No. S253593

IN THE SUPREME COURT OF CALIFORNIA

YAHOO! INC.,
Plaintiff and Petitioner,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA
Defendant and Respondent.

After a Certification Order by the
United States Court of Appeals for the Ninth Circuit
Case No. 17-16452

PETITIONER'S OPENING BRIEF

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CERTIFIED QUESTION

Pursuant to its order dated April 10, 2019, this Court certified the following question for review in connection with this case:

Does a commercial general liability insurance policy that provides coverage for personal injury, defined as injury arising out of oral or written publication, in any manner, of material that violates a person's right of privacy, and that has been modified by endorsement with regard to advertising injuries, trigger the insurer's duty to defend the insured against a claim that the insured violated the Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227) by sending unsolicited text message advertisements that did not reveal any private information?

INTRODUCTION

Standard form "personal and advertising injury" coverage under commercial general liability polices includes several exclusions, including an exclusion for alleged 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 broad "personal injury" coverage, by separating out and differentiating coverage 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" as is the case to trigger the separate advertising injury coverage.

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 National Union Policies, which provide coverage for ***conduct***-based "personal injury" offenses, separate and apart from ***content***-based "advertising injury" offenses, trigger National Union's duty to defend Yahoo against claims that the insured violated the TCPA by sending unsolicited text messages that did not reveal any private information.

Yahoo was denied the benefit of the personal injury coverage when the district court dismissed Yahoo's complaint by interpreting the policy's personal injury coverage based on the publication of material that violates a "person's right to privacy" to include only intrusions on a person's right to secrecy, and not to include invasions of the right to seclusion. In so doing, the district court failed to consider the context of the personal injury coverage in the manuscript endorsement where the conduct-based "personal injury" offenses must be treated differently from the content-based "advertising injury" offenses that have the additional requirement that the "material" appear "in your 'advertisement.'"

The district court incorrectly based its decision on two intermediate California appellate decisions (*ACS Systems* and *JT's Frames*) that interpret language in typical (non-negotiated) "advertising injury" provisions as encompassing only violations of the right of secrecy, ignoring that Yahoo negotiated separate "personal injury" coverage to more broadly reach publication "in any manner" of material alleged to violate a person's "right of privacy." As the Ninth Circuit Court of Appeals noted when it certified this question to this Court, of the two California intermediate courts to address the issue of whether the phrase "oral or written publication . . . of material that violates a person's right of privacy" covers injury solely to the right to seclusion, *ACS* suggested that such a provision would provide coverage, whereas *JT's Frames* held that it does not.

This Court should resolve this conflict and hold that the personal injury coverage for violations of the "right to privacy" in the National Union Policies includes coverage for claims alleging violations of the right to seclusion, as intended by the parties when they negotiated the manuscript endorsement. This conclusion would comport with this Court's long held mandate that all terms of an insurance policy be interpreted according to their plain and ordinary meaning, and that the interpretation of policy provisions should be based on the context in which these provisions appear in the policy.

This conclusion would also be consistent with the rulings of numerous other courts that have interpreted language such as contained in Yahoo's negotiated "personal injury" endorsement as encompassing TCPA claims. Yahoo's reading finds support in decisions from 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.

This Court should answer the certified question in the affirmative and conclude that National Union's promise to provide coverage for "personal injury," which includes injury arising out of "oral or written

publication, in any manner, of material that violates a person's right of privacy," triggered National Union's duty to defend Yahoo against the TCPA lawsuits.

STATEMENT OF JURISDICTION

The California Supreme Court has jurisdiction over the present case as a result of its April 10, 2019 order granting a request for certification of a question by the United States Court of Appeals for the Ninth Circuit pursuant to California Rule of Court 8.548(f)(5).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Yahoo sued National Union in the United States District Court for the Northern District of California in January 2017, alleging a single cause of action: Breach of Contract – Duty to Defend. (ER025-26.)[1] 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. (ER002-011.) The district court concluded that Yahoo did not plausibly allege that the policies' coverage for "oral or written publication, in any

[1] All record citations herein are to the Excerpts of Record prepared pursuant to the Ninth Circuit's procedure.

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 move to 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 timely appealed from that judgment to the Ninth Circuit Court of Appeals.

Yahoo's appeal was argued before a three-judge panel of the Ninth Circuit on December 17, 2018 (Circuit Judges Milan D. Smith, Jr. and Jacqueline H. Nguyen, and Judge Jane A. Restani, sitting by designation from the United States Court of International Trade). On January 16, 2019, the Ninth Circuit issued an Order Certifying Question to the California Supreme Court pursuant to California Rule of Court 8.548. On March 27, 2019, this Court granted the Ninth Circuit's request, revising the certified question as set forth above and as confirmed in this Court's April 10, 2019 Order.

II. THE NATIONAL UNION 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 (the "National Union Policies"). (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, the "personal and advertising injury" coverage is subject to several exclusions, including: (1) Exclusion 2(p) for "Distribution of Material in Violation of Statutes" that specifically excludes coverage for TCPA claims, and (2) Exclusion 2(j) for "Insureds In Media And Internet Type Businesses" that specifically excludes coverage for an entity such as Yahoo whose business is in media and internet type businesses. (ER023, ¶ 23; ER045.)

Rather than agree to the standard form language, Yahoo negotiated an endorsement entitled "Endorsement No. 1."[2] (ER023-24, ¶¶ 23-24.) Endorsement No. 1 replaced the standard form combined "personal and advertising injury" coverage with separate and distinct coverages for "personal injury" and "advertising injury," and also removed several exclusions. (ER023-024, ¶ 24; ER 101-02.) By replacing the standard

[2] This endorsement was not included in the last of the five National Union Policies covering the period May 31, 2012 to May 31, 2013. Therefore, this appeal involves only the four National Union Policies covering the period May 31, 2008 to May 31, 2012. Yahoo, at the appropriate time, will amend its Complaint to reflect this change.

form language through Endorsement No. 1, Yahoo intentionally moved toward a coverage provision that was more suited to its specialized risks.

The original standard form policy identified the following seven offenses under the combined definition of "personal and advertising injury":

> 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".

(ER052.) This combined definition included both conduct-based as well as content-based enumerated offenses that could trigger "Coverage B Personal and Advertising Injury Liability."

With Endorsement No. 1, Yahoo and National Union agreed to change the standard form language and split up the offenses that fall within the definitions of "personal injury" and "advertising 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).)

> "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).)

The phrase "in your advertisement" was added to the original language "[o]ral or written publication, in any manner, of material that violates a person's right of privacy" to clarify that to trigger the content-based "advertising injury" offense, the "material" had to be disclosed "in your advertisement," whereas the conduct-based "personal injury" coverage retained the original definition.

In addition, Endorsement No. 1 removed the following two exclusions that previously would have excluded coverage for TCPA claims: (1) Exclusion 2(p) "Distribution Of Material In Violation Of Statutes," which excludes coverage for actions or omissions that violate or is alleged to violate various statutes, including the TCPA, and (2) Exclusion 2(j) "Insureds In Media And Internet Type Businesses," which excludes coverage to insureds, such as Yahoo, who are in the business of media and internet services. As alleged in Yahoo's complaint against National Union, "Yahoo specifically sought to expand the 'personal injury' coverage

provided by the National Union Policies through a separately drafted manuscript endorsement [which] removes several exclusions and provides broad coverage for 'personal injury.'" (ER023-24, ¶ 24.)

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." (*Id.*)

III. CLASS ACTION TCPA 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 the National Union 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 the underlying plaintiffs' rights of privacy. (ER025, ¶ 30.) Yahoo confirmed that none of the exclusions, conditions, or limitations contained in the 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.)

ARGUMENT

I. THE "PLAIN MEANING" OF THE POLICY TERMS POTENTIALLY COVER THE CLAIMS AGAINST YAHOO FOR ALLEGED VIOLATIONS OF THE TCPA.

In California, the right to privacy is generally understood to encompass both a right "to be free from unwanted intrusions," known as the ***right to seclusion***, as well as a right "to keep personal information confidential," known as the ***right to secrecy***. *See State Farm General Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429, 445 (2010); *see also ACS Sys., Inc. v. St. Paul Fire and Marine Ins. Co.*, 147 Cal. App. 4th 137, 148-49 (2007). Despite Yahoo's allegations in its complaint that it sought to expand the coverage for personal injury in the National Union Policies, the district court limited the personal injury coverage to include only the right to secrecy and not the right to seclusion. 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.

A. "Oral Or Written Publication, In Any Manner" Includes the Transmission Of Text Messages.

"Publication" is not defined in the National Union Policies and therefore 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). "The policy should be read as a layman would read it and not as it might be analyzed by an attorney or an insurance expert." *Crane v. State Farm Fire & Cas. Co.*, 5 Cal. 3d 112, 115 (1971); *see also E.M.M.I. Inc. v. Zurich Am. 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 Chem. Corp. of Calif. 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." *Allstate Ins. Co.*, 45 Cal. 4th at 1018 .[3]

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

[3] These rules of interpretation apply to standard form policy provisions as well as manuscript provisions—such as Endorsement No. 1 at issue in this case—resulting from a negotiated agreement between the insured and the insurer. *See Powerine Oil Co., Inc. v. Superior Court* ("*Powerine II*"), 37 Cal. 4th 377, 391 (2005). Manuscript provisions are "entirely nonstandard and drafted for the particular risk undertaken." *Dart Indus., Inc. v. Comm. Union Ins. Co.*, 28 Cal. 4th 1059, 1073-74 & n.5 (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).

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 message 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 to the represented class of plaintiffs. *See* Cal. Civ. Code § 1641.

Here, the district court did the opposite and 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 fundamentally different policy language that 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. The court interpreted the "making known" language in the "'plainest and most common reading of the phrase,'" which involved "'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.* at 150-51 (citation omitted) (emphasis in original). 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 150 (emphasis in original).

The *ACS Systems* court not only relied on this "making known" language in rejecting coverage for TCPA claims, it distinguished authorities interpreting policies that more broadly covered any "publication" of material that violated a person's right of privacy. *Id.* at 153.[4] The insured in *ACS Systems* had relied on cases interpreting "publication" policies (similar to the National Union Policies here) where the courts found that the insurer owed a duty to defend TCPA lawsuits. 147 Cal. App. 4th at 153 (citations omitted). *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.* Thus, as the Ninth Circuit Court of Appeals correctly observed when it certified the question

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[4] The *ACS Systems* court distinguished all of the following cases because they involved "publication" language: *Park University Enters., 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).

at issue in this appeal to this Court, of the two California Courts of Appeal to have addressed the issue of whether "injury . . . arising out of . . . [o]ral or written publication . . . of material that violates a person's right of privacy" requires the defense of TCPA claims, "*ACS Systems* suggested that such a provision would provide coverage" for TCPA claims. *Yahoo v. National Union*, 913 F.3d 923, 925 (9th Cir. 2019).

Despite the clear coverage distinction between "making known" and "oral or written publication" policy language as articulated by the *ACS Systems* court, the district court relied on *JT's Frames* to conclude that those two phrases actually were "synonymous phrase[s]" with a "marginal semantic difference." *JT's Frames*, 181 Cal. App. 4th at 447. This decision 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 Control 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. *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 (emphasis in original). 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 ("publishing in a trade journal of general circulation") demonstrated an intent to give the word "publishing" a very specific meaning. *Id.* at 168. Consequently, *JT's Frames* mischaracterizes *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). 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).[5]

In reaching a contrary result and limiting "publication" to violations only of the victim's right to secrecy (as opposed to seclusion), *JT's Frames* also mistakenly relied on *American States Ins. Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939, 942 (7th Cir. 2004), where the Seventh Circuit Court of Appeals sought to predict how the highest state court would interpret Illinois law. *JT's Frames*, 181 Cal. App. 4th at 447. When the issue ultimately was presented to the Illinois Supreme Court, the highest court in Illinois rejected the Seventh Circuit's prediction in *Valley Forge Ins. Co.*, 860 N.E.2d at 320, holding instead 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 that 'publication' matters in a 'secrecy situation,' but not in a 'seclusion situation' … as a basis for interpreting the insurance policy language"

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[5] 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).

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,[6] 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, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh Pa.*, No. 11-4097-JTM, 2013 WL 66071, at *13 (D. Kan. Jan. 4, 2013); *Sawyer*, 821 N.W.2d 250. These courts apply the same plain meaning requirement the California Supreme Court mandates for the construction of insurance policies under California law.

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 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

[6] 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.

transmission of allegedly unsolicited text messages constituted a potentially covered "publication."

B. "Material That Violates A Person's Right of Privacy" Includes Text Messages Allegedly Sent Without Consent.

As with "publication," the National Union 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 at 29-30.

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 National Union 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.[7]

[7] 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 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.

In construing "material" to be limited only 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." (*Id.*) 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)

As these courts recognize, one of the stated purposes of the TCPA is to protect individuals from receiving unsolicited communications: "The Act presumes 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.* Under the TCPA, it is the allegedly unsolicited 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 National Union 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 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 well-established California insurance 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 [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 National Union Policies according to their plain and ordinary meaning, the Text Message Actions sufficiently allege potentially covered violation of privacy rights. *Montrose Chem. Corp.*, 10 Cal. 4th at 666-667 ("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.").

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. 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 v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276-77 (1966) (holding an insurer must defend a suit that "potentially seeks damages within the coverage of the policy").

II. THE CONTEXT OF THE MANUSCRIPT "PERSONAL INJURY" COVERAGE ENDORSEMENT SUPPORTS THE DUTY TO DEFEND.

The Court's interpretation of the "personal injury" offense of "oral or written publication, in any manner, of material that violates a person's right of privacy must be grounded in the context in which this provision appears in the policy. In the National Union Policies, the "personal injury" coverage was deliberately expanded by manuscript endorsement to cover specialized risks beyond what was covered by the standard form language. The endorsement removed certain exclusions, including the TCPA exclusion, and provided expanded coverage for conduct-based "personal injury" offenses, separate and distinct from content-based "advertising injury" offenses. When the violation of a person's "right of privacy" offense is viewed in the context of this new "personal injury" endorsement, it is clear that the National Union Policies were triggered and required National Union to defend Yahoo against the Text Messaging Actions.

A. Yahoo And National Union Agreed To Delete Several Exclusions, Including 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 new endorsement separated the type of covered offenses between "personal injury" and "advertising injury" coverage, replacing the previous, combined, standard form coverage for "personal and advertising injury." (ER102-03.) And Yahoo and National Union removed several exclusions from the standard form "personal and advertising injury" coverage, including the TCPA exclusion, to make clear what type of claims would be covered by the new, stand-alone "personal injury" coverage. (ER100-02.)

While the district court acknowledged that Endorsement No. 1 "alters coverage as to personal injury" and "provide[s] extended coverage for personal and advertising injury," the district court did not ascribe any broader coverage to this clause as alleged by Yahoo in its complaint. (ER002-03.) To the contrary, the district court relied on *ACS Systems* and *JT's Frames*, both of which construe standard-form "advertising injury" clauses, not "personal injury" clauses, which is at issue in the National

Union Policies. Particularly given that Yahoo secured a ***separate*** definition for "advertising injury" coverage 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. Calif. 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 did not consider the fact that Endorsement No. 1 eliminated the TCPA exclusion from the National Union Policies. Such deletion is critical to the interpretation of the "personal injury" coverage under the National Union 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) . . . ." (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 Grp. 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 original standard policy included a TCPA exclusion suggests that the language of its standard form—which provided coverage for "oral or written publication, in any manner, of material that violates a person's right of privacy"—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 two different coverage provisions.

In addition to agreeing to remove Exclusion 2(p), Yahoo and National Union agreed to remove the standard form Exclusion 2(j), which previously excluded coverage for content-based "personal and advertising injury" offenses for "Insureds In Media and Internet Type Businesses," such as Yahoo. (ER101-02.) Under the original standard form policy, Yahoo—being an insured in "media and internet type businesses"—was covered only for the following 3 of the 7 enumerated "personal and advertising injury" offenses: "(a) False arrest, detention or imprisonment; (b) Malicious prosecution; [or] (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." (ER045 and 052.)[8] With Endorsement No. 1, this Exclusion 2(j) was removed, and the enumerated offense "(e) Oral or written publication, in any manner, of material that violates a person's right of privacy" was added to the list of covered "personal injury" offenses along with the other conduct-based offenses (a)-(c). (ER102-03, § III(a).)

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 that also removed exclusions that otherwise could have excluded coverage for TCPA claims, warrant permitting the parties to conduct discovery as to the meaning of the "personal injury" coverage.

B. The New, Stand-Alone, "Personal Injury" Coverage Provides Coverage For *Conduct*-Based Intrusions Of Privacy.

The original standard form policy identified the following seven offenses under the combined definition of "personal and advertising injury" coverage:

a. False arrest, detention or imprisonment;

[8] Exclusion 2(j) excludes coverage for "Insureds In Media And Internet Type Businesses" "[h]owever, this exclusion does not apply to Paragraphs 14.a, b., and c. of 'personal and advertising injury' under the Definitions Section." (ER045.)

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".

(ER052.)

With the addition of Endorsement No. 1 to the National Union Policies, Yahoo and National Union agreed to divide the combined "personal and advertising injury" offenses into distinct and separate "personal injury" and "advertising injury" offenses, 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) (emphasis 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"***.

(ER103, § III(b) (emphasis added).)

The "personal injury" coverage in the National Union 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. 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 by the insured 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 by the insured 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 the National Union Policies applies solely to ***content***-based injuries, given the explicit wording of those provisions. The "advertising injury" provision includes a newly added 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 of the National Union Policies. 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).

For example, 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). Given this context in which the "right of privacy" language appears as part of the other "advertising injury" offenses, "it would be unreasonable to give a different interpretation to the advertising injury offense at issue." *ACS Systems*, 147 Cal. App. 4th at 152; *see also JT's Frames*, 181 Cal. App. 4th at 448 (relying on this context, the "right of privacy" "may most reasonably be interpreted as referring to advertising material whose *content* violates a person's right of privacy." (emphasis in original)).

Here, Yahoo negotiated for two separate coverages—"personal injury" and "advertising injury"—that each 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") 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 newly added "personal injury" endorsement, 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.

III. 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.

For all the reasons discussed above, Yahoo submits the district court improperly applied the intermediate appellate decisions in *ACS Systems* and *JT's Frames* to dismiss Yahoo's complaint. Yahoo submits that, to the extent *JT's Frames* and *ACS Systems* can be interpreted to preclude coverage here, those rulings do not reflect California insurance law. 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.*, 32 Cal. 4th at 471; *Powerine II*, 37 Cal. 4th 377, 391 (2005); *Allstate Ins. Co.*, 45 Cal. 4th at 1018. Instead, the intermediate decisions adopted improperly narrow and technical definitions of the terms "publication," "material," and "right of privacy."

This Court repeatedly has emphasized the importance of giving terms in an insurance contract their plain meaning. In *E.M.M.I.*, for example, this 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*, this 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 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. *Allstate Ins. Co.*, 45 Cal. 4th at 1020-21.

The plain reading of the undefined policy terms "publication," "material," and "right of privacy" at least potentially encompass TCPA claims. The majority of state and federal courts to consider these policy terms according to their plain and ordinary meaning have overwhelmingly held that TCPA claims qualify for coverage. *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); *Hooters of Augusta, Inc.*, 157 Fed. Appx. 201 (11th Cir. 2005); *Park University Enters., Inc.*, 442 F.3d 1239 (10th Cir. 2006) (finding coverage applying a plain meaning analysis); *Valley Forge Ins. Co.*, 860 N.E.2d at 316 (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.*, 869 N.E.2d at 572 (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, 666 (Ohio Ct. App. 2009) (applying dictionary definition of "publication" to find coverage for claims under the TCPA); *Penzer*, 29 So. 3d at 1006 (finding "advertising injury" clause covered TCPA claims when "plain meaning" of terms was adopted); *Sawyer* 821 N.W.2d at 258 (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.*, 6 F. Supp. 3d at 863-864 (finding duty to defend based on "commonly used meaning" of "advertising

injury" terms); *HIAR Holding*, 411 S.W.3d at 270 (holding "advertising injury" clause covered TCPA claims); *Collective Brands, Inc.* , 2013 WL 66071 at *13 (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); *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Papa John's Intl., Inc.*, 29 F. Supp. 3d 961, 968 (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 this Court similarly emphasizes the importance of applying a policy's plain meaning to an insured, this Court should follow these decisions and similarly hold that National Union owed Yahoo a duty to defend the Text Message Actions.

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., Id.* 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).

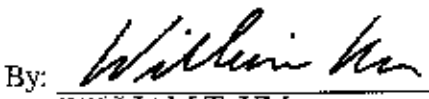
Neither *ACS Systems* nor *JT's Frames* meaningfully addressed the out-of-jurisdiction decisions finding coverage (many of which post-date the intermediate courts' rulings).[9] Rather, they both favorably cite *American States*, an early Seventh Circuit decision whose prediction of Illinois law subsequently was rejected by the Illinois Supreme Court in *Valley Forge*. This Court should follow the majority of other jurisdictions in holding that language such as in the National Union Policies provides coverage for TCPA claims.

[9] 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.

CONCLUSION

For the foregoing reasons, the Court should conclude that under California insurance law, personal injury coverage (as compared to advertising injury) defined as injury arising out of "oral or written publication, in any manner, of material that violates a person's right of privacy," triggers National Union's duty to defend Yahoo against TCPA lawsuits. Accordingly, the judgment of the district court should be reversed.

Date: June 28, 2019 JASSY VICK CAROLAN LLP

By: 

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YAHOO! INC.

CERTIFICATE OF SERVICE

Yahoo! Inc. v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania
Case No. S253593

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 800 Wilshire Boulevard, Suite 800, Los Angeles, CA 90017.

On June 28, 2019, I served true copies of the following document(s) described as

PETITIONER'S OPENING BRIEF

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