction of Illinois law in *Valley Forge*. It matters when the highest court of a state rules that a federal court's prediction of that state's law was dead wrong.

Undeterred, National Union argues that *Auto-Owners Insurance Company. v. Websolv Computing, Inc.*, 580 F.3d 543 (7th Cir. 2009), establishes that *American States* applied a "contextual approach" similar to that used in California, whereas Illinois applied a "plain meaning" approach. Appellee's Br., at 41. But California agrees with Illinois that undefined policy terms must be given "their

plain, ordinary, and popularly understood meanings." *Valley Forge*, 860 N.E.2d at 323; *see Bank of the West*, 833 P.2d at 552 (holding "policy terms must be read in their 'ordinary and popular sense'"). And later decisions have rejected *Websolv* as inconsistent with state law similarly requiring policy terms to be given "their common and ordinary meaning." *Sawyer*, 821 N.W.2d at 257 (citations omitted).

Despite *Valley Forge*, the Seventh Circuit elected to "stand by" its prior analysis in *Websolv*, ruling that Iowa law "refers to closely related or associated policy language to illuminate the meaning of insurance-coverage provisions." 580 F.3d at 550. But the "associated policy language" in *Websolv* involved an "advertising injury" policy. *Id.* at 551. As with the "advertising injury" provisions construed in *JT's Frames* and *American States*, the surrounding provisions in *Websolv* covered "advertising-injury claims for libel, slander, misappropriation, and copyright infringement," all of which "focus on harm arising from the *content* of an advertisement rather than harm arising from mere *receipt* of an advertisement." *Id.* at 551 (emphasis in original).

Yahoo does not seek coverage under an "advertising injury" provision. Rather, Yahoo negotiated a "personal injury" provision that includes conduct-based offenses rather than only content-based offenses. This difference alone distinguishes *JT's Frames*, *American States*, and *Websolv*.

Moreover, despite having erred in its prediction of Illinois law in *American States*, the Seventh Circuit refused to certify the issue to the Iowa Supreme Court in *Websolv*. 580 F.3d at 549 n.3. Later courts tasked with predicting the decisions of other state supreme courts have refused to follow these decisions where, as in California, state law "seeks to give undefined contract terms their plan meaning." *See, e.g., CE Design*, 6 F. Supp. 3d at 867. This Court should find *American States* and *Websolv* poor predictors of how the California Supreme Court likely would resolve whether Yahoo's policy covers TCPA claims.

B. None of the cases in National Union's Addendum A suggests the California Supreme Court would following the minority position.

None of these cases cited in National Union's Addendum A constitutes persuasive evidence that the California Supreme Court would follow the minority positon and deny coverage under policy language such as at issue here.

Two cases applied Illinois law to "advertising injury" coverage during the window between the Seventh Circuit's decision in *American States* (in 2004) and the Illinois Supreme Court's rejection of that decision in *Valley Forge* (in 2006). *See New Century Mortg. Corp. v. Great N. Ins. Co.*, No. 05-C-2370, 2006 WL 2088198, at *6 (N.D. Ill. July 25, 2006), and *St. Paul Fire & Marine Ins. Co. v. Brunswick Corp.*, 405 F. Supp. 2d 890 (N.D. Ill. 2005). Because these decisions had to follow the Seventh Circuit's (incorrect) ruling, they have no value here.

Two of the cases interpret "making known" policies, distinguishable for all of the reasons discussed above. *See Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 639 (4th Cir. 2005), and *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, No. C06-1056RSL, 2007 WL 564075, at *5 (W.D. Wash. Feb. 16, 2007), *aff'd*, 301 Fed Appx. 707 (9th Cir. 2008).

Three of the cases interpret advertising injury policies under Pennsylvania law and follow a decision by the Pennsylvania Superior Court. *Hartford Fire Ins. Co. v. Flagstaff Indus., Corp.*, No. 1:11-CV-1137, 2012 WL 1669845, at *6 (N.D. Ohio May 10, 2012) (following *Telecommc'ns Network Design v. Brethren Mut. Ins. Co.*, 5 A.3d 331 (Pa. Super. 2010)); *Md. Cas. Co. v. Express Prod., Inc.*, Nos. 08-2909 & 09-857, 2011 WL 4402275, at *17 (E.D. Pa. Sept. 22, 2011) (same); and *Auto-Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388, 409-10 (3d Cir. 2016) (same). In *Brethren*, the Pennsylvania Superior Court narrowed the meaning of the term "privacy" to secrecy interests because of the "advertising injury" context of the coverage grant, all of which focused "on the content of the message itself." 5 A.3d at 337.

Three federal district court decisions from the Seventh Circuit follow *American States* to interpret "advertising injury" policies under Indiana law. *Ace Rent-A-Car, Inc. v. Empire Fire & Marine Ins. Co.*, 580 F. Supp. 2d 678, 688-89 (N.D. Ill. 2008); *Ace Mortg. Funding, Inc. v. Travelers Indem. Co. of Am.*, No.

1:05-cv-1631-DFH-TAB, 2008 WL 686953, at *2 (S.D. Ind. Mar. 10, 2008); and *Erie Ins. Exch. v. Kevin T. Watts, Inc.*, No. 1:05-CV-867-JDT-TAB, 2006 WL 1547109, at *4 (S.D. Ind. May 30, 2006).

Finally, one of the decisions National Union cites involved a policy with a TCPA exclusion. *Integral Res., Inc. v. Hartford Fire Ins. Co.*, No. 2:14-CV-02308-R (AGRx), 2014 WL 2761170, at *7 (C.D. Cal. June 13, 2014) (Real, J.). Here, Yahoo negotiated an endorsement that did not include the standard TCPA exclusion. The two sentences of *Integral Resources* holding the coverage grants did not encompass TCPA claims merely cited *ACS Systems* and *JT's Frames*, without offering any analysis whatsoever of either decision. 2014 WL 2761170, at *7. Yahoo respectfully submits this *dicta* should not be persuasive to this Court, particularly given the presence of a TCPA exclusion.

IV. National Union agrees that this Court should certify the coverage issue to the California Supreme Court.

Yahoo's opening brief argued that the district court improperly applied the intermediate appellate decisions in *ACS Systems* and *JT's Frames* in dismissing Yahoo's claims, because (a) *ACS Systems* involved different "making known" language and distinguished authorities construing "publication" policies, while (b) *JT's Frames* placed great emphasis on the "advertising injury" context of its ruling (in contrast with Yahoo's negotiated coverage for "personal injury" claims). Even if not distinguishable, Yahoo has provided the Court with a sufficient basis to

predict the California Supreme Court would follow the overwhelming majority of courts and hold that policies granting coverage for the "publication" of "material" that violates a person's "right of privacy" encompass TCPA claims.

Yahoo alternatively requested that, if the Court believes the California Supreme Court would apply these cases to reject coverage here, it certify the coverage issue to the California Supreme Court. Appellant's Br., at 41-43. Yahoo proposes the following question:

> Does a policy that covers "injury" arising out of "oral or written publication, in any manner, of material that violates a person's right of privacy" cover claims that the insured violated the TCPA by sending unsolicited text messages?

Appellant's Br., at 42.

National Union agrees that, if this Court questions whether *ACS Systems* and *JT's Frames* would apply here, the issue should be certified. Appellee's Br., at 62. National Union proposes the following question:

> Does a duty to defend exist under California law under the personal injury offense of injury arising out of the publication of material that violates a person's right of privacy in a commercial general liability coverage grant for violations of the TCPA, where the TCPA claims at issue involve the injured parties' "seclusion" right to be left alone from unwanted text messages, and where the coverage grant responds only to invasions of privacy that involve the disclosure of the injured party's personal information to a third party?

Appellee's Br., at 62.

If the Court certifies the issue, Yahoo respectfully submits that it should use Yahoo's, rather than National Union's question. By phrasing the coverage grant as limited to "invasions of privacy that involve the disclosure of the injured party's personal information to a third party," National Union's question improperly assumes a key merits issue. Because numerous courts have agreed that the policy language at issue here covers the transmission of unwanted advertisements to the claimant (in violation of the claimant's "seclusion" right of privacy), the Court should certify Yahoo's neutrally-worded question to the California Supreme Court.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, the judgment of the district court should be reversed, and the case remanded for further proceedings and trial. In the alternative, the Court should certify the coverage issue to the California Supreme Court.

Respectfully submitted, July 27, 2018.

s/ William T. Um

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant [s/ William T. Um] Date [Jul 27, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 27, 2018 KILPATRICK TOWNSEND & STOCKTON LLP

By: *s/ William T. Um*
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CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 17-16452

I, William T. Um , certify that this brief is identical to the version submitted electronically on [date] Jul 27, 2018 .

Date July 31, 2018

Signature /s/William T. Um

(either manual signature or "s/" plus typed name is acceptable)

S253593

Appeal No. 17-16452

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Yahoo! Inc.,
Plaintiff-Appellant,

v.

National Union Fire Insurance Company of Pittsburgh, PA
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 5:17-cv-00447-NC
Hon. Nathanael M. Cousins

APPELLANT'S EXCERPTS OF RECORD – VOL. I

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INDEX

APPELLANT'S EXCERPTS OF RECORD

VOLUME I

VOLUME II

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

YAHOO! INC.,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendant.

Case No. 17-cv-00447 NC

JUDGMENT

In accordance with the Court's June 2, 2017, order granting defendant's motion to dismiss with leave to amend, and plaintiff's subsequent request that the Court enter judgment in this case, judgment is entered in favor of defendant and against plaintiff with respect to all claims asserted in the complaint.

The clerk is ordered to terminate case no. 17-cv-00447 NC.

IT IS SO ORDERED.

Dated: June 29, 2017

NATHANAEL M. COUSINS
United States Magistrate Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

YAHOO! INC.,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendant.

Case No. 17-cv-00447 NC

ORDER GRANTING NATIONAL UNION'S MOTION TO DISMISS WITH LEAVE TO AMEND

Re: Dkt. No. 15

In this insurance breach of contract action, defendant National Union Fire Insurance Company of Pittsburgh, PA (National Union) moves to dismiss plaintiff Yahoo! Inc.'s (Yahoo) complaint. The issue presented is whether the disputed insurance provision provides coverage for Yahoo's alleged violations of privacy. The Court grants dismissal because National Union showed that Yahoo's construction of the disputed insurance provision did not provide for coverage. For the reasons set forth below the motion is GRANTED WITH LEAVE TO AMEND.

I. BACKGROUND

A. Factual Background

National Union sold Yahoo five consecutive Commercial General Liability (CGL) insurance policies. Dkt. No. 1 at 6. The policies each contain similar language, which provides coverage for personal and advertising injury. *Id.* at 82-85. The policies contain Endorsement No. 1, which alters coverage as to personal injury. *Id.* at 84. The policy

contains an endorsement in order to provide extended coverage for personal and advertising injury. Endorsement No. 1 defines personal injury as "injury, including consequential 'bodily injury', arising out of one more of the following offenses: . . . (e) oral or written publication, in any manner, of material that violates a person's right of privacy." Dkt. No. 1 at 85. The CGL policies provide that National Union will pay the sums that Yahoo becomes legally obligated to pay as damages due to personal injury. Dkt. No. 15 at 4.

During the period of January 2013 to April 2014, several class action lawsuits (Text Message Litigations) were filed against Yahoo as a result of Yahoo's alleged transmission of unsolicited text messages. Dkt. No. 1 at 2-6. These lawsuits allege violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA). *Id.* The Text Message Litigations allege that through the unsolicited transmission of the text messages, Yahoo invaded the privacy of the plaintiffs. *Id.* at 3, 4.

Once the Text Message Litigations began, Yahoo notified National Union to obtain coverage under the policy. *Id.* at 7. National Union denied coverage. *Id.*

B. Procedural History

On January 27, 2017, Yahoo filed its complaint, which alleges a breach of contract claim due to National Union's denial of coverage and consequent failure to defend. Dkt. No. 1. On April 10, 2017, National Union filed its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Dkt. No. 15. This Court has jurisdiction under 28 U.S.C. § 636(c) as both parties consented to proceeding before a magistrate judge. *See* Dkt. Nos. 6, 17.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). On a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the non-movant. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Court, however, need not accept as true "allegations that are

merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need not allege detailed factual allegations, it must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

If a court grants a motion to dismiss, leave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

III. DISCUSSION

National Union moves to dismiss Yahoo's complaint because the insurance policy does not cover the Text Message Litigations. Dkt. No. 15 at 2.

A. Insurance Contract Interpretation under California Law[1]

Insurance policies are contracts and therefore must be interpreted as such. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990). The "mutual intention" of the parties at the time of contract formation governs the contract's interpretation. *Id.* at 821. The parties' intentions are inferred from the "clear and explicit" meaning of these provisions. *Id.* at 822. The provisions are interpreted in their "ordinary and popular" sense unless the

[1] In Yahoo's opposition to the motion to dismiss, Yahoo asserts that "National Union prematurely assumes that California law applies with no basis for this conclusion." Dkt. No. 24 at 11. Yahoo does not provide support for the Court applying non-California law. Furthermore, in Yahoo's statement regarding jurisdiction and venue in the complaint, Yahoo makes clear that the parties are before the Court in diversity, and that "the contracts of insurance that are the subject of this action were entered into and were to be performed within this District, and the underlying events giving rise to Yahoo's claim for insurance coverage occurred within this district." Dkt. No. 1 at 2. As National Union pointed out, a federal court sitting in diversity must apply the forum state's substantive law. *Welles v. Turner Entm't Co.*, 503 F.3d 728, 738 (9th Cir. 2007) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). Yahoo's language in the complaint mirrors California Civil Code § 1646, which requires that a contract be interpreted "according to the law and usage of the place where it is to be performed; or . . . where it was made." Yahoo's unsupported assertion that non-California law may apply to this case is not well taken.

terms are used in a "technical sense or a special meaning is given to them by usage." *Id.* A policy provision is considered ambiguous when it is capable of more than one interpretation. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). When ambiguity in policy language or term arises, courts must resolve that ambiguity in favor of the insured. *United Nat. Ins. Co. v. Spectrum Worldwide Inc.,* 555 F.3d 772, 777 (9th Cir. 2009). The language of a contract must be interpreted as a whole, which means ambiguities cannot be found in the abstract. *Waller*, 11 Cal. 4th at 18.

B. The Disputed Policy Provision

The disputed provision is contained in the definition of personal injury coverage. The policy covers personal injury arising out of "oral or written publication, in any manner, of material that violates a person's right of privacy." Dkt. No. 1 at 85. Yahoo argues that this disputed provision means that the Text Message Litigations are covered under the policy and therefore National Union owes Yahoo a duty to defend it in the underlying lawsuits.

i. Right of Privacy

Courts have identified two meanings for the right to privacy: (1) secrecy and (2) seclusion. *ACS Sys., Inc.*, 147 Cal. App. 4th at 148. The privacy right of secrecy involves the right to prevent disclosure of personal information to third parties. *Id.* at 149. The privacy right of seclusion involves the right to be let alone. *Id.* at 148. Invasion of the privacy right of secrecy involves the "*content* of communication," whereas invasion of the privacy right of seclusion involves "*means*, *manner*, and *method* of communication." *Id.* at 149 (emphasis in original). For example, a person who wants to conceal a criminal conviction from an employer asserts a claim for secrecy privacy. *Id.* at 148. A person who wishes to prevent solicitors from calling on the telephone asserts a claim to the privacy right of seclusion. *Id.*

Similar to this case, *ACS* involved an insured seeking coverage in a lawsuit alleging violations of the TCPA due to the insured sending unsolicited advertisements via fax machine. *Id.* at 140. The court analyzed whether the disputed policy provision provided

coverage for the underlying litigation. *Id.* at 145. There, the disputed provision provided coverage for injury resulting from "making known to any person or organization written or spoken material that violates an individual's right of privacy." *Id.* at 149. Because the disputed provision required that the material be made known, the court reasoned that the policy required disclosure of the material to third parties. *Id.* The court concluded that coverage for TCPA violations was not available. *Id.* at 154. A violation of secrecy privacy involves material being made known to third parties, but violation of seclusion privacy does not. *Id.* at 150. The court ruled that the policy provided coverage for violations of secrecy privacy, but not seclusion. *Id.*

Yahoo cites *Los Angeles Lakers, Inc. v. Federal Insurance. Co.*, No. 14-cv-7743 DMG, 2015 WL 2088865 (C.D. Cal. April 17, 2015) (on appeal) to argue that TCPA violations are protected under insurance policies. Dkt. No. 24 at 10. In *Los Angeles Lakers*, the court analyzed a policy exclusion clause, which excludes coverage for certain actions, to determine if there was a duty to defend in an underlying TCPA violation action. 2015 WL 2088865, *5. The court reasoned that violations of the TCPA were protected under the broad exclusion clause language. *Id.* at *7. The exclusion clause in *Los Angeles Lakers* contained different language from this case. *Id.* at *2. There, the clause merely stated "invasion of privacy" as one of its several exclusions, which is broader policy language than the language here. *Id.*; Dkt. No. 1 at 85 (*compare with* "oral or written publication, in any manner, of material that violates a person's right of privacy."). In addition, the policy language in *Los Angeles Lakers* afforded a broader interpretation of privacy because exclusion clauses are to be interpreted narrowly in order to protect the insured. 2015 WL 2088865, *3 (citing *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 647-48 (2003)). This case does not implicate any exclusion clause.

Yahoo also cites *Owners Insurance Co. v. European Auto Works, Inc.*, 695 F.3d 814 (8th Cir. 2012), to assert that both secrecy and seclusion privacy are protected under the policy. Dkt. No. 24 at 10. *Owner's Insurance* presents similar policy language as the

current case[2], but it uses Minnesota law to interpret the policy. 695 F.3d at 819. The Yahoo policy is governed by California law, and under California law, insurance policy provisions with such language have not been construed to also cover alleged violations of seclusion privacy. *See e.g., ACS Sys., Inc.*, 147 Cal. App. 4th 137; *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429 (2010). Yahoo has not presented the Court with California cases stating to the contrary.

ii. Analysis of the Policy Text

First, the Court considers the policy's plain text. The text of the disputed provision is "oral or written publication, in any manner, of material that violates a person's right of privacy." Dkt. No. 1 at 85. "Publication" is defined as "making known." *Reimel v. Alcoholic Bev. Appeals Bd.*, 256 Cal. App. 2d 158, 166-67 (1967). In situations where secrecy privacy is violated, publication plays a key role. *JT's Frames, Inc.*, 181 Cal. App. 4th at 447. However, in situations where seclusion privacy is violated, publication is irrelevant. *Id.*

JT's Frames is particularly helpful and on point in this case. There, the court analyzed whether an insurance policy provided coverage in an underlying action alleging violations of the TCPA. *Id.* at 434. The policy in *JT's Frames* contained an advertising injury clause, which covered injury caused by "oral or written publication of material that violates a person's right of privacy." *Id.* In order to analyze the meaning of that provision, the court first looked to the text of the provision. *Id.* at 445. In *ACS*, the disputed policy language stated, "making known to any person or organization written or spoken material that violates an individual's right of privacy." 147 Cal. App. 4th at 149. The court in *JT's Frames* determined that "making known" and "publication" have the same meaning. 181 Cal. App. 4th at 447. The court concluded that the policy covered secrecy privacy, but not seclusion privacy, because publication means that material is being made known to third parties, and secrecy privacy involves disclosure of material to third parties. *Id.* Seclusion

[2] The provision of in *Owner's Insurance Co.* states, "oral or written publication of material that violates a person's right of privacy." 695 F.3d at 817.

privacy does not.

Here, Yahoo made the text messages known to the recipients, but did not make the content of the text messages known *to third parties*. It is the content of the material that violates a person's right to privacy when that material is made known. *ACS Sys., Inc.*, 147 Cal. App. 4th at 149. Making information known implies "telling, sharing or otherwise divulging, such that the injured party is the one whose private material is *made known*, not the one *to whom* the material is made known." *Id.* (citing *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 641 (4th Cir. 2005)). Thus, for information to be made known or published, the information must be disclosed to a third party. *ACS Sys., Inc.*, 147 Cal. App. 4th at 149. Here, the disputed provision therefore only plausibly covers injury caused by the disclosure of private content to third parties based on the word "publication" in the provision. *ACS Sys., Inc.*, 147 Cal. App. 4th at 150. Thus, the disputed provision does not cover Yahoo's alleged legal violations because Yahoo did not disclose the content of the material to third parties, but only to the underlying plaintiffs.

Another tool for interpreting the contract provision's text is the last antecedent rule. *Id.* The last antecedent rule states that, "qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote." *Renee J. v. Superior Court*, 26 Cal. 4th 735, 743 (2001). The disputed provision states, "oral or written publication, in any manner, of material that violates a person's right of privacy." Dkt. No. 1 at 85. Applying this rule to the disputed provision, "that violates a person's right of privacy" modifies the word "material." *JT's Frames, Inc.*, 181 Cal. App. 4th at 446. This means the disclosed material must violate a person's right of privacy. *Id.* As the policy is drafted, "material" can only violate a person's right of privacy if it is "confidential information and violated the victim's right to secrecy." *Id.*

Yahoo argues that "right of privacy" should be construed broadly so as to afford the greatest protection to the insured. Dkt. No. 24 at 9. Although this is correct in terms of interpretation of insurance policies, the broad definition Yahoo offers ignores the

interpretation of the disputed provision as a whole. Yahoo's desired interpretation of "right of privacy" looks to the term in the abstract, but the correct method of interpretation under California law is examining the provision as a whole. *ACS Sys., Inc.*, 147 Cal. App. 4th at 146. When looking at the entire disputed provision, it shows that there must be publication of material for privacy to be violated. Therefore, the element of publication must be satisfied in order for privacy to be violated. The text messages do not violate a person's privacy right of secrecy, and thus these injuries are not covered under the disputed policy provision. Thus, according to the text of the disputed provision, National Union does not owe a duty to defend Yahoo for violations of seclusion privacy.

iii. Analysis of the Policy Context

Second, the court considers the context in which the disputed provision is contained in the contract. As previously stated, insurance policies must be interpreted as a whole and not in the abstract in order to interpret ambiguous language. *ACS Sys, Inc.*, 147 Cal. App 4th at 146. Analyzing the placement of provisions in the policy, and using other clauses in the policy to help interpret the other provisions, sheds light on the meaning of ambiguous language. *Id.* at 151. Here, the disputed provision is the last of five offenses in which personal injury coverage arises. It is important to analyze the provision directly before the disputed one in order to use the context of that provision to help determine the disputed provision's meaning. *Id.* The provision immediately before the disputed one provides coverage for "oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services." Dkt. No. 1 at 84. Libel or slander involves "a publication of defamatory content about someone to a third person." Cal. Civ. Code §§ 45, 46; *Live Oak Publ'g Co. v. Cohagan*, 234 Cal. App. 3d 1277, 1284 (1991); *ACS Sys., Inc.*, 147 Cal. App. 4th at 151. The provision directly before the disputed one states that the violation comes from the sharing of content to third parties and not just from receiving the content. *ACS Sys., Inc.*, 147 Cal. App. 4th at 152. That provision only provides coverage when content is disclosed to third parties. Because the disputed provision immediately follows the provision

covering slander and libel, it is reasonable to infer that the disputed provision also provides coverage only when material is disclosed to third parties. This type of disclosure violates the privacy right of secrecy, not seclusion.

Secrecy and seclusion privacy are mutually exclusive in this context because of the use of "publication." The term "publication" plays a key role in interpreting the meaning of the disputed provision as a whole. The provision involving slander and libel requires disclosure to third parties. *Id.* Therefore, it follows that the disputed provision would also involve disclosure to third parties.

In its brief, Yahoo discusses the context of the disputed provision, but omits the provision immediately before the disputed one. Dkt. No. 24 at 8. Yahoo cites two of the provisions prior to the disputed one. Those provisions are: "(a) false arrest, detention, or imprisonment" and "(c) the wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor." Dkt. No. 1 at 84. Yahoo ignores the provision providing the most context. Dkt. No. 24 at 8. By ignoring the provision immediately before the disputed one, Yahoo draws strained inferences about the context of the policy as a whole. Courts will not strain to find ambiguity in policy language. *Waller*, 11 Cal. 4th at 18-19. The other provisions Yahoo cites are different from the disputed one, and therefore Yahoo concludes that the context of the provision does not shed light on its meaning. Dkt. No. 24 at 9. However, the provision immediately before the disputed one contains language that signals the importance of disclosure to third parties. Because the disputed provision directly follows a provision that involves disclosure to third parties, the Court concludes that the disputed provision also involves disclosure to third parties. Yahoo's argument is unpersuasive.

C. Qualifying Policy Language

The disputed policy provision states, "oral or written publication, in any manner, of material that violates a person's right of privacy." Dkt. No. 1 at 85. Yahoo argues that the "in any manner" language broadens the meaning of publication. Dkt. No. 24 at 12. This

argument is unsupported by binding authority, and is unpersuasive. Applying the last antecedent rule to this phrase, shows that "in any manner" applies to the preceding phrase, "oral or written publication." Therefore, "in any manner" modifies "publication." Interpreting this language in its "ordinary and popular" sense provides that information may be made known in any way in order for coverage to apply. *AIU Ins. Co.*, 51 Cal. 3d at 821. Any manner of publication involves any medium by which material is published. Here, the information was never published because the content was never made known to third parties. *ACS Sys., Inc.*, 147 Cal. App. 4th at 149. Therefore, the manner of publication is not at issue because there was no publication in the first place.

D. Yahoo's Other Arguments

In opposition to National Union's motion to dismiss, Yahoo cites several cases that are irrelevant here. *See* Dkt. No. 24 at 9-10, 12.

These cases cite out of state law, which do not interpret insurance policies in the same manner as California courts. For example, Yahoo cites *Park University Enterprises, Inc. v. American Casualty Co. of Reading, Pa*, which applies Kansas law to interpret the disputed insurance policy provision. 442 F.3d 1239, 1249 (2006). In Kansas, the standard for interpreting insurance policies is viewing ambiguous terms as a reasonable person and determining meaning from that perspective. *Id.* Although this is similar to California's method of interpreting ambiguous terms in favor of the insured, that court did not consider the context of the contract as a whole. *Waller*, 11 Cal. 4th at 11. It is important to view the contract as a whole and not in the abstract. *ACS Sys., Inc.*, 147 Cal. App 4th at 146. The court in *Park University* looks at the language in the abstract to determine if it is ambiguous. *Park University Enter, Inc.*, 442 F.3d at 1249. California courts also look to context. *Waller*, 11 Cal. 4th at 11.

Yahoo cites several other cases which also apply out-of-state laws to interpret insurance policy language. *See* Dkt. No. 24 at 9, 12. Like *Park University*, those cases are also inapposite because they assign meaning to policy language that is inconsistent with California case law. *Collective Brands, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*,

No. 11-cv-4097 JTM, 2013 WL 66071, *13 (D. Kan. Jan. 4, 2013) (explicitly rejecting use of California law to interpret similar insurance policies); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill. 2d 352, 368 (2006) (finding that a similarly-worded policy may be interpreted using dictionary definitions for "right of privacy," which includes seclusion); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 157 Fed. App'x 201, 206 (11th Cir. 2004) (applying Georgia law and a broader interpretation of privacy); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 846 (N.D. Tex. 2003) *aff'd* 96 Fed. App'x 960 (5th Cir. 2004) (applying Texas law to interpret the meaning of "publication"). Therefore, this Court will not consider those cases in ruling on this case's merits.

However, because Yahoo's claim for coverage could possibly be amended by the allegation of additional facts, or by other reasons why the court should not dismiss this case with prejudice,[3] the Court GRANTS leave to amend.

IV. CONCLUSION

For the foregoing reasons, National Union's motion to dismiss is GRANTED WITH LEAVE TO AMEND. The amended complaint must be filed with the Court by June 23, 2017.

IT IS SO ORDERED.

Dated: June 2, 2017

NATHANAEL M. COUSINS
United States Magistrate Judge

[3] In its reply, National Union requests that its motion be granted with prejudice so that Yahoo may not amend its complaint to argue that, for example, coverage exists under a different provision. Dkt. No. 30 at 14-17. This argument has not been fully briefed, and was not in any way the subject of the original complaint or motion to dismiss. *See Dytch v. Yoon*, No. 10-cv-02915 MEJ, 2011 WL 839421, at *3 (N.D. Cal. Mar. 7, 2011) (quoting *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("It is improper for a moving party to introduce new facts or different legal arguments in the reply brief than those presented in the moving papers."). The Court declines to consider National Union's argument, the merits of which may be taken up again on a subsequent motion to dismiss.

Appeal No. 17-16452

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Yahoo! Inc.,
Plaintiff-Appellant,

v.

National Union Fire Insurance Company of Pittsburgh, PA
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 5:17-cv-00447-NC
Hon. Nathanael M. Cousins

APPELLANT'S EXCERPTS OF RECORD – VOL. II

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Appeal No. 17-16452

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INDEX

APPELLANT'S EXCERPTS OF RECORD

VOLUME I

VOLUME II

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

YAHOO! INC., a Delaware corporation,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a Pennsylvania corporation,

Defendant.

CASE NO.: 5:17-cv-00447-NC
Hon. Nathanael M. Cousins
Courtroom 7 – 4th Floor

PLAINTIFF YAHOO! INC.'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; REPRESENTATION STATEMENT

Date Complaint Filed: 1/31/2017

PLEASE TAKE NOTICE that Plaintiff Yahoo! Inc. ("Yahoo") hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered by this Court on June 29, 2017 (Dkt. 39), as well as the Court's preceding order granting with leave to amend Defendant National Union Fire Insurance Company of Pittsburgh, PA's Motion to Dismiss entered on June 2, 2017 (Dkt. 37). The Judgment is appealable pursuant to 28 U.S.C. § 1291.

The Representation Statement is set out on the next page of this document. The Judgment dated June 29, 2017 from which Yahoo appeals is attached hereto as Exhibit A. Yahoo knows of no related cases currently pending in the Ninth Circuit.

Dated: July 18, 2017

KILPATRICK TOWNSEND & STOCKTON

/s/William T. Um
WILLIAM T. UM
HEATHER W. HABES
Counsel for Plaintiff YAHOO! INC.

REPRESENTATION STATEMENT
(FED. R. APP. P. 12(B); Circuit Rule 3-2(B))

PLEASE TAKE FURTHER NOTICE THAT, in this appeal, the undersigned represent Yahoo! Inc., plaintiff and appellant in this matter, and no other party:

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Dated: July 18, 2017

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UNITED STATES DISTRICT COURT

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NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a Pennsylvania corporation,

Defendant.

CASE NO.: 5:17-cv-00447-NC
Hon. Nathanael M. Cousins
Courtroom 7 – 4th Floor

NOTICE OF PLAINTIFF YAHOO'S ELECTION TO STAND ON COMPLAINT

Date Complaint Filed: 1/31/2017

Plaintiff Yahoo! Inc. files this short statement to notify the Court and Defendant National Union Fire Insurance Company of Pittsburgh, PA that, in light of the Court's June 2, 2017 Order granting National Union's Motion to Dismiss, Yahoo will stand on its Complaint filed on January 31, 2017. Yahoo will not amend its Complaint. Yahoo thus respectfully requests that the Court enter judgment in this action.

Dated: June 23, 2017

KILPATRICK TOWNSEND & STOCKTON

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

YAHOO! INC., a Delaware corporation,

Plaintiff,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, a Pennsylvania corporation,

Defendant.

CASE NO.:

COMPLAINT FOR BREACH OF CONTRACT (DUTY TO DEFEND)

DEMAND FOR JURY TRIAL

Plaintiff Yahoo! Inc. ("Yahoo") files this Complaint against National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), alleging as follows:

1. This lawsuit arises out of National Union's failure to honor its contractual obligation to defend Yahoo under a series of commercial general liability insurance policies, in connection with class action lawsuits filed in California, Illinois, and Pennsylvania against Yahoo alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"). Yahoo brings a single claim for breach of contract pertaining to National Union's duty to defend, and seeks to recover damages resulting from National Union's breach.

The Parties, Jurisdiction And Venue

2. Plaintiff Yahoo is a corporation formed under the laws of the State of Delaware with its principal place of business in Sunnyvale, California.

3. Defendant National Union is a corporation organized under the laws of Pennsylvania, with its principal place of business in New York, New York. As detailed below, National Union issued numerous insurance policies to Yahoo. National Union is a member of the AIG family of insurers.

4. This Court has jurisdiction over the subject matter of this complaint pursuant to 28 U.S.C. § 1332(a) because there is complete diversity of citizenship between the parties and the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs.

5. Venue is proper in this District under 28 U.S.C. § 1391(b)(1), (c)(2) and (d) in that National Union is subject to personal jurisdiction because it regularly transacts business in California and is an admitted insurer in California. Venue is also proper under 28 U.S.C. § 1391(b)(2) because the contracts of insurance that are the subject of this action were entered into and were to be performed within this District, and the underlying events giving rise to Yahoo's claim for insurance coverage occurred within this District.

Text Message Litigation Against Yahoo

6. During the period of January 2013 to April 2014, several class action lawsuits were filed against Yahoo alleging violations of the TCPA as a result of its alleged transmission of unsolicited text messages. These claims are detailed below and are collectively referred to hereafter as the "Text Message Litigation."

(A) California Lawsuits

Sherman v. Yahoo! Inc., Case No. 3:13-cv-00041 (S.D. Cal.)

7. On January 8, 2013, plaintiff Rafael David Sherman filed a class action complaint against Yahoo in the United States District Court for the Southern District of California (the "*Sherman* Complaint"). The *Sherman* Complaint asserts two

claims against Yahoo: (1) "Negligent Violations of the Telephone Consumer Protection Act," and (2) "Knowing and/or Willful Violations of the Telephone Consumer Protection Act." Both claims are premised on Yahoo's alleged action of "negligently and/or intentionally contacting Plaintiffs on Plaintiffs' cellular telephones, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., ("TCPA"), thereby invading Plaintiffs' privacy."

8. Plaintiffs in *Sherman* contend that Defendant "illegally contacted Plaintiff and the Class members via their cellular telephones by using an unsolicited SPAM text messages [*sic*], thereby causing Plaintiff and the Class members to incur certain cellular telephone charges or reduce telephone cellular time for which Plaintiff and the Class members previously paid, and invading the privacy of said Plaintiff and Class members." The *Sherman* Complaint further alleges that "[t]he TCPA was designed to prevent calls like the ones described within this complaint, and to protect the privacy of citizens like Plaintiff."

9. The *Sherman* Complaint seeks to recover on behalf of the putative class consisting of "all persons within the United States who received a text message substantially similar or identical to the text message described in Paragraph 15 of this Complaint from Defendant without prior express consent, which message by Defendant or its agents was not made for emergency purposes, within the four years prior to the filing of this Complaint."

Reza v. Yahoo! Inc., Case No. 3:13-cv-00071 (S.D. Cal.)

10. On January 10, 2013, plaintiffs Raquel Reza and Shafiq Memon filed their class action complaint against Yahoo in the United States District Court for the Southern District of California (the "*Reza* Complaint"). The *Reza* Complaint asserts two claims against Yahoo: (1) "Negligent Violations of the Telephone Consumer Protection Act," and (2) "Knowing and/or Willful Violations of the Telephone Consumer Protection Act." Both claims are premised on Yahoo's alleged action of "negligently and/or intentionally contacting Plaintiffs on Plaintiffs' cellular

telephones, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., ("TCPA"), thereby invading Plaintiffs' privacy."

11. The *Reza* Complaint seeks to recover on behalf of the putative class consisting of "all persons within the United States who received a text message substantially similar or identical to the text messages described in Paragraphs 11 and 13 of this Complaint from Defendant without prior express consent, which message by Defendant or its agents was not made for emergency purposes, within the four years prior to the filing of this Complaint."

12. The *Reza* Complaint was deemed related to the *Sherman* Complaint and transferred on March 27, 2013. The *Reza* Complaint was dismissed without prejudice on April 17, 2013, and the *Sherman* Complaint was dismissed with prejudice on March 3, 2016.

(B) Illinois Lawsuits

Johnson v. Yahoo! Inc., Case No. 14-cv-02028 (N.D. Ill.)

13. On March 21, 2014, plaintiff Rachel Johnson filed a class action complaint against Yahoo in the United States District Court for the Northern District of Illinois (the "*Johnson* Complaint"). The *Johnson* Complaint asserts a single count against Yahoo for violation of the TCPA. This claim is premised on plaintiff's allegation that Yahoo used "an automatic telephone dialing system to send unsolicited text messages to Plaintiff's cellular telephone in direct contravention to the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ..." And that "[i]n an effort to enforce this fundamental federal right to privacy, Plaintiff files the instant class action complaint alleging violations of the TCPA."

14. The *Johnson* Complaint seeks to recover on behalf of the putative class consisting of "(1) All persons within the United States (2) to whose cellular telephone number (3) Yahoo sent a non-emergency text message (4) using an automatic telephone dialing system (5) within 4 years of the complaint (6) without prior express consent."

Calderin v. Yahoo! Inc., Case No. 14-cv-02753 (N.D. Ill.)

15. On April 16, 2014, plaintiff Zenaida Calderin filed a class action complaint against Yahoo in the United States District Court for the Northern District of Illinois (the "*Calderin* Complaint"). The *Calderin* Complaint asserts a single count against Yahoo for violation of the TCPA. This claim is premised on Yahoo's alleged sending of "unsolicited and unauthorized" text messages "without prior express consent via an automatic dialing system."

16. The *Calderin* Complaint seeks to recover on behalf of the putative class consisting of persons who: "from on or after four years prior to the filing of this action, (ii) were recipients of texts to their cellular phone numbers ... by or on behalf of Yahoo, and (iii) with respect to whom Yahoo cannot provide evidence of prior express written consent."

17. The *Calderin* Complaint and the *Johnson* Complaint were consolidated in a single action by order dated July 3, 2014, under Case No. 14-cv-02028. This consolidated action is still pending.

(C) Pennsylvania Lawsuit

Dominguez v. Yahoo! Inc., Case No. 13-cv-01887 (E.D. Penn.)

18. On April 10, 2013, plaintiff Bill H. Dominguez filed a class action complaint against Yahoo in the United States District Court for the Eastern District of Pennsylvania (the "*Dominguez* Complaint"). The *Domiguez* Complaint asserts a single count against Yahoo for violation of the TCPA. This claim is premised on the allegation that Yahoo "directly and/or vicariously used an ATDS [automatic telephone dialing system] to initiate numerous unsolicited telephone calls to the cellular telephone numbers of Plaintiff and the Class." An amended complaint was filed on December 4, 2015 (the "*Dominguez* Amended Complaint").

19. The *Dominguez* Amended Complaint seeks to recover on behalf of the putative class consisting of "all persons residing within the territorial limits of the Court of Appeals for the Third Circuit who purchased a cellular telephone which,

prior to its purchase, had been associated with a Yahoo! account belonging to another individual who had authorized the sending of text message Yahoo! Alerts to said telephone and to whom Yahoo! sent to the cellular telephone number at least one unsolicited text message, during the period beginning four (4) years prior to the filing of the Complaint and continuing through the date of the resolution of this case."

20. The *Dominguez* Complaint is still pending.

21. Yahoo incurred in excess of the jurisdictional amount to defend the California lawsuits, and continues to incur substantial defense fees and costs in connection with the remaining pending lawsuits in Illinois and Pennsylvania.

The National Union Policies

22. National Union sold to Yahoo five consecutive, one-year "Commercial General Liability" insurance policies covering the period of May 31, 2008 to May 31, 2013 (the "National Union Policies"). Each of the National Union Policies provides Commercial General Liability coverage with a General Aggregate Limit of $2,000,000 subject to a $1,000,000 limit for "Personal and Advertising Injury" coverage, and a $1,000,000 per occurrence limit for each occurrence. The National Union Policies all contain substantially similar terms that provide coverage for the Text Message Litigation. As an example, attached hereto as Exhibit A is a true and correct copy of National Union Policy No. XWC 721-90-84, which covered the period of May 31, 2008 to May 31, 2009.

23. The National Union Policies include a Commercial General Liability ("CGL") Coverage Form. This Form includes, among other coverages, "COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY" comprised of two sections. Section (1) is the "Insuring Agreement" and Section (2) is titled "Exclusions" and includes subparts numbered (a) – (p) that purport to limit the coverage available under the Insuring Agreement in section (1). Ex. A, CGL Coverage Form, Coverage B.

24. Significantly for purposes of this lawsuit, Yahoo specifically sought to

expand the "personal injury" coverage provided by the National Union Policies through a separately drafted manuscript endorsement. In "Endorsement No. 1"[1], "COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY" of the Form is "deleted in its entirety and replaced" with "COVERAGE B PERSONAL INJURY LIABILITY" as set forth in the Endorsement (the "Personal Injury Endorsement"). Ex. A, End. 1 § II. In contrast to the CGL Coverage Form, this Personal Injury Endorsement removes several exclusions and provides broad coverage for "personal injury." *Id.*

25. As set forth in the Personal Injury Endorsement, the Insuring Agreement for "COVERAGE B PERSONAL INJURY LIABILITY" states:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. ...

Ex. A, End. 1 § II.

26. "Personal injury" is defined by the Personal Injury Endorsement as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses: ... (e) Oral or written publication, in any manner, of material that violates a person's right of privacy." Ex. A, End. 1 § III(a).

27. Yahoo has paid all premiums due on the National Union Policies in full. Yahoo has also satisfied all pertinent terms of and conditions precedent to the National Union Policies.

National Union's Refusal To Defend The Text Message Litigation

28. Yahoo provided timely notice of the Text Message Litigation, or was excused from providing notice, to National Union under the National Union Policies. In response, National Union repeatedly denied coverage.

[1] Endorsement No. 1 is included in Exhibit A. The same Endorsement appears in each of the following National Union Policies (with only slight changes in spacing), but the title of the Endorsement differs: 2009-2010 Policy ("Endorsement #1); 2010-2011 ("Endorsement"); 2011-2012 Policy ("Endorsement # 004").

29. Notwithstanding National Union's denials, Yahoo urged National Union to change its position, explaining in detail the bases for coverage under the National Union Policies by letter dated May 28, 2014. National Union, however, reconfirmed its denial through counsel by letter dated June 13, 2014.

30. The Text Message Litigation alleges, among other things, "publication" by Yahoo of text messages that purportedly violated underlying plaintiffs' rights to privacy. Additionally, none of the exclusions, conditions or limitations contained in the National Union Policies operate to preclude coverage. At the very least, the Text Message Litigation contained claims and allegations that gave rise to *the potential for coverage*, thus triggering National Union's duty to defend Yahoo under well accepted insurance principles.

31. By refusing to honor its contractual obligations to defend Yahoo in connection with the Text Message Litigation, National Union breached one or more of the National Union Policies.

COUNT I

(Breach of Contract – Duty to Defend)

32. Yahoo incorporates herein by reference paragraphs 1 through 31 of this Complaint as fully set forth herein.

33. National Union had a duty to defend Yahoo under the National Union Policies because the Text Message Litigation alleges "personal injury" arising out of the offense of "publication" of "material" that "violates a person's right to privacy" or raised at least the potential for coverage.

34. Yahoo complied with all applicable conditions precedent contained in the National Union Policies related to National Union's duty to defend. None of the exclusions, conditions or limitations contained in the National Union Policies operate to preclude National Union's duty to defend.

35. By failing to defend Yahoo in the Text Message Litigation, National Union materially breached its obligation under one or more of the National Union

Policies.

36. As a direct and proximate result of National Union's breach, National Union has deprived Yahoo of the benefit of the insurance for which Yahoo has paid premiums to National Union, and has caused Yahoo to incur significant legal defense fees and expenses in an amount exceeding the jurisdictional amount.

37. Yahoo has been damaged in an amount to be proven at trial, which consists of unreimbursed defense costs associated with the Text Message Litigation, plus interest and other appropriate damages.

PRAYER FOR RELIEF

WHEREFORE, Yahoo respectfully seeks the following relief:

A. That the Court enter judgment in favor of Yahoo;

B. An award of damages in Yahoo's favor in an amount to be determined at trial;

C. An award of Yahoo's reasonable attorneys' fees, pre-judgment and post-judgment interest, costs and the expenses of this action;

D. For such other and further relief as this Court deems just and proper.

DATED: January 27, 2017

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: */s/William T. Um*
WILLIAM T. UM
HEATHER W. HABES

Attorneys for Plaintiff
Yahoo! Inc.

REQUEST FOR TRIAL BY JURY

Yahoo hereby requests that this case be tried to a jury.

DATED: January 27, 2017

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: */s/William T. Um*
WILLIAM T. UM
HEATHER W. HABES

Attorneys for Plaintiff
Yahoo! Inc.

EXHIBIT A

POLICYHOLDER NOTICE

Thank you for purchasing insurance from a member company of American International Group, Inc. (AIG). The AIG member companies generally pay compensation to brokers and independent agents, and may have paid compensation in connection with your policy. You can review and obtain information about the nature and range of compensation paid by AIG member companies to brokers and independent agents in the United States by visiting our website at www.aigproducercompensation.com or by calling AIG at 1-800-706-3102.

AIG **AMERICAN INTERNATIONAL COMPANIES ®**

70 Pine Street, New York, NY 10270
(212) 770-7000

Coverage is provided by

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
(a capital stock company)

COMMERCIAL GENERAL LIABILITY DECLARATIONS

NAMED INSURED & MAILING ADDRESS
YAHOO, INC.
701 FIRST AVENUE
SUNNYVALE, CA 94089-1019

PRODUCER'S NAME & MAILING ADDRESS
ABD INSURANCE AND FINANCIAL SERVICES
305 WALNUT STREET
REDWOOD CITY, CA 94063-1731

POLICY PERIOD: From 05/31/2008 to 05/31/2009 at 12:01 A.M. Standard Time at your mailing address shown above.

FORM OF BUSINESS:

☒ CORPORATION ☐ PARTNERSHIP ☐ LIMITED LIABILITY COMPANY ☐ INDIVIDUAL ☐ OTHER

BUSINESS DESCRIPTION: INTERNET OR WEB OPS.

LOCATION OF ALL PREMISES YOU OWN, RENT OR OCCUPY: ON FILE WITH COMPANY

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

POLICY PREMIUM:* $290,650

PREMIUM SHOWN IS PAYABLE: $290,650 **at inception.**

*This policy is subject to annual audit.

Premium for Certified Acts of Terrorism Coverage Under Terrorism Risk Insurance Act 2002 as amended by the Terrorism Risk Insurance Program Reauthorization Act 2007:
$26,399 Included In Policy Premium

SCHEDULE OF STATE TAXES, FEES AND SURCHARGES, IF APPLICABLE:**

**State Taxes, Fees and Surcharges shown are in addition to the above referenced Policy Premium.

ENDORSEMENTS ATTACHED TO THIS POLICY: SEE ATTACHED FORMS SCHEDULE

THESE DECLARATIONS AND THE COMMON POLICY DECLARATIONS, IF APPLICABLE, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORMS, AND ENDORSEMENTS IF ANY ISSUED TO FORM A PART THEREOF COMPLETE THE ABOVE NUMBERED POLICY.

Date Issued: 06/30/2008

ER030

By signing below, the President and the Secretary of the Insurer agree on behalf of the Insurer to all the terms of this policy.

President
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

Secretary
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

This policy shall not be valid unless signed at the time of issuance by an authorized representative of the Insurer, either below or on the Declarations page of the policy.

Authorized Representative

LIMITS OF INSURANCE		
EACH OCCURRENCE LIMIT	$1,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	$1,000,000	Any one premise
MEDICAL EXPENSE LIMIT	$10,000	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	$1,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	$2,000,000	
PRODUCTS/COMPLETED OPERATIONS AGGREGATE LIMIT	$2,000,000	

RETROACTIVE DATE (CG 00 02 ONLY)

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL AND ADVERTISING INJURY" WHICH OCCURS BEFORE THE RETROACTIVE DATE, IF ANY, SHOWN BELOW.

RETROACTIVE DATE: NONE
(ENTER DATE OR "NONE" IF NO RETROACTIVE DATE APPLIES.)

CLASSIFICATION AND PREMIUM

CLASSIFICATION	CODE NO.	PREMIUM BASE	RATE Prem/Ops	RATE Prod/comp Ops	ADVANCE PREMIUM Prem/Ops	ADVANCE PREMIUM Prod/comp Ops
SEE COMPOSITE RATE ENDORSEMENT						
					Total:	$290,650

A = AREA
C = TOTAL COST
M = ADMISSIONS
O = TOTAL OPERATING EXPENSES
P = PAYROLL
S = GROSS SALES
T = OTHER
U = UNITS (EACH)

ER032

FORMS SCHEDULE

EFFECTIVE DATE: 05/31/2008

NAMED INSURED: YAHOO, INC.

POLICY NUMBER: XWC 721-90-84

IL0017	(1198)	COMMON POLICY CONDITIONS
CG0001	(1207)	COMM GEN'L LIAB COV FORM
CG0224	(1093)	EARLIER NOTICE OF CANC
CG2015	(0704)	ADDITIONAL INSURED - VENDORS
CG2147	(1207)	EMPL. RELATED PRACTICES EXCL
CG2404	(1093)	WAIVER OF TRANS RIGHTS OF RECOV
CG3234	(0105)	CALIFORNIA CHANGES
IL0021	(0702)	NUCLEAR ENERGY LIAB EXCL (BROAD FORM)
IL0270	(0907)	CA CHANGES-CANC/NONRENEWAL
58332	(0793)	TOTAL LEAD EXCLUSION
61944	(0295)	BROAD FORM NAMED INSURED
62132	(0395)	UNINTENTIONAL ERRORS AND OMISSIONS
64009	(1195)	NONOWNED WATERCRAFT ENDT
82540	(0405)	ASBESTOS AND SILICA EXCL ENDT
51767	(0402)	EMPLOYEE BENEFITS LIABILITY INS
61707	(1294)	AMENDT OF DUTIES, OCC, OFFNSE, CL/SUIT
61712	(1206)	ADD'L INSRD-WHERE REQ'D UNDER CONTRACT
61945	(0901)	EXTENDED FIRE DAMAGE LIAB (WATER)
62134	(0395)	AMENDT ENDT - WHEN WE DO NOT RENEW
62898	(0901)	RADIOACTIVE MATTER EXCLUSION
64007	(0405)	FELLOW EMPLOYEE EXCLUSION DELETED
65157	(0496)	INCIDENTAL MEDICAL MALPRACTICE COVERAGE
67260	(0397)	BODILY INJURY DEFINITION EXTENSION
67265	(0397)	AMENDMENT OF OTHER INSURANCE
67266	(0397)	NEWLY ACQUIRED ENTITY COVERAGE EXT
67446	(0497)	LIMITED JOINT VENTURE COVERAGE
71705	(0998)	LIBERALIZATION
71709	(0304)	COMPOSITE RATING PLAN ENDORSEMENT
74437	(0304)	BLENDED POLLUTION EXCLUSION
74447	(0901)	PERSONAL INJURY DEFINITION EXTENSION
78689	(0703)	FUNGUS EXCLUSION
87295	(0105)	EXCLUSION - VIOLATION OF STATUTES
89644	(0705)	AMENDATORY ENDT- COVERAGE TERR
ENDT NO.1		COVERAGE B - PERSONAL INJURY

GENERAL LIABILITY

NOTICE TO POLICYHOLDERS

REVISIONS TO ADDITIONAL INSURED ENDORSEMENTS

This Notice does not form a part of your insurance contract. The Notice is designed to alert you to coverage changes in several additional insured endorsements in this policy. If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) apply. Please read your policy, and the endorsements attached to your policy, carefully.

This notice contains a brief synopsis of the revisions to the following endorsements:

- CG 20 07 07 04 - Additional Insured - Engineers, Architects, Or Surveyors
- CG 20 10 07 04 - Additional Insured - Owners, Lessees Or Contractors - Scheduled Person Or Organization
- CG 20 15 07 04 - Additional Insured - Vendors
- CG 20 26 07 04 - Additional Insured - Designated Person Or Organization
- CG 20 28 07 04 - Additional Insured - Lessor Of Leased Equipment
- CG 20 31 07 04 - Additional Insured - Engineers, Architects Or Surveyors
- CG 20 32 07 04 - Additional Insured - Engineers, Architects Or Surveyors Not Engaged By The Named Insured
- CG 20 33 07 04 - Additional Insured - Owners, Lessees Or Contractors - Automatic Status When Required In Construction Agreement With You
- CG 20 34 07 04 - Additional Insured - Lessor Of Leased Equipment - Automatic Status When Required In Lease Agreement With You
- CG 20 37 07 04 - Additional Insured - Owner, Lessees Or Contractors - Completed Operations

When any of the above references endorsements are attached to your policy, there is coverage for a person or organization that you name as an additional insured on your policy **ONLY** if the bodily injury, property damage or personal and advertising injury is caused in whole or in part by your acts or omissions or the acts or omissions of those working on your behalf.

There is **NO** coverage for the additional insured for bodily injury, property damage or personal and advertising injury caused entirely by any negligence that is not attributable to you or those acting on your behalf.

This may be a reduction in coverage in states where you are contractually permitted to hold harmless an additional insured for that additional insured's sole negligence or in states where courts have enabled coverage for the sole negligence of the additional insured.

POLICY NUMBER: GL 721-90-84

COMMERCIAL GENERAL LIABILITY
CG P 010 12 07

2007 GENERAL LIABILITY MULTISTATE FORMS REVISION ADVISORY NOTICE TO POLICYHOLDERS

This is a summary of the major changes to your policy. This notice does not reference every editorial change made in the coverage form. No coverage is provided by this summary nor can it be construed to replace any provisions of your policy or endorsements. You should read your policy and review your Declarations page for complete information on the coverages you are provided. If there is any conflict between the policy and this summary, **THE PROVISIONS OF THIS POLICY SHALL PREVAIL.**

The major areas within the policy that broaden or reduce coverage are highlighted below. Also, the areas within the policy that do not impact coverage are highlighted below.

COVERAGE FORM CHANGES

NO IMPACT IN COVERAGE

SUPPLEMENTARY PAYMENTS SECTION

CG 00 01 12 07 - Commercial General Liability Coverage Form (Occurrence Version)
CG 00 02 12 07 - Commercial General Liability Coverage Form (Claims-made Version)
CG 00 09 12 07 - Owners And Contractors Protective Liability Coverage Form - Coverage For Operations Of Designated Contractor
CG 00 33 12 07 - Liquor Liability Coverage Form (Occurrence Version)
CG 00 34 12 07 - Liquor Liability Coverage Form (Claims-made Version)
CG 00 35 12 07 - Railroad Protective Liability Coverage Form
CG 00 37 12 07 - Products/Completed Operations Liability Coverage Form (Occurrence Version)
CG 00 38 12 07 - Products/Completed Operations Liability Coverage Form (Claims-made Version)
CG 00 39 12 07 - Pollution Liability Coverage Form Designated Sites
CG 00 40 12 07 - Pollution Liability Limited Coverage Form Designated Sites
CG 00 65 12 07 - Electronic Data Liability Coverage Form
CG 00 66 12 07 - Product Withdrawal Coverage From

The Supplementary Payments Section in your policy provides coverage for your defense costs with respect to any claim we investigate or settle, or any suit against you that we defend. The Supplementary Payments Section has been revised to reinforce that coverage is provided for court costs taxed against you, but this section does not provide coverage for plaintiff's attorneys' fees or attorneys' expenses taxed against you.

While this change is considered to be a reinforcement of coverage intent, it may result in a decrease in coverage in jurisdictions where courts have ruled that plaintiff's attorneys' fees or attorneys' expenses taxed against the insured can be levied as a supplementary payment.

INFRINGEMENT OF COPYRIGHT, PATENT, TRADEMARK OR TRADE SECRET EXCLUSION

CG 00 01 12 07 - Commercial General Liability Coverage Form (Occurrence Version)
CG 00 02 12 07 - Commercial General Liability Coverage Form (Claims-made Version)
CG 00 65 12 07 - Electronic Data Liability Coverage Form

The Infringement Of Copyright, Patent, Trademark Or Trade Secret Exclusion in your policy has been revised to reinforce that the exclusion does **not** apply to coverage for personal and advertising injury arising out of infringement of other intellectual property rights involving the use of another's advertising idea in your advertisement.

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES EXCLUSION

CG 00 01 12 07 - Commercial General Liability Coverage Form (Occurrence Version)
CG 00 02 12 07 - Commercial General Liability Coverage Form (Claims-made Version)

Previously, this exclusion was added to your policy via mandatory endorsement. The endorsement contained an exclusion addressing injury or damage arising out of any action or omission that violates or is alleged to violate the Telephone Consumer Protection Act (TCPA), the CAN-SPAM Act of 2003 or any other similar statute, ordinance or regulation that prohibits or limits the sending, transmitting, communicating or distribution of material or information. This exclusion has now been incorporated directly into your policy.

LIQUOR LIABILITY

CG 00 33 12 07 - Liquor Liability Coverage Form (Occurrence)
CG 00 34 12 07 - Liquor Liability Coverage Form (Claims-made)

The definition of "injury" in your policy has been revised to reinforce that coverage is provided for bodily injury or property damage, as well as any related care, loss of services or loss of support.

MULTISTATE ENDORSEMENTS

BROADENINGS IN COVERAGE

Existing Endorsements

CG 22 60 12 07 - Limitation Of Coverage - Real Estate Operations
When this revised endorsement is attached to your policy, coverage is provided for injury and damage arising out of the ownership, operation, maintenance or use of premises listed **or shown** by you. The addition of the words "or shown" accommodates real estate agents who provide real estate professional services for properties shown but not listed by such agents.

CG 22 93 12 07 - Lawn Care Services Coverage
When this revised endorsement is attached to your policy, insureds who apply herbicides/pesticides on lawns under their regular care are now provided bodily injury and property damage coverage.

New Endorsements

CG 22 92 12 07 - Snow Plow Operations Coverage
When this endorsement is attached to your policy, coverage is provided for bodily injury and property damage arising out of snow plow operations performed by an auto.

CG 24 16 12 07 - Canoes Or Rowboats
When this endorsement is attached to your policy, coverage is provided for bodily injury and property damage arising out of the operation of any canoe or rowboat owned or used by or rented to you.

REDUCTIONS IN COVERAGE

Existing Endorsements

CG 21 47 12 07 - Employment-related Practices Exclusion (For Use With Commercial General Liability Coverage Forms)

CG 29 51 12 07 - Employment-related Practices Exclusion (For Use With The Owners And Contractors Protective Liability And Pollution Liability Coverage Forms)

The Employment-related Practices Exclusion is revised to reinforce that, when these endorsements are attached to your policy, coverage is not provided for any injury to a person associated with the employment of that person, whether it occurs before employment, during employment or after employment of that person. Additionally, the exclusion is revised to reinforce that coverage does not apply for injury to a person caused by the malicious prosecution of that person.

While these changes are each a reinforcement of coverage intent, they may result in a decrease in coverage in jurisdictions where courts have ruled the exclusion to be inapplicable in employment-related malicious prosecution claims and/or post-employment claims. For that reason, out of caution, we are listing it as a decrease.

New Endorsements

CG 21 97 12 07 - Abuse Or Molestation Exclusion - Specified Professional Services

When this endorsement is attached to your policy, coverage is not provided for injury or damage arising out of the actual or threatened abuse or molestation of a person while in the care, custody or control of any insured, during the rendering of the specified professional service.

CG 21 98 12 07 - Total Pollution Exclusion Endorsement (For Use With The Products/Completed Operations Coverage Forms)

When this endorsement is attached to your policy, coverage is not provided for bodily injury or property damage (including any loss, cost or expense) arising out of any pollution exposure.

GENERAL LIABILITY

NOTICE TO POLICYHOLDERS

REVISIONS TO ADDITIONAL INSURED - VENDORS

This Notice does not form a part of your insurance contract. The Notice is designed to alert you to coverage changes in several additional insured endorsements in this policy. If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) apply. Please read your policy, and the endorsements attached to your policy, carefully.

This notice contains a brief synopsis of the revisions to endorsement **CG 20 15 07 04 - Additional Insured - Vendors**

When this endorsement is attached to your policy, there is NO coverage for an additional insured vendor for bodily injury or property damage arising out of the sole negligence of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf, unless the bodily injury or property damage is caused by:

1. Repackaging solely for the purpose of inspection, demonstration, testing or the substitution of parts under instruction from you, and then repackaged in the original container; or

2. Inspections, adjustments, tests or servicing that the vendor has agreed to make or normally undertake to make in the usual course of business, in connection with the distribution or sale of the products.

This may be a reduction in coverage in states where you are contractually permitted to hold harmless an additional insured for that additional insured's sole negligence or in states where courts have enabled coverage for the sole negligence of the additional insured.

POLICY NUMBER: GL 721-90-84

IL 00 17 11 98

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
   a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
   b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys

1. We have the right to:
   a. Make inspections and surveys at any time;
   b. Give you reports on the conditions we find; and
   c. Recommend changes.
2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
   a. Are safe or healthful; or
   b. Comply with laws, regulations, codes or standards.
3. Paragraphs **1.** and **2.** of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
4. Paragraph **2.** of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

POLICY NUMBER: GL 721-90-84

COMMERCIAL GENERAL LIABILITY
CG 00 01 12 07

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** - Definitions.

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of rea-

sonable force to protect persons or property.

b. **Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. **Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. **Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. **Employer's Liability**

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. **Pollution**

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under

the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or

(b) the operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs **(1)**, **(3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** - Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3)**, **(4)**, **(5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph **(6)** of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. **Personal And Advertising Injury**

"Bodily injury" arising out of "personal and advertising injury".

p. **Electronic Data**

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. **Distribution Of Material In Violation Of Statutes**

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** - Limits Of Insurance.

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. **Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** - Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. **Exclusions**

This insurance does not apply to:

a. **Knowing Violation Of Rights Of Another**

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. **Material Published With Knowledge Of Falsity**

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. **Material Published Prior To Policy Period**

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. **Criminal Acts**

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. **Contractual Liability**

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. **Breach Of Contract**

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. **Quality Or Performance Of Goods - Failure To Conform To Statements**

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. **Wrong Description Of Prices**

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. **Infringement Of Copyright, Patent, Trademark Or Trade Secret**

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. **Insureds In Media And Internet Type Businesses**

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of websites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a.**, b. and c. of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. **Electronic Chatrooms Or Bulletin Boards**

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. **Unauthorized Use Of Another's Name Or Product**

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. **Pollution**

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. **Pollution-Related**

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. **War**

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. **Distribution Of Material In Violation Of Statutes**

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or

(3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

COVERAGE C MEDICAL PAYMENTS

1. **Insuring Agreement**

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. **Exclusions**

We will not pay expenses for "bodily injury":

a. **Any Insured**

To any insured, except "volunteer workers".

b. **Hired Person**

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. **Injury On Normally Occupied Premises**

To a person injured on that part of premises you own or rent that the person normally occupies.

d. **Workers Compensation And Similar Laws**

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. **Athletics Activities**

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. **Products-Completed Operations Hazard**

Included within the "products-completed operations hazard".

g. **Coverage A Exclusions**

Excluded under Coverage **A**.

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** - Coverage **A** - Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by,

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III - LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C**;

b. Damages under Coverage **A**, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage **B**.

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

a. Damages under Coverage **A**; and

b. Medical expenses under Coverage **C**

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. **Bankruptcy**

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. **Duties In The Event Of Occurrence, Offense, Claim Or Suit**

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any de-

mands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. **Primary Insurance**

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. **Excess Insurance**

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** - Coverage **A** - Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. **Method Of Sharing**

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total ap-

plicable limits of insurance of all insurers.

5. **Premium Audit**
   a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
   b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
   c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.
6. **Representations**

   By accepting this policy, you agree:
   a. The statements in the Declarations are accurate and complete;
   b. Those statements are based upon representations you made to us; and
   c. We have issued this policy in reliance upon your representations.
7. **Separation Of Insureds**

   Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:
   a. As if each Named Insured were the only Named Insured; and
   b. Separately to each insured against whom claim is made or "suit" is brought.
8. **Transfer Of Rights Of Recovery Against Others To Us**

   If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.
9. **When We Do Not Renew**

   If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

   If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
   a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
   b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.
2. "Auto" means:
   a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
   b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

   However, "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
   a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
   b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or
   c. All other parts of the world if the injury or damage arises out of:
      (1) Goods or products made or sold by you in the territory described in Paragraph **a.** above;
      (2) The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or
      (3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

   provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

   a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

   b. A sidetrack agreement;

   c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

   d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

   e. An elevator maintenance agreement;

   f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

      Paragraph f. does not include that part of any contract or agreement:

      (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

      (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

         (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

         (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

      (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

   a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

   b. While it is in or on an aircraft, watercraft or "auto"; or

   c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

   but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

   a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

   b. Vehicles maintained for use solely on or next to premises you own or rent;

   c. Vehicles that travel on crawler treads;

   d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

      (1) Power cranes, shovels, loaders, diggers or drills; or

      (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

   e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

      (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:
    a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
    b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.
21. "Your product":
    a. Means:
        (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
            (a) You;
            (b) Others trading under your name; or
            (c) A person or organization whose business or assets you have acquired; and
        (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
    b. Includes:
        (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
        (2) The providing of or failure to provide warnings or instructions.
    c. Does not include vending machines or other property rented to or located for the use of others but not sold.
22. "Your work":
    a. Means:
        (1) Work or operations performed by you or on your behalf; and
        (2) Materials, parts or equipment furnished in connection with such work or operations.
    b. Includes:
        (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
        (2) The providing of or failure to provide warnings or instructions.

POLICY NUMBER: GL 721-90-84

COMMERCIAL GENERAL LIABILITY
CG 02 24 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EARLIER NOTICE OF CANCELLATION PROVIDED BY US

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Number of Days' Notice: 90

(If no entry appears above, information required to complete this Schedule will be shown in the Declarations as applicable to this endorsement.)

For any statutorily permitted reason other than nonpayment of premium, the number of days required for notice of cancellation, as provided in paragraph 2. of either the CANCELLATION Common Policy Condition or as amended by an applicable state cancellation endorsement, is increased to the number of days shown in the Schedule above.

POLICY NUMBER: GL 721-90-84

COMMERCIAL GENERAL LIABILITY
CG 20 15 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - VENDORS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s) (Vendor)
BLANKET AS REQUIRED BY WRITTEN CONTRACT
Your Products
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Section II - Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) (referred to below as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions:

1. The insurance afforded the vendor does not apply to:
   a. "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement;
   b. Any express warranty unauthorized by you;
   c. Any physical or chemical change in the product made intentionally by the vendor;
   d. Repackaging, except when unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instructions from the manufacturer, and then repackaged in the original container;
   e. Any failure to make such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products;
   f. Demonstration, installation, servicing or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product;
   g. Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor; or
   h. "Bodily injury" or "property damage" arising out of the sole negligence of the vendor for its own acts omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:
      (1) The exceptions contained in Subparagraphs d or f.; or
      (2) Such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.
2. This insurance does not apply to any insured person or organization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products.

POLICY NUMBER: GL 721-90-84

COMMERCIAL GENERAL LIABILITY
CG 21 47 12 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph **2., Exclusions** of Section **I - Coverage A - Bodily Injury And Property Damage Liability:**

This insurance does not apply to:

"Bodily injury" to:

(1) A person arising out of any:

(a) Refusal to employ that person;

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs **(a)**, **(b)**, or **(c)** above is directed.

This exclusion applies:

(1) Whether the injury-causing event described in Paragraphs **(a)**, **(b)** or **(c)** above occurs before employment, during employment or after employment of that person;

(2) Whether the insured may be liable as an employer or in any other capacity; and

(3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. The following exclusion is added to Paragraph **2., Exclusions** of Section **I - Coverage B - Personal And Advertising Injury Liability:**

This insurance does not apply to:

"Personal and advertising injury" to:

(1) A person arising out of any:

(a) Refusal to employ that person;

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs **(a)**, **(b)**, or **(c)** above is directed.

This exclusion applies:

(1) Whether the injury-causing event described in Paragraphs **(a)**, **(b)** or **(c)** above occurs before employment, during employment or after employment of that person;

(2) Whether the insured may be liable as an employer or in any other capacity; and

(3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

POLICY NUMBER: GL 721-90-84

COMMERCIAL GENERAL LIABILITY
CG 24 04 10 93

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization:
WHERE REQUIRED BY WRITTEN CONTRACT

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

The TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US Condition (Section IV - COMMERCIAL GENERAL LIABILITY CONDITIONS) is amended by the addition of the following:

We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your ongoing operations or "your work" done under a contract with that person or organization and included in the "products-completed operations hazard". This waiver applies only to the person or organization shown in the Schedule above.

POLICY NUMBER: GL 721-90-84

COMMERCIAL GENERAL LIABILITY
CG 32 34 01 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CALIFORNIA CHANGES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
ELECTRONIC DATA LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCT WITHDRAWAL COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

The term "spouse" is replaced by the following:

Spouse or registered domestic partner under California law.

POLICY NUMBER: GL 721-90-84 IL 00 21 07 02

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(Broad Form)

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
PROFESSIONAL LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:
   - **A.** Under any Liability Coverage, to "bodily injury" or "property damage":
     - **(1)** With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
     - **(2)** Resulting from the "hazardous properties" of "nuclear material" and with respect to which **(a)** any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or **(b)** the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
   - **B.** Under any Medical Payments coverage, to expenses incurred with respect to "bodily in jury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.
   - **C.** Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:
     - **(1)** The "nuclear material" **(a)** is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or **(b)** has been discharged or dispersed therefrom;
     - **(2)** The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or
     - **(3)** The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion **(3)** applies only to "property damage" to such "nuclear facility" and any property thereat.
2. As used in this endorsement:

   "Hazardous properties" includes radioactive, toxic or explosive properties.

   "Nuclear material" means "source material", "Special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material **(a)** containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and **(b)** resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

(a) Any "nuclear reactor";

(b) Any equipment or device designed or used for **(1)** separating the isotopes of uranium or plutonium, **(2)** processing or utilizing "spent fuel", or **(3)** handling, processing or packaging "waste";

(c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

(d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

POLICY NUMBER: GL 721-90-84

IL 02 70 09 07

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CALIFORNIA CHANGES - CANCELLATION AND NONRENEWAL

This endorsement modifies insurance provided under the following:

CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
CRIME AND FIDELITY COVERAGE PART
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
EQUIPMENT BREAKDOWN COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
PROFESSIONAL LIABILITY COVERAGE PART

A. Paragraphs **2.** and **3.** of the **Cancellation** Common Policy Condition are replaced by the following:

2. All Policies In Effect For 60 Days Or Less

If this policy has been in effect for 60 days or less, and is not a renewal of a policy we have previously issued, we may cancel this policy by mailing or delivering to the first Named Insured at the mailing address shown in the policy and to the producer of record, advance written notice of cancellation, stating the reason for cancellation, at least:

a. 10 days before the effective date of cancellation if we cancel for:

(1) Nonpayment of premium; or

(2) Discovery of fraud by:

(a) Any insured or his or her representative in obtaining this insurance; or

(b) You or your representative in pursuing a claim under this policy.

b. 30 days before the effective date of cancellation if we cancel for any other reason.

3. All Policies In Effect For More Than 60 Days

a. If this policy has been in effect for more than 60 days, or is a renewal of a policy we issued, we may cancel this policy only upon the occurrence, after the effective date of the policy, of one or more of the following:

(1) Nonpayment of premium, including payment due on a prior policy we issued and due during the current policy term covering the same risks.

(2) Discovery of fraud or material misrepresentation by:

(a) Any insured or his or her representative in obtaining this insurance; or

(b) You or your representative in pursuing a claim under this policy.

(3) A judgment by a court or an administrative tribunal that you have violated a California or Federal law, having as one of its necessary elements an act which materially increases any of the risks insured against.

(4) Discovery of willful or grossly negligent acts or omissions, or of any violations of state laws or regulations establishing safety standards, by you or your representative, which materially increase any of the risks insured against.

(5) Failure by you or your representative to implement reasonable loss control requirements, agreed to by you as a condition of policy issuance, or which were conditions precedent to our use of a particular rate or rating plan, if that failure materially increases any of

the risks insured against.

(6) A determination by the Commissioner of Insurance that the:

(a) Loss of, or changes in, our reinsurance covering all or part of the risk would threaten our financial integrity or solvency; or

(b) Continuation of the policy coverage would:

(i) Place us in violation of California law or the laws of the state where we are domiciled; or

(ii) Threaten our solvency.

(7) A change by you or your representative in the activities or property of the commercial or industrial enterprise, which results in a materially added, increased or changed risk, unless the added, increased or changed risk is included in the policy.

b. We will mail or deliver advance written notice of cancellation, stating the reason for cancellation, to the first Named Insured, at the mailing address shown in the policy, and to the producer of record, at least:

(1) 10 days before the effective date of cancellation if we cancel for nonpayment of premium or discovery of fraud; or

(2) 30 days before the effective date of cancellation if we cancel for any other reason listed in Paragraph **3.a.**

B. The following provision is added to the **Cancellation** Common Policy Condition:

7. Residential Property

This provision applies to coverage on real property which is used predominantly for residential purposes and consisting of not more than four dwelling units, and to coverage on tenants' household personal property in a residential unit, if such coverage is written under one of the following:

Commercial Property Coverage Part

Farm Coverage Part - Farm Property - Farm Dwellings, Appurtenant Structures And Household Personal Property Coverage Form

a. If such coverage has been in effect for 60 days or less, and is not a renewal of coverage we previously issued, we may cancel this coverage for any reason, except as provided in **b.** and **c.** below.

b. We may not cancel this policy solely because the first Named Insured has:

(1) Accepted an offer of earthquake coverage; or

(2) Cancelled or did not renew a policy issued by the California Earthquake Authority (CEA) that included an earthquake policy premium surcharge.

However, we shall cancel this policy if the first Named Insured has accepted a new or renewal policy issued by the CEA that includes an earthquake policy premium surcharge but fails to pay the earthquake policy premium surcharge authorized by the CEA.

c. We may not cancel such coverage solely because corrosive soil conditions exist on the premises. This Restriction **(c.)** applies only if coverage is subject to one of the following, which exclude loss or damage caused by or resulting from corrosive soil conditions:

(1) Capital Assets Program Coverage Form (Output Policy);

(2) Commercial Property Coverage Part - Causes Of Loss - Special Form; or

(3) Farm Coverage Part - Causes Of Loss Form - Farm Property, Paragraph **D.** Covered Causes Of Loss - Special.

C. The following is added and supersedes any provisions to the contrary:

NONRENEWAL

1. Subject to the provisions of Paragraphs **C.2.** and **C.3.** below, if we elect not to renew this policy, we will mail or deliver written notice stating the reason for nonrenewal to the first Named Insured shown in the Declarations and to the producer of record, at least 60 days, but not more than 120 days, before the expiration or anniversary date.

We will mail or deliver our notice to the first Named Insured, and to the producer of record, at the mailing address shown in the policy.

2. Residential Property

This provision applies to coverage on real property used predominantly for residential purposes and consisting of not more than four dwelling units, and to coverage on tenants' household property contained in a residential unit, if such coverage is written under one of the following:

Capital Assets Program (Output Policy) Coverage Part

Commercial Property Coverage Part

Farm Coverage Part - Farm Property - Farm Dwellings, Appurtenant Structures And Household Personal Property Coverage Form

a. We may elect not to renew such coverage for any reason, except as provided in **b.**, **c.** and **d.** below:

b. We will not refuse to renew such coverage solely because the first Named Insured has accepted an offer of earthquake coverage.

However, the following applies only to insurers who are associate participating insurers as established by Cal. Ins. Code Section 10089.16. We may elect not to renew such coverage after the first Named Insured has accepted an offer of earthquake coverage, if one or more of the following reasons applies:

(1) The nonrenewal is based on sound underwriting principles that relate to the coverages provided by this policy and that are consistent with the approved rating plan and related documents filed with the Department of Insurance as required by existing law;

(2) The Commissioner of Insurance finds that the exposure to potential losses will threaten our solvency or place us in a hazardous condition. A hazardous condition includes, but is not limited to, a condition in which we make claims payments for losses resulting from an earthquake that occurred within the preceding two years and that required a reduction in policyholder surplus of at least 25% for payment of those claims; or

(3) We have:

(a) Lost or experienced a substantial reduction in the availability or scope of reinsurance coverage; or

(b) Experienced a substantial increase in the premium charged for reinsurance coverage of our residential property insurance policies; and

the Commissioner has approved a plan for the nonrenewals that is fair and equitable, and that is responsive to the changes in our reinsurance position.

c. We will not refuse to renew such coverage solely because the first Named Insured has cancelled or did not renew a policy, issued by the California Earthquake Authority that included an earthquake policy premium surcharge.

d. We will not refuse to renew such coverage solely because corrosive soil conditions exist on the premises. This Restriction (d.) applies only if coverage is subject to one of the following, which exclude loss or damage caused by or resulting from corrosive soil conditions:

(1) Capital Assets Program Coverage Form (Output Policy);

(2) Commercial Property Coverage Part - Causes Of Loss - Special Form; or

(3) Farm Coverage Part - Causes Of Loss Form - Farm Property, Paragraph **D.** Covered Causes Of Loss - Special.

3. We are not required to send notice of nonrenewal in the following situations:

a. If the transfer or renewal of a policy, without any changes in terms, conditions, or rates, is between us and a member of our insurance group.

b. If the policy has been extended for 90 days or less, provided that notice has been given in accordance with Paragraph **C.1.**

c. If you have obtained replacement coverage, or if the first Named Insured has agreed, in writing, within 60 days of the termination of the policy, to obtain that coverage.

d. If the policy is for a period of no more than 60 days and you are notified at the time of issuance that it will not be renewed.

e. If the first Named Insured requests a change in the terms or conditions or risks covered by the policy within 60 days of the end of the policy period.

f. If we have made a written offer to the first Named Insured, in accordance with the timeframes shown in Paragraph **C.1.**, to renew the policy under changed terms or conditions or at an increased premium rate, when the increase exceeds 25%.

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY, PLEASE READ CAREFULLY

TOTAL LEAD EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL UMBRELLA LIABILITY

This insurance does not apply to any "bodily injury", "property damage", "personal injury", or "advertising injury", or any other loss, cost or expense arising out of the presence, ingestion, inhalation, or absorption of or exposure to lead in any form or products containing lead.

Lawrence J. Sweeney

AUTHORIZED REPRESENTATIVE

58332 (7/93)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BROAD FORM NAMED INSURED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
BUSINESS AUTO COVERAGE FORM
TRUCKERS COVERAGE FORM

Policy Declarations, "Named Insured" is revised to include:

"Named Insured" means the person or organization first named as the Named Insured on the Declarations Page of this policy (the "First Named Insured"). Named Insured also includes (1) any other person or organization named as a Named Insured on the Declarations Page; (2) any subsidiary, associated, affiliated, allied or acquired company or corporation (including subsidiaries thereof) of which any insured named as the Named Insured on the Declarations Page has more than 50% ownership interest in or exercises management or financial control over at the inception date of this policy, provided such subsidiary, associated, affiliated, allied or acquired company or corporation and their operations have been declared to us prior to the inception date of this policy.

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

61944 (2/95)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UNINTENTIONAL ERRORS AND OMISSIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section IV - Commercial General Liability Conditions, 6. - Representations is amended by adding:

d. The unintentional failure by you or any Insured to provide accurate and complete representations as of the inception of the policy will not prejudice the coverages afforded by this policy.

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

62132 (3/95)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NONOWNED WATERCRAFT ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section I - Coverages, Coverage A. - Bodily Injury and Property Damage Liability, 2. - Exclusions, g. - Aircraft, Auto or Watercraft, (2), is amended to read:

(2) A watercraft you do not own that is:

(a) Less than 50 feet long; and

(b) Not being used to carry persons or property for a charge.

However, this exception does not apply to watercraft you do not own that is used in any pre-arranged race or speed contest.

Section II - Who is an Insured, is amended to add following the last unmarked paragraph:

No person is an insured with respect to any watercraft owned in whole or in part by such person or by a member of his household.

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ASBESTOS AND SILICA EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section I. - Coverages, Coverage A.- Bodily Injury and Property Damage Liability, 2. - Exclusions, is amended to add the following exclusions:

Q. Asbestos

"Bodily injury" or "Property damage" arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos products, asbestos fibers or asbestos dust, or to any obligation of the insured to indemnify any party because of "bodily injury" or "property damage" arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos products, asbestos fibers or asbestos dust.

R. Silica

"Bodily injury" or "property damage" or any other loss, cost or expense arising out of the presence, ingestion, inhalation or absorption of or exposure to silica products, silica fibers, silica dust or silica in any form, or to any obligation of the insured to indemnify any party because of "bodily injury" or "property damage" arising out of the presence, ingestion, inhalation or absorption of or exposure to silica products, silica fibers, silica dust or silica in any form.

Section I. - Coverages, Coverage B.- Personal and Advertising Injury Liability, 2. - Exclusions is amended to add the following exclusions:

P. Asbestos

"Personal and Advertising Injury" arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos products, asbestos fibers or asbestos dust, or to any obligation of the insured to indemnify any party because of "personal and advertising injury" arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos products, asbestos fibers or asbestos dust.

Q. Silica

"Personal and Advertising Injury" or any other loss, cost or expense arising out of the presence, ingestion, inhalation or absorption of or exposure to silica products, silica fibers, silica dust or silica in any form, or to any obligation of the insured to indemnify any party because of "personal and advertising injury" arising out of the presence, ingestion, inhalation or absorption of or exposure to silica products, silica fibers, silica dust or silica in any form.

All other terms, conditions and exclusions of the policy shall remain unchanged.

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

NOTICE: EXCEPT TO SUCH EXTENT AS MAY OTHERWISE BE PROVIDED HEREIN, THE COVERAGE OF THIS ENDORSEMENT IS GENERALLY LIMITED TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED IN WRITING TO THE INSURER PURSUANT TO THE TERMS HEREIN. PLEASE READ THIS ENDORSEMENT CAREFULLY AND DISCUSS THE COVERAGE THEREUNDER WITH YOUR INSURANCE AGENT OR BROKER.

NOTICE: THE LIMIT OF INSURANCE AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED BY US FOR LEGAL DEFENSE.

EMPLOYEE BENEFITS LIABILITY INSURANCE
PROVIDES CLAIMS-MADE COVERAGE - Please read carefully

ADDITIONAL DECLARATIONS

ITEMS		
1.	**LIMIT OF INSURANCE FOR EMPLOYEE BENEFITS LIABILITY INSURANCE** Any payments made pursuant to this endorsement will be subject to, and erode the General Aggregate Limit of the policy to which this endorsement is attached. $ 1,000,000 , Each Wrongful Act or Series Of Related Wrongful Acts Limit	
2.	**SELF INSURED RETENTION:** ☐ (Applicable, if checked)	$, Each Wrongful act or series of related Wrongful acts. If applicable, then the insurance provided by this endorsement will only apply in excess of the listed Self Insured Retention (hereinafter "Retained Limit"). Additionally, we shall have the right, but not the duty, to defend any suit against the Insured seeking damages on account of a Wrongful act or series of related Wrongful acts.
3.	**DEDUCTIBLE:** ☒ (Applicable, if checked)	$ 1,000, Each Wrongful act or series of related Wrongful acts. If applicable, then the Deductible is subject to the terms and conditions of the Deductible Endorsement - Form A (Form No.) that is attached to the policy under Endorsement No. .
4.	**RETROACTIVE DATE:**	05/01/1998
5.	**ESTIMATED ANNUAL PREMIUM:**	$ INCLUDED

A. For the purpose of coverage provided by this endorsement only, **SECTION I - COVERAGES,** is amended with the addition of the following:

COVERAGE - EMPLOYEE BENEFITS LIABILITY

1. Insuring Agreement

   a. We will pay the Insured for those sums which the Insured shall become legally obligated to pay as damages because of any "claim" made against the Insured due to any "Wrongful act" of the Insured, or any other person for whose acts the Insured is legally liable, in the "administration" of the "employee benefit program" of the Insured.

      Except with respect to a Retained Limit as indicated in Item 2 of the Additional Declarations, we have the right and duty to defend any suit against the Insured seeking damages on account of such negligent act, error or omission, even if any of the allegations of the suit are groundless, false or fraudulent, and we may make such investigation and settlement of any "claim" or suit as we deem expedient. However, we will have no duty to defend the insured against any "suit" seeking damages to which this insurance does not apply.
      But:

      1) The amount we will pay for damages is limited as described in Section D. 1. of this endorsement headed Limits of Insurance;
      2) the amounts we pay for "allocated loss adjustment expenses" will reduce the Limit of Insurance available, as provided under Section D. 1. of this endorsement headed Limits of Insurance; and
      3) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments, settlements, or "allocated loss adjustment expenses".

      No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Section C. of this endorsement.

   b. The insurance provided by this endorsement applies to damages only if:

      1) the damages did not occur before the Retroactive Date, if any, shown in Item 4. of the Additional Declarations or after the end of the policy period; and
      2) the "claim" for damages covered by this endorsement is first made against the Insured, in accordance with Paragraph c. below, during the policy period or an Extended Reporting Period we provide under Section E., 2. Optional Extended Reporting Period.

   c. A "claim" seeking damages will be deemed to have been made at the earlier of the following times:

      1) When notice of such "claim" is received and recorded by any insured or by us, whichever comes first; or
      2) When we make settlement in accordance with Paragraph 1.a. above

      A "claim" received and recorded by the insured within 60 days after the end of the policy period will be considered to have been received within the policy period, if no subsequent policy is available to cover the "claim".

   d. All "claims" for damages made by an "employee" because of any "Wrongful act" or series of related "Wrongful acts", including damages claimed by such "employee's" dependents and beneficiaries, will be deemed to have been made at the time the first of those "claims" is made against any insured.

2. Exclusions

   This endorsement does not apply to:

      a. Dishonest, Fraudulent, Criminal Or Malicious Act.

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

b. Bodily Injury, Property Damage, Or Personal And Advertising Injury

"Bodily injury", "property damage" or "personal and advertising injury".

c. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

d. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the "employee benefit program".

e. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any "claim" based upon:

1) Failure of any investment to perform;
2) Errors in providing information on past performance of investment vehicles; or
3) Advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the "employee benefit program"

f. Workers' Compensation And Similar Laws

Any "claim" arising out of your failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits law or any similar law.

g. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

h. Available Benefits

Any "claim" for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

i. Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the internal Revenue Code or any similar state or local law.

j. Employment-Related Practices

Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

k. Failure to Maintain Insurance or Bond

Any "claim" made against the Insured based on or attributable to any failure or omission on the part of the Insured to effect and maintain insurance or bonding for Plan Property or Assets.

B. For purposes of the coverage provided by this endorsement only, **Section II - Who Is An Insured** is deleted in its entirety and replaced with the following:

Insured: as used in this endorsement, means the Named Insured, provided that (a) if the Named Insured is designated as an individual, the insurance applies only to the conduct of a business of which he is the sole proprietor and (b) the unqualified word Insured also includes the following:

A. If the Named Insured is or includes a partnership or joint venture, any partner or member thereof but only with respect to his liability as such;
B. Any executive officer, director or stockholder of the Named Insured while acting within the scope of his duties as such;
C. Any employee, provided such employee is authorized to act in the "administration" of the "Employee Benefits Program" of the Named Insured.

C. For the purposes of the coverage provided by this endorsement only, **SECTION I - SUPPLEMENTARY PAYMENTS - COVERAGES A AND B**, is deleted in its entirety and replaced with the following:

ALLOCATED LOSS ADJUSTMENT EXPENSES - EMPLOYEE BENEFITS LIABILITY COVERAGE

a. If a Retention Amount is shown in Item 2. of the Additional Declarations above, you are responsible for all "Allocated Loss Adjustment Expenses" we pay as Supplementary Payments, according to the election indicated by an "X" below. If no election is indicated, election i. shall apply.

☐ i. All "Allocated Loss Adjustment Expenses" up to the Retained Limit. However, the most you are responsible for with respect to damages and "Allocated Loss Adjustment Expenses" combined shall not exceed the Retained Limit.

☐ ii. All "Allocated Loss Adjustment Expenses".

☒ iii. A part of "Allocated Loss Adjustment Expenses". That part will be calculated by dividing the smaller of the Retained Limit or the damages you pay by the damages we pay. If we pay no damages, you are responsible for all "Allocated Loss Adjustment Expenses" up to the applicable Retained Limit and 100 % of all remaining "Allocated Loss Adjustment Expenses".

☐ iv. No "Allocated Loss Adjustment Expenses".

b. If a Deductible Amount is shown in Item 3. of the Additional Declarations above, **you must reimburse us** for all "Allocated Loss Adjustment Expense" we pay as Supplementary Payments, according to the election indicated in the Deductible Endorsement that is referred to in Item 3 of the Additional Declarations.

c. With regard to either a Retained Limit or a Deductible:

(1) your duty to pay for "Allocated Loss Adjustment Expenses" applies separately to each "Wrongful act" or series of related "Wrongful acts" committed in the "administration" of the "employee benefit program" of the Insured; and
(2) All payments made by us for "Allocated Loss Adjustment Expenses" will be within the Limits of Insurance as provided under Section D. 1. of this endorsement headed Limits of Insurance.

D. For the purposes of the coverage provided by this endorsement, **Section III - Limits Of Insurance** is revised as follows:

1. Limits Of Insurance

a. The Limits of Insurance shown in the Additional Declarations and the rules below fix the most we will pay regardless of the number of:
   1) Insureds;
   2) "Claims" made or "suits" brought;
   3) Persons or organizations making "claims" or bringing "suits";
   4) "Wrongful act" or series of related "Wrongful acts"; or
   5) Benefits included in your "employee benefit program".

b. The General Aggregate Limit as described in **Section III - Limits Of Insurance, 2.** is amended to include the following paragraph:

   d. All damages and all associated "allocated loss adjustment expenses" that we pay because of a "Wrongful act" or series of related "Wrongful acts" committed in the "administration" of the "employee benefit program" of the Insured.

c. Subject to the General Aggregate Limit, the Each Wrongful Act or Series Of Related Wrongful Acts Limit as stated in Item 1. of the Additional Declarations is the most we will pay for all damages and all associated "allocated loss adjustment expenses" due to any one "Wrongful act" or series of related "Wrongful acts" committed in the "administration" of the "employee benefit program" of the Insured.

However, the amount paid under this endorsement shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the "employee benefit program".

The Limits of Insurance of this endorsement apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations of the policy to which this endorsement is attached, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits Of Insurance.

2. Retention Amount

If a Retention Amount is shown in Item 2. of the Additional Declarations above, the Limits of Insurance for the Coverage provided by this endorsement will apply in excess of the Retained Limit as stated in Item 2. of the Additional Declarations.

Subject to additional "Allocated Loss Adjustment Expenses", the Retained Limit is the most an insured will pay for all damages due to any one "Wrongful act" or series of related "Wrongful acts" committed in the "administration" of the "employee benefit program" of the Insured.

3. Deductible

If a Deductible Amount is shown in Item 3. of the Additional Declarations above, **you must reimburse us** for all damages due to any one "Wrongful act" or series of related "Wrongful acts" committed in the "administration" of the "employee benefit program" of the Insured and any "Allocated Loss Adjustment Expense" we pay as Supplementary Payments, according to the terms and conditions as provided for in the Deductible Endorsement that is referred to in Item 3 of the Additional Declarations.

E. For the purpose of coverage provided by this endorsement only, **SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS,** is amended with the addition of the following conditions:

1. PREMIUM

The premium stated in the ADDITIONAL DECLARATIONS is an estimated premium only. Upon termination of each annual period of this endorsement the Insured, on request, will furnish us a statement of the total number of employees at the end of the period. The earned premium shall be computed on the average of the number of employees at the end of the coverage period and that stated in the ADDITIONAL DECLARATIONS. If the earned premium thus computed exceeds the estimated premium paid, the Insured shall pay the excess to us; if less, we shall return to the Insured the unearned portion paid by such Insured.

2. OPTIONAL EXTENDED REPORTING ENDORSEMENT

The coverage under the Employee Benefits Liability Endorsement may end because one of us chooses to cancel it or not renew it. If this is not the result of non-payment of the premium, then you have the right to purchase an Extended Reporting Period Endorsement. The Extended Reporting Period does not extend the policy period or change the scope of coverage provided. It only extends the time to report covered claims that were first committed before the end of the policy period but not before the Retroactive Date, if any, shown in the Schedule. The "claim" must first be made against an Insured and reported to us within 3 years after the Employee Benefits Liability Endorsement ends and while the reporting endorsement is in effect.

To obtain this reporting endorsement you must request it in writing and pay the additional premium within 30 days after this agreement ends. If we don't receive written notice and payment within this period, the Extended Reporting Period will not go into effect. Additionally, you may not exercise this right at a later date.

We'll sell you this endorsement for the additional premium. This additional premium will not exceed 200% of the annual premium for the Employee Benefits Liability Endorsement. Once you pay the premium we can't cancel the endorsement. We will determine the additional premium taking into account the following:

a. The exposures insured;
b. Previous types and amounts of insurance;
c. Limits of Liability available under the Employee Benefit Liability Insurance for future payment of damages; and
d. Other related factors.

The Extended Reporting Period endorsement applicable to this coverage shall set forth the terms, not inconsistent with this Section, applicable to the Extended Reporting Period, including a provision to the effect that the insurance afforded for "claims" first received during such period is excess over any other valid and collectible insurance available under policies in force after the Extended Reporting Period starts.

The optional Extended Reporting Endorsement does not reinstate or increase the Limits of Liability applicable to any "claim" to which The Employee Benefits Liability Endorsement applies.

3. CONFORMITY WITH STATUTE

Terms of this endorsement which are in conflict with the statute of the state wherein this endorsement is issued are hereby amended to conform to such statutes.

F. Special Conditions relating to the Retained Limit (if applicable)

1. With respect to the coverage provided by this endorsement only, Section IV - Commercial General Liability Conditions, 2. - Duties in the Event of Occurrence, Offense, "claim" or Suit, a. is amended to read:

A. Periodic Notices: on a ANNUAL basis, you must provide us with a written summary (loss run) of all "wrongful acts", "claims", or "suits" which have or may result in payments within the Retained Limit.

This written summary must show:

1. The date of the "wrongful act"; and
2. A description of the damage, and
3. The amount paid or reserved, including "allocated loss adjustment expense", resulting from the "wrongful act", "claim" or "suit".

B. Individual Notices of a "wrongful act": in addition to the Periodic Notices provided for in A. above, you must see to it that we are notified as soon as practicable of any "wrongful act" which may result in a "claim". Knowledge of a "wrongful act" by your agent, your servant, or your employee will not in itself constitute knowledge to you unless the Director of Risk Management (or one with similar or equivalent title) or his/her designee, at the address shown in the policy declarations, will have received such notice. To the extent possible notice should include how, when and where the "wrongful act" took place and the nature of any damage arising out of the "wrongful act". You must provide us with any and all additional information, material and/or data, subsequent to the original notice, as it becomes available.

2. Claims Administration

A. You will employ and pay, without any reimbursement from us, a firm acceptable to us for the purpose of providing claim services (Claims Administrator). In the event of cancellation, expiration or revision of the contract between you and the self-insurance service company, you will notify us within ten (10) days of the cancellation, expiration or revision.

B. Loss settlements made by you or the Claims Administrator will be within the terms, conditions and limits of the policy.

C. There will be no reduction of the Retained Limit because of payment of "claims" or "suits" arising from "claims" or "suits" for which coverage is not afforded to by the policy.

3. Bankruptcy

Your bankruptcy, insolvency, inability to pay, failure to pay, or refusal to pay the Retained Limit will not increase our obligations under the policy. In the event there is insurance, whether or not applicable to an "wrongful act", "claim" or "suit" within the Retained Limit, you will continue to be responsible for the full amount of the Retained Limit before the limits of insurance under this policy apply. In no case will we be required to pay the Retained Limit or any portion thereof. Our obligations will attach only when the entire amount of the Retained Limit has been paid and then only in excess of the Retained Limit and not in excess of the total limit of insurance adjusted for any reduction in the aggregate limit of our liability.

G. For the purpose of coverage provided by this endorsement only, **SECTION V - DEFINITIONS**, is amended with the addition of the following definitions:

1. "Administration": shall mean:
   A. Giving counsel to employees with respect to the Employee benefit program;
   B. Interpreting the Employee benefit program;
   C. Handling of records in connection with the Employee benefit program;
   D. Effective enrollment, termination or cancellation of employees under the "Employee benefit program", provided all are acts which are authorized by the Named Insured.

2. "Allocated Loss Adjustment Expenses" means all fees for service of process and court costs and court expenses; pre- and post-judgment interest; attorneys' fees; cost of undercover operative and detective services; costs of employing experts; costs for legal transcripts, copies of any public records, and costs of depositions and court-reported or recorded statements; costs and expenses of subrogation; and any similar fee, cost or expense reasonably chargeable to the investigation, negotiation, settlement or defense of a loss or a "claim" or "suit" against you, or to the protection and perfection of your or our subrogation rights.

   "Allocated Loss Adjustment Expenses" shall not include our general overhead, the salary and employee benefits of any of our employees, nor the fees of any attorney who is our employee or under our permanent retainer; nor the fees of any attorney we retain to provide counsel to us about our obligations, if any, under any policy issued by us or our affiliated company(ies), with respect to a "claim" or "suit" against you.

3. "Cafeteria plans" means plans authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars.

4. "Claim" means any demand, or "suit", made by an "employee" or an "employee's" dependents and beneficiaries, for damages as the result of an act, error or omission.

5. "Employee benefit program": means a program providing some or all of the following benefits to "employees" of the Insured, whether provided through a cafeteria plan or otherwise:

   (a) group life insurance; group accident or health insurance; dental, vision and hearing plans; provided that no one other than an "employee" of the Insured may subscribe to such benefits and such benefits are made generally available to those "employees" of the Insured who satisfy the plan's eligibility requirements;
   (b) profit sharing plans, employee savings plans, pension plans, employee stock subscription plans, provided that no one other than an "employee" of the Insured may subscribe to such benefits and such benefits are made generally available to all "employees" of the Insured who are eligible under the plan for such benefits;
   (c) workmen's compensation, unemployment insurance, social security benefits, disability benefits;
   (d) Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies; and
   (e) Any other similar benefits designated in the Schedule or added thereto by endorsement.

6. "Wrongful act": means any actual or alleged negligent act, error or omission in the "administration" of the Employee Benefits Plan.

H. For the purpose of coverage provided by this endorsement only, Definitions 5. and 18. in **SECTION V - DEFINITIONS** are replaced by the following:

5. "Employee" means a person actively employed, formerly employed, on leave of absence or disabled, or retired. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

18. "Suit" means a civil proceeding in which damages because of an act, error or omission to which this insurance applies are alleged. "Suit" includes:

   a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

All other terms, exclusions, and conditions of this policy remain unchanged.

Authorized Representative or Countersignature (in States Where Applicable)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF DUTIES IN THE EVENT OF OCCURRENCE, OFFENSE, CLAIM OR SUIT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section IV - Commercial General Liability Conditions, 2. - Duties in the Event of Occurrence, Offense, Claim or Suit, a. is hereby deleted and replaced with the following:

a. You must see to it that we are notified as soon as practicable on any "occurrence" or an offense which may result in a claim. Knowledge of an "occurrence" or an offense by your agent, your servant, or your employee will not in itself constitute knowledge to you unless the Director of Risk Management (or one with similar or equivalent title) or his/her designee, at the address shown in the policy declarations, will have receive such notice. To the extent possible notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED - WHERE REQUIRED UNDER CONTRACT OR AGREEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION II - WHO IS AN INSURED, is amended to include as an additional insured:

Any person or organization to whom you become obligated to include as an additional insured under this policy, as a result of any contract or agreement you enter into which requires you to furnish insurance to that person or organization of the type provided by this policy, but only with respect to liability arising out of your operations or premises owned by or rented to you.
However, the insurance provided will not exceed the lesser of:

- The coverage and/or limits of this policy, or
- The coverage and/or limits required by said contract or agreement.

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

61712 (12/06)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXTENDED FIRE DAMAGE LIABILITY
(WATER DAMAGE)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section III - Limits of Insurance, 6. is amended to read:

6. Subject to 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to premises, while rented to you or temporarily occupied by you with permission of the owner, arising out of any one fire or out of water damage associated with attempts to extinguish any one fire.

Lawrence J. Sweeney

Authorized Representative or Countersignature (In States Where Applicable)

61945 (9/01)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT ENDORSEMENT - WHEN WE DO NOT RENEW

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section IV - Commercial General Liability Conditions, 9. - When We Do Not Renew is amended to read:

9. If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than NINETY (090) days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

Laurence J. Sweeney
AUTHORIZED REPRESENTATIVE

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

RADIOACTIVE MATTER EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section I. - Coverages, Coverage A.- Bodily Injury and Property Damage Liability, 2. - Exclusions, is amended to add:

Any liability for "bodily injury" or "property damage" arising out of the actual, alleged or threatened exposure of person(s) or property to any radioactive matter or any form of radiation.

Section I. - Coverages, Coverage B.- Personal and Advertising Liability, 2. - Exclusions, is amended to add:

Arising out of the actual, alleged or threatened exposure of person(s) or property to any radioactive matter or any form of radiation.

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

62898 (9/01)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FELLOW EMPLOYEE EXCLUSION DELETED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Section II - Who is an Insured, 2. a. (1) (a) is amended to read:

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company) or to your other "volunteer workers" while performing duties related to the conduct of your business.

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

64007 (04/05)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

INCIDENTAL MEDICAL MALPRACTICE LIABILITY COVERAGE

This endorsement modifies insurance provided under the following:

Commercial General Liability Coverage Form

Section V - DEFINITIONS - is amended to add:

"Incidental Medical Malpractice Injury" means "Bodily Injury" arising out of the rendering of or failure to render the following services:

a. medical, surgical, dental, x-ray or nursing service or treatment or the furnishing of food or beverages in connection therewith; or

b. the furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances.

Section II - WHO IS AN INSURED, 2. a. (1) (d) is deleted in its entirety and replaced with the following:

(d) Arising out of his or her providing or failing to provide professional health care services, except for "bodily injury" arising out of "Incidental Medical Malpractice Injury" by any physician, dentist, nurse or other medical practitioner employed or retained by you. However, the insurance provided hereunder to such persons will not apply to liability arising out of services performed outside of the scope of their duties as your "employees." Any series of continuous, repeated or related acts will be treated as the occurrence of a single negligent professional healthcare service.

The Coverage provided by this endorsement does not apply to you or any insured if you are engaged in the business or occupation of providing any of the services described in the definition of "Incidental Medical Malpractice Injury".

Laurence J. Sweeney
AUTHORIZED REPRESENTATIVE

65157 (4/96)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BODILY INJURY DEFINITION EXTENSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section V - Definitions, 3. - "Bodily injury" is amended to read:

3. "Bodily injury" means physical injury, sickness or disease, including death resulting from any of these; or the following when accompanied by physical injury, sickness or disease: mental anguish; shock; or emotional distress.

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDMENT OF OTHER INSURANCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section IV - Commercial General Liability Conditions, 4. - Other Insurance, b. - **Excess Insurance,** is amended to read:

b. Excess Insurance

This insurance is excess over any of the other insurance whether primary, excess, contingent or on any other basis:

(1) Unless such insurance is specifically purchased to apply as excess of this policy, or

(2) you are obligated by contract to provide primary insurance.

When this insurance is excess, we will have no duty under Coverage A or B to defend any claim or "suit" that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NEWLY ACQUIRED ENTITY COVERAGE EXTENDED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section II - Who is an Insured, 4. a. is amended to read:

4. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

   a. Coverage under this provision is afforded only until the 90TH day after you acquire or form the organization or the end of the policy period, whichever is earlier;

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

67266 (3/97)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITED JOINT VENTURE COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section II - Who is an Insured, Last unmarked paragraph is amended to read:

No person or organization, other than you, is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

Laurence J. Sweeney
AUTHORIZED REPRESENTATIVE

67446 (4/97)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

Policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

LIBERALIZATION CLAUSE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

If we revise or replace our standard policy form to provide more coverage without an additional premium charge, your policy will automatically provide the additional coverage as of the day revision is effective in your state.

Lawrence J. Sweeney
AUTHORIZED REPRESENTATIVE

71705 (9/98)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMPOSITE RATING PLAN PREMIUM ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM (CGL)
LIQUOR LIABILITY COVERAGE FORM (LL)
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE FORM (PCO)
BUSINESS AUTO COVERAGE FORM (BA)
GARAGE COVERAGE FORM (G)
TRUCKERS COVERAGE FORM (T)

The Class Code, Premium Basis, and Rate section of the Policy Declarations is changed to apply as follows:

The premium for this policy will be computed upon a composite basis as shown below in accordance with our rules, rates, rating plans, premiums and minimum premiums and the other policy terms.

SCHEDULE

Coverage (CGL, LL PCO, BA G or T)	Premium Type (S or NS)	Estimated Basis of Premium	Composite Rate(s)	Estimated Premium	Minimum Premium	Deposit Premium
CGL	NS	3,666,562	72.0000	$263,994		$263,994
CGL	NS	112.5 ACRES	2.2860	$257		$257
TRIA		3,666,562	.0072	$26,399		$26,399
			Totals:	$290,650		$290,650

The Composite Rate(s) shown above apply per 1,000 (a number such as 1, 10, 100, etc) of SQUARE FOOT (a basis of premium type defined on page 2 of this endorsement).

COMPOSITE RATING PLAN PREMIUM ENDORSEMENT

DEFINITIONS OF "BASIS OF PREMIUM TYPE"

(Subject to "Exceptions", if any, described below)

Admissions means the total number of persons, other than you, your partners and your employees, admitted during the policy period, to events conducted on premises you own, rent, lease, or otherwise control, whether on paid admission tickets, complimentary tickets or passes.

Cost means the total cost to you for all work performed for you during the policy period by independent contractors and their subcontractors at all levels, including the cost of all labor, materials, equipment and supplies furnished, used or delivered for use in the execution of such work, whether furnished by the owner, by contractors or subcontractors at any level, including, but not limited to, all fees, allowances, bonuses, and commissions either made, paid or due, as well as taxes other than taxes which you collect as a separate item and remit directly to a governmental division.

Gallons means the total number of gallons of liquid petroleum gases invoiced on any basis to any customer, whether or not the insured actually takes possession of such gasses.

Licensed Auto means the final average of the number of "autos" at policy inception and the number of "autos" at policy termination.

Miles means the total mileage driven during the policy period by all licensed "autos" owned by you.

Receipts means the gross amount of money you have charged others for work that you, your partners, your employees, your contractors and subcontractors at all levels have performed during the policy period, including taxes other than taxes which you collect as a separate item and remit directly to a governmental division.

Remuneration or **Payroll** means all of the money or the substitute for money earned during the policy period by you if you are the proprietor of the insured business, by all partners if you are a partnership or by all members if you are a Limited Liability Company, and by all your employees for their services to you during the policy period, subject to the following:

- ☐ Total Gross Remuneration or Payroll, without limitation; or
- ☐ Determined and limited in accordance with our Workers' Compensation Insurance Manual's rules respectively for the states in which you have employment; or
- ☐ Determined and limited in accordance with our General Liability Insurance Manual's rules respectively for the states in which you have employment.

Sales means the gross amount of money you or others trading in your name have charged for all goods and services you or they have sold or distributed during the policy period, including charges for delivery, installation, service and repair, and including taxes other than taxes which you or such others collect as a separate item and remit directly to a governmental division. Sales will include both foreign and domestic sales and sales by one named insured to another unless otherwise indicated by "x" below:

- ☐ Sales do NOT include foreign sales.
- ☐ Sales do NOT include sales by one named insured to another.

Units means the number of items of the types specified in this endorsement.

a. **Units that you hold for use in your business** shall mean half the sum of their number at the policy's inception and their number at its expiration or termination, (if terminated then prorated by the fraction of an annual period that the policy remained in effect).

b. **Units that you sell to others** whether for your own account or the account of another, shall mean the total number of such units that you sell during the policy term.

If Units is selected as the basis of premium, a Unit is a(n)

Other Basis of Premium Type (define here):

Other Definitions

Subject is a Premium Type which means that such premium is subject to adjustment under a retrospective rating plan described in an endorsement attached to the policy. "Subject" is signified on Page 1 by a Premium Type "S".

Non-Subject is a Premium Type which means that such is NOT subject to adjustment under a retrospective rating plan described in an endorsement attached to the policy. "Non-Subject" is signified on Page 1 by a Premium Type "NS".

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BLENDED POLLUTION EXCLUSION

This endorsement modifies Insurance provided under the following:

Commercial General Liability Coverage Form

SECTION 1 - COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 2., Exclusions, f., Pollution is deleted in its entirety and replaced by the following:

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily Injury" if sustained within a building and caused by smoke, fumes, vapor, or soot from equipment used to heat that building;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke, or fumes from a "hostile fire"; or

(iv) "Bodily injury" or "property damage" arising out of the actual discharge, dispersal, seepage, migration, release or escape of "pollutants" caused by fire, explosion, lightening, windstorm, vandalism or malicious mischief, collapse, riot and civil commotion, flood, automatic sprinkler leakage, earthquake, or collision or upset of "mobile equipment" or aircraft, which is sudden and accidental, provided that;

1. Such pollution commences during the term of this policy;

2. An insured discovers the commencement of such pollution no later than fourteen (14) calendar days after it commences; and

3. The insured reports the commencement of such pollution to us in writing no later than twenty (20) days following its discovery by any insured.

(v) "Bodily injury" or "property damage" arising out of the actual discharge, dispersal, seepage, migration, release or escape of "pollutants" that results directly from the violent breaking open or explosion of any plant, building, equipment other than underground tanks, underground piping, or underground equipment, for which the named insured has legal responsibility, either as owner or operator caused by perils other than those listed in (iv) above, provided that:

1. Such pollution commences during the term of this policy;
2. An insured discovers the commencement of such pollution no later than fourteen (14) calendar days after it commences; and
3. The insured reports the commencement of such pollution to us in writing no later than twenty (20) days following its discovery by any insured.

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal, electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor;

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire"; or

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects of "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PERSONAL INJURY DEFINITION EXTENSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Section V - Definitions, 14. - "Personal injury and Advertising injury" is amended to read:

14. "Personal injury and advertising injury" means injury, including consequential "bodily injury", humiliation, mental anguish or shock, arising out of one or more of the following offenses:

   a. False arrest, detention or imprisonment;
   b. Malicious prosecution;
   c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
   d. Oral or written publication of material, in any manner, that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
   e. Oral or written publication, in any manner, of material that violates a person's right of privacy.
   f. The use of another's advertising idea in your "advertisement"; or
   g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

74447 (9/01)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGUS EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

This insurance does not apply to "bodily injury", "property damage", "personal and advertising injury", or any other loss, cost or expense, including but not limited to, losses, costs or expenses related to, arising from or associated with clean-up, remediation, containment, removal or abatement, caused directly or indirectly, in whole or in part, by:

a. Any "fungus(i)", "mold(s)", mildew or yeast, or
b. Any "spore(s)" or toxins created or produced by or emanating from such "fungus(i)", "mold(s)", mildew or yeast, or
c. Any substance, vapor, gas, or other emission or organic or inorganic body or substance produced by or arising out of any "fungus(i)", "mold(s)", mildew or yeast, or
d. Any material, product, building component, building or structure, or any concentration of moisture, water or other liquid within such material, product, building component, building or structure, that contains, harbors, nurtures or acts as a medium for any "fungus(i)", "mold(s)", mildew, yeast, or "spore(s)" or toxins emanating therefrom,

regardless of any other cause, event, material, product and/or building component that contributed concurrently or in any sequence to that "bodily injury", "property damage", "personal and advertising injury", loss, cost or expense.

For the purposes of this exclusion, the following definitions are added to the Policy:

"Fungus(i)" includes, but is not limited to, any of the plants or organisms belonging to the major group fungi, lacking chlorophyll, and including "mold(s)", rusts, mildews, smuts, and mushrooms.

"Mold(s)" includes, but is not limited to, any superficial growth produced on damp or decaying organic matter or on living organisms, and "fungi" that produce molds.

"Spore(s)" means any dormant or reproductive body produced by or arising or emanating out of any "fungus(i)", "mold(s)", mildew, plants, organisms or microorganisms.

It is understood that to the extent any coverage may otherwise be provided under this policy or any of its other endorsements, the provisions of this exclusion will supercede.

ALL OTHER TERMS AND CONDITIONS SHALL REMAIN UNCHANGED.

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

78689 (7/03)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - VIOLATION OF STATUTES IN CONNECTION WITH SENDING, TRANSMITTING OR COMMUNICATING ANY MATERIAL OR INFORMATION

This insurance does not apply to any loss, injury, damage, claim, suit, cost or expense arising out of or resulting from, caused directly or indirectly, in whole or in part by, any act that violates any statute, ordinance or regulation of any federal, state or local government, including any amendment of or addition to such laws, that includes, addresses or applies to the sending, transmitting or communicating of any material or information, by any means whatsoever.

To the extent any coverage may otherwise be available under this Policy, the provisions of this Exclusion shall supercede the same and exclude such coverage.

All other terms and conditions of the policy are the same.

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

ENDORSEMENT

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of

policy No. GL 721-90-84 issued to YAHOO, INC.

by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDATORY ENDORSEMENT - COVERAGE TERRITORY

This endorsement modifies insurance provided under the following:

Payment of loss under this policy shall only be made in full compliance with all United States of America economic or trade sanction laws or regulations, including, but not limited to, sanctions, laws and regulations administered and enforced by the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC").

Lawrence J. Sweeney

Authorized Representative or Countersignature (in States Where Applicable)

89644 0705

ENDORSEMENT NO. 1

This endorsement, effective 12:01 A.M. 05/31/2008 forms a part of policy No. GL 721-90-84 issued to YAHOO, INC. by NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE B – PERSONAL INJURY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

I. The "**Personal And Advertising Injury**" exclusion contained in "**2. Exclusions**" of Section I, **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY** is hereby deleted and replaced with the following:

Personal Injury; Advertising Injury "Bodily injury" arising out of "personal injury" or "advertising injury".

II. In Section I, **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY** is hereby deleted in its entirety and replaced with the following:

COVERAGE B PERSONAL INJURY LIABILITY

1. **Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

(3) Our duty to defend applies only in those countries in the coverage territory where legal circumstances permit us to defend. In those countries in the coverage territory where legal circumstances do not permit us to defend, we will reimburse you for your defense costs, subject to our prior authorization.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

b. This insurance applies to "personal injury" caused by an offense arising out of your business, but only if the offense was committed in the "coverage territory" during the policy period. Any claim or "suit" must be made or brought in the coverage territory or the United States of America, its territories and possessions, Puerto Rico or Canada.

2. **Exclusions**

This insurance does not apply to:

a. **Knowing Violation Of Rights Of Another**

"Personal injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal injury".

b. **Material Published With Knowledge Of Falsity**

"Personal injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. **Material Published Prior To Policy Period**

"Personal injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. **Criminal Acts**

"Personal injury" arising out of a criminal act committed by or at the direction of the insured.

e. **Contractual Liability**

"Personal injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. **Breach Of Contract**

"Personal injury" arising out of a breach of contract.

g. **Infringement Of Copyright, Patent, Trademark or Trade Secret** "Personal injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

h. **Electronic Chatrooms Or Bulletin Boards**

"Personal injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

i. **Unauthorized Use Of Another's Name Or Product**

"Personal injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

j. **Pollution**

"Personal injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

k. **Pollution-Related**

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

l. **Asbestos**

Arising out of the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos products, asbestos fibers or asbestos dust, or to any obligation of the insured to indemnify any party because of damages arising out of the

manufacture of, mining of, use of, sale of, installation of, removal of, distribution of, or exposure to asbestos products, asbestos fibers or asbestos dust.

n. **War**

Personal injury arising directly or indirectly as a result of or in connection with war, whether declared or not, or any act or condition incident to war. War includes civil war, insurrection, invasion, act of foreign enemy, civil commotion, factional civil commotion, military or usurped power, rebellion or revolution.

o. **Employment-Related Practices**

Personal injury to:

(1) A person arising out of any:

(a) Refusal to employ that person;

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of **personal injury** to that person at whom any of the employment related practices describe in paragraphs (a), (b) or (c) above is directed.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

p. **Terrorism**

Personal injury arising directly or indirectly as a result of or in connection with **terrorism** including, but not limited to, any contemporaneous or ensuing **personal injury** caused by fire, looting or theft.,

q. **Advertising Injury**

Damages arising out of "advertising injury".

III. For the purposes of this endorsement, **SECTION V - DEFINITIONS** is amended as follows:

a. The definition of "personal and advertising injury" is deleted in its entirety and replaced by the following:

"Personal injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention, or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

e. Oral or written publication, in any manner, of material that violates a person's right of privacy.

b. The following definition is added:

"Advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. Oral or written publication, in any manner, of material in your "advertisement" that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. Oral or written publication, in any manner, of material in your "advertisement" that violates a person's right of privacy;

c. The use of another's advertising idea in your "advertisement"; or

d. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

IV. Furthermore and not withstanding the foregoing, all other references to "personal and advertising injury" in the Coverage Part shall be deleted and replaced with "personal injury".

All other terms, conditions and exclusions of this policy remain unchanged.

Laurence J. Sweeney

AUTHORIZED REPRESENTATIVE

ADRMOP,APPEAL,CLOSED,CONSENT,PRVADR

U.S. District Court
California Northern District (San Jose)
CIVIL DOCKET FOR CASE #: 5:17-cv-00447-NC

Yahoo! Inc. v. National Union Fire Insurance Company of Pittsburgh, PA
Assigned to: Magistrate Judge Nathanael M. Cousins
Case in other court: USCA, 17-16452
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 01/27/2017
Date Terminated: 06/29/2017
Jury Demand: Plaintiff
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

Plaintiff

Yahoo! Inc.
A Delaware corporation

represented by **Heather W Habes**
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310-248-3830
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ATTORNEY TO BE NOTICED

V.

Defendant

National Union Fire Insurance Company of Pittsburgh, PA
a Pennsylvania corporation

represented by **Daniel Ira Graham , Jr.**
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Date Filed	#	Docket Text
01/27/2017	1	COMPLAINT *For Breach of Contract (Duty to Defend)* against National Union Fire Insurance Company of Pittsburgh, PA (Filing fee $ 400, receipt number 0971-11111212.). Filed byYahoo! Inc.. (Attachments: # 1 Civil Cover Sheet)(Um, William) (Filed on 1/27/2017) (Entered: 01/27/2017)
01/27/2017	2	Proposed Summons. (Um, William) (Filed on 1/27/2017) (Entered: 01/27/2017)
01/30/2017	3	Case assigned to Magistrate Judge Nathanael M. Cousins. Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit *E-Filing A New Civil Case* at http://cand.uscourts.gov/ecf/caseopening. Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 2/13/2017. (sv, COURT STAFF) (Filed on 1/30/2017) (Entered: 01/30/2017)
01/30/2017	4	**Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 4/26/2017. Case Management Conference set for 5/3/2017 10:00 AM at the US District Court, 280 S. First St., San Jose, CA 95113 in Courtroom 7, 4th Floor. Signed by Judge Nathanael Cousins on 1/27/17. (srnS, COURT STAFF) (Filed on 1/30/2017) (Entered: 01/30/2017)**
01/30/2017	5	Summons Issued as to National Union Fire Insurance Company of Pittsburgh, PA. (srnS, COURT STAFF) (Filed on 1/30/2017) (Entered: 01/30/2017)
02/09/2017	6	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by Yahoo! Inc... (Habes, Heather) (Filed on 2/9/2017) (Entered: 02/09/2017)
02/13/2017	7	NOTICE by Yahoo! Inc. *of Filing Proof of Service* (Habes, Heather) (Filed on 2/13/2017) (Entered: 02/13/2017)
02/13/2017		Electronic filing error. Incorrect event used. [err101]. Correct event is: Summons Served Executed. Please re-file in its entirety. Re: 7 Notice (Other) filed by Yahoo! Inc. (srnS, COURT STAFF) (Filed on 2/13/2017) (Entered: 02/13/2017)
02/13/2017	8	SUMMONS Returned Executed by Yahoo! Inc.. National Union Fire Insurance Company of Pittsburgh, PA served on 2/3/2017, answer due 2/24/2017. (Habes, Heather) (Filed on 2/13/2017) (Entered: 02/13/2017)
02/17/2017	9	STIPULATION *TO EXTEND TIME TO RESPOND TO COMPLAINT* filed by Yahoo! Inc.. (Um, William) (Filed on 2/17/2017) (Entered: 02/17/2017)
02/27/2017	10	Certificate of Interested Entities by Yahoo! Inc. (Habes, Heather) (Filed on 2/27/2017) (Entered: 02/27/2017)
03/23/2017	11	STIPULATION *(AMENDED) TO EXTEND TME TO RESPOND TO COMPLAINT* filed by Yahoo! Inc.. (Habes, Heather) (Filed on 3/23/2017) (Entered: 03/23/2017)
04/04/2017	12	CLERK'S NOTICE REGARDING Consent or Declination: Defendant shall file a consent or declination to proceed before a magistrate judge by 4/18/2017. Note that any party is free to withhold consent to proceed before a magistrate judge without adverse substantive consequences. The forms are available at: http://cand.uscourts.gov/civilforms. (lmh, COURT STAFF) (Filed on 4/4/2017) (Entered: 04/04/2017)
04/10/2017	13	NOTICE by National Union Fire Insurance Company of Pittsburgh, PA *to Motion and Motion to Dismiss* (Attachments: # 1 Proposed Order Granting National Union Fire Ins. Company of Pittsburgh, PA's Motion to Dismiss)(Lovell, Matthew) (Filed on 4/10/2017) (Entered: 04/10/2017)

04/10/2017	14	Request for Judicial Notice re 13 Notice (Other), *In Support of Its Motion to Dismiss* filed byNational Union Fire Insurance Company of Pittsburgh, PA. (Related document(s) 13) (Lovell, Matthew) (Filed on 4/10/2017) (Entered: 04/10/2017)
04/10/2017	15	MOTION to Dismiss filed by National Union Fire Insurance Company of Pittsburgh, PA. Motion Hearing set for 5/24/2017 01:00 PM in Courtroom 7, 4th Floor, San Jose before Magistrate Judge Nathanael M. Cousins. Responses due by 4/24/2017. Replies due by 5/1/2017. (Attachments: # 1 Proposed Order Granting National Union Fire Ins. Company of Pittsburgh, PA's Motion to Dismiss)(Lovell, Matthew) (Filed on 4/10/2017) (Entered: 04/10/2017)
04/10/2017	16	CLERK'S NOTICE REGARDING Consent or Declination: Defendants shall file a consent or declination to proceed before a magistrate judge by 4/17/2017. Note that any party is free to withhold consent to proceed before a magistrate judge without adverse substantive consequences. The forms are available at: http://cand.uscourts.gov/civilforms. (lmh, COURT STAFF) (Filed on 4/10/2017) Modified text on 4/12/2017, typo error (cv, COURT STAFF). (Entered: 04/10/2017)
04/17/2017	17	CONSENT/DECLINATION to Proceed Before a US Magistrate Judge by National Union Fire Insurance Company of Pittsburgh, PA.. (Lovell, Matthew) (Filed on 4/17/2017) (Entered: 04/17/2017)
04/17/2017	18	ADR Clerk's Notice re: Non−Compliance with Court Order (ewh, COURT STAFF) (Filed on 4/17/2017) (Entered: 04/17/2017)
04/18/2017	19	Certificate of Interested Entities by National Union Fire Insurance Company of Pittsburgh, PA (Lovell, Matthew) (Filed on 4/18/2017) (Entered: 04/18/2017)
04/20/2017	20	ADR Certification (ADR L.R. 3−5 b) of discussion of ADR options (Lovell, Matthew) (Filed on 4/20/2017) (Entered: 04/20/2017)
04/20/2017	21	STIPULATION and Proposed Order selecting Private ADR by Yahoo! Inc. filed by Yahoo! Inc.. (Habes, Heather) (Filed on 4/20/2017) (Entered: 04/20/2017)
04/20/2017	22	**ORDER REFERRING CASE to Private ADR re 21 . Signed by Judge Nathanael Cousins on 4/20/2017.** (lmh, COURT STAFF) (Filed on 4/20/2017) (Entered: 04/20/2017)
04/24/2017	23	MOTION for leave to appear in Pro Hac Vice (Filing fee $ 310, receipt number 26225OJ3.) Filing fee previously paid on 4/24/2017 filed by National Union Fire Insurance Company of Pittsburgh, PA. (Graham, Daniel) (Filed on 4/24/2017) (Entered: 04/24/2017)
04/24/2017	24	OPPOSITION/RESPONSE (re 15 MOTION to Dismiss) filed byYahoo! Inc.. (Habes, Heather) (Filed on 4/24/2017) (Entered: 04/24/2017)
04/24/2017	25	ADR Certification (ADR L.R. 3−5 b) of discussion of ADR options (Habes, Heather) (Filed on 4/24/2017) (Entered: 04/24/2017)
04/24/2017	26	**ORDER GRANTING APPLICATION for Admission of Attorney Daniel Graham Pro Hac Vice 23 . Signed by Judge Nathanael Cousins.** (lmh, COURT STAFF) (Filed on 4/24/2017) (Entered: 04/24/2017)
04/25/2017	27	STIPULATION WITH PROPOSED ORDER *TO CONTINUE INITIAL CASE MANAGEMENT CONFERENCE* filed by Yahoo! Inc.. (Attachments: # 1 Declaration of William T. Um In Support of Joint Stipulation to Continue Initial Case Management Conference, # 2 Proposed Order Granting Stipulation to Continue Initial Case Management Conference)(Habes, Heather) (Filed on 4/25/2017) (Entered: 04/25/2017)
04/25/2017	28	**ORDER GRANTING STIPULATION TO CONTINUE 27 . Case Management Conference set for 5/24/2017 01:00 PM in Courtroom 7, 4th Floor, San Jose. Signed by Judge Nathanael Cousins on 4/25/2017. (lmh, COURT STAFF) (Filed on 4/25/2017) (Entered: 04/25/2017)**
04/26/2017	29	JOINT CASE MANAGEMENT STATEMENT & [PROPOSED] ORDER filed by Yahoo! Inc.. (Habes, Heather) (Filed on 4/26/2017) Modified on 4/28/2017 (bwS, COURT STAFF). (Entered: 04/26/2017)

05/01/2017	30	REPLY (re 15 MOTION to Dismiss) *In Support of Motion to Dismiss* filed byNational Union Fire Insurance Company of Pittsburgh, PA. (Lovell, Matthew) (Filed on 5/1/2017) (Entered: 05/01/2017)
05/04/2017	31	**Order deferring ruling on 29 Stipulation re case schedule (until ruling on motion to dismiss) entered by Magistrate Judge Nathanael M. Cousins. (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 05/04/2017)**
05/22/2017	32	CLERK'S NOTICE VACATING the hearing set for 5/24/2017 01:00 PM re Motion to Dismiss 15 . The Court finds the motion suitable for hearing without oral argument. Case Management Conference continued to 6/21/2017 10:00 AM in Courtroom 7, 4th Floor, San Jose. Case management statement due 6/14/2017. *(This is a text-only entry generated by the court. There is no document associated with this entry.)* (lmh, COURT STAFF) (Filed on 5/22/2017) (Entered: 05/22/2017)
05/30/2017	33	STIPULATION WITH PROPOSED ORDER *TO CONTINUE INITIAL CASE MANAGEMENT CONFERENCE* filed by Yahoo! Inc. and National Union Fire Insurance Company of Pittsburgh, PA. (Habes, Heather) (Filed on 5/30/2017) Modified on 5/31/2017 (sfbS, COURT STAFF). (Entered: 05/30/2017)
05/30/2017	34	**ORDER GRANTING STIPULATION TO CONTINUE 33 . Case Management Conference set for 7/5/2017 10:00 AM in Courtroom 7, 4th Floor, San Jose. Signed by Judge Nathanael Cousins on 5/30/2017.** (lmh, COURT STAFF) (Filed on 5/30/2017) (Entered: 05/30/2017)
06/01/2017	35	MOTION for leave to appear in Pro Hac Vice (Filing fee $ 310, receipt number 0971-11439189.) filed by National Union Fire Insurance Company of Pittsburgh, PA. (Nicolaides, Richard) (Filed on 6/1/2017) (Entered: 06/01/2017)
06/02/2017	36	**ORDER GRANTING APPLICATION for Admission of Attorney Richard H. Nicolaides, Jr. Pro Hac Vice 35 . Signed by Judge Nathanael Cousins.** (lmh, COURT STAFF) (Filed on 6/2/2017) (Entered: 06/02/2017)
06/02/2017	37	**ORDER GRANTING NATIONAL UNION'S MOTION TO DISMISS WITH LEAVE TO AMEND. Re: Dkt. No. 15 . Amended complaint must be filed with the Court by 6/23/2017. Signed by Judge Nathanael Cousins.** (lmh, COURT STAFF) (Filed on 6/2/2017) (Entered: 06/02/2017)
06/23/2017	38	NOTICE by Yahoo! Inc. *Election to Stand on Complaint* (Habes, Heather) (Filed on 6/23/2017) (Entered: 06/23/2017)
06/29/2017	39	**JUDGMENT: In accordance with the Court's June2, 2017, order granting defendant's motion to dismiss with leave to amend, and plaintiff's subsequent request that the Court enter judgment in this case, judgment is entered in favor of defendant and against plaintiff with respect to all claims asserted in the complaint. ***Civil Case Terminated. Signed by Judge Nathanael Cousins on 6/29/2017. (lmh, COURT STAFF) (Filed on 6/29/2017) (Entered: 06/29/2017)**
07/18/2017	40	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Yahoo! Inc.. (Pay.gov Agency Tracking ID 0971-11556207.) *and Representation Statement* (Habes, Heather) (Filed on 7/18/2017) (Entered: 07/18/2017)
07/19/2017	41	USCA Case Number 17-16452 USCA for 40 Notice of Appeal filed by Yahoo! Inc.. The schedule is set as follows: Mediation Questionnaire due on 07/26/2017. Appellant Yahoo! Inc. opening brief due 10/26/2017. Appellee National Union Fire Insurance Company of Pittsburgh, Pennsylvania answering brief due 11/27/2017. Appellant's optional reply brief is due 21 days after service of the answering brief. (sfbS, COURT STAFF) (Filed on 7/19/2017) (Entered: 07/19/2017)
07/25/2017	42	*****ELECTRONIC FILING ERROR. FORM NOT COMPLETE*****Transcript Designation Form for proceedings held on n/a before Judge n/a, *No Transcripts Designated* (Habes, Heather) (Filed on 7/25/2017) Modified on 7/26/2017 (sfbS, COURT STAFF). (Entered: 07/25/2017)
07/26/2017		Electronic filing error. Please re-file in its entirety. Re: 42 Transcript Designation Form (sfbS, COURT STAFF) (Filed on 7/26/2017) (Entered: 07/26/2017)

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November 6, 2018

Molly C. Dwyer, Clerk of Court
United States Court of
Appeals for the Ninth Circuit

Re: Response to Clerk's Orders Requesting Supplemental Briefing in *Yahoo! Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, Appeal Case No. 17-16462

Dear Ms. Dwyer:

Appellee National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") submits this letter brief in accordance with the October 16 and October 22, 2018 "Clerk Orders" requesting supplemental briefing on two issues: (1) the "impact on this case of *Los Angeles Lakers, Inc. v. Federal Insurance Co.*, 869 F.3d 796 (9th Cir. 2017)" ("*LA Lakers*") and (2) "whether the policy exclusion found at page 98 of the excerpts of record [the "violation of statutes" exclusion] provides an alternate basis for affirming the district court." (ECF 39-40.)

INTRODUCTION

LA Lakers is a decision that Yahoo did not raise in this appeal, and with good reason. As the district court observed, *LA Lakers* is factually inapposite. *LA Lakers* evaluated the broad scope of the phrase "invasion of privacy" in the context of an exclusion contained in a Directors and Officers ("D&O") liability policy. The present case, in contrast, concerns the limitations of coverage under the insuring agreement of National Union's Commercial General Liability policies, where "personal injury" is more narrowly defined to require an "[o]ral or written publication, in any manner, of material that violates a person's right of privacy" (the "privacy offense"). (ER103.) If anything, *LA Lakers* illustrates why National Union's privacy offense does not afford coverage for all possible invasions of privacy, but rather, more narrowly encompasses only privacy claims involving publication of material that violates another's ***right of secrecy***. This supports National Union's position that coverage is not afforded for the Yahoo TCPA claims, which concern the privacy right of seclusion.

As to the question posed by the second Clerk Order, the violation of statutes exclusion in the record does not provide grounds to fully resolve this appeal because it is found in only the first of five National Union policies.

DISCUSSION

I. *LA Lakers* Is Factually Inapposite, but It Reinforces Why the National Union Policies Cover the Right to Secrecy, Not Seclusion.

In *LA Lakers*, this Court held that an unqualified exclusion for "invasion of privacy" in a D&O policy "unequivocally and broadly" excluded coverage for a TCPA claim. *LA Lakers*, 869 F.3d at 799. There, after the Lakers were sued, the team sought coverage under a D&O policy. *Id.* The D&O policy afforded coverage for "wrongful acts," but excluded coverage for any claim "based upon, arising from, or in consequence of libel, slander, oral or written publication of defamatory or disparaging material, ***invasion of privacy***, wrongful entry, eviction, false arrest, false imprisonment, malicious prosecution, malicious use or abuse of process, assault, battery, or loss of consortium." *Id.* at 800 (emphasis added).

In reviewing the D&O policy language, this Court acknowledged "how broad this exclusionary clause is." *Id.* at 801. In comparing the D&O policy's undifferentiated phrase "invasion of privacy" to the intent of the TCPA, this Court concluded that a TCPA claim is "inherently an invasion of privacy claim" because a violation of the TCPA is rooted in the recipient's seclusion-based privacy interest. *Id.* at 806. As such, this Court applied the "broad exclusionary clause" to bar coverage for the TCPA claim. *Id.*

Tellingly, Yahoo itself decided not to cite *LA Lakers* on appeal, and rightfully so. As the district court correctly observed, *LA Lakers* is distinguishable from this case in critical respects. (ER006.) In *LA Lakers*, this Court considered application of an exclusion for "invasion of privacy," without a publication requirement. *Id.* at 800. The Court found it "evident from the plain language" that the policy's use of the broad term "invasion of privacy" was intended to encompass "*all* invasion of privacy claims," including the seclusion interest implicated by the TCPA. *Id.* at 805 (emphasis added). The same conclusion is not evident here.

By contrast, the National Union policies limit the definition of "personal injury" to only certain offenses, among them, the "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." (ER103.) This privacy offense does not, by its plain language, encompass *all* invasion of privacy claims. Instead, the offense contains a publication requirement that limits coverage in the first instance to only those claims that involve: (1) a publication; (2) of material that violates a right of privacy. (ER103.)

In considering coverage for privacy violations, the California Supreme Court holds that potential coverage cannot automatically extend to any conceivable species of privacy right, but rather, coverage depends on the meaning of the word "privacy" in the context of the policy as a whole. *See Bank of the West. v. Superior Court*, 833 P.2d 545, 552 (Cal. 1992). As discussed more fully in National Union's Appellee Brief, the requirements that a covered privacy offense involve a "publication" of "material" that violates a "right of privacy" cannot be read out of the National Union policies. These components materially narrow the scope of coverage to those privacy claims that allege the

disclosure of informational content to someone other than the complaining party itself. (*See* National Union's Appellee Brief, ECF 22 at pp. 18-43.) This language does not encompass the right of seclusion that this Court found "at the heart of the TCPA." *LA Lakers*, 869 F.3d at 806. Instead, as the California Court of Appeal has consistently held, and the District Court correctly recognized, the National Union policies cover only violations of another's right to secrecy. *See State Farm General Ins. Co. v. JT's Frames, Inc.*, 104 Cal. Rptr. 3d 573 (Ct. App. 2010); *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 3d 786 (Ct. App. 2007).

In sum, *LA Lakers* is inapposite because it addressed an exclusion, with exceedingly broad language, in a different type of insurance policy. But if *LA Lakers* provides any value to the Court, it supports National Union's position. The undifferentiated phrase "invasion of privacy" in *LA Lakers*, when juxtaposed with the National Union policies' specific coverage grant (requiring a *publication* of *material* that *violates a right of privacy*) elucidates the limitations that the National Union policies impose on coverage. This plain language

confirms that the National Union policies cover a narrow class of privacy claims – those involving a right of secrecy alone – which does not include the TCPA claims against Yahoo.

II. The Violation of Statutes Exclusion Does Not Provide a Basis for Complete Affirmance.

The violation of statutes exclusion found in the record does not provide a basis for full affirmance in this case. Yahoo's Complaint attaches the 2008-2009 National Union policy as an "exemplar," and alleges that all five of National Union's policies are "substantially similar." (ER023, ¶22.) However, the violation of statutes exclusion in the 2008-2009 exemplar policy (ER098) is not found in the four subsequent National Union policies – nor are those policies part of the record.

Because the violation of statutes exclusion is found in only the 2008-2009 policy, National Union did not raise the exclusion to avoid overcomplicating its motion to dismiss. The same is true here. Any substantive discussion of the exclusion's merits would not provide grounds for complete affirmance, and thus, would detract from the central focus of this appeal – that the National Union policies' violation

of privacy offense does not encompass seclusion-based privacy claims, such as the TCPA lawsuits against Yahoo. Accordingly, National Union respectfully asks this Court to affirm the district court's dismissal order on this basis.

Respectfully submitted,

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

s/ Daniel I. Graham, Jr.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing letter brief is 1211 words and is less than ten pages long, and therefore, complies with the Clerk of Court's Orders dated October 16, 2018 and October 22, 2018.

Dated: November 6, 2018

Respectfully submitted,

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 6, 2018, this letter brief was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

Dated: November 6, 2018

Respectfully submitted,

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November 6, 2018

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Case: Yahoo! Inc. v. National Union Fire Insurance
Case No.: 17-16452
In Re: Supplemental Brief in Response to Court's Request (Dkt. Nos. 39 & 40)

To Molly C. Dwyer, Clerk of the Court:

Plaintiff-Appellant, Yahoo! Inc. ("Yahoo") submits the following supplemental brief responding to the Court's request for the parties to address the following two items:

1. The parties are ordered to submit supplemental briefs addressing the impact on this case of *Los Angeles Lakers, Inc. v. Federal Insurance Co.*, 869 F.3d 795 (9th Cir. 2017) [Dkt. 39]; and
2. Whether the policy exclusion found at page 98 of the excerpts of records provides an alternate basis for affirming the district court [Dkt. 40].

The short answer to issue number one is that although not directly controlling, this Court's decision in *Los Angeles Lakers, Inc. v. Federal Insurance*

Co. ("*Lakers*") supports Yahoo's position in this appeal that coverage for a claim alleging violation of "a person's right of privacy" should be interpreted broadly to include claims brought under the Telephone Consumer Protection Act ("TCPA"), which protects the right to be let alone; the right to seclusion.

Regarding the second issue, the policy exclusion found at page 98 does not provide an alternate basis for affirming the district court because this exclusion was superseded by a later and broader Endorsement No. 1 entitled, "Coverage B – Personal Injury" (the "Personal Injury Endorsement") (pages ER100 to ER103), which eliminated this exclusion for Personal Injury Claims such as the claims at issue in Yahoo's appeal.

Issue Number One: Impact of *Lakers* Decision

In the *Lakers* decision, this Court held that "a liability insurance policy that unequivocally and broadly excludes coverage for invasion of privacy claims also excludes coverage for TCPA claims." *Lakers*, 869 F.3d 798. In reaching this conclusion, the Court analyzed the purpose behind the TCPA and determined that it was to prevent invasions of privacy, and because the policy at issue expressly excluded claims "based upon, arising from, or in consequence of. . .invasion of privacy," the insurance carrier did not owe any duty to defend an underlying lawsuit alleging violations of the TCPA.

On the surface, it would appear that the *Lakers* case should control the outcome of this appeal because both cases involve the scope of insurance coverage under liability policies for TCPA claims. One major difference, however, is that the *Lakers* decision involves an exclusion prohibiting coverage for "invasion of privacy" claims whereas the instant appeal involves an insuring agreement allowing coverage for claims that "violate a person's right of privacy."

Because the *Lakers* decision involves the interpretation of a policy exclusion, and not a grant of coverage, the *Lakers* decision is not controlling authority in this appeal, and neither party cited the *Lakers* decision in their respective briefs as controlling authority. Nonetheless, the Court's analysis in *Lakers* that a TCPA claim is, by its nature, an "invasion of privacy" claim supports Yahoo's position in this appeal that National Union's agreement to provide coverage for "personal injury," which is defined to include conduct-based offenses such as "oral or written publication, in any manner, of material that violates a person's right of privacy" must include the defense of TCPA claims.

The policy exclusion at issue in the *Lakers* decision states that "[no] coverage will be available" for a claim, "based upon, arising from, or in consequence of libel, slander, oral or written publication of defamatory or disparaging material, invasion of privacy, wrongful entry, eviction, false arrest,

false imprisonment, malicious prosecution, malicious use or abuse of process, assault, battery or loss of consortium[.]" *Lakers*, at 800. This list of conduct-based offenses that are excluded in the *Lakers* decision is almost the identical list of conduct-based offenses that are covered "personal injury" offenses under the National Union Policies at issue here.

Specifically, National Union agreed to provide coverage to Yahoo for claims "arising out of one or more of the following offenses: (a) false arrest, detention, or imprisonment; (b) malicious prosecution; (c) wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (d) oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or (e) oral or written publication, in any manner, of material that violates a person's right of privacy." (ER102-103).

As the *Lakers* Court concluded, conduct that violates a person's right of privacy includes the "intrusion upon the plaintiff's seclusion or solitude," or the "right to be let alone." *Lakers*, at 801. The Court further concluded that the purpose of the TCPA was to protect a person's privacy rights, including the right to seclusion. For the same reasons that the *Lakers* Court believed that a TCPA

claim—involving a violation of the right to seclusion—should be excluded by policy language excluding "invasion of privacy" claims, the same reasoning should be true and a TCPA claim should be covered where, as here, the policy grants coverage for the same conduct-based offenses, including claims that "violates a person's right of privacy."

Accordingly, Yahoo respectfully submits that the *Lakers* decision, although not directly controlling authority, supports Yahoo's position that a claim alleging violation of the TCPA, which protects the right to seclusion or the right to be let alone, should be covered where, as here, the carrier agreed to provide coverage for claims alleging violations of "a person's right of privacy."

Issue Number Two: Policy Exclusion at Page 98

The policy exclusion endorsement found at page ER098, entitled "Exclusion – Violation of statutes in connection with sending, transmitting or communicating any material or information" (the "Statute Endorsement") does not apply to Yahoo's claim for coverage for the underlying TCPA claims because this exclusion was removed as part of the Personal Injury Endorsement found at pages ER100 to ER103.

As Yahoo alleged in its original Complaint, National Union sold to Yahoo five consecutive, one-year Commercial General Liability ("CGL") insurance

policies, which consists of the CGL Coverage Form and various endorsements that modify the original form policy language. (ER023). Yahoo attached only one of the five CGL policies—the 2008 Policy—at issue as an example to its Complaint. *Id.* There are four other policies, which contain similar endorsements as the 2008 Policy. For reference, the Statute Endorsement for the 2009 Policy states:

> **EXCLUSION – VIOLATION OF STATUTES IN CONNECTION WITH SENDING, TRANSMITTING OR COMMUNICATING ANY MATERIAL OR INFORMATION**
>
> *Paragraph q. Distribution Of Material In Violation Of Statutes, of Item 2. Exclusions, of Coverage A, Section 1 – Coverages; and*
>
> *Paragraph p. Distribution of Material in Violation of Statutes, of Item 2, Exclusions, of Coverage B, Section 1 – Coverages;*
>
> *are replaced with the following:*
>
> This insurance does not apply to any loss, injury, damage, claim, suit, cost or expense arising out of or resulting from, caused directly or indirectly, in whole or in part by, any act that violates any statute, ordinance or regulation of any federal, state or local government, including any amendment of or addition to such laws, that addresses or applies to the sending, transmitting or communicating of any material or information, by any means whatsoever.

> To the extent any coverage may otherwise be available under this Policy, the provisions of this Exclusion shall supercede the same and exclude such coverage.
>
> All other terms and conditions of the policy are the same. [2009 Policy].

The Statute Endorsement was intended to modify two exclusions in the 2008 CGL Policy Form section entitled, "Distribution Of Material In Violation Of Statutes," which states as follows:

> [This insurance does not apply to:] "Personal and advertising injury" arising out of any action or omissions that violates or is alleged to violate:
>
> (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
> (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
> (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information."

See paragraph p., section 2 Exclusions, of Coverage B, Section I – Coverages. (ER045).[1] The Statute Endorsement set forth in the 2009 Policy specifically states that the endorsement is replacing paragraph p of Coverage B and paragraph q of Coverage A.

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[1] The same exclusion exists to exclude coverage for "bodily injury" and "property damage," which coverages are not at issue in this appeal at paragraph q., section 2 Exclusions, of Coverage A, Section I – Coverages. (ER044).

The Statute Endorsement was then superseded by another endorsement to the policy entitled, "Coverage B – Personal Injury" (the "Personal Injury Endorsement"), which states, "COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY is hereby deleted in its entirety and replaced with the following[.]" (ER100). The Personal Injury Endorsement provides new definitions of covered personal injury offenses and then sets forth new exclusions that Yahoo and National Union agreed would apply to Personal Injury claims, none of which exclude claims alleging violation of the TCPA, or any other similar statute in connection with the sending, transmitting or communicating of any material or information. (ER101-ER102).

All of this is consistent with Yahoo's allegations in its Complaint that "Yahoo specifically sought to expand the 'personal injury' coverage provided by the National Union Policies through a separately drafted manuscript endorsement [that] removes several exclusions and provides broad coverage for 'personal injury.'" (ER023-ER024). In other words, Yahoo and National Union agreed to modify the standard CGL policy form, which originally excluded coverage for TCPA claims—and which was extended to exclude the violation of any statute involving the sending of information—and then ultimately agreed to remove these

exclusions when it negotiated the later issued Personal Injury Endorsement. (ER100-E103).

If National Union is forthright with the Court, it would concur with Yahoo that the Statute Endorsement at page 98 (as well as similar endorsements in the other four policies), does not provide a basis for confirming the district court decision. The language in the Personal Injury Endorsement is clear that all prior definitions and exclusions are "hereby deleted in its entirety and replaced with" new definitions and exclusions. (ER100). Indeed, National Union never raised the Statute Endorsement as a primary or even an alternative basis for challenging Yahoo's claim for coverage for the underlying TCPA claims with the district court or in this appeal.

If National Union now tries to argue that the Statute Endorsement in the 2008 Policy and the four other policies should apply, the Court should summarily reject National Union's newly discovered coverage position. If National Union does take this position in its supplemental brief, the mere fact that National Union raised the argument should be a basis for the Court to reverse the district court decision as there would be an ambiguity regarding what the parties intended when they agreed to have all prior definitions and exclusions surrounding coverage for

Personal and Advertising Injury "hereby deleted in its entirety and replaced with" new definitions and exclusions.

The Court should reverse the district court's grant of the motion to dismiss and allow the case to proceed to discovery. The Court must accept as true Yahoo's allegation that "Yahoo specifically sought to expand the 'personal injury' coverage provided by the National Union Policies through a separately drafted manuscript endorsement [that] removes several exclusions and provides broad coverage for 'personal injury,'" and allow the parties to conduct discovery to prove or disprove Yahoo's allegation. Either way, this Court should reverse the district court and allow Yahoo's complaint to proceed.

Respectfully submitted,

s/William T. Um
William T. Um
of Jassy Vick Carolan LLP
FOR YAHOO! INC.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: November 6, 2018

JASSY VICK CAROLAN LLP

s/ William T. Um
WILLIAM T. UM
For Yahoo! Inc.