

EXHIBIT 1

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10 TECHNOLOGY SERVICE, INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 PEGATRON TECHNOLOGY SERVICE,
14 INC., an Indiana corporation,

15 Plaintiff,

16 vs.

17 ZURICH AMERICAN INSURANCE
18 COMPANY, a New York corporation;
19 AMERICAN GUARANTEE & LIABILITY
20 INSURANCE COMPANY, a New York
21 corporation; and DOES 1 through 100,
22 inclusive,

23 Defendants.

Case No.: 5:18-cv-01477-LHK

**PLAINTIFF PEGATRON TECHNOLOGY
SERVICE, INC.'S NOTICE OF MOTION
and MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PARTIAL
SUMMARY JUDGMENT**

Date: October 24, 2019
Time: 1:30 p.m.
Courtroom: 8
Hon. Lucy H. Koh

[REDACTED VERSION]

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NOTICE OF MOTION AND MOTION

NOTICE IS HEREBY GIVEN that on October 24, 2019, at 1:30 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, in Courtroom 8 of the United States District Court, Northern District of California, located at 280 South First Street, San Jose, California, Plaintiff will and hereby does move the Court for partial summary judgment on the grounds that there is no genuine issue as to any material fact, and Plaintiff is entitled to judgment as a matter of law on the issues set forth below:

- 1. That American Guarantee & Liability Ins. Co. ("AGLIC") owed a duty to defend the binding mediation proceedings;
- 2. That AGLIC breached its duty to defend the binding mediation proceedings;
- 3. That AGLIC owed a duty to indemnify the settlement;
- 4. That AGLIC breached its duty to indemnify the settlement;

If the Court for any reason declines to find each of the above issues in Plaintiff's favor, Plaintiff requests adjudication of the following issues:

- 5. That the Contractual Liability Exclusion did not apply to preclude AGLIC's duty to defend and indemnify the settlement;
- 6. That the Recording and Distribution Exclusion did not apply to preclude AGLIC's duty to defend and indemnify the settlement;
- 7. That the Access or Disclosure Exclusion did not apply to preclude AGLIC's duty to defend and indemnify the settlement;

Plaintiff's motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities below, the Declaration of Alexander F. Stuart; Declaration of Kyle Steinbrueck; Declaration of Zoe Chen; Declaration of Lily Chao; the Exhibits (confidential and non-confidential); and all pleadings and papers on file in this action, and upon such additional evidence and argument as may be presented to the Court at the time of the hearing.

INTRODUCTION

This insurance coverage action arose after Defendant American Guarantee & Liability Ins. Co. ("AGLIC") induced Plaintiff to agree to a binding mediation with the third party claimant, and then abandoned Plaintiff, forcing Plaintiff to pay the substantial mediation award out of its own pocket. (Plaintiff Pegatron Technology Service Inc., is hereafter referenced as "PTSI"). AGLIC initially acknowledged coverage for the claim; consented to binding mediation with the claimant with high-low settlement parameters; waived the No Voluntary Payments condition of the policy, and AGLIC also appeared at the binding mediation. After expressly waiving the No Voluntary Payments condition, AGLIC then invoked the clause anyway, and disclaimed its obligations under its policies based upon a misapplication of exclusions, and based upon its own misinterpretation of obscure phrases in the exclusions. AGLIC breached its duty to defend and its duty to indemnify the settlement, and this motion seeks an adjudication of those legal issues, and alternatively, various sub-issues regarding coverage.

Many of the facts involved in this claim are highly confidential, including the identity of the third party claimant ("Jane Doe"), and the entity whom PTSI was obligated to indemnify (PTSI's "Customer"), so they are referenced by generic names in this motion.

I. SUMMARY JUDGMENT STANDARDS

Summary judgment may be granted where “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law”. (F.R.C.P. 56 (a).) The Court may grant summary judgment on each claim or defense or upon part of each claim or defense. *Id.* If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact - including an item of damage or other relief - that is not genuinely in dispute, and treat the fact as established in the case. (F.R.C.P. 56 (g).)

California law controls this dispute in diversity. *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir, 2001). Under California law, "interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation. *State v. Continental Ins. Co.*, 55 Cal.4th 186, 195 (2012). Whether an insurer owes a duty to defend is a question of law. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 18 (1995). With respect to the underlying

1 tort claims made by Jane Doe (an Oregon resident), there is no conflict in the laws of California
 2 and Oregon regarding the privacy torts, and the law of the forum state is thus applied. *Genesis*
 3 *Insurance Co. v. BRE Properties*, 916 F.Supp.2d 1058, 1065 (N.D.Cal., 2013).¹

4 **II. FACTS**

5 **A. Underlying Claim**

6 The claim at issue resulted when a female college student, Jane Doe, discovered that
 7 sexually explicit photos and a video she had stored on her mobile phone had been uploaded to her
 8 Facebook page. The uploading occurred while Jane Doe's mobile phone was undergoing repairs at
 9 Plaintiff PTSI's facility in Elk Grove, California. (Confidential Ex's 4, 5, 6.) PTSI performs
 10 repair services at a facility for its customer in Elk Grove. (Confidential Ex's. 26, 27). (PTSI's
 11 customer is referenced as "Customer".) Jane Doe had shipped the phone to PTSI's repair facility
 12 on January 12, 2016. Shortly thereafter, friends informed her of the sexually explicit images on
 13 her Facebook page. (Confidential Ex's 4, 5, 6.) The manner in which the images were uploaded
 14 suggested that Jane Doe had uploaded the images herself, casting Jane Doe in the falsest of light,
 15 and causing her severe emotional distress. (Confidential Ex. 5, 6.)

16 PTSI operated the Elk Grove facility with employees of Third Party Vendor that provided
 17 skilled technical workers. (Confidential Ex's. 25, 26, 27). The employment services agreement
 18 between PTSI and Third Party Vendor contained a reciprocal indemnity provision, and provided
 19 that PTSI was responsible for any claim arising from its own conduct, including the failure to
 20 properly supervise Third Party Vendor's employees. (Confidential Ex. 25 ¶9).

21 On January 25, 2016, a lawyer representing Jane Doe sent a letter to Customer reporting
 22 the incident and demanding the preservation of evidence. (Confidential Ex 4.) On February 4,
 23 2016, the lawyer sent a follow-up letter describing the incident and demanding \$5 million to settle
 24 all claims. (Confidential Ex 5.)

25 After an exhaustive investigation, Customer determined that two employees of the Third

26 _____
 27 ¹ There are conflicts on issues of *respondeat superior* liability and the power of a trial court (state
 28 or federal) to review a compensatory damages award for excessiveness, issues that might become
 relevant if AGLIC attacks the settlement on grounds that neither PTSI nor Customer faced
respondeat superior liability, or that the amount of the settlement was excessive.

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1 Party Vendor had uploaded the images to Jane Doe’s Facebook page, and the agency promptly
2 fired both of them. (Confidential Ex's 5, 7).

3 **B. Customer Tenders to Pegatron and PTSI**

4 On February 4, 2016, Customer tendered Jane Doe’s claims to Pegatron [REDACTED
5 REDACTED
6 REDACTED] (Confidential Ex. 7 [tender]; Confidential Ex. 26 [MSA].)

7 The repair services were performed by Pegatron's subsidiary, PTSI, pursuant to a Repairs
8 Services Agreement ("RSA") between Customer, Pegatron and PTSI. The RSA incorporated the
9 terms of the MSA, including an indemnity provision requiring that Pegatron and/or PTSI defend
10 and indemnify Customer against claims like those brought by Jane Doe. (Confidential Ex. 27 [RSA]
11 - incorporation provision is at pg. 1; (Confidential Ex. 26, [MSA] - indemnity provision is ¶7.1).

12 On February 19, 2016, Customer tendered Jane Doe’s claims to PTSI under the indemnity
13 provisions of the MSA. (Confidential Ex. 8).

14 **C. PTSI Tender to AGLIC and Response**

15 On February 22, 2016, PTSI tendered the claims of Jane Doe and Customer to AGLIC
16 under a policy of commercial general liability ("CGL") insurance issued to PTSI as named insured.
17 (Confidential Ex. 9). On February 24, 2016, Pegatron sent AGLIC all of the documents AGLIC
18 requested in response to the tender letter, including the employment services agreement between
19 PTSI and Third Party Vendor, and the MSA between and Customer and Pegatron. (Confirmed in
20 Confidential Ex 10). On February 25, 2016, Pegatron's counsel, Zoe Chen, informed AGLIC's
21 handling adjuster that Customer wanted to negotiate an early pre-litigation settlement, and that
22 [REDACTED
23 REDACTED]

24 Jane Doe’s lawyer had countered with [REDACTED]
25 [REDACTED] Chen emphasized to AGLIC that
26 PTSI and its insurer needed to cooperate with Customer:

27 [REDACTED]
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[REDACTED]

(Confidential Ex. 10)

AGLIC responded by email, confirming that Pegatron had coverage under the policy. (Confidential Ex. 11). After informing Chen that PTSI could count on \$1 million of primary coverage, AGLIC then stalled the process of committing to binding mediation with a long series of questions. (Confidential Ex. 12).

Customer moved expeditiously to finalize a binding mediation agreement [REDACTED], which was fully executed by Customer and Jane Doe on February 26, 2016. (Confidential Ex. 13). Customer then asked Pegatron, PTSI and Third Party Vendor to indemnify the results of the binding mediation, requesting written confirmation on February 26, 2016 that Pegatron/Third Party Vendor would be indemnifying Customer for the full amount of the settlement [REDACTED REDACTED] (Confidential Ex. 14). Since AGLIC had not yet given its consent for mediation, Pegatron and PTSI retained outside counsel. Customer agreed to extend the deadline for confirmation to March 4, 2016, and outside counsel informed AGLIC of the imminent deadline. (Confidential Ex. 15).

PTSI's counsel continued to emphasize the urgency of the situation and request confirmation from AGLIC that AGLIC consented to settlement. (Confidential Ex.16).

When AGLIC had failed to commit by the March 4 deadline imposed by Customer, Pegatron's general counsel advised Customer that it would fund the [REDACTED]settlement Customer was proposing:

[REDACTED]

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1 (Confidential Ex. 17).

2 Several hours later, on March 4, 2016, AGLIC's coverage counsel confirmed that AGLIC
3 would not assert the "no voluntary payments" condition as a defense to coverage for the claim.
4 (Confidential Ex. 18).

5 **D. Binding Mediation March 23, 2016**

6 Jane Doe's claims proceeded to binding mediation in Portland, Oregon on March 22,
7 2016. The mediation proceeded with AGLIC's consent, with AGLIC itself participating through
8 its coverage counsel. Despite consenting to and participating in the mediation, AGLIC did not
9 provide a defense to PTSI.

10 Before mediation, Jane Doe had [REDACTED] and when the
11 parties reached an impasse in settlement negotiations, the mediator (a retired local judge) issued a
12 binding award of [REDACTED] The award was reduced to a written settlement agreement.
13 (Confidential Ex. 19).

14 **E. AGLIC's Post-Mediation Denial of Coverage**

15 On April 7, 2016, AGLIC denied coverage under the CGL policy, and on April 27, 2016,
16 AGLIC denied coverage under its excess policy. (Confidential Ex's. 20, 21). Incredibly, AGLIC
17 denied coverage based upon the policy's "no voluntary payments" condition despite the fact that it
18 had expressly waived that defense prior to the mediation. (Confidential Ex. 20, pgs. 9, 11).

19 **F. Pegatron and PTSI's Settlement with Customer**

20 Pegatron and PTSI entered into a written settlement agreement with Customer in July
21 2016. (Confidential Ex. 22.) The agreement called for [REDACTED

22 REDACTED

23 REDACTED]

24 **G. Tender of Indemnification to AGLIC**

25 On July 13, 2016, Pegatron and PTSI wrote to AGLIC responding to AGLIC's denial
26 letters and requesting reconsideration. (Confidential Ex. 23.) The letter noted that [REDACTED
27 REDACTED] and that PTSI was
28 suffering extreme financial hardship as a consequence.

1 **H. AGLIC's Wrongful Reaffirmation of Denial**

2 On September 6, 2016, AGLIC reaffirmed its wrongful denial of coverage. (Confidential
3 Ex. 24.) The letter was unduly hostile, beginning with an extraordinary attack of Pegatron and
4 PTSI's counsel, whom AGLIC falsely accused of misrepresentation. The letter first confirmed that
5 AGLIC had indeed waived its right to assert a "voluntary payments" defense. AGLIC, however,
6 falsely accused counsel for Pegatron and PTSI of misrepresentation based upon AGLIC's own
7 misreading of the MSA and RSA. AGLIC erroneously concluded that the MSA and and RSA "did
8 not contain or incorporate an indemnity agreement in favor of [Customer] or Pegatron against
9 PTSI." (Confidential Ex. 24, pg. 2.) In fact, the MSA did contain an express indemnity provision,
10 and the RSA incorporated the indemnity provision. (Confidential Ex. 27 [RSA] - incorporation
11 provision is at pg. 1; (Confidential Ex. 26, [MSA] - indemnity provision is ¶7.1).

12 **I. PTSI's Indemnity Obligation**

13 The parties to the RSA are Customer, Pegatron and PTSI. Pegatron and PTSI are
14 described "collectively" as "Supplier." The RSA then "incorporates terms" of the MSA "by
15 reference." (Confidential Ex. 27 [RSA] - incorporation provision is at pg. 1). Clarifying language
16 follows the incorporation of the MSA. First, the RSA states that "[u]nless otherwise defined, the
17 capitalized terms shall have the same meaning as such terms in the MSA." Next, the RSA states
18 that in case of any "conflict in terms between this RSA and MSA, the terms of this RSA shall
19 control." (Confidential Ex. 27, pg. 1). This means that the RSA's definition of "Supplier"
20 (Pegatron and PTSI collectively) controls interpretation of the MSA's indemnity obligation
21 imposed upon the "Supplier":

22 Supplier shall indemnify, hold harmless and upon [Customer's] request defend
23 [Customer]
24 . . . from and against all claims, charges, and causes of action of any type . . .
arising out or in connection with:

25 (a) Supplier's failure to comply with the terms of this Agreement, including
26 the data privacy and security requirements described under Section 9, and/or
applicable Federal, state or local law, statute, common law regulation or ordinance;

27 (b) Any negligent act or omission, or any willful misconduct, on the part of
28 of Supplier or Supplier's Employees or their respective subcontractors, agents

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1 or the like in the performance of the Services.

2 (Exhibit 26, MSA ¶7.1.)

3 To incorporate the terms of the MSA, it was necessary for Customer only to reference
4 "terms of the MSA," and make the document containing those terms available to PTSI. *Chan v.*
5 *Drexel Burnham Lambert, Inc.* (1986) 178 Cal.App.3d 632, 641. It was not necessary to recount
6 each term by paragraph or page number.

7 **III. AGLIC'S COVERAGE**

8 **A. CGL Coverage for Publication of Material in Violation of Rights of Privacy**

9 AGLIC issued the liability coverage in the CGL policy providing "personal and
10 advertising injury" coverage. The coverage was to protect PTSI against any "oral or written
11 publication, in any manner, of material that violates a person's right of privacy".

12 **1. Insuring Agreement**

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

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

(Exhibit 1 pg. "Zurich 000181").

23 **SECTION V - DEFINITIONS**

24 3. "Bodily injury" means bodily injury, sickness or disease sustained by a person,
25 including death resulting from any of these at any time.

26 14. "Personal and advertising injury" means injury, including consequential "bodily
27 injury", arising out of one or more of the following offenses:

28 * * *

e. Oral or written publication, in any manner, of material that violates a person's
right of privacy;
(Exhibit 1 pgs. "Zurich" 000188, 000190).

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B. Commercial Umbrella Coverage for Publication of Material in Violation of Rights of Privacy

AGLIC's Commercial Umbrella Liability Policy includes both "Excess Follow Form Liability Insurance" and Umbrella Liability Insurance. The Excess coverage applies excess of AGLIC's CGL liability coverage pursuant to the same terms and conditions as that underlying CGL coverage, with limits of \$10,000,000. (Exhibit 2 pgs. "Zurich" 000365, 000370).

The Umbrella coverage applies on a primary basis when the CGL policy does not apply (the coverage "does not apply to any loss, claim or suit for which insurance is afforded under underlying insurance or would have been afforded except for the exhaustion of the Limits of Insurance of underlying insurance"). (Exhibit 2 pgs. "Zurich" 000370). An "umbrella policy" fills in gaps in coverage left open by the primary insurance. *Wells Fargo Bank v. California Insurance Guarantee Assn.* 38 Cal.App.4th 936, 940 fn2 (1995). The Umbrella Liability Policy provides "personal and advertising injury" coverage, which is defined as:

12. Personal and advertising injury means 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.

* * *

Personal and advertising injury also means mental anguish, mental injury, humiliation, or shock, if directly resulting from an offense listed in items **12.a** through **12.h** above.

(Exhibit 2 pgs. "Zurich" 000370, 000382).

IV. AGLIC'S DUTY TO DEFEND

A. Policy Provisions Obligating Defense

The CGL Policy obligated AGLIC to provide a defense to PTSI. As set forth above, the Policy imposes a duty upon AGLIC to "defend the insured against any 'suit' " seeking damages because of "personal and advertising injury" to which the policy applies. (Exhibit 1 pg. "Zurich" 000181). The policy defines "suit" to include the binding mediation at issue which proceeded pursuant to AGLIC consent and with AGLIC's participation:

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SECTION V - DEFINITIONS

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.

(Exhibit 1 pg. "Zurich" 000191).

AGLIC's Umbrella Liability Policy also imposed a duty to defend:

A. We have the right and duty to assume control of the investigation and settlement of any claim, or defense of any suit against the insured for damages covered by this policy:

* * *

2. Under Coverage B, when damages are sought for bodily injury, property damages, or personal and advertising injury to which no underlying insurance or other insurance applies.

(Exhibit 2 pg. "Zurich" 000372).

The Policy's definition of "Suit" encompasses the binding mediation:

6. Suit means a civil proceeding in which injuries or damages 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.

(Exhibit 2 pg. "Zurich" 000379).

B. An Insurer's Defense Obligation is Triggered by a Mere Possibility of a Claim Within the Scope of Coverage

"An insurer faces an uphill battle from the beginning because the duty to defend in California is extensive." *Century Surety Co. v. United Specialty Ins. Co.*, 2018 U.S. Dist. LEXIS 69807 *13 (C.D. Cal., 2018) [internal citation omitted]. An insurer's duty to defend is broader than the duty to indemnify, and it may apply even in an action where liability under the policy

1 ultimately fails to materialize. *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 299
 2 (1993). “[T]he duty to defend may exist where coverage is questionable and ultimately found
 3 lacking [citations omitted], and any doubt must be resolved in favor of the insured.” *Amato v.*
 4 *Mercury Casualty Co.*, 18 Cal.App.4th 1784, 1790 (1993); *Montrose* at 300.

5 To establish that an insurer owed a duty to defend, an insured has only the minimal burden
 6 to show that there was a potential for coverage under the insuring agreement of the Policy.
 7 *Montrose, supra* at 300-301. An insured is entitled to a defense if the underlying complaint alleges
 8 liability for damages potentially covered under the policy, or if the complaint might be amended to
 9 give rise to a liability that would be covered. *Id.*; *Gray v. Zurich*, 65 Cal.2d 263, 275-276 (1966).
 10 Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that
 11 the claim may be covered by the policy. *Montrose, supra* at 295. An insurer has an immediate
 12 duty to defend incepting upon tender of the claim to the insurer. *Id.*

13 Once the insured has met its minimal burden to make a prima facie showing of the
 14 potential for coverage, the burden then shifts to the insurer to show that undisputed facts
 15 conclusively eliminated the potential for coverage. *Montrose, supra*, at 300. The insurer must
 16 prove the claim cannot fall within the policy's coverage. *Id.* An insurer may defeat a motion for
 17 summary judgment only by producing undisputed extrinsic evidence conclusively eliminating the
 18 potential for coverage under the policy. *Century Surety Co*, *supra*, 2018 U.S. Dist. LEXIS 69807
 19 *14. An insurer cannot deny a defense on grounds that an exclusion might apply. An insurer is
 20 obligated to provide a defense where an exclusion arguably applies but may reasonably be
 21 interpreted to be inapplicable to the alleged facts. *Aroa Marketing, Inc. v. Hartford Ins. Co. of*
 22 *Midwest*, 198 Cal.App.4th 781, 786 (2011).

23 Evidence which merely places in dispute whether the insured's actions will eventually be
 24 determined to fall outside the insuring agreement, or fall within an exclusion, is insufficient to
 25 defeat the insured's right to summary adjudication of the duty to defend. *Montrose* at 300, 304.
 26 When the evidence does not eliminate the possibility that the insured's conduct is covered, the duty
 27 to defend is established. *Montrose* at 301. The mere existence of a question of fact dispositive of
 28 coverage establishes the duty to defend. *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th

1 1076, 1085.

2 **V. AGLIC'S DUTY TO INDEMNIFY THE SETTLEMENT**

3 An insured who has been abandoned by its insurer and elects to settle rather than risk an
 4 adverse judgment is entitled to an evidentiary presumption in litigation against the insurer. *Pruyn*
 5 *v. Agricultural Ins. Co.* 36 Cal.App.4th 500, 527 (1995). The settlement becomes presumptive
 6 evidence of the liability of the insured, and the amount thereof. *Id.* at 525. For the presumption to
 7 arise, the insured need only establish the following foundational facts: (1) the insurer wrongfully
 8 failed to provide coverage or a defense; (2) the insured thereafter entered into a settlement which
 9 was (3) reasonable in the sense that it reflected an informed and good faith effort by the insured to
 10 resolve the claim. *Id.* at 528. The evidentiary presumption given to the insured is one which
 11 affects the burden of proof. *Id.* at 529. Presumptions affecting the burden of proof are established
 12 in order to implement public policy concerns, and are "justifiably given greater weight". *Id.* at 529.
 13 When an insurer has breached the insurance policy, there is an obvious need, as a matter of policy,
 14 to permit the insured to protect its position by settling the third party's claim, so long as the
 15 settlement is reasonable. *Id.* at 530. "It is sound and rational to conclude that the burden of
 16 showing that the settlement does *not* reflect the fact and amount of the insured's liability should fall
 17 upon the insurer whose breach has occasioned the settlement". *Id.* (emphasis original, internal
 18 citation omitted). Additionally, "[t]he insurer, not the insured, has the burden of proving by a
 19 preponderance of the evidence that the settlement payments were allocable to claims not actually
 20 covered, and the defense costs were allocable to claims not even potentially covered". *Navigators*
 21 *Specialty Ins. Co. v. Moorefield Construction, Inc.*, 6 Cal.App.5th 1258, 1287 (2016).

22 **VI. JANE DOE'S CLAIM WAS WITHIN THE SCOPE OF AGLIC'S**
 23 **COVERAGE**

24 The publication of Jane Doe's photos and video easily qualify as a written publication of
 25 material "in any manner" that violates a person's right of privacy. The publication humiliated Jane
 26 Doe, subjecting Customer and PTSI to liability in tort for (1) the publication of private facts, and
 27 (2) false light publicity. The latter tort arises from the negative inference others could draw from
 28 publishing sexually explicit images to Jane Doe's Facebook page, namely that she had published

1 the images herself.

2 To construe the scope of "personal injury" coverage, courts look to substantive law
3 regarding the personal injury "offenses". See *Fibreboard Corp. v. Hartford Accident & Indem.*
4 *Co.* 16 Cal.App.4th 492, 511 (1993) (because the offenses listed in the definition of "personal
5 injury" are not defined, courts "give them meaning by reference to their common law elements".)
6 California recognizes four common law privacy torts: (1) public disclosure of private facts; (2)
7 intrusion into private places, conversations, or other private affairs; (3) presentation to the public in
8 a false light; and (4) misappropriation of one's image or personality. *Shulman v. Group W*
9 *Productions* (1998) 18 Cal.4th 200, 214.

10 Liability for "public disclosure of private facts" arises when unwanted publicity is given to
11 private aspects of a person's life. *Shulman, supra* at 214. The elements of the tort are (1) public
12 disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable
13 person and (4) which is not of legitimate public concern. *Id.* Public disclosure of private "facts" is
14 not limited to those recorded in a writing, but expansively encompasses the publication of pictures
15 and even oral statements. *Ignat v. Yum! Brands, Inc.*, 214 Cal.App.4th 808, 815-819 (2013).

16 A "false light" claim requires a disclosure creating a false impression about someone
17 which states or implies something highly offensive that would have a tendency to injure their
18 reputation. *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1082 (9th Cir., 2002). "False light" publicity
19 "exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will
20 recognize it as such". *M.G. v. Time Warner, Inc.*, 89 Cal.App.4th 623, 636 (2001). A showing of
21 malice is only required for public figures. *Id.* "It is well-established that a defendant is liable for
22 what is insinuated as well as for what is stated explicitly." *Solano, supra* at 1083. In *Solano*, the
23 court held that a Playgirl magazine cover which featured a photograph of an actor could create the
24 false impression that readers could expect to find nude photos of the actor inside the magazine (*id.*
25 at 1083), and that the actor "was not the wholesome person he claimed to be, that he was willing to
26 - or was 'washed up' and had to - sell himself naked to a women's sex magazine". *Id.* at 1084. The
27 Court of Appeals cited with approval a decision from another district in which an actress asserted a
28 false light claim based upon Hustler magazine's insinuation that she was the kind of person to pose

1 nude for Hustler. *Solano, supra* at 1083, citing *Douglass v. Hustler Magazine*, 769 F.2d 1128 (7th
 2 Cir., 1985). The United States Supreme Court has confirmed the privacy interest that exists
 3 regarding the contents of a smart phone. *Riley v. California*, 573 U.S. 373, 375-376, 134 S.Ct.
 4 2473, 189 L.Ed.2d 430 (2014). Even celebrities retain a privacy interest in their sex lives and
 5 intimate details of their lives. *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823,
 6 840 (C.D.Cal., 1998).

7 The posting to Facebook of Jane Doe's private photos and videos satisfied the policy's
 8 requirement of "a publication, in any manner". "Publication" means "making known" to third
 9 parties. *Yahoo! Inc. v. National Union Fire Ins. Co.*, 255 F. Supp. 3d 970, 975 (N.D.Cal., 2017).
 10 The personal injury provision thus covers injury caused by the disclosure of private content to third
 11 parties. *Id.* The phrase "in any manner" modifies "publication", and means that information may
 12 be made known in any way in order for coverage to apply. *Id.* at 977. "Any manner" of
 13 publication involves any medium by which material is published. *Id.*

14 Finally, Jane Doe's claim satisfied the policies' requirement of injury. The CGL policy
 15 defines injury to include "consequential 'bodily injury', arising out of a personal injury offense."
 16 (Exhibit 1 pg. 000190). "Bodily injury" includes physical injury resulting from emotional
 17 distress. *Abellon v. Hartford Ins. Co.*, 167 Cal.App. 3d 21, 27-29 (1985); *M.C. v. Princeton*
 18 *Excess & Surpluss Lines Inc. Co.*, 2017 U.S. Dist LEXIS 116278, *19-*23. Additionally,
 19 AGLIC's Umbrella Policy expressly defines injury to include "mental anguish, mental injury,
 20 humiliation, or shock" directly resulting from a personal injury offense. (Exhibit 2 pg. 000382).

21 **VII. AGLIC'S WRONGFUL DENIAL OF ITS OBLIGATIONS**

22 AGLIC denied coverage on multiple grounds, none of which are valid. AGLIC invoked
 23 the "no voluntary payments" clause which AGLIC had expressly waived; AGLIC denied coverage
 24 based upon exclusions which do not apply; and AGLIC stood upon its specious assertion that PTSI
 25 faced no liability for publication of the photos and video. (Confidential Ex's. 20, 21, 24).

26 AGLIC has the burden to prove there is no conceivable possibility of an injury falling
 27 outside the scope of its exclusions. An insurer that wishes to rely on an exclusion has the burden
 28 of proving through conclusive evidence that the exclusion applies in all possible worlds. *Atlantic*

1 *Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal.App.4th 1017, 1039 (2002). Insurance coverage
 2 provisions are "interpreted broadly so as to afford the greatest possible protection to the insured,
 3 whereas exclusionary clauses are interpreted narrowly against the insurer". *MacKinnon v. Truck*
 4 *Insurance Exchange*, 31 Cal.4th 635, 648 (2003). To hold in favor of the insured, the court need
 5 not determine that the insurer's interpretation is not possible or is not reasonable. *Id.* at 655. Even
 6 assuming the insurer's interpretation is reasonable, a finding of coverage must be affirmed so long
 7 as there is any other interpretation under which recovery may be permitted. *Id.* If an insurer's
 8 interpretation is considered reasonable, the insurer still cannot prevail unless it also establishes that
 9 its interpretation is the *only* reasonable one. *Id.*(emphasis original).

10 **A. AGLIC Wrongfully Denied Coverage on Grounds PTSI Had No Liability**
 11 **for the Publication of the Photos and Video**

12 PTSI faced liability on two fronts, but AGLIC deliberately ignored one basis of liability,
 13 and deliberately misinterpreted the document giving rise to the other avenue of liability. PTSI's
 14 liability stemmed from (1) its direct tort liability to Jane Doe; and (2) from its duty to indemnify
 15 Customer for the liability to Jane Doe. In this coverage action, the settlement constitutes
 16 presumptive evidence of PTSI's liability to Jane Doe, and the amount of damages sustained by Jane
 17 Doe. *Pruyn, supra*, 36 Cal.App.4th 500, 525.

18 **B. AGLIC Wrongfully Denied Coverage Based Upon a Contractual Liability**
 19 **Exclusion**

20 AGLIC contends that coverage is barred by a contractual liability exclusion (while at the
 21 same time asserting the inconsistent position that PTSI had no contractual liability to Customer.)
 22 (Confidential Ex's. 20, 21, 24). The Exclusion provides that AGLIC has no obligation to indemnify
 23 PTSI against "personal and advertising injury" for which PTSI has "assumed liability in a contract
 24 or agreement". (Exhibit 1 pg. "Zurich" 000159). An exception to the exclusion provides that it
 25 does not apply to "liability for damages that the insured would have in the absence of the contract
 26 or agreement". (Exhibit 1 pg. 000159). The exception parses liability for tort damages, so that the
 27 exclusion applies only when the insured is exposed to liability for contract damages. *Roger H.*
 28 *Proulx & Co. v. Crest-Liners, Inc.*, 98 Cal.App.4th 182, 203 (2002). In *Proulx*, the court observed

1 that the exclusion applies only in situations where the insured's liability derives exclusively from
 2 the assumption of duties under a contractual indemnity provision. *Id.* at 202. If the insured's
 3 liability derives from other duties owed, the exclusion has no effect. See also *Lumbermens Mutual*
 4 *Casualty Co. v. Corning, Inc.*, 2008 U.S. Dist. LEXIS 126717 *48 (C.D.Cal., 2008).

5 AGLIC had no basis to assert that PTSI exclusively faced exposure to contractual
 6 indemnity. PTSI assumed custody of Jane Doe's phone, employed Third Party Vendor workers to
 7 repair the phone, and undertook responsibility for Internet connection to the phone, and as such,
 8 PTSI owed legal duties to Jane Doe to protect her from invasions of privacy arising from PTSI's
 9 repair activities. (Confidential Exhibits 5, 8, 25, 26, 27, and Ex. 27 pg. PTSI002532 opening
 10 paragraph [re PTSI responsibility for connectivity].

11 **C. AGLIC Wrongfully Denied Coverage Based Upon a Recording and**
 12 **Distribution Exclusion**

13 **1. The Exclusion Does Not Encompass Jane Doe's Claim**

14 AGLIC denied coverage based on an exclusion titled "Recording and Distribution of
 15 Material or Information in Violation of Law". (Confidential Ex's. 20, 21 pg.6, 24 pg.7). This
 16 exclusion begins with the elimination of coverage for any "personal and advertising injury" that
 17 arises out of any "action or omission that violates or is alleged to violate" (1) the Telephone
 18 Consumer Protection Act ("TCPA"), its amendments and additions, (2) the CAN-SPAM Act of
 19 2003, its amendments and additions; and (3) the Fair Credit Reporting Act ("FCRA"), its
 20 amendments and additions, including the Fair and Accurate Credit Transaction Act. The
 21 endorsement then adds the following obscure language to the list of statutes for which coverage is
 22 eradicated:

- 23 (4) any federal, state or local statute, ordinance or regulation, other than the
 24 TCPA, CAN-SPAM Act of 2003, or FCRA and their amendments
 25 and additions, or any other legal liability, at common law or otherwise,
 that addresses, prohibits, or limits the printing, dissemination, disposal,
 monitoring, collecting, recording, use of, sending, transmitting,
 communicating or distribution of material or information.

26 (Exhibit 1, pgs. "Zurich" 000167-168; Exhibit 2 pg. 000396).

27 The posting of extremely personal and private images on a social media site does not fall
 28

1 within the recording and distribution exclusion. First, the posting of images is not a violation of
2 the TCPA, CAN-SPAM Act of 2003 or the FCRA, and Jane Doe never claimed that the uploading
3 of her images violated any of those statutes. Nor did Jane Doe claim that the posting of her photos
4 and video violated any other statute, ordinance or regulation. (Confidential Exhibits 4, 5).

5 While the exclusion also refers to “any other legal liability, at common law or otherwise,”
6 that phrase (buried deep within the exclusion), cannot be interpreted to wipe out coverage for
7 “publications in any manner” otherwise promised by AGLIC’s grant of “personal and advertising
8 injury” coverage. In *Safeco Ins. Co. Robert S.*, 26 Cal.4th 758, 764-765 (2001), the Supreme Court
9 refused to enforce an “illegal act” exclusion on grounds that the term “illegal” was so broad that it
10 could encompass any violation of law, including breaches of tort duty which would render the
11 insurer’s promise to cover bodily injury caused by accident illusory. The same analysis applies
12 here. The phrase “any other legal liability, at common law or otherwise,” is so broad that it could
13 render AGLIC’s promise of libel coverage, slander coverage, disparagement coverage and invasion
14 of privacy coverage illusory. See also *Evanston Insurance Co. v. Gene by Gene, Ltd.*, 155 F.
15 Supp.3d 706 (S.D. Tex., 2016), where the court agreed that the insurer's construction of a
16 substantially similar exclusion was unreasonable, because it would render illusory the policy's
17 advertising injury coverage and personal injury coverage for claims arising out of publication of
18 material that violates a person's right of privacy. *Id.* at 712-713.

19 AGLIC's interpretation also violates the rule that context must be considered when
20 interpreting a policy provision. See *Yahoo! Inc., supra*, 255 F. Supp. 3d 970, 976-977. The
21 principle of *ejusdem generis* precludes AGLIC's interpretation that the catchall subpart (4) applies
22 to preclude coverage for the posting of Jane Doe's confidential photos and videos to Facebook.
23 The *ejusdem generis* canon of construction instructs that catchall clauses are to be read as being
24 restricted to categories of the same general nature as those specifically enumerated. *Berns v. Sentry*
25 *Select Ins. Co.*, 656 Fed. Appx. 326 *2 (9th Cir., 2016). The rule is "based on the obvious reason
26 that if the [writer] had intended the general words to be used in their unrestricted sense, [he or she]
27 would not have mentioned the particular things or classes of things which would in that event
28 become mere surplusage. *White v. Ultramar, Inc.*, 21 Cal.4th 563, 573 (1999) [bracketed notations

1 original]. The court in *Evanston Insurance v. Gene by Gene, supra* applied the doctrine of
 2 *ejusdem generis* to interpret the scope of the catchall subpart excluding coverage for claims based
 3 upon "any other statute, law, rule, ordinance, or regulation that prohibits or limits the sending,
 4 transmitting, communication, or distribution of information or other material" . The court
 5 concluded that the scope of the catchall provision was restricted to the same general categories as
 6 the preceding subparts of the exclusion, which encompassed statutes governing unsolicited
 7 communication to consumers that intrude into one's seclusion [the TCPA and CAN-SPAM Act
 8 which are also specified in AGLIC's exclusion] . *Id.* at 711-712. Likewise, in *Harleysville*
 9 *Preferred Insurance Co. v. Rams Head Savage Mill, LLC*, 237 Md. App. 705, 187 A.3d 797 (Md.
 10 App., 2018), the court applied the doctrine of *ejusdem generis* to find that the catchall provision in
 11 a recording and distribution exclusion was limited to the same type of laws as the preceding
 12 categories protecting consumers from unwanted solicitations and the improper collection and
 13 distribution of financial information [the TCPA, CAN-SPAM Act, and FCRA which are also
 14 specified in AGLIC's exclusion.] *Id.* at 735.

15 **2. AGLIC's Confirmed Intent of the Catchall Provision Was Consistent**
 16 **With the Doctrine of *Ejusdem Generis* and Contravenes AGLIC's**
 17 **Current Contrary Interpretation**

18 The “recording and distribution” exclusion bears form no. U-GL-1517-B CW (04/13),
 19 indicating the exclusion was first used in 2013. AGLIC submitted a similar exclusion, bearing
 20 form no. U-GL-1517-A CW (01/12), to the Indiana Department of Insurance in December 2011.
 21 (Exhibit 3). When AGLIC submitted its exclusion, it represented that the phrase “any other legal
 22 liability, at common law or otherwise”:

23 *clarifies* our coverage intent by confirming our intent
 24 to exclude all causes of action arising out of Telephone
 25 Consumer Act (TCPA), CAN-SPM [sic] Act of 2003,
 26 Fair Credit Reporting Act (FCRA) and Accurate [sic]
 27 Credit Transaction Act (FACTA).

28 (Exhibit 3, pg.3, emphasis added)

AGLIC cannot use language intended to *clarify* its exclusion of certain statutory causes of
 action to deprive an Indiana insured of its right to “personal and advertising injury” coverage for

1 common law violations of privacy. In disclaiming coverage of Jane Doe's claim, AGLIC
 2 misrepresented its submission to the Indiana Department of Insurance, arguing that the submission
 3 addressed the first three prongs of the exclusion barring coverage for certain statutory violations.
 4 (Confidential Ex. 23, pg. 8.) AGLIC's misrepresentation is revealed as false by AGLIC's own
 5 redline version of the exclusion, which confirms that its submission specifically addressed changes
 6 to the exclusion contained in the *fourth prong* adding the phrase “any other legal liability, at
 7 common law or otherwise.” (Exhibit 3, pg. 13).

8 Drafting history of a policy is strong evidence of the intent of the policy. *Fireguard*
 9 *Sprinkler Systems v. Scottsdale Insurance*, 864 F.2d 648, 653 (9th Cir., 1988). *Prudential-LMI*
 10 *Commercial Insurance Co. v. Reliance Insurance Co.*, 22 Cal.App.4th 1508, 1513 (1994)
 11 (insurance industry publications are particularly persuasive as interpretive aids where they support
 12 coverage on behalf of the insureds). A construction given to the contract by the parties with
 13 knowledge of its terms before any controversy has arisen as to its meaning, is entitled to great
 14 weight. *Beneficial Fire and Casualty Insurance Company*, 46 Cal.2d 517, 524 (1956). An insurer
 15 is bound by its interpretation of its own policy. *Middlesex Mutual Insurance Co. v. Ramirez*, 116
 16 Cal.App.3d 733, 740 (1981).

17 **D. AGLIC Wrongfully Denied Coverage Based Upon an**
 18 **Access or Disclosure Exclusion**

19 AGLIC next claimed that an exclusion, titled “Exclusion – Access or Disclosure of
 20 Confidential or Personal Information and Data-Related Liability – Limited Bodily Injury Exception
 21 Not Included,” also eliminated coverage for Jane Doe's invasion of privacy claims. (Confidential
 22 Ex's 20 pg. 7; Ex. 24 pg. 9). This exclusion provides that the policy does not apply to “personal
 23 and advertising injury” arising out of “any access to or disclosure of any person’s or organization’s
 24 confidential or personal information, including patents, trade secrets, processing methods, customer
 25 lists, financial information, credit card information, health information or any other type of
 26 nonpublic information.” (Exhibit 1, pg. "Zurich" 000198).

27 The phrases “personal information” and “any other type of nonpublic information” suffer
 28 from the same overbreadth that renders the “recording and distribution” exclusion unenforceable

1 when applied to Jane Doe's facts. *Safeco Ins. Co. Robert S.* (2001) 26 Cal.4th 758, 764-765. Only
 2 by construing “personal information” and “any other nonpublic information” to mean all
 3 information personal to Jane Doe could AGLIC apply the “access or disclosure” exclusion to
 4 defeat coverage. But if the Exclusion applies to all information personal to Jane Doe, then the
 5 exclusion also applies to all information personal to anyone, effectively vitiating all coverage for
 6 libel, slander, and invasion of privacy, since those coverages each depend on the “publication” (i.e.,
 7 disclosure) of personal facts. (Exhibit 1, pg. "Zurich" 000190 ¶14(d) and (e).)

8 AGLIC's interpretation again contravenes the rule that the context must be considered
 9 when interpreting a policy provision, and that the doctrine of *ejusdem generis* restricts the scope of
 10 generic catchall clauses. *Yahoo! Inc., supra*, 255 F. Supp. 3d 970, 976-977; *White v. Ultramar,*
 11 *Inc., supra*, 21 Cal.4th at 573; *Berns v. Sentry, supra* 656 Fed. Appx. 326 *2. The specific
 12 examples enumerated by AGLIC in its exclusion are confined to the contexts of intellectual
 13 property, business competition, financial privacy, and health care. The catchall phrase tacked on
 14 to the end of the exclusion cannot be interpreted expansively to encompass all other categories of
 15 information which someone may consider personal. Even AGLIC has conceded that the “access
 16 or disclosure” exclusion applies only to a small subset of invasion of privacy torts, and does not
 17 apply to other privacy torts such as *false light publicity*. (Confidential Ex. 24, pg. 10.) Thus, by
 18 AGLIC’s own admission, the “access or disclosure” exclusion *cannot* defeat coverage for Jane
 19 Doe's damages, since Jane Doe's claim triggered coverage for false light publicity. The uploading
 20 of extremely personal and private images to Jane Doe’s own Facebook page cast her in the falsest
 21 of light by suggesting she had intended to publish the images herself.

22 If AGLIC intended to eliminate the violation of privacy coverage it granted, it had an
 23 obligation to notify the insured in clear and precise terms that it was eliminating coverage.
 24 California law requires that every exclusion must be conspicuous, plain and clear. *Haynes v.*
 25 *Farmers Ins. Exchange*, 32 Cal.4th 1198, 1204 (2004). A policy exclusion is plain and clear when
 26 its meaning is obvious to a layperson, “stated precisely and understandably, in words that are part
 27 of the working vocabulary of the average layperson.” *Id.* This means more than the traditional
 28 requirement that contract terms be “unambiguous.” Precision is not enough. Understandability is

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1 required. *Id.* at 1211. If not plain and clear, the exclusion cannot be enforced. *Id.* at 1204.
2 Obscuring the elimination of promised coverage in an exclusion that purports to address patents,
3 trade secrets, and financial and health information does not come close to complying with the
4 clarity and precision required by California law.

5 **E. AGLIC's Wrongful Denial of Commercial Umbrella Coverage**

6 AGLIC has disputed coverage under its umbrella policy on essentially the same grounds
7 that it has refused CGL coverage. (Confidential Ex. 21). AGLIC's denial is wrongful for the same
8 reasons. Additionally, although the umbrella policy expressly defines "personal and advertising
9 injury", to include pure "mental anguish, mental injury, humiliation", AGLIC imposed a non-
10 existent "physical injury" requirement. (Confidential Ex. 21 pg. 7 ¶C).

11 **CONCLUSION**

12 To prevail on this motion, PTSI need only show a bare potential that the claim fell within
13 the scope of AGLIC's coverage, that AGLIC wrongfully failed to provide a defense or coverage,
14 and PTSI entered into a settlement with was reasonable in the sense that it reflected an informed
15 and good faith effort by PTSI to resolve the claim. PTSI has met its burden. AGLIC breached its
16 duty to defend and indemnify the settlement, and cannot escape the consequences of its breach by
17 asserting policy conditions it waived, nor by misinterpreting and misapplying exclusions.

18
19 DATED: August 23, 2019

20 WILLOUGHBY, STUART, BENING & COOK

21
22 By _____ /S/
23 ALEXANDER F. STUART
24 Attorneys for Plaintiff
25
26
27
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