New York County Index No. 651982/11

New York Supreme Court
Appellate Division – First Department

ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff-Respondent,

-against-

SONY CORPORATION OF AMERICA, *et al.*,

Defendant-Appellants,

-and-

MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, *et al.*,

Defendant-Respondents,

-and-

SONY ONLINE ENTERTAINMENT LLC, *et al.*,

Defendants.

BRIEF OF *AMICI CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*

The Complex Insurance Claims Litigation Association ("CICLA") and the American Insurance Association ("AIA") (jointly, "*amici*") are leading trade associations of major property and casualty insurance companies. Together the members of *amici* write a substantial amount of insurance both in New York and nationwide.[1] On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums and files *amicus curiae* briefs in significant cases. CICLA also seeks to assist courts in understanding and resolving important insurance coverage issues, and has participated in numerous cases throughout the country, including cases before this Court.[2]

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[1] Respondents St. Paul Fire and Marine Insurance Company, Zurich American Insurance Company, and Mitsui Sumitomo Insurance Company of America are members of AIA, and an affiliate of St. Paul Fire and Marine Insurance Company is a member of CICLA. However, this brief is filed on behalf of CICLA and AIA and not any individual member company.

[2] CICLA, or its predecessor the Insurance Environmental Litigation Association ("IELA"), has appeared as an *amicus curiae* in numerous New York cases, including: *K2 Invest. Group, LLC v Am. Guar. & Liab. Ins. Co.*, 22 NY3d 578 [2014]; *Consol. Edison Co. of N.Y., Inc. v Allstate Ins. Co.*, 98 NY2d 208 [2002]; *Northville Indus. Corp. v Natl. Union Fire Ins. Co.*, 89 NY2d 621 [1997]; *Town of Harrison v Natl. Union Fire Ins. Co.*, 89 NY2d 308 [1996]; *Inc. Vil. of Cedarhurst v Hanover Ins. Co.*, 89 NY2d 293 [1996]; *Cont. Cas. Co. v Rapid-Am. Corp.*, 80 NY2d 640 [1993]; and *Technicon Elecs. Corp. v Am. Home Assur. Co.*, 74 NY2d 66 [1989]. AIA also has appeared as an *amicus curiae* in numerous New York cases, including: *Dummit v Chesterton,* Docket No. APL-2014-00209 [NY 2014]; *K2 Invest. Group, LLC v Am. Guar. & Liab. Ins. Co.*, 22 NY3d 578 [2014]; *J.P. Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *Bentoria Holdings, Inc. v Travelers Ind. Co.*, 20 NY3d 65 [2012]; and *Pioneer Tower Owners Assn. v State Farm Fire and Cas. Co.*, 12 NY3d 302 [2009].

AIA and CICLA members write a substantial amount of insurance both in New York and nationwide. As a result, AIA and CICLA members have in-depth knowledge of the important insurance contract issues presented in this case, which will substantially impact insurers and policyholders. Notably, cases in which CICLA's predecessor participated as an *amicus* include *County of Columbia v Continental Ins. Co.*, 83 NY2d 618 [1994], which is a controlling precedent for this case. AIA and CICLA respectfully submit that their knowledge and perspective will assist the Court in deciding this case and the important insurance principles at stake.

For the reasons stated, *amici* are vitally interested in this Court's review of the issues presented. *Amici* respectfully submit that this Court should affirm the judgment below holding that the underlying litigation did not allege a covered "personal and advertising injury" under the policies at issue.[3]

STATEMENT OF FACTS

Amici provide a brief summary of the facts relevant to the issues discussed. In April 2011, a group of "hackers" launched a series of criminal cyber attacks against the Sony Online Entertainment Network, the Sony PlayStation Network, and related networks. (Record vol II at 667.) Following the cyber attacks,

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[3] *Amici* limit the scope of their brief to this question and do not address other matters that may be presented in this appeal.

numerous third-parties brought suit against various Sony-related entities, including Sony Corporation of America ("SCA") and its subsidiary, Sony Computer Entertainment America LLC ("SCEA," and, together with SCA, "Sony"). These suits were centralized in a Multidistrict Litigation captioned *In re Sony Gaming Networks &Customer Data Security Breach Litigation*, MDL No 2258 [SD Cal] (the "MDL Action"). *Id.* ¶ 16. The class action complaints filed prior to consolidation, as well as the consolidated complaints filed in the MDL Action, allege that Sony failed to maintain adequate security safeguards to protect the MDL plaintiffs' personal or financial information, but do not allege that Sony was in some way involved with any publication or disclosure of such information due to the cyber attacks. Indeed, the court overseeing the MDL Action summarized the initial consolidated complaint in the MDL Action as follows:

> Plaintiffs freely admit [that] Plaintiffs' Personal Information was stolen as a result of a criminal intrusion of Sony's Network. Plaintiffs do not allege that Sony was in any way involved with the Data Breach. Rather, Plaintiffs allege that Sony failed to maintain adequate security procedures to protect against this type of theft. . . . [T]here are no allegations of conversion or any other intentional conduct by Sony that would indicate that Sony sought to unlawfully retain possession of Plaintiffs' Personal Information.

(*In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F Supp 2d 942, 974 [SD Cal 2012].)

SCEA, SCA and two other subsidiaries—Sony Online Entertainment LLC ("SOE") and Sony Network Entertainment International LLC ("SNEI")—

purchased from three separate insurers what Sony described as "cyber" liability policies.[4] (Record vol II at 1028-29). Further, Sony has in fact called upon those cyber liability insurers for costs it has incurred in connection with the underlying suits. *Id.* ¶ 13.

In addition, SCA and its subsidiary SCEA purchased commercial general liability ("CGL") policies from Mitsui Sumitomo Insurance Company of America ("Mitsui") and Zurich American Insurance Company ("Zurich"). *Id.* ¶¶ 1-5. Both Mitsui and Zurich indicated to SCA and SCEA that coverage would not be available because, *inter alia*, the underlying suits did not seek damages because of "personal and advertising injury" to which the CGL Policies applied. In this coverage action, at a hearing held on February 21, 2014, Judge Oing agreed with Mitsui and Zurich that the underlying suits did not allege an "offense" within the Coverage B "personal and advertising injury" provisions of the CGL Policies. This appeal followed.

SUMMARY OF ARGUMENT

The underlying claims do not fall within the "personal and advertising injury" coverage of the CGL policies. First, Coverage B, the personal and advertising injury coverage, encompasses only specific, enumerated offenses, all of

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[4] SCA is an additional insured under the cyber liability policies purchased by SOE and SNEI.

which require affirmative, intentional conduct by the policyholder. This has been settled law in New York for at least two decades, since the Court of Appeals' decision in *County of Columbia v Continental Insurance Co.*, 83 NY2d 618, 627-28 [1994]. Here, Sony in no way had any intentional or affirmative involvement with the alleged malicious theft of data by hackers. The underlying suits do not seek damages because of injury by the policyholder consisting of the "offense[]" of "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." (*E.g.*, Record vol. III at 1270.)

Second, even if the "personal and advertising injury" coverage somehow were otherwise implicated (which it is not), there was no "publication" of any material by Sony. Rather, the "offense[]" that Sony is alleged to have committed is the "fail[ure] to maintain adequate security procedures to protect against this type of theft." (*In re Sony Gaming Networks*, 903 F Supp 2d at 974.) There is no indication that *Sony* published any of the claimants' personal data, let alone that the information was published at all. As a result, the personal and advertising injury coverage is not applicable here. This outcome is compelled by the plain language and structure of Coverage B in the CGL policies, as well as binding precedent from the Court of Appeals, and informed by the holdings of numerous courts nationwide.

Enforcing the terms of CGL policies is important. Finding coverage would flout decades of settled law in New York and elsewhere on the meaning and scope of widely-used personal and advertising injury coverage provisions in CGL policies. *Amici* respectfully submit that Sony's unreasonable reading of its CGL policies should be rejected. Enforcing the CGL policies' coverage as written enables the insurance market to function properly. Exposures from third-party theft of information do not fall within Coverage B. However, the insurance marketplace does offer many forms of cyber liability insurance designed and rated to address data breach claims. *See, e.g.*, 1 Internet Law and Practice § 2:49. Indeed, the record reflects that Sony sought and purchased coverage under specialty cyber policies. (Record vol II at 1028-29.) The CGL Policies in this appeal do not provide overlapping coverage for those data breach claims, and *amici* urge this Court to enforce the CGL insurance contract terms in accordance with longstanding precedent.

ARGUMENT

I. THE UNDERLYING SUITS DO NOT FALL WITHIN THE CGL COVERAGE B "OFFENSE" OF "ORAL OR WRITTEN PUBLICATION, IN ANY MANNER, OF MATERIAL THAT VIOLATES A PERSON'S RIGHT OF PRIVACY"

A. Sony Did Not Commit a Covered Coverage B "Offense"

The scope of the "personal and advertising injury" or "Coverage B" insuring agreement of the CGL Policies is made clear by its plain language and structure. In relevant part, the CGL Policies at issue state:

> **Section I – Coverage B Personal and Advertising Injury**
>
> **1. Insuring Agreement**
>
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false or fraudulent. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply . . . . This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.
>
> **Section V – Definitions** [. . .]
>
> 14. ""Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

(*E.g.*, Record vol II at 1040, 1053.)

A plain reading of this text reveals several predicate requirements. Subject to the terms and conditions of the CGL Policies, Zurich and Mitsui have a duty to defend suits seeking sums that Sony becomes legally obligated to pay as "damages because of" an "injury" that "aris[es] out of" one of several enumerated "offenses," including "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." (*See, e.g.*, *Chubb Custom Ins. Co. v Standard Fusee Corp.*, No. 49A02-1301-PL-91, 2014 WL 252016 [Ind Ct App Jan. 23, 2014] ["Coverage B limits the qualifying injury to certain specifically enumerated offenses[.]"].)

Here, Sony cannot prove that the underlying suits fall within the plain language of the Coverage B insuring agreement in the CGL Policies. An "offense" refers to the conduct allegedly committed by the policyholder, not the harm that results from that alleged conduct. (*G & K Mgt. Servs., Inc. v Owners Ins. Co.*, 2014-Ohio-5497, ¶ 30). There was no "act or conduct perpetrated by Sony" that brought about the alleged data breach incident; the relevant conduct was unaffiliated hackers "illegally breaking into [Sony's] security system." (Record vol I at 87.) Sony is not alleged to have published anything in any manner that violates a person's right of privacy. Indeed, Sony is not alleged to have published anything at all. Rather, the offense that Sony is alleged to have committed is the "fail[ure] to maintain adequate security procedures to protect against . . . [electronic data] theft." (*In re Sony Gaming Networks*, 903 F Supp 2d at 974.) Because Coverage B does not extend to coverage for an alleged failure to maintain adequate security procedures, no coverage is available under the CGL policies.

B. Binding Precedent from the Court of Appeals Dictates That Coverage B Offenses Require an Affirmative, Intentional Act By the Policyholder

An examination of the enumerated "offenses" listed in Coverage B confirms that Sony did not commit a covered "offense." The enumerated "offenses" which the CGL policies' personal and advertising injury provisions cover include false arrest, malicious prosecution, wrongful eviction, libel and slander,

misappropriation of ideas in advertisements, and copyright infringement. These offenses have one thing in common—they are all common law torts or statutory offenses that require affirmative conduct by a policyholder. As the court below stated, it would not make sense for the definition of "personal and advertising injury" to "sudden[tly] . . . take[] a different approach and include[] acts by 3rd parties." (Record vol I at 187.)

Binding precedent from the Court of Appeals dictates this result. In *County of Columbia v Continental Insurance Co.*, 83 NY2d 618, 624 [1994], the Court of Appeals considered whether the policyholder was entitled to a defense under a "personal and advertising injury" endorsement in a CGL policy. The claimant sued the insured county for the contamination of soil, air, ground and surface waters. The definition of personal injury was similar to that found in the CGL policies here.[5] It provided specified coverage for damages because of personal injury arising out of enumerated offenses, including "'wrongful entry or eviction or other invasion of the right of private occupancy'" and what the Court described as "invasion of privacy by publication." (*Id.* at 628.) The Court looked to the actions

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[5] The language of the policy at issue in *County of Columbia* provided that "personal injury" was an "injury arising out of one or more of the following offenses committed during the policy period: (1) false arrest, detention, imprisonment, or malicious prosecution; (2) wrongful entry or eviction or other invasion of the right of private occupancy; (3) a publication or utterance [constituting defamation or invasion of an individual's right of privacy]." (*County of Columbia v Cont. Ins. Co.*, 189 AD2d 391, 393-94 [3d Dept 1993] *affd*, 83 NY2d 618 [1994].)

of the policyholder alleged in the underlying complaint, and concluded that the allegations in the underlying complaint of "continuing nuisance, continuing trespass and invasion" were "not among the enumerated offenses covered by the personal injury endorsement." (*id.* at 627)

Critical to the Court of Appeals' determination in *County of Columbia* was the fact that personal injury coverage extends only to enumerated torts, and that these torts all involve purposeful acts by the policyholder. As the Court stated:

> [T]he coverage under the personal injury endorsement provision in question was intended to reach only purposeful acts undertaken by the insured or its agents. Evidence that only purposeful acts were to fall within the purview of the personal injury endorsement is provided, in part, by examining the types of torts enumerated in the endorsement in addition to wrongful entry, eviction and invasion: false arrest, detention, imprisonment, malicious prosecution, defamation and invasion of privacy by publication.

(*Id.* at 627-28.) The Court's review of all of the torts in the personal injury coverage grant, and its conclusion that all of those torts required purposeful acts undertaken by the insured or its agents, was pivotal to its conclusion. This determination about the nature of the offenses in the personal injury coverage as a whole was a necessary step for the Court of Appeals' holding that Coverage B did not respond to the claims at issue in *County of Columbia.*[6]

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[6] Thus, the argument of *amicus* United Policyholders, suggesting that this portion of *County of Columbia* was somehow dicta, is wholly without merit. *See* Brief of *amicus curiae* United Policyholders in support of the appellant, at 6-8 (positing that all discussion of offenses other than "invasion of the right of private occupancy" in *County of Columbia* was unnecessary dicta).

Further, with respect to the conclusion that the personal injury offenses require a purposeful act by the policyholder, the terms of the Coverage B insuring agreement found in the CGL Policies here are fully consistent with the conclusion the Court of Appeals reached in *County of Columbia*. There is nothing in the offense of "oral or written publication, in any manner, of material that violates a person's right of privacy" that contradicts the Court of Appeals' prior conclusion that all the personal injury torts require intentional conduct by the insured.[7] As in *County of Columbia*, the CGL Policies here provide personal injury coverage only for specified "offenses," torts which all require purposeful acts by the policyholder. The offenses that the Court reviewed to reach its holding in *County of Columbia* included "invasion of privacy by publication," and the Court of Appeals deemed that each "offense" required "purposeful acts" by the policyholder or its agent. There is simply no basis for concluding that the Court of Appeals' analysis of the personal injury coverage provisions in *County of Columbia* does not control here. If the parties here meant to alter that result or to privately contract around the existing legal rule, they could, and should, have explicitly provided for a different

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[7] As the trial court correctly recognized, the use of the phrase "publication in any manner . . ." in the CGL Policies means only that the publication can be made in any medium, such as via a fax, via email, or via another manner of publication. (Record vol I at 296.) . In other words, as recognized by the U.S. Court of Appeals for the Eleventh Circuit, "the phrase 'in any manner' merely expands the categories of publication (such as e-mail, handwritten letters, and, perhaps, 'blast-faxes') covered by the Policy." (*Creative Hospitality Ventures, Inc. v U.S. Liab. Ins. Co.*, 444 Fed Appx 370, 376 [11th Cir 2011].)

approach. As it is, the CGL Policies are governed by the settled New York law on the scope of Coverage B, a result in accord with *County of Columbia* and substantial authority from other courts.[8]

C. Decisions from Numerous Other Courts Confirm That Coverage B Offenses Require Affirmative, Intentional Acts By the Policyholder

County of Columbia is by no means the only judicial decision discussing the import of examining all of the "offenses" discussed in Coverage B. As the trial court put it, "court[s] have . . . required that . . . for coverage to actually get triggered . . . the acts have to be conducted or perpetrated by the policyholder." (Record vol. I at 294). Indeed, numerous other courts have recognized that the Coverage B offenses require active, intentional conduct by a policyholder. (*See, e.g.*, *Butts v Royal Vendors, Inc.*, 202 W Va 448, 454 [W Va Ct App 1998] [per curiam] [adopting *County of Columbia* and holding that the offense of oral or written publication "was not written to cover publication by a third-party"]; *Gregory v Tenn. Gas Pipeline Co.*, 948 F2d 203, 209 [5th Cir 1991] [personal injury coverage "requires active, intentional conduct by the insured"]; *Liggett Group, Inc. v Ace Prop. Cas. Ins. Co.*, 798 A2d 1024, 1032 [Del 2002] [North Carolina law] ["personal injury" provisions of policy "must be read with the

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[8] See *infra*, Part C, pp. 13-16, for a discussion of the substantial authority supporting the conclusion that the personal injury offenses require intentional, affirmative conduct by the policyholder.

preceding list of torts encompassing, broadly, libel, slander, and defamation" and do not cover passive conduct]; *Buell Indus., Inc. v Greater N.Y. Mut. Ins. Co.*, 259 Conn 527, 510-11 [Conn 2002] [stating that "personal injury provisions were intended to reach only intentional acts by the insured" and adopting the *County of Columbia* holding]; *Stonelight Tile v Calif. Ins. Guar. Assn.*, 58 Cal Rptr 3d 74, 89 [Cal Ct App 2007] [noting that Coverage B offenses are based on intentional conduct, and not accidental conduct]; *Harrow Prods. v Liberty Mut. Ins. Co.*, 64 F3d 1015, 1025 [6th Cir 1995] [adopting *County of Columbia* and holding that each enumerated offense in Coverage B requires an intentional act]; *Arrowood Indem. Co. v Oxford Cleaners & Tailors, LLC*, No.. 1:13-12298-PBS, 2014 WL 4104169, *8 [D Mass Aug 15, 2014] [holding that "personal and advertising injury" offenses must be interpreted "in light of the words around [them]" and that claims for negligence are not sufficient to trigger these provisions].)

The recent *Arrowood* decision plainly demonstrates the limited reach of Coverage B of CGL policies. In *Arrowood*, the enumerated Coverage B "offenses" under the policy at issue included "false arrest, detention or imprisonment; malicious prosecution; wrongful entry into or eviction of a person from a room, dwelling or premises which the person occupies; libel, slander or invasion of privacy which is the result of a written or spoken statement." (*Arrowood*, 2014 WL 4104169, *4). The policyholder was sued for negligent

trespass. *Arrowood* applied Massachusetts law, which provides that "wrongful entry . . . may include negligent trespass." (*Id.* at *8.) However, applying the contract interpretation principle of *noscitur a sociis*,[9] the *Arrowood* court was compelled to "interpret the term 'wrongful entry' in light of the words around it, which indicate that only intentional torts are covered" under Coverage B of a CGL policy. (*id.*) Therefore, the *Arrowood* court held that the policy at issue did not cover negligent trespass—even though negligent trespass is a type of "wrongful entry" offense in Massachusetts. As this holding illustrates, Coverage B offenses are specified intentional torts. They require intentional action by the policyholder and plainly do not include liability for theft of information by a third party.

Here, Sony's alleged offense was the "fail[ure] to maintain adequate security procedures to protect against . . . [electronic data] theft." (*In re Sony Gaming Networks*, 903 F Supp 2d at 974.) The plaintiffs did "not allege that Sony was in any way involved with the Data Breach." (*Id.* at 974.)[10] There is no allegation that Sony committed an intentional act of "publication . . . of material that violates a

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[9] New York courts also apply this doctrine in interpreting insurance policies. *See, e.g., Harris v Allstate Ins. Co.*, 309 NY 72, 76-77 [1955]; *Popkin v Sec. Mut. Ins. Co. of New York*, 48 AD2d 46, 47-48 [1st Dept 1975]

[10] The "offenses" of the hackers are not those of the policyholder or its agent and are not attributable to Sony. Further, the hackers themselves are not alleged to have committed a "publication." The substance of the underlying allegations is not that the hackers "published" any information. Rather, the offense the hackers are alleged to have committed is having "stolen [personal information] as a result of a criminal intrusion of Sony's Network." (*In re Sony Gaming Networks*, 903 F Supp 2d at 974.)

person's right of privacy." As a result, the CGL Policies do not provide coverage here.

This conclusion is further bolstered by the fact that the enumerated offenses in the personal injury coverage must arise out of Sony's "business." It is absurd to stretch the policy's coverage to situations where an insured is victimized by third parties. The data theft lawsuits do not allege the "oral or written publication, in any manner, of material that violates a person's right of privacy" arising out of Sony's business.[11] This Court should conclude that the CGL Policies do not respond.

D. The Underlying Facts Do Not Concern the "Publication" of Material at All.

Here, there can be no doubt that Sony did not publish any material. In fact, the "offense" for which the plaintiffs sought damages was not the publication of any material in any manner at all. An alleged failure to maintain adequate security procedures is simply not a "publication."

It would be unprecedented to equate publication of material with the theft of information by a third party with no relationship to the policyholder. Even the most expansive judicial interpretations of the term "publication" encompass only

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[11] In this case, Sony was attacked and information was stolen. While the alleged failure to provide adequate computer security arguably may arise out of Sony's "business," any alleged invasion of privacy does not. Any alleged invasion of privacy would be the result of the hackers' "business," and not Sony's.

circumstances where a policyholder distributes information to a third-party, not where a third-party breaks in to steal information. *See, e.g., Zurich Am. Ins. Co. vFieldstone Mtge. Co.*, No. CCB-06-2055, 2007 WL 3268460, *5 [D Md Oct. 26, 2007] [although policyholder was alleged to have sent information to only the plaintiff, policyholder nonetheless chose to distribute information]; *Tamm v Hartford Fire Ins. Co.*, No. 020541BLS2, 2003 WL 21960374, *4 [Mass Super July 10, 2003] [insured "published" material where he deliberately distributed allegedly confidential material]. These cases are entirely inapposite from the circumstances here, where a third party stole the information at issue. Theft of information is far removed from the requirement of "publication" of material in the offenses enumerated in the CGL Policies' Coverage B.

II. PUBLIC POLICY SUPPORTS ENFORCEMENT OF THE PLAIN CONTRACT TERMS

As discussed above, the Coverage B personal and advertising injury coverage part does not reach the circumstances of data theft in this case. Shoehorning coverage for claims such as those in this appeal into CGL policies would result in an unwarranted expansion of policy terms at the expense of both insurers and insureds.

In this case, SCEA, SOE and SNEI purchased cyber policies, and have in fact called upon those cyber liability insurers for costs they have incurred in

connection with the underlying suits.[12] (Record vol II at 1028-29). Given the limitations of CGL policies, commentators widely recommend that corporations consider cyber insurance coverage to address risks associated with data security intrusions. (*See, e.g.*, Eric G. Orlinsky, et al., *Cybersecurity: A Legal Perspective*, 47 Md St BJ 30, at 32, 34 [Nov./Dec. 2014] ["As the pace and extent of data breaches increases, it is prudent for organizations to have adequate cyber insurance coverage."]; 1 Internet Law and Practice § 2:49 ["Traditional insurance may not cover liabilities arising from 'e' business. As a result, the insurance industry has developed new products aimed specifically at e-commerce and other cyber liability."]; *see also* Target Corp, Form 10-K: Annual Report Pursuant to § 13 or 15(d) of the Securities Exchange Act of 1934 at 17, *available at* https://www.sec.gov/Archives/edgar/data/27419/000002741914000014/tgt-20140201x10k.htm [indicating that Target Corp. has $100 million in "network-security insurance coverage" and that this coverage is responding to costs arising out of the recent data breach at that corporation].)

As one commentator has explained, "[Cyber] policies provide coverage for risks not covered or specifically excluded by various types of traditional policies. Showing that they are intended to be unique coverages, and not overlapping in

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[12] As noted above, SCA is an additional insured under the cyber liability policies purchased by SOE and SNEI.

scope, the[se] cyber risk policies often exclude coverage likely to be found in a CGL policy, like advertising injury." Toni Scott Reed, *Cybercrime: Losses, Claims, and Potential Insurance Coverage for the Technology Hazards of the Twenty-First Century*, 20 Fidelity LJ 55, 79 [2014] [footnotes omitted]. Unlike cyber coverages, Coverage B of the CGL policy plainly does not reach exposures from third-party theft of information, which is at issue here.[13]

Enforcing the CGL policy as written is not only required by New York law, but it also promotes important public policy objectives by enabling the insurance market to function properly. It permits insurers, writing risks within the State of New York, accurately to appraise their exposure, and set premiums based on the limits of their policies. Courts also have stated that enforcing the policy terms avoids imposing the unnecessary burden on "ordinary insureds . . . of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." (*See Garvey v State Farm Fire & Cas. Co.*, 770 P2d 704, 711[Cal 1989] [noting the destabilizing effects of judicial expansions of coverage on the insurance underwriting process, which relies heavily on contract predictability].)

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[13] A Mitsui policy issued to SCA after the policy at issue here added an exclusion for data security claims. Consistent with Mitsui's view that data claims like this one were never within CGL coverage, the addition of the exclusion "didn't alter the premium" for the later-issued policy. (Record vol. I at 364). According to Mitsui's counsel, Mitsui was moved to add this exclusion because "to equate publication with the theft of information is such an extraordinary expansion of the policy that one would never even contemplate that we would be in this battle." (*Id.*)

Commercial entities throughout New York, including those in the banking, finance and insurance industries, conduct their affairs with the expectation that the courts will enforce contracts as written. New York's settled approach to contract enforcement is critical to its role as a worldwide center of finance, including insurance. (*See Graf v Hope Bldg. Corp.*, 254 NY 1, 4 [1930] ["We are not at liberty to revise while professing to construe. . . . [S]tability of contract obligations must not be undermined by judicial sympathy."]).[14] Judicial fidelity to these basic principles is critical to retaining the confidence of the business community at large that the bargain made will be the bargain enforced.

Insurers agree to bear certain risks for consumers and businesses in return for the consideration of correspondingly priced premiums. This delicate balance is sustainable only when courts enforce the bargain struck under the insurance contract's clear terms. This Court should affirm the ruling below and decline to shoehorn the claims at issue into CGL policies' coverage.

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[14] New York law is clear that "[c]ourts 'may not make or vary the contract of insurance to accomplish [their] notions of abstract justice or moral obligation.'" (*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996] [citations omitted; internal modifications in original]; *See also Consol. Edison Co. of N.Y., Inc. v Allstate Ins. Co.*, 98 NY2d 208, 221-22 [2002] ["In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect.'"] [citations omitted].)

CONCLUSION

For all of the foregoing reasons, *amici* respectfully submit that this Court should affirm the judgment of the trial court.

Dated: January 28, 2015

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